IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Case No. 99374-2
(Consolidated with case no. 99379-3)

On review from:
Court of Appeals No. 37240-5-III

STATE OF WASHINGTON, Respondent,

v.

M.Y.G., Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

Although he successfully completed a deferred disposition, resulting in the dismissal of his criminal charges, the Superior Court ordered M.Y.G. to submit his personal genetic information for inclusion into a government database of felony criminal offenders. Because the Court of Appeals' interpretation of a "conviction" to include the entry of the deferred disposition under RCW 43.43.754(1)(a) conflicts with the plain language of the Juvenile Justice Act as well as the purposes of rehabilitation and the heightened privacy interests of juvenile offenders, this Court should hold that M.Y.G. was not required to submit a DNA sample upon entering a deferred disposition.

II. ASSIGNMENTS OF ERROR

1. M.Y.G.'s entry of a deferred disposition under the Juvenile Justice Act, RCW 13.40.127, does not constitute a felony conviction within the meaning of RCW 43.43.754(1)(a) for purposes of collecting his DNA for government databases.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the plain language of RCW 43.43.754(1)(a), read in the context of its related statutes, unambiguously requires

mandatory collection of a juvenile's DNA as part of juvenile court proceedings when the juvenile enters a deferred disposition.

2. Whether the history of increased privacy protections for juvenile court proceedings compared to adult criminal proceedings indicate the legislature did not intend to permanently identify a juvenile who successfully completes a deferred disposition with a permanent criminal record associated with adult felony offenders.
3. Whether a narrow interpretation of RCW 43.43.754(1)(a) is necessary to prevent the statute from unconstitutionally intruding into the privacy interests of Washington citizens.

IV. STATEMENT OF THE CASE

M.Y.G. is a 15-year-old boy who was charged in juvenile court with two counts of theft of a motor vehicle. CP 1. He requested and obtained a deferred disposition under RCW 13.40.127, which is an alternative resolution available to juveniles with minimal criminal histories. CP 24. He stipulated to his guilt and agreed to comply with conditions of supervision. CP 19-23. Subsequently, he successfully completed supervision and his conviction was vacated and dismissed. *See Opinion*, at 2-3.

Over M.Y.G.'s objection, the trial court ordered him to submit a DNA sample under RCW 43.43.754(1)(a) when it entered the order deferring prosecution but stayed the order pending M.Y.G.'s appeal. CP 28, RP 17. The Court of Appeals affirmed the order by applying the Sentencing Reform Act ("SRA")'s definition of "conviction" and concluding that the legislature intended to treat M.Y.G.'s entry of a deferred disposition as a felony conviction for purposes of DNA collection. *Opinion*, at 4-5. This Court granted review to determine whether entry of a deferred disposition constitutes a conviction requiring the collection of DNA under RCW 43.43.754(1)(a). *Petition for Review*, at 1-2.

V. ARGUMENT

Interpreting the reach of RCW 43.43.754(1)(a) requires this Court to determine whether the legislature intended for juveniles who enter and successfully complete deferred dispositions, resulting in the dismissal of criminal charges, to be compelled to submit their DNA into a database of felony offenders. A plain language reading supports M.Y.G.'s argument that he was not "convicted of a felony" when he entered a deferred disposition under the Juvenile Justice Act. Moreover, a contrary interpretation would lead to absurd and potentially constitutionally infirm results considering the purposes of the Juvenile Justice Act and the

heightened privacy interests of juveniles. Accordingly, this Court should reverse the Court of Appeals and hold that M.Y.G. is not required to submit a DNA sample.

A. Standard of Review

The reviewing court's goal in interpreting a statute is to ascertain the legislature's intent by examining the statute's plain language and its context in the statutory scheme. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). If the plain language of the statute is unambiguous, the inquiry ends and the statute is enforced in accordance with its plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Only if the statutory language is ambiguous does the court then turn to legislative history and canons of statutory construction to discern the legislative intent. *Id.* at 110-11. In that undertaking, the goal of the court is to adopt "that interpretation which best advances the statute's legislative purpose." *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 88, 847 P.2d 455 (1993).

B. Under a plain language reading, RCW 13.04.240 prohibits interpreting M.Y.G.'s juvenile court proceeding as a felony conviction for purposes of creating a permanent DNA record.

When interpreting the statute at issue, "a court should not apply a mechanical definition but rather should interpret the meaning of terms in

the context of the statute as a whole and consistently with the intent of the legislature." *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 849, 215 P.3d 166 (2009). Here, RCW 43.43.754(1)(a) states:

> A biological sample must be collected for purposes of DNA identification analysis from: (a) Every adult or juvenile individual convicted of a felony, or any of the following crimes (or equivalent juvenile offenses) . . ..

But the statute does not define the term "convicted," nor does it establish a standard for determining whether an alternative disposition available in juvenile court constitutes a conviction for purposes of compulsory DNA collection.

By entering the deferred disposition in juvenile court to a felony charge, M.Y.G. stipulated to entry of a finding of guilt. RCW 13.40.127(4). Upon successfully completing the conditions imposed during the deferral period, the conviction is vacated and the case dismissed with prejudice, then administratively sealed after the child's 18th birthday. RCW 13.40.127(9), (10). Consequently, after the child reaches 18 years of age, he is considered as not having previously been convicted. *State v. P.M.P.*, 7 Wn. App. 2d 633, 643-44, 434 P.3d 1083 (2019); RCW 13.50.260(6)(a).

Multiple related provisions of the Juvenile Justice Act, as well as case law evaluating the distinctions between juvenile court and adult criminal proceedings, support a plain language reading of RCW 43.43.754(1)(a) that applies only to juvenile court matters that proceed to final disposition. In evaluating whether compulsory DNA collection is triggered, this Court must consider that M.Y.G.'s entry of a deferred disposition was a contingent proceeding that is purposefully structured to avoid the stigma of a permanent criminal record.

1. RCW 13.04.240 and related statutes prohibit treating M.Y.G.'s deferred disposition as equivalent to an adult criminal conviction while M.Y.G. remains in juvenile court.

This Court has previously concluded that the term "conviction" was ambiguous because it is used to refer to both juvenile and adult proceedings in various different provisions of the code. *In re Juveniles A, B, C, D, E*, 121 Wn.2d at 87-88. The *Juveniles* Court therefore considered the public health policies of the mandatory HIV testing statute to conclude that the legislature intended to apply it to juvenile sex offense adjudications. *Id.* at 88-90. But the *Juveniles* Court did not consider the definition of the term "conviction" in the context of RCW 13.04.240,[1]

[1] The Juvenile Justice Act further provides that "adjudication" may have the same meaning as "conviction" only for purposes of sentencing in adult court. RCW 13.04.011(1). The language limiting the equivocal treatment

which expressly states, "An order of court adjudging a child a juvenile offender or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime."

Because juvenile offenses are not considered crimes, juveniles cannot be convicted of felonies. *State v. Saenz*, 175 Wn.2d 167, 173, 283 P.3d 1094 (2012) (*citing* RCW 13.04.240). While courts have recognized that RCW 13.04.240 is not expansive in its reach, they acknowledge that its protections apply while a juvenile offender is still in juvenile court. *See U.S. v. Mendez*, 765 F.3d 950, 952 (9th Cir. 2014), *cert. denied*, 575 U.S. 978 (2015); *State v. Johnson*, 118 Wn. App. 259, 263, 76 P.3d 265 (2003), *review denied*, 151 Wn.2d 1021 (2004) ("[T]he juvenile statute is properly concerned with preventing an adjudication of guilt from being considered a crime while one is still a juvenile, as this approach furthers its rehabilitative purpose.").

Consequently, cases interpreting RCW 13.04.240 to permit treatment of a juvenile adjudication as equivalent to a criminal conviction typically have done so in the context of later adult criminal proceedings, where the adjudication may predicate a criminal charge or sentence.

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of the terms to adult sentencings was adopted in 2010. Laws of Wash. c. 150 § 4 (2010).

Johnson concerned eligibility for DOSA in an adult criminal proceeding as the result of prior juvenile adjudications. 118 Wn. App. at 261-62. *State v. Cheatham*, 80 Wn. App. 269, 274-75, 908 P.2d 381 (1996), held that because the unlawful possession of a firearm statute specifically referenced juvenile adjudications, a juvenile adjudication could predicate a later firearm charge. For purposes of calculating the offender score in an adult sentencing, the Court of Appeals has held that a sentence withholding adjudication constitutes a conviction. *State v. Heath*, 168 Wn. App. 894, 901, 279 P.3d 458, *review denied*, 177 Wn.2d 1008 (2012). Under these circumstances, when the Sentencing Reform Act or a specific criminal statute expressly provides for juvenile adjudications to be treated as convictions, RCW 13.04.240 establishes no bar.

But M.Y.G. does not come before the court as an adult subject to the Sentencing Reform Act, but a child subject to the Juvenile Justice Act. Cases interpreting RCW 13.04.240 in the context of juvenile court proceedings thus reach the opposite outcome as cases evaluating adult criminal proceedings. For example, in *State v. S.M.H.*, 76 Wn. App. 550, 559, 887 P.2d 903 (1995), where the statute defining a "sex offense" did not include a juvenile adjudication for a felony with sexual motivation, there was no duty to register as a sex offender. And in *In re Frederick*, 93 Wn.2d 28, 30, 604 P.2d 953 (1980), a juvenile detained for an

adjudication of guilt on a felony charge could not be guilty of an escape crime because his detention could not be "pursuant to a felony" in light of RCW 13.04.240.

Reading RCW 43.43.754(1)(a) not to trigger compulsory DNA collection in the course of juvenile court deferred disposition proceedings is consistent with the language of the statute as well as the limitations imposed by RCW 13.04.240. M.Y.G.'s interpretation harmonizes the potentially conflicting statutory directives consistent with the reasoning of *Frederick* and *S.M.H.*

2. The manner of collecting DNA provided for in the statute supports the conclusion that it is not triggered until a final judgment is entered and a disposition imposed.

Further support for M.Y.G.'s plain language interpretation of RCW 43.43.754(1)(a) can be found in related provisions of the same statute. Subsection (5) of the statute allocates responsibility for performing DNA collection among various local and state agencies depending upon whether the convicted person is serving or will serve any term of confinement. But it is unknown at the time of entering a deferred disposition whether a juvenile will be confined for the offense, because the case will only proceed to final disposition if he is unsuccessful in complying with the conditions of the deferral. RCW 13.40.127(9)(c).

Consequently, by dividing responsibility for DNA collection as it did, the legislature intended for a sentence or disposition to precede the collection.

This interpretation is further borne out by RCW 43.43.7541, which imposes a $100 fee for the DNA collection to be imposed as part of the offender's sentence. These fees fund the DNA database program. *State v. Lewis*, 194 Wn. App. 709, 719-20, 379 P.3d 129, *review denied*, 186 Wn.2d 1025 (2016), *abrogated on other grounds by State v. Anderson*, 9 Wn. App. 2d 430, 447 P.3d 176 (2019). An interpretation requiring mandatory collection upon entering a deferred disposition provides no mechanism for payment of the fee because there is no sentence or disposition imposed.

Thus, the mechanisms of the mandatory DNA collection statute support M.Y.G.'s interpretation that compulsory sampling is not triggered unless and until a final disposition order is entered. At the time of disposition, the court has the authority to collect the fee to fund the collection as well as the information needed to correctly direct the payment. At the time of entering the deferred disposition, the court has no authority to fund the sampling and no means of determining which agency will bear responsibility for it.

C. Under principles of statutory construction, the history and purposes of the Juvenile Justice Act, the heightened confidentiality of juvenile court records, and the need to preserve the constitutionality of the DNA collection statute from unlawful intrusions into personal privacy, all support a limited reading of the compulsory DNA collection statute.

If the Court determines that RCW 43.43.754(1)(a) is not unambiguously susceptible to a single interpretation, it must turn to statutory construction in an effort to determine which interpretation best advances the legislative purpose. *In re Juveniles A, B, C, D, E*, 121 Wn.2d at 88.

The legislature adopted the Juvenile Justice Act for significantly different and more complex purposes than the adult criminal justice system. *State v. T.C.*, 99 Wn. App. 701, 706-07, 995 P.2d 98 (2000). While the Sentencing Reform Act has punishment as its primary purpose, the Juvenile Justice Act places a greater emphasis on the needs of the child. *Id.* Consequently, unlike adults for whom a criminal record is related to the goal of punishment, children who rehabilitate should not bear "the stigma of permanently wearing the label of juvenile delinquent." *State v. S.J.C.*, 183 Wn.2d 408, 429, 352 P.3d 749 (2015).

"By proceeding in a juvenile court the State protects offenders 'against [the] consequences of adult conviction such as the loss of civil

rights, [and] the use of adjudication against him in subsequent proceedings . . . ." *Monroe By and Through Broulette v. Soliz*, 132 Wn.2d 414, 420-21, 939 P.2d 205 (1997) (*quoting Kent v. U.S.*, 383 U.S. 541, 557, 86 S. Ct. 1045, 1055, 16 L. Ed. 2d 84 (1966)). Indeed, the distinction between juvenile proceedings and adult criminal convictions implicates fundamental constitutional rights, and therefore both tolerates and compels differences from the adult criminal system. *State v. M.S.*, __ Wn.2d __, __ P.3d __, 2021 WL 1418885 (April 15, 2021) at *10 (Stephens, J., concurring).

The legislature's purposes in enacting mandatory DNA collection have grown over time but have simultaneously come into conflict with the unique nature of juvenile court proceedings. When originally passed in 1989, the purpose of the DNA database was to provide "a reliable and accurate tool for the investigation and prosecution of sex offenses . . . and violent offenses . . .." Laws of Wash. c. 350 § 1 (1989). Consequently, mandatory collection was originally only required from "every individual convicted . . . of a felony defined as a sex offense . . . or a violent offense." Laws of Wash. c. 350 § 4 (1989). Based on its role as a tool for prosecuting sex and violent offenses, the legislature soon expanded mandatory collection to juveniles adjudicated guilty of violent and sex offenses. Laws of Wash. c. 271 §§ 401-402 (1994). By 2002, the

legislature abandoned the limitation to sex and violent offenses, allowing the database to be used for any criminal investigation and expanding it to any felony conviction or adjudication as well as certain misdemeanors. Laws of Wash. c. 289 §§ 1, 2 (2002). And the number of qualifying misdemeanors expanded again in 2008, 2017, and 2019. Laws of Wash. c. 97 § 2 (2008); Laws of Wash. c. 272 § 4 (2017); Laws of Wash. c. 443 § 3 (2019). Finally, the legislature enforced the obligation to submit a DNA sample by making refusal a crime, first applicable only to sex offenders with a duty to register, and then extending criminal penalties to all offenders shortly after. Laws of Wash. c. 261 § 10 (2015); Laws of Wash. c. 443 § 3 (2019).

Thus, over the years, the legislature's purpose has grown increasingly expansive as the investigative value of genetic information has grown. *See, e.g.,* Laws of Wash. c. 443 § 2 (2019) ("DNA data has proven to be an invaluable component of forensic evidence analysis."); Laws of Wash. c. 329 § 1 (1999) ("Creating an expanded DNA data bank bears a rational relationship to the public's interest in enabling law enforcement to better identify convicted violent and sex offenders who are involved in unsolved crimes, who escape to reoffend, and who reoffend after release."). Yet, despite the ever-growing reach of compulsory DNA collection, the legislature has never specifically considered whether a

deferred disposition in juvenile court is a conviction for DNA collection purposes.

At the same time over the last decade, the legislature has grown increasingly protective of juvenile court proceedings, affording them greater confidentiality than adult criminal cases. Beginning in 2010, the legislature extended provisions for sealing juvenile records to class A offenses and restricted the access of researchers to sealed records. Laws of Wash. c. 150 §§ 2, 3 (2010). Then in 2014, in recognition of the barriers a publicly-available juvenile court record poses to rehabilitation, the legislature created a process to seal nearly all juvenile court adjudications upon the child reaching 18 years of age. Laws of Wash. c. 175 § 4 (2014). Thus, legislative expansion of the DNA database stands in tension with legislative goals to promote greater privacy and closure for rehabilitated juvenile offenders.

These legislative acts have taken place against a common law backdrop that "has always treated juvenile court records as distinctive and deserving of more confidentiality than other types of records." *S.J.C.*, 183 Wn.2d at 417. Likewise, the intersection of RCW 43.43.754(1)(a) with juvenile court proceedings must be consistent with the overall purpose of the Juvenile Justice Act to further the child's rehabilitation by responding

to the child's individual needs while holding the child accountable and imposing proportionate punishment. *See generally* RCW 13.40.010(2). Compulsory DNA collection from juveniles does not further these purposes and, indeed, may even impede them. *See* Monteleoni, Paul M., *DNA Databases, Universality, and the Fourth Amendment,* 82 N.Y.U. L. REV. 247, 254-56 (2007) (government databases pose a risk of governmental harassment, oppression, and stigmatization, and may chill lawful, prosocial behavior); Lapp, Kevin, *As Though They Were Not Children: DNA Collection from Juveniles,* 87 TULANE L. REV. 435, 476 (2014) (Rather than offering the juvenile offender a fresh start, mandatory DNA collection "reduces the chances the juvenile can shake his youthful misdeed and avoid further contact with law enforcement.").

Despite the legislature's expansive goals for its DNA database, it is unlikely the legislature would intend to reach juvenile proceedings at the cost of the rehabilitative goals of the juvenile justice system. Moreover, the deferred disposition proceeding is specifically aimed at avoiding the creation of a permanent criminal record that forever associates the child with a youthful mistake. This purpose cannot be reconciled with the purpose of aiding law enforcement investigations by collecting and storing evidence to investigate potential perpetrators in the future.

Finally, the reach of the DNA statute must be limited by constitutional considerations. *See State v. Blake*, 197 Wn.2d 170, 188-89, 481 P.3d 521 (2021) (when consistent with the purposes of the statute, it should be construed to avoid constitutional doubt). Courts have recognized that collecting a DNA sample is a search within the meaning of the Fourth Amendment and article I, section 7. *State v. Garcia-Selgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). Consequently, the justification for compulsory warrantless DNA collection relies upon the diminished privacy interests of convicted or incarcerated felons as distinguished from ordinary citizens. *See State v. Surge*, 160 Wn.2d 65, 72, 156 P.3d 208.

In *Surge*, the State compared DNA collection to fingerprinting and similar compilations of identifying information to become part of a convicted felon's criminal history. 160 Wn.2d at 72-73. Consequently, in the case of convicted felons, compulsory collection of DNA for identification and recordkeeping is not an intrusion into a private affair. *Id.* at 74. But the same cannot be said of juvenile court proceedings, which have always been treated differently than adult criminal records and afforded greater confidentiality. *S.J.C.*, 183 Wn.2d at 430. And, unlike a convicted felon, a juvenile who successfully completes a deferred disposition ultimately ends up with no conviction at all. *See* RCW 13.40.127(9)(c) ("A deferred disposition shall remain a conviction unless

the case is dismissed and the conviction is vacated . . . or sealed ...."). Yet the DNA collection program provides no mechanism for the juvenile whose adjudication is vacated and dismissed to have his DNA removed from the database. *See generally* WAC 446-75-070(1)(b) ("The patrol will not expunge a sample based on a dismissal entered after a period of probation, suspension or deferral of sentence.").

Nor are the privacy interests of the accused the only consideration. As DNA technology has progressed, it has allowed police to expand analysis from a perfect match with a single suspect, to a partial match that can identify close biological relations. *See* Frohman, Evan, *23PolicemenandMe: Analyzing the Constitutional Implications of Police Use of Commercial DNA Databases*, 23 U. PA. J. CONST. L. 1495, 1505 (2020) (describing familial searches); *see also* Pattock, Amanda, *It's All Relative: Familial DNA Testing and the Fourth Amendment*, 12 MINN. J. L. SCI. & TECH. 851, 857-58 (2011) (describing how CODIS can be employed to conduct familial searches). Consequently, the *Surge* rationale that collecting a convicted felon's genetic identifiers implicates only the privacy interests of the felon no longer holds. To the contrary, ordinary citizens can fall under suspicion and become subjects of investigation based on genetic identifiers, not because they contributed to the database themselves, but merely because they happen to share those

identifiers. Furthermore, because of racial and cultural disparities in felony convictions, as well the tendency of groups such as Mormons and Hispanics to have larger families, the intrusions into the privacy of ordinary citizens will likely be disproportionately borne by minority communities. Frohman, 23 U. PA. J. CONST. L. at 1510.

Neither juveniles who successfully complete a deferred disposition, nor their non-offending family members, are among the categories of individuals whose privacy interests in their bodily autonomy and personal genetic information are diminished. *See Surge*, 160 Wn.2d at 74. A rehabilitated juvenile is an ordinary citizen with full privacy interests under article I, section 7. *Id.* at 76. An expansive interpretation of RCW 43.43.754(1)(a) that applies compulsory DNA collection to a rehabilitative juvenile proceeding thus intrudes unlawfully into the private affairs of the juvenile.

Nor does the "special needs" doctrine adopted in *Juveniles* justify the collection of a child's DNA for ordinary law enforcement investigations. The *Juveniles* Court upheld the compulsory HIV testing of juveniles adjudicated guilty of sex offenses based upon the public health needs and the characteristics of HIV that render a warrant impracticable. 121 Wn.2d at 91-92. Among the factors considered were that the testing

was not done to obtain evidence for prosecution and would not place the challengers at risk of a new conviction or longer sentence. *Id.* at 92. But the compulsory DNA collection statute has no purpose beyond assisting law enforcement investigations, including criminal investigations. *See generally* RCW 43.43.753. And unlike the limited disclosure of HIV test results, the DNA sample may be submitted into the federal DNA database, allowing criminal investigators nationwide to evaluate the child's DNA as potential evidence. *See* RCW 43.43.754(6) ("Nothing in this section prohibits the submission of results derived from the biological samples to the federal bureau of investigation combined DNA index system.").

Consequently, an interpretation of RCW 43.43.754(1)(a) that compels a child who participates in a program specifically designed to allow that child to remain an ordinary citizen with full privacy interests to submit genetic material that may be used without a warrant as evidence against himself and his close family members in future criminal investigations and prosecutions is constitutionally suspect. Unlike adult criminals, juvenile offenders have both historically held, and should be entitled to hold, significant privacy interests in their interactions with juvenile courts. *S.J.C.*, 183 Wn.2d at 417. Because compelling a child to assist in creating a permanent biological record of the child's past criminal behavior for warrantless use by law enforcement intrudes into the child's

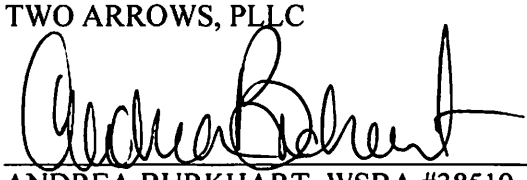
privacy interests, and because the narrower interpretation is consistent with the legislative policy of confidentiality of juvenile court proceedings, the court should avoid the risk of constitutional infirmity by concluding that the entry of a deferred disposition is not a conviction for DNA collection purposes.

VI. CONCLUSION

For the foregoing reasons, this Court should REVERSE and VACATE the order compelling M.Y.G. to submit a DNA sample to the State when he entered his deferred disposition.

RESPECTFULLY SUBMITTED this 14 day of May, 2021.

TWO ARROWS, PLLC



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CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Supplemental Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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And, pursuant to prior agreement of the parties, by e-mailing a copy to:

Larry D. Steinmetz
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 14 day of May, 2021 in Kennewick, Washington.

Andrea Burkhart

BURKHART & BURKHART, PLLC

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