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No. 102580-7
Court of Appeals No. 38830-1-III

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON STRANDBERG-BIGGS,

Petitioner.

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

Petition for Review

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A. Introduction

Because it criminalized "innocent passivity" *Blake* found the former drug possession statute unconstitutional. In doing so, *Blake* recognized and sought to ameliorate the numerous and significant consequences which flowed from the criminalization of this passive non conduct.

But *Blake's* promise has been artificially hampered. Courts across the State continue to burden people with unlawful convictions arising in the course of prosecutions for the passive nonconduct of drug possession. Thus, despite *Blake* people face prosecution and remain burdened with convictions, and all the attendant consequences, based on the initial and unlawful prosecution for that nonexistent crime of possession.

In order to fully address the harms caused by the unconstitutional drug possession statute, it is necessary to recognize that charges for violating those unlawful sentences or bail jumping charges stemming from those unlawful prosecutions are themselves unlawful.

B. Identity of Petitioner and Opinion Below

Jason Strandberg-Biggs asks this Court to accept review of the opinion of the Court of Appeals in *State v. Strandberg-Biggs*, 38830-1-III.[1]

C. Issue Presented

A void statute is a legal nullity. When the Supreme Court struck down the drug possession statute, it voided all actions taken in reliance on the statute. Where a criminal statute is void so too are all punishments imposed.

Accordingly, the prosecution never had the authority to charge Mr. Strandberg-Biggs with drug possession. The trial court never had the authority to impose a sentence of community custody for that conviction. That sentence was never valid. Mr. Strandberg-Biggs's noncompliance with the terms of that unlawful sentence cannot be the basis of a prosecution for escape from community custody.

[1] A petition for a related issue is pending in *State v. Koziol*, 38630-9-III.

D. Statement of the Case

A court convicted Mr. Strandberg-Biggs of the nonexistent crime of possessing drugs. CP 15. As part of the sentence for that "conviction" the court imposed a term of community custody. *Id.* When he did not show up for an appointment with his probation officer, the prosecutor charged Mr. Strandberg-Biggs with escape from community custody. CP 1-2, 15.

Before that case could get to trial, *Blake* concluded the possession was unconstitutional. *State v. Blake*, 197 Wn. 2d 170, 185, 481 P.3d 521 (2021). In response the trial court dismissed the pending charge. CP 14.

Insisting they must be allowed to prosecute Mr. Koziol for his failure to show up at the probation office as required by his void judgment on a nonexistent and unconstitutional charge, the State appealed.

The Court of Appeals reversed the trial court.

E. Argument

The opinion of the Court of Appeals seeks to limit the scope of this Court's landmark decision in *Blake*. The court's effort to limit the relief *Blake* sought to provide is contrary to this Court's decisions and presents an issue of substantial public interest. Each of these considerations warrant this Court review pursuant to RAP 13.4.

The trial court correctly dismissed the effort to prosecute Mr. Strandberg-Biggs for violating the conditions of void sentence imposed on a nonexistent crime.[2]

Blake found the possession statute unconstitutional. 197 Wn.2d at195. "An unconstitutional law is void, and is as no law." *Montgomery v. Louisiana*, 577 U.S. 190, 204, 136 S. Ct. 718, 731, 193 L. Ed. 2d 599 (2016) (citations omitted). That means the statue was unconstitutional from its inception, and

[2] It is worth noting the prosecutor did not present any of the arguments it presents on appeal to the trial court. Only in limited circumstances may party raise and issue for the first time on appeal. RAP 2.5(a). None of those exceptions apply here. Because the State did not raise any of its claims before the trial court, this Court of Appeals should a have refused to address them and affirmed.

there was never a valid charge. *In re the Pers. Restraint of Hinton*, 152 Wn.2d 853, 860, 100 P. 3d 801 (2004). Moreover, there was never a valid sentence.

A penalty imposed under an unconstitutional law is also void. *Montgomery*, 577 U.S. at 204. A judgment pertaining to an invalid conviction and sentence is invalid and may not be used to determine future punishment. *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986).

When failing to comply with an order is an element the trial court has gatekeeping duty to determine the "applicability" if not the validity of the order. *State v. Miller*, 156 Wn.2d 23, 31, 156 P.3d 827 (2005). *Miller* rejected the idea that the validity of a no-contact was an element in the prosecution for violating the order. *Id.* Instead, this Court defined the trial court's duty to determine whether the order could be "applicable" to the crime charged. *Id*. And the Court defined "applicable" to include the same issues which previous opinions had discussed regarding validity. *Id*. ("not issued by a

competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order").

To convict Mr. Strandberg-Biggs of escape from community custody the State would have to prove he was on community custody. RCW 72.09.310.

Even if the validity of the prior judgment is not element, a point Mr. Strandberg-Biggs does not concede, the court still has a gatekeeping function to perform. The court must determine whether the void judgment and sentence was "applicable" to the charged acts. It was not.

Mr. Strandberg-Biggs's term of community custody was imposed as part of the penalty for his possession conviction. Because the possession conviction was void so too was the sentence and community custody term. *Montgomery*, 577 U.S. 190, 204. Punishing Mr. Strandberg-Biggs for violating that unconstitutional sentence compounds the original constitutional

violation. *State v. French*, 21 Wn. App. 2d 891, 897, 508 P.3d 1036 (2022).

"Jurisdiction means the power to hear and determine." *State ex rel. McGlothern v. Superior Court*, 112 Wash 501, 505, 192 P. 937 (1920). There are three types of jurisdiction: "jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment." *Marriage of Little*, 96 Wn.2d 183, 197, 634 P.2d 498 (1981). Because the possession statute was void, no court had authority to enter a judgment for a conviction of possession.

This case is nearly identical to *French*. There the state appealed the trial court's refusal to add an additional point to a person's sentence for having committed the offense while on community custody. Just like this case, the community custody term in *French* was the product of a void possession conviction. The court concluded because the possession conviction was void so too was the community custody term imposed because of the conviction. *French*, 21 Wn.App. at 895-96. And the

Court explained the judgment and sentence of the possession conviction was invalid and could not be used to determine future punishment. *Id*. at 895 (citing *Ammons*, 105 Wn.2d at 187-88.)

To convict Mr. Strandberg-Biggs of escape from community custody the state must first prove he was on community custody. RCW 72.09.310. Even had the judge permitted the case to go to trial, the prosecutor could not prove that. The judgment and sentence imposing that term is invalid and cannot be used to determine future punishment. A*mmons*, 105 Wn.2d at 187-88. Under *Miller* a void judgement entered by a court without authority could not "applicable" to the charged conduct. The judge properly carried out the gatekeeping function *Miller* required of him, the prosecutor could not was on community custody, a necessary predicate for proving he escaped from community custody. RCW 72.09.310. Because the prosecutor could not prove Mr. Strandberg-Biggs

was subject to community custody in the first place the trial court properly dismissed the charge.

But the Court of Appeals opinion brushes this aside. The opinion reason *French* only concerned whether a court could impose community custody "pursuant to an unconstitutional law." Opinion at 9. The somehow reasoned this is different from whether that same invalid judgment could prove the person was on community custody for purposes of proving they escaped from community custody. *Id.* But the opinion never explains how. Indeed, there is no difference at all.

RCW 10.16.080 requires "if it should appear upon the whole examination that no offense has been committed" the trial court lacks any power over the person and may even dismiss the charge. Where an actual crime has been committed a court has jurisdiction of the person once it finds probable cause. That is not the case where the person has not committed an actual crime. Because possession has never been a valid crime the court could never find probable cause and lacked the

authority to impose a sentence. That is the court lacked jurisdiction under RCW 10.16.080.

The opinion ignores this to instead conclude the order was "valid" because the trial court had jurisdiction. Opinion at 10. But it never explains how. Plainly the court did not have jurisdiction. The subsequent order was invalid. And Mr. Strandberg-Biggs cannot be prosecuted for violating this invalid order. The court fails to appreciate in both this case and in its prior decision in *State v. Paniagua*, 22 Wn. App. 2d 350, 511 P.3d 113, *review denied*, 200 Wn.2d 1018 (2022), is that possession of drugs was never a crime. It is impossible to imagine a more frivolous charge than one for a nonexistent crime.

The opinion of the Court of Appeals is contrary to decisions of this Court. Most troubling, the Court of Appeals opinions in this and other bail jumping cases work to artificially limit the relief this Court intended in *Blake*. This Court should accept review under RAP 13.4.

F. Conclusion

The trial court properly dismissed the prosecutor's effort to convict Mr. Strandberg-Biggs of violating the conditions of a void order. The Court of Appeals's opinion warrants review by this Court.

This brief complies with RAP 18.17 and contains 1628 words.

Submitted this 21st day of November, 2023.

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September 19, 2023

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CASE # 388301
State of Washington v. Jason Lee Strandberg Biggs
FERRY COUNTY SUPERIOR COURT No. 2010004010

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please see word count rule change at https://www.courts.wa.gov/wordcount, effective September 1, 2021. Please file the motion electronically through this court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW:jab
Attachment

c: **E-mail**—Hon. Lech J. Radzimski

c: Jason Lee Strandberg Biggs
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FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Appellant, v. JASON LEE STRANDBERG BIGGS, Respondent.	)))))))))	No. 38830-1-III UNPUBLISHED OPINION

C●●NEY, J. — The State appeals the trial court's dismissal of Jason Lee Strandberg Biggs' charge of escape from community custody. While under the supervision of the Department of Corrections (DOC) on a conviction for unlawful possession of a controlled substance, Mr. Biggs allegedly failed to report as required. Consequently, he was charged with escape from community custody. Relying on the Supreme Court's decision in *Blake*, and without the benefit of this court's decision in *Paniagua*, the trial court dismissed the charge of escape from community custody. *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021); *State v. Paniagua*, 22 Wn. App. 2d 350, 511 P.3d 113, *review denied*, 200 Wn.2d 1018, 520 P.3d 970 (2022).

We reverse and remand for further proceedings.

BACKGROUND

On July 16, 2018, Mr. Biggs was sentenced to 12 months of community custody supervision through the DOC. His supervision arose from a single conviction for unlawful possession of a controlled substance under former RCW 69.50.4013(1) (2017). As a condition of his community custody, Mr. Biggs was required to comply with the instructions, rules, and regulations of the DOC and to "report to and be available for contact with the assigned CCO [community corrections officer] as directed until instructed to no longer report, or a court order is issued closing the case." Clerk's Papers (CP) at 9.

In late June 2020, Mr. Biggs fell out of compliance after he allegedly failed to maintain contact with his CCO and did not attend a required virtual chemical dependency treatment group session. Thereafter, the CCO issued a DOC warrant for Mr. Biggs' arrest. Through mid-August 2020, the CCO had not received any communication from Mr. Biggs. Hence, the State charged Mr. Biggs with escape from community custody in violation of RCW 72.09.310. On August 13, 2020, the trial court entered a finding of probable cause for the charge and issued a bench warrant for Mr. Biggs' arrest.

In February 2021, the Washington Supreme Court delivered its opinion in *Blake*, which held that the portion of RCW 69.50.4013(1) related to simple drug possession offenses violated the due process clauses of the state and federal constitutions and was therefore void. More than a year later, in March 2022, Mr. Biggs was brought before the

court for an arraignment. At the arraignment, Mr. Biggs' counsel informed the court that he had reviewed the judgment and sentence that established the term of community custody. In doing so, he discovered that the "sole conviction" was for unlawful possession of a controlled substance, which was "barred by *Blake*." Rep. of Proc. (RP) at 5. Defense counsel then made an oral motion to dismiss the charge consistent with other "rulings issued by this Bench." RP at 6. In response, the State argued the charge was filed prior to the *Blake* decision and a finding of probable cause had been previously entered.

The trial court promptly granted Mr. Biggs' motion and dismissed the charge with prejudice. Applying *Blake*, the trial court found the "statute for which [Mr. Biggs] was convicted which resulted in the imposition of a term of community custody has been determined to be facially invalid." CP at 17. The trial court reasoned that the charge must be dismissed because "a requirement that an individual be subject to community custody cannot survive if the underlying conviction which required the supervision is subject to the *Blake* decision." CP at 17. The court indicated it would not exercise its discretion "to selectively pick portions of an invalidated conviction that was obtained by enforcement of a statute that has been determined to be unconstitutional on its face." CP at 18.

The State appeals.

ANALYSIS

The State contends the trial court erred when it dismissed the charge of escape from community custody. We agree.

Before the trial court, Mr. Biggs failed to provide a legal basis for his oral motion to dismiss. CrR 8.3(c) permits a defendant to move for dismissal of a charge "due to insufficient evidence establishing a prima facie case of the crime charged." S*ee State v. Knapstad*, 107 Wn.2d 346, 356-57, 729 P.2d 48 (1986). Such a motion "shall be in writing and supported by an affidavit or declaration . . . ." CrR 8.3(c)(1).

A criminal charge should be dismissed if there are "no disputed material facts and the undisputed facts do not raise a prima facie case of guilt as a matter of law." *State v. Bauer*, 180 Wn.2d 929, 935, 329 P.3d 67 (2014) (citing *Knapstad*, 107 Wn.2d at 356-57). In deciding a defendant's motion, "the court shall view all evidence in the light most favorable to the prosecuting attorney and the court shall make all reasonable inferences in the light most favorable to the prosecuting attorney." CrR 8.3(c)(3). The decision to grant a dismissal is reviewed de novo. *State v. Barnes*, 189 Wn.2d 492, 495, 403 P.3d 72 (2017).

"The elements of a crime are those facts 'that the prosecution must prove to sustain a conviction.'" *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005) (quoting BLACK'S LAW DICTIONARY 559 (8th ed. 2004)). "It is proper to first look to the statute to determine the elements of a crime." *Id.* Mr. Biggs was charged with escape from

community custody under RCW 72.09.310. *See* RCW 9.94A.030(25)(a) (including RCW 72.09.310 as a form of "[e]scape"). RCW 72.09.310, also described as violating community custody, states:

> An inmate in community custody who willfully discontinues making himself or herself available to the department for supervision by making his or her whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a class C felony under chapter 9A.20 RCW.

For the purposes of this statute, "community custody" means "that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department." RCW 9.94A.030(5); RCW 72.09.015. It also includes community and postrelease supervision as defined by RCW 9.94B.020.

In dismissing the escape from community custody charge, the trial court reasoned that because the underlying charge (RCW 69.50.4013(1)) was facially invalid, there existed no set of circumstances in which the statute could constitutionally be applied. Alternatively stated, because community custody was imposed on a conviction from an unconstitutional statute, Mr. Biggs was never subject to a lawful custodial order. Relying on analogous cases addressing bail jumping and attempt to elude a police vehicle, the

State contends the dismissal was erroneous since escape from community custody does not require proof of a valid predicate crime.

In *State v. Gonzales*, the Washington Supreme Court addressed the elements of the crime of escape. 103 Wn.2d 564, 565, 693 P.2d 119 (1985). The question in *Gonzales* was whether a person charged with first degree escape under former RCW 9A.76.110(1) (1982)[1] may challenge the constitutional validity of the convictions that led to their confinement. After Gonzales was charged with escape in the first degree, he argued that the State could only rely on constitutionally valid convictions to prove the "'conviction of a felony'" element of first degree escape. *Id.* at 566. The trial court agreed and allowed the State to only present evidence of constitutionally valid convictions. On appeal, the Supreme Court reversed, concluding the State was not required to prove the underlying convictions were constitutionally valid. *Id.* at 567-68.

The holding in *Gonzales* distinguished the crime of escape from other criminal proceedings where prior convictions must be proved constitutionally valid. For example, the State is required to prove the constitutional validity of a prior "conviction" when that conviction is used to enhance a present sentence or infringes on the exercise of a constitutionally protected right. *Id.* at 567. The same does not hold true when proving

[1] Former RCW 9A.76.110 (1982) stated a person was guilty of escape in the first degree "if, being detained pursuant to a conviction of a felony or an equivalent juvenile offense, he escapes from custody or a detention facility."

whether a defendant was "detained pursuant to a conviction of a felony" for the purposes of escape. *Id.*

Accordingly, the Supreme Court brought Washington in line with the vast majority of other jurisdictions by holding that defendants charged with escape could not "challenge the legality of their confinement at the escape trial." *Id.* at 567-68. If a defendant wishes to challenge the constitutionality of their confinement imposed by a prior conviction, a personal restraint petition is the proper avenue for such collateral attack. *Id.* at 568; *State v. Snyder*, 40 Wn. App. 388, 339, 698 P.2d 957 (1985) (agreeing that "the orderly administration of criminal justice" requires the judgments establishing original confinement to "be treated as valid until a court with jurisdiction rules otherwise").

Here, the trial court erred in finding the holding of *Gonzales* distinguishable because it addressed circumstances where the underlying conviction was invalid as applied to the facts of the case. The State has no burden to prove the constitutional validity of the prior conviction, whether the challenge is as-applied or facially invalid. Though *Gonzales* considered the elements of escape under a different statute, its principles remain relevant to RCW 72.09.310. *See* RCW 9.94A.030(25)(a) (establishing RCW 72.09.310 as an "[e]scape" crime). Under RCW 72.09.310, the State must prove the defendant was "[a]n inmate in community custody." It is immaterial whether community custody was imposed pursuant to a constitutionally valid conviction and the

defendant may not lodge a belated challenge to the validity of the community custody at the escape trial.[2]

More recently, this court decided *Paniagua*. In *Paniagua*, we concluded a bail jumping conviction remained valid even when the underlying crime for which the defendant failed to appear is later invalidated on constitutional grounds. 22 Wn. App. 2d at 358. Albeit *Paniagua* addressed the elements of bail jumping, it likewise affirmed a line of cases holding that the validity of an underlying conviction is not an element of the crime of escape, alleviating the State from having to prove the constitutionality of the underlying conviction. *Id.* at 356-58. To prove the crime of escape from community custody, the State was not required to present evidence that the underlying conviction, for which a term of community custody was imposed, was constitutionally valid.

Mr. Biggs further contends this court should affirm the dismissal pursuant to *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), and *State v. French*, 21 Wn. App. 2d 891, 508 P.3d 1036 (2022). These cases are distinguishable as they address sentencing consequences from prior convictions, not the elements required to prove substantive charges.

In *Montgomery*, the United States Supreme Court addressed the sentencing of offenders who were juveniles when their crimes were committed and assessed when new

[2] *See* 13A SETH A. FINE, WASHINGTON PRACTICE SERIES: CRIMINAL LAW § 13:4 (3d ed. 2019).

substantive rules must be retroactively applied. *Montgomery*, 577 U.S. at 197-204. *Montgomery* is relevant in so far as it justifies why Mr. Biggs may seek to void his unlawful possession of a controlled substance conviction and judgment in a collateral attack even after it became final. *See id.* at 204-05. However, there exists a contrast between a penalty imposed based on an unconstitutional conviction and the penalty accruing from a violation of a separate *constitutionally valid* law prohibiting escape. Mr. Biggs' prior unconstitutional conviction is not being used to determine future punishment; rather, he is facing punishment for allegedly committing a new criminal act.

For similar reasons, *French* is unhelpful. In *French*, Division One of this court considered whether the trial court could add a point to the defendant's offender score where, at the time the defendant committed the criminal act, he was on community custody pursuant to a constitutionally invalid conviction. The court concluded that community custody imposed pursuant to an unconstitutional law could not be considered when computing an offender score. The issue in *French* specifically involved "a sentencing court's exercise of its authority during a sentencing proceeding." 21 Wn. App. 2d at 901. This issue was "materially distinguishable from the issue presented in *Gonzales*" and says nothing about the elements to prove the crime of escape. *Id.*

Finally, Mr. Biggs' reliance on *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), is not persuasive. *Miller* addressed the sufficiency of the evidence required to prove the crime of violating a domestic violence no-contact order. As an initial matter,

the Supreme Court held that the validity of the no-contact order was not an explicit or implied element of the crime and did not require fact-finding by the jury. The court did, however, instruct that the trial court, as part of its gate-keeping function, "should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged." *Id.* at 31. "An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order." *Id.*

Subsequent decisions have warned that some of the language in *Miller* "may be capable of being read more broadly when viewed in isolation." *City of Seattle v. May*, 171 Wn.2d 847, 854, 256 P.3d 1161 (2011). The *May* court clarified that *Miller* did *not* overturn the well-established collateral bar rule which generally "prohibits a party from challenging the validity of a court order in a proceeding for violation of that order." *Id.* at 852. The *May* court explained that an order is inapplicable only when it does not apply to the defendant or to the charged conduct. *Id.* at 854. In other words, "a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim." *Marley v. Dep't of Lab. & Indus.*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994).

Mr. Biggs failed to show that the trial court lacked jurisdiction to enter the original judgment and sentence that imposed his term of community custody. When faced with a potentially invalid court order, the solution is not to willfully violate it. Instead, Mr.

Biggs could have challenged his original judgment and sentence in a timely manner and complied with the terms of the order until it was otherwise overturned. *Snyder*, 40 Wn. App. at 339.

Because the State presented sufficient facts to establish a prima facie case for the charge of escape from community custody, the trial court erred when it granted Mr. Biggs' oral motion to dismiss. Accordingly, we reverse and remand for further proceedings.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Fearing, C.J.

Staab, 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 – Division Three** under **Case No. 38830-1-III**, 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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Washington Appellate Project

Date: November 21, 2023

WASHINGTON APPELLATE PROJECT

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