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STATE OF WASHINGTON

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Supreme Court NO. _____
COA No. 59468-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY ERICKSON,

Petitioner.

FILED DIV 1
APPEALS DIV 1
COURT OF APPEALS
STATE OF WASHINGTON
2008 APR 30 PM 4:57

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

The Honorable James Allendoerfer

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Erickson was the appellant in COA No. 59468-1.

B. COURT OF APPEALS DECISION

In a decision issued March 31, 2008, the Court of Appeals (Division One) affirmed Mr. Erickson's conviction.

C. ISSUES PRESENTED ON REVIEW

1. Whether the trial court erred following the CrR 3.6 hearing in admitting evidence that was seized as the product of a seizure supported by a warrant issued without a finding of probable cause.

2. Whether, under the Fourth Amendment and under Article 1, § 7 of the State Constitution, a warrant for arrest may issue following the defendant's failure to appear for a probation violation hearing where there is no finding of probable cause to support the underlying violation allegation.

D. STATEMENT OF THE CASE

Mr. Erickson was convicted of possession of a controlled substance in a stipulated bench trial, following a CrR 3.6 hearing in which he challenged his arrest on a warrant. CP 4-15, 65-66. He was ordered to serve 90 days confinement. CP 4-15. He appealed. CP 16. The Court of Appeals affirmed. Appendix A.

E. ARGUMENT

The question whether the warrant of arrest was properly issued presents a question arising under the Constitutions of the United States and the State of Washington, warranting review under RAP 13.4(b)(3).

THE WARRANT FOR MR. ERICKSON'S ARREST WAS NOT SUPPORTED BY A FINDING OF PROBABLE CAUSE.

1. Suppression hearing and trial court's ruling. On November 16, 2006, Mr. Anthony Erickson was walking near a used car lot by Highway 99 in Lynnwood, Washington. 12/21/06VRP at 7; CP 29-31. According to the testimony at the CrR 3.6 suppression hearing and the trial court's findings of fact, Lynnwood police officer Jason Valentine observed Mr. Erickson waiving animatedly at the officer as he drove by in his marked patrol car. Officer Valentine stopped his vehicle and approached Mr. Erickson on foot, whereupon he and the defendant had a "friendly" conversation. 12/21/06VRP at 10; CP 29-31.

When the officer asked Mr. Erickson his name, the defendant stated his name and also proffered his identification card. 12/21/06VRP at 10; CP 29-31. Valentine wrote down the

information and then terminated the contact, but after running Mr. Erickson's name through a warrant database in his patrol vehicle, he discovered that there was a warrant for the defendant's arrest from case number C38418 LWP, issued by the Lynwood Municipal Court on October 4, 2006. 12/21/06VRP at 12-13; CP 29-31. The officer searched for and located Mr. Erickson, who was still on foot, and arrested him on the warrant, following which an amount of cocaine was located on his person. CP 124, 29-31.

Prior to the CrR 3.6 hearing the parties filed multiple briefs which ultimately raised one contested issue. CP 45-64, 67-73, 74-80, 81-104, 105-06, 107-11, 112-20, Mr. Erickson challenged the validity of the warrant on ground that no documentation evidenced any finding of probable cause relating to the underlying allegations in the case of several probation violations, including a failure to appear for a drug/alcohol evaluation and follow-up treatment, and a failure to pay fines and assessments. CP 67-73; 12/21/06VRP at 62-65. The State asserted that the warrant in question was justified merely by Mr. Erickson's failure to appear in court for the probation violation hearing on these matters, scheduled for October 2, 2006, and asserted that this failure was personally observed by

the judge and that a bench warrant therefore was properly issued without further documentation of probable cause. CP 45-64; 12/21/06VRP at 57.

Following argument, the trial court held that the State's position was correct because CrRLJ 2.5 and State v. Parks, 136 Wn. App. 232, 148 P.3d 1098 (2006) allow a court to issue a bench warrant where a defendant fails to appear for a hearing as to which he has been given notice. CP 65-66. The court held:

The time and place for a due process hearing on probable cause is at the duly scheduled probation violation hearing held in open court. Defendant was sent notice of such hearing, and summonsed to appear. Unfortunately, he had changed his mailing address without notifying the City, and apparently did not receive the notice. He failed to appear. The only remaining remedy for the Municipal Court was to issue a bench warrant. Following Defendant's arrest a full hearing was timely held by the Court on the underlying allegations relating to Defendant's probation violations. He was found guilty and was sanctioned with jail time.

CP 66.

2. The court rules and the constitution provide that no warrant for arrest may issue except upon probable cause.

CrRLJ 2.2, which governs the issuance of arrest warrants in district or municipal courts, specifies that arrest warrants must be

supported by a documented finding of probable cause, specifically providing that

a warrant of arrest must be supported by an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The evidence shall be preserved. The court must determine there is probable cause to believe that the defendant committed the crime alleged before issuing a warrant.

CrRLJ 2.2. CrRLJ 2.2(b)(2) specifies that if the complaint charges the commission of a misdemeanor or gross misdemeanor, the court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent bodily harm to the accused or another, in which case it may issue a warrant. Similarly, CrRLJ 2.2(b)(5) permits a warrant to issue if a person fails to respond to a summons. But CrRLJ 2.2(c) provides that when a warrant is issued, it must include certain specific information, including "that the court has found that probable cause exists."

These court rules enforce the dictates of the Washington Constitution, Article I, § 7, which provides that "no person shall be

disturbed in his private affairs, or his home invaded, without authority of law." When served, a warrant of arrest disturbs a person in his private affairs, and thus a warrant shall not issue "without authority of law" regardless of whether it is labeled an administrative warrant, an arrest warrant, a bench warrant, or something else. State v. Walker, 101 Wn. App. 1, 5-6, 999 P.2d 1296 (2000) (citing City of Seattle v. McCready (McCready II), 124 Wn.2d 300, 309-10, 877 P.2d 686 (1994); City of Seattle v. McCready (McCready I), 123 Wn.2d 260, 271-72, 868 P.2d 134 (1994)). In addition, the Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

The Walker case involved a bench warrant for a failure to appear that was signed and issued by a court clerk, contrary to the provisions of CrRLJ 2.2 and otherwise unauthorized by statute or code. State v. Walker, 101 Wn. App. at 3 (quoting the trial court's

finding that "the municipal court computerized records do not reflect that [Walker] appeared in court."). The remedy in Walker was suppression given that there was no probable cause finding by a judge. "To date, the Washington Supreme Court has remedied all violations of Article I, section 7 by applying the exclusionary rule." State v. Walker, 101 Wn. App. at 11-12.

In the present case, the parties placed into evidence the docket from the Lynnwood Municipal Court and all documentation from the issuance of the warrant. Supp. CP ____, Sub # 23 (Exhibits 1-3). The docket in Case # 000038418 from the Lynnwood Municipal Court indicated that on August 8, 2006 a probation violation report was filed with the court arising out of the defendant's prior conviction for fourth degree assault, but with no specific violations noted in the record. On September 7, 2006, the Notice of Probation Violation hearing was returned to the court, with an indication that no forwarding address for the defendant was known. CP 68.

Then, on October 2, 2006, Mr. Erickson failed to appear at the probation violation hearing, and a \$5,000 bench warrant was issued. CP 68. The record of the hearing does not contain a

finding of probable cause for probation violations at the time of the hearing. The docket does not contain a notation of probable cause for probation violations. The warrant, which was issued after the failure to appear at the probation violation hearing, noted "Failure to Appear" and "Violation of a Court Order". Exhibit 1. The "Violation of a Court Order" notation does not specify which order was violated and does not specify the violations.

3. An issuing court must make a determination of probable cause, finding probable cause to believe that a probation violation has occurred, prior to issuing a warrant for a defendant when a defendant fails to appear for a probation violation hearing. Settled law indicates that a specific finding of probable cause, made on the record, must support every arrest warrant issued by a court. The finding of probable cause must be sufficiently specific to allow a reviewing court to assess the validity of the warrant. The basis for this position is the 4th and 14th Amendments to the US Constitution and Article 1, § 7 of the Washington State Constitution.

Probable cause is a mutable concept which simply means that there is sufficient evidence that would lead a reasonable and

prudent person to take action. In certain circumstances, probable cause must be established by a court prior to police action, such as an arrest warrant issued by a court or a search warrant issued by a court. To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Supreme Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. at 13-14.

In State v. Parks, 136 Wn. App. 232, 148 P.3d 1098 (2006), the Court of Appeals found that a judge must find probable cause prior to issuing a warrant when a case is in pretrial status at the Municipal Court level. The Court clearly based its opinion on the Due Process clause. There, the State argued that the warrant was

issued for the defendant's failure to appear, under Rule 2.2.

Critically, the Court states in the opinion that a finding of probable cause for the underlying offense must support a bench warrant issued for failure to appear. State v. Parks, 136 Wn. App. at 237.

When addressing the issue of the alleged conduct of contempt or bail jumping, the Court specifically noted that there was no finding of probable cause for either of those offenses noted in the docket. State v. Parks, at 238-39. Further, the Court noted that the court rules were established to enforce the Constitution, not evade it:

Taken as a whole, the criminal rules for the courts of limited jurisdiction are designed to enforce, not evade, the constitutional command. There should have been a judicial finding of probable cause, made on the record before the court attempted to force Parks to appear in court. We hold that making such a finding is not only a "best practice" but also a constitutional obligation of the issuing court.

State v. Parks, 136 Wn. App. at 239. Based on these authorities, the arrest warrant was required to be, but in this case was not supported by a finding of probable cause, and the defendant's failure to appear does not absolve the trial court of finding probable cause to support the underlying allegations before issuing an arrest warrant for the failure to appear.

Furthermore, an additional issue in the present case is one of an adequate record of a probable cause finding. The Municipal Court has a constitutional duty to the defendant to issue a ruling with a clear record. See Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1974) (finding of probable cause must be memorialized in the record). Without an adequate record, there can be no meaningful review of a probable cause determination. In the case at bar, the record is wholly inadequate to allow a reviewing court to determine whether probable cause was found and whether there was a sufficient basis for such a finding. The warrant cannot be upheld.

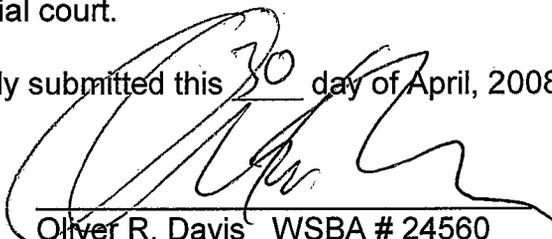
4. Suppression and reversal are required. Evidence which is the product of an unlawful search or seizure is not admissible. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Evidence will be excluded as fruit of the illegal seizure unless the illegality is not the "but for" cause of the discovery of the evidence, and suppression is required where the challenged evidence is in some sense the product of illegal governmental activity. Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, 615 (1984) (citing United States v.

Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 537 (1980)). Here, the cocaine found on the defendant's person would not have been discovered but for Officer Valentine's illegal detention of Mr. Erickson. For this reason, and based on the foregoing, Mr. Erickson asks that this Court reverse the trial court's order denying his motion to suppress, and reverse his conviction.

F. CONCLUSION.

Based on the foregoing, Mr. Erickson respectfully requests that this Court accept review, and reverse the judgment and sentence of the trial court.

Respectfully submitted this 30 day of April, 2008.



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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 59468-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	PUBLISHED OPINION
ANTHONY JAY ERICKSON,)	
)	
Appellant.)	FILED: March 31, 2008

LEACH, J. -- Anthony Erickson seeks reversal of his conviction for misdemeanor possession of a controlled substance. Erickson argues that he was arrested on a bench warrant that was invalid for lack of probable cause, and that he was convicted based on evidence discovered incident to an illegal arrest. We affirm.

On November 16, 2006, a Lynnwood police officer made contact with Erickson. Erickson willingly volunteered his name when asked. After terminating contact, the officer entered Erickson's name into a warrant database and discovered a bench warrant issued by Lynnwood Municipal Court. The officer reinitiated contact with Erickson and arrested him based on the warrant. At the jail, the booking officer searched Erickson and discovered a baggie of cocaine.

Erickson was charged with possession of a controlled substance. He moved to suppress evidence based on his contention that the warrant was invalid

due to lack of probable cause. After a CrR¹ 3.6 hearing, the trial judge denied Erickson's motion to suppress. Erickson waived his right to a jury and stipulated to a bench trial on agreed documentary evidence. He was convicted as charged and sentenced to 90 days in jail.

The bench warrant used to arrest Erickson was issued because he failed to appear at a probation review hearing following his conviction for assault in the fourth degree.² Erickson had been released on probation following this conviction. While he was under the supervision of the municipal court, Erickson's probation officer filed a report alleging that Erickson had violated that probation by failing to report to the probation department upon release and failing to enroll in drug treatment. A summons was issued directing Erickson to appear at a probation review hearing but the summons was returned because Erickson had moved and not provided the court with his new address, contrary to the terms of his probation. The municipal judge ordered a bench warrant for failure to appear at the review hearing.

It is undisputed that the municipal court record shows probable cause existed for—and that Erickson was found guilty of—assault in the fourth degree. Nevertheless, Erickson maintains that an additional finding of probable cause that he committed a probation violation was required before the court could issue a bench warrant for his arrest. We disagree.

¹ Superior Court Criminal Rules.

² City of Lynnwood v. Erickson, No. C38418.

The municipal court issued a warrant not because it found that Erickson had violated his probation but because he was *convicted of assault* and subsequently failed to appear for a hearing at which the court could make a determination regarding an alleged probation violation. Failure to appear, in itself, is not a crime.³ Any punishment imposed for a probation violation relates to the original conviction for which probation was granted.⁴ Thus, although the alleged probation violation and subsequent failure to appear set the wheels in motion for Erickson's eventual arrest, the assault conviction was the crime underlying the issuance of the bench warrant.

A finding of probable cause for a probation violation is not required before issuing a warrant for failure to appear. As a probationer, Erickson had a right to minimum due process before his probation could be revoked, including "(a) written notice of the claimed violations of [probation or] parole; (b) disclosure . . . of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence."⁵ But these requirements must be met before Erickson's probation is revoked, not before the court may issue a bench warrant for failure to appear.

Erickson urges us to adopt a rule requiring a municipal court to find probable cause for a probation violation before a probationer may be compelled

³ State v. Parks, 136 Wn. App. 232, 237, 148 P.3d 1098 (2006) (citing State v. Walker, 101 Wn. App. 1, 6, 999 P.2d 1296 (2000)).

⁴ State v. Watson, 160 Wn.2d 1, 8-9, 154 P.3d 909 (2007).

⁵ City of Seattle v. Lea, 56 Wn. App. 859, 860, 786 P.2d 798 (1990) (quoting Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)).

to appear in court. Because probationers have a diminished right of privacy under the Fourth Amendment and article 1, section 7 of our state constitution,⁶ a probationer may be compelled to appear in court for a number of reasons, including a probation review hearing. And if a probationer fails to appear when a summons is issued directing such appearance, an arrest warrant may be issued. We decline to adopt a rule that would tie the hands of municipal court judges by stripping them of the primary mechanism available for enforcing probation compliance when a probationer fails to report to the probation department and then fails to respond to a subsequent summons, i.e., the ability to issue a bench warrant.

Erickson argues that, under State v. Walker,⁷ he was arrested without authority of law. In Walker, the defendant was cited for consuming alcohol in a public park, and agreed in writing to appear for a hearing.⁸ When Walker did not appear, the clerk of the municipal court issued an arrest warrant for failure to appear.⁹ The question in Walker was whether a bench warrant issued by a court clerk without judicial participation was permitted by the court rules.¹⁰ We held that no statute or court rule authorized a warrant to issue absent judicial participation.¹¹

⁶ State v. Lucas, 56 Wn. App. 236, 239-40, 783 P.2d 121 (1989).

⁷ 101 Wn. App. 1, 999 P.2d 1296 (2000).

⁸ Walker, 101 Wn. App. at 3.

⁹ Walker, 101 Wn. App. at 3.

¹⁰ Walker, 101 Wn. App. at 6.

¹¹ Walker, 101 Wn. App. at 10-11.

By contrast, the bench warrant for Erickson's arrest was expressly authorized by the applicable court rules, which allow a municipal court to issue a bench warrant when a defendant fails to appear. CrRLJ¹² 2.2(b)(5) provides for the issuance of a warrant for the arrest of a defendant who "fails to appear in response to a summons . . . if the sentence for the offense charged may include confinement in jail." In addition, CrRLJ 2.5 provides:

The court may order the issuance of a bench warrant for the arrest of any defendant who has failed to appear before the court, either in person or by a lawyer, in answer to a citation and notice, or an order of the court, upon which the defendant has promised in writing to appear, or of which the defendant has been served with or otherwise received notice to appear, if the sentence for the offense charged may include confinement in jail.

Because Erickson failed to appear in response to a summons and the sentence for assault in the fourth degree may include jail time, the bench warrant was authorized by the court rules.

Erickson also argues that State v. Parks¹³ requires a probable cause finding for a probation violation before a municipal court may issue a bench warrant. In Parks, we held that a finding of probable cause for the underlying crime is required at some point in the proceeding before issuing an arrest warrant under CrRLJ 2.5.¹⁴ Parks was cited for minor in possession of alcohol in municipal court.¹⁵ He appeared pro se, was arraigned, and pled not guilty.¹⁶ He

¹² Criminal Rules for Courts of Limited Jurisdiction.

¹³ 136 Wn. App. 232, 148 P.3d 1098 (2006).

¹⁴ Parks, 136 Wn. App. at 239.

¹⁵ Parks, 136 Wn. App. at 234.

¹⁶ Parks, 136 Wn. App. at 234.

attended a pretrial hearing where he confirmed his trial date, but he subsequently failed to appear for trial.¹⁷ The municipal court issued a bench warrant for failure to appear under CrRLJ 2.5. On appeal, it was undisputed that the municipal court had never made a finding of probable cause on the underlying criminal charge against Parks.¹⁸ We held that the bench warrant violated the Fourth Amendment because the court had not made a finding of probable cause for the underlying minor in possession charge.¹⁹

The Ninth Circuit recently rejected an argument to extend Parks to require a court to make a new finding of probable cause before issuing a bench warrant for the arrest of a probationer in United States v. Gooch.²⁰ Officers entered Gooch's residence in order to execute a warrant for the arrest of Gooch's roommate, Michael Conn.²¹ While searching for Conn, officers observed paraphernalia suggesting heroine use in both Conn's and Gooch's bedrooms.²² Based on these observations, they obtained a search warrant for the residence.²³ When officers entered his room during the execution of the warrant, Gooch was sleeping on the bed.²⁴ The officers told Gooch to lie on his stomach and keep his hands visible, but Gooch reached toward his pillows, where three loaded firearms

¹⁷ Parks, 136 Wn. App. at 234.

¹⁸ Parks, 136 Wn. App. at 236.

¹⁹ Parks, 136 Wn. App. at 236, 239-40.

²⁰ 506 F.3d 1156 (9th Cir. 2007).

²¹ Gooch, 506 F.3d at 1158-59.

²² Gooch, 506 F.3d at 1157-58.

²³ Gooch, 506 F.3d at 1158.

²⁴ Gooch, 506 F.3d at 1158.

were hidden.²⁵ Gooch was convicted of being a felon in possession of a firearm.²⁶ On appeal, Gooch argued that the arrest warrant for Conn was legally defective because it was issued without probable cause, and that without the initial entry based on that warrant the police would not have had a basis to obtain the search warrant that led to his arrest.²⁷ The Ninth Circuit held that the entry and subsequent search for Conn were reasonable and permissible.²⁸ The court noted, "Parks is inapplicable here, where the bench warrant for Conn's arrest was made for failure to comply with the terms of probation after a finding of guilty for the underlying offense."²⁹

Similarly, Parks does not apply to the present case, where the bench warrant was issued for failure to appear at a probation review hearing following Erickson's conviction for the underlying offense, fourth degree assault. Parks specifically held that CrRLJ 2.5 does *not* require a probable cause finding at the time a bench warrant is issued, but rather that "the bench warrant will not be valid unless the record establishes that the court made a finding of probable cause *at some earlier point in the history of the case.*"³⁰ The Fourth Amendment probable cause requirement as enumerated in Parks was met in this case when probable cause was found for the underlying assault charge. We decline to extend Parks

²⁵ Gooch, 506 F.3d at 1158.

²⁶ Gooch, 506 F.3d at 1157.

²⁷ Gooch, 506 F.3d at 1158.

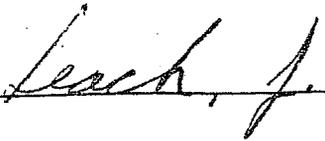
²⁸ Gooch, 506 F.3d at 1159.

²⁹ Gooch, 506 F.3d at 1160 n.3.

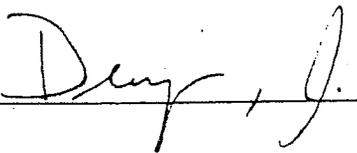
³⁰ Parks, 136 Wn. App. at 239 (emphasis added).

to require a new finding of probable cause each time a municipal court wishes to compel a probationer under its supervision to appear in court. The probable cause necessary for a municipal court to issue a bench warrant for the arrest of a probationer who fails to appear is the probable cause for the original crime of which he or she was convicted. Because a finding of probable cause for the underlying offense of assault in the fourth degree was made before the issuance of the bench warrant, the warrant was valid.

Affirmed.



WE CONCUR:





DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Petition for Review** filed under **Court of Appeals No. 59468-1-I** (for transmittal to the Supreme Court) to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for respondent: **Mary Kathleen Webber - Snohomish County Prosecuting Attorney**, appellant and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 30, 2008

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