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MAR 14, 2012

Court of Appeals  
Division III  
State of Washington

No. 27962-6-III

IN THE COURT OF APPEALS  
OF THE  
STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

BERNARD RIALS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Tari Eitzen

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SUPPLEMENTAL BRIEFING OF APPELLANT  
(on application of *State v. Gresham* (84148-9)  
and *State v. Scherner* (84150-1))

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**A. SUMMARY OF SUPPLEMENTAL BRIEFING**

Mr. Rials' prior conviction evidence, including both the judgment and sentence and the extremely condemning testimony from the prior victim and her mother, was not admissible pursuant to RCW 10.58.090. Furthermore, the State never offered and the court never actually admitted the evidence pursuant to ER 404(b), so defense counsel never had any opportunity to request a proper limiting instruction under ER 404(b). Given that there were no eye witnesses, that the direct evidence of the current crime consisted only of the child victim's testimony five years after the alleged incident, that the defendant did not confess to the crime, and that the majority of the evidence presented by the State focused on the defendant's propensity for sexual misconduct based on his prior sex offense, the erroneous admission of this evidence under RCW 10.58.090 was not harmless. Finally, the error was exacerbated when the jury was improperly instructed based on RCW 10.58.090 that it could consider the prior sex offense "for its bearing on any matter to which it is relevant..." including the defendant's character and propensity for committing sex offenses, which is directly contrary to ER 404(b). (CP 208) A new trial is necessary and warranted.

## **B. SUPPLEMENTAL STATEMENT OF FACTS**

On June 13, 2008, one day after the Legislature enacted RCW 10.58.090 and shortly before Mr. Rials' trial was scheduled to begin, the State filed a notice of intent to introduce Mr. Rials' 1996 sex offense evidence pursuant to RCW 10.58.090. (CP 92-106; RP 39-52, 57-58) The State did not move to admit Mr. Rials' sex offense evidence pursuant to ER 404(b). (See CP 92-106; RP 39-52)

Defense counsel argued that the prior sex offense should be excluded, emphasizing the prejudice to the defendant where there was a lack of direct evidence for the current charge and the prior offense would "have by far the most effect on the jury... when the jury hears the allegations from the 1996 case, it's going to be case closed, basically..." (RP 66)

But the prosecutor contrasted RCW 10.58.090 with ER 404(b), noting that the former creates a presumption for admissibility of sex offense propensity evidence rather than a presumption of inadmissibility like ER 404(b). (See RP 49-52) The State noted that admission under RCW 10.58.090 was consistent with the Legislature's findings that "there is compelling public interest in admitting all significant evidence that will shed some light on the credibility of the charge and any denial by the defense." RP 49. The State concluded that "the court is meant to liberally

construe any objection to this [prior sex offense evidence] and sustain the validity of the legislative enactment.” (RP 52)

The trial court agreed with the State’s analysis under RCW 10.58.090, particularly that the prejudice factor now favored a presumption of admissibility for sex offense evidence instead of a presumption of inadmissibility like under ER 404(b). (*See* RP 49-50, 55-56) The court stated, “[t]he inflammatory nature is going to go down a little bit in importance...” as compared to a similar prejudice analysis when considering an ER 404(b) motion. (RP 50) (emphasis added) “[T]he purpose behind the enactment of this statute that it becomes exceptionally probative in these unique circumstances where sometimes all you have is a child statement and not a lot of physical evidence.” (RP 64)

Defense counsel argued that RCW 10.58.090 unconstitutionally allowed admission of propensity evidence irrespective of the bar on such evidence found in ER 404(b). (RP 54) But the court countered that RCW 10.58.090 is just one more “exception to 404(b).” (*Id.*) The court concluded that the evidence was admissible pursuant to the newly enacted statute. (RP 69-72) The court did mention that it may have entertained a motion to admit the evidence under ER 404(b) (RP 72-73), but no motion was made to admit the evidence under ER 404(b), and the court did not

hear testimony or any offers of proof for such evidence to be admitted to be considered under that rule (RP 69).

Ultimately, the court weighed and admitted the evidence under RCW 10.58.090, issuing its specific findings in relation to RCW 10.58.090, not ER 404(b). (RP 69-73; CP 92-93) To that end, the jury was instructed on RCW 10.58.090 that “evidence of the defendant’s commission of another sex offense is admissible and may be considered for its bearing on any matter to which it is relevant.” (CP 208) (emphasis added). The jury considered the prior sex offense evidence for its unlimited purpose, and it ultimately found Mr. Rials guilty of first-degree child molestation. (CP 281-91) Mr. Rials is now serving a life sentence without the possibility of parole. (*Id.*)

**C. SUPPLEMENTAL ARGUMENT ON APPLICATION OF  
STATE v. SCHERNER AND STATE v. GRESHAM.**

Mr. Rials’ conviction should be reversed because his prior sex offense was admitted pursuant to RCW 10.58.090 for “its bearing on any matter to which it is relevant...,” (CP 208), which conflicts with ER 404(b)’s categorical bar on admitting such evidence to show a propensity for committing sex offenses. Mr. Rials’ opening and reply briefs on this issue are incorporated herein by reference with the following supplementation as requested by this Court.

In sum, (1) the prior conviction evidence was improperly admitted pursuant to a statute that the Supreme Court has since declared unconstitutional. (2) The erroneous admission was not harmless. (3) The State never offered and the court never properly admitted the prior sex offense evidence for a permissible purpose under ER 404(b). Finally, (4) the erroneous instructions to the jury that it could consider the prior sex offense evidence for “any matter,” rather than some specific limited purpose, only aggravated the error and further prejudiced the defendant.

**Issue 1: Whether the prior conviction evidence was improperly admitted in this case pursuant to RCW 10.58.090.**

On January 5, 2012, our Supreme Court decided the consolidated matters of *State v. Scherner* (84150-1) and *State v. Gresham* (No. 84148-9). *State v. Gresham*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2012 WL 19664 (2012). At issue was whether prior sex offense evidence could be admitted pursuant to RCW 10.58.090, which generally allowed admission of prior sex offense propensity evidence “notwithstanding Evidence Rule 404(b)...” (*See also* Appellant’s Opening Brief at pg. 22). The Supreme Court explained its concern in that:

“RCW 10.58.090 makes evidence of a defendant's commission of other sex offenses admissible for the purpose of proving the defendant's character (e.g., the defendant is the “child-molesting type”) in order to show that the defendant has committed the charged offense in spite of ER 404(b)'s prohibition of admission for that purpose.”

*Gresham*, \_\_\_ Wn.2d \_\_\_, at page 8.

The Supreme Court acknowledged that prior sex offense evidence may be admissible in some cases pursuant to ER 404(b), not to prove conforming character of the defendant, but to prove such things as motive, opportunity, intent, preparation, plan, knowledge, etc. *Gresham*, \_\_\_ Wn.2d \_\_ at page 5. But these alternatives to admission are not “exceptions” to the categorical bar on propensity evidence; “there are no exceptions to ER 404(b)[‘s]” bar on propensity evidence. *Id.* at page 10. Whereas, RCW 10.58.090 improperly attempts to create an exception to ER 404(b) “notwithstanding” the categorical bar on propensity evidence. *Id.* at 8-10. Thus, given the irreconcilable conflict between ER 404(b) and RCW 10.58.090, the Supreme Court declared RCW 10.58.090 unconstitutional, holding “that the statute violates the separation of powers doctrine.” *Id.* at 12.

Here, the trial court admitted Mr. Rials’ prior sex offense evidence pursuant to RCW 10.58.090, a statute that has now been declared unconstitutional. (RP 69-73; CP 189-90) The trial court held the State to a lesser burden of proof for the admission of the prior sex offense evidence than that found in ER 404(b), finding specifically that RCW 10.58.090 led to a presumption of admissibility rather than inadmissibility like existed under ER 404(b) analyses. The court even noted that there

was a lesser threshold requirement for admitting propensity evidence under the new legislation, particularly since its consideration of probative value verses inflammatory nature was lessened.

The trial court in this case did exactly what the Legislature intended: it admitted prior sex offense evidence to aid the State in obtaining a sex offense conviction where the evidence may not have otherwise been sufficient to establish guilt. But the trial court's decision in this case did exactly what the Supreme Court warned against in its decision to hold RCW 10.58.090 unconstitutional. The Supreme Court has rejected this trial court's opinion that RCW 10.58.090 created an "exception" to ER 404(b). The trial court unknowingly erred by admitting the prior sex offense evidence in this case because there are no "exceptions" to ER 404(b), including the Legislature's attempt at an exception by passing RCW 10.58.090.

The evidence was admitted in this case for any purpose the jury might find relevant, even if that purpose was to find that the defendant had a "child-molesting type" character. This was specifically warned against by the Supreme Court in *Gresham, supra*. There can be no doubt that the trial court erred by admitting Mr. Rials' prior sex offense evidence, including the testimony of that victim and her mother, pursuant to RCW

10.58.090. The Supreme Court has spoken on this very same issue in *State v. Gresham, supra*. The trial court erred.

**Issue 2: Whether the erroneous admission of prior conviction evidence pursuant to RCW 10.58.090 was prejudicial and not “harmless error.”**

The trial court erred by admitting Mr. Rials’ prior sex offense evidence pursuant to RCW 10.58.090, and this error cannot be considered harmless in this case. Given the lack of direct evidence supporting guilt, other than the child’s vague testimony almost five years after the event, the error is not harmless.

According to *State v. Gresham, supra*, if the trial court erred by admitting evidence under RCW 10.58.090, the next inquiry is whether that error could be considered harmless. That is, the question is “whether ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’” *Gresham*, \_\_\_ Wn.2d \_\_\_, at pg. 12 (quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). It should be noted that “in sex cases... the prejudice potential of prior acts is at its highest.” *Id.* (quoting *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)).

In *Gresham, supra*, the court found that the error in admitting the prior conviction evidence under RCW 10.58.090 was not harmless. The Court held that, while the evidence was not insufficient for a jury to

convict the defendant, there was a “reasonable probability that absent this highly prejudicial evidence of Gresham’s prior sex offense... the jury’s verdict would have been materially affected.” *Gresham*, \_\_ Wn.2d \_\_ at pg. 12. The Court explained:

“Much of the testimony at trial was predicated on the fact of Gresham's prior conviction, including all of A.C.'s testimony and much of J.L.'s parents' testimony. What would remain absent the erroneously admitted evidence would be J.L.'s testimony that Gresham had molested her and her parents' corroboration that Gresham had had the opportunity to do so, along with the investigating officer's testimony. There were no eyewitnesses to the alleged incidents of molestation... [W]e cannot say that the erroneous admission of the evidence of Gresham's prior conviction was harmless error.”

*Gresham*, \_\_ Wn.2d \_\_ at pg. 12.

Here, the circumstances are markedly similar to Gresham’s case. Most of the testimony in this case was predicated on the fact of Mr. Rials’ prior conviction, including the testimony of the prior victim, the prior victim’s mother and Mr. Rials’ counselor Mr. Valenzuela, who testified regarding the defendant’s prior offense and propensity for such crimes. What remains, absent this evidence, is the child’s vague testimony five years after the alleged incident; the child’s hearsay presented through her mother; the mother’s own inconsistent statements of where and when the crime might have occurred; and testimony regarding the investigative interview of the mother and daughter, which did not even begin until well

after one year from the alleged incident and was further problematic due to the leading nature of questions put to the child.

This case is unlike *State v. Scherner*, \_\_ Wn.2d \_\_ (No. 84150-1), which was consolidated with *Gresham*, *supra*. In *Scherner*, *supra*, the defendant essentially confessed to the crime in a recorded conversation with the victim, the victim's testimony about the assault was very detailed and Scherner had attempted to escape prosecution by absconding to Florida with at least \$14,000 cash. The Court found that any error admitting prior sex offense evidence without a limiting instruction under ER 404(b) was harmless. "[T]he remaining overwhelming evidence of Scherner's guilt persuades us that the outcome of his trial would not have been materially affected." *Gresham*, \_\_ Wn.2d \_\_, at pg. 8.

Here, the defendant did not confess to any crime against M.R. Also, M.R.'s testimony was not particularly detailed or reliable given the length of time that had lapsed since the alleged offense, the leading nature of subsequent interviews and the inconsistencies in both her testimony and her mother's testimony. In other words, there was not sufficient, let alone "overwhelming" evidence as in *Scherner*, to conclude that the jury's verdict was not materially affected by the substantial amount of prior conviction evidence admitted in this case.

Mr. Rials has been sentenced to life in prison without the possibility of parole, and yet the possibility of his conviction being improperly based on character propensity evidence is too great to ignore. The trial court's error in admitting the prior conviction evidence pursuant to RCW 10.58.090 was not harmless and requires, at the very least, a new trial.

**Issue 3: Whether the court failed to actually admit the prior conviction evidence under ER 404(b).**

The State may argue that the evidence was alternatively admissible under ER 404(b) so that, like in *Scherner*, *supra*, the RCW 10.58.090 error was of no moment.

In *State v. Scherner*, the Supreme Court noted that the prior conviction evidence was admitted by the trial court pursuant to RCW 10.58.090 and ER 404(b) to demonstrate the existence of a common scheme or plan. *Scherner*, \_\_ Wn.2d \_\_ (No. 84150-1; Opinion Filed 1/5/2012). Thus, even without RCW 10.58.090, the evidence was admissible in *Scherner*. *Scherner*, \_\_ Wn.2d \_\_, pg. 13.

The key difference between this case and *Scherner* is that no motion was made to admit under ER 404(b), there were no offers of proof or evidence presented that would support an ER 404(b) admission, the court only speculated that ER 404(b) might have applied but utilized an incorrect legal standard without specific evidentiary support, no specific

findings were made, and defense counsel never had an opportunity to request appropriate limiting instructions since the evidence was not actually admitted under ER 404(b).

ER 404(b) categorically excludes prior conviction propensity evidence unless it is otherwise found admissible upon proper showing.

ER 404(b) states:

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

ER 404(b). In order to admit evidence of prior misconduct under ER 404(b), the trial court must:

“(1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose of the evidence; (3) decide whether the evidence is relevant to prove an element of the State's case; and (4) find that the probative value of the evidence outweighs its prejudice.

*In re Detention of Coe*, 160 Wn. App. 809, 818-19, 250 P.3d 1056 (2011) (citing *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

“This analysis must be conducted on the record.” *Id.* (quoting *Foxhoven*, 161 Wn.2d at 175). “The burden of demonstrating a proper purpose [i.e. the first three factors] is on the proponent of the evidence.” *Scherner*, *supra* at pg. 5 (citing *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)). “It is because of this burden that evidence of prior misconduct is

presumptively inadmissible.” *Schnerer, supra*, at pg. 5  
(citing *DeVincentis*, 150 Wn.2d at 17).

Here, Mr. Rials’ prior conviction evidence was not offered by the State under ER 404(b). The evidence was specifically offered under RCW 10.58.090, only one day after the Legislature passed this legislation, and just before trial was set to begin in Mr. Rials’ case. The State did not offer any evidence under ER 404(b); indeed, the witnesses who may have been available to testify in support of admitting evidence under ER 404(b) were present but were never called because the trial court instead streamlined the process and admitted the evidence under RCW 10.58.090 in an apparent effort at judicial efficiency.

The trial court later speculated that the prior conviction evidence may have been admissible under ER 404(b), but it never conducted any analysis of the evidence to support such an admission. Furthermore, the trial court did not determine whether or not the probative value of such an admission under ER 404(b) outweighed the prejudice that is inherent when admitting prior sex offense evidence. Importantly, the trial court agreed with the State’s incorrect analysis that RCW 10.58.090 created a presumption for admission, even though ER 404(b) creates a presumption for exclusion. Thus, since the court clearly did not consider the appropriate inquiry for admitting evidence under ER 404(b), this case is

wholly unlike *State v. Scherner* where the evidence was found alternatively admissible under ER 404(b).<sup>1</sup>

Even upon remand, it is highly unlikely that there will be a proper purpose for admission under ER 404(b), nor that the probative value would outweigh prejudice to the defendant. The two sex offenses were only loosely similar at best. According to the evidence, Mr. Rials did not have any lengthy relationship with the first victim's mother, he apparently met that mother while drinking with some other people and only knew her briefly, he entered the victim's room secretly by a ladder at night and without permission, and he stated confusion or mistake as to whose room he was in upon discovery by that mother. Whereas in the underlying case, Mr. Rials had an ongoing relationship with the child's mother, he did not abscond away or trespass into any location in order to access the child, he denied having committed the sex offense as opposed to claiming a mistake like with the first victim, and the alleged circumstances of the current offense were that the defendant inappropriately touched the girl over her clothes as opposed to any sort of penetration.

Other than the one-year difference in age between the child in this case and the child from 1996, there was not sufficient similarity between the two offenses or their preparation to admit the prior conviction

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<sup>1</sup> This court only reviews ER 404(b) admissions for abuse of discretion when the trial court correctly interpreted the rules of evidence. *See e.g., Scherner, supra*, at pg. 6.

evidence. *See Scherner, supra*, at pg. 6 (discussing the burden of proof to admit evidence as a common scheme or plan or signature crime, noting that “‘similarity in results’ is insufficient.”)

Furthermore, given the dissimilarity between the crimes and, as explained above, the lack of overwhelming evidence supporting this current conviction, the prejudice of admitting the prior sex offense evidence exceeded any probative value. The trial court never conducted a proper inquiry under this factor (noting that the prejudice inquiry was lesser under RCW 10.58.090). Regardless, had the trial court made the proper inquiry, it would have come up short. As explained above, the child in this case testified vaguely about occurrences five years prior, there were circumstances that made the subsequent investigation of this crime less than trustworthy (e.g., leading questions to the child), the child’s mother’s testimony was inconsistent, and the defendant never admitted the offense.

Defense counsel aptly noted that this prior conviction evidence, which included extensive examination of the prior victim and her mother on details beyond the prior judgment and sentence, would be and was the most damning evidence in this case. Had a proper motion been made by the State and the appropriate standard for prejudice been considered by the

trial court, it is highly likely that the trial court would have excluded the prior conviction evidence, even under ER 404(b).

In sum, the State did not move, argue or offer evidence of the prior sex offense evidence under ER 404(b). Furthermore, even though the trial court speculated that ER 404(b) may have applied, the trial court was operating under an incorrect understanding of the legal presumption regarding the prejudice factor, so the court's speculation about admissibility cannot be relied upon at this time. Finally, regardless of what the trial court may or may not rule in the future, the bottom line is that the trial court never actually admitted the evidence in this case under ER 404(b). An incorrect legal standard was utilized, the witnesses' testimony was never presented, no findings were actually made that the evidence was admissible pursuant to ER 404(b) and the evidence was improperly admitted instead under RCW 10.58.090 so that defense counsel never had the opportunity to challenge ER 404(b) or request necessary limiting instructions.

Given that the most condemning evidence in this case was admitted pursuant to RCW 10.58.090 rather than ER 404(b), and given that the prejudicial effect outweighed any slight probative value, Mr. Rials respectfully requests reversal and, at a minimum, a new trial.

**Issue 4: Whether the jury was improperly instructed on the prior conviction evidence in a manner that prejudiced the defendant's right to a fair trial.**

The jury was improperly instructed, consistent with the unconstitutional RCW 10.58.090, that “evidence of the defendant’s commission of another sex offense is admissible and may be considered for its bearing on any matter to which it is relevant.” (CP 208) If the same evidence would have been properly admitted under ER 404(b), defense counsel would presumably have requested and been entitled to an appropriate limiting instruction.<sup>2</sup> Since the evidence was not admitted under ER 404(b), a correlating limiting instruction was not requested or even necessarily appropriate at the time. But, the mis-instruction to the jury consistent with RCW 10.58.090, especially when compared to instructions under ER 404(b), exacerbated the prejudice to the defendant from the prior conviction evidence in this case.

If evidence is admitted pursuant to ER 404(b), “the party against whom the evidence is admitted is entitled, upon request, to a limiting instruction informing the jury that the evidence is only to be used for the proper purpose and not for the purpose of proving the character of a person in order to show that the person acted in conformity with that character.” *Schnerer*, \_\_\_ Wn.2d \_\_\_, pg. 5 (citing *State v. DeVincentis*, 150

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<sup>2</sup> Defense counsel cannot, in good faith, be alleged ineffective for failing to request a limiting instruction under ER 404(b) when the evidence was never actually admitted under ER 404(b).

Wn.2d at 23 (citing *State v. Saltarelli*, 98 Wn.2d at 362). *See also Coe*, 160 Wn. App. at 819 (citing *Foxhoven*, 161 Wn.2d at 175) (“If the evidence is admitted, the trial court must give the jury a limiting instruction.”) “An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.” *Scherner*, \_\_ Wn.2d at pg. 7.

Here, the jury was instructed that it could consider Mr. Rials’ prior conviction evidence for its bearing on any matter the jury deemed relevant. Quite possibly, the jury would think the evidence was relevant to show exactly what *State v. Gresham, supra*, warned against with regard to RCW 10.58.090 evidence: to establish that the defendant had a “child-molesting” type of character. Unlike instructions under ER 404(b) that specifically instruct the jury not to consider the evidence to find that the defendant has acted in conformity with such character preconceptions, the jury instructions in this case allowed and, indeed, encouraged the jury to consider the evidence for *any* purpose. This was the anti-limiting instruction.

The underlying instructions exacerbated the error under RCW 10.58.090 and did nothing to alleviate any prejudice to the defendant.

There is a great likelihood that the jury considered the prior conviction evidence for its bearing on Mr. Rials' character, and that it convicted Mr. Rials accordingly. "Jurors are presumed to follow instructions." *State v. Grisby*, 97 Wn.2d 493, 509, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211 (1983). Presuming that the jury followed its instructions in this case, Mr. Rials requires a new trial.

"When the allegation is child molestation, evidence of prior similar acts creates a likelihood that the jury will convict based solely upon character." *State v. Baker*, 89 Wn. App. 726, 736, 950 P.2d 486 (1997) (citing *State v. Krause*, 82 Wn. App. 688, 696, 919 P.2d 123 (1996), *review denied*, 131 Wash.2d 1007, 932 P.2d 644 (1997)). Mr. Rials respectfully requests that his conviction and life-sentence be reversed due to the great likelihood that he was convicted of this current offense based on the highly prejudicial evidence of his prior offense rather than evidence of the current underlying crime.

### **C. CONCLUSION**

Justice cannot be served by an unreliable conviction. Mr. Rials encourages this Court to consider the evidentiary errors in this case, along with the other errors thoroughly addressed in his earlier briefing, and conclude that his conviction should be reversed and either dismissed or, at a minimum, remanded for a new, fair trial.

Respectfully submitted this 14<sup>th</sup> day of March, 2012.

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 27962-6-III  
vs. )  
BERNARD RIALS ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 14, 2012, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's supplemental briefing to:

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Having obtained prior permission from Spokane County Prosecutor's Office, I also served Mark Lindsey at kowens@spokanecounty.org by e-mail.

Dated this 14<sup>th</sup> day of March, 2012.

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