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

DONALD CALVIN ,)	NO. 67627-0-I_
)	
Appellant,)	STATEMENT OF
)	ADDITIONAL GROUNDS
v.)	FOR REVIEW
)	PRESENTED
THE STATE OF WASHINGTON,)	PURSUANT TO RAP 10.10
)	
Respondent.)	

COMES NOW the appellant, and offers his *pro se* Statement of Additional Grounds for Review.

**I.
JUDICIAL MISCONDUCT**

1. *Comment upon the evidence:*

Judge Mura committed prejudicial error in altering the critical jury instruction during jury deliberations, and at a time when the jury was unable to reach a unanimous verdict.

2. *Judicial Misconduct:*

Judge Mura unlawfully influenced the jury to bring a unanimous vote to convict, by introducing an altered instruction after stating he would never do so.

During Jury Instructions, Judge Mura state in rather certain and unequivocal terms, that in the event some question should arise - or a

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1 note be delivered to him - he would return the same without comment.

2 RP _____

3 In turning this "about face" by responding to the jury's question -
4 with a new instruction no less - Judge Mura sent a message to the two
5 jurors who refused to join in the "to convict" vote, that it was his
6 preference - or his command - that the "hold out" jurors join with the
7 majority in voting "to convict" defendant/appellant.

8 **3. *Judicial Misconduct:***

9 **Judge Mura unlawfully commented upon the evidence, and**
10 **unduly influenced the jury to bring a unanimous vote to convict, by**
11 **introducing an altered instruction *after stating he would never do so.***

12 Judge Mura's action in contradicting himself so forcibly, most very
13 probably or certainly was read or understood by the dissenting jurors as a
14 message of Judge Mura's *preference* that the two dissenting jurors join with
15 the others in a "to convict" vote, and/or a *command* that the two jurors relax
16 their convictions and/or stand down from their beliefs to expedite
17 defendant/appellant's conviction.

18 **II.**
19 **INEFFECTIVE ASSISTANCE OF COUNSEL,**
20 **AND GROSS INCOMPETENCY OF COUNSEL**

21
22 **4. *Ineffective Assistance of Counsel - Failure to Seek and***
23 ***Urge Self-defense Instruction, and Recalcitrance in Refusing***
24 ***Appellant's Demand that Counsel Request Entrance of the Self-***
25 ***defense Instruction:***

26 Appellant's Defense Counsel, Mr. Johnston was ineffective in
27 refusing to urge a self defense instruction; and was grossly incompe-

STATEMENT OF ADDITIONAL GROUNDS FOR APPEAL

Page #2 of 22.

1 tent in erroneously interpreting the law controlling this matter as stated
2 by the Washington State Supreme Court in *State v. Valentine*, Wn2d
3 , P.2d (1997), *as an excuse* for failing to urge the self-defense
4 instruction.

5 Moreover, Mr. Johnston was incompetent and ineffectual in
6 failing and refusing to request such a jury instruction, *over appellant's*
7 *urging and demands that he do so.*

8 **FACTS**

9 At an hearing had on August 16, 2011, Mr. Johnston alludes to
10 the absence of *any* defense (with respect to a charge of Assault Third,
11 at any rate); and/or that *no self-defense instruction was countenanced*
12 *by our law.*

13 Explaining his belief, Mr. Johnston advised,¹ the Court: "[I]
14 thought there is *no* defense that I can determine in these third degree
15 assault cases since the Supreme Court announced the Ballentine (*sic*)²
16 case." Report of Proceedings, p.18, l. 21-24.³

¹ Here we may just as well have written "Mr. Johnston *ill-advised* the Court," - as his view of the law was and is clearly erroneous and demonstrates an incompetency and lack of effectiveness of counsel which brought high - and irreversible - prejudice to appellant.

² We are certain the case-name offered here was, in fact, *Valentine* (*i.e.*, *State v. Valentine*, Wn.2d , P.2d ___ (19)). It appears that the transcriptionist merely misunderstood the name stated - and, given the phonetic proximity, such is a reasonable error and inference.

³ It should be noted that the Report of Proceedings referred to here, *infra*, is that of an hearing upon Motion to Arrest Judgment and for New Trial, had August 16, 2011 (*i.e.*, post-sentencing). *This* transcription is paginated separately and apart from the trial transcription, and does not appear to have been attached to the latter. A copy of the relevant page is attached herewith for clarity. We will certainly provide the transcription in entirety upon the Court's direction, but have not done so here, as it is unclear whether the same was previously made a part of the Appellate Court's record in this case.

STATEMENT OF ADDITIONAL GROUNDS FOR APPEAL

Page #3 of 22.

1 Thus, it appears Mr. Johnston believed (and so he informed
2 appellant out of court), that there was no defense - *i.e., of any kind* - to
3 such a charge, once indicted; Thus, for all intents and purposes, once
4 charged, *guilt is a foregone conclusion*.

5 However, Mr. Johnston was incorrect, and in failing (or refusing
6 to request the self-defense instruction), was grossly incompetent, and
7 brought severe prejudice to appellant.

8 Moreover, Mr. Johnston's error in failing to submit and/or
9 request the limited self-defense instruction be offered to the jury is
10 most egregious as *appellant, personally, demanded he do so well prior*
11 *to trial*, and did so repeatedly.

12 Appellant discussed the need for a self-defense instruction with
13 Mr. Johnston, *and requested that he speak to Judge Mura about this*
14 *several times prior to trial*. Nevertheless, Mr. Johnston took the
15 position that no such self-defense instruction (at least with respect to an
16 prosecution for Assault Third Degree), was available or extant in the
17 State of Washington.

18 However, Mr. Johnston's interpretation of the effect and rule of
19 *State v. Valentine, Id.*, was and *is clearly in error*. Your appellant
20 sought the advice of another attorney, who was of the opinion that *State*
21 *v. Valentine, Id.*, did and does, in fact, provide a limited defense of self-
22 defense to a charge of Assault Third.

23 Moreover, your appellant, personally, obtained a copy of the
24 Court's opinion in *State v. Valentine, Id.*, at the conclusion of the first

The uppercase "RP," will, hereinafter generally refer to the transcription of the *trial* proceedings (*i.e.*, those had July 25, & 26, 2011), - unless otherwise noted.

STATEMENT OF ADDITIONAL GROUNDS FOR APPEAL

Page #4 of 22.

1 day of trial your appellant approached and confronted Mr. Johnston,
2 armed with this "second opinion,"⁴ as well as the hardcopy of *State v.*
3 *Valentine, Id.*, with the relevant holdings highlighted.⁵ Your appellant
4 there and then urged Mr. Johnston in the strongest terms possible to
5 reconsider, and to *present this matter to Judge Mura.*

6 Nevertheless, Mr. Johnston refused, stating variously that "it
7 was too late"; Judge Mura would "not allow it" (*i.e.*, even if the law
8 permit a self-defense instruction), and - in any case, he did not agree.
9 Mr. Johnston further stated he "had made a mistake," and his attitude
10 was nonchalant, indifferent, and cavalier.

11 *Moreover*, and after being confronted with his rather egregious
12 error in this matter, Mr. Johnston refused to seek an arrest of judgment
13 on the basis that the self-defense instruction was erroneously omitted.

14 ***5. Ineffective Assistance of Counsel - Failure to Stress and***
15 ***Press Requirement that Jury Find Absence of Self-defense Beyond a***
16 ***Reasonable Doubt:***

17 Appellant's Defense Counsel, Mr. Johnston was ineffective and
18 grossly incompetent in failing to instruct the jury that defendant/-
19 appellant was:

20 (1) entitled to assert self defense, and to argue that in
21 raising his arm against the light of Ranger Moularas, and in attempting
22 to shield his eyes from mace, he was acting lawfully - and in self-
23 defense, and;

⁴ *I.e.*, as to the effect and holding of *State v. Valentine, supra.*

⁵ Mr. Perelman, and a paralegal employed by the Defender's Office, aided appellant in parsing out the law of *State v. Valentine, supra*, and both persons were in disagreement with Mr. Johnston's "interpretation" of the law as established therein.

1 (2) that *the jury must find beyond a reasonable doubt that*
2 *defendant/appellant was not acting in self-defense in performing these*
3 *gestures, and;*

4 (3) that *no guilty verdict was possible unless the jury*
5 *determined unanimously that appellant was acting deliberately and*
6 *maliciously (i.e., attempting to induce fear in Ranger Moularas) in*
7 *performing these gestures.*

8 Officer Ranger Moularas states (as we perceive it), that he was
9 "assaulted" in seven ways:

- 10 1. Your appellant stepped too close to him, in receiving his
11 instructions and order to exit;⁶ RP, p. 20, l. 20-21.
- 12 2. Your appellant made Ranger Moularas apprehensive "because we
13 are trained you're not suppose (*sic*) to be approached by subjects."⁷
14 RP, p. 20, l. 22-24.

⁶ Ranger Moularas'es assertion that he exited his vehicle for "officer safety" is ludicrous. *If he were truly so afraid* (and we would offer his fear - if genuine - was the product of cowardice - not any intent on appellant's part to induce fear), *he would have simply rolled up his window, taken appellant's auto license, and called for the Cavalry* - pronto: *E.g.*: "There's a vicious man here - He says he wants to bathe his body in my shower - and, Oh My God - he's *staring* at me!" Oh dear! Well, one can't be too careful these days.

⁷ Additionally, Ranger Moularas testified that he had "officer safety" concerns. He claimed that he felt "apprehensive" when approached by appellant. RP, p. 20, l. 22-24. However, in fact, Ranger had called out to appellant. Ranger Moularas also recites a story of a death of an officer by a man who shot an officer (presumably after approaching him). Well, to this we would respond that impecunious persons seeking bathing facilities are less likely than those who plan murder to execute a park ranger without other cause. Ranger Moularas'es claims are ludicrous and brought only as a diversion. If he were in fact so terrified, the correct response would have been to roll up his window, take appellant's auto license, and drive away while calling for help.

⁸ We are unclear, again, as to how exactly this demonstrates an *intent* upon the part of appellant *to induce fear* light of the fact that no one has informed appellant that he was not to approach law enforcement - and, to our knowledge - such law, if it be so, has never been published. *Moreover*, it is difficult to understand (or, at minimum, disturbing), that it is now *a felony to approach a law enforcement officer* - especially

- 1 3. Your appellant inquired about the cost to use the park shower "in a
2 straining tone,"⁹ which Ranger Moularas "didn't know how to take"
3 (RP, p. 20, l. 12-14); and was, thus (because Ranger Moularas
4 "didn't know how to take"), assaulted by these comments, "tone,"
5 and question - as we understand it.
6 4. Your appellant "proceeded to stare right through (Ranger
7 Moularas), as he was standing within two feet of (him) there."
8 RP, p. 20, l. 25; p. 21, l. 1-2.
9 5. Your appellant became aggravated and asked for Ranger
10 Moularas'es name, shouting "at least I know your damn name."
11 RP, p. 21, l. 18-21.
12 6. Your appellant took a step towards him after having been sprayed
13 with Ranger Moularas'es mace chemical. RP
14 7. Your appellant raised his hand (after Ranger Moularas shined his
15 light upon appellant), and made "a movement toward me" and
16 cursed about the bright and blinding light. RP, p. 23, l. 14-17.¹⁰
17

18 We find at least four of which "assaults" to be amenable to a
19 reasonable "self-defense" defense and instruction; and/or to have been
20 acts (if having actually, and in reality, occurred - see, *e.g.*, #3, & #4),¹¹

when the officer is calling for one's attention. It is further disturbing to recognize that to "approach" a law enforcement officer may constitute a felony assault in a case - such as this - where the assaulter does not know that the individual calling to him is law enforcement.

⁹ In truth, we are uncertain what, precisely, a "straining tone" might be - or how such constitutes an assault. We are certain appellant's straining tone was not *intended* to induce fear - but most certainly not fear of bodily harm.

¹⁰ We note - and ask the Court to note, particularly - that *there are two versions* - by Ranger Moularas - *of these events*. That quoted above is derived upon direct examination by Moularas'es counsel and - most significantly - omits several minutes of detail, which radically alter the story of the events. Another version, obtained under cross-examination, adds much to the story: in particular, that Ranger Moularas had, in fact, ordered appellant to leave, and that appellant had entered his vehicle at the time he asked for Ranger Moularas'es name - not before. Further, the version taken under cross-examination shows that Ranger Moularas ordered appellant to exit his vehicle - *i.e.*, the name request and step towards did not occur at Ranger Moularas'es truck, as the direct questioning version suggests.

¹¹ We would contend that appellant, not having the super-powers of Iron Man, is incapable of X-ray vision - and, thus, did not "assault" Ranger Moularas in this way.

STATEMENT OF ADDITIONAL GROUNDS FOR APPEAL

Page #7 of 22.

1 effected and *committed in the lawful course of defending appellant's*
2 *own person and body.*

3 For example, had the self-defense instruction been permitted¹² -
4 defendant/appellant may have had a defense to the charge of Assault
5 Third, in that he was acting in self-defense by:

6 (1) Stepping one step closer so that he might avoid arrest by
7 receiving orders which he would otherwise have been unable to hear.¹³

8 (2) In "straining" his voice he was acting in self-defense so as to
9 appear more obsequious - and thus, avoid or at least diminish the ire of
10 Ranger Moularas.

11 (3) Appellant could have argued that, in staring, he was acting
12 in self-defense of an impending mace and club attack.

13 (4) Appellant could have argued that he was acting in self-
14 defense in asking for Ranger Moularas'es name, by preserving a record
15 in the event of an (*e.g.*, excessive force), lawsuit.

16 (5) Appellant may have had a defense to the assault of stepping
17 forward, in defending self against the mace, by getting away from or
18 under the spray.

19 (6) Appellant may have had a defense to the assault of raising his
20 hand, in defending his eyes against the painful light - as well as the
21 chemical spray.

22
23 With respect to resisting arrest, Ranger Moularas charged
24 appellant with resisting for moving away from the strikes of his steel
25 baton. This is not the act of a reasonable or fair man.

26 ***Appellant had no duty to stand mute and accept such violence.***

27 Had the self-defense instruction been permitted to the jury, it
28 might be demonstrated that appellant, in moving away, was merely

¹² The entry of the self-defense instruction is, of course, pendent upon Mr. Johnston's willingness to submit and argue for the instruction - a thing he refused at the trial.

¹³ During trial, we have argued that appellant's purpose in stepping close to Ranger Moularas was solely and exclusively effected in an attempt to hear what was being said. RP p. 114, l. 24-25; p. 115, l. 1-11.

1 attempting to avoid the blows of Ranger Moularas'es steel baton -
2 which we would contend and now assert *appellant had no "duty" to*
3 *accept or suffer.*

4 **Mr. Johnson's gross incompetence and ineffectual assistance**
5 **in failing to instruct the jury of appellant's limited right to defend**
6 **his person brought extreme prejudice to appellant.**

7
8 ***6. Ineffective Assistance of Counsel - Failure to Demand a***
9 ***Bill of Particulars and Failure to Attempt or Request Limitation of***
10 ***the State's case to Intent to Induce Fear:***

11 Appellant's Defense Counsel, Mr. Johnston was ineffective in
12 failing to demand a bill of particulars or statement to make more clear,
13 as to upon what theory the State based Its allegation of Assault Third.

14 ***7. Ineffective Assistance of Counsel:***

15 Appellant's Defense Counsel, Mr. Johnston was ineffective in
16 failing to move the superior court to limit or restrict the State's case to
17 evidence that the allegation of commission of assault was based solely
18 and exclusively upon appellant's *intent* to induce fear in Ranger
19 Moularous, there being no other possible theory of commission of said
20 assault, given the evidence presented below.

21 ***8. Ineffective Assistance of Counsel:***

22 Appellant's Defense Counsel, Mr. Johnston was ineffective and
23 incompetent in failing to move the superior court to limit the jury
24 instruction upon assault to that portion of the law which provides that
25 an assault is committed when - and not unless - one *intends* to induce
26 fear in a public servant; this being the sole possible theory of assault
27 given the evidence presented below.

STATEMENT OF ADDITIONAL GROUNDS FOR APPEAL

Page #9 of 22.

1 **9. Ineffective Assistance of Counsel - Failure to Vigorously**
2 **Advocate that Proof Beyond a Reasonable Doubt of Intention to**
3 **Induce Fear Must be Established, or Acquittal must Ensnue:**

4 Appellant's Defense Counsel, Mr. Johnston was ineffective
5 and grossly incompetent in failing to explain to the jury that they
6 would be required to find that appellant had *intention* of inducing
7 fear in Ranger Moularas, *based upon evidence* of overt and
8 discernable acts which would reasonably demonstrate that
9 *appellant intended to induce fear; and that Ranger Moularas'es*
10 *subjective belief that appellant's intention was to induce fear would*
11 *not support a guilty verdict.*

12 **10. Ineffective Assistance of Counsel:**

13 Appellant's Defense Counsel, Mr. Johnston was ineffective and
14 incompetent in failing to present to the jury evidence that appellant had
15 no *intention* of inducing fear in Ranger Moularas; appellant requesting
16 solely and only access to bathing facilities, and;

17 **11. Ineffective Assistance of Counsel:**

18 Appellant's Defense Counsel, Mr. Johnston, was ineffective and
19 displayed gross incompetence in failing to explain that the law provides
20 that a verdict of guilty to assault third - given the facts of this case -
21 required that the State prove *beyond a reasonable* doubt intent to
22 induce fear on the part of appellant.

23 **12. Ineffective Assistance of Counsel - Refusal of Defendant's**
24 **Instruction re: Waiver of Right to be Free from Double Jeopardy:**

25 Appellant's Defense Counsel, Mr. Johnston, was ineffective and
26 grossly incompetent in failing to move for mistrial immediately upon

1 the Court's suggestion that the jury instruction would be altered mid-
2 deliberation. RP, p. 177, l. 25; p. 178, l. 1-5.

3 This error is most egregious, as appellant - from the defendant's
4 box - instructed Mr. Johnston to waive his right to be free from double
5 jeopardy, and to demand the mistrial.

6 **13. *Ineffective Assistance of Counsel - Failure to Press Court***
7 ***to Permit Jury to Hear Recording of Ranger Moularas'es Comments***
8 ***Recorded at Time of Appellant's Arrest.***

9 Appellant's Defense Counsel, Mr. Johnston, was ineffective and
10 displayed incompetence in failing to press the trial court to permit the
11 jury to hear the recording of Ranger Moularas'es statements made at the
12 time of appellant's arrest; and this in spite of Judge Mura's suggestion
13 that he might reconsider his refusal at a later time.

14 **14. *Ineffective Assistance of Counsel:***

15 Appellant's Defense Counsel, Mr. Johnston, was ineffective
16 and displayed incompetence in failing to present evidence that Ranger
17 Moularas fear was not induced or prompted by any acts or intent of
18 appellant, but arose wholly of out of bald and unabashed cowardice on
19 the part of Ranger Moularas, although evidence of motivation by
20 cowardice was amply available.

21 **15. *Ineffective Assistance of Counsel:***

22 Appellant's Defense Counsel, Mr. Johnston, was ineffective and
23 grossly incompetent in failing to present evidence that Ranger Moul-
24 aras acted improperly, if not illegally, in arresting appellant, in that *his*
25 *fear arose from knowledge that he had acted in violation of law - and*

1 *not from any overt act on part of appellant* - and of Parks' Department
2 Rules, and was motivated solely by cowardice.

3 **16. *Ineffective Assistance of Counsel - Failure to Demand***
4 ***Hearing on, or Otherwise Attempt to Establish the Absence of***
5 ***Probable Cause in an Unlawful Arrest of Appellant:***

6 Appellant's Defense Counsel, Mr. Johnston, was ineffective and
7 grossly incompetent in failing to demonstrate that Ranger Moularas acted
8 illegally, and without probable cause in ordering appellant to exit his
9 vehicle after ordering him to leave, and that Ranger Moularas'es
10 command, ordering appellant to exit his vehicle was motivated by anger,
11 and a desire to punish appellant for asking the Ranger to spell his name.¹⁴

12 **17. *Ineffective Assistance of Counsel - Failure to Pursue Line***
13 ***of Inquiry as to Hung Jury:***

14 Appellant's Defense Counsel, Mr. Johnston, was ineffective and
15 grossly incompetent in failing to pursue a line of inquiry as to a "hung"
16 jury, where - upon "canvassing" two of the jurors immediately post-
17 trial, determined that at least two jurors "held out," refused to and
18 would not join with the balance of the jury in voting to convict until
19 obtaining the new jury instruction from Judge Mura.¹⁵

20 **18. *Ineffective Assistance of Counsel:***

¹⁴ It appears, moreover, that a *reasonable man* would conclude that all of the "assaults" - all of them - imagined by Ranger Moularas, would have well been alleviated by simply leaving appellant in his vehicle to drive home - which, in fact, *Ranger Moularas ordered appellant to do before macing and blinding appellant's eyes*. And this seems the course any reasonable man would have taken, given that appellant had - *before* being maced and beaten - obeyed Ranger Moularas'es order to vacate; was, in fact, seated in his vehicle when ordered to exit by Ranger Moularas, who then - and without cause - maced appellant, and commenced to beat him without warning.

¹⁵ A very cursory note promulgated by Mr. Johnston, taken from comments made to him by jurors immediately after trial is attached herewith.

1 Appellant's Defense Counsel, Mr. Johnston, demonstrated gross
2 incompetence and was ineffectual in failing to move the Superior Court
3 for a new trial upon the basis that Judge Mura "interfered" with the jury's
4 *inability* to convict by injecting an instruction which prompted and/or
5 pressed all jurors to agree wherein - immediately previously to entry of
6 the late instruction - the jury was unable to reach a unanimous verdict.

7 **19. *Ineffective Assistance of Counsel:***

8 Appellant's Defense Counsel, Mr. Johnston, demonstrated gross
9 incompetence and was ineffectual in failing to move the Superior Court for
10 a new trial upon receipt of the information that two jurors refused to find
11 guilt, and this is especially so where Judge Mura invited such a motion.

12 **20. *Ineffective Assistance of Counsel - Failure to Attack the***
13 ***Credibility of the State's Witness in the Face of Strong Evidence***
14 ***Contradicting the Witness' Testimony:***

15 Appellant's Defense Counsel, Mr. Johnston was ineffective and
16 grossly incompetent in failing to attack the credibility of Ranger
17 Moularas, in failing or omitting to apprise the jury of a most serious
18 inconsistency in Ranger Moularas'es testimony when juxtaposed to his
19 statement:

20 Ranger Moularas testified that he had never struck appellant
21 across his back (*i.e.*, when holding defendant/appellant face down on
22 the ground); Whereas, *in his statement to Officer Osborn, Ranger*
23 *Moularas admits doing this very thing. Exhibit A.*

24 Mr. Johnston erred in dismissing Ranger Moularas before
25 attacking his credibility with evidence that may have been very
26 damaging to his character.

1 We would assert this evidence - if properly presented - would
2 have cast sufficient doubt upon Ranger Moularas'es testimony and
3 credibility, that the jury would have found reasonable doubt of assault.

4 A vigorous advocate would have not dismissed Ranger
5 Moularas at the juncture he did. No, rather a vigorous advocate would
6 have presented the testimony of Officer Osborn (who testified that
7 Ranger Moularas, in fact, admitted striking appellant on the back - RP,
8 p. 102, l. 13-22); and following receipt of such testimony - and with
9 Officer Osborn in the Courtroom - returned Ranger Moularas and
10 confronted him with the lie.

11 However, Mr. Johnston failed to do so. Mr. Johnston's failure to
12 confront Ranger Moularas with this inconsistency¹⁶ cannot be said to
13 have been a "tactical" move. It was simply incompetence.

14 Mr. Johnston - while alluding to it (RP, p. 52, l. 18-25) - made
15 no clear mention of this inconsistency to the jury, and his incompetence
16 and failure to attack the credibility of Ranger Moularas with this valu-
17 able evidence brought severe prejudice to appellant's defense at trial.

18 This is especially so, as we believe and strongly assert that the
19 jury's decision was based upon passion and prejudice, asserted *infra*.

20 **21. *Ineffective Assistance of Counsel:***

21 Appellant's Defense Counsel, Mr. Johnston was ineffective and
22 grossly incompetent in failing to present evidence - though provided

¹⁶ Ranger Moularas testified that he didn't recall striking struck appellant in the back - but that he did not strike appellant after knocking appellant down. However, Ranger Moularas'es Report tells a much different story.

1 and readily available to him - of deafness impairing appellant's ability
2 to hear.¹⁷

3 Mr. Johnston had obtained results - clinical findings - of an
4 hearing test taken upon appellant - and quite contemporaneously with
5 the superior court trial -, and by a medical doctor; and which results
6 demonstrated by findings that appellant suffered from severe hearing
7 loss. Appellant had signed a "Release" form requesting the medical
8 doctor provide these results to Mr. Johnston, and the same were duly
9 transmitted to Mr. Johnston by the doctor's personnel.¹⁸

10 In addition, Mr. Johnston had the medical doctor's prescription
11 for an hearing aid for appellant in his possession, *yet failed to make any*
12 *effort to have the same admitted into evidence*, nor to present the same
13 to the jury to:

14 (a) bolster this defense during trial - and this failure
15 notwithstanding mention of deafness several times during trial¹⁹; or;

16 (b) to present this evidence with a view to rehabilitate
17 defendant/appellant's credibility during trial.

18 Appellant testified as to hearing loss. RP, p. 114, l. 24-25; p.
19 115, l. 1-14, 22.

¹⁷ If we had been so permitted, would have argued that those things which brought fear (or the pretense of fear) - *i.e.*, stepping in close proximity to Ranger Moularas'es vehicle (RP, p. 37, l. 1-11, 16-25, *e.g.*); were not perpetrated to induce fear (or with any intent to induce fear), but were merely and solely the gestures of a partially deaf man to hear what was being said to him - and no more!

¹⁸ We believe these were simply transmitted by mail; but - in any event - are certain of their receipt by Mr. Johnston, as the results were displayed to and discussed in the confines of Mr. Johnston's office.

¹⁹ See, *e.g.*, RP, p. 38, l. 5-7;

1 On rebuttal, Mr. Richey presented lengthy evidence that impugned
2 defendant/appellant's testimony as to deafness. RP p. 132, l. 8-21.

3 Although the means to rehabilitate defendant/appellant's
4 credibility was amply available to Mr. Johnston, Mr. Johnston
5 remained mute as to this matter, and failed to quell Mr. Richey's
6 vicious attack on appellant's character - and at the most critical time.

7 We find that the placement of Mr. Richey's attack on appellant's
8 character - just at the close of the State's case - was extraordinarily
9 well-timed.

10 And, as *Mr. Johnston failed to present the evidence in his*
11 *possession at that critical moment* - the strong evidence which would
12 have rehabilitated the defendant/appellant in the eyes of the jury -
13 brought severe prejudice to appellant - perhaps the most severe - and
14 worked (or by omission, permitted), an injustice to swell. Mr.
15 Johnston's incompetence in this failure can in no wise be said to be
16 "tactical." It was, rather, a very foolish - and strongly prejudicial -
17 error of judgment.

18 ***22. Ineffective Assistance of Counsel - Failure to Adequately***
19 ***Question Veniremen:***

20 Appellant's Defense Counsel, Mr. Johnston, demonstrated gross
21 incompetence and was ineffectual in failing to inquire of the veniremen
22 of their personal experience with arrests and/or mace/pepper spray,
23 and/or use of other forms of force in arrest.

24 **IV. JUROR MISCONDUCT**

25 ***23. Juror Misconduct:***

1 A juror, a man, failed to disclose that he, personally, had an
2 history of arrest, and that during said arrest was forced by spray of
3 mace to submit to arrest.²⁰

4 **24. Juror Misconduct:**

5 A juror, a man, was said to have substantially influenced other
6 jurors to appellant's prejudice, by recounting in deliberations, his person-
7 al experience of being sprayed with mace during an arrest; in which re-
8 counting he is reported to have said defendant "would not have acted that
9 way," and made other statements/assertions prejudicial to the appellant.

10 **25. Juror Misconduct:**

11 A juror, a man, was said to have substantially influenced other
12 jurors to appellant's prejudice, by recounting during deliberations-his
13 *personal experience of being sprayed with mace* during an arrest; in
14 which recounting he is reported to have said defendant "would not have
15 acted that way"; thus attacking defendant/appellant's credibility in
16 deliberations by insinuating that defendant/appellant was lying about
17 his response to being struck with the mace and beaten with baton.

18 **26. Juror Misconduct:**

19 A juror, a man, was said to have substantially influenced other
20 jurors to appellant's prejudice, by acting as appellant's prosecutor *in*
21 *deliberations*, when he suggested or asserted that defendant/appellant
22 was lying about running from the mace spray, and in other statements
23 argued that - *because of the juror's personal experience in being*

²⁰ A very cursory note as to Mr. Johnston's findings after speaking to the jurors post-deliberations is attached herewith.

1 *arrested under force of mace*²¹ - defendant/appellant should not be
2 found innocent.

3 **27. *Juror Misconduct:***

4 A juror, at the time of receipt of Judge Mura's amended
5 instruction, is reported to have informed two jurors who refused to join
6 in a "to convict" vote, that they *must* align themselves with the
7 majority, as it was "obviously (the) judge's" intention that they join the
8 majority in voting "to convict" defendant/appellant.

9 **III.**
10 **SUFFICIENCY OF THE EVIDENCE**
11 **AS A CONSTITUTIONAL REQUIREMENT**

12
13 **28. *Sufficiency of the Evidence:***

14 Sufficient evidence, as required by the FOURTEENTH
15 AMENDMENT, that appellant harbored intent to induce fear in Ranger
16 Moularas was and is not extant in this case.

17 **29. *Passion and prejudice:***

18 The jury's decision is polluted and must not be permitted to
19 stand, being wholly based upon passion and prejudice. Certain com-
20 ments made to Mr. Johnston post-conviction (during a minimal
21 "canvassing" of the jury), indicated that a majority of the jury were

²¹ With respect to these comments, we have received only Mr. Johnson's report of the comments (apparently made to him by the very juror that offered the prejudicial statements immediately after verdict). Mr. Johnson, as we have complained, failed to pursue this, or further investigate, *or inform Judge Mura of this potential juror misconduct*, doing nothing more than relating the information to appellant and a witness after the trial.

We have hired a professional investigator to pursue this matter - specifically to discover precisely what the misconducting juror said about being sprayed with mace, and/or why defendant "would not have" acted as he did.

1 predisposed to "side with" Ranger Moularas and/or *any person*
2 *claiming law-enforcement powers or status*, or under pretense thereof,
3 *regardless of the evidence*, and;

4 Moreover, additional comments made it appear at least one juror
5 - evidently the same who claimed to have been, himself, sprayed with
6 mace and arrested - was encouraging the other jurors to look for
7 "signals in" defendant/appellant's testimony and "body language"
8 which indicated he was lying (*i.e., as to being innocent or not guilty of*
9 *the crime of Assault Third, as we understand it*).

10 Thus, *due to passion* (*in support of any law-enforcement*
11 *personnel, regardless of the facts or circumstance*); *and due to*
12 *prejudice* (*against any person who opposes any statement of anyone*
13 *asserting law enforcement status - whether by pretense or otherwise*);
14 the jury (or a majority thereof), disregarded the Court's instruction that
15 guilt must be proven by the State - and transposed thereupon their own
16 "belief" that *the onus was upon defendant/appellant to show why he*
17 *should not be found guilty* - in contempt and disregard of law.

18 **PRAYER FOR RELIEF**

19

20 At an hearing had upon Motion for Arrest of Judgment and for
21 New Trial, taken August 16, 2011,²² Judge Mura comments upon the
22 potentiality and likelihood of reversal on appeal as follows:

²² Photocopy of the transcription of the entire sentencing hearing, along with the transcription of the hearing upon Motion for Arrest of Judgment, are attached herewith as it is unclear whether these matters were previously made a part of the Appellate Court's record in this case. We do sincerely apologize in the event we have inadvertently duplicated these materials.

STATEMENT OF ADDITIONAL GROUNDS FOR APPEAL

1 I don't worry about appeals. I'm not the kind of judge
2 that wrings my hands and wipes my forehead worrying
3 about what the Court of Appeals says because, like I say
4 oftentimes, *when I'm reversed, they're wrong*. So I'm very
5 comfortable getting reversed if I have to be.

6
7 RP, p. 20, l. 5-10. (Aug. 16, 2011).

8 We are not legal scholars; we are lay persons. Therefore, it is
9 unclear to us whether the Appellate Court, in reversing appellant's
10 conviction, will be "wrong" on a legal basis - as opposed to being
11 "right" on a moral basis.

12 We suspect, however, that Judge Mura's intent here was to say
13 that the Appellate Court, in reversing, would do a "legal" error - not a
14 moral one.

15 WHEREFORE, we respectfully ask the Court of Appeals for
16 Division One to reverse on a *moral* basis - that Justice, that concept so
17 precious, and yet so elusive - be done in this case.

18 If the Court of Appeals be "wrong" in reversing *as a matter of*
19 *law* then let it be so. We, are no more than feeble laity. Nevertheless,
20 we do not agree that the law was correctly observed below, and - for
21 whatever worth our uneducated view may be - assert that there must be
22 *some* defense to a charge of Assault Third (*e.g.*, such as self-defense).

23 *Moreover*, we would contend that every element of the crime
24 *must* be proven beyond a reasonable doubt. Further, that the absence of
25 the self-defense instruction brought irreparable prejudice to appellant,
26 and this is demonstrated, particularly, in the jury's question to Judge
27 Mura as to the propriety of the instruction.

STATEMENT OF ADDITIONAL GROUNDS FOR APPEAL

Page #20 of 22.

1 If there be no defense to assault third, where the same is asserted
 2 - as herein - solely upon the basis of fear; *every time* a law enforcement
 3 person feels fear - or *contends* that he was afraid (and we see such
 4 persons so contending very frequently indeed!), a man will be guilty of
 5 a felony, *even though he not recognize he makes such a person afraid.*

6 Such a scheme is too prone to abuse - as we would contend
 7 occurred herebelow.

8 No there must be some proof of *intent* to induce fear. None was
 9 presented - certainly not proven - below.

10 Let Justice be done. Reverse as a matter of Justice and morality.
 11 Let Judge Mura's interpretation of the law care for Itself.

12 We ask the Court of Appeals to Reverse with directions to
 13 initiate a New Trial. We do not ask for a change of judge in this case.

14
 15

Most respectfully submitted,

16
 17
 18

 Donald Calvin, appellant *pro se*

19

VERIFICATION

21 I have incurred some brain damage, and wish the Court of
 22 Appeals to know that I have received substantial aid in the preparation of
 23 this paper. A man much more knowledgeable and familiar with these
 24 things than I am has helped me to prepare this paper; but I am signing
 25 my name below to show that what is written on these papers has been
 26 read and explained to me, and to show that this is what I want to say to
 27 the Wise Judges of the Court of Appeals of the State of Washington, for
 28 Division One, and that what I have sworn to above is the truth. I so
 29 certify.

30

STATEMENT OF ADDITIONAL GROUNDS FOR APPEAL

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Donald Calvin
Appellant *pro se*

January 07, 2013
Lynden, WA
(Date & place)

In reviewing this and any future papers submitted, *pro se*, your
appellant respectfully requests the Court of Appeals for Division One
liberally construe his pleadings pursuant to the mandate of the
UNITED STATES SUPREME COURT in *Haines v. Kerner*, U.S.
L.Ed.2d , S.Ct. (1972?).

CASE SUMMARY/ PROBABLE CAUSE STATEMENT

WHATCOM COUNTY SHERIFF'S OFFICE

PAGE 9 OF 10

OFFENSE/ EVENT DESCRIPTION Assault 3rd Degree		DATE 4/10/10	EVENT NUMBER 10A06878
COURT			
DISTRICT <input type="checkbox"/>	SUPERIOR <input checked="" type="checkbox"/>	JUVENILE <input type="checkbox"/>	MUNICIPAL <input type="checkbox"/>
SUSPECT ADMITTED OFFENSE <input checked="" type="checkbox"/>	CRIME PARTNER ADMITTED OFFENSE <input type="checkbox"/>	CRIME PARTNER ADMITTED AND NAMED SUSPECT AS PARTICIPANT <input type="checkbox"/>	
INJURIES RECEIVED BY VICTIM			
MEDICAL ATTENTION REQUIRED?		LOCATION OF ARREST:	DATE AND TIME OF ARREST:
YES <input checked="" type="checkbox"/>	AT SCENE <input checked="" type="checkbox"/>	245 Chuckanut Drive	Date: 4/10/2010
NO <input type="checkbox"/>	AT HOSPITAL <input type="checkbox"/>		Time: 21:20

A-1 Calvin, Donald L (01/06/56) 301 W Badger, Lynden, WA
V-1 Moularas, Alexander 02-05-78 Washington State Parks Ranger 360-676-2093

Probable cause exists for Assault 3rd Degree, Resisting Arrest, and Obstructing.

On 4-10-10 at 2116 hours What-Comm advised a park ranger was fighting with a subject in front of the park entrance to Larrabee State Park. What-Comm advised he was Code 3.

As I was coming into the area I was advised the Ranger (V1) Officer Alexander (Alex) Moularas was code 1 with one in custody. Upon arrival I observed (A1) Donald Calvin sitting on the ground. I knew Donald from my time working in the Jail and I know he is considered officer safety. Donald was being tended to by aid units as he was sprayed with pepper spray.

While Donald was being tended to I spoke with Officer Moularas. I asked him to explain to me what happened. Officer Moularas said he was doing his rounds in uniform and fully marked patrol vehicle when he noticed the vehicle sitting at the gate entrance. Officer Moularas said where the car was is a day use only area and the gates were locked. Officer Moularas said he approached Donald and was trying to talk with him. He said he was using his flashlight to illuminate the car and Donald was becoming agitated. He said he told Donald he was not allowed to use the park and that made him angrier. Officer Moularas said Donald yelled "get the fucking light out of my face."

Officer Moularas said Donald rapidly exited the car and had his hand elevated near his face in an attack posture. Officer Moularas said he was worried Donald was going to assault him since he was all alone in a dark area so he grabbed his department issued pepper spray and deployed it in Donald's Face. He said Donald was screaming at him and still advancing towards him so he deployed his baton. Officer Moularas said he used the figure 8 pattern for batons he was taught while in the academy to try and gain compliance from Donald. Officer Moularas said when he was using the baton he was yelling, "Police get on the ground, Police stop resisting." Officer Moularas said all the strikes landed in the chest and back area of Donald. Officer Moularas said Donald was throwing punches around in a flailing manner during the entire event. Officer Moularas said Donald attempted to flee the scene on foot and he was able to grab a hold of him and escort him to the ground using a straight arm bar takedown. Officer Moularas said while he was trying to get the handcuffs on Donald he was continuing to resist and not comply with his commands.

Officer Moularas said he was finally able to gain control of Donald and advised his dispatch center he was code 1 for County units.

I then spoke with Donald who had said he understood his Miranda rights that Officer Moularas read to him and that he would talk to me. Donald said he wasn't trying to assault anyone. Donald said he wanted to use the shower and Officer Moularas told him no.

Reporting Deputy Osborn	4A178	Reviewing Deputy
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EXHIBIT *A*

Interview with juror

I talked with young man juror with black hair – he said that the Philippine juror number 12 was influence because 12 had been maced twice before he was able to reassure no no you would not go forward—

Research out

It was 10-2 for guilty and then they went guilty

EXHIBIT B



CASCADE AUDIOLOGY AND HEARING AID CENTER

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Gary K. Johnson, M.D. James R. Gross, M.D. Gary L. Brown, M.D. David A. Riley, M.D. Jonathan R. Grant, M.D. Kevin C. Harris, M.D.

Name Donald Calvin Age 55 D.O.B. 1-6-1956 Date 7-7-2011

Referral _____ Audiologist C. Wolfe-Hads, MA, CCC-A Time 3pm
Cheri?

	Right	Left	SF
PT			
AVE	<u>35</u>	<u>38</u>	
SRT	<u>35</u>	<u>40</u>	
MCL	<u>70</u>	<u>70</u>	
ULL	—	—	

PT NBN Warble Pulsed

Word Recognition Score

Right	Left
<u>84%</u> @ <u>80</u> dBHL	<u>88%</u> @ <u>80</u> dBHL
____% @ _____ dBHL	____% @ _____ dBHL

Binaural = _____ % @ _____ dBHL

Live Voice Recorded
 Word List CID W22 IB
 SPN _____ dBHL _____ Ear

Audiogram Key

	Right	Left	Both
AC Unmasked	○	×	BC Forehead Unmasked
AC Masked	△	□	Sound Field \$
BC Mastoid Unmasked	<	>	Examples of No Response Symbols
BC Mastoid Masked	◻	◻	
BC Forehead Masked	⌋	⌋	

Acoustic Reflex Threshold

Right Ear 500 1000 2000 4000

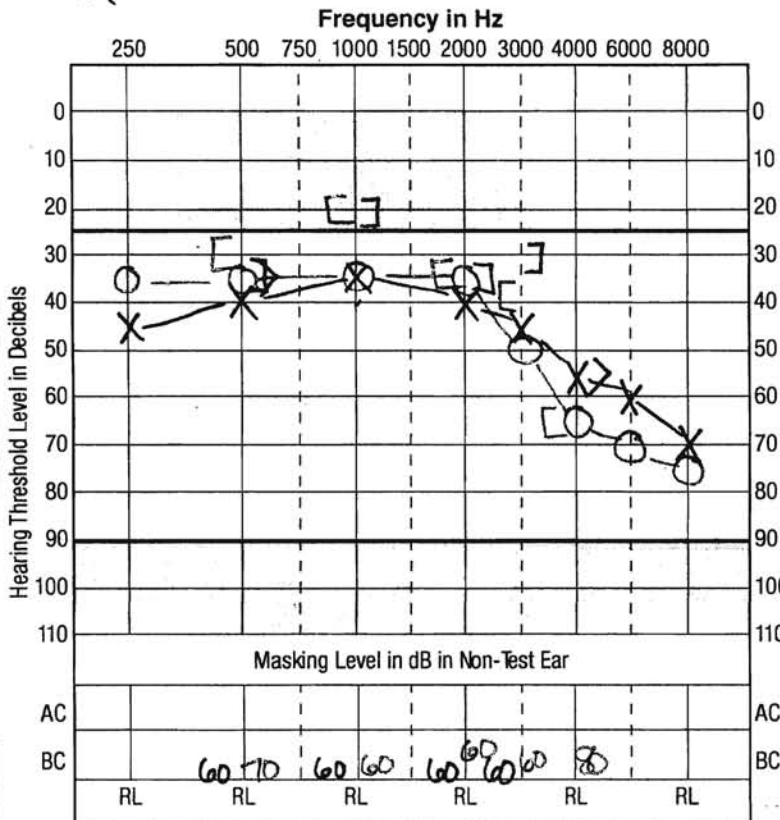
Contra.	dB	dB	dB	dB
Ipsi.	dB	dB	dB	dB

Left Ear 500 1000 2000 4000

Contra.	dB	dB	dB	dB
Ipsi.	dB	dB	dB	dB

AUDIOGRAM (ANSI S3.6 1989)

Insert Head Phones Soundfield VRA Play



Otoscope Exam

R wax, PE tube

L non-occl. wax

OAE

Pass _____ Refer _____

DPOAE _____

TEOAE _____

Comments:

Test Reliability Audiometer

Pure Tone good GSI-6

Speech good

Comments:

Mixed HL Au

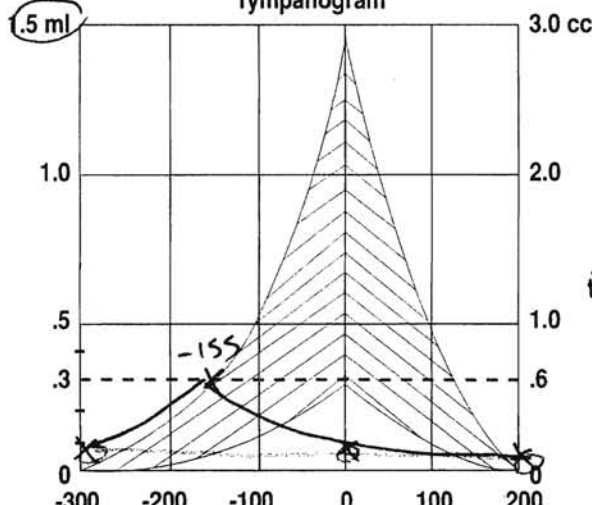
Impedance Audiometry

Ear Canal Volume R .2 L 0.9

Probe:

226 Hz 678 Hz 1000 Hz

Tympanogram



ETD Au