Supreme Court No. 101962-9
(COA No. 56437-8-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JAMES ROWLEY,

Petitioner.

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

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# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

James Rowley, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

## B. COURT OF APPEALS DECISION

Mr. Rowley seeks review of the Court of Appeals decision dated April 4, 2023, attached as an appendix.

## C. ISSUES PRESENTED FOR REVIEW

Must there be a remedy where the government intentionally destroys potentially exculpatory evidence where a defendant's original personal restraint petition is still pending on an issue that the government agreed required a new trial?

## D. STATEMENT OF THE CASE

The information charging Mr. Rowley contained only one piece of forensic evidence, a cigarette that the

government alleged tied him to the crime. CP 3. Mr. Rowley's brother Jon claimed Mr. Rowley was the only person known to smoke Marlboro cigarettes, the brand found near where the complainant was sleeping.[1] *Id.*

Wendel Stewart found the cigarette. CP 4. A retired police officer, he carefully placed it into a bag and gave it to the police. *Id.* The government asserted the Marlboro cigarette tied Mr. Rowley to the location where the crime occurred. *Id.*

The government charged Mr. Rowley with first-degree child molestation. CP 5. The case went to trial in 2008, where a jury convicted Mr. Rowley. CP 24. The cigarette was the only physical evidence introduced at this trial. CP 91-92. After the trial, the sheriff's office took control of the cigarette. CP 93-95.

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[1] Because most of the witnesses share the last name Rowley, they are referred to by their first name only, except for James Rowley, the appellant.

Based on a past conviction, the court sentenced Mr. Rowley to life in prison on July 14, 2008. CP 17-18. On appeal, this Court affirmed his conviction and issued its mandate on November 9, 2009. CP 19.

Mr. Rowley brought a timely personal restraint petition before the government destroyed the cigarette. CP 24. The government conceded the error and joined Mr. Rowley in requesting a new trial. CP 98. The government still possessed the cigarette when it conceded. *Id*. This Court agreed and reversed Mr. Rowley's conviction on March 10, 2014. CP 33.

In 2013, after the government's concession, the sheriff's department decided to clean out its evidence locker and destroyed the only physical evidence, the cigarette, that tied Mr. Rowley to the alleged crime. CP 98. The sheriff never notified Mr. Rowley of its decision

to destroy the evidence, nor did it provide him with the opportunity to test the cigarette for touch DNA. *Id*.

As Mr. Rowley prepared for his new trial, it was disclosed that Mr. Rowley was not the only person who smoked Marlboro cigarettes. *Matter of Rowley*, noted at 5 Wn. App. 2d 1004 (2018); CP 96, 108. Jon, the brother who falsely claimed that Mr. Rowley was the only Marlboro cigarette smoker, was also discovered to smoke Marlboros. *Id*. Mr. Rowley's brother admitted he had taken a cigarette from Mr. Rowley 30 minutes before the incident. CP 104.

With new abilities to test physical evidence for touch DNA, Mr. Rowley sought to test the cigarette for potential exculpatory evidence, believing his brother committed the alleged crimes. *Rowley*, 5 Wn. App. 2d 1004. That was when he discovered the government had destroyed the cigarette. *Id*.

Mr. Rowley moved to dismiss the matter for governmental misconduct. CP 107. The trial court denied his motion. *Rowley*, 5 Wn. App. 2d 1004. The case went to trial, where Mr. Rowley was convicted without the potentially exculpatory evidence. CP 119. Mr. Rowley brought an appeal and personal restraint petition, both of which failed to give him any relief. *Id.*

Mr. Rowley returned to the superior court, asking to test evidence for DNA. CP 55. The superior court denied his motion. CP 60. The Court of Appeals reviewed his case, providing him with no relief. App. 1.

E. ARGUMENT

Mr. Rowley has the right to fundamentally fair processes that provides him with a fair trial. *Reed v. Goertz*, ___ U.S. ___, ___, 143 S. Ct. 955, 961 (2023). When the Court of Appeals denied him relief for the evidence destroyed by the government while Mr.

Rowley's initial personal restraint petition was pending, which the government agreed required a new trial, it deprived him of that right. App. 4. This Court should accept review of this important constitutional question. RAP 13.4(b)(3) and (4).

### 1. DNA testing provides the opportunity to overturn wrongful convictions.

If the government had not destroyed the cigarette used to convict Mr. Rowley, he could have tested it for touch DNA evidence. This decision deprived Mr. Rowley of the opportunity to establish his innocence.

Unfortunately, in cases where new evidence results in an exoneration, misconduct is rife. Samuel Gross, Maurice Possley, Kaitlin Roll, & Klara Stephens, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police, and Other Law Enforcement, The National Registry of Exonerations*, University of Michigan Law School, 1

(2020). As of February 2019, 54 percent of the cataloged exonerated cases involve governmental misconduct. *Id.* More than a third of those cases involved police misconduct. *Id.*

Even so, there is very little accountability. Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California, 1997–2009, A Veritas Initiative Report,* 16 (2010).[2] Of the 707 cases examined in this report where an appellate court found misconduct, the Court found it harmless in all but 159 cases. *Id.* And despite an obligation that findings of misconduct be reported to state bar associations, only six prosecutors were disciplined. *Id.*

These findings were consistent with other research. In 2003, the Center for Public Integrity

[2] https://perma.cc/58R9-Z4WF

studied 11,000 state court cases with misconduct allegations. Neil Gordon, *Harmless Error, Misconduct and Punishment*, Center for Public Integrity (2003).[3] Of the 2,000 cases involving misconduct, 44 prosecutors were subject to bar complaints, and only 14 suffered sanctions. *Id.*

When prosecutors are asked to police themselves, very little accountability takes place. A study revealed that the Department of Justice investigated only nine percent of the 4,000 cases where complaints were made, finding misconduct only 15 times. William Moushey, *Win at All Costs*, Pitt. Post-Gazette, at A (Nov. 22, 1998).[4] This research was consistent with a similar study conducted by USA Today, where the periodical found that from 1997 to 2010, judges found

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[3] https://publicintegrity.org/politics/state-politics/harmful-error/misconduct-and-punishment/

[4] https://perma.cc/85QL-39R8

misconduct in 201 federal cases, but only six prosecutors were reported for discipline. Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today (Sept. 23, 2010).

The same is true of police misconduct. In 44 percent of exonerations, law enforcement concealed evidence favorable to the accused. Gross, at 32. Concealing evidence is the most common type of official misconduct. *Id.* In 30 percent of exonerations, law enforcement hid substantive evidence of innocence, including forensic evidence, which would have shown the defendant was not the perpetrator of the crime. *Id.* Of the known exonerations, police withheld evidence in 27 percent of cases classified as sex abuse cases and 32 percent of the time in sexual assault cases. *Id.* at 81. Police destroyed, altered, or concealed potentially

exculpatory evidence in 40 percent of exonerated cases. *Id*. at 83.

**2. The testing requested by Mr. Rowley effectively combats wrongful convictions.**

Unlike traditional DNA collection methods, touch DNA requires tiny samples, such as a skin cell left on an object after touching or casually handling it. *Id*. at 2. Angela Williamson, *Touch DNA: Forensic Collection and Application to Investigations*, J. Assoc. Crime Scene Reconstr. 1 (2012).[5] This method uses the same testing as traditional DNA tests but varies in collection methods. Victoria Kawecki, *Can't Touch This? Making A Place for Touch DNA in Post-Conviction DNA Testing Statutes*, 62 Cath. U.L. Rev. 821, 829 (2013). *Id*.

Touch DNA methodology has dramatically increased the number of items that can be tested. App.

[5] https://www.acsr.org/wp-content/uploads/2012/01/Williamson.pdf

2. In the 1980s, to perform a DNA test, forensic investigators needed a blood or semen sample about the size of a quarter. Max Houck & Lucy Houck, *What Is Touch DNA?*, Sci. Am. (Aug. 8, 2008).[6] The sample size fell to the size of a dime in the 1990s and became "if you can see it, you can analyze it." *Id*. Touch DNA only requires seven or eight cells from the outermost layer of the skin. *Id*.

Touch DNA testing was developed in the 2000s, too late to be utilized at Mr. Rowley's first trial. Mary Graw Leary, *Touch DNA and Chemical Analysis of Skin Trace Evidence: Protecting Privacy While Advancing Investigations*, 26 Wm. & Mary Bill Rts. J. 251, 257 (2017); *see also Matter of Rowley*, noted at 5 Wn. App. 2d 1004. In its decision, the Court of Appeals

[6] https://www.scientificamerican.com/article/experts-touch-dna-jonbenet-ramsey/

recognized that when Mr. Rowley last petitioned for relief, touch DNA testing had not yet become available. App. 2.

Touch DNA found on cigarettes has been instrumental in Washington cases. In 2019, Bremerton police linked a 26-year-old case to a suspect based on touch DNA discovered on a cigarette the police had kept. Meagan Flynn, *A Cigarette Butt and an Old Scrap of Paper Led to an Arrest in a 26-Year-Old Unsolved Killing*, Washington Post (January 7, 2019).[7] Likewise, Burien detectives linked an arson to a woman based on touch DNA found on a cigarette three years after the incident. KIRO 7 News Staff, *Deputies:*

[7] https://www.washingtonpost.com/nation/2019/01/07/cigarette-butt-an-old-scrap-paper-led-an-arrest-year-old-homicide-cold-case/

*DNA Linked Woman to Cold Case Arson Scene*, Kiro 7 (April 11, 2019).[8]

Scientists may find enough DNA to generate a profile with as little as 0.5 nanograms. *United States v. Barton*, 909 F.3d 1323, 1328 (11th Cir. 2018). In *Barton*, a scientist obtained a sample of 210 picograms of material from a firearm and, using amplification techniques, copied the DNA to get a sample. *Id.* Despite the low amount of DNA, the prosecution extracted a DNA profile from the firearm. *Id.* "Due to its superb sensitivity, mass spectrometry (MS) is a powerful tool widely used for forensic application by providing either molecular or elemental analysis." Khalid Mahmud Lodhi et al., *Generating Human DNA*

[8] https://www.kiro7.com/news/local/deputies-dna-linked-woman-to-cold-case-arson-scene/939336076/

*Profile(s) from Cell Phones for Forensic Investigation*, 6 J. Forensic Res. 288, 291 (2015).

### 3. The government destroyed potentially exculpatory evidence before Mr. Rowley could have it tested.

Post-conviction DNA testing is intended to correct the injustice of convicting an innocent person. *See State v. Thompson*, 173 Wn.2d 865, 872, 271 P.3d 204 (2012). "Many innocent individuals have been exonerated through post-conviction DNA tests, including some who had overwhelming evidence indicating guilt." *State v. Crumpton*, 181 Wn.2d 252, 261-62, 332 P.3d 448 (2014). In determining whether to provide testing, courts "should presume DNA evidence would be favorable to the convicted individual." *State v. Gentry*, 183 Wn.2d 749, 765, 356 P.3d 714 (2015) (quoting *Crumpton*, 181 Wn.2d at 255).

RCW 10.73.170 provides the process for requesting testing. App. 3. The motion must establish the court ruled DNA testing did not meet acceptable standards at the time of the request, *or* that DNA technology has now advanced to test the DNA evidence in the case, *or* that testing now would provide significant new information. *Id*. The motion must also explain the materiality of the evidence. *Id*. The court must grant the motion where it is "more probable than not" that the DNA evidence would demonstrate innocence. *Id*.

The Court of Appeals determined Mr. Rowley's motion should not be granted because the evidence was not exculpatory. App. 3. But it is impossible to know what the evidence would have disclosed without testing it. This holding is inconsistent with RCW 10.73.170 and the opinions of this Court. RAP 13.4(b)(2).

Instead, this Court should find that Mr. Rowley's motion meets the requirements for DNA testing. *See* RCW 10.73.170. At the time of Mr. Rowley's first trial, touch DNA testing was not being used. *Rowley*, 5 Wn. App. 2d 1004. Mr. Rowley also meets the criteria because testing now would produce significant new information. RCW 10.73.170.

The cigarette Mr. Rowley seeks to have tested was the only physical evidence cited in the probable cause statement. CP 31. This key physical evidence tied him to the assault. *Id*. It was a smoking gun in many ways, as the probable cause statement claimed that the cigarette brand was unique to him, providing damning evidence of his guilt. *Id*.

But the government's claim of the uniqueness of this evidence was false. CP 104, 108. Instead, Mr. Rowly's brother, who lived in the house, also smoked

Marlboro cigarettes and could have been the perpetrator. *Id*.

Testing the cigarette for touch DNA, the only physical evidence in the case, would have helped to establish Mr. Rowley's innocence had it been conducted. *Crumpton*, 181 Wn.2d at 255. If the DNA on the cigarette showed it belonged to Mr. Rowley's brother, it would have cast serious doubt on the strength of the government's case. Testing the cigarette for touch DNA would have also reinforced Mr. Rowley's assertion that he was not in the room on the night of the assault. Either way, the touch DNA would have been powerful evidence of Mr. Rowley's innocence.

Further, touch DNA testing was not yet a viable testing procedure at Mr. Rowley's first trial. *Matter of Rowley*, noted at 5 Wn. App. 2d 1004. It was not until

Mr. Rowley's conviction was overturned that technology became sufficiently advanced. *Id*.

Critically, the cigarette still existed when the government agreed Mr. Rowley was entitled to a new trial. Only after the concession did the government decide to destroy the potentially exculpatory evidence. Given the critical nature of the cigarette and its exculpatory value, this decision not to preserve the evidence should not be held against Mr. Rowley or deprive him of his ability to have the evidence tested.

**4. The decision to destroy the only physical evidence requires a remedy, which this Court can provide by ordering a new trial.**

Mr. Rowley recognizes that the cigarette no longer exists, making it impossible for him to test it for exculpatory evidence. But where the decision to destroy the evidence occurred under the circumstances that occurred here, Mr. Rowley should not have to suffer a

lack of remedy. Instead, this Court should grant review to determine what an adequate remedy is when the government intentionally destroys potentially exculpatory evidence. RAP 13.4(b)(3) and (4).

When the government destroyed the cigarette found at the assault scene, it ensured Mr. Rowley would not be able to take advantage of post-conviction DNA testing. The legislature could not have intended that the government could make this end-run around the statute to prevent Mr. Rowley from being able to prove his innocence. To deny Mr. Rowley's opportunity for testing would encourage future prosecutors to destroy evidence as quickly as possible rather than retain it as potential proof of innocence. To avoid this problem, this Court should accept review and address what remedy should be provided when potentially exculpatory evidence is destroyed.

The question of what remedy should be provided when the government destroys potentially exculpatory evidence is an issue of first impression, but the importance of DNA evidence where there is a sole perpetrator is not. In *State v. Gray*, the Court of Appeals held that the defendant was entitled to post-conviction DNA testing because it was undisputed that only one perpetrator existed. 151 Wn. App. 762, 774, 215 P.3d 961 (2009). Likewise, this Court held that DNA testing can either exculpate or inculpate the defendant where there is a sole perpetrator. *Thompson*, 173 Wn.2d at 867.

Mr. Rowley was alleged to be the sole perpetrator. CP 3. However, other persons, including his brother, were in the house when the alleged crime occurred. CP 4. Importantly, the prosecution asserted Mr. Rowley was the only person who smoked Marlboro

cigarettes, even though this was not true as his brother also smoked them. CP 3. Discovering the brother's DNA on the cigarette would call into question the integrity of Mr. Rowley's conviction.

Mr. Rowley's right to have DNA tested post-conviction was thwarted by the sheriff's decision to destroy the only physical evidence linking Mr. Rowley to this crime, even though his timely personal restraint petition was still pending. CP 109. Mr. Rowley is serving the rest of his life in prison. The government owed it to him to retain the evidence it used to convict him, at least until he had exhausted his post-conviction remedies. Given the number of cases where police destruction of evidence contributed to the wrongful conviction of an innocent person, taking away Mr. Rowley's chance to prove his innocence is

fundamentally unfair. Gross, at 32; *Reed*, 143 S. Ct. at 961 (2023).

This Court should grant review so that Mr. Rowley's conviction can be vacated. Because the evidence no longer exists, Mr. Rowley should have the opportunity to explain that the government destroyed the potentially exculpatory evidence. The jury should also be instructed that they could infer that had the government not destroyed the cigarette, it is probable that it would have contained exculpatory evidence. *See*, *e.g., State v. Brunson*, 128 Wn.2d 98, 100, 905 P.2d 346 (1995) (burglary); *State v. Hanna*, 123 Wn.2d 704, 706, 871 P.2d 135 (1994) (reckless driving).

Accepting review of this significant constitutional question and issue of substantial public interest can provide remedies for those attempting to prove their innocence. Mr. Rowley deserves a remedy for the

decision by the government to destroy the only forensic evidence tied to his case, which an inference that the evidence would have been exculpatory would provide. Giving Mr. Rowley this relief would give weight to the legislature's intent to provide an avenue for wrongfully convicted persons to demonstrate their innocence. RCW 10.73.170. With no other option to ever be released from custody, denying Mr. Rowley relief encourages the government to destroy potentially exculpatory evidence in other cases swiftly. Instead, this Court should grant review to address the remedy for the government's decision to deprive Mr. Rowley of potentially exculpatory evidence.

F. CONCLUSION

Based on the preceding, Mr. Rowley asks this Court to grant review. RAP 13.4(b).

This petition is 2,990 words long and complies with RAP 18.7.

DATED this 4th day of May 2023.

Respectfully submitted,

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APPENDIX

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Filed
Washington State
Court of Appeals
Division Two

April 4, 2023

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JAMES CURTIS ROWLEY,<br><br>Appellant. | No. 56437-8-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

VELJACIC, J. — James C. Rowley appeals the trial court's order denying his postconviction motion for deoxyribonucleic acid (DNA) testing under RCW 10.73.170. He also raises several claims in his statement of additional grounds for review (SAG). We affirm.

FACTS[1]

In 2008, nine-year-old AKR told her parents and her grandmother that Rowley had sexually touched her while she was asleep on a couch in her grandmother's basement. A jury found Rowley guilty of child molestation in the first degree. Division I of this court affirmed.

When investigating AKR's claims, police found an unsmoked cigarette at the scene. The cigarette was not submitted to a crime laboratory for analysis because the police did not believe it had any evidentiary value. The police destroyed the cigarette in 2013.

[1] The facts of this case are taken from *State v. Rowley*, No. 75239-1-I (Wash. Ct. App. July 25, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/752391.pdf, and *In re Pers. Restraint of Rowley*, No. 51244-1-I (Wash. Ct. App. Aug. 28, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/512441.pdf.

In 2018, Rowley filed a personal restraint petition (PRP) claiming that his conviction must be dismissed because the destroyed cigarette was exculpatory and destroyed in bad faith. He argued that "touch DNA" could have been retrieved from the unsmoked cigarette. We held that Rowley did not demonstrate that it was apparent to police in 2013, when the cigarette was destroyed, that DNA could have been retrieved from the cigarette. Thus, he failed to show that the cigarette was exculpatory. Additionally, we held that the cigarette was destroyed as part of a routine evidence purge. Thus, Rowley failed to show bad faith.

In 2021, Rowley filed a pro se postconviction motion pursuant to RCW 10.73.170 for DNA testing of "all evidence preserved by law enforcement." Clerk's Papers (CP) at 55. At the motion hearing, Rowley did not provide any further clarification. The State asserted that it was unclear what evidence Rowley wanted tested but the State assumed it was the cigarette. The trial court stated that it was "mindful of the—the Court of Appeals decision . . . regarding the cigarette butt or cigarette. . . . So, I mean there has been arguments to the Court of Appeals already about destroyed evidence or lack of evidence." Report of Proceedings at 15. The trial court denied Rowley's motion.[2]

Rowley appeals the trial court order denying his postconviction DNA testing motion.

## ANALYSIS

### I. DNA TESTING

Rowley argues that the trial court erred in denying his motion for postconviction DNA testing of the unsmoked cigarette. Because Rowley had previously failed to show that the cigarette is exculpatory, we affirm.

[2] In the same order, the trial court also denied a motion for discovery and a motion to strike restitution. Rowley does not appeal the denial of these motions.

The postconviction DNA testing statute, RCW 10.73.170, allows a convicted person serving a prison sentence to request postconviction DNA testing. The trial court will grant the motion if "the convicted person has shown that the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). We review a trial court's ruling on a motion for postconviction DNA testing for abuse of discretion. *State v. Thompson*, 173 Wn.2d 865, 870, 271 P.3d 204 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable, or it bases its decision on untenable or unreasonable grounds. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). We may affirm on any basis supported by the record on appeal. *State v. Poston*, 138 Wn. App. 898, 905, 158 P.3d 1286 (2007).

We initially note that Rowley filed a vague motion for DNA testing of "all evidence preserved by law enforcement." CP at 55. He was clearly aware that the unsmoked cigarette was destroyed in 2013 as part of a routine evidence purge because he contested the destruction of the cigarette in his 2018 PRP. Nevertheless, the State and the trial court presumed Rowley was referring to testing of the cigarette in his 2021 motion and he did not rebut this presumption at the hearing. Accordingly, we give Rowley the benefit of the doubt and presume the cigarette was the subject of Rowley's motion.

The issue of DNA testing of the cigarette was already litigated in Rowley's 2018 PRP. There, we held that there was no error in not testing the cigarette for DNA because it was not exculpatory. That conclusion has not been undermined by this or any other court. Whether it was destroyed consistent with statutory guidance is immaterial if it is not exculpatory. Rowley fails to show that the DNA evidence would demonstrate innocence on a more probable than not basis as required under RCW 10.73.170(3). Accordingly, the trial court did not abuse its discretion in denying Rowley's postconviction motion for DNA testing.

II. SAG CLAIMS

Rowley makes several assertions in his SAG. However, they all relate to the arguments already set forth by counsel in his brief regarding DNA testing of the destroyed unsmoked cigarette. We only consider SAG claims that have not already been adequately addressed by counsel. RAP 10.10(a). Therefore, Rowley's arguments are not properly before us and we do not further address them.

CONCLUSION

We affirm the trial court's order denying Rowley's postconviction motion for DNA testing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Cruser, A.C.J.

Price, J.

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 56437-8-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Timothy Higgs
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Mason County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: May 4, 2023

# WASHINGTON APPELLATE PROJECT

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