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Court of Appeals  
Division II  
State of Washington  
3/13/2019 8:00 AM

NO. 52775-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RANDALL KING,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable J. Andrew Toynebee, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that King committed forgery under RCW 9A.60.020(1)(a) or (b).

2. The defendant assigns error to the following findings of fact:

The court finds the defendant knew he was depositing into the credit union forged documents. All three paper instruments were obviously altered to the point where a reasonable person would suspect their authenticity, and know they are forged. CP 43 (FF 1.6).

The court further finds the defendant intended to defraud the credit union by cashing these three forged instruments through an ATM machine rather than going inside the credit union and asking a bank teller to verify the authenticity of the documents. CP 43 (FF1.7)

3. The trial court erred when it concluded King was guilty of forgery.

4. King's Sixth Amendment and Wash. Const. art. I, § 22 right to effective assistance of counsel was violated when defense counsel failed to raise the defense of legal efficacy to Count I, or to bring a *Knapstad* or half-time motion to dismiss.

B. ISSUES PRESENTED ON APPEAL

1. Did the state fail to prove beyond a reasonable doubt that King committed forgery under RCW 9A.60.020(1)(a) or (b) when King did not falsely make, complete, or alter a written instrument or; possess, utter, offer, dispose of, or put off as true a written instrument which he knows to be forged?

2. Was there substantial evidence to support the trial court's findings of fact 1.6 and 1.7, namely that King knew the instruments were forged, when the state failed to prove beyond a reasonable doubt the alterations and/or misrepresentations within the instruments constituted forgery?

3. Was there substantial evidence to support the trial court's conclusion that King was guilty of forgery when King did not falsely make, complete, or alter a written instrument or; possess, utter, offer, dispose of, or put off as true a written instrument which he knows to be forged?

4. Was King's Sixth Amendment right to effective assistance of counsel violated when defense counsel failed to

raise the absence of legal efficacy as a defense to Count I when the money order was not signed by any drawer?

C. STATEMENT OF THE CASE

1. Procedural History

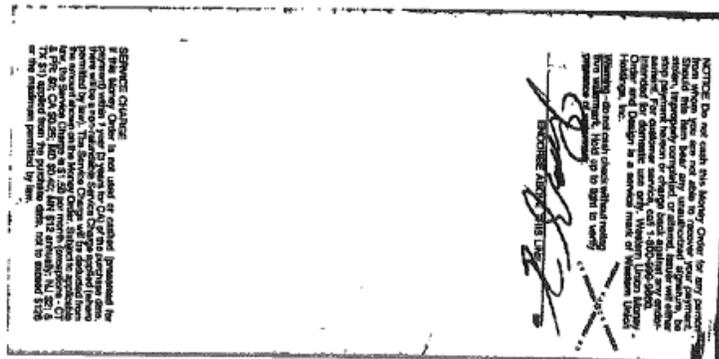
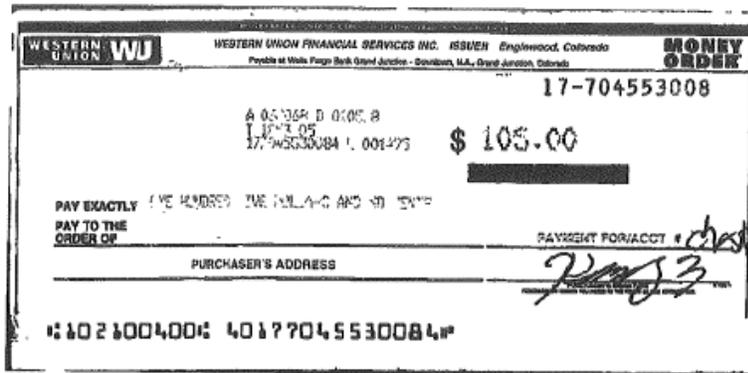
Randall King was charged by amended information with three counts of Forgery (RCW 9A.60.020(1)(a) or (b)), and one count of Theft in the Second Degree (RCW 9A.56.020(1)(a), (b), or (c)). CP 29-32. After a bench trial, King was found guilty as charged. CP 43, 48. King timely appeals. CP 59.

2. Substantive Facts

Randall King held an account at the TwinStar Credit Union in Lewis County. RP 10, 14; Exh. 1. Over the course of a few days King deposited two money orders drawn on Western Union and a cashier's check drawn on Chase Bank into a TwinStar Automatic Teller Machine (ATM) and then immediately withdrew cash. RP 19, 21; Exh. 1.

a. \$105 Money Order

King signed the back of a \$105 money order and deposited it into his TwinStar account through the ATM. RP 43, 47. After he deposited the money order King withdrew \$100 in cash. RP 21. The \$105 money order appeared as follows:



Exh 1 at p.3.

This money order was flagged by TwinStar fraud services supervisor, Corey Morgan, because the “Pay to the Order” line appeared to have been whited out prior to being deposited. RP 9, 15, Exh. 1. The state presented no evidence of who wrote “pay to the order of Randy King.” RP 18, 34, 45.

b. \$430 Money Order

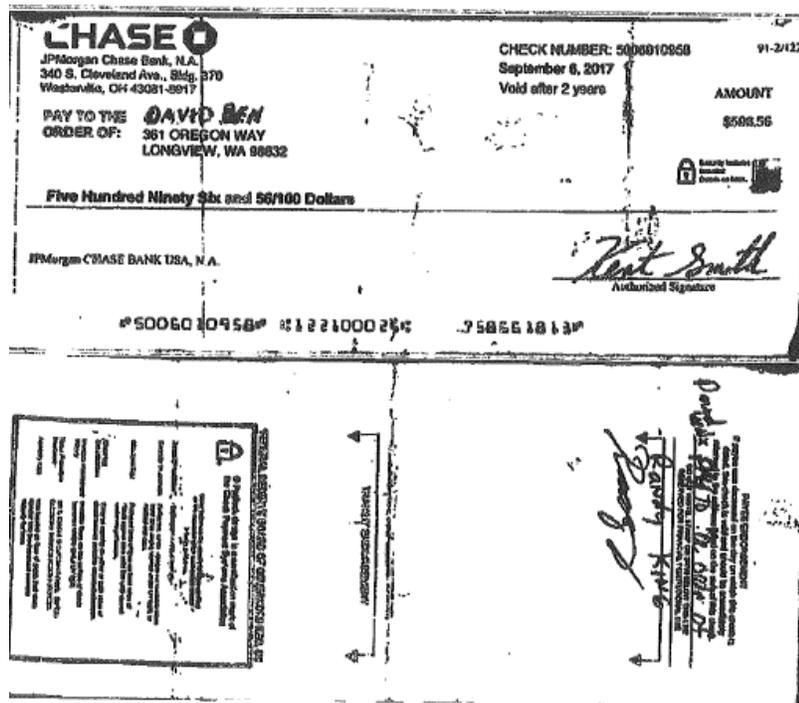
King signed his name to the back of a \$430 money order below the endorsement that read “Pay to the order of Randy C. King.”



c. \$596.56 Check

King signed his name to the back of a \$596.56 cashier's check under the endorsement which read "Pay to the order of Randy King" RP 44. After signing his name King again deposited the check into his TwinStar account through the ATM and then withdrew \$500 in cash. RP 19, 21.

The \$596.56 check appeared as follows:



Exh. 1 at 5.

Morgan flagged this check because the name on the "Pay to the Order" appeared to have been whited out and the name "David Ben" manually inserted. RP 18. The state presented no evidence of

who wrote “David Ben” as the payee or who wrote “pay to the order of Randy King” on the back of the check. RP 18, 34, 45.

d. Trial Testimony

At trial, King testified that he cashed the money orders at the behest of Roxie Chipman who was unable to cash them because she had no bank account. RP 33, 36, 42. Chipman testified at trial and confirmed that she gave King the \$105 money order and the \$430 money order to cash. RP 32-33, 36. King further testified he cashed the \$596.56 cashier’s check at the behest of an acquaintance named China who also had no bank account. RP 44.

e. Trial Court’s Findings and Conclusions

After a bench trial, the court found King guilty of three counts of forgery. CP 80. Although the trial court did not find King’s or Chipman’s testimony credible it did not make any finding that King altered the instruments himself. King testified at trial that he signed his name to the back of each instrument, but the trial court did not make a specific finding that King signed the instruments. RP 43-44; CP 42-43. Instead, the trial court found that King offered three instruments that were “obviously altered.” CP 43.

D. ARGUMENT

1. THE STATE FAILED TO PROVE  
BEYOND A REASONABLE DOUBT  
THAT KING'S CONDUCT  
CONSTITUTED THE CRIME OF  
FORGERY

The state failed to prove beyond a reasonable doubt that King's conduct constituted the crime of forgery.

In a criminal prosecution, the state must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016) (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (quotations omitted)).

This Court must reverse the conviction if there is insufficient evidence to prove an element of a crime. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); *State v. Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

To convict King of forgery the state had to prove beyond a

reasonable doubt that, with intent to injure or defraud, he either falsely made, completed, or altered a written instrument or possessed, uttered, offered, disposed of, or put off as true a written instrument which he knew to be forged. RCW 9A.60.020(1)(a) and (b).

After a bench trial, this court reviews the trial court's findings of fact to determine whether they are supported by substantial evidence and then reviews whether those findings support the trial court's conclusions of law. *State v. Disney*, 199 Wn. App. 422, 428, 398 P.3d 1218 (2017) (citing *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014)).

- a. King did not commit forgery when the alterations to the check and money orders did not state a falsity regarding the genuineness of the instruments

"Forgery requires a false making, not just a false representation." *State v. Marshall*, 25 Wn. App. 240, 241, 606 P.2d 278 (1980). Generally, "forgery cannot be charged if the accused signs or uses his own true or actual name." *Marshall*, 25 Wn. App. at 241 (citing *State v. Lutes*, 38 Wn.2d 475, 480, 230 P.2d 786 (1951)).

The landmark case on forgery in Washington is *Dexter Horton*

*Nat'l Bank v. United States Fidelity & Guar, Co.*, 149 Wash. 343, 270 P.799 (1928). Although *Dexter Horton* is a civil case involving an action under an insurance policy, and it predates the criminal forgery statute, it has been cited in criminal cases as a valid interpretation of principles relating to forgery. See, e.g., *State v. Mark*, 94 Wn.2d 520, 523-24, 526-27, 618 P.2d 73 (1980).

In *Dexter Horton*, an employee of Crenshaw & Bloxom named H.N. Howe, without authority, endorsed, a check payable to Crenshaw & Bloxom as follows: "Crenshaw & Bloxom, H.N. Howe, Cashier." *Dexter Horton*, 149 Wash. at 345. The Washington Supreme Court held that although the employee was not authorized to receive the funds, his endorsement did not constitute forgery because the check was exactly what it purported to be. *Dexter Horton*, 149 Wash. at 351.

In holding that this endorsement was not a forgery the Washington Supreme Court cited *People v. Bendit*, 111 Cal. 274, 43 P. 901 (1896) with approval as follows:

"When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself,-in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a

person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not.”

*Dexter Horton*, 149 Wash. at 348 (citing *Bendit*, 111 Cal. 274).

“Though a forgery, like false pretenses, requires a lie, it must be a lie about the document itself: the lie must relate to the genuineness of the document.” *State v. Esquivel*, 71 Wn. App. 868, 871, 863 P.2d 113 (1993) (quoting LaFave & A. Scott, *Criminal Law* § 90, at 671 (1972)).

In *Mark*, the defendant, a pharmacist, submitted Medicaid reimbursement claim forms on which he wrote physicians’ names. *Mark*, 94 Wn.2d at 523. By writing the physicians’ names on the form, Mark falsely represented that each physician had prescribed the drugs for which the claim was made. However, Mark did not claim the physicians actually signed the form. *Mark*, 94 Wn.2d at 523. Therefore, writing the physicians’ names on the form did not constitute forgery because Mark did not assert that anyone other than himself wrote the instrument. *Mark*, 94 Wn.2d at 523-24.

Following these principles, in *Mark*, the court reversed the defendant’s conviction for forgery when he signed Medicaid reimbursement forms which contained misrepresentations of fact,

but the forms were not forgeries because they were exactly what they purported to be -- Medicaid reimbursement claim forms. *Mark*, 94 Wn. 2d at 523-24 (citing *Dexter Horton*, 149 Wash. at 348).

Similarly, in *Marshall*, the defendant, a pharmacist, was charged with forgery for submitting over 300 allegedly fraudulent reimbursement forms. *Marshall*, 25 Wn. App. at 241. The Washington Supreme court reversed Marshall's conviction for forgery because the reimbursement forms he submitted were genuine and were submitted with his own true signature. They were not falsely made and it was undisputed that Marshall had the authority to submit valid forms to DSHS for reimbursement. *Marshall*, 25 Wn. App. at 242.

In contrast, the Court of Appeals upheld the defendant's conviction in *State v. Soderholm* when the defendant signed the name of another person, Johnson, to an affidavit, without Johnson's authority or consent, and without indicating Soderholm signed it as Johnson's agent. *State v. Soderholm*, 68 Wn. App. 363, 366, 375, 842 P.2d 1039 (1993). The affidavit was not what it purported to be, namely an affidavit signed by Johnson.

The Court of Appeals also held that a falsified government

document, namely an alien registration card and a social security card, could constitute forgery even though true statements appeared on those documents. *Esquivel*, 71 Wn. App. at 871. By showing the cards to the officers, the defendants misrepresented their legal status and the instruments' only value was to falsely represent the defendants' right to legally be in this country. *Esquivel*, 71 Wn. App. at 872. Therefore, the defendant's intent to defraud could be inferred. *Esquivel*, 71 Wn. App. at 872.

In *State v. Scoby*, the Court of Appeals held a rational trier of fact could infer that Scoby knew a purported \$20 bill had been forged because of the obviousness of the alteration. *State v. Scoby*, 57 Wn. App. 809, 812, 790 P.2d 226 (1990), *aff'd*, 117 Wn.2d 55, 810 P.2d 1358 (1991), *amended*, 117 Wn.2d 55, 815 P.2d 1362 (1991). The "\$20 bill" was actually a \$1 bill to which the upper corners of a \$20 bill had been taped, the picture of George Washington appeared on the face of the bill and contained the words "ONE DOLLAR" in large letters at the bottom of the face. *Scoby*, 57 Wn. App. at 811.

Here the instruments are more like the instruments in *Mark*, *Marshall*, and *Dexter Horton* than in *Soderholm*, *Esquivel*, and *Scoby*. Similar to *Dexter Horton*, *Mark* and *Marshall*, the check and

money orders themselves were genuine. There was no evidence the instruments were anything other than a check issued by Chase Bank and money orders issued by Western Union. Just as the pharmacists in *Mark* and *Marshall* were authorized to submit Medicaid reimbursement forms containing truthful information, King was authorized to negotiate instruments containing truthful information that specifically indorsed the instrument to him. See RCW 62A.3-205(a) (“When specially indorsed, an instrument becomes payable to the identified person.”).

As the bearer, King was also authorized to negotiate the \$105 money order that contained a blank endorsement so long as the information contained in the instrument was truthful. See RCW 62A.3-205 (b) (“When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.”). Just like *Mark*, *Marshall*, and the *Dexter Horton* employee, King did not pretend to be someone he was not nor did he claim the check and money orders were something they were not. Instead, his signature, at most, falsely represented that he was authorized to receive the funds. Under *Dexter Horton*, *Mark*, and *Marshall*, this is insufficient to constitute forgery as a

matter of law. *Dexter Horton*, 149 Wash. at 351; *Mark*, 94 Wn.2d at 523-24; *Marshall*, 25 Wn. App. at 242-43.

*Soderholm*, *Scoby* and *Esquivel*, are distinguishable from King's case because here, King was not pretending to be someone else. Nor was he trying to hold out a formal document form as something it was not. In contrast, the defendants in *Esquivel* were not authorized to possess an alien registration card or social security card in their names. By doing so, they were pretending to be legal citizens when they were not. And similarly, *Soderholm* did not have authority to sign Johnson's name to an affidavit and by doing so he held out the affidavit as an affidavit signed by Johnson when it was not.

Further, whether the instruments were "obviously altered" is immaterial under *Scoby* because King's case does not involve altering the nature of the instrument such as passing off a \$1 bill as a \$20 bill. In *Scoby*, the altered instrument involved a lie about the document itself and the question was whether *Scoby* knew the document itself was false. In contrast, here, the question was not whether King knew the documents were false, but whether he knew he was not authorized to receive the funds. If for the sake of

argument, King knew that the instruments were altered, this alone, would not constitute forgery. Rather King had to know that whoever altered the instruments was pretending to be someone other than the maker of the writing. *Mark*, 94 Wn.2d at 523.

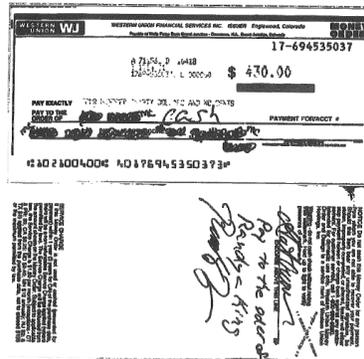
“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Because the state failed to prove the elements of forgery, this Court must reverse King’s convictions for forgery and remand for dismissal with prejudice.

- b. The \$430 money order was insufficient to support a conviction for forgery because even if genuine it lacked legal efficacy

To support a forgery conviction, the instrument must “be something which, if genuine, may have legal effect or be the foundation of legal liability.” *State v. Smith*, 72 Wn. App. 237, 243, 864 P.2d 406 (1993) (Smith II). An instrument without the signature of a drawer does not create legal liability. *Smith*, 72 Wn. App. at 243 (quoting RCW 62A.3-401(1)). Therefore, a check lacking the signature of any drawer is insufficient to support a conviction as a

matter of law. *Smith II*, 72 Wn. App. at 243 (citing *Scoby*, 117 Wn.2d at 57-58).

Here, the \$430 money order lacked the signature of any drawer.



Exh. 1.

Therefore, no person was liable on the instrument and the money order was insufficient to support a conviction for forgery. *Smith II*, 72 Wn. App. at 243.

Because the state failed to prove the elements of forgery, this Court must reverse King's convictions for forgery and remand for dismissal with prejudice. *Hickman*, 135 Wn.2d at 103.

2. KING WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO RAISE LEGAL EFFICACY AS A DEFENSE TO COUNT I, OR MOVE TO DISMISS COUNT I WHEN THE MONEY ORDER WAS NOT SIGNED BY ANY DRAWER

The Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052 (1984)). The Court reviews ineffective assistance of counsel claims de novo. *State v. Wooten*, 178 Wn.2d 890, 895, 312 P.3d 41 (2013).

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and that the deficient representation was prejudicial. *State v. Kylo*, 166 Wn.2d 856, 862-63, 215 P.3d 177 (2009). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687.

Counsel's performance is deficient if it falls below an objective standard of reasonableness." *Kylo*, 166 Wn.2d at 862. (citation

omitted). Counsel's performance is not deficient if it can be characterized as legitimate trial strategy. *Kyllo*, 166 Wn.2d at 863. To establish actual prejudice, King must show there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Kyllo*, 166 Wn.2d at 862.

- a. Defense counsel's failure to make a *Knapstad* motion or a half time motion to dismiss for insufficient evidence prejudiced the defendant

Actual prejudice means that the error was not harmless. *In re Creace*, 174 Wn.2d 835, 844, 280 P.3d 1102 (2012).

The trial court has inherent power to dismiss a case where the undisputed facts, considered in the light most favorable to the state, are insufficient to support a finding of guilt. *State v. Knapstad*, 107 Wn.2d 346, 351-53, 729 P.2d 48 (1986). Defense counsel may bring a "half-time" motion when the state has not presented enough evidence to convict the defendant of the charged crime. *State v. Nicholson*, 119 Wn. App. 855, 858, 84 P.3d 877 (2003), *disapproved of on other grounds by State v. Smith*, 159 Wn. 2d 778, 154 P.3d 873 (2007) (Smith III).

Under *Smith II*, 72 Wn. App. at 243, there was insufficient evidence as a matter of law to convict King of forgery on Count I for the \$430 money order because it lack the signature of any drawer. Had defense counsel brought a *Knapstad* or half-time motion to dismiss count I, the court would have dismissed it as a matter of law. *Smith II*, 72 Wn. App. at 243. Therefore, defense counsel's error was not harmless and King was actually prejudiced by counsel's error.

Because the state's evidence cannot support a forgery conviction on Count I, this court should reverse King's conviction. "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *Hickman*, 135 Wn.2d at 103 (quoting *Hardesty*, 129 Wn.2d at 309). Therefore, this Court must reverse King's conviction and remand for dismissal with prejudice.

#### E. CONCLUSION

Randall King respectfully requests that this court reverse Kings convictions for forgery (Counts I, II, and III) and remand for dismissal with prejudice.

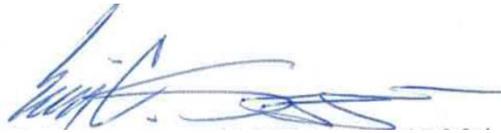
DATED this 13<sup>th</sup> day of March 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office [appeals@lewiscountywa.gov](mailto:appeals@lewiscountywa.gov) and [sara.beigh@lewiscountywa.gov](mailto:sara.beigh@lewiscountywa.gov) and Randall King/DOC#782413, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362a true copy of the document to which this certificate is affixed on March 13, 2019. Service was made by electronically to the prosecutor and Randall King by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**LAW OFFICES OF LISE ELLNER**

**March 12, 2019 - 9:32 PM**

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