

Supreme Court No. _____
(COA No. 74708-8-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN KIRK,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

John Kirk, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Kirk seeks review of the Court of Appeals decision dated June 12, 2017, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals reversed Mr. Kirk's conviction and remanded the case for further proceedings because despite Mr. Kirk's clear request to proceed pro se, the trial court grossly misadvised him of the charge and its sentencing stakes. A mandate constitutes the law of the case and binds the court and parties below to adhere to appellate court's ruling. But on remand, the court never acknowledged Mr. Kirk's pro se request, and treated the attorney appointed as stand-by as if he were Mr. Kirk's lawyer. Did the court disregard the Court of Appeals mandate and violate Mr. Kirk's right to represent himself or receive effective assistance of counsel under the Sixth and Fourteenth

Amendments and their even greater protections under the state constitution?

2. Mr. Kirk's conviction rested on a police officer's sua sponte efforts to entice Mr. Kirk into agreeing to sexual relations with a child. Did the police violate the Fourth Amendment and the officer's lawful authority by exceeding its authority and did the court lack jurisdiction over the offense? Did the prosecution further violate the Fourteenth Amendment when it stemmed from an incident manufactured by the police, in excess of the officer's authority, to create a crime that Mr. Kirk had not intended to commit?

D. STATEMENT OF THE CASE

In 2013, John Kirk asked to represent himself. 11/7/13RP 16-17. The trial court granted this request, but grossly misrepresented the punishment Mr. Kirk faced. CP 35. On appeal, the State conceded this error invalidated Mr. Kirk's waiver of counsel. *Id.* The Court of Appeals reversed Mr. Kirk's conviction and remanded the case for further proceedings. CP 34-35.

On remand, the court made no mention of the basis for reversal. Instead, it continued the case for trial with very few in-court hearings in Mr. Kirk's presence. CP 171-79. From the outset, it ignored the

inadequate colloquy -- it did not discuss the charges and punishment Mr. Kirk faced, tell him of the dangers of self-representation, or determine whether he knowingly, intelligently, and voluntarily waived counsel.

The Office of Public Defense appointed Craig McDonald as standby counsel, but Mr. McDonald did not tell Mr. Kirk he was only appointed in a limited role. 1/5/16RP 178-79, 180-81. Mr. McDonald promised to set a hearing on Mr. Kirk's self-representation but did not do so. 8/25/15RP 5.

The court held a CrR 3.5 and 3.6 hearing and, as the parties prepared to select a jury, Mr. McDonald admitted he had never filed a notice of appearance and was only appointed as standby counsel, which he never told Mr. Kirk. 1/5/16RP 178-79, 181. The court asked Mr. Kirk if he would agree to have Mr. McDonald represent him and Mr. Kirk consented, but requested he be permitted to dictate the questions Mr. McDonald asked the lead detective. 1/5/16RP 180. The court did not rule on this request. 1/5/16RP 180-81.

Just as jury selection was set to begin, Mr. Kirk pled guilty to the charged offense. 1/5/16RP 183. He also filed a notice of appeal. CP 99. The facts are further set forth in the Court of Appeals opinion,

Appellant’s Opening Brief, in the pertinent argument sections, Appellant’s Reply Brief, and the Statement of Additional Grounds for Review. Facts as outlined in each of these pleadings are incorporated by reference herein.

E. ARGUMENT

1. By disregarding the mandate of the Court of Appeals concerning Mr. Kirk’s expressly stated request for self-representation, Mr. Kirk was denied his constitutional right to self-representation and the corollary right to effective assistance of counsel.

a. When a defendant has made a clear request for self-representation, the court is prohibited from ignoring it.

The constitution guarantees criminal defendants the right to waive counsel and represent themselves, as well as the right to representation by a competent attorney at all stages of a criminal proceeding. U.S. Const. amends. 6,¹ 14;² Const. art. I, § 22;³ *Faretta v.*

¹ The Sixth Amendment provides in part, In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

² The Fourteenth Amendment says in part: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.”

³ Article I, section 22 provides in pertinent part:

California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975);
State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

“The unjustified denial of this [pro se] right *requires* reversal.”
Madsen, 168 Wn.2d at 503 (quoting *State v. Stenson*, 132 Wn.2d 668,
737, 940 P.2d 1239 (1997), emphasis added in *Madsen*). The “clear
and explicit” state constitutional right to self-representation is more
strictly protected than the federal constitutional right. *State v. Silva*, 107
Wn.App. 605, 618-19, 27 P.3d 663 (2001).

The “only bases” to deny a request for self-representation is the
court’s finding that the request is equivocal, untimely, involuntary, or
made without understanding its consequences. *Madsen*, 168 Wn.2d at
504. This finding “must be based on some identifiable fact,” and not
merely the judge’s speculation. *Id.* at 505. The court cannot “stack the
deck” by failing to conduct the proper inquiry. *Id.* at 506.

The *Madsen* Court also ruled that a defendant’s request is not
rendered equivocal or waived when he fails to repeat it at later hearings,
after the court deferred ruling. *Id.* at 507. A court may not find

In criminal prosecutions the accused shall have the right to appear and
defend in person, or by counsel, to demand the nature and cause of the
accusation against him, to have a copy thereof, . . .[and] to have a speedy
public trial by an impartial jury.”

“equivocation” by “referencing future events then unknown to the trial court. Such prophetic vision is impossible for the trial court.” *Id.*

Therefore, the defendant’s failure to repeatedly assert his request for self-representation does not excuse the court from having failed to consider and rule on the request when it was required to do so. *Id.* at 508.

b. The trial court ignored its obligations under the law of the case and inexplicably violated Mr. Kirk’s Sixth Amendment rights following a successful appeal.

In 2013, Mr. Kirk unequivocally asserted his right to self-representation and the court concluded he was validly waiving his right to counsel. 11/7/13RP 16-17, 23-24. However, during this colloquy, the judge grossly misinformed Mr. Kirk of the penalty he faced if convicted -telling him it was a class C felony with a five year maximum when it was a class A felony with a lifetime maximum. CP 35; *see* COA 71865-7-I. The State conceded this error on appeal. *Id.* The Court of Appeals agreed and reversed Mr. Kirk’s conviction, remanding the case for further proceedings in accordance with the opinion. CP 34-35.

A trial court must “strictly comply” with the mandate issued by the Court of Appeals. RAP 12.2; *see State v. Schwab*, 134 Wn.App. 635, 645, 141 P.3d 658 (2006). But the trial court ignored the reason

Mr. Kirk's conviction was reversed and treated Mr. Kirk as if he never asked to represent himself, barely holding and hearings at which his personal presence was offered. CP 171-73.

In the instant appeal, the Court of Appeals forgave the trial court, claiming remand "for further proceedings" did not specifically direct the trial court to do anything. Slip op. at 6. But this ruling is illogical and contrary to precedent.

A remand for further proceedings consistent with an appellate court opinion, signals the trial court that it must address the reason for the remand. *In re Marriage of Rockwell*, 157 Wn.App. 449, 454, 238 P.3d 1184 (2010). In no circumstance may the court simply ignore the reason for the remand. *Harp v. American Sur. Co. of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957); *see also Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 183, 311 P.3d 594 (2013) ("An appellate court's mandate is the law of the case and binding on the lower court and must be followed."). In a criminal case, the appellate court's mandate is particularly important because it protects the constitution right to appeal "in all cases," and disregarding this mandate undercuts this constitutional right. Art. I, §§ 3, 22.

The remedy for the issue that required reversing Mr. Kirk's conviction is to conduct a valid pro se colloquy. Mr. Kirk had already unequivocally expressed his intent to waive counsel. He is not required to repeat it at every hearing. *Madsen*, 168 Wn.2d at 505, 507.

Of the 11 court dates that occurred before trial, seven were mere continuance orders entered without any in-court proceedings. CP 171-73, 174, 175-76, 178, 179. Mr. Kirk did not even appear before a judge in open court on these dates. *Id.* The case proceeded without conducting a colloquy regarding Mr. Kirk's waiver of counsel.

Mr. Kirk was not even told that his attorney, Mr. McDonald was only appointed as stand-by counsel. As the trial started, Mr. McDonald confessed that his appointment was as "standby" counsel only. 1/5/16RP 18-81. Mr. Kirk did not know of Mr. McDonald's limited assigned role. 1/5/16RP 181 ("I wasn't aware that Mr. McDonald was a . . . standby."). Mr. McDonald admitted he had never filed a notice of appearance in the case. 1/5/16RP 178-79.

The plain directive of the Court of Appeals opinion was for the court to provide accurate information about self-representation so that Mr. Kirk could make a knowing and intelligent choice. CP 35. The

court did not give Mr. Kirk that opportunity at the inception of the remand, despite the mandate.

The result of the Court of Appeals opinion should have been to return Mr. Kirk to the position he was in at the time he waived counsel, having unequivocally asserted his right to self-representation, as the law of the case. *See Bank of Am., N.A.*, 177 Wn.App. at 183. This mandate triggered the court's obligation at the outset of proceedings to conduct a valid colloquy and determine if Mr. Kirk wanted to enter a knowing, intelligent and voluntary waiver of counsel.

After it came to light just as jury selection was to begin that Mr. McDonald was appointed on a limited basis as standby, the court asked Mr. Kirk if he was satisfied having defense counsel represent him.

1/5/16RP 179-81. Mr. Kirk agreed, but he also asserted his desire to have hybrid representation to allow him the opportunity to question the lead detective, or at least direct the questions his lawyer should ask.

1/5/16RP 180 ("My only concern" is "there will certain questions that I want to put before [the detective] to be sure that they are asked."). The court did not rule on this request.

This belated conversation many months after the mandate was issued does not satisfy the mandate or fulfill the trial court's obligation to afford a person the opportunity to represent himself when requested.

During the prior trial proceedings, where Mr. Kirk had invalidly waived counsel, he repeatedly asked the court for standby counsel. 11/7/13RP 24-25; 11/22/13RP 28-29; 2/24/14RP 51; 3/3/14RP 111-12, 116-17. These requests were repeatedly denied. *See, e.g.*, 3/3/14RP 112 (“I have been denied standby counsel to help me through the technical aspects. I just want to make an objection to the fact that had I had standby counsel, . . . I would not be forced into a guilty plea.”). Without standby counsel, he had struggled to represent himself. He had minimal access to legal resources because he was housed in the King County jail, which has no law library for inmates, and had limited access to an investigator. 11/7/13RP 22; 11/22/13RP 30.

Had Mr. Kirk understood he had received the standby counsel he long sought after his case was remanded, he may have chosen to represent himself from the outset. 1/5/16RP 181. He indicated his desire to be involved in the case as a litigator by asking for hybrid representation because he felt it was important that he shape the

questions for the State's central witness. 1/4/16RP 9, 103-05; 1/5/16RP 168-69.

The court stacked the deck against Mr. Kirk by acting as if he had no right to represent himself. He was entitled to have time to prepare for trial as his own attorney under the Court of Appeals mandate, not merely a mid-trial switch, which is all the court offered. By delaying any inquiry until the trial proceedings were under way, the court "stacked the deck" against exercising his right to self-representation. *Madsen*, 168 Wn.2d at 506. This denied Mr. Kirk his right to meaningful self-representation under article I, section 22 and the Sixth Amendment.

2. Mr. Kirk was unlawfully arrested and prosecuted in violation of the Fourth and Fourteenth Amendments.

As Mr. Kirk explained in his Statement of Additional Grounds for Review, the arresting officer exceeded his authority when investigating and arresting Mr. Kirk, in violation of the Fourth Amendment and article, I section 7. He acted outside of the statutory legal authority accorded to him by enticing Mr. Kirk to attempt a criminal act, as discussed in the Statement of Additional Grounds, pages 3-6.


His prosecution also violates his right to fair treatment as a matter of due process under the Fourteenth Amendment. Based on the arresting officer's ultra vires acts, detailed in the Statement of Additional Grounds, the court should not have had jurisdiction over Mr. Kirk and the allegations made against him. Statement of Additional Grounds at 3. In addition, in the interest of justice, the police officer's acts in enticing Mr. Kirk to express an interest in sexual acts with a child when Mr. Kirk's only intent was to engage in sexual acts with an adult, the prosecution should be dismissed. *See* Statement of Additional Grounds at 3, 6. Review should be granted and Mr. Kirk's conviction reversed and dismissed.

F. CONCLUSION

Based on the foregoing, Petitioner John Kirk respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 12th day of July 2017.

Respectfully submitted,



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APPENDIX A

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2017 JUN 12 AM 9:00

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,)	No. 74708-8-1
)	
Respondent,)	
)	DIVISION ONE
v.)	
)	
JOHN LLOYD KIRK,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: June 12, 2017
)	

MANN, J. — John Kirk appeals his conviction for attempted second degree rape of a child arguing that he was denied the right to proceed pro se. Although Kirk requested to proceed pro se in a previous trial for the same crime, we reversed that conviction and remanded for a new trial. On remand, Kirk did not request to proceed pro se and agreed to be represented by appointed counsel. We affirm the judgment and sentence.

FACTS

In January 2011, Kirk solicited sex through a Craigslist personals ad entitled, “DADDY LOOKING FOR HIS LITTLE GIRL.” An undercover detective responded to the ad and told Kirk that he had a 13-year-old daughter who was interested in having sex with older men. After exchanging numerous e-mails, the detective and Kirk met face to face. After the meeting, Kirk confirmed that he was interested in meeting the 13-year-

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old girl for sex. Kirk was arrested when he showed up at the predetermined location with several items including: condoms, lubricant, a vibrator, and a camera.

In January 2011, the State charged Kirk with the attempted rape of a child in the second degree. In August 2011, Kirk pleaded guilty to an amended charge of attempting to promote commercial sex abuse of a minor. On appeal, the State conceded that Kirk's offender score had been miscalculated. We accepted the State's concession, granted Kirk's request to withdraw his guilty plea, and remanded for a new trial. In re Pers. Restraint of Kirk, No. 69168-6-I, slip op. at 1-2 (Wash. Ct. App. Mar. 18, 2013) (unpublished) (Kirk I).

In March 2014, Kirk proceeded to trial pro se and was found guilty. On appeal, the State conceded that Kirk had not knowingly waived his right to counsel because the court misinformed him about the offense's maximum penalty. We accepted the State's concession, reversed Kirk's conviction, and remanded for further proceedings. State v. Kirk, No. 71865-7-I, slip op. at 1 (Wash. Ct. App. June 15, 2015) (unpublished) (Kirk II).

In January 2016, Kirk—while represented by counsel—pleaded guilty to attempted rape of a child in the second degree (Kirk III). Kirk did not request to proceed pro se. Kirk appeals the judgement and sentence.

ANALYSIS

Kirk argues on appeal that he was denied his right to proceed pro se. The State counters that Kirk waived the right to proceed pro se by not asking the trial court to proceed pro se. We agree with the State.

I

Under the Washington Constitution and the Sixth Amendment to the United States Constitution, criminal defendants have the right to proceed pro se. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22 (“the accused shall have the right to appear and defend in person”); Faretta v. Cal., 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). “The unjustified denial of this [pro se] right requires reversal.” State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (quoting State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997)). “A waiver of counsel must be knowing, voluntary, and intelligent.” City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). “If counsel is properly waived, a criminal defendant has a right to self-representation.” Acrey, 103 Wn.2d at 209 (citing U.S. CONST. amend. VI; WASH. CONST. art. I, § 22).

However, “[t]he right to proceed pro se is neither absolute nor self-executing.” Madsen, 168 Wn.2d at 504. The request must be unequivocal and timely. In order “[t]o protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation, the defendant’s request to proceed pro se must be unequivocal.” Stenson, 132 Wn.2d at 740. Courts are required to “indulge in every reasonable presumption against a defendant’s waiver of his or her right to counsel.” Madsen, 168 Wn.2d at 504 (internal quotations omitted).

II

After remand, Kirk’s case returned to the trial court for scheduling. At the initial scheduling hearing, public defender Craig McDonald appeared as Kirk’s attorney. McDonald stated that he would set up a hearing to determine if Kirk wanted to proceed with representation or pro se. The trial court invited Kirk to set up a hearing if he

wanted: "All right, Mr. Kirk. So your trial date is going to be the 14th of October. . . . And of course, you can set a hearing to address the Court with regard to a request to proceed pro se any time you like." At no time did Kirk request such a hearing.

At the pretrial omnibus hearing, McDonald told the trial court that he "may be asking for [Kirk] to conduct some of the examination." The trial court immediately inquired into the scope of McDonald's representation. McDonald replied that he would handle every aspect of the case, but that Kirk wanted to ask or dictate questions to be asked of the State's main witness. At that point, Kirk clarified that he only wanted to question the witness:

[Kirk]: Your Honor, if I understand your last question, do I intend to or would I intend to conduct any other part of the trial.

The Court: Correct.

[Kirk]: I am very confident in [McDonald] and the only thing that I am requesting is that, during either the cross-examination or the Defense's direct examination, I be allowed to question [the arresting detective]. And as [McDonald] suggested, if this is the inappropriate time to make that decision, we can bring it up later.

Recognizing that Kirk was asking for "hybrid" representation, the trial court asked the parties to research the issue further and took the issue under advisement.

The next day, the trial court explained that it understood that although McDonald had been appointed as Kirk's standby counsel, Kirk wanted McDonald to represent him:

The Court: So [McDonald] has been appointed as standby counsel, which generally means that an individual is representing themselves, okay, and that counsel is appointed simply to be there for advice, not to actively represent an individual throughout the course of a trial. In this case, it's a little bit different because [McDonald] has been actively representing you throughout this trial and, from my conversation with both of you yesterday, you indicated that you were comfortable with that because you were comfortable with [McDonald's] representation.

And that was okay with you and that's how you wanted to proceed. I'm fine with that, if that's, you know—I think that's fine. The indication I got yesterday, though, was that you did want to participate in the trial in essentially what would be a co-counsel role by asking questions of [the arresting detective] when [the detective] was on the stand.

[Kirk]: Yes, sir.

The Court: And that's my understanding of the extent that you wish to be involved in the trial. Is that correct?

[Kirk]: That would be correct, sir.

The court denied Kirk's motion for hybrid representation.¹

The prosecutor then voiced confusion over McDonald's representation of Kirk, noting that he could not find a notice of appearance by McDonald. The trial court again asked McDonald about the scope of his representation. McDonald confirmed that he represented Kirk: "And I have been acting as counsel. And I believe it was my client's or [Kirk's] decision for me to act as counsel." The trial court then asked Kirk directly what he wanted, and Kirk confirmed for the second time that he wanted McDonald to represent him:

The Court: Okay. And [Kirk], I can ask you, is that your desire? And has that been your desire, for [McDonald] to act as your counsel?

[Kirk]: Excuse me, Your Honor. I have no objection to him acting as counsel. My only concern is the issue we raised earlier—

The Court: Uh huh.

[Kirk]: —that there will be certain questions that I want to put before [McDonald] to be sure that they are asked.

¹ There is no constitutional right in a criminal case for hybrid representation, i.e., to participate as cocounsel at trial. State v. Hightower, 36 Wn. App. 536, 540, 676 P.2d 1016 (1984).

The court then reconfirmed that Kirk was not asking to proceed pro se:

The Court: Our concern here is, we want to make sure that your desire is to have counsel represent you and not that you act on your behalf pro se. And it looks like [McDonald] has been appointed to represent you as full counsel. And we want to make sure that, that was your desire.

[Kirk]: It is.²

Kirk confirmed that he had “no objection to [McDonald] being [his] lawyer.”

Despite the trial court’s express invitation, at no time did Kirk request to proceed pro se. Rather, he affirmed and reaffirmed his desire to proceed to trial with representation. “A defendant’s request to proceed pro se must be both timely made and stated unequivocally.” Stenson, 132 Wn.2d at 737. Kirk was not denied his right to waive his right to counsel and proceed pro se.

III

Kirk argues also that his due process rights were violated because the trial court failed to “strictly comply with the mandate” of this court by not conducting a new formal colloquy on his right to appear pro se. The order of this court in Kirk II was simply to “reverse the conviction, and remand for further proceedings.” While the basis of the reversal was Kirk’s improper waiver of his right to counsel, we did not mandate that the trial court conduct a new pro se colloquy; we simply reversed Kirk’s conviction and remanded for a new trial. This argument lacks merit. If Kirk wanted to waive counsel and proceed pro se at the new trial, it was his burden to request a colloquy.

² (Emphasis added.)

IV


Kirk filed a pro se statement of additional grounds (SAG) in which he raises several issues. First, Kirk alleges that the detective who arrested him violated multiple criminal laws related to promoting prostitution and entrapment. This argument lacks merit. "Where the police merely give a defendant an opportunity to commit a crime by employing a ruse, entrapment is not established." State v. Youde, 174 Wn. App. 873, 886, 301 P.3d 479 (2013); see RCW 9A.16.070. Here, the detective gave Kirk the opportunity to commit a crime with a fictitious 13-year-old girl. The ruse did not constitute entrapment.

Second, Kirk alleges that the detective who arrested him did not follow the United States Department of Justice's Internet Crimes Against Children Program's "Operational and Investigative Standards" (Standards) by not obtaining his supervisor's consent. While a copy of the Standards is in the appellate record, Kirk bases his claims on facts and evidence that are not in the record. Issues that involve facts or evidence not in the record are properly raised through a properly supported personal restraint petition, not a SAG. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008); RAP 10.10(c).

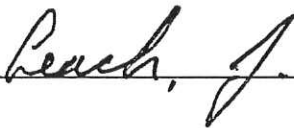
Finally, Kirk challenges the trial court's jurisdiction. "[J]urisdiction over a crime rests exclusively in the courts of the state in which the crime is committed." State v. Lane, 112 Wn.2d 464, 470, 771 P.2d 1150 (1989). Washington has jurisdiction over anyone who "commits in the state any crime, in whole or in part." RCW 9A.04.030(1). Kirk pleaded guilty to attempted second degree rape of a child and admitted that this crime occurred in King County, Washington. Jurisdiction was proper.


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We affirm Kirk's judgment and sentence.



WE CONCUR:





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** under **Case No. 74708-8-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: July 12, 2017

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