

NO. 44922-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JOSÉ BERNAL MARTINEZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The police evaded the warrant requirement, choosing to conduct a warrantless vehicle stop and hoping to gain consent for a vehicle and apartment search from the driver. The driver, however, lacked authority to consent to a search of an apartment in which he had spent one night as a houseguest, for which he did not know the address, and to which he was not permitted to invite guests. The police conducted the search anyway, and subsequently coerced the consent of the renter, José Bernal Martinez. The search was unlawful and the resulting evidence should have been suppressed either because the driver lacked the authority to consent or because Bernal Martinez's consent was not voluntary.

B. ASSIGNMENTS OF ERROR

1. The evidence seized in the warrantless search of Bernal Martinez's apartment should have been excluded because Ponce-Gutierrez lacked authority to consent to the search. CP 38 (Conclusions 3, 5).

2. The evidence seized in the warrantless search of Bernal Martinez's apartment should have been excluded because Bernal

Martinez's consent to search was involuntary. CP 38 (Conclusions 4, 5).

3. In the absence of substantial evidence, the court erred in finding "Detective Hall is a fluent Spanish speaker." CP 36 (Finding of Fact (FF) 9).

4. In the absence of substantial evidence, the court erred in entering Finding of Fact 15, including that Ponce-Gutierrez was informed of his right to restrict the scope of consent. CP 36.

5. In the absence of substantial evidence, the court erred in referring to Bernal Martinez's home as Ponce-Gutierrez's "residence" and "home." CP 36 (FF 12, 14, 16).

6. In the absence of substantial evidence, the court erred in finding "Defendant Ponce-Gutierrez was a resident at the address of 3093 NE 57<sup>th</sup> Avenue, Apartment B, located in Vancouver, Washington." CP 37 (FF 21).

7. In the absence of substantial evidence, the court erred in entering Finding of Fact 24 to the extent it finds that Bernal Martinez was informed of his right to restrict the scope of consent. CP 37.

8. In the absence of substantial evidence, the court erred in entering Finding of Fact 25 to the extent it finds that Bernal Martinez was informed of his right to restrict the scope of consent. CP 37-38.

9. The judge's oral ruling is in error to the same extent as the above assignments of error. *See* CP 27 (FF 27 (incorporating oral ruling)).

10. The trial court erred in concluding Bernal Martinez was guilty of possession of a controlled substance with intent to deliver. CP 43.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. By declining to obtain a warrant, law enforcement assumed the burden of proving Ponce Gutierrez's authority to consent to a search of Bernal Martinez's home. Did the State prove Ponce Gutierrez's authority to consent where he did not know the address of the apartment, had stayed in the apartment only one night, asked to use a telephone to call for permission to enter, and only had a borrowed key to the apartment on a key chain for a vehicle also borrowed from Bernal Martinez?

2. Did the State fail to prove that Bernal Martinez's subsequent consent to search his apartment was voluntary where prior to obtaining

his consent, four or five armed police officers had already entered his apartment, where one of the officers asked him where they could talk, where more officers were poised outside the entryway, where Bernal Martinez's limited education took place in Mexico, where he had no known experience with law enforcement, where *Miranda*<sup>1</sup> warnings were not administered, and where the *Ferrier*<sup>2</sup> advisements were inaccurately translated into Spanish?

D. STATEMENT OF THE CASE

José Bernal Martinez was in his bedroom, in his home, around dinnertime when he heard someone entering his 830-square-foot apartment. RP 25, 113-15, 165; Exhibit 1. He went into the hallway and peeked around the corner toward the entrance. RP 166-67. He saw four or five armed officers in marked vests and uniforms standing in his hallway. RP 47-48, 167, 179. He went into the hallway and, he later testified, one of the officers pulled a gun and pointed it at him. RP 167, 178. Three or more officers were just outside the entryway. RP 48-49, 114. In poorly-accented Spanish, Detective Shane Hall asked Bernal Martinez whether he was alone, whether he had any weapons, and then

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

<sup>2</sup> *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

whether there was somewhere they could talk. RP 71, 92-93, 117, 168-70. Bernal Martinez retreated into his bedroom, where Hall joined him, sat on Bernal Martinez's bed, and closed the door all but a crack. RP 93, 119, 169-71. The other officers remained just on the other side of the bedroom door. RP 119-20.

Bernal Martinez was raised in Mexico, where he was educated only through the eighth grade. RP 163. He had no prior experience with law enforcement. CP 45, 54. The police had no warrant to enter Bernal Martinez's home. RP 49-50. They were not targeting him, and his consent was not sought until Hall spoke with him in his 10 or 12 feet by 14 feet bedroom. The police could offer no reason why they failed to get a warrant. RP 50.

Instead of complying with the warrant requirement, the police tried to circumvent it by stopping Bernal Martinez's houseguest while he was in a vehicle and securing his consent to search both the vehicle and Bernal Martinez's home. Before noon that day, Oregon deputy Kevin Jones was watching a third person, Carlos Guerrero-Valenzuela, in Portland. RP 5, 7, 34. An unidentified source informed Deputy Jones that Valenzuela would be receiving drugs, so he followed Valenzuela. RP 7-9. Jones watched Valenzuela meet with an unknown

occupant of a black Ford Fusion. RP 9. Although Jones could not see into the vehicle, he thought the “meeting was consistent with a drug transaction.” RP 9-10, 35-36. Jones and several other officers followed the Ford Fusion into Washington State, where around noon the vehicle parked at an apartment complex and the driver got out and went into an apartment. RP 10-12, 36-37. The Oregon police officers watched the individual come back out of the apartment and drive off in the Fusion. RP 13. The officers followed the Fusion for a short period of time, then left and refocused on Valenzuela. RP 13.

Jones arrested Valenzuela in Oregon around three in the afternoon. RP 13-14, 38. Valenzuela told Jones he had owed money to the driver of the Ford Fusion and had dropped money off to him. RP 15, 40. Drugs were found during a search of Valenzuela. RP 16. He then claimed that the drugs were from the driver of the Ford Fusion. RP 16, 40-41.

Around 5:30 p.m., Jones contacted officers in the Clark/Skamania County Drug Task Force, asking them to identify and investigate the driver, who Jones said lived in the apartment they saw him go into. RP 16-17, 38, 42, 72-74. Several sheriff’s deputies and Detective Hall began surveillance of the apartment building, intending

to contact the driver. RP 18, 75. An out-of-state law enforcement agency had contacted officers in the drug task force to alert them to a drug shipment that had been intended for the same apartment building—which specific apartment was not clear, the shipment had been some time earlier, and the shipment had been intercepted. RP 73-75; CP 35 (FF 7). The police decided to stop the driver in his vehicle, rather than approach the apartment, which was “more complicated,” or to further investigate. RP 78-79. Thus, several unmarked Oregon and Washington police vehicles followed the driver after he returned to the Fusion, and Hall stopped him a couple minutes from the apartment. RP 18-20, 23, 76-78, 80, 147.

Hall’s strategy was to gain the driver’s consent to search both the vehicle and the apartment he had left, obviating any need to obtain a warrant supported by probable cause from a neutral and detached magistrate.<sup>3</sup> RP 78-79. Upon being stopped, the driver identified himself as Daniel Ponce-Gutierrez and asked to use a telephone because he did not have permission to be in the apartment he had come from, let alone invite others to it. RP 79, 83-84, 149-50. He further

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<sup>3</sup> Hall confirmed it was “common practice” to interview a subject during a vehicle stop to gain consent, rather than approach a residence (or secure a warrant). RP 78-79.

told Hall that he could direct Hall to the apartment but did not know the address. RP 84.162. Ponce-Gutierrez testified that Hall denied his request and obtained his verbal consent to search. RP 84-87, 150. A search of the car turned up nothing. RP 87.

Hall then drove Ponce-Gutierrez back to the apartment, followed by the other Washington and Oregon officers, and used a key on the same key chain used for the Fusion to gain access to the apartment. RP 23, 46-47, 87-88. Hall testified Ponce-Gutierrez said he was the sole occupant of the apartment. RP 90. The police made no further inquiry. But such inquiry would have revealed Ponce-Gutierrez had stayed with Bernal Martinez only one night—the night preceding the surveillance. RP 161-62, 163. Ponce-Gutierrez had never brought people to the apartment. RP 161.

Hall entered the apartment followed by approximately seven officers. RP 24-25, 48-49. Once four or five of them were already inside the apartment, they came across Bernal Martinez, who had been inside. RP 28-29, 54-55. That is when Hall asked Bernal Martinez whether he was alone, whether he had any weapons, and then whether there was somewhere they could talk. RP 71, 92-93, 117, 168-70.

In Bernal Martinez's twelve by fourteen foot bedroom, Hall spoke with him for about 45 minutes and emerged with his consent to search the apartment without limitation. RP 93-94. Hall spoke with Bernal Martinez in Spanish and provided the following Spanish-language interpretation of the *Ferrier* advisements:

Usted tiene el derecho de refusar consentimiento, de revocar consentimiento, o limitar el ámbito del registro en cualquier momento.

RP 100, 108-09.<sup>4</sup> The police discovered money and drugs in the two-hour search of the apartment. RP 29-30, 50, 116. After Bernal Martinez and Ponce-Gutierrez were advised of their rights to remain silent and to an attorney, they admitted involvement in the drug trade. RP 97-99, 121-23, 131-34.

Bernal Martinez moved to suppress the evidence as the fruit of an unlawful search—contesting the validity of the vehicle stop, the consent by Ponce-Gutierrez and the voluntariness of Bernal Martinez's consent. CP 15-19. The trial court denied the motion and found Bernal

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<sup>4</sup> Under *Ferrier* and its progeny, when police officers seek entry into a home to conduct a consensual search for contraband without a search warrant, they must advise that consent can be refused, the scope of the search can be limited, and consent can be revoked at any time. *See generally State v. Ruem*, 179 Wn.2d 195, 313 P.3d 1156, 1162-63 (2013).

Martinez guilty after a stipulated bench trial. CP 34-56; RP 222-32, 269-70.<sup>5</sup>

E. ARGUMENT

**The police’s purposeful, warrantless search of Bernal Martinez’s home was unconstitutional.**

Article I, section 7 prohibits the police from entering a private citizen’s home without a warrant except under narrow, jealously guarded exceptions. *E.g.*, Const. art. I, § 7; *State v. Hendrickson*, 129 Wn.2d 61, 72, 917 P.2d 563 (1996); *State v. Loewen*, 97 Wn.2d 562, 565, 647 P.2d 489 (1982). This Court reviews de novo whether a warrantless search of a private home was lawful, subjecting the purported justification to a “high degree of scrutiny.” *State v. Arreola*, 176 Wn.2d 284, 292, 290 P.3d 983 (2012); *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007).

1. Bernal Martinez’s guest did not have authority to consent to a search of Bernal Martinez’s home.

The police purposefully declined to approach Ponce –Gutierrez while he was at or near the apartment and could offer no explanation for their failure to secure a warrant. RP 78. In evading the warrant requirement, the police overlooked an important prerequisite to a

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<sup>5</sup> Bernal Martinez preserved his objection to the denial of his suppression motion. *E.g.*, CP 38 (FF 28).

consensual search: the individual must have authority to consent to the search. Whether an individual has authority to consent is a question of law; it does not turn on Detective Hall's subjective belief. *State v. Morse*, 156 Wn.2d 1, 5, 123 P.3d 832 (2005).<sup>6</sup>

Our Supreme Court has warned law enforcement that they are “well advised” to inquire into the specific relationship between the individual from whom consent is sought and the property. *Id.* The State bears the burden of showing that a houseguest had authority to consent to a warrantless search of another's home. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). “If the police choose to conduct a search without a search warrant based upon the consent of someone they believe to be authorized to so consent, the burden of proof on issues of consent and the presence or absence of other cohabitants is on the police.” *Morse*, 156 Wn.2d at 15. “Where the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.” *State v. Leach*, 113 Wn.2d 735, 744,

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<sup>6</sup> Article I, section 7 is interpreted more protectively than the Fourth Amendment in this regard. Concepts of “reasonableness” and a “good faith belief” do not comport with Washington's constitutional protections. See generally *State v. Morse*, 156 Wn.2d at 7-13, for a discussion of the distinctions between Washington and federal law pertaining to authority to consent to the search of a home. See also *State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008).

782 P.2d 1035 (1989) (quoting *United States v. Impink*, 728 F.2d 1228, 1231 (9th Cir.1984)).

Under article I, section 7, whether a houseguest can consent to the search of a home depends upon that guest's independent authority to so consent and the reasonable expectation of his host about that authority. *Morse*, 156 Wn.2d at 10; *State v. Eisfeldt*, 163 Wn.2d 628, 638-39, 185 P.3d 580 (2008). Ponce-Gutierrez must be authorized to permit the search in his own right. *Morse*, 156 Wn.2d at 10. And it must be reasonable to find that Bernal Martinez assumed the risk that Ponce-Gutierrez might permit a search. *Id.* "The touchstone of the inquiry is that the person with common authority must have free access to the shared area and authority to invite others into the shared area." *Id.* at 10-11.

Law enforcement did not inquire whether, and the State did not show that, Ponce-Gutierrez was more than a "casual visitor" and had "run of the house." *Morse*, 156 Wn.2d at 11 (quoting 4 Wayne R. Lafave, *Search and Seizure* § 8.5(e) at 235 (4th ed. 2004)); *see id.* at 11, 14 (casual visitors of five days "had limited control and, therefore, limited authority over that portion of the apartment they shared with" defendant). Rather, Ponce-Gutierrez did not know the address for the

apartment, had only stayed in Bernal Martinez's apartment for one night, and told Detective Hall that he needed to make a telephone call because he was not authorized to bring people into the apartment. RP 149-50, 161-62, 163. In light of these facts, the trial court's findings that the apartment was Ponce-Gutierrez's residence or home are without ample support. CP 36 (FF 12, 14, 16).

The police did not obtain a warrant, but could offer no basis for that failure. RP 49-50. Nor did the police research the ownership interests in the property prior to seizing Ponce-Gutierrez. RP 10-13, 16-18, 36-38, 72-78 (police aware of prior suspected illegal activity at apartment building and had ample time to investigate).

Ponce-Gutierrez could only consent to a search of the areas to which he had "run of the house." Ponce-Gutierrez had a key to the apartment but no authority to bring people into the apartment. *See* RP 163 (key ring for vehicle loaned to Ponce-Gutierrez included apartment key); *Eisfeldt*, 163 Wn.2d at 632, 639 (contractor with key to home lacked authority to consent to law enforcement search). Detective Hall's subjective belief, standing alone, "cannot be used to validate a warrantless search under article I, section 7." *Morse*, 156 Wn.2d at 12. Because the State did not show that Bernal Martinez granted Ponce-

Gutierrez the right to control or exercise joint possession over any area of the apartment, Ponce-Gutierrez's consent to search that apartment was deficient.

2. Bernal Martinez's consent was not voluntary where four or more law enforcement officers with guns were already in his home, the *Ferrier* warnings were not properly provided, and law enforcement did not administer *Miranda* warnings.

Law enforcement failed to obtain a warrant and declined to examine who could grant consent to search Bernal Martinez's apartment. The police then stumbled again when they encountered Bernal Martinez in his apartment. The procedures by which they extracted his consent rendered that consent involuntary.

Whether consent is voluntary depends on the circumstances, and a court will consider "(1) whether *Miranda* warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of his right not to consent." *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004) (citations and footnote omitted). As with all exceptions to the warrant requirement, the State must prove voluntariness by clear and convincing evidence. *E.g.*, *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); *State v. Flowers*, 57 Wn.

App. 636, 644-45, 789 P.2d 333 (1990). The totality of the circumstances shows Bernal Martinez's consent was not voluntary.

First, the police were already in Bernal Martinez's home when he was asked to consent. RP 107-09. In fact, Bernal Martinez stumbled out of his bedroom into the hallway to find four or five armed officers in uniforms and with accessories emblazoned "police" or "Sheriff." RP 28, 46-48, 54-55. These four or five armed men had already crossed the threshold of the entryway into his home. RP 46-47, 178-79. Approximately three more officers remained just outside the entryway. RP 89-90. Bernal Martinez testified one of the officers pointed a gun at him. RP 179. Hall immediately demanded Bernal Martinez identify himself; Bernal Martinez turned over an identification card. RP 90-92. Hall next asked where they could talk. RP 93. Hall testified Bernal Martinez indicated they could talk in his bedroom. RP 93.<sup>7</sup> At this point, no warnings or introductions had been made. From Bernal Martinez's perspective, a cadre of officers had simply entered his apartment and made demands of him.

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<sup>7</sup> While Hall testified the consent conversation occurred in Bernal Martinez's bedroom after Hall asked him where they could talk, Jones testified that the conversation occurred mostly in the hallway. RP 24-26. Ponce-Gutierrez confirmed Hall talked with Bernal Martinez in his bedroom. RP 156. They moved the interrogation into the living room later. *E.g.*, RP 93, 116.

In the bedroom while sitting on Bernal Martinez's bed, Detective Hall purported to provide Bernal Martinez with the *Ferrier* advisements that he had the right to refuse consent, the right to revoke consent, and the right to limit the scope of consent at any time. RP 93-94, 100, 170-71. The room was 10 to 12 feet by 14 feet, and the door was all but firmly shut with officers guarding the other side. RP 119-20. Hall communicated in Spanish with Bernal Martinez, and read into the record the Spanish-language version of the advisements he provided:

Usted tiene el derecho de refusar consentimiento, de revocar consentimiento, o limitar el ámbito del registro en cualquier momento.

RP 100. Despite the *Ferrier* requirements, Hall did not advise Bernal Martinez that he could limit the scope of the consent. Rather, Hall advised Bernal Martinez he could refuse or revoke consent or *he could limit the scope of his registration*. Google Translate, <http://translate.google.com/> (last visited Jan. 15, 2014); Free Translation, <http://www.freetranslation.com/> (last visited Jan. 15, 2014). The trial court's findings that Bernal Martinez and Ponce-Gutierrez were fully advised are without substantial evidence in the record because the *Ferrier* advisements Hall actually provided did not

inform them they could limit the scope of their consent. CP 36-38 (FF 9, 15, 24, 25).

The inaccuracy in Hall's translation is particularly significant in light of Bernal Martinez's education and background. Bernal Martinez was educated only through eighth grade and only in Mexico. RP 163. He had no prior experience with the criminal justice system. CP 45, 54.

Finally, the police did not advise Bernal Martinez of his *Miranda* rights prior to obtaining his consent to search. RP 97-99, 121-22, 125-29, 177.<sup>8</sup> He was not informed of his right to remain silent in the face of five police officers in his home and three or more waiting just outside the front door. *See State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123 (1975).

Bernal Martinez's testimony further suggests that his consent to search his already-intruded-upon home was not voluntary. He testified he heard someone come into his apartment and peeked around the corner to find five law enforcement officers in his home. RP 165-66,

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<sup>8</sup> The trial court concluded: "Miranda warnings need not be given prior to obtaining consent to search." CP 28 (conclusion 2). While technically correct—*Miranda* warnings are not a per se prerequisite—the failure to provide *Miranda* warnings in advance of securing consent is relevant to whether consent was voluntarily given. *Reichenbach*, 153 Wn.2d at 132.

179. When he came into the hallway, one officer drew his gun and pointed it at Bernal Martinez. RP 167. Bernal Martinez was asked whether he was alone, whether he had any guns, and where the officer could speak with him further. RP 167-70. At that point, he had not been advised he could refuse to allow the officers into his home (and they were already inside) or that he had the right to silence and to an attorney. Bernal Martinez testified that Hall told him Ponce-Gutierrez had already provided consent and he was going to search anyway. RP 173-75. Bernal Martinez did not recall being informed that he could withdraw consent at any time; in fact, as set forth above, he was only informed he could withdraw “registration.” RP 174-75.

Under the totality of the circumstances, the State failed to prove by clear and convincing evidence that Bernal Martinez’s consent was voluntary.

3. The State cannot use the evidence obtained as a result of these unlawful tactics; Bernal Martinez’s conviction should be reversed.

The invalidity of either of these justifications for the warrantless search of Bernal Martinez’s apartment requires suppression of the fruits of the subsequent search and reversal of the resulting conviction. *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d

441 (1963). The police chose to proceed without obtaining a warrant to search the vehicle in which Ponce-Gutierrez was riding or Bernal Martinez's apartment. The police elected not to actually knock on Bernal Martinez's door and seek his consent at the entry way but to stop Ponce-Gutierrez, a mere guest, outside the home and seek his consent for entry. The police chose to obtain entry through an apartment key from Ponce-Gutierrez's key chain. And when the police encountered Bernal Martinez, they elected not to retreat but to ask him to draw them further into the apartment and obtain his consent once already inside his bedroom.

At each of these steps, the police made a choice and our constitution requires the police bear the burden to justify the lawfulness of that decision. The State cannot do so. On one or more of the above grounds, the fruit of the poisonous tree—the evidence seized during the two-hour search of Bernal Martinez's home—should be suppressed.

*See Morse*, 156 Wn.2d at 16; *Eisfeldt*, 163 Wn.2d at 639-40.

Suppression of the evidence necessitates reversal of the conviction. *See id.*

F. CONCLUSION

The trial court erred in failing to suppress the evidence seized at Bernal Martinez's apartment. The police chose not to obtain a warrant. The officers relied instead on Ponce-Gutierrez's consent to search Bernal Martinez's apartment. But Ponce-Gutierrez had only stayed at the apartment the night before, did not have authority to invite guests to the apartment, and did not know the address. Ponce-Gutierrez lacked authority to consent.

In the alternative, the evidence should have been suppressed because Bernal Martinez's subsequent consent was not voluntary in light of the numerous armed officers in his apartment, the poorly-translated *Ferrier* warnings, his lack of education and experience with law enforcement, and the fact that *Miranda* warnings had not been administered at the time consent was garnered. Under either ground, Bernal Martinez's conviction should be reversed.

DATED this 28th day of February, 2014.

Respectfully submitted,



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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 44922-6-II
	)	
JOSE BERNAL MARTINEZ,	)	
	)	
Appellant.	)	

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