6-5-2012

State v. Parsons Respondent's Brief Dckt. 38980

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38980
	)	
vs.	)	
	)	
DANIEL DALE PARSONS, JR.,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature Of The Case

Daniel Dale Parsons, Jr., appeals from the judgment entered upon the jury verdicts finding him guilty of aiding and abetting robbery, eluding a peace officer, and being a persistent violator. For the first time on appeal, Parsons claims that one of the district court's jury instructions regarding the persistent violator enhancement was erroneous.

Statement Of The Facts And Course Of The Proceedings

On October 20, 2010, Parsons' wife entered a KeyBank branch in Boise, Idaho wearing a wig, sunglasses, a black sweater and gloves, and handed the teller a note that stated, "WE HAVE GUNS! MONEY IN BAG!" (PSI, p.2[1]; Tr., p.165, L.18 - p.172, L.2; p.174, Ls.1-13.) The teller put money in the bag and Parsons' wife exited the bank. (PSI, p.2; Tr., p.172, L.5 - p.173, L.25; p.176, Ls.9-13.)

Shortly thereafter, police located and began pursuing Parsons and his wife in a vehicle travelling on I-84. (PSI, p.2; Tr., p.227, L.5 - p.233, L.15.) Parsons accelerated to speeds over 110 miles per hour, drove through a construction zone, and weaved in and out of traffic during the pursuit. (PSI, p.56; Tr., p.233, L.16 - p.238, L.5.) Parsons eventually lost control of the vehicle and crashed into a storage shed located in the backyard of a residence. (PSI, p.2; Tr., p.238, Ls.6-22.) Officers at the scene of the crash observed a gun and

[1]PSI page numbers correspond with the page numbers of the electronic file "ParsonsPSI.pdf."

numerous denominations of money on the ground near the vehicle. (PSI, p.57; Tr., p.322, L.15 - p.323, L.18; p.377, Ls.4-14.)

The state charged Parsons with aiding and abetting robbery and eluding a peace officer. (R., pp.38-39.) The state also sought a persistent violator enhancement based on Parsons' prior felony convictions for unlawful sale of a controlled substance, conspiracy to commit robbery with the use of a firearm, and two counts of burglary. (R., pp.107-08.) A jury convicted Parsons of aiding and abetting robbery and eluding a peace officer. (R., pp.217-18; Tr., p.613, L.17 - p.614, L.23.) The jury then found that Parsons was a persistent violator. (R., p.219; Tr., p.637, L.22 - p.638, L.13.)

The district court sentenced Parsons to fixed life for aiding and abetting robbery and enhanced Parsons' sentence for eluding a peace officer to fixed life based on the persistent violator enhancement. (R., pp.233-36; Tr., p.663, Ls.3-21; p.664, Ls.14-16.) The district court ordered the sentences to run consecutively. (R., p.234; Tr., p.664, Ls.4-5.) Parsons timely appealed. (R., pp.238-40.)

ISSUES

Parsons states the issue on appeal as:

> WHETHER THE COURT ERRED WHEN IT ORALLY CHANGED A JURY INSTRUCTION IN A CONFUSING WAY THAT COULD HAVE MISLED THE JURY INTO BELIEVING THAT IT NEED NOT FIND AN ELEMENT OF THE OFFENSE BECAUSE IT HAD ALREADY BEEN ESTABLISHED

(Appellant's brief, p.3.)

The state rephrases the issue on appeal as:

Has Parsons failed to demonstrate fundamental error in the jury instructions?

ARGUMENT

Parsons Has Failed To Show Fundamental Error In The Jury Instruction Setting Forth The Elements The State Was Required To Prove To Establish That Parsons Was A Persistent Violator

A. Introduction

For the first time on appeal, Parsons argues that the district court erred by orally changing one of the jury instructions regarding the persistent violator enhancement "in a way that made it confusing and could have misled the jury into believing" that one of Parsons' prior felony convictions "had already been established and it must accept it." (Appellant's brief, p.9.) Parsons claim is constitutional in nature. However, Parsons has failed to meet his burden of demonstrating clear error on the record and he has failed to establish that there is a reasonable possibility that the alleged error affected the outcome of the trial. Therefore, Parsons cannot show fundamental error in the district court's instruction.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, 587-88, 261 P.3d 853, 864-65 (2011) (citing State v. Humpherys, 134 Idaho 657, 659, 8 P.3d 652, 654 (2000)). "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." State v. Shackelford, 150 Idaho 355, 373-74, 247 P.3d 582, 600-01 (2010) (citing Kuhn v. Proctor, 141 Idaho 459, 462, 111 P.3d 144, 147 (2005)). Jury instructions are reviewed as a whole because "[i]t is well established that [an]

instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)).

C. Parsons Has Failed To Carry His Burden Of Establishing Fundamental Error With Respect To His Claim Of Instructional Error

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). This same principle applies to alleged errors in jury instructions. See I.C.R. 30(b) ("No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection."). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

Review under the fundamental error doctrine requires Parsons to demonstrate the error he alleges: "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Perry, 150 Idaho at 228, 245 P.3d at 980. Application of this three-prong test to Parsons' claim of instructional error shows that he has failed to demonstrate fundamental error.

After Parsons was convicted of aiding and abetting robbery and eluding a peace officer, the district court informed the jury that the state also charged Parsons with being a persistent violator and that Parsons "denied the alleged prior convictions." (R., p.211; Tr., p.616, L.10 - p.617, L.8.) The district court instructed the jury that "[y]ou must now determine and find whether or not the allegation of two or more prior convictions is true. For purpose of this finding, the following additional instructions are given you [sic] which you will consider along with the pertinent instructions which have heretofore been given to you.[2]" (R., p.211; Tr., p.617, Ls.11-15.) The district court also instructed the jury that in order to find that Parsons was a persistent violator, the jury must determine whether the state proved beyond a reasonable doubt that Parsons "has been convicted on at least two prior occasions of felony offenses." (R., p.212; Tr., p.618, L.22 - p.620, L.8.) The written jury instructions provided that:

> [Y]ou must next consider whether the defendant has been convicted on at least two prior occasions of felony offenses.
>
> The state alleges the defendant has prior convictions as follows:
>
> **Count I**
>
> That the Defendant, DANIEL D. PARSONS JR, on or about the 24th day of July, 1981, was sentenced after a conviction or guilty plea for the crime of UNLAWFUL SALE OF A CONTROLLED SUBSTANCE, a FELONY, in the County of Washoe, State of Nevada, by virtue of that certain Judgment of Conviction made and entered in Case No. C81-303.

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[2] The district court had previously instructed the jury that "[a]s members of the jury it is your duty to decide what the facts are and to apply those facts to the law that I have given you. You are to decide the facts from all the evidence presented in the case." (R., p.195; Tr., p.575, Ls.2-6.)

and
Count II

That the Defendant, DANIEL D. PARSONS JR, on or about the 22nd day of May 1987, was sentenced after a conviction or guilty plea for the crime of CONSPIRACY TO COMMIT ROBBERY WITH THE USE OF A FIREARM, a FELONY, in the County of Washoe, State of Nevada, by virtue of that certain Judgment of Conviction made and entered in Case No. C86-1702.

and/or[3]
Count III

That the Defendant, DANIEL D. PARSONS JR, on or about the 22nd day of May 1987, was sentenced after a conviction or guilty plea for the crime of BURGLARY, a FELONY, in the County of Washoe, State of Nevada, by virtue of that certain Judgment of Conviction made and entered in Case No. C86-1700.

and/or
Count IV

That the Defendant, DANIEL D. PARSONS JR, on or about the 22nd day of May 1987, was sentenced after a conviction or guilty plea for the crime of BURGLARY, a FELONY, in the County of Washoe, State of Nevada, by virtue of that certain Judgment of Conviction made and entered in Case No. C86-1703.

(R., p.212.) The written instructions further provided that "[t]he existence of a prior conviction must be proved beyond a reasonable doubt and your decision must be unanimous." (R., p.212.)

The state presented its evidence regarding Parsons' prior felony convictions (Tr., p.622, L.6 - p.631, L.10), and the district court instructed the

[3] The "and/or" language in this instruction was proposed by the state in order "to preserve the persistent violator [enhancement] if the jury does find him guilty of persistent violator given case law to show that he has two underlying or two previous convictions where there was an intervening period in which he could have been rehabilitated." (Tr., p.29, Ls.6-24.) Defense counsel did not object to this jury instruction. (Tr., p.29, Ls.22-23.)

jury, in relevant part, as follows:

> Just as the state has the burden of proving all of the elements of the crime of aiding and abetting robbery and eluding beyond a reasonable doubt, so the state has the burden of proving beyond a reasonable doubt that the defendant, Daniel D. Parsons, Junior, has been convicted of at least prior two [sic] felonies by finding the state has proven beyond a reasonable doubt at least two of the counts alleged in the Information Part II.
>
> Thus in this case if you find from the evidence beyond a reasonable doubt that the defendant has been convicted of at least two of the crimes listed in Part II of the information and that each of the same two crimes is a felony, then you should find the defendant is a persistent violator of the law. Should that evidence fail to prove this beyond a reasonable doubt, then you should find the defendant is not a persistent violator.
>
> *Now, for the purposes of this instruction, you must find that Count One has been proven beyond a reasonable doubt.*

(Tr., p.632, L.21 - p.633, L.24 (emphasis added).)

Parsons did not object to the preceding jury instruction. However, he argues on appeal that the district court's oral jury instruction that "for the purpose of this instruction, you must find that Count One has been proven beyond a reasonable doubt" was erroneous because "this sentence can mean two very different things." (Appellant's brief, p.9.) Parsons' claim of reversible error is without merit.

Although Parsons' claim is constitutional in nature, see, e.g., Draper, 151 Idaho at 588, 261 P.3d at 865 ("the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement."), the error that Parsons alleges is not clear on the record. Under the fundamental error test, Parsons must establish not only that there was an error, but that there was an error that is "clear or obvious" on the record, "without

the need for any additional information" including information "as to whether the failure to object was a tactical decision." Perry, 150 Idaho at 226, 245 P.3d at 978.

Parsons contends that "[w]hile it can be determined from the full record what has [sic] going on," the district court's jury instruction regarding the persistent violator enhancement "*could have* misled the jury" into thinking that the conviction listed under Count I had already been established. (Appellant's brief, pp.9, 11 (emphasis added).) However, Parsons' strained interpretation of the district court's jury instruction does not establish that there was a clear or obvious error. When the jury instructions are reviewed as a whole and in the context of the entire trial record, there is no reasonable likelihood that a rational jury would have applied the challenged instruction in a way that violated Parsons' constitutional rights.

Based on the circumstances regarding Parsons' prior felony convictions, the parties and the district court wanted to ensure that the jury did not find that Parsons was a persistent violator based solely on his three prior felony convictions that he was sentenced for on May 22, 1987. (Tr., p.566, L.2 - p.568, L.4; p.637, Ls.5-16.) The district court wanted to make it clear that the state had to prove the 1981 conviction set forth in Count I beyond a reasonable doubt, as well as at least one of the 1987 convictions set forth in Counts II-IV, before the jury could find that Parsons was a persistent violator. (Tr., p.637, Ls.16-18.) Accordingly, the district court used an "and/or" format for the 1987 convictions. (R., p.212; Tr., p.568, Ls.3-4.)

In addition to the jury instruction setting forth the prior convictions alleged by the state, the district court instructed the jury that "[y]ou must now determine and find whether or not the allegation of two or more prior convictions is true." (R., p.211; Tr., p.617, Ls.8-10.) The district court emphasized the fact that "[j]ust as the state has the burden of proving all of the elements of the crime of aiding and abetting robbery and eluding beyond a reasonable doubt, so the state has the burden of proving beyond a reasonable doubt that the defendant, Daniel D. Parsons, Junior, has been convicted of at least prior two [sic] felonies by finding the state has proven beyond a reasonable doubt at least two of the counts alleged in the Information Part II." (Tr., p.633, Ls.2-11; R., p.213.)

These instructions, along with the other jury instructions provided by the district court, make it highly unlikely that any juror would have interpreted the district court's statement that "for the purposes of this instruction, you must find that Count One has been proven beyond a reasonable doubt" as a direction that an element of the persistent violator enhancement had already been established. Furthermore, any possible ambiguity in the challenged instruction would have been cured by the other jury instructions regarding the state's burden of proof and the jury's duty to decide what the facts of the case were. See State v. Ranstrom, 94 Idaho 348, 352, 487 P.2d 942, 946 (1971) (holding that any jury confusion that may have resulted from the challenged jury instruction would have been "disspelled" by another instruction regarding the state's burden of proving "every material allegation contained in the Information beyond a reasonable doubt"); see also State v. Field, 144 Idaho 559, 574, 165 P.3d 273, 288 (2007)

(holding that "any confusion" in the challenged jury instruction was "cured" by the use of other instructions that were given). As such, the instruction given by the district court did not relieve the state of its burden of proving every element of the persistent violator enhancement beyond a reasonable doubt

Parsons' speculation that the challenged instruction "could have misled the jury" is simply unsupported by the trial record. (Appellant's brief, p.11.) During the prosecutor's closing argument, the prosecutor explained her understanding of the instruction at issue here by stating:

> The judge instructed you that you need to find Count One and what she meant by that — or my reading of what she meant by that is there's this judgment, which is the second to the last page, the first page forward from the blue page, which is — the case number's listed here in the upper left and it's the 1981 conviction.
>
> The remainder of the judgments have their case numbers also visible up here on the left-hand upper corner and — however, they are all listed in the text together. And so there's three different case numbers and three charges; the burglary, the conspiracy to commit robbery with the use of a firearm and being an ex-felon in the possession of a firearm.
>
> And so what the instruction is calling on you to do is to determine that this is in regard to Mr. Parsons and that at least one of these that are sort of listed here together are also him and that together he's been convicted twice previously.
>
> Because these are all listed on the same judgment, we ask you not to find just two of these, but one of these and the one from the earlier dates because there's more separation in time and it's more proper under the rules and the laws.

(Tr., p.635, L.1 - p.636, L.2.)

After defense counsel presented his closing argument, the jury left the courtroom to deliberate and the district court explained the purpose of the instruction that was given to the jury:

> I want to make it really clear for the record that they had to find that the first count was, in fact, proven because I think that's what the intent was of the way in which we've written it. And even though it's not in the written instructions, the law is very clear that the oral instructions are actually what control.
>
> I'm not going to rewrite that because I think that the point — the point here is we want to make sure that it cannot be later argued that they didn't find him on the one, they just found him on these other three. I want to make it clear they have to find the one before they find the rest of them.

(Tr., p.637, Ls.5-18.)

Parsons attempts to downplay the significance of these comments on the challenged jury instruction because the "prosecutor's interpretation of what the court meant cannot substitute for a correct instruction from the court,"[4] and "while the court made its record about what it was trying to do, it did not do so before the jury, and so it does not clarify the instruction the jury received." (Appellant's brief, pp.10-11.) However, these unobjected to statements made by the prosecutor and the district court are relevant to the determination of how the jury would have interpreted and applied the challenged instruction. The instruction is not misleading when it is appropriately read in the context of the other jury instructions that were given and the trial record. Therefore, Parsons has failed to demonstrate clear error.

Parsons has also failed to show that the lack of an objection was not

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[4] Although it is true that the district court instructed the jury that it must follow the jury instructions given by the court (R., p.194), "[c]losing argument is an opportunity for the parties to clarify the issues that must be resolved by the jury; to review the evidence with the jury and discuss, from the parties' respective standpoints, the inferences to be drawn therefrom; and to discuss the law set forth in the jury instructions as it applies to the trial evidence." State v. Beebe, 145 Idaho 570, 576, 181 P.3d 496, 502 (Ct. App. 2007)

intentional. As stated previously, defense counsel did not object to the jury instructions regarding the persistent violator enhancement. If defense counsel thought, as appellate counsel now contends, that the challenged jury instruction may have eliminated the state's burden of proving every element of the persistent violator enhancement beyond a reasonable doubt, defense counsel would have had multiple opportunities to object to the instruction. However, there was no objection when the district court gave the instruction and there was no objection when the district court and the prosecutor commented on the intended purpose of the jury instruction regarding Parsons' prior felony convictions. (See Tr., p.633, Ls.22-24; p.635, L.1 - p.636, L.13; p.637, Ls.5-18.) Accordingly, this failure to object was either a tactical decision designed to allow Parsons to belatedly raise the issue on appeal if the case did not conclude in his favor or defense counsel's understanding of the jury instruction was actually consistent with the statements made by the district court and the prosecutor. Either way, Parsons has failed to satisfy the second prong of the fundamental error test.

Parsons has also made no showing that he was prejudiced by the alleged error. Under the third prong of the fundamental error test, "the defendant must further persuade the reviewing court that the error was not harmless; i.e., that there is a reasonable possibility that the error affected the outcome of the trial." State v. Jackson, 151 Idaho 376, 378, 256 P.3d 784, 786 (Ct. App. 2011).

Parsons argues that harmless error does not apply here because "the instruction does not simply ignore an element that the jury has to find, but rather,

appears to direct the jury that the element has already been found so rather than the jury needing to find two prior convictions, it needed only find one more in addition to the apparently already established conviction." (Appellant's brief, p.11.) More specifically, Parsons argues that the district court's instruction regarding Count I is "similar to when the court instructs a jury on a stipulation" and is analogous to a court directing a verdict. (Appellant's brief, pp.10-11.) These arguments should be rejected.

"A jury instruction that lightens the prosecution's burden of proof by omitting an element of the crime, creating a conclusive presumption as to an element, or shifting to the defendant the burden of persuasion on an essential element, is impermissible." State v. Crowe, 135 Idaho 43, 47, 13 P.3d 1256, 1260 (Ct. App. 2000). However, "[a] harmless error analysis may be applied in cases involving improper instructions *on a single element of the offense* or even when a court omits an essential element from the instructions to the jury." State v. Hansen, 148 Idaho 442, 444, 224 P.3d 509, 511 (Ct. App. 2009) (emphasis added).

The district court did not direct a verdict on the persistent violator enhancement. As stated above, the instruction given by the district court did not relieve the state of its burden of proving every element of the persistent violator enhancement beyond a reasonable doubt. However, even assuming that the jury could have somehow interpreted the instruction in the way that Parsons contends on appeal, the alleged error may still be reviewed for harmless error because the challenged instruction only relates to a single element of the

persistent violator enhancement. The alleged error in this case is more akin to an omitted element or a conclusive presumption regarding an element than a directed verdict on an entire criminal charge.

"[W]here the jury instructions were only partially erroneous, such as where the jury instructions improperly omitted one element of a charged offense, the appellate court may apply the harmless error test, and where the evidence supporting a finding on the omitted element is overwhelming and uncontroverted, so that no rational jury could have found that the state failed to prove that element, the constitutional violation may be deemed harmless." Draper, 151 Idaho at 591, 261 P.3d at 868 (quoting Perry, 150 Idaho at 224, 245 P.3d at 976).

Application of this standard to the facts of this case shows that the alleged error in the district court's statement that "for the purposes of this instruction you must find that Count One has been proven beyond a reasonable doubt" was harmless. Although Parsons did not plead guilty to the persistent violator enhancement, the record shows that Parsons never actually contested the enhancement. (See Tr., p.618, Ls.12-19; p.631, Ls.4-5; p.632, Ls.16-20; p.636, Ls.14-17.) Furthermore, the state presented an overwhelming amount of evidence clearly establishing that Parsons had been convicted of at least two prior felonies.

At trial, the state called Detective Pietrzak who testified that he collected the items contained in State's Exhibit 38A from Part I of the trial and that he took the photograph of those items that was admitted as State's Exhibit 2 in Part II of

the trial. (Tr., p.621, L.12 - p.624, L.11.) Those items consisted of an ex-felon registration card that had Parsons' photograph, name, date of birth, and social security number on it.[5] (Tr., p.625, L.18 - p.626, L.3; State's Exhibit 2.) The state also presented Parsons' certified penitentiary packet, which contained Parsons' name, his date of birth, his social security number, his mug shot, his Nevada Department of Prisons number, his fingerprint card, and a physical description of Parsons. (State's Exhibit 1; Tr., p.626, L.11 - p.629, L.3.) Parsons' penitentiary packet also contained judgments of conviction for his 1981 felony conviction for unlawful sale of a controlled substance and his 1987 felony convictions for conspiracy to commit robbery with the use of a firearm and two counts of burglary. (State's Exhibit 1; Tr., p.629, L.4 - p.631, L.1.) The first page of the penitentiary packet is a certificate attesting to the packet's authenticity that was signed by the Nevada Correctional Case Records Manager and the Secretary of State for Nevada. (State's Exhibit 1.) That certificate states that (1) "in [the signatory's] legal custody as such officer are the original files and records of persons heretofore committed to said penal institution;" (2) the attached documents are "copies of the original records;" (3) that those original records pertain to "Daniel Dale Parsons #17002;" and (4) that the signatory has "compared the foregoing and attached copies with their respective originals now on file in my office and each thereof contains, and is, a full, true and correct copy

[5] Parsons' driver's license and his social security card were both admitted during Part I of the trial (Tr., p.413, L.24 - p.416, L.18; p.626, Ls.4-10), and his date of birth and social security number were set forth in Parsons' booking photo, which was admitted in Part I of the trial (State's Exhibit 69; Tr., 477, Ls.12-25).

of its said original." (State's Exhibit 1.)

In light of this overwhelming evidence, the error alleged by Parsons was harmless. Parsons does not even attempt to explain how a reasonable jury could conclude that the 1981 conviction set forth by the state in Count I of the persistent violator enhancement was not proven, while also concluding that at least two of the 1987 convictions set forth in Count II had been established. The judgments of convictions for all four of the prior convictions alleged by the state were contained in the same penitentiary packet and the evidence proved beyond a reasonable doubt that all of those convictions belonged to Parsons. The only real difference between the information contained in the penitentiary packet regarding Parsons prior convictions is that the packet contains an additional document regarding Parsons' 1981 conviction that shows that Parsons' probation was revoked in that case. (State's Exhibit 1.)

The evidence presented by the state regarding Parsons' prior convictions overwhelmingly established that Parsons had two prior felony convictions and that Parsons was a persistent violator of the law. No rational juror could have found for Parsons on the question of whether he was a persistent violator based on the evidence that was presented at trial. Therefore, the alleged instructional error was harmless and Parsons has failed to demonstrate fundamental error.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdict finding that Parsons was a persistent violator.

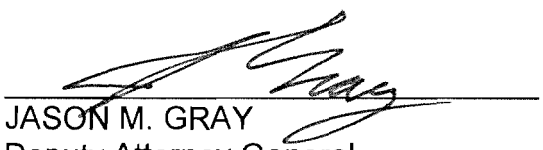
DATED this 5th day of June 2012.

JASON M. GRAY
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of June 2012, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Greg S. Silvey
Attorney at Law
P.O. Box 565
Star, Idaho 83669



JASON M. GRAY
Deputy Attorney General

JMG/pm