

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
3/22/2021 10:15 AM  
BY SUSAN L. CARLSON  
CLERK

The Supreme Court  
State of Washington  
Supreme Court No. 98215-7  
COA# 5215-6-II

State of Washington  
Respondent  
V

Donald Howard McELISH  
Appellant

Motion for Review

Treated as a Petition for Review

Donald Howard McELISH 239025  
Rm-5c

Donald Howard McELISH  
#239025 GB-04-1L  
Coyote Ridge Correction Center  
PO Box 769  
Conwell Wa. 99324

## Cases

State v Robin Lee Davis 177 W.V. App. 454; 311 P.3d

1278 2013 W.V. App. Div I

State v Kenneth O East 3 W.V. App. 128; 474 P.2d 582

1970 W.V. App. Div I

State v Kassahun 78 W.V. App. 938 W.V. App. 1995

State v Martin 149 W.V. App 689 Div I 2009

State v Motyka 21 W.V. App 798; 386 P.2d 913

1978 Div III

Blackburn v Cross 510 F. 2d 1014 5th Cir

## Rules

ER Rule 801

ER Rule 203

RAP 2.5 (a)(2)

RAP 2.2 (b)

RAP 12.1

RAP 2.5 (c)(2)

## Statute >

5th Amendment next

RCW 9A.44.100 (1)(a)

RCW 9A.44.50 (1)(a)

RCW 9A.28.20 (1)(3)(a)

## Insurrection

Doctrine of Collateral Estoppel  
5th Amendment - Double Jeopardy

## Exhibits

Six (6) pages McELRISH exhibit I

Belong Judgment and Sentence see 3.2 Exhibit II

CRR 4.7 "Discovery" due process violation Exhibit III

Spencer Court order 12-2-01146-7 } Exhibit III

Smith Affidavit (withheld at trial)

(iii)

## Identity of Petitioner

Donald W. McElish 239025

Prisoner Pw-2c

GB-04-12

Coyote Ridge Correctional Center

Po box 769

Council No. 99326

Exhibit 1

McElfish

Judge Haan made 3 findings of fact that were overturned by the appellate court (underlined language is what was directly overturned):

- 1. "At the hearing on May 10[,] [C.M.] testified she was aware of the contents of the affidavit and that half of the affidavit was incorrect and half of it was correct"

**A) CM statements in agreement with affidavit:**

- i. *McElfish had limited participation in the events:*

Pg. 15:

“Q: ...So when you arrived at that location, Mr. McElfish, Donnie, he was asleep- or appeared to be asleep?”

A: Um-hum.

Q: He was lying in his bed?

A: Um-hum.

Q: All right. So, up to this point, it’s fair to say he had absolutely no knowledge or participation in getting you down to that location?

A: I don’t think so.”

Pg. 18-19:

“Q: And, ma’am, at this point, my client’s essentially still in the process of waking up; is that correct?”

A: Yeah, he’s standing up, I think out of bed by then.

Q: All right. But he’s not participating in any of this behavior at this point; correct?

A: Yes.”

Pg. 30:

“Q: Ma’am, isn’t it safe to say upon reflection that, you know, frankly, if all three of these guys had been in on it together that, you know, frankly, Mr. McElfish would’ve been more involved from the beginning?”

A: Probably.”

Pg. 31:

“Q: Okay. So, ma’am, you know, frankly, he never tried to kidnap you and he didn’t start this; correct?”

A: Yes.

Q: And he didn't actually try and, you know, rape you or anything along those lines; correct?

A: No, Brandt was the on switch, he didn't try and do that."

Pg. 47:

"Q: ...My client had nothing to do with you getting to that room; correct?

A: Yeah.

Q: All right. And, you know, my client was not involved in beating you or threatening you with any weapons; correct?

A: Yeah.

Q: All right. And it is correct that my client was asleep when you got into that; yes?

A: Um-hum, yes."

ii. *McElfish appeared scared during the altercation:*

Pg. 16:

"A: We just walked in the back door and then he screamed at [McElfish], and he just jumped up and kind of- he's like yelling: Wake up, which I was shocked about because he usually didn't yell at [McElfish] because they were friends"

---

"Q: ...Did my client appear scared to you?

A: He was half awake, and, yeah

Q: Are you-

A: Not at- maybe scared, or tired a little. Yeah, he just wasn't expecting to get yelled at when he was sleeping."

Pg. 26-27:

"Q: You testified that he appeared scared; is that correct?

A: Yeah. I said- yeah."

Pg. 30-31:

"Q: So upon reflection, isn't it true that you've come to the conclusion that he was not as involved as Mr. Jensen?



A: Yeah, I never thought he was as involved as Mr. Jensen. I said I thought he was scared and that he probably was scared that Brandt would get mad at him if he let me go, you know--"

Pg. 47-48:

"Q: It is also correct that my client appeared scared of Mr. Jensen; correct?

A: Yes, I think so.

Q: All right. And it's also correct in the statement that, you know, when you attribute things to him, it may have been that he was acting out of fear; correct?

A: Yes."

iii. *McElfish did not engage CM in sexual activity*

Pg. 29:

"Q: Okay. But my point is: My client never did anything sexual to you; correct?

A: Well, not really.

Q: All right.

A: He tried, though."

Pg. 50:

"Q: Okay. But you didn't actually think that he was going to have sex with you; correct?

A: I don't know. I wouldn't think- I wouldn't think he would

Q: Okay. And you, in fact, made representations that you didn't think he was physically able to have sex; correct?

A: From what I've heard and stuff and stuff-

---

A: Yeah. I didn't think he was going to..."

**B) CM statements disagreeing with affidavit:**

i. *McElfish trying to grab/stop CM from leaving (v. helping CM leave in affidavit)*

Pg. 25:

"A: ...I ran for the door that was right by it, it's close by, so [McElfish] tried to grab me and pull me back in, but I got away."

Pg. 29:

"Q: He, in fact, didn't even say 'stop' or anything along those lines; correct?"

A: I can't remember if he said anything, but he was just grabbing me, pullin' me back in.

Q: Well, he didn't, in fact, pull you back in; correct?"

A: No, because I got away.

Q: Okay. He touched you; correct?"

A: He tried grabbing me, my arm. It's just hard to remember very detail [sic], but yeah, he grabbed me."

Pg. 34:

"Q: He didn't open up the door for you; correct?"

A: No he didn't try to help."

Pg. 42:

"Q: In this statement it says that he was- he, [McElfish], was trying to help you get the tape off, he wasn't trying to keep you there or hurt you-

A: He wasn't trying to help me get the tape off."

ii. *CM did not feel guilty for 'sending an innocent man to jail'*

Pg. 34:

"A: Yeah, and [the affidavit] said other things, like I said I feel really guilty because I didn't want an innocent man to go to jail. I wouldn't want an innocent man to go to jail, either; but, I just said what was true, and then they decided that."

iii. *CM alleges McElfish touched her breast*

Pg. 38:

"Q: Did he try to touch you at any point while you were still sitting in the chair?"

A: At one point, I don't know if it was when we were alone or when the guys were still in there, but he, like, touched my boob or something."

---

"Q: So, at some point, either when you were alone or when all three men were there, he did touch your breast?"

A: Yeah, and I was kind of shocked, because I was like- I was surprised because I didn't think he was on their side or anything. I don't know."

Pg. 44-45:

"Q: ...Ma'am, you stated today that your breast was touched; correct?"

A: I do remember something like that..."

---

"Q: Okay, so you do remember being touched, but you don't have a clear recollection of how it occurred; correct?"

A: He just touched- he just grabbed me, or something-"

Pg. 48:

"Q: Okay. Ma'am, when I was questioning you just a half hour ago you said he didn't do anything sexual to you; correct?"

A: Well he grabbed my boob, but I meant, like, you know, try to have sex with me or something, or rape."

iv. *General statements of disagreement*

Pg. 34:

"A: ...[the affidavit] said a lot of things that weren't true."

Pg. 47:

"A: ...[the affidavit]'s a lot wrong."

**C) CM statements that don't clearly agree or disagree**

i. *CM can't remember whether McElfish touched her vagina*

Pg. 40:

"Q: Now during the trial, at the original trial, you testified that you remembered something about him trying to touch you anywhere else on your body and you said on your privates- your private area.

A: I don't remember that, I don't-

Q: Okay.

A: I mean, I- I might have blanked- blacked it out, or something."

ii. *CM can't identify where any touching may have become sexual*

Pg. 46:

"Q: ...Ma'am, do you know if there was any sexual intent when- you know, is there anything you can point to, to show that any touching was sexual in nature?"

A: Well, I don't know he did it, but it must've been something."

2. "Inconsistent with her testimony at trial, while stating the Mr. McElfish touched her breast, she testified that Mr. McElfish did not touch her in a sexual manner. She denied that he touched her vagina and added that at the time of this incident, the defendant appeared to be scared of Jensen. The court finds this testimony to be reliable"

For statements relating to alleged sexual activity, SEE 1.A.iii

For statements relating to McElfish allegedly touching CM's breasts SEE 1.B.iii

For statements relating to McElfish allegedly touching CM's vagina, SEE 1.C.i

3. "There was no direct evidence at trial that corroborated the claims made by [C.M.]"

Exhibit 2

FILED  
SUPERIOR COURT

2014 APR 24 PM 2 40

GOWLITZ COUNTY  
BEVERLY R LITTLE CLERK  
BY AL

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DONALD HOWARD MC ELFISH,

Defendant.

SID: WA11387775  
If no SID, use DOB: 07-23-50

No. 12-1-01146-7

Felony Judgment and Sentence (FJS)

- Prison  RCW 9.94A.507 Prison Confinement  
 Jail One Year or Less  RCW 9.94A.507 Prison Confinement  
 First-Time Offender  
 Special Sexual Offender Sentencing Alternative  
 Special Drug Offender Sentencing Alternative  
 Clerk's Action Required, para 4.5 (DOSAs), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

14 9 00984 1 *Sam*

I. Hearing

1.1 The court conducted a sentencing hearing this date 4/24/14; the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court Finds:

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon

guilty plea  jury-verdict MARCH 17, 2014  bench trial: *MKH*

Count	Crime	RCW	Date of Crime
I	ATTEMPTED RAPE IN THE SECOND DEGREE	9A.44.050 9A.28.020(1)	10-05-12
III	KIDNAPPING IN THE FIRST DEGREE	9A.40.020(1)	10-05-12
IV	ASSAULT IN THE SECOND DEGREE INTENT TO COMMIT A FELONY WITH SEXUAL MOTIVATION	9A.36.021(1)(e) 9.94A.030 9.94A.835	10-05-12

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1.

The burglary in Count \_\_\_\_\_ involved a theft or intended theft.

The jury returned a special verdict or the court made a special finding with regard to the following:

The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.507.

The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count \_\_\_\_\_ RCW 9.94A.533(9).

The offense was predatory as to Count \_\_\_\_\_ RCW 9.94A.836.

Felony Judgment and Sentence (FJS)  
(RCW 9.94A.500, 505)(WPF CR 84.0400 (4/2008))

*74*

- The victim was under 15 years of age at the time of the offense in Count \_\_\_\_\_ RCW 9.94A.837.
- The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count \_\_\_\_\_ RCW 9.94A.838, 9A.44.010.
- The defendant acted with **sexual motivation** in committing the offense in Count IV RCW 9.94A.835.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The defendant used a **firearm** in the commission of the offense in Count \_\_\_\_\_ RCW 9.94A.602, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count \_\_\_\_\_ RCW 9.94A.602, 9.94A.533.
- Count \_\_\_\_\_, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, when a juvenile was present in or upon the premises of manufacture in Count \_\_\_\_\_ RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- The defendant committed  **vehicular homicide**  **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- For the crime(s) charged in Count(s) \_\_\_\_\_, **domestic violence** was pled and proved. RCW 10.99.020 & RCW 26.50.010(1).
- The offense in Count \_\_\_\_\_ was committed in a county jail or state correctional facility. RCW 9.94A.533(5).
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): **COUNT IV ASSAULT IN THE SECOND DEGREE**
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

**2.2 Criminal History (RCW 9.94A.525):**

	Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult, Juv.	Type of Crime
1	DRIVE BY SHOOTING	05-08-99	CLARK, WA	02-13-99	A	
2						
3						
4						
5						

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The following prior offenses require that the defendant be sentenced as a **Persistent Offender** (RCW 9.94A.570):

1118 5

The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

**2.3 Sentencing Data:**

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
I	4	XI	83.25 - 110.25 MOS	min - Life max	83.25 - 110.25 MOS min - Life max	LIFE
III	4	X	72 - 96 MOS		72 - 96 MOS	20 YEARS
IV	4	IV	15 - 20 MOS	min - Life max	15 - 20 MOS min - Life max	LIFE

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9).

Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are  attached  as follows: \_\_\_\_\_

**2.4**  **Exceptional Sentence.** The court finds substantial and compelling reasons that justify an exceptional sentence:

within  below the standard range for Count(s) \_\_\_\_\_

above the standard range for Count(s) \_\_\_\_\_

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were  stipulated by the defendant,  found by the court after the defendant waived jury trial,  found by jury, by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4.  Jury's special interrogatory is attached. The Prosecuting Attorney  did  did not recommend a similar sentence.

**2.5 Ability to Pay Legal Financial Obligations.** The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):



III. Judgment

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [X] The defendant is found NOT GUILTY of Counts II Indecent Liberties / Rape & Compulsion

[ ] The court DISMISSES Counts \_\_\_\_\_

IV. Sentence and Order

It is Ordered:

4.1a The defendant shall pay to the clerk of this court:

JASS CODE

RTN/RJN \$ TBD Restitution to: \_\_\_\_\_  
(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

PCV \$ 500.00 Victim assessment RCW 7.68.035

\$ Domestic Violence assessment up to \$100 RCW 10.99.080

CRC \$ 3419 Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$ 200.00 FRC

Witness costs \$ WFR

Sheriff service fees \$ 2,819.00 SFR/SFS/SFW/WRF

Jury demand fee \$ 250.00 JFR

Extradition costs \$ EXT

Incarceration fee \$ 150.00 JLR

Other \$

PUB \$ 8110.109 Fees for court appointed attorney RCW 9.94A.760

WFR \$ Court appointed defense expert and other defense costs RCW 9.94A.760

FCM/MTH \$ Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430

CDF/LDI/FCD \$ Drug enforcement fund of Cowlitz County Prosecutor RCW 9.94A.760  
NTF/SAD/SDI

MTH \$ Meth/Amphetamine Clean-up fine \$3000. RCW 69.50.440, 69.50.401(a)(1)(ii).

CLF \$ 100.00 Crime lab fee [ ] suspended due to indigency RCW 43.43.690

\$ 100.00 Felony DNA collection fee [ ] not imposed due to hardship RCW 43.43.7541

RTN/RJN \$ Emergency response costs (for incidents resulting in emergency response and conviction of driving, flying or boating under the influence, vehicular assault under the influence, or vehicular homicide under the influence, \$1000 max.) RCW 38.52.430

\$ Urinalysis cost

\$ Other costs for: \_\_\_\_\_

\$ 4935.109 Total RCW 9.94A.760

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[ ] shall be set by the prosecutor.

[X] is scheduled for 6-30-2014 @ 9:00am

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[ ] Restitution ordered above shall be paid jointly and severally with:

Name of other defendant                      Cause Number                      (Amount-\$)

RJN

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[ X ] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 25.00 per month commencing \_\_\_\_\_ RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

[ ] The court finds that the defendant has the means to pay, in addition to the other costs imposed herein, for the cost of incarceration and the defendant is ordered to pay such costs at the rate of \$50 per day, unless another rate is specified here: \_\_\_\_\_ (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.1b [ ] **Electronic Monitoring Reimbursement.** The defendant is ordered to reimburse \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_, for the cost of pretrial electronic monitoring in the amount of \$ \_\_\_\_\_.

4.2 **DNA Testing.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[ ] **HIV Testing.** The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 **No Contact:** The defendant shall not have contact with CHERYL L. MIRANDA 10-18-70 \_\_\_\_\_ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence).

[ X ] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

The defendant shall not use, own or possess any **firearm** or ammunition while under the supervision of the Department of Corrections. RCW 9.94A.120.

[ ] The firearm, to wit: \_\_\_\_\_ is forfeited to \_\_\_\_\_ a law enforcement agency.

4.4 **Other:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4.5 Confinement Over One Year. The court sentences the defendant to total confinement as follows:

(a) Confinement. RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

96 months on Count III \_\_\_\_\_ months on Count \_\_\_\_\_  
0 months on Count IV as it is the same criminal conduct  
\_\_\_\_\_ months on Count \_\_\_\_\_ months on Count \_\_\_\_\_

The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_.

The confinement time on Count \_\_\_\_\_ includes \_\_\_\_\_ months as enhancement for  firearm  deadly weapon  sexual motivation  VUCSA in a protected zone  manufacture of methamphetamine with juvenile present  sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: 100-LIFE

The sentence herein shall run consecutively with any DOC sanction imposed in cause number: \_\_\_\_\_ County Cause # \_\_\_\_\_, but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The sentence herein shall run consecutively with the sentence in cause number(s) \_\_\_\_\_

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(b) Confinement. RCW 9.94A.507 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count I minimum term 100 months maximum term LIFE  
Count \_\_\_\_\_ minimum term \_\_\_\_\_ maximum term \_\_\_\_\_

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served unless the credit for time served prior to sentencing is specifically set forth here by the court: \_\_\_\_\_

4.6 Community Placement or Community Custody. The court orders community placement or community custody as follows:

Community Placement: Count \_\_\_\_\_ for \_\_\_\_\_ months;  
Count \_\_\_\_\_ for \_\_\_\_\_ months; Count \_\_\_\_\_ for \_\_\_\_\_ months.

Community Custody for count(s) I, sentenced under RCW 9.94A.507, for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

Community Custody:  
Count III for 36 months;  
Count \_\_\_\_\_ for \_\_\_\_\_ months;  
Count \_\_\_\_\_ for \_\_\_\_\_ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660

committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.507 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) The defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) The conditions of community placement or community custody include chemical dependency treatment		
c) The defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (8) for sex offenses, submit to electronic monitoring if imposed by DOC; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.720. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.507 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

The defendant shall have no contact with: \_\_\_\_\_

The defendant shall remain  within  outside of a specified geographical boundary, to wit: \_\_\_\_\_

The defendant shall not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030(8).

The defendant shall participate in the following crime-related treatment or counseling services: \_\_\_\_\_

The defendant shall undergo an evaluation for treatment for  domestic violence  substance abuse  mental health  anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: undergo an evaluation for treatment for sex offenders and fully comply with all recommended treatment

Other conditions: \_\_\_\_\_

For sentences imposed under RCW 9.94A.507, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

4.7  **Work Ethic Camp.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp. The court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

**4.8 Off - Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections:**

Other conditions may be imposed by the court or DOC during community custody or are set forth here: As outlined by DOC in Appendix F, if any, and additional conditions listed below:

- Submit to, and at your expense, a polygraph examination and a plethysmograph as directed by Corrections Officer or treatment provider.
- Participate in any therapy deemed necessary by your Corrections Officer.
- Have no contact with male/female/any children under the age of eighteen.
- The defendant shall not frequent parks or playgrounds or any location where minor children congregate.
- The defendant shall not live or stay in the residence where (minor child/minor females/minor males) are present unless granted specific permission by your community corrections officer or the court.
- Do not own, use, or possess firearms or ammunition.

**V. Notices and Signatures**

- 5.1 Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). **You are required to contact the Cowlitz County Collections Deputy, 312 SW First Avenue, Kelso, WA 98626 (360) 414-5532 with any change in address and employment or as directed. Failure to make the required payments or advise of any change in circumstances is a violation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 days in jail.** The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- This crime involves a Rape of a Child in which the victim became pregnant. The defendant shall remain under the court's jurisdiction until the defendant has satisfied support obligations under the superior court or administrative order, up to a maximum of twenty-five years following defendant's release from total confinement or twenty-five years subsequent to the entry of the Judgment and Sentence, whichever period is longer.
- 5.3 Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.
- 5.4 Restitution Hearing.**  
 I waive any right to be present at any restitution hearing (sign initials): \_\_\_\_\_
- 5.5 Community Custody Violation.**  
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.  
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).
- 5.6 Firearms.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

**Cross off or delete if not applicable:**

**5.7 Sex and Kidnapping Offender Registration.** RCW 9A.44.130, 10.01.200.

**1. General Applicability and Requirements:** Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a

*Felony Judgment and Sentence (FJS) (Appendix 2.4, Findings of Fact/Conclusions Exceptional Sentence)*

(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2007))

Page \_\_\_\_\_ of \_\_\_\_\_

student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

**2. Offenders Who Leave the State and Return:** If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

**3. Change of Residence Within State and Leaving the State:** If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

**4. Additional Requirements Upon Moving to Another State:** If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

**5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12):** If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

**6. Registration by a Person Who Does Not Have a Fixed Residence:** Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

**7. Reporting Requirements for Persons Who Are Risk Level II or III:** If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

**8. Application for a Name Change:** If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

5.8  Count \_\_\_\_\_ is a felony in the commission of which you used a motor vehicle. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.9 If you are or become subject to court-ordered mental health or chemical dependency treatment, you must notify DOC and you must release your treatment information to DOC for the duration of your incarceration and supervision. RCW 9.94A.562.

**5.10 IF AN APPEAL IS PROPERLY FILED AND APPEAL BOND POSTED, THE DEFENDANT WILL REPORT TO THE DEPARTMENT OF CORRECTIONS, WHO WILL MONITOR THE DEFENDANT DURING THE PENDENCY OF THE APPEAL, SUBJECT TO ANY CONDITIONS IMPOSED BY DOC AND/OR INCULDED IN THIS JUDGMENT & SENTENCE AND SPECIFICALLY NOT STAYED BY THE COURT.**

5.11 Other: \_\_\_\_\_

Done in Open Court and in the presence of the defendant this date: 4/24/14

*M. Law*  
Judge/Print Name:

*Amie Hunter*  
(Deputy) Prosecuting Attorney  
WSBA No. B1375  
Print Name: AMIE HUNTER

*Richard Suryan*  
Attorney for Defendant  
WSBA No. 13263  
Print Name: RICHARD SURYAN

*Donald Howard*  
Defendant  
Print Name: DONALD HOWARD  
MC ELFISH



**Voting Rights Statement:** I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: 

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the \_\_\_\_\_ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: \_\_\_\_\_

I, \_\_\_\_\_, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_

Clerk of the Court of said county and state, by: \_\_\_\_\_, Deputy Clerk

Exhibit 3

1 DONALD McELFISH, )  
PETITIONER, )  
2 -V.S- )  
3 )  
4 COWLITZ COUNTY, )  
SUPERIOR COURT )  
5 HONORABLE JUDGE HAAN )  
RESPONDENT, )  
6

CASE NO.12-1-01146-7

CrR 4.7 discovery  
Notice of due process violation

"Clerks Action required"

7 CrR 4.7 discovery rule: CrR 4.7 (a)(1)(i)(2)(7)(ii)(iii).

8 Having come to my attention through Public disclosure,  
9 I am informing all parties that a due process violation  
10 occurred at trial. That Exculpatory evidence (SMITH  
AFFIDAVIT) has been discovered, by diligence and Public  
Disclosure use. "Smith Affidavit" enclosed as Exhibit 1.

11 ER 801 (d)(1)(i)(ii) permits the admission of a trial  
12 witnesses prior inconsistent statement as Substantive  
13 evidence when that statement was made as a written  
14 complaint (under oath subject to penalty of perjury) to  
investigating police officers. These types of statements  
are commonly referred to in practice as "SMITH AFFIDAVITS"  
See State v. Smith 97 Wn. 2d, 856, 651 P.2d. 207, 209  
(1982).

15 At this time I am requesting an evidentiary hearing  
16 pertaining to the "SMITH AFFIDAVIT".

Sincerely

Mr. Donald McElfish

Donald McELFISH 239025  
GB-22-L  
Coyote Ridge Correction Center  
PO BOX 709  
CONWELL WA

19 cc=3 1 Exhibit

20 Prosecutor Aila Wallace

21 Court Honorable Judge Marlyn K Haan

22 Counsel Kevin Hochhalter

99326

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ENDORSED FILED  
SUPERIOR COURT

JAN 27 2020

COWLITZ COUNTY  
STACI MYKLEBUST, Clerk

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

State of Washington  
Plaintiff/Petitioner,

vs.

Donald McEiffish  
Defendant/Respondent.

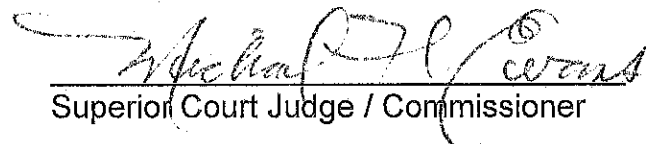
No. 12-1-01146-7  
ORDER

THIS MATTER having come on regularly for hearing before the above-entitled court, and the Court being fully advised; now, therefore,

IT IS HEREBY ORDERED:

Pursuant to RAP 7.2(a) this Court does not have authority to take action on this matter which is currently on appeal.

Date: 1-27-2020

  
Superior Court Judge / Commissioner

Redacted  
for Release

# COWLITZ COUNTY SHERIFF'S OFFICE STATEMENT FORM

STATEMENT OF CHERYL MURKIN  
ADDRESS 13431 Lewis River Rd  
DAY TELEPHONE 231-4280  
NIGHT TELEPHONE 608-8649  
DATE OF BIRTH 10-18-70  
BUSINESS \_\_\_\_\_

CASE NUMBER \_\_\_\_\_  
DATE \_\_\_\_\_  
PERSONS PRESENT: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Brant has the same leather bag as mine he accused me of taking his bag. I thought was mine a month ago. He had put my mace in it. Was a mistake I told him that I went to get it back for him + my other friend gave it away to someone cause I left it there. but we can still get it back. Well when I ran into ~~Brant~~ Brant + piglet he started up again about the bag. I told him I can get it back. He was workin his self up I could see + drinking whisky (He gets Meen) Jekle + Hyde, I really liked him I thought. They took me, made me go 2 the garage below 2 talk 2 Donny MacFish + going on and on about stupid things and said I had 2 pay back now for stealing but I really didnt, so he <sup>(Brant)</sup> said I had 2 get naked I didnt want to be yelled, threw me around the other guys just watched I though Donny or piglet would help me.

I, Cheryl Murkin, do certify (declare) under penalty of perjury under the laws of the State of Washington that I have read the foregoing statement or it has been read to me and I know the contents of the statement, and that the foregoing statement is true and correct. (RCW 9A.72.085)

Signed on this #5 day of October, 2012, in Cowlitz County, Washington.

Signature Cheryl Murkin  
Witness [Signature] 25

the # third guy was (Donny MacFish)

page 1  
Easy

COWLITZ COUNTY SHERIFF'S OFFICE  
STATEMENT CONTINUATION

STATEMENT OF CHERYL MIRANDA

CASE NUMBER \_\_\_\_\_

PAGE NUMBER \_\_\_\_\_

(Brant)  
then he hit me in the face" and also if  
i cryed he got angrier he cut his  
finger while duck taping me naked hands  
and feet onto the chair cut his finger  
bad almost off ~~at~~ then Blamed me  
for him getting cut. told me he  
was gonna cut me I deserve it.  
then he ~~he~~ hit me again in face.  
he said I have 2 get into bed  
with Donny first and then they  
were next. He left us alone  
is the only way I got away  
caz I wasnt gonna do them  
he turned to get the other  
ones back cuz it wasnt particip-  
ating then I made a run for it.  
~~then~~ I barely escaped, I ran  
away naked with just a tiny towel  
that kept falling off then 3 cars passed  
me up and a bus saw me then I  
heard him coming back on his ~~his~~ cycle 2 get

I, Cheryl Miranda, do certify (declare) under penalty of perjury under the laws of  
the state of Washington that I have read the foregoing statement or it has been read to me and I know the contents of the  
statement, and that the foregoing statement is true and correct. (RCW 9A.72.085) <sup>me</sup> 50 →

Signed on this 5 day of October, 2012, in Cowlitz County, Washington.

Signature Cheryl Miranda

Witness [Signature]

Witness \_\_\_\_\_

page 2

I jumped over the guard rail and down in to the stickers ~~to~~

Fell in the swamp. ran so fast, made it to the first house thought they were home they wouldn't answer panicked cuz I heard them coming to kill me. he doesnt wanna go to jail so hed take care of me.

Brant pulled a gun out and the knife also. and told ~~me~~ me to my face Im gonna kill you I dont care I have nothing to lose

I didnt wanna enter the house just wanted a phone + to hide tried to hide in porch couldnt they were coming.

27  
\$ it so real bed the lady was life or ~~page 3~~ death

Citation to Court of Appeals Division II No. 52115-6-11 dtd  
March 17 2020, Order denying Motion for re-consideration

Supreme Court of Washington NO 93088-1 ORDER  
COA NO 76737-2-1 Petition for Review Denied dtd Jan 3 2018

COA Division I NO 76737-2-1 ORDER Denying Motion  
for Re-consideration dtd 9/8/2017

Supreme Court of Washington NO 92637-9 ORDER  
COA NO 46216-8-II Petition for Review denied dtd June 1 2016

COA DIV II NO 46216-8-11 Order granting motion for  
Extension of time to file a motion for Re-consideration and denying motion  
for reconsideration dtd Dec 10 2015.



June 9, 2020

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

DONALD HOWARD McELFISH,

Appellant.

No. 52115-6-II

ORDER DENYING  
MOTION FOR RECONSIDERATION

Appellant Donald McElfish moves for reconsideration of the court's March 17, 2020 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Melnick, Sutton

FOR THE COURT:

  
\_\_\_\_\_  
MAXA, J.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
1/3/2018  
BY SUSAN L. CARLSON  
CLERK

# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD MCELFISH,

Petitioner.

No. 95088-1

## ORDER

Court of Appeals  
No. 76737-2-I

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen (Justice Owens sat for Justice Madsen), Stephens, González and Yu, considered at its January 2, 2018, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 3rd day of January, 2018.

For the Court

Fairhurst, C.J.  
CHIEF JUSTICE

FILED  
9/8/2017  
Court of Appeals  
Division I

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

STATE OF WASHINGTON,  
Appellant,  
v.  
DONALD HOWARD MCELFIN,  
Respondent.

No. 76737-2-I

ORDER DENYING MOTION  
FOR RECONSIDERATION

The appellant, Donald McElfish, has filed a motion for reconsideration. The court has taken the matter under consideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Tricker, A J

FILED  
5 JUN 01 2016  
WASHINGTON STATE  
SUPREME COURT

# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD HOWARD McELFISH,

Petitioner.

NO. 92637-9

ORDER

C/A NO. 46216-8-II

Department I of the Court, composed of Chief Justice Madsen and Justices Johnson, Fairhurst, Wiggins, and Gordon McCloud; considered at its May 31, 2016, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 1<sup>st</sup> day of June, 2016.

For the Court

Madsen, C.J.  
CHIEF JUSTICE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,  Respondent,  v.  DONALD HOWARD MCELFISH,  Appellant.
--

No. 46216-8-II

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE A MOTION FOR RECONSIDERATION AND DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for an extension of time to file a motion for reconsideration of the Court's October 20, 2015 opinion. Upon consideration, the Court grants the motion.

APPELLANT moves for reconsideration of the Court's October 20, 2015 opinion. Upon consideration, the Court denies the motion.

Accordingly, it is

SO ORDERED,

PANEL: Jj. Bjorgen, Maxa, Lee

DATED this 10<sup>th</sup> day of December, 2015.

FOR THE COURT:

*Bjorgen, A.C.J.*  
ACTING CHIEF JUDGE

cc: Aila Rose Wallace (via email)  
Christopher Gibson (via email)  
Donald Howard McElfish (via USPS)

FILED  
COURT OF APPEALS  
DIVISION II  
2015 DEC 10 PM 9:24  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

Was it an improper denial of Division II Court of Appeals to deny the Petitioner Mr. McELISH to bring under RAP 2.5(a)(2) which permits a new trial involving a Constitutional right to bring forth an issue for the first time on appeal

Had the COA Division II not taken in account the Relevant testimony that was given at the Superior Court hearing in granting a new trial, The Division II court prejudiced Mr. McELISH the Petitioner.

Had the Court of Appeals Div II not addressed the issue of Collateral Estoppel (Double Jeopardy) where other courts have long standing of recognizing the Doctrine of Collateral Estoppel?

Should the State have been barred by Double Jeopardy "Collateral Estoppel" from Appealing the Superior Courts ruling of issuing Defendant McELISH a new trial?

RAP 2.5(1)(2) an Appellate Court MAY review a decision in a prior Appeal in the same case if the Prior decision is clearly erroneous and did work an injustice (Manifest Injustice) to Mr. McElish.

RAP 2.2 b: The State or local government may appeal in a criminal case only from the following Super Court decisions and ONLY the appeal will not put the defendant in double jeopardy.

RAP 2.1 The Division I and Division II courts were not fully briefed to rule the charges Mr. McElish faced at trial:

(I) Attempted Rape II

(II) Indecent Liberties / Sexual Compulsion

(III) Kidnaps I

(IV) Assault in second degree w/ sexual compulsion.

Mr. McElish was found not guilty of Indecent Liberties w/ Sexual Compulsion. See Exhibit II, Felony Judgment and Sentence 3.2

RCW 9A.44.100(1)(a)

(1) A person is guilty of Indecent Liberties when he or she knowingly causes another person to have sexual contact with him or her or another.

(a) with Sexual Compulsion is a class A felony.

9A.28.20(1)(3)(a)

(1) A person is guilty of an attempt to commit a crime if with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

(3) an attempt to commit a crime is a;

(a) class A felony if the crime attempted is; Indecent Liberties w/ Sovereign Compulsion or Rape in the second degree.

Comparing 9A 44.100(2)(a) and 9A.28.20(1)(3)(a), the two crimes are the same in law and fact Sexual Touching is the act that happens in both statutes.

Under RAP 2.2(b) the state is barred from an appeal that puts the defendant in double jeopardy.

Under RAP 2.2(a) the state should have been barred from appealing Superior Court's ruling on New Trial. The Prosecution failed to brief Division II on the charge Indecent Liberties w/ Sovereign Compulsion, which McElish was found not guilty at trial.

The Sixth Amendment prohibition against Double Jeopardy incorporates "The Doctrine of Collateral Estoppel" and protects a defendant who has been acquitted of a charge from having the same matters redetermined at a later proceeding. See State v Kessakaw 78 Wn App. 938 Wn App. Div I Id.

RAP 2.2 Having had the Prosecutor in her appeal brief failed to brief the Court on the Indecent Liberties w/ Sovereign Compulsion verdict of not guilty prejudiced Mr. McElish before the court as having been guilty of Sexual Touching when, in fact McElishes jury acquitted him of that charge.



Under Doctrine of Collateral Estoppel must show:

(1) The issue decided in judgment is identical to that presented in the current action.

(2) The prior adjudication must have resulted in a final judgment on the merits.

(3) The opposing party, must be the same or in privity with a party to the prior litigation, and

(4) Application of Collateral Estoppel must not work an injustice. Collateral Estoppel applies in criminal law through the Fifth Amendment against Double Jeopardy.

The following "relevant" testimony taken at hearing may 10 21  
was never brought forward See SIX (c) pages MCEISH exhibit 1

(1) Did not kidnap C.M.

(2) Did not try to rape her

(3) Was not involved with attacks upon her

(4) there was no direct evidence at trial that corroborated  
claims made by C.M. Only hearsay and no testimony that would  
validate the crimes charged.

The Prosecutor does not bring forth evidence (testimony,  
statements) which is her responsibility to bring forward in this  
action or at trial that could be used to rule in MCEISH's  
favor.

This Prosecutorial Misconduct goes all the way back to victim's  
probable cause statement - See 4.7 "Discovery" "Notice of Pre Trial  
Violation" and order State Court dtd 1/27/20. This Smith Affidavit  
was withheld at trial. See Exhibit III

The Prosecutor withheld testimony that Judge Hagan  
used in all three findings that Division could overturned  
See SIX (c) Pages MCEISH Exhibit I

The Prosecutor withheld the findings of Not Guilty  
Indecency with a child w/ possible compulsion from the Court of Appeals  
Division I which brought about a Mahler error of Constitutional  
magnitude i.e.; Double jeopardy - Collateral Estoppel.

Conclusion

Relief Sought

Dismiss charges w/ prejudice and remand with instructions to Superior Court to re-try Mr. McELISH (grant a new trial) with full disclosure to include probable cause statement of Victim C.M.

Submit to Pro-se

Mr. Donald Howard McELISH

# 239025 GB04-11

Coyote Ridge Correctional Center

PO box 769

Cornwall, VT. 99326

Paul W. C. W.

Donald McELISH pro-se

## Mailing list

Supreme Court  
State of Washington  
Temple of Justice  
PO Box 40929  
Olympia WA, 98504

Aila Rose Wallace  
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# INMATE

March 22, 2021 - 10:15 AM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 98715-7  
**Appellate Court Case Title:** State of Washington v. Donald Howard McElfish  
**Superior Court Case Number:** 12-1-01146-7

DOC filing of McElfish Inmate DOC Number 239025

### The following documents have been uploaded:

- 987157\_20210322101501SC667920\_9637\_InmateFiling.pdf {ts '2021-03-22 10:10:49'}

*The Original File Name was doc1pcnl1171@doc1.wa.gov\_20210322\_091959.pdf*

The DOC Facility Name is Coyote Ridge Corrections Center.

The Inmate The Inmate/Filer's Last Name is McElfish.

The Inmate DOC Number is 239025.

The CaseNumber is 987157.

The Comment is 1of1.

The entire original email subject is 05,McElfish,239025,987157,1of1.

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