No 48187-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

ERIK PETTERSON

BRIEF OF APPELLANT

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A. Assignment of Error

Assignment of Error

The trial court erred by vacating its Order Modifying Community Custody Conditions seven years after entering the order when there was not a material change in circumstances.

Issue Pertaining to Assignment of Error

1. Was the Department equitably estopped from bringing the motion to modify Mr. Petterson's community custody conditions seven years after it acquiesced to the modifications?

2. Did the trial court err by concluding it did not have the statutory authority to modify the community custody conditions of a probationer serving a SSOSA sentence?

B. Statement of Facts

Erik Petterson, born October 15, 1968, was charged in Kitsap County Superior Court on October 22, 2001 with one count of first degree child molestation for an incident that occurred on October 13, 2001. CP, 1 The legislature had just amended the penalty statute for this offense, effective 43 days earlier on September 1, 2001, to require

lifetime community custody for anyone convicted of this offense. See former RCW 9.94A.712 (recodified with minor changes as RCW 9.94A.507). Therefore, Mr. Petterson represents one of the first individuals charged under the terms of this statute.

On February 11, 2002, Mr. Petterson petitioned for and was granted a SSOSA sentence pursuant to RCW 9.94A.670. CP, 6. At the time of sentencing, the Court entered a Judgment and Sentence with all the mandatory and discretionary conditions set out in RCW 9.94A.670. The Court ordered a minimum sentence of 68 months, with 62 months suspended, and a maximum sentence of life. CP, 7. Importantly, the Court ordered that the "Defendant shall report to DOC no later than 72 hours after release from custody and shall comply with all conditions stated in this Judgment and Sentence, including those checked in the Supervision Schedule, and other conditions imposed by the court or DOC during community custody." CP, 8

On October 4, 2005, Mr. Petterson appeared for his treatment termination hearing as contemplated by RCW 9.94A.670(9). CP, 14. At that time, he had completed his three years of treatment and there was a joint request to terminate him from treatment. The Court granted the motion and signed an order. CP, 15. Inexplicably, the Order terminated him from both treatment and community custody. The mistake was discovered in late 2006 and on December 5, 2006, the State filed a

motion to amend the order. CP, 17. The motion was eventually granted on March 9, 2007. Mr. Petterson appealed that order. CP, 24. This Court affirmed on March 11, 2008, holding that the October 4, 2005 order was a scrivener's error correctable pursuant to CrR 7.8(a). See 36048-9-II. See, generally, RP, 1-4 (April 18, 2008). The mandate issued on April 21, 2008.

On April 28, 2008, the parties held a hearing to discuss what should happen next in light of the Court of Appeals decision. Mr. Petterson moved to be terminated entirely from community custody. RP, 4 (April 18, 2008). The motion was supported by his then Community Corrections Officer (CCO) David Payne. RP, 4 (April 18, 2008). Mr. Petterson argued that because the SSOSA statute gives judges the authority to "modify" community custody conditions, it may terminate the conditions entirely or, in the alternative, modify them. RP, 6 (April 18, 2008). The prosecutor, represented by DPA Kevin Hull[1], objected to the motion. RP, 6 (April 18, 2008). The Court held it lacked the authority to terminate community custody, noting that the statute says "modify, not "terminate." RP, 9 (April 18, 2008). Mr. Petterson then argued that the Court should modify the community custody conditions to delete many of the provisions, including polygraphs, urinalysis, and regular reporting.

[1] Currently a Kitsap County Superior Court judge

RP, 10 (April 18, 2008). The Court decided to defer a decision to allow CCO Payne to be present. RP, 11-12 (April 18, 2008)

The Court reconvened on May 5, 2008 with DPA Hull and CCO Payne both present. CCO Payne opined that, regardless of what the Court decided to do, short of terminating Mr. Petterson entirely, the Department would continue to actively supervise him, including polygraphs and regular reporting. RP, 4-5 (May 5, 2008). The reason was the Department may be exposed to civil liability if it did not continue to supervise. RP, 4 (May 5, 2008). The parties took note of RCW 9.94A.715(2)(c), which states the department may not impose conditions which contravene the Court's order. RP, 6 (May 5, 2008). DPA Hull expressly told the Court that the statute gives the court authority to modify the community custody conditions RP, 8 (May 5, 2008). DPA Hull also expressed a concern that he does not represent the Department of Corrections and it may be appropriate to have an attorney from the attorney general's office present. RP, 8-9 (May 5, 2008). CCO Payne agreed that legal representation from the attorney general's office was appropriate. RP, 10 (May 5, 2008). The Court expressed a concern that the department was essentially saying it would ignore a court order and set another hearing to allow the attorney general's office to be present RP, 11-12 (May 5, 2008).

The next hearing occurred on May 30, 2008. At that hearing, the State was represented by DPA Kevin Cure and CCO Payne was again present. RP, 4 (May 30, 2008). No one from the attorney general's office appeared, however. RP, 1 (May 30, 2008). Mr. Petterson's counsel represented without contradiction by the State that the attorney general's office had "no position one way or another how the court rules." RP, 3 (May 30, 2008). DPA Cure told the Court that his office had been in contact with both the Department of Corrections and the Indeterminate Sentence Review Board (ISRB) and neither body was taking a position. RP, 4 (May 30, 2008). The State was opposing the motion, however. RP, 4 (May 30, 2008). The Court ruled, after reviewing the statute, that it had the authority to modify the community custody conditions. RP, 5 (May 30, 2008). The Court signed an order modifying the community custody conditions to require that Mr. Petterson: (1) obey all laws; and (2) update the Department of any change in address or phone number. CP, 40. All other community custody conditions were suspended. CP, 40. The Order stated it was subject to modification at any time by any party or the Department. CP, 40. The Court orally admonished Mr. Petterson that if he were to violate the law, he would be back before the Court and "all the conditions could be put back on you." RP, 5 (May 30, 2008). This Order was not appealed by any party or the Department.

A DOC staff meeting was held on February 13, 2009. CP, 117 At that meeting, Mr Petterson's situation was discussed The Department decided to comply with the Court order, but "if at any time, the offender fails to obey all laws (however minor) or information is received the offender is participating in illegal or risk-related behavior that the court be informed immediately and request a hearing for sentence modification " CP, 117

Since January 1, 2009, Mr. Petterson has maintained strict compliance with his conditions. CP, 98. The Department regularly conducts criminal history checks to ensure compliance. CP, 98. Additionally, although Mr Petterson has no requirement to report to DOC, he has continued to report when requested by his CCO. CP, 98. The record shows he has reported thirteen times since January 1, 2009, including on January 9, 2009, February 6, 2009, February 13, 2009 (field call), October 12, 2011, June 20, 2012, July 29, 2013, August 6, 2013 (field visit), August 14, 2013, September 4, 2013, September 12, 2013 (field visit), October 1, 2013, May 21, 2014, and July 14, 2015 CP, 104 et seq. Mr. Petterson also requested and was granted permission to travel out of state for routine vacations on August 19, 2014 (Oregon), December 29, 2914 (Hawaii), and June 15, 2015 (Oregon). CP, 104 et seq. In each instance, Mr. Petterson promptly contacted DOC to advise them of his return to the state of Washington

On May 29, 2013, the Department filed a report indicating Mr. Petterson was in full compliance with his community custody. CP, 41. The next day, the Kitsap County Superior Court signed an Order removing him from the sex offender registry. CP, 41. This Order was not appealed by any party or the Department.

In July of 2013, an issue arose where Mr. Petterson indicated a desire to move to Minnesota. RP, 6 (August 9, 2013). This caused the Department to become concerned because Mr. Petterson was living in another state without notifying the state as required by the Interstate Compact. RP, 6 (August 9, 2013). The possibility that Mr. Petterson would want to move from the State of Washington was not one that was contemplated by the parties at the May 30, 2008 hearing. RP, 7 (August 9, 2013). The Department filed a document titled "Notice of Violation," although Mr. Petterson was not actually out of compliance. In response, Mr. Petterson filed a Motion to Clarify Conditions. CP, 47. A hearing was held and the parties entered a stipulation that Mr. Petterson would not leave the State of Washington without permission and would not move from the State of Washington without complying with the Interstate Compact. CP, 52; RP, 7 (August 9, 2013). This Order was not appealed by any party or the Department.

Mr. Petterson decided not to petition under the Interstate Compact and move to Minnesota. He continued to remain in compliance with his

community custody. On April 29, 2014, Mr. Petterson notified the Department he intended to move to Redmond, Washington in King County on May 1, 2014 CP, 108. Over a year later, his case was transferred to a new CCO in King County. CP, 106. This CCO decided to reinstate all community custody conditions as if Mr. Petterson were just starting his SSOSA. CP, 105. A copy of the proposed conditions is in the record. CP, 120. Mr. Petterson declined to sign the new conditions citing his earlier court orders The Department decided to enlist the aid of the AG, who filed the Motion of DOC to Modify Conditions. Mr. Petterson responded in writing. CP, 95.

The trial court granted the Department's motion in a written memorandum on September 16, 2015. CP, 142. In the Order, the trial court ruled that the Department is free to impose community custody conditions pursuant to RCW 9.94A.715. CP, 145. Mr. Petterson appealed from this Order. CP, 148.

C. Argument

1. The Department is equitably estopped from bringing the motion to modify Mr. Petterson's community custody conditions seven years after it acquiesced in the modifications.

Before reaching the merits of Mr. Petterson's argument, it is worth noting the procedural posture of this appeal. When the sentencing

court originally modified the community custody conditions on May 30, 2008, the court had invited the Attorney General's office to appear. That office declined to appear and sent word through the Kitsap County Prosecutor's Office that they did not have position on the pending motion. The Order was entered and no one appealed. Seven years later, the Department then files a motion to vacate the Order because a new CCO was assigned to the case and did not like the order. The Department should be equitably estopped from bringing this motion. A party seeking to apply equitable estoppel against the government must establish: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission; (4) equitable estoppel must be necessary to prevent a manifest injustice; and (5) the exercise of governmental functions must not be impaired as a result of the estoppel. *State v McInally*, 125 Wn.2d 854, 106 P/3d 794 (2005).

In this case, the Department failed to take a position, despite the court's invitation that it do so. Mr. Petterson relied on the Department's action by complying with the community custody requirements. Putting him back on community custody as if he were starting his probation all over would cause great prejudice to him There would be a manifest

injustice to start him over on probation. And government functions will not be impaired, as demonstrated by the fact that he was supervised in Kitsap County for seven years without incident prior to his move to King County The Department's motion should be foreclosed by equitable estoppel.

2. <u>The trial court erred by concluding it did not have the statutory authority to modify the community custody conditions of a probationer serving a SSOSA sentence.</u>

Mr. Petterson's situation presents an important issue of statutory construction that will affect thousands of offenders. Effective on September 1, 2001, the legislature created a new sentencing scheme for certain enumerated sex offenses. RCW 9.94A 712 (later recodified as RCW 9.94A.507). Sometimes referred to as Determinate Plus sentencing, offenders sentenced pursuant receive a maximum sentence and minimum sentence. The maximum sentence is equal to the maximum penalty for the offense. Therefore, Mr. Petterson, who was convicted of a Class A felony sex offense, has a maximum sentence of life. The minimum sentence must be something within the standard range for the offense. In Mr. Petterson's case the standard range was 51 to 68 months and the Court set the minimum sentence as 68 months. Once a person has completed his or her minimum sentence, they are released into the community on community custody. The offender

remains on community custody until he or she has completed the maximum sentence. Because most of the enumerated offenses in RCW 9.94A.712 are Class A felonies, most offenders are on community custody for life. Therefore, since 2001, the number of sex offenders added to the Department's caseload has increased at a relatively steady rate, while almost no offenders drop off the case load. Mr. Petterson, who committed his offense October 13, 2001, just 43 days after the effective date of the statute, represents one of the earliest, if not the earliest, probationer subject to lifetime probation. But as stated, the numbers are constantly increasing and only the death of the probationer removes a person from the Department's caseload.

Regardless of whether a person is subject to Determinate Plus sentencing, the offender has the opportunity to petition for a SSOSA sentence pursuant to RCW 9.94A.670. Mr. Petterson made such a petition and the petition was granted. When an offender is granted a SSOSA, the Court suspends the majority of the minimum sentence. In Mr. Petterson's case 62 months were suspended, with six months to serve immediately. Upon completion of the six months, Mr. Petterson was released from jail to start his community custody. He has, therefore, been in jail or on community custody for the past 14 years. Assuming an average life expectancy of 79 years, the Department is going to have to

supervise him for another 31 years despite the fact that he is deemed to be a low risk to re-offend.

Ordinarily, a sentence is final once it is imposed and may not be modified by the trial court. *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989). But in reaching that conclusion, the Court said the following, "We hold that SRA sentences may be modified only if they meet the requirements of the SRA provisions relating directly to the modification of sentences." *Shove* at 89. The issue before this Court is whether a probationer who has been granted a SSOSA sentence pursuant to RCW 9.94A.670 but who remains on lifetime community custody pursuant to RCW 9.94A.712 (or .507) may have his community custody conditions modified by the Court. The answer to that question under the statute is clearly yes.

The issue of whether a sentencing court may modify the community custody conditions of a SSOSA candidate after imposition of the sentence appears to be one of first impression in Washington. But there are at least two cases that seem to presume this authority. In *State v. Miller*, 159 Wn.App 911, 247 P.3d 457 (2011) the Defendant applied several times to have his SSOSA community custody conditions modified. For instance, the trial court modified the conditions to allow alcohol consumption and to pursue romantic relations with women without first getting permission from his CCO. The defendant also

petitioned to have the term of the sentence to be reduced from 123 months to 93 months. The Court of Appeals opinion seems to sanction the first two modifications, but not the latter. *Miller* at 915-16. This discussion is dicta, however, given that the issue on appeal was the propriety of the SSOSA revocation, not the propriety of the earlier modifications. In *State v. Letourneau*, 100 Wn.App. 424, 997 P.2d 436 (2000), after the trial court revoked the SSOSA sentence, the Court issued two orders "modifying and clarifying" the sentence. Although the Court of Appeals reversed the two orders, it did so on the merits and not because the trial court lacked the authority to modify the sentence.

There are twelve subsections to RCW 9.94A.670. Subsections (4), (5), (6) and (7) set forth the procedure at the sentencing hearing and lay out multiple mandatory and discretionary requirements for the sentencing court. Subsection (5) sets forth the mandatory requirements of a SSOSA sentence and reads, in relevant part:

> (5) As conditions of the suspended sentence, the court must impose the following:
> (a) . . .
> (b) A term of community custody equal to the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.507, or three years, whichever is greater, and *require the offender to comply with any conditions imposed by the department under RCW 9.94A.703.*

(Emphasis added.) In its motion in the trial court, the Attorney General's office emphasized this provision and argued the Department has the

authority to impose community custody conditions separate and apart from those ordered by the sentencing court pursuant to RCW 9.94A.703.

Mr. Petterson has never disagreed with this position. In fact, that is exactly what happened here. In the Judgment and Sentence the Court ordered, "Defendant shall report to DOC no later than 72 hours after release from custody and shall comply with all conditions stated in this Judgment and Sentence, including those checked in the Supervision Schedule, and other conditions imposed by the court or DOC during community custody." CP, 8. Mr. Petterson did not appeal from this order.

The final requirement at the sentencing hearing is that the judge set a treatment termination date: "(7) At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment." Mr. Petterson's treatment termination date was set for October 4, 2005.

The treatment termination hearing did not go as expected, however. Instead of removing Mr. Petterson from treatment, the trial court removed him from community custody (although the Department continued to supervise him in the interim). The error was not discovered for almost a year and it took a decision from this Court to determine with finality that Mr. Petterson would continue to be on community custody for life. After this Court issued its Mandate, however, the parties

reconvened to decide what, if any, community custody conditions should be modified. The Court, after consulting the Kitsap County Prosecutor's Office and the Department of Corrections, and giving the Attorney General's Office an opportunity to respond, issued its Order of May 30, 2008, requiring Mr. Petterson to: (1) obey all laws; and (2) update the Department of any change in address or phone number. CP, 40. The trial court was absolutely within its power to do so under subsection (9).

> (9) At least fourteen days prior to the treatment termination hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding the offender's supervision and treatment. Prior to the treatment termination hearing, the treatment provider and community corrections officer shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community custody conditions. The court may order an evaluation regarding the advisability of termination from treatment by a sex offender treatment provider who may not be the same person who treated the offender under subsection (5) of this section or any person who employs, is employed by, or shares profits with the person who treated the offender under subsection (5) of this section unless the court has entered written findings that such evaluation is in the best interest of the victim and that a successful evaluation of the offender would otherwise be impractical. The offender shall pay the cost of the evaluation. *At the treatment termination hearing the court may: (a) Modify conditions of community custody*, and either (b) terminate treatment, or (c) extend treatment in two-year increments for up to the remaining period of community custody.

(Emphasis added.) The Kitsap County Prosecutor's Office acknowledged as much when DPA Hull expressly told the Court that the statute gives the court authority to modify the community custody conditions. RP, 8 (May 5, 2008).

Although not directly implicated by Mr. Petterson's case, it is worth noting that the statute also gives the sentencing court authority to modify the conditions at annual review hearings. Subsection (8)(b) reads: "The court shall conduct a hearing on the offender's progress in treatment at least once a year. At least fourteen days prior to the hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding the offender's supervision and treatment. At the hearing, the court may *modify* conditions of community custody *including, but not limited to, crime-related prohibitions and affirmative conditions* relating to activities and behaviors identified as part of, or relating to precursor activities and behaviors in, the offender's offense cycle or revoke the suspended sentence." (Emphasis added.) The phrase "including, but not limited to" gives the sentencing court very broad authority to modify the community custody conditions for SSOSA candidate.

The Oxford Dictionary defines "modify" as to "make partial or minor changes to (something), typically so as to improve it or to make it less extreme." It makes sense that the legislature would authorize the

sentencing court to modify the community custody conditions to improve them or make them less extreme A person who has been granted a SSOSA sentence is generally deemed to be someone who is amenable to treatment and someone who can be safely monitored in the community. See RCW 9.94A.670(4). After the offender has completed his or her treatment, that would be even more so. It makes no sense to monitor all see sex offenders with the same cookie cutter rules. Some sex offenders will be deemed high risks to reoffend. These offenders would be inappropriate for SSOSA and will requires high degrees of monitoring throughout their community custody On the other hand, low risk offenders who are given the opportunity for a SSOSA and graduate from treatment require fewer Department resources and their efforts at self-improvement should be recognized by the Court.

It also makes sense that it is the sentencing court, and not the Department, that makes these decisions The Public Duty Doctrine makes the Department liable under certain circumstances when, after being negligently supervised by the Department, a probationer causes harm to a third party. As the Supreme Court said in one case, "[T]he county probation officer owed a duty to exercise reasonable care to control [the probationer] to prevent reasonably foreseeable harm to others resulting from his dangerous propensities " *Bishop v. Miche*, 137 Wn 2d 518, 973 P.2d 465 (1999). But the *Bishop* case also says that there is no

breach of that duty or proximate cause when the probation officer is simply complying with the orders of the Court. By authorizing the Court, and not the Department, to modify the community custody conditions, it removes the exposure to liability that might otherwise exist. In fact, this was the concern expressed by CCO Payne at the May 5, 2008 hearing.

That the Department and the Court may disagree on what community custody conditions are appropriate was contemplated by the statute. As noted above, the sentencing court at the original sentencing hearing must authorize the Department to impose additional community custody conditions pursuant to RCW 9.94A.703. But those conditions may not contravene the orders of the Court. Former RCW 9.94A.715 (2)(c) (later recodified as RCW 9.94A.704 (6) and (11)) states: "The department *may not impose* conditions that are contrary to those imposed by the court and *may not contravene* or decrease court imposed conditions. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function." (Emphasis added.) This statute limits the power of the Department and says the conditions imposed by the Court may not be "contravened" by the Department. This statute, in addition to limiting the Department's authority, also demonstrates the authority of the Court to modify conditions over the objection of the Department.

The trial court's Order on Motion to Modify Conditions of Community Custody is difficult to follow on this point On the one hand, the trial court concludes that the court lacks the authority to modify the provisions of RCW 9.94A.670(5), essentially giving the Department full authority to impose any conditions it desires. On the other hand, the Order states the probationer is free to "challenge, in good faith, specific conditions." CP, 145 If the court has the authority to modify some conditions, as it clearly does, it has the authority to modify all the conditions, or none at all.

Both the Attorney General's Office and the trial court's Order noted that all the previous Orders were subject to review by either party or the Department. Mr. Petterson does not dispute that. But that was not intended as a carte blanche for the Department to come back to Court for no apparent reason. As the trial court told Mr. Petterson when it first modified the conditions, he would be back before the Court and "all the conditions could be put back on you" if he were to violate the law. RP, 5 (May 30, 2008). Additionally, the unforeseen circumstances precipitated by Mr. Petterson's desire to move to Minnesota in July of 2013 caused an amendment of the conditions.

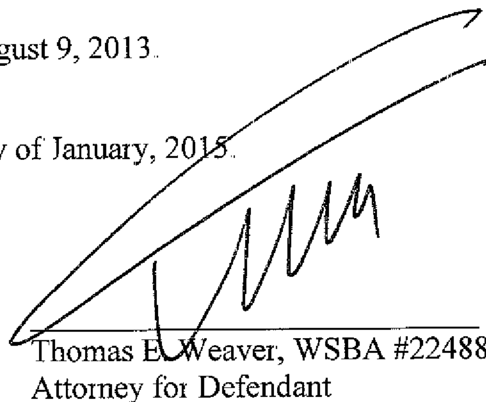
Should Mr. Petterson violate the law or there be another unforeseen circumstance, then further amendment of the Orders may be appropriate But Mr. Petterson has been a model probationer The Court

suspended the majority of community custody conditions seven years ago. There have been no problems with his community custody. He has maintained law abiding behavior. He has reported when requested, despite the fact that he is not required to do so. He has reported his whereabouts, including when he has left the state. The decision to reimpose all the community custody conditions as if he were starting over on his probation simply because his case was transferred from one CCO to another after he moved from Kitsap County to King County is arbitrary and capricious. The Court's Orders of May 30, 2008 and August 9, 2013 were lawful and the trial court abused its discretion in ruling otherwise.

D. Conclusion

This Court should reverse the trial court's order of September 16, 2015 and reinstate the Order of August 9, 2013.

DATED this 26th day of January, 2015.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

9

STATE OF WASHINGTON,	)	Court of Appeals No.: 48187-1-II
Plaintiff/Respondent,	)	DECLARATION OF SERVICE
vs.	)	
ERIK PETTERSON,	)	
Defendant/Appellant.	)	

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STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

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17 I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

18 On January 28, 2016, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to the Kitsap County Prosecuting Attorney's Office via email to: kcpa@co.kitsap.wa.us through the Court of Appeals transmittal system

19
20

21 On January 28, 2016, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

22

Erik Petterson
PO Box 3053
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23
24

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The Law Office of Thomas E. Weaver
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1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

2 DATED: January 28, 2016, at Bremerton, Washington.

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5 Alisha Freeman

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