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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RONALD WAYNE MACDONALD,

Appellant.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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**A. ISSUE**

A crime victim is constitutionally and statutorily entitled to make a statement at sentencing. Where the victim is deceased, she may speak through a representative. Here, the deceased victim had no living family or friends to speak for her. In these narrow circumstances, may an investigating officer assume the role of victim representative and speak at sentencing without breaching the plea agreement?

**B. STATEMENT OF THE CASE**

In October of 1978, 80-year-old Arlene Roberts lived in a small trailer in south King County. Although she was a widow and lived alone, she was well known to her neighbors. Ms. Roberts's neighbors became concerned when they had not seen her about her normal routine. They checked on her and discovered that her trailer had been ransacked. CP 3.

Police investigators discovered drawers open and overturned, Ms. Roberts's purse and a diamond ring missing, and her wallet rifled through. CP 4. They found Ms. Roberts deceased on her bed. She lay face up, covered by a blanket, with a pillow over her face. Her blouse was unbuttoned and she was naked from the waist down. Her wrists and ankles were bound with nylon stockings, clothing was tied around her mouth, and a hair net was used as a ligature around her neck. CP 3.

The medical examiner concluded that Ms. Roberts died from asphyxiation due to strangulation. She had been beaten in the head and one of her shoulders was dislocated, possibly from the force of tying her hands behind her back. CP 3. It took the medical examiner 18 paragraphs in his autopsy report to document the injuries that Ms. Roberts suffered. CP 194. Ms. Roberts died a horrific death. CP 194.

Investigators collected several latent fingerprints from papers scattered on the floor of the trailer. These papers included recently dated bank statements and receipts. Although the police considered several persons as possible suspects, the case ultimately became inactive. CP 4.

In the fall of 2010, Detective Scott Tompkins of the King County Sheriff's Office, tasked with the investigation of "cold" or unsolved homicides, asked that the latent prints be reexamined based on technology that was not available in 1978. CP 4; 1RP 62.<sup>1</sup> Three fingerprints found on the documents near Ms. Roberts's bed were individualized to the appellant, Ronald Wayne MacDonald. CP 4; 1RP 67.

Detective Tompkins learned that in October of 1978, MacDonald was living with friends of his mother at an address only seven blocks from Ms. Roberts's trailer park. CP 5. Those friends told Tompkins that

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<sup>1</sup> The verbatim report of proceedings consists of five volumes. They are referred to as follows: 1RP (June 11, 2012); 2RP (June 12, 2012); 3RP (June 13, 2012); 4RP (June 14, 2012); and 5RP (June 18, 2012). The transcript of the August 12, 2012, sentencing hearing appears at CP 188-211.

MacDonald frequently left the house at night for extended periods of time; they did not know where he went. Id. Tompkins spoke to Denise Reynolds, who was friends with Ms. Roberts and had lived in the same trailer park. 2RP 112. Ms. Reynolds told Detective Tompkins that shortly after Ms. Roberts's murder, she discovered a young man with distinctive "reddish, blondish, brownish" long hair, looking into Reynolds's bedroom window. CP 148-49; 2RP 112. Reynolds provided this description to Tompkins on September 21, 2011, the day before the State filed charges against MacDonald, and before there was any media coverage of the story or pictures of MacDonald in the news. 2RP 112-23. A booking photograph of MacDonald taken near the time of the murder showed his hair as long and distinctively "reddish." 2RP 113.

Tompkins also learned that MacDonald had been arrested by the Seattle Police on burglary charges in June and August of 1978. CP 5. Although Ms. Roberts's residence was located in unincorporated King County, Seattle Police jurisdiction came within blocks of Ms. Roberts's trailer. CP 5. Tompkins discovered that since 1978, MacDonald had had numerous arrests, including for burglary, in multiple states; MacDonald was currently living in Nevada. CP 5; 1RP 67-68.

In June of 2011, Detective Tompkins and Detective James Allen traveled to Nevada and spoke with MacDonald. CP 5; 1RP 68. During

their recorded interview, MacDonald never specifically denied murdering Ms. Roberts, despite questioning from Tompkins, who asked MacDonald to view crime scene photographs and “walk him through it.” CP 6. MacDonald simply stated that he wanted to get his things in order, volunteering that he would “be ready for extradition” in a few days. CP 6. Similarly, when Tompkins mentioned taking responsibility and showing remorse, MacDonald responded only that he would “talk about that when I get back to Washington State. I’ll be ready to go whenever you guys tell me to. I’ll be ready to go Monday morning.” CP 6-7. When Tompkins asked if there had been a sexual assault on Ms. Roberts, MacDonald replied, “I’ll be ready to go Monday morning.” CP 7.

After the recorded interview ended, Tompkins walked with MacDonald out into the lobby of the Reno Police Department. CP 7. Instead of leaving the building, MacDonald sat down. 1RP 78. Tompkins ultimately sat with him. 1RP 83, 161. Tompkins asked MacDonald, “Did you know her?” MacDonald replied, “No.” 1RP 39, 84; 2RP 16. Tompkins told MacDonald that he thought Ms. Roberts might have been a friend of MacDonald’s mother, but MacDonald again said, “No.” Id. During their conversation, MacDonald volunteered, not in response to any question, “I was 17 years old. I was young and stupid.” CP 7; 1RP 39, 88; 2RP 16. When Tompkins asked MacDonald, “Why that trailer?”

MacDonald did not answer. CP 7; 1RP 88. MacDonald made other incriminating remarks during the conversation with Tompkins, including a denial that there had been any other similar incidents and a statement that although he had never thought about going to the police and turning himself in, he wished he could say that he had thought about it. CP 7-8; 1RP 39, 85, 88-89; 2RP 16. MacDonald also answered, "Of course I am," when asked if he was remorseful. CP 8; 1RP 89; 2RP 16. MacDonald ultimately began crying, admitting that it had always been in the back of his mind that "this day would come," and that living with this had "driven him crazy." CP 9; 1RP 91.

On September 22, 2011, MacDonald was charged in King County Superior Court with Murder in the First Degree for the death of Ms. Roberts. CP 1. The information was later amended to add a charge of second-degree murder. CP 76-77. The matter was ultimately assigned for trial to the Honorable Judge McCarthy. The court heard pretrial motions, including a lengthy CrR 3.5 hearing, and determined that MacDonald's statements to Detective Tompkins were admissible. 1RP; 2RP 105.

Following pretrial motions, MacDonald entered an Alford<sup>2</sup> plea to Manslaughter in the Second Degree. CP 79-84; 5RP 3-14. The plea

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<sup>2</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

agreement required the parties to recommend a suspended sentence<sup>3</sup> on condition that MacDonald serve 16 months in custody.<sup>4</sup> CP 81, 202.

MacDonald was sentenced on August 8, 2012. CP 188-211. Prior to the sentencing hearing, Detective Tompkins asked the prosecutor if he could speak to the court because Ms. Roberts had no one to speak for her. CP 180. The prosecutor told Tompkins that she would ask the court, and told him not to tell her what he planned to say. CP 180-81. At sentencing, the prosecutor asked the court to follow the terms of the plea agreement. CP 191. She told the court that Detective Tompkins would like to speak, as Ms. Roberts had no family. CP 191-92. She made clear that she did not know what Tompkins would say, and that whatever he said, it would do nothing to affect her recommendation, which was "still solidly for 16 months because that's what the agreement was." CP 192. The court agreed to hear from Tompkins. CP 192.

Tompkins expressed that he understood the need for a plea agreement in the case, and that he had been "on board" for such a resolution. CP 192. However, he told the court that he felt

obligated to ask for the maximum sentence in this case.  
This woman was born in 1898, and she has no living

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<sup>3</sup> The State agreed to recommend that the sentence be suspended for five years, but authorized MacDonald to recommend a one-year period of suspension. CP 203.

<sup>4</sup> Because the crime occurred prior to enactment of the Sentencing Reform Act, sentence was imposed pursuant to RCW 9.92.060.

family. No one to speak on her behalf. And so I know that you heard a lot in the 3.5 hearing about what happened in Reno in our interview of the defendant, but I also would like to introduce you to what happened to the victim. And I don't think you saw those, and I'd like to present those to you.

CP 192. Tompkins referred to photographs of the crime scene. Id. MacDonald objected, and stated his belief that Tompkins's comments were a breach of the plea agreement. CP 193. The court overruled the objection, concluding, "The State is making its recommendation and adhering to that recommendation. As I understand it, Detective Tompkins is here speaking with respect to the victim." CP 194. The court noted that a victim advocate frequently speaks for the victim, and stated that it believed Tompkins could "take that role." Id.

Tompkins pointed out that the photographs depicted Ms. Roberts as she was found by the police. CP 194. He addressed her significant injuries and how her death was an awful one. Id. Although Tompkins also referred to some of the evidentiary issues raised by MacDonald's presentence report, the court was clear on Tompkins's role as the victim's representative, and took his comments "as they pertain to his advocacy on behalf of the victim." CP 197. Tompkins concluded his remarks by underscoring the fact that, despite the significant passage of time,

Ms. Roberts was “a part of our community. And whether it happened 34 years ago or last week, it needs to be held to the same standard.” CP 196.

Before imposing sentence, Judge McCarthy made lengthy and thoughtful comments. CP 204-08. He went through the facts of the crime, acknowledged MacDonald’s lack of recent criminal history, and considered the input of MacDonald’s family and friends. Id. However, the court articulated that, “Perhaps the most relevant thing about this case is the nature of the offense back in 1978.” CP 207. The court quoted the adage, “Justice delayed is justice denied,” and expressed its sincere belief that a lesser sentence would be an affront to justice as well as to the memory of Ms. Roberts. CP 207-08. The court sentenced MacDonald to the maximum of 60 months, with a 55-month minimum. CP 207, 218-19.

MacDonald’s lawyers told the court that they were considering a motion to withdraw the plea. CP 209. Judge McCarthy reminded everyone that he had allowed Detective Tompkins to speak as a victim advocate, and stated that he had not considered the comments in any other context and that he would have imposed the same sentence had Tompkins not spoken. CP 210.

MacDonald later moved to withdraw his plea. CP 111-23. Judge McCarthy had since retired and no judge had yet been sworn to replace him. CP 212. Finding that the facts were settled by the current record, the

chief criminal judge transferred MacDonald's motion to the Court of Appeals. CP 212-13. The Court of Appeals affirmed MacDonald's conviction. State v. MacDonald, No. 69415-4-I (Wn. App. Jan. 21, 2014) (unpublished).

C. **ARGUMENT**

The Washington Constitution assures crime victims a meaningful and significant role in the criminal justice system. Deceased victims are guaranteed the right, through a representative, to address the court regarding the sentence to be imposed. The elderly homicide victim in this case had no living relatives or friends when MacDonald was finally charged and sentenced in her death 34 years after it occurred. Accordingly, the court properly allowed Detective Tompkins to speak at sentencing on her behalf in the limited role of victim representative.

Relying on State v. Sanchez,<sup>5</sup> in which five justices of this Court determined that an investigating police officer is bound by the terms of a plea bargain, MacDonald argues that Detective Tompkins's statements at the sentencing hearing breached the plea agreement. However, Sanchez did not consider the issue in the context in which it is raised here.

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<sup>5</sup> 146 Wn.2d 339, 46 P.3d 774 (2002).

This Court should conclude that, on the narrow facts of this case, the plea agreement was not breached when Detective Tompkins spoke solely on behalf of the victim as her representative. If this Court were to adopt MacDonald's conclusion—that an investigating officer can *never* assume the role of victim's representative unless his remarks strictly accord with the plea agreement—a victim with no living family or friends would be deprived of her constitutional and statutory rights to have her voice heard at sentencing. An investigating officer should be allowed to speak on behalf of a deceased victim at sentencing when that victim has no one else who could do so.

1. CRIME VICTIMS HAVE A CONSTITUTIONAL AND STATUTORY ROLE AT SENTENCING THAT IS INDEPENDENT OF THE STATE'S ROLE.

Our state constitution provides crime victims with basic fundamental rights to ensure that they have a meaningful role in the criminal justice system, and to guarantee that they are accorded dignity and respect. Wash. Const. art. I, § 35. One of the constitutional protections that victims possess is the right to make a statement at sentencing; if the victim is deceased, “[T]he prosecuting attorney may identify a representative” to exercise that right on their behalf. *Id.*

Additionally, the Sentencing Reform Act guarantees the victim or her representative the opportunity to present a statement at the sentencing hearing: “The court shall . . . allow arguments from . . . the victim, the survivor of the victim, or a representative of the victim or survivor . . . as to the sentence to be imposed.” RCW 9.94A.500(1). See also RCW 7.69.030(14) (reasonable effort shall be made to ensure that victims and survivors of victims may present a statement personally, or through a representative, at the sentencing hearing); RCW 7.69.010 (victims’ rights to be vigorously protected); RCW 7.69.020(4) (defining a “victim impact statement”); RCW 7.69.030(13) (guaranteeing that victim may present a victim impact statement to the court).

These statutory provisions unambiguously evince the legislature’s intent that a sentencing court *shall* consider the crime’s impact on victims and their survivors when determining the appropriate sentence. See also State v. Mail, 121 Wn.2d 707, 711, 854 P.2d 1042 (1993) (interpreting former version of RCW 9.94A.500(1) as outlining the *minimum* amount of information, if available and offered, a sentencing court *must* consider). Thus, a crime victim and her representative have both a constitutional and a statutory role at the sentencing hearing that is independent of the State’s.

2. THE STATE HAS BOTH AN OBLIGATION TO HONOR ITS PLEA AGREEMENT AND A DUTY TO PROTECT THE VICTIM'S RIGHTS.

Principles of contract law and constitutional concerns of due process require the State to act in good faith and comply with plea agreements. State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997); Santebello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). The prosecutor is obligated to participate in the sentencing proceedings, answer the court's questions candidly, and not hold back relevant information about the plea agreement. State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). A prosecutor must not undercut the terms of the bargain, either explicitly or by conduct evincing the intent to circumvent the agreement. Sledge, 133 Wn.2d at 840.

A reviewing court applies an objective standard to determine whether the State breached a plea agreement; the motivations or justifications of the State are irrelevant. Sledge, 133 Wn.2d at 843 n.7. When reviewing a claim that a plea agreement was breached, the reviewing court must consider the sentencing record in its entirety. State v. Van Buren, 101 Wn. App. 206, 213, 2 P.3d 991 (2000). A bright line rule as to the conduct constituting a breach is impractical. Talley, 134 Wn.2d at 187.

This Court has previously addressed the obligations that investigating law enforcement officers have respecting plea bargains. In Sanchez, five justices agreed that an investigating officer is bound by the prosecutor's plea agreement based on principles of agency and fairness.<sup>6</sup> 146 Wn.2d at 356. However, courts have recognized that a tension exists between the State's responsibility to present relevant evidence and respond to the court's inquiries and its duty to uphold the plea agreement. Talley, 134 Wn.2d at 187. The State's obligation to crime victims highlights this tension.

In reality, the victim's recommendation regarding the appropriate sentence often diverges from the agreement entered into by the State and the defendant. Nonetheless, a prosecutor who assists a victim in exercising her right to communicate information to the court does not by that conduct breach a plea agreement. State v. Carreno-Maldonado, 135 Wn. App. 77, 86, 143 P.3d 343 (2006); State v. Lindahl, 114 Wn. App. 1, 12, 56 P.3d 589 (2002) (prosecutor did not breach plea agreement by

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<sup>6</sup> Four justices determined that neither an investigating officer nor a community corrections officer is bound by the prosecutor's plea agreement, and voted to affirm the convictions of the two consolidated defendants. Sanchez, 146 Wn.2d at 355 (Bridge, J., lead opinion). Four justices dissented, concluding that both an investigating officer and a community corrections officer must adhere to the terms of a plea agreement. Id. at 370 (Madsen, J., dissenting). One justice concluded that investigating officers are bound by the plea agreement but community corrections officers are not. Id. at 356 (Chambers, J., concurring in part and dissenting in part).

asking the court to hear directly from victim's representative regarding victim's request for exceptional sentence); State v. Davis, 43 Wn. App. 832, 837, 720 P.2d 454 (1986) (State does not breach plea agreement merely by advising court of witnesses who wish to be heard at sentencing). Indeed, a prosecutor *must* assist a victim in submitting an impact statement if requested. RCW 7.69.020(4); RCW 7.69.030(13). The prosecutor must also inform the court when a victim wishes to address the court at sentencing. RCW 7.69.010; RCW 7.69.030(14).

The duty to uphold a plea bargain notwithstanding, prosecutors and law enforcement officers are tasked with assuring that the victim's rights are protected in a manner no less vigorous than those protections afforded the defendant. RCW 7.69.010. Specifically, in the event a crime victim is deceased, the prosecuting attorney may designate a representative to ensure that the sentencing court considers the impact of the crime on the victim when determining the appropriate sentence. Wash. Const. art. I, § 35; RCW 9.94A.500(1). This constitutional protection *shall not* constitute a basis for error in favor of a criminal defendant. Wash. Const. art. I, § 35.

3. IN THE LIMITED CIRCUMSTANCE WHERE NO FAMILY OR FRIENDS REMAIN TO REPRESENT THE RIGHTS OF A DECEASED VICTIM AT SENTENCING, AN INVESTIGATING OFFICER SHOULD BE ALLOWED TO FILL THE ROLE OF VICTIM REPRESENTATIVE.

MacDonald argues that his right to due process precluded Detective Tompkins from assuming the role of victim representative. Article I, section 35 requires that a crime victim, or her representative, be allowed to make a statement at sentencing. State v. Gentry, 125 Wn.2d 570, 628-29, 888 P.2d 1105 (1995). This Court must make every reasonable effort to harmonize the victims' rights provision with MacDonald's due process rights under the plea agreement. Id. at 625.

Here, Ms. Roberts was 80 years old at the time of her death. CP 1, 3. Had she lived, she would have been 114 years old in 2012, when MacDonald was sentenced. She had no living relatives or anyone else who could speak on her behalf. CP 192. The court authorized Detective Tompkins to fill the role of victim representative and to speak for Ms. Roberts, who otherwise would have had no voice at the sentencing hearing:

As I understand it, Detective Tompkins is here speaking with respect to the victim. In many cases, if not all criminal cases, particularly serious ones such as this, a victim advocate very frequently speaks to the court on behalf of the victim. There is no victim advocate speaking

here today, and I think Detective Tompkins may take that role.

CP 194.

Detective Tompkins told the court that he would "like to introduce what happened to the victim." CP 192. He provided photographs to the court depicting the injuries Ms. Roberts suffered at the time of her death. CP 194. Tompkins stressed that although much time had gone by, Ms. Roberts was "a part of our community," and that this crime "happened to somebody." CP 196. This was all appropriate victim impact commentary. Although Tompkins also responded to certain assertions that MacDonald made in his presentence report regarding the evidence, the court clarified that it was allowing the detective to address the court only

insofar as he is speaking on behalf of the victim since there's not a victim advocate here today[,] and not so much as a comment on the nature of the plea negotiations or the evidence as such. . . . So I'll take his comments as they pertain to his advocacy on behalf of the victim.

CP 197.

Under the circumstances of this case, when the victim had no living friends or family to speak for her, allowing Detective Tompkins to serve as the victim's representative assured that her constitutional rights were protected at the sentencing hearing. It also assured that the sentencing court was presented with the information necessary for it to

consider the impact of the crime on the victim when determining the appropriate sentence. See RCW 9.94A.500(1) (courts shall allow a victim to speak as to the appropriate sentence); RCW 7.69.020(4) (victim impact statement provides information about impact of the crime on the victim). Moreover, by allowing Detective Tompkins to speak on behalf of Ms. Roberts, the trial court fulfilled *its own* statutory obligation to vigorously protect the rights of crime victims. See RCW 7.69.010 (judges required to protect the rights of victims in the same manner they protect the rights of criminal defendants).

MacDonald suggests that the only way to give effect to both his due process rights and the victims' rights provision is to prohibit an investigating officer from assuming the role of victim representative. However, his argument implies the existence of someone else to serve in that capacity. He ignores the reality that in the situation where a victim has no other living person to speak for her, construing the victims' rights amendment in such a manner would defeat its purpose and effect entirely. If not Detective Tompkins, then who?

It is true that prosecuting agencies often enlist victim advocates whose duty is to the victim, and not to the State. See RCW 7.69.030(10) ("The role of the crime victim advocate is to provide emotional support to the crime victim."). Here, there was no living crime victim or survivors

for an appointed advocate to console. Moreover, had a victim advocate been designated to represent Ms. Roberts at the sentencing hearing, the only function the advocate could have served would have been to consult with Tompkins regarding the circumstances of the crime, and then to relay his assessment of the crime's impact on Ms. Roberts to the sentencing court. In the narrow circumstances here, to draw a distinction between a designated victim advocate and Tompkins would elevate form over substance.

A defendant's right to due process binds the State to the plea agreement—it does not bind the victim or her representative. Thus, due process is not implicated when a defendant enters into a plea agreement in the face of uncertainty as to what the victim's or her representative's position at sentencing will be. Here, the court allowed Tompkins to speak at sentencing solely in the capacity of victim's representative. In this situation, MacDonald's right to due process was not violated.

To support his argument that due process was violated, MacDonald relies heavily on Sanchez, 146 Wn.2d 339. However, its facts are inapposite to the circumstances here. In Sanchez, the plea agreement required the prosecutor to make no sentencing recommendation. Id. at 343. At the sentencing hearing, the defendant requested a Special Sex Offender Sentencing Alternative (“SSOSA”). Id. The investigating

officer spoke to the court and stated his belief that a SSOSA was inappropriate. Id. Unlike the present case, the investigating officer did not purport to speak on behalf of the victim. Indeed, the victim and her parents were present in court and spoke for themselves. Id. Thus, the Sanchez court had no occasion to consider whether an investigating officer can speak on the victim's behalf when there is no victim or any other living family or friends to address the court.

The facts of this case are similarly distinguishable from those in Carreno-Maldonado, 135 Wn. App. 77. There, three victims were present at the sentencing hearing and informed the prosecutor that they were there only to observe; they did not wish to address the court. Id. at 80. After the deputy prosecutor, purporting to speak on behalf of the victims, made statements undercutting the plea agreement, the Court of Appeals determined that the constitutional and statutory protections provided to victims did not provide the State the right to speak for the victims "when they have decided not to speak and have not requested assistance in otherwise communicating with the court." Id. at 86. Crucial to the court's conclusion was the fact that the victims were able to speak for themselves, had they so desired. Id. By contrast here, Ms. Roberts simply had no remaining relatives or friends at all; it was not the case that such a person existed but did not wish to be heard.

It is not the usual case that a victim will have no living family or friends to serve as her representative. This Court should determine that, under the narrow facts presented, Detective Tompkins could properly stand in the shoes of the victim. This construction of the victims' rights provision affords Ms. Roberts the "due dignity and respect" to which she is constitutionally entitled, and gives meaning to all parts of the Washington State Constitution. Gentry, 125 Wn.2d at 625.

**D. CONCLUSION**

The State respectfully requests that this Court conclude that, in the narrow case where a deceased victim has no living family or friends to represent her at sentencing, a law enforcement officer may assume that limited role without breaching the plea agreement.

DATED this 27<sup>th</sup> day of June, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

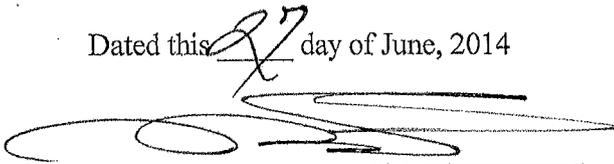
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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. RONALD WAYNE MACDONALD, Cause No. 89912-6, in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27 day of June, 2014

A handwritten signature in black ink, appearing to be "J. Winkler", written over a horizontal line.

Name  
Done in Seattle, Washington

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Thank you,

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