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COURT OF APPEALS  
DIVISION II

NO. 37433-1-II

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

STATE OF WASHINGTON  
BY cm  
DEPUTY

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STATE OF WASHINGTON,

Respondent,

v.

R.H.,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF LEWIS COUNTY, JUVENILE DIVISION

Before the Honorable Tracy Loiacono Mitchell, Court Commissioner

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENT OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	1
C. STATEMENT OF THE CASE.....	2
1. <u>Procedural history:</u> .....	2
2. <u>Trial Testimony:</u> .....	6
D. ARGUMENT.....	10
1. <u>COUNSEL’S FAILURE TO MOVE TO SUPPRESS EVIDENCE SEIZED DURING AN UNLAWFUL SEARCH OF R.H.’S BEDROOM AND A CUPBOARD CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL AND DENIED R.H. A FAIR TRIAL</u> .....	10
a. The warrantless search of R.H.’s bedroom and the cupboard in his bedroom was unlawful .....	10
b. R.H. did not receive the constitutionally guaranteed right to effective representation.....	14
E. CONCLUSION .....	16

**TABLE OF AUTHORITIES**

<b><u>WASHINGTON CASES</u></b>	<b><u>Page</u></b>
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	4
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	11, 12, 14
<i>State v. Jeffries</i> , 105 Wn.2d 398, 717 P.2d 722, <i>cert denied</i> , 479 U.S. 922, 107 S.Ct. 328 (1986).....	14
<i>State v. Leach</i> , 113 Wn.2d 735, 782 P.2d 1035 (1985) .....	12, 13
<i>State v. Mathe</i> , 102 Wn.2d 537, 688 P.2d 859 (1984).....	12
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	16
<i>State v. Risen</i> , 116 Wn. App. 955, 69 P.3d 362 (2003) .....	13
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	14
<i>State v. West</i> , 139 Wn.2d 37, 983 P.2d 617 (1999) .....	14
<b><u>UNITED STATES CASES</u></b>	<b><u>Page</u></b>
<i>Arkansas v. Sanders</i> , 442 U.S. 753, 61 L.Ed. 2d 235, 99 S. Ct. 2586 (1979).....	11
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	14
<i>United States v. Matlock</i> , 415 U.S. 171, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974).....	12, 13
<b><u>REVISED CODE OF WASHINGTON</u></b>	<b><u>Page</u></b>
RCW 9A.52.030 .....	2, 5
RCW 9A.56.040 .....	2, 5
RCW 66.44.270 .....	2, 5
<b><u>COURT RULES</u></b>	<b><u>Page</u></b>
CrR 3.5 .....	2
CrR 3.6.....	2

<b><u>CONSTITUTIONAL PROVISIONS</u></b>	<b><u>Page</u></b>
Const. art 1, § 7 .....	11
Const. art 1, § 22 .....	14
U.S. Const., amend. IV. ....	11
U.S. Const., amend. VI .....	14

**A. ASSIGNMENT OF ERROR**

1. Trial counsel provided ineffective assistance of counsel. Trial counsel's failure to seek suppression of evidence seized during an unlawful search of the Appellant's bedroom and a cupboard in the bedroom denied him effective assistance of counsel.

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

1. At a non-jury juvenile Fact-Finding hearing, the Court Commissioner found that Appellant R.H., together with others, broke into and entered a restaurant and stole 30 or 31 bottles of alcohol. On the basis of these facts, the Court Commissioner found R.H. guilty of burglary in the second degree and theft in the second degree. In a search of R.H.'s bedroom, police found shoes, a coat, and a pair of gloves that the State argued were used during the burglary of the restaurant. In a cupboard in the R.H.'s bedroom, police found two bottles of alcohol. R.H.'s mother consented to a search of the apartment and R.H.'s bedroom. Police did not ask for the R.H.'s consent to a search of his bedroom or the cupboard, although he was present when the police obtained consent from his mother. Counsel failed to seek suppression of the unlawfully seized evidence. Where the State's case rested in large part upon the unlawfully seized evidence, did counsel's failure to seek suppression deny the Appellant effective representation?

**C. STATEMENT OF THE CASE**

**1. Procedural history:**

R.H. was charged by information filed in Juvenile Division of the Lewis County Superior Court with second degree burglary<sup>1</sup> and second degree theft,<sup>2</sup> either as a principal or accomplice, and with minor in possession of alcohol.<sup>3</sup> Clerk's Papers [CP] at 25-26.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Court Commissioner Tracy Mitchell heard the Fact-Finding Hearing on January 22 and 31, 2008. The Commissioner found R.H. committed the offenses as charged. 2Report of Proceedings [RP] at 102.

The court entered the following Findings of Fact and Conclusions of Law on February 18, 2008:

**FINDINGS OF FACT**

1. On December 14, 2007, at approximately 0423 hours, a security alarm was triggered at the All in Restaurant and Lounge.
2. The All in Restaurant and Lounge is located at 1783 State Route 508, Onalaska WA 98570, within Lewis County, Washington.
3. Respondent lives at 436 2<sup>nd</sup> Street W, Apt 3, Onalaska, WA 98570. The residence is (i) 100 yards (ii) ¼ mile or (iii) a three minute walk to the All In Restaurant and Lounge.
4. On December 13, 2007, [C.C.] (hereinafter [C.]) and [A.D.-

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<sup>1</sup> RCW 9A.52.030.

<sup>2</sup> RCW 9A.56.040.

<sup>3</sup> RCW 66.44.270.

- G.] (hereinafter “[A.]”) arrived at Respondent’s residence.
5. [C.] had and still considers Respondent to be a friend.
  6. Respondent testified that the three boys, [C.], [A.], and himself, were “hanging out” on December 13, 2007, and went to Brenda’s Market. At around midnight the three retu[r]ned to Respondent’s home.
  7. At the Respondent’s residence, one of the boys put on a movie. Thereafter, [A.], [C.], and Respondent all fell asleep.
  8. On December 14, 2007, at around 3:15AM, the three boys, all wearing warm clothing, left the Respondent’s residence and began walking around the general area. The Respondent, [A.], and [C.] went to the All in Restaurant and Lounge.
  9. The Respondent entered the All in Restaurant and Lounge. An orange hammer was located on the exterior of the business and adjacent to the broken window on the West side of the Restaurant. The hammer was used to gain entry into the building, by breaking a large window.
  10. [C.] partially entered the All in Restaurant and Lounge and Respondent went all the way into the All in Restaurant and Lounge.
  11. All three of the boys carried alcohol bottles. The value of the bottles was in excess of \$250 dollars and through the testimony of Ms. Draper the business owner was valued at \$418 dollars.
  12. Respondent, in conjunction with [A.] and [C.], took a number of alcohol bottles. Devonna Draper established that the number of alcohol bottles removed from the business totaled 30 or 31 bottles.
  13. Some bottles were both broken and stashed along the way from the All in Restaurant and Lounge to Respondent’s residence. All three boys returned to Respondent’s home, with at least 2 bottles of alcohol from the restaurant.
  14. Respondent testified that when he returned to his home sometime on December 14, 2007, after had been at the All in Restaurant and Lounge he went to the kitchen to get juice. At the time he was getting juice he was trembling.
  15. Respondent, [C.], and [A.] consumed alcohol at Respondent’s residence. The Respondent’s DOB is 11-11-1992. The respondent admitted to consuming alcohol found in his

- bedroom by law enforcement.
16. Law enforcement officers arrived at and in the area of Respondents' homes. [A.] and [C.] see the law enforcement officers and run from the residence. As [A.] and [C.] leave they drop clothing in the living room.
  17. The testimony of [C.] was consistent with the physical evidence of the case and the timing of events and deemed credible. Both the physical manner and way [C.] spoke while before the court supported and added to his credibility.
  18. The testimony of K.H. was partially credible and K.H. did see [R.H.] enter the residence first, prior to [C.] and [A.], within an hour of the burglary.
  19. Testimony of Valencia Kurzeika that no one was in the residence during the evening/morning hours of December 13, 2007, to December 14, 2007, was not credible.
  20. Testimony of Respondent was consistent with that of [C.] except for a 10 to 15 minutes time period between Respondent claiming, he left the scene of the tavern when the tavern was broken into, and when he claimed he returned home.
  21. Respondent testified that on December 14, 2007, at approximately 5:50AM he laid down in bed to go to sleep and then got up a few minutes later to take a shower. Respondent testified he took a shower at 5:50AM because his hair was greasy.
  22. The court considered Respondent's statements in examining the credence (probability) of his version of events surrounding the burglary and theft. The court finds the Respondent's statements no credible or logical and the court further finds that Respondent fully participated in the burglary and theft of the stolen alcohol and consumption of alcohol.

### **CONCLUSIONS OF LAW**

The Court now makes the following conclusions of law:

1. The Court has jurisdiction over the Respondent and the subject matter of this case.
2. The Respondent is guilty of burglary in the Second Degree

(RCW 9A.52.030).

3. The Respondent is guilty of Theft in the Second Degree (RCW 9A.56.040).
4. The Respondent is guilty of Unlawful possession/consumption of Alcohol (RCW 66.44.270)[.]
5. A[n] Order on Adjudication and Disposition consistent with these findings shall enter.

CP at 12-16.

After finding R.H. committed the offenses, the Court Commissioner ordered a disposition hearing on February 12, 2008. At that hearing, the court entered an Order on Adjudication and Disposition. The court ordered confinement of 10 days for each count, to be served consecutively, and also ordered a total of 15 months of community supervision, ending May 11, 2009. CP at 19. RP (February 12, 2008) at 10.

The Court ordered restitution in the amount of \$1,316.16, and ordered that R.H., C.C. and A.G. have joint and several liability for that amount. RP (March 11, 2008) at 6-7.

Timely notice of appeal was filed on March 11, 2008. CP at 3-9. This appeal follows.

**2. Trial testimony:**

Deputies from the Lewis County Sheriff's Office were dispatched to the All In Restaurant and Lounge early on the morning of December 14, 2007, following a report of a burglary of the business. 1Report of

proceedings [RP] at 8, 9, 10. The All In Restaurant is located at 1783 State Route 508 in Onalaska, Washington. 1RP, at 10. After arriving, Lewis County Deputy Sheriff Jason Mauermann saw that the lower portion of large window in the front of the building was broken and that there was glass on the ground. 1RP at 14. An orange hammer was found near the broken window. 1RP at 20. Inside the restaurant, police found alcohol bottles on the floor in the area behind the bar. 1RP at 16, 17.

A State Patrol officer who also responded to the report found broken bottles in the middle of Wesarg Road, near the restaurant. 1RP at 21.

A police dog led officers west on Second Avenue in Onalaska, and police found nine or ten alcohol bottles hidden in bushes. 1RP at 26, 27, 67, 68.

Police went to an apartment complex at 436 Second Street in Onalaska, where R.H. lives. 1RP at 33. R.H., along with C.C., were suspects in a previous burglary. 1RP at 32. Deputy Mauermann stated:

Because of the type of break in we had and the other previous [break] ins that we investigated with the same modus of operandi, and knowing the optional suspects in those other cases, and knowing where one of the suspects lived, I made a determination that we needed to look into talking to [R.H.]

1RP at 33.

Deputy Mauermann noted a drop of blood on the hand railing of the

stairs leading to the apartment complex. 1RP at 34. He found a second drop of blood on the stairs. 1RP at 35.

R.H.'s mother, Valencia Kurzeika, let Deputy Mauermann and two other officers into the apartment. 1RP at 36, 37. R.H. was taking a shower, and his mother retrieved him from the shower in order to talk to police. 1RP at 38. R.H. denied any involvement in a burglary and told police that he had been sleeping all night and that he was taking a shower to get ready for school. 1RP at 39, 42. R.H. did not have any cuts on his person and was not bleeding. 1RP at 41.

Valencia Kurzeika gave consent to search R.H.'s room. 1RP at 43. Deputy Mauermann stated: "we ended up getting consent to search from Valencia, who's the mother, to search [R.'s] room and look at different things that [R.] was wearing and to determine whether or not he was actually part of the crime or not." 1RP at 42. Ms. Kurzeika signed a consent to search form provided by police. 1RP at 42. In R.H.'s room police found gloves that had glass particles in the palm area and blood on them, and a University of Utah coat. 1RP at 44. In his room police also found shoes that were wet and apparently had a piece of glass in or on them. 1RP at 45. Police found numerous empty alcohol bottles on display on a windowsill. 1RP at 43. They also found in a cupboard in R.H.'s room a bottle of Black Velvet and a

bottle of Goldschlager, both of which contained alcohol. 1RP at 44. Police then administered constitutional warnings to R.H. 1RP at 45.

R.H. told police that there was a piece of glass in the shoe because he went outside to smoke and stepped on a broken ashtray. 1RP at 46. His mother testified that there was glass at the bottom of the steps from an ashtray she had previously knocked off the barbeque. 2RP at 12, 13.

R.H. said that A.G. and a person named A.P. had come to his apartment with alcohol and then left. 1RP at 50.

A.G. and C.C. were arrested for suspicion of burglary. 1RP at 99-100. A.G. had cuts on his hand. 1RP at 52, 53.

C.C. testified that he and A.G. left their house in Mossyrock and went to R.H.'s house. 1RP at 88. He slept at R.H.'s for a while and then R.H. and A.G. woke him and they went outside and walked around and then went to the All In Restaurant, which is about a quarter mile from R.H.'s house. 1RP at 90. C.C. stated the A.G. broke the window with an orange hammer and R.H. went inside the building. 1RP at 92, 93. C.C. said that he went "inside for a second but not all the way in." 1RP at 93. He stated that R.H. passed bottles of alcohol through the window to them and then they ran. 1RP at 94. He stated that some bottles broke in the parking lot, and they hid some bottles in a bush. 1RP at 94. He stated that they took a bottle of Yukon Jack and a

bottle of Goldschlager to R.H.'s apartment where they were drinking until they saw police car lights outside the building. 1RP at 95, 96. After the police came to the building, C.C. and A.G. went to a store and waited for the bus, where they were subsequently arrested by police. 1RP at 98.

R.H. testified that C.C. and A.G. showed up at his apartment on December 13. 2RP at 34. They stayed over at his house, and he woke up at 3:15 a.m. 2RP at 35. He went outside to smoke a cigarette, and then C.C. came outside. 2RP at 36. C.C., A.G., and R.H. walked around, and then sat down on a bench behind the All In Restaurant. 2RP at 37. C.C. brought up breaking into the restaurant, and R.H. thought he was joking and started to walk back to his house. 2RP at 38. R.H. denied breaking into the restaurant or acting as a lookout for the others. 2RP at 38. C.C. and A.G. came back to house 15 to 20 minutes later with four to five bottles of alcohol with them, and he told C.C. to hide them on the road because he didn't want them in his house. 2RP at 39. He said that C.C. did so, but that there were still two bottles left on top of his television stand. 2RP at 40. R.H. stated that he drank alcohol with C.C. and A.G.<sup>4</sup> 2RP at 40, 53.

R.H. said that C.C. and A.G. left at about 5:30 a.m. when they saw

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<sup>4</sup> During closing argument, defense counsel acknowledged that R.H. drank alcohol brought into the apartment by C.C. and A.G. 2RP at 89.

police lights outside the building. 2RP at 41. They left a coat and gloves and ran from the apartment. 2RP at 41. He stated that he tried to sleep, and then decided to take a shower because his hair felt greasy. 2RP at 41.

**D. ARGUMENT**

**1. COUNSEL'S FAILURE TO MOVE TO SUPPRESS EVIDENCE SEIZED DURING AN UNLAWFUL SEARCH OF R.H.'S BEDROOM AND A CUPBOARD CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL AND DENIED R.H. A FAIR TRIAL**

**a. The warrantless search of R.H.'s bedroom and the cupboard in his bedroom was unlawful**

During the investigation of the burglary of the All In Restaurant and Lounge, members of law enforcement went to an apartment complex located about a quarter mile from the restaurant. 1RP at 33. Deputy Mauermann stated that he went to the complex because R.H., who lived there, was a suspect in a previous burglary. 1RP at 33. Drops of blood were found on the steps leading to the apartment. 1RP at 35. R.H.'s mother, Valencia Kurzeika, let the police into the apartment. 1RP at 27. She got R.H., who was in the shower. 1RP at 37, 38. She signed a Consent to Search form. 1RP at 42. Police did not obtain consent to search from R.H. They searched R.H.'s bedroom and a cupboard in the room. 1RP at 43-44. In his room police found empty bottles on display, shoes, a jacket, and a pair of gloves.

1RP at 43-44. In the cupboard they found two bottles of alcohol. 1RP at 44. R.H. was charged with burglary, theft, and minor in possession. The search of the bedroom and the cupboard was not authorized by either a warrant or the circumstances, and it therefore violated R.H.'s constitutional rights.

Both the state and federal constitutions provide individuals against unreasonable searches and seizures. Const. art 1, § 7; U.S. Const., amend. 4. A warrantless search is presumed to be unreasonable, and exceptions to the warrant requirement are limited and carefully drawn. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 61 L.Ed. 2d 235, 99 S. Ct. 2586 (1979)). The State bears the burden of proving that a warrantless search falls within one of these exceptions. *Hendrickson*, 129 Wn.2d at 71.

No recognized exception to the warrant requirement justifies the search in this case. These established exceptions include consent, plain view, exigent circumstances, and investigative stops. *Hendrickson*, 129 Wn.2d at 71. Deputy Mauermann testified that R.H.'s mother signed a Consent to Search form, and that she consented "to search [R.'s] room . . . ." <sup>5</sup> 1RP at 42. Although R.H. had been retrieved from the shower by his mother and was present when Ms. Kurzeika consented to the search, police did not obtain

R.H.'s permission to search his bedroom or the cupboard in the room.

Washington adopted the "common authority rule" in *State v. Mathe*, 102 Wn.2d 537, 543, 688 P.2d 859 (1984). The common authority rule was initially formulated in *United States v. Matlock*, 415 U.S. 164, 171, n. 7, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974):

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

In *State v. Leach*, 113 Wn.2d 735, 782 P.2d 1035 (1985), the common authority rule was addressed in connection with the presence of a non-consenting person versus the absence of that person. The *Matlock* rule was enunciated based upon absence alone. The *Leach* Court stated at 744:

Where police have obtained consent to search from an individual possessing, at best, equal control over the premises, that consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent. However, **should the cohabitant be present and able to object, the police must also obtain the cohabitant's consent.** Any other rule exalts expediency over an individual's Fourth Amendment guaranties. Accordingly, we

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<sup>5</sup>The consent to search form was not made part of the record .

result to beat a path to the door of exceptions.

(Emphasis supplied.) *See also State v. Risen*, 116 Wn. App. 955, 962, 69 P.3d 362 (2003).

It is obvious under the facts and circumstances of this case that R.H.'s mother did not have control over the cupboard in R.H.'s bedroom or its contents. It is questionable from the record whether Ms. Kurzeika had equal control over R.H.'s bedroom itself.

Police only asked Ms. Kurzeika for consent to search. 1RP at 42. R.H. was present at the time. 1RP at 37. The consent to search exception to the warrant requirement is inapplicable under the facts of this case. Under *Leach* and *Rison*, the police should have requested and obtained consent from R.H. prior to searching his bedroom and the cupboard inside his room.

**b. R.H. did not receive the constitutionally guaranteed right to effective representation**

Under Washington Constitution Article I, § 22, and United States Constitution Sixth Amendment, an accused is guaranteed effective counsel. By definition, counsel is ineffective when both prongs of a two-prong test are met: (1) deficient performance and (2) resulting prejudice. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (citing *Strickland v. Washington*, 466 U.S. 668, 667-669, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984));

*State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert denied*, 479 U.S. 922, 107 S.Ct. 328 (1986).

Deficient performance is shown if counsel's conduct falls below an objective standard of reasonableness based on a consideration of all the circumstances. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance to counsel. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To satisfy the prejudice prong, a defendant must show that counsel's performance was so inadequate that there exists a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *State v. West*, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). Both prongs of the ineffective assistance test are satisfied by the facts in this case.

Counsel's failure to file a motion to suppress was unreasonable under the circumstances of this case, since there was no reason to believe such a motion would have been denied. As discussed *supra*, suppression was required because no circumstances existed that would have justified the warrantless search of R.H.'s bedroom without his consent. No attempt was made prior to or during trial to suppress the evidence seized by law

enforcement.

Moreover, the record clearly establishes that a motion to suppress was a required tactical choice. With the evidence found inside the house suppressed, the case would boil down to the bottles found in the bushes, the broken bottle, the blood drops, and C.C.'s testimony against R.H.'s testimony. The only alternative to suppression, and the course taken by counsel at trial, was to present R.H.'s testimony, which is wholly dependent upon R.H.'s credibility. Counsel knew, however, that Deputy Mauermann would testify that R.H. was a suspect in another burglary. 1RP at 33. Under these circumstances, a decision not to pursue suppression could not be considered a legitimate trial strategy.

The record also establishes that counsel's unprofessional error resulted in prejudice. The police did not witness the alleged burglary nor secure a warrant. R.H. did not consent to the search, the evidence was not in plain view, and no exigent circumstances justified the warrantless search. Considering this evidence, the State would not have been able to carry its burden of overcoming the presumption that the warrantless search was unreasonable. See *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Therefore, there is no doubt that a motion to suppress would have been granted.

There is a reasonable probability that counsel's deficient performance prejudiced the outcome of the case. R.H. did not receive the constitutionally guaranteed effective assistance of counsel, and his felony convictions should be reversed.

**F. CONCLUSION**

Evidence seized from R.H.'s room should be suppressed. Trial counsel's failure to seek suppression constituted ineffective assistance of counsel and denied R.H. a fair trial. His convictions for second degree burglary and second degree theft should therefore be reversed.

DATED: September 22, 2008.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

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DIVISION II

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STATE OF WASHINGTON

BY Cm  
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IN THE COURT OF APPEALS  
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COURT OF APPEALS NO.  
37433-1-II

LEWIS COUNTY CAUSE  
NO. 07-8-00278-2

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to, R.H., Appellant, and Joseph F. Salas, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on September 22, 2008, at the Centralia, Washington post office addressed as follows:

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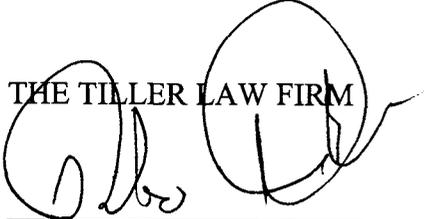
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