93858-0
Supreme Court No. _____
Court of Appeals No. 31563-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MICHEAL ORREN GORSKI,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Ruth E. Reukauf, Judge

PETITION FOR REVIEW

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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I. IDENTITY OF PETITIONER

Petitioner, Michael Orren Gorski, is the appellant below and asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division III, unpublished opinion filed on September 13, 2016.[1] The court denied Mr. Gorski's motion for reconsideration on October 13, 2016. Copies of the opinion and order are attached as Appendices A and B, respectively.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the trial court abused its discretion by allowing Cecil Toney to be coached over defense counsel's objection and give altered testimony under the guise of ER 612, which prejudiced Mr. Gorski and requires a new trial.

B. Whether the remaining evidence was insufficient to sustain the conviction for murder in the second degree as either a principal or an accomplice.

C. Whether the requisite inquiry into ability to pay discretionary costs under *State v. Blazina* and discretionary costs of medical care and incarceration under *State v. Leonard* applies to defendants who had retained counsel at trial but were found indigent for purposes of pursuing appeal.

IV. STATEMENT OF THE CASE

[1] The current online version is found at *State v. Brugnone* (consolidated with *State v. Gorski*), No. 31529-1-III, 2016 WL 4921360 (Wash. Ct. App. Sept. 13, 2016).

Procedural background. On July 11, 2011, Michael Orren Gorski was charged by information with one count of second-degree murder, acting as a principal or an accomplice in the 1997 murder of Carolyn Clift. CP 1. Co-defendant Frank Brugnone was similarly charged. Brief of Appellant Brugnone, p. 3. Mr. Gorski's case was tried to a jury and Mr. Brugnone's case was simultaneously tried to the court. 1/17/13 RP 165.

In the State's opening statement, the jury was told:

> ... that Mr. Brugnone made several statements after being advised of his constitutional rights, including that he had gone to the apartment of Carolyn Clift, the victim, that there was hugging, that he remained a short period of time, that she screamed, that she went down, that he saw blood, that he said, I'm out of here. You'll have an opportunity to hear additional information about the statement made by the codefendant, Frank Eugene Brugnone.

1/29/13 RP 398. Although redaction to avoid *Bruton* issues was contemplated, the parties and court eventually agreed to present the co-defendant's interview through a bifurcated proceeding.[2] The jury did not hear testimony about the contents of Mr. Brugnone's four-hour-long post-arrest statement to police. 2/6/13 RP 1489–1522; 2/11/13 RP 1828–1923.

Testimony. At 11:19 pm on August 28, 1997, a resident of the Selah Square Apartments in Selah, Washington, called police to say she

[2] 8/10/12 RP 56–69; 10/29/12 RP 124; 11/2/12 RP 132–33; 1/24/13 RP 184–86; 1/25/13 RP 264–66, 272–74, 282; 2/4/13 RP 1065, 1133–39; 1141–42; 2/5/13 1265–74, 1281–1304; 2/6/13 RP 1485–86.

heard a scream and thought it was her neighbor, Carolyn Clift. 1/29/13 RP 438–40, 448–50. Responding officers arrived within minutes and entered the apartment. 1/29/13 RP 443, 450, 468–69. They found Ms. Clift lying dead on the floor. 1/29/13 RP 443–44, 453, 481.

An autopsy revealed Ms. Clift had four stab wounds through three wound entrances; one at the lower region of the left ribcage, another on the lower left chest, and one between the shoulder blades that had two wound paths from the same entrance. 1/30/13 RP 590. The wound to the back was unusual, requiring "a tremendous amount of force" to cut through the vertebrae. Dr. Selove, the forensic pathologist, stated the knife may have been pounded into the back to penetrate as far as it did. 1/30/13 RP 585, 591–94. He described defensive cut wounds on the left hand and minor bruising on her face, neck, and elbow. 1/30/13 RP 606-07. The pathologist estimated the time of death was probably 11:00 pm or earlier. 1/30/13 RP 647–648.

Officers interviewed neighbors in the apartment complex. 73-year-old neighbor Carolee Appleton said she did not see anyone going in or out of the apartment on the night of the homicide. 2/1/13 RP 948, 972–733. On September 10, 1998, a year later, Ms. Appleton told an officer that a month prior to the homicide she had seen two "kids" arrive in a blue

pickup truck. 2/1/13 RP 981–82. At that time Mr. Brugnone owned and drove an older blue pickup truck. 2/4/13 RP 1161; 2/6/13 RP 1313. Only one of them, the passenger, went into Ms. Clift's apartment. 2/1/13 RP 982. She again reported she did not see a vehicle or the "kids" the night of the murder. 2/1/13 RP 985.

On September 17, 1998, Ms. Appleton gave a third statement. 2/1/13 RP 987. She again reported that she did not see anyone on the night of the homicide, and again, that she had seen a person three weeks prior to the murder: a man driving a blue pickup truck dropped his friend off at the apartment. 2/1/13 RP 987–88. She described the individual who entered the apartment at that time as late 20s to 30 years old, with a butch type haircut. 2/1/13 RP 990, 1035. When he was leaving, she heard him say to the driver of the truck, "C'mon let's get out of here." 2/7/13 RP 1562. She believed she heard the same male voice on the night of the homicide. 2/1/13 RP 992, 1035.

Fifteen years later, at trial, Ms. Appleton denied some of the content of her earlier statements and noted that she did not remember things very well. 2/1/13 RP 990–92, 996, 1012. She testified that on the afternoon of the homicide, between 5:30 and 6:30 pm, she sat with Ms. Clift and another tenant at a picnic table. 2/1/13 RP 951. A man

approached the table and said, "I've come with dessert. I'm not taking her to dinner." He carried a bag wrapped around a bottle, and followed Ms. Clift into her apartment. 2/1/13 RP 952–53. Ms. Appleton said someone driving a blue truck had dropped off the man. 2/1/13 RP 954.

Later that night, Ms. Appleton thought she heard a man knock lightly on Ms. Clift's door between 1:30 and 2:30 am; he did not enter the apartment. 2/1/13 RP 963; 997. She heard him say, "It's taking too long. Come on. Hurry." 2/1/13 RP 962–63. The man then ran back to his truck and another man came running out of the apartment with a towel shielding his face. 2/1/13 RP 998.

85-year-old apartment resident Virginia "Maxine" Jones testified that neighbor Lila Powell called her about 9:30 pm saying she heard screams. The witness did not remember telling police a different time. Ms. Jones went to Ms. Clift's apartment and called out for her. When she did not get an answer, the two went into Ms. Powell's apartment. 1/31/13 RP 846, 848, 855–56, 867. Ms. Jones saw a man run by the door, with his head down, and something shielding his face. He was wearing an unbuttoned shirt, blue jeans, and was between 5'10" and 6' tall. 1/31/13 RP 849–51. He ran into Ms. Clift's apartment, turned around, and went back out. 1/31/13 RP 861–62. Then she heard the motor of a car start.

She saw a car, not a truck. She speculated there was another person in the car, but never saw anyone. 1/31/13 RP 863–64, 876.

Investigating officers collected a variety of items from inside Ms. Clift's apartment, including Marlboro cigarette butts that were located inside near the front door and a pair of eyeglasses from the living room. 1/29/13 RP 566–67. Officers did not recover a knife.

Officers contacted Mr. Gorski on September 2, 1997, and on September 4, 1997, he gave a taped interview. He also gave an un-taped interview on September 17, 1997. 1/31/13 RP 725–26. Mr. Gorski told police he had been at his former girlfriend Meghan Nunley's home until 10:30 or 11:00 pm the evening in question and then went home. At the time, he lived with Mr. Brugnone and Mr. Brugnone's wife. 1/30/13 RP 728–31; 1/31/13 RP 730; 2/1/13 RP 924.

On the evening of the murder, between 5:00 and 6:00 pm, Ms. Clift had gone to the local liquor store and purchased a bottle of whiskey. 1/30/13 RP 688, 690. She told the clerk she was excited because a boyfriend who had been in military was coming over for dinner. 1/30/13 RP 689, 701. Mr. Gorski entered and made a purchase. 1/30/13 RP 690–91. Ms. Clift and Mr. Gorski did not acknowledge one another in the

store, but after they left, the clerk saw Ms. Clift talking to Mr. Gorski near his car. 1/30/13 RP 692–94.

Later that evening, between 7:00 and 7:30 pm, Ms. Clift rented two movies from a video store. 2/4/13 RP 1102–06. A witness who arrived at the Wagon Wheel bar that evening around 7:30 or 7:45 pm., also recalled seeing Ms. Clift sitting at a table with two women and a man. 2/6/13 RP 1358–59. Sometime after 9:00 pm she saw Ms. Clift slumped against a hallway wall as a different man was speaking to her in a scolding tone. 2/6/13 RP 1363–66. She did not see Ms. Clift or the man again that evening. 2/6/13 RP 1368–69.

A witness remembered seeing Ms. Clift at the Wagon Wheel bar dancing by herself, after 9:00 pm that same evening. 2/1/13 RP 887–88. She left alone, before midnight. 2/1/13 RP 889, 896. He also saw Mr. Brugnone that evening, but not with Ms. Clift. 2/1/13 RP 893. He did not remember seeing Mr. Gorski. 2/1/13 RP 894.

Meghan Nunley, a former girlfriend of Mr. Gorski, testified she saw Mr. Gorski that afternoon at the Wagon Wheel. 2/1/13 RP 923–24, 928. She invited him to her home. She left the bar sometime between 7:00 and 7:15 pm. 2/1/13 RP 939–40. Mr. Gorski arrived at her home between 8:00 and 8:30 pm. He told her he was late because he had given a

woman a ride home from the liquor store. 2/1/13 RP 940–41, 944. He stayed until 10:00 or 10:30 pm. 2/1/13 RP 941.

Cecil Toney, Ms. Nunley's ex-husband, learned of the murder two days after it occurred but did not report it. 1/31/13 RP 773–74, 777–79, 806; 2/1/13 RP 927–28. Ten years after the 1997 murder, Toney gave information to police regarding the unsolved homicide. In his 2007 and 2011 interviews, Toney reported while taking a friend to the Selah Square Apartments the night before the murder, he saw Mr. Gorski and Mr. Brugnone duck down as his headlights shone on them as they stood in the parking lot between two cars. 1/31/13 RP 782–83, 800; 2/6/13 RP 1326.

On July 12, 2011, police arrested Mr. Gorski. 2/6/13 RP 1407–11, 1421. Mr. Gorski, 46-years-old at the time of the homicide, testified he was not with Mr. Brugnone on that day. 2/7/13 RP 1617, 1635. He saw Ms. Clift at the liquor store, gave her a ride home, and at her invitation, went inside her apartment. 2/7/13 RP 1591–96, 1603, 1654. They drank gin and smoked cigarettes. 2/7/13 RP 1603, 1663. As they sat on the sofa, they kissed and hugged. 2/7/13 RP 1606–08. He left her apartment between 7:30 and 7:40 pm and went to Ms. Nunley's home until 10:00 or 10:30 pm and then drove home. 2/7/13 RP 1609–10, 1613–14, 1658. He forgot his eyeglasses and cigarettes at the apartment. 2/7/13 RP 1610.

Subsequent DNA testing results on the cigarette butts and eyeglasses, as well as scrapings from Ms. Clift's fingernails, were found to be consistent with the DNA profile of Michael Gorski. 1/31/13 RP 732; 2/4/13 RP 1184–85, 1190–91, 1194–96; 1201–02.

During trial, Toney testified his sighting of Mr. Gorski and Mr. Brugnone in the parking lot occurred on the night of the murder rather than the night before as he had earlier told police. 1/31/13 RP 800, 840–41. He stated he told police he saw them between 12:00 and 12:30 am and the transcript of his interview verifies this. 1/31/13 RP 791, 843. On cross-examination, Toney changed his earlier testimony that he saw them between 11:00 pm and midnight, and testified he actually saw them between 12:00 and 12:30 am. 1/31/13 RP 780, 800.

Defense counsel objected[3] to the State's proposal to have the witness review a police summary of his February 22, 2007, interview with Detective Chris Gray and then be re-examined about the timeframe. 1/31/13 RP 816– 24. Out of the presence of the jury, the State acknowledged and the court agreed Toney's testimony clearly gave the time as between 12:00 and 12:30 am. 1/31/13 RP 822. The witness had

[3] Division Three incorrectly determined defense counsel made no objection and relied upon its misinterpretation in concluding the objection was waived. *Slip Opinion, pp. 7–8.*

not expressed any inability to recall the timeframe. Over objection, the court allowed the witness to look at the police summary, relying on ER 612. 1/31/13 RP 824–25. Despite the State's representation otherwise to the trial court, Det. Gray did not testify to the content of his summary and the summary was not admitted into evidence. 1/31/13 RP 717, 819–20; 2/6/13 RP 1325. After review, Toney changed his testimony on re-examination. He acknowledged the summary indicated he'd told police the time frame had to be between 11:00 pm and midnight and adopted that time frame as his testimony. 1/31/13 RP 834–43.

Mr. Gorski was found guilty of second degree murder, committed while armed with a deadly weapon. CP 802–03. At sentencing the court imposed restitution of $3,694.21, discretionary costs of $250 and mandatory costs of $800, for a total Legal Financial Obligation (LFO) of $4,744.21, and found Mr. Gorski had the means to pay the costs of incarceration and medical care. CP 821. The court did not inquire into Mr. Gorski's financial resources or consider the burden payment of LFOs would impose on him. 3/8/13 RP 2018–23. The court ordered Mr. Gorski to pay the costs and assessments within 180 days after his release at a monthly amount to be determined by the Yakima County Clerk. CP 822, ¶

4.D.7. The trial court found Mr. Gorski indigent for this appeal. (On file with the Court of Appeals)

V. ARGUMENT IN SUPPORT OF REVIEW

This Court should accept review under RAP 13.4(b)(1) and (3) to resolve a conflict with decisions of this Court and the United States Supreme Court and to determine a significant question of law under the state and federal constitutions.

A. The trial court abused its discretion by allowing Cecil Toney to be coached over defense counsel's objection and give altered testimony under the guise of ER 612, which prejudiced Mr. Gorski and requires a new trial.

ER 612 governs the procedure for using a writing to refresh a witness's memory. A witness may use a writing to refresh his or her memory for the purpose of testifying if the adverse party has an opportunity to review the writing. The opposing party is entitled to cross-examine the witness from the writing and to introduce portions of it into evidence. ER 612.

The trial court must ensure that (1) the witness' memory needs refreshing, (2) opposing counsel has the right to examine the writing, and (3) the trial court is satisfied that the witness is not being coached. *State v. Little,* 57 Wn.2d 516, 521, 358 P.2d 120 (1961). The witness should first be questioned until his or her memory is exhausted and the witness

indicates a need for the writing. Tegland, 5A Wash. Prac., Evidence Law and Practice § 612.3 (5th ed.) (citing at fn. 2: *U.S. v. Morlang*, 531 F.2d 183 (4th Cir. 1975) and *State v. Huelett*, 92 Wn.2d 967, 603 P.2d 1258 (1979)). A witness is not "coached" if "the witness is using the notes to aid, and not to supplant, his own memory." *Little,* 57 Wn.2d at 521. "[A]n attorney, including a prosecutor, may not 'coach' a witness, i.e., urge a witness to create testimony, under the guise of refreshing the witness' recollection under ER 612. See *State v. Delarosa–Flores,* 59 Wn. App. 514, 517, 799 P.2d 736 (1990), *rev. denied,* 116 Wn.2d 1010, 805 P.2d 814 (1991); *see also* RPC 3.4 cmt. 1 ('Fair competition in the adversary system is secured by prohibitions against ... improperly influencing witnesses.')." *State v. McCreven*, 170 Wn. App. 444, 475, 284 P.3d 793 (2012). Abuse of discretion occurs if no reasonable person would take the view adopted by the trial court. *Huelett*, 92 Wn.2d at 969.

Here, ER 612's threshold requirement that the witness' memory needed refreshing was not met. Mr. Toney testified without hesitation his sighting of Mr. Gorski and Mr. Brugnone took place between 12:00 and 12:30 am and that his prior statement to police verified this time frame. 1/31/13 RP 791, 800, 843. The State and the court acknowledged his testimony was "solid" and "firm" as to this time frame. 1/31/13 RP 822.

Toney's memory was not "exhausted" and he did not indicate any need to refer to extrinsic writings. However, after being allowed over objection to review the reports, Toney acknowledged the police summaries indicated he'd told police the time frame had to be between 11:00 pm and midnight. Toney then adopted that time frame as his testimony. 1/31/13 RP 834–43. The trial court erred and abused its discretion in permitting Toney to be coached, after objection, by improperly reviewing the police summaries and to give altered testimony.

Toney's changed testimony was highly prejudicial. Dr. Selove, the forensic pathologist, estimated the time of death was probably 11:00 pm or earlier. 1/30/13 RP 647–648. The 911 call was made at 11:19 pm. 1/29/13 RP 506. Police responded within minutes, searched and cordoned off the apartment, parking lot and neighboring streets, and found no one in the immediate area. 1/29/13 RP 438, 462, 467–69. 483–85. Toney's original testimony and interview statement that he saw them in the parking lot between 12:00 and 12:30 am was the only eyewitness testimony placing Mr. Gorski and Mr. Brugnone anywhere near the victim's apartment. The timeframe is inconsistent with her death.

Despite the State's representation otherwise to the trial court, Det. Gray did not testify to the content of his summary and the summary was

not admitted into evidence. 1/31/13 RP 717, 819–20; 2/6/13 RP 1325. Thus according to the State's untainted evidence, Toney was lying about having seen the two men. The remaining evidence was not overwhelmingly tipped in the State's favor and the jury may have reached a different conclusion. Instead, the witness was improperly allowed to adjust his testimony to present a timeframe that complemented and sealed the State's case. Mr. Gorski was prejudiced by the court's error and is entitled to a new trial.

B. The remaining evidence was insufficient to sustain the conviction for murder in the second degree as either a principal or an accomplice.

This Court should accept review because due process requires the State to prove its case beyond a reasonable doubt. U.S. Const., amendment 14; Wash. Const., article 1, § 3; *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Sufficiency of the evidence for a conviction is a question of constitutional magnitude. RAP 13.4(b)(3). The Court of Appeals opinion affirming the conviction does not comport with due process as it rests on tainted and prejudicial inference rather than substantial evidence.

Mr. Gorski was charged with murder in the second degree. To sustain a conviction for murder in the second degree, the State was

required to prove beyond a reasonable doubt the defendant without premeditation intended to cause the death of another person and caused the death of such person. RCW 9A.32.050(1).

The State's evidence here cannot sustain a conviction as either a principal or an accomplice. There was no direct physical evidence establishing that Mr. Gorski committed or was a participant in the crime. The indirect untainted evidence, even taken in a light most favorable to the State, does not place Mr. Gorski at Ms. Clift's apartment at the time of commission of the murder.

Mr. Gorski acknowledged being in Ms. Clift's apartment earlier that evening, drinking gin and smoking cigarettes, kissing and making out. 2/7/13 RP 1591–96, 1603, 1606–08, 1654, 1663. The liquor store owner had seen them beforehand, when they bought alcohol sometime between 5:00 and 6:00 pm. 1/30/13 RP 688–89, 690–94, 701. Mr. Gorski left the apartment alone between 7:30 and 7:40 pm and went to Ms. Nunley's home until 10:00 or 10:30 pm and then drove home. 2/7/13 RP 1609–10, 1613–14, 1658. Ms. Nunley verified Mr. Gorski arrived at her house between 8:00 and 8:30 pm and stayed until 10:00 or 10:30 pm. 2/1/13 RP 940–41, 944.

Ms. Clift was seen alone between 7:00 and 7:30 pm as she rented two movies from a video store. 2/4/13 RP 1102–06. At the Wagon Wheel bar, two witnesses also saw Ms. Clift alive after Mr. Goski left her apartment. One witness saw Ms. Clift around 7:30 or 7:45 pm. and again sometime after 9:00 pm. 2/6/13 RP 1358–59, 1363–66, 1368–69. The second witness saw Ms. Clift dancing by herself, after 9:00 pm. 2/1/13 RP 887–88.

According to the evidence, Ms. Clift was seen alone and alive until sometime after 9:00 p.m. The pathologist estimated the time of death as 11:00 pm or earlier. 1/30/13 RP 647–648. The 911 call was made at 11:19 pm. 1/29/13 RP 506. Thus the murder must have occurred sometime after 9:00 pm and before 11:19 pm.

Evidence showed Mr. Gorski was at Ms. Nunley's or the Brugnone's house during this time period. 1/30/13 RP 728–31; 1/31/13 RP 730; 2/1/13 RP 924, 940–41, 944. Mr. Gorski was not seen with Ms. Clift after he left her apartment. 2/1/13 RP 894. At best, the testimony of the apartment neighbors and other witnesses established only circumstantially that Mr. Brugnone may have been in the area in his blue pickup with an unknown passenger. In the absence of Toney's

impermissibly altered testimony as argued above, the evidence does not place Mr. Goski at the crime scene.

Substantial evidence means evidence sufficient to persuade an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973). Here, the jury's verdict is not supported by substantial evidence. There was no untainted evidence from which any rational trier of fact could conclude Mr. Gorski took any action or had any intent to, or did cause the death of Ms. Clift. Because there is no evidence to conclude Mr. Gorski participated in the homicide, the special verdict of use of a deadly weapon should also be reversed and dismissed.

C. The requisite inquiry into ability to pay discretionary costs under *State v. Blazina* and discretionary costs of medical care and incarceration under *State v. Leonard* applies to defendants who had retained counsel at trial but were found indigent for purposes of pursuing appeal.

Mr. Gorski asked Division Three to review the trial court's imposition of discretionary legal financial obligations including the $250 jury fee and costs of incarceration and medical care and the requirement to repay the costs and assessments within 180 days after release from confinement, without inquiry into his ability to pay. Brief of Appellant ("BOA"), Issue 3, pp. 19–26. The court declined to consider this claim

"[i]n these circumstances, where there is no more than $250 that possibly may be at issue[4], and where Mr. Gorski did not claim indigency until after sentencing." *See Slip Opinion*, pp. 9–10; Appendix B.

Division Three declined to consider the issue of the $250 jury demand fee, which is arguably discretionary under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (March 12, 2015). The opinion fails to address Mr. Gorski's issue of costs of incarceration and medical care, both of which are discretionary and require an adequate pre-imposition inquiry into ability to pay. *State v. Leonard*, 184 Wn.2d 505, 507–08, 358 P.3d 1167 (2015) (per curiam). The trial court made a boilerplate finding that "the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed here." CP 819, ¶ 2.6.[5] The trial court did not inquire into Mr. Gorski's financial resources or consider the burden payment of LFOs would impose on him. 3/8/13 RP 2018–23. The trial court required Mr. Gorski to pay $50 per day toward the cost of incarceration for the duration of his prison sentence,

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[4] The court noted "[i]t is unclear to us whether the $250 jury demand fee is a mandatory or discretionary cost. *Slip Opinion* at 9 (footnote omitted). RCW 10.01.160(2) states that jury fees under RCW 10.46.190 may be included as costs. A court cannot order a defendant to pay costs unless the defendant is or will be able to pay them. RCW 10.01.160(3).

[5] *Cf.* "The judgment and sentence forms used in this case do not include the standard language indicating that the defendant has the ability to pay the LFOs." *Slip Opinion*, p. 9 fn 3.

and the costs of his medical care, and required all costs and assessments be paid within 180 or 270 days of release. BOA, p. 12; CP 821, ¶¶ 4.D.4, 4.D.5; CP 822, ¶ 4.D.7.

Assuming Mr. Gorski does not accrue good time and incurs no medical expenses while in prison, the principal alone of the costs of incarceration LFO will be slightly over $371,000.[6] Further, Mr. Gorski's outstanding LFO debt and restitution of $3,694.21[7] will continue to grow over the next 20.33 years with accumulating interest at twelve per cent. It is also unlikely any future motions to remit could alleviate the burden of the principal restitution amount of $3,694.21, which by statute can never be waived or modified. RCW 10.82.090(2)(b). That statute further provides an offender cannot ask to modify or reduce accrued restitution interest until he has been released from "total confinement" **and** only if he has already paid the principal in full. *Id.*

In its opinion, Division Three acknowledges Mr. Gorski is serving a lengthy sentence and will be quite elderly upon release and, therefore, unable to earn a living. *Slip Opinion*, p. 10. Mr. Gorski was ordered to pay restitution and will have an extensive LFO balance due to the assessed

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[6] $50 x 365 days = $18,250 x 20.33 years (224 months) = $371,022.50.
[7] BOR, p. 11; CP 821.

discretionary costs including incarceration and medical care, and interest accruing on all of the obligations. Whether Mr. Gorski had retained counsel at trial was not determinative whether he had current and future ability to pay LFOs. The sentencing court must make an individualized inquiry on the record. *Blazina*, 182 Wn.2d at 839; *Leonard*, 184 Wn.2d at 508. It did not. Mr. Gorski asks this Court to consider this issue on its merits and remand to the trial court for resentencing with proper consideration of his ability to pay consistent with *Blazina* and *Leonard*.[8]

VI. CONCLUSION

For the reasons stated, Mr. Gorski respectfully asks this Court to accept review of his petition.

Respectfully submitted on November 14, 2016.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office, P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149; FAX: None
gaschlaw@msn.com

[8] If this case is remanded for reconsideration of the discretionary LFOs, Mr. Gorski requests the trial court be further directed to reconsider the time frame in which he has to repay his LFOs. *See, e.g., State v. Rivera Jr.*, No. 32920-8-III, 2016 WL 5399720, at *3 (Wash. Ct. App. Sept. 20, 2016) (Pennell, J.). Pursuant to GR 14.1(a), the unpublished opinion in *State v. Rivera Jr.* is cited as a non-binding authority of Division Three for the proposition that when reconsidering an offender's ability to pay LFOs it is also appropriate for the trial court to reconsider the required timeframe of repayment.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 14, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's petition for review and Appendix A (opinion filed 9/13/16) and Appendix B (order denying motion for reconsideration filed 10/13/16):

Michael Orren Gorski (#230776)
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen WA 98520

E-mail: David.Trefry@co.yakima.wa.us
David B. Trefry
Yakima County Prosecutor's Office
P. O. Box 4846
Spokane WA 99220-0846

E-mail: marietrombley@comcast.net
Marie J. Trombley, Attorney at Law
P. O. Box 829
Graham WA 98338

s/Susan Marie Gasch, WSBA #16485

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

October 13, 2016

E-mail:
Susan Marie Gasch
Gasch Law Office
PO Box 30339
Spokane, WA 99223-3005

E-mail:
Joseph Anthony Brusic
Yakima County Prosecutor's Office
128 N 2nd St Rm 329
Yakima, WA 98901-2621

E-mail:
Marie Jean Trombley
Attorney at Law
PO Box 829
Graham, WA 98338-0829

E-mail:
David Brian Trefry
Yakima County Prosecutors Office
PO Box 4846
Spokane, WA 99220-0846

CASE # 315291
State of Washington v. Frank Eugene Brugnone
YAKIMA COUNTY SUPERIOR COURT No. 111009861
consolidated with CASE # 315631
State of Washington v. Michael Orren Gorski
YAKIMA COUNTY SUPERIOR COURT No. 111009721

Dear Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy (unless filed electronically) of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
Attachment

FILED
OCT 13, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 31529-1-III
Respondent,	)	(consolidated with
v.	)	No. 31563-1-III)
	)	
FRANK EUGENE BRUGNONE	)	
and MICHAEL ORREN GORSKI,	)	ORDER DENYING
	)	MOTION FOR
Appellants.	)	RECONSIDERATION

THE COURT has considered appellant Michael Orren Gorski's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of September 13, 2016, is denied.

PANEL: Judges Korsmo, Siddoway, Pennell

BY A MAJORITY:

George Fearing

GEORGE FEARING
Chief Judge

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

September 13, 2016

E-mail:
Susan Marie Gasch
Gasch Law Office
PO Box 30339
Spokane, WA 99223-3005

E-mail:
Joseph Anthony Brusic
Yakima County Prosecutor's Office
128 N 2nd St Rm 329
Yakima, WA 98901-2621

E-mail:
Marie Jean Trombley
Attorney at Law
PO Box 829
Graham, WA 98338-0829

E-mail:
David Brian Trefry
Yakima County Prosecutors Office
PO Box 4846
Spokane, WA 99220-0846

CASE # 315291
State of Washington v. Frank Eugene Brugnone
YAKIMA COUNTY SUPERIOR COURT No. 111009861
consolidated with CASE # 315631
State of Washington v. Michael Orren Gorski
YAKIMA COUNTY SUPERIOR COURT No. 111009721

Dear 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 file an original and two copies of the motion (unless filed electronically). 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 (may be filed by electronic facsimile transmission). 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,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. Ruth E. Reukauf
c: Frank Eugene Brugnone
11J-00530
Yakima County DOC
111 N. Front Street
Yakima, WA 98901

Michael Orren Gorski
#230776
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

FILED
SEPT 13, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 31529-1-III
Respondent,	)	(consolidated with
	)	No. 31563-1-III)
v.	)	
	)	
FRANK EUGENE BRUGNONE	)	
and MICHAEL ORREN GORSKI,	)	UNPUBLISHED OPINION
	)	
Appellants.	)	

KORSMO, J. — Frank Brugnone and Michael Gorski appeal from their convictions for second degree murder, raising separate challenges arising from their joint trial. Determining that there was no error, we affirm.

FACTS

This joint prosecution involved a "cold case," the investigation into the 1997 murder of Carolyn Clift, who was killed in her apartment late in the evening of August 28th that year. Two men were seen leaving Ms. Clift's apartment, but police were unable to identify them at the time. Early DNA testing was inconclusive, but more sensitive testing later tied Mr. Gorski to the crime scene.

He had been a subject of the original police investigation because he was seen conversing with Ms. Clift outside a Selah liquor store on August 28th after both had

made purchases at the establishment. The two left together in his car. Later that evening Ms. Clift was seen renting a video at a video store. Brugnone, Clift, and Gorski all were seen later that evening at the Wagon Wheel, but Ms. Clift was not seen in the company of the two men at the establishment.

Around 11:00 p.m., a neighbor in the Selah Square Apartments heard screaming from Ms. Clift's apartment and called another neighbor. When they received no response to their knocks at her door, the two women called 911. While they were awaiting police, some neighbors saw a white male run from Ms. Clift's apartment and one of them heard him call out "get it started." An engine started up and two men drove off in a blue pickup truck.

Police discovered Ms. Clift dead on the floor of her living room. She had been stabbed four times. The final wound penetrated her vertebra and had probably been driven in by a hammer or similar object. The investigation identified several people of interest, but was unable to place any of them at the crime scene that evening. Mr. Gorski told police he had given Ms. Clift a ride home from the liquor store, but otherwise had not known her. He lived at that time at Mr. Brugnone's home. Brugnone's wife told police that her husband drove a blue pickup truck.

In 2007, a witness, Cecil Toney, came forward and told police he had seen Clift and Brugnone, whom he knew, in a blue pickup truck outside the Selah Square Apartments the night of the murder. Later that year, Selah police submitted cigarette

butts found at the crime scene for DNA testing. Mr. Gorski's DNA was found on them, as well as on a pair of eyeglasses. Y-STR testing in 2011 on mixed DNA recovered from the victim's fingernails also matched Mr. Gorski and excluded all of the other males under investigation.

Mr. Brugnone, who initially told police he had never been at Ms. Clift's apartment, later confessed that he had been in the apartment at the time of the killing, but denied involvement in the act. He described Gorski attacking Ms. Clift from behind and throwing her into him, leading Brugnone to leave the apartment. As she fell to her knees, Mr. Brugnone told her that "Mike will take care of you."

Charges of second degree murder while armed with a deadly weapon were filed against the two men and proceeded to a joint trial. Brugnone waived his right to a jury trial and his case tried to the bench while a jury heard the case against Mr. Gorski. Brugnone's statements to the police were not presented to the jury.

Both men were found guilty as charged. The trial court imposed identical high-end 244 month sentences in each case. Both men appealed to this court. The two appeals were consolidated and considered by a panel without oral argument.

ANALYSIS

Mr. Brugnone's appeal challenges the sufficiency of the evidence to support four of the bench trial findings and to support the conviction. Mr. Gorski challenges the admission of Mr. Toney's testimony, the sufficiency of the evidence to support the jury

verdict, and the imposition of legal financial obligations (LFOs) against him. We address those contentions in the order indicated, beginning with Mr. Brugnone's issue.[1] We then will consider motions filed by both men to waive costs on appeal.

Sufficiency of Evidence Against Mr. Brugnone

Mr. Brugnone challenges the sufficiency of the evidence, including four findings entered after the bench trial. He contends he was merely a bystander. Well settled standards govern our review of this argument.

"Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-106, 330 P.3d 182 (2014) (*citing State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Id.* In reviewing insufficiency claims, the appellant necessarily admits the truth of the State's evidence and all reasonable inferences drawn therefrom.

---

[1] Both men also submitted personal statements of additional grounds. RAP 10.10. Each claims the other was guilty and he was found guilty only due to the association with the other, but neither explains why a severance was required. Mr. Gorski also argues his confrontation right was violated, citing to *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). However, Mr. Brugnone's statement was never put before the jury, so this claim is without merit. The other arguments are either unintelligible or dependent upon evidence outside the record of this case, so we are unable to address them.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, this court must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Mr. Brugnone first challenges five of the findings from the bench trial, which we group into three contentions. The first challenge is to finding 70, which determined that Carolee Appleton had overheard the driver (Brugnone) ask Mr. Gorski, "did you do it?" In her statement to the police, she had quoted Brugnone as stated in finding 70. At trial, defense counsel asked Ms. Appleton if she had told the officer she heard the man say, "did you do it?" Report of Proceedings (RP) at 1012. She stated that the officer got that part right, but she was not sure of the order of the statement with respect to the other statements. She recited it thus: "He was yelling at the other guy, get that started. We've got to get out of here. He said, 'What did you do?' Something like that, in that order." RP 1013. While the latter formulation does vary, the trial court was free under the evidence to credit her original statement ("did you do it?") that she had just affirmed for defense counsel. At most, there was a conflict in the evidence. The trial judge was permitted to accept the first statement in the place of the second.

The next challenge is to finding 75, which states that "Megan Nunley testified that she has some memory of Defendant Frank Brugnone asking her for an alibi for the date

of August 28, 1997." This finding is amply supported by the evidence. Ms. Nunley's direct statement in court was "I vaguely remember him asking for an alibi." RP at 926. Replacing "vaguely" with "some memory" is an accurate recitation of the meaning of the statement. This finding, too, is supported by substantial evidence.

The remaining challenges relate to credibility determinations made in the findings. The court found that Mr. Brugnone's statement to the police was both "self-serving" and inconsistent with the physical evidence, and that Mr. Brugnone was not an innocent bystander.[2] Credibility determinations are for the trier of fact and cannot be changed by this court. *Camarillo*, 115 Wn.2d at 71. These findings summed up the trial court's view of the evidence and were within its purview. There was no error.

The ultimate question is whether the evidence supported the bench verdict. Although the evidence of his direct participation is not as clear as it is for Mr. Gorski, it was sufficient to support the verdict. He was present for the killing, urged Mr. Gorski to hurry up after telling the victim that Gorski would "take care of [her]," started up his truck, and waited for Gorski before driving the two away from the scene. Thereafter he lied to the police and maintained that story for 10 years. Given that the victim showed defensive injuries and was stabbed in front and in back, the judge was permitted to infer

[2] *See* Findings of Fact 92-94. CP at 155.

that his participation was more active than he admitted. Brugnone's statement about leaving the scene also was inconsistent with the report from the apartment dwellers.

The evidence supports the bench verdict. The trial judge was not required to accept Mr. Brugnone's version of the events.

Testimony of Cecil Toney

Mr. Gorski initially argues it was error for prosecutor to refresh Toney's memory on redirect examination after Toney had changed his testimony on cross-examination concerning the time frame when he had seen the two men at the apartment complex. The claim of error was not preserved and also is without merit.

On direct examination, Mr. Toney testified he had seen Gorski and Brugnone at the apartments between 11 p.m. and midnight. RP at 780. On cross examination, after reviewing a transcript of his 2007 statement, Toney indicated the time was between midnight and 12:30 a.m. RP at 791. He subsequently adjusted his time frame and maintained that time during his testimony. RP at 800. The prosecutor subsequently showed Toney his initial statements, made before the interview, that placed the two men there between 11 p.m. and midnight. No objection was lodged to this effort. Nonetheless, Mr. Toney maintained the 12-12:30 time frame even after being shown the initial report. RP at 843.

No objection was raised to the prosecutor's re-examination. Accordingly, the failure to object waived any objection. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); RAP 2.5(a). Moreover, the redirect examination was utterly harmless. Even after seeing his original remarks, Mr. Toney stuck with his answer to defense counsel that the incident occurred between 12:00 and 12:30 a.m. The re-examination did not change the witness's testimony in the least.

There was no error at all. This issue is without merit.

Sufficiency of the Evidence Against Gorski

Mr. Gorski likewise challenges the sufficiency of the evidence to support the conviction, arguing that he left the apartment complex near 7:30 p.m. and could not have committed the crime. The jury was free to conclude otherwise.

The standards of review, previously mentioned, require that we consider the evidence in a light most favorable to the State and determine whether there was evidence that permitted the jury to find each element of the offense proven beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201. As also noted in the earlier discussion, the case against Mr. Gorski was quite strong. Despite his protestation that he was not at the scene, DNA from his glasses and cigarette butts put him there, and he was seen leaving the apartment complex soon after the victim's screams alerted the neighbors. Ms. Clift's body showed several defensive wounds and Mr. Gorski's DNA was recovered from her fingernails. Like Mr. Brugnone, he lied to the police about his presence at the crime scene.

While Mr. Gorski's testimony conflicted with the State's theory of the case, the jury accepted the latter instead of the former. The evidence amply supported the determination that Gorski was the last person to see Ms. Clift alive and was undoubtedly the killer. It was sufficient.

Gorski LFO Contentions

Mr. Gorski's final contention is a claim that the court erred in imposing LFOs without first determining his ability to pay them.[3] We decline to consider this issue, which was not presented to the trial court.

Mr. Gorski was represented at trial by retained counsel and did not claim indigency until after he was sentenced when he then sought to appeal at public expense. The trial court imposed LFOs consisting of restitution ($3,694.21), the $500 crime victim assessment, the $200 filing fee, a $100 DNA collection fee, and a $250 jury demand fee. It is unclear to us whether the $250 jury demand fee is a mandatory or discretionary cost.[4]

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[3] The judgment and sentence forms used in this case do not include the standard language indicating that the defendant has the ability to pay the LFOs.

[4] *Compare* RCW 10.01.160(2) (indicating in relevant part that the jury fee "under RCW 10.46.190 may be included in costs the court may require a defendant to pay"), *with* RCW 10.46.190 (stating that "every person convicted . . . shall be liable to all the costs . . . including . . . a jury fee . . . for which judgment shall be rendered and collected"). *See also State v. Diaz-Farias*, 191 Wn. App. 512, 524, 362 P.3d 322 (2015) (concluding demand fee could be imposed per RCW 10.01.160(2)) and *State v. Munoz-Rivera*, 190 Wn. App. 870, 894, 361 P.3d 182 (2015) (defendant considered jury demand fee as mandatory cost).

All of the remaining assessments have previously been determined to constitute mandatory costs that, therefore, are not subject to a determination of ability to pay before imposition. *State v. Lundy*, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013).

In these circumstances, where there is no more than $250 that possibly may be at issue, and where Mr. Gorski did not claim indigency until after sentencing, we exercise the discretion granted us under *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015), and decline to consider this claim initially on appeal.

Costs on Appeal

Lastly, both defendants filed similar motions to enlarge time and to deny costs on appeal in accordance with a recent general order of this court, effective June 10, 2016. That order requires the requests to have the panel hearing the appeal exercise its discretion to deny costs in the event the State substantially prevails, must make the request in the appellant's opening brief or by motion filed within 60 days of the filing of the brief of appellant. Both opening briefs in this case were filed in 2015, well before the effective date of the general order.

We grant the motion to extend time and will consider the requests on the merits. Both men note they are serving lengthy sentences and will be quite elderly upon release and, therefore, unable to earn a living. Both men were ordered to pay restitution and will have extensive LFO balances due to the interest attached to the existing

judgments. In these circumstances, we exercise our discretion and direct that costs not be awarded to the State in these appeals.

Affirmed.

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.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Pennell, J.

GASCH LAW OFFICE

November 14, 2016 - 10:25 AM

Transmittal Letter

Document Uploaded: 315631-Petition for review 11-14-16 Gorski, Michael Orren 31563-1.pdf

Case Name: State v. Michael Orren Gorski

Court of Appeals Case Number: 31563-1

Party Respresented: appellant

Is This a Personal Restraint Petition? ☐ Yes ☑ No

Trial Court County: ___ - Superior Court # ___

Type of Document being Filed:

☐ Designation of Clerk's Papers / ☐ Statement of Arrangements

☐ Motion for Discretionary Review

☐ Motion: ___

☐ Response/Reply to Motion: ___

☐ Brief

☐ Statement of Additional Authorities

☐ Affidavit of Attorney Fees

☐ Cost Bill / ☐ Objection to Cost Bill

☐ Affidavit

☐ Letter

☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ___
Hearing Date(s): _____

☐ Personal Restraint Petition (PRP)

☐ Response to Personal Restraint Petition / ☐ Reply to Response to Personal Restraint Petition

☑ Petition for Review (PRV)

☐ Other: _____

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to David.Trefry@co.yakima.wa.us and marietrombley@comcast.net.

Sender Name: Susan M Gasch - Email: gaschlaw@msn.com

GASCH LAW OFFICE

November 14, 2016 - 10:26 AM

Transmittal Letter

Document Uploaded: 315631-COA opinion 9-13-16, Appendix A, unpub Gorski, Michael 31529-1.pdf

Case Name: State v. Michael Orren Gorski

Court of Appeals Case Number: 31563-1

Party Respresented: appellant

Is This a Personal Restraint Petition? ☐ Yes ☑ No

Trial Court County: ___ - Superior Court # ___

Type of Document being Filed:

☐ Designation of Clerk's Papers / ☐ Statement of Arrangements

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☐ Motion: ___

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Hearing Date(s): _____

☐ Personal Restraint Petition (PRP)

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☐ Petition for Review (PRV)

☑ Other: Appendix A to Petition for Review 31563-1-III

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to David.Trefry@co.yakima.wa.us and marietrombley@comcast.net.

Sender Name: Susan M Gasch - Email: gaschlaw@msn.com

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November 14, 2016 - 10:28 AM

Transmittal Letter

Document Uploaded:	315631-COA order 10-13-16, Appendix B, denying mtn 4 recon Gorski, Michael Orren 31563-1.pdf
Case Name:	State v. Michael Orren Gorski
Court of Appeals Case Number:	31563-1
Party Respresented:	appellant
Is This a Personal Restraint Petition?	☐ Yes ☑ No
	Trial Court County: ___ - Superior Court # ___

Type of Document being Filed:

- ☐ Designation of Clerk's Papers / ☐ Statement of Arrangements
- ☐ Motion for Discretionary Review
- ☐ Motion: ___
- ☐ Response/Reply to Motion: ___
- ☐ Brief
- ☐ Statement of Additional Authorities
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- ☐ Letter
- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ___ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition / ☐ Reply to Response to Personal Restraint Petition
- ☐ Petition for Review (PRV)
- ☑ Other: Appendix B to Petition for Review 31563-1-III

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to David.Trefry@co.yakima.wa.us and marietrombley@comcast.net.

Sender Name: Susan M Gasch - Email: gaschlaw@msn.com