

FILED  
March 24, 2014  
Court of Appeals  
Division III  
State of Washington

**NO. 31937-7-III**

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**COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSE AGUILAR GOMEZ, APPELLANT

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Appeal from the Superior Court of Grant County  
The Honorable John M. Antosz

No. 13-1-00397-2

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**Brief of Respondent**

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. ..... 1

    1. When considering the evidence in the light most favorable to the State, was there sufficient evidence to convince a rational trier of fact that defendant was guilty of making a false or misleading statement to a public servant?.....1

    2. Did the trial court properly refuse to give a jury instruction for the inferior-degree offense of assault in the fourth degree when the evidence did not show that the lesser offense was committed to the exclusion of the charged offense?.....1

B. STATEMENT OF THE CASE..... 1

    1. Procedure.....1

    2. Facts.....3

C. ARGUMENT..... 6

    1. THERE WAS SUFFICIENT EVIDENCE TO CONVINC  
A RATIONAL TRIER OF FACT THAT DEFENDANT  
WAS GUILTY OF MAKING A FALSE OR  
MISLEADING STATEMENT TO A PUBLIC  
SERVANT.....6

    2. THE TRIAL COURT PROPERLY REFUSED TO GIVE  
AN INSTRUCTION FOR THE INFERIOR-DEGREE  
OFFENSE OF ASSAULT IN THE FOURTH DEGREE  
BECAUSE THE EVIDENCE DID NOT SHOW THAT  
THE LESSER OFFENSE WAS COMMITTED TO THE  
EXCLUSION OF THE CHARGED OFFENSE.....12

D. CONCLUSION..... 16

## Table of Authorities

### State Cases

<i>State v. Cord</i> , 103 Wn.2d 361, 693 P.2d 81 (1985).....	8
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	13, 15
<i>State v. Gerber</i> , 28 Wn. App. 214, 622 P.2d 888 (1981).....	7
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	7
<i>State v. Joy</i> , 121 Wn.2d 333, 851 P.2d 654 (1993).....	7
<i>State v. Peterson</i> , 133 Wn.2d 885, 948 P.2d 381 (1997).....	13, 15
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	7, 12
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	7
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	12
<i>State v. Warden</i> , 133 Wn.2d 559, 947 P.2d 708 (1997).....	13

### Statutes and Court Rules

ER 801(a).....	10
RCW 9A.36.031(1)(g).....	1
RCW 9A.36.041 .....	14
RCW 9A.76.175.....	1, 2, 8, 9, 11, 16
RCW 46.61.502(1).....	1

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When considering the evidence in the light most favorable to the State, was there sufficient evidence to convince a rational trier of fact that defendant was guilty of making a false or misleading statement to a public servant?
2. Did the trial court properly refuse to give a jury instruction for the inferior-degree offense of assault in the fourth degree when the evidence did not show that the lesser offense was committed to the exclusion of the charged offense?

B. STATEMENT OF THE CASE.

1. Procedure

On June 28, 2013, the Grant County Prosecuting Attorney's Office (State) charged Jose Aguilar Gomez (defendant) with assault in the third degree against a law enforcement officer,<sup>1</sup> driving under the influence of intoxicants,<sup>2</sup> and making a false or misleading statement to a public servant.<sup>3</sup> CP 1--2. Defendant's jury trial began on August 28, 2013, before the Honorable John M. Antosz. RP 1.

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<sup>1</sup> RCW 9A.36.031(1)(g).

<sup>2</sup> RCW 46.61.502(1).

<sup>3</sup> RCW 9A.76.175.

After the State rested its case-in-chief, defendant moved to dismiss the charge of making a false statement based on a challenge to the sufficiency of the evidence. RP 208–10. Defense counsel argued defendant did not make a “material statement”<sup>4</sup> (i.e., a written or oral statement) when the investigating officer asked for defendant’s license and defendant provided his brother’s driver’s license to falsely identify himself. RP 208–09. The court denied the motion, finding that defendant had adopted the written name on the driver’s license when he produced it in response to the law enforcement officer’s investigation. RP 218–19. The court reasoned this adoption constituted a material statement as contemplated by RCW 9A.76.175. RP 218–19.

Before closing arguments defendant requested an instruction for the lesser-degree offense of assault in the fourth degree. RP 228. The court refused to give the instruction. RP 228. Although the court’s holding on this issue is on the record, the parties’ argument on this matter, as well as the court’s reasoning for its holding, occurred off record. *See* RP 228.

The jury found defendant guilty of assault in the third degree and making a false statement, but acquitted defendant of driving under the influence. CP 162–64 (Verdict Forms A, B, and C). On September 10, 2013, the court sentenced defendant to three months in custody for the

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<sup>4</sup> RCW 9A.76.175 defines “material statement” as “a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.”

assault charge<sup>5</sup> and five days on the false statement charge. CP 169, 174 (Judgment and Sentence, paragraphs 4.1 and 4.9).

Defendant timely filed a notice of appeal on the same day of his sentencing. CP 185.

## 2. Facts

On June 26, 2013, Washington State Patrol Trooper Christopher Kottong had just finished a traffic stop on State Route 243 when he turned to his patrol car and noticed an oncoming truck. RP 84–88. Seeing that the truck was still a reasonably safe distance away, Trooper Kottong decided to enter his vehicle before the truck passed. RP 87–89. As the trooper stepped into his car, he heard the oncoming truck cross the highway rumble strips just behind his patrol car. RP 89. The sound surprised the trooper because he originally believed that he was going to have ample time to safely enter his vehicle before the truck should have passed him. RP 89. Immediately thereafter the truck passed him at a high rate of speed. RP 89.

Trooper Kottong used his radar and confirmed the truck was speeding nearly 10 mph over the speed limit. RP 89–90. He pulled out, activated his emergency lights, and pursued the truck until it rolled to a stop on the side of the highway. RP 89–92. Trooper Kottong approached the truck and contacted the driver. RP 92. Defendant was the driver of the

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<sup>5</sup> Defendant had an offender score of 0 with a standard range of 1-3 months. CP 168 (Judgment and Sentence, paragraph 2.3).

truck. RP 86.

Initially, Trooper Kottong attempted to explain the reason for the stop, but defendant only stared blankly in response. RP 93. Defendant asked Trooper Kottong if he spoke Spanish—to which the trooper replied he spoke a little. RP 93. Trooper Kottong asked defendant in Spanish to identify himself and to produce a valid license, registration, and proof of insurance. RP 93–94, 118.

In response to the trooper's questions, defendant produced a Washington State driver's license with the name of "Juan Aguilar Gomez." RP 94. At the time, Trooper Kottong did not know defendant—*Jose Aguilar Gomez*—was not *Juan Aguilar Gomez* and later relied on the name from the license to verify with dispatch whether defendant had any outstanding warrants and to determine the registered owner of the truck. RP 94, 120.

While defendant tried to produce a valid registration, Trooper Kottong observed defendant fumble around with several documents and struggle to orient them properly. RP 94–95. Trooper Kottong also noticed defendant had poor coordination, glassy and white eyes, and an odor of intoxicants coming from the vehicle. RP 94–95. When Trooper Kottong asked defendant whether he had been drinking alcohol, defendant responded affirmatively. RP 95. Based on these observations, Trooper Kottong decided to arrest defendant for driving under the influence and asked him to get out and sit on the truck's back bumper. RP 96, 120. After

checking for warrants, Trooper Kottong returned and asked defendant to face the truck in order to execute an arrest. RP 96.

As Trooper Kottong tried to grab defendant's left arm, defendant abruptly jerked it away causing the officer's handcuffs to fall to the ground. RP 96. Defendant wrestled his way to the right side of the vehicle and turned to see Trooper Kottong trying to deploy his taser. RP 97–98. Trooper Kottong's taser, however, malfunctioned on several attempts, so defendant fled by foot. RP 97–98. Trooper Kottong pursued. RP 98.

Defendant made it a short distance from the truck when Trooper Kottong caught up, tackled him to the ground, and tried grabbing his arms to complete the arrest. RP 98. Defendant, however, evaded the trooper's attempts to secure his arms and repeatedly struggled away from the trooper. RP 98. Trooper Kottong tried to call for backup but his radio had been torn from his belt and its channels turned to a different frequency. RP 103. Defendant twisted onto his back with his fists clenched, so Trooper Kottong pressed his forearm onto defendant's face to force him to submit. RP 99–100.

The skirmish lasted for several minutes. RP 99. While the trooper became increasingly exhausted, defendant manifested little fatigue—oddly maintaining a blank expression throughout the entire scuffle. RP 98, 100, 103.

At some point defendant reached down towards Trooper Kottong's belt and grabbed the trooper's testicles. RP 104. The trooper yelled at the

top of his lungs, and when defendant did not release his grip, he punched defendant in the face until defendant rolled over. RP 104–05. Desperate, and exhausted, Trooper Kottong could only lie on top of defendant to subdue him. RP 105.

Trevor Waters, a local citizen, just happened to pass Trooper Kottong’s patrol car on the highway and observe the men wrestling near the road. RP 199–200. He pulled over and asked if everything was okay. RP 200–01. Trooper Kottong told Waters he needed help and instructed Waters to retrieve the fallen handcuffs and other leg restraints from his patrol car. RP 105–06, 201–03. Shortly after, Mattawa City Police Department Officer Mike Stump also arrived and helped detain defendant. RP 107, 203.

After securing defendant in his car, Trooper Kottong transported him to Columbia Basin Hospital for medical clearance to book him in the county jail. RP 108. Washington State Patrol Sergeant Marcus Smith—Trooper Kottong’s acting supervisor—also arrived at the hospital to conduct a standard review of force and to help process defendant. RP 108, 162. Defendant apologized to Sgt. Smith and indicated he had been scared of the taser. RP 172–74.

Defendant neither testified nor presented any witnesses for his defense.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO

CONVINCE A RATIONAL TRIER OF FACT  
THAT DEFENDANT WAS GUILTY OF  
MAKING A FALSE OR MISLEADING  
STATEMENT TO A PUBLIC SERVANT.

When reviewing for sufficiency of the evidence, the court must view the evidence in the light most favorable to the State to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981); *see also State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (holding that all reasonable inferences from the evidence must be interpreted in favor of the State and interpreted most strongly against the defendant).

Circumstantial and direct evidence are considered equally reliable on review. *Thomas*, 150 Wn.2d at 874. Determinations regarding conflicting evidence or credibility are up to the trier of fact and not subject to review. *Id.* Specifically regarding credibility determinations, the Washington State Supreme Court has held that "great deference" must be given to the trier of fact's determinations because "[i]t, alone, has had the opportunity to view the witness' demeanor and to judge his veracity."

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

In this case, to convict defendant of making a false or misleading statement to a public servant, the jury had to find that the State proved the following elements beyond a reasonable doubt:

- (1) That on or about June 26<sup>th</sup>, 2013, the defendant made a false or misleading statement to a public servant;
- (2) That the statement was material;
- (3) That the defendant knew both that the statement was material and that it was false or misleading; and
- (4) That this act occurred in the State of Washington.

CP 157 (Instruction No. 17).<sup>6</sup>

Defendant primarily argues he did not make a “material statement”—at least as contemplated by RCW 9A.76.175—when he produced his brother’s driver’s license in response to Trooper Kottong’s request to defendant to identify himself, and that license states, “Not valid for identification.” *See* Brief of Appellant at 4–6. This argument and the remainder of the sufficiency challenge are addressed in turn.

- a. When a law enforcement officer requests a defendant to identify himself by his driver’s license as part of a criminal investigation, the defendant’s subsequent production of another person’s driver’s license may constitute a “material statement” as contemplated by RCW 9A.76.175.

The court instructed the jury that “[a] material statement is a

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<sup>6</sup> *See* RCW 9A.76.175.

written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.” CP 159 (Instruction No. 19). This definition complied with the statutory definition under RCW 9A.76.175.

Defendant first argues that by producing a driver’s license that falsely identified himself, he did not make either a “written or oral” statement as required by RCW 9A.76.175. The trial court rejected a similar argument below when it held:

As to the sufficiency of the evidence argument made by the defendant that he did not provide any – or did not make any written or oral statement, because the written statement that he gave the officer was not written by him will be denied. *There’s no requirement that the writing on the statement actually be done by the defendant. The defendant can adopt a statement that’s written by someone else.* The statute does not require such a rigid interpretation that the writing itself had to be done mechanically or physically by the defendant. He could order someone else to do it or ask someone else to provide the writing, or could adopt it even if he didn’t do that.

RP 218–19 (emphasis added). As the trial court properly concluded, the defendant in this case adopted the name on the driver’s license—Juan Aguilar Gomez—in place of his own, which constitutes a “written statement.”

Consider hypothetically an officer who stops a person based on reliable information that the person had previously been involved in crime. The officer explains the purpose of his investigation and asks the party to

identify himself. Subsequently, without verbal response, the person produces a library card, driver's license, work badge, or some other card identification to the officer and points at the name on the card. In this context, it is clear that the person's production of identification is an act intended to satisfy the investigating officer's inquiry—or, in other words, a "statement" made (albeit not strictly oral but certainly written) to identify himself. Even the rules of evidence expressly consider some nonverbal communication as "statements." *See* ER 801(a).

Next, defendant argues that no public servant would reasonably rely on a driver's license with the words, "Not valid for identification," inscribed on the card. Brief of Appellant at 6. This argument confuses why the driver's license might not be "valid for identification" in a strictly legal sense for purposes of requesting social security cards, birth certificates, applying for health benefits, etc., while simultaneously be used to identify the card's holder. Apparently, defendant carried the driver's license and willingly produced it when asked by a law enforcement officer to identify himself. Consider again the State's hypothetical above where a person produces a work badge to an officer with the similar proscription, "not valid for identification." While perhaps the work badge might not help the holder legally obtain a driver's license or birth certificate, the work badge could still properly identify the holder or (as is here) purposely misidentify oneself to investigating officers.

Defendant's intentional production of a driver's license identifying himself as Juan Aguilar Gomez and not Jose Aguilar Gomez constitutes a "material statement" as contemplated by RCW 9A.76.175.

- b. The State presented sufficient evidence to satisfy the remaining elements of the crime.

For the first element, it is undisputed that the State provided evidence that the crime occurred on June 26<sup>th</sup>, 2013 (RP 86–87), or that Trooper Kottong was a public servant (RP 84–85). Additionally, defendant made a false or misleading statement to Trooper Kottong by producing a driver's license with the name "Juan Aguilar Gomez"—which was an incorrect assertion of his true name, Jose Aguilar Gomez. RP 93–94.

Second, as argued above, the production of the license constitutes a "material statement" because it was a written statement adopted by defendant. Furthermore, Trooper Kottong relied on the information to check the name for warrants and to identify the registered owner of the truck in question. RP 120. Such action demonstrates that the information conveyed by defendant was material because the trooper actually relied on the information in the discharge of his duties.

Third, the evidence demonstrated that defendant knew the statement was material and false or misleading because his name is Jose, not Juan, and surely it is reasonable to infer defendant understood this

distinction. Moreover, Trooper Kottong asked defendant in Spanish to identify himself by his driver's license, so it is unlikely defendant misunderstood the trooper's commands. That defendant understood the statement was material is a reasonable inference that this Court must draw in favor of the State. *See Salinas*, 119 Wn.2d at 201.

Fourth, there is no dispute that these acts occurred in Washington State. RP 87.

When considering the evidence in the light most favorable to the State, there was sufficient evidence to convince a rational trier of fact that defendant made a false statement to Trooper Kottong when he produced a driver's license that falsely identified himself as Juan. The State requests this Court to affirm his conviction.

2. THE TRIAL COURT PROPERLY REFUSED TO GIVE AN INSTRUCTION FOR THE INFERIOR-DEGREE OFFENSE OF ASSAULT IN THE FOURTH DEGREE BECAUSE THE EVIDENCE DID NOT SHOW THAT THE INFERIOR OFFENSE WAS COMMITTED TO THE EXCLUSION OF THE CHARGED OFFENSE.

A trial court's refusal to give a requested instruction, if based on a factual dispute, is reviewable only for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). An instruction for an inferior degree offense is proper when:

- (1) the statute for both the charged offense and the proposed inferior degree offense “proscribe but one offense”; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior

degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

*State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

When analyzing the third prong, or “factual prong,” of the *Fernandez-Medina / Peterson* test, “the evidence *must* raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *Fernandez-Medina*, 141 Wn.2d at 455 (emphasis added). The trial court should administer an inferior degree instruction only if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit on the greater offense. *Id.* at 456 (citing *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

The first two prongs under *Fernandez-Medina* are not at issue: the State recognizes that assault in the third and fourth degrees proscribe one offense, assault is divided into four degrees, and fourth-degree assault is inferior to third-degree assault.<sup>7</sup> The issue here, however, is whether the evidence raises an inference that only fourth-degree assault was committed to the exclusion of third-degree assault. *See Fernandez-Medina*, 141 Wn.2d at 455.

The trial court instructed the jury that to find defendant guilty of assault in the third degree, the State had to prove three elements:

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<sup>7</sup> See RCW 9A.36.041 (“A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or *third degree*, . . .” (emphasis added)).

1. That on or about June 26<sup>th</sup>, 2013, the defendant assaulted Christopher Kottong;
2. That at the time of the assault Christopher Kottong was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
3. That any of these acts occurred in the State of Washington.

CP 150 (Instruction No. 10). Assault in the fourth degree, on the other hand, would have omitted the second element above and only required the jury to find that defendant assaulted Christopher Kottong. *See* RCW 9A.36.041.

There is no evidence that defendant committed fourth-degree assault to the exclusion of third-degree assault—especially where, as is here, there was a single assault against a single victim, and that victim was a law enforcement officer. Trooper Kottong testified that he was commissioned by the Washington State Patrol in 2011 and employed by them at the time of the offense. RP 84. He graduated from two different law enforcement academies of respectively seven and eighteen weeks to become a state trooper. RP 84. Nor is there any question as to whether he was performing his official duties at the time of the assault: Trooper Kottong testified he was working as a road trooper on the day and time in question and he was clearing a previous traffic stop before the assault occurred. RP 85–89.

At trial, defendant did not contest whether Trooper Kottong was a law enforcement officer who was performing his official duties. Even on

appeal, defendant acknowledges both that (1) “[t]here is no dispute that Trooper Kottong is a law enforcement officer,” and (2) “[t]here is no dispute that he was performing his official duties at the time of the assault.” Brief of Appellant at 7. These concessions turn defendant’s argument on its head: these two points unarguably demonstrate that defendant could not have committed fourth-degree assault *to the exclusion* of third-degree assault. If Trooper Kottong was a law enforcement officer performing his official duty, then defendant has essentially stipulated there was no way for him to commit only fourth-degree assault to the exclusion of assault in the third degree.

Defendant oversimplifies this issue as merely a question of whether assault in the fourth degree is an inferior-degree offense to assault in the third degree. *See* Brief of Appellant at 7. He argues that because fourth-degree assault is a lesser degree of third-degree assault, which the State does not deny, he was per se entitled to a jury instruction on fourth-degree assault. Brief of Appellant at 7. But this argument is not supported by any case authority and ignores the proper standard of review for when an instruction for an inferior-degree offense is appropriate. *See Fernandez-Medina*, 141 Wn.2d at 454–56. Defendant’s reasoning, at its logical end, would require a jury instruction on fourth-degree assault every time the State charged a person with a higher degree of assault—regardless of the circumstances. This would nullify *Fernandez-Medina*, its grandfather case, *Peterson*, and all of their progeny. An instruction for fourth-degree

assault was unwarranted, and thus the trial court properly denied defendant's request.

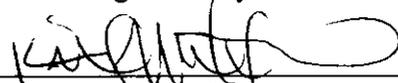
D. CONCLUSION.

The State requests this Court to affirm defendant's conviction of making a false statement because sufficient evidence supported each element of the crime. Defendant's production of a Washington driver's license that misidentified him to Trooper Kottong constituted a "material statement" under RCW 9A. 76.175.

The State also respectfully requests this Court to affirm defendant's conviction for third-degree assault. Defendant concedes there is no evidence that defendant committed assault in the fourth degree to the exclusion of assault in the third degree. Because Trooper Kottong was a law enforcement officer performing his official duties at the time of the offense, defendant could not have committed only fourth-degree assault.

DATED: March 24, 2014

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WSB # 46290

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31937-7-III
	)	
vs.	)	
	)	
JOSE AGUILAR GOMEZ,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

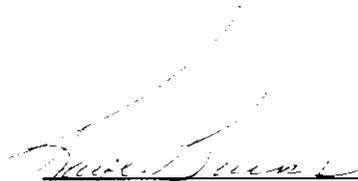
That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Dennis W. Morgan  
[nodblspk@rcabletv.com](mailto:nodblspk@rcabletv.com)

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter:

Jose Aguilar Gomez  
c/o Dennis Morgan  
PO Box 1019  
Republic WA 99166

Dated: March 24, 2014.

  
\_\_\_\_\_  
Kaye Burns