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Case # 339874

Statement of Additional Grounds for Review

State of Washington
v.
Shane Morgan

COPY

FILED

AUG 17 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By________

IN THE COURT OF APPEALS
FOR DIVISION III

SHANE MORGAN, Appellant,	)	~~MOTION TO FILE~~ A STATEMENT
	)	OF ADDITIONAL GROUNDS
VS.	)	
	)	County No. 15-1-000721
STATE OF WASHINGTON, Respondants,	)	Appeal No. ~~33~~ 339874

I. FACTS.

The Appellant now comes forth to argue that the additional issues must now be considered pursuant to **R.A.P. 10.10**:

1). That the Prosecutor was vindictive in the exercising of amending of the Complaint;

2). The Prosecutor committed misconduct numerous times on the record;

3). The Attorney of Record failed to represent the defendant at some crucial points of arguments from the Prosecutor, and

4). The Judge had committed misconduct throughout the Record by the decisions made.

II. ARGUMENT.

DID THE APPELLANT RECEIVE A FAIR TRIAL IN THIS CASE?

The Appellant will now come forth to raise some crucial points of arguments that requests this court to have the State not

only respond to them, but also for the courts to weigh the issues as well. State v. Gout, 111 Wn.App. 875,881, 46 P.3d 832 (2002) (quoting Bjurstrom v. Campbell, 27 Wn.App. 449,450-51, 618 P.2d 533 (1980)); State v. Williamson, 120 Wash.App. 1001 (2004); State v. Gragg, No. 32776-7-II (2006); Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994)(citing Coleman v. Thompson, 111 S.Ct. 2456, 115 L.Ed.2d (1991); Nickerson, 971 F.2d at 1129.

The following issues **must** now be considered:

(A). VINDICTIVE PROSECUTION.

It is clear that the Prosecutor is relying on his authority of power to charge that it becomes a clear showing of vindictiveness in the beginning of Trial. **VRP at 15.**

It becomes an act of vindictiveness later on in the record when the attorney and prosecutor begin to argue the issue; **VRP at 31-43**; and the attorney states how the prosecutor is trying to force a plea on the defendant; **VRP at 36-37**; and how the State has failed to show any type of new evidence that they may have beenbeen even "seeking" that is never shown, only an act of vindictive prosecution is all there is here. **VRP at 36.**

This court must recognize that the Constitutional Due Process principles prohibit prosecutorial vindictiveness. United States v. Goodwin, 457 U.S. 368,372-85, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982).

It was clear that the defendant wanted to seek a Trial, but not be punished for it , but the prosecutor had other intentions

in mind. United States v. Meyer,810 F.2d 1242,1245-46 (D.C. Cir. 1987); U.S. v. Wall,37 F.3d 1443,1447 (10th Cir. 1994)(quoting U.S. v. Wood,36 F.3d 945,946 (10th Cir. 1994)).

The prosecutor had decided to Amend the Charging Document at trial using the grounds of warning the defendant of the posibility, but usually comes with new evidence or the acknowledgment that the State is seeking some additional evidence and **none** of this had ever occurred. State v. Schaffer,120 Wash.2d 621, 845 P.2d 281 (1993); State v. Pelkey,109 Wash.2d. 484, 745 P.2d 854 (1987); State v. Gosser,33 Wash.App. 435, 656 P.2d 514 (1982).

If this court was to give a proper review of the record it would show that the state would **never** be able to prove their actions in this case in regards to this issue. Wall,37 F.3d at 1447(quoting U.S. v. Raymer,941 F.2d 1031,1040 (10th Cir. 1991)).

(B). DIRECT EVIDENCE.

The State prosecutor and the investigating officer know that there has to be a showing of the Chain of Command of how the evidence is present and that was never shown;**VRP at 29**; and that shows in the testimony made by Jennifer Rogers(officer); **VRP at 101-136**; and Perry Lomax(security);**VRP at 136-169.**

This shows that the evidencve of the receipts should of never been admitted as evidence without showing the proper "Chain of Command" in this matter. State v. Campbell,103 Wn.2d 1,21, 691 P.2d 929 (1984).

This must be done appropiately and with sufficient completeness or it will cause a reversal as is here.U.S. v. Cardenas,864 F.2d 1528,1531 (10th Cir. 1989).

This court must now also review this and establish whether or not this was a "HARMLESS ERROR" under the Brecht test.Brecht v. Abrahamson,507 U.S. at 637, 113 S.Ct. 1710(quoting Kotteakos v. United States,328 U.S. 750,776, 66 S.Ct. 1239, 90 L.Ed.2d 1557 (1946)).

The very clear reason this is now being stated is because the testimony given by Perry Lomax establishes that he does not control the video ot the removal of the evidence from the system, only the knowledge of the definitions and how it operates and this does not establish a Harmless Error by any means.O'Neal v. McAninch,513 U.S. 432,439, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995); Gray v. Klauser,282 F.3d 633,651 (9th Cir. 2002); United-States v. Hitt,981 F.2d 422,425 (9th Cir. 1992); Payton v. Woodford,299 F.3d 815,828 (9th Cir. 2002).

These are statements that were made in Trial and are now subject to comment just as any other bit of evidence.United States v. Chaney,446 F.2d 571,575-76, cert.denied, 404 U.S. 993.

(C). PROSECUTORIAL MISCONDUCT.

(c)(1) During Trial:

When an appellant raises a claim of Prosecutorial Misconduct that it is held to a high threshold for the argument to prevail and these courts are known to want a showing of both improper

conduct and resulting prejudice;State v. Fisher,165 Wn.2d 727, 747, 202 P.3d 937 (2009);State v. Miles,139 Wash.App. 879,885, 162 P.3d 1169 (2007); State v. Hughes,118 Wn.App. 713,727, 77 P.3d 681 (2003)(citing Stenson,132 Wn.2d at 718, review denied, 151 wn.2d 1039 (2004), or amount to a denial of Due Process; Darden v. Wainwright,477 U.S. 168,181, 106 S.Ct. 2464, 91 L.Ed. 2d 144 (1986)(quoting Donnelly v. DeChristoforo,416 U.S. 637,643, 94 S.Ct. 1868, 40 L.Ed.2d. 431 (1974)).

The prosecutor had started off by making flagrant statements that the court should of never allowed about two males shopping together considering there is an **LGBT** community that does this all the time in the Society, but made it seem unnatural to the Jury members.**VRP at 159-61.**

This statement was objected to, but the Judge had allowed this to continue committing an abuse of discretion allowing this to occur; United States v. Foreman,588 F.3d. 1159,1164 (8th Cir. 2009); United States v. Miller,621 F.3d 723,730 (8th Cir. 2010); Mayer v. Sto Indus.,Inc.,156 Wash.2d 677,684, 132 P.3d 115 (2006); State v. Levy,156 Wash.2d 709,721, 132 P.3d 1067 (2006); and the prosecutor tried to state that he was not asking for an opinion which is completely false;**VRP at 159;** and this amounts to a Manifest Constitutional Error that is not harmless; State v. Bar,123 Wn.App. 373 (2004); especially since this appellants guilt is not founded on hard evidence; State v. Kirkman,126 Wn.App. 97 (2005); and this is no different

than bringing forth perjured testimony; United States v. LaPage, 231 F.3d 488,491, 271 F.3d 909 (9th Cir. 2000); and leading this witness into a desired answer. State v. Scott,20 Wash.2d 696,698, 149 P.2d 152 (1944); State v. Torres,16 Wash.App. 254, 258, 554 P.2d 1069 (1976).

(c)(2) Closing Arguments:

Even though these courts give the prosecutor a wide laditude in making and expressing reasonable inferences from the evidence; State v. Hoffman,116 Wash.2d 51,94-95, 804 P.2d 577 (1991); the "**do not**" allow arguments that are "**unsupported**" by the admitted evidence. State v. Belgarde,110 Wash.2d 504,505,508-09, 755 P.2d 174 (1988).

The prosecutor had started off by making the mistake of misstating the Law on what is consistent to the Principal Actor and the Accomplice Actor to a crime trying to confuse the Jury on what the Co-Defendant had done in this crime and what this defendant had supposedly committed. **VRP at 284.**

The Law is clear that to prove "Accomplice Liability" the mere presence of a defendant without the actual proof of aiding the Principle Actor dispite the knowledge is "**not sufficient**" to establish Accomplice Liability. State v. Teal,117 Wn.App. 836, 73 P.3d 406 (2003); State v. Parker,60 Wash.App. 719,724-25, 806 P.2d 1241 (1991); and to review the rapid change of todays technology there is "no" possible way for an individual to know how to operate every electronic device created in our

society.State v. Castro,32 Wash.App. 559,564, 648 P.2d 485 (1982) (see also): State v. Collins,76 Wash.App. 496,501-02, 886 P.2d 243 (1995).

The prosecutor wanted then continue to confuse the Jury by making false statements about what the witness for the State was saying (Snyder) about who the clothing purchases were actually for at the time during the purchase;**VRP at 286**; and for the attorney to not object to these statements had actually amounted to ineffective assistance of Counsel; Zapata v. Vasquez,No. 12-17503 (9th Cir. June 9, 2015), and this allowed the State to make an improper appeal to the passion and prejudice to the Jury.State v. Thierry,**COA** No. 145379-7-II (2015); State v. Dhaliwal150 Wn.2d 559,578, 79 P.3d 432 (2003); State v. Brown,132 Wn.2d 529,561, 940 P.2d 546 (1997); State v. Monday,171 Wash.2d 667,675, 257 P.3d 551 (2011).

These are errors that are also "**not harmless**" without sacrificing a fair trial.Delaware v. Van Arsdali,475 U.S. 673, 89 L.Ed.2d 674,684-85, 106 S.Ct. 1431 (1986); Rose v. Clark,478 U.S. 570, 92 L.Ed.2d 460,470, 106 S.Ct. 3101 (1986); State v. Guloy,104 Wn.2d 412,426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

(D). JUDICIAL MISCONDUCT.

(d)(1) Dismissal:

After the arguments in closing the defense had again requested a dismissal of charges and the Judge had made a false statement

amounting to misconduct stating he **"cannot"** just overturn a conviction which the law is clear that an **"arrest of judgment"** can be had and a **"Knapstad Motion to Dismiss"** can occur in this case at hand by the Trial Judge.**VRP at 341,343.**

This type of error in Law not only violates the "APPEARANCE OF FAIRNESS DOCTRINE"; State v. Bilal,77 Wash.App. 720,722, 893 P.2d 674 (1995); In re Marriage of Littlefield,133 Wash.2d 39,47, 940 P.2d 1362 (1997), but is also a "PLAIN ERROR" in nature; United States v. Pirani,406 F.3d 543,550 (8th Cir. 2005) (quoting Johnson v. United States,520 U.S. 461,466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); showing a **"one-sidedness"** for the State Prosecutor in this decision; McMillan v. Castro,405 F.3d 405, 409-10 (6th Cir. 2005); Tumey v. Ohio,273 U.S. 510,535, 47 S.Ct. 437, 71 L.Ed. 749 (1927); that enacts a "LIBERTY INTEREST" for this court to now review the matter; Hewitt v. Helms, 459 U.S. 466, 103 S.Ct. 868, 74 L.Ed.2d 675 (1983); Toussaint v. McCarthy,801 F.2d 1080,1089 (9th Cir. 1986), cert denied, 481 U.S. 1069, 107 S.Ct. 2462, 95 L.Ed.2d 871 (1987), and this court has the **"responsibility"** to correct this **"error of interpretation"** of how the Law is applied.State v. DeVincentis,150 Wash.2d 11,17, 74 P.3d 119 (2003)(citing State v. Walker,136 Wash.2d 767,771-72, 966 P.2d 883 (1998)); State ex rel Carroll, 79 Wash.2d at 26, 482 P.2d 775.

(d)(2) Sentencing:

The courts have an obligation to apply a sentence that does not show an abuse of discretion, especially when it comes to

the "knowledge" factor of Accomplice Liability;State v. Hayes,No. 89742-5 (2015); and when it comes to an individual "asking for help" to be corrected the courts have an "obligation" to assist the defendant in a sentence that will allow this individual to stop committing crimes in the future.State v. Williams,97 Wn.App. 263, 983 P.2d 687 (1999)(citing State v. Summers,60 Wn.2d 702,707, 375 P.2d 143 (1962)).

This Judge that had adequate evidence before him about the defendants "MENTAL HEALTH" and "DRUG ABUSE" problems had still decided to abuse his discretion in what to do to the defendant in regards to a sentencing alternative of DOSA "knowing" its more difficult to complete this type of program than just sitting in a cell and being again released into Society.VRP at 381.

This Judge did not "infer" his knowledge, but actually "presumed" what he thought what this defendant was going to do and that is not allowed in the court system.State v Womble,93 Wash. App. 599,604, 969 P.2d 1097 (1999).

This Judge clearly had "RELIABLE EVIDENCE" of the defendant "voluntarily" revoking a prior "DOSA" treatment due to legal issues that were occurring and was complying with the requirements to complete the program at the stage he was at;State v. Strauss,119 Wash.2d 401,418, 832 P.2d 78 (1992); State v. Herzog,112 Wash.2d 419,424, 771 P.2d 739 (1989); and this liberty issue arises from Laws and Policies of this State.Wilkinson v. Austin,545 U.S. 209,221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005)(citing Vitek v. Jones,445 U.S. 480,493-94, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980).

It is clear that "**no reasonable person**" would of taken this position to try and correct an individual such as this when there was a "SHOWING OF ATTEMPT" for treatment as was here by this defendant.Mayer v. Sto. Indus.,Inc.,156 Wash.2d,. 677,684, 132 P.3d 115 (2006)(quoting State v. Rorich,149 Wash.2d 647,654, 71 P.3d 638 (2003)(quoting State v. Lewis,115 Wash.2d 294,298-99, 797 P.2d 1141 (1990)); State v. VyThang,145 Wash.2d 630,642, 41 P.3d 1159 (2002); Nationwide Mut.Fire Ins. Co. v. Ford Motor Co.,174 F.3d 801,805 (6th Cir. 1999), overruled on other grounds by Adkins v. Wolever,554 F.3d 650,652 (6th Cir. 2009).

(E). CLOSING.

The appellant now requests that this court now make rational decisions on these issues raised and protect what the State of Washington relies on as the "INTEREST OF JUSTICE" when determining what type of relief "**must**" be given;State v. Gilbert,68 Wn.App. 379,384, 842 P.2d 1029 (1993); especially now considering that there is "**merit**" to act on this appeal and Statement of Additional Grounds herein.Surland v. State,392 Md. 34,35, 895 A.2d 1034 (2006); State v. Webb,167 Wash.2d 470, 219 P.3d 695 (2009).

(F). RELIEF.

The Appellant now comes forth to request this court to grant the following type of relief:

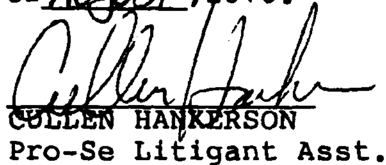
1). Dismiss the Charges w/ or w/o prejudice; or

2). Reverse and Remand for a new Trial, and

3). Determine that the Lower Courts had clearly abused its discretion on denying a sentencing alternative to treatment.

I SWEAR UNDER THE PENALTY OF PERJURY THAT ALL STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE

Dated this 6 day
of August, 2016.



CULLEN HANKERSON
Pro-Se Litigant Asst.

SHANE MORGAN

DECLARATION OF MAILING

I, Shane Morgan, now states and declares that a true copy of this motion was sent to the following individuals:

THE COURT OF APPEALS
DIVISION III
N. 500 CEDAR
SPOKANE, WA 99201

JILL SHUMAKER REUTER
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and was sent through the Monroe Correctional Complex Legal Mail system on the 6 day of August, 2016 by way of First Class Mail.

I SWEAR UNDER THE PENALTY OF PERJURY THAT ALL STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE

Dated this 6 day
of August, 2016.

SHANE MORGAN