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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

GILBERTO CHACON ARREOLA,

Respondent.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 19,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting interference in private affairs without authority of law. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

II. INTRODUCTION

It is well established in Washington that Article 1, Section 7 of the state constitution does not allow police to engage in pretextual stops to investigate Washington citizens. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). "The protections guaranteed by article 1, section 7 are qualitatively different from those under the Fourth Amendment" and afford Washington citizens greater protections against warrantless searches and seizures. *State v. Snapp*, ___ Wn.2d ___, ___ P.3d ____, 2012 WL 1134130 at ¶ 23 (2012).

The position argued by the State and *amici curiae* Washington State Patrol and the Washington Association of Prosecuting Attorneys ("WSP/WAPA") in their briefing conflicts with this established precedent.

Under their position, the police could justify a stop of a Washington citizen as long as *any* criminal act or traffic infraction was claimed to be "a reason" for the stop, even if the primary motivation for the stop (as in this case) is something else. The argument is unsound for several reasons: (1) the proposed standard has already been repeatedly considered and rejected by Washington's courts; (2) it is a standard at odds with the rights afforded by Washington's Constitution and the case law upholding its protections of Washington's citizens; and (3) given the large number of traffic rules and the broad discretion police have in enforcing them, the adoption of the proposed standard would effectively permit the police to stop and investigate any citizen traveling in a vehicle at any time for any reason. This result conflicts with Washington's historical defense of its citizens' rights.

The rule in Washington is, and should remain: even if there are multiple reasons for a stop, if the predominant reason for the stop did not comply with the state constitution's requirements for probable cause, reasonable suspicion or a warrant, the stop is pretextual and evidence obtained as a result of it must be suppressed.

III. STATEMENT OF THE CASE

The following facts are taken from the parties' briefs:

- Officer Anthony Valdivia received an unsubstantiated tip about a

possible drunk driver – all parties agree the tip was not sufficient to justify a stop;

- Believing the car Mr. Chacon was driving matched the tip, the officer followed Mr. Chacon for some period of time but did not observe any signs of drunk driving;

- The only infraction the officer did observe was a modified muffler on Mr. Chacon's car, which violated a state equipment requirement;

- The officer did not immediately stop Mr. Chacon upon observing the muffler infraction, but instead continued to follow him to further investigate signs of impaired driving;

- Eventually, and without ever having observed evidence of impaired driving, Officer Valdivia subjected Mr. Chacon to a traffic stop, and only then obtained evidence of drunk driving;

- Officer Valdivia testified that his "primary motivation" for stopping Mr. Chacon was to investigate the alleged drunk driving tip; he said that the muffler was "an additional reason for the stop" but if asked to balance the reasons the "greater" reason was the DUI tip.

The trial court denied Mr. Chacon's motion to suppress. The Court of Appeals reversed, ruling that even if the trial court was factually correct that the officer "would have" made the stop regardless of the DUI tip, the trial court's legal conclusion was erroneous since the muffler justification "was clearly subordinate to the officer's desire to investigate the DUI report." *State v. Arreola*, 163 Wn. App. 787, 797, ___ P.3d ___ (2011). Relying on Article 1, Section 7 and the holding of *Ladson*, the Court of Appeals said the correct legal test was whether the stop was primarily

motivated by the officer's desire to investigate drunk driving, although he lacked a valid basis to make the stop for that reason. Since the officer admitted the DUI tip was his primary motivation, an unconstitutional pretextual stop had occurred.

IV. ISSUE ADDRESSED BY AMICUS

Whether Article 1, Section 7 permits traffic stops when the primary reason for the stop is not supported by authority of law.

V. ARGUMENT

A. The Pretext Rule Is Well Established in Washington

This Court held in *Ladson* that "pretextual traffic stops violate article I, section 7, because they are seizures absent the 'authority of law' which a warrant would bring." *Ladson,* 138 Wn.2d at 358. It explained that the core protections of our state constitution require the pretext rule:

> while the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, article 1, section 7, holds the line by pegging the constitutional standard to those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.

Id. at 349. Exceptions to the state constitution's warrant requirement are "carefully drawn and narrowly applied." *Snapp,* 2012 WL 1134130 at ¶ 39; *see also Ladson,* 138 Wn.2d at 349 (describing such exceptions as "jealously and carefully drawn."). Thus, to protect this privacy, this Court

set forth a clear standard of law:

> We conclude the citizens of Washington have held, and are entitled to hold, a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when *the true reason* for the seizure is not exempt from the warrant requirement. We therefore hold that pretextual traffic stops violate article I, section 7, because they are seizures absent the "authority of law" which a warrant would bring.

Ladson, 138 Wn.2d at 358 (emphasis added).

The pretext rule remains the law in Washington. Since *Ladson*, Washington courts have consistently upheld and applied its ruling that "a warrantless traffic stop based on mere pretext violates article 1, section 7 of the Washington Constitution because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law required for an intrusion into a citizen's privacy interest." *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). This Court has repeatedly cited *Ladson* favorably. *See, e.g., State v. Landsden*, 144 Wn.2d 654, 662, 30 P.3d 483 (2001) (*Ladson* rule does not apply to search with valid warrant); *State v. O'Neill*, 148 Wn.2d 564, 577 n. 1, 62 P.3d 489 (2003) (officer approaching parked car is not traffic stop seizure that occurred in *Ladson*); *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (exception to warrant requirement cannot be used as pretext to search). In fact, this Court has at least twice since *Ladson* evaluated whether a

particular traffic stop was pretextual. *See Nichols*, 161 Wn.2d 1; *Snapp*, 2012 WL 1134130. Although neither stop was found to be pretextual, there was no question that an actual pretextual stop would have violated Article 1, Section 7. To the contrary, this Court reiterated that "[a]n officer may not use a traffic infraction as a pretext to stop a citizen and search for evidence of criminal wrongdoing that is unrelated to the reason for the stop." *Snapp*, 2012 WL 1134130 at ¶ 53.

B. The Primary or Predominant Reason Test Applied by the Court of Appeals Is Supported by *Ladson* and Its Progeny

The "primary reason" test used by the Court of Appeals here is an appropriate application of *Ladson's* rule barring pretextual stops. The Court below stated:

> a traffic stop is without authority of law where it cannot be constitutionally justified for its *primary reason* (speculative criminal investigation) but only for some other reason (enforcing the traffic code) which is at once lawfully sufficient but only a secondary reason."

Arreola, 163 Wn. App. at 797 (emphasis added) (hereafter referred to as the "primary reason" or "predominant reason" test).

That primary reason test is exactly what *Ladson* meant by the "true reason." 138 Wn.2 at 358. *Ladson* specifically recognized that the "primary motivation" test used in other situations involving exceptions to the warrant requirement (such as the emergency exception) is an appropriate test in the pretext context as well. *Ladson*, 138 Wn.2d at 357

(quoting *State v. Angelos*, 86 Wn. App. 253, 256-57, 936 P.2d 52 (1997)). It is exemplified by Officer Valdivia's testimony here, that on balance the "greater" reason for the stop was the DUI tip, even though it was without authority of law.

"Pretext is, by definition, a false reason used to disguise a real motive. Thus, what is needed is a test that tests real motives. Motives are, by definition, subjective." *Ladson* at 359 n.11 (quotation omitted). Thus, to evaluate pretext, *Ladson* set forth the following test:

> When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.

Ladson, 138 Wn.2d at 358-59. "To satisfy the exception, the State must show that the officer, both subjectively and objectively, '*is actually motivated*' by the legitimate reason for the stop." *Id.* at 358-59 (emphasis added) (also phrasing it as a ban on stops "when the *true reason* for the seizure is not exempt from the warrant requirement.")

Contrary to the State's claims, the primary reason test does *not* necessitate a finding of pretext whenever there are multiple reasons for a stop. Nor does the primary reason test mean that an officer must "ignore violations of the traffic code, which the officer would ordinarily enforce, simply because the officer suspects that the offender may be committing a

more serious offense." Petition for Review at 1. These arguments ignore the holding in *Ladson* which directs that the totality of the circumstances be considered. 138 Wn.2d at 359.

In practice, the primary reason test involves the examination of the *predominant* motive for the stop – i.e., an officer may have a suspicion of a separate criminal act, but so long as that suspicion is not the predominant reason for conducting the stop, the stop is constitutional. *See Ladson*, 138 Wn.2d at 357 ("The search must not be primarily motivated by" intent to investigate or arrest without probable cause") (quoting *State v. Angelos*, 86 Wn. App. at 256-57). Of course, the officer's after-the-fact characterization of his own motivation is not dispositive by itself. Washington courts routinely evaluate officer motives under this standard by looking at multiple factors, using both objective and subjective evidence.

For example, in *Nichols*, the officer identified more than one reason for his suspicions, but the court found that the infraction of crossing a double-yellow line was the reason the officers pulled over defendant's car. 161 Wn.2d at 12. In so holding, the court distinguished other cases where the predominant reason appeared to be suspicion of other crimes because the officers did not promptly act on the traffic infraction. *Id.*

The inquiry performs the important task of evaluating the constitutionality of the officer's acts. *See* Daniel Yeager, *The Stubbornness of Pretexts*, 40 San Diego L. Rev. 611 (2003) (without an examination of the primary reason for the stop, "we impede the entire project of regulating police, whose actions can be neither meaningfully praised nor meaningfully blamed if they cannot be understood.") The standard advocated by the State—requiring merely the articulation of one legitimate motivation, however minor—would cut out this critical court function.

C. The State and WSP/WAPA Positions Would Swallow Washington's Constitutional Protection Against Pretextual Stops

This Court examined the language of the state constitution and expressly found that: "our constitution requires we look beyond the formal justification for the stop to *the actual one*." *Ladson*, 138 Wn.2d at 353 (emphasis added). The State and WSP/WAPA purport to accept this holding, but then seek to apply the holding in a way that would eviscerate it. WSP/WAPA concedes as much in their memorandum; under their proposed standard, "few if any traffic stops made by a patrol officer in a marked vehicle will fail as pretextual when the officer's usual duties include traffic enforcement." Memorandum of Amici at 7. This is not an "interpretation" of *Ladson*, but rather an attempt to overturn it and

effectively allow pretextual stops—stops made without authority of law.

1. A "Would Have" Standard Is Inherently Speculative and Fails to Deter Pretextual Stops

Although they use somewhat different language, both the State and WSP/WAPA suggest the adoption of a "would have" standard to determine whether there was pretext; if the officer would have made the stop to enforce the traffic code, a court should not consider whether the actual motivation was investigation of other criminal activity. Petition for Review at 9 n. 3 ("but for" test); Memorandum of Amici at 7 ("would not have made the stop"). The Court of Appeals rightly rejected this test: "whether Officer Valdivia would have pulled over Mr. Chacon for the muffler violation had he not been concerned about drunk driving is irrelevant to our analysis; our concern is only with why the stop was made in this particular case." *Arreola*, 163 Wn. App. at 797.

The "would have" test is inherently speculative in nature, requiring a court to imagine a hypothetical scenario in which there was *no* improper motivation for the stop. It is similar in this regard to the "inevitable discovery" doctrine, which has a court imagine how an investigation would have proceeded without unlawful action. But Article 1, Section 7 does not operate in an imagined world; it looks instead to the *actual* invasion of private affairs. This Court accordingly found "the inevitable

discovery doctrine is necessarily speculative" and incompatible with Article 1, Section 7. *See State v. Winterstein*, 167 Wn.2d 620, 634, 220 P.3d 1226 (2009). *Winterstein* also considered the practical implications, and determined that "the inevitable discovery doctrine would leave no incentive for the State to comply with article I, section 7." *Id.* at 636 (quotation omitted). The same is true of the "would have" test proposed here.

Forbidding pretextual stops and using the primary reason test to determine whether one occurred creates a clear and effective deterrent to misconduct by insuring that illegal stops are not used to generate evidence that would contribute to a conviction. That deterrent is undermined if an officer knows that evidence discovered during an illegal stop might indeed be admitted if the prosecutor can successfully argue after the fact that a lawful stop "would have" occurred on hypothetical facts.

It is all too easy to rely on hindsight when considering the effect of a "would have" standard, framing the question as whether or not to exclude evidence after the fact—both after we know the existence and relevance of the evidence, and after the State has had an opportunity to construct a description of how the hypothetical stop *might* have occurred. Even with the best of faith on the part of the State, all testimony and recollections will be shaded with the rose-colored glasses of hindsight,

resulting in an inherently unreliable description of the hypothetical actions the officer would have taken. As with all suppression motions, the question arises in a context where the prosecutor has some grounds for believing the defendant is guilty. But it is the stops of innocent people, which are almost never examined by any court, that we most want to deter. A weak pretext rule (the "would have" standard) will likely result in some increase in the number of illegal stops conducted, including instances in which no wrongdoing is actually present.

In summary, the standard proposed by the State would swallow the jealously guarded narrow exception to the warrant requirement and in its place leave a police officer with virtually unfettered discretion to stop a Washington motorist on a whim. Once again, this Court should decline to "abandon our commitment against pretext and significantly undermine the vitality of article 1, section 7" *Ladson*, 138 Wn.2d at 357-58.

2. The State Must Prove a Stop Is Supported by Authority of Law

Washington has long required the State to bear the burden of proving that a warrantless search or seizure was justified by a valid exception to the warrant requirement, and issues relating to pretext have been treated no differently. *See State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980) (restricting inventory searches to the scope for which the

warrant exception was intended and stating "we recognize the possibility for abuse and have required the State show that the search was conducted in good faith and not as a pretext for an investigatory search"); *State v. Simpson*, 95 Wn. 2d 170, 189, 622 P.2d 1199 (1980) ("the State must demonstrate that the impoundment was lawful, and that the inventory search was proper and not a mere pretext for an investigatory search); *Angelos*, 86 Wn. App. at 256-57 ("To satisfy the [emergency] exception, the State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to render aid or assistance. The search must not be primarily motivated by intent to arrest and seize evidence.") (quotations omitted).

The Court of Appeals thus quite properly put the burden on the State to show that the stop was actually motivated by a violation of the traffic code for which there was a valid basis to make a stop. *See Arreola*, 163 Wn. App. at 793-94. This Court should reject the invitation by WSP/WAPA to reverse the standard and place the burden on the defendant to show that a stop is pretextual. Memorandum of Amici Curiae at 6-8. WSP/WAPA fails to cite a single Washington case to support this burden shifting. That is not surprising, because the proposition is directly at odds with Washington law. Although WSP/WAPA refer to other states' decisions, these cases are not helpful to interpret Article 1, Section 7,

which has language unlike the constitution in the vast majority of other states. This Court should instead look at its own precedent, and retain the long-standing requirement that the State must prove an exception to the warrant requirement is applicable.

3. The Pretext Rule Applies to and Does Not Hinder Investigations of Traffic-Related Offenses

The State's argument before the Court of Appeals in this case attempted to limit the pretext rule to cases involving only non-driving investigations, selectively quoting *Ladson*. The Court of Appeals rightly rejected that argument, recognizing that "the rationale of *Ladson* cannot be reconciled with the State's position." *Arreola*, 163 Wn. App. at 798. The proper question, as explained in *Ladson*, is whether the stop is supported by authority of law—not the nature of the crime being improperly investigated.

This Court has itself implicitly recognized that the pretext rule applies to driving-related offenses; it has favorably discussed a lower court finding of pretext in a stop whose actual, unsupported, purpose was to investigate a suspended license—a driving-related offense. *See Nichols*, 161 Wn.2d at 12 (discussing *State v. Myers*, 117 Wn. App. 93, 69 P.3d 367 (2003)). It is worth noting that the State had advanced the same argument in *Myers* that it did here to the Court of Appeals, claiming that

the pretext rule did not apply to an investigation of a suspended license.

The State has not directly renewed that argument before this Court, but it is advanced by WSP/WAPA. And both continue to insist that application of the pretext rule harms the ability of law enforcement to enforce traffic laws. This argument is belied by the facts. Traffic fatalities in Washington are at an all-time low, with a steady decrease since *Ladson* was decided, and transportation officials have been quoted as attributing that in part to "strong enforcement of traffic laws." *Washington traffic fatalities record low in 2010*, Seattle Times, Mar. 31, 2011. There is no need for a traffic or DUI exception to the pretext rule and warrant requirement. Indeed, this Court rejected a DUI exception over 20 years ago when it found that sobriety checkpoints do not comport with the "authority of law" demanded by Article 1, Section 7. *See City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988).

Similarly, application of the "primary reason" test to prevent unconstitutional pretextual stops does not, as the State argues, force officers to "either (a) deliberately avoid enforcing the traffic code; or (b) close his or her eyes and ears to other suspected criminal activity." State's Petition for Review at 9. The "primary reason" test does not require that probable cause for a traffic violation be *the only reason* for stopping a citizen, just the predominant one. Officers can, and should, continue to

investigate traffic violations, including DUI—but they must not stop drivers for that investigation unless there are facts to support the stop.

D. Stops for Traffic Infractions Are Particularly Ripe for Abuse as Pretext Stops and as Cover for Racial Profiling

Pretextual traffic stops are incompatible with Article 1, Section 7, because of the essentially unfettered discretion they give to officers. As this Court recognized in *Ladson*, "The traffic code is sufficiently extensive in its regulation that whether it be for failing to signal while changing lanes, driving with a headlight out, or not giving 'full time and attention' to the operation of the vehicle, virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter. Thus, nearly every citizen would be subject to a *Terry* stop simply because he or she is in his or her car." *Ladson*, 138 Wn.2d at 358 n. 10 (quotations and citations omitted).

The traffic codes of most states, including Washington, are extensive enough to guarantee that every motorist is in violation of some traffic infraction at nearly any given time. *See, e.g.*, RCW 46.61 ("Rules of the Road" Statutes); *see also* Thomas M. Lockney and Mark A. Friese, *Constitutional Roadkill in the Courts: Looking to the Legislature to Protect North Dakota Motorists Against Almost Unlimited Police Power to Stop and Investigate Crime*, 86 N. Dak. L. Rev. 1, 30-34, 62 (2010)

(listing the myriad of traffic infractions available and stating that under the Fourth Amendment's lack of a pretext rule, "any reasonably astute police officer can stop any vehicle virtually at will."). Offenses such as failing to signal, driving slightly above or below the speed limit, and not giving full time and attention to the road, all violate traffic ordinances. Indeed:

> The use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a *police officer will almost invariably be able to catch any given motorist in a technical violation.* This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.

Abraham Abramovsky, *Pretext Stops and Racial Profiling after Whren v. United States: the New York and New Jersey Responses Compared*, 63 Alb. L. Rev. 725, 733 (2000) (emphasis added).

The use of a pretext becomes even more dangerous when it is used to cloak an underlying suspicion of criminal activity based upon race. This use is well documented:

> police officers mentally put minority drivers in a separate lane for heightened scrutiny, looking for traffic violations as a pretext for a stop . . . The heightened scrutiny alone renders them unequal, even to the minority drivers who are never stopped . . . to the minority drivers who are the targets of the pretextual stops, the inequality is even more manifest.

I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 Harv. C.R.-C.L. L. Rev. 1, 26, 34 (2011)

(further explaining that pretext "permits officers to essentially use race as an 'unofficial' proxy for suspicion – for example, officers can think black + male + Pathfinder = suspicion – so long as the 'official' articulated basis for the stop is documentable, color-blind violation.")

At the very least, lack of a pretext rule—or a weak pretext rule as advocated by the State—prevents courts from examining the potential of racial motivation in one of the primary settings in which the police and citizenry interact. *See* Kevin Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 Geo. L.J. 1005, 1007 (2010) (stating that the federal abandonment of a pretext rule "effectively rendered the Fourth Amendment impotent in combating pretextual stops of automobiles based on the race of the occupants."); *see also* Abramovsky, *Pretext Stops and Racial Profiling after Whren v. United States*, 63 Alb. L. Rev. at 726-27. There are few mechanisms by which police motivations and potentially race-based harassment can be monitored, so effectively taking away this tool would have tragic consequences for Washington's treatment of minorities. Moreover, it is contrary to Washington's strong history of prohibiting warrantless searches of its citizenry.

E. The Instant Case Fits Squarely Within *Ladson's* Prohibition Against Pretext and the Harm it Seeks to Prevent

The instant case is a classic example of the harm *Ladson's* rule against pretext serves to prevent. Here, Officer Valdivia was interested in investigating Mr. Chacon for driving under the influence; however, he lacked probable cause to support the infringement on Mr. Chacon's privacy that a stop and investigation would entail. Officer Valdivia then followed Mr. Chacon for some time, but failed to develop any evidence to further support his suspicion. So, instead, Officer Valdivia used a traffic infraction (a muffler violation) to make an end-run around the Article 1, Section 7 requirement of a warrant or a recognized exception to the warrant exception. He pulled him over under the guise of a traffic infraction and used the investigation of that infraction to search for probable cause for a greater offense. Permitting police to use traffic infractions in this manner realizes the very harm the Washington Constitution and the Court in *Ladson*, sought to prevent—the erosion of Washington citizens' right to privacy under the "authority of law" standard. As noted *supra*, it is the stops of innocent people, which are rarely if ever examined by any court, that we most want to deter. Washington's "true reason" standard prevents the erosion of this right.

Indeed, as applied here, the rule worked as it should. Had Officer

Valdivia been actually motivated by a desire to enforce the traffic code, he would not have been precluded from discovery of further evidence of driving under the influence upon viewing Mr. Chacon. However, the examination of the totality of the circumstances demonstrated that he was not so motivated—thus, the *Ladson* rule worked as it should. It prevented Washington's police force from evading the constitutional requirements for search and seizure.

VI. CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to hold that a pretextual traffic stop violates Article 1, Section 7 unless the State proves that the *primary* motivation for the stop was enforcement of the traffic violation. Accordingly, the evidence obtained here by an unconstitutional traffic stop should be suppressed.

Respectfully submitted this 20th day of April, 2012.

By

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DECLARATION OF SERVICE

The undersigned hereby declares as follows:

On April 20, 2012, I caused a true and correct copy of the foregoing document to be duly served via email on the following attorneys of record:

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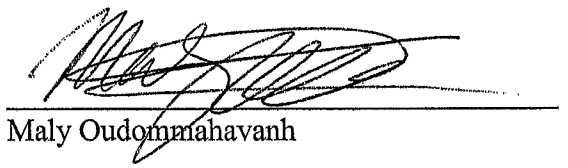
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: April 20, 2012, at Seattle, Washington.



Maly Oudommahavanh