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No. 68024-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN CHADWICK DUBLIN,

Appellant.

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STATE OF WASHINGTON

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

The Honorable Laura Gene Middaugh

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BRIEF OF APPELLANT

---

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Brian Dublin was guilty of first degree burglary in Count 3 and attempted first degree rape of G.A.G in Count 4.

2. The trial court erred in failing to sever counts 3 and 4 involving G.A.G. from those involving A.B. and E.P.

3. Mr. Dublin's attorney rendered deficient representation in failing to renew the motion to sever counts 3 and 4 from the remaining counts.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires that the State prove each element of the offense beyond a reasonable doubt. The fact that Mr. Dublin was the person responsible is one of the elements of the offenses charged. In counts 3 and 4, those involving G.A.G., the State provided no evidence that the person responsible for attacking G.A.G. was Mr. Dublin. Is Mr. Dublin entitled to reversal of those counts with instructions to dismiss?

2. A court must sever offenses if there is a risk of substantial prejudice to the defendant from a joint trial. Mr. Dublin moved prior to trial to sever counts 3 and 4 from the

remaining counts due to the lack of evidence tying him to these two offenses where the other counts had substantially greater evidence. This disparate quantum of evidence allowed the jury to infer Mr. Dublin's guilt on counts 3 and 4 from the overwhelming evidence on the remaining counts. Did the trial court err in failing to sever counts 3 and 4 due to the disparate quantum of evidence, which ultimately prejudiced Mr. Dublin?

3. A defendant has a constitutionally protected right to the effective assistance of counsel. To preserve a motion to sever for appellate review, defense counsel must renew the motion to sever sometime before the close of evidence. Mr. Dublin's attorney moved pretrial to sever counts 3 and 4, but failed to renew the motion. Was Mr. Dublin denied his constitutionally protected right to the effective assistance of counsel, entitling him to reversal of counts 3 and 4?

#### C. STATEMENT OF THE CASE

On August 8, 2003, at approximately 3 a.m. on Vashon Island, 18 year old A.B. was awakened by a man holding a knife. RP 576-83. A.B. indicated the man smelled of stale alcohol. RP 590. The man raped A.B. vaginally and anally, then before

leaving, told her he did not want to hear about the assault from the police or read about it in the Beachcomber, the local newspaper. RP 591. A.B. fled into her step-father's room where she disclosed the rape. RP 558. A.B. was taken to Harborview Hospital, where she was examined and a sexual assault kit obtained. RP 454, 475, 595. The samples from the sexual assault kit were tested for DNA and two profiles emerged; one for A.B. and one for an unidentified male. RP 846. The DNA database was searched with no match discovered. RP 854. The sheriff's office exhausted its leads and A.B.'s case went cold. RP 411.

On July 2, 2006, at approximately 3:15 a.m. on Vashon Island, 12 year old G.A.G. and her younger sister S.G. were asleep in the same bed in their parents' house. RP 1254. G.A.G. was awakened by the whispering of a man that he had already stabbed her older sister and to keep quiet. RP 1317-18. The man took G.A.G. into the family room where he grabbed her genital area. RP 1319. The man ordered G.A.G. to take off her clothing and bend over. RP 1323. Instead, G.A.G. fled into her parents' room where she disclosed the assault. RP 1262-65,

1324. G.A.G.'s parents called 911. RP 1265. The sheriff's office was unable to identify a suspect and the G.A.G. case went cold as well. RP 2006.

On January 10, 2010, at approximately 2 a.m. again on Vashon Island, 17 year old E.P. came home from a night of partying and went to bed. RP 1593-94, 1635-37. Shortly thereafter, E.P. was awakened by a man lying on top of her. RP 1638. The man told her he would kill her if she tried to make a sound. RP 1640. The man raped her vaginally and then fled. RP 1641-43. E.P. ran into her parents' room, who called 911. RP 1643-44. E.P. was taken to Harborview Hospital where she was examined. RP 1446, 1645. A sexual assault kit was obtained from E.P. 1443, 1447.

As E.P. spoke to sheriff's investigators regarding the assault, she thought her assailant might be Mr. Dublin, a person she knew and disclosed that information to the sheriff's deputies. RP 1644.

DNA was obtained from the vaginal swabs taken from E.P. which revealed a male profile that was matched to Brian

Dublin. RP 694-97, 710-13. Mr. Dublin was subsequently matched to the DNA taken from A.B. as well. RP 699.

A search by sheriff's deputies of Mr. Dublin's residence revealed two shoe boxes in the loft area of the cabin which was being used for storage. RP 1137. Inside one of the two boxes was a blue paper notebook. RP 1139. Inside the notebook was a list, which contained among other names, A.B., G.A.G., and E.P. RP 1146-47.

Mr. Dublin was charged with three counts of first degree burglary, one each for A.B., G.A.G., and E.P. CP 168-70. Each of the burglary counts included a sentence enhancement allegation, that the offense was committed for the purpose of sexual gratification. CP 168-70. Mr. Dublin was also charged with two counts of first degree rape, one each for A.B. and E.P., and one count of attempted first degree rape involving G.A.G. CP 168-70.<sup>1</sup>

Prior to trial, Mr. Dublin moved to sever counts 3 and 4, the counts involving G.A.G., from the other counts, noting the

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<sup>1</sup> Mr. Dublin was also charged with a count of attempted indecent liberties involving another woman, C.B. CP 171. The jury was deadlocked on this count and a mistrial was subsequently declared. CP 200.

non-existence of DNA, fingerprints, identification, or other indicia pointing to Mr. Dublin as the person responsible. RP 125-26. In denying the motion to sever counts, the trial court ruled:

I'm going to deny [the motion to sever]. There's certainly sufficient similarities and things that tie them together. Not the least of which is the book that had AB, GG, and EP in it, which clearly ties them together.

RP 128.

Following a jury trial, Mr. Dublin was found guilty of all counts as charged. CP 196-204.

D. ARGUMENT

1. THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED TO SUPPORT THE BURGLARY AND ATTEMPTED RAPE CONVICTIONS INVOLVING G.A.G.

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358,

364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The State failed to prove Mr. Dublin was the person who broke into G.A.G.'s house and attempted to engage in sexual intercourse with her by forcible compulsion. As charged here, to convict Mr. Dublin of first degree burglary, the jury had to find that he entered or remained unlawfully in the house with the intent to commit a crime against a person or property therein, and that, in the course of the burglary, Mr. Dublin assaulted G.A.G. RCW 9A.52.020(b); *State v. Winston*, 135 Wn.App. 400, 411, 144 P.3d 363 (2006).

In addition, attempted first degree rape required the State to prove Mr. Dublin attempted to engage in sexual intercourse with G.A.G., with forcible compulsion. RCW 9A.44.040(1)(a) (first degree rape), RCW 9A.28.020(1) (attempt); *State v. Smith*, 165 Wn.App. 296, 320, 266 P.3d 250 (2011). Thus, the State carried the burden of proving beyond a reasonable doubt that Mr. Dublin was the person responsible for the burglary and attempted rape.

The State had no direct evidence linking Mr. Dublin to the acts committed at G.A.G.'s house. Instead, the State relied entirely on the "similarities" between these offenses and the offenses involving A.B. and E.P. As opposed to the offenses involving A.B. and E.P. there was no DNA evidence in the case involving G.A.G. In addition, there were no fingerprints of any value obtained at G.A.G.'s. RP 1944-45. Further, G.A.G. was unable to identify her assailant. While G.A.G. attended a lineup which included Mr. Dublin and at which she noted that he and another had similar facial features to the assailant, G.A.G. never identified Mr. Dublin as being the assailant. RP 1523.

Contrary to the State's claim of "similarities" in the offenses involving all three young women in making its case in counts 3 and 4, the dissimilarities outnumber the similarities and the "similarities" claimed by the State were not so similar.

The State noted that all three houses were in rural areas and backed up to densely wooded areas. This was unremarkable since Vashon Island is a rural island with large tracts of densely wooded areas where homes have been built.

In A.B.'s attack, A.B. stated she saw a knife or the assailant feigned having a knife. RP 581-83. G.A.G. did not see a knife, nor did the assailant show what appeared to be a knife, and in E.P.'s case there was no weapon shown or implied. RP 1846. The State emphasized that in all three residences the assailant entered by way of an unlocked door. But each of the families emphasized that residents of Vashon traditionally have not locked their doors. RP 550-51, 1245, 1690. In all three attacks other people were in the home, not surprising when the attacks occurred in the early morning hours before daylight.

While there was digital and penile penetration in A.B.'s and E.P.'s rapes, there was no penetration in G.A.G.'s case. RP

1847. There was vaginal and anal penetration in A.B.'s case, yet only vaginal penetration in E.P.'s case. There was DNA in A.B.'s and E.P.'s cases, none in G.A.G.'s. RP 1848. Mr. Dublin had been to E.P.'s house and G.A.G.'s on prior occasions, but had never been to A.B.'s. RP 2032-35. A.B. claimed her assailant smelled of stale alcohol, G.A.G. claimed he smelled of cigarette smoke, E.P. made no claim about smell.

Finally, particular emphasis was placed on the notebook, which contained the names of all three women and was found in Mr. Dublin's residence. Once again, this fact is unremarkable since there was no evidence presented the notebook belonged to Mr. Dublin, no evidence presented that he had exclusive control over the location where the notebook was found, and no evidence that the handwriting in the notebook was Mr. Dublin's.

Given the totality of the evidence presented, the State failed to sustain its burden of proving Mr. Dublin was the person responsible for the offenses committed against G.A.G.

c. Mr. Dublin is entitled to reversal of his first degree burglary conviction and attempted first degree rape conviction with instructions to dismiss. Since there was insufficient evidence to support the convictions involving G.A.G. counts 3 and 4, this Court must reverse those convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. THE TRIAL COURT ERRED IN FAILIING TO SEVER COUNTS 3 AND 4 FROM THE REMAINING COUNTS

a. The right to a fair trial includes the right to be tried for the charged offense, without irrelevant accusations of other wrongful conduct. An accused person’s right to a fair trial is a fundamental part of due process of law. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Erroneous

evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (the introduction of improper evidence deprives a defendant of due process where “the evidence ‘is so extremely unfair that its admission violates fundamental conceptions of justice.’”).

Compliance with state evidentiary and procedural rules does not guarantee compliance with the requirements of due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9<sup>th</sup> Cir. 1991); *citing Perry v. Rushen*, 713 F.2d 1447, 1453 (9<sup>th</sup> Cir. 1983), *cert. denied*, 469 U.S. 838 (1984). Due process is violated where evidence was admitted that renders the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9<sup>th</sup> Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9<sup>th</sup> Cir. 1986).

An accused person has a fundamental right to be tried only for the offense charged. U.S. Const. amend. V; Const. art. I, §22; *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). The “fundamental concept” that a “defendant must be tried for what

he did, not who he is,” is violated by introducing evidence designed to show a propensity for committing sex offenses.

*State v. Cox*, 781 N.W.2d 757, 769 (Iowa 2010).

b. The court must sever counts where the strength of the evidence on the counts is widely disparate and the defendant would suffer prejudice. A trial court may sever offenses if doing so will promote a fair determination of the defendant's guilt or innocence on each offense, considering the resulting prejudice to the defendant. CrR 4.4(b); *State v. Bryant*, 89 Wn.App. 857, 864, 950 P.2d 1004 (1998). A defendant may be unfairly prejudiced by a single trial if that trial invites the jury “to cumulate evidence to find guilt or infer a criminal disposition.” *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Further, severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). The joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature. *State*

*v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). This danger of prejudice exists even if the jury is properly instructed to consider the crimes separately. *State v. Harris*, 36 Wn.App. 746, 750, 677 P.2d 202 (1984). The defendant seeking severance must show that a trial on multiple counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). In assessing whether severance is appropriate, a trial court weighs the prejudice inherent in joined trials against the State's interest in maximizing judicial economy. *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

c. The evidence supporting counts 3 and 4 was grossly disparate compared to the remaining counts. To determine whether to sever charges to avoid prejudice to a defendant, a court considers the strength of the State's evidence on each count; the clarity of defenses as to each count; court instructions to the jury to consider each count separately; and the admissibility of the evidence of the other charges even if not joined for trial. *Russell*, 125 Wn.2d at 62-63. Finally, the court must consider whether the evidence was cross-admissible on

each count. *Russell*, 125 Wn.2d at 63. But, “[n]o one factor is preeminent; all must be assessed in determining whether potential prejudice requires severance.” *State v. Warren*, 55 Wn.App. 645, 655, 779 P.2d 1159 (1989).

In *Hernandez*, the defendant was tried on three counts of robbery of different convenience stores occurring on different days and there was great disparity between the witnesses' certainty in identifying the defendant. *State v. Hernandez*, 58 Wn.App. 793, 799-800, 794 P.2d 1327 (1990), *review denied*, 117 Wn.2d 1011 (1991). This difference in the strength of evidence, coupled with the lack of cross-admissibility, required severance. *Hernandez*, 58 Wn.App. at 800. Hernandez's conviction was due primarily to the fact that he was identified by eyewitnesses. But, these witnesses identified Hernandez with differing degrees of certainty. The witness to the first robbery was initially reluctant to identify Hernandez. On the day before trial, he could only be “65%” certain that Hernandez was the robber. Furthermore, the witness's testimony was not corroborated. Much the same can be said of the second robbery where the witness said that she was “positive” Hernandez was the robber,

but her testimony was not corroborated. Thus, the State's evidence on these two counts was somewhat weak, and any prejudice flowing from the joinder would likely have been significant.

On the other hand, the third robbery was witnessed by three persons. Each of these witnesses expressed great certainty about their identification of Hernandez. When asked, one witness said he was "100%" certain, another said "98%" certain, and the third said she was "75–80%" certain. This Court concluded the trial court erred in denying the motion to sever:

Looking at all of the factors, including the fact that evidence on each count would not have been admissible at separate trials as well as the fact that the State's evidence on counts one and three was weak, we conclude that the denial of the severance motion amounted to a manifest abuse of the trial court's discretion.

*Hernandez*, 58 Wn.App. at 799-800.

Here, similar to *Hernandez* where the evidence was so disparate, G.A.G. was unable to identify her assailant, there were no fingerprints, and as opposed to the counts involving the other two women, there was no DNA evidence linking Mr.

Dublin to the offenses involving G.A.G. RP 125. The court's ruling rested solely on the cross-admissibility, which is only one of the factors. Further, the court's focus on the notebook which included the names of the three women was misguided. There was no evidence presented that the book belonged to Mr. Dublin or that the entries were made by him.

d. Reversal is required because of the resulting prejudice to Mr. Dublin. Where the cases were improperly joined in one trial, the convictions must be reversed unless the error was harmless. *Bryant*, 89 Wn.App. at 864.

The State had little in the way of evidence to offer on counts 3 and 4 compared to that offered on the remaining counts. Thus, this was a classic case of bootstrapping, using the allegations of one matter to prove the allegations in another matter. As a consequence, the error in failing to sever counts 3 and 4 from the remaining counts was not harmless.

3. MR. DUBLIN'S ATTORNEY RENDERED DEFICIENT REPRESENTATION WHEN HE FAILED TO RENEW THE MOTION TO SEVER COUNTS 3 AND 4 INVOLVING G.A.G. FROM THE REMAINING COUNTS

a. Mr. Dublin had the right to the effective assistance of counsel. A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of

reasonably effective lawyer. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland*, 466 U.S. at 687.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo." *Sutherby*, 165 Wn.2d at 883.

b. Counsel's failure to renew the motion to sever Counts 3 and 4 constituted deficient performance. CrR 4.4(a) requires a defendant make a pretrial motion to sever and, if overruled, to renew the motion before the close of the evidence. Mr. Dublin's counsel made a pretrial motion to sever counts 3 and 4 from the remaining counts. The court denied the motion and Mr. Dublin's counsel did not renew the motion to sever

before the close of the evidence. As a consequence, Mr. Dublin submits that this failure rendered his counsel ineffective and the failure to move to sever prejudiced him. Mr. Dublin asks this court to reverse Counts 3 and 4 and remand for a new trial.

c. Mr. Dublin was prejudiced by his attorney's deficient representation. To demonstrate prejudice in the joint trial context, the defendant must show that the trial court likely would have granted a severance motion and that, if he were tried separately, there was a reasonable probability he would have been acquitted. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004).

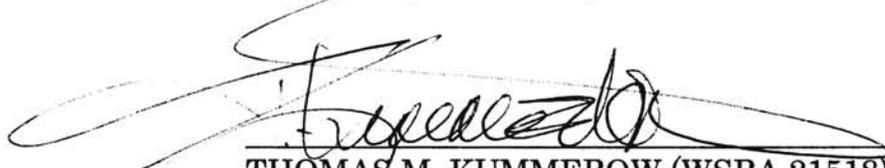
As argued, *supra*, the trial court erred in failing to grant the motion initially. Given the great disparity in the evidence between counts 3 and 4 and the remaining counts, there was a reasonable possibility the jury bootstrapped the evidence from the stronger counts, which had they not, Mr. Dublin would have been acquitted. Mr. Dublin suffered prejudice from his attorney's failure to renew the motion to sever and his convictions on counts 3 and 4 should be reversed.

E. CONCLUSION

For the reasons stated, Mr. Dublin requests this Court reverse his convictions for first degree burglary and attempted first degree rape in counts 3 and 4 with instructions to dismiss. Alternatively, Mr. Dublin requests this Court reverse the convictions on counts 3 and 4 and remand for a new trial.

DATED this 28<sup>th</sup> day of June 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over a horizontal line. The signature is fluid and cursive.

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Washington Appellate Project – 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68024-2-I
v.	)	
	)	
BRIAN DUBLIN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
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<input checked="" type="checkbox"/> BRIAN DUBLIN 353035 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF JUNE, 2012.

X \_\_\_\_\_ 

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