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DIVISION II

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COA No. 37692-0-II

STATE OF WASHINGTON
BY _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KODI CARR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF CLALLAM COUNTY

The Honorable S. Brooke Taylor

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Ms. Carr's trial on a charge of first degree theft based on alleged improper use of an ATM card, the State failed to provide the defendant with material required to be disclosed under Brady v. Maryland.

2. The defendant's counsel provided ineffective assistance of counsel by failing to seek dismissal of the charge based on the State's failure to preserve material exculpatory evidence.

3. Trial counsel provided ineffective assistance of counsel by failing to request a jury instruction on the defense of a good faith claim of title to the property allegedly stolen.

4. Cumulative error denied Ms. Carr a fair trial, requiring reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State failed to produce evidence materially helpful to the defense when it did not provide a recording of an inmate telephone call that showed Ms. Carr's use of the complainant's ATM card was lawful.

2. Whether the defendant's counsel provided ineffective assistance of counsel by failing to seek dismissal of the charge of theft based on the State's failure to preserve material exculpatory

evidence, in the form of a recording of a telephone call made by an inmate of a jail to the defendant, in which the inmate indicated that Ms. Carr had permission to use the ATM card in question.

3. Whether trial counsel provided ineffective assistance of counsel by failing to request a jury instruction on the defense of a good faith claim of title to the property allegedly stolen, where the evidence at trial warranted such an instruction, and where counsel pursued the defense in closing, but failed to request an appropriate jury instruction that would have allowed the jury to acquit Ms. Carr based on the facts and the law.

4. If none of the above-described errors of ineffective assistance of counsel individually require reversal, does the cumulatively prejudicial effect of trial counsel's errors of deficient performance require reversal?

C. STATEMENT OF THE CASE

1. **Procedural history.** On January 29, 2007, Kodi Carr was charged with first degree theft based on alleged improper use of an ATM card owned by Thomas Wheeler, while Wheeler was in the Clallam County Jail in October of 2006. CP 47-48. According to the affidavit of probable cause, another inmate at the jail, Clifford Topham, arranged with Wheeler to have Wheeler authorize jail

officials to release his ATM card to the defendant, Ms. Carr, so that Carr could pick it up at the jail and obtain cash to bail both men out of jail. CP 47.

Ms. Carr was arrested after Wheeler learned that Carr had made purchases and cash withdrawals using the card, which he claimed were not authorized. CP 48. Ms. Carr claimed, however, that Mr. Topham owed her money, and that part of the arrangement under which she accepted the ATM card from jail officials was an agreement, which Topham described to her in a telephone conversation, under which she could also use the ATM card for purchases. Mr. Topham would then reimburse Mr. Wheeler for these purchases on his ATM card and in that fashion discharge his debt to Ms. Carr. 3/25/08RP at 52, 114-15, 117-20.

Although the Clallam County jail preserved four telephone calls between Mr. Topham and Ms. Carr which the State employed to attempt to prove an arrangement by which Ms. Carr would pick up Wheeler's ATM card and use it solely to obtain bail money, the jail failed to preserve an additional telephone call between Topham and Carr, in which they discussed the arrangement by which Carr could use the card for additional expenses. 3/24/08RP at 28, 39; 3/25/08RP at 55.

However, Ms. Carr's trial counsel failed to bring a motion to dismiss the theft charge for the State's failure to preserve a recording of this additional telephone call, which constituted "material exculpatory evidence" that would have proved Ms. Carr's innocence.

In addition, Ms. Carr's counsel failed to formally raise a defense of good faith claim of title, or to request a jury instruction outlining for the jury that valid defense to the charge of theft.

Following a jury verdict of guilty, Ms. Carr was sentenced to an exceptional sentence based on multiple incidents per victim and an unusually large dollar amount of the thefts, issues upon which the jury passed by special verdicts. CP 11.

She appeals. CP 05.

2. Substantive evidence. Mr. Wheeler testified that during the time he was in the Clallam County Jail in 2006, he spoke with a fellow inmate who indicated that he could arrange for Wheeler to be "bailed out," if Wheeler would arrange for a female friend of the inmate's to be given Wheeler's bank ATM card. 3/24/08RP at 15-16. Wheeler agreed to this plan and sent a "kite," or jail communication letter, to jail officials, authorizing the release of his ATM card from the jail's property room to the woman, who would come and pick it

up. 3/24/08RP at 16. Shortly thereafter, Wheeler was told by prison officials that his ATM card had been "misappropriated." 3/24/08RP at 17-18.

Wheeler did not recall the name of the inmate [Clifford Topham] with whom he made this arrangement, or the name of the woman [Ms. Carr] he directed prison officials to release his ATM card to. 3/24/08RP at 15-17.

A Clallam County Sheriff's deputy retrieved computer records that indicated that four telephone calls occurred between inmate Topham and Ms. Carr between October 26 and November 2, 2006. 3/24/08RP at 41-42; State's exhibit 3. These calls contained a discussion of use of Wheeler's ATM card to obtain bail money. 3/24/08RP at 46-47; State's exhibit 20.

Patrick Brady, the head of security at First Federal Savings and Loan, authenticated bank records which catalogued instances of usage in 2006 of two ATM cards, belonging to joint account holders Thomas Wheeler and Susan Foster. 3/24/08RP at 58-59. The bank records showed instances in which Ms. Foster had used her card to withdraw cash and/or make purchases, and instances in which Mr. Wheeler's card had been used for withdrawals and purchases. 3/24/08RP at 62. The usage instances pertaining to Mr. Wheeler's

ATM card were between October 27 and October 30, 2006, and totaled \$5,465.45. 3/24/08RP at 67-68.

According to other witnesses from various merchants in the Port Angeles and Sequim areas, Ms. Carr had been observed and/or videotaped using Mr. Wheeler's card for purchases and cash withdrawals. 3/24/08RP at 75-76, 3/25/08RP at 9-19.

Kodi Carr testified in her defense. In October of 2006, Ms. Carr began receiving telephone calls from a longtime friend, Clifford Topham, who was then an inmate at the Clallam County Jail. 3/25/08RP at 49. In early October of 2006, Topham called Carr and asked her to help him get his dog out of the pound. 3/25/08RP at 50. The State, despite a sheriff's deputy's claim that the jail's computer system recorded all calls, did not produce a recording of this telephone call. 3/25/08RP at 50.

In addition, Ms. Carr noted that she had spoken with Mr. Topham on the phone at other times during October of 2006, at times to help Topham communicate with his daughter, and most importantly, to discuss arrangements about Carr's use of Wheeler's ATM card for expenses beyond just getting bail money out of the bank. 3/25/08RP at 51. There was an additional telephone conversation between Topham and Ms. Carr shortly before the 27th

of October, in which Topham indicated that since he owed Ms. Carr money, he would be "paying back [that money to] Mr. Wheeler." 3/25/08RP at 52, 114-15. Under this arrangement, Topham specifically indicated an arrangement allowing Carr to use the ATM card for cash and purchases. 3/25/08RP at 117-20. At that time, Mr. Topham owed Ms. Carr and her fiancé, Mr. Steven Blake, about \$4,200. 3/25/08RP at 52-53.

After receiving Mr. Wheeler's card from the jail by written permission from Wheeler, Ms. Carr had to make multiple withdrawals from the ATM machine, in order to obtain the bail money, because the machine would only allow her to withdraw a certain amount of cash at a time, and also because the ATM machine cut her off when she entered an incorrect "PIN" code that Mr. Topham had given her. 3/25/08RP at 58-59. Ms. Carr also made a number of purchases at Wal-Mart and other stores, all with the understanding that Mr. Topham would pay Mr. Wheeler back the amount Carr used Wheeler's card for, up to the amount of money that Topham owed to her. 3/25/08RP at 61-62, 90-92. Topham was released on bail on October 29, 2006. 3/24/08RP at 28, 39. Once Ms. Carr bailed Mr. Topham out of jail, she returned Wheeler's ATM card to Topham. 3/25/08RP at 66.

Defense witness Casey Allen, who did not know the defendant, received a telephone call around the same month of October in 2006, during which Topham asked Allen in the same fashion to help bail him out of jail. 3/25/08RP at 73.

D. ARGUMENT

1. THE STATE FAILED TO PRODUCE BRADY MATERIAL.

Under Brady v. Maryland and its progeny, State as well as federal prosecutors must turn over exculpatory and impeachment evidence, whether or not requested by the defense, where the evidence is material either to guilt or to punishment. See, e.g., United States v. Bagley, 473 U.S. 667, 676, 682, 105 S. Ct. 3375, 3380, 3383-84, 87 L. Ed. 2d 481 (1985); United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 2399, 49 L. Ed. 2d 342 (1976); (both relying on Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963)). The Brady rule, an enforcement of Fifth Amendment principles, encompasses evidence known to the police and sheriffs: in order to comply with Brady,

the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf . . . including the police.

Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995); see U.S. Const. amend. 5.

Deputy Wenzel, from the Clallam County jail, testified regarding the procedure used to record telephone calls between jail inmates and persons outside the jail. 3/24/08RP at 39. He indicated that the jail's recording advisory system starts when the inmate "picks up the receiver." 3/24/08RP at 39-40. The inmate and the outside person are both prompted to push a button to acknowledge their understanding that the call will be recorded. 3/24/08RP at 38-40. According to the deputy, all calls are recorded except for inmate-attorney calls. 3/24/08RP at 40.

The deputy stated that at the time that various telephone calls were recorded by the jail in October 2006, the facility was utilizing computer servers which maintained the recording of calls for one year, meaning that calls made in October of 2006 would be stored to and beyond the time that Ms. Carr was charged in January of 2007. 3/24/08RP at 40-41; CP 47. Deputy Wenzel retrieved four recorded calls between Topham and Carr by searching the system, and then transferred or copied the audio record of the calls to a computer floppy disk. 3/24/08RP at 46-47; State's exhibit 20.

From the four recordings the deputy retrieved, written transcripts were prepared, which the deputy testified were accurate depictions of the content of the recorded telephone calls. 3/24/08RP

at 48; State's exhibit 19. Notably, however, Ms. Carr gave detailed testimony regarding one or more calls between her and Mr. Topham that the jail apparently failed to preserve the recordings of. Ms. Carr explained that in one of these calls, Mr. Topham explained that Ms. Carr could also use Wheeler's ATM card for expenses and withdrawals, to cover the monies Topham owed her, in addition to withdrawing \$1,000 to be used to for bail money. 3/25/08RP at 55.

The plain failure of the State to turn over this exculpatory evidence, required under Brady, requires reversal. See Part D.2, *infra* (discussing exculpatory value of recording).

**2. MS. CARR'S COUNSEL WAS
INEFFECTIVE FOR FAILING TO MOVE
FOR DISMISSAL BASED ON THE
STATE'S FAILURE TO PRESERVE
MATERIAL EXCULPATORY EVIDENCE.**

a. The failure to raise a dispositive motion to dismiss will constitute ineffective assistance of counsel if the motion would have been granted. Criminal defendants have a right to effective assistance of defense counsel. U.S. Const. amend. 6. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." In addition, article 1, section 22 of the Washington State Constitution provides in relevant part: "In criminal prosecutions the

accused shall have the right to appear and defend in person, or by counsel.”

To obtain reversal of a criminal conviction based on ineffective assistance of counsel, a defendant must show on appeal that: (1) her counsel's performance was deficient; and (2) that the deficient performance resulted in prejudice to the outcome of trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To show prejudice, the defendant must establish that “there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” McFarland, 127 Wn.2d at 335.

A “reasonable probability” is defined as “a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. Under the reasoning and rule of Strickland, therefore, the failure of counsel to raise a motion to dismiss will constitute ineffective assistance, if the motion, had it been raised, “would have been granted” and likely been dispositive. In re Pers. Restraint of Davis, 152 Wn.2d 647, 711, 101 P.3d 1 (2004).

b. Counsel was deficient for failure to seek dismissal based on the State's failure to preserve the material exculpatory evidence of Ms. Carr's telephone call with Mr. Topham in which he indicated she could use the ATM card for amounts owed to her by him. Ms. Carr's counsel provided deficient performance in this case by failing to seek dismissal based on the Clallam County jail's failure to preserve a recording of the exculpatory telephone call the defendant described in her trial testimony. The prosecution has a duty to preserve material exculpatory evidence. California v. Trombetta, 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984); U.S. Const. amend 14. In Trombetta, and in Arizona v. Youngblood, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988), the Supreme Court developed a test to determine whether the government's failure to preserve evidence significant to the defense violates a defendant's due process rights. The rule is that if the State has failed to preserve "material exculpatory evidence," criminal charges must be dismissed. California v. Trombetta, supra; Arizona v. Youngblood, supra.

The federal courts have recognized ineffective assistance claims for not moving to dismiss for the State's failure to preserve material exculpatory evidence. See Reiter v. United States, 371 F.

Supp. 2d 417 (S.D.N.Y. 2005); Mitchell v. Artus, 2008 U.S. Dist. LEXIS 42604 (S.D.N.Y. 2008); Green v. Cain, 2001 U.S. Dist. LEXIS 22075 (E.D.La 2002). In order to be considered "material exculpatory evidence," the evidence in question must both possess an exculpatory value that was apparent before it was destroyed, and must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Trombetta, 467 U.S. at 489; State v. Straka, 116 Wn.2d 859, 885, 810 P.2d 888 (1991).

The Trombetta standard is plainly met in Ms. Carr's case. The State failed to preserve a phone call, described in detail by Ms. Carr, which would have been exculpatory because it would have proved Ms. Carr's assertion that her use of Wheeler's ATM card for expenses was perfectly proper and pursuant to arrangements between her, Mr. Topham, and Wheeler. This telephone call was plainly relevant and exculpatory at first blush, given the nature of the theft charge and the form of Ms. Carr's defense. Her claim of innocence would have been supported by the telephone call, the content of the call was entirely consistent with the State's own evidence in the case, and it tended to show Ms. Carr was using Wheeler's card in good faith that she had permission to do so.

There was no viable reason why the critical telephone call, between Mr. Topham and Ms. Carr, in which Ms. Topham received permission to use the ATM card as she did, was not preserved. The Clallam County deputy stated that the telephone call recording system in use by the jail in 2006 was an old computer system, which had now been replaced by an upgraded system. 3/24/08RP at 40-41. He admitted that there was no way to determine if the old computer system might have failed to maintain each and every inmate telephone call, and he admitted, "if it missed something, it missed something." 3/24/08RP at 53. These facts manifestly demonstrate a failure to preserve material exculpatory evidence - the jail was recording telephone calls, retained four that were inculpatory to the defendant, but somehow failed to maintain a recording of one or more calls with immediately obvious exculpatory content.

c. A proper motion to dismiss would have been granted, or alternatively, the outcome of trial would have been different.

The outcome of trial would have been different but for counsel's deficient performance in failing to seek dismissal under the above facts and the rule of Trombetta, a fact that can be demonstrated in two ways. For very similar reasons, the failure to preserve the call in question would have required dismissal under Trombetta, and

relatedly, the presence of the call as evidence in the case would have resulted in acquittal. Much in the case already pointed toward Ms. Carr's innocence. Ms. Carr openly signed her name and provided her driver's license to the jail officials when she came to pick up the ATM card on October 27. 3/25/08RP at 57. Most importantly, Deputy Wenzel identified State's exhibit 1 as a jail inmate's "kite" in which inmate Wheeler had made a written request that the jail officials release his ATM card to Kodi Carr. 3/24/08RP at 34-37; State's exhibit 1.

Ms. Carr's already viable defense of innocence and a lack of intent to steal renders the unpreserved evidence of the critical telephone call all the more material and exculpatory. That evidence, which was lost without reasonable explanation, required competent counsel to seek dismissal under Trombetta, and the failure of counsel to do so requires reversal of the theft conviction for ineffective assistance of counsel under the Sixth Amendment.

**3. MS. CARR'S COUNSEL WAS
INEFFECTIVE FOR FAILING TO
RAISED A DEFENSE OF "GOOD FAITH
CLAIM OF TITLE."**

a. The failure to present a valid defense and request appropriate jury instructions can constitute ineffective assistance of counsel. To obtain reversal of her conviction based

on ineffective assistance of counsel, Ms. Carr, as noted, must show deficient attorney performance and resulting prejudice to the outcome. Strickland v. Washington, 466 U.S. at 687; State v. McFarland, 127 Wn.2d at 334-35.

In Ms. Carr's case, defense counsel failed to seek a jury instruction defining the defense to the theft charge of good faith claim of title. The failure to raise a viable affirmative defense is ineffective assistance of counsel, if the defense would, within reasonable probabilities, have succeeded. For example, counsel's prejudicial failure to present a "voluntary intoxication" defense has been held to satisfy both prongs of the Strickland ineffective assistance of counsel test, if the defense would likely have resulted in acquittal. State v. Thomas, 109 Wn.2d 222, 226-29, 743 P.2d 816 (1987). Merely arguing a theory in closing argument is inadequate – a party presenting a theory of acquittal or an affirmative defense must be able to rely on a jury instruction as legal support for her argument. See State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

b. A defense of good faith claim of title, supported by a standard pattern jury instruction, would have changed the outcome of Ms. Carr's trial. There must be sufficient evidence to

support an affirmative defense instruction, or any instruction requested by a party. State v. Yates, 64 Wn. App. 345, 351, 824 P.2d 519 (1992). The evidence is sufficient to warrant an given jury instruction if "the jury could reasonably infer the existence of the facts needed to use it." Yates, 64 Wn. App. at 351.

In the present case, Ms. Carr was charged with first degree theft in violation of RCW 9A.56.030, the crucial requirement of proof requiring the State to persuade the jury that Ms. Carr obtained money or goods and services by theft as defined at RCW 9A.56.020(1) as follows: "Theft" is

- (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services[.]

Here, based on the facts of the case, the defense of "good faith claim of title" would have been eminently viable and likely material to the outcome of trial. RCW 9A.56.020(2)(a) provides that it is a sufficient defense to a theft charge that the defendant appropriated the property "openly and avowedly under a claim of title made in good faith, even though the claim [may] be untenable." See also WPIC 19.08 (Washington Pattern Jury Instructions, Criminal (1998)).

Some Washington cases describe the defense of title as an affirmative defense, State v. Casey, 81 Wn. App. 524, 527, 915 P.2d 587 (1996), while others state that the defense negates the element of intent to steal by providing that a defendant cannot be guilty of theft if she takes property "under the good faith belief that [s]he is the owner, or entitled to the possession, of the property." State v. Hicks, 102 Wn.2d 182, 184, 683 P.2d 186 (1984). In any event, whether a good faith claim of title was "credible," i.e., whether it was made in good faith – presents a jury question for that factfinder to decide whether to believe or not. State v. Ager, 75 Wn. App. 843, 880 P.2d 1017 (1994); LaFAVE & SCOTT, Criminal Law, § 8.6(f)(1), at 379.

Had Ms. Carr's counsel requested a jury instruction on good faith claim of title, the trial court below would certainly have been required to give the instruction. All the evidence pointed toward good faith use of the ATM card. The Savings and Loan security officer admitted that Ms. Carr was plainly not trying to disguise herself in the videos that showed her withdrawing cash. 3/25/08RP at 22. She signed for the ATM card at the jail facility, and also presented her driver's license as identification. The court below would have reviewed this "entire record in the light most favorable to

the defendant" to determine whether the instruction was appropriate.

State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997);

State v. Fernandez- Medina, 141 Wn.2d 448, 456, 6 P.3d 1150

(2000); State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000).

Although these facts point to a highly believable defense under this theory, the court would not have weighed the evidence or addressed the credibility of the defense, which are exclusive functions of the jury. May, 100 Wn. App. at 482.

Ms. Carr made clear that her intentions in using Wheeler's ATM card were completely appropriate, because of the arrangement which she and Topham discussed on the telephone. 3/25/08RP at 60-61. Steven Blake, Ms. Carr's fiancé, confirmed that Ms. Carr told him in October of 2006 that Mr. Topham had arranged to have Mr. Wheeler release Wheeler's ATM card to her for bailing him out of jail and also to make purchases in the amount of money Topham owed her. 3/25/08RP at 86-87. Blake confirmed that Topham told Carr that he was going to pay Mr. Wheeler back the money and purchases charged to Wheeler's card, and in that manner Topham would be settling his debt to Ms. Carr. 3/25/08RP at 87. Under these standards and this evidence, the defense of good faith claim of title would likely have succeeded. Counsel's performance was

both deficient and prejudicial, therefore, reversal of Ms. Carr's theft conviction is required.

4. MS. CARR'S THEFT CONVICTION SHOULD BE REVERSED UNDER THE CUMULATIVE ERROR DOCTRINE.

The cumulative effect of the above trial court errors requires reversal of Ms. Carr's first degree theft conviction, in the unlikely event that this Court concludes that each error of ineffective assistance argued above, examined on its own, would otherwise be considered harmless. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

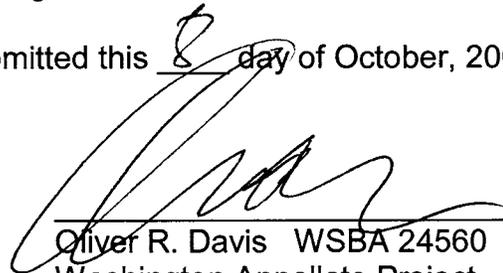
To determine whether cumulative error exists, the reviewing court examines the nature of the errors: constitutional error -- as shown in the present case -- is more likely to contribute to cumulative error than multiple non-constitutional errors. Russell, 125 Wn.2d at 94. This is a case where the prejudice from multiple errors, committed by counsel, went to the heart of the question of true factual innocence, and they require reversal. Russell, 125 Wn.2d at 93-94. It cannot be said beyond a reasonable doubt that the failure to produce and preserve material exculpatory evidence substantiating Ms. Carr's account, along with counsel's

ineffectiveness including her failure to present a highly credible defense of good faith claim of title with legal instructional support, leaves this Court facing a verdict in which it can have confidence. This Court should look at the case as a whole, and determine that the cumulative effect of trial counsel's errors combined to deny Ms. Carr a fair trial. State v. Alexander, 64 Wn. App. at 150-51.

E. CONCLUSION

Based on the foregoing, Ms. Carr respectfully requests that this Court reverse her judgment and sentence.

Respectfully submitted this 8 day of October, 2008.



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

STATE OF WASHINGTON,)
 Respondent,)
 v.)
 KODI CARR,)
 Appellant.)

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 DEPT. OF JUSTICE

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF OCTOBER, 2008, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | |
|---|--|
| <p>[X] ANN M. LUNDWALL
 ATTORNEY AT LAW
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SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF OCTOBER 2008.

X _____


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