No. 104410-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JESSICA MONTESI,

Respondent,

v.

BRANDON MONTESI,

Petitioner.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY

This appeal concerns Washington's weapons-surrender statute, RCW 9.41.800-.804, .815. This statute recognizes the "heightened risk of lethality" posed by abusers who, though subject to domestic-violence-protection orders (DVPOs), continue to have access to firearms. RCW 9.41.801(1). Those subject to DVPOs must therefore temporarily surrender their firearms if they pose a credible threat to—or if the DVPO forbids the use or attempted use of force, or threats of force, against—the protected person. RCW 9.41.800(2)(c).

The goal of the weapons-surrender statute is to reduce harm, not punish offenders. So the statute contains an immunity provision, RCW 9.41.801(9), that allows the subject of a weapons-surrender order to surrender firearms without risking prosecution. That immunity provision is the subject of this appeal.

The appeal arises from the DVPO Jessica Montesi obtained against her ex-husband, Brandon Montesi.[1] In her DVPO petition, she requested that he be ordered to surrender his firearms under the weapons-surrender statute. The trial court granted that request, but Brandon, the trial court found, failed to comply with the weapons-surrender order. A year later, Brandon moved the court to declare the weapons-surrender statute unconstitutional on multiple grounds. After the trial court denied his motion, Brandon appealed, and the Court of Appeals rejected his constitutional arguments in a published opinion.

Brandon now asks this Court to review the Court of Appeals' decision. He says the Court should hear his arguments that the weapons-surrender statute violates (1) his right against compulsory self-incrimination; (2) the Fourth Amendment and

[1] Because the parties share a last name, this brief will refer to them by their first names for the sake of clarity only. No disrespect is intended.

article I, section 7 of the Washington Constitution; and (3) the separation of powers.

Brandon offers three grounds for review. First, he claims that the Court of Appeals' decision conflicts with *State v. Flannery*, 24 Wn. App. 2d 466, 520 P.3d 517 (2022). *See* RAP 13.4(b)(2). That claim is wrong. *Flannery* held that an earlier version of the weapons-surrender statute, not the current one, violated the right against compulsory self-incrimination. And it did not address the other constitutional questions that Brandon raises.

Second, Brandon urges the Court to accept review under RAP 13.4(b)(3), which permits review when "a significant question of law" under the state or federal constitution is involved. But for a question of law to be "significant," it must have some merit. Brandon's constitutional arguments are wholly meritless.

Finally, Brandon says that this case involves an issue of substantial public interest that should be determined by this

Court. RAP 13.4(b)(4). The constitutionality of the weapons-surrender statute does indeed present an issue of substantial public interest. Whether it is an issue that "should be determined by the Supreme Court," *id.*, is a question only this Court can answer.

RESPONDENT'S STATEMENT OF THE ISSUES PRESENTED

1. Is the immunity provided by RCW 9.41.801(9) not coextensive with, and thus insufficient to protect, the constitutional right against compulsory self-incrimination?

2. By requiring Brandon to look for, gather, and surrender his firearms, does the weapons-surrender statute make him a state actor and force him to violate his own rights under the Fourth Amendment or article I, section 7?

3. "[B]y enforcing legislative mandates" in the weapons-surrender statute, Am. Pet. for Review at 29, does the judiciary violate the separation of powers?

RESPONDENT'S STATEMENT OF THE CASE

I. Jessica receives a DVPO against Brandon.

Not long after the parties' divorce became final in late April 2022, Brandon told their daughters, then aged 10 and 9, that Jessica "should think twice before messing with him because he ha[d] a 'safe full of guns' and 'nothing to lose.'" Clerk's Papers (CP) 276. The next day, after returning to Jessica's house unannounced to gather his belongings, the parties' elder daughter witnessed Brandon swinging an ax in one hand and a hammer in the other. *Id.* at 278. He told her that he was "done with this bull shit," and that he was going to "take [Jessica's] dad out first to prevent a struggle, then kill [Jessica], and then go in the house and 'finish [Jessica's] mom off.'" *Id.*

Jessica petitioned for a DVPO against Brandon. After a hearing, the trial court granted the petition. *Id.* at 96–106.

II. The trial court orders Brandon to surrender his weapons, determines that Brandon has not complied with the order, and holds him in contempt.

Jessica's DVPO petition asked that Brandon be ordered to surrender his firearms. CP 4, ¶ 19. The trial court granted that request. *See id.* at 21–25, 107–10.

Brandon submitted a declaration asserting that he did not have access to or possession of any firearms, and in support, submitted a declaration from his friend, Steve Krance. *In re Montesi*, — Wn. App. 2d —, 572 P.3d 459, 463 (2025). Krance averred that the weapons were stored under lock at his house. CP 34.

The trial court, however, "determined Brandon was not in compliance with the weapons surrender order." *Montesi*, 572 P.3d at 463. Krance then "submitted a new declaration identifying seven firearms he had received from Brandon." *Id.* In response, Jessica submitted a declaration identifying numerous weapons that Brandon owned and Krance had not accounted for, including multiple assault rifles, an additional

shotgun, additional hunting rifles, at least two 9 mm handguns, and a revolver nicknamed "the Judge." CP 312, ¶ 6.

At the next hearing to determine compliance with the weapons-surrender order, Brandon was voluntarily sworn in. Report of Proceedings (RP) 8:15–22. The court asked him about the unaccounted-for firearms. Brandon and his counsel did not deny that the firearms existed—indeed, his counsel explicitly stated that he was not denying their existence. They did claim, however, that Brandon did not know where they were. *See id.* at 9:5–11:23, 12:16–15:7; *see also* Br. of Resp't, App. (excerpting hearing). The court found Brandon to be out of compliance with the weapons-surrender order.

The next month, though, Brandon began claiming that the missing firearms did not exist. RP 24:23–28:9, 44:19–45:23. The court found this claim not to be credible and held Brandon in civil contempt. CP 137; *see also id.* at 196.

III. The trial court denies Brandon's motion to declare the weapons-surrender statute unconstitutional, and the Court of Appeals affirms.

Over a year after the order to surrender weapons was first issued, Brandon filed a motion to declare the weapons-surrender statute unconstitutional. After briefing and argument, the trial court found that Brandon remained out of compliance with the weapons-surrender order and denied his motion to declare the weapons-surrender statute unconstitutional. *Montesi*, 572 P.3d at 463. Brandon appealed, raising all the constitutional arguments he raises in his petition, plus an argument under the Second Amendment.

Meanwhile, Jessica filed a RAP 4.4 motion with this Court, asking it to transfer and hear the case. Unopposed Mot. to Transfer Case to Supreme Court under RAP 4.4 ("Mot. to Transfer"), *Montesi v. Montesi*, No. 103598-5 (Nov. 15, 2024) (attached as an Addendum to this Answer). The Commissioner denied the motion, ruling that "the better use of judicial resources at this juncture is to let the appeal proceed" before the

Court of Appeals. Ruling Denying Motion to Transfer Case at 3, *Montesi*, No. 103598-5 (Dec. 16, 2024).

The appeal thus proceeded before the Court of Appeals, which rejected Brandon's constitutional arguments. It explained how the text of the weapons-surrender statute addressed any realistic threat of prosecution, and thus did not violate the privilege against self-incrimination.[2] *Montesi*, 572 P.3d at 464–65. It also concluded that Brandon's objection to certain aspects of the weapons-surrender statute was "only theoretical." *Id.* at 466. As for the Fourth Amendment and article I, section 7, the court concluded that they did not apply at all because Brandon was not a state actor. *Id.* at 466–67. It rejected Brandon's Second Amendment argument, *id.* at 468, a holding that the petition for review does not challenge. And it held that the weapons-surrender statute "does not impermissibly delegate

[2] Brandon failed to preserve any argument that applying RCW 9.41.801(9) here would give it retroactive effect. *Montesi*, 572 P.3d at 468 n.5. Nor does his petition make any such argument. *See* RAP 13.7(b).

[legislative] authority to the courts" in violation of the separation of powers. *Id.* at 469.

ARGUMENT

I. The Court of Appeals' decision does not conflict with *Flannery*.

According to Brandon, review is warranted under RAP 13.4(b)(2) because the Court of Appeals' decision here conflicts with *State v. Flannery*, 24 Wash. App. 2d 466, 520 P.3d 517 (2022). There is no conflict.

Flannery was a criminal prosecution for assault. *Id.* at 469. After charges were filed, the court entered a no-contact order, making it a felony for Flannery to own or possess firearms. *Id.* at 475. The trial court then entered a weapons-surrender order against him, and when he did not comply, the prosecution filed another criminal charge for noncompliance. *See id.* at 476. On appeal, Division II held that the weapons-surrender order, combined with the criminal prosecution for noncompliance with the order, violated the defendant's rights under the Fifth Amendment. *Id.* at 483–84.

That holding, however, applied an earlier version of the weapons-surrender statute that provided no immunity from prosecution: "The applicable statute here is *former* RCW 9.41.800." *Id.* at 472 (emphasis added). The statute has since been amended three times, *see* Laws of 2023, ch. 462, § 403; Laws of 2022, ch. 268, § 30; Laws of 2021, ch. 215, § 75, and now contains a detailed immunity provision, RCW 9.41.801(9). *Flannery* cannot control the interpretation of a new statutory provision that was enacted after it.[3] "In light of the amendment of RCW 9.41.801," Brandon's "reliance on *Flannery* is misplaced." *Montesi*, 572 P.3d at 468.

Nor does the Court of Appeals' opinion here conflict with *Flannery*'s ruling on the Fourth Amendment and article I,

[3] Kelsey Turner, "Why Many Judges in WA Won't Order Abusers to Turn in Guns," InvestigateWest (June 30, 2023), https://www.investigatewest.org/why-many-judges-in-wa-wont-order-abusers-to-turn-in-guns [https://perma.cc/S3P2-QF8S] ("State legislators attempted to clarify *Flannery*'s Fifth Amendment concern with a '*Flannery* fix' contained in recently passed legislation . . . .").

section 7. In *Flannery*, the trial court ruled that the former weapons-surrender statute violated the Fourth Amendment and article I, section 7 because it *also* violated the Fifth Amendment. 24 Wn. App. 2d at 477–78. Against this conclusion, the state advanced only one argument on appeal: the weapons-surrender statute was constitutional because a constitutional violation occurs not at the time of search but only "when the fruits of the illegal search are used against a defendant." *Id.* at 484. This argument assumed a constitutional violation and simply disputed its timing. This is the legal theory that *Flannery* rejected.

That theory is not at issue here, since Jessica, unlike the state in *Flannery*, has disputed the existence of a constitutional violation under the Fourth Amendment and article I, section 7. More importantly, *Flannery* never addressed the question that the Court of Appeals decided here: whether persons subject to weapons-surrender orders become state actors when locating weapons in their own homes. And "[i]n cases," like *Flannery*,

"where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). *Flannery*, in short, does not address the state-action question here, much less conflict with the Court of Appeals' holding on that question.

Review under RAP 13.4(b)(2) is not warranted.

II. Because Brandon's constitutional arguments wholly lack merit, the questions of law he raises are not "significant."

Brandon also invokes RAP 13.4(b)(3), which provides for review of "a significant question of law under the Constitution of the State of Washington or of the United States." But there cannot be "a significant question of law" merely because (as here) a legal question has great *practical* importance to the people of our state. Reading the phrase that way would make RAP 13.4(b)(3) largely unnecessary, because RAP 13.4(b) already provides for review of "issue[s] of

substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The word "significant" also modifies "question of law," a context that directs attention to the legal arguments raised. *See State v. Lilyblad*, 163 Wn.2d 1, 9–10, 177 P.3d 686 (2008) (meaning of words may be indicated by those with which they are associated). All of this suggests that a "significant question of law" must have some merit. And merit is a quality lacking in Brandon's constitutional arguments.

A. Brandon raises no plausible argument that RCW 9.41.801(9), the weapons-surrender statute's immunity provision, violates the privilege against self-incrimination.

The weapons-surrender statute provides immunity from prosecution in RCW 9.41.801(9). Immunity statutes like RCW 9.41.801(9) are intended to confer immunity "coextensive with the scope of the [constitutional] privilege," which then permits the immunized person to be compelled to give evidence. *In re Dependency of A.M.-S.*, 196 Wn.2d 439, 445, 474 P.3d 560 (2020) (citation omitted).

Brandon challenges RCW 9.41.801(9) under both the Fifth Amendment and article I, section 9 of the Washington Constitution, which provide the same level of protection from compulsory self-incrimination. *Id.* According to Brandon, however, RCW 9.41.801(9) provides constitutionally insufficient immunity from prosecution. This position has no merit.

1. Never having invoked the privilege or identified a realistic threat of incrimination, Brandon may challenge only the statute's self-executing immunity.

Generally, "a person must invoke the Fifth Amendment protections in order for them to apply." *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995). Witnesses seeking the protection of the constitutional privilege against self-incrimination must also establish some factual predicate suggesting they face a "realistic threat of self-incrimination." *State v. King*, 130 Wn.2d 517, 524, 925 P.2d 606 (1996) (citation omitted); *see State v. Hobble*, 126 Wn.2d 283, 290,

892 P.2d 85 (1995). Without this predicate, witnesses are typically not allowed to invoke the constitutional privilege. *Hobble*, 126 Wn.2d at 291.

Nowhere in the record has Brandon explicitly invoked the constitutional privilege or identified a realistic fear of incrimination—a failure that should limit the scope of his constitutional challenge. At most, he may challenge only the immunity in subsection (9)(a) of RCW 9.41.801, which provides self-executing immunity as to certain categories of crimes. *See* RCW 9.41.801(9)(a). Because this kind of immunity applies automatically to anyone subject to a weapons-surrender order, Brandon falls within its protection without having to invoke the constitutional privilege. *See Montesi*, 572 P.3d at 464.

But Brandon should not be allowed to challenge the second kind of immunity that RCW 9.41.801(9) provides. That second kind of immunity, governed by subsection (9)(b)–(d) of RCW 9.41.801, covers any crimes that fall outside the

categories listed in subsection (9)(a)'s self-executing immunity. *See* RCW 9.41.801(9)(c).

Because only a prosecutor may confer this kind of immunity, RCW 9.41.801(9)(d), it is not self-executing, and Brandon may challenge it only after properly invoking the constitutional privilege. And, because he has failed to point to a realistic threat of incrimination that subsection (9)(a)'s self-executing immunity does not cover, his challenge should be limited to showing that subsection (9)(a) provides insufficient immunity as to the categories of crime that it enumerates.

2. RCW 9.41.801(9)(a)'s self-executing immunity is coextensive with, and hence complies with, the constitutional privilege.

An immunity statute complies with the constitutional privilege if it "is coextensive with the scope of the privilege." *Kastigar v. United States*, 406 U.S. 441, 449 (1972). This test is amply satisfied by the self-executing immunity of subsection (9)(a) of RCW 9.41.801.

Subsection (9)(a) provides immunity from prosecution for "[t]he act of voluntarily surrendering" weapons, "providing testimony relating to the surrender of" weapons, or "complying with an order to surrender" weapons. RCW 9.41.801(9)(a). This language provides immunity for any of the acts or testimony that a weapons-surrender order could require: surrendering weapons, voluntarily or not, *see* RCW 9.41.801(2); and providing sworn proof of compliance with a weapons-surrender order, *see* RCW 9.41.801(6)(a), (7)(d), (10), (12); RCW 9.41.804.

Subsection (9)(a) also confers "immunity from use and derivative use," which is coextensive with the constitutional privilege. *Kastigar*, 406 U.S. at 453; *see Dependency of A.M.-S.*, 196 Wn.2d at 446. It provides that the acts or testimony required by a weapons-surrender order, "and any information directly or indirectly derived from such act or testimony, may not be used against the person subject to the order" in certain criminal prosecutions. RCW 9.41.801(9)(a). This language

tracks the language of 18 U.S.C. § 6002, which also provides immunity from use and derivative use. *Kastigar*, 406 U.S. at 453.

Although subsection (9)(a)'s self-executing immunity does not cover prosecution for all crimes, it covers the kinds of prosecution most relevant to the subject of a weapons-surrender order. These include "any criminal prosecution under this chapter," i.e., chapter 9.41. RCW 9.41.801(9)(a). Subsection (9)(a)'s self-executing immunity hence covers, among other crimes, the unlawful possession of firearms (e.g., possession by someone subject to a DVPO). RCW 9.41.040. Subsection (9)(a) also covers "any criminal prosecution under . . . chapter 7.105 RCW." RCW 9.41.801(9)(a). Chapter 7.105 RCW governs civil-protection orders, including DVPOs, and makes it a crime to violate DVPOs. RCW 7.105.450. It may be relevant where, as here, a weapons-surrender order is incorporated in a DVPO. *See* CP 102.

Brandon maintains, however, that subsection (9)(a)'s self-executing immunity falls short because "[o]rders under" chapters 7.105 and 26.09 RCW "are not specifically listed in RCW 9.41.801(9)(a)." Am. Pet. for Review at 19. This argument is wrong.

Subsection (9)(a) expressly provides immunity against any criminal prosecution "under . . . chapter 7.105 RCW." RCW 9.41.801(9)(a). The provisions of chapter 7.105 RCW specify the criminal penalties for violations of orders issued under that chapter. *See* RCW 7.105.450–.460. Thus, if an order under chapter 7.105 RCW gives rise to criminal liability, that criminal liability will be "under . . . chapter 7.105 RCW," RCW 9.41.801(9)(a), and will be covered by subsection (9)(a). Subsection (9)(a)'s self-executing immunity, then, does extend to orders under chapter 7.105 RCW.

Subsection (9)(a) also covers criminal liability associated with orders under chapter 26.09 RCW, which governs divorce proceedings. The relevant orders are those contemplated by

RCW 26.09.050 and 26.09.060—orders that can include a weapons-surrender provision. *See* RCW 26.09.050(1) (citing weapons-surrender statute); RCW 26.09.060(4) (same). Any criminal liability related to these orders, however, arises under chapter 7.105 RCW. When a protection order under chapter 26.09 RCW is knowingly violated, chapters 26.09 and 7.105 RCW both make clear that the violation is a crime "UNDER CHAPTER 7.105 RCW." RCW 26.09.050(2) (capitalization in original); RCW 26.09.060(7) (same); *see also* RCW 7.105.550(1)(a). Because a violator of a relevant order issued under chapter 26.09 RCW is subject to "criminal prosecution[] . . . under chapter 7.105 RCW," the relevant orders under chapter 26.09 RCW are covered by subsection (9)(a). RCW 9.41.801(9)(a). Brandon's contrary argument fails.

3. Even if Brandon's challenge could reach the other provisions of RCW 9.41.801(9), it would lack merit.

Even if Brandon's challenge could extend beyond the statute's self-executing immunity, it would be meritless.

First, subsection (9)(b) of RCW 9.41.801 allows persons subject to a weapons-surrender order to show that they need more protection than subsection (9)(a)'s self-executing immunity provides. Brandon objects to subsection (9)(b), claiming that it violates the constitutional privilege because it requires a *Bone-Club*[4] analysis before courtroom closure. Am. Pet. for Review at 19–20.

But as long as Brandon invokes the privilege in an open proceeding, *State v. Rainey*, 180 Wn. App. 830, 840–41, 327 P.3d 56 (2014), an *in camera* proceeding in this context "would always satisfy" the five *Bone-Club* factors, *State v. White*, 152 Wn. App. 173, 182, 215 P.3d 251 (2009). *Bone-Club* imposes no burden on the right against self-incrimination. In arguing otherwise, Brandon creates a gratuitous conflict between the Washington Constitution's open-trial right and its right against self-incrimination. *See, e.g.*, *State v. Gentry*, 125 Wn.2d 570,

[4] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

624–25, 888 P.2d 1105 (1995) (noting that the Court makes every attempt to harmonize the provisions of the Washington Constitution).

Second, if the subject of the weapons-surrender order does show that he faces "a realistic threat of self-incrimination . . . not addressed by" subsection (9)(a)'s self-executing immunity, subsections (9)(c) and (d) are triggered. RCW 9.41.801(9)(c). Under subsection (9)(c), the prosecutor must be afforded a chance to extend immunity "narrowly tailored" to the kind of self-incrimination at issue. *Id.*

The statute does not limit the crimes that this immunity can cover. It requires only that the threat of prosecution be "realistic" and the immunity agreement "narrowly tailored to address any realistic threat of self-incrimination." *Id.* And that limitation is *at least* coextensive with the constitutional privilege, which extends only to a "realistic threat of self-incrimination." *King*, 130 Wn.2d at 524 (citation omitted); *see also In re Recall of Inslee*, 199 Wn.2d 416, 431, 508 P.3d 635

(2022) ("narrowly tailored" means "not substantially broader than necessary").

Nevertheless, Brandon contends that because this immunity "may only be extended by the prosecuting attorney," RCW 9.41.801(9)(d), it fails to provide a constitutionally sufficient level of protection. Am. Pet. for Review at 22. He is incorrect.

Whether or not a prosecutor decides to extend immunity, subsections (9)(c) and (d) of RCW 9.41.801 fully protect the right against self-incrimination. If a prosecutor extends immunity, the subject of the weapons-surrender order can, of course, comply with the order without fear of self-incrimination.

But if the prosecutor does not extend immunity, subsection (9)(d) ensures that the subject of the weapons-surrender order need not surrender weapons that may incriminate. "If the prosecuting attorney declines to extend immunity such that" compliance with the weapons-surrender

order would create a "realistic threat of self-incrimination," then "the court's order must provide for the surrender of every firearm, dangerous weapon, and concealed pistol license that does *not* implicate a realistic threat of self-incrimination." RCW 9.41.801(9)(d) (emphasis added). By stating that the weapons-surrender order must require the surrender of every weapon that does *not* implicate self-incrimination, subsection (9)(d) necessarily provides that weapons-surrender orders will *not* require the surrender of any weapon that *does* implicate self-incrimination. Brandon offers no alternative reading of this language.

There is no plausible interpretation of RCW 9.41.801(9) under which it violates the constitutional privilege against compulsory self-incrimination.

B. Brandon raises no plausible argument that RCW 9.41.801(9) implicates the Fourth Amendment or article I, section 7 of the Washington Constitution.

The Fourth Amendment and article I, section 7 apply only to state actors. *E.g.*, *City of Pasco v. Shaw*, 161 Wn.2d

450, 459, 166 P.3d 1157 (2007). So these constitutional provisions are implicated here only if the weapons-surrender order turns Brandon into state actor when he locates weapons in his home.

To determine whether private citizens are state actors, courts examine "the capacity in which a person acts at the time of the search." *Id.* at 460 (citation and alteration omitted). Factors "[c]ritical" to this inquiry "include [1] whether the government knew of and acquiesced in the intrusive conduct *and* [2] whether the party performing the search intended to assist law enforcement efforts *or to further his [or her] own ends*." *Id.* (second alteration in original) (quoting *State v. Swenson*, 104 Wn. App. 744, 754, 9 P.3d 933 (2000)).

Washington courts have recognized that when someone complies with a law or regulation, the compliant person is primarily acting to avoid liability, not to promote governmental policy. Thus, for example, when landlords contract with a private party to perform a property inspection under a city

ordinance, the landlords "first and foremost further their own ends," and so are not state actors. *Shaw*, 161 Wn.2d at 461. Or, when a film lab contacts law enforcement because it suspects that a customer is trying to use its services to forge drivers' licenses, it is not a state actor because its motivation is to "further [its] own purpose of avoiding liability and not to act as an agent for police." *State v. Walter*, 66 Wn. App. 862, 866, 833 P.2d 440 (1992).

The reasoning of these cases squarely applies here and shows why Brandon cannot be a state actor. Any "search" that Brandon conducts would be to further his own ends: namely, to comply or seem to comply with a binding court order, and to avoid sanctions for noncompliance. His purpose would not be to assist law enforcement by taking firearms out of the hands of dangerous persons. *See* RCW 9.41.801(1) (referring to the "heightened risk of lethality to petitioners when respondents to protection orders . . . continue to have access to firearms"). Indeed, since Brandon has taken the position that he is *not*

dangerous, removing firearms from dangerous persons could not be Brandon's own purpose. *See* CP 125, 168.

Nor, in locating his weapons, would Brandon be providing general "assistance to law enforcement in the form of uncovering any illegal acts." *Shaw*, 161 Wn.2d at 461. To put this point more concretely: While locating his weapons, it is not as if Brandon would be looking for evidence of other illegal activity so that he could report himself to law enforcement. For that reason, too, he would not be a state actor.

Brandon does not directly address the state-action problem. Instead, he cites RCW 9.41.801(4), which authorizes a court to issue a warrant if there is probable cause to believe that a respondent has not complied with a weapons-surrender order and that a crime has occurred. This provision, Brandon seems to be suggesting, shows that he would be a state actor when he locates weapons in his house. That conclusion does not make follow. Search warrants are directed to state actors—"peace officer[s]"—who then perform the authorized search. CrR

2.3(c); *see also* RCW 10.79.020. Not being a peace officer, Brandon's reliance on RCW 9.41.801(4) is misplaced.

It is also difficult to understand how Brandon could intrude on *his own* private affairs under article I, section 7, or have a reasonable expectation of privacy *against himself* under the Fourth Amendment. Yet this apparent oxymoron follows from Brandon's argument that he has been ordered to perform a search that implicates his constitutional rights. That is because a "search" under either the Fourth Amendment or article I, section 7 requires some intrusion into privacy. *See State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014).

It would be perfectly valid to conclude that this contradiction at the heart of Brandon's argument shows that he cannot perform a constitutionally relevant "search" on himself. That is certainly one way to reject Brandon's constitutional challenge. But it seems simpler to avoid the contradiction altogether by recognizing that Brandon is not a state actor who is subject to the constitutional limits on searches and seizures.

Finally, Brandon's argument has startling ramifications. Brandon argues that he, as the subject of a court order, becomes a state actor while obeying that order. Accepting that premise would mean that when parties in civil litigation are compelled to turn over documents located in their homes, they become state actors who cannot search and seize the documents without a warrant. That result is not just strange (though it is that). It would also conflict with the broad access to discovery to which civil litigants in Washington are entitled. *See Lowy v. PeaceHealth*, 174 Wn.2d 769, 776–77, 280 P.3d 1078 (2012).

C. Brandon raises no plausible argument that RCW 9.41.801(9) violates the separation of powers.

Brandon contends that RCW 9.41.801(9) violates the separation of powers. This contention approaches the frivolous. Brandon cites no case suggesting that courts intrude on the Legislature merely by "enforcing legislative mandates." Am. Pet. for Review at 29. "There is no question" that the Legislature has "the authority to grant immunity through

immunity statutes." *Dependency of A.M.-S.*, 196 Wn.2d at 448. Interpreting and applying that statutory immunity, far from intruding on the Legislature, is a core judicial function. *See Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009); *see also Montesi*, 572 P.3d at 469.

III. The constitutionality of the weapons-surrender statute presents an issue of substantial public interest.

Brandon also seeks review on the ground that his petition raises "an issue of substantial public interest that should be determined by Supreme Court." RAP 13.4(b)(4).

There is no denying that the constitutionality of the weapons-surrender statute presents "an issue of substantial public interest." RAP 13.4(b)(4). A court's refusal to issue a weapons-surrender order can have fatal consequences. Jessica herself argued as much in her earlier motion to transfer this case. *See* Mot. to Transfer at 6–7, 8, *Montesi*, No. 103598-5 (attached as Addendum to this Answer); *id.*, App. 1. It also appears that some trial courts in the state, even after the Court

of Appeals' decision here, continue to refuse weapons-surrender orders on constitutional grounds.[5]

Still, an issue of public importance warrants review only if it "should be determined by the Supreme Court." RAP 13.4(b)(4). Whether the issue here satisfies that criterion is a discretionary question that only this Court can answer.

CONCLUSION

Review is not warranted under RAP 13.4(b)(2) because the Court of Appeals' decision here does not conflict with *Flannery*. Review is not warranted under RAP 13.4(b)(3) because the constitutional arguments here do not raise significant questions of law. Whether review is warranted under RAP 13.4(b)(4) is a question only this Court can answer.

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[5] *See* Kelsey Turner, "Some Washington Judges Aren't Ordering Accused Abusers to Surrender Guns. A New Court Ruling Could Change That," InvestigateWest (Aug. 21, 2025), https://www.investigatewest.org/some-washington-judges-arent-ordering-accused-abusers-to-surrender-guns-a-new-court-ruling-could-change-that [https://perma.cc/C6BZ-EFHY]; *see also* Mot. to Transfer, App. 3 (attached as Addendum to this Answer).

I hereby certify that this document contains 4,920 words in accordance with RAP 18.17.

RESPECTFULLY SUBMITTED this 9th day of September, 2025.

KELLER ROHRBACK L.L.P.

By: *s/Benjamin Gould*
Benjamin Gould, WSBA #44093

Attorney for Respondent

ADDENDUM

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

BRANDON MONTESI, Appellant, v. JESSICA MONTESI, Respondent.	Supreme Court No. _____ COA No. 85858-1 UNOPPOSED MOTION TO TRANSFER CASE TO SUPREME COURT UNDER RAP 4.4

Jessica Montesi—the Respondent in the Court of Appeals and the petitioner in the trial court—respectfully moves for transfer of this case under RAP 4.4. This case presents several constitutional challenges to the current version of the statute governing orders to surrender weapons (the "weapons-surrender statute"), RCW 9.41.800–.804, .815. Trial courts around our state have reached conflicting answers on whether the current weapons-surrender statute is constitutional. In light of the

widespread confusion in the lower courts and the life-and-death importance of the weapons-surrender statute, the Court should grant this motion.

Counsel for Jessica Montesi have consulted with Appellant Brandon Montesi's counsel, who do not oppose this motion.[1]

I. RELEVANT BACKGROUND

A. Lower courts continue to invoke *State v. Flannery* to deny weapons-surrender orders, even though *Flannery* was interpreting an earlier version of the weapons-surrender statute.

Under our state's weapons-surrender statute, domestic-violence-protection orders (DVPOs) and other civil-protection orders can require a restrained party to immediately surrender all firearms and dangerous weapons. *See* RCW 9.41.800(2). An order to surrender weapons is often necessary in these circumstances, the Legislature has found, because there is a

[1] Because the parties share a last name, this motion will generally refer to the parties by their first name for clarity. No disrespect is intended.

"heightened risk of lethality" when persons subject to civil-protection orders "become aware of court involvement and continue to have access to firearms." RCW 9.41.801(1).

An older version of the weapons-surrender statute was at issue in *State v. Flannery*, 24 Wn. App. 2d 466, 520 P.3d 517 (2022). There, Division II of the Court of Appeals concluded that the older version of the statute violated the Fourth and Fifth Amendments. *See id.* at 479–85.

The version of the weapons-surrender statute at issue in *Flannery*, however, has been substantially revised to address potential constitutional issues. *See* Laws of 2023, ch. 462, § 403; Laws of 2021, ch. 215, § 75.[2] The statute now makes it possible for persons subject to a weapons-surrender order to secure immunity as to any criminal offense. *See* RCW 9.41.801(9)(a), (c). To the extent such persons fail to secure

[2] In *Flannery*, the earlier of these amendments (Laws of 2021, ch. 215, § 75) was held not to be retroactive. *See* 24 Wn. App. 2d at 470–72. The court therefore applied an earlier version of the statute.

immunity and face a realistic threat of incrimination, the statute allows them not to surrender incriminating weapons. *See* RCW 9.41.801(9)(d).

Even after this most recent version of the weapons-surrender statute had come into effect, though, Washington courts have invoked *Flannery* to deny requests for weapons-surrender orders. Superior Courts in Clark and Benton County, for example, decline to enter orders to surrender weapons. *See infra* at 6–8.

B. After Jessica is granted a DVPO that orders Brandon to surrender his weapons, the trial court holds Brandon in contempt and denies his motion to declare the weapons-surrender statute unconstitutional.

In 2022, Jessica petitioned for and was granted a DVPO against Brandon. The DVPO contained a provision requiring Brandon to surrender his weapons, *see* CP 102, and was renewed in September 2023, CP 234–35.[3] After the DVPO

[3] The DVPO was renewed most recently in August 2024, but that renewal was entered after the Clerk's Papers were

issued, the trial court determined that Brandon had not complied with the directive to surrender his weapons. He was eventually declared in contempt of the order, CP 137, and as far as the record shows, he remains in contempt, CP 241–47.

In 2023, Brandon, relying on *Flannery*, filed a motion asking the trial court to declare that the weapons-surrender statute violated the Fifth Amendment; the Fourth Amendment and article I, section 7 of the Washington Constitution; violated the Second Amendment; and violated the separation of powers. In a six-page reasoned memorandum issued in September 2023, the trial court denied the motion, noting, among other things, that *Flannery* had dealt with an older version of the weapons-surrender statute that did not contain the new provisions regarding immunity.[4] CP 248–53 (attached as App. 3).

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transmitted. *See* Order, *Montesi v. Montesi*, No. 22-2-08041-8 (Wash. Super. Ct., King Cnty. Aug. 22, 2024).

[4] The current version of the weapons-surrender statute went into effect on July 23, 2023. *See* Laws of 2023, ch. 462. Beginning on that day, Brandon could have taken advantage of the statute's immunity provisions if he had purged his ongoing

Brandon appealed that denial to Division I. CP 254. He continues to press all the constitutional arguments he raised before the trial court. His reply brief was filed on November 1, so briefing has now closed. *See* RAP 4.4 ("A party should not file a motion to transfer until the record has been perfected and all briefs have been filed in the Court of Appeals.").

II. REASONS TO GRANT THIS MOTION

This case presents constitutional questions on which the lower courts are split. That split, and the overwhelming practical importance of the legal questions here, warrant this Court's immediate attention.

A. Trial courts are split on the constitutionality of the weapons-surrender statute.

In Clark County, Superior Courts decline to enter weapons-surrender orders. In April 2024, a Vancouver resident

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contempt and complied with the weapons-surrender order. *See* RCW 9.41.801(9). Thus, the immunity provisions in the current version of the weapons-surrender statute apply to Brandon, and to this appeal, as both a formal and a practical matter.

named Carissa Larkin received a civil-protection order against her former fiancé, Kyle Palmer. App. 1 (attached). But while that order prohibited Palmer from possessing firearms, it did not require him to surrender them—in keeping with the Clark County Superior Court's policy since May 2023. *See id.* That policy led to Larkin's death when, in July of this year, Palmer "shot her to death, then himself, in the parking lot of her central Vancouver apartment complex. The mother of three was holding her 4-year-old son, who was grazed by a bullet. The child left a trail of blood behind him as he fled." *Id.*

Superior Courts in Benton County also decline to enter weapons-surrender orders. In May 2023, Ilana Hernandez received a civil-protection order against her husband. The Superior Court, however, denied her request for a weapons-surrender order, citing Fourth Amendment concerns. *See* App. 2 at 16–17 (attached) (transcript of hearing).

In King County, on the other hand, courts routinely enter weapons-surrender orders. *See* App. 1. This case is a good

example. Here, a King County Superior Court considered but rejected Brandon's arguments against the weapons-surrender statute's constitutionality. *See* App. 3.

B. The constitutionality of the weapons-surrender statute presents a question of enormous practical importance.

It is not merely the legal confusion in the lower courts that warrants this Court's urgent intervention. As the death of Carissa Larkin shows, the denial of a weapons-surrender order can have fatal consequences. The great practical importance of those orders for survivors of domestic violence, as well as the importance that the Legislature places on weapons-surrender orders, *see* RCW 7.105.362(1), 9.41.801(1), favor the granting of this motion.

This Court recently denied a request for direct review in *Hernandez v. Hernandez*, No. 102120-8, a case in which the trial court, citing Fourth Amendment concerns, had denied a request for a weapons-surrender order. There, however—as in many cases involving civil-protection orders—the person

subject to the civil-protection order had no attorney. Here, both sides have counsel. This case thus presents a suitable opportunity for the Court to decide the constitutionality of weapons-surrender orders.

III. CONCLUSION

As things now stand, accidents of geography determine whether survivors of domestic violence receive the protection of weapons-surrender orders. To end that inequitable state of affairs and conclusively answer whether weapons-surrender orders are constitutional, the Court should grant this motion to transfer.

I certify that this document contains 1,292 words, excluding the items exempted by RAP 18.17(b).

DATED this 15th day of November, 2024.

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PROOF OF SERVICE

I hereby declare under penalty of perjury that on November 11, 2024, I caused to be served a true and correct copy of this document on the following recipients by email, the recipients having consented to that mode of service:

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4860-3485-9255, v. 2

Appendix 1

Jessica Prokop, ***The Victim in a Vancouver Murder-Suicide Had a Protection Order but Clark County Judges Say the Law Doesn't Let Them Take Guns from Abusers,*** **The Columbian (Aug. 12, 2024).**

The victim in a Vancouver murder-suicide had a protection order but Clark County judges say the law doesn't let them take guns from abusers

State's courts at odds over forcing surrender of arms after Flannery decision

By Jessica Prokop, Columbian Local News Editor
Published: August 12, 2024, 6:05am

Baylee Gonzales embraces the daughter of Carissa Larkin on the morning of July 25 as first responders work at the scene of a murder-suicide in central Vancouver that left Larkin dead. (Amanda Cowan/The Columbian files) **Photo Gallery**

Carissa Larkin (Photo contributed by Baylee Gonzales) Photo

Carissa Larkin feared for her life after obtaining a civil domestic violence protection order in April against her former fiance.

In her petition, Larkin, 32, wrote that Kyle Palmer owned firearms: "I am unsure of what Kyle is capable of but fear retaliation."

On July 25, he shot her to death, then himself, in the parking lot of her central Vancouver apartment complex. The mother of three was holding her 4-year-old son, who was grazed by a bullet. The child left a trail of blood behind him as he fled the grisly scene.

Even though the protection order prohibited Palmer, 38, from possessing firearms, the court never demanded he surrender them.
That's because in May 2023, about a year before Larkin sought protection, the Clark County Superior Court bench stopped ordering people subject to civil protection orders to surrender their weapons. The change stems from a Washington Court of Appeals ruling in a Kitsap County domestic violence case, known colloquially as the Flannery decision.

The decision has created confusion and inconsistency across the state's Superior Courts — and putting some victims, including those in Clark County, more at risk.

Clark County's presiding judge says the bench is legally bound to follow the higher court's decision. Domestic violence victim advocates and attorneys say the county court's interpretation of the Flannery decision is wrong and endangers survivors.

"When you know firearms are involved, but courts aren't ordering that the firearms be surrendered, I think it's an injustice to the victims," said Michelle Bart, founder of the National Women's Coalition Against Violence & Exploitation. "You tell me a woman (has) been granted a protective order, and you're not going to do anything in order to make sure that she's safe and her children are safe?"

Flannery decision

Dwayne Allen Flannery was ordered to surrender his firearms by a Kitsap County Superior Court judge in a 2019 domestic violence assault case. He refused and claimed the order violated his Fourth and Fifth Amendment rights against unreasonable search and seizure and self-incrimination. He argued if he surrendered his weapons, he'd be admitting to possessing them when he legally wasn't allowed to under the no-contact order in the case.

In a November 2022 decision, the state Court of Appeals sided with Flannery, and the weapons surrender order was dropped.

The Washington Legislature in 2023 passed a bill to resolve uncertainties raised by the Flannery case. House Bill 1715 outlined a number of domestic violence victim protections, including one that built on the Tiffany Hill Act, the 2020 electronic monitoring law named after the Clark County mother and Marine sergeant who was fatally shot by her estranged husband. HB 1715 took effect in July 2023.

Despite this so-called Flannery fix, Clark County Superior Court has not changed its current procedure.

Michelle Bart of National Women's Coalition Against Violence & Exploitation takes a break in her downtown Vancouver office on Thursday afternoon. (Amanda Cowan/The Columbian) Photo

Presiding Judge Derek Vanderwood said the legislative change related to Flannery only partially addresses the Fifth Amendment issue of self-incrimination, in that a person cannot be prosecuted for certain crimes pursuant to a weapons surrender. Additionally, the legislation does not address the Fourth Amendment concerns, he said.

"Our interpretation of Flannery is that a person can be legally restricted from possession (of) firearms, but their Fourth and Fifth Amendment rights may be violated by the surrender process itself rather than by the restriction alone," Vanderwood said in an email on behalf of the bench. "We continue to order firearm restrictions, but have not entered the standalone order to surrender."

Those restrictions state the respondent is prohibited from "accessing, possessing, having in their custody or control, purchasing, receiving, or attempting to purchase or receive firearms, other dangerous weapons or concealed pistol licenses."

Conflicting practices

Other counties made similar changes after Flannery, according to reporting by InvestigateWest. But King County continues to issue weapons surrender orders. Presiding King County Superior Court Judge Ketu Shah said the Fourth Amendment issue hasn't been raised there.

If a respondent or defendant asserts their Fifth Amendment right, the court has them fill out a form stating they are invoking that right. He said the issue is not often raised on the civil side, more so in criminal cases. The King County Prosecuting Attorney's Office is also not filing criminal charges against people who don't surrender their firearms, he said. Instead, prosecutors may come back to the court to ask for a hearing on the issue.

"From our position, we believe the law requires it, authorizes it, so when the state or petitioner asks, we see if it meets the legal threshold and issue an order to surrender weapons. If the defendant or respondent object, we respect that process," Shah said.

"For us, we just try to follow the law and do our best to interpret it as we see fit. And this is what we're doing right now."
Vanderwood, Clark County's presiding Superior Court judge, said the local bench analyzed the Flannery decision and its implications on weapons surrender orders before making any changes.

"My view is this is not a policy that we have adopted to apply because we personally think it's the best approach, the most correct approach, that it leads to the best results. That's not the analysis that we've had," Vanderwood said. "Our analysis is based on the laws that exist, that it applies and how that law then impacts our determination."

The Clark County court asked the state's Administrative Office of the Courts for guidance about Flannery, said Commissioner Christine Hayes, who was just appointed as the court's 12th judge. And some judicial officers participated in a statewide civil protection order workgroup that discussed the issue.

"We are doing this because we believe that is the interpretation of what the law requires," Hayes said.

At odds with the court

Still, domestic violence victim advocates and attorneys are at odds with the Clark County court's interpretation.

"Our program disagrees that Flannery creates a problem for the court. We're not very enthusiastic about the court relying on this (Administrative Office of the Courts) research in making this decision as to firearms and whether the orders of surrender should be happening," said Jeffrey Keddie, managing attorney for Northwest Justice Project's Vancouver office.

Keddie said his office believes the Legislature's fix is sufficient to protect the rights of people who are seen as credible threats.

His office has raised the issue at the county's civil protection order stakeholder meetings and asked whether the court plans to revisit it.

"We really are trying to be actively in communication with stakeholders as to what best practices for this should look like," Hayes said, adding that's why the group was created, to try to ensure protections are being afforded to domestic violence survivors. "We are continuing to evaluate case law as it changes ... to make sure we're performing our duties as prescribed by law and ensuring we are providing the protections as required by law."

For instance, a recent U.S. Supreme Court decision in United States v. Rahimi upheld a decades-old federal law that prohibits firearms possession by domestic violence abusers who pose a credible threat to the physical safety of an intimate partner.

Vanderwood said the county bench is discussing how the Rahimi case affects the surrender of firearms process. However, he noted Rahimi largely focused on the Second Amendment, not the Fourth and Fifth Amendment issues raised by Flannery.

"I'm glad they are revisiting it. I would like them to change that policy," Keddie said. "I think that it's important folks who are seen as a credible threat to their partners have to surrender their firearms. I think it's imperative. When there is a significant risk and someone has a firearm there is a much greater risk of lethality."

'We need consistency'

According to the Washington State Coalition Against Domestic Violence, 45 percent of domestic violence homicides occur within the first 90 days following separation. And the presence of firearms increases the risk of lethality by 500 percent.

Spokeswoman Elizabeth Montoya said the coalition has heard from member programs and advocates from across the state about the Flannery issue.

"It's unfortunate that different courts and counties across the state are taking that opportunity, that confusion, to kind of use their discretion on what to do," Montoya said. "We need consistency, we need follow through.

...

We need the courts to put this into practice and actually get firearms out of the hands of abusers."

According to a
report released Thursday by Everytown for Gun Safety that looks at domestic homicide-suicides with a firearm, survivors in the nonprofit's focus groups said nearly 25 percent of the perpetrators were prohibited by law from possessing a firearm, including being under a domestic violence protection order.

New appointed Clark County Superior Court Judge Christine Hayes Photo

The report says states that prohibit people subject to domestic violence protection orders from possessing firearms have seen a 13 percent decrease in intimate partner firearm homicide rates.

"The No. 1 factor is, how are we going to keep that man or woman ... safe? How are we going to keep the kids safe?" said Bart, of NWCAVE. "Perpetrators, no matter who they may be, they are out to finish a job, and they're going to do it one way or another.

But if we have tools in our toolkit that we can put into place in every county in this state in order to keep those safe that are innocent ... then we'll be a step ahead of the game."

Keddie, of Northwest Justice Project, said he believes the Washington Supreme Court will need to weigh in on the issue to bring clarity and consistency.

"All of Washington state should be a safe place for survivors of violence, and having the uncertainty between all of the different courts creates a situation of terrible risk to some survivors," Keddie said.

Appendix 2

Order Denying Respondent's Motion to Declare Weapon Surrender Statute Unconstitutional, *Montesi v. Montesi*, No. 22-2-08041-8 KNT (Wash. Super. Ct. Sept. 19, 2023).

FILED
2023 SEP 19
KING COUNTY
SUPERIOR COURT CLERK

CASE #: 22-2-08041-8 KNT

Superior Court of Washington, County of King

In re: Petitioner: Jessica Montesi And Respondent: Brandon Montesi	No. 22-2-08041-8 KNT **Order Denying Respondent's Motion to Declare Weapon Surrender Statute Unconstitutional**

Order

1. At the July 14, 2023, compliance hearing, the respondent raised the *Flannery* case, and asked the court to find the weapon surrender order, issued pursuant to statute, unconstitutional. *State v. Flannery*, 24 Wn.App.2d 466 (2022). The court continued the hearing and instructed the parties to brief *Flannery.* The Court held a hearing on August 30, 2023.
2. In reaching its decision, the Court has considered briefing from the respondent, the petitioner, and the State, other documents from the court record, and argument from all attorneys.
3. The Weapons Surrender Order, and the statutes that authorize the Order and the Court's duty to hold compliance hearings, RCW 9.41.800 and RCW 9.41.801, do not offend either the Federal or State Constitutions.
4. The Respondent argues that the current weapon surrender statutes violate his Fifth, Fourth, and Second Amendment rights, as well as the doctrine of Separation of Powers. The burden of proof on a party making a facial challenge to a statute is to show the statute or statutes are unconstitutional beyond a reasonable doubt. The respondent has not met his burden, and as such, his request is denied, as discussed below.
   a. **Fifth Amendment.** The *Flannery* case is not applicable here. *Flannery* analyzed a 2019 statute that the Washington State Legislature subsequently amended. In that amendment, the Legislature addressed the Fifth Amendment immunity issue. The

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King County Superior Court
Seattle, WA 98104
206-477-1501

Respondent has not met his burden and has not shown that the statutes at issue here are facially unconstitutional. The revised statutes – the ones under which this Court has issued its Order to Surrender Weapons and holds compliance hearings -- *do* afford immunity from prosecution in subsequent criminal proceedings. See RCW 9.41.801(9)(a). This legislative carve-out addresses the 5th Amendment and Article I, section 7 and 9 concerns raised in *Flannery* and by Respondent here. Respondent has also not shown that the statutes are unconstitutional as applied to him. He spent significant time arguing that Ms. Montesi's request for jail time as a sanction for civil contempt is the equivalent of exposure to criminal liability. The contempt order (different than the Order to Surrender) is a well-accepted civil sanction for defiance of a court order. The two legal issues are separate and the latter does not fall under any criminal statutory scheme nor does it function as a criminal sanction equivalent. There are no violations of Respondent's 5th Amendment rights.

b. **Fourth Amendment.** *Flannery* is also not applicable to the 4th Amendment and Article I concerns raised by Respondent. The statutes here demand an accounting for dangerous weapons and their surrender. See, e.g., RCW 9.41.801(6)(a). The legislature has not deputized the judiciary to search people's homes without probable cause or without a warrant. The legislature has demanded people subject to the Order to Surrender account for their weapons and give them to police. "We conclude that the party ordered to surrender weapons has the burden to prove compliance." Braatz v. Braatz, 2 Wn. App. 2d 889, 898, 413 P.3d 612, 617 (2018). The Legislature has directed the Courts to ensure court orders are enforced. This is a far cry from a State actor unreasonably and unlawfully intruding into a person's home or private affairs. The Court is not a State actor here and neither is the Respondent. He is a named party in a civil matter being asked to produce or account for a thing in his possession. In civil litigation, this occurs regularly and does not run afoul of the Constitutional prohibitions against an unreasonable search. The 4th Amendment and Article I concerns fail for this elementary reason: asking a Respondent in a civil matter to account for something (even a gun) does not equate to an unreasonable and unconstitutional search of a particular place.

c. **Second Amendment.** The Respondent cited the *Rahimi* case in support of his Second Amendment argument. *United States v. Rahimi*, 61 F.4th 443, 452 (5th Cir.), cert. granted, 143 S. Ct. 2688 (2023). *Rahimi* is not binding on this Court. It is also unpersuasive. This Court does not find that an Order to Surrender Weapons, issued as a result of Respondent being restrained by an Order of Protection, runs afoul of the

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Second Amendment of the United States Constitution or any provisions of Washington's Constitution.

The U.S. Court of Appeals for the 5th Circuit decided *Rahimi* in March of 2023. It held that a federal statute prohibiting firearm possession after entry of a domestic violence restraining order was unconstitutional because a person in that instance was not someone who the Founders contemplated losing their rights to access guns under 2nd Amendment. The analysis ignores the Founder's uncanny wisdom and the absence of information about domestic violence and modern firearms before them when they drafted and signed the Constitution.

Rahimi concedes that recent US Supreme Court cases involving firearms restrictions *have* upheld prohibitions on certain individuals, such as convicted felons and the mentally ill, from possessing firearms. It found that the *Heller* case's reference to "law-abiding, responsible" citizens *excludes* groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders "presumptively" tolerated or would have tolerated. *Rahimi*, 61 F.4th at 452. But *Rahimi* then goes on to say that Congress' exclusion of respondents who are subject to domestic violence protection orders would *not* be in this group – that the Founders *would have* tolerated their possession of firearms.

In this Court's view, the Rahimi Court short-changes the Founding Fathers and their commitment to the promise of life and liberty. Had the Founders known of the proved nexus between domestic violence, the use of firearms, and firearms' seemingly unlimited power for destruction of the human body when an induvial pulls the trigger in rage or hate they would have recognized, tolerated and embraced reasonable limits on the right to bear arms. In 1788, no one envisioned (or could have envisioned) the devastation that a person, found by the court to present a credible threat to petitioner necessitating the issuance of a protection order, could inflict on a protected party, themselves, or an entire community with a weapon readily available today in American society to otherwise law-abiding people.

Take, for example, the AR 15 ("America's Rifle"). As recently, and accurately, described by the Washington Post, the "The AR-15 fires bullets at such a high velocity…that it can eviscerate multiple people in seconds. A single bullet lands with a shock wave intense enough to blow apart a skull and demolish vital organs. The impact is even more acute on the compact body of a small child." What does an AR-15 do to a human body? A visual examination of the deadly damage. - Washington Post

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The power of this weapon is not disputed. It is not disputed that the Founding Fathers did not have AR-15s. It is not disputed that they could not and did not contemplate the modern firearm's power when they enacted the Constitution.

It is also not disputed that one of the weapons this Court has found to be unaccounted for by Mr. Montesi is an AR 15.

The Founding Fathers did not have the copious studies concerning domestic violence available today or the view that domestic violence was even a problem. With suffrage, changes to law to protect people abused in their relationships, and a willingness of victims to speak up, American society has begun, slowly, to move beyond this anachronistic viewpoint that domestic violence was an issue for the family and one to be tolerated or ignored.

The Founders did not have that insight into the insidiousness of domestic violence. But the Founders would have tolerated limits on the mentally ill possessing weapons.

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose…Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

D.C. v. Heller, 554 U.S. 570, 626–27, 128 S. Ct. 2783, 2816–17, 171 L. Ed. 2d 637 (2008)

What the Supreme Court is saying in 2008 under *Heller* is what the Rahimi court missed in 2023: the 2nd amendment has limits. Those limits allow for prohibitions on the right to possess firearms when reasonably tied to a legitimate purpose.

In Washington, the steps a Court must follow before it may issue an Order to Surrender Weapons are both procedurally and substantively fair. The Order to Surrender suspends, but does not eliminate, a Constitutional right (here, the right to possess firearms) after the parties had notice, an opportunity to testify, to present, to

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challenge, and to explain evidence, and for a duly elected judicial officer to rule on the issue before them.

Mr. Montesi proposes that the *Rahimi* analysis would still include him under the Second Amendment's umbrella of "law abiding" citizens. Washington's Legislature, however, has made a direct connection between gun violence and domestic violence in its extensive findings explaining why it passed this law. Mr. Montesi is not having his right to bear arms suspended because he was speeding or was a bad steward of the environment, or because he is a political non-conformist. As the Legislature has described, there is a nexus between his conduct and the suspension of this Constitutional right. Our State Legislature has concluded – based on years of data showing the same -- that gun violence and domestic violence are linked. The temporary intrusion on this important constitutional right (the 2nd Amendment's right to bear arms) is well considered and puts Mr. Montesi outside the umbrella of its protection.

It is important to recognize that the Nation's "historical tradition of firearm regulation" has been circular and self-limiting. How, indeed, can the Nation adequately regulate firearms under a standard of "tradition" when the starting and end point for the "tradition" is a time when the power of an AR 15 would be inconceivable or the notion of domestic violence unspoken?

But even taking this circumstance of bizarre legal reasoning at face value, Washington's regulation would meet the Founders' approval. If the Founding Fathers had been aware of the deadly connection between guns and domestic violence, their logic and their wisdom would have led them to tolerate and indeed embrace these restrictions. As our Legislature has noted "domestic violence victims also face increased risks when their abuser has access to firearms. Firearms are used to commit more than half of all intimate partner homicides in the United States. When an abusive partner has access to a gun, a domestic violence victim is 11 times more likely to be killed." RCW 7.105.900.

Would the Founders have discarded the data now compiled on domestic violence, and the thousands of corroborating instances of it being committed with firearms, and turned a blind eye? Presumptively, the answer is no. They were committed to justice and domestic tranquility and enshrined those goals in the introduction to the Nation's founding documents. E.g., "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure

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the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." Preamble, U.S. Constitution. To suggest that if they had known the information outlined above that they would have not tolerated temporary restrictions on access to firearms undervalues and ignores their judgment, insight and the other reasonable limitations outlined by the *Heller* Court.

Here, Mr. Montesi's possession of the AR 15, the pistol, and the 13 other weapons falls that remain unaccounted run afoul of a lawfully issued ordered meant to protect the petitioner from both firearm and domestic violence. The benefits to Washington's citizens from its laws requiring the surrender of firearms in cases where protection orders have issued do not outweigh the burden on Mr. Montesi to have this Constitutional right suspended and do not afford him protections otherwise guaranteed by the Second Amendment. See Heller, 544 US at 626-627.

d. Separation of Powers. The Legislature's statutory outline of how to conduct hearings and ensure compliance with the Order to Surrender Weapons does not implicate the separation of powers doctrine.

5. The Court Orders: The respondent's motion is DENIED.

6. The Court's oral ruling is incorporated by reference.

Ordered.

9/19/23
Date

Judge Sean P. O'Donnell

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Appendix 3

Transcript of Proceedings, *Hernandez v. Hernandez*, No. 23-2-00366-03 (Wash. Super. Ct. May 25, 2023).

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR BENTON COUNTY

In Re: Petitioner: ILANA SAMARA HERNANDEZ, And Respondent: MICHAEL J. HERNANDEZ	No. 23-2-00366-03

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED THAT the above-entitled matter came on regularly for hearing before the HONORABLE COMMISSIONER ANDREW M. HOWELL, Commissioner of the Superior Court of the County of Benton, State of Washington, commencing on May 25, 2023.

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APPEARANCES:

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Appearing on behalf of the Petitioner;

MICHAEL J. HERNANDEZ, ESQ.
Pro Se
Appearing on behalf of the Respondent.

PROCEEDINGS:

JUDGE HOWELL: 22-2-00366-03, Ilana Hernandez vs. Michael Hernandez.

Good morning, Ms. Carlisle.

MS. CARLISLE: Good morning.

JUDGE HOWELL: Good morning, Mr. Hernandez. Your client is not present, is that correct?

MS. CARLISLE: She is on the phone, Your Honor.

JUDGE HOWELL: Thank you.

MS. CARLISLE: Ilana Hernandez. I saw her (inaudible).

JUDGE HOWELL: Ms. Hernandez, can you hear the Court?

MS. HERNANDEZ: Yes, sir. Can you hear me?

JUDGE HOWELL: I can. I can see you now. Thank you.

As the parties are aware, this matter is back before the Court on further consideration of the outstanding issue of the petitioner's renewed request for an order to surrender and prohibit weapons. Previously, the order of protection was entered, the Court raised concerns with regards to State v.

Flannery, noted that the issue or request for the order to surrender and prohibit weapons would be taken under advisement.

As the parties are aware, a memorandum -- I filed a memorandum directing the parties to further brief the issue with regards to authority and the parties' position regarding the availability of entering such an order in light of the decision from State v. Flannery. Ms. Carlisle, you submitted briefing on behalf of your client. The Court has had the opportunity to review that. Mr. Hernandez, I did not see any additional briefing or supplemental briefing submitted on your behalf.

I will, in much the same as the original hearing on the order of protection, I will afford each side the opportunity for argument, and much the same, in a matter of which you've not previously submitted any filings to this Court, so you will be limited in regards to the argument that you make here this morning. I will hear first from Ms. Carlisle, as she is the moving party. You'll be afforded the opportunity to support your argument in opposition, if there is any, and the Court will give its ruling regarding the question to surrender and prohibit weapons.

Do you understand, sir?

MR. HERNANDEZ: Yes.

JUDGE HOWELL: Okay. Ms. Carlisle, you may proceed.

MS. CARLISLE: Thank you, Your Honor.

As we said, we're here to renew our motion to surrender firearms because Mr. Hernandez has over 23 handguns, 15 AR-15s, two rifles, as well as many unassembled firearms. Mr. Hernandez is a gun enthusiast. He has guns on him, in his car, and in his home. He also has a concealed weapons permit. The guns are loaded. He has used his guns to intimidate and threaten his family. He has threatened to commit suicide, and threatened to take Ms. Hernandez and their children with him.

First, I'd like to make a record that we object to the Court relying on memos issued by the Office of Administrative Hearings -- I'm sorry, I'm not -- Administrative Office of the Courts. Because the AOC is essentially getting to argue to this Court without being present, and the AOC has no standing in this case.

Further, I don't believe that I'm arguing that Flannery isn't controlling, because it isn't. I believe I'm arguing to this Court why it should not

follow memos issued by the AOC that have incorrect legal analysis and are beyond the authority given to them by statute, which is RCW 2.56.030.

JUDGE HOWELL: Well, Ms. Carlisle, I'm going to interrupt briefly. There's -- I -- the Court's reviewed this record. There has been no mention made of AOC memorandums as a guiding authority for which the Court's decisions were previously rendered or pause in which the decision was taken under advisement.

What the record contains to this point are the Court's concerns that a Court of authority, which Division II is a Court of authority, and while there has not been a ruling from Division III, the Court raised concerns regarding the controlling nature of the decision in Flannery. And so at this point, the record, as contained here, has -- is absent and vacant of any -- any memorandums or briefings of AOC.

I understand that you spoke at length in your briefing about that, your oral argument is addressing it here today. That has not been any articulated reasons by myself as to the concerns I have as the judicial officer in this matter. The record that I have made are the concerns that I have in my review of Flannery. And so I'd ask that your

arguments be addressed to that extent.

MS. CARLISLE: Thank you, Your Honor. I just want to make a very brief timeline of facts. The Flannery opinion was issued in November of 2022. This Court was issuing orders to surrender, no problem, until the beginning of February of 2023, and that's when those AOC memos were issued, and that's when we started seeing this problem statewide.

So I just want to make my record to the facts that I see here before the Court. I won't address the AOC memos again, if you're saying that the Court is not relying on it.

JUDGE HOWELL: Well, what I'll further state is that I think there's not a basis for which you can make that record in its entirety. You are appearing before me as counsel on behalf of Ms. Hernandez. I have not, to my recollection, had you appear before me on any other matters concerning protection order cases, nor have you been present for the Court's determination on any other matters. There is -- I think that while you may make that record, the basis for which it is being made is incomplete.

This, myself, I am the assigned judicial officer who has overheard -- who is assigned to the protection order docket. There are other judicial

officers in there to take the responsibility of the ex parte docket. I participate routinely in those responsibilities, as well. I think that the record that you have made is -- it's not supported that this -- I have -- the concerns that I raise with regards to Flannery have been raised since the time in which Flannery was first decided.

The Court is mindful that the very week in which it came out, I expressed my concerns on the record. I believe the opinion was released on a Thursday. It was on the date of the docket, and I expressed at that time my concern, and I took individual analysis of each case and concerns that I had at that time.

And so I understand the record you've made, and I understand that there is an acknowledgment that this has been a statewide issue, but with regards to this case specifically and matters in Benton County, I don't think the record is supported in that regard.

MS. CARLISLE: Okay. So let's address Flannery, then, Your Honor. Well, I guess I want to back up really quick. So you're saying Your Honor stopped issuing orders to surrender on this docket in November of 2022?

JUDGE HOWELL: No, I state -- no, I

did not state that. I said that I have expressed my concerns from the time in which Flannery was issued, and that I have, on an individual basis, undertaken that analysis at the time in which requests were made.

MS. CARLISLE: When did this Court start doing a full sua sponte will not issue orders to surrender firearms in the civil protection order docket?

JUDGE HOWELL: I do not believe that is at issue here before the Court's determination and I'm not going to engage in that discussion.

MS. CARLISLE: All right. So we'll talk about the Flannery decision, which is not -- I don't believe it's binding here, and it was interpreting a 2019 statutory scheme. We are discussing the 2021 -- 2021 version of the statutory scheme that applies to this case here. The 2019 scheme did not have an immunity provision, the 2021 version does.

The Flannery court was discussing a pretrial criminal case where the State had brought charges against Mr. Flannery for not complying with the surrender order. There was a catch-22 in that case, because when that Court issued the order to surrender, the minute that order was issued, Mr.

Flannery was technically probably -- could have been in violation of it, and there was no immunity provision. That's why the legislature added the immunity provision in 2021.

Mr. Hernandez does not make any arguments that the firearm statutory scheme is unconstitutional. The state simply is not -- and the statute is simply not facially unconstitutional, and Mr. Hernandez was making an argument that the statute is invalid as applied to him. That is a very fact-specific argument and analysis.

It's very important for this Court to remember that and analyze this issue, because there are many, if not most -- I would say absolutely most of the scenarios on this docket were an order to surrender firearms would not violate the Fifth Amendment. When I talk about the very fact-specific analysis that must happen, Mr. Hernandez cannot show that complying with an order to surrender would expose him to a realistic threat of self-incrimination.

Now, if he can articulate a realistic threat of self-incrimination, this Court can do an in-camera review or seal the record and determine if there is an applied violation and then take it from there. And most of that context would happen in a

criminal realm, not here. The fact is there is no Fifth Amendment violation here.

Mr. Hernandez was a lawful gun owner when the DVPO was entered. The immunity provision covers him for surrendering them now. The criminal charge in Benton County District Court does not involve any allegation of any firearm use.

As for the Fourth Amendment, there is no Fourth Amendment violation, and the Flannery court explicitly limited its opinion to the arguments presented in that case. By claiming that the surrender of firearms scheme violates the Fourth Amendment, the Flannery court -- and I'm going to say the AOC memos, even though they're not being relied on here -- missed the biggest elephant in the room. There is no search by the government.

In every case cited by Flannery and the memos talks about the government doing the search. In Marshall vs. Barlow, it is was the government that did the random searches on businesses to make sure they were compliant with OSHA. In the City vs. Mancini, the police were setting up sobriety checkpoints. So both cases, the government was fully involved.

The government is not involved when a person is ordered by this Court to go get their guns

and surrender them to the police department, to surrender per a civil protection order. There is also no search when a person goes to their own home to get their firearms to surrender, because that doesn't reveal any private information that would constitute private affairs protected by the Fourth Amendment. Again, there is no Fourth Amendment violation.

The most important thing here, I think, the Court has to remember when it's looking at all the cases on this docket is that there is a severability clause in the statute. And since 2014, the legislature has put in the severability clause in every change they've made to the statutory surrender scheme.

So if this Court does find for some reason that the prong to order the surrender and fill out the surrender declaration violates the Fourth or Fifth Amendment, which we are not claiming here, there are tons of other prongs in the statute that this Court should be applying as to prohibiting Mr. Hernandez from accessing firearms, prohibiting him from having custody and control of them, from purchasing them, from retrieving them from somebody else, or attempting to purchase them or receive them from somebody else.

It can also tell him that he cannot try to

go get a concealed weapons permit or he has to turn in his concealed weapons permit that he has. This Court is choosing to do nothing. I find it extremely troubling that this Court would disregard the legislature's strong public policy protecting domestic violence victims and preventing gun violence, because it has adopted an incorrect analysis of the Flannery opinion. It's wrong, and it's dangerous.

This Court should immediately issue an order to surrender and prohibit firearms in this case and in most cases on this docket. Thank you.

JUDGE HOWELL: Thank you, Ms. Carlisle.

Mr. Hernandez, do you have any argument you wish to present at this time?

MR. HERNANDEZ: The Richland Police Department took my concealed carry permit when they arrested me. As far as -- I don't even like targets that are shaped like people, I don't even like targets that are shaped like animals. I just go for the square ones, because I wouldn't choose to shoot an animal, let alone a person, unless I'm going to eat the animal, not that I would eat the person.

But I haven't -- I have never threatened to harm my family with firearms. My family's safety is

my most important priority. And not all of my firearms are loaded. There are usually only a couple that are loaded. I wouldn't even be able to fit them in my safe if they were all loaded.

I forgot what I was going to -- I don't have any criminal record. I have no -- my stuff, when I was building them, to store them, and most of them have never even been fired because I was building things that I wanted to hand down to my kids after I died. And I had a little collection of stuff going, and when my wife left, she took half of my collection, approximately $15,000 worth of guns, and she went and sold them.

And I -- I've already got rid of my guns. They're at my brother's house anyway, and he's holding them until this stuff is all over.

JUDGE HOWELL: All right. Thank you, sir.

Ms. Carlisle, do you have an order, a proposed order to present?

MS. CARLISLE: I do, Your Honor. I just want to say quickly that, you know, Mr. Hernandez at our last hearing said that he had already been ordered to surrender his firearms in the criminal matter, which was not the case. I just want to make

that record that that did not happen.

I have an order to surrender and prohibit weapons. I didn't fill it out, Your Honor, because I wasn't sure what you were going to order today.

JUDGE HOWELL: I understand.

MS. CARLISLE: And then I also have the order on motion for surrender and prohibition of weapons, so I will pass those up. All I have really filled out is the caption, so I don't know what your ruling will be, but I will pass those up.

JUDGE HOWELL: Thank you.

MR. HERNANDEZ: Can I have (inaudible)?

JUDGE HOWELL: Only briefly, sir.

MR. HERNANDEZ: We were supposed to go to my wife's sister's house for Thanksgiving, and I'm a truck driver, been a truck driver for 24 years.

JUDGE HOWELL: And just -- let me just -- if this has anything to do with other than the Court's determination on your -- the order to surrender and prohibit weapons, I'm not going to hear anything further on it.

MR. HERNANDEZ: It was just about my family's safety.

JUDGE HOWELL: I'm not going to hear

anything further on it.

While the Court has raised concerns with regards to Flannery since the time that it was authored, the -- this is the first time in which the Court has heard thorough argument and briefing to the extent in which Flannery affects the Court's ability to enter a requested order to surrender and prohibit weapons. Counsel for Ms. Hernandez, I believe, is correct. Flannery is very clear in that it is an analysis of the statute that is before the immunity clause, it is not the statute at issue here.

I do not find that there is a Fifth Amendment prohibition and that Flannery doesn't address the specific -- the statute here. The Court's concern that I have is with regards to the Fourth Amendment and concerns that I have that the ordering a surrender of firearms would constitute an unlawful search that -- such that I will find that I -- there's a basis to prohibit Mr. Hernandez from having firearms, and I will enter an order to that effect, sir, that you are prohibited from having firearms, based upon the prior petition and argument and considerations of this Court in which I found that there was a basis for the entry of the domestic violence protection order.

I will not go so far as to enter an order, though, that will have you surrender those firearms. The concerns that I have I've already articulated or stated regard that of the Fourth Amendment. So the orders that have been handed forward, I appreciate that they have not been filled out in entirety, Ms. Carlisle, as I will have to make modifications to them so that you, sir, are on notice that you are prohibited from possessing firearms of any kind.

I'm not extending it to include the language of surrender, as Ms. Carlisle is well aware that -- and I'm putting you on notice, sir, the -- upon entry of the Court's orders here today, if Ms. Hernandez wishes to seek revision or appeal this Court's decision, you have 10 days from the entry of the order for that to occur.

MS. CARLISLE: Your Honor, if I'm not mistaken, appeal would be 30 days, correct?

JUDGE HOWELL: You have 10 days for revision on this order.

MS. CARLISLE: Yeah.

JUDGE HOWELL: And appeal, if you wish to not seek revision, is separate from that, correct?

MS. CARLISLE: My only request, Your Honor, was to make sure that you state that you are

not going to order the surrender per the Fourth Amendment. And I also have a question, I'm not sure the Court will answer it, I'm trying to figure out what search you believe is happening when you order a surrender.

JUDGE HOWELL: I've expressed that my concern is with regard to the Fourth Amendment, I think that record was already clearly made, and so I'm -- and I'm not going to articulate that any further.

MS. CARLISLE: But you will put that in the order, that you are not going to order the surrender because of the Fourth Amendment?

JUDGE HOWELL: I've already stated that.

MS. CARLISLE: Okay.

MR. HERNANDEZ: (Inaudible) like any spare barrels or handguns or grips or anything like that. As far as I understand, anything that has a serial number, like a lower receiver, is what is considered a firearm, like an upper receiver would not. A not assembled upper receiver, would that be considered a firearm?

JUDGE HOWELL: Sir, I would direct you to seek the advice of counsel with regards to what would qualify or not qualify as a firearm that is

prohibited under this order.

(Pause in the proceedings).

JUDGE HOWELL: Sir, you're going to get a copy of both these orders before you leave today.

Thank you, Counsel.

MS. CARLISLE: Thank you.

* * *

STATE OF WASHINGTON)
) ss.
COUNTY OF BENTON)

I, Dina Ranger, a Certified Shorthand Reporter of the State of Washington, do hereby certify that I listened to the digital audio provided by the Court and wrote in shorthand the proceedings had upon the hearing of the cause previously captioned herein on May 25, 2023, before the HONORABLE COMMISSIONER ANDREW M. HOWELL, Judge of the Superior Court of the State of Washington, County of Benton; that I thereafter had reduced my said stenotype notes by computer-aided transcription; and that foregoing transcript, consisting of 19 pages, constitutes a full, true, and accurate record of the proceedings had upon the hearing of said cause, and of the whole thereof.

Witness my hand on this 7th day of June, 2023.

_____
Dina Ranger, WA-CSR, RPR
WA-CSR #2313
Registered Professional Reporter

KELLER ROHRBACK LLP

September 09, 2025 - 8:37 AM

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