

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

STATE OF WASHINGTON,	)	
Respondent,	)	WSC No. _____
	)	COA No. 58475-1-II
vs.	)	
	)	RAP 9.6(a) MOTION
JODI SUE LINDQUIST,	)	TO SUPPLEMENT
Petitioner.	)	RECORD
_____	)	

I. IDENTITY OF MOVING PARTY

Petitioner Jodi Sue Lindquist, by and through counsel of record, Nielsen Koch & Grannis, PLLC, requests the relief stated in part II.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 1.2(a), RAP 7.3, RAP 9.6(a), and RAP 9.10, Ms. Lindquist requests that this Court accept for filing her second supplemental designation of clerk's papers, designating for the appellate record Sub. No. 122, "Order Appointing Independent Defense Expert to Evaluate Pursuant to RCW 10.77 and Directing Payment," signed by the trial court

and filed on April 6, 2023 (also attached as an appendix for this Court's reference). A second supplemental designation of clerk's papers and petition for review are being filed contemporaneously with this motion.

### III. RELEVANT FACTS

1. This case involves Ms. Lindquist's direct appeal from her Grays Harbor County conviction for second degree assault. Ms. Lindquist's first trial commenced on December 14, 2022 and resulted in a mistrial due to Ms. Lindquist's outbursts during the State's first witness. 12/14/22 RP 130-32. The trial court found Ms. Lindquist guilty at a subsequent bench trial in July of 2023. 7/18/23 RP 139- 40. Ms. Lindquist's judgment and sentence was entered on July 18, 2023. CP 107.

2. Repeated concerns about Ms. Lindquist's competency arose during the trial proceedings and, ultimately, three different competency evaluations were conducted. The first two found Ms. Lindquist competent, but the third, done by Dr. Kenneth Muscatel, expressed "very significant concerns"

about Ms. Lindquist's competency and capacity to assist in her own defense. CP 195-200 (first evaluation, October 27, 2022), 295-302 (second evaluation, January 18, 2023), CP 308-33 (third evaluation, April 21, 2023).

3. Nielsen Koch & Grannis (NKG), PLLC, was appointed on August 9, 2023 to represent Ms. Lindquist on appeal. NKG filed an initial designation of clerk's papers on September 18, 2023. The initial designation of clerk's papers did not designate every document in the court file, consistent with RAP 9.6(a), which "encourage[s]" each party "to designate only clerk's papers and exhibits needed to review the issues presented to the appellate court."

4. More specifically, the original designation did not include Sub. No. 122, Order Appointing Independent Defense Expert to Evaluate Pursuant to RCW 10.77 and Directing Payment, filed in the trial court on April 6, 2023. This two-page order, signed by the trial court, found an issue regarding Ms. Lindquist's "competency to stand trial and, possibly, the

Defendant's ability to distinguish right from wrong at the time of the offense." Appendix, 1. The order further appointed Dr. Muscatel to perform at public expense an independent competency evaluation of Ms. Lindquist, "pursuant to the provisions of RCW 10.77." Appendix, 1-2. In ACORDS, the docket entry for this order reads: "ORDER APPOINTING EXPERT FOR EXAM," done by Judge David Mistachkin on April 6, 2023.

5. Kevin March, a former attorney at NKG, was originally assigned to Ms. Lindquist's appeal. Mr. March prepared an opening brief on Ms. Lindquist's behalf, filing it on July 16, 2024. Mr. March challenged, among other things, the trial court's finding that Ms. Lindquist was competent to proceed to her second trial that resulted in conviction, despite Dr. Muscatel's expressed reservations in the third competency evaluation. Br. of Appellant, 60-71. Mr. March emphasized the constitutional and statutory rights of the accused not to be tried while incompetent. Br. of Appellant, 60-62.

6. At the time of filing the opening brief, Mr. March also filed a supplemental designation of clerk's papers. This supplemental designation included the three sealed competency evaluations, as well as their corresponding sealing orders. The supplemental designation also included numerous letters Ms. Lindquist sent to the trial court. The supplemental designation did not, however, include Sub. No. 122, the order appointing an independent defense expert to evaluate Ms. Lindquist pursuant to chapter 10.77 RCW.

7. The State filed its response brief on September 16, 2024. The State argued Ms. Lindquist "fail[ed] to prove on appeal that she was not competent," asserting the three competency evaluations "found that she understood the risks of her actions and consequences of her behavior." Br. of Resp't, 25-26. But the State did not contest the adequacy of the record before the court of appeals, and nowhere argued the third competency evaluation done by Dr. Muscatel was not ordered pursuant to chapter 10.77 RCW. In fact, the State acknowledged,

“In March 2023, Defendant’s new defense counsel *received court approval* to conduct a third, independent competency examination.” Br. of Resp’t, 15 (emphasis added) (citing CP 304-07, defense motion for continuance, and 4/10/23 RP 158).

8. Mr. March filed a reply brief on Ms. Lindquist’s behalf on September 30, 2024. Mr. March did not file another supplemental designation of clerk’s papers.

9. Mr. March resigned from NKG in October of 2024. The partners at NKG reassigned Mr. March’s active cases to the remaining attorneys at NKG. Undersigned counsel, Mary Swift, was informed by the partners on November 11, 2025 that she had been assigned Ms. Lindquist’s appeal. Ms. Swift was provided with the appellate briefing, as well as Ms. Lindquist’s court file.

10. At the time of reassignment, Ms. Swift checked the case status on ACORDS. The case had already been deemed ready on September 30, 2024, and was screened without oral argument on October 1, 2024. Given the case status, Ms. Swift did not at that point conduct an independent review of the record.

11. On December 18, 2024, the court of appeals sent the parties a non-oral argument setting letter indicating the case would be considered on March 17, 2025. At no point did the court of appeals ask the parties to transmit any additional clerk's papers to the court pursuant to RAP 9.10.

12. The court of appeals issued an unpublished opinion on April 8, 2025. The court rejected Ms. Lindquist's competency challenge because it appeared from the record before the court that "the Dr. Muscatel evaluation was *not* the product of an order under RCW 10.77.060 from the trial court (unlike the two previous WSH evaluations, our record includes no order under RCW 10.77.060 and no order staying the proceeding), but it was merely an independent evaluation secured by defense counsel." Opinion, 15. The court of appeals therefore concluded, "Without the evaluation being a product of an order under RCW 10.77.060, there simply was no cause or requirement for the trial court to make any decision about it." Opinion, 16.

13. Ms. Swift was on a preplanned family vacation April 8-15, 2025 when she received the court of appeals' opinion. Despite being on vacation, Ms. Swift briefly reviewed the court of appeals' opinion, along with the parties' briefing. Ms. Swift noted the court of appeals' holding about there being no chapter 10.77 RCW order authorizing Dr. Muscatel's evaluation. In all candor to the court, Ms. Swift did not think to doubt the court of appeals' conclusion that no such order existed and, therefore, did not at that time consider reviewing the court file to verify there was no such order. This was not a strategic choice.

14. Upon returning from her vacation on April 16, Ms. Swift was extremely preoccupied with several pressing matters, including a very overdue and very complex opening brief in State v. Dean, No. 86607-9-I (filed 4/22/25); reply briefs in State v. Ingalsbe, No. 59514-1-II (filed 4/24/25), and State v. Reinholdt, No. 59369-6-II (filed 5/5/25); petitions for review in State v. Bellerouche, No. 84887-9-I (filed 4/25/25), and State v. Lewis, No. 85201-9-I (filed 4/29/25); and a motion for reconsideration



in State v. Waits, No. 37894-2-III (filed 5/5/25). Given these numerous other deadlines, Ms. Swift planned to file a petition for review for Ms. Lindquist on the competency issue but did not consider filing a motion for reconsideration.

15. Ms. Swift began work on Ms. Lindquist's petition for review on May 6, 2025, in order to meet the May 8 deadline. In preparing the petition for review, Ms. Swift reviewed the court file and discovered Sub. No. 122, the trial court's April 6, 2023 order appointing Dr. Muscatel to conduct an independent competency evaluation pursuant to chapter 10.77 RCW. Ms. Swift then reviewed the original and supplemental designations of clerk's papers, and confirmed Sub. No. 122 had never been designated for appellate review. Ms. Swift immediately started preparing this motion to supplement the record on appeal, seeking designation of Sub. No. 122, to be considered along with Ms. Lindquist's petition for review.

#### IV. GROUND FOR RELIEF

Undersigned counsel for Ms. Lindquist respectfully requests that this Court allow belated supplementation of the record with Sub. No. 122, pursuant to RAP 9.6(a) and to facilitate a decision on the merits, consistent with RAP 1.2(a). Ms. Lindquist's petition for review and a second supplemental designation of clerk's papers are being filed contemporaneously with this motion.

"The party presenting an issue for review has the burden of providing an adequate record to establish such error, and should seek to supplement the record when necessary." State v. Sisouvanh, 175 Wn.2d 607, 619, 290 P.3d 942 (2012) (citations omitted). RAP 9.6(a) allows any party to freely supplement the record on review with a supplemental designation of clerk's papers "prior to or with the filing of the party's last brief." "Thereafter," however, "a party may supplement the designation only by order of the appellate court, upon motion."

RAP 1.2(a) provides that the Rules of Appellate Procedure “will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a) further specifies “[c]ases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands[.]” RAP 7.3 permits appellate courts “to perform all acts necessary or appropriate to secure the fair and orderly review of a case.”

Here, Sub. No. 122, the April 6, 2023 order appointing Dr. Muscatel to conduct an independent competency evaluation pursuant to chapter 10.77 RCW, rebuts the court of appeals’ conclusion that “the Dr. Muscatel evaluation was *not* the product of an order under RCW 10.77.060 from the trial court.” Opinion, 15. Of course, the court of appeals was absolutely correct that “our record includes no order under RCW 10.77.060 and no order staying the proceeding,” although the trial court did continue trial pending the evaluation. Opinion, 15; 4/10/23 RP 161. That is because the April 6 order was not designated by

either counsel representing Ms. Lindquist. However, the failure to designate Sub. No. 122 was entirely an oversight by both counsel and not a strategic choice in any way.

The burden of perfecting the appellate record lies with the appellant and so Sub. No. 122 should have been designated for the court of appeals' review. However, neither Mr. March nor Ms. Swift had reason to anticipate that the lack of Sub. No. 122 would be the basis for the court of appeals' decision. The State did not argue the appellate record was inadequate in its response brief. See Br. of Resp't, 25-27. Presumably that is because the State reviewed the court file and knew that a chapter 10.77 RCW order was entered on April 6, 2023. Indeed, the State agreed defense counsel "received court approval" to pursue an independent competency evaluation. Br. of Resp't, 15.

Without shifting blame, it is curious that the court of appeals did not exercise its discretionary authority under RAP 9.10 to call for supplementation of the record. RAP 9.10 provides, where a party has made a "good faith effort" to provide

a complete record for appellate review, the appellate court “will not ordinarily” affirm a trial court decision “because of the failure of the party to provide the appellate court with a complete record of the proceedings below.” RAP 9.10 therefore allows the appellate court on its own initiative to direct the transmittal of additional clerk’s papers “[i]f the record is not sufficiently complete to permit a decision on the merits of the issues presented for review.”

To reiterate, the State did not dispute the existence of a chapter 10.77 RCW order. In the verbatim report of proceedings filed in the court of appeals, defense counsel noted on April 10, 2023 that “the Court has authorized that an independent professional be available to evaluate the defendant for 10.77 issues.” 4/10/23 RP 158, 162 (trial court acknowledging it authorized defense counsel to retain an expert). The State at that hearing “agree[d] that the eval is probably a good thing.” 4/10/23 RP 159. The trial court granted the defense motion to continue trial pending Dr. Muscatel’s competency evaluation. 4/10/23 RP

161. And, in the subsequent May 22, 2023 sealing order, the trial court ordered: “That the independent RCW 10.77 report prepared by Dr. Ken Muscatel, PhD. herein for this case matter shall be sealed.” CP 334-35. This order was designated for appellate review.

In sum, there was quite a bit of information before the court of appeals to indicate that Dr. Muscatel’s evaluation was ordered pursuant to chapter 10.77 RCW. While this does not excuse appellate counsels’ mistake, it perhaps explains it.

Ms. Lindquist should not be punished for assigned counsels’ oversight in failing to designate Sub. No. 122 for review. RAP 9.6(a) expressly allows for belated supplementation of the record. This rule should be interpreted liberally “to promote justice and facilitate the decision of cases on the merits,” particularly given the constitutional question at issue (competency). RAP 1.2(a); see also State v. Mendez, 137 Wn.2d 208, 216-17, 970 P.2d 722 (1999) (reviewing state constitutional claim raised for first time in petition for review

where “the core issue [was] not new”); Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (reviewing procedural due process claim raised for first time in motion for reconsideration); State v. McCullum, 98 Wn.2d 484, 487, 656 P.2d 1064 (1983) (reviewing constitutional instructional issue raised for first time in petition for review).

Granting Ms. Lindquist’s motion to supplement the record with Sub. No. 122, which was signed and filed by the trial court during Ms. Lindquist’s trial proceedings, will facilitate a decision on the merits. Sub. No. 122 directly rebuts the court of appeals’ conclusion that Dr. Muscatel’s evaluation “was *not* the product of an order under RCW 10.77.060 from the trial court,” and undermines the court of appeals’ rejection of Ms. Lindquist’s competency argument on those faulty procedural grounds. Opinion, 15. Granting the motion will also serve judicial efficiency by negating the need for a subsequent personal restraint petition from Ms. Lindquist challenging appellate counsels’ oversight.

V. CONCLUSION

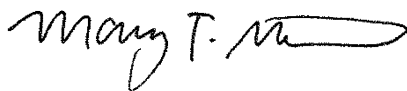
Undersigned counsel respectfully requests that this Court grant the motion to supplement the record and accept for filing the second supplemental designation of clerk's papers.

DATED this 8th day of May, 2025.

**I certify this document contains 2,434 words, excluding those portions exempt under RAP 18.17.**

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift", with a stylized flourish at the end.

---

MARY T. SWIFT, WSBA No. 45668  
Attorney for Petitioner



# Appendix

PD

FILED

2023 APR -6 PM 1:23

GRAYS HARBOR CO.  
KYM FOSTER  
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JODI LINDQUIST,

Defendant.

No.: 22-1-273-14,


**ORDER APPOINTING INDEPENDENT  
DEFENSE EXPERT TO EVALUATE  
PURSUANT TO RCW 10.77 AND  
DIRECTING PAYMENT**

~~☒ Clerk's Action~~ ~~SEAL ORDER~~

This matter having come before the above-entitled court, upon motion of the Defendant by and through her court-appointed counsel, and the court having jurisdiction over the subject matter and parties herein. The court finds there is an issue regarding one or more of the following: the Defendant's competency to stand trial and, possibly, the Defendant's ability to distinguish right from wrong at the time of the offense. The Court finds that the Defendant is indigent and is unable to pay for the services of an independent expert to perform the evaluation. The Grays Harbor County Department of Public Defense has reviewed the request and approved the expenditure.

IT IS HEREBY ORDERED that Dr. Brent Muscatel is appointed to examine the Defendant, at public expense, in order to perform independent expert professional assistance for

ORDER APPOINTED  
INDEPENDENT DEFENSE  
EXPERT TO DO EVALUATION—  
PURSUANT TO RCW 10.77

22-1-00273-14  
ORAPE 122  
Order Appointing Expert for Examination  
14271317  


JONATHAN FESTE  
ATTORNEY AT LAW  
1010 S. L ST, STE G  
TACOMA, WA 98405  
(253) 503-7106

1 the Defendant, pursuant to the provisions of RCW 10.77, *State v. Griffith*, 91 Wn.2d 572, 589  
2 P.2d 799 (1979),

3 IT IS FURTHER ORDERED that pursuant to RCW 10.77.020, RCW 10.77.060, RCW  
4 10.77.070, and RCW 10.77.140, the named expert is permitted reasonable access to the  
5 Defendant for purposes of the examination and to all medical, psychological and psychiatric  
6 reports and relevant reports and records pertaining to the defendant.  
7

8 Defense attorney Jonathan Feste ([feste48@gmail.com](mailto:feste48@gmail.com)) requests notice of the time and  
9 place of the evaluation to be present.

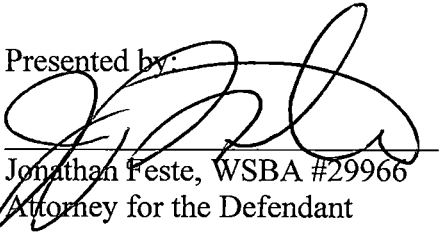
10 IT IS FURTHER ORDERED that, pursuant to the provisions of RCW 10.77 and WAC  
11 388-875-0040, the Department of Social and Health Services shall assume financial  
12 responsibility for the services of the Defendant's independent expert including payment of fees  
13 for the examination, preparation of written report, travel time, testimony and any other related  
14 expenses required by this order, as authorized by law.  
15

16 ~~The Clerk of the Court Shall Seal this Order.~~

17  
18 DONE IN OPEN COURT on this 6<sup>th</sup> day of April 2023  
19

20  
21   
JUDGE

22 Presented by:

23   
24 Jonathan Feste, WSBA #29966  
25 Attorney for the Defendant  
26  
27

ORDER APPOINTED  
INDEPENDENT DEFENSE  
EXPERT TO DO EVALUATION—  
PURSUANT TO RCW 10.77

JONATHAN FESTE  
ATTORNEY AT LAW  
1010 S. L ST, STE G  
TACOMA, WA 98405  
(253) 503-7106

**NIELSEN KOCH & GRANNIS P.L.L.C.**

**May 08, 2025 - 2:16 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 58475-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Jodi Sue Lindquist, Appellant  
**Superior Court Case Number:** 22-1-00273-8

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Division II  
State of Washington  
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2023 APR -6 PM 1:23

GRAYS HARBOR CO.  
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COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

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No.: 22-1-273-14,

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ORAPE 122  
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2 P.2d 799 (1979),

3 IT IS FURTHER ORDERED that pursuant to RCW 10.77.020, RCW 10.77.060, RCW  
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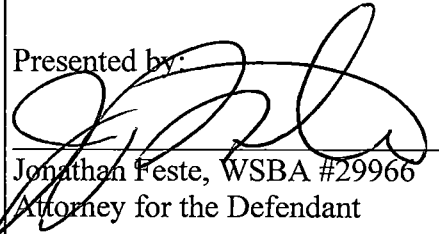
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14 expenses required by this order, as authorized by law.  
15

16 ~~The Clerk of the Court Shall Seal this Order.~~

17  
18 DONE IN OPEN COURT on this 6<sup>th</sup> day of April 2023  
19

20  
21   
22 JUDGE

23 Presented by:

24   
25 Jonathan Feste, WSBA #29966  
26 Attorney for the Defendant  
27

ORDER APPOINTED  
INDEPENDENT DEFENSE  
EXPERT TO DO EVALUATION—  
PURSUANT TO RCW 10.77

JONATHAN FESTE  
ATTORNEY AT LAW  
1010 S. L ST, STE G  
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THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON

*Respondent,*

v.

JODI SUE LINDQUIST,

*Petitioner.*

CAUSE NO. 22-1-00273-14

SECOND SUPPLEMENTAL  
DESIGNATION OF CLERK'S PAPERS

COURT OF APPEALS NO. 58475-1-II

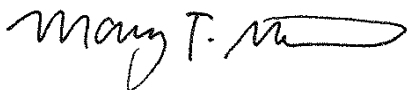
Clerk's Action Required

TO: Superior Court Clerk

Please prepare and transmit to the Court of Appeals, Division Two, the following Clerk's Papers.

Sub. No.	Description/Name	Filed
122	Order Appointing Expert for Examination	04/06/2023

DATED this 8th day of May, 2025.



Mary T. Swift, WSBA No. 45668  
NIELSEN KOCH & GRANNIS, PLLC  
Attorneys for Petitioner

2ND SUPPLEMENTAL DESIGNATION OF  
CLERK'S PAPERS - 1

NIELSEN KOCH & GRANNIS, PLLC  
The Denny Building  
2200 6th Ave., Ste 1250  
Seattle, WA 98121  
(206) 623-2373

# GRAYS HARBOR COUNTY SUPERIOR COURT

May 09, 2025 - 3:08 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 58475-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Jodi Sue Lindquist, Appellant  
**Superior Court Case Number:** 22-1-00273-8

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State of Washington  
5/9/2025 3:08 PM

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF GRAYS HARBOR**

**STATE OF WASHINGTON  
vs  
JODI SUE LINDQUIST**

**GRAYS HARBOR COUNTY CAUSE NO. 22-1-00273-14  
COURT OF APPEALS NO.**

***INDEX OF CLERK'S PAPERS ON APPEAL***

<b>TITLE OF DOCUMENT</b>	<b>PAGES</b>
Order Appointing Expert for Examination	346 - 347
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# GRAYS HARBOR COUNTY SUPERIOR COURT

May 09, 2025 - 3:08 PM

## Transmittal Information

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