

TABLE OF CONTENTS

A. Assignments of Error 1

B. Statement of Facts 1

C. Argument 10

 1. During voire dire, the trial court erroneously denied Mr. Bird his last
preemptory challenge. The trial court erred by requiring Mr. Bird to prove
prejudice..... 10

 2. The court erred by admitting the hearsay of Nick Poling when: (1) the
statements do not fit within the definition of an excited utterance, and (2) the
admission of the statements violated Mr. Bird’s Right of Confrontation under the
Sixth Amendment..... 13

D. Conclusion 16

TABLE OF AUTHORITIES

Cases

<u>Batson v. Kentucky</u> , 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)	12, 13
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)	14
<u>Hammon v. State</u> , 809 N.E.2d 945 (Ind. Ct. App. 2004), <u>cert. granted</u> , __ U.S. __ (2005)	15
<u>Harrison v. United States</u> , 163 U.S. 140, 142, 41 L. Ed. 104, 16 S. Ct. 961 (1896)	12
<u>Holland v. Illinois</u> , 493 U.S. 474, 482, 107 L. Ed. 2d 905, 110 S. Ct. 803 (1990)	11
<u>State v. Brady</u> , 116 Wn.App. 143, 64 P.3d 1258 (2003)	11
<u>State v. Brown</u> , 127 Wn. 2d 749, 903 P.2d 459 (1995)	13
<u>State v. Davis</u> , 154 Wn.2d 291, 302-303, 111 P.3d 844, <u>cert. granted</u> , __ U.S. __ (2005)	15
<u>State v. Evans</u> , 100 Wn.App. 757, 998 P.2d 373 (2000)	12, 13
<u>State v. Ohlson</u> , No. 32112-2-II (Wash.App.Div.2 12/28/2005)	15
<u>State v. Vreen</u> , 143 Wn.2d 923, 26 P.3d 236 (2001)	12, 13
<u>United States v. Annigoni</u> , 96 F.3d 1132 (9th Cir. 1996)	12
<u>United States v. Marchant</u> , 12 Wheat. 480 (1827)	11

A. Assignments of Error

Assignments of Error

1. The trial court erred by denying Mr. Bird's motion for new trial.
2. The trial court erred by admitting the hearsay of Nick Poling as excited utterances.
3. The trial court erred by admitting the hearsay of Nick Poling, who did not testify, in violation of the Sixth Amendment Right of Confrontation.

Issues Pertaining to Assignments of Error

1. During voir dire, the trial court erroneously denied Mr. Bird his last preemptory challenge. Did the trial court err by requiring Mr. Bird to prove prejudice?
2. Did the trial court err by admitting the hearsay of Nick Poling when: (1) the statements do not fit within the definition of an excited utterance, and (2) the admission of the statements violated Mr. Bird's Right of Confrontation under the Sixth Amendment?

B. Statement of Facts

Gordon Bird was charged with first degree assault for assaulting Jimmy Dobras on January 28, 2004. CP, 1. At the request of the defense, the court instructed the jury that it is a defense to the charge that the assault was in self defense or defense of property. CP, 109. A jury found him guilty. CP, 120. He appeals.

Background Facts

Jimmy Dobras was twenty-two years old at the time of this incident. RP, 365. He is very familiar with the streets of West Bremerton because he has lived there for a long time. RP,411. He used to stay with a friend on Montgomery Street. RP, 411. Mr. Bird now lives in the same house that he used to stay in. RP, 412. He used to cut through the yard of the Montgomery Street house as a shortcut. RP, 413.

On January 28, 2004, Mr. Dobras was visiting his friend Shawn O'Brien at 2145 – 11th Street in Bremerton. RP, 412. He and his friends were drinking alcohol and smoking marijuana. RP, 416-17. They decided to walk to the nearby Safeway to pick up some pizza. RP, 418. Walking back, Mr. Dobras and Mr. Poling decide to take the Montgomery Street shortcut. RP, 419. But his effort to save some time was stymied by a locked gate. RP, 420.

As Mr. Dobras and Mr. Poling retreated back to Montgomery Street, Mr. Bird came out of his house and started yelling at the young men. RP, 422. Mr. Bird was upset that they were in his yard. RP, 422. Mr. Dobras turned around and saw Mr. Bird swinging a sword. RP, 422. Mr. Dobras and Mr. Poling split up in a “V” walking backwards. RP, 423. Mr. Dobras described Mr. Bird as “swinging wildly, trying to maybe scrape, nick or a cut here or there maybe.” RP, 428. Mr. Dobras was struck by the sword. RP, 429. Mr. Dobras then took off running. RP, 430. He returned to Mr. O'Brien's house. RP, 430. An ambulance was called and he was taken to the hospital. RP, 433. X-rays showed a punctured lung. RP, 435.

Mr. Bird testified that he was preparing to take a bath when he heard a noise outside. RP, 742. Someone was at his front door messing with the doorknob. RP, 744. Mr. Bird retrieved a sword from his sword collection. RP, 744. His expectation was that whoever was outside would run away upon seeing the sword. RP, 746. He went outside and told them to get off his property. RP, 746. The two young men did not leave, however. RP, 746. Mr. Dobras answered, "You don't own this property. I used to live here." RP, 746. Mr. Bird started swinging the sword, hoping it would scare them away. RP, 747. Mr. Bird testified he believed there was a third young man. RP, 749. Instead, the young men were circling him, like vultures. RP, 751. Mr. Bird continued to swing the sword, first at one young man, then at the other. RP, 751. He believed he saw Mr. Dobras pull out a knife. RP, 752. Mr. Dobras lunged into him with his knife, getting struck with the sword. RP, 752. He did not intend to stab him. RP, 755. Mr. Dobras then turned and ran away. RP, 752.

At trial, the State called two neighbors who did not have any apparent bias towards either the defendant or the victim. The first was Heather Wallace. RP, 480. She heard voices outside her house, went to her bedroom window, and watched what transpired. RP, 482. She described Mr. Bird as very angry. RP, 483. He was say, "Get off my property. There's no trespassing." RP, 483. She could see that Mr. Bird had a sword. RP, 484. The two young men were "taunting" Mr. Bird. RP, 484. They were holding up there hands, palms inward, gestering in a "come on" motion. RP, 485. Mr. Bird was swinging the sword "like a baseball bat." RP, 486. On of the young men was walking backwards and

tripped, at which point he was stuck by the sword in a jabbing motion. RP, 486-87.

The second neighbor is Joyce Dechesneau. RP, 506. She was watching television when she heard Mr. Bird say, "Get the fuck out of here." RP, 508. This prompted her to look out her window. RP, 508. She saw three men "picking on" an older gentleman. RP, 509. (Ms. Dechesneau insisted there were three young men, not two. RP, 525.) They were verbally badgering him. RP, 514. They were going after the "poor guy in a threatening manner, you know, aggressively." RP, 517-18. She immediately called 911. RP, 510. As she was looking, she saw a shiny metal thing that she initially thought was a golf club, but later realized was sword. RP, 510. Mr. Bird was swinging the sword like a baseball bat. RP, 510. He told them if they did not leave, he was going to hurt them. RP, 512. She saw one of the young men trip. RP, 515. She did not see any jabbing motion or any contact with the sword. RP, 526. She later saw the police arrest Mr. Bird, which did not make sense to her because he was defending himself. RP, 525.

Excited Utterances of Mr. Poling

Just before midnight on January 28, 2004, Deputy Frank Shaw responded to the 911 call from 2145 – 11th Street in Bremerton. RP, 317. He was the first officer to arrive at the scene of the call. RP, 318.

Upon arriving, Deputy Shaw saw four people, two males and two females. RP, 321. Two of the people were later identified as Linda Payment and Nick Poling. RP, 318. The three people were holding up Mr. Dobras, who was bleeding from the chest. RP, 321.

When he first arrived, the witnesses were helping with Mr. Dobras. RP, 326. Deputy Shaw first spoke to Mr. Poling. RP, 326. He had an odor of alcohol and said that he had been drinking. RP, 328. He was not out of breath, but he was “kind of excited.” RP, 325. He was not overly animated. RP, 325. He was speaking “louder than a normal speak.” RP, 325. He first said that Jimmy had been stabbed and the sword went all the way through him. RP, 326. Deputy Shaw then began questioning him for specifics about what had happened. RP, 328.

In front of the jury, and over objection, Deputy Shaw described his conversation with Mr. Poling.

A. Let me look at my report here. I asked him what happened and he told me that the four of them, the people in the house went down to Safeway, got pizza, and when they left the store the girls actually had left ahead of them. And then him and Mr. Dobras were cutting through a yard, and that’s when they were confronted by – they couldn’t get through and they came back out and they were confronted by Mr. Bird.

Q. Okay. Did he explain the event - -

What do you mean by confrontation?

A. I would have to look here to find out where that is exactly.

They came out and then he saw the older - - I didn’t know it was Mr. Bird at the time, so the older white male came out and confronted them. He said he was holding the sword and yelled at them to get off the property. He was pointing the sword towards Mr. Dobras. And then he explained

how they were standing and said Mr. Dobras was about - - several feet away from Mr. Bird, and then he kind of referenced a - - about six feet is what I wrote down, the estimation of distance that he showed me. And then they had moved out to the street, and then he saw the - - the guy lunge forward. Actually, explained or showed me how when he was asked what happened. Showed me like a lunge and said he stabbed Mr. Dobras in the chest.

Q. Who lunged?

A. Mr. Bird.

Q. And did he tell you anything else?

A. He said it happened so fast he didn't remember Mr. Dobras had been stabbed. He saw him lunge and come back and then they ran off, that's - - so they were running, he saw Dobras after - - behind him and saw that he had been stabbed.

RP, 346-47.

Mr. Bird objected to Mr. Poling's testimony on two grounds. First, the State had not established that they were excited utterances. RP, 331. Second, Mr. Bird argued that Mr. Poling's statements violated his right to confrontation in two ways. He argued that the statements were "prepared for litigation." RP, 331. He also argued that he was unable to cross-examine. RP, 332. The trial court ruled that the Sixth Amendment right of confrontation did not apply to these circumstances. RP, 336. The court next found that the statements were excited

utterances and admitted them. RP, 336. The court also admitted the excited utterances of Ms. Payment. RP, 338.

During the cross-examination of Deputy Shaw, an issue came up about the defendant's position at the time Dobras was stabbed. RP, 369. Deputy Shaw was unable to remember what Mr. Poling told him and his report did not assist him in refreshing his memory. RP, 369-70.

Mr. Poling did not testify at trial. There was some evidence that he was in Maryland at the time of trial. RP, 410. There was no evidence offered that the State had attempted to subpoena him or that he was not amenable to process.

Deputy Shaw also interviewed Ms. Payment. RP, 326. She said that Mr. Poling had run into the house and said, "Jimmy needs help." RP, 323. She said they had gone to get food and the guys had returned with Jimmy injured. RP, 323. She said, "Jimmy's hurt bad." RP, 324.

Voire Dire

Jury selection commenced on January 24, 2005. RP, 30. The court decided to have one alternate juror, with each party being given seven preemptory challenges. CP, 127. As will be seen, juror numbers 32 and 33 were the focus of a dispute at the conclusion of voire dire, so a brief comment about them is appropriate. Juror number 32 barely participated in voire dire, apparently answering only one question about whether he felt a civic responsibility to be a juror. RP, 116. Conversely, juror number 33 actively participated, providing answers to a variety of topics. See RP, 46-47, 71 (mother was victim of burglary), 182 (robber should not be shot in back but "drag[ged] in the house"), RP, 202

(believed he would make a good juror as evidenced by the fact he has been on a jury before).

At the conclusion of *voire dire*, the parties started alternately excusing jurors through the use of the preemptory challenge. RP, 218. Mr. Bird, through his counsel, exercised preemptory challenges on juror numbers 2, 10, 17, 26 while Deputy Prosecutor Jim Mitchell exercised one preemptory challenge against juror number 4. RP, 219. After juror number 26 was excused by the defense, Mr. Mitchell exercised a preemptory challenge against juror number 27. RP, 220. Mr. Bird excused juror number 28. RP, 220. Mr. Mitchell excused juror number 29. RP, 220. Mr. Bird then accepted the panel. RP, 220. Mr. Mitchell excused juror number 30. RP, 220. The defense excused juror number 31.

While juror number 32 was walking towards the jury box, Mr. Longacre said he intended to excuse juror number 32. CP, 162. The court reporter did not hear Mr. Longacre say that and it does not appear in the record. In Mr. Bird's post-trial motion, he asserts, "The defense then attempted a preemptory challenge on the juror replacing the juror removed. The juror may have heard the challenge. The court informed the defense that it had exercised all its challenges. The defense thought maybe they had miscounted." CP, 162. See also RP, 230 (Mr. Bird wanted to "excuse Juror No. 32"). While the court reporter may not have heard Mr. Longacre excuse juror number 32, she did record the confusion that followed:

THE COURT: Juror No. 32, you are up here in the empty chair:

Mr. Mitchell, unless my count is inaccurate, you are complete.

MR. MITCHELL: I have, your Honor.

THE COURT: Mr. Longacre, unless I'm inaccurate in my math, you are completed as well, I think.

MR. LONGACRE: Let me double check though.

THE COURT: I've got seven.

MR. LONGACRE: All seven.

THE COURT: Do you want to check her notes?

MR. LONGACRE: No, she's accurate.

RP, 221.

After the jury was sworn, they were excused to the jury room. The court clarified the confusion. RP, 230. According to the court, although Mr. Bird had used six preemptory challenges to excuse six jurors, he had "accepted" the panel after his fifth challenge. The "accept" counted as a preemptory challenge, according to the trial court. RP, 230. He then exercised his last remaining challenge on juror number 31. Mr. Bird counted his preemptory challenges "differently" and wanted to excuse juror number 32. RP, 230. Defense counsel reiterated that he thought he had "one more" and wanted to seat juror number 33. RP, 231. The clerk's minutes also make clear that the court was counting the "accept" as the sixth preemptory challenge. CP, 121. Juror number 32 was seated in seat number 12 and deliberated on the case. RP, 123. Juror number 24, who was seated in seat number 2, was the alternate and did not deliberate. CP, 123, 121, 146.

At the conclusion of the trial, Mr. Bird filed a motion for new trial. CP, 149. In his amended motion for new trial, he argued that the trial court erred by denying his last preemptory challenge. CP, 162. He argued that a juror which he had preempted, and for which he had the right to exercise a preemptory challenge, had sat on his jury. CP, 162. The remedy was a new trial.

The court heard argument on the motion for new trial on February 25, 2005. RP, 896. The first issue was whether the trial court had erroneously precluded Mr. Bird from using his last preemptory challenge. The trial court concluded that it had. The trial court, after reviewing CrR 6.4 (e) said, “It is clear to me that the practice I engaged in in this case does not follow the rule, and, of course, from now on I will modify my practice.” RP, 913,

The next question was more difficult for the trial court: does the defendant have the burden of showing prejudice? The trial court concluded that there was insufficient “evidence of prejudice other than what could be presumed from the fact that the person the defense wanted seated didn’t get seated. . .” RP, 915. In light of what the trial court considered “odd circumstances,” the motion for new trial was denied. RP, 915.

C. Argument

1. During *voire dire*, the trial court erroneously denied Mr. Bird his last preemptory challenge. The trial court erred by requiring Mr. Bird to prove prejudice.

The trial court erred by denying Mr. Bird's motion for new trial on the grounds that he had failed to establish prejudice. Mr. Bird was not required to show prejudice. The motion should have been granted.

The right to exercise preemptory challenges is a fundamental right that is implicit in the Sixth Amendment right to an "impartial jury." Holland v. Illinois, 493 U.S. 474, 482, 107 L. Ed. 2d 905, 110 S. Ct. 803 (1990). See also United States v. Marchant, 12 Wheat. 480 (1827) (preemptory challenges part of the common law at time Sixth Amendment enacted). When a trial court establishes the rules of *voire dire* at the outset of the trial, those rules become the rule of the case and may not be changed after the defendant has detrimentally relied on them. State v. Brady, 116 Wn.App. 143, 64 P.3d 1258 (2003) (depriving defendant of second round of questioning after he had completed his first round was abuse of discretion). In Mr. Bird's case, everyone agreed that each party would get seven preemptory challenges. But the trial court erroneously permitted only six preemptory challenges. Mr. Bird was denied his constitutionally guaranteed right to an impartial jury

The first issue is whether the trial court erred by denying Mr. Bird his seventh preemptory challenge. The trial court concluded that it did and this conclusion is correct. CrR 6.4 (e)(2) describes the procedure for exercising preemptory challenges. It says, "Acceptance of the jury as presently constituted shall not waive any remaining preemptory challenges to jurors subsequently called." Because Mr. Bird wished to exercise a preemptory challenge to a

“subsequently called” juror, the trial court erred by treating his earlier “accept” as a waiver. As the trial court itself admitted, error was committed.

The critical question is whether Mr. Bird must show prejudice. The answer is no. In State v. Vreen, 143 Wn.2d 923, 26 P.3d 236 (2001) the Supreme Court concluded “the erroneous denial of a litigant's peremptory challenge cannot be subject to harmless error analysis when the objectionable juror sits on the panel that convicts the defendant. Such error is per se reversible.” The Court affirmed the Court of Appeals decision, which reached the same conclusion. State v. Vreen, 99 Wn. App. 662, 994 P.2d 905 (2000).

The Court cited State v. Evans, 100 Wn.App. 757, 998 P.2d 373 (2000) and United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996) (en banc) as authority. In Evans, the Court said, “Any impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply.” This remedy is consistent with more than a century of precedent. Harrison v. United States, 163 U.S. 140, 142, 41 L. Ed. 104, 16 S. Ct. 961 (1896) (after concluding that defendant was deprived of preemptory challenge, conviction summarily reversed without harmless error analysis).

In both Vreen and Evans, the defendant had tried to exercise a preemptory challenge of a “juror of color.” The Court denied the challenge, citing Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The appellate courts first determined that the requisite prima facie showing of racial discrimination had not been shown, so Batson was inapplicable. Because Batson

did not apply, the defendant had a constitutional right to exercise the preemptory challenge and the denial was per se reversible.

Likewise, Mr. Bird was denied his last preemptory challenge and prejudice is presumed. The fact that the denial of his last challenge was as the result of a misreading of the court rule, rather than a misreading of Batson, is of no moment. Reversal is required.

**2. The trial court erred by admitting the hearsay of Nick Poling when:
(1) the statements do not fit within the definition of an excited utterance, and
(2) the admission of the statements violate Mr. Bird's Right of Confrontation under the Sixth Amendment.**

The trial court admitted the hearsay of Mr. Poling as an excited utterance. The foundational testimony for whether Mr. Poling was in an excited state at the time of the statements came from Deputy Shaw. Deputy Shaw testified that Mr. Poling had an odor of alcohol and said that he had been drinking. RP, 328. He was not out of breath, but he was "kind of excited." RP, 325. He was not overly animated. RP, 325. He was speaking "louder than a normal speak." RP, 325.

An excited utterance requires proof that there be a startling event and that the statement be made while the declarant was under the stress or excitement caused by the event. State v. Brown, 127 Wn. 2d 749, 903 P.2d 459 (1995). Undoubtedly the confrontation between Mr. Bird and Mr. Dobras was a startling event. But there was insufficient evidence for the trial court to conclude that Mr. Poling was still under the influence of the startling event at the time of the

statements. The trial court erred by determining that the statements were excited utterances.

Of even more concern is the fact that the court gave no credence to the fact that the hearsay was admitted in violation of the Confrontation Clause. While the first couple statements of Mr. Poling were spontaneous, most of the statements he made that were admitted as excited utterances were made in response to questions from Deputy Shaw. As such, the court should have declared the statements testimonial for purposes of the Confrontation Clause. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Instead, the trial made no determination whether the statements were testimonial or not.

The record does not show that Mr. Poling was unavailable as a witness. Although it was believed that he was in Maryland at the time of trial, there is no evidence in this record that the State made any effort to subpoena him or to bring him to Washington for trial. He was not unavailable.

Mr. Bird was significantly prejudiced by the admission of the hearsay of Mr. Poling. The most significant factual dispute in this case revolved around how Mr. Dobras came to be stabbed by the sword. Mr. Dobras testified he was stuck when Mr. Bird altered his swinging pattern to an occasional jab with the sword. Mr. Bird testified that Mr. Dobras was struck by the sword while Mr. Dobras was lunging towards him with a knife. Neighbor Heather Wallace believed the contact occurred when Mr. Dobras tripped. Neighbor Joyce Dechesneau did not see any contact with the sword. During the cross-examination of Deputy Shaw, he was asked what Mr. Poling told him about the positions of the two primary

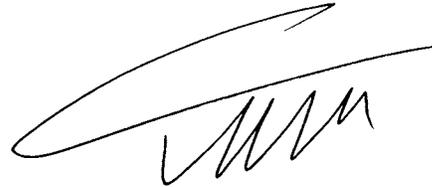
people at the time of the contact with the sword. Deputy Shaw was unable to remember what Mr. Poling told him and his report did not assist him in refreshing his memory. RP, 369-70. Mr. Bird would have been assisted by an opportunity to cross-examine Mr. Poling.

Just prior to filing his Brief of Appellant, this Division of the Court of Appeals published the case of State v. Ohlson, No. 32112-2-II (Wash.App.Div.2 12/28/2005). In Ohlson, this Division fashioned a per se rule that excited utterances are never testimonial. Judge Hunt dissented from this sweeping holding, though she concurred with the result. With all due respect to the Honorable Bridgewater and Honorable Quinn-Brintnall, Mr. Bird strongly disagrees with this sweeping result. When a person such as Mr. Poling gives a semi-comprehensive narrative of events in response to a series of questions from a police officer who is preparing a report, the statements are testimonial and admission of the statements violates the Confrontation clause. This Division is unlikely to be the last word on this topic, however, as the United States Supreme Court has agreed to review this issue in a pair of cases. State v. Davis, 154 Wn.2d 291, 302-303, 111 P.3d 844, cert. granted, __ U.S. __ (2005); Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004), cert. granted, __ U.S. __ (2005). This pair of cases should be decided by the end of June, 2006. Mr. Bird's Right of Confrontation was violated by the admission of Mr. Poling's hearsay when he was available as a witness and the hearsay was testimonial in nature.

D. Conclusion

This Court should reverse Mr. Bird's conviction and remand for a new trial.

DATED this 17th day of January, 2006.

A handwritten signature in black ink, consisting of a large, sweeping loop at the top and several smaller, connected strokes below it.

Thomas E. Weaver, WSBA #22488
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

1)	Court of Appeals No.: 32943-3-II
2)	
3	STATE OF WASHINGTON,)	AFFIDAVIT OF SERVICE
4	Respondent,)	
5	vs.)	
6	GORDON SMITH BIRD,)	
7	Appellant.)	

8	STATE OF WASHINGTON)
9	COUNTY OF KITSAP)

FILED
COURT OF APPEALS

06 JAN 19 AM 9:31

BY [Signature]

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On January 19th, 2006 I sent an amended Affidavit of Service, via facsimile, of BRIEF OF APPELLANT to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

On January 19th, 2006 I sent an amended Affidavit of Service, postage prepaid, of BRIEF OF APPELLANT to Mr. Randall Sutton, Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366.

On January 19th, 2006 I sent an amended Affidavit of Service, postage prepaid, of BRIEF OF APPELLANT to Mr. Gordon Smith Bird, DOC #880182, Prairie Correction Facility, P.O. Box 500, Appleton, Minnesota 56208.

Dated this 19 day of January, 2006.



Thomas E. Weaver
WSBA #22488
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 19 day of January, 2006.



NOTARY PUBLIC in and for
the State of Washington.
My commission expires:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25