IN THE SUPREME COURT OF THE
STATE OF WASHINGTON
Supreme Court No. 1012390
Court of Appeals No. 38003-3-III

STATE OF WASHINGTON,
Respondent
v.
PHILIP NOLAN LESTER,
Petitioner,

AMENDED ANSWER TO PETITION FOR REVIEW

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B. ARGUMENT

The Petitioner has not established any of the circumstances to accept discretionary review under RAP 13.4(b)(3) and (4).

1. THE ADMISSION OF A MEDICAL REPORT FROM A FORENSIC EXAMINATION FROM A NON-TESTIFYING WITNESS DID NOT VIOLATE MR. LESTER'S CONFRONTATION RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

"The Sixth Amendment's Confrontation Clause provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This bedrock procedural guarantee applies to both state and federal prosecutions. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct.1354, 158 L.Ed.2d 177 (2004), citing *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The US Supreme Court in *Crawford* goes on to state that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with

the Framer's design to afford the State's flexibility in their development of hearsay law ...". *Crawford*, 541 U.S. at 68. "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* Stated another way, "[t]he Confrontation Clause bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Crawford*, 541 U.S. at 53-54.

"The Sixth Amendment prohibits the admission of testimonial hearsay statements in a criminal case without an opportunity for cross-examination. *State v Hopkins*, 134 Wash.App. 780, 790, 142 P.3d 1104 (2006) citing *Crawford v. Washington*, 541 U.S. 36, 50-51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "There are three prerequisites before *Crawford*

applies. First, the statements must be offered for the truth of the matter asserted, i.e., for a hearsay purpose." *Hopkins*, 1334 Wash.App. at 790, citing *In re Pers. Restraint of Theders*, 130 Wash.App. 422, 432-33, 123 P.3d 489 (2005). "Second, the statements must be testimonial, and third, the defendant must not have had an opportunity to cross-examine the declarant." *Hopkins*, 1334 Wash.App. at 790-91. While the *Crawford* court did not specifically define testimonial statements, they did identify three examples of statements that are testimonial: "(1) ex parte in-court testimony or its functional equivalent . . . or similar pretrial statements that a declarant would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, ...; and (3) statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 790-97, citing *Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S.Ct.1354, 158 L.Ed.2d 177 (2004).

The Confrontation Clause requires the Court to identify whether statements are testimonial or non-testimonial. *State v. Burke,* 196 Wash.2d 712, 729, 478 P.3d 1096 (2021). The Court must "objectively evaluate the statements and action of the parties to the encounter ...to determine the primary purpose of the statements made..."*Id.* at 729, citing *Michigan v. Bryant*, 562 U.S. 344, 370, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).

Petitioner mistakenly contrasts *Hopkins with State v. Doerflinger*, 170 Wash.App. 650, 285 P.3d 217 (2012). In *Doerflinger*, the victim sustained an injury to his face from an altercation. *Id.* at 654. The emergency room physician suspected a fracture in the nose but was also concerned with other possible injuries that would require more detailed care than a nasal fracture. *Id.* The emergency room physician sent the patient for a computerized tomography (CT) scan. The radiologist reviewed and confirmed a nasal fracture. *Id.* The

Court ultimately found that there was no evidence that the primary purpose of the radiologist was to create an out-of-court substitute for trial testimony and therefore it was non-testimonial and the confrontation clause did not apply to its admission.

"The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.* at 655 (internal quotation omitted). "But not every out-of-court statement used at trial implicates the confrontation clause. The confrontation clause is implicated only by a witness who bears testimony." *Id.* "Testimony, in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* citing *State v. Jasper*, 158 Wash.App. 518, 527, 245 P.3d 228 (2010).

The statements made by this medical provider were his findings and impressions of the victim and not made as a substitute for trial testimony. They likewise were not

inadmissible hearsay because the report was properly admitted as an exception to hearsay rule, as a business record.

Even if admission of this report was error, it was harmless error. "When an error, such as improperly admitted hearsay evidence, deprives the defendant of the right to confrontation, the State must show that the error was harmless beyond a reasonable doubt." *Hopkins*, 1334 Wash.App. at 792, citing *State v. Powell*, 126 Wash.2d 244, 267, 893 P.2d 615 (1995). "An error is harmless beyond a reasonable doubt if untainted evidence properly admitted at trial was so overwhelming that it necessarily leads to a finding of guilty." *Hopkins*, 1334 Wash.App. at 792, citing *State v. Thompson*, 151 Wash.2d 793, 808, 92 P.3d 228 (2004). Witness statements to a medical doctor are not testimonial (1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working

with the State. *State v. Sandoval*, 137 Wash. App. 532, 537, 154 P.3d 271 (2007).

There was sufficient untainted evidence for the jury to rely upon to convict Mr. Lester. Therefore, even if it was error to admit the medical record of the victim, it was harmless error.

2. EVIDENCE ALLEGEDLY COMMENTING ON THE CREDIBILITY OF THE ACCUSER WAS NOT USED TO BOLSTER THE STATE'S CASE, WAS PROPERLY ADMITTED, AND TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO IT.

It is generally improper for a witness to opine on either the defendant's guilt or a victim's credibility because doing so risks intruding upon the jury's constitutionally protected role of factfinder. *State v. Kirkman*, 159 Wash.2d 918, 927, 155 P.3d 125 (2007). This type of claim can be raised for the first time on appeal only if the alleged error is "manifest". *Id.* at 934. Appellate review is waived by a failure to object at trial unless the testimony involved "an explicit or almost explicit" opinion on the defendant's guilt. *Id.* If an opinion is indirect or inferential,

the lack of an objection is fatal on appeal. *Id.* at 921. As a general rule, Appellate Courts do not consider arguments raised for the first time on appeal. RAP 2.5(a). Litigants must generally attempt to remedy any potential error at trial. *State v. O'Hara*, 167 Wash.2d 91, 98, 217 P.3d 756 (2009). If not, a party "could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." *State v. Stoddard*, 192 Wash.App. 222, 227, 366 P.3d 474 (2016).

RAP 2.5(a) contains several exceptions to this general rule. Defendant's may raise an argument for the first time on appeal if, inter alia, he can show "manifest error affecting a constitutional right." RAP 2.5(a). An error is only "manifest" if the defendant can demonstrate "actual prejudice". *State v. Mohamed*, 187 Wash.App. 639, 648-49, 350 P.3d 671 (2015). A defendant can show "actual prejudice" by making a "plausible showing ... that he asserted error had practical and identifiable consequences" at trial. *State v. Gordon*, 172

Wash.2d 671, 676, 260 P.3d 884 (2001) (citations omitted). Only "obvious" errors that cannot be attributed to trial strategy can be first reviewed on appeal. *O'Hara*, 167 Wash.2d at 100; *Kirkman*, 159 Wash.2d at 937.

Courts will not presume actual prejudice simply because the record contains objectionable conduct. See *State v. Yonker*, 133 Wash.App. 627, 634, 137 P.3d 888 (2006) (communication between the bailiff and jury, while improper, was not presumed to be manifest error). An error is likewise not manifest if its prejudicial effect is based on speculation. *State v. Lynn*, 67 Wash.App. 339, 346, 835 P.2d 251 (1992); *State v. St. Peter*, 1 Wash.App.2d 961, 963, 409 P.3d 361 (2018). If a defendant cannot establish a factual basis for his claim in the record, then he cannot show actual prejudice. *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995). The exceptions under RAP 2.5(a) should be narrowly applied, and a claim does not warrant review simply because it is constitutional in nature. *Kirkman*, 159 Wash.2d at 934. A manifest error requires a

record "sufficient to determine the merits of the claim." *O'Hara*, 167 Wash.2d at 99. Courts have generally declined to find actual prejudice when the jury was properly instructed on their exclusive role as factfinder. *State v. Montgomery*, 163 Wash.2d 577, 595, 183 P.3d 267 (2008); *State v. Elmore*, 154 Wash.App. 885, 898, 228 P.3d 760 (2010).

The jury was instructed that they were "the sole judges of the credibility of each witness" and that they are "the sole judges of the value or weight to be given to the testimony of each witness." CP 342.3, p. 3. Jurors are presumed to follow the court's instructions absent evidence to the contrary. *State v. Davenport*, 100 Wash.2d 757, 763-64, 675 P.2d 1213 (1984). There is no evidence presented that the jury was unable to follow the court 's directions. This Court should adhere to the general rule that any prejudice resulting from the alleged opinion was cured by the trial court properly instructing the jury. *Kirkman*, 159 Wash.2d at 937.

In order to establish that his trial attorney was ineffective, a defendant must demonstrate both (1) that counsel performed deficiently, and (2) that the deficient performance resulted in prejudice. *State v. Cienfuegos*, 144 Wash.2d 222, 226, 25 P.3d 1011 (2011). Both prongs of the test must be satisfied or the ineffectiveness claim fails. *Matter of Hopper*, 4 Wash.App. 2d 838, 844, 424 P.3d 228 (2018). Appellate Courts review ineffective assistance of counsel claims de novo. *State v. Wafford*, 199 Wash.App. 32, 41, 397 P.3d 926 (2017).

The defendant has the burden of showing that their attorney's conduct fell "below an objective standard of reasonableness." *State v. Grier*, 171 Wash.2d 17, 33, 246 P.3d 1260 (2011). An attorney's performance is presumed effective, and this presumption is overcome only if counsel's actions cannot be explained by any conceivable legitimate strategy. *State v. Aho*, 137 Wash.2d 736, 745-46, 975 P.2d 512 (1999). A defense attorney's performance is also not deficient simply because the reviewing court does not believe the strategy

employed was ideal. *State v. Carson*, 184 Wash.2d 207, 220, 357 P.3d 1064 (2015). An alleged deficiency is not considered in isolation, but rather within its surrounding context. See *State v. McFarland*, 127 Wash.2d at 335 ("Competency of counsel is determined based upon the entire record below."). Thus, the court must accordingly consider counsel's contemporaneous perspective, and should not find an attorney deficient based on the benefit of hindsight. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). A defendant must show that the errors made were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *State v Fortum-Cebaba*, 158 Wash.App. 158, 167, 241 P.3d 800 (2010) (quoting *Strickland*, 466 U.S. at 687). An attorney is not deficient for declining to object when the complained-of evidence was not objectionable. *State v. Johnson,* 113 Wash.App. 482, 493, 54 P.3d 155 (2002).

"Only in egregious circumstances, on testimony central

to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Neidigh*, 78 Wash.App 71, 77, 895 P.2d 423 (1995) (quoting *State v. Madison*, 53 Wash.App. 754, 763, 770 P.2d 662 (1989)).

Additionally, conduct that "can be characterized as legitimate trial strategy or tactics" is not considered deficient performance. *State v. Dow*, 162 Wash.App. 324, 335, 253 P.3d 476 (2011); *State v. Carson*, 184 Wash.2d 207, 220-21, 357 P.3d 1064 (2015).

Washington Courts recognize that withholding an objection to avoid emphasizing inadmissible evidence is a legitimate trial tactic. *State v. McLean*, 178 Wash.App. 236, 247-48, 313 P.3d1181 (2013); *State v. Kloepper*, 179 Wash.App. 343, 355, 317 P.3d 1088 (2014).

A defendant is prejudiced by his attorney's deficient performance if he can show a reasonable probability that the outcome of the proceeding would have been different but-for his counsel 's unprofessional errors. *Grier*, 171 Wash.2d at 34.

A reasonable probability is one that is "sufficient to undermine confidence in the outcome." *Id.* at 33. If the trial record does not demonstrate the likelihood of a more favorable result absent the error, the ineffectiveness claim fails. *State v. Fedoruk*, 184 Wash.App. 866, 884, 339 P.3d 233 (2014).

In *State v. Kirkman*, the court held that the testimony provided by the Doctor did not comment directly or indirectly on the defendant's guilt or innocence, but the doctor "actually testified that his findings neither corroborated nor undercut" the victim's account of being sexually abused. 159 Wash.2d at 930. The *Kirkman* case involved a Doctor who testified that "the victim gave 'a very clear history' with 'lots of details' and 'a clear and consistent history of sexual touching...with appropriate affect' and that '[t]he physical examination doesn't really lead us one way or the other, but I thought her history was clear and consistent." *Id.* at 131-32. Just like in the case at hand, in which the medical records indicate that "history is quite convincing - exam is normal but that does not rule out

any abuse ...", there is no comment on the defendant's guilt and no vouching for the victim, the medical records actually are inconclusive of any abuse.

There is no prejudice shown to the defendant in their admission and any error would have been cured by the proper instruction provided to the jury in that they are the "sole judges of credibility of each witness." CP 342.3, p. 3. To further support that there was no prejudice to Mr. Lester, trial counsel used the inconclusive nature of the medical reports in his closing to support their theory that no abuse occurred. RP 490.

When addressing the statements contained in the defendant 's recorded interview, these statements were not objected to by trial counsel and are therefore not available for review. However, even if the comments were available for review, defense counsel had a strategic reason for not objecting to the entry of these statements. In fact, defense counsel during

his closing arguments uses the fact that the detective lied to the defendant to get him to confess, yet he still would not confess. RP 499.

3. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT REQUESTING A "SEPARATE AND DISTINCT ACTS" INSTRUCTION.

"The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution protect a defendant against multiple punishments for the same offense." *State v. Sanford*, 15 Wash.App.2d 748, 752, 477 P.3d 72 (2020), citing *State v. Mutch*, 171 Wash.2d 646, 661, 254 P.3d 803 (2011). Double jeopardy issues are questions of law that are reviewed de novo. *State v. Hughes*, 166 Wash.2d 675, 681, 212 P.3d 558 (2009). The double jeopardy clauses of the Washington State and United States Federal Constitutions protect a defendant from multiple prosecutions and multiple punishments for the same offense. *Whalen v. United States,* 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *State v.*

Vladovic, 99 Wash.2d 413, 423, 662 P.2d 853 (1983). However, the double jeopardy clause does not prohibit separate punishment for different offenses. In *re Pers. Restraint of Fletcher*, 113 Wash.2d 42, 46-47, 776 P.2d 114 (1989). Therefore, offenses committed during a single incident are not necessarily the same offense. *Vladovic*, 99 Wash.2d at 423.

"Double jeopardy is not implicated when the defendant is charged with both child rape and child molestation based only on evidence of penetration because in that situation rape and molestation are separate offenses." *Sanford*, 15 Wash.App.2d at 753, citing *State v. Land*, 172 Wash.App. 593, 600, 295 P.3d 782 (2013). "The touching of sexual parts for sexual gratification constitutes molestation up until the point of actual penetration; at that point, the act of penetration alone, regardless of motivation, supports a separately punishable conviction for child rape." *Id.*

In this case, we have separate and distinct acts that support each offense separately. A.B. testified that "Junior

sticked (sic) his thing in my mouth . . .". RP 286. She also testified that Mr. Lester had touched her private parts, and then explained that he touched her vagina by licking it. RP 288.

During Detective Behymer's testimony, the recorded interview of A.B. was played. In the interview A.B. specifically states that Mr. Lester put his penis in her mouth and that he "licked her butt". RP 341-345. She further goes on to disclose that Mr. Lester had "[p]ut his pee pee in my butt." RP 348

Based on her disclosures to Detective Behymer, taken in conjunction with her testimony during trial, it is clear that we have child molestation which includes "sexual contact" between A.B. and Mr. Lester, as well as penetration by Mr. Lester, which supports the rape of the child charge.

"Two offenses are considered to be the 'same offense' for double jeopardy purposes if the offenses are the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not

necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses." *State v. Jones*, 71 Wash.App. 798, 824-25, 863 P.2d 85 (1993), rev. denied, 124 Wash.2d 1018, 863 P.2d 85 (1994), citing In *re Pers. Restraint of Fletcher*, 113 Wash.2d 42, 47, 776 P.2d 114.

Child molestation is not the "same offense" as rape of a child for purposes of double jeopardy. *Jones*, 71 Wash.App. at 825. This is because "molestation requires that the offender act for purposes of sexual gratification, an element not included in the first degree rape of a child, and first degree rape of a child requires that penetration or oral/genital contact occur, an element not required in child molestation. Each offense requires the State to prove an element that the other does not, and therefore the offenses are not the 'same offense' for double jeopardy purposes." *Id.*

Our case involves not only touching for sexual gratification, but penetration by Mr. Lester against A.B.,

therefore, we have two separate and distinct crimes for which the jury could convict. Even if this Court found that there was a possibility that the jury could convict the defendant of both child rape and child molestation based on the same act and that the trial court was remiss in not providing the separate and distinct jury instruction, such a failure does not necessarily mean that multiple convictions violate double jeopardy. *Sanford*, 15 Wash.App.2d at 753, citing *State v. Land*, 172 Wash.App. 593, 603, 295 P.3d 782 (2013). "The failure to give such an instruction does not necessarily mean that multiple convictions violate double jeopardy." *Sanford*, 15 Wash.App.2d at 753, citing *State v. Mutch*, 171 Wash.2d 646, 663, 254 P.3d 803 (2011). But the failure to give such an instruction does create the potential risk that the defendant did receive multiple punishments for the same offense. *Id.*

To decide if flawed jury instruction did result in a double jeopardy violation, the appellate court must review the entire trial record. *Sanford*, 15 Wash.App.2d at 754, citing *State v.*

Mutch, 171 Wash.2d 646, 664, 254 P.3d 803 (2011). The reviewing court will only find that there was a violation if after "[c]onsidering the evidence, arguments, and instructions, if it is not clear that it was 'manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act." *Sanford*, 15 Wash.App.2d at 754, citing *State v. Mutch*, 171 Wash.2d 646, 664, 254 P.3d 803 (2011).

4. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THE CRIMES AS A MATTER OF LAW WHEN THE STATE CHARGED A RANGE OF DATES IN WHICH MR. LESTER COMMITTED THE ACTS.

"Evidence is sufficient to support a conviction, if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The reviewing court must defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. Thus, 'all reasonable inferences from the

evidence must be drawn in favor of the State and interpreted most strongly against the defendant.' " *State v. Hayes*, 81 Wash.App. 425, 430, 914 P.2d 788 (1996).

Time is not an element of the crime of rape of a child. *Id.* at 433. Specifics regarding date, time, place, and circumstances are factors regarding credibility and are not necessary elements to sustain a conviction. *Id.* at 437. Instead, the evidence need only be specific as to the type of act committed, the number of acts committed, and the general time period. *Id.* It is up to the trier of fact to determine whether the testimony of the alleged victim is credible on these basic points. *Id.* at 435. Where time is not a material element of the charged crime, the language "on or about" is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi. *Id.* at 432.

5. THE SENTENCING COURT DID NOT IMPROPERLY CONSIDER THE EFFECTS OF TESTIFYING ON THE VICTIM IN IMPOSING A SENTENCE ON MR. LESTER.

"As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate review, so long as the punishment falls within the correct standard sentencing range established by the Sentencing Reform act of 1981." *State v. Williams*, 149 Wash.2d 143, 146, 65 P.3d 1214 (2003). The Sentencing reform Act itself states, "[a] sentence within the standard range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed." RCW 9.94A.585. The Court may impose any sentence it deems appropriate within the standard range. *State v. Mail*, 121 Wash.2d 707, 710, 854 P.2d 1042 (1993). "This precept arises from the notion that, so long as the sentence falls within the proper presumptive sentencing range set by the legislature, there can be no abuse of discretion as a matter of law as the sentence's length." *Williams*, 149 Wash.2d at 146-47. "According wide latitude to the sentencing judge comports with the view that the punishment should fit the offender and not

merely the crime." *State v. Herzog*, 112 Wash.2d 419, 424, 721 P.2d 739 (1989) (internal quotations and citations omitted).

Even a standard-range sentence, if imposed merely to punish a defendant for exercising his right to a jury trial, would violate due process. *State v. Sandefer*, 79 Wash.App. 178, 181, 900 P.2d 1132 (1995). Due process is not implicated merely because a judge comments on a defendant's choice to exercise his right to trial. See United *States v. Carter*, 804 F.2d 508 (9th Cir. 1986); *State v. Sandefer*, 79 Wash.App. 178. "While a judge may not sentence vindictively or punitively, he may have a legitimate reason for sentencing defendant more severely. The Court may properly consider the details, flavor and impact upon victims of the offense as presented at trial." *United States v. Carter*, 804 F.2d at 514. See also *United States v. Hull*, 792 F.2d 941, 943 (9th Cir. 1986) (court could deny probation because defendant did not express remorse); *United States v. Malquist*, 791 F.2d 1399, 1402-03 (9th Cir. 1989) (court could include defendant's lack of repentance in sentencing calculus).

The sentencing court does make mention of the toll that the trial has taken on the victim, but he does so in response to the continued denial of responsibility expressed by the defendant and defense counsel in regards to the charge and findings of guilt. The court did not improperly impose a sentence on the defendant and did not act punitively to the defendant for exercising his right to confront his accuser and go to trial.

C. CONCLUSION

For the foregoing reasons above the State respectfully requests that the Petition for Review be DENIED.

Dated this 5th day of October 2022

This document contains 4120 words, exclusive of the parts of the document exempted from the word count by RAP 18.17

Respectfully Submitted by:

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COURT OF APPEALS
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STATE OF WASHINGTON Plaintiff/Respondent, v. PHILIP NOLAN LESTER, Defendant/Appellant.	SUPREME Court No. 1012390 COA No. 38003-3 CERTIFICATE OF SERVICE

I, Christa Levine, do hereby certify under penalty of perjury that on the 5th day of October, 2022, I caused the original AMENDED ANSWER TO PETITION FOR REVIEW to be filed in the Court of Appeals Division III and a true copy of the same to be served on the following in the manner indicated below:

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