Supreme Court No. 96501-3
Court of Appeals No. 76472-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VLADIMIR PITSURENKO,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

Washington Court of Appeals Decisions

Rules

Statutes

Federal Constitutional Provisions

A. IDENTITY OF PETITIONER

Vladimir Pitsurenko, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision 76472-1-I, issued on October 8, 2018, pursuant to RAP 13.3 and RAP 13.4(b)(1), (3), and (4). The opinion is attached.

B. ISSUES PRESENTED FOR REVIEW

1. This Court has specifically provided that trial courts have a responsibility to protect the constitutional rights of the diverse populations they serve. Non-English speakers accused of crimes have the constitutional right to a fair trial and to confront and cross-examine witnesses. To this end, this Court has promulgated court rules that require thorough and precise translation of all material to criminal defendants. Where Mr. Pitsurenko was prosecuted for violating a no-contact order that was not translated to him as required by this Court's general rules, did the trial court improperly abdicate its gatekeeping function by admitting the untranslated no-contact order as evidence against Mr. Pitsurenko, necessitating review by this Court under RAP 13.4(b)(1),(3), and (4)?

2. To prove that Mr. Pitsurenko committed the offense of violation of a no-contact order, the State was required to prove that he knowingly violated a provision of the no-contact order, but this order was not translated him. Should this Court accept review under RAP 13.4(b)(3) and (4) to determine whether Mr. Pitsurenko's due process right was violated by the State's failure to prove that he understood, and thus knowingly violated the specific terms of the no-contact order?

C. STATEMENT OF THE CASE

Vladimir Pitsurenko is from Russia. RP 303. He moved to the United States as an adult. RP 304. He was married to Margarita Pitsurenko in Russia, and she followed him to the United States several years later. RP 303-304. They have three children. RP 305. Their relationship was volatile and both had been accused of committing acts of domestic violence. CP 43-46; 101-112. The court issued a domestic violence no-contact order after their separation. CP 36. This no-contact order had specific provisions, including a distance provision and permission for third-party contact for the purpose of child visitation. CP 36.

Mr. Pitsurenko required the services of an interpreter at every court hearing. CP 37, 63, 88, 92; 113, 115, 118; RP 3, 35. Police

officers testified that Mr. Pitsurenko could not understand when they tried to explain Mr. Pitsurenko's legal rights to him. RP 288. The no-contact order contains a provision where the certified or registered interpreter must sign, indicating that the order was translated for the defendant from English into the language spoken by the Defendant. CP 37. This section on the no-contact order was not signed by an interpreter. CP 37. Audio from the December 18 hearing when the no-contact order was entered revealed that the interpreter did not translate the document and its detailed provisions to Mr. Pitsurenko. RP 30-34; CP 118-119.

The defense sought to prohibit the order from being introduced at trial on the basis that the specific terms of the no-contact order were not translated to Mr. Pitsurenko. CP 11-19; 118-119. The trial court denied this motion. RP 45, 78. At trial, the State did not introduce evidence that the provisions of the no-contact order had been translated to Mr. Pitsurenko. Mr. Pitsurenko was convicted by a jury of violating the order that was never translated to him. CP 146, 147.

The Court of Appeals affirmed the jury's conviction, despite the fact that the State failed to produce evidence that the no-contact was

translated to him, and the court order was admitted against him at trial despite being constitutionally infirm. Slip Opinion at 1.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review under RAP 13.4(b)(1),(3), and (4) where the trial court abdicated its duty to protect Mr. Pitsurenko's constitutional rights as a non-English speaker, wrongly determining that an untranslated order was applicable to the crime charged.

As part of a trial court's gate-keeping function, it must determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged. *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed. *Miller*, 156 Wn.2d at 31.

Washington courts guarantee that in a criminal case, the accused has a constitutional right to an interpreter. *State v. Gonzales-Morales*, 138 Wn.2d 374, 378–79, 979 P.2d 826 (1999). This is based upon the Sixth Amendment constitutional right to confront witnesses and "the right inherent in a fair trial to be present at one's own trial." *Id.*

The Legislature has also declared it the policy of this state "to secure the rights, constitutional or otherwise, of persons who, 'because of a non-English speaking cultural background, are unable to readily

understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.'" *State v. Teshome*, 122 Wn. App. 705, 710, 94 P.3d 1004 (2004) (citing *Gonzales-Morales*, 138 Wn.2d at 378–79) (quoting RCW 2.43.010)). The Legislature has provided that "[a]ll language interpreters serving in a legal proceeding, whether or not certified or qualified, shall abide by a code of ethics established by supreme court rule." RCW 2.43.080.

General Rule (GR) 11.2(b) establishes this code of conduct for interpreters:

> A language interpreter shall interpret or translate the material thoroughly and precisely, adding or omitting nothing, and stating as nearly as possible what has been stated in the language of the speaker, giving consideration to variations in grammar and syntax for both languages involved.

The Supreme Court is clear that trial courts must adapt their practices to protect the rights of a diverse population: "The growing diversity of our population will no doubt require judges to assume an affirmative role in ensuring that individual litigants fully understand the proceedings." *In re Khan*, 184 Wn.2d 679, 696, 363 P.3d 577 (2015) (Yu J., concurring).

As a "gatekeeper," the trial court has the duty to determine, "as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged." *Miller*, 156 Wn.2d at 31. The *Miller* court approved of a court's exclusion of an order that was "vague and was inadequate to give the defendant notice of what conduct was criminal and what conduct was innocent. The court was rightly loath to allow a person to be convicted under such circumstances." *Miller*, 156 Wn.2d at 29 (citing *City of Seattle v. Edwards*, 87 Wn. App. 305, 307, 311, 941 P.2d 697 (1997)). Similarly, in *State v. Marking*, a court order that failed to give the accused notice that consensual contact with the protected party violated the order was an issue that should have been considered by the trial court prior to admitting the order. *City of Seattle v. May*, 171 Wn.2d 847, 854, 256 P.3d 1161 (2011) (citing *State v. Marking*, 100 Wn. App. 506, 997 P.2d 461 (2000)).[1] If the order failed to give the defendant notice that the

[1] Though *Miller* overruled *Edwards* and *Marking* in part, holding that the validity of the no-contact order is not an element of the crime, the Court nevertheless approved of *Edwards'* invalidation of the vague court order: "we are inclined to believe that the Court of Appeals reached appropriate results in *Marking* and *Edwards*, issues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court. Collectively, we will refer to these issues as applying to the 'applicability' of the order to the crime charged." *Miller*, 156 Wn.2d at 31.

charged conduct was prohibited, the order should have been excluded as inapplicable. *Id.*

The court's role as gatekeeper is necessary when admission of evidence turns on the State meeting its burden to show that that a non-English speaker's rights were translated to him. In *State v. Morales,* where the State had the burden to show that the accused's 308[2] warning was read to him, and the police officer could not testify he knew whether the translator had in fact conveyed this right to the defendant, "The State failed to prove the 308 warning was read to Morales; thus, the blood alcohol test results were erroneously admitted." *State v. Morales*, 173 Wn.2d 560, 576-578, 269 P.3d 263 (2012).

Here, like in *Morales,* the State had the burden to show that Mr. Pitsurenko's legal rights and obligations were conveyed to him. However, the State could not produce evidence that the specific provisions he was accused of violating had been translated to him. The trial court thus erred in admitting the no-contact order at trial.

[2] "308 warnings" require the investigating officer to "inform the person of his or her right ... to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506." *Morales*, 173 Wn.2d at 569.

The Court's logic approving the result in *Edwards* and *Marking* applies with equal force to Mr. Pitsurenko's case, where his inability to understand legal English made the untranslated portions of the no-contact order similarly deficient to the vague terms of the order in *Edwards* and lack of notice in *Marking.* After hearing the audio from the December 18 hearing in which the no-contact order was entered, the trial court ruled:

> THE COURT: That was -- that was my read on it, Counsel, based upon when you listen to the totality as the Counsel -- and there's that one portion where it's a little bit blurry, but if you listen very carefully, you can hear him referencing all the documents he went through, which includes the plea. And it also -- it's a little blurry right there, but you also hear him reference the no-contact order.
>
> MS. WILSON: So just to make sure I understand, there was nothing specific that you heard or nothing that defense counsel said explicitly that he had gone through it, it's just
>
> THE COURT: I've told you what I was going to --
> MS. WILSON: -- the totality of it. Okay.

RP 45. Defense counsel filed a motion for the court to reconsider its ruling absent evidence that the terms of the no-contact order had been translated to Mr. Pitsurenko. CP 118. The trial court again denied this motion, "based on the totality of the circumstances," this time referencing not just the December 18, 2012 hearing, but the

"subsequent hearings in Federal Way and Des Moines." RP 78. However, at these subsequent hearings he pleaded guilty to *in-person* contact, not violation of a specific distance provision.

May clarifies and confirms that the "the trial court's gate-keeping role includes excluding…orders that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct)." 171 Wn.2d at 854. Here, the trial court abused its discretion in denying the defense's motion to exclude the no-contact order absent evidence that the specific provisions had been translated to him, as is constitutionally required and mandated by Supreme Court rule. The no-contact order was thus inapplicable to the crime charged, because the offense required a knowing violation of the no-contact order's provisions. CP 1. The order was therefore inadmissible.

Mr. Pitsurenko seeks review by this Court to decide whether an untranslated order can be constitutionally applied to him as a non-English speaker under RAP 13.4(b)(1),(3), and (4). Slip opinion at 7.

2. Mr. Pitsurenko asks this Court to determine whether sufficient evidence can support a conviction for a violation of a no-contact order when the State fails to present evidence that the underlying no-contact order was translated to the non-English speaker. RAP 13.4(b)(3),(4).

Mr. Pitsurensko was accused of knowingly violating a provision of a no-contact order against his estranged wife, Margarita Pitsurenko. CP 1; RCW 26.50.110(1), (5). The State was thus required to prove beyond a reasonable doubt that Mr. Pitsurenko knew of the order and *knowingly* violated its provisions. *State v. Sisemore*, 114 Wn. App. 75, 77-78, 55 P.3d 1178 (2002). A person acts knowingly if "he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense." RCW 9A.08.010(1)(b)(i); *Sisemore*, 114 Wn. App. at 78 (The State had to show the accused "knew the order existed and willfully, that is, knowingly and intentionally, contacted or remained in contact with" the protected party.).

A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. U.S. Const. amend. XIV; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt." *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). Here, no reasonable trier of fact could find that Mr. Pitsurenko, who requires the services of a translator for legal proceedings, knowingly violated the specific terms of an order which the State failed to show he understood. RP 3, 13.

Mr. Pitsurenko argued pre-trial that the no-contact order failed to provide adequate notice to because its provisions were not translated to him when the order was entered by the court. RP 13, CP 16-19; 36-37. The audio from the December 18, 2012 hearing in which the no-contact order was issued was played into the record, outside the presence of the jury, in support of the defense's motion. RP 30. The only discussion of the no contact order was Mr. Pitsurenko's attorney stating the following:

> We've also reviewed the Notice of Ineligibility to Vote and Possess Firearms. He's signed that and I'm handing that up as well. He's signed the form acknowledging receipt of the no-contact order, and I've signed the order.

RP 31. This hearing revealed that the interpreter did not specifically translate the document and its detailed provisions to Mr. Pitsurenko. RP 30-34; CP 118-119. This was supported by the fact that the portion of the no-contact order that should have been signed by the interpreter

indicating it had been translated to him was blank. CP 37. Nevertheless, the trial court denied the defense's motion to exclude the order, based on its perception about the "totality" of the hearing, not because there was evidence that the order had in fact been translated to Mr. Pitsurenko. RP 45.

At trial, the prosecution presented evidence that Mr. Pitsurenko was outside of Margarita Pitsurenko's home. RP 283. She did not see him until after police arrived, but recognized his voice outside. She called the police, who responded and found Mr. Pitsurenko outside of her apartment. RP 310; 283.

Mr. Pitsurenko's prior convictions for violation of a no-contact order were presented to the jury in a bifurcated proceeding; thus the State could not rely on them as evidence to infer that Mr. Pitsurenko had knowledge of the terms of the no-contact order in the first phase of trial, when the State had the burden of establishing that he knowingly violated the no-contact order. RP 81. And even if the State had relied on these prior convictions to help meet its burden of proof, they would not have sufficed, because these were guilty pleas for in-person violation of the no-contact order, which was different from the

violation alleged here, where there was no in-person contact. RP 55-56; CP 56; 88.

The Prosecution presented the jury with no evidence from the December 18 hearing to even attempt to establish that Mr. Pitsurenko knew about the specific terms of the order prohibiting him from coming within a specific distance of Ms. Pitsurenko. Rather, the State simply introduced the no-contact order that specifically lacked the translator's certification that it had been read and translated to Mr. Pitsurenko. CP 37; RP 286-287. Thus, all that the jury heard was that Mr. Pitsurenko, a non-English speaker who does not understand legal English, signed a no-contact order with specific provisions that had not been translated to him, and then was found outside of Ms. Pitsurenko's apartment. There was no evidence that he knew of the specific terms of the order, and that he had knowledge that he could not be within 1000 feet of her residence; thus, there was insufficient evidence that he knowingly violated the specific terms of the order. CP 36.

The Court of Appeals found this evidence sufficient, relying on a police officer's thin claim that Mr. Pitsurenko communicated with them in English at the time at the time of his arrest, even if they also

admitted that Mr. Pitsurenko told them "he didn't understand anything." Slip op. at 5.

Mr. Pitsurenko seeks review by this Court of the Court of Appeals decision that should have excluded an untranslated no-contact order as inapplicable to the crime charged. The erroneous admission of this order improperly relieved the State of its burden of proof of Mr. Pitsurenko's mental state. RAP 13.4(b)(1), (3),(4).

F. CONCLUSION

Based on the foregoing, Mr. Pitsurenko respectfully seeks review under RAP 13.4(b)(1), (3), and(4).

Respectfully submitted this the 7th day of November 2018.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. VLADIMIR PITSURENKO, Appellant.	No. 76472-1-I DIVISION ONE UNPUBLISHED OPINION FILED: October 8, 2018

BECKER, J. — A jury convicted Vladimir Pitsurenko in 2016 of felony violation of a domestic violence court order. Notwithstanding the absence of evidence that an interpreter translated the provisions of the no-contact order, issued four years previously, into Pitsurenko's native language, the State presented sufficient evidence to prove that Pitsurenko was aware of the no-contact order and knowingly violated it. And because the law does not permit Pitsurenko to collaterally challenge a court order in a later proceeding in which he is charged with violating that order, the court properly denied his motion to exclude the no-contact order. We affirm.

Margarita and Vladimir Pitsurenko grew up together in Russia. When Pitsurenko was about 20 years old, he moved to the United States. His wife,

Margarita, followed a couple of years later.[1] The couple lived in Massachusetts for several years before they settled in Washington. They have three children together. The couple separated in late 2012 or early 2013.

In December 2012, the King County Superior Court issued a no-contact order prohibiting Pitsurenko from contacting Margarita for a period of five years. The order prohibited Pitsurenko from being within 1,000 feet of Margarita's residence or her person. The order permitted only third-party contact for the purpose of facilitating visitation with the children. Pitsurenko signed the order underneath the statement, "I acknowledge receipt of this order." At the end of the no-contact order, there is a section for an authorized interpreter to certify that he or she translated the provisions of the order into the defendant's native language. That portion of the order was left blank.

Four years later, around midnight on October 5, 2016, Margarita called the police after she heard someone yelling "like an animal" outside her bedroom window of the apartment she shared with the children. She immediately recognized Pitsurenko's voice. The screaming lasted for about 20 minutes and disturbed some of her neighbors. Margarita was afraid to look outside or open the door, but once she heard police officers arrive, she stepped onto her porch and saw Pitsurenko.

Donovan Heavener, a Federal Way police officer, arrived at Margarita's apartment in response to her call. He heard yelling, walked behind the apartment, and found Pitsurenko standing next to the back patio door. Officer

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[1] We refer to Margarita Pitsurenko by her first name to avoid confusion.

Heavener spoke to Pitsurenko, who provided his Russian passport as identification. Pitsurenko appeared to be intoxicated. His eyes were glassy and bloodshot, and he smelled of alcohol. After a second officer arrived and spoke with Margarita, Officer Heavener arrested Pitsurenko.

At Pitsurenko's bifurcated trial for felony violation of a no-contact order, the State presented the testimony of Margarita and the two police officers who responded to her call. The defense did not call any witnesses.

There was no dispute that Pitsurenko received the no-contact order in 2012 and that his presence on Margarita's back patio on the night of October 5, 2016, violated the terms of the order. Pitsurenko argued that he could not speak English well enough to understand the terms of the no-contact order, pointing out that the State presented no evidence that the order was translated into Russian in 2012, or at any other time. And relying on evidence that Margarita unsuccessfully sought to rescind the no-contact order in 2015, Pitsurenko claimed he had reason to believe the order was no longer in effect.[2]

The State argued that the two-page order was not overly technical or complex and there was no evidence to indicate that Pitsurenko's understanding of English was insufficient to understand it. The State further argued that Pitsurenko's use of an interpreter during the trial was not evidence that his English ability was insufficient to understand the terms of the no-contact order without translation and pointed to evidence that Pitsurenko was able to communicate with the police officers in English at the time of his arrest.

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[2] Apparently, Margarita failed to schedule a hearing on her motion to lift the order.

A jury found Pitsurenko guilty. The jury also found by special verdict that Pitsurenko and Margarita were members of the same family or household prior to or at the time of the crime. Following a second phase of the trial, the jury found that Pitsurenko had been convicted twice previously of violating the provisions of a court order. He now appeals.

Sufficiency of the Evidence

Pitsurenko claims that because the State presented no evidence that an interpreter translated the order, or other evidence that he understood its specific terms, no reasonable trier of fact could find that he knowingly violated the no-contact order. Pitsurenko contends the only evidence before the jury demonstrated that he was a Russian speaker who was unable to understand "legal English" and he signed an order that was not translated into his native language. He points out that the jury could not infer knowledge from his two prior convictions for violating the 2012 order because the evidence of his convictions was not before the jury.

This court reviews claims of insufficient evidence to determine whether, "after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences from the evidence in favor of the State and against the defendant. Salinas, 119 Wn.2d at 201. In the sufficiency context, we consider circumstantial evidence as probative as direct evidence. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). We defer to the fact finder on issues of conflicting testimony, witness

credibility, and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

To convict Pitsurenko of felony violation of a court order from October 5, 2016, to October 6, 2016, the State had to prove that a no-contact order applicable to Pitsurenko existed on those dates, that Pitsurenko knew the order existed and knowingly violated it, and that, in relevant part, he had twice been previously convicted for violating the provisions of a court order. See RCW 26.50.110(1). A person acts knowingly if "he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense." RCW 9A.08.010(1)(b)(i).

Contrary to Pitsurenko's argument, the jury was not required to infer that he could not have understood the terms of the 2012 no-contact order without translation. Both police officers communicated with Pitsurenko on the night of the incident in English. When Officer Heavener came upon Pitsurenko, they briefly conversed in English. They had further conversation while a second officer spoke with Margarita. Later, on the way to the jail, Officer Heavener and Pitsurenko discussed something else "not related to this case whatsoever." Officer Heavener acknowledged that when he recited the Miranda[3] warnings, Pitsurenko responded that he "didn't understand anything." But Pitsurenko's statement was vague and ambiguous, especially because before and after he claimed not to understand "anything," Pitsurenko communicated with the officers in English.

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

Viewing the evidence and all reasonable inferences in the light most favorable to the State, as we are required to do, the evidence was sufficient for the jury to find that Pitsurenko knew of the existence of the order and knowingly violated it.

Admission of No-Contact Order

Before trial, Pitsurenko sought to exclude the 2012 no-contact order he was charged with violating. He argued that because the provisions of the order were not translated into his native language, the order was invalid. The State objected because whether or not it was translated, the order had not expired and the trial court had the authority to impose it. After listening to an audio recording of the December 2012 sentencing hearing, during which the court issued the no-contact order as a part of a criminal judgment and sentence, the trial court denied the motion. The trial court also denied Pitsurenko's motion for reconsideration.

Pitsurenko assigns error to the court's ruling. He claims that because there was no evidence the order was translated, the State failed to prove he had specific notice of the prohibited conduct and the court should have excluded the order as "inapplicable."

The collateral bar rule prohibits a party from challenging the validity of a court order in a later proceeding for violation of that order. City of Seattle v. May, 171 Wn.2d 847, 852, 256 P.3d 1161 (2011). While exceptions exist for orders that are void or inapplicable, the court order at issue in this case is neither. May, 171 Wn.2d at 852, 854-55. An order is void "only if there is 'an absence of jurisdiction to issue the type of order, to address the subject matter, or to bind the

defendant.'" May, 171 Wn.2d at 852, quoting Mead Sch. Dist. No 354 v. Mead Educ. Ass'n, 85 Wn.2d 278, 284, 534 P.2d 561 (1975). And an order is "inapplicable" only if it does not apply to the defendant or to the charged conduct, or if the order cannot constitutionally be applied because, for instance, the face of the order fails to give the restrained party adequate notice of the prohibited conduct. May, 171 Wn.2d at 854.

The no-contact order was in effect in October 2016, and Pitsurenko was subject to the terms of the order. The terms of the order are not vague, nor is it otherwise inadequate on its face. Pitsurenko's argument regarding his right to translation of the provisions of the order does not implicate the limited exceptions to the collateral bar rule. May leaves no doubt that no-contact orders issued pursuant to chapter 10.99 RCW, as Pitsurenko's was, may not be collaterally attacked. May, 171 Wn.2d at 854-55; see also State v. Miller, 156 Wn.2d 23, 31 n.4, 123 P.3d 827 (2005) ("We do not suggest that orders may be collaterally attacked after the alleged violations of the orders. Such challenges should go to the issuing court, not some other judge.").

Affirmed.

Becker, J.

WE CONCUR:

Andrus, J.

Mann, ACJ

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. 76472-1-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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