NO. 45939-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEMAR DATHAN WALLER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 13-1-00942-2

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it denied the defendant's seventh continuance motion and motion for new counsel, where it accommodated the defendant's trial preparation and witness investigation needs, and where defense counsel's performance was not deficient?

2. Can the defendant show deficient performance, and prejudice that would have affected the outcome of the trial, where throughout the proceedings, trial counsel objected to the admission of evidence, brought necessary and appropriate motions, and argued that the State had not proved its case beyond a reasonable doubt?

3. Where the defendant failed to preserve the issue of the trial court's inquiry into the defendant's ability to pay, and where the defendant has a statutory remedy that can be utilized "at any time", should this Court decline to review the trial court's legal financial obligation order?

B. STATEMENT OF THE CASE.

1. *Procedure.*

On March 6, 2013, Appellant Lemar Dathan Waller (the "defendant") was charged with two felony drug offenses, delivery of cocaine, and possession of heroin with intent to deliver. CP 1-2. He was arraigned, pled not guilty and a trial date was set for April 29, 2013. CP 4. The trial was thereafter continued six times on the defendant's motion. CP

4-9. The case age at the time of the last continuance was 278 days, and at that continuance the trial court set a January 7, 2014, trial date. CP 9.

On January 7, 2014, the defendant appeared before the criminal presiding judge. RP (Cuthbertson), 01/07/2014, p.2[1]. At that hearing the defendant made an oral motion for new counsel that would necessarily have required another continuance. RP (Cuthbertson), 01/07/2014, p.3-5. After hearing from both the defense attorney and the defendant, the trial court denied the motion and assigned the defendant's case to a trial department. RP (Cuthbertson), 01/07/2014, p.7.

Trial began the same day. RP (Hickman) vol. 1, p.3. When the case was called, the defendant advised the trial judge of the substance of the motion for appointment of new counsel that was heard by the criminal presiding judge. RP (Hickman) vol. 1, p.4-5. The trial judge declined to hear additional argument from the defendant but left open the possibility of the defense bringing a motion for reconsideration before the criminal presiding judge. RP (Hickman) vol. 1, p.7.

The trial judge also considered a number of pre-trial motions. These included a motion to add a defense witness or witnesses [RP (Hickman) vol. 1, p. 10-11.] and for a recess for the defendant to review

[1] The hearings that are relevant to the issues in this appeal took place before two Pierce County trial court departments. Citations to the verbatim record in this brief will include the judge's name, date and page number for hearings in the criminal presiding department, and the judge's name, volume and page number for trial proceedings.

surveillance video footage with his attorney [[RP (Hickman) vol. 1, p. 29-30.] Both of these motions were granted. RP (Hickman) vol. 1, p. 11. The defense attorney indicated that insofar as a defense witness list was concerned, "We can certainly amend that and supplement that tomorrow." RP (Hickman) vol. 1, p. 11.

Trial proceeded with the State calling seven witnesses on Wednesday, January 8, and Thursday January 9, 2014. RP (Hickman) vol. 2, p. 130, vol. 3 p. 282. The State rested and the trial court recessed early at approximately 3:00. RP (Hickman) vol.3, p. 366-67. After having the remainder of the court day on Thursday, all day Friday and the weekend to consider whether to present a defense case, the defendant rested without calling any witnesses or testifying in his own defense. RP (Hickman) vol. 4, p. 372. The record does not disclose that any defense witnesses were identified as potential trial witnesses.

After closing argument and deliberations, the jury returned a guilty verdict on one of the two counts. CP 67-69. The defendant was convicted of delivery of cocaine as charged in Count One. CP 67.

2. *Facts.*

The drug charges arose from a Tacoma Police "hot pop" investigation in Tacoma's Hilltop neighborhood. RP (Hickman) vol.2, p. 204-05. The area was selected after analysis of complaint and crime statistics showed that it was an area of "high narcotics activity". RP (Hickman) vol.2, p. 205. The operation consisted of sending a paid

informant into the area with pre-recorded buy money to buy drugs. RP (Hickman) vol.2, p. 206, 208. The informant was equipped with an audio recording device and the transaction was videotaped. RP (Hickman) vol.2, p. 211, 216-17. The informant was in the field, away from her case agent for approximately 20 minutes during the hot pop. RP (Hickman) vol.2, p. 218.

The hot pop investigation was conducted by a team of officers. The team included, first the case agents, one of whom was Officer Brian Kim. Officer Kim described the pre and post search of the informant [RP (Hickman) vol.2, p. 212, 215-26.], the recovery of cocaine from the informant after her purchase, and the recovery of heroin by the take down team. RP (Hickman) vol.2, p. 222-25.

The team also included technical or surveillance officers, one of whom was Officer Terry Krause. Officer Krause introduced the surveillance recordings. RP (Hickman) vol.3, p. 356. He testified about having seen the transaction depicted in the video, that three people were in the vicinity or nearby at the time and that only one of them, the defendant, made an exchange with the informant. RP (Hickman) vol.3, p. 357-359, 364.

The third component of the hot pop team was the take down officers. Officer Christopher Shipp testified that as he moved in to arrest the defendant, the defendant fled on foot and was apprehended after a short chase. RP (Hickman) vol.3, p. 294-95. The buy money that had

been provided to the informant (confirmed through review of the serial numbers) was recovered from the pockets of the defendant's clothing. RP (Hickman) vol.3, p. 296-97.

Each of the seven officers who testified was cross examined by the defense attorney. In addition the defense attorney voiced a number of objections throughout the trial proceedings and at the conclusion of the State's case, brought a motion to dismiss which was denied. RP (Hickman) vol. 4, 372-75, 382-84. After the defendant was convicted of the delivery charge in Count One, the court set a sentencing date for January 24, 2014. CP 96-109.

The defendant had sixteen prior felony convictions that resulted in an offender score of 14. CP 99. The defendant's sentencing recommendation included a request for an exceptional sentence below the range due to ill health and the small monetary value of the cocaine sold to the informant. RP (Hickman) vol. 6, 470-73. The defendant's mother spoke on his behalf and reported that the defendant suffered from addiction and that his health problems were related to repeated addiction relapses. RP (Hickman) vol. 6, 475-76. While neither the defendant nor the defense attorney specifically objected to the legal financial obligations portion of the sentence, the trial court had before it defense arguments about the defendant's health and the relatively low impact on the community of the street level drug transaction prior to entering that order. RP (Hickman) vol. 6, 470-73, 480-82. In light of the defendant's history

of relapse, the court ordered a drug evaluation and follow up, and that he not have contact with drug users or sellers as part of the defendant's post release supervision. RP (Hickman) vol. 6, 481.

The defendant was sentenced to a mid-range sentence of 75 months. CP 102. This appeal was timely filed on February 21, 2014. CP 113-24. To date no motion for remission of the defendant's legal financial obligations has been filed.

C. ARGUMENT.

1. WHERE THE DEFENDANT HAD PREVIOUSLY SOUGHT A CONTINUANCE SIX TIMES, AND WHERE THE TRIAL COURT ACCOMMODATED THE DEFENDANT'S TRIAL PREPARATION AND WITNESS NEEDS, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE MOTION FOR NEW APPOINTED COUNSEL AND FOR A CONTINUANCE.

An essential aim of the Sixth Amendment "is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." ***Wheat v. United States***, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697, 100 L. Ed. 2d 140 (1988). In substitution motions, federal courts consider a variety of factors that "include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict)." ***Martel v. Clair***, 80 USLW

4198, 132 S. Ct. 1276, 1287, 182 L. Ed. 2d 135 (2012). "Because a trial court's decision on substitution is so fact-specific, it deserves deference; a reviewing court may overturn it only for an abuse of discretion." *Id.*

In Washington, once a criminal case is set for trial, "no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown." CrR 3.1(e). "Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court." ***State v. Stenson***, 132 Wn. 2d 668, 733-34, 940 P.2d 1239, 1272 (1997), citing ***Wheat v. United States***, 486 U.S. at 164, ***State v. DeWeese***, 117 Wn.2d 369, 376, 816 P.2d 1 (1991), and ***State v. Sinclair***, 46 Wn. App. 433, 730 P.2d 742 (1986).

"The general loss of confidence or trust alone is not sufficient to substitute new counsel." ***State v. Stenson***, 132 Wn. 2d 668, 733-34, 940 P.2d 1239, 1272 (1997), citing ***Johnston v. State***, 497 So.2d 863(Fla. 2010). "A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Id.*, citing ***Smith v. Lockhart***, 923 F.2d 1314, 1320 (8th Cir.1991).

In this case the defendant made an oral motion for appointment of new counsel on the day of trial. The motion colloquy took place in the criminal presiding department on January 7, 2014. During the motion

hearing the criminal presiding judge had the following information at his disposal: (1) that the defendant was out of custody [RP (Cuthbertson), January 7, 2014, p. 2.]; (2) that the defendant had previously sought a continuance six times [CP 4-9.]; (3) that the new counsel and continuance motion was brought in the criminal presiding court after the case had been pending for ten months; [CP 9.] (4) that the last continuance had been made a month before and listed as the reason for the continuance "Defense attorney has personal issues and needs some additional time to better provide effective assistance of counsel" [CP 9.]; and (5) that the basis for the new counsel and continuance motion was virtually the same basis offered by the defendant a month before. CP 9. With these background facts before it, the criminal presiding judge considered the defendant's motion for new counsel and for his seventh continuance.

During the hearing the criminal presiding judge was provided little more in the way of facts supporting the new counsel request. The transcript of the hearing is only seven pages. During the colloquy the defense position was not so much that the defense attorney would not be effective as that the defendant did not think that he would. RP (Cuthbertson), January 7, 2014, p. 3-4. The defense attorney stated, "Mr. Waller prefers that I be dismissed from his case and that new counsel be appointed. He feels he is not receiving effective assistance, and I respect that. The reality and the perception are the same: If a person feels that they're not getting the full effort, then they're not, because that perception

is supreme, in my opinion." RP (Cuthbertson), January 7, 2014, p.3. In terms of specific reasons supporting the defense attorney advised the court, (1) "our communication has broken down. . ." [RP (Cuthbertson), January 7, 2014, p. 4.], and (2) "there's been some personal issues in his life as well. . . ." RP (Cuthbertson), January 7, 2014, p.4.

The defendant also addressed the court. His statements indicated not so much that there was a communication breakdown as that there had been a lack of communication except face to face at court appearances. RP (Cuthbertson), January 7, 2014, p.5. Neither the defendant nor the defense attorney provided any specific information about what attempts were made to communicate with each other outside court. There was no mention of unreturned phone calls, lack of cell phone minutes, transportation difficulties, or the like. Insofar as prejudice is concerned only two defense preparation deficits that were brought to the court's attention. Namely that the defendant had not viewed the undercover police surveillance video [RP (Cuthbertson), January 7, 2014, p. 5-6.], and that there may have been an individual pictured in the video who the defendant knew and who might have been a viable trial witness. RP (Hickman) vol.1, p. 10.

The criminal presiding judge also had at his disposal more than a decade's experience in a busy urban court of general jurisdiction. As any trial judge or lawyer would know, the defendant's trial preparation needs would not be ignored by the trial department. As to the defendant not

having viewed the surveillance video, the defense attorney asked the trial department for accommodation as follows: "Would the Court allow us to adjourn at this time, come back at about 1:15, 1:30, begin jury selection? We should be able to pick a jury today. That way he and I will have seen the video together, and he may have a name of a potential witness that we can then bring to the attention of the jury by ordering an extended recess. RP (Hickman) vol. 1, p.29. The trial court granted the request. *Id.* Thereafter, no further complaint was voiced by the defense as to lack of opportunity to view the surveillance video.

The trial department dealt with the potential for a last minute defense witness in much the same common sense fashion. The State did not object nor ask for a continuance or recess. RP (Hickman) vol. 1, p.29. The reason is that the trial judge had given the parties the assurance that the witness would be allowed to testify, but that the State would be given a reasonable opportunity to prepare to address the witness. RP (Hickman), vol. 1, p. 11. The trial judge stated, "Okay. Well, that gets to be problematic in the sense that I don't want to do trial by surprise. I know you're not involved in that kind of thing, but if you do get a witness, I obviously will have to make sure that opposing counsel has an opportunity to fully vet that witness before they take the stand." *Id.*

"A defendant may not discharge appointed counsel unless the motion is timely and upon proper grounds." ***State v. Cross***, 156 Wn. 2d 580, 606-07, 132 P.3d 80, 92 (2006), citing ***In Re: Stenson,*** *supra*, at 732-

34. In this case, there is no reason not to support the exercise of discretion of the two trial judges. Harkening back to the factors identified in ***Wheat***, the trial judges in this case denied the defense motion (1) because it was untimely in that it was made orally on the day of trial, (2) after a complete hearing in which all of the reasons that the defense cared to bring to the court's attention were considered, (3) after hearing allegations of pretrial communications difficulties but seeing no evidence of such, and (4) after addressing specific trial preparation needs in a commonsense reasonable fashion. We could hardly ask more of any trial judge.

Considering the paucity of evidence of specific prejudice, one would be justified in suspecting that the new counsel and continuance motion was actually an attempt to delay resolution of his case by an out-of-custody defendant who was facing a substantial prison term. Be that as it may, on the record in this case there is insufficient evidence for this Court to conclude that there was an abuse of discretion.

2. WHERE THE DEFENDANT IS UNABLE TO SHOW DEFICIENT PERFORMANCE, OR PREJUDICE THAT AFFECTED THE OUTCOME OF THE TRIAL, THE DEFENDANT IS UNABLE TO OVERCOME THE STRONG PRESUMPTION THAT TRIAL COUNSEL'S PERFORMANCE WAS ADEQUATE.

To prevail on an ineffective assistance claim, a defendant must show both deficient performance and resulting prejudice. ***State v. Carson***, 179 Wn. App. 961, 975, 320 P.3d 185 (2014), citing ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). The standard of review is *de novo*,

"beginning with a strong presumption that trial counsel's performance was adequate and reasonable and giving exceptional deference when evaluating counsel's strategic decisions." *Id.* at 975-76, citing ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and ***State v. Grier***, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Insofar as deficient performance is concerned, the defendant's burden is heavy. "To prove ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced him, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." ***In re Personal Restraint of Monschke***, 160 Wn. App. 479, 490, 251 P.3d 884, 891 (2010), citing ***State v. Thomas***, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). As the United States Supreme Court put it "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a

breakdown in the adversary process that renders the result unreliable." ***Strickland v. Washington***, 466 U.S. at 687. ***In re Personal Restraint of Crace***, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012).

In this case, most of the defendant's argument is about potential but not actual deficient performance and prejudice. The State's case was simple but powerful. It consisted of an undercover drug buyer dispatched to buy drugs from whoever might sell in a public park that was overrun by drug selling. RP (Hickman) vol.2, p. 205-06, 208. The target area was intentionally a target-rich environment. RP (Hickman) vol.2, p. 205. The drug buyer was filmed during the transaction from start to finish. RP (Hickman) vol.3, p. 357-359, 364. The resulting video enabled the arrest team to identify the defendant as the seller. *Id.* It also allowed the jury to see the crime as it occurred. Finally, the video was supported by real evidence, which was the drugs purchased and the recorded buy money that was found on the defendant's person. RP (Hickman) vol.3, p. 296-97.

In light of the strength and simplicity of the State's case, the defendant's argument about lack of investigation must be examined in context. The defense attorney could do nothing about the video; it showed what it showed. He could do nothing about the buy money; it was found on the defendant's person. While the record includes a suggestion that the defendant knew people who were in the park, it is silent as to how they might have helped his case. Because there was no allegation of mistaken identity or that the defendant was not there (and how could there be when

he was arrested by the arrest team immediately after the drug sale) the other people in the park would only have confirmed what was already beyond dispute, namely that it was the defendant shown on the video making a drug sale.

In light of the evidence in this case, there is no basis for the argument that the defense attorney's performance was deficient. The defense attorney cross examined all of the witnesses. After the State rested, he had three days over a weekend to assist the defendant in the decision as to whether to put on a defense case. RP (Hickman) vol. 4, 372-75, 382-84. After the weekend the defendant elected not to testify. *Id.* There is nothing in the record about defense witnesses that the defendant wanted to call. Since the defendant was vocal at the pre-trial motion concerning his request for new counsel, but said not a word about witnesses that he wanted to call, a reasonable inference is that the witnesses were not called because they would not have helped his case.

It is possible for an ineffective assistance claim to be supported by a failure to call witnesses. ***In re Personal Restraint of Davis***, 152 Wn. 2d 647, 672-73, 101 P.3d 1, 16 (2004). In ***Davis,*** trial counsel was alleged to have been ineffective for failing to call witnesses. The court applied the ***Strickland*** test and determined that the failure satisfied neither the performance nor prejudice prong. As might be said of this case, the ***Davis*** court stated, "Counsel's decision not to call these witnesses constitutes a

strategic decision. Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel." *Id.* at 672-73.

Had there been a renewal of the defendant's continuance motion coupled with an offer of proof concerning a witness or witnesses that the defense wanted to call, the record might better support the defendant's arguments in this appeal. As it stands, the record does not support deficient performance or prejudice. Accordingly, this Court should affirm the defendant's conviction.

3. WHERE THE DEFENDANT FAILED TO PRESERVE THE ISSUE OF THE TRIAL COURT'S INQUIRY INTO HIS ABILITY TO PAY, AND WHERE THE DEFENDANT HAS A STATUTORY REMEDY THAT CAN BE UTILIZED "AT ANY TIME", THIS COURT SHOULD DECLINE TO REVIEW THE TRIAL COURT'S LEGAL FINANCIAL OBLIGATION ORDER.

Error may not be raised for the first time on review except under limited circumstances. RAP 2.5(a). The rule is permissive and states that an appellate court "may refuse to review any claim of error which was not raised in the trial court." *Id.* A potential exception to this general rule is "manifest error affecting a constitutional right." RAP 2.5(a)(3). This exception is not intended to provide a means for an end run around the rule, but rather is "a narrow one" to be applied sparingly. ***State v. Scott***, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

In connection with a challenge to legal financial obligations, the Supreme Court has applied the exception to the rule. ***State v. Blazina***, 182

Wn.2d 827, 344 P.3d 680 (2015). In ***Blazina,*** there was no indication that the defendant had objected to the imposition of legal financial obligations. The Court therefore stated that, "Unpreserved LFO errors do not command review as a matter of right . . . ." *Id* at 833. However the court noted that, "National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." *Id.* The court determined that there was urgency in the "cries for reform" that warranted its review of the issue despite lack of a trial court objection. What ***Blazina*** did not hold was that all legal financial obligation challenges have the same urgency.

There is good reason to distinguish the urgency identified in ***Blazina*** from this case. Here the defendant is serving a prison sentence. There is no evidence in the record that any collection action has been initiated by Department of Corrections. Were there to be a collection action, the defendant has a statutory means for obtaining relief:

> (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.01.160(4).

The defendant appears to be an able bodied man of 46 with a history of addiction-related health problems. RP (Hickman) vol. 6, 475-76. The record shows that he was engaged in the business of selling drugs and had the physical capability of fleeing from the police on foot. There is no evidence of physical or mental infirmity sufficiently severe to prevent him from securing gainful employment after his release from prison. It would be premature to speculate about the defendant's prospects before he has had a chance to avail himself of a drug evaluation and treatment and seek honest post-release employment. RP (Hickman) vol. 6, 480-82. It would be consistent with an optimist's view of human potential to hope that the defendant will choose to leave behind the drug subculture that landed him in prison, look for help with his addiction, look for work, and support himself and his loved ones just as other men in their forties do.

The ***Blazina*** case appears to have been intended to send a message. It was perfectly appropriate for the Supreme Court to utilize its RAP 2.5(a) discretion to send that message. But ***Blazina*** should not be read as mandating that criminal defendants make legal financial obligations an issue at each and every sentencing. Experienced trial lawyers and judges are instinctively aware that it may not benefit a defendant to argue about money at sentencing. It does not take much imagination to understand that a defendant might not want the trial court to force him to make an issue out of money. To do so could make it seem that the defendant has no remorse nor any intent to rehabilitate himself. Defendants and defense

counsel should be free to focus the court's attention at sentencing on what they, together, deem important and should not be forced to spend precious time and attention on arguments about fines and costs in each and every case.

In this case, the trial court knew that the defendant was indigent and represented by a public defender without the defendant being required to highlight that fact at the sentencing hearing. The trial court also knew that the defendant had a criminal history that included sixteen prior felony convictions. It knew that the defendant had struggled with addiction. It is a reasonable inference that the defendant intentionally elected not to make an issue out of the legal financial obligations in the hope that his argument for an exceptional sentence would carry the day. Thus the lack of a defense objection can be deemed strategic and consistent with appropriate competent legal representation.

Blazina should not be read as compelling this Court to review each and every legal financial obligation order no matter what the state of the record. To have so held, the ***Blazina*** court would have implicitly abrogated the need for this Court to exercise appropriate appellate discretion under RAP 2.5(a) in challenges to legal financial obligations. ***Blazina*** should not be read as imposing such a mandate, particularly where the defendant has a statutory remedy that he can take advantage of in a motion in the trial court "at any time" under RCW 10.01.160(4).

D. CONCLUSION.

For the foregoing reasons, the State urges the Court to affirm the defendant's conviction and the legal financial obligations in his sentence.

DATED: August 24, 2015.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.24.15 Therese Vor
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