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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 25223-0-III
25218-3-III

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

STATE OF WASHINGTON,

Respondent,

V.

JIMMY McINTOSH,

Appellant.

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

The Honorable Vic Vanderschoor, Judge

RAP 10.10
STATEMENT OF ADDITIONAL GROUNDS

Jimmy McINTOSH
C.C.A./F.C.C.
P.O. BOX 6900
FLORENCE, AZ 85232

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A. ASSIGNMENT OF ERROR

1. The Court Infringed upon the defendants 5th, 6th, and 14th Amendment rights to Due Process and "Double Jeopardy."

2. The courts infringed upon the defendants 5th, 6th, and 14th Amendments to Due Process, Jury Trial when sentencing the defendant outside of their jurisdiction and juries finding's.

3. The Trial Court abused it's discretions when denying MR. McINTOSHs' motion to supress officer Mendozas' statement concerning the defendant in the photo montage therefore infringing upon Mr. MCINTOSHS' 5th, 6th, and 14th Amendment rights to Due Process, And Fair Trial.

4. There is insufficient evidence for the defendants' conviction to stand the alleged victims could never even identify Mr. McINTOSH this violates Mr. McINTOSHS' 5th, 6th, and 14th Amendment Rights to Due Process and proof beyond a reasonable doubt.

B. STATEMENT OF THE CASE

The defendant adopts counsels' statement of the case except for the underlying facts which support the following issue's.

1. SUBSTANTIVE FACTS

Officer Mendoza alleged that nobody ever told him any facts concerning the incident, but the alleged victims all said they immediately ran over to his house and told Mendoza everything. (VRP 311) Within hours of this a photomontage was made and shown to the alleged victims. (VRP 311). None of the victims could identify Mr. McINTOSH but did identify the only person officer Mendoza reported. (VRP 312). Officer Mendoza never mentioned McINTOSH in his initial report. (VRP 312). Only after the defendants car was found did mendoza mention McINTOSH. (VRP 312). Officer Mendoza originally described the suspect who was supposed to be McINTOSH as a Blond hair blue eyed man wearing a plaid shirt. (VRP 321). Later after the car was found Mendoza changed his story, and said they were [illegible]light

Hispanics. This was only after the car was found. Mendoza said this only after the initial report. (VRP 321). Officer Mendoza never said anything about knowing Mr. McINTOSH until after McINTOSH was arrested and infact in the photomontage the only person wearing the plaid shirt was McINTOSH and no one else. Mendoza who never said anything about the defendant in the initial report was the only person to pick out McINTOSH. Mr. Mendoza said he was carrying a bat. Nobody was masked and all the alleged victims even said this person was a blond haired blue eyed man. (VRP 323). Later Mendoza Said he only knew Iniquez, but McINTOSH by sight. HE never mentioned this in his report. (VRP 323). In the 3.6 suppression hearing Mendoza said he went to school with the defendant but this is a lie. Mr. Mendoza committed perjury. In fact the only reason he knew McINTOSHS' name is due to the fact the defendant beat up Mr. Mendozas' brother in the middle of a big group of people.

2. **SENTENCING FACTS**

Mr. McINTOSH was charged with 1st degree robbery which was charged as first and not second degree due to the alleged use of a firearm. Mr McINTOSH was given four counts with an additional punishment for the same reasoning in fact and law as the initial charge the use of a firearm. Mr. McINTOSH was given four firearm enhancements the jury used RCW 9.94A.602 to find the defendant was armed with a deadly weapon. Nowhere in this RCW does it allow for the judge to give a firearm enhancement but only deadly weapon enhancements. WPic 2.07 defines firearms as a deadly weapon and initiative 159 seperates firearm and deadly weapon for enhancement purposes.

The defendant was given the maximum for his offense and the fire-arm enhancements were piled ontop of this relevant statutory maximum. The same goes for the community custody that was given to the defendant.

C. ARGUMENTS

ROBBERY IN THE FIRST DEGREE IS A CHARGE WHICH WAS ELEVATED DUE TO THE USE OF A FIREARM THEN THE FIRE-ARM ENHANCEMENTS WERE GIVIN FOR THE SAME FACT AND LAW AS THE ORIGINAL CHARGE'S THIS INFRINGES UPON THE DEFENDANTS 5th, 6th, and 14th AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

The Double jeopardy provision of the federal and state constitution protect criminal defendants from multiple punish-ment for the same offense. **BENTON V. MARYLAND**, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Double Jeopardy is a constitutional issue that may be raised for the first time on direct appeal. **STATE V. BOBIC**, 140 WN.2d. 250, 257, 996 P.2d 610 (2000). The Court may not enter multiple convictions for the same criminal conduct. **STATE V. FREEMAN**, 153 WN.2d at 770-71.

SENTENCING ELEMENTS ARE THE SAME AS ELEMENTS OF AN OFFENSE.

Initiative 159 was passed much before **RING V. ARIZONA**, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); **WASHINGTON V. RECUENCO**, 126 S.Ct. 2546 (2006)(Any possible distinction between an 'element' of a felony offense and a sentencing factor was unknown to the practice of ..... trial by jury and judgement by court as it exsisted during the surrounding year's of our nations founding.... Accordingly we have to treat sentencing factors, like elements, as facts that have to be tried to the jury and proven beyond a reasonable doubt.)

The federal Courts when encouraging state's to follow the armed crime act, never had in mind for the sentencing enhancements to be used like redundant elements of an offense in which results in double jeopardy. The federal courts enable a criminal for a FASE only if certain criteria's are met. Unlike Washington which hands out accompanying FASE for single incidents that either resulted in multiple charges or the felony has the use of a firearm in the elements. This is Double Jeopardy clear cut, and is not warded by the federal government.

LEGISLATION INTENT MUST BE RE-EXAMINED

The legislation can not know all the outcomes of their laws until they actually go into effect. In some cases the legislation can construe a law that violate's some peoples rights without violating others rights, and have this be unintentional. Many people are under the impression that if the legislation enacts a law it does not and cannot violate constitutional rights, but this is wrong. **ALBERNAZ V. U.S.**, 450 U.S. 333, 340, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

Despite the ruling in **STATE V. NGUYEN**, 142 P.3d 1118-9, 1121 (2006), the legislation did show concerns about double jeopardy issue's arising from initiative 159, and exempted the charges they believed would violate this amendment. The charges of ROBBERY, ASSAULT, AND BURGLERY in the first degree all require in most circumstances an alternative charge from the use of a firearm. When this is done, and the criminal defendant recieves additional FASE for the same reasoning in facat and law as the charge it violates Double jeopardy.

The test set forth in **BLOCKBURGER V. U.S.**, 284 U.S. 299, 304 52 S.Ct. 180, 76 L.Ed. 306 (1932), has been met in this instant case because Mr. McINTOSH was charged with four counts of ROBBERY WITH A FIREARM for one ROBBERY, then punished a second time for commiting armed robbery by FOUR FASE which added 20 years ontop of his sentence. the fact is armed with a firearm you can not commite an armed robbery without being armed, the law is the use of a firearm in a robbery and once again you can not commite armed robbery without being armed. The correct course is to remove the offending FASE from the defendants sentence.

Also their is no authority for the judge to impose the FASE the jury found by RCW 9.94A.602 that Mr. McINTOSH was armed with a deadly weapon WPic 2.07 defined firearm as a deadly weapon, but initiative 159 seperated these two terms for enhancement purposes. The jury only found deadly weapon, and Mr. McINTOSH should be sentenced accordingly to the findings. In **STATE V. MONDAY**, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975), it is made clear that the legislation and not the judicial branch alters punishment in the sentencing process. The judicial branch can not create a procedure which the legislation has not made to do so would usurp the power of the legislation.

Therefore the defendant ask this Honorable Court to Vacate the offending FASE, or Reduce to the juryies finding of Deadly weapon and not firearm.

ISSUE TWO

THE RELEVANT STATUTORY MAXIMUM IN THIS CASE IS THE STANDARD MAXIMUM RANGE NO SUBSTANTIAL AND COMPELLING REASONS WERE FOUND BY THE JURY TO EXCEED THIS MAXIMUM THE SENTENCING JUDGE EXCEEDED PROPRER AUTHORITY WHEN SENTENCING THE DEFENDANT OUTSIDE THE PROPER SENTENCING AUTHORITY.

The U.S. supreme court ruled in **CUNNINGHAM V. CALIFORNIA**, 549 U.S.__(2007) NO. 05-6551 January 22, 2007, interpreting BLAKELY V. WASHINGTON, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 405 (2004):

"While the over a;; statutory maximum for a Class "B" felony was ten year's (LIFE FOR A CLASS "A") the State's sentencing reform act added an important qualification if no Facts were reflected in the jury's verdict, were found by the trial judge, a defendant could not recieve a sentence above the standard range of 49-53 months. The reform act permitted but did not require a judge to exceed that standard range if he or she found substantial and compelling reasons justifying an exceptional sentence.'" **SEE CUNNINGHAM SUPRA (EMPHASIS ADDED).**

In other words if Mr. McINTOSH did not stipulate or the jury did not find substantial and compelling reasons, the relevant statutory maximum is the standard maximum range not life.

Washington tried to argue to the contrary in **BLAKELY** and the supreme court rejected their argument, the same will happen concerning this arguement.

INITIATIVE 159 DOES NOT ALLOW FASE OVER THE MAXIMUM FOR THE OFFENSE.

It is clear the legislation and voters did not allow for the FASE to exceed the maximum for the offense. Initiative 159 specifically say's that the FASE can not exceed the offenses' statutory maximum. Therefore when the judge did, in this case he exceeded

the authority of the court, and the proper remedy is to reduce the underlying offense so that the enhancement may fit inside without exceeding this maximum.

RCW 9.94A.505(5) HOLD THE SAME FOR COMMUNITY CUSTODY.

The legislature did not provide for community custody to exceed this maximum either. The proper course would be to reduce the underlying sentence so the community custody does not exceed this maximum or to remove the community custody.

Therefore Mr. McINTOSH ask this Honorable Court for the relief stated above, and remand for re-sentencing.

ISSUE THREE

THE TRIAL COURT ABUSED IT'S DISCRETION WHEN DENYING DEFENDANT'S MOTION TO SUPPRESS AND TO DISMISS.

Reviewing Court's use the abuse of discretion standard when determining whether supression hearing should have been granted. STATE V. MARTZ, 8 Wn.App. 192, 504 P.2d 1174 (Wash. APP.DIV 2 1973). If the decision was unreasonable, and no person under the same circumstances would have came to the same conclusion then the court has abused it's discretion. STATE V. PERRETT, 86 Wn.APP.312, 936 P.2d 426 (Wash.APP.Div.2 1997).

The defense entered a motion to supress officer mendoza's out-of-court identification. SEE APPENDIX A. The judge dismissed this motion because he believed Mendoza knew the defendant and would have picked him in the photomontage anyway's. This is unreasonable because all of the evidence proved Mr. McINTOSH was not there and in fact Mr. Mendoza was the only reason why the defendant was picked.

None of the alleged victims picked Mr. McINTOSH but did pick threw photomontage Mr. Iniguez the co-defendant who was also identified as driving the car to and from the crime.

Mr. Mendoza never mentioned anything about McINTOSH in his reports until McINTOSH's CAR WAS FOUND VANDILIZED. Mendoza lied on the stand numerouse times once alleging he and the defendant went to school together (This is not true). In fact Mendoza claimed he was never told about the incident before he picked McINTOSH in the photomontage, but the alleged victims ran right to his house and told him everything. A big subject was the blond haired blue eyed plaid shirt wearing culprit. After the car was found and the fact that it was the defendants car was made, a montage came into exsistance and the only picture with a man wearing a plaid shirt was McINTOSH. Still the victims did not pick this picture, and the only one who did was Mr. Mendoza. In Fact Mr. Mendoza never knew the defendant he only knew him by reputation because the defendant beat up Mr. Mendozas' brother in a big social group. If that plaid shirt picture would not have been in the montage then the defendant would have never been picked.

Under **MANSON V. BRATHWAITE**, 432 U.S. 98, 116, 53 L.Ed.2d 140, 97 S.Ct. 2243 (1977); State v. Maupin, 63 Wn.App.887. 822, P.2d 355 (1992) this identification was beyond permissive, and the judge should have dismissed the identification and the case against Mr. McINTOSH.

Therefore the defendant ask this Honrable Court to reverse his conviction and or hold an evidentiary hearing to determine these matters.

ISSUE FOUR

THEIR IS INSUFFICENT EVIDENCE TO SUPPORT MR. McINTOSHS' CONVICTION NONE OF THE ALLEGED VICTIMS EVER IDENTIFIED THE DEFENDANT.

The standard for a sufficiency of the evidence argument is clearly set out in **JACKSON V. VIRGINIA**, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979): **STATE V. A.T.P.-R.**, 132 Wn.APP.181, 130 P.3d 877 (WASH.APP.DIV.3). The conviction is sufficient if all essential elements can be found beyond a reasonable doubt by a reasonable minded trier of fact. Any credibility determination are to be left to the jury. If the evidence viewed in a light most favorable to the state can not stand alone for the conviction then it is unsuffecient.

In this case their is absolutely no evidence against the defendant. Nobody could even identify Mr. McINTOSH, and everybody described him as the blond hair blue eyed culprit. Mr. McINTOSH was only identified by a police officer off Duty who never reported the defendant until after his car was found vandilized. Just due to the fact Mr. McINTOSHS' car was used, and vandilized in the crime is the only reason why MR. McINTOSH was found guilty. No culprits used mask's the one's whom was found was identified by the victims, but Mr. McINTOSH was never not even in trial. No reasonable minded person after hearing all the evidence could have found that Mr. McINTOSH was their because the victims couldn't even recognize him, no fingerprints, shoe prints nothing.

If the victims can not identify the defendant, and no physical evidence can put his physical body at the crime, then a man across the way from the victims house can not be the only evidence to support Mr. McINTOSHS' conviction. This is not a credibility determination it's just the fact's, and the fact remains there is absolutely more evidence saying the defendant was not their then the small hang nail opinion that is there.

Therefore Mr. McINTOSH ask this HONORABLE COURT TO reverse his conviction and dismiss the conviction.

CONCLUSION

There are numerouse sentencing issue's which require action from the Court. Also Mr. McINTOSH should have his conviction reversed and Mr. Mendoza's out-of-Court identification evidence suppressed. There also is not suffiecent evidence to support this conviction and the defendant should have his conviciton dismissed.

RESPECTFULLY SUBMITTED,

THIS 23RD DAY OF May, 2007.

Jimmy McIntosh

JIMMY McINTOSH

APPENDIX

"A"

Superior Court, Franklin County, State of Washington

STATE OF WASHINGTON, Plaintiff, vs. JIMMY H. McINTOSH, Defendant.	No. 05-1-50196-0 **NOTICE OF HEARING**

TO: The Clerk of the Court and the plaintiff, State of Washington, and your attorney:

PLEASE TAKE NOTE that: Tracy Scott Collins, attorney for Jimmy H. McIntosh, respectfully requests that this matter be set for hearing on his motion to suppress evidence and dismiss on _____, at _____, in the presiding criminal court.

Dated this 19, day of Jan, 2006.

Respectfully,

TRACY SCOTT COLLINS, 20839

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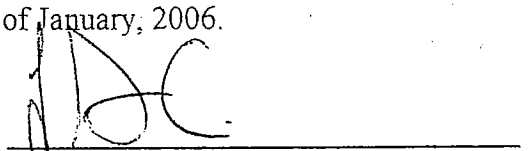
SUPERIOR COURT, FRANKLIN COUNTY, WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 05-1-50196-0
	)	
vs	)	DEFENDANT'S MOTION
	)	SUPPRESS EVIDENCE
	)	AND TO DISMISS
JIMMY H. McINTOSH,	)	
	)	
Defendant.	)	

COMES NOW, the defendant, by and through his attorney, Tracy Scott Collins, and respectfully moves the Court to grant his motion to suppress evidence and dismiss the charges herein. This motion is based on the record and file herein, and the attached Memorandum of Law.

Respectfully submitted this 17th, day of January, 2006.



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SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR FRANKLIN COUNTY

STATE OF WASHINGTON, Plaintiff, v. JIMMY H. McINTOSH, Defendant.	)	NO. 05-1-50196-0 MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND DISMISS

COMES NOW the defendant, Jimmy H. McIntosh, by and through his attorney Tracy Scott Collins, and respectfully requests the Court suppress identification evidence and dismiss this case based upon the following:

I. STATEMENT OF RELEVANT FACTS

In the instant case, Officer Mendoza saw the four perpetrators enter the home of Gilberto Bahena from across the street. Attachment A. He described the four individuals as "Hispanic", and says they were ". . . all wearing dark pants with three of

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was discovered abandoned and damaged in a parking lot of an apartment in Kennewick.. Attachment C. On June 1, 2005, officers searched the car at impound pursuant to a search warrant. Attachment E. Located inside the car on the back seat, among other things, was plaid orange- reddish color shirt with large squares fitting the description given by the victims in the robbery. Attachment E. A photo of that shirt was obtained for evidentiary purposes. Attachment F.

II. DISCUSSION

A. The Photo Montage is Impermissibly Suggestive and Requires Suppression.

The legality of an out-of-court identification concerns fundamental due process. Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L.Ed. 2d 1247 (1968). In cases involving photographic out of court identifications, the question of legality revolves around whether the identification procedure was so impermissibly suggestive as to deny the defendant due process of law by creating a very substantial likelihood of irreparable misidentification. Simmons, supra at 383. Instances described by the *Simmons* Court that could rise to this level include when the police display to a witness only a single picture of a defendant that resembles the description provided by the witness, or when police show a witness several photos of different persons, with the photo of the defendant emphasized in some way, or when the police tell a witness that they have other evidence that a person in the line up committed the crime in question. Simmons, supra at 383, State v. Hilliard, 89 Wn. 2d 430, 439, 573 P.2d 22 (1977).

Following *Simmons*, courts developed a two step examination to be used to determine if a particular identification procedure complies with due process based

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largely on Manson v. Brathwaite, 432 U.S. 98, 116, 53 L. Ed.2d 140, 97 S.Ct. 2243 (1977). This process has been followed religiously by Washington Courts. State v. Vaughn, 101 Wn.2d 604, 608-609, 682 P.2d 878 (1984).

The first step is to determine whether the identification procedure at issue was impermissibly suggestive. Id. at 610. In that regard, "The presentation of a single photograph is, as a matter of law, impermissibly suggestive". State v. Maupin, 63 Wn. App. 887, 896, 822 P.2d 355 (1992). But that is not the only police identification procedure Washington Courts have found impermissibly suggestive. Where a witness had described the perpetrator as "tall and blond", for example, it was suggestive to present a photo montage containing only the defendant with blond hair. State v. Traweek, 43 Wn. App. 99, 103, 715 P.2d 1148 (1986). Other Courts have found such factors as the difference in backgrounds of the photo montage pictures "troubling", State v. Weddel, 29 Wn. App. 461, 475, 629 P. 2d 912 (1981), and a difference is size of the photos of the defendant as opposed to the others "not an ideal procedure", State v. Smith, 9 Wn. App. 279, 282, 511 P.2d 1032 (1032). Finally, the State Supreme Court specifically alluded that a difference in clothing worn in the photo line up by the Defendant, as opposed to the others, could be suggestive if it would "draw attention" to that particular photo. State v. Vickers, 148 Wn. 2d 91, 119, 59 P.3d 58 (2002). Of course, the reviewing court must consider all the possible suggestive aspects of a photo montage as a whole in determining whether the identification procedure was impermissibly suggestive for constitutional purposes. Weddel, supra at 475.

The second step is to determine whether the suggestiveness of the identification procedure created a substantial likelihood of irreparable misidentification.

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Maupin, supra at 897. This crucial determination turns on the "reliability" of the questionable identification in the "totality of the circumstances"as indicated by,

1) the witness's opportunity to view the suspect at the time of the crime,

2) the witness's degree of attention,

3) the accuracy of any prior description of the suspect by that witness,

4) the level of certainty demonstrated at the time of the identification, and

5) the time that has passed between the crime and the identification.

Maupin, supra at 897, *Brathwaite*, supra at 114.

Should an out-of-court identification be determined to be suggestive creating a substantial likelihood of misidentification, all potential in-court identifications of the witnesses in question may be suppressed as well. State v. Williams, 27 Wn. App. 430, 443, 618 P.2d 868 (1981). This is because of the potential harm caused when an impermissibly suggestive identification causes the witness to misidentify the defendant, for whatever reason, and the witness thereafter retains in his memory the image of a photograph rather than that of the person who really committed the crime. Hilliard, supra at 439.

In the photo montage shown to Officer Mendoza, Jimmy McIntosh, number 5, is the only person wearing a markedly plaid shirt. Attachment D. The shirt is not only plaid, the pattern in unmistakably large. A cursory comparison of the shirt worn by Mr, McIntosh in the montage photo and the plaid shirt found in the back seat of the Lumina reveals the significant similarity in the pattern. Attachment F. In addition, the back ground is completely different than that in any other picture in the photo

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montage. There can be no doubt that, given the unique facts of this case, and the importance of the plaid shirt in the description of one of the perpetrators as well as the shirt discovered in the maroon Lumina, these factors render the photo in the montage impermissibly suggestive. Had the officers who prepared the montage wished to avoid the suggestive nature of the photo in question, they could easily have used another photo of Jimmy McIntosh that they circulated in an effort to secure his arrest. Attachment G. That photo was recent, taken in April 2004, and appears much closer in appearance to that of the other photos of the persons in the montage.

As to whether this suggestiveness of the photo montage created a substantial likelihood of irreparable misidentification, the court looks at the totality of the circumstances, applying the *Braithwaite* factors, supra. 1) Officer Mendoza had scant opportunity to view the suspects at the time of the crime. He saw them come down the side of the house and described them all as "Hispanic males". Attachment A. He did not see the perpetrators leave the scene of the crime. Curiously, he did not describe Jimmy McIntosh as the "White" male involved in the robbery until he was looking at the photo montage. Attachment C. 2) Officer Mendoza was at his home across the street when he saw the four go into his neighbor's home. Officer Mendoza was not a victim of this crime, and does not appear to have followed up at the time of the robbery by approaching the neighbor's home to make sure everything was in order. His degree of attention was obviously limited. 3) The accuracy of any prior description of Mr. McIntosh is certainly called into question by the fact that in his initial report he describes the four perpetrators as being "Hispanic", Attachment A, and only later, after viewing the photo montage, changes to three "Hispanics" and a "White" guy. Attachment C. 4)

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Officer Mendoza appears certain of the identification at the time he was shown the montage, but his certainty is tainted by the fact that he contradicts his earlier impression that the four robbers were all "Hispanic", and the fact that Jimmy McIntosh is not "White", being readily identifiable as "Hispanic" in any context. He is certainly not "White" in the sense identified by the four victims who were inside the residence at the time of the robbery, that being "blond hair with blue eyes". Attachment B. 5) There was not a significant delay between what Officer Mendoza witnessed and the identifications in question. This makes the identification all the more suspect in this context, as the description given by Officer Mendoza changed so substantially in the short time between seeing the perpetrators at the scene and the comments he made while viewing the photo montage. It certainly suggests that something drew his attention to the photo of Jimmy McIntosh in the montage to the extent that he forgot the four men he saw going into his neighbor's home were all "Hispanic"

The totality of the circumstances in this case suggests that the impermissibly suggestive photo montage did create a substantial likelihood of irreparable misidentification as evidenced by the problems discussed above. Given that there is a very high likelihood that the photo of Jimmy McIntosh in the montage distorted Officer Mendoza's original description of the four perpetrators to the extent that he changed the race of one of them, it is a virtual certainty that he will now only be able to identify Jimmy McIntosh in court only by the impression left in his mind by the photo in the montage. Jimmy McIntosh, therefore, respectfully requests this Court suppress the identification of himself as one of the perpetrators of this robbery by Officer Mendoza both through the photo montage and in court.

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B. Without Officer Mendoza's Identification the State Cannot Make a *Prima Facie* Case for Robbery Against Jimmy McIntosh.

It has long been the law in Washington that a criminal charge may be dismissed by a trial court if the State's evidence is insufficient as a matter of law to sustain the charge. State v. Knapstead, 102 Wn.2d 346, 352, 729 P.2d 48 (1986). When a *Knapstead* motion is filed, the court considers the undisputed evidence with all reasonable inferences in a light most favorable to the State to decide if there is a *prima facie* case on the undisputed facts. Id. at 357. A *Prima facie* case means that there is evidence of sufficient circumstances to support a logical and reasonable deduction of the facts sought to be proven. State v. Hamrick, 19 Wn. App. 417, 419, 576 P.2d 912 (1978).

In order to prove Robbery in the First Degree armed with a firearm the State must show that the defendant, with intent to deprive the owner of property, did unlawfully take personal property from the person of another against that person's will by use of force, violence or fear of injury, and in the commission thereof, or in immediate flight therefrom, defendant was armed with a deadly weapon. RCW 9A.56.190; RCW 9A.56.200; RCW 9.94A.602 & RCW 9.94A.510.

In determining the statutory construction, courts should ascertain and carry out the intent of the legislature by first looking directly at the language of the statute in question. State v. Halsten, 108 Wn. App. 759, 762, 33 P.2d 751 (2001). When the statutory language is unambiguous, a court should not look beyond the plain meaning of the words. In re A, B, C, D, E, 121 Wn.2d 80, 847 P.2d 455 (1993). Criminal statutes must be given a strict and literal interpretation. *Halsten*, supra.

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A person's physical presence and assent alone are insufficient to establish accomplice liability, and an accomplice must be shown to have given aid by words, acts, encouragement or support. State v. Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979).

In Mr. McIntosh's case, the only evidence left of his involvement in this alleged robbery after suppression of Officer Mendoza's improper identification is the maroon Lumina, and its content. The Lumina was identified as belonging to Mr. McIntosh. Inside, there was a black baton shocker type item described by the victims as used in the robbery, and the plaid shirt. Attachment E.

The fact that a vehicle registered to Mr. McIntosh's was used in the robbery is not sufficient to establish a *prima facie* case of robbery against Mr. McIntosh. Even if he is accused merely as a accomplice, the fact that his car was at the scene does not meet this burden.

Jimmy McIntosh, therefore, respectfully requests this Court dismiss the charges against him pursuant to *Knapstead, supra.*

VI. CONCLUSION

Based upon the foregoing, Jimmy McIntosh respectfully requests that this Court suppress all out-of-court identifications, as well as all potential in-court identifications as being the product of a suggestive identification procedure that created a substantial likelihood of irreparable misidentification. In addition, he respectfully request the Court dismiss the charges herein pursuant to *Knapstead*, supra.

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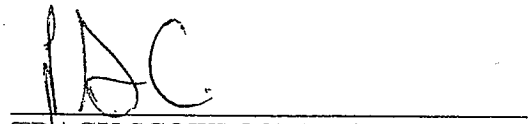
RESPECTFULLY SUBMITTED this 17th day of January, 2006.



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