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Court of Appeals  
Division II  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Appellant,

v.

TIMOTHY C. KETCHUM,

Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 17-1-00217-7

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BRIEF OF APPELLANT

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## I. INTRODUCTION

On March 12, Washington State Patrol Trooper Allen Nelson stopped the defendant, Timothy Ketchum, for speeding near Forks, Washington, in Clallam County. CP 12. Trooper Allen learned that Ketchum was driving with his license suspended, had five outstanding warrants for his arrest, and that the vehicle Ketchum was driving was not his but was owned by his girlfriend that lived in Port Orchard, Washington, in Kitsap County. CP 12. Trooper Allen decided to have the vehicle impounded based upon his assessment of the conditions and that the owner was not available to take control of the vehicle and other factors. CP 13.

A vehicle impound search revealed the presence of a large amount of marijuana and a baggie of methamphetamine. CP 12–13. Ketchum was arrested for driving with his license suspended and his outstanding warrant. CP 12. The State charged Ketchum with Possession of a Controlled Substance, Methamphetamine. CP 39.

Ketchum moved to suppress the evidence on the basis that the vehicle was unlawfully impounded and searched because Trooper Nelson did not ask Ketchum if someone was available to pick up the vehicle. CP 35–36. The trial court granted the motion to suppress. CP 15.

The State appeals the conclusions of law on the basis that the trial court erred in its interpretation of *State v. Froehlich*, 197 App. 831, 391 P.3d

559 (2017) which the trial court relied upon as its authority for ordering the suppression of the State's evidence. Additionally, the State appeals because the trial court applied the exclusionary rule to suppress evidence when there was no violation of Ketchum's privacy interests.

## II. ASSIGNMENTS OF ERROR

1. The State assigns error to the trial court's conclusion that under the facts of this case, *State v. Froehlich*, 197 App. 831, 391 P.3d 559 (2017), requires that the State's evidence be suppressed because Trooper Allen did not ask Ketchum if anyone was available to remove the vehicle from the side of the highway.
2. The trial court erred by applying *State v. Froehlich*, 197 Wn. App. 831, 838, 391 P.3d 559 (2017) as a basis for suppression because the holding of *Froehlich* was limited to the specific facts of that case.
3. The trial court erred in its failure to apply the holding of *State v. Peterson*, 92 Wn. App. 899, 964 P.2d 1231 (1998) as that case is on point.
4. The trial court erred in its finding that Trooper Allen did not consider alternatives to impoundment of the vehicle.
5. The trial court erred by allowing Ketchum to benefit from the exclusionary rule when the vehicle subject to the impound search did not belong to Ketchum and was not rightfully in Ketchum's

possession.

6. The trial court erred by not requiring Ketchum to meet his burden to establish that he had a privacy interest in Ms. Parker's vehicle.

### III. STATEMENT OF THE ISSUES

1. Whether *State v. Peterson*, 92 Wn. App. 899, 964 P.2d 1231 (1998) supports Trooper Allen's decision to have the vehicle impounded when Trooper Allen was authorized to impound the vehicle under RCW 46.55.113(1) and when he considered highway safety issues, ownership of the vehicle, and location of the owner prior to deciding to have the vehicle impounded?
2. Whether it would have been appropriate for Trooper Nelson to ask Ketchum if he could make arrangements for another person to pick up the vehicle which he took without permission and when Ketchum claimed that he let some other people borrow the vehicle the night before suggesting they were responsible for the presence of contraband in the vehicle?
3. Whether Ketchum may not benefit from the exclusionary rule, although he had automatic standing to challenge the search, because had no privacy interest in the vehicle which he took without the owner's permission?

#### IV. STATEMENT OF THE CASE

On March 12, 2016, Ketchum was stopped by the Washington State Patrol (WSP) Trooper Nelson, for speeding on Highway 101, North of Forks, Washington. CP 12, RP 8. Trooper Nelson determined that Ketchum was driving while his license was suspended and that he had five active warrants for charges that included driving with license suspended in the third degree. CP 12. Ketchum was not the owner of the vehicle as it was owned by Ketchum's girlfriend who lives in Port Orchard. RP 12, CP 12. Ketchum told Trooper Nelson that he had been borrowing the car for the past few days. RP 12.

Trooper Allen arrested Ketchum for driving with his license suspended and on his outstanding warrant out of Clallam County District Court for Driving While License Suspended. CP 12; RP 13.

#### Considerations regarding decision to impound

Trooper Allen testified that it was a "hard rain" at the time of the stop. RP 13. "Hard rain" in Forks means that the rain is bouncing off the pavement such that it comes back up and gets people wet. RP 13. The rain came in intervals and there was a lot of standing water on the roadway. RP 14. Visibility on the highway was poor at times and the sky was overcast. RP 14. It was approximately 4:30 p.m. on a weekday and there are a good number of logging trucks commuting back to Forks on the highway around that time. RP

24.

Trooper Nelson testified that he did not believe there were any reasonable alternatives to impounding the vehicle because of the road and weather conditions. RP 29. Nelson also pointed out that there was no place to push the vehicle to get it off the traveled portion of the road. RP 29. The traveled portions of the road included the shoulders because bicyclists use the shoulder a lot. RP 28–29. Trooper Nelson’s safety considerations were based upon his experience patrolling that particular area of Highway 101 in the past 20 years. RP 30.

Trooper Nelson also considered whether there was anybody available to pick the vehicle up. RP 30. Trooper Nelson was aware that the owner of the vehicle resided in Port Orchard as that was what Ketchum told him. RP 30. Trooper Nelson also considered the fact that Ketchum was being arrested for driving with his license suspended and that he had a prior conviction for driving with his license suspended. RP 33.

Trooper Nelson did not ask Ketchum what he wanted done with the vehicle and he didn’t ask Ketchum whether there was anyone else who could or would come to take the vehicle. RP 35. Trooper Nelson decided to have the vehicle impounded. RP 15.

#### Miranda Rights

Trooper Nelson advised Ketchum of his *Miranda* rights and Ketchum

verbally acknowledged that he understood his rights. RP 16. Trooper Nelson informed Ketchum that he was going to do an inventory search to secure his personal items so that everything could be documented before the vehicle was towed to an impound lot. RP 15. Ketchum told Trooper Nelson about the marijuana in the vehicle and that it belonged to him and he did not want lose to the marijuana. RP 16. Trooper Nelson told Ketchum that the marijuana would be secured. RP 16

#### Inventory search

During the inventory search, Trooper Allen found quart size bags of marijuana Ketchum had already mentioned and which he did not want to lose. RP 20. Attached to one of the bags of marijuana, Trooper Allen found a smaller bag containing white crystal substance which he suspected to be methamphetamine. RP 20. Trooper Allen described the package as being stuck to the marijuana package. RP 21.

Ketchum, the sole occupant of the vehicle, stated that the marijuana was his and that he didn't want to lose it but denied that the white crystal substance was his. RP 14, 20. Ketchum said that there were other people that borrowed the vehicle the night before in the Sequim area. RP 14–15, 20–21.

Just prior to the tow truck hooking up the vehicle to take it to impound, WSP Sgt. Ryan contacted Trooper Nelson to inform him that the owner of the vehicle, Ms. Parker, called to inform that the vehicle was taken

without her permission by Ketchum. RP 19. Parker stated that she didn't want to file a report for Theft. RP 19. Trooper Nelson did not make any attempt to contact the owner of the vehicle, Ms. Parker. RP 36.

## V. ARGUMENT

### A. THE TRIAL COURT ERRED BY INTERPRETING *STATE V. FROEHLICH* AS REQUIRING SUPPRESSION OF THE EVIDENCE BECAUSE *FROEHLICH* DOES NOT APPLY TO THE FACTS OF THIS CASE.

“We review conclusions of law from an order pertaining to the suppression of evidence de novo.” *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); *see also State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

#### 1. The trial court erred by applying the *Froehlich* Court's community caretaking analysis in the wrong context contrary to the holding under *State v. Peterson*.

The trial court erred by applying the holding in *Froehlich* 197 Wn. App. 831, 391 P.3d 559 (2017) as a basis to suppress the evidence (CP 15) because the facts of *Froehlich* are distinguishable from the instant case and *State v. Peterson* is directly on point. *See State v. Peterson*, 92 Wn. App. 899, 964 P.2d 1231 (1998). The vehicle impound in *Froehlich*, was analyzed under the community caretaking function; whereas, in *Peterson*, the vehicle impound was analyzed under an “officer's statutory authority to impound a vehicle when the driver had a suspended license and the owner was not at the

scene, not the community caretaking function.” *Froehlich*, at 840 (citing *Peterson*, 92 Wn. App. at 902–03).

In *State v. Froehlich*, WSP Trooper Richardson encountered Ms. Froehlich after she collided with a pick-up truck. *Froehlich*, at 834–35. The vehicle Froehlich was driving came to rest one to two feet from the fog line with the right side of the vehicle up an embankment. *Id.* at 835. Froehlich was the lone occupant of the vehicle and was not the owner. *Id.* Trooper Richardson questioned Froehlich about potential drug use and did not believe her denials and another Trooper arrived to administer field sobriety tests. *Id.* However, Froehlich requested an ambulance and she was taken to the hospital where the other Trooper determined that Froehlich was not impaired. *Id.*

Prior to Froehlich’s departure to the hospital, *Trooper Richardson did not ask her what she wanted to do with the vehicle or inquire about her ability to arrange for the car’s removal.* *Id.* Richardson determined that the car’s location presented a safety hazard and that it was impossible to move the vehicle without a tow truck. *Id.* “Because of his concerns about leaving an unsecured car that contained exposed valuables and the fact that the car was a traffic hazard, Richardson decided to impound Froehlich’s vehicle.” *Froehlich*, at 835–36. Richardson then began an inventory of the vehicle and discovered suspected methamphetamine in Froehlich’s purse. *Id.* at 836.

Froehlich was charged with unlawful possession of methamphetamine. *Id.* Froehlich moved to suppress the methamphetamine on the basis that Richardson had no lawful basis for the impounding the vehicle and doing an inventory search. *Id.*

The trial court, made two rulings leading to its suppression order. *Id.* The first ruling was that Richardson did not lawfully impound the vehicle as part of his *community caretaking function* because he did not ask Froehlich about her ability to arrange for the removal of the car despite her ability to respond to such an inquiry. *Id.* Additionally, the trial court ruled that *Richardson had no statutory authority to impound the vehicle. Id.* (emphasis added). The State appealed.

“Law enforcement may lawfully impound a vehicle for three reasons: (1) as evidence of a crime, (2) under the community caretaking function, or (3) when the driver has committed a ‘traffic offense for which the legislature has expressly authorized impoundment.’” *State v. Froehlich*, 197 Wn. App. 831, 838, 391 P.3d 559 (2017) (quoting *State v. Tyler*, 177 Wn.2d 690, 698, 302 P.3d 165 (2013)).

On appeal, the *Froehlich* Court analyzed the case in the context of the community care taking function. *Id.* at 838.

The *Froehlich* Court affirmed the trial court’s ruling and held that Richardson was required to have at least considered whether Froehlich could

arrange for the towing as required under the community caretaking exception outlined in *Tyler*, 177 Wn.2d at 700–01. *Froehlich*, at 841. Despite having the opportunity to do so, there was no evidence in the record that Richardson even considered asking Froehlich about her ability to have the car removed from the scene. *Id.* at 839, 841.

The State in *Froehlich* argued that, under *State v. Peterson*, 92 Wn. App. 899, 964 P.2d 1231 (1998), Trooper Richardson was not required to ask Froehlich about removing the car and he had no duty to contact the registered owner of the vehicle when no one was available on the scene to drive the vehicle. *Id.* at 840.

The *Froehlich* Court pointed out that *Peterson* did *not* apply because “*Peterson* involved an officer's statutory authority to impound a vehicle when the driver had a suspended license and the owner was not at the scene, not the community caretaking function. *Therefore, the State was not required to establish, as here, that the driver's spouse and friends were not available to move the vehicle.*” *Froehlich*, at 840 (citing *Peterson*, 92 Wn. App. at 902–03)(emphasis added).

In *State v. Peterson*, the defendant was stopped by Officer Carroll due to expired tabs and was found to be driving with a suspended license. *State v. Peterson*, 92 Wn. App. 899, 901, 964 P.2d 1231 (1998). Peterson was the sole occupant and the vehicle which was owned by a John Brady. *Id.* Without

asking Peterson if someone could pick up the vehicle and without contacting the owner, Carroll decided to impound the vehicle and found controlled substances during an inventory search. *Id.*

The *Peterson* Court noted that “the owner was not present to authorize a licensed and insured driver to remove the vehicle or to authorize leaving the vehicle by the side of the road” and held that “impoundment was the best approach to protect the police and the property owner and was reasonable under these circumstances.” *Id.*

In the instant case, after stopping Ketchum for speeding, Trooper Nelson arrested Ketchum because, as in *Peterson*, he was driving with his license suspended. CP 12. “It is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state.” RCW 46.20.342(1).

Because Trooper Nelson arrested Ketchum for driving with a suspended or revoked license under RCW 46.20.342, Trooper Nelson was authorized to impound the vehicle under RCW 46.55.113(1) and WAC 204-96-010.

Whenever the driver of a vehicle is arrested for a violation of RCW 46.20.342 or 46.20.345, the vehicle is subject to summary impoundment, pursuant to the terms and conditions of an applicable local ordinance or state agency rule at the direction of a law enforcement officer.

RCW 46.55.113(1).

(1) When a driver of a vehicle is arrested for a violation of RCW 46.20.342, the arresting officer may, in his/her own discretion, considering reasonable alternatives, cause the vehicle to be impounded.

WAC 204-96-010(1).

The facts of this case fall within the *Peterson* fact pattern where the statutory authorization exception applied rather than *Froehlich* which dealt with the community caretaking exception. Therefore, as in *Peterson*, Trooper Nelson was not obligated to ask Ketchum whether he could find someone to move the vehicle. *Froehlich*, at 840 (citing *Peterson*, 92 Wn. App. at 902–03)(emphasis added).

Nevertheless, the trial court in this case took the holding from the *Froehlich* community caretaking analysis and applied it to the statutory authorization exception when it held:

While an officer does not have to exhaust all possible alternatives to impoundment, *Froehlich* establishes that under these circumstances there must at least be some inquiry into whether the driver can make arrangements for someone to remove the vehicle. Based on the forgoing, the court suppresses the evidence in question.

CP 14,–15.

It is also evident that the trial court mistakenly analyzed this case under the community caretaking function when the court explained it while questioning Trooper Nelson:

I mean, you never asked Mr. Ketchum, if he had somebody else available to move the -- I mean, and what it says here, it says, for the impoundment and this is a different case, but they say for the impoundment in this other case, to be lawful *under the community caretaking function*, they had to at least consider whether the driver and the driver's spouse or the driver's friends were available to move the car from the scene.

RP 45.

This is error as the facts of this case do not fall under *Froehlich* and the community caretaking function, but rather, they fall squarely within *Peterson* where the basis for impoundment was a "traffic offense for which the legislature has expressly authorized impoundment." *Froehlich*, 197 Wn. App. at 838 (citing *Tyler*, 177 Wn.2d at 698).

Therefore, the State requests this Court to reverse the trial court's decision suppressing the evidence.

- 2. The court erred in applying *State v. Froehlich* because its holding is limited to the specific facts of that case and Nelson was not obligated to ask Ketchum, who unlawfully possessed the vehicle, to determine the vehicle's fate after he was arrested.**

In *Froehlich*, the Court did go on to determine there *was* a statutory basis for impoundment in order to examine the case outside the rubric of the community caretaking function. *Froehlich*, 197 Wn. App. at 844. Ultimately, the *Froehlich* Court held that suppression was still proper because the Court found that Trooper Richardson did not consider reasonable alternatives to impoundment. *Froehlich*, 197 Wn. App. at 844.

However, the *Froehlich* Court limited its holding when it stated, “Under the *specific facts of this case*, we hold that Richardson had an obligation to ask Froehlich about other alternatives to impounding the car . . . .” *Id.* at 845 (emphasis added). Furthermore, the *Froehlich* Court “acknowledge[d] that there may be situations when an officer has no obligation to ask a driver about reasonable alternatives to impoundment.” *Id.* at 845.

The facts of the present case are different from *Froehlich* and are much more in accord with *Peterson* where the impound was based upon statutory authority.

“The ‘[r]easonableness of an impoundment must be assessed in light of the facts of each case.’” *Froehlich*, at 846 (Melnick, J., dissenting) (quoting *Tyler*, 177 Wn.2d at 699).

Here, it would be unreasonable for Trooper Nelson to allow Ketchum to choose a person to move the vehicle because Ketchum claimed he borrowed the car a few days prior from his girlfriend who lived in Port Orchard and, meanwhile, he had five outstanding warrants for his arrest. RP 13, 15.

Additionally, soon after the inventory search, Sgt. Ryan called Trooper Nelson and relayed that the vehicle owner, Ms.Parker, called and said that Ketchum took the vehicle without her permission. RP 19. Although,

Trooper Nelson learned of this after making the decision to impound the vehicle, Nelson testified that he was still in the position to stop the impound from occurring as the hook up had not yet been completed with the tow truck. RP 19, 30. Trooper Nelson testified that even if Ms. Parker asked the State Patrol to not impound the vehicle, Trooper Nelson still would have had to move the vehicle off the road and there was nowhere nearby to do that safely. RP 29, 30. Finally, Trooper Nelson testified that he did not believe there to be any reasonable alternatives under the circumstances. RP 29.

Furthermore, before the inventory search, Ketchum claimed he had marijuana in Ms. Parker's vehicle and apparently he discussed this with Trooper Nelson and wanted to be able to keep it. This allowed Trooper Nelson to grab the marijuana for safekeeping. After finding the suspected methamphetamine baggie attached to Ketchum's marijuana, Ketchum said that some other (unidentified) people borrowed the car in Sequim the night before. Are these the very people Ketchum would have contacted to pick up the vehicle?

The holding of *Froehlich* was limited to the specific facts of that case which substantially differ from the facts of this case. Furthermore, it would not have been prudent for Trooper Nelson to ask Ketchum if he wanted somebody of his choice to retrieve the vehicle and there were no reasonable alternatives under the circumstances. Therefore, the impound was lawful and

the Court should reverse the trial court's ruling suppressing the evidence.

**B. THE TRIAL COURT ERRED BY ALLOWING KETCHUM TO BENEFIT FROM THE EXCLUSIONARY RULE FOR THE SEARCH OF A VEHICLE THAT KETCHUM TOOK FROM ANOTHER WITHOUT PERMISSION.**

The State argued in response to Ketchum's Demand for a CrR 3.6 Hearing and motion to suppress evidence that Ketchum could not benefit from the exclusionary rule because he had no rights to assert in regards to the search of Ms. Parker's vehicle. CP 26–28. The trial court did not address this issue.

Assuming Ketchum may have had automatic standing to raise the suppression issue, it is the State's position that Ketchum may not benefit from the exclusionary rule for a search of Ms. Parker's vehicle and alleged violation of Ms. Parker's rights. *See State v. Hinton*, 179 Wn.2d 862, 880, 319 P.3d 9 (2014) ("These cases . . . teach us that it is the determination of a constitutionally protectable interest, or private affair, that gives rise to the ability to challenge the warrantless search by the government.").

Trooper Nelson did not intrude into Ketchum's private affairs by searching Ms. Parker's vehicle because Ketchum took the vehicle without permission and therefore, he did not have any private affairs or "privacy interests Washington citizens held in the past and are entitled to hold in the future." *State v. Myrick*, 102 Wn.2d 506, 510–11, 688 P.2d 151 (1984).

Additionally, Ketchum already made clear that he wanted his marijuana secured so he could keep it and the baggie of methamphetamine was found in plain view attached to Ketchum's marijuana.

The purpose of automatic standing is to allow a defendant charged with a possessory offense to challenge the legality of a search or seizure without being subject to self-incrimination. *State v. Jones*, 146 Wash.2d 328, 334–35, 45 P.3d 1062 (2002).

*But a defendant asserting automatic standing must still assert his own rights, not those of a third party.* *State v. Shuffelen*, 150 Wash.App. 244, 255, 208 P.3d 1167 (2009) (quoting *State v. Williams*, 142 Wash.2d 17, 23, 11 P.3d 714 (2000)). Automatic standing does not permit a defendant to collaterally attack a search on the basis that it violated another's rights . . . . *Shuffelen*, 150 Wash.App. at 255, 208 P.3d 1167.

*State v. Libero*, 168 Wn. App. 612, 619, 277 P.3d 708 (2012) (emphasis added).

“Under article I, § 7, the consideration is whether a defendant's “private affairs” have been invaded.” *State v. Wisdom*, 187 Wn. App. 652, 679, 349 P.3d 953 (2015) (Korsmo, J., dissenting) (citing *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984)). “That term ‘focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’” *Id.* (citing *Myrick*, at 511).

“It is an open question whether or not a defendant has any privacy interest in a stolen vehicle or its contents.” *Wisdom*, at 680 (Korsmo, J., dissenting) (citing *State v. Zakel*, 119 Wn.2d 563, 571, 834 P.2d 1046 (1992) (“I would answer that question “no” because one reason for an inventory

search is to protect a vehicle owner's property. *State v. White*, 135 Wn.2d 761, 769–70, 958 P.2d 982 (1998). I would hold that a thief has no privacy interest that overrides that of the true owner. An inventory search to protect and recover the true owner's property should not be constrained by a thief's assertions concerning which of the contents are his and which are not.”).

Moreover, it is the defendant’s burden to establish a privacy right under Art. 7, sec. 1. *State v. Jordan*, 126 Wn. App. 70, 107 P.3d 130, *review granted* 155 Wn.2d 1011, 122 P.3d 913, *reversed on other grounds* 160 Wn.2d 121, 156 P.3d 893 (2005) (“The defendant has the burden of showing that his or her “private affairs” were disturbed by police in a way that implicates the State Constitution.”); *see also State v. Jackson*, 82 Wn. App. 594, 601–02, 918 P.2d 945 (1996).

Here, Ketchum was never required to establish that he had a right to privacy in another person’s vehicle which he took without permission and that such interest was a “privacy interest[ ] Washington citizens held in the past and are entitled to hold in the future.” *Myrick*, 102 Wn.2d at 510–11.

Although there may be automatic standing to raise the challenge, Ketchum may not benefit from the exclusionary rule because his rights were not violated by the search of someone else’s vehicle which he wrongfully possessed. Therefore this Court should reverse the trial court’s decision suppressing the evidence.

## VI. CONCLUSION

The trial court erred because it erroneously applied the fact specific holding of *State v. Froehlich* to the facts of this case as a basis to suppress the evidence. Additionally, the trial court failed to apply *State v. Peterson* which was on point.

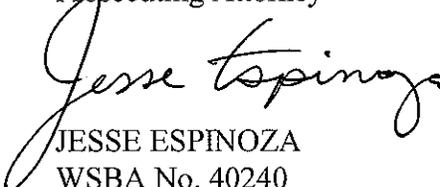
Furthermore, Ketchum had no privacy interest in Ms. Parker's vehicle which he took without permission and therefore the trial court erred by applying the exclusionary rule to suppress the evidence.

For the foregoing reasons, the Court should reverse the trial court's decision suppressing the evidence.

Respectfully submitted this 2nd day of February, 2018.

Respectfully submitted,

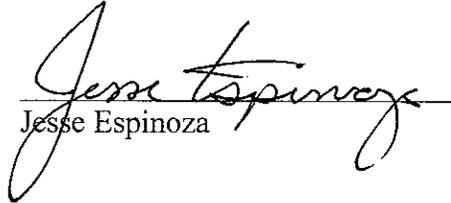
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**CERTIFICATE OF DELIVERY**

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to John A. Hays on February 2, 2018.

MARK B. NICHOLS, Prosecutor

  
Jesse Espinoza

**CLALLAM COUNTY DEPUTY PROSECUTING ATTORN**

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