

90237-2

NO. 44645-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

ALEJANDRO BUSTOS-OCHOA,

Petitioner.

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PETITION FOR REVIEW

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MAY 16 2014

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

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**A. *IDENTITY OF PETITIONER***

ALEJANDRO BUSTOS-OCHOA asks this court to accept review of the decision designated in Part B of this motion.

**B. *DECISION***

Petitioner seeks review of each and every part of the decision of the Court of Appeals affirming the Cowlitz County Superior Court judgment and sentence. A copy of the Court of Appeals decision is attached.

**C. *ISSUES PRESENTED FOR REVIEW***

Does substantial evidence support a conviction for delivery of a controlled substance when no witness saw a delivery occur and the informant to whom the drugs were allegedly delivered did not testify at trial?

**D. *STATEMENT OF THE CASE***

On the evening of March 22, 2012, Cowlitz-Wahkiakum County Drug Task Force Agent Brian Streissguth arrested a methamphetamine dealer by the name of Larry Lindsey and suggested to Mr. Lindsey that he might be able to help himself if he worked for the Task Force by arranging to have someone deliver methamphetamine to him with the Task Force Agents observing the transaction. *Id.* In order to avoid going to jail Mr. Lindsey readily agreed and made a telephone call during which he appeared to be setting up a drug deal. RP 18-30.

Once the phone call was over Mr. Lindsey told the officers that he had

arranged to purchase one ounce of methamphetamine in the parking lot of the Home Depot in Longview. RP 31-32. After searching Mr. Lindsey and finding no drugs or money on his person, Officer Streissguth took him to a parking lot of a local business close to Home Depot in Longview. RP 31-35. Another Task Force Officer drove Mr. Lindsey's vehicle to that location. RP 61-62. Officer Streissguth then searched Mr. Lindsey's car and did not find any drugs or money. RP 31-35. Although the officer had previously found drugs secreted in air vents in vehicles, he did not search the air vents in Mr. Lindsey's vehicle because they did not readily disassemble. RP 53-54. Neither did Officer Streissguth have a drug dog brought to the scene to perform a search of Mr. Lindsey's vehicle. RP 54-55. At this point Officer Streissguth gave Mr. Lindsey \$1,240.00 and allowed him to get into his own vehicle and drive into the parking lot at Home Depot. RP 38-39. Officer Streissguth did not see where Mr. Lindsey parked, believing that other officers were present to watch him. RP 38. Mr. Lindsey entered the Home Depot parking lot around 8:00 pm. RP 39.

By about 8:45pm nothing had happened. RP 39. As a result Officer Streissguth called Mr. Lindsey and told him to again contact his alleged drug source. *Id.* After speaking to Mr. Lindsey on the phone Officer Streissguth moved to the North end of the parking lot to place himself where he thought the person Mr. Lindsey contacted would enter. RP 41. Finally, at around

10:00 pm Officer Streissguth saw a black Volkswagen Golf enter the parking lot. *Id.* A short while later Officer Streissguth saw the same vehicle as it pulled back out onto the public streets. RP 42-44. At that point Officer Streissguth saw the driver whom he later identified him as the defendant Alejandro Bustos-Ochoa. *Id.* Other agents followed Mr. Bustos-Ochoa to a residence in Vancouver. RP 67, 98-100.

The Task Force Agents involved in the operation with Officer Streissguth were Officers Brown, Hanson, Tate and Hanberry. RP 22, 59, 69, 84, 107. Officer Brown testified that he entered the parking lot ahead of Mr. Lindsey but he did not claim that he saw Mr. Lindsey park or that his part of the operation was to watch Mr. Lindsey. RP 63-66. Rather his job was to follow the target vehicle away from the transaction, which he did after other agents told him that the suspect was leaving the parking lot. RP 66. Similarly Officer Hanson's job was to watch an entrance to the Home Depot lot and follow the suspect's vehicle. RP 71. He did not claim to have seen where Mr. Lindsey parked and he did not claim to have seen a transaction. *Id.*

In contrast to Officer Streissguth, Brown and Hanson, Officer Tate did claim that he saw an interaction between the defendant and the Volkswagen that entered the Home Depot Parking lot. RP 87-93. According to Officer Tate, he stationed his vehicle in the parking lot where he could see Mr.

Lindsey sitting in his red passenger vehicle. RP 87-90. At one point he saw Mr. Lindsey get out of his vehicle and stand by it for a few minutes and then reenter. RP 90-93. However, he did not see Mr. Lindsey have any interaction with anyone and he did not see Mr. Lindsey get into the truck or any other compartment of his vehicle. *Id.*

At about 10:00 pm Officer Tate saw the defendant drive up in a black Volkswagen and park near Mr. Lindsey. *Id.* When he did Mr. Lindsey got out of his vehicle, got into the front passenger seat of the Volkswagen for a couple minutes, then get out and reenter his vehicle. *Id.* At this point the Volkswagen drove away, as did Mr. Lindsey. *Id.* However, Officer Tate did not claim to see the exchange or possession of any items in the hands of either Mr. Lindsey or the defendant. RP 105.

Although Officer Tate did state that he saw the interaction between the defendant in the Volkswagen and Mr. Lindsey at around 10:00 pm, he did not claim that he saw Mr. Lindsey enter the parking lot and park, and he did not claim that he had Mr. Lindsey under surveillance the whole time Mr. Lindsey was in the parking lot. RP 90-93, 103-104. Rather, he claimed that he observed Mr. Lindsey for less than 30 minutes prior to the 10:00 pm interaction. RP 103-104. His later testimony on this point went as follows:

Q. Do you recall about how long you entered up having to wait in surveillance?

A. It seemed like a long time only because it was the end of a long day. We were on overtime by this point, but it was probably less than thirty minutes that I sat in that parking lot waiting for the transaction to come together.

RP 91.

Finally, Officer Hanberry also claimed that he saw the interaction between the defendant and Mr. Lindsey in the parking lot at the Home Depot and he described that transaction in the same manner as did Officer Tate. RP 111-112. However, as with Officer Tate, he did not claim that he saw Mr. Lindsey enter the parking lot and he did not claim he watched Mr. Lindsey the entire time. *Id.* Rather, he testified that the black Volkswagen appeared “soon after” he started watching Mr. Lindsey. RP 111. His later testimony on this issue went as follows:

A. I set up here. I was advised what the CI would be driving.

Q. Mm-hmm.

A. CI pulled into the lot, parked somewhere in this general area here. I’d say probably thirty yards or so in front of me, not too far. Then soon after, a – a vehicle came in, parked next to the CI vehicle.

Q. When you say “soon after,” was it like, five minutes, fifteen, an hour?

A. It’s hard to tell. I do – I do it so often.

RP 111.

The officers who followed the defendant out of the parking lot and to Vancouver went to that same residence a few days later and arrested the

defendant, whom they testified was the same person who drove the Volkswagen to the encounter with Mr. Lindsey. RP 68, 73, 96-100, 115. By contrast, Officer Streissguth followed Mr. Lindsey back to the original parking lot where they had started earlier in the evening and searched Mr. Lindsey and his vehicle. RP 42-44. Officer Streissguth found neither money nor drugs when he searched Mr. Lindsey. RP 44-47. However, his search of the vehicle revealed about an ounce of methamphetamine secreted in the gas cap. *Id.* This was a location that the officer knew Mr. Lindsey used to transport methamphetamine. *Id.* He claimed that his earlier search of this location had failed to uncover any methamphetamine. RP 44. He did not explain how the methamphetamine got in the gas cap when Neither Officer Tate nor Officer Hanberry claimed that they saw Mr. Lindsey access the gas cap after his contact with the defendant. *Id.*

By information filed July 30, 2012, and later amended the Cowlitz County Prosecutor charged the defendant Alejandro Bustos-Ochoa with one count of delivery of methamphetamine on March 22, 2013. CP 1-2, 7-8. The case later came on for trial before a jury with the state calling five police officers as witnesses. CP 22, 59, 69, 84, 107. The state did not call the confidential informant to testify as the officers apparently could not find him. RP 18-19. These witnesses testified to the facts set out in the preceding factual history. *See Factual History, supra.*

Following the presentation of the state's case the defense rested without calling any witnesses. RP 118. The court then instructed the jury without objection from either party and both the state and the defense made their closing arguments. CP 31-45; RP 119-130, 130-149. The jury then retired for deliberation after which it returned a verdict of guilty. CP 46; RP 156-159. The court later sentenced the defendant within the standard range. CP 47-59; RP 166-172. The defendant thereafter filed timely notice of appeal. CP 61-74.

By unpublished opinion filed April 1, 2014, three judges from Division II of the Court of Appeals affirmed. *See* Opinion attached. By order entered May 2, 2014, the Court of Appeals denied Defendant's timely Motion to Publish. *See* Order attached. The defendant now requests that this court accept review and reverse the decision of the Court of Appeals.

***E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED***

Under RAP 13.4(b)(3), this case presents a significant question of law under both Washington Constitution, Article 1, § 3, as well as United States Constitution, Fourteenth Amendment. Specifically, this case presents this court with an opportunity to provide a guidepost explaining what constitutes substantial evidence in a recurring type of drug case in which a non-testifying confidential informant allegedly buys drugs from a defendant but no police officers sees the transaction. The following examines this issue.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228

(1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that the defendant’s fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and

obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

*State v. Mace*, 97 Wn.2d at 842 (emphasis added).

In the case at bar, the state charged the defendant with delivery of methamphetamine under RCW 69.50.401(1). This statute provides as follows:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.40.401(a).

The gravamen of this offense, as charged against the defendant, is to deliver methamphetamine to another person. As the following explains the evidence presented at trial, even when seen in the light most favorable to the state, does not constitute substantial evidence that anyone delivered methamphetamine to Mr. Lindsey, much less that the defendant delivered methamphetamine to him. First and foremost two facts about this case

should be noted: (1) that no witness saw the defendant possess or deliver methamphetamine or even exchange anything with Mr. Lindsey, and (2) Mr. Lindsey was out of the sight of the task force agents for a significant period of time during the first hour and one-half of the time he was parked in the Home Depot Parking lot.

On this latter point the following facts are critical. At trial Officer Streissguth testified that the informant entered the Home Depot parking lot around 8:00 pm. All of the officers agreed that the interaction between the defendant and Mr. Lindsey occurred at 10:00 pm. However, the only two officers who saw Mr. Lindsey in the parking lot had only been watching him for under 30 minutes before the defendant arrived. This leaves over one and one-half hours with no evidence as to what Mr. Lindsey was doing and who was meeting with him in the parking lot of a store that was open to the public.

Under these two critical facts, there were many sources for the methamphetamine Officer Streissguth found in Mr. Lindsey's gas cap. For example, the methamphetamine could have come from a person who walked by Mr. Lindsey's vehicle in the relatively dark parking lot; a person Mr. Lindsey called to bring him the methamphetamine. Similarly, it could have come from some person who left it in the parking lot at Mr. Lindsey's request at the location Mr. Lindsey parked. Third, Mr. Lindsey could have had the methamphetamine already secreted in his vehicle in the vents or some other

location where Officer Streissguth did not look. He could then have transferred it to the gas cap. Out of all of the possible scenarios this last appears most likely because of the following facts: (1) Mr. Lindsey was in the parking lot for an extended time with noone watching him, (2) Both Officer Tate and Officer Hanberry watched all interactions between the defendant and Mr. Lindsey, they saw Mr. Lindsey drive off, and they never claim to have seen Mr. Lindsey access his gas cap much less put something in it, and (3) Officer Streissguth did find methamphetamine in the gas cap after Mr. Lindsey drove back to the first parking lot.

The task force agents' failure to keep the informant within their view at all times and the task force agents' failure to do a thorough search of the defendant's vehicle creates a situation in which the police only suspected that the defendant was the source of the methamphetamine. As the decision in *Mace* explains, evidence that only gives rise to suspicion or speculation does not constitute substantial evidence sufficient to meet the requirements of due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should accept review, reverse the decision of the Court of Appeals and reverse the defendant's conviction.

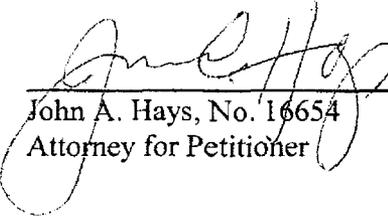
#### **F. CONCLUSION**

For the reasons set out in this motion, this court should accept review of

this case and reverse the decision of the Court of Appeal.

Dated this 2<sup>nd</sup> day of May, 2014.

Respectfully submitted,



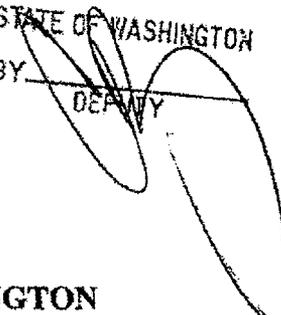
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STATE OF WASHINGTON

BY  DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO BUSTOS-OCHOA,

Appellant.

No. 44645-6-II

UNPUBLISHED OPINION

JOHANSON, A.C.J. — Alejandro Bustos-Ochoa appeals from his delivery of a controlled substance conviction. He claims that the State offered insufficient evidence to prove that he transferred methamphetamine to a confidential informant (CI). He argues that law enforcement lost contact and control over the CI for nearly 90 minutes while they waited for the transaction to happen, and that no one actually saw Bustos-Ochoa give the CI the methamphetamine. Because the State offered sufficient evidence at trial from which a reasonable juror could infer that Bustos-Ochoa delivered methamphetamine to the CI, we affirm Bustos-Ochoa's conviction.

FACTS

On March 22, 2012, a CI, arrested earlier that day on different drug charges, assisted the Cowlitz/Wahkiakum Narcotics Task Force ("task force") in a controlled buy<sup>1</sup> in the parking lot of the Longview Home Depot. The task force supervised the CI at all times between his arrest and the end of the controlled buy later that day. Kelso Police Detective Jeffrey Brown drove the CI in the CI's vehicle from the CI's home to the location for the controlled buy. Before the controlled buy, Longview Police Detective Brian Streissguth searched the CI and his car. Streissguth did not find any drugs or cash on the CI or anywhere in his car. Detective Streissguth gave the CI \$1,240 in prerecorded cash to purchase an ounce of methamphetamine.

Although the detectives' testimony differed about the passage of time during the controlled buy, the substance of the events and observations was consistent. The task force had sight of the CI at all times between 8:00 PM and 10:00 PM while waiting for the meeting to happen. The CI never interacted with anyone or any part of his vehicle until a black Volkswagen arrived around 10:00 PM. The CI was in the black Volkswagen for a few minutes, and then the Volkswagen drove away. Although none of the surveillance officers could see inside of the black Volkswagen when the CI got in, Detectives Streissguth and James Hanberry saw the driver as he left. After the black Volkswagen left, Kelso Police Sergeant Kevin Tate saw the CI "interact" with the fuel door area of his car where it was planned the CI would hide the drugs he purchased. After the meeting was over, Detective Streissguth again searched the CI and his car

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<sup>1</sup> A "controlled buy" is when law enforcement uses a CI to conduct a drug buy. Law enforcement searches the CI before and after the buy, holds any money found on the CI until after the buy, and gives the CI only prerecorded cash for the drug deal. Law enforcement follows the CI to the meeting location and there is continuous surveillance of the CI to ensure that he/she interacts only with the targeted suspect.

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finding about an ounce of methamphetamine in the fuel door of the car which had not been there before. The CI no longer had the \$1,240 Detective Streissguth gave to him.

All of the detectives, including Sergeant Tate and Detective Hanberry, testified that they followed the Volkswagon after it left the Home Depot parking lot and eventually arrived at an address on 78th Street in Vancouver. They saw the male driver, identified as Bustos-Ochoa, get out of the car and walk into the house.

After police executed a search warrant on the Vancouver house, the State charged Bustos-Ochoa with delivery of a controlled substance. At trial, the detectives involved in the surveillance of the controlled buy testified to the above facts. The CI did not testify because the State could not locate him. A jury found Bustos-Ochoa guilty as charged, and he now appeals.

#### ANALYSIS

Bustos-Ochoa argues that there was insufficient evidence to convict him because no one saw the delivery occur and the CI did not testify at trial. Because there was sufficient evidence from which a jury could infer that Bustos Ochoa delivered a controlled substance to the CI, we affirm.

An insufficiency claim admits the truth of the State's evidence and all inferences reasonably drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). There is sufficient evidence to convict when, after viewing the evidence in the light most favorable to the State, any rational juror could have found the elements of the crime met beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201. Direct and circumstantial evidence carry the same weight. *State v. Allen*, \_\_\_ Wn. App. \_\_\_, 317 P.3d 494, 498 (2014). We do not reweigh

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the evidence and substitute our judgment for that of the jury. *State v. Kilburn*, 151 Wn.2d 36, 57, 84 P.3d 1215 (2004).

RCW 69.50.401(1) prohibits the manufacture, delivery, or possession of any controlled substance with intent to manufacture or deliver the controlled substance. Methamphetamine is a schedule II controlled substance. RCW 69.50.206(d)(2). "Delivery" and "deliver" mean the actual or constructive transfer of a substance from one person to another. RCW 69.50.101(f).

Bustos-Ochoa argues that without direct observation of what occurred in the car and without the CI's testimony, the State cannot prove that Bustos-Ochoa transferred the methamphetamine<sup>2</sup> to the CI. Bustos-Ochoa also asserts that the task force did not observe the CI for over 90 minutes and that the CI could have gotten the methamphetamine from another person because Sergeant Tate and Detective Hanberry testified that they had only been watching the CI for a short time. We disagree.

The State needed to prove that Bustos-Ochoa transferred methamphetamine to the CI on March 22, 2012. Before meeting with Bustos-Ochoa, the CI did not have drugs on his person or anywhere in his car. Detective Streissguth gave the CI \$1,240 in premarked bills to buy an ounce of methamphetamine. After the black Volkswagon left, Detective Streissguth found about an ounce of methamphetamine in the CI's car and the CI no longer had the premarked cash. Detectives Streissguth and Hanberry identified the driver of the black Volkswagon and the man who walked into the house at 78th Street as Bustos-Ochoa. Despite the discrepancies in their calculation of time, all the State's witnesses stated that they had sight of the CI from the time he was arrested earlier in the day until after the controlled buy was complete and never observed

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<sup>2</sup> Both parties stipulated that the substance Detective Streissguth recovered from the fuel door of the CI's car was methamphetamine.

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him interact with anyone else or any other part of his car until after the meeting with the black Volkswagon. Based on this evidence and the reasonable inferences therefrom, any rational juror could determine that Bustos-Ochoa transferred methamphetamine to the CI on March 22, 2012.

Although no one directly witnessed Bustos-Ochoa delivering the methamphetamine to the CI in the car, the reasonable inferences drawn from the State's evidence establish that a transfer of methamphetamine occurred. Accordingly, we affirm his conviction.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

*Johanson, A.C.J.*  
JOHANSON, A.C.J.

We concur:

*Hunt, J.*  
HUNT, J.

*Maxa, J.*  
MAXA, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,  
Respondent,  
v.  
ALEJANDRO BUSTOS-  
OCHOA,  
Appellant.

No. 44645-6-II

ORDER DENYING MOTION TO PUBLISH

APPELLANT moves for publication of the Court's April 1, 2014 opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Hunt, Maxa

DATED this 1<sup>st</sup> day of May, 2014.

FOR THE COURT:

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DIVISION II  
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STATE OF WASHINGTON  
BY  
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Johanson, A.C.J.  
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## HAYS LAW OFFICE

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### Transmittal Letter

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Court of Appeals Case Number: 44645-6

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Objection to Cost Bill

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Petition for Review (PRV)

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