STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2009AP3149-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY EDWARD REED, JR.,

DEFENDANT-APPELLANT.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DENNIS CIMPL, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

TABLE OF CONTENTS

CASES CITED

Page

Page

Page

STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2009AP3149-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY EDWARD REED, JR.,

DEFENDANT-APPELLANT.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DENNIS CIMPL, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument or publication are warranted in this case. The case requires the application of well-settled principles to a specific fact situation. The briefs

fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side.

ARGUMENT

I. REED IS NOT ENTITLED TO ANY RELIEF ON HIS CLAIM THAT THE STATE BREACHED THE PLEA AGREEMENT.

Reed argues that he is entitled to "at least a new sentencing hearing" (Reed's brief at 9), because the State materially and substantially breached his plea agreement.

An accused has a constitutional right to the enforcement of a negotiated plea agreement. Consequently, once an accused agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the accused's due process rights demand fulfillment of the bargain. *State v. Williams*, 2002 WI 1, ¶ 37, 249 Wis. 2d 492, 637 N.W.2d 733 (citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)); *see also State v. Naydihor*, 2004 WI 43, ¶ 10, 270 Wis. 2d 585, 678 N.W.2d 220.

Whether the State breached a plea agreement is a mixed question of fact and law. The precise terms of a plea agreement between the State and a defendant and the historical facts surrounding the State's alleged breach of that agreement are questions of fact. *Williams*, 249 Wis. 2d 492, ¶ 2; *Naydihor*, 270 Wis. 2d 585, ¶ 11. Whether the State's conduct constitutes a material and substantial breach of the plea agreement is a question of law that this court reviews *de novo*. *Id.* A breach is material and substantial when it

"defeats the benefit for which the accused bargained." *Williams*, 249 Wis. 2d 492, ¶ 38; *Naydihor*, 270 Wis. 2d 585, ¶ 11.

The State agrees with Reed's recitation of the plea agreement contained in Reed's brief (Reed's brief at 5). The State also agrees the State breached the agreement. The assistant district attorney acknowledged he "misspoke" at sentencing when he stated "I think the only appropriate response is prison" when the agreement called for no sentencing recommendation (42:6).

The circuit court held Reed waived his breach of the plea agreement claim (33; 43:4). Reed argues that a breach of a plea agreement cannot be waived. He cites no authority for this proposition. He cannot be right because there are numerous cases holding that failure to object at sentencing alone "waives" the issue on appeal. *State v. Smith*, 153 Wis. 2d 739, 741, 451 N.W.2d 794 (Ct. App. 1989) ("[T]he right to object to an alleged breach of a plea agreement is waived when the defendant fails to object and proceeds to sentencing after the basis for the claim of error is known to the defendant"); *State v. Dugan*, 193 Wis. 2d 610, 624-25, 534 N.W.2d 897 (Ct. App. 1995) (Failure to object to a breached plea agreement at the sentencing hearing waives this issue on appeal); *State v. Howard*, 2001 WI App 137, ¶ 12, 246 Wis. 2d 475, 630 N.W.2d 244. *See also State v. Paske,* 121 Wis. 2d 471, 473-75, 360 N.W.2d 695 (Ct. App. 1984) (where defendant knew prior to sentencing of prosecutor's breach of plea bargain, defendant's decision not to withdraw his no-contest pleas prior to imposition of sentence was reaffirmation of those pleas).

The Supreme Court explained more than two decades ago when a defendant did not challenge the prosecutor's breach of a plea bargain: "The situation is not so much waiver of claimed error, rather it is an abandonment of right to object by persisting in a plea strategy after the basis for the claim of error is known to defendant." *Farrar v. State*, 52 Wis. 2d 651, 660, 191 N.W.2d 214 (1971) (parenthetical and footnote omitted). Perhaps Reed means he did not intentionally relinquish a known right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

But here, Reed himself made a conscious (and intentional) decision to proceed with the sentencing based on his attorney's strategy to concede the two convictions warranted prison. After the prosecutor "misspoke" the following occurred:

> ATTORNEY GRIFFIN [the assistant district attorney]:
>
> * * *
>
> I'd like to withdraw those comments. Perhaps, we should just adjourn this whole thing and another DA and another judge should hear this. I don't know how we can do that. It just seems to me that's gonna be safer at this point, for which I apologize.
>
> THE COURT: Since we're going to adjourn the restitution hearing, I think we should just —
>
> ATTORNEY GRIFFIN: Unless Mr. Reed wants to proceed today and —
>
> THE COURT: I don't think Ms. Cleghorn —
>
> ATTORNEY GRIFFIN: You can disregard my comments.

THE COURT: Ms. Cleghorn's talking to him right now.

ATTORNEY CLEGHORN: Your Honor, I think my client and the length of time I've handled this case for him, he's aware of the fact that he's gonna get prison time for this.

I just wanted to make sure that the record was correct in what the recommendation was, and that was my fault previously. He's indicated that he would like to go forward today. We are going to be acknowledging that this is a prison case, so I don't believe that the comments thus far that the DA's made are going to effect it.

THE COURT: I'm not gonna consider the DA's recommendation for prison at all.

Mr. Reed, at sidebar I told your lawyer, as well as the district attorney, I'm gonna have to recuse myself from the restitution hearing because of the fact that American Family is asking for some money; and I don't want to handle any cases from American Family because of a personal matter that I have with them. So, therefore, another judge is going to hear the restitution hearing.

The district attorney and your lawyer cut a deal, and in that deal the deal was that the district attorney was not supposed to tell me anything other than comment on the crime but not give me an idea of whether I should sentence you to prison, put you on probation or put you in jail.

The district attorney has violated that agreement because he said that I should send you to prison. If you want, I'll recuse myself right now; and we'll give this to another judge; and there will be a different district attorney and that district attorney won't mention the word "prison" or I can handle the sentencing today. What do you want to do?

THE DEFENDANT: I think it's been going on long enough. I think it should just be settled today.

> THE COURT: You understand if you want the adjournment before a different judge, I'd give it to you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Anybody promise you anything to get you to do that?
>
> THE DEFENDANT: No.
>
> THE COURT: Anybody threaten you in any way to get you to agree that I should do the sentencing?
>
> THE DEFENDANT: No.
>
> THE COURT: Okay. Mr. Griffin, continue.

(42:67-8).

The circuit court explained Reed's right to the plea bargain and specifically offered an immediate remedy (specific performance) for the breach. Reed declined; he acknowledge that he understood he could have a different prosecutor and judge at a different sentencing. This is an intentional relinquishment of his known right.

II. REED IS NOT ENTITLED TO ANY RELIEF ON HIS CLAIM THAT HIS PLEA WAS INVOLUNTARY.

A. Reed Has Waived The Issue That He Is Entitled To Withdraw His Plea.

Reed moved to withdraw his pleas because he claimed that he did not understand the consequences "of three un-charged read-in

offenses" (25:1). He contends that the circuit court had a duty to explain read-ins. He argues the circuit court erred by holding he waived his claim for plea withdrawal (33; 43:4).

At the post-conviction motion hearing, the circuit court concluded "I think I crossed every 't' and dotted every 'i' with Mr. Reed. I gave him every opportunity once he learned about what a dismissal and read-in meant" (43:4).

At the sentencing the following occurred:

> THE COURT: Did Judge Donald go over the elements of those with him when he took the plea?
>
> ATTORNEYY CLEGHORN: I believe the new case law says it's not appropriate to go through the read ins.
>
> THE COURT: You got to tell them. You've got to tell them that. The new case law says you don't have to get him to admit it.
>
> ATTORNEY GRIFFIN: He did admit there would be these read ins.
>
> ATTORNEY CLEGHORN: Yes.
>
> THE COURT: You understand that the read ins that aren't charged, you can never be charged with them; and I can consider them in purposes of sentencing? Do you understand that?
>
> THE DEFENDANT: Now I do.
>
> THE COURT: How many read ins were there, Mr. Griffin, four read ins, count three and three other read ins?
>
> ATTORNEY GRIFFIN: Correct.

THE COURT: And those three other read ins were burglaries -- or two burglaries and receiving stolen property.

ATTORNEY GRIFFIN: Correct. Two burglaries and what would be the receiving stolen property that Mr. Reed was initially arrested as a suspect in the armed robbery.

THE COURT: You understand that in addition to the burglary that you pled guilty to and the attempted burglary that you pled guilty to, I am going to consider three other burglaries, the one that's on this complaint and two that are not and a receiving stolen property in deciding what to sentence you? I can't increase the maximums that you're looking at. The maximums that you're looking at on the burglary and the attempt burglary are 18 and three quarters years in prison. Okay.

THE DEFENDANT: (Nods head.)

THE COURT: And that -- but I can't go over that, but I can consider them in deciding what to do with you. You can never be charged with those three burglaries and the receiving stolen property; do you understand that?

THE DEFENDANT: Now I do, yes.

THE COURT: Okay. I'm sort of getting into this thing as I'm going. I'll make the same offer to you again. If you feel this record is so messed up at this point that you don't want me to handle the sentencing, I'll pass the case 'cause I got to recuse myself on the restitution anyway or if you want me to go ahead, I'll go ahead.

THE DEFENDANT: I think -- I think it's just been There's been enough punishment on this issue. It's been going on a year. I think it should be resolved.

THE COURT: You want to go ahead today?

THE DEFENDANT: Yes.

(42:19-21).

Paske, is instructive here. Paske entered into a plea agreement whereby the prosecution agreed to recommend a sentence for a term not to exceed eleven years, in return for his plea to seventeen felonies and one misdemeanor. *Paske,* 121 Wis. 2d at 472. While incarcerated and awaiting sentencing, Paske conspired with other inmates to escape from the Sheboygan county jail. Paske pled to an escape charge as a result. *Id.* At the sentencing proceeding, but prior to the imposition of the sentences themselves, the prosecutor stated he would not stand by his original recommendation and, instead, would make no recommendation as to sentencing on the original eighteen counts. *Id.* at 473. After the prosecutor placed upon the record his new sentencing recommendation, Paske's attorney observed that Paske would be within his rights to withdraw his previous pleas of no contest to the eighteen counts, but Paske elected to go ahead with sentencing. *Id.* This court held "Paske's no contest pleas were reaffirmed with full prior knowledge of the state's altered position on sentencing." *Id.* at 474.

Although *Paske* involved a plea agreement, the principle of reaffirmation applies here. With full knowledge of the claim that read-ins had not been adequately explained and the court's offer to pass the case, Reed decided to go ahead with sentencing. This election reaffirmed his pleas and he has waived this claim.

B. Reed's Plea Was Knowingly, Voluntarily And Intelligently Made With An Understanding Of Read-In Offenses.

In order to withdraw a guilty or no contest plea after sentencing, a defendant carries the heavy burden of establishing that the trial court should permit the defendant to withdraw the plea to correct a "manifest injustice." *State v. Washington,* 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993). This court and the Supreme Court have identified two "different route[s] to plea withdrawal." *State v. Howell*, 2007 WI 75, ¶ 2, 301 Wis. 2d 350, 734 N.W.2d 48; *State v. Basley*, 2006 WI App 253, ¶ 4, 298 Wis. 2d 232, 726 N.W.2d 671.

Under a line of cases beginning with *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986), the defendant may claim that the plea colloquy on its face was deficient. Wisconsin Stat. § 971.08(1)(a), requires the judge taking the plea to "determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." A plea that is not knowingly, voluntarily or intelligently entered creates a manifest injustice. *Bangert*, 131 Wis. 2d at 257.

Under a line of cases running through *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), the defendant may claim that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm. *Howell*, 301 Wis. 2d 350, ¶ 74. The extrinsic factor creates the manifest injustice.

"*Bangert* and its progeny govern the circuit court at plea colloquies. A circuit court must address defendants personally and fulfill several duties set forth in Wis. Stat. § 971.08 and judicial ***mandates*** to ensure that a plea of guilty or no contest is constitutionally sound." *Howell,* 301 Wis. 2d 350, ¶ 26 (emphasis added). Those duties are:

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
>
> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;
>
> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;
>
> (8) Establish personally that the defendant understands that the court is not bound by the terms

> of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his plea; and
>
> (10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

State v. Brown, 2006 WI 100, ¶ 35, 293 Wis. 2d 594, 716 N.W.2d 906.[1]

A defendant may invoke *Bangert* only by alleging that the circuit court failed to fulfill its plea colloquy duties. *Howell*, 301 Wis. 2d 350, ¶ 27. If a defendant moves to withdraw his or her plea in a motion which makes a *prima facie* showing that the plea was accepted without the trial court's conformance with Wis. Stat. § 971.08 or other "***mandatory*** procedures," and if the motion alleges that in fact the defendant did not know or understand the information that should have been provided at the plea colloquy, the motion warrants an evidentiary hearing. *Id.* (emphasis added). In contrast, a defendant's *Nelson/Bentley* motion must meet a higher standard for pleading than a *Bangert* motion. A defendant must allege facts which, if true, would establish the extrinsic factor and the legal right to relief. To obtain a hearing, a motion must raise a question of fact; if it presents only conclusory

[1] The court is also required by Wis. Stat. § 971.08(1)(d) to inquire of the district attorney whether he or she has complied with Wis. Stat. § 971.095(2) concerning consultation with victims. *Id.*

allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in its discretion deny the motion without a hearing. *Id.* ¶ 75.

Reed does not clearly indicate whether he contends his motion invoked *Bangert* or *Nelson/Bentley*. He does contend the circuit court was required to:

> advise a defendant that it may consider read-in charges when imposing a sentence but that the maximum penalty of the charged offense will not be increased; that the circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecutions of the read-in charge.

(Reed's brief at 9). He relies on *State v. Straszkowski*, 2008 WI 65, ¶ 5, 310 Wis. 2d 259, 750 N.W.2d 835. *Straszkowski* does not create a mandatory procedure, however.

It is true that the *Straszkowski* court stated:

> circuit court[s] should advise a defendant that it may consider read-in charges when imposing sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge.

Id. ¶ 5. It is also true the court did "not adopt the court of appeals' determinations that read-in charges are merely 'collateral consequences' of a plea, and that therefore information about read-ins 'is not a prerequisite to entering a knowing and intelligent plea.'" *Id.* ¶ 26. But the court also "'decline[d] to engage in further analysis regarding the circuit court's obligation to explain the nature

of read-in offenses . . . .'" *Id.* So the court did not mandate that circuit courts must explain read-ins personally in a soliloquy with the defendant. Reed's claim that the *Straszkowski* court established a mandate for circuit court plea colloquies goes too far.

In the absence of the supreme court ***mandating a circuit court's duty*** to explain the nature of read-in offenses, the motion here is solely a *Nelson/Bentley* motion because a defendant "may invoke *Bangert* only by alleging that the circuit court failed to fulfill its plea colloquy ***duties***." *Howell*, 301 Wis. 2d 350, ¶ 27 (emphasis added). *See e.g. State v. Wesley*, 2009 WI App 118, ¶¶ 21-24, 321 Wis. 2d 151, 772 N.W.2d 232 (treating a motion to withdraw a plea based on lack of understanding the ambiguous term "dismissed outright" as a *Nelson/Bentley* motion).

If the circuit court had treated the motion as a *Bangert* motion, it was obliged to hold a hearing at which the State has the burden to prove that the plea was knowing, intelligent, and voluntary. *Howell*, 301 Wis. 2d 350, ¶ 29. If the circuit court had treated the motion as a *Nelson/Bentley* motion it could deny the motion "if the record as a whole conclusively demonstrates that relief is not warranted." *Howell*, 301 Wis. 2d 350, ¶ 77.

Prior to his plea on November 17, 2008, Reed filled out a "Plea Questionnaire/Waiver of Rights" form (13). The second page of the form contained "Understandings," one of which was:

> I understand that if any charges are read-in as part of a plea agreement they have the following effects:

- Sentencing - although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased.
- Restitution - I may be required to pay restitution on any read-in charges.
- Future prosecution - the State may not prosecute me for any read-in charges.

(13:2).

At the plea hearing, Reed acknowledged his signature on the forms (the "Plea Questionnaire/Waiver of Rights" form (13) and the "Addendum") (14)) (41:5). He also told the circuit court his attorney had gone over the forms with him and that he understood "everything that is contained on these forms" (41:5).

Reed can not prevail in either proceeding. Under *Bangert*, the plea questionnaire and Reed's testimony at the plea hearing establish that his plea was knowing, intelligent and voluntary. Under *Nelson/Bentley*, the record as a whole conclusively demonstrates that relief is not warranted because the plea questionnaire and Reed's testimony establish that he was aware of the read-ins effect and he understood the effect. *Howell*, 301 Wis. 2d 350, ¶¶ 29, 77.

III. REED IS NOT ENTITLED TO ANY RELIEF ON HIS CLAIM THAT JUDGE CIMPL ERRED BY NOT RECUSING HIMSELF FROM THE POST-CONVICTION PROCEEDING.

Reed lastly claims the Judge Cimpl should have recused himself from the determination on the post-conviction motion. Presumably, his remedy would be a new post-conviction motion proceeding.

As Reed recognizes, there is a presumption that a judge is free of bias and prejudice. In order to overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased or prejudiced. *State v. McBride*, 187 Wis. 2d 409, 414-15, 523 N.W.2d 106 (Ct. App. 1994).

"A litigant is denied due process only if the judge, in fact, treats him or her unfairly." *State v. Rochelt*, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Ct. App. 1991) (internal quotation omitted). An appearance of partiality or circumstances which might lead a person to speculate upon the judge's partiality is not a denial of an impartial judge. *Id.* Reed presented no evidence that Judge Cimpl was actually biased or treated him unfairly. And he does not now object to Judge Cimpl's handling of the sentencing hearing nor did he after he found out Judge Cimpl would recuse himself from the restitution hearing.

Even under an appearance of impartiality standard, Reed's claim fails. "'The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned.' ABA Standards, The Function of the Trial Judge, sec. 1.7 (1972)." *State v. Asfoor*, 75 Wis. 2d 411, 436, 249 N.W.2d 529 (1977). This standard establishes both "[a] subjective test based on the judge's own determination of his or her impartiality and an objective test based on whether impartiality can reasonably be questioned." *State v. Walberg*, 109 Wis. 2d 96, 106, 325 N.W.2d 687 (1982).

At the sentencing hearing, Judge Cimpl put his reason for recusing himself from the restitution hearing on the record.

> Mr. Reed, at sidebar I told your lawyer, as well as the district attorney, I'm gonna have to recuse myself from the restitution hearing because of the fact that American Family is asking for some money; and I don't want to handle any cases from American Family because of a personal matter that I have with them. So, therefore, another judge is going to hear the restitution hearing.

(42:7). Reed requested that Judge Cimpl recuse himself from handling the post-conviction proceedings apparently on the ground that he had recused himself from the restitution hearing.[2] Judge Cimpl rejected the claim.

> I don't think I have to recuse myself from this motion. Because I just recused myself for that limited purpose of the restitution, which Judge Brash handled.

(43:4).

Because Judge Cimpl indicated he did not doubt his impartiality, only the objective test remains for consideration. The record demonstrates that Judge Cimpl's decision not to recuse himself was objectively reasonable. The restitution hearing had been handled by Judge Brash (43:4). Reed offers no authority for the proposition that once a judge recuses him or herself from a particular hearing for a limited

[2] The record does not contain a written motion.

purpose, that judge may not preside over any unrelated matter. The post-conviction motion was unrelated to the restitution. Reed did not raise any restitution issues (25).

CONCLUSION

For the reasons state above, this court should affirm Reed's judgment of conviction and the denial of his post-conviction motion and request for recusal.

Dated at Madison, Wisconsin, this 11th day of June, 2010.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,031 words.

Dated this 11th day of June, 2010.

_____

Warren D. Weinstein
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of June, 2010.

_____
Warren D. Weinstein
Assistant Attorney General