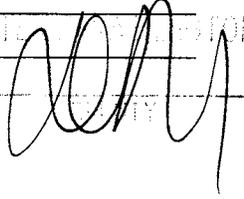


FILED
COURT OF APPEALS

NO. 39999-7-II

10 AND 20 AM 8:41

STATE OF WASHINGTON
BY 

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER MICHAEL JOHNSTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 09-1-02778-3

RESPONDENT'S BRIEF

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

1. Did the trial court properly comply with the time for trial rule in continuing defendant's trial?
2. Did the trial court properly allow gang-related testimony regarding the victim that was not objected to at trial?
3. Was defendant provided effective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

On June 4, 2009, the Pierce County Prosecuting Attorney's Office charged CHRISTOPHER MICHAEL JOHNSTON, hereinafter "defendant" with one count of robbery in the first degree in Pierce County Cause No. 09-1-02778-3. CP 1-2.

The case was assigned to the Honorable Bryan Chushcoff and trial was set for July 28, 2009. However, the trial was continued several times.¹ On November 3, 2009, the jury returned the verdict finding defendant guilty of robbery in the first degree. CP 80.

¹ Details concerning the continuances are discussed further below.

On November 13, 2009, the court sentenced defendant to a standard range sentence of 57 months, the low end of the standard range. CP 83-96. Defendant filed a timely notice of appeal from entry of this judgment. CP 97.

2. Trial Continuances

On July 28, 2009, trial was continued for cause until September 1, 2009, due to continuing investigation by both sides. CP 10; 7/29/2009 RP 6.² Defendant objected. *Id.* Time left for trial was 30 days. *Id.*

On September 1, 2009, the trial was continued until September 8, 2009, because no courtrooms were available. CP 11. Defendant did not object to the continuance. *Id.* The time for trial was not tolled, leaving 23 days left for trial. *Id.*

On September 8, 2009, trial was continued until September 10, 2009, because no courtrooms were available. CP 12. Defendant did not object to the continuance. 9/8/2009 RP 3. The time for trial was not tolled, leaving 21 days left for trial. *Id.*

On September 10, 2009, trial was continued for cause until September 28, 2009, because defense counsel was in another trial and no

² Some transcripts are not numbered, therefore citing to the record for unnumbered transcripts will be formatted as: Date of Transcript, RP, Page Number. Citing to numbered transcripts will be formatted as: Volume, RP, Page Number.

courtrooms were available. CP 14. Defendant objected. *Id.* The time for trial was reset to 30 days. *Id.*

On September 28, 2009, trial was continued for cause until October 12, 2009, because both defense counsel and the prosecuting attorney were in other trials. CP 15. Defendant objected. *Id.* The time for trial was reset to 30 days. *Id.*

On October 12, 2009, trial was set over until October 13, 2009, because no courtrooms were available. CP 16. Defendant did not object to the continuance. *Id.* Time for trial was not tolled, leaving 29 days left for trial. *Id.*

On October 13, 2009, trial was set over until October 14, 2009, because no courtrooms were available. CP 17-24. Defendant objected. *Id.* Time for trial was not tolled, leaving 28 days left for trial. *Id.*

On October 14, 2009, trial was continued until October 19, 2009, because no courtrooms were available and defense counsel was scheduled to be in another trial the next day. CP 25-32. Defendant objected. *Id.* Time for trial was not tolled, leaving 23 days left for trial. *Id.*

On October 19, 2009, trial was continued for cause until October 26, 2009, because the prosecuting attorney was in another trial that was anticipated to last through the week. CP 33, 10/19/2009 RP 4. Defendant objected. *Id.* Time for trial was reset to 30 days. *Id.*

3. Facts

On June 2, 2009, around 7:30 p.m., Christopher Fagot was walking alone through Hidden Village Park in Spanaway when he was called over by a group of people. 2 RP 27. There were about 10 to 15 people in the group. 2 RP 29. Mr. Fagot recognized one of the members of the group as Nick, a guy he had seen around the neighborhood. *Id.*

Mr. Fagot spoke with Nick for a minute and then another member of the group, defendant, asked Mr. Fagot if he wanted to buy weed. 2 RP 30. Mr. Fagot told defendant “no, I don’t. I’m not down with that.” *Id.* Defendant then asked Mr. Fagot what “hood” he was from. 2 RP 30. Mr. Fagot told defendant that he was not in a gang. *Id.*

Another member of the group, Marcus Reed³, asked Mr. Fagot if he had money. 2 RP 30-31. Mr. Fagot said no. *Id.* Mr. Reed then said to Mr. Fagot “I’m going to be straight up. This is a pocket check.” 2 RP 31. Mr. Reed then pulled out a knife with a blade approximately four inches long. 2 RP 32. Defendant told Mr. Fagot to “Show respect to him and just give him your money.” 2 RP 33.

³ Marcus Reed was also charged with Robbery in the First Degree for this offense but pled guilty to Robbery in the 2nd Degree prior to testifying for the defense at this trial. 3 RP 164.

Mr. Fagot emptied his pockets and handed the \$5 he had to Mr. Reed. 2 RP 35. When Mr. Fagot tried to give Mr. Reed his 75 cents, Mr. Reed said “I don’t want your chump change. Have more next time.” 2 RP 36.

Mr. Fagot left the park and walked to Wal-Mart to get his brother. 2 RP 36. Mr. Fagot and his brother then walked back home, walking all the way around the neighborhood to avoid cutting back through the park. 2 RP 36-37. Once Mr. Fagot got home, he called his mother who told him to call 911. 2 RP 38.

Deputy Matthew Hirschi, from the Pierce County Sheriff’s Department, received a call from dispatch that a robbery occurred in the park behind Wal-Mart. 2 RP 72-73. The information included a description of a possible suspect, a description of a vehicle that was near the people who had robbed Mr. Fagot, and that a knife was involved. 2 RP 72-73, 78.

After receiving the call, Deputy Hirschi went to the park where the robbery had occurred to see if the suspects were still in the area. 2 RP 73. As soon as Deputy Hirschi entered the area, he saw the vehicle and a large group of people where the victim had said that the incident took place. *Id.* Deputy Hirschi also saw a subject that “matched the description in the call

to a T.” *Id.* The subject was male, medium to tall, wearing a blue Dickie shirt and blue Dickie shorts. *Id.*

Deputy Hirschi got out of his vehicle and advised dispatch that he would be with a large group of people. 2 RP 74. Deputy Hirschi went over to the group and asked everybody what they were doing. *Id.* Deputy Hirschi then separated the suspect from the group and asked him some questions. *Id.*

Deputy Chad Helligso and Deputy William Marquiss, from the Pierce County Sheriff’s Department, responded to the scene of the robbery to assist Deputy Hirschi as the primary backup. 2 RP 97. Once the backup deputies arrived, Deputy Hirschi went to contact the victim. 2 RP 75.

Deputy Hirschi arrived at Mr. Fagot’s home and had Mr. Fagot explain what happened.⁴ 2 RP 76. Deputy Hirschi then transported Mr. Fagot to the park where the other deputies had arranged a line up with the group. *Id.* Deputy Hirschi shined a spotlight on the group and Mr. Fagot pointed out defendant and Marcus Reed as the two individuals who had robbed him. *Id.*

⁴ The State wishes correct a factual error in Appellant’s Brief. Defendant is not 6’1 and white as described in Appellant’s Brief, p. 16, he is in fact half Filipino and approximately 5’6. RP 30, 32, 128.

Defendant and Mr. Reed were read their rights and arrested. 2 RP 78. When Deputy Hirschi searched defendant incident to arrest, he found a stack of money in defendant's pocket that was in sequential order and then a separate five-dollar bill that was just stuffed into his pocket. 2 RP 81-82. This sparked Deputy Hirschi's interest because he knew that a five-dollar bill had been taken from the victim. 2 RP 83.

C. ARGUMENT.

1. DEFENDANT'S TIME FOR TRIAL RIGHTS WERE NOT VIOLATED BECAUSE THE TIME FOR TRIAL DID NOT EXPIRE AND THE TRIAL COURT MADE A PROPER RECORD WHEN CONTINUING THE TRIAL.

A trial court may continue trial date for good cause. CrR 3.3(f)(2). An appellate court reviews a trial court's decision to grant a continuance under CrR 3.3(f)(2) for abuse of discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). It will not disturb a trial court's decision unless the appellant makes "a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Under CrR 3.3(f)(2), “the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” Under CrR 3.3(b)(5), “[i]f any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.” Under CrR 3.3(e)(3), continuances are excluded from computing time for trial.

The trial court considers all relevant factors when exercising its discretion to grant or deny a continuance. *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005). This includes time to prepare for trial and scheduling conflicts as appropriate bases for granting a continuance. *Id.* at 200.

Defendant’s time for trial rights were not violated. In computing the CrR 3.3 time for trial, section (e) not only excludes continuances, but also excludes periods of time attributed to unavoidable or unforeseen circumstances beyond the control of the court or the parties. *See* CrR 3.3(e)(8). Conflicts in the prosecuting attorney’s schedule qualify as unavoidable circumstances justifying an extension of the speedy trial date under CrR 3.3(d)(8). *State v. Krause*, 82 Wn. App. 688, 698, 919 P.2d 123 (1996)(holding under CrR 3.3(e)(8) precursor).

Although the trial was continued nine times, four of those continuances were for cause which tolls the time for trial. The first continuance was granted for cause due to continuing investigation by both

sides. CP 10. It is not an abuse of discretion to continue a trial date to permit defense counsel additional time to prepare for trial, to ensure effective assistance of counsel. See *State v. Williams*, 104 Wn. App. 516, 523, 17 P.3d 648 (2001). The other three continuances that tolled the time for trial were granted due to scheduling conflicts with defense counsel and/or the prosecuting attorney. Both continuing investigation and scheduling conflicts are appropriate bases for granting continuances. *State v. Flinn*, 154 Wn.2d at 200.

The remaining five continuances were all due to administrative necessity because no courtrooms were available. The time for trial continued to run each time a continuance was granted on these grounds. Of those five continuances, defendant did not object to three of them. CP 11, 16. Although defendant objected to six of the nine continuances, a continuance may be granted over the defendant's personal objection.

State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984).

Furthermore, the trial court made a proper record when ordering these continuances, including attaching the court schedule to two of the orders continuing trial, and also discussed that bringing in a pro tem judge was not possible due to budget constraints. 10/13/2009 RP 14.

In *State v. Lackey*, 153 Wn. App.791, 223 P.3d 1215 (2009), this Court examined a similar issue. There, the Court pointed out that "the constitutional right to a speedy trial is not violated at the expiration of a fixed time, but at the expiration of a reasonable time." *Id.* at 800, quoting

State v. Monson, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997). The Court went on to apply the analysis under *Barker v. Wingo*, 407 U.S. 514, 522-30, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

The *Barker* analysis requires that the reviewing court consider the conduct of the parties, the length of the delay, the reasons for the delay, whether the defendant complained about the delay, and any prejudice to the defendant. *State v. Lackey*, 153 Wn. App. at 800, citing *Barker*, 407 U.S. at 528-530.

In the present case, the total delay for trial was less than three months. The first continuance, which occurred on July 28, 2009, was granted because both sides needed more time for investigation. CP 10. That continuance was for cause and was the reason for over one month of the total delay for trial. The continuances granted on September 10, 2009, and September 28, 2009, were also continued for cause. CP 14, 15. Both of those continuances were due to the defense counsel and the prosecutor being in other trials, and those continuances count for over one month of the delay.

The other continuances were due to administrative necessity because no courtrooms were available. Most of those continuances were short, one or two day delays and a proper record was made including attaching the court schedule to the order continuing trial. During these

continuances, the time for trial was not tolled. Additionally, defendant did not object to three of those continuances, and those continuances count for less than one month of the delay.

Defendant's case is distinguished from *State v. Kenyon*, 167 Wn.2d 130, 216 P.3d 1024 (2009). In *Kenyon*, the Washington State Supreme Court determined that the speedy trial rule, which allows exclusions for unavoidable or unforeseen circumstances, does not permit a trial court to continue a criminal trial past the speedy trial deadline because of the unavailability of a judge to preside over the trial. *Id.* In that case, the defendant's trial was continued for over five months, mostly due to the unavailability of a judge to hear the case. *Id.* However, in the present case, the time for trial was not extended when trial was continued due to unavailability of courtrooms. The time for trial only tolled when the trial was continued for cause such as continuing investigation, or conflicts with the defense and/or prosecuting attorney's schedules. Additionally, the trial court made a proper record when they noted the reason for the continuances, attached the court schedule to two of the orders for continuances, and discussed on the record why it was not possible to bring in a pro tem judge.

"[D]eprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself." *Barker v. Wingo*, 407 U.S. at

521. Defendant was not prejudiced by the delay in trial. Furthermore, the trial court made a proper record each time trial was continued. Therefore, defendant's time for trial rights were not violated.

2. THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY IN REFERENCE TO THE VICTIM POSSIBLY BEING IN A GANG, AND DEFENSE FAILED TO OBJECT TO THE EVIDENCE; THEREFORE THIS ISSUE WAS NOT PRESERVED FOR APPEAL.

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Id.* at 421. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *State v. Rehak*, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992).

The only mention of what Appellant labels as "gang-related" evidence was directed at Mr. Fagot, the victim, not defendant. At trial, Mr. Fagot testified that defendant asked him what "hood" he was in. 2 RP

30. When Mr. Fagot was asked to clarify what “hood” meant, Mr. Fagot testified that it meant what gang he was in. *Id.* Defense counsel did not object to this testimony.

During closing argument, the prosecutor stated that Mr. Fagot was wearing red clothes and a red hat so it was possible that the group could have thought he was wearing gang colors. 3 RP 176. Again, this “gang-related” inference was directed solely at the victim, not defendant. The only thing the jury could reasonably conclude from this evidence was that defendant may have been worried that Mr. Fagot was in a gang. An inference that the victim was in a gang in no way prejudices defendant.

Additionally, since defense failed to object to any of these statements, even if it was error to admit this testimony, defense did not preserve this issue for appeal.

Even if defense had objected to this testimony, it is unlikely that his objection would have been sustained. The “gang-related evidence” in no way implicated either defendant or Mr. Reed as members of a gang. At no time did anyone testify that either defendant or Mr. Reed were involved in a gang. In fact, the prosecuting attorney even clarified in closing rebuttal that “I’m not suggesting that this is a gang-related incident.” 3 RP 211.

The Appellant discusses that the admission of the “gang-related” evidence was improper under ER 404(b) as “evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show

conformity therewith.” Appellant’s Brief, p. 13. However, ER 404(b) is irrelevant to this issue. None of the gang-related evidence was directed at defendant. The testimony in no way implicated defendant as being in a gang and was not admitted for the purpose of showing defendant’s character. If anything, the evidence goes to the victim’s character.⁵ There is no evidence that the court abused its discretion.

Defense failed to object to any of the gang-related testimony, and therefore did not preserve this issue for appeal. Even if defense had objected, it is unlikely that the objection would have been sustained, because the gang-related testimony was directed at the possibility of the victim being in a gang, not defendant.

3. DEFENSE COUNSEL’S FAILURE TO OBJECT TO PROPER CONTINUANCES, FAILURE TO OBJECT TO ADMISSIBLE GANG-RELATED EVIDENCE IN REFERENCE TO THE VICTIM, AND FAILURE TO REQUEST AN UNNECESSARY LIMITING INSTRUCTION DID NOT AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant has the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution, and Article I,

⁵ Appellant raised in passing that the evidence, while sufficient, was not compelling. Since appellant did not cite any authority and concedes that the evidence was sufficient to convict defendant of robbery in the first degree, the State will not address this issue. An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

Section 22 of the Washington Constitution. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. *State v. Hendrickson*, 129 Wn.2d at 77-78.

Under the first prong, the appellate court will presume the defendant was properly represented. *Id.* Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In order to prevail on a claim of ineffective assistance of counsel, both prongs of the test must be met. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). If either part of the test is not satisfied, the inquiry need go no further. *State v. Hendrickson*, 129 Wn.2d at 77-78. Additionally, the reviewing court will defer to counsel's strategic decision when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot form a basis for a claim of ineffective

assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994). Defendant must show, from the record as a whole, that defense counsel lacked a legitimate strategic reason to support his or her challenged conduct. *State v. McFarland*, 127 Wn.2d at 336.

Counsel's choice of whether or not to object at trial is a "classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.*, (citing *Strickland v. Washington*, 466 U.S. 668, *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980)). Furthermore, in order to prevail on a claim of ineffective assistance of counsel for a failure to object at trial defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

In the present case, defense counsel did not object to the trial continuances or move to dismiss based on a claim of violation of defendant's time for trial right. Neither of these actions constitute deficient performance on the part of defense counsel. The first

continuance was granted for cause due to continuing investigations on both sides. CP 10. Defense counsel did not object to this continuance because it was necessary to continue the trial in order for defense counsel to investigate further to provide effective representation for defendant. Furthermore, this continuance actually benefited defendant. Even if defense counsel had objected to that continuance, the objection would not have been sustained because continuing investigation was a proper reason for granting a continuance under CrR 3.3 and was necessary to ensure a fair trial.

Several of the other continuances were granted due to scheduling conflicts because the defense counsel and/or the prosecuting attorney were in other trials. Defense counsel did not object to these continuances because the conflict was with his schedule, and conflicts with the defense or prosecuting attorney's schedule are proper reasons for granting a continuance. Even if defense counsel had objected to these continuances, the objection would not have been sustained.

Defense counsel could have objected to the continuances based on unavailability of courtrooms. However, defendant did not object to three of the five continuances granted on these grounds. CP 11, 12, 16. Even if defense counsel had objected to the other two continuances granted due to unavailability of courtrooms, it is unlikely that his objection would have been sustained. The trial court made a proper record each time it granted a continuance, the time for trial was not tolled, and defendant's time for trial

never ran out. Defense counsel's failure to object to the trial continuances does not amount to ineffective assistance of counsel.

As discussed in argument two, no mention of the word "gang" or "hood" was made during trial in reference to either defendant or Mr. Reed. The only time the subject of the possibility of gang involvement was mentioned during trial was in reference to the victim. It was reasonable trial strategy for defense counsel not to object to the inference that the victim was in a gang. Even if defense counsel had objected to this testimony, it is unlikely his objection would have been sustained because the evidence could not reasonably have been considered prejudicial to defendant. Counsel's choice of whether or not to object at trial is a "classic example of trial tactics." *State v. Madison*, 53 Wn. App. at 763. It was a reasonable trial strategy for defense counsel to let the testimony regarding whether or not the victim was in a gang come into evidence. It was also reasonable trial strategy for defense counsel to mention the gang-related evidence during closing argument.

Finally, it was not ineffective assistance of counsel for defense counsel to choose not to request a limiting instruction in relation to the gang evidence. Since the gang evidence was solely in reference to the possibility of the victim's gang involvement, it was not necessary for defense counsel to request a limiting instruction for this evidence. While

an attorney's failure to request a jury instruction that would have aided defense may constitute deficient performance, the key language there is "would have aided defense." Since a limiting instruction would not have aided defense, it was not deficient performance for defense counsel to not request such an instruction.

The State never argued that this was a gang-related incident and in fact specifically stated, "I am not suggesting this is a gang-related incident" in closing rebuttal. 3 RP 211. No testimony was given that could reasonably be thought to lead the jury to infer that either defendant or Mr. Reed were involved in a gang. Therefore, it was not necessary for defense counsel to either object to the gang-related evidence or to request a limiting instruction for the same.

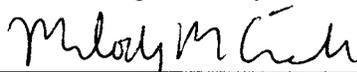
Appellant has failed to demonstrate that defense counsel's performance at trial was deficient or that it in any way prejudiced defendant in this case.

D. CONCLUSION.

For the forgoing reasons, the State respectfully requests the court affirm defendant's judgment and sentence for robbery in the first degree.

DATED: August 18, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Karen Judy
Rule 9

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.


Date Signature

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