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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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WASHINGTON STATE
SUPREME COURT
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STATE OF WASHINGTON,

Respondent,

vs.

ZYION HOUSTON-SCONIERS AND TRESON ROBERTS,

Petitioners.

BRIEF OF *AMICUS CURIAE*
CREATIVE JUSTICE
SUPPORT OF PETITIONERS

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 ORIGINAL

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I. IDENTITY AND INTERESTS OF AMICUS

Creative Justice (CJ), founded in 2015, is a grassroots arts-based alternative to incarceration supporting court-involved youth in Martin Luther King Jr. County. CJ provides age appropriate supports and services utilizing restorative justice principles. Decades of research show that juvenile incarceration has failed—it wastes taxpayer dollars, does not increase public safety, and exposes youth to abuse. In response, King County has done work to decrease reliance on youth incarceration. However, not all young people have benefited equally from this effort: almost three quarters of juvenile detention admission in 2014 were youth of color. In 2015, local community organizers, led by black and brown youth, helped to pass a Seattle City Council resolution calling for “zero use of detention for youth” and employing more community-based alternatives instead. 4Culture and a cohort of community partners developed Creative Justice as an innovative approach to issues in juvenile justice.

II. ISSUE ADDRESSED

Whether the “automatic decline” statute, RCW 13.04.030, mandating juveniles be tried as adults for certain enumerated offenses, fails to reduce recidivism, creates harmful racial disparities, prevents juveniles for accessing those age appropriate services most necessary for

rehabilitation, and further perpetuates the “Tough on Crime” era and the use of the “super predator” myth.

III. STATEMENT OF CASE

The context of this case involves two late teen African-American youth, Zyion Houston-Sconiers and Treson Robers, ages 17 and 16 convicted of robbing trick or treaters at gunpoint on October 31st, 2012 and taking candy and a phone without inflicting any bodily harm. Based solely on their ages and the nature of the allegations filed against them, Zyion and Treson were denied the opportunity to have a court consider whether they should be tried in juvenile court but were instead prosecuted, convicted, and sentenced in adult court. Zion and Treson were sentenced to 31 years and 26 years. The Court of Appeals panel, divided 2 to 1, rejected both Petitioners’ challenges to the constitutionality of the automatic decline statute.

IV. ARGUMENT

Washington’s automatic decline statute fails to reduce recidivism, increases racial disproportionality, and prevents juveniles from accessing age appropriate services most necessary for their rehabilitation.

Furthermore, the continued use of the “automatic decline” statute is archaic and harkens back to the “Tough on Crime” era and the “Super Predator” narrative; which we now know is not only mythical but also

harmful to communities of color. These issues are of substantial public interest which should be determined by this Court, thus satisfying RAP 13.4(b)(1),(2),(3), and (4) and justifying a grant of review.

A. Automatic Decline is Contrary to Public Interest and Harmful Because it is Associated with Increased Recidivism and Disproportionately Affects Youth of Color

The automatic decline statute is associated with increased recidivism. In December 2013, the Washington State Institute for Public Policy researched the impact of automatic decline upon recidivism and found juveniles who are auto-declined have higher rates of recidivism than those who remain in juvenile court. Elizabeth Drake, *The Effectiveness of Declining Juvenile Court Jurisdiction of youthful Offenders* at 1, 9 (2013).¹ Furthermore, additional research reveals young people whose cases are transferred from juvenile court to adult court have an increased likelihood of recidivism when compared to young people with similar offenses whose cases remained in juvenile court. Children's Law Center, Inc., *Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System*, 1 (2012).² Moreover, youth tried in adult courts

¹ Available at http://www.wsipp.wa.gov/ReportFile/1544/Wsipp_The-Effectiveness-of-Declining-Juvenile-Court-Jurisdiction-of-Youth_Final-Report.pdf

² Available at http://www.campaignforyouthjustice.org/documents?FR_OH_0512.pdf.

commit new offenses sooner and at higher rates. Jason J. Washburn et al., *Psychiatric Disorders among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 *Psychiatric Services* 965, 972 (2008). The continued implementation of automatic decline statutes and reliance upon the adult system to rehabilitate juvenile offenders does not decrease recidivism. In fact, automatic decline increases recidivism and acts against public interest.

B. Automatic Decline is Harmful Because it Disproportionately and Negative Affects Communities of Color

The use of both automatic decline and discretionary decline is associated with the disproportionate representation of youth of color in the adult criminal justice system. Youth of color are not only more likely to be transferred to adult court, but are also more likely to be sentenced in adult court. Data from the Washington State Department of Social and Health Services reveals an alarming over-representation of youth of color adjudicated in adult court. Between 2010 and 2014 of the juveniles charged and sentenced in adult criminal court 26.2% were white non-hispanic and 68.5% were youth of color. Washington State DSHS, *Annual*

Report: Data Analysis Juvenile Transfers to Adult Court, Annual Report

1, 146 (2014).³

TABLE 65
Juveniles Charged and Sentenced in Adult Criminal Court *
by Race/Ethnicity from FY 2010-2014

Race/Ethnicity	2010		2011		2012		2013		2014		5-Year Total		5-Year % of Total	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Asian/Pacific Islander (non-Hispanic) **	4	2.5%	9	7.2%	8	6.7%	2	1.8%	1	1.4%	24	4.3%		
Black (non-Hispanic) **	50	36.4%	29	23.2%	43	35.8%	28	24.8%	29	40.8%	188	31.8%		
Native American (non-Hispanic) **	2	1.2%	3	2.4%	3	2.5%	3	2.8%	3	4.2%	13	2.2%		
White (non-Hispanic) **	41	29.3%	38	30.4%	24	20.0%	33	29.2%	19	26.6%	155	26.2%		
Hispanic (of any race)	42	29.5%	41	32.8%	37	30.8%	43	38.1%	17	23.9%	180	30.5%		
Race & Ethnicity Unknown	14	8.8%	5	4.0%	5	4.2%	5	4.4%	2	2.8%	31	5.2%		
TOTAL	163		125		120		119		71		591		100.0%	
Total Number of Minority Youth	107	66.0%	82	65.6%	91	75.8%	76	65.4%	50	70.4%	405	68.5%		

Data Source: Forecasting Division, Office of Financial Management, WA State Statistical Analysis Center, January 2015.
* Data includes both youth transferred from juvenile court to adult superior court (Discretionary declines) and Exclusive Adult Jurisdiction (auto declines).
These person-level data provide only youth who were filed/charged in adult criminal (superior) court while under the age of 18 years, and who were convicted in adult court.
** Note: Youth designated with "unknown" ethnicity are included in this race category (e.g., both Asian non-Hispanic and Asian "unknown ethnicity" are included); ethnicity is not a required field in the Judicial Information System (JIS).

TABLE 66
Juveniles Charged and Sentenced in Adult Criminal Court *
by Race/Ethnicity and Type of Transfer or Waiver from FY 2010-2014

Race/Ethnicity	2010				2011				2012			
	Auto	Disc	Auto	Disc	Auto	Disc	Auto	Disc	Auto	Disc	Auto	Disc
Asian/Pacific Islander (non-Hispanic) **	3	4.1%	1	1.1%	2	2.7%	2	2.7%	5	8.9%	3	4.7%
Black (non-Hispanic) **	33	45.2%	26	29.2%	13	25.0%	16	21.9%	27	48.2%	16	25.0%
Native American (non-Hispanic) **	1	1.4%	1	1.1%	1	1.9%	2	2.7%	0	0.0%	3	4.7%
White (non-Hispanic) **	15	20.5%	26	29.2%	10	19.2%	28	38.4%	5	8.9%	19	29.7%
Hispanic (of any race)	19	26.0%	23	25.8%	18	34.6%	23	31.5%	17	30.4%	20	31.3%
Race & Ethnicity Unknown	2	2.7%	12	13.5%	3	5.8%	2	2.7%	2	3.6%	3	4.7%
TOTAL	73		89		52		73		56		64	

LEGEND:
Auto = Exclusive Original Adult Criminal Court Jurisdiction (Auto decline)
Disc = Discretionary decline of Jurisdiction - transferred by the juvenile Court to Adult Criminal (Superior) Court following a discretionary or mandatory hearing

Race/Ethnicity	2013				2014				TOTAL 5-Year Period			
	Auto	Disc	Auto	Disc	Auto	Disc	Auto	Disc	Auto	Disc	Auto	Disc
Asian/Pacific Islander (non-Hispanic) **	0	0.0%	2	3.7%	0	0.0%	3	3.0%	15	5.5%	9	2.9%
Black (non-Hispanic) **	24	46.2%	14	25.9%	19	50.0%	10	30.3%	116	42.8%	82	26.2%
Native American (non-Hispanic) **	0	0.0%	3	5.6%	1	2.6%	2	6.1%	3	1.1%	11	3.5%
White (non-Hispanic) **	11	21.2%	17	31.5%	9	23.7%	10	30.3%	50	18.5%	100	31.9%
Hispanic (of any race)	16	30.8%	17	31.5%	9	23.7%	8	24.2%	79	29.2%	91	29.1%
Race & Ethnicity Unknown	1	1.9%	1	1.9%	0	0.0%	2	6.1%	6	3.0%	20	6.4%
TOTAL	52		54		38		33		271		313	

Data Source: Forecasting Division, Office of Financial Management, WA State Statistical Analysis Center, January 2015.
* Data includes both youth transferred from juvenile court to adult superior court (Discretionary declines) and Exclusive Adult Jurisdiction (auto declines).
These person-level data provide only youth who were filed/charged in adult criminal (superior) court while under the age of 18 years, and who were convicted in adult court.
** Note: Youth designated with "unknown" ethnicity are included in this race category (e.g., both Asian non-Hispanic and Asian "unknown ethnicity" are included); ethnicity is not a required field in the Judicial Information System (JIS).

³ Charts showing racial break down of automatic and discretionary declines available at <https://www.dshs.wa.gov/sites/default/files/JJRA/pccjj/documents/annual-report2014/Sect-7j-Trans.to.Adult.Crt.pdf>

Additionally, Washington's Sentencing Guidelines Commission also found youth of color are disproportionately over-represented in both automatic and discretionary decline. Sentencing Guidelines Commission, *Disproportionately and Disparity in Juvenile Sentencing*, 4 (2007).⁴ The Commission found disproportionate over-representation of several communities of color. Notably, black youth are affected at one of the highest rates, as shown in the following chart. *Id.*

Race/Ethnicity	Automatic		Discretionary	
	Total	Ratio	Total	Ratio
African American (Black)	17	10.31	8	5.27
Asian	3	1.13	0	0
Caucasian (White)	15	0.49	23	0.81
Latino	2	0.42	3	0.68
Native American	1	1.117	1	1.27

A 2014 American Psychological Association study revealed similar findings further illuminating these issues and additional aspects of the harm caused by the adjudication of youth of color in adult court. By the age of 10 black boys are perceived to be older and less innocent than

⁴ Chart showing total number of cases and ratio comparing number of declines to population proportion for each group, available at [http://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/Juvenile DisparityDisproportionality_FY2007.pdf](http://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/Juvenile%20DisparityDisproportionality_FY2007.pdf).

their white counterparts.⁵ Such perceptions and racial bias lead to higher rates of black youth adjudicated and sentence in adult courts. The above data shows the damaging consequences of transferring juveniles to adult court and reveals the notable and problematic over-representation of youth of color in the adult system. The continued implementation of automatic decline statutes and reliance upon the adult system to rehabilitate juvenile offenders disproportionately harms and negatively impacts communities of color.

C. Automatic Decline is Contrary to Public Interest and Harmful Because it Prevents Juveniles from Accessing Age Appropriate Rehabilitative Services

The juvenile justice system was created over 100 years ago with the intention of providing age appropriate care and rehabilitative opportunities for youth as opposed to punishment—including incarceration and other punitive measures. The Haywood Burns Institute, *Stemming the Rising Tide: Racial & Ethnic Disparities in Youth Incarceration & Strategies for Change*, at 1, 15 (2015).⁶ Over the last few decades legislators and voters have increasingly supported the transfer of

⁵ Dr. Philip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children* (2014), available at <http://www.apa.org/news/press/releases/2014/03/black-boys-older.aspx> (summary); <http://www.apa.org/pubs/journals/releases/psp-a0034663.pdf> (full article reporting study results)

⁶ Available at http://www.burnsinstitute.org/wp-content/uploads/2016/05/Stemming-the-Rising-Tide_FINAL.pdf.

youth into criminal courts contributing to the erosion of the developmental distinction between youth and adults. An overwhelming amount of research shows the adult criminal justice system incapable and ill-equipped to effectively serve the needs of juvenile offenders at all stages of the process. UCLA School of Law Juvenile Justice Project, *The Impact of Prosecuting Youth in the Adult Criminal Justice System* at 1, 1 (July 2010).⁷ The adult criminal system was never intended to serve youth. The advent of the juvenile justice system was to answer, albeit an answer with it's own problems, the unique social, psychological, physiological, and neurological needs of juveniles. The juvenile criminal justice system, more intentionally than the adult criminal justice system, seeks to provide youth with the opportunity to rehabilitate, change their behavior, and remain a part of society at-large ready to participate as productive citizens.

A 2005 joint report by Human Rights Watch and Amnesty International acknowledged youth as excellent candidates for rehabilitation because of their forming identities and ability to learn new skills and find new values. Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Juvenile Offenders in the United States* (2005).⁸ The report also outlined key neurological research proving important

⁷ Available at <http://www.campaignforyouthjustice.org/documents/UCLA-Literature-Review.pdf>.

⁸ Available at <https://www.hrw.org/reports/2005/us1005/6.htm>.

distinctions between youth and adults—highlighting reasons why transferring juveniles to adult court is ineffective for rehabilitation of juvenile offenders. Research shows that children, including youth, act more irrationally and with less maturity than adults due to their long-term decision-making faculties having not yet reached full maturation. *Id.* Furthermore, adolescent thinking is present-oriented; meaning children and youth are neurologically incapable of accurately considering and determining the future outcomes of present decisions. *Id.* While youth are more likely to make risky decision they are also more likely to respond to correction and therefore are more likely to respond well to rehabilitative programs and opportunities designed for their age group and developmental level.

D. Automatic Decline is Contrary to Public Interest and Harmful Because it is a Racially Stereotypical Remnant of the “Tough on Crime” Era and the “Super-Predator” Myth

In 1977 the Washington Juvenile Justice Act created a limited and individualized process of decline from juvenile court. The decline hearing process maintained judicial discretion in deciding which cases were so extreme they need to be tried in adult court. The law mandated decline hearing for certain crimes, but gave discretion to the judge to determine if the decline should actually occur. This was done with the understanding

that a juvenile would only be sent to adult court “upon a finding that the declination would be in the best interest of the juvenile or the public.”⁹

In 1994 the Washington State Legislature passed an amendment to RCW 13.04.030 to allow for automatic decline of juveniles ages 16 or 17 for certain enumerated offences.¹⁰ The time during which the 1994 bill was brought before the Legislature is marked by extreme public hysteria built upon the mythical concept of the youth “super-predator”—a supposedly amoral, repeat and violent juvenile offender whose behavior can only be curbed by harsher sentencing. The Fair Punishment Project, *The Superpredator Myth and Rise of the JWLOP* (April 12, 2016).¹¹ Later, in 1997, the legislation was expanded to cover lesser offenses.¹²

In the late 1980s and early 1990s academics and the media described the rising rates of youth crime as the product of societal shifts

⁹ CENTER FOR LAW AND JUSTICE & LAURA W KENNEDY, WASHINGTON STATE NEW JUVENILE CODE, II: AN ANALYSIS OF PUBLIC DOCUMENTS--THE PRE-LEGISLATIVE AND LEGISLATIVE PERIODS WASHINGTON STATE NEW JUVENILE CODE, II: AN ANALYSIS OF PUBLIC DOCUMENTS--THE PRE-LEGISLATIVE AND LEGISLATIVE PERIODS (1979), <https://www.ncjrs.gov/pdffiles1/digitization/72320ncjrs.pdf> (last visited Jul 2016). (Legislative Intent Section).

¹⁰ HISTORY OF BILL: HB 2319, HISTORY OF BILL: HB 2319 (1994), <http://app.leg.wa.gov/dlr/billsummary/default.aspx?year=1993&bill=2319> (last visited July 2016).

¹¹ Available at <http://fairpunishment.org/the-superpredator-myth-and-the-rise-of-jwlop/>.

¹² HISTORY OF BILL: HB 3900, HISTORY OF BILL: HB 3900 (1997), <http://app.leg.wa.gov/dlr/billsummary/default.aspx?year=1997&bill=3900> (last visited July 2016).

and violence in the media. This led to a shift in the view of youth offenders as children to “super-predators”. This directly resulted in more punitive laws regarding youth offenders across the United States.¹³

The “super-predator” myth carries with it a clear racial undertone. At the time of its inception the highly publicized crimes that had taken over the public imagination were only crimes committed by black men.¹⁴ These highly racialized and dangerous misconceptions were the product of fear mongering and racially biased media practices. Such fears were crystalized in the infamous article by John Dilulio entitled “The Coming of the Super-Predators”. The term “super-predator” is defined by Dilulio as crime-prone juveniles “who have absolutely no respect for human life and no sense of the future” and whose natural instinct is to commit crime.¹⁵ Dilulio wrote a follow-up article entitled “My Black Crime

¹³ Gary W Kubek et al., WRIT OF CERTIORARI: MILLER V ALABAMA AND JACKSON V HOBBS CASES 10-9647, 10-9646 (2012), <http://eji.org/files/10-9647,%2010-9646%20tsac%20Jeffrey%20Fagan,%20et%20al..pdf> (last visited July 2016).

¹⁴ Lynn Chancer, *before and after the central park jogger: when legal cases become social causes*, 4 CONTEXTS 38–42, 38-42 (2005), http://www.vonsteuben.org/ourpages/auto/2013/4/16/56167528/before%20_%20after%20the%20central%20park%20jogger.pdf (last visited Jul 2016). (Or at least at the time that was what the public believed. In the Central Park Jogger case it has now come to light that the black juveniles convicted of the rape of a jogger were actually innocent.)

¹⁵ John J DiIulio, *The Coming of the Super-Predators*, THE WEEKLY STANDARD, 1995, <http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160> (last visited Jul 2016).

Problem and Ours”¹⁶ in which he specifically targets black juvenile offenders as the prime candidates to become super-predators. As a result, a national hysteria and unreasonable fear of black youth gave way to the highly racialized “super-predator” myth and the introduction of automatic decline statutes across the United States.

In 1994 Washington’s first automatic decline statute was passed as part of an omnibus bill (“1994 Violence Reduction Programs Act”); which included rehabilitative and crime prevention programs, firearms regulations, attempts to reduce violence in the media, and more stringent punitive sentencing for certain enumerated juvenile crimes.¹⁷ Unlike the 1977 mandated decline hearings, these laws did not allow for judicial discretion or for consideration for individual circumstances. The 1994 automatic decline statute established that youth offenders ages 16 or 17 who had committed certain offenses would automatically be sent to adult court.

The language of the 1994 automatic decline bill was clearly tied to the national conversation surrounding the “super-predator”. Despite the

¹⁶ Available at <http://www.city-journal.org/html/my-black-crime-problem-and-ours-11773.html>.

¹⁷ 53RD LEGISLATURE, ENGROSSED SECOND SUBSTITUTE HOUSE BILL 2319 ENGROSSED SECOND SUBSTITUTE HOUSE BILL 2319 (1994), <http://lawfilesexternal.wa.gov/biennium/1993-94/Pdf/Bills/House%20Passed%20Legislature/2319-S2.PL.pdf> (last visited Jul 2016).

fact that youth violence had peaked in 1993 (the year before) and was, by 1994, at the start of a slow decline,¹⁸ the authors of House Bill 2319 said “youth violence is increasing at an alarming rate.” The bill report, like the national narrative, utilized terms such as “tidal wave,” “epidemic,” and “unprecedented.”¹⁹

Now, it is widely documented that automatic decline laws were created on the basis of misinformation. The first element of misinformation was the concept of the rising rates of juvenile crime. While juvenile crime peaked in 1993, it went down steadily until the year 2000 to rates lower than that of 1985.²⁰ Secondly, after the 1990s the “super-predator” myth was dismissed as false by the scientific community and even by Dilulio himself.²¹ Research shows that most antisocial youth outgrow their deviant behavior, not by isolation or punitive measures, but

¹⁸ Gary W Kubek et al., WRIT OF CERTIORARI: MILLER V ALABAMA AND JACKSON V HOBBS CASES 10-9647, 10-9646, 36 (2012), <http://eji.org/files/10-9647,%2010-9646%20tsac%20Jeffrey%20Fagan,%20et%20al..pdf> (last visited July 2016).

¹⁹ FINAL BILL REPORT E2SHB 2319 PARTIAL VETO, FINAL BILL REPORT E2SHB 2319 PARTIAL VETO (1994), <http://app.leg.wa.gov/documents/billdocs/1993-94/htm/bill%20reports/house/2319-s2.fbr.htm> (last visited Jul 2016).

²⁰ Kubek, *supra*, at 35; See also *supra* at 43 (It is important to note here also that “Empirical studies show that the legislative changes undertaken by certain states were not causally responsible for the decline in juvenile homicide rates.”)

²¹ *Id.* at 32

rather the support of specific environmental impacts such as employment.²²

Furthermore, automatic decline laws, as stated previously, do not accomplish their stated purpose. Ostensibly, the goal of harsher sentencing is neither a deterrent nor does it decrease recidivism. In fact, it increases recidivism and racial disproportionality furthering perpetuating the myth of the “super-predator” and negative impacts upon communities of color.

V. CONCLUSION

The research, data, original intent of the juvenile criminal justice system, and sound public policy all support the conclusion that continued implementation of the “automatic decline” statute, RCW 13.04.030, mandating juveniles be tried as adults for certain enumerated offenses, fails to reduce recidivism, creates harmful racial disparities, prevents juveniles for accessing those age appropriate services most necessary for rehabilitation, and further perpetuates the “Tough on Crime” era and the use of the “super predator” myth.

²² Id. at 34

RESPECTFULLY SUBMITTED this 8th day of September, 2016.

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I declare, under penalty of perjury, under the law of the State of Washington, that on the date below I served a copy of the foregoing Amicus Curiae Brief of Creative Justice by email the same, properly addressed, to:

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Subject: RE: Filing in Case No. 92605-1, State of Washington v. Zyion Dontice Houston-Sconiers and Treson Lee Roberts

Received 9/8/16.

Supreme Court Clerk's Office

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From: Nikkita Oliver [mailto:nikkita.oliver@gmail.com]
Sent: Thursday, September 08, 2016 4:44 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: KARSdroit@aol.com; PCpatcecf@co.pierce.wa.us; SCCAttorney@yahoo.com
Subject: Filing in Case No. 92605-1, State of Washington v. Zyion Dontice Houston-Sconiers and Treson Lee Roberts

Good Afternoon,

Attached for filing in case No. 92605-1, State of Washington v. Zyion Dontice Houston-Sconiers and Treson Lee Roberts, are the following documents:

- Motion by Creative Justice for Leave to File Amici Curiae Memorandum in Support of Review
- Motion for Extension of Time to File Amicus Curiae Motion and Brief
- Brief of Amicus Curiae Creative Justice Support of Petitioners
- Certificate of Service

The documents are filed by Nikkita R. Oliver, WSBA No. 49734 (nikkita@creativejustice.4culture.org/ 206-296-7580). Parties' counsel have consented to service by email and are copied above.

Sincerely,

--

Nikkita R. Oliver

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"Every great dream begins with a dreamer. Always remember, you have within you the strength, the patience, and the passion to reach for the stars to change the world."

- Harriet Tubman

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