

Supreme Court No. 93453-3  
Court of Appeals No. 73113-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOHN HENRY JOHNSON,

Petitioner.

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ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUMMARY OF APPEAL

The State did not prove beyond a reasonable doubt that John Henry Johnson specifically intended to steal an access device where there was no evidence to show he knew the purse he took contained an access device. Therefore, the State did not prove the elements of second degree theft in violation of constitutional due process.

Even if the statute did not require the State to prove Johnson had a specific intent to steal an access device, the State assumed the burden of proving that element because it was included in the to-convict instruction without objection.

B. ISSUES PRESENTED

1. To prove theft, the State must prove beyond a reasonable doubt a person took “the” property of another with the specific intent to deprive him or her of “such” property. In this case, “the” property was an “access device”—a credit card. To prove a person acted with a specific intent to deprive, the evidence must establish the person acted with actual knowledge. Did the State fail to prove Johnson specifically intended to deprive the owner of her access device where it did not prove he knew of the existence of the access device?

2. Under the “law of the case” doctrine, the State assumes the burden of proving an element contained without objection in the to-convict instruction. The law of the case doctrine is a long-standing, well-established common law rule in Washington adopted by this Court. Did the Court of Appeals err in disregarding this Court’s decisions and refusing to apply the law of the case doctrine?

C. STATEMENT OF THE CASE

Johnson was charged and convicted of one count of second degree theft of an “access device.” CP 193; RCW 9A.56.040(1)(c). Testimony at trial established Johnson picked up Kendra Farmer’s purse that was sitting on a couch in a Pottery Barn store. 1/26/15RP 61, 78-79; 1/27/15(a.m.)RP 154, 177. Inside the purse were some credit and debit cards. 1/26/15RP 65. But Johnson never opened the purse or looked inside of it. 1/26/15RP 91; 1/27/15(a.m.)RP 153. There was no evidence to show he knew what was inside.

The to-convict jury instruction informed the jury it must find beyond a reasonable doubt that Johnson (1) “wrongfully obtained or exerted unauthorized control over property of another”; (2) “the property was an access device”; and (3) Johnson “intended to deprive the other person of *the access device.*” CP 157 (emphasis added).

Johnson argued on appeal that the State did not prove the statutory elements of the crime because it did not prove he specifically intended to steal an access device. He also argued that under the “law of the case” doctrine, the State bore the burden of proving this element because it was included in the to-convict instruction without objection. The Court of Appeals affirmed.

D. ARGUMENT

**1. The State did not prove the statutory elements of the crime because it did not prove Johnson specifically intended to steal an access device.**

The State presented no evidence to show that Johnson knew what was inside Farmer’s purse. This was contrary to the statute, which requires proof that the accused acted with the intent to deprive the owner of his or her access device. Proof of intent requires proof of actual knowledge. Because no evidence—whether direct or

circumstantial—showed Johnson knew the purse contained an access device, the evidence was insufficient to prove intent.<sup>1</sup>

The crime of theft is defined by statute as “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). A person is guilty of theft in the second degree if he or she “commits theft of . . . an access device.” RCW 9A.56.040(1)(d).

The statute requires the State to prove the accused acted with the intent to steal an access device. The Court’s objective is to give effect to the Legislature’s intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). The surest indication of legislative intent is the language enacted by the Legislature, so if the meaning of a statute is plain on its face, the Court gives effect to that plain meaning. Id.

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<sup>1</sup> The State bore the burden to prove the elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The question on review is whether, when the evidence is viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

As a penal statute, the theft statute must be construed strictly and may not be extended by construction to situations not clearly intended by the Legislature. Blanchard Co. v. Ward, 124 Wash. 204, 207, 213 P. 929 (1923). If the statute is ambiguous, under the rule of lenity, the Court must adopt the interpretation that favors the defendant. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). A statute is ambiguous if it is susceptible to two or more reasonable interpretations. Dep’s of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). The proper interpretation and application of the statute is a question of law reviewed *de novo*. Ervin, 169 Wn.2d at 820.

The plain meaning of the second degree theft statute demonstrates the Legislature intended to require proof of a specific intent to steal an access device. A person commits a theft when he or she “wrongfully obtain[s] or exert[s] unauthorized control over *the property . . . of another . . . with intent to deprive him or her of such property.*” RCW 9A.56.020(1)(a) (emphases added). For purposes of second degree theft, “the property” is an “access device.” RCW 9A.56.040(1)(d). The second term, “such property,” refers to the earlier term “the property,” which is an “access device.” See Webster’s Third New International Dictionary 2283 (1993) (the word “such”

means “of this or that character, quality, or extent : of the sort or degree previously indicated or implied,” or “previously characterized or specified”); State v. Wentz, 149 Wn.2d 342, 351, 68 P.3d 282 (2003) (“Under the last antecedent rule, unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent.”) (quotation marks and citation omitted).

Thus, applying basic principles of statutory construction, the statute requires the State to prove Johnson specifically intended to deprive Farmer of her “access device.”

It is not enough to prove Johnson intended to steal Farmer’s purse. “Specific intent” is “an intent to produce a specific result, as opposed to an intent to do the physical act that produces the result.” State v. Esters, 84 Wn. App. 180, 184, 927 P.2d 1140 (1996) (quotation marks and citation omitted). “[W]here specific intent is an element of a crime, the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act.” State v. Louthier, 22 Wn.2d 497, 502, 156 P.2d 672 (1945).

Thus, in a prosecution for second degree theft, a specific intent to deprive another of an access device cannot be presumed from evidence that the accused took a purse containing an access device.

The element of intent to steal an “access device” must be proved as an independent fact. Id.

When criminal intent is an element of the crime, the State bears a simultaneous burden to prove actual knowledge. The criminal statute creates a hierarchy of mental states in declining order of seriousness: intent, knowledge, recklessness, and criminal negligence. RCW 9A.08.010; State v. Johnson, 173 Wn.2d 895, 905, 270 P.3d 591 (2012). The mental state of “specific intent” is the highest mental state requirement defined by statute. Johnson, 173 Wn.2d at 905. Within this hierarchy, “proof of a higher mental state is necessarily proof of a lower mental state.” State v. Acosta, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984); RCW 9A.08.010(2). Thus, proof of intent necessarily encompasses knowledge. City of Spokane v. White, 102 Wn. App. 955, 963, 10 P.3d 1095 (2000).

A necessary corollary to this rule is that intent cannot be proved *without* actual knowledge. See, e.g., State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992) (unlawful possession of a controlled substance with intent to manufacture or deliver requires proof that the defendant *had knowledge* of the nature of the controlled substance, as “[i]t is impossible for a person to intend to manufacture or deliver a

controlled substance without knowing what he or she is doing[;] . . . one who acts intentionally acts knowingly”); State v. Shipp, 93 Wn.2d 510, 518, 610 P.2d 1322 (1980) (where jury found defendant acted intentionally, “[b]y law, he also acted knowingly”); State v. Thomas, 98 Wn. App. 422, 425, 989 P.2d 612 (1999) (“By acting intentionally, a person by law also acts knowingly.”).

The criminal code requires proof of *actual* knowledge, not constructive knowledge. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); Shipp, 93 Wn.2d at 514. A person has actual knowledge when “he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense” or “he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b).

Although actual knowledge may be proved through circumstantial evidence, the evidence must still demonstrate actual as opposed to constructive knowledge. Allen, 182 Wn.2d at 374; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The distinction between finding actual knowledge through circumstantial evidence and finding knowledge because the defendant “should have known” is

subtle but critical. Allen, 182 Wn.2d at 374. The State must do more than prove an ordinary person in the defendant's situation would have known the fact in question. Id.

Thus, to prove a person intended to steal an access device contained inside a purse, the State must do more than show an ordinary person in that situation would know the purse probably contained an access device. The State must prove the accused *actually knew* the purse contained the access device. RCW 9A.56.020(1)(a); RCW 9A.56.040(1)(d); Allen, 182 Wn.2d at 374.

Contrary to the Court of Appeals' conclusion in this case, requiring the State to prove actual knowledge of the access device is different from requiring the State to prove actual knowledge of the value of the property in another type of theft case. The degree of the crime of theft often turns on the value of the property stolen. See RCW 9A.56.030(1)(a), .040(1)(a), .050(1). The State need not prove the defendant knew the value of the property. Delmarter, 94 Wn.2d at 637. As discussed, the statute requires proof only that the defendant wrongfully obtained or exerted unauthorized control over "the" property with intent to deprive the owner of "such" property. RCW 9A.56.010(1)(a). Thus, the State must prove the defendant had actual

knowledge of—and a specific intent to steal—“the” property, even if it need not prove the defendant had actual knowledge of its value.

In this case, “the” property is “[a]n access device.” RCW 9A.56.020(1)(a), .040(1)(d). Thus, the State was required to prove Johnson actually knew he was stealing an access device.

The State did not meet its burden. The State presented no evidence—whether direct or circumstantial—that Johnson knew the purse contained an access device. It is not enough to say that an ordinary person in Johnson’s position would have known the purse probably contained an access device. Allen, 182 Wn.2d at 374.

In State v. Lust, 174 Wn. App. 887, 889, 300 P.3d 846 (2013), the defendant took a purse and removed credit and debit cards from a wallet inside. He was convicted of third degree theft for stealing the purse and second degree theft for stealing the cards. The Court of Appeals held the two offenses were not factually or legally identical, in part, because “the theft statute required proof Mr. Lust intended to deprive the tavern patron of the purse when he took it without her permission and he separately intended to deprive her of the credit and debit cards when he removed them from the wallet inside.” Id.

Similarly, here, the charge of second degree theft of an access device required proof of Johnson's separate, specific intent to deprive Farmer of her credit and access cards, which was not satisfied by proving simply that he had an intent to deprive her of her purse. The State did not meet its burden of proof because there is no evidence that Johnson *knew* Farmer's purse contained any credit or debit cards, much less that he intended to deprive her of them. Thus, the evidence was insufficient to sustain the charge beyond a reasonable doubt.

**2. The Court of Appeals erred in refusing to follow this Court's well-established precedent applying the law of the case doctrine.**

Even if the theft statute did not require the State to prove Johnson had a specific intent to steal Farmer's access device, the State assumed the burden of proving that element because it was included in the to-convict jury instruction without objection. The to-convict instruction stated that the State must prove Johnson "intended to deprive the other person of the access device." CP 157. Under the "law of the case" doctrine, the State bore the burden to prove this element beyond a reasonable doubt.

The law of the case doctrine provides that "jury instructions not objected to become the law of the case." State v. Hickman, 135 Wn.2d

97, 102, 954 P.2d 900 (1998). In a criminal case, if an unnecessary element is included in a to-convict instruction that is not objected to, the element becomes the law of the case that must be proved by the State in the same manner as other necessary elements. See State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) (“Added elements become the law of the case . . . when they are included in instructions to the jury.”). The question on appeal is whether the evidence was sufficient to prove the added element beyond a reasonable doubt. Hickman, 135 Wn.2d at 103.

The law of the case doctrine “is an established doctrine with roots reaching back to the earliest days of statehood.” Hickman, 135 Wn.2d at 101. See id. at 101 n.2 (“In 1896, this court held ‘whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case.’”) (quoting Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896)). By 1917, the Court “declared the law of the case doctrine to be ‘so well established that the

assembling of the cases is unnecessary.”<sup>2</sup> Hickman, 135 Wn.2d at 101 n.2 (quoting Peters v. Union Gap Irr. Dist., 98 Wash. 412, 413, 167 P. 1085 (1917)).

The Court of Appeals disregarded this Court’s well-established case law applying the law of the case doctrine. In doing so, the court overstepped its authority. Once this Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this Court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The Court of Appeals may not disregard this Court’s

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<sup>2</sup> Washington courts have applied the law of the case doctrine consistently in countless cases since then, both civil and criminal. See, e.g., Millies v. LandAmerica Transnation, 185 Wn.2d 302, 313, 372 P.3d 111 (2016); France, 180 Wn.2d at 814; State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995); State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1988); State v. Dugger, 75 Wn.2d 689, 692, 453 P.2d 655 (1969); State v. Hames, 74 Wn.2d 721, 725, 446 P.2d 344 (1968); State v. Leohner, 69 Wn.2d 131, 134, 417 P.2d 368 (1966); State v. Holbrook, 66 Wn.2d 278, 281, 401 P.2d 971 (1965); Jones v. Hogan, 56 Wn.2d 23, 29, 351 P.2d 153 (1960); Madigan v. Teague, 55 Wn.2d 498, 501, 348 P.2d 403 (1960); Agranoff v. Morton, 54 Wn.2d 341, 345, 340 P.2d 811 (1959); State v. Henker, 50 Wn.2d 809, 812, 314 P.2d 645 (1957); Tonkovich v. Dept. of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948); Schatz v. Heimbigner, 82 Wash. 589, 590-91, 144 P. 901 (1914); Washburn v. City of Federal Way, 169 Wn. App. 588, 599, 283 P.3d 567 (2012), aff’d on other grounds, 178 Wn.2d 732, 310 P.3d 1275 (2013); State v. Abuan, 161 Wn. App. 135,156, 257 P.3d 1 (2011); State v. Barnett, 104 Wn. App. 191, 201, 16 P.3d 74 (2001); Okkerse v. Westgate Mobile Homes, Inc., 18 Wn. App. 45, 48, 566 P.2d 944 (1977); State v. Siderits, 17 Wn. App. 56, 60, 561 P.2d 231 (1977).

decisions even if it disagrees with them. In re Pers. Restraint of Heidari, 174 Wn.2d 288, 292-93, 274 P.3d 366 (2012).

Moreover, this Court will not reject its prior holdings unless there is a clear showing that an established rule is incorrect and harmful. State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). A party asking this Court to reject a prior decision must show that the decision is “so problematic that it must be rejected.” Id. In this case, the State made no attempt to demonstrate that Hickman or related cases are so problematic they must be rejected.

To the contrary, in Hickman, the Court refused to abandon the law of the case doctrine despite the State’s urging, due to the beneficial effects of the doctrine and because it is so well-established. Hickman, 135 Wn.2d at 105. Neither the State nor the Court of Appeals has demonstrated the law of the case doctrine should be abandoned now.

The law of the case doctrine serves a valuable purpose. It “benefits the system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given to

the jury.”<sup>3</sup> Hickman, 135 Wn.2d at 105. It is based on the premise that whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury. Id. at 101 n.2. Just as a party may not challenge unobjected to jury instructions for the first time on appeal, it may not disavow jury instructions that were acquiesced to below. State v. Calvin, 176 Wn. App. 1, 22, 316 P.3d 496 (2013). “That basic function serves to avoid prejudice to the parties and ensure that the appellate courts review a case under the same law considered by the jury.” Id.

In a criminal case, the jury and the parties are entitled to rely upon the “to-convict” instruction as a complete statement of the law regarding the elements of the crime. “All of the elements of the charged crime must appear in the to-convict instruction because it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence.” State v. Johnson, 180 Wn.2d 295, 306, 325 P.3d 135 (2014) (quotation marks and citations omitted). If an

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<sup>3</sup> In criminal cases, the law of the case doctrine is “encapsulated in criminal rule CrR 6.15(c), which requires all objections to jury instructions be made before the instructions are given to the jury.” Hickman, 135 Wn.2d at 105.

erroneous to-convict instruction creates a new element of the crime, it is binding upon the jury. The added element becomes part of the law of the case which the State must prove to the jury's satisfaction.

Hickman, 135 Wn.2d at 101.

The Court of Appeals wrongfully concluded the law of the case doctrine is superseded by the United States Supreme Court's recent decision in Musacchio v. United States, \_\_\_ U.S. \_\_\_, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016). In Musacchio, the Court held that a challenge to the sufficiency of the evidence under federal law "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." 136 S. Ct. at 715.

Musacchio does not overrule Hickman or abrogate long-standing Washington precedent on the law of the case doctrine. The doctrine is not premised on federal common law or federal constitutional due process. Rather, it is premised on the Washington Constitution and the rules of appellate review as crafted by our courts since the birth of this state. See Hickman, 135 Wn.2d at 101-02.

Musacchio specifically recognized that, "[w]hen an appellate court reviews a matter on which a party failed to object below, its review may well be constrained by other doctrines such as waiver,

forfeiture, and estoppel.” Musacchio, 136 S. Ct. at 716. Washington’s law of the case doctrine rests upon principles of waiver and estoppel.

The law of the case doctrine arises “from the nature and exigencies of appellate review,” not simply from the constitutional principle that the State must prove every element of the crime beyond a reasonable doubt. State v. France, 180 Wn.2d 809, 814, 329 P.3d 864 (2014). France further explained,

This case is framed by *two* fundamental principles of law: the first constitutional, *the second arising from the nature and exigencies of appellate review*. The first principle is that constitutional due process requires that the State prove every element of the crime beyond a reasonable doubt. The second principle is that “jury instructions not objected to become the law of the case.” If the jury is instructed (without objection) that to convict the defendant, it must be persuaded beyond a reasonable doubt of some element that is not contained in the definition of the crime, the State must present sufficient evidence to persuade a reasonable jury of that element regardless of the fact that the additional element is not otherwise an element of the crime.

France, 180 Wn.2d at 814 (emphases added) (citations omitted).

The standard used to evaluate the sufficiency of the evidence in criminal cases can be traced to Jackson v. Virginia, and In re Winship. Winship held that the Due Process Clause of the Fourteenth Amendment requires the State to prove every element of a criminal offense beyond a reasonable doubt. Winship, 397 U.S. at 364. Jackson

held that in evaluating whether the State has met this burden, the court views the evidence in the light most favorable to the prosecution and analyzes whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson, 443 U.S. at 319. Shortly after Jackson, this Court adopted this standard in evaluating the sufficiency of the evidence. Green, 94 Wn.2d at 221-22.

The Court has adopted the same standard in reviewing whether the State has met its burden to prove an added element in a jury instruction. Hickman, 135 Wn.2d at 103. But it does not therefore follow that the law of the case doctrine is dependent upon the Due Process Clause of the Fourteenth Amendment, as construed by the United States Supreme Court. The law of the case doctrine was applied in criminal cases predating Winship, Jackson, and Green. See, e.g., State v. Hames, 74 Wn.2d 721, 724-25, 446 P.2d 344 (1968); State v. Hall, 41 Wn.2d 446, 451, 249 P.2d 769 (1952).

The law of the case doctrine is premised on state common law and the Washington Constitution, which provides that judges “shall declare the law.” Const. art. IV, § 16. In 1896, the Court described the law of the case doctrine as a “general rule,” and noted that it had special support in article IV, section 16. Pepperall, 15 Wash. at 183.

Neither Pepperall nor Hickman cites to the federal constitution or uses the phrase “due process” in expounding on the law of the case doctrine.

The law of the case doctrine is premised not only on the courts’ constitutional authority to declare the law at trial, but also arises from this Court’s inherent rule-making power. See Agranoff, 54 Wn.2d at 345. The Court has inherent power to govern court procedures, stemming from article four of the state constitution. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); Const. art. IV, § 1. The Court’s authority to govern court procedures is also provided by statute. See RCW 2.04.190 (“The supreme court shall have the power . . . generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state.”).

In sum, the Court of Appeals erred in concluding that Musacchio overruled Hickman. The issue is not a matter of federal law. States remain free to continue using the jury instructions as the yardstick in deciding whether parties—including the government—have met their burden. See Michigan v. Long, 463 U.S. 1032, 1040,

103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds).

Nothing has changed since Hickman. The law of the case doctrine continues to provide beneficial effects in both criminal and civil trials and appeals. Its legal foundations are secure. Its underlying rationales endure.

The State bore the burden to prove Johnson specifically intended to steal Farmer's access device because that element was included in the to-convict instruction. For the reasons stated in the previous section, the State did not meet its burden.

E. CONCLUSION

The State did not prove beyond a reasonable doubt that Johnson intended to steal an access device. The conviction should be reversed and the charge dismissed.

Respectfully submitted this 20th day of January, 2017.

/s/ Maureen M. Cyr

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Washington Appellate Project - 91052  
Attorneys for Petitioner

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 93453-3
	)	
JOHN JOHNSON,	)	
	)	
Petitioner.	)	

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF JANUARY, 2017, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** 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:

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