

NO. 37519-2-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE: STATE v. JOHN DOE, A Juvenile

APPELLANT JOHN DOE'S OPENING BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BRIEF OF APPELLANT

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A. Assignments of error

Assignment of Error 1

The trial court erred by finding that the language “having found to have committed” as found in RCW 9A.44.130 is analogous to the definition of “conviction” as found in RCW 9.94.030(12).

Assignment of Error 2

The trial court erred by finding that an admission to a charge with specific “vacating” language in Marion County Juvenile Court was the functional equivalent of a plea of guilty rather than a diversion agreement, stay of proceedings or deferred disposition.

Assignment of Error 3

The trial court erred by failing to apply Full Faith and Credit to the Marion County Juvenile Court Order deferring any registration requirement.

Issues Pertaining to Assignments of Error

Issue 1

Do out of state juvenile dispositions that came about without a formal plea petition, but based solely on an admission, count as sex offenses under RCW 9A.44.130 when all of the applicable definitions of “sex offense” under RCW 9A.44.130(10) require a “conviction”?

Issue 2

Are out of state juvenile dispositions based upon admissions the equivalent of a deferred prosecution in Washington such that they do not count as “convictions” of “sex offenses” under RCW 9A.44.130(10) where the court imposed a period of supervision that focused on treatment, provided a “Contract for Vacating Language” that would allow for the ultimate vacation of the admissions, provided for a deferral of any sex offender registration requirement that might otherwise be applicable to a full conviction and signed an order on registration that

deferred the registration requirement and set forth the court's intent that the deferral of the registration requirement would be honored by other jurisdictions under the full faith and credit clause?

Issue 3

Is Washington required to give full faith and credit to an out of state valid judgment in a juvenile court proceeding where the judgment defers any requirement that the juvenile register as a sex offender during the pendency of his proceedings in the Marion County, State of Oregon Circuit Court/Juvenile Department?

B. Statement of the Case

In October 2006, John Doe was a 15-year old juvenile ("Juvenile Doe") living in Clark County, Washington. CP 6 at 2. At that time, agents of the Marion County Sheriff's office contacted him regarding allegations that he had engaged in sexually inappropriate behavior with another minor child in Marion County during the summer of 2005. CP 6 at 2-3.

Juvenile Doe entered into a treatment program shortly thereafter, and is currently in compliance with that program. CP 5 at 2. In addition, a "Safety Plan" was initially created prior to the court proceedings in Marion County as part of Juvenile Doe's treatment. Subsequently, that Safety Plan was approved by the Marion County Juvenile Department, ordered by the Marion County Circuit Court to remain in place, and the plan is currently being monitored by the Clark County Juvenile Department. CP 6 at 3.

In March 2007, the Marion County Juvenile Department (Marion County Juvenile Court No. 07J0203) and the Wasco County Juvenile Department (Wasco County Juvenile Court No. J0701401) filed petitions alleging that Juvenile Doe engaged in conduct that, if committed as an adult, would have constituted the crimes of Sodomy in the First Degree and Sexual Abuse in the First Degree under the laws of the State of Oregon, and both petitions were consolidated under Marion County Juvenile Court No. 07J0203. CP 6 at 3.

On August 27, 2007, pursuant to negotiations with the Marion County Juvenile Department and the Marion County District Attorney's office, Juvenile Doe entered "admissions" to one count of Sodomy I and one count of Sexual Abuse I. There was no written petition filed with the admissions. CP 6 at 3. However, as part of the admissions, the government and Juvenile Doe stipulated to specific "vacating" language, which provided:

VACATION OF JURISDICTION/REDUCTION TO

MISDEMEANOR:

Jurisdiction on allegations 2A (Sexual Abuse I and Sodomy I) of the petition dated 3/9/07 may be vacated, after a hearing before the court, the admissions set aside and the allegation(s) dismissed if the youth successfully completes probation within ____

months and has no further adjudicated law violations (Sex Offenders Only).

In addition, as long as the vacating language is effective, Juvenile Doe was not to be required to register as a sex offender under ORS 181.592 *et seq.*:

The DNA sample and sex offender registration are deferred until a decision is made regarding vacating jurisdiction. If the youth successfully completes all conditions of probation, upon written factual findings, the court may vacate the order taking jurisdiction and have all admissions set aside and charges dismissed. The youth shall abide by the Contract for Vacating Language and meet all requirements therein.

CP 6 at 3-4

Pursuant to Juvenile Doe's admissions and agreements with the Marion County Deputy District Attorney and Juvenile Department authorities, the Marion County Juvenile Court entered several Orders: Judgment of Jurisdiction and Conditions of Probation, Contract for Vacating Language, Parental Supervision Plan, and Order on Registration. The Order on Registration states that if Juvenile Doe complies with all the imposed terms and conditions, the admissions will be vacated.

Both the "Judgment of Jurisdiction and Conditions of Probation" and the "Order on Registration" specifically defer any requirement that Juvenile Doe register as a sex offender under ORS

181.592 *et seq.* until the admissions are vacated, which would permanently abrogate any registration requirement. Should Juvenile Doe fail to comply with the terms and conditions imposed, the vacating language could be removed and he could be required to register pursuant to ORS 181.595. CP 6 at 4.

The court in Marion County specifically provided in the Order on Registration that:

It is the intent of this court that the deferral of this registration requirement be binding on any jurisdiction, and if the youth is supervised by another state that the state give full faith and credit to this order, that supervises this youth unless or until such time as this court removes the vacating language from the order and requires the youth to register.

Juvenile Doe is a resident of Clark County, Washington, and his supervision was transferred to Washington via the Interstate Compact Act. The Juvenile Department of Clark County would not honor the Marion County Juvenile Court's orders deferring the registration requirement without a judicial order from a Clark County Superior Court judge. CP 6 at 5.

Juvenile Doe filed this action in Clark County Superior Court seeking an order that prohibited the state from requiring Juvenile Doe to register as a sex offender. CP 6. Judge Bennett ruled against

Juvenile Doe, finding that the proceedings in Marion County were tantamount to a “conviction” and Washington State law required that Juvenile Doe register. CP 9. However, Judge Bennett stayed his ruling pending the filing of a Notice of Appeal, and this court granted a stay of the ruling during the pendency of the appeal. CP 9 and CP 3.

C. Summary of Argument

The proceedings in Marion County Juvenile Court did not result in a “sex offense” as defined by RCW 9A.44.130(10). To qualify as a “sex offense” as defined by 9A.44.130(10), an individual must have been “convicted” of certain enumerated conduct. The Marion County proceedings, contrary to the ruling of the trial court, did not result in the “functional equivalent” of a “conviction”. Therefore, the registration requirements imposed by that statutory scheme are inapplicable to Appellant and the trial court should be reversed.

D. Argument

Assignment of Error 1

The trial court erred by finding that the language “having found to have committed” as found in RCW 9A.44.130 is analogous to the definition of “conviction” as found in RCW 9.94.030(12).

The crux of the trial court’s ruling is as follows:

These documents, taken together demonstrate to me that the proceeding in Marion County was the functional

equivalent of a plea of guilty and disposition under Washington law. The admission by the juvenile; the imposition of conditions of probation for up to 5 years, the dismissal of some charges; the imposition (although suspended) of 4 days in detention; the language under "DNA TESTING", specifically: the youth offender is within the jurisdiction of the court for having committed an act . . . that if done by an adult would constitute a felony . . . ; the imposition of 80 hours of community service; and the imposition of fines and assessments all indicate that this is a fully adjudicated disposition, which would demonstrate that the juvenile was found to have committed the offenses. This is not a diversion agreement, nor stay of proceedings, **nor deferred disposition.**

CP 9 at 6 (emphasis supplied)

RCW 9A.44.130(1)(a) provides in pertinent part:

Any adult or juvenile residing ... in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence...

RCW 9A.44.130(10)(a) defines sex offense and provides in pertinent part:

"Sex offense" means:

- (i) Any offense defined as a sex offense by RCW 9.94A.030;

- (iv) Any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense under this subsection. (Emphasis supplied.)

Under the plain language of RCW 9A.44.130, any resident of the State of Washington who has been found to have committed, or has been convicted of, any sex offense as defined by RCW 9A.44.130(10)(a) is required to register. The only two possibly relevant definitions of sex offense to this case are found in RCW 9A.44.130(10)(a)(i) & (iv). Thus, by definition, a sex offense is either an offense defined by 9.94A.030 or any federal or out-of-state conviction.

An adjudication or deferred disposition is clearly not included in RCW 9A.44.130(1)(a)(iv), as the plain language of that section only applies to a “conviction”. Where a statute is plain and unambiguous, the courts derive the meaning of the statute and the legislature's intent from the statute’s specific language. *In re the Parentage of J.H.*, 112 Wash.App. 486, 498, 49 P.3d 154 (2002), review denied, 148 Wash.2d 1024, 66 P.3d 637 (2003).

Moreover, when statutory language is unambiguous, the courts may only look to the plain language to determine the legislative intent and cannot consider outside sources. *State v. Wilson*, 125 Wash 2d 212, 217, 883 P2d 320 (1994). Further, when interpreting a criminal statute, the courts are to give the statute a literal and strict interpretation. *Wilson*, 125 Wash 2d at 217, 883 P2d 320. The courts are precluded from adding clauses to an unambiguous statute when the legislature has chosen not to include that language because the courts presume that the legislature “means exactly what it says.” *Davis v. Dep't of Licensing*, 137 Wash.2d 957, 964, 977 P.2d 554 (1999).

The plain and straightforward language of RCW 9A.44.130(10)(a)(iv) limits its breadth to “convictions” and excludes any reference to adjudications and deferred dispositions and thus the court cannot add in other clauses. Therefore, the only possible definition available that one could allege encompasses the disposition in Marion County is found in RCW 9A.44.130(10)(a)(i).

At the trial court, the state argued that the proceedings in Marion County juvenile court were “convictions” under RCW

9A.44.130(1)(a)(i) because the dispositions in Marion County Juvenile court met the definition of sex offense as defined by RCW 9.94A.030.¹

The only possible provision of RCW 9.94A.030 that could conceivably apply is RCW 9.94A.030(42)(d) which, ironically, is almost verbatim to the language in 9A.44.130(1)(a)(iv): “Any federal or out of state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection”.²

Coincidentally, that section mirrors RCW 9A.44.130(1)(a)(iv). *See* RCW 9.94A.030(42)(d)³. The plain language of

¹ - (42) "Sex offense" means: (a)(i) A felony that is a violation of chapter 9A.44 RCW other than ***RCW 9A.44.130(11); (ii) A violation of RCW 9A.64.020; (iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080; or (iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection; (c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or (d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

² - This action does not challenge whether the elements of the offenses in the Marion County proceedings do or do not meet the elements of an offense in RCW 9A.44, nor does it seek a comparability analysis. The parties agreed that if the appellate court ultimately determined that the Marion County proceedings were “convictions” as found by the trial court, then subsequent proceedings would be required to see if the elements of the offenses in the Marion County proceedings met the elements of an offense in Washington that would require registration.

³ - Compare RCW 9A.44.130(1)(a)(iv): “Any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense under this subsection”.

and

RCW 9.94A.030(42)(d): “Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection”.

RCW 9.94A.030(42)(d) does not include federal or out-of-state juvenile adjudications for conduct that is classified as a sex offense under §42(a), only convictions. Thus, only residents of this state who have been “convicted” of a federal or out-of-state sex offense are subject to the registration requirements of RCW 9A.44.130.

At the trial court, and despite the plain language of RCW 9.94A.030(42)(d), the state relied upon RCW 9.94A.030(12)⁴ and *State v. Morley*, 134 Wash 2d 588, 952 P 2d 167 (1998) in asserting that the Marion County disposition was, in fact, the functional equivalent of a “conviction” under RCW 9.94A.030(42)(d). However, the trial court did not find that RCW 9.94A.030(12) applied. Instead, the trial court found that the definition found in RCW 9.94A.030(12) was “analogous” to the “having found to have been committed” phrase in 9A.44.130 and, therefore, would otherwise qualify as a conviction for purposes of the registration requirement. CP 9 at 5-6.

As to the state’s argument, the trial court is correct that RCW 9.94A.030(12) is not applicable. First, the nature of the definition, as found by the trial court, necessarily involves a “verdict of guilty, a

⁴ - RCW 9.94A.030(12) provides that: “Conviction’ means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty and acceptance of a plea of guilty.

finding of guilty and acceptance of a plea of guilty”, none of which are present in juvenile court dispositions. CP 7 at p 5 ll 19-22.

Second, the definitions found in RCW 9.94A.030 are for assessing convictions and determining criminal histories for the purpose of sentencing a person who has been convicted of a felony under the laws of the State of Washington. RCW 9.94A.010 (setting forth the purposes of the SRA). There is nothing within the SRA, or within 9A.44.130 that states that the definition of “conviction” as found in 9.94A.030(12) is applicable to the definition of conviction in 9A.44.130.

If RCW 9.94A.030(12) truly represents the overarching statutory definition of “conviction”, then the definition of “criminal history” that distinguishes between the terms conviction and adjudications would simply be surplusage. In addition, RCW 9A.44.130(10)(a)(iv) would be surplusage because every single disposition of any comparable offense would fall under the state’s broad reading. The usual rule of statutory construction is that “[c]ourts should not construe statutes to render any language superfluous.” *State v. Riles*, 135 Wash.2d 326, 340, 957 P.2d 655 (1998). Since adopting the state’s position would result in making the need to distinguish between conviction and adjudication in 9.94A.030(14) superfluous, and have the real effect of repealing *sub*

silento 9A.44.130(10)(a)(iv), the definition of conviction in 9.94A.030(12) should not be read to apply to the Marion County disposition.

Even if the multiple statutory schemes are viewed in the light most favorable to the state, what constitutes a “conviction” under 9A.44.130 is, at best, ambiguous. If the Court finds that the statutory scheme is ambiguous, then requiring Appellant to register would violate the Appellant’s due process rights because the statutory scheme fails specifically to give a person of common understanding sufficient notice.

In *State v. Liden*, 118 Wash App 734, 737, 77 P.3d 668 (2003), the court found that the registration statute in effect at that time was unconstitutional based upon the legal premise that:

Due process requires that a penal statute be sufficiently specific so that persons of common understanding will be on notice of the activity the statute prohibits. *State v. Jenkins*, 100 Wash.App. 85, 89, 995 P.2d 1268, *review denied*, 141 Wash.2d 1011, 10 P.3d 1072 (2000). "The requirement of sufficient definiteness 'protects individuals from being held criminally accountable for conduct which a person of ordinary intelligence could not reasonably understand to be prohibited.' " *Jenkins*, 100 Wash.App. at 90, 995 P.2d 1268 (quoting *State v. Coria*, 120 Wash.2d 156, 163, 839 P.2d 890 (1992)).

In *Liden*, the court examined the underlying sex offender registration statutory scheme and held that the term “active supervision”

did not provide sufficient notice and, therefore, the statute was unconstitutional. *Id.* Under *Liden*, even if this court finds the statute to be ambiguous, the court must still apply the rule of lenity. *Id.* Specifically, in finding that the language of the statute might be ambiguous, the *Liden* court stated:

The rule of lenity, favoring the accused, "assures adequate notice, and thus due process, concerning what conduct will be considered illegal." *In the Matter of the Personal Restraint of Tortorelli*, 149 Wash.2d 82, 98, 66 P.3d 606 (citing *Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985)), *cert. denied*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434, 2003 WL 21692178 (2003).

In this case, for the state's position to be tenable, the court would have to find that it is adequate notice because a person could read 9A.44.130 and be referred to the definition of sex offense under RCW 9.94A.030(42) and then, without reference, find RCW 9.94A.030(12), and then read 9.94A.030(42) *in para material* with both RCW 9.94A.030(12) and RCW 9.94A.030(14). The trial court also necessarily rejected this view by not applying *Morley* and by viewing the definition in 9.94A.030(12) as analogous to the language in RCW 9A.44.130.

Therefore, should the court find that the statutory scheme is not the modicum of clarity, the court must still find for the Appellant

under the rule of lenity. *Id.*

Assignment of Error 2

The trial court erred by finding that an admission to a charge with specific “vacating” language in marion county juvenile court was the functional equivalent of a plea of guilty rather than a diversion agreement, stay of proceedings or deferred disposition.

The Marion County disposition is really the functional equivalent of a deferred disposition rather than a “conviction”. For example a deferred prosecution is a statutorily-created “sentencing alternative of *pre-conviction* probation, to be added to the traditional choices of imprisonment, fine, and postconviction probation.” *State ex rel. Schillberg v. Cascade Dist. Court*, 94 Wn.2d 772, 779, 621 P.2d 115 (1980). In a deferred prosecution program, the defendant's referral for treatment results in the postponement of trial and the eventual removal of records relating to the charges. *State v. Glasser*, 37 Wn.App. 131, 132, 678 P.2d 827 (1984). In *City of Kent v. Jenkins*, 99 Wash App 287, 290, 992 P.2d 1045 (2000), the court addressed the nature of a deferred prosecution and held, that a deferred prosecution “is not equivalent to a guilty plea or a conviction”. *Id.*

The record in this case clearly shows: 1) an admission, but no plea petition, 2) the imposition of some conditions including treatment, 3) a specific deferral of any registration requirement and 4) specific and

unequivocal vacating language that states the matter can be vacated and proceedings dismissed.

Therefore, this matter, as in the *City of Kent, supra*, is the functional equivalent of a deferred disposition and, as such, would not qualify as a conviction. As it is not a conviction, or even the functional equivalent thereof, the requirements of 9A.44.130 do not apply.

Assignment of Error 3

The trial court erred by failing to apply Full Faith and Credit to the Marion County Juvenile Court Order deferring any registration requirement.

It would be a miscarriage of justice to impose a registration requirement upon a juvenile in the State of Washington where the disposition in the Oregon Court specifically and expressly defers any sex offender registration requirement as long as the Petitioner is in full compliance with the terms and conditions of his supervision.⁵

Under the principles of Full Faith and Credit, this court should honor the specific rulings and Orders of the Marion County Juvenile Court. Article IV, § 1 of the United States Constitution provides:

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and

⁵ - Petitioner is currently in full compliance.

proceedings shall be proved, and the effect thereof.

The principles of Full Faith and Credit are deeply rooted in American jurisprudence, and “[J]udgments, including criminal convictions of sister states, are generally accorded full faith and credit and their validity may not be collaterally attacked.” *State v. Lindsey*, 150 Wash 121, 272 P 72 (1928); *State v. Gimarelli*, 105 Wash App 370, 20 P3d 430 (2001)(validity of prior conviction from another state irrelevant to using that prior conviction in criminal history in Washington because, even though conviction invalid in Washington, Washington must give full faith and credit to judgments from other states).

Under *Lindsey* and *Gimarelli*, judgments of other states must be given full faith and credit. The nature of the disposition itself, as well as the recognition of the judgment deferring any registration requirement, should be entitled to full faith and credit.

In this case, the Marion County Court not only made the order regarding registration deferred under Oregon law, but specifically issued a directive to other jurisdictions to adhere to the Court’s order under the full faith and credit clause:

It is the intent of this court that the deferral of this registration requirement be binding on any jurisdiction, and if the youth is supervised by another state that the state

give full faith and credit to this order, that supervises this youth unless or until such time as this court removes the vacating language from the order and requires the youth to register.

At the trial court, the state relied on *State v. Berry*, 121 Wash 2d 121, 5 P 3d 658 (2000). However, *Berry* supports Juvenile Doe's assertion that the full faith and credit clause applies to the Oregon state court deferral of any registration requirement. *Berry* involved an appeal of the imposition of a Washington State sentence pursuant to the Persistent Offender Accountability Act that used prior California adult convictions in order to meet the requirements of POAA. *Id* at 123-125. The crux of *Berry's* argument was that the Washington Court must honor the California "stay".

However, the *Berry* court emphasized the fact that the purpose of the full faith and credit clause "provides a means for ending litigation by putting to rest matters previously decided between adverse parties in any state or territory of the United States." *In re Estate of Tolson*, 89 Wash.App. 21, 29, 947 P.2d 1242 (1997). *Id.* at 127.

After making that declaration, the *Berry* court applied the full faith and credit clause with "full force" and honored the California judgments because the only claim was that the California court had misapplied its own laws. *Id* at 128-129. The court did reject treating the

convictions as being non-existent, but based that upon the fact that it appeared from the record that the convictions were valid. *Id.* In addition, the court gave great deference to the fact that there is no requirement that the court engage in a “post-conviction” comparability study. *Id.* at 132.

Thus, in this case, we have a fully valid judgment involving acts that occurred outside the State of Washington. The Oregon court made orders in a judgment regarding the disposition including vacating language, a specific deferral of the registration requirement and a specific order requesting the court’s deferral of the sex offender registration requirement be given full faith and credit.

This Court should honor the juvenile disposition Order that defers any registration requirement, find that the Washington statutory scheme does not supersede the Marion County Order and/or give full faith and credit to the Oregon Court judgment that any registration requirement is deferred.

E. Conclusion

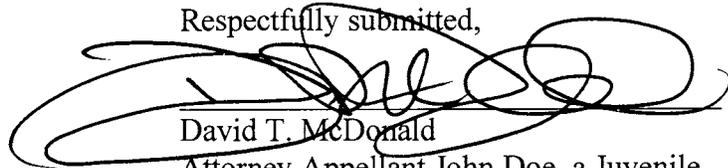
The dispositions in the Marion County, State of Oregon, Circuit Court: Juvenile Department do not qualify as “sex offenses” as defined by RCW 9A.44.130(10) and, therefore, the dispositions do not bring the Appellant under the registration requirements of that statutory scheme. In addition, when viewed objectively, the dispositions are not the

“functional equivalent” of convictions but are more akin to a “deferred prosecution” which is a “pre-conviction” disposition. Therefore, the juvenile has not been “convicted” for the purposes of RCW 9A.44.130 and the registration requirement is not applicable to him.

Even if the court finds that the judgment does meet the statutory definitions, the court should grant full faith and credit to the entire Oregon judgment, including the deferral of the registration requirement.

DATED this 17th day of September 2008.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and flourishes, positioned above the printed name.

David T. McDonald

Attorney Appellant John Doe, a Juvenile
WSBA #18446

DECLARATION

I declare that on the 17th day of September 2008, I filed the original and one copy of APPELLANT JOHN DOE'S OPENING BRIEF with the Court of Appeals, Division II in the manner indicated below:

Court of Appeals, Division II
950 Broadway
Suite 300, MS TB-06
Tacoma, WA 98402-4454

U.S. Mail
 Hand Delivery

CERTIFICATE OF SERVICE

I certify that on the 17th day of September 2008, I caused a true and correct copy of APPELLANT JOHN DOE'S OPENING BRIEF to be served on the following in the manner indicated below:

Gene A. Pearce
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Vancouver, WA 98666-5000

U.S. Mail
 Hand Delivery

John Doe, a Juvenile
To his Home Address
In Vancouver, Washington

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By: 

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