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STATE OF WASHINGTON
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NO. 40801-5-II

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

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL A. LAR,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant his right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when it denied the defendant's motion to suppress evidence.

2. Trial counsel's failure to file a timely motion to suppress evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

3. The trial court's refusal to excuse a juror who failed to disclose his relationship with a state's witness denied the defendant his right to a fair and impartial jury under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment.

4. The trial court erred when it sentenced the defendant to life in prison under the persistent offender act because the state failed to present admissible evidence that the defendant had two prior qualifying convictions for violent offenses.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, if it refuses to suppress evidence the police obtained after illegally detaining and arresting the defendant?

2. Does a trial counsel's failure to file a timely motion to suppress evidence deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the court would have granted the motion and the suppression of the evidence seized would have resulted in an acquittal?

3. Does a trial court's refusal to excuse a juror who failed to disclose his relationship with a state's witness deny the defendant his right to a fair and impartial jury under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, when the defense would have exercised a peremptory challenge had the information been disclosed and the court had two alternates sitting on the jury?

4. Does a trial court err if it sentences a defendant under the persistent offender act when the state fails to present admissible evidence that the defendant had two prior qualifying convictions for violent offenses?

STATEMENT OF THE CASE

Factual History

At about 7:30 on the morning of January 25, 2010, Holly Weitz arrived at the Twin Star Credit Union on Gold Street in the city of Centralia to begin her work as a teller. RP2 18-21.¹ As she drove into the parking lot she saw fellow employee Esperanza Meijia-Tellez waiting in her vehicle. *Id.* Pursuant to the bank's opening procedures, Ms Weitz was supposed to call Ms Meijia-Tellez on her cell phone, enter the building, turn off the security system, turn on all of the lights, and then tell Ms Meijia-Tellez over the cell phone that all was clear and she could safely enter. RP2 22-24. Following this procedure, Ms Weitz established a cell phone connection with Ms

¹The record in this case includes nine volumes of verbatim reports, including six volumes of verbatim reports of the trial, and three volumes of verbatim reports of hearings. The court reporter began each volume at page "1." The three volumes of verbatim reports of the hearings are referred to herein as "RP [date of hearing] [page #]." The trial volumes are referred to herein as follows:

- "RP1 [page #]" - first day of trial held on 3/24/10;
- "RP2 [page #]" - second day of trial held on 3/25/10;
- "RP3 [page #]" - third day of trial held on 3/26/10;
- "RP4a [page #]" - first volume of the fourth day of trial held on the morning of 3/30/10
- "RP4b [page #]" - second volume of the fourth day of trial held on the afternoon of 3/30/10; and
- "RP5 [page #]" - fifth day of trial held on 3/31-10.

Meijia-Tellez, entered the building at the side door by the ATM machine, went into the bank, turned off the security system, and began turning on the lights. *Id.*

When Ms Weitz entered the assistant manager's office and turned on the lights, she saw a man with a ski mask over his face and dressed all in black. RP2 22-26. This man had what appeared to be a .45 caliber automatic pistol in one hand and a knife in another. *Id.* Ms Weitz thought him to be about 60-years-old and noted that he had very blue eyes. *Id.* As soon as Ms Weitz turned on the light, the man rushed forward and knocked her to the ground, either with his body or by hitting her with the gun. RP2 26-27. He then held the gun and knife to her head and threatened to kill her if she grabbed for the cell phone. *Id.* He also said he was going to use her as a hostage. *Id.* Although terrified, Ms Weitz explained that if she did not get on the phone with her fellow employee in the parking lot, that employee would immediately call the police. RP2 27-29.

As a result of Ms Weitz's statement, the intruder told her to take the cell phone and call the employee in the parking lot. RP2 27-29. However, Ms Weitz was so upset that she was unable to do so and told the intruder as much. *Id.* He then physically took her over to the side door and instructed her to hold her cell phone outside to show that it was not working and motion for the other employee to enter. *Id.* In fact, Ms Meijia-Tellez had heard the

commotion just before losing the cell phone connection with Ms Weitz, and she had immediately called the police. RP2 96-99. As a result, as Ms Weitz opened the side door to the bank and waived her cell phone at Ms Meijia-Tellez, she saw a Centralia Police Officer walk up along the side of the building to her location with his firearm in hand. RP2 29-30. Seeing this, she mouthed and gestured that the intruder had a gun. *Id.* The officer then grabbed Ms Weitz by the arm, pulled her out of the doorway, stepped into her place, saw the intruder standing in the shadows holding a gun, and fired twice at him. RP2 30-31, 108-114. The officer then backed out of the doorway. RP 2 108-114.

Within a minute or two, a number of officers arrived and established a perimeter around the bank. RP2 115-119. They then spent the next couple of hours trying to establish communication with the intruder. RP2 130-137. However, they were unsuccessful. *Id.* The local SWAT team then circled about the bank in an armored vehicle, and eventually stormed into the building in two groups. RP2 138-140. Inside, they found a broken window in the assistant manager's office with a small amount of blood on the frame and some blood on some glass shards. *Id.* However, they found no intruder. RP3 27-29. At this point, the police began a search of the area around the bank, including a search by a tracking dog while detectives processed evidence from within the bank. RP2 138-140; RP3 95-102. The police found

no evidence and no intruder. *Id.* By later that afternoon, the police had finished their work at the scene. RP3 12-13.

At about 7:15 that evening, a person by the name of Kimberly Ronnell drove up to her house at 818 S. Tower St. in Centralia, which is situated a few blocks from the Twin Star Credit Union. RP3 65-69. As she did, a man from across the street asked her to call him a cab so he could get to Olympia. *Id.* The man had blond hair, looked kind of “groggy, and was wearing a dark jacket and jeans. *Id.* Ms Ronnell complied with his request, and a few minutes later, a cab driver from Quality Cabs picked the man up. *Id.* This person was the defendant. RP3 69-73. He told the cab driver that he had been in a motor vehicle accident and had hurt his arm. *Id.* Pursuant to the defendant’s request, the cab driver took the defendant to a bar called Peppers in Olympia. RP3 76-78. On his way back to Centralia, the cab driver thought the whole situation odd, so he called the Centralia police and told them what he had seen. *Id.*

At about 8:45 that evening, the defendant walked into the Phoenix Inn on Capital Way in Olympia and asked one of the employees to call a cab or limousine service as he needed to get up to Seattle. RP3 86-88. At the time, the defendant was wearing dark clothing, and had a denim jacket with blood on it wrapped around his right arm. *Id.* He was obviously in a lot of pain, but he refused the employee’s offer to call for medical aid, saying that he did

not have insurance to pay for it. *Id.* The defendant was eventually able to arrange for a taxi ride to Sea-Tac Airport. *Id.* While waiting, one of the other employees at the Phoenix Inn thought the situation odd, so she called the police in Olympia. RP3 90-95. However, the dispatcher with whom she spoke did not appear very interested. *Id.*

A few minutes later, the defendant's cab arrived, the defendant got in the back seat, and the taxi drove away from the motel. RP3 86-88. Almost immediately thereafter, the Olympia Police called back to the employee who had called them to get information about the cab in which the defendant had left. RP3 94-95. Using this information, Olympia police officers found the cab a number of blocks away, noted the presence of a passenger, and made a traffic stop. RP3 132-136. They then pulled the defendant out of the cab and arrested him at gun point. *Id.* Once at the police station, the officers took the defendant's clothing from him, and then took him to the hospital. RP3 136-139. Other officers at the hospital noted that the defendant appeared to have a recent gunshot wound to his arm and to his hip. RP3 52-53, 138-140. The defendant was later taken to Harborview Medical Center in Seattle for treatment. RP 3/10/10 1-48; RP 3/17/10 1-57.

The day after the robbery, a number of Centralia Officers went back to the Twin Star Credit Union to again look for evidence. RP3 138-144, 173-180. During this search, they found some shards of glass with blood on

them under some bushes along one of the outside walls of the building, along with keys and an electronic fob to a Cadillac. *Id.* The officer sent the pieces of glass to the lab for analysis, along with a sample of the defendant's blood which the officer had obtained pursuant to a court order. *Id.* The officer also did a search of the streets near the Credit Union, and finally found a Cadillac whose doors unlocked when they pressed the button on the electronic key fob. RP2 142-146. The officers then relocked the car and had it towed from the scene. *Id.* They later searched the car pursuant to a warrant, and found the defendant's wallet inside. RP 106-107. According to a registration check, the vehicle belonged to the defendant's wife. RP4b 29-31.

The defendant spent a number of days at Harborview Medical Center under heavy sedation and in and out of consciousness. RP 3/10/10 1-48; RP 3/17/10 1-57. When he was awake, a number of officers asked him questions, eventually getting the defendant to admit that he had been the intruder in the Credit Union, that he had hidden all day in the bushes, and that when everyone left the bank later that evening he had walked across the street to another bank, hidden the gun and knife, and left the scene, eventually getting a cab ride to Olympia. *Id.* Based upon this information, Centralia Police Officers went over to the bank across the street from the credit union and found the gun and knife, which were hidden in some bushes. RP3 181-183. In fact, what Ms Weitz had thought was a .45 caliber handgun was a

pellet pistol. RP4a 33-35.

Procedural History

By information filed January 29, 2010, and amended March 24, 2010, the Lewis County Prosecutor charged the defendant Michael A. Lar with first degree burglary, first degree kidnaping, and attempted robbery in the first degree. CP 1-3, 55-58. Each charge included a claim that the defendant committed it while armed with a deadly weapon. *Id.* The state also gave written notice that it believed that if the defendant were convicted of any of the current charges, he would be subject to a sentence of life in prison under the Persistent Offender Accountability Act found in RCW 9.94A.555. CP 49.

The court later called the case for a hearing under CrR 3.5 with the state summoning four police officers as witnesses. CP 20-21, 45-46. Following this testimony and argument by counsel, the court suppressed all statements the defendant made pursuant to custodial interrogation as (1) non-voluntary, (2) obtained without proper *Miranda* warning, and (3) taken following an invocation of the right to silence. See RP 3/10/10 1-48 and RP 3/17/10 48-52. The court later entered findings of fact and conclusions of law in support of its decision to suppress the defendant's statements. CP 59-63. The conclusions of law were as follows:

4.2 The defendant was in custody, having been arrested and transported to Harborview Hospital, in restraints and under guard the entire time.

4.3 The defendant was under pain medication and unable to make a knowing and voluntary waiver of Miranda Rights.

4.4 The police tactics to get Mr. Lar to talk were effective as Mr. Lar was heavily medicated. The statements made were not voluntary.

4.5 The invocation of Miranda Rights is not subject specific. Once a defendant invokes Miranda, all questioning must stop.

4.6 Mr. Lar invoked his Miranda Rights but continued to be questioned by Centralia Police Officers.

4.7 None of the statements made pre-Miranda were voluntary.

4.8 Once Miranda was invoked all questioning should have stopped. All statements made after the invocation of Miranda were in violation of the defendant's rights.

CP 62.

On Tuesday, March 16, 2010, the defendant filed a motion to suppress all evidence the police obtained during and following his arrest, which the defense argued was made without a warrant and was presumptively a violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. CP 42-43. Specifically, the defendant argued that the police had stopped, arrested, and searched him without a warrant, without probable cause, and without reasonable suspicion that he had committed a crime. *Id.* Eight days later, on Wednesday, March 24, 2010, the court called the case for trial before a jury. RP1 1-3. At that time, the defense requested that the motion to suppress be

argued. RP1 14-26. The trial court refused to hear the defendant's motion, ruling that it was untimely. *Id.* Following the close of the state's case on the fourth day of trial, the defendant renewed the motion to suppress, which the court again refused to consider. RP4 117-120.

While the court refused to consider the defendant's prior written motion to suppress, it did hear the defendant's oral motions *in limine*, arguing that (1) the defendant's medical records should be suppressed because the state obtained them in violation of the Health Care Information Act, and (2) that the evidence of the defendant's treating physician should be excluded as it would violate the physician-patient privilege. RP1 23-28, 29-33. Following argument by counsel, the court granted both motions. *Id.* In addition, prior to trial, the court granted another defense motion to exclude any evidence of the defendant's prior convictions for bank robbery as inadmissible under ER 404(b). RP 3/17/10 53-58.

Prior to the court's ruling on the defendant's motion to suppress and motions *in limine*, the court and parties conducted *voir dire* and the parties accepted 12 jurors and two alternates. CP 64-65. During this process, the defense exercised four of its six available peremptory challenges. CP 65. The eighth juror accepted on the panel was No. 32, Casey French. CP 65; RP2 187-193. During the *voir dire* process, he had responded along with the other jurors and eventually accepted that he was unacquainted with the

persons the state had listed as witnesses in the case. RP2 187-193. In fact, Mr. French's answer on this point was in error. *Id.* During a break on the second day of trial, the defendant's attorney saw Mr. French greet a state's witness by the name of Joey McKnight. *Id.* Mr. McKnight was the taxi cab driver who had taken the defendant from Chehalis to Olympia, and who later testified to the defendant's physical condition as well as to statements he made. RP3 69-78.

After defense counsel informed the prosecutor and the court as to what he had seen, the court called Mr. French in for questioning. RP 2 187-193. At that time, Mr. French informed the court that Joey McKnight was an acquaintance who he recognized as the boyfriend of the old girlfriend of French's step son, that he did not recognize his last name when the judge read it, and that when he saw him outside the courtroom he recognized and greeted him. RP2 187-193. However, Mr. French assured the court that in spite of these facts, he could be fair and impartial and evaluate Mr. McKnight's testimony as any other witness. *Id.* The defense moved to strike Mr. French from the jury, noting that (1) at the point the defense accepted Mr. French on the jury the defense still had two peremptory challenges remaining, and (2) had Mr. French revealed his connection to Mr. McKnight, the defense would have exercised a peremptory challenge to exclude him as it had with a number of other potential jurors who had connections to state's witnesses.

Id. In spite of the fact that there were still two alternatives also sitting on the jury at that time, the trial court denied the defendant's motion. *Id.*

Following the reception of evidence in this case, the court instructed the jury without objection noted on the record by the defense. RP5 3, 6-7. The parties then presented closing argument, after which the jury retired for deliberations. RP5 7-62. At one point, the jury sent out a note requesting to review the testimony of one of the police officers. CP 173. Without objection from the parties, the court refused the request. RP5 64-65; CP 173. The jury later returned verdicts of guilty on each count, and findings that the defendant committed each count while armed with a deadly weapon. CP 175-180; RP5 70-74.

The court later held a sentencing hearing, during which the state called Jennifer Tien as its only witness. RP 5/26/10 3-7. Ms Tien testified that she is a federal probation officer and that since 2008 she has supervised the defendant on old federal convictions. *Id.* During the sentencing hearing, and over defense objection, the court admitted copies of two federal judgment and sentences showing that on November 8, 1985, a "Michael Anthony Lar" was sentenced in federal court following his plea to two counts of armed bank robbery, and that on January 31, 1997, a "Michael Anthony Lar" was sentenced in federal court on one count of armed bank robbery and one count of bank robbery. Exhibits 2-3 from 5/26/10 sentencing hearing. While the

person listed in these judgments had the same name as the defendant, the state did not offer any fingerprint comparison evidence to show that the defendant was the same person, and the state did not call any witnesses who were present at either of the two prior sentencing hearings who could identify the defendant as the person listed in the exhibits. RP 5/26/10 1-14.

Based upon the court's findings that (1) the defendant was the person listed in the prior federal convictions, and (2) that these convictions were equivalent to Washington violent offenses for the purpose of the Persistent Offender Act, the court sentenced the defendant on each count to life in prison without the possibility of release. CP 201-208. The defendant thereafter filed timely notice of appeal. CP 210-218.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT, WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

Under Washington Constitution, Article 1, § 7, as well as United States Constitution, Fourth Amendment, warrantless searches and seizures are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized following a warrantless search or seizure unless the prosecution meets its burden of proving that the officer's conduct fell within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). Since warrantless searches and seizures are presumptively unreasonable, the state bears the burden of proving an exception to the warrant requirement, if the defendant first meets the burden of production of evidence that the evidence in question was "seized" without aid of a warrant. *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998). The defendant does not bear the burden of speculating as to which exception to the warrant requirement the state might claim exists and then disprove the application of that exception. *Id.*

In the case at bar, the defense filed a motion to suppress all evidence

the state obtained following the defendant's warrantless arrest and search. Although short, the defendant's motion does meet the defendant's burden of production of evidence to show that he was arrested and searched without the aide of a warrant. This evidence the police obtained by exploiting this presumptively illegal, warrantless arrest included the following: the defendant's identity, his clothing, his statements, his DNA, the police officer's views of the defendant's person including their views of his gunshot wounds, as well as the pellet gun and knife the police found after the defendant told them where these items were secreted. But for the police illegally stopping the vehicle in which he rode and but for their illegal arrest of his person, the police would not have obtained any of this evidence.

In the case at bar, the defendant filed his written motion to suppress on April 15, 2010, nine days prior to the scheduled trial. The state did not so much as file a written reply or make an oral argument to carry its burden of proving an exception to the warrant requirement. Thus, the trial court should simply have granted the defendant's motion and suppressed the evidence as a consequence of the state's failure to even attempt to meet its burden of proving an exception to the warrant requirement. However, far from holding the state to its burden of proof, the trial court simply refused to even consider the defendant's motion upon the court's mistaken belief that the motion was "untimely." As the following explains, this ruling was erroneous.

The procedures governing the filing of motions to suppress are governed by CrR 3.6. This rule states as follows on these procedures:

(a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

CrR 3.6.

In the case at bar, the defendant did meet the requirements of CrR 3.6 by filing a written motion to suppress that set forth the facts and the basis for suppressing the evidence. Thus, the defendant met the requirements of CrR 3.6. Indeed, the trial court did not rule otherwise. Rather, the trial court ruled that the motion was untimely. Under the criminal rules, there is no time limit for bringing motions generally or motions to suppress specifically. However, under CR 6, motions generally require five days notice prior to hearing. This rule states:

(d) For Motions – Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of

the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

CR 6(d).

Our courts have repeatedly held that the civil rules are applicable in criminal cases if the criminal rules are silent on the issue at hand. *State v. Cronin*, 130 Wn.2d 392, 923 P.2d 694 (1996). This principle particularly applies if the rule involves an issue of procedure. *State v. Gonzalez*, 110 Wn.2d 738, 757 P.2d 925 (1988). Thus, to the extent there is a time requirement for filing a motion to suppress under CrR 3.6, that time requirement is five days under CR 6. Thus, in the case at bar, the defendant's motion was timely, and the trial court erred when it refused to hear the defendant's motion.

It is true that courts have held that a defendant must move for suppression within a "reasonable time" before the case is called for trial, although the decision so holding does not specifically state what a "reasonable time" is other than that time necessary for the state to respond and for the court to fairly consider the issues raised. *State v. Burnley*, 80 Wn.App. 571, 572, 910 P.2d 1294 (1996). Thus, for example, the courts have held that a motion brought after the admission of the evidence or at the

end of the state's case is not brought within a "reasonable time." *State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638 (1966).

In the case at bar, the defendant filed the motion within the time period required under the civil rule. In addition, his remarks during the preliminary motions at trial indicated that he had assumed that the court would start with the suppression motion because the witnesses needed for the motions, who were the Olympia officers who stopped and arrested the defendant, were all going to be attending the trial since they were listed as state's witnesses. Thus, there was no issue about missing witnesses, or no opportunity for the state to adequately respond. Under these circumstances, there was no reason for the trial court to refuse to hear the defendant's motion since it was brought within the time period required under the civil rules, the state had adequate time to respond, and the witnesses necessary for the motion were available. Consequently, the trial court erred when it refused to hear the defendant's motion.

Although the court refused to hear the motion, there are a number of factors in the law and facts from the trial that strongly indicate that the defense would have prevailed had the court heard the motion. First, the presumption under the law required the suppression of the evidence since the Olympia police stopped the defendant and arrested him without a warrant. Second, the stop and arrest was made over twelve hours after the robbery

took place. Third, the arrest took place in another city. Fourth, and perhaps most important, the Chehalis police had no unique physical description of the robber, and the Olympia police had no information from which to connect the defendant to the robbery other than the suspicion of the motel clerk's and their own "hunch" that perhaps this person had been involved in the robbery. Finally, the Chehalis police did not even know if the robber had been shot. From the physical evidence in the bank, they believed that he had cut himself while exiting through the window. These facts strongly indicate that there was no legal basis at all for even a *Terry* stop on the defendant, much less a custodial arrest. Thus, it is highly likely that the motion would have been successful.

In addition, had the motion been successful, then the state's case would have been significantly weakened. Indeed, the only evidence that would have connected the defendant to the bank would have been the key fob found in the bushes. However, this evidence did not even prove that the defendant had been to the bank. Rather, it simply indicated that at some point in time, a person who had driven the defendant's wife's car had been to the bank. Thus, it is more likely than not that had the motion been granted, the jury would have acquitted on all charges. As a result, this court should reverse the defendant's convictions and remand for a new trial and with instructions to grant a hearing on the defendant's motion to suppress.

II. TRIAL COUNSEL'S FAILURE TO FILE A TIMELY MOTION TO SUPPRESS EVIDENCE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at

694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims that he was denied effective assistance of counsel based upon (1) his trial attorney's failure to timely argue the written suppression motion he had filed, and (2) his trial attorney's failure to bring a motion to suppress the pellet gun and knife the police obtained from illegally interrogating him. The following sets out these arguments.

A criminal defendant is denied effective assistance of counsel under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, where no legitimate strategic or tactical explanation can be found for a particular trial decision by defense counsel, and where that decision causes prejudice. *State v. Rainey*, 107 Wn.App. 129, 28 P.3d 10 (2001) (citing *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995)). The failure to bring "a plausible motion to suppress potentially unlawfully obtained evidence is one such decision." *State v. Meckelson*, 133 Wn.App. 431, 135 P.3d 991 (2006) (citing *State v. Rainey*, 133 Wn.App. at 136).

For example, in *State v. Meckelson, supra*, a police officer began

following two vehicles based upon his belief that the driver of the first vehicle had looked at him and appeared overly nervous. As the officer pulled behind the first vehicle, the second car turned abruptly without signaling, which also aroused the officer's suspicions. The officer then decided to stop the second vehicle on the infraction, which he did. The defendant was a passenger in the second vehicle, and as the officer approached, he ordered the defendant out based upon his furtive movements as he appeared to be trying to either get something out from underneath the seat or put something there. When the defendant exited, the officer saw two baggies of drugs and arrested the defendant. The defendant was later charged with possession of those drugs with intent to deliver.

Following arraignment, the defendant's counsel filed a motion to suppress and submitted the motion to the court for decision based upon the officer's reports only. Counsel did so upon the mistaken belief that if the court found that the officer had a reasonable belief that the driver had committed the infraction, his motive in making the stop was irrelevant. The court denied the motion and a jury later found the defendant guilty of the lesser included offense of possession. On appeal, the defendant argued that trial counsel's failure to argue to the court that the officer had stopped his vehicle on a pretext denied the defendant effective assistance of counsel.

In addressing the defendant's claims, the court first noted that

counsel's failure to present the pretext argument and request an evidentiary hearing fell below the standard of a reasonable prudent attorney. The court stated as follows on this issue:

Whether a vehicle stop is pretextual is a factually nuanced question. The court must consider the totality of the circumstances. The relevant circumstances include the subjective intent of the officer as well as the objective reasonableness of the stop. This necessarily involves an inquiry into the officer's subjective intent. So the necessary inquiry here was: Was the officer's stop solely for the driver's failure to signal, or was the officer's purpose (as he candidly suggests) to look for evidence of another crime? It is not enough for the State to show that there was a traffic violation. The question is whether the traffic violation was the real reason for the stop.

Mr. Meckelson's lawyer walked away from this inquiry:

State v. Meckelson, 133 Wn.App. at 436-437 (citations omitted).

Having found the first prong on a claim of ineffective assistance, the court then went on to address the issue of prejudice. The court stated:

Defense counsel's job here was to represent Mr. Meckelson's interests, and that included challenging the officer's subjective reason for the stop. Sergeant Thoma was never given the opportunity to testify whether he would have stopped this car but for his inchoate and legally unsupportable suspicions. And, even if the officer had testified that he would have stopped the car for failure to signal, it would have been up to the judge to believe or disbelieve that testimony.

The suppression ruling stands and falls on its own merits, based upon the evidence before the suppression judge, not what is later developed at trial. The possession of methamphetamine charge would have been dismissed without the drug evidence. Counsel's ineffective assistance here was, then, prejudicial.

State v. Meckelson, 133 Wn.App. at 438 (citations omitted).

In the case at bar, the evidence presented at trial strongly supported an argument that the Olympia officers neither had probable cause nor a reasonable suspicion based upon objective facts sufficient to justify their stop of the vehicle in which the defendant was passenger or sufficient to justify an arrest. Defense counsel recognized this fact and appropriately filed a written suppression motion seeking to exclude all of the evidence that the police obtained from their illegal actions. However, if the trial court was correct that the defense counsel was untimely in bringing the motion, then to the same extent that counsel's conduct in failing to argue the factual issue critical to the suppression motion in *Meckelson* fell below the standard of a reasonably prudent attorney, so trial counsel's conduct in failing to timely argue the suppression motion in the case at bar also fell below the standard of a reasonably prudent attorney.

Similarly, in the case at bar, as in *Meckelson*, trial counsel's failure also caused prejudice. As was mentioned in the preceding argument, had the motion to suppress been successful, the state's case would have been significantly weakened, given all of the critical evidence the police obtained from their illegal actions. This evidence includes the identity of the defendant, his DNA, and the fact that he had suffered gunshot wounds. Absent this evidence, the state would have been left with a key fob to a car associated with the defendant that might or might not have been left by the

bank robber.

Thus, there is a high likelihood that had counsel timely argued the motion already filed, the jury would have entered verdicts of acquittal. Thus, the defendant has also proved prejudice, and this court should reverse the defendant's convictions and remand for a new trial with instructions to grant a hearing on the defendant's motion to suppress.

However, a close look at the record at the pretrial hearing and the trial also indicates that the defendant was denied effective assistance when his attorney failed to bring a motion to suppress the gun and the knife the police found following their coerced statements by the defendant. Specifically, the facts reveal that the police made a number of searches outside the bank and into at least a two block area looking for evidence, including the gun and knife that the bank teller described. In fact, the police went to the effort of using both a tracking dog as well as a bloodhound. The police found nothing. However, after their coercive interrogation of the defendant while he was in severe pain in the hospital, drugged, and going in and out of consciousness, they were able to get the defendant to tell them where the gun and the knife were hidden. They then immediately went and retrieved the items.

As part of the findings on the CrR 3.5 hearing, the court specifically found as follows:

4.2 The defendant was in custody, having been arrested and

transported to Harborview Hospital, in restraints and under guard the entire time.

4.3 The defendant was under pain medication and unable to make a knowing and voluntary waiver of Miranda Rights.

4.4 The police tactics to get Mr. Lar to talk were effective as Mr. Lar was heavily medicated. The statements made were not voluntary.

4.5 The invocation of Miranda Rights is not subject specific. Once a defendant invokes Miranda, all questioning must stop.

4.6 Mr. Lar invoked his Miranda Rights but continued to be questioned by Centralia Police Officers.

4.7 None of the statements made pre-Miranda were voluntary.

4.8 Once Miranda was invoked all questioning should have stopped. All statements made after the invocation of Miranda were in violation of the defendant's rights.

CP 62.

The suppression of physical evidence obtained as a result of a mere violation of a defendant's *Miranda* rights is not usually a remedy available under either the Fourth or Fifth Amendments. *State v. Spotted Elk*, 109 Wn.App. 253, 34 P.3d 906 (2001). However, when the physical evidence is obtained as a result of coerced statements, suppression is the appropriate remedy. *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985); *State v. Lozano*, 76 Wn.App. 116, 882 P.2d 1191 (1994). In the case at bar, the findings from the CrR 3.5 hearing strongly suggest that the defendant's statements concerning the location of the gun and knife were the

result of non-voluntary, coerced statements. Trial counsel should have filed a motion to suppress these two critical pieces of physical evidence since no legitimate strategic or tactical explanation can be found for the failure to do so. In other words, counsel's failure to bring such a motion fell below the standard of a reasonably prudent attorney.

In addition, in the same manner that the failure to properly seek the suppression of the defendant's identity, DNA, and physical condition caused prejudice, so the failure to seek the suppression of the gun and the knife also caused prejudice because they were also two critical pieces of evidence that strongly supported the testimony of the complaining witness. Thus, in the same manner that the failure to properly argue the written suppression motion denied the defendant effective assistance of counsel, so the failure to bring a motion to suppress the gun and knife also denied the defendant effective assistance of counsel and entitles the defendant to a new trial.

III. THE TRIAL COURT'S REFUSAL TO EXCUSE A JUROR WHO FAILED TO DISCLOSE HIS RELATIONSHIP WITH A STATE'S WITNESS DENIED THE DEFENDANT HIS RIGHT TO A FAIR AND IMPARTIAL JURY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 21, and under the United States Constitution, Sixth Amendment, every person in this state accused of a crime has the right to a "fair trial by a panel of impartial, indifferent jurors."

Irvin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961); *State v. Latham*, 100 Wn.2d 59, 667 P.2d 56 (1983). This right is also guaranteed under RCW 4.44.130, which guarantees the right to exercise peremptory challenges, and RCW 4.44.170, which guarantees the right to make challenges for cause. These rights are also included in CrR 6.4. The Washington Supreme Court states the proposition as follows:

These protections include the right to have a juror excused if the trial judge is of the opinion that grounds for challenge are present. CrR 6.4(c)(1). A challenge for cause may be made for either implied or actual bias. RCW 4.44.170. Actual bias is defined as the existence of a state of mind which satisfied the judge that the juror “cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2). Implied bias, on the other hand, arises when a juror has some relationship with either party; with the case itself; or has served as a juror in the same or a related action. RCW 4.44.180.

State v. Latham, 100 Wn.2d at 63.

The decision whether or not to grant a challenge for cause lies within the sound discretion of the trial court and will only be reversed upon showing a manifest abuse of that discretion. *State v. Gilchrist*, 91 Wn.2d 603, 590 P.2d 809 (1979). However, if a juror should have been excused for cause and ends up sitting on the jury because the defendant had exhausted all available peremptories, then the remedy is reversal. *Miles v. F.E.R.M. Enters., Inc.*, 29 Wn.App. 61, 627 P.2d 564 (1981).

By contrast, the improper denial of peremptory challenge is presumed

prejudicial and entitles a defendant to a new trial if that juror remained on the panel. *State v. Vreen*, 143 Wn.2d 923, 931, 26 P.3d 236 (2001) (“Any impairment of a party’s right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply”). The decision in *State v. Bird*, 136 Wn.App. 127, 148 P.3d 1058 (2006), illustrates this principle.

In *State v. Bird, supra*, the defendant went to a jury trial on a charge of first degree assault. At one point during *voir dire*, the defendant accepted the panel as currently constituted. The state then exercised another peremptory, as did the defendant. The trial court then ruled, over defendant’s argument to the contrary, that the defendant’s prior acceptance of the panel functioned as the exercise of a peremptory, thus exhausting all of his available challenges. The defendant was ultimately convicted, and appealed, arguing that the court had erred when it refused to allow him to exercise his last peremptory challenge.

In addressing the defendant’s claims, the state admitted that the trial court had erred when it denied the defendant the exercise of his last peremptory, and that such an error is presumed prejudicial. However, the state argued that since the defendant had not specifically objected to the denial, he had waived the issue for appeal. The court of appeals rejected this argument, noting that defendant’s counsel had presented his argument that his

prior acceptance did not constitute the exercise of a peremptory challenge in sufficient time to allow the court to remedy the error. As a result, the court reversed the defendant's conviction, holding as follows:

Bird raised the trial court's error at the conclusion of voir dire and in his motion for a new trial. The objection was timely made and allowed the trial court to correct its error by seating a new venire for jury selection after each party exercised or clearly waived its seven peremptory challenges. Thus, the issue was preserved for appeal.

As the State concedes and, as our Supreme Court has held: "Any impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply." *Vreen*, 143 Wash.2d at 931, 26 P.3d 236 (quoting *State v. Evans*, 100 Wn.App. 757, 774, 998 P.2d 373 (2000)).

Here, the trial court admitted that it erroneously denied Bird his final peremptory challenge. Due to this error, the objectionable juror sat on the jury that convicted Bird. Accordingly, the trial court's error mandates reversal for a new trial without a showing of prejudice.

State v. Bird, 136 Wn.2d at 134 (come citations omitted).

In the case at bar, the defendant had two peremptory challenges at the point in time that he initially accepted the jury panel, which included juror No. 32, Casey French. However, as counsel later argued, his acceptance of this juror was in reliance upon his statements that he was unacquainted with the persons the state had listed as witnesses in the case. In fact, this claim was in error. During a break on the second day of trial, the defendant's attorney saw Mr. French greet a state's witness by the name of Joey McKnight. After defense counsel informed the prosecutor and the court as

to what he had seen, the court called Mr. French in for questioning. Mr. French then informed the court that he was socially acquainted with one of the state's witnesses, but did not recognize his last name when the judge read it during *voir dire*. Upon hearing this response, defendant's counsel immediately moved to strike Mr. French from the jury, noting that (1) at the point the defense accepted Mr. French on the jury the defense still had two peremptory challenges remaining, and (2) had Mr. French revealed his connection to Mr. McKnight, the defense would have exercised a peremptory challenge to exclude him as it had with a number of other potential jurors who had connections to state's witnesses. In spite of the fact that there were still two alternative jurors sitting with the jury, the trial court denied the defendant's motion.

In this case, the state may argue that the trial court did not err because the defendant did not timely exercise a peremptory challenge to exclude Mr. French from the jury. However, this argument must fail under the unique facts of this case because the defense attempted to exercise an available peremptory immediately upon learning that the juror had incorrectly stated that he was not acquainted with any of the state's witnesses. Although this happened after a day of testimony, the defendant's exercise of this peremptory would not have caused any delay to the proceedings at all because the court had two alternate jurors sitting with the jury. The defendant was

not bringing a motion for a mistrial. Rather, the defendant simply moved to exercise a peremptory he had been denied by the juror's incorrect answer. Either one of these alternates could have taken the place of Mr. French on the jury, and the court would still have had another alternate juror available as insurance. Thus, in the same manner in *Bird* that the denial of an available peremptory challenge entitled the defendant to a new trial, so in the case at bar, the denial of the defendant's attempted peremptory challenge also entitles the defendant to a new trial.

IV. THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT TO LIFE IN PRISON UNDER THE PERSISTENT OFFENDER ACT BECAUSE THE STATE FAILED TO PRESENT ADMISSIBLE EVIDENCE THAT THE DEFENDANT HAD TWO PRIOR QUALIFYING CONVICTIONS FOR VIOLENT OFFENSES.

In the case at bar, the state argued and the court agreed that the defendant should be sentenced to life in prison without the possibility of release on each conviction under the Persistent Offender Accountability Act found in RCW 9.94A.570. This provision states as follows in part:

Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release

. . . .

RCW 9.94A.570.

Under RCW 9.94A.030(31)(a), the definition of "persistent offender" includes the following elements:

(31) “Persistent offender” is an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under > RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or

RCW 9.94A.030(31)(a).

Under RCW 9.94A.030(27)(a), the term “most serious offense,” is defined to include “[a]ny felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony.” In the case at bar, the defendant was convicted of two class A felonies, and one attempted to commit a class A felony. Thus, there is no question that the defendant’s current convictions qualify as “most serious offenses,” for the purpose of the RCW 9.94A.570.

In this case, the state claimed that the defendant had four prior federal convictions for bank robbery, with the second two having been committed after the defendant had been sentenced on the first two. As part of this appeal, the defendant does not dispute the state’s claim that these convictions all qualify as “most serious offenses” under RCW 9.94A.030(31)(a).

However, what the defendant does dispute, is the argument that the state presented substantial evidence to prove that the defendant had the alleged prior convictions. The following sets out this argument.

At the sentencing hearing in the case at bar, the state called Jennifer Tien as its only witness on the issue of the defendant's prior convictions. RP 5/26/10 3-7. Ms Tien testified that she is a federal probation officer and that since 2008 she has supervised the defendant on old federal convictions. During the sentencing hearing, and over defense objection, the court admitted copies of two federal judgment and sentences showing that on November 8, 1985, a "Michael Anthony Lar" was sentenced in federal court following his plea to two counts of armed bank robbery, and that on January 31, 1997, a "Michael Anthony Lar" was sentenced in federal court on one count of armed bank robbery and one count of bank robbery. Exhibits 2-3 from 5/26/10 sentencing hearing. While the person listed in these judgments had the same name as the defendant, the state did not offer any fingerprint comparison evidence to show that the defendant was the same person, and the state did not call any witnesses who were present at either of the two prior sentencing hearings who could identify the defendant as the person listed in the exhibits. RP 5/26/10 1-14. As a review of the decision in *State v. Hunter*, 29 Wn.App. 218, 627 P.2d 1339 (1981), explains, this evidence was insufficient to prove that the defendant was the person named in the prior convictions.

In *State v. Hunter, supra*, the court addressed the issue of what constitutes substantial evidence on this issue of identity. In this case, the state charged the defendant Dallas E. Hunter with attempted escape, alleging that he had tried to leave the Cowlitz County Jail where he was being incarcerated pursuant to a felony conviction. In order to prove that the defendant was being held “pursuant to a felony conviction,” as was required under the statute, the state successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named “Dallas E. Hunter” as the defendant. Following conviction, the defendant appealed, arguing in part that the trial court erred when it admitted the judgments because the state failed to present evidence that he was the person identified therein.

In addressing this argument, the court first noted that when the fact of a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant’s name alone is neither competent evidence to go to the jury, nor is it sufficient to prove the prior conviction. The court stated:

Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Harkness*, 1 Wn.2d 530, 96 P.2d 460 (1939); *State v. Brezillac*, 19 Wn.App. 11, 573 P.2d 1343 (1978). See *State v. Clark*, 18 Wn.App. 831, 832 n.1, 572 P.2d 734 (1977).

State v. Hunter, 29 Wn.App at 221.

In *Hunter*, the state had also presented the evidence of a Probation Officer from the Department of Corrections who had revoked the defendant from his work release program, had personal knowledge of the fact of the defendant's felony conviction, and had him incarcerated in the Cowlitz County jail pending his return to prison pursuant to his Lewis County Felony Convictions. Based upon this "independent" evidence to prove that the defendant was the person named in the judgments, the Court of Appeals found no error in admitting the documents. The court stated:

We hold that [the Probation Officer's] testimony was sufficient independent evidence to establish a prima facie case that defendant was the same Dallas E. Hunter as named in the certified judgments and sentences. After the State introduced this evidence, the burden was on defendant to come forward with evidence casting doubt on the identity of the person named in the documents. *State v. Brezillac, supra*.

State v. Hunter, 29 Wn.App. At 221-222.

By contrast, in the case at bar, the probation officer the state called as a witness had no personal knowledge that the defendant was the person named in the two judgments. She had not been present during either case, and had only been supervising the defendant for a relatively short period of time. Thus, in the case at bar, the trial court erred when it sentenced the defendant to three terms of life in prison without the possibility of release because the state failed to meet its burden of proving the fact of the

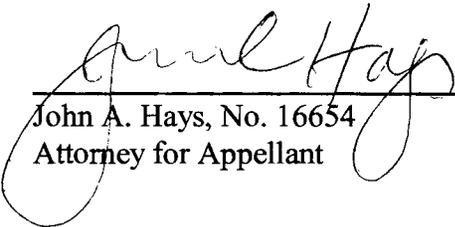
defendant's prior qualifying convictions. As a result, this court should vacate the defendant's sentences and remand with instructions to resentence him within the standard range.

CONCLUSION

This court should reverse the defendant's convictions and remand for a new trial based upon (1) the trial court's failure to consider his suppression motion, (2) trial counsel's failure to properly bring a suppression motion, (3) the trial court's failure to allow him to exercise an available peremptory challenge, and (4) the trial court's failure to sustain the defendant's objection to inadmissible hearsay. In the alternative, this court should vacate the defendant's sentences under the persistent offender act and remand with instructions to sentence within the standard range.

DATED this 30th day of December, 2010.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CrR 3.6
Suppression Hearings – Duty of Court

(a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

CrR 6.4
Challenges

(a) Challenges to the Entire Panel. Challenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law for their selection.

(b) Voir Dire. A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

(c) Challenges for Cause.

(1) If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause.

(2) RCW 4.44.150 through 4.44.200 shall govern challenges for

cause.

(d) Exceptions to Challenge.

(1) Determination. The challenge may be excepted to by the adverse party for insufficiency and, if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party and, if so, the court shall try the issue and determine the law and the facts.

(2) Trial of Challenge. Upon trial of a challenge, the Rules of Evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or if found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; but if not so determined or found otherwise, it shall be disallowed.

(e) Peremptory Challenges.

(1) Peremptory Challenges Defined. A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror. In prosecutions for capital offenses the defense and the state may challenge peremptorily 12 jurors each; in prosecution for offenses punishable by imprisonment in the state Department of Corrections 6 jurors each; in all other prosecutions, 3 jurors each. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the number of challenges provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant.

(2) Peremptory Challenges – How Taken. After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called.

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

**STATE OF WASHINGTON,
Respondent,**

APPEAL NO: 40801-5-II

vs.

AFFIRMATION OF SERVICE

**MICHAEL ANTHONY LAR,
Appellant.**

**STATE OF WASHINGTON)
) vs.
COUNTY OF LEWIS)**

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **December 30, 2010**, I personally placed in the mail the following documents

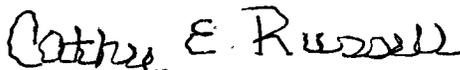
- 1. BRIEF OF APPELLANT
- 2.. AFFIRMATION OF SERVICE

to the following:

**MICHAEL GOLDEN
LEWIS COUNTY PROS. ATTY
345 W. MAIN ST.
CHEHALIS, WA 98532**

**MICHAEL ANTHONY LAR - #263880
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE.
WALLA WALLA, WA 99362**

Dated this 30TH day of **DECEMBER, 2010** at **LONGVIEW, Washington.**



**CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS**