Supreme Court No. 95640-5
Court of Appeals No. 49877-4-II

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHELE CALDWELL,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Michele Caldwell, the petitioner, asks this Court to grant review and reverse the Court of Appeals' decision refusing to remand for necessary findings of fact and conclusions of law. The Court of Appeals affirmed Ms. Caldwell's conviction for forgery on January 17, 2018. The Court of Appeals denied Ms. Caldwell's motion for reconsideration on February 7, 2018. Copies of these rulings are attached in the appendix.

B. ISSUE

Following a bench trial, the trial court must enter written findings of fact and conclusions of law. Failure by the trial court is error requiring remand. Copying and pasting language from the pattern to-convict instruction for forgery, the trial court concluded the elements of the offense were proved. The court, however, did not separately state the factual bases for these legal conclusions. There was no oral ruling. Notwithstanding precedent, the Court of Appeals held there was no error and refused to remand. Is this decision in conflict with precedent, warranting review and reversal? RAP 13.4(b)(1), (2).

C. STATEMENT OF THE CASE

Michelle Caldwell was charged with one count of forgery and one count of identity theft in the second degree. CP 1-2, 7-8. The charges were based on an allegation that Ms. Caldwell had deposited a falsely

made check belonging to another person. CP 3-5. Ms. Caldwell elected a bench trial. CP 6. After the trial, the court entered a written verdict acquitting Ms. Caldwell of second degree identity theft, but convicting her of forgery. CP 9; RP 61. The court did not provide an oral ruling or memorandum decision. RP 61. The court later entered written "findings" parroting the pattern "to-convict" instruction for forgery. CP 13; cf. WPIC 130.03 Forgery—Possessing—Offering—Disposing Of—Elements, 11A Wash. Prac., Pattern Jury Instr. Crim. (4th Ed).

Among her assignments of error, Ms. Caldwell assigned error both to the court's decision determining guilt and the court's failure to enter adequate written findings of fact and conclusions of law. Br. of App. at 1-2. Consistent with precedent and so that she could fairly litigate her appeal, Ms. Caldwell asked for the Court of Appeals to remand her case to the trial court for the necessary findings of fact and conclusions of law. The Court of Appeals refused.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Despite the lack of any true written findings of fact and no oral ruling to fill the void, the Court of Appeals refused to remand for the necessary findings. This decision violates precedent, meriting review and reversal.

After a defendant is adjudicated guilty in a bench trial, the trial court must enter written findings of fact and conclusions of law. CrR

6.1(d). A purpose of this requirement is to facilitate appellate review. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). The findings should "identify the evidence relied upon to support each element of each count." Id. at 623. They "must be sufficient to suggest the factual basis for the ultimate conclusion." State v. Silva, 127 Wn. App. 148, 153 n.6, 110 P.3d 830 (2005). The "failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions." Head, 136 Wn.2d at 622.

The trial court entered written findings of fact and conclusions of law. CP 12-14. The court's "findings," however, merely mirror the elements of forgery under RCW 9A.60.020(1)(b):

> Based on the evidence provided the Court hereby finds the following facts:
>
> 1. That on or about April 21, 2015, the defendant possessed, or uttered, or offered or disposed of, or put off as true a written instrument which had been falsely made, completed, or altered.
>
> 2. That the defendant knew that the instrument had been falsely made, completed, or altered;
>
> 3. That the defendant acted with intent to injure or defraud.
>
> 4. That the above acts occurred in the State of Washington.

CP 13; cf. WPIC 130.03 Forgery—Possessing—Offering—Disposing Of—Elements, 11A Wash. Prac., Pattern Jury Instr. Crim. (4th Ed).

This was inadequate. The trial court's "findings" are *conclusions of law*, not findings of fact. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) ("A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law."). If a court's determination concerns whether evidence showed that something occurred or existed, it is a finding of fact. Goodeill v. Madison Real Estate, 191 Wn. App. 88, 99, 362 P.3d 302 (2015). If the determination is made through a process of legal reasoning or legal interpretation of evidentiary facts, it is a conclusion of law. Id. The elements of a crime are ultimate legal conclusions because they are legal interpretations of evidentiary facts. State v. Greco, 57 Wn. App. 196, 204, 787 P.2d 940 (1990) ("Findings of fact are required in judge-tried cases in order to support a conviction, and should separately state the factual basis for the legal conclusions as to each element of the crime.") (emphasis added), citing State v. Russell, 68 Wn.2d 748, 750, 415 P.2d 503 (1966). Therefore, the trial court did not fulfill its duty to enter written findings of fact, let alone adequate findings. See, e.g., In re LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986) (conclusory and general "findings" that evidence proved persons were "gravely disabled" were inadequate).

This Court of Appeals stated that failure to enter written findings is subject to harmless error review. Slip. op. 4, citing State v. Banks, 149

Wn.2d 38, 43, 65 P.3d 1198 (2003). This is incorrect and misreads Banks. In Banks, the trial court failed to address the issue of knowledge, an essential element of the offense. 149 Wn.2d at 42-43. This error is analogous to when a jury instruction omits an essential element of an offense. Id. at 43-44. That sort of error is subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Brown, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). This Court held harmless that the trial court's failure to conclude that the missing element (knowledge) was proved beyond a reasonable doubt, reasoning that the trial court would have reached the same conclusion of guilt. Banks, 149 Wn.2d at 46. This Court declined to remand for additional findings because the trial court's *other* written findings and conclusions necessitated an inference that it had found knowledge. Id.; Cf. Head, 136 Wn.2d at 622 (rejecting argument that failure to enter findings was harmless in light of comprehensive oral ruling and remanding).

Here, the error is not harmless because it hindered Ms. Caldwell's ability to appeal her conviction. See id. at 619 (written findings "enable an appealing defendant to focus on issues arguably supported by the record and avoid pursuing issues obviously lacking merit."). Ms. Caldwell (and her appellate attorney) do not know what evidence the trial

court relied on in reaching its legal conclusions. It must be recalled that despite convicting Ms. Caldwell of forgery, the trial court acquitted her of identity theft. The evidence offered by the State in support of these charges were the same (the deposit of a falsely made or completed check containing another person's identifying information). RP 11-39. Nevertheless, the trial court concluded that the evidence did not prove the elements of second degree identity theft beyond a reasonable doubt.[1]

In response to the foregoing argument, the Court of Appeals reasoned Ms. Caldwell "could have challenged the findings of fact as written to raise a sufficiency of the evidence argument." Order Denying Mot. for Reconsideration at 1.

This misses the point. Once a trial court enters adequate findings of fact and conclusions of law, the appellate court reviews *de novo* whether the conclusions of law are supported by the findings. State v.

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[1] As set out in the pattern "to-convict" instruction, the elements of second degree identity theft are:

(1) That on or about(date), the defendant knowingly [obtained, possessed, or transferred] [or] [used] a means of identification or financial information of another person [, living or dead];
(2) That the defendant did so with the intent to commit any crime;
(3) That the defendant knew that the means of identification or financial information belonged to another person; and
(4) That any of these acts occurred in the State of Washington.

WPIC131.06 Identity Theft—Second Degree—Elements, 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 131.06 (4th Ed).

A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). Therefore, if a trial court's findings do not support the conclusions of law, the defendant may be entitled to reversal. See id. at 418-421. For example, in A.M., the Court of Appeals reversed a conviction for first degree rape of a child because the trial court found only penetration of the buttocks, not the anus. Id. at 421. Therefore, the trial court erred in concluding that there had been "sexual intercourse"—an essential element of the offense.

In this case, the trial court's failure to enter adequate findings deprived Ms. Caldwell of the possibility of showing that the trial court did not find adequate facts to support the conviction. The trial court may have found facts insufficient to constitute the crime of forgery. Findings may also show the trial court erred in the manner that it reached its verdict. See State v. Read, 147 Wn.2d 238, 246, 53 P.3d 26 (2002) (presumption that trial court correctly applied the law in bench trial can be rebutted). But because the trial court provided no oral ruling or written findings, it is impossible to know.

In a footnote, this Court of Appeals chastised Ms. Caldwell for not supporting her assignment of error that the State failed to prove the forgery conviction beyond a reasonable doubt with argument and held the assigned error waived. Slip. op at 1 n.1. The lack of findings, however, hampered any such challenge. See A.M., 163 Wn. App. at 418-421

(sufficiency challenge to conviction was successful in light of trial court's written findings). And to repeat, there was not even an oral ruling to base such a challenge upon. See Head, 136 Wn.2d at 624 ("An appellate court should not have to comb an oral ruling to determine whether appropriate "findings" have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.") (emphasis added).

Similarly, the Court of Appeals reasoned that findings were not necessary to resolve the other issues Ms. Caldwell raised, which consisted of evidentiary and sentencing errors. Slip. op. at 5. This may be true. But it does not make the challenge to lack of adequate findings moot or harmless. Under this kind of reasoning, a defendant could never *solely* raise an error as to a lack of findings of fact and conclusions of law on appeal. And Ms. Caldwell wanted adequate findings so that she could potentially identify additional issues on appeal or to support a challenge to the court's adjudication of guilt on forgery. Indeed, appellate counsel had a duty to do so. See McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429, 438-39, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988) ("The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal."); Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 18

L. Ed. 2d 493 (1967) (appellate counsel's "role as advocate requires that he support his client's appeal to the best of his ability.").

The appellate court's ruling sends a message to prosecutors and trial judges that adequate findings of fact and conclusions of law are unnecessary. This conflicts with this Court's reasoning in Head:

> A prosecuting attorney required to prepare findings and conclusions will necessarily need to focus attention on the evidence supporting each element of the charged crime, as will the trial court. That focus will simplify and expedite appellate review.

Head, 136 Wn.2d at 622. Here, unless this Court enforces the requirement, prosecutors and judges have no incentive to enter adequate written findings of fact and conclusions of law. Instead, the incentive will be to enter conclusory "findings" modeled on "to-convict" instructions because the appellate court will hold any challenge to the inadequate findings "harmless."

The Court of Appeals' decision refusing to remand for the necessary findings of fact and conclusions of law conflicts with the precedent, particularly this Court's decision in Head. Review is therefore warranted. RAP 13.4(b)(1), (2). And because this sort of error is likely to recur following bench trials (at least in Pacific County), this is an issue of substantial public interest meriting review. RAP 13.4(b)(4).

E. CONCLUSION

For the foregoing reasons, Ms. Caldwell respectfully requests that this Court grant review. Following this grant, this Court should reverse with instruction that the case be remanded to the trial court for necessary findings of fact and conclusions of law. The trial court should not be permitted to take new evidence. Head, 136 Wn.2d at 625. The trial court is free to reach a different result only as to the forgery charge. Id. If the trial court maintains the conviction, Ms. Caldwell should be free to appeal from this judgement. Id. at 626.

DATED this 6th day of March 2018.

Respectfully submitted,

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Appendix

Filed
Washington State
Court of Appeals
Division Two

January 17, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHELE S. CALDWELL, Appellant.	No. 49877-4-II UNPUBLISHED OPINION

LEE, J. – Michele S. Caldwell appeals her forgery conviction after a bench trial. Caldwell argues that the trial court erred by not entering adequate findings of fact and conclusions of law and by admitting the alleged forged check without authentication. Caldwell also argues that the sentencing court erred by imposing legal financial obligations (LFOs) because it incorrectly believed that those fees were mandatory.[1] We affirm.

FACTS

Caldwell lived with Lowell Gilbertson and his son, Bret Gilbertson. Lowell's[2] bank notified him of a suspicious check deposited at one of its branches. The check was made out to Bret and then endorsed to Caldwell. Lowell did not write the check.

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[1] Caldwell also alleges in her assignment of error section of her brief that the State failed to prove that Caldwell committed forgery beyond a reasonable doubt. She, however, does not address this assignment of error in the analysis section of her brief. Accordingly, we deem this issue waived. *See* RAP 10.3(6) (appellant's brief should contain argument in support of issues presented in addition to citations to legal authority and to the relevant parts of the record).

[2] Because Lowell and Bret share the same last name, we use their first names for clarity. We intend no disrespect.

The State charged Caldwell with forgery and second degree identity theft. Caldwell waived her right to a jury trial and the matter proceeded to a bench trial.

During the bench trial, Lowell testified that he has a checking account at Key Bank and that the bank had contacted him about a "concerning transaction" involving his account. Verbatim Report of Proceedings (VRP) (Oct. 18, 2016) at 14. When shown a copy of the suspicious check, the State asked Lowell, "Does that appear to be a check from your checking account?" VRP (Oct. 18, 2016) at 15. Lowell responded that "it could be" a check from Key Bank, but Lowell suspected it was from an "organization[] wanting [him] to open a charge account." VRP (Oct. 18, 106) at 15.

Lowell testified he did not write the check and pointed out that it was made out to his son, but his son's name was misspelled and the signature was not Lowell's. Lowell also testified that his name was in the left corner of the check and it "appear[ed]" to be from his checking account, "but it's not the format of my check." VRP (Oct. 18, 2016) at 16.

The State then offered to admit the check as an exhibit. The trial court sustained the defense's lack of foundation objection because Lowell only testified that the check "appear[ed]" to be his. VRP (Oct. 18, 2016) at 17. Upon further questioning by the State, Lowell testified that the check was made out to "B-R-I-T" and that this spelling of his son's name was incorrect. VRP (Oct. 18, 2016) at 17.

The State then called Bret to testify. Bret testified that he was familiar with the check in question and that it was "a check written on my—a bank account of my father's." VRP (Oct. 18, 2016) at 21. Bret also testified that the back of the check was endorsed by "Brit Gilbertson" and

"signed over to Michele Caldwell." VRP (Oct. 18, 2016) at 22. Bret testified he did not sign the check. He also testified that he first saw the check when the investigating officer showed it to him.

The State moved again to admit the check. Caldwell again objected. The trial court overruled the objection and admitted the check.

Karen Kaino, a bank employee, testified that she was familiar with the check and that it was deposited into Caldwell's account through the Automated Teller Machine (ATM) at Kaino's branch. She testified that the check was suspicious and did not appear to be a regular check of Lowell's. Kaino also testified to the video surveillance showing Caldwell depositing the check at the bank's ATM.

The trial court found Caldwell guilty of forgery, but not guilty of second degree identity theft. The trial court entered findings of fact and conclusions of law. (CP 12-14) The findings state:

> 1. That on or about April 21, 2015, the defendant possessed, or uttered, or offered or disposed of, or put off as true a written instrument which had been falsely made, completed, or altered.
>
> 2. That the defendant knew that the instrument had been falsely made, completed, or altered.
>
> 3. That the defendant acted with intent to injure or defraud.
>
> 4. That the above acts occurred in the State of Washington.

Clerk's Papers (CP) at 13. The trial court also imposed mandatory LFOs totaling $600.

Caldwell appeals.

ANALYSIS

A. ADEQUACY OF FINDINGS OF FACT

Caldwell contends the trial court's findings of fact are inadequate and that this court should remand for entry of proper findings. We disagree.

"The criminal rules for superior court judges require that, following a bench trial, the judge enter findings of fact and conclusions of law." *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003) (citing CrR 6.1(d)). "Adequate appellate review requires from the trial court findings of fact which show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact that penetrates beneath the generality of ultimate conclusions, together with a knowledge of the standards applicable to the determination of those facts." *State v. Jones*, 34 Wn. App. 848, 851, 664 P.2d 12 (1983).

When drafting the findings of fact, "[e]ach element must be addressed separately, setting out the factual basis for each conclusion of law" and the findings must specifically state that each element has been met. *Banks*, 149 Wn.2d at 43. Where the trial court fails to meet these requirements, appellate review is subject to a harmless error analysis. *Id.*

The elements of forgery are set forth in RCW 9A.60.020. A person is guilty of forgery. "if, with intent to injure or defraud (a) . . . she falsely makes, completes, or alters a written instrument or; (b) . . . she possesses, utters, offers, disposes of, or puts off as true a written instrument which . . . she knows to be forged." RCW 9A.60.020(1)(a)-(b). The trial court's findings of fact state:

1. That on or about April 21, 2015, the defendant possessed, or uttered, or offered or disposed of, or put off as true a written instrument which had been falsely made, completed, or altered.

2. That the defendant knew that the instrument had been falsely made, completed, or altered.

3. That the defendant acted with intent to injure or defraud.

4. That the above acts occurred in the State of Washington.

CP at 13.

Here, the trial court separately addressed the elements of forgery and specifically stated that each element had been met in its findings of fact. While more details regarding the facts that support each element would be preferred, the findings still satisfy CrR 6.1(d) and *Banks*, 149 Wn.2d at 43. Moreover, Caldwell raises evidentiary and sentencing errors on appeal. These issues can both be reviewed without relying on the findings of fact entered. Accordingly, we hold the trial court's findings of fact are adequate and do not require remand.

B. ADMITTANCE OF CHECK

Caldwell next argues the trial court erred by abusing its discretion in admitting the check in question. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Barry*, 184 Wn. App. 790, 801-02, 339 P.3d 200 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). In other words, the court abuses its discretion if it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Id.* at 284.

We will not reverse a trial court decision for an erroneous evidentiary ruling unless the error resulted in prejudice. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An error is prejudicial if there is a reasonable probability that the outcome would have been different had the error not occurred. *Id.* We presume that the trial court judge knows the rules of evidence and properly applies them. *In re Harbert*, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975).

Under ER 901(a), "[t]he requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." A witness with personal knowledge of a piece of evidence may authenticate it by stating that the evidence is what it is claimed to be. ER 901(b)(1).

Here, Lowell testified that his bank contacted him about a suspicious check. Lowell also testified that the check offered at trial "could be" and "appear[ed] to be" from his checking account, but he suspected it was a check used to open a "charge" account. VRP (Oct. 18, 2016) at 15-16. Bret then testified that he was familiar with the check in question and that it was "a check written on my—a bank account of my father's." VRP (Oct. 18, 2016) at 21. Bret also testified that the back of the check was endorsed by "Brit Gilbertson" and "signed over to Michele Caldwell," but he did not sign the check. VRP (Oct. 18, 2016) at 22.

The combined testimonies of Lowell and Bret establish that they had personal knowledge of the account and check. This provided the necessary authentication for the check. Thus, tenable grounds exist for the trial court's decision to admit the check. The trial court did not abuse its discretion.

However, even if the trial court erred by admitting the check after Bret's testimony, the error would be harmless because it would have been admitted later after Kaino's testimony. Kaino, a bank employee, testified that she was familiar with the check and that it was deposited through the ATM at her branch. She testified that the check was suspicious and did not appear to be a regular check of Lowell's. Kaino also testified to the video surveillance showing Caldwell depositing the check at the bank's ATM.

We will not reverse an evidentiary ruling unless the error resulted in prejudice. *Neal*, 144 Wn.2d at 611. Since the check would have ultimately been admitted, any error in admitting it after Bret's testimony would be harmless and would not affect the trial's outcome. Therefore, we hold the trial court did not commit reversible error in admitting the check.

C. LFOs

Caldwell next contends the sentencing court erred by incorrectly believing it lacked authority to waive all LFOs. We disagree.

Sentencing courts are required to impose mandatory LFOs. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Here, the trial court imposed a $500 crime victim assessment and a $100 deoxyribonucleic acid (DNA) collection fee. Each of these LFOs are required by statute and thus are mandatory. *Id.* Because the trial court imposed mandatory LFOs, Caldwell's claim fails.[3]

[3] In its response brief, the State argues that the sentencing court erred in only imposing a $500 crime victim assessment and a $100 DNA fee. Because the State did not file a cross appeal, this contention is not properly raised on appeal. RAP 10.3(a)(6). Accordingly, we do not address whether the sentencing court erred by not imposing additional LFOs.

We affirm.

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.

Lee, J.

We concur:

Worswick, P.J.

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

February 7, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHELE S. CALDWELL, Appellant.	No. 49877-4-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Michele S. Caldwell, moves for reconsideration of our unpublished opinion issued on January 17, 2018. Contrary to Caldwell's assertion, we did not hold that the written findings amounted to harmless error. Rather, we held that because the trial court addressed each element and because Caldwell raised evidentiary and sentencing issues, the findings were sufficient for this court's review. Therefore, Caldwell's harmless error argument in her motion for reconsideration is unpersuasive.

Next, Caldwell asserts that the findings "hindered Ms. Caldwell's ability to appeal," apparently because she could not raise a sufficiency of the evidence argument. Motion for Recon. at 4. But she could have challenged the findings of fact as written to raise a sufficiency of the evidence argument. It is assumed that a different approach was taken not because of the findings but because a sufficiency of the evidence challenge would have been futile given that the State offered video surveillance of Caldwell depositing the forged check.

Caldwell does not provide persuasive arguments to warrant reconsideration. Therefore, after review of the motion and records herein, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Worswick, Lee, Melnick

J.

Lee, 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. 47136-1-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 Mark McClaine, Pacific County Prosecuting Attorney [mmcclain@co.pacific.wa.us]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 6, 2018

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