

No. 74874-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS ROSS WHITE,

Appellant.

FILED  
Oct 4, 2016  
Court of Appeals  
Division I  
State of Washington

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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 trial court abused its discretion in ordering restitution, because the State failed to prove the victims lost any money at all – let alone that they lost a specific amount. CP 233-72; RP (1/29/16) 149-87.

2. The judge’s imposition of restitution based on facts he found by a preponderance of the evidence violated Mr. White’s constitutional rights to a jury trial and proof beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21.

3. The convictions on counts 45-55 are invalid because the prosecutions were initiated after the statute of limitations had run.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Restitution may only be ordered for easily ascertainable damages caused by a defendant’s crimes. Douglas White pleaded guilty to multiple counts of identity theft and mortgage fraud because he performed appraisals without a license and signed the appraisals with Tom Reed’s name and license number. Mr. White’s customers had hired him and his company to perform appraisals, and there was no evidence that the appraisals were inaccurate, that the mortgages obtained were compromised, or that customers would have hired Tom Reed if they had not hired Douglas White. Did the sentencing court abuse its discretion in ordering Mr. White to refund appraisal fees to several customers and to

pay over \$16,000 in restitution to Tom Reed on the basis that this was the sum of appraisal fees paid to Douglas White?

2. The Sixth and Fourteenth Amendments guarantee the right to have a jury find, beyond a reasonable doubt, the facts essential to punishment. Article I, section 21 of the Washington Constitution provides an “inviolable right” to a jury trial on damages. Did the imposition of restitution on Mr. White, based upon a judge’s finding of the amount of damages by a preponderance of the evidence, violate these constitutional provisions?

3. The statute of limitations for mortgage fraud is five years after the violation or three years after discovery of the violation, whichever is later. Mr. White was alleged to have committed 11 counts of mortgage fraud between June 12, 2008 and June 10, 2009 by using Tom Reed’s electronic signature and license number on appraisals. CP 93-96. Tom Reed filed a complaint about false appraisals in 2010 and the detective interviewed him on July 29, 2010. CP 19-20. However, the State did not charge Mr. White with these counts until February 20, 2015. CP 46, 68-75. Must the convictions on these counts be reversed and dismissed because the prosecutions were initiated after the statute of limitations had run?

C. STATEMENT OF THE CASE

Douglas White pleaded guilty to 28 counts of second-degree identity theft and 27 counts of mortgage fraud. CP 76-96, 160-83. Mr. White's crimes consisted of using another person's electronic signature and license number when performing appraisals. CP 19-31.

Mr. White had worked for the other person, Tom Reed, from 2004-2008. CP 20. Mr. Reed's company was Washington Appraisal Reviews. CP 19.

Mr. White later performed appraisals as part of his own business, Washington Real Estate Services. CP 20. Several individuals and mortgage companies hired Mr. White to perform appraisals. These customers were referred directly to Mr. White, and had never hired or worked with Tom Reed. CP 20, 23, 27.

Mr. White performed the appraisals and used his company's letterhead, but because he did not have a license, he signed the appraisals with Tom Reed's electronic signature and license number. CP 20-31, 236-72. Although Mr. White falsely used Mr. Reed's signature and license numbers, the appraisals he performed were apparently accurate, and the

customers successfully obtained mortgages. CP 19-31; RP (1/22/16 - CoA no. 74469-1-I)<sup>1</sup> 269, 288-89; RP (1/29/16) 166.

Despite the fact that no customers lost money, Mr. White accepted responsibility for his fraud. He pleaded guilty, and was sentenced to 60 months in prison. CP 160, 163.

Mr. White did, however, contest the State's request for restitution. RP (1/29/16). The State asked that the court order Mr. White to return appraisal fees to 10 customers, and to pay Tom Reed restitution of over \$16,000. CP 192-232. The latter request was the total of all appraisal fees paid, and was based on the theory that if the customers had not hired Douglas White, they may have hired Tom Reed. CP 236; RP (1/29/16) 169-74. The court ordered restitution over Mr. White's objections that the State failed to prove loss or damage. CP 233-35; RP (1/29/16) 166.

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<sup>1</sup> This transcript is the restitution hearing for the co-defendant, Diana Merritt. Both Mr. White and the State referred to the facts and arguments adduced at Ms. Merritt's restitution hearing during Mr. White's restitution hearing. *See, e.g.*, RP (1/29/16) 149, 166.

D. ARGUMENT

**1. The restitution order is improper and should be vacated.**

- a. Restitution may be ordered only for easily ascertainable damages caused by the crime.

A sentencing court's authority to order restitution is limited by statute. *State v. Cawyer*, 182 Wn. App. 610, 616, 330 P.3d 219 (2014). The relevant statute provides for restitution "whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property." RCW 9.94A.753(5). "[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3).

Restitution is appropriate only if a causal connection exists between the defendant's offense and the victim's injuries for which restitution is sought. *Cawyer*, 182 Wn. App. at 616-17. "Losses are causally connected if the victim would not have incurred the loss but for the crime." *State v. Acevedo*, 159 Wn. App. 221, 230, 248 P.3d 526 (2010).

The State bears the burden of proving loss amount by a preponderance of the evidence. *State v. Griffith*, 164 Wn.2d 960, 965, 195

P.3d 506 (2008). “Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.” *Griffith*, 164 Wn.2d at 965 (internal citations omitted).

The question of whether a loss is causally connected to a crime is a question of law this Court reviews de novo. *Acevedo*, 159 Wn. App. at 230. This Court reviews a trial court’s factual findings for substantial evidence. *Griffith*, 164 Wn.2d at 965.

- b. The State failed to prove by a preponderance of the evidence that there was any loss or damage – let alone that there was over \$16,000 lost.

In this case, the State presented insufficient evidence to support the restitution order. The court ordered Mr. White to pay \$400 or \$450 each to 10 individuals, reasoning this was the amount each had paid him to perform appraisals. CP 233-35. But the State failed to prove that these people suffered any losses – let alone losses in these specific amounts. These individuals successfully obtained mortgages based on Mr. White’s appraisals, and there was no evidence that the appraisals were inaccurate. RP (1/29/16) 166 (defense attorney notes this absence of proof at restitution hearing) CP 236-72 (State’s documents in support of restitution simply show that appraisal fees were paid); CP 19-44 (certification for

determination of probable cause, which formed factual basis for guilty plea, does not show these individuals lost money).

The court also ordered Mr. White to pay \$16,050.00 to Tom Reed. CP 233. The court apparently arrived at this amount by adding all of the appraisal fees paid to Mr. White. CP 236. The sentencing court reasoned that Mr. Reed “should be compensated for those appraisals that would have gone to him, if Mr. White had been doing what he said he was doing, which was working with Mr. Reed.” RP (1/29/16) 177.

But there was no evidence showing that Mr. Reed *lost* these amounts. The State’s theory seemed to be that but for Mr. White’s crimes, all of Mr. White’s customers would have hired Mr. Reed. RP (1/29/16) 169-74. However, there is no support in the record for this claim; in fact, the evidence is to the contrary.

Mr. Reed has owned his own appraisal company, Washington Appraisal Reviews, since 1995. CP 19. But all of the customers at issue in this case obtained appraisals through Mr. White’s company, Washington Real Estate Services. CP 194-229; *see also* CP 20 (Tom Reed said he had never done an appraisal for Stay in Home Mortgage Company); CP 23 (“Reliance Mortgage sought to hire Washington Real Estate Services” (Doug White’s company)); CP 27 (multiple borrowers state they were referred to Doug White’s company). If these customers had wanted to hire

Washington Appraisal Reviews, they could have done so. They did not. The fact that the person they did hire was fraudulently using Tom Reed's license does not mean Tom Reed lost the appraisal fee. To assume that the customers would have hired Tom Reed if Doug White were not wrongly performing appraisals is pure speculation, and is an impermissible basis for imposing restitution. *Griffith*, 164 Wn.2d at 965.

*State v. Hahn*, 100 Wn. App. 391, 996 P.2d 1125 (2000) is instructive. There, the defendant pleaded guilty to two counts of second degree assault after severely injuring two victims. *Hahn*, 100 Wn. App. at 392, 394. The State sought restitution for both victims' medical treatment, and submitted hospital records identifying "numerous medical services rendered either on the date of the crime or shortly thereafter." *Id.* at 400. Even under these circumstances, this Court reversed the restitution order because the evidence was "insufficient to allow the sentencing court to estimate losses by a preponderance of the evidence without speculation or conjecture." *Hahn*, 100 Wn. App. at 400. If the evidence supporting restitution was insufficient in *Hahn*, it is certainly insufficient here, where alleged damages are based purely on the speculation that Tom Reed would have performed (and been paid for) appraisals if Doug White had not.

It is also worth noting that following substantially similar arguments the trial judge declined to order co-defendant Diana Merritt to

pay restitution. *See* Appendix A (Order Denying Restitution in King Co. 14-1-02955-8 SEA); RP (1/22/16 - CoA no. 74469-1-I) 259-317; RP (1/29/16) 149, 166 (Both sides refer to arguments made in Ms. Merritt's case). At Ms. Merritt's restitution hearing, the court noted that the victims may have suffered a loss if the property value had been inflated, but he said "I don't have any evidence that the appraisals themselves were not relatively accurate." RP (1/22/16 - CoA no. 74469-1-I) 269. The judge went on:

So then the question becomes, are these other costs that they've incurred losses or injury? Well, it seems to me they got what they wanted in the long run. You're absolutely right, [prosecutor]; they bargained for an appraisal done by a licensed appraiser. But when push comes to shove, they actually got ultimately the services that they wanted and the loan refinance that they wanted.

RP (1/22/16 - CoA no. 74469-1-I) 288. The court concluded, "So when you get right down to it, I'm of the mind that there are no demonstrable, ascertainable damages to the individuals involved either, from the perspective of the cost of the appraisals themselves." *Id.* at 289.

The same reasoning applies to preclude restitution to the ten borrowers in Mr. White's case, yet at Mr. White's restitution hearing the court reversed course and said:

[There] has to be a loss of property, or an injury to a person, and it has to be easily ascertainable. Well, how do

we do that in this particular case? Well, the way I see it is every one of these appraisals involving a charged victim who wishes to be compensated for the amount of money they spent on the appraisal by a person who wasn't licensed to do the appraisal, I believe that that's compensable. And that's easily ascertainable. For some folks it was 400 bucks, for others it was 450. But every one of those individuals who's asked to be compensated for the cost of that essentially worthless appraisal, should get that compensation.

RP (1/29/16) 176.

The judge was wrong, because, as he had recognized only a week earlier at Ms. Merritt's hearing, the borrowers did not suffer any losses. They did not have to get new appraisals by licensed professionals; they obtained mortgages based on Mr. White's appraisals and no one had required them to obtain new appraisals after Mr. White's fraud was discovered. Thus, the appraisal fees do not constitute losses and it was improper to order restitution in the amount of the appraisal fees. *See* RP (1/29/16) 166.

The court also declined to order Ms. Merritt to pay restitution to Mr. Reed, reasoning that Mr. White should be responsible for any losses to him. RP (1/22/16 - CoA no. 74469-1-I) 289. But again, the State never proved that Mr. Reed lost the appraisal fees that were paid to Mr. White. Customers hired Mr. White to perform appraisals; he performed the appraisals, and he was paid for these appraisals. Although he committed

crimes by using Mr. Reed's electronic signature and license number, Mr. Reed had never been hired to perform these appraisals to begin with, so he cannot be said to have lost the fees. *See* RP (1/29/16) 169.

In sum, the restitution order should be vacated because the State failed to prove the victims lost the amounts ordered. This Court need not reach the alternative argument below.

- c. The judge's finding of damages by a preponderance of the evidence violated Mr. White's federal constitutional rights to due process and a jury trial.

The problems outlined above demonstrate the importance of enforcing the constitutional rights to a jury trial and proof beyond a reasonable doubt in restitution cases.

The Sixth and Fourteenth Amendments guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment. *Blakely v. Washington*, 542 U.S. 296, 313, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV. Restitution constitutes punishment. *State v. Kinneman*, 155 Wn. 2d 272, 281, 119 P.3d 350 (2005). In this case, Mr. White did not admit facts essential to restitution nor did a jury find the facts essential to restitution.

In *Kinneman*, the Washington Supreme Court rejected an argument that the rights to a jury trial and proof beyond a reasonable doubt apply to

restitution. *Kinneman*, 155 Wn.2d at 282. But this was before the U.S. Supreme Court decided *Southern Union v. United States*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012) and *Alleyne v. United States*, \_\_\_ U.S. \_\_\_ 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). In *Southern Union*, the Court held that the rights to a jury trial and proof beyond a reasonable doubt apply to the facts necessary to imposing fines, not just to facts necessary to imposing imprisonment. *Southern Union*, 132 S.Ct. at 2350-51. The court explained, “the amount of a fine ... is often calculated by reference to particular facts ... [like] the amount of the defendant’s gain or the victim’s loss, ....” *Id.* at 2350-51. “This is exactly what *Apprendi* guards against: judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury’s verdict or the defendant’s admissions allow.” *Id.* at 2352. In *Alleyne*, the Court extended *Apprendi* to the facts necessary to impose minimum punishment, not just maximum punishment. *Alleyne*, 133 S.Ct. at 2155.

“The United States Supreme Court is, of course, the ultimate authority concerning interpretation of the federal constitution.” *State v. Tyler*, No. 73564-1-L, 2016 WL 4272999, at \*5 (Wash. Ct. App. Aug. 15, 2016). In light of *Southern Union* and *Alleyne*, *Kinneman* is no longer good law. The amount of restitution is calculated by reference to the amount of victim loss. RCW 9.94A.753(3). Thus, consistent with the

Constitution, the amount must be proved to a jury beyond a reasonable doubt. *Southern Union*, 132 S.Ct. at 2350-51. Because that did not occur here, this Court should reverse and remand for a restitution hearing at which the State must prove the loss amount to a jury beyond a reasonable doubt.

- d. The judge's finding of damages by a preponderance of the evidence violated Mr. White's state constitutional rights to due process and a jury trial.

The restitution procedure here violated not only the federal constitution, but also the state constitution. Article I, section 3 guarantees the right to due process, and article I, section 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Const. art. I, § 21. This right to a jury trial applies to a determination of damages. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 648, 771 P.2d 711, *as amended*, 780 P.2d 260 (1989). “The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.” *State v. Strasburg*, 60 Wash. 106, 116, 110 P. 1020 (1910) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L. Ed. 356 (1866)). “In other words, a constitutional protection cannot be bypassed by allowing it to

exist in form but letting it have no effect in function.” *Sofie*, 112 Wn.2d at 660. Thus, the Court reasoned the jury’s function as fact-finder could not be divorced from the ultimate remedy provided. “The jury’s province includes determining damages, this determination must affect the remedy. Otherwise, the constitutional protection is all shadow and no substance.” *Sofie*, 112 Wn.2d at 661.

In *Sofie* the Court held the legislature could not remove that traditional function from the jury by means of a statute that capped noneconomic damages. Similarly, nothing permits the removal of this damage-finding function from the jury simply by terming such damages “restitution.” Restitution is limited to damages causally connected to the offense. *Cawyer*, 182 Wn. App. at 616-17. The damages at issue are no different than the damages at issue in *Sofie*, i.e., they are the value of loss suffered as a result of the acts of another. To preserve “inviolable” the right to a jury trial, article I, section 21 must afford a right to a jury determination of such damages. For this reason, too, this Court should reverse the restitution order and remand for a hearing at which the State must prove the loss amount to a jury beyond a reasonable doubt.

**2. The convictions on counts 45-55 should be vacated because the prosecutions were barred by the statute of limitations.**

In addition to vacating the restitution order, this court should vacate the convictions on counts 45-55. The State charged these counts by amended information on February 20, 2015. CP 46, 68-75. The State alleged these crimes occurred between June 12, 2008 and June 10, 2009. *Id.* But the statute of limitations requires prosecution within five years of the violation or three years of discovery of the violation. RCW 19.144.090. Because that did not occur with respect to counts 45-55, those convictions should be reversed and the charges dismissed with prejudice. *See State v. Eppens*, 30 Wn. App. 119, 130, 633 P.2d 92 (1981) (vacating convictions for three charges filed after statute of limitations had run).

The purpose of a statute of limitations is “to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.” *Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970). Such limitations reflect a recognition that time “erode[s] memories or [makes] witnesses or other evidence unavailable.” *Stogner v. California*, 539 U.S. 607, 615, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003). Statutes of limitations “encourag[e] law enforcement officials promptly to

investigate suspected criminal activity.” *Toussie*, 397 U.S. at 115. Finally, they “prevent prosecution of those who have been law abiding for some years.” Wayne R. LaFare, *Criminal Procedure*, § 18.5(a) at 184 (3d ed. 2007).

The statute of limitations creates an absolute bar to prosecution. *Eppens*, 30 Wn. App. at 124. Although a defendant may waive his right to be tried within the statute of limitations, such waiver must be explicit and must occur before the statute of limitations has run. *State v. Peltier*, 181 Wn.2d 290, 297, 332 P.3d 457 (2014); *see also In re the Personal Restraint of Stoudmire*, 141 Wn.2d 345, 354-55, 5 P.3d 1240 (2000) (vacating two convictions for statute of limitations violation even though petitioner pleaded guilty and raised issue for first time in a second PRP). Mr. White did not waive his right to be prosecuted within the statute of limitations. CP 76-96; RP (8/19/15) 3-32.

The relevant statute provides:

- (1) Any person who knowingly violates RCW 19.144.080 or who knowingly aids or abets in the violation of RCW 19.144.080 is guilty of a class B felony punishable under RCW 9A.20.021(1)(b). Mortgage fraud is a serious level III offense per chapter 9.94A RCW.
- (2) No information may be returned more than (a) five years after the violation, or (b) three years after the actual discovery of the violation, whichever date of limitation is later.

RCW 19.144.090.

The State charged Mr. White with mortgage fraud more than five years after the alleged violations. CP 46, 68-75 (showing amended information was filed February 20, 2015, alleging Mr. White committed mortgage fraud between June 12, 2008 and June 10, 2009). The amended information was also filed more than three years after the discovery of the alleged violations. CP 19-20 (certificate for determination of probable cause shows Tom Reed contacted police in the spring of 2010).

Accordingly, Mr. White asks this Court to reverse the convictions on counts 45-55, and remand for dismissal of the charges with prejudice.

*Eppens*, 30 Wn. App. at 130.

**3. If this Court affirms it should decline to order costs.**

If Mr. White does not substantially prevail on appeal and the State requests appellate costs, any such motion should be denied. This Court has discretion under RAP 14.2 to decline an award of costs. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). This means “making an individualized inquiry.” *Sinclair*, 192 Wn. App. at 391. A person’s ability to pay is an important factor. *Id.* at 389.

Mr. White was found to be indigent. CP 282-83. This creates a presumption of indigency that continues on appeal. RAP 15.2(f); *Sinclair*,

192 Wn. App. at 393. The trial court further recognized this indigency by waiving discretionary legal financial obligations. CP 162. Given this record, the Court should exercise its discretion and reject any requests for costs in the event the State prevails.

E. CONCLUSION

Mr. White asks this Court to vacate the restitution order because the State failed to prove loss or damages. In the alternative, the restitution order should be reversed and the case remanded for a hearing at which the State must prove loss amount to a jury beyond a reasonable doubt.

Mr. White also asks this Court to reverse the convictions on counts 45-55 and remand for dismissal of the charges, because the prosecution of these counts commenced after the statute of limitations had run.

DATED this 4th day of October, 2016.

Respectfully submitted,

/s Lila J. Silverstein  
Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorney for Appellant

# APPENDIX A

**FILED**  
KING COUNTY WASHINGTON

JAN 22 2016

SUPERIOR COURT CLERK  
BY Susan Bone  
DEPUTY

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KING**

STATE OF WASHINGTON  
vs.  
DIANA J. MERRITT  
Defendant.

Plaintiff,

NO. 14-C-02955-088A

**ORDER ON CRIMINAL  
MOTION  
(ORCM)**

The above-entitled Court, having heard a motion FOR RESTITUTION ON BEHALF OF  
TOM REED, KIRK LAKEY, JON NELSON + KAREN PAW

IT IS HEREBY ORDERED that THE RESTITUTION IS NOT ORDERED.

DATED: JAN. 22, 2016

Jennifer S. Anderson  
Deputy Prosecuting Attorney 33203  
Attorney for the Defendant

Jeffrey Ramsdell  
JUDGE  
JEFFREY RAMSDELL

Order on Criminal Motion (ORCM)

05/02



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 74874-2-I
v.	)	
	)	
DOUGLAS WHITE,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF OCTOBER, 2016, 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:

[X] KING COUNTY PROSECUTING ATTORNEY	( )	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	( )	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] DOUGLAS WHITE	(X)	U.S. MAIL
387377	( )	HAND DELIVERY
LARCH CORRECTIONS CENTER	( )	_____
15314 DOLE VALLEY RD		
YACOLT, WA 98675		

**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF OCTOBER, 2016.



X \_\_\_\_\_

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