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STATE OF WASHINGTON  
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NO. 85791-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS ROSE,

Petitioner.

---

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

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PETITIONER'S SUPPLEMENTAL BRIEF

---

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ORIGINAL

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A. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED.

1. Ruth Georges received a solicitation in the mail offering her the opportunity to open a new credit card account if she paid \$30. She threw it into the garbage because she did not want the new credit card and did not have the money to initiate an account. Douglas Rose took it from her trash can and, after police found it in his pocket, he was convicted of possessing a "stolen access device" without the owner's permission. Does the definition of stolen access device, which requires that the device "can be used" to obtain something of value by means of "an account," include an unaccepted offer to open a new credit card account?

2. A police officer arrested Rose for possession of drug paraphernalia after seeing a glass tube in his bag that contained "a residue." The Court of Appeals upheld the arrest based on a different theory: that there was probable cause to believe the residue in the tube was a controlled substance. Where the trial court did not find the police had probable cause to believe the residue was a controlled substance, and the police lacked authority to arrest Rose for possession of drug paraphernalia when they did not see Rose use it to ingest drugs, was Rose's arrest legally authorized?

B. STATEMENT OF THE CASE.

A police officer stopped Douglas Rose as he walked down a street at 10 a.m., believing Rose matched the description of a suspect from a recent report of a possible trespass or burglary. 5/21/09RP 3-4, 8. Officer Tom Croskey detained Rose but soon learned that the trespass report did not merit further action. Id. at 6. Before releasing Rose, Croskey noticed two inches or less of a glass tube protruding from a side pocket of Rose's bag. Id. at 13. Rose had placed the bag on the ground at Croskey's direction during the detention. Id. at 11. Croskey thought there was residue of a "white chalky substance on the inside of the tube." Id. at 12. He thought the tube was "consistent with" a tool in which a person could ingest drugs. Id. He "arrested the defendant for possession of drug paraphernalia." Id. at 26.

After arresting Rose, the officer searched him and found what looked to be a credit card in the name of Ruth Georges. 5/21/09RP 26, 6/30/09RP 41. Georges was an acquaintance of Rose's, and Rose had been at her apartment that day. 6/30/09RP 84. Georges had received an offer to open a new credit card account in the mail, but it required her to pay \$30 to create the account. 6/30/09RP 86. Georges "threw it in the garbage can." Id.

She "didn't want it." Id. at 87. She did not know how anyone else could use it "because it's not activated" and "[y]ou have to give them 30 bucks first, and then it gets activated." Id. at 88.

Rose said he did not know the credit card was in his belongings and it must have been put there when his belongings were mixed with trash that he was helping Georges take out of her apartment. 6/30/09RP 103-04. The card remained unsigned, bearing a sticker indicating it had not yet been activated. Ex. 3.

Rose was charged with and convicted of possession of a controlled substance, based on the residue found in the glass tube, and possession of stolen property in the second degree, based on the card with Georges's name on it that he had in his pocket. CP 1-2; CP 26-28. The pertinent facts are further addressed below.

C. ARGUMENT.

1. A DISCARDED SOLICITATION TO CREATE A NEW CREDIT CARD ACCOUNT IS NOT AN "ACCESS DEVICE" AS REQUIRED FOR POSSESSION OF STOLEN PROPERTY

a. A stolen access device is defined by statute to require the ability to access an available account. Statutes setting forth the essential elements of criminal offenses are strictly construed. United States v. Lanier, 520 U.S. 259, 266, 117 S.Ct.

1219, 137 L.Ed.2d 432 (1997). Only conduct "clearly" covered by a criminal statute may be penalized. Lanier, 520 U.S. at 266.

Unambiguous language is given its plain meaning, and no language in a statute may be considered superfluous. State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005). "Under the rule of lenity, where a statute is ambiguous, [courts] must interpret it in favor of the defendant." Id.

Rose was charged with one count of possession of stolen property in the second degree based on an unactivated and unused credit card the police found in his possession upon a search incident to his arrest for the unrelated offense of possession of drug paraphernalia. CP 1 (citing RCW 9A.56.140(1)); RCW 9A.56.160(1)(c); 6/30/09RP 29, 41, 86.

As charged, possession of stolen property in the second degree required the prosecution to prove Rose possessed a "stolen access device." RCW 9A.56.160(1)(c);<sup>1</sup> RCW 9A.56.140(1).<sup>2</sup> An "access device" is defined by statute as a card, account number, or

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<sup>1</sup> Under RCW 9A.56.160(1)(c), "A person is guilty of possessing stolen property in the second degree if: . . . He or she possesses a stolen access device."

other “means of account access” that “can be used alone or in conjunction with another device” to obtain anything of value. RCW 9A.56.010(1).<sup>3</sup> The statutory language is unambiguous and is construed based on its plain meaning. See Berger v. Sonneland, 144 Wn.2d 91, 104-05, 26 P.3d 257 (2001) (“courts assume the legislature means exactly what it says”).

Washington courts have interpreted “access device” as one linked to an existing account. An account number on the bottom of a check is an “access device” when witnesses testify the account number belonged to an another person’s open checking account. State v. Chang, 147 Wn.2d 490, 498-99, 195 P.3d 1008 (2008), rev. denied, 166 Wn.2d 1002 (2009). A replacement card issued for an on-going account is an access device. State v. Clay, 144 Wn.App. 894, 898-99, 184 P.3d 674 (2008), rev. denied, 165 Wn.2d 1014 (2009). An account number taken from a receipt in

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<sup>2</sup> “Possessing stolen property” means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1).

<sup>3</sup> “Access device” means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.  
RCW 9A.56.010(1).

the trash can is an "access device" where it contains the complete existing account number and it is sufficient to make purchases. State v. Askham, 120 Wn.App. 872, 885, 86 P.3d 1224, rev. denied, 152 Wn.2d 1032 (2004). In each of these instances, the prosecution offered evidence that the account information was actually used, or capable of being used, to obtain something of value.

Additionally, in each of these cases, the access device was tied to an existing account. And rightfully so: the statute mandates that the access device is one that "can be used." RCW 9A.56.140(1). "Can be used" is not otherwise defined. When words are not otherwise defined by statute, they are given their "plain and ordinary meaning as defined in a standard dictionary," based on traditional rules of grammar. State v. Marohl, 170 Wn.2d 691, 699, 246 P.3d 177 (2010).

"Can be used" is written in its present tense. See Carr v. United States, U.S., 130 S.Ct. 2229, 2236, 176 L.Ed.2d 1152 (2010) (use of present tense indicates legislative intent to focus on current capacity to commit offense). The dictionary definition of "can" is "to be able to do, make or accomplish." Webster's Third International Dictionary, Unabridged, at 323 (3<sup>rd</sup> ed. 1993). The

Legislature did not use the phrase "could be used," or words that imply a future, hypothetical sense. The plain meaning of "can be used" is that the owner of the card is "able to" use it to obtain something of value at the present time.

The statutory definition of stolen access device also requires that the card must be one that accesses an "account." RCW 9A.56.010(1). An account is a contractual relationship in which a person may obtain goods or services and the issuing company in turn expects and receives payment. United States v. Bailey, 41 F.3d 413, 417 (9<sup>th</sup> Cir. 1994) (construing similar language in 18 U.S.C. § 1029 proscribing use of an access device); see Tingley v. Haish, 159 Wn.2d 652, 660 n.11, 152 P.3d 1020 (2007) (in context of established business relationship, "'account' is 'generally defined as an unsettled claim or demand, by one person against another, which creates a debtor-creditor relationship between them,'" quoting 1 Am.Jur.2d Accounts & Accounting § 1 at 620-21 (2005)). When a credit card company offers a new account to someone, but the recipient rejects the offer, no debtor-creditor relationship is established and no account exists. See Bailey, 41 F.3d at 417.

At the time the Legislature crafted its definition of access device, it intended to address the various means by which a person

could fraudulently access another person's existing accounts with a bank or credit card company. See State v. Standifer, 110 Wn.2d 90, 94, 750 P.2d 258 (1988) ("access device" intended to address fraudulent transactions involving "mechanisms that allow people to obtain access to [other people's] credit and checking accounts."). When no account has been created, the card cannot be used as a means to access the account, and the possession of the unused and unactivated card falls outside the ambit of the statute.

b. The card in Rose's pocket was not an "access device." To determine whether a credit card "can be used" to obtain something of value via an account, the Court of Appeals has ruled that the proper focus is the card's status when last in the possession of the rightful owner. State v. Schloredt, 97 Wn.App. 789, 987 P.2d 647 (1999). The cards in Schloredt were stolen from the complainants' cars and had been issued for on-going accounts. Id. at 792, 794. A card may be cancelled by the time a police officer finds it in someone else's possession, but that post-theft alteration of the card's status would not negate the card's ability to "be used" to purchase something from an account. Id. at 793-94.

In the instance where the intended owner of the card never received it, a card may be an "access device" if evidence shows it

can be used to access an open account. Clay, 144 Wn.App. at 898-99. In Clay, the defendant was charged with possession of a replacement card for an existing Meryvn's account. Id. at 896. The owner of the card had held her account for over five years and was expecting the replacement card in the mail, but it never arrived. Id. When an officer found the Meryvn's card in Clay's pocket, someone had signed the back of it with the owner's name, but the owner testified that she had not signed it. Id. There was no evidence that the defendant had used the card, but there was also "no testimony that any additional steps needed to be taken to activate that card" and use it. Id. at 899. Because the Meryvn's card was issued for an on-going account, had been signed on the back and nothing more needed to occur to use the card, there was sufficient evidence to consider it an access device. Id.

In Askham, the defendant used an account number from a credit card receipt he found in a trash can to make successful purchases in the credit card owner's name. 120 Wn.App. at 885. Although the defendant did not have the card itself, and thus did not know the expiration date, a representative of American Express testified that an account could be used without knowing the expiration number. Id. Indeed, the defendant used the account to

make purchases, thereby showing that he had sufficient information to use the account to obtain something of value. Id.

Unlike these other cases, Rose was not in possession of a card connected to an on-going credit account. Georges explained that the card could not be used "because it's not activated" and "[y]ou have to give them 30 bucks first." 6/30/09RP 88. She did not have \$30 to spend to activate the card. Id. It did not replace an expired card for an existing account, like the Meryvns's card in Clay. 144 Wn.App. at 898. Unlike Clay, additional steps were required to access the account and Georges neither paid the fee nor planned to do so. 6/30/09RP 86-87. Georges "didn't want it" and for that reason, she "threw it in the garbage can." Id. at 87-88.

Rose did not try to make any purchases with the card, unlike in Askham, where the defendant obtained the account number for an existing account and used it, thus demonstrating that the account number was an access device. 120 Wn.App. at 885. Even when the card was last in Georges' possession, she could not have used it to obtain anything of value. 6/30/09RP 88. A card that represents an offer to create a new account does not constitute a stolen access device under RCW 9A.56.010(1).

c. Because Rose did not possess a stolen access device, his conviction for possession of stolen property must be reversed. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). The prosecution failed to prove that Rose knowingly withheld a stolen access device from its owner when the card was not linked and would never be linked to an existing account.

2. ROSE WAS UNLAWFULLY ARRESTED  
WHEN HE DID NOT COMMIT A CRIME IN  
THE PRESENCE OF THE OFFICERS

a. The State bears the burden of proving that the police had authority to arrest Rose. Each individual "has the right to be left alone by police unless there is probable cause based on objective facts that the person is committing a crime." State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008); U.S. Const. amend. 4<sup>4</sup>; Wash. Const. art. I, § 7.<sup>5</sup> An officer has probable cause to arrest a person if the facts and circumstances within his knowledge are sufficient to cause a person of reasonable caution

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<sup>4</sup> The Fourth Amendment to the United States Constitution provides: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

to believe that the suspect is committing or has committed a crime. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996) (quoting State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)). The State bears the burden of proving a lawful search and arrest. See State v. Ibarra-Cisneros, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2011 WL 4992328, \*2 (Oct. 20, 2011). A "lawful custodial arrest is a constitutional prerequisite to any search incident to arrest." State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2008).

After a suppression hearing challenging the legality of a search and seizure, the court must enter written findings pursuant to CrR 3.6.<sup>6</sup> A trial court's resolution of the factual circumstances of an encounter are entitled to great deference. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). "In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." Id. at 14. Consequently, facts omitted from the court's

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<sup>5</sup> Article I, section 7 guarantees that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law."

<sup>6</sup> CrR 3.6 provides:

At the conclusion of a hearing, upon a motion to suppress physical, oral or identification evidence the trial court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) the court's findings as to the disputed facts; and (4) the court's reason for the admissibility or inadmissibility of the evidence sought to be suppressed.

written findings are deemed unproved by the State, because the prosecution has the burden of proof at a suppression hearing. Id.

In Armenta, a police officer testified that before seizing the defendants, he discovered that one defendant claimed to have a Washington identification card but the officer could not locate this name in existing databases and thus he had reason to believe it was a false name. Id. at 14. The trial court's findings of fact did not parrot this testimony. The judge's findings did not include any judicial determination that the officer seized the defendant after discovering he provided a false name. Id. Due to the absence of a factual finding, this Court presumed that the prosecution had not proven that the officer learned the defendant gave a false name before seizing the men, and accordingly it could not rely on the officer's testimony on this point to justify the seizure. Id. ("Because the State had the burden of proof at the suppression hearing, we presume in light of the absence of a finding that [defendant] Cruz did not make the statement attributed to him by [Officer] Randles.").

Armenta demonstrates that the trial court's role is the fact-finder, and the great deference accorded to its findings on appeal constrain the reviewing court from rendering new factual determinations based on its own view of what the testimony could

have been. Here, even though the trial court did not find that Rose possessed a controlled substance, and the arresting officer did not testify that he thought the glass tube contained a controlled substance, the Court of Appeals concluded that the officer "could" have believed there was a controlled substance in the glass tube. Slip op. at 16. The Court of Appeals exceeded its authority as reviewing court. Its reasoning is contrary to Armenta, unsupported by the testimony at the CrR 3.6 hearing, and undermines the Court of Appeals' role as a reviewing court rather than a fact-finding court. See State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

b. At the suppression hearing, the State did not prove it had probable cause to arrest Rose for possession of a controlled substance. As mandated by CrR 3.6, the trial court entered written findings following Rose's suppression hearing. CP 52-53. The only finding regarding residue was: "Officer Croskey further saw a **residue** in the tube in the daylight." CP 53 (Finding of Fact 12, emphasis added). The court did not describe the nature of the residue. From this factual finding, the trial court concluded that the officer had authority to arrest Rose for possession of drug paraphernalia. CP 53 (Conclusion of Law 6).

The factual finding is consistent with the testimony. The officer did not testify that he believed the residue in the tube was a controlled substance. He said he saw a "white, chalky substance" which led him to believe that the glass pipe was "consistent with" drug paraphernalia. 5/21/09RP 12. But he did not claim any expertise in identifying controlled substances or indicate any particular controlled substance might be involved. See 5/21/09RP 12-14, 26. He did not describe the substance further.

At the same time, Rose cast doubt on the officer's observations. Before arresting Rose, the officer had seen only a small portion of the pipe: "[a]bout an inch and a half, maybe. Not more than two inches" protruding from a bag. 5/21/09RP 13; CP 53. At the suppression hearing, the defense attorney showed the tube to Croskey and indicated that he did not see any residue in it. 5/21/09RP 12-13. He asked the officer whether the residue had fallen out. Id. at 13. The officer assured the attorney that he saw residue in the pipe. Id. at 14. The attorney responded, "I'm getting old because I tell you what, that's great vision." 5/21/09RP 14. Then, the attorney turned to the judge and said, "I'm just going to show that to the Court." Id.

This exchange shows the attention paid to the minute amount of material inside the tube, and it demonstrates that the trial court deliberately entered the factual finding that the tube contained an unnamed "residue," rather than a controlled substance residue, after it examined the tube and heard testimony about it. CP 53.

The trial court had another reason to determine that the State had not proven the officer observed a controlled substance in the bag. Rose vehemently objected to the State's failure to preserve the bag from which the pipe was purportedly protruding. 5/21/09RP 12-23. The court may have found that the State's failure to retain the bag denied the court the ability to assess what the officer could see protruding from a pocket in the bag and thus it would not simply endorse a broad claim that the officer could see what was in the tube.

Finally, the testimony at the suppression hearing and the focus of the State's arguments to the trial court never included an assertion that the officer observed a controlled substance in the tube. The officer's testimony was that he considered the tube to be drug paraphernalia, meaning an implement used to ingest drugs. 5/21/09RP 14, 26. He never offered the opinion that the residue

contained a controlled substance. The prosecution never argued the residue was a controlled substance. 5/21/09RP 35. The residue could have been ashes, spices, or debris that did not contain any controlled substance.

The Court of Appeals was not free to sua sponte conclude that this residue provided probable cause to arrest Rose for possession of a controlled substance. The trial judge saw the glass tube and heard the testimony. The judge did not find the State proved the residue was a controlled substance, looked like one, or that the officer could have reasonably believed the residue was a controlled substance. CP 52-53.

The Court of Appeals claimed it could uphold the search on any basis, citing State v. Huff, 64 Wn.App. 641, 646, 826 P.2d 698, rev. denied, 119 Wn.2d 1007 (1992). But in Huff, the officer testified that he smelled the overwhelming and "quite distinctive" odor of methamphetamine in a car, he had been trained to recognize the smell, and he had encountered it 50-75 times. Id. at 643-44, 648. Although the officer arrested the two people in the car for other reasons, the court upheld the search and arrest based on the objective evidence of probable cause to believe there was

methamphetamine in the car. Id. at 646-67. The decision in Huff does not refer to any controlling factual findings by the trial court.

Contrary to Huff, Croskey did not claim that he recognized the residue to be from a controlled substance, or even testify that he had any experience or training recognizing the detritus of a controlled substance in a tube. Far from being the overwhelming and distinctive presence of a controlled substance in Huff, **Error! Bookmark not defined.** there was a miniscule amount of residue in the tube that was barely visible. 5/21/09RP 14. The Court of Appeals erred by casting aside the court's factual findings and holding that the officer "could" have believed the white powdery substance was a controlled substance when the trial court did not find it was objectively reasonable to conclude the small amount of residue lodged in the glass tube contained a controlled substance. Slip op. at 16.

c. The officer did not have probable cause to arrest Rose for use of drug paraphernalia when this misdemeanor offense did not occur in the officer's presence. "Possession of potential drug paraphernalia is not a crime" and cannot be the basis for an arrest. O'Neill, 148 Wn.2d at 584 n.8. Using paraphernalia to ingest drugs is a misdemeanor, but a police officer

cannot arrest a person for a misdemeanor unless the arrestee commits that crime in the officer's presence. O'Neill, 148 Wn.2d at 584 n.8; RCW 69.50.412; RCW 10.31.100.

In O'Neill, an officer saw a "coke spoon," described as a spoon with residue on it. 148 Wn.2d at 572, 584. But O'Neill had not used the spoon in the officer's presence. Id. at 584 n.8. "Thus, the officer could not have arrested O'Neill for use of the drug paraphernalia because he could not arrest for this misdemeanor if it was not committed in his presence." Id.

Similarly, no police officer saw Rose use drug paraphernalia. 5/21/09RP 13; see RCW 69.50.412. Croskey saw a small portion of a glass tube in Rose's bag and arrested him on that basis. 5/21/09RP 12, 26. The court's written findings of fact show only that the prosecution proved Croskey saw "a residue" in the glass pipe. CP 53 (Finding of Fact 12). The court did not find the officer saw Rose engaging in activity that reasonably appeared to be actual drug use. Cf., State v. Neely, 113 Wn.App. 100, 108, 52 P.3d 539 (2002) (evidence showed use of drug paraphernalia where woman was in a car late at night with tools for ingesting drugs and was "bobbing her head up and down . . . as if ingesting" something). The tube in Rose's bag was the sum total of what the

court found constituted the factual basis for his arrest. Therefore, the officer lacked authority to arrest Rose. O'Neill, 148 Wn.2d at 584 n.8.

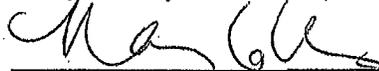
“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.” State v. Buelna Valdez, 167 Wn.2d 761, 778, 224 P.3d 751 (2009) (quoting State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002)); Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Because the arrest was not valid, the police lacked lawful authority to search Rose and his bag. The necessary remedy is to suppress the unlawfully obtained evidence.

D. CONCLUSION.

For the foregoing reasons, Douglas Rose respectfully requests this Court hold that the State did not prove he was lawfully arrested or that he possessed a stolen access device.

DATED this 14th day of November 2011.

Respectfully submitted,



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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 85791-1-III
	)	
DOUGLAS ROSE,	)	
	)	
PETITIONER.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF NOVEMBER, 2011, I CAUSED THE ORIGINAL **PETITIONER'S SUPPLEMENTAL BRIEF** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/>	MEGAN BREDEWEG, DPA	<input checked="" type="checkbox"/>	U.S. MAIL
	BENTON COUNTY PROSECUTOR'S OFFICE	<input type="checkbox"/>	HAND DELIVERY
	7122 W OKANOGAN AVE	<input type="checkbox"/>	_____
	KENNEWICK WA 99336-2341		
<input checked="" type="checkbox"/>	DOUGLAS ROSE	<input checked="" type="checkbox"/>	U.S. MAIL
	6204 W RICHARDSON ST	<input type="checkbox"/>	HAND DELIVERY
	PASCO, WA 99301	<input type="checkbox"/>	_____

**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2011.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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1511 Third Avenue  
Seattle, Washington 98101  
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