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COURT OF APPEALS

No. 39941-5

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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

BY  DEPUTY

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**STATE OF WASHINGTON,**

Respondent,

vs.

**BRIAN REED,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

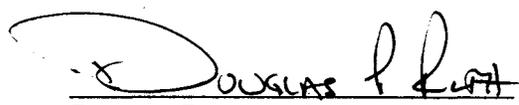
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**Respondent's Brief**

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## STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

## ARGUMENT

### **I. ANY DEFICIENT PERFORMANCE OF COUNSEL DID NOT ALTER THE OUTCOME OF THE TRIAL**

Mr. Reed's first claim is that his attorney's deficient performance denied him effective representation and prejudiced the outcome of his trial. To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* State v. Thomas, 109 Wn.2d 222, 743 P.2d 8 16 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931 (1996); Thomas, 109 Wn.2d at 226. The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can

conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 75 1 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday morning quarterbacking the contemporary assessment rule forbids. It is meaningless... for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated, "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice. Strickland, 466 U.S. at 694. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

Mr. Reed claims that his counsel met the above standards when he failed to move for suppression of the state's evidence. He claims that this failure prejudiced him because there was a reasonable probability that the trial court would have suppressed the evidence if given the opportunity. He bases this claim on his characterization of the contact between him and the arresting officer as a seizure. Since the contact was a seizure, he argues, the discovery of the outstanding warrant was the fruit of an unlawful

detention and the court was required to suppress all evidence resulting from the incident search. Because the contact was in fact not an improper seizure, his claim of prejudice fails.

The procedural restrictions located in Article 1, Section 7 of the Washington constitution are implicated only if the officer "seizes" an individual during an encounter between an officer and that individual. The constitutional provisions do not prohibit consensual or permissive contact between officers and individuals, and evidence obtained during such interactions is admissible at trial. State v. Belanger, 36 Wn.App. 818, 677 P.2d 781 (1984). The determinative test for of the legality of an encounter is whether, considering all the circumstances, "an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009), quoting Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). This standard is a "*purely objective one*, looking to the actions of the law enforcement officer. . . ." Harrington at 663 (emphasis added) (*citing State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998); State v. Bailey, 154 Wn.App. 295, 224 P.3d 852 (2010).

Although there is no litmus-paper test for distinguishing a consensual encounter from a seizure, courts have made it clear that law enforcement officers do not violate the prohibition against unreasonable seizures "by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen ..." *Florida v. Royer*, 460 U.S. 491, 497, 506, 103 S.Ct. at 1324, 1329 (1993). A consensual encounter is not elevated to a seizure by an officer's request for identification or by passively directing an individual to remove his hands from his pockets. But, if the officer uses coercive language or directs the person to perform some task, the character of the contact may change. *Harrington*, 167 Wn.2d at 663; *State v. Barnes*, 96 Wn.App. 217, 223, 978 P.2d 1131 (1999); *Young*, 135 Wn.2d at 512. An encounter may lose its consensual nature and become an investigatory detention when the officer insists upon a response from the individual, directs the person to take some action, orders him or her to remain in one location, or requests permission to frisk or search. *State v. Coyne*, 99 Wn.App. 566, 570, 995 P.2d 78 (2000); *State v. Ellwood*, 52 Wn.App. 70, 73, 757 P.2d 547 (1988); *Harrington*, 167 Wn.2d at 664. Likewise, holding a person's

identification so that they are unable to leave an area constitutes a seizure. State v. Thomas, 91 Wn.App. 195, 201, 955 P.2d 420, review denied, 126 Wn.2d 1030 (1998). Other factors weighing on whether a person is free to leave an encounter include the number of officers at the scene, whether the encounter occurred in a public or non-public setting, whether the officer physically touched the citizen, and the use of a patrol car's emergency lights or siren. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)); Bailey, 154 Wn.App. at 303.

At a suppression hearing, Mr. Reed would have had the burden of proving that the encounter with the Centralia police officers was a seizure. State v. Thorn, 129 Wn.2d 347, 354, 917 P.2d 108 (1996), overruled on other grounds, State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003); State v. Mote, 129 Wn.App. 276, 282, 120 P.3d 596 (2005). He could not have done so. Officer Lowery did not arrive on the scene with either his patrol car's siren or emergency lights activated. The officer testified that he "contacted" Mr. Reed and the vehicle on the scene, but the record does not reflect that he blocked the vehicle with his patrol car. Likewise, there is no evidence in the record that he directed Mr.

Reed to do anything or requested that Mr. Reed submit to a search. He merely asked for him to identify himself and later to produce identification. There was no evidence that Officer Lowery removed Mr. Reed's identification from his presence. Nor does the record establish that the officer was authoritative or positioned himself in a way that physically blocked Mr. Reed from returning to the car. And officer Lowery did not extensively question Mr. Reed. In short, nothing in the record here indicates that the officers conveyed to Mr. Reed that he was not free to leave.

Mr. Reed cites *State v. Harrington* to support his argument. In *Harrington*, the officer pulled his patrol car into a driveway without blocking the sidewalk. *Harrington*, 167 Wn.2d at 660. He exited the patrol car and moved to the grassy area adjacent to the sidewalk. *Id.* The officer asked an approaching pedestrian, Mr. Harrington, whether he could talk to him for a minute and then upon receiving an affirmative response asked the person where he was coming from. *Harrington*, 167 Wn.2d at 661. At the same time, he asked Mr. Harrington to remove his hands from his pockets. As he was doing so, a second officer arrived and stood a few feet away, observing the encounter. *Id.* The original officer asked Mr. Harrington for permission to frisk. Doing so, the officer found a

methamphetamine pipe on Mr. Harrington. *Harrington*, 167 Wn.2d at 661-662.

The Supreme Court observed that what began as a social contact progressively became a seizure when the nature of the encounter between Mr. Harrington and the officer became more formal with each proceeding event. *Harrington*, 167 Wn.2d at 665-666. In detail, the court described the actions taken by the officer that increased the coerciveness of the encounter. The last of these events was the officer's request for Mr. Harrington to submit to a search. It is clear from the court's opinion that it is this action that finally rendered the contact a seizure. "Requesting to frisk is inconsistent with a mere social contact... When Reiber requested a frisk, the officers' series of actions matured into a progressive intrusion substantial enough to seize Harrington." *Harrington*, 167 Wn.2d at 669-70.

Similarly, this court gave significance to the request to frisk in *Soto-Garcia*, the case providing the legal support for the *Harrington's* court's holding. In the *Soto-Garcia* opinion, this court observed that the entirety of the officer's actions ultimately created a coercive atmosphere in which the contacted citizen felt unable to freely break off. *State v. Soto-Garcia*, 68 Wn.App. 20, 25, 841 P.2d

1271 (1992) *abrogated in part by State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996). The encounter remained consensual, however, until "the officer asked him if he had cocaine on his person and if he could search him." *State v. Soto-Garcia*, 68 Wn.App. at 2. At that point, this court held, the individual was seized. *Id.*

The atmosphere of the encounter here was different than those in *Harrington* and *Soto-Garcia*. The significant factors supporting the holdings in those two cases were not present when Officer Lowery contacted Mr. Reed. The officer did not ask any questions about drug possession and did not request to search Mr. Reed. He didn't verbalize any observations about Mr. Reed's appearance or conduct. There is nothing in the record indicating the officer attempted to control Mr. Reed's actions or to use his authority to gain compliance. The detective simply asked for Mr. Reed's name, and when he had reason to suspect Mr. Reed was lying, he asked if Mr. Reed had any identification at all. These questions are materially less intrusive than requesting a person remove his hands from his pockets and to submit to a frisk. See *State v. Johnson*, 2010 WL 1875794, 3 (May 11, 2010) (Officer parking 10-15 feet behind parked car and twice asking occupants

for identification and about their presence in a handicap spot was a social contact).

The only element of the contact between Mr. Reed and Officer Lower that was discussed by the *Harrington* court is the presence of more than one officer at the scene. But there is nothing in the record that indicates that a reasonable person would be threatened by the presence of the additional officers. The officers did not converge on the scene. Rather, the record strongly indicates that the two officers arrived well into the initial contact, and possibly after Officer Lowery had viewed Mr. Reeds' correct identification. The record also supports that the other officers observed the interaction, but did not contact the defendant before the arrest, and did not outnumber the individuals contacted. Nothing in the *Harrington* opinion indicates that this passive presence of more than one officer is sufficient alone to transform a consensual encounter into a seizure. In contrast, courts in other cases have found that an individual who is contacted by more than one officer is not automatically restrained from exercising his or her freedom of movement. For instance, in *State v. Smith* this court recently held that a defendant was not seized although several armed officers were present searching the defendant's motel room

and one of them inquired into the defendant's identity. State v. Smith, 154 Wn.App. 695, 699-700, 226 P.3d 195 (2010). Similarly, Division One declined to find that a seizure existed when two officers approached a man, asked for his identification, and then performed a warrant search on the name. The court held that "There is no reason handing the license to another officer standing beside the first would have led a reasonable person to believe that he was not free to leave." State v. Hansen, 99 Wn.App. 575, 579, 994 P.2d 855, 857 (2000). See also, U.S. v. \$25,000 U.S. Currency, 853 F.2d 1501,1505 (9<sup>th</sup> Cir.1988) (finding no seizure where the defendant was approached in airport by officers, answered "yes" when the officers asked if they could speak to him, and the police officers never raised their voices or showed any signs of force or aggression); Mendenhall, 446 U.S. at 547-48.

Mr. Reed argues differently, claiming that the presence of the additional officers was coercive. In support of his argument, he reiterates his testimony at trial that the arrival of the other patrol car was "kind of scary." Appl's Br. at 9. Of course, this testimony does not establish that it is probable that the trial court would have suppressed the evidence as the fruit of an illegal seizure. The test for whether a defendant was seized at the time of a search is an

objective one that looks at the actions of the officer. Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877. The test is not predicated on the impressions of the defendant. Moreover, a trial court may disregard self-serving testimony that it finds lacks credibility. State v. Hull, 86 Wn.2d 527, 542, 546 P.2d 912 (1976). It is likely the court would have done so here. The court could have inferred that Mr. Reed's fear at the time of the contact was due to his possession of an illegal substance and his knowledge of the outstanding warrant for his arrest more than an inherent fear in any show of force that the additional officers represented.

Because there is little probability that the trial court would have suppressed the evidence used to convict Mr. Reed, he has failed to meet his burden of establishing that he was prejudiced by his attorney's performance. To a certain degree, this failure is due to the lack of evidence in the record specifically describing the actions of the officers during the contact with Mr. Reed. Yet, an inadequate record is not a basis for concluding that an attorney acted deficiently or prejudiced a defendant by failing to establish these facts. A defendant still "bears the burden of showing both deficient performance and resulting prejudice." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If Mr. Reed feels

that his attorney negligently failed to place in the record evidence that would establish the officer's contact as a seizure, a personal restraint petition is the appropriate vehicle for bringing those matters before the court. McFarland, 127 Wn.2d at 337-338,

Mr. Reed's claim regarding the admissibility of the physical evidence fails for a second, alternate reason. Even if the officer's contact with Mr. Reed constituted a seizure, it was not an unreasonable seizure that would necessitate suppression of the evidence. Because Officer Lowery had reasonable suspicion that Mr. Reed's conduct was illegal, he was within his authority to seize Mr. Reed for questioning.

An officer may seize a person to investigate criminal activity if the officer has reasonable suspicion that the person is involved in the activity. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968). To justify a *Terry* stop, a police officer must be able "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. The level of suspicion necessary to support a detention is "a substantial possibility that criminal conduct has occurred or is about to occur." State v Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). This criterion is measured by looking at the totality of the

circumstances known to the officer at the inception of the stop. State v. Lee, 147 Wn.App. 912, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009).

Here, Officer Lowery observed three individuals loading something in to the back seat of their car from the back loading area of a grocery store. It was eleven-o'clock at night. The property appeared to the officer to belong to the store. RP at 33. Based upon this observation, the officer stopped behind the vehicle and investigated whether the individuals had permission to take what he saw were batteries. RP at 51. One of the individuals responded that they had received permission. *Id.* The officer then asked each for his or her name. *Id.*

This evidence was sufficient to create a reasonable suspicion of criminal activity. *See Belanger*, 36 Wn.App. at 821. Although Mr. Reed and his friends did have permission to obtain the batteries, at the time of Officer Lowery's observation their conduct was more consistent with illegal activity than innocent endeavors. The removal of goods late at night from the loading dock of a store and placement of the goods in a private car would make any law enforcement officer conclude that there existed a substantial possibility that criminal conduct was occurring. "While

an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to ignore that experience." State v. Samsel, 39 Wn.App. 564, 570-571, 694 P.2d 670 (1985).

Thus, Mr. Reed's argument fails as he has not established that the trial court would have excluded the trial evidence if his attorney had sought a suppression hearing. The record does not support that the evidence was obtained after an unreasonable seizure. As a result, Mr. Reed has failed to establish that the trial court would have found that he met his burden of establishing nonconsensual contact with Officer Lowery. Even if he had been able to do so, the record supports a finding that Officer Lowery had a basis for a nonconsensual, *Terry* stop that would have justified his request for Mr. Reed to identify himself. This court should affirm the conviction.

## **II. THE TRIAL COURT'S ADMISSION OF THE CRIME LAB REPORT IS NOT A BASIS FOR REVERSING MR. REED'S CONVICTION**

### **A. This Court Should Reject Mr. Reed's Argument On The Basis Of Rap 2.5.**

Mr. Reed's second argument is that the court improperly admitted the state's lab report. He claims that the report is hearsay.

It is unnecessary for this court to address this issue. First, Mr. Reed waived this argument when he failed to make a hearsay objection to the trial court's admission of the report. A party must make a specific objection to the admissibility of evidence at the trial court in order to preserve a claim of error on appeal. ER 103(a); State v. Korum, 157 Wn.2d 614, 648, 141 P.3d 13 (2006). Under RAP 2.5(a), an appellate court may refuse to review any claim of error not raised below, subject to several exceptions.

One exception stated in RAP 2.5 covers constitutional errors. RAP 2.5 permits this court to consider an issue raised for the first time on appeal if it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3). This court has adopted a strict approach to the rule because the failure to object robs the trial court of the ability to correct the error at the time and thus avoid a costly retrial. State v. Powell, 166 Wn.2d 73, 82,206 P.3d 321 (2009). The burden is on the defendant to "identify the constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." McFarland, 127 Wn.2d at 333 (citations omitted).

Here, Mr. Reed objected to the foundation for admission of the lab report, but did not object that the report was impermissible hearsay. RP at 41, 48. Nor has he now established that the alleged error is manifest and affects a constitutional right. Thus, his argument should be barred under RAP 2.5.

**B. Admission Of The Lab Report Did Not Alter The Outcome Of The Trial.**

Second, admission of the lab report was harmless. The report is a one page document that identifies the requesting officer and law enforcement agency, describes the item received and tested by the crime lab, states the findings of the lab, and provides the identity and qualifications of the lab chemist. Exhibit 2, Supp. CP. This same information was presented to the jury through the testimony of the chemist who prepared the report. RP at 26-31. In fact, he read the conclusion of his testing directly from the report. RP at 31. Since this testimony was repetitive of the information in the report, the admission of the lab report could not have changed the outcome of the trial. The erroneous admission of a hearsay statement that is 'merely repetitive' of other properly admitted evidence is harmless. State v. Johnson, 35 Wn.App. 380, 386, 666 P.2d 950 (1983).

Mr. Reed asserts that the admission of the lab report bolstered the state's case, but provides no basis to conclude that the jury would rely upon the report more than the chemist's testimony, or forget the testimony. Since the chemist read directly from the report, there is no reason to believe the report carried more weight than the testimony. Equally, there is nothing in the record placing the testing results or the chemist's qualifications in doubt. Both the report and the testimony were brief and straightforward. Therefore, even if the lab report had not been admitted into evidence the jury's verdict, more likely than not, would not have changed. Mr. Reed fails to meet his burden of establishing prejudice. *State v. Pruitt*, 145 Wn.App. 784, 794, 187 P.3d 326 (1998).

**C. The Lab Report Was Properly Admitted Under CrR 6.13.**

Finally, although hearsay, the report was admissible under CrR 6.13. Consistent with ER 803, this rule "establishes an exception to the hearsay rule and provides a method for a lab report to be self-authenticating." *State v. Neal*, 144 Wn.2d 600, 605, 30 P.3d 1255 (2001). "So long as the form and notice requirements of the rule are complied with, the court may allow admission of the report without expert testimony or a foundation

witness." State v. Sosa, 59 Wn.App. 678, 682, 800 P.2d 839, 842 (1990). Here, the crime lab report fulfilled these requirements. As shown on the bottom of the report, the report was provided to the defendant within the required time. The lab report was given to defense counsel on April 1, 2009 and the trial started on September 4, 2009, more than fifteen days later.

The form of the certification is also clearly proper being that it is an exact replica of the standard listed in the CrR 6.13 with the addition of necessary details concerning the case at hand. The report, therefore, was admissible as an exception to the hearsay rule.<sup>1</sup> See Sosa, 59 Wn.App. at 602-603.

Mr. Reed argues that the state failed to comply with the requirements for the rule as stated in the Omnibus Order and, thus, cannot now claim it applies. Appl Br. at 11 n.1. This is incorrect. The Omnibus Order gave the state the option of notifying the defendant that it was intending "to rely on CrR 6.13(b) and offer, at trial, the lab report... *in lieu of that expert's live testimony.*" Omnibus Order, p.2, Supp. CP (emphasis added). Since the state

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<sup>1</sup> Even if a report is admissible under CrR 6.13, it still must conform to the confrontation clause of the U.S. Constitution. Sosa, 59 Wn.App. at 603. Mr. Reed does not claim that the report here is a violation of that clause. Regardless, the report clearly satisfies the two prong test for deciding whether evidence adheres to the clause. See Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531 (1980). Therefore, there is no constitutional bar in allowing this report into evidence.

provided both the lab report and the testimony of the state lab expert, there was no reason for the state to notify the defendant of its intentions. Thus, the state's failure to provide notice was not contrary to the Omnibus Order.

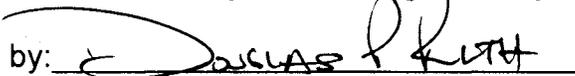
Moreover, satisfaction of this provision of the order is not a precondition for asserting CrR 6.13 as a hearsay exception. The notice requirements of the rule do not contain this provision. Thus, any failure of the state to inform Mr. Reed of its intent to offer the lab report into evidence does not change the character of the evidence. Once the state met the requirements of CrR 6.13, the report became admissible. The state's failure to follow its discovery practice may constitute a due process violation, but it did not render the report inadmissible hearsay.

#### CONCLUSION

For the foregoing reasons, this court should affirm Mr. Reed's conviction.

RESPECTFULLY submitted this 7 day of June, 2010.

MICHAEL GOLDEN  
Lewis County Prosecuting Attorney

by:   
DOUGLAS P. RUTH, WSBA 25498  
Attorney for Plaintiff

FILED  
COURT OF APPEALS

10 JUL -7 PM 5:00

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

STATE OF WASHINGTON

STATE OF WASHINGTON, )  
Respondent, )  
vs. )  
BRIAN T. REED, )  
Appellant. )  
\_\_\_\_\_ )

BY \_\_\_\_\_  
NO. 39941-5 DEPUTY

DECLARATION OF  
MAILING

Ms. Casey Cutler, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On June 7, 2010, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jodi R. Backlund, Esq.  
Manek R. Mistry, Esq.  
203 Fourth Ave E Suite 404  
Olympia WA 98501

DATED this 7 day of June 2010, at Chehalis, Washington.

  
\_\_\_\_\_  
Casey L. Cutler, Paralegal  
Lewis County Prosecuting Attorney Office