Case # 296571

Consolidated with
296911, 296792

Statement of Additional Grounds for Review

State of Washington
v.
Anthony Deleon

No. 29691-1-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION III

ANTHONY DELEON,

Defendant/Appellant,

STATEMENT OF ADDITIONAL GROUNDS
RAP 10.10

I. OPENING STATEMENT

The petitioner, Anthony Deleon, Humbly ask this Honorable Court to please not hold him to the same standards as a lawyer. Since he is acting Pro Se, and has no legal training. Please give these pleadings liberal interpretation and hold them to less stringent standards than those drafted by lawyers. MALENG V. COOK, 490 U.S. 488, 493, 109 S.Ct. 1923, 1926-27 (1989).

II. ASSIGNMENT OF ERRORS

1.) The state failed to Disclose Brady material of a May 2 shooting at the same address, using the same gun, in a Sureno on Sureno shooting; and alleged victim Angelo Lopez, criminal History of an Assault one in connection to gang retaliation.

2.) Mr. Deleon was denied his Constitutional Rights to present a defense, when the Trial Judge would not allow relevant evidence to be admitted that logically proves why the States Star witness did not identify the Petitioner until a month later, and then lied about it.

3.) Mr. Deleon was denied his Constitutional rights to be present at all critical stages, and his Public Trial rights, when not present during the discussion of a jury inquiry, that resulted in the wrong time, of the 911 call being given to the jury, during deliberations.

4.) ALBERNAZ controls the Legislature can not violate our Double Jeopardy rights.

A. ISSUES RELATING TO ASSIGNMENT OF ERROR

1.) Did the States Failure to Disclose Brady Material violate the Petitioners 5th, 6th, 14th Amendment rights to the U.S. Constitution, Doctrines of Substantive Due Process and Rights to Fair Trial? As well as under Wash.Const. Art. 1 subsections 3,10,21,22 (Amendment 10)?

2.) Did the Trial Court violate Mr. Deleon's rights to present a defense, under the state and Federal Constitution, for not allowing the news paper reference in opening statements?

3.) Did the Trial Court violate the Petitioners rights to Due Process, Public Trial, and Rights to be present, when not escorting him from jail, to be part of the Trial Court discussion, involving the juries inquiry during deliberations?

4.) Is the reasoning in STATE V. NGUYEN, 134 Wn.app. 863 (wash.div.1.2006) and State V. Kelley, contrary to Albernaz v. U.S., 450 U.S. 333 (1981)?

A.) where Justice Stewart, Marshall, and Stevens held:

"No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishment unless each statutory offense requires proof that the other did not, under the criterion of BLOCKBURGER."

III. FACTS RELEVANT TO RAP 10.10

The Petitioner adopts the facts set out in the Appellant's brief, and disputes all the facts in the Prosecutions brief.

Procedural Facts

Amended Information was filed October 13, 2009 Charging the petitioner with three counts of First degree assault with double time FASE, and gang aggravators. (CP 94). A second amended information was filed on May 7, 2010. It added a count of attempting to elude a pursuing police vehicle as to the Petitioner.

Judgment and sentence was entered on February 4, 2011. The Trial Court imposed an exceptional sentence of 1002 Months.

SUBSTANTIVE FACTS

On may 2, 2009 a Sureno on Sureno shooting took place on 1111 Tacoma Avenue, at Ignacio Cardenas house. 22 caliber bullets were recovered. On may 2, 2009 two gang related shootings occured in sunny side and Grandview. No arrest were made for these Sureno on Sureno gang shootings. Rp 170-175, 205 (Vol. II 9/7/10); RP 301-305 (Vol. IV 9/27/10).

Ignacio Cardenas was with Miguel and Angelo Lopez on May 9, 2009. Mr. Cardena and MR. Acevedo were standing on the sidewalk outside the fenced yard at 1111 Tacoma in Sunnyside Washington. Rp 1231.

Mr. Acevedo saw a car driving by the house. He described the car as a silver Taurus. He believed it was someone he knew and flashed a gang sign. Which proves Sureno Gang members own a silver Taurus. The car made a u-turn and one of the passengers yelled at him. The car did a second u-turn and as it passed the house shots were fired from the passengers side. 10-15-10 RP 1772.

Mr. Cardenas, Mr. Acevedo, and Mr. Lopez could not identify anybody in the car. Rp 755 10/6/10; Rp 1353 10/11/10; Rp 1356; Rp 1643 10/14/10; Rp 1777-17778, 1787 10/15/10.

Jose Baraja, Monica Mendoza, and Grisleda Mendoza were arriving at 1111 Tacoma as the shooting occured. Monica is Mr. Cardena's cousin. Nobody called 911 in the truck when the shooting occured. Nobody saw red bandannas over the face of the shooter, nor could identify anybody in the Car. The Three in the Truck decided to chase the Silver car. They lost the car for a long time. Monica Mendoza, once 911 was called, and even when she gave her May 9, 2009 statement, did not identify the Petitioner. Rp 640-659, 2364-2377. In fact only after the three in the truck believed the Car was found again, did they call 911, they can not even be sure it is the same car. Even then Jose Baraja did not get the License plate number right. Rp 2319-2322.

Mr. Baraja said it was a gold car at the shooting, not a silver car. Rp 2341. Jose and Grisleda did not identify the Petitioner either, Rp 2364. Even in Monica Mendozas first tape statement with Detective Ortiz, she still did not identify the Petitioner, and claimed there were four people in the Car of the shooters. Only three were found in the Silver car. Rp 2364-2365.

Monica Mendoza, never mentioned the face mask bandannas, or the Petitioner, until a September interview. Mr. Edmonds based the Petitioners entire defense, on the fact that sunnyside newspaper named all three defendants, days after May 9th, and suddenly Monica Mendoza starts to drastically alter her statement. Rp 640-651, 2364-2377. The Trial Court would not allow the newspaper to be admitted or any reference. "I dont need to have them admitted if that's going to be a problem, but the fact of their existence explains our entire defense." Mr. Edmond pleads to the court. Rp 640-641.

Mr. Edmond: That Monica Mendoza

The Court: Had read those articles?

Mr. Edmond: And, therefore, has identified our clients. The evidence will show -- and I'm Giving the court a preview of my opening, okay? The evidence is going to show that monica mendoza -- that when the call came in, there was no -- nobody could identify... the only person who was identified the following monday, after the newspaper article came out, was octavio, and she said that he was the driver and the shooter.

Then all of the sudden we have -- by the time her interview on september, now she is absolutely positive that our clients were at the shooting and she identified them before the 911 call during the intersection. RP 641-642.

Mr. Edmonds: Its the only explanation for how she changed her id... the state is seeking to convict our clients based on the idea and the testimony thats going

to come in from her — that she could identify our clients at the scene of the shooting and I cant show the jury why that's, excuse me, BS, then that eviscerates our defense. Rp 642.

The defense is that there was no identification. And we can show that there was no identification, but then we have to explain why shes now suddenly so sure. Rp 643.

The Court: For the purposes of the opening statement it's not coming in. And you can not reference the newspaper article in the opening. Rp 643.

The 911 tape played as evidence for the Jury, clearly showed that at the time, even after the intersection, the three in the truck were just panicky people who had no idea, no clue who was in the car. Rp 2372.

THE SILVER CAR FULL OF ALCOHOL AND SOME DRUGS

On May 9, 2009 Anthony Deleon (Monkey, a non-active Norteno. Rp 504, 539), was driving a silver Taurus, his brother Ricardo Deleon in the backseat, and Octavio Robledo in front passengers seat. Rp 1905 10/18/10; Rp 1009 10/7/10. The three in the silver car were drinking and driving. Rp 2343, 2376-2377. When out of nowhere the Police turned lights on to pull them over. Scared they began to elude to get rid of the open containers. Rp 719-720, 1412, 859-866, 23762377.

Officer Lemon described an object flying by his car. Officer Hellyer observed something fly, too. Nothing was ever retrieved, near Mp 78, or the river. Rp 720-722, 766, 768, 969, 1002, 1092-1097, 2373.

Sgt. Cunningham conducted the search of the Taurus. Inside the car beer, bong, and Marijuana were found. Rp 1663-1693, 1708 10/14/10; Rp 2106-2109 10/20/10. No Bullets, no Shells, no guns were found in the car. The police never did any stipiling test. Rp 669-676; Rp 2174-2175.

NINE 22 SHELLS WERE COLLECTED THAT MATCHED THE MAY 2 SHOOTING

Sgt. Kelley and Sgt. Cunningham collected evidence from the area at 1111 Tacoma. Nine (9) .22 casings were located in the street. Rp1055, 1612, 1628, 1634 10/7/10. The State Patrol crime lab discovered the shell casing recovered on May 9, 2009 from 1111 Tacoma, Matched the shell casing found on May 2, 2009. It is not random. They're being targeted. The motive is gang activity. Rp 205. The state failed to timely disclose this information. Rp 170-175, 205 9/7/10; Rp 300-305 9/27/10.

Another, failed disclosure by the state is the criminal history of alleged victim Angelo Lopez. Rp 170. Mr. Edmond, the Petitioners trial attorney, interviewed Angelo Lopez. During the interview it was discovered that Mr. Lopez had been charged with an assault one which is gang related, and was allowed to plead all the way down to a misdemeanor. Mr. edmond, Motioned for Disclosure under Brady. This evidence is important because it explains how the shooting on may 2nd and May 9th, are in retaliation for the assault, Sureno gang was responsible, no Norteno Motive. Rp 170. What Makes this prejudicial is the State is alleging that the Petitioner is responsible for the May 2nd shootings as well. The prosecutor even admitted he knew about this evidence. Rp 172-174.

PUBLIC TRIAL AND RIGHT TO BE PRESENT AT CRITICAL STAGES VIOLATED

During deliberations the Jury sent an inquiry to the judge asking to hear the 911 tapes again. The Petitioner was not present during this process. Rp 2390-2399. The bailiff played the wrong 911 content, not approved by the lawyers, and told the Jury the wrong time that the call occured. This affected the fact finding process. Rp 2397 11/23/10. The time was actually 11:02 and 38 seconds, the Bailiff told the jury, it was 11 O'clock and 43 seconds. Rp 2396-2397. This is important for the jury, so they can understand where the Silver car would be during the shooting.

IV. ARGUMENT

ISSUE ONE

THE STATE FAILED TO DISCLOSE EXCULPATORY EVIDENCE WHICH VIOLATED THE PETITIONERS DUE PROCESS AND FAIR TRIAL RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTION

To support dismissal under CrR 8.3(b), the petitioner must show by a preponderance of the evidence both (1) arbitrary action or governmental misconduct, and (2) actual prejudice affecting the defendant's right to a fair trial. STATE v. WILSON, 149 Wash.2d 1, 9 (2003). Claimed governmental misconduct need not be evil or dishonest in nature; "Simple mismanagement is sufficient." STATE v. MICHIELLI, 132 Wash.2d 229, 239 (1997).

Under CrR 4.7, the State must disclose all material evidence, no later than Omnibus.

Even if misconduct is the result of mismanagement rather than deceit, it is egregious enough to satisfy the first requirement for a CrR 8.3(B) Dismissal. STATE v. MOEN, 150 Wash.2d 221, 226 (2003). "Evidence is material under BRADY, and the failure to disclose it justifies setting aside a conviction, only where there exist a reasonable probability that had the evidence been disclosed the result at trial would have been different. KYLES v. WHITLEY, 514 U.S. 419, 433-434 (1995). "Due Process makes the good or bad faith of the state irrelevant for material exculpatory evidence, as opposed to evidence which is merely potentially useful." STATE v. BURDEN, 104 Wn.app. 507 (wash.app.div.2 2001).

A. THE STATE FAILED TO DISCLOSE ON TIME AND FULLY

The state failed to disclose two very important pieces of evidence to the defense, and well into trial Defense Counsel Mr. Edmond requested disclosure, and never received a timely disclosure, nor full disclosure of:

1.) Alleged Victim Angelo Lopez prior Gang related Assault one Charge which proves the May 2 and May 9 shootings are Sureno on Sureno Retaliation.

2.) The Police reports of the two shootings on May 2, at the same address, which the May 9 bullets matched. Which proves this is not a north versus south, but south versus south gang motivation.

See RP 170-175, 205 (vol. II 9/7/10); Rp 301-305 (Vol. IV 9/27/10)

What makes the late and partial disclosure even more prejudicial is the fact that absolutely no physical evidence places the petitioner at the crime scene. The Only eye witness identification is very unreliable as well, Monica Mendosa is not very helpful to the jury. The Judge stopped Mr. Edmond from proving why she changed her statements three times. Rp 640-647.

The prosecution has a duty to disclose timely by Omnibus, and did not which violated the petitioners rights to present a defense, and fair trial rights.

In U.S. v. AGURS, 427 u.s. 97, 10 (1976), the U.S. Supreme Court made the distinction between specific request, and general request. "There are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request... This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence." AGURS 96 S.ct. 2401.

The late disclosure prejudiced the petitioners chance at being fully prepared and ready for trial. The defense had to fight all through trial for even partial disclosure, only to be ambushed by the State making inferences that the Petitioner was responsible for the May 2 and May 9 shootings. The defense had no way to combat this ambush.

B. IMPEACHMENT EVIDENCE IS EVEN MORE EGREGIOUS

The state may argue that this evidence was only impeachment evidence. "Impeachment evidence, However, as well as exculpatory evidence, falls within the Brady Rule... Such evidence is 'evidence favorable to an accused...' so that, if disclosed and used effectively, it may make the difference between conviction and

acquittal. Napue v. Illinois, 360 U.S. 264, 269 (1959)(The Jury's estimate if the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend)... failure to disclose impeachment evidence is even more egregious than failure to disclose exculpatory evidence 'because it threatens the defendant's right to confront adverse witnesses...' The government's failure to disclose requested impeachment evidence that the defense could use to conduct an effective cross-examination of important prosecution witnesses constitutes 'constitutional error of the first magnitude' requiring automatic reversal." U.S. v. BAGLEY, 473 U.S. 667, 105 S.ct. 3375, 3380 (U.S.WASH.1985).

The impeaching nature of this evidence makes it even more critical, the late disclosure, and partial disclosure warrants a reversal.

CONCLUSION

The Petitioner ask this Most Honorable Court to dismiss all Charges with Prejudice, or in the alternative reverse and remand for a new trial, with instructions for timely and full disclosure of the evidence.

ISSUE TWO

THE TRIAL COURT EVISCERATES THE PETITIONERS RIGHT TO PRESENT A DEFENSE BY NOT ALLOWING THE NEWS PAPER REFERENCE OR NEWS PAPERS TO BE ADMITTED INTO TRIAL

A criminal defendant has a right under the sixth Amendment of the U.S. Constitution and Art. 1 Subsection 22 (Amendment 10) of Washington State Constitution to present a defense. STATE v. MAUPIN, 128 Wn.2d 918, 924 (1996). A Defendant has a right to present a defense, but the right does not extend to irrelevant or inadmissible evidence. STATE v. JONES, 108 Wn.2d 713, 720 (2010).

The right to fair trial provides fair opportunity to defend against the states accusations. If the defendant's evidence is relevant and admissible, then it is the states burden to demonstrate that, the evidence is so prejudicial as to disrupt the fairness of the Fact-finding process at trial. State v. DARDEN, 145 Wn.2d 612, 622 (2002). We review an alleged denial of the right to present a defense De novo. STATE v. JONES, 168 Wn.2d 713, 719 (2010).

Evidentiary rules impermissibly abridge a criminal defendant's rights to present a defense only if they are arbitrary or disproportionate, and infringe upon a weighty interest of the accused. U.S. V. SCHEFFER, 523 U.S. 303, 308 (1998). A trial Court's decision to admit or to exclude evidence is reviewed for abuse of discretion. DARDEN at 619. A Court necessarily abuses its discretion by denying a criminal defendants constitutional rights. STATE v. ENIQUEZ, 167 Wn.2d 273, 280 (2009).

ER 401 DEFINITION OF RELEVANT EVIDENCE

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.

ER 402

Relevant evidence Generally admissible; irrelevant evidence inadmissible

ER 403

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.

Although relevant, evidence may be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice...

A. THE NEWS PAPER REFERENCE IS RELEVANT AND SHOULD BE ADMITTED

Mr. Edmond explained to the judge that the newspaper explained why Monica Mendoza, the only witness to id the Petitioner, did not claim Anthony Deleon was in the car until months after the shooting. Rp 640-647. This evidence is relevant, and makes logical inferences about how Monica Mendoza started to change her original

statement, and identified the Petitioner. The jury was never allowed to hear about this fact, never seen this evidence, their verdict can not be trusted.

Mr. Edmond explained "I dont need to have them admitted if that's going to be a problem, but the fact of their existence explains our entire defense." RP 640-641. "The evidence is going to show that Monica Mendoza — the only person who was identified the following Monday, after the newspaper article came out, was Octavio, and she said that he was the driver and the shooter.

"Then all of the sudden we have — by the time her interview on September, now she is absolutely positive that our clients were at the shooting and she identified them before the 911 call during the intersection." Rp 641-642.

"Its the only explanation for how she changed her id... the state is seeking to convict our clients based on the idea and the testimony thats going to come in from her — that she could identify our clients at the scene of the shooting and I cant show the jury why that's, excuse me, BS, then that eviscerates our defense." Rp 642. "The defense is that there was no identification. And we can show that there was no identification, but we have to explain why shes now suddenly so sure." Rp 643.

The trial court would not allow any reference, or the newspaper to come into the trial, or in opening statements. This severely prejudices the Petitioner removing his entire defense. The jury now has no idea how to view Monica Mendoza, many drastic changes in her statements. Without this relevant evidence the Jury can not properly put into perspective the logical and rational inference of how she suddenly changed her statement, and how that implies the Petitioner is innocent.

CONCLUSION

The Petitioner ask this Court to reverse and remand for a new trial, with instructions to allow this evidence.

ISSUE THREE

THE TRIAL COURT VIOLATED THE PETITIONERS RIGHTS TO BE PRESENT AT ALL CRITICAL STAGES AND PUBLIC TRIAL RIGHTS BY ANSWERING A JURY INQUIRY DURING DELIBERATIONS WITHOUT ESCORTING MR. DELEON TO THE COURT ROOM

During deliberations the Jury sent out an inquiry asking to hear the 911 tapes again. The Petitioner was not present, nor notified. The Prejudicial element is the fact that the Bailiff told the jury the call happened at 11 o'clock and 43 seconds. When in reality the call occured at 11:02 and 38 seconds. This is very important due to where the Petitioners car was located. Rp 2390-2399. This error violates the Petitioners rights to be present, and public trial rights. The defense attorney Mr. Edmond was notified, but not the Petitioner. The Petitioner has a Constitutional right to influence the response to the jury, and to participate in this critical stage.

In STATE v. SUBLETT, 156 Wash.App. 160 (2010) the Court noted whether a defendant's public trial right applies in the context of an in-chamber conference to answer a question the jury submitted during deliberations appears to be an issue of first impression in Washington. The Court went on to note: "In STATE v. SADLER, 147 Wash.app. 97, 114 (2008), this court recognized that the public trial right applies to evidentiary phases of the trial as well as other 'adversary proceedings...'" The State Supreme Court has granted review on SUBLETT, see, 156 Wash.app. 160 (2010). This Petition should be stayed pending the final outcome of Sublett.

CrR 6.15(f) requires all parties to be notified, and allowed to comment or object in open court. This violates Mr. Deleons U.S. const. Amendment 6 and 14 and the Wash. Const. Article 1, section 22 rights to be present and public trial rights.

CONCLUSION

This most Honorable Court should stay this petition pending Sublett, or reverse and remand for a new trial.

ISSUE FOUR

THE PETITIONERS DOUBLE JEOPARDY RIGHTS HAVE BEEN VIOLATED BY THE LEGISLATION FOR REDUNDANT FIREARM ENHANCEMENTS THAT ARE THE SAME IN FACT AND LAW AS THE ASSAULT

The Petitioners 5, 6, 14 Amendment rights to the U.S. Constitution have been violated. Washington State Supreme Court in STATE v. Kelley; and Division one in, STATE v. HOTUEN, 134 Wn.App 863 (wash.Div.1 2006), erroneously ruled that the Double Jeopardy clause does nothing more than ensure that punishment is not more than the legislation intended.

The United States Supreme Court sees it much differently, and common sense dictates that the legislation can not violate the Petitioners Constitutional rights. In Albernaz v. U.S., 450 U.s. 333, 67 Led.2d 275, 101 S.ct. 1137 (1981), Justice Stewart, Marshall, and Stevens directly shot down Washington States Supreme Court and Division ones logic:

"No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishment unless each statutory offense required proof that the other did not, under the criterion of BLOCKBURGER."

No matter if it is intended or not, the three FASE given to Mr. Deleon for the higher offense of Assault one, act as a higher element of the offense, given for the same fact and law as the three assaults. This violates Double Jeopardy, and the legislation must be put in check. When the Test of Blockburger, 284 U.S. 299, 52 S.ct. 180 (1932) is satisfied the legislation can not trump the Double Jeopardy Clause. Sentencing factors are elements, raising the total punishment time beyond what the standard range is, and therefore the FASE's violate Double Jeopardy.

CONCLUSION

Please vacate all the FASE from the Judgment and sentence, and remand for re-sentencing.

Each of the issues in this case require a reference hearing, or an evidentiary hearing.

Thank you for your time and efforts in this matter,

Respectfully Submitted

This day of Sept 21st 2012

X Anthony DeLeon

ANTHONY DELEON

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Anthony DeLeon, declare and say:

That on the 23rd day of September, 2012, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 296911:

1. Statment of Additional Grounds Pg. 1-14;

addressed to the following:

The Court of Appeals
Division III
500 Cedar
Spokane, WA 99201

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 23rd day of September, 2012, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Anthony DeLeon
Signature

Anthony DeLeon
Print Name

DOC 766237 UNIT G-B-04
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
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