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March 22, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 74037-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS CLOYD,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	8
1. A UNANIMITY INSTRUCTION WAS NOT REQUIRED BECAUSE THE DELIVERIES WERE PART OF A CONTINUING COURSE OF CONDUCT .....	8
2. THE FAILURE TO PROVIDE THE UNANIMITY INSTRUCTION WAS HARMLESS ERROR .....	15
3. BASED ON THE INVITED ERROR DOCTRINE, CLOYD INVITED THIS ERROR AND IS THEREBY PRECLUDED FROM RAISING THIS ISSUE ON APPEAL .....	17
D. <u>CONCLUSION</u> .....	18

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Boyer, 91 Wn.2d 342,  
588 P.2d 1151 (1979)..... 17

State v. Camarillo, 115 Wn.2d 64,  
794 P.2d 850 (1990)..... 15, 16

State v. Corbett, 158 Wn. App. 576,  
242 P.3d 52 (2010)..... 17

State v. Fiallo-Lopez, 78 Wn. App. 717,  
899 P.2d 1294 (1995)..... 10, 11, 12, 13

State v. Gitchel, 41 Wn. App. 820,  
706 P.2d 1091 (1985)..... 15

State v. Gooden, 51 Wn. App. 615,  
754 P.2d 1000 ..... 9

State v. Handran, 113 Wn.2d 17,  
775 P.2d 453 (1989)..... 9, 11, 12

State v. Henderson, 114 Wn.2d 867,  
792 P.2d 514 (1990)..... 17

State v. Kitchen, 110 Wn.2d 403,  
756 P.2d 105 (1988)..... 8, 16

State v. Locke, 175 Wn. App. 779,  
307 P.3d 771 (2013)..... 12, 13

State v. Petrich, 101 Wn.2d 566,  
683 P.2d 173 (1984)..... 8, 9, 16, 17

State v. Studd, 137 Wn.2d 533,  
973 P.2d 1049 (1999)..... 17

State v. Workman, 66 Wash. 292,  
119 P. 751 (1911)..... 9

Statutes

Washington State:

RCW 69.50.401..... 1

**A. ISSUES PRESENTED**

1. Was Cloyd deprived of his right to a unanimous jury verdict when the trial court did not provide the jury a unanimity instruction?

2. Should this Court exercise its discretion and deny any requests for costs.<sup>1</sup>

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Nicholas Cloyd with violation of the Uniform Controlled Substances Act (delivery of cocaine) under RCW 69.50.401(1), (2)(a). CP 1-5. A jury found Cloyd guilty as charged. CP 12. Cloyd was sentenced to a prison-based DOSA (Drug Offender Sentencing Alternative). 4 RP 453.<sup>2</sup>

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<sup>1</sup> The State is not taking a formal position in this case regarding the issue of the Court's discretion to deny any requests for costs.

<sup>2</sup> Reports of Verbatim Report of Proceedings consists of four volumes from five separate dates including the sentencing hearing. In this brief, the 07/17/14 report of proceedings before the Honorable Judge Jeffrey Ramsdell is cited as 1 RP; the 07/21/14 report is cited as 2 RP; the 07/22/14 report is cited as 3 RP; and the 07/23/14, 09/01/15 report is cited as 4 RP.

## 2. SUBSTANTIVE FACTS

On the evening of July 22, 2013, the Seattle Police Department's West Precinct's Anti-Crime Team was conducting a "buy bust" operation in the Belltown neighborhood of Seattle, Washington. 2 RP 234-35, 240, 329. During the course of the "buy bust" operation each officer had distinct roles and responsibilities. 2 RP 234-35, 315. Officer Andrew Zwaschka's<sup>3</sup> role during this operation was to act as the undercover buyer. 2 RP 240, 277, 331. Officer Zwaschka had previously participated in numerous "buy busts" and performed this specific role approximately 25 times. 2 RP 253.

Officer Forrest Lednicky<sup>4</sup> and Officer Kevin Jones<sup>5</sup> assisted as trailing officers ("trailer(s)") to ensure Officer Zwaschka's safety during this operation. 2 RP 240, 253, 277, 329-30. Multiple other officers, including Officer Raul Vaca,<sup>6</sup> assisted as part of the arrest team. 2 RP 231, 235.

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<sup>3</sup> Officer Zwaschka has been employed by the Seattle Police Department for ten years. 2 RP 227.

<sup>4</sup> Officer Lednicky has been employed by the Seattle Police Department for seven years. 2 RP 327-28.

<sup>5</sup> Officer Jones has been employed by the Seattle Police Department for fifteen years. 2 RP 265.

<sup>6</sup> Officer Vaca has been employed by the Seattle Police Department for ten years. 4 RP 368.

Officer Zwaschka, Officer Jones, and Officer Lednicky explained in detail that the trailing officers' primary focus during a "buy bust" operation is the safety of the undercover officer. 2 RP 253, 279, 330. Officer Zwaschka further explained that although it is important for the trailer to make observations for report writing purposes, trailers ultimately obtain specific information regarding the buy directly from the undercover officer. 2 RP 248, 255. Officer Jones also testified that given the nature of the operation and environment, it is not possible to maintain visual contact with the undercover officer the entire time. 2 RP 271. Specifically, he discussed that traffic, buildings, and other barriers prevent a trailer from having visual contact with the undercover officer at all times. 2 RP 271.

On July 22, 2013, Officer Zwaschka was provided \$40 in pre-recorded money. 2 RP 237-39. A photocopy was taken of the pre-recorded money and confirmed by Officer Zwaschka. 2 RP 238-39. At approximately 8:20 P.M., Officer Zwaschka was in plain clothes on Third Avenue between Lenora and Battery Street trying to purchase narcotics. 2 RP 240.

Officer Zwaschka approached someone, later identified as Andrew Jones. Officer Zwaschka told Jones that he wanted to

purchase drugs. 2 RP 241. Jones told Officer Zwaschka that he could get him some drugs and the two began walking on Third Avenue. 2 RP 241. Jones made a phone call while the two of them were walking and inquired "where are you at or where are you?" 2 RP 242. While on the phone, Jones turned to Officer Zwaschka and asked him how much narcotics he wanted to purchase. Officer Zwaschka told Jones that he wanted \$20.00 worth of narcotics. 2 RP 242.

Jones and Officer Zwaschka turned onto Battery Street heading west. 2 RP 242. This is consistent with Officer Jones' testimony. 2 RP 279-80. Officer Jones testified that he turned the corner about five to seven seconds after Officer Zwaschka in order to remain undetected as a trailing officer. 2 RP 278-80. Officer Jones was not immediately able to observe Officer Zwaschka right after he turned the corner with Jones and had to pass by them without acknowledgement to avoid detection. 2 RP 280. Officer Lednicky also testified he did not have consistent visual contact with Officer Zwaschka and could not recall his proximity at times. 2 RP 334, 337. Officer Lednicky further testified that it is not uncommon to have multiple trailing officers because they regularly reposition themselves to avoid detection. 2 RP 330, 335. In

addition, the trailing officers cannot maintain visual contact with the undercover officer, especially if the undercover officer changes directions. 2 RP 335.

After Jones and Officer Zwaschka turned the corner, Jones directed Officer Zwaschka to approach a white Crown Victoria facing eastbound, on the south side of the 200 block of Battery Street. 2 RP 243. Officer Zwaschka approached the passenger side of the car as directed. 2 RP 243. As he approached the vehicle, he saw that the front passenger window was rolled down a couple of inches and noticed that the windows were tinted. 2 RP 243. The front passenger in the vehicle was later identified as the defendant, Nicholas Cloyd. 2 RP 243. Officer Zwaschka walked up to the front passenger window and spoke to Cloyd briefly. 2 RP 244. Officer Zwaschka then began to hand Cloyd \$20.00 in exchange for the drugs based on his conversation with Cloyd and Jones. 2 RP 243. Cloyd then told Officer Zwaschka "no, no, no, you are going to deal with the girl." 2 RP 244. While Cloyd was telling Officer Zwaschka that he was going to deal with the "girl" in the vehicle, Cloyd began to pour what appeared to be small white rocks of crack cocaine out of a container into the palm of his hand. 2 RP 244-46. Officer Zwaschka believed the rocks to be crack

cocaine, based on his extensive training and experience as well as his conversation with Cloyd and Jones. 2 RP 245-46.

While peering into the window about an arm's length away, Officer Zwaschka observed Cloyd transfer the contents he had just placed in his hand to the female driver, later identified as Erika Frunk. 2 RP 244, 258. Officer Zwaschka expressed no doubts about his observations regarding the activities he observed in the vehicle.<sup>7</sup> 2 RP 263.

Frunk exited the driver's side door after the hand exchange between Cloyd and Frunk. 2 RP 244-45. Frunk approached Officer Zwaschka and the two of them conducted the transaction behind an electronic parking meter. 2 RP 245. Officer Jones observed Officer Zwaschka give Frunk the pre-recorded \$20.00 bill and Frunk hand him the crack cocaine.<sup>8</sup> 2 RP 245.

After the delivery from Frunk to Officer Zwaschka, Frunk returned to the vehicle where Cloyd was still seated and Officer Zwaschka walked away. Officer Zwaschka gave the signal to his

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<sup>7</sup> Officer Zwaschka had conducted hundreds of traffic stops over the course of ten years at the time of this operation, and has extensive experience making observations of suspects through windows even when the view is limited or obstructed. 2 RP 258.

<sup>8</sup> The suspected crack cocaine was field tested positive for cocaine. 2 RP 247. This field test was confirmed by the Washington State Patrol Crime Laboratory in Seattle by forensic scientist Mark Strongman who re-tested the material and confirmed it was cocaine. 2 RP 343-54.

team that he had successfully purchased narcotics. 2 RP 248.

Officer Jones observed the "good buy" signal and radioed the arrest team. 2 RP 281-82.

Officer Vaca received information from Officer Zwaschka about the sale and arrested Cloyd while other officers from the arrest team made contact with Frunk and Jones. 4 RP 372. Cloyd was searched, but there were not any drugs found on his person. 4 RP 372. Officer Vaca testified that it is not unusual for someone involved in a narcotic transaction to not have drugs on them at the time of a search. 4 RP 373. He further elaborated that suspects can easily have an opportunity to discard the illegal substances before they are contacted by law enforcement. 4 RP 373.

After the arrest, a search warrant was obtained for the Crown Victoria. 2 RP 323-24. Pursuant to the search, law enforcement located \$151 above the front passenger side visor, where Cloyd was seated. 2 RP 250. Law enforcement only located \$2.00 above the driver side visor, where Frunk was seated.

**C. ARGUMENT**

**1. A UNANIMITY INSTRUCTION WAS NOT REQUIRED BECAUSE THE DELIVERIES WERE PART OF A CONTINUING COURSE OF CONDUCT.**

Cloyd contends that he was denied his right to a unanimous jury verdict because the court did not provide the jury with a Petrich instruction.<sup>9</sup> He is mistaken. No unanimity instruction was required because Cloyd's actions were part of a continued course of conduct. In addition, Cloyd did not request a unanimity instruction. Rather, Cloyd adopted the State's proposed instructions at trial and agreed that the State's instructions were correct. 4 RP 396-97.

In Washington, a conviction may stand only when a unanimous jury concludes that the defendant committed the criminal act charged in the information. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Failure to give a unanimity instruction can be raised for the first time on appeal. In considering this issue, the standard of review is de novo. According to State v. Petrich, the State must either elect a single act to rely on for a conviction, or the Court must instruct the jury that they must all agree on a specific criminal act. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). However, the rule articulated in Petrich

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<sup>9</sup> A Petrich instruction is also referred to as a unanimity instruction.

applies only when the State presents evidence of "several distinct acts."<sup>10</sup> The Petrich rule does not apply when the State presents evidence of a continuing course of conduct. State v. Handran, 113 Wn.2d 17, 775 P.2d 453 (1989).

In reviewing the record, a unanimity instruction was not required. The evidence presented at trial clearly demonstrates the two deliveries were part of a continuing course of conduct. Acts occurring in one place during a short period of time are considered part of a continuing course of conduct. State v. Handran, 113 Wn.2d at 11. To determine whether criminal conduct constitutes a continuing course of conduct, the facts must be evaluated in a commonsense manner. Handran, 113 Wn.2d at 17.

In addition, a continuing course of conduct occurs when there is an ongoing enterprise with a single objective. State v. Gooden, 51 Wn. App. 615, 619-20, 754 P.2d 1000. When the evidence shows that a defendant engaged in a series of actions intended to achieve the same objective, this also supports the characterization of those actions as being a continuing course of

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<sup>10</sup> When the evidence presented involves conduct at different times and places, it tends to show several distinct acts. Handran, 113 Wn.2d at 17 (citing Petrich, 101 Wn.2d at 571); State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911).

conduct rather than several distinct acts. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

In Fiallo-Lopez, undercover detectives were working with an informant, identified as Jeff Cooper ("Cooper"), to purchase cocaine in an undercover buy operation. Fiallo-Lopez, 78 Wn. App. at 719-20. This case involved two deliveries that occurred between the defendant and Cooper in a short period of time. Like Cloyd, Fiallo-Lopez argued that he was denied his right to a unanimous jury verdict because the State did not elect one delivery to rely on and claimed the trial court erred by failing to give a unanimity instruction.<sup>11</sup> Fiallo-Lopez, 78 Wn. App. at 723. Fiallo-Lopez argued there were two distinct acts of delivery and two separate locations and that the State based its case on the contention that he was an accomplice to both deliveries. Fiallo-Lopez, 78 Wn. App. at 723, 725.

The Court in Fiallo-Lopez held that even though the two deliveries occurred at different times and places, the deliveries were still considered to be a continuing course of conduct as a result of the common sense consideration that they were both intended for the same ultimate purpose, which was delivery of

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<sup>11</sup> Like Cloyd, Fiallo-Lopez also did not propose a unanimity instruction to the court.

cocaine by Fiallo-Lopez to the informant. Fiallo-Lopez, 78 Wn. App. at 725-26. The Court found that a unanimity instruction was not required and that Fiallo-Lopez was not denied his right to a unanimous jury. Fiallo-Lopez, 78 Wn. App at 727. The Court further compared Fiallo-Lopez's case to that of Handran, where the defendant committed two assaults aimed at the same purpose. Fiallo-Lopez, 78 Wn. App. at 726.

In Handran, the defendant climbed through a window into his ex-wife's apartment while she was asleep and began to kiss her. Handran, 113 Wn.2d at 12. His ex-wife demanded that Handran leave and in response Handran pinned down his ex-wife and struck her in the face. Handran, 113 Wn.2d at 12. Handran, just like Cloyd and Fiallo-Lopez, did not offer a unanimity instruction, therefore, no instruction was given. Handran, 113 Wn.2d at 13. The jury in Handran found him guilty of burglary in the first degree. Handran, 113 Wn.2d at 13. Handran appealed based on the lack of a unanimity instruction. The Court held that the facts, when viewed in a commonsense manner, evidenced a continuing course of conduct as to the assault underlying the burglary. Handran, 113 Wn.2d at 17.

In State v. Locke,<sup>12</sup> Locke appealed his conviction and sentence for one count of making threats against the Governor and her family. Locke had made several threats to the Governor through three separate emails. The Court found that the three emails were part of a continued course of conduct and that a unanimity instruction was not required because of the following reasons: the defendant sent all three electronic communications within a short span of four minutes, the communications were sent from the same location and went to the same location, and all three communications served the same objective, which was communicating, at the very least, the defendant's desire that the Governor or her family be harmed or killed.

The deliveries involving Cloyd are analogous to the cases of Fiallo-Lopez, Handran, and Locke. The deliveries that Cloyd engaged in occurred over a short period of time, involved the same parties, and were conducted for the same objective. First, these two deliveries occurred over a very short period of time. Officer Zwaschka walked up to the car and briefly spoke to Cloyd. While speaking to Cloyd, Officer Zwaschka observed Cloyd pour the suspected cocaine into his hand and give it to Frunk. Frunk exited

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<sup>12</sup> State v. Locke, 175 Wn. App. 779, 307 P.3d 771 (2013).

the vehicle and delivered cocaine to Officer Zwaschka in exchange for the money. The time frame between the delivery from Cloyd to Frunk and Frunk to Officer Zwaschka was almost instantaneous; much shorter than the time period exhibited in Fiallo-Lopez and even Locke.

Second, this delivery involved the same parties: Cloyd, Officer Zwaschka, and Frunk. Officer Zwaschka was present and speaking to Cloyd as he delivered the suspected cocaine to Frunk. Frunk then immediately exited the vehicle and delivered cocaine to Officer Zwaschka.

Third, the exchange between Cloyd and Frunk was conducted in order to facilitate the ultimate objective, which was to sell cocaine to Officer Zwaschka. Officer Zwaschka had firsthand knowledge of his own interaction with Cloyd, but also witnessed the exchange between Cloyd and Frunk.

While Cloyd alleges that the jurors may have doubted that this first exchange ever even happened, Officer Zwaschka testified that he did not have any doubts about what he observed inside the vehicle. The record clearly supports the fact that Cloyd's actions facilitated the ultimate delivery of the cocaine to Officer Zwaschka.

Fourth, when the evidence is evaluated in a commonsense manner, it is reasonable to believe that the initial exchange between Cloyd and Frunk was performed to aid in the final delivery of the cocaine to Officer Zwaschka. The observations by Officer Zwaschka, in addition to the \$151 dollars that was found where Cloyd was sitting, exemplifies his active participation in facilitating the delivery to Officer Zwaschka. Indeed, these facts could arguably be viewed as only one delivery to officer Zwaschka that simply occurred in two stages.

All in all, even if viewed as two separate deliveries, the deliveries occurred over a very short period of time, in close proximity, involved the same parties, and facilitated the ultimate objective of selling cocaine to Officer Zwaschka. Therefore, these deliveries were part of a continuing course of conduct and, pursuant to case law, no unanimity instruction was required. Cloyd's argument that this case involved multiple acts should be rejected.

**2. THE FAILURE TO PROVIDE THE UNANIMITY INSTRUCTION WAS HARMLESS ERROR.**

Failure to provide a unanimity instruction, when required, violates the defendant's constitutional right to a unanimous verdict and is reversible error, unless the error is harmless. State v. Camarillo, 115 Wn.2d 64, 794 P.2d 850 (1990). In "multiple acts" cases the standard of review for harmless error is whether a "rational trier of fact could find that each incident was proved beyond a reasonable doubt." State v. Gitchee, 41 Wn. App. 820, 823, 706 P.2d 1091 (1985). Cloyd argues that the jury discriminated between the first delivery and the second delivery and therefore the error was harmful.<sup>13</sup> This claim should be rejected. If there was an error, the error was harmless. Based on the evidence presented, no rational trier of fact could have entertained a reasonable doubt that each delivery occurred.

The Supreme Court of Washington addressed this precise issue in Camarillo. In Camarillo, the victim testified in detail to three incidents that each independently supported one count of indecent liberties. Camarillo, 115 Wn.2d at 70, 794 P.2d 850. See also

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<sup>13</sup> Cloyd also contends that some of the jurors may have doubted the fact that Cloyd delivered the cocaine to Frunk. There is no evidence in the record to support this claim. Therefore, this argument should not be considered by this Court.

Kitchen, 110 Wn.2d at 413-14, 756 P.2d 105 (holding the failure to provide a Petrich instruction harmless where the jury could not rationally discriminate between two incidents). The Court in Camarillo determined that if the jury reasonably believed that one incident occurred based on the evidence presented at trial, all the incidents must have occurred. Camarillo, 115 Wn.2d at 70.

The same reasoning applies here when the "multiple acts" analysis is applied. Officer Zwaschka detailed his observations during the undercover buy, his personal interactions with Cloyd, and described Cloyd's delivery of cocaine to Frunk inside the vehicle. Officer Zwaschka testified that he did not have any doubts about his observations. Cloyd did not offer any evidence upon which the jury could discriminate between these two deliveries. If the jury reasonably believed Cloyd was an accomplice to the crime of delivery, then it must have also been believed that the delivery between Cloyd and Frunk occurred. There is no basis for the jury to have rationally distinguished between the two deliveries. As such, under Cloyd's "multiple acts" analysis, Cloyd's argument fails. Based on the testimony and evidence presented at trial, if there was an error, it was harmless. This Court should therefore affirm Cloyd's conviction and sentence.

**3. BASED ON THE INVITED ERROR DOCTRINE, CLOYD INVITED THIS ERROR AND IS THEREBY PRECLUDED FROM RAISING THIS ISSUE ON APPEAL.**

The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involved a constitutional right. State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990) (citing State v. Boyer, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979)). This doctrine applies to alleged failures to provide a Petrich unanimity jury instruction. For example, in State v. Corbett, 158 Wn. App. 576, 592, 242 P.3d 52 (2010), the Court of Appeals held that where the defendant proposed jury instructions that did not include a Petrich instruction, the invited error doctrine precluded him from challenging the failure to provide such an instruction on appeal.

In this case, Cloyd did not provide the court with separate proposed jury instructions. Rather, Cloyd expressly adopted the jury instructions proposed by the State as his own proposed instructions to the court. 4 RP 396-98. The trial court inquired and confirmed on two occasions that Cloyd agreed with the proposed

instructions and Cloyd agreed that they were the correct instructions to be provided to the jury. 4 RP 396-98. In doing so, Cloyd waived the ability to challenge on appeal any error that may be contained in the adopted instructions he agreed to provide to the jury. Cloyd invited this error and should be precluded from seeking appellate review.

**D. CONCLUSION**

Cloyd was not denied his right to a unanimous jury verdict. Based on the aforementioned reasons, this Court should affirm Cloyd's conviction and sentence.

DATED this 22<sup>nd</sup> day of March, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the Appellant, Dana Nelson, containing a copy of the Brief of Respondent, in STATE V. NICHOLAS CLOYD, Cause No. 74037-7-1-I, in the Court of Appeals, Division I, 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.

  
Name  
Done in Seattle, Washington

03-22-16  
Date