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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Custody of:

LMS,

FAUALUGA SIUFANUA AND BILLIE SIUFANUA,

Petitioners,

and

TONY SAMOA FUGA and

LISA LYNETT SIUFANUA,

Respondents.

SEALED

RESPONDENT, TONY SAMOA FUGA'S
ANSWER TO PETITION FOR REVIEW

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 ORIGINAL

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I. IDENTITY OF RESPONDENT

Tony Fuga is the Respondent in the Court of Appeals, and is the Respondent before this Court. Respondent respectfully asks this Court to deny the grandparents' Petition for Review.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

This Court should decline to accept review of the Court of Appeals decision as it is not in conflict with either "a decision of the Supreme Court" or "another decision of the Court of Appeals". Specifically:

1. The Court of Appeals Decision is consistent with the holding in In re Custody of B.M.H., 179 Wn.2d 224, (2013) and Marriage of Allen, 28 Wn. App. 637 (1981), because the decision does not hold that the actual detriment standard in a non parental custody case can *only* be met when a child has special needs.
2. The Court of Appeals Decision is consistent with In re Custody of E.A.T.W., 168 Wn.2d 335 (2010) regarding application of the adequate cause standard in a nonparental custody case.
3. The Court of Appeals decision is consistent with RCW 13.34.030(1)'s definition of abandonment as well as RCW 26.10.160(2)(a) regarding the Court's authority to make a discretionary ruling whether to restrict a parent's time.

III. STATEMENT OF THE CASE

The Respondent, Tony Samoa Fuga (hereinafter, "Tony") and the Respondent, Lisa Siufanua (hereinafter, "Lisa") were involved in an intimate relationship beginning in 2004.¹ LMS was born to Tony and Lisa

¹ The first names are being used for ease of reference. No disrespect is intended.

in December of 2005. (CP 198.) For the first approximately three years of LMS's life, the parties resided together at Lisa's parents', Billie Siufanua and Faualuga Siufanua (hereinafter, "grandparents") residence. Both Tony and Lisa provided parenting functions for their daughter. (CP 247). After approximately three years, Tony and Lisa separated, but Tony continued to spend time with LMS and supported her by providing Lisa with cash, clothing and diapers. (CP 199).

Eventually, Tony moved from Washington to California to enhance his employment opportunities. (CP 203). He met his current wife, Vaelua, in San Diego where they were married. Tony and Vaelua are both employed at the San Diego Naval Base. (CP 203). They have two children of their marriage, ages 4 and 5. (CP 203).

Tony and Vaelua attended and graduated from IT Technical school and have their certification in computers. (CP 203). Their five year old son attends kindergarten at O'Farrell Elementary School and is very interested in sports and gaming. (CP 204). Tony's 4 year old son also attends O'Farrell Pre School and likes to watch action movies and play games. (CP 204). Tony's family is very active including attending programs through their church where Vaelua's father is a pastor. (CP 234). Tony and his wife research where local family activities are

scheduled at at no or low cost and attend those functions with their children. (CP 204).

Tony and his wife, Vaelua have a loving relationship. (CP 204). According to Vaelua, Tony has never shown any violent tendencies towards her or anyone else. (CP 234). Tony has great relationships with his co-workers and the parties' extended family on both sides. (CP 234). Vaelua keeps Tony grounded and is very supportive of him. (CP 204). They listen to music and attend church together. (CP 204). Vaelua's dream is to be a school teacher and her parents live close by and are very supportive of their family. (CP 204). Vaelua has a natural and genuine love for children. (CP 204). Tony and Vaelua have been active at the children's school and have attended field trips with them as parent chaperones. (CP 204-05). They enjoy those times immensely watching their children learn and succeed in school. (CP 205). Tony and Vaelua work opposite shifts so they can balance their time together and a parent is always with their children. (CP 234).

Tony is very fond of the children's school's sticker program where the children will receive a sticker if they behave and display kindness to their teacher and classmates. (CP 205). It is the highlight of Tony's day to come home from work and hear that his children received a sticker. (CP 205).

Tony lives a very peaceful life with his wife and children. (CP 199, 233). Neither Tony nor his wife drink alcohol or are interested in any activities that do not involve their children. (CP 205, 234). Tony and Vaelua live a very child centered life.

While Tony's family life is nice, he always missed his daughter LMS, and wished every day of his life that she was also a part of his happiness. (CP 205). Not a day would go by that he would not think about his daughter LMS and how empty his heart was without her being a greater part of his life. (CP 205).

Over the years that Tony moved to California, he continued to support LMS. (CP 203). Specifically, even after Tony moved from Lisa's parents' residence, he remained in contact with Lisa and LMS and made sure he supported LMS with money for diapers, food and anything she needed. (CP 206). Once Tony moved to San Diego and was employed, he paid child support to Lisa for the benefit of LMS through the state of Washington Division of Child Support. (CP 206-207). When Tony changed employers, he called the DCS to notify them of his new employment. (CP 206-207).

Tony's mother and step-father, Ty Tufono and Chris Chaussee, were also in a close and supportive relationship with Lisa and LMS. (CP 207). Tony's parents would pick LMS up at the McDonalds in Federal

way on the weekends and keep her from Friday to Sundays on an every other weekend basis. (CP 207). Tony's parents continued to help Lisa with LMS in addition to helping Lisa move away from her parents' residence and get a place of her own with LMS. (CP 207). Lisa moved into an apartment with LMS with a friend who had two young children. (CP 249). Tony's parents circulated a Christmas card in 2009 with a picture of them and LMS. (CP 249). Lisa lived with LMS and her boyfriend in their own apartment in Federal Way after moving from Des Moines. (CP 249). This included Tony's parents helping Lisa with money for rent, clothing and food for her and LMS on a weekly basis. (CP 207).

Eventually, Lisa stopped communicating with Tony and his parents regarding LMS. (CP 249). Tony's mother went to the apartment that Lisa was residing with LMS but discovered that Lisa had been evicted. (CP 207). Tony's mother also went to a residence in Burien that she used to pick LMS up from but the family who resided there indicated they had not seen Lisa nor LMS for months. (CP 207). Lisa's phone number was disconnected and the cell phone numbers for Lisa's parents no longer worked. (CP 208).

In July of 2012, Lisa brought LMS to San Diego for vacation. (CP 208). Lisa brought LMS to Tony's grandmother's house. (CP 208).

When Tony arrived at his grandmother's house to see LMS, she ran and leaped into his arms hugging him and crying, "Daddy, Daddy" telling Tony that she missed him. (CP 234-35). LMS never left Tony's side during the entire visit. (CP 235). She clung to Tony and asked him numerous questions such as, "what's your favorite color Daddy?" and "What's your favorite foods?". (CP 235). Vaelua noticed how much LMS looked like her oldest son, Jordon. (CP 235). She also noticed during this visit how much love there was from LMS to Tony and from Tony to LMS. (CP 235). After Lisa left with LMS, a few moments later, LMS called Tony on his phone just so she could hear his voice again. (CP 235). Tony promised that he would see her again soon and that she could call him anytime. (CP 235).

Tony and his wife had a good talk with Lisa and they all exchanged phone numbers. (CP 208). Tony told Lisa to let him know if there was ever anything that she needed for LMS to please call. Lisa said okay. The very next day, Tony tried to call Lisa on the phone number that she provided but the number was disconnected. (CP 208). Tony was unable to contact her or find either Lisa or LMS. (CP 208).

Tony denies a history of acts of domestic violence towards Lisa or anyone else as alleged by the grandparents. The incident that resulted in his arrest occurred in April of 2005, before LMS was born. (CP 198).

Tony and Lisa got into a verbally loud argument at the airport. (CP 198). Although the police report makes clear that Lisa explained to the security guards that Tony had not physically assaulted her in any way, he was arrested and charged with 4th degree assault. (CP 198). Tony agreed to domestic violence behavioral therapy and on November 21, 2006, the case was dismissed. (CP 199). Lisa and Tony continued to live together after this incident for over three years with LMS. (CP 199). Tony did not have any further criminal charges in either Washington or California. (CP 199).

It should be noted, however, that Tony described an incident where appellant, Faualuga Siufanua, assaulted Tony in 2008 when Tony was living with Lisa at her parents' residence. (CP 208). Tony described an incident where, Mr. Siufanua, punched Tony in the face when he brought some of Tony's belongings over to Tony's cousin's place after Lisa and Tony separated. (CP 208). In fact, appellant, Faualuga Siufanua, threatened to kill Tony or have him killed if he came around Lisa or LMS. (CP 248). This was very frightening to Tony as he was young, confused about life and he feared for his safety because appellant, Faualuga Siufanua is described as a big man with a bad temper. (CP 248). For Tony, contacting Lisa or LMS at Lisa's parents' house was out of the question due to Lisa's father's threats, which Tony believed he was capable of following through on. (CP 248).

Tony lost contact with Lisa when she moved without leaving a forwarding address. (CP 199). Tony and his parents were not able to contact Lisa or LMS either. (CP 199). The claim by the grandparents that LMS has always lived with them at their residence is false. LMS lived with Lisa in different locations after Tony and Lisa separated which has been shown by Tony's parents picking up LMS at Lisa's residence, separate and apart from the grandparents' house. (CP 207). Tony never abandoned LMS, he just did not know how to find or get into contact with LMS after Lisa repeatedly cut off contact. (CP 199).

While LMS was in the care of Lisa's parents, she was not performing well in school. (CP 250). As of March 10, 2014, LMS had been absent 17 days and tardy 19 days. (CP 278).

There were specific letters written by the principal of LMS's school expressing the concern that LMS had been absent and tardy on so many occasions and that it was seriously impacting LMS's learning. (CP 279).

Tony expressed concern that LMS was having excessive absences and tardies and that this was having a detrimental impact on her education. (CP 250). Tony indicated he would be able to make sure LMS was arriving to school on time and that she would be ready to learn. (CP 250).

Tony also expressed concern that LMS was being left alone unsupervised by adults when Lisa's parents were caring for LMS due to their employment, which required them to work in the evenings. (CP 251). Also, Tony advised the trial court that there were numerous other children living in Lisa's parents' residence who arguably have serious emotional issues, similar to Lisa's emotional issues. (CP 251).

Procedural History

On September 5, 2012, a Judgment and Order Determining Parentage was entered with the Court confirming that Tony is LMS's biological father. (CP 215). In the Order, Lisa was determined to be LMS's primary parent and reserved the issue of Tony's residential time to a future determination. (CP 216-17).

On October 8, 2014, after discovering that Lisa was incarcerated and was suspected of using illegal drugs, Tony filed a Petition to Modify the Order Determining Parentage, specifically asking the Court to find adequate cause to modify the Order and designate him as LMS's primary parent. (CP 198).

On October 24, 2015, with full knowledge of Tony's Petition for Modification of Parenting Plan and his counsel of record, Appellant grandparents filed a Non Parental Custody Petition and Obtained an Ex-parte Restraining Order preventing Tony from having contact with his

daughter. (CP 198). The Ex-parte Restraining Order did not provide a mechanism for Tony to see his daughter, even in a supervised capacity. (CP 227-30).

On October 30, 2014, Tony filed a Response to the grandparents' Petition specifically denying that (1) he was not a suitable custodian of his daughter, (2) he had abandoned his daughter; and (3) that he had engaged in a history of acts of domestic violence or assault. (CP 19). Tony also specifically advised in his Response that LMS had lived with Lisa apart from the grandparents, addressing their false contention that LMS had "been living with the petitioner's for her entire life". (CP 20). Tony specifically requested that the Court dismiss the Petition for Non Parental Custody and that custody of LMS be awarded to him. (CP 20). He further asked the Court to enter a restraining order against the grandparents from disturbing his peace. (CP 20).

Also on October 30, 2014, Tony filed a Motion to Dismiss the Non Parental Custody proceeding based on the fact that there was no adequate cause to proceed with the action. (CP 189-96). In his declaration in support of the motion, Tony specifically described the care and support that he had provided to LMS. (CP 199). He advised the court regarding why he was a fit parent and it would be in LMS's best interests for the Court to place his daughter in his custody. (CP 197-200).

On November 7, 2014, the grandparents filed their response to Tony's motion. In their response, the grandparents did not identify any special need of the child either physical or psychological that they were concerned about if Tony were to be granted custody. (CP 52-57). They only made allegations against Tony and described generally the care they provided for LMS. (CP 54-56). The grandparents did not describe whatsoever any specific detriment or actual harm that would occur to LMS if the Court were to grant custody to Tony. (CP 52-57).

On November 14, 2014, a Pro Tem Court Commissioner determined that the grandparents did not meet their burden of proof to show that Tony was either an unfit parent or that placing LMS with him would cause actual harm to her growth and development should LMS be placed in his custody. (CP 58-61).

After the Court denied adequate cause, the grandparents filed a Motion for Revision which was heard by the Honorable Suzanne R. Parisien. (CP 174-175). Judge Parisien denied the motion for revision, also finding that the grandparents had not met their burden of proof to show that either Tony was unfit or that placement of LMS with him would cause actual harm to her growth and development. (CP 169-170).

IV. ARGUMENT

- A. **The Court of Appeals decision is consistent with Custody of B.M.H. and Marriage of Allen because the decision does not hold that the actual detriment standard in a nonparental custody case can *only* be met when a child has special needs.**

The Court of Appeals properly relied on Custody of B.M.H., *supra*, when affirming the dismissal of the grandparents non parental custody petition. In their Petition for Review, the grandparents incorrectly characterize the Court of Appeals holding and reliance on Custody of B.M.H. by contending that the actual detriment standard can *only* be met with a child has special needs. That is not what the Court of Appeals decision states. In fact, in the decision, the Court of Appeals specifically quotes and applies the proper legal standard as set forth in Marriage of Allen, 28 Wn.App. 637 (1981) as follows:

“Actual detriment has been defined as a middle ground, something greater than the comparative and balancing analyses of the best interests fo the child test, but less than a showing of unfitness”.

Id.

The Court of Appeals decision also states that “whether placement with a parent will result in actual detriment to a child’s growth and development is a highly fact-specific inquiry that must be determined on a case-by-case basis.”

Regarding the Court of Appeals reference to B.M.H., *supra*, a former step-father who had parented B.M.H. for his entire life petitioned the court for non parental custody. B.M.H.'s biological father had died 6 months prior to B.H.M.'s birth. The former step-father was present at B.H.M.'s birth, and even cut B.M.H.'s umbilical cord. The former step-father was actively involved in B.M.H.'s life and the parties even changed B.M.H.'s last name from the biological father's last name to the last name of the former step-parent. The only reason that he did not formally adopt B.M.H. was because of the effect it might have on the survivor benefits that B.M.H. receives by virtue of his biological father's death.

In 2001, the parties divorced but the former step-father continued to have residential time with B.M.H. for years until 2010 when the mother planned to move with B.M.H. 50 miles away. Out of concern of the proposed move and the impact that would have on his seeing B.M.H., the former step-father filed a non parental custody petition indicating that he had parented B.M.H.'s for his entire life and that removing him from B.M.H.'s life would cause detriment to his growth and development. *Id.* at 233. In dismissing the former step-father's non parental custody petition, this Court held:

But here, without more extraordinary facts bearing on B.M.H.'s welfare, the prerequisites for a nonparental custody action have not been met. The concern that Ms. Holt might interfere with Mr. Holt and B.M.H.'s relationship is insufficient to show actual detriment under *Shields* and to meet the burden of production for adequate cause under *E.A.T.W.* [footnote omitted]. Although the importance of preserving fundamental psychological relationships and family units was part of the court's analysis in *Allen and Stell*, there were more extreme and unusual circumstances that contributed to the finding of actual detriment. In each case, the child had significant special needs that would not be met if the child were in the custody of the parent. Continuity of psychological relationships and family units was particularly important where a child had these special needs. Here, additional circumstances have not been alleged. This court has consistently held that the interests of parents yield to state interests only where "parental actions or decisions seriously conflict with the physical or mental health of the child." *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) (citing *Parham*, 442 U.S. at 603). Other facts in the affidavits point to Ms. Holt's dating patterns and her decision to move to Castle Rock. These are not the kind of substantial and extraordinary circumstances that justify state intervention with parental rights. We reverse the Court of Appeals and dismiss the nonparental custody petition without prejudice.

In re Custody of B.M.H., 179 Wn.2d at 239.

When discussing B.M.H., *supra*, in the context of the instant case, the Court of Appeals carefully noted that the continuity of psychological relationships and family units was particularly important where a child has special needs. The Court of Appeals properly focused on the importance of a biological parent's fundamentally protected right to raise their child versus a claim of actual detriment based solely on the absence

of that parent, without any other special need that would meet the extraordinary circumstances test enumerated in B.M.H., supra, and Marriage of Allen, supra.

The Court of Appeals properly concluded that Tony's absence from his daughter's life, by itself, did not mean that Tony was unfit or unable to meet his daughter's needs and that the grandparents allegations against Tony did not meet extremely high criteria and burden of proof necessary to meet the actual detriment standard. While the Court of Appeals decision states the instant case is analogous to B.M.H., in that there are no allegations that the child has a special need or evidence that Tony was not currently able to meet LMS's needs, the Appellate Court did not state that the actual detriment standard can *only* be met when a child has special needs as contended by the grandparents. Because the Court of Appeals did not hold that the actual detriment standard can only be met when a child has special needs, the grandparents' argument fails as the entire premise on which their argument is based is incorrect. Therefore, contrary to to the grandparents' contention, the Court of Appeals decision is consistent with the holdings in Custody of Anderson, 77 Wn. App. 261 (1995) Marriage of Allen, 28 Wn. App. 637 (1981) and Custody of E.A.T.W., 168 Wn.2d 335 (2010) and the Petition for Review should be denied.

B. The Court of Appeals Decision is consistent with Custody of E.A.T.W. as the Court properly applied the adequate cause standard pursuant to RCW 26.10.032 when dismissing the grandparents' third party custody action.

RCW 26.10.032(1) requires a non biological party seeking a custody order to submit along with his or her motion an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and set forth facts supporting the requested order. RCW 26.10.032(2) provides that the trial court shall deny the motion and dismiss the action unless it finds that adequate cause for hearing the motion is established by the affidavits. Id. Adequate cause has been defined in a modification context as a showing sufficient to support a finding on each fact that the movant must prove to prevail. In re Custody of E.A.T.W., 168 Wn.2d 335, 347, 227 P.3d 1284 (2010). The Court applies the "heightened standard" when making a determination of whether adequate cause has been established in a non parental custody action. In re Custody of B.M.H. 179 Wn.2d 224, 315 P.3d 470 (2013).

The Court of Appeals applied the correct standard as enumerated in RCW 26.10.032 and Custody of E.A.T.W., *supra*, when dismissing the grandparents petition for lack of adequate cause. Specifically, the Court of Appeals rejected the argument that Tony's absence from his daughter's

life equated to his inability to care for her presently and that the record clearly established that LMS knew Tony to be her father and Tony was a presently fit parent who was married and successfully raising two other children. Specifically, the Court of Appeals correctly determined that Tony's fundamental right to custody of his daughter is protected by the Fourteenth Amendment despite his long absence from her life and that the grandparents raising LMS for most of her remembered life is not enough to prove actual detriment to her growth and development.

The Court of Appeals also rejected the argument that actual detriment would be caused to LMS because of the allegation that Tony engaged in domestic violence. The allegation against Tony involved one domestic violence charge in April of 2005. Tony participated in the court-ordered domestic violence treatment and the charge was dismissed. The Court of Appeals properly concluded that the weight to be afforded to this incident was limited because it happened 10 years ago and there was no evidence that Tony had any other criminal history.

The argument that adequate cause hearing was held less than 20 days after the Summons and Petition were served should also be rejected by this Court as the grandparents did not object or request a continuance of the hearing and proceeded assumedly because they were prepared to do so at the time. Further, this argument is not relevant to the contention

that the Court of Appeals decision conflicts with E.A.T.W., *supra* and should be rejected on that basis. Because the Court of Appeals properly applied the adequate cause standard pursuant to RCW 26.10.032 and Custody of E.A.T.W., *supra*, the Petition for Review should be denied.

C. The Court of Appeals Decision is consistent with RCW 13.34.030(1) and RCW 26.10.160(2)(a).

The definition set forth in RCW 13.34.030(1) regarding abandonment in a dependency proceeding is not directly applicable in the context of an adequate cause determination under RCW 26.10.032. Therefore, there is nothing inconsistent with the Court of Appeals decision and RCW 13.34.030(1).

The legal standard to be applied in a nonparental custody case as enumerated above is actual detriment to the growth and development of the child. The Court of Appeals provided careful analysis regarding that standard as it related to the amount of time Tony was not present in his daughter's life. The Court of Appeals properly concluded that "moving a child away from a nonparent to whom the child is bonded is not, by itself, actual detriment". In fact, in B.M.H., *supra*, this Court rejected the same argument that the grandparents are making. The Court of Appeals in the instant case also stated:

The Siufanuas lean heavily on the fact that Fuga was almost entirely absent from his daughter's life for many years while

the Siufanuas were raising her. But even such a long absence does not establish actual detriment as the cases have illuminated the meaning of that term. Fuga's fundamental right to custody of his daughter is protected by the Fourteenth Amendment despite his long absence from her life. Weighed against the fundamental protected right of the biological parent, even the fact that the Siufanuas have been raising LMS for most of her remembered life is not enough to prove that placing LMS with Fuga will be an actual detriment to her further growth and development.

(See Page 6 of Court of Appeals Decision).

Also, the facts regarding why Tony was unable to see and spend time with his daughter are in dispute. The record establishes that Tony was unaware of where the mother, whom he believed was primarily caring for LMS resided. Although Tony's parents were in contact with LMS's mother, she eventually stopped communicating with them and the contact information they had for her had been changed. Also, Tony described an incident where the maternal grandfather assaulted him and threatened his life if he ever came around the mother or LMS again.

Further, the Court of Appeals decision carefully addressed the issue of whether Tony's past absence rendered him currently unable to meet his daughter's needs. The evidence in the record displays that Tony works full time, is married, and has two other children whom he cares for on a daily basis. The Court of Appeals concluded that the un rebutted evidence showed that Tony was able and willing to care for his daughter

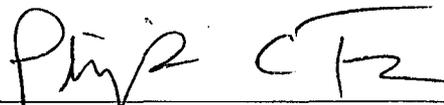
and that the trial court did not abuse its discretion in finding that Tony was not unfit to parent LMS. Because the Court of Appeals decision is consistent with RCW 13.34.030(1) and RCW 26.10.160(2)(a), the Petition for Review should be denied.

V. CONCLUSION

In conclusion, Respondent respectfully asks this Court to deny the grandparents' Petition for Review of the Court of Appeals' Decision.

Dated this 8th day of April, 2016.

TSAI LAW COMPANY, PLLC

A handwritten signature in black ink, appearing to read "Philip C. Tsai", written over a horizontal line.

Philip C. Tsai, WSBA #27632
Attorneys for Tony Samoa Fuga

PROOF OF SERVICE

Melissa Perez certifies as follows:

On April 8, 2016, I served upon the following a true and correct copy of this Answer to Petition for Review via Email, and Legal Messenger:

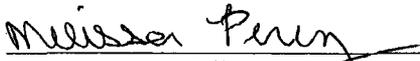
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 8 day of April, 2016 at Seattle, WA.



Melissa Perez

OFFICE RECEPTIONIST, CLERK

To: Philip C. Tsai; lcarlsen@mckinleyirvin.com; b.edwards@pivotallawgroup.com; Div-1 Front Desk
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Subject: RE: Case # 92897-5 - Faualuga and Billie Siufanua v. Tony Fuga and Lisa Lynnett Siufanua

Dear Supreme Court Clerk,

Attached to this email is the Answer to the Petition for Review submitted by the Petitioners in the above referenced case. Please confirm receipt. Thank you for your kind attention to this email.

Very truly yours,

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Subject: Case # 92897-5 - Faualuga and Billie Siufanua v. Tony Fuga and Lisa Lynnett Siufanua

Importance: High

Attached is a copy of the letter issued by the Clerk or Deputy Clerk on this date in the above referenced case. Please consider this as the original for your files, a copy will not be sent by regular mail. When filing documents by email with this Court, please use the main email address at supreme@courts.wa.gov

Supreme Court Clerk's Office

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