SUPREME COURT NO. 95250-7
C.O.A. No. 47835-8-II
Cowlitz Co. Cause No. 14-1-01082-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWARD JAMES WILKINS,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney, Cowlitz County Prosecuting Attorney's Office.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly decided this matter. The Respondent respectfully requests this Court deny review of the October 10, 2017, Court of Appeals' opinion in *State of Washington vs. Edward Wilkins*, No. 47835-8-II.

III. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' opinion affirming that Wilkins' convictions, which were sentenced as same criminal conduct, did not violate double jeopardy present a significant question of constitutional law or involve an issue of substantial public interest?

2. Does the Court of Appeals' opinion that the State was not estopped from responding to Wilkins' double jeopardy argument on appeal involve an issue of substantial public interest?

IV. STATEMENT OF THE CASE

In 2008, Edward Wilkins was in a relationship with the mother of three-and-a-half-year-old N.H. and lived with them. RP at 342, 365-67. Wilkins would stay home with N.H. while N.H.'s mother went to work. RP

at 365, 369, 374. One day when her mother was at work, Wilkins took N.H. into her mother's bedroom and had sexual intercourse with her. RP at 415, 421. During this event Wilkins inserted his penis into N.H.'s vagina.[1] RP at 423. As a result of their genital-to-genital contact, N.H. acquired genital herpes. RP at 459, 465-66, 469. Subsequently, N.H. complained of her "privates hurting." RP at 370. N.H.'s mother took N.H. to the hospital for a medical examination and was informed that N.H. had genital herpes. RP at 371-74. Because genital herpes is passed from genital-to-genital contact, N.H.'s mother was also informed this was a strong indication of sexual abuse. RP at 374, 458, 469.

N.H.'s mother and Wilkins separated; N.H. and her mother moved to Idaho. RP at 374-75. When N.H. tried to talk about what had happened, her mother would tell her she did not want to talk about it. RP at 375. Wilkins was subsequently convicted and went to prison for an unrelated sex offense, involving a different child.[2] RP at 192-95, 216, 221. Several years later, N.H. disclosed what had happened to a forensic interviewer in Idaho. RP at 417-21. Police obtained a search warrant for Wilkins' medical

[1] As N.H. stated at trial, his "bad spot … went up mine." RP at 415, 421. N.H. identified her bad spot as her vagina, and Wilkins' bad spot as his penis. RP at 423-25.
[2] The court denied the State's ER 404(b) motion to admit evidence related to this offense. RP at 252-54.

records from prison, revealing Wilkins had herpes as manifested by bumps on his penis.[3] RP at 508-11, 490-93.

Wilkins was charged with rape of a child in the first degree for having sexual intercourse with three-and-a-half-year-old N.H. RP at 347-350, 366, 415, 421-24. Prior to trial, the State moved to amend the information, adding a count of child molestation in the first degree. RP at 232; CP at 9-10. Wilkins' attorney acknowledged that the amendment would not change the evidence, but objected to form, maintaining the counts should be charged in the alternative. RP at 232.

The following exchange then took place between the prosecutor and the court:

> Court: Mr. Bentson, is it – is it a – is it a separate and distinct act or is it an alt –
>
> Prosecutor: Well, it's the same –
>
> Court: -- alternate?
>
> Prosecutor: -- act, Your Honor. Your – you don't have to charge them as alternatives. I mean, that's really the State's option, whether we charge two things. If you had penetration, you have Rape of a Child 1. If you had a child molest, you have Rape Child 2. And –
> Court: Is there any con – any – any concern that the jury could make a determination of guilty on both counts?

[3] The jury was not informed Wilkins' records came from prison. RP at 256.

> Prosecutor: I think if the jury were to find him guilty of both counts, then the Court would then throw out the lower count. I think that's how it's done.
>
> Court: So the rule of lenity doesn't apply?
>
> Prosecutor: No, not the rule of lenity, Your Honor. I think that would be for statutory interpretation.
>
> Court: Okay.
>
> Prosecutor: But I think if you have two and you have a – merger issue, then the lesser one goes away. So we do that with the understanding that if they find him guilty of both, the Court would be dismissing the child molest in the first degree at some point, or –
>
> Court: I mean, is it akin to charging someone with residential burglary or burglary in the second degree, and just kind of depending on how the jury interprets the evidence? Is that kind of the approach?
>
> Prosecutor: Right, Your Honor, I think child molest in the first degree is not a lesser-included of rape of a child in the first degree, and the reason for that is rape of a child in the first degree requires penetration, whereas child molest in the first degree requires sexual contact with – for the purpose of sexual gratification....

RP at 233-34.

Wilkins' attorney agreed the evidence would permit the jury to find both crimes, but again objected, maintaining the two crimes should be charged in the alternative. RP at 234-35. The court granted the motion to amend. RP at 235. Wilkins was convicted of both crimes. RP at 618.

At sentencing, the prosecutor stated:

> [H]e was found guilty of both Rape of a Child 1 and child molest in the first degree. The parties agree, we did at the time and we continue to, that that was same criminal conduct, it was based on one act that the victim testified to, so they should not count against each other on the offender score. He should be sentenced for both, he was convicted of both, but they're same criminal conduct and so – in reading the cases on this, the Court has to make a finding they were same criminal conduct. It's normally the Defendant's burden, but we are in agreement that it was same criminal conduct, so the parties are jointly asking the Court to find that those two were same criminal conduct.

RP at 631.

Wilkins' attorney agreed with the State and asked the court to find the two crimes were same criminal conduct, stating:

> And I think it's – it's – if the Court would recall, that's what we discussed at the time the State made the motion to amend. Defense objected to the form, requesting it be an alternative count as opposed to a separate count. The Court allowed the amendment as stated, but at the time, the parties all indicated it should be same criminal conduct if he was convicted of both and it shouldn't count against each other, effectively being sentenced primarily to the greater charge, so I think that's appropriate.

RP at 631-32. Wilkins' attorney did not argue that the two convictions violated double jeopardy. RP at 631-32. The court found the two crimes were same criminal conduct and did not count them against each other when determining the offender score. CP at 46.

Despite having stated it was appropriate to treat the crimes as same criminal conduct, for the first time on appeal Wilkins argued the convictions

violated double jeopardy. *Appellant's Opening Brief* at 7-11. The State responded to this argument. *Respondent's Brief* at 8-11. The Court of Appeals found that the convictions did not violate double jeopardy, however one of the judges dissented "solely on this issue." *Slip Op.* at 23. The Court of Appeals unanimously found that the State was not estopped from responding to Wilkins' double jeopardy argument. *Slip Op.* at 5-8, 23.

V. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Wilkins' petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

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

Wilkins maintains his double jeopardy argument that was rejected by the Court of Appeals involves a significant question of constitutional law and an issue of substantial public interest under RAP 13.4(b)(3) and (4). He also maintains the Court of Appeals' determination that the State was permitted to respond to this argument on appeal involves a substantial issue

of public interest under RAP 13.4(b)(4). He does not claim that either of these rulings are in conflict with existing case law of the Court of Appeals or Supreme Court under RAP 13.4(b)(1) or (2).

Wilkins' claim of double jeopardy fails because rape of a child and child molestation do not violate double jeopardy when based on a single act of penetration. *See State v. Land*, 172 Wn.App. 593, 600, 295 P.3d 782 (2013). Thus, his double jeopardy claim does not raise a constitutional issue or involve an issue of substantial public interest. His claim that the State was estopped from responding to his double jeopardy argument on appeal also fails because a concession or admission concerning a question of law is not binding on the reviewing court. *See State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988). For these reasons, his petition does not meet the criteria required for review under RAP 13.4(b).

A. WILKINS' CONVICTIONS FOR RAPE OF A CHILD IN THE FIRST DEGREE AND CHILD MOLESTATION IN THE FIRST DEGREE DID NOT VIOLATE DOUBLE JEOPARDY.

Because Rape of a Child in the First Degree and Child Molestation in the First Degree each contain independent elements, Wilkins' convictions do not violate double jeopardy. The Court of Appeals has explained:

> Child molestation requires that the offender act for the purpose of sexual gratification, an element not included in first degree rape of a child, and first degree rape of a child requires penetration or oral/genital contact occur, an element not required in child molestation. Each offense requires the

> State to prove an element that the other does not, and therefore the offenses are not the 'same offense' for double jeopardy purposes.

State v. Jones, 71 Wn.App. 798, 825, 863 P.2d 85 (1993). Wilkins' convictions for Rape of a Child in the First Degree and Child Molestation in the First Degree both occurred as part of a single incident.[4] At sentencing the parties agreed that these two crimes should be considered same criminal conduct. RP at 631-32. The court found they were same criminal conduct and did not count the crimes against each other when calculating Wilkins' offender score. RP at 631-32. Wilkins now contends that the two convictions based on a single incident violate double jeopardy. However, a single incident of penetration done for purposes of sexual gratification allows for convictions of both rape of a child and child molestation without violating double jeopardy.

The double jeopardy clause of the constitution protects a defendant from a second trial for the same offense and against multiple punishments for the same offense. *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983) (citing *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)); *see also*, *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); U.S. CONST. amend. V; WASH.

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[4] "The molestation occurred when Wilkins had sexual contact with N.H. for sexual gratification; the rape occurred when there was penetration." *Slip Op.* at 11.

CONST. art. I, § 9. To protect against double jeopardy, the *Blockburger* test examines whether each offense contains an element not contained in the other. *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2 1267 (1995) (referencing *Blockburger*, 284 U.S. at 304). "Washington case law establishes the *Blockburger* test adequately protects the citizens of this state from double jeopardy." *Id.* at 106.

Washington's "'same evidence' test is basically identical to the *Blockburger* test." *Id.* at 104. Offenses committed during a single transaction are not necessarily the "same offense." *Vladovic*, 99 Wn.2d at 423 (citing *State v. Roybal*, 82 Wn.2d 577, 512 P.2d 718 (1973)). To be the same offense for double jeopardy purposes, the offenses must be the same in law and fact. *Id.* "If there is an element in each offense which is not included in the other, and the proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses." *Id.*

When, under the same evidence test, each offense contains independent elements, there is a presumption that the legislature intended to allow multiple convictions for the same act. *State v. Calle*, 125 Wn.2d 769, 776-780, 888 P.2d 155 (1995). This presumption is overcome "only by clear evidence of contrary intent." *Id.* at 780. In *Calle*, there was no clear evidence of contrary legislative intent to overcome the presumption of

independent elements with regard to the crimes of rape and incest based on a single act of sexual intercourse. *Id.* In *Jones*, double jeopardy was not violated for convictions of rape of a child in the first degree and child molestation in the first degree based on a single incident. 71 Wn.App. at 825. The Supreme Court has also held that because rape of a child and child molestation have independent elements, "[t]he two crimes are separate and can be charged and punished separately." *State v. French*, 157 Wn.2d 593, 611, 141 P.3d 54 (2006).

The Court of Appeals has specifically examined the issue of double jeopardy with regard to child molestation and rape of a child by penetration.[5] *State v. Land*, 172 Wn.App. 593, 600, 295 P.3d 782 (2013). "Where the only evidence of sexual intercourse supporting a count of child rape is evidence of penetration, rape is not the same offense as child molestation." *Id.* at 600. This is because "the touching of sexual parts for sexual gratification constitutes molestation up until the point of actual penetration; at that point the act of penetration alone, regardless of motivation, supports a separately punishable conviction for child rape." *Id.*

[5] Regardless of whether or not *Land's* reasoning is dicta, its explanation of the distinction between rape of a child involving penetration and child molestation is sound and its conclusion is correct.

Consequential to the double jeopardy analysis is whether the State seeks to impose multiple punishments for the same offense.[6] *See Land*, 172 Wn.App. at 603. Moreover, the same criminal conduct analysis contemplated by RCW 9.94A.589(1)(a) provides legislative "validation of the concept of multiple convictions arising out of the same criminal conduct[.]" *Calle*, 125 Wn.2d at 781 (citing former RCW 9.94A.400(1)(a)).

Here, the crime of rape of a child required penetration. The crime of child molestation required sexual contact for the purpose of sexual gratification. Therefore, rape of a child and child molestation each contain independent elements. Further, at the moment when Wilkins touched N.H.'s vagina with his penis for the purpose of sexual gratification he committed the crime of child molestation; when his penis penetrated N.H.'s vagina, he committed the crime of rape of a child. *See Slip Op.* at 11. Thus, the two crimes were not the same in law and fact. Because rape of a child and child molestation each contain independent elements, there is a presumption that his convictions did not constitute the same offense for double jeopardy purposes.

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[6] When a jury convicts a defendant of both rape of a child and child molestation based on the same incident, then these crimes may encompass same criminal conduct. *State v. Dolen*, 83 Wn.App. 361, 365, 921 P.2d 590 (1996), *abrogated on other grounds by State v. Graciano*, 176 Wn.2d 531, 538-39, 295 P.3d 219 (2013). Under RCW 9.94A.589(1)(a), when a court finds that two current offenses encompass same criminal conduct, then those current offenses shall be counted as one crime and served concurrently.

a statute as opposed to a statement of fact *is not binding on the court.*" *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988) (emphasis in original) (quoting *Dettore v. Brighton TP., Etc.*, 91 Mich.App. 526, 534, 284 N.W.2d 148 (1979)). At the time of the amended information, the prosecutor indicated that because the two crimes were based on a single act, he thought the court would dismiss the lesser charge if Wilkins was convicted of both. Later, at sentencing, both the State and Wilkins agreed that the crimes should be treated as same criminal conduct, thus it was unnecessary to dismiss one of the crimes. Because, at most, the prosecutor's statement was a legal concession not a factual one, the State was not estopped from taking a different position on appeal.

"Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Cunningham v. Reliable Concrete Plumbing, Inc.*, 126 Wn.App. 222, 224-25, 108 P.3d 147 (2005). "There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time." *Anfinson, v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012). Importantly, judicial estoppel is not intended to provide a technical defense for litigants

seeking to derail potentially meritorious claims. *Miller v. Campbell*, 164 Wn.2d 529, 544, 192 P.3d 352 (2008).

Questions that guide a trial court's determination of whether to apply judicial estoppel are: (1) whether a party's current position is inconsistent with an earlier position, (2) whether judicial acceptance of an inconsistent position in the later proceeding will create the perception that the party misled either the first or second court, and (3) whether the party asserting the inconsistent position will obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Afinson*, 174 Wn.App at 861-62. Judicial estoppel is only available when the first court adopted the inconsistent claim or position, either as a preliminary matter or as part of a final disposition. *Taylor v. Bell*, 185 Wn.App. 270, 282-83, 340 P.3d 951 (2014), *review denied*, 183 Wn.2d 1012 (2015).

In the criminal context, a court is "not bound by erroneous concessions of legal principles." *Knighten*, 109 Wn.2d at 902. For example in *Knighten*, the Supreme Court was not bound by the State's previous concession that there was no probable cause for arrest at the time of Knighten's detention. *Id.* at 901-02. The Court drew an important distinction between a concession on a matter of law, which is not binding, and concession of fact, that would be binding. *Id.* at 902. The Court stated: "'Whether or not such a concession was made is unimportant, and of course,

this court is nowise bound thereby, the question being one of law to be determined from admitted facts.'" *Id.* (quoting *In re Dunn's Estate*, 31 Wn.2d 512, 528, 197 P.2d 606 (1948)).

Here, because at the time of the amendment the claimed concession was legal, it does not bind this Court, permitting the State to oppose Wilkins' double jeopardy claim on appeal. When moving to amend the information, the prosecutor explained that the two crimes listed were based on a single act. RP at 233. At the time, double jeopardy was not discussed. RP at 232-35. The prosecutor expressed a belief that there may be a future merger issue.[7] RP at 233. Of course, at this point in the proceedings neither double jeopardy nor merger were at issue because Wilkins had not yet been convicted or acquitted of either crime. *See State v. Michelli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997) (explaining the merger doctrine does not prevent the State from charging multiple crimes even if those crimes merge, and that "the question of merger arises only after the State has successfully obtained guilty verdicts on the charges that allegedly merge."); *State v.*

[7] The prosecutor's statements about what would happen if Wilkins was convicted of both crimes were qualified: "I think if the jury were to find him guilty of both counts, then the Court would then throw out the lower count. I think that's how it's done. RP at 233. And, "I think if you have two and you have a – merger issue, then the lesser one goes away. So we do that with the understanding that if they find him guilty of both, the Court would be dismissing the child molest in the first degree at some point, or –" RP at 233. The prosecutor's use of the word "or" prior to being cut off by the court suggests the prosecutor may been about to state an alternative. Because the issue of multiple convictions was not yet before the court, these statements were irrelevant to the motion.

Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005) (applying *Michelli* to the double jeopardy analysis). Thus, when the motion to amend was made, the issue before the court was whether Wilkins could be charged with two crimes based on a single act, not double jeopardy.

At sentencing, both the prosecutor and Wilkins agreed that because the crimes were based on a single act they should be treated as same criminal conduct. RP at 631-32. Wilkins' attorney stated: "The Court allowed the amendment as stated, but at the time, the parties all indicated it should be same criminal conduct if he was convicted of both and it shouldn't count against each other." RP at 632. Thus, Wilkins and the State agreed the crimes should be counted as same criminal conduct at sentencing. Wilkins now takes a different position on appeal, arguing that the two convictions violated double jeopardy. Just as Wilkins' prior legal concession at sentencing does not bar him from arguing double jeopardy on appeal, the State should not be bound by a prior legal concession on a point that was not even at issue at the time of the amendment.

Moreover, the court's decision to treat the two crimes as same criminal conduct at sentencing demonstrates that it did not rely on any assertion of a future dismissal when it granted the motion to amend. Obviously, the trial judge had heard from the parties at the time the motion to amend was granted and was aware of what had been stated. Had the trial

court interpreted the law as requiring dismissal of the child molestation conviction it would have done so. The court's decision not to dismiss demonstrates its decision on the motion to amend was not based on an intention to dismiss later should a conviction result.

The State did not take a position that was clearly inconsistent, it did not mislead the trial court, and it did not gain an unfair advantage because of the statement. The prosecutor's position on appeal is not clearly inconsistent with an earlier position. As the Court of Appeals noted, when asked about what happened if Wilkins were convicted of both charges the prosecutor was uncertain. *See Slip Op.* at 6-7. Because the issue of two convictions was not before the court, the prosecutor's statements were not relevant to the issue of whether the amendment should be granted.[8] Rather, they were qualified statements about a legal issue that could arise in the event of two convictions. Importantly, at sentencing neither the parties nor the court viewed the State's earlier statements as inconsistent with the position that was taken.

There was no attempt to mislead the court or evidence the court was misled. To prevent Wilkins from being punished for both crimes, the State

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[8] CrR 2.1(d) permits amending an information "at any time before verdict . . . if substantial rights of the defendant are not prejudiced." "Where the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial." *State v. Gosser*, 33 Wn.App. 428, 435, 656 P.2d 514 (1982).

advocated for treating the crimes as same criminal conduct because they were based on a single act, and Wilkins agreed. Neither the court nor Wilkins' attorney claimed to have been misled when the information was amended. Further, the prosecutor demonstrated a continuing effort to be correct legally, stating: "in reading the cases on this, the Court has to make a finding they were same criminal conduct." RP at 631. The prosecutor's position at sentencing reflected a better understanding of the law, and an effort to prevent Wilkins from being punished for both offenses.

Finally, no unfair advantage was gained by the State's earlier position, because the issues of merger or double jeopardy had no bearing on whether a motion to amend should be granted. *See Michelli*, 132 Wn.2d at 238-39. The court was required to base its decision on whether the amendment prejudiced Wilkins in his defense, not a future possible consequence. Even at the time, Wilkins never asserted such prejudice and agreed both crimes were appropriate because of how the jury might interpret the evidence. RP at 235.

Wilkins now claims this same court may have sentenced him more harshly because he had two convictions. Yet the trial court was well aware of what the evidence was at trial and also found same criminal conduct applied. There is no evidence that sentencing was improperly influenced by the fact that Wilkins committed two crimes with one act. Further,

because the crimes were classified as same criminal conduct, they correctly reflect what occurred—Wilkins touched N.H. for purposes of sexual gratification and also had sexual intercourse with her. While there is a negative stigma associated with being convicted of either one of these horrific crimes, they do not violate double jeopardy, and they both were found unanimously by a jury beyond a reasonable doubt based on evidence of Wilkins' conduct. Any future court or indeterminate sentencing review board will see the crimes for what they were—same criminal conduct that encompassed two different crimes.

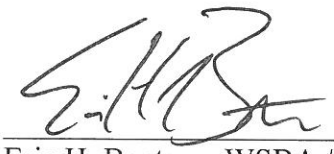
When Wilkins argued double jeopardy for the first time on appeal, the State responded by arguing the two offenses were same criminal conduct, consistent with its position at sentencing. Not until sentencing did double jeopardy become an issue, as prior to this point Wilkins had not yet been convicted of two crimes. Since double jeopardy and merger were not at issue at the time of the amendment, the prosecutor's comments regarding merger at that time should not be considered inconsistent with the State's argument on appeal. Because judicial estoppel is only available when the first court adopted the inconsistent claim or position, and the trial court did not adopt the inconsistent position, estoppel should not apply here. *See Taylor*, 185 Wn.App. at 273, 282-83.

But even if the prosecutor's reference to merger is interpreted as a legal concession that was inconsistent with its argument on appeal, this concession was erroneous on the issue of double jeopardy: "Where the only evidence of sexual intercourse supporting a count of child rape is evidence of penetration, rape is not the same offense as child molestation." *State v. Land*, 172 Wn.App. 593, 600, 295 P.3d 782 (2013). As in *Knighten*, because an erroneous legal concession does not bind the Court, the State was not estopped from opposing Wilkins' double jeopardy claim. For these reasons, Wilkins does not raise an issue of substantial public interest.

VI. CONCLUSION

Because the petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 8th day of December, 2017.



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CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

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

Signed at Kelso, Washington on December 8th, 2017.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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Transmittal Information

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