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SUPREME COURT  
STATE OF WASHINGTON  
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No. 96238-3  
COA No. 76339-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAINAINA KARIUKI,

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

Michael Kariuki asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Michael Wainania Kariuki*, No. 76339-3-I (July 30, 2018). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires the State prove each of the elements of the charged offense. Second degree assault by strangulation requires proof that the defendant obstructed the victim's blood flow or ability to breathe or they acted with the intent to obstruct the blood flow or ability to breathe. The evidence presented here failed to show Mr. Kariuki either obstructed S.M.R's blood flow or ability to breathe nor any evidence he intended to do so. The evidence merely established S.M.R. had redness on her neck and nothing more. Is a substantial question of law under the United States and Washington Constitutions presented

requiring reversal of the second degree assault conviction with instructions to dismiss?

2. Statements made for the purpose of medical diagnosis or treatment are admissible under an exception to the rule against admitting hearsay. Hearsay statements attributing fault are not admissible under this exception. The trial court allowed hearsay statements of S.M.R. regarding injuries she suffered and allowed S.M.R.'s claim that Mr. Kariuki was the person responsible for inflicting the injuries. Is a substantial question of law under the United States and Washington Constitutions presented where the trial court violated Mr. Kariuki's right to due process and right to a fair trial when it erroneously admitted S.M.R.'s hearsay statements?

D. STATEMENT OF THE CASE

1. The events of the evening of May 11, 2015.

On May 11, 2015, Federal Way Police were dispatched to Michael Kariuki's apartment regarding an allegation that an assault had occurred. RP 827-29. Mr. Kariuki alleged he had been assault by his girlfriend, Nikki. RP 837. He directed the police to where Nikki lived. RP 842.

The officers went to the location and located several young women, and after asking, one of them identified herself as “Nikki.” RP 845-47, 1211. This young woman identified herself as S.M.R. RP 847. While speaking to her friend, Tabitha, S.M.R. quickly turned and ran into the apartment. RP 850, 1211. S.M.R.’s sister, Brittcole came from the apartment and began speaking to the police. RP 1216. At some point during this discussion, Tabitha went into the apartment looking for S.M.R. RP 1216. She quickly returned and stated that S.M.R. had some knives and was going to attempt suicide. RP 1217. S.M.R. was quickly restrained by the police officers. RP 1218-20. The officers spoke further with Brittcole and Tabitha and S.M.R. RP 862, 1220-21.

From that point forward, the focus of the investigation changed. 1221-22. The officers arrested Mr. Kariuki. RP 1223. The officers seized Mr. Kariuki’s cellphone on his arrest. RP 1224-25. The investigation also revealed S.M.R. was 13 years of age and Mr. Kariuki was 20 years of age. RP 876. A download of Mr. Kariuki’s cellphone revealed a video clip of Mr. Kariuki and S.M.R. engaging in sexual intercourse. RP 1430-37, 1575, 1600.

2. S.M.R.'s statements to the social worker.

S.M.R. did not testify at trial. S.M.R. was taken to Children's Hospital Emergency following her attempted suicide. RP 866, 1150. S.M.R. was initially seen by Social Worker Janelle Heath. RP 1150. Over Mr. Kariuki's objection, and according to Ms. Heath, who claimed the statement was part of the examination process and thus a statement made as part of medical diagnosis or treatment, S.M.R. reported:

that around 6:00 p.m. on 5/11/2015, she was at Michael's home, also referred to as Mike. She said that Mike is a 21-year-old man that she's known for three months. That she was sexually active with him on multiple occasions. She was sexually active with him this evening around 6:00 p.m. She reported that also in this past evening she had been drinking liquor with him, approximately five drinks.

She went on to say that this evening he slapped, choked, and pushed her into a dresser. Things escalated when he took off her clothes and she said no. She ran out of the room with her clothes and got dressed and ran to her sister's house. She called out to her brother Gary for help.

[S.M.R.] reported that Brittcole, Shane, Gary, Magical and Py walked back to Mike's house and [S.M.R.] began to hit Mike. She said her family pulled her away. She walked home and the police came.

RP 1168-69.

Pediatric nurse Courtney Walker examined S.M.R. and noted a bruise on S.M.R.'s neck and bruising on her torso. RP 1083-85. Dr. Dan Himelic, also examined S.M.R. and confirmed bruising on S.M.R.'s neck and tenderness in her ribs. RP 1336.

### 3. Charges and verdict.

Mr. Kariuki was charged with two counts of second degree rape of a child, one count of second degree child molestation, one count of second degree "assault by strangulation," one count of communicating with a minor for an immoral purpose, and one count of sexual exploitation of a minor. CP 11-12. Following the jury trial, Mr. Kariuki was convicted of one count of second degree rape of a child for the video clip on his cellphone, and one count of second degree assault by strangulation. CP 123, 128. The jury acquitted Mr. Kariuki of the second rape of a child count and the child molestation count. CP 126-27. The jury was unable to reach a verdict on the remaining counts and a mistrial was declared on those counts. RP 1930.

### 4. Court of Appeals decision.

The Court of Appeals rejected Mr. Kariuki's argument that there was insufficient evidence that he strangled S.M.R. Decision at 4-5. The Court also ruled S.M.R.'s hearsay statement to the hospital social



worker that Mr. Kariuki was the person who assaulted her was properly admitted as a statement for the purpose of medical diagnosis or treatment. Decision at 5-7.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

**1. There was insufficient evidence Mr. Kariuki was guilty of second degree assault by strangulation.**

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Strangulation is defined by RCW 9A.04.110(26) as:

Compress[ing] a person’s neck, thereby obstructing the person’s blood flow or ability to breathe, or doing so with the intent to obstruct the person’s blood flow or ability to breathe;

In order to convict Mr. Kariuki of assault in the second degree by strangulation, the State was required to prove beyond a reasonable doubt that he intentionally assaulted S.M.R. by either obstructing S.M.R.'s blood flow or ability to breathe by compressing her neck or that he compressed S.M.R.'s neck with the specific intent to cause this result. *State v. Reed*, 168 Wn.App. 553, 574-75, 278 P.3d 203, *review denied*, 176 Wn.2d 1009 (2012).

Here, there was a bruise on S.M.R.'s neck and she stated to the hospital social worker that she had been "choked." RP 1168. But this term is meaningless as a colloquial term that doesn't necessarily mean a restriction of the airway, but also can denote merely placing one's hands around one's throat without squeezing.

Contrary to the Court of Appeals conclusion, the two medical professionals who examined S.M.R., the emergency room (ER) doctor and the ER nurse did not state that the bruise on S.M.R.'s neck was the result of strangulation:

On the anterior medial portion of her neck, kind of by her trachea, she did, she did have a contusion, so a bruise, and I recall that being read [sic] red in its color and tender as well.

...

Q. And were there particular areas that you were focusing on?

A. Well, in general, what's written in my note is the patient had some bruising to her frontal neck region. There's no specifics in my note to where that particularly was, so I would not be able to comment exactly where that was.

RP 1083, 1336.

In addition, the Court of Appeal ignored the fact that lacking from the ER examination of S.M.R. was evidence of petechiae,<sup>1</sup> which results from strangulation:

Q. Now, one of the things, one of the places that you can find petechiae is in cases of strangulation; is that right?

A. That's correct.

Q. And you didn't find it here, right?

A. I did not.

RP 1129.

As a consequence, there was no evidence produced nor any reasonable inference that could be drawn that S.M.R.'s airway was restricted the extent that here blood flow was obstructed or her ability to breathe hindered. The only evidence was a bruise on her neck. In addition, there was nothing brought before the jury to suggest that Mr.

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<sup>1</sup> “[A] minute reddish or purplish spot containing blood that appears in skin or mucous membrane as a result of localized hemorrhage[.]”  
<https://www.merriam-webster.com/dictionary/petechia>.

Kariuki intended to obstruct S.M.R. blood flow or ability to breath. No rational jury could conclude that the evidence produced here was sufficient to prove strangulation.

Accordingly, Mr. Kariuki asks this Court to grant review and reverse his assault by strangulation conviction.

**2. S.M.R.'s hearsay statements to the hospital social worker were inadmissible as a statement of medical diagnosis or treatment under ER 803(a)(4).**

- a. *The admission of irrelevant evidence violates the due process right to a fair trial.*

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. XIV; *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Generally, the mere failure to comply with state evidentiary rules does not violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). But, mere compliance with state evidentiary and procedural rules does not *guarantee* compliance with the requirements of due process. *Id.*, citing *Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984). Due process *is* violated where the admission of evidence was arbitrary or so

prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986).

b. *S.M.R.’s statement to the social worker included statements regarding fault, which were inadmissible.*

ER 803(a)(4) provides an exception to the general prohibition against hearsay testimony for statements “made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Because ER 803(a)(4) pertains to statements “reasonably pertinent to diagnosis or treatment,” it allows statements regarding causation of injury, but generally not statements attributing fault. *State v. Redmond*, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). This Court provided the following example to illustrate its holding: “[T]he statement ‘the victim said she was hit on the legs with a bat,’ would be admissible, but ‘the victim said her husband hit her in the face’ would not be admissible.” *Id.*

The Court of Appeals has recognized two exceptions to the doctrine that statements attributing fault are not admissible; cases of child abuse and cases involving domestic violence. *State v. Sims*, 77

Wn.App. 236, 239-40, 890 P.2d 521 (1995); *State v. Butler*, 53

Wn.App. 214, 766 P.2d 505 (1989).

When a trial court determines that statements attributing fault are admissible under ER 803(a)(4), “[m]uch ... depends on the context in which such statements are made.” *In re Dependency of Penelope B.*, 104 Wn.2d 643, 656, 709 P.2d 1185 (1985).

The Court of Appeals relied solely on the ruling of the trial court without more. Decision at 6. Yet, there is no evidence S.M.R. lived with Mr. Kariuki or had any ongoing domestic relationship with him. S.M.R. and Mr. Kariuki had known each other for a mere month. Further, there is no evidence that Dr. Himelic relied on the statement for purposes of medical treatment or diagnosis. The record does not demonstrate that either the doctor, the ER nurse, or the ER social worker advised S.M.R. about counseling services. Under these circumstances, it is not clear that the statement was relevant to preventing further injury to S.M.R., and the trial court erred in not excluding it.

The Court of Appeals decision is contrary to this Court’s decision in *Redmond*. This Court should grant review to further clarify that admission of statements of fault do not qualify under the hearsay

exception for statements for the purpose of medical diagnosis or treatment. As a result, Mr. Kariuki's conviction for assault should be reversed.

F. CONCLUSION

For the reasons stated, Mr. Kariuki asks this Court to grant review of the Court of Appeals decision and reverse his conviction.

DATED this 27<sup>th</sup> day of August 2018.

Respectfully submitted,

*s/Thomas M. Kummerow*

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## APPENDIX



IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 76339-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
MICHAEL WAINAINA KARIUKI,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 30, 2018
_____	)	

FILED  
DIVISION ONE  
COURT OF APPEALS  
STATE OF WASHINGTON  
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ANDRUS, J. — Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the offense proved beyond a reasonable doubt. Michael Wainaina Kariuki challenges the sufficiency of the evidence supporting his conviction for second degree assault by strangulation. But, viewing the evidence in the light most favorable to the State, a rational juror could have found beyond a reasonable doubt that Kariuki assaulted his victim by strangulation. We affirm.

FACTS

S.R., a 13 year-old girl living with her sister, Brittcole Trent, was in a sexual relationship with Kariuki, a 21 year-old neighbor. On May 11, 2015, S.R. and her friend Tabitha Chamberlain visited Kariuki. When S.R. returned home, she was distraught. She smelled of alcohol and her cheek was red and swollen. S.R. told Trent that Kariuki wanted to have sex with her in front of Chamberlain and, when she said no, he slapped her.

S.R., Trent, and other family members went to Kariuki's apartment and demanded to know what had happened. Kariuki denied slapping S.R. Kariuki's stepfather told Trent to leave and pushed her. Before Trent could restrain her, S.R. ran at Kariuki and began hitting him. Kariuki's stepfather called the police and reported an assault.

When police officers responded, Kariuki was limping. He told the officers that S.R. had assaulted him and injured his leg. Kariuki declined to give details about what occurred and later stated that he injured his leg when he tripped over a table.

After speaking with Kariuki and his stepfather, the officers went to S.R.'s apartment, where they spoke with S.R., Chamberlain, and Trent on the steps outside. S.R. was uncooperative. Officer Blackshear observed that her cheek and eyelid were swollen. S.R. and Chamberlain spoke with the officers briefly then went into the apartment. The officers remained outside speaking with Trent. After some time, Chamberlain rushed out of the apartment yelling that S.R. had knives and was about to kill herself. The police officers and Trent ran inside and found S.R. in a bathroom. Trent was able to take the knives away from S.R. The officers took S.R. into custody to prevent her from harming herself. They called for an ambulance to transport her to the hospital for evaluation by a mental health professional.

While waiting for the ambulance, Officer Blackshear placed S.R. in the back of the patrol car. He observed that she smelled of alcohol and appeared intoxicated. He also observed bruises on S.R.'s neck. Blackshear photographed the bruises and instructed the medics to evaluate S.R. for strangulation.

Following an investigation, the State charged Kariuki with two counts of rape of a child in the second degree, assault in the second degree by strangulation, sexual exploitation of a minor, communication with a minor for immoral purposes, and child molestation in the second degree. During a three-week trial, Trent, Chamberlain, and the responding officers testified to the events related above. Professionals who cared for S.R. at the hospital also testified.

A social worker, Janelle Heath, stated that S.R. told her that she had been sexually active with Kariuki on multiple occasions. S.R. told Heath that, on May 11, she and Kariuki had several drinks. Kariuki then wanted to have sex but S.R. said no. S.R. told Heath that Kariuki slapped her, choked her, and pushed her into a dresser. The emergency room physician, Dan Himelic, testified that he observed bruising on the front of S.R.'s neck. S.R. told Himelic that her "significant other" attacked her and choked her. The nurse who conducted the sexual assault exam, Courtney Walker, testified that she observed a bruise on S.R.'s neck near her trachea, as well as other scratches and bruises. Walker stated that bruising is one sign of strangulation.

S.R. did not testify. According to Trent, S.R. was in love with Kariuki and did not testify because she did not want to get him in trouble.

The jury convicted Kariuki of one count of rape of a child and assault in the second degree by strangulation.<sup>1</sup>

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<sup>1</sup> The jury acquitted Kariuki on the second count of rape of a child and the child molestation charge. The jury was unable to reach a verdict on the remaining charges and a mistrial was declared as to those charges.

ANALYSIS

Kariuki challenges the sufficiency of the evidence supporting his conviction for second degree assault by strangulation. Sufficiency of the evidence is a question of law that we review de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The test is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

To convict of assault by strangulation, the State must prove that the defendant compressed the victim's neck and thereby either (1) obstructed the person's blood flow or ability to breathe or (2) intended to obstruct the person's blood flow or ability to breathe. RCW 9A.36.021(1)(g); RCW 9A.04.110(26). Kariuki argues that the evidence at trial was insufficient for a reasonable person to conclude that he obstructed S.R.'s blood flow or her ability to breathe or acted with the specific intent to cause that result.

We disagree. Officer Blackshear saw bruising on S.R.'s neck. He documented her bruises by photographing them. These photos were admitted at trial. Blackshear described what he'd seen as a "long red mark" in the center of her throat. He also testified he found vomit in the backseat of his patrol car after transporting S.R. to the hospital. Medical personnel testified that vomit is a symptom of strangulation. The nurse who attended to S.R. testified that she saw and photographed a 1.5 cm by 1 cm bruise on the anterior medial portion of S.R.'s

neck, near her trachea. The social worker and the emergency room doctor both testified that S.R. reported she had been choked.

Proof of intent can be made through circumstantial evidence. State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994). Intent to commit a crime may be inferred from a defendant's conduct where it is plainly indicated as a matter of logical probability. In re Personal Restraint Petition of Fuamaila, 131 Wn. App. 908, 923 n.23, 924, 131 P.3d 218 (2006) (evidence of intent to murder inferred from victim's multiple stab wounds) (quoting State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997)). Evidence of intent is gathered from all of the circumstances of the case. State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Based on all of the evidence presented to the jury in this case, it could reasonably conclude that the injury on S.R.'s trachea—caused by a force strong enough to cause bruising—was indicative of an intent to obstruct S.R.'s ability to breathe. The jury could reasonably infer that Kariuki injured S.R. with the intent to obstruct S.R.'s breathing.

Kariuki also challenges the admission of S.R.'s hearsay statements to Heath, the social worker. He objects to Heath's testimony that S.R. told her that Kariuki slapped her, choked her, and pushed her into a dresser. Kariuki contends this statement was not within the medical hearsay exception because it attributed fault.

We review the trial court's decision to admit a statement under a hearsay exception for abuse of discretion. State v. Magers, 164 Wn.2d 174, 187, 189 P.3d 126 (2008). The trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. Id. at 181.

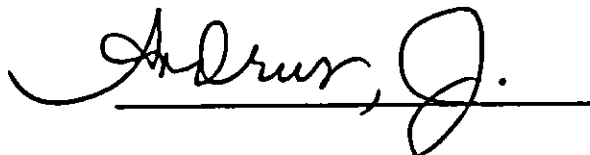
Statements made for the purpose of medical diagnosis or treatment are admissible as medical hearsay. ER 803(a)(4). Because they are not reasonably pertinent to diagnosis or treatment, statements attributing fault are not generally within this exception. State v. Redmond, 150 Wn.2d 489, 496-97, 78 P.3d 1001 (2003). But the admissibility of a statement as medical hearsay depends on the specific context in which the statement was made. In re Dependency of Penelope B., 104 Wn.2d 643, 656, 709 P.2d 1185 (1985). We have recognized attributions of fault as medical hearsay in cases of child abuse and domestic violence. State v. Sims, 77 Wn. App. 236, 239, 890 P.2d 521 (1995). In such cases, statements attributing fault are pertinent to the treatment of the victim's psychological and emotional injuries, which may include recommendations on how to prevent a recurrence of abuse. Id. at 239-40. See also State v. Butler, 53 Wn. App. 214, 222, 766 P.2d 505 (1989).

In this case, the trial court heard argument concerning S.R.'s hearsay statements in pretrial motions. The court considered the specific facts of this case, particularly the romantic relationship between Kariuki and S.R.; their ages; the proximity of their homes; and the fact that the alleged violence caused psychological harm that led S.R. to attempt suicide. Given these facts, the court ruled that S.R.'s statements attributing fault to Kariuki were reasonably pertinent to medical diagnosis and treatment.

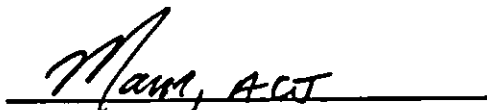
The trial court did not abuse its discretion. The court properly considered S.R.'s statements in the specific context of this case. The decision is based on proper grounds and is not manifestly unreasonable.

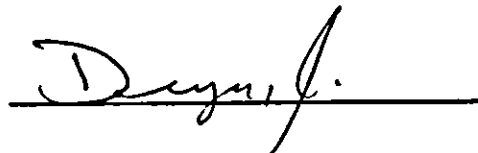
Furthermore, even if the trial court erred, the error was harmless. An erroneous decision to admit evidence is grounds for reversal only if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). In this case, Trent and Chamberlain testified that S.R. was in a relationship with Kariuki, visited him on May 11, and was distraught after the visit. The doctor, nurse, and responding officer each testified that they saw bruises on S.R.'s neck. Photographs of the bruises were admitted into evidence. The doctor testified that S.R. told him that her boyfriend choked and attacked her. The nurse testified that bruising is one sign of strangulation. Given this unchallenged evidence, it is not reasonably probable that the outcome of the trial would have been different if S.R.'s hearsay statement to the social worker had not been admitted.

Affirmed.

  
\_\_\_\_\_

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. 76339-3-I**, 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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petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: August 27, 2018



# WASHINGTON APPELLATE PROJECT

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