

Aug 10, 2016, 8:05 am

**RECEIVED ELECTRONICALLY**

NO. 93328-6

THE SUPREME COURT OF  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,  
Respondent

v.

APOLINAR PEREZ GOMEZ  
Appellant/Petitioner.

---

ANSWER TO PETITION FOR REVIEW  
BY YAKIMA COUNTY

---

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 ORIGINAL

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A. INTRODUCTION.

ISSUES PRESENTED BY PETITION

1. Is Dismissal proper at this time?
2. Does dismissal at the time unfairly curtail Mr. Perez Gomez's right to file any necessary future collateral appeals?
3. Does the Judge's Misinterpretation of the State's motion to remand that at no time previously had asked for dismissal as a condition of remand to vacate his conviction prejudice Mr. Perez Gomez?

ANSWER TO ISSUES PRESENTED BY PETITION

1. Dismissal is proper.
2. Dismissal does not curtail any future right of Petitioner.
3. The Court of Appeals did not misinterpret the State's motion.

Gomez comes before this court requesting review of the order granting the State's motion to remand to allow withdrawal of his guilty plea, allowing the case to proceed to trial and dismiss of the appeal. (See Appendix A) The Court of Appeals issued this order based upon the final document filed by the State in that court a "Motion to Remand To Allow Withdrawal of Plea – Trial" filed in the Court of Appeals on April 25<sup>th</sup>, 2016. (See Appendix B.)

Previous to the State's request for set forth in the motion for remand/withdrawal/trial/dismissal, Gomez had asserted in his initially briefing that he was not properly advised of the immigration consequences of his plea of guilty. He maintained that he would not have pleaded guilty had he known the consequences and that he would be deported afterwards.

It should be noted that to date there has been nothing supplied to any court that would definitively prove that any immigration actions pertaining to Gomez were a direct result of the underlying conviction.

Briefs had previously been filed in the Court of Appeal. The Court of Appeals had ordered remand and additional hearing in the trial court. It was at that time the State reviewed this case and determined that it was in the best interest of all parties and in the interest of judicial economy to request that the case be remanded to the trial court allowing the withdrawal of Gomez's guilty plea and the having case proceeding to trial. All actions Gomez indicated he wished to occur in his original briefing. The State maintains that there was no failure by trial counsel at the original plea. However, the time and money involved in the requested hearing followed by the continued appellate process outweighed the time and investment by all parties in allowing the withdrawal of the plea and a trial.

The State petitioned the Court of Appeals to order the case remanded for withdrawal of the plea of guilty and allowance for the case to proceed to trial. Gomez objected to this request. The State filed a final letter with the Court of Appeals regarding this objection. (Appendix C).

The Court of Appeals granted the State's request, ordering the remand and plea withdrawal, the ultimate result of which will be a trial for

the defendant. The Court of Appeals also dismissed the appeal of the guilty plea.

In this petition Gomez has set forth no basis for review which comport with RAP 13.4(b) and 13.5A. Because Gomez has not met any of the conditions set forth in those rules this court need not and should not grant review of the ruling of Division III of the Court of Appeals.

As this court is well aware RAP 13.4(b) sets forth the basis for review;

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993);

...we do not address this issue because it was not raised on appeal. An issue not raised or briefed in the Court of Appeals will not be considered by this court. State v. Laviollette, 118 Wn.2d 670, 679, 826 P.2d 684 (1992).

#### B. STATEMENT OF THE CASE

Petitioner was arrested on August 2, 2011 after attempting to eluding police in a high speed chase that ended when he hit a barrier after he exited the freeway, he was intoxicated at the time of his arrest. (CP 1-

2) He charged with one count of Attempting to Elude a Pursing Police Vehicle and one count of Driving Under the Influence of Intoxicating Liquor and was arraigned on August 11, 2011. On August 12, 2011 his trial attorney Mr. Scott Bruns was appointed. (CP 4-6) On September 29 and again on October 3, 2011 the case was set for “plea & sent.” (CP 8-9)

On October 3, Dora Ornelas a certified court interpreter for Yakima County signed the Statement of Defendant on Plea of Guilty. This statement was apparently read to the defendant on two occasions. The first has not been supplied by Appellant the second reading is not in the record due to an “Audio skip(s)” in that specific and important portion of the hearing.

At some point Petitioner was apparently taken into custody by a federal agency. An attachment to the consolidated PRP indicates that Gomez stated to an agent of the United States Department of Homeland Security that he, Gomez, was not a citizen of the United States, his parents were not citizens, nor had he served in the U.S. military. He stated that he was a citizen of Mexico. He claimed that he did not have any applications or petitions pending that would allow him to remain lawfully in the United States. He further stated that he last entered the United States at or near an unknown place, on or after 2004. (Petitioner has been in this country

unlawfully for at least eleven years) In doing so, he is in violation of section 212(a)(6)(i) of the immigration and Nationality Act, as amended. Gomez listed his address for service as 1114 Rock Ave. Yakima, WA 98902.

The offense was committed on August 6, 2011, Gomez was sentenced on October 6, 2011. Petitioner was sentenced to “63” days with credit for time served. It would appear that he was released on the date of sentencing. During that time he spoke to and was advised by another attorney whose practice is immigration law. There is no indication that at any time between his release and now Gomez has been placed into custody. Petitioner’s address is not a jail or holding facility therefore Petitioner is not under restraint. Nothing in Gomez’s Declaration states that that the immigration “consequences” he now claims are based on this criminal conviction.

#### C. ARGUMENT

As with a direct appeal, acceptance of review of the Court of Appeals opinion is governed by RAP 13.4(b). This rule sets forth the manner and mechanism for review of a decision by the Court of Appeals terminating review.

This case does not meet any of the criterion set forth in RAP 13.4(b) RAP 13.4(b) Considerations Governing Acceptance of Review;



This case does not 1) Conflict with any decision by this court; 2) This ruling does not conflict with any ruling by any other division of the Court of Appeals or for that matter any court; 3) The ruling does not raise a significant question under either the State or Federal Constitution; the ruling merely reiterates the standard that has been applied for years 4) The issues raise in this petition for review do not involve an issue of substantial public interest that this court should determine.

Gomez petitioned the Court of Appeals for relief from his conviction that was the result of his plea of guilty. His claim is that his plea was involuntary due to alleged errors committed by his attorney regarding the immigration consequences of that plea.

After the Court of Appeals ordered an additional hearing in the trial court the State reviewed this case, in office, and determined that the best use of the scarce resources of the Court, the State of Washington and Yakima County was to request the Court of Appeals Division III grant an order remanding this case with a specific order to the trial court to allow Gomez to withdraw his plea. This would reinstitute the original charges and thereafter allow the Defendant to do as he indicated that he wished, have a trial by a jury his peers.

Clearly this action would necessitate the dismissal of the pending appeal of the guilty plea and dependent on the outcome of that trial allow

Gomez to appeal any and all results, as allowed by court rule, of that trial. The underlying appeal herein would be and is moot because the State, without acknowledging any errors, has agreed to this defendant's wishes.

The State was shocked when the defendant objected in the Court of Appeals to the States request to allow the defendant to have what he was asking for in his original brief, the chance to withdraw his guilty plea and the chance to have a trial by a jury of his peers.

The State is even more amazed that now that the Court of Appeals has granted his wish, he continues to object.

Gomez in his petition makes conditional statement such as;

The court's order can neither grant additional rights nor abridge the rights of either party as granted by the Washington State Constitution or as interpreted by case law.

In this instance it is quite possible that this order may abrogate Mr. Perez Gomez' rights by cutting off his rights to file a further appeal should the trial court commit any errors during the further proceedings in this matter.  
(Petition at 3)

None of this is supported by recitation to what section of the "constitution" these rights are found in nor what rule or case law "quite possibly" supports this allegation.

He next argues that "it does not require a stretch of the imagination to see" arguments pertaining to his original attorney's actions would not be allowed in a future appeal. It has been clear from the outset that

Gomez is requesting a withdrawal of his plea and a chance to conduct a trial. The State has agreed to that so any issues raised regarding the previous actions of his trial counsel and a plea of guilty are not matters which could or would need to be litigated in any future appeal situation. Gomez is going to go to trial and therefore the consequences of an attorney's possible improper conduct involving a previous plea of guilty would be, by definition, not an issue because, once again, he will be going to trial not pleading guilty.

Petitioner claims on page four of his petition that the actions of the Court of Appeals may affect his rights, this section of the petition is false on more than one level. First, the trial court will not be taking actions on a plea of guilty and a trial attorney will not be advising Gomez about his rights and the ramifications of a plea on his current immigration status in this country and therefore neither Padilla nor Sandoval apply and secondly if the trial court commits an error in any action upon remand the defendant has the right to appeal that action and the State is not capable of stopping that appeal, the rules allow for such an action. Further, the State is at a loss as to how a trial court would "simply decide not to follow" case law that is precedential. The trial court is bound to follow the rulings in both of those cases.

As stated by petitioner:

In the instant matter, should the trial court subsequently commit error and simply decide not to follow Padilla and Sandoval, Mr. Perez Gomez would be left without the means for any further appellate review. Such an outcome is not in the interests of justice. (Petition at 4)

Padilla v. Kentucky, 559 U.S. 356 130 S. Ct. 1473, 1761. Ed. 2d 284 (2010), Padilla emphasized that for "at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." Id. at 372. (Emphasis added)

In State v. Sandoval, 171 Wn.2d 163, 168,249 P.3d 1015 (2011), the court concluded counsel performed deficiently by incorrectly dismissing the risks of deportation and not informing the defendants plea to a third degree rape equated to an "aggravated felony" under federal immigration law that certainly subjected him to deportation. Sandoval, 171 Wn.2d at 174.

In re Personal Restraint of Ramos, 181 Wn.App. 743, 750, 326 P.3d 826 (Div. 3 2014);

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. Sandoval, 171 Wn.2d at 169 (citing In re Pers. Restraint of Riley, 122 Wn.2d 772,780,863 P.2d 554 (1993)); McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441,25 L. Ed. 2d 763 (1970). Faulty advice of counsel may render the defendant's guilty plea involuntary or unintelligent. Sandoval, 171 Wn.2d at 169 (citing Hill V. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 88

L. Ed. 2d 203 (1985); McMann, 397 U.S. at 770-71). To establish that the plea was involuntary or unintelligent due to counsel's inadequate advice, the defendant must show under the test in Strickland that his attorney's performance was objectively unreasonable and that he was prejudiced by the deficiency. Sandoval, 171 Wn.2d at 169. (Emphasis added.)

It is clearly difficult to answer this petition in that the State has agreed to allow the defendant to have what he was asking for and he is now continuing to object, now to the Court of Appeals granting his request. The State assured the Court of Appeals that there was no malice or artifice in the request but purely a simple realization that the resources of the State, by and through the trial court, the Yakima County Prosecuting Attorney's Office, the Yakima County Office of Assigned Counsel, the Court of Appeals Division III and now the Supreme Court of the State of Washington, could be better expended by simply granting this defendant what he was and, apparently still is, requesting, which is a trial.

The Respondent State of Washington - the Yakima County Prosecutors Office - can and does agree with the actions of the Court of Appeals Division III. While the State may not have used the explicit words "dismissal of the appeal" the Court of Appeals clearly understands its own rules and correctly interpreted the State's request for remand, withdrawal and trial would necessitate the dismissal of the pending appeal.

The Respondent herein now states unequivocally that the intent of

the State's final filing in the Court of Appeals Division III was for an order from that court requiring the trial court to allow Gomez to withdraw his previously entered guilty plea and the dismissal of the previous appeal of that guilty plea. The Respondent herein further states that the State's intent was not that any valid right of the defendant be extinguished.

It is the States understanding and belief that the action of the order entered by the Court of Appeals the defendant has not and will not extinguish or be preclude any future right to appeal any and all outcomes of such trial which, obviously, comport to the Rules of Appellate Procedure. Clearly the defendant would have the right to a direct appeal of his trial if the outcome of that trial is in fact appealable.

The State is at a total loss as to how this case has come to this point in the litigation. The State had and has literally agreed to give the defendant what he has asked for, an order allowing him to withdraw his guilty plea and occasion to have his case tried before a jury and yet he now persists in objecting to getting what he requested from the beginning.

There is no need for analysis of any immigration consequences or the actions of any previous attorneys or the actions of the trial court or the issues alleged in the appeal arising from the guilty plea. The State has offered Gomez a "do over" with no conditions, the very thing he has argued he should get.

#### D. CONCLUSION

The Chief Judge of the Court of Appeals III signed the order which was issued by a panel of three judges of the Court of Appeals Division III. The actions of that court and those judges was and is correct.

The Petitioner mentions the rules applicable to this type of action but cites to no case that this order conflicts with either from this court or the court of appeals, he cites to nothing that is a significant question under either the State or Federal Constitution and finally this ruling does not involve an issue of substantial public interest that this court should determine.

The Court of Appeals properly analyzed the facts that were presented to that court by the Petitioner as well as the motion to allow withdrawal of guilty plea and remand for trial. Based on the information before it that court, a three judge panel, an order issued literally giving this Petitioner what he wanted and yet now the State is being asked to explain why the highest court of this State should not grant review of that order, an order that, once again, gives Gomez what he wanted, withdrawal of his plea and a trial. The facts presented when analyzed with the applicable law do not establish that there was any violation of any of Petitioner's rights.

The Court of Appeals properly granted the order, there is no basis

for this court to accept review of that ruling.

Respectfully submitted this 9<sup>th</sup> day of August 2016,

David B. Trefry

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DECLARATION OF SERVICE

I, David B. Trefry state that on August 9, 2016, I emailed a copy of the State's response, by agreement of the parties to Mr. DeYoung at deyounglaw1@gmail.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9<sup>th</sup> day of August, 2016 at Spokane, Washington.

By: s/David B. Trefry  
DAVID B. TREFRY WSBA# 16050  
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# APPENDIX A

Renee S. Townsley  
Clerk/Administrator

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*The Court of Appeals  
of the  
State of Washington  
Division III*

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June 2, 2016

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CASE # 328708  
State of Washington v. Apolinar Perez Gomez  
YAKIMA COUNTY SUPERIOR COURT No. 111011106  
(consolidated with CASE # 329909; PRP of Apolinar Perez Gomez)

Counsel:

Enclosed is your copy of this Court's Order Granting State's Motions to Remand and to Dismiss Appeal, which was filed today. A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:pb  
Attachment

c: Apolinar Perez Gomez  
1114 Rock Ave  
Yakima, WA 98902

**FILED**  
**June 2, 2016**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 32870-8-III</b>
	)	<b>(consolidated with</b>
<b>Respondent,</b>	)	<b>No. 32990-9-III)</b>
	)	
<b>v.</b>	)	
	)	<b>ORDER GRANTING</b>
<b>APOLINAR PEREZ GOMEZ,</b>	)	<b>STATE'S MOTIONS TO</b>
	)	<b>REMAND AND</b>
<b>Appellant.</b>	)	<b>TO DISMISS APPEAL</b>
<hr/>	)	
<b>In the Matter of the Personal Restraint of</b>	)	
	)	
<b>Apolinar Perez Gomez,</b>	)	
	)	
<b>Petitioner.</b>	)	

This matter was set on the court's March 17, 2016 docket for decision without oral argument. On April 15, 2016, the Chief Judge signed an order for a reference hearing. In response to the order, the State filed a motion (1) to remand for the trial court to enter an order withdrawing guilty plea, and (2) for this court to dismiss the appeal. Having considered that motion, appellant's response, and the State's reply,

IT IS ORDERED that the State's motion to remand for the trial court to enter an order withdrawing guilty plea is granted, and the trial court shall enter such order and

No. 32870-8-III; 32990-9-III  
*State v. Perez Gomez; PRP of Perez Gomez*


any further order necessary to vacate appellant's conviction arising from that plea.

IT IS FURTHER ORDERED that the appeal is dismissed.

IT IS FURTHER ORDERED that each party shall bear their own costs of appeal.

PANEL: Judges Lawrence-Berrey, Siddoway and Pennell

FOR THE COURT:

  
\_\_\_\_\_  
GEORGE FEARING  
CHIEF JUDGE

# APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	NO. 32870-8-III
Respondent,	)	
	)	MOTION TO REMAND
vs.	)	TO ALLOW WITHDRAWAL OF
	)	PLEA – TRIAL.
APOLINAR PEREZ GOMEZ,	)	
	)	
Appellant.	)	
_____	)	

I. IDENTITY OF MOVING PARTY.

The respondent, State of Washington, asks for the relief designated in Paragraph II.

II. STATEMENT OF RELIEF SOUGHT.

The respondent requests the Court of Appeals Division III grant the respondent's request as set forth in this Motion. So that the ends of justice might be served, the Respondent, State of Washington, requests that this court remand this case to the trial court where the defendant shall be allowed to withdraw his guilty plea and have his case tried to a jury of his peers.

III. GROUNDS FOR RELIEF SOUGHT.

After receiving this court's order to remand this case for a reference hearing the State of Washington by and through the Yakima County Prosecutors Office reviewed the case and determined that the best use of the scarce resources of the State would be to agree to allow the Appellant/defendant, Apolinar Perez Gomez, to withdraw his guilty plea to the underlying offense of Attempting to Elude a Pursuing Police RCW 46.61.024 and reset this case for trial.

This remand will grant the relief Appellant is asking for and this action will allow the defendant a chance to have his case tried to a jury thereby negating his present claim that he would not have plead guilty if he had been properly informed of the immigration consequences of that plea.

The State vehemently disagrees with the Appellant's contention that the actions of his original trial counsel was deficient at the time of the plea, however in order to expedited this case and use the least amount of the scarce resources of the State the remand and trial will be the most efficient method of creating a record, negating the present claim and satisfying Gomez's desire to withdraw his plea and have his day in court.

The State has determined that the reference hearing and the procedure for that hearing along with all the previous actions that have taken place in this case will in all probability exceed the time and expense of conducting an actual trial.

Further, if this court were to determine that Gomez's allegation is correct



and remand for a trial the State would then have had to proceed through the CrR 7.8 motion, the initial Personal Restraint Petition, the motions to allow a direct appeal, motions to consolidate, responses to the motions to consolidate, the ordered reference hearing and then finally the trial.

Therefore this motion should considerably decrease the overall cost in time, money and effort for all parties.

The State has communicated this intent by separate correspondence to appellate counsel for Mr. Gomez to determine if he shall be representing appellant/defendant in trial and if not the State has requested current address/contact information for the Appellant in order to allow the State to serve Gomez with any notices needed to speedily try this case.

#### IV. Conclusion.

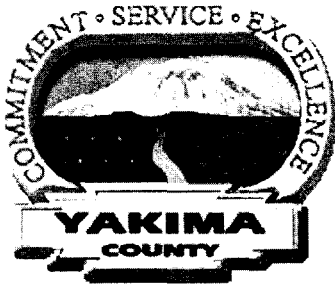
The State respectfully requests that this court remand this case to the trial court to allow the Appellant/defendant to withdraw his guilty plea, have the matter set for trial and trial counsel appointed if needed.

Further, the State would request that this court require Appellate counsel to inform this court and the State if he will or will not be representing Mr. Gomez in trial. If Appellate counsel is not going to be trial counsel the State requests that this court order counsel to supply the State with current contact information for Mr. Gomez so that a summons may be served and any notice be properly sent to Mr. Gomez.

Respectfully submitted this 25<sup>th</sup> day of April, 2016

s/ David B. Trefry  
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# APPENDIX C



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---

May 23, 2016

TO: Washington State Court of Appeals, Division III  
500 W. Cedar St., Spokane, WA 99201

***RE: State v. Gomez, COA# 32870-8-III***

To Whom It May Concern:

The Yakima County Prosecutors Office requested that this court allow the remand of this case in order that Mr. Gomez may be allowed to withdraw his plea and proceed to trial as he requested this present appeal. Mr. Gomez has responded to the State's request by indicating that he cannot join in that request for several reasons. A brief response is needed to that objection.

1. There is no need to stipulate to a set of facts for the trial court to review, the State is asking this court to remand to the trial court with and order to the trial court that Mr. Gomez be allowed withdraw his plea, as he has requested.
2. It is correct that the State does not have the "inherent" authority to vacate a conviction, which once again, is why the State is asking this court to order the remand with direction to the trial court to allow withdrawal of the plea and set the matter on for trail.
3. The State is unsure what "rule" against successive motions Mr. Gomez is referring to but if this court orders the withdrawal of the guilty plea the trial court will obviously act in accordance. In addition this matter is not being dismissed by this remand, the case will be pending until withdrawal occurs at which time the State would move for dismissal of this petition as moot.
4. It is not "ultimately up to Appellant...to accept the State's motion" it is this courts power to grant or deny motions, not the parties. Further, by allowing

the remand and trial there will be no issues regarding advisement of rights at the time of the plea for Mr. Gomez, who after all is the petitioner herein.

5. The ultimate fate of this case if it were to proceed to fruition and Mr. Gomez were to prevail is a remand by this court with an order to the trial court to allow withdrawal of his plea. This would allow him to proceed to trial as he indicates he would have done if, as alleged, his attorney had not incorrectly advised him of the consequences of his plea.
6. Finally it must be noted that the State's request has no hidden agenda or false pretense. The Yakima County's Prosecutors Office on a regular basis has reviewed claims before this court and determined that the best resolution, the resolution that wisely uses the scarce resources of the judicial system is one that does not require the full process of appeal. That is the reason for the State's motion, to allow Mr. Gomez to have what he has requested.

Respectfully submitted this 23<sup>rd</sup> day of May, 2016.

s/ David B. Trefry

David B. Trefry WSBA #16050

Senior Deputy Prosecuting Attorney

Attorney for Respondent

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DECLARATION OF SERVICE

I, David B. Trefry, state that on May 23, 2016, I emailed a copy of this letter, by agreement of the parties, to Mr. Brent De Young at [deyounglaw1@gmail.com](mailto:deyounglaw1@gmail.com)

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23<sup>rd</sup> day of May at Spokane, Washington,

s/ David B. Trefry  
DAVID B. TREFRY, WSBA #16050  
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## OFFICE RECEPTIONIST, CLERK

---

**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Wednesday, August 10, 2016 8:08 AM  
**To:** 'David Trefry'; Brent De Young  
**Subject:** RE: State v. Gomez 933286

Received 8/10/16.

Supreme Court Clerk's Office

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**Subject:** State v. Gomez 933286

To Whom It May Concern:

Please find attached the State's Answer to the Petition for Review filed in this case.

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