Supreme Court No. 91370-6

(Court of Appeals No. 71127-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FERDI DeGUZMAN,

Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Ferdi DeGuzman, appellant below, seeks review of the Court of Appeals decision designated in Part B. Appendix.

B. COURT OF APPEALS DECISION

Mr. DeGuzman appealed from his conviction below. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

Due Process requires a guilty plea be entered knowingly, intelligently and voluntarily. If the defendant has been misadvised about the applicable sentence for the offense, the resulting plea is not entered knowingly, voluntarily and intelligently. Did the trial court abuse its discretion in denying Mr. DeGuzman's motion to withdraw his plea, and is the Court of Appeals decision thus in conflict with this Court's decisions, requiring review? RAP 13.4(b)(1).

D. STATEMENT OF THE CASE

On April 24, 2013, Ferdi DeGuzman pled guilty to two counts of second degree rape of a child, in connection with allegations made by his step-daughter, A.Z. These claims related to conduct allegedly occurring when A.Z. was between 12 and 13 years old. CP 1-8, 27; RP 7-21.[1]

[1] The verbatim report of proceedings consists of one consecutively-paginated transcript containing hearings from April 23, 2013 through November 1, 2013, which is referred to as "RP."

During the plea allocution, Mr. DeGuzman answered all of the deputy prosecutor's questions with single-word responses of "yes," "correct," and "no." RP 7-20. When asked whether he wanted to plead guilty or not guilty to the remaining counts in the Information, Mr. DeGuzman simply replied, "guilty." RP 20.[2] Mr. DeGuzman was told by the deputy prosecutor that he was eligible for the Special Sex Offender Sentencing Alternative (SSOSA), and Mr. DeGuzman verified that he had reviewed the program's requirements with his attorney. RP 15-16.[3] During the plea allocution, the deputy prosecutor twice acknowledged that Mr. DeGuzman was requesting a SSOSA, even though the trial court might not grant one. RP 12.

The deputy prosecutor informed Mr. DeGuzman on the record that the standard range sentence for the crime to which he was pleading guilty was "120 to 158 months"; she also informed Mr. DeGuzman that if he did not receive the SSOSA, he would "serve a minimum term of confinement in the Department of Corrections." RP 10, 12.

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[2] Mr. DeGuzman pled guilty to two counts of rape of a child in the second degree, in exchange for the dismissal of the first count in the Information – child molestation in the first degree. RP 12, 22.

[3] Mr. DeGuzman acknowledged he understood the State would be opposing his SSOSA request, and that he could be on supervision for life. RP 11-13; CP 16-20.

Despite the mixed information given, when asked if he understood the terms of his plea, Mr. DeGuzman replied, "yes." RP 12.

The deputy prosecutor led Mr. DeGuzman through a factual allocution, written by his own counsel, which he adopted. RP 19. Following this colloquy, the trial court informed Mr. DeGuzman that the deputy prosecutor had "covered everything," so the court simply asked if Mr. DeGuzman had any questions. RP 21. Mr. DeGuzman stated that he did not. Id. The trial court set the case over for sentencing. RP 22.

On June 3, 2013, Mr. DeGuzman stated that he wished to withdraw his guilty plea, and new counsel was appointed; he also asserted his belief that he was not effectively represented by prior counsel. RP 26-33. New counsel was appointed on June 6, 2013, and the case was continued for a hearing on Mr. DeGuzman's motion to withdraw his guilty plea. RP 36, 40, 46.

On August 7, 2013, Mr. DeGuzman filed a motion to withdraw his guilty plea, contending that his plea was involuntary, as he did not comprehend the direct consequences of his plea – specifically the term of confinement. CP 122-31.

A contested hearing was held on September 17, 2013, at which Mr. DeGuzman testified to his understanding of the plea conditions, and his miscommunications with his former attorney. RP 57-80. Mr. DeGuzman

testified that he only pled guilty because he had believed that if he were denied the SSOSA, his standard range would be 124 to 158 days, not months. RP 75-76, 123. In addition to Mr. DeGuzman's own testimony, the court heard audio tapes of telephone calls between Mr. DeGuzman and his girlfriend, A.Z.'s mother. On the tapes, the couple could be heard discussing their plans for the following summer – indicating DeGuzman's understanding that the sentence he faced would be only a few months, at most, before he would be eligible for work release. RP 73, 95.

The trial court denied Mr. DeGuzman's motion to withdraw his plea, denied the SSOSA, and sentenced Mr. DeGuzman to 144 months to life. CP 108-19; RP 150, 215.

Mr. DeGuzman appealed the denial of his motion to withdraw his guilty plea on similar grounds to those stated in this petition, arguing the trial court abused its discretion when it denied his motion to withdraw his guilty plea. CP 120-21.

On January 26, 2015, the Court of Appeals affirmed Mr. DeGuzman's conviction. Appendix.

Mr. DeGuzman seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, BECAUSE MR. DEGUZMAN'S MOTION TO WITHDRAW HIS PLEA SHOULD HAVE BEEN GRANTED, AS NECESSARY TO CORRECT A MANIFEST INJUSTICE.. RAP 13.4(b)(1).

Pursuant to CrR 4.2(f), a defendant may withdraw a plea of guilty "whenever it appears that the withdrawal is necessary to correct a manifest injustice." A manifest injustice occurs if the plea was not knowing, voluntary and intelligent. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000) (finding manifest injustice where defendant's motion to withdraw guilty plea was denied, due to ineffective assistance of counsel and where plea was not voluntary and intelligent). A trial court's decision on a motion to withdraw a guilty plea is reviewed for an abuse of discretion. State v. Marshall, 144 Wn.2d 266, 280, 27 P.3d 192 (2001), abrogated on other grounds by State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012).

1. Due process requires a defendant be properly advised of the direct consequences of his guilty plea.

Due Process requires that a defendant's plea of guilty be knowing, voluntary, and intelligent. U.S. Const. amend. 14; Const. art. I, sec. 3; Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); see also In re the Personal Restraint of Isadore, 151 Wn.2d 294,

298, 88 P.3d 390 (2004) ("A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences."). A guilty plea is involuntary if the defendant is not properly advised of a direct consequence of his plea. State v. Turley, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

"Where a plea agreement is based on misinformation . . . generally the defendant may choose . . . withdrawal of the guilty plea." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). Under Walsh, a guilty plea is not voluntary and cannot be valid if it is made without an accurate understanding of the consequences. 143 Wn.2d at 8.

Because of the constitutional rights waived by a guilty plea, the State bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. Boykin, 395 U.S. at 242. "The record of the plea hearing must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea." Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976).

2. Because Mr. DeGuzman was not properly advised of the direct consequences of his guilty plea, the plea was not knowingly or voluntarily entered.

When a defendant enters a plea agreement where he has been misadvised concerning the penalty he faces, he is entitled to withdraw the

plea because it was invalidly entered. State v. Mendoza, 157 Wn.2d 582, 590, 141 P.3d 49 (2006). "Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." Id. at 591. In Mendoza, this Court found that a defendant's understanding of the direct consequences of his plea is so essential, that even where the ultimate sentence resulted in less time than the defendant believed he would receive, the defendant is entitled to withdraw his plea. Id. at 584.

Here, Mr. DeGuzman, in an even stronger example than the defendant in Mendoza, timely moved to withdraw his plea immediately upon discovering his misunderstanding of the plea agreement – well before sentencing. RP 25. Although as in Mendoza, Mr. DeGuzman ultimately was sentenced within the standard range, his plea was involuntary, and his motion to withdraw should have been granted.

The relevant maximum sentence is a direct consequence of a guilty plea. Walsh, 143 Wn.2d at 8-9; State v. Morley, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). A "defendant must be advised of the maximum sentence which could be imposed prior to entry of the guilty plea." State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

Due to the inconsistent and confusing statements regarding sentencing made by the deputy prosecutor and by his own counsel at the

time of his guilty plea, Mr. DeGuzman's guilty plea was involuntarily entered. For example, he was told both that his standard range was 120 to 158 months, and that he would "serve a minimum term of confinement." RP 10, 12. As Mr. DeGuzman later argued during his plea withdrawal hearing, there was no incentive for him to plead guilty for a sentence of 144 months to life – a lengthy sentence that he could have received after trial. RP 70, 76, 136.[4]

Due to the confusing statements made to Mr. DeGuzman, both inside and outside of the courtroom, as reflected during the hearing on the motion to withdraw his guilty plea, Mr. DeGuzman did not clearly understand the terms and consequences of the plea agreement. Because he was not properly informed of the direct consequences of his guilty plea, Mr. DeGuzman's plea was not knowingly and voluntarily made. Isadore, 151 Wn.2d at 298.[5]

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[4] The record supports Mr. DeGuzman's contention that he was only a passive participant in the plea process. RP 88. "I just kept saying "yes." He also said that after quickly speaking to his attorney in the hallway, she instructed him to return to the courtroom and simply "plea all the yes [sic]." RP 122.

[5] Mr. DeGuzman need not demonstrate that the misinformation regarding his sentence was material to his decision to plead guilty. This Court has rejected such a requirement, stating that a materiality test:

> ...conflicts with this court's jurisprudence. This court has repeatedly stated that a defendant must be informed of all direct consequences of a guilty plea, and that failure to inform the defendant of a direct consequence renders the plea invalid. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

3. Mr. DeGuzman's motion to withdraw his guilty plea should have been granted.

Where a defendant is misadvised of the direct consequences of his guilty plea, the plea is involuntary and he is entitled to withdraw the plea. Isadore, 151 Wn.2d at 303; Walsh, 143 Wn.2d at 8.[6] Because the State failed to meet its burden to demonstrate that Mr. DeGuzman's guilty plea was knowing, voluntary and intelligent, his motion to withdraw should have been granted.

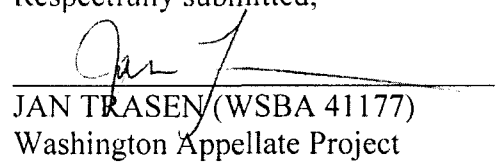
Because the Court of Appeals decision is premised upon findings supported by insufficient evidence, it is in conflict with decisions of this Court, requiring review. RAP 13.4(b)(1).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

DATED this 25th day of February, 2015.

Respectfully submitted,



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Isadore, 151 Wn.2d at 301.

[6] Unlike the defendants in State v. Knotek, 136 Wn. App. 412, 426, 149 P.3d 67 (2006), rev. denied, 161 Wn.2d 1013, 166 P.3d 1218 (2007), and Mendoza, 157 Wn.2d at 582, Mr. DeGuzman moved immediately to withdraw his guilty plea, once he realized the error.

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FERDI MAI DEGUZMAN, Appellant.	No. 71127-0-I DIVISION ONE UNPUBLISHED OPINION FILED: January 26, 2015

LEACH, J. — Ferdi DeGuzman appeals the trial court's order denying his motion to withdraw his plea of guilty to two counts of rape of a child in the second degree. DeGuzman alleges that because he misunderstood his potential sentence to be 120 to 158 days, not months, his plea was involuntary. Because the record shows that defense counsel and the State properly advised DeGuzman that he faced a standard range sentence of 120 to 158 months and that he understood the terms of his plea agreement, we conclude that he made the guilty plea voluntarily. Therefore, the trial court did not abuse its discretion by denying DeGuzman's motion to withdraw his plea. We affirm.

Background

In May 2011, 13-year-old A.Z. told her therapist that her mother's boyfriend, Ferdi DeGuzman, was sexually molesting her. A.Z. told a police detective that beginning when she was 9 or 10 years old, DeGuzman would

make "motions" as if he were having sex with her and masturbate in front of her. He eventually began to touch her under her clothes, including touching her vagina with his hand and mouth. When the detective interviewed him, DeGuzman eventually admitted the sexual contact but blamed A.Z., maintaining that she had initiated it and "made him do things that he didn't want to do."

The State charged DeGuzman with one count of child molestation in the first degree and two counts of rape of a child in the second degree. On April 24, 2013, DeGuzman pleaded guilty to two counts of rape of a child. The plea form DeGuzman signed stated that the standard range sentence for the charged crime was 120 to 158 months with a maximum term of life in prison and that the prosecutor recommended an indeterminate sentence of 158 months to life.

At the plea hearing, the State reviewed the entire plea form with DeGuzman. DeGuzman answered, "Yes," when the prosecutor asked him if he had gone over the plea with his attorney and had enough time to consider its consequences. The prosecutor asked DeGuzman if he understood he could stop the proceedings at any time if he had a question or needed more time to talk to his attorney. DeGuzman again answered, "Yes." The prosecutor asked, "Do you understand that your decision to plead guilty here today is a final one and that you cannot change your mind in the future?" DeGuzman answered, "Correct, yes."

DeGuzman answered affirmatively when the prosecutor asked if he understood that the standard sentencing range on each count would be 120 to

158 months, that the maximum term was life in prison, and that if the judge sentenced him within the standard range, he would not be able to appeal his sentence. The prosecutor explained that DeGuzman's plea involved an indeterminate sentence, defined that term, and asked if he understood. He answered, "Yes." The prosecutor explained the terms of the plea agreement, noting that the State opposed DeGuzman's request for a special sex offender sentencing alternative (SSOSA).

After asking DeGuzman if he made his plea "freely and voluntarily," the prosecutor asked, "Do you understand that we could tear up this plea form right now and go to trial on this case if that's what you wanted?" DeGuzman answered, "Yes." When asked if anyone had attempted to induce him to accept the plea agreement by threatening him or making any promises beyond the agreement, he answered, "No." He confirmed he wished to go forward with the plea. He agreed that he adopted the factual statement in the plea form, which the prosecutor read into the record. Three different times during the plea colloquy, the prosecutor asked if he had any questions, and each time DeGuzman answered, "No."

Following the plea colloquy, the trial court noted that the prosecutor "covered everything on [the court's] checklist" but told DeGuzman, "I do want to make sure if you have any questions for me or your attorney or even the State that this is your time to ask before I accept your plea. Do you understand that?" DeGuzman answered, "Yes, I do, your Honor," and when the court asked if he

had any questions, he replied, "No, your Honor." The court accepted the guilty plea, dismissed the child molestation count, and found DeGuzman guilty of two counts of rape of a child in the second degree.

On August 7, 2013, DeGuzman filed a motion to withdraw his plea, alleging that because he had misunderstood his standard range sentence to be 120 to 158 days, not months, his plea was not voluntary. He contended that defense counsel coerced the guilty plea and that he was denied effective assistance because of lack of communication.

At the September 2013 hearing on his motion to withdraw the guilty plea, DeGuzman testified that his former defense counsel pressured him to take the plea deal, that he was "just scared" to tell his attorney he didn't want to plead guilty, and that he thought his plea would result in a sentence of "124 to 148 days." He also testified that he "thought [the sentence] was going to be six to eight months" in prison. In support of his argument that he misunderstood his potential sentence, DeGuzman offered audiotapes of jail telephone conversations with his girlfriend, A.Z.'s mother, in which the couple discusses plans to be together the following summer.

DeGuzman acknowledged, however, that when his counsel talked to him about his potential sentence, "[S]he would say it in years," and that he thought she had said that if he lost at trial his sentence could be 13 to 17 years.[1] He also

[1] DeGuzman appears also to testify on redirect that he understood that the court could sentence him to 13 to 17 years even with a plea deal.

testified that in early discussions, his attorney urged him to take a plea deal that would entail a seven- or eight-year sentence. And he did not dispute the State's observation that over the course of more than a year of representation, he never complained about any problem communicating with his attorney.

Though he testified on direct examination that he had "never been in this kind of circumstantial position before," DeGuzman conceded during cross-examination that in 2001 and 2004, he pleaded guilty to felony crimes and signed similar plea forms. He conceded that the State had asked him if he had any questions and that he had answered, "No." He acknowledged understanding that the trial court has discretion in sentencing and might not grant his request for a SSOSA.

The trial court denied DeGuzman's motion to withdraw his guilty plea:

> If we allowed a defendant to withdraw a plea based simply on the kind of testimony that Mr. DeGuzman has offered, almost no plea would stand. And I simply don't find his statements credible and I don't find them persuasive, and . . . in many instances they're contradictory.

The court opined that DeGuzman's telephone statements to A.Z.'s mother showed not that DeGuzman misunderstood his sentence but rather that "he's trying to diminish what he's done and he's trying to diminish the seriousness of his crime and he's also trying to diminish the consequence that he could be in jail for over a decade." The court also noted its own impressions from the plea hearing:

> And I appreciate the fact that I'm the judge that's reviewing this request because, you know, obviously, I was the judge that saw Mr.

> DeGuzman the day that I accepted his plea. He did not appear to me in the slightest to be someone that was under coercion, that was in fear of his attorney, that didn't think that he could proceed to trial.

On November 1, 2013, the trial court denied DeGuzman's request for a SSOSA, imposing a sentence of 144 months. DeGuzman appeals the court's denial of his motion to withdraw his guilty plea.

Analysis

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily."[2] The defendant must understand the nature of the charges and the direct consequences of a guilty plea, which include sentencing consequences.[3] CrR 4.2(f) allows a defendant to withdraw a plea of guilty "whenever it appears that the withdrawal is necessary to correct a manifest injustice." A manifest injustice occurs where a plea is involuntary.[4] Generally, the defendant bears the burden of proving a manifest injustice, which our Supreme Court defines as "'obvious, directly observable, overt, not obscure.'"[5] A strong public interest supports enforcement of voluntary and intelligent plea

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[2] State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); State v. Robinson, 172 Wn.2d 783, 794, 263 P.3d 1233 (2011); U.S. CONST. amend. XIV, §1; WASH. CONST. art. I, § 3.

[3] Ross, 129 Wn.2d at 284 (quoting CrR 4.2(d)); State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

[4] State v. Quy Dinh Nguyen, 179 Wn. App. 271, 282, 319 P.3d 53 (2013), review denied, 181 Wn.2d 1006 (2014); Ross, 129 Wn.2d at 284. Other circumstances which may constitute a manifest injustice under CrR 4.2(f) are ineffective assistance of counsel, the defendant's failure to ratify a plea, or the prosecution's breach of a plea agreement. Quy Dinh Nguyen, 179 Wn. App. at 282.

[5] Ross, 129 Wn.2d at 283-84 (internal quotation marks omitted) (quoting State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)).

agreements.[6] The trial court has discretion to grant or deny a motion to withdraw a guilty plea.[7]

DeGuzman contends that the trial court abused its discretion in denying his motion to withdraw his guilty plea. He argues that because he was not properly advised of the direct consequences of his guilty plea, he did not enter the plea voluntarily. We disagree.

The record shows that DeGuzman's attorney and the State thoroughly advised DeGuzman of the direct consequences of his guilty plea, including the relevant standard and maximum sentences. DeGuzman confirmed in open court that he had had sufficient opportunity to discuss the terms of the agreement with his attorney and to consider the terms of his plea. He conceded several times that his attorney explained his potential sentence in terms of years, not days.

The State reviewed the entire plea form in open court, accurately stating the standard sentencing range and the fact that the court might not grant the request for a SSOSA. The State asked DeGuzman three times if he had any questions, and the trial court likewise asked him if he had any questions for the court, the State, or his own attorney. At the end of the plea colloquy, the prosecutor informed DeGuzman that he could choose to "tear up this plea form right now and go to trial." DeGuzman denied that anyone had threatened him or made promises beyond the terms of the agreement.

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[6] State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001).
[7] Robinson, 172 Wn.2d at 791.

Contrary to his assertion that the prosecutor's statements about sentencing were "inconsistent and confusing," the State explained the meaning of "indeterminate sentence" and clearly stated the standard range, which DeGuzman confirmed he understood. DeGuzman had experience with the plea process, having entered guilty pleas to two previous felony charges. In short, the record contradicts DeGuzman's assertion that he "did not clearly understand the terms and consequences of the plea agreement."

DeGuzman cites several cases in support of his argument that his misunderstanding of sentencing consequences made his plea involuntary. But in the cases he cites, the defendants' guilty pleas were based on mistakes: a miscalculated offender score,[8] a legal error about the consequences of juvenile convictions,[9] or misinformation about the proper standard range sentence.[10] Here, by contrast, the record shows that defense counsel and the State correctly advised DeGuzman of the sentencing consequences of his plea. DeGuzman's case is more analogous to State v. Blanks,[11] where the defendant argued that he misunderstood the plea agreement's words, "Defendant can petition for SSOSA. State will oppose SSOSA," to mean that the agreement contained a SSOSA recommendation. In Blanks, the defendant's former defense attorney testified that "he explained the plea in great detail and that Blanks apparently

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[8] State v. Mendoza, 157 Wn.2d 582, 584-85, 141 P.3d 49 (2006).
[9] Robinson, 172 Wn.2d at 785-86.
[10] Walsh, 143 Wn.2d at 3-4, 8-9.
[11] 139 Wn. App. 543, 551, 161 P.3d 455 (2007).

understood that the State would not recommend a SSOSA."[12] Division Two of this court held that the record supported the trial court's finding that Blanks was not a credible witness and that the case was one of "'buyer's remorse.'"[13] Here, given the detailed plea colloquy, DeGuzman's numerous opportunities to ask questions or reject the plea, and DeGuzman's own testimony, the record amply supports the trial court's finding that DeGuzman understood the consequences of his plea and thus entered it voluntarily. The court did not abuse its discretion in denying DeGuzman's motion to withdraw his guilty plea.

Conclusion

Because the record shows that DeGuzman was fully advised of the consequences of his guilty plea and thus made his plea voluntarily, the trial court did not abuse its discretion in denying his motion to withdraw the plea. We affirm.

WE CONCUR:

[12] Blanks, 139 Wn. App. at 551.
[13] Blanks, 139 Wn. App. at 551.

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

STATE OF WASHINGTON, Respondent, v. FERDI DEGUZMAN, Appellant.	)))))))))	NO. 71127-0

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 25TH DAY OF FEBRUARY, 2015, A COPY OF ***APPELLANT'S PETITION FOR REVIEW*** WAS ELECTRONICALLY SERVED ON THE PARTY DESIGNATED BELOW (BY U.S. MAIL TO MR. DEGUZMAN).

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SIGNED IN SEATTLE, WASHINGTON THIS 25th DAY OF FEBRUARY, 2015

X _____