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STATE OF WASHINGTON
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NO. 33981-1-II
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TERRY LEE WINTERSTEIN

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Terry Lee Winterstein asks this court to accept review of the decision in Part B of this motion.

B. DECISION

Appellant Terry Lee Winterstein seeks review of that portion of the Court of Appeals, Division II decision filed September 11th, 2007, affirming his conviction and holding that he was not entitled to relief from judgment and suppression of the evidence against him, requiring reversal and dismissal of his conviction. A copy of the published opinion of the Court of Appeals is attached.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals held that even though Mr. Winterstein properly effectuated a change of his address with DOC, the Community Corrections Officer had the authority of law to enter his prior residence because he had a reasonable belief, under *Terry v. Ohio*, that Mr. Winterstein still resided at his prior residence. Did the Court of Appeals err in applying *Terry* analysis to the question of whether the CCO had the authority of law, under Article I, § 7, to enter and search Mr. Winterstein's prior residence?

2. If the Court of Appeals properly relied on *Terry* to determine whether the CCO had the authority of law to enter Mr. Winterstein's

former residence, did it err in concluding that the CCO's actions were reasonable under *Terry*?

3. The Court of Appeals held that even if the Community Corrections Officer lacked the authority of law to enter and search the residence at 646 Englert Rd., the inevitable discovery exception to the exclusionary rule saved the evidence from mandatory suppression. Does Article I, § 7 permit an "inevitable discovery" exception to its exclusionary rule?

D. STATEMENT OF THE CASE

The house that was the subject of this warrant and the initial warrantless search by DOC clearly bore the address of 646 Englert Road. CP 131. A motor home (RV) near the house bore the address of 646 ½ Englert Road. CP 131.

The warrantless search was conducted by Corrections Officer Kris Rongen and two other officers from DOC. RP Vol. II (6-28-05), 130. The DOC officers also took officers from the Clark-Skamania Drug Task Force and the Cowlitz Wahkiakum Drug Task Force because he had been informed by Clark-Skamania that they believed there was a methamphetamine lab at 646 Englert Road. RP Vol. II (6-28-05) 130-131. Officer Rongen made the initial entry. RP Vol. II (6-28-05) 131. In one of the bedrooms of the residence, which the DOC officers knew did not

belong to Mr. Winterstein and was later determined to be Mr. Soderlind's, the officers observed items that they believed indicated the presence of a meth lab. RP Vol. II (6-28-05), 139, 264, Trial RP Vol. II, 183. This observation was made from the threshold of the door. RP Vol. II (6-28-05), 201.

Trial counsel for Mr. Soderlind, John Hays interviewed Kris Rongen in an attempt to verify the information given to him by Mr. Soderlind. CP 157. Mr. Rongen told him that Mr. Winterstein had come to DOC and changed his address using the Kiosk computer on February 6th, 2003, the same day as the search. CP 157. Mr. Rongen said there was no way to tell whether Mr. Winterstein visited the Kiosk before or after the search, and stated he had no way of knowing about the change of address because it happened on the same day. CP 157. Mr. Coppola, the deputy prosecutor, later informed Mr. Hays' that Mr. Rongen had confirmed for him that Mr. Winterstein changed his address on February 6th, 2003. CP 157. Mr. Northrip, trial counsel for Mr. Winterstein, had consulted extensively with Mr. Hays about the State's representations regarding the date on which Mr. Winterstein changed his address with DOC. CP 134. Mr. Northrip also received discovery from the State, in the form of a report from CCO Rongen, stating affirmatively that according to DOC records, Mr. Winterstein did not change his address

with DOC until February 6th, 2003. CP 135. Based on the State's representations, Mr. Northrip, like Mr. Hays, abandoned a pre-trial motion to suppress. CP 135.

On December 20th, 2004, Mr. Winterstein proceeded to trial on the charge of manufacturing methamphetamine. After closing arguments were completed in the trial, Mr. Northrip, and deputy prosecutor Heiko Coppola were reviewing the exhibits that had been admitted prior to them being submitted to the jury. CP 137. Exhibit 122 had been labeled "misc. documents." CP 137. Within these documents was a billing statement dated January 13th, 2003, addressed to Mr. Winterstein at 646 ½ Englert Road. CP 137. (Exhibit 4). This document had never been provided to either Mr. Hays or Mr. Northrip during discovery, and proved that the prior representations of the deputy prosecutor and DOC were in fact misrepresentations, whether intentional or not. CP 137-138.

Following Mr. Winterstein's conviction, both Mr. Winterstein and Mr. Soderlind made motions under CrR 7.8. Mr. Winterstein moved for relief from judgment under CrR 7.8 (b) (2) (3) and (5), allowing relief from judgment based on newly discovered evidence and based on the misrepresentation of an adverse party, as well as Mr. Winterstein's constitutional right to be free from unreasonable searches and seizures. CP 130. The State stipulated that this document showing that Mr.

Winterstein had changed his address with DOC at least as early as January 13th, 2003, constituted newly discovered evidence as contemplated by CrR 7.8 (b) (2). Because the newly discovered evidence pertained to a suppression issue, the successful litigation of which would have required dismissal of the State's case, all parties agreed that Mr. Winterstein and Mr. Soderlind would litigate their respective motions in the form of a suppression motion. RP Vol. II (6-28-05), 109. All parties stipulated that if the Court agreed that CCO Rongen lacked the legal authority to enter 646 Englert Road to look for Mr. Winterstein, based on Mr. Winterstein's prior change of address, then all evidence observed during the course of this warrantless entry and seized in the subsequent search warrant should have been suppressed and that relief from judgment and dismissal of the cases was required. *Id.* This motion was heard before the Honorable James Warme on June 28th, 2005. It should be noted at this point that no findings of fact and conclusions of law were entered following this motion, so this entire statement of the case is based upon the Report of Proceedings, the Clerk's Papers and Exhibits.

The Court took testimony at the June 28th motion from CCO Kris Rongen, and Cowlitz-Wahkiakum Task Force Detective Tim Watson. On February 6th, 2003, Mr. Winterstein was a probationer under his supervision. *Id.* at 120. Rongen testified that probationers will meet with

an intake officer, who reviews the conditions of supervision with the probationer, before they are assigned to a field officer (such as Rongen). Id. at 121. When an offender meets with the field officer, the CCO will again review the same written conditions with the offender that was provided to him by the intake officer. Id. The Court admitted exhibit 8, entitled "Standard Conditions," which was the document of written conditions given to Mr. Winterstein when he was placed on probation. Id. at 123, Exhibit 8.

These written conditions required, among other things, that the probationer *notify* the community corrections officer before change of residence or employment. RP Vol. II (6-28-05) 164, Exhibit 8. Rongen testified that he told Mr. Winterstein, as he tells all of his probationers, that prior to changing his address, he would need to come in and talk with him (Rongen) and get his permission. Id. at 124.

CCO Rongen also explained the Kiosk device at the Longview DOC office. He testified that an offender can change his address using this machine. Id. at 126. This Kiosk also might be referred to as the Genie. Id. at 159. He testified however, that under *his* conditions, an offender must meet with him and get permission to change his address before he could utilize the Kiosk to change his address. Id. at 126-127. When asked if changing one's address with the Kiosk met DOC's

requirements, Rongen testified that the Kiosk simply doesn't meet *his* requirements as a CCO. Id. at 213-214. He conceded, however, that he is an employee of DOC, that his authority as a community corrections officer is derived from the authority given to him by DOC, and that he has no greater authority than DOC. Id.

Rongen admitted that he instructs his probationers to use the Kiosk, and that the Kiosk specifically allows a probationer to notify a community corrections officer of a change of address. Id. at 168.

Revealing his disdain for the Kiosk, CCO Rongen testified there is "no merit" to a change of address done at the Kiosk. Id. at 220. He stated: "...[T]o base my supervision off what a computer is asking somebody, instead of a face-to-face contact, that's not sufficient enough. That face-to-face contact is what generates my rapport; my understanding...where the violation behavior is, things of that nature. So I'm not gonna base information off the Kiosk reporting." Id. at 221. Rongen then grudgingly conceded that offenders are allowed to change their address at the Kiosk, and that the Department encourages offenders to use it. Id. at 221-223.

CCO Rongen admitted that he has access to any information an offender puts into the Kiosk from the computer at his desk. Id. at 168, 219. Although he wouldn't open up that particular program on a daily basis, he would normally open it up before he went out to do a field

contact. Id. at 127-128. He did not explain why, in spite of the fact he was aware an offender could change his address using the Kiosk, he did not check the database prior to the search on February 6th, 2003. Id. at 186-187.

With regard to the incident on February 6th, 2003, CCO Rongen conceded before he went to Englert Road, he met with the officers from both the Clark-Skamania and Cowlitz-Wahkiakum task forces at the Woodland Police Department early in the morning for a raid planning meeting. Id. at 204-205. The Task Force officers had informed Rongen that they believed there was a meth lab at 646 Englert Road but that they didn't have enough evidence to obtain a search warrant. Id. 203-204. When he arrived at 646 Englert Road, he knocked on the door and announced himself. Id. at 131. At the same time, the door "came open." Id. When he entered, he went down the hallway to where the bedrooms were located. Id. He ordered the other people in the residence to have a seat in the living room. Id. Another officer went into the bedroom they believe to belong to Mr. Winterstein. Id. One of the people he encountered in the house was Sunshine O'Connor, who he believed was Mr. Winterstein's girlfriend. Id. at 132. Rongen asked her where Mr. Winterstein was and whether he still lived there. Id. at 132-133. When asked by the Court why he asked Ms. O'Connor if Mr. Winterstein still

lived there, Rongen stated that it was for the purpose of verification, “just one more additional thing.” Id. at 136. Rongen was never asked why, if he had no actual knowledge that Mr. Winterstein had changed his address to 646 ½ Englert Road, he felt it necessary to ask Ms. O’Connor if Mr. Winterstein still lived there as a means to establish that his address was 646 Englert Road, not 646 ½ Englert Road. Report of Proceedings.

Rongen testified, over the objection of both defense attorneys, that Ms. O’Connor replied yes, that Mr. Winterstein was still living there. Id. at 137.

Rongen testified he then went to the bedroom he believed to be Mr. Winterstein’s and “verified Mr. Winterstein’s room as being how I recollected from my last visit there...” Id. at 138. Again, Rongen was not asked why it was necessary to perform this verification when he had no reason to believe, according to him, that Mr. Winterstein had changed his address. Report of Proceedings. While looking in the area of the bedrooms, Rongen looked into another bedroom (later determined to be Mr. Soderlind’s) and saw a scale with white residue on it, a jar of what appeared to be red phosphorous, and a meth pipe. Id. at 139. He then backed out and informed the Task Force officers of his discovery, and they subsequently obtained a search warrant. Id. at 141. Mr. Winterstein

was not there at the time the DOC officers entered 646 Englert Road. Id. at 202, 209.

Detective Watson of the Cowlitz-Wahkiakum Narcotics Task Force testified on behalf of the State. He testified that after he obtained a search warrant, he entered the motor home which bore the address of 646 ½ Englert Road. Id. at 248. He testified it did not appear that anyone was living there. Id. No contraband was found in the motor home. Id. at 252. Detective Watson testified on cross-examination that although it would have been awkward to move around the motor home due to the large number of boxes within it, one could nevertheless do so. Id. at 253. He also conceded that someone could have slept there, in spite of its messy condition. Id. at 253.

The defense argued that Rongen, based upon the violation of failure to report, had the authority to enter only Mr. Winterstein's home and to search for Mr. Winterstein in particular. Id. at 260-261, 270. Rongen did not have the authority to conduct a warrantless search of someone else's home, or to search for evidence of a crime. Id. at 270-271.

The Court denied the motion of both defendants for relief from judgment. The Court agreed with both defense attorneys that Mr. Winterstein was not required to get permission from CCO Rongen before he changed his address, and was permitted to utilize the Kiosk to do so.

Id. at 291-292. The Court, however, was ultimately persuaded by information gathered by Rongen *after* the warrantless entry into 646 Englert Road, and ruled that Rongen had the lawful authority to conduct this warrantless entry and search because he had acted in good faith. Id. at 292-293.

E. ARGUMENT

I. THE COURT OF APPEALS ERRED IN APPLYING TERRY ANALYSIS TO DETERMINE WHETHER THE CCO HAD THE AUTHORITY OF LAW TO ENTER A RESIDENCE OTHER THAN MR. WINTERSTEIN'S.

Division II's opinion ignored the body of precedent holding that prior to entering a home to conduct a search, law enforcement must possess authority of law under Article I, § 7 of the Washington State Constitution. *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *State v. Wallin*, 125 Wn.App.648, 660, 105 P.3d 1037 (2005); *State v. Morse*, 156 Wn.2d 1 (2005); *State v. Littlefair*, 129 Wn.App. 330, 340 (2005). Instead, the court stated: "Washington caselaw does not appear to address the lengths to which an officer must go to ensure that the address he or she is searching is, indeed, the probationer's residence." (Opinion at page 15). The Court chose to apply the "specific and articulable facts" standard promulgated in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968),

to decide whether law enforcement officers possess the authority of law to enter a residence other than a probationer's. *Id.*

Mr. Winterstein argues that Division II erred in holding that *Terry* analysis controls the question of whether the CCO had the authority of law under Article I, § 7 to enter the residence at 646 Englert Rd.

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT CCO'S RONGEN'S ENTRY INTO THE RESIDENCE AT 646 ENGLERT RD. WAS REASONABLE UNDER TERRY.

Should this Court affirm the Court of Appeals' holding that *Terry* analysis controls the question of how a CCO must determine the address of a probationer prior to entering a residence at which he no longer resides, Mr. Winterstein argues that CCO Rongen did not have a reasonable basis to believe he still lived at 646 Englert Rd. The Court noted two possible sources of information regarding Mr. Winterstein's current address: (1) the official address possessed by the DOC (646 ½ Englert Road) and (2) CCO Rongen's "previous experience" meeting Mr. Winterstein at the house at 646 Englert Rd. *Id.*

In then concluding that CCO Rongen acted reasonably in ignoring the information contained in his own database and instead relying on his past contacts with Mr. Winterstein, the Court relied on two factors: (1) the fact that CCO Rongen believed he possessed the authority to require Mr.

Winterstein to obtain his permission before moving and (2) the fact that Mr. Winterstein's new address was a motor home on the same piece of property as the mobile home bearing the address 646 Englert Rd. Id.

The Court of Appeals erred in finding Rongen had "a reasonable belief" Mr. Winterstein still lived at 646 Englert Rd. The first factor relied on by the Court, that Rongen believed he possessed the authority to require Mr. Winterstein to obtain his permission before changing his address, should not have been considered by the Court of Appeals. This belief on the part of Rongen was specifically rejected as reasonable by the trial court. The trial court found that Rongen did not have the authority to alter the rules of Mr. Winterstein's supervision which simply required him to notify DOC of a change of address, not obtain permission prior to moving. The trial court further found that changing one's address using the Kiosk was an approved method by which to change an address and that Mr. Winterstein had properly effectuated a change of address. The Court of Appeals affirmed each one of these findings. (Opinion at page 11-12). CCO Rongen's grandiose imagination regarding his power as a community corrections officer does not render his belief on this point reasonable.

The second factor relied on by the Court lacks reason and appears to reflect a misunderstanding of the facts. CCO Rongen did not know

until well after this search (several months after, if we are to believe he didn't knowingly lie to both the Deputy Prosecutor and both defense attorneys about when he became aware of this change of address) that Mr. Winterstein had changed his address to the motor home on the property. How can the fact that Mr. Winterstein changed his address to a motor home (as though that, in itself, is an unreasonable act) be used as a factor in determining the reasonableness of CCO Rongen's belief when CCO Rongen was not even aware of this fact? He became aware of this fact after he entered 646 Englert Rd. and searched it.

In order for this fact to be considered in the "specific and articulable facts" calculus, he must have been aware of it *before* he entered 646 Englert Rd. *Terry* requires that a detention must be justified at its inception. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002), citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). "For a permissible *Terry* stop the State must show that (1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes." *Duncan*, at 172, *Collins* at 173. Here, the entry was not justified at its inception where CCO Rongen claimed not to know, until months after this search, that Mr. Winterstein had changed his address to the motor home.

Review is therefore appropriate under RAP 13.4 (b) (3) because this case involves a significant question of law under the Washington State Constitution.

III. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE DOCTRINE OF INEVITABLE DISCOVERY JUSTIFIED THIS SEARCH UNDER ARTICLE 1, SECTION 7.

The Court of Appeals' reliance on the doctrine of inevitable discovery was error. The State never raised inevitable discovery as a justification for this search. This issue was raised sua sponte by Judge Penoyer at oral argument. The Court of Appeals relied on *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995). The doctrine of inevitable discovery, which has never been officially adopted by this Court¹, is *not* an exception to the warrant requirement but an exception to the exclusionary rule of the Fourth Amendment. The Court of Appeals recognized as much when it stated that under the doctrine of inevitable discovery the "suppression of the evidence" was not affected. (Opinion at page 16).

This Court has consistently refused to recognize any exception whatsoever to the exclusionary rule of Article I, § 7. In *State v. White* this Court held:

¹ *State v. O'Neill*, 148 Wn.2d 564, 592, 62 P.3d 489 (2003), n.11.

The language of [Article I, § 7] constitutes a mandate that the right to privacy shall not be diminished by the gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than curbing governmental actions.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). “Whenever the right is unreasonably violated, the remedy *must* follow.” (Emphasis in original.) *Id.*; *State v. Boland*, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990); see also, *State v. Young*, 123 Wn.2d 173, 196, 867 P.2d 593 (1994); *In re the Personal Restraint of Maxfield*, 133 Wn.2d 332, 343, 945 P.2d 196 (1997); *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); *State v. Barker*, 143 Wn.2d 915, 922, 25 P.3d 423 (2001).

White, and its view that Article I, § 7 requires an automatic exclusionary remedy, was entirely consistent with long-established cases. S. Pitler, Washington Law Review, *The Origin and Development of Washington’s Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L. Rev. 459, 474-80 (1986). The Supreme Court first recognized the Washington Constitution’s requirement of exclusion in *State v. Gibbons*, 118 Wash. 171, 184, 203 P. 390 (1922). The Court continued to apply this state remedy until the early-1960s when *Mapp v. Ohio* found the Fourteenth Amendment made the federal rule applicable in state courts. Pitler, at 486, citing, *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081

(1961). Following *Mapp*, the Washington Courts began applying the federal rule without mention of the state rule. Pitler, at 487-89. The Court's decisions in that period relied entirely on the Fourth Amendment without mention of Article I, § 7. These cases did not repudiate the independent nature of the Washington exclusionary rule, they simply ignored it.

White then ended this roughly 20-year period with the Court's return to the independent and more protective state exclusionary rule. *White* was followed in quick succession by a string of decisions reaffirming the broader protections of Article I, § 7. Pitler, at 493-96. The independent and automatic nature of the Washington exclusionary rule is thus long-established, and has been consistently relied upon by this Court in the 24 years following *White*. Here, the Court of Appeals relied on this Court's holding in *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995) to conclude that inevitable discovery is an accepted exception to the exclusionary rule under Article I, § 7. However, the portion of *Warner* which addresses the doctrine of inevitable discovery dealt with a violation of the 5th Amendment and relied entirely upon federal case law. *Warner* at 888. Further, in *State v. O'Neill*, this Court stated that inevitable discovery has not been recognized as an exception to the exclusionary rule

under Article I, § 7. *State v. O'Neill*, 148 Wn.2d 564, 592, 62 P.3d 489 (2003), n.11.

Even if the Court of Appeals was entitled under Article I, § 7 to rely on the doctrine of inevitable discovery, the Court erred in holding it applied in this case because the evidence does not suggest that the police would have inevitably discovered the evidence by lawful means. The Court of Appeals held as follows: Had CCO Rongen gone to the motorhome at 646 ½ he would have found it “uninhabitable,” he would have concluded that Mr. Winterstein was living at 646 Englert Rd., he would have gone to the residence, he would have asked those inside whether Mr. Winterstein was living there, they all would have said “yes,” and CCO Rongen would then have proceeded as he did. This conclusion is entirely speculative. Further, it is contrary to the evidence.

Officer Watson conceded that a person could have lived in the motorhome despite its messy stated, and, more importantly, CCO Rongen *did not* ask the occupants he encountered whether Mr. Winterstein was living there until he had already entered the house and begun searching it. He had already looked inside of both Mr. Winterstein and Mr. Soderlind’s bedrooms by the time he asked Sunshine O’Connor whether Mr. Winterstein lived there. Assuming, as the Court of Appeals did, that CCO Rongen would have asked the occupants gathered at the residence whether

Mr. Winterstein lived there *prior to entering* is not warranted. The opinion of the Court of Appeals characterizes the evidence as though CCO Rongen in fact asked, prior to entering, whether Mr. Winterstein lived there (see Opinion at page 16, paragraph 3). That was not the case. The evidence here does not support the Court of Appeals' conclusion that the evidence that gave rise to the search warrant would have been inevitably discovered by lawful means.

Because the Court of Appeals concluded that inevitable discovery is a recognized exception to the exclusionary rule under Article I, § 7, and this conclusion is contrary to precedent from this Court, review is appropriate under RAP 13.4 (1). Also, this presents a significant question under Article I, § 7 of the Washington State Constitution and review is proper under RAP 13.4 (3).

F. CONCLUSION

For the reasons above, this Court should accept review in this case.

Respectfully submitted this 10th day of October, 2007.



ANNE M. CRUSER, WSBA#27944
Attorney for Mr. Winterstein

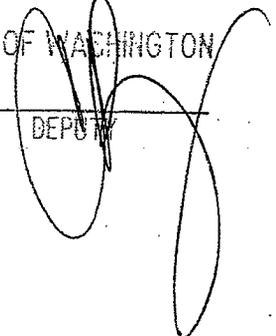
APPENDIX

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TERRY WINTERSTEIN,

Appellant.

No. 33981-1-II

OPINION PUBLISHED IN PART

PENOYAR, J. — Terry Winterstein was under the supervision of Community Corrections Officer (CCO) Rongen. Based on alleged probation violations, including a tip that Winterstein was manufacturing methamphetamine at his residence, CCO Rongen led a team of officers to search the property. The officers discovered an active methamphetamine lab in a travel trailer, as well as evidence of manufacturing in a bedroom of the mobile home on the property. The bedroom was later identified as Bror Soderlind's, and Soderlind ultimately pleaded guilty to manufacturing methamphetamine. Winterstein was charged as an accomplice,

and a jury convicted him of unlawful manufacture of methamphetamine. Following the trial, Winterstein filed a CrR 7.8 motion for relief from judgment based on newly discovered evidence that Department of Corrections (DOC) had been notified of his address change prior to the search. The motion was denied, and Winterstein now appeals, claiming that (1) the trial court erred by not issuing his proposed jury instructions regarding a landlord's accomplice liability, (2) the evidence is not sufficient to support his conviction, and (3) the evidence from the search should have been suppressed. None of his arguments is persuasive, and we affirm.

FACTS

I. SEARCH

On February 5, 2003, CCO Rongen received information from Clark-Skamania Drug Task Force officers that Terry Winterstein, who was under supervision after a gross misdemeanor conviction,¹ was manufacturing methamphetamine at his residence. Based on this information, Winterstein's failure to report as required, and a prior positive test for methamphetamine, CCO Rongen planned to search Winterstein's residence the next day.

CCO Rongen had previously met with Winterstein at his residence, 646 Englert Road. At that time, Winterstein gave him a tour of the mobile home. There were three bedrooms in the mobile home, and Winterstein informed CCO Rongen that he could not go into the other bedrooms because they were not his. CCO Rongen also met Winterstein's girlfriend, Sunshine O'Connor, who was living with him at the time.

¹ Winterstein pleaded guilty to malicious mischief in September 2002. He was imprisoned for less than one year, and began reporting for community supervision in October 2002.

Officers observed several structures on the property when they arrived on February 6, including the mobile home (646 Englert Road), a motor home (646½ Englert Road), and a travel trailer. The numbers "646" and "646½" were spray-painted on the front of the mobile home and the motor home, respectively. Report of Proceedings (RP) (Jun. 28, 2005) at 251-52.

CCO Rongen, accompanied by officers from DOC and the Clark-Skamania Drug Task Force, and Detective Watson (from the Cowlitz-Wahkiakum Narcotics Task Force), initially approached the mobile home. CCO Rongen testified that when he arrived at the entrance to the mobile home, the door was open. He stated that he announced himself as from DOC, and "a male voice [said], 'Yeah, come on in.'" 1 RP (Dec. 20-23, 2004) at 64.

There were four people at the mobile home when CCO Rongen entered — Bror Soderlind, Sunshine O'Connor, and another man and woman. Winterstein was not present. CCO Rongen collected these people in the living room and then went back down the hallway, where he observed "paraphernalia-type items" in the bedrooms. 1 RP (Dec. 20-23, 2004) at 65. He testified that he did not enter the other rooms but from the hallway, he saw a scale and a substance he believed to be red phosphorous in one of the bedrooms (later identified as Soderlind's). He then alerted the drug task force officers that there may be a methamphetamine lab. At that time, Detective Watson advised CCO Rongen to stop searching.

From the doorway of Soderlind's bedroom, Detective Watson could see red phosphorous, blister packs of Sudafed, a white powder substance, and a scale. Detective Watson looked through the house to see if there was any cause for immediate concern. He then removed everyone from the house and secured the scene until a search warrant could be obtained.

While the officers were waiting for the search warrant, Winterstein returned to the property. Upon seeing the officers, Winterstein "sped out of there." 1 RP (Dec. 20-23, 2004) at 70. The officers briefly pursued him, but they were unable to apprehend him.

After obtaining a search warrant, officers from the two narcotics task forces searched all structures on the property and discovered an active methamphetamine manufacturing lab in the travel trailer. The officers also searched the motor home, but both Detective Hess and Detective Watson testified that it did not appear that anyone was living in it.²

Based on evidence recovered from the search, Winterstein was charged with unlawful manufacture of methamphetamine.³

II. TRIAL

Winterstein was tried by a jury in December 2004. At trial, the State argued that he was guilty as Soderlind's accomplice, but the defense claimed that he was merely Soderlind's landlord and not an accomplice.

Soderlind agreed to testify at Winterstein's trial after receiving immunity from further prosecution. He stated that he was living with Winterstein and O'Connor at the time of the

² Detective Hess testified that it looked like the motor home was being used for storage; Detective Watson agreed and stated that there was no pathway from one end of the motor home to the other — "either a box or [a] car part" blocked the path. 2 RP (Dec. 20-23, 2004) at 288.

³ Soderlind, Winterstein's tenant, pleaded guilty to one count of manufacturing methamphetamine on July 9, 2003 (the possession charge was dismissed). He was sentenced to 40 months imprisonment and 9-12 months community custody, and he is currently appealing in linked case, no. 33672-3-II.

search — specifically, that Winterstein was still living at 646 Englert Road at the time of the search. He paid Winterstein \$100 per month in cash to live there.

According to Soderlind, he would manufacture methamphetamine in the travel trailer on the property, which Winterstein and another man brought in. Winterstein also ran electricity out to the trailer, at Soderlind's request, and with no questions asked. When asked whether he had informed Winterstein that he was cooking methamphetamine on the property, Soderlind stated, "I never told him when I would be. He was aware at one time that I was, but I never did state when." 3 RP (Dec. 20-23, 2004) at 356.

Soderlind testified that he cooked the methamphetamine by himself and that Winterstein never bought cold tablets for him. However, Soderlind did provide Winterstein with methamphetamine ("never a contractual amount"), and Winterstein never ordered Soderlind to stop manufacturing methamphetamine on his property. 3 RP (Dec. 20-23, 2004) at 356-57.

Katherine Boyer, a Walgreen's employee, testified that Winterstein came into the store on a regular basis to buy pseudoephedrine-based cold medicines. She stated that "he was probably in there just about every [shift]," and he would purchase the maximum amount of medicine (3 packets). 3 RP (Dec. 20-23, 2004) at 333. Austin Fogelquist, another Walgreen's employee, also testified that Winterstein was a regular customer in the store and would purchase the maximum amount of pseudoephedrine products allowed by law.

In his defense, Winterstein called three witnesses who testified that he was living with his brother, not at 646 (or 646½) Englert Road. Winterstein proposed jury instructions based on *State v. Roberts*, 80 Wn. App. 342, 355-56, 908 P.2d 892 (1996), regarding precisely what is

necessary to convict a landlord of manufacturing a controlled substance based on an accomplice theory. The trial court rejected his proposed instructions and instead issued a general accomplice instruction.

The jury returned a guilty verdict on December 23, 2004.

III. POST-TRIAL MOTIONS

Before trial, Winterstein maintained that he had changed his address with a DOC kiosk weeks before the search, from 646 Englert Road to 646½ Englert Road. Therefore, he claimed the search was illegal. Both Soderlind's attorney and Winterstein's attorney filed suppression motions based on this information. However, CCO Rongen informed Soderlind's attorney that Winterstein had only changed his address on February 6, 2003 — the same day as the search. Based on this information, both Soderlind and Winterstein's attorneys abandoned their suppression motions. Consequently, Soderlind pleaded guilty, and Winterstein went to trial.

However, immediately before submitting the exhibits to the jury, Winterstein's attorney and the prosecutor examined each document within each exhibit. In a box of miscellaneous documents, which the police had seized from the mobile home, they discovered a DOC billing statement dated January 13, 2003, addressed to Winterstein at the new address.

Following Winterstein's conviction, both Winterstein and Soderlind filed CrR 7.8 motions for relief from judgment. Winterstein argued for relief under 7.8(b)(2), (3), and (5), based on newly discovered evidence, the misrepresentations of an adverse party, and Winterstein's constitutional right to be free from unreasonable search and seizures.

All parties agreed that Winterstein and Soderlind would litigate their respective motions in the form of a suppression motion.

At the suppression motion hearing, CCO Rongen claimed that probationers needed permission from him before they changed their addresses. He also testified that although information from DOC kiosks was available on his computer, he did not look at that database before executing the search at Winterstein's property.

The trial court did not enter written findings of fact and conclusions of law, but it orally found that DOC had notice of Winterstein's change of address before January 13, 2003. The court then stated:

The Department had notice of his attempted change of address. Mr. Rongen had notice of his last approved, apparently, address.

And this is a key finding here. 646 and a ½ was not his address. He lived at 646. The change of address to 646 and a ½ was a ruse. Now, I say that because when Mr. Rongen went to the house in February, Mr. Winterstein's room was the same as it had been when he had been there in January. When he asked the girlfriend if Mr. Winterstein still lived in the house, the girlfriend said yes.

Mr. Soderlind testified, he said Mr. Winterstein still lived in the house. And the detective said, nobody was living in the motor home. It was a ruse. So, when the officer goes there, acting in good faith, to his actual address, without knowledge that the Defendant has attempted to change his address by way of a ruse, is he bound by it[?] I don't think so. I don't think he's bound by the ruse.

The only point as far as I can tell -- the only inference I can get from this is that he did this so they wouldn't come and search his house. They would go search in the motor home that was next door, that nobody was living in.

RP (Jun. 28, 2005) at 292-93.

The trial court denied Winterstein's suppression motion and CrR 7.8 motion for a new trial. It declined to address the scope of the search and the unreasonableness of searching the home on a misdemeanor without further briefing. This appeal followed.

ANALYSIS

I. JURY INSTRUCTIONS

Winterstein argues that the trial court erred by refusing to give the jury his proposed instructions based on *Roberts*, 80 Wn. App at 355-56. Specifically, he claims that the accomplice instruction given inadequately addresses a situation where a landlord is present and may have knowledge of the activity but fails to take affirmative steps to stop it. We disagree.

Jury instructions are sufficient if they are supported by sufficient evidence, they allow the parties to argue their theories of the case, and, when read as a whole, properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 908 n.1, 909, 976 P.2d 624 (1999). We review the adequacy of jury instructions de novo as a question of law. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). It is prejudicial error to submit an issue to the jury that the evidence does not support. *State v. Clausing*, 147 Wn.2d 620, 627, 56 P.3d 550 (2002) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000)).

Winterstein proposed the following three instructions, citing *State v. Roberts*, 80 Wn. App. at 355-56, for each:

As a matter of Washington State law, a person is not an accomplice in the commission of manufacturing a controlled substance merely because that person is the landlord of the manufacturer, accepts rent from the manufacturer, knows or becomes aware of the manufacturing on the rented premises, pays utilities for the tenant manufacturer, and fails to remove or report the manufacturing operation. Such evidence is evidence of mere presence and knowledge.

Clerk's Papers (CP) at 105.

A person is not an accomplice in the commission of a crime merely because that person rents premises to another person and that other person then commits a crime, even if the landlord knows or becomes aware that the renter is using the

premises to commit a crime. The landlord is not required to remove the criminal operation on the rented premises and is not required to report the criminal operation to the police. The landlord is also not required to stop accepting rent or to stop providing utility service to the renter.

CP at 125.

A person is not an accomplice in the commission of a crime merely because that person rents premises to another person and that other person then commits a crime, even if the landlord knows or becomes aware that the renter is using the premises to commit a crime. The landlord is not required to remove the criminal operation on the rented premises and is not required to report the criminal operation to the police.

CP at 126.

The court rejected these proposed instructions and instead gave the following accomplice instruction:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of the crime of manufacturing methamphetamine if, with knowledge that it will promote or facilitate the commission of manufacturing methamphetamine, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the manufacture of methamphetamine; or
- (2) aids or agrees to aid another person in planning or committing the manufacture of methamphetamine.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Instr. 9, CP at 119.

This accomplice instruction properly informed the jury of applicable law and still allowed the defense to argue its theory of the case. The instruction specifically states that "more than mere presence and knowledge" is necessary. Instr. 9, CP at 119. There was no need to instruct

the juries on the intricacies of the *Roberts* opinion or specifically instruct them on accomplice liability for landlords. The defense was still free to argue (and did argue) that Winterstein was merely a landlord and did not know of or aid Soderlind's manufacturing operation. The trial court did not err in rejecting Winterstein's proposed instructions; the court's instructions were entirely proper.

II. SUFFICIENCY OF THE EVIDENCE

Winterstein, citing *Roberts*, 80 Wn. App. at 355-57, also claims that the evidence was insufficient to support his conviction because a landlord cannot be convicted as an accomplice by merely providing premises, having knowledge of the operation, and failing to take action. The State disagrees, pointing out that the evidence established (1) Winterstein's frequent purchases of large amounts of pseudoephedrine, (2) that Winterstein helped set up the trailer used for manufacturing and connected electrical power to it, and (3) that Winterstein fled the scene when CCO Rongen confronted him.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201.

Winterstein's argument is not persuasive. After obtaining the search warrant, officers observed two methamphetamine pipes in Winterstein's bedroom. Additionally, Soderlind testified that Winterstein helped bring the travel trailer onto the property and hooked up the electricity to it, despite the fact that Soderlind had arranged to live in the mobile home and had no intention of living in the travel trailer. Finally, the testimony from two Walgreen's employees that Winterstein regularly bought pseudoephedrine-based cold medicines (the maximum amount allowable under Washington law) unmistakably points to Winterstein's aiding Soderlind in the manufacturing operation. The evidence here was clearly sufficient to convince any rational trier of fact of Winterstein's guilt beyond a reasonable doubt.

III. WARRANTLESS SEARCH

As stated above, the trial court did not enter written findings of fact and conclusions of law. Therefore, Winterstein and the State base their arguments on the findings and conclusions contained in the court's oral ruling. The State assigns error to the trial court's findings regarding Winterstein's change of address, and Winterstein assigns error to its conclusions regarding the legality of the search.

A. Change of Address

In reviewing a trial court's denial of a suppression motion, we review challenged findings of fact for substantial supporting evidence. *State v. Lawson*, 135 Wn. App. 430, 434, 144 P.3d 377 (2006) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Mendez*, 137 Wn.2d at 214.

The State assigns error to the trial court's findings of fact that (1) Winterstein was not required to obtain DOC approval prior to changing his address, and (2) Winterstein had properly effected a change of address with DOC prior to the search. According to the State, Winterstein was required to obtain DOC pre-approval for any address change. Because he did not do so, he did not properly effect a change of address and the search of 646 Englert Road was justified.

Each of these findings is supported by substantial evidence. Winterstein's DOC conditions state that he should "[n]otify the community corrections officer before changing residence," not that he must obtain permission first. CP at 212. The conditions are specific where *permission* is required, rather than *notification*. CCO Rongen's testimony was the sole evidence indicating that permission was required. However, credibility determinations are for the trier of fact and we do not review them on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The written conditions are sufficient to persuade a fair-minded person that notification of Winterstein's address change was all DOC required.

Additionally, substantial evidence supports the finding that Winterstein had properly effected a change of address. DOC clearly had been notified of his new address, as evidenced by the DOC billing statement and the notice of violation, both of which listed Winterstein's address as 646½ Englert Road. Again, CCO Rongen's testimony is the only evidence that controverts the trial court's finding, and the trial court was the proper judge of his credibility. Substantial evidence supports the court's finding that DOC was properly notified of Winterstein's new address.

In the alternative, the State argues that the search was justified “under the good faith exception to the warrant requirement.” Resp’t Br. at 12. We reject this argument. Washington courts have consistently declined to create “good faith” exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement. *State v. Morse*, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005). To accept a “good faith” exception here would violate longstanding precedent, and we decline to do so.

B. Legality of the Search

Winterstein argues that the trial court erred in denying his motion for relief from judgment because CCO Rongen lacked the legal authority to search the residence at 646 Englert Road. According to Winterstein, “there can be no question that CCO Rongen made a material misrepresentation to [Soderlind’s attorney, Winterstein’s attorney, and the prosecutor].” Appellant’s Br. at 33. He claims that Winterstein did effectuate an official change of address with DOC, and the trial court therefore erred in concluding that the search of the residence was justified.⁴

Warrantless searches of constitutionally protected areas are presumed unreasonable absent proof that one of the well-established exceptions applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Exceptions to the warrant requirement are to be “jealously and carefully drawn.”

⁴ Detective Watson testified at trial that the assessor’s office informed him that the property had not been officially subdivided.

State v. Hendrickson, 129 Wn.2d 61, 72, 917 P.2d 563 (1996) (quoting *State v. Bradley*, 105 Wn.2d 898, 902, 719 P.2d 546 (1986)). The State bears the burden of establishing an exception to the warrant requirement. *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

Washington recognizes a warrantless search exception, when reasonable, to search a parolee or probationer and his home or effects. *State v. Campbell*, 103 Wn.2d 1, 22-23, 691 P.2d 929 (1984) (citing *Hocker v. Woody*, 95 Wn.2d 822, 826, 631 P.2d 372 (1981)); *See State v. Coahran*, 27 Wn. App. 664, 666-67, 620 P.2d 116 (1980)). A probation or parole officer may search the probationer's home without a warrant so long as the search is reasonable and is based upon a well founded suspicion that a violation of probation has occurred. *State v. Lucas*, 56 Wn. App. 236, 244, 783 P.2d 121 (1989); *State v. Simms*, 10 Wn. App. 75, 87, 516 P.2d 1088 (1973); *Coahran*, 27 Wn. App. at 666-667. A "well founded suspicion" is analogous to the cause requirement of a *Terry* stop. *Simms*, 10 Wn. App. at 87; *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Reasonable suspicion for a *Terry* stop must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the search]." *Terry*, 392 U.S. at 21. A reasonable suspicion requires only sufficient probability, not absolute certainty. *New Jersey v. T.L.O.*, 469 U.S. 325, 346, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

In this case, Winterstein concedes that CCO Rongen had a well-founded suspicion that he violated his probation conditions. The issue here is whether CCO Rongen had the authority to search 646 Englert Road, not Winterstein's current self-reported address, due to that well-founded suspicion. According to Winterstein, "CCO Rongen could have developed some basis

to search 646 Englert Road if he had conducted some investigation showing that Mr. Winterstein could be found at that residence on February 6th, 2003.” Appellant’s Br. at 42.

Washington caselaw does not appear to address the lengths to which an officer must go to ensure that the address he or she is searching is, indeed, the probationer’s residence. Therefore, we choose to apply *Terry*’s “specific and articulable facts” standard to whether officers are searching an appropriate address.

In this case, CCO Rongen had two possible sources of information regarding Winterstein’s current residence: (1) the information in the DOC database and (2) his previous experience meeting Winterstein at his residence at 646 Englert Road.

The DOC database information was changed by Winterstein without any face-to-face contact or investigation into whether he was truly moving. CCO Rongen could have, and arguably should have, searched the DOC database before searching the property. However, he had a reasonable belief that Winterstein’s residence was still the mobile home. CCO Rongen testified that, as he understood Winterstein’s conditions of supervision, he had to approve any change of address before Winterstein could move. He had not approved any address change, so he very likely believed that Winterstein remained at the mobile home. Additionally, given CCO Rongen’s previous contact with Winterstein and the fact that the new purported address was a motor home on the same premises, it was reasonable for CCO Rongen to conclude that Winterstein still resided at the old address, even if CCO Rongen had checked DOC’s address database.

Specific and articulable facts supported CCO Rongen's belief that Winterstein still lived in the mobile home. Under this standard, the search was not improper, and the trial court did not err in denying Winterstein's suppression motion. We affirm.⁵

C. Inevitable Discovery

Additionally, under the doctrine of inevitable discovery, Winterstein's address change does not affect suppression of the evidence. The inevitable discovery doctrine applies when there is a reasonable probability that evidence in question would have been discovered other than from the tainted source. *State v. Warner*, 125 Wn.2d 876, 889, 889 P.2d 479 (1995).

Had the officers searched the motor home first, they would have found it full of boxes and uninhabitable. Upon finding this, they would have likely and reasonably proceeded to the mobile home, asked those inside whether Winterstein still lived there (as they did), and receiving affirmative answers, would have proceeded exactly as they did. Therefore, it is reasonably probable that the evidence would still have been discovered despite Winterstein's ruse.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

⁵ In the linked case, *State v. Soderlind*, No. 33672-3-II, we noted that this search should have been limited to those rooms known to belong to Winterstein and the common areas of the mobile home. Because the evidence in Soderlind's bedroom was in plain view from the common area of the hallway, however, the evidence recovered did not have to be suppressed.

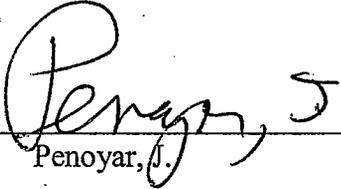
IV. SAG ISSUES

In his Statement of Additional Grounds (SAG), Winterstein argues that DOC offenders “in the C-D categories receive [sic] no face to face supervision. . . They would be supervised by kiosk machines.” SAG at 1-2 (citing *State v. Bramme*, 115 Wn. App. 844, 64 P.3d 60 (2003)). Therefore, Winterstein claims that no face-to-face contact with CCO Rongen was required.

In *Bramme*, a CCO testified that DOC assesses each incoming offender and assigns him or her a risk and needs level of A (most serious), B, C, or D (least serious). *Bramme*, 115 Wn. App. at 846. According to this officer, drug offender sentencing alternative (DOSAs) offenders in the C and D categories receive no face-to-face supervision once they are released from the institution. *Bramme*, 115 Wn. App. at 846.

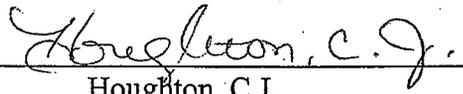
The record does not support Winterstein’s claim that anything less than face-to-face supervision was required. Winterstein’s DOC conditions clearly state that he was required to report *in person* on the first and third Wednesday of every month. This argument is not persuasive.

Affirmed.

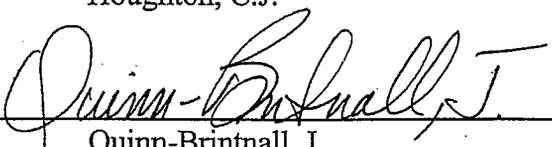


Penoyar, J.

We concur



Houghton, C.J.



Quinn-Brintnall, J.

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STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

vs.

TERRY WINTERSTEIN,

Petitioner.

) Court of Appeals No. 33981-1-II
) Cowlitz County No. 03-1-00997-8

) AFFIDAVIT OF SERVICE AND MAILING

ANNE M. CRUSER, being sworn on oath, states that on the 10th day of October 2007,
affiant personally served upon:

Susan I. Baur
Cowlitz County Prosecuting Attorney
312 S.W. 1st Avenue
Kelso, WA 98626

and that said service contained the following:

- (1) PETITION FOR REVIEW
- (2) AFFIDAVIT OF SERVICE

Further, affiant placed a properly stamped envelope in the mails of the United States
addressed to:

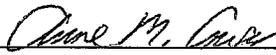
Mr. Terry Winterstein
DOC #243320

1
2
3
4 Airway Heights Corrections Center
5 PO Box 2049, M-A-63 Upper
6 Airway Heights, WA 99001-2049

7 and that said envelope contained the following

- 8
9
10
11
12 (1) PETITION FOR REVIEW
13 (2) AFFIDAVIT OF MAILING
14

15
16 Dated this 10th day of October 2007

17
18 
19 ANNE M. CRUSER, WSBA #27944
20 Attorney for Appellant
21
22

23 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of
24 Washington that the foregoing is true and correct.

25 Date and Place: October 10th, 2007, Kalama, Washington

Signature: Anne M. Cruser