SUPREME COURT NO. 90749-8

NO. 70564-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN STUM,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Anita Farris, Judge

PETITION FOR REVIEW

JENNIFER L. DOBSON
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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner, Benjamin Chad Stum, the appellant below, asks this Court to review the decision referred to in Section B.

B. COURT OF APPEALS DECISION

Stum requests review of the Court of Appeal's decision in State v. Stum (COA No. 70564-4-I) filed on August 4, 2014.[1]

C. ISSUE PRESENTED FOR REVIEW

For Miranda[2] purposes, does a valid Terry[3] stop ripen into a custodial detention when its duration is left open-ended and the officer employs the "Reid Technique"[4] to obtain self-incriminating statements?

D. GROUNDS FOR REVIEW

Review should be granted under RAP 13.4(b)(3) and (4). Whether a Terry stop ripens into a custodial interrogation triggering

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[1] This decision is attached as an Appendix.

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[4] The "Reid Technique" is an interrogation technique that is widely used by law enforcement agencies. Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, Criminal Interrogation and Confessions (5th ed. 2011).

Miranda warnings raises a significant question of law under both the State and federal constitutions and is an issue of substantial public interest that should be determined by this Court.

E. RELEVANT FACTS

On April 3, 2013, at approximately 10:00 a.m., there was a large explosion at an apparently unoccupied residence in Everett. 1RP 90-91.[5] The explosion blew out the house windows and knocked the front door off its hinges and across the street. 1RP 93-116. The basement was burned and the walls were dangerously destabilized. 1RP 93-116. The house had to be demolished given the extent of the damage. 2RP 169.

Shortly after the explosion, Detective Michael Atwood arrived on scene, inspected the house and interviewed neighbors who described a suspect they saw fleeing from the back of the house. 1RP 92, 116-17, 174, 176. Afterward, Atwood parked his car in an alley behind the house. 1RP 118. He was talking to a neighbor when a man fitting the suspect's description (Stum) came walking down the alley. RP 9; 1RP 118.

[5] The Report of Proceedings are referred to as follows: RP (6-14-13); 1RP (6-17-13 and 6-18-13).

Atwood introduced himself as he approached Stum. RP 9, 12. Stum was carrying a sheathed hunting knife in one hand and an open beer can in the other. RP 9. Atwood told Stum it was illegal to have an open beer in public. RP 13. He ordered Stum to set down the beer and give him the knife. RP 9. Atwood secured the knife in his police car, took Stum's identification, and ran his name to check his warrant status. RP 9, 14, 20.

Atwood informed Stum that the fire in the house appeared suspicious. RP 13. He also said the beer Stum had been drinking was the same brand as the empty beer cans found in the exploded house. RP 13-14. Atwood asked where Stum slept the previous night. RP 13-14. When Stum did not confess to being in the house, Atwood applied the "Reid Technique" of interrogation, at some point suggesting it was time for Stum to be truthful in order to lighten his psychological burden. RP 17.

Eventually, Stum began to cry and told the officer he had been staying in the house and had caused the explosion when, after attempting to remove copper pipes from the basement, he lit a cigarette. RP 18; 1RP 123. At this point, Atwood read Stum his Miranda rights, asked him to clarify his confession, and obtained a written confession from Stum. RP 19.

On April 15, 2013, the Snohomish County prosecutor charged Stum with one count of second degree burglary. CP 96-97. The information was subsequently amended to include an additional count of first degree reckless burning. CP 81-82.

At trial, Stum challenged the admissibility of his confession on grounds it was the product of custodial interrogation occurring prior to Miranda warnings. RP 26-29. The trial court ruled the confession was admissible, finding Stum's statements were voluntary because he was free to leave at any time. RP 30-31. The State used Stum's confession to support the convictions. 1RP 123; 1RP 151-53.

Stum appealed, arguing his Fifth Amendment right against self-incrimination was violated when the trial court failed to suppress the illegally obtained confession. Brief of Appellant (BOA) at 8-16. Specifically, he argued his confession should have been suppressed because he was in custody when Atwood interrogated him, but was never given Miranda warnings prior to his confession. BOA at 8-16; Reply Brief of Appellant (RBOA) at 1-7. The Court of Appeals disagreed, finding Atwood merely conducted a Terry stop and, thus, Stum's confession was admissible regardless of Miranda warnings. Appendix at 1, 5-8.

F. ARGUMENT IN SUPPORT OF REVIEW

REVIEW SHOULD BE GRANTED SO THIS COURT MAY CLARIFY WHEN POLICE QUESTIONING DURING A TERRY STOP ELEVATES TO THE LEVEL OF CUSTODIAL INTERROGATION, REQUIRING MIRANDA WARNINGS.

The question presented in this case is: when does an investigative detention ripen into a custodial interrogation for Miranda purposes? More specifically, does a detention that is of an open-ended duration, and which includes the officer's use of the "Reid Technique," elevate the level of police coerciveness beyond that contemplated during a Terry stop, thereby triggering the need for Miranda warnings?

The Fifth Amendment to the United States Constitution commands "[n]o person ... shall be compelled in any criminal case to be a witness against himself." To preserve an individual's Fifth Amendment right against compelled self-incrimination, police must inform a suspect of his or her rights before custodial interrogation takes place. Miranda, 384 U.S. at 444; State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

"Custodial interrogation" is questioning initiated by law enforcement officers after a person has been deprived of his or her freedom in any significant way. Miranda, 384 U.S. at 444. The

legal inquiry for determining whether an individual is in custody for Miranda purposes is whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004) (citing Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

A routine investigative detention is not custodial for Miranda purposes. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345. This is because a genuine Terry stop is brief and less coercive than the type of custodial interrogation contemplated by Miranda. Heritage, 152 Wn.2d at 218. "[U]nlike a formal arrest, a typical Terry stop is not inherently coercive because the detention is presumptively temporary and brief, is relatively less 'police dominated', and does not easily lend itself to deceptive interrogation tactics." State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992) (quoting Berkemer, 468 U.S. at 439).

During a routine Terry stop, a law enforcement officer may detain a person and ask a "moderate" number of questions to determine the suspect's identity and confirm or dispel the officer's suspicions without reading Miranda warnings. Heritage, 152 Wn.2d at 218. Because the degree of restraint in a routine investigative

detention is minimal, it does not require Miranda warnings because it is a less coercive encounter. Heritage, 152 Wn.2d at 218; Berkemer, 468 U.S. at 439–40. However, this case does not involve a routine Terry stop.

Contrary to the Court of Appeals, the record in this case shows Stum's encounter with Atwood went beyond brief and moderate questioning and involved the type of coercive interrogation tactics that require Miranda warnings.

First, the record shows a reasonable person in Stum's position would not have believed he was at liberty to terminate the interrogation and leave. Atwood approached Stum and immediately informed Stum that he was committing an open container violation. Atwood never told Stum he would not be cited for this violation. Nor did he tell Stum he was free to leave. Atwood also confiscated Stum's personal property and kept it during the encounter. Furthermore, Atwood informed Stum of the link between himself and the suspicious fire that Atwood was currently investigating. Finally, Atwood vigorously questioned Stum about his presence in the house.

All these factors would have led a person in Stum's position to believe he was not free to leave. See, BOA at 11-13 (arguing

this point in greater detail). The Court of Appeals' conclusion to the contrary fails to give any weight to the fact Atwood had specifically referred to the open container violation or the pressured questioning about the fire. Appendix A at 7-8. Yet, these are significant factors that should have weighed in the court's analysis of whether Stum was in custody.

Second, this record demonstrates Atwood's detention of Stum went beyond a valid Terry stop. Id. Holding otherwise, the Court of Appeals overlooked two key aspects of Atwood's interaction with Stum that are inconsistent with that of a routine Terry stop: (1) the duration of the stop was left open-ended; and (2) the officer's use of the "Reid Technique" prior to mirandizing Stum. Appendix at 7-8.

Where the duration of a seizure is left open-ended and the reason for the detention is left unresolved, the encounter is not a true Terry stop in which Miranda warnings are not required. State v. France, 129 Wn. App. 907, 909-10, 120 P.3d 654 (2005). The seizure in this case was left open-ended.

When Atwood approached Stum, he told Stum it was illegal to be walking around with an open container of alcohol in public.[6] An officer is permitted to issue a notice when such an infraction occurs in his presence.[7] After an officer tells a person he is committing an open-container violation, that person is not free to just walk away. See, State v. Duncan, 146 Wn.2d 166, 172-73, 43 P.3d 513 (2002) (officers testified that persons stopped for open-container violation were not free to leave). Such an encounter remains open-ended until the officer either issues a citation or affirmatively informs the citizen no citation will be issued.

Here, Atwood informed Stum he was violating the open-container law at the very start of the encounter. Atwood never issued a citation for the violation and never told Stum he would not be issuing one. Thus, Atwood left the duration of the detention open-ended and unresolved while he proceeded to interrogate Stum about the fire. As such, this encounter was not merely a brief investigatory Terry stop but, instead, resembled a custodial seizure.

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[6] RCW 66.44.100; Everett Municipal Code 10.42.020.

[7] RCW 7.80.050(2).

Moreover, Atwood's deliberate application of the "Reid Technique" elevated the coerciveness of the encounter to such a degree it was no longer a routine investigatory stop. As shown below, this particular interrogation technique is more coercive than that permitted during Terry stops and, thus, requires Miranda warnings prior to its use.

Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices. In re Cross, __ Wn.2d __, 327 P.3d 660, 675 (2014). Application of the "Reid Technique" is highly coercive. While the technique is believed to be effective at securing confessions among guilty suspects, it is also considered to enhance the risk of procuring false confessions from innocent suspects. Brian L. Cutler, et. al., Interrogations and False Confessions: A Psychological Perspective, 18 Can. Crim. L. Rev. 153, 157 (June, 2014).

The "Reid Technique" instructs police "to use coercive and deceptive techniques to obtain a confession," such as "presenting false evidence, preventing the suspect from speaking unless he/she is making a confession, tricking the suspect into a confession by offering an understanding and sympathetic attitude,

and minimizing the moral seriousness of the crime." Jessica R. Meyer & N. Dickon Reppucci, Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility, 25 Behav. Sci. & L. 757, 760 (2007). When applying this technique, the investigator appraises the suspect's truthfulness. Cutler, supra, at 156. If deceit is detected, the investigator infers that the suspect is guilty and the ensuing interrogation is designed to extract a confession. Id. at 157. At this point, "[t]he interrogation procedure is not investigative in nature; rather, it is guilt presumptive." Id.

Although Atwood claims he was engaged merely in a Terry stop, he admitted to using the Reid Technique on Stum prior to giving Miranda warnings. RP 17-19. The officer psychologically manipulated Stum into admitting his involvement in the arson. Id. Sum was emotionally overcome after use of this technique and confessed. Id.

Given these circumstances, Atwood elevated the level of police coerciveness beyond what is acceptable for a Terry stop. Stum should have been informed of his Miranda rights. Because he was not, the confession should have been suppressed. The Court of Appeals' decision to the contrary undercuts the

constitutional protections that are at the heart of Miranda. It permits officers to apply the "Reid Technique" during Terry stops, which do not require Miranda warnings.

The need for clarification from this Court as to the appropriate use of coercive interrogation techniques cannot be understated. The "Reid Technique" is widely used by law enforcement. It is a technique that is designed to force a suspect into making incriminating statements. Here, it was applied without any apparent hesitation during an open-ended detention. If – as this case suggests – officers are using the "Reid Technique" during alleged Terry stops and thereby avoiding Miranda requirements, it is imperative that the constitutionality of this practice be reviewed by this Court. RAP 13.4(b)(3) and (4).

G. CONCLUSION

Because this case presents a significant question of law under the state and federal constitutions and an issue of substantial public interest, petitioner respectfully asks this Court to grant review. RAP 13.4(b)(3), (4).

Dated this 3rd day of September, 2014.

Respectfully submitted

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BENJAMIN CHAD STUM, Appellant.	)	No. 70564-4-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: August 4, 2014

TRICKEY, J. — Police questioning during a routine investigatory detention does not rise to the level of custodial interrogation. Because Benjamin Stum's statements to police occurred during a valid Terry stop, no Miranda warnings were required, and the trial court properly denied his motion to suppress. Nor has Stum demonstrated any prejudice resulting from the delayed entry of findings of fact and conclusions of law following the CrR 3.5 hearing. We therefore affirm his convictions for second degree burglary and first degree reckless burning.

FACTS

The relevant facts are essentially undisputed. On April 3, 2013, Everett Police Detective Michael Atwood responded to a reported explosion at an unoccupied residence on 41st Street.[1] The explosion blew out the windows, sent

[1] Report of Proceedings (RP) (CrR 3.5 Hearing, June 14, 2013) at 7; 1 RP (June 17 & 18, 2013) at 90-91.

the front door across the street, damaged the walls, and caused a fire in the basement.[2]

Upon arriving, Atwood, an arson investigator and bomb technician, noticed extensive damage to the house from some type of explosion.[3] After inspecting the house, Atwood interviewed several neighbors, who described a man they saw leaving the house at about the time of the explosion.[4] Atwood drove around the neighborhood, but could not find the man. He then returned to the house and resumed his investigation.[5]

While Atwood spoke with one of the neighbors, he noticed a man approaching on foot.[6] The man, later identified as Benjamin Stum, was carrying a sheathed hunting knife in one hand and an open beer can in the other.[7] Atwood walked over to Stum, who matched the description of the man that neighbors saw leaving the house around the time of the explosion.[8] Stum's beer can was identical to several empty cans that Atwood had seen inside the damaged house.[9]

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[2] The city of Everett eventually demolished the house. 1 RP at 93-116.
[3] RP at 7.
[4] RP at 8.
[5] RP at 8.
[6] RP at 8-9.
[7] RP at 9.
[8] RP at 9.
[9] RP at 13.

Atwood, who was not in uniform, identified himself and asked Stum to put down the beer can and hand over the knife.[10] Stum complied, and Atwood placed the knife on the front seat of his nearby police van.[11] Atwood told Stum that he was investigating a suspicious fire in the house.[12] He checked Stum's identification card briefly and then returned the card.[13]

Atwood informed Stum that it was illegal to carry an open beer can in public and that his beer can matched several empty cans in the house.[14] At some point during the conversation, Atwood told Stum that it was "time to be honest."[15] Stum eventually became emotional and indicated that he had been sleeping in the house for some time and that the explosion was an accident.[16]

Because of the amount of damage in the house, Atwood was skeptical about Stum's assertion and asked him to clarify it.[17] When Stum confirmed that he was in the house at the time of the explosion, Atwood stopped the conversation and advised Stum of his Miranda rights.[18] See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The conversation had lasted about five minutes.[19]

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[10] RP at 9.
[11] RP at 9.
[12] RP at 14.
[13] RP at 14.
[14] RP at 13.
[15] RP at 16.
[16] RP at 17-18.
[17] RP at 18.
[18] RP at 19.
[19] RP at 16.

Stum indicated that he understood his rights and continued to talk with Atwood.[20] He also provided a written statement.[21] Stum explained that he had been living in the vacant house for several months.[22] On the day of the explosion, Stum was cutting and removing copper pipe downstairs in the house to sell. At some point, he began to smell gas.[23] Stum indicated that he had caused the explosion when he used a lighter to test the quantity of gas or when he took a break and lit a cigarette.[24]

The State charged Stum with one count of second degree burglary and one count of first degree reckless burning.[25] Prior to trial, the defendant moved to suppress his statements to Detective Atwood, arguing that they were made during custodial interrogation without the benefit of Miranda warnings.[26] Following a CrR 3.5 hearing, the trial court denied the motion, concluding that because the encounter was brief, non-coercive, and involved a valid investigatory detention, Stum was not in custody for purposes of Miranda.[27]

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[20] RP at 10-11.
[21] RP at 11.
[22] 1 RP at 123.
[23] 1 RP at 122.
[24] 1 RP at 122-23.
[25] Clerk's Papers (CP) at 81.
[26] RP at 26-29.
[27] RP at 30-31.

The jury found Stum guilty as charged,[28] and the court sentenced him under a first-time offender waiver to 90 days of incarceration and one year of community custody.[29]

ANALYSIS

Stum contends that the trial court erred in concluding that he was not in custody during Detective Atwood's initial questioning and that his statements were therefore admissible without the benefit of Miranda warnings. He argues that the circumstances of the encounter, including Atwood's explanation of the illegality of the open beer container, the confiscation of his knife, and the detective's suggestions that he might be involved in the explosion, exceeded the scope of a valid investigatory detention and were sufficiently coercive to constitute custodial interrogation for Miranda.

We review the trial court's decision following a CrR 3.5 hearing to determine whether substantial evidence supports the findings of fact and whether those findings, in turn, support the conclusions of law. State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The trial court's determination as to whether questioning constituted custodial interrogation is a conclusion of law that we review de novo. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

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[28] CP at 34-35.
[29] CP at 18-27.

Miranda warnings are required prior to the initiation of "custodial interrogation." State v. Heritage, 152 Wn.2d 210, 217, 95 P.3d 345 (2004). The test for determining whether a defendant is in custody for purposes of Miranda is an objective one: "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." Lorenz, 152 Wn.2d at 37 (citing Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

Consistent with the Fourth Amendment and article I, section 7 of the Washington Constitution, a police officer may conduct a brief investigatory detention if the officer has a reasonable and articulable suspicion that an individual is involved in criminal activity. State v. Sieler, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980); see also Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). During the course of a Terry stop, the officer may ask a moderate number of questions "to confirm or dispel the officer's suspicions." Heritage, 152 Wn.2d at 218. Because Terry stops generally are brief and occur in public, "they are substantially less police dominated than the police interrogations contemplated by Miranda." Heritage, 152 Wn.2d at 218 (internal quotation marks omitted) (quoting Berkemer, 468 U.S. at 439). Consequently, a routine investigatory detention is not custodial for purposes of Miranda. Heritage, 152 Wn.2d at 218.

Here, when Detective Atwood approached Stum, he knew that Stum matched the description of a man seen leaving the house at the time of the

explosion and that Stum was carrying a beer can identical to those that he had seen inside the house. Under the circumstances, Atwood had specific and articulable facts justifying a brief investigatory detention to determine whether Stum might have been involved with the explosion.

Atwood did not tell Stum he could not leave, place him in handcuffs, or otherwise restrain him or restrict his movements. The questioning occurred in public and involved only Atwood and Stum. Although Atwood removed Stum's hunting knife before talking to him, an officer may temporarily secure a suspect's weapon without exceeding the permissible scope of an investigatory detention. See State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). Finally, the questioning was brief, lasting no longer than five minutes. Once Stum clarified that he was in the house at the time of the explosion, Atwood stopped the questioning and advised Stum of his Miranda rights. Contrary to Stum's assertions, the questioning did not exceed the valid scope of a Terry stop. Under the circumstances, a reasonable person would not have believed that his freedom was curtailed to a degree analogous to a formal arrest. The trial court correctly concluded that the encounter did not constitute a custodial interrogation requiring Miranda warnings

Stum's arguments rest primarily on the claim that a reasonable person in his position would not have felt free to leave. But when a police officer questions a suspect during a valid investigatory detention, the fact that the suspect is not necessarily free to leave does not elevate the encounter into a custodial

interrogation. See Berkemer, 468 U.S. at 439-40 (Fourth Amendment seizure of suspect for routine Terry stop or comparable traffic stop does not rise to the level of "custody" for purposes of Miranda); Heritage, 152 Wn.2d at 218; State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992).

In his opening brief, Stum assigned error to the trial court's failure to enter written findings of fact and conclusions of law following its denial of his motion to suppress.[30] See CrR 3.5. The trial court promptly entered findings and conclusions after the State learned of the error.

We will not reverse a conviction for the late entry of findings and conclusions unless the delay prejudiced the defendant or the findings and conclusions were tailored to address the issues raised in the defendant's appellate brief. State v. Cannon, 130 Wn.2d 313, 329-30, 922 P.2d 1293 (1996).

In his reply brief, Stum has assigned error to two minor findings related to the open beer container that he was carrying. Those findings are immaterial to our analysis of the custody issue. The relevant written findings and conclusions accurately reflect the evidence presented to the trial court, the parties' arguments, and the trial court's oral decision. Stum has not alleged or demonstrated that the written findings and conclusions are inadequate to permit appellate review or that the delayed entry was in any way prejudicial. Reversal is therefore not warranted. See State v. Brockob, 159 Wn.2d 311, 344, 150 P.3d 59 (2006); Cannon, 130 Wn.2d at 330.

[30] Br. of Appellant at 1, 17.

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Affirmed.

Trickey, J

WE CONCUR:

Spearman, C.J.

Appelwick, J

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. BENJAMIN STUM, Appellant.	)))))))))	SUPREME COURT NO. _____ COA NO. 70564-4-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF SEPTEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BENJAMIN STUM
1424 MAPLE STREET
EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF SEPTEMBER 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 03, 2014 - 2:59 PM

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