NO. 31736-6-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

FILED
December 11, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Appellant,

vs.

ISAAC BARAJAS

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 3

I. RESPONDENT DID NOT UNEQUIVOCALLY INVOKE HIS RIGHT TO REMAIN SILENT 3

II. THERE IS NO EVIDENCE THE OFFICERS OVERBORE RESPONDENT'S WILL 5

III. THE TRIAL COURT'S RULING IGNORES BRIGHT-LINE RULES FAVORED BY THE SUPREME COURT OF THE UNITED STATES 7

IV. THE TRIAL COURT'S RULING MISREADS NON-PRECEDENTIAL CASE LAW 10

E. CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Berghuis v. Thompkins, 560 U.S. 370, 381-382 (2010) 4, 8, 9

Boyd v. State, 726 S.E.2d 746, 748, 749 (Ga. 2012) 16

Commonwealth v. Clarke, 960 N.E. 2d 306,
310, 311 (2012) 11, 17

Davis v. United States, 512 U.S. 452, 461 (1994) 4, 8

Dutil v. State, 93 Wn.2d 84, 90, 91-93
606 P.2d 269, 273 (1980) 5, 17

In re H.L.R., 269 Cal.App. 610, 75 Cal.Rptr. 308 (1969) 6

Miranda v. Arizona, 384 U.S. 436, 476 (1966) 6

New York v. Belton, 453 U.S. 454, 458 (1981) 7

Norris v. Georgia, 651 S.E.2d 40, 42 (2007) 17

People v. Brown, 496 N.E.2d 1020, 1021 (Ill. 1986) 14, 15, 16

People v. Calhoun, 889 N.E. 2d 795, 797, 799,
801, 802 (Ill 2008) 13, 14

People v. Crane, 585 N.E. 2d 99, 101, 103, 104 (1991) 12, 13, 14

People v. Ferran, 591 P.2d 1013, 1014 (Colo. 1978) 18

State v. Cushing, 68 Wn.App. 388, 392,
842 P.2d 1035, 1037 (1993) 5

State v. Furman, 122 Wn.2d 440, 450,
858 P.2d 1092, 1099 (1993) 6

TABLE OF AUTHORITIES CONTINUED

State v. Gasteazoro-Paniagua, 173 Wn.App. 751, 756-57, 294 P.3d 857, 860, (2013) 4

State v. Hodges, 118 Wn.App. 668, 673, 77 P.3d 375, 377 (2003) 4, 17

State v. Linares, 75 Wn.App. 404, 409, 880 P.2d 550, 554 (1994) 17

State v. Piatnitsky, 170 Wn.App. 195, 214, 282 P.3d 1184, 1193 (2012) (review granted in part, 176 Wn.2d 1022, 299 P.3d 1171 (2013)). 10

State v. Radcliffe, 139 Wn.App. 214, 220, 159 P.3d 486, 489 (2007) 4

State v. Ralios, 783 N.W. 647 (2010) 10

State v. Rhoades, 809 P 2d 455 (1991) 13

United States v. Basher, 629 F.3d 1161, 1168 (9th Cir. 2011) 10

OTHER AUTHORITIES

B. Cardozo, The Nature of the Judicial Process, Yale University Press 141 (1921) 7

Jacob D. Briggs, Gonzales-Lopez and Its Bright-Line Rule: Result of Broad Judicial Philosophy or Context-Specific Principles? 2007 BYU L. Rev. 531, 531 (2007) 7

A. ASSIGNMENT OF ERROR

Because Respondent never unequivocally invoked his right to remain silent nor requested counsel, the trial court abused its discretion by suppressing Respondent's confession on untenable grounds, namely that its reasoning is counter to the weight of case law.

B. ISSUE

The trial court suppressed Respondent's confession, finding Respondent's shaking his head to be unequivocal. Its reasoning was that in other jurisdictions, appellate courts have affirmed convictions in cases in which appellant indicated understanding his or her rights by nodding his or her head, where appellate counsel argued nodding one's head is an equivocation. Was it an abuse of discretion to suppress a confession based upon non-precedential case law that was not on point with this case?

C. STATEMENT OF THE CASE

On November 27, 2012, Officers Raymond Aparicio and Ryan Flanagan of the Pasco Police Department contacted Isaac Barajas. (RP 17, 18.) Officer Aparicio spoke with Mr. Barajas first. (RP 6.) Officer Aparicio advised Mr. Barajas of his rights under Miranda. (RP 7.) Mr. Barajas indicated he understood those rights by either

nodding his head, (RP 24), or by stating that he did, (RP 10.) Officer Aparicio asked Mr. Barajas if he wanted to talk to him. (RP 7.) Mr. Barajas did not speak; he looked away and slowly shook his head side to side. (RP 8, 19-20.)

The two officers left the interview room to discuss the situation (RP 8.) Officer Aparicio did not believe Mr. Barajas had invoked his right to remain silent and the interview could continue. Id. Officer Flanagan wanted to speak to Mr. Barajas about a different incident. (RP 20.) The officers agreed Mr. Barajas had not invoked his rights under Miranda. (RP 20.) The officers agreed that the officers could ask Mr. Barajas if he wanted to speak with Officer Flanagan. (RP 8, 20.)

The officers returned to the room. (RP 8, 13.) Officer Aparicio sat further from Mr. Barajas. (RP 9.) Officer Flanagan told Mr. Barajas he wished to talk to him about a different matter. (RP 21.) Mr. Barajas continued to look away; Officer Flanagan asked Mr. Barajas to look at him while they were talking so that he (Flanagan) could be sure Mr. Barajas understood what he was saying to him. (RP 25-26.) Mr. Barajas did so. Id. Officer Flanagan asked Mr. Barajas if he understood the rights Officer Aparicio read to him; Mr. Barajas stated he did. (RP 21-22.) Officer Flanagan and Mr. Barajas

then discussed the incident Officer Flanagan was investigating. (RP 22.) At no time during his interactions with the officers did Mr. Barajas request an attorney. (RP 14, 22.) At no time did Mr. Barajas verbally state that he did not wish to speak to either officer, nor did he give Officer Flanagan any indication he did not wish to speak to him. (RP 8, 15, 22.)

On February 14, 2013, the Franklin County Prosecutor's Office filed an Information in the Juvenile Division of the Superior Court alleging one count of Residential Burglary. (CP 13-14.) Mr. Barajas appeared and entered a plea of not guilty at arraignment on March 14, 2013. On June 11, 2013, a 3.5 hearing was held before the Honorable Bruce Spanner. Respondent did not testify. Judge Spanner suppressed the statement made to Officer Flanagan. Mr. Barajas' counsel moved to dismiss the case. (CP 5-6.) Appellant did not object because it believed it could not prove its case beyond a reasonable doubt without Mr. Barajas' confession. Id. Appellant filed a notice of appeal on June 18, 2013. (CP 3.)

D. ARGUMENT

I. RESPONDENT DID NOT UNEQUIVOCALLY INVOKE HIS RIGHT TO REMAIN SILENT.

The right to remain silent must be unequivocal. Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) (where defendant remained silent for nearly three hours and argued that was sufficient to establish he was invoking his right to remain silent). Contra State v. Hodges, 118 Wn.App. 668, 673, 77 P.3d 375, 377 (2003). Here, Respondent's turning away and silently shaking his head in response to Officer Aparicio was equivocal. State v. Radcliffe, 139 Wn.App. 214, 220, 159 P.3d 486, 489 (2007) aff'd, 164 Wn.2d 900, 194 P.3d 250 (2008) ("A request is equivocal if further questions are needed to determine if the suspect has made a request."). "Unequivocal means leaving no doubt, expressing only one meaning; expressing finality." State v. Gasteazoro-Paniagua, 173 Wn.App 751, 756-57, 294 P.3d 857, 860, (2013). Here, the officers stepped out of the room to confer. (RP 8.) The fact they needed to confer demonstrates Respondent's non-verbal communication *was* an equivocation.

Officers are not required to stop questioning to clarify an equivocation, but seeking clarification is the better practice. Davis v. United States, 512 U.S. 452, 461 (1994). Here, Officer Flanagan told Respondent he wished to speak to him about a separate incident. (RP 21.) Officer Flanagan reminded Respondent of the rights Officer

Aparicio read to him; Respondent responded verbally when asked if he remembered them. (RP 22.) At no time during this conversation did Respondent indicate he wanted to speak with an attorney or that he did not want to answer Officer Flanagan's questions. Id. Respondent made no unequivocal invocation of his right to remain silent. Id.

II. THERE IS NO EVIDENCE THE OFFICERS OVERBORE RESPONDENT'S WILL.

Even where a suspect waives his or her right to remain silent, the court's inquiry does not end; the court must consider the totality of the circumstances to ensure law enforcement did not extract the waiver by overbearing the individual's will. State v. Cushing, 68 Wn.App. 388, 392, 842 P.2d 1035, 1037 (1993). See Tennessee v. Benton, 759 S.W.2d 427, 432 (1988) ("No longer is physical mistreatment necessary to invalidate a confession. Subtler forms of coercion have appeared; they often seem just as effective as the roundly condemned tactics of yesteryear."). Custodial interrogation is inherently coercive; "[t]he purpose of the Miranda advice and warnings is to dispel some of that coercion." Dutil v. State, 93 Wn.2d 84, 90, 606 P.2d 269, 273 (1980). "In determining the voluntariness of a juvenile's confession, the court must consider the

totality of the circumstances, including the juvenile's age, experience, and capacity to understand the warnings given him." State v. Furman, 122 Wn.2d 440, 450, 858 P.2d 1092, 1099 (1993).

Respondent was fifteen years of age at the time of his interview. He had no known criminal history; this may well have been his first experience of being in police custody. Despite the potential discomfort of the situation, there is no evidence here Respondent's will was overborne. Although he was handcuffed while being transported to the police station, he was not in handcuffs while officers were speaking with him in the interview room. (RP 6, 18.) He did not appear to be under the influence of any intoxicants. (RP 7, 18); See In re H.L.R., 269 Cal.App. 610, 75 Cal.Rptr. 308 (1969) (confession suppressed because defendant was under the influence of drugs and hallucinating at the time of the interview). Officers remain seated throughout the interview. (RP 9, 20-21.) The police interviewed Respondent for approximately an hour. (RP 10.) Respondent was *not* detained for a lengthy period before making an incriminating statement. Miranda v. Arizona, 384 U.S. 436, 476 (1966) ("[T]he fact of a lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights.").

III. THE TRIAL COURT'S RULING IGNORES BRIGHT-LINE RULES FAVORED BY THE SUPREME COURT OF THE UNITED STATES.

"The judge, even when he is free, is still not wholly free. He is not free to innovate at pleasure." B. Cardozo, The Nature of the Judicial Process, Yale University Press 141 (1921). Here, the trial court's ruling is directly counter to precedent favoring bright-line rules and well outside the "discretion informed by tradition, methodized by analogy, and subordinated to the primordial necessity of order in the social life" of which Justice Cardozo wrote. Id. (interior quotation omitted).

The advantage of "bright-line" rules for law enforcement cannot be disputed. Jacob D. Briggs, Gonzales-Lopez and Its Bright-Line Rule: Result of Broad Judicial Philosophy or Context-Specific Principles? 2007 BYU L. Rev. 531, 531 (2007). This is perhaps best expressed by Justice Stewart in New York v. Belton:

> "A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field. In short, a single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."

453 U.S. 454, 458 (interior quotations and citations omitted) (1981). Indeed, the Supreme Court recognized that bright-line rules not only guide law enforcement, they assist the general public in knowing "the scope of his constitutional protection." 453 U.S. at 460. But strict adherence to a bright-line rule in the face of an ambiguity undermines the value of that rule:

> "The *Edwards* rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost."

Davis, 512 U.S. at 461.

As the State noted in its memorandum before the trial court, the Respondent's act of turning away and shaking his head could have communicated many things. (CP 11.) Given that this appears to have been Respondent's first experience as a suspect in a criminal matter, it could have communicated disbelief or discomfort. Viewing such an ambiguous act as an unequivocal invocation of one's right to remain silent is in direct conflict with the Supreme Court's reasoning in Berghuis:

> "There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoids difficulties of proof and ... provides guidance to officers on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guess wrong. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity. Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation. But as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process."

560 U.S. at 381-82 (interior citations and quotations omitted). Here, Officer Aparicio took the time to clarify whether his belief the interview did not need to cease was correct. (RP 8.) The officers even conferred with a detective to ensure they were not overstepping their bounds. (RP 12-13.) The trial court's ruling cannot be harmonized with Berghuis in that it places upon law enforcement the added burden of interpreting an ambiguous non-verbal communication, and then suppressed a voluntary confession, burdening "society's interest in prosecuting criminal activity." 560 U.S. at 382. This is precisely the

type of "unacceptable hindrance to law enforcement" requiring an *unequivocal* invocation avoids. State v. Piatnitsky, 170 Wn.App. 195, 214, 282 P.3d 1184, 1193 (2012) (review granted in part, 176 Wn.2d 1022, 299 P.3d 1171 (2013)).

IV. THE TRIAL COURT'S RULING MISREADS NON-PRECEDENTIAL CASE LAW.

The trial court based its decision upon its reading of cases from other jurisdictions in which appellate courts held nodding one's head is an unequivocal acknowledgment of one's rights. RP 37. While Appellant is not aware of the specific cases the trial court considered, its own review of national case law does not support the trial court's decision in this matter. But see United States v. Basher, 629 F.3d 1161, 1168 (9th Cir. 2011) ("head nods have been found to express consent.")

The supreme court of South Dakota rejected an appellant's contention nodding his head was an equivocation in State v. Ralios, 783 N.W. 647 (2010). But the head nod was not the central part of his argument. That defendant also argued his confession should have been suppressed because, "he did not speak English well enough to understand the advisement, was tired from his work schedule, and was sleep deprived at the time of the interview." Id. at 654. The

appellate court based its affirmation of the trial court's ruling on evidence the defendant spoke English well enough to give detailed information to the detectives. Id. at 656. While the decision references the "head nod," it does not appear to factor into that court's decision. Id.

In Commonwealth v. Clarke, the Massachusetts Supreme Court affirmed a lower court's suppression of the defendant's statements made after he shook his head in response to the detective's question, "So you don't want to speak?" 960 N.E.2d 306, 310 (2012). Clarke is distinguishable from this case because in that case the defendant also repeatedly told the detectives he did not wish to speak with them and he wanted to go home. 960 N.E.2d at 311. He did so *verbally*. Id. Although the detectives told that defendant nothing would happen to him if maintained his silence, the detectives also told him, "'nothing' does not exclude you still being charged and us detaining you here. You'll either be bailed, or you'll have to go to court in the morning to answer what you're being charged with. So it doesn't mean you'll get to walk up out of here and go home right now." 960 N.E.2d at 312. The record also showed that defendant appeared confused. Id. There is nothing in the record in this case to indicate the officers engaged in such conduct. Also, here, the

respondent made *no* verbal indications he wished to invoke his right to remain silent; in fact, his only verbalizations indicated he did understand his rights and he was willing to waive those rights.

In People v. Crane, the Illinois Supreme Court rejected that defendant's assertion his in-custody statements were improperly admitted. 585 N.E.2d 99 (1991). In Crane, the detectives testified they asked the defendant if he understood each right individually; he gave no response. 585 N.E. at 101. Once he read all the rights, the detective asked the defendant if he understood them; he nodded his head. Id. When asked if he wished to speak to the detectives, the defendant against nodded his head. Id. But when asked about the circumstances of the victim's death, that defendant gave no response whatsoever. Id. After being shown a photograph of the murder victim's bludgeoned and burned body and hearing what the detectives had been told by others about the defendant's role in the murder, the defendant sat silently for several minutes. Id. One of the detectives told the defendant, "to tell them if he did want to talk in order to save everyone time." Id. After a brief pause, the defendant gave a statement. Id. The defendant in Crane also testified at his suppression hearing; his version of events is notably different than the detectives'. Id.

While it is true the Crane court held defendant's head nod was "evidence [he] knowingly and voluntarily waived his right to remain silent[,]" his non-verbal communication was not the basis for his argument in support of suppression. Id. at 103-04. That defendant testified that while one detective was reading his rights, the other showed him the photograph of the victim's body and said, "You burned him alive, you murdered him." Id. at 101. In his version of events, the defendant responded that he had not murdered anyone and he wanted a lawyer. Id. He refused to speak for an hour, but then gave a statement after being intimidated by one of the detectives. Id. Crane is inapposite to this case.

An Idaho case, State v. Rhoades, has some similarities to the case at bar. 809 P.2d 455 (1991). In Rhoades, the defendant was arrested in Nevada and interviewed by Idaho law enforcement officers. 809 P.2d at 461. Although that court notes the defendant nodded his head in response to being asked whether he understood his rights, Id. at 462, his nodding his head had nothing to do with the court's reasoning in affirming the trail court's admission of his statements, Id. at 463.

People v. Calhoun did reverse a trial court's suppression of an in-custody statement given after the defendant nodded his head to

indicate he understood his rights. 889 N.E.2d 795 (Ill. 2008). There, the trial court found, "there was no indication that defendant understood the *Miranda* warnings or that he expressly waived his rights." Id. at 799. In Calhoun, detectives first interviewed the defendant without advising him of his rights under Miranda because he was not under arrest. Id. at 797. After roughly fifteen to twenty minutes, a detective asked the defendant if he shook the baby; he replied, "A little." Id. Soon after, the detective advised the defendant of his rights, and the defendant made further incriminating statements. Id. The defendant testified he told the detectives what he believed they wanted to hear because he thought they wouldn't let him go until he did so. Id. at 799.

Calhoun is distinguishable because the trial court found there was no indication the defendant understood his rights under Miranda. Id. at 802. While Calhoun quotes Crane, supra, and another Illinois case holding a nodded head constitutes waiver of the right to remain silent, it does not appear the defendant in Calhoun argued the court should disregard his non-verbal communication with the detectives. Id. at 799-80, 801.

The other case mentioned in the paragraph above is People v. Brown, 496 N.E.2d 1020 (Ill. 1986). In Brown, the defendant was first

read his rights by local law enforcement at 10:15 a.m. and again at 10:30 a.m. after being arrested following a shootout in which the other suspect was shot. 496 N.E.2d at 1021. That defendant replied "I know my rights" and he declined to speak with officers; the officers left the defendant without questioning him. Id. At 11:15 a.m., two Federal Bureau of Investigation (FBI) agents read defendant his rights. Id. He again stated "I know my rights," and he refused to sign a waiver of rights form. Id. The FBI agents left the room. At 11:45 a.m., a detective from the local law enforcement agency read the defendant his rights under Miranda; this time the defendant nodded his head. Id. The detective asked the defendant why he'd been picked up; the defendant stated it was because of his past and that he did not know the other suspect. Id. When he was told the other suspect had died, the defendant began to cry; he then made a spontaneous incriminating statement. Id. The appellate court found law enforcement "scrupulously honored" that defendant's right to remain silent because both the arresting officers and the FBI agents did not speak with him after he indicated he would not waive his right to remain silent. Id. at 1022. The detective again read the defendant his rights; his nodding his head stood in stark contrast to his invocation of his rights earlier in the day. Id. While the Brown court

does not state such, it would appear that defendant clearly understood his rights and knew how to invoke them. His nodding his head in response to the detective should be viewed in light of that knowledge, and his incriminating statement was not made in response to questioning from law enforcement. Brown does not support the trial court's reasoning in the case at bar.

Again looking outside of Washington, there is a case in which an appellate court rejected the notion that a nodding head was sufficient to indicate the defendant understood his rights. Boyd v. State, 726 S.E.2d 746 (Ga. 2012). In Boyd, the appellate court held the custodial statement made by a 15-year old criminal suspect should have been suppressed. Id. at 748. The appellate court found the officer's recitation of the defendant's rights "were unnecessarily read in a way that might have confused an adult, much less a 15-year-old being interviewed at 2:30 a.m." Id. at 749. When asked if he understood his rights, the defendant "gave a slight nod of his head." Id. The court noted that prior to this point, the defendant spoke his answers. Id. While the decision repeatedly mentions the slightness of defendant's head nods or shakes, it also noted the interviewer did not "ask him if he wanted to wait until his father had been reached before proceeding with the interview." Id. In Georgia, "[a] parent's presence,

although not required, is a significant factor in support of finding of waiver." Norris v. Georgia, 651 S.E.2d 40, 42 (2007). Washington requires the presence of a parent or guardian for a waiver to be effective *only* when the child is under the age of twelve. Dutil, 93 Wn.2d at 91-93, 606 P.2d at 273-74. Appellant is unaware of any Washington case discussing the presence of a parent in manner the Georgia Supreme Court relied upon this factor in Norris. See State v. Linares, 75 Wn.App. 404, 409, 880 P.2d 550, 554 (1994) ("[A] juvenile is entitled to the same privilege against self-incriminations as an adult, not to more extensive protection of his or her Fifth Amendment rights.") (interior quotations and emphasis removed).

What the case at bar - and all the cases in this section - hinge upon is the court's interpretation of an individual's non-verbal communication. Here, while Respondent initially shook his head as if to indicate "No," upon clarification, he agreed to speak with Officer Flanagan. (RP 21-22.) This is in direct contrast to Clarke, where the defendant repeatedly expressed that he did not wish to speak with officers, 960 N.E.2d at 311, or Hodges, where the defendant sat mute for an extended period of time, 118 Wn.App. at 673. "[W]here[] the defendant's conduct clearly demonstrates his intention to waive his constitutional rights, that waiver may be accomplished by nonverbal

communication. In law, as in life generally, there are cases where actions speak louder than words, and this, in our opinion, is such a case." People v. Ferran, 591 P.2d 1013, 1014 (Colo. 1978). Here, Respondent's conduct clearly indicated he was aware of his rights and he waived them. Given that the officers did not overbear Respondent's will, his decision to speak with them after they sought clarification when confronted with a head shake was voluntary, intelligent and knowing.

E. CONCLUSION

Respondent's turning away and shaking his head when asked "Do you want to talk to me?" was an equivocation. Officers Aparicio and Flanagan did exactly what the weight of case law expects them to do: they asked no incriminating questions until they clarified what Respondent was attempting to communicate. After confirming he understood his rights, Respondent waived them and agreed to speak with Officer Flanagan. The officers did not engage in trickery or deception, nor did their actions overbear Respondent's will. Because Respondent's confession was the result of a voluntary, knowing, and intelligent waiver of his rights under

Miranda, Appellant respectfully requests this court reverse the trial court's suppression of Respondent's statement to law enforcement.

Dated this 11th day of December, 2013.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that on the 11th day of December, 2013, a copy of the foregoing was delivered to Isaac Barajas, Respondent, 231 South Owen, Pasco WA 99301 and to

Daniel Stovern, opposing counsel, 1030 North Center Parkway, Kennewick WA 99336 by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Signed and sworn to before me this 11th day of December, 2013.

Notary Public in and for
the State of Washington,
residing at Kennewick
My appointment expires:
May 19, 2014

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