

Court of Appeals No. 72302-2San Juan County  
 Superior Court Cause No. 13-1-05039-8  
 San Juan County District Court Cause No. 12-71

COURT OF APPEALS  
 DIVISION I.  
 OF THE STATE OF WASHINGTON

ERROL CHARLES SPEED  
 Appellant

v.

STATE OF WASHINGTON  
 Respondent

REPLY TO BRIEF OF RESPONDENT

Filed by Lawrence Curt Delay WSBA #20339  
 Counsel for Appellant Errol Charles Speed  
 232 A Street, Ste. 8 Friday Harbor, WA 98250  
 Telephone: 360-378-6976

2015 DEC 14 11:47  
 STATE OF WASHINGTON  
 COURT OF APPEALS  
 DIVISION I

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	2
REFERENCES TO THE RECORD	6
INTRODUCTION	7
REPLY TO ISSUES PRESENTED	7
CONCLUSION	32

## TABLE OF AUTHORITIES

### CASES

	Page
<u>Aguilar v. Texas</u> , 378 U.S. 108, 84 S.Ct. 1509	
(1964)	25-27, 29, 30, 32
<u>Spinelli v. U.S.</u> , 393 U.S. 410, 89 S.Ct. 584	
(1969)	25-27, 29, 30, 32
<u>State v. Cord</u> , 103 Wash. 2d 361, 693 P.2d 81	
(1985)	20, 27, 28
<u>State v. Fore</u> , 56 Wash. App. 339, 783 P.2d 626	
(1989)	24, 25
<u>State v. Graham</u> , 130 Wash. 2d 711, 724-25, 927	
P.2d 227, 234 (1996)	24, 25
<u>State v. Jackson</u> , 150 Wn.2d 251, (2003)	29, 30
<u>State v. Jones</u> , 55 Wash. App. 343, 346, 777 P.2d	
1053, 1054-55 (1989)	28, 29
<u>State v. Lyons</u> , 174 Wash. 2d 354, 275 P.3d	
314 (2012)	26, 27
<u>State v. Myrick</u> , 102 Wash. 2d 506, 688 P.2d 151	
(1984)	18, 20, 21
<u>State v. Wilson</u> , 97 Wash. App. 578, 988 P.2d 463	
(1999)	21
<u>State v. Young</u> , 123 Wash. 2d 173, 867 P.2d 593	
(1994)	21, 22

### STATE STATUTES

• RCW 9A.72.085	14
-----------------	----

### SAN JUAN COUNTY CODE

• SJCC 15.04.500	8
<p>“Accessory structure” means a structure that is incidental to and supports the use of the primary residence. Accessory structures include, but are not limited to, garages, carports, agricultural buildings and woodsheds, all being less than 1,000 square feet in area; decks and pumphouses; fences less than six feet in height; aboveground water tanks less than 5,000 gallons in capacity; and playhouses. Accessory structures cannot be inhabited.</p>	

• SJCC 15.04.540

15

...B. For the purpose of this section, an owner/builder owns property when he or she has recorded title to or is purchasing the property on a recorded real estate contract. To obtain a permit, the applicant shall first file an application in writing on a form furnished for that purpose by the building official. Every such application shall contain the following information:

1. Name and address of the applicant;
2. The address and location of the proposed structure including the tax parcel number(s) of the land on which it is to be located;
3. A plot plan indicating the location of the structure in relation to property lines and other structures;
4. One-quarter-inch minimum scale drawings, including foundation, floor plan, cross section view and all four exterior elevations. Any alteration to the approved plans that affect life safety requirements (SJCC 15.04.560), outside dimensions of the residence or other applicable codes must be submitted to the Permit Center. "As built" drawings shall be submitted to the Permit Center for informational purposes upon completion of the residence. Plans for exempt accessory structures are not required.

• SJCC 15.04.570

8, 13-15

A. A statement of exemption is required; however, no permit, fee nor inspection pursuant to the UBC shall be required for construction of accessory structures typically defined in the UBC as Group M1 or M2 occupancy structures when they are accessory to a private residence or to be used for agricultural purposes; provided that such structure shall not be used for human habitation.

B. Such statement of exemption shall be reviewed by the Permit Center and health and community services departments for compliance with state and County laws. Accessory structure exemptions are unlimited as to number unless prohibited by land use density requirements as determined by the County planning department. (Ord. 80-1992)

• SJCC 15.04.590

15

A. Other than as provided in this article, no inspection by the County building official shall be made of an owner/builder-constructed residence, appurtenant or accessory structure and Sections 305 and 306 of the UBC, 1988 Edition, shall not apply to owner/builder-constructed structures. The owner/builder shall arrange for the County building official to inspect said residence or appurtenant structure for life safety requirements prior to occupancy.

B. This subsection shall not be construed to limit inspections meant to insure compliance with other regulations or laws, such as plumbing, electrical, mechanical, sanitation and energy code requirements.

C. Any dwelling unit built using nonrenewable energy sources for heating will be required to meet energy code requirements as adopted by the state of Washington. The owner/builder will arrange and pay for energy code review and related inspections. Any additional inspections that an owner/builder desires can be arranged by appointment and payment of appropriate fees.

D. Structures built under an owner/builder permit may require successful completion of the following inspections:

1. Sanitary. Prior to the issuance of an owner/builder permit, a sanitary inspection and a sewage permit shall be required from the County health department. A pit privy shall be deemed in

compliance with this article; provided potable water under pressure is not plumbed into any structure requiring a plumbing permit from the building department.

2. Life Safety. As defined in SJCC 15.04.560.

3. Energy. Energy Code review is required if a nonrenewable heat source such as electricity, gas, oil or wood is used to heat a residence or appurtenant structure. Accessory structures must meet state energy code requirements if heated. Wood as a source of fuel is considered nonrenewable. Owner/builders must comply with state energy code requirements unless exempted as follows:

a. The building or structure or portion thereof may be exempt; provided the building or structure does not exceed a peak design rate of energy usage of more than 3.4 BTU/hr per square foot, or 1.0 watt per square foot of floor area for heating requirements; and

b. The indoor design temperature for the residential structure is based on a minimum of 70 degrees Fahrenheit for heating and 78 degrees Fahrenheit for cooling; or

c. A renewable heat source is used, such as (1) solar radiation; (2) energy sources resulting from wind, waves and tides, lake or pond thermal differences; and (3) geothermal;

d. Existing Buildings. See SJCC 15.04.710 for exceptions from full Energy Code compliance.

4. Electrical. Owner/builders using electricity are not exempt from Washington State Department of Labor and Industry requirements and must obtain electrical permits and inspections per Title 19, Chapter 19.28 RCW, Chapters 296-46 and

296-401 WAC.

5. Plumbing. Any plumbing requires a plumbing permit unless expressly exempted by Uniform Plumbing Code Section 20.5. Any structure which has internal plumbing requiring potable water under pressure shall be provided with a "grey water" sewage system meeting County health department's requirements and the requirements of the Uniform Plumbing Code pursuant to Chapters 10 and 11.

6. Mechanical. A mechanical permit and inspection(s) is/are required if mechanical devices are installed as defined in the Uniform Mechanical Code per Section 301(a) or as exempted per Section 301(b). (Ord. 80-1992)

REFERENCES TO THE RECORD<sup>1</sup>

---

<sup>1</sup>The record on appeal includes Clerk's Papers in envelopes #1-4, which contain documents filed with the trial court. To assist the reader, certain documents in those envelopes are reproduced in the appendices, along with other documents that are part of the Superior Court record that is part of the designated record.

The appendices referred to in this Reply Brief include references to appendices to Appellant's Brief, as well as the appendices to Appellant's Reply Brief, which continue the letter sequence of those appendices to the Brief of Appellant.

## INTRODUCTION

Respondent's Brief contains repeated misstatements of facts and repeated identical allegations. Respondent Errol Speed ("Speed") will address the misstatements and allegations just once rather than every time they occur.

This Reply does not include a response to additional issues the Court struck (per its letter of September 10, 2015) from Speed's opening brief on motion of the State, but which the State yet chose to address in its Brief. A response to those issues are in the accompanying Motion For Permission To File A Response To Additional Grounds For Review.

## REPLY TO ISSUES PRESENTED

At p. 1, ¶1, the state admits it used the Polaris images and notes at p.3 footnote 1 that

---

the public has free access to it. The State does not mention that the County created the images. The issue is not the availability of the images, but that the County created the images.

The images showed skylights, a porch, and a deck on the structure, which do not add to probable cause that it was a residence.

At p.1, ¶2 the State claims the affidavit of Chris Laws, the Department's Code Enforcement Officer ("CEO")<sup>2</sup>, established, without reference to the images attached to the affidavit, that "Speed had unpermitted structures and fixtures." This claim (repeated at p.18) is not correct.

At p.2, ¶4 (and see p.23) the State claims as a "given" that Speed's structure required a permit. But an accessory structure - one that supports a residence and has an area less than 1,000 sq. ft. - does not need a permit. SJCC 15.04.500 and

---

<sup>2</sup> Any reference in this brief to a CEO is always a reference to Chris Laws.



570A. The magistrate was not informed that the structure has an area of 864 square feet - which was stated in three places in the assessor's report, ("AREA: 864.0 sq.ft." at CP 213; "24X36" at CP 214; and "864" at CP 215). This data, and the report, were not disclosed to the magistrate.

Instead, the CEO informed the magistrate that the structure had a "footprint" of about "1332.5 square feet" (CP 177, ¶15). However, that figure is not labeled "footprint" in the report, CP 215, so it is unknown why the CEO claimed it was a footprint. Further, as CEO stands for "Code Enforcement Officer," he should have known that the area of an accessory structure is not to be measured by its footprint. See, Appx.B, Ex.E.

At p.24, ¶2, the State refers to a "reasonable probability" of the size of the structure; however, its size was not a debatable issue; it either was or was not over 1,000 sq. ft., and the

CEO had the data in hand to determine the size but did not provide that data to the magistrate.

At the top of p.23 the State claimed Speed gave no explanation as to why he did not need a permit. Speed did so, many times: See, Appx.U, V. and Brief Of Appellant p.13.

In footnote 7 at p.23 the State claims the CEO did not know the area of the structure. Wrong: the CEO stated he had seen the assessor's report, which report contained the area in three places; and as the Code Enforcement officer he also knew that its "footprint" was irrelevant.

The only reference in the affidavit to evidence of the structure (apart from the images) was the assessor's report, and it showed the structure to be within the allowable size for one that did not need a permit and showed that its characteristics - no heating system, electricity, plumbing, or septic - were not evidence of a residence.

At p.2, 11.4-7 (and at p.25), the State claims the County relied on its own investigation and not the informant's tip to establish probable cause; that is misleading - without the tip there would not have been an investigation.

The assessor's report indicates there was a wood stove in the structure (CP 213-214). Thus at p.2, ¶4 (and at pp.5, 20-21, 24 and 28) the State disputes staleness by claiming it always "indisputably" existed. However, a stove is an impermanent appliance, unlike a fireplace, and can be removed at any time. Thus, the presence or lack of a wood stove (State's Brief, p.4) may have been possible at any time. Further, the report is stale, as it was dated 2008.

Also, having a wood stove is not evidence it was *installed* and *functioning* in the structure. Note that at ¶¶21-28 of Appx.M, the CEO states he saw chimney piping outside the structure and saw a wood stove inside, but he never said they were

attached to each other. Further, the State presents no evidence that a permit is needed to merely possess a wood stove.

The assessor's report states near the bottom right of CP 213 that the interior of the structure was unfinished ("unfin"), indicating that a device such as a wood stove, may not yet have been installed. Further, to the left of that indication the report states there is no heating device ("none") in the structure, lending support to the absence of an installed woodstove.

At CP 177, ¶15, the CEO states that image "B" showed a "stove." It does not. At best, the image showed a chimney but not whether it was attached to anything. A wood stove is not mentioned in the search warrant except to determine whether one is attached to a chimney.  
(top of CP 173)

A chimney on a structure also does not support probable cause that the structure is residence,

for the CEO admitted in a District Court hearing, testifying that an accessory structure may have a chimney. Appx.W, p.4, 11.2,3.

Whether a wood stove is present or whether there is a permit for one has nothing to do with whether the structure was a residence. Further, the State refers to p.5, ¶18 (CP 177) of the affidavit, where the CEO concludes that "a mechanical permit is required for a wood stove," but the CEO provides no legal authority for his claim. The State thus fails to show that an *uninstalled* wood stove requires any permit.

At p.3, ¶2 (and at pp.4, 18, 19, 22, and 23), the State addresses the "statement of exemption" ("Statement") Speed submitted to the County pursuant to §570A.

At p.4 ¶2 the State claims the County rejected Speed's Statement because it was not on a certain form. However, SJCC 15.04.570B does not require use of a particular form; only that the Statement

be reviewed for compliance by state and county laws. Thus it is *ultra vires* under the Code for the County to require a certain form.

The County form, entitled "Owner Builder Affidavit for Exemption" ("Affidavit") (see, CP 227-28), is contrary to the Code: An affidavit is a statement made under oath, under a penalty of perjury. A "statement" is not made under oath unless the law states it is a "sworn statement." See, RCW 9A.72.085. Thus, the County may *not* require an *Affidavit*.

The Affidavit form states, "For Exemption" rather than "of exemption" found in §.570A. This changes the meaning of the document: "of" means having to do with, concerning, or derived from; whereas "for" means "in order to be; become, get, or have." The County form thus changes the meaning of §.570A from an exemption that exists to asking for an exemption one does not have.

The third sentence of the County's Affidavit requires the signer to "submit to the CD&P a plot plan drawing." This directly violates SJCC 15.04.540B.4, which states that no plan is required for an accessory structure.

The second page of the Affidavit lists signature blocks for examiners such as a permit coordinator, plans examiner, and storm water technician to sign their approval; however, no plan is needed under §.540B.4, no inspection is needed under SJCC 15.04.590, and no permit is needed under §.570. Further, the Affidavit states, "DOCUMENTS TO BE SUBMITTED" and lists various plans and a fee of \$105, but under §.570, no fee is needed either. CP 228.

In sum, the County's Affidavit form requires what the Code does not require. The form is actually an application for a building permit under Article I. of SJCC 15.04. presented as **the** form to complete to have an *exempt* accessory

structure, and by signing it the applicant voluntarily agrees to be removed from Article II. of SJCC 15.04., the Owner/ Builder provisions. This is *ultra vires* to the County's authority.

In the affidavit of October 16, 2012 (CP 175-79), the CEO conceals from the magistrate that Speed submitted his Statement to the County on February 2, 2012. That omission was misleading, as it concealed from the magistrate that Speed had complied with the requirements for having a lawful accessory structure. Therefore, points a)-d) at p.19 of the State's Brief were a direct result of the magistrate's conclusion that the structure required a permit and that Speed did not provide a statement of exemption.

At p. 3, ¶2 the State wrongly claims that a Statement of Exemption must first be obtained before building an exempt structure; there is no Code requirement that an exemption be *first*



obtained. Speed was thus not out of compliance for submitting his Statement when he did.

At p.4, ¶2 (and at pp.6, 14) the State claims the District Court asked the parties to address what could be seen at lawful altitude. It did not. Speed moved to suppress the images; that led the State to conduct fly-overs to shore up its claim of what can be seen from the air.

At the top of p. 5 (and at p.19), the State claims the County applied for a search warrant to get evidence that Speed gave a false statement to the assessor's office. Such a statement could only apply to the wood stove and the lack of electricity, plumbing, and septic. However, the County had no probable cause that *false* information had been given on those items, so the warrant should not have been issued to search for evidence of a false statement.

Also at p. 5 (and at p.18) the State claims that Speed did not have "the necessary permits"

for the trailer, and again cites to the CEO's affidavit, which again fails to provide any legal authority to support that conclusion. Further, at no time, anywhere, does the CEO provide legal authority for requiring such a permit.

At p.6, the end of ¶2 (and at p.28), the State addresses what the CEO claimed he saw from the aircraft during the fly-overs. But whatever he saw was tainted as he had already walked on the ground executing the unlawful search warrant.

The State claims at p.9 that magnified images are not unreasonably intrusive, but provides no authority for that statement. To the point, State v. Myrick, 102 Wash. 2d 506, 512, 688 P.2d 151, 154 (1984), provides that a lawful search may be done with the unaided eye. That means - no magnification.

At p. 9 and at the top of p.10 the State presents as a fact that the aerial photographs were taken at 4,800 ft. This is not a fact in

evidence: The Polaris images were *to have been* taken from an altitude of 4,800 ft. above average terrain. However, there is no evidence of the actual altitude of the aircraft when it was over the subject property.

At p.10 the State ironically says it was necessary to enlarge the images "to show the detail of the ground." This is exactly what constitutes an unreasonable search. Further, the magistrate was not informed by the affidavit either that the Polaris images were enlarged, or the level of enlargement.

At footnote 4 on p.10, the State falsely insinuates that Speed claims "the whole of his property" as curtilage. Speed claims just the area within the 150 foot wide heavily vegetated boundaries as curtilage. That is about 4.3 acres. The entire property is 11 acres (Appx. 0 to Brief of Appellant, p.18, last three lines.

The State claims at p.11 that Myrick's ruling at 514 - that a defendant does not have a privacy right where aerial surveillance reveals what can be identified with the unaided eye - does not include the logical deduction that lawful searches are those that do not use an aided eye.

The State wrongly argues that Myrick did not address visual enhancement devices; however, State v. Cord, 103 Wash. 2d 361, 365, 693 P.2d 81, 84 (1985), concluded that the element of visual enhancement is part of the ruling in Myrick when it stated, "In *State v. Myrick*, 102 Wash.2d 506, 688 P.2d 151 (1984), the aerial surveillance at issue had been conducted without visual enhancement devices at an altitude of 1,500 feet" (underlining added).

Likewise, Cord adds at the same page, "As in *Myrick*, the police here viewed the contraband without visual enhancement devices and from a lawful vantage point." Also see, State v.

Wilson, 97 Wash. App. 578, 581-82, 988 P.2d 463, 465 (1999) ("Aerial surveillance is not a search where the contraband is identifiable with the unaided eye, from a lawful vantage point, and from a nonintrusive altitude").

At p.12 the state applies binocular, flashlight and thermal imaging cases to aerial searches. They are inapt comparisons as the lawfulness of aerial searches has an altitude component, so the issue is not resolved by whether police can see more easily what is open to public view.

State v. Jackson, 150 Wn.2d 251, (2003) found GPS tracking to be "a particularly invasive method" as it is the electronic equivalent of having a police officer follow a suspect around the clock; it was "unusually invasive" by reason of the vast amount of information that can be obtained, some with no connection to wrongdoing.

Moreover, State v. Young, 123 Wash. 2d 173, 867 P.2d 593 (1994) supports Myrick's prohibition on

using an aided eye. In Young the court ruled as unreasonable a device that "goes well beyond an enhancement of natural senses." Young at 182-83. That is an aided eye view.

At p.13 ¶2, the State claims aerial views are not unreasonable searches if images are enlarged. However, if that results in seeing more than what may be seen with the unaided eye at lawful altitude, that is an unreasonable search.

In the middle of p.15 the State claims it was "undisputed" what the CEO saw. It was disputed - through the use of illegal images, the illegal search on the ground, the tainted search, etc.

At p.15 last paragraph, the State claims Speed did not challenge what Laws testified to seeing. Speed did - at the July 23 hearing, by having first searched on the ground, etc.

At the bottom of p.15 to top of 16 the State claims the Superior Court found it undisputed

that Speed did not challenge what the CEO observed. No court ever said that.

At p.18 the State claims probable cause to search the property by reason of a lack of a trailer permit; but lack of such a permit does not show that the structure is a residence.

At pp.18 (and at pp.22 and 23) the State claims probable cause because of a 2001 construction of an unrelated "accessory agricultural building." Speed disagrees; he was not the landowner, tenant, nor lessee of the property on which that structure was built, had no ownership interest in the structure, and had no responsibility towards either the land or the structure. Appx.AA.

The state claims at pp.20-21 that the one and three-year old images (State's Brief p.2, ¶4) were not stale by reason that the structure was existent when the warrant was executed. This is a fishing expedition, as no one can predict that

what is seen in an old image will still be in existence, unchanged, years later.

The state admits at p.21 that the CEO conceded an accessory structure may have characteristics of a residence. But the CEO failed to inform the magistrate that *by Code* (a) the building need not be surrounded by "agricultural activity" to be an accessory structure and (b) such activities may occur indoors; and by *Policy* footprint area does not apply. Thus the trial court allowed the CEO to ignore facts, policy and law, and accepted what the CEO chose to believe.

At p.22 the State points to State v. Graham, 130 Wash. 2d 711, 724-25, 927 P.2d 227, 234 (1996), which cites to State v. Fore, 56 Wash. App. 339, 783 P.2d 626 (1989), for the rule that "probable cause is not negated merely because it is possible to imagine an innocent explanation for observed activities."



However, in both Graham and Fore officers described an illegal drug sale, where an officer's experience matters; hence those cases do not stand as a license to ignore *Code, Policy,* and *Facts*, as the CEO did here.

At p.25 the State says, "Speed now contends that the lower courts erred by failing to employ the Aguilar-Spinelli test." Speed made that argument to the Superior Court. The Superior court found that no information about what Mr. Pearson may have said to the County employee was relied upon by the County.

¶4 of the affidavit (CP 175) said: "On or about December 16, 2011, I received an activity report...;" it did not say the report contained an informant's tip, did not say who the informant was, what he said, how he knew what he conveyed, or his veracity. The County simply sidestepped Aguilar-Spinelli and acted on the tip.

The activity report, CP 212, by a Deputy Building Official ("DBO"), reads in part, "After a conversation with [REDACTED] I was informed that the subject property had potentially engaged in construction of a single family residence without obtaining a building permit."

The activity report is devoid of an Aguilar-Spinelli inquiry. The DBO then investigated the claim of the unnamed informant, illustrating that his investigation was based on the informant's tip, and was unhampered by Aguilar-Spinelli.

The State addresses State v. Lyons, 174 Wash. 2d 354, 357, 275 P.3d 314, 315-16 (2012), which this court's Commissioner cited in the March 4, 2015, letter to the parties.

The state incorrectly claims at p.26 that Lyons held: "an affidavit for a search warrant that was based 'solely on information from a confidential informant' did not establish timely probable cause because the affidavit failed to state when

the informant observed the criminal activity.”

That quote misrepresents Lyons; see p.357

Aguilar-Spinelli does not apply only when a search warrant is based exclusively on what is reported by an informant. As correctly noted by this court's Commissioner and as stated in Lyons at 359, Aguilar-Spinelli applies whenever an affidavit is based on an unidentified informant's tip. That includes when the affidavit is even partially based on an informant's tip.

The state excuses the failure to comply with Aguilar-Spinelli by claiming that the CEO's investigation alone, though based upon information provided by the informant, supplied the court with probable cause. That approach, however, guts Aguilar-Spinelli and is not consistent with Lyons.

The State relies on State v. Cord, 103 Wash. 2d 361, 363, 693 P.2d 81, 83 (1985), in claiming that where an affidavit is sufficient to

establish probable cause without reference to information provided by an informant, the court need not address a challenge to the informant's reliability. However, in Cord the police had an anonymous tip and the affidavit provided no information about the informant or whether the informant had provided specific information as to the location of the marijuana in that case.

Cord chose to not address the issue of the reliability of the anonymous informant, stating at 365 that the affidavit was sufficient to establish probable cause absent information provided by the informant.

Speed's facts are different: here the informant was known, not anonymous, and ample information about the informant was in the possession of the County and relevant to the informant's veracity.

Further, in State v. Jones, 55 Wash. App. 343, 346, 777 P.2d 1053, 1054-55 (1989), material information about an informant that was known to

the police was withheld from the police and the appellate court upheld a dismissal because the information withheld was critical to the issue of the veracity of the informant.

In Speed's case the CEO *knew* there were "very contentious feelings" between Speed and the informant and the County Prosecuting Attorney had warned the County council that the informant was retaliating against Speed. See, Appx.C, Ex.5.

As in Jones, the CEO withholding information about Mr. Pearson the informant served to avoid disclosing to the magistrate critical information about the Mr. Pearson's veracity, which is a failure to comply with Aguilar-Spinelli.

Finally, the State relies on State v. Jackson, 102 Wash. 2d 432, 438, 688 P.2d 136, 140 (1984), for the point that if the informant's tip fails under Aguilar-Spinelli, probable cause may yet be established by independent police investigatory work that corroborates the tip. Nothing in

Jackson supports the CEO ignoring Aguilar-Spinelli and concealing from the magistrate that not only was there an informant, but also that the informant was hostile towards Speed.

At the top of p.28 the State claims the CEO confirmed the informant's tip as to the presence of the wood stove and trailer; wrong: Mr. Pearson said nothing about those items.

At the bottom of p.28 the State asserts it "did not rely on evidence from the flyovers for any other purpose," but the State does not discuss to what purpose it did rely upon the evidence.

The State relied upon that evidence for the purpose of showing that what was depicted in the images can be seen at a lawful altitude with an unaided eye. The irony, however, is that the same officers involved in the flyovers used telephoto lenses (Appx.Z, p.2, ¶12) to view the property and had seen the property on the ground.

At p.29 the State presents some of the CEO's testimony about the solar panel in an attempt to convey the idea that the CEO was able to see and recognize what he saw independently of what he had seen when he searched the property on the ground. The record of the CEO's testimony is at p.8, l.19 to p.10, l.4 of Appx.W, the transcript of the trial court proceedings of July 23, 2013.

In that testimony the CEO admits he (a) saw the solar panel on the ground, (b) knew its location, (c) knew it is a speck on the photograph he presented to the court, and (d) knew that anyone who had not been on the property would *not* recognize that speck as being a solar panel.

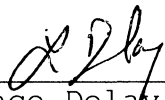
The CEO also testified at p.7, l.16 to p.8, l.18 of that transcript that he saw a water heater on the property, visible as a grayish object in a photograph he presented to the court, and that by looking at the photograph alone he

himself could not tell that it was a water heater  
but for having seen it on the ground.

The CEO's testimony undermined his claim, for  
what he saw from the air could be recognized only  
because he had earlier searched on the ground.  
Thus his observations during the flyovers were  
tainted by the earlier views when he executed the  
illegal warrant.

#### CONCLUSION

Errol Speed requests the court to find that the  
County failed to comply with Aguilar-Spinelli and  
improperly relied upon aerial images that were an  
unlawful search; there was no probable cause for  
the warrant; and that the fly-overs were tainted  
by the prior searches.

 Dec. 9, 2015  
\_\_\_\_\_  
Lawrence Delay WSBA 20339  
Counsel for Appellant

RECEIVED  
DEC 14 11:11 AM  
CLERK OF COURT



Court of Appeals No. 72302-2San Juan County Superior Court  
Cause No. 13-1-05039-8  
San Juan County District Court Cause No. 12-71

COURT OF APPEALS  
DIVISION I.  
OF THE STATE OF WASHINGTON

---

ERROL CHARLES SPEED  
Appellant

v.

STATE OF WASHINGTON  
Respondent

---

APPENDICES TO  
APPELLANT'S REPLY BRIEF

---

Filed by Lawrence Curt Delay  
WSBA #20339  
Counsel for Appellant Errol Charles Speed  
232 A Street, Ste. 8  
Friday Harbor, WA 98250  
Telephone: 360-378-6976

RECEIVED  
JAN 14 2014  
14:11:47  
W

The following documents are arranged alphabetically, according to the indicated letter listed by each document (documents A through T have been provided previously, in Appendices to Appellant's Brief):

- A.** DECLARATION OF ERROL C. SPEED, dated January 7, 2013
- B.** DECLARATION OF ERROL C. SPEED RE: MISLEADING STATEMENTS, dated July 31, 2013.
- C.** DEFENDANT'S MOTIONS TO DISMISS OR TO SUPPRESS AND MEMORANDUM, dated January 7, 2012
- D.** DECLARATION OF CHRISTOPHER LAWS, dated October 10, 2012
- E.** DECLARATION OF ERROL C. SPEED, dated March 12, 2013
- F.** DECLARATION OF GREG SUTHERLAND, dated FEBRUARY 2, 2013
- G.** RESPONSE TO MOTION TO DISMISS OR SUPPRESS dated February 11, 2013
- H.** DECLARATION OF ERROL C. SPEED, dated May 20, 2013
- I.** LETTER OF WARD CARSON dated July 5, 2013
- J.** DECLARATION OF WARD W. CARSON, dated July 19, 2013
- K.** DECLARATION OF CHERYL JACKSON, dated FEBRUARY 24, 2014
- L.** SEARCH WARRANT, dated October 16, 2012
- M.** DECLARATION OF CHRISTOPHER LAWS dated November 14, 2012
- N.** BRIEF OF APPELLANT FILED IN SAN JUAN COUNTY SUPERIOR COURT dated January 14, 2014
- O.** FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE dated October 23, 2013
- P.** DECLARATION OF ERROL C. SPEED dated June 20, 2013
- Q.** LETTER DECISION OF THE SUPERIOR COURT dated July 9, 2014
- R.** Administrator v. Harkom, 35 C.A.B. 934 (1962)
- S.** Richards v. Pick, NTSB Order No. EA 3646, August 24, 1992; March 3, 2010, letter to Ms. Simmons from Rebecca B. McPherson; FAA Memorandum dated August 28, 2012
- T.** ORDER ON MOTION RE: TRANSCRIPT AND OVER-LENGTH BRIEF dated December 20, 2013
- U.** DEFENDANT'S MEMORANDUM RE: THE STATE'S CLAIMS RE: STATEMENT OF EXEMPTION dated June 3, 2013
- V.** Omitted.

- W.** VERBATIM REPORT OF PROCEEDINGS; TUESDAY, JULY 23, 2013; THE HONORABLE STEWART R. ANDREW, JUDGE filed April 10, 2015
- X.** Omitted.
- Y.** Omitted.
- Z.** DECLARATION OF ERROL C. SPEED, filed June 20, 2013
- AA.** DECLARATION OF ERROL C. SPEED, dated September 3, 2013

Following is the text of a state statute cited in Appellant's Reply Brief:

STATE STATUTE

- RCW 9A.72.085

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (2) Is subscribed by the person;
- (3) States the date and place of its execution; and
- (4) States that it is so certified or declared under the laws of the state of Washington.

Dated this 9 day of Dec., 2015.

  
\_\_\_\_\_  
Lawrence Delay/WSBA 20339  
Counsel for Appellant

U

1  
2  
3  
4 IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
5 IN AND FOR THE COUNTY OF SAN JUAN

6 STATE OF WASHINGTON, ) CASE NO. 12-71  
7 Plaintiff, )  
8 vs. ) DEFENDANT'S MEMORANDUM  
9 ERROL CHARLES SPEED, ) RE: THE STATE'S CLAIMS RE:  
10 Defendant. ) STATEMENT OF EXEMPTION

11 Defendant Errol Speed ("Speed"), by and through counsel  
12 Lawrence Curt Delay hereby responds to the State's claims that  
13 Speed's Statement of Exemption had no legal effect. The claim  
14 is based on allegations in the State's Memorandum filed on May  
15 28, 2013, that (1) the statement was not filed on "the form  
16 required by the permit center;" (2) Speed "failed to provide any  
17 of the information required" for staff at the CD&P to perform  
18 its review under SJCC 15.04.570B; and (3) the county did not  
19 approve Speed's statement of exemption. This memorandum is  
20 supported by the Declaration of Lawrence Curt Delay.

21 In the Declaration of Christopher Laws filed on May 17,  
22 2013, the State contends for the first time that the Statement  
23 of Exemption Speed filed on February 2, 2013, was not accepted  
24 by the County, though Mr. Laws previously stated that Speed  
25 filed one "pursuant to SJCC 15.04.570." See, paragraph 12,  
26 Declaration of Christopher Laws dated November 28, 2012.  
Nowhere in that paragraph did Mr. Laws assert that Speed's  
Statement of Exemption was invalid or was not accepted.

1 That assertion is raised in the State's May 28 filing, and  
2 as this argument is the very first one it raises in its May 28  
3 Memorandum, it implies the State places great stock in it; for  
4 that reason Speed submits this Memorandum to illustrate why the  
5 State's position is without support in the law.

6 First, at note 1 on page 3 of its Memorandum, the State  
7 contends that counsel for Speed was informed that Speed "failed  
8 to submit the appropriate form" and that thereafter Speed failed  
9 to "correct the situation." That is not correct; rather, Speed  
10 took the position that \$.570 did not require the use of a  
11 particular form and if the correct form were provided, his  
12 counsel would review it.

13 Second, at note 1 on page 3 of its Memorandum, the State  
14 contends that "SJCC 15.04.080 provides the director with  
15 authority to administer and enforce the owner-builder provisions  
16 of the code and establish procedures:" That is an incorrect  
17 statement of the law because \$.080 B provides, "Unless otherwise  
18 delegated by the County administrator, the director shall  
19 administer and enforce the codes adopted in this article"  
20 (emphasis added). SJCC 15.04 is divided into two Articles, I.  
21 applies to building codes, and II. applies to owner/builder  
22 provisions, which contains the authority for an accessory  
23 structure, under \$.570; thus, the authority granted to the  
24 director to administer the codes under \$.080 B, which is what  
25 the State refers to, is limited to the *building code* and there  
26 is no language in Article II. that grants similar authority to  
the Director with regard to the *owner/builder provisions*.

1 In the case at hand, the Director has produced a form  
2 purporting to be the one to be used by a citizen wishing to  
3 submit a statement of exemption under \$.570. That requirement  
4 is simply *ultra vires* to his authority under the statutes and  
5 regulations governing his position. *Ultra vires* acts are those  
6 performed with no legal authority and are void on the basis that  
7 no power to act existed. South Tacoma Way, LLC v. State, 169  
8 Wash. 2d 118, 123, 233 P.3d 871, 874 (2010).

9 At the second note, the State claims that the Director has  
10 the authority to enforce the owner builder provisions. However,  
11 under \$.540 B.4., no plan is required to be submitted; under  
12 \$.590 "...no inspection by the County shall be made of an ...  
13 accessory structure;" \$.660 provides that a record is to be  
14 kept of statements of exemption filed; and under \$.570, no fee  
15 and no permit are required. In short, regarding a statement of  
16 exemption per se, nothing much is required of the Director.

17 The State continues at its second note that the Director is  
18 to determine if the items necessary for a complete application  
19 meet the minimum requirements established by RCW 19.27.095.  
20 However, statute \$.095 refers exclusively to an application for  
21 a building permit, but as has been stated, no permit required of  
22 an accessory structure by virtue of \$.570. For the director to  
23 create a body of work to do with a statement of exemption, is  
24 therefore simply *ultra vires* to his authority.

25 Going back to a basic error committed by CD&P, \$.570 states  
26 that a "statement of exemption" is required. However, the form  
provided to the court by the State, attached to the May 15  
Declaration of Christopher Laws, is entitled "Owner/Builder  
Affidavit For Exemption." There are many aspects of the form

1 that are simply *ultra vires* to the regulatory scheme: (1) there  
2 is no reference in the Code to an affidavit for exemption;  
3 hence, CD&P has no authority to require the citizens of the  
4 county to complete such a form.

5 (2) §.570 A. expressly states, "A statement of exemption  
6 is required...." The use of the indefinite article, "A", used to  
7 qualify the associated noun "statement" in this sentence,  
8 connotes a thing not previously noted or recognized in the text;  
9 whereas "the" would refer to a thing previously noted or  
10 recognized in the text. Therefore, if "the" had been used prior  
11 to "statement", it would have indicated a previously noted or  
12 recognized statement. However, as that is not the case, the  
13 meaning of "statement" is determined only by what is contained  
14 in the sentence itself.

15 (3) An affidavit is a statement made under oath; that is,  
16 made under a declaration under penalty of perjury that it is the  
17 truth. A "statement" is not made under penalty of perjury,  
18 unless the law states it is a "sworn statement." See, RCW  
19 9A.72.085. Therefore, for CD&P to require the builder of an  
20 accessory structure to submit an *affidavit* when the Code  
21 requires no more than a *statement* is *ultra vires* to the  
22 authority of the CD&P.

23 (4) The use of the term "For Exemption" rather than "of  
24 exemption" changes the meaning and purpose of the document.  
25 "Of" means: having to do with, concerning, derived from or  
26 coming from; whereas "for" means "in order to be; become, get,  
have." Applied to the matter at hand, CD&P's form changes the  
Code's meaning that an exemption is a given, into applying for



an exemption that one does not have. This change of status of what is held is likewise *ultra vires* to CD&P's authority.

(5) The text of the purported Affidavit itself works havoc with what the Code requires of an accessory structure owner, as is evident from a close reading of its fine print. In its opening sentences the signer is stating that he "will submit to the CD&P" a plot plan drawing, though that is in direct violation of §.590, under which no plan is required.

(6) The second page of the Affidavit is a Notification for those persons purportedly applying for the exemption, which is *ultra vires* to the authority of CD&P: it lists signature blocks for examiners to sign their approval, for a permit coordinator, plans examiner, and stormwater technician; however, as stated previously, no plan is required (§.540 B.4); no inspection is required (§.590), and no permit is required (§.570). Further, the notice lists in all capital letters, "DOCUMENTS TO BE SUBMITTED", and lists various plans, and a fee of \$105, though under §.570, no fee is required.

In summary, CD&P's Affidavit is really an application for a building permit, under Article I. of SJCC 15.04. posed as **the** form to fill out to satisfy the Code requirement of a statement of exemption required in order to have an accessory structure. Under CD&P's *ultra vires* form, once the first page is signed, the applicant is totally removed from Article II., which is not consistent with the letter and spirit of Article II.

In the case at hand, Speed filed a statement of exemption. The reasonable reading of the review requirement under §.570 B is that if CD&P did not have enough information based upon what

1 was in the statement submitted by a citizen, it would make an  
2 inquiry of the citizen. Here, no inquiry was made of Speed; in  
3 fact, there is no record that CD&P did not accept his statement.  
4 Its only response to the statement was that it was not on its  
5 form; and, further, when Mr. Laws stated that Speed had  
6 submitted his statement "pursuant to SJCC 15.04.570" the  
7 implication was that the statement was accepted.

8 However, the State now claims Speed "failed to provide any  
9 of the information required" for staff at the CD&P to review.  
10 That is not correct: in his statement Speed provided the tax  
11 parcel number, street address, and the fact the structure was a  
12 single story under 1,000 square feet. Further, CD&P already had  
13 in its possession Polaris aerial photos, which, based upon the  
14 location information Speed provided, would have illustrated that  
15 the structure was well back from the ten-foot set back required.  
16 In addition, CD&P was in possession of the Assessor's office  
17 records, which supported Speed's statement of exemption.

18 At page 2, 11.22-26 of his May 15, 2013, Declaration, Mr.  
19 Laws states that another reason Speed's statement of exemption  
20 was not accepted was that it was not "accompanied by the  
21 required supporting documents..." However, \$.570 does not  
22 require a citizen to support his statement of exemption with any  
23 documents; therefore, this claim is not supported by the law.


24 Mr. Laws continues in his declaration at p.3, 11.7-9, that  
25 "...habitable structures ... are not exempt structures, and must be  
26 permitted..." That is also an incorrect statement: the pertinent  
rule is that, "Accessory structures cannot be inhabited." (SJCC  
15.04.500.) A "habitable structure" is one that is capable of  
being inhabited, which is not the same as a structure that is

1 actually inhabited. So a structure capable of being inhabited  
2 is not therefore required to be permitted. In short, \$.570  
3 addresses actual use, not the capacity for a potential use.

4 In conclusion, while the State claims Speed's Statement of  
5 Exemption had no legal effect, in fact, the contrary is true:  
6 the form required by CD&P has no legal effect and the attempts  
7 of that office to impose upon Speed the various requirements  
8 addressed by their form are *ultra vires* to its statutory and  
9 regulatory authority, and are therefore illegal.

10 Further, the purported bases that CD&P gave for not  
11 accepting Speed's Statement of Exemption are not valid under the  
12 County Code.

13 Dated this 3 day of June, 2013.

14  
15   
16 \_\_\_\_\_  
17 Lawrence Curt Delay; WSBA #20339  
18 Attorney for Plaintiff  
19  
20  
21  
22  
23  
24  
25  
26

**W**

COUNTY CLERK'S OFFICE  
FILED

APR 10 2015

JOAN P. WHITE  
SAN JUAN COUNTY, WASHINGTON

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SAN JUAN

STATE OF WASHINGTON,	)	
	)	Court of Appeal No. 72302-2
Plaintiff,	)	Appeal Case No. 13-1-05039-8
	)	District Court No. 000012-71
vs.	)	
	)	
ERROL CHARLES SPEED,	)	
	)	
Defendant.	)	

---

VERBATIM REPORT OF PROCEEDINGS  
TUESDAY, JULY 23, 2013  
THE HONORABLE STEWART R. ANDREW, JUDGE

---

TRANSCRIBED FROM AUDIO FILE BY:  
BRANDI LEWIS

ORIGINAL

CORPOLONGO & ASSOCIATES  
114 West Magnolia Street, Suite 400-110  
Bellingham, WA 98225  
1 (360) 671-6298

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SAN JUAN

STATE OF WASHINGTON, )  
 ) Court of Appeal No. 72302-2  
Plaintiff, ) Appeal Case No. 13-1-05039-8  
 ) District Court No. 000012-71  
vs. )  
 )  
ERROL CHARLES SPEED, )  
 )  
Defendant. )

-----TRANSCRIPT-----

BE IT REMEMBERED THAT on the 23rd day of July  
2013, the above-entitled and numbered cause came regularly  
on for hearing before the Honorable Stewart R. Andrew,  
District Court Judge for the County of San Juan, State of  
Washington.

APPEARANCES

For the Plaintiff: KAMIL PETER PALUBICKI  
Prosecuting Attorney's Office  
PO Box 94667  
Seattle, WA 98124-4667  
206.684.7802  
206.684.4648 (Fax)  
peter.palubicki@seattle.gov

For the Defendant: LAWRENCE CURT DELAY  
Attorney at Law  
232 A Street Eight  
PO Box 698  
Friday Harbor, WA 98220-9590  
360.378.6976  
360.378.6848 (Fax)  
Icdelay@rockisland.com

1 (Beginning of Requested Transcript.)

2 TESTIMONY OF CHRIS LAWS

3 Having been duly sworn, testified, as follows:

4 DIRECT EXAMINATION

5 BY MR. DELAY:

6 Q. And you submitted to the judge as attachments --  
7 attachments A, B, C and D that the structure -- you  
8 actually had a white box that said suspected SFR,  
9 right?

10 A. Yes.

11 Q. And that SFR means single family residence, right?

12 A. Yes.

13 Q. Why did you not identify the structure as a suspected  
14 accessory structure?

15 A. Because I believed it to be a single family residence.

16 Q. And you based the single -- a suitable conclusion is  
17 it was a single family residence because why; an  
18 accessory structure would not have skylights?

19 A. No. Not at all.

20 Q. It would not have a chimney?

21 A. No.

22 Q. Would not have a porch, would not have a deck?

23 A. No.

24 Q. It's true an accessory structure may have a skylight,  
25 then, right?

1     **A.**     **Sure.**

2     **Q.**     **It may have a chimney?**

3     **A.**     **Yes.**

4     **Q.**     **May have a porch?**

5     **A.**     **Yes.**

6     **Q.**     **May have a deck?**

7     **A.**     **Yes.**

8     **Q.**     **And a deck would also be consistent with an accessory**  
9               **structure that is used for agricultural purposes,**  
10              **right?**

11    **A.**     **I couldn't speak to that.**

12    **Q.**     **You also noted that the structure was located a**  
13               **distance from agricultural activity?**

14    **A.**     **Yes.**

15    **Q.**     **Why in that declaration did you think it important to**  
16               **address agricultural activity?**

17    **A.**     **Well, I was trying to demonstrate to The Court that**  
18               **the location of the suspected single family residence**  
19               **was consistent with where, um, my years of planning**  
20               **experience and other experience in the department we**  
21               **would -- we would expect to see a single family**  
22               **residence. Most people that we see who apply for**  
23               **agricultural, you know, farm type of buildings don't**  
24               **necessarily put their house right next to it or by a**  
25               **field.**



1 Q. But Mr. Law --

2 A. This just seemed more consistent.

3 Q. But Mr. Speed did not apply for anything?

4 A. Correct.

5 Q. Okay, so why did you think it was important to comment  
6 on proximity to agricultural activity?

7 A. Because most -- it is the opinion of the department  
8 that most people don't put their houses right next to  
9 their Ag fields. And if -- if I recall correctly Mr.  
10 Speed declared that this was an agricultural accessory  
11 structure and so the department is looking at it and  
12 thought well, if it is indeed a barn, let's say, it  
13 would make more sense for it to be closer to the  
14 agricultural.

15 Q. But are you familiar with the definition of an  
16 accessory structure?

17 A. Excuse me?

18 Q. Are you familiar with the definition of an accessory  
19 structure?

20 A. I cannot quote it to you verbatim, but, yes, there is  
21 a definition.

22 Q. Okay.

23 (A portion of the hearing not transcribed.)

24 BY MR. DELAY:

25 Q. "Accessory structure means a structure that is

1 incidental to and that supports the use of the primary  
2 residence." Period. So, Mr. Laws, why is it  
3 important to even mention distance from agricultural  
4 activity in light of this definition?

5 A. Well, because there's -- according to the Defendant  
6 there is no primary residence here.

7 Q. Objection, non-responsive.

8 Why is it important to address proximity to  
9 agricultural activity with regard to this structure?

10 A. That's just the opinion of the department. In looking  
11 at this, remember when I'm doing an investigation I  
12 have to use all the facts that are present to me. So  
13 as I look at this I cannot ignore the prox -- the  
14 location of this structure in -- when -- in  
15 relationship to the entire parcel. So as I look at  
16 the entire parcel and I'm having to make judgments  
17 like, okay, what can this reasonably be; can  
18 reasonably be a barn?

19 (A portion of the hearing not transcribed.)

20 BY MR. DELAY:

21 Q. Are you familiar with the term permaculture?

22 A. Permaculture?

23 Q. Yes.

24 A. I've hear of it, but I can't give you a definition?

25 Q. Do you know what it is?

1     **A.**     **Agriculture that's permanent?**

2                 I don't know the definition of it is, I'm sorry.

3     **Q.**     **Would it surprise you that if permaculture means**  
4                 **sustainable architecture and self-maintained**  
5                 **agricultural systems modeled from natural ecosystems?**

6     **A.**     **And you if you say that's what it is I am sure it is.**

7     **Q.**     **Are you familiar with what permaculture homesteads**  
8                 **look like from aerial photos?**

9     **A.**     **Um, no.**

10    **Q.**     **Would it surprise you that the structure in question**  
11                **is surrounded by permaculture?**

12    **A.**     **Well, since I don't have a clear understanding of what**  
13                **that really means, I can't answer that. I am sorry.**

14                **(A portion of the hearing not transcribed.)**

15    BY MR. DELAY:

16    **Q.**     **You said in your field report that you saw a water**  
17                **heater, right?**

18    **A.**     **I said I saw the water heater, yes.**

19    **Q.**     **The water heater?**

20    **A.**     **I believe so.**

21    **Q.**     **Is that in the photos either -- is it the five or six?**

22    **A.**     **Yes. In the photographs I took.**

23    **Q.**     **Okay.**

24    **A.**     **Yes.**

25    **Q.**     **Can you show me on Exhibits 5 or 6 where it is?**

1       **A.    Yes.**

2                   MR. PALUBICKI:  Just so the record is clear,  
3                   which exhibit were you referring to Mr. Laws and Mr.  
4                   Lawrence took?

5                   MR. DELAY:  Five and six.

6       BY MR. DELAY:

7       **Q.    And, for the record, that is a sort of grayish object**  
8                   **to the right of the small porch?**

9       **A.    Yes.**

10      **Q.    Is that accurate?**

11      **A.    Yes.**

12      **Q.    Now, looking at the photograph, how can you that is a**  
13                   **-- or the water heater?**

14      **A.    You can't.**

15      **Q.    But you just testified that you saw the water heater?**

16      **A.    I did see it.**

17      **Q.    Isn't that because you saw it on the ground?**

18      **A.    Yes.**

19      **Q.    You testify -- you testified -- sorry.  You stated in**  
20                   **your field report that you saw a solar panel, right?**

21      **A.    Yes.**

22      **Q.    Is that in the photograph?**

23      **A.    Yes.**

24      **Q.    Where is it?**

25                   MR. PALUBICKI:  Which Exhibit are you referring

1 to Mr. Lawson?

2 MR. LAWS: Exhibit 6, again.

3 MR. PALUBICKI: Thank you.

4 BY MR. DELAY:

5 Q. Are you referring to the little specks of something  
6 that does not appear to be green to the right of what  
7 you said was the water heater?

8 A. Well, remember that a photograph is something taken in  
9 a moment of time. As we circled around the entire  
10 property we could see clearly that it was a solar  
11 panel.

12 Q. Okay. But in this photograph, just a clarification,  
13 you are pointing to a speck of something that may not  
14 be green to the right of what you said was the water  
15 heater?

16 A. Yes.

17 Q. Now, if -- if you were to show this to anyone who had  
18 not been on the property would they -- you agree they  
19 wouldn't recognize that immediately as being a solar  
20 panel, would they?

21 A. Of course not. Not just from the picture.

22 Q. But you know it's a solar panel because you saw it on  
23 the ground?

24 A. Actually, in that case even at 500 to 1,000 feet you  
25 can clearly tell it's a solar panel.

1       Q.     But you also saw the solar panel on the ground, right?

2       A.     Yes.

3       Q.     You saw it in this exact location, right?

4       A.     Yes.

5                       (End of requested transcript.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

STATE OF WASHINGTON.        )  
  )    S S :  C E R T I F I C A T E  
COUNTY OF WHATCOM        )

I, BRANDI MARIE LEWIS, Notary Public in and  
for the State of Washington do hereby certify;

That the foregoing is a true and correct to  
transcription of the audio recording taken on the date  
and at the time and place as shown on page One hereto;

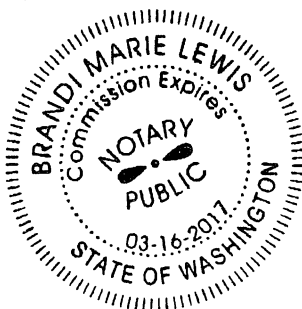
That I am not related to any of the  
parties to this litigation and have no interest in the  
outcome of said litigation;

Witness my hand and seal this 26th day of

March, 2015.

*Brandi Lewis*

BRANDI MARIE LEWIS, NOTARY PUBLIC,  
IN AND FOR THE STATE OF  
WASHINGTON, RESIDING  
AT BELLINGHAM. NOTARY EXPIRES  
MARCH 16, 2017.



IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SAN JUAN

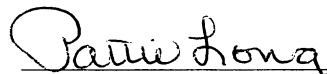
STATE OF WASHINGTON, )  
 ) Court of Appeal No. 72302-2  
Plaintiff, ) Appeal Case No. 13-1-05039-8  
 ) District Court No. 000012-71  
vs. )  
 )  
ERROL CHARLES SPEED, )  
 )  
Defendant. )

-----  
NOTICE OF FILING  
-----

Lawrence Curt Delay Court of Appeals  
Attorney at Law Division One  
PO Box 698 One Union Square  
Friday Harbor, WA 98220-9590 600 University Street  
Seattle WA 98101-4170

PLEASE TAKE NOTICE that on the 31st day of  
March, 2015, the original of the above-numbered and named  
Verbatim Report of Proceedings, dated July 23, 2013, was  
mailed to Lawrence Delay for Filing with Sand Juan County  
Clerks Office.

DATED this 30th day of March, 2015.

  
PATTIE LONG, OFFICE ADMINISTRATOR  
CORPOLONGO & ASSOCIATES  
114 West Magnolia, Suite 400-110  
Bellingham, WA 98225

(360) 671-6298



**Z**

State of Washington  
County of San Juan

I, CYNTHIA ROSE Clerk of the District  
Court of the State of Washington, for the County of San Juan  
do hereby certify that the foregoing instrument is a true and  
correct copy of the original now on file in my office.  
IN TESTIMONY WHEREOF, I have hereunto set my hand  
and affixed the Seal of said Court at my office at Friday Harbor  
this 14th day of Dec, 2013.

Cynthia Rose  
District Court Clerk

DISTRICT COURT  
FILED

JUN 20 2013

By CP Clerk  
San Juan County, Washington

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SAN JUAN

STATE OF WASHINGTON, )  
Plaintiff, ) CASE NO. 12-71  
vs. )  
ERROL CHARLES SPEED, ) DECLARATION OF ERROL C. SPEED  
Defendant. )

I, Errol C. Speed, being first duly sworn according to law,  
depose and state as follows:

1. I am the defendant in this case and I have personal knowledge of the facts in this declaration.
2. I reside at 629 Minnow Creek Lane, in the community of Westsound on Orcas Island, Washington. In my neighborhood, which is approximately a one half mile square, there are over 50 residences (and many more structures). It is a congested residential area. See my attached map of my neighborhood.
3. The approximate boundaries of my neighborhood area are:  
Nordstrom Lane/ Swan Road/Wildwood Road to the north; Mountain Crest Drive/ Northern Lights Drive/ Honeysuckle Lane to the east; Pinneo Road to the south; and Orcas Road to the west.
4. On Saturday, June 1, 2013, at approximately 2:15 pm, a hi-wing Cessna type aircraft, that appeared to be white and blue, repeatedly circled my residential and agricultural areas at what appeared to me to be less than 500 feet above the ground.

1 5. The aircraft's engine noise was much louder than I have  
2 heard in the past, so much so that it was impossible to ignore,  
3 and was very disturbing and invasive to me.

4 6. It also highly agitated my livestock, which include a  
5 horse, goats, chickens, and a goose. My horse was so agitated  
6 that she ran snorting and whinnying into the forested areas of  
7 her enclosure.

8 7. My flock of chickens ran for cover in the brush, sounding  
9 their warning calls as they commonly do when a bird of prey is  
10 flying low above their area.

11 8. I could not get a clear view of the aircraft's numbers, as  
12 I was in a treed area of my property and the aircraft was flying  
13 in circles.

14 9. The plane climbed in altitude and circled again. Within  
15 approximately five minutes or so of the aircraft's arrival, it  
16 departed to the southwest.

17 10. It is very uncharacteristic of normal air traffic near my  
18 property, which flies at what I estimate to be over 1,000 feet  
19 above the ground, and in a single direction transit.

20 11. The minimum safe altitude over my residential area is over  
21 1,000 feet. There are Douglas fir trees on my property that  
22 approach 100 feet in height and a hill with a 347-foot elevation  
23 approximately 1,500 feet from my land. This would have required  
24 the pilot to fly at even a higher altitude than 1,000 feet to  
25 meet the FAR 91.119(b) requirement.

26 12. I have reviewed the metatags of the seven photographs  
provided to me by my counsel (the prosecutor's office numbered  
the photos). The tags provide technical data about each  
photograph, which data is set forth in the following paragraph.  
The data indicates that all the photographs were taken with a  
camera using magnification - which is a focal length of over  
43mm. Here, the focal lengths were 190mm and 155mm.

#1 DSC00025.JPG

Camera- Sony  
Model- DSC-H200  
F-stop f/5.4  
Exposure Time- 1/250 sec.  
ISO Speed ISO-160  
Exposure bias 0 Step  
Focal Length 34mm  
Max Aperture 3.265  
Metering Multi Spot  
Flash No Flash  
35mm focal length 190

#2 DSC00026.JPG

Camera- Sony  
Model- DSC-H200  
F-stop f/5.4  
Exposure Time- 1/250 sec.  
ISO Speed ISO-80  
Exposure bias 0 Step  
Focal Length 34mm  
Max Aperture 3.265  
Metering Multi Spot  
Flash No Flash  
35mm focal length 190

#3 DSC00028.JPG

Camera- Sony  
Model- DSC-H200  
F-stop f/5.4  
Exposure Time- 1/200 sec.  
ISO Speed ISO-80  
Exposure bias 0 Step  
Focal Length 34mm  
Max Aperture 3.265  
Metering Multi Spot  
Flash No Flash  
35mm focal length 190

#4 DSC000030.JPG

Camera- Sony  
Model- DSC-H200  
F-stop f/5.4  
Exposure Time- 1/250 sec.  
ISO Speed ISO-100  
Exposure bias 0 Step  
Focal Length 34mm  
Max Aperture 3.265  
Metering Multi Spot  
Flash No Flash  
35mm focal length 190

#5 DSC00032.JPG

Camera- Sony  
Model- DSC-H200  
F-stop f/5.4  
Exposure Time- 1/160 sec.  
ISO Speed ISO-100  
Exposure bias 0 Step  
Focal Length 34mm  
Max Aperture 3.265  
Metering Multi Spot  
Flash No Flash  
35mm focal length 190

#6 DSC00033.JPG


Camera- Sony  
Model- DSC-H200  
F-stop f/5.4  
Exposure Time- 1/250 sec.  
ISO Speed ISO-200  
Exposure bias 0 Step  
Focal Length 34mm  
Max Aperture 3.265  
Metering Multi Spot  
Flash No Flash  
35mm focal length 190

#7 DSC00035.JPG

Camera- Sony  
Model- DSC-H200  
F-stop f/5.2  
Exposure Time- 1/250 sec.  
ISO Speed ISO-160  
Exposure bias 0 Step  
Focal Length 28mm  
Max Aperture 3.265  
Metering Multi Spot  
Flash No Flash  
35mm focal length 155

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of June, 2013, in Eastsound, Washington.

  
ERROL C. SPEED

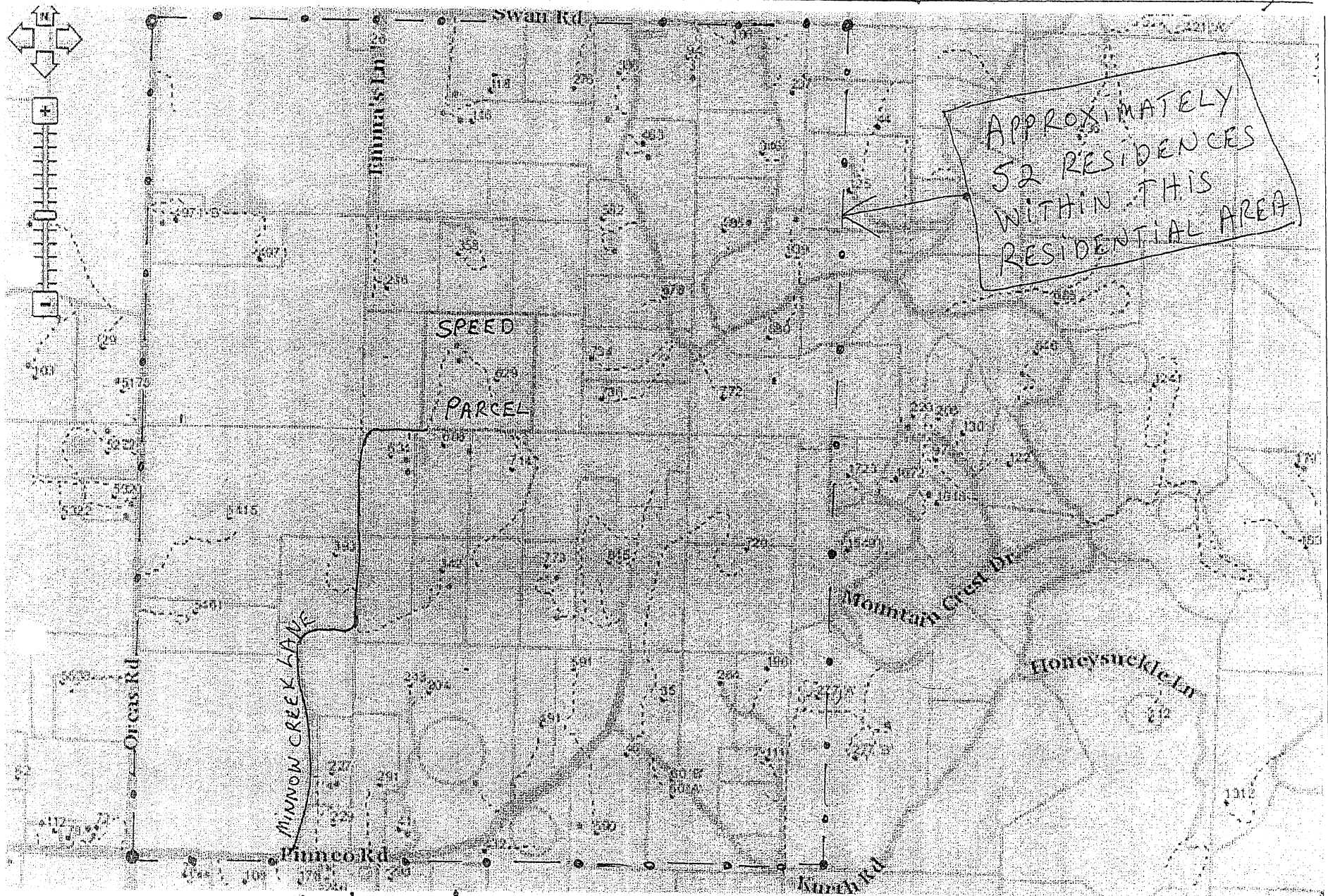
*by telephonic authorization*

SPEED RESIDENCE IS

LOCATED AT 629 MINNOW CREEK

LANE.

= APPROXIMATE BOUNDARIES OF CONGESTED AREA (APPROX. .5 mile X .5 mile)



CONGESTED RESIDENTIAL AREA SURROUNDING SPEED RESIDENCE  
LOCATED WITHIN THE WESTSOUND COMMUNITY / SETTLEMENT - ORCAS ISLAND, WA

**AA**

1  
2  
3  
4 IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
5 IN AND FOR THE COUNTY OF SAN JUAN

6 STATE OF WASHINGTON, )  
7 Plaintiff, ) CASE NO. 12-71  
8 vs. )  
9 ERROL CHARLES SPEED, ) DECLARATION OF ERROL C. SPEED  
10 Defendant. )  
11

12 I, Errol C. Speed, being first duly sworn according to law,  
13 depose and state as follows:

- 14 1) I am the defendant in this case and I have personal  
15 knowledge of the facts in this declaration.  
16 2) In the late 1990s I participated in the construction and use  
17 of a building located on land owned by Fred Ayer on Orcas Island.  
18 3) The permit application for that building was obtained by  
19 another person.  
20 4) I was neither the landowner, tenant, or lessee of that land  
21 owned by Mr. Ayer; thus, I had no responsibility towards either  
22 the land or any structure built upon it.  
23 5) I also had no control over either Mr. Ayer or the person who  
24 applied for the permit for that building.

25 I declare under penalty of perjury under the laws of the State  
26 of Washington that the foregoing is true and correct.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2013, in Eastsound, Washington.

\_\_\_\_\_  
ERROL C. SPEED



IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SAN JUAN

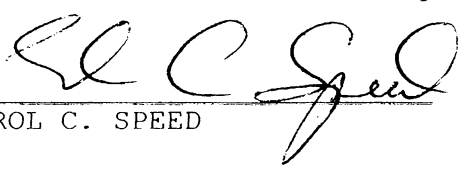
STATE OF WASHINGTON,	)	
Plaintiff,	)	CASE NO. 12-71
vs.	)	
ERROL CHARLES SPEED,	)	DECLARATION OF ERROL C. SPEED
Defendant.	)	

I, Errol C. Speed, being first duly sworn according to law,  
depose and state as follows:

- 1) I am the defendant in this case and I have personal knowledge of the facts in this declaration.
- 2) In the late 1990s I participated in the construction and use of a building located on land owned by Fred Ayer on Orcas Island.
- 3) The permit application for that building was obtained by another person.
- 4) I was neither the landowner, tenant, or lessee of that land owned by Mr. Ayer; thus, I had no responsibility towards either the land or any structure built upon it.
- 5) I also had no control over either Mr. Ayer or the person who applied for the permit for that building.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 3rd day of September 2013, in Eastsound, Washington.

  
ERROL C. SPEED

Court of Appeals No. 72302-2  
San Juan County Superior Court Cause No. 13-1-05039-8  
San Juan County District Court Cause No. 12-71

COURT OF APPEALS

DIVISION I.

OF THE STATE OF WASHINGTON

---

ERROL CHARLES SPEED  
Appellant

v.

STATE OF WASHINGTON  
Respondent

---

CERTIFICATE OF MAILING

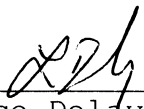
---

I hereby certify that on this day I caused a copy of the following documents to be mailed to the address stated below.

- REPLY TO BRIEF OF RESPONDENT
- APPENDICES TO APPELLANT'S REPLY BRIEF

Jennifer Paige Joseph  
King County Prosecutor's Office  
516 3rd Avenue, Ste. W554  
Seattle, WA, 98104-2362

Dated this 9 day of Dec., 2015.

  
\_\_\_\_\_  
Lawrence Delay WSBA 20339  
Counsel for Appellant  
232 A Street, Ste. 8  
Friday Harbor, WA 98250  
Telephone: 360-378-6976

CERTIFICATE OF MAILING

RECEIVED  
JAN 14 2016  
11:47  
