73803-8

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Court of Appeals
Division I
State of Washington

NO. 73803-8-I

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

STATE OF WASHINGTON

Respondent

v.

JOSHUA REDDING

Appellant

BRIEF OF RESPONDENT

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Does a police officer have the power to offer immunity from prosecution?

II. STATEMENT OF THE CASE

A. SEX OFFENDER REGISTRATION IN SNOHOMISH COUNTY

By law sex offenders who lack a fixed residence "must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours." RCW 9.94A.130(5)(b). Pursuant to this statute, the Snohomish County Sheriff requires sex offenders lacking a fixed residence to report every Tuesday between 9:00 AM and 5:00 PM to the Sheriff's Office located on the 4th Floor of the Snohomish County Courthouse in Everett. CP 91. The in-person weekly appearance at the Sheriff's Office serves at least two important functions: first, the offender is required to turn in a weekly reporting form with an accurate account of where they have been for the last seven days, and receive a new form for the coming week; second, the offender signs a "homeless sign-in sheet' which is then date stamped and placed in the offender's file to prove his compliance for that week. 4/17/15 RP 7-8.

The job of registering and tracking sex offenders is a detective-level position in the Snohomish County Sheriff's Office. 4/17/15 RP 3. The position requires more than mere clerical duties and includes verifying the information supplied by sex offenders, working with offenders in order to keep them in compliance with registration requirements, occasionally taking fingerprints and photos of the offenders, and providing them with legal notice of their registration duties under the law. 4/17/15 RP 4-5, 10.

Snohomish County's homeless sex offender population is never 100% compliant with the weekly in-person registration requirements, meaning that in any given week at least one but sometimes dozens of homeless sex offenders will violate the requirements of the statute. 5/16/15 RP 9. However, in practice, missing one week of reporting will not usually result in a criminal charge being filed. The general policy of the Snohomish County Sheriff's Office is to refer criminal charges for Failure to Register only if a homeless sex offender misses two consecutive weeks of reporting. 4/17/15 RP 9-10.

B. JOSHUA REDDING'S FAILURE TO REGISTER LASTED FOUR CONSECUTIVE WEEKS

Defendant Joshua Redding has been required to register as a sex offender since 1997, due to his conviction of first degree child molestation. CP 74, 80. In 2010 the defendant was convicted of Attempted Failure to Register, a gross misdemeanor. Then in 2012 the defendant was convicted of felony Failure to Register in King County Superior Court. The defendant's most recent criminal conviction prior to this case was another felony Failure to Register charge in Snohomish County Superior Court. CP 71. That conviction occurred on November 13, 2013, and resulted in an exceptional sentence below the standard range, including a six month term of confinement followed by 36 months of community custody. CP 71.

On January 13, 2015, Joshua Redding was serving his term of community custody. See CP 78, 118, 179. He reported in person to the Sheriff's Office and filled out a change of address form reflecting his new residential status as homeless. CP 84, 93. The defendant's community corrections officer (CCO) was aware of this change. CP 78. Also on January 13, the defendant initialed and signed a Notification of Registration Requirements which

included his affirmative duty to report weekly and in person while he lacked a fixed residence. By signing the form, he acknowledged his ongoing duty to reappear, in person, every Tuesday between 9:00 a.m. and 5:00 p.m. on the 4th floor of the Snohomish County Courthouse. CP 91-92.

The next four Tuesdays were January 20, January 27, February 3, and February 10. The defendant did not report in person to the Sheriff's Office on any of those four consecutive weeks, despite his acknowledged legal obligation to do so. CP 78.

C. THE DEFENDANT DID NOT REPORT TO DETECTIVE BERG WITH THE REQUIRED FORM; HE REPORTED TO THE COUNTY JAIL ON AN UNRELATED DOC WARRANT.

On February 10, Snohomish County's sex offender registration and tracking Detective Scott Berg called the defendant's cell phone. The person who answered identified himself as "Josh" and acknowledged that he was out of compliance with his registration requirements. He explained that he was "in the mountains" and unable to report in person. 4/17/15 RP 14-15.

Det. Berg and the defendant spoke by phone twice on February 11th. 4/17/15 RP 22. During those phone calls the defendant said that he had a DOC warrant for his arrest and had been trying to get in touch with his CCO about that issue. He said

he didn't want to register in person out of fear that he would be arrested on the DOC warrant. 4/17/16 RP 14-15.

Det. Berg provided the defendant with the name and direct phone number for the CCO responsible for supervising the defendant. He reiterated the importance of immediately complying with his registration requirements. 4/17/16 RP 16-17. He told the defendant to report with his form by February 13th or Failure to Register charges would be forwarded to the prosecutor's office for review. 4/17/16 RP 20. Despite making that statement, Det. Berg denied that he made any promises or "deals" with the defendant which would bind him not to refer charges to the prosecutor's office. 4/17/16 RP 23.

On February 12th, the defendant turned himself in to the Snohomish County jail on his DOC warrant. The record contains no evidence that the defendant turned in his weekly reporting form detailing his whereabouts for the past four weeks. When his attorney asked him why he didn't report directly to Detective Berg in the Sheriff's Office, the defendant testified, "It was about 6:00 at night on a Thursday, and I wanted to just get straight down there. I didn't want to chance it." 4/17/15 RP 27.

D. PROCEDURAL POSTURE AND THE DEFENDANT'S MOTION TO DISMISS

Detective Berg referred a police report to the Snohomish County Prosecutor on February 24, 2015, alleging that the defendant committed one count of Failure to Register during the four weeks when he was in the mountains instead of in compliance. CP 73-74. The prosecutor's office filed one count of Failure to Register on February 26. CP 183.

The defendant filed a motion to dismiss. He argued that he and Det. Berg formed an "oral contract" in which the defendant waived his fundamental right to personal liberty. According to the defendant, Det. Berg breached the contract by referring charges to the prosecutor. CP 174-178.

The State's response denied that any promise was made, much less any oral contract. CP 157-173. After hearing testimony from both Det. Berg and the defendant as summarized above, the defendant's attorney conceded two points. First, there was no direct promise made to the defendant. Second the defendant failed to comply with Det. Berg's instructions by failing to report directly to the Sheriff's Office and by failing to turn in his weekly form. The defendant argued that by turning himself into the jail instead of the

Sheriff's Office, and without his form, he "substantially complied" with "that type of agreement." 4/17/15 RP 35-36.

The court denied the motion to dismiss. It rejected the idea that principles of contract law can be grafted onto the case law dealing with immunity from prosecution. The court also found that "the facts don't support the existence of any kind of contract, even an implied oral contract here." Id. at 39.

On May 6, the court entered findings of fact and conclusions of law denying the motion to dismiss. CP 147-149. On July 13, the court approved the parties' stipulation for a bench trial on agreed documentary evidence. The court then entered another set of findings establishing the elements of the charged offense and concluding that the defendant was guilty. CP 60-64.

The defendant faced a standard range sentenced of 43-57 months based on his offender score of 9. CP 21. The court imposed an exceptional sentence based on a finding that the defendant's ability to appreciate the wrongfulness of his conduct or conform to the requirements of the law was significantly impaired by his diagnosed mental illness. See RCW 9.94A.535(1)(e). CP 33-34. The court sentenced the defendant to 36 months in prison, but

increased the standard 36 month term of community custody to 48 months. CP 23.

III. ARGUMENT

A. A POLICE OFFICER DOES NOT HAVE AUTHORITY TO BIND A PROSECUTOR'S CHARGING DECISION.

Washington courts have rejected the wholesale application of contract law principles to agreements made between police officers and criminal suspects. Only the prosecuting attorney can enter into such an agreement, and it is usually in the context of either a written plea agreement or a written grant of immunity in exchange for testimony. State v. Reed, 75 Wn. App. 742, 744, 879 P.2d 1000 (1994). In either case, the court must first approve the plea or immunity agreement before it takes effect. CrR 4.2, 6.14.

The Attorney General and each county's elected prosecuting attorney, along with their deputies, are the only authorities with the power to prosecute criminal law violations in Washington. See RCW 9.94A.401, 9.94A.411; 36.27.020(4); 36.27.040; 43.10.232. Police officers are not directly accountable to voters and therefore lack the same power to pursue or forgo prosecutions. For this reason an agreement by police to "drop charges," without the involvement of the county prosecutor, exceeds the police officer's authority and is generally unenforceable as a contract. This is true

even though the prosecutor may have a general practice of honoring those agreements, most commonly seen between an officer and a confidential informant. "This practice does not convert the police into agents having the power to legally bind the prosecutor to such agreements." Reed, 75 Wn. App. at 745. Many cases from other jurisdictions are in accord.[1]

The Washington Supreme Court ruled, 45 years ago, that police officers are not qualified to discharge the duties of the prosecuting attorney. State v. Hull, 78 Wn.2d 984, 989, 481 P.2d 902 (1971). In Hull a material witness alleged that a Seattle police

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[1] See State v. Smith, 809 A.2d 1174, 1177 (Del. Super. 2002) aff'd, 839 A.2d 666 (Del. 2003)(citing Hunter v. United States, 405 F.2d 1187, 1188 (9th Cir.1969) (holding Federal agents had no statutory authority to provide defendant a grant of immunity in exchange for cooperation); State v. Borrego, 445 So.2d 666, 668 (Fla.Dist.Ct.App.1984) (declining to enforce executory agreement not to prosecute by district attorney); State v. Caswell, 121 Idaho 801, 828 P.2d 830, 833 (1992) (holding that unauthorized agreement not to prosecute by a narcotics officer in exchange for cooperation was not enforceable); Winkles v. State, 40 Md.App. 616, 392 A.2d 1173, 1175-76 (1978) (holding police officer did not have power to promise defendant nonprosecution or to bind the State's attorney); Commonwealth v. St. John, 173 Mass. 566, 54 N.E. 254, 254 (1899) (declining to enforce nonprosecution agreement made by city marshal without the authority of local prosecutor); People v. Gallego, 430 Mich. 443, 424 N.W.2d 470, 472-76 (1988) (refusing to enforce written nonprosecution agreement by DEA agents and state detectives which was not authorized by prosecutors); State v. Marsh, 290 N.J.Super. 663, 676 A.2d 603, 605 (1996) (denying specific enforcement of unauthorized nonprosecution agreement); Commonwealth v. Stipetich, 539 Pa. 428, 652 A.2d 1294, 1295 (1995) (denying specific enforcement of unauthorized non prosecution agreement); State v. Russell, 671 A.2d 1222, 1223 (R.I.1996) (holding municipal police officers had no authority to enter into binding agreement not to prosecute without the consent of the Attorney General); State v. Cox, 162 W.Va. 915, 253 S.E.2d 517, 521 (1979) (holding unauthorized nonprosecution agreement between police and defendant was unenforceable)).

officer granted him immunity from testifying in exchange for his cooperation with the Seattle Police Department's internal investigation into allegations of a police payoff system. Id. at 985. The Court was unwilling "to grant police an arbitrary power to pick-and-choose those favored – or unfavored – citizens upon whom immunity from testifying would be bestowed or withheld." Instead, a police officer "cannot grant or promise that which he has no power or authority to give." Any promises to the contrary are void and unenforceable. Id. at 989.

It is just as well-settled that the person claiming reliance on a government agent's promise "takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." United States v. Lilly, 810 F.3d 1205, 1210 (10th Cir. 2016) (citing Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384, 68 S.Ct. 1, 92 L.Ed. 10 (1947)). It is the defendant's burden to show that Det. Berg had actual authority to make the particular promise alleged. Lilly, 810 F.3d at 1211. According to Reed, no one but the county prosecutor has the authority to create a binding nonprosecution agreement. State v. Reed, 75 Wn. App. at 745.

In this case the defendant has failed to demonstrate that Det. Berg had actual authority to offer a nonprosecution agreement in exchange for the defendant turning himself in. He has even failed as a threshold matter to prove the exact terms of the alleged promise. The defendant has described Det. Berg's promise as "an offer to not file a failure to register charge if Mr. Redding reported by February 13, 2015." Br. App. 7. This description is unsupported by the evidence. The detective's conditional statement called for the defendant "to report with his form by 2-13 or FTR charges will be forwarded." 4/17/15 RP 20. The trial court recognized that the defendant's interpretation was "sort of the reverse of that, switching it around...". 4/17/15 RP 39. The same reversal has been repeated in the defendant's brief. Br. App. 7. Detective Berg never explicitly promised not to forward charges to the prosecutor's office. This fact was conceded by Mr. Redding's trial counsel, but is contested again on appeal. Compare 4/17/15 RP 35 with Br. App. 9-10.

The application of contract law principles to this case is inappropriate because there was no contract. Det. Berg had no authority over the charging decision. He never promised that the defendant could avoid his referral of charges, much less how the prosecutor would subjectively evaluate the merits of the referral. It

is not even clear that the defendant relied on any of his dealings with Det. Berg in deciding to turn himself in to the jail, as he had a completely separate DOC escape warrant impacting his liberty at the time.

B. EVEN WHEN ANALYZED AS A CONTRACT, THE DEFENDANT DID NOT PERFORM HIS OBLIGATION OR PROVIDE ADEQUATE CONSIDERATION.

While the defendant has attempted to import the concepts of contract law into his legal argument, he has not attempted to address the critical concepts of agency and actual authority which are fundamental to the evaluation whether a nonprosecution agreement is enforceable. It is his burden to do so. See State v. Bryant, 146 Wn.2d 90, 104, 42 P.3d 1278 (2002); Lilly, 810 F.3d at 1211-1212. Instead, the defendant conflates the Snohomish County Sheriff's Office and the Snohomish County Prosecutor's Office into a single entity when he claims that "Snohomish County" both "assur[ed] Mr. Redding charges would not be filed..." and abused its prosecutorial discretion by filing the charge. Br. App. 8. These agencies perform vastly different functions and are not interchangeable. As seen in Hull, the notion of granting police the authority to immunize witnesses risks the unacceptable result of allowing the police to "direct and manage the course and outcome"

of court proceedings. Hull, 78 Wn. 2d. at 989. The constitution instills in each county's elected prosecutor, not the police, the broad discretion to choose the nature and number of charges to file in any individual case. State v. Rice, 174 Wn.2d 884, 904, 279 P.3d 849 (2012). A prosecuting attorney cannot be bound by a nonprosecution agreement he knew nothing about and to which he was not a party. Bryant, 146 Wn. 2d. at 100.

1. The defendant did not perform the contract's terms.

According to the defendant's contract theory, Det. Berg was obligated "to not file a failure to register charge if Mr. Redding *reported* by February 13, 2015." He then asserts that he performed on the contract by "turn[ing] himself in to the Snohomish County jail on February 12." Br. App. 7 (*emphasis* added). Even if Det. Berg had authority to make any such contract, the defendant did not fulfill his duty to *report* simply by turning himself in to a jail. The written notice signed by the defendant and entered into evidence contains a very precise definition of what it means to "report" when a sex offender is homeless:

> You must report every Tuesday between the hours of 9:00 AM and 5:00 PM to the Snohomish County Sheriff's Office located at the Snohomish County Courthouse, 4th Floor, 3000 Rockefeller Ave. Everett, WA, 98201. At the time of weekly homeless reporting you shall keep an accurate

> accounting of where you have stayed during the week and provide it to the county sheriff. Homeless sex and kidnapping offenders shall use the form provided by the Snohomish County Sheriff's Office for this purpose.

CP 91. To further reinforce these details, the very same page contains a bold-typed, all-caps sentence with a dedicated signature block to which the defendant affixed his initials. It states:

> **I UNDERSTAND THAT IF I AM HOMELESS THAT I HAVE TO REPORT IN PERSON EVERY TUESDAY BETWEEN 9:00 AM AND 5:00 PM AND TURN IN AN ACCURATE ACCOUNTING, INCLUDING A COMPLETE ADDRESS OR COMPLETE LOCATION OF WHERE I HAVE STAYED ON MY HOMELESS FORM.**

Id. (emphasis in original). Given the very specific requirements regarding time, location, and manner of reporting, the defendant's assertion that he "did report by turning himself into the jail..." is wholly without support in the record. The record contains no indication that the defendant told anyone at the jail about his intention to report as a homeless sex offender, or that he was prepared at the jail to account for his past month's whereabouts on the required SCSO form. The unstated assumption is that turning himself in to the jail was "close enough." This assumption suffers from the same conflation of law enforcement roles and responsibilities as has already been displayed regarding police and prosecutors. Specifically, the record contains no evidence that any

corrections officer at the jail knew anything about the defendant's failure to register for four consecutive weeks, his communications with Det. Berg, or the defendant's obligation to account for his whereabouts on the required form. The record is just as silent on whether the defendant took any steps to bring this information to the attention of staff at the jail. In fact, it was not jail staff but the defendant's CCO who informed Det. Berg that the defendant had been booked into the county jail. CP 79. It is simply inaccurate to assert that the defendant substantially complied with his registration requirement by booking himself into jail on an unrelated arrest warrant.

The trial court recognized this:

> Mr. Redding had two things going on. He had a DOC warrant ... and he had a reporting requirement as a sex offender. It's clear he did not report to the Sheriff's Office with his form, as required by law, outlining where he had been during that time. The Court finds there was no agreement, express or implied, between Detective Berg and the defendant. In fact, as a matter of law, the contract theory here can't be just grafted onto the immunity from prosecution case law to create immunity in this case.

4/17/15 RP 39-40.

2. The alleged contract was not supported by adequate consideration.

Even if the defendant persuades this Court that a contract was formed, and that he substantially complied with the demands of the contract, that contract would still be unenforceable because it lacked adequate consideration. The defendant was already required by law to register as a sex offender. Performance of an existing legal obligation is not adequate consideration to support a contract. Snyder v. Roberts, 45 Wn.2d 865, 871, 278 P.2d 348 (1955).

While the defendant alleges that his conviction should be reversed based on violations of due process and fundamental fairness, he declines to identify what, if any, fundamental rights he sacrificed under his contract theory. Most criminal cases in which courts have applied principles of contract law have involved plea agreements or nonprosecution (i.e. immunity) agreements. See Bryant, 142 Wn.2d at 96-97. In the case of a plea agreement, it is obvious that a defendant waives fundamental Fifth and Sixth Amendment rights by stating that he committed the crime and declining his opportunity to make the government prove its case. In the case of an immunity agreement, a defendant usually sacrifices

Fifth Amendment rights by making statements of evidentiary value to another criminal investigation. In this case the defendant sacrificed no fundamental rights. On appeal he does not claim otherwise.

At the trial court level the defendant claimed that his decision to turn himself into jail was a sacrifice of his fundamental right to liberty. CP 178. While it is true that most citizens would forfeit a liberty interest by voluntarily turning themselves in to jail, the same cannot be said for someone with an active arrest warrant supported by probable cause and issued by a neutral magistrate. Under both the federal and state constitutions, a valid arrest warrant authorizes the police to deprive a person of his liberty. See State v. Hatchie, 133 Wn. App. 100, 109, 114, 135 P.3d 519 (2006) aff'd, 161 Wn.2d 390, 166 P.3d 698 (2007). Because the defendant did not have a legal right to remain at liberty before he turned himself in to the county jail, his voluntary surrender at the jail cannot accurately be described as relinquishing a fundamental right. He provided no consideration for the contract he allegedly made with Det. Berg.

Finally, a contractual agreement not to report a crime is unenforceable as a matter of public policy. Fomby-Denson v. Dept. of the Army, 247 F.3d 1366, 1375-78 (Fed. Cir. 2001). Assuming

the defendant could demonstrate a legal contract by overcoming the noted deficiencies regarding agency, authority, performance, and consideration, this Court should still decline to enforce a contract requiring a police officer to withhold evidence of a crime from the local prosecutor.

C. THE FAILURE TO REGISTER CHARGE WAS NEITHER FUNDAMENTALLY UNFAIR NOR AN ABUSE OF PROSECUTORIAL DISCRETION

The defendant next argues that the prosecutor abused his discretion by failing to consider mitigating circumstances before charging the defendant with failure to register. Br. App. 9. He relies primarily on State v. Pettitt, 93 Wn.2d 288, 609 P.2d 1364, 1368 (1980). The prosecutor there had a mandatory policy of charging defendants as a habitual criminal (subjecting them to a life sentence per RCW 9.92.090) based solely on a formulaic tabulation of a defendant's prior felony convictions. The court found that the use of a simple formula without consideration of the facts of the defendant's specific case represented a failure to exercise prosecutorial discretion. Yet the court remanded the case not to insist on a particular result, but instead to insist that the prosecutor's sentencing recommendation be informed by a case-specific exercise of discretion. Pettitt, 93 Wn.2d at 290, 296.

The defendant's plea for this court to completely override prosecutorial discretion and insist on a particular result - dismissal – is not a remedy supported by Pettitt. And unlike Pettitt, there is no evidence in this record that the prosecutor failed to account for mitigating circumstances in the charging decision. The prosecutor asked the court to impose the minimum standard range sentence. 7/21/15 RP 7-8. At most there is evidence that any mitigating circumstances were not persuasive enough to override the prosecutor's consideration of other considerations. These include the serious nature of the defendant's first degree child molestation conviction, his multiple prior convictions for failing to register, his offender score of nine, and the fact that he failed to register for four consecutive weeks while simultaneously escaping from DOC supervision.

The only explicit reference to the consideration of mitigating circumstances in a prosecutorial decision arises in the context of a death penalty notice. RCW 10.95.040(1). But even that decision is a subjective one not readily reduced to a checklist of mitigating factors. As long as the prosecutor has reason to believe that mitigating circumstances meriting leniency are lacking, the decision will not be disturbed even if "a judge or defense [do not] share a

county prosecutor's belief." State v. Monfort, 179 Wn.2d 122, 137, 312 P.3d 637 (2013). As Mr. Redding's case does not involve a death penalty notice, there is no legal authority requiring an explicit evaluation of the role mitigating factors may have played in the charging decision. The prosecutor's charge in this case represents an individualized search for justice reflecting "local values, problems, and priorities." See Rice, 174 Wn.2d at 902. It was not an abuse of prosecutorial discretion.

Finally, the defendant's assertion of a due process violation based on fundamental unfairness must also fail. He offers only generic language endorsing fair play and decency - concepts the State endorses as well. See Br. App. 11-12. However, the cases from which these lofty quotes originate do not approach any factual resemblance to this defendant's situation. See In re Det. of Ross, 114 Wn. App. 113, 123, 56 P.3d 602 (2002) (sexually violent predator trials adequately protect a sexually violent predator's liberty interest); State ex rel. Coughlin v. Jenkins, 102 Wn. App. 60, 64, 7 P.3d 818 (2000) (assertion of jurisdiction over out-of-state father in parentage action did not violate due process); United States v. Lovasco, 431 U.S. 783, 797, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977) (prosecutorial delay prior to filing charges *did not* violate

due process); Rochin v. California, 342 U.S. 165, 166, 72 S. Ct. 205, 206, 96 L. Ed. 183 (1952) (due process violated when deputies obtained drug evidence without a warrant by ordering doctors to pump the handcuffed defendant's stomach to induce vomiting of the capsules he had swallowed).

Det. Berg's dealings with the defendant do not offend notions of fair play and decency. He waited four weeks to investigate the failure to register despite a standard practice of commencing those investigations after two weeks. 4/17/15 RP 10, 14. He was correct in determining that the defendant's booking in the local jail on an unrelated warrant is not the same as reporting to the Sheriff's Office with a full accounting of his whereabouts on the required form.

Likewise, the prosecutor was well within his constitutional powers of discretion to file the charge even if one accepts that the defendant's misinterpretation of Det. Berg's promise was reasonable. The charging decision shows that competing factors clearly outweighed the arguments advanced in this appeal. Judicial intervention in the form of dismissal would be an improper intrusion into the difficult, subjective determinations we have constitutionally delegated to elected prosecutors.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on April 11, 2016.

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DECLARATION OF SERVICE

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and MARLA ZINK (marla@washapp.org, wapofficemail@washapp.org e-mail address).

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at the Snohomish County Prosecutor's Office.

JFord

JILL FORD DATE: 4/11/16
LEAD LEGAL SECRETARY/Appeals Unit