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STATE OF WASHINGTON  
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No. 97183-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

ROBERT GROTT,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

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**BRIEF OF *AMICUS CURIAE* WASHINGTON ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS**

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## A. INTRODUCTION

A first aggressor instruction entirely removes self-defense. If a jury finds the elements of the first aggressor instruction satisfied, it cannot find the defendant acted in self-defense. Thus, this Court emphasized the instruction should be provided sparingly, and the circumstances constituting an act of first aggression must be narrow.

In *Amicus*' experience, the prosecution has been broadly seeking first aggressor instructions—requesting them in an increasing number of self-defense cases. Trial courts need additional guidance from this Court to clarify an instruction is warranted only if the defendant's alleged act of first aggression precedes the charged conduct and would entitle the named victim to respond in lawful self-defense. In the case of conflicting evidence, the conflict must be based on a factual issue in the evidence relating to the preceding aggressive act.

This case aptly demonstrates the problem. Under the State's theory and the trial court's instructions, Robert Grott and other Washingtonians would be denied the ability to lawfully protect themselves from someone who tried to kill them, threatened to kill them when they next met, and carried a loaded gun at that next meeting. This Court should affirm the Court of Appeals.

B. IDENTITY AND INTEREST OF *AMICUS*

Washington Association of Criminal Defense Lawyers refers to the statements of interest and identity in its motion for leave to file this brief.

C. ISSUES ADDRESSED BY *AMICUS*

1. Whether this Court's precedent correctly indicates a first aggressor instruction must be based upon a preceding, separate act by the defendant that entitles another to respond in self-defense?

2. Whether any conflict in evidence supporting a first aggressor instruction must relate to a factual dispute regarding this preceding, separate act?

3. Whether defense counsel acts deficiently by failing to object to an instruction that removes their client's defense and is contrary to precedent?

4. Whether a first aggressor instruction has a practical and identifiable effect on the trial if it deprives the defendant of his defense?

D. STATEMENT OF THE CASE

Robert Grott served as a Marine in Afghanistan and was honorably discharged in 2012.<sup>1</sup> His service significantly changed him, causing him to be hypervigilant and socially unengaged. RP 1929. Grott was slowly

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<sup>1</sup> *Amicus* draws the facts from the Court of Appeals opinion, unless otherwise noted.

readjusting to civilian life when his cousin was murdered in a gang-related drive-by shooting at a gas station. RP 2266. Feeling unsafe in the area, Grott moved to Tacoma to live with his brother and two cousins. RP 1942-43.

Julian Thomas was a friend of Grott's cousins and spent time at their house. Thomas was also a menace to Grott and his family. Grott believes Thomas stole his handgun in August 2015.

On Halloween, Thomas shot Grott's front door, nearly hitting Grott in the head. In the subsequent months, Thomas continued threatening to kill Grott, stating when he saw Grott, "it's either him or me." Grott's cousin took the threats seriously and conveyed them to Grott.

After the Halloween night shooting, Grott experienced a significant increase in anxiety and vigilance. He started carrying a gun. He often inspected his house for potential threats. Grott became isolated and paranoid. He confided in a family member that he was hurting and afraid of someone, and that his life was in danger.

One February day, Grott's brother urged him to get out of the house and go do something. RP 1548-59. Grott rode his skateboard past a gas station where several people—including Thomas—were in the parking lot and adjacent convenience store. Grott saw Thomas and/or his car. Grott started firing his weapon towards Thomas, and continued to fire as he

walked closer. In the end, Grott fired 48 rounds and killed Thomas. A loaded firearm was found under Thomas' body.

The State charged Grott with first degree murder and seven counts of first degree assault of the bystanders of the shooting.

Grott asserted the shooting was in self-defense, and the trial court instructed the jury on the use of lawful force. Grott also claimed he had diminished capacity due to post-traumatic stress disorder (PTSD). A retired military psychologist testified in Grott's defense that PTSD would likely result in someone over-perceiving or focusing on potential threats in the environment, affecting how they interpret others' actions. The psychologist further testified he believed "Grott felt that he had [no] other alternative but to defend himself" at the gas station.

The self-defense instruction is unchallenged. But the trial court also provided the State's proposed first aggressor instruction. On that basis, the Court of Appeals reversed.

#### E. ARGUMENT

- 1. As this Court explained in *State v. Riley*, a first aggressor instruction can be provided only where the defendant commits an intentional act separate from the charged conduct and that act entitles the named victim to respond in lawful self-defense.**

The Court of Appeals correctly held, under *State v. Riley* and subsequent Court of Appeals decisions, a first aggressor instruction is

erroneous if the only evidence supporting it is the charged conduct or the claimed self-defense. 137 Wn.2d 904, 908-09, 976 P.2d 624 (1999). The seldom-required first aggressor instruction must be based on a preceding, separate act of aggression by the defendant. *Id.* at 908-09, 910 n.2. That preceding act must be sufficient to entitle another (the named victim) to respond in lawful self-defense. *Id.* at 909-10. Courts may provide first aggressor instructions only under these circumstances because they vitiate the defendant's right to have the prosecution prove the absence of self-defense beyond a reasonable doubt. *Id.*

- a. As in *Riley*, a trial court should provide a requested first aggressor instruction only if the evidence shows the defendant's provoking conduct occurred prior to and separate from the charged conduct.

In *Riley*, the Court clearly indicated the aggressor instruction was proper because evidence showed Riley acted aggressively before the charged act of assault. 137 Wn.2d at 909. Although the evidence varied as to what occurred before Riley's assault on Jaramillo, it consistently showed "Riley drew his gun first and aimed it at Jaramillo" and other events transpired before the charged assault. *Id.* at 906-07, 909.

This Court relied on the evidence of preceding, uncharged conduct to uphold the first aggressor instruction. *Riley*, 137 Wn.2d at 909 ("there was evidence that Riley drew his gun first and aimed it at Jaramillo").

The Court of Appeals holding in this case is consistent with *Riley*. *Accord State v. Wingate*, 155 Wn.2d 817, 820, 823, 122 P.3d 908 (2005) (relying on *Riley* to find first aggressor instruction supported because evidence showed, first, defendant drew his gun and aimed it at the named victim's friends, then, the named victim approached and was shot); *State v. Bea*, 162 Wn. App. 570, 577-78, 254 P.3d 948, *rev. denied*, 173 Wn.2d 1003, 271 P.3d 248 (2011) (holding first aggressor instruction must be supported by conduct separate from the charged assault and upholding instruction because such preceding conduct existed in that case).

- b. In addition to *Riley*, constitutional principles and logic require a first aggressor instruction be supported by conduct preceding the charged act.

*Riley's* explanation that evidence supporting a first aggressor instruction cannot derive from the charged conduct is further supported under the constitution and logic.

Conduct that arises after a defendant's need to act in self-defense cannot be used to justify a first aggressor instruction. When a defense is based in self-defense, the defendant asserts his actions were lawful. RCW 9A.16.020(3) (actions in self-defense are not unlawful); *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). Conduct that is lawful cannot then be used to remove that lawfulness.

Where a trial court determines evidence supports a lawful force instruction, it is incumbent on that court to instruct the jury correctly on the law of self-defense. Allowing the State to interpose a first aggressor instruction for conduct that chronologically follows the defendant's need to act in self-defense would render irrelevant whether the defendant acted in self-defense. This would eviscerate the right to act in self-defense.

To hold otherwise also relieves the State of its constitutional duty to prove the conduct charged. *Riley*, 137 Wn.2d at 910 n.2; *Acosta*, 101 Wn.2d at 616-18, 625. When a defendant adequately raises self-defense, the State bears the ultimate burden of proof on the issue. *Acosta*, 101 Wn.2d at 625. The State must prove beyond a reasonable doubt that the defendant's conduct was unlawful, wrongful or without justification or excuse. *Id.* at 618. That is, the State must prove the absence of self-defense beyond a reasonable doubt. *Id.* A first aggressor instruction relieves the State of this burden. *Riley*, 137 Wn.2d at 910 n.2. Without a preceding act of aggression, the jury must simply decide whether there is an act of lawful self-defense or a crime.

If a single course of conduct could be used to support a first aggressor instruction, the instruction could be provided in all self-defense cases. At trial, the charge is always supported by some evidence the defendant committed an aggressive criminal act. If that same act, or a

portion of that act, could be used to justify a first aggressor instruction, it is clear there is no case in which a first aggressor instruction would not be warranted. Not only would this outcome be illogical, it is directly controverted by this Court. *E.g.*, *Riley*, 137 Wn.2d at 909-10 first (aggressor instructions are warranted in three limited circumstances).

Two Court of Appeals cases amply demonstrate the distinction. In *State v. Sampson* the first aggressor instruction was properly provided based on conduct that preceded both the charged act and the defendant's alleged need to act in self-defense. 40 Wn. App. 594, 699 P.2d 1253 (1985). Kenneth Sampson shot Bryant Conrad at a gas station and was charged with assault. The conflict arose when Sampson, the attendant, insisted Conrad owed more than he paid. *Id.* at 595.

According to the State, Sampson was the initial aggressor because he grabbed Conrad, withdrew a gun and aimed it at the ground while emitting a big, serious stare, refused to put the gun away, and became physically hostile. 40 Wn. App. at 595-96. Conrad then pushed Sampson, which formed the basis for Sampson's self-defense claim. *Id.* Only after Sampson's physically aggressive conduct and Conrad's push, did the charged assault occur: Sampson's gun discharged and hit Conrad in the stomach. *Id.* at 596.

Because, under the State's theory, Sampson pulled his gun and acted with force and/or threat of force before Conrad used force, the first aggressor instruction was proper. *Id.* at 600. Sampson could claim Conrad's push provoked the need for Sampson to act in self-defense. But the State could also argue that Sampson created his own "need" to act in self-defense through his prior acts of physical aggression.

In *State v. Wasson*, on the other hand, the Court of Appeals held the trial court improperly provided a first aggressor instruction because the defendant committed no act of aggression aside from the charged conduct. 54 Wn. App. 156, 772 P.2d 1039 (1989). Wasson and a friend began fighting outside a bar, and Wasson removed a gun from the backseat of his car. *Id.* at 157. A neighbor, Thomas Reed, told them to be quiet, and entered the fray by knocking down Wasson's friend. *Id.* at 158. After physically defeating Wasson's friend, Reed turned and took several steps towards Wasson. *Id.* Wasson responded by shooting Reed in the chest, and was charged with assault. *Id.* Wasson claimed he shot Reed in self-defense after Reed knocked down his friend and came toward him. *Id.* at 158.

Unlike *Sampson*, even under the State's evidence, Wasson did not initiate an act toward the named victim until the charged assault. Although Wasson made noise while he was fighting with his friend, he committed no aggressive act toward Reed until the charged shot to the chest. 54 Wn.

App. at 159. Therefore, the court held the first aggressor instruction was erroneous and unfairly denied Wasson his claim of self-defense. *Id.*

This case closely resembles *Wasson*, and not *Sampson*, in regard to a single act. As the prosecutor described Grott's conduct in closing argument,

What did [Grott] do before he actually started firing?  
Skateboarded up to the AM/PM and saw Mr. Thomas.

RP 2238. This is not aggressive conduct that would entitle Thomas to respond with force. The prosecutor continued,

There is no evidence that Mr. Thomas saw him. The defendant paused, stood there for a little bit.

*Id.* This likewise is not aggressive conduct by Grott.

There are two witnesses that testified that they saw him there walking. I think one said pacing and the other said standing there. Standing there contemplating. What do I do now? What do I do now?

*Id.* This too is not aggressive conduct by Grott. The prosecutor then reached the charge, "He made a conscious decision to attack, kill him." *Id.*

The prosecution never established a preceding aggressive act. *See also* RP 2315-16 (rebuttal argument notes no act of aggression from Grott before "he made the decision to start shooting"), 2317 (prosecution's claim that Grott's actions constituted "shoot first ask questions later" rather than, for example, "send[ing] a warning shot off" is inconsistent

with first aggressor), RP 2322 (“He chose to kill Mr. Thomas so needlessly without taking any steps before that”).

Even under the State’s argument, Grott did not act aggressively toward Thomas before he started firing. Thus, the Court of Appeals aptly held there was no evidence Grott made an intentional provoking act “before the shooting.” Slip Op. at 7-8.

- c. As this Court set forth in *Riley*, sufficient evidence supports a first aggressor instruction only if the named victim is entitled to respond to the defendant’s separate, preceding aggressive act in lawful self-defense.

The initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force. *Riley*, 137 Wn.2d at 911-12. For the victim’s use of force to be lawful, the victim must reasonably believe they are in danger of imminent harm. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). Put otherwise, there must be sufficient evidence that the defendant’s preceding conduct created a reasonable necessity for the named victim to act in lawful, reasonable self-defense.

In *Riley*, this Court explained that the provoking conduct supporting a first aggressor instruction must entitle the named victim to act with lawful force. *Riley*, 137 Wn.2d at 911-12. Words alone could not justify a first aggressor instruction because a named victim “faced with

only words is not entitled to respond with force.” *Id.* at 911. Quoting from LaFave, the Court explained, “the reason one generally cannot claim self-defense when one is an aggressor is because ‘the aggressor’s victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense.’” *Id.* (quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 657–58 (1986) (footnotes omitted)).

This Court also discussed why this restriction must be strictly applied. Self-defense principles “would be distorted” if a named victim could use justified force in circumstances less than the named defendant’s right to act in self-defense. *Riley*, 137 Wn.2d at 911-12. The Court should reaffirm this holding, making clear that the defendant’s conduct substantiates a first aggressor instruction only if it is sufficient to entitle the named victim to respond with lawful force.

*Wasson* once again illustrates the wisdom of *Riley*’s discussion. In *Wasson*, the defendant arguably breached the peace in his quarrel with a friend. 54 Wn. App. at 159. But he exhibited no aggression towards the named-victim neighbor who told them to quiet down. *Id.* When the neighbor turned and took several steps towards Wasson after the neighbor knocked down Wasson’s friend, Wasson arguably had the right to act in self-defense. *Id.* at 157-58. But the named-victim neighbor did not. Thus

the State could disprove Wasson’s right to act in self-defense beyond a reasonable doubt—by arguing the neighbor did not present an imminent threat of harm to Wasson, for example. But the State was not entitled to a first aggressor instruction because no preceding conduct by Wasson would have justified the neighbor-victim’s use of force. *Id.* at 159-60.<sup>2</sup>

Likewise, here, the State could argue to the jury Grott lacked a right to act in self-defense, which was based on Grott’s perception Thomas stole Grott’s firearm, attempted to kill him, threatened to kill him on sight, and had a loaded weapon when Grott saw him at the gas station. But the State was not entitled to a first aggressor instruction because Grott did not commit a preceding act of aggression that would entitle Thomas to respond with lawful force.

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<sup>2</sup> This requirement should not be conflated with using the word “unlawful” to describe the defendant’s first act of aggression, which was held unconstitutionally vague in *State v. Arthur*, 42 Wn. App. 120, 708 P.2d 1230 (1985). See *Wingate*, 155 Wn.2d at 822. The requirement here pertains to the lawfulness of the named victim’s action or response. The aggressive conduct must provoke the named victim’s lawful act of self-defense (a “belligerent response”) to deprive the defendant of his own right to act in self-defense. This concept is not vague and courts and parties are accustomed to applying it to claims of self-defense.

**2. The first aggressor instruction could not be based on a conflict in evidence here because the parties did not materially dispute what occurred.**

While conflicting evidence can form a basis for providing a first aggressor instruction, not just any conflict justifies providing the disfavored instruction. The conflict must be factual, not a legal question of what the factual evidence proves. *See Riley*, 137 Wn.2d at 909, 910. Moreover, the conflict must relate to whether the defendant's conflict reasonably provoked a belligerent response by the named victim. *Id.*

For example, the instruction is appropriate if there is conflicting evidence as to which party first withdrew their weapon in an act separate from the charged conduct. *E.g.*, *State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986); *State v. Richmond*, 3 Wn. App. 2d 423, 432-33, 415 P.3d 1208 (2018).

In *Richmond*, the Court of Appeals upheld the first aggressor instruction because the parties presented conflicting evidence as to who first produced a weapon. 3 Wn. App. 2d at 433. "According to the State's witnesses, Mr. Richmond armed himself with a [four-foot-long] two-by-four and ran outside his home" towards Higginbotham. *Id.*; *accord id.* at 427-28. Richmond, on the other hand, contended he was standing on his porch when Higginbotham approached him with what appeared to be a knife and Richmond then reached for the two-by-four. *Id.* at 433 The

conflicting timeline allowed the State to argue, under its view of the facts, Richmond committed a preceding aggressive act and a first aggressor instruction was not error. *Id.*

In Grott's case, no conflict as to the timeline or facts preceding the charged conduct justifies a first aggressor instruction. As is clear from the State's petition for review, the parties do not disagree as to the facts that preceded Grott's act of self-defense. *See* Petit. for Rev. at 16-18. While the defense sought to prove Thomas had a loaded gun in his hand when Grott started to fire, that evidence simply pertains to whether Grott's charged conduct was justified by self-defense. *Accord* Supplemental Brief of Petitioner at 12 (noting Grott's contention that Thomas was armed with a loaded gun and engaged Grott pertained to Grott's self-defense claim). If Thomas had a gun in his hand and Grott saw it before he started firing, the jury would be more likely to find Grott's shots constituted a reasonable response to an imminent threat. If Thomas did not have a gun in his hand, the jury might be less likely to find self-defense.<sup>3</sup>

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<sup>3</sup> The State's assertion that the first aggressor instruction "was actually part of [Grott's] theory of the case," is premised on this same mistaken understanding. Supplemental Brief of Petitioner at 13; *accord id.* at 18-19. Grott argued Thomas provoked his need to act in self-defense because it supported Grott's self-defense defense. That evidence, or theory, did not support the first aggressor instruction.

Grott's conduct was either in self-defense or it was unlawful murder and assaults. Whether Thomas had a weapon is irrelevant to any other action that occurred before the charged conduct. Neither the prosecution nor the defense argued that Thomas removed his weapon in response to any act by Grott that preceded the charged conduct. *See supra* at 10-11 (discussing State's argument). Thus, there was no conflict of evidence pertaining to preceding acts of first aggression.

A first aggressor instruction is not warranted, and simply served to place a weighty finger on the scale in favor of the State.

**3. There was no reasonable basis for defense counsel not to object to a first aggressor instruction that is based on charged conduct.**

The State argues defense counsel's failure to preserve an error in first aggressor instructions is often tactical. *Petit for Rev.* at 7. *Amicus* strongly disagrees. As this Court noted in *Riley*, a first "aggressor instruction impacts a defendant's claim of self-defense." 137 Wn.2d at 910 n.2. Aggressor instructions negate a defendant's self-defense claim, "effectively and improperly removing it from the jury's consideration." *State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005). Therefore, having requested and received instructions on self-defense, there could be no reasonable tactical basis for defense counsel not to object to a first aggressor instruction.

In fact, defense counsel here devoted part of closing argument to persuading the jury *not* to find Grott was the first aggressor. RP 2290. Such argument would have been unnecessary if counsel had objected and the court had not provided the first aggressor instruction.

Moreover, this Court has instructed courts to “use care in giving an aggressor instruction” because of its impact on self-defense. *Riley*, 137 Wn.2d at 910 n.2. There can be no tactical reason for defense counsel not to hold the trial court to this standard of care.

Finally, as discussed, appellate case law holds the act of first aggression must be separate from the charged conduct. *Bea*, 162 Wn. App. at 577-78; *see Riley*, 137 Wn.2d at 909. Yet, the State relies on the charged conduct, which Grott claims is lawful self-defense, to support the first aggressor instruction. Supplemental Brief of Petitioner at 16, 17-18; *see* RP 2230, 2233, 2236 (describing firing of 48 shots without distinguishing preceding and charged conduct); *see also* RP 2237-38 (prosecutor uses Grott’s perceptions as evidence of motive and intent). Defense counsel was ineffective for failing to object in light of the precedent. *See, e.g., In re Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015); *Hinton v. Alabama*, 571 U.S. 263, 274, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014) (“An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point

is a quintessential example of unreasonable performance under *Strickland.*”).

**4. The first aggressor instruction caused Grott practical and identifiable harm.**

The State claims the first aggressor instruction was not manifest error and Grott’s attorney’s failure to object did not prejudice him. *E.g.*, Supplemental Brief of Petitioner at 12, 19, 22. For example, the State argues “If there was no evidence that the defendant was the aggressor, and the instruction was given in error, then the only conclusion is that the instruction was inapplicable and superfluous” because the jury would come to the correct conclusion. *Id.* at 12.

On the contrary, the practical and identifiable effect and the prejudice here is the very concern warned of in *Riley*, 137 Wn.2d at 910 n.2. The jury could have followed the instructions and found Grott was precluded from claiming self-defense because *some* of the charged conduct constituted acts of first aggression and Grott committed the charged acts. In fact, this is what the prosecution argued in closing—that the jury should convict because Grott acted aggressively and not in self-defense. RP 2316 (“Everything that the defendant did that day was aggressive. . . . It was all aggressive.”), 2317 (“Everything that he did was

aggressive. 48 rounds, multiple magazines, not caring about cover, just advancing into the open, yelling”), 2318 (“All aggressive.”).

Under the instructions given, the jury would not have to acquit if it found Grott acted in self-defense so long as it also found Grott’s singularly charged shooting spree constituted an act of first aggression under the instructions. The first aggressor instruction impacted Grott’s defense.

#### F. CONCLUSION

The Court should reaffirm *Riley* and provide clarification that first aggressor instructions should be provided in limited circumstances. The instruction must derive from actions distinct from and preceding the charged conduct and that entitle the named victim to respond in lawful self-defense. *Amicus* also requests the Court hold conflicting evidence supports providing a first aggressor instruction only if there are conflicting facts related to the defendant’s preceding conduct.

Respectfully submitted this 18<sup>th</sup> day of October, 2019



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
Petitioner,	)	No. 97183-8
	)	
v.	)	
	)	
ROBERT GROTT,	)	CERTIFICATE OF SERVICE
Respondent.	)	

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I, Marla Zink, state that on the below indicated date, I caused to be filed in the Supreme Court of the State of Washington the attached Brief of *Amicus Curiae* Washington Association of Criminal Defense Lawyers dated October 18, 2019 and a true and correct copy of the same to be served on the following in the manner indicated below:

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SIGNED and DATED this 18th day of October, 2019 in Seattle, WA:

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