

65870-1

65870-1

No. 65870-1-I

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICKLAS RIVAS,

Appellant,

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPELLANT'S REPLY BRIEF

RYAN BOYD ROBERTSON
WSBA No. 28245
ROBERTSON LAW PLLC
800 Fifth Avenue Suite 4000
Seattle, Washington 98104
(206) 892-2094
ryan@robertsonlawseattle.com

TABLE OF CONTENTS

	<u>Page No.</u>
I. APPELLANT’S REPLY TO ISSUES RAISED IN RESPONDENT’S BRIEF	1
II. ARGUMENT	2-19
1. State’s opposition to grant of discretionary review is not timely	2-3
2. Even if timely, the Court of Appeals did not abuse its discretion in granting review	3-7
3. State mis-construes opening remarks by defense counsel	7-9
4. Neither the “invited error doctrine” nor the “open door doctrine” apply to counsel’s remarks in opening statement	9-14
a. Adherence to Court Instructions	9-10
b. Invited Error and Open Door	10-14
5. State is not able to minimize or justify comment on exercise of Miranda Rights	14-18
6. State cannot overcome presumption of prejudice	18-19
III. CONCLUSION	19

Attachments

1. Court Letter dated July 19, 2011

TABLE OF AUTHORITIES

<u>Washington Cases</u>	<u>Page No.</u>
<u>City of Bothell v. Barnhart</u> , 172 Wn.2d 223 257 P.3d 648 (2011)	3, 4, 6
<u>City of Bothell v. Barnhart</u> , 156 Wn. App. 315 234 P.3d 264 (2010)	4
<u>Cole v. Harveyland, LLC</u> , 163 Wn. App. 199 258 P.3d 70 (2011)	4, 5
<u>State v. Alger</u> , 31, Wn. App. 244 640 P.2d 44 (1982)	11
<u>State v. Burke</u> , 163 Wn.2d 204 181 P.3d 1 (2008)	18
<u>State v. Curtis</u> , 110 Wn. App. 6 37 P.3d 1274 (2002)	15, 16, 17, 18
<u>State v. Easter</u> , 130 Wn.2d 228 922 P.2d 1285 (1996)	15
<u>State v. Ferguson</u> , 76 Wn. App. 560 886 P.2d 1164 (1995)	4
<u>State v. Frawley</u> , 140 Wn. App. 713 167 P.3d 593 (2007)	12
<u>State v. Grisby</u> , 97 Wn.2d 493 647 P.2d 6 (1982)	9, 10
<u>State v. Jones</u> , 144 Wn. App. 284 183 P.23 307 (2008)	10, 12
<u>State v. Lewis</u> , 15 Wn. App. 172, 548 P.2d 587 (1976)	11

<u>State v. McEnry</u> , 124 Wn. App. 918 103 P.3d 857 (2004)	4
<u>State v. Romero</u> , 113 Wn. App. 779 54 P.3d 1255 (2002)	16, 18, 19
<u>State v. Rivers</u> , 129 Wn.2d 697 921 P.2d 495 (1996)	13
<u>State v. Stephens</u> , 22 Wn. App. 548 591 P.2d 827 (1979)	11
<u>State v. Thorgerson</u> , 172 Wn.2d 438 258 P.3d 43 (2011)	9
<u>State v. Young</u> , 63 Wn. App. 324 818 P.2d 1375 (1991)	11
<u>Stevens v. Gordon</u> , 118 Wn. App. 43 74 P.3d 653 (2003)	4
<u>Federal Cases</u>	<u>Page No.</u>
<u>Miranda v. Arizona</u> , 384 U.S. 436 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	Passim
<u>Douglas v. Cupp</u> , 578 F.2d 266 (9 th Circ. 1978)	16, 17

<u>Washington Court Rules</u>	<u>Page No.</u>
RAP 2.1(a)	4

RAP 2.2	5
RAP 2.3(d)(2)	2, 5, 6
RAP 2.5(a)	2, 3, 4, 5, 6
RAP 12.3(b)	2
RAP 13.5(a)	2
RAP 13.5(d)	2

Washington Evidence Rules

Page No.

ER 402	12
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Treatises

Page No.

Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14 (5th ed.2007).	12
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Note: The State has filed a motion to supplement the record with a transcript of opening statements from trial. Appellant has objected, and submitted an additional transcript of the judge's instruction to the jury before opening statements. Appellant has not received notice of a ruling on the motion. Both transcripts are referred to in this reply brief. Reference is made to the specific motions by the parties containing the transcripts.

I. APPELLANT'S REPLY TO ISSUES RAISED IN RESPONDENT'S BRIEF

1. State's opposition to grant of discretionary review is not timely.¹
2. Even if timely, the Court of Appeals did not abuse its discretion in granting review.²
3. State mis-construes opening remarks by defense counsel.³
4. Neither the "invited error doctrine" nor the "open door doctrine" apply to counsel's remarks in opening statement.⁴
5. State is not able to minimize or justify comment on exercise of Miranda Rights.⁵
6. State cannot overcome presumption of prejudice.⁶

¹ Brief of Respondent pg. 10.

² Brief of Respondent pg. 14.

³ Brief of Respondent pgs. 21, 21, 24, 35, 28.

⁴ Brief of Respondent pg. 19.

⁵ Brief of Respondent pg. 22.

⁶ Brief of Respondent pg. 28.

II. ARGUMENT

1. State's opposition to grant of discretionary review is not timely.

The State is simply re-arguing its argument raised in its brief opposing discretionary review.⁷ This Court rejected this argument when the three judge panel granted discretionary review under RAP 2.3(d)(2) and RAP 2.5(a).

When review was granted, the Court advised the parties that the order will become "final" unless a motion for discretionary review is filed with the Supreme Court.⁸ The State did not seek this remedy. They should be precluded from challenging the grant of review now.

According to RAP 12.3(b), a grant of discretionary review is deemed an "interlocutory" decision. According to rule, a party seeking to challenge an interlocutory decision must file, within 30 days, a motion for discretionary review with the Supreme Court. RAP 13.5(a). While conceivably, under RAP 13.5(d), the State could re-new its objection before this Court had the Supreme Court rejected its motion, the failure to even follow this procedure

⁷ State's Response Opposing Motion for Discretionary Review, pg. 12-15.

⁸ Att. 1.

constitutes a waiver of the issue and the State should not be allowed to use this rule as a basis to resuscitate its objection now.⁹

2. Even if timely, the Court of Appeals did not abuse its discretion in granting review.

The State suggests this Court committed reversible error when it granted discretionary review where Mr. Rivas raised an issue in his motion for discretionary review that was not raised on RALJ appeal.¹⁰ However, case law is clear the Court retains discretion to do so. The State has not established the three judge panel abused its discretion. This argument should be rejected.

The State's reliance on City of Bothell v. Barnhart, 172 Wn.2d 223, 257 P.3d 648 (2011), is misplaced. Barnhart addressed the issue of the responding party (Bothell) attempting to expand the issues for review once discretionary review was granted. Barnhart, at 234. The Court noted that under RAP 2.5(a) "[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." Barnhart, at 234; RAP 2.5(a). The Court of Appeals elected not to consider Bothell's

⁹ The State does not cite RAP 13.5 in its response brief.

¹⁰ Brief of Respondent pg. 16.

arguments because the issues involved were complex, the issues were not fully developed, and the briefing was inadequate. Barnhart, at 234; citing City of Bothell v. Barnhart, 156 Wn. App. 315, 538, 234 P.3d 264 (2010). The Court refused to say that under these circumstances the Court of Appeals abused its discretion to reject consideration of the City's arguments. Barnhart, at 235.¹¹

The issue the State raises in this case, however, is whether it was proper to grant discretionary review in the first place. Under RAP 2.5(a), the Court of Appeals retains discretion to review any issue not raised in the trial court. Cole v. Harveyland, LLC, 163 Wn. App. 199, 204-205, 258 P.3d 70 (2011). A court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. State v. McEnry, 124 Wn. App. 918, 924, 103 P.3d 857 (2004). A court does not abuse its discretion unless no reasonable person would take the position the court adopted. Stevens v. Gordon, 118 Wn. App. 43, 51, 74 P.3d 653 (2003).

¹¹ While the Court of Appeals did not cite expressly to RAP 2.5(a), it would appear from its analysis that it contemplated the rule where it did not find the record sufficient to consider the arguments that were not raised below.

Appellate rules define the term “review” to mean both “appeal” and “discretionary review.” RAP 2.1(a). RAP 2.5 is entitled, “Circumstances Which May Affect Scope of Review.” RAP 2.5(a) is entitled, “Errors Raised for the First Time on Review.” By use of the term “review” in RAP 2.5, the rule is clearly meant to apply to both an appeal under RAP 2.2 and discretionary review under RAP 2.3. It was not improper for the Court to consider this rule in deciding whether to grant discretionary review.

By use of the word “may” RAP 2.5(a) sets forward a discretionary rule for declining to accept review of any issue not raised below. Cole v. Harveyland, LLC, at 204. The rule also contains three express exceptions: a party may raise a claimed error of: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right, for the first time in the appellate court. RAP 2.5(a). The Court granted review stating the issue in this case was a question of manifest error of law under the State and federal constitutions, and the criteria under RAP 2.3(d)(2)¹² and

¹² RAP 2.3(d)(2) states, “Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be

RAP 2.5(a)(3) were satisfied. Both parties filed more than adequate briefs on the issue. The rules cited above are concerned with errors involving a Constitutional right. The nature of the issue in this case falls within the subject matter of the rules. It may be unusual for the Court to grant review under these circumstances, but this does not mean the Court abused its discretion.

Even if this Court is inclined to review the granting of discretionary review using the standards applied in Barnhart, the Court did not abuse its discretion. The issue in the present case is not complex, case law is settled, testimony clearly identifies the issue, and the parties have had the opportunity to provide adequate briefing. The Court did not abuse its discretion in granting discretionary review.

Finally, the State argues Mr. Rivas is attempting to transform a motion for discretionary review into a de facto method for direct review by withholding constitutional issues on RALJ appeal.¹³ This argument fails for two reasons. First, it ignores the fact that any request for review under RAP 2.3(d) and/or RAP 2.5(a) is

accepted only: (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved.”

¹³ Brief of Respondent pg. 17.

discretionary. It makes no sense to knowingly withhold an issue related to a constitutional violation on RALJ appeal taking the risk the Court may not grant review. Second, the defendant would be forgoing the opportunity to prevail on RALJ appeal which would force the State to seek discretionary review of the issue. This is not an enviable path for appeal.

The State has not demonstrated the Court abused its discretion in granting review.

3. State mis-construes opening remarks by defense counsel.

The State makes three general points in regard to trial counsel's remarks in opening statement. First, he intended the comments on assertion of rights to be introduced at trial.¹⁴ Second, he presented essentially identical evidence to the jury when Mr. Rivas and another witness testified Rivas wanted a lawyer present before arrest and while at the scene of the accident investigation.¹⁵ Third, he inferred Deputy Jeffries performed an incomplete DUI investigation when he did not ask Mr. Rivas specific questions

¹⁴ Brief of Respondent pg. 21.

¹⁵ Brief of Respondent pg. 21, 25,

Third, trial counsel never stated in his opening remarks that the post-arrest investigation was incomplete.¹⁷ He references certain questions that an officer could ask a person under investigation for DUI, but never asserted those questions would be asked after arrest as opposed to before. Counsel's comments were not linked to a conversation with counsel and invocation of rights. It is speculation for the State to draw this connection on appeal.

4. Neither the “invited error doctrine” nor the “open door doctrine” apply to counsel’s remarks in opening statement.

a. Adherence to Court Instructions.

Where the trial court instructs the jury that counsel's comments in opening statement are not evidence, the jury must be presumed to have followed this instruction. State v. Thorgerson, 172 Wn.2d 438, 444, 258 P.3d 43 (2011); State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

Grisby is instructive. There, counsel for co-defendant said in opening statement that he would produce a witness who would say Grisby said if he ever was accused of murder he would kill all the

¹⁷ State's Supplemental RP – Appendix A to State's Motion to Supplement the Record, pg. 11.

witnesses. Grisby, at 499. No witness was produced at trial. Id. Due to the court's instruction, there was no error.

Judge Stephenson instructed the jury in this case immediately before the lawyers made opening statements that;

“Now, insofar as the procedure and the manner in which the trial is going to be conducted. The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and to apply the law. They are not evidence. You are to disregard any remark, statement, or argument that is not supported by the evidence or the law and is stated by the Court.”¹⁸ [Emphasis added]

The State has not argued how or why the jury would disregard the court's instruction. Furthermore, the State fails to explain how its case would have been prejudiced if it had not introduced Deputy Jeffries' testimony.

b. Invited Error and Open Door.

The doctrines of “invited error” and “open door” are not synonymous. State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). Invited error applies when a party induces the trial court to err. Jones, at 298. The State has presented no legal authority to suggest the doctrine applies to a lawyer's comments made in

¹⁸ Appellant's Motion to Supplement Response Filed January 24, 2012, Opposing State's Motion – Attachment 3, pg. 3.

opening statement. The State presents two cases, but neither is applicable. In State v. Alger, 31, Wn. App. 244, 640 P.2d 44 (1982), the defense attorney signed off on a written stipulation that was read to the jury during the testimonial phase of trial. Alger, at 248. The Court held that applying the invited error doctrine to preclude review of the stipulation on appeal did not deny Alger a fair trial. Alger, at 249. Alger cites to State v. Lewis, 15 Wn. App. 172, 548 P.2d 587 (1976).¹⁹ There, the defense attorney requested an instruction for the jury at the conclusion of trial that gave an erroneous statement of the law. Lewis, at 175-176. The Court applied the doctrine to preclude review. Lewis, at 176-177. The second case, State v. Young, 63 Wn. App. 324, 818 P.2d 1375 (1991), is inapplicable. There, the Court applied invited error to preclude review of a restitution issue conceded by counsel at the trial court. Young, at 330. Invited error does not apply in the present case because neither Mr. Rivas nor trial counsel *induced* the trial court to commit any error.

¹⁹ Lewis has been reversed, but on other grounds. State v. Stephens, 22 Wn. App. 548, 558, 591 P.2d 827 (1979).

The open door doctrine is an evidence rule. State v. Jones, 144 Wn. App. at 298. The doctrine pertains to the admissibility of evidence in two circumstances:

1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and

(2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

Jones, at 298; citing Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14, at 66–67 (5th ed.2007).

Application of the open door doctrine is limited by constitutional concerns, such as the right to a fair trial. Jones, at 298. Constitutional concerns trump strict application of court rules. Jones, at 298, citing State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007). Jones cites to ER 402 stating that the rule “allow[s] trial court to rule that otherwise relevant evidence is inadmissible if admission would violate constitutional protections.” Jones, at 298. Even if a defendant has opened the door to a particular subject, the prosecutor still has an ethical duty to protect the rights of the defendant and not introduce incompetent evidence. Jones, at 298.

The State cites to State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996), to argue a defendant may invoke the “open door doctrine” based on his lawyers comments in opening statement. But Rivers does not offer such a generic view of the law. Instead, Rivers identifies the rule that a lawyer’s remarks in opening statement can be used for impeachment purposes if the defendant testifies inconsistently with the lawyer’s remarks. Rivers, at 709. Rivers’ lawyer told the jury there was an issue of identification in the case. Rivers, at 708. Rivers testified he took the victim’s money claiming he was owed a drug debt. Rivers, at 703. It was not error for the prosecutor to question the defendant whether there was any issue in the case concerning his identification. Rivers, at 709.

Here, trial counsel neither induced the trial court to err nor opened the door to Deputy Jeffries’ testimony. It is hard to believe the prosecutor would not have known Deputy Jeffries’ testimony would be a comment on the assertion of rights under Miranda. As such, she did not have free reign to introduce the testimony. Furthermore, Mr. Rivas had yet to offer any contradictory testimony on the subject matter. Therefore, there was no evidence before the

court to impeach. For these reasons, no justification exists for the State to have introduced this testimony at trial.

5. State is not able to minimize and justify comment on exercise of Miranda Rights.

The State presents two arguments to justify or minimize the comment on Mr. Rivas' exercise of Miranda rights. First, the State argues any comment on the exercise of rights was indirect,²⁰ and second, the State reasonably believed its case would be prejudiced if it did not present the testimony.²¹ These arguments fail.

First, the State claims Deputy Jeffries' testimony was an indirect comment on the exercise of Miranda. Any reference to assertion of rights was "narrowly tailored"²² and the prosecutor never argued any consciousness of guilt from the testimony to the jury.²³ The State argues that Deputy Jeffries "never directly testified that Rivas asserted his right to silence or refused to answer any questions."²⁴ This distinction fails.

²⁰ Brief of Respondent pg. 26

²¹ Brief of Respondent pg. 24.

²² Brief of Respondent pg. 26.

²³ Brief of Respondent pg. 23.

²⁴ Brief of Respondent pg. 27.

Courts have held that a “direct” comment on the exercise of Miranda rights occurs when the state introduces evidence a defendant exercised Miranda rights as substantive evidence of guilt. State v. Curtis, 110 Wn. App. 6, 11-12, 37 P.3d 1274 (2002). Here, it is un-disputed Deputy Jeffries testified Mr. Rivas asserted his rights after being read Miranda. (CP 374-376) A prosecutor need not “harp” on the testimony in closing argument to constitute an improper argument inferring consciousness of guilt. Curtis, at 13. Instead, Curtis focused on the fact the prosecutor deliberately sought the testimony from the officer. Curtis, at 13. “Either eliciting testimony or commenting in closing argument about the arrestee's exercise of his Miranda rights circumvents the Fifth Amendment right to silence as effectively as questioning the defendant himself.” Curtis, at 13; citing State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Furthermore, the nature of the testimony in this case is identical to Curtis. In Curtis, the prosecutor asked:

Q. Go ahead. And you had him—once he got out, then you—

A. I read him his Miranda, his constitutional rights.

Q. Was anything said at that time?

A. He refused to speak to me at the time, and wanted an attorney present.

Curtis, at 9.

This is similar to the testimony found in Douglas v. Cupp, 578 F.2d 266 (9th Circ. 1978), where the prosecutor asked:

Who arrested Mr. Douglas?

A. I did.

Q. Did he make any statements to you?

A. No.

Prosecutor: That's all the questions I have."

Cupp, at 267.²⁵

The State attempts a distinction stating Deputy Jeffries never testified Mr. Rivas refused to answer questions.²⁶ But this fact was still presented to the jury. Deputy Jeffries testified he could not ask Mr. Rivas any questions after speaking with a lawyer. (CP 374-376) Therefore, the impact of the testimony was the same: Mr. Rivas

²⁵ This testimony is also similar to that in State v. Romero, 113 Wn. App. 779, 785, 54 P.3d 1255 (2002). Even absent comment in closing argument by the State, the testimony was a direct comment on Romero's exercise of rights, and was not harmless. At 792; 795.

²⁶ Brief of Respondent pg. 26-27.

exercised his rights in Miranda and did not make any statements to the deputy.

The testimony in this case was no less a direct comment on the exercise of Miranda rights than the testimony in Curtis and Cupp. It is not necessary for the prosecutor to expressly refer to the testimony in closing argument to violate Mr. Rivas' constitutional rights. The testimony was deliberate, the exercise of rights was clear, and the fact Mr. Rivas did not answer any subsequent questions was clear from the testimony. This meets the standard found in case law.

Second, the State attempts to distinguish the fact of this case from Curtis by re-iterating trial counsel introduced the evidence first.²⁷ But as explained above, "invited error" and "open door" do not apply. Nonetheless, the State was concerned that if it did not question Deputy Jeffries about the exercise of rights first, the jury might think the deputy either violated Mr. Rivas' rights or was hiding evidence.²⁸ Besides failing to explain how a jury may come to these conclusions, this argument ignores the rule that

²⁷ Brief of Respondent pg. 24.

²⁸ Brief of Respondent pg. 24.

jurors are presumed to follow the court's instructions and ignore statements of counsel not supported by the record. The State fails to explain why the jury might ignore this rule in this case.

6. State cannot overcome presumption of prejudice.

Mr. Rivas' argument concerning harmless error was presented in his opening brief and will not be re-written here. Both parties cite to the constitutional harmless error test. Such error may be harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same verdict in the absence of error. State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The State presents a one sided version of events supporting its argument error was harmless.²⁹ However, it is clear the Court must review the entire record. In cases such as Curtis and Romero, the courts concluded the harmless error standard could not be met in part due to the conflicting testimony presented at trial. See Curtis, at 9; Romero, at 795. As Curtis points out, unless the evidence overwhelmingly supports a guilty verdict, "what may or may not have influenced the jury remains a mystery." Curtis, at 15.

²⁹ Brief of Respondent pg. 29-30.

In cases where conflicting testimony ultimately results in a credibility contest, a jury can be swayed by improper testimony concerning a defendant's assertion of rights. Romero, at 795. Two of the law enforcement witnesses had only minor contact with Mr. Rivas. (CP 272-275; 331-337) The jury was free to weigh their testimony on intoxication. Ms. Gonzalez, the passenger, was impeached on her statement to law enforcement on the night of the accident where she never told the officers she thought Mr. Rivas was impaired. (CP 230-231) Another witness at the scene never once mentioned Mr. Rivas being intoxicated. (CP 191-198)

It cannot be known whether the jury was ultimately swayed by Deputy Jeffries' testimony, or to what degree the verdict was influenced by testimony Mr. Rivas asserted his Miranda rights after arrest and before a breath test request. Mr. Rivas submits the totality of evidence was not overwhelming, and the State cannot meet this standard.

III. CONCLUSION

For the reasons submitted herein, Mr. Rivas asks this Court to reverse the conviction for Driving under the Influence and remand for new trial.

RESPECTFULLY SUBMITTED this 9th day of February, 2012.

RYAN B. ROBERTSON
ATTORNEY AT LAW

A handwritten signature in black ink, appearing to read 'R. B. Robertson', written in a cursive style.

Ryan B. Robertson, WSBA #28245
Attorney for Appellant

ATTACHMENT 1

*The Court of Appeals
of the
State of Washington*

RICHARD D. JOHNSON,
Court Administrator/Clerk

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

July 19, 2011

Celia A. Lee
King County Prosecutor's Office
516 3rd Ave
Seattle, WA, 98104-2385
celia.lee@kingcounty.gov

Aleksandra K Letts
King County Prosecuting Attorney's Office
W554 King County Courthouse
516 3rd Ave
Seattle, WA, 98104-2385
aleksandra.letts@kingcounty.gov

Ryan Boyd Robertson
Robertson Law PLLC
800 Fifth Ave Ste 4000
Seattle, WA, 98104-3180
ryan@robertsonlawseattle.com

Nicklas Edward Rivas
3709 S. 162nd St.
Seatac, WA, 98188

CASE #: 65870-1-1
State, Res. v. Nicklas Rivas, Pet.

Counsel:

Please find enclosed a copy of the Order Granting Discretionary Review entered in the above case today.

The order will become final unless counsel files a motion for discretionary review to Supreme Court within thirty days from the date of this order. RAP 13.5(a).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

enclosure

TWG

c: The Hon. L. Gene Middaugh