NO. 46137-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DARYL CLAY REID,

Appellant.

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

The Honorable Marilyn Haan, Judge (trial)
The Honorable Stephen Warning, Judge (sentencing)

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting trial Exhibit 1 where the State failed to establish a chain of custody.

2. The trial court improperly entered a verdict finding Mr. Reid guilty of possession of methamphetamine in a county jail.

3. Mr. Reid's right to effective assistance of counsel was violated in light of defense counsel's proposal and the trial court giving an irrelevant and prejudicial unwitting possession instruction.

4. The prosecutor improperly argued to the jury that the giving of an unwitting possession instruction meant Mr. Reid conceded possessing methamphetamine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Because drug evidence is so unique and is easy to tamper with, it is not admissible unless the proponent establishes a chain of custody with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated. Here the corrections officer who found a baggie of suspected methamphetamine never identified the baggie admitted at trial as Exhibit 1. The baggie described by the corrections officer was much different than the baggie later retrieved by a sheriff's deputy from an unidentified jail booking

officer. Did the State fail to establish a chain of custody with sufficient completeness such that Exhibit 1 was admitted in error?

2. A defendant has a Sixth Amendment and Article I, Section 22 right to counsel and to the effective representation of counsel. A defendant is entitled to a new trial where he can establish his attorney performed deficiently and he was prejudiced by the ineffective representation. At trial, Mr. Reid's defense was that he did not possess methamphetamine. Yet, defense counsel proposed and the court instructed the jury on the affirmative defense that Mr. Reid possessed, albeit unwittingly, methamphetamine. Does defense counsel's prejudicial error in proposing an irrelevant unwitting possession jury instruction entitle Mr. Reid to a new trial?

C. STATEMENT OF THE CASE

Daryl Clay Reid entered the Cowlitz County Jail on November 5, 2013, after a back injury had sent him to the emergency room. RP 73, 81. All Mr. Reid wanted to do was lie on his cell bunk and let nature's healing process take its course. RP[1] 74-75.

Because of his back injury, Mr. Reid needed a lower bunk. RP 83. The jail had a lower bunk available in F10, a lockdown unit. RP 31. Jeremiah Landis was housed in F10 earlier in the day. RP 31, 37, 83.

[1] This appeal has only a single volume of verbatim ("RP").

Other inmates did not want Landis around because he stole from them. RP 83. F10 was last-resort housing for Landis. RP 30, 83.

Before being incarcerated, Mr. Reid was twice searched: once by law enforcement and again by corrections staff during booking. RP 42, 73. Mr. Reid did not have methamphetamine in his possession. RP 76.

As part of the booking process, Mr. Reid changed from his personal clothes to jail "greens." RP 26-27, 42-43. As he was being moved to his assigned cell, just as all inmates do, he stopped and picked up a ubiquitous jail bucket. RP 38-39. Jail buckets are packed by worker inmates. RP 39. Each jail bucket contains exactly two wool blankets, two sheets, and one towel. RP 38. The buckets are Tupperware-like and approximately two feet wide and two feet deep. RP 33. Inmates have the freedom to use the buckets to store personal items such as commissary purchases and court papers. RP 38. After each inmate picks up a bucket post-booking, the bucket remains in their cell. RP 44-45. Buckets are subject to search by corrections officers at any time. RP 33. The buckets do not lock and do not have lids. RP 38. One inmate could easily put items in another inmate's bucket. RP 46.

Mr. Reid had no personal property and did not use the jail bucket after he removed from it what he needed for comfort. RP 74-75, 79.

Inmate greens and linens are swapped out once a week. RP 26. The swap outs occur on a precise schedule by unit. RP 28. A "unit" is a cell area. The units are referenced by letters A - F. RP 28. The letter assigned to a unit dictates whether the weekly greens and linen swap occurs on Saturday or on Sunday. RP 28.

On Saturday, November 9, corrections officers arrived in F unit to do the swap out. RP 29. Inmates were immediately ordered out of their cells and given clean greens to change into. RP 28-29. Inmates removed the dirty linens from their cells. RP 27. While the inmates were changing their clothes outside of their cells, corrections officers searched each cell for contraband. RP 29.

Corrections Officer Joel Treichel, an eleven-year employee at the jail, searched Landis's and Reid's cell. RP 25-26, 32. Officer Treichel estimated the cell was about eight feet by ten feet and fifteen feet deep. RP 31. Fixtures in the cell were a bunk bed and a stainless steel toilet-sink combo. RP 31. The cell did not leave room for privacy. RP 32. To Officer Treichel, it looked like Landis had made his bed on the floor rather than sleeping on the upper bunk. RP 33. Per Officer Treichel, inmates commonly did not want to sleep on the upper bunk. RP 33, 45. In addition to the fixtures, there were two of the ubiquitous jail buckets in the cell. One was partially under the bed thus closer to Mr. Reid's lower

bunk. RP 33. The other was closer to where Landis may have been sleeping. RP 33, 45-46. Officer Treichel assumed the bucket closer to Mr. Reid was used by Reid and the bucket closer to Landis was used by Landis. RP 44-45. This, however, was just an assumption on Officer Treichel's part as he had no real way to know who, if either, was using the buckets. RP 47.

In searching the bucket closer to Mr. Reid, Officer Treichel found "a little baggie, and it looked like what I thought drugs would look, you know, in a baggie, what I've seen before drugs look like." RP 34. It was square and about two inches by two inches. RP 47. The baggie was laying underneath some paperwork. "Mr. Reid's name was on the papers," per Officer Treichel. RP 34. The baggie was not otherwise concealed or secreted in anything. RP 34, 49. Officer Treichel could not recall the type of paperwork. RP 34, 49. He did not look at the paperwork closely and did not seize it.[2] RP 24-49. Officer Treichel confronted Mr. Reid and Landis about the baggie. RP 79. Mr. Reid had never seen the baggie before. He had no idea where it came from. RP 79, 80, 81.

Mr. Reid did not appear to be under the influence of any illicit substances. RP 45.

[2] No paperwork was admitted as evidence.

Cowlitz County Sherriff's Deputy Derek Baker responded to the call of suspected drugs found in the jail. RP 53. He spoke with Officer Treichel. RP 35, 53. Treichel did not hand him anything. RP 53. It was a booking officer who handed Deputy Baker "the drugs that were found in the jail." RP 35, 53-54. The booking officer was never identified. RP 24-57. In contrast to Officer Treichel's description of the baggie, Deputy Baker described the item he received from the booking officer as a small Ziploc baggie "wrapped with electrical tape with another pharmaceutical – a known pharmaceutical wrapping that was opened attached to it as well." RP 54.

Deputy Baker packaged the baggie he received from the booking officer and put it into evidence at the sheriff's office. RP 56. That baggie was admitted over objection at trial as Exhibit 1. RP 63-64. Mr. Reid challenged the admission arguing no adequate chain of custody had been established. RP 63-64. Officer Treichel never identified Exhibit 1 as the baggie he found in the cell shared by Mr. Reid and Landis. RP 24-49, 64.

Washington State Patrol forensic scientist John Dunn tested Exhibit 1 and determined its contents contained methamphetamine. RP 58, 66.

Mr. Reid was the sole defense witness at trial. RP 72-83. He did not know where the baggie came from. He had not seen it. RP 80. He had

never possessed it. RP 80. Mr. Reid had done nothing to prevent Landis from accessing or using the bucket that originally stored Reid's linens. RP 74-76. Reid had not put any papers with his name on it in a jail bucket. RP 75. Reid had no jail papers. RP 75.

Defense counsel requested the jury be instructed on the affirmative defense of unwitting possession. RP 84. The court instructed the jury as follows:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

RP 96-96; Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 10 (sub. nom. 19).

Consistent with Mr. Reid's testimony, defense counsel argued in closing that Mr. Reid never possessed the baggie. RP 105-13.

The State argued the giving of the unwitting possession instruction meant Mr. Reid conceded possession of the baggie. RP 114.

The jury found Mr. Reid guilty of possession of methamphetamine[3] and, under a special verdict, that the possession occurred in a county jail.[4] CP 3, 4.

The court[5] imposed a 12 months plus 1 day standard range sentence and added an additional 12 months for the county jail enhancement. CP 11; RP 130.

Mr. Reid appeals all portions of his Judgment and Sentence. CP 19.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EXHIBIT 1 BECAUSE THE STATE FAILED TO ESTABLISH A SUFFICIENT CHAIN OF CUSTODY.

The description of the baggie found in cell F10 by Officer Treichel is markedly different than the description of the baggie provided to Deputy Baker by an unnamed detention officer. As no one identified the baggie as the baggie found in F10, the trial court abused its discretion in admitting Exhibit 1 as the purported baggie from F10. Mr. Reid is entitled to dismissal of his possession conviction.

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[3] RCW 69.50.4013(1)
[4] RCW 9.94A.533(5)(a)
[5] Judge Warning heard Mr. Reid's sentencing.

a. A sufficient chain of custody must be established before a court may admit drugs into evidence.

To be admissible, physical evidence of a crime must be sufficiently identified and demonstrated to be in substantially the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Factors to be considered include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. *Id.* On appeal, a trial court's decision to admit evidence is reviewed for abuse of discretion. *Id.*

Drug evidence, which is not readily identifiable and is susceptible to alteration by tampering or contamination, should be identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). The proponent of the evidence must "establish a chain of custody 'with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.'" *Id.* (quoting *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989)).

b. The State did not establish a sufficient chain of custody for Exhibit 1.

The State failed to make a sufficient showing that Exhibit 1 was the baggie found by Officer Treichel in the jail cell. The evidence did not

establish that Officer Treichel properly tracked the baggie between the time he found it and the time Deputy Baker collected it from an unnamed jail booking officer. Officer Treichel described the baggie he found merely as a two inch by two inch square. RP 34, 47. Deputy Baker described a different item. The item he received from a booking officer was a small Ziploc baggie wrapped in electrical tape with pharmaceutical wrapping attached to it. RP 54.

Officer Treichel never explained who handled the baggie between the time he found it and the time it made its way to an unnamed booking officer. RP 24-49. Officer Treichel did explain that all sorts of contraband made its way into the jail without ever being detected. RP 26. Inmates are searched during booking. RP 73. If contraband such as a baggie of drugs is found on a person during booking, the booking officer would presumably have immediate access to it. No one testified how a booking officer would handle a baggie of drugs removed from a newly booked offender and how it would be kept separate from a similar baggie removed from an inmate's property.

Officer Treichel was never asked during his testimony to identify Exhibit 1 even though the prosecutor had Exhibit 1 in the courtroom when questioning Treichel. RP 110. Thus, the State failed to "establish a chain of custody with sufficient completeness to render it improbable that the

original item had either been exchanged with another or been contaminated or tampered with." *Roche*, 114 Wn. App. at 436.

c. Without Exhibit 1, the evidence is insufficient to convict Mr. Reid of possession of methamphetamine and the conviction must be reversed.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id*. U.S. Const Amend. 14; Wash. Const. Art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To find Mr. Reid guilty as charged, the State had to prove beyond a reasonable doubt that on or about November 9, 2013, Mr. Reid possessed methamphetamine. CP 1; Supp. DCP, Court's Instructions to

the Jury, Instruction 9; RCW 69.50.4013; *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Absent Exhibit 1, there is no evidence Mr. Reid possessed methamphetamine. Therefore, the State failed to meet its burden. Reversal and dismissal of the prosecution is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. DEFENSE COUNSEL PROPOSING AN UNWITTING POSSESSION JURY INSTRUCTION CONTRARY TO MR. REID'S DEFENSE OF DENIAL OF POSSESSION CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

a. Mr. Reid had the constitutionally protected right to the effective assistance of counsel.

A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. Amend VI;[6] Const. Art. I, § 22;[7] *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and

[6] The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense."
[7] Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel…."

knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of a person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is not legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance

remains simply reasonableness under prevailing professional norms"), *quoting Strickland*, 466 U.S. at 688. While an attorney's decisions are treated with deference, his or her actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

As to the second prong (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas,* 109 Wn.2d at 226.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law [and is] reviewed de novo." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

b. Mr. Reid's trial counsel rendered ineffective assistance of counsel by offering a jury instruction on unwitting possession.

Mr. Reid's testimony at trial was that he neither possessed the ubiquitous jail bucket nor the baggie found in the bucket. RP 72-82. In closing argument, trial counsel reiterated Mr. Reid's trial testimony. RP 105-113. This contrasted with the State's theory that each inmate had

dominion and control over a specific bucket and could exclude their cellmate and other inmates from the bucket. RP 103, 116.

In order to convict a defendant of possession of a controlled substance, the State must prove that the person possessed a controlled substance and, specifically, what the substance was. RCW 69.50.4013. Knowledge is not an element of the crime of possession of a controlled substance. *State v. Bradshaw*, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004), *cert. denied*, 544 U.S. 922 (2005). Washington has adopted the affirmative defense of unwitting possession in drug possession cases in order to ameliorate the harshness of a strict liability offense. *Bradsaw*, 152 Wn.2d at 538; *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994); *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006 (1982). Because unwitting possession is an affirmative defense, it falls on the defendant to prove the possession is unwitting possession. *Cleppe*, 96 Wn.2d at 381; *State v. Michael*, 160 Wn. App. 522, 527, 247 P.3d 842, *review denied*, 172 Wn.2d 1015 (2011). If the defendant affirmatively established that "his 'possession' was unwitting, then he had no possession on which the law will convict." *Cleppe*, 96 Wn.2d at 381.

It was not objectively reasonable for defense counsel to propose an unwitting possession instruction: it was not Mr. Reid's defense. Defense

counsel argued in closing only that Mr. Reid never possessed a baggie and more specifically did not possess either of the ubiquitous jail buckets or anything in the buckets. RP 109-10. Defense counsel never gave the jury any context to help them apply the unwitting possession instruction because there was no applicable context. What the instruction did was leave Mr. Reid inexcusably vulnerable to the prosecutor's excoriating rebuttal closing argument telling the jury the unwitting possession instruction meant Mr. Reid conceded possession of the baggie.

> PROSECUTOR: His argument, *as you've been instructed*, also includes this idea that he didn't know it was there. He didn't know it was there: unwitting possession. Well, when you have an unwitting possession case, *the place that you start with is he agrees he was in possession of that bag*, because the Defense says he was in possession, he simply didn't know he was in possession. *So he's essentially agreeing that that bag was in his possession.* In order to do that, he would have to agree that the bag was in his bin, with his stuff, underneath his bed. But he also refutes that fact. He refutes the fact of where the bin was located, what was in the bin, where the location of Mr. Landis was, the location of Mr. Landis' bin, he refutes all of that. But he also argues, "I didn't know that I was in possession of it." You have two competing arguments here, both of which you're supposed to consider. Both of which you are supposed to consider what supports it. All you have to this man saying it must have been somebody else, it must have been this way, it must have been that way. It could have been this way, it could have been that way. That's what he's asking you to believe.

RP 114-15 (emphasis added).

Jurors are told the law requires each instruction be given equal import. "The order of these instructions has no significance as to their

relative importance. They are all important." Supp. DCP, Court's Instructions to the Jury, Instruction 1. By proposing the unwitting possession instruction, defense counsel told the jury the instruction was needed to resolve the issues in the case. But given the defense theory of the case, the instruction was irrelevant. Proposing the affirmative defense instruction was an unreasonable trial tactic.

c. Mr. Reid suffered prejudice from counsel's deficient performance.

Trial counsel's deficient performance alone "does not warrant setting aside the judgment...if the error had no effect on the judgment. " *Strickland*, 466 U.S. at 691. In order to establish prejudice, Mr. Reid "must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The defendant is not required to establish his innocence or even demonstrate "that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693.

In order to establish prejudice, Mr. Reid need only show that had his attorney not proposed an unwitting possession instruction, there was a reasonable probability that the jury's verdict would have been different.

Strickland, 466 U.S. at 693. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

From a jury perspective, the only explanation of the unrebutted unwitting possession instruction was that it meant Mr. Reid conceded possession. RP 114-15. Up to that point in the case, who possessed the baggie was a legitimate question. There were two inmates. Linens and greens swap out was always on Saturdays in F unit. Mr. Reid and Landis did not get along. Nothing prevented Landis from scribbling Mr. Reid's name on some papers and putting the papers and the baggie in the ubiquitous jail bucket closest to Mr. Reid. The papers with Mr. Reid's name on them were not seized or investigated. Landis had no incentive to get himself in trouble for having drugs in the jail. He did have incentive to make sure Me, Reid was blamed for the drugs.

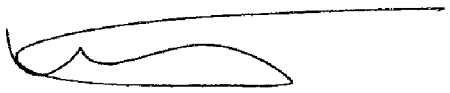
Defense counsel's proposal of the unwitting possession instruction undermined confidence in the verdict. Counsel was ineffective for proposing it. This Court should reverse Mr. Reid's conviction for possession of methamphetamine.

E. CONCLUSION

Mr. Reid's conviction for possession of methamphetamine in a county jail should be reversed and dismissed with prejudice.

Alternatively, defense counsel's request for the erroneous unwitting possession instruction denied Mr. Reid effective assistance of counsel. As such, Mr. Reid's conviction should be reversed and remanded for retrial.

Respectfully submitted this 6th day of November 2014.



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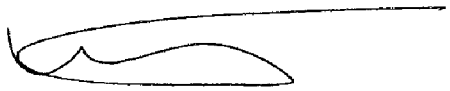
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief with: (1) Susan I. Baur, Cowlitz County Prosecutor's Office, at baurs@co.cowlitz.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Daryl Clay Reid/DOC# 909217, Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 6, 2014, in Longview, Washington.



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