SUPREME COURT NO. 102156-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CHRISTOPHER PETEK,

Respondent.

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

The Honorable Jessica Reeves, Judge
The Honorable Patrick Monasmith, Judge

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF ANSWERING PARTY

Respondent Christopher Petek, the appellant below, requests the relief stated in part B.

B. RELIEF REQUESTED

Petek requests that this Court deny the State's petition for review. If this Court grants the State's petition, Petek requests review of the issues raised in this answer but not decided by the Court of Appeals.

C. ISSUES PRESENTED FOR REVIEW

1. Must the conviction for unlawful possession of a firearm be reversed because the information fails to allege the essential element of knowledge?

2. Must the firearm conviction be reversed due to ineffective assistance of counsel because (1) counsel, not knowing the law on reopening a case, was deficient in bringing a motion to dismiss for insufficient evidence after the State rested its case, thereby giving the State an opportunity to reopen its case and cure the proof problem

and (2) the charge would have been dismissed had counsel waited to bring the sufficiency of evidence challenge until after the verdict, at which time the State could not have supplied the missing proof?

3. Even if the corpus delicti rule is satisfied, whether the evidence is still insufficient to convict on one count of possession with intent to distribute an imitation controlled substance because the possession of MSM to dilute the purity of a controlled substance does not establish the charge?

D. STATEMENT OF THE CASE

The Court of Appeals reversed the convictions in an unpublished decision on the grounds that (1) the State failed to demonstrate a reasonable belief that the recreational vehicle harbored an individual posing a danger to the arresting officers justifying a protective sweep, requiring suppression of the evidence; and (2) Petek's admission to possessing "fake heroin" and "fake

meth" was inadmissible on corpus delicti grounds, and without his admission, there is insufficient evidence to establish that the substances he possessed were imitation. Slip op. at 1 (attached to State's petition as Appendix A). The Court of Appeals did not reach additional issues raised by Petek. Slip op. at 13, n.7.

E. ARGUMENT

1. The issues raised in the State's petition do not merit review.

a. Whether the State failed to prove the protective sweep exception to the warrant requirement is a fact-bound issue. The Court of Appeals appropriately applied the settled legal standard to the particular facts of this case in holding the State did not meet its heavy burden.

Warrantless searches are per se unlawful under both the Fourth Amendment and article I, section 7 unless they fall within a specific exception to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). These exceptions are jealously guarded and

carefully drawn. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

To prove the "protective sweep" exception to the warrant requirement, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Maryland v. Buie, 494 U.S. 325, 334, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990).

The State claims the suppression issue in Petek's case presents a significant question of constitutional law meriting review under RAP 13.4(b)(3). Petition at 14. It doesn't. There is no significant question of constitutional law because the law is settled and the Court of Appeals merely applied it.

In actuality, the State bickers about the significance of the particular facts of this case. The fact-bound nature

of the State's argument makes it a poor candidate for discretionary review.

The State's argument boils down to the notion that officers could not be sure there was no one inside the trailer that posed a danger. It posits "officers knew that someone or something was moving inside the trailer but could not say with certainty that the trailer did not contain one or more individuals who posed a threat to law enforcement." Petition at 21.

Ignorance does not equal articulable suspicion of danger. Officers knew there was a dog moving around in the trailer. Officers articulated no facts showing a human remained inside once Petek and his girlfriend were secured outside the trailer. Dispositively, officers lacked a reasonable belief based on articulated facts that someone inside the trailer posed a danger to arresting officers.

The State "must establish the exception to the warrant requirement by clear and convincing evidence."

State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The Court of Appeals applied the established legal standard for the protective sweep exception to the facts of this case and correctly determined the State failed to meet its burden of proof on the particular facts of this case. Buie, 494 U.S. at 334; State v. Chambers, 197 Wn. App. 96, 127, 387 P.3d 1108 (2016), review denied, 188 Wn.2d 1010, 394 P.3d 1004 (2017); State v. Hopkins, 113 Wn. App. 954, 960, 55 P.3d 691 (2002).

b. In line with settled precedent, the Court of Appeals appropriately declined to consider the State's new theory presented for the first time on appeal.

Apparently sensing the weakness of its "protective sweep" argument, the State complains that the Court of Appeals should have considered whether the State proved the exigent circumstance exception to the warrant requirement. Petition at 15-18. The State raised its exigent circumstance argument for the first time on

appeal. The Court of Appeals correctly applied precedent in declining to address the State's exigent circumstance claim.

This Court's decision in State v. Samalia, 186 Wn.2d 262, 279, 375 P.3d 1082 (2016) is on point. In Samalia, the State argued the exigent circumstance exception to the warrant requirement for the first time on appeal. Samalia, 186 Wn.2d at 279. The Supreme Court refused to consider this exception on appeal because it was not argued below. Id. Petek's case is no different. Other decisions are in accord. See, e.g., State v. Larson, 88 Wn. App. 849, 852, 946 P.2d 1212 (1997) ("We will not affirm on the basis of a theory argued for the first time on appeal."); State v. Carter, 79 Wn. App. 154, 162-63, 901 P.2d 335 (1995) ("The State is raising this alternative theory for the first time on appeal; this is a fatal defect.").

The State relies on State v. Smith, 165 Wn. App. 296, 266 P.3d 250 (2011), aff'd on other grounds, 177

Wn.2d 533, 303 P.3d 1047 (2013), positing the Court of Appeals decision is in "direct conflict" with it. Petition at 14. There is no conflict under RAP 13.4(b)(2). As the Court of Appeals recognized, the State in Smith developed "both facts and legal argument supporting its position" at the trial level. Slip op. at 24, n.10 (quoting Smith, 165 Wn. App. at 308). That did not happen here.

The State whistles past the graveyard in ignoring this Court's decision in Samalia, which controls the issue in Petek's favor. By raising this argument for the first time on appeal, the State deprived Petek of the opportunity to develop facts to counter the argument. The opportunity for skillful cross examination of law enforcement witnesses targeted at showing a lack of exigent circumstances has been lost. It would be unfair to consider this alternative basis to affirm the trial court's decision.

"[T]here are obvious due process problems in affirming a trial court ruling in a criminal proceeding on an alternative theory against which the defendant has had no opportunity to present an argument." State v. Adamski, 111 Wn.2d 574, 580, 761 P.2d 621 (1988). Crucially, "fundamental fairness suggests that it ought not be done unless there can be no dispute on the alternative theory." Id. Petek vigorously disputes the State's alternative exigent circumstance theory.

The State had every opportunity to raise an exigent circumstance argument below and declined to do so. The Court of Appeals appropriately refused to consider the State's belated claim raised for the first time on appeal.

Moreover, the State in its petition does not even seek review of the merits of its exigent circumstance argument. It presents no substantive argument on this alternative exception to the warrant requirement. There is nothing of substance to review here.

c. The plain language of the statute shows the Court of Appeals correctly held that, applying the corpus delicti doctrine, the evidence is insufficient to support the convictions for possession with the intent to deliver an imitation controlled substance.

The State claims this Court invented and imposed a new element in holding the State failed to prove possession with intent to deliver an imitation controlled substance under the corpus delicti rule. Petition at 25. Nonsense.

What the State needs to prove depends on the charge it chooses to bring. State v. Olds, 39 Wn.2d 258, 261, 235 P.2d 165 (1951) ("defendants in criminal cases must be convicted of the offenses charged and guilt of other offenses will not suffice.").

In deciding how to prosecute this case, the State faced a fork in the road. The State had a choice. The State implies it could have charged Petek with possession with intent to deliver a real controlled substance and did

him a favor in not doing so. Petition at 24. The State instead chose to charge possession with intent to deliver an imitation controlled substance. That charging decision has proof consequences.

The State needed to prove the substance at issue was not a controlled substance. This is what the statute plainly requires. RCW 69.52.030(1) (making it unlawful to "possess with intent to distribute, an imitation controlled substance."); RCW 69.52.020(3) (an "imitation controlled substance" is "a substance that is not a controlled substance, but which by appearance or representation would lead a reasonable person to believe that the substance is a controlled substance.").

The jury was instructed, in accord with the statute, that in order to convict, it must find Petek possessed imitation controlled substances and that an imitation controlled substance "means a substance that is not a controlled substance." CP 124-25, 128.

To prove the substances were imitations, it is not enough that the substance merely looks like a real illegal substance. The State must also establish through competent proof that the substance alleged to be an imitation of the real thing is not in fact a controlled substance.

The State's argument nonetheless pretends there is no requirement that the imitation substance is not a controlled substance. According to the State, it does not matter whether the substance is a controlled substance; rather, the only thing that matters is whether the substance appears to be a controlled substance. Petition at 26.

The State's argument reads a proof requirement right out of the statute. "The State is obliged to present sufficient evidence to establish that a defendant's conduct falls within the scope of a criminal statute, regardless of whether the statute's requirements are elemental or

definitional." State v. Crowder, 196 Wn. App. 861, 869, 385 P.3d 275 (2016), review denied, 188 Wn.2d 1003, 393 P.3d 361 (2017). The definitional statute contains the requirement that the substance "is not a controlled substance." RCW 69.52.020(3). The State cannot evade this requirement by ignoring it. No portion of a criminal statute can be interpreted in a manner that renders language meaningless or superfluous. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

The Court of Appeals correctly determined the State failed to meet its burden of proof under the corpus delicti rule. In attempting to prove Petek possessed substances that were imitations of the real thing, the State relied on Petek's confession that what looked like real heroin was fake heroin and what looked like real methamphetamine was not real methamphetamine but rather MSM. 2RP[1] at

[1] The verbatim report of proceedings is cited as follows: 1RP - 4/20/21; 2RP - two consecutively paginated

469-70, 493-94. Evidence independent of Petek's confession did not prove the substances were imitations of controlled substances. The State does not dispute the Court of Appeals' conclusion that the field tests were insufficient to independently prove the substances were imitations. Slip op. at 27-29.

The State, due to less than diligent investigation, haphazard presentation of its case, or misunderstanding of the law, made the fatal mistake of thinking it could rely on Petek's confession to prove its case. The State was the architect of its own error.

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volumes consisting of 04/27/2021, 05/10/2021, 05/11/2021, 05/12/2021, 05/25/2021. The narrative report of proceedings is cited as follows: 1NRP - 4/20/21; 2NRP - 04/27/2021, 05/10/2021, 05/11/2021, 05/12/2021, 05/25/2021.

2. In the event this Court accepts review of the State's petition, this Court should also take review of additional issues not reached by the Court of Appeals.

This case is riddled with reversible error. "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues." RAP 13.7(b).

a. The information is defective in failing to include an essential element of the firearm offense.

A charging document is constitutionally defective when it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. Knowledge is an

essential, non-statutory element of the crime of unlawful possession of a firearm. State v. Marcum, 116 Wn. App. 526, 66 P.3d 690 (2003); State v. Cuble, 109 Wn. App. 362, 367, 35 P.3d 404 (2001) (citing State v. Anderson, 141 Wn.2d 357, 362, 5 P.3d 1247 (2000)).

Petek seeks review under RAP 13.4(b)(3). The information omits the essential element of "knowledge" for the unlawful possession of firearm offense. CP 11. The information nowhere alleges Petek "knowingly" possessed the firearm.

The Stevens County Prosecutor's Office committed a similar error in State v. Level, 19 Wn. App. 2d 56, 493 P.3d 1230 (2021). Level held the knowledge element could not be fairly implied from an allegation in the information that the defendant "unlawfully" possessed a stolen motor vehicle. Level, 19 Wn. App. 2d at 58.

From prior case law, Level discerned "the adverb 'unlawfully' can convey a mental state element (such as

knowledge or intent) when permitted by common sense inferences," but "[w]hen it comes to crimes punishing simple possession of contraband, the mental state required by the law is not a matter of obvious common sense." Id. at 61-62.

"The case law governing unlawful possession offenses shows the mere fact possession of a certain object is 'unlawful' does not mean the possession was accompanied by a specific type of knowledge." Id. at 63. Even under the liberal standard of review applicable to challenges raised for the first time on appeal, "an information's allegation that the defendant acted unlawfully is insufficient to convey an inference that the conduct was done with a mental state of knowledge." Id.

The same conclusion holds here. Unlawful possession of a firearm, like the possession of a stolen vehicle offense in Level, is a crime punishing simple possession of contraband. As such, the allegation that

Petek "unlawfully" possessed the firearm is insufficient to convey the knowledge element. The remedy is reversal and dismissal of the charge without prejudice. Vangerpen, 125 Wn.2d at 792-93.

b. Counsel provided ineffective assistance in bringing a premature motion to dismiss the firearm count, which enabled the State to prove its case.

Every person accused of a crime is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. That right is violated where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Id. at 687.

Deficient performance is that which falls below "an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn. 2d 222, 226, 743 P.2d 816 (1987). Of

importance in assessing deficiency, counsel has a duty to know the relevant law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

There are two relevant laws at issue here. First, it is axiomatic that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. State v. Huber, 129 Wn. App. 499, 501, 119 P.3d 388 (2005). When criminal liability depends on the accused's being the person to whom a document pertains, such as when proof of a prior conviction is at issue, the State must use independent evidence to prove the accused is the person named in the document. State v. Santos, 163 Wn. App. 780, 784, 260 P.3d 982 (2011). Identity of names is insufficient. Huber, 129 Wn. App. at 502.

Petek's attorney competently identified this law and relied on it to argue that the State failed to prove its case on the firearm count. 2RP 409-10. Where Petek's

attorney performed deficiently, however, was in moving to dismiss this count too soon based on a mistaken belief that the State could not reopen its case after the defense rested. 2NRP 412.

This brings us to the second relevant law, which an objectively reasonable attorney needs to know in deciding when to raise a sufficiency of evidence challenge. It is well established that a trial court has discretion to allow the State to reopen its case to present additional evidence after the defense has moved for dismissal based on insufficient evidence, even after both sides have rested their cases. State v. Brinkley, 66 Wn. App. 844, 848, 837 P.2d 20 (1992).

Counsel was ignorant of this key point of law at the time the motion was made. When the State expressed its desire to reopen its case in response to the motion to dismiss, defense counsel countered by stating "I think it's -- it's clear that you ought to have more than just the

judgment and sentence. I do not believe you can reopen that after the defense rests." 2NRP 412.

The judge identified that as "our key right there" but did not know the answer to whether the State could reopen. 2RP 412. The judge then recessed to allow the attorneys to research the issue. 2NRP 412; 2RP 413. Defense counsel said he would research it. 2RP 413. The judge arranged for counsel to conduct his research in the court library. 2NRP 412; 2RP 413, 415. When the case reconvened later that day, the research had been done, and it was by then apparent to all that the court had discretion to allow the State to reopen. 2RP 415, 419-20.

"To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" In re Pers. Restraint of Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (quoting Sanders v. Ratelle, 21 F.3d 1446,

1456 (9th Cir. 1994)). Defense counsel's duty to investigate includes a duty to research the relevant law. State v. Estes, 188 Wn.2d 450, 460, 395 P.3d 1045 (2017).

It was not a reasonable professional judgment for counsel to launch the motion to dismiss based on the mistaken premise that the State could not reopen its case. It was not a reasonable professional judgment to forgo research on that issue before making that motion. Ignorance of the relevant law is not a legitimate tactic. Meadows v. Lind, 996 F.3d 1067, 1075 (10th Cir. 2021). It is a quintessential example of unreasonable performance. Hinton v. Alabama, 571 U.S. 263, 274, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014).

Prejudice results from a reasonable probability that the result would have been different but for counsel's deficient performance. Strickland, 466 U.S. at 694. Without the proof of the prior conviction element, Petek

could not have been convicted of unlawful possession of a firearm. The State conceded it had failed to prove the prior conviction element before reopening its case. 2RP 411. The firearm conviction would have fallen if defense counsel had not given the State an opportunity to save it. Counsel need only have waited to bring a motion based on insufficient evidence until after the verdict, at which point the State could not reopen its case. State v. Jackson, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996), review denied, 131 Wn.2d 1006, 932 P.2d 644 (1997).

The remedy for ineffective assistance claims under the Sixth Amendment "should be tailored to the injury suffered from the constitutional violation" and place the defendant "in the same position he was in before the violation of his right to effective representation." State v. Maynard, 183 Wn.2d 253, 262, 351 P.3d 159 (2015) (quoting United States v. Morrison, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981)). Before

counsel's ineffective decision to bring a motion to dismiss, the firearm charge was doomed to be dismissed with prejudice due to the State's failure of proof. The tailored remedy is dismissal of that charge with prejudice due to insufficient evidence. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (remedy for conviction based on insufficient evidence is reversal of conviction and dismissal of the charge with prejudice). Petek seeks review under RAP 13.4(b)(3).

c. Even if the corpus delicti rule is satisfied, the evidence remains insufficient evidence to convict on one count of possession with intent to distribute an imitation controlled substance.

Assuming arguendo that there is no corpus delicti violation, the evidence is still insufficient to establish guilt on count 2, possession with intent to distribute imitation methamphetamine. The substance at issue, MSM, is a cutting agent for methamphetamine. It is used to dilute that controlled substance. Possession of a cutting agent

with intent to dilute a controlled substance is not a crime under RCW 69.52.030(1). Petek seeks review under RAP 13.4(b)(3).

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"To determine whether the State has produced sufficient evidence to prove each element of the offense, we must begin by interpreting the underlying criminal statute." State v. Budik, 173 Wn.2d 727, 733, 272 P.3d

816 (2012). Under RCW 69.52.030(1), "It is unlawful for any person to manufacture, distribute, or possess with intent to distribute, an imitation controlled substance." "'Distribute' means the actual or constructive transfer (or attempted transfer) or delivery or dispensing to another of an imitation controlled substance." RCW 69.52.020(2). An "imitation controlled substance" is "a substance that is not a controlled substance, but which by appearance or representation would lead a reasonable person to believe that the substance is a controlled substance." RCW 69.52.030(3).

"The purpose of statutory construction is to give content and force to the language used by the Legislature." State v. Wilson, 125 Wn.2d 212, 216, 883 P.2d 320 (1994). The language of the relevant statute is clear. To prove possession with intent to deliver an imitation controlled substance, it must be established that

the substance at issue "is not a controlled substance." RCW 69.52.030(3).

A "controlled substance" is "a substance as that term is defined in chapter 69.50 RCW." RCW 69.52.030 (1). It is unlawful to possess with intent to deliver a controlled substance. RCW 69.50.401(1).

The question for this appeal is whether possession of a cutting agent used to dilute a controlled substance can support a conviction for possession of an imitation controlled substance with intent to distribute it.

Real methamphetamine — a controlled substance — was found in the RV. 2RP 404, 406; Ex. 15, 33. Petek admitted he sold methamphetamine to support his habit. 2RP 325. He did not admit to selling MSM by itself. MSM is a cutting agent. 2RP 182; 2NRP 326. Detective Coon described MSM as "a powder chemical substance that when mixed directly closely resembles methamphetamine, often-times used to mix into a bag of methamphetamine

to increase its weight and resale." 2NRP 326. Detective Frizzell described MSM in a similar manner. 2NRP 182. The evidence does not show Petek intended to distribute MSM by itself, passing it off as imitation methamphetamine. As a cutting agent, MSM is mixed in with real methamphetamine to increase the weight of the substance and resulting sale value.

A diluted controlled substance is still a controlled substance and thus, by definition, not an imitation controlled substance. Possession with intent to distribute a diluted controlled substance is therefore not a crime of possession with intent to distribute an imitation controlled substance. Rather, possession with intent to distribute a diluted controlled substance is the crime of possession with intent to deliver a controlled substance.

To hold otherwise would be to criminalize every act of possession with intent to deliver a controlled substance as possession with intent to distribute an imitation

controlled substance where the substance at issue is not 100 percent pure and unadulterated. In interpreting statutes, "'we presume the legislature did not intend absurd results' and thus avoid them where possible." State v. Weatherwax, 188 Wn.2d 139, 148, 392 P.3d 1054 (2017) (quoting State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010)).

Even assuming the statute is susceptible to more than one reasonable interpretation, the rule of lenity requires the court "to adopt the interpretation most favorable to the defendant." State v. Flores, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008). To the extent there is any reasonable ambiguity on whether possession of a cutting agent such as MSM with intent to deliver it as part of an actual controlled substance qualifies as criminal under RCW 69.52.030(1), that ambiguity must be resolved in Petek's favor.

Further, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). The State may not rely on circumstantial evidence that is "patently equivocal." Id. at 8.

Petek admitted he sold methamphetamine to others. It is speculation that Petek possessed the MSM with intent to distribute it by itself as fake methamphetamine, as opposed to possessing the MSM for the purpose of cutting real methamphetamine that he intended to deliver. The former is the crime of possession with intent to deliver an imitation controlled substance, the latter is the crime of possession with intent to deliver a controlled substance. The State did not charge Petek with the latter. The count must be dismissed due to insufficient evidence.

F. CONCLUSION

For the reasons stated, Petek respectfully requests that this Court deny the State's petition for review. If this

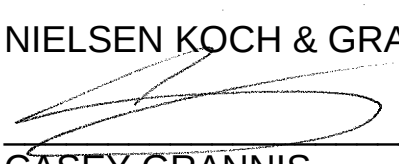
Court grants the State's petition, then Petek requests that the issues raised in this answer be accepted for review as well.

I certify that this document was prepared using word processing software and contains 4546 words excluding those portions exempt under RAP 18.17.

DATED this 4th day of August 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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August 04, 2023 - 11:12 AM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Christopher Donald Petek
Superior Court Case Number:	20-1-00421-3

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