No._____ TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA v. WILLIAM JOSEPH BARBER II	From Wake County COA 20-268

PETITION FOR DISCRETIONARY REVIEW
PURSUANT TO N.C. GEN. STAT. § 7A-31
and
NOTICE OF APPEAL PURSUANT TO N.C. GEN. STAT. § 7A-30
(Constitutional Question)

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PETITION FOR DISCRETIONARY REVIEW PURSUANT TO N.C. GEN. STAT. § 7A-31
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NOTICE OF APPEAL PUSUANT TO N.C. GEN. STAT. § 7A-30
(Constitutional Question)

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant, WILLIAM JOSEPH BARBER II, respectfully petitions the Supreme Court of North Carolina, in its discretion, to review the judgment of the Court of Appeals rendered 21 December 2021, COA 20-268, which is attached hereto. The opinion affirmed the decision of the trial court. Discretionary review should be granted for the following reasons: (1) the decision of the Court of Appeals has significant public interest; and (2) the cause involves legal principles of major significance to the First Amendment and criminal jurisprudence of the State. N.C. Gen. Stat. § 7A-31.

Defendant also gives Notice of Appeal of the Court of Appeal's decision, which directly involves substantial questions arising under the Constitutions of North Carolina and the United States, N.C. Gen. Stat. § 7A-30, specifically with regard to the guarantee of free speech. In support, Defendant shows unto the Court the following:

STATEMENT OF CASE AND FACTS

This case arises from criminal charges brought against the Defendant, Bishop Dr. William Joseph Barber II (hereinafter "Bishop Barber") for engaging in public speech advocating for the rights of people living in poverty at the North Carolina General Assembly during regular business hours in May 2017.

After the issuance of a presentment, a Wake County Grand Jury indicted Bishop Barber for second degree trespass on May 15, 2018. (R. p. 4) On June 4, 2019, Assistant District Attorney Patel signed a misdemeanor statement of charges. (R. p. 5) ADA Patel arraigned Bishop Barber on the misdemeanor statement of charges. (T. pp. 77-78)

The jury trial began on June 3, 2019 in the Wake County Superior Court before Superior Court Judge Stephan R. Futrell. On June 6, 2019, the jury returned a guilty verdict on second degree trespass. (R. p. 65) On that date, the Court entered a judgement of one day in custody suspended for twelve months unsupervised probation on the condition that Bishop Barber pay a $200 fine, court costs, and twenty-four hours of community service. (R. pp. 68-69) Bishop Barber gave oral

notice of appeal. (T. p. 496)

A. The District Attorney unlawfully attempted to supersede an indictment with a misdemeanor statement of charges.

Here, the Defendant, Bishop Barber, was indicted by the grand jury for second-degree trespass. Specifically, the grand jury issued a "presentment" directing the prosecutor to investigate the matter after hearing testimony from the legislative officer who had cited Defendant. A month later, the prosecutor sought the indictment, which was returned by the grand jury and served on Defendant. However, on the eve of trial, the prosecutor prepared and served on Defendant a *different charging document*, called a "misdemeanor statement of charges." This document also charged Defendant with trespass, as had been charged in the indictment, but altering some factual allegations.

The State proceeded with the trespassing prosecution pursuant to the statement of charges document, rather than the indictment. Bishop Barber argues that the Trial Court lacked jurisdiction because he must be tried only upon an indictment in Superior Court, and not a misdemeanor statement of charges. State v. Barber, 2021-NCCOA-695, Court of Appeals Decision, ¶11-12.

B. Bishop Barber's conduct was speech and assembly at the North Carolina General Assembly protected by the First Amendment.

Bishop Barber's trespass case involves protected First Amendment speech in a public forum; however, he was prosecuted under a statute that

applies to trespass on private property. The trial court and Court of Appeals failed to appreciate the constitutional dimensions of the prosecution.

On May 30, 2017, Bishop Barber entered the North Carolina General Assembly with a group of NAACP members, doctors, and people who needed health care, because they were deeply concerned that the General Assembly had blocked implementation of the Affordable Care Act for four years. (T. p. 344) Bishop Barber cared about the 500,000 North Carolinians who were denied health care due to the inaction of the North Carolina General Assembly. (T. p. 345) He was concerned that the leader of the N.C. Senate had not scheduled public hearings to hear from doctors on the impact of the denial of health care in North Carolina. (T. p. 345)

Bishop Barber believed he had the right to take these concerns to the North Carolina General Assembly, during regular business hours, because of the constitutional "right to instruct the legislature at the General Assembly." (T. p. 354) He understood the North Carolina Constitution to mean that "everything done in the Government should be done for the good of the whole." Barber had read that the constitution provided that "all rights originate with the people." (T. p. 354) N.C. const. Art. I Sec. 2. He was motivated by the provision of the North Carolina Constitution that says, "beneficent provision for the poor, the orphans, and the willing is the first duty of a civilized Christian State." (T. p. 355) N.C. Const. Art. XI Sec. 4. Bishop Barber had met with many North Carolina public officials to discuss important issues but had never been able to meet with Senator Phil Berger,

President Pro Tempore of the North Carolina Senate. (T. pp. 340-341) Bishop Barber had previously requested and been denied meetings with President Pro Tempore Phil Berger, and had never received responses to many requests to meet. (T. p. 341) The Senate President Pro Tempore and the Speaker of the House are important officials because they control the General Assembly agenda. (T. p. 360)

On May 30th, Bishop Barber gathered with about fifty people at the North Carolina General Assembly. (T. p. 356) Once inside the General Assembly, these people prayed, quoted the North Carolina Constitution, and scriptures from the Bible. (T. p. 359) People read from letters which they wanted to deliver and discuss with their state leaders. (T. p. 359) When they tried to deliver their letters to the Speaker of the House, someone at the office door told them they could not enter. (T. p. 361) Next, they went to the Senate President Pro Tempore's office to deliver their letters and address their grievances. (T. p. 362) When they arrived, the office was closed. (T. p. 363) Bishop Barber then sat on a wooden stool and began to chant in a "call and response" manner. (T. p. 363)

"Call and response" involves a vocal leader who chants a phrase or statement, then group members join together in unison and repeat that phrase. On this day, the call and response included phrases and statements such as: "500,000 people in the state are without health care"; "one out of every four persons in this country is without health care"; quoted portions and parts of the protections articulated in the Constitution; that many people who did not have health care were poor, including

working poor people and veterans; that there are racial disparities in those who are impacted, and that 346,000 people in North Carolina that were being denied health care were white; that this conduct was immoral, a violation of our deepest moral values and a violation of fundamental human rights. (T. p. 364)

They chanted outside the offices of the Senate President Pro Tempore and the Speaker of the House so that they and other members of the General Assembly could hear their message since they were responsible for rendering decisions on these matters.

The State's witness agreed that Bishop Barber would "say something and the group with him would repeat it in unison." (T. p. 119) The volume of noise from the group "disturbed" legislative staff, according to the sergeant at arms and chief of police. (T. p. 278) The General Assembly's Police Chief, Martin Brock, got a bullhorn and informed the group that they needed to lower their voices due to noise complaints. (T. pp. 214-15) However, no legislators or legislative staff members testified that they were "disturbed."

Building Rules of the General Assembly prohibit noise loud enough to impair conversations and disrupt the ability of legislators and their staff from carrying out their duties. (T. p. 220) Chief Brock asserted that Bishop Barber "screamed" to the crowd, and they yelled back in response. (T. p. 230) He stated that while standing with the group of people, the noise level made it hard for him to communicate on his phone. (T. p. 230) Chief Brock said he announced twice that the group should lower

their voices and move, or they would be arrested because they were preventing people from doing their work. (T. p. 235) Chief Brock said that the group ignored his requests. (T. pp. 235-36) Chief Brock observed Captain Stiltner tell the group to leave the building or face arrest. (T. pp. 237-39) Chief Brock testified that he told Bishop Barber to leave, and if he did not stop leading the chants, he would be placed under arrest. (T. p. 239) When Bishop Barber refused to leave, he was arrested. (T. pp. 240-41)

Bishop Barber disputed the State's testimony that he was yelling. (T. p. 365) He stated that he was not yelling at the top of his lungs; rather, he was using his "voice as a preacher … which sometimes elevates, sometimes is lower depending on affect and particularly in a call and response situation, I was utilizing a voice that God has given me for that purpose." (T. p. 366)

C. The Trial Court erroneously granted the prosecution's Motion in Limine and prohibited Defendant from introducing First Amendment evidence.

At trial, prior to opening arguments, the Superior Court addressed the prosecution's recently filed motion in limine to limit Bishop Barber from fully presenting his First Amendment defense. The trial court never ruled that the area was a public forum. Yet, the court ruled: "Defendant is ordered to refrain from arguing in the jury's presence any statements that mislead or confuse the jury about what the law is, and this would include during jury selection, opening statements, examination of witnesses, and until further correction or clarification,

closing statement." (T. p. 71) Without delineating the full contours of this prohibition on Bishop Barber's ability to present his First Amendment facts and argument, the court gave as one example of prohibited conduct "arguments to the effect that, first of all, the Defendant cannot be guilty of second degree trespass because the Legislative Building is the property, quote, of another, end quote, under GS 14-159.13(a)(1) because the Defendant, or we, or everybody in the courtroom are the State of North Carolina." (T. p. 71-72) Further limiting Bishop Barber's First Amendment defense, the court ruled that whether time, place and manner restrictions are reasonable and meet constitutional requirements "is the legal issue that is not within the scope of factual questions for the jury." (Id.) Thus, the court announced that it would allow only "limited evidence as to the Defendant's exercise of his free speech rights in order to explain his actions on the day in question." (Id.)

The court further ruled that the burden of proof on the claim "that the application of the statute and the regulations to the Defendant in these circumstances unduly burdens his exercise of his constitutional rights" rests with the Defendant, stating: "That will be a matter of proof for the Defendant to sustain that contention and at the time of the charge conference will determine whether the proof has been sufficient to allow the Defendant to argue that to the jury." (T. p. 76) The court concluding its motion in limine ruling by acknowledging: "I understand that that is somewhat vague." (T. p. 77)

In support of his First Amendment argument that the noise level did not rise

to a violation of reasonable time, place and manner restrictions on free speech, Bishop Barber sought to introduce evidence that prior protestors in the same area had involved similar or greater noise levels and yet the protesters were not arrested. The court excluded this evidence, apparently relying on the earlier ruling that the application of time, place and manner restrictions was a legal issue for the court rather than a question of fact for the jury. (T. p. 72-73)

REASONS TO GRANT DISCRETIONARY REVIEW

I. THE COURT OF APPEALS ERRED WHEN IT DETERMINED A MISDEMEANOR STATEMENT OF CHARGES CAN SUPERSEDE AN INDICTMENT FOR A MISDEMEANOR IN SUPERIOR COURT ON ORIGINAL JURISDICTION AND BECAUSE APPLICATION OF *CAPPS* TO THIS CASE VIOLATES DEFENDANTS' DUE PROCESS AND LAW OF THE LAND RIGHTS.

Standard of Review

A defendant may properly raise the issue of subject matter jurisdiction at any time, even for the first time on appeal. In re T.R.P., 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). Challenges based on subject matter jurisdiction are reviewed *de novo*. In re A.L.L., 376 N.C. 99, 101, 852 S.E.2d 1, 4 (2020).

Argument

"The pleading in felony cases and ***misdemeanor cases initiated in the superior court*** division ***must be a bill of indictment***, unless there is a waiver of the bill of indictment. N.C. Gen. Stat. Ann. § 15A-923. Here, the prosecution secured an indictment, but then proceeded upon a superseding misdemeanor statement of charges in direct violation of this statute. The trial court had no jurisdiction to

proceed upon a misdemeanor statement of charges for a misdemeanor initiated in superior court because the pleading "must be a bill of indictment." Id. Furthermore, N.C. Gen. Stat. §15A-642 provides that prosecutions originating in superior court must be upon indictment or information, and waivers of indictments must be in writing and signed by the defendant and their attorney. N.C. Gen. Stat. §15A-642. Here, the misdemeanor originated in Superior Court with a presentment and indictment, but the District Attorney proceeded upon a misdemeanor statement of charges. The Court of Appeals erroneously interpreted the use of a misdemeanor statement of charges as an amendment to the indictment. State v. Barber, 2021-NCCOA-695, Court of Appeals Decision, ¶24 ("a statement of charges may be treated as an amendment to the appropriate charging document.")

In reaching this erroneous decision, the Court of Appeals relied upon State v. Capps, 374 N.C. 621, 843 S.E.2d 167 (2020). This reliance was problematic because *Capps* does not apply to situations where, as occurred here, the misdemeanor statement of charges is used to purportedly supersede an *indictment* as opposed to amending an *arrest warrant* appealed from District Court. The Superior Court has original jurisdiction of misdemeanors when the state proceeds upon an indictment; the District Court has original jurisdiction of misdemeanors when the state proceeds upon a warrant that is appealed de novo to the Superior Court. N.C. Gen. Stat. §7A-271. *Capps* dealt with a situation where a misdemeanor statement of charges amended a warrant, a charging document with original jurisdiction in the

District Court. State v. Capps, 374 N.C. 621, 623, 843 S.E.2d 167, 168 (2020) ("Before jury selection in superior court, the prosecutor moved to amend the warrant charging injury to personal property and misdemeanor larceny.") The Court of Appeals misapplied Capps to the present situation, ignoring the indictment requirement for misdemeanors originating in Superior Court. State v. Barber, 2021-NCCOA-695, Court of Appeals Decision, ¶27.

The Court of Appeals treated the misdemeanor statement as an amendment to the indictment, stating that the amendment did not substantially alter the charges. Id. at ¶29. This ignores the fact that the prosecutor never moved the Trial Court to amend the indictment, and the Trial Court never granted a motion to amend the indictment. Rather, the prosecutor filed the misdemeanor statement of charges, the court proceeded upon the misdemeanor of charges, and used that charging document when instructing the jury. The indictment was never before the trial court once the State, on its own motion, proceeded on the misdemeanor statement of charges.

The Court of Appeals applied this language in *Capps*: "We hold that when a prosecutor's action is in substance an amendment to a criminal pleading, no matter what the document containing the amendment is labeled, the amendment can be made at any time as long as it does not alter the nature of the offense or is otherwise authorized by law." State v. Capps, 374 N.C. 621, 624, 843 S.E.2d 167, 169 (2020). Capps does not apply to the situation where the misdemeanor statement

of charges superseded an indictment.

There is an additional problem with the application of *Capps* to the instant case. This Court decided *Capps* in 2020 and Bishop Barber was tried in Superior Court in 2019. As the Court of Appeals opinion acknowledges, the law at the time of Bishop Barber's trial was that the Superior Court did not have jurisdiction to try the case. Neither this Court nor any court or legislature can bestow jurisdiction for a trial *ex post facto*. To do so would violate the defendant's rights under the due process clause of the United States Constitution as well as violate the defendant's rights under the law of the land clause of the North Carolina Constitution.

This Court should grant the petition for discretionary review because the Court of Appeals erroneously extended the ruling in *Capps* to allow a misdemeanor statement of charges to supersede an indictment, as well as violating defendant's constitutional rights by relying on law made after the defendant's trial to grant jurisdiction to the trial court. This Court should clarify this important jurisdictional issue as well as the important constitutional issues raised by the lower court's application of the *Capps* decision to this case. Without this clarification, prosecutors will erroneously believe that they can unilaterally amend indictments without a ruling from the court, and there will be confusion with respect to which charging document confers jurisdiction upon the court – the indictment or the misdemeanor statement of charges? This Court should review this case to avoid clarify this important jurisdictional issue and avoid this confusion.

II. THE COURT OF APPEALS ERRED WHEN IT IGNORED THE FIRST AMENDMENT IMPLICATIONS ARISING WHEN THE LAW OF PRIVATE TRESPASS IS APPLIED TO A PROTEST ON A MATTER OF PUBLIC CONCERN IN A PUBLIC FORUM.

Standard of Review

The Court of Appeals applied a de novo standard of review when determining whether the case involved the First Amendment. "To resolve this issue, we must first decide whether [defendant exhibited] speech protected by the First Amendment, for, if it is not, we need go no further." State v. Barber, 2021-NCCOA-695, Court of Appeals Decision, ¶31. [I]n cases raising First Amendment issues ... an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)

Court of Appeals Decision

The Court of Appeals concluded that this case was about "loud speech," not free speech under the First Amendment**Error! Bookmark not defined.**. State v. Barber, 2021-NCCOA-695, Court of Appeals Decision, ¶33. In reaching this conclusion, the Court of Appeals noted that the General Assembly rules prohibit speech that "disturbs" the General Assembly. The Court of Appeals concluded that Defendant Barber was convicted of trespass for loud speech, not for the content of his speech; and therefore no First Amendment issues arose.

The Court of Appeals went on to conclude that, even if the First Amendment is implicated, Defendant Barber's rights were not violated as a matter of law because the General Assembly rules are "reasonable time, manner, place restrictions." Id. at ¶35. The Court of Appeals concluded that the General Assembly is *potentially a limited public forum*, governed by reasonable time, manner, place restrictions and that the Defendant violated those rules by speaking too loudly. Id. at ¶¶40-42.

The Court of Appeals did not resolve the important issue regarding whether the halls of the General Assembly constitute a public forum within the meaning of the First Amendment. Judge Inman concluded, in a concurring opinion, that the General Assembly constituted a designated public forum subject to the First Amendment reasonable time, manner, place restrictions. Id. at ¶50. This divergence between the majority and concurring opinion with respect to the application of the First Amendment to the General Assembly deserves consideration by this Court. As detailed below, the concurring opinion also erred in finding that Bishop Barber violated legislative building rules by being too loud, even though a jury never considered or found this constitutional fact. This Court recently held in *Taylor*, that the jury must find this kind of constitutional fact. State v. Taylor, 2021-NCSC-164, ¶ 53

Argument

The problem with the ultimate First Amendment determinations of the Court

of Appeals decision is that the trial court's ruling on the motion in limine and its exclusion of relevant evidence prevented Bishop Barber from fully presenting his First Amendment case. The court erred by hampering defense counsel with a "vague" prohibition on what they could argue, excluded relevant evidence that other protests producing similar noise levels did not result in arrest of the protesters, shifted the burden of proving the reasonableness of the content and application of purported time, place, and manner restrictions to the Defendant and failed to properly instruct the jury. The Court of Appeals also ignored substantial prosecution witness testimony that law enforcement focused not on informing protesters that they would be arrested if they did not lower the noise level, but rather that they would be arrested if they did not stop chanting or if they did not leave the building.

Most importantly, because of errors by the trial court in excluding First Amendment evidence and argument, the jury never considered the factual issue of whether Bishop Barber was too loud, and Bishop Barber was never given an opportunity to argue to the jury that he was engaged in protected First Amendment conduct in a public forum. By focusing on how the case is about loud speech, rather than the content of speech, the Court of Appeals conceded that this is a First Amendment issue because under the private law of trespass, a person can be removed from property for no reason whatsoever. However, when the First Amendment applies, a person can be removed from a public forum only for a

constitutional cause.

Defendant argued the case of *State v. Taylor* in the Court of Appeals to show how constitutional elements are implied into state criminal statutes when the First Amendment is implicated. In *Taylor*, the Defendant was charged with "threatening to kill a court officer," however the trial court did not apply the First Amendment doctrinal elements of proof of a "True Threat." State v. Taylor, 270 N.C. App. 514, 841 S.E.2d 776, 788 (2020). In *Taylor*, the Court of Appeals concluded that state criminal laws must, when applicable, be interpreted through the lens of the First Amendment to the United States Constitution. First Amendment doctrine may require proof of additional elements not present in the state statute. And when there are additional constitutional elements, the Court must instruct the jury on those elements. Id. at 789.

In the present case, the First Amendment doctrines of public forum, political speech, and reasonable time, manner, place restrictions apply to the state crime of trespass because Bishop Barber was assembled in the North Carolina General Assembly, engaging in political speech, and addressing his grievances with his representatives when he was arrested for trespass and ordered to leave the premises. Unlike the law of private property and trespass, Bishop Barber was authorized to be on the public property of the General Assembly and had the implied right to be where he was. Understood through the lens of the First Amendment, the law of public trespass in the context of political speech has

constitutional elements in addition to those in a case of private person charged with trespassing upon private property. These elements include whether the area Bishop Barber stood was a "public forum," and the constitutional fact with respect to whether Barber violated reasonable time, manner, place restrictions by "disturbing" members or staff of the General Assembly.

While the Court of Appeals was considering Defendant's appeal, this Court affirmed how the First Amendment requires additional elements of proof in this Court's decision in *Taylor*. This Court reviewed the Court of Appeals decision in *Taylor* and handed down a ruling shortly before the Court of Appeals opinion in this case. In *Taylor*, the Constitution required the State to prove constitutional elements of intent with respect to a "true threat," and that the jury must consider that constitutional factual issue. State v. Taylor, 2021-NCSC-164, ¶ 53. ("Because, as we have discussed above, the facts presented by the State could have allowed a reasonable jury to conclude defendant uttered a true threat, a properly instructed jury must be allowed to consider this question.") Similarly in the present case, because Bishop Barber was engaged in speech of a public concern in a public forum, there were additional constitutional elements to the law of private trespass that should have been considered by the trial court, and a jury should have determined whether his speech was "too loud," or "disturbing," and not the trial court or the Court of Appeals. Applying Taylor to the law of trespass will require future North Carolina Courts to require proof of violation of time, manner, place restrictions

before a protester can be convicted of trespass in a public forum.

This Court should therefore grant the petition for discretionary review or accept the Notice of Appeal. This case directly involves a substantial question arising under the First Amendment to the Constitution of the United States and Article I Section 14 of the North Carolina Constitution and presents a Due Process Violation of Defendant's rights. The issues presented here are of substantial constitutional importance and high public interest in need of clarification by this Court. Without this clarification, the Court of Appeals decision threatens to produce a consequential chilling effect on protected free speech conduct in the state and to introduce confusion and error in criminal practice due to the error in jurisdictional analysis below.

ISSUES TO BE PRESENTED

I. THE COURT OF APPEALS ERRED WHEN IT DETERMINED A MISDEMEANOR STATEMENT OF CHARGES CAN SUPERSEDE AN INDICTMENT FOR A MISDEMEANOR IN SUPERIOR COURT ON ORIGINAL JURISDICTION AND BECAUSE APPLICATION OF *CAPPS* TO THIS CASE VIOLATES DEFENDANTS' DUE PROCESS AND LAW OF THE LAND RIGHTS.

II. THE COURT OF APPEALS ERRED WHEN IT IGNORED THE FIRST AMENDMENT IMPLICATIONS ARISING WHEN THE LAW OF PRIVATE TRESPASS IS APPLIED TO A PROTEST ON A MATTER OF PUBLIC CONCERN IN A PUBLIC FORUM.

CONCLUSION

For the reasons set forth above Defendant requests that this Court grant the petition for discretionary review or accept the Notice of Appeal of the issues presented.

Respectfully submitted this day, 25 January 2022.

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CERTIFICATE OF COMPLIANCE WITH N.C.R.APP. P. 28(j) and 33(b)

Undersigned counsel hereby certifies that this brief is in compliance with N.C.R.App.P. 28(j) in that it is printed in 12-point New Century font and contains no more than 8750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare the brief. I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Respectfully submitted this date: Jan 25, 2022

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CERTIFICATE OF SERVICE AND FILING

I, the undersigned attorney, do hereby certify that a copy of the foregoing NOTICE OF APPEAL AND PETITION FOR DISCRETIONARY REVIEW in the above-entitled action was filed by mail pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure by sending it first class mail, postage prepaid to the Clerk of North Carolina Supreme Court, Post Office Box 2170, Raleigh, North Carolina 27602-2170 by placing it in a depository for that purpose.

I further hereby certify that a copy of the above and foregoing PETITION FOR DISCRETIONARY REVIEW were served by first class mail, postage prepaid to the following:

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Respectfully submitted this day, January 25, 2022

LOCKAMY LAW FIRM.

By: ***//s// C. Scott Holmes***
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