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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

CITIZENS AGAINST LINSCOTT/INTERSTATE ASPHALT PLANT, an unincorporated non-profit association organized under the laws of the state of Idaho,

Petitioner/Appellant,

v.

BONNER COUNTY BOARD OF COMMISSIONERS, a public agency of the State of Idaho,

Respondent/Cross-Appellant,

and

FRANK E. LINSCOTT and **CAROL LINSCOTT; INTERSTATE CONCRETE AND ASPHALT COMPANY**,

Intervenors/Cross-Appellants.

Supreme Court Docket No. 47909-2020

Bonner County Case No. CV09-19-0629

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Bonner,
Honorable District Judge Jeff Brudie, Presiding

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a. Nature of the Case

The Board of County Commissioners for Bonner County, Idaho ("BOCC") approved application C1015-18 granting a conditional use permit ("CUP") to Frank and Carol Linscott ("Linscotts"). The CUP authorized the Linscotts to relocate an asphalt batch plant owned by Interstate Concrete and Asphalt Company ("Interstate") to their gravel pit located in Sagle, Idaho. Seeking to overturn the BOCC's decision, Citizens Against the Linscott/Interstate Asphalt Plant ("Petitioner") initiated an appeal to the Bonner County District Court. Following briefing and oral argument, District Judge Jeff Brudie affirmed the BOCC's decision granting the CUP, and Petitioner now appeals once more.

In response, Bonner County now requests that this Court uphold the District Court's decision granting the CUP, and further find that the District Court should have dismissed the appeal at the outset of litigation when Petitioner failed to submit its Petition within time limits prescribed by statute.

b. Administrative Proceedings

The gravel pit in question sits on nearly one hundred forty (140) acres just west of Highway 95 in Sagle, Idaho. (A.R. 9).[1] Interstate currently operates the batch plant on Baldy Mountain Road in Sandpoint, where it has been in operation for decades. (A.R. 1273). Working in tandem, the Linscotts and Interstate requested a CUP permitting them to move the batch plant into the

[1] For the Court's convenience, Bonner County will pattern its citations to the Record after Petitioner.

gravel pit, where it will occupy less than 10 acres in the middle of the pit. (A.R. 24). Prior to the current CUP, Bonner County issued the Linscotts and Interstate temporary CUPs to produce asphalt in the gravel pit six times in 1995, 2001, 2003, 2004, 2005, and 2013, respectively. (A.R. 15). In addition, the County has approved and issued building permits for various structures on the Linscotts' property five times. (A.R. 519-549).

Bonner County Revised Code ("BCRC") § 12-336(4) required the application to address concerns with noise, light, glare, smoke, odor, dust, particulate matter, vibrations and hours of operation. (A.R. 123). At each level of the administrative process, opponents argued that any number of those concerns would adversely affect the neighborhood, but the BOCC relied on contrary evidence when approving the CUP. In particular, the BOCC noted the lack of complaints and/or issues with the batch plant in its current location, which is squarely in the middle of the city Sandpoint and therefore close to a school, an elderly care facility, and high-density housing. (A.R. 1273). Interstate also noted there were four hundred twenty two (422) parcels of land within a half-mile radius of the batch plant's current location but only forty four (44) within the same distance of the proposed site. (A.R. 1274). Further, to address concerns with pollution, the BOCC conditioned the issuance of the CUP on continuing compliance with regulations promulgated by the Idaho Department of Environmental Quality. (A.R. 1028).

After the BOCC's initial decision approving the CUP, neighbors requested reconsideration pursuant to Idaho Code § 67-6535(2)(b) and BCRC § 12-263.

Planning Director Milton Ollerton suggested that the BOCC grant the request but limit the scope of the additional hearing to the status of the gravel pit as a prior nonconforming use and the significance, if any, of that designation. (A.R. 1035).

At the subsequent hearing, planning staff explained that BCRC § 12-336(22) required only that the batch plant be placed in an "active" gravel pit. (A.R. 1346-48). Moreover, staff argued that the gravel pit and the proposed asphalt batch plant within it were two separate and distinct uses. Id. Staff further explained that BCRC § 12-340 stated only that nonconformities could not be grounds for adding additional prohibited uses. Id. (emphasis added) As such, staff suggested that because the batch plant was conditionally permissible at the site in question (and therefore not a prohibited use as defined in BCRC § 12-821), it was not "subject to the regulations [for] full nonconforming uses." Id.

Following the staff presentation, counsel for Bonner County noted there was no current investigation into the legality of the gravel pit, let alone a court-affirmed building or zoning violation. (A.R. 1359-1360). As such, counsel expressed concern that denying the CUP application based on an unsubstantiated complaint would violate the Linscotts' due process rights to contest that claim. Id. At the conclusion of the hearing, the BOCC reaffirmed its original approval of the CUP application, thereby concluding the underlying administrative process upon which this appeal is based. The last hearing was held on March 22, 2019, and the BOCC issued its final written decision on March 25, 2019. (A.R. 1001-11).

c. District Court Proceedings

On April 19, 2019, Petitioner attempted to submit its Petition for Judicial Review to the Bonner County District Court via iCourt electronic submission. (R. 35). On the same day, counsel for Bonner County received a "courtesy copy" of the Petition via email which did not contain a case number. Id. On April 22, 2019, Bonner County received a copy of the Petition via conventional mail which likewise did not contain a case number. Id.

On April 30, 2019, counsel for Bonner County attempted to file a Notice of Appearance in the case but could not do so. Id. After consulting with court staff, counsel for Bonner County determined that the Petition had been rejected and notice of same sent to counsel for Petitioner on April 22, 2019. Id. On May 1, 2019, counsel for Bonner County contacted counsel for Petitioner to inform them of this fact. (R. 36). Petitioner refiled the Petition the same day, and it was accepted by the iCourt. Id. However, Bonner County did not receive notice that the Petition had been accepted until May 6, 2019, when counsel for Bonner County received another "courtesy copy" of the Petition via email directly from Petitioner (this copy finally contained a case number). Id.

Relevant statutory law (discussed *infra*) required Petitioner to initiate its appeal within twenty eight (28) days of the BOCC's final decision. Because Petitioner's final, corrected filing was submitted after that deadline, Bonner County moved to dismiss the Petition, alleging it was filed untimely. (R. 24-33). In response, Petitioner claimed its original filing, which would have been timely if accepted, was wrongly rejected by the Court, and thus it should have been

allowed to relate back to that date. (R 51-52). However, Petitioner admitted it received notice of the rejected filing on April 22, 2019, and having received said notice, failed to resubmit the Petition as the result of either: (1) an inexplicable iCourt error; or (2) an "inadvertent mis-click." (R. 48).

After briefing and oral argument, the District Court wrongly denied Bonner County's Motion to Dismiss, finding that Petitioner could relate back to its first filing attempt, and the Petition was therefore timely. (R. 92-96). In particular, the District Court committed reversable error when finding that Petitioner's second attempt to submit the Petition was never received or filed for reasons "outside of their control." Further, the District Court committed reversable error by denying Bonner County's motion "in the interest of justice," without undertaking any substantive analysis of Idaho's electronic filings rules. (R. 94).

Having denied Bonner County's Motion to Dismiss, the Court allowed Interstate and the Linscotts to intervene in the case, then proceeded to hearing. After briefing and oral argument, the Court denied the Petition and upheld the BOCC's decision granting the CUP. (R. 285-95). Bonner County hereby incorporates the Intervenors' recitation of that analysis in their respective briefing by reference as though set forth in full.

d. <u>Petitioner's Subsequent Complaint for Declaratory Relief</u>

In the interim between the District Court's decision and this appeal, Petitioner sought declaratory relief in a separate action to invalidate the statute upon which Bonner County relied when reviewing and ultimately approving the CUP in dispute.

In the early months of 2018, Bonner County provided public notice of a proposal amending then-current land use rules (BCRC § 12-336) to allow the placement of a batch plant in gravel pits located "in the industrial zone." (A.R. 384). However, the BOCC ultimately adopted a version which allowed batch plants in other zones as well. The Linscotts' gravel pit is not in an industrial zone, but instead lies in Rural-5 and Commercial zones, respectively. (A.R. 9).[2] Thus, Petitioner alleged, and Bonner County conceded, that the County failed to provide adequate public notice when adopting the ordinance in question. However, Bonner County did not concede that permits issued pursuant to that ordinance (including the CUP at issue here) were affected in any way.

IV. Issues on Appeal

a. The District Court committed reversable error when finding that Petitioner timely filed its Petition for Judicial Review.

b. The District Court committed reversable error when finding that Petitioner's failure to resubmit its Petition for Judicial Review resulted from forces outside its control.

c. The District Court committed reversable error when denying Bonner County's Motion to Dismiss "in the interest of justice" and without any substantive analysis of Idaho's electronic filing rules.

d. The subsequent invalidation of BCRC § 12-336 following the District Court's decision did nothing to affect the validity of the CUP in question.

[2] The Linscotts' original application mistakenly stated that zoning for the gravel pit was Rural-5 and Alpine Village. This was likely due to the similarity of the colors designating Alpine Village and Commercial on Bonner County's online zoning map.

e. Petitioner is not entitled to attorney fees.

f. Bonner County hereby incorporates additional issues for appeal presented by Intervenors in their respective briefing by reference as though set forth in full.

V. Standard of Review

Idaho's Local Land Use Planning Act, I.C. §§ 67-6501 et seq. ("LLUPA") allows judicial review of the approval or denial of a land use application, including such a decision issued by county government. See generally In re Jerome Cnty. Bd. Of Comm'rs, 153 Idaho 298 (2012). The procedural rules for such an appeal are governed by the Idaho Administrative Procedure Act (Idaho Code §§ 67-5270-79). I.C. § 67-6521(1)(d); Evans v. Bd. Of Comm'rs of Cassia Cnty. Idaho, 137 Idaho 428, 430-31 (2002). In addition, because such an appeal is expressly authorized by statute, the proceedings must comply with Idaho Rule of Civil Procedure 84 where applicable. I.R.C.P. 84(a)(1).

Only "affected persons" may challenge a final decision under LLUPA. Idaho Code § 67-6521 defines an "affected person" as:

> [O]ne having a bona fide interest in real property which may be adversely affected by:
>
> (i) The approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter;
>
> (ii) The approval of an ordinance first establishing a zoning district upon annexation or the approval or denial of an application to change the zoning district applicable to specific parcels or sites pursuant to section 67-6511, Idaho Code; or
>
> (iii) An approval or denial of an application for conditional rezoning pursuant to section 67-6511A, Idaho Code.

The Court must uphold the underlying decision unless it finds the decision was: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence in the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). In addition, to prevail, an affected person must also demonstrate prejudice to a substantial right. I.C. § 67-5279(4).

There is a strong presumption favoring the validity of the action of a zoning board. Angstam v. City of Boise, 128 Idaho 575, 578 (Ct. App. 1996). Although the interpretation of a zoning ordinance is a question of law subject to judicial review, "there is a strong presumption that the actions of [a political subdivision] are valid when it has interpreted and applied its own zoning ordinances." Lusk v. City of Boise, 158 Idaho 12, 14 (2015). Likewise, the Court must uphold the underlying decision if it supported by substantial and competent evidence, even if conflicting evidence also exists. Hawkins v. Bonneville Cnty. Bd. of Comm'rs, 151 Idaho 228, 231 (2011); Krempasky v. Nez Perce Cnty. Planning and Zoning, 150 Idaho 231, 235 (2010) (stating "this Court will not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact and will defer to the agency's findings unless they are clearly erroneous"); Neighbors for a Healthy Gold Fork v. Valley Cnty., 145 Idaho 121, 126 (2007).

VI. Argument

a. The Court should grant Bonner County's Motion to Dismiss because the District Court committed reversable error when it found the Petition was timely filed.

When Bonner County moved to dismiss before the District Court, the crux of the motion centered on Petitioner's ability to relate back to its first attempt to file the Petition. Petitioner first attempted to file the Petition on April 19, 2019, but the filing was denied. (R. 35). Petitioner received notice on April 22, 2019. Id. Next, Petitioner allegedly attempted to refile the Petition on April 24, 2019, but admitted it was never submitted. (R. 78-79). Petitioner tried to excuse this error by suggesting, without any supporting evidence, that it may have been a "glitch in the iCourt system," but also admitted it may have been the result of an inadvertent "mis-click." Id. Notably, Petitioner offered absolutely no evidence to demonstrate how the iCourt system might have malfunctioned or that there was any legitimate reason to think it had done so.[3] Thus, the only credible explanation for Petitioner's failure to file the Petition on April 24, 2019 was Petitioner's own admission of error. Because of that error, Petitioner did not actually refile the Petition until May 1, 2019, eight business days after it was given notice that its first filing had failed and thirty-seven (37) days after the BOCC's final decision.

[3]iCourt sends automated notices at all stages of the submission process, not just when a document is denied. Thus, the system sends an automatic notification when a document has been submitted. It is safe to presume the secretarial staff for Givens Pursley is professional and very familiar with the iCourt system. As such, Ms. Warden would have known the proposed filing never reached the Court when she never received notice to that effect. This is further evidence that the District Court committed reversable error when finding that Petitioner failed to timely file for reasons outside its control.

Idaho Code § 67-6521(d) states in relevant part:

> An affected person aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code, may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code.

Idaho Rule of Civil Procedure 84 states as follows:

> **(n) Effect of Failure to Comply with Time Limits**. The failure to physically file a petition for judicial review or cross petition for judicial review with the district court within the time limits prescribed by statute and these rules is jurisdictional and will cause automatic dismissal of the petition for judicial review on motion of any party, or on the initiative of the district court. Failure of a party to timely take any other step in the process for judicial review will not be deemed jurisdictional but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review.

(Emphasis added). Thus, if the Court allowed Petitioner to relate back, the filing would be deemed timely, but if not allowed, the Court would have been jurisdictionally barred from hearing the case.

This procedural posture placed the outcome of the motion squarely on the District Court's interpretation of the electronic filing rules set forth by the Idaho Supreme Court. Those rules state in relevant part:

> **(a) Rejected Documents.** Documents that do not comply with this rule, or the requirements of the aforementioned Electronic Filing Guide or court policy, may be returned to the filer for correction. If the document is not corrected as requested within the time frame provided for in subsections (b) and (c) of this rule, the document will be deemed to have not been filed.
>
> **(b) Request for Correction.** If a document submitted electronically for filing is not accepted, the electronic filing system will send notification to the filer that explains why the document was rejected or will describe an error or irregularity and request correction and resubmission by the filer.

(c) Resubmission of Rejected Filing; Relief. A filer who resubmits a document within 3 business days (excluding legal holidays) of the date of the request for correction under this section may request, as part of the resubmission, that the date of filing of the resubmitted document relate back to the date of submission of the original document to meet filing requirements. If the third day following request for correction is not a judicial day, then the filer may resubmit the filing with a request under this subsection on the next judicial day. A filer who resubmits a document under this subsection must copy the existing envelope and include in the "Comments to Court" field notification for an electronic resubmission the following words: "Resubmission of corrected filing, request filing relate back to _____, the date of original submission."

ID R ELEC FILE SERV Rule 13. (Emphasis added).

(a) Technical Error. Any party may obtain relief if the electronic filing system is temporarily unavailable or if an error in the transmission of the document or other technical problem prevents the electronic filing system from receiving a document. Upon satisfactory proof of such an occurrence, the court must permit the filing date of the document to relate back to the date the filer first attempted to file the document to meet filing requirements. If appropriate, the court may adjust the schedule for responding to these documents or the court's hearing, or provide other relief.

(b) Resubmission of Document; Relief. A filer who resubmits a document under this Rule:

(1) Must include in the "Comments to Court" field notification for an electronic resubmission the following words: "Resubmission of filing, submission unsuccessful, request filing date relate back to _____, date of original submission."

(2) Must also provide the date of the original attempted submission, the date the filer was notified the submission was not successful, and explain the reason for requesting that the date of filing relate back to the original submission. The request for original filing date must be resubmitted within 7 business days (excluding legal holidays) of the date the filer was notified the submission was not successful. If the seventh day following notice of error is not a judicial day, then the filer may resubmit the filing with a request under this subsection on the next judicial day.

> (3) May also include supporting exhibits that substantiate the system malfunction together with the resubmission.

ID R ELEC FILE SERV Rule 14. (Emphasis added).

Rote application of these rules should have resulted in the dismissal of the Petition. Petitioner received notice that its filing was rejected. It did not resubmit the Petition within three business days of that date. As such, the Petition should have "been deemed to have not been filed," and therefore untimely. ID R ELEC FILE SERV Rule 13(a). Even assuming *arguendo* the initial filing was wrongly denied, that would have amounted to a technical or "system error" addressed by Rule 14, and Petitioner would have had seven days to relate back. Even that did not occur.

Instead of granting Bonner County's Motion to Dismiss, the District Court held as follows:

> The Petitioners [] cured the alleged defect and resubmitted the petition. Then for reasons unknown, the petition was never received and filed electronically. Petitioners made multiple attempts to timely file but were prevented by circumstances outside of their control. Therefore, in the interest of justice Bonner County's motion is denied as to this claim.

(R. 94). This holding is riddled with factual and legal error. Although not explicitly stated, it implies that the Court accepted Petitioner's naked assumption that iCourt failed and its attempt to resubmit the Petition on April 24, 2019 magically disappeared into the aether. When a filer seeks relief from a technical error, Rule 14(a) requires that they demonstrate "satisfactory proof of such an occurrence" before the Court may grant relief. The only proof offered in this case was an affidavit suggesting a technical error may have occurred, without any additional

information showing how that could have happened or why it was more likely than the alternative explanation: human error.

Based on this erroneous holding, the Court went on to conclude that Petitioner was blameless for its failure to refile and justice demanded the motion be denied. It was wrong on both counts. Petitioner was solely responsible for failing to file the Petition in a timely manner. Further, the rules demand neutral application of their terms, not vague references to justice. The Court's reference to that concept, without any substantive analysis of the electronic filing rules, was wholly inadequate and amounted to reversable error. This Court should overturn that decision, find that Petitioner filed the Petition on May 1, 2019, and either grant Bonner County's Motion to Dismiss or remand to the District Court for a ruling consistent with that finding.

b. The subsequent invalidation of BCRC § 12-336 had no effect on the outcome of this case because the Linscotts' rights vested when they applied for the CUP.

BCRC § 12-336 was amended in the early months of 2018. The Linscotts applied for the CUP on August 8, 2018, several months later. (A.R. 8). The statute was later invalidated, but not until July 17, 2020. Petitioner now contends the subsequent invalidation likewise invalided the issuance of the CUP, but this is directly contrary to well-established caselaw.

"Idaho law is well-established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit." South Fork Coalition v. Bd. of Comm'rs of Bonneville Cnty., 117 Idaho 857, 860-61 (1990). "An owner of property has a vested right to put it to a permissible use

as provided for by the prevailing zoning ordinances." Ben Lommond, Inc. v. City of Idaho Falls, 92 Idaho 595, 601 (1968). "The right accrues at the time an application [] is made." Id. Further, "subsequently enacted ordinances [are] not given retroactive effect, and the ordinance effective at the time of application [is] definitive of the parties' rights." Id. at 861 (quoting Cooper v. Board of County Commissioners of Ada County, 101 Idaho 407 (1980)).

The preceding authority establishes that the Linscotts' rights vested when applying for the CUP and were not undone by the later invalidation of the statute. Petitioner, however, reaches the opposite conclusion via citation to Hillman v. City of Pocatello, 74 Idaho 69 (1953), claiming that "the Amendment is void and has always been void." Petitioner's Opening Brief at 8. This reliance is misplaced.

In Hillman, the City of Pocatello adopted an ordinance which attempted to annex certain property. Id. at 70. When adopting the ordinance, the City relied upon a statute which "granted cities the power to extend boundaries to include land lying contiguous or adjacent to any city." Id. (internal quotations omitted). However, the property in question was "1500 feet north from the limits of the city at its nearest point." Id. Interpreting the statute in question, the Court found it did not allow annexation of such distant land and concluded "the City of Pocatello did not have authority or power to pass the ordinance in question, hence the same is void." Id. at 72. Put another way, the Court held that the City's ordinance was *ultra vires*, stating, "there being no authority for the enactment of the ordinance in question, it never had and does not now have any validity." Id.

Petitioner now asks this Court to apply the same analysis, but to do so would be a mistake. No one contends Bonner County acted outside its statutory authority when adopting the amendment to BCRC § 12-336; i.e. Bonner County has the right to permit batch plants in any zone it desires. Bonner County failed to provide adequate public notice of that amendment, but that is radically different from the facts in Hillman. It makes sense to invalidate actions taken under authority which a municipality could never possess, but that logic breaks down when the flaw in the legislative process is merely procedural.

Public policy concerns also compel the Court to reach this conclusion. A common justification for the theory that a landowner's rights vest upon application is that landowners need certainty and should be protected from a malevolent municipality seeking retroactive application of a later-enacted ordinance. Taylor v. Canyon Cnty. Bd. of Comm'rs, 147 Idaho 424, 436 (2009). When the threat of retroactive application comes from parties like Petitioner, municipalities need this protection too, perhaps even more so.

For example, BCRC § 11-101 requires landowners in Bonner County to apply for and receive a Building Location Permit ("BLP") prior to the construction of a home, shop, accessory building, and many other structures. It was adopted in its most recent form in 2015 but existed in similar fashion long beforehand. Acting in reliance on that statute, Bonner County has permitted thousands of structures. One such permit was recently issued for a satellite backhaul station in a rural neighborhood and (not surprisingly) hotly contested by neighbors. Relying on Petitioner's analysis, those neighbors could file a declaratory

judgment action, and if successful, invalidate not just BCRC § 11-101, but every single permitting decision based thereon over the last five years. The resulting invalidation of BLPS would throw Bonner County's land use administration into absolute chaos. The Court should refuse to issue a ruling which makes that scenario possible.

To conclude, the Court should uphold the underlying decision by finding that Petitioner cannot challenge the validity of BCRC § 12-336. To the extent the Court is willing to consider the later invalidation of that statute, the Court should find that said invalidation had no impact on the CUP in question for the reasons stated above. Finally, the Court should affirmatively limit the holding in Hillman to those cases in which a municipality never had the authority to adopt an ordinance in the first place.

c. Petitioner is not entitled to attorney's fees.

I.C. § 12-117 states in relevant part:

> (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the non-prevailing party acted without a reasonable basis in fact or law.

(Emphasis added). Petitioner does not deserve attorney's fees because Bonner County was the prevailing party in the District Court and has acted reasonably at all times in this litigation. BCRC § 12-336 was valid and in effect when the BOCC approved the CUP and when Petitioner initiated this action. Bonner County's reliance on that statute (and others) was vindicated by the District

Court. Even if Petitioners prevail on appeal, the District Court's agreement with Bonner County confirms the County argued the case based on reasonable facts and law. Now, the issues raised by Bonner County on cross-appeal and its defense of the District Court's decision are not only reasonable but should prevail (again). As such, there is no basis for this Court to award Petitioner fees incurred in pursuit of this action.

d. Incorporation of other issues by reference.

Bonner County hereby incorporates all additional issues for appeal and arguments presented by Intervenors in their respective briefing by reference as though set forth in full.

VII. Conclusion

Wherefore, Bonner County respectfully requests that this Court: (1) reverse the District Court's decision denying Bonner County's Motion to Dismiss; and (2) affirm the District Court's decision denying the Petition.

DATED this 18th day of August 2020.

Bill Wilson
Deputy Prosecutor

CERTIFICATE OF DELIVERY

I hereby certify that on this 18th day of August 2020, I served a true and correct copy of the foregoing via iCourt digital transmission to the following:

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