

FILED  
MARCH 21, 2013  
Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

No. 31271-2-III

Chelan County Superior Court No. 02-1-00593-5

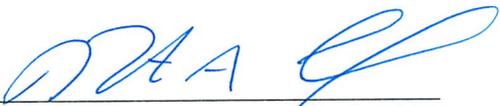
STATE OF WASHINGTON  
Respondent,

vs.

JOSE MANAJARES  
Appellant.

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**APPELLANT'S AMENDED OPENING BRIEF**

  
Brent A. De Young, WSBA #27935

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Attorney for Appellant

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1. ASSIGNMENTS OF ERROR

- I. Appellant Assigns Error To The Trial Court's Refusal To Consider His Motion To Withdraw His Guilty Plea
- II. The Appellant's Motion Should Have Been Granted And His Plea Vacated Due To His Trial Counsel's Ineffective Assistance.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does Washington Law Require The Physical Presence Of The Defendant At A Post-Conviction Motion Hearing?
2. Were The Immigration Consequences To The Defendant's Plea Sufficiently Determinable At The Time Of His Guilty Plea?
3. Is The Defendant's Assertion That He Was Not Properly Informed Of The Immigration Consequences Specific To His Plea Sufficiently Corroborated?
4. If The Defendant's Assertions Regarding The Advice He Received From His Trial Counsel Are Not Sufficiently Corroborated, Is The Defendant Entitled To A Fact Finding Hearing?
5. Is Trial Counsel's Alford Plea On Behalf Of The Defendant Ineffective Assistance Of Counsel?

II. STATEMENT OF THE CASE

On November 1, 2002, the Defendant, Jose Manajares, made an initial appearance in the Chelan County Superior Court. A Motion and Declaration for Order of Probable Cause was filed under the above-shown cause number. (CP42)

On November 5, 2002, an Information charging the Defendant with one count of Assault in the 4th Degree (RCW 9A.36.041(1)) and one count of Unlawful Imprisonment (RCW 9A.40.040(1)). (CP 1-2)

On November 6, 2002, Attorney David S. Delong filed a Notice of Appearance on behalf of the Defendant as appointed counsel.

On December 11, 2002, the Defendant signed a Guilty Plea Statement to one count of Unlawful Imprisonment (RCW 9A.40.040(1)). The defendant entered an Alford Plea. (CP 3-9)

Sentencing took place on that same date. The Defendant was sentenced to serve 41 days in the Chelan County Jail. In addition, he was to pay fines and costs totaling \$710.00 with payments set at \$50.00 per month beginning 30 days after release from custody of the Chelan County Jail. The Defendant was also to serve 12 months of community custody after release. (CP 10-19)

A Motion Hearing to Vacate Mr. Manjares' Guilty Plea was held on November 15, 2012. At that hearing, the judge denied the motion on the basis that the Court would not entertain a motion for relief without the Defendant being present. (CP 140) (2RP 9') At the time of the hearing, Mr. Manjares had been deported and is still currently residing in Mexico.

### III. ARGUMENT AND AUTHORITY

#### A. The Presence Of The Defendant Is Not Required For A CrR 7.8 Motion

The Superior Court's order dated November 15, 2012 provides:

"The court will not entertain a motion without the defendant being present." (CP 140) (2RP 9-10)

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<sup>1</sup> Hereinafter, the December 11, 2002 plea and sentence verbatim report is referred to as 1RP and the November 15, 2012 motion hearing verbatim report (CP 140) is referred to as 2RP

The procedure for a motion to vacate a guilty plea is found under CrR 7.8.

Specifically, CrR 7.8(c)(1) provides:

Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

There is no part of this court rule that requires the appearance of the defendant.

Rule CrR 3.4 entitled “Presence of the Defendant” states when the presence of the Defendant is required. Rule CrR 3.4(c) provides:

Defendant Not Present. If in any case the defendant is not present when his or her personal attendance is necessary, the court may order the clerk to issue a bench warrant for the defendant's arrest, which may be served as a warrant of arrest in other cases.

Therefore, if the trial court could have properly invoked the authority of the court to issue a bench warrant for the defendant’s failure to appear then his presence would have also been legally required. In the instant case, the trial court had no authority to issue a bench warrant as his presence was not required.

B. The Immigration Consequences Were Easily Determinable At The Time Of The Defendant’s Plea And Thus The Defendant Should Have Been Warned Of Them Prior To His Guilty Plea.

Mr. Manajares, through his affidavit, states that Mr. De Long used the court interpreter to explain the guilty plea and sentencing documents. Mr. Manajares in his declaration stated that he was not informed that his deportation was a certain result. (CP 71 – Declaration of the Defendant) The transcript of the plea and sentencing also corroborates the Defendant’s declaration. (1RP 18-20)

Mr. Manajares, who is the beneficiary of an approved immigration petition, was sent to the Northwest Immigration Detention Center and subsequently deported for

having been convicted of an aggravated felony. (CP 118-139 – Affidavit of Immigration Attorney Michael Grim)

C. The Defendant Has Made A Prima Facie Case For Ineffective Assistance Of Counsel Regarding The Specific Immigration Consequences Of His Plea. Any Perceived Deficiencies In Corroboration Should Be Resolved In A Fact-Finding Hearing

Immigration Attorney Michael Grim confirmed that trial counsel’s entry of an Alford plea in this matter ensured Mr. Manajares’ own deportation. The immigration attorney stated:

“Mr. De Long did not make a factual statement on behalf of his client but instead entered an “Alford Plea. Therefore, under the immigration law, the police reports and affidavit of probable cause became part of the record of conviction available for review by the immigration court.”

(CP 119 – Affidavit of Immigration Attorney Michael Grim)

“8 USC 1182(a)(2)(A)(i)(I) provides that an alien is inadmissible for having committed a crime of moral turpitude (CIMT). If he is considered by an immigration judge or consular officer to be convicted of a CIMT, Mr. Manjares is no longer eligible to receive an immigrant visa through his father who is a lawful permanent resident, even though a visa petition filed by the father has already been approved.”

(CP 119 – Affidavit of Immigration Attorney Michael Grim)

“[I]n determining whether a statute of conviction fits within the generic definition of CIMT, immigration judges and consular officials must usually limit themselves to the language of the statute of conviction (the categorical approach) or to a limited number of documents in the record of conviction (the modified categorical approach). Those documents include the charging document, written plea agreement, transcript of plea colloquy, or statement on plea of guilty. *See Parrilla v. Gonzalez*, 414 F.3d 1038 (9<sup>th</sup> Cir. 2005). ”

(CP 119 – Affidavit of Immigration Attorney Michael Grim)

“by attaching the affidavit of probable cause and the police reports, the factual statements would be sufficient to establish that his conduct, and therefore his conviction, involved moral turpitude.”

(CP 119-120 – Affidavit of Immigration Attorney Michael Grim)

“The guilty plea also set up Mr. Manjares to suffer an additional disability in the form of a lifetime ban at 8 USC § 1182(a)(9)(A)(ii)(1). This provision bars any alien ordered removed by an immigration judge from ever obtaining a visa if he was convicted of an “aggravated felony” (as defined in immigration law) prior to the order of removal. It is clear from the record that the Department of Homeland Security has treated Mr. Manjares’ conviction as an immigration aggravated felony.”

(CP 121 – Affidavit of Immigration Attorney Michael Grim)

“However, given the high likelihood of being ordered removed after such a conviction, it would be unreasonable for criminal defense counsel not to inform his client of the possibility of suffering this particular immigration penalty.”

(CP 121 – Affidavit of Immigration Attorney Michael Grim)

After learning that this conviction was a life-time bar to his ever being able to stay in the United States, Mr. Manjares hired counsel to pursue post-conviction relief.

(CP 71- Declaration of the Defendant) Mr. Manjares’ efforts were unsuccessful (See attached denial of Petition for Writ of Habeas Corpus)

Trial counsel David De Long supplied an affidavit describing his practices in regards to non-citizens and guilty pleas. (CP 72-73) He stated that he would always go over the guilty plea statement with the defendant, including the general immigration warnings. However, he also stated that he did not have any special training or background in regards to immigration consequences of guilty pleas. He only knew that a defendant with a Border Patrol Hold would be sent to the immigration jail for a hearing. Attorney De Long stated that he is now aware that Alford Pleas are not recommended for non-citizens. At the time that Mr. Manjares pled guilty, Mr. De Long was not aware of this.

(CP 72-73 – Affidavit of Trial Counsel David De Long)

Trial counsel’s lack of knowledge of the immigration consequences ensured his client’s deportation.

D. The Defendant Should Be Entitled To A Fact-Finding Hearing Regarding Any Disputed Issues Of Fact

The Washington Supreme Court explained that the

“State's response must answer the allegations of the petition and identify all material disputed questions of fact. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.”

*In re Rice*, 118 Wn.2d 876, 887, 828 P.2d 1086 (1992). See also, *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 473, 965 P.2d 593 (1998).

For allegations "based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. [*Rice*, 118 Wn.2d at 886]. Where the "petitioners' evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence.” *Rice*, 118 Wn.2d at 886. The affidavits ... must contain matters to which the affiants may competently testify. *Rice*, 118 Wn.2d at 886. The evidence must show that the "factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

*Rice*, 118 Wn.2d at 886.

*In re Pers. Restraint of Crace*, 157 Wn. App. 81, 94-95, 236 P.3d 914 (2010).

E. Trial Counsel’s Entry Of An Alford Plea For A Noncitizen Is Ineffective Assistance Of Counsel

The U.S. Supreme Court defined “Record of Conviction” to include only the following documents: The statutory definition of the crime; the charging document related to the offense of conviction; jury instructions that actually required the jury to find all the elements of the removal ground in order to convict the defendant; a bench-trial

judge's formal rulings of law and findings of fact; written plea agreement; admissions at a colloquy between judge and defendant; and any explicit factual finding by the trial judge to which the defendant assents or some “comparable judicial record” of information about the factual basis for the plea.

The Record of Conviction does not include the following documents: pre-sentence report; certificate of probable cause; arrest reports; statements by prosecutor only; dropped or dismissed complaints or information. See *Taylor v. United States*, 495 U.S. 575 (1990).

In the instant case, trial counsel’s inclusion of the police reports drives home the point that representation of noncitizens requires trial counsel to be aware of the severe consequences that result from seemingly innocuous actions on behalf of the client.

“Although police reports and complaint applications, standing alone, may not be used to enhance a sentence following a criminal conviction, the contents of these documents may be considered in removal proceedings if specifically incorporated into the guilty plea or admitted by a defendant.”

*Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005) (Certification for Determination of Probable Cause, incorporated by reference into guilty plea, demonstrated that conviction met the definition of sexual abuse of a minor) (internal citation omitted); see also *Fregozo v. Holder*, 576 F.3d 1030, 1033 n.1 (9th Cir. 2009) (neither the court nor the BIA could rely on police reports that were not incorporated by reference into the nolo plea or the record of conviction, to determine whether alien was convicted of a “crime of child abuse” within the meaning of the INA); *United States v. Espinoza-Cano*, 456 F.3d 1126 (9th Cir. 2006) (police report could be considered in

determining whether prior conviction qualified as an aggravated felony because report was incorporated by reference into the charging document and stipulated to form the factual basis of a guilty plea); *United States v. Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. 2005) (defendant's assent to the statement of facts in a motion to set aside the indictment or information under Cal. Penal Code § 995 was a proper basis for a sentencing court to engage in a modified categorical analysis).

Here, but for the defendant's entry of an Alford Plea, it appears clear that he would not have been found to have committed an aggravated felony by the immigration court. (CP 118-139 – Affidavit of Immigration Attorney Michael Grim)

#### IV. CONCLUSION

The presence of the defendant at his Motion to Vacate Guilty Plea hearing was not legally required. Based on the applicable statutes, case law and affidavits offered by the defendant, trial counsel, and an immigration lawyer, the defendant was never properly informed as to the readily ascertainable consequences of his guilty plea. Neither was he given proper notice of his rights to an appeal. Furthermore, entry of an Alford Plea on behalf of a non-citizen is also ineffective assistance of counsel. Accordingly, Mr. Manajares' guilty plea should be vacated.

Respectfully submitted this 15<sup>th</sup> day of March, 2013.

  
Brent A. De Young, WSBA #27935  
Attorney for Appellant

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOSE MANJARES-VALLADARES,	)	
	)	CASE NO. C12-1538-JLR-MAT
Petitioner,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
NATHALIE ASHER, <i>et al.</i> ,	)	
	)	
Respondents.	)	
	)	

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is a native and citizen of Mexico who is being detained at the Northwest Detention Center in Tacoma, Washington, pursuant to a reinstated order of removal. (Dkt. 1, Attach. 1 at 1-3.) On September 10, 2012, petitioner, proceeding through counsel, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, along with an emergency request for stay of removal. (Dkt. 1, Attach. 1.) He alleges he has filed a motion to vacate his 2002 conviction for unlawful imprisonment in Chelan County Superior Court, which serve as the basis for his removal order. (Dkt. 1, Attach. 1 at 2.) He asserts that if he is successful, the basis for his removal order would be invalid and he would no longer be removable. *Id.* at 3.

01 Petitioner requests that this Court issue an order allowing him to remain in the United States  
02 until a final decision has been made on his applications for relief from removal. *Id.*

03 For the reasons set forth below, the Court recommends that petitioner's petition for writ  
04 of habeas corpus and emergency request for stay of removal (Dkt. No. 1, Attach. 1) be DENIED  
05 and this matter be DISMISSED with prejudice.

## 06 II. DISCUSSION

07 Petitioner alleges that "reinstatement of a removal order based on what is likely a  
08 constitutionally infirm conviction violates [his] rights under the Immigration and Nationality  
09 Act, his rights under substantive and procedural due process as guaranteed by the Fifth  
10 Amendment to the United States Constitution, and his rights under international law." (Dkt. 1,  
11 Attach. 1 at 3.) He relies on *Padilla v. Kentucky*, \_\_ U.S. \_\_, 130 S. Ct. 1473, 176 L. Ed. 2d  
12 284 (2010), in which the Supreme Court held that defense counsel has a constitutional duty to  
13 inform criminal defendants of the immigration consequences of their guilty pleas. *Id.* at 2.  
14 Petitioner avers that his trial counsel has admitted he did not give him specific immigration  
15 consequence advice. *Id.* In support of his habeas petition, petitioner asserts that he has filed a  
16 collateral attack against his criminal conviction in Chelan County Superior Court, which serves  
17 as the basis for his removal from the United States. He requests a stay of removal and seeks to  
18 enjoin respondents from executing his removal order while he challenges his criminal  
19 conviction in state court. *Id.* at 3. Because petitioner is only challenging his final order of  
20 removal rather than the fact of his current detention, the Court finds that it lacks jurisdiction to  
21 grant such relief under the REAL ID Act of 2005. See 8 U.S.C. § 1252(a)(5).

22 The REAL ID Act provides that "a petition for review filed with an appropriate court of

01 appeals in accordance with this section shall be the sole and exclusive means for judicial review  
02 of an order of removal entered or issued under any provision” of the Act. 8 U.S.C. §  
03 1252(a)(5); *see also* 8 U.S.C. § 1252(b)(9) (“Judicial review of all questions of law and fact,  
04 including interpretation and application of constitutional and statutory provisions, arising from  
05 any action taken or proceeding brought to remove an alien from the United States . . . shall be  
06 available only in judicial review of a final order under this section”). Pursuant to 8 U.S.C. §§  
07 1252(a)(5) and (b)(9), a federal district court lacks jurisdiction over a habeas petition seeking to  
08 challenge an order of removal. *See, e.g., Flores Torres v. Mukasey*, 548 F.3d 708, 710–11 (9th  
09 Cir. 2008); *Iasu v. Smith*, 511 F.3d 881 (9th Cir. 2007).

10 “A request to stay an order of removal based on a pending collateral claim does not  
11 escape the jurisdiction stripping provisions of the REAL ID Act.” *Mancho v. Chertoff*, 480 F.  
12 Supp. 2d 160, 162 (D.D.C. 2007) (citing *Formusoh v. Gonzales*, No. 3-07-CV-0128-K, 2007  
13 WL 465305 (N.D. Tex. Feb. 12, 2007) (dismissing for lack of subject matter jurisdiction habeas  
14 petition of petitioner seeking stay of removal pending resolution of an I-130 petition and an  
15 I-485 adjustment of status petition)); *Tale v. United States Dep’t of Homeland Sec.*, 2006 U.S.  
16 Dist. LEXIS 47577, at \*1 (S.D. Tex. July 13, 2006) (finding lack of jurisdiction to grant  
17 petitioner preliminary and permanent injunctions barring his deportation prior to the resolution  
18 of his claims pending before an immigration judge). Absent statutory or legal authority that  
19 creates an exception to the REAL ID Act, this Court lacks subject matter jurisdiction to grant  
20 the relief requested.

21 The Court also notes that it has no jurisdiction to look into the validity of petitioner’s  
22 underlying conviction. *See, e.g., Contreras v. Schiltgen*, 122 F.3d 30, 31-32 (9th Cir. 1997),

01 *aff'd on reh'g*, 151 F.3d 906, 907 (9th Cir. 1998) (holding that a petitioner "may not collaterally  
02 attack his state court conviction in a habeas proceeding against the INS."); *accord Resendiz v.*  
03 *Kovensky*, 416 F.3d 952, 961 (9th Cir. 2005). Rather, such claims must be raised in an  
04 application for post-conviction relief filed with the appropriate federal or state court. *See*  
05 *Padilla*, 130 S. Ct. at 1473 (holding that defense counsel engaged in deficient performance by  
06 failing to advise the defendant of the immigration consequences of his guilty plea). "The  
07 availability of post-conviction motions or other forms of collateral attack does not affect the  
08 finality of the conviction for immigration purposes, unless or until the conviction has been  
09 overturned pursuant to such a motion." *Matter of Ponce De Leon*, 21 I&N Dec. 154, 157 (BIA  
10 1997); *see also Waugh v. Holder*, 642 F.3d 1279, 1281 (10th Cir. 2011) (holding that *Padilla*  
11 does not disturb the rule). Should petitioner show that his conviction has been vacated, he may  
12 seek *sua sponte* reopening of his removal proceedings before the Board of Immigration  
13 Appeals. *See* 8 C.F.R. § 1003.2(a).

### 14 III. CONCLUSION

15 For the foregoing reasons, the Court recommends that petitioner's petition for writ of  
16 habeas corpus and emergency request for stay of removal (Dkt. 1, Attach. 1) be DENIED and  
17 this matter be DISMISSED with prejudice. A proposed order accompanies this Report and  
18 Recommendation.

19 DATED this 11th day of September, 2012.

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22 \_\_\_\_\_  
Mary Alice Theiler  
United States Magistrate Judge

Case 2:12-cv-01538-JLR Document 4-1 Filed 09/11/12 Page 1 of 1

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTONChambers of  
Mary Alice Theiler  
United States Magistrate JudgeU.S. District Court  
700 Stewart Street, Suite 12132  
Seattle, WA 98101

September 11, 2012

To: Brent Adrian De Young, De Young Law Office

From: Mary Alice Theiler, United States Magistrate Judge

Re: Jose Manjares-Valladares v. Nathalie Asher, et al.; (No: C12-1538-JLR)

Enclosed is a copy of my Report and Recommendation and proposed order in the above-captioned case, which has been filed with the Clerk. This Report and Recommendation is not an appealable order. Any notice of appeal should not be filed until the District Judge enters judgment in this case.

Objections to the recommendation should be filed with the Clerk and served upon all parties to this suit within **fourteen (14)** days of the date of this letter. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motion calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14)** days after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on September 28, 2012.

Thank you for your cooperation.

Sincerely,



Mary Alice Theiler  
United States Magistrate Judge

enclosures

cc: Hon. James L. Robart

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOSE MANJARES-VALLADARES,	)	
	)	CASE NO. C12-1538-JLR
Petitioner,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	
NATHALIE ASHER, <i>et al.</i> ,	)	
	)	
Respondents.	)	
_____	)	

The Court, having reviewed petitioner's Petition for Writ of Habeas Corpus and Emergency Request for Stay of Removal, the Report and Recommendation of the Honorable Mary Alice Theiler, United States Magistrate Judge, and any objections or responses to that, and the remaining record, finds and Orders as follows:

- (1) The Court adopts the Report and Recommendation;
- (2) Petitioner's Petition for Writ of Habeas Corpus (Dkt. 1) and Emergency Request for Stay of Removal (Dkt. 1, Attach. 1) are DENIED, and this action is DISMISSED with prejudice; and
- (3) The Clerk shall send a copy of this Order to counsel for petitioner and to Judge

01 Theiler.

02 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

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\_\_\_\_\_  
JAMES L. ROBART  
United States District Judge

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**United States District Court**  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOSE MANJARES-VALLADARES,

Petitioner,

v.

NATHALIE ASHER, et al.,

Respondents.

**JUDGMENT IN A CIVIL CASE**

CASE NUMBER: C12-1538-JLR

**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

**THE COURT HAS ORDERED THAT**

The Report and Recommendation is adopted and approved. Petitioner's Petition for Writ of Habeas Corpus is **DENIED** and this case is **DISMISSED** with prejudice.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
WILLIAM M. MCCOOL

Clerk

\_\_\_\_\_  
Deputy Clerk

WASHINGTON STATE COURT OF APPEALS  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,  
vs.  
JOSE MANAJARES,  
Defendant/Appellant.

NO. 31271-2-III

APPELLANT'S AMENDED OPENING  
BRIEF

CERTIFICATE OF SERVICE

I certify that on this 15<sup>th</sup> day of March, 2013, I caused to be sent by U.S. Mail,  
first-class postage prepaid, a copy of Appellant's Amended Opening Brief to:

Douglas Shae  
Chelan County Deputy Prosecutor  
P.O. Box 2596  
Wenatchee, WA 98807-2596

Jose Manjares  
Glenda Pineda Valladares  
El Tule  
Municipio Tomatlan  
Jalisco, Mexico  
98465



Brent A. De Young, WSBA #27935