Supreme Court No. 97450-1
(COA No. 50794-3-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. DOTSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Michael Dotson asks this Court to review the opinion of the Court of Appeals in *State v. Dotson*, No. 50794-3-II (issued on June 18, 2019). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Article I, section 22 guarantees a defendant the right to notice of the charges brought against him by the State. Here, the State charged Mr. Dotson with violating a court order which was not in effect at the time of the alleged offense. Just moments before resting its case, the State learned of its error and moved to amend the information to allege violation of a different court order. Was Mr. Dotson deprived of his right to notice of the charges against him? RAP 13.4(b)(3), (4).

2. CrR 2.1(d) permits amendment of the information only when a defendant's substantial rights are not prejudiced by the amendment. When a jury is empaneled and the State moves to amend late in its case, impermissible prejudice to a defendant's rights is more likely to occur. Here, after learning it had charged Mr. Dotson with violating an invalid court order, the State moved to amend the information to include a different order just moments before resting its case. Where the record is

clear counsel would have advised Mr. Dotson differently and prepared for trial differently in light of the amendment, and were Mr. Dotson's substantial rights to notice, effective counsel, and the prepare a defense prejudiced by the late amendment?

C. STATEMENT OF THE CASE

Aberdeen Police Officer Steve Timmons saw Michael Dotson walking with Leona Martin-Starr. RP 92. Believing Mr. Dotson had a court order prohibiting contact with Ms. Martin-Starr, Officer Timmons contacted Sergeant Ross Lampky to verify whether a valid no-contact order was in effect. RP 94-95. Sergeant Lampky confirmed the existence of a valid no-contact order between Mr. Dotson and Ms. Martin-Starr, but the officers did not know what specific no-contact order was in place. RP 112. Later that day, Officer Timmons saw Mr. Dotson again, this time without Ms. Martin-Starr. RP 96. Officer Timmons arrested Mr. Dotson for violating a no-contact order. Id.

The State charged Mr. Dotson with one count of violation of a court order. CP 60-62. In the information, the State accused Mr. Dotson of violating a pretrial no contact order issued by Grays Harbor Superior Court under cause number 15-1-381-2. CP 60-62; Ex. 9. The State

further alleged Mr. Dotson committed the violation against a family or household member. CP 60-62.

At trial, Ms. Martin-Starr did not appear. Instead, the State offered two prior judgment and sentences and their corresponding no-contact orders to establish Mr. Dotson and Ms. Martin-Starr were family or household members. Ex. 4, 6, 8, 9. Sergeant Lampky testified he confirmed the existence of a no-contact order between Mr. Dotson and Ms. Martin-Starr, but he did not know which specific order or under which cause number the records department had verified the order. RP 112. He did not know if multiple orders were in place. Id.

Following Sergeant Timmons's testimony, the State informed the court, "the last thing I will do is offer the certified copies of the J&S's and I will be – that should be it." RP 120. The court recessed. RP 120. Upon resuming the trial and just prior to resting its case, the State moved to amend the information to allege Mr. Dotson had violated the post-conviction no-contact order issued under cause number 13-1-75-2 rather than the pretrial order from cause number 15-1-381-2 as initially charged. RP 124-25. The State asserted it was the "consensus of our office that as a matter of law" the subsequent conviction in cause

number 15-1-381-2 "would basically nullify the [pretrial] order" charged in the information. Id.

Defense counsel objected to the late amendment. Counsel made clear he would have "proceeded in a different way" had the correct no-contact order been listed in the information. RP 125. Counsel informed the court, "the information is the one that [defense] had been preparing for this entire time." Counsel argued that had he known the State would proceed under the 13-1-75-2 order, "it would have been a different issue entirely from the get-go." RP 126, 127. Counsel further averred, "I know that I would have looked at the case in a different way and advised my client accordingly." RP 128. More specifically, counsel "would have certainly had different things to say to [Mr. Dotson] and [he] would have certainly prepared differently based on that no-contact order versus" the order originally alleged in the information. Id. Counsel further moved to dismiss based on prosecutorial mismanagement. RP 127.

Nevertheless, the court allowed the amendment, stating, "I don't see how you could have gotten or attacked this certified copy of the domestic violence no-contact order." RP 133. The State introduced in evidence the judgment and sentence and post-conviction no-contact

order for cause number 13-1-75-2. RP 136-37. Mr. Dotson was convicted of violating a court order. CP 1-12.

The Court of Appeals found the trial court did not err in permitting the late amendment. Slip Op. at 4. The court found Mr. Dotson did not establish he was prejudiced by the amendment because his "attorney's general statements to the trial court do not identify any prejudice or substantial right that was prejudiced" thereby. Slip Op. at 6. Additionally, the court declined to follow this Court's plurality opinion in State v. Gehrke, 193 Wn.2d 1, 434 P.3d 522 (2019), determining that the State in this case had not "functionally completed" its case. Slip Op. at 5, n. 1.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The State's eleventh-hour amendment to the information deprived Mr. Dotson of his constitutional right to notice of the charge, prejudicing his right to effective assistance of counsel and to prepare a defense.

a. The charging document must provide notice of all elements of the offense.

The accused has a constitutional right to notice of the crimes alleged against him. Const. art. I, § 22[1]; U.S. Const. amend. VI.[2] Notice of the nature of the charges and cause of the allegations is provided through the information. CrR 2.1. The State must include all essential elements of the allegation in the information. State v. Kosewicz, 174 Wn.2d 683, 691, 278 P.3d 184 (2012) (citing State v. Kjorsvik, 117 Wn.2d 93, 101–02, 812 P.2d 86 (1991)). A defendant's right to notice is violated when he or she is put on trial for an uncharged act. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

The charging document must contain (1) the elements of the crime charged, and (2) a description of the specific conduct of the

[1] Article I, section 22 provides in pertinent part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof . . .."

[2] The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . .."

defendant which allegedly constituted the crime. City of Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992). The description of the alleged conduct is essential to providing the accused with adequate notice and the opportunity to prepare a defense. State v. Tandeki, 153 Wn.2d 842, 847, 109 P.3d 398 (2005).

b. The charging document may only be amended if substantial rights of the defendant have not been prejudiced.

CrR 2.1(d) controls the amendment of a charging document. It provides: "The court may permit any information . . . to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." CrR 2.1(d). "CrR 2.1[(d)] necessarily operates within the confines of article 1, section 22." State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987). While amendments to the information are liberally allowed between arrest and trial, the constitutionality of amending the information once trial has already begun presents a different question. Id. at 490. This is because the stages of trial, including pretrial motions, jury selection, opening statements, and the questioning and cross-examination of the State's witnesses, are based on the "precise nature of the charge alleged in the information." Id. "Where a jury has already been empaneled, the defendant is highly

vulnerable to the possibility that jurors will be confused or prejudiced by a variance from the original information." Id. Impermissible prejudice to a defendant's substantial rights is more likely when a jury is involved and the amendment occurs late in the State's case. State v. Schaffer, 120 Wn.2d 616, 621, 845 P.2d 281 (1993).

Additionally, a plurality of this Court recently determined the Pelkey rule extends to situations where the State has functionally completed presentation of its case. State v. Gehrke, 193 Wn.2d 1, 434 P.3d 522 (2019). In Gehrke, the State moved to amend the information to add one count of first degree manslaughter at the conclusion of its presentation of its case. 193 Wn.2d at 5. The plurality found that the rule established in Pelkey is "not concerned with whether the State has *formally* rested." Id. at 9 (emphasis in original). Indeed, Pelkey holds that trial courts may not allow the "State to amend the information . . . *after the State completed presentation of its case in chief*." Pelkey, 109 Wn.2d at 487 (emphasis added).

c. Mr. Dotson's substantial rights were prejudiced by the State's late amendment to the information.

Here, Mr. Dotson's substantial rights were prejudiced by the State's late amendment. The State moved to amend the information

shortly before it rested its case. The information as originally charged accused Mr. Dotson of violating a pre-trial no-contact order issued in Grays Harbor Superior Court cause number 15-1-381-2. Because Mr. Dotson was later convicted of the underlying charge from that 2015 case, it was "the consensus of [the State] that as a matter of law, that would basically nullify the order" which Mr. Dotson had been charged with violating in the instant case. RP 124-25. Upon discovering it had charged Mr. Dotson with violating an order which was not in effect on the date of the incident, the State moved to amend the information, just moments before resting its case, to charge him with violating a post-conviction no-contact order issued in cause number 13-1-75-2.

This late amendment prejudiced Mr. Dotson's right to notice of the charge against him, his right to effective counsel, and his right to prepare a defense. The 2015 no-contact order originally identified in the information was no longer in effect because it was a pretrial order which was not extended or replaced after Mr. Dotson was convicted.[3] Nowhere on the subsequent judgment and sentence did the court

[3] See State v. Shultz, 146 Wn.2d 540, 547, 48 P.3d 301 (2002) (holding a pretrial no-contact order may remain in effect after conviction if the trial court determines at sentencing that contact with the victim is to be restricted and affirmatively indicates on the judgment and sentence the pretrial order is to remain in effect).

restrict contact between Mr. Dotson and Ms. Martin-Starr or indicate the pretrial order was to remain in effect. Ex. 4. Notably, the checkbox next to the no-contact sentencing condition is unchecked. Ex. 4. Thus, counsel advised Mr. Dotson, and prepared for and proceeded to trial, with the understanding the State had charged Mr. Dotson with violating a no-contact order not in effect at the time of the alleged violation.

The Court of Appeals found Mr. Dotson's attorney's statements were "general" and did not identify any prejudice or substantial rights affected by the late amendment. Slip Op. at 6. The court also declined to apply the reasoning in Gehrke's lead opinion, and distinguished it by noting the State had not functionally completed its case because it recalled Sergeant Timmons as a witness after the trial court permitted the late amendment. Slip Op. at 5, n. 1.

However, the record is clear counsel would have proceeded differently and advised Mr. Dotson differently had the State not amended the information without notice. RP 128, 130. While counsel acknowledged Mr. Dotson might still have chosen to pursue trial, counsel was clear he "would have certainly had different things to say to [Mr. Dotson]" and he "would have certainly prepared differently." RP 128. It is possible, if not likely, counsel only advised Mr. Dotson to

pursue trial *because* the State charged him under the wrong no-contact order, and would have otherwise discouraged Mr. Dotson from trial otherwise.

Moreover, contrary to the Court of Appeals decision, the State in this case had functionally completed the presentation of its case. The State informed the trial court, "the last thing I will do is offer the certified copies of the J&S's and I will be – that should be it." RP 120. That the State later recalled a witness *after* the trial court had already permitted an untimely amendment to the information is inconsequential to determining when the State had completed presentation of its case.

By allowing the State to correct this "error in their ways" just minutes before it rested its case, the court deprived Mr. Dotson of his right to notice, right to effective counsel, and right to prepare a defense. RP 126. This Court should accept review to determine whether the trial court abused its discretion when it allowed an eleventh-hour amendment to the information despite significant prejudice to Mr. Dotson's substantial rights, in contravention of Pelkey, Schaffer, and CrR 2.1(d). RAP 13.4(b).

E. CONCLUSION

Based on the foregoing, Mr. Dotson respectfully requests that review be granted. RAP 13.4(b).

DATED this 18th day of July 2019.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 18, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL J. DOTSON, Appellant.	No. 50794-3-II UNPUBLISHED OPINION

LEE, A.C.J. — Michael J. Dotson appeals his conviction for felony violation of a no contact order. Dotson argues that the trial court erred by allowing the State to amend its information mid-trial. Dotson also argues that he received ineffective assistance of counsel. We affirm.

FACTS

The State charged Dotson with Felony Violation of a No Contact Order (VNCO). CP 60; PDF 62. The information specifically alleged that "on or about May 26, 2017, with knowledge that the Grays Harbor Superior Court had previously issued a no contact order. . .in State of Washington v. Michael James Dotson, Cause No. 15-1-381-2 did violate the order while the order was in effect. . . ." Clerk's Papers (CP) at 60; PDF 62.

Prior to trial, the State offered four certified judgment and sentences showing Dotson's prior VNCOs against the same victim. VRP 13-14. Dotson objected, arguing that because the State was only required to prove two prior VNCOs, introducing proof of four prior VNCOs was

unduly prejudicial. VRP 13-14. The trial court agreed and ruled that the State would be limited to introducing evidence of two prior VNCOs. VRP 17. However, if Dotson challenged the validity of either prior VNCO, the State would be permitted to offer evidence of the additional prior VNCOs in rebuttal. VRP 17.

Sergeant Steve Timmons of the City of Aberdeen Police Department testified at Dotson's jury trial. VRP 89. Timmons testified that, on May 26, 2017, he was eating at a restaurant before starting his shift. VRP 91. While at the restaurant, Timmons saw Dotson with Leona Starr and Clifford Hudson. VRP 92. Timmons testified that he was familiar with all three individuals because of previous contacts he had with them. VRP 92-93. Timmons was aware that Dotson had a no contact order prohibiting contact with Starr. VRP 94. Timmons confirmed the no contact order with Sergeant Ross Lampky. VRP 94. Later, after he began his shift, Timmons arrested Dotson for violation of the no contact order. VRP 96. Timmons testified that he pulled a copy of a pretrial no contact order and attached it to his police report. VRP 117; Ex. 9.

Lampky also testified at trial. VRP 103. Lampky testified that Timmons called him and asked him to verify a no contact order between Dotson and Starr. VRP 105. Lampky called the records department and verified there was a no contact order that had been served. VRP 105. Lampky testified that he did not know what specific no contact order was confirmed by the records department or if there were multiple orders in effect at the time. VRP 112.

The trial court then released the jury for lunch. VRP 119. Before the trial court recessed for lunch, the State informed the court that, after lunch it would introduce the certified judgment and sentences for the prior VNCOs and then "that should be it." Verbatim Report of Proceeding

(VRP) at 120. However, after lunch, the State asked to amend its information. VRP 124. The State explained,

> Well, as you heard at the end of testimony, the no-contact order which has been admitted as Exhibit 3, is a pretrial no-contact order. The defendant was convicted prior to this date and a postconviction replacement order was not put in place. So I had a conversation over lunch about whether the conviction nullifies the pretrial order. And it's the consensus in our office that as a matter of law, that would basically nullify the order we've been talking about as Exhibit 3.
>
> Now, Mr. Dotson had two active orders at that time. He had an order which has been premarked as Exhibit 8, but not admitted in Cause Number 13-1-75-2. That is a postconviction no-contact order, same parties are protected, same restraint provisions, and it does not expire until 2018. So as embarrassing as it is that our office didn't catch it until now, I just – the – the amended information simply changes the cause number of the no-contact order that was violated.

VRP at 124-25. The State proposed an amended information alleging that Dotson violated a no contact order issued in Cause No. 13-1-75-2. CP 43; PDF 45.

Dotson objected to the amendment and asserted that he would be prejudiced by the amendment. VRP 127. The trial court asked Dotson to explain exactly how he was prejudiced. VRP 128. Dotson's attorney stated,

> So by not amending to it, we proceeded in a certain way. Whereas, if they would have amended it two weeks ago or earlier, I know that I would have looked at the case in a different way and advised my client accordingly.
> . . . .
> He still may have wanted to go to trial, but I would have certainly had different things to say to him and I would have certainly prepared differently based on that no-contact order versus the one that I had. Because I did not have that one, it's not in my –
> . . . .
> Yes. So maybe I misspoke about not having that until recently. I keep seeing pretrial. But I also looked a little further and that was the – but still, had they plead it properly, I would have changed my strategy on how to attack the validity of the no-contact order.
> . . . .

> I mean I proceeded on this case as this is a preconviction. This no-contact order is preconviction, so I set my case up on that to question the officers about is this the one that you verified? Is this the one that you base your decision to arrest on. And the answer was yes. Had they plead the different one saying postconviction, I probably wouldn't even – those questions wouldn't' even have been – I mean they would have been relevant, but I probably wouldn't have asked them.

VRP at 125-31.

The trial court stated that it was "struggling to see any prejudice by allowing the information to be amended, because it is allowable to amend the information right up to the time that the State rests." VRP at 132. The trial court allowed the State to amend the information. VRP 133.

The jury found Dotson guilty of felony VNCO. CP 34; PDF 36. Dotson's offender score was calculated at 10. CP 3; PDF 5. The trial court imposed a standard range sentence of 60 months confinement. CP 4; PDF 6.

Dotson appeals.

ANALYSIS

A. AMENDMENT OF INFORMATION

Dotson argues that the trial court erred by allowing the State to amend its information. Br. of App. at 10-13. We disagree.

We review a trial court's ruling on a motion to amend a complaint for an abuse of discretion. *State v. Schaffer*, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

CrR 2.1(d) allows the State to amend an information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced."[1] While the rule permits liberal amendment, it operates within the boundaries of article 1, section 22 of the Washington Constitution, which requires that the accused be adequately informed of the charge to be met at trial. *State v. Schaffer*, 120 Wn.2d 616, 622-23, 845 P.2d 281 (1993).

[1] Recently, our Supreme Court decided *State v. Gehrke*, ___ Wn.2d ___, 434 P.3d 522, 526 (2019). The main issue in *Gehrke* was whether to expand the *Pelkey* rule, which prohibits the State from amending an information after it rests unless the amendment is to a lesser included or lesser degree offense. *Gehrke* is a plurality opinion. Four justices signed the opinion applying the *Pelkey* rule to a situation when the State had functionally completed presentation of its case but before it formally rested. *Gehrke*, 434 P.3d at 529. Three justices dissented, stating that the *Pelkey* rule does not apply until the State formally rests. *Gehrke*, 434 P.3d at 534-35. Two justices concurred in the result reached by the four justices because the defendant demonstrated prejudice resulting from the amendment, as required under CrR 2.1(d). *Gehrke*, 434 P.3d ay 533. But the concurring justices disagreed with the plurality opinion in applying the *Pelkey* rule and expressly agreed with the dissent that the *Pelkey* rule does not apply until the State formally rests. *Gehrke*, 434 P.3d ay 533. Therefore, a majority of justices agreed that the *Pelkey* rule does not apply until the State has formally rested its case.

A plurality opinion "has limited precedential value and is not binding on the courts." *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). Therefore, we decline to follow the rule articulated by the plurality—that *Pelkey* applies when the State functionally completes the presentation of its case—and continue to apply CrR 2.1(d)'s substantial prejudice rule if the amendment is made prior to the State resting its case in chief. *See State v. Schaffer*, 120 Wn.2d 616, 619-22, 845 P.2d 281 (1993) (declining to apply *Pelkey* to amendments during the State's case and holding that CrR 2.1(d) is the appropriate rule to apply to amendments made during the State's case).

Moreover, here, although the State told the trial court that it had completed presenting evidence, after trial court allowed the amendment, the State actually briefly recalled Sergeant Timmons and presented additional testimony. VRP 135-36. Therefore, even under the "functionally completed" standard set by the plurality opinion in *Gehrke*, the *Pelkey* rule likely would not apply because the State presented additional evidence after the amendment.

The defendant bears the burden of establishing prejudice resulting from an amendment to the information. *See State v. Mahmood*, 45 Wn. App. 200, 205, 724 P.2d 1021 (1986) (holding in the absence of showing the defendant was misled or surprised, the defendant cannot meet his burden to show prejudice). A defendant can meet the burden by showing unfair surprise or inability to prepare a defense. *State v. James*, 108 Wn.2d 483, 489, 739 P.2d 699 (1987).

Here, Dotson's attorney argued the amendment was prejudicial because he would have advised his client differently and he would have taken a different approach to questioning the officers. However, Dotson's attorney's general statements to the trial court do not identify any prejudice or substantial right that was prejudiced by the amendment. And the record shows that the State provided Dotson with a copy of the post-conviction NCO in discovery prior to trial. VRP 129-30. Also, the State did not call any different witnesses based on the amendment. Because Dotson had a copy of the valid post-conviction NCO and the State did not add or change witnesses, Dotson fails to show unfair surprise or an inability to present a defense. *See State v. James*, 108 Wn.2d 483, 489, 739 P.2d 699 (1987) (holding defendant can show prejudice to substantial rights by showing unfair surprise or an inability to prepare a defense); *Mahmood*, 45 Wn. App. at 205.

The trial court did not abuse its discretion by allowing the State to amend the information. Accordingly, we affirm Dotson's conviction.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Dotson also argues that he received ineffective assistance of counsel because his counsel failed to object to evidence of his prior convictions and failed to stipulate to the fact of the prior convictions. Br. of App. at 14-16. We disagree.

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 346 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). An ineffective assistance of counsel claim is a mixed question of fact and law that we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. *Grier*, 171 Wn.2d at 32-33 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If the defendant fails to satisfy either prong, the defendant's ineffective assistance of counsel claim fails. *Grier*, 171 Wn.2d at 33.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. We engage in a strong presumption that counsel's performance was reasonable. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant may overcome this presumption by showing that " 'there is no conceivable legitimate tactic explaining counsel's performance.' " *Grier*, 171 Wn.2d at 33. Recently, our Supreme Court held that the record must be sufficient for us to determine what counsel's reasons for the decision were in order to evaluate whether counsel's reasons were legitimate. *State v. Linville*, 191 Wn.2d 513, 525-26, 423 P.3d 842 (2018). If counsel's reasons for the challenged action are outside the record on appeal, the defendant must bring a separate collateral challenge. *Linville*, 191 Wn.2d at 525-26.

Here, defense counsel did object to the admission of four of Dotson's prior convictions because the State only needed to prove he had two prior convictions. However, the reasons why counsel decided to have the State prove the existence of the prior convictions rather than stipulating

to the existence of prior convictions is not in the record before us. Therefore, this court cannot determine whether counsel's performance was deficient for failing to stipulate to the existence of Dotson's prior convictions. *See Linville*, 191 Wn.2d at 525-26. Accordingly, Dotson must bring a collateral challenge. *Linville*, 191 Wn.2d at 525-26; *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

, A.C.J.

Lee, A.C.J.

We concur:

Worswick, J.

Cruser, J.

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. 50794-3-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: July 18, 2019
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