

COA No. 34924-1-III  
COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

NATHAN CALVERT, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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**INDEX**

**I. APPELLANT’S ASSIGNMENTS OF ERROR ..... 1**

**II. ISSUES PRESENTED ..... 1**

**III. STATEMENT OF THE CASE ..... 2**

    Procedural history. .... 2

    Substantive facts. .... 3

**IV. ARGUMENT ..... 7**

**A. THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT’S MOTION TO SUPPRESS EVIDENCE AND THEREFORE PROPERLY RULED THAT THE DEFENDANT’S CONFESSION WAS ADMISSIBLE. .... 7**

        1. Standard of review. .... 7

        2. Substantial evidence supports the trial court’s finding of waiver. .... 9

        3. Even if the trial court erred in admitting Mr. Calvert’s statements in the State’s case-in-chief, that error was harmless. .... 17

**B. BY FAILING TO RAISE THE ISSUE OF WHETHER THE \$200 FILING FEE IMPOSED AT SENTENCING IS A MANDATORY FEE, THE DEFENDANT WAIVED ANY CLAIM REGARDING THIS NON-CONSTITUTIONAL ISSUE ON APPEAL..... 22**

        1. The defendant provides no basis for raising this new and unpreserved issue on appeal..... 22

        2. This court’s discretionary authority to accept review should not be exercised in this case. .... 23

        3. The statute imposing the fee is mandatory in nature. .... 24

C. UNLESS DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL. .... 27

V. CONCLUSION ..... 28

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	24
<i>Crown Cascade, Inc. v. O'Neal</i> , 100 Wn.2d 256, 668 P.2d 585 (1983).....	25
<i>In re Det. of Ambers</i> , 160 Wn.2d 543, 158 P.3d 1144 (2007) .....	23
<i>In re Estate of Little</i> , 106 Wn.2d 269, 721 P.2d 950 (1986).....	25
<i>In re Pers. Restraint of Yates</i> , 177 Wn.2d 1, 296 P.3d 872 (2013).....	24
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004) .....	24
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983).....	23
<i>State v. Athan</i> , 160 Wn.2d 354, 158 P.3d 27 (2007).....	8, 10
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	23
<i>State v. Bockman</i> , 37 Wn. App. 474, 682 P.2d 925 (1984) .....	21
<i>State v. Booth</i> , 36 Wn. App. 66, 671 P.2d 1218 (1983).....	21
<i>State v. Broadaway</i> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	8
<i>State v. Brown</i> , 128 Wn. App. 307, 116 P.3d 400 (2005).....	22
<i>State v. Bryan</i> , 93 Wn.2d 177, 606 P.2d 1228 (1980) .....	26
<i>State v. Deal</i> , 128 Wn.2d 693, 911 P.2d 996 (1996) .....	18
<i>State v. Dictado</i> , 102 Wn.2d 277, 687 P.2d 172 (1984) .....	9
<i>State v. Duncan</i> , 185 Wn.2d 430, 374 P.3d 83 (2016) .....	24
<i>State v. Fedorov</i> , 181 Wn. App. 187, 324 P.3d 784, <i>review denied</i> , 181 Wn.2d 1009 (2014).....	10

<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	26
<i>State v. Gasteazoro-Paniagua</i> , 173 Wn. App. 751, 294 P.3d 857 (2013).....	8
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985) .....	18
<i>State v. Guzman-Cuellar</i> , 47 Wn. App. 326, 734 P.2d 966 (1987).....	21
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	7, 8
<i>State v. Hutchinson</i> , 85 Wn. App. 726, 938 P.2d 336 (1997).....	13
<i>State v. Kier</i> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	26
<i>State v. Linares</i> , 98 Wn. App. 397, 989 P.2d 591 (1999).....	20
<i>State v. Lundy</i> , 176 Wn. App. 96, 308 P.3d 755 (2013) .....	22
<i>State v. Mason</i> , 31 Wn. App. 41, 639 P.2d 800 (1982) .....	12
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	8
<i>State v. Ng</i> , 110 Wn.2d 32, 750 P.2d 632 (1988) .....	18
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009) .....	20
<i>State v. Pierce</i> , 169 Wn. App. 533, 280 P.3d 1158, <i>review denied</i> , 175 Wn.2d 1025, 291 P.3d 253 (2012).....	8
<i>State v. Q.D.</i> , 102 Wn.2d 19, 685 P.2d 557 (1984) .....	26
<i>State v. Rupe</i> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	11
<i>State v. Sargent</i> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	9
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988) .....	20
<i>State v. Stewart</i> , 113 Wn.2d 462, 780 P.2d 844 (1989).....	13
<i>State v. Stoddard</i> , 192 Wn. App. 222, 366 P.3d 474 (2016).....	22
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	19, 20

<i>State v. Terrovona</i> , 105 Wn.2d 632, 716 P.2d 295 (1986) .....	12, 15, 16
<i>State v. Unga</i> , 165 Wn.2d 95, 196 P.3d 645 (2008) .....	9, 11, 12
<i>State v. Vaughn</i> , 101 Wn.2d 604, 682 P.2d 878 (1984), review denied, 140 Wn.2d 1027 (2000) .....	20, 22
<i>State v. Vickers</i> , 148 Wn.2d 91, 59 P.3d 58 (2002) .....	8, 20

#### FEDERAL CASES

<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) .....	11
<i>Berghuis v. Thompkins</i> , 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) .....	12, 13, 15
<i>Colorado v. Connelly</i> , 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) .....	10
<i>Escobedo v. Illinois</i> , 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) .....	10
<i>Mincey v. Arizona</i> , 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d. 290 (1978) .....	9
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) .....	9, 10, 13
<i>Moran v. Burbine</i> , 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) .....	10, 14, 17
<i>North Carolina v. Butler</i> , 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979) .....	12, 14, 15
<i>Oregon v. Mathiason</i> , 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) .....	10
<i>United States v. Andaverde</i> , 64 F.3d 1305 (9th Cir. 1995) .....	10

<i>United States v. Washington</i> , 431 U.S. 181, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977).....	9
<i>Withrow v. Williams</i> , 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993).....	11

**CONSTITUTIONAL PROVISIONS**

U.S. CONST. amend. V.....	9
U.S. CONST. amend. XIV.....	9
Wash. Const. art. I, § 9.....	9

**STATUTES**

RCW 10.01.160 .....	24
RCW 36.18.020 .....	25

**RULES**

Fed. R. Crim. P. 51 .....	19
Fed. R. Crim. P. 52 .....	19
RAP 2.5.....	19, 20, 23
RAP 14.2.....	27, 28

## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court erred in denying the defendant's motion to suppress his confession obtained by police during the CrR 3.5 hearing and in entering findings of fact 2.3 and 2.6, and in entering conclusions of law 3.2, 3.3, 3.4, 3.5, and 3.6.

2. The trial court erred in imposing a \$200 criminal filing fee pursuant to RCW 36.18.020(h) without considering the defendant's ability to pay this legal financial obligation (LFO).

## **II. ISSUES PRESENTED**

1. Did the trial court err in denying the defendant's motion to suppress his confession obtained by police, after determining that the defendant knowingly, voluntarily, and intelligently gave his statement after he was correctly advised of, and understood, his rights, when neither Corporal Thurman nor Deputy Hill coerced the defendant, made no promises, and where the defendant voluntarily offered his statements to law enforcement?

2. Does the defendant's failure to object to the imposition of the mandatory \$200 filing fee limit his ability to raise the issue on appeal, and does the compulsory language contained in RCW 36.18.020(h) indicate the fee is mandatory?

### III. STATEMENT OF THE CASE

#### Procedural history.

On August 19, 2015, the defendant, Nathan Calvert, was charged in the Spokane County Superior Court with residential burglary, possession of a stolen motor vehicle, attempt to elude a police vehicle, failure to remain at the scene of an accident, and possession of a controlled substance. CP 1-2. Mr. Calvert pleaded guilty to possession of a stolen motor vehicle, failure to remain at the scene of an accident, and possession of a controlled substance on October 20, 2016. CP 5-13.

Prior to the commencement of trial, on the remaining counts of residential burglary and attempt to elude a police vehicle, the court conducted a CrR 3.5 hearing and determined that the statements made by Mr. Calvert to law enforcement officers would be admissible at trial. CP 94-96; RP 53-57.

After a jury trial, Mr. Calvert was found guilty of both residential burglary and attempt to elude a police vehicle. CP 87-89, 102-14; RP 254-260. At sentencing, the trial court waived the imposition of a standard range sentence and imposed a prison-based drug offender alternative sentence of 36.75 months, as well as 36.75 months of treatment in the community. CP 100-14; RP 315-16. The court also imposed mandatory legal financial

obligations, which included a \$200 criminal filing fee. CP 102, 108; RP 315.

Substantive facts.

On August 25, 2015, the Zuniga-Aguilar family returned home late from a family trip to Silverwood theme park. RP 107, 131. Javier Zuniga, his wife, Sofia Aguilera, his daughter, Mayra Aguilera, and his son-in-law, Bryce Aguilera, were in one car, while his son, Luis Zuniga, was in his own car. RP 126. Luis<sup>1</sup> arrived home ten minutes before the rest of his family. RP 107, 132. He opened the garage, intending to park his car inside, but realized it was blocked by two other vehicles parked in the driveway. RP 107. Leaving the garage open, Luis went inside the house. RP 107-08.

Soon, the rest of the family arrived. Ms. Aguilera proceeded into the open garage, assuming her son was already inside. RP 116. The garage was dark, with only the car's headlights shining in. RP 121. She yelled out a greeting, but the voice that responded was not her son's. RP 117. An unknown man replied that he was there to use the bathroom. RP 117. Ms. Aguilera screamed for her husband. RP 118, 127. Mayra<sup>2</sup> heard her

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<sup>1</sup> Hereinafter Luis Zuniga will be referred to as "Luis" for clarity. No disrespect is intended.

<sup>2</sup> Hereinafter Mayra Aguilera will be referred to as "Mayra" for clarity. No disrespect is intended.

mother screaming, then observed a man run out of the garage, followed by her father, Mr. Zuniga. RP 127, 132-33. The man had a shaved head and was wearing a tank top, shorts, and a small backpack. RP 127, 134, 142. Mayra immediately called the police. RP 128.

Luis heard the commotion downstairs and ran outside. RP 108. Bryce<sup>3</sup> was already outside moving his Suburban out of the driveway when he saw Mr. Zuniga chasing a man across the lawn. RP 108, 140. Luis and Bryce saw the man running on foot and followed in their own vehicles. RP 110, 136-37. About a block east of the house, near Blake and Fourth Avenue, Luis and Bryce gave up the chase when the man ran behind some bushes. RP 110, 141-42.

Corporal Thurman, a certified K-9 handler, was working the graveyard shift that night. RP 61-62. Police radio broadcasted a residential burglary in progress. RP 64. Corporal Thurman quickly responded to the scene. *Id.* As he neared Fourth Avenue and Blake, he noticed a suspicious car driving in the dark without any headlights. RP 70. Based upon his training and experience, he immediately attempted a traffic stop. RP 72. Once Corporal Thurman got behind the car, however, it turned eastbound onto Fifth and accelerated rapidly away from the officer, travelling at speeds

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<sup>3</sup> Hereinafter Bryce Aguilar will be referred to as “Bryce” for clarity. No disrespect is intended.

in excess of 60 miles per hour. RP 72, 92. The car then crossed into the opposing lane of traffic, attempted to negotiate a turn, lost control, and crashed into an unattended parked vehicle. RP 73-75.

The driver, Mr. Calvert, exited the car and ran, ignoring Corporal Thurman's commands to stop. RP 76. Mr. Calvert ran through a backyard of a residential home and jumped over a chain-link fence. *Id.* Corporal Thurman and his K-9 tracked Mr. Calvert and found him hiding underneath a vehicle parked in a residential driveway. RP 77. The K-9 made contact, biting Mr. Calvert, at which point Corporal Thurman apprehend him. RP 77-78. The entire chase occurred within 33 seconds according to dispatch records. RP 90.

At this time, Deputy Hilton had arrived to assist Corporal Thurman. RP 26, 78. Because Mr. Calvert was angry and yelling about the dog bite, Corporal Thurman diffused the situation by allowing Deputy Hilton to handle Mr. Calvert. RP 39, 78. Corporal Thurman remained close and radioed for medics to assist. RP 39. Deputy Hilton searched Mr. Calvert for weapons and advised him of his constitutional rights. RP 26-27, 30-37. Mr. Calvert did not respond after being read his rights. RP 27. He continued yelling at Corporal Thurman, so Deputy Hilton ceased any further questioning. RP 27, 30. There was no indication that Mr. Calvert did not hear Deputy Hilton or understand the reading of his rights. RP 31-32.

Mr. Calvert did not appear to be under the influence of any substance, aside from being agitated and frustrated as a result of the dog bite. RP 28, 30. Deputy Hilton did not make any threats or promises to get Mr. Calvert to answer questions. RP 30; CP 95 (Undisputed Fact 2.13).

Ms. Aguilera and Mayra were taken to conduct a “show-up.” RP 111. While neither witness could identify Mr. Calvert in court months after the burglary, they both definitively recognized the man apprehended by police as being the same individual in their garage on the evening of the incident. RP 115-16, 128, 135. In fact, Ms. Aguilera had no doubt the man detained was the same man she had seen in her garage. RP 123-24. Further, when shown photograph exhibits of Mr. Calvert on the night of the incident (P-17 and P-18) during trial, Ms. Aguilera recognized the man as the person in her garage, including his shirt, shorts, and backpack. RP 116-19.

Later on, Corporal Thurman contacted Mr. Calvert at the hospital to ensure he was alright as a result of the K-9 contact and to document his injuries. RP 36-37, 42-43, 79. Corporal Thurman did not re-advise Mr. Calvert of his rights because he was present when Deputy Hilton read Mr. Calvert his rights approximately twenty minutes earlier. RP 37-38. Mr. Calvert had calmed down by then, and admitted he had been a meth addict for many years and was trying to support his habit. RP 40. He also stated he had stolen a vehicle three days prior, as well as other various items.

RP 41, 79-81. With respect to the burglary, Mr. Calvert said he was present in the garage when the homeowners arrived. RP 41-42, 82. During the conversation, Mr. Calvert gave no indication to Corporal Thurman that he did not understand the questions, nor did Mr. Calvert ask for an attorney or cease speaking at any point. RP 37. Corporal Thurman did not make threats or promises in order to persuade Mr. Calvert to answer questions. RP 38.

#### IV. ARGUMENT

##### **A. THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND THEREFORE PROPERLY RULED THAT THE DEFENDANT'S CONFESSION WAS ADMISSIBLE.**

Mr. Calvert challenges the trial court's refusal to suppress his statements made to Corporal Thurman. Mr. Calvert claims that his confession was not voluntary because he was under the stress of surrounding circumstances. This, he contends, violated his right against self-incrimination. This assertion is not supported by the record. Mr. Calvert made those statements after he was properly advised of his constitutional rights, which he then knowingly, voluntarily, and intelligently waived by speaking with Corporal Thurman. Therefore, statements made by Mr. Calvert were properly admitted at trial.

##### 1. Standard of review.

Following a suppression hearing, the trial court's findings of fact are reviewed for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644-47,

870 P.2d 313 (1994). A reviewing court “will not disturb a trial court’s conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding.” *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). The party challenging a finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *Hill*, 123 Wn.2d at 644. Unchallenged findings of fact are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997); *State v. Gasteazoro-Paniagua*, 173 Wn. App. 751, 755-56, 294 P.3d 857 (2013). Conclusions of law are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007); *State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025, 291 P.3d 253 (2012) (trial court’s conclusions of law must be properly derived from its findings of fact).

2. Substantial evidence supports the trial court's finding of waiver.

Both the federal and state constitutions guarantee that no person shall be compelled to give evidence against himself. *See* U.S. CONST. amend. V, XIV; Wash. Const. art. I, § 9.<sup>4</sup> This fundamental predicate bars the use of any involuntary statement against an accused in a criminal trial. *United States v. Washington*, 431 U.S. 181, 186-87, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977); *State v. Dictado*, 102 Wn.2d 277, 293, 687 P.2d 172 (1984), *abrogated on other grounds by State v. Lorenz*, 152 Wn.2d 22, 37, 93 P.3d 133 (2004); *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S.Ct. 2408, 57 L.Ed.2d. 290 (1978). Neither constitution, of course, forbids self-incrimination. *Washington*, 431 U.S. at 186-87; *Dictado*, 102 Wn.2d at 293.

To give force to the protection against involuntary self-incrimination, police officers are required to advise an arrested defendant of his constitutional rights prior to interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Sargent*, 111 Wn.2d 641, 647-48, 762 P.2d 1127 (1988). *Miranda* warnings are only required when a suspect is in-custody and is subjected to

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<sup>4</sup> Courts have repeatedly held the rights protected by the two parallel constitutional provisions to be conterminous. *See, e.g., State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008) (“The protection provided by the state [constitutional] provision is coextensive with that provided by the Fifth Amendment”).

interrogation. *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). The warnings need not be administered by the officer who actually engages in the questioning or by an officer from the same department, as long as the warnings are given by a law enforcement agent prior to the start of questioning. *United States v. Andaverde*, 64 F.3d 1305, 1313 (9th Cir. 1995); *State v. Fedorov*, 181 Wn. App. 187, 324 P.3d 784, *review denied*, 181 Wn.2d 1009 (2014).

Under *Miranda*, a custodial statement is voluntary, and therefore admissible, if made after the defendant has been advised of his rights, including the right to remain silent, and when the defendant knowingly, voluntarily, and intelligently waives those rights. *Miranda*, 384 U.S. at 444; *Athan*, 160 Wn.2d at 380. “Voluntary” signifies no coercion – physical or psychological – and the defendant must be both physically and mentally capable of understanding his actions. *See Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). A waiver is voluntary if “it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.” *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

Involuntariness, on the other hand, necessitates some distinct measure of official coercion from an officer; the officer must say or do something to overcome an accused’s free will to resist. *Colorado v.*

*Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). More precisely, coercive police activity is a necessary prerequisite to a determination that a defendant's confession was not voluntary within the meaning of the Due Process Clause. *State v. Unga*, 165 Wn.2d 95, 167, 196 P.3d 645 (2008).

For instance, a statement may be involuntary where a police officer exerts coercive pressure upon the suspect in order to obtain a confession. *Id.* at 101. Coercion may be by way of express or implied promises, as well as by exertion of some improper form of influence. *Id.*

To determine voluntariness, a court considers the totality of the circumstances, including a defendant's physical and mental condition, his experience, and the conduct of the police.<sup>5</sup> *Arizona v. Fulminante*, 499 U.S. 279, 286-86, 111 S.Ct 1246, 113 L.Ed.2d 302 (1991); *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984). When applying the totality of the circumstances test, the reviewing court "does 'not ask whether the confession would have been made in the absence of the interrogation.'"

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<sup>5</sup> In addition to the crucial element of police coercion under the totality of circumstances test, other factors include: "the length of the interrogation; its location; its continuity; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant of the rights to remain silent and to have counsel present during custodial interrogation." *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (and cases cited therein); *accord Unga*, 165 Wn.2d at 101.

*Unga*, 165 Wn.2d at 102. “If the test was whether a statement would have been made but for the law enforcement conduct, virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of official action.” *Id.*

It is generally recognized that “[a]n express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver.” *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). However, an express repudiation is not required. *Id.* A waiver may be implied through “the defendant’s silence, coupled with an understanding of his rights, and a course of conduct indicating waiver.” *Butler*, 441 U.S. at 373; *State v. Terrovona*, 105 Wn.2d 632, 646, 716 P.2d 295 (1986). Therefore, a waiver may be inferred from particular facts and circumstances. *State v. Mason*, 31 Wn. App. 41, 639 P.2d 800 (1982). The United States Supreme Court has explained:

As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afforded.

*Berghuis v. Thompkins*, 560 U.S. 370, 385, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).

Prior to *Thompkins*, many considered that when a suspect was silent during police questioning it signified a valid invocation of the right to silence; *Thompkins* held, conversely, that absent a suspect's unambiguous assertion of the right to silence or counsel, police do not have to scrupulously honor the suspect's waiver and may continue questioning the suspect, even for hours on end, hopeful that the suspect answers some questions under circumstances demonstrating a valid waiver. 560 U.S. at 381-83. However, if the defendant invokes his right to counsel or his right to remain silent, all questioning must cease. *Miranda*, 384 U.S. at 473-74; *State v. Stewart*, 113 Wn.2d 462, 466, 780 P.2d 844 (1989).

Substantial experience with the criminal justice system may also support an inference that the defendant appreciates the gravity of *Miranda* warnings and its coexistent peril. See, e.g. *State v. Hutchinson*, 85 Wn. App. 726, 739, 938 P.2d 336 (1997), *rev'd on other grounds*, 135 Wn.2d 863, 959 P.2d 1061 (1998) (in twelve preceding years, defendant had been *Mirandized* on at least five separate occasions, and on each occasion had acknowledged those rights, waived them, and answered questions).

Here, the record contains substantial evidence supporting the trial court's determination that Mr. Calvert knowingly and voluntarily waived his right to remain silent and chose to continue with the interview. It is

undisputed that Deputy Hilton read Mr. Calvert his constitutional rights.<sup>6</sup> CP 95. The fact that Mr. Calvert was extremely upset and disturbed after having been contacted by the K-9, needing medical treatment for his injuries, does not in and of itself render a waiver of *Miranda* rights involuntary. *Butler*, 441 U.S. at 373. Voluntariness is a matter of deliberate choice, without use of police coercion. *Burbine*, 475 U.S. 412.

After the K-9 tracked and located Mr. Calvert, and after Corporal Thurman diffused the situation by allowing Deputy Hilton to handle Mr. Calvert, RP 39, 77-78, Deputy Hilton read Mr. Calvert his rights while standing right next to him, but did not ask any questions. RP 26-27, 30-37.

Subsequently, Mr. Calvert was questioned at the hospital by Corporal Thurman, only twenty minutes after he was *Mirandized* at the scene of his apprehension. RP 37-38. Corporal Thurman was not required to re-recite *Miranda* warnings at the hospital because he was on the scene when Deputy Hilton read Mr. Calvert his rights. RP 36-37, 42-43, 79. At the hospital, Mr. Calvert's demeanor was calm. RP 40. Mr. Calvert

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<sup>6</sup> The only disputed findings of fact are 2.3 and 2.6 – that Mr. Calvert was advised of his rights immediately following his arrest, and that Mr. Calvert's remarks to Corporal Thurman was Mr. Calvert's response to Deputy Hilton reading Mr. Calvert his rights. The remaining findings of fact are verities for purposes of this appeal, including: 2.1; 2.2; 2.4; 2.5; 2.7; 2.8; 2.9; 2.10; 2.11; 2.12; and 2.13. CP 95.

admitted he had been a meth addict for many years and was trying to support his drug habit. *Id.* He also stated he had stolen a vehicle three days prior, as well as other various items. RP 41, 79-81. With respect to the burglary, Mr. Calvert said he was standing in the garage when the homeowners arrived. RP 41-42, 82. During the conversation, Mr. Calvert did not have any difficulty understanding Corporal Thurman's questions, nor did he at any point ask for an attorney or cease speaking. RP 37.

If Mr. Calvert wanted to remain silent, he should have unambiguously invoked his right to remain silent and terminated the interview. Instead, Mr. Calvert chose to continue providing a statement to Corporal Thurman – a “course of conduct indicating waiver” of the right to remain silent. *Butler*, 441 U.S. at 373; *see also Thompkins*, 560 U.S. at 379-81) (an accused must invoke his right to remain silent unambiguously).

The defense erroneously assumes that no waiver of *Miranda* occurred simply because Mr. Calvert did not expressly waive *Miranda*. Br. of Appellant at 11. The underlying solecism seems to be that after *Miranda* rights are read, no questioning or conversation may occur until there has been an express waiver thereof. In contrast to this assumption, our high court has instructed that although there is no per se presumption of a waiver, an effective waiver does not require a suspect's express statement. *Terrovona*, 105 Wn.2d at 646. In accordance with this principle, the defense

conceded during the CrR 3.5 hearing that there is no case law or legal authority that requires a criminal defendant to affirmatively acknowledge that he heard and understood his *Miranda* rights. RP 52.

Most importantly, the record is devoid of any evidence of police coercion. There was no “additional showing ... that the inherently coercive atmosphere of custodial interrogation ... disabled the accused from making a free and rational choice.” *Terrovona*, 105 Wn.2d at 646. Mr. Calvert has not challenged the trial court’s finding that neither police officer made any promises or threats to him in order to entice him to provide a statement. CP 95 (Undisputed Fact 2.13). There were no threats, coercive measures, or promises made by Corporal Thurman or Deputy Hilton in order to get Mr. Calvert to answer questions. RP 30, 38. Additionally, there was nothing out of the ordinary or excessive about the length of time the questioning occurred. The record establishes that Mr. Calvert was in good mental health, and that his thought processes were not impaired by alcohol, drugs, youth, or immaturity. RP 28-30. There is no evidence that any officer deliberately exploited Mr. Calvert’s mental condition immediately after he was contacted by the K-9. To the contrary, Deputy Hilton and Corporal Thurman did not ask any questions prior to Mr. Calvert’s treatment at the hospital. RP 27, 30, 39, 78.

Likewise, Mr. Calvert was not a novice to the criminal justice system – he was a “9-plus” offender. RP 278, 301. His criminal history was extensively outlined by the trial court during the sentencing hearing, including twelve convictions, ten of which were felonies. CP 14-15, 92-93; RP 269-276. Based on his experience, it can be inferred that Mr. Calvert knew he did not have to answer questions, and that if he invoked his right to remain silent or ask for an attorney, questioning would cease immediately. Because Mr. Calvert’s decision to give a statement was a “voluntary decision” that “was made with full awareness and comprehension of all the information *Miranda* requires police to convey,” his waiver was valid. *Burbine*, 475 U.S. at 424.

In consideration of the totality of circumstances, substantial evidence exists to support the trial court’s conclusion of law 3.5 that the State properly satisfied its burden, by a preponderance of evidence, to show Mr. Calvert’s statements were a knowing, voluntary, and intelligent relinquishment of his *Miranda* rights. Therefore, the trial court properly and justifiably admitted Mr. Calvert’s confession.

3. Even if the trial court erred in admitting Mr. Calvert’s statements in the State’s case-in-chief, that error was harmless.

When a voluntary confession is improperly admitted into evidence, the ensuing conviction may still be upheld if its admission constituted

harmless error. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988). “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *Id.* (citation omitted); *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). A reviewing court looks only at the untainted evidence in determining whether that evidence is so overwhelming that it “necessarily leads to a finding of guilt.” *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Here, even without Mr. Calvert’s confession, the jury would have reached the same result. Shortly after the Zuniga-Aguilar family arrived home from a family trip, Ms. Aguilar went into the garage and was greeted by an unknown man’s voice. RP 117. She screamed for her husband. RP 127, 132-33. Mayra, who was outside, saw a man with shaved off hair, wearing a tank top, shorts, and a small backpack running from the garage. *Id.*

Luis and Bryce responded quickly and followed Mr. Calvert in their own vehicles. RP 110, 136-37. The chase ended about a block east, near Blake and Fourth Avenue, after Mr. Calvert ran behind some bushes. RP 110, 141-42. Corporal Thurman was in the area, heard the radio broadcast advising of the burglary in process, and responded to the scene quickly. RP 64. Precisely where Luis and Bryce lost Mr. Calvert, near

Fourth Avenue and Blake, Corporal Thurman noticed a suspicious car without headlights and followed it as it fled. RP 70-72, 73-75. The car ultimately crashed into another parked vehicle. *Id.* Mr. Calvert exited the car and ran through residential yards. RP 76. A K-9 located Mr. Calvert, finding him hiding underneath a car parked in a residential driveway. RP 77. The entirety of the pursuit of Mr. Calvert lasted approximately 33 seconds. RP 90.

Both Ms. Aguilera and Mayra positively identified Mr. Calvert as being the same individual in their garage on the evening of the incident. RP 11, 115-16, 128, 135

Based on this testimony, any alleged error in admitting the confession was harmless beyond a reasonable doubt. In considering the entirety of the circumstances on the night of the incident, any error in admitting the statement in the State's case-in-chief was harmless.

Mr. Calvert erroneously contends that the show-up identification by Ms. Aguilera and Mayra was suggestive for purposes of the harmless error analysis.<sup>7</sup> Br. of Appellant at 15. A defendant bears the burden of

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<sup>7</sup> Mr. Calvert improperly contends for the first time on appeal that the show-up identification was suggestive without first establishing the necessary requirements. It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. RAP 2.5; Fed. R. Crim. P. 51 and 52; *see also State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013).

demonstrating that an identification procedure was impermissibly suggestive. *Vickers*, 148 Wn.2d at 118. If he fails, the inquiry stops. *State v. Vaughn*, 101 Wn.2d 604, 609-10, 682 P.2d 878 (1984), *review denied*, 140 Wn.2d 1027 (2000). Only if the procedure was proved to be suggestive, the reviewing court may assess, given a totality of circumstances, whether the procedure created a substantial likelihood of irreparable misidentification. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999).

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RAP 2.5 “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves: (1) trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; or (3) manifest error affecting a constitutional right. Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). A manifest constitutional error is one that “is so obvious on the record that the error warrants appellate review.” *State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009).

Because Mr. Calvert asserts no basis for raising a challenge to the show-up identification for the first time on appeal, and no argument in support of that challenge, any claim of error in this regard should not be addressed by this Court.

Show-up identifications are not impermissibly suggestive per se.<sup>8</sup> *State v. Guzman-Cuellar*, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). “The key inquiry in determining admissibility of the identification is reliability.” *Booth*, 36 Wn. App. at 70. Factors probative of reliability include: the opportunity of the witness to observe the criminal at the time of the crime; the degree of attention; the accuracy of the prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation. *Id.*

Here, Mr. Calvert has failed to meet his burden, and thus any inquiry into whether the show-up was suggestive ends. There are no facts contained in the record to support any claim of impermissible suggestibility during the show-up identification or at the time of the in-court identification at trial using photographic exhibits. In order for the defense to properly raise a constitutional challenge to Mr. Calvert’s show-up identification, this Court must first find that, “impermissibly suggestive identification procedures were used in obtaining,” the identification testimony of eyewitnesses.

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<sup>8</sup> Even suggestive show-up procedures have been held admissible where the balancing of the harm of the suggestiveness is outweighed by witness’ reliability. *State v. Booth*, 36 Wn. App. 66, 671 P.2d 1218 (1983). Furthermore, suggestive “[s]howups held shortly after a crime is committed and in the course of a prompt search for the suspect have been found to be permissible.” *Id.*; see also *State v. Bockman*, 37 Wn. App. 474, 481-82, 682 P.2d 925 (1984).

*Vaughn*, 101 Wn.2d at 607-08; *see also State v. Brown*, 128 Wn. App. 307, 116 P.3d 400 (2005).

Our Supreme Court clarified that the factors of reliability are not called into question unless and until an appellant shows the existence of impermissibly suggestive identification procedures. *Vaughn*, 101 Wn.2d. 604. Despite a failure to establish impermissibly suggestive procedures, or any taint whatsoever, Mr. Calvert asks this Court to find that the show-up procedure was suggestive in order to establish that the error was not harmless beyond a reasonable doubt. Therefore, the show-up identification should not be used in the harmless error analysis.

**B. BY FAILING TO RAISE THE ISSUE OF WHETHER THE \$200 FILING FEE IMPOSED AT SENTENCING IS A MANDATORY FEE, THE DEFENDANT WAIVED ANY CLAIM REGARDING THIS NON-CONSTITUTIONAL ISSUE ON APPEAL.**

Mr. Calvert claims that the \$200 filing fee constitutes a discretionary cost and that this Court should disregard the holdings in *State v. Lundy*, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013), and, presumptively, in *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016).

1. The defendant provides no basis for raising this new and unpreserved issue on appeal.

Mr. Calvert provides no basis for review of this unpreserved issue on appeal. He does not allege manifest error, lack of trial court jurisdiction,

or failure to establish facts upon which relief can be granted, as required under RAP 2.5(a)(1) and (2). A party may not generally raise a new argument on appeal that the party did not present to the trial court. *In re Det. of Ambers*, 160 Wn.2d 543, 557 n. 6, 158 P.3d 1144 (2007). A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

2. This court's discretionary authority to accept review should not be exercised in this case.

Additionally, this issue is broadly based on *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). There, the court ruled that appellate courts have discretionary authority to hear LFO challenges raised for the first time on appeal. *Id.* at 833-835. Although *Blazina* empowers appellate courts to consider LFO challenges where the trial court did not conduct the statutory inquiry at sentencing, it is less certain whether that discretionary authority applies to post-*Blazina* sentencings, such as this one, involving an unchallenged inquiry. This case does not warrant the exercise of that discretionary authority, assuming it does exist.

Moreover, the amount in dispute is only \$200. Mr. Calvert does not establish why this \$200 could not be paid as ordered. Mr. Calvert is only 33 years of age at the present time. CP 1-6. If the financial burden is too much

to bear in the future, then Mr. Calvert has the alternative of seeking remission. *See* RCW 10.01.160(4).

When a party urges an appellate court to overrule an earlier decision, that party must make a clear showing that the established rule is both incorrect and harmful. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 25, 296 P.3d 872 (2013); *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-47, 217 P.3d 1172 (2009); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). Mr. Calvert has failed to *clearly* demonstrate that the *Lundy* holding is incorrect, or that it is harmful.

3. The statute imposing the fee is mandatory in nature.

Mr. Calvert asserts that the Washington Supreme Court recently noted that the \$200 filing fee was merely treated as mandatory. Br. of Appellant at 23, citing *State v. Duncan*, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016). How Mr. Calvert gleans from the full footnote<sup>9</sup> that the

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<sup>9</sup> *State v. Duncan*, 185 Wn.2d at 436 n.3:

We recognize that the legislature has designated some of these fees as mandatory. *E.g.*, RCW 7.68.035 (victim assessment); RCW 43.43.7541 (DNA (deoxyribonucleic acid) collection fee); RCW 10.82.090(2)(d) (effectively making the principal on restitution mandatory). Others have been treated as mandatory by the Court of Appeals, *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (holding that the filing fee imposed by RCW 36.18.020(2)(h) is mandatory and courts have no discretion to consider the offender's ability to pay). While we have not had occasion to consider the constitutionality of all of these statutes, we

State Supreme Court was *skeptical* regarding the holding in *Lundy*, is puzzling, at best. The mandatory nature of the filing fee statute, RCW 36.18.020 is self-evident. It provides in pertinent part:

(2) Clerks of superior courts **shall** collect the following fees for their official services:

...

(h) Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case **shall** be liable for a fee of two hundred dollars.

(Emphasis added).

The legislative use of the words “shall” was intended. This Court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986). It is well settled that the word “shall” in a statute is presumptively imperative and operates to create a duty. *Crown Cascade, Inc. v. O’Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983);

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have found that the victim penalty assessment statute was not unconstitutional on its face or as applied to the defendants in the case because there were sufficient safeguards to prevent the defendants from being sanctioned for nonwillful failure to pay. *See Curry*, 118 Wn.2d at 917, 829 P.2d 166.

*State v. Q.D.*, 102 Wn.2d 19, 29, 685 P.2d 557 (1984) (citing *State v. Bryan*, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980)). The word “shall” in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent. *Bryan*, 93 Wn.2d at 183 (quoting *State Liquor Control Bd. v. State Personnel Bd.*, 88 Wn.2d 368, 377, 561 P.2d 195 (1977)). Therefore, the \$200 filing fee is a mandatory assessment.

Moreover, RCW 36.18.020 was amended in 2015, two years after the publication of the *Lundy* decision. However, the statute was amended *without taking any action* on the relevant portions subject to Mr. Calvert’s present argument. In *State v. Kier*, 164 Wn.2d 798, 805, 194 P.3d 212 (2008), the Court found controlling the presumption of legislative acquiescence in judicial interpretation where the assault statute was amended following the Court’s decision three years earlier in *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). There, as here, the statute was amended *without taking any action* on the relevant portions subject to the earlier decision. The presumption of legislative acquiescence in judicial interpretation is a principle of statutory construction that should control this case.

**C. UNLESS DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL.**

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis added).

The trial court determined Mr. Calvert to be indigent for purposes of his appeal on September 22, 2016, based on a declaration provided by Mr. Calvert. CP 92-93. The State is unaware of any change in Mr. Calvert’s circumstances. Should Mr. Calvert be unsuccessful on appeal, the Court

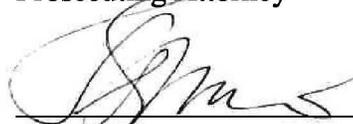
should only impose appellate costs in conformity with RAP 14.2 as amended.

## V. CONCLUSION

This trial court's ruling admitting Mr. Calvert's statements should be upheld. The unpreserved claim that the filing fee is discretionary should not be considered because the filing fee collection statute is mandatory in nature. The State respectfully requests this Court to affirm the judgment and sentence imposed in this case.

Dated this 26 day of June, 2017.

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Prosecuting Attorney



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Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

NATHAN CALVERT,

Appellant.

NO. 34924-1-III

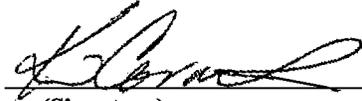
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 26, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kevin A. March  
marchk@nwattorney.net; sloanej@nwattorney.net

6/26/2017  
(Date)

Spokane, WA  
(Place)

  
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# SPOKANE COUNTY PROSECUTOR

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