

70620-9

70620'9

NO. 70620-9-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

DONALD KINSELL JONES,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael Rickert, Judge

RESPONDENT'S BRIEF

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ORIGINAL

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CONSTITUTIONAL PROVISIONS

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I. SUMMARY OF ARGUMENT

Petitioner was stopped in the early morning hours of December 6, 2012 for driving erratically within his lane of travel and crossing over the fog line three times within a mile. The Trial court ruled correctly that *State v. Prado* does not apply to this case. *Prado*, 145 Wn.App. 646, 186 P.3d 1186 (2008) The Trial court also correctly asserted that due to the time of day, the time of year, and the driving, that it was potentially unsafe and a valid basis for a stop for further investigation.

The Trial court correctly found that the underlying conviction met the requirements for comparability in this case as an out-of-state conviction as the basis for the current charge of unlawful possession of a firearm. The Court was correct in looking at the four corners of the document and finding that it was a felony conviction for possession of methamphetamine and that possession of methamphetamine is also a felony in the State of Washington.

II. ISSUES

1. Did the Trial court commit probable error when it determined that the facts of this case warranted an articulable basis for a further investigation of a crime being committed and denied

the motion to suppress citing the case of *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008)?

2. Did the Trial court commit probable error in finding certain facts in its Findings of Fact and Conclusions of Law? CP 20 (attached as Appendix A).
3. Did the Trial court err when it found sufficient facts to support a finding for prior conviction of a felony when a Judgment and Sentence from the State of Idaho for felony possession of methamphetamines was introduced into evidence and Petitioner was identified as the Defendant in that case?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

¹ The Petitioner is charged with unlawful possession of a firearm in the second degree. Petitioner brought a motion to suppress all evidence pursuant to CrR 3.6 based upon an invalid stop, relying on *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008). Testimony of Officer Richter was heard by the Trial court in this case. The Honorable Judge Dave Needy denied Petitioner's motion to

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

"DATE RP NAME OF HEARING.

suppress. Factual findings were entered and filed on July 1, 2013. Petitioner filed a writ to the Court of Appeals for discretionary review following the CrR 3.6 hearing. The State opposed the writ for discretionary review. The writ for discretionary review to the Court of Appeals was eventually consolidated with this appeal as filed. Petitioner stipulated to his statements for purposes of a 3.5 hearing on July 31, 2013. Petitioner entered a waiver of a jury trial and stipulated to a bench trial on August 1, 2013. The Honorable Judge Michael Rickert presided over the bench trial in this case on August 5, 2013. At trial, the parties stipulated to the earlier testimony regarding the stop by Officer Richter from the CrR 3.6 hearing. Petitioner was sentenced to 4 months jail on this charge on September 11, 2013. The Court stayed the sentence pending this appeal.

2. Statement of Facts

Defendant Donald Jones was driving on State Route 20, westbound at Thompson Road in the early morning hours of December 16, 2012, within the city limits of Anacortes. 6/12/12 RP 6². Officer Richter observed the Petitioner drive over the fog line

² The verbatim report of proceedings is referred to by the date of the hearing as indicated on the transcript's cover page. The hearing occurred in 2013 not 2012 but will cite to the cover page date to identify the proceeding.

three times and correct himself with a slow drift and erratic driving. 6/12/12 RP 7, CP 20. Officer Richter noted that the correction was consistently driving at an angle, not a straight line within the Petitioner's lane for approximately one mile. 6/12/12 RP 7, 11. Officer Richter made a stop of Petitioner to further investigate the crime of driving under the influence of intoxicants. 6/12/12 RP 7. The Court found that "the driving in this case is more potentially dangerous -- although it's clear there was no other traffic actually endangered at the time -- and creates a more clear violation of lane travel than *Prado* does." 6/12/12 RP 11, CP 20. The Court also determined that "there's always a potential of unsafeness to him or others if the weaving were to continue and go on ..." 6/12/12 RP 13.

During the investigation of the stop, Officer King arrived to assist Officer Richter and Officer King observed in plain view a rifle with a mounted scope on the backseat of Petitioner's vehicle. 8/5/13RP 8-9. A check of Petitioner's driving status returned to Officer Richter that Petitioner did not have a valid driver's license. Officer King took a photograph of the Petitioner on the night of the stop to ensure his identity. 8/5/13 RP 15. Officer King noted that Petitioner was on DOC supervision. 8/5/13 RP 12. When questioned about his criminal history, Petitioner disclosed that he was previously

convicted of a felony controlled substance possession charge. 8/5/13 RP 14. Officer King notified Petitioner of his constitutional rights and sought permission to search Petitioner's vehicle. Petitioner consented to a search of his vehicle. 8/5/13 RP 9-10. Officer King retrieved a Weatherby Mark V 7mm hunting rifle from Petitioner's car. 8/5/13 RP 10.

Officer King did follow up investigation as to Petitioner's previously admitted felony and identified a Judgment and Commitment and Order of Probation from the State of Idaho for the Petitioner. 8/5/13 RP 19. Officer King identified that the Judgment was that of Petitioner. 8/5/13 RP 20. The Judgment and Commitment and Order of Probation from the State of Idaho identified Petitioner as Defendant in that case was admitted into evidence. 8/5/13 RP 22. The Petitioner gave his date of birth to Officer Richter on the night of the traffic stop as being 11/6/83. 8/5/13 RP 30. Officer Richter ran the Petitioner's name through dispatch and confirmed a person with that date of birth and social security number existed and that those numbers also matched up with what was on the Judgment and Commitment and Order of Probation from the State of Idaho with Petitioner's name on it. 8/5/13 RP 30-31. The Idaho Judgment and Commitment and Order of Probation indicated

that it was against the Defendant Donald Kinsell Jones, Petitioner herein, the date of birth and social security numbers on that document match those of the Petitioner herein, and the second paragraph of the document indicates the defendant has been found guilty of felony possession of a controlled substance, methamphetamines, a felony violation. 8/5/13 RP 41-42. The elements are the same as the State of Washington felony possession of a controlled substance, the sentencing range is similar to the State of Washington's; the notice of appeal is similar to that which we give in Washington for felony sentences. 8/5/13 RP 42.

IV. ARGUMENT

1. Officer Richter had a sufficient basis to stop the Petitioner for further investigation of suspected criminal activity.

Generally, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513, 515 (2002). When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668, 680 (2000). An investigative stop, including a traffic stop that is based on

a police officer's reasonable suspicion of either criminal activity or a traffic infraction, is an exception to the warrant requirement. *U.S.C.A. Const. Amend. 4*; West's RCWA Const. Art. 1 § 7. See *State v. Arreola*, 176 Wn.2d 284, 292–93, 290 P.3d 983 (2012); see also *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A reasonable suspicion exists when specific, articulable facts and rational inferences from those facts establish a substantial possibility that criminal activity or a traffic infraction has occurred or is about to occur. *State v. Snapp*, 174 Wn.2d 177, 197–98, 275 P.3d 289 (2012).

When reviewing the lawfulness of an investigative stop, the court evaluates the totality of the circumstances presented to the police officer. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). Those circumstances may include the police officer's training and experience. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

In evaluating investigative stops, the court must determine: (1) whether the initial interference with the suspect's freedom of movement was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances that justified the interference in the first place. *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S.Ct. 1868, 1878-79, 20 L.Ed.2d 889 (1968); *State v. Williams*, 102

Wn.2d 733, 739, 689 P.2d 1065 (1984). In determining the proper scope of the intrusion, the court considers (1) the purpose of the stop, (2) the amount of physical intrusion, and (3) the length of time the suspect is detained. *Williams*, 102 Wn.2d at 740.

Under RCW 46.61.140 (1), a law enforcement officer can stop a vehicle when it fails to drive within its lane of travel “as nearly as practicable.” RCW 46.61.021(2) authorizes officers to detain persons for traffic infractions for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction. *State v. Burks*, 114 Wn. App. 109, 111-12, 56 P.3d 598, 600 (2002). The police may also stop a vehicle based on a well-founded suspicion of criminal activity, and may require its occupants to identify themselves and explain their activities, in the same manner as with a pedestrian. *State v. Serrano*, 14 Wn.App. 462, 464-66, 544 P.2d 101 (1975). *See also Hiibel v. District Court*, 542 U.S. 177, 187, 124 S.Ct. 2451 (2004). *See also State v. Quezadas-Gomez*, 165 Wn.App. 593, 267 P.3d 1036 (2011). *Review denied* (April 24, 2012).

A traffic detention is a seizure and must have been justified in its inception to be lawful. *State v. Burks*, 114 Wn. App. 109, 111-12,

56 P.3d 598, 600 (2002). Officers only need reasonable suspicion, not probable cause, to stop a vehicle in order to investigate whether the driver committed a traffic infraction or a traffic offense. See *Duncan*, 146 Wn.2d at 173-75; RCW 7.80.050(3). In a recent Washington State Division One Court of Appeals decision, the Court ruled that Washington State's requirement that automobile drivers remain within a single lane of travel "as nearly as practicable" does not impose strict liability. *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008). See also RCW 46.61.140(1).

In *Prado*, an officer stopped the defendant's car based on a single excursion outside the lane of travel by two tire widths for a period of one second. *Prado* at 647. The stop was solely based on the officer's belief that the defendant committed the infraction of traveling outside the lane of travel contrary to RCW 46.61.140(1). The stop was not based on any suspicion of criminal activity, reasonable or otherwise. After making the stop, the officer discovered that the driver was intoxicated. Because the stop was not based, either in whole or in part, on suspicion of criminal activity, the validity of the stop depended on whether the infraction occurred. Division I of the Court of Appeals held that the language "a vehicle shall be driven *as nearly as practicable* entirely within a single lane

and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety” meant that the legislature did not intend to punish brief incursions over the lane lines. *Prado* at 649. “A vehicle crossing over the line for one second by two tire widths on an exit lane does not justify a belief that the vehicle was operated unlawfully.” *Id.*

This case is substantially different than *Prado*. In *Prado*, the *sole* basis for the traffic stop was the suspected infraction, not reasonable suspicion of criminal activity. In *Prado*, even if the stop had been based on a suspicion of criminal activity, such suspicion would likely have been deemed unreasonable due to the extreme brevity of the transgression. The State’s position in *Prado* essentially demanded perfection of drivers and the Court of Appeals correctly held that the legislature did not intend such rigidity. That is not what occurred here. Here, Officer Richter saw Mr. Jones cross the fog line three times within a mile and each time drift back at an angle into his lane, which, based on her training and experience, suggested to her that the driver could be impaired. At that point she had a reasonable suspicion of criminal activity. To meet the standard of reasonable suspicion, an officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts,

reasonably warrant [the detention].” *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S.Ct. 1868 (1968). “When reviewing the merits of an investigatory stop, a court must evaluate the totality of the circumstances presented to the investigating officer.” *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690 (1981). The court should also take the officer’s experience into account when determining whether an officer’s suspicion is reasonable. *Glover* at 514 (“The court takes into account an officer’s training and experience when determining the reasonableness of a *Terry* stop.”)

Officer Richter’s stop of Mr. Jones’ car was based on Officer Richter’s suspicion that Mr. Jones was engaged in criminal activity and that suspicion was reasonable.

In a more recent look at this issue, the Court decided whether three incursions over the fog line is a sufficient basis to support reasonable suspicion of driving under the influence. *State v. McLean*, 178 Wn.App. 236, 313 P.3d 1181 (2013). The Court in *McLean* found that the trooper had reasonable suspicion of driving under the influence when he observed the vehicle weave within its lane and cross onto the fog line three times. *Id.* From the articulable fact of this observation, and from his training and experience identifying

driving under the influence, it was rational for Trooper Thompson to infer that there was a substantial possibility that McLean was driving under the influence. That substantial possibility establishes a reasonable suspicion permitting Trooper Thompson to make a warrantless traffic stop. *McLean, Id., citing Arreola*, 176 Wn.2d at 292–93, 290 P.3d 983; *Snapp*, 174 Wn.2d at 197–98, 275 P.3d 289.

Whether driving over the fog line or center line, a serious safety concern exists when a vehicle fails to stay within its lane of travel around other cars, mailboxes, and residences, without any protection from a tired or intoxicated driver. The Petitioner in this particular case drove in a manner that indicated to Officer Richter that he was not driving within his lane of travel “as nearly as practicable” by crossing over the fog line and slowly drifting back into his lane at an angle – all within the distance of a mile. 6/12/12 RP 7. The Trial court here found that while there may not be an actual endangerment to others at the time of Petitioner’s driving there is always a “potential unsafeness to him or others should the weaving go on.” 6/12/12 RP 13. The Trial court also determined that the Petitioner’s driving was more potentially dangerous, even if no other traffic was actually endangered, to create a more clear violation of lane travel than *Prado*. 6/12/12 RP 11. The trial Court did not err when it found that

Petitioner's driving was more than a brief incursion over the fog line as in *Prado* and found that it was a clear violation and a valid basis for Officer Richter to stop the Petitioner for further investigation [of criminal activity]. 6/12/12 RP 11-12.

2. The trial Court did not err when it found that the out-of-state conviction of a felony met the comparability requirements to convict the Petitioner of the charge of unlawful possession of a firearm in the second degree.

Due process requires the State to prove each essential element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 22; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Accordingly, the trial court must accurately instruct the jury as to each essential element of a charged crime and the State's burden of proving the elements beyond a reasonable doubt. *State v. Williams*, 136 Wn. App. 486, 493, 150 P.3d 111 (2007). The legislature defines the elements of a crime. *State v. Williams*, 162 Wn.2d 177, 183, 170 P.3d 30 (2007).

Our appellate courts have held that while the existence of a prior conviction is an essential element that must be proved to the jury beyond a reasonable doubt, the question of whether a prior conviction qualifies as a predicate offense for purposes of elevating a

crime from a misdemeanor to a felony is a threshold question of law for the court to decide. *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005); *State v. Gray*, 134 Wn. App. 547, 549-50, 138 P.3d 1123 (2006); *State v. Carmen*, 118 Wn. App. 655, 77 P.3d 368 (2003).

RCW 9.41.040(2)(a)(1) forbids possession of firearms if a person has “previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section. Out of state convictions are classified according to the comparable offense definitions and sentences provided in Washington law. RCW 9.94A.525(3). The legislative purpose of this statute is to give the out-of-state convictions the same effect as in-state convictions. *State v. Cameron*, 80 Wn.App. 374, 378, 909 P.2d 309 (1996).

Courts (1) identify the comparable Washington offense, (2) classify the comparable Washington offense, and (3) treat the out-of-state conviction as if it were a conviction for the comparable Washington offense. *Id.* at 378-79. When identifying the comparable Washington offense, courts compare the elements of the out-of-state crime with the elements of potential comparable Washington crimes

as defined on the date the out-of-state crime was committed. *Id.* at 379.

The court in *Stevens*, looked at elements of first degree rape in Oregon in 1989 and compared the elements of second degree rape in Washington and determined that the elements of the two offenses were identical pursuant to RCW 9.94A.525(3) and upheld the conviction for unlawful possession of a firearm based on the felony conviction in Oregon. *State v. Stevens*, 137 Wn.App. 460, 153 P.3d 903 (2007).

In determining whether foreign convictions are comparable to Washington strike offenses, we have devised a two part test for comparability. *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998). In *Morley*, the court held that for the purposes of determining the comparability of crimes, **the court must first compare the elements of the crimes.** *Morley*, 134 Wn.2d at 605-06, 952 P.2d 167. In cases in which the elements of the Washington crime and the foreign crime are not substantially similar, **we have held that the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington**

statute. *Morley*, 134 Wn.2d at 606, 952 P.2d 167. However, "[w]hile it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. **Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.**" *Id.* *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (emphasis added). In determining whether a foreign conviction is comparable to a Washington felony, the court has devised a two-part test for comparability. *Lavery*, 154 Wn.2d at 255.

First, the sentencing court compares the elements of the out-of-state offense with the elements of the apparently comparable Washington crime. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the results of the comparison show that the elements of the crimes are comparable as a matter of law, or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction counts toward the defendant's offender score for the present crime. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). If the legal comparability does not resolve the issue, the ability to do factual comparability still remains.

The key inquiry is whether, under the Washington statute, the defendant could have been convicted if the same acts were committed in Washington. *State v. Thomas*, 135 Wn.App. 474, 144 P.3d 1178 (2006). The State need not independently prove those facts related to the foreign conviction that were admitted by the defendant but our opinion in *Thomas* makes clear that, in order to establish factual comparability, the State need independently prove only those facts that, when alleged by the State, have not been *admitted* by the defendant. *State v. Releford*, 148 Wn.App. 478, 200 P.3d 729 (2009), citing *Thomas*, 135 Wn.App. at 482 (“Where the underlying facts were proved to a trier of fact beyond a reasonable doubt, *or admitted or stipulated to*, *Shepard* and *Lavery* allow the sentencing court to decide whether an out-of-state conviction was based on facts that would violate a comparable Washington offense.” (emphasis added)).

In *Releford*, the court held that the facts supporting a prior conviction must either be proved beyond a reasonable doubt *or* admitted by the defendant. *Id.* Put another way, if the defendant admitted facts in a prior proceeding, then they need not be independently proved by the State to establish factual comparability. *Id.* In order to determine that which was admitted by the defendant as a result of the entry of a

guilty plea, it is necessary to look to the law of the state in which the defendant entered the plea *as that law existed at the time of the plea*—that is, the law from which the defendant could reasonably expect the consequences of the guilty plea to flow. *State v. Releford*, 148 Wn.App. 478, 200 P.3d 729 (2009).

The trial court in this case looked at the certified copy of the judgment and sentence for the out-of-state conviction of Mr. Jones and found that Mr. Jones pled guilty to possession of methamphetamines, a felony in Idaho. The trial court went on to compare that no matter how small the amount of possession in Washington, it would also be a felony. The trial court also compared the sentencing times, probation terms, and notices of appeal and found those to be equivalent to a felony in Washington. The Petitioner also admitted to the officers in this case that he was previously convicted of a felony controlled substance possession charge. 8/5/13 RP 14.

The fact that you can be guilty of felony possession of methamphetamine in Idaho by ingestion is merely a narrower definition of the crime than Washington's and would still be comparable. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). In this case, the trial court correctly analyzed the elements

from the certified judgment and sentence of the out-of-state conviction and determined that it was equivalent to a felony in Washington for purposes of finding Mr. Jones guilty of unlawful possession of a firearm. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); *State v. Releford*, 148 Wn.App. 478, 200 P.3d 729 (2009), *citing Thomas*, 135 Wn.App. at 482.

a. Law regarding proving criminal history

The State must prove the existence of prior convictions by a preponderance of the evidence. RCW 9.94A.500 (1). Although a court certified copy of a judgment and sentence is the best evidence of proof of a prior conviction, it is not the only means of proof.

The best evidence of a prior conviction is a certified copy of the judgment. *State v. Cabrera*, 73 Wn. App. 165 at 168, 868 P.2d 179 (1994). However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history. *Cabrera*, 73 Wn. App. at 168, 868 P.2d 179; *see also Morley*, 134 Wn.2d at 606, 952 P.2d 167 (court may look at foreign indictment and information to determine whether underlying conduct satisfies elements of Washington offense). *But see Morley*, 134 Wn.2d at 606, 952 P.2d 167 (facts and allegations contained in record of prior proceedings, if not directly related to the elements of the charged offense, may be insufficiently proved and unreliable).

The above underscores the nature of the State's burden under the SRA. It is not overly difficult to meet. The State must introduce evidence of some kind to support the alleged criminal history, including the classification of out-of-state convictions. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

The state may introduce other comparable evidence only if it is shown that the writing is unavailable for some reason other than the serious fault of the proponent. *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979). *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002).

In the absence of any contrary evidence presented by the defense, the State met the burden of proof of Mr. Jone's prior conviction of a felony possession of methamphetamine by a preponderance of the evidence.

V. CONCLUSION

For the aforementioned reasons, this State requests that this Court affirm the conviction of unlawful possession of a firearm in the second degree.

DATED this 7th day of August, 2014.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: Karen L. Pinnell
KAREN L. PINNELL, WSBA#35729
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Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Nancy P. Collins, addressed as Washington Appellate Project, 1511 Third Avenue, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 7th day of August, 2014.

Karen R. Wallace
KAREN R. WALLACE, DECLARANT