

No. 47978-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

ANDREW LEWIS MERKEL,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 14-1-03467-1  
The Honorable Stanley Rumbaugh, Judge

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OPENING BRIEF OF APPELLANT

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## TABLE OF CONTENTS

<b>I.</b>	<b>ASSIGNMENTS OF ERROR</b> .....	1
<b>II.</b>	<b>ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR</b> .....	1
<b>III.</b>	<b>STATEMENT OF THE CASE</b> .....	2
	A. PROCEDURAL HISTORY.....	2
	B. SUBSTANTIVE FACTS .....	3
<b>IV.</b>	<b>ARGUMENT &amp; AUTHORITIES</b> .....	6
	A. THE STATE DID NOT PROVE, BEYOND A REASONABLE DOUBT, THAT MERKEL INTENDED TO EITHER INJURE OR CAUSE FEAR OF INJURY TO MIKE.....	6
	B. MERKEL DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING BECAUSE HIS ATTORNEY FAILED TO OBJECT TO THE IMPOSITION OF DISCRETIONARY LFOs.....	10
	C. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED. ....	13
<b>V.</b>	<b>CONCLUSION</b> .....	16

## TABLE OF AUTHORITIES

### CASES

<u>City of Tacoma v. Luvene</u> , 118 Wn.2d 826, 827 P.2d 1374 (1992).....	6
<u>State v. Baker</u> , 136 Wn. App. 878, 151 P.3d 237 (2007).....	8-9
<u>State v. Blazina</u> , 174 Wn. App. 906, 301 P.3d 492 (2013).....	11
<u>State v. Blazina</u> , 182 Wn.2d 827, 344 P.3d 680 (2015)....	11, 12-13
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995) .....	7
<u>State v. Claypool</u> , 111 Wn. App. 473, 45 P.3d 609 (2002).....	11
<u>State v. Daniels</u> , 87 Wn. App. 149, 940 P.2d 690 (1997).....	8
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993) .....	10
<u>State v. Eastmond</u> , 129 Wn.2d 497, 919 P.2d 577 (1996).....	7
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995).....	10
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	10
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	10
<u>State v. Johnston</u> , 85 Wn. App. 549, 933 P.2d 448 (1997).....	8
<u>State v. Lyle</u> , 188 Wn. App. 848, 355 P.3d 327 (2015).....	11, 12
<u>State v. Mierz</u> , 127 Wn.2d 460, 901 P.2d 286 (1995) .....	10
<u>State v. Nolan</u> , 141 Wn.2d 620, 8 P.3d 300 (2000) .....	14
<u>State v. Pierre</u> , 108 Wn. App. 378, 31 P.3d 1207 (2001).....	8
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	7

<u>State v. Sinclair</u> , 2016 WL 393719 (2016) .....	13, 15-16
<u>State v. Williams</u> , 159 Wn. App. 298, 244 P.3d 1018 (2011) .....	7
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994) .....	7
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	10

**OTHER AUTHORITIES**

RAP 14.2 .....	13
RAP 15.2 .....	15
RCW 9A.08.010 .....	8, 9
RCW 9A.52.020 .....	7
RCW 10.01.160 .....	11
RCW 10.73.160 .....	13
U.S. Const. amd. VI .....	10
Wash. Const. art. I, § 22 (amend. x) .....	10

## **I. ASSIGNMENTS OF ERROR**

1. The State failed to meet its burden of proving every essential element of the crime of first degree burglary beyond a reasonable doubt.
2. The State failed to prove that Andrew Merkel intended to assault Mike Wittenberg.
3. Andrew Merkel was denied his constitutional right to effective assistance of counsel.
4. Trial counsel's representation was ineffective because he failed to object to the trial court's decision to impose discretionary legal financial obligations without first determining whether Andrew Merkel had the ability to repay those obligations.
5. Any future request for appellate costs should be denied.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the State prove beyond a reasonable doubt that Andrew Merkel intended to assault Mike Wittenberg by dragging Wittenberg 20 yards with his car, where the evidence showed that Merkel was attempting to flee the scene of a burglary, that Wittenberg was holding onto Andrew Merkel's car, and that Merkel made no attempt to hold onto

Wittenberg or otherwise put Wittenberg in danger?

(Assignments of Error 1 & 2)

2. Was trial counsel's representation ineffective at sentencing when he failed to object to the trial court's decision to impose discretionary legal financial obligations without first determining whether Andrew Merkel had the ability to repay those obligations? (Assignments of Error 3 & 4)
3. Should this court deny any future request for appellate costs where Andrew Merkel does not have the ability to repay the costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 5)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Andrew Lewis Merkel with one count of first degree burglary (RCW 9A.52.020(1)(b)). (CP 1) The jury convicted Merkel as charged. (08/05/15 RP 3; CP 32)<sup>1</sup> The trial court imposed a 100-month standard range sentence. (08.28.15 RP 10; CP 46) This appeal timely follows. (CP 53)

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<sup>1</sup> The transcripts will be referred to by the date of the proceeding contained therein.

B. SUBSTANTIVE FACTS

Denise Ingram lives on 77<sup>th</sup> Street East in Bonney Lake, Washington. (08/03/15 RP 7) Mike and Robin Wittenberg live directly across the street. (08/03/15 RP 7, 43, 49) In the afternoon of August 22, 2014, while the Wittenbergs were away from home, Ingram noticed an unfamiliar man standing in the Wittenbergs' front yard. (08/03/15 RP 12, 50, 105) Ingram described the man as slim, Caucasian, in his early-20s, and wearing camouflaged patterned shorts and shirt. (08/03/15 RP 13)

Ingram saw the man approach the Wittenbergs' front door and knock several times. (08/03/15 RP 12) When there was no answer, the man reached for the doorknob. (08/03/15 RP 12) Ingram was suspicious, so she called Robin and asked whether she was expecting anyone to come to her house that day.<sup>2</sup> (08/03/15 RP 13, 98-99) Robin said no, so when Ingram saw the man walk to the side of the home and thru the gate, she decided to call 911. (08/03/15 RP 13-14)

Mike arrived home just as Ingram was placing the call. (08/03/15 RP 15, 50) Once inside, he heard a noise in one of the

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<sup>2</sup> To avoid confusion, the Wittenbergs will be referred to by their first names.

bedrooms, so he walked down the hall to investigate. (08/03/15 RP 52) When he reached the master bedroom, Mike saw an unfamiliar man rifling through his dresser drawers. (08/03/15 RP 53) Mike yelled and lunged toward the man. (08/03/15 RP 53) The man immediately ran out the sliding door that leads to the Wittenbergs' back yard. (08/03/15 RP 54) Mike ran out the front door, hoping to intercept the man in front of the house. (08/03/15 RP 55)

Ingram was standing in the Wittenbergs' driveway still talking to the 911 operator when Mike ran back outside. (08/03/15 RP 16, 17) She also saw the man run out the side gate and down the street. (08/03/15 RP 17) Mike chased the man around the corner, and saw him get into a silver colored car parked on the side of the road. (08/03/15 RP 18, 56) By the time Mike reached the car, the man had gotten inside, shut the door, and started the engine. (08/03/15 RP 61, 62)

Mike decided he wanted to stop the man from driving away, so he stuck his head and upper torso through the open driver's side window and put one hand on the steering wheel and one hand on the man's chest. (08/03/15 RP 62, 63) He said to the man, "You're not going anywhere," but the man "smirked," put the car in reverse, and backed up. (08/03/15 RP 20, 62) Mike was pulled along with

the car, but did not tell the man to stop. (08/03/15 RP 20, 64) The man drove about 20 yards, coming to rest on a neighbor's lawn. Mike let go of the car, and the man drove away. (08/03/15 RP 37, 62, 64)

Mike was able to read the license plate and he relayed that information to Ingram, who was standing nearby and still talking to the 911 operator. (08/03/15 RP 65) A responding officer saw a car that matched the description and license plate number. (08/03/15 RP 145, 148) The driver was a young, Caucasian male wearing a camouflage shirt. (08/03/15 RP 145) But the officer lost sight of the car when it sped away. (08/03/15 RP145, 148, 149)

Around that same time, Bonney Lake resident Sharon Wells heard sirens, then heard the sound of car tires squealing, and then heard a loud thump. (08/04/15 RP 42) When she went to her front yard, she saw a silver colored car speed by, and noticed that her mailbox had been knocked off its red painted post. (08/04/15 RP 42, 43-44)

Using the license plate information, police were able to determine that the registered owner was named Nancy Martin. (08/03/15 RP 114, 119) Police went to Martin's address, and saw a silver car with the matching license plate parked in the driveway.

(08/03/15 RP 119-20) They also noticed some front-end damage to the car, including several red marks that appeared to have been caused by the transfer of paint from another surface. (08/03/15 RP 121, 123-24, 125) Police also determined that Martin is Andrew Merkel's grandmother. (08/04/15 RP 24)

Mike suffered some minor cuts and abrasions on his legs and ankles as a result of being dragged by the car. (08/03/15 RP67) Later, the Wittenbergs noticed that some of Robin's jewelry was missing. (08/03/15 RP 71, 100-01) Ingram was unable to identify the suspect from a photomontage, but Mike chose a photograph of Anderw Merkel. (08/03/15 RP 25, 70) Mike also identified Merkel at trial. (08/03/15 RP 70-71)

#### **IV. ARGUMENT & AUTHORITIES**

- A. THE STATE DID NOT PROVE, BEYOND A REASONABLE DOUBT, THAT MERKEL INTENDED TO EITHER INJURE OR CAUSE FEAR OF INJURY TO MIKE.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the

prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor ... assaults any person.” RCW 9A.52.020(1)(b). Thus, to support the conviction, the State was required to prove that Merkel assaulted Mike. (CP 1, 15) That meant the State had to prove that Merkel formed the specific intent to either: (1) cause Mike bodily injury; or (2) create in Mike apprehension and fear of bodily injury. (CP 16) See State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

Specific intent is an essential element of all forms of assault. State v. Eastmond, 129 Wn.2d 497, 500, 504, 919 P.2d 577 (1996).<sup>3</sup> To commit assault, a person must have intended to cause bodily harm or to create an apprehension of bodily harm. State v. Williams, 159 Wn. App. 298, 307, 244 P.3d 1018 (2011) (citing

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<sup>3</sup> *Overruled on other grounds by* State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002).

Byrd, 125 Wn.2d at 713).

Specific intent cannot be presumed, but may be inferred as a logical probability from the surrounding facts and circumstances. State v. Pierre, 108 Wn. App. 378, 386, 31 P.3d 1207 (2001). The trier of fact ascertains “intent” by determining whether a person acts with the “objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a); Wilson, 125 Wn.2d at 217.

The facts of State v. Johnston, are similar to this case. 85 Wn. App. 549, 554-55, 933 P.2d 448 (1997). There, the evidence was sufficient to show assault by “actual battery” where the defendant accelerated while a security officer was reaching into the vehicle, causing the security officer’s arm to be struck by the vehicle. However, assault by actual battery does not require proof that the defendant specifically intended to inflict injury or fear of injury. See State v. Daniels, 87 Wn. App. 149, 155, 940 P.2d 690 (1997). So while the facts are similar, the law of that case does not control.

In State v. Baker, the defendant accelerated directly toward one police officer’s occupied patrol car and toward another officer as he sat on his motorcycle. 136 Wn. App. 878, 881-82, 151 P.3d

237 (2007). Baker also “flipped off” one officer, laughed, and then sped off. 136 Wn. App. at 882. Both the trial court and the appellate court found these circumstances sufficient to show Baker’s intent to assault the two officers. 136 Wn. App. at 882-83.

The evidence here shows no similar intent. Merkel had left Mike’s home and was fleeing the scene. He was sitting in his car and had started the engine before Mike caught up to him and reached inside the car. Merkel did not drive towards Mike, did not grab or hit or hold onto Mike’s body or in any way keep Mike in contact with the car. He merely attempted to drive away.

Obviously, Merkel’s intent was to get away from the scene and to avoid arrest. Merkel may have acted negligently or recklessly when he drove away while Mike was still reaching into his car,<sup>4</sup> but no reasonable juror could have concluded that he specifically intended to assault Mike under the facts of this case.

The reviewing court should reverse a conviction and dismiss

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<sup>4</sup> “A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d). “A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c).

the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Accordingly, this court must reverse and vacate Merkel's conviction.

B. MERKEL DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING BECAUSE HIS ATTORNEY FAILED TO OBJECT TO THE IMPOSITION OF DISCRETIONARY LFOs.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). To prevail on an ineffective assistance of counsel claim, Merkel must show both deficient performance and resulting prejudice. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

As to the first element, defense counsel's representation was deficient because he failed to challenge the trial court's imposition of LFOs. RCW 10.01.160 gives a sentencing court authority to impose legal financial obligations on a convicted offender, and includes the following provision:

[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added). The word “shall” means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). The judge must consider the defendant’s individual financial circumstances and make an individualized inquiry into the defendant’s current and future ability to pay, and the record must reflect this inquiry. State v. Blazina, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015).

In State v. Blazina, 174 Wn. App. 906, 301 P.3d 492 (2013), this Court refused to address a challenge to the imposition of LFOs raised for the first time on appeal.<sup>5</sup> Later, in State v. Lyle, 188 Wn. App. 848, 355 P.3d 327 (2015), the defendant argued on appeal that his trial counsel was ineffective for failing to object to the imposition of LFOs. This Court noted that, “[b]ecause the sentencing hearing was after we issued our opinion in Blazina,

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<sup>5</sup> Our State Supreme Court subsequently affirmed this Court’s exercise of discretion in refusing to address the LFO issue raised for the first time on appeal but, exercising its own discretion to reach the issue, held that a sentencing judge must make an individualized inquiry into the defendant’s current and future ability to pay. Blazina, 182 Wn.2d at 837-38.

counsel should have been aware that to preserve any issue related to the LFOs he was required to object. Thus, Lyle has arguably shown deficient performance[.]” 188 Wn. App. at 329.

Similarly here, Merkel’s sentencing hearing was held after this Court issued its decision in Blazina, and counsel should have been aware that he needed to object in order to preserve any appellate issue related to imposition of LFOs.<sup>6</sup>

Unlike the defendant in Lyle, however, Merkel can show that he was prejudiced by counsel’s deficient performance. The State requested that \$500 be imposed to reimburse the State for defense costs, and the trial court, without further inquiry or discussion, agreed. (08/28/15 RP 6, 10; CP 44) Then, in the same hearing, the court found that Merkel was indigent, based on his declaration that he owns no property, has no job, has no income, his only asset is a car worth \$2,500, and he owes approximately \$50,000 in previously ordered court fines. (08/28/15 RP 13; CP 54-55, 58-62)

As noted by the Supreme Court in its Blazina opinion, “if someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.” 182

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<sup>6</sup> This Court’s opinion in Blazina was issued on May 21, 2013, and Merkel’s sentencing hearing was held on August 28, 2015.

Wn.2d at 839. It is clear from Merkel's declaration that he does not have the means to pay the \$500 in discretionary LFOs the sentencing court imposed.

Thus, if trial counsel had objected to the imposition of LFOs and had forced the sentencing court to fulfill its statutory obligation to determine Merkel's current or future ability to pay, it is more likely than not that the court would have found that Merkel does not have the ability to pay LFOs and would not have imposed \$500 in discretionary LFOs. Accordingly, this Court should strike the LFO order and remand Merkel's case for a hearing on his ability to pay.

C. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.<sup>7</sup>

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

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<sup>7</sup> Recently, in State v. Sinclair, 2016 WL 393719, at \*5 (2016) Division one concluded "that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." Merkel is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1's interpretation of RAP 14.2.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the authority to award costs of appeal “is permissive,” the Court held, so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Merkel’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, as argued above, Merkel owns no property, has no job, has no income, his only asset is a car worth \$2,500, and he owes approximately \$50,000 in

previously ordered court fines. (08/28/15 RP 13; CP 54-55, 58-62) Merkel will be incarcerated for the next eight years. (CP 46) There was no evidence below, and no evidence on appeal, that Merkel has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Merkel is indigent and entitled to appellate review at public expense. (CP 54-55) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, 2016 WL 393719, at \*7 (2016), Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made

findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

Similarly, there has been no evidence presented to this court, and no finding by the trial court, that Merkel's financial situation has improved or is likely to improve. Merkel is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

#### **V. CONCLUSION**

Merkel's actions do not prove, beyond a reasonable doubt, that he intended to either injure or cause fear of injury to Mike. Merkel's first degree burglary conviction must be reversed. Additionally, Merkel's counsel should have objected to the court's decision to impose \$500 in discretionary LFOs, and this court should decline any future request to impose appellate costs.

DATED: February 17, 2016



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Attorney for Andrew Lewis Merkel

**CERTIFICATE OF MAILING**

I certify that on 02/17/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Andrew L. Merkel, DOC# 340937, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**February 17, 2016 - 12:45 PM**

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