

**Court of Appeals No. 37411-1-II**

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**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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**STATE OF WASHINGTON,**

**Plaintiff/Respondent,**

**v.**

**JUSTIN LEVI PARHAM,**

**Defendant/Appellant.**

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY: *[Signature]*  
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**BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 07-1-01513-4  
The Honorable Lisa Worswick, Presiding Judge**

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**A. ASSIGNMENTS OF ERROR**

1. Mr. Parham's prior convictions were not admissible for purposes of impeachment on the burglary and theft charges because Mr. Parham did not testify as to those charges.

2. The jury was not instructed that it could only consider Mr. Parham's prior convictions for impeachment purposes for the bail jumping charges but not for the burglary and theft charges for which he did not testify, and for which the court prohibited cross-examination, and thus, impeachment.

3. The evidence of Mr. Parham's prior convictions which were admitted under 609 (a)(2) unduly prejudiced him as to the burglary and theft charges and in all likelihood affected the jury's verdicts on all charges.

4. The trial court committed reversible error when it refused to instruct the jury that Mr. Parham's failure to testify as to the burglary and theft charges could not be considered indicative of guilt.

5. Severance of the bail jumping charges from the burglary and theft counts was necessary to a fair verdict in Mr. Parham's case.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where the state was permitted to impeach Mr. Parham's credibility with prior convictions as to his defense to the crime of bail jumping, and where Mr. Parham did not testify as to the burglary and theft charges, did the trial court commit reversible error by not instructing the jury that it could consider the ER 609 (a)(2) evidence only for the limited purpose of weighing Mr. Parham's credibility with respect to his testimony concerning the bail jumping charges? (Assignment of Error Numbers One and Two)

2. Was there a reasonable probability that the jury verdicts were affected by the improper evidence of Mr. Parham's prior crimes? (Assignment of Error Number Three)

3. Where Mr. Parham testified only as to the bail jumping charges, was it error for the trial court to refuse to instruct the jury that his failure to testify as to the burglary and theft charges could not be used to infer guilt? (Assignment of Error Number Four)

4. Was the potential for prejudice too great for the trial court to deny Mr. Parham's motion to sever counts where the state's

proof of bail jumping was far stronger than that of the burglary and theft charges, where the evidence was not cross admissible, where Mr. Parham only testified as to the bail jumping charges, and where the jury was not properly instructed on either the prior conviction evidence or the effect to give Mr. Parham's failure to testify regarding the burglary and theft charges? (Assignment of Error Number Five)

### **C. STATEMENT OF THE CASE**

#### **1. *Procedural History***

On March 21, 2007, the defendant/Appellant, Justin Levi Parham, was charged by Information with one count of Residential Burglary. (RCW 9A52.025). CP 1.

On October 25, 2007, an Amended Information was filed. The Amended Information included the original charge of Residential Burglary in Count I. Three more counts were added including First Degree Theft (RCW 9A.56.020(1)(a) and RCW 9A.56.030 (1)(a), and two counts of Bail Jumping (RCW 9A.76.170(1) and RCW 9A.76.170(3)(c)). CP 3-4.

On January 16, 2008, Mr. Parham proceeded to trial by jury. RP

1-5. He was convicted of all counts. CP 108-111; RP 5 444-448.

On February 28, 2008, the trial court imposed a standard range sentence in the Department of Corrections as follows: sixty (60) months on Count I (Residential Burglary), twenty-nine (29) months on Count II (First Degree Theft), and forty-three (43) months on each of Counts III and IV (Bail Jumping). Sentences on all counts were ordered to be served concurrent to one another. CP 118-129; RP 7 467-468. A timely Notice of Appeal was filed on March 4, 2008. CP 178-190.

## **2. Motion Hearings**

Mr. Parham's Motion to Dismiss Counts I and II pursuant to *State V. Knapstad*<sup>1</sup> was filed on December 12, 2007, and heard on January 17, 2008. CP 6-29; RP 2 20. The trial court denied the Motion. CP 33-35. Another Motion to Dismiss Counts I and II based on insufficient evidence was raised by Mr. Parham at half-time; it too was denied. RP 4 328.

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*State v. Knapstad*, 107 Wn. 2d 346,729 P.2d 48 (1986).

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Additional motions heard on January 17, 2008, included a Motion to Suppress Statements pursuant to CrR 3.5 and a Motion to Sever Counts I and II (Residential Burglary and First Degree Theft) from Counts III and IV (Bail Jumping).

The trial court ruled that the statements Mr. Parham made to Detective Elizabeth Lindt were admissible with the exception of his statement refusing to allow a warrantless search of the house or adjoining shed in which he resided. CP 112-114; RP 2 104. During trial, however, at the state's urging, the court ruled that the state could admit a "sanitized" version of Mr. Parham's refusal to consent to a warrantless search. RP 3 116. The court ruled that Mr. Parham's refusal to consent to a search could not be mentioned, but Detective Lindt could testify before the jury that when she questioned Mr. Parham about his residence he responded that "there were things he didn't want the officer to see." RP 3 119. <sup>2</sup>

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Although Detective Lindt's testimony in this regard was objected to reversible error cannot be claimed because the trial court found that Mr. Parham waived his right to remain silent after being properly *Mirandized*. See *State v. Norland*, 113 Wash.App. 171,53 P.3d 529 (2002); CP 112-114.

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The court denied Mr. Parham's Motion to Sever Counts I and II from Counts II and IV. RP 2 39. The motion was renewed at the close of the state's case, and again denied. RP 4 324-328.

During trial, the court ruled that the state could impeach Mr. Parham with two prior crimes involving dishonesty under ER 609. The two crimes included a 2005 Possession of Stolen Property and 2007 Possession of a Fictitious or Altered Drivers Licence. RP 4 327.

## **2. *Factual Summary***

On January 23, 2007, Jennifer Peterson was residing with her fiancée, James Dean, and her twelve (12) year old son at their home located in South Hill, Puyallup. RP 3 179-180. Ms. Peterson and her son arrived home at about 5:00 p.m. to find that the house had been entered without permission, "ransacked," and that various items, including a new forty-two (42) inch plasma flat screen television, had been taken. RP 3 181-183. The value of the items taken was \$4,720.00. RP 3 224.

It appeared to Ms. Peterson that the point of entry was a ground floor window that was located in the back of the fenced in home. The

screen of the window had been removed and the window was now open. RP 3 185. Additionally, a sliding kitchen door located behind the house was now wide open. RP 3 184. Ms. Peterson quickly called 911 and then called Mr. Dean. RP 3 183.

Forensic investigator with the Pierce County Sheriff's Office, Loree Barnett, arrived the same evening at about 8:30 p.m. to process the scene. RP 3 143. Ms. Barnett obtained a partial palm print and a single fingerprint from the exterior of the window in question. RP 3 146. The window screen was lying on the ground below. RP 3 148. Ms. Barnett was unable to obtain any other usable prints. RP 3 146.

Ms. Barnett compared the latent prints she had obtained from the window to those of Mr. Parham's. She concluded that the recovered partial prints matched the left palm and left thumb of Mr. Parham. RP 3 151.

On January 26, 2007, Detective Elizabeth Lindt interviewed Mr. Parham at the South Hill Precinct. Mr. Parham was cooperative and spoke openly to the detective. RP 3 230-233. Mr. Parham indicated that he had never been to the Peterson home and that he was home all

day with his brothers on January 23, 2007. RP 3 233. Mr. Parham also stated that “there were things [in his residence] that he didn’t want [Detective Lindt] to find.” RP 3 237.

The state alleged that Mr. Parham failed to appear for court on May 2, 2007 and again on July 25, 2007. CP 3-4. Mr. Parham testified that on May 2, 2007 his car broke down on his way to court. RP 4 331. He ended up walking the remainder of the substantial distance, and arrived at court just after 11:00 a.m. Mr. Parham was told he was too late . On the same date Mr. Parham scheduled a motion to quash the bench warrant that had been issued. RP 4 332.

The evidence was uncontested that the scheduling order to quash was signed on May 2, 2007 and filed on May 3, 2007. RP 4 296, 362. The bench warrant was revoked by order dated May 10, 2007. RP 4 292. The jury was instructed that “uncontrollable circumstances” constituted a defense to the charge of bail jumping. CP 80-107; Instruction No. 21. Mr. Parham did not assert this defense against the July 25, 2007 bail jumping charge.

**D. ARGUMENT**

**I. MR. PARHAM WAS DENIED HIS RIGHT TO A FAIR TRIAL BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED PRIOR CONVICTION EVIDENCE UNDER ER 609.**

In Mr. Parham's case, the state moved to allow the admission of two prior crimes solely under ER 609 (a)(2) for the purpose of impeaching Mr. Parham's credibility when he testified. Mr. Parham testified only for the purpose of asserting his defense to the May 2, 2007 bail jumping charge, and the trial court limited the state's cross-examination to the narrow scope of Mr. Parham's direct testimony, which did not include testimony concerning the burglary or theft charges. RP 4 328.

The prior crimes included a 2005 second degree possession of stolen property and a 2007 possession of a fictitious or altered driver's license. RP 4 327. Mr. Parham's counsel objected to the admission of evidence of both crimes because Mr. Parham testified only as to the bail jumping charges and such impeachment evidence would not be admissible as to the residential burglary and the theft charges for which

Mr. Parham was not testifying. Additionally, Mr. Parham's attorney objected to a finding that the 2007 crime was indeed a crime of dishonesty. RP 4 327. No discussion concerning the nature of the 2007 crime was held on the record, although the trial court apparently reviewed Mr. Parham's plea statement from that case without's objection. CP 76-79. Following the trial court's ruling that the prior convictions were admissible, Mr. Parham's attorney elicited this information on direct, clearly for tactical reasons. RP 4 333.

It is well established that a defendant must only be tried for the offense actually charged. *State v. Goebel*, 40 Wn. 2d 18,21,240 P.2d 251 (1952), overruled on other grounds, *State v. Lough*, 125 Wn. 2d 847,889 P.2d 487 (1995). Consistent with this rule, evidence of other crimes is admissible in only a few narrow circumstances.

One of those circumstances is when used to challenge the credibility of a witness's testimony under ER 609. That rule provides:

**(a) General Rule.** For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death

or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statements, regardless of the punishment. (Emphasis added).

ER 609(a).

This rule was adopted in 1979 and was designed to narrow the scope of convictions admissible for impeachment. See Washington Court Rules (State), Comment to ER 609(a), at 128 (West 2000), *State v. Jones*, 101 Wn.2d 113,117, 677 P.2d 131 (1984) overruled on other grounds, *State v. Brown*, 111 Wn.2d 124,761 P.2d 588 (1988); 5A Karl B. Tegland Washington Practice Evidence § 609, at 388-89. (4<sup>th</sup> ed. 1999)

**(a) *Mr. Parham's prior convictions were inadmissible.***

The purpose of impeachment evidence under ER 609 is to enlighten the jury with respect to the witness' credibility on the stand. *State v. King*, 75 Wn.App. 899,878 P.2d 466 (1994), review denied, 125 Wn. 2d 1021 (1995). Where a defendant does not testify such impeachment evidence is inadmissible.

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In Mr. Parham's case, the trial court understood Mr. Parham's need to present his defense to the bail jumping charge and accommodated him in exercising this right by limiting the scope of the state's cross-examination to the questions posed on direct, which pertained only to the bail jumping charges. Because Mr. Parham did not testify regarding the burglary and theft charges it was improper to allow prior conviction impeachment that the jury would infer pertained to all of the charges.

**(b) *The impeachment of Mr. Parham with the prior crimes unduly prejudiced him and materially affected the outcome of the trial.***

A harmless error standard of review applies to ER 609 (a) rulings. *State v. Ray*, 116 Wash. 2d 531,806 P.2d 1220 (1991). An error under ER 609 requires reversal where "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Calegar*, 133 Wn.2d 718,727,947 P.2d 235 (1997) (quoting *State v. Ray*, 116 Wash. 2d 531,806 P.2d 1220 (1991)).

As a general principle, "[t]he admission of prior conviction

evidence by its very nature is highly prejudicial because of its inherent implication that once a criminal, always a criminal.” *State v. Burton*, 101 Wn.2d 1,9,676 P.2d 975 (1981). According to the Supreme Court, “Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record. H. Kalven & H. Zeisel, The American Jury 146,160-69 (1966). It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again.” *State v. Jones*, 101 Wn.2d at 120.

Moreover, the danger of unfair prejudice is at its highest where, as here, the prior conviction is for a crime similar to the crime for which the defendant is being tried. *Jones*, 101 Wn.2d at 120. Here, Mr. Parham’s prior convictions were for crimes involving dishonesty, crimes similar in nature and character to the theft and burglary charges.

Additionally, the jury was not instructed that it could only consider the prior crimes evidence for purposes of determining Mr. Parham’s credibility as to the bail jumping charges about which he testified.

The fact that the jury was provided the standard ER 609 limiting instruction does not save the convictions for residential burglary and first degree theft. (See CP 80-97, Instruction No. 6.) According to *Tegland*, when the standard limiting instruction is used, “it is doubtful that a jury would be able or even inclined to make the necessary distinction [between the proper and an improper use of the prior conviction].” *Tegland, Supra* § 609.16, at 424.

Because the prior conviction evidence was admitted, and because it was admitted without an appropriate limiting instruction, Mr. Parham was prejudiced and denied a fair trial. His denial of a fair trial requires reversal.

**II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO INSTRUCT THE JURY ON THE EFFECT TO GIVE MR. PARHAM’S FAILURE TO TESTIFY AS TO COUNTS I AND II.**

The trial court rejected Mr. Parham’s proposed instruction which stated:

*The defendant is not compelled to testify, and the fact that the*

*defendant has not testified cannot be used to infer guilty and should not prejudice him in any way.*

Defendant's Proposed Instruction No. Two; CP 65-75; RP 4 372 (WPIC 6.31).

The United States Supreme Court has held that the Fifth Amendment affords a criminal defendant the right, upon request, to have the jury instructed both that he need not testify and that his trial silence may not be used against him. *Carter v. Kentucky*, 450 U.S. 288, 101 S. Ct. 1112, 67 L.Ed. 2d 241 (1981). The Washington state constitution's provision of a privilege against self-incrimination has been held to be coextensive with the federal provision. See Wash. Const. Art. I § 9; see eg. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991).

A WPIC 6.31 instruction "must be given by the court if requested by the defense." *State v. King*, 24 Wash.App. 495, 601 P.2d 982 (1979). Failure to charge the jury with this instruction, upon request, is not a mere "technical error. . . which do[es] not affect . . . substantial rights," but is rather "[o]f a very different order of

importance” from the “mere etiquette of trial and . . . the formalities and minutiae of procedure.” *Bruno v. United States*, 308 U.S. 287, 293-294, 60 S.Ct. 198,200, 84 L.Ed 451 (1939). To make sure by such an instruction that a jury is crystal clear about a criminal defendant’s rights, and its duties, under the Fifth Amendment, is the court’s “affirmative obligation.” *Carter v. Kentucky, supra*. 450 U.S. at 302-03.

Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since “[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers.”

The esteemed federal appellate judge Henry J. Friendly best described the proper measure of a jury misinstructed in this area: “[I]n the absence of instruction, nothing could be more natural than for them to draw an adverse inference from the lack of testimony from the very person who should know the facts best.” *United States v. Gargilo*, 310 F.2d 249,262 (2<sup>nd</sup> Cir. 1962).

In Mr. Parham’s case, where he testified only to the bail

jumping charges, the WPIC 6.31 instruction was essential. The jury was left to ponder why he had addressed the bail jumping, but not the burglary and theft charges. Without instruction to the contrary the jury would naturally suppose he did not testify about those charges because he was guilty.

Furthermore, Mr. Parham's apparent refusal to testify to the burglary and theft charges likely gave rise to a greater inference of guilt on the bail jumping charges. The jurors simply had no way to sort this confusion out absent an instruction that advised them that his silence could not be interpreted as indicative of guilt. The court's refusal to provide the necessary instruction denied Mr. Parham a fair trial and constituted reversible error.

### **III. THE TRIAL COURT'S FAILURE TO GRANT MR. PARHAM'S MOTION TO SEVER CONSTITUTES REVERSIBLE ERROR.**

Although CrR 4.3 permits joinder of offenses, CrR 4.4(b) requires severance whenever the court determines that severance will promote a fair determination of a defendant's guilt or innocence as to

each offense. <sup>3</sup> *State v. Russell*, 125 Wn.2d 24,62,882 P.2d 747 (1994), cert. denied 115 S. Ct. 2004,131 L.Ed. 2d 1005 (1995).

The courts have repeatedly recognized that joinder is inherently prejudicial. *State v. Ramirez*, 46 Wn.App. 223,226,730 P.2d 98 (1986). A defendant may be prejudiced because:

- (1) He may become embarrassed or confounded in presenting separate defenses;
- (2) The jury may use the evidence of one of the crimes charged to infer a criminal disposition of the part of the defendant from which is found his guilt of the other crime or crimes charged; or
- (3) The jury may cumulate the evidence of the various

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CrR 4.3(a) provides:

(a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

- (1) Are of the same or similar character, even if not part of a single scheme or plan; or
- (2) Are based on the same conduct or on a series of acts connected together or constitution parts of a single scheme or plan.

CrR 4.4(b) provides:

(b) Severance of Offenses. The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a) shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

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crimes charged and find guilt when, if considered separately, it would not so find.

*State v. Bythrow*, 114 Wn.2d 713, 718790 P.2d 154 (1990) (Citations omitted); *State v. Sanders*, 66 Wn.App. 878, 885, 833 P.2d 452 (1992), rev. denied, 120 Wn.2d 1027 (1993)

Courts have also taken into account prejudice that may reside in “a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964).

In determining whether the potential for prejudice requires severance, a trial court must consider four factors which may serve to offset the inherent prejudice of joinder: (1) the strength of the state’s evidence as to each count; (2) the clarity of the defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *Russell*, 125 Wn.2d at 63, citing *State v. Smith*, 74 Wn.2d 744, 755-56, 446 P.2d 571 (1968); *State v. York*, 50 Wn.App. 446, 451, 749 P.2d 683 (1987), rev. denied, 110 Wn.2d 1009

(1988).

The state's evidence was far stronger on the bail jumping charges. It was undisputed that Mr. Parham failed to appear for court on both dates scheduled by previous court orders that he had signed. He offered an affirmative defense to the May 2, 2007 bail jumping charge. His defense was that he appeared on May 2, 2007, albeit late, but that his tardiness was due to circumstances beyond his control.

For the burglary and theft charges the evidence that Mr. Parham committed the crimes consisted solely of his prints identified on the Peterson's exterior window plus his somewhat incriminating statement that he had things in his home that he did not want the police to see. Such evidence was just barely sufficient to sustain the convictions as a matter of law.<sup>4</sup>

The trial court's failure to sever the counts prejudiced Mr. Parham's attempts to clearly defend both "sets" of cases, that is, the burglary and theft counts, and the bail jumping counts. In the first

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See *State v. Bridge*, 91 Wn.App. 98,955 P.2d 418 (1998) and *State v. Todd*, 101 Wn.App. 945,6 P.3d 86 (2000).

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“set” of cases, the burglary and theft charges, his strategy was to argue reasonable doubt, and to invoke his Fifth Amendment privilege. An opposite strategy was necessary for the second “set” of cases. Mr. Parham had an affirmative defense to present as to the May 2, 2007 bail jumping charge, which required his testimony.

The jury instructions in Mr. Parham’s case were woefully lacking because not only was no instruction provided to the jury concerning Mr. Parham’s silence as to the burglary and theft charges, but furthermore, the jury was never told that it could not consider the prior conviction evidence against him for those charges.

The evidence was not cross-admissible in general between the two sets of cases. Had Mr. Parham’s motion to sever been granted, the jury would not have heard any evidence of the bail jumping charges in the burglary and theft cases, and visa versa. The witnesses were different for each set of cases as was the entirety of the evidence.

Of great importance is, of course, that the impeachment evidence would not have been admitted, or even offered, had the burglary and theft counts been severed, because Mr. Parham did not

intend to testify as to those counts. Had the charges been severed Mr. Parham would not have been forced to elect between his right to testify, and his right to a fair trial including the privilege of not testifying.

The court abuses its discretion in not granting severance where the defendant can point to a specific undue prejudice. *State v. Bythrow*, 114 Wn.2d 713,720-721,790 P.2d 154 (1990) citing *State v. Grisby*, 97 Wn. 2d 493,507,647 P.2d 6 (1982) cert. denied, 459 U.S. 1211 (1983). The specific undue prejudice in Mr. Parham's case consisted of the admissibility of otherwise inadmissible evidence including the inherently prejudicial prior crimes evidence, the awkward and unjust decision Mr. Parham was forced to make which resulted in presenting his defense to one count while not testifying on two others, and the inadequate instruction the jury was provided.

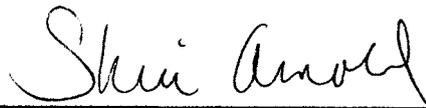
While judicial economy is a continuous concern, and was evident here by the trial court's repeated reminders to the parties of time constraints, such concerns should not have overridden Mr. Parham's right to have the charges fairly adjudicated via separate trials.

Given the undue prejudice Mr. Parham suffered, the trial court abused its discretion in denying severance in this case.

**E. CONCLUSION**

For all of the foregoing reasons and conclusions, and because Mr. Parham's convictions were all tainted, he respectfully requests that this Court reverse his convictions and remand this case to the trial court.

Respectfully Submitted this 9<sup>th</sup> day of September, 2008.



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Sheri L. Arnold  
WSBA No. 18760  
Attorney for Appellant

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 9, 2008, I delivered in person to: the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by U.S. mail to Justin L. Parham, DOC # 315927, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenue, Walla Walla, Washington 99362-1065, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on September 9, 2008.

  
\_\_\_\_\_  
Norma Kinter