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COA No. 64212-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2010 MAR 31 PM 4:56

STATE OF WASHINGTON,

Respondent,

v.

KENNETH PERCY KLINGER

Appellant.

ON APPEAL FROM THE KING COUNTY SUPERIOR COURT
IN THE STATE OF WASHINGTON

The Honorable Michael J. Fox

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
WSBA No. 24560
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. In Mr. Klinger's trial on a single-count charge of possession of prohibited depictions of minor children in violation of RCW 9.68A.070, the trial court erred in denying the defendant's CrR 3.6 motion to suppress evidence obtained as the result of a Department of Corrections (DOC) "community supervision" search of his home and the seizure of the entire home computer system.

2. Following the CrR 3.6 hearing, the trial court erred in entering Finding of fact 7, which states that a DOC officer questioned the defendant "further" after the polygraph examination, thus inaccurately finding that the basis of the DOC search was not solely the polygraph examination.

3. The trial court erred in entering the factual finding labeled Conclusion of law 11, which finds that "[t]he totality of the circumstances of the failed polygraph combined with Klinger's answers regarding the computers, gave DOC reasonable cause" to search, thus inaccurately finding that the basis of the DOC search was not solely the polygraph examination.

4. Whether DOC relied solely on the polygraph as support for its search of the Klinger home, or whether there was a separate,

independent and additional investigation supporting the search, where the DOC officer's continued post-polygraph questioning of Mr. Klinger merely repeated, reviewed and clarified aspects of the defendant's previous answers, essentially just continuing the DOC interview briefly but now with the polygraph device turned off, and where this questioning was therefore not some new investigatory basis of support for the search, but merely a part of the short, mostly polygraphed interrogation of the defendant.[1]

5. The trial court erred in denying the defendant's ER 608(b) motion to impeach two State's witnesses who were DOC officers, including one whose opinion testimony was essential to the State's proof on the complex issue of "possession" of digital computer images, with reference to their recent disciplinary proceedings for misconduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying the defendant's CrR 3.6 motion to suppress the computer-image and computer-

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[1]Findings of fact incorrectly denominated as conclusions of law will be reviewed as the former, State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981), the applicable standards of review being that this Court will review findings of fact for substantial evidence, State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994), and reviews conclusions of law relating to the suppression of evidence de novo. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

system evidence obtained as the result of a DOC search of the defendant's home, and to therefore dismiss the charge, where he was a probationer subject to conditions of supervision, and where:

a. the search and seizure was illegal because it was premised solely on the defendant's answers to questions posed by Community Corrections Officers ("CCO's") of the Department of Corrections during a polygraph examination, and where the trial court erred in accepting the State's factual claim that the search was based on two independent factors, since some additional questions were asked after the polygraph was disconnected;

b. the search and seizure was not supported by reasonable suspicion, where no authority exists to establish that polygraph results may be the sole basis used to satisfy a constitutionally-imposed standard of suspicion such as the "reasonable suspicion" standard required to be satisfied for a probationer search;

c. the search and seizure involved and disturbed the privacy interests of a third party, Mrs. Klinger, but there was no "probable cause" to believe that the defendant was violating his conditions of supervision

2. The criminal defendant's right to impeach the credibility of

crucial prosecution witnesses is an aspect of his constitutional right to a fair adversarial trial, which is violated by an overly rigid interpretation of ER 608(b). Did the trial court therefore err in denying the defendant's ER 608(b) motion to impeach two State's witnesses with reference to their recent disciplinary proceedings for misconduct as DOC employees, where the misconduct involved abuse of their legal authority to evade proper legal process, and cast serious doubt on the credibility of their broad testimonial claims that the defendant's computer system rendered him a "possessor" of images found thereon?

3. Whether reversal is required on the basis of the violation of the defendant's constitutional right to impeach a crucial State's witness, DOC officer Jeffrey Brown, where the later forensic expert who testified plainly did not have enough of the computer system's hardware to testify persuasively that the defendant "possessed" the images in question, and where Brown's testimony, and the jury's trust in him, was critical to the State's case, because he assured the jury that his undocumented visual survey of the connections between the various computers found at the Klinger house indicated that the defendant possessed the prohibited images.

C. STATEMENT OF THE CASE

1. <u>Procedural history</u>. Mr. Klinger was charged with one count of possession of depictions of minors[2] engaged in sexually explicit conduct, pursuant to RCW 9.68A.070, and he proceeded to jury trial. CP 48, CP 83, CP 114-24.

Prior to, and at trial below, the trial court entered critical rulings denying (a) the defendant's CrR 3.6 motion to suppress the digital computer images that were located following a search and seizure, and (b) the defendant's ER 608(b) motion to impeach the credibility of the DOC officers who testified, and in particular that of Jeffrey Brown using the fact of recent disciplinary proceedings by DOC for unprofessional conduct:

a. Court's ruling on the legality of the DOC search and seizure.

Following a polygraph examination that DOC officers deemed concerning as to whether Klinger was violating conditions of probation, officers searched the home Mr. Klinger shared with his wife Helen. Mr. Klinger contended the search was based solely

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[2]At trial, the prohibited nature of the images' depictions was opined upon by a medical witness knowledgeable in child physical development. 8/3/09RP at 8/3/09RP at 90, 99.

on the polygraph examination, which violated DOC's own policy. The State argues that further questioning of Mr. Klinger by DOC agents after the polygraph was disconnected amounted to an "additional" basis for the search. In any event, the DOC officers did not have information amounting to reasonable suspicion -- the general level of cause required to search a person under post-conviction community supervision. See Part D.2, infra; 6/24/09RP at 146-49.

Additionally, the search of the home and seizure of the computers by the DOC officers was not supported by "probable cause," as is required by the existence of a third party's interest in both the residence and the laptop as part of her private affairs. State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009). Absent a reasonable, more likely than not belief the defendant had access to the computer systems, which amounted to that required level of cause, the search and seizure were illegal. See Part D.2, infra; 6/24/09RP at 130.

b. Court's ruling excluding the defendant's necessary impeachment evidence as to a crucial State's witness, which violated Mr. Klinger's constitutional right to cross-examine and impeach the credibility of key prosecution witnesses.

At trial, the critical contention that Mr. Klinger "possessed" the digital images was established by the testimony of DOC community corrections office, Jeffrey Brown, who testified that the defendant's and his wife's computers were linked together electronically in their home. 8/3/09RP at 70-79. Officer Brown admitted that the official photos taken of the computer set-up during the investigation had been lost. 8/3/09RP at 72, 77. As a result, the jury very much had to take Brown's word on the complex and critical issue of the connections between the various computers.[3]

A forensics officer, Detective Walden, who examined the seized computers some days later at a DOC facility, testified that one or more of the computers seemed to be able to access the

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[3]Officer Brown had no specialized training in computers, either with regard to their systems or how they do or do not access the internet, but more importantly he admitted that the photos taken of the computer set-up during the investigation had been lost. 8/3/09RP at 72, 77.

internet and had the cables to be linked together. 8/3/09RP at 109; 8/4/09RP at 21-22, 58. However, no "router" device, which links multiple computers to the internet and to each other, was ever seized by the DOC officers or ever inspected by Walden. 8/3/09RP at 80-81. Since the photographs of the computer system as it was set up in the Klinger home were lost, CCO Jeffrey Brown's testimony became critical on the question of "possession" of the digital images.

In this context, CCO Brown, who surveyed the complicated electronic systems, opined for the jury on their functionality and connections, without ever having sat down to, for example, determine if the internet and programs on other allegedly linked computers could be accessed. In order to convict the defendant of possession, this opinion was critical to the State's proof.

The Browns as witnesses would have been impressive to the jury; in addition to their *curriculums vitae*, the Browns were twin brothers who were both officers of the law. Mr. Klinger was, therefore, prejudiced materially when the trial court prevented him from introducing legitimate impeachment evidence involving Jeffrey Brown's (and his brother's) discipline and sanctions by his

employer, the Department of Corrections, evidence of which was properly admissible under ER 608(b), and which would have corrected the falsely flattering impression that the jury received of Jeffrey Brown. 6/24/09RP at 10, 126, 146-49.

Mr. Klinger appeals. CP 125.

2. Facts, including CrR 3.6 findings. The trial court found as follows following a CrR 3.6 suppression hearing (except for the findings to which Mr. Klinger has assigned error in Part A, supra, the court's findings accurately represent both the chronology of the DOC search and the evidence gathered during the entirety of the investigation and later adduced at trial):

> 1. Department of Corrections (DOC) staff Jeremy Brown, Jeffrey Brown and Theo Lewis testified and the court finds their testimony to be credible.
> 2. On February 20, 2008, the defendant, Kenneth Klinger was being supervised by the DOC for Possession of Depictions of Minors Engaged in Sexually Explicit Conduct and Attempted Child Molestation in the Second Degree.
> 3. Due to the underlying offenses, conditions of Klinger's supervision with DOC included submitting to polygraphs and searches of his home and computers.
> 4. In addition, because of the underlying convictions, Klinger was not allowed to view or have in his possession any type of

pornography nor was he allowed to access the Internet.
5. On February 20, 2008, Klinger reported to DOC for a routine polygraph exam.
6. The polygraph exam showed deception by Klinger with regard to whether he had looked at pornography and whether he had accessed the Internet.
7. As a result of this finding by the polygrapher, Jeremy Brown, Klinger's assigned Community Corrections Officer questioned him further.
8. During Jeremy's Brown's questioning of Klinger, Klinger denied having viewed pornography or accessing the Internet.
9. When asked about the computers at his house, Klinger told Jeremy Brown that there were only two computers - one was his wife's and the other his.
10. Klinger also stated that his wife's computer was locked and that he could not access it and that it was the only one hooked up to the Internet.
11. Klinger then told Jeremy Brown that the computers were networked together for the purpose of playing role-playing games.
12. When Jeremy Brown explained to Klinger that they were going to his house to confiscate his computer and asked if there was anything he wanted to tell them about, Klinger responded "Nothing that is mine."
13. When Jeremy Brown expressed his concerns about the computers being networked, Klinger stated, that his wife had to unlock his computer for him to even get on it.
14. Following his conversation with Klinger, the Browns staffed the case with their supervisor, Theo Lewis, and the decision was made to search Klinger's residence for

> computers and pornography based on the failed polygraph, Klinger's conflicting statements and Klinger's underlying offenses.
> 15. Klinger was then transported to his house by Jeffrey Brown and Kristi Becker, where they were joined by DOC Officers Nyblod, Ervin and Turner.
> 16. On the way to his residence, Klinger claimed that he had seen some porn on the sidewalk when he was working and put it in the trash but denied viewing any.
> 17. Once inside the residence, a total of five computers were discovered, in contrast to the defendant's earlier statement that there were only two computers.
> 18. In the living room were 3 computer desks, each with a computer that were connected with a router.
> 19. In addition, another computer was located in a bedroom closet and another was found in the nightstand.
> 20. In addition to the computers, a green shopping bag was recovered which contained several items including pornography videos as well as a paystub from Klinger's employer.
> 21. Klinger stated that he was not aware that the other computers were in the residence.
> 22. Klinger admitted to accessing the computer closest to the kitchen and also the one on the middle desk.
> 23. Klinger again stated that his wife was the only one with Internet access.
> 24. All 5 computers were seized as a result of this search.

CP 90 (CrR 3.6 Findings of Fact). Following argument on the CrR 3.6 motion, the trial court concluded that Mr. Klinger was required

as conditions of his sentence and supervision by DOC to submit to polygraph exams. CP 90 (CrR 3.6 Conclusion of law 8). The answers Klinger provided indicated deception with regard to accessing pornography and the Internet, and Klinger then indicated that while he didn't have Internet access, the computer he used was networked to one which did have Internet access. CP 90 (CrR 3.6 Conclusions of law 10, 11). The court ruled that the

> totality of the circumstances of the failed polygraph combined with Klinger's answers regarding the computers, gave DOC reasonable cause to suspect there was evidence that Klinger had violated his conditions of supervision.

CP 90 (CrR 3.6 Conclusion of law 11). The court also reasoned that the number of computers found in the home exceeded those that Klinger claimed in his polygraphed interview to have. CP 90 (CrR 3.6 Conclusions of law 12, 13).

Following a jury verdict of guilty on the count charged, Mr. Klinger was sentenced to 63 months, based on an agreed offender score. CP 48, CP 83, CP 114-24.

D. ARGUMENT

1. THE SEARCH OF THE KLINGERS' HOME, AND THE SEIZURE OF THE COMPUTER SYSTEMS, VIOLATED THE STANDARDS OF SUSPICION REQUIRED IN THE CONTEXT OF THE DOC SEARCH.

a. <u>The search of Mr. and Mrs. Klinger's home and the seizure of the computers was unconstitutional under the initial, general "reasonable suspicion" standard for probation searches, which was not established by the defendant's polygraph answers.</u>

1. The general standard for probationers subject to searches and seizures that do not implicate the privacy rights of non-probationer citizens who retain full "probable cause" protections.

The warrantless search of the house in which Mr. Klinger and his wife resided, conducted by the Washington State Department of Corrections, violated the Fourth Amendment to the U.S. Constitution and Article I, § 7 of the Washington State Constitution. The search of the residence and seizure of the computers, authorized and initiated by DOC officials, cannot be justified even under the reduced standard of reasonableness

applicable to searches of probationers.

First, it is unreasonable and unconstitutional for a government officer to search or seize without a warrant, under both the Washington and United States constitutions. State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996); State v. Leach, 113 Wn.2d 735, 738, 782, P.2d 1035 (1989); State v. Miller, 91 Wn. App. 181, 184, 955, P.2d 810 (1998); U.S. Const., amend. 14; Wash Const. art. 1, § 7.[4] Exceptions to the constitutionally mandated warrant requirement are jealously and carefully drawn. Leach, at 738; State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005); State v. Littlefair, 129 Wn. App. 330, 340, 119 P.3d 359 (2005).

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[4]Article 1, § 7 of the Washington State Constitution provides as follows:

> No person shall be disturbed in his private affairs, or his home invaded, without the authority of law.

In contrast, the Fourth Amendment states:

> 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.

The State provision places no explicit limitations on the individual's right to privacy, as does the Fourth Amendment. As distinguished from the Fourth Amendment, the purpose of Article 1, § 7, is to protect the individual's right to privacy, rather than to limit or curb governmental actions. State v. Patterson, 51 Wn. App. 202, P.2d 945, review denied, 111 Wn.2d 1006 (1988) at 204.

The prosecution bears the burden of proving that a warrantless search falls within one of those narrow and carefully drawn exceptions. Littlefair, at 340, State v. Turner, 114 Wn. App. 653, 657, 59 P.3d 711 (2005).

Unlike federal law, in Washington, any unconstitutional search or seizure absolutely requires exclusion of all evidence found following the constitutional violation. State v. Ladson, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999); Morse, at 9-10; State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). "[A]ll subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." Ladson, at 359-60. Unlike the federal system, Washington does not recognize a good faith exception at the exclusionary rule. Littlefair, at 344; White, at 107-08; Morse, at 9-10; State v. Wallin, 125 Wn. App. 648, 660, 105 P.3d 1037 (2005).

As a general rule, probation officers can only perform a warrantless search when they have a well-founded suspicion that a probationer is violating a condition of his ordered probation. This allowance is a recognized general exception to the warrant requirement under both the Fourth Amendment to the United

States Constitution and Article I, § 7 of the Washington State Constitution that would apply to Mr. Klinger as a probationer, in an uncomplex case. Gruen v. Wisconsin, 483 U.S. 868, 97 L.Ed.2d 709, 107 S.Ct. 3164 (1987); State v. Simms, 10 Wn. App. 75, 85, 516 P.2d 1088, review denied, 83 Wn.2d 1007 (1974); State v. Lucas, 56 Wn. App. 236, 783 P.2d 121 (1989); State v. Patterson, 51 Wn. App. 202, 752, P.2d 945, review denied, 111 Wn.2d 1006 (1988); State v. Lampman, 45 Wn. App. 228, 724 P.2d 1092 (1986).

In State v. Simms, 10 Wn. App. at 85, the Court of Appeals held that a parole or probation officer can conduct a search of a parolee or his home without first obtaining a warrant. However, the Court held that such a warrantless search would be unconstitutional under the Fourth Amendment unless the parole officer had a well founded suspicion of a parole violation, similar to what is required for investigative stops. Simms, at 87-88. A later case held that Washington's constitution imposed a similar requirement: a warrantless search of a parolee's person or home is unconstitutional unless the parole officer has a reasonable suspicion that the parolee has violated conditions of parole. State

v. Patterson, 51 Wn. App. at 204-06. The Legislature incorporated this standard into the Sentencing Reform Act:

> If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search.

RCW 9.94A.631.

In adopting the "well founded" or "reasonable" suspicion standard, the Simms Court relied upon the standard employed in investigative (Terry) stop cases. In that arena, a warrantless seizure may be reasonable. State v. Barnes, 96 Wn. App. 217, 221, 978 P.2d 1131 (1999) (citing State v. Rife, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997)). Such a stop is legitimate if it is based on an articulable suspicion of criminal activity. State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). The Supreme Court has defined "articulable suspicion" as a "substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); see, e.g., United States v. Crawford, 323 F.3d 700 (2003) (search of parolee's home was constitutionally unreasonable where law enforcement officials did not have reasonable suspicion that

parolee was engaged in continuing criminal activity or that evidence of crime would be found).

Therefore, before, an officer can conduct a warrantless search based on reasonable suspicion, the officer must have an articulable and well-founded suspicion, based on objective facts, that the person has committed a violation of his supervision. Mr. Klinger was on community supervision on the date in question, so although diminished, his right to privacy was still protected under the Fourth Amendment and Wash. Const. art. 1, § 7. Gruen v. Wisconsin, 483 U.S. at 870-71; State v. Patterson, 51 Wn. App. at 206-07.

2. The polygraph evidence did not amount to reasonable suspicion.

Mr. Klinger could be subjected to a warrantless search but only upon a well-founded suspicion that he violated his community supervision conditions. Patterson, at 205, 208; Gruen, 483 U.S. at 870-71 (warrantless search of probationer must be supported by reasonable cause); RCW 9.94A.195.

The search of Mr. Klinger's residence and seizure of the computers was not reasonable and beyond the scope of a search

justified under any exception to the warrant requirement, including under a reduced standard of cause. Importantly, in State v. Patterson, supra, the Court noted the usefulness of employing a balancing test on a case-by-case basis, in order to determine whether the scope of a search is proper. Patterson, at 208. In approving the balancing test approach, Patterson underscores the guiding principle that, although a probationer has a diminished right to privacy, that privacy interest is diminished only to the extent required to ensure that the probation program is workable and public safety is not jeopardized. See also Simms, at 86. Here the search and seizure was not reasonable. Because the search was not based on specific and articulable facts indicating that evidence of parole violations would be found in a specific location on the premises.

Importantly, no court has held that polygraph results will establish reasonable suspicion, whether in the context of parolee searches, or to establish cause for the detention of persons. While the rules of evidence do not apply to cause determination proceedings because there is no concern that a jury will be prejudiced, see State v. Anderson, 41 Wn. App. 85, 95, 702 P.2d

481 (1985), and while admissibility of polygraph results as evidence of guilt at trial is strictly limited, State v. Renfro, 96 Wn.2d 902, 905, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982) (polygraph examinations are generally inadmissible in Washington absent stipulation), there are decisions indicating that the markings these devices produce may have use in other contexts, which would include suspicion and cause determinations. See Renfro, 96 Wn.2d at 95; State v. Sutherland, 94 Wn.2d 527, 528, 617 P.2d 1010 (1980); State v. Pleasant, 21 Wn. App. 177, 583 P.2d 680 (1978).

Still, none of these cases have come close to ruling that polygraph results can ever establish reasonable suspicion in and of themselves. These cases involve, for example in State v. Anderson, the use of polygraph results as one factor in supporting the credibility of an informant in a warrant affidavit. Anderson, 41 Wn. App. at 85. A similar case in Oregon holds that polygraphs do have probative value and the results may be utilized to "bolster" the reliability of an informant. State v. Coffey, 309 Or. 342, 788 P.2d 424 (1990). These cases, plainly involving standards of suspicion in which polygraph result are merely one small aspect of the proof

package assembled to meet them, say nothing about the use of polygraphs as the essentially sole factor in impelling a search of a parolee's residence and possessions. There is simply no authority for the DOC officers in this case basing their search decision on a polygraph. These cases have merely indicated that the evidence rules allow consideration of evidence that would be inadmissible in a trial and other contexts, and may be considered in suppression hearings.

The search of the Klinger home, however, was plainly based solely on questioning of Mr. Klinger by DOC personnel using a polygraph machine as a means of inducing matters which the officers then continued to question him about. Although at some point DOC personnel no longer had the defendant hooked up to the polygraph, at that time an officer simply continued to ask Mr. Klinger questions about pornography and access to the internet (two conditions in his supervision); these later questions merely clarified former questions posed. See CP 9-44 (State's Response to Motion to Suppress, attachment, report of polygraph examination); see Assignments of Error 3, 4; Findings of Fact 9, 10, 11.

Notably, Mr. Klinger showed the search was against written DOC policy for this aforegoing reason, and it is clear that the polygraph was indeed the sole reason the search and seizure in Mr. Klinger's case were ordered. The search in this case was based on questioning of Mr. Klinger by DOC personnel responsible for his community supervision, as noted above, during much of which time Mr. Klinger was strapped to a polygraph machine that can tell when people are lying. Although at some point DOC no longer had the defendant hooked up to the connecting wires of the device, they simply continued to ask Mr. Klinger questions about whether he had possessed pornography or accessed the internet in his home (two conditions in his supervision). These later questions merely inquired about the same topics as the former questions posed when the defendant was connected to the machine, and thus there is no non-polygraph "second factor" to support the DOC search by showing it to premised on other bases besides solely the polygraph. See CP 9-44 (State's Response to Motion to Suppress, attachment, report of polygraph examination); see Assignments of Error 3, 4, Findings of Fact 9, 10, 11).

DOC policy has integrated the language of RCW 9.94A.631

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

STATE OF WASHINGTON, Respondent, v. KENNETH KLINGER, Appellant.	)))))))))	NO. 64212-0-I

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[X] KENNETH KLINGER 852628 CLALLAM BAY CC 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710