NO. 103509-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OWEN GALE RAY,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Timothy Ashcraft

No. 20-1-03059-9

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

I. INTRODUCTION

Owen Gale Ray was convicted of felony harassment, second degree assault, and reckless endangerment arising from a post-Christmas incident in which he threatened to kill his wife and assaulted her with a firearm in the presence of two young children. The jury convicted Ray after finding that his claimed brain injuries and post-traumatic stress disorder (PTSD) did not impact his ability to act knowingly or intentionally. Ray seeks both a new trial and a significant reduction in his sentence.

Ray asks this court to accept review to define the term "exigent circumstances" in RCW 9.77.090(1)(c). No such guidance is needed from this court as undefined words in a statute are given their ordinary dictionary definition. Even if a privacy act-specific definition of the phrase should be deemed appropriate, this case is the wrong vehicle as the court of appeals held that any error in admitting the challenged recording was harmless.

Ray contends that convictions for both assault and harassment violates double jeopardy. Identifying two published opinions from two different divisions that reached different conclusions based on different arguments, Ray claims that review is necessary to resolve the conflict. He is wrong. Division I's 2011 case's determination that convictions for both crimes arising out of the same incident was based on the fourth prong of the double jeopardy analysis—a prong that Division II did not address in its 2005 opinion. The appellate court's denial of Ray's double jeopardy claim was correct, and it merits no additional review.

II. RESTATEMENT OF THE ISSUES

A. This court ordinarily will not address arguments which are unnecessary to the just resolution of the case. The court of appeals did not address the merits of Ray's exigent circumstances claim because any error was harmless. Is direct review of the trial court's discretionary decision appropriate where the decision is fact-specific and existing precedent provides ample guidance to the lower court?

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B. The test utilized in determining whether the legislature authorized separate punishments for multiple offenses has four prongs. The court of appeals relied on a 2011 Division I opinion that found separate punishment was not prohibited under the fourth prong. Is review unwarranted under RAP 13.4(b)(2), where the 2006 Division II published opinion that reached the contrary result never addressed the fourth prong?

III. STATEMENT OF THE CASE

Owen Ray and K.R.'s marriage began to deteriorate in 2017, when K.R. decided to return to work full time. RP 467, 1336. Ray was unhappy with K.R.'s decision as he had decided to accept a new position at Joint Base Lewis McChord (JBLM), rather than retiring, and he wanted K.R. to be available to perform the social and volunteer activities expected of a colonel's wife, along with all the household chores. RP 468-70, 1338, 1363-64. RP 468, 1338.

Ray's performance of his duties was always exemplary, but his subordinates were concerned about his alcohol consumption. RP 731, 1085-88, 1094-97, 1099, 1118-20, 1254. Although Ray's increased alcohol consumption did not impact

his work life, it did impact his home life, with Ray getting angry, yelling, cussing, and calling K.R. a "bitch." RP 471-72. In June of 2020, Ray resorted to violence, pushing K.R. into a wall while yelling and cussing. RP 474-75.

On December 26, 2020, Ray became increasingly angry at K.R. believing that she was undermining his authority with the children. RP 466, 1347. As the evening progressed Ray began consuming a significant amount of alcohol, he got louder and became increasingly testy. RP 480, 734, 746. *Id.*

When K.R. distanced herself from Ray by seeking refuge on the third floor of the house where the children slept, Ray obtained a handgun and then climbed the stairs looking for her. RP 486, 488-89. After Ray ignored K.R.'s plea to put the gun away, K.R. called 9-1-1. RP 491. Ray responded by pointing the gun at K.R. and telling her to hang up. RP 493.

The 9-1-1 system recorded much of the chaos that ensued,[1] including K.R. begging for help because Ray had a gun and was threatening her, was "going to kill us," and "he's going to kill my kids." Ex. 33 and 35.[2] The 9-1-1 recording also contains both statements of possible self-harm from Ray and the repeated invectives he directed at Kristin. *Id.* Finally, the 9-1-1 call includes children crying out "Dad, Please don't hurt us," "I don't want to die," and "please don't hurt her." Ex. 35. The 9-1-1 recording did not, however, clearly capture everything that was said during the incident. RP 684, 833, 963; Exs. 33, 35 (screaming and inaudible sounds).[3]

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[1] All three 9-1-1 recordings were admitted as nontestimonial excited utterances. Ray did not challenge these rulings on appeal.

[2] Transcripts of the 9-1-1 recordings, Exs. 34 and 36, were admitted as illustrative exhibits. RP 423, 424.

[3] The screaming and yelling can also be heard in the background of the oldest child's separate 9-1-1 call. *See* RP 1008-09; Ex. 37.

K.R.'s attempt to get away from Ray resulted in her stumbling and falling to the floor of her middle child's room. RP 493. Ray followed, firearm in hand, stood over her and kicked and stomped her in the head, face, and chest. RP 493, 510, 640-41, 947, 960. Following the assault, Ray left the bedroom only to return and point the gun at K.R. a second time. RP 493, 839, 841, 955. When Ray broke down the door and returned to the room a third time, he pointed the gun at the children on the bed. RP 497, 843, 955. K.R. placed herself between the gun and her children. RP 497, 844. Ray kept the gun pointed at K.R., and after turning off the lights pointed the gun again at K.R. and the children. RP 497-98, 944, 946.

When Ray left the bedroom to yell at the police officers who surrounded the home, K.R. and the children made their escape. RP 499. As K.R. fled, Ray pointed the gun at K.R. a fourth time but did not shoot. *Id.*

Upon leaving the house, K.R. and her children were directed toward a waiting police car. RP 230-31, 499, 500, 1024;

Ex. 42. This police car was equipped with video and audio recording devices. RP 1019. The devices had been turned on prior to K.R. and her children entering the vehicle. RP 1021.

Once K.R. and her children were inside the patrol car, the vehicle was driven a few blocks away to where a make-shift command center was being set up. RP 500-01, 1024; Ex. 42. Immediately upon arrival at the command post, K.R. was questioned regarding Ray's access to weapons in the home, phone numbers at which Ray may be reached, and other information necessary to evaluate the threat Ray posed to the officers surrounding the home. RP 235, 501, 1025-26. This questioning was captured on one of the officer's body worn camera and a portion was captured on the car's video and audio system. RP 183; Ex. 40(b), 44.

While K.R. was being questioned outside the patrol car, the three children remained seated in the patrol car. RP 180; Ex. 40(b). The patrol car's video and audio system captured an unscripted discussion of the incident between the three children.

RP 1021, 1026; Ex. 40(b). The children expressed the fear they felt, which had not been totally alleviated by their distance from the house. Ex. 40(b) at 00:47:13-1:01:10.

Approximately 16 minutes after the patrol car came to a stop at the command center and while officers were obtaining preliminary information from K.R. necessary for threat assessment and successful negotiation, the officer whose patrol car the children were seated in, advised the children that they were being recorded. *Compare* Ex. 44 at 48:32 *with* Ex. 44 at 1:05:06.

The information obtained from K.R. was instrumental in contacting Ray so negotiations could begin for his peaceful surrender. RP 368, 375, 377. After a multi-hour standoff, Ray exited the home and was taken into custody. RP 187, 387-88.

A few days after his arrest, Ray spoke by phone with his brother Jake, his mother, and his father. RP 1010. During these conversations, Ray expressed remorse, and stated that the incident was all his fault and he "just lost it" when 9-1-1 was

called. Exs. 106-09. While Ray stated that he never threatened the kids, he did not make the same assertion as to K.R. *Id.*

Ray was charged with seven offenses arising from the events on December 27th. *See* CP 453. Ray asserted a diminished capacity defense to all but one count. CP 975. Ray contended that a combination of his untreated Post Traumatic Stress Disorder (PTSD), multiple head injuries sustained in the army, and his alcohol consumption rendered him unable to act intentionally or knowingly. CP 984-88. Although Ray claimed no memory of the incident, he asserted that he was suicidal during the incident and had no intent to hurt anyone but himself. RP 763, 1351.

The jury was instructed on both diminished capacity and voluntary intoxication. CP 403-04. But after hearing from two expert witnesses regarding the impact of PTSD and past head injuries had on Ray's ability to form the required mens rea, the jury found guilty of second-degree assault with a deadly weapon (RCW 9.94A.021(1)(c)), and harassment with respect to K.R.,

and of reckless endangerment. RP 1530-31. The jury further found that K.R. and Ray were in an intimate relationship, that Ray was armed with a firearm at the time of the crimes, and that the crimes were an aggravated domestic violence offense. *Id.* As to the reckless endangerment count, the jury found that Ray and the children were family or household members. RP 1531.

Ray appealed his convictions. He claimed that a new trial was required because the law enforcement camera mounted video was obtained in violation of the privacy act because the officer did not immediately advise the children that they were being recorded. Appellant's Opening Brief at 39-46. While the trial court admitted the video under the "exigent circumstances" exception of RCW 9.73.090(1)(c), the court of appeals did not decide whether the exception applied because any error was harmless. *State v. Ray*, No. 86163-8-I, 2024 WL 4025999 at *5 (Wash. App. Sep. 3, 2024) (unpublished) ("We need not address whether the circumstances here qualify as "exigent" under RCW

9.73.090(1)(c). Even if we assume, without deciding, the trial court erred in admitting the recording, the error was harmless.").

Ray, for the first time on appeal, claimed that convictions for both felony harassment and second degree assault violated double jeopardy. Appellant's Opening Brief at 69-75. The court of appeals rejected this argument, concluding that "the offenses have independent purposes, which is evidence of legislative intent for dual punishments." *Ray*, 2024 WL 4025999 at *13.

Ray seeks further review of these decisions. The State files this timely response demonstrating that neither issue satisfies RAP 13.4's demanding standards.

IV. ARGUMENT

Ray's petition for review presents two fact-intensive questions. One issue was never reached by the court of appeals. The other was resolved consistently with existing published case law. Ray's petition for review should be denied because this court will not address arguments that are unnecessary to a just

resolution of a case and conflicting unpublished court of appeals opinions do not satisfy RAP 13.4(b)(2).

A. Existing Case Law Provides Ample Guidance Regarding the Undefined Phrase "Exigent Circumstances" in the Privacy Act.

When resolution of a claim requires the appellate court to answer two or more questions, the court may address the questions in any order. If the issue may be resolved on harmlessness or absence of prejudice, the appellate court need not also address whether an error did occur. *See, e.g., Strickland v. Washington,* 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (observing that, as to the two requirements essential to support a claim of ineffective assistance of counsel, deficient performance and prejudice, "if it is easier to dispose of [the] claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed"); *State v. Rohrich*, 149 Wn.2d 647, 71 P.3d 638 (2003) (resolving appeal solely on the prejudice prong of CrR 8.3(b) without reaching the government misconduct prong). These cases are consistent with

this court's rule that it ordinarily will not address arguments which are unnecessary to the just resolution of the case. *See e.g., Fields v. Dept of Early Learning*, 193 Wn.2d 36, 41 n.1, 434 P.3d 999 (2019); *In re Pers. Restraint of Lile*, 100 Wn.2d 224, 230, 668 P.2d 581 (1983).

Ray's petition for review asks this court to violate the rule and to render an advisory opinion on what constates exigent circumstances for purposes of RCW 9.73.090(1)(c). The court of appeals did not resolve the question of exigent circumstances because even assuming "the trial court erred in admitting the recording, the error was harmless." *Ray*, 2024 WL 4025999 at * 5. Ray's request should be rejected on two grounds.

1. If it was error to admit the dashcam video, the error was harmless.

First the court of appeals' determination that the admission of the video was harmless is correct. Admission of evidence in violation of the privacy act is a statutory, not a constitutional violation. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); *State v. Courtney*, 137 Wn. App. 376, 383, 153 P.3d

238 (2007). Nonconstitutional error only requires reversal when the defendant satisfies his burden of showing, within reasonable probabilities, that had the error not occurred the outcome of the trial would have been materially different. *See, e.g., State v. Barry*, 183 Wn.2d 297, 317-18, 352 P.3d 161 (2015); *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Ray has not met this burden.

The admissible evidence before the jury included three 9-1-1 recordings. One of the recordings allowed the jury to hear for itself how terrified the two younger children were of their father on December 26th. *See* Ex. 35 (children crying and shouting "Dad, Please don't hurt us," "I don't want to die," and "please don't hurt her."). The other recording captures the brave older sister fearfully describing the situation, with screams from her sister's bedroom occasionally heard in the background. *See* Ex. 37.

The dashcam video was cumulative to the contemporaneous 9-1-1 recordings, belying Ray's claim that the

only direct evidence of the children's reaction to Ray's violent acts came from the video. *See* Petition for Review at 19. And the jury did not view the video until after it heard the 911 recordings. *Compare* RP 423-25 (Exs. 33 and 35, K.R.'s 9-1-1 calls, published on September 13, 2022) and RP 1009 (Ex. 37, L.R.'s 9-1-1 call, published morning of September 19, 2022), *with* RP 1026 (dash cam video published the afternoon of September 19, 2022).

Ray has not lodged the same objections to the 9-1-1 tapes that he has to the video. Ray does not claim that the 9-1-1 recordings were only offered to "play on the jury's prejudices or passions." Petition for Review at 19. He does not contend that the 9-1-1 tapes were unlikely to elicit an emotional response from the jurors. Nor does Ray claim that the 9-1-1 recordings precluded the jurors from following their instruction to "not let their emotions overcome your rational thought process." CP 384. Ray, therefore, fails to impeach the court of appeal's

determination that if any error occurred from the admission of the dashcam video it was harmless.

Ray seeks to avoid this conclusion by raising a quasi-hearsay/confrontation clause objection. *See* Petition for Review at 17-19 (complaining that the children did not present live testimony at trial). The trial court, however, admitted the video and the 9-1-1 recordings over Ray's hearsay and confrontation clause objections and Ray did not challenge those rulings in the appellate court. RP 886-67, 900. He cannot renew these objections in this court. *See, e.g., In re Pers. Restraint of Tobin*, 165 Wn.2d 172, 175 n. 1, 196 P.3d 670 (2008) (supreme court will not consider issues that were not raised in the court of appeals).

Ray, moreover, cites to nothing in the record in support of his speculation that the State would call the children as witnesses rather than rely solely on the 9-1-1 recordings if the dashcam video was excluded. And to the extent Ray's prejudice argument strays from the absence of exigent circumstances to a complaint

regarding the court's ER 403 redactions to the video, Ray was free to call the children in his case if he thought their testimony would support his reconstructed version of events. *See* RP 571 ("Hard to reconstruct this exactly because [Ray's] memory is awfully impaired of this"); RP 1375 (Ray only remembers shards and bits and pieces of the incident and he only "know[s] what was recorded on the 9-1-1 recording"). Ray's petition for review should be denied.

2. A robust body of law provides ample guidance regarding the interpretation of the phrase "exigent circumstances" in the privacy act.

Ray acknowledges that he is asking this court to review the trial court's exigent circumstances determination. Petition for Review at 13-14. This court rarely grants direct review of a superior court decision and none of the grounds for taking this extraordinary step are present in this case. *See* RAP 4.2(a). Because the existence of exigent circumstances will always be a fact intensive question and existing case law provides ample

guidance to the superior court of the legal standard to be applied to the facts there is no need for this court to intervene.

Ray acknowledges in this court[4] that absent a statutory definition for the term "exigent circumstances" in the privacy act, the phrase is given its ordinary dictionary definition. *See* Petition for Review at 12 (citing *State v. Barnes*, 189 Wn.2d 492, 496, 403 P.3d 72 (2017)). The State wholeheartedly agrees with this well-established rule. *See* Brief of Respondent at 26 (citing *Barnes*). Additional case law holds that when a phrase used in a statute has a well-understood legal meaning, courts assign the familiar legal term its familiar legal meaning. *StarKist Company v. State*, 25 Wn. App. 2d 83, 94, 522 P.3d 594 (2023).

Both dictionary definitions and case law construing the phrase "exigent circumstances," establish that the court must consider the totality of the circumstances. *See generally State v.*

[4] Ray's court of appeals brief merely noted that "'[e]xigent circumstances' is undefined," Appellant's Opening Brief at 39-40, without providing any argument on how the phrase should be interpreted.

Smith, 165 Wn.2d 511, 518, 199 P.3d 386 (2009) (courts determine whether an exigent circumstance justifying warrantless search existed by looking at the totality of the situation in which the circumstance arose); *State v. Finch*, 137 Wn.2d 792, 827-30, 975 P.2d 967 (1999) (courts determine whether the public safety exception to Miranda justified a delay in tendering the warnings by looking at the totality of the circumstances); Merriam-Webster's Online Dictionary: *circumstance*[5] ("the sum of essential and environmental factors (as of an event or situation)"). The trial court did this before rendering its decision regarding the dashcam video. *See generally* RP 886-901, 919-21.

Ray's objection is not that the trial court applied the wrong definition to the facts—it is that the trial court did not give the weight to certain facts that Ray would prefer. Specifically, Ray

[5] Available at https://www.merriam-webster.com/dictionary/circumstances last visited Oct. 28, 2024).

contends that because the notice of recording requires no set language and "takes mere seconds," it was error to find exigent circumstances. Petition for Review at 14-15. But these two factors will always be present and if, as Ray requests, they will always control whether a delay in providing notice that the dashcam is recording is allowable, the phrase "exigent circumstances" in RCW 9.73.090(1)(c) is rendered surplusage. This violates a cardinal principle of statutory interpretation: that statutes are to be construed so no clause, sentence, or word shall be superfluous, void, or insignificant. *See, e.g., State v. Garza*, 200 Wn.2nd 449, 456-57, 518 P.3d 1029 (2022); *City of Seattle v. Long*, 198 Wn.2d 136, 147-48, 493 P.3d 94 (2021).

Here, the trial court balanced a variety of facts, mostly derived from the testimony of the officers at the command center and the officers surrounding Ray's home, RP 893, before concluding that the 16 minute delay[6] between arriving at the

[6] *Compare* Ex. 44 at 48:32 *with* Ex. 44 at 1:05:06.

command center and notice of recording being given to the children was not inappropriate given the on-going emergency. Many reasonable judges would reach the same conclusion. Ray's petition for review should be denied because even if one assumes Ray could satisfy his burden of demonstrating that the outcome of the trial would likely have been different if the video had been excluded, this case does not lend itself to the announcement of a new rule that will be applicable to other cases.

B. The Court's Resolution of Ray's Double Jeopardy Claim is Consistent with the Published Decisions of the Court of Appeals

Ray was convicted of both second degree assault with a firearm and with felony harassment. The harassment charge was supported by both verbal threats and Ray's aiming a firearm at K.R. The assault charge was supported by Ray pointing a firearm at K.R. four separate times, one of which occurred after Ray broke down the bedroom door to regain access to K.R. Because Ray did not assert a double jeopardy claim until appeal, the trial court was denied an opportunity to craft instructions that

would ensure the jury relied on different facts to support both convictions. Ray, however, did not benefit from his sandbagging because the assault and the harassment statutes address separate ills.

Ray requests that this court grant review of the denial of his double jeopardy claim pursuant to RAP 13.4(b)(2).[7] His request should be denied because the court of appeals opinion is consistent with the published court of appeals decisions and a conflict with another unpublished opinion does not satisfy the plain language of RAP 13.4(b)(2).

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[7] RAP 13.4(b)(2) provides that:

> A petition for review will be accepted by the Supreme Court *only*:
>
> . . .
>
> (2) If the decision of the Court of Appeals is in conflict with a *published* decision of the Court of Appeals;

[Emphasis added.]

The legislature has near plenary power to define criminal conduct and assign punishment for such conduct. This power extends to authorizing multiple convictions arising from the same conduct, each of which may be punished separately. The only constitutional limitation on the punishment that may be exacted resides in the Eighth Amendment and Wash. Const. article I, § 14, not the Double Jeopardy Clause. *See generally Missouri v. Hunte*r, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."); *State v. Kelley*, 168 Wn.2d 72, 77, 226 P.3d 773 (2010) (same).

As a rule, the Washington Legislature has elected to limit the consequences of multiple convictions arising out of the same criminal act instead of prohibiting multiple convictions arising from a single act. *State v. Calle*, 125 Wn.2d 769, 781-82, 888 P.2d 155 (1995); RCW 9.94A.589(1)(a) (treat crimes that require

the same criminal intent, the same victim, and that are committed at the same time and place as one crime for purposes of the offender score). A defendant who claims that this general principle does not apply in his case must satisfy a four-step test. *State v. Heng*, 22 Wn. App. 2d 717, 731, 512 P.3d 942 (2022), *aff'd*, 2 Wn.3d 384, 539 P.3d 13 (2023). If legislative intent to allow cumulative punishments can be found in any of the four steps of the analysis, the defendant's double jeopardy challenge fails. *State v. Arndt*, 194 Wn.2d 784, 818, 453 P.3d 696 (2019).

The *Ray* court applied all four steps of the double jeopardy analysis. Its decision on the first three steps of the analysis was consistent with that of *State v. Lemming*, 133 Wn. App. 875, 888, 138 P.3d 1095 (2006). *See Ray*, 2024 WL 4025999 at * 10. As for the fourth step of the analysis—whether the two offenses serve different purposes, the court, after noting that *Lemming* did not address this point, held, consistent with the other published opinion, that the legislature established the crimes to serve different purposes. *See Ray*, 2024 WL 4025999 at * 11-13,

quoting *State v. Mandanas*, 163 Wn. App. 712, 262 P.3d 522 (2011). While *Mandanas* resolved the double jeopardy question differently than *Lemming*, it did not "conflict" with *Lemming* as *Lemming* was silent on this point. *See Ray*, 2024 WL 4025999 at *11.

The *Mandanas* determination that assault and harassment serve different purposes is supported by the historical record. Assault and harassment are in different chapters of the Revised Code of Washington. Assault in the second degree, RCW 9A.36.021 is in a chapter intended to protect against the social evil that occurs when one person intentionally physically attacks and injures another. *See* Chapter 9A.36 RCW ("Assault—Physical Harm"). Although the current second-degree assault with deadly weapon statute only dates to 2011, the crime of assault with a deadly weapon dates to territorial days and the offense was included in the 1975 enactment of the modern criminal code. *See* Laws of 2011, ch. 166, §1 (current version of the statute); Laws of 1975 1st ex. sess., ch. 260, §

9A.36.020(1)(c) (Washington criminal code); Code of 1881, § 807 (assault with a deadly weapon).

Harassment, RCW 9A.46.020, is in a different chapter that was first adopted in 1985. *See* Laws of 1985, ch. 288, § 2. The creation of the crime of harassment, long after Washington criminalized assault and its placement in a different chapter, establishes that it serves a different purpose than the crime of assault. And the legislative findings clearly state that different purpose--the harassment chapter was adopted to address acts "designed to coerce, intimidate, or humiliate the victim." RCW 9A.46.010.

This case, moreover, is factually different from *Lemming.* In *Lemming* the defendant made a single death threat to the victim while pushing her against the wall and then left the location. 133 Wn. App. at 879-80. Ray pointed the firearm at K.R. four times, breaking a door down to reach her the third time. Because Ray engaged in the same conduct four times—separate incidents could have supported the guilty verdicts for both

harassment and assault. Ray's petition for review should be denied.

V. CONCLUSION

Ray has not made the case for further review. Existing precedent was properly applied by the court of appeals. Ray's petition for review should be denied.

This document contains 4,450 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 29th day of October, 2024.

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10/29/2024	*s/ Kimberly Hale*
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PIERCE COUNTY PROSECUTING ATTORNEY

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