No. 89548-1
COA No. 68438-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN CURTIS COLLINS,

Petitioner.

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

The Honorable Laura Gene Middaugh

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON CASES

STATUTES

RULES

A. IDENTITY OF PETITIONER

Steven Collins asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the Court of Appeals unpublished decision in *State v. Steven Curtis Collins*, No. 68438-8-I (October 14, 2013). A copy of the decision is in the Appendix at pages A-1 to A-5.

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires that a guilty plea be entered knowingly, intelligently, and voluntarily. If the defendant is misadvised about the applicable maximum sentence for the offense charged, the resulting plea is not entered knowingly, voluntarily, and intelligently. Mr. Collins was advised that he could be sentenced up to 20 years for the offense with which he was charged, when in fact the maximum sentence he faced was 60 months. Was Mr. Collins's resulting guilty plea invalid because it was not entered knowingly, voluntarily, and intelligently?

2. Did the trial court also fail to advise Mr. Collins that if he was revoked from the DOSA, the court would impose *all* of the remaining time in the standard range, which here was 40 months, and which rendered Mr. Collins's guilty plea invalid?

3. Is the decision in Mr. Collins's case in direct conflict with the decision of Division Two in *State v. Knotek,* 136 Wn.App. 412, 149 P.3d 676 (2006), *review denied,* 161 Wn.2d 1013 (2007)?

D. STATEMENT OF THE CASE

Steven Collins pleaded guilty to one count of possession with intent to deliver methadone. CP 8-17. In the Statement of Defendant on Plea of Guilty, Mr. Collins was advised the standard range for this offense was 20+ - 60 months, with a maximum sentence of 20 years. CP 9.[1] Mr. Collins was also advised that the judge could impose a sentence outside the standard range. CP 12. Mr. Collins was not advised that since he pleaded guilty, the judge could impose a sentence above the standard range only if Mr. Collins stipulated to aggravating factors in his guilty plea.

[1] Under RCW 69.50.408, a person who had previously been convicted of a drug offense under chapter RCW 69.50, the maximum sentence is doubled for this offense. Mr. Collins had previously been convicted of conspiracy to distribute cocaine. CP 25, 35. Since delivery of a controlled substance is a Class B offense with a statutory maximum of 10 years, here the statutory maximum doubled to 20 years.

Mr. Collins was also advised in the Statement of Defendant on Plea of Guilty that the judge could impose a DOSA but was not advised that should he be revoked from the DOSA, the court would impose the entire standard range sentence. CP 14.

The Judgment and Sentence filed following the sentencing hearing stated the standard range as 20+ to 60 months, with a maximum sentence of 20 years. CP 70.

On appeal, Mr. Collins contended his plea was not a knowing, voluntary or intelligent plea because he had been misadvised of the maximum sentence which she faced. The Court of Appeals adhered to its decision in *State v. Kennar,* 135 Wn.App. 68, 143 P.3d (2006), *review denied,* 161 Wn.2d 1013 (2007), and ruled that the intent of the drafters of CrR 4.2 required that defendants be advised of the standard range and the maximum sentence, and the decision in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) did change this practice. Decision at 2.

The Court also rejected Mr. Collins' argument that he was misadvised about the DOSA, contending reveocation of a DOSA is an collateral consequence of the plea. Decision at 3-4.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

MR. COLLINS'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED, AS HE WAS MISADVISED OF THE MAXIMUM SENTENCE AND MISADVISED REGARDING THE DOSA

1. Due process mandates that a guilty plea be entered voluntarily. A defendant may plead guilty if there is a factual basis for the plea and the defendant understands the nature of the charges and enters the plea voluntarily. CrR 4.2(a); *State v. Ford*, 125 Wn.2d 919, 924, 891 P.2d 712 (1995). Due process requires that the guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re the Personal Restraint of Stoudamire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001). "A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." *In re the Personal Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). Misadvisement of the relevant maximum sentence is a direct consequence of a guilty plea. *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001); *State v. Morley*, 134 Wn.2d 588, 621, 952 P.2d 167 (1998).

2. Mr. Collins was misadvised of the relevant maximum sentence.

a. The trial court misadvised Mr. Collins of the maximum sentence. The court and the Statement of Defendant on Plea of Guilty advised Mr. Collins that the maximum sentence for his offense was 20 years. CP 9; RP 6. That information was incorrect. The plea form also stated:

> (h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so or both parties stipulate to a sentence outside the standard range. If the judge goes outside the standard range, either I or the State can appeal that sentence to the extent to which it was not stipulated. If the sentence is within the standard range, no one can appeal the sentence.

CP 12. This paragraph erroneously implied that the judge could impose a sentence above the standard range.

It is true that a person being sentenced for a Class B felony cannot be punished by confinement exceeding a term of ten years. RCW 9A.20.021(1)(b). But in *Blakely v. Washington*, the United States Supreme Court rejected the notion that this term under RCW 9A.20.021(1)(b) was the statutory maximum for a Class B offense under the SRA. 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403

(2004). Instead, the Court noted that the maximum sentence was "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Emphasis in the original.) *Id.* Consistent with *Blakely*, this Court has recognized that "it is the direct consequences of her guilty plea, not the maximum potential sentence if she went to trial, that [the defendant] had to understand." *State v. Knotek*, 136 Wn.App. 412, 424 n.8, 149 P.3d 676 (2006), *review denied,* 161 Wn.2d 1013 (2007) (emphasis in original).[2] Thus, here, the maximum sentence was the high end of the standard range, which was 60 months. CP 29.

Mr. Collins's guilty plea did not support a sentence above 60 months – the maximum the judge could have imposed for possession with intent to deliver methadone based on his offender score. RCW 69.50.401; RCW 9.94A.505, .510, .518, .525, .530, .535. Well before Mr. Collins entered his guilty plea, the standard form was amended to read as follows:

> (h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do

[2] *But see State v. Kennar*, 135 Wn.App. 68, 143 P.3d 326 (2006), *review denied*, 161 Wn.2d 1013 (2007) (reaching opposite conclusion).

so. I understand the following regarding exceptional sentences:

(i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.

(ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.

(iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by the imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.

(iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proved beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

I understand that if a standard range sentence is imposed, the sentence cannot be appealed by anyone. If an exceptional sentence is imposed after a contested hearing, either the State or I can appeal the sentence.

CrR 4.2(g). The information Mr. Collins was given did not substantially comply with this form, and therefore violated the rule. *Id.* It also violated Mr. Collins's constitutional right to a knowing, intelligent, and voluntary plea, because it misinformed him about the sentencing consequences of his plea. *Isadore*, 151 Wn.2d at 298; *Walsh*, 143 Wn.2d at 8.

Mr. Collins was advised that the judge could impose a sentence outside the standard range, up to a maximum sentence of 20 years. This statement was incorrect under *Blakely* and CrR 4.2(g). Because Mr. Collins was misadvised of the sentencing consequences of his plea, his plea was involuntary and consequently invalid.

b. The trial court misadvised Mr. Collins that the DOSA is the entire midrange standard range sentence and not merely one-half the mid-point. The Statement of Defendant on Plea of Guilty advised Mr. Collins that if the court sentenced him to a DOSA, the sentence was one-half the midpoint of the standard and that in addition, the court would impose community custody for the remaining one-half of the midpoint. CP 14. Mr. Collins was not advised that the sanction for violation of the DOSA was imposition of all of the remaining time under the standard range, which here was 40 months.

"A DOSA is a form of standard range sentence consisting of total confinement for one-half of the mid-standard range followed by community supervision." *State v. White,* 123 Wn.App. 106, 113, 97 P.3d 34 (2004). Under a prison-based DOSA sentence, the defendant serves one-half of the standard-range sentence in prison while receiving substance abuse treatment. RCW 9.94A.662(1)(a)(2); *State v. Grayson,* 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). If the defendant fails to complete the DOSA program, or DOC administratively terminates the offender from the DOSA program, the defendant is reincarcerated to serve the balance of the unexpired sentence subject to the rules relating to earned early release. RCW 9.94A.660(7)(c).

In the Statement of Defendant on Plea of Guilty, Mr. Collins was advised:

> (o) The judge may sentence me under the special drug offender sentencing alternative (DOSA) if I qualify under former RCW 9.94A.120(6) (for crimes committed before July 1, 2001), or RCW 9.94A660 (for offenses committed on or after July 1, 2001). This sentence could include a period of total confinement for one-half the mid-point of the standard range or 12 months, whichever is greater, and community custody of at least one-half of the standard range, plus all of the other conditions prescribed in paragraph (6)(e). The judge could impose a residential treatment-based DOSA alternative that would include three to six months of residential chemical dependency treatment and 24 months community custody, plus all the other conditions described in

> paragraph (6)(e). During confinement and community custody under either alternative, I will be required to participate in substance abuse evaluations and treatment, not to use illegal controlled substances and to submit to testing to monitor that, and other restrictions and requirements will be placed on me.

CP 14.

Again well before Mr. Collins entered his guilty plea, the plea form had been amended to read as follows:

> (t) The judge may sentence me under the drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94A.660. If I qualify and the judge is considering a residential chemical dependency treatment-based alternative, the judge may order that I be examined by DOC before deciding to impose a DOSA sentence. If the judge decides to impose a DOSA sentence, it could be either a prison-based alternative or a residential chemical dependency treatment-based alternative.
>
> If the judge imposes the prison-based alternative, the sentence will consist of a period of total confinement in a state facility for one-half of the midpoint of the standard range, or 12 months, whichever is greater. During confinement, I will be required to undergo a comprehensive substance abuse assessment and to participate in treatment. The judge will also impose a term of community custody of one-half of the midpoint of the standard range.
>
> If the judge imposes the residential chemical dependency treatment-based alternative, the sentence will consist of a term of community custody equal to one-half of the midpoint of the standard sentence range or two years, whichever is greater, and I will have to enter and remain in a certified residential chemical dependency treatment

program for a period of three to six months, as set by the court.

As part of this sentencing alternative, the court is required to schedule a progress hearing during the period of residential chemical dependency treatment and a treatment termination hearing scheduled three months before the expiration of the term of community custody. At either hearing, based upon reports by my treatment provider and the department of corrections on my compliance with treatment and monitoring requirements and recommendations regarding termination from treatment, the judge may modify the conditions of my community custody or order me to serve a term of total confinement equal to one-half of the midpoint of the standard sentence range, followed by a term of community custody under RCW 9.94A.701.

During the term of community custody for either sentencing alternative, the judge could prohibit me from using alcohol or controlled substances, require me to submit to urinalysis or other testing to monitor that status, require me to devote time to a specific employment or training, stay out of certain areas, pay $30.00 per month to offset the cost of monitoring and require other conditions, such as affirmative conditions, and the conditions described in paragraph 6(e). The judge, on his or her own initiative, may order me to appear in court at any time during the period of community custody to evaluate my progress in treatment or to determine if I have violated the conditions of the sentence. If the court finds that I have violated the conditions of the sentence or that I have failed to make satisfactory progress in treatment, the court may modify the terms of my community custody or order me to serve a term of total confinement within the standard range.

CrR 4.2(g).

Again as in the previous argument, the information Mr. Collins was given did not substantially comply with this form, and therefore violated CrR 4.2. *Id.*

But more importantly, the amended form not used here, would have properly advised the defendant that non-compliance with the DOSA program could result in the defendant serving the term of total confinement under the standard range. In the form actually used in Mr. Collins's plea, he was never advised that non-compliance could expose him to serving the entire term of confinement under the standard range, here, 40 months. This failure was not cured at the hearing on his guilty plea where the court merely advised Mr. Collins that it could sentence him to a DOSA but that the State was not recommending a DOSA. RP 9. Further, at sentencing, Mr. Collins acknowledged the DOSA required 20 months of supervision, and actively advocated for it, but the judge never advised him that during those 20 months, if he failed to complete the program or was dismissed from it, the court would impose *all* of the remaining time on the standard range, which here was 40 months. RP 14-28.[3]

[3] At the subsequent hearing on Mr. Collins's *pro se* motion for an appeal bond, Mr. Collins stated that he believed the court had sentenced him to 20 months plus 12 months supervision and not the 40 months the court imposed with 20 of those months

Thus, the failure to advise Mr. Collins of the total term of confinement to which he was exposed violated his constitutional right to a knowing, intelligent, and voluntary plea, because it misinformed him about the sentencing consequences of his plea. *Isadore*, 151 Wn.2d at 298; *Walsh*, 143 Wn.2d at 8.

The Court of Appeals reliance on the distinction between a direct consequence of a guilty plea versus a collateral consequence has been rendered meaningless in light of the United States Supreme Court's decision in *Padilla v. Kentucky,* 559 U.S. 356, 365-66, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (finding risk of deportation not a collateral or direct consequence of guilty plea but requiring advisement regardless). Thus, this Court should accept review to determine whether the direct versus collateral consequence distinction has survived and, if not, whether the trial court failed to adequately advise Mr. Collins properly of the risk of revocation of the DOSA.

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essentially suspended on the condition he successfully completed the program. RP 39. Mr. Collins noted his attorney never advised him of this detail as well. RP 40.

3. The decision of Division One in Mr. Collins's case is in direct conflict with Division Two of the Court of Appeals' decision in *Knotek*. The Court of Appeals rejected Ms. Collins's argument that trial court erred when it advised him that the maximum sentence he faced was the statutory maximum as opposed to the high end of the standard range, relying on its decision in *Kennar,* 135 Wn.App. at 74-76. *Kennar* ruled that the decision in *Blakely* did not change the requirements regarding the advisement of the maximum sentence. *Id.*

Division Two of the Court of Appeals in *Knotek* disagreed. The Court in *Knotek* ruled that consistent with *Blakely*, the Court has recognized that "it is the direct consequences of her *guilty plea*, not the maximum potential sentence if she went to trial, that [the defendant] had to understand." *Knotek*, 136 Wn.App. at 424 n.8 (emphasis in original).

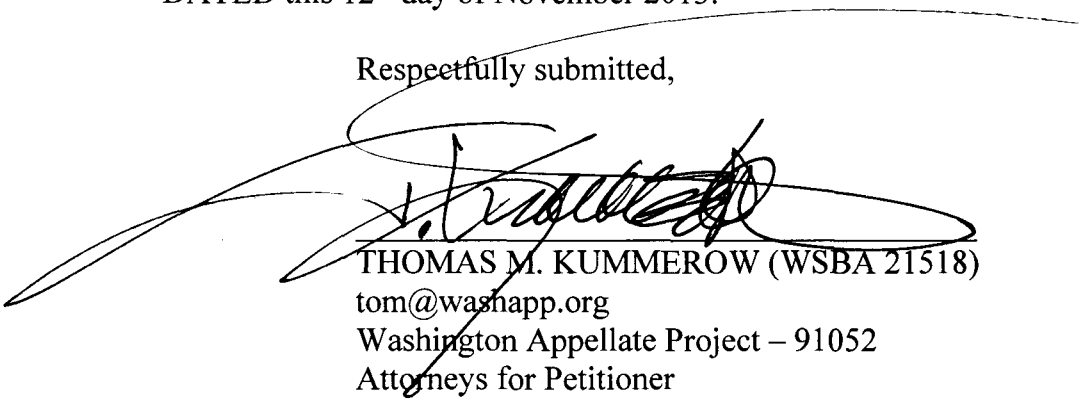
The decisions in this case and the decision of Division One in *Kennar* are in direct conflict with the Division Two decision in *Knotek*. As a consequence, this Court should grant review to resolve this conflict.

F. CONCLUSION

For the reasons stated, Mr. Collins submits this Court should grant review of the decision in his matter, and reverse his conviction and sentence.

DATED this 12th day of November 2013.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 68438-8-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
STEVEN CURTIS COLLINS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: OCT 14 2013

PER CURIAM. Steven Collins appeals from the judgment and sentence entered after he pleaded guilty to delivery of methadone. He contends the plea was not knowingly, intelligently, and voluntarily entered because he was misinformed regarding the applicable statutory maximum and consequences of his plea. We affirm.

Collins pleaded guilty to one count of delivery of methadone. At the plea hearing, the court informed him that the applicable maximum sentence was twenty years in prison and a $50,000 fine and that his standard range was twenty months and one day to sixty months. Collins acknowledged that he understood. He also acknowledged that the State would recommend twenty months and one day of incarceration and twelve months of community custody. The court accepted his plea.

At sentencing, Collins requested a drug offender sentencing alternative (DOSA), stating that he wanted the extended period of community custody of the DOSA sentence. "[T]he reason why I want the DOSA, the longer supervision that I

have out in the community I think is better for me...instead of just 12 months or whatever it is, you know what I'm saying, the longer is better. I feel like I need that and I want that." Verbatim Report of Proceedings (VRP at 19). The trial court gave Collins a prison based DOSA sentence of twenty months of confinement followed by twenty months of community custody.

Collins contends his plea is invalid because he was misadvised of the relevant maximum sentence. Both the plea agreement and the court informed Collins that the statutory maximum was twenty years. Collins contends this was error under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). According to Collins, the applicable maximum sentence was the maximum he could receive under the plea agreement – i.e., the high end of his standard range or 60 months. This argument is controlled by our decision in State v. Kennar, 135 Wn. App. 68, 74-75, 143 P.3d 326 (2006), rev. denied, 161 Wn.2d 1013, 166 P.3d 1218 (2007). There, we held that "CrR 4.2 requires the trial court to inform a defendant of both the applicable standard sentence range and the maximum sentence for the charged offense as determined by the legislature." Kennar, 135 Wn. App. at 75. Collins was informed of both the standard range and statutory maximum. There was no error.

Collins also alleges that his plea was involuntary because he was never informed that violation of his DOSA could lead to imposition of his remaining sentence. A defendant must be informed of all the direct consequences of his plea,

but he need not be advised of all possible collateral consequences of his plea. State v. Ward, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994). "The distinction between direct and collateral consequences of a plea 'turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment'." State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980) (quoting Cuthrell v. Director, 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005, 94 S. Ct. 362, 38 L.Ed.2d 241 (1973)). For example, a habitual criminal proceeding is a collateral consequence of a guilty plea, because "(1) it is not automatically imposed by the court in which the defendant has entered a plea of guilty, and (2) it cannot automatically enhance a defendant's sentence." Ward, 123 Wn.2d at 513.

Similarly, the revocation of a DOSA is not an automatic procedure with a direct impact on Collins' sentence. An offender in violation of a DOSA may be reclassified to serve the remaining balance of the original sentence. RCW 9.94A.662(3). Revocation of a DOSA sentence requires a Department of Corrections proceeding with a preponderance of the evidence standard of proof. In re Pers. Restraint Petition of McKay, 127 Wn. App. 165, 168, 110 P.3d 856 (2005). Therefore, "any effect on punishment flows not from the guilty plea itself but from additional proceedings and thus cannot qualify as immediate." State v. Ross, 129 Wn. 2d 279, 285, 916 P.2d 405 (1996). The possibility of additional incarceration resulting from violation of the DOSA is merely speculative.

Collins was properly instructed on the duration of incarceration and community custody. VRP at 19-20, Clerk's Papers (CP) at 31. He clearly understood the direct implications of his DOSA. If Collins was misinformed, that misinformation applies only to a collateral consequence of his DOSA sentence and does not support withdrawal of his plea.

Due process requires that a guilty plea be knowing, voluntary, and intelligent. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). "A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." Id. at 298. A defendant must be informed of all direct consequences of his plea. Id. The statutory maximum sentence for a charged crime is a direct consequence. In re Pers. Restraint of Stockwell, 161 Wn. App. 329, 335, 254 P.3d 899 (2011) (citing State v. Weyrich, 163 Wn.2d 554, 557, 182 P.3d 965 (2008)).

Statement of Additional Grounds

Collins claims that his counsel was ineffective for failing to inform him about the length and consequences of his DOSA sentence. Statement of Add'l Grounds for Review (SAG) at 1. "A defendant claiming ineffective assistance of counsel must show that counsel's performance was objectively deficient and resulted in prejudice." State v. Emery, 174 Wn.2d 741, 754-55, 278 P.3d 653 (2012) (citing State v. McFarland, 127 Wn. 2d 322, 334-35, 899 P.2d 1251 (1995)). Courts strongly presume that representation was effective. Emery, 174 Wn.2d. at 755.

Trial counsel's responsibility is to assist the defendant in "evaluating the evidence against him and in discussing the possible *direct* consequences of a guilty plea." State v. Malik, 37 Wn. App. 414, 417, 680 P.2d 770 (1984). Failure to advise of collateral consequences does not amount to ineffective assistance of counsel requiring withdrawal of a plea. State v. Holley, 75 Wn. App. 191, 197, 876 P.2d 973 (1994). As noted above, the possible incarceration due to revocation of a DOSA sentence is not a direct consequence of the plea. Any failure to inform Collins about this collateral consequence does not support an ineffective assistance claim.

We affirm the conviction.

For the court:

Cox, J.

Leach, C.J.

Spearman, 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. 68438-8-I**, 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 or residence address as listed on ACORDS:

☒ respondent Dennis McCurdy, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 12, 2013