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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36514-0-III

STATE OF WASHINGTON, Respondent,

v.

ROCKY RHODES KIMBLE, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

After the State filed a memorandum in the Court of Appeals acknowledging that the offender scores and standard ranges set forth on Rocky Kimble's judgment and sentence were incorrect, Kimble moved to vacate the judgment and sentence and for resentencing. After his appointed counsel did not communicate with him about the motion and advocated a position contrary to his interests, Kimble directed the attorney to withdraw and moved to discharge him. Without inquiring into the conflict or ruling on the motion to discharge his attorney, the trial court ultimately concluded that Kimble's motion was barred by the doctrine of collateral estoppel. Because the trial court erred in ruling on Kimble's motion without inquiring into the conflict of interest, because the State is judicially estopped from taking a contrary position regarding Kimble's offender score than it took previously in the Court of Appeals, and because the trial court failed to properly apply the elements of collateral estoppel, the trial court's order denying Kimble's motion to vacate the judgment and sentence should be reversed and the case remanded for resentencing.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in failing to inquire into the asserted conflict of interest between Kimble and his appointed attorney before ruling on Kimble's motion.

ASSIGNMENT OF ERROR NO. 2: Under the doctrine of judicial estoppel, the State may not argue in the Court of Appeals that Kimble's offender score is invalid and later argue in the Superior Court that his offender score is valid.

ASSIGNMENT OF ERROR NO. 3: Collateral estoppel does not bar Kimble's motion to vacate the judgment and sentence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the trial court deprived Kimble of conflict-free counsel when it knew of a dispute concerning the representation and failed to inquire into it or rule on Kimble's motion to discharge the attorney.

ISSUE NO. 2: Whether the trial court's failure to inquire into the asserted conflict of interest deprived Kimble of an opportunity to be heard on the State's motion to strike his motion to vacate the judgment and sentence.

ISSUE NO. 3: Whether the State's position in the Court of Appeals that Kimble's offender score was miscalculated and there was no factual dispute about the circumstances was inconsistent with its later assertion that the score was not miscalculated under prior rulings of the Court of Appeals and the Supreme Court.

ISSUE NO. 4: Whether the State's concession in the Court of Appeals that Kimble's offender score was miscalculated and there was no factual dispute about the circumstances was asserted to benefit the State's position in that proceeding.

ISSUE NO. 5: Whether the State's change in position on Kimble's offender score calculation creates the impression that it misled the Court of Appeals as to the existence of a factual dispute concerning the offender score.

ISSUE NO. 6: Whether the Court of Appeals' order dismissing Kimble's 2015 personal restraint petition and the Supreme Court's order denying discretionary review of the dismissal were final judgments on the merits of Kimble's offender score calculation.

ISSUE NO. 7: Whether the Court of Appeals' order dismissing Kimble's 2015 personal restraint petition and the Supreme Court's order denying

discretionary review of the dismissal should be given preclusive effect when the court summarily dismissed the petition without applying the rule of lenity or remanding for a reference hearing after Kimble demonstrated a facial ambiguity in the judgment and sentence.

IV. STATEMENT OF THE CASE

The State charged Rocky Kimble with first degree burglary and first degree rape in 1999. CP 1. Ultimately, the parties reached a plea agreement in which Kimble pleaded guilty to amended charges of first degree rape and residential burglary and stipulated to a prior conviction for robbery in Wisconsin. CP 13-14. Under the agreement, the State would recommend a high end sentence of 160 months on the rape charge and 17 months on the residential burglary, running concurrently, premised upon an offender score of "3." CP 15. The trial court accepted the plea agreement. CP 18.

Subsequently, the trial court rejected the parties' recommendations and imposed an exceptional sentence of 360 months on the rape charge based on a judicial finding of deliberate cruelty. CP 37, 39, 51-52. It entered findings of fact and conclusions of law in support of the exceptional sentence. CP 47. Kimble appealed the exceptional sentence on the grounds that the aggravating circumstances were not pled or proven

to a jury and the Court of Appeals affirmed it based upon *State v. Gore*, 143 Wn.2d 288, 21 P.3d 262 (2001).¹ CP 59. The appeal was mandated on September 6, 2001. CP 57.

In 2012, Kimble filed a motion to withdraw his guilty plea on the grounds that his offender score was miscalculated, rendering his guilty plea unknowing and involuntary. CP 67. The apparent basis for the miscalculation Kimble argued was lack of comparability of a prior out-of-state conviction included in his offender score. CP 69, 70. The State responded by moving to transfer the motion to the Court of Appeals for consideration as a personal restraint petition and also argued the motion was not timely. CP 96, 97. The trial court entered findings of fact and conclusions of law finding that the score of “3” on the rape charge consisted of two points for a violent felony prior conviction for second degree robbery from Wisconsin and a “1” for the other current offense of residential burglary. CP 109-10. It concluded that Kimble’s motion was not timely and transferred it to the Court of Appeals. CP 110.

¹ *Gore* was subsequently overruled by *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). *State v. Hughes*, 154 Wn.2d 118, 131, 110 P.3d 192 (2005). However, the Washington Supreme Court has held that *Blakely* does not apply retroactively to convictions that were final at were time, which precludes Kimble from obtaining relief from the exceptional sentence premised upon judicial fact-finding in a collateral attack. *State v. Evans*, 154 Wn.2d 438, 442, 114 P.3d 627 (2005). But in the event Kimble’s sentence is vacated, *Blakely* would apply to a resentencing proceeding. See *State v. McNeal*, 142 Wn. App. 777, 787 n. 14, 175 P.3d 1139 (2008).

Kimble then sought review of the order transferring his motion to the Court of Appeals. CP 116. The personal restraint petition itself was dismissed because Kimble did not pay the filing fee or submit a statement of finances to the Court of Appeals. CP 118. On his motion to modify, the Court of Appeals directed him to withdraw his petition and proceed instead with the appeal, where counsel had been appointed to represent him. CP 118. Subsequently, the Court of Appeals declined to consider the merits of the offender score argument and considered only the propriety of the transfer order. CP 118, 120. It held that the transfer order was proper and that Kimble could file a personal restraint petition to obtain substantive review of his issues. CP 120.

Thereafter, Kimble filed a motion to withdraw his guilty plea in which he argued that the sentencing court had found the rape and burglary charges to comprise the same criminal conduct. CP 128, 132. Accordingly, the offender score for the residential burglary charge should have been a “1,” and Kimble contended his plea was involuntary because he was misadvised of the consequences of the plea. CP 133. The judgment and sentence entered shows that a box was checked that states: “Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400): . . .” No specific crimes are then listed.

The State again responded by requesting that the motion be transferred to the Court of Appeals as a personal restraint petition. CP 235. It argued that Kimble was not prejudiced by the miscalculated offender score, noting that he did not challenge the sentence on the rape charge and the sentence on the residential burglary charge did not affect his total term of confinement because it ran concurrently with the sentence on the rape charge. CP 239, 245-46. Again, the trial court transferred the motion to the Court of Appeals as a personal restraint petition. CP 247. Kimble again appealed the transfer order. CP 260.

While that matter was pending, Kimble filed a motion to vacate the judgment and sentence and sought resentencing because the State conceded in its pleadings in the Court of Appeals that his offender scores and standard sentence ranges were miscalculated. CP 267. Kimble's motion cited a portion of the State's appellate briefing that read:

When the State offered to reduce the First Degree Burglary charge to Residential Burglary, Kimble's offender score remained at three (3) on the Rape charge, but should have been reduced by two (2) on the Residential Burglary charge under RCW 9.94A.360(7) because RCW 9.94A.360(1) no longer applied to double the points for Kimble's 1993 Robbery conviction. See RCW 9.94A.360(7), (8), and (10), re-codified as RCW 9.94A.525(7), (8), and (10).

Then, after the sentencing court determined both current offenses constituted the "same criminal conduct," but before imposing sentence, **Kimble's offender score**

should have been reduced by one (1) point on both charges, and his standard ranges recalculated. See RCW 9.94A.400(1)(a), re-codified as RCW 9.94A.589(1)(a).

If Kimble's offender score had been properly recalculated, his standard range for First Degree Rape would have been 111-147 months (offender score 2, seriousness level XII) instead of 120-160 months (offender score of 3), and his standard range for Residential Burglary would have been 6-12 months (offender score 1, seriousness level IV) instead of 13-17 months (offender score 3). See RCW 9.94A.310, re-codified as RCW 9.94A.510; RCW 9.94A.320, re-codified as RCW 9.94A.515.

...

Since the facts concerning Kimble's miscalculated offender score and the resulting facial invalidity of his Judgment and Sentence are not contested, resolution of his CrR 7.8 motion does not require any hearing.

CP 271, CP 292-93, 295 (emphasis added).

The trial court appointed counsel to represent Kimble on his motion and set a briefing schedule for a response from the State and a reply by the defense. RP 59, 65-67. In its response, despite having acknowledged that Kimble's offender scores were incorrect, the State contended that Kimble was not prejudiced by the error because an exceptional sentence had been imposed. CP 309-10.

Kimble's attorney did not file a reply to the State's briefing. CP 325-26. At the next hearing on Kimble's motion, his attorney advised the court that he needed to review the transcript of the guilty plea and

sentencing hearings because “I don’t really believe Judge Baker even found anything to be the same course of criminal conduct.” RP 72. The trial court continued the hearing a defense counsel’s request. RP 78-79.

Thereafter, Kimble moved to discharge his appointed attorney on the grounds of a conflict of interest and a breakdown in communication. CP 323. He described his unsuccessful efforts to speak with counsel about the motion and the State’s response, to obtain a copy of the State’s response, his surprise that counsel advocated a position contrary to his interests at the motion hearing, and his direction to counsel to withdraw before the next hearing and not file anything further on his behalf. CP 325-29.

Before the next hearing, the State filed a motion to strike Kimble’s motion to withdraw his guilty plea.² CP 334. It argued that the issue of Kimble’s offender scores had already been decided in a personal restraint petition and was, therefore, barred by collateral estoppel. CP 335. Kimble’s appointed attorney did not file any response to either the State’s motion or Kimble’s *pro se* motion to discharge him as counsel. RP 86. At the next hearing, without addressing the asserted conflict of interest or

² Kimble’s motion to withdraw his guilty plea had been transferred to the Court of Appeals as a personal restraint petition in December 2017. CP 247.

moving to withdraw from representation, appointed counsel advised the court that he was aware of a 2015 order from the Washington Supreme Court that appeared to address the offender score calculation. RP 86-88. The trial court did not rule on Kimble's motion to discharge counsel and denied his motion to vacate the judgment and sentence on the grounds that it was barred by collateral estoppel. RP 88, CP 350.

Kimble now appeals from the denial of his motion to vacate the judgment and sentence. CP 351.

V. ARGUMENT

Once the trial court became aware of the asserted conflict of interest between Kimble and his appointed attorney, it was error for the court to take further action on the motion without inquiring into the conflict, which deprived Kimble of an opportunity to respond to the State's argument on collateral estoppel. Furthermore, on the merits, the State is judicially estopped from changing its position on the offender score after representing to the Court of Appeals that the score was miscalculated and the facts agreed such that no hearing was required. Lastly, collateral estoppel does not bar Kimble's motion to vacate the judgment and sentence. The trial court's order denying Kimble's motion should be reversed and the case remanded for resentencing.

A. After Kimble moved to discharge his appointed attorney due to a conflict of interest, the trial court was required to inquire into the asserted conflict before ruling on Kimble's pending motion to vacate.

A conflict of interest amounts to ineffective assistance of counsel when the conflict adversely affects the interests of the client. *State v. Chavez*, 162 Wn. App. 431, 438, 257 P.3d 1114 (2011). When a trial court becomes aware of a potential conflict of interest, it has a duty to investigate. *State v. Regan*, 143 Wn. App. 419, 425-26, 177 P.3d 783, *review denied*, 165 Wn.2d 1012 (2008). If the defendant timely asserts a conflict of interest and the trial court fails to conduct an adequate inquiry, automatic reversal is required. *Id.* at 426 (*citing Holloway v. Arkansas*, 435 U.S. 175, 188, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)).

An actual conflict of interest exists “when, during the course of the representation, the attorney’s and the defendant’s interests diverge with respect to a material factual or legal issue or to a course of action.” *Id.* at 428 (*quoting U.S. v. Levy*, 25 F.3d 145, 155 (2nd Cir. 1994)). A defendant is adversely affected by a conflict of interest when the conflict causes a lapse in representation that is contrary to the defendant’s interests, or likely affects particular aspects of the attorney’s advocacy for the client.

Id. Lack of preparation may constitute a conflict of interest. *See State v. Jensen*, 125 Wn. App. 319, 333-34, 104 P.3d 717, *review denied*, 154 Wn.2d 1011 (2005).

In the present case, Kimble asserted the existence of a conflict arising from counsel's failure to communicate with him, keep him apprised of the State's position on his motion, and prepare for the motion hearing sufficient to advocate for his position. Indeed, counsel invited the court to ignore the State's concession on the offender score miscalculation, which was directly contrary to Kimble's motion and the remedy sought. As a result, counsel's conduct directly and adversely affected Kimble's position in the litigation. This conflict was sufficient to establish an actual conflict of interest.

Once the conflict of interest was asserted, it was error for the trial court not to either inquire further into its basis (if it questioned the existence of an actual conflict) or to disqualify Kimble's attorney from further representation. *See State v. McDonald*, 143 Wn.2d 506, 513, 22 P.3d 791 (2001) (although standby counsel is not constitutionally required, when standby counsel is appointed and the court knows or should know of a potential conflict, failure to inquire is reversible error). Furthermore, the trial court should not have taken further action on Kimble's motion

without affording him an opportunity to respond to the State's argument, either *pro se* or through conflict-free counsel. Instead, the trial court's actions in ignoring the conflict and denying Kimble's motion rendered the process fundamentally unfair.

Because Kimble had a right to present his arguments on his motion without interference by a conflicted attorney appointed to him, the trial court's failure to respond to his motion to discharge his attorney was reversible error. Accordingly, its order denying his motion to vacate the judgment and sentence should be reversed and the case remanded.

B. Having conceded the error Kimble asserted in the Court of Appeals, the State is judicially estopped from changing its position to gain an advantage before a different tribunal.

On the merits, the State's position in its motion to strike Kimble's motion was contrary to the position it took in the Court of Appeals in 2018 when it represented that his offender scores were miscalculated and no facts were in dispute. Because the State's position in the Court of Appeals benefited itself in prior litigation, it was estopped from thereafter changing its position to gain a tactical advantage on Kimble's motion to vacate the judgment and sentence. Accordingly, the concession should be binding on the State in Kimble's motion, and the motion should be determined solely

on the State's argument that Kimble was not prejudiced by the miscalculated offender score.

“Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224-25, 108 P.3d 147 (2005). Among the purposes of the doctrine are to preserve respect for the judicial system and to avoid inconsistency, duplicity, and waste of time. *Id.* at 225. Judicial estoppel applies to bar an inconsistent position if either the prior position benefited the litigant or was accepted by the court. *Id.* at 230-31.

In general, consideration of judicial estoppel is guided by three factors: (1) Whether the party's later position is clearly inconsistent with its earlier position, (2) Whether acceptance of the inconsistent position by a subsequent court would give the impression that either the first or second court was misled, and (3) whether the party asserting the inconsistent position would derive an unfair advantage or impose unfair detriment to the opposing party if not estopped. *Harris v. Fortin*, 183 Wn. App. 522, 527, 333 P.3d 556 (2014) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007)). The factors are satisfied here.

In this case, the State argued in the Court of Appeals in 2018 – after the Supreme Court ruling that it later argued collaterally estopped Kimble’s argument that his offender score was miscalculated – that no dispute existed concerning the miscalculation of Kimble’s offender scores. CP 291-94. It took this position for its own benefit in the pending litigation to contradict Kimble’s argument that he would not have accepted the plea offer if he had been properly advised of the correct sentencing ranges and to oppose a potential reference hearing on Kimble’s motion. CP 294-95. The State’s position in the Court of Appeals – that the offender scores were miscalculated and there was no factual dispute concerning the miscalculation – directly contradicts its position taken in the trial court on Kimble’s motion to vacate the judgment and sentence – that the offender score was not miscalculated and had already been reviewed. Accepting the State’s position on Kimble’s motion would lead to the conclusion that the Court of Appeals was misled that there was no factual dispute concerning the offender score calculation. And the change in position works to Kimble’s detriment by depriving him of the ability to seek a reference hearing from the Court of Appeals while denying him the opportunity to seek an alternative remedy based upon the concession.

Because the factors establishing judicial estoppel are present here, the State should not be permitted to change its position that the offender

scores were indisputably miscalculated. Accordingly, the trial court's ruling denying Kimble's motion to vacate should be reversed and remanded for reconsideration consistent with the State's prior position in the Court of Appeals.

C. Collateral estoppel does not bar Kimble's motion to vacate the judgment and sentence when the prior dismissal order was not a final judgment on the merits and Kimble did not receive a full and fair hearing on the facts supporting his claim for relief.

Under the doctrine of collateral estoppel, when an ultimate factual issue has been determined by a valid and final judgment, the issue cannot be relitigated in the future. *State v. Mullin-Coston*, 152 Wn.2d 107, 113, 95 P.3d 321 (2004). A party asserting collateral estoppel must show that (1) the issue decided in the first adjudication is identical to the one presented in the second; (2) the prior adjudication ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted was a party or in privity with a party to the prior litigation³; and (4) application of the doctrine must not work an injustice.

³ This element addresses non-mutual collateral estoppel by one who was not a party to the prior litigation against one who was. Here, the parties are identical in both proceedings, so this court need not further evaluate whether non-mutual collateral estoppel applies in criminal proceedings. *See Mullin-Coston*, 152 Wn.2d at 120 (after evaluating applicability of non-mutual collateral estoppel in criminal cases generally,

Id. at 114 (quoting *State v. Bryant*, 146 Wn.2d 90, 98-99, 42 P.3d 1278 (2002)). Here, the State bore the burden of establishing every element of the test. See *Bryant*, 146 Wn.2d at 99; *State v. Vasquez*, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001), *affirmed*, 148 Wn.2d 303, 59 P.3d 648 (2002). This court reviews *de novo* whether its burden has been satisfied. *Vasquez*, 109 Wn. App. at 314.

Under the first and second factors, the court considers whether the issue was actually litigated and necessarily and finally determined in the prior proceeding. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). In evaluating whether there is a final judgment on the merits, courts also consider whether the claim was properly resolved on the merits or on procedural grounds. See *Ullery v. Fulleton*, 162 Wn. App. 596, 604-07, 256 P.3d 406, *review denied*, 173 Wn.2d 1003 (2011) (where court dismissed case on standing but also evaluated the merits, the court's determination of the merits should not operate as a bar to a future claim). Under the fourth factor, the "injustice" prong, the primary consideration is whether the parties received a full and fair hearing on the issue in question such that the prior decision was procedurally fair. *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648

holds the doctrine does not apply to preclude litigation of identical issues decided by a jury verdict against a separate defendant).

(2002). Moreover, courts evaluate whether the party had an incentive to fully litigate the question in the prior proceeding. *Hadley v. Maxwell*, 144 Wn.2d 306, 312, 27 P.3d 6000 (2001).

In the present case, the State relied upon an order from the Court of Appeals dismissing Kimble's 2015 personal restraint petition and an order from the Washington Supreme Court denying discretionary review of that dismissal. CP 338, 344. In the 2015 personal restraint petition, Kimble contended that because his offender scores were miscalculated and he was misinformed of the consequences of the plea, he should be entitled to withdraw the plea. CP 339-40. Alternatively, he argued that the miscalculated offender score was prejudicial error that required resentencing. CP 340. Twelve days after he filed his petition, the Court of Appeals dismissed it. *See Case Events* (docket), no 33237-3-III.

The Court of Appeals' ruling and the Supreme Court's denial of review should not have preclusive effect in the present case because, at a minimum, Kimble should have received an evidentiary hearing on the question whether the sentencing court intended to find that the rape and the burglary crimes constituted the same criminal conduct. *See* RAP 16.11(b) ("If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for . . . a reference

hearing.”). Undisputably, the sentencing court checked the box finding that crimes constituted the same criminal conduct. CP 36. However, it did not write in the crimes of burglary and rape at the end of the paragraph, and it did not recalculate Kimble’s offender score when it made the finding. CP 36, 37. This created an ambiguity in the judgment and sentence as to the nature of the sentencing court’s findings.

Ordinarily, ambiguities must be construed in favor of the defendant in a criminal case. *See City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009) (describing the rule of lenity in resolving legislative ambiguity). Alternatively, the Court of Appeals could have remanded the petition for an evidentiary hearing under RAP 16.11(b). Instead, its summary resolution of an ambiguous fact contrary to Kimble was not consistent with the court’s ordinary procedure and deprived Kimble of a fair opportunity to have the issue determined.

Furthermore, both the Court of Appeals and the Supreme Court concluded that Kimble’s argument that his plea was involuntary did not overcome the one-year time bar to file a personal restraint petition under RCW 10.73.100. CP 340, 346. When a petition sets forth multiple grounds for relief and the court determines at least one of the grounds is time-barred, the entire petition must be dismissed and claims that are not

time-barred will not be decided. *In re Personal Restraint Petition of Hankerson*, 149 Wn.2d 695, 72 P.3d 703 (2003). Thus, once the reviewing court determined that Kimble's claim of involuntariness was time-barred, the inquiry should have ended. As in *Ullery*, that determination should have been conclusive and the court's further evaluation of the merits should not have preclusive effect. *See* 162 Wn. App. at 606 (“[W]hen a dismissal is based on two or more determinations at least one of which, standing alone, would not render the judgment a bar to another action on the same claim, then in such a case, if the judgment is one rendered by a court of first instance, it should not operate as a bar.”).

Accordingly, the prior rulings by the Court of Appeals and the Supreme Court did not collaterally estop Kimble from seeking resentencing based on miscalculated offender scores because they were not final judgments on the merits of the claim, and because it would work an injustice to give those rulings preclusive effect. Since the State subsequently conceded that the scores were miscalculated and did not assert any factual dispute in that regard, Kimble should have received the resentencing relief he requested. This court should remand the case for that purpose.

VI. CONCLUSION

For the foregoing reasons, Kimble respectfully requests that the court REVERSE the order dismissing his motion to vacate the judgment and sentence and REMAND the case for a resentencing hearing.

RESPECTFULLY SUBMITTED this 1 day of July, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
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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 Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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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 and sworn this 1 day of July, 2019 in Kennewick,
Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

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