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DIVISION II

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STATE OF WASHINGTON
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No. 41185-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jessica Young,

Appellant.

Clallam County Superior Court Cause No. 10-1-00035-5

The Honorable Judge George Wood

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence and statements obtained in violation of Ms. Young's Fourth Amendment rights.
2. The trial court erred by admitting evidence and statements obtained in violation of Ms. Young's right to privacy under Wash. Const. Article I, Section 7.
3. The trial court erred by denying Ms. Young's motion to suppress evidence.
4. Ms. Young was unlawfully seized in the absence of a reasonable suspicion based on specific articulable facts that she was engaged in criminal activity.
5. The police violated Ms. Young's right to privacy and her right to be free from unreasonable searches and seizures by ignoring her choice to walk away from the contact, by two officers seeking her out and cornering her, and by asking for additional information.
6. The search of Ms. Young's purse was not properly incident to arrest because she was handcuffed and under guard at the time the officers searched her purse.
7. The trial court erred by entering Finding of Fact No. 6.
8. The trial court erred by entering Finding of Fact No. 11.
9. The trial court erred by entering Finding of Fact No. 12.
10. The trial court erred by entering Finding of Fact No. 16.
11. The trial court erred by entering Finding of Fact No. 17.
12. The trial court erred by entering the findings and conclusions contained within the section captioned "Initial Contacts."
13. The trial court erred by entering the findings and conclusions contained within the section captioned "Restroom."

14. The trial court erred by entering the findings contained within the section captioned "Search of Purse."
15. The trial court failed to properly determine Ms. Young's criminal history and offender score.
16. The trial court erred by sentencing Ms. Young with an offender score of three.
17. The trial court erred by adopting Finding 2.2 of the Judgment and Sentence, which purported to list Ms. Young's criminal history.
18. The 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A seizure not amounting to arrest is unlawful unless based on a reasonable suspicion that the person seized is engaged in criminal activity. Here, the officer lacked any suspicion that Ms. Young was engaged in criminal activity. Did her seizure violate the Fourth Amendment and Wash. Const. Article I, Section 7?
2. An officer may not search a purse incident to arrest unless there is no time to obtain a warrant and there is some danger that the suspect will grab a weapon or destroy evidence. Here, the officers searched Ms. Young's purse after she had been handcuffed, at a time when they could have sought a warrant without risk to themselves or to the evidence, and in the absence of any actual fear that Ms. Young might try to grab a weapon or destroy evidence. Did the warrantless search violate Ms. Young's rights under the Fourth Amendment and Wash. Const. Article I, Section 7?
3. At sentencing, the prosecution must prove criminal history by a preponderance of the evidence. Here, the prosecutor neither alleged nor proved Ms. Young's criminal history, but the court sentenced her with an offender score of three. Must the

sentence be vacated and the case remanded for resentencing with an offender score of zero?

4. Under the Fourteenth Amendment's due process clause, the state is constitutionally required to prove criminal history by a preponderance of the evidence. The 2008 amendments to the SRA permit the court to use a prosecutor's bare assertions as prima facie evidence of criminal history, and allow the court to draw adverse inferences from the offender's silence pending sentencing. Do the 2008 amendments to the SRA violate an offender's Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jessica Young was in Safeway in Sequim when Officer Larson saw her. RP (6/3/10) 18. He thought she became nervous when she saw him. Ms. Young left the store without making any purchases. Officer Larson approached her as she walked out of the store. RP (6/3/10) 18, 22. He asked her for identification, and Ms. Young told him she did not have any with her. RP (6/3/10) 48, 72. He then asked her name and date of birth, and Ms. Young gave the name and asked him if she had to give the DOB. Larsen responded that she did not. RP (6/3/10) 18, 49. He asked her where she was going, what she was doing, and told her that most people do not go into the store and leave without buying anything. RP (6/3/10) 50. She asked if she could leave, and when Larsen responded in the affirmative, Ms. Young walked away. RP (6/3/10) 18, 50, 71-72.

Larsen had never seen Ms. Young before and had no information about her. RP (6/3/10) 21. He suspected that she might have been shoplifting, but she had taken nothing that he knew of. RP (6/3/10) 22. He ran a "local check" on her and it did not return any warrants. RP (6/3/10) 51.

Ms. Young walked toward a closed laundromat, and went behind it. RP (6/3/10) 18. She was leaning on the wall and talking on the phone

when Officer Wright approached her, with Officer Larsen not far behind. RP (6/3/10) 52, 58-59, 72. Each police car was parked behind the laundromat, and both officers got out and talked with Ms. Young, still on the phone. RP (6/3/10) 18-20.

Ms. Young was trying to get to the mobile home park behind the businesses, and there was a chain link fence in the back of the lot. RP (6/3/10) 58, 72. Wright was there first, and he asked Ms. Young why she was there, because the business was closed. RP (6/3/10) 63, 72-73. Ms. Young said that she was on the phone and felt harassed by the officers, and that she was trying to get to the mobile home park. RP (6/3/10) 63, 72-73. Wright told her to wait for Officer Larsen, as he wanted to talk to her. RP (6/3/10) 72-73.

Larsen arrived and asked Ms. Young for the last 4 digits of her Social Security number, and Ms. Young gave him four numbers.¹ RP (6/3/10) 21, 24. He told her that he thought she was lying about her name, being evasive, and that he wanted to verify who she was. RP (6/3/10) 21. According to Officer Larson, “for all I know” she was planning to break into the business. RP (6/3/10) 23. The officers stood five feet away from her, at 45 degree angles. RP (6/3/10) 60.

¹ The court’s written findings indicate that the officer asked for and received the last two digits of the number. This seems to be a typographical error. Findings of Fact, Memorandum Opinion and Order Re: Motion to Suppress, p. 2, Supp. CP.

Ms. Young then walked toward the Sequim West Motor Inn, and the officers lost sight of her. RP (6/3/10) 25, 37. At this point, dispatch indicated that Jessica Palombo-Young had a warrant in Fife, the result of the statewide check that Larsen had requested. RP (6/3/10) 25, 51-52; Findings of Fact, Memorandum Opinion and Order re: Motion to Suppress, p. 2, Supp. CP.

Larsen asked the hotel proprietor if he had seen a woman, and was told that a woman had gone over toward a bar called “Mugs and Jugs” across the street. RP (6/3/10) 10-11. It was after 10:00pm. RP (6/3/10) 8, 13.

Officer Wright had already gone in the bar, and asked the bartender if he had seen a woman. The bartender responded that he had, made a “long wavy hair” gesture, and said that a woman was in the bathroom.² RP (6/3/10) 61. Larsen arrived, and the officers opened the women’s bathroom door. RP (6/3/10) 30.

The room was small, with one toilet stall that had a door that latched shut. RP (6/3/10) 31, 36. The room also held a sink, and a window area that had bars over it. RP (6/3/10) 32-33. The officers could

² The court’s findings refer to this “long wavy hair:” gesture as a “brief description”, to which Appellant has assigned error. Findings of Fact, Memorandum Opinion and Order re: Motion to Suppress, p. 2, Supp. CP.

see a person's shoes and shins under the stall door. RP (6/3/10) 9, 34.

They called Ms. Young's name and said they were there to arrest her. RP (6/3/10) 9. They were not sure it was her in the bathroom. RP (6/3/10) 34.

Ms. Young was in the stall part of the bathroom, with the door closed. RP (6/ 3/10) 9, 77. She opened the door of the stall, and Officers Larson and Wright arrested Ms. Young. RP (6/3/10) 9-10, 14. As they came out of the bathroom, the officers shoved Ms. Young, wearing cuffs, against the bar, since they perceived that she had tried to pull away from them. RP (6/3/10) 10.

Before they put Ms. Young into the back of the patrol car, the officers searched her purse. RP (6/3/10) 16, 40. Ms. Young had set her purse onto the floor inside the bathroom. RP (6/3/10) 79. They found needles in the purse, later determined to contain methamphetamine. RP (6/3/10) 43; Order of Guilt and Findings.

Ms. Young moved to suppress the evidence. Motion to Suppress, Amended State's Response to Defendant's Motion to Suppress, Supp. CP.

At the suppression hearing, Officer Larsen characterized his search of the purse as an inventory search, though he acknowledged that he did not make notes about the contents of the purse and that the jail would later do another inventory search and make notes. RP (6/3/10) 45-46.

Ms. Young said that at the Safeway, Larsen asked her if he could look into her bag to see if she had taken anything, and she opened it and showed him. RP (6/3/10) 71. Larsen denied this. RP (6/3/10) 90. Ms. Young also testified that when she was behind the laundromat, and Wright told her to wait for Larsen, she took it as a command. RP 96/3/10) 72-73. She stated that Larsen told her she had to give him the last four digits of her social security number. RP (6/3/10) 73. She also said that the officers reached into the stall to arrest her. RP (6/3/10) 78.

Officer Wright testified that he opened the bathroom door and stood in the threshold. RP (6/3/10) 57. Officer Larsen denied that either of them entered the room. RP (6/3/10) 35. Larsen acknowledged that the officers were not in hot pursuit of Ms. Young, and there was no back door to the bathroom she could have left through. RP (6/3/10) 35.

Neither of the officers remembered bringing Ms. Young's purse outside. They both acknowledged that it would not be appropriate for them to have allowed Ms. Young to bring it out. RP (6/3/10) 39, 44, 66.

The court entered a written order and opinion, denying Ms. Young's suppression motion. Findings of Fact, Memorandum Opinion and Order Re: Motion to Suppress. Supp. CP. The court found the initial contacts reasonable, the entry into the restroom reasonable, and the purse

search reasonable. Findings of Fact, Memorandum Opinion and Order Re: Motion to Suppress, Supp. CP.

The court held a stipulated trial, finding Ms. Young guilty as charged. Order of Guilt and Findings, Supp. CP; RP (7/21/10) 3-12.

At sentencing, neither party listed any prior convictions for Ms. Young in the courtroom, nor in any presentencing filings.³ RP (8/11/10) 2-6. Nonetheless, the court found three prior felonies. CP 6.

Ms. Young timely appealed. CP 5.

ARGUMENT

I. THE WARRANTLESS SEARCH AND SEIZURE VIOLATED MS. YOUNG'S RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 7 AND HER FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). In the absence of a finding on a factual issue, the appellate court presumes

³ During impeachment at the CrR 3.6 hearing, the state asked Ms. Young about her criminal history: Ms. Young did not know if she had been convicted of criminal impersonation in 2009, she thought she had been convicted of forgery on 2009, and she knew she had been convicted of theft in the second degree in 2009. RP (6/3/10) 85-86.

that the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wash.App. 259, 265, 39 P.3d 1010 (2002). The validity of a warrantless search is reviewed *de novo*. *Gatewood*, at 539.

B. Evidence seized without a search warrant is generally inadmissible in a criminal trial.

Under the Fourth Amendment to the U.S. Constitution,

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 or things to be seized.

U.S. Const. Amend. IV.⁴ Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.⁵ *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999).

⁴ The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

⁵ Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135

Under both provisions, searches and seizures conducted without authority of a search warrant ““are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions.”” *Arizona v. Gant*, ___ U.S. ___, ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wash.2d 889, 894, 168 P.3d 1265 (2007). The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

One exception to the search warrant requirement is where the search is performed incident to arrest. The rationale behind the exception is that an arrest triggers a concern not only for the officer’s safety, but also for the preservation of potentially destructible evidence within the

Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

arrestee's control.⁶ *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

A lawful custodial arrest is a constitutional prerequisite to any search incident to arrest. *Id.* An arrest is unlawful when it is based on information unlawfully obtained: "If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government's illegality." *State v. Harrington*, 167 Wash.2d 656, 664, 222 P.3d 92 (2009); *see also, e.g., State v. Allen*, 138 Wash.App. 463, 471-472, 157 P.3d 893 (2007). Where the arrest is derived (directly or indirectly) from a violation of the Fourth Amendment or Article I, Section 7, the seized items must be suppressed as "fruits of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *State v. Glossbrener*, 146 Wash.2d 670, 685, 49 P.3d 128 (2002).

C. Ms. Young was unlawfully seized when officers asked for her name and date of birth, asked for her identification, disregarded her efforts to avoid contact, cornered her, confronted her with an accusation of lying, and asked for her social security number.

Both the Fourth Amendment and Article I, Section 7 apply to brief detentions. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct.

⁶ The search incident to arrest exception to the warrant requirement is narrower under Article I, Section 7 than under the Fourth Amendment. *State v. Moore*, 161 Wash.2d 880, 885, 169 P.3d 469 (2007).

2574, 45 L.Ed.2d (1975), *State v. Martinez*, 135 Wash.App. 174, 180, 143 P.3d 855 (2006). A seizure occurs following an officer's display of authority whenever a reasonable person would not feel free to leave or otherwise disregard the officer's request. *Harrington*, at 664; *State v. Beito*, 147 Wash.App. 504, 509, 195 P.3d 1023 (2008). To justify a warrantless seizure, the police must be able to point to specific and articulable facts giving rise to an objectively reasonable belief that the person seized is engaged in criminal activity or is armed and presently dangerous. *State v. Xiong*, 164 Wash.2d 506, 514, 191 P.3d 1278 (2008); *State v. Allen*, at 470.

In this case, the officers' persistent efforts to identify Ms. Young changed what might have been a mere social contact into a seizure. After telling Ms. Young that she was free to leave, the officer nonetheless called for backup, cornered her behind a closed business (using two patrol cars), and asked for additional information. RP (6/3/10) 18, 19-21, 23, 48-51, 59-60, 63-64, 71-74. Under these circumstances, Ms. Young was seized at the time she gave the officers the last four numbers of her social security number (in reverse order). This information allowed the officers to discover the Fife warrant, which provided the basis for the arrest. RP (6/3/10) 51-52.

The officers did not have a reasonable belief that Ms. Young was engaged in criminal activity; nor did they have reason to suspect that she was armed and dangerous.⁷ Instead, Officer Larsen claimed that the “totality of everything” seemed suspicious. RP (6/3/10) 21. Specifically, he thought she might be shoplifting, but did not have any specific, articulable reason to suspect her. RP (6/3/10) 21-22. He found it suspicious that she left Safeway without buying anything, and believed she left because she saw him. RP (6/3/10) 21-22. This amounts to no more than a vague hunch; furthermore, even assuming she left because she saw him, citizens are entitled to avoid the police and need not explain their reasons for doing so.

Larsen thought it strange that Ms. Young did not carry identification. RP (6/3/10) 22. However, in America people are permitted to leave their houses without identifying papers.

Larsen also could not understand why Ms. Young would choose to stand behind a closed business while speaking on her cell phone. RP (6/3/10) 23. But no evidence was provided rebutting her testimony that she was trying to make her way to the adjoining trailer park. RP (6/3/10) 72-73, 74, 88-96. Nor was there testimony that people never went to that

⁷ In fact, Officer Larsen explicitly testified that Ms. Young was not breaking any laws when he first approached her. RP (6/3/10) 22.

location without some nefarious purpose. Finally, her statement on the phone—that she felt like she was being harassed by the police—provided a more than sufficient explanation for her decision to visit the back of the business. RP(6/3/10) 21, 64.

The officers' "facts" did not provide a reasonable suspicion to detain Ms. Young. *See, e.g., Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) (loitering in an area known for drug trafficking insufficient for a reasonable belief that person was engaged in criminal activity.) Accordingly, the seizure violated her rights under the Fourth Amendment and under Article I, Section 7. Her conviction must be reversed, the evidence suppressed, and her case dismissed with prejudice. *Harrington*, at 664.

D. The search of Ms. Young's purse was not properly incident to her arrest.

The justification for the search-incident-to-arrest exception is that the search "must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest." *State v. Valdez*, 167 Wash.2d 761, 777, 224 P.3d 751 (2009). The justification vanishes, however, when the search "can be delayed to obtain a warrant without running afoul of those concerns;" under such circumstances, "the warrant must be obtained." *Id.*

In this case, the officers had already separated Ms. Young from her purse when they went through it and found contraband. She was handcuffed, and under guard by another officer. RP (6/3/10) 16-17, 40, 44, 65. There was no danger that she would seize a weapon or seek to destroy evidence. Furthermore, the officers did not claim any actual concern that she might grab the purse after she'd been handcuffed.

Because Ms. Young was handcuffed and under guard at the time the officers went through her purse, the search cannot be properly justified as incident to her arrest. *Valdez, at 777. But see State v. Johnson*, 155 Wash.App. 270, 229 P.3d 824 (2010) (distinguishing vehicle searches from all other searches incident to arrest).

In this case, nothing prevented the officers from obtaining a search warrant. Accordingly, the search violated Ms. Young's rights under the Fourth Amendment and Article I, Section 7. Her conviction must be reversed, the evidence suppressed, and her case dismissed with prejudice. *Valdez, supra.*

II. THE SENTENCING PROCEEDING VIOLATED MS. YOUNG'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *In re*

Detention of Post, 145 Wash.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)).

The state does not meet its burden to establish an offender's criminal history through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wash.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." *Id.*, at 482. This rule is constitutionally based, and thus cannot be altered by statute; as the Supreme Court pointed out, requiring the offender to object when the state presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." *Id.*, at 482.

In 2008, the legislature amended RCW 9.94A.500 and RCW 9.94A.530. *See* Laws of 2008, Chapter 231, Section 2. Under RCW 9.94A.500(1), "[a] criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500(1). Furthermore, the sentencing court may rely on information that is "acknowledged in a trial or at the time of sentencing," and

“[a]cknowledgment includes... not objecting to criminal history presented at the time of sentencing.” RCW 9.94A.530(2).⁸

These provisions result in the “unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482. By requiring an offender to object to a prosecutor’s allegations, RCW 9.94A.500(1) and RCW 9.94A.530(2) violate the Fifth and Fourteenth Amendments to the U.S. Constitution. *Ford*, *supra*.

Here, the prosecutor failed to allege any criminal history at sentencing, and did not present any evidence of criminal history. Under these circumstances, Ms. Young should have been sentenced with an offender score of zero. Instead, however, the Judgment and Sentence reflects four prior convictions, and the court sentenced Ms. Young with an offender score of three.

Absent an acknowledgment or some proof of prior history at trial or sentencing, the sentence was entered in violation of Ms. Young’s Fourteenth Amendment right to due process. *Ford*, *supra*. Accordingly, the sentence must be vacated and the case remanded for sentencing with an offender score of zero. *Id.*

⁸ Under the prior version of the statute, a Statement of Prosecuting Attorney was insufficient to establish an offender’s criminal history. *State v. Mendoza*, 165 Wash.2d 913, 205 P.3d 113 (2009).

CONCLUSION

For the foregoing reasons, the conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. In the alternative, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on February 28, 2011.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY: DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Jessica Young
717 W. 6th Street
Port Angeles, WA 98362

and to:

Clallam County Prosecuting Attorney
223 E. 4th Street, Suite 11
Port Angeles, WA 98362-0149

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 28, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 28, 2011.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant