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63738-0

NO. 63738-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,

v.

ROY PORTER,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE CHRIS WASHINGTON

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2010 JAN 29 PM 1:10

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Probable cause to arrest exists when the totality of the facts and circumstances known to officers would warrant a reasonably cautious person to believe an offense is being committed. Where a trained officer sees, in a short amount of time, multiple hand-to-hand transactions that are consistent with drug dealing, in a high narcotics area, and then communicates to arresting officers the location and description of the suspect, and finally provides real-time confirmation that the correct suspect had been contacted, is there individualized probable cause to effectuate an arrest of that suspect?

2. Appellate review of a refusal to grant a request for an exceptional sentence below the standard range is limited to circumstances in which a court either refuses to exercise any discretion or when a court relies on an impermissible basis for refusing to grant the request. Here, the appellant requested an exceptional sentence based on the small amount of drugs possessed. Did the trial court properly consider the evidence presented at trial when determining if the facts of the appellant's case were truly distinguishable and extraordinary?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the appellant, Roy Stephen Porter, with one count of Violation of the Uniform Controlled Substances Act (possession of cocaine.) CP 15; RCW 69.50.4013. A trial was held before the Honorable Chris Washington. Prior to the trial, Judge Washington also presided over the CrR 3.6 hearing. The court entered written findings of fact and conclusions of law as required by CrR 3.6. CP 72-75.

After a jury trial, the appellant was found guilty as charged. CP 27. This timely appeal followed. CP 63.

**2. SUBSTANTIVE FACTS**

On October 5, 2008, Officer Lee was conducting surveillance in Occidental Park. RP 16-18, 146. This area is a high narcotics area, and the police have received numerous reports regarding narcotics activity there. RP 17, 147. Officer Lee was in a fixed location and observed the park using binoculars. RP 17-18, 147, 152-53. The binoculars were 10 by 50, which Officer Lee estimated would make an object that is roughly 150 feet away appear as though it was only 15 feet away. RP 18, 145-46.

At roughly 8:20pm, Officer Lee noticed the appellant. RP 17, 158. Officer Lee's attention was first directed to the appellant when a group of people approached the appellant. RP 18, 158-59, 162.

In less than a minute, as Officer Lee watched, the appellant engaged in a total of three hand-to-hand transactions. RP 18-19. In each of these transactions, the appellant pulled a small item out of his left front pants pocket with his left hand. This item was then exchanged in return for money. RP 18-19. Officer Lee testified that what he observed was consistent with an illegal narcotics transaction. RP 19. At that point, Officer Lee radioed to the arrest team and asked for the appellant to be arrested. RP 19. Officer Lee conveyed, via his radio, a description and location of the appellant. RP 26-28. According to Officer Lee, he provided as much information as he can such that an arrest team will be able to distinguish the suspect from other individuals in the area. RP 190-91. Before the arrest team could move in, however, the appellant engaged in what appeared to be a fourth narcotics transaction. RP 20.

Officer Diamond was one of the officers assigned to the arrest team that night. RP 212. Both Officers Lee and Diamond estimated that it took around 30 seconds for the arrest team to

arrive from the time the call for arrest was made. RP 185, 235, 239. Officer Diamond testified that as he arrived into the park, he could immediately see the suspect that Officer Lee was describing. RP 216. The appellant both matched the physical description and was also in the area that Officer Lee had described. RP 39.

As Officer Diamond approached, the appellant looked in Officer Diamond's direction, and then turned and walked approximately 10-15 feet, and it appeared to Officer Diamond that the appellant was attempting to hide behind two other individuals. RP 41, 51, 53, 220. Officer Diamond was wearing a black raid vest with clear white lettering that said "police," and had his badge displayed at the top of the vest. RP 39. In a short amount of time, Officer Diamond was able to contact and arrest the appellant. RP 39.

Using the radio, Officer Lee confirmed that the correct suspect had been arrested. RP 21. When asked if he was certain the person he saw engaging in the suspected narcotics deals was the same person subsequently arrested, Officer Lee responded, "without a doubt. I never lost sight of him." RP 168; see also RP 33. Officer Lee added that after he calls for the arrest of an individual, it's his practice to continue to watch that suspect until

he/she is under arrest not only to make sure that the correct person is placed under arrest, but also to make sure that evidence is not destroyed or compromised. RP 168.

Officer Diamond searched the appellant at the scene subsequent to arrest, and located over a hundred dollars in cash. RP 42. Later at the precinct, Officer Lee conducted a more thorough search in which the appellant's left pocket was turned inside out, and the contents were placed into a small plastic baggie. RP 21. Eric Finney of the Washington State Patrol Crime Lab later tested the contents of the appellant's front left pants pocket. Due to the small amount of material, it was not practical to obtain a weight of the substance. RP 255. However, there was enough material to be tested and lab tests revealed the substance to be cocaine. RP 252.

**C. ARGUMENT**

**1. THERE WAS PROBABLE CAUSE TO ARREST PORTER.**

A trial court's determination of whether evidence meets the probable cause standard is reviewed de novo. In re Peterson, 145 Wn.2d 789, 799, 42 P.3d 952 (2002).

Probable cause to arrest exists where the totality of the facts and circumstances known to the officers at the time of arrest would warrant a reasonably cautious person to believe an offense is being committed. State v. Herzog, 73 Wn. App. 34, 53, 867 P.2d 648 (1994). In making this determination, reviewing courts must give consideration to an arresting officer's special expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). Probable cause to arrest requires more than "a bare suspicion of criminal activity," State v. Terravona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986), but does not require facts that would establish guilt beyond a reasonable doubt. State v. Conner, 58 Wn. App. 90, 98, 791 P.2d 261 (1990).

In State v. Fore, a police officer was conducting surveillance using binoculars, in response to numerous complaints of narcotics activity in the area. 56 Wn. App. 339, 340, 783 P.2d 626 (1989). The officer was a twelve-year veteran, who estimated that he'd initiated around 80 arrests in the previous six years as a result of surveillance with binoculars. In just a few minutes, as the officer watched, the defendant engaged in multiple transactions. In each transaction, the defendant handed over a small baggie and received what appeared to be folded currency in exchange. Id.

at 341. The surveillance officer testified about his extensive training and experience with respect to identification of controlled substances, narcotics investigation, and surveillance techniques. Id. at 342.

This Court determined that probable cause existed to arrest a defendant in Fore based on a number of factors, including the number of transactions, the short timeframe in which the transactions occurred, the officer's observations of small baggies being exchanged for currency, and the fact that the officer had a clear view that was enhanced with binoculars. Id. at 343-44. Additionally, this Court noted that the officer had special training in narcotics investigation, and that the officer was aware of numerous complaints of drug transactions in the area. Id. at 344.

Similarly, the totality of facts in this case gave rise to probable cause to arrest the respondent. Specifically, Officer Lee's testimony revealed that:

- Officer Lee has been a law enforcement officer for around thirteen years. RP 14, 137-38.
- Officer Lee described his extensive training with respect to narcotics, including identifying controlled substances, recognizing

narcotics transactions, and making narcotics related arrests.

RP 15-16, 139-145.

- Officer Lee estimated that he'd spent "hundreds of hours doing narcotics surveillance." RP 145.

- On the night of October 5, 2008, Officer Lee was conducting surveillance in Occidental Park. RP 16-18, 146.

- Occidental Park is an area of high narcotics activity. RP 17, 147. There have been numerous complaints made to law enforcement about drug activity in that park. RP 17, 147.

- Officer Lee was inside a building that's located in the northwest corner of the park. RP 17, 153. Specifically, Officer Lee was on the second floor in a stairwell. RP 152-53.

- To enable him to better see, Officer Lee conducted surveillance that evening with the assistance of 10 by 50 binoculars. RP 18, 145.

- Officer Lee testified that he had a clear, unobstructed view of the appellant, and that there was nothing impeding his vision. RP 18, 159. When asked about trees in the park, Officer Lee indicated that while there are trees in the park, the trees did not impede his view of the appellant in any way. RP 159.

- Officer Lee testified that while it was nighttime, there were lights illuminating the park. RP 31, 199.

- Officer Lee's attention was first drawn to the appellant when a group of individuals approached the appellant. RP 18. In less than a minute, the appellant appeared to engage in three separate drug transactions. RP 19. Each transaction occurred one right after another, with Officer Lee describing it as a "continuous event." RP 20.

- In each transaction, the appellant removed a small item, what Officer Lee believed to be narcotics, from his left pants pocket and used his left hand to give it to the person Officer Lee believed to be a buyer. RP 18-19.

- While Officer Lee could not make out exactly what the appellant was handing over to the other individuals, Officer Lee could see that the appellant received money in exchange for each of the small items. RP 18-19, 25.

- Based on his training and experience, Officer Lee testified that the appellant's actions were consistent with someone who was selling narcotics in exchange for money. RP 19. Based on what he'd seen thus far, Officer Lee informed the arrest team to move in and arrest the appellant. RP 19.

- It took approximately 30 seconds before the arrest team arrived. RP 185, 217. Before the arrest team moved in to the area, the appellant engaged in a fourth transaction, that was similar in nature to the previous three insofar as the appellant provided a small item out of his left pocket and received money in exchange. RP 20.

Taken together, the facts described above provided probable cause for the appellant to be arrested. As this Court held in State v. Maesse, "in those circumstances where police officers are acting together as a unit, cumulative knowledge of all of the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect." 29 Wn. App. 642, 647, 629 P.2d 1349 (1981). This is precisely one of those circumstances.

- a. The Location Of The Suspect As Described By The Surveillance Officer Was Consistent With The Area In Which The Appellant Was Found and Contacted

The appellant points out contradictions from Officer Lee's and Officer Diamond's testimonies as to the appellant's location at the time of arrest. The appellant then speculates that Officer Lee

must have lost sight of the actual suspect and must have confirmed the arrest of the appellant "simply because he was a black male wearing a white t-shirt and jeans." Br. App. at 13. These speculations are unfounded.

It is accurate that there is some variation between the testimonies of Officer Lee and Officer Diamond. At the time Officer Lee called for the appellant's arrest, Officer Lee testified that the appellant was standing by the benches. RP 26. As the arrest team moved in, the appellant moved southbound to where he was taken into custody, just short of the totem poles and near the bocce ball court. RP 28, 166. Officer Lee estimated that there's a little more than 20 feet between the south of the east side benches and the totem poles. RP 27. Officer Lee estimated that the appellant traveled maybe 20 to 30 feet from the place where Officer Lee first noticed him to the place where he was arrested. RP 166.

Officer Diamond testified that prior to his arrival in the park, he had been provided with both a location and description of the suspect. RP 36-37, 215. As Officer Diamond arrived, he looked into the park and immediately saw the suspect that had been described. RP 39, 216. Officer Diamond recalled that the location he had been provided for the suspect was between the bocce ball

courts and the totem poles. RP 37. When Officer Diamond exited his vehicle, the appellant began to walk away, heading "somewhat northbound." RP 41, 220. According to Officer Diamond, the appellant walked 10-15 feet and appeared to crouch down behind two other people. RP 51, 53, 220. Officer Diamond testified that the appellant was arrested there, at a location near the bocce ball court. RP 41.

While there is some variation between the testimonies of Officers Lee and Diamond, both testimonies were consistent as to the general area of the arrest. When describing the park, Officer Lee testified that at the east end of the park there are some bocce ball courts. RP 154. Just south of the bocce ball courts are two totem poles, and directly west of the courts are two additional totem poles. RP 154. (Although Officer Diamond described this second set not as totem poles, but rather as "statues." RP 218.)

At trial, each officer was provided with a separate map of Occidental Park, and each officer marked with an "X" the location where the appellant was arrested. RP 166, 221. Officer Lee made his markings on State's exhibit number two, and Officer Diamond on State's exhibit number four. Both exhibits were admitted. In closing argument, the State highlighted both of the exhibits for the

jury and pointed out that the discrepancy was no more than a few feet apart. RP 363.

Both of the officers had different perspectives of the events on October 5, 2008. Officer Lee was in a stairwell in a building in the northwest corner of the park. As a result, Officer Lee was looking down and across the park at the events that were occurring in the southeast side of the park. On the contrary, Officer Diamond was on the street level, moving into the park from the east side. As he observed the appellant, Officer Diamond was also moving, and was preparing himself to make an arrest. In a situation such as this, where you have officers who are viewing a situation from separate perspectives, some variation is natural. Overall, however, the officers' testimonies as to the location of the appellant at the time of his arrest are largely consistent. There is a lack of evidence to support the appellant's conjecture that the officers must have been viewing two separate individuals.

b. The Description Provided Of The Appellant  
Was Sufficient For The Arresting Officer To  
Identify The Correct Individual

On the evening of October 5, 2008, Officer Lee testified that there were quite a few people in the park. RP 23. Approximately

half of the people in the park were African-American, and most of those were middle aged or older. RP 188. As Officer Lee watched the appellant, he used his radio to describe the appellant's location and description to the arrest team. RP 21, 26-28. Officer Lee testified that it's his practice to start at the top and provide a "head to toe" description of what a suspect is wearing, including clothing, headwear, eye wear, and shoe color. RP 28. At the time of his testimony, Officer Lee was not able to recall the description that he radioed to the arrest teams that evening. RP 28. Officer Diamond also testified that it's protocol to provide a head to toe description. RP 37, 215. Officer Diamond was provided with a suspect description that evening, and he recalled that he was told the suspect was a black male wearing a white t-shirt and jeans. RP 37, 215. Officer Diamond testified that that's all he could recall of the description that had been given. RP 216.

Officer Diamond testified that there was no one else in the park that matched the suspect description. RP 49, 224. Presumably because a white t-shirt and jeans is a fairly basic combination, the appellant commented on Officer Diamond's testimony as being "highly dubious." Br. App. at 12. The appellant then goes on to speculate that other people in the park could have

matched the description and could have gone unnoticed when Officer Diamond focused on the appellant.

The testimony at trial however, included clothing descriptions of at least four other individuals. The other individual who was arrested that night was wearing a multicolored jacket. RP 50, 227. The two individuals that the appellant attempted to crouch behind when the arrest team arrived were both wearing puffy black jackets. RP 49, 240. And finally, Officer Diamond testified that he was wearing a sweatshirt underneath his vest. RP 50. When asked if the appellant was wearing a jacket, Officer Diamond was unequivocal in his response, the appellant "did not. (The appellant) had no jacket. It was a white t-shirt." RP 50.

The events in this case took place in the evening hours in the month of October. The clothing descriptions we have for four other individuals who were out that night include warmer clothing, such as jackets and sweatshirts. The appellant's choice of clothing that evening was unique when put into context of the time of year and what other people were wearing.

There is nothing to support the appellant's assertion that Officer Diamond simply rounded up the first black male wearing a white t-shirt that he saw. On the contrary, Officer Diamond arrived

to the park, and immediately saw a person that matched both the location and the detailed description that Officer Lee had provided. And Officer Lee continued to provide updates as the arrest team moved in.

c. The Surveillance Officer Provided Simultaneous Confirmation That The Correct Suspect Was Contacted

The appellant contends that, at the time of the arrest, the arresting officer was unaware that he was arresting the correct person. As a result, the appellant argues that this Court cannot consider Officer Lee's "alleged knowledge that Officer Diamond was arresting the correct person." Br. App. at 15. However, the appellant fails to cite any support in the record for this assertion.

On the contrary, the testimony indicated that Officer Lee, the surveillance officer, was in continuous communication with Officer Diamond, the arresting officer. That evening, the officers were communicating with each other via a radio frequency. RP 21. Prior to the arrest, Officer Lee used the radio to provide the arrest team with information as to the appellant's activities, description, and location. RP 26-28. The radio communication did not stop once Officer Lee made a request for the appellant's arrest. Instead,

Officer Lee continued surveillance as the arrest team moved in to ensure that the correct suspect was arrested. RP 26. Officer Lee specifically testified that he was giving out information as quickly as he could as the arrest team was moving in. RP 29.

This is not a situation in which there was a time delay as Officer Lee moved from the surveillance location to the arrest site in order to provide confirmation. Rather, Officer Lee notified Officer Diamond via radio that he had arrested the right individual. RP 21. When describing his communication with the arrest team, Officer Lee testified that he "did mention the south totem poles as Mr. Porter was walking away. So when he first started walking in a southbound direction, (Officer Lee) let the arrest teams know that if he got past the totem poles, (Officer Lee) would no longer have eyes on him." RP 192. Officer Lee maintained visual contact with the appellant and did not lose sight of the appellant until after the appellant was placed into custody and searched. RP 21, 167. Officer Lee specifically testified that he "never lost sight" of the appellant. RP 168. Officer Diamond testified that as he looked into the park, he "saw the suspect that Officer Lee was *describing*" to him. RP 216 (emphasis added).

Officer Lee was in real time contact with the arrest team. This was not a situation in which the officers "guessed and checked" their way to a proper arrest. In a situation in which a surveillance officer is able to provide immediate and instant confirmation, there is no risk of circumventing the requirement that probable cause must be specific to the person arrested.

In this case, there was probable cause to make an arrest and that probable cause was specific to the appellant.

**2. THE TRIAL COURT'S DENIAL OF PORTER'S REQUEST FOR AN EXCEPTIONAL SENTENCE WAS APPROPRIATE.**

The appellant was convicted on June 4, 2009. CP 27. On June 26, 2009, the appellant was sentenced. The appellant and the State agreed that with an offender score of 5, the appellant's standard range in this case was six months plus one day to eighteen months. RP 376, 378; CP 56. The court gave the appellant the low end the range, and ordered the appellant to report on July 31, 2009 by 9:00am to begin serving a six-month plus one day sentence on work release. CP 58. Factoring in "good time," the appellant should have already completed his sentence, which could have made his request for re-sentencing moot. That said, the appellant never reported to

serve his sentence. As a result, Judge Washington signed a warrant for the appellant's arrest on September 4, 2009. See Appendix A, attached. To the State's knowledge, at the time of this writing, the appellant's warrant is still outstanding.

In a situation in which a trial court has refused to grant a request for an exceptional sentence below the standard range, appellate review is "limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). The appellant contends that the trial court denied his request on an impermissible basis. The court in Garcia-Martinez provided some guidance on what constitutes an impermissible basis,

A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex, or religion.

Id. In this case, the appellant asked for an exceptional sentence based on the fact that the amount of drugs in this case was "extraordinarily small." RP 379. A trial court may treat an

"extraordinarily small amount" of a controlled substance as a substantial and compelling reason for a downward departure from the standard sentence range. State v. Alexander, 125 Wn.2d 717, 727, 888 P.2d 1169 (1995). Sentencing judges are therefore permitted to "distinguish between crimes typical of a defined class and those which are truly distinguishable as 'extraordinary.'" Id.

At the appellant's sentencing, the trial court reasoned,

Well, my sense is from the trial that the amount of cocaine really isn't of much significance... My sense is from the testimony, that even though it's not what you're charged with, at one time in the evening you may have had more in your pants than what you had when the police got you.

RP 381. The trial court evaluated the appropriateness and reasonableness of the appellant's request. In doing so, the court commented on the evidence that was presented in the case. It was permissible for the trial court to evaluate that evidence to determine if the facts of the appellant's case were such that it was distinguishable from other drug possession cases. The appellant's case is distinguishable from other drug possession cases, but not in a way that's favorable to the appellant. The evidence at trial revealed indicia of drug dealing. There was more to the story than simply the fact that a small amount of cocaine was possessed.

There is nothing that requires a trial court to grant an exceptional sentence any time the amount of drugs possessed is small. The trial court's determination that there was not enough of a basis to give an exceptional sentence below the standard range was neither a refusal to exercise any discretion at all, nor was it a reliance on an impermissible basis.

As a result, there is not a basis for review of appellant's standard range sentence, and this case should not be remanded for re-sentencing.

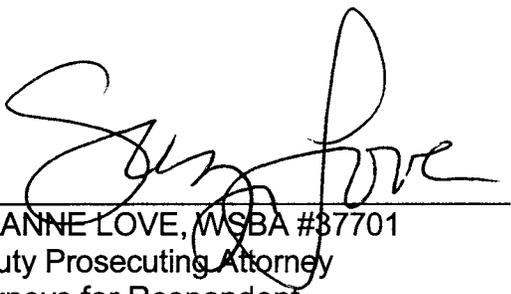
**D. CONCLUSION**

For all the foregoing reasons, the State asks this Court to affirm the appellant's conviction for Violation of the Uniform Controlled Substances Act (possession of cocaine) and deny the appellant's request for re-sentencing.

DATED this 15 day of January, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
SUZANNE LOVE, WSBA #37701  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

# **Appendix A**

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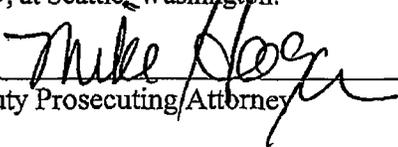
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

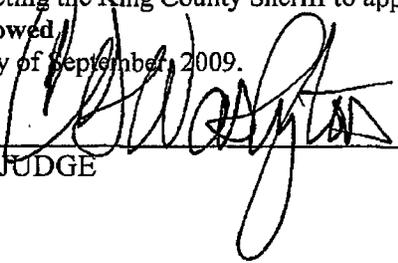
STATE OF WASHINGTON, )  
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 ) Plaintiff, )  
 vs. ) No. 08-1-12110-7 SEA  
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 )  
 ROY PORTER, )  
 ) Defendant, ) MOTION, CERTIFICATION AND  
 ) ORDER FOR BENCH WARRANT

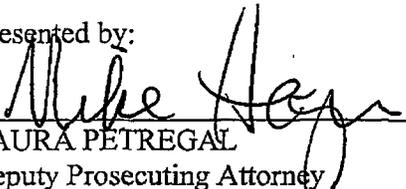
The undersigned deputy prosecuting attorney moves the court for an order directing the clerk of the court to issue a bench warrant for the defendant in the above-entitled cause and certifies that: on June 26, 2009 the defendant was sentenced to serve a 6 month plus 1 day jail commitment and was ordered to surrender to the King County Jail by July 31, 2009 to commence serving this commitment. The defendant has failed to report to the King County Jail to serve this commitment as ordered by the court. Signed and dated by me this 4 day of September, 2009, at Seattle, Washington.

  
Deputy Prosecuting Attorney

**ORDER**

Good cause having been shown, it is hereby ORDERED that the Clerk of this court issue a bench warrant for the arrest of the above-named defendant, directing the King County Sheriff to apprehend the said defendant. Bail on this warrant shall: ~~not be allowed~~.  
DONE IN OPEN COURT this 4 day of September, 2009.

  
JUDGE

Presented by:  
  
LAURA PETREGAL  
Deputy Prosecuting Attorney

MOTION, CERTIFICATION AND ORDER FOR  
BENCH WARRANT

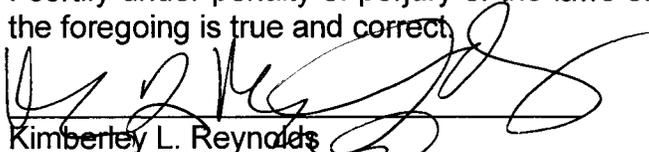
Revised 4/01

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Mindy Ater, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ROY PORTER, Cause No. 63738-0-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.

  
\_\_\_\_\_  
Kimberley L. Reynolds  
Done in Seattle, Washington

1/15/10  
Date

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