NO. 103550-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KAVEY POLLARD,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. SUMMARY OF ARGUMENT AGAINST REVIEW

The Court of Appeals properly affirmed the trial court's exercise of discretion to dismiss a potential juror for cause. The potential juror expressed a conscious bias against people in positions of authority, "the people that make the laws and rules," and the court system. The juror conditioned his ability to set aside those biases and follow the court's instructions on the chance that nothing would arise in the case that would relate to those biases.

The totality of the record in this case showed that the excused potential juror had experienced "multiple situations" in his professional life that caused him to believe that people "in charge" and people who "make the laws and rules," were unfair, and he said he "suffered" an emotionally pessimistic view of authority figures every day, which he could not ignore. That was combined with a contentious divorce and child-custody fight in which he "experienced bias at every level" that

could impact his ability to perform his duties as a juror and "follow all the instructions" to a degree he could not quantify.

As the trial court decided, this juror exhibited a *probability* of bias, not a mere *possibility*, especially in a case in which the defense would center on police overreach and abuse. The Court of Appeals properly affirmed. Review by this Court is unwarranted.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

Pollard cites to RAP 13.4(b)(1) and argues that the decision below conflicts with this Court's recent opinion in *State v. Smith*, 3 Wn.3d 718, 555 P.3d 850 (2024) (*Smith II*). To the contrary, the Court of Appeals' opinion in this case is faithful to this Court's steadfast deference in *Smith II* to the discretion of the trial court in deciding whether to dismiss potential jurors for cause. Review should be denied.

C. ISSUE PRESENTED

Has Pollard failed to demonstrate that review is warranted when the Court of Appeals followed the correct legal analysis to conclude that the trial court properly exercised its broad discretion to excuse for cause a juror who demonstrated a probability of actual bias?

D. STATEMENT OF THE CASE

The State prepared a comprehensive recitation of the facts of the case in the Brief of Respondent below. Brf. of Resp. at 2-20. The Court of Appeals likewise described the

facts in detail. *State v. Pollard*, No. 84278-1-I, Slip op. at 1-9 (Div. I, Sept. 23, 2024).

E. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

1. REVIEW IS INAPPROPRIATE WHERE THE COURT OF APPEALS' OPINION ADHERES TO ESTABLISHED CASE LAW AFFIRMING THE BROAD DISCRETION OF THE TRIAL COURT TO EXCUSE JURORS FOR CAUSE.

a. Relevant Facts.

The trial court conducted jury selection remotely with Pollard's agreement. RP 90. Based on answers to a questionnaire, the court excused some of the potential jurors for hardship, and some for cause. RP 90-113. The court scheduled the remaining jurors in "panels" of numerical order, with the first panel to be questioned in the morning, the second panel that afternoon, and a third panel, if needed, the following day. RP 115-16, 212.

On his questionnaire, Juror 71, who was in the second panel, said that he had concerns about his ability to be fair and

impartial. RP 214, 274. In open court, he said that he was "going through some challenging times" that were a culmination of experiences in both his personal and professional life. *Id.* He said that he could not "ignore those experiences," which he described as "people in positions of authority and power abuse that power." RP 275.

The prosecutor asked Juror 71 if he would be able to set those thoughts aside, listen impartially to the testimony of law enforcement, and then follow the judge's instructions, given that those officers and the judge were authority figures. RP 275. Juror 71 said, "I'm not sure," and "it is a maybe for me." RP 275-76. He clarified that "it's not about trusting the law enforcement officers, it's about trusting the people behind them that are making those laws and rules." RP 276. Juror 71 characterized himself as having a "conscious bias" against authority figures. *Id.*

His recent personal and professional experiences had led Juror 71 to conclude that "there are people in positions of

power and authority who claim to be fair and are not." RP 277. He was not sure if the problem was "the rules or regulations or the laws" (as opposed to individuals), but he had recently "suffered" through the "emotion" of feeling that way "every day." *Id.* Juror 71 felt that if something were to come up in the trial that related to those experiences, it could impair his judgment and prevent him from focusing on the evidence and the law. RP 277, 279.

When asked if he had heard anything thus far that would make it difficult for him to be impartial, Juror 71 said, "Not at this moment. But I'll be honest with you, even sitting here right now and … expressing my feelings in front of two lawyers and a judge is making me very uncomfortable." RP 280. He admitted that he was still unsure whether he could be fair and impartial. *Id.*

Later, outside the presence of the rest of the panel, the trial court asked Juror 71 to share more about the experiences that he believed might impair his ability to serve impartially.

RP 306-07. Juror 71 made clear that there was "not a single isolated situation," but rather "multiple situations" in his professional life where those in power display favoritism and treat "small sets of people unfairly."[1] RP 307. He was clear that he had experienced a "repeated hammering in [his] professional life where [he saw] people in authority just going [scot] free." RP 308.

Juror 71 felt that when he needed an ally, "people took the path of least resistance," and so he started feeling, "maybe that's the way to go." RP 308. When he heard of this case, his first impression was not to care whether the right decision was made, but "whatever gets this case sorted out quickly." *Id.* Even though he knew that was legally inappropriate, he was

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[1] Citing to RP 307, Pollard claims that Juror 71 said that he observed people in his professional life exhibit favoritism and *"minorities"* get treated unfairly. Pet. for Rev. at 7. Juror 71 actually said that he observed that a "small set of people" were treated unfairly. RP 307. Later, Juror 71 clarified that he had been penalized at work for having the "minority *viewpoint*." RP 309.

concerned he might not be willing to stand up to the other jurors if he had a minority opinion about Pollard's case because he had been "set up for failure" and "penalized" at work for not going along with the majority view. RP 308-09, 312. He might disagree with everybody else but change his mind, just to "get it over the finish line." RP 309.

Juror 71 also revealed that he had lost custody of his daughter in a divorce proceeding. RP 307, 309-10. He believed that there was "bias at every level" during the custody case over his daughter. RP 310.

In his own words, Juror 71 said that these experiences in both his professional and personal life had caused him to suffer "pessimism," "bias," and "confirmation bias." RP 309. He was clear that his ability to follow the court's instructions would "depend on the instruction." RP 311. He was clear that his ability to be impartial would be conditioned on whether something in the case related to his personal experiences. RP

277, 308-10. He could not "quantify" for the trial court the impact of his bias on his ability to be impartial. *Id.*

The State challenged Juror 71 for cause, stating that "at the end of the day … he just doesn't know if he can be fair and impartial, and it depends on how the facts of the case turn out." RP 313. The trial court excused Juror 71, stating its concerns about Juror 71's ability to follow the court's instructions and to also weigh the evidence fairly and impartially, the trial court excused Juror 71. RP 314. The court noted that the juror had "stated repeatedly" that he feared something in the trial could come up that, based on his experiences and stated bias, would prevent him from being fair and impartial. *Id.* The court concluded that "he was clear enough about that concern that I do find there is cause to excuse him." RP 315.

b. Relevant Legal Standard.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution,

guarantee the right to trial by an impartial jury. *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995).

RCW 2.36.110 outlines the duty of a trial judge to excuse any juror, "who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service."

Jurors with actual bias should be excused. *State v. Slert*, 186 Wn.2d 869, 877, 383 P.3d 466 (2016). "Actual bias" is defined by statute as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2).

When a party challenges a juror for cause based on actual bias, the trial judge asks whether the prospective juror's state of mind is such that he or she can try the case fairly and

impartially. *Otis v. Stevenson-Carson School Dist. No. 303*, 61 Wn. App. 747, 752-53, 812 P.2d 133 (1991). The judge must decide if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Hughes*, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 852, 83 L. Ed. 2d 841 (1985)). To excuse a juror for actual bias, "the court must be satisfied, *from all the circumstances*, that the juror cannot disregard such opinion and try the issue impartially." *State v. Griepsma*, 17 Wn. App. 2d 606, 612, 490 P.3d 239 (2021) (emphasis added).

"Potential jurors are sometimes less than clear, equivocating in response to the questions they are asked as part of the voir dire process." *State v. Booth*, 24 Wn. App. 2d 586, 599, 521 P.3d 196 (2022). A juror's "equivocal answers alone" do not justify removal for cause. *State v. Noltie*, 116 Wn.2d 831, 838-40, 809 P.2d 190 (1991)). However, a juror is properly excused for cause when the likelihood that the juror

suffers from actual bias is "probable" and not merely "possible." *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 809, 425 P.3d 807 (2018) (quoting *Noltie*, 116 Wn.2d at 838-40). A potential juror is properly excused if they cannot demonstrate the ability to set preconceived ideas aside and decide the case only on the evidence given at the trial and the law as given by the court. *Brett*, 126 Wn.2d at 157-58.

The trial court is in the best position to determine a potential juror's ability to be impartial because it can observe the potential juror's demeanor and evaluate and interpret the juror's answers. *Noltie*, 116 Wn.2d at 839. For that reason, appellate courts "afford great deference to the trial court's assessments concerning bias, and the grant or denial of a challenge for cause will be reversed only for manifest abuse of discretion." *Smith II*, 3 Wn.3d at 854 (citing *Noltie*, 116 Wn.2d at 839). Discretion is abused only when *no reasonable judge* would have reached the same conclusion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (emphasis added). This

deference acknowledges the importance of the trial judge's observations of demeanor, as well as the trial judge's ability to interpret and evaluate a juror's answers to questions. *State v. Gentry*, 125 Wn.2d 570, 634, 888 P.2d 1105 (1995).

c. The Court of Appeals Properly Concluded That the Trial Court's For-Cause Excusal of Juror 71 Was a Proper Exercise of Its Wide Discretion.

Applying the above principles, the trial court properly exercised its discretion to excuse Juror 71 for cause. A reasonable judge could easily conclude it was *probable* that Juror 71's views would prevent or substantially impair the performance of his duties as a juror.

Juror 71 suffered from significant and ongoing professional and personal trauma that made him deeply distrustful of authority figures and the "rules or regulations or laws" they apply and enforce. RP 277. He told the court that he was "very uncomfortable" even discussing his views before

the authority figures in this case — two lawyers and the judge. RP 280.

Juror 71 was clear that his bias against authority figures originally stemmed from "multiple situations" in his career, and that the "icing on the cake" had been his divorce proceeding in which he lost custody of his child because of what he viewed as "bias at every level" of the court proceedings. RP 307, 309-10. Juror 71 felt that "more often than not" individuals in positions of authority treat a "small set of people unfairly," and penalize those with minority views. RP 309. Juror 71 told the trial court that these experiences had led him to be pessimistic, biased, and to suffer from confirmation bias — a characteristic indisputably inconsistent with the open mind necessary for proper jury service. RP 309.

When asked if his bias would impact his ability to listen to the evidence and independently weigh it for himself, Juror 71 consistently answered, "It may," "I'm not sure," and "It's a maybe for me." RP 275-76, 310. He was unequivocal about

possessing a "conscious bias." And he never wavered in his significant concern that if his own personal experiences related to anything in the case, his verdict could be influenced by the bias he had developed from his ongoing experiences in both his personal and professional life. RP 277, 308-10. And given that Juror 71's experiences and biases were about authority figures, power, and rules in a very general sense, the probability of them being triggered in a criminal trial was very high.

Finally, Juror 71 expressed significant reservations about his ability to properly deliberate. He indicated that in his experience, when he had needed help from others, they "took the path of least resistance," and so he had started to think that "maybe that's the way to go." RP 308. His prior negative experiences where he was penalized for "having a minority opinion" caused him to fear that he would simply go along with the majority opinion during deliberations regardless of his own views. RP 309.

In *Smith II*, this Court performed a "fact-specific" analysis of its prior cases to conclude that the correct approach "requires trial judges to carefully assess the juror's statements, and any additional information … in order to determine whether the juror is actually biased and therefore unfit to serve." 3 Wn.3d at 727. *Smith II* reaffirmed the deference owed to the trial court's determination:

> Given the nuanced nature of this exercise, which relies heavily on the trial judge's assessment of the juror's responses, demeanor, and tone in context, appellate review is appropriately restrained. We will not disturb the trial court's decision absent a clear abuse of discretion, i.e., where no reasonable judge would have made the same decision.

Id.

Unequivocal statements indicating bias, without a subsequent assurance of impartiality, can establish actual bias. *Booth*, 24 Wn. App. 2d at 600. A later commitment to impartiality is required because a clear statement of bias cannot be overcome by "nuance of inflection or demeanor." *Id.*

Here, Juror 71 relayed that he had suffered multiple professional situations where the people in charge had retaliated against him for expressing a contrary viewpoint. He unequivocally admitted that he harbored conscious bias against "authority figures," the courts, and in his words, those "that are making those laws and rules." He steadfastly conditioned his ability to be fair and follow the law on whether the evidence in the case triggered these personal experiences.[2] He never

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[2] In his petition for review, Pollard repeatedly claims that Juror 71 "said he would set aside his preconceived ideas because 'obviously' when looking at the evidence he would weigh 'if there is enough there.'" Pet. for Rev. at 4, 21, 23. Pollard mischaracterizes the record. Juror 71 said:

> [Y]ou know, obviously, when you look at the evidence, you have to -- you have to try to understand if … there is enough there. But … the concern that I'm bringing here is that right now I may be consciously biased with a — you know, a pessimistic view about authority figures. And — and I don't want that to, you know, influence my decision or — or other jurors' decisions.

RP 276. Contrary to Pollard's characterization, Juror 71 did *not* say that he could set his biases aside. Rather, he stated that while he *understood* the proper role of a juror, he was unsure of his *ability to perform* that role due to his biases.

provided a clear assurance of impartiality after unequivocally expressing his bias. The Court of Appeals properly affirmed the trial court's conclusion that this demonstrated a probability of actual bias. *Slip. op.* at 12.

But even if Juror 71's statements of bias were equivocal, the trial court still properly found a probability of actual bias considering *all* the circumstances, and other objective factors. While equivocal statements alone are insufficient, *Smith II* affirmed that a juror's equivocations *combined with objective factors* can support a conclusion of actual bias. 3 Wn.3d at 727 (citing *Noltie*, 116 Wn.2d at 838). For example, in *City of Cheney v. Grunewald*, a DUI case, one of the jurors had joined Mothers Against Drunk Driving several years earlier after his niece was killed by a drunk driver. 55 Wn. App. 807, 811, 780 P.2d 1332 (1989). Standing alone, those facts did not establish implicit or actual bias against the defendant. *Id.* However, actual bias was found when those facts were coupled with statements from the juror "that he would not want six jurors

with his frame of mind on the jury ... and that he would not receive a fair trial with six such jurors." *Id*.

In other words, even equivocal statements may establish actual bias if there are additional objective factors — such as the juror's own experience with identical or substantially similar situations — that cumulatively establish a probability of actual bias. *Smith II*, 3 Wn.3d at 730.

One such objective factor in this particular case was that Pollard's defense would center on portraying the Bellevue Police Department as mounting an emotionally driven campaign to have Pollard fired from his job and to frame him for a crime because he had posted a Snapchat video of one of their undercover cars, supposedly exposing their operations. *See* RP 591-93, 600-04, 624-25, 695-97, 699, 709-10.

That is to say that Pollard's case would raise the precise issues that Juror 71 said would trigger his biases — whether authority figures had abused their power and retaliated against Pollard. Any equivocation in Juror 71's statements could be

viewed together with the objective fact that his biases were directly implicated by the evidence to be presented, perhaps more so than a typical criminal trial, and was sufficient for the trial court to conclude that it was probable, not just possible, that Juror 71 would be unable to decide the case based solely on the evidence and the instructions provided by the court.

The trial court was in the best position to evaluate Juror 71's demeanor, his answers to questions, and to determine his ability to serve. The Court of Appeals correctly held that the trial court's determination was entitled to deference. As *Noltie* recognized, the trial judge is *best positioned* to determine "whether the juror's answers merely reflected *honest caution* ... or whether they manifested a *likelihood of actual bias*." 116 Wn.2d at 840 (emphasis added). The Court of Appeals properly concluded that a reasonable judge could have excused Juror 71 for cause.

d. The Court of Appeals' Decision Does Not Depend on the Analysis Overturned In *Smith II*.

Pollard seeks review by arguing that the Court of Appeals' opinion depends on the erroneous analysis in *State v. Smith*, 27 Wn. App. 2d 838, 534 P.3d 402 (2023) (*Smith I*), overturned by this Court in *Smith II*, *supra*. Although the decision below cited to *Smith I*, it did not depend on its reasoning to affirm the trial court's discretion here.

In *Smith I*, the Court of Appeals *reversed* the trial court's discretionary decision to *deny* a challenge for cause. 27 Wn. App. 2d at 851-52. When asked if she would change her vote to reach consensus, the prospective juror in *Smith I* said that she would not change her vote if she was "100 percent very confident," but might do so if she was "on the fence." *Smith I*, 27 Wn. App. 2d at 847. The Court of Appeals decided that this statement demonstrated a *probability* of the juror changing her mind just to reach a verdict, not just a *mere possibility*, "particularly when framed through the lens of her initial

reluctance to serve due to work and financial concerns." *Id.* at 852. According to *Smith I*, the problem was that if a juror is "on the fence," the State has necessarily failed to satisfy its burden. *Id.* *Smith I* thus believed it was an abuse of discretion to deny Smith's challenge for cause.

However, this Court disagreed that the potential juror had exhibited a probability of actual bias. *Smith II*, 3 Wn.3d at 732. *Smith II* pointed out that the Court of Appeals had improperly focused on whether the juror was able to commit to being impartial — which is relevant to the rehabilitation of a juror who has stated a bias — without first determining whether the juror had unequivocally expressed bias. 3 Wn.2d at 730. According to *Smith II*, the potential juror's statements were equivocal, and standing alone, were insufficient to establish actual bias. *Id.* at 731-32.

Here, unlike in *Smith I*, the potential juror unequivocally expressed bias against authority figures including those in the court system. He conditioned his ability to be impartial on the

evidence he was to hear and whether it was relatable to his negative experiences. Unlike in *Smith I*, the Court of Appeals' analysis here properly focused on whether Juror 71 was able to express a commitment to impartiality after he had demonstrated clear bias. *See Slip op.* at 11-12. Moreover, as outlined above (and unlike *Smith I*), there were objective factors in addition to Juror 71's in-court statements that established a probability of actual bias. The evidence in this case would directly invoke the issues inherent in Juror 71's biases, but Juror 71 had conditioned his ability to be fair on the evidence and instructions *not* invoking those issues. Said another way, the issues that Juror 71 said were likely to prevent him from being impartial were highly likely to arise in a criminal trial, especially one like Pollard's.

Finally, *Smith II* affirms the broad deference to be given to the trial court's decision — which the Court of Appeals' opinion rightly recognizes. *Slip op.* at 11. Pollard has failed to

establish that the decision below conflicts with this Court's decision in *Smith II* in such a manner that warrants review.

e. GR 37 Does Not Apply to For-Cause Challenges.

Pollard claims that Juror 71's excusal was improper because his biases might be disparately shared by people of color. Pollard cites to the policies underlying GR 37 to support this claim. The Court of Appeals properly rejected Pollard's invitation to graft the requirements of GR 37 onto the analysis for an excusal for cause.

The right to an impartial jury applies to both the prosecution and the defense. *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). A juror who suffers actual bias is unqualified to serve, regardless of race or the reasons for the bias. *State v. Teninty*, 17 Wn. App. 2d 957, 963-64, 489 P.3d 679 (2021).

Unlike for-cause challenges, no reason need be given to exercise a peremptory challenge. *State v. Saintcalle*, 178

Wn.2d 34, 77, 309 P.3d 326, 351 (2013), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017) (Gonzalez, J. concurring). Consequently, peremptory challenges are subject to litigants' conscious and subconscious biases. Measures such as GR 37 are thus required to combat racial discrimination.

But to excuse a juror for cause, a trial court must find specific facts demonstrating that the juror is biased, prejudiced, or otherwise unqualified to serve. *Saintcalle*, 178 Wn.2d 34 at 77 (Gonzalez, J. concurring). The court must be satisfied that the juror cannot disregard preexisting opinions and try the case impartially. RCW 4.44.190.

Pollard asserts that, "As a matter of law, negative experiences with the police and a distrust of police do not constitute actual bias sufficient to exclude a juror." Pet. for Rev. at 14. He cites no authority other than GR 37 for this pronouncement. But GR 37(h)(i) and (ii), outline that negative experiences with and distrust of law enforcement are

presumptively invalid reasons for exercising a *peremptory* challenge. GR 37(h)(i), (ii).

Juror 71 denied that he distrusted the police, and he did not disclose any negative experiences with them. RP 276. He said that he did not trust "the people behind them that are making those laws and rules." *Id.* He also expressed bias against the court system stemming from his custody/divorce proceeding. RP 309-10. But even assuming that distrust of the *legal system* is the same as a distrust of *police*, a juror cannot be excused for cause unless such distrust impairs the juror's ability to serve impartially.

"Judges should proceed with caution" when a party challenges a person of color for cause. *Teninty*, 17 Wn. App. 2d at 963-64. But "safeguarding jury impartiality means a juror suffering from actual bias may be excluded from service, regardless of race or the reasons for the bias." *Id.* "[I]f the party requesting a strike proves the proposed juror holds a bias that impairs the juror's ability to fairly and impartially decide

the case, the strike should be sustained regardless of the juror's race or disparate impact concerns." *Id.* The Court of Appeals correctly concluded that GR 37 is inapplicable.

Pollard asserts — with no citation to the record and no persuasive argument to support such inferences — that:

> The State argued that it was not dismissing Juror 71 for any other reason such as his ethnicity or minority views but because he was not sure he could be fair and impartial. But here, *the real reason* the prosecutor struck Juror 71 *is probably* because of his perspective as a person of color … *It appears the real reason* Juror 71, a minority was struck for expressing skepticism of the criminal justice system. Juror 71 made the prosecution uncomfortable because he said he experienced discrimination and impermissible bias at all levels of his divorce and custody proceedings.

Pet. for Rev. at 23-24 (emphasis added). The record does not support Pollard's baseless suppositions. The State never attempted to justify its challenge of Juror 71 vis-á-vis the concerns of GR 37. RP 313. The State solely argued that Juror 71 should be stricken because he conditioned his ability to be impartial and follow the court's instructions on the chance that

nothing in the case would relate to his own personal experiences and strongly held biases. *Id.* And the Court of Appeals agreed, affirming the trial court's determination that Juror 71 exhibited a probability of actual bias. Review is unwarranted.

F. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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DATED this 28th day of JANUARY, 2025.

Respectfully submitted,

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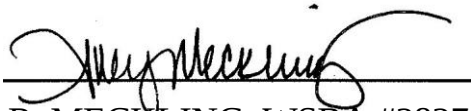
By: 
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