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STATE OF WASHINGTON  
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NO. 64321-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

TERRON THOMPSON,

Appellant.

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

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The amended information was constitutionally deficient as to Count II, Bail Jumping.

2. Police officers unconstitutionally seized Mr. Thompson.

3. The trial court erred in concluding that Mr. Thompson was not seized until after he looked startled and put his hands in his pockets, because officers had arrived with guns visible and yelled, "Police, Show us your hands" before Mr. Thompson did anything.

4. The trial court erred in finding (as part of its "conclusion of law") that the officers suspected Mr. Thompson of criminal activity before they seized him.

5. The trial court erred in concluding that the seizure of Mr. Thompson was constitutional, and in denying the motion to suppress.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An information is constitutionally deficient if it fails to set forth every element of the crime charged. One element of bail jumping is that the defendant had notice of the actual date on which he was to appear in court. Mr. Thompson was charged with bail jumping for failing to appear in court on October 12, 2007. Was the information constitutionally deficient because it alleged only that Mr.

Thompson had “knowledge of the requirement of a subsequent personal appearance” rather than knowledge of the requirement of an appearance on October 12, 2007?

2. Although the occupant of a home may be detained during a valid residential search, this limited exception to the probable cause requirement does not extend to those merely present on the premises. Rather, there must be “presence plus” – independent factors tying the person to the illegal activities being investigated or raising a reasonable suspicion that the person is armed and dangerous – to justify the seizure of a person merely present at the scene. When multiple police officers arrived to search probationer Shameka Thompson’s home, appellant Terron Thompson was standing outside in the driveway. Although Terron Thompson was not the probationer in question, was not named in any search warrant, and was not suspected of criminal activity, officers immediately ordered him to stop and put his hands up. Was the seizure of Mr. Thompson unconstitutional, requiring suppression of the evidence obtained as a result of the seizure?

C. STATEMENT OF THE CASE

On April 26, 2007, appellant Terron Thompson was visiting his mother’s house, where his sister Shameka Thompson also

lived. 5 RP 167, 172. Terron Thompson was in the driveway with a friend, working on his car. 2 RP 43; 4 RP 86.

In the meantime, Shameka Thompson, who was on probation, went to meet her community corrections officer. When she arrived at the Department of Corrections (“DOC”) office, she was arrested for a community custody violation because there was a gun in the car in which she had been riding. 4 RP 82.<sup>1</sup> DOC officers decided to search Shameka’s home, and they enlisted sheriff’s deputies to assist them. 4 RP 83.

Five officers in three cars formed a caravan and drove to the home Shameka shared with her mother. 4 RP 84. When the caravan of officers arrived at Shameka Thompson’s home, Terron Thompson and his friend were still standing outside the residence near the carport area, working on the car. 4 RP 15; CP 73 (Finding of Fact k). As soon as the officers arrived at the house, they got out of their vehicles, ran toward the residence with guns visible, and yelled, “Police. Show us your hands.” 4 RP 16.

Mr. Thompson was startled and started walking backwards toward the house. 4 RP 16-18. Officer Aaron Thompson pointed

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<sup>1</sup> There are six volumes of verbatim reports of proceedings in this case: 1 RP (7/9/08), 2 RP ((7/9/08, 7/10/08, 2/5/09, 2/24/09, 4/17/09, 4/22/09, 4/23/09, 4/30/09, 8/26/09, 9/16/09, 10/2/09), 3 RP (7/14/08), 4 RP (7/15/08), 5 RP (7/16/08), and 6 RP (7/17/08).

his shotgun at Terron Thompson and again ordered him to show his hands. 4 RP 71; CP 73 (Finding of Fact n).

Mr. Thompson sat down in the doorway of the house, and “made a throwing motion off to the right inside of the door frame.” 4 RP 18. According to the officers, one of the items Mr. Thompson threw into the house was a gun. 4 RP 53. Officers retrieved the gun from the floor just inside the house, and, after determining that Mr. Thompson had a prior conviction, arrested him for unlawful possession of a firearm. 4 RP 58. DOC then proceeded to search Shameka’s house based on her probation violation. 4 RP 20.

Mr. Thompson was charged with unlawful possession of a firearm and released on bail. CP 1-4. When he did not appear for an omnibus hearing on October 12, 2007, the State amended the information to add a count of bail jumping, alleging:

That the defendant TERRON LEE THOMPSON in King County, Washington, on or about October 12, 2007, being charged with Unlawful Possession of a Firearm in the first Degree, a Class B felony, having been admitted to bail, and with knowledge of the requirement of a subsequent personal appearance before the court, did fail to appear.

Supp. CP \_\_\_\_, Sub No. 173 (Appendix A at 2).<sup>2</sup>

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<sup>2</sup> The State did not file the amended information. A copy was attached to the presentence report, and counsel has filed a supplemental designation of

Before trial, Mr. Thompson moved to suppress the gun and statements he had made at the home on the basis that he was unconstitutionally seized. CP 11-22; 4 RP 3-114. The trial court denied the motion. CP 72-74; 4 RP 114-19.

Mr. Thompson was convicted on both counts as charged. CP 60-61. He timely appeals. CP 90-99.

D. ARGUMENT

1. THE BAIL JUMPING CONVICTION SHOULD BE REVERSED AND THE CHARGE DISMISSED WITHOUT PREJUDICE TO THE STATE'S ABILITY TO REFILE BECAUSE THE AMDENDED INFORMATION WAS CONSTITUTIONALLY DEFICIENT.

a. An information is constitutionally deficient if it fails to set forth every element of the crime charged. Article I, section 22 of our state constitution<sup>3</sup> and the Sixth Amendment to the federal constitution<sup>4</sup> require the State to provide an accused person with notice of the offense(s) charged. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). An offense is not properly charged unless the information sets forth every essential element of the

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clerk's papers designating the presentence report in order for this Court to have a copy of the amended information.

<sup>3</sup> "In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him ...."

<sup>4</sup> "In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation ...."

crime, both statutory and nonstatutory. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The charging document must contain: (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. Auburn v. Brooke, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). “This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.” Pelkey, 109 Wn.2d at 488 (quoting State v. Ackles, 8 Wash. 462, 464-65, 36 P. 597 (1894)).

A challenge to the sufficiency of the charging document is of constitutional magnitude and may be raised for the first time on appeal. State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989)). Where, as here, the issue is raised for the first time on appeal, the standard of review set forth in Kjorsvik applies. This Court asks: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice? Kjorsvik, 117 Wn.2d at 105-06. If the answer to the first question is “no,” reversal is required without reaching the second

question. State v. McCarty, 140 Wn.2d 420, 425-28, 998 P.2d 296 (2000) .

b. The information in this case is constitutionally deficient because it omits the element of notice of the date on which Mr. Thompson was to appear in court. Here, the answer to the first question above is “no,” i.e., a necessary element of the crime is neither explicitly stated nor fairly implied. See id. at 428. Accordingly, the conviction on count II should be reversed. Id.

The amended information added a charge of bail jumping (count II) and alleged:

That the defendant TERRON LEE THOMPSON in King County, Washington, on or about October 12, 2007, being charged with Unlawful Possession of a Firearm in the first Degree, a Class B felony, having been admitted to bail, and with knowledge of the requirement of a subsequent personal appearance before the court, did fail to appear.

Supp. CP \_\_\_\_ (Appendix A at 2) (emphasis added). The information alleged that Mr. Thompson had knowledge of a requirement of a subsequent personal appearance, but did not allege he had notice he was supposed to appear on the specific date in question (October 12, 2007). This is insufficient.

The defendant’s receipt of notice of the court date is an essential element of the crime of bail jumping. State v. Fredrick,

123 Wn. App. 347, 353, 97 P.3d 47 (2004); State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). The “to convict” instruction in this case properly set forth this element:

To convict the defendant of the crime of bail jumping, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 12<sup>th</sup> day of October, 2007, the defendant failed to appear before a court; and
- (2) That the defendant was charged with unlawful possession of a firearm in the first degree; and
- (3) That the defendant had been released by court order or admitted to bail with the requirement of a subsequent personal appearance before that court on October 12, 2007; and
- (4) That the defendant knew of the requirement to subsequently appear before the court on October 12, 2007; and
- (5) That the acts occurred in the State of Washington.

CP 55 (Instruction 11) (emphasis added). The amended information, though, did not include this element. It was, therefore, constitutionally deficient and reversal is required. McCarty, 140 Wn.2d at 428.

c. The remedy is reversal and dismissal without prejudice.

Washington courts “have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal of charges without prejudice to the State’s ability to refile charges.” State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342

(2008). This Court should reverse Mr. Thompson's conviction on Count II, and remand for dismissal of the charge without prejudice.

Id.

2. THE POLICE OFFICERS' DETENTION OF MR. THOMPSON WAS UNCONSTITUTIONAL BECAUSE HE WAS NOT THE PROBATIONER FOR WHOM THE HOUSE WAS BEING SEARCHED, WAS NOT AN OCCUPANT OF THE HOUSE BEING SEARCHED, AND WAS NOT SUSPECTED OF CRIMINAL ACTIVITY.

a. More than mere presence is required to justify the detention or search of an individual, other than an occupant, at the scene of a valid home search. The Fourth Amendment provides, in relevant part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Article I, Section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7.

Generally, the seizure of a person must be supported by probable cause. State v. Broadnax, 98 Wn.2d 289, 293, 654 P.2d 96 (1982) (citing Dunaway v. New York, 442 U.S. 200, 208, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)). There are two narrow exceptions to the probable cause requirement. State v. King, 89

Wn. App. 612, 618-19, 949 P.2d 856 (1998). One is the situation addressed by Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under Terry, an officer may briefly detain a person if the officer harbors a reasonable suspicion, based on specific articulable facts, that the individual is engaging in criminal activity. Id.

A “still narrower” exception to the probable cause requirement is that addressed in Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). See King, 89 Wn. App. at 618-19. That exception allows officers who are properly searching a residence to briefly detain occupants of that residence while conducting the search. Summers, 452 U.S. at 704-05; King, 89 Wn. App. at 618-19.

The Summers exception does not extend to nonoccupants of a home at which officers are executing a search warrant or otherwise properly searching a house. Broadnax, 98 Wn.2d at 304.<sup>5</sup> Because constitutional rights are individually held, mere association with a person suspected of criminal activity does not strip away the protections of the Constitution. Id. at 296; Ybarra v.

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<sup>5</sup> Broadnax was partially abrogated on other grounds (“plain-feel” doctrine) by Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). The four conclusions in Broadnax unrelated to this issue remain good law. 98 Wn.2d at 304. Mr. Thompson does not raise a “plain-feel” issue.

Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) (person's mere presence at bar where officers executed search warrant did not justify even a patdown search of his person); State v. Douglas S., 42 Wn. App. 138, 140-41, 709 P.2d 817 (1985) (same rule in a home). Thus, "while an occupant may be detained during the execution of a residential search warrant, this limited exception to the probable cause requirement does not extend to those merely present on the premises." Broadnax, 98 Wn.2d at 304.

Rather, the State must prove "presence plus" to justify the detention of an individual who is not an occupant of the home during the execution of a valid home search. State v. Smith, 145 Wn. App. 268, 276, 187 P.3d 768 (2008). The "plus" consists of independent factors, other than presence at the scene, tying the person to the illegal activities being investigated or raising a reasonable suspicion that the person is armed and dangerous. Id.

b. The State failed to satisfy the "presence plus" requirement in this case. Here, the officers seized Mr. Thompson merely because he was present at the scene. When the caravan of officers arrived at Shameka Thompson's home, Terron Thompson and a friend were standing outside the residence near the carport

area. 4 RP 15; CP 73 (Finding of Fact k). The officers went to the home to search it based on Shameka Thompson's community custody violations; they did not know Terron Thompson and did not suspect him of criminal activity. 4 RP 72, 79. The portion of the trial court's "Conclusion of Law" which describes the officers as having "developed suspicions of criminal activity" is a factual finding not supported by the record. No officer testified he suspected Mr. Thompson of criminal activity; to the contrary, the officers testified they did not have individualized suspicion of criminal activity with respect to him. 4 RP 72.

As soon as the officers arrived at the house, they got out of their vehicles, approached the residence with guns visible, and yelled, "Police. Show us your hands." 4 RP 16. This seizure was unconstitutional because based on mere presence at the scene. Broadnax, 98 Wn.2d at 304; Smith, 145 Wn. App. at 276.

It was after this point that Mr. Thompson looked startled and started walking backwards with his hands in his pockets. 4 RP 16-18. The trial court erroneously used this behavior to justify a seizure that had already occurred. See Michigan v. Tyler, 436 U.S. 499, 505-06, 98 S.Ct. 142, 56 L.Ed.2d 486 (1978) (warrantless search of burned premises cannot be justified on ground of

abandonment by arson until arson has been proved, and conviction cannot be used ex post facto to validate introduction of evidence used to secure same conviction).

After Mr. Thompson looked startled and put his hand in his pocket, Officer Aaron Thompson pointed his shotgun at Terron Thompson and again ordered him to show his hands. 4 RP 71; CP 73 (Finding of Fact n). Even this second seizure is unconstitutional, because the fact that Mr. Thompson was standing in the driveway looking startled and putting his hands in his pockets is not sufficient to create the “presence plus” necessary to support a seizure. See State v. Gatewood, 163 Wn.2d 534, 540, 182 P.3d 426 (2008) (seizure improper even where suspect was in a high-crime area after midnight and upon seeing police officers his eyes grew wide, he twisted to his left and appeared to hide something, and he jaywalked).

Smith is on point. There, police officers drew their guns and ordered occupants out of a car that had parked in the driveway of a residence where police were about to serve a search warrant. Smith, 145 Wn. App. at 271. The trial court denied a motion to suppress evidence obtained as a result of the seizure, finding,

“those officers certainly had concern for their safety.” Id. at 273.

But this Court reversed, holding:

The issue here is clear: whether police may lawfully seize at gunpoint and detain for investigation the two occupants of a car who appeared in the driveway of a residence at which officers are prepared to execute a search warrant when neither the vehicle nor any woman was named. We hold that they may not.

Id. at 274. Similarly here, officers seized Mr. Thompson at gunpoint even though he was not named in a warrant, was not the probationer for whom the officers were searching the house, and was not suspected of criminal activity. Under Smith, the seizure was unconstitutional.

In Broadnax, the Washington Supreme Court noted that the distinction between an occupant and a nonoccupant in this context is critical. 98 Wn.2d at 300. Thus, even though the defendant in Broadnax was inside the house that was being searched subject to a valid warrant, it was improper for the officers to detain him because he was just a visitor. Id. at 292. Here, Mr. Thompson was not even inside the house, so it was even less appropriate for officers to seize him.

Summers and King are inapposite. Summers involved the detention of a person in his own home during execution of a search

warrant for that home. Summers, 452 U.S. at 704-05. The United States Supreme Court explained why the brief detention of an occupant is legal:

Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself. Indeed, we may safely assume that most citizens -- unless they intend flight to avoid arrest -- would elect to remain in order to observe the search of their possessions. . . . Moreover, because the detention in this case was in respondent's own residence, it could add only minimally to the public stigma associated with the search itself.

Summers, 452 U.S. at 701-02 (emphasis added).

King is also inapposite. In that case, not only was the defendant inside the house, but when police came upon him, he had a gun in plain sight – a fact that the court stressed in endorsing the detention. 89 Wn. App. at 616, 619 (“Fedderson unexpectedly encountered King, with a gun on the bed beside him”) (emphasis in original). Thus, the State met the “presence plus” requirement in King.

Unlike the defendant in King, Mr. Thompson did not display a weapon, and was not inside the home to be searched. Nor was he suspected of criminal activity. Because the State failed to show “presence plus,” the detention of Mr. Thompson was unconstitutional. Broadnax, 98 Wn.2d at 301.

Even if the officers did possess individualized reasonable suspicion of Mr. Thompson, that would still arguably not be enough to justify the seizure. That is because the nature of the intrusion here was unreasonable under the circumstances, and therefore constituted an arrest justifiable only by probable cause. See United States v. Robertson, 833 F.2d 777, 781 (9<sup>th</sup> Cir. 1987) (officers’ detention of visitor at gunpoint for 5-15 minutes during execution of arrest warrant at methamphetamine lab constituted arrest; her mere presence did not amount to probable cause); contrast State v. Belieu, 112 Wn.2d 587, 597-98, 773 P.2d 46 (1989) (detention at gunpoint reasonable, and therefore not a full-blown arrest, where defendant was a suspected weapons thief).

Here, multiple officers descended upon Mr. Thompson, pointed their weapons directly at him, and ordered him to freeze and put his hands up. This occurred under circumstances in which, unlike Belieu, officers did not suspect Mr. Thompson of being a

weapons thief, and indeed did not suspect him of committing any crime. Accordingly, Mr. Thompson's seizure was like the unreasonable seizure that constituted an arrest in Robertson, not like the seizure in Belieu, in which use of drawn guns was reasonable because the detainee was a suspected weapons thief.

As in Robertson, probable cause to support the arrest was absent:

We hold that probable cause for her arrest was absent. For all that was then known to the officers, Steeprow was an innocent visitor. Lacking from both the arrest warrant for Johnson and the search warrant for the premises was the slightest indication that Steeprow was involved in criminal activity. Her mere presence on the premises, without more, cannot support an arrest of her under these circumstances.

833 F.2d at 782. Similarly here, Mr. Thompson's mere presence in the driveway of the premises at which a probationer lived does not provide probable cause to support his arrest. Therefore, even if the seizure did not violate Smith and Broadnax, it would still be unconstitutional. Robertson, 833 F.2d at 781-82.

c. Reversal and suppression is required. All "evidence obtained as a result of an unlawful seizure is inadmissible." State v. Reichenbach, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). "[T]he right of privacy shall not be diminished by the judicial gloss of a

selectively applied exclusionary remedy. . . . [W]henever the right is unreasonably violated, the remedy must follow.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

The law enforcement officers here discovered the gun as a result of the unconstitutional seizure of Mr. Thompson.

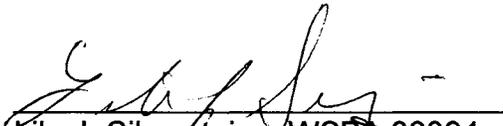
Accordingly, the evidence should have been suppressed. The conviction on count I should be reversed and the case remanded with instructions to suppress both the gun and the statements elicited as a result of the seizure. State v. Parker, 139 Wn.2d 486, 505, 987 P.2d 73 (1999); Smith, 145 Wn. App. at 277-78.

E. CONCLUSION

For the reasons above this Court should reverse the bail jumping conviction and dismiss without prejudice to the State's ability to refile. This Court should also reverse the conviction for unlawful possession of a firearm, and remand with instructions to suppress the gun and statements obtained as a result of the unlawful seizure.

DATED this 21<sup>st</sup> day of April, 2010.

Respectfully submitted,

  
Lila J. Silverstein - WSBA 38394  
Washington Appellate Project  
Attorneys for Appellant

# APPENDIX A



1 That the defendant TERRON LEE THOMPSON in King County, Washington, on or  
2 about October 12, 2007, being charged with Unlawful Possession of a Firearm in the First  
3 Degree, a Class B felony, having been admitted to bail, and with knowledge of the requirement  
4 of a subsequent personal appearance before the court, did fail to appear;

5 Contrary to RCW 9A.76.170, and against the peace and dignity of the State of  
6 Washington.

7 DANIEL T. SATTERBERG  
8 Prosecuting Attorney

9 By: \_\_\_\_\_  
10 Erin H. Becker, WSBA #28289  
11 Senior Deputy Prosecuting Attorney  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64321-5-I
v.	)	
	)	
TERRON THOMPSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21<sup>ST</sup> DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> TERRON THOMPSON 761978 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF APRIL, 2010.

X \_\_\_\_\_ 

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