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THE SUPREME COURT OF WASHINGTON

DAVID KOENIG,

Respondent,

v.

THURSTON COUNTY and the THURSTON COUNTY
PROSECUTING ATTORNEY,

Petitioners

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SUPREME COURT
STATE OF WASHINGTON
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BRIEF OF AMICI ALLIED DAILY NEWSPAPERS OF
WASHINGTON, THE WASHINGTON NEWSPAPER
PUBLISHERS ASSOCIATION, THE SEATTLE TIMES, AND
THE WALLA WALLA UNION-BULLETIN

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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICI

Amici Curiae are daily newspapers or are organizations representing newspapers throughout the State. Full descriptions of the identities of Amici are contained in the Motion to File Amicus, filed herewith.

This case deals with the public's access under the Public Records Act ("PRA") to Special Sexual Offender Sentencing Alternative ("SSOSA") evaluations and Victim Impact Statements ("VIS") used by a trial court in sentencing decisions and prosecutors in sentencing recommendations. This Court's decision will directly impact Amici, who are frequent users of the PRA to inform their readers and monitor their government. Amici have a legitimate interest in assuring the Court is adequately informed about the issues and impact its decision will have on all record requestors, not only the parties.

II. STATEMENT OF THE CASE

Amici adopt the Statement of the Case sections provided by Koenig in his Brief of Appellant and Supplemental Brief.

III. ARGUMENT AND AUTHORITY

This case deals with a Victim Impact Statement ("VIS") and Special Sex Offender Sentencing Alternative ("SSOSA") evaluation, received by the prosecutor—after a sex offender has been arrested, charged, and convicted—for consideration by the Court in sentencing decisions and the

prosecutor in fashioning and supporting his or her sentencing arguments. The County alleges these records are exempt pursuant to RCW 42.56.240(1) as “specific intelligence information and specific investigative records compiled by investigative, [and] law enforcement ... agencies...” the nondisclosure of which are “essential to effective law enforcement” and to protect the victim and convicted sex offender’s rights to privacy. For the privacy argument, the County argues the entirety of the records and all of their contents are highly offensive to a reasonable person and of no legitimate concern to the public. For the reasons discussed below, the County is incorrect and the records must be ordered released.

A. The Records are Not Investigative Records Compiled by Law Enforcement

Throughout this case, the County has argued that the records need not be disclosed and that the public has no legitimate interest in them, highlighting the fact that neither record was created by the government and was voluntarily and independently provided to the government by outsiders with no requirement that they do so. See County’s Response to WCOG Amicus WCOG Brief filed 1/20/09 at 3-4:

The fact that the PAO has reviewed the documents does not convert the *content* of the documents into information relating to the conduct of government. The disclosure of the two documents that were not prepared by a public officer and that do not contain

information about a public agency would not assist the public with government transparency. . . .

The documents are not prepared by the police or the PAO. Instead, the VIS is voluntarily prepared by the victim of crime and the PE [SSOSA evaluation] is voluntarily provided by the defendant. Neither the victim nor the defendant are forced to prepare the information.

see also County's Response Brief in Div. I filed 7/1/08 at 35

(characterizing the SSOSA and VIS as "Two private documents that were created by third parties and voluntarily provided to the PAO."); and County's Reply to Koenig's Answer to Petition for Review filed 9/21/09 at 5 ("Unlike a police report, a VIS is voluntarily provided by an individual who is not part of a law enforcement agency.").

By their very nature, the records at issue here were never in the possession of the police or used to investigate the offense, arrest the individual, make a charging decision, or prosecute and convict the defendant. Instead, the records are solely for use by the trial court for a sentencing determination after the individual has been convicted, and the prosecutor's use is solely to support sentencing arguments to be made by the prosecutor which need not be followed by the trial court.

The County relies for its exemption arguments on the lower appellate court case of Cowles Pub'g Co. v. Pierce County Prosecutor's Office, 111 Wn. App. 502, 45 P.3d 620 (2002), which dealt with a mitigation packet prepared by a defendant and given to the prosecutor for use by the

prosecutor in deciding whether or not to seek the death penalty. The **Pierce County** decision is not binding on this Court and this Court need not follow it. That decision was wrongly decided and improperly extended the reach of exemption 240(1) to records to which it did not and cannot apply. But, the case at bar is removed from even the reach of that opinion as this case deals with sentencing arguments and recommendations, not charging decisions like the **Pierce County** case.

Previous cases evaluating the exemption now found at Section 240(1) have held that the investigation must be “one designed to ferret out criminal activity or to shed light on some other allegation of malfeasance” for the exemption to apply. **Columbian Pub’g Co. v. City of Vancouver**, 36 Wn. App. 25, 31, 671 P.2d 280 (1983). This Court held that records maintained by a prosecutor concerning an individual who routinely served as an expert witness in DWI cases did not constitute investigative records because maintenance of the records did not relate to ferreting out criminal activity or shedding light on an allegation of malfeasance. **Dawson v. Daly**, 120 Wn.2d 782, 792-93, 845 P.2d 995 (1993); **see also Prison Legal News v. Department of Corrections** (“**PLN**”), 154 Wn.2d 628, 640, 15 P.3d 316 (2005) (records relating to discipline of prison staff for misconduct is not an investigative record under this exemption; dealt with punishment decisions for on-the-job misconduct not an investigation to

ferret out and prosecute crime); and Cowles Pub’g Co. v. City of Spokane, 69 Wn. App, 678, 683, 849 P.2d 1271, review denied, 122 Wn.2d 1013 (1993) (use-of-force reports required by rule to be compiled by police concerning each contact by K-9 dogs with individuals are not investigative records; administrative records are not investigations of whether crime was committed). “Investigative records” covered under this exemption have been limited to records used to identify a suspect and arrest him or her and refer the matter to a prosecutor for a charging decision—not a blanket exemption for all records used to prosecute or charge or sentence a suspect once arrested. Compare Newman v. King County, 133 Wn.2d 565, 947 P.2d 712 (1997) (holding exempt police department files of ongoing murder investigation where suspect had not yet been identified); with Cowles Pub’g Co. v. Spokane Police Dept., 139 Wn.2d 472, 479, 987 P.2d 620 (1999) (holding that police investigative records are presumptively disclosable if a defendant has been arrested and the case has been referred to a prosecutor for a charging decision, rejecting argument that “law enforcement” and “investigation” extend through prosecution trial, sentencing and appeals).

Here, the suspect was already identified and the matter was referred to a prosecutor for a charging decision long before the records were created or received. The prosecutor had already made his or her charging decision,

and the records at issue were used solely to fashion arguments in support of sentencing recommendations by a prosecutor. The sentencing decision was to be made by the trial judge, not the prosecutor. Any “investigation” by the prosecutor stemming from the VIS or SSOSA evaluation—if any was performed—was not part of ferreting out criminal activity or shedding light on an allegation of malfeasance. The crime had already been proven, and the conviction secured. The “investigation” as to the defendant and his crime are necessarily over once the VIS and SSOSA evaluation records are created by others and received by a prosecutor. The VIS and SSOSA are simply not investigative records compiled by a law enforcement agency as covered by RCW 42.56.240(1) and thus not exempt under provision. While, based on the Pierce County decision, the parties argued under the assumption that the SSOSA evaluation was an investigative record, this Court must now rule as to the interpretation of the PRA to inform all courts and agencies as to the proper reach of exemptions.¹ This Court should not sidestep this issue merely because the parties felt compelled to follow an earlier erroneous lower appellate court decision.²

¹ See Brief of Appellant at 29 (“Koenig assumes, *arguendo*, that a SSOSA evaluation, unlike a VIS, is an “investigative record” for purposes of RCW 42.56.240(1).”)

² See Kustura v. Department of Labor and Industries, 142 Wn. App. 655, 677, fn. 35, 175 P.3d 1117 (2008) (court addressing issue raised by amicus “because it is necessary to reach a proper decision” even though court need not address issues raised solely by amicus.); see also City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000) (addressing constitutional issue raised solely by amicus).

B. The County Has Not Proven Nondisclosure of the Records is Essential to Effective Law Enforcement

As illustrated above, a prosecutor's selection of sentencing arguments and recommendations which need not be followed by a trial court are not the type of "law enforcement" this Court has previously held fall within the definition of "essential to effective law enforcement." Identifying suspects, arresting them, and referring them for a charging decision fell within such definition and agencies in the past have shown that when suspects are not yet identified, or are at large, certain facts within investigative records must be kept secret for a suspect to be apprehended and charged. No appellate case to date has ever accepted the broad concept of "law enforcement" the County urges here—that any record considered by a prosecutor in making any argument related to sentencing is "law enforcement" under RCW 42.56.240(1) or that pleadings and publicly-filed court documents the prosecutor receives as a party to the criminal case are "law enforcement" under this exemption. While the County acknowledges it cannot compel the VIS or SSOSA evaluation to be created and that it only receives them if the victim or defendant voluntarily creates them, the County nonetheless argues it is essential to effective law enforcement that such records always be exempt in their entirety because otherwise such records may not be created. The County

claims it cannot effectively enforce the law without the creation of a VIS and SSOSA. The County has not and cannot meet its burden of showing nondisclosure of these records are essential to effective law enforcement.

Amici will focus their arguments on the SSOSA evaluation as the VIS is addressed by Amicus WCOG. *Amici* agree with WCOG that nondisclosure of the VIS is not essential to effective law enforcement and that the County has not met its burden of proving it is. *Amici* also agree with and adopt WCOG's arguments regarding the impropriety of requiring requestors to rebut declarations such as those offered by the County in the context of a PRA case.

A SSOSA evaluation is prepared at the request of a defendant or the trial court. A defendant has the option of seeking a SSOSA evaluation and pursuing a SSOSA sentence which drastically reduces, if not eliminates, his or her term of incarceration in exchange for treatment. **Koenig v. Thurston County**, 155 Wn. App. 398, 415, 229 P.3d 910 (2010) (noting that defendants can receive a minimum sentence and have it suspended if the sentence is less than 11 years and serve no more than 12 months in jail). The County has not, and cannot prove, that eligible convicted sex offenders will refuse to participate in a SSOSA evaluation and risk serving a full sentence solely because the evaluation might be disclosed. The offender here, who received a SSOSA sentence, has not even made this

claim. SSOSA evaluations are and have been available to the public, they are read by judges, cited in court opinions, and convicted sex offenders still participate in such evaluations nonetheless. But more importantly, whether or not an offender participates in a SSOSA evaluation or not has no bearing on whether or not “effective law enforcement” can be performed if such reports are disclosed. Convicted sex offenders who chose not to participate in a SSOSA evaluation will be tried, and if convicted, sentenced to their normal term. The County’s preference for a sentencing alternative option removed from public scrutiny does not make the preference essential, nor does secrecy guarantee the law enforcement will be “effective.” Our history has proven exactly the opposite—that secrecy makes government action less effective and less reliable and eliminates the public trust and confidence necessary for effective democratic governance.³

As an aside, even the statistical argument made by the County for why law enforcement will be improved with secret SSOSA evaluations is not persuasive. The County alleges that SSOSA sentencing has allegedly produced a lower recidivism rate than normal full-length sex offender

³ See Prison Legal News, Inc. v. Department of Corrections, 154 Wn.2d 628, 649, 115 P.3d 316 (2005) (quoting New York Times Co. v. United States, 403 U.S. 713, 724, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (Douglas, J., concurring) “Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health.”)

incarceration. The data cited proves, however, that SSOSA sentences do not completely eliminate recidivism for SSOSA-sentenced offenders. Its data also ignores the reality that the SSOSA program's parameters necessarily screen out certain offenders more likely to re-offend from eligibility, making comparison of the SSOSA and non SSOSA sentenced offenders inexact. Further, because the data is based on recidivism within five years of release, SSOSA-sentenced offenders who re-offend, who may have served sentences under one year, actually offended far quicker after their conviction than those who served full sentences and then re-offended, raising questions about whether treatment reduces recidivism.

By virtue of this argument, however, the County tries to stretch the concept of "law enforcement" beyond the detection and prosecution of crime, but into treatment and prevention of recidivism—a noble goal but beyond the strict parameters of exemption 240(1). A county prosecutor's goal to rehabilitate sex offenders and a belief that a certain type of sentence might reduce the odds of recidivism does not make it "essential to effective law enforcement" that all aspects of that alternative sentencing program be removed from public scrutiny. Further, to be "essential" to "effective law enforcement," law enforcement must be unable to function effectively without the secrecy. Many other actions could cure a problem of increased recidivism among sex offenders, including but not limited to,

longer terms of incarceration, stricter monitoring, and stricter conditions upon release. The County, however, claims complete discretion and secrecy in its sentencing alternative arguments and the court's decision to allow shorter incarceration terms is the only option to keep law enforcement effective. Division Two realized the weakness of this argument and disagreed. That holding should be affirmed.

C. The County Has Not Proven the Records are of No Legitimate Concern to the Public.

The County argues the public has no legitimate concern in the contents of a SSOSA evaluation used by a Court to decide whether to divert a convicted sex offender to treatment and a lesser period of incarceration. The County argues the public similarly has no legitimate interest in a VIS which is akin to a statement in open court and is relied up by a judge in making a sentencing decision.⁴

The SSOSA evaluation is reviewed by a trial court to decide whether or not to offer a convicted sex offender an alternate sentence that drastically reduces, if not eliminates, the offender's time in prison and sets conditions on his or her release and treatment. The prosecutor reviews the SSOSA evaluation and can use it to argue for or against such alternate sentencing. Issues concerning sex offenders, their prosecution,

⁴ Again, *Amici* will focus their arguments on the SSOSA evaluation as the VIS has been addressed by Amicus WCOG. *Amici* agree with WCOG that nondisclosure of the VIS in its entirety is not essential to protect the victim's privacy.

confinement, supervision, and treatment are matters of legitimate public concern. The Washington State Legislature, and states across the country, passed laws to require convicted sex offenders to register with police and police to notify the public about their release and whereabouts. Civil commitment laws were passed to allow states to civilly commit violent sex offenders after their sentences were served to protect the public.

Mandatory reporting laws were passed to require those in positions of authority to report sexual abuse to authorities. It should stand without argument that the public has an interest in whether or not its courts divert a convicted sex offender to an alternate sentence program that could allow the offender to be released back into the community with little or no jail time. It should stand without argument that the public has an interest in whether its prosecutor supports or opposes such an alternate sentence. And it should stand without argument that the public has a legitimate interest in the very records the court and prosecutor relied upon in making the decisions described above. But the County here is arguing the public has no interest in such records, and that any interest asserted is not “legitimate” because the public will allegedly be harmed more than it is served by release of the records at issue. The precise harm to the public is vague and wholly speculative (i.e. defendants might not pursue a SSOSA sentence, victims might not make a VIS, prosecutors might have to try

cases they would otherwise be able to plead out if a SSOSA option is not available). But at its base the County alleges the public should just trust blindly that its courts and prosecutors will do what it in the public's best interest and never falter, never err, never be swayed by improper motives to treat a particular individual one way and reject such alternatives for another. In short, the County asks the public to give up the rights the PRA mandates it have: "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.56.030.

The public has a legitimate interest in the exact contents of records the judges and prosecutors they have elected to represent them rely upon in deciding to sentence a convicted sex offender to an alternate sentence. The public has a legitimate interest in monitoring its government and its courts and this includes viewing the records they review in making decisions related to sentencing and public safety. The level of detail provided by an offender form the basis for the court's determination whether an offender is amenable to treatment and his or her relative danger to the community. The interest cannot be fulfilled by sanitizing the details for release.

Similarly, as explained in the WCOG Amicus Brief, the VIS filed with the trial court and provided to the prosecutor provides information relied upon by the court in issuing a sentencing decision and relied upon by the prosecutor in making sentencing recommendations and arguments. The public's interest in this statement is similarly legitimate as it forms the basis for these governmental decisions.

The County has not proven the public is harmed more than it is served by release of the SSOSA evaluation or VIS. The County speculates victims may not make VIS and that some offenders may not opt for a SSOSA evaluation. The County has not shown how this truly harms the public's interest, however, only that it harms the prosecutor's desire to operate in complete obscurity in his or her sentencing recommendations and shields the judge from scrutiny and public understanding of his or her sentencing decisions. Such secrecy has been found to harm the public's interests, not serve it. See fn. 3, *supra*.

The County has not shown the public has no legitimate interest in the VIA and SSOSA evaluation and thus they cannot be exempt based on the privacy prong of RCW 42.56.240(1).

D. SSOSA Evaluations are Not Exempt Health Care Records

The County belatedly argues that the SSOSA evaluation is a private health care record the State is precluded from releasing without the

defendant's consent. The County assumes anything a health care provider does must qualify as health care and the records of such provider exempt as health care records under RCW 70.02. The County is wrong. Its health care argument is meritless and should be rejected.

"Health care" means any care, service, or procedure provided by a health care provider (a) to diagnose, treat, or maintain a patient's physical or mental condition; or (b) that affects the structure or any function of the human body. RCW 70.02.010(5).

"Health care information" means any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care. RCW 70.02.010(7).

In Hines v. Todd Pacific Shipyards Corp., 127 Wn. App. 356, 112 P.3d 522 (2005), the plaintiff argued that his former employer had violated Chapter 70.02 by disclosing results of the plaintiff's drug test to a subcontractor. The trial court granted summary judgment for the former employer and the Court of Appeals affirmed, holding:

Todd is not a "health care provider," the results of a drug screening test that Todd requires the employees to obtain after an on-the-job injury is not "health care information" and the drug screening test was not administered to Hines as a "patient." Todd's drug screening test was a condition of Hine's employment.

127 Wn. App. at 366-67. Like the drug test in Hines, the purpose of a SSOSA evaluation is **not** diagnosis or treatment of the defendant. The purpose of a SSOSA evaluation is to enable a sentencing court "to determine whether the offender is amenable to treatment." RCW

9.94A.670(3); see State v. Banks, 114 Wn. App. 280, 287, 57 P.3d 284 (2002). Further, the SSOSA evaluation is not administered to the defendant as a “patient.” The defendant is not a patient of the sentencing court or the SSOSA evaluator. A SSOSA evaluation may be ordered and provided to the sentencing court without the defendant’s consent. RCW 9.94A.670(3); Banks, 114 Wn. App. at 287. A sentencing court may order a second SSOSA examination without the defendant’s consent. RCW 9.94A.670(3)(c). Because these procedures are not controlled by the defendant and not for the benefit of the defendant, the defendant is clearly not a “patient” for purposes of a SSOSA evaluation.

A SSOSA evaluator plays a different role than the SSOSA treatment provider. The SSOSA evaluation precedes SSOSA sentencing and the resulting treatment. The SSOSA evaluator has a duty to report the defendant’s relative risk to the community. RCW 9.94A.670(3)(b). The defendant is aware he or she is being evaluated by a SSOSA evaluator with the plan that the evaluation will be shared with the trial court and prosecutor. RCW 9.94A.670 prevents the SSOSA evaluator, or anyone from the evaluator’s practice, from becoming the offender’s SSOSA treatment provider “unless the court has entered written findings that such treatment is in the best interests of the victim and that successful treatment of the offender would otherwise be impractical.” RCW 9.94A.670. Thus,

the defendant is aware he or she is not in a confidential treatment-focused relationship with the evaluator; he or she knows he or she is not a “patient” of the evaluator and that the report will be disclosed to those seeking to incarcerate and punish him or her. WAC 246-930-320, which establishes detailed standards for SSOSA evaluations used by courts, contains no provisions for privacy or confidentiality. In contrast, WAC 246-930-330, which establishes detailed standards for subsequent SSOSA treatment, requires that providers “maintain and safeguard client files consistent with the professional standards and with Washington state law regarding health care records...” SSOSA evaluations and SSOSA treatment records are different events performed by different individuals with different statutory obligations and roles. Like the drug test in Hines, though the record may be “medical” in nature and prepared by a health care professional, the SSOSA evaluation is not a health care record and its content is not health care information and the defendant was not a “patient” of the SSOSA evaluator. It is no more a private health care record than competency evaluations performed of criminal defendants to determine their fitness to stand trial or sex offender evaluations for civil commitment purposes for RCW 71.09 proceedings.

Further, even if a SSOSA evaluation could be considered health care information, the sentencing court and prosecuting attorney are not health

care providers. RCW 70.02.020 only restricts disclosures by a health care provider or an assistant, agent or employee of a health care provider. Similarly, the exceptions in RCW 70.02.050 only applies to a health care provider. Because the County is not a health care provider, Chapter 70.02 does not apply here. See Fisher v. Department of Health, 125 Wn. App. 869, 876-77, 106 P.3d 836 (2005) (cause of action created by RCW 70.02.170 only applies to health care providers); Hines, 127 Wn. App. at 369 (same). The County argues that Chapter 70.02 claims exist even when other persons obtain such information. The same argument was rejected in Murphy v. State, 116 Wn. App. 297, 62 P.3d 533 (2003).

In Murphy, a former sheriff brought an action against the State Pharmacy Board for disclosing his prescription records to the prosecuting attorney, which resulted in criminal charges. The Court of Appeals held that RCW 70.02.020 did not apply to the Board because it was not a health care provider. 115 Wn. App. at 314. The court also rejected the plaintiff's argument that the legislative findings in RCW 70.02.005 imposed a duty on the Board. Id. The Court should reject the same argument raised by the County here related to release by the court and prosecutor. The County here erroneously relies on PLN, 154 Wn.2d 628, 115 P.3d 316 (2005), for its argument that RCW 70.02 is an exemption here. PLN dealt with a request to a prison health care facility for records including patient health

care records thus the agency in that case was a health care provider and the records were health care records. Here the court and prosecutor are not health care providers and the records are not health care records. The provisions cited in RCW 70.02 do not apply to the SSOSA evaluation. This case is not about whether SSOSA treatment records would be exempt, but whether the initial SSOSA evaluation is exempt.

E. Any Exempt Material Must be Redacted and Records Released.

The County argues that the VIS and SSOSA evaluation must be withheld in their entirety because the alleged invasion of privacy and blow to effective law enforcement cannot be prevented if any aspect of the record is released. The County has not proven all aspects of these records meet the exemptions and has certainly not shown how every word of the documents satisfies an exemption. This Court has previously rejected the “connect the dots” and “read beneath the black ink” arguments the County raises here and must do so again. In **Bainbridge Island Police Guild v. City of Bainbridge Island**, this Court required disclosure of documents regarding sexual assault allegations against a police officer, allowing redaction of only the officer’s name. ___ Wn.2d ___, 2011 WL 3612247, *6-7 (2011). The requestor had asked for the records using the name of the accused and the officer had argued for exemption of the entire document

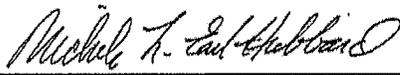
on privacy grounds. Id.. This Court, however, found that the record had to be released redacting only the name of the accused. Id. Similarly, in Koenig v. City of Des Moines, 158 Wn.2d 173, 181, 142 P.3d 162 (2006), this Court ordered released to a requestor a record of a child sexual assault investigation where the requestor had asked for the records using the victim's name. Again, this Court ordered just the victim's name and certain other statutorily-exempt details redacted but the remainder of the record released. Here the County has not proven all aspects of any record are exempt and argues instead the identity will be guessed by virtue of information obtained elsewhere. This Court has already rejected this argument and should do so here, and records must be produced with redactions, not entirely withheld, if they contain exempt information.

IV. CONCLUSION

Based on the foregoing, the Court should find the records are not exempt from disclosure and must be released.

Respectfully submitted this 6th day of September, 2011.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 6, 2011, I delivered a copy of the foregoing Amicus Brief via email pursuant to agreement, with back up copies sent via U.S. Mail, to:

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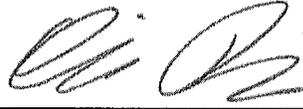
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Dated this 6th day of September 2011 at Seattle, Washington.

A handwritten signature in black ink, appearing to read "Chris Roslaniec", written in a cursive style.

Chris Roslaniec