SUPREME COURT NO. _____

NO. 85521-2-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RIDEAUX,

Petitioner.

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

The Honorable Andrea Darvis, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Michael Rideaux asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals decision in State v. Rideaux, COA No. 85521-2-I, filed on September 23, 2024, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. If this Court overrules State v. Brown,[1] did the sentencing court err in failing to recognize its discretion to impose concurrent rather than consecutive firearm enhancements under RCW 9.94A.533(3)?[2]

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[1] State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999), overruled in part by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017).

[2] Currently pending before this Court is State v. Kelly, 25 Wn. App. 2d 879, 526 P.3d 39 (2023), rev. granted, 2 Wn.3d 1001 (2023) (No. 102002-3). One of the issues in Kelly is whether Brown should be overruled. State v.

2. Whether this constitutes an issue of substantial public interest that should be considered by this Court? RAP 13.4(b)(4)?

D. STATEMENT OF THE CASE

Michael Rideaux was convicted of one count of first degree murder and two counts of attempted first degree murder (each with a firearm enhancement) based on a shooting that happened in 2005, when Rideaux was 23 years old. CP 4, 25, 35-36. The decedent had been in an altercation with Rideaux's friend at a party before the shooting. CP 36. Rideaux was sentenced to 891 months (74.25 years), including the firearm enhancements. CP 29. His convictions were affirmed on appeal. CP 34-52.

Following a successful personal restraint petition in 2021, the Supreme Court remanded Rideaux's case for resentencing under State v. Weatherwax, 188 Wn.2d 139, 392 P.3d 1054 (2017). Because the attempt conviction

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Kelly, No. 102002-3, Suppl. Br. Pet'r, at 5, 27-36 (Wash.

carried the lower minimum standard range sentence, it should have been used as the base sentence under RCW 9.94A.589(1)(b).

In advance of resentencing, Rideaux filed a motion for an exceptional sentence below the standard range, based on his youthfulness and immaturity at the time of the crimes. CP 153-162; Matter of Monschke, 197 Wn.2d 305, 482 P.3d 276 (2021). Moreover, during the 18 years Rideaux had been in prison, he had been rehabilitated. See e.g. State v. Dunbar, 27 Wn. App. 2d 238, 532 P.3d 652 (2023).

Resentencing took place on June 9, 2023. The state agreed this Court remanded for a full de novo resentencing. RP 16. At the hearing, the court heard from forensic psychologist David Dixon who testified about the mitigating qualities of youthfulness present in Rideaux's case, including immaturity, suggestibility and

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12/4/23).

impulsivity. RP 8. The doctor also noted Rideaux's progress toward adulthood and rehabilitation had been remarkable. RP 10.

The state requested the court impose the low end of the range (RP 23), while the defense argued the court should sentence Rideaux to 218 months, including the enhancements, which amounted to credit for time served or 18+ years at the time. RP 53. The defense acknowledged that under the current state of the law, the court could not reduce the time for the firearm enhancements. RP 49. However, the defense argued the court could impose an exceptional base sentence to result in the total amount requested. RP 49-51.

In contrast, the state argued the court could not impose a base sentence of less than 240 months, the mandatory minimum for the first degree murder conviction. RP 17; RCW 9.94A.540.

The court found the mitigating qualities of youth merited an exceptional sentence below the standard range. RP 62. The court further noted Rideaux had grown and was a different, more thoughtful person than the one it sentenced 18 years earlier. RP 63-64.

Yet, the court also felt constrained in its ability to exercise discretion in setting the sentence. RP 62. The court noted "I can't do what I want to do just because I think all of the circumstances justify it." RP 62. The court felt constrained to impose the 240-month mandatory minimum and to impose the three firearm enhancements consecutively. RP 67. Accordingly, that's what the court imposed for a total of 420 months (240 + 60 + 60 + 60); the court imposed low-end concurrent sentences for counts 2 and 3. RP 67.

On appeal, Rideaux argued that assuming this Court held Brown were wrongly decided, the lower court failed to recognize its discretion to impose concurrent

firearm enhancements. Brief of Appellant (BOA) at 7-18. Like the trial court below, however, the appellate court felt constrained to follow this Court's decision in Brown:

> As he did in the trial court, Rideaux concedes that current Supreme Court law forecloses his argument, acknowledging the issue is controlled by Brown. Rideaux hopes that in reviewing Kelly, the Supreme Court will adopt the analysis advanced by the dissent in Brown, that would have recognized the enhancements as increasing the standard range, but without overriding the sentencing court's discretion otherwise afforded by the SRA. Brown, 139 Wn.2d at 32-33 (Madsen, J., dissenting). But the Supreme Court has not done so yet, so the sentencing court here did not err, because under existing law it lacked discretion to do other than impose the firearm enhancements consecutively. We are equally constrained to affirm.

Appendix at 7.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

THIS CASE INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE REVIEWED BY THIS COURT.

This case involves the discretion vested in sentencing courts to impose sentences commensurate with the purposes of the SRA. The court was not allowed to do so in Rideaux's case. As is apparent from this Court's acceptance of review in Kelly, this is not just an issue for Rideaux, but one that has far-reaching effects in our society. This Court should accept review. RAP 13.4(b)(4).

In Brown, in a narrow 5-to-4 decision, this Court held that sentencing courts do not have discretion to depart from mandatory weapon enhancements. 139 Wn.2d at 29. The basis for this holding was the following "absolute" statutory language: "Notwithstanding any other provision of law, all firearm enhancements under this

section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter."[3] RCW 9.94A.533(3)(e).

Despite the language emphasized in Brown, the statute does not say the length of time imposed for a firearm enhancement cannot be modified under the exceptional sentence provisions of RCW 9.94A.535. This makes it different from the restrictive language used by the legislature in RCW 9.94A.540(1), which instructs that mandatory minimum terms for certain very serious offenses "shall not be varied or modified under RCW 9.94A.535." The absence of this language in RCW 9.94A.533 suggests the length of enhancements can be modified under the exceptional sentence provisions. See State v. Conover, 183 Wn.2d 706, 713, 355 P.3d 1093

[3] At issue in Brown was a deadly weapon enhancement,

(2015) ("[T]he legislature's choice of different language indicates a different legislative intent.").

At the very least, these textual differences create ambiguity as to whether concurrent enhancements are permitted. See State v. McFarland, 189 Wn.2d 47, 54, 399 P.3d 1106 (2017) (finding ambiguity in the phrase "[n]otwithstanding any other law"). Even if there are other reasonable interpretations, the rule of lenity requires the reasonable interpretation that is most favorable to the defendant be applied, meaning that concurrent enhancements are allowed. Conover, 183 Wn.2d at 711-12; see McFarland, 189 Wn.2d at 55.

Justice Madsen's concurring opinion in Houston-Sconiers, joined by Justice Johnson, supports this analysis. There, two teens robbed other children of candy on Halloween while armed with a firearm and were sentenced to decades of imprisonment due to

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which contains identical language. RCW 9.94A.533(4)(e).

"mandatory" firearm sentence enhancements. Houston-Sconiers, 188 Wn.2d at 12-13. This Court reversed and overruled Brown as it relates to juvenile sentences. Id. at 21 & n.5. This Court reasoned, in light of Eighth Amendment jurisprudence, the statutes must be read to allow trial courts discretion to impose mitigated downward sentences for juveniles. Id. at 21, 24-26.

Justice Madsen agreed this was the right result, but reasoned this was because "the discretion vested in sentencing courts under the Sentencing Reform Act of 1981 (SRA) includes the discretion to depart from the otherwise mandatory sentencing enhancements when the court is imposing an exceptional sentence." Id. at 34 (Madsen, J., concurring). The concurring opinion analysis would apply to adult defendants.

As explained by Justice Madsen, because the legislature did not specifically forbid exceptional sentences downward for firearm enhancements, but

forbade exceptional sentences in other circumstances, exceptional sentences for firearm enhancements are proper:

> Although the SRA explicitly gives sentencing courts the discretion to impose exceptional sentences, it also sets forth certain crimes with mandatory minimum sentences from which sentencing courts have no discretion to depart. RCW 9.94A.540. The legislature explicitly stated that such mandatory minimums "shall not be varied or modified under RCW 9.94A.535," the exceptional sentence provision. RCW 9.94A.540(1). The enumerated crimes for which courts do not have the power to impose exceptional sentences do not include any of the crimes or enhancements at issue in this case. See RCW 9.94A.540. And where a statute specifies the things on which it operates, we infer the legislature intended all omissions. Queets Band of Indians v. State, 102 Wn.2d 1, 5, 682 P.2d 909 (1984). Therefore, RCW 9.94A.540 did not apply in this case to deprive the sentencing court of its ability to consider an exceptional sentence.

Id. at 36. The language of RCW 9.94A.533 also does not mandate a contrary result because it "does not exclude

the enhanced sentences from modification under the exceptional sentence provision." Id. at 37.

In sum, it is improper to read additional prohibitions into RCW 9.94A.533(3)(e). The legislature was silent as to whether the length of firearm enhancements could be modified as part of an exceptional sentence. As RCW 9.94A.540(1) shows, the legislature knows how to prohibit this, but did not. Consequently, RCW 9.94A.533(3)(e) should not be read to deprive sentencing courts of their discretion to impose concurrent firearm enhancements as an exceptional sentence downward.

"Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values." McFarland, 189 Wn.2d at 57. "[C]oncurrent sentences are sometimes necessary to remedy injustices caused by the mechanical application of grids and ranges[.]" State v. Graham, 181 Wn.2d 878, 886, 337 P.3d 319 (2014). Mandatory consecutive

sentences for firearm enhancements has "robbed judges of the discretion that the legislature, through the SRA, expressly gives them in order to fulfill the purposes of the act." Houston-Sconiers, 188 Wn.2d at 39 (Madsen, J., concurring). Firearm enhancements "may be as long as or even vastly exceed the portion imposed for the substantive crimes." Id. at 25. This is a "travesty." Id. at 40 (Madsen, J., concurring).

Here, the sentencing court clearly found that "operation of the multiple offense policy" and consecutive sentencing resulted in "a presumptive sentence that is clearly excessive in light of the purposes of this chapter." RP 66. The law should not be interpreted in a manner that deprives the court of the discretion to remedy this injustice – particularly where the legislature has not expressly legislated.

Washington courts "will overrule prior precedent when there has been a clear showing that an established

rule is incorrect and harmful or when the legal underpinnings of our precedent have changed or disappeared altogether." State v. Pierce, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (internal quotation marks omitted) (quoting Deggs v. Asbestos Corp. Ltd., 186 Wn.2d 716, 727-28, 729, 381 P.3d 32 (2016); W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)). Brown should be overruled because it is wrong and demonstrably harmful, as this case and others prove.

Besides being wrong for the reasons outlined by Justice Madsen, Brown failed to consider the constitutional-doubt canon of construction. Statutes must be interpreted to avoid constitutional doubts or problems. Gomez v. United States, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); Utter v. Bldg. Indus. Ass'n of Washington, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); Houston-Sconiers, 188 Wn.2d at 24.

Unless firearm enhancements are subject to modification through an exceptional sentence, unconstitutional cruel punishment is the sure result. The state and federal constitutions forbid cruel punishment. U.S. CONST. amend. VIII; CONST. art. I, § 14. Washington's constitutional provision has frequently been independently interpreted to provide greater protection than its federal analog. In re Pers. Restraint of Monschke, 197 Wn.2d 305, 311-13 & n.6, 482 P.3d 276 (2021); State v. Gregory, 192 Wn.2d 1, 15, 427 P.3d 621 (2018).

Lengthy consecutive sentences for firearm enhancements create disproportionate and draconian sentences. Without the escape valve of an exceptional sentence, people will receive sentences that are unconstitutionally cruel. Absent express language stating that firearm enhancements are not subject to modification or departure through an exceptional sentence, firearm

enhancements remain subject to such modification or departure. This interpretation avoids a substantial constitutional question. Thus, it is the interpretation that must be adopted. See State v. Blake, 197 Wn.2d 170, 215-16, 481 P.3d 521 (2021) (Stephens, J., concurring) (statute should be read in a manner to avoid constitutional issue); State v. Jenks, 197 Wn.2d 708, 733, 487 P.3d 482 (2021) (Madsen, J., dissenting) (to avoid offending constitutional prohibition against cruel punishment, statute at issue should be construed to apply retroactively).

Furthermore, as a report from the Department of Corrections recognizes, people of color "are more likely to receive weapon enhancements than White individuals convicted for the same types of crimes" and "Black individuals received 1.5 times more enhancements, on average, than White individuals."[4] "Concurrent versus

[4] Karl Jones et al., Sentence Enhancements and Race, Department of Corrections (Mar. 1, 2022). Available at

consecutive weapons enhancements could impact sentence length disparity in the current prison population given the overrepresentation of the Black, Hispanic, and Asian and Pacific Islander populations among those with two or more weapon enhancements." Id. Permitting exceptional sentences for firearm enhancements would go a long way to helping remedy the problem of systemic racial injustice that this Court committed itself to ending in its June 4, 2020 letter. Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. (June 4, 2020).

F. CONCLUSION

For the reasons stated above and those advocated for in the Kelly case, this Court should accept review. RAP 13.4(b)(4).

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Dated this 18th day of October, 2024.

Respectfully submitted,

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APPENDIX

FILED
9/23/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Appellant, v. MICHAEL ALLEN RIDEAUX, Respondent.	No. 85521-2-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Micheal Rideaux appeals his criminal sentence, challenging the sentencing court's imposition of three firearm enhancements consecutive to the base term and consecutive to one another, and the imposition of a victim penalty assessment (VPA). We affirm the imposition of consecutive firearm enhancements and remand with instructions to strike the VPA as a ministerial matter.

I

According to police and evidence later brought out at trial, during the night of March 11-12, 2005, after getting into a fight earlier, while another drove him Rideaux fired at least 24 shots from an assault rifle toward three occupants of another car at speed on the highway, killing Dee Davis, one of the occupants of the other car, and injuring the other two. Rideaux was 23 years old at the time. By third amended information, the State charged Rideaux with one count of murder in the first degree and two counts of attempted murder in the first degree, all while

armed with a firearm. Rideaux was convicted of all three counts, and found by special verdict to be armed with a firearm.

At sentencing, the State recommended a sentence totaling 891 months. A family speaker on behalf of Rideaux, his counsel, and Rideaux maintained his innocence. He sought an exceptional downward sentence of 240 months. The court denied Rideaux's request for an exceptional sentence.

Because murder in the first degree or the attempt of one is a serious violent offense, RCW 9.94A.030(46)(a)(i), (ix), Rideaux was subject to consecutive, rather than concurrent, sentencing under RCW 9.94A.589(1)(b). Under that provision, the court was to determine the standard sentence range for one of his offenses—the one with the "highest seriousness level"—using his prior and current convictions that were not serious violent offenses to determine his offender score, and determine the standard sentence range for other serious violent offenses using an offender score of zero. Id. The court did this by calculating his offender score for the murder conviction as "1," and using zero as his offender score for the consecutively sentenced attempted murder convictions. This led to standard ranges of 250 to 333 months for the murder conviction, and 180 to 240 months for each of the attempted murder convictions. In addition, each count was subject to a 60 month firearm enhancement. In accord with the State's recommendation, the court sentenced Rideaux to a mid-range sentence of 291 months on the murder conviction, mid-range sentences of 210 months on each of the attempted murder convictions, to run consecutively, and a 60 month firearm enhancement on each

count, to run consecutively to the base terms and to each other. This resulted in a total sentence of 74 years, 3 months in prison. The judgment and sentence were affirmed on appeal. State v. Rideaux, noted at 143 Wn. App. 1046, 2008 WL 852016, at *8.

II

This sentencing calculation was held to be error in State v. Weatherwax, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017) (citing State v. Breaux, 167 Wn. App. 166, 179, 273 P.3d 447 (2012)). The consecutive sentencing rule of section .589(1)(b) is ambiguous in the case of anticipatory crimes, here Rideaux's attempted murder convictions. Weatherwax, 188 Wn.2d at 154-55. An anticipatory crime has the same seriousness level as its target crime. Id. at 152. But an anticipatory crime is subject to a rule setting its standard range at only 75 percent of a completed offense. Id. at 154 (citing RCW 9.94A.595). As a result, because Rideaux's murder and attempted murder convictions had the same seriousness level, section .589(1)(b) did not say which should be used to start sentencing calculations and scored at 1, and which should be thereafter scored at zero. But it results in a longer sentence to apply the offender score to the completed offense and use zero for the attempt convictions, than to start with one of the attempt convictions. See Breaux, 167 Wn. App. at 171-74 (comparing calculations). Weatherwax held the rule of lenity required the latter. 188 Wn.2d at 155.

On February 3, 2021, with the State conceding error, the Supreme Court granted Rideaux's personal restraint petition based on Weatherwax and remanded to King County Superior Court for resentencing.

Resentencing was held on June 9, 2023. Rideaux asked for an exceptional downward sentence, which would have amounted to his time served since being taken into custody in March 2005, then totaling 18 years in prison. Rideaux pointed to his young age at the time of the crimes, his susceptibility to peer pressure in the highly charged atmosphere of that night, his accomplishments in prison including obtaining his GED,[1] the maturity he had gained, his work in corrections employment, and his favorable disciplinary record. Rideaux relied on an amended June 6, 2023 report by psychologist David M. Dixon, PhD. At sentencing, Dr. Dixon testified that he examined Rideaux on November 13, 2021, for approximately five hours. Dr. Dixon testified he found no evidence that Rideaux suffered from psychopathology, Rideaux did not minimize his actions, and he took responsibility for what happened. Dr. Dixon opined that at the time of the crimes, Rideaux showed emotional developmental delay, was suggestible and impressionistic, and that immaturity, suggestibility, and impulsivity played a role in his involvement in the crimes. Dr. Dixon described Rideaux as having made remarkable progress toward rehabilitation while in custody, with a good prognosis if released.

The State was represented by the prosecutor who originally tried the case. The State noted the Weatherwax error affected the standard range by "less than

[1] A "GED" is a general equivalency degree program for students who are not able to complete a traditional high school curriculum. State v. Becker, 132 Wn.2d 45, 58, 935 P.2d 1321 (1997).

six months," but agreed that on resentencing Rideaux was entitled to seek an exceptional sentence on different grounds. The State argued there was nevertheless a mandatory minimum of 240 months for a conviction of murder in the first degree, see RCW 9.94A.540, as well as mandatory consecutive firearm enhancements, none of which could be modified through an exceptional sentence, resulting in the court lacking discretion to impose a sentence less than 35 years. The State disputed whether Rideaux's childhood supported Dr. Dixon's opinion about his impetuousness at that time. The State disputed that there was a factual basis to say the crime was the result of peer pressure. Finally, the State disputed the degree to which Rideaux acknowledged responsibility for the crimes. Yet, recognizing Rideaux's youth and progress in custody, the State amended its recommendation to the low end of the standard range.

The court heard from Davis's family, including his son who had been 10 months old at the time of the murder, and several persons who spoke on Rideaux's behalf and to his rehabilitation. Rideaux addressed the court, expressing both acceptance of responsibility and remorse. In pronouncing sentence, the court noted Rideaux's abandonment of his claims of innocence, expression of remorse, and progress in custody. The court found the presumptive range was clearly excessive in light of the purposes of the Sentencing Reform Act of 1981 (SRA), and in light of the requirement that the sentences for Rideaux's crimes run consecutively and with mandatory firearm enhancements. However, the court concluded it was required to impose a mandatory minimum sentence for murder

in the first degree of 240 months, and in addition the three firearm enhancements consecutive to the sentence and to one another.

The new standard ranges were 240 to 320 months for the murder conviction, 187.5 to 249.75 months for the first attempted murder conviction, and 180 to 240 months for the other attempted murder conviction. The court imposed the low end of each standard range, running concurrently. The court imposed a 60 month firearm enhancement on each count, to run consecutively to the base terms and to each other. The new total sentence was 35 years.

Rideaux appeals.

III

A

Rideaux argues that the sentencing court "erred in failing to recognize its discretion to impose concurrent rather than consecutive firearm enhancements."

In State v. Brown, the court held that a deadly weapon enhancement was " '*mandatory*,' " " '*must be served*,' " and left no judicial discretion to impose an exceptional downward sentence not including the enhancement. 139 Wn.2d 20, 26, 983 P.2d 608 (1999) (quoting former RCW 9.94A.310(4)(e)(1995)), overruled in part by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). In State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003), overruled in part by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), the court held that newly added statutory language additionally meant that firearm and deadly weapon enhancements run consecutively to other firearm or deadly weapon

enhancements. In State v. Kelly, 25 Wn. App. 2d 879, 888-89, 526 P.3d 39 (2023), review granted, 2 Wn.3d 1001 (2023), this court adhered to the result long understood to follow from the combination of Brown's rejection of discretion to sentence below a term required by an applicable enhancement coupled with the DeSantiago's understanding that the legislature mandated consecutive enhancements—that sentencing courts lack discretion to do other than impose applicable enhancements consecutively.

As he did in the trial court, Rideaux concedes that current Supreme Court law forecloses his argument, acknowledging the issue is controlled by Brown. Rideaux hopes that in reviewing Kelly, the Supreme Court will adopt the analysis advanced by the dissent in Brown, that would have recognized the enhancements as increasing the standard range, but without overriding the sentencing court's discretion otherwise afforded by the SRA. Brown, 139 Wn.2d at 32-33 (Madsen, J., dissenting). But the Supreme Court has not done so yet, so the sentencing court here did not err, because under existing law it lacked discretion to do other than impose the firearm enhancements consecutively. We are equally constrained to affirm.

B

Rideaux separately challenges the sentencing court's imposition of the $500 VPA, pointing out it was mandatory at the time of his sentencing under review but under new legislation shall not be imposed if the court finds that the defendant is indigent. The State does not dispute Rideaux is indigent and does not object to

striking the VPA from the judgment and sentence as a ministerial matter. We accept the State's concession.

We affirm Rideaux's sentence and remand with directions to strike the VPA as a ministerial matter.

Birk, J.

WE CONCUR:

Chung, J.

Smith, C.J.

NIELSEN KOCH & GRANNIS P.L.L.C.

October 21, 2024 - 1:49 PM

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