

NO. 35903-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

SCOTT ALLEN TUIITE,

Appellant.

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
07 JUN -9 PM 1:11  
BY [Signature]

BRIEF OF APPELLANT

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ORIGINAL

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

The trial court erred when it found good cause to continue the trial beyond speedy trial because the state falsely informed the court that a necessary witness was not available but would be available on a new date when the witness had not been subpoenaed, was not available for the new trial date, and was not necessary to the state's case. SCP 8; RP 4-6, 66-73.

### ***Issues Pertaining to Assignment of Error***

Does a trial court violate a defendant's statutory right to speedy trial when it finds good cause to continue a trial based upon the state's misrepresentations concerning the necessity and availability of a witness?

## STATEMENT OF THE CASE

### *Factual History*

At about 3 a.m. on July 15, 2006, Kelso Police Officer Doug Lane was on routine patrol in the city of Kelso when he drove up behind a person on a motorcycle stopped at a solid red light. RP 18. After a few seconds the motorcycle proceeded through the red light. RP 19. Seeing this, Officer Lane immediately turned on his overhead lights and drove after the motorcycle, which quickly accelerated to about 40 mph in a 25 mph zone. RP 19-20. After a few blocks and one turn the motorcycle came to an abrupt stop. RP 20. As Officer Lane got out of his patrol car the motorcycle driver got off his vehicle and took off his helmet. *Id.* As he did so Officer Lane recognized the person as the defendant Scott Allen Tuite, a person Officer Lane had ticketed the previous night for driving while suspended. RP 21. Assuming that the defendant was still suspended, Officer Lane told him that he was under arrest. RP 21-22.

As Officer Lane put handcuffs on the defendant, Kelso Police Officer Dave Shelton drove up to assist. RP 22. Once on the scene, Officer Shelton walked over to the motorcycle, reached down under it, picked up a red Marlboro cigarette box, and handed it to Officer Lane. *Id.* Officer Lane looked inside the box and found a small baggie of what later proved to be methamphetamine. RP 23, 59-64. According to Officer Lane, after advise

of his rights the defendant admitted that the methamphetamine belonged to him. RP 24-25. The defendant also stated that he had a drug pipe in his pocket. *Id.* Officer Lane retrieved the pipe from the defendant's pocket. *Id.* After some conversation about "making an arrangement," Officer Lane took the handcuffs off of the defendant and let him go. RP 26.

### ***Procedural History***

On October 10, 2006, the defendant Scott Allan Tuite appeared before the Cowlitz County Superior Court for arraignment on charges of possession of methamphetamine, use of drug paraphrenalia, and third degree driving while suspended. CP 1-2, SCP 1.<sup>1</sup> Although the defendant was in custody on another matter he was not in custody in the instant case. RP 4. As a result, the court set pretrial for December 13, 2006, and trial for January 19, 2007, which was 86 days after the arraignment. SCP 1.

At the scheduled pretrial the defendant did not appear. SCP 2. As a result, the court ordered a bench warrant and struck the pending jury without striking the trial date. SCP 2. The next day the parties and the court determined that the defendant had not been in court the previous day because the Department of Corrections had taken him into custody. RP 3-6. Consequently, the court recalled the warrant and reinstated the call for a jury

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<sup>1</sup>"SCP" signifies supplemental clerk's papers at the page designated.

on the trial date. SCP 3.<sup>2</sup>

At pretrial the defendant appears out of custody. SCP 4. The court then ordered the parties back in court on January 3rd for a CrR 3.5 hearing, which the court later changed to January 10th. SCP 5. On that date the court heard testimony from Officer Douglas Lane and the defendant. SCP 6-7. Following argument on the issue the court ruled the defendant's statements admissible. *Id.* The court also ordered the parties back into court on January 18th for a "readiness" hearing. SCP 6.

On January 18th the state moved for a continuance beyond the time for speedy trial under CrR 3.3 on the basis that Officer Shelton was a necessary witness for the state, that he was unavailable on the trial date set, and that he would be available for a later trial date. SCP 8. Based upon these representations by the state the trial court found good cause and granted the motion to continue. SCP 8. The court then set a new trial date of February 2, 2007, which was 100 days after arraignment. *Id.*

On February 2, 2007, the court called the case for trial. RP 1. At that time the state indicated it would call three witnesses: Officer Lane, Officer

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<sup>2</sup>The Cowlitz County Superior Court Bench follows the custom of not striking trial dates after a defendant fails to appear at pretrial. Rather, the court strikes the jury and leaves the trial on for call to see if the defendant appears as previously ordered. The court does this to facilitate a second charge of bail jumping for the defendant's failure to appear at the scheduled trial date.

Shelton, and a forensic scientist from the Washington State Patrol Crime Lab. RP 6. The defense then moved to dismiss on the basis of a speedy trial violation. RP 4-6. The court denied the motion. *Id.* However, during the trial, the defense found out for the first time that the state had not served a subpoena on Officer Shelton, that Officer Shelton was not available as a witness, that the state was now saying that Officer Shelton was not a necessary witness, and that the state would not call Officer Shelton to testify. RP 66-67. The state responded that it had just found out that Officer Shelton was in Alaska and that he had not been served with a subpoena. RP 67-69. The state also indicated that it could proceed without Officer Shelton as a witness. *Id.* Based upon this information the defense proposed and the court gave a missing witness instruction. RP 66-71. The court also took the defendant's plea to the driving while suspended charge and dismissed the paraphernalia charge with the state's consent. RP 12-14, 73.

After the testimony of its two witnesses the state rested. RP 65. The defense rested without calling any witnesses. RP 72. The court then instructed the jury without objection and the parties presented closing arguments. RP 73-81, 81-111. After deliberation, the jury returned a verdict of guilty to the remaining charge of possession of methamphetamine. CP 35. The court thereafter sentenced the defendant within the standard range and the defendant filed timely notice of appeal. CP 37-49, 51.

## ARGUMENT

### **THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO DISMISS BASED UPON A VIOLATION OF THE DEFENDANT'S STATUTORY RIGHT TO SPEEDY TRIAL.**

Under CrR 3.3(a), the time for trial for a person not held in jail is "90 days after the commencement date specified in this rule." CrR 3.3(b)(2)(i). The "[t]he initial commencement date" under CrR 3.3(c)(1) is "the date of arraignment as determined under CrR 4.1." Under CrR 3.3(h), "[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice." CrR 3.3(h). The purpose of CrR 3.3 is to prevent undue and oppressive incarceration prior to trial. *State v. Kingen*, 39 Wn.App. 124, 692 P.2d 215 (1984).

Under CrR 3.3(f)(2), the trial court may grant a motion to continue a trial to a specific date outside of the time limits for speedy trial upon a showing of good cause if such continuance is "required in the administration of justice" and it will not prejudice the defendant. This section states:

(f) Continuances. Continuances or other delays may be granted as follows:

. . . .

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has

expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f)(2).

While the trial court bears the responsibility for assuring a defendant's right to speedy trial under this rule, the decision whether or not to grant a continuance beyond the time required under CrR 3.3 lies within the sound discretion of the trial court and will only be overruled upon an abuse of that discretion. *State v. Nguyen*, 131 Wn.App. 815, 129 P.3d 821 (2006). An abuse of discretion occurs "when the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons." *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

For example, in *State v. Nguyen, supra*, a defendant was convicted of a home invasion robbery following a trial outside the time for speedy trial. The court set the trial outside the speedy trial rule upon the state's motion that it needed more time to gather more information about some "related" home invasion robberies. In fact the state had no evidence linking the defendant or his offense to the other defendants and the other cases. Rather, the state believed that further investigation might potentially link the cases. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state's motion to continue.

In addressing the defendant's arguments the court of appeals first

acknowledged that separate trials for multiple defendant's charged with the same offenses were not favored at the law. Thus, it would well be within the trial court's discretion to exceed one defendant's speedy trial rights in order to facilitate a joint trial. However, the court went on to note that where the various defendants were not charged jointly and where there was no evidence to link the various similar offenses, it would be an abuse of discretion to exceed one defendant's speedy trial rights to allow the police more time to search for "potential" connections among the cases. The court held:

The suspicion that a link will "potentially" be discovered between the case that is scheduled for trial, and other crimes not yet charged, is not like other reasons that our courts have recognized as justifying delay of trial as "required in the administration of justice." The continuance in this case was not required to allow the State to prepare its case. The State could have proceeded to trial on December 29 on the charge for which Nguyen had already been arraigned. If forensic testing later provided evidence that Nguyen was responsible for other crimes, the State could have filed the additional charges at that time. Alternatively, if trying all the home invasion robberies together was a higher priority, the State could have waited to charge Nguyen until the testing of evidence was completed. The State has not explained why it is just to detain a defendant longer than 60 days after arraignment solely on the suspicion that he might be linked to some other crime.

*State v. Nguyen*, 131 Wn.App. at 820-821.

While it is an abuse of discretion to grant a motion to continue outside the time for speedy trial based solely upon the need to find "possible" or "potential" state's witnesses, the unavailability of material state witness is an acceptable ground for continuing a criminal trial if there is valid reason for

unavailability, the witness will become available within reasonable time, and there is no substantial prejudice to defendant. *State v. Nguyen*, 68 Wn.App. 906, 847 P.2d 936 (1993). However, the failure of the state to make adequate arrangements to prepare its case is not a valid ground for a continuance beyond the time for speedy trial. *State v. Wake*, 56 Wn.App. 472, 783 P.2d 1131 (1989).

For example, in *State v. Wake, supra*, the state charged the defendant with three counts of possession of a controlled substance with intent to deliver. One day before trial the state moved to continue to a new date outside the time for speedy trial on the basis that the forensic scientist from the crime lab who tested the controlled substances was unavailable on the date set. The defense objected, arguing that the state had been aware of this problem for over two weeks and could have made alternative arrangements for another expert to testify. Apparently the unavailability of the witness was related to chronic under staffing at the state crime lab. The court granted the continuance. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state's motion to continue.

The rationale of Mack is equally applicable to the use of expert witnesses who are employed by the State and whose departmental budgets are subject to State budgetary constraints. As noted by the court here, the State has failed to keep pace with the growing number of drug cases, has an inadequate staff available for court testimony

and, as a result, a logjam is being created. If congestion at the State crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem. Additionally, the prosecutor knew of the conflict almost 2 weeks before trial was scheduled, and had an opportunity to make alternative arrangements. Thus, this was not an unavoidable circumstance beyond the control of the State.

Additionally, the issuance of a subpoena is a critical factor in granting a continuance. In *State v. Alford*, 25 Wn.App. 661, 665, 611 P.2d 1268 (1980) and *State v. Yuen*, 23 Wn.App. 377, 379, 597 P.2d 401, review denied, 92 Wn.2d 1030 (1979) continuances were affirmed because the witnesses were under subpoena. Conversely, in *State v. Smith*, 56 Wash.2d 368, 370, 353 P.2d 155 (1960) and *State v. Toliver*, 6 Wn.App. 531, 533, 494 P.2d 514 (1972) the failure to issue subpoenas was grounds to deny motions for continuance. The issuance of a subpoena ensures a record will be made regarding the reasons for the absence of a witness and allows the opposing party an opportunity to argue the merits of unavailability. Here, there was no such record.

The court abused its discretion in granting the continuance under CrR 3.3(h)(2); the judgment is reversed and the charges are dismissed.

*State v. Wake*, 56 Wn.App. at 475-476.

In the case at bar, as in *Wake*, the state obtained a continuance over the defendant's objection based upon its claim that a material witness was unavailable. In the case at bar, as in *Wake*, the state had not placed the witness under subpoena. In addition, in the case at bar, unlike *Wake*, (1) the prosecutor misrepresented that the witness would become available for the new trial date when he actually was not going to become available, and (2) the state was quite able to proceed without the witness. Thus, in the same manner that the trial court in *Wake* abused its discretion when it granted the

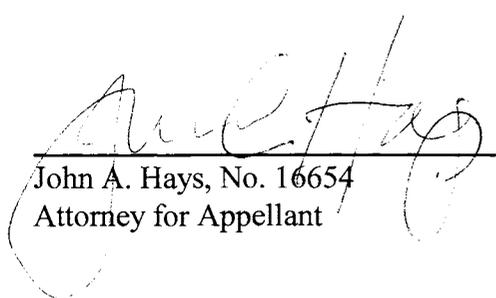
state's motion to continue the trial beyond the time set under the speedy trial rule, so the trial court in the case at bar abused its discretion when it granted the state's motion to continue the trial beyond the time set under the speedy trial rule. As a result, this court should reverse the defendant's conviction and dismiss the charges as did the court in *Wake*.

**CONCLUSION**

The trial court abused its discretion when it granted the state's motion to continue beyond the time for speedy trial. Consequently, the defendant's conviction should be reversed and the charges dismissed.

DATED this 6th day of July, 2007.

Respectfully submitted,



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Attorney for Appellant

**APPENDIX**  
**CrR 3.3**  
**TIME FOR TRIAL**

(a) General Provisions.

(1) Responsibility of Court. It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(2) Precedence Over Civil Cases. Criminal trials shall take precedence over civil trials.

(3) Definitions. For purposes of this rule:

(i) "Pending charge" means the charge for which the allowable time for trial is being computed.

(ii) "Related charge" means a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.

(iii) "Appearance" means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) "Arraignment" means the date determined under CrR 4.1(b).

(v) "Detained in jail" means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) Construction. The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) Reporting of Dismissals and Untimely Trials. The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g).

(b) Time for Trial.

(1) Defendant Detained in Jail. A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) Defendant Not Detained in Jail. A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5).

(3) Release of Defendant. If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) Return to Custody Following Release. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire

earlier than 30 days after the end of that excluded period.

(c) Commencement Date.

(1) Initial Commencement Date. The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of

venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

(d) Trial Settings and Notice--Objections--Loss of Right to Object.

(1) Initial Setting of Trial Date. The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2) Resetting of Trial Date. When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) Competency Proceedings. All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) Proceedings on Unrelated Charges. Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) Continuances. Delay granted by the court pursuant to section (f).

(4) Period between Dismissal and Refiling. The time between the dismissal of a charge and the refiling of the same or related charge.

(5) Disposition of Related Charge. The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) Defendant Subject to Foreign or Federal Custody or Conditions. The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) Juvenile Proceedings. All proceedings in juvenile court.

(8) Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) Disqualification of Judge. A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the Court or a Party. On motion of the court or a party,

the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
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 vs. )  
 )  
 SCOTT ALLAN TUITE, )  
 Appellant. )

NO. 06-1-00657-4  
COURT OF APPEALS NO:  
35903-1-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF COWLITZ )

CATHY RUSSELL, being duly sworn on oath, states that on the 6<sup>TH</sup> day of JULY, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR  
COWLITZ COUNTY PROSECUTING ATTY  
312 S.W. 1ST STREET  
KELSO, WA 98626

NO ADDRESS KNOWN FOR  
APPELLANT (See Affirmation)

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIRMATION OF CATHY RUSSELL
- 3. AFFIDAVIT OF MAILING

DATED this 6<sup>TH</sup> day of JULY, 2007.

Cathy Russell  
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 6th day of JULY, 2007.

Donna Baker  
NOTARY PUBLIC



NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
Commission expires: 10-24-09

AFFIDAVIT OF MAILING - 1

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

STATE OF WASHINGTON, )  
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 Plaintiff, )  
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 vs. )  
 )  
 SCOTT ALLEN TUIITE, )  
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 Petitioner. )  
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No. 35903-1  
AFFIRMATION OF  
CATHY E. RUSSELL

Cathy E. Russell states the following under penalty of perjury under the laws of Washington State. I am the legal assistant for the attorney of record for the petitioner in his direct appeal, having been appointed by order of the Office of Public Defense.

The petitioner in this case was released from jail on June 16<sup>th</sup>, 2007. Upon release, he listed an incomplete address and message phone number. I have diligently searched my file followed up on all leads to try and find a current address for my client and at this time have not been able to come up with any known address or any one with any current information.

Dated this 15<sup>th</sup> day of JULY, 2007 at Longview, Washington.

Cathy E. Russell  
Cathy E. Russell Legal Assistant to  
John A. Hays, WSB No. 16654  
Attorney at Law

AFFIRMATION OF  
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