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Supreme Court No. 95602-2
(COA No. 73352-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EZEKIAL WATKINS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Ezekial Watkins, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated below, pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Watkins seeks review of the Court of Appeals decision dated December 11, 2017, for which reconsideration was denied on January 31, 2018, copies of which are attached as Appendix A and B.

C. ISSUES PRESENTED FOR REVIEW

Ezekial Watkins is a young man whose significant neurological defects give him cognitive abilities at the level of a nine-year-old. The police obtained a statement from him using suggestive, deliberate interview tactics that many police departments condemn. The hours-long statement extracted by police was central evidence to convince the jury of his culpability for the charged crime.

1. A waiver of *Miranda***Error! Bookmark not defined.** rights must be knowing, intelligent, and voluntary. Mr. Watkins has a nine-year-old child's cognitive ability and is particularly suggestible. Police detectives held in him a small interview room and deliberately used coercive techniques to obtain a confession. The trial court disliked the

police techniques but found no case law condemning these tactics. Should this Court review the propriety of this interview process as a violation of the protections required by *Miranda* and a matter of substantial public interest?

2. Deliberately burying *Miranda* warnings in the middle of an interrogation undermines their effectiveness and violates their purpose, as the United States Supreme Court held in *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). Detectives purposefully withheld *Miranda* warnings from Mr. Watkins until thier lengthy interrogation process elicited his admissions to criminal offenses, then they minimized the rights and continued questioning without a break. Did the police undermine the *Miranda* warnings by an intentional two-step interview process, contrary to *Seibert*? This Court has never addressed *Seibert* to guide courts when police deliberately delay *Miranda* warnings. The Court of Appeals relied on a pre-*Seibert* case. Does substantial public interest favor review?

3. A search warrant authorizes taking only specified items for which the police have established probable cause to seize. The warrant to search Mr. Watkins' home allowed the police to gather "any other items" at the detective's discretion. Was this catchall warrant overbroad

and contrary to the particularity requirements of the Fourth Amendment and article I, section 7?

4. A court may only remove a seated juror during trial due to a juror's bias or inability to serve. Over defense objection, the court struck a seated juror who asked for a short break to check on his injured mother during a months-long trial, an accommodation the court made for itself and others. The court removed the juror even though the likely delay was minor and would not have impacted the trial. Did the court improperly remove a selected and sworn juror without just cause, contrary to this Court's precedent?

D. STATEMENT OF THE CASE

Ezekial Watkins is a young man who is "substantially impaired cognitively." CP 187. Neurological expert Dr. Richard Adler found "significant" and "abnormal" frontal lobe deficits and had never seen a more "negatively affected" brain imaging scan than Mr. Watkins's. 2/25/15RP 3142; CP 180.

Based on reports to police that Mr. Watkins killed his former girlfriend, police detectives deliberately arranged an interview room under the protocol of the Reid interrogation method to question him at length. 1/14/17RP 17; Opening Brief at 14-19, 23-25. The detectives

withheld *Miranda* warnings until after they secured a confession, telling him his story "didn't make sense" and this was his "opportunity" to be truthful and continued to press for more details. CP 258-59. Only after getting an actual confession to involvement in causing her death, as well as admissions he buried her body, they gave *Miranda* warnings. CP 263. But the detective told Mr. Watkins with warnings was given, "just so you know," took no break to highlight the decision-making required by *Miranda*, and instead told Mr. Watkins they would "continue" to talk about the incident. CP 263.

At trial, Mr. Watkins presented his diminished capacity and his belief he was acting in reasonable self-defense, based on how he perceived events. CP 685, 699; 3/3/15RP 3318, 3637-38. He was convicted of the most serious charge, first degree murder. CP 711.

Pertinent facts are contained in the argument sections herein as well as the Opening Brief of Appellant.

E. ARGUMENT

1. The police circumvented protections for suspects with substantial cognitive deficits who are readily manipulated by police. This Court should grant review.

The prosecution has a heavy burden to prove an accused person knowingly and voluntarily waived his *Miranda* rights. *Miranda v.*

Arizona, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). It must show a suspect was aware of "the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

Determining whether a suspect knowingly and intelligently waived his right to remain silent depends on the suspect's subjective level of understanding. *North Carolina v. Butler*, 441 U.S. 369, 374, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). "A defendant's mental capacity directly bears upon the question whether he understood the meaning of his *Miranda* rights and the significance of waiving his constitutional rights." *United States v. Garibay*, 143 F.3d 534, 538 (9th Cir. 1998).

To assess the voluntariness of a statement obtained by the police, the court must weigh the tactics and setting of the interrogation alongside any particular vulnerabilities of the suspect. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Relevant factors include the suspect's age, low intelligence, and educational deficits. *Id.* The court must also consider the lack of advice of to the suspect of his constitutional rights and the person's familiarity with the criminal justice system. *Id.*

In juveniles, evaluating the totality of the circumstances "includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). The Supreme Court has made clear that juvenile confessions induced by police call for "special care" in evaluating voluntariness. *See J.D.B. v. North Carolina*, 564 U.S. 261, 277, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011); *Haley v. Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed.2d 224 (1948).

The "fundamental differences" between the brains of young people and adults do not disappear when a minor becomes an adult. *State v. O'Dell*, 183 Wn.2d 680, 692, 358 P.3d 359 (2015). A young adult who has not reached full neurological maturity is likely to be less able to make reasonable, intelligent choices such as made by a reasonable adult. *Id.* at 692-93. Although Mr. Watkins was a young adult when questioned by police, he had numerous deficits in his cognitive functioning and was like a six to nine year old in his comprehension. 1/15/15RP 258, 262.

The voluntariness inquiry requires a full consideration of the compounding influence of the police techniques "as applied to *this* suspect." *Miller v. Fenton*, 474 U.S. 104, 116, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (emphasis in original).

This Court should grant review to address the necessary inquiry into whether Mr. Watkin's statement to police was properly obtained voluntarily and consistent with his constitutional rights under the Fifth Amendment and the protections of article I, section 9.

2. This Court should address the constitutional implications of deliberately delayed *Miranda* warnings used to extract a confession from a substantially impaired suspect in an hours-long police station interview.

Custodial interrogation must be preceded by *Miranda* warnings for a statement to be admissible at trial. Determining whether a police interrogation is custodial rests on the totality of circumstances. *Thompson v. Keohane*, 516 U.S. 99, 112 & n.11, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). The Court of Appeals placed undue weight on the single comment made to Mr. Watkins that the police told him one time that he "was free to leave" at the start of the station house questioning to conclude the lengthy interrogation by two detectives in a closed room was not custodial. It also cast aside the deliberate delay of

Miranda warnings as not an "infrequent" tactic, contrary to the Supreme Court's criticism of this very practice in *Seibert*.

a. Questioning a person for hours in a police interview room to extract his involvement in causing a death is custodial.

In a case with circumstances, the Third Circuit ruled police questioning was custodial. *United States v. Jacobs*, 431 F.3d 99 (3rd Cir. 2005). In *Jacobs*, the police told the suspect he was free to leave, but there was not "pro or con" in the custodial analysis because the police said nothing more about it. 431 F.3d at 106. In fact, Jacobs was free to leave and she left "without hindrance." *Id.* It is also relevant whether the person is told he did not need to answer questions, and Mr. Watkins was not told this. *See Morton v. United States*, 125 A.3d 683, 690 (D.C. 2015) (custodial nature of interrogation includes whether police say do not "have to answer questions posed by the police").

Instead of giving outsized weight to one comment at the start of the interview, *Jacobs* emphasized three critical factors for courts to weigh in determining whether a person is in custody that the Court of Appeals disregarded. First, "station house interrogations" are far more likely to induce the psychological compulsion and pressure to answer questions associated with custody. 431 F.3d at 105. Second, the court

considers what the interrogating police knew about the suspect's culpability, because if the police have evidence against the suspect, it tends to create "the kind of atmosphere of significant restraint that triggers *Miranda* and *vice versa*." *Id.* The third factor is whether the police conveyed to the suspect by word or deed their belief in the person's guilt. *Id.*

For Mr. Watkins, these factors demonstrate custodial interrogation. First, he was questioned in a small closed police room surrounded by two officers, which is "most apt" to create psychological compulsion and police intimidation. *Id.* He was told once, at the start, he could leave, but he would have to travel through a police station and out a door that was locked when he entered. Slip op. at 7. He was not told he did not have to answer questions, but rather told the police knew his was lying. *See* Ex. 60 at 44("I know answers to questions before I ask them . . . I'm giving you an opportunity to be truthful with me."); *see also* Ex. 60 at 26, 31-32, 43, 44 (similarly requesting "the truth").

Second, the interrogating police already intended to arrest Mr. Watkins and this pre-existing inculpatory information determined their interview tactics, indicating custodial interrogation. *Jacobs*, 431 F.3d at 105. Third, the police told Mr. Watkins they knew he was lying,

displaying phone records from the incident and a shovel like the one used to bury Ms. Chou. No one would feel free to leave. 431 F.3d at 105-06.

Mr. Watkins' situation is far different from *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), the case on which the Court of Appeals drew a false parallel when in fact, *Mathiason* demonstrates the custodial nature of Mr. Watkin's interrogation. In *Mathiason*, a parolee agreed to speak with an officer at the stationhouse. *Id.* at 493. Within a mere five minutes of entering the station, he was told he was not under arrest, asked to tell the truth, and he confessed. *Id.*

The *Mathiason* Court deemed this interrogation non-custodial because it was brief, the defendant was told he was not under arrest and he was not in fact arrested, and he came voluntarily. *Id.* at 494.

There are constitutionally critical differences between *Mathiason* and Mr. Watkins's case, demonstrating the Court of Appeals decision conflicts with it. Unlike the key factor of *Mathiason*'s brief interview, five minutes from start of contact to confession, police pressed Mr. Watkins for almost two hours before the court deemed the interview "custodial" and he received *Miranda* warnings. 1/14/15RP

17-149. For nearly two hours, they pressed Mr. Watkins for details, continually told Mr. Watkins he had to stop lying, and got him to admit he illegally buried a dead body all before *Miranda* warnings. CP 230-249. Two or more detectives sat close to Mr. Watkins and questioned him, unlike the single officer in *Mathiason*. 1/14/15RP 11; Ex. 60 at 1. The police never told Mr. Watkins he would not be arrested, unlike *Mathiason*. And Mr. Mathiason did not lack intellectual skills and was not completely inexperienced with being accused of a crime, as was Mr. Watkins who had never been arrested before.

Not only was Mr. Watkins hampered in his decision-making skills by having the intellectual ability of a young child, the police used the Reid Interrogation method which even the trial court disliked. 129/16RP 108. This tactic relies heavily on false evidence ploys and deceit to elicit a confession, leading to wrongful convictions. The Marshall Project, *The Seismic Change in Police Interrogations* (Mar. 7, 2017), available at: https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations#.rC9thbbFa (last viewed Mar. 2, 2018).

The trial court disliked the Reid technique used, but found no cases deeming it illegal. 1/29/15RP 108, CP 627.

Mr. Watkins' interrogation became custodial, if not at the outset than at least far before close to two hours passed while he was pressed to tell the truth and told he was not doing so. No reasonable person in Mr. Watkins' shows would have believed he was free to leave. This Court should grant review of the methods used to extract a confession without *Miranda* warnings.

b. This Court should address the deliberate delay of Miranda warnings until after extracting admissions of criminal acts in a long and purposeful interview.

The police deliberately withheld *Miranda* warnings until Mr. Watkins confessed to being involved in causing Ms. Chou's death, downplayed those warnings, and never gave Mr. Watkins any break to consider the import of the warnings. This tactic was condemned in *Seibert*, 542 U.S. at 608, 613.

Seibert, however, is a plurality opinion where the combination of the four justice majority and concurring opinion amounts to a majority on the notion that delayed warnings are constitutionally suspect but without clear guidance on the rule courts should follow. *Seibert*. 542 U.S. at 617 (plurality); *Id*. at 622 (Kennedy, J. concurring.). This ambiguity favors review by this Court to determine the test our courts should apply.

The Court of Appeals' reason for distinguishing *Seibert* here – that it was not "infrequent" for people to be interrogated for two hours, confess, and then receive *Miranda* warnings – does not adequately address this critical issue. Slip op. at 11. There is no debate that the police deliberately delayed *Miranda* during a lengthy interview for the purpose of obtaining a confession prior to giving Mr. Watkins notice of his rights to remain silent and receive the assistance of counsel. This was a purposefully devised interview process where *Miranda* warnings were consciously offered only after Mr. Watkins confessed and only then in a way that made it appear Mr. Watkins had little choice or reason to not repeat his admissions and elaborate upon them. This scenario is precisely what *Seibert* expressed as an improper mechanism for undermining the protections of *Miranda*.

The Court of Appeals also confused the legal analysis required for a dynamic interrogation that grows increasingly custodial. It summarily states that because the defendant in *Seibert* was arrested at the outset but Mr. Watkins was not, Mr. Watkins was not subjected to custodial interrogation. Slip op. at 11.

But no cases demand an outright formal arrest for *Seibert* to apply. This analysis ignores the progressively custodial nature of the

interrogation. Even if not custodial at the start like *Seibert*, the police obtained a confession to a lesser crime before giving *Miranda* warnings, which created a situation in which Mr. Watkins was being interrogated after supplying the police with a basis to arrest him. Ex. 60 at 47-45; Opening Brief at 19.

The Court of Appeals also relied on *State v. Lorenz*, 152 Wn.2d 22, 37, 93 P.3d 133 (2004), but that case is not only factually different, stemming from person's statement written at her own home where the police had grounds to arrest her, it was decided before *Seibert*. This Court has not issued any decisions addressing this question-first scenario that was criticized in *Seibert*.

Seibert dictates the question-first tactics undermined the voluntariness of these belatedly given *Miranda* warnings. This court should grant review.

3. The police unlawfully seized private property from Mr. Watkins' home pursuant to an overbroad search warrant.

a. A warrant must particularly state the items to be seized.

Under the Fourth Amendment's particularity requirement, a search warrant must demonstrate probable cause to search the place and seize the items described, and it "must describe the items to be seized

with particularity." *State v. Besola*, 184 Wn.2d 605, 609, 359 P.3d 799 (2015); *see Kentucky v. King,* 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); U.S. Const. amend. 4; Const. art. I, § 7.

b. The warrant's generalized authorization to seize anything deemed relevant during the intrusion of the home violates the particularity requirement.

The police obtained warrants to search Mr. Watkins' current apartment and his parent's home "for evidence of the crime of Murder including but not limited to" specified items connected to the offense. CP 409. The warrant described specific items, such as "knife (Camo handle, black bladed), folding knife around 4" blade, camo hoody, dominion and control documents, tan boots . . . [and] black t-shirts with writing on them (one should have the name Ezekiel in Roman lettering across it)." CP 409. But it also said the police may take "any other item that Detectives reasonably believe may be associated with this crime." *Id.*

The authority to seize "any other item" gave the police general permission to rummage through all property to locate any item of interest, at the detectives' discretion. The warrant already explicitly listed the items the police had a reasoned basis to believe were associated with the offense and located in the home, such as the weapon

used and clothes worn. Consequently, the catchall "any other item" permitted police to seek out anything else that they did not have a basis to suspect it might be in the home or probable cause that it was connected to the crime.

Acting under this broad permission to take anything else they wished, the police went through all of Mr. Watkins' possessions and took far more than the warrant particularly described. They seized multiple journals, poems, a calendar, and writings that they used at trial. *See* 2/11/15RP 2239-58, 2373-75; 3/12/15RP 4181; CP 65-68; Exs. 15, 18, 20, 22, 23, 24, 25, 26, 27, 28, 34.

This broad authority is prohibited by the particularity requirement. It does not adequately protect individual property rights and authorizes an impermissibly wide-reaching search of a person's home. *See, e.g., State v. Garcia*, 140 Wn.App. 609, 622, 166 P.3d 848 (2007) (invalidating warrant that allowed search of "any and all" persons present as generalized suspicion that "violated the Fourth Amendment's requirement of particularity"). This Court should grant review.

4. The court improperly excused a sitting and qualified juror, over defense objection, based on a minor expediency concern in the middle of trial.

The state and federal constitutions protect an accused person's right to participate in the selection of a jury and to receive a fair trial by that selected jury. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *State v. Irby*, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011), U.S. Const. amends. 6, 14; Const. art. I, section 22. Even more protective than the federal constitution, Washington expressly guarantees the inviolate right to a 12-person jury and unanimous verdict in a criminal prosecution. *Irby*, 170 Wn.2d at 884; *State v. Williams-Walker*, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010) ("greater protection" for jury trial rights under article I, sections 21 and 22 than federal constitution).

CrR 6.5 allows a court to excuse a juror only after it has "found" the person is "unable to perform the duties" of a juror. Under RCW 2.36.110, the court shall excuse a juror if she has "manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service."

The court must err on the side of caution by protecting the defendant's constitutional right to ensure that a juror is not dismissed for his views of the evidence. *State v. Depaz*, 165 Wn.2d 842, 854, 204 P.3d 217 (2009). The court abuses its discretion if its decision to dismiss a juror stems from using the wrong evidentiary standard. *State v. Elmore*, 155 Wn.2d 758, 778, 123 P.3d 72 (2005) ("once the proper evidentiary standard is applied, the trial court's evaluation of the facts is reviewable only for abuse of discretion"). In *Elmore*, the court failed to apply a heightened evidentiary standard when weighing conflicting evidence about whether a juror was participating in deliberations or was refusing to do so. *Id.* at 779. Because the court had not applied the correct evidentiary standard, the Supreme Court held that the trial court had improperly dismissed the juror. *Id.* at 780.

Near the end of the State's case-in-chief, Juror 13 learned his mother had gone to the hospital due to a fractured bone in her arm. 2/23/15RP 2892-93. He asked to leave two hours early to be sure his mother's insurance paperwork and medications were properly relayed to the hospital. *See* 2/23/15RP 2894 (court noted there were two hours and twenty minutes left in day).

Juror 13's mother lived in a managed care facility. *Id.* at 2892-93. He hoped to miss only the rest of the afternoon in court so he could verify her insurance information with medical providers. *Id.* at 2891. This hospital was five miles from the Kent courthouse, and Juror 13 said he "should be available again tomorrow." *Id.* at 2892.

The judge had adjourned early or adjusted the calendar a number of times, for himself, witnesses, and other jurors, including that very morning. *Id.* at 2876. But the court refused to let Juror 13 check his mother's hospital admission and return, over defense objection.

On this day of trial, no live witnesses were testifying; the evidence consisted of playing a lengthy videotape of Mr. Watkins' statement to the police. *Id.* at 2881.

Defense counsel offered to adjust its questioning of witnesses and juggle other witnesses to retain Juror 13. 2/24/15RP 2890, 2895, 2910. The court refused this short delay, preferring to excuse Juror 13 even though there was a good chance he would be available the next day. *Id.* at 2894, 2896.

In sum, the court removed Juror 13 because it refused to allow a minor trial delay even though the defense offered reasonable scheduling accommodations. And the parties knew witness scheduling issues

would arise the next day that had nothing to do with Juror 13. By striking a seated juror who merely needed a couple of hours for an emergency during a long case, when the evidence being presented could be rescheduled and the defense offered reasonable alternatives, the court acted arbitrarily.

CrR 6.5 allows the court to remove only an unfit juror whose behavior is "incompatible with proper and efficient jury service." The court did not make this finding. The court removed Juror 13 after a cursory determination of expediency even though the time saved was trivial, alternatives were available, and despite the defense objection. The unreasonable removal of the juror requires reversal. This Court should grant review.

F. CONCLUSION

Based on the foregoing, Petitioner Ezekial Watkins respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 2nd day of March 2018.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS DIV I
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EZEKIEL JAMES WATKINS, Appellant.	)	No. 73352-4-I DIVISION ONE UNPUBLISHED OPINION FILED: December 11, 2017

APPELWICK, J. — Watkins was convicted of first degree murder. He argues that police elicited a confession in violation of Miranda,[1] that evidence was obtained in violation of the privacy act,[2] that a search warrant was overbroad, and that the trial court improperly dismissed a juror. We affirm.

FACTS

High school student Kathy Chou disappeared. Police contacted her ex-boyfriend, Ezekiel Watkins. He spoke with police at the police station. Watkins also took a polygraph test. He was not arrested at that time.

Over one year later, Watkins' friend Giovanni Candelario told police that he had seen Watkins covered in blood and dirt on the night Chou disappeared. Candelario also told police that he told Watkins that he suspected he was involved in Chou's disappearance, and Watkins did not deny it. Another friend, Jon Carpenter, told police that he had given Watkins a shovel the night that Chou

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
[2] Ch. 9.73 RCW.

disappeared. In light of these revelations, Detective Greg Barfield called and asked Watkins to come to the station for an interview. They agreed to meet at the station six days later, on July 6, 2011, at 11:00 a.m.

Watkins drove himself to the station. The interview room was located within a secure area of the building. The area could be opened from the inside without a key. Watkins sat closest to the door. The police did not take his phone or keys. He was not handcuffed.

When he began the interview at 11:24 a.m., one of Detective Barfield's first statements to Watkins was as follows:

> So before we get started I want to make sure you understand that we're just talking to everybody in the case. It's new to me cause I wasn't involved in it back when she, when Kathy went missing. I want you to know that you are free to go at any time. It's a voluntary statement. Matter of fact if you do decide to do that, if you want to leave this door right here, you go out that door and hang a right and that's the door you came in at.

At 11:55 a.m., Detective Barfield notes that, contrary to Watkins' prior statements, phone records show that they texted and called one another 46 times that day. Barfield tells Watkins that "we need to know everything," and "I'm asking you to be straight with me."

At 12:04 p.m., Watkins eventually concedes that he saw Chou that night, they took a walk in the park, and finished between 9 and 10. At 12:16 p.m., police placed a shovel wrapped in evidence tape in the interview room in the view of Watkins. At 12:17 p.m., Detective Barfield tells Watkins, "I've given you many opportunities to tell me before I had to confront you if there's something that's different."

Shortly thereafter, Watkins tells Detective Barfield that Chou cut her own throat. Watkins admits that his friend Carpenter brought a shovel and helped him bury her body. Detective Barfield pressed further,

> But Ezekiel, I have a hard time believing that she somehow gets a hold of your knife and then stabs herself multiple times in the neck and your reaction is to not go to call the police or call for an ambulance but to call your friend, have him meet you and you guys go and bury the body. It doesn't sit right with me. Right? And I just want you to be truthful with me about it. Cause yeah I can tell, it's pretty easy honestly to tell you when you're being truthful and when you're not being truthful. That's how I know to ask what questions I ask because you kind of, for most people honestly it is very hard for them to hide a lie on their face and with their body. You just do things you know subconsciously. You don't realize you're doing it. But for me it's like, it's like a red flag going up when I see it. So I'm just asking you to be straight. I'm going to give you an opportunity to tell me how.

At 12:37 p.m., Watkins admits to stabbing Chou, although he claims it occurred during a physical struggle between the two.

Immediately thereafter, Detective Barfield reads Watkins his Miranda rights. Watkins waived those rights, the interview continued, and Watkins took police to the burial site later that day. Watkins was charged with first degree murder. His statements that day were admitted into evidence after a CrR 3.5 hearing. A jury found him guilty. He appeals.

DISCUSSION

Watkins makes four arguments. First, he argues that the State obtained incriminating statements in violation of Miranda, and the trial court erred in admitting those statements. Second, he argues that the trial court erred in admitting evidence that was obtained in violation of the Washington privacy act.

Third, he argues that the trial court admitted evidence that was obtained pursuant to an overbroad search warrant. Finally, he argues that the trial court erred in dismissing a juror due to a family emergency.[3]

I. Miranda

Watkins first argues that the police violated his Fifth Amendment rights under Miranda. When Watkins confessed to stabbing Chou, he had not been given Miranda warnings. Watkins argues that the circumstances of the interview amounted to a custodial interrogation and Miranda warnings were required. He notes that the interview occurred in a small room at the police station. He notes that the officer told Watkins that he needed to be truthful. Further, he claims that police strategically brought into the interview room a piece of evidence—a shovel—that suggested that police knew Watkins was not being truthful.

A. Custodial Interrogation

When a state agent subjects a suspect to custodial interrogation, the Fifth Amendment to the United States Constitution requires that Miranda warnings must be given. 384 U.S. at 467-68. If police conduct a custodial interrogation without Miranda warnings, statements made by the suspect during the interrogation must be suppressed. Id. at 479. Whether a person is in "custody" is an objective inquiry: considering all the circumstances, would a reasonable person feel that his or her freedom was curtailed to a degree associated with formal arrest? State v.

[3] On cross appeal, the State assigns error to the trial court's decision to exclude evidence regarding an alleged "trophy" that Watkins collected from the victim on grounds that it was overly prejudicial. But, because we affirm, we do not address this argument.

Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). The defendant must show some objective facts indicating his or her freedom of movement was restricted or curtailed. State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004). We review a trial court's custodial determination de novo. Id. at 36.

Watkins argues that he was subject to a custodial interrogation from the outset of the interview.[4] He cites to United States v. Jacobs, 431 F.3d 99, 105 (3d Cir. 2005), where the court reasoned that all station house interrogations should be scrutinized with extreme care. Further, he argues that Detective Barfield's conduct over the course of the interview created a custodial setting by conveying his belief that Watkins was guilty, pressing for the truth, and placing the incriminating shovel into Watkins' view.

The station house interview here is comparable to the facts in Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). A burglary victim told police that Mathiason was the only possible culprit she could think of. Id. at 493. About 25 days after the burglary, the officer told Mathiason he would like to discuss something. Id. Mathiason voluntarily went to the police station. Id. He

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[4] Watkins first stresses that the trial court erred in applying a subjective standard to whether Watkins was subject to custodial interrogation. He notes that, in support of its decision, the trial court cited Watkins' belief that he would be able to go to work later that afternoon after he had just admitted to stabbing and burying Chou. Watkins is correct that the proper standard is an objective one. See Lorenz, 152 Wn.2d at 36-37. But, the trial court's ultimate conclusion was that "[u]nder the totality of the circumstances, a reasonable person in the defendant's position would not have felt that his freedom was curtailed." (Emphasis added.) This reflects an objective analysis. And, similar to this situation, many prior cases contain passing references to a suspect's own belief. See, e.g., State v. D.R., 84 Wn. App. 832, 834, 836, 930 P.2d 350 (1997) (explaining that the proper standard is a reasonable person standard, but also noting that the suspect testified that he did not believe he was free to leave).

was taken into a room with a closed door, and told that he was not under arrest. Id. The officer told Mathiason that he wanted to discuss the burglary, and that his truthfulness would possibly be considered by the district attorney or the judge. Id. The officer falsely claimed that he had discovered Mathiason's fingerprints at the scene. Id. Mathiason confessed after about five minutes. Id.

The United States Supreme Court found that there was no Miranda violation. Id. at 495. It concluded that this "noncustodial situation is not converted to one in which Miranda [sic] applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on movement, the questioning took place in a 'coercive environment.'" Id. Like Mathiason, Watkins went voluntarily to the station, was told he could leave, and the police had suspicion that Watkins was involved.

But, Watkins argues that this case is more similar to Jacobs. In that case, Jacobs was a police informant. Id. at 102. Police subsequently learned that Jacobs was engaging in illegal activity that violated police instructions. Id. at 103. Jacobs arrived at the station upon police request. Id. at 103. In an open office area, police placed suitcases that they thought would elicit information from Jacobs. Id. With the suitcases in view, the police told her that they had information that she was assisting in the trafficking. Id. Shortly thereafter, she confessed to illegal activity. Id. at 103-04

The Jacobs court found that this was a custodial interrogation. Id. at 108. It reasoned,

> To recap, in Jacobs' case, in addition to (1) the questioning taking place at the FBI offices, and (2) Sullivan believing Jacobs was guilty, the following additional factors were present: (3) Jacobs was summoned to FBI offices without explanation; (4) Sullivan's questions were confrontational and intimidating; (5) he used interrogation tactics, including placing the incriminating suitcases in Jacobs' view; (6) he communicated to Jacobs that he thought she was guilty; (7) Jacobs felt obligated to come to and stay at the questioning because she was reasonably under the impression that she was still an FBI informant; (8) she was not specifically told she was not under arrest before questioning began; and (9) she did not agree to meet with Sullivan with knowledge of the fact that questioning about a criminal offense would take place.

Id. Although the suitcase placement in Jacobs is somewhat comparable to the strategic shovel placement here, Jacobs is critically different. There, the court noted that Jacobs would have felt compelled to speak with police given her status as an informant. Id. Watkins was under no such obligation. He had denied police requests before.[5] And, unlike Jacobs, police unequivocally told Watkins that he was "free to leave at any time." Id. at 107.

Watkins also relies on United States v. Craighead, 539 F.3d 1073 (9th Cir. 2008). There, armed officers wearing flak jackets, some with unholstered weapons, executed a search warrant on Craighead's residence. Id. at 1078. During the search, an agent told Craighead they wanted to speak with him. Id. And, Craighead was told he was free to leave. Id. at 1078. The agent directed him to a storage shed in the back of his house, and interviewed him for 20 to 30

[5] For example, he once denied a police request for him to take a polygraph test. A few days later, Watkins changed his mind and took the test after initially refusing.

minutes. Id. at 1078. A detective was guarding the door. Id. at 1088. Agents from three different law enforcement agencies were present for the search. Id. The court found that the interview was a custodial interrogation. Id. at 1089.

The distinctions between Craighead and Mathiason are significant. Craighead did not voluntarily go to a police station. The police came to his home. See id. at 1078. Although he was informed he could leave, this instruction was less valuable given that he was already on his own property, and could not retreat to the safety of his own home, which was being searched by officers. Id. at 1088. And, the court found that the presence of multiple agencies suggested that others besides the interviewing agent might forbid him to leave. Id.

Lorenz, is also instructive. As Lorenz's residence was being searched as part of a child molestation investigation, police pulled her aside and questioned her. Lorenz, 152 Wn.2d at 27. The police told Lorenz she was not under arrest and was free to leave at any time, and she signed a statement to that effect. Id. at 37-38. But, she was not allowed to enter her trailer during the search. Id. at 37. The officers then told her to " 'sit here'. " Id. at 27. She confessed in a written statement. Id. at 27-28. Lorenz argued that she was effectively in custody for the purposes of Miranda. Id. at 36. The court reasoned that "[i]t is irrelevant whether Lorenz was in a coercive environment at the time of the interview." Id. at 37. Relying on the explicit instructions that Lorenz was free to leave, the court found that Lorenz was not in custody.[6] Id. at 37-38.

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[6] Lorenz contradicts another argument made by Watkins. During the critical interview, Watkins initially confessed to Detective Barfield that he buried Chou's remains after she had stabbed herself. Only later did Watkins finally confess to

Here, the police requested an interview. And, similar to Mathiason and unlike Craighead, Watkins voluntarily showed up at the police station at a mutually agreed time. The police told him that he was "free to leave." They told him how to exit the station. Like Mathiason, the fact that the interview occurred in the police station setting did not render the interview custodial. The presence of the shovel wrapped with evidence tape was less deceptive than the false statement that the police had found Mathiason's fingerprints at the scene. This tactic did not make the interrogation custodial. In light of these cases and Miranda's objective standard, the trial court did not err in concluding that Watkins was not subjected to custodial interrogation prior to confessing.

B. Admissibility of post-*Miranda* statements

Watkins' first confession occurred prior to him receiving Miranda warnings. After the police read him his Miranda warnings, he confessed again. Watkins argues that this is an interrogation strategy that the Supreme Court declared unconstitutional in Missouri v. Siebert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

In Siebert, the police arrested and ultimately obtained a confession from Siebert. Id. at 604-05. In their interrogation, the police deliberately refrained from

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stabbing Chou. Watkins argues that because this amounted to a confession of a separate crime—unlawful disposal of human remains under RCW 68.50.130— it supports the inference that he was in custody. But, in Lorenz the court rejected a similar argument: "it is, as the State contends, irrelevant whether the police had probable cause to arrest Lorenz (before or during the interview)." 152 Wn.2d at 37. Therefore, the fact that police had probable cause during the interview to believe that Watkins had committed a different crime than that being investigated does not establish that he was in custody.

providing Miranda warnings as part of a "question first" strategy. See id. at 605-06. Writing for the four justices in the plurality, Justice Souter reasoned that the key inquiry underlying Miranda is whether the warnings reasonably convey to a suspect his or her rights under Miranda:

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on the suspect's part would be perplexity about the reason for discussing rights at that point . . . . Thus, when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."

Id. at 613-14 (alteration in original) (footnote omitted) (quoting Moran v. Burbine, 475 U.S. 412, 424, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)).

Justice Kennedy concurred in the judgment, and provided the fifth and decisive vote to exclude Siebert's confession. Id. at 618 (Kennedy, J., concurring). He reasoned that "[t]he plurality is correct to conclude that statements obtained through the use of this technique are inadmissible." Id. He agreed that "only in the infrequent case," such as Siebert, when police use a question-first strategy in a calculated way, post-Miranda statements must be excluded. Id. at 622. Adopting Justice Kennedy's analysis, this court has reasoned that a trial court must suppress postwarning confessions during a deliberate two-step interrogation where a midstream Miranda warning did not effectively apprise the suspect of his or her rights. State v. Hickman, 157 Wn. App. 767, 774-75, 238 P.3d 1240 (2010).

Siebert was arrested prior to the first phase of questioning. 524 U.S. at 604. But, Watkins was not under arrest and not subject to custodial interrogation when he first confessed. Admission of his confession was therefore not barred by Seibert, as framed in Justice Kennedy's concurrence, and was surely not the "infrequent case" that it contemplates.

C. Waiver of *Miranda* Rights

Watkins has fetal alcohol spectrum disorder that causes cognitive impairment. Watkins argues that his cognitive disabilities, in conjunction with the circumstances, rendered his waiver of his Miranda rights involuntary. After hearing his rights, when asked whether he is willing to continue speaking with Detective Barfield, Watkins stated, "I guess so." Detective Barfield said, "You guess so?" and "Is that a yes?" Watkins responds, "Yeah."

Under Miranda, a confession is voluntary, and therefore admissible, if made after the defendant has been advised of his or her rights, and the defendant then knowingly, voluntarily, and intelligently waives those rights. State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). The voluntariness of a confession is determined from a totality of the circumstances under which it was made. Id. at 663-64. Factors considered include a defendant's physical condition, age, mental abilities, physical experience, and police conduct. Id. at 664. A defendant's mental disability is relevant, but does not necessarily render a confession involuntary. Id. When a trial court determines a confession is voluntary, an appellate court will not disturb that finding if it is supported by substantial evidence from which the trial

court could have found that the confession was voluntary by a preponderance of evidence. Id.

The State and Watkins each presented expert testimony on whether Watkins' waiver of his Miranda rights was knowing and voluntary in light of his cognitive impairment. The State offered testimony from Dr. Kenneth Muscatel. Dr. Muscatel opined that, while Watkins has cognitive impairment, he was capable of understanding his Miranda rights and able to knowingly, intelligently, and voluntarily waive them. The trial court concluded that Dr. Muscatel's testimony was "more persuasive" than Watkins' expert.

In arguing that the trial court erred, Watkins cites numerous facts from the record showing Watkins' impairment, such as his low cognitive difficulties. But, Dr. Muscatel noted that he was tracking the conversation throughout the interrogation, which suggested that his waiver was voluntary. Based on his evaluation, Dr. Muscatel testified that he "had no question about him being competent to understand, appreciate, and waive Miranda, if he so chose." Substantial evidence supports the trial court's conclusion that Watkins' waiver of his Miranda rights was knowing, intelligent, and voluntary.

II. Privacy Act

During the interviews of Watkins, police used a handheld audio recorder that Watkins was aware of, but also recorded Watkins via video for a period after the handheld audio recorder was turned off.[7] Watkins argues that the trial court

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[7] The State agreed not to offer these recordings that were made without Watkins' knowledge.

should have excluded observations and summaries of the conversations, and evidence obtained in the investigation that stemmed from the conversations, because the conversations were recorded in violation of the privacy act.[8]

If a party violates RCW 9.73.030, which prohibits unconsented recording of "private conversations," the proper remedy is exclusion, as well as all evidence obtained during the conversation. See State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990). By contrast, if a party violates RCW 9.73.090(1)(b), which requires officers to inform persons being recorded that they are in fact being recorded, the remedy is exclusion of the recording only. Lewis v. Dep't of Licensing, 157 Wn.2d 446, 472, 139 P.3d 1078 (2006). Whether a conversation was private under the privacy act is a question of law reviewed de novo. State v. Kipp, 179 Wn.2d 718, 728-29, 317 P.3d 1029 (2014).

In Lewis, our Supreme Court noted that "this court and the Court of Appeals have repeatedly held that conversations with police officers are not private." 157 Wn.2d at 460. There "is no reasonable expectation of privacy for persons in custody undergoing custodial interrogations." Id at 467. Watkins' challenge was solely to the application of the trial court order to portions of the conversation after he confessed, was arrested and was read his rights. Therefore, he was subject to custodial interrogation during the entirety of the recorded conversations.[9] Watkins'

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[8] The State argues that this argument is waived. But, in his motion to exclude, Watkins argued that "violation of the act requires not only suppression of the recordings themselves but of all evidence derived directly and indirectly as a result of that violation." This is sufficient to preserve this issue.

[9] Watkins confessed to stabbing Chou at roughly 12:37 p.m. Police read him his Miranda rights immediately thereafter.

conversations with police here were not "private." Recording those conversations did not violate the privacy act. The trial court did not err in denying Watkins' request to exclude the evidence.

III. Search Warrant

Police obtained a search warrant for Watkins' parents' home where he had previously resided. The warrant specified items to be seized, such as specific clothing items, a knife with a camouflage handle, a pick axe, and "[a]ny other item . . . that Detectives reasonably believe may be associated with this crime." The warrant was granted in response to an affidavit that stated that Watkins killed Chou because Chou had been harassing Watkins' new girlfriend. Watkins argues that the "any other item" language is overbroad, and therefore violated the requirement that items to be seized be described with particularity.

The Fourth Amendment requires that search warrants particularly describe the place to be searched and the persons or things to be seized. U.S. CONST. amend. IV. Warrants must enable the searcher to reasonably ascertain and identify the things that are authorized to be seized. State v. Besola, 184 Wn.2d 605, 610, 359 P.3d 799 (2015). This court reviews de novo the issue of whether a warrant meets the particularity requirement of the Fourth Amendment. State v. Clark, 143 Wn.2d 731, 753, 24 P.3d 1006 (2001). And, it evaluates search warrants in a common sense, practical manner, rather than using a hypertechnical standard. State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997).

Quoting Marron v. United States, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927), Watkins contends that the purpose of the particularity requirement is that " 'nothing is left to the discretion of the officer executing the warrant.' "[10] But, decisions of this court have reasoned that a "grudging and overly technical requirement of elaborate specificity has no place in determining whether a warrant satisfies the Fourth Amendment requirement of particularity." State v. Christiansen, 40 Wn. App. 249, 254, 698 P.2d 1059 (1985).

In Christiansen, a clause in the warrant directed seizure of " 'all evidence and fruits of the crime(s) of manufacturing, delivering, or possessing controlled substances.' " Id. at 251. The court found that this was sufficiently particular, because the description of the items to be seized was confined to the evidence of the suspected crime. Id. at 254. This court came to a similar conclusion in State v. Reid, 38 Wn. App. 203, 212, 687 P.2d 861 (1984):

> The warrant here sufficiently limited the searching officers' discretion. The phrase "any other evidence of the homicide" specifically limited the warrant to the crime under investigation. The specific items listed, such as a shotgun and shotgun shells, also provided guidelines for the officers conducting the search. Therefore, these limitations were adequate to prevent a general exploratory search.

Similarly here, the warrant limited the scope to items "[d]etectives reasonably believe may be associated with this crime." (Emphasis added.)

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[10] Our Supreme Court has reasoned that this specific statement, from Marron v. United States, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927), "is not read literally, because to do so would mean that an officer could never seize anything which is not specifically named in the warrant." State v. Perrone, 119 Wn.2d 538, 546, 834 P.2d 611 (1992).

Contrast these holdings with a case cited by Watkins, State v. Garcia, 140 Wn. App. 609, 622, 166 P.3d 848 (2007). There, the court invalidated a warrant that authorized a search of " 'any and all persons present' " at a motel room that was to be searched in relation to a drug investigation. Id. at 616, 623. It reasoned that this language was not limiting and that a generalized belief that all persons present are involved in criminal activity is an insufficient nexus. Id. at 623. Garcia does not support a conclusion that the warrant was overly broad.

Watkins argues that police were improperly rummaging through his belongings, as evidenced by the personal writings that they seized. But, here the warrant explicitly directed officers to limit their search to items related to the crime. As illustrated in the affidavit, the detectives knew the crime being investigated, the murder of Chou, was directly related to Watkins' romantic relationship with his new girlfriend. A journal and notes that contain the new girlfriend's name is precisely where a detective might reasonably expect to find personal notes relevant to the crime and motive. As in Reid, the warrant was sufficient to protect against a general exploratory search. It was sufficiently particular.

IV. Dismissal of Juror

Watkins next argues that the trial court erred in dismissing a sitting juror due to a conflict, instead of delaying trial to accommodate the juror. The trial court replaced juror 13 with an alternate juror after juror 13 was informed that his mother had a medical emergency.

A defendant in a criminal case has a right to be tried by an impartial, 12-person jury. State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995). A

defendant has no right to be tried by a particular juror or by a particular jury.[11] Id. In cases, like the one here, that are expected to take a considerable time, the trial judge may direct the selection of one or more alternate jurors. Id. CrR 6.5 governs the use of alternate jurors. State v. Stanley, 120 Wn. App. 312, 315, 85 P.3d 395 (2004). This court reviews a trial court's decision to replace a juror with an alternate for abuse of discretion. State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993).

Juror 13 requested to be excused for a family medical emergency. The defense and the trial court questioned the juror about the specifics of the situation. Juror 13 had power of attorney with respect to his mother who was experiencing a medical emergency. After this questioning, the trial court concluded that replacement of the juror was warranted. In Ashcraft, the court upheld the trial court's replacement of a juror who had a planned flight to Belgium, and the jury deliberations had been prolonged due to adverse weather. Id. at 461-62. Surely the need to attend to this emergency was more pressing than the planned flight in Ashcraft. The trial court did not abuse its discretion in determining that the medical emergency of the juror's mother provided a proper basis for being excused.

Watkins proposed a brief delay in the proceedings to accommodate the juror, rather than dismissing him. Whether the absence of the juror would have been very brief could not be known with certainty. The trial court properly weighed

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[11] Relatedly, Watkins suggests that the replacement of the juror with the alternate juror implicates his constitutional rights. But, Watkins cannot establish that seating alternate jurors amounted to a constitutional error, because he "has no right to be tried by a jury that includes a particular juror." State v. Jorden, 103 Wn. App. 221, 229, 11 P.3d 866 (2000).

the impact of a further delay on the trial. It was not an abuse of discretion to dismiss Juror 13 rather than grant a continuance.

We affirm.

Appelwick, J.

WE CONCUR:

Mann, J.

Becker, J.

APPENDIX B

FILED
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STATE OF WASHINGTON
2016 ... 12: 29

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

STATE OF WASHINGTON, Respondent, v. EZEKIEL JAMES WATKINS, Appellant.	)	No. 73352-4-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Ezekiel Watkins, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73352-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: March 2, 2018

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