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101123-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 38157-9-III

STATE OF WASHINGTON, Respondent,

v.

JOSHUA ALAN CONNELLY, Petitioner.

PETITION FOR REVIEW

Andrea Burkhart, WSBA #38519 Two Arrows, PLLC 1360 N. Louisiana St. #A-789 Kennewick, WA 99336 Tel: (509) 572-2409 Email: Andrea@2arrows.net Attorney for Petitioner

TABLE OF CONTENTS

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Authorities Citedii
I. IDENTITY OF PETITIONER
II. DECISION OF THE COURT OF APPEALS 1
<u>III. ISSUES PRESENTED FOR REVIEW</u> 1
IV. STATEMENT OF THE CASE
V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED
VI. CONCLUSION
<u>CERTIFICATE OF SERVICE</u> 9
APPENDICES
A - Unpublished Opinion in State v. Connelly, no. 38157-9-III (filed June 28, 2022)
B -Dept. of Corrections publication no. 400-RE001 (June 2022) (caseload statistics)

AUTHORITIES CITED

<u>Cases</u>

State v. Barboza-Cortes, 194 Wn.2d 639, 451 P.3d 707 (2019)	5
State v. Klimes, 117 Wn. App. 758, 73 P.3d 416 (2013)	7
State v. Linehan, 147 Wn.2d 638, 56 P.3d 542 (2002)	6
State v. Peterson, 168 Wn.2d 763, 230 P.3d 588 (2010)	6, 7
State v. Sandholm, 187 Wn.2d 726, 364 P.3d 87 (2015)	5
State v. Woodlyn, 188 Wn.2d 157, 392 P.3d 1062 (2017)	4, 5

Constitutional Provisions

Yash. Const. art. I § 214

Statutes

Court Rules

RAP 13.4(b)(3)	4, 8
RAP 13.4(b)(4)	4, 8

I. IDENTITY OF PETITIONER

Joshua Connelly requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on June 28, 2022, concluding that escape from community custody is not an alternative means crime. A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

The escape from community custody statute, RCW 79.09.310, provides that the crime is committed passively when the offender fails to maintain contact with a community corrections officer, or actively when the offender makes his whereabouts unknown. Does the statute establish alternative means of committing the crime, requiring a unanimous jury verdict as to the means?

IV. STATEMENT OF THE CASE

While on community custody, Joshua Connelly lived in an uninsulated shed with no running water or cell phone service, located about two miles from the nearest neighbor. RP 134-38, 169. He did not have a driver's license and required transportation assistance to get to and from his appointments. RP 112, 137, 145-46.

Mr. Connelly first met with his community custody officer ("CCO") in April 2019 and was initially successful, with his required in-person check-ins reduced from weekly to biweekly by February 2020. RP 92, 96, 111, 113. The CCO made an unannounced visit to Mr. Connelly's shed on March 6, 2020 and reminded him that he had an in-person appointment for the following week on March 12. RP 114-16. When Mr. Connelly missed the appointment, the CCO called his number and left a message requesting an immediate call back, but he did not receive one. RP 117-18. After he tried unsuccessfully to reach Mr. Connelly through his emergency contact, the CCO

issued a warrant for Mr. Connelly's arrest that afternoon. RP 118-19.

According to the CCO, his options after that point were to try to get a Community Response Unit to apprehend him, go out personally with the arrest team to find him, or refer the case for escape charges. RP 122. The CCO elected to wait and refer the matter for escape charges. RP 122-23. He took no steps to locate Mr. Connolly and had no reason to believe Mr. Connolly was not still at the shed. RP 144, 147.

At trial, both parties agreed that escape from community custody was an alternative means crime and proposed instructions to the jury defining it as such. RP 173, CP 180, CP 204. The "to convict" instruction specifically advised the jury that it did not need to unanimously determine which of the alternatives had been proven. CP 180. The State emphasized the lack of unanimity requirement in its closing argument. RP 199-200.

On appeal, Mr. Connolly contended that insufficient evidence supported the "making his whereabouts unknown" means presented to the jury. *Appellant's Brief*, at p. 6. The Court of Appeals concluded that escape from community custody is not an alternative means crime, but rather describes two varieties of action by which the offender willfully discontinues making himself available to the Department of Corrections for supervision. *Opinion*, at 6-7.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(3) and (4). Jury unanimity is required by article I, section 21 of the Washington constitution. *State v. Woodlyn*, 188 Wn.2d 157, 162-63, 392 P.3d 1062 (2017). To satisfy this requirement, when a defendant is charged with an offense that can be committed by alternative means and insufficient evidence supports of or more of the alternatives, express jury unanimity is required to convict. *Id.* at 164; *State v. Barboza-Cortes*, 194 Wn.2d 639, 451 P.3d 707 (2019).

Whether escape from community custody is an alternative means crime has not been decided in any authoritative appellate decision. Determining whether a statute establishes alternative means of committing a crime involves statutory interpretation. *State v. Sandholm*, 187 Wn.2d 726, 732, 364 P.3d 87 (2015). The statute at issue here reads:

> An inmate in community custody who willfully discontinues making himself or herself available to the department for supervision by making his or her whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a class C felony under chapter 9A.20 RCW.

RCW 79.09.310. At issue is whether making one's

whereabouts unknown and failing to maintain contact with the

department as directed constitute distinct acts, or nuances of the

same act. Sandholm, 187 Wn.2d at 732.

Applying these standards, Washington courts have concluded that, for example, theft is an alternative means crime that can be committed by taking, deception, or misappropriation. *State v. Linehan*, 147 Wn.2d 638, 644-45, 647, 56 P.3d 542 (2002). By contrast, the crime of failure to register does not establish alternative means when it penalizes the same act of failing to register under three different circumstances of changing residence. *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010).

Whether escape from community custody criminalizes distinct acts or simply describes nuances inhering in a single act is a question of constitutional magnitude as well as a matter of substantial public interest. The question is constitutionally significant because it implicates the requirement of a unanimous jury verdict as well as the evidence necessary to establish guilt beyond a reasonable doubt. Judicial determination is necessary to evaluate which crimes are alternative means crimes, and therefore present special

considerations of jury unanimity. *Peterson*, 168 Wn.2d at 769. "[T]here simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits." *Id. (quoting State v. Klimes*, 117 Wn. App. 758, 769, 73 P.3d 416 (2013))

Moreover, the question is of substantial public interest because of the lack of an authoritative decision on the issue and its applicability to tens of thousands of individuals on active community supervision in Washington. *See Appendix B* (Dept. of Corrections supervision caseload statistics). Consequently, review will be of interest to not only the more than 12,000 people serving community custody terms but the officials supervising them, the prosecutors charging them, and the judges presiding over their trials. The issue should be decided by this court to set a uniform standard and avoid the risk of conflicting or duplicitous decisions in the absence of binding precedent deciding it.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(3) and (4) and this Court should enter a ruling that the evidence was insufficient to establish the "making his whereabouts unknown" means of committing the crime of escape from community custody.

RESPECTFULLY SUBMITTED this 28 day of July, 2022.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519 Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Joshua A. Connelly, DOC #365676 Coyote Ridge Corrections Center PO Box 769 Connell, WA 99326

Kathryn Isabel Burke Ferry County Prosecutor's Office 350 E Delaware Ave Stop 11 Republic, WA 99166-9747

I declare under penalty of perjury under the laws of the State

of Washington that the foregoing is true and correct.

Signed this <u>28</u> day of July, 2022 in Kennewick,

Washington.

1-1-05

Andrea Burkhart

Court of Appeals Opinion no. 38157-9-III (filed 6/28/2022)

APPENDIX A

FILED JUNE 28, 2022 In the Office of the Clerk of Court WA State Court of Appeals Division III

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

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STATE OF WASHING	BTON,						
Re	espondent,						
v.							
JOSHUA ALAN CONNELLY,							
Aŗ	opellant.						

No. 38157-9-III

UNPUBLISHED OPINION

FEARING, J. — Joshua Connelly challenges his conviction for escape from community custody on the basis that the crime constitutes an alternative means case and the superior court failed to deliver a jury unanimity instruction. Because we conclude escape from community custody does not comprise an alternative means crime, we reject Connelly's contention and affirm his conviction.

FACTS

We take the facts from the trial testimony of Community Custody Officer (CCO)

Travis Hurst, the only testifying witness at trial.

Joshua Connelly served a sentence on community custody. His community custody conditions required him to meet with CCO Travis Hurst every other week. During their February 26, 2020 meeting, Hurst reminded Connelly of their next meeting scheduled for March 12 and gave Connelly a business card with the date and time of the next appointment written on the back.

On March 6, 2020, CCO Travis Hurst visited Joshua Connelly's listed address to inquire why Connelly had absented his chemical dependency classes. Connelly lived then in a small, uninsulated shed. Connelly replied that he lacked transportation to the classes. Hurst referred Connelly to Special Mobility Services for rides to and from appointments. CCO Hurst verbally reminded Connelly of the March 12 appointment.

When March 12 arrived, Joshua Connelly failed to report to the Ferry County Jail for the scheduled meeting. CCO Travis Hurst called Connelly's phone number, received no response, and left a voicemail directing Connelly to return the call. Hurst also called Connelly's girlfriend, Marie Ocampo, who said that Connelly had missed his ride into town for the meeting. Hurst issued a Department of Corrections arrest warrant for Connelly. Hurst exerted no effort to physically locate Connelly. Hurst next saw Connelly on May 20, 2020, when Connelly was in custody.

PROCEDURE

The State of Washington charged Joshua Connelly with escape from community

custody and an aggravator for committing the crime shortly after release from

incarceration. The superior court charged the jury:

To convict the defendant of Escape from Community Custody, as charged in Count 1, each of the following elements of the crime must be proven beyond a reasonable doubt:

(1) That on, or between, March 6, 2020 and May 20, 2020, the defendant was an inmate in community custody;

(2) That the defendant willfully discontinued to make himself available to the department for supervision by:

(a) making his whereabouts unknown; or

(b) failing to maintain contact with the department as directed by the community corrections officer; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1) and (3), and either alternative of elements 2(a) or 2(b), have been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which alternative 2(a) or 2(b) has been proven beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proven beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 180.

The jury returned a guilty verdict. The jury declined to find that Connelly had

committed the crime shortly after being released from incarceration.

LAW AND ANALYSIS

On appeal, Joshua Connelly argues (1) that the jury instruction concerning the

crime of escape from community custody improperly failed to require juror unanimity as

to the alternative means proven and (2) insufficient evidence supported the first

alternative that Connelly made his whereabouts unknown. Because we reject the argument that the crime of escape from community custody constitutes an alternative means offense, we do not reach Connelly's second contention.

An alternative means crime is one in which the legislature provided that the State may prove the proscribed criminal conduct in a variety of ways. *State v. Barboza-Cortes*, 194 Wn.2d 639, 643, 451 P.3d 707 (2019). Deciding whether a statute creates an alternative means crime is a judicial question of statutory interpretation. *State v. Barboza-Cortes*, 194 Wn.2d 639, 643 (2019).

We begin our review of whether a statute creates alternative means crimes by analyzing the language of the criminal statute at issue. *State v. Barboza-Cortes*, 194 Wn.2d 639, 643 (2019). RCW 72.09.310, the escape from community custody statute, reads:

An inmate in community custody who willfully discontinues making himself or herself available to the department for supervision by making his or her whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a class C felony under chapter 9A.20 RCW.

Joshua Connelly wisely contends that use of the disjunctive "or" in

RCW 72.09.310 creates two alternative means to commit the crime of escape from community custody: (1) making one's whereabouts unknown and (2) failing to maintain contact with the department as directed by the community custody officer. The State

counters that these "alternatives" compose nuances of one criminalized act: a willful discontinuance of making oneself available to the department for supervision.

Use of the disjunctive "or" does not necessarily create alternative means. *State v. Sandholm*, 184 Wn.2d 726, 734, 364 P.3d 87 (2015). Instead the statutory analysis focuses on whether each alleged alternative describes distinct acts that amount to the same crime. *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). "The more varied the criminal conduct, the more likely the statute describes alternative means." *State v. Sandholm*, 184 Wn.2d 726, 734 (2015). But when the statute describes minor nuances inhering in the same act, the more likely the various "alternatives" constitute merely facets of the same criminal conduct. *State v. Sandholm*, 184 Wn.2d at 734.

Even if the accused could accomplish the two or more enumerated acts forming the crime exclusive of the other act or acts, the crime does not necessarily qualify as an alternative means offense. In *State v. Peterson*, 168 Wn.2d 763 (2010), the Supreme Court examined whether former RCW 9A.44.130 (2003) provided alternative means constituting the crime of failure to register as a sex offender. The statute afforded three methods to accomplish the crime: (1) failing to register after becoming homeless, (2) failing to register after moving between fixed residences within a county, or (3) failing to register after moving from one county to another. To explain why these distinctions did

not create an alternative means crime, the Supreme Court compared the failure to register statute with the crime of theft:

The alternative means available to accomplish theft describe *distinct acts* that amount to the same crime. That is, one can accomplish theft by wrongfully exerting control over someone's property or by deceiving someone to give up their property. In each alternative, the offender takes something that does not belong to him, but his *conduct* varies significantly. In contrast, the failure to register statute contemplates *a single act* that amounts to failure to register: the offender moves without alerting the appropriate authority. His conduct is the same—he either moves without notice or he does not. The fact that different deadlines may apply, depending on the offender's residential status, does not change the nature of the criminal act: moving without registering.

State v. Peterson, 168 Wn.2d at 770 (emphasis in original).

Based on the reasoning in *State v. Peterson*, we hold that escape from community custody is not a crime of alternative means. RCW 72.09.310 criminalizes an inmate in community custody "who willfully discontinues making himself or herself available to the department for supervision." The statute then identifies two varieties of action by which an inmate may achieve this criminal act. The accused may either render his or her whereabouts unknown or fail to maintain contact with the department as directed by the community corrections officer.

Regardless of the method by which the accused commits escape from community custody, the accused fails to appear before his community custody officer. The accused fails to cooperate in his supervision by the Department of Corrections. Although one can fail to contact her community custody officer without failing to expressly notify the

officer of her current location, the two actions compliment one another in disobedience of the community custody condition of periodically reporting to the officer.

In his reply brief, Joshua Connelly argues that this court should apply the law of the case doctrine to determine that the jury instruction requires treatment of RCW 72.09.310 as an alternative means crime. This argument undermines Connelly's assignment of error, which complains that the jury instruction failed to provide an alternative means instruction. The instruction read:

the jury need not be unanimous as to which alternative 2(a) or 2(b) has been proven beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proven beyond a reasonable doubt.

CP at 180. This instruction did not require juror unanimity as to either supposed "alternative means."

CONCLUSION

Escape from community custody under RCW 72.09.310 does not comprise an alternative means crime. The superior court committed no instructional error. We affirm the conviction of Joshua Connelly.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

mg, J. Fearing

WE CONCUR:

riddours, CJ. Siddoway, C.J.

r,

Pennell, J.

Dept. of Corrections Publication No. 400-RE001 (06/2022)

APPENDIX B

Prison and Work Release Population Male Population Fernale Population Operating Capacity June 2021 Forecast	12,941 12,207 734 18,999 15,444	68.1% 83.9%	13 month fre cursent popul curses popul	etern/capacity	18 000 17 000 18 000 13 000 14 000 11 000	~	~~~	~~~	+a		21 — Nov	21	
		100.9%	current popul	ten stollars at		#12 AN+13	74514	AA-35 AA-3	6 bil 17	Ad 15 Ju	19 14:20	10-21 1	×27
February 2022 Forecast	12,825				_	0/1-2021	Nov 2021	Dec.2021	Jan-2022	Feb-2022	Mar 2022	Apr-2022	May-2022
	May 2021 13.875	Jun-2021 13,693	Jul 2021 \$3,497	Aug-2021 13,380	Sep 2021 13,348	Oct-2021	Nov 2021 13,200	Dec-2021	Jan-2022	Feb-2022	Mar 2022	Apr-2022 12,948	May-2022 12,941
	May 2021	Jun-2021	Jul 2021	Aug-2021	Sep 2021								
Prison and Work Release Population	May 2021 13.875	Jun-2021 13,693	Jul 2021 \$3,497	Aug-2021 13,380	Sep 2021 13,348	13,265	13,200	13,150	13,007	12,971	12,981	12,948	12,941
Prison and Work Release Population Male Population	May 2021 13.875	Jun-2021 13,693 12,912	Jul 2021 13,497 12,734	Aug-2021 13,380 12,624	Sep 2021 13,348 12,591	13,265 12,519	13,200	13,150 11,611	13,007 12,207	12,971 12,23%	12,981 10,240	12,948 12,207	12,941
Prison and Work Release Population Male Population Female Population Cut-of State Population	May 2021 13.875 11.065 910	Jun-2021 13,693 12,912 781	Jul 2021 \$3,497 12,734 763	Aug-2021 13,380 12,624	Sep 2021 13,348 12,591 757	13,265 12,519 745	13,200 12,460 246	13,150 11,411 21/2	13,007 10,277 230	12,971 12,295 750	12,981 12,240 -745	12,948 1,2207 741	12,941 12,907 734
Prison and Work Release Population Male Population Female Population Cut-of-State Population Operating Capacity	May-2021 13.875 0.1.065 91/1	Jun-2021 13,693 12,912 781	Jul 2021 \$3,497 12,734 763	Aug-2021 13,380 12,629	Sep 2021 13,348 12,560 750	13,265 12,519 745 0	13,200 12,460 744 15	13,150 11411 752 0	13,007 10,227 240 11	12,971 12,29% 750	12,981 12,240 74,5 11	12,948 12,297 741 10	12,941 12,207 734 0
Female Population	May 2021 13.875 1.1.665 9.10 19,024	Jun-2021 13,693 12,912 781 0 19,024	Jul 2021 13,497 12,734 763 19,024	Aug-2021 13,380 12,524 19,024	Sep 2021 13,348 12,501 750 8 19,024	13,265 12,519 745 4 19,024	13,200 12,460 740 15 18,999	13,150 31 411 749 0 18,999	13,007 12,277 140 18,999	12,971 12,335 750 16 18,999	12,983 12,240 741 0 18,999	12,948 12,207 741 10 18,999	12,941 12,207 734 0 18,999

 Variance: (Actual v.s.N.9/e00ber/2028 Forec.se)
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 -121
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 -128

 Variance: (Actual v.s.N.9/e00ber/2028 Forec.se)
 -58
 15
 62
 116

 Forece and Ward Result Responses
 -124
 368
 200
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 354
 243
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 522
 454
 395

Difference: Admissions - Releases	-133	-269	-175	-101	-120	-134	26	-113	-139	-17	64	-26	-58
Female Incercerated individuals	11	59	44	13	析	39	th	28	31	- 24	25	16	44
Male incarcerated individuals	600	576	529	181291	44.	385	-414	440	364	35¥	425	435	469
Total Releases	557	635	573	510	486	424	454	467	382	386	45B	460	453
Female Intercented Individuals	32	25	43	(HC	40	16	40	340	- 29	-78	39	291	31:
Male incarcerated Individuals	390	321	355	\$2%	375	274	-340	230	210	\$43	443	1675	158
Total Admissions	424	346	398	409	895	290	460	329	24,3	369	522	-424	393

Violator Population	May 2022	2000 y
OMNEViolator Population OMNEViolator Population OMNEViolator Population - Male OMNEViolator Population - Female Adjusted Violator Population	13-monthi trend	1800 1800 1200 1200 1003 803
February 2022 Forecast	616 50.3% adjusted population test	800 1 600 1 200

	May-2021	Jun-2021	Jul-2021	Aug-2021	Sep-2021	Oct-2021	Nov-2021	Dec-2021	Jan-2022	Feb-2022	Mar-2022	Apr-2022	May-2022
OMNI Violator Populatien	636	639	573	¢18	359	370	370	372	303	339	379	411	385
OMENTION POPULATION Male	\$59	304	512	122	315	3,79	154	388	271	291	3.96	+6-	343
OMMI Victorial Population - Future	27	75	20.	4u	4 (41	16	415	52	46	43	45	42
Adjusted Violator Population	\$17	519	463	339	291	300	300	298	241	270	304	331	310
June 2021 Forecast	681	1634	527	24.6	2900	3,101	1.07@	1.0.15	1,12'1	1,149.)	1.132	1174	1.149
November 2021 Forecast						359	491	603	.7252	847	10.82	677	633
February 2022 Forecast									372	401	40)	511	616
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 Variance: (Actual vs. November 2021 Forceast)
 -111
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 Variance: (Actual vs. November 2021 Forceast)
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 CANTI Violator Population is reported as a monthly energy and is based on the number of individuals confined to violations as reported in CANE
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Community Supervision			May	2022	35000						-	Annual	Trend
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					14	12 M D	Jur 24	Jul 15 Jul 1	6 Jul-17	Jul-18	Jul 19 Jul 2) /u#21	Jul-22
	May-2021	Jun-2021	Jul-2021	Aug-2021	Sep-2021	Oct-2021	Nov-2021	Dec-2021	Jan-2022	Feb-2022	Mar 2022	Apr-2022	May-2022
Individuals on Active Supervision	16,837	16,230	15,268	14,256	13,869	13,393	13,269	13,054	12,643	12,5414	12.572	12,652	12,673
Inactive Caseload	14,885	14.574	14,439	14,435	14,278	14,295	14,118	13,979	13,787	13,525	13,201	12,964	12,812
June 2021 Forecast	17,410	16,957	16,604	16,310	15,750	15,507	15,458	15.367	15,594	15,716	15.926	16,059	16.222
November 2021 Forecast						13,361	12,964	12,603	12,433	12,531	12,741	12,825	12,938
February 2022 Forexast		20122-112							12,851	12,641	12,425	12,339	12,243
Variance: sActual vs. November 2021 For			5		-	Salution II	285 4	451	210	13	-169	-173	.265
Variance: (Actual vs. February 2022 Forec		2%								-97	147	313	430
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DOC Publication 400-RE001 (6/2022)

BURKHART & BURKHART, PLLC

July 28, 2022 - 10:24 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	38157-9
Appellate Court Case Title:	State of Washington v. Joshua Alan Connelly
Superior Court Case Number:	20-1-00021-3

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