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No. 94848-8

Appeal from Court of Appeals, Case No. 49599-6

SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY WHITE

Petitioner,

v.

CLARK COUNTY

Respondent.

CLARK COUNTY'S
ANSWER TO PETITION FOR REVIEW

ANTHONY F. GOLIK
Prosecuting Attorney for Clark County, Washington

JANE VETTO, WSBA #21649
Senior Deputy Prosecuting Attorney
Clark County Prosecuting Attorney
Civil Division
PO Box 5000
Vancouver WA 98666-5000
Tele: (360) 397-2478
Fax: (360) 397-2184

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I. INTRODUCTION

In 2015, Division One and Division Two of the Court of Appeals both upheld superior court orders denying Timothy White (hereinafter "White") access to electronic copies of voted ballots from the November 5, 2013 general election.[1] This Court denied review of those decisions. On July 25, 2017, in a published opinion, Division Two affirmed the trial court's finding that Clark County properly withheld voted ballots in response to White's subsequent request for copies of "all election records" from the November 5, 2013 election, while providing over 100,000 other records.[2] This Court should deny review of Division Two's decision for several reasons. First, the decision does not conflict with any precedent of either the Court of Appeals or this Court. Second, there are ample safeguards and avenues for the public to oversee elections without compromising the absolute ballot secrecy and security mandated by the Washington State Constitution. Finally, Division Two's decision protects ballot secrecy and security consistent with Art. VI, Sec. 6 and Title 29A RCW.

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[1] *White v. Clark Cnty.*, 188 Wn. App. 622, 354 P.3d 38 (2015), *review denied,* 185 Wn.2d. 1009 (2016) (hereinafter "*White I*"); *White v. Skagit Cnty.*, 188 Wn. App. 886, 355 P.3d 1178 (2015), *review denied,* 185 Wn.2d 1009 (2016) (hereinafter "*White II*").
[2] *White v. Clark County*, 199 Wn. App. 929, 401 P.3d 375 (2017) (hereinafter "*White III*").

II. ISSUE PRESENTED

White has not shown review is warranted under RAP 13.4(b), but if White's Petition for Review were granted, the issue would be:

Do Art. VI, Sec. 6 of the Washington Constitution, the strict ballot security provisions in Title 29A RCW, and the mandated Secretary of State regulations regarding secrecy and security constitute an "other statute" exemption under the PRA where these provisions permit robust public oversight of elections, but do not allow anyone other than county election officials to touch or possess voted ballots or copies?

III. STATEMENT OF THE CASE

On July 2, 2015, three days after receipt of the *White I* decision, White sent a public records request for "all election records," including voted ballots, from the November 5, 2013 election to Clark County.[3] Because they have been the subject of ongoing litigation, the County has retained all records pertaining to the November 5, 2013 election.[4] The County responded within five days, as required, letting White know he would receive his first record installment by July 23, 2015.[5] On July 23,

[3] CP p. 75, lines 15-19; CP pp. 92-93. In his brief to the superior court, White stated that his July 2, 2015 public records request was "substantially identical" to his November 6, 2013 request. CP p. 146, lines 24-26. On November 6, 2013, White requested "images of pre-tabulated ballots from the 2013 general election." On July 2, 2015, however, White requested "all election records" from the 2013 general election.
[4] CP p. 52, lines 6-8.
[5] CP p.75, lines15-21; CP p. 95.

2015, Elections Supervisor Cathie Garber mailed White a thumb drive containing 93,807 digital images of affidavit envelopes with all associated metadata intact via certified mail.[6] On September 2, 2015, Ms. Garber mailed White a 1,970 page ballot exemption log, as well as a thumb drive containing 8,985 pages of additional responsive documents.[7] Ms. Garber's September 2, 2015 letter explained that the County could not produce voted ballots, based on Washington Constitution Article VI, Sec. 6, Title 29A RCW, and the two Court of Appeals' decisions upholding the denial of his prior requests for ballots.[8]

On October 15, 2015, Ms. Garber mailed White a thumb drive containing additional responsive records and a three-page list of responsive records the County had only in paper copies, which were available to White to copy or view.[9] Not including the 1,970 page ballot exemption log, the County produced to White over 100,000 responsive documents pursuant to his request for "all election records."[10]

White filed a motion to show cause in Clark County Superior Court on October 13, 2015, alleging that Clark County had responded to White's July 2, 2015 records request with only one email and had not

[6] CP p. 76, lines 10-23; CP p. 101.
[7] CP p. 77, lines 3-14; CP pp. 114-117.
[8] *Id.*
[9] CP p. 78, lines 3-19; CP pp. 127-140.
[10] CP pp. 78-80.

produced any records.[11] The trial court denied White's motion and dismissed his case. White filed for direct review of the trial court's dismissal, which this Court denied. Division Two heard oral argument, and issued a published decision, affirming the trial court's dismissal. *See White III.*

The *White III* Court first noted that *White I* did not directly control the resolution of the present issue because White's earlier request was for pre-tabulated voted ballots and the *White I* opinion did not address whether an exemption existed for tabulated ballots, stating only that ballots must be kept secure at least 60 days after tabulation. *White I* at 637; *White III* at 935.

Building on its analysis in *White I,* as well as Division Two's analysis in *White II,* Division Two held that White is not entitled to disclosure of any voted ballots, finding:

> [W]e hold White is not entitled to disclosure of the requested records because (1) both RCW 29A.60.110 and WAC for 434-261-045 create an "other statute' exemption that applies to election ballots even after the minimum 60-day retention after tabulation, 2) whether concerns about jeopardizing the secrecy of the vote could have been addressed by redacting certain information is immaterial because the" other statute' exemption applies to the entire ballot, and 3) RCW 42.56.210(2) does not override this exemption because White cannot show that withholding the ballots is "clearly unnecessary" to protect the vital

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[11] CP pp. 1-23.

> government interest in preserving the voter's right to absolute secrecy of their votes.

White III at 932.

Addressing White's statutory argument first, the *White III* Court focused on the plain language of RCW 29A.60.110. The statute requires all voted ballots to be sealed in secure containers that can only be opened in four specific circumstances. *White III* at 935-36. "'The containers may only be opened by the canvassing board [1] as part of the canvass, [2] to conduct recounts, [3] to conduct a random check under RCW 29A.60.170, or [4] by order of the superior court in a contest or election dispute.'" *Id.* (quoting RCW 29A.60.110).

"[T]he agency has two choices once the 60 day period ends: the ballots must be kept in sealed containers indefinitely, unless one of the four specified situations arises, or the ballots must be discarded. Neither choice allows the ballots to be disclosed to a requesting person." *White III* at 936.

The Court went on to reject White's argument that because the PRA is not expressly mentioned, the legislature must have intended disclosure. Instead, the Court followed Division One, recognizing that "the Legislature also 'specified that certain non-ballot election records may be disclosed to the public.'" *Id.* at 936 (quoting *White II).* "[I]t would

be superfluous for the Legislature to single out specific types of elections records as subject to disclosure unless it were viewed as exceptions to the general rule of nondisclosure. *Id.* Because RCW 29A.60.110 makes it clear that tabulated ballots must remain sealed, there was no reason for the Legislature to include an explicit exemption. *White III* at 936-937.

Ultimately, the *White III* Court concluded that RCW 29A.60.110 was dispositive:

> White overlooks that RCW 29A.60.110 does not simply require sealed storage; it also includes unambiguous language stating that the sealed containers may only be opened in four specific situations. *It is that restriction on access in the balance that creates the exemption.* The provisions of RCW 29A.60.110 are inconsistent with disclosing copies of tabulated ballots under the PRA. *We therefore hold that RCW 29A.60.110 constitutes an express "other statute" exemption for tabulated ballots.*

White III at 937 *(emphasis added).*

RCW 29A.60.110 was sufficient to affirm withholding of voted ballots. Even so, the Court went on to find that WAC 434-261-045 also supports the finding of an "other statute" exemption. "[A]lthough an agency cannot be allowed to determine what records are exempt from the PRA, the Secretary of State did not attempt to regulate disclosure or interpret disclosure requirements of the PRA when promulgating WAC 434-261-045." *White III* at 938. Instead, the Secretary of State implemented regulations to ensure about security in secrecy during

processing, *"pursuant to the express enabling provisions of RCW 29A.04.611."* *White III* at 938 *(emphasis added).*

Division Two then finally explained:

> Article VI, section 6 of the Washington Constitution provides voters "**absolute secrecy**" in their votes. Washington statutes and regulations also protect this right and ensure that ballots are secure.

White III at 940 *(internal citations omitted).*

White, making the same arguments he has raised before to both the Court of Appeals and this Court, now seeks review of *White III.* The Court should deny review because *White III* adheres to Court of Appeals' precedent, this Court's precedent, and follows Washington statutory and constitutional law.

IV. ANALYSIS

White has not met his burden of establishing a basis for review under RAP 13.4(b).

A. There is No Conflict Between *White III* and Court of Appeals' Precedent.

The Court of Appeals applied the plain language of RCW 29A.60.110, which requires that after tabulation ballots must be securely stored and they cannot be removed from their secured containers absent one of four enumerated circumstances: as part of the canvass, to conduct recounts, to conduct a random check under RCW 29A.60.170, or by order

of the superior court in a contest or election dispute. RCW 29A.60.110. As the *White III* Court correctly held, this statute does not allow public access to voted ballots.

Rather than "ignoring" precedent, as White alleges in his petition, Division Two specifically cited and followed precedent. First, in rejecting White's argument that he should have access to ballots after their required retention period ends, the *White III* Court cited to *White II's* holding that "all ballots" are exempt from production under the PRA and that the destruction of ballots "achieves the constitutional mandate for a secret ballot." *White II* at 1183-1184.

Indeed, in *White III*, Division Two specifically relied on Division One's analysis in *White II,* concluding that had the legislature intended ballots to be publicly disclosed it would have said so expressly, like it did for some other election records. *White III* at 936-37. This is especially true in light of RCW 29A.60.110's express restriction on the unsealing of the ballot containers, which can occur only in specific circumstances, none of which is for public disclosure. *Id.*

White attempts to avoid RCW 29A.60.110 by claiming that he is only requesting electronic copies of ballots, not the paper ballots sealed in the storage container. But this argument misstates both the facts and the law. The Court of Appeals has already recognized that electronic copies of

ballots are "ballots" under the statutory definition of the term. *White I* at 632; *White II* at 894. Electronic copies of voted ballots must be maintained in sealed and secured storage just like paper copies of ballots. *Id.;* RCW 29A.60.110 ("Immediately after tabulation, *all* ballots must be sealed....")

Likewise, in concluding that WAC 434-261-045 also supports an "other statute" exemption to the PRA, the *White III* Court followed *White I.* The Secretary of State's regulation was not aimed at regulating disclosure or interpreting the PRA. WAC 434-261-045.[12] "Instead, the Secretary of State 'implemented regulations to ensure ballot security and secrecy during processing, *pursuant to the express enabling provisions* of RCW 29A.04.611.'" *White III* at 938 (quoting *White I*). The legislature has expressly delegated to the Secretary of State, Washington's chief elections officer, the responsibility for developing rules to ensure the required absolute secrecy and security of voted ballots. *White I* at 634-35. RCW 29A.04.611(34). Thus, a ballot secrecy and security regulation could support an "other statute" finding.

Finally, *White III* specifically followed Court of Appeals' precedent by relying on both *White I* and *White II's* interpretation of Art.

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[12] Specifically in *White III,* Division Two noted, "White argues that WAC 434-261-045 cannot be another statute because state administrative rules cannot provide a PRA exemption. But in *White I,* this Court considered and rejected this argument. 188 Wn. App. at 636, 354 P.3d 38." *White III* at 938. This Court declined to review *White I.* See *White v. Clark County*, 185 Wn.2d 1009 (2016).

IV, Sec. 6 of the Washington Constitution. Division Two correctly recognized that Article VI, Sec. 6 provides "absolute secrecy" for voters. *White III* at 940. The statutes and regulations protect this right by maintaining strict security and secrecy of voted ballots even after they have been tabulated. RCW 29A.60.110. "Preserving the integrity and secrecy of votes and the security of election ballots clearly is a vital government function." *Id.*; see also, *White II*, 188 Wn. App. at 898, 355 P.3d 1178.

Thus, *White III* is consistent with Court of Appeals' precedent.

B. There is No Conflict Between the Published Opinion and Supreme Court Precedent.

1. The PRA and this Court's precedent allow for an "other statute" to exempt records from disclosure.

This Court has recognized a public records exemption can exist even in cases where a statute does not expressly mention the PRA or use the word "exemption" or "confidential." See, *e.g., Progressive Animal Welfare Society v. Univ. of Wash.,* 125 Wn.2d 243, 884 P.2d 592 (1994) *(PAWS II);* see also, *Hangartner v. City of Seattle,* 151 Wn.2d 439, 90 P.3d 26 (2004) (holding that RCW 5.60.060(2)(a), protecting attorney-client communication, is an "other statute" under the PRA). Here, as in

those cases, the statutory scheme does not permit access to voted ballots at all, except in four specific circumstances.

Although White says *White III* conflicts with *John Doe v. Wash. State Patrol,* 185 Wn.2d 363, 371, 374 P.3d 63 (2016), it does not. As Division Two noted, "[t]he statute 'does not need to expressly address the PRA, but it must expressly prohibit or exempt the release of records.'" See *White III,* at 935 (quoting *John Doe,* 185 Wn.2d at 373).

The *White III* Court explained that the legislature omitted the running of the statutory retention period from the list of four specific circumstances enumerated in RCW 29A.60.110 where there can be access to voted ballots after tabulation. See *White III* at 937; see also, *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008) ("Omissions are deemed to be exclusions") citing, *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). The *White III* Court found that the plain language of RCW 29A.60.110 requires that ballots "be retained for at least sixty days" and that the County has two choices as the 60-day period ends; it may destroy them after that time period has elapsed or keep them indefinitely in sealed containers. *White III* at 936. "[N]either choice allows for the ballots to be disclosed to a requesting person." *Id.*

2. This Court's precedent also allows for finding that regulations may serve as "other statutes."

Holding that regulations that are not inconsistent with laws can support an "other statute" exemption under the PRA does not create a conflict either. See *Ameriquest Mortg. Co. v. Office of Attorney Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (holding that "federal regulation's privacy protections to supplement the PRA's exemptions"). While the *Ameriquest* decision addresses a federal regulation, the decision is equally applicable here where the state constitution mandates that the state legislature protect the secrecy of the vote. See *State ex rel. Empire Voting Mach. Co. v. Carroll*, 78 Wn. 83, 85, 138 P. 306 (1914) (To "guard against intimidation and secure freedom in the exercise of the elective franchise," Article VI, Sec. 6 of the Washington Constitution admonishes the legislature to "secure to every elector absolute secrecy in preparing and depositing his ballot.").

Because RCW 29A.04.611(11) and (34) direct the Secretary of State to adopt standards and procedures to "ensure the secrecy of a voter's ballots" and to "guarantee the secrecy of ballots" – fulfilling the constitutional mandate, the enacted regulations, which are part of a body of law providing for ballot security and secrecy, have the force of an "other statute." See *Weyerhaeuser Co. v. State*, 86 Wn.2d 310, 317, 545

P.2d 5 (1976) ("regulations so adopted *[at the express direction of the legislature]* are 'entitled to considerable weight in determining legislative intent,' unless compelling reasons are presented sufficient to show the scheme is in conflict with the intent and purpose of the legislation.") citing, *Earley v. State*, 48 Wn.2d 667, 673, 296 P.2d 530 (1956).

While White attempts to argue that *John Doe* precludes this finding, again, it does not. In *White I,* Division Two found that regulations adopted pursuant to specific legislative direction to create "standards and procedures to guarantee the secrecy of ballots," can support an exemption under the PRA.[13] This analysis does not create a conflict with this Court's precedent. This Court has previously declined to review this analysis and it should do so again here.[14]

C. White's Petition Does Not Raise Any Issue of Substantial Public Interest.

1. The *White III* decision does not "hamper" or "forfeit" public oversight as Title 29A RCW provides a comprehensive plan for citizen oversight of the election process.

[13] Although White asserts *White III* "contradicts" and "dilutes" the *John Doe* decision, he does not explain how, because he cannot. *White III* cites to and specifically follows the Supreme Court's analysis in *John Doe*. In that case, the Supreme Court found that if an exemption from disclosure of public records is not found within the Public Records Act itself, an "other statute" exemption can be found only when the Legislature has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production. The *White III* Court cited to and followed this analysis in finding that pursuant to Title 29A. RCW and the Washington State Constitution, voted ballots are exempt from production in their entirety.

[14] See *White v. Clark County*, 185 Wn.2d 1009 (2016).

As with every other argument in his petition for review, White's "public oversight" argument is a repetition of the same argument he has raised in his previous petitions for review. Once again, citing concerns about "unconditional trust," White's petition ignores the statutory scheme for public oversight of elections which is set out in Title 29A RCW. Washington's legislature has provided for citizen oversight of ballot processing and tabulation to facilitate transparency and the opportunity for timely election challenges where necessary, while also maintaining strict protocols to minimize the risk of fraud or mistake in vote counting. The *White III* decision does not undermine this process.

The political parties and other organizations can designate official observers whom the county auditors must allow to observe ballot processing.[15] Before an election, observers and the public must be permitted to watch testing of vote tallying systems.[16] Once ballot processing begins, counting centers must be open to the public.[17] While only employees and those specifically authorized by the county auditor can touch any ballot, ballot container or vote tallying system, anyone can watch this process.[18] Political party observers can call for a random check

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[15] RCW 29A.40.100; RCW 29A.60.170.
[16] RCW 29A.12.130.
[17] RCW 29A.60.170; WAC 434-261-010.
[18] WAC 434-261-010.

of ballot counting equipment.[19] Observers may also attend any recount, though they cannot handle ballots or record information about voters or votes.[20]

When election officials question the validity of a challenged or provisional ballot, or when the intent of the voter cannot be resolved, the county canvassing board determines how the votes will be counted.[21] Meetings of the county canvassing board are open public meetings. Notice must be published and the board must make any rules available to the public.[22]

Finally, the county auditor must prepare and make publicly available detailed reports that precisely reconcile the number of ballots received, counted and rejected, including specific accounting for various ballot types (for example, provisional ballots).[23] Public oversight of ballot processing and tabulation from start to finish, along with public reconciliation reports, allow a public check on all elections.

Multiple safeguards exist to ensure election accuracy and White's argument that the *White III* decision somehow eliminates public oversight

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[19] RCW 29A.60.170(3).
[20] RCW 29A.64.041(3).
[21] RCW 29A.60.050, .140.
[22] RCW 29A.60.140(5); WAC 434-262-025.
[23] RCW 29A.60.235.

of the elections process ignores Washington law and the evidence in the record, and is without merit.

2. White's assertion the *White III* decision will allow "fraud" or "hacking" is also contradicted by the evidence in the record.

As the Court of Appeals found, White's assertions are unsupported by the record. First, no evidence or argument in the record supports White's insinuation of fraud. The articles White cites regarding the Ashley Madison or JP Morgan website hacking, Initiative 276, and elections in Kansas do not establish that Washington State elections have been subject to tampering or fraud. Moreover, there is no evidence that any County has used "uncertified software"[24] for tabulation or that the existing computer systems and programs fail to meet the statutory and regulatory requirements for security. RCW 29A.12.080 (requiring that the voting device secure voter secrecy), WAC 434-335-040(3).[25] Furthermore, there

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[24] White cannot demonstrate that any county used unapproved software. While he again cites to a lawsuit he filed in San Juan County Superior Court, White's complaint in that case was that a specific system, which allowed election officials and voters to track online whether their ballots had been sent and then received and counted, had to be certified. The system did not process or tabulate ballots, nor was the system's effectiveness challenged.

[25] WAC 434-335-040 provides, in relevant part:
(3) A vote tabulating system must:
(a) Be capable of being secured with lock and seal when not in use;
(b) Be secured physically and electronically against unauthorized access;
(c) Not be connected to, or operated on, any electronic network including, but not limited to, internal office networks, the internet, or the world wide web. A network may be used as an internal, integral part of the vote tabulating system but that network must not be connected to any other

is no evidence of successful hacking or election tampering, either specifically in the present case, or with Washington's election systems in general. As the County demonstrated in both of the lawsuits underlying the *White I* and *White III* decisions, the Ballot Now and Tally computers are standalone setups that cannot be "hacked." They are not connected to any network and a data card is used to transfer data between the two computers.[26] The computers are kept secure, access to them is severely restricted and tracked, and election officials must work in teams of at least two people when tabulating or preparing for tabulation.[27] Systems must pass a logic and accuracy test prior to each election, and the parties can randomly call for a test of the system mid-election.[28] Moreover, all counties must submit precise reconciliation reports to the Washington Secretary of State that reconcile numbers of ballots as they move through the tabulation process ending in secure storage.[29]

While White's Petition for Review focuses on the idea that he should be allowed to conduct a private recount in any election, he again ignores the law. Recounts are mandated for close elections, and an official

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[25] (3)(c) *(cont.)*
network, the internet, or the world wide web; and
(d) Not use wireless communications in any way.
[26] CP p. 73, lines 5-7.
[27] WAC 434-261-102.
[28] WAC 434-335-330.
[29] RCW 29A.60.235.

recount can be requested for any election with the deposit of a fee. RCW 29A.64.011 to .030. But the statute does not permit a private recount, or any recount under any other circumstances. RCW 29A.64.041. ("The canvassing board shall not permit the tabulation of votes for any nomination, election, or issue other than the ones for which a recount was applied for or required [under RCW 29A.64].") If White wants to be able to conduct private recounts, he must convince the legislature to change the law.

D. White's Issues do not Raise any Significant Question of Constitutional Law.

In his Petition, White does not argue that his issues present a question of constitutional law for the simple reason that he cannot, as the *White III* Court found:

> Article VI, Section 6 of the Washington Constitution provides voters absolute secrecy in their votes. Washington statutes and regulations have protected this right to ensure that ballots are secure. See *White I*, 188 Wn. App. at 638, 354 P.3d 38. "Preserving the integrity and secrecy of votes from the security of election ballots clearly is a vital government function." *Id.*: see also, *White II*, 188 Wn. App. at 898, 355 P.3d 1178. Accordingly we reject White's argument that the PRA exemption for election ballot should be disregarded under RCW 42.56.210(2).

White III at 940.

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V. CONCLUSION

Although White attempts to characterize the *White III* decision as a departure from Washington law, it is not. The decision by Division Two of the Court of Appeals in *White III* relies on the absolute ballot secrecy requirements of Article VI, Sec. 6, and the ballot security scheme of RCW 29A., to conclude that all voted ballots are exempt from disclosure. Division Two specifically referenced and followed both Court of Appeals and Supreme Court precedent in its decision. Finally, the laws and regulations adopted pursuant to Article VI, Sec. 6 of the Washington State Constitution satisfy the constitutional mandate for ballot secrecy, while providing a comprehensive method for members of the public to observe election staff as they process and tabulate ballots and oversee the elections process, eliminating any constitutional or public interest issues. Every argument made in White's Petition for Review has already been made by White in his earlier petitions, and this Court has already declined review of these arguments.

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Because Petitioner has not met his burden under RAP 13.4(b), Clark County respectfully requests that this Court deny White's Petition for Review.

DATED this 8th day of November, 2017.

RESPECTFULLY SUBMITTED:

Jane Vetto, WSBA #21649
Senior Deputy Prosecuting Attorney
Clark County Prosecutor's Office
Civil Division
PO Box 5000
Vancouver WA 98666-5000
Telephone: (360) 397-2478
Facsimile: (360) 397-2184
Email: jane.vetto@clark.wa.gov

Attorney for Respondent Clark County

CERTIFICATE OF SERVICE

I, Thelma Kremer, hereby certify and state the following:

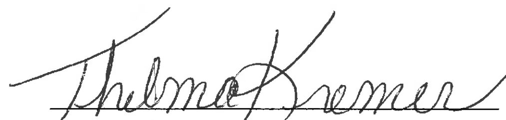
I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein.

On the 8th day of November, 2017, I electronically filed the foregoing *Clark County's Answer to Petition for Review* with the Supreme Court for the State of Washington, and such e-filing will cause a true and correct copy of the foregoing to be emailed to the parties as follows:

Eric D. "Knoll" Lowney
Alyssa Englebrecht
Smith & Lowney
2317 E John St.
Seattle WA 98112-5412
Email: alyssa@smithandlowney.com
knoll@smithandlowney.com

Rebecca R. Glasgow
Deputy Solicitor General
Office of Attorney General of WA
PO Box 40117
Olympia WA 98504-0117
Email: Rebecca@atg.wa.gov

Dated this 8th day of November, 2017.



CLARK COUNTY PROSECUTING ATTORNEY

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Appellate Court Case Title:	Timothy White v. Clark County
Superior Court Case Number:	15-2-02827-1

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