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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45351
Plaintiff-Respondent,)	
)	BINGHAM COUNTY NO. CR 2016-3419
v.)	
)	
AUGUSTINE GARNICA)	APPELLANT'S BRIEF
PEREZ, JR. ,)	
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BINGHAM**

**HONORABLE DARREN B. SIMPSON
District Judge**

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STATEMENT OF THE CASE

Augustine Garnica Perez, Jr., appeals the district court's denial of his motion to suppress evidence discovered as the result of an investigatory stop of the white Mercedes he was driving toward the Fort Hall casino. The sole basis for the stop was a call made to police dispatch. The caller complained that the driver of a white Mercedes was still "roaring their motor" around the Old Fort Hall Housing Complex and it was after 10:30 at night; the caller also reported that the driver had pulled into the driveway of her aunt's house and almost hit the back of her aunt's car. Although the caller made a conclusory statement that the driver was "driving really recklessly," the specific conduct she described did not constitute the crime of reckless driving under Idaho law.

Mr. Perez contends that the stop violated his Fourth Amendment rights because the information failed to provide specific, articulable facts to support a reasonable suspicion that he had committed the crime of reckless driving. Not only did the caller fail to provide facts that a reckless driving crime had been committed, her description of the vehicle was insufficient to justify the officer in stopping Mr. Perez. The district court's conclusions to the contrary were erroneous, and its denial of Mr. Perez's motion to dismiss should be reversed.

Statement of the Facts and Course of Proceedings

Based solely on a report he received from the Fort Hall Police Department dispatch, Officer Robert Henry decided to stop Mr. Perez's vehicle as it was traveling toward the Fort Hall casino. (Tr., p.7, L.22 – p.12, L.2.) After he stopped the car, Officer Henry smelled alcohol coming from inside and called for an Idaho state police officer to investigate for DUI. (Tr., p.11,

Ls.17-21; R., pp.6-17.) Mr. Perez was subsequently arrested¹ and charged with felony DUI, driving without a valid license, and failing to carry insurance, and the State additionally filed a persistent-violator enhancement. (R., pp.16-17, 83-88.)

Mr. Perez filed a motion to suppress the evidence claiming he was stopped without reasonable articulable suspicion that he had violated any traffic laws, in violation of his constitutional rights. (R., pp.153, 171.) The State opposed the motion, claiming the stop was justified based on the citizen's report to dispatch, and that the "dispatch audio recording of her call indicates that she was an eyewitness to the driving pattern that caused her to call the police." (R., pp.181-82.)

At the suppression hearing, Officer Henry testified that sometime after 10:00 p.m., he received a report from the Fort Hall Police Dispatch of "a reckless driver out of the Old Fort Hall Housing Complex, on Wardance Circle, almost hit a vehicle on the way out, and it was described as a white, two-door Mercedes." (Tr., p.7, L.14 – p.8, L.4; p.14, Ls.1-4; p.10, Ls.7-10.) However, this information was not consistent with the dispatch call; what the caller actually reported was that the vehicle had "pulled into [her aunt's] driveway and almost hit her car – the back of it" (Ex.A(a)), and the caller made no statement regarding the number of doors on the vehicle (*See generally* Ex.A).

Officer Henry also testified that earlier that same day, he observed a white, two-door Mercedes parked outside a residence on Wardance Circle, and that it was "the first white Mercedes I've come across that's been parked in Old Housing." (Tr., p.9, Ls.6-10.) He decided to drive back to the residence to look for it. (Tr., p.8, L.21 – p.9, L.24.) When he found that the

¹ Officer Henry is an Indian Highway Safety Officer. (Tr., p.6, Ls.9-11.) Following the stop, and presumably upon determining that Mr. Perez is not a tribal member, he contacted Idaho State

white Mercedes was not there, Officer Henry drove out to the casino, gas station, and trading post, as well as the two main roads, looking for it. (Tr., p.10, Ls.14-17.) As he was searching along one of those roads, Eagle Road, Officer Henry saw a white Mercedes pass him, traveling in the opposite direction and headed toward the casino. (Tr., p.15, Ls.8-10.) Officer Henry turned around and followed it, activated his emergency lights, and stopped the car that Mr. Perez was driving. (Tr., p.15, Ls.8-12.) Officer Henry testified he observed no law violations and no erratic driving; he testified that, he made no other observations about the vehicle. (Tr., p.11, Ls.5-17; p.15, L.22 – p.16, L.4.) His only reason for stopping Mr. Perez’s vehicle, as he repeatedly confirmed, was the report he had received from dispatch. (Tr., p.8, 1-4; p.11, L.24 - p.12, L.2; p.16, L.5-8.)

After Officer Henry’s testimony, the State introduced the recording of the dispatch call and played it for the court. (*See* Tr., p.13, Ls.3-16; Ex. A.)² The content of that call is as follows:³

Caller: I’m the one who called in earlier about that white car that was roaring around out here. It just left Deanna Preacher’s house, and it was doing the same thing, like, whoever was driving it didn’t know how to drive it, ‘cause it kept trying to go in drive, and then it couldn’t, but, like it’s a standard or something.

Dispatch: Okay

Caller: Then it pulled into her driveway, and then I, my [inaudible] looked out, to see which, well, then finally put it in drive and it went out but they say it took off toward the bingo hall.

peace officer Nicholas Gallegos; Officer Gallegos administered standard field sobriety tests and then arrested Mr. Perez. (R., pp.16-17.)

² The audio recording of the call, Exhibit A, is recorded in three consecutive audio files, labeled (a), (b), and (c). The total length of the recording is slightly over three minutes.

³ At the district court’s request, the parties waived the reporting of the audio recording. (Tr., p.12, Ls.24-25.) Appellant’s Counsel has attempted to accurately quote from the audio, recognizing the Exhibit is the official record.

Dispatch: My officer already checked out the driver of that vehicle, already, and she –

Caller: I don't know. Yah. But they are still out here, roaring their motor and everything and it's already, what is it, 10:30 at night?

Dispatch: And it was that same vehicle?

Caller: Yah. It was that same one.

Dispatch: Okay. Now, is this the one that had the Oregon tags?

Caller: No. This was the one that, the Mercedes.

Dispatch: Okay.

Caller: 'Cause I had to go to the bingo hall to get my mom, earlier. I seen Officer Johnson, and he just left Deanna's house, and I talked to him, and told him, and he asked me if I know who the owner of the Mercedes was, and I said "no" and I go, "all I know is I seen a man, a native guy, driving it. And they went toward the bingo hall. From Wardance Circle they turned east, and went toward the bingo hall."

Dispatch: Okay, so they went south on Eagle – east on Warbonnet toward Eagle?

Caller: Yah. I don't know if they went toward the bingo hall or not. I don't know from there.

Dispatch: Okay. How long ago was this?

Caller: Not even five minutes ago.

Dispatch: Okay. I can have an officer come check the area for that vehicle. Now, what did you say the vehicle was doing?

(Ex. A (a)).

Caller: It was roaring its motor, like it wanted to race someone, or race a car or something. Then it pulled into Deanna's driveway and almost hit her car – the back of it.

The only reason I'm concerned is because that's my aunt. She's an elderly lady there that has custody of all of her grandkids. And she doesn't say nothing when her kids and grandkids go over there and

drink and party and stuff. She's scared of them, but she won't say nothing. She's always been like that.

Dispatch: Okay. So it was a white Mercedes-Benz, though?

Caller: Yah. It was that white Mercedes, the one that I called in, that was out here, that was slammin' on his breaks and everything before.

Dispatch: Okay. Do you want to give your name?

Caller: It's Celia Edmo. I talked to Officer Johnson, I think it's Sgt. Johnson, outside the bingo hall and was telling him what that car was doing, 'cause he was asking me if I knew –

((Ex. A(b)).

He was driving really recklessly; I go, "what if he drives up on the sidewalk and gets one of these kids, definitely he's not gonna stop?" So –

Dispatch: Celia, how do you spell your first name?

Caller: C-E-L-I-A

Dispatch: And your last name is "Edmo"?

Caller: Yah. I'm just [inaudible] 'cause right here, in this corner, there's four houses with nothin' but little kids. So, that's why I'm concerned.

Dispatch: Okay. I will see if I can get Sgt. Johnson, because he already knows what vehicle you were talking about. I'll see if I can get him to go and check the area and see if he can find it.

Caller: Alright then.

Dispatch: What's a good number for you then?

Caller: [provides a phone number]

Dispatch: Okay. I will have him come check it out.

Caller: Alright. Bye.

Dispatch: Bye.

(Ex. A (c).)

No other testimony or documentary evidence was presented in connection with the suppression motion, and there was no indication by the district court judge that any additional information was being considered. (*See generally* Tr., p.4, L.4 – p.29, L.12.)

In a ruling from the bench, the district court denied Mr. Perez’s motion to suppress. (Tr., p.29, Ls.3-22.) In reaching that decision, the district court concluded that the conduct reported by the caller provided reasonable suspicion that the driver committed the crime of reckless driving, and that describing the vehicle as a white Mercedes justified Officer Henry in stopping the Mr. Perez’s vehicle as it was travelling toward the Fort Hall Casino. (Tr., p.22, Ls.7-16.) The district court explained:

Officer Henry described,⁴ and we listened to, the dispatch call from a Ms. Edmo, who identified herself, gave her address, talked about and reported a reckless driver, and indicated the make and model – or that make of the vehicle and the color of the vehicle, and that it was in this area of [...] Wardance Circle, and indicated that it almost hit a vehicle, *and so outlined the basis for a person driving a vehicle in a reckless manner. ...*

(Tr., p.22, Ls.17-25 (emphasis added).)

The court went on to conclude that the events outlined by Ms. Edmo provided “reasonable suspicion that *a crime had been committed of driving recklessly*, which justified, under the totality of the circumstances, Officer Henry to stop this vehicle.” (Tr., p.28, Ls.6-11 (emphasis added).)

After the district court denied his suppression motion, Mr. Perez entered a conditional plea to driving under the influence, reserving his right to appeal the district court’s decision.

⁴ Officer Henry’s testimony mischaracterizes the information that was provided to dispatch. The caller did *not* report that the driver “almost hit a vehicle on the way out” of the Fort Hall Housing Complex as claimed by Officer Henry. (*see* Tr., p.8, Ls.1-4; p.10, Ls.7-10; *compare generally* Ex.A.) Rather, the caller specifically stated that the vehicle “pulled into Deanna’s driveway and almost hit her car – the back of it.” (Ex.A(a)).

(Tr., p.50, Ls.7-9; p.62, Ls.20-23; R., p.238.) The district court sentenced Mr. Perez to eight years, with three years fixed. (R., p.248.) Mr. Perez timely appealed. (R., p.255.)

ISSUE

Did the district court err in denying Mr. Perez's motion to suppress?

ARGUMENT

The District Court Erred In Denying Mr. Perez's Motion To Suppress

A. Introduction

When a police officer's investigatory stop relies solely on the report of another police officer or agency, "it is incumbent upon the state to prove that the directive or report was justified by reasonable suspicion." *State v. Van Dorne*, 139 Idaho 961, 964 (2004). In this case, the district court erroneously concluded that the events described in Ms. Edmo's call to dispatch provided a reasonable articulable suspicion that Mr. Perez had committed the crime of reckless driving. Ms. Edmo complained that the driver was "roaring" its motor, and she stated that he had pulled into her aunt's driveway and almost hit the back of her aunt's car. However, she reported no speeding or other driving behavior that could be possibly be characterized as "reckless driving" within the meaning of Idaho's motor vehicle statute. Moreover, while the vehicle that Ms. Edmo described – a white Mercedes – might be a rarity in the Old Fort Hall Housing area, there is no indication in the record that such vehicles are uncommon to the public roadways that lead to the reservation's casino. Consequently, even if Ms. Edmo's report to dispatch had outlined the events constituting a crime, her description of a "white Mercedes" driven by a "native guy" did not justify the officer in stopping Mr. Perez. The district court's conclusions to the contrary were erroneous, and suppression should have been granted

B. Standard Of Review

"In reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated." *State v. Purdum*, 147 Idaho 206, 207 (2009) (citation omitted). "This Court will accept the trial court's findings of fact unless they are clearly

erroneous. However, this Court may freely review the trial court's application of constitutional principles in light of the facts found." *Id.* (citations omitted). "At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *State v. Aguirre*, 141 Idaho 560, 562 (Ct. App. 2005) (citations omitted). Determinations of reasonable suspicion are reviewed de novo. *State v. Morgan*, 154 Idaho 109, 111 (2013).

The Fourth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment's Due Process Clause, guarantees that that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV; *see also* Idaho Const. Art. I, § 17. "Traffic stops constitute seizures under the Fourth Amendment." *State v. Henage*, 143 Idaho 655, 658 (2007) (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). Yet, "[l]imited investigatory detentions are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime." *State v. Morgan*, 154 Idaho 109, 112 (2013). As such, two possible justifications for a traffic stop exist: (1) the officer has a reasonable, articulable suspicion that the driver has committed an offense, such as a traffic offense; or (2) the officer has a reasonable, articulable suspicion that the driver is engaged in other criminal activity. *State v. Neal*, 159 Idaho 439, 442 (2015).

"Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts." *Morgan*, 154 Idaho at 112. "Reasonable suspicion requires more than a mere hunch or 'inchoate an unparticularized suspicion.'" *Id.* at 112 (quoting *State v. Bishop*, 146 Idaho 804, 811 (2009)). "The 'whole picture' must yield a particularized and objective basis for suspecting a violation of the law." *State v. Haworth*, 106

Idaho 405, 406 (1984) (quoting *United States v. Cortez*, 449 U.S. 441, 418 (1981)). “The test for reasonable suspicion is on the totality of the circumstances known to the officer at or before the time of the stop.” *Neal*, 159 Idaho at 443.

Evidence obtained in violation of Fourth Amendment protections is subject to the exclusionary rule, which requires the suppression of evidence obtained as a direct result of the illegal seizure, as well as “fruit of the poisonous tree.” See *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963); *State v. Guzman*, 122 Idaho 981, 988-98 (1992).

C. The State Has Failed To Meet Its Burden Of Establishing The Call To Dispatch Contained Specific Articulate Facts That Justified The Stop

“[A]n officer who makes an investigatory stop in reliance upon a report or bulletin from another law enforcement officer or agency need not have personal knowledge of the facts that underlay the report *so long as the person who generated the report possessed the requisite reasonable suspicion.*” *State v. Van Dorne*, 139 Idaho 961, 964 (2004) (citing *United States v. Hensley*, 469 U.S. 221 (1985) (emphasis added)). Where an officer conducts an investigatory stop on the basis of another officer’s report or bulletin, “the admissibility of the evidence derived from the stop ... turns upon whether the officer who issued the report or bulletin had knowledge of articulable facts supporting a reasonable suspicion that the person to be stopped is or has been involved in criminal activity.” *Id.* 963. If the report was “issued in the absence of reasonable suspicion, then a stop in objective reliance on it violates the Fourth Amendment.” *Id.*, at 963-64 (quoting *Hensley*, 469 U.S. at 232). And when, as in the present case, the defendant seeks suppression of the evidence derived from the stop, “it is incumbent upon the State to prove that the directive or report was justified by reasonable suspicion.” *Van Dorne*, 139 Idaho at 694.

Here, Officer Henry did not personally observe any driving behavior or other conduct that provided a reason to suspect Mr. Perez of violating a traffic law or of any other criminal

activity. (*See generally* Tr., p.4, L.4 – p.29, L.12.) Rather, Officer Henry explicitly testified that his suspicion of Mr. Perez was based *solely* on the dispatch report. (Tr., p.8, Ls.1-4; p.11, Ls.8-10.) However, the information provided to dispatch by the caller, Ms. Edmo, contained no facts that justified the stop: the facts reported did not establish that the driver of the white Mercedes committed the crime of reckless driving; nor did those facts justify Officer Henry’s suspicion that the white Mercedes he observed travelling to the Casino was the same car Ms. Edmo had observed at her aunt’s house in Old Fort Hall Housing.

1. The Dispatch Call Did Not Contain Facts To Support A Reasonable Articulable Suspicion Of The Crime Of Reckless Driving

The district court erroneously concluded that the events outlined by Ms. Edmo in her call to dispatch provided the requisite reasonable suspicion that the driver had committed the crime of reckless of driving. (*See* Tr., p.28, Ls.6-11.)

The crime of reckless driving is defined in Idaho Code 49-1401(1).⁵ That statute reads:

Any person who drives or is in actual physical control of any vehicle upon a highway, or upon public or private property open to public use, carelessly and heedlessly or without due caution and circumspection, and at a speed or in a manner as to endanger or be likely to endanger any person or property, or who passes when there is a line in his lane indicating a sight distance restriction, shall be guilty of reckless driving ...

I.C. § 49-1401(1).

Although Ms. Edmo made a conclusory statement during her call that the driver of the Mercedes was “driving really recklessly” (Ex.A(c)), her long explanation of the offending behavior does not support the conclusion that the driver had committed any reckless driving

⁵ Although the stop occurred on Indian country, Idaho’s motor vehicle laws apply to public roads maintained and operated by the State and its counties and political subdivisions. *See* I.C. § 67-5101G (Public Law 280); *State v. McCormack*, 117 Idaho 1009, 1014 (1990). The State offered

offense. She complained that the driver was “roaring their motor” – “like whoever was driving it didn’t know how to drive, ‘cause it kept trying to go in drive, and then it couldn’t” and that “it’s already 10:30 at night” (Ex.A(a), 00:12); she also described the revving as “like it wanted to race someone, or race a car or something” (Ex.A(b), 00:03). Notably, however, the caller made *no* report of speeding or erratic driving. (*See generally* Ex.A.) In fact, aside from the “roaring,” there is no reported observation of any driving behavior on any public roadway. (*See generally* Ex.A.) The only fact which possibly approaches reckless driving was Ms. Edmo’s statement that the driver pulled into her aunt’s driveway and almost hit the back of her aunt’s car.⁶ However, absent speeding or erratic driving, the fact that a stranger has pulled his car in close to another’s in a driveway does establish reckless driving.

Moreover, even if the driver had acted carelessly and endangered property when he pulled into the aunt’s driveway, there was no reasonable suspicion that he have violated the reckless driving statute, because it was a residential driveway, not a “highway” or “public or private property open to public” within the meaning of the meaning of the reckless driving statute. *See* I.C. § 49-1401(1). The term “private property open to the public” is defined in Idaho’s motor vehicle statute, *see* I.C. § 49-117(18),⁷ and has been interpreted by the Idaho

no evidence or argument, in the district court, of any tribal code or other law as justification for the stop. (*See generally* Tr., p.4, L.4 – p.29, L.12.)

⁶ Officer Henry’s testimony that the driver “almost hit a car coming out of Wardance Circle” (Tr., p.10, Ls.7-10), inaccurately suggested that the driver had come close to hitting a moving vehicle while he was driving on the roadway. Those, of course, were not the facts Ms. Edmo reported to dispatch.

⁷ Chapter 1 of Title 49, Idaho Code, provides definitions for the words and phrases used in Idaho’s Motor Vehicle Code. I.C. § 49-101. The definition for “private property open to the public” is set forth in I.C. § 49-117(18), which reads:

“Private property open to the public” means real property not owned by the federal government or the state of Idaho or any of its political subdivisions, but is available for vehicular traffic or parking by the general public with the permission of the owner or agent of the real property.

Supreme Court to *not* cover the driveway of a private residence. *State v. Knott*, 132 Idaho 476, 479 (1999) (“The fact that social guests and persons with business at the residence are permitted to use the driveway does not make it property available to the general public for vehicular traffic or parking.”); *see also State v. Martinez-Gonzalez*, 152 Idaho 775, 781 (Ct. App. 2012) (noting that “the Idaho Supreme Court delimited the outer boundaries of [now I.C. § 49-1401(18)]’s application, concluding it did not cover the driveway of a private residence” (citing *Knott*, 132 Idaho 476)).

In her call to dispatch, Ms. Edmo reported the vehicle had pulled *into the driveway* of her aunt’s house, where he almost hit the back of her aunt’s car. (Ex.A(a).) The act did not occur on a roadway or property subject to Idaho’s reckless driving statute. I.C. § 49-1401(1). Thus, contrary to the district court’s conclusion, there was no information in the call to dispatch that would provide a reasonable suspicion that the crime of reckless driving had been committed. The district court’s conclusion was erroneous.

2. The Fact That A White Mercedes Was Rare In The Old Fort Hall Housing Area Did Not Justify The Stop Of Mr. Perez’ Vehicle While Travelling On A Main Road Toward The Reservation’s Casino

Even if there had been evidence of reckless driving crime by the driver of a white Mercedes, Officer Henry was not justified in stopping Mr. Perez based solely on the make and color of his car. The district court’s contrary conclusion was erroneous.

In *State v. Zapata-Reyes*, this Court noted with skepticism the possibility of identifying a vehicle by a general description of its color and make, without other “significant distinguishing features.” 144 Idaho 703, 708-09 (2007). Holding that the caller’s description of the car by

I.C. § 49-117(18).

general make and common color was inadequate to identify the car, the Court in *Zapata-Reyes* observed that the reporting of a car

with uncommon characteristics, such as a purple car or one with unique painting decals, may make the car identifiable without a license plate number, the caller here described a car of *common color – white –* and provided *no other significant distinguishing features*.

Id. at 708 (emphasis added).

In the present case, Officer Henry testified that it was rare to see Mercedes-Benz *in the Old Fort Hall Housing Complex*, and that the one he saw there earlier in the day was the first white Mercedes he'd ever seen "*parked in Old Housing.*" (Tr., p.9, Ls.1-10 (emphasis added).) As his testimony illustrates, however, Officer Henry did not find a Mercedes when he went back to look in the Old Fort Hall housing area, and he was driving around the reservation, including along the main roads, looking for one. (Tr., p.10, Ls.14-20.) He was searching the main roads – not Old Fort Hall Housing Complex – when he observed Mr. Perez driving southbound on Eagle Road going toward the casino. (Tr., p.10, L.25 – p.11, .21.)

Thus, even if white Mercedes are rarely parked in the Old Fort Housing Complex, that is not the relevant location. Mr. Perez's vehicle was traveling on a public roadway headed toward the casino (Tr., p.10, L.25 – p.11, p.21), which presumably attracts visitors from outside the Old Fort Hall Housing area. There was absolutely no testimony or other evidence that Mercedes-Benzenes are a rarity on the roadways to or from the casino. (*See generally* Tr.) The totality of the circumstances in this case did *not* provide Officer Henry a reasonable suspicion that Mr. Perez had committed the crime of reckless driving, and the officer violated his Fourth Amendment rights by stopping his vehicle.

CONCLUSION

Mr. Perez respectfully requests that this Court reverse the district court's denial of his suppression motion, vacate his judgment of conviction, and remand the case to the district court for further proceedings.

DATED this 18th day of May, 2018.

_____/S/_____
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of May, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

AUGUSTINE GARNICA PEREZ JR
INMATE #57574
ISCC
PO BOX 70010
BOISE ID 83807

DARREN B SIMPSON
DISTRICT COURT JUDGE
Delivered via e-mail to: dsimpson@co.bingham.id.us

MANUEL MURDOCH
ATTORNEY AT LAW
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_____/S/_____
MAGALI CEJA
Administrative Assistant

KAC/mc