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STATE OF WASHINGTON

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No. 84573-5

CLEAR

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID A. OPPELT, JR.,

Petitioner.

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

The Honorable Ellen J. Fair
The Honorable Bruce I. Weiss

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUMMARY OF ARGUMENT

This Court has established a three-step test to determine whether a pre-accusatorial delay violated a defendant's right to due process: (1) the defendant must establish the delay was actually prejudicial to the defense; (2) the court must consider the State's reasons for the delay; and (3) "if the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused." The third step is reached only if the defendant establishes actual prejudice and the State has a valid justification for the delay.

Here, Mr. Oppelt was charged with child molestation alleged to have occurred six and one-half years earlier. Five months later, he was further charged with rape of child, based on the same allegations. The Court of Appeals ruled the delay was actually prejudicial to the defense and was caused by the State's unjustified negligence. Even though the State did not have a justification for the delay, the court nonetheless balanced the competing interests of the parties and concluded the State's interest in proceeding with the prosecution outweighed the prejudice to Mr. Oppelt's ability to present a defense. In so concluding, the court misstated the third step of this Court's test by omitting the phrase "if the State is able to

justify the delay." Based on the same conclusion, the court also ruled dismissal was not required in the furtherance of justice. These rulings are contrary to this Court's three-step test and require reversal.

B. ISSUES PRESENTED FOR REVIEW

1. This Court has established a three-step test to determine whether pre-accusatorial delay violates a defendant's constitutional right to due process:

(1) The defendant must show he was prejudiced by the delay; (2) the court must consider the reasons for the delay; and (3) *if the State is able to justify the delay*, the court must undertake a further balancing of the State's interests and the prejudice to the accused.

Here, the Court of Appeals ruled Mr. Oppelt was prejudiced by the pre-accusatorial delay and the State failed to justify the delay. Nonetheless, the court reached the third step of the test, balanced the parties' interests, and found the State's interests outweighed the prejudice to Mr. Oppelt. The court stated the third step is undertaken only when the State does *not* have a valid justification for the delay, the converse of this Court's test. Did the court's misapplication of the three-step test violate Mr. Oppelt's right to due process when the negligent pre-accusatorial delay was actually prejudicial to his defense?

2. Pursuant to CrR 8.3(b), a court may dismiss a prosecution in the furtherance of justice where governmental misconduct, including simple mismanagement, is prejudicial to the accused and materially affects the right of the accused to a fair trial. Was Mr. Oppelt entitled to dismissal of the prosecution in the furtherance of justice due to the governmental mismanagement that resulted in a prejudicial and negligent pre-accusatorial delay?

B. STATEMENT OF THE CASE

On May 18, 2001, Detective Jonathan Jensen was assigned to investigate allegations that David A. Oppelt, Jr., petitioner herein, sexually assaulted his step-daughter, A.R. 6/12/08 RP 29-31. He completed his investigation on August 2, 2001, and referred the case to the Snohomish County Prosecutor's Office. 6/12/08 RP 33, 42-43. Child Protective Services (CPS) also investigated the allegations, concluded the allegations were unfounded, and returned A.R. to Mr. Oppelt's home. 6/5/08 RP 13.

Almost six years later, on June 4, 2007, a different CPS case worker contacted the Snohomish County Prosecutor's Office to inquire about the case. CP 92. The prosecutor's office had no record of the case but was able to obtain a copy of Detective Jensen's referral. CP 93.

After an additional five and one-half months, on November 26, 2007, Mr. Oppelt was charged with child molestation in the first degree, alleged to have occurred six and one-half years earlier, "on or about the 4th day of May, 2001 through the 16th day of May, 2001." CP 187-88. After yet another five months, on April 18, 2007, Mr. Oppelt was further charged with rape of a child in the first degree, also alleged to have occurred during the same time period in 2001. CP 183-84.

Mr. Oppelt moved to dismiss the prosecution because 1) the delay violated his constitutional right to due process, and 2) dismissal was required in the furtherance of justice. CP 164-80; 6/5/08 RP 2-39. Specifically, he argued the delay was actually prejudicial to his defense because A.R.'s grandmother, Bertha Olson, to whom A.R. allegedly first made the accusation, had developed a medical condition that affected her memory.¹ 6/5/08 RP 7. He further argued the delay was prejudicial because Detective Jensen's field notes were lost and the defense was

¹ Ms. Olson could not remember what type of lotion she told A.R. to apply to her genital area after A.R. made her accusation against Mr. Oppelt that could have caused the redness observed by the sexual assault nurse examiner. Also, she did not remember speaking with the police or giving a statement about the incident. 6/5/08 RP 7-9.

unable to interview A.R. close in time to the allegations. 6/5/08 RP 9-13.

The trial court agreed that Mr. Oppelt was actually prejudiced by Ms. Olson's memory loss and that the delay from August 2001 until June 2007 was due to the State's negligence in allowing the case to "slip through the cracks."² CP 94-95; 6/5/08 RP 34-36. Even so, the court concluded that, although "the balancing test is somewhat of a close one," the State's interest in pursuing the prosecution outweighed the actual prejudice to Mr. Oppelt. CP 95; 6/5/08 RP 36-39. Mr. Oppelt was subsequently found not guilty of rape of a child in the first degree and guilty of child molestation in the first degree. CP 65-66.

Mr. Oppelt appealed, contending the trial court misconstrued this Court's three-step test to determine whether pre-accusatorial delay violated due process, namely, the court improperly balanced

²Conclusion of Law 1: "The court finds that Bertha Olson's inability to recall the type of lotion used and who applied it to the victim's genital area as well as Bertha Olson's medical condition that affects her memory is sufficient to satisfy the defendant's burden of showing actual prejudice resulting from the delay in this case."

Conclusion of Law 2: "The court finds that the loss of Detective Jensen's field notes is not sufficient to show actual prejudice as it is only speculative that the notes would have been helpful to the defense."

Conclusion of Law 3: "The court finds that the defense's inability to interview the victim at the time of the report is also insufficient to show actual prejudice as it is only speculative that she would have said something other than what she is saying now."

the interests of the parties when he established the delay was prejudicial and negligent. Br. of App. at 11-16. He further argued that the trial court abused its discretion in failing to dismiss the case in the furtherance of justice, pursuant to CrR 8.3(b).

In an unpublished decision, the Court of Appeals agreed the delay was prejudicial and negligent. Opinion at 9. Nonetheless, the court went on to balance the competing interests of the parties and ruled the State's interest in prosecuting Mr. Oppelt outweighed the actual prejudice he suffered by the pre-accusatorial delay. Opinion at 11-12. The court further ruled the prejudicial and negligent delay did not affect Mr. Oppelt's right to a fair trial. Opinion at 12.

C. ARGUMENT

1. THE PREJUDICIAL AND NEGLIGENT PRE-ACCUSATORIAL DELAY OF SIX AND ONE-HALF YEARS BETWEEN THE ALLEGED OFFENSE AND THE FILING OF THE INFORMATION VIOLATED MR. OPPELT'S RIGHT TO DUE PROCESS.

Oppressive pre-accusatorial delay in filing charges violates the due process clauses of the Fifth³ and Fourteenth⁴ Amendments

³"No person shall be . . . deprived of life, liberty, or property, without due process of law."

⁴"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

to the United States Constitution where an unjustified delay causes actual prejudice to the defense. *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), citing *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); *State v. Norby*, 122 Wn.2d 258, 262-63, 858 P.2d 210 (1993). A delay may violate due process even if charges are brought within the statute of limitations.

Nor do statutes of limitations excuse unreasonable delay or failure to prosecute at an earlier time. Indeed, statutes of limitations do not preclude judicial inquiry into the reasonableness or constitutionality of delays within that period. This conclusion is supported by the court's ability to review prearrest delays to determine whether a defendant's due process rights have been violated.

State v. Chavez, 111 Wn.2d 548, 560, 761 P.2d 607 (1988).

Following *Lovasco*, this Court established a three-step test for determining whether a delay violated a defendant's due process rights: "(1) the defendant must show he was prejudiced by the delay; (2) the court must consider the reasons for the delay; and (3) if the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused." *State v. Lidge*, 111 Wn.2d 845, 848, 765 P.2d 1292

(1989), quoting *State v. Alvin*, 109 Wn.2d 602, 604, 746 P.2d 807 (1987).

The three steps are considered sequentially, that is, a defendant must first establish prejudice, then the court will consider the State's reasons for the delay, and finally, if the delay is justified, the court will balance the State's interest against the prejudice to the defendant. *Norby*, 122 Wn.2d at 264; *State v. Dixon*, 114 Wn.2d 857, 860, 792 P.2d 137 (1990). The third step is reached only if both the defendant demonstrates actual prejudice and the State validly justifies the delay. "If the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused." *State v. Calderon*, 102 Wn.2d 348, 353, 684 P.2d 1293 (1984).

a. The court erred in balancing the interests of the parties, in light of the court's finding that Mr. Oppelt suffered actual prejudice due to the State's unjustified negligent delay. The trial court found Mr. Oppelt was actually prejudiced by the delay and the delay was caused by the State's negligence when the case "slipped through the cracks." 6/5/08 RP 34-36; CP 53-55. In fact, at the motion hearing, the State conceded the delay was unjustified, and stated, "And obviously, we don't have a reason." 6/5/08 RP 4, 26.

This concession was reiterated on appeal. “The pre-trial judge found that the delay was negligent. . . . The State does not challenge this finding.” Br. of Resp. at 18. Therefore, the trial court erred in reaching the third step and balancing the interests of the parties. “The third step, balancing the State’s interest against the prejudice to the accused, is undertaken only when a justification is presented.” *State v. Frazier*, 82 Wn. App. 576, 589, 918 P.2d 964 (1996)

The Court of Appeals endorsed the trial court’s erroneous balancing of the interests of the parties. Opinion at 10-12. In so doing, the Court significantly misstated the third step of this Court’s well-settled three-part test. The court characterized the test thusly: “the defendant must show he was prejudiced by the delay; the court must consider the reasons for the delay; and *the court must undertake a balancing of the State’s interest and the prejudice to the accused.*” Opinion at 7 (emphasis added). Without explanation, the court notably omitted the beginning phrase of the third step, “if the state is able to justify the delay.”

The court acknowledged its ruling was in conflict with Division Two’s opinion in *Frazier, supra*. Opinion at 10. In *Frazier*, after the defendant reached his eighteenth birthday, he was

charged as an adult with an offense to which he had confessed 17 months earlier when he was a juvenile. 82 Wn. App. at 579. The trial court found the defendant was prejudiced by the loss of juvenile jurisdiction and the State had no credible explanation for the delay. *Id.* at 592. The trial court then balanced the interests of the State and the defendant's right to due process, concluded the State had not met its responsibility to provide the defendant "the full protection of the law," and dismissed the case. *Id.* at 579-80.

Division Two affirmed, but noted:

The State has no interest in processing the accused in an unjustifiably negligent fashion. Moreover, the State's interest in fairly administering justice can only be served when such fairness is maintained.

The trial court correctly determined that Frazier was prejudiced, that the State provided no reason for the delay, and that this negligent delay was unjustified; therefore, it did not need to reach the third step and balance the interests of the State and Frazier.

Id. at 592.

Here, however, Division One adhered to its own reasoning in *State v. Shiefferl*, in which the court stated:

After the defendant has made the requisite showing of prejudice, . . . the court must consider the reasons for the delay and the degree of prejudice to the defendant. That is, the State's reasons for the delay must be balanced against the resulting prejudice to the defendant.

51 Wn. App. 268, 271-72, 753 P.2d 549 (1988). It may be noted, the opinion in the instant case did not refer to *State v. Anderson*, decided one year before *Shiefferl*, in which Division One correctly recognized:

The court must consider the reasons for the State's delay and determine if the delay is justified. *If the delay is justified*, the court must balance the prejudice to the defendant against the State's interest and determine if the action complained of violates fundamental conceptions of justice.

46 Wn. App. 565, 568-69, 731 P.2d 519 (1987) (emphasis added).

The court's decision here is directly converse to decisions from this Court. Over a quarter of a century ago, this Court ruled, "*If the State is able to justify the delay*, the court must undertake a further balancing of the State's interest and the prejudice to the accused." *Calderon*, 102 Wn.2d at 353 (emphasis added). This statement has been adopted verbatim as the third step in the three-step analysis for pre-accusatorial delay. See *Norby*, 122 Wn.2d at 263; *Dixon*, 114 Wn.2d at 860; *State v. Cantrell*, 111 Wn.2d 385, 390, 758 P.2d 1 (1988); *Lidge*, 111 Wn.2d at 848; *Alvin*, 109 Wn.2d at 604. The court's abridgement of the third step was in error.

b. The court's conclusion that the balance favored the State's interest was unsupported by the record. Even if the court properly reached the third step, it erred in concluding the prejudice to Mr. Oppelt was outweighed by the State's interests. "The State has no interest in processing the accused in an unjustifiably negligent fashion." *Frazier*, 82 Wn. App. at 592. Again, the State conceded it had no justification for the negligent delay. Therefore, the balance weighs entirely in favor of Mr. Oppelt.⁵

The State's case relied heavily on statements and investigative notes prepared in 2001. By the time of trial, none of the parties who investigated the incident had an independent memory of the investigation. 6/10/08 RP 65; 6/11/08 RP 150, 200; 6/12/08 RP 46. Therefore, for all practical purposes, the witnesses were unavailable for cross-examination on their notes and statements.

⁵ In its Answer to Petition for Review, the State compares the pre-accusatorial delay analysis with a time for trial analysis. Ans. to Pet. at 7-8. The United States Supreme Court set out four non-exclusive factors to consider when determining whether a post-charging delay violated a defendant's right to a speedy trial: the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Of course, Mr. Oppelt was under no obligation to demand that he be charged with a crime. The other three factors, however, weigh in favor of Mr. Oppelt.

When balancing the competing interests of the parties, the ultimate question is “whether the action complained of . . . violates those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions’ . . . and which define ‘the community’s sense of fair play and decency.’” *Lovasco*, 431 U.S. at 790 (internal citations omitted); accord *Dixon*, 114 Wn.2d at 860; *Calderon*, 102 Wn.2d at 353. Given the extreme length of the delay, the lack of any corroborating physical evidence, CPS’s finding that the allegations were unfounded, the complaining witness’s reluctance to proceed, together with the absence of any similar accusations against Mr. Oppelt, the prejudice to Mr. Oppelt and his inability to mount a meaningful defense significantly outweighed the State’s interest in pursuing a charge that was stale due to its own unjustified negligence.

c. Negligent delay can violate due process. In its Answer to Petition for Review, the State contends governmental negligence can never violate due process. Ans. to Pet. at 14. This contention was rejected by the Court of Appeals in this case and should be further rejected by this Court. See Opinion at 6-7. The State relies on *County of Sacramento v. Lewis*, 523 U.S. 833, 837, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), a *civil* action pursuant to

42 U.S.C. § 1983. Accordingly, *Lewis* did not address whether actual prejudice, coupled with negligent governmental pre-accusatorial delay, can violate a *criminal* defendant's constitutional right to due process. The State's reliance on *Lewis* is misplaced.⁶

Moreover, the State's conduct in this case could be characterized as reckless. In the criminal context, recklessness is defined as:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

RCW 9A.08.010(c). Here, the loss of the referral for six years presented a substantial risk of harm and was such a gross deviation from the normal course of business as to constitute recklessness.

⁶ In the context of the Sixth Amendment right to a speedy trial, the United States Supreme Court has stated:

Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. *United States v. Doggett*, 505 U.S. 647, 657, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992).

The State also contends there is no authority from this Court that due process may be violated by a negligent pre-accusatorial delay. Ans. to Pet. at 14. This is categorically incorrect. See *State v. Salavea*, 151 Wn.2d 133, 139, 86 P.3d 125 (2004) (“[I]f the delay only is negligent, due process may or may not be violated.”); *State v. Warner*, 125 Wn.2d 876, 890, 889 P.2d 479 (1995) (“This court has recognized only two circumstances where delay can justify vacating a conviction: (1) an intentional delay by the State to circumvent the juvenile justice system will violate due process, and (2) a negligent delay *may* violate due process.”); *Dixon*, 114 Wn.2d at 866 (“[A]bsent a deliberate or negligent delay on the part of the State which results in a loss of juvenile court jurisdiction, a juvenile’s right to due process is not violated.”); *Lidge*, 111 Wn.2d at 848 (“A deliberate delay to circumvent the juvenile justice system violates due process; a negligent delay may also.” (Quoting *Alvin*, 109 Wn.2d at 604)); *Calderon*, 102 Wn.2d at 353 (“It has been suggested that negligently failing to bring charges promptly may also establish a constitutional violation.”).

The Ninth Circuit also has explicitly ruled that negligent delay may violate a defendant’s right to due process. See *United States v. Ross*, 123 F.3d 1181, 1184-85 (9th Cir. 1997) (“Preindictment

delay that results from negligence or worse may violate due process.”); *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985) (“The determination of whether a pre-indictment delay has violated due process is essentially decided under a balancing test, and we do not find that intent or reckless behavior by the government is an essential ingredient in the mix.” (Citations omitted)).

The Fourth and Seventh Circuits have similarly ruled that negligent delay may violate due process. See, e.g., *United States v. Sowa*, 34 F.3d 447, 450-51 (7th Cir. 1994); *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-04 (4th Cir. 1985). As the Fourth Circuit explained:

[W]e cannot agree . . . that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation. Taking this position to its logical conclusion would mean that no matter how egregious the prejudice to the defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community’s sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive.

Howell, 904 F.2d at 895.

Some circuit courts require a defendant to establish the delay was due to prosecutorial bad faith or recklessness, and completely dispense with balancing the prejudice and the State's justification. See, e.g., *United States v. Crouch*, 84 F.3d 1497, 1522-25 (5th Cir. 1996); *United States v. Marler*, 756 F.2d 206, 213 (1st Cir. 1985). However, *Lovasco* requires balancing the interests of the parties.

[T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. . . . We are to determine only whether the action . . . violated those "fundamental conceptions of justice which lie at the base of our civil and political institutions" and which define "the community's sense of fair play and decency."

431 U.S. at 790 (internal citations omitted). Accordingly, the analyses of these circuit courts should be rejected

d. Mr. Oppelt's conviction must be vacated. A prejudicial and negligent pre-accusatorial delay violates a criminal defendant's due process and requires vacation of a conviction. *Warner*, 125 Wn.2d at 890; *Lidge*, 111 Wn.2d at 848. Mr. Oppelt's conviction for child molestation in the first degree must be vacated and the charge dismissed.

2. THE PREJUDICIAL AND NEGLIGENT PRE-ACCUSATORIAL DELAY OF SIX AND ONE-HALF YEARS BETWEEN THE ALLEGED OFFENSE AND THE FILING OF THE INFORMATION REQUIRED DISMISSAL IN THE FURTHERANCE OF JUSTICE.

Pursuant to CrR 8.3(b), a court may dismiss a criminal prosecution in the furtherance of justice.⁷ A trial court may dismiss a charge under CrR 8.3(b) where the defendant shows by a preponderance of the evidence “(1) ‘arbitrary action or governmental misconduct’ and (2) ‘prejudice affecting the defendant’s right to a fair trial.’” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003), quoting *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1993).

A trial court’s ruling regarding dismissal pursuant to CrR 8.3(b) is reviewed for abuse of discretion. *Michielli*, 132 Wn.2d at 240. A court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 491 (2006); *Rohrich*, 149 Wn.2d at 654.

⁷CrR 8.3(b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial. The court shall set forth its reasons in a written order.

Here, the trial court twice abused its discretion in denying Mr. Oppelt's motion to dismiss in the furtherance of justice. First, governmental misconduct may be "simple prosecutorial mismanagement." *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). In light of the State's concession of mismanagement and the court's finding of actual prejudice, the court's failure to dismiss was untenable. Second, the trial court found Mr. Oppelt failed to establish that he could not receive a fair trial because the delay was "just as likely" to be prejudicial to the State. CP 55 (Conclusion of Law 6, 7). This is not the correct standard. CrR 8.3(b) refers only to "prejudice to the rights of the accused." The issue of prejudice therefore resides with the defendant only. Thus, the court's consideration of speculative prejudice to the State was the incorrect legal standard.

"The purpose of [CrR 8.3(b)] is to see that one charged with a crime is fairly treated." *State v. Whitney*, 96 Wn.2d 578, 580, 637 P.2d 956 (1981). See also *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 720 (2003) ("It is well-established that CrR 8.3(b) is designed to protect against arbitrary action or governmental misconduct."). Yet, even though the Court of Appeals determined "[t]he State's delay qualifies as mismanagement" and the memory loss related to

evidence that "could have bolstered Oppelt's defense," it nonetheless ruled the trial court did not err, on the grounds that the prejudice from the delay did not affect Mr. Oppelt's right to a fair trial. Opinion at 9, 13. This ruling is contrary to the purpose of CrR 8.3(b).

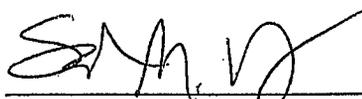
Based on the State's well-founded concession of negligent mismanagement and the court's finding of actual prejudice, Mr. Oppelt was entitled to dismissal of the charges in the furtherance of justice.

D. CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the briefing below and the Petition for Review, Mr. Oppelt requests this Court reverse and vacate his conviction for child molestation in the first degree due to prejudicial and unjustifiably negligent pre-accusatorial delay.

DATED this 21st day of October 2010.

Respectfully submitted,



SARAH M. HROBSKY (12352)
THOMAS M. KUMMEROW (21518)
Washington Appellate Project (91052)
Attorneys for Petitioner

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STATE OF WASHINGTON,)
)
 Respondent,)
)
)
 DAVID OPPELT, JR.,)
)
)
 Petitioner.)

NO. 84573-5

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** 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:

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