Supreme Court No. 102402-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NATHAN SMITH,
Respondent,

v.

STATE OF WASHINGTON,
Petitioner.

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

ANSWER TO STATE'S PETITION FOR REVIEW

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A. INTRODUCTION

Nathan Smith "simply asks for a jury made up of individuals who are able to follow the court's instructions and to afford him the constitutional protections to which is entitled." Slip op. at 10. Because Juror 27's answers showed she could not hold the State to its burden of proof and was unable to follow the presumption of innocence, the Court of Appeals properly applied well-settled law in concluding Juror 27 was biased and holding the trial court erred in denying Mr. Smith's motion to strike her for cause. And because Mr. Smith exhausted all his peremptory challenges and was convicted by a jury with a seated biased juror, the Court of Appeals correctly reversed Mr. Smith's conviction and remanded for a new trial.

The State distorts the issues and misrepresents the opinion's holding in its attempt to concoct grounds for review where none exist. The opinion follows established law, does not conflict with cases from this Court or the Court of Appeals, and presents no novel issues. This Court should deny review.

B. IDENTITY OF RESPONDENT

Mr. Smith, appellant below and respondent here, asks this Court to deny the State's petition seeking review of the Court of Appeals decision, dated August 21, 2023.

C. DECISION BELOW

In voir dire, Juror 27 expressed concerns about her ability to deliberate because she was "not a confrontational person." Slip op. at 7. She said she may change her vote to "agree with everyone" if she was "on the fence" about the State's proof, even if she was not convinced. *Id.* She agreed she may go along with "whatever the rest of the group thinks, even if [she] personally didn't feel that way." *Id.* She admitted she would hold to her beliefs only if she was "100 percent very confident." *Id.*

Juror 27 also said she thought someone who did not testify was "slightly more likely" guilty than someone who did. Slip op. at 7. When the court explained the constitutional right to remain silent, she remained confused and questioned that a

person not testifying "would not make me think he is more guilty." *Id.* at 8. Rather than agree to the presumption of innocence, she told the parties she would view a defendant not testifying as "neutral." *Id.*

Although Mr. Smith moved to strike Juror 27 for cause, the court denied the motion. *Id.* at 2. He exhausted all of his peremptory challenges, and Juror 27 sat on Mr. Smith's jury. *Id.*

The Court of Appeals reversed. *Id.* at 1-14. Applying longstanding rules of law, it ruled Juror 27 demonstrated actual bias because she was unable to commit to applying the presumption of innocence. *Id.* at 8-10. The court also agreed Juror 27 was unable to understand or follow the burden of proof. *Id.*

The Court of Appeals held "the trial court manifestly abused its discretion in denying Smith's motion to strike juror 27 for cause." *Id.* at 13. The court recognized Mr. Smith preserved the claim by moving to strike Juror 27 and

exhausting all his peremptory challenges. *Id.* at 2-6. Because this biased juror sat on Mr. Smith's jury, the Court of Appeals reversed and remanded for a new trial. *Id.* at 14.

D. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals properly apply well-settled caselaw when it held the trial court wrongly denied Mr. Smith's challenge for cause because a juror who cannot agree to hold the State to its burden of proof beyond a reasonable doubt and cannot commit to applying the presumption of innocence demonstrates a probability of bias?

2. Did the Court of Appeals properly apply well-settled caselaw when it held a trial court errs and denies a defendant a fair trial when it refuses a defendant's motion to strike a biased juror for cause, the defense exhausts all of its peremptory challenges, and the biased juror sits on the jury?

3. If this Court grants the State's petition for review, should it also grant review of Mr. Smith's challenges to the

court's *Petrich*[1] instruction, given over Mr. Smith's objection and against the prosecutor's wishes, and additional language in the to-convict instruction because the instructions presupposed Mr. Smith committed the offense more than once on multiple dates, resolved a factual issue, and constituted judicial comments on the evidence?

E. STATEMENT OF THE CASE

The State charged Mr. Smith with a single count of rape of a child in the first degree for an alleged assault of Hayden when he was four or five years old. CP 78. During voir dire, three potential jurors expressed bias. Juror 6 could not commit to being fair and impartial. RP 122, 227-33; Br. of Appellant, App. 6 (BOA, App.). Juror 10 disagreed with the presumption of innocence and felt "very strongly" that an innocent person would testify. RP 361-62, 371-72.

Juror 27 was unable to follow the presumption of innocence. RP 249-51. She agreed that a person who did not

[1] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

testify was more likely guilty and said an innocent person would testify. RP 391-93. She was also unable to commit to being fair and impartial. RP 246-52. Finally, Juror 27 expressed concern about her ability to deliberate and demonstrated she could not hold the State to its burden of proof. She explained she would be unduly swayed by other jurors if she was "on the fence" because she was "not a confrontational person." RP 251. She admitted she may "change [her] vote to whatever the rest of the group thinks" to just "agree with everyone" even if she "personally didn't feel that way." RP 251.

Mr. Smith moved to strike all three jurors for cause. RP 233, 252, 327-31, 374. The court denied the motion as to each juror. RP 245, 327-31, 374-75, 453. Mr. Smith exercised peremptory challenges for Jurors 6 and 10 but ran out of challenges. RP 467-68. Having exhausted his peremptory

challenges, Juror 27 sat on the jury.[2] RP 466-67, 472. The jury convicted Mr. Smith. CP 61; RP 769-72. The court sentenced him to life in prison with the possibility of release after 108 months. CP 14; RP 791.

The Court of Appeals held the trial court manifestly abused its discretion when it denied Mr. Smith's for-cause challenge to Juror 27. Slip op. at 2, 13. It ruled Juror 27 "repeatedly demonstrated a probability" that she could not follow the court's instructions on the presumption of innocence or the burden of proof. *Id.* at 13. The court recognized Mr. Smith was unable to strike Juror 27 because he exhausted his peremptory challenges. Slip op. at 2-6. And it held the sitting of this biased juror on Mr. Smith's jury prejudiced him and required the court to reverse and remand for a new trial. Slip op. at 1-14.

[2] The court granted each side six peremptory challenges, plus one for the alternate. RP 14, 340. Mr. Smith exercised all seven peremptory challenges, striking Jurors 2, 6, 8, 10, 15, 17, 32. RP 464-71.

F. ARGUMENT

This Court should deny the State's petition for review. The Court of Appeals properly applied well-settled law to the facts of Mr. Smith's case. The State does not satisfy any of the RAP 13.4(b) criteria for review. However, if this Court grants review, Mr. Smith requests it grant review of his challenges to the *Petrich* and to-convict instructions as well.

1. The Court of Appeals properly ruled the trial court erred when it denied Mr. Smith's challenge for cause, he exhausted all his peremptory challenges, and a biased juror sat on his jury.

a. The State distorts Mr. Smith's arguments and misrepresents the opinion's holding by baselessly claiming he argued for and the Court of Appeals found a person has a constitutional right to an obstinate juror.

As it did in its briefing and argument in the Court of Appeals, in its petition the State misrepresents the relevant inquiry by distorting the issues. Mr. Smith did not challenge biased Juror 27 based on a claimed right to an obstinate juror, nor did the Court of Appeals apply any such logic. Instead, the questions at issue in Mr. Smith's appeal are: is Mr. Smith

entitled to an unbiased jury; is a juror who demonstrates a probability that they cannot hold the State to its burden of proof and will not follow the presumption of innocence biased; and did the trial err when it denied Mr. Smith's for-cause challenge, Mr. Smith exhausted his peremptory challenges, and a biased juror sat on his jury. The answer to these questions is yes.

The Court of Appeals applied well-settled law in recognizing that a juror who cannot follow the presumption of innocence or the burden of proof is actually biased and followed this Court's precedent in reversing and remanding for a new trial where Mr. Smith moved to strike the juror for cause, exhausted his peremptory challenges, and was forced to proceed to trial with a biased juror seated on his jury.

The State twists the Court of Appeals opinion to devise a confusing, three-part issue statement, which is predicated on a false factual premise. PFR at 1-3, 17-18. All of the State's manufactured issues derive from the State's incorrect proposition that Mr. Smith argued for and the Court of Appeals

established a new constitutional right: the right to an obstinate juror. The State then asks this Court to accept review to determine "the constitutionally requisite degree of … obstinacy" and to parse out when the purportedly required level of obstinacy is lacking. PFR at 1-3.

The Court of Appeals did not create a right to an "obstinate" or a "hold out" juror. Therefore, there is no need to explore the contours of such a right. Because Juror 27 "was unable to commit to applying the presumption of innocence" and either "did not understand … or was unable to follow" a juror's obligation to hold the State to its burden of proof beyond a reasonable doubt, the Court of Appeals correctly concluded Juror 27 was actually biased. Slip op. at 8. This Court should disregard the State's misrepresentation of the issues and reject the State's petition.

b. The Court of Appeals correctly ruled Juror 27 presented a probability of bias where her answers demonstrated she could not hold the State to its burden of proof or follow the presumption of innocence.

Juror 27 exhibited the probability of actual bias in her answers that demonstrated she could not participate fully in deliberations, could not hold the State to its burden of proof, and could not commit to follow the presumption of innocence. RP 246-52, 327-31, 391-93.

The opinion presents a straightforward application of this Court's well-establish precedent that where a potential juror demonstrates "'a probability of actual bias,'" the court must grant a motion to dismiss for cause. Slip op. at 2-4 (explaining standard and quoting *State v. Noltie*, 116 Wn.2d 831, 838-39, 809 P.2d 190 (1991)). The opinion also recognized that mere equivocation is insufficient. Slip op at 3-4 (citing *Noltie*). Finally, the opinion followed this Court's holdings that where jurors espouse views that "would 'prevent or substantially impair the performance of [their] duties as [jurors] in

accordance with [their] instructions and [their] oath,'" they should be dismissed for cause. Slip op. at 3 (quoting *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995) (alternations in slip op.).

The State's argument that the opinion conflicts *Noltie* is wrong.[3] PFR at 16-18, 21-22, 28-29. To the contrary, the opinion cites and follows *Noltie*. The Court of Appeals also agreed trial courts are "'in the best position to determine a juror's ability to be fair and impartial.'" Slip op. at 2-3 (quoting *Noltie*, 116 Wn.2d at 839). It acknowledged appellate courts must "'uphold a trial court's decision so long as it falls within the broad range of reasonable decisions.'" Slip op. at 3 (quoting *Noltie*, 116 Wn.2d at 839).

The opinion applied *Noltie*'s "probability of actual bias" requirement and afforded the trial court the appropriate

[3] The State argues the opinion conflicts with *Noltie* and *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 425 P.3d 807 (2018). However, all of these State's references to *Sassen Van Elsloo* are repeating quotes from *Noltie*.

deference. But it refused to treat *Noltie* as mandating deference to a degree that nullifies appellate review. Slip op. at 13 ("[W]hile we agree that our standard of review is deferential to the trial judge, we will not accept the dissent's invitation to apply this deference as 'a rubber stamp.'" (quoting *State v. Gonzales*, 111 Wn. App. 276, 281, 45 P.3d 205 (2002)). This does not establish a conflict.

Similarly, the opinion does not conflict with *Gonzales* or *State v. Irby*, 187 Wn. App. 183, 347 P.3d 1103 (2015). PFR at 18, 23-27. Importantly, the State fails to mention that *Irby* addressed a trial court's independent duty to excuse a juror as biased in the absence of any motion from a party. *Irby*, 187 Wn. App. at 193. The State pretends the Court of Appeals faulted the trial court for not independently recognizing Juror 27's bias and sua sponte dismissing her. PFR at 15.

Although RCW 2.36.110 imposes on the trial court a duty to excuse unfit jurors, this case does not involve the trial court's duties to independently intervene, as in *Irby*. The Court

of Appeals recognized that Mr. Smith moved to strike Juror 27 for cause and held that the trial court erred in denying the strike because her answers demonstrated a probability of actual bias under RCW 4.44.170(2). Slip op at 2, 4-5, 13.

Moreover, like the statements in *Gonzales* and *Irby*, Juror 27's statements here reflected a likelihood of actual bias when "her full statements, not just certain words from separate sentences" are viewed "in the context they were given." Slip op. at 11. Juror 27's statements show her admitted susceptibility to adopting other jurors' opinions even if she was inclined to vote differently. She said she would hold steadfast in her beliefs and not change her vote despite it being different than other jurors only if she were "100 percent confident." Slip op. at 7-8, 11-12. But if she was not "100 percent confident" or she was "on the fence," she recognized she was likely to follow the opinions of others.

Rather than conflict with prior caselaw, the Court of Appeals simply applied these cases' enduring principles to the

particular facts of Mr. Smith's case. It properly recognized that Juror 27 did not present equivocation or the mere possibility of bias but rather the probability of bias. Slip op. at 3-4. The court carefully reviewed the record and accurately concluded "juror 27 repeatedly demonstrated a probability that she could not apply the presumption of innocence or follow the court's instructions." Slip op. at 13. The Court of Appeals properly held "juror 27's statements collectively … reflect[] a probability of actual bias." Slip op. at 12. The opinion applies the appropriate standard of a probability of actual bias, not a mere possibility of bias, contrary to the State's argument.

The Court of Appeals properly concluded Juror 27's answer demonstrated she could not hold the State to its burden of proof. Slip op. at 8-13. Juror 27 stated she would only maintain her belief and not change her vote to go along with the group "'[i]f [she] was 100 percent confident.'" Slip op. at 11 (quoting RP 251). As the opinion recognized, "In contrast, if she 'was like, I believe this evidence, or whatever, but I am

kind of like, on the fence, then I may agree with everyone.'"

Slip op. at 12 (quoting RP 251).

As the Court of Appeals rightly explained:

> [B]eing "on the fence" directly implicates proof beyond a reasonable doubt—if a juror is on the fence, the State has necessarily failed to satisfy its burden to prove the elements beyond a reasonable doubt. Simply "agree[ing] with everyone" when "on the fence," meaning that the State has failed to meet its burden, contradicts the unequivocal instructions on the law and the deliberation process. This was a clear statement that juror 27 either did not understand her obligations under the law or was unable to follow them; possible both.

Slip op. at 8 (footnote omitted).

The Court of Appeals also properly concluded Juror 27's answers showed she could not follow the presumption of innocence. Juror 27 expressed initial misgivings when she said, "'[I]nnocent until proven guilty. It is just hard when it is a child.'" Slip op. at 6 (quoting RP 250). She said, "I think I can" presume innocence and agreed to "'try my best.'" Slip op. at 6-7 (quoting RP 250).

But when questioned further, Juror 27 agreed that if Mr. Smith did not testify, it would "'point in favor of guilty'" because she believed an innocent person would "'want to go up and tell your story about what happened.'" Slip op. at 7 (quoting RP 392). Even when the court interjected to explain the constitutional right not to testify, Juror 27 maintained her position. RP 392-93. She asked, "[I]t is neutral is that how I am supposed to look at it?" RP 393. She stated, "'So that would put it at neutral, like him not testifying would not make me think he is more guilty.'" Slip op. at 8 (quoting RP 393).

As the Court of Appeals adeptly stated, "There is nothing neutral about the presumption of innocence." Slip op. at 10. Considering Juror 27's statements as a whole, the opinion properly concluded Juror 27 could not commit to follow the presumption of innocence, and "Even after correction from the trial court, juror 27 did not understand her duty as a juror and demonstrated an inability to serve as the law requires." Slip op. at 10.

The Court of Appeals applied the law to Juror 27's "full statements, not just certain words from separate sentences, in the context they were given." Slip op. at 11. The State, however, isolates Juror 27's different responses and parses individual words within her answers. PFR at 27-29. It is only by fracturing her answers and plucking words out of context that the State is able to construct a theory of review.

c. This Court's review is not warranted because the Court of Appeals correctly applied well-settled law to the facts of Mr. Smith's case.

The Court of Appeals decision adheres to soundly grounded precedent. The Court of Appeals did not announce any new rule or create a new constitutional right. It simply applied longstanding, well-settled law to the particular facts of Mr. Smith's case. This Court should deny review.

2. If this Court grants the State's petition for review, it should also review Mr. Smith's challenges to the *Petrich* instruction, which the trial court erroneously delivered against the wishes of both parties, and the to-convict instruction because the instructions unconstitutionally commented on the evidence.

Before trial, the prosecution proposed jury instructions that included a *Petrich* instruction because it "was not clear" if Hayden would testify the incident occurred on more than one date. RP 708; CP 204. However, after the presentation of the evidence, the State withdrew its request for a *Petrich* instruction. RP 708-09. The prosecutor explained the evidence "made it clear this was something occurring on one date." RP 708.

In addition to not being warranted based on the evidence, the prosecution opposed a *Petrich* instruction because:

> I also am worried it could cause confusion to the jury if [the] only actual testimony about this at trial indicated this is something that occurred on one date. And certainly the State's arguments to the jury in closing would be arguing for the existence of this occurring on one date, rather than multiple dates.

RP 709. Therefore, the prosecution withdrew the request for the multiple acts instruction. Mr. Smith objected to a *Petrich* instruction as well. RP 709-10.

Although neither side requested the instruction and Mr. Smith objected to it, the court nevertheless delivered a *Petrich* instruction. CP 74 (No. 9). The court found it "prudent" to give the instruction in case the jurors believed the dates or number of times the acts occurred was "not consistent." RP 716. Mr. Smith maintained his objection. RP 709, 715-16, 725-26.

The court also changed the language of the first element of the to-convict instruction after the parties reviewed it. RP 725-26; CP 71 (No. 6). Instead of stating the jury must find the crime occurred "from on or about March 1, 2018 to on or about August 31, 2018," the court told the jury it must find the crime occurred "*on one or more date(s)* from on or about March 1,

2018 to on or about November 26, 2018."[4] *Compare* CP 201 (proposed to-convict), *with* CP 71 (to-convict given to jury).

If this Court grants review of the State's petition, it should also review Mr. Smith's challenge to these improper instructions. The court's *Petrich* instruction and additional language in the to-convict instruction presupposed Mr. Smith committed the offense more than once on multiple dates, contrary to the evidence at trial. The erroneous to-convict and improper *Petrich* instructions confused the evidence and constituted an impermissible comment on the evidence. The Court of Appeals opinion rejecting Mr. Smith's challenges conflicts with *Petrich* itself, as well as cases applying it, and violates the constitutional prohibition against judicial comments on the evidence, meriting this Court's review. RAP 13.4(b)(1)-(4).

[4] The date range changed after the prosecution filed an amended information to conform to the evidence presented at trial. CP 78, 190; RP 701.

The prosecution charged Mr. Smith with a single count of child rape. CP 78. It presented evidence of a single occurrence of child rape, occurring on a single day during a period when the prosecution alleged Mr. Smith was babysitting Hayden. RP 548-50, 574, 597-98. The evidence at trial "made it clear this was something occurring on one date" as part of "one course of conduct." RP 708 (quoting trial prosecutor).

The prosecution withdrew its preliminary request for a *Petrich* instruction because the evidence "made it clear this was something occurring on one date." RP 708-09. The prosecution opposed the instruction because the "only actual testimony about this at trial indicated this is something that occurred on one date," and it was worried including a *Petrich* instruction would "cause confusion to the jury." RP 709. The prosecution also committed to arguing "for the existence of this occurring on one date, rather than multiple dates." RP 709. Mr. Smith objected to the instruction for these same reasons. RP 709-10, 715-16, 725-26.

Despite the absence of evidence or argument of multiple acts on multiple dates, and over Mr. Smith's objection, the court instructed the jury: "The State alleges that the defendant committed acts of first degree rape of a child *on multiple occasions*." CP 74 (emphasis added). It also told the jury it need not be unanimous on "all the acts," even though the evidence did not support multiple acts occurring on multiple dates. CP 74. The court also altered the to-convict instruction to inform the jurors the allegations concerned "one or more date(s)," again contrary to the evidence and the prosecution's argument. CP 71.

A *Petrich* instruction does not apply to instances involving continuing acts or a continuing course of conduct. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Repeated sexual acts occurring within a brief period of time in the same location with the same victim are "plainly a continuing course of conduct," and a unanimity instruction is not appropriate. *State v. Lee*, 12 Wn. App. 2d 378, 397, 460

P.3d 701 (2020). As the trial prosecution argued, and the evidence clearly established at trial, the allegations all occurred during a single incident during a short time span on one day, which made them a continuing course of conduct.

Hayden testified Mr. Smith assaulted him on a single day during a period of time when his mother and sister went to the store. RP 548-50. His mother testified Hayden told her the incident happened while she and her daughter were at the store, supporting Hayden's testimony of a single incident. RP 574, 597-98. All the evidence established a single incident on a single date, not multiple instances on multiple dates.

The prosecution also clearly informed the jury it was relying on a single occurrence. RP 708-09, 729-31, 755-56. In rebuttal, the prosecution highlighted Hayden's consistency in claiming this happened on only a single day. RP 755-56. "*Hayden has not been inconsistent or ever suggested this happened on multiple days.* He suggested it happened on multiple times." RP 756 (emphasis added). "He told us here in

trial this is something that happened multiple times, *but on one day*." RP 756 (emphasis added). Thus, consistent with the evidence and its closing argument, in rebuttal the prosecution reaffirmed this was a single continuing act and its election that this occurred in a single incident on one day. It also emphasized that Hayden had always claimed it occurred in a single incident.

The court erred in giving a *Petrich* instruction over Ms. Smith's objections and against the prosecution's wishes. The *Petrich* instruction and the erroneous to-conviction instruction telling the jury the State alleged the offense occurred on multiple occasions and on multiple dates constituted an impermissible comment on the evidence, created confusion for the jury, and improperly addressed factual issues.

The Court of Appeals rejected Mr. Smith's challenge to the *Petrich* instruction by circularly reasoning that multiple distinct acts require *Petrich* instruction to preserve jury unanimity. Slip op. at 14-18. This misses the gravamen of Mr.

Smith's argument—the State did *not* accuse Mr. Smith of multiple distinct acts on multiple different dates nor did the evidence demonstrate multiple distinct acts on multiple different dates. The evidence was clear—and the State argued—the incident occurred on a single date as part of a continuing course of conduct. To give the *Petrich* instruction without evidence of multiple distinct acts on multiple different dates and in the face of a clear election conflicts with the reasoning of *Petrich* and this Court's cases applying it. *See State v. Carson*, 184 Wn.2d 207, 219, 357 P.3d 1064 (2015) (objecting to Petrich instruction not deficient performance because instruction did not apply to facts of case).

The opinion also rejected Mr. Smith's challenge to the court's sua sponte change to the to-convict instruction. Slip op. at 18-19. It did so by narrowly construing comments on the evidence as pertaining to only the definitive resolution of a factual dispute. Slip op. at 19. But the interpretation of the evidence and determination of if, when, and how the sexual act

occurred were ultimately issues of fact for the jury to decide. The court's instructions telling the jury that the prosecution alleged Mr. Smith committed the acts of rape "on multiple occasions" and "on one or more date(s)" told the jury how to interpret the evidence against Mr. Smith. CP 71, 74. It settled a fact that was for the jury to decide. The instructions also suggested to the jury evidence of additional misconduct, occurring on more than one date, existed that they did not hear.

Where an instruction "had the effect of focusing the attention of the jury" on a particular issue, the instruction is an impermissible comment on the evidence. *In re Det. of R.W.*, 98 Wn. App. 140, 143, 988 P.2d 1034 (1999); *see also State v. Koontz*, 145 Wn.2d 650, 657, 41 P.3d 475 (2002) (courts must apply protections against undue emphasis of certain evidence). That is what occurred here.

The evidence did not support the altered to-convict and *Petrich* instructions. No one requested these instructions, and Mr. Smith objected to the *Petrich* instruction. The unwarranted

instructions created confusion for the jury, emphasized a particular issue, and suggested to the jury evidence of additional misconduct, occurring on more than one date, existed that they did not hear. The court should have adopted the prosecution's narrowing of its evidence and respected, not undermined, the evidence presented and the prosecution's clear election. If the Court grants the State's petition, it should accept review of the erroneous *Petrich* and to-convict instructions as well.

G. CONCLUSION

The State's petition meets none of the criteria under RAP 13.4(b). This Court should deny review.

In compliance with RAP 18.17(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 4,712 words.

DATED this 18th day of October, 2023.

Respectfully submitted,

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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 of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 102402-9**, 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:

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Date: October 18, 2023

WASHINGTON APPELLATE PROJECT

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