102833-4

NO. 39384-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ISAIAH THOMAS OLIVER,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

ISAIAH THOMAS OLIVER requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Oliver seeks review of an unpublished Opinion of Division III of the Court of Appeals dated February 8, 2024. (Appendix "A" 1-8)

3. ISSUES PRESENTED FOR REVIEW

1. Should either a trial court and/or an appellate court be required to take judicial notice of facts that were testified to in a jury trial that resulted in a mistrial, but were not reintroduced at a second trial which was a bench trial?

2. If an officer, who has no probable cause to search a vehicle which has tinted windows, uses a flashlight at night to look through those windows, has there been a violation of the Fourth

Amendment to the United States Constitution and/or Const. art I, § 7?

3. Is an attorney ineffective for not bringing a suppression motion if the answer to the above issue is yes?

4. STATEMENT OF THE CASE

FIRST TRIAL

Officer Pierson of the Kalispell Tribal Police was conducting a patrol check at Cooper Landing Apartments in the early morning hours of April 27, 2021. He saw a bright green Dodge Charger parked outside the main office with its lights on. The office lights were also on but the office itself was closed. (Blocker, RP 11, ll. 22-24; RP 12, ll. 13-24; RP 13, ll. 10-23)

Officer Pierson later was conducting a welfare check at the Northern Quest Casino. As he was driving through the parking lot he again saw the Dodge Charger. He drove by it because he considered it a suspicious vehicle. There were two black men outside the car. He called the license plate in to dispatch to determine who was the Dodge Charger's registered owner. It

returned to Jennifer Oliver. She has two sons who are also associated with the vehicle. (Blocker RP 17, ll. 5-22; RP 21, l. 21 to RP 22, l. 19)

Officer Pierson later returned to the Dodge Charger. Taking a flashlight he walked up to it and looked through the tinted windows on the driver's side. He immediately saw a firearm between the driver's seat and the console. (Blocker RP 18, ll. 15-23; RP 19, ll. 15-18; RP 39, ll. 1-7)

Officer Pierson described his purpose for checking out the interior of the Dodge Charger as conducting a search for drugs. He described it as a common practice for law enforcement in the area of the Cooper Landing Apartments and casino. (Blocker RP 18, l. 24 to RP 19, l. 11)

SECOND TRIAL

Officer Pierson was again the only witness at trial. His testimony at the bench trial varied from what he said at the jury trial. He now recalled that he did not make contact with the Dodge Charger at Copper Landing Apartments due to following another

vehicle which sped from the area. He then went on the welfare check to the casino. The Dodge Charger was already there. (Blocker RP 123, l. 22 to RP 124, l. 19; RP 126, ll. 2-11; ll. 18-21)

It was after seeing the firearm that dispatch advised him that Jennifer Oliver was the registered owner. He was also told about Ms. Oliver's sons who were prohibited from possession of firearms. (Blocker RP 129, ll. 11-22; RP 129, l. 24 to RP 130, l. 2; RP 163, ll. 20-24)

Defense counsel's cross-examination of the officer at the second trial did not encompass the fact that the Dodge Charger had tinted windows which the officer believed he could not see through without the flashlight. It thus did not become a part of the second trial. (Blocher RP 39, ll. 1-7)

In response to questions from the trial court the officer advised the he checked the Dodge Charger due to his suspicions concerning it after having observing it in two different places. (Blocker RP 156, ll. 1-3)

The Hon. Timothy B. Fennessy presided at both the jury trial and bench trial. He entered Findings of Fact and Conclusions of Law on November 9, 2022. He determined that Mr. Oliver was guilty of Count 1 (Ruger .45) and not guilty of counts 2 and 3. (CP 91)

The appellate court's decision ignores the fact that the officer could not have seen through the window of the Dodge Charger because of its tint. He candidly admitted that he needed a flashlight to do so. This falls outside the parameters of the open view doctrine.

The Court of Appeals decision determined that Mr. Oliver's trial counsel was not ineffective for failing to bring a suppression motion.

The Court's decision is rather broad when it states at p.6

> There is no argument regarding whether Officer Pierson was permitted to be in the area of the vehicle. Just as Officer Pierson could lawfully be parked outside of the casino, he could also intentionally look through the

> windows of the vehicle also parked there.

The Court of Appeals decision states, in connection with the issue of the tinted windows, that:

> Although Oliver argues on appeal that the vehicles windows were tinted and therefore Officer Pierson still would not have been able to see through them during daylight hours without the aid of a flashlight, the record is undeveloped as to this fact and therefore this court cannot rely on it as a basis for finding that a motion to suppress bought by defense counsel would have succeeded.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

When Officer Pierson admitted that he could not see through the tinted windows without the aid of a flashlight it established that he was exceeding the parameters of both the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

> Although they protect similar interests, "the protections guaranteed by article I, section 7 of the state constitution are

qualitatively different from those provided by the Fourth Amendment to the United States Constitution." *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). The Fourth Amendment protects only against "unreasonable searches" by the State. Leaving individuals subject to any manner of warrantless, but reasonable, searches. U.S. Const. amend. IV "the right of the people to be secure in their ... houses... against unreasonable searches ... shall not be violated...."); *Illinois v. Rodriguez*, 497 U.S. 177, 187, 110 S. Ct. 2793, 111 L Ed. 2d 148 (1990) "[What] is at issue ... is not whether the right to be free of searches has been *waived* but whether the right to be free of *unreasonable* searches has been *violated*."

By contrast, article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 ("No person shall be disturbed in his private affairs or his home invaded, without authority of law." This is because "[u]nlike in the Fourth Amendment, the word 'reasonable' does not appear in any form of the text of article I, section 7 of the Washington Constitution." *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). Understanding this significant

> difference between the Fourth Amendment and article 1, section 7 is vital to properly analyze the legality of any search in Washington."

State v. Eisfeldt, 163 Wn.2d 628, 634-35, 185 Wn.3d 580 (2008).

Officer Pierson's use of a flashlight to see into a vehicle with tinted windows during the hours of darkness constitutes a warrantless, unconstitutional, illegal search.

Initially, Office Pierson had no probable cause to conduct a search.

> Probable cause is not subject to calculation by formula or mathematical certainty. It is a combination of facts, circumstances, and judgment. The traditional formula provides that
>
> > [p]robable cause for an arrest [search] without a warrant arises from a belief based upon facts and circumstances within the knowledge of the arresting [searching] officer that would persuade a cautious but disinterested person to believe the arrested person has committed a crime. The officer need not have knowledge or evidence sufficient to establish guilt beyond a reasonable doubt,

> for in this area the law is concerned with probabilities arising from the facts and circumstances of every-day life on which prudent men, not legal technicians, act.
> ...*State v. Parker*, 79 Wn.2d 326, 328-29, 485 P.2d 60 (1971).

State v. Morgan, 78 Wn. App. 208, 212, 896 P.2d 731 (1995).

The facts available to Officer Pierson at the time he conducted the search consist of the following: 1). He saw the green Dodge Charger at Cooper Landing Apartments outside the main office with its headlights on. He did not see anyone around that car. 2). He next observed the car in the parking lot at the Northern Quest Casino with two black men standing outside it. 3). He did not notice any criminal activity at Cooper Landing Apartments. 4). He did not notice any criminal activity by the individuals in the casino parking lot. 5). He walked up to the car and shined his flashlight through the driver's side tinted window. 6). He did not believe he would have been able to see inside the car without using the flashlight. 7). He saw a firearm between the driver's

seat and the console. 8). He later learned that the sons of the registered owner were prohibited from possessing a firearm.

> Probable cause exists when the arresting [searching] officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe that a suspect has committed or is committing a crime.

State v. Afana, 169 Wn.2d 169, 182, 233 P.3d 879 (2010).

Officer Pierson had no information that a crime had been committed. Officer Pierson had no information that the car was involved in the commission of a crime.

The officer candidly admitted that he routinely conducted searches of vehicles in the Northern Quest parking lot because people often left contraband in them that was immediately observable.

Mr. Oliver asserts that both the trial court and the appellate court have the ability to employ judicial notice in connection with facts elicited during the course of either a prior trial or a related trial. The leading case in the State of Washington

involving judicial notice appears to be *Swak v. Dept. Labor & Ind.*, 40 Wn.(2d) 51, 53-4, 240 P.(2d) 560 (1952).

> A court of this state will take judicial notice of the record in the cause presently before it or in proceedings engrafted, ancillary, or supplementary to it [Citations omitted.] … *Perrault v. Emporium Dept. Store Co.*, 83 Wn. 578, 145 P. 438 (on second appeal, after new trial awarded on first appeal, facts in record of first trial noticed. [Citations omitted.] … *Cloquet v. Department of Labor Industries*, 154 Wn. 363, 282 P. 201 (in workmen's compensation case involving aggravation of injuries, record in prior case *involving same injury* noticed). [Citations omitted.]
>
> In each of the cited cases, the nature of the proceeding was such that the trial or the appellate court could infer that prior proceedings had taken place in the case before it or in proceedings engrafted, ancillary, or supplementary to it. The record of those proceedings was then noticed judicially.

See also: *Forks v. Fletcher*, 33 Wn. App. 104, 106, 652 P.2d 16 (1982) (an appellate court can take judicial notice of any fact the court of jurisdiction judicially notices.)

Neither the trial court not the Court of Appeals made any effort to exercise its authority to do so.

ER 201 addresses the issue of judicial notice involving adjudicative facts. It states, in part:

> (a). **Scope of Rule.** This rule governs only judicial notice of adjudicative facts.
> (b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> (c) …
> (d) …
> (e) …
> (f) *Time of Taking Notice.* Judicial notice may be taken at any stage of the proceeding.

The State claims that Mr. Oliver has a duty to present evidence in connection with the degree of tint on the vehicle's windows. Apparently the State disavows the longstanding rule and constitutional right of all defendants that they need not present any testimony or evidence on their own behalf.

The Court of Appeals decision indicates that the fact in question was not fully developed. The decision seems to be shifting the burden of proof from the State to the defense as to the degree of tint. If a tinted window exceeds specifications its is the State's burden to prove it in a traffic infraction case. Shifting the burden of proof is impermissible.

Judicial notice can be taken of the fact that we drive down the highways on a daily basis and see vehicles that you cannot see into due to the darkened windows. Tinted windows are a means of declaring one's privacy.

Mr. Oliver asserts that the tinted window question constitutes an adjudicative fact that was conceded by the officer's testimony at the mistrial.

> An "adjudicative fact" is a "controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties." BLACK'S LAW DICTIONARY 669 (9th ed. 2009)

Discipline of Sanai, 177 Wn.2d 743, 753 n.3, 302 P.3d 864 (2013).

The State at no time challenged Officer Pierson's testimony that he could not see through the tinted window without the aid of a flashlight until it filed its brief before the Court of Appeals.

As announced in *State v. Patterson*,112 Wn.2d 731, 734-35, 774 P.2d 10 (1989)

> [W]e have carefully restricted automobile searches to balance an individual's privacy interest against a real state and societal need to search; mere convenience is simply not enough....
> Necessity, a societal need to search without a warrant, provides the underlying theme in these decisions. Against societal need, we balance privacy interests provided by article 1, section 7

> of our own constitution. Both analysis under the factors outlined in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), and scholarly commentary support our independent interpretation of that provision. [Citations omitted.]
> In the areas of search incident to arrest and *Terry* stops, we found that concerns for the safety of officers and potential destructibility of evidence do outweigh privacy interests and warrant a bright-line rule permitting limited searches. [Citations omitted.] *However, the concerns are not the same when officers approach a parked, immobile, unoccupied, secured vehicle.* In such a situation no bright-line rule is necessary. If exigencies in addition to potential mobility exist, they will justify a warrantless search.

(Emphasis supplied.)

No such exigencies exist in Mr. Oliver's case.

6. CONCLUSION

The Court of Appeals decision should be overturned based upon Mr. Oliver's claim of ineffective assistance of counsel for failing to file a suppression motion involving the unauthorized,

unconstitutional, privacy invading use of a flashlight to see through tinted windows at night.

The Court of Appeals decision creates an unfortunate rift in the jealously guarded exceptions to the search warrant rule. It would allow law enforcement to willy-nilly wander through various parking lots at their unjustified convenience, whether night or day, looking in the windows of parked vehicles to determine whether or not they could locate any evidence of contraband, without even one iota of probable cause to do so.

Mr. Oliver respectfully requests that the Supreme Court accept review.

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CERTIFICATE of COMPLIANCE: *I certify under penalty of perjury that this document contains 2582 words, excluding the parts of the document exempted from the word count by RAP 18.17.*

DATED this 27th day of February, 2024.

Respectfully submitted,

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APPENDIX "A"

FILED
FEBRUARY 8, 2024
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

STATE OF WASHINGTON, Respondent, v. ISAIAH THOMAS OLIVER, Appellant.	)	No. 39384-4-III
	)	UNPUBLISHED OPINION

STAAB, J. — Isaiah Oliver appeals from a conviction for first degree unlawful possession of a firearm following a bench trial. He argues: (1) defense counsel was ineffective for failing to bring a motion to suppress the firearm observed by Officer Clay Pierson with the aid of a flashlight while looking through the window of a vehicle at night, and (2) the trial court erred in finding that the plain view exception to the warrant requirement applied. We disagree with both arguments and affirm.

BACKGROUND

Officer Pierson was employed by the Kalispell Tribal Police Department. On the date of the incident in question, Officer Pierson was on duty and conducting a daily prowl check at an apartment complex. While at the complex, he noticed a bright green Dodge Charger with its lights on, parked at the complex's office even though the office was

closed. Officer Pierson was fairly familiar with vehicles in the complex and had never seen the Charger before, and there were not usually vehicles parked in that area with their lights on.

Officer Pierson left the apartment complex to respond to a welfare check at a nearby casino. At the casino he noticed the same Charger and saw two individuals exiting the vehicle. After Officer Pierson conducted the welfare check, he returned to the Charger and shined his flashlight through the driver's side window. He immediately observed a firearm "tucked in the driver's seat and the center console." Rep. of Proc. (Nov. 7, 2022) at 128.

Officer Pierson learned that the passenger of the vehicle was Isaiah Oliver and that he and the driver were both prohibited from possessing firearms.

Oliver was placed under arrest, and the State charged him with first degree unlawful possession of a firearm. He waived his right to a jury trial and the case was tried to the bench.

At trial, Officer Pierson testified about his discovery of the firearm. Defense counsel cross-examined Officer Pierson and elicited testimony that the Charger had tinted windows.[1]

[1] On appeal, Oliver's counsel argues that Oliver's attorney at trial failed to conduct any cross-examination of Officer Pierson during the bench trial and failed to ask about the tinted windows. *See* Br. of Appellant at 7. This assertion is belied by the record.

Following a bench trial, the trial court found Oliver guilty of one count of first degree unlawful possession of a firearm based on the firearm observed by Officer Pierson in the Charger. The court entered written findings of fact and conclusions of law. Relevant to this appeal, the court found:

> 12) Upon looking in the driver's side door window, Officer Pierson observed a semi-automatic handgun lodged between the driver's seat and the center console of the vehicle in plain view;
>
> 13) Officer Pierson testified that he also looked in the passenger side door window with the assistance of a flashlight and observed the same semi-automatic handgun lodged between the driver's seat and the center console of the vehicle in plain view from that view[.]

Clerk's Papers (CP) at 93. It also concluded that "Oliver knowingly had a firearm in his possession or control, to wit a Ruger .45 which was in plain view and within his immediate area of control while riding as a passenger in the vehicle." CP at 94.

Oliver appeals.

ANALYSIS

1. INEFFECTIVE ASSISTANCE OF COUNSEL

Oliver argues that defense counsel was ineffective for failing to bring a motion to suppress the firearm observed by Officer Pierson through the window of the Charger. This court disagrees.

Criminal defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*,

190 Wn.2d 104, 115, 410 P.3d 1117 (2018). "A claim of ineffective assistance of counsel" is "an issue of constitutional magnitude" that "may be considered for the first time on appeal." *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

A defendant bears the burden of showing (1) that his counsel's performance "fell below an objective standard of reasonableness based on consideration of all the circumstances" and, if so, (2) that there is a reasonable probability that but for counsel's poor performance, the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "If either element . . . is not satisfied, the inquiry ends." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In reviewing the record for deficiencies, there is a strong presumption that counsel's performance was reasonable. *McFarland*, 127 Wn.2d at 335. "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation." *Id.* at 335. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo*, 166 Wn.2d at 863.

"If a defendant centers their claim of ineffective assistance of counsel on their attorney's failure to object, then 'the defendant must show that the objection would likely have succeeded.'" *State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (quoting *State v. Crow*, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019)). "'Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.'" *Id.* (quoting *Crow*, 8 Wn. App. 2d at 508).

Oliver maintains that defense counsel was ineffective for failing to bring a motion to suppress the firearm found in Officer Pierson's initial search of the Charger with the flashlight. He claims that the search was unconstitutional under both the United States and Washington Constitutions. Oliver fails to show that a motion to suppress was likely to succeed.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *State v. Muhammad*, 194 Wn.2d 577, 591, 451 P.3d 1060 (2019). Similarly, article I, section 7 of the Washington Constitution states that "'[n]o person shall be disturbed in his [or her] private affairs, or his [or her] home invaded, without authority of law.'" *Id.* at 586 (alteration in original) (quoting article I, sec. 7). Under the Washington Constitution, "a search occurs when the government disturbs 'those privacy interests which citizens of

this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *Id.* (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

Notably, the open view doctrine provides that a detection does not constitute a search "'when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used[.]'" *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000) (quoting *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996)).

There is no argument regarding whether Officer Pierson was permitted to be in the area of the vehicle. Just as Officer Pierson could lawfully be parked outside of the casino, he could also intentionally look through the windows of the vehicle also parked there.

In regard to Officer Pierson's use of a flashlight to look through the window of the vehicle, our Supreme Court has upheld the use of a flashlight under the open view doctrine where the flashlight "does not transform an observation which would fall within the open view doctrine during daylight into an impermissible search simply because darkness falls." *Rose*, 128 Wn.2d at 398-99. "There is no reasonable expectation of privacy in" "contraband [left] in plain sight, visible through" a window. *Id.* at 394, 399. The court in *Rose* explained that employing a flashlight does not render the viewing intrusive because it is an "exceedingly common device." *Id.* at 399.

Here, Officer Pierson used a flashlight to aid in looking through the window of the vehicle at night. This use of a flashlight to aid in seeing what would apparently be readily visible during daylight hours is permissible under the open view doctrine, and therefore did not transform Officer Pierson's observation inside the vehicle into a search.

Although Oliver argues on appeal that the vehicle's windows were tinted and therefore Officer Pierson still would not have been able to see through them during daylight hours without the aid of a flashlight, the record is undeveloped as to this fact and therefore this court cannot rely on it as a basis for finding that a motion to suppress brought by defense counsel would have succeeded.[2]

On the record before us, defense counsel was not ineffective for failing to bring a motion to dismiss Officer Pierson's "search" of the Charger because it did not constitute a search under the open view doctrine.

2. PLAIN VIEW EXCEPTION TO WARRANT REQUIREMENT

Next, we reject Oliver's contention that the trial court found that the "plain view" exception to the warrant requirement applied to Officer Pierson's initial "search" of the

[2] Oliver maintains that it is the State's burden on appeal to show that Officer Pierson could have seen the firearm through the window without the aid of a flashlight during daylight hours. However, the defendant, not the State, carries the burden in an "ineffective assistance of counsel" claim. *See State v. McFarland*, 127 Wn.2d at 335.

vehicle.[3] Following the bench trial, the trial court entered findings of fact, conclusions of law, and a judgment in which the court determined that the firearm was in "plain view" to any individual sitting on the passenger side of the Charger and also in "plain view" when Officer Pierson looked through the window. This conclusion was part of the trial court's finding of guilt, it was not a finding that the plain view exception to the warrant requirement applied. At the time the court entered the finding it was not addressing any allegations of a warrantless search.

Affirmed.

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.

Staab, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

[3] Oliver also assigns error to the trial court's conclusions that the possession or control of the firearm occurred in the State of Washington and each of the elements of unlawful possession of a firearm were proved beyond a reasonable doubt. However, he fails to provide argument in support of his assignments of error and we therefore decline to consider it. *See State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008) ("Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review."), *rev'd on other grounds*, 170 Wn.2d 117, 240 P.3d 143 (2010).

NO. 39384-4-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	SPOKANE COUNTY
Plaintiff,	)	NO. 21 1 01246 32
	)	
v.	)	
	)	
ISAIAH THOMAS OLIVER,	)	
	)	
Defendant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 27th day of February, 2024, I caused a true and correct copy of the *Petition for Discretionary Review* to be served on:

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