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No. 101293-4
COA No. 82849-5-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN GLENN COX,

Appellant.

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

The Honorable Donald Richter, Judge
Cause No. 13-1-00914-9

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether review is appropriate under RAP 13.4(b) where the Court of Appeals properly reviewed findings and conclusions from a reference hearing that it ordered, at which the trial court properly considered factual allegations and determined that no violation of Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) occurred.

B. STATEMENT OF THE CASE

1. Procedural History.

On June 13, 2013, Cox was charged by way of criminal information with a single count of criminal solicitation for murder in the first degree (domestic violence). CP 9.¹ On September 5, 2013, the State filed a First Amended Information alleging criminal solicitation for murder in the first degree (domestic violence), criminal solicitation for murder in the first

¹ Consistent with the Brief of Appellant, this pleading refers to the original clerk's papers transferred to this case as CP, and clerk's papers from the reference hearing as Supp CP.

degree, and violation of pretrial no contact order (domestic violence). CP 14-15. A corrected Second Amended Information was filed on September 6, 2013, with the same alleged charges. CP 16-17. Finally, a Third Amended Information was filed on February 7, 2014, again correcting information in the same charges. CP 20-21. Trial occurred February 11-20, 2014. RP 3.²

Following the trial, the jury found Cox guilty as charged of all three offenses and affirmatively returned special verdicts that the victim was a family or household member with regard to counts 1 and 3. CP 92, 74-77. Cox was sentenced to a total term of confinement of 398.63 months. CP 109. The conviction was affirmed on direct appeal in an unpublished decision. State v. Cox, No. 45971-0-II, 2016 Wash.App.LEXIS 2700, 2016 WL 6653028, 196 Wn. App.1051. Subsequent to the direct appeal, Cox filed a personal restraint petition alleging that the State had

² Consistent with the Brief of Respondent in the Court of Appeals the report of proceedings from Cox's direct appeal is referenced as RP and the report of proceedings from the reference hearing is referenced as 2RP.

presented false testimony and failed to disclose exculpatory information prior to trial. In re Personal Restraint of Cox, No. 51647-1-II. Division II of this Court transferred the matter to Division I of the Court of Appeals and it was assigned case number 79664-0-I.

Following oral argument, the Court of Appeals entered an order remanding the matter to the trial court to consider whether Cox's claims were supported by fact and to determine whether Cox was entitled to relief. In re Pers. Restraint of Cox, No. 79664-0-I, 2019 Wash.App.LEXIS 2333, 2019 WL 4167004, 10 Wn. App.2d 1010 (2019). A reference hearing was held in the superior court and the trial court entered findings of fact and conclusions of law in the State's favor, finding that Mr. Cox failed to demonstrate that the State presented false testimony and failed to prove that the State withheld evidence that was material prior to trial. Supp CP 529-534.

Following the reference hearing, Mr. Cox filed a notice of appeal, seeking review of the reference hearing. That appeal was

assigned case No. 56010-1-II by Division II of this Court and was transferred to Division I and assigned cause number 82849-5-1.

2. Substantive Facts.

To avoid excessive repetition, the State incorporates by reference and relies upon the statement of substantive facts from trial contained in the Brief of Respondent filed in the Court of Appeals.

3. Reference Hearing.

In cause number 79664-0-I, the Court of Appeals indicated,

The Court of Appeals is not a fact finding court, and this opinion should not be construed as resolving any factual disputes in this case. Therefore, we remand to the trial court for a reference hearing. At the reference hearing, the trial court is to decide (1) whether the State failed to timely produce potential impeachment evidence that was material to the question of whether the State's witnesses, Thompson and Parmley, were being truthful in their testimony relative to Parmley's participation as a witness, (2) whether any such evidence that was not disclosed would have provided defense counsel the opportunity to impeach Thompson or Parmley, and

(3) if so, whether the failure to provide that evidence to Cox was prejudicial.

In re Personal Restraint Petition of Cox, 2019 Wash.App.LEXIS

2333 at 35-36. With regard to the truthfulness of testimony, the

Court indicated,

This Court does not resolve factual questions. We remand for a reference hearing to determine whether (1) Thompson and Parmley's testimony was actually false, (2) Juris knew or should have known that Thompson and Parmley's testimony was actually false, and (3) the false testimony was material.

Id. at 31.

As part of the reference hearing, the parties prepared and submitted agreed exhibits for the trial court to consider. Supp CP 1-497. Included in those exhibits were the direct trial testimony of Ray Lopez-Ortiz, Supp CP 3-81; a transcript of the audio phone call between Lopez-Ortiz and Cox that was admitted at trial, Supp CP 82-86; a separate transcript of an audio conversation between Lopez-Ortiz and Cox that was admitted at trial, Supp CP 87-97; the direct trial testimony of Lisa Cox, Supp

CP 98-118; the direct trial testimony of Suzanne Fucal, Supp CP 119-126; the trial testimony of Kenneth Parmley, Supp CP 127-202; the trial testimony of Mark Thompson, Supp CP 203-211; trial transcript to *motions in limine* regarding Parmley's criminal history, Supp CP 212-219; Emails of Craig Juris, which were attached to the State's PRP response, Supp CP 228; Emails of Mark Thompson which were attached to the State's PRP response, Supp CP 229-265; Emails of Karl Hack which were attached to the State's PRP response, Supp CP 266-297; the Declaration of Craig Juris that was attached to the State's PRP response, Supp CP 298-301; the Declaration of Mark Thompson that was attached to the State's PRP response, Supp CP 302-309; and the Declaration of Karl Hack that was attached to the State's PRP response, Supp CP 310-316.

The stipulated exhibits also included the criminal information from the prosecution of Kenneth Parmley, Supp CP 317-318; the statement of defendant on plea of guilty in Parmley's case, Supp CP 319-328; the judgment and sentence

from Parmley's case, Supp CP 329-337; the Prosecutor's Statement of Criminal History filed in Parmley's case, Supp CP 338-341; Kites from Kenneth Parmley that were discovery in the prosecution of Mr. Cox, Supp CP 342-348; the appendices which were attached to Mr. Cox's PRP, Supp CP 349-483; and additional emails of Mark Thompson, Supp CP 484-496. The parties stipulated that each of those documents were admitted for purposes of the reference hearing and could be considered by the trial court.

During the reference hearing, counsel for Mr. Cox acknowledged that Mr. Cox had the burden of proof in the reference hearing. 2RP 13. Former Thurston County Deputy Prosecuting Attorney, Craig Juris, testified that he was the lead Deputy Prosecuting Attorney responsible for the prosecution in State v. Cox. 2RP 19. Juris testified that the audio recordings of the conversations between Lopez-Ortiz and Cox were the recordings that were admitted and played to the jury. 2RP 21-23. Juris indicated that while he was prosecuting Cox for

solicitation to murder Lisa Cox he received information that an inmate named Kenneth Parmley had information about the case that he wanted to provide which “turned out to be information that Mr. Cox attempted to hire him to kill Mr. Ortiz.” 2RP 25.

Juris said that he became aware of that information from Deputy Prosecuting Attorney, Mark Thompson. 2RP 25. Juris confirmed that at the time Parmley reached out to the prosecuting attorney’s office, he was charged with a crime and was being prosecuted by DPA Thompson. 2RP 25-26. Mr. Thompson reached out to Mr. Juris to discuss the possibility of offering Mr. Parmley a deal to cooperate and gave Juris the authority to make a plea offer in exchange for testimony, but Juris never actually made a plea offer to Mr. Parmley that was contingent upon his testimony, nor did he ask Thompson to do so. 2RP 26.

Juris testified that attorney Karl Hack represented Mr. Parmley and did not indicate to him that Parmley was seeking a deal in connection with the case against Mr. Cox. 2RP 27. Juris confirmed that he provided Mr. Cox’s trial defense attorney, Paul

Strophy, the impeachable criminal history of Parmley prior to Parmley's testimony. 2RP 28. Juris indicated that Parmley was in custody and the jury was made aware that he was in custody at the time of his testimony. 2RP 29-30. Juris confirmed that Parmley indicated in his testimony that he was interested in obtaining consideration when he came forward. 2RP 30. Juris referenced the transcript at trial and indicated that Parmley indicated during trial that he was trying to get a deal. 2RP 30-31. However, Juris testified that Mr. Parmley did not receive a deal in his case that was contingent on him assisting with the case against Mr. Cox. 2RP 31.

During trial, Parmley indicated that he had asked his attorney about consideration. RP 495, 2RP 31. Juris indicated that Parmley's case was resolved before the trial of Mr. Cox and was not contingent on his testimony against Mr. Cox. 2RP 32. Juris also testified that after his case had resolved, Mr. Parmley sent a series of kites asking for help with his case and Juris provided those kites to defense counsel Paul Strophy. 2RP 33-

34. During trial, in front of the jury, Juris asked Parmley about those kites. RP 514. Juris noted that Parmley did have a reduction of his original charge, but it was not in exchange for his testimony in the trial of Mr. Cox and indicated that Mr. Strophy was notified of the reduction. 2RP 35-36, RP 532.

Juris testified regarding the process for a cooperation agreement in a court case. 2RP 40. He indicated that there was no specific cooperation agreement in place for Mr. Parmley to testify against Mr. Cox and had Parmley not testified at trial, there would have been no effect on the resolution of his criminal charge. 2RP 40. Juris testified that cooperation agreements are normally in writing and would be unenforceable by either side if not in writing. 2RP 41.

While Juris provided Mr. Parmley's relevant criminal history to Mr. Strophy, he did not research Mr. Parmley's warrant status for misdemeanors. 2RP 42. Juris testified,

My experience is warrants are something that are not admissible at trial, regardless of why they have been entered. I've had that argument numerous

times when I was in Thurston County, and they are not something that could be testified to, either directly or as impeachment, without some other door being opened in the first place, which wasn't something that would have been able to happen based on the nature of what they were.

2RP 42. Juris indicated that he did not dive deeper into Parmley's warrant history other than a cursory look at what his criminal history was. 2RP 42. On cross examination, Juris reiterated that "Mr. Thompson was a witness to verify the actual factual basis that no agreement was made, not his opinion of what Mr. Parmley's personality was." 2RP 74.

Thurston County Senior Deputy Prosecuting Attorney, Mark Thompson, testified at the reference hearing. 2RP 77-78. Thompson confirmed that Parmley was originally charged with attempted robbery in the first degree. 2RP 79. While prosecuting Parmley, Thompson received an email from Thurston County Corrections indicating that Parmley had information he wanted to provide. 2RP 79. Thompson acknowledged that he had sent an email to Mr. Juris authorizing

him to negotiate a cooperation agreement if he chose to. 2RP 80. Thompson testified that independent of the case involving Mr. Cox, he was considering a reduction to robbery in the second degree and looking into the chemical dependency program. 2RP 81. Thompson indicated that he and defense attorney Hack were looking into the chemical dependency program early on in the case against Mr. Parmley. 2RP 81-82.

Thompson testified that Juris indicated that he did not feel the need to enter into a cooperation agreement with Mr. Parmley. 2RP 85. Thompson testified that Juris received an email from defense counsel Hack indicating that Parmley was willing to help without consideration and Juris emailed Thompson, “No use in selling the farm if we don’t need to.” 2RP 86. No cooperation agreement was offered. 2RP 86.

In August of 2013, Thompson made an offer to Mr. Hack for a reduction in Parmley’s case to robbery in the second degree with the Thurston County Jail Chemical Dependency Program. 2RP 86. The offer indicated that the resolution was not

contingent on Mr. Parmley cooperating in the case against Mr.

Cox. 2RP 87. Mr. Thompson testified

I did put down that he was tenably - - I'm tenably giving you this offer. I just wanted to copy it to Mr. Juris to make sure, but at this point I was prepared to go ahead and make that offer as long as Mr. Juris did not give me a reason to condition it on anything, and he later - - Mr. Juris later indicated that he was fine taking the - - allowing me to make the offer and going forward with the plea.

2RP 87. In a subsequent email, Thompson confirmed to Hack that Mr. Juris was not asking that it be contingent upon testimony in Mr. Cox's case. 2RP 87-88.

Thompson testified that at one point during the discussion of the chemical dependency program, he and Mr. Hack had a discussion regarding a warrant for failure to transfer title out of Jefferson County. 2RP 88. Thompson testified,

The hope was that we were going to - - once Mr. Parmley was sentenced on a robbery second degree charge, that he'd be put on the waiting list, that he would then be sent up to Jefferson County so he could go ahead and clear that warrant. That would go ahead and allow him then to be able to have a seamless transition from an inpatient in-custody phase one to a work release phase two part of the

program without having to worry about a warrant at that time.

2RP 89. When asked if anything about the warrant related to the prosecution of Mr. Cox, Thompson responded, “no, that’s something that at least I’ve been doing for years. It just helps the person, like I said seamlessly be able to participate in the CDP program.” 2RP 89.

Thompson testified that at one point in the negotiations, Mr. Hack indicated that his client might want to do straight jail time rather than the chemical dependency program and Thompson testified, “I went ahead and basically sent him the email saying that if we were gonna (sic) walk away from a CDP, that was basically the end of the reasons given me for that reduction and I would go ahead and pull the offer.” 2RP 90-91.

Thompson said the reason for his offer was,

Mr. Hack had been the one that had discussed the fact that his client had been relapsing - - or had relapsed after about six or seven years clean and sober, and that seemed to be also a suggestion supported by the fact that Mr. Parmley did have some drug convictions from years before, back in

around 2005, and several theft type of behavior before that which would be at least consistent with possible drug usage. There was also in the police reports the suggestion from the victim that Mr. Parmley was acting very strange which would be at least consistent, in my mind, with that.

2RP 91.

Eventually Parmley accepted the reduction with the chemical dependency program. 2RP 91-92. Thompson confirmed that the resolution that had been worked out was in no way contingent upon Mr. Parmley cooperating in the prosecution of Mr. Cox. 2RP 95. Thompson indicated, if a resolution involving cooperation had been reached, he

Would have done two things. We would have first noted it in this plea agreement as far as what conditions were made. Obviously, the court makes the inquiry if there's any promises or representations that are being made to the defendant pursuant to them entering a change of plea. So we go ahead and first would indicate that there was that requirement, that it was conditioned upon his cooperation with the testimony against Mr. Cox. I would also go ahead and have (sic) drafted and required him to sign an actual contract to testify or agreement to testify against Mr. Cox in his case, and that way I'm protected. If Mr. Parmley would have gone ahead and backed out of his agreement to

testify, then I would have an actual legal basis to go ahead and seek to withdraw the plea.

2RP 96-97. Thompson confirmed that did not occur in the prosecution of Kenneth Parmley. 2RP 98.

When asked about his knowledge of Mr. Parmley's warrants, Thompson testified that other than the Jefferson County warrant he was not aware of other warrants at the time of his testimony at trial. 2RP 121-122. When asked if that would have affected his testimony about Parmley doing well in the community, Thompson testified,

Unsure. Sometimes those are financial warrants, and sometimes they're just - - they just move. I mean, like I said, when I go ahead and make a statement that he's been crime free for a while, I go ahead and look at a fact - - and I even re-looked at Mr. Parmley's history preparing for today, and I just see there's a big gap of nothing since 2005 to 2012.

2RP 122.

Parmley's attorney, Karl Hack, also testified at the reference hearing. Mr. Hack indicated that he had told Mr. Thompson that if Parmley got consideration that would be fine,

but Parmley was not asking for any promises in exchange for coming forward. 2RP 146. Hack confirmed that neither Thompson nor Juris ever conditioned a resolution on Mr. Parmley cooperating in the prosecution of Mr. Cox. 2RP 153-154. Hack further indicated that a cooperation agreement would normally be reflected in the statement of defendant on plea of guilty and there was no such notation in Mr. Parmley's paperwork. 2RP 155. Mr. Hack also testified with his experience dealing with Mr. Thompson and how he would expect any agreement to be in reflected in the plea statement, testifying,

Yes, especially dealing with Mr. Thompson. Mr. Thompson is very fastidious about having everything in writing, and that's just another reason why I feel that you can be sure that anything like that would have been reflected somewhere. Mr. Thompson is very careful about these things.

2RP 155-156.

As its last witness at the reference hearing, the State called defense attorney Paul Strophy, who represented Mr. Cox at trial. 2RP 172. Strophy testified, "my general memory is that during

my cross-examination of Mr. Parmley I was aware of him mentioning to Detective Kolb on multiple times during his interview with her that, you know, one of his goals was to get a better deal, or hopes, I should say, was to get a better deal.” 2RP 174, RP 521. Strophy acknowledged that he was able to cross examine Parmley on that issue during trial. 2RP 174-175, RP 522, 531. Strophy acknowledged that he had received a copy of the interview conducted by Detective Kolb in discovery. 2RP 176. Strophy also acknowledged that he questioned Parmley about his plea and his criminal history. 2RP 176. Strophy testified, “I was aware of the criminal history that was provided in discovery by the State. I don’t know if that was complete, but I have no reason to believe that it was not complete.” 2RP 177. Strophy also acknowledged that he was provided the inmate kites from Mr. Parmley prior to trial and that he was able to cross examine Parmley about those. 2RP 178-179.

Strophy also testified about his cross examination of Mr. Thompson and indicated that he was aware that there had been a

reduction in the charge for Mr. Parmley's case at the time of trial in Mr. Cox's case. 2RP 179. When asked about the warrant history, Mr. Strophy indicated that he learned about them after trial, but further noted "I don't know whether or not the court would have ruled them admissible, and even prior to that I don't know whether or not I would have been able to prepare any specific arguments as to why they were admissible prior to trial." 2RP 181.

The defense elected to call no witnesses at the reference hearing. 2RP 208. Following the reference hearing, the trial court gave a detailed oral ruling. When considering whether Parmley's testimony that he did not get a deal for his testimony was false, the trial court noted, "what this court sees is explicit evidence from both Mr. Hack [and Mr. Thompson] that Mr. Parmley was not asking for a deal in exchange for his testimony." 2RP 240-241. The trial court noted, "There was testimony from Mr. Parmley during his interview with the detective that he was hoping for some consideration, and that was clearly in front of

the jury and was clearly something that was provided to Mr. Cox's defense attorney at trial." 2RP 241.

When discussing whether Cox had demonstrated that Mr. Thompson testified falsely, the trial court noted there was a very specific quote from Mr. Thompson's testimony that was claimed to have been false in that "Mr. Thompson had claimed that there were no notes or messages that were available detailing the plea negotiations." 2RP 241. The trial court noted that the actual transcript shows that Thompson was asked if there were any notes or messages that had either Mr. Parmley or Mr. Hack expressing that he hoped for a better deal. 2RP 242. The trial court stated,

The court then went and looked for any information whether or not that statement was true and again was confronted with the multiple emails in which Mr. Hack was relaying to Mr. Thompson that any cooperation in regards to Mr. Cox's case was to be without consideration.

2RP 242.

The trial court next indicated that Mr. Thompson testified that there had been a reduction in the charge based on a number of things. 2RP 242-243. The trial court specifically found that “Thompson cannot be said to have been testifying falsely when he referenced crime free in the community.” 2RP 244. The court held, “So this court does not find that the petitioner has met his burden to prove that there was actual false testimony from Mr. Parmley or Mr. Thompson.” 2RP 244.

The trial court then discussed whether the existence of misdemeanor warrants was impeachment evidence. The court stated, “At the reference hearing, there was no evidence submitted that detailed that these warrants were issued after failing to appear where a written promise to appear or a promise to appear had been made.” 2RP 244-245. The court indicated based on the evidence presented at the reference hearing, “the court does not find that the existence of those warrants in and of themselves provided impeachable material that was failed to have been disclosed.” 2RP 245. The court further noted, “this

court saw no evidence that Mr. Parmley was aware of any warrants except for” the Jefferson County warrant for failure to transfer title. 2RP 245-246. The court noted that the emails from Mr. Thompson indicated the warrant would not keep Parmley from entering the chemical dependency program and the stated, “important in that email is there is never a reference or condition upon removing of that warrant or any discussion about how removing that warrant would be conditioned upon Mr. Parmley’s testimony in the Cox case.” 2RP 246-247.

The trial court then discussed whether a failure to provide email strings was a failure to provide impeachable evidence. The trial court found,

Even though the email streams themselves were not forwarded to Mr. Cox’s attorney, apparently the interview of Mr. Parmley by the detective, which included his statement that he was hoping for a deal or a break in his case that was provided to defense counsel, and in fact he was cross-examined about that multiple times during his testimony at the Cox trial. The kite where he was going to recant his testimony was also provided to defense counsel, and the letter where he was put in protective custody, and he was unhappy about that situation, and his

indication he was going to refuse to testify unless that was addressed by Mr. Juris - - that letter was also supplied to defense counsel.

2RP 249-250. The trial court entered written findings of fact and conclusions of law consistent with its oral ruling. Supp CP 529-534.

4. Court of Appeals Decision.

In an unpublished opinion, Division I of the Court of Appeals, noted that the procedural posture of the case stemmed from a collateral attack. Unpublished Opinion, No. 82949-5-I, at 6. The Court of Appeals properly noted that the trial court's determination of credibility cannot be reviewed on appeal. *Id.*; In re Pers. Restraint of Davis, 152 Wn.2d 647, 679, 101 P.3d 1 (2004). The Court of Appeals declined to consider Cox's claim of improper vouching because the claim was beyond the scope of remand for the reference hearing. Unpublished Opinion, at 9. The Court of Appeals found that the trial court's findings and conclusions were supported by substantial evidence and affirmed

the reference hearing findings. *Id.* at 10. Cox now seeks review of that decision.

C. ARGUMENT

1. There is no basis under RAP 13.4(b) upon which this Court should accept review.

A petition for review will be accepted by this Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Cox's Petition for Review argues that the decision of the Court of Appeals conflicts with a decision of the of the United States Supreme Court, Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The decision of the Court of Appeals does not conflict with Brady. In fact, the record

demonstrates that the Court of Appeals remanded the case to the trial court to conduct a factual hearing regarding the allegations of prosecutorial misconduct. The issue considered by the Court of Appeals was whether or not the trial court's findings and conclusions from the reference hearing were supported by substantial evidence. The Court of Appeals properly gave deference to the credibility determinations of the trial court. Davis, at 680.

The petition for review does not demonstrate error by the Court of Appeals, rather the petition focuses on issues that were considered and decided by the trial court during the reference hearing. The decision of the Court of Appeals properly reviewed those findings to see if they were supported by substantial evidence. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 112-13, 937 P.2d 154, 943 P.2d 1358 (1997). The decision of the Court of Appeals properly recognized the unique procedural posture of the proceedings. The decision does not conflict with decisions of the United States Supreme Court or the Washington

State Supreme Court. There is no basis upon which this Court should accept review.

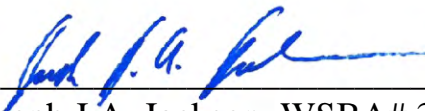
In addition to the arguments contained herein, the State incorporates the arguments included in the Brief of Respondent which more thoroughly demonstrate why the Court of Appeals decision was correctly decided.

D. CONCLUSION

The State respectfully requests that this Court deny review and affirm the decision of the Court of Appeals.

I certify that this document contains 4655 words, not including those portions exempted from the word count, as counted by word processing software, in compliance with RAP 18.17.

Respectfully submitted this 24th day of October 2022.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in The Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: October 24, 2022.

Signature: *Stephanie Johnson*

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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