Case # 308502

Statement of Additional Grounds for Review

State of Washington
v.
Robert James Middleworth Jr.

30850-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

Case # 308502

ROBERT J. MIDDLEWORTH,

Affiant

v.

STATE OF WASHINGTON

Respondent

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Respectfully submitted:

by: Robert Middleworth # 948011
Affiant

Robert J. Middleworth
#948011 unit G cell GA02
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99362-0769

ISSUE 1

ILLEGAL EDITING OF TRANSCRIPT

Affiant is clearly at a disadvantage in this matter as the correctional institution in which I am incarcerated - Coyote Ridge - has denied me access to Internet, computer, and typewriter in an obviously highly illegal and collaborative effort with the Walla Walla County Prosecutor's Office to defeat my Appeal.

Their efforts have sunk much further into the criminal morass than just the usual lies and distortion of evidence. Indeed, the official transcript provided to this Court has been ***criminally*** and heavily edited to remove any evidence of actions strongly suggestive of judicial, prosecutorial and representative misconduct.

I will mention only one instance here, but I can assure the Court there are many more which will be addressed when I file my Tort case against the State of Washington, after I am exonerated of these fraudulent and spurious charges.

ISSUE 2

VIOLATION OF COURT ORDER

During Ms. Mulhern's summation in Trial Three, she stated that the evidence for my guilt was overwhelming; including, '***scabs***' on my penis. Attached as an Exhibit to this document is a '*Motion in Limine*' - from attorney Jerry Makus - to "*EXCLUDE EVIDENCE AND OPINIONS REGARDING PENIS LESIONS*". **(Ex. A)**

This Motion is dated **December 20, 2011**! That is long before the third trial took place. According to attorney Makus, Judge Schacht concurred with his Motion and suppressed any testimony - or reference to - in that regard.

When Ms. Mulhern made her comment concerning scabs, Mr. Makus jumped to his feet and objected loudly and vigorously to Ms. Mulhern's violation of the Court's Order and demanded a mistrial. Judge Schacht told him to "*Sit down and shut up. This thing is going to end, today.*"

However, this entire exchange has been edited out of the transcript. My mother, Phyllis Hewitt, and a family friend, Mildred Smith, were both present and witnessed this exchange, as did I. Obviously, if Ms. Mulhern violated a Court Order suppressing any reference to ***alleged*** lesions on my penis, a mistrial should have been granted.

Mr. Makus' arguments are well stated in his *Motion in Limine*; however, he now claims that the suppression order was only issued orally by Judge Schacht and that he failed to follow up with a request for an official order from the Court. That exchange between Judge Schacht and attorney Makus has been edited out, as well!

Now, Mr. Makus has made it clear that he will not assist my Appeals Attorney in any capacity in open repudiation of his legal obligation under Washington State Law. He has also attempted to extort money from me by offering to provide legal assistance but only if I pay him to do so at the rate he charges his private clients.

In Affiant's opinion, attorney Makus should have confronted Judge Schacht concerning his 'Oral Order' to suppress such testimony. He should have forced the bench to call for a recess until the issue had been discussed in chambers with both Mr. Makus and Ms. Mulhern. Not only did Mr. Makus fail to do that, but ***Judge Schacht made no effort to ascertain the reason for Mr. Makus' request for a mistrial!***

ISSUE III

VIOLATION OF THE FAIRNESS DOCTRINE

A. After the first trial, I attempted to have Judge Schacht recused from any further participation in this matter. This was based largely on Attorney Randy Lewis' '*Motion For a New Trial*', in which he exposed numerous judicial errors made by the bench in the first trial.

Judge Schacht ruled that since I had already recused Judge Lohrmann from the case, I had no other option but to allow him to continue. However, according to the laws of the State of Washington, that is not necessarily true. An ethical judge will recuse him/ herself, voluntarily, when it becomes clear that a ***Conflict of Interest*** exists.

While a litigant is allowed one ***unilateral*** recusal, further recusals may be justified on the basis of new evidence - or as in this case - continuing actions by the sitting judge which suggest or constitute a ***Conflict of Interest***.

Clearly, on the basis of his incompetence in the first trial, Judge Schacht should

not have continued to sit on this case for two additional trials after a new trial was granted partly on the basis of judicial error in denying me my right to be present in the courtroom."

B. Judge Schacht refused to dismiss attorney Gail Seimers from my case despite my stated belief that I could not work with her and despite evidence I submitted to the Court as proof that a '*conflict of interest*' existed between us. As a last resort, *I filed a malpractice suit against her in which I exposed her ineptitude as an attorney*.

I was incarcerated at the time, so I had to rely on a friend of mine - Guillermo F. Garcia - who is a paralegal to draw up my legal papers and file them with the Court. In addition to being a paralegal, Mr. Garcia is a retired *Special Agent* from federal law enforcement. He is also an upstanding citizen of good character.

In the transcripts provided to the Court from the Walla Walla County Superior Court, *First Trial - P. 40-45*, Judge Schacht engaged in a conversation with Ms. Mulhern and County Jailer Mr. Romine in which he slandered Mr. Garcia, repeatedly.

The Court can read those exchanges from the attached **Ex. B.** Of particular relevance is the exchange between myself and Judge Schacht on **P. 37**. I used my *unilateral recusal* against Judge Schacht in my malpractice lawsuit against Ms. Seimers. Thus, he was ethically prohibited from involving himself in the matter.

On **P. 44**, the following exchange between Judge Schacht and Mr. Romine (the jailer) was recorded:

> Schacht: "So also my understanding -- and correct me if I'm wrong, Captain, that Mr. Garcia for various type of inappropriate, illegal and unlawful behavior has been banned from the Walla Walla County Jail; is that not correct?" Romine: "That is correct."

This is an example of the subterfuge used by the bench and prosecution during the course of these trials. Mr. Garcia was assisting me as a paralegal in the malpractice case. ***Mr. Garcia also had my <u>POWER OF ATTORNEY</u>!*** Judge Schacht knew this, but he ***unethically*** used his position on the bench to obstruct my ability to defend myself.

<u>C.</u> ***<u>What is not memorialized here is very important</u>!*** **<u>a.</u>** The Order banning Mr. Garcia originated from Judge Schacht's chambers! Knowing his actions were in violation of judicial ethics, he never signed that Order. It was on file at the Walla Walla County Courthouse as of May 7, 2013. If it has disappeared, since, we all know why.

<u>b.</u> Mr. Garcia filed an *amicus brief* on my behalf after he reviewed the phony '***Certificate of Probable Cause***' filed by Officer Dutton against me. He conducted his own criminal investigation and proved beyond a shadow of a doubt that I was innocent. The prosecutor's office, the bench, and Gail Seimers collaborated to shut him up.

<u>c.</u> ***<u>Had</u>*** Mr. Garcia actually engaged in "*inappropriate, illegal and unlawful behavior*" as alleged by Judge Schacht and Mr. Romine, he would have had charges filed against him and been prosecuted to the fullest extent of the law and beyond. These people hate him with a passion! So, why weren't any charges filed against him?

<u>d.</u> These phony charges were instigated by a collaborative bit of theater

between Ms. Seimers, Mr. Romine, Judge Schacht and the prosecutor's office. Mr. Garcia had been to the jail numerous times assisting myself and others, (John Stearns, in particular) in the capacity of a paralegal and there were never any problems.

Mr. Garcia assists indigents in legal matters - *without charge* - and he does so in full accordance with the dictates of General Rules 24 & 25 of the Washington State Practice of Law Board.

When James Nagle (Walla Walla County Prosecutor) learned that Mr. Garcia was responsible for his declining conviction rate, he began an illegal crusade against him that continues to this day. Judges Zagelow, Votendahl, and Schacht involved themselves in this crusade with the end result that they opted to resign rather than face ethics charges.

When Mr. Garcia arrived at the jail to discuss the malpractice suit I filed against Ms. Seimers, Mr. Romine met him by the visitation rooms and told him, "Mr. Garcia you are not allowed back here." When Mr. Garcia inquired why, Mr. Romine replied, "Because you are a phony lawyer."

Mr. Garcia responded that he was not a lawyer of any kind and had never claimed to be a lawyer. Mr. Romine pointed down the hallway to a woman Mr. Garcia had never seen before and said, "That woman just told me that you informed her you were an attorney." That woman turned out to be Gail Seimers assistant!

The entire episode was a set-up to get rid of Mr. Garcia so he couldn't assist me

with my malpractice suit. The proof is that no charges were ever filed against him and the person who claimed Mr. Garcia told her he was a lawyer was Gail Seimer's aide - whom I just happened to be trying to get rid of as my attorney. Connect the dots!

With Mr. Garcia barred from the jail, I had no one to assist me in my lawsuit against Ms. Seimers. I requested a continuance so that I could have time to work on the case, but ***Judge Lohrmann dismissed my case without a hearing!***

e. Here is the two edged sword: *I unilaterally recused Judge Lohrmann from the criminal case filed against me by the prosecution*. The malpractice suit was inexorably linked to the criminal suit from which Judge Lohrmann had been recused. *He violated judicial ethics by failing to recuse himself.*

I unilaterally recused Judge Schacht from the malpractice suit. By involving himself in the collaborative effort to exclude Mr. Garcia from assisting me with that case by having him barred from the jail, *he voluntarily involved himself in a legal matter from which he had legally been recused; thus, violating judicial ethics*.

F. Judge Schacht then used the bench as a platform from which to denigrate Mr. Garcia so as to justify his decision to ban all materials submitted to the Court in my defense that didn't come from Ms. Seimers. In fact, Judge Schacht ordered the Court Clerks to refuse any materials from Mr. Garcia submitted on my behalf.

Attorney Randy Lewis castigated Judge Schacht in his '*Motion For A New*

Trial' for denying me my right to allow Mr. Garcia to assist me via a lawful 'Power of Attorney and denying Mr. Garcia his legal right to act as a paralegal. I believe that is what is known as *Criminal Restrain of Trade*!

Attorney Lewis' arguments were sufficiently persuasive to win me a new trial, but Judge Schacht was undeterred. He prohibited Mr. Garcia from assisting me in any way during the next two trials, even after Mr. Lewis took him to task for such actions!

CITING JUDGE SCHACHTS LEGAL OPINIONS ON THE FAIRNESS DOCTRINE

The strongest legal argument one can make against a judge in regard to the ***Fairness Doctrine,*** is to cite that judge's previous rulings on the subject. Thus, I have attached - as **Ex. C** - Judge Schacht's decision in the ***Appeal*** of *'College Place v Guillermo F. Garcia'*, No: 05-1-00052-7, on August 22, 2008.

In that case, Mr. Garcia had been found guilty in a jury trial of *assault and resisting arrest,* despite the favorable testimony of the only eyewitness and the absolute lack of any evidence to support the charges.

Although, there were numerous grounds on which to base an *Appeal*, Mr. Garcia's attorney, Janelle Carmen, argued that the sitting judge - John Junke - was in violation of the ***Fairness Doctrine*** when he failed to recuse himself on the basis that he was the attorney of record for Mr. Garcia's son, Justin Cadwallader, at the same time that he heard Mr. Garcia's case.

Exhibit C is a complete copy of Judge Schacht's decision. I will cite - in the interest of brevity - the most pertinent precedents which Judge Schacht used as *authorities* in his decision:

> **STATE V. BREMMER, 53 WnApp.367 (1989)** *"The law requires not only an impartial judge, but also a judge who appears to be impartial."*
>
> **STATE V RING, 134 An.App. 716 (2006)** *"This doctrine (the Appearance of Fairness Doctrine) requires the reviewing court to consider how the proceedings would appear to a reasonably disinterest person."*
>
> **MILWAUKEE RAILROAD V HUMAN RIGHTS COMMISSION, 82 Wn.2d 802 (1976)** *"Our system of jurisprudence also demands that in addition to impartiality, disinterestedness, and fairness of the part of the judge, there must be **NO!** question or suspicion as to the integrity and fairness of the system, i.e. **justice must satisfy the appearance of justice**..."*
>
> *"Thus, it is apparent that **even a mere suspicion of irregularity**... is to be avoided by the judiciary in the discharge of its duties. The issue is not whether the judge was actually biased or whether the interest actually affected him, **but whether the proceedings appeared fair**."*

a. Judge Schacht - indisputably - violated his previous rulings in '*College Place v Garcia*', in this case. The most disinterested person in the world would not condone Judge Schachts decision to force me to be represented by an attorney whom I was suing for legal malpractice, at the same time.

This is certainly in contrast to Judge Schacht's previous stance that "*This doctrine (the Appearance of Fairness Doctrine) requires the reviewing court to consider how the proceedings would appear to a reasonably disinterested person.*"

b. Judge Schachts collaboration with the prosecutor's office and the court-appointed attorney to bar Mr. Garcia from the jail in an effort to deny me legal assistance in my malpractice case against Gail Seimers violates his previous stance that "*...the law requires not only an impartial judge but also a judge who appears to be impartial.*"

This is especially egregious when these alleged violations ("*inappropriate, illegal and unlawful behavior)* were never detailed nor were any charges ever brought against him. Any disinterested observer would find that unacceptable!

c. Judge Schacht used his position on the bench as a bully pulpit to slander and denigrate Mr. Garcia with baseless rumors and spurious allegations - none of which were true - in an unethical effort to bolster the credibility of his *nuncios* barring Mr. Garcia from assisting me in my case against Gail Seimers. His actions clearly constituted judicial misconduct by forcing me to be represented by an incompetent attorney.

REPLY TO DEFENDANTS RESPONSES

P. 1, no. 5: Does an 'abiding belief' argument constitute reversible prosecutorial error where the argument mirrors the WPIC and there was no *timely objection*?

Reply: Ms. Zink pointed out in our brief that *timely objection* was made in the opening statements at the beginning of the trial by the prosecutor and **Judge Schacht ruled that she could not do that**.

P. 4, l. 6 &7: ... the child had significant exterior and *internal genital tearing*

bleeding, visible pustules, and sores.

Reply: There was no *internal genital tearing or bleeding*. There was only *exterior sores* that were referred to as pustules. The photos show no sign of interior bleeding or penetration.

P. 4, p. 2: Ms. Cooper and Lt. Dutton met with the Defendant the next day.

Reply: The interview with Ms. Cooper and Officer Dutton is not admissible in court because I was not read my rights including the disclaimer that whatever I said could be used against me in a court of law. Also, I never said I came in because they considered me a suspect. I simply went to see what I could do to help via a request from Kristy.

P. 4, p. 2, l. 4-6: He falsely stated that the child had a history of UTI's. She did not.

Reply: Classic case of misdirection and prevarication. I knew virtually nothing of Brandy's medical history. The prosecution has already acknowledged that it was Kristy who told the hospital staff she thought Brandy was suffering from an UTI.

P. 5, l. 1-2: ... he stated that he believed there were burns or bruising on the inside of the child's thighs due to the cold cans of pop.

Reply: Both Kristy and Brandy testified at trial that they used cold cans of soda to try and alleviate Brandy's discomfiture. I had nothing to do with that. I simply stated

that it could possibly have been the source of bruising.

P. 5 p. 2: On September 24, she had to be transported to Sacred Heart in Spokane for treatment. There she was treated for bacterial vaginosis and genital herpes simplex infection. By this time, she had developed herpes sore and **an UTI** .

Reply: Brandy was not sent to Sacred Heart for treatment of bacterial vaginosis and genital herpes simplex infection. She was sent there because Walla Walla could not determine what was wrong with her. Sexual assault wasn't an important factor at the time because no sexual assault or rape kit had ever been opened - ***and never was***!

Also, the prosecution seems to believe that since there were no medical records of Brandy suffering from UTI's, that Kristy was mistaken. However, Kristy never had money to pay for medical treatment and she only took Brandy in this time because I insisted she do so and because I said I would pay for it.

The suggestion that I was in any way responsible for Brandy's pathology - at that time - is ludicruous. I was incarcerated at the Walla Walla County Jail and Brandy was in foster care. Yet, the prosecution focused it's blame game on me. Even from jail!

P. 5, p.3: Dr. Wren and Dr. Edminster both testified that they had never seen this diagnosis in a child so young before.

Reply: The doctors did not testify to the child's diagnosis as being a sexually transmitted disease. They simply said it could be one of the many ways that a child could

get it. They also testified that the child could have had it transmitted to her through someone touching her. Most importantly, **her mother testified during the second trial that she had herpes during the time Brandy was wearing diapers and she was cleaning and changing her. Yet, in the first trial she denied that SHE had ever had herpes!**

P. 5, p. 2: Nurse Reynolds observed yellow-colored sores with drying, crusty scabs encompassing the majority of the top of the Defendant's penis, consistent with a herpes outbreak in the last 3-12 days.

Reply: Ms. Reynolds didn't testify to sores. Initially, she stated she saw what could possibly have been lesions. She was called as a witness to the evidence she took - ***not for her unverified opinion of an observation that was never substantiated by medical*** testing. That is why the court suppressed any testimony in that regard. The rape-kits were never opened or tested because the prosecution knew they were negative.

P. 6, p. 1: The 34 minute videotape of the interview was played for the jury.

Reply: This is the classic case of hysteria prevailing over reason in these kinds of cases. Three cases come to mind: The Wenatchee church sex scandal, the New York child care center and the Los Angeles child care center.

In each case, a mild complaint or statement taken out of context was used to launch an investigation where it was determined that each site had been a hell-hole of deviancy and sexual abuse. With each passing day the details became more sordid.

Even though many people were convicted and imprisoned, after the hysteria subsided and reason took over - as well as competent investigation - virtually everyone was exonerated. It's the Salem Witch Trials all over again and as American as apple pie.

P. 6, p. 2: At trial, BD described other incidences.

Reply: Brandy didn't describe any sexual assaults at all. The prosecutor described these alleged assaults and Brandy simply agreed. ***She also testified that she was doing what her mother and the prosecutor told her to do***.

Keep in mind that the prosecutor and CPS had custody of Brandy and if Kristy didn't do things their way, she was unlikely to ever regain custody of her child. Even now, she doesn't have custody. A relative does although Kristy lives with her.

Also, the prosecution keeps playing both sides of the street. On one hand, they allege Kristy is mentally incompetent and slow so they ignore her testimony that she only left Brandy with me **one time** for about 15 minutes. However, she is suddenly considered a competent witness when she is willing to testify against me. Very ethical!

P. 7, p. 1: The Defendant's motion for a new trial was granted on the basis that the Defendant's request to "address the jury" could have been interpreted as a request to testify and therefore should have been granted.

Reply: Apparently, the prosecutor failed to read the entirety of Randy Lewis Motion for a New Trial. It's very simplistic to state that was the reason for another trial

BEING granted. In fact. Mr. Lewis shredded the incompetency of Gail Seimers. savaged the ethical vacuousness of Ms. Mulhern. and castigated the judge for repeated instances of judicial error. She also failed to mention that Judge Schacht **on the record** stated "***There's no evidence and this case can't make it through appeal***"!

P. 7. 2: Defendant made a motion for mistrial the next day for the reason that the State had not properly redacted a taped interview of BD in the way the court had ordered.

Reply: This was typical of the prosecution, throughout. They ignored Court Orders, habitually, and Judge Schacht was extremely loathe to confront this. Even with this being an egregious violation of his Order, he very hesitantly agreed to the mistrial.

P. 8. p. 4: Defendant argues that the trial court violated his right to be present by holding a critical stage hearing in chambers. Because a status conference is not a critical stage, the right is not implicated.

Reply: I was told by attorney Makus that this was a '***pre-trial hearing***' where both old and new evidence could be discussed. As such, I was present and had issues prepared to present to the Court.

It is *so-convenient* for the prosecution that - ***after the fact*** - Judge Schacht decided to call it a '**status conference**'.

I was present and had issues I wanted to address to the Court, especially, that of Double Jeopardy which Attorney Makus had drawn up at my insistence and then

withdrew - without my permission - in Court! Even if this Court opts to call it a **status conference**, that status was subject to significant alteration by what I was prepared to present to the court at that time.

P. 8, p. 5: The core of this right is *...to be present when evidence is presented.*

Reply: I never waived my right to be present. Mr. Makus told me I was not allowed to attend. I insisted and *he denied me my right stating that Judge Schacht had made it clear I was not welcome to attend or observe*!

That really says it all! I had evidence to present which could have impacted the status of trial and I was not allowed to be present: thus, denying me the opportunity to present evidence.

If the core of this right is "... to be present when evidence is presented" as Ms. Chen stated in the State's Response, she has just proven that Judge Schacht intentionally violated the very core of my rights under this statute.

P. 11, p. 2: While both attorney's shared facts with the court (consistent between the attorney's), and while the Defendant may have wished to defend against the appearance that he *forged a report from an out-of-state expert*, the truth or falsity or implications of these facts were irrelevant.

Reply: Typical misdirection and prevarication from the prosecution. **The truth is always relevant except to corrupt prosecutors and judges.** I had a number of

issues to present to the court at what I was told was a pre-trial hearing and I was denied.

The out-of-state expert, Dr. Rudolph Varesko, had filed a report with the Court in conjunction with a pathologist (Dr. Spearman, I think was his name) in which they stated explicitly that all of the blood tests proved I could not have infected anyone with herpes, at all.

The blood tests only tested positive for antibodies for herpes, but there was not a sufficient amount of antibodies with which to even run a clinical study. Kristy testified that she had herpes when Brandy was an infant. I have never had herpes. The medical evidence suggests that I was exposed to herpes through intimate contact with Kristy.

And as final proof that this is typical misdirection from the prosecution, there is no mention, anywhere in the record, of a possibly forged report. Mr. Makus in an illegal and unethical act, collaborated with the prosecution to not bring that report into court.

P. 12, p.2: Defendant alleges that a discussion of blood tests represented a critical stage where his presence was necessary.

Reply: This proves my previous point. If, in fact, Mr. Makus and Ms. Mulhern had collaborated to suppress the medical testimony of Dr. Varesko and Dr. Spearman - and Mr. Makus had already told me that he wouldn't submit it - this was my opportunity to make my point before the judge that Mr. Makus was in violation of his ethical duty to provide a robust defense for his client. It was the prosecutions burden to controvert the

evidence from the medical experts or to prove their spurious allegations of a forged report. I could have quickly dismissed such outrageous lies with the letter of explanation that Dr. Varesko sent to Mr. Makus, (which Mr. Makus refused to submit to the Curt) a copy of which I had in my possession for the pre-trial hearing.

As far as Dr. Wren is concerned, at the third trial - when he was handed the report by Mr. Makus - ***he testified that it was the first time he had ever seen that report***! Yet, the prosecutor stated that Dr. Wren had presented his opinion by voicemail. **No written opinion was anticipated**. So, on what basis was his previous opinion derived when he testified in Court that the first time he saw the report was when Mr. Makus handed it to him in Court?

P. 21, p. 2: In other words, his very challenge articulated the separate acts.

Reply: Apparently, the prosecutor believes I am illiterate or was semi-comatose during the trial. Of course, I mentioned those things because that is what was presented as evidence by the prosecution.

Does she really expect the court to believe that I must be guilty by mentioning the alleged acts to which they had already alluded? If so, then they must be equally guilty because they were aware of these alleged acts, also. ***What the prosecutor fails to mention is that Brandy testified her mother told her to say those things***!

P. 22, p. 2: Even if double jeopardy is implicated in the conviction of different

crimes, ... the description of different acts make manifestly apparent the fact that the verdicts resulted from distinct acts.

Reply: This is prosecutorial doublespeak. First, I have never admitted to any of the acts alleged in evidence. The only testimony from both Kristy and Brandy was that she was left with me only one time and that Kristy was with Brandy, at all other times.

That means Kristy must have been an accomplice in these alleged numerous sexual assaults. Since, according to her testimony, Brandy was never alone with me - except for the one time - then Kristy must have a pretty good idea how many of these alleged acts and assaults took place since she must have witnessed them.

This is typical hysterical reaction to a charge of sexual abuse against a child. A nurse claims she saw what **might be lesions related to STD's** on my penis, a blood test shows antibodies for herpes, I am an ex-con, find me guilty and justice is served!

And to top this all off, the prosecutor has the gall to say that since I described these various acts, I was admitting to them. No, I was merely repeating what I heard the prosecution state. If one is not allowed to challenge the charges made against them by reviewing them, then mounting a defense is no longer feasible. This is idiocy!

CONCLUSION

Based upon the foregoing, the Defendant respectfully requests this Court to vacate the conviction against him.

DATED: MAY 9, 2013

Respectfully submitted:

Robert J Middleworth

Robert J. Middleworth
Affiant

ROBERT J. MIDDLEWORTH
DOC #948011
COYOTE RIDGE CORRECTIONS CENTER
1301 N. EPHRATA AVENUE
PO BOX 769
CONNELL, WA 99326

Case # 308503

EX. A

SUPERIOR COURT OF WASHINGTON – WALLA WALLA COUNTY

STATE OF WASHINGTON, Plaintiff, Vs. ROBERT J. MIDDLEWORTH, Defendant.	NO. 10 1 00287 9 MOTION IN LIMINE - EXCLUDE EVIDENCE AND OPINIONS REGARDING PENIS LESIONS

Comes Now the Defendant, Robert Middleworth, and hereby moves the Court for an order excluding any and all evidence, testimony or opinions relating to observed lesions on the penis of Mr. Middleworth.

On or about 9/26/10 a nurse named Alysa Reynolds gathered evidence from Mr. Middleworth for a sexual assault kit. The kit was sent to the State crime lab and never opened by the State crime lab.

While gathering the evidence for the kit, Ms. Reynolds observed lesions on the penis of Mr. Middleworth.

The nurse would testify that:

> There are a number of diseases that could cause lesions that look like that.

JERRY M. MAKUS
Attorney at Law
320 West Main
Walla Walla, Washington 99362-2821
TELEPHONE (509) 522-2020 • FAX (509) 522-2021

ER 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Further, Washington Rules of Evidence, Rule 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Allowing opinion evidence that is irrelevant and speculative is an abuse of trial court discretion. State v Lewis, 141 Wn.App. 367, 166 P.3rd 786 (2007) review denied 163 Wn.2d 1030, 185 P.3rd 1195 (2008). As stated in Griswold v Kilpatrick, 107 Wn.App. 757, 761 – 62, 27 P.3rd 246 (2001):

> The factual, informational, or scientific basis of an expert opinion, including the principle or procedures through which the expert's conclusions are reached, must be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact.

The State should not be allowed to introduce speculative opinions that "maybe" the lesions were caused by herpes and that "maybe" Mr. Middleworth had herpes lesions on his penis when examined by M. Reynolds. This is especially true when speculation about the cause of any lesion would be the only "probative value" for which such evidence is admitted – keeping in mind that the kit gathered by Ms. Reynolds was never opened by the State crime lab.

JERRY M. MAKUS
Attorney at Law
320 West Main
Walla Walla, Washington 99362-2621
TELEPHONE (509) 522-2020 • FAX (509) 522-2021

The only purpose for introducing such evidence – insofar as the Defense can tell – is to encourage the jury to speculate that Mr. Middleworth had active herpes and "might" be the cause of herpes in the alleged victim.

Dated: December 20, 2011.

Jerry M. Makus, WSBA #6227
Attorney for Defendant

JERRY M. MAKUS
Attorney at Law
320 West Main
Walla Walla, Washington 99362-2821
TELEPHONE (509) 522-2020 • FAX (509) 522-2021

EX B.

Case # 308502

you will select a foreman and deliberate upon your verdict.

You are officers of the Court and must act judiciously with an earnest desire to determine and declare a proper verdict. Throughout the trial you should be impartial and permit neither sympathy nor prejudice to influence you.

Mr. Hartford, would you please pass out the notebooks?

(Bailiff complied.)

Everybody have a notebook and a pencil? Do not write your names in the notebooks. They are identified by your juror number, your juror seat.

There are a number of spectators in the courtroom. After opening statements I will admonish any of you that --

THE DEFENDANT: May I address the Court, please?

THE COURT: No, you may not.

THE DEFENDANT: You are fired, Gail Siemers.

THE COURT: Okay. Mr. Middleworth --

THE DEFENDANT: For the statement she made to me about an hour ago.

THE COURT: Mr. Middleworth, I do not want you to interrupt me again.

THE DEFENDANT: This woman said because of my lawsuit, she is not going to defend me properly.

MS. SIEMERS: That's not true.

THE COURT: Okay. Ladies and gentlemen, would you please excuse yourself to the jury room for a minute?

(The following occurred out of the presence of the jury:)

THE COURT: Mr. Middleworth, we are not going to constantly interrupt this trial with your making statements when the Court has not recognized you to do that.

THE DEFENDANT: I understand.

THE COURT: You may not speak on your own. You are represented by an attorney whether you like that or not, and she is the person who speaks in court for you.

THE DEFENDANT: Then you need to give me another attorney, like I asked you to.

THE COURT: I have already ruled on that numerous times and I am not going to do that.

THE DEFENDANT: Then I'm going to continue to battle you on it because this whole court case right now is a mistrial.

THE COURT: Okay.

THE DEFENDANT: You are completely ignoring the fact that I have recused you from this case because of your involvement in a lawsuit that was filed against Ms. Siemers two weeks ago.

THE COURT: Okay.

THE DEFENDANT: This is an ethical violation of the law.

THE COURT: Okay. Mr. Middleworth, I am not involved in that lawsuit. But if you are going to continue to

There was another gentleman, Captain, that was seated right behind Ms. Siemers and Lieutenant Dutton a few minutes ago just before Mr. Middleworth spoke up, and I see that you have removed him. And Lieutenant Dutton said that he swore at the Court or swore at one of the attorneys or parties or something. Did you hear what he said?

JAIL CAPTAIN: Yes. He basically said bullshit.

THE COURT: Okay. And was that when I was speaking?

JAIL CAPTAIN: It was right after you were speaking.

THE COURT: Okay. Do you know who he might be or was he a witness or a spectator for the Defendant or --

JAIL CAPTAIN: He is, I believe, for the Defendant, I guess.

LIEUTENANT DUTTON: He is the grandfather of the child. That is what he said.

THE COURT: The grandfather of the child victim?

LIEUTENANT DUTTON: The child, right. And he wasn't liking what he was hearing here, not from you, but Mr. Middleworth.

THE COURT: His comment was towards Mr. Middleworth, the Defendant?

LIEUTENANT DUTTON: The Defendant, yes.

THE COURT: Okay. That was Lieutenant Dutton who was just speaking.

Okay. The record should reflect that I have asked that

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Mr. Middleworth be removed. I have given him multiple chances up till now to conform his behavior to the rules of court, to request his assistance in helping Ms. Siemers to address him -- or represent him. He has repeatedly tried to fire her.

I think the record should be absolutely clear that we have gone through this on several other hearings. He repeatedly has asked the Court for more time. In fact, we continued the matter previously from a trial date to allow him to hire his own retained counsel. As he indicated earlier this morning, every time he is going to do that, but he never quite gets the job done. We have had no attorney make an appearance on his behalf in this case in any way.

There was an attorney by the name of Cathlin Donohue, who is an attorney who practices in Dayton, who at some point in time -- and I was not privy to this and I don't think we need to make any more record concerning it other than the fact I'm aware that she either tried to or did contact Ms. Siemers at one time. And I am not sure what her purpose was to get involved or exactly what it was, but at least she did contact Ms. Siemers.

I also have reviewed a Sheriff's Office investigative report. I reviewed that Thursday or Friday of last week. I don't recall now. And it was in response to an e-mail

sent by Ms. Siemers concerning what she perceived to be potential harassment or threats against her by if not Mr. Middleworth directly, by somebody on his behalf including Mr. Garcia, who is listed as a witness here, and it had to do with an alleged incident involving Ms. Donohue and Mr. Garcia in Dayton, where she ended up being stabbed or cut with a knife during a confrontation.

I read that report and it appears that the factual information given to possibly Ms. Siemers, maybe Ms. Mulhern and myself was not correct according to that report. It did not appear it involved Mr. Garcia and Ms. Donohue. It apparently involved another gentleman that Ms. Donohue, at least in reporting it to the Columbia County -- I am not sure if it was the Police Department or Sheriff's Office but the Columbia County authorities felt he was there if not explicitly at Mr. Garcia's direction, certainly covertly there. And while it had nothing to do with this trial directly, it had to do with Ms. Donohue representing this gentleman on some kind of an assault case, and it scared her obviously enough that she made a report.

The reason I think that is important for part of this record is that that is the person that Mr. Middleworth has continually indicated was going to represent him in this matter.

I know there was an incident in Walla Walla County District Court not too long ago involving Mr. Garcia and Ms. Donohue, where again I was not present, but I understand they at least verbally were assaultive to each other and maybe even physically. And I think one or both of them had to be removed from the courtroom.

But in any event, the likelihood of Ms. Donohue becoming retained counsel for Mr. Middleworth, at either Mr. Middleworth's direction or Mr. Garcia's direction, I think, is slim to none.

And so that -- for that reason, among a number of other reasons, I have chosen not to allow an additional 30 days as he indicated earlier this morning to allow him to raise money to hire Ms. Donohue. There has been absolutely no showing to me that he or his family or his friends have any means of raising any money to retain a lawyer. Ms. Donohue is not an approved attorney in Walla Walla County for appointment for indigent defendants, and therefore, the likelihood of her being involved in this case is not very great.

To allow him a continuance at this stage is not fair to the State, in my opinion, it is not fair to the victim in this case, in my opinion. And my belief is that not only is Mr. Middleworth's behavior here in court today and previously an attempt to delay these proceedings, but the

request for a continuance is the same thing and it would not serve any productive purpose or result in him having any more of a fair trial than he would have today and/or with Ms. Siemers representing him.

I have discussed with him previously his right to represent himself in this matter. I have explained to him the procedure concerning that. And he on more than one occasion told me, no, he did not want to represent himself. He wanted to have another attorney represent himself.

And so although I suspect on appeal of this matter, if it reaches that stage or at some point in a motion for new trial or some other such procedure, he may request or state that he always wanted to represent himself in this matter. I gave him that opportunity. He chose not to accept it. And he never on his own behalf, nor did he request Ms. Siemers set up a hearing so the Court could have the colloquy with him about representing himself. So I have not allowed him to do that.

He has continued to file motions pro se in this matter, however. And by pro se, I mean without Ms. Siemers' knowledge, agreement, consent or input. He has done that through two third parties, one his mother and secondly, Mr. Garcia, neither of those persons are attorneys, neither of those persons can represent him.

And the obvious indicator to me these are not something

that Mr. Middleworth is able to do himself is all of those motions, except for a couple of letters he sent to the Court in longhand, have been typed. And I checked with Sergeant Hall this morning and Mr. Middleworth for all the time he has been in the county jail does not have access to a typewriter, and they are all typed. So I know somebody else is typing those and then presenting them to the clerk's office for filing.

I do not recognize those documents as appropriate filings in this case because they were not done with Ms. Siemers' direction or concern. And as I indicated, a nonlawyer cannot represent him nor can he represent himself in this matter.

So also my understanding -- and correct me if I'm wrong, Captain, that Mr. Garcia for various types of inappropriate, illegal and unlawful behavior has been banned from the Walla Walla County Jail; is that not correct?

JAIL CAPTAIN: That is correct.

THE COURT: So he has not been able to go in himself and discuss these matters with Mr. Middleworth, not that it would make any difference at all. But again, it is being done by third parties somehow and not directly through Mr. Middleworth and Mr. Garcia.

What I plan to do, counsel, and I will make a statement

in a minute about the spectators, what I plan to do, counsel, is bring the jury back in, explain to them that based upon Mr. Middleworth's choice that he is going to refuse to cooperate with Ms. Siemers and refuse to follow the procedures of the Court. He has made a decision he no longer wishes to participate personally in this case. And I'm going to find that he made that choice, that I believe the case can proceed. He is represented by counsel. And I'm going to proceed with the trial herein.

What I meant -- What I was going to mention a minute ago for the spectators that are here and, I guess, I certainly approve of the Captain's decision to remove the grandfather, although that apparently was directed at the Defendant as opposed to the Court or some other party or attorney or staff member, he probably -- and I don't approve of what he said and that outburst, he probably isn't a problem in the sense that he will continue to do that during the trial, I would guess.

But those of you who are spectators, this is a public trial and you are certainly free to stay and watch, whether you are a spectator on behalf of the Defendant or a spectator on behalf of the State or the victim or her family. But while you are here, I want you to be noncommittal in your behavior. In other words, I don't want you to sigh. I don't want you to verbally speak out.

MS. SIEMERS: I do not, your Honor. Thank you for consideration of my motion.

THE COURT: What I plan to do, counsel, I will bring the jury in, I will indicate to them that both parties have rested, there will be no further testimony or evidence presented and we will take a brief recess.

Counsel will join me in chambers in a few minutes and we will go through the instructions. We will prepare the instructions and come back in and instruct and hear closing arguments. Bring the jury in, please.

(The following occurred in the presence of the jury:)

THE COURT: The State has rested; is that correct, Ms. Mulhern?

MS. MULHERN: Yes, your Honor. The State has rested.

THE COURT: Is the defense resting, Ms. Siemers?

MS. SIEMERS: The defense is resting, your Honor, with no witnesses.

DEFENSE RESTS

THE COURT: Ladies and gentlemen, we have completed the evidentiary portion of the trial. We now need to take another recess for a few minutes. I need to finalize the Court's instructions upon the law. They are just about completed. And once we do that or have done that, you will be brought back in and the Court will instruct you upon the

law and we will hear the closing arguments of counsel. Then you will be allowed to retire to begin your deliberations.

So please leave your notebooks on your seats or on the counter.

Do not discuss this case in any way.

I don't think we will be more than 10 or 15 minutes finalizing these instructions, and then we'll come back in and complete this case.

You may now retire.

(A short recess was taken.)

(The following occurred out of the presence of the jury.)

THE COURT: The record should reflect that the Court has prepared instructions upon the law in this case. I have provided copies of those instructions to both counsel.

Does the State have any objection to or take any exception to the giving or failure to give of any instructions?

MS. MULHERN: The State does not, your Honor.

THE COURT: Does the Defense have any objection to or take any exception to the giving or failure to give of any instructions?

MS. SIEMERS: We do not, your Honor.

THE COURT: The record should reflect that Ms. Siemers is

here on behalf of Mr. Middleworth, that he's not present in court.

Has he made any request to you about this afternoon to be present in court, Ms. Siemers?

MS. SIEMERS: No, your Honor.

THE COURT: The Court has determined that it is not going to allow him to be present, number one, because he hasn't made a request to that effect, but more importantly because of the ruling I made the other day when he was -- he chose to excuse himself from these proceedings in the past and certainly yesterday he exhibited unpredictable behavior in terms of physical and verbal outbursts.

Although the record doesn't show this because we are not on video tape, during the comments he made yesterday he was somewhat aggressive in his posture, somewhat posturing in the fact that he was going to say something no matter what the Court instructed him to do or not to do. And I see no reason to believe he wouldn't continue with that type of behavior should he be here for closing arguments.

Secondly, over the course of these proceedings he has made a number of direct threats to both Ms. Siemers and the Court; calling us names, being very disrespectful to the Court and to Ms. Siemers and the process.

While there have been no direct threats at least to this Court to physically harm the Court, he has certainly made

threats to interfere with my ability to sit as a judge in this county, to make complaints to various persons and agencies and parties, to have me removed from the bench. He made the same type of threats towards Ms. Siemers.

And under those circumstances, I believe, that he has forfeited his right to be here this afternoon.

As I indicated yesterday, the only other alternative the Court would have in terms of trying to enforce the Court's rules and instructions and procedures, which all of the parties, counsel and witnesses need to comply with, would be to physically restrain him with shackles and manacles, a straight jacket, for instance, a spit hood or duct tape across the mouth or other such types of things.

I do not believe those are good alternatives. I think they would certainly impede his ability to have a fair trial and interfere with his due process. So the only other alternative that leaves would be to have sufficient security personnel in the courtroom that should he become aggressive or should he rise from his chair or should he make threatening gestures towards Ms. Siemers or Lieutenant Dutton, who is seated right next to her, the only way we could respond is with physical force by the security personnel. And I am not confident that he would not act before we could even do that. He simply is not predictable.

Case #30850-2

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF WALLA WALLA
P.O. BOX 836
WALLA WALLA, WASHINGTON 99362

CHAMBERS OF
JUDGE DONALD W. SCHACHT
DEPARTMENT NO. II

EX. C

August 22, 2008

Ms. Janelle Carman
Attorney at Law
6 East Alder Street, Suite 418
Walla Walla, WA 99362

Mr. Charles Phillips
Attorney at Law
6 East Alder Street, Suite 317
Walla Walla, WA 99362

Re: City of College Place v. Garcia
Walla Walla County Cause Number 05-1-00052-7

Dear Counsel:

The Court has now received and reviewed Mr. Barrett's declaration. Mr. Barrett states that Mr. Garcia did not request Mr. Barrett, during the trial of this matter, to seek removal of John Junke as the judge therein. Mr. Barrett further states that there was no objection made at trial to Mr. Junke sitting as judge pro tem. This claim is supported by the record herein.

The Court finds Mr. Barrett's recall to be more credible than Mr. Garcia's. It therefore appears that Mr. Junke's declaration that he (Junke) had no reason to be biased against Mr. Garcia or know of the Cadwallader relationship is credible. That, however, is not the end of the inquiry.

From the very beginning and as indicated in the Court's letter of May 7, 2008, the Court's basis for ruling that the conviction should be reversed was as a result of a violation of the Appearance of Fairness Doctrine. Even though it appears there was no affirmative objection to Mr. Junke hearing this case, due process may still have been violated. The Court does note that the original Traffic Citation #02635, issued to Justin Calwallader on June 6, 2004, lists Guillermo Garcia as the owner of the car Mr. Cadwallader was driving. Whether Mr. Junke made note of that is unknown.

The Court concludes that Mr. Garcia probably knew of the potential conflict if Mr. Junke heard his case, but there is no factual basis to show that. The Court surmises that Mr. Garcia's claim that he advised Mr. Barrett to object to Mr. Junke is not factually based but may be an attempt to support his claim of ineffective assistance of counsel.

Therefore, for purposes of this appeal, the Court will find that the alleged potential bias/appearance of fairness issue was discovered post trial. The City cites State v. Thach, 126 Wn.App. 297 (2005), for the proposition that a new trial will not be granted upon the post-trial discovery of new evidence unless the evidence will probably change the result of the trial. Here, there is no newly discovered evidence. Therefore, the Thach case is distinguishable.

Further, the out of state cases cited by the City are also distinguishable. There is no showing here that Mr. Junke was actually biased against Defendant Garcia. The issue here is the "appearance of fairness," how does the whole criminal procedure process appear to a reasonably disinterested person and does it appear fair?

State v. Bremmer, 53 Wn.App.367 (1989), states that "the law requires not only an impartial judge but also a judge who appears to be impartial." The issue here is complicated by the facts of the case. The undisputed facts are that John Junke was appointed as trial judge pro tem to hear this case by Judge Wernette after Defendant Garcia filed an affidavit of prejudice against him. Prior to the trial beginning in November, 2004, Mr. Junke represented Defendant Garcia's stepson, Justin Cadwallader, on a drunk driving charge, which was resolved in October, 2004. During this time, the relationship between Cadwallader and Garcia was estranged. If the reasonably disinterested person knew of these facts and was viewing the trial of Defendant Garcia, he/she would more likely than not believe that the proceedings did not appear fair. But, in this case, it appears neither Mr. Barrett, Mr. Junke or even Defendant Garcia knew these facts.

There has been no showing that pro tem Judge Junke showed actual bias towards Defendant Garcia. There has been no showing Defendant Garcia did not get a fair jury trial. State v. Ring, 134 Wn.App. 716 (2006), holds that "This doctrine (the Appearance of Fairness Doctrine) requires the reviewing court to consider how the proceedings would appear to a reasonably disinterested person." As further stated in that case, "There is nothing in the record that would cause a reasonably disinterested person to conclude that the trial judge was unfair," page 772. The same is true in the instant case.

The Court has also reviewed the case of Milwaukee Railroad v. Human Rights Commission, 87 Wn.2d 802 (1976). Beginning at page 806, there is an extensive discussion of the "Appearance of Fairness Doctrine," albeit in the factual context set forth

in Milwaukee Railroad and before an administrative tribunal. While factually different, the basic principles in applying the doctrine are the same.

At page 808, the court states: "Our system of jurisprudence also demands that in addition to impartiality, disinterestedness, and fairness on the part of the judge, there must be no question or suspicion as to the integrity and fairness of the system, i.e., justice must satisfy the appearance of justice..." Further on page 809, the court said, "Thus it is apparent that even a mere suspicion of irregularity ... is to be avoided by the judiciary in the discharge of its duties." The issue is not whether the judge was actually biased or whether the interest actually affected him, but whether the proceedings appeared fair.

In the Milwaukee Railroad case, there was no direct evidence the tribunal member was prejudiced or motivated in favor of the commission. The deciding factor used by that court in determining that the appearance of fairness had been violated was the simple fact that the tribunal member had a pending job application with the very commission on trial.

The court then stated at page 811, "Under these facts and circumstances, we cannot say that a reasonably prudent and disinterested observer would conclude that the Railroad obtained a fair, impartial and neutral hearing in the proceedings before the hearing tribunal."

The Court, therefore, finds the Defendant's conviction must be reversed because of the violation of the Appearance of Fairness Doctrine. The matter is remanded back to the trial court for a new trial before a different judge. The Court having ordered a new trial, the other issues raised on appeal are not addressed. To the extent the Court previously ruled that dismissal was appropriate, said ruling is vacated.

Very truly yours,

Donald W Schacht

DONALD W. SCHACHT

DWS/tmd