NO. 99922-8

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DONALD GEORGE, IV,

Petitioner.

# ANSWER TO PETITION FOR REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

ANNE EGELER
Deputy Prosecuting Attorney
WSBA No. 20258/ OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-7400

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## I. INTRODUCTION

Review of the Court of Appeals decision is not warranted. The unpublished appellate decision closely adhered to state and federal case law. First, George's motion to suppress was properly denied. George contends that the deputy pursued him based on a fleeting glimpse and "no other circumstances." Pet. at 7. Not so. The Court of Appeals properly applied the longstanding "totality of the circumstances" test in holding that the deputy had a reasonable suspicion of criminal activity. *See, e.g.*, *State v. Weyand*, 188 Wn.2d 804, 811-12, 399 P.3d 530 (2017)). The circumstances included George's unusual leap from a still-moving car and headlong flight in response to a routine traffic stop, a felony warrant for a similar looking man, and the trial court's uncontested finding that George resembled the wanted felon.

Second, the Court of Appeals followed long settled case law in upholding the trial court's discretionary decision to exclude the irrelevant oral ruling from 2014. While defendants

have a constitutional right to present a full defense, it is well settled that there is no constitutional right to present irrelevant evidence. *E.g.*, *State v. Orn*, 197 Wn.2d 343, 352, 482 P.3d 913 (2021).

The petition for review should be denied.

## II. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals properly determine that the seizure was justified by a reasonable suspicion of criminal activity, based on unchallenged state and federal case law holding that reasonable suspicion requires analysis of the totality of the circumstances, including appearance, prior knowledge and experience, and flight from law enforcement?

B. Did the Court of Appeals properly uphold the discretionary ruling that an unrelated hearing was irrelevant and had no probative value in determining the truthfulness or untruthfulness of testimony in the instant case, given longstanding, unchallenged state and federal case law holding that the defendant has no constitutional right to use irrelevant evidence?

## III. STATEMENT OF THE CASE

### A. George Was Seized by a Deputy Who Mistook Him for a Wanted Felon

On March 14, 2018, Kristie Lopez-Hopkins left her home at approximately 9:00 a.m. and went to work. 06/25/19 RP 235.

When she returned that evening, she discovered that she had been burglarized. *Id.* at 230. Her 50-inch television and a gun safe were missing. *Id.* at 236. In the safe, Lopez-Hopkins kept a loaded .38 caliber Taurus handgun, credit cards, and financial documents. *Id.* at 236-38.

On that same day, Deputy Seth Huber was actively looking for John Ironnecklace, an individual with an outstanding felony warrant. *Id.* at 218. Deputy Huber had verified the warrant a day or two earlier, and he knew that Ironnecklace still had not been captured. *Id.*

Just before 11:00 a.m., Deputy Huber saw a car fail to properly signal before turning. *Id.* at 178. He signaled the car to stop. *Id*. The car slowed but was still travelling at approximately 10 mph when the front passenger leaped from the car and ran through a front yard. *Id.* at 179, 181. Deputy Huber glimpsed George from a 30–40-foot distance and thought he was Ironnecklace. *Id.* at 180, 217. Deputy Huber stopped his vehicle and gave chase on foot. *Id.* at 180-81.

When the deputy came within arm's length of the fleeing man, he saw George reach into the pocket of his jacket, where the butt of a gun was sticking out. *Id.* at 181, 186. As George took his next step, he lost his footing and fell to the ground, landing on the gun. *Id.* at 182, 185, 186. Deputy Huber also lost his footing and fell on top of George. *Id.* at 185.

With both men on the ground, George pushed himself up and flung the loaded gun out from under his body. *Id.* at 182, 185. 190. Deputy Huber saw it land in front of George and flattened George back to the ground. *Id.* at 185, 186. When George pushed up again, Deputy Huber had no idea what his intent was. *Id.* at 185. There was already one gun in play and the deputy did not know whether the man beneath him had another gun. *Id.* He drew his service weapon and commanded the man not to move. *Id.* at 186, 187.

Minutes later, a second deputy arrived and George was secured. *Id.* at 188. Deputy Huber then retrieved the firearm and found that it was a loaded Taurus .38 revolver. *Id.* at 189.

Clumped in the spot where George had landed on the ground, there were credit cards issued to Kristie Lopez-Hopkins and Luis Lopez-Hopkins; mail addressed to Kristie Lopez-Hopkins and Luis Lopez-Hopkins, including a letter containing a pin number to activate a credit card; and a baggy of alprazolam pills. *Id.* at 194, 197, 201-02, 207-08.

The car George had leapt from was abandoned in the roadway and towed but not before Deputy Huber observed that the rear seats had been removed to accommodate a large television.

George was charged with second-degree identity theft, second-degree unlawful possession of a firearm, unlawful possession of a stolen firearm, and unlawful possession of a controlled substance. CP 55-57; CP 127-28.

### B. The Trial Court Denied a Motion to Suppress the Evidence Found as a Result of the Seizure

George moved to suppress the items discovered as a result of his seizure and detention. CP 5-14, 30-34, 35-40. At the CrR 3.6 hearing, Deputy Huber testified that he had previously

contacted and arrested Ironnecklace many times, and on March 14, 2018, he was actively looking for Ironnecklace on an outstanding felony warrant. 05/30/19 RP 13, 27. The Deputy knew Ironnecklace was still wanted when he saw George fleeing from the car. *Id.*

As George ran, Deputy Huber got a glimpse of him from a distance of 30-40 feet and "strongly believed" that he was Ironnecklace. *Id.* at 13. He explained that both men had dark hair, a ponytail, and a similar skin tone. *Id.* at 30. When asked about the 18-year age difference between Ironnecklace and George, Deputy Huber testified that narcotic abuse can drastically alter one's appearance and had done so with George. *Id.* at 28, 43.

Deputy Huber assumed the man was fleeing because he was Ironnecklace and wanted to evade capture on the warrant. *Id.* at 37. The deputy explained that when in a foot pursuit, he immediately gives orders to stop and get on the ground, and identifies himself. *Id.* at 14. As George ran across the yard, Deputy Huber testified that he had closed the distance to three or

four feet when he saw George reach into his pocket. *Id.* at 14-15. He could see "clear as day" that what George was reaching for was a gun. *Id.* at 14-15.

Deputy Huber testified that the chase was only for 50-60 yards and he believed George was Ironnecklace the entire time. *Id.* at 18. He still believed he was chasing Ironnecklace and he called him "Johnny" while they were on the ground. *Id.* at 18. It was not until he was walking George to the patrol car that he realized he was not Ironnecklace. *Id.* at 18-19.

The trial court found Deputy Huber's testimony credible and that it was reasonable for him to believe that the fleeing man was Ironnecklace. CP 39. The court concluded that it was extremely unusual for a passenger to jump out of a car that was still moving during a routine traffic stop. CP 39. The trial court found that the deputy did not have time to study the fleeing man's features or tattoos, or call on the radio to confirm the man's identity, before making the split-second decision to go after him. *Id*. After examining booking photos of George and Ironnecklace,

the trial court made a finding that "[a]s of March 14, 2018, the Defendant and Mr. Ironnecklace appeared quite similar." *Id.* at 38; *compare* CP 23-24 (George) with CP 27-28 (Ironnecklace).

Examining the circumstances as a whole, the trial court concluded that "it was reasonable for the deputy to believe that the fleeing passenger was John Ironnecklace" and denied the motion to suppress. CP 39-40.

### C. The Trial Court Prohibited Use of Irrelevant Material for Impeachment Purposes

The State filed a motion in limine to exclude testimony from an unrelated 2014 oral ruling which the defense wished to use to impeach Deputy Huber. 06/25/19 RP 149, 150.

In the 2014 case, the trial judge indicated that three minor variances in Deputy Huber's testimony gave her concerns about the credibility of the testimony but did not indicate whether the variances were caused by memory issues or untruthfulness. 1/22/15 RP 162. First, she noted that Deputy Huber testified he had read a report, but later said he had skimmed it. *Id.* at 163. Second, Deputy Huber testified that he did not visually recognize

the defendant until he was handed a driver's license; on cross examination, he stated that he ran the registration prior to approaching the vehicle, raising a question about whether the deputy could have recognized the defendant based on the registration. *Id.* Finally, Deputy Huber testified that he did not call for backup, but another deputy arrived at the traffic stop. *Id.* at 164. The trial judge stated that "on balance," she had concerns about the credibility of the testimony. *Id.* But at no point did she indicate that the deputy was untruthful.

The State moved to exclude the 2014 ruling because it was not relevant and did not contain any finding regarding the deputy's character for truthfulness or untruthfulness. *Id.* at 146, 149. The trial judge indicated that the 2014 oral ruling was not proper impeachment evidence because it was impossible to determine whether the judge simply thought the deputy's memory was incomplete. *Id.* at 152. George agreed that the 2014 ruling "is not very clear" and conceded that there was no finding of governmental misconduct. *Id.* at 156. The trial court ruled that

although standing alone, the 2014 ruling was not sufficient for impeachment purposes, it would revisit the issue if Deputy Huber's credibility was brought into question. *Id.* at 150-58.

At trial, George was found guilty of four charges. CP 91-94; 06/27/19 RP 344-45. He received a standard range sentence of 123 months of confinement. 06/27/19 RP 384-85.

George filed a timely appeal but did not contest the finding that George and Ironnecklace appeared quite similar. CP 38, 129. The Court of Appeals affirmed the conviction.

## IV. ARGUMENT

### A. The Court of Appeals Decision Tightly Adheres to Well Settled Case Law on Formation of Reasonable Suspicion of Criminal Activity

George's petition contends that review should be accepted to resolve a conflict in the case law. Pet. at 6 (citing RAP 13.4(b)(1) and (2)). There is no conflict. It is well settled that a deputy may stop and briefly detain a person "when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *United States v.*

*Hensley*, 469 U.S. 221, 227, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985); *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017). The totality of the circumstances demonstrates that Deputy Huber had a reasonable suspicion of criminal activity. Because the trial court's denial of the motion to suppress is entirely consistent with state and federal case law, further review is unwarranted.

Appellate courts consider de novo the "totality of the circumstances known to the officer," and determine whether there is substantial evidence supporting challenged findings of fact. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 1068 (1992); *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004) (addressing standard of review). Relevant circumstances include the deputy's training and experience, the location of the stop, and the amount of physical intrusion on the suspect's liberty, and the conduct of the person detained. *State v. Acrey*, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003). A deputy's reasonable suspicion is frequently based on both the facts he observes and

"commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

Contrary to George's claim on appeal, George's resemblance to Ironnecklace was not the sole cause of suspicion. Pet. at 6-7. First, Deputy Huber was actively searching that morning for Ironnecklace, who had a felony warrant. He had interacted with Ironnecklace numerous times and was well aware of his appearance. Second, George reacted to a routine traffic stop by leaping from a moving car and running. "[E]vasive behavior is a pertinent factor in determining reasonable suspicion." *Wardlow*, 528 U.S. at 124. And "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.*; *see also State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008) (recognizing that "[f]light from police officers may be considered along with other factors" in determining reasonable suspicion of criminal activity). In the

deputy's experience, jumping from a moving car to run from a routine traffic stop was definitely unusual. 5/30/19 RP 12.

It was in this context that Deputy Huber glimpsed the fleeing man and was certain that he was Ironnecklace. 05/30/18 RP 13. George and Ironnecklace have similar features, the same color hair, and a similar hair style. *Compare* CP 23-24 (George Booking Photos) with CP 27-28 (Ironnecklace Booking Photos).

After studying the men's appearance, the trial court made an unchallenged finding that Ironnecklace and George looked quite similar. CP 38 (comparing CP 23-24 (George) with CP 27-28 (Ironnecklace). This unchallenged finding is a verity on appeal. *State v. Scherf*, 192 Wn.2d 350, 370, 429 P.3d 776 (2018).

Throughout the few seconds of the chase, the deputy continued to believe George was Ironnecklace. While certain he was chasing a convicted felon, the deputy saw the man reach into his pocket to grab a gun before they both stumbled to the ground. 5/30/19 RP 16. While on the ground, the deputy still believed the

man was Ironnecklace and called him by the name "Johnny." 5/30/19 RP 18.

As this Court has expressly recognized, seizure of a person other than the one against whom a warrant is issued "is valid if the arresting officer (1) acts in good faith, and (2) has reasonable, articulable grounds to believe that the suspect is the intended arrestee." *State v. Smith*, 102 Wn.2d 449, 453-54, 688 P.2d 146 (1984). This test is well recognized in both state and federal courts and may support even the higher burden of probable cause applicable to warrantless arrests, rather than *Terry* stops. "[W]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." *Hill v. California*, 401 U.S. 797, 802, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971) (internal quotation marks omitted).

When a deputy mistakenly believes that an individual is the subject of a warrant, "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment."

*Hill v. California*, 401 U.S. 797, 804, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971); *e.g.*, *Rivera v. County of Los Angeles*, 745 F.3d 384, (2014) (holding that mistaken arrest did not violate the Fourth Amendment because the officers "had a good faith, reasonable belief that the arrestee was the subject of the warrant" despite a difference in appearance); *United States v. Williams*, 773 F.3d 98, 104 n. 2 (D.C. Cir. 2014) (noting that "reasonable mistake" cases include mistakes in officers' own observations).

The decision to pursue the fleeing man was well within reason. *See Heien v. North Carolina*, 574 U.S. 54, 60-61, 135 S. Ct. 530, 190 L. Ed. 2d 475 (2014) (explaining that with respect to search and seizure, "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection.") (internal quotation omitted).

George contends that the Court of Appeals decision conflicts with *State v. Smith*, 102 Wn.2d 449, 688 P.2d 146

(1984) because "[t]here is nothing here other than George's resemblance to Ironnecklace." Pet. at 11. But as the Court of Appeals explained, the cases are readily distinguishable. Op. at 7-9.

In *Smith*, officers responded to a tip they believed was questionable, regarding a teenage, white male with brown hair and tattoos on both hands. *Smith*, at 451, 455. The officers saw a young man standing on the sidewalk who met the general physical description and detained and searched him. *Id.* at 451. The Court held that the "mere fact that petitioner fit the description" was not enough to provide a reasonable suspicion. *Id.* at 454.

As the Court of Appeals correctly held, "three key facts distinguish this case from *Smith*." *Id.* First, the deputy did not pursue a man who merely matched a general description. Based on personal knowledge of Ironnecklace, the deputy felt certain that Ironnecklace was the fleeing man. *Id.* Second, in contrast with *Smith*, the deputy did not have the luxury of time to verify

the fleeing man's tattoos. He "had to make a split-second decision whether to pursue" a man he believed had a felony warrant for his arrest. *Id.* And third, unlike *Smith*, George was not standing around—he was in flight. The courts have repeatedly emphasized that flight is an important factor in determining whether reasonable suspicion exists. *E.g.*, *Wardlow*, 528 U.S. at 124; *Gatewood*, 163 Wn.2d at 540.

It is perhaps understandable that George continues to ask the courts to ignore the totality of the circumstances. Pet. at 6-7 (asserting that other than the glimpse of George's face, "there are no other circumstances supporting the officer's belief"). Were George to address the full record of the 3.6 hearing, and the trial and appellate courts' resulting application of the totality of the circumstances test, he would be left without argument. The courts' application of well-settled law was proper and provides no basis for review.

### B. George's Disagreement with the Evidentiary Ruling Does Not Create a Constitutional Concern

Excluding the ambiguous 2014 oral ruling did not impair George's right to present a defense. The state and federal constitutions provide the fundamental right to present a defense, including the right to cross-examine witnesses. Const. art. 1§ 22; U.S. Const. amend. VI. But as this Court has consistently held, "[n]either the right to confront nor the right to present a defense are without limitation." *Orn*, 197 Wn.2d at 352; *State v. Arndt*, 194 Wn.2d 784, 812, 453 P.3d 696 (2019). It is well settled that "a defendant has no right to present irrelevant evidence." *Orn*, 197 Wn.2d at 352 (citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). The Court of Appeals decision properly applied settled law. As a result, George's petition presents no reason to revisit these long-settled constitutional principles.

### 1. The evidentiary ruling was a proper excise of discretion

The trial court properly exercised its discretion in determining that the 2014 oral ruling was irrelevant. *See Orn*, 197 Wn.2d at 353 (holding that evidentiary rulings are reviewed for abuse of discretion). Because the 2014 oral ruling was not probative of truthfulness, it did not meet the requirements of ER 608.

In the 2014 oral ruling, the judge stated that there were inconsistencies in Deputy Huber's testimony regarding a traffic stop. 11/26/14 RP 162. To illustrate the concern, she provided three minor examples, stating for example that Deputy Huber was inconsistent in answering that he had read a document, and then later stating that he had just skimmed it. *Id.* at 162-63. There was no indication of dishonesty, untruthfulness, or governmental misconduct.

In examining the 2014 oral ruling during George's trial, the trial court could not determine what it meant. There were no findings and conclusions or transcripts to consider. The trial

court explained that when there is a memory failure the court cannot find the testimony credible, but that does not mean the witness was dishonest. *Id.* at 152. George agreed that the 2014 ruling "unfortunately, is not very clear" and that there was no finding of misconduct. 06/25/19 RP 156. Given the absence of any finding of untruthfulness, the trial court properly determined that the 2014 oral ruling was not relevant and granted the suppression motion. The court further indicated that while the ambiguous oral ruling was not relevant standing alone, George could renew his request to use it if there was other evidence indicating a lack of truthfulness. 1/22/15 RP 150-58.

Admission of credibility evidence under ER 608(b) "is highly discretionary." *State v. Lee*, 188 Wn.2d 473, 488, 396 P.3d 316 (2017) (internal citation omitted). Under the abuse of discretion standard, the trial court decision is not disturbed unless "'no reasonable judge would have ruled as the trial court did.'" *State v. Arredondo*, 188 Wn.2d 244, 256, 394 P.3d 348 (2017) (quoting *State v. Mason*, 160 Wn.2d 910, 934, 162 P.3d 396

(2007)). Because the 2014 oral ruling did not find that Deputy Huber was dishonest, a reasonable judge would conclude it was not relevant or probative of truthfulness.

Contrary to George's argument, exclusion of the ambiguous oral ruling does not conflict with *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980). In *York*, the trial court erred in suppressing *conclusive evidence* that the undercover investigator was fired from a law enforcement job based on "irregularities" in his paperwork and "general unsuitability for the job." *Id.* at 34. The conclusive evidence was probative because it tended to show the investigator's general disposition for untruthfulness. *Id.* The impact of the suppression decision was compounded by the State's contrary argument that the investigator had "done a good job, just like he's done in the past in his prior jobs." *Id.* at 35.

In sharp contrast, the 2014 oral ruling did *not* contain a conclusive determination of Deputy Huber's character for truthfulness. It therefore was irrelevant under ER 402 and not

probative of truthfulness under ER 608(b). As a result, the Court of Appeals properly upheld the trial court's exercise of discretion.

### 2. The irrelevant 2014 oral ruling was not critical to George's defense

George now contends that he was none-the-less constitutionally entitled to use the irrelevant oral ruling to impeach Deputy Huber because the jury verdict "hinged" on the credibility determination. Pet. at 16. As discussed above, this argument fails because there is "*no right* to present irrelevant evidence." *See, e.g., Orn*, 197 Wn.2d at 353 (emphasis added). Suppression of the 2014 hearing did not impair George's "ability to present *relevant* evidence supporting [his] central defense theory." *Arndt*, 194 Wn.2d at 814 (emphasis added).

Even if there were a right to use irrelevant evidence to impeach a witness, admission of the irrelevant material would have been "so prejudicial as to disrupt the fairness of the factfinding process." *Orn*, 197 Wn.2d at 353 (citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). Judges are

constitutionally permitted to exclude even marginally relevant evidence if it poses an undue risk of prejudice or confusion. *Id.* (citing *Holmes v. South Carolina*, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). It would eviscerate the State's ability to prosecute a case if its witnesses' reputation for truthfulness or untruthfulness could be impeached using irrelevant material. Critically, admission of irrelevant material would carry an undue risk of misleading the jury. As this Court indicated in *Orn*, ER 403 addresses these problems by allowing exclusion of even relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Orn*, 197 Wn.2d at 353.

Finally, even if George had a constitutional right to admission of irrelevant, misleading material, his contention that the verdict "hinged" on the 2014 oral ruling is incorrect. Pet. at 16. This is not a case in which a single deputy testified. Multiple officers testified and the cross-examination mined the perceived

differences in their testimony and wording of their reports. 06/25/19 RP 213, 215-16, 221-24; 06/26/19 RP 282-83. The closing argument used the alleged inconsistencies to claim that the testimony was not credible. *See id.* at 312-24. This was far more impactful than the 2014 oral ruling George told the trial court "unfortunately is not very clear." 1/22/15 RP 156. As a result, even if the 2014 oral ruling had some minimal relevance—and it did not—it would not have been sufficient to overcome the prejudicial impact of using the 2014 ruling to unfairly impugn the deputy's reputation for truthfulness.

**3. Given the unchallenged evidence, any error was harmless beyond a reasonable doubt**

Even if the exclusion had been improper, "[a] constitutional error is harmless if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (internal citation omitted)). If George had been allowed to bring in the inconclusive, irrelevant material it would not have impacted the verdict.

The evidence established that there an active warrant for Ironnecklace's arrest, the trial court made an unchallenged finding of fact that George and Ironnecklace are similar in appearance, George was in flight from a routine traffic stop, he tossed a handgun away from his body before falling to the ground, and he was found with credit cards issued to other people. Under these facts, any error in excluding evidence from the 2014 hearing was harmless beyond a reasonable doubt.

## V. CONCLUSION

The State requests that the petition be denied. The decisions below fully comport with longstanding decisions of this Court and the federal courts and there is no issue presented that merits review under RAP 13.4.

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RESPECTFULLY SUBMITTED this 22nd day of November, 2021

MARY E. ROBNETT
Pierce County Prosecuting Attorney

*s/Anne Egeler*
ANNE EGELER
Deputy Prosecuting Attorney
WSB # 20258 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-7400
anne.egeler@piercecountywa.gov

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## PIERCE COUNTY PROSECUTING ATTORNEY

## November 22, 2021 - 2:41 PM

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| **Appellate Court Case Title:** | State of Washington v. Donald George IV |
| **Superior Court Case Number:** | 18-1-01032-4 |

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