

NO. 42960-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RACHAEL RIDER,

Appellant.

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

The Honorable James Lawler and Richard Brosey Judges

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	2
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural Facts</u> .....	2
2. <u>Substantive Facts</u> .....	3
C. <u>ARGUMENTS</u> .....	5
1. THE TRIAL COURT ERRED BY ADMITTING UNLAWFULLY SEIZED EVIDENCE CONTRARY TO ESTABLISHED STATE AND FEDERAL LAW AND IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.....	5
<u>Article 1, Section 7</u> .....	7
2. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING UNDUELY PREJUDICIAL EVIDENCE UNDER ER 404(b) WITHOUT CONDUCTING AN ER 404(b) ANALYSIS.....	10
<u>Not Harmless Error</u> .....	14
3. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO STAY THE IMPOSITION OF THE SENTENCE KNOWING THAT ITS ER 3.6 RULING WAS CONTRARY TO CURRENT LAW, AND WITHOUT THAT EVIDENCE THE STATE COULD NOT PROCEED TO TRIAL.....	15

**TABLE OF CONTENTS**

	Page
D. <u>CONCLUSION</u> .....	16

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<i>State v. Abuan</i> , 161 Wn.App. 135, 257 P.3d 1 (2011).....	5, 9, 10
<i>State v. Afana</i> , 169 Wn.2d 169, 223 P.3d 879 (2010).....	9
<i>State v. Byrd</i> , 162 Wn.App. 612, 258 P.3d 686 (2011).....	2, 5, 6
<i>State v. Bythrow</i> , 114 Wash.2d 713, 790 P.2d 154 (1990).....	12, 13
<i>State v. Cole</i> , 90 Wn.App. 445, 949 P. 2d 841 (1998).....	15
<i>State v. Cunningham</i> , 93 Wn.2d 823, 613 P.2d 1139 (1980).....	14
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	11, 12
<i>State v. Garcia–Salgado</i> , 170 Wn.2d 176, 240 P.2d 153 (2010).....	7, 8
<i>State v. Gresham</i> , 173 Wn.2d 405, 269 P.3d 207 (2012).....	11, 12, 14
<i>State v. Herzog</i> , 73 Wn.App. 34, 867 P.2d 648(1994).....	12
<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	12
<i>State v. Lord</i> , 161 WN.2d 276, 165 P.3d 1251 (2007).....	16

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES, continued</u>	
<i>State v. McKinney</i> , 148 Wn.2d 20, 60 P.3d 46 (2002).....	7
<i>State v. Robinson</i> , 171 Wn.2d 292, 253 P.3d 83 (2011).....	5
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982).....	11
<i>State v. Smith</i> , 119 Wn.2d 675, 835 P.2d 1025 (1992).....	2
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	14
<i>State v. Snapp</i> , ____ P.3d ____, 2012 WL 1134130 (Wash).....	8, 9, 10
<i>State v. Swiger</i> , 159 Wn.2d 224, 149 P.3d 372 (2006).....	15
<i>State v. Valdez</i> , 167 Wn. App 761, 224 P.3d 751 (2009).....	7, 8, 9, 10
<i>State v. Vy Thang</i> , 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).....	12
 <u>FEDERAL CASES</u>	
<i>Arizona v. Gant</i> , 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)....	2, 5, 6, 16
<i>Chimel v. California</i> , 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).....	6, 7

**TABLE OF AUTHORITIES**

Page

FEDERAL CASES, continued

*Michelson v. United States*,  
335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948).....12

*New York v. Belton*,  
453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).....6

*Thornton v. United States*,  
541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d (2004).....8

OTHER RULES AND STATUTES

RCW 9.95.062.....15

ER 404(b).....3, 10, 11, 13, 14

Washington State constitution Article I, section 7.....7, 8, 9, 10

United States Constitution Fourth Amendment.....5, 7

A. ASSIGNMENT OF ERROR

1. Ms. Rider was denied her right to a fair trial where the judge refused to follow establish law, choosing instead to admit evidence based on overruled case law.
2. The trial judge abused his discretion by failing to conduct an ER 404(b) analysis to determine the relevance of prior acts of misconduct –which would have been deemed inadmissible under an ER 404(b) analysis.
3. The trial judge abused his discretion by refusing to grant a stay of imposition of the sentence knowing that the finding of guilt was based on inadmissible evidence introduced at trial.
4. Ms. Rider assigns error to conclusion of law 2.1.
5. Ms. Rider assigns error to conclusion of law 2.2.
6. Ms. Rider assigns error to conclusion of law 2.3.
7. Ms. Rider assigns error to conclusion of law 2.4.
8. Ms. Rider assigns error to conclusion of law 2.5.
9. Ms. Rider assigns error to conclusion of law 2.6.
10. Ms. Rider assigns error to finding of fact 1.6.
11. Ms. Rider assigns error to finding of fact 1.7.
12. Ms. Rider assigns error to finding of fact 1.6.
13. Ms. Rider assigns error to finding of fact 1.14.

### Issues Pertaining to Assignments of Error

1. Was Ms. Rider denied her right to a fair trial where the judge refused to follow establish law, choosing instead to admit evidence based on overruled case law?
2. Did the trial judge abuse his discretion by failing to conduct an ER 404(b) analysis to determine the relevance of prior acts of misconduct – which would have been deemed inadmissible under an ER 404(b) analysis?
3. Did the trial judge abuse his discretion by refusing to grant a stay of imposition of the sentence knowing that the finding of guilt was based on inadmissible evidence introduced at trial?

### B. STATEMENT OF THE CASE

#### 1. Procedural Facts

Rachael Rider was initially charged with theft and illegal possession of a controlled substance. CP 1-3. Following a 3.6 hearing Judge Lawler admitted the evidence declining to follow *Arizona v. Gant*, 556 U.S. 332, 351, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) and *State v. Byrd*, 162 Wn.App.162 258 P.3d 686 (2011) which represent the current law, choosing instead to follow that “other line of cases”, *State v. Smith*, 119 Wn.2d 675, 835 P.2d 1025 (1992)

CP 48-50; RP 19. The state amended the information to charge only a single count of illegal possession of a controlled substance. Supp CP (Amended Information ----). Defense counsel moved in limine to suppress any reference to the dismissed charge of shoplifting. CP 4; RP 6-9. The trial judge, without conducting an ER 404(b) analysis admitted the evidence and denied defense counsel's motions to suppress all evidence related to the dismissed charge. CP 48-50; RP 6-9.

Following a jury trial, Ms. Rider was convicted as charged. 2RP 63; CP 51-60. Defense counsel moved to stay imposition of the sentence based on the judge's refusal to follow current state and federal law, and his refusal to suppress inadmissible evidence. 3RP 4. The trial court denied the motion and imposed the sentence. 3RP4-5. This timely appeal follows. CP 61.

## 2. Substantive Facts

Ms. Rider was detained on suspicion of shoplifting at Wal-Mart. 2RP 16-17. Mr. Bingham, the loss prevention staff at Wal-Mart waited with Ms. Rider and a female witness in a small room while the police were en route. RP 16-17. When officer Ayers arrived, Ms. Rider was sitting on a bench; her purse was within reach of all three occupants of the room. RP 17.

Officer Ayers took possession of Ms. Rider's purse and placed it on the trunk of his patrol car after he secured Ms. Rider in the back of the patrol car. RP 18-19. After Ms. Rider was secured in the back of the patrol car, officer Ayers searched Ms. Rider's purse. RP 19. Officer Ayers opened a small bottle of Advil and discovered 4 blue pills. RP 20. Officer Ayers called poison control and from that conversation believed that the pills were a controlled substance. RP 26.

Ms. Rider stipulated to the admissibility of her interrogatory statements. 2RP 4-5. Ms. Rider told the officer that the pills were a generic form of valium that she obtained from a friend to address anxiety from being beaten by an abusive boyfriend. 2RP 21. The crime lab scientist, analyzed one of the four pills and determined that it was diazepam. 2RP 33, 36-37. Ms. Rider did not have a prescription for this medication. 2RP 21.

During trial, officer Ayers testified in detail about Ms. Rider being detained on suspicion of shoplifting. 2RP 15-17. Officer Ayers explained to the jury that after he handcuffed and placed Ms. Ayers in the back of the patrol car, and that he searched Ms. Rider 's purse that was outside on his car trunk where he opened a small bottle of Advil and discovered 4 blue pills. 2RP 19-20.

C. ARGUMENTS

1. THE TRIAL COURT ERRED BY ADMITTING UNLAWFULLY SEIZED EVIDENCE CONTRARY TO ESTABLISHED STATE AND FEDERAL LAW AND IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

The State bears the burden to show that a warrant exception applies to permit a warrantless search incident to arrest when neither officer safety nor a risk of destruction of contraband exist. *State v. Abuan*, 161 Wn.App. 135, 153, 257 P.3d 1 (2011). Searches are unreasonable if one of the above exceptions does not apply. *Arizona v. Gant*, 556 U.S. 332, 351, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Issues of constitutional interpretation and waiver are questions of law, which courts review de novo. *State v. Robinson*, 171 Wn.2d 292, 301-302, 253 P.3d 83 (2011).

Contrary to the trial court's ruling, the search of Ms. Rider's purse after she was secured in the patrol car was unlawful. *Gant*, 129 S.Ct. at 1716; *State v. Byrd*, 162 Wn.App. 612, 617, 258 P.3d 686 (2011). In 2009, the United States Supreme Court in *Gant* rejected the idea that under the Fourth Amendment *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)

authorized the search of a vehicle incident to a recent occupant's arrest after the arrestee had been secured and could not access the inside of the vehicle. *Gant*, 129 S.Ct. at 1719. The Court in *Gant* explained that to read *Belton* as it had been widely read would “untether the [vehicle search incident to arrest] rule from the justifications underlying ... the exception.” *Gant*, 129 S.Ct. at 1718.

Both *Gant* and *Belton* applied the general rules of the search incident to arrest exception set out in *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) to the automobile context. The search in *Chimel* did not involve an automobile and neither does the instant case. However, a search incident to an arrest is a search incident to an arrest whether the object searched is a car or a purse.” *Byrd*, 162 Wn.App. at 617.

Under *Chimel*, without a warrant, an officer may only search an arrestee and the area within his or her immediate control when an arrest is made when officer safety or the preservation of evidence is of concern. *Chimel*, 395 U.S. at 762–63. Such a search is unreasonable where these concerns are absent. *Chimel*, 395 U.S. at 762–63. An officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search. *Gant*, 129 S.Ct. at 1719; *Chimel*, 395 U.S. at 763–64.

Here, Ms. Rider was secured in a patrol car when her purse was searched and she had no way to access the purse. Moreover, the Ayers was not concerned with officer safety or the destruction of evidence. The justifications for the search incident to arrest exceptions did not exist here; the warrantless search of Ms. Rider's purse violated the Fourth Amendment.

Article 1, Section 7.

The Washington State constitution, Article I, section 7 provides broader protections than the Fourth Amendment. *Valdez*, 167 Wn. App. at 772. Article 1, section 7 provides in relevant part, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” *Id.* Article 1, section 7 “creates ‘an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions....’” *Valdez*, 167 Wn.2d at 772, quoting, *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), *overruled in part by Stroud*, 106 Wn.2d at 150–51.

The protections guaranteed by article I, section 7 are qualitatively different from those under the Fourth Amendment. *State v. Garcia–Salgado*, 170 Wn.2d 176, 183, 240 P.2d 153 (2010); *Valdez*, 167 Wn.2d at 772; *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). Warrantless searches are per se

unreasonable under the Washington state constitution, subject to a limited set of carefully drawn exceptions. *State v. Snapp*, \_\_\_\_P.3d \_\_\_\_, 2012 WL 1134130 (Wash); *Garcia–Salgado*, 170 Wn.2d at 176.

The *Thornton* exception discussed in *Gant* permits a warrantless search when it is reasonable to believe evidence relevant to the crime of arrest might be found in a vehicle. *Snapp*, at page 2. In *Snapp*, the State Supreme Court held that the “*Thornton*”<sup>1</sup> exception does not apply under article 1, section 7 of the State Constitution because “[A]rticle I, section 7 is not grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual's private affairs without authority of law[]” which includes officer safety and destruction of evidence. *Snapp*, citing, *Valdez*, 167 Wn.2d at 773; *Snapp* at page 13. Thus under article 1, section 7, to search a vehicle or container incident to arrest, there must be either officer safety or concerns with destruction or concealment of evidence. *Id.*

In *Patton*, and *Valdez*, both decided after *Gant*, the State Supreme Court held that a warrant must be obtained in the

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<sup>1</sup> *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d (2004).

absence of concerns for officer safety or destruction of evidence. *Valdez*, 167 Wn. 2d at 777. [The good faith and inevitable discovery exceptions do not apply under article I, section 7 and “[are]incompatible with the article I, section 7 exclusionary rule.” *Abuan*, 161 Wn.App. at 147-148, 153; *State v. Afana*, 169 Wn.2d 169, 184, 223 P.3d 879 (2010).

In *Abuan*, the defendant challenged the search of the vehicle and of his person under Article 1, section 7 of the Washington State Constitution. *Abuan*, 161 Wn.App at 147-148. The officers arrested the driver for driving with a suspended license. *Abuan*, a passenger in the car and the driver were secured in the back of the police car prior to the search of the car. *Abuan*, 161 Wn.App at 151. Neither officer testified that they suspected *Abuan* was armed or engaged in criminal activity. *Abuan*, 161 Wn.App at 147. One of the officer’s testified that *Abuan* was “cooperative [and] cordial” and that there was “[n]o indication of drugs, alcohol or any furtive movements”. *Id.*

This Court determined that based on the officer’s testimony there was no reasonable and articulable justification for searching *Abuan* and the trial court likely would have granted a motion to suppress *Abuan*'s statements and the marijuana he possessed. *Id.* *Abuan*, 161 Wn.App at 152.

The Court in *Snapp*, affirmed that *Valdez*, overruled *Stroud* (concerning the scope of the vehicle search-incident-to-arrest exception insofar as it concerned locked containers in the vehicle) on the issue of permitting search incident to arrest to include the time immediately after the arrest when the arrestee is secured in a patrol car. *Valdez*, 167 Wn.2d at 777.

*Snapp* and the cases discussed therein as applied to the instant case provide that the only justification for a warrantless search of a person incident to arrest require either a risk to officer safety or concerns with destruction of evidence.

Officer Ayers did not state that he believed that Ms. Rider's purse might contain evidence of a crime or that he had officer safety concerns. Thus under article 1 section 7, officer Ayers search was illegal under the state and federal constitutions and the trial court's refusal to suppress and error of constitutional magnitude *Snapp, supra; Abuan*, 161 Wn.App at 152.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING UNDUELY PREJUDICIAL EVIDENCE UNDER ER 404(b) WITHOUT CONDUCTING AN ER 404(b) ANALYSIS.

Over defense objection, the trial court admitted evidence of the

dismissed charges of theft without conducting an ER 404(b) analysis.

ER 404(b) provides, in full:

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) prohibits, “[e]vidence of other crimes, wrongs, or acts”. If evidence is relevant and not unduly prejudicial, the evidence *may*, however, be admissible for another purpose. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The proponent bears the burden of demonstrating a proper purpose. *Gresham*, 173 Wn.2d at 420; *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). If evidence of a defendant's prior crimes, wrongs, or acts is admissible for a proper purpose, the defendant is entitled to a limiting instruction upon request. *Gresham*, 173 Wn.2d at 423-424, citing, *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character. “*Gresham*, 173 Wn.2d at 420. To admit evidence of a person's prior misconduct,

“the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *Gresham*, 173 Wn.2d at 421, quoting, *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). “[E]vidence of prior misconduct is presumptively inadmissible” *Gresham*, 173 Wn.2d at 421, citing, *DeVincentis*, 150 Wn.2d at 17.

The exclusion of propensity evidence is based on the policy concern that such evidence will “so overpersuade [the jury] as to prejudice one with a bad general record.” *State v. Herzog*, 73 Wn.App. 34, 49, 867 P.2d 648(1994), quoting, *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed. 168, 69 S.Ct. 213, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948). Consequently, the court must closely examine prior misconduct evidence and deny its admission unless it, in some tangible way, tends to prove that the defendant intended to commit the charged crime. See, e.g., *State v. Bythrow*, 114 Wash.2d 713, 715-16, 719, 790 P.2d 154, (1990) (evidence of similar robbery two days before

charged robbery admissible to prove what defendant intended by his presence).

Here, aside from propensity, the suspicion of theft does not tend to prove that on the charged occasion Ms. Rider possessed a single tablet of valium. There is simply no connection between the suspicion of theft and the current charge and no need for this information to provide context for the police stop. Thus, the trial court erred in admitting the suspicion of theft , above and beyond the fact that under an ER 403 analysis, the evidence was unduly prejudicial.

The Court orally ruled: “I’m going to deny the motion. I will allow the state to present evidence that she was contacted for suspicion of theft....there has to be some context for the contact—I’ll order that there be no testimony about her being arrested for theft....just contacted on suspicion of theft.”. 2RP 8. The court also “denied” the motion to suppress testimony from the Wal-Mart loss prevention officer. 2RP 8.

Had the trial court conducted an ER 404(b) analysis it would not have been able to establish: (1) that the act occurred; (2) a valid purpose for admitting the evidence; (3) any relevance or need for admission of the evidence other than to establish that Ms. Rider

was a bad character; or (4) that the probative outweighed the unduly prejudicial impact of the evidence.

The court accepted the state's concerns that the suspicion of theft was needed to explain to the jury the reason for the police contact. As defense counsel suggested this could easily have been addressed by simply stating that the police contacted Ms. Rider and searched her purse and found the valium. There was no need to present the overly prejudicial suspicion of shoplift. The suspicion of shoplifting was not relevant to the possession of valium and under ER 403 was unduly prejudicial and served no purpose other than to establish that Ms. Rider's was a bad person.

#### Not Harmless Error

It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for non-constitutional error. *Gresham*, 173 Wn.2d at 433. The question, then, is whether, " 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " " *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986), *quoting*, *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Considering the strong persuasive power of the prior suspicion of theft and the inadmissibility of the

valium evidence, there is more than a reasonable probability that absent this highly prejudicial evidence the prior bad act likely influenced the jury's decision. For this reason, Ms. Rider was denied her right to a fair trial requiring reversal of the conviction.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO STAY THE IMPOSITION OF THE SENTENCE KNOWING THAT ITS ER 3.6 RULING WAS CONTRARY TO CURRENT LAW, AND WITHOUT THAT EVIDENCE THE STATE COULD NOT PROCEED TO TRIAL.

Here, the trial court abused its discretion when it denied Ms. Rider's motion to stay the imposition of her sentence pending appeal. 2RP 4-6. The reviewing court applies an abuse of discretion standard to the trial court's decisions regarding the grant or denial of an appeal bond under RCW 9.95.062. *State v. Swiger*, 159 Wn.2d 224, 231, 149 P.3d 372 (2006), citing, *State v. Cole*, 90 Wn.App. 445, 447, 949 P. 2d 841 (1998).

A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of

the law. *State v. Lord*, 161 WN.2d 276, 283–84, 165 P.3d 1251 (2007).

Here, the trial court applied the wrong legal standard when it ignored *Gant* and admitted the valium evidence. Trial counsel argued the correct case law which the trial court expressly declared he would not apply, in favor of following an older invalid set of cases. The trial court knew that *Gant* controlled the admission of evidence yet chose to rely on older, overruled case law. Under these circumstances, armed with this knowledge that Ms. Rider's conviction would be over turned on appeal, the trial court's decision was vindictive, manifestly unreasonable and ultimately an abuse of discretion. For these reasons, Ms. Rider's sentenced should have been stayed pending resolution of the appeal.

D. CONCLUSION

Ms. Rider respectfully requests this Court reverse her conviction and remand for dismissal with prejudice because without the inadmissible evidence the state could not proceed against Ms. Rider. Alternatively, Ms. Rider was denied a fair trial by the admission of unfairly prejudicial evidence that outweighed its probative value which requires remand for a new trial. Finally, this

court should remand for an appeal bond hearing directing the trial court to set a reasonable appeal bond for Ms. Rider.

DATED this 26th day of April 2012

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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LISE ELLNER  
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I, Lise Ellner, a person over the age of 18 years of age, served Lewis County Prosecutor Appeals Department [appeals@lewiscountywa.gov](mailto:appeals@lewiscountywa.gov) and Rachael Rider c/o General Delivery Chehalis, WA 98523 true copy of the document to which this certificate is affixed, On April 26, 2012. Service was electronically.



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