

FILED  
Feb 07, 2013  
Court of Appeals  
Division I  
State of Washington

8 8410-2

NO. 69831-1-I  
69832-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Plaintiff,

v.

JOSEPH THOMAS McENROE AND  
MICHELE KRISTEN ANDERSON,

Defendants.

FILED  
2013 FEB 12 A 9:26  
BY RONALD D. CARPENTER  
CLERK

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

---

**STATE'S REPLY IN SUPPORT OF  
MOTION FOR DISCRETIONARY REVIEW**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANDREA R. VITALICH  
Senior Deputy Prosecuting Attorney

JAMES M. WHISMAN  
Senior Deputy Prosecuting Attorney  
Attorneys for Plaintiff

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ARGUMENTS IN REPLY</u> .....	1
1. THE BRIEFING SCHEDULE IS ADEQUATE TO ADDRESS WHETHER THIS COURT SHOULD GRANT REVIEW .....	1
2. THIS COURT SHOULD STAY THE EFFECT OF THE TRIAL COURT’S RULING SO THAT IT CAN CONSIDER WHETHER TO GRANT REVIEW AND TO CONSIDER THE MERITS OF THE ISSUE.....	2
3. THE TRIAL COURT’S RULING IS NECESSARILY FACT-DEPENDENT AND THUS, IT IS PREMATURE BECAUSE NO FACTS HAVE BEEN ADDUCED .....	3
4. THE TRIAL COURT (AND DEFENDANTS’ COUNSEL IN DEFENSE OF THE TRIAL COURT’S THEORY) FUNDAMENTALLY MISPERCEIVE THE PROSECUTOR’S FILING DECISION .....	7
5. THERE IS NO EQUAL PROTECTION VIOLATION ....	13
6. SEPARATION OF POWERS .....	15
7. MCENROE’S IRRELEVANT ARGUMENTS .....	15
B. <u>CONCLUSION</u> .....	17

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Oregon v. Guzek, 546 U.S. 517,  
126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006) .....6

Rompilla v. Beard, 545 U.S. 374,  
125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) .....6

Washington State:

State v. Brown, 64 Wn. App. 606,  
825 P.2d 350, rev. denied,  
119 Wn.2d 1009 (1992) ..... 5

State v. Brown, 132 Wn.2d 529,  
940 P.2d 546 (1997).....15

State v. Brown, 64 Wn. App. 606,  
825 P.2d 350, rev. denied,  
119 Wn.2d 1009 (1992) .....5

State v. Dearbone, 125 Wn.2d 173,  
883 P.2d 303 (1994).....3, 4

State v. Dodd, 120 Wn.2d 1,  
838 P.2d 86 (1992).....14

State v. Elmore, 139 Wn.2d 250,  
985 P.2d 289 (1999).....14

State v. Handley, 115 Wn.2d 275,  
796 P.2d 1266 (1990).....14

State v. McEnroe, Wash. Supreme Ct. No. 84693-6 .....16

State v. Pettitt, 93 Wn.2d 288,  
609 P.2d 1364 (1980).....5

Statutes

Washington State:

RCW 10.95.040 .....3, 4, 5, 16

Rules and Regulations

Washington State:

RAP 2 .....2

A. ARGUMENTS IN REPLY

1. THE BRIEFING SCHEDULE IS ADEQUATE TO ADDRESS WHETHER THIS COURT SHOULD GRANT REVIEW.

Both defendants complain that the accelerated briefing schedule ordered by this Court is inadequate and unfair. Defendant Anderson even suggests that the accelerated schedule could result in ineffective assistance of counsel. *See* Anderson Response, at 2, 3. In support of these objections, both defendants describe the State's Motion for Discretionary Review as "256 pages." *See* McEnroe's Objection to Accelerated Briefing Schedule, at 2; Anderson Response, at 2. But the State's *motion* is actually 19 pages long, and only 18 of those pages are substantive. The remaining "pages" are actually appendices, which consist of pleadings that were filed months or even years ago (many of which were *written by* counsel for defendant McEnroe), orders from the trial court with which the defendants are surely very familiar, and a transcript of a hearing in which the defendants participated. These complaints regarding length are not well-taken.

Furthermore, defendant McEnroe complains that the State's motion "contains several arguments and authorities different than (sic) contained in the State's briefing below." McEnroe's Objection to Accelerated Briefing Schedule, at 2. This is hardly surprising given that,

as the State has already emphasized, “the trial court dismissed the notices of intent to seek the death penalty *on grounds that had not been briefed or argued by either defendant[.]*” Motion for Discretionary Review, at 4 (emphasis supplied). This obvious fact is plainly demonstrated by the materials submitted in support of the motion that *was* made by the defendants, which comprise most of the appendices to the State’s Motion for Discretionary Review.

Given the circumstances present in this case – *i.e.*, that the trial court dismissed the death penalty on the eve of McEnroe’s trial on grounds that were not raised by either defendant, and that find no support in state or federal law – this Court’s accelerated briefing schedule is entirely appropriate and necessary to ensure that this matter is heard promptly in order to serve the interests of justice. *See* RAP 2(c).

2. THIS COURT SHOULD STAY THE EFFECT OF THE TRIAL COURT’S RULING SO THAT IT CAN CONSIDER WHETHER TO GRANT REVIEW AND TO CONSIDER THE MERITS OF THE ISSUE.

The defendants suggest that there will never be sufficient time to consider the merits of this motion. The State disagrees and, if additional time is needed, respectfully asks this Court or the Supreme Court to issue an order staying the effect of the trial court’s ruling, so that *voir dire* may

proceed in McEnroe's trial as currently scheduled. The parties optimistically estimate that *voir dire* will last until approximately April 19<sup>th</sup>. If the trial court's ruling is stayed, the parties could complete the *voir dire* as the appellate court is considering the merits of the issue.

3. THE TRIAL COURT'S RULING IS NECESSARILY FACT-DEPENDENT AND THUS, IT IS PREMATURE BECAUSE NO FACTS HAVE BEEN ADDUCED.

In arguing that the trial court's ruling is not premature, both defendants cite State v. Dearbone, 125 Wn.2d 173, 883 P.2d 303 (1994), for the proposition that it is proper for a trial court to dismiss a notice of intent to seek the death penalty prior to trial. *See* Anderson Response, at 9; McEnroe's Response, at 12. Dearbone bears no resemblance to what occurred in this case.

In Dearbone, the prosecutor notified defense counsel by voice mail and in person that the State was filing a notice of intent to seek the death penalty; however, the prosecutor did not actually serve defense counsel with a copy of the notice until after the deadline for filing the notice had expired. Dearbone, 125 Wn.2d at 175-76. The trial court then granted the State's motion to reopen the time limit for serving the notice under RCW 10.95.040(2), finding that the defense had actual notice of the

State's decision, and that the defendant had suffered no prejudice.

Dearbone, 125 Wn.2d at 176, 178.

The defendant sought and was granted discretionary review of the issue. The Washington Supreme Court reversed on grounds that the language of RCW 10.95.040 is plain, clear, and unambiguous that the notice of intent to seek the death penalty must be filed *and served* by the deadline. As the court succinctly stated, "filing and service of notice is mandatory – no notice, no death penalty." Dearbone, 125 Wn.2d at 177. The court further held that "good cause" to reopen the time for filing and serving the notice "requires a reason *external* to the prosecutor for his failure to serve notice." Id. at 179 (emphasis in original).

Based on this case, the defendants argue that it is entirely appropriate for the trial court to dismiss a notice of intent to seek the death penalty, and thus, the trial court's order in this case is not premature. But Dearbone concerns a purely procedural issue based on the plain language of an unambiguous statute; it does not concern a ruling intruding upon the executive decision-making of the elected prosecuting attorney on unprecedented grounds that were never raised by the defendants. Moreover, it should go without saying that the trial court in Dearbone did *not* dismiss the notice of intent to seek the death penalty, whereas the trial court in this case *did* dismiss it. Nothing in Dearbone encourages trial

courts to dismiss notices of intent to seek the death penalty on whatever grounds they wish, whether supported by authority or not.<sup>1</sup>

The trial court in this case substituted its judgment for that of the Prosecutor based on the trial court's perception of how the Prosecutor considered the available evidence, without any concrete idea of what that evidence actually entails. That evidence should be adduced at *trial*, and based upon that evidence and whatever mitigation the defendants present, a *jury* should decide what penalty the defendants should receive. The trial court has deprived the State of the opportunity to fully prosecute these defendants in accordance with Washington law; as such, the trial court's ruling is premature and should be reversed. *See State v. Brown*, 64 Wn. App. 606, 825 P.2d 350, rev. denied, 119 Wn.2d 1009 (1992).

Moreover, defendant Anderson notes that the trial court said that under RCW 10.95.040(1), "the scope of the information appropriate for the prosecutor's review is as broad as that which may be considered by a jury." Anderson Response, at 6. Thus, one would think that the trial court would have familiarized itself with the facts and circumstances as proved by the evidence that will be considered by the jury. Yet, Anderson later

---

<sup>1</sup> Also, the trial court's ruling imposes the wrong remedy. *See State v. Pettitt*, 93 Wn.2d 288, 609 P.2d 1364 (1980) (where a prosecutor had a mandatory policy for filing habitual offender notices, remand to have the prosecutor apply correct standard was the appropriate remedy, not dismissal of notice).

admits that “the court’s ruling has nothing to do with the facts to be advanced at trial or the sufficiency of the evidence.” Anderson Response, at 10. As described more fully below, that is precisely the problem with the trial court’s ruling; it *should* depend on the facts of the crime and the mitigation evidence, but it replaces such an examination with an *assumption* that the prosecutor simply filed a death notice because the case was strong. Put another way, the trial court did not examine the evidence to determine whether the prosecutor’s decision flowed from the facts and circumstances of these heinous crimes.

The defendants also suggest to this Court that residual or lingering doubt is not relevant to the jury’s determination because it is not related to moral culpability. Anderson Response, at 14-15; McEnroe Response, at 12. The law is to the contrary. Although a trial court is not constitutionally *compelled* to give a residual or lingering doubt *instruction*, that does not mean that a defendant is constitutionally forbidden from presenting such an argument. *Compare Oregon v. Guzek*, 546 U.S. 517, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006) (instruction on residual doubt not constitutionally required), *with Rompilla v. Beard*, 545 U.S. 374, 389-90, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (acknowledging defense of residual doubt in capital penalty phase and holding that counsel has a duty to advance that defense through investigation). Under this law, a

defendant certainly can argue in the penalty phase that, although the evidence is sufficient to convict, there is residual doubt as to his guilt such that a life sentence is appropriate. The State must be allowed to consider this possibility in deciding whether to seek the death penalty. In sum, the trial court's ruling is based on abstract assumptions about facts that have not yet been adduced. As such, it is premature as well as mistaken.

4. THE TRIAL COURT (AND DEFENDANTS' COUNSEL IN DEFENSE OF THE TRIAL COURT'S THEORY) FUNDAMENTALLY MISPERCEIVES THE PROSECUTOR'S FILING DECISION.

The State has consistently resisted efforts by defense counsel and the trial court to explain in open court the process of reasoning that the King County Prosecutor used in deciding to file the notice of intent to seek the death penalty. As argued in the State's motion, the Prosecutor is under no legal obligation to explain his filing decision because that discretion is vested in him as an independently elected public official. Moreover, it is folly to suggest that *any* explanation – whether long or short – would somehow put matters to rest. If the Prosecutor fully explained his reasoning in a lengthy document, that document would be endlessly dissected by defense counsel, demands for testimony and cross examination would follow, the inquiry would veer into the facts and

circumstances of cases past and present, and an entire mini-trial would be held over whether a penalty phase in the actual trial should ever occur. If the Prosecutor says little or nothing, however, his decision will be subject to speculation and misunderstanding, as is shown by the trial court's ruling in this case.

In addition, vetting the Prosecutor's thought processes would risk revealing details of the evidence and make even more difficult the seating of an untainted jury. To fully explain the Prosecutor's reasoning would require delving into facts and inferences that would be damaging to the defendants. For these reasons, the trial court's first error was in continuing to prod the deputy prosecutor for information and, when such information was not forthcoming, speculating about the basis for the executive decision that was made.

In defense of the trial court's ruling, Anderson's lawyers summarize the false dichotomy that the trial court has incorrectly attributed to the Prosecutor's filing decision:

[The Prosecutor] singled out Ms. Anderson and Mr. McEnroe for a possible death sentence, *not because of the heinousness of their acts, or because of a lack of compelling mitigation evidence*, but because, in essence, the police had the good fortune to encounter cooperative suspects and otherwise did a good job investigating the case. As such the tipping point for the decision to seek death was not related to "the circumstances of the crime or character or record of the accused," but was *something*

*wholly extrinsic to the awfulness of the crime or the moral culpability of the defendants.*

Anderson Response, at 5-6. This assertion – that the Prosecutor sought the death penalty *only* because the case is strong – is fundamentally false.

The problem stems in large part from the manner in which the trial court seems to have formulized its theory. Indeed, the trial judge has not been provided with even a single photograph of the crime scene, has not read any forensic reports analyzing that crime scene, has not heard from a single live witness, has not read a single word of the transcript of these defendants' confessions, and has not heard even a minute of the defendants' audiotaped confessions in which can be heard the chilling callousness with which they describe carrying out their calculated plan to kill six human beings, including two small children. The court has seen some portion of McEnroe's mitigation but, to the State's knowledge, has not seen any mitigation related to Anderson.<sup>2</sup>

Rather, the discussion in the trial court on the topic of why the death penalty was sought has consisted of the court repeatedly posing a series of hypotheticals and then musing about or asking the lawyers to comment on what a hypothetical prosecutor might do under various

---

<sup>2</sup> Should this matter proceed any further, and should there be *any question* in this Court's mind regarding the heinousness of these crimes and the relative inadequacy of the defense's mitigation, the State will seek to provide substantive evidence to this Court, so that this Court's decision will not be made in a factual vacuum.

posited circumstances, and why. This Socratic exercise regarding death penalty decision-making in the abstract bears almost no relation to how real-world decisions are made based on real evidence, involving real people.

The actual evidence shows how brutally these six human beings were slain. It shows that two were killed first, and that the defendants went to great lengths to hide these first killings lest their later-arriving victims be spooked by the discovery of the corpses of their relatives. The actual evidence shows why the defendants plotted to kill this family and just how shockingly banal their reasons are. It also shows that the six victims were killed for different reasons, and that the children were killed last, after being forced to watch their parents die, to eliminate the children as witnesses. It is hard to imagine a collection of facts showing a more brutal, calculating, and cold series of murders. This evidence shows that these crimes were – to paraphrase the defendants’ own language quoted above – heinous, awful, blameworthy, culpable and deserving of the ultimate sentence the citizens of Washington State have authorized.

The State has repeatedly made clear that these facts were considered along with the mitigating evidence provided by the defendants, and that the mitigation evidence did not merit leniency in light of the facts of the crime. RP (1/17/13) 65-66, 71-72, 74-78, 80-82; RP (3/26/10) 6,

8-9, 16, 18-19, 27-28, 30. That is precisely what is required under the statute.

The trial court has ruled, however, that the Prosecutor erred in this case by considering the “strength” of the evidence.<sup>3</sup> As this Court is well aware, a death penalty case includes two stages of decision-making for the prosecutor. The first is the decision whether to file the charge of murder in the first degree with aggravating circumstances. This decision focuses on whether the evidence can prove the elements of the crime and the aggravating factors. Second, there is the decision whether to pursue the death penalty. This decision focuses on the nature of the defendant’s crime and whether that crime is heinous, awful, and revolting such that the defendant him-or herself is deserving of special approbation and the ultimate penalty. All conclusions, however, *must* flow from the evidence.

In determining whether to file a death notice, the prosecutor must make a preliminary or threshold determination: is the evidence strong enough to withstand the delay, rigors, and scrutiny that can be expected in death penalty litigation? However, once that threshold is passed the prosecutor does not weigh the “strength of the evidence” as some *independent* aggravating factor against the evidence of mitigation, as if the

---

<sup>3</sup> Anderson’s lawyers implicitly recognize the speculative nature of the court’s ruling when they say the trial court pointed out that the Prosecutor “likely” weighed the strength of the case. Anderson Response, at 15-16.

strength were an *independent* counterbalance to mitigation. Rather, the prosecutor considers all of the evidence and the mitigation in a global, holistic way in making an individualized determination as to whether the death penalty is warranted. The trial court erred by assuming that the “strength” of the evidence was somehow separated from the calculus in this case and independently weighed.

In attempting to prove the logic of the court’s ruling the defendants illustrate its weaknesses. For example, Anderson attempts to explain why and circumstances are distinct from evidence as follows:

[A] fact and circumstance would be the details described in a confession. By contrast, an example of something related to the strength of the evidence would be the existence of an admissible confession. . . . The Court’s order says it is appropriate for the prosecutor (sic) consider the description of a crime as relayed in the confession. But, it is not permissible for the prosecutor to consider whether the existence and likely admissibility of the confession renders the state’s proof stronger.

Anderson Response, at 15. But this is plainly a distinction without a difference. If statements in a confession are inadmissible because the confession was illegally obtained, for instance, it makes little sense to file a death notice based on evidence the jury will never hear. As the trial court’s own ruling recognizes, the prosecutor should consider what the jury considers. Ruling, at 7. The evidence of the defendant’s blameworthiness must be admissible or it is irrelevant to the decision.

Otherwise, the prosecutor would be required to file death notices in cases where, for example, the defendant's sadistic past is known to prosecutors but will never be presented to a jury because the witnesses to his sadism are dead. The law certainly would not demand such absurdity.

The actual evidence in this case – not some abstraction from the lawyers' representations about the evidence – shows that the defendants' conduct was culpable, awful, and heinous. The mitigation presented was not compelling. Thus, there is no basis to conclude that the Prosecutor erred in determining that, given the facts of the crime, there are not sufficient mitigating circumstances to merit leniency.

5. THERE IS NO EQUAL PROTECTION VIOLATION.

Defendant Anderson defends the trial court's conclusion that the King County Prosecutor committed an equal protection violation without conducting any equal protection analysis, and then argues that the State failed to conduct a detailed equal protection analysis in its motion for discretionary review. *See* Anderson Response, at 17. Rather than undermine the State's argument, Anderson's point illustrates the fundamental weakness in the trial court's ruling: namely, that it is without any *legal* analysis whatsoever, and seemingly based solely on a hypothetical, the trial court has invented an equal protection violation out

of whole cloth. The State's inability to respond in detailed fashion to the trial court's equal protection analysis is due to the fact that such analysis does not exist.

In any event, as noted in the State's motion, any equal protection analysis must begin with the determination as to whether two or more individuals are "similarly situated." Motion for Discretionary Review, at 16. For purposes of this determination, the Washington Supreme Court has held in the sentencing context that even co-defendants are not "similarly situated" for sentencing purposes absent proof of "near identical participation in the same set of criminal circumstances," and even then, if there is a rational basis for treating them differently, there is no equal protection violation. State v. Handley, 115 Wn.2d 275, 290-92, 796 P.2d 1266 (1990). Accordingly, as between different defendants in different cases, with different evidence available against them, those defendants are plainly *not* "similarly situated."

Indeed, the Washington Supreme Court has repeatedly recognized that each capital case is "unique," and "cannot be matched up like so many points on a graph." State v. Elmore, 139 Wn.2d 250, 308, 985 P.2d 289 (1999) (citing State v. Dodd, 120 Wn.2d 1, 26, 838 P.2d 86 (1992)). Therefore, the decision to seek or to impose the death penalty in any case necessarily requires "an individualized determination on the basis of the

character of the individual and the circumstances of the crime.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). By requiring absolute uniformity based on a hypothetical, the trial court’s conclusion that an individualized consideration of the evidence by the Prosecutor constitutes an equal protection violation is simply untenable.

6. SEPARATION OF POWERS.

Anderson argues that there is no separation of powers violation because a court has the authority to ensure that a prosecutor follows the statute and does not violate the constitution. This argument begs the question. The State relies on its original arguments.

7. McENROE’S IRRELEVANT ARGUMENTS.

Much of defendant McEnroe’s response brief consists of detailed descriptions of his previous motions to dismiss the notices of intent to seek the death penalty. *See* McEnroe’s Response, at 2-8. To the extent that McEnroe is suggesting that these previous motions should be considered anew on discretionary review, any such suggestion should be soundly rejected. The State is seeking review of the trial court’s January 31, 2013

ruling; McEnroe's other motions are not at issue.<sup>4</sup> It also bears mentioning that one of these prior motions, to which McEnroe devotes substantial attention in his response brief, was the subject of a prior defense motion for discretionary review, which was summarily denied by the Washington Supreme Court. *See State v. McEnroe*, Wash. Supreme Ct. No. 84693-6 (denying review of McEnroe's "Motion to Strike Notice of Intent to Seek the Death Penalty on Grounds that It Was Filed in Violation of RCW 10.95.040"). This portion of McEnroe's brief adds little to this Court's analysis.

Lastly, McEnroe devotes the final pages of his response brief to arguing that McEnroe will plead guilty if the death penalty remains dismissed, and that the issue of whether a prosecutor can consider the "strength of the evidence" was argued in the trial court, and therefore, the record supports it. McEnroe's Response, at 13-16. McEnroe's purported pledges to plead guilty are irrelevant to whether the trial court's ruling is legally sound. Moreover, the transcripts that have been submitted by all parties amply demonstrate the State's position that the trial court's rationale for dismissing the notices of intent to seek the death penalty is of

---

<sup>4</sup> The State appended the materials regarding McEnroe's most recent motion to its Motion for Discretionary Review for the specific purpose of demonstrating that the trial court's ruling is not based on McEnroe's arguments. The State did not submit these materials for the purpose of suggesting that McEnroe's motion either has merit or should be reviewed by this Court.

its own making, and is not based on any briefing submitted or arguments made by the defendants' attorneys.

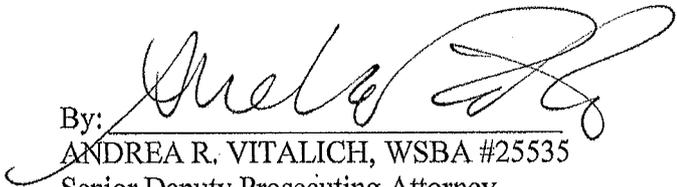
B. CONCLUSION

For the foregoing reasons, the State asks this Court to grant review and reverse the trial court's ruling. If the ruling is not summarily reversed, the State respectfully asks this Court to stay the trial court's ruling, and direct that jury selection should proceed as scheduled.

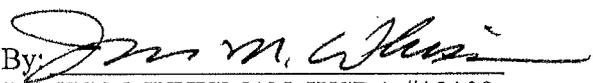
DATED this 7<sup>th</sup> day of February, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

ANDREA R. VITALICH, WSBA #25535  
Senior Deputy Prosecuting Attorney

By: 

JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney  
Attorneys for Plaintiff  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I sent by electronic mail and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to the following counsel:

Attorney for Petitioner Michele K. Anderson	Attorney for Petitioner Michele K. Anderson
Colleen E. O'Connor Society of Counsel 1401 E Jefferson St Ste 200 Seattle WA 98122-5570  colleen.oconnor@scraplaw.org	David P Sorenson SCRAP 1401 E Jefferson St Ste 200 Seattle WA 98122-5570  david.sorenson@scraplaw.org

containing a copy of the State's Reply in Support of Motion for Discretionary Review , in STATE V. MICHELE K. ANDERSON, Cause No. 69832-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

*SC Brame*  
Name  
Done in Seattle, Washington

2/7/13  
Date 2/7/13