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STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON)
)
Respondent,) No. 69227-5-I
)
v.) STATEMENT OF ADDITIONAL
) GROUNDS FOR REVIEW
)
JAMES G. HUDEN)
(your name))
Appellant)

I, JAMES G. HUDEN, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
JUL 22 PM 3:5[illegible]

Additional Ground 1

I. ABUSE OF DISCRETION
A. DEFENDANT'S POLICE INTERROGATION VIDEO WAS TESTIMONIAL IN NATURE
B. COURT MISAPPLIED CASE LAW WHEN IT ALLOWED JURY UNRESTRICTED REVIEW OF THE VIDEO EXHIBIT
C. COURT'S DECISION TO ALLOW UNRESTRICTED ACCESS TO THE TESTIMONIAL EXHIBIT WAS MANIFESTLY UNREASONABLE.

Additional Ground 2

II PROSECUTORIAL MISCONDUCT
A. IMPROPER COMMENTS ON DEFENDANT'S DEMEANOR
B. IMPROPER INSINUATIONS AS TO DEFENDANT'S VERACITY AND CREDIBILITY
C. IMPROPER COMMENTS ON DEFENDANT'S SILENCE TO INFER GUILT
D. UNFAIR VOUCHING FOR STATE WITNESSES.
III. CUMULATIVE ERROR.

If there are additional grounds, a brief summary is attached to this statement.

Date: 7-16-13 Signature: [signature]

SUBSTANTIVE FACTS

DURING THE STATE'S CASE-IN-CHIEF, A VIDEO EXHIBIT OF THE DEFENDANT'S POLICE INTERROGATION WAS PLAYED IN COURT. THE FOLLOWING DAY OF TRIAL, THE JUDGE RECEIVED A JURORS NOTE EXPLAINING HE WAS UNABLE TO HEAR PART OF THE VIDEO. THE JUROR REQUESTED TO VIEW THE VIDEO AGAIN. [9RP-1126]

THE JUDGE DECIDED NOT TO RESPOND TO THE JUROR'S REQUEST, BUT WOULD CONSIDER THE ISSUE LATER IF THE JURY, DURING DELIBERATIONS, REQUESTED TO VIEW THE VIDEO. [9RP-1167]

THE VIDEO WAS SENT TO THE JURY WITH THE OTHER EXHIBITS, BUT WITHOUT A MEANS TO VIEW IT. THE JURY WAS EXCUSED TO DELIBERATE AT 12:59 PM. [10RP-1273]. THE JURY REQUESTED A VIDEO PLAYER SIXTEEN MINUTES ~~LATER~~ LATER. [10RP-1274]

A LAPTOP COMPUTER WITH SOFTWARE TO VIEW THE VIDEO WAS SENT TO THE JURY. [10RP-1277]

I. THE COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE JURY UNSUPERVISED AND UNLIMITED ACCESS TO THE DEFENDANTS POLICE INTERROGATION VIDEO.

A. THE VIDEO WAS A TESTIMONIAL EXHIBIT.

OVER THE PAST DECADE, SEVERAL COURTS HAVE ADDRESSED THE DEFINING OF TESTIMONIAL STATEMENTS:

"THE COURT INDICATED THAT "'[P]OLICE INTERROGATION'" SHOULD BE GIVEN ITS COLLOQUIAL MEANING AND THAT A RECORDED STATEMENT "'KNOWINGLY GIVEN IN RESPONSE TO STRUCTURED POLICE QUESTIONING, QUALIFIES [AS INTERROGATION] UNDER ANY CONCEIVABLE DEFINITION.'"

STATE V. WALKE, 129 WASH. APP. 258, 339, 118 P.3d 935 (DIV. I 2005) (QUOTING CRAWFORD V. WASHINGTON, 541 U.S. 36, 53, 124 S.Ct. 1354 (2004)

"STATEMENTS TAKEN BY POLICE OFFICERS IN THE COURSE OF INTERROGATIONS ARE... TESTIMONIAL UNDER EVEN A NARROW STANDARD."

CRAWFORD, 124 S.Ct. AT 1364, 541 U.S. 36 (2004)

"STATEMENTS MADE IN THE COURSE OF A POLICE INVESTIGATION ARE NON TESTIMONIAL IF THE PRIMARY PURPOSE OF THE QUESTIONING IS TO ALLOW POLICE TO ASSIST IN AN ONGOING EMERGENCY. DAVIS V. WASHINGTON, 547 U.S. 813, 822, 126 S.Ct 2266, 165 L.Ed.2d 224 (2006). BUT STATEMENTS ARE TESTIMONIAL IF THE PRIMARY PURPOSE OF QUESTIONING IS TO ESTABLISH OR PROVE PAST EVENTS POTENTIALLY RELEVANT TO LATER CRIMINAL PROSECUTION AND CIRCUMSTANCES OBJECTIVELY INDICATE THAT THERE IS NO ONGOING EMERGENCY. DAVIS, 547 U.S. AT 822, 126 S.Ct 2266 (2006)." STATE V. McDANIEL, 230 P.3d 245, 255, 155 WASH. APP 829 (20

THE DEFENDANTS POLICE INTERROGATION VIDEO WAS A TESTIMONIAL EXHIBIT. THE DEFENDANT TWICE WAS READ HIS MIRANDA WARNINGS, ONCE AT HIS HOME AND AGAIN AT THE PUNTA GORDA, FLORIDA POLICE STATION BEFORE HIS VIDEOTAPED INTERROGATION. THE MIRANDA WARNINGS MADE CLEAR THAT THE INTERROGATION WOULD BE POTENTIALLY RELEVANT TO LATER CRIMINAL PROSECUTION. THERE WAS NO ONGOING EMERGENCY.
[IRP 12-14, IRP 17-18]

I- B. THE DECISION TO GIVE THE JURY UNLIMITED AND UNSUPERVISED REVIEW OF THE DEFENDANTS TESTIMONIAL VIDEO WAS REACHED BY A MISAPPLICATION OF CASE LAW.

THE COURT ASSUMED THE JURY WOULD MAKE A REQUEST FOR A REVIEW OF THE DEFENDANT'S VIDEO DURING DELIBERATIONS AND WOULD TAKE THE MATTER UP "AT THAT TIME." [9RP-1167]

THE PROSECUTOR CITED FOR THE RECORD THREE SUPREME COURT CASES AS PRECEDENTS THAT THE COURT COULD FOLLOW FOR REPLAYING AUDIO AND VIDEO EXHIBITS FOR THE JURY:

STATE V. CASTELLANOS, 132 WN. 2d 94
STATE V. ELMORE, 139 WN. 2d 250, 293-298
STATE V. GREGORY, 158 WN. 2d 759, 847-848
[10RP-1249]

EACH OF THESE CASES ALLOWED THE JURY UNLIMITED ACCESS TO THE REVIEW OF AUDIO AND VIDEO EXHIBITS, SPECIFICALLY BECAUSE THE EXHIBITS WERE DETERMINED TO BE NONTESTIMONIAL IN NATURE. BUT JURIES ARE NOT GIVEN UNSUPERVISED AND UNLIMITED ACCESS TO TESTIMONIAL EXHIBITS.

THE VIDEO EXHIBIT REVIEWED BY THE GREGORY JURY WAS A NONTESTIMONIAL VIDEO TAPE OF THE CRIME SCENE.

STATE V. GREGORY, 147 P. 3d 1201, 1247, 158 WN. 2d 759 (2006)

CASTELLANOS: "THE TAPES AT ISSUE HERE WERE NOT TESTIMONIAL. THEY WERE CONTEMPORANEOUS RECORDINGS OF DRUG TRANSACTIONS AND AS SUCH WERE SUBSTANTIVE EVIDENCE OF THE DEFENDANT'S GUILT.

STATE V. CASTELLANOS, 935 P. 2d 1353, 1357, 132 WN. 2d 94 (1997)

THE COURT IN CASTELLANOS NOTED THAT "ALLOWING THE TAPES WITH A PLAYBACK MACHINE TO GO TO THE JURY IS CONSISTENT WITH THE LAW IN MOST OTHER STATES. FOR INSTANCE, THE WYOMING SUPREME COURT HAS CONSISTENTLY CONCLUDED ALLOWING THE JURY UNLIMITED ACCESS TO BODY WIRE TAPES AND A PLAYBACK MACHINE IS WELL WITHIN THE SOUND DISCRETION OF THE TRIAL JUDGE. THE COURT DISTINGUISHED TESTIMONIAL EXHIBITS WHICH ARE NOT PERMITTED IN WYOMING BECAUSE OF THE CONCERN SUCH DOCUMENTS, IN EFFECT, "'ACT AS A SPEAKING, CONTINUOUS WITNESS ... TO THE EXCLUSION OF THE TOTALITY OF THE EVIDENCE TAKEN AT THE TRIAL WHICH MUST BE VIEWED IN ITS ENTIRETY).'" PINO V. STATE, 849 P.2d 716, 719 (WYO. 1993) (QUOTING 3 DAVID W. LOUISELL AND CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 390 AT 683-684 (1979))." CASTELLANOS, 935 P.2d AT 1356, 132 WN. 2d 94 (1997)

"'THE GENERAL RULE OF EXCLUSION [OF TESTIMONIAL EVIDENCE] IS INAPPLICABLE WITH RESPECT TO TAPE RECORDINGS OF CRIMINAL ACTS SUCH AS DRUG TRANSACTIONS". MUNOZ V. STATE, 849 P.2d 1299, 1301 (WYO. 1993) (BODY WIRE RECORDINGS OF DRUG TRANSACTIONS WERE "A RECORD OF A CRIMINAL TRANSACTION AND WERE NONTESTIMONIAL AND THUS AVAILABLE TO THE JURY IN THEIR DELIBERATIONS AS ANY OTHER EXHIBIT")." CASTELLANOS AT 1357

THE ELMORE COURT FOLLOWED CASTELLANOS AND SENT TAPES OF ELMORE'S CONFESSION AND INTERVIEW TO THE JURY ALONG WITH A PLAYER AND ALL THE OTHER EXHIBITS, BECAUSE THE TAPES WERE DETERMINED TO BE NONTESTIMONIAL EXHIBITS.

STATE V. ELMORE, 985 P.2d 289, 316, 139 WN. 2d 250 (1999)

"THE TAPES WERE RELEVANT TO THE JURY'S INQUIRY. AS THE TRIAL COURT NOTED, THE RECORDING OF ELMORE'S LENGTHY CONFESSION WAS ESSENTIALLY THE CASE FOR BOTH SIDES BECAUSE IT BOTH DESCRIBED THE CRIME AND REFLECTED ELMORE'S DECISION TO COME BACK AND TAKE RESPONSIBILITY). HEARING (5-3-96) AT 25-26 (..." 'THIS CAN HARDLY BE SAID TO BE A PIECE OF EVIDENCE WHICH WAS SMALL IN COMPARISON TO THE REST OF THE ~~EVIDENCE~~ CASE AND, THEREFORE, SUSCEPTIBLE TO BEING OVEREMPHASIZED.'")

ELMORE AT 316-317

JUDGE J. SANDERS DISSENTED, WRITING "THE EXERCISE OF DISCRETION BY THE TRIAL JUDGE IN CASTELLANOS IS NOT THE ONLY GROUND UPON WHICH CASTELLANOS MUST BE DISTINGUISHED FROM THE PRESENT CASE. BECAUSE THE TAPES IN CASTELLANOS WERE CONTEMPORANEOUS TAPE RECORDINGS OF DRUG TRANSACTIONS, THEY WERE NON TESTIMONIAL. CASTELLANOS, 132 WN. 2d AT 102, 935 P. 2d 1353 ("'THE TAPES AT ISSUE HERE WERE NOT TESTIMONIAL.'") HOWEVER, THE TAPES IN THE PRESENT CASE WERE TESTIMONIAL IN NATURE BECAUSE THEY WERE RECORDINGS OF A CONFESSION DURING WHICH A DETECTIVE ASKED QUESTIONS, ELICITING ANSWERS FROM ELMORE."

ELMORE AT 327

"THIS COURT HAS NEVER BEFORE HELD THAT A TESTIMONIAL EXHIBIT MAY GO TO THE JURY AND SHOULD NOT SO HOLD IN THIS CASE." ID.

THE DEFENDANTS POLICE INTERROGATION VIDEO IN THE PRESENT CASE WAS TESTIMONIAL IN NATURE. THE COURT MISAPPLIED CASE LAW AND ABUSED ITS DISCRETION WHEN IT ALLOWED THE JURY UNLIMITED AND UNSUPERVISED ACCESS TO REVIEW IT. THE COURT TOOK NO DISCRETIONARY STEPS TO PREVENT THE PREJUDICIAL EFFECTS OF UNDUE EMPHASIS ON THE TESTIMONIAL VIDEO.

I- C. THE DECISION TO ALLOW THE JURY UNLIMITED AND UNSUPERVISED REVIEW OF THE DEFENDANT'S TESTIMONIAL VIDEO WAS MANIFESTLY UNREASONABLE.

"TRADITIONALLY UNDER COMMON LAW, THE TRIAL COURT HAD NO DISCRETION TO SUBMIT DEPOSITIONS AND OTHER TESTIMONIAL MATERIALS TO THE JURY ROOM FOR UNSUPERVISED REVIEW BY THE JURY EVEN IF THOSE MATERIALS HAD BEEN PROPERLY ADMITTED INTO EVIDENCE AT TRIAL [FN1]. THE PURPOSE OF THIS RULE WAS TO PREVENT JURIES FROM OVEREMPHASIZING THE SUBMITTED TESTIMONY TO THE DETRIMENT OF THE TESTIMONY THAT WAS NOT SUBMITTED. [FN2]

THE BELIEF WAS THAT IN THE CASE OF A LENGTHY TRIAL, SUBMITTING THE DEPOSITION TESTIMONY WOULD LIKELY CAUSE IT TO OVERWHELM THE JURY'S MEMORY OF THE ORAL TESTIMONY. [FN3] WHILE THE ORIGINAL FOCUS OF THE RULE WAS ON DEPOSITION TESTIMONY, TRANSCRIPTS OF ORAL TESTIMONY GIVEN WITHIN COURT ALSO FELL UNDER THE RULE. [FN4]

THERE ARE TWO IMPORTANT LIMITS TO THE SCOPE OF THE RULE. COURTS DECLINE TO APPLY IT TO ANY EVIDENCE THAT IS NOT TESTIMONIAL BECAUSE THE PURPOSE OF THE RULE ONLY APPLIES TO TESTIMONIAL EVIDENCE. [FN5] COURTS HAVE ALSO LIMITED ITS APPLICATION TO SITUATIONS WHERE THE JURY HAS UNSUPERVISED OR UNLIMITED ACCESS TO THE TESTIMONIAL EVIDENCE. THUS, COURTS HAVE NOT APPLIED THE RULE WHERE THE TRIAL COURT LIMITED THE JURY'S REVIEW OF THE EVIDENCE TO OPEN COURT WHEN THE PARTIES WERE PRESENT, OR WHERE THE COURT HAD CONTROL OVER THE NUMBER OF TIMES THE MATERIAL WAS REVIEWED. [FN6] THE REASONING BEHIND THIS LIMIT ON THE RULE HAS BEEN THAT WHEN THE TRIAL COURT HAS NOT ALLOWED THE JURY UNRESTRICTED ACCESS TO

THE TESTIMONIAL MATERIALS, THE RISK THAT THE JURY MIGHT GIVE THE EVIDENCE UNDUE EMPHASIS DOES NOT EXIST. [FN7]

CR51(h) STATES:

DELIBERATION. AFTER ARGUMENT, THE JURY SHALL RETIRE TO CONSIDER ITS VERDICT. IN ADDITION TO THE WRITTEN INSTRUCTIONS GIVEN, THE JURY SHALL TAKE WITH IT ALL EXHIBITS RECEIVED IN EVIDENCE, EXCEPT DEPOSITIONS. COPIES MAY BE SUBSTITUTED FOR ANY PARTS OF PUBLIC RECORDS OR PRIVATE DOCUMENTS AS OUGHT NOT, IN THE OPINION OF THE COURT, TO BE TAKEN FROM THE PERSON HAVING THEM IN POSSESSION. PLEADINGS SHALL NOT GO TO THE JURY ROOM.

THIS RULE IS THE SAME TODAY AS IT WAS WHEN ADOPTED IN 1967. [FN8] THE PROHIBITION OF DEPOSITIONS IN THE JURY ROOM HAS EXISTED IN WASHINGTON STATUTORY LAW LONG BEFORE THE ADOPTION OF THE CURRENT RULE. [FN9] WHILE CR51(h) EXPRESSLY REFERS ONLY TO DEPOSITIONS, THE COURT HAS ALSO HELD THAT INTERROGATORIES FALL WITHIN ITS SCOPE. [FN10] "INSOFAR AS THE COURT RULE IS AN EMBODIMENT OF THE COMMON LAW RULE, IT PRESUMABLY WOULD ENCOMPASS TESTIMONIAL TRANSCRIPTS JUST AS THE COMMON LAW DOES."

STATE V. MONROE, 27 P.3d 1249, 1251-52, 107 WN. APP. 637 (DIV I 2001)

THE MONROE COURT NOTED THAT NO WASHINGTON COURT HAD EXPRESSLY CONSIDERED THE COMMON LAW RULE, BUT FOUND STATE V. CASTELLANOS TO BE ONE OF TWO CASES RELEVANT TO THE ISSUE; (MONROE AT 1252)

"IN STATE V. CASTELLANOS, THE SUPREME COURT HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE JURY TO HAVE AUDIO TAPES THAT WERE CONTEMPORANEOUS RECORDINGS MADE DURING A DRUG TRANSACTION. [FN11] ALTHOUGH THE JURY HAD UNLIMITED ACCESS

TO THE TAPES, THE SUPREME COURT HELD THAT THE TRIAL COURT DID NOT ERR BECAUSE THE TAPES WERE NOT TESTIMONIAL IN NATURE BUT RATHER WERE SUBSTANTIVE EVIDENCE. [FN12]

"THE DEFENDANT'S POLICE INTERROGATION VIDEO IN THE INSTANT CASE WAS NEITHER NONTESTIMONIAL NOR SUBSTANTIVE EVIDENCE. WHEN THE DELIBERATING JURY REQUESTED A PLAYBACK MACHINE, THE JUDGE ACKNOWLEDGED SHE "HA[D] THE CASES" [10RP-1274] AND ADMITTED "I DON'T KNOW THAT WE REALLY WOULD HAVE ANY CONTROL OVER HOW MANY TIMES [THE JURY] LOOKED AT [THE VIDEO]", IF THE JURY WAS GIVEN A PLAYER. [10RP-1276]. THE COURT THEN DECIDED TO GIVE THE JURY A VIDEO PLAYER. [10RP-1277]. THIS ABUSE OF DISCRETION ALLOWED THE JURY TO GIVE THE DEFENDANT'S TESTIMONIAL POLICE INTERROGATION VIDEO UNDUE EMPHASIS.

IRONICALLY, THE STATE HAD ALREADY STATED FOR THE RECORD THE APPROPRIATE PROCEDURE FOR THE COURT TO REPLAY A TESTIMONIAL EXHIBIT FOR A DELIBERATING JURY:

"IN MY BRIEF TIME DOING SOME RESEARCH OVER THE LUNCH BREAK THERE ARE SOME CASES WHERE AUDIO AND VIDEO HAS BEEN REPLAYED FOR A JURY DURING DELIBERATIONS. AND THE WAY IT'S DONE IS THEY'RE BROUGHT BACK INTO THE COURTROOM. IT'S PLAYED ONCE. AND THERE'S ALSO A CAUTIONARY INSTRUCTION TO THEM THAT IT'S ONLY BEING PLAYED AGAIN BECAUSE OF DIFFICULTIES WITH THE AUDIO QUALITY. AND THAT IT'S NOT -- THEY SHOULD NOT OVEREMPHASIZE IT. AND THAT'S, OF COURSE, THE CONCERN. AND THAT'S WHY THESE THINGS ARE NOT SENT BACK INTO THE JURY ROOM." [9RP-1166]

FOOTNOTES

FN1 CHAMBERS V. STATE, 726 P.2d 1269, 1275 (Wyo. 1986)

FN2 CHAMBERS, 726 P.2d AT 1275

FN3 SEE WELCH V. FRANKLIN INS. CO., 23 W. VA. 288, 309-10 (1883)

FN4 SEE UNITED STATES V. HERNANDEZ, 27 F.3d 1403 (9TH CIR 1994); STATE V. HARRIS, 247 MONT. 405, 808 P.2d 453 (1991)

FN5 SEE STATE V. CASTELLANOS, 935 P.2d 1353, 132 WASH. 2d 94 (1997); PINO V. STATE, 849 P.2d 716 (Wyo. 1993) (ADMITTING BOTH AUDIO TAPE OF DRUG TRANSACTION AND TRANSCRIPT THEREOF BECAUSE THE EVIDENCE WAS NOT TESTIMONIAL.

FN6 UNITED STATES V. MONTGOMERY, 150 F.3d 983 (9TH CIR 1998); CHAMBERS, 726 P.2d 1269

FN7 UNITED STATES V. SHAW, 936 F.2d 412 (9TH CIR. 1991)

FN8 4 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE, AT 447 (4TH ED. 1992)

FN9 WATERMOTE V. STANDARD FURNITURE CO., 53 WASH. 539, 540-41, 102 P. 443 (1909)

FN10 SEE O'MARA V. KROETCH, 170 WASH. 440, 16 P.2d 818 (1932)

FN11 CASTELLANOS, 935 P.2d AT 1357, 132 WASH. 2d 94

FN12 CASTELLANOS, 132 WASH 2d. AT 101-102, 935 P.2d 1353. AS AUTHORITY FOR THE DISTINCTION, CASTELLANOS CITED PINO, 849 P.2d AT 719. THE DECISION IN PINO WAS EXPLICITLY MADE IN REFERENCE TO THE COMMON LAW RULE IS WELL ESTABLISHED IN WYOMING LAW. SEE CHAMBERS, 726 P.2d AT 1275.

II THE PROSECUTORS COMMENTS PREJUDICED THE DEFENDANTS RIGHT TO A FAIR TRIAL. IN HIS CLOSING ARGUMENT, THE PROSECUTOR:

A. IMPROPERLY INFERRED GUILT BY EXPRESSING HIS PERSONAL OPINION OF THE DEFENDANTS DEMEANOR.

B. UNFAIRLY AND INACCURATELY CHARACTERIZED THE DEFENDANTS VERACITY AND CREDIBILITY TO INFER GUILT.

C. VOUCHED FOR THE STATES WITNESSES

D INTERJECTED INTO THE CASE HIS PERSONAL OPINION OF THE DEFENDANTS GUI

E. IMPROPERLY COMMENTED ON THE DEFENDANTS SILENCE TO INFER GUILT.

II A. THE PROSECUTOR IMPROPERLY AND REPEATEDLY INFERRED GUILT BY EXPRESSING HIS PERSONAL OPINION OF THE DEFENDANT'S DEMEANOR.

"BY GIVING HIS OPINION, AN ATTORNEY MAY INCREASE THE APPARENT PROBATIVE FORCE OF HIS EVIDENCE BY VIRTUE OF HIS PERSONAL INFLUENCE, HIS PRESUMABLE SUPERIOR KNOWLEDGE OF THE FACTS AND BACKGROUND OF THE CASE, AND THE INFLUENCE OF HIS OFFICIAL POSITION."

UNITED STATES V. DELGADO, 631 F.3d 685, 700 (5TH CIR. 2011) (QUOTING UNITED STATES V. MORRIS, 568 F.2d 396, 401 (5TH CIR. 1978)

THE PROSECUTOR SUGGESTED TO THE JURY THAT HE KNEW HOW PEOPLE SHOULD REACT IN STRANGE AND STRESSFUL INCIDENTS AND THE DEFENDANT DID NOT MEET HIS EXPECTATIONS:

"WELL, THERE'S A LOT TO BE LEARNED FROM WATCHING HIS BEHAVIOR, HIS REACTIONS IN THE VIDEO; PERHAPS MORE SO THAN EVEN ANYTHING HE HAD TO SAY. AND THE REACTIONS THAT DETECTIVE PLUMBERG DESCRIBED FOR YOU AT THE HOUSE.

PUNTA GORDA, FLORIDA. ABOUT AS FAR AWAY AS YOU CAN GET FROM WHIDBEY ISLAND IN THE CONTINENTAL U.S.. KNOCK, KNOCK, KNOCK. "HI! I'M A DETECTIVE FROM ISLAND COUNTY, WASHINGTON. WHAT ARE YOU DOING HERE?"

NOTHING. ONE OF THE MOST MEANINGFUL THINGS THAT JIM HUDSON PROVIDED THE DETECTIVES AND THAT YOU NOW KNOW ABOUT." [10RP 1238-39]

"A JURY IS ESPECIALLY LIKELY TO PERCEIVE THE PROSECUTOR AS AN "EXPERT" ON MATTERS OF WITNESS CREDIBILITY, WHICH HE ADDRESSES EVERY DAY IN HIS ROLE AS REPRESENTATIVE OF THE GOVERNMENT IN CRIMINAL TRIALS. IT MAY BE INCLINED TO GIVE WEIGHT TO THE PROSECUTOR'S OPINION IN ASSESSING THE CREDIBILITY OF WITNESSES, INSTEAD OF MAKING THE INDEPENDENT JUDGEMENT OF CREDIBILITY TO WHICH THE DEFENDANT IS ENTITLED."

UNITED STATES V. McKOY, 771 F.2d 1207, 1211, (9TH CIR. 1985)

THE PROSECUTOR CONTINUED HIS INSINUATIONS OF GUILT BY BEHAVIOR:

"AND THEN, THROUGHOUT MOST OF THE VIDEO, YOU WATCHED MR. HUDON'S HEAD DOWN. VERY FLAT AFFECT FOR ALMOST THE ENTIRE INTERVIEW. NOT ALOT OF EMOTION. NOT A LOT OF ANIMATION. THEN WHEN HE'S CONFRONTED WITH THAT AGAIN, HE STRETCHES AND HE STARTS TALKING ABOUT HOW THEY BROKE UP AND THEIR RELATIONSHIP. ONE OF THE FEW TIMES HE HAD ANY ANIMATION.

THE OTHER TIMES HE SHOWED SOME ANIMATION WAS WHEN HE WAS [SIC] TALKING ABOUT MATTERS THAT WERE PRETTY INNOCUOUS LIKE "'HOW NICE A 12-YEAR-OLD LEXUS CAN RUN.'" THAT WAS -- "'OH, YEAH. YOU KNOW.'" SUDDENLY HE'S RELAXED. DIFFERENT GUY. TURN THE CONVERSATION BACK TO THE MURDER. "WELL, LET'S SEE. QUIET. THOUGHTFUL. FLAT AFFECT"

[10RP-1239-40]

THE PROSECUTOR'S PERSONAL OPINION OF THE DEFENDANTS BEHAVIOR IMPLIED THAT HE HAD OUTSIDE KNOWLEDGE OF

HIS NORMAL BEHAVIOR AND THAT WHAT THE JURY SAW IN THE DEFENDANT'S POLICE INTERROGATION WAS UNUSUAL FOR HIM. THE JURY SHOULD KNOW HE KNEW THIS TO BE TRUE.

"'IT IS FAIR TO SAY THAT THE AVERAGE JURY, IN A GREATER OR LESS DEGREE, HAS CONFIDENCE THAT [THE OBLIGATION TO DO JUSTICE], WHICH SO PLAINLY REST[S] UPON THE PROSECUTING ATTORNEY, WILL BE FAITHFULLY OBSERVED. CONSEQUENTLY, IMPROPER SUGGESTIONS, INSINUATIONS AND, ESPECIALLY, ASSERTIONS OF PERSONAL KNOWLEDGE ARE APT TO CARRY MUCH WEIGHT AGAINST THE ACCUSED WHEN THEY SHOULD PROPERLY CARRY NONE.'" BERGER V. UNITED STATES, 295 U.S. 78,8 55 S.Ct. 629, 79 L.Ed. 1314 (1935). THE PROSECUTOR'S EXPRESSION OF PERSONAL OPINION "'CARRIES WITH IT THE IMPRIMATUR OF THE GOVERNMENT'S JUDGEMENT, RATHER THAN ITS OWN VIEW OF THE EVIDENCE.'" UNITED STATES V. YOUNG, 470 U.S. 1, 19, 105 S.Ct 1038, 84 L.Ed.2d (1985). SUCH AN EFFECT PLAINLY UNDERMINES THE FAIRNESS OF THE CRIMINAL TRIAL AND THE RELIABILITY OF THE VERDICT IT PRODUCES."

DELGADO, 631 F.3d AT 700 (5TH CIR. 2011)

THE PROSECUTORS OPINION OF THE DEFENDANTS DEMEANOR IN HIS POLICE INTERROGATION INFERRED HE HAD PERSONAL KNOWLEDGE OF HOW PEOPLE REACT WHEN SURPRISED AND ACCUSED - THE DEFENDANT DID NOT MEET HIS EXPECTATIONS:

"DO YOU REMEMBER WHAT HIS REACTION WAS? HIS REACTION WAS: 'I DON'T KNOW WHY ANYONE WOULD SAY THAT.'"

THE MAN HAD ~~JUST~~ BEEN ACCUSED IN HIS OWN LIVING ROOM OF MURDER BY SOMEONE THAT TRAVELED ALL THE WAY ACROSS THE COUNTRY. AND THAT WAS THE BEST HE COULD COME UP WITH."

[10RP 1239]

RATHER THAN ALLOW THE MEMBERS OF THE JURY THEIR OWN OPINIONS OF THE DEFENDANTS POLICE INTERROGATION, HE REPEATEDLY INSINUATED THE JURY SHOULD INFER GUILT BY SHARING HIS OPINION, HIS MORE KNOWLEDGABLE AND EXPERIENCED OPINION.

"A PROSECUTOR HAS NO BUSINESS TELLING THE JURY HIS INDIVIDUAL IMPRESSIONS OF THE EVIDENCE. BECAUSE HE IS THE SOVEREIGN'S REPRESENTATIVE, THE JURY MAY BE MISLED INTO THINKING HIS CONCLUSIONS HAVE BEEN VALIDATED BY THE GOVERNMENT'S INVESTIGATORY APPARATUS."

UNITED STATES V. KERR, 981 F.2d 1050, 1053 (C.A.9 (MONT.) 1992)

THE PROSECUTOR'S OPINION OF THE DEFENDANTS DENIAL RANGED FROM:

"HE NEVER, IN THOSE TWO INTERVIEWS, MR. HUDEN NEVER DENIED IT."

[10RP-1239] TO RELUCTANTLY ACKNOWLEDGING HE HAD, IN FACT, DENIED IT:

"IT WAS THE CLOSEST HE CAME TO A DENIAL, BUT IT WAS SORT OF AN OBLIQUE DENIAL" [10RP 1240]

AND AGAIN COMMENTED ON THE DEFENDANTS DEMEANOR TO INFER GUILT:

"WELL, HE MAY THINK HE'S NOT A KILLER. THE EVIDENCE IS OVERWHELMIN THAT THAT'S EXACTLY WHAT HE IS. AND IT'S EXACTLY WHAT HE DID. AND HE CAN'T EVEN FACE UP TO IT HIMSELF. SAID HE WAS SCARED. SCARED THE POLICE WERE THERE. HE DIDN'T ACT SCARED WHEN THEY SHOWED UP AT HIS HOUSE. HE DIDN'T KNOW HOW TO ACT."

[10RP-1240]

"WHAT ARE YOU SCARED OF?

"I DON'T KNOW. YOU GUYS ARE HERE."

STILL, NOT MUCH OF A DENIAL.

[ID]

"EVEN IF THE JURY DID NOT UNDERSTAND THE PROSECUTOR TO REFER TO HIS KNOWLEDGE OF FACTS OUTSIDE THE RECORD, THE JURY COULD HAVE CONSTRUED THE STATEMENTS OF OPINION AS 'EXPERT TESTIMONY' BASED ON HIS PERSONAL KNOWLEDGE AND HIS PRIOR EXPERIENCE WITH OTHER CASES. SEE UNITED STATES V. GRUNBERGER, 431 F.2d 1062, 1068 (2d Cir. 1970)."

UNITED STATES V. McKOY, 771 F.2d 1207, 1210 (C.A.9 (Nev.) 1985)

II-B THE PROSECUTOR UNFAIRLY AND DISINGENUOUSLY INSINUATED TO THE JURY THAT INFORMATION OBTAINED FROM THE DEFENDANT'S INTERROGATION WAS UNTRUTHFUL. IT IS NOT A STRETCH TO CONCLUDE THAT IF THE DEFENDANT HAD INDEED ANSWERED HIS INTERROGATOR'S QUESTIONS UNTRUTHFULLY OR IF HE HAD EVADED ANSWERING OR REFUSED TO ANSWER INTERROGATOR'S QUESTIONS, THAT FACT WOULD MOST ASSUREDLY FOUND ITS WAY INTO THE STATE'S CASE AND CLOSING ARGUMENT.

BUT THE PROSECUTOR COULD ONLY SUGGEST THAT THE DEFENDANT HAD BEEN LESS THAN TRUTHFUL, LEAVING THE JURY WITH THE FALSE IMPRESSION THAT THE PROSECUTOR HAD OUTSIDE KNOWLEDGE TO SUPPORT HIS OPINION:

"OH, BACK TO MR. HUDSON'S INTERVIEW, BY THE WAY. HE DID -- HE DID SAY THAT THEY GOT OUT [OF THE HOTEL] EARLY ON THE 26TH IN THEIR TRAVELS WHEN HE WAS TELLING SOME THINGS, SOME ACTUAL INFORMATION THAT HE GAVE THAT WAS RELIABLE HERE. IT MAY HAVE SEEMED INNOCUOUS TO HIM; BUT, OF COURSE, CORROBORATES WHAT THE MARRIOTT RECEIPT TELLS US." [10RP-1241]

(POINT OF FACT: THE MARRIOTT RECEIPT CORROBORATED THE DEFENDANT'S INFORMATION)

IRONICALLY, THE STATE USED THE VERACITY OF THE DEFENDANT'S INFORMATION THROUGHOUT ITS CLOSING ARGUMENT TO IMPLY GUILT:

"WE KNOW THAT JIM HUDSON BY HIS OWN TESTIMONY... WE KNOW THAT HE WAS IN THE AREA ON THE ISLAND OVER CHRISTMAS, 2003." [10RP 1226]

"WE KNOW HE DROVE THERE BECAUSE OF HIS STATEMENTS." [10RP 1226]

"[R]EMEMBER IN JIM'S INTERVIEW THAT PEGGY FLEW UP WITH THE GIRLS." [10RP-1227]

"WE KNOW THAT, IN PART, BECAUSE MR. HUDSON TOLD DETECTIVE PLUMBERG IN THE INTERVIEW THAT HE STAYED AT SOME AIRPORT [SIC] BY 13 COINS DOWN AT THE AIRPORT." [10RP-1229]

"... ACTUALLY) CONSISTENT WITH WHAT MR. HUDSON SAID TO DETECTIVE PLUMBERG ON THE VIDEOTAPED INTERVIEW." [10RP-1230]

"AND, THANKFULLY, JIM TOLD DETECTIVE PLUMBERG IN THE INTERVIEW THAT PEGGY PAID FOR IT WITH HER CREDIT CARD." [10RP-1230]

"HE [DEFENDANT] CONFIRMED THAT PEGGY) DID CALL RUSS." [10RP-1241]

"HE SAID ABOUT THE CHRISTMAS PRESENT." [ID.]

"HE CONFIRMED HE HAD SEEN RUSS A FEW DAYS BEFORE CHRISTMAS." [ID.]

"HE CONFIRMED THAT HE STAYED AT DICK DEPOSITS." [10RP-1242]

"HE CONFIRMED THAT HE DROVE AND PEGGY FLEW." [ID.]

IMPLYING TO THE JURY THAT THE DEFENDANT HAD LIED TO HIS POLICE INTERROGATORS WAS PREJUDICIAL AND UNFAIR.

"" "WHETHER A WITNESS HAS TESTIFIED TRUTHFULLY) IS ENTIRELY FOR THE JURY) TO DETERMINE." UNITED STATES V. BROOKS, 508 F.3d 1205, 1210 (9TH CIR. 2007) (QUOTING UNITED STATES V. ORTIZ, 362 F.3d 1274, 1279 (9TH CIR. 2004)"

STATE V. ISH, 241 P.3d 389, 392, 170 WASH. 2d 189 (WASH 2010)

"IT IS AXIOMATIC THAT PROSECUTORS CANNOT EXPRESS TO THE JURY) THEIR PERSONAL OPINIONS CONCERNING THE CREDIBILITY OF WITNESSES OR THE DEFENDANT. SEE U.S. V. GRACIA, 522 F.3d 597, 601-2 (5TH CIR 2008); U.S. V. WASHINGTON 44F.3d 1271, 1278 (5TH CIR 19 U.S. V. HERNANDEZ, 891 F.2d 521, 526 (5TH CIR 1989); U.S. V. LESLIE, 759 F.2d 366, 378 (5TH CIR 1985); U.S. V. MACK, 643 F.2d 1119, 1124 (5TH CIR. 1981); U.S. V. GARZA, 608 F.2d 659, 662 (5TH CIR 1979); U.S. V. ~~HERRERA~~, 531 F.2d 788, 790 (5TH CIR. 1976); HALL V. U.S., 419 F.2d 582, 586-87 (5TH CIR 1969)."

 UNITED STATES V. DELGADO, 631 F.3d 685, 700 (2011)

II-C. THE PROSECUTOR IMPROPERLY COMMENTED ON THE DEFENDANT'S SILENCE TO INFER GUILT.

"HE DIDN'T MENTION ON THE 26TH THAT HE CAME UP AND DROPPED OFF KEYS. AND HE DIDN'T MENTION BILL MARLOW. HE DIDN'T MENTION HAVING DINNER AT THE RED LION WITH THE EARLY'S. AND THERE WERE THINGS HE LEFT OUT. PRETTY SIGNIFICANT." [ORP-1242]

IT MAY BE RATIONALLY ASSUMED THAT HAD THE DEFENDANT BEEN ASKED BY HIS POLICE INTERROGATORS, "AFTER YOU LEFT THE HOTEL, WHERE DID YOU GO?" AND HE REFUSED TO ANSWER OR ANSWERED UNTRUTHFULLY, THAT WOULD BE REFLECTED IN THE RECORD.

THE PROSECUTOR HERE IS TELLING THE JURY THAT, BY NOT VOLUNTEERING AN ANSWER TO AN UNASKED QUESTION, THEY SHOULD USE THAT TO CONCLUDE GUILT. IT WAS UNFAIR AND PREJUDICIAL TO DO SO.

II D. THE PROSECUTOR IMPROPERLY VOUCHED FOR STATE WITNESSES IN HIS CLOSING ARGUMENT.

"VOUCHING FOR A GOVERNMENT WITNESS IN CLOSING ARGUMENT HAS OFTEN BEEN HELD TO BE PLAIN ERROR, REVIEWABLE EVEN THOUGH NO OBJECTION WAS RAISED. SEE, E.G., U.S. V. LUDWIG, 508 F.2d 140 (10TH CIR. 1974). SEE ALSO U.S. V. CARLSO, 576 F.2d 846 (10TH CIR. 1978) (COURT RAISED OBJECTION SUA SPONTE)"

UNITED STATES V. ROBERTS, 618 F.2d 530, 534 (C.A. 9 (ARIZ) 1980)

THE STATE NOTED THE IMPORTANCE OF BILL HILL AND KEITH OGDEN TO ITS CASE:

"THE MOST DAMNING EVIDENCE AGAINST MR. HUDEN IS THE TESTIMONY OF BILL HILL." [10RP-1221]

"[T]HE TESTIMONY OF BILL HILL, KEITH OGDEN AND KATHY GEIL ARE SO STRONG, SO OVERWHELMING, IN AND OF ~~THEMSELVES~~ THEY PROVE BEYOND A REASONABLE DOUBT." [10RP-1229]

"WHEN THE CREDIBILITY OF THE WITNESS IS CRUCIAL, IMPROPER VOUCHING IS PARTICULARLY LIKELY TO JEOPARDIZE THE FUNDAMENTAL FAIRNESS OF THE TRIAL. U.S. V. MOLINA, 934 F.2d 1440, 1445 (9TH CIR 1991)"

UNITED STATES V. EDWARDS, 154 F.3d 915, 922 (C.A. 9 (WASH.) 1998

FROM STATES CLOSING ARGUMENT:

"I SUBMIT TO YOU THAT BILL HILL IS A HERO." [10RP-1216]

"KEITH OGDEN, I SUBMIT, IS ALSO A HERO." [10RP-1217]

"BILL HILL'S TESTIMONY IS UNCONTROVERTED. IT'S UNASSAILABLE. IT'S UNIMPEACHABLE. IT HAS EVERY - WHAT WE CALL - INDICIA OF RELIABILITY." [10RP-1223]

"DID BILL HILL GET ANY BENEFIT OUT OF ANY OF THIS? NONE. NONE. IN FACT, THE WHOLE THING WORKED AGAINST HIM, WHICH TELLS YOU HOW ALL THE MORE CREDIBLE." [ORP-1223]

"THAT'S NOT EVIDENCE THAT'S EARTH SHATTERING, LIKE THE TESTIMONY OF BILL HILL AND KEITH OGDEN." [ORP-1233]

"[THE VOUCHING RULE] WAS DESIGNED TO PREVENT PROSECUTORS FROM TAKING ADVANTAGE OF THE NATURAL TENDENCY OF JURY MEMBERS TO BELIEVE IN THE HONESTY OF LAWYERS IN GENERAL, AND GOVERNMENT ATTORNEYS IN PARTICULAR, AND TO PRECLUDE THE BLURRING OF "'FUNDAMENTAL DISTINCTIONS'" BETWEEN ADVOCATES AND WITNESSES. U.S. V. PRANTIL, 764 F.2d 548, 554 (9TH CIR 1985)."

EDWARDS, 154 F.3d AT 922 (C.A. 9 (WASH.) 1998)

II E. THE PROSECUTOR INTERJECTED HIS PERSONAL OPINION OF THE DEFENDANTS GUILT:

"[I]F YOU FIND MR. HUDON GUILTY, AND I STRONGLY ARGUE THAT IS THE CASE..."
[10RP-1245]

"A STATEMENT BY COUNSEL CLEARLY EXPRESSING HIS PERSONAL BELIEF AS TO THE CREDIBILITY OF WITNESSES OR GUILT OR INNOCENCE OF THE ACCUSED IS FORBIDDEN. STATE V. CASE, 49 WASH. 2d 66, 298 P. 2d 500 (1956)."
STATE V. PAPADOPOULOS, 662 P. 2d 59 (WASH. APP. DIV I (1983)

"THE STATE MAY NOT ASSERT ITS PERSONAL OPINION AS TO THE DEFENDANT'S GUILT OR A WITNESS'S CREDIBILITY. STATE V. MCKENZIE, 157 WASH. 2d 44, 53, 134 P. 3d 221 (2006); STATE V. REED, 102 WASH. 2d 140, 145, 684 P. 2d 699 (1984)."
STATE V. LINDSAY, 288 P. 3d 641, 171 WASH. APP. 808 (DIV 2 2012)

III. THE CUMULATIVE EFFECTS OF THE JURY'S UNRESTRICTED REVIEW OF THE DEFENDANTS POLICE INTERROGATION VIDEO, COUPLED WITH THE TAINTING OF THE JURY'S INDEPENDENT JUDGEMENT OF EVIDENCE BY THE PROSECUTOR'S PERSONAL OPINIONS, INSINUATIONS AND ASSERTIONS OF OUTSIDE KNOWLEDGE PREJUDICED THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 69227-5-I
	)	
JAMES HUDEN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ISLAND COUNTY PROSECUTING ATTORNEY
P.O. BOX 5000
COUPEVILLE, WA 98239
ICPAO webmaster@co.island.wa.us

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF JULY, 2013.

X Patrick Mayovsky