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STATE OF WASHINGTON
BY  DEPUTY

NO. 37798-5-II
Lewis County No. 07-1-00268-0

STATE OF WASHINGTON,

Respondent,

vs.

DONALD JAMES LYNCH

Appellant.

BRIEF OF APPELLANT

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**IV. MR. LYNCH'S CONSTITUTIONAL RIGHT TO A
SPEEDY TRIAL WAS VIOLATED.**

**V. MR. LYNCH RECEIVED INEFFECTIVE ASSISTANCE
OF COUNSEL WHEN HIS ATTORNEY FAILED TO
OBJECT TO THE ASSAULT IN THE FOURTH DEGREE
INSTRUCTION.**

C. STATEMENT OF THE CASE

On December 6, 2006 Mr. Lynch was arraigned on a charge of assault in the fourth degree. RP (7-30-07), p. 13. On February 14, 2007 he executed a speedy trial waiver. RP (7-30-07), p. 51. On February 21, 2007 the city of Chehalis dismissed the case. RP (7-30-07), p. 13. On April 19, 2007, the Lewis County Prosecutor filed charges of assault in the second degree and, in the alternative, assault in the third degree, arising from the same course of conduct as the previous charge of assault in the fourth degree. CP 1-2.

On May 17, 2007 Mr. Lynch was arraigned in Lewis County Superior Court; however a trial date was not set at that time. RP (7-30-07), p. 13. On June 8, 2007, the court held a hearing on a number of

motions filed by Mr. Lynch, including his motion to dismiss on the grounds that the time for trial had expired. RP (6-8-07), p. 17. Relying upon the former CrR 3.3, Mr. Lynch contended that the State had a minimum of seven and a maximum of fourteen days remaining in the speedy trial period when it filed the current charges. RP (6-8-07), p. 18. He also argued speedy trial began running on the date Information was filed in superior court, April 19th, not the arraignment date of May 17th. RP (6-8-07), p. 18. The State, also relying on the former version of CrR 3.3 (and its belief about what the rule provided), argued that the waiver in municipal court survived the dismissal and gave the State at least eighty three days left in the speedy trial period. RP (6-8-07), p. 18.¹ Alternatively, the State argued it likely had ninety days but at least thirty days. RP (6-8-07), p. 19.

The court ruled that under the holding of *State v. Duffy*, 86 Wn.App. 334, 936 P.2d 444 (1997), the State had ninety days from the date of arraignment in Superior Court to bring Mr. Lynch to trial. RP (6-8-07), p. 21. The court then set trial for July 30, 2007. RP (6-8-07), p. 32. On June 12, 2007 Mr. Lynch filed a written objection to the trial date. CP 72.

¹ A speedy trial waiver filed in a different court, under a different cause number, does not survive dismissal of the case. *State v. Hamilton*, 121 Wn.App. 633, 90 P.3d 69 (2004).

On July 5th, 2007, Mr. Lynch appeared with counsel for the first time and counsel again moved to dismiss on the grounds of speedy trial. RP (7-5-07), p. 2. The court, apparently relying on the earlier ruling issued on June 8th, made no comment on the motion. RP (7-5-07), p. 2-3. On July 12th, 2007 the parties again came before the court and Mr. Lynch informed the court that he again wanted to proceed pro se. RP (7-12-07), p. 3-4. The court then conducted an extensive colloquy with Mr. Lynch about the risks of self-representation, at the conclusion of which he allowed counsel to withdraw. RP (7-12-07), p. 4-6.

On July 13th, 2007 the parties again came before the court for a Knapstad hearing. The court acknowledged that Mr. Lynch had filed a written motion to dismiss on the grounds of speedy trial but refused to consider it because it wasn't properly noted. RP (7-13-08), p. 3.

On July 30, 2007 the case came before visiting Judge Gordon Godfrey for trial. Mr. Lynch, appearing with stand-by retained counsel Don Blair, again moved to dismiss the case on the ground that speedy trial had elapsed. RP (7-30-07), p. 48-59. The court ruled that 151 days of speedy trial had elapsed and orally dismissed the case. RP (7-30-07). The court refused to sign a written order of dismissal, stating "Well, let's not—I've ordered the matter orally on the record, and I'm going to give them their opportunity here, counsel, and that is going to note it up for entry of

final orders. I'm not going to rush to the gate and sign something here without giving them their day... You've won the battle, but maybe not the war. I don't know." RP (7-30-07), p. 60.

On August 1, 2007 the State filed a one page motion to reconsider, citing no statute, court rule, or case, and accompanied by no affidavit or memorandum of law. CP 59. On August 16, 2007 the case came before court to set the motion to reconsider for argument. RP (8-16-07). The court advised the parties that they would need to talk to the administrator and get a date for the hearing. RP (8-16-07), p. 1. Mr. Lynch asked the court if he was subject to conditions of release, and the court said "no." RP (8-16-07), p. 2. Mr. Lynch asked "So I don't have to come to the hearing?" The court replied "Yes, you do." RP (8-16-07), p. 2. At that time Mr. Lynch signed a case setting form, which directed him to appear on August 30, 2007 or face arrest. CP 91. For reasons that do not appear in the record, the August 30th hearing did not take place. The case evidently came before the court again on November 14, 2007 (although the file contains no clerk's minute reflecting a hearing on that date) and the hearing was set for December 5, 2007. CP 99. Mr. Lynch was required to sign another notice of case setting directing him to appear on December 5, 2007 or face arrest. CP 99. For weather related reasons, the

December 5, 2007 hearing was continued, ex parte, to December 17, 2007.

CP 104.

On December 17, 2007, having still never signed a written order of dismissal, Judge Godfrey considered the State's motion to reconsider as a CrR 7.8 motion over Mr. Lynch's objection. RP (12-17-07), p. 5. The court held that the State's motion was governed by CrR 7.8 (b) (1), which addresses "mistakes." RP (12-17-07), p. 14. Mr. Lynch attempted to argue to the court that mistakes of law cannot be corrected by a CrR 7.8 motion but was cut off by a very irritated Judge Godfrey:

Mr. Lynch: "I agree that rule 7.8 works to cure mistakes, but the cases I cited...I cited you particular portions of the cases, and they're very clear that mistake does not apply on a matter of law, and specific—"

Judge Godfrey: "I've made my ruling. I'm not going back."

Mr. Lynch: "I'm not asking that. You're bringing it up—"

Judge Godfrey: "I'm just saying, I ruled on that, and that's where I'm going."

Mr. Lynch: "—that as a matter of law—"

Judge Godfrey: "I am not going to have words put in my mouth. If you wish to argue a matter of law issue elsewhere, that's fine."

RP (12-17-07), p. 14-15.

Judge Godfrey, reversed his earlier decision and reinstated the charges, ruling that the time in municipal court factored into the time for trial, as did the speedy trial waiver Mr. Lynch executed in Chehalis Municipal Court seven days prior to the dismissal of the case. RP (12-17-07), p. 21-26. The State argued that it should get a new 90 day period in which to try Mr. Lynch because this constituted a “new trial” under CrR 3.3 (c) (iii). RP (12-17-07), p. 26. The court agreed and granted the State another 90 days in which to bring Mr. Lynch to trial. Id.

On December 20, 2007, the parties came before the court again to set a trial date. Mr. Lynch reiterated his objection to the State getting a 90 day speedy trial period, asserting it should be no more than 30 days. RP (12-20-07), p. 2. Mr. Lynch demanded a trial by no later than January 16, 2008. RP (12-20-07), p. 4. The court set trial for February 25th, 2008. RP (12-20-07). Mr. Lynch, through his standby counsel Mr. Blair, asked the court to go ahead and set a hearing on his objection to the trial date due to the expiration of speedy trial but the court declined to do so, stating it would not be set until they knew which judge would preside over the trial. RP (12-20-07), p. 11. On December 28, 2007 Mr. Lynch filed a written objection to the February 25th trial date. CP 105. On January 3, 2008 Mr. Lynch again tried to have his motion set for a hearing and the State objected, contending that Mr. Lynch lacked the right to file such a motion

because Judge Godfrey had already ruled against him, and accusing Mr. Lynch of trying to “circumvent” the Court of Appeals. RP (1-3-08), p. 4. The court again refused to set the motion for a hearing because it had not yet been determined which judge would hear the trial. RP (1-3-08), p. 4-5. Mr. Lynch asserted that the court lacked jurisdiction to hear the case due to the expiration of speedy trial, and reasserted that the court also lacked jurisdiction to hear the case when, on December 17th, it reinstated the prosecution. RP (1-3-08), p. 5.

On February 13, 2008 Judge Godfrey held a hearing on Mr. Lynch’s motion to dismiss for violation of the speedy trial rule. Mr. Lynch reiterated his previous objections to the reinstatement of the prosecution against him because the court improperly granted the State’s CrR 7.8 motion, and his objection to the trial date on the ground that the time for trial had expired. RP (2-13-08), p. 1-12. Mr. Lynch also contended that the speedy trial clock should be no more than 30 days because the reinstatement of the prosecution was not a “new trial” under CrR 3.3 (c) (iii). RP (2-13-08), p. 13. The State responded to each of Mr. Lynch’s objections by arguing that his objections needed to be taken up with the Court of Appeals. RP (2-13-08). The court denied each of Mr. Lynch’s motions, stating “At this point, Mr. Lynch, I think you have more than made your record on the issues of speedy trial...” RP (2-13-08). On

February 21, 2008, counsel for Mr. Lynch asked to have the trial moved from February 25th to March 10th, still within the court's calculation of the speedy trial period ending March 16, 2008 (and to which calculation Mr. Lynch steadfastly objected to). RP (2-21-08), p. 1. The court agreed to re-set the trial to March 10, 2008. RP (2-21-08).

Trial commenced on March 10th, 2008. Mr. Blair, acting as counsel for Mr. Lynch, again moved to dismiss the prosecution on the basis of speedy trial. Trial RP I, p. 8-15. Mr. Blair stated Mr. Lynch was maintaining all of his previous speedy trial objections, and argued specifically that the time for trial had expired because the State had only 30 days after the reinstatement of charges on December 17th, 2007 in which to bring Mr. Lynch to trial, not 90 days. Trial RP I, p. 8-15. Mr. Blair pointed out that none of the events which would trigger the commencement of a new 90 day speedy trial period under CrR 3.3 (c), had occurred in this case. Id. Specifically, Mr. Blair argued that this was not a new trial under CrR 3.3 (c) (iii) because there had never been a trial. Trial RP I, p. 10. Judge Godfrey angrily denied the motion, ruling for the first time that speedy trial did not run because of the waiver Mr. Lynch filed in Chehalis Municipal Court on February 14, 2007. Trial RP I, p. 13. When Mr. Blair pointed out that the waiver was filed in municipal court, Judge Godfrey replied "Correct. People can argue it elsewhere...People can take

that up with a higher court. It is my understanding when you look at this, it is the same situation, if it is the same or related charges it has to be the same or related waiver. We're done with it. That's the ruling, we're going to proceed forthwith." Trial RP I, p. 14.

The allegation the State presented at trial was that Mr. Lynch had assaulted George Shepherd in the second degree or, alternatively, in the third degree. Mr. Lynch contended that he acted in self-defense. Trial Report of Proceedings. The court, without objection from defense counsel, instructed the jury that assault in the fourth degree was a lesser included offense of both assault in the second degree and assault in the third degree. Trial RP III, p. 3, CP 21. The jury returned verdicts of not guilty as to assault in the second degree and assault in the third degree. CP 31-32. The jury returned a verdict of guilty as to assault in the fourth degree. CP 33. On April 17th, 2008, Mr. Blair filed a motion for a new trial on the basis that assault in the fourth degree is not a lesser included offense of assault in the third degree by criminal negligence. RP (4-17-08), CP 34. The court denied the motion, noting that no objection was made to the instruction at trial. RP (4-17-08), p. 6. Mr. Lynch was sentenced on May 23rd, 2008 and this timely appeal followed. CP 53-58, 60.

On May 23rd, the day of sentencing, the State finally presented findings of fact and conclusions of law on the court's reinstatement of the prosecution against Mr. Lynch. CP 49-51. Mr. Lynch assigns error to findings of fact numbers: 1.5 and 1.8; and to conclusions of law numbers: 2.1; 2.3; and 2.4. CP 50-51.

D. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO REINSTATE THE CHARGES AGAINST MR. LYNCH AFTER THEY WERE DISMISSED ON JULY 30, 2008.

The State filed a motion to reconsider on August 1, 2007. CP 59. The State did not cite to any rule, and there is no superior court criminal rule allowing for a motion to reconsider. CP 59. The trial court therefore considered the State's motion as a motion for relief from judgment under CrR 7.8. The court erred in granting the State's motion. CrR 7.8 allows for relief from judgment or order in the following circumstances:

(a) *Clerical mistakes*: Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2 (e).

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.* On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to *RCW 10.73.090, .100, .130, and .140*. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(c) *Procedure on vacation of judgment:*

- (1) *Motion:* Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting

forth a concise statement of the facts or errors upon which the motion is based.

(2) *Transfer to Court of Appeals*: The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by *RCW 10.73.090* and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

CrR 7.8.

Errors of law cannot be corrected by a CrR 7.8 motion for relief from judgment, and must be raised on appeal. *State v. Dennis*, 67 Wn.App. 863, 865, 840 P.2d 909 (1992); *Burlingame v. Consolidated Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986); *In re Marriage of Tang*, 57 Wn.App. 648, 789 P.2d 118 (1990). The court stated that it was correcting a “mistake.” Presumably, the court was referring to a mistake under CrR 7.8 (b), rather than a clerical mistake under CrR 7.8 (a). This plainly was not a clerical mistake. “An intentional act by the court cannot be a clerical error.” *State v. Rookhuyzen*, No. 61427-4-I (published Jan. 20, 2009); *In re Getz*, 57 Wn.App. 602, 604, 789 P.2d 331 (1990). It also was not the type of mistake contemplated by CrR 7.8 (b). It was an error of law, wherein the

trial court believed it had misapplied CrR 3.3. Mr. Lynch cited on-point case law for the court but the court, quite disappointingly, was not interested in listening.

In *Dennis*, the trial court dismissed the prosecution's case when it concluded, in error, that jurisdiction was precluded by federal law where the defendant was an Indian from Canada. *Dennis* at 865. After the case was dismissed, the State did not file a notice of appeal and the time for appeal elapsed. *Dennis* at 863. Dennis was later indicted in federal court and those charges were dismissed when the federal court concluded that he was not an "Indian" within the meaning of the major crimes act.

Dennis at 863. The State made a motion for relief from judgment under CrR 7.8 (b) (5), the so-called "catch all" provision of CrR 7.8. *Dennis* at 863. The trial court granted the motion and reinstated the prosecution. *Id.* The Court of Appeals reversed, agreeing with Dennis that the State's decision not to appeal the dismissal precluded it from raising the issue under CrR 7.8 (b) (5). *Dennis* at 865-66. The Court held first, mistakes of law cannot be corrected by a motion under CrR 7.8, and that the "catch-all" provision under 7.8 (b) (5) also did not authorize relief because to do so would render subsection (b) (1) meaningless. *Dennis* at 866. The Court also rejected the State's contention that the interest of justice strongly favored allowing the court to reassert jurisdiction, stating that

such a standard should not be applied where the mistake was one of law that could have been appealed but was not. *Dennis* at 866. It is worth noting that Mr. Dennis was accused of stabbing his wife, not committing an assault in the fourth degree. Here, the Superior Court lost jurisdiction over this matter thirty days after the July 30th, 2007 dismissal when the time period for the State to appeal the ruling expired. Mr. Lynch's conviction should be reversed and dismissed.

II. MR. LYNCH'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED WHEN THE TRIAL COURT REINSTATED THE PROSECUTION BECAUSE THE SPEEDY TRIAL CLOCK CONTINUED TO RUN BETWEEN JULY 30, 2007 AND DECEMBER 17, 2007.

A reviewing court reviews the application of the speedy trial rule de novo; it is a question of law. *State v. Nelson*, 131 Wn.App. 108, 113, 125 P.1008 (2006); *State v. Kindsvogel*, 149 Wn.2d 477, 480, 69 P.3d 870 (2003). When trial commenced on March 10, 2008 speedy trial had expired by at least fifty days for the following reasons: First, the court never entered an order dismissing the charge, and speedy trial kept on running. The court's oral ruling was tentative, inasmuch as he stated that he wanted to give the State the opportunity to argue the matter further and told Mr. Lynch and his stand-by counsel that they may have won the battle and not the war. Further, the court refused to sign a written order of dismissal, with the idea that there would be further argument or briefing

by the State. The State's filing of the motion to reconsider two days after the tentative dismissal did not stop the speedy trial clock, as the State may argue.

There is no criminal rule governing motions to reconsider; as noted above the court treated the motion as a motion for relief from judgment or order under CrR 7.8. However, CrR 7.8 (b) plainly requires the order or judgment to be a "final" judgment or order. Further, CrR 7.8 (c) requires that the application be made by motion, accompanied by an affidavit setting forth a concise statement of the facts or errors upon which the motion is based. Here, the State's motion was not accompanied by an affidavit or even a memorandum of law. CP 59. It was not until November 9, 2007 that the State filed accompanying materials to its motion. CP 91. It should be noted that there is no excuse whatsoever, nor has one been proffered, for why it took the State 100 days to file the brief on its motion to reconsider and another month to bring the matter before the court for a hearing on its motion. For at least 47 days during this period of time (from August 16th through August 30th, 2007 and November 14th through December 17th, 2007) Mr. Lynch was subject to an order of the court requiring him to appear and subjecting him to arrest for failing to do so. The State should not be rewarded for this delinquent conduct.

When the court considered the State's motion as a CrR 7.8 motion it erred. First, assuming the court's July 30, 2007 order was a final order, the court lost jurisdiction over this case when the State failed to exercise its proper remedy of appealing the decision (argued in part I). If it wasn't a final order, there was no order from which relief could be sought under CrR 7.8. The State simply can't have it both ways: Either the oral dismissal was a final order and the State's remedy was to file a notice of appeal within thirty days of the order, or it was not a final order and speedy trial never stopped running. Should the State attempt to argue that the period between July 30, 2007 and December 17, 2007 was an "excluded period" under the rule, this court should reject such an argument. It must be noted at this juncture that there is a paucity of case law addressing the 2003 amendments to the speedy trial rule. When the rule was amended, much if not most of the case law governing CrR 3.3 (including the case law relied upon by the court at every juncture of the proceedings below) was abrogated by the 2003 amendments. There is nothing in CrR 3.3 (e) that covers a situation like this. Excluded periods under CrR 3.3 (e) are: 1. competency proceedings; 2. proceedings on unrelated charges; 3. continuances; 4. period between dismissal and refilling; 5. disposition of a related charge; 6. the time in which a defendant is subject to foreign or federal custody; 7. time spent in juvenile

proceedings; 8. unavoidable or unforeseen circumstances *beyond the control of the court or the parties*; and 9. the five day period after a judge is disqualified.

Here, none of these exceptions apply. Should the State attempt to argue that this was a period between dismissal and re-filing, it should be noted, again, that the State's only remedy was to file a notice of appeal if this was a final order of dismissal, and jurisdiction was lost when it didn't. Even if this Court were determine it was an excluded period, the time for trial was no more than 30 days after the reinstatement of charges on December 17th, as Mr. Blair argued to the court on March 10th, not 90 days. CrR 3.3 (b) (5) provides: "*Allowable Time After Excluded Period*. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period."

When the court dismissed the charges on July 30th, 2007, 73 days had elapsed between his arraignment on May 17th and July 30th. As such, the State had 13 days remaining on the clock, which is automatically converted to no less than 30 days by operation of CrR 3.3 (b) (5). However, the State certainly had no more than 30 days. There is no authority for granting the State a new 90 day period, nor was a valid authority cited for such a proposition. Although the State asked the court

to consider this a “new trial” under CrR 3.3 (c) (iii), it did not meet the definition of a new trial. CrR 7.5 addresses situations in which a court should consider granting a new trial, and the rule plainly contemplates that a trial had already occurred, just as Mr. Blair argued to the court on March 10th. CrR 7.5 pre-supposes that a trial has occurred and a verdict rendered, insofar as it requires the motion to be made within ten days after the verdict or decision (see CrR 7.5 (b))

Further, as noted above, for at least 47 days during the time period between July 30, 2007 and December 17, 2007, Mr. Lynch was subject to an order of the court requiring him to appear and subjecting him to arrest for failing to do so. These orders were a condition of release, as they required him to appear or face arrest. As such, the trial court erred in entering finding of fact number 1.8 on the May 23rd Findings of Fact and Conclusions of Law (which was actually a conclusion of law packaged as a finding of fact), which said that Mr. Lynch was not subject to conditions of release. Conditions of release are tantamount to detention in jail. CrR 4.1 (a), *State v. Greenwood*, 57 Wn.App. 854, 790 P.2d 1243 (1990). These 47 days cannot be excluded from the speedy trial clock where Mr. Lynch’s freedom was restrained by an order to appear backed by the threat of arrest.

Even if this court were to reject Mr. Lynch's contention that speedy trial continued to run from July 30, 2007 or, alternatively, that the proper remedy after the court's order of dismissal was a notice of appeal and not a motion to reconsider, the time for trial had still expired by 40 days by the time trial commenced on March 10, 2008 because of those 47 days in which he was subjected to an order to appear and the threat of arrest. It is not clear why the court bound Mr. Lynch over under threat of arrest when the case was supposedly dismissed. Nevertheless, even if this Court were to conclude that the State had 90 days from December 17th, 2007 in which to bring Mr. Lynch to trial rather than 30 days as Mr. Lynch contends, speedy trial had still expired. There were 83 days between the reinstatement of charges on December 17th and the commencement of trial on March 10th, 2008. Adding 47 days to this period means that 130 days had elapsed on the speedy trial clock (and an incredible 190 days if this Court agrees that the time for trial after December 17th was 30 days rather than 90). The State, contrary to its assertion below, was not permitted to simply wipe the slate clean, ignoring a whopping 47 days in which Mr. Lynch lived under the threat of arrest, and get a new 90 days to bring him to trial (after dithering for an unbelievable 138 days from the date it filed its motion to reconsider and bringing the motion before the court for a hearing. As the moving party, it

was their burden to bring the case before the court, not Mr. Lynch's, and Mr. Lynch lived for nearly two months under the threat of arrest while the State did *nothing* on this case). Mr. Lynch's CrR 3.3 right to a speedy trial was violated and his conviction should be reversed and dismissed.

III. DID THE AMENDMENTS TO CrR 3.3 CHANGE THE TIME FOR WHICH SPEEDY TRIAL BEGINS RUNNING AGAIN AFTER A DISMISSED CHARGE IS RE-FILED TO THE DATE OF RE-FILING, RATHER THAN THE DATE OR ARRAIGNMENT AFTER RE-FILING?

Former CrR 3.3 (g) (4) stated that an excluded period included "The time between the dismissal of a charge and the defendant's arraignment or rearraignment in superior court following the refiling of the same charge." The 2003 amendments specifically removed the language pertaining to arraignment or rearraignment and changed it, in CrR 3.3 (e) (4), to say that the excluded period is "The time between the dismissal of a charge and the refiling of the same or related charge." By its plain language, the current rule seems to say that when a charge is dismissed and refiled, as Mr. Lynch's was on February 21, 2007 in municipal court and refiled again on April 19, 2007 in superior court, speedy trial begins running on the date the charge is refiled, not on the date of rearraignment after the refiling. Mr. Lynch made this very argument to the court and was disregarded. It continues to be Mr. Lynch's opinion that speedy trial began running on April 19th, 2007 not May 17th

(the date of arraignment) and, as such, 102 days had expired by the time he was first brought to trial on July 30th, 2007. Appellant found no case law addressing this question, unsurprisingly, and bases his argument exclusively on the plain language of the rule.

Statutes must be read so that each word is given effect and no portion of the statute is rendered meaningless or superfluous. *Spokane Valley v. Spokane County*, 145 Wn.App. 825, 833 (2008); *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). If a statute is unambiguous, its meaning must be derived from the wording of the statute. *Spokane Valley* at 833, *State v. Lee*, 96 Wn.App.336, 341, 979 P.2d 458 (1999). Here, former CrR 3.3 (g) (4) specified that the clock-triggering date in situations where a case is dismissed without prejudice and then re-filed was the date the defendant was arraigned on the re-filed charge. Those who authored the amendments to CrR 3.3 were aware of that language because it was plain to be seen, and they specifically removed it and changed the clock-triggering date to the day the charge is re-filed. In Mr. Lynch's case, that means that irrespective of whether the speedy trial period after re-filing was 30 days or 90 days, there were 28 fewer days in the clock than the court calculated because the clock began running on April 19th, 2007, not May 17th and speedy trial still expired before the case was brought to trial on July 30, 2007.

Irrespective of which avenue by which this case is analyzed, Mr. Lynch's rule-based right to a speedy trial was violated in this case and the case should be reversed and dismissed with prejudice.

IV. MR. LYNCH'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED.

The right to a speedy trial is guaranteed by both the federal and Washington state constitutions. *State v. Iniguez*, 143 Wn.App. 845, 855 (2008); Sixth Amendment, United States Constitution; Article 1, Section 22, Washington State Constitution. The Sixth Amendment right to a speedy trial attaches when the charge is filed or an arrest is made that holds one to answer a criminal charge, whichever occurs first. *Iniguez* at 855; *State v. Corrado*, 94 Wn.App. 228, 232, 972 P.2d 515 (1999); *United States v. Loud Hawk*, 474 U.S. 302, 310-11, 106 S.Ct. 648 (1986); *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455 (1971); *Dillingham v. United States*, 423 U.S. 64, 65, 96 S.Ct. 303 (2008). "When determining whether delay is unconstitutional, the court considers the length of the delay, the reason for the delay, whether the defendant asserted the right, the prejudice to the defendant, and such other circumstances as may be relevant." *Iniguez* at 855; *State v. Whelchel*, 97 Wn.App. 813, 823-24, 988 P.2d 20 (1999); quoting *State v. Flabedo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989); quoting *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct.

2182 (1972). “Notably, the presumption that delay has prejudiced the defendant “”intensifies over time.”” *Iniguez* at 855-56; *Corrado* at 233, quoting *Doggett v. United States*, 505 U.S. 647, 652, 112 S.Ct. 2686 (1992).

Mr. Lynch was arrested on November 24, 2006 and brought to trial 472 days later. He was under conditions of release requiring him to appear before the court for nearly all of that time, including 47 of the 140 days in which the case inexplicably languished between the tentative dismissal of the charges on July 30, 2007 and the reinstatement of the charges on December 17, 2007. The State’s mismanagement of this case is inexcusable. The State should have promptly appealed Judge Godfrey’s July 30th decision if it disagreed with it. Ignorance of the proper remedy is not an excuse to hold Mr. Lynch in legal limbo for nearly five months, not knowing his fate. Even assuming the proper vehicle to challenge Judge Godfrey was a motion for relief from judgment under CrR 7.8, there is no excuse for why the State, as the moving party, failed to bring the motion before the court for a hearing until December 5th, 2007 (which hearing was then set over to December 17th, 2007 by the court due to extreme weather).

When the court reinstated the charges on December 17th, 2007 Mr. Lynch promptly put the State on notice that his position was that the speedy trial period was 30 days, not 90. Rather than ignore Mr. Lynch

because he was pro se, and assume he knew better, the prosecutor should have actually read the rule. Mr. Lynch did everything the law requires him to do, which is to say he objected on the grounds of speedy trial at every critical stage. All of his objections were timely and compliant with CrR 3.3. If anything, Mr. Lynch over-objected, drawing the ire of Judge Godfrey at the February 13, 2008 hearing and his outright anger on the first morning of trial. “The defendant’s assertion of his speedy trial right...is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.” *Iniguez* at 857, quoting *Barker* at 531-32. “The timeliness, vigor, and frequency with which the right to a speedy trial is asserted are probative indicators of whether a defendant was denied needed access to a speedy trial over his objection.” *Iniguez* at 857, quoting *Cain v. Smith*, 686 F.2d 374, 384 (6th Cir. 1982).

“When examining the reasons for the delay, the court must keep in mind that ‘different weights should be assigned to different reasons.’” *Iniguez* at 856, citing *Barker* at 531. “Even if the reason for the delay is neutral, rather than improper, ‘the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.’” *Id.* “...[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim.” *Doggett* at 655. Should the State argue that the delay in this case was caused by the fact that Judge Godfrey

was a visiting judge, it should be noted that Mr. Lynch did not pick Judge Godfrey. Further, unless Judge Godfrey was on vacation for 140 straight days, the delay between the “dismissal” on July 30, 2007 and the reinstatement of the charges on December 17th, 2007 was patently unreasonable. That the State failed to file any pleadings to accompany its anemic “motion to reconsider” until November 9th, 2007 demonstrates that the State was dilatory in bringing this matter back before the court. As the moving party, this was the State’s responsibility, not Mr. Lynch’s. The State should not be rewarded for obvious mistakes and an apparent lack of initiative. Mr. Lynch’s constitutional right to a speedy trial was violated and his conviction should be reversed and dismissed.

V. MR. LYNCH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE ASSAULT IN THE FOURTH DEGREE INSTRUCTION.

Assault in the fourth degree is not a lesser included instruction of assault in the third degree by criminal negligence. *State v. Sample*, 52 Wn.App. 52, 757 P.2d 539 (1988); *Seattle v. Wilkins*, 72 Wn.App. 753, 865 P.2d 580 (1994). Moreover, where there are numerous ways of committing the greater crime charged, and the crime can be committed by one but not another of the alternative means, then any lesser included offense must be a lesser included offense of all the means. *Wilkins* at 757;

State v. Curran, 116 Wn.2d 174, 183, 804 P.2d 558 (1991). Defense counsel failed to object to the assault in the fourth degree instruction and his failure to object constituted ineffective assistance of counsel.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Here, the jury did not fail to return a verdict as to assault in the second degree and assault in the third degree; they returned verdicts of not guilty on each of those charges. The jury was instructed that assault in the fourth degree was a lesser included offense of assault in the third degree by criminal negligence, which it clearly isn't. As such, Mr. Lynch was convicted of a crime which was not charged. There was no legitimate strategy in acquiescing to an instruction on an offense that is not included within the higher offense with which Mr. Lynch was charged, and the

prejudice to Mr. Lynch speaks for itself: He was convicted of assault in the fourth degree. Mr. Lynch was denied effective assistance of counsel and his conviction should be reversed and dismissed.

E. CONCLUSION

Mr. Lynch's conviction for assault in the fourth degree should be reversed and dismissed.

RESPECTFULLY SUBMITTED this 4th day of February, 2009.



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APPENDIX

1. RULE 7.5 NEW TRIAL

(a) Grounds for New Trial.

The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

(1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;

(2) Misconduct of the prosecution or jury;

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

(4) Accident or surprise;

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

(6) Error of law occurring at the trial and objected to at the time by the defendant;

(7) That the verdict or decision is contrary to law and the evidence;

(8) That substantial justice has not been done.

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

(b) Time for Motion; Contents of Motion.

A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

The motion for a new trial shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Affidavits.

When a motion for a new trial is based upon affidavits they shall be served with the motion. The prosecution has 10 days after such service within which to serve opposing affidavits. The court may extend the period for submitting affidavits to a time certain for good cause shown or upon stipulation.

(d) Statement of Reasons.

In all cases where the court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record which cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(e) Disposition of Motion.

The motion shall be disposed of before judgment and sentence or order deferring sentence.

2. RULE 7.8 RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further

subject to RCW **10.73.090**, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(c) Procedure on Vacation of Judgment.

(1) *Motion.* Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) *Transfer to Court of Appeals.* The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW **10.73.090** and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) *Order to Show Cause.* If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

3. RULE 4.1 ARRAIGNMENT

(a) Time.

(1) *Defendant Detained in Jail.* The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court, if the defendant is (i) detained in the jail of the county where the charges are pending or (ii) subject to conditions of release imposed in connection with the same charges.

(2) *Defendant Not Detained in Jail.* The defendant shall be arraigned not later than 14 days after that appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay. For purposes of this rule, "appearance" has the meaning defined in CrR 3.3(a)(3)(iii).

(b) Objection to Arraignment Date - Loss of Right to Object.

A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of the arraignment. If the court rules that the objection is correct, it shall establish and announce the proper date of arraignment. That date shall constitute the arraignment date for purposes of CrR 3.3. A party who fails to object as

required shall lose the right to object, and the arraignment date shall be conclusively established as the date upon which the defendant was actually arraigned.

(c) Counsel.

If the defendant appears without counsel, the court shall inform the defendant of his or her right to have counsel before being arraigned. The court shall inquire if the defendant has counsel. If the defendant is not represented and is unable to obtain counsel, counsel shall be assigned by the court, unless otherwise provided.

(d) Waiver of Counsel.

If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. Waiver of counsel at arraignment shall not preclude the defendant from claiming the right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed. If such claim for counsel is not timely, the court shall appoint counsel but may deny or limit a continuance.

(e) Name.

Defendant shall be asked his or her true name. If the defendant alleges that the true name is one other than that by which he or she is charged, it must be entered in the minutes of the court, and subsequent proceedings shall be had by that name or other names relevant to the proceedings.

(f) Reading.

The indictment or information shall be read to defendant, unless the reading is waived, and a copy shall be given to defendant.

4. RULE 3.3 TIME FOR TRIAL

(a) General Provisions.

(1) *Responsibility of Court.* It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(2) *Precedence Over Civil Cases.* Criminal trials shall take precedence over civil trials.

(3) *Definitions.* For purposes of this rule:

(i) "Pending charge" means the charge for which the allowable time for trial is being computed.

(ii) "Related charge" means a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.

(iii) "Appearance" means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) "Arraignment" means the date determined under CrR 4.1(b).

(v) "Detained in jail" means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) *Construction.* The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) *Related Charges.* The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) *Reporting of Dismissals and Untimely Trials.* The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g).

(b) Time for Trial.

(1) *Defendant Detained in Jail.* A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) *Defendant Not Detained in Jail.* A defendant who

is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5).

(3) *Release of Defendant.* If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) *Return to Custody Following Release.* If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) *Allowable Time After Excluded Period.* If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

(c) Commencement Date.

(1) *Initial Commencement Date.* The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) *Resetting of Commencement Date.* On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) *Waiver.* The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) *Failure to Appear.* The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) *New Trial.* The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) *Appellate Review or Stay.* The acceptance of review or

grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

(d) Trial Settings and Notice - Objections - Loss of Right to Object.

(1) *Initial Setting of Trial Date.* The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2) *Resetting of Trial Date.* When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(3) *Objection to Trial Setting.* A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) *Loss of Right to Object.* If a trial date is set outside the time allowed by this rule, but the defendant lost

the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods.

The following periods shall be excluded in computing the time for trial:

(1) *Competency Proceedings.* All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) *Proceedings on Unrelated Charges.* Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) *Continuances.* Delay granted by the court pursuant to section (f).

(4) *Period between Dismissal and Refiling.* The time between the dismissal of a charge and the refiling of the same or related charge.

(5) *Disposition of Related Charge.* The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) *Defendant Subject to Foreign or Federal Custody or Conditions.* The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) *Juvenile Proceedings.* All proceedings in juvenile court.

(8) *Unavoidable or Unforeseen Circumstances.* Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) *Disqualification of Judge.* A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances.

Continuances or other delays may be granted as follows:

(1) *Written Agreement.* Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) *Motion by the Court or a Party.* On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period.

The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice.

A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY MA
DEPUTY

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

STATE OF WASHINGTON,)
) Court of Appeals No. 37798-5-II
) Lewis County No. 07-1-00268-0
 Respondent,)
)
 vs.) AFFIDAVIT OF MAILING
)
 DONALD LYNCH,)
)
 Appellant.)
)

ANNE M. CRUSER, being sworn on oath, states that on the 4th day of February 2009, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Lori Smith
Lewis County Deputy Prosecuting Attorney
360 N.W. North St.
Chehalis, WA 98532

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Mr. Donald Lynch

AFFIDAVIT OF MAILING- 1 -

Anne M. Cruser

Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
anne-cruser@kalama.com

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2
3
4 182 Shiloh Road
Winlock, WA 98596

5 and that said envelope contained the following:

- 6 (1) BRIEF OF APPELLANT
7 (2) REPORT OF PROCEEDINGS (TO MS. SMITH)
8 (3) SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
9 (4) RAP 10.10 (TO MR. LYNCH)
10 (5) REQUEST FOR TRANSCRIPT (TO COURT OF APPEALS, cc'd TO MR
11 LYNCH)
12 (6) AFFIDAVIT OF MAILING

13 AND

14 Ruth Allison
15 Lewis County Clerk's Office
16 345 W. Main St., Second Floor
17 Chehalis, WA 98532

18 and that said envelope contained the following:

- 19 (1) SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
20 (2) AFFIDAVIT OF MAILING

21 Dated this 4th day of February, 2009

22 
23 ANNE M. CRUSER, WSBA #27944
24 Attorney for Appellant
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I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: Feb. 4, 2009, Kalama, WA

Signature: Anne M. Cruser