Supreme Court No. 93035-0
Court of Appeals No. 71912-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TRAVIS LILE, Appellant.

REPLY TO STATE'S CROSS PETITION FOR REVIEW

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ANSWER OF PETITIONER TRAVIS LILE TO STATE'S CROSS PETITION TO REVIEW

1. Introduction

Travis Lee Lile replies to the state's Cross Petition to Review the Affidavit of Prejudice issue resolved by the Court of Appeals, which both parties agree constitutes a ruling on a matter of first impression.

At page 4 of its Answer and Cross Petition for Review, the State writes, " the State is cross petitioning on the Court of Appeals decision that the judge's granting of a motion for continuance in this case was not a discretionary ruling under the statutory provisions regarding affidavits of prejudice"..... But the State concludes, "The State asks this court to accept review of that issue should this court accept review of Petitioner's issue regarding the Court of Appeals finding that erroneous denial didn't warrant reversal under the facts of this case." State's Answer to Petition for Review, page 4 bottom and page 5 top.

It is important to review that in this case, an agreed continuance position was advanced by the parties before the Superior Court at a status hearing. This agreement pushed the case trial date one week and in the interim, Lile filed an affidavit of prejudice against Judge Uhrig, who had signed the agreed continuance order. Lile also filed a motion to sever counts seeking to have one trial relate to Lile's assault of Christopher Rowles and Amanda Millman and a second trial for the charges of Lile assaulting the police officer and resisting arrest. See Memorandum in Support of Motion to Sever, CP 19-24; State's Memorandum Opposing Severance, CP 25-30, see 1RP, 15-34.

Lile's purpose for affidaviting Uhrig was to prevent him from ruling on any issue involved in the case, particularly severance.

In response, the deputy prosecutor moved to strike the affidavit of prejudice as untimely, and noted the matter before Judge Uhrig. Judge Uhrig struck the affidavit, as untimely, ruling that his adoption of the agreed continuance position advanced by the parties at the status hearing was a discretionary ruling.

So the position of the parties relating to issues to be reviewed or not is as follows:

2. Petitioner is asking the court to review the portion of the Court of Appeals decision, which allows trial judges who have been disqualified by the filing of an affidavit of prejudice to rule on pretrial criminal motions. The new rule of law announced by the Court of Appeals is that the ensuing criminal conviction after a trial presided over by another judge can be affirmed if the pretrial ruling by the disqualified judge was correct, or, in this case, was waived by failing to renew the severance motion at the conclusion of trial.

The State's position on this point is to urge this court to deny review and affirm the conviction of the petitioner. The effect of the adoption of the state's position is to create new precedent, which allows a disqualified judge to rule on pretrial motions, and have them reviewed in the same manner all pretrial motions are reviewed by an appellate court. This ruling denies litigants the statutory right created and given to them by the Affidavit of Prejudice statutes. The distinction between the impact of pretrial rulings and trial rulings is not discussed by the Court of Appeals. There is absolutely no difference in impact upon the final outcome of the criminal trial between resolution of pretrial motions and trial motions and other rulings by the trial court. This statement is based upon petitioner's counsel's experience in over forty (40) years of practice. For example, Mr. T never had to

stand trial in In re Armed Robbery, 99 Wn2d 106, 659 P.2d 1092 (1983), a case I had as a young man. Making sure the most favorably disposed judge is assigned to the case is a paramount duty of an advocate. Everybody knows that the defense lawyers and the prosecutors manipulate to get the best judge from their respective perspectives assigned to the case.

The resolution of pretrial rulings in criminal cases, such as confession, suppression and severance rulings, are often decisive in the outcome of the criminal trial. The right conferred by the statute is to give the litigant the absolute right to disqualify one time one judge from making any ruling in the case, not just rulings at trial. Petitioner asserts the intention of the statute was to preserve the right of the litigant to have these pretrial legal rulings in criminal cases, not be decided by a disqualified judge. The Court of Appeals decision permits a disqualified judge to rule on pretrial motions and the conviction is affirmed as long as the disqualified judge does not preside at trial. Under the Court of Appeals opinion, all of these pretrial rulings decided by the disqualified judge, many of which involve making factual findings, are then, as here, subject to the least rigorous standard of appellate review.

The rationale for exempting pretrial rulings as insignificant and not within the purview of the Affidavit to Prejudice statutes is not discussed by the Court of Appeals and is nil. The implication of the Court of Appeals decision is that had the disqualified judge presided at trial, reversal would have been automatic, but ruling on the pretrial issues was

different because? Why would a legislative statute make such a distinction if its purpose was to create a right to exclude one judge from making any rulings in the case?

Judge Dwyer summed it up best in oral argument before the Court of Appeals when he replied to the deputy prosecutor's argument that the severance motion should be reviewed and sustained because it was within the trial judge's discretion to make such a ruling, and said, " does this not take the teeth out of the Affidavit of Prejudice statute." Oral Argument Court of Appeals, January 7, 2016. A truer statement and observation could not be made. This ruling, if affirmed, will lead to a cavalier attitude by Superior Court judges in deciding criminal scheduling and pretrial motions to proceed, all ahead full, because there is absolutely no sanction imposed for erroneously denying any motion to disqualify under RCW 4.12.050. Power ignores a vacuum. Prior to this ruling, it is petitioner's counsel's observation that the Superior Court Judges were extremely reluctant and resistant to rule on any part of a case where an affidavit had been filed against the judge. This mental frame of reference by the courts in its consideration of the impact of the filing of affidavits of prejudice will dramatically change, if the Court of Appeals ruling is affirmed. The Affidavit of Prejudice statute will only ensure that a litigant gets a non disqualified judge to preside at the trial portion of the case.

3. Although the State urges this court to deny review and affirm the conviction and the reasoning of the Court of Appeals, the State wants the court to review that portion of the Court of Appeals decision that concluded that Judge Uhrig's continuance was a discretionary decision under the traditional rule of In Recall of Lindquist 172 Wn2d 120, 129, 258 P.2d 3d 9 (2011) and State v. Dennison 115 Wn2d 609, 801 P.2d 1993 (1990).

In effect, only if this court accepts review, does the state want this court to review the question of whether the setting of a case down for trial at a status hearing involves a discretionary ruling when the parties by agreement push the criminal trial over in the norm rotation (every 60 to 90 days). The state wants to be in the same position that the parties were in before in the Court of Appeals and, in effect, get to prevail on the issue that Judge Uhrig was correct in his ruling disallowing the filing of the Affidavit of Prejudice. Resolution of the case on this basis would obviate the need to protect the criminal conviction by sustaining the Court of Appeals' exception to the application of the Affidavit of Prejudice statute for pretrial criminal motions.

The state adheres to its argument that In Recall of Lindquist 172 Wn2d 120, 258 P.2d 3d 9 (2011) and State v. Dennison 115 Wn2d 609, 801 P.2d 1993 (1990) lead to the conclusion that a Superior Court Judge in his/her adoption of the parties' request sitting in a status hearing that the case be set over for a continuance, rather than announcement of confirmation of trial, is a discretionary act.

The Court of Appeals accurately reviews the state's argument in pages 7-13 of its opinion and its reasoning is sound and should be affirmed. Not stated but relevant and dominant, in petitioner's view, is the setting in which the conclusion that the setting over of a criminal case for continuance by agreement took place, a status hearing. Lile wrote in his brief before the Court of Appeals as follows:

Whatcom County has three Superior Court judges and just recently acquired a

> fourth. When a case such as the Lile case is continued for almost a year before trial, the case is brought before the Superior Court approximately every six weeks to two months. This is done by an order which schedules a status hearing on a Wednesday morning at 8:30 am and a trial date one week from the following Monday at 9 am. All cases not tried or settled appear on the status calendar, are called, and the parties are asked about the status of the case. If the parties both request trial, the case is confirmed for trial and the parties appear one week from the following Monday for trial. In this scenario, the parties ready for trial appear on the Monday along with all other parties who have confirmed for trial. The presiding Superior Court judge, using rules of priority for trial, determines which case is tried first. The remaining cases are bumped for one week. This process is described in the declaration of counsel in support of motion to reconsider. CP0061.
>
> If both of the parties agree they are not ready for trial and want a continuance, the case is continued and a new paper order with carbon copies is presented with a new status and trial date at the status hearing or shortly thereafter.
>
> At the status hearing where one party wants trial and the other wants a continuance, the matter is set over to the criminal calendar, which is on Thursday morning at 8:30 am each week. Contested motions to continue are not heard on the status calendar in the experience of this counsel.

Lile again reasserts that the agreed pushing of the trial date for a week to accommodate the litigants falls within the ambit of activity within the proviso of RCW 4.12.050: "but the arrangement of the calendar, ***the setting of an action, motion or proceeding down for hearing or trial,*** the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso." When a criminal case is set over by agreement to the status calendar judge, it is the equivalent of the setting of an action, motion or proceeding down for hearing or trial, and not a discretionary continuance. Contested decisions to continue cases are never decided at the status hearing in Whatcom County. Where the parties

disagree as to whether a case should be confirmed for trial or continued, the case remains confirmed for trial and the party seeking the continuance is required to note the matter for argument on the contested criminal calendar, which is heard in Whatcom County on Thursday at 8:30 am.

The point to be made is that contested continuance decisions are always set over by the status calendar judge to the Whatcom County Criminal calendar, which is every Thursday at 8:30 am for contested hearings. Those decisions granting or denying a motion to continue on the criminal calendar are discretionary.

3. Waiver under CrR 4.4 (a) (2) has no application ***as*** to whether petitioner can challenge the ruling of Judge Uhrig as a nullity under RCW 4.12.050.

The severance waiver argument is central to the Court of Appeals carving out of an exception to the RCW 4.12.050 for pretrial rulings. Pretrial rulings can be made by properly excluded trial judges under RCW 4.12.050 and those rulings can be sustained under the same standard as all other pretrial rulings, reserving the automatic rule of reversal, only if the disqualified jurist makes a ruling at trial or presides at trial. The court rules cannot restrict the application of the scope of RCW 4.12.050. The state's severance waiver argument places court rule restraints upon the assertion and application of a statutory right. Its defect is that it equates severance rulings decided by a disqualified judge under RCW 4.12.050 on parity with other legitimate pretrial rulings made by judges, who have not been disqualified, and thus stands RCW 4.12.050 on its head.

Especially in severance motions, which are discretionary and virtually unassailable on appeal, it was Lile's absolute right to exclude Judge Uhrig from the case, and get another judge to exercise that "crucial discretion" to decide whether to exercise that discretion to grant Lile's request for two trials. That crucial exercise of judicial discretion is what is taken from litigants, if this exception for pretrial rulings is sustained. Lile was entitled to have a non disqualified judge make the decision.

Lile's lost opportunity was to have the jury hear the assault case against Rowles and Amanda Millman first, and later the case of Lile's assault upon Bellingham Police Officer Woodward would be tried. Lile's strategy was to present his case that Christopher Rowles, with all of his domestic violence baggage, was the aggressor. Key to Lile's defense was that Rowles started the fight. Lile's strategy was to show that Rowles intentionally pushed or bumped into Lile after Rowles observed Lile berate his girl friend Amanda Millman with profane insults. Lile wanted to present evidence that Rowles was an emotional roller coaster who, when viewing his girl friend be verbally abused by another male, reacted by a show of force intended to intimidate ***Lile*** into submission. That Rowles reacted and started the fight by menacingly approaching Lile with his companion Powell. Rowles' quick approach and his act of getting in the face of Lile, instilled in Lile the belief that he was about to be hit. And then, Lile fearing to be hit, struck out at Rowles. Bellingham Police Officer Woodard did not see this fight start, just saw that a fight was in progress.

Lile had no criminal record nor did his witnesses, two sailors in the United States Navy and another friend, an EMT with no criminal record, all of whom testified that Amanda Millman walked into the wheelhouse of an going fight between the men and was struck.

In contradiction to this testimony, Bellingham Police Officer Woodward observed Lile without provocation or justification walk several paces forward to strike Amanda Millman, and did strike her knocking her to the ground and breaking her jaw. But Woodward was some 120 feet away when he observed this and there were many other persons about. RP 206. Woodward did not see the brush between Amanda Millman and Lile, which immediately preceded the outbreak of the fight. Nor did Woodward see what immediately took place after the brush between Millman and Lile, the bump of shoulders between Rowles and Lile which immediately preceded the outbreak of fighting, RP 213.

Either way, the Superior Court decision to grant severance or deny it, is virtually unassailable on appeal. In allowing a properly excluded Superior Court judge to rule on a discretionary motion, like a severance motion, the Court of Appeals approves a result where the litigant does not get the most favorably disposed judge to exercise this discretion in a crucial pretrial motion. Instead, the litigant, who attempted to disqualify the judge under RCW 4.12.050, gets the challenged judge to hear the motion.

The filing of an affidavit of prejudice by a party reflects that party's conscious choice that the challenged judge is worst suited to decide any motions in a case. This is the

opinion of petitioner's counsel, which is the view of any lawyer in Whatcom County who files an affidavit of prejudice against a sitting judge.

This is the point missed by the Court of Appeals in its analysis and its severance waiver conclusion. The discretionary ruling first exercised here in this case was the first ruling denying severance of counts. This ruling was decisive in impact upon Lile's rights and circumstance. It tremendously reduced his chance of a successful verdict on the charges that he assaulted Rowles and Amanda Millman because trial on all counts presented evidence of Lile's fleeing the scene and his subsequent apprehension and resistance to the police officers.

As to waiver, the idea that the trial judge just finishing a trial of two weeks is going to exercise discretion to grant a new trial by a post trial ruling on severance of counts is not a realistic fact or idea upon which to resolve this legal controversy. Judge Uhrig's ruling denying severance was a nullity because he had no authority to rule on the motion. Uhrig's action in ruling deprived petitioner of his absolute right to remove Uhrig from the case and cannot be legitimized by any severance waiver argument.

4. Petitioner's petition for review can also stand independently on the following issues:

   Did the trial court err in refusing to permit evidence of Christopher Rowles' two previous orders of adjudication for domestic violence, after Rowles testified on cross examination that he was not a fighting person on the basis that violence against women is not "fighting."

Petitioner reasserts the rationale for differentiation between Rowles' fight with his former girl and his fight with petitioner Lile, is untenable. Before again commenting on

this issue, two important factual and legal points should be made with respect to the record as perceived by he Superior Court and the Court of Appeals.

First is the factual point made already by petitioner in his petition at page 13 that notwithstanding the emphasis and significance placed by the Superior Court and the Court of Appeals that no accusation of fighting was made in Ms. Foster's application for a personal protection order against Rowles and the fact that the domestic violence victim of Mr. Rowles never characterized what happened to her as "fighting, " those assertions of fact are mistaken, ' see exact quote at page 13 of petition for review. The Court of Appeals opinion quotes, "After reviewing the record of Rowles alleged assault of his ex girlfriend, the trial court specifically noted that the allegations involving the assault in the petition for an order of protection did not accuse of Rowles of fighting." Slip Opinion, page 20, bottom.

Another legal correction in the opinion of petitioner ought be made in the record, which relates to the consistent position taken by the State in this litigation that the only matters raising the issue of whether Rowles professed to be a non fighting guy came to light on cross examination.

The Court of Appeals at slip opinion page 21, footnote 10, wrote, " The state argues the door was not opened because Lile first elicited Rowles testimony on cross examination of the state's witness. ***The state did not elicit the testimony on direct examination.***"

Here are the similar statements or assertions of character made by Rowles relating to whether he fights, or is a non fighting guy who lets things roll off his chest, or is a guy who does not want to fight, in chronological order contained in the record in the case:

Statement 1.
In the direct testimony of Christopher Rowles, the following took place upon examination by the deputy prosecutor of Christopher Rowles:

> Well how come you did not like defend yourself?
>
> Everything like caught me by surprise to be honest with you, I don't get into too many fights. I don't think ***I*** have ever been in fight. So it kind of caught me by surprise and I was knocked back a bit against the car. RP 508, lines 1-7.

Statement 2
Later on cross examination, after Rowles testified he heard profanities, he testified

> "I am not a fighting guy so I just let things roll off my chest here. " RP 528, lines 1-5.

Statement 3

Still later on cross examination, Rowles testified:

> Are you punching back?
>
> A. No. Q. Why not?
>
> A. Still a little in shock. I didn't, I'm not a fighter. I didn't want to be a fighter. RP 538, lines 17-18.

The Court of Appeals found significant that Rowles limited his self assessment to the statement only that he was not a fighting guy, which, according to the Court of Appeals, is not probative of his truthfulness; page 23, referencing footnote 11. The Court of Appeals also declared that the "I am not a fighting guy" and I am not a fighter"

statement was not the same as the statement that Rowles was "a peaceful person," Slip opinion at page 23. Petitioner respectfully disagrees because one of the not a fighter remarks of Rowles came just before the words "so I let things roll off my chest."

The sum total of the claim that Rowles "I don't get into too many fights. I don't think ***I*** have ever been in fight." RP 508, lines 1-7, (brought out by the state) and combined with" I am not a fighting guy so I just let things roll off my chest here RP 528, lines 1-5, (cross examination) and "I didn't (punch back). I didn't, I'm not a fighter. I did not want to be a fighter," RP 538, lines 17-18, falls in petitioner's view within the parameters of what it means to be a "peaceful person."

Ultimately the Court of Appeals concluded that allowing evidence of Rowles' domestic assault of his former girlfriend was not probative of whether he was a fighter or not. Slip opinion at page 24.

The rationale by which the Court of Appeals ratified the decision of the Superior Court was its conclusion that Rowles' behavior leading to the entry of protections orders against him was factually different from the behavior of an aggressor in a fight with a male stranger. The status of the combatant as a ***stranger*** and a ***male*** was the significant difference. The reasoning underpinning this conclusion is found earlier at page 20.

That analysis can be broken down as follows;

1.Rowles assault was motivated by man woman jealousy;

2. Rowles did not punch his girlfriend or fight with a stranger;

3. Rowles 's threats to "beat the asses of men" was motivated by jealousy.

4. The victim, Nicole Foster, in her personal protection order application, never accused Rowles of fighting, Slip Opinion at page 20, bottom. Again, this is a wrong statement of fact because the former girl friend Foster characterized what happened as fighting twice; see petition for review page 13, which precisely quotes the exact language of Ms. Foster.

The reality is that Rowles said he "was not a fighter" but in fact he is; he just fights with women. This opens the door because the impeachment is logically relevant to dispute Rowles statements, including his statement that Rowles lets things roll off his chest; see Slip Opinion at page 23. The degree of force used by Rowles in his assault of his former girlfriend Nicole Foster is not significant from petitioner's point of view because it is irrelevant to the assertion of a man engaged in another fight with another male, when that man makes the assertion that he is not a fighting man to justify his non punching or fighting back in any way, as if he was a Quaker. The reality is that Rowles engaged in the use of physical force against another person and the degree of force was minimalized by the Superior Court and ratified by the Court of Appeals because Rowles did not punch the subdued woman.

The observation that the amount of force used in Rowles's assault upon his former girlfriend was not the same as the force used in a pitched battle between two males only reflects the total disparity of the physical strength between the parties. The only logical conclusion to be drawn here is that Rowles can accurately be described as a fighting bully

which impeaches, in petitioner's mind, the credibility of an adjudicated domestic violence abuser of a woman when he makes the statement that he is "a non fighting man" to explain why he did not punch or fight back. A person who only uses physical force against weaker foes who are women or men should not shield such a person when he profess to portray himself a non fighting man to gain favor with the jury as a victim.

The reasoning that Rowles' fight with his former girl was so much different than a fight between two males in which a punch or punches are thrown is error, and an abuse of discretion. A person either fights or does not fight. When he says he is a non fighter, he should not be shielded from examination because he only fights with women or weaker foes that he can subdue without punching. Ms. Foster, the victim of Rowles domestic assault, considered the activity to be fighting and it was. The rationales of the Superior Court and Court of Appeals should be rejected!

5. Petitioner's petition for review can also stand independently on the following issues:

   Did the court err in allowing the prosecution to undermine the integrity of defense counsel by insinuating counsel had an underhanded purpose in meeting with defense witnesses?

   The prosecutor claimed he was inquiring as to lack of cooperation between a witness and the police and the witnesses' later change of testimony after meeting with defense counsel to show a change of recollection testimony at a precise moment of time.

Petitioner's counsel disagrees and asserts that in effect what took place was a presentation motivated at communicating to the jury that defense counsel was coaching witnesses and this was the explanation for any change of testimony after the witnesses met with defense counsel. The Court of Appeals' concession that the testimony could be interpreted to portray petitioner's counsel as a tamperer of witnesses should be dispositive and in and of itself should be grounds for reversal. Regardless of whether the deputy prosecutor intended to convey this portrayal of defense counsel, and in fact he did, the fact that evidence did so should be enough in and of itself to warrant reversal.

In effect, the state brought ER 404 bad acts evidence where the bad act was allegedly committed by defense counsel. Where norm evidence of ER 404 (b) bad acts is offered and admitted, it must be proved more probably than not that the defendant (not his lawyer) committed the bad acts offered, State v. Tharp, 96 Wn2d 591, 637 P.2d 961 (1981). Once the trial court finds the preponderance standard met, the court must engage the traditional balancing test under ER 404 (b) and determine whether the probative value of the bad act evidence is relevant to one of the exceptions set out in ER 404 (b) and, if so, lastly, the trial court must determine whether the prejudicial effect of the bad act evidence, if admitted, overcomes its prejudicial effect.

There was not any evidence of any misconduct upon the part of petitioner's counsel. In addition, the probative value of the proffered evidence must

be weighted against the prejudicial effect, and evidence of the lawyer's bad acts are, petitioner submits, never admissible. If the lawyer is engaged in criminal conduct in the courts in the course of representation of a client in a criminal case, the remedy is for the state to move to recuse the lawyer and prosecute him.

Destruction of the integrity of defense counsel has to be reversible error in a criminal trial under the rigorous the test of United States v. McDonald 620 F.2d 559 (5th Cir. 1980) and Bruno v. Rushon 721 F.2d 1193 (1983). The following is taken from the opinion in Bruno v. Rushon:

> In opening arguments before the jury, the prosecutor reviewed the testimony of an important witness for the defense that had repudiated earlier pro-prosecution statements she had given government investigators. He inferred that this sudden reversal at trial in her memory was the direct product of her consultation with the accused's attorney before she took the stand. He returned to this theme in the closing part of his argument. Thus, in hopes of destroying the credibility of her testimony on the stand, the prosecutor had labelled defense counsel's actions as unethical and perhaps even illegal without producing one shred of evidence to support his accusations.
>
> In closing his summation, the prosecutor lunged into a vicious attack on the accused's claims of innocence by openly hinting to the jury that the fact that the accused hired counsel was in some way probative of the defendant's guilt. Indeed, the obvious import of the prosecutor's comments was that all defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their client's involvement with the alleged crimes.

Here, the meeting was between defense counsel and witnesses. The defendant Lile was not present. The State produced evidence claiming to show that the witnesses changed their testimony after meeting with defense counsel and the repeated references to the presence of counsel was presented to impute responsibility for any change to defense counsel. The change of testimony after meeting with defense counsel presentation and argument by the prosecutor was designed purely to disparage defense counsel and portray him as a tamperer of witnesses. The effect on the defendant's case is the same however in that the jury sees defense counsel as corrupt and also concludes that defendant must be guilty, if his lawyer is tampering with witnesses.

Is not Bruno v. Rushon 721 F.2d 1193 (1983) on point?

6. Petitioner's petition for review can also stand independently on the remaining issues most significant:

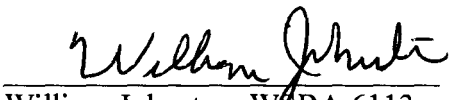
Did the trial court err in allowing the state to develop a bias against the defendant portraying him a violent man prone toward fighting because of his service in the United States Navy by arguing he was a warrior, considered himself to be a warrior and represented himself as a warrior because of a tattoo on his back which was displayed to the jury in the context that the defendant was a warrior. The connation given and intended was that by virtue of his service as a Second Class Petty Officer in the US Navy, the defendant was a warrior and his status as a warrior explained the state's hypothesis as to how the defendant attacked first Christopher Rowles and Taylor Powell and then, a defenseless woman, Amanda Millman.

Lile sees the trial judge's exercise of her discretion to allow impeachment of Lile on collateral facts and to impute the character trait of violence to him. The

judicial discretion exercised in this trial was totally in favor of the state and to the detriment of petitioner.

The remaining issues should also be considered to sustain a reversal, if necessary, based upon the doctrine of cumulative error.

Dated this 23rd day of May, 2016



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