

NO. 31832-0-III

FILED  
July 16, 2014  
Court of Appeals  
Division III  
State of Washington

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HEATH T. WISDOM,

Appellant.

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	ii-iii
I. <u>ASSIGNMENTS OF ERROR</u> .....	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u> .....	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u> .....	1
II. <u>STATEMENT OF THE CASE</u> .....	1
III. <u>ARGUMENT</u> .....	1
RESPONSE TO ALLEGATION ONE .....	1
IV. <u>CONCLUSION</u> .....	17

TABLE OF AUTHORITIES

PAGE

**Cases**

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992) ..... 2

In re Marriage of Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003)..... 3

Nast v. Michaels, 107 Wn.2d 300, 730 P.2d 54 (1986)..... 3, 6

Simpson v. Thorslund, 151 Wn.App. 276, 211 P.3d 469 (2009)..... 15

State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010) ..... 5, 6

State v. Bales, 15 Wn.App. 834, 552 P.2d 688 (1976), review denied, 89 Wn.2d 1003 (1977)..... 13

State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997)..... 3

State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) ..... 5, 6

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 15

State v. Dugan, 109 Wn.App. 599, 36 P.3d 1103 (2001) ..... 3

State v. Dugas, 109 Wn.App. 592, 36 P.3d 577 (2001)..... 3,4,6,10,13,14

State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005)..... 2

State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974) ..... 12

State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012) ..... 3

State v. Hardman, 17 Wn.App. 910, 567 P.2d 238 (1977), review denied, 89 Wn.2d 1020 (1978)..... 13

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)..... 2

State v. Houser, 95 Wn.2d 761, 622 P.2d 1218 (1980) ..... 12, 13

TABLE OF AUTHORITIES (continued)

	PAGE
<u>State v. Robertson</u> , 88 Wn.App. 836, 947 P.2d 765 (1997) review denied, 135 Wn.2d 1004, 959 P.2d 127 (1998) .....	2
<u>State v. Ross</u> , 106 Wn.App. 876, 26 P.3d 298 (2001), review denied, 145 Wn.2d 1016 (2002).....	2
<u>State v. Singleton</u> , 9 Wn.App. 327, 511 P.2d 1396 (1973).....	13
<u>State v. Simpson</u> , 95 Wn.2d 170, 662 P.2d 1199 (1980).....	7, 12, 13
<u>State v. Smith</u> , 76 Wn.App. 9, 882 P.2d 190 (1994) .....	3,4,6,11,12
<u>State v. Valdez</u> , 167 Wn.2d 761, 224 P.3d 751 (2009).....	2
<u>State v. Welker</u> , 37 Wn.App. 628, 683 P.2d 1110 (1984) .....	17
<u>Sweeten v. Kauzlarich</u> , 38 Wn.App.163, 684 P.2d 789 (1984).....	2
<b>Federal Cases</b>	
<u>Arizona v. Gant</u> , 556 U.S. 332, 129 S.Ct.1710, 173 L.Ed.2d 485 (2009) .....	4, 6
<b>Rules and Statutes</b>	
CrR 3.6 .....	16
RAP 10.3(b) .....	1
RCW 46.55.113 .....	7

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes two assignments of error. These can be summarized as follows;

Assignments of Error

1. The court erred when it denied Wisdom's motion to suppress evidence found in the stolen car he was driving at the time of his arrest?
2. Did Wisdom have an expectation of privacy in the bag found in the stolen vehicle that he was driving even after he admitted to the possession of drugs in that same stolen vehicle?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court did not err when it denied the motion to dismiss.
2. Appellant did not have an expectation of privacy in the bag located in the stolen automobile he was driving at the time of his arrest.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

RESPONSE TO ALLEGATION ONE

Wisdom objected to the findings in the trial court but has not challenged the findings or conclusions in his appeal, therefore this court will review the trial court's findings of fact in a suppression hearing for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016 (2002). Unchallenged findings are verities on appeal. State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009) (citing State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005)). The court will review questions of law de novo. Valdez, 167 Wn.2d at 767; unchallenged findings of fact are verities on appeal” Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

See also, Sweeten v. Kauzlarich, 38 Wn. App. 163, 169, 684 P.2d 789 (1984) oral opinion does not become final unless or until it is incorporated in written findings of fact and conclusions of law; oral decision can be used to explain but not to impeach written findings and conclusions. This court may also look to the oral rulings of the court if it were to find the trial court's written findings incomplete or inadequate; this court can look to the trial court's oral findings to aid our review. State v. Robertson, 88 Wn.App. 836, 843, 947 P.2d 765 (1997), *review denied*, 135 Wn.2d 1004, 959 P.2d 127 (1998).

State v. Gresham, 173 Wn.2d 405,419, 269 P.3d 207 (2012). We may affirm the trial court on any correct ground, Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); “This court may affirm a lower court's ruling on any grounds adequately supported in the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003); Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) ” [A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.”

In its written ruling the court states that it would appear some of the cases cited by the parties have “tacitly” overruled prior decisions this is not an accurate recitation of the law. A ruling by a court in a case cannot “tacitly” overrule prior decisions. State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997) “Stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. Lucky, 128 Wn.2d at 735.” The trial court indicated that it “unable to reconcile State v. Smith, 76 Wn. App. 9, 882 P.2d 190 (1994)...with State v. Dugan, 109 Wn. App. 599, 36 P.3d 1103 (2001) CP 86.” However, Smith has been cited in numerous cases, none of those cases overruled that decision. The trial court did not have the legal ability to determine that one court of appeals case “tacitly” overruled another courts earlier decision. The fact that Smith has not been “tacitly overruled” by Dugas is demonstrated by

the fact that the court in Dugas cites to Smith, see footnote 10 at page 997 of Dugas.

In Appellant's section "a" he argues that the search would violate Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) the State did not argue this to the trial court as a search incident to arrest. CP 15-20, 84-88. However it would appear that even given the edicts of Gant this search would have been valid. Dep. Boyer stopped the truck driven by Appellant for the felony of possession of a stolen automobile, not some minor infraction. The law allows the officer to impound and inventory a vehicle that has been seized based on that crime. Therefore the search would not have exceeded that scope of a search allowed by the ruling in Gant. Deputy Boyer testified that he took photographs of both the exterior and the interior and the contents because that can be determinative of proving whether that person in control of the car at the time of the stop should have known that the car was stolen. It is clear that this information was needed in this case to rebut Wisdom's own statement that he "bought" the truck and the ATV for a value significantly less than retail value. In Arizona v. Gant, the Court said that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or **it is reasonable to believe the vehicle contains evidence of the**

**offense of arrest.**" *Id.* at 1723. (Emphasis mine.) The Washington State Supreme Court in State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010) citing State v. Buelna Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009) stated, “[i]n Buelna Valdez, a decision handed down shortly after Patton, we reiterated that a warrantless search of an automobile is permissible under the search incident to arrest exception only "when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest." Buelna Valdez, 167 Wn.2d at 777, 224 P.3d 751. (Emphasis mine.)

Dep. Boyer testified the one of the facets of his job was to “investigate auto theft. And regularly do that.” (RP 3) This is confirmed by the fact that his car was fitted with “an automated license plate reader system” that notified him that truck driven by Wisdom had been reported as stolen. Dep. Boyer confirmed that the license plate and the vehicle were in fact stolen from NCIC WSC.” (RP 4) Dep. Boyer than states “Based on my training and experience, any time I’m investigation an auto theft case the conditions of the vehicle, the different, the appearance of the vehicle , is all key information. Which leads to the reasonableness of a person knowing or not know if the vehicle was stolen.” (RP 6-7) The deputy called a tow truck and further explained “The vehicle was a stolen motor vehicle. Which is, by procedure, would be impounded to the tow

yard. And after that had taken place it would be then released to the rightful owner of the vehicle.” RP 7

The actions of Dep. Boyer fall within the requirements of Gant and Patton Buelna Valdez and Afana.

The State did not address this theory at the trial court level but as stated in Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) " [A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.”

A review of “impound inventory” cases indicates these cases are very fact specific. Obviously the general standard applies throughout however each case is unique in that the items that are being impounded and inventoried are different and distinct. This can be seen in State v. Dugas, 109 Wn.App. 592, 36 P.3d 577 (2001)<sup>1</sup> the case the trial court considered as having “tacitly overruled” Smith. Dugas addresses the impound inventory of a coat taken off by the owner and laid to the side a small container was found in that coat during the “impound inventory.” Cases such as Wisdom’s and Smith address fact patterns that involve vehicles and the complexity that arises from fact patterns such as this where there is a defendant, at night, in a public location, with a stolen

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<sup>1</sup> It should be noted that the State is assuming that the above cited case is the case relied upon by the trial court. In the findings and conclusion the court cites this case as State v. Dugan, 109 Wn. App. 599, 36 P.3d 1103 (2001) there is no such case. However trial counsel for appellant did cite to State v. Dugas, supra, at CP 32)

vehicle that cannot be secured and is going to be towed by a private towing company, all the while containing a package with a very large amount of cash observable from outside the truck and with the officer being informed that there is allegedly also a substantial amount of extremely dangerous substance, methamphetamine, within this unsecured truck. There is no comparison to a person's coat and a small container within.

The State asserted in the trial court that this was an inventory search as authorized by State v. Simpson, *infra*, and RCW 46.55.113, this assertion was supported by the testimony of Dep. Boyer. RCW 46.55.113 is titled "Removal by police officer – Definition" and sets forth several legal bases for impoundment of an car. Those include:

(2) In addition, a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances:

(d) Whenever the driver of a vehicle is arrested and taken into custody by a police officer;

(e) Whenever a police officer discovers a vehicle that the officer determines to be a stolen vehicle;

There is no doubt from his testimony that the deputy was not conducting some sort of drug search under the guise of an impound inventory. He had identified that the vehicle driven by Wisdom was stolen, (RP 4) the ignition had been taken out and Wisdom admitted that

he had “purchased” the vehicle and the ATV in the back, for far less than it was worth. (RP 5-6) The totality of the deputy’s testimony demonstrates that although he had been informed by Appellant that there were narcotics in the truck he was proceeding with his investigation based on the confirmed crime, possession of a motor vehicle. (RP 6-7) The officer took pictures of the vehicle and called for a tow truck. The reason for the pictures was to aid the investigation regarding the possession of the stolen vehicle, “Based on my training and experience, any time I’m investigating an auto theft case the conditions of the vehicle, the different, the appearance of the vehicle, is all key information. Which leads to the reasonableness of a person knowing or not knowing if the vehicle was stolen.” (RP 6-7) In response to questions from the State regarding the reason for calling a tow truck the deputy testified “The vehicle was a stolen motor vehicle. Which is, by procedure, would be impounded to the tow yard. And after that had then taken place it would be then released to the rightful owner of the vehicle.” (RP 7) The deputy testified that regarding if the actual owner was present or located “No, he was not. And we were unable to make arrangements for that person to come and retrieve the vehicle.” (RP 7) Regarding the condition of the truck Boyer testified he “Noted that the steering column was punched. The rims were attached, or the wheels, the rims were attached to the vehicle. Missing

lug nuts. There were not the standard number of lug nuts on the vehicle. Holding the tires onto the vehicle. Which is an indicator to me that the wheels had probably been changed....It's a common occurrence in auto theft type crimes." (RP 7)

When queried about his continued actions inside the truck Dep. Boyer and the Deputy Prosecuting attorney had the following exchange;

**Boyer:** I took custody of a black bag. Which was seated on the passenger side of the vehicle.

**Foster:** Why

**Boyer:** It obviously contained a large amount of money. Which was clearly visible from the outside of the vehicle looking in. And Mr. Wisdom had previously stated that there was a large amount of methamphetamine in the vehicle."

**Foster:** ...What was your purpose for seizing that black bag?

**Boyer:** It appeared to be an item of high value. Which anytime there is something of high value it's never left in an impound vehicle. It's place into property and then claimed by the rightful owner. If it is to... and it also appeared to be a narcotic sales type bag. Which contained a large amount of drugs.

**Foster:** Is this any different from a regular inventory search?

**Boyer:** No, it is not.

(RP 8-9)

Further, a fact that has not been addressed to any real extent was that in the back of this truck was a stolen ATV. The arrest occurred at night in a public parking lot, there were no keys for the truck, the true owner was not able to retrieve that truck, there was a bag on the seat that through open view the deputy could see contained an large amount of currency (something that defendant had not stated when he made his the

drugs are on the seat statement) and the truck and ATV were located at the time of the stop in a convenience store parking lot. As stated in Dugas,

Opening a closed container found in the jacket was not a step necessary or reasonable to guard against a false property loss claim. The officers testified that their standard procedure for an inventory search included a search for illegal drugs, a purpose outside the scope of a valid inventory search.

Balancing the legitimate needs of the police against the right to be free of warrantless intrusions into ones personal effects, we conclude that it was unreasonable to search inside the closed container.

The testimony of the deputy covers twenty-five pages. During the deputies testimony the deputy was unshakeable regarding the reason and nature of this search and that he was only conducting an impound inventory. While there is no doubt that he was told by the defendant that there was a large amount of drugs on the seat his testimony is unrefuted and he was not tripped up by defense counsel who attempted to get the deputy to “admit” that his intent was more than just an inventory;

CAHN: Ok. When you opened that black bag you were looking for methamphetamine. Correct?

BOYER: I was looking for the contents of the bag to document what I had seized.

CAHN: OK. Which you believed would've contained the methamphetamine my client allegedly described to you Correct?

BOYER: There was a good chance that's was it was. I knew it contained a large amount of money. Which I had to document. And obviously it had a compartment which could've contained any other number of things.

CAHN: OK.

BOYER: Which I would document when taking that property.  
(RP 15)

It would be absurd to think that the courts would mandate that the officer leave a bag of cash and perhaps drugs sitting on the seat of a stolen truck, with no key, with a stolen ATV in the back, at night, in the public parking lot of a convenience store. That is not the law in this state. One can only imagine the lawsuit that would arise when the “owner” of the cash or the real owner of the truck and ATV arrived at the parking lot later only to find this truck and ATV stolen again. The same would be true if the bag of money was left on the seat in plain sight and same is true regarding the negligence claim and liability to the deputy and the county for the failure to uphold the community care taking responsibility when the drugs were found and ingested by some “innocent” third party can only be imagined.

As State v. Smith, 76 Wn.App. 9, 13, 882 P.2d 190 (1994) so accurately stated:

The inventory search is a recognized exception because, unlike a probable cause search and a search incident to arrest, the purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function. The often-cited reasons justifying the inventory search are to protect the arrestee's property from unauthorized interference while he is in jail; to protect the police from groundless claims that property has not been adequately safeguarded

during detention; and to avert any danger to police or others that may have been posed by the property. Knowledge of the precise nature of the property protects against claims of theft, vandalism, or negligence. Colorado v. Bertine, supra at 373, 107 S.Ct. at 742; State v. Garcia, 35 Wn.App. 174, 665 P.2d 1381, review denied, 100 Wn.2d 1019 (1983).

The court in Smith, Id at 18, citing “State v. Gluck, 83 Wn.2d 424, 428, 518 P.2d 703 (1974) notes that our cases have long recognized inventory searches as a practical necessity, but we have also insisted that they be conducted in good faith for the purposes of (1) finding, listing, and securing from loss during detention, property belonging to a detained person, (2) protecting police from liability due to dishonest claims of theft, and (3) protecting temporary storage bailees against false charges.” See also, State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980).

When a vehicle is impounded, an inventory pursuant to that impoundment is a recognized exception to the general rule requiring a warrant an inventory search pursuant to department policy may be conducted. The search must be reasonable and the impound must not be a pretext for an evidentiary search. Id.

A motor vehicle may be lawfully impounded in certain specific circumstances: (1) as evidence of a crime, if the officer has probable cause to believe that it was stolen or used in the commission of a felony, State v. Houser, 95 Wn.2d 761, at 149-50,622 P.2d 1218 (1980); (2) as part of the

police "community caretaking function," if the removal of the vehicle is necessary (in that it is abandoned, or impedes traffic, or poses a threat to public safety and convenience, or is itself threatened by vandalism or theft of its contents), and neither the defendant nor his spouse or friends are available to move the vehicle, Houser, at 150-52; State v. Hardman, 17 Wn. App. 910, 567 P.2d 238 (1977), review denied, 89 Wn.2d 1020 (1978); State v. Bales, 15 Wn. App. 834, 552 P.2d 688 (1976), review denied, 89 Wn.2d 1003 (1977); and (3) as part of the police function of enforcing traffic regulations, if the driver has committed one of the traffic offenses for which the legislature has specifically authorized impoundment. See State v. Singleton, 9 Wn. App. 327,332-33, 511 P.2d 1396 (1973); 2 W. LaFave, § 7.4(a).

Under Simpson, the impoundment was lawful pursuant to RCW 46.55.113 because the vehicle was stolen. Further, Dugas cited by the trial court is both "distinguishable" on the facts and at the same time the analysis of the law in Dugas would support the search conducted in Wisdom's case. In Dugas the court describes a factual situation where the coat seized which contained the small container within which the drugs were found did not pose a "threat" and therefore the court ruled that it should not have been opened. The court in Dugas cites both Houser and Smith, the case the trial court says was tacitly overruled, to support that

this type of search is still valid and as stated above is highly fact based.

(Dugas at footnote 14 page 597 and footnote 10.)

Dugas states;

The inventory search is a recognized exception because, unlike a probable cause search and a search incident to arrest, the purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function. Knowledge of the precise nature of the property protects against claims of theft, vandalism, or negligence. Inventory searches are regularly upheld when they are conducted according to standardized police procedures which do not give excessive discretion to the police officers, and when they serve a purpose other than discovering evidence of criminal activity. But an inventory search may not be unlimited in scope. The permitted extent of such searches must be restricted to effectuating the purposes that justify their exception to the Fourth Amendment. (Footnotes omitted.)

A bag containing “[a] large amount of cash, \$2700.00 and some change in cash”(RP 10), sitting on the seat vehicle in the “paved parking lot for a convenience store or gas station...in the hours of darkness in the evening, with “other pedestrian and vehicle traffic, at the East Valley Market (RP 16-19) clearly is an item which would meet the requirements of the cases set forth above which indicate that a container may my looked into in an impound inventory search.

Defense counsel attempted numerous times and in numerous ways to get Dep. Boyer to state that he was basically on a fishing expedition in

the cab of the truck. Dep. Boyer's response to one of these numerous queries was "I was not specifically searching for methamphetamine. If that is what you're trying to ask..." (RP 20)

This was a CrR 3.6 hearing conducted and decided by the court, Simpson v. Thorslund, 151 Wn.App. 276, 211 P.3d 469 (2009)

"Thorslund's objections, however, relate to matters of credibility and such is the preserve of the fact-finder alone. We will not substitute our judgment for that of the trial court. The trial court had the opportunity to evaluate Smith when he testified at trial and to consider any timely objections to Smith's testimony or his report at that time."

"Determinations of credibility are for the fact finder and are not reviewable on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

#### RESPONSE TO ALLEGATION "b."

The State did not claim at the suppression hearing, nor was there testimony from the deputy, that he had requested consent from the appellant to search the vehicle and subsequently the black bag. (CP 33-4) Appellant has addressed consent in his opening brief however, the State does not intend to respond to this portion of the opening brief with case law which would address "implied consent" because it was not argued

below nor do the facts support consent as **the** method, impound inventory, which allowed the search of the stolen vehicle and the bag within.

The trial court did discuss with counsel in the CrR 3.6 hearing whether the defendant had impliedly consented to the search of black bag when he stated to the officer after having been advised of his rights per Miranda, that there was a large amount of methamphetamine on the seat of the truck.

The only response that the State will put forward is to point out to this court that the findings and conclusions authored by the court do not state that Appellant consented to the search. The summation by the court states;

Here, it is significant that defendant admitted that a large amount of meth was on the truck seat and that the officer limited his search to where he reasonably expected the meth. *That is, the officer did not conduct a general investigatory search for evidence.* Rather, he conducted a more detailed inventory search in the one area where Defendant no longer had a reasonable expectation of privacy: the area where he told the deputy a large amount of meth was.

When a person tells law enforcement that drugs are in a specific area, it is unreasonable for that person to have any expectation of privacy in that limited area. Here, the intrusion was minimal, and the defendant no longer had a reasonable expectation of privacy in the bag. (CP 39 emphasis in the original)

Obviously the court does discuss expectation of privacy, however it is equally obvious that all of the case law that is cited by the court in the

written ruling pertains to impound inventory which was and is the legal and valid basis for the search and was the basis argued by the State below and in this court.

#### IV. CONCLUSION

For the reasons set forth above this court should deny this appeal. The actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this 16<sup>th</sup> day of July 2014,

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DECLARATION OF SERVICE

I, David B. Trefry state that on July 16, 2014, emailed a copy, by agreement of the parties, of the Respondent's Brief to Kristina Nichols at [wa.appeals@gmail.com](mailto:wa.appeals@gmail.com) and the same was deposited in the United States mail on this date to;

Heath T. Wisdom, Register No. 13870-085  
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16<sup>th</sup> day of July, 2014 at Spokane, Washington,

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