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JANUARY 26, 2012

Court of Appeals  
Division III  
State of Washington

**NO. 297381**

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

JAY FREDERIC FISCHER, Appellant

BENTON COUNTY SUPERIOR COURT NO. 10-1-01042-8

***Consolidated with***

COURT OF APPEALS **NO. 298027**

THE STATE OF WASHINGTON, Respondent

v.

DOROTHY LORRAINE JONES, Appellant

BENTON COUNTY SUPERIOR COURT NO. 10-1-01043-6

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BRIEF OF RESPONDENT

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## STATEMENT OF FACTS

The crime at an abandoned house at 620 N.  
Everett, Kennewick, Washington:

About two weeks before the crimes herein, Ronald Koehler had about \$2,000.00 worth of methamphetamine, which belonged to Dorothy Jones, the defendant herein. (II RP 90-91). Instead of selling the drugs, Mr. Koehler spent the next two weeks getting high. (II RP 116).

The two-week bender came to an abrupt end when defendant Fischer lured Mr. Koehler to an abandoned house on the pretext of repaying him a loan. (II RP 93). Once in the house, a third person, Ramon Aguilar, and another person started beating Mr. Koehler. (II RP 94-95). The assault is evident from exhibit numbers 2, 3, 6, and 7, and attached as "Appendix A." (EX. 2, 3, 6, 7).

Mr. Fischer supplied the two with a wire or rope, which they used to hogtie Mr. Koehler (II RP 97). Aguilar telephoned defendant Jones and said, "What do you want me to do with him? We

got him." (II RP 98). Ms. Jones appeared at the abandoned house shortly after the call. (II RP 98).

Ms. Jones forced Mr. Koehler to sign his name on a blank piece of paper two times. (II RP 99). Jones stated, "We're going to take your car, Ron. Sign these papers. Sign your signature here." (II RP 99). Aguilar had Koehler's car keys. (II RP 99). Aguilar threatened to kill Mr. Koehler and his children if he reported the crime. (II RP 114).

The search warrant executed at 1108 W. Entiat, Kennewick, Washington:

Despite the threat, Mr. Koehler ran for help. (II RP 109). A clerk at a convenience store called 911. (II RP 180). Mr. Koehler told the police that Ms. Jones forced him to sign his name on a piece of paper, and that his wallet, cell phone, and cash had been stolen. (CP 282, Findings 6-7).

The following day, the police were conducting surveillance at Ms. Jones' place of employment at 1108 W. Entiat in Kennewick, Washington where she works as a caretaker. (CP 282, Findings 8, 10). The police saw a woman matching Ms. Jones' description enter that residence. (CP 283, Finding 10). The woman was driving a white Dodge Caravan, which is the type of vehicle Ms. Jones had. (CP 282-83, Findings 9-10).

The police applied for and was issued a search warrant for 1108 W. Entiat, Kennewick, Washington. (CP 283, Finding 11).

Defendant Jones was in a bedroom in the residence. (CP 283, Finding 12). The police searched a purse in that bedroom. (CP 283, Finding 13). The purse contained Ms. Jones' identification and blank pieces of paper with Mr. Koehler's purported signature. (III RP 378-79). However, those were not the pieces of paper that Mr. Koehler signed (II RP 102).

Recovery of Koehler's vehicle:

Mr. Koehler's car was a 2001 Audi purchased for \$20,000.00, and it was his most valuable possession. (II RP 107-08). Mr. Koehler's car was recovered in Pasco, Washington on October 8, 2010, but was trashed with the key bent in the ignition, the interior ripped, the seats cut, and the weather stripping ripped off. (II RP 109, 183-85). Mr. Koehler put the interior damage at \$4,500.00. (II RP 109).

I. **RESPONSE TO DEFENDANT FISCHER'S APPEAL BRIEF  
NO. 29738**

**ARGUMENT**

Defendant Fischer's syllogism seems to be:

A. If the Superior Court suspends the sentence of a misdemeanor defendant, it must place the defendant's probation under the supervision of a county probation officer or a community corrections officer with the Department of Corrections.

B. The Superior Court suspended Defendant Fischer's sentence, but placed him under the supervision of the Benton County Clerk.

C. Therefore, the Order that the Benton County Clerk supervise Defendant Fischer is void.

However, Mr. Fischer's argument fails for at least two reasons. First, the trial court did not place Mr. Fischer on "probation" or community custody." Second, the county clerk is specifically authorized to collect legal financial obligations.

**1. THE TRIAL COURT DID NOT IMPOSE PROBATION.**

The State respectfully suggests that Defendant Fischer has improperly confused the trial court's power to suspend a sentence, and the power to impose probation. A trial court has the authority to suspend a sentence under RCW 9.92.060, and the authority to impose probation under RCW 9.95.210. Those are distinct statutes. As stated in *State v. Davis*, 56 Wn.2d 729, 355 P.2d 344 (1960), there the two acts "leave the

probation procedure available 'after conviction \* \* \* of any crime,' and the suspended sentence procedure available '[w]henver any person shall be convicted of any crime except murder, burglary in the first degree, arson in the first degree, robbery, carnal knowledge of a female under the age of ten years, or rape \* \* \*.'"<sup>1</sup> *State v. Davis*, 56 Wn.2d at 737.

The *Davis* Court dealt with a sentence for negligent homicide, ten months of which were suspended on various conditions. About four years after the suspended sentence was imposed, the State moved to revoke the suspension. The defendant responded that the time period to revoke the suspension had elapsed under RCW 9.95.200, regarding the maximum length of probation.

The *Davis* Court noted the distinction between a suspended sentence procedure in RCW

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<sup>1</sup> This statute is no longer applicable to felonies. RCW 9.92.900

9.92 and the probation procedure in RCW 9.95. The Court held that *Davis* was not sentenced to probation because:

There is no reference to probation; there is no direction that the suspension will 'continue for such a period of time' as the court shall determine. The appellant was not ordered to report to the Board of Prison Terms and Paroles as that act requires; neither that board nor any state parole officer is in this picture.

*State v. Davis*, 56 Wn.2d at 736. All of these factors are present here: The trial court did not direct Defendant Fischer to report to the Department of Corrections, did not state that he was on probation, and did not set a period of probation.

The granting of probation and/or a suspended sentence is discretionary with the trial court. *State v. Riddell*, 75 Wn.2d 85, 449 P.2d 97 (1968). Mr. Fischer's argument, that if the trial court suspended its sentence it was also required to place the defendant on probation, is incorrect.

2. THE COUNTY CLERK'S OFFICE IS AUTHORIZED TO COLLECT LEGAL FINANCIAL OBLIGATIONS.

A. RCW 9.94A.760(8) authorizes a county clerk's office to collect legal financial obligations.

RCW 9.94A.760(8) is directly on point and authorizes a county clerk's office to collect legal financial obligations, which provides:

After the judgment and sentence or payment order is entered, the department is authorized, for any period of supervision, to collect the legal financial obligation from the offender. Subsequent to any period of supervision or, **if the department is not authorized to supervise the offender in the community, the county clerk is authorized to collect unpaid legal financial obligations from the offender.** Any amount collected by the department shall be remitted daily to the county clerk for the purpose of disbursements. The department and the county clerks are authorized, but not required, to accept credit cards as payment for a legal financial obligation, and any costs incurred related to accepting credit card payments shall be the responsibility of the offender. (Emphasis added.)

RCW 9.94A.760(8).

**Additional response to defendant's argument:**

*State v. Hall*, 35 Wn. App. 302, 666 P.2d 930 (1983) is inapplicable. In *Hall*, the trial court sentenced the defendant, who was convicted of Robbery in the Second Degree, to three hours of probation to be served in his attorney's office. The trial court entered the sentence at 9:00 a.m. on August 3, 1982, and dismissed the case, after the defendant spent his three hours lounging in his attorney's office, that afternoon. The Court of Appeals reversed the trial court and held that if a trial court sentences a defendant to probation, it must be done correctly. Pursuant to RCW 9.95.210, if a trial court imposes probation, "[t]he court shall order the probationer to report to the secretary of corrections or such officer as the secretary may designate and as a condition of said probation to

follow implicitly the instructions of the secretary."<sup>2</sup> *State v. Hall*, 35 Wn. App. at 305.

*Hall* has little relevance to this matter. The county clerk is specifically authorized to collect legal financial obligations. The trial court appropriately gave the clerk the authority to supervise the defendant's payment of his costs, fines, and restitution. There is no reason to remand the matter.

**II. Response to Defendant Jones' Appeal Brief No.**

**298027**

**ISSUES**

1. Does Defendant Jones have standing to contest a search warrant at the residence of the person for whom she was a caregiver?
  - A. Who has the burden of proving standing, and what is that burden?
  - B. Has Ms. Jones proven she had a subjective expectation of privacy in items found at the Casey Mackey residence?

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<sup>2</sup> <sup>1</sup>RCW 9.95.210 has since been amended. The statutory language quoted is from the *Hall* case.

2. If Ms. Jones has standing, did the magistrate authorizing the search warrant abuse his/her discretion?
  - A. What is the standard on review regarding a challenge to the issuance of a search warrant?
  - B. Did the magistrate abuse his/her discretion in issuing the search warrant?
3. Assuming Defendant Jones has standing and assuming the warrant was issued improperly, was the error harmless?

#### ARGUMENT

1. MS. JONES DOES NOT HAVE STANDING TO CONTEST A SEARCH WARRANT AT THE RESIDENCE OF MR. MACKEY.
  - A. The defendant has the burden of proving standing.

The defendant has the burden of establishing that the search which produced the evidence violated her privacy rights. *State v. Link*, 136 Wn. App. 685, 150 P.3d 610 (2007). In order to show a legitimate expectation of privacy, the defendant must demonstrate 1) a subjective expectation of privacy in the object of the challenged search 2) which society recognizes as reasonable. *Id.*

Ms. Jones had no subjective expectation of privacy in Mr. Mackey's residence. The search warrant was for 1108 W. Entiat, Kennewick, Washington, which was the residence of Casey Mackey. Ms. Jones was the caregiver of Mr. Mackey. Ms. Jones did not live there; she had no expectation of privacy in the premises.

**B. Ms. Jones has not proven any expectation of privacy in items located at Mr. Mackey's residence at 1108 W. Entiat, Kennewick, Washington.**

The defendant is confusing the search of the Mackey residence and the search of the purse. The search warrant authorized the police to search 1108 W. Entiat, Kennewick, Washington. The purse was at the residence, and could be searched pursuant to that warrant.

It may have been a good strategy for Ms. Jones to keep items stolen from Mr. Koehler at a third person's residence. If the police found Koehler's cash, cell phone, and car keys at Ms. Jones' residence, she would be directly linked to

the crime. However, that strategy runs the risk that Ms. Jones would not have standing to contest the search of the third person's residence.

**2. EVEN IF MS. JONES HAS STANDING, THE MAGISTRATE DID NOT ABUSE HIS OR HER DISCRETION IN GRANTING THE SEARCH WARRANT.**

**A. The standard on review of a search is "abuse of discretion" with doubts resolved in favor of the validity of the warrant.**

A search warrant is entitled to a presumption of validity. *State v. Wolken*, 103 Wn.2d 823, 827-28, 700 P.2d 319 (1985) (recognizing that a defendant is entitled to go beyond the face of the search warrant affidavits only in limited circumstances). The decision to issue a search warrant is highly discretionary. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Courts generally give great deference to the magistrate's determination of probable cause and view the supporting affidavit for a search warrant in a commonsensical manner rather than hypertechnically. *State v. Young*, 123 Wn.2d 173,

195, 867 P.2d 593 (1994); see also *State v. Vickers*, 148 Wn.2d 91, 109, 59 P.3d 58 (2002) (incorrect date in warrant affidavit was an immaterial scrivener's error); *In re Yim*, 139 Wn.2d 581, 989 P.2d 512 (1999) (failure to expressly state that suspect did not possess an explosive's license, an essential element of the crime, did not invalidate warrant). Accordingly, courts generally resolve doubts concerning the existence of probable cause in favor of the validity of the search warrant. *State v. Vickers*, 148 Wn.2d at 108-09.

**B. The warrant was properly issued**

Here, the warrant was properly issued because the police knew that Ms. Jones worked as a caregiver at 1108 W. Entiat, and because the police had strong evidence that she had just entered that residence.

First, when the crime in question is theft, burglary, or robbery, in which property was obtained by the perpetrator, it is reasonable to

infer that the criminal would have the fruits of his crime in his residence, vehicle, or place of employment. *State v. McReynolds*, 104 Wn. App. 560, 569-570, 17 P.3d 608 (2000). It is reasonable to believe that Ms. Jones would hide property taken from the robbery of Mr. Koehler at the place she was working as a caretaker.

Second, it was reasonable to assume that the police had just seen Ms. Jones drive her white Dodge Caravan to 1108 W. Entiat and enter the residence. At least there is no evidence that some other woman, matching the defendant's description and driving the same type of vehicle (a white Dodge Caravan), frequented Mr. Mackey's residence.

**3. IN ANY EVENT, THE SEARCH WARRANT LEAD TO NO SIGNIFICANT EVIDENCE REGARDING THE THEFT OF A MOTOR VEHICLE CHARGE.**

"An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict." [citations omitted] *State v. Eaker*, 113 Wn. App. 111, 120, 53 P.3d 37 (2002). It is

the State's burden to prove the error was harmless beyond a reasonable doubt. *State v. L.B.*, 132 Wn. App. 948, 954, 135 P.3d 508 (2006).

The pieces of paper with Mr. Koehler's purported signature were not the ones which the defendant forced him to sign on October 5, 2010, after he was severely beaten. Those pieces of paper were evidence of Count III of the Amended Information, "Obtaining a Signature by Deception or Duress." (CP 97-98). However, they did not prove that Ms. Jones participated in the theft of Mr. Koehler's vehicle. Here, Mr. Koehler had been beaten and his car had been stolen as retribution for his stealing \$2,000.00 in drugs from Ms. Jones. That is the reason Ms. Jones was convicted of Theft of a Motor Vehicle.

#### **CONCLUSION**

Ms. Jones' conviction should be affirmed. The Judgment and Sentence in Mr. Fischer's case need not be modified.

**RESPECTFULLY SUBMITTED** this 26th day of  
January 2012.

**ANDY MILLER**  
Prosecutor

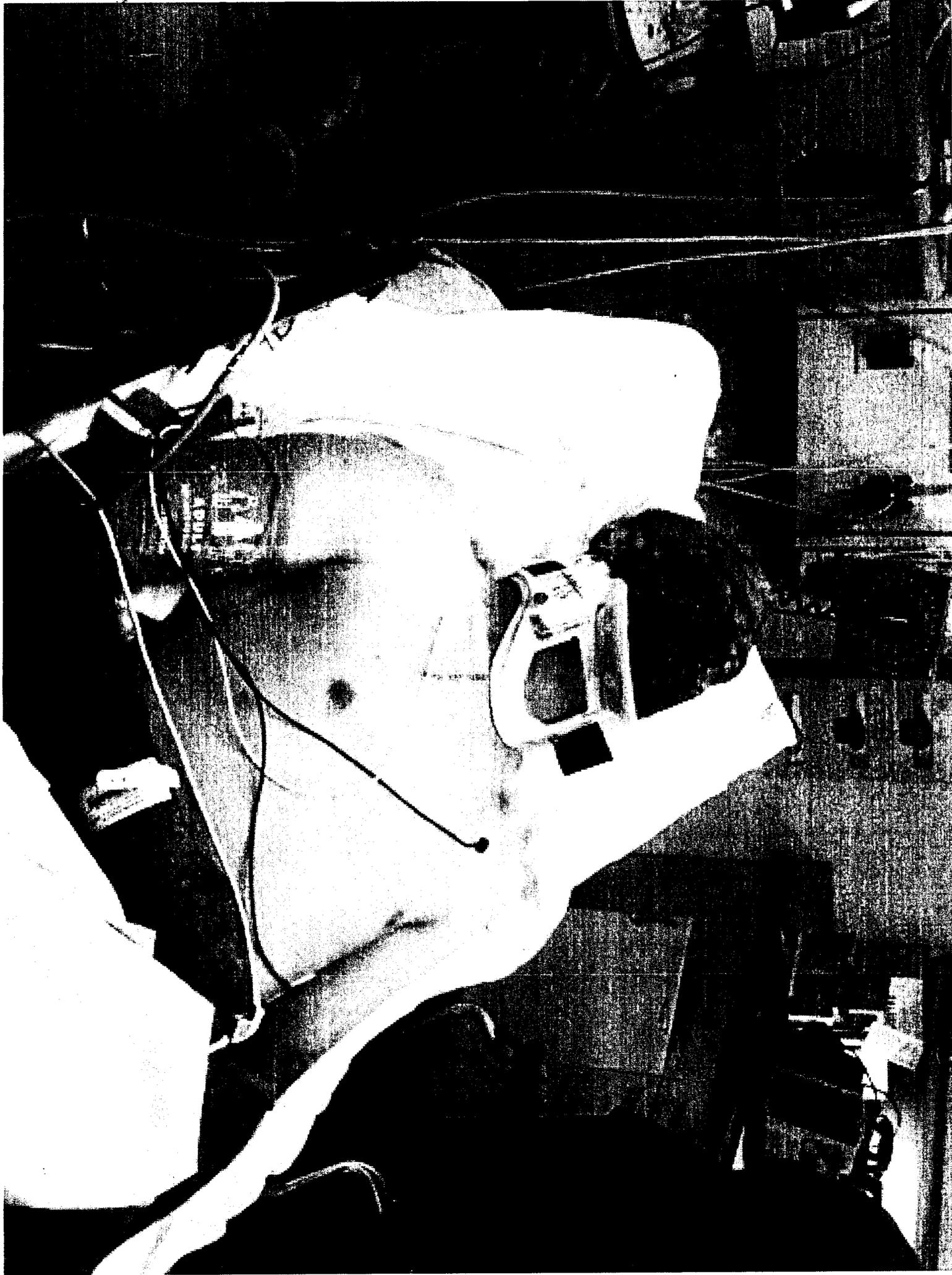
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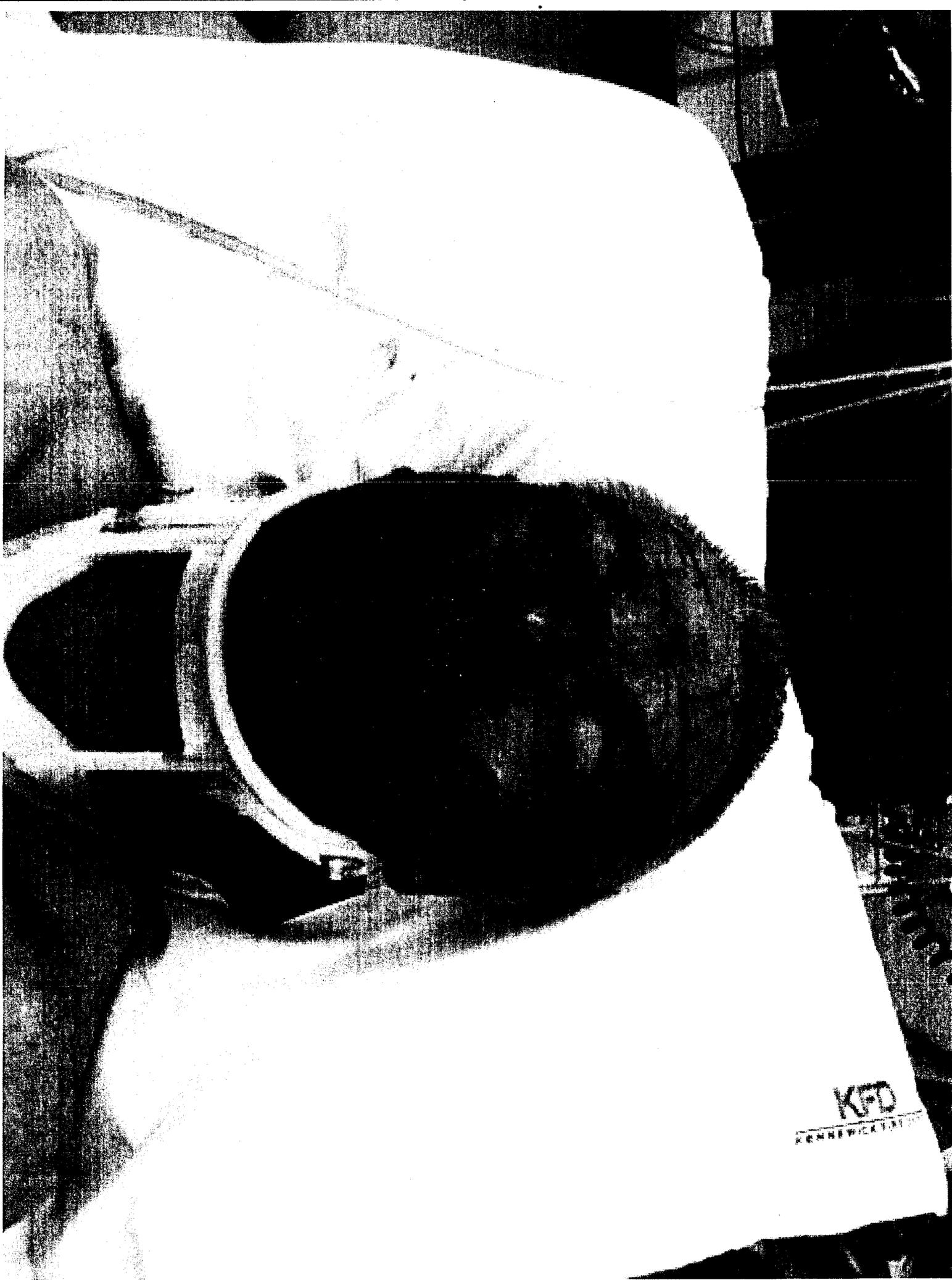
# APPENDIX A

EXHIBITS 2, 3, 6, 7









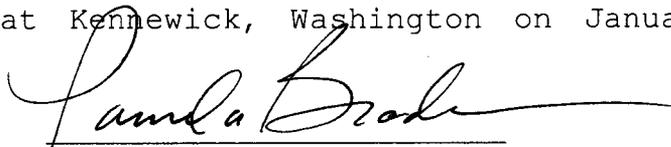
KFD  
KENNEWICK STATE

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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