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

IN RE THE PERSONAL RESTRAINT PETITION OF:	No. 43995-6-II
RONALD HOLTZ,	PETITIONER'S REPLY TO STATE'S RESPONSE
Petitioner	

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. ISSUE RAISED ON THE FIRST TIME ON APPEAL "PRESUMPTION OF PREJUDICE DOCTRINE" AND "MANIFEST ERROR" RAP 2.5(A)(3), CONSTITUTIONAL MAGNITUDE.

2. THE CHARGING DOCUMENT, INFORMATION, ACCUSATION, AND STATEMENT IS CONSTITUTIONALLY INADEQUATE TO GIVE NOTICE VIOLATING "ESSENTIAL ELEMENTS RULE."

3. DOES SUBSTANTIAL EVIDENCE EXIST FOR A FACTUAL FINDING RAP 16.14(6) AND SPECIAL RULE FOR ORDER ON SUMMARY JUDGMENT? RAP 9.12.

B. STATUS OF PETITIONER:

Petitioner, Ronald Holtz, is restrained pursuant to a Judgment and sentence entered in Pierce County Cause No. 11-1-03845-1. He has

Filed A direct Appeal of his conviction, #43995-6-II. on September 24th 2013, Petitioner Filed A Motion For Relief From Judgment pursuant to CrR 7.8 and was transfered on September 26, 2013 by Superior Court Judge Kathryn Nelson pursuant to CrR 7.8(c)(2) to Division II Court of Appeals No. #45427-1-II as A(PRP) October 11, 2013. on or about October 23, 2013, Petitioner filed an Objection to transfer due to it's "Recharacterization" of which the Court of Appeals acting Chief Judge denied on November 13, 2013.

The State claims Petitioner was convicted of Felony violation of a No-Contact Order (NCO) and Assault in the Fourth degree. In the contrary, this is incorrect as the Judgment & Sentence will show only the (NCO) violation.

C. ARGUMENT:

1. ISSUE RAISED ON THE FIRST TIME ON APPEAL "PRESUMPTION OF PREJUDICE DOCTRINE" AND "MANIFEST ERROR" RAP 2.5 (A)(3), CONSTITUTIONAL MAGNITUDE.

Petitioner proceeds to state the standard of review of a CrR 7.8 motion transfered to the Appellate Court as a (PRP). "A motion in trial Court for Relief From Judgment, order, or proceeding is the Functional equivalent of a (PRP) in the Court of Appeals. (In some cases) emphasis STATE v. Madsen, 153 Wash. App. 471, 228 P.3d 24 (2009).

SEE: STATE v. Sandoval, 171 Wn. 2d 163 (2011). Ordinarily, A personal Restraint petitioner alleging constitutional ERROR must show Actual and substantial prejudice. SEE In RE Pers. Restraint of Lord, 152 Wn. 2d 182, 188, 94 P.3d 952 (2004). This actual and substantial prejudice standard does not apply when the petitioner has not had A PRIOR opportunity to appeal the issue to A disinterested judge. SEE In RE Pers. Restraint of Grantham, 168 Wn. 2d 204, 214, 227 P.3d 285 (2010). However, if some other showing of

prejudice is required by the law underlying the petitioner's claim of Const-itional error, the petitioner must make the requisite showing of prejudice. Id. at 214-15. Sandoval had to bring a (PRP) to meet his burden of proving ineffective Assistance of Counsel because his Counsel's Advice does not appear in the trial Court Record. see State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the record or existing trial record, the appropriate means of doing so is through a personal Restraint petition, which may be filed concurrently with the direct Appeal"). Grantham, 168 Wn.2d at 214. Sandoval, has not already had an opportunity to appeal to a disinterested judge. Thus, does not have to show actual prejudice; Has only burden to show he's entitled to relief for one of the reasons listed in RAP 16.4(c). see Grantham, 168 Wn.2d at 214. For Ineffective Assistance of Counsel based on an Attorney's Advice during the plea bargaining process. see Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Counsel "Kent Underwood," did in Fact, raised the issue of prior Charging documents used to substantiate prior violations in order to constit-ute a third For a Felony (NCO) violation. Also, the birth date missing in Lake Wood Municipal Court Charging document No. #9L1035 used as one in the prior history. Defendant Holtz did not stipulate either (Sept. 4, 2012 - Pg. #107 Line 7-19). In transcripts.

However, A party may raise an error For the First time on appeal if it is a manifest error affecting a Constitutional Right. As this Court recently held in STATE V. GRIMES, 165 Wn.App. 172, 185-86, 267 P.3d 454 (2011). (citing State v. O'Hara, 167 Wash.2d 91, 98, 217 P.3d 756 (2009), Rev. den., 175 Wash.2d 1010, 287 P.3d 594 (2012), For this RAP 2.5(a)(3) exception to apply.

see History For Manifest error found in: STATE V. Bertrand, 165 Wn.App. 393, 267 P.3d 511 (Wash.App. Div. 2 2011); For instance, in 1861, when "Washington" still included the whole of Idaho and parts of Colorado and Montana, the Supreme Court of the Washington Territory decided Blumberg v. McWear, 1 Wash. Terr. 141 (1861). In this Wharfage case, Blumberg petitioned

FOR A MISTRIAL BECAUSE THE TRIAL COURT REFUSED TO GIVE HIS PROPOSED JURY INSTRUCTIONS. JUSTICE OLIPHANT'S OPINION NOTED,

> THESE INSTRUCTIONS ARE NOT PROPERLY BEFORE THE COURT, NOT HAVING BEEN EXCEPTED TO AT THE TIME. WHEN A PARTY WISHES THE ACTION OF THE COURT BELOW TO BE REVIEWED UPON A WRIT OF ERROR, FOR REFUSING OR GRANTING A NEW TRIAL -- TO THE ADMISS OR REJECTION OF EVIDENCE -- REFUSING TO GIVE INSTRUCTIONS PRAYED FOR -- OR TO THE CHARGE OF THE COURT, HE MUST EXCEPT OR OBJECT, AS THE CASE MAY BE, AT THE TIME, AND HAVE THE SAME NOTED BY THE JUDGE, OR ELSE THEY WILL NOT BE REGARDED BY THE SUPREME COURT.
>
> BLUMBERG, 1 WASH. TERR. AT 141-42 (EMPHASIS ADDED)

SEE "PLAIN ERROR" - THUS, 115 YEARS BEFORE THE ADOPTION OF RAP 2.5(A)(3), ABSENT A CONTEMPORANEOUS OBJECTION AT TRIAL, AN APPELLATE COURT COULD NOT PROPERLY REVIEW AN ASSIGNMENT OF ERROR. AND, ALTHOUGH THE BLUMBERG COURT DID NOT ADDRESS WHETHER AN APPELLATE COURT COULD REVIEW A MANIFEST ERROR RAISED FOR THE FIRST TIME ON APPEAL, IN WILLIAMS V. NINEMIRE, 23 WASH. 393, 63 P. 534 (1900), THE COURT DID REVIEW AN ERRONEOUS JURY INSTRUCTION NOT OBJECTED TO AT TRIAL THAT, IN EFFECT, DIRECTED A [165 WN. APP. 408] VERDICT AGAINST THE APPELLANT. THUS, THE EXCEPTION ALLOWING REVIEW OF AN ERROR RAISED FOR THE FIRST TIME ON APPEAL FOR "MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT," LONG EXISTED BEFORE THE ADOPTION OF RAP 2.5(A)(3).

RAP 2.5(A)(3), IN 1976, THE WASHINGTON SUPREME COURT HANDED DOWN OVER 50 CASES THAT, IN ONE WAY OR ANOTHER, ADDRESSED "MANIFEST ERROR". BLACK'S LAW DICTIONARY DATES THE FIRST ENGLISH USAGE OF "MANIFEST ERROR" TO THE 18TH CENTURY AND DESCRIBES IT AS:

> "[A]N ERROR THAT IS PLAIN AND UNDISPUTABLE, AND THAT AMOUNTS TO A COMPLETE DISREGARD OF THE CONTROLLING LAW OR CREDIBLE EVIDENCE IN THE RECORD."

BLACK'S LAW DICTIONARY 622 (9TH ED. 2009). REVIEW OF OVER 100 YEARS OF WASHINGTON JURISPRUDENCE CONFIRMS THIS. CONSTITUTING

REVERSIBLE ERROR. In STATE V. Phillips, 59 WASH. 252, 259, 109 P. 1047 (1910), FOR INSTANCE, the SUPREME COURT stated;

> "The Aid of Counsel is GUARANTEED by the Constitution to EVERY PERSON ACCUSED OF A CRIME, And this is UNIVERSALLY RECOGNIZED AS ONE OF THE SUREST SAFEGUARDS AGAINST INJUSTICE AND OPPRESSION. Any Conduct or Statement on the part of the Court that tends to impair the influence or destroy the usefulness of Counsel is palpable and manifest error."

And in Sawley V. Spokane Falls & Northern Railway Co., 27 Wash. 536, 538-89, 67 P. 1094 (1902), the PERVASIVE USAGE OF THE TERM is made clear:

"And in Support of their position, [Counsel Argues] that an assignment of error is an assignment of ignorance, for error implies ignorance; that to charge gross, palpable, or manifest error, -- terms which are commonly found in briefs filed in Appellate Courts, -- is to charge uncommon error, which is uncommon ignorance; And that to say that the action of the Court was an "extra judicial assumption of power" was to say that the judge assumed to decide that which did not belong to the judge to determine."

(Emphasis added.) In McLain V. Easley, 146 Wash. 377, 381-82, 264 P. 714 (1928), The Supreme Court went so far [165 Wn. App. 409] as to recognize it's own Manifest error on a Motion for Reconsideration.

IF an Appellant successfully shows that the unpreserved trial error is both Constitutional in magnitude and manifest, in that it had practical and identifiable consequences below, the burden then shifts to the State to prove that the error was harmless under Chapman standard

beyond A REASONABLE doubt. RAP 2.5(A)(3). Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (U.S. Cal. 1967). A PARTY MAY RAISE AN ERROR FOR THE FIRST TIME ON APPEAL IF IT IS A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT. AS THIS COURT RECENTLY held in STATE V. GRIMES, 165 WN. App. 172, 185-86, 267 P.3d 454 (2011). (citing STATE V. O'HARA, 167 WASH. 2d 91, 98, 217 P.3d 756 (2009), REV. den., 175 WASH. 2d 1010, 287 P.3d 594 (2012), FOR this RAP 2.5(A)(3) EXCEPTION to Apply.

Petitioner is entitled to REVIEW EVEN though the trial court RECORd does support the mere stated FRASES in objection with the RAISing of ISSUE by Counsel briefly and Defendants objections to stipulATE to the invalid upon their FACE charging documents, FROM LAKEWOOD and PIERCE County. EVEN IF it had not been, Constitutional ISSUES OF such MAGNITUDE under the "PRESUMPTION OF PREJUDICE doctrine" and "MANIFEST ERROR" HAVE the Right to be BROught FOR the FIRST time on APPEAL FOR REVIEW in light of "Plain ERROR" AS WELL.

2. THE CHARGING DOCUMENT, INFORMATION, ACCUSATION AND STATEMENT IS CONSTITUTIONALLY INADEQUATE TO GIVE NOTICE VIOLATING "ESSENTIAL ELEMENTS RULE".

Petitioner properly RAISED the ISSUE of Constitutionally deficient Complaints OF No Contact ORDER VIOLATIONS (NCO) and DEFECTIVE and insufficient charging documents in his CrR 7.8 motion to the PIERCE County SUPERIOR COURT AS REPRESENTED by Counsel whom in FACT, did BRIEFLY REFER to the PRIOR CHARGING documents which DEFENDANT's REFUSAL to Stipulate to due to deeming (esp.) No. 9L-1035 AS insufficient BECAUSE OF missing the Birth date. Counsel informed him that it WAS AN ISSUE only to be RAISED on Appeal which during RESEARCH defendant discovered, City of Bothell v. Kaiser, 152 Wash. App. 466, 217 P.3d 339 (2009). Defendant charged with misdemeanor violation of a no-Contact

ORDER WAS not REQUIRED to show that he WAS PREJUDICED by omission, From citation which ALSO SERVED AS A Complaint BECAUSE it WAS signed AND issued by A PROSECUTOR, OF information SUFFICIENT to identify the ORDER he ALLEGEDLY VIOLATED, in ORDER to obtain dismissal OF the Complaint BECAUSE it FAILED to SATISFY the due PROCESS REQUIREMENT OF informing him OF the ESSENTIAL ELEMENTS OF the CHARGE. ALSO cited; CITY OF SEATTLE V. TERMAIN, 124 Wn. App. 798, 103 P.3d 209 (WASH. App. DIV. 1 2004); STATE V. ARTHUR, 126 Wn. App. 243, 108 P.3d 169 (2005); STATE V. BORRERO, 147 Wn. 2d 353, 360, 58 P.3d 245 (2002); STATE V. LEACH, 113 WASH. 2d 679, 689, 782 P.2d 552 (1989).

The due PROCESS REQUIREMENT OF informing DEFENDANT OF the ESSENTIAL elements OF the CHARGE; AMENDED Complaint MERELY stated that DEFENDANT KNOWINGLY VIOLATED A no-CONTACT ORDER AND that the ORDER CONTAINED A STATEMENT that A VIOLATION OF it's TERMS WAS A CRIMINAL OFFENSE AND would subject DEFENDANT to ARREST, AND AMENDED Complaint MERELY CITED the RELEVANT STATUTES, but AMENDED Complaint did not identify the ORDER by stating the DATE OR COURT OF ISSUANCE, OR by naming the PROTECTED PERSON. U.S.C.A. Const. Amend. 14; West's RCWA Const. Art. 1 § 3. RCWA 26.50.110; CrRLJ 2.1 (A)(2).

- LAKEWOOD MUNICIPAL COURT -

I) EXH. #1 & #2, No. #9L-1035 (VNCO) (ORIGINAL Complaint) 9/11/09 AND (AMENDED Complaint) 10/16/09. Both ARE DEFICIENT charging documents which only cite the statutes but does not describe the conduct OR particular CIRCUMSTANCE that VIOLATED that LAW SATISFYING the "ESSENTIAL ELEMENTS" REQUIREMENT. The AMENDED Complaint 10/16/09 is deficient AS the birth date is omitted. devoid OF NOTICE

II) EXH. #3, No. #9L-1203 (VNCO), 10/23/09. does not CITE the NATURE OF Conduct/CUSATION NOR particular CIRCUMSTANCES constituting the VIOLATION AND/OR CRIME other than citing the STATUTE which VIOLATES Notice AND ESSENTIAL ELEMENTS doctrine.

III) Exh. #4, No. #9L-1000, 4° DV ASSAULT, 8/31/09, This charging document is as deficient by merely citing statute without the specific conduct described inorder to define that this specific crime by the "Essential Elements," violated the law.

IV) Exh. #5, No. #11L-0369, 4° DV ASSAULT, 3/17/11, This charging document is deficient with no plain, concise written statement of the essential facts constituting the offense charged and does not meet the "Essential Element Rule" requirement.

V) Exh. #6, ~~PIERCE COUNTY SUPERIOR COURT~~ No. #10-1-02212-2(VNCO), 7/20/10, does not cite the nature of accusation/conduct nor particular circumstances in a plain and concise written statement of the essential facts constituting the offense charged nor provide notice in satisfying the "Essential Elements" Rule.

VI) Exh. #7, No. #11-1-03845-1(VNCO), 9/19/11, This charging document is deficient by merely citing statute without the specific conduct described inorder to define this specific crime by the "Essential Elements" Rule requirement and is, thus, "invalid upon it's face."

The State is only responding to No. #9L-1035 and #11L-0369. Then is Non-Responsive on charging documents of numbers #9L-12-03, #9L-1000, #10-1-02212-2, and #11-1-03845-1 of which Petitioner moves to strike any response and grant relief on these, being they were cited in initial briefing.

Petitioner states that inorder to capture the body of the argument of the case in chief one must delv into the history for the true sake of Arguendo being case in point. The First Washington case

to overturn a conviction due to the insufficiency of the charging document was Leonard v. Territory, 2 Wash. Terr. 381, 7 P. 872 (1885), In holding that the indictment was insufficient to sustain a charge of murder, the Court specifically rejected an argument that the missing element could be inferred from the language of the indictment. Under our laws an indictment must be direct and certain, both as regards the crime charged and as regards the particular circumstances thereof, when they are necessary to constitute a complete crime.

The State has relied upon State v. Kjorsvik and State v. Leach Again Petitioner will cite both for arguendo, as in State v. Kjorsvik, 812 P.2d 86, 117 Wn.2d 93 (Wash. 1991) the following is found: [117 Wn.2d 98]

In the case of State v. Leach, 113 Wash.2d 679, 689, 782 P.2d 552 (1989), we recently stated that "the 'essential elements' rule requires that a charging document allege facts supporting every element of the offense, in addition to adequately identifying the crime charged". This core holding of Leach requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime. Leach, explains that merely reciting the statutory elements of the crime charged may not be sufficient. Because statutory language may not necessarily define a charge sufficiently to apprise an accused with reasonable certainty of the nature of the accusation against that person, so that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense, mere recitation of the statutory language in the charging document may be inadequate.

[117 Wn.2d 99] Leach, 113 Wash.2d at 688, 782 P.2d 552. We have recently reiterated that it is sufficient to charge in the language of a statute if the statute defines the offense with certainty.

Conclusion, All essential elements of a crime, statutory or otherwise must be included in a charging document in order to afford notice

to an accused of the nature and cause of the accusation against him. This conclusion is based on constitutional law and court rule. Const. art. 1, § 22 (amend. 10) provides in part:

"In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him, ... [117 wn.2d 98]

U.S. Const. Amend 6 provides in part:

"In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation; ...

CrR 2.1(b) provides in part that,

"the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged".

The following most recent cases dealing with misdemeanors and felonies, all contain the same language of insufficient and/or defective charging document. The "essential element rule" State v. Cochrane, 253 P.3d 95, 160 Wn.App. 18 (Wash. App. Div. 1 2011) (DUI prior misdemeanors were used to establish a felony with an insufficient charging document). State v. Johnson, 297 P.3d 710, 172 Wn.App. 112 (Wash. App. Div. 1 2012) (Information charging unlawful imprisonment was constitutionally deficient). State v. Rivas, 298 P.3d 686, 168 Wn.App. 882 (Wash. App. Div. 2 2012) (Element of malicious mischief missing constituting an insufficient and defective charging document.) (We review challenges to the sufficiency of a charging document de novo). State v. Phuong, 299 P.3d 37, 174 Wn.App. 494 (Wash. App. Div. 1 2013) (A charging document is constitutionally adequate only if all the essential elements of a crime are included in the charging document).

Petitioner states that the cases of Kaiser, Leach, and Cochrane specifically deal with prior misdemeanor defective information/charging documents used to establish a current felony charge. Where if the prior are invalid so is the current conviction as well as the cur-

insufficiencies invalidating the Felony charging documents. Just like in Leach the omitting of the victim's age is similar to Lakewood Municipal Court No. #9L-1035 and Kaiser as the amended Complaint Failed to relate back. These coupled with Termain, Gorsuch, Borrero, Sutherland, Cochrane, Johnson, Rivas, and Phuong Sum up No.'s #9L-1203, #9L-1000, #11L-0369, #10-1-02212-2, and #11-1-03845-1 by addressing the essence of the issue. These charging documents and/or Complaints are a "Plain Error" by there Construction being defective in violation State, Federal Constitution and law. The "Essential Elements Rule" requires that a charging document allege Facts supporting every element of the offense, in addition to adequately identifying the crime charged. The Petitioner is entitled to relief as a matter of law with "Plain Error" constituting a Manifest Injustice to be dismissed with prejudice as the remedy.

3. Does substantial evidence exist for a factual finding RAP 16.14(b) and special rule for order on summary judgment RAP 9.12?

Petitioner cites that Counsel for the State misinterprets the Doctrine of this case and history, as the body of the factual argument literally sums up to the law of the case doctrine. This is simply that the failure to include all elements with Facts supporting the offense, in addition to adequately identifying the crime charged, constitutes a insufficient or defective Complaint or charging document. This violates the "Essential Elements" Rules which is a Manifest and Plain Error, reviewed de novo on the first time on Appeal. "Substantial Evidence" as a standard for factual findings in personal Restraint petition (PRP) reference hearings, exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true. RAP 16.14(b). In lieu of the Facts presented with Plain Error as the

Presumption of prejudice doctrine has automatically ATTACHED, viewing the Constitutional Magnitude, Petitioner must SEEK REMEDY pursuant to RAP 9.12's Special Rule For order on Summary Judgment For the Petitioner based upon the merit of Facts.

D. CONCLUSION:

The information in this case with exhibits and argument based in law that the Complaints/charging documents ARE FACTUALLY deficient not only WERE they objected to but irregardless CAN be RAISED For the First time on appeal. Petitioner Requests REVERSAL, VACATE, and dismissal with prejudice.

DATED: February 24, 2014.

Respectfully submitted,
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CERTIFICATE OF SERVICE
I certify that I ~~mailed~~ emailed copies of to Respondent & App. Counsel on 3/6/14
Date Signed