IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II
AT TACOMA

STATE OF WASHINGTON, Respondent, v. AARON GUSTER CLOUD, Defendant.	COA No. 45579-0-II STATEMENT OF ADDITIONAL GROUNDS (RAP 10.10) [CLERKS ACTION REQUIRED]

I, AARON GUSTER CLOUD, have received and reviewed the opening brief prepared by my appellate attorney. Summarized below are the additional grounds for review that are not addressed within that brief. I understand the court will review this statement of additional grounds for review when my appeal is considered on the merits.

The additional grounds, and a summary is attached to this statement.

Date: Sept 16 2014 Signature: Aaron G. Cloud

S.A.G.

ADDITIONAL GROUND 1

THE TRIAL COURT ABUSED IT'S DISCRETION IN ADMITTING THE OUT-OF-COURT STATEMENTS OF MICHELLE ROSS.

The trial court's decision to allow the State to manipulate getting hearsay evidence in by police officers not allowed in, was manifestly unreasonable and was exersized on untenable grounds, for untenable reasons. Prejudicial statements made by Miss Ross to an officer were used as "substantive" proof to establish the elements for (i) assault, (ii) drive-by-shooting, and (iii) possession of a firearm. These statements were allowed in as impeachment evidence based on Miss Ross's denial at trial that she never made these prejudicial out-of-court statements. These statements, being hearsay, would not otherwise have been admissible. The State's only purpose in calling Miss Ross as their witness was to impeach her by calling officer Floyd May so that the jury could then hear otherwise unattainable testimony about two hearsay statements that were attributed to Miss Ross. In closing the State made this hearsay into "substantive" evidence, putting the gun in the Defendant's hand. RP 597. Because this evidence cannot be used as "substantive" proof of guilt, the State may not use

impeachment as a guise for submitting to the jury substantive evidence that would otherwise be inadmissible. Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence. State v. Clinkenbeard, 130 Wn.App. 522, 569 (2005). This is not a challenge to the procedure that took place to impeach Miss Ross, this is a challenge to the purpose for which the State impeached Miss Ross. Evidence Rule 613(b) allows ones own witness to be impeached with a prior inconsistant statement. It is however, an abuse of the rule [ER 607/Fed.R.Evid. 607] for the prosecution to call a witness that knew would not give it useful information or evidence, just so it could introduce hearsay evidence against the defendant in hope that the jury would miss the subtle distinction between impeachment and substantive evidence. Kitsap County prosecutor Robert Davy's purpose was not to impeach Miss Ross but to put in hearsay as substantive evidence against Mr. Cloud, which ER 607 does not contemplate or authorize. State v. Lavaris, 106 Wn.2d 340, 345 (1986). Factual proof of Davy's intent is when he asked the jury to consider Miss Ross's credibility when weighed against known evidence. RP 665. The concern behind this prohibition is that prosecutor's will exploit the

jury's difficulty in making the subtle distinction between impeachment and substantive evidence. Clinkenbeard, supra at 569-70. "The only evidence that established sexual intercourse between M.Q. and Clinkenbeard came from the impeachment evidence brought out on the State's direct examination of Sgt. Hall. The record does contain atleast one objection by Mr. Clinkenbeard to the testimony of a Ms. Gall and Sgt. Hall regarding anything M.Q. might have said." Id. at 570. Within Mr. Cloud's case, the only evidence that Cloud ever fired a weapon at Kyle Fortuna from a vehicle, was improperly illicited through impeachment evidence that was brought out through the State's contrived examination of Officer Floyd May. RP 204. Officer May's hearsay statements were that Mr. Cloud, "pulled out a gun and shot at the truck," and that Miss Ross, "didn't know he had a gun until that moment." These statements were only allowed for impeachment purposes. No evidence existed other than this to establish a nexus to Mr. Cloud shooting a firearm at Kyle Fortuna from a vehicle. Although Mr. Cloud's charges are different than that of Mr. Clinkenbeard's, the manifest issues at hand are identical. In both cases the State abused this hearsay exception rule just so that the jury could hear

this prejudicial hearsay evidence under the guise of impeachment. Within Clinkenbeard, the Appellate Court found that, "despite the fact that the proper use of M.Q.'s prior inconsistent statements was for impeachment purposes only, the State used the as substantive evidence of guilt at trial. In it's closing argument to the jury, the prosecution asserted that M.Q.'s statements to Sgt. Hall were proof of sexual intercourse between M.Q. and Clinkenbeard." Id. at 570-71. In Mr. Cloud's case, the prosecutor within his closing argument before asserts that Mr. Cloud fired a gun at Mr. Fortuna. "It was in his possession not only when he shot at Kyle Fortuna..." RP 599 (Line 21-22). As in Clinkenbeard's case, the State was arguing impeachment evidence as substantive evidence, as the only evidence that Mr. Cloud fired a gun at Mr. Fortuna came from the statements that were admitted under, "impeachment purposes only," after Defense objection. RP 202. These out-of-court prejudicial statements that the prosecution got admitted under the guise of impeachment can not ever be considered just harmless. The jury was allowed to hear a police officer in full uniform giving testimony about untrustworthy statements that left the jury with the impression that an "eye witness" saw Aaron Cloud shoot at Kyle Fortuna. The jury throughout trial was allowed to hear the prosecutor

argue and vouch this impeachment evidence as being substantive evidence. There was no "eye witness" that ever testified, let alone any witness who could testify that Mr. Cloud shot at Mr. Fortuna. In fact, Miss Ross testified as, "never seeing Mr. Cloud with a gun." RP 88. Kyle Fortuna testified that he did not recognize Mr. Cloud when the prosecutor pointed to the defendant at trial. RP 51-52. Mr. Fortuna further testified it wasn't Mr. Cloud and he never seen Mr. Cloud with a gun in his hand or hearing a shot. RP 128. The jury should have never heard the impeachment evidence that was brought out through the preplanned examination of officer May nor prosecutor Davy's closing arguments as to this hearsay, and untrustworthy, highly prejudicial and highly inflammatory statements that clearly denied and deprived Mr. Cloud of his basic and fundemental constitutional safeguards and protections therein. A simple instruction for the jury to disregard these highly prejudicial and harmful statements would not have fixed this error. Here the record shows that this hearsay exception rule was abused. If the out-of-court statements, which were admitted under the guise of impeachment, would not have been argued as substantive evidence, or even admitted so that the jury would miss the subtle distinction between impeachment and substantive evidence, the jury would heve reached an

entirely different kind of verdict. Mr. Cloud did not receive a fair and proper trial due the trial court's error and the jury having heard these hearsay statements as argued for the wrong purpose. A prosecutor cannot use impermissible hearsay as substantive evidence. United States v. Valencia, 600 F.3d 389, 411 (5th Cir. 2010). Because prosecutor Davy's misstatement of what was not substantive material fact, Mr. Cloud's due process and right to a fair trial under the Fifth Amendment was violated since it was used to obtain his conviction. Berger v. United States, 295 U.S. 78 (1935). It is prejudicial error for a prosecutor to garner conviction by bolstering facts not in evidence. State v. Jones, 144 Wn.App. 284, 183 P.3d 307 (2008). Getting the jury to consider evidence as substantive that clearly was not, violated the standard that the jury may not consider evidence which was not introduced at trial. Smith v. Phillips, 455 U.S. 209 (1982).

ADDITIONAL GROUND 2.

MR. CLOUD'S U.S. 6TH AMEND. AND WA. ST. 1 § 22, RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ADMITTED "PORTIONS" OF A 911 CALL THAT WAS NEVER AUTHENTICATED.

During trial, the prosecutor attempted to introduce an extrinsic statement which was duly objected to by the Defense. RP 53-54. Extrinsic evidence is properly admitted under 613 B. However, in Mr. Cloud's case, the alleged victim/witness, Mr. Kyle Fortuna, was played the 911 recording, from where the statement came from. Mr. Fortuna did not recall making the 911 call nor the statement in question. Based on this asserted fact, the court denied the prosecution's motion to introduce the 911 call for impeachment purposes. RP 65. Next, the prosecutor motioned for the court to introduce three statements from the 911 recording. The same 911 recording that was initially denied. The State sought to now get the statements introduced for identifying purposes without ever laying the proper foundation requirement. Here, the trial court grants the State's position in allowing the presentation of playing "portions" of the 911 call before the jury for

"identification purposes," sans required authentication over Defense objection. Not only was it the State's primary purpose to introduce these hearsay statements, but also being the State's sole intention and only way to get these statements into evidence period through the 911 call that was denied by the court on two previous attempts. Since the 911 recording was never authenticated, the court erred in allowing the "portions" to be played before the jury. The Defense objected yet again. RP 116. These statement "portions" were allowed to be introduced as evidence before the jury under Evidence Rule 801(d)(1). However, ER 801(d)(1) states that a statement is not hearsay if the declarent of the prior statement testifies at the trial or hearing and is subject to cross examination concerning the statement, and that the statement is one of identification of a person after perceiving the person. This rule has two prongs. The State did not meet both prongs. Although the statements are one of identification, the declarant of these alleged statements via the 911 recording was not authenticated by Mr. Fortuna or an expert witness. This deprived Mr. Cloud the opportunity to cross-examine the true declarant regarding the hearsay statements that were introduced. Prior to trial the 911 tape was played and Mr.

Fortuna not only did not recognize the voice, but was very adamant that the voice was not his, but "that guy." RP 57-58. This is a violation of Mr. Cloud's constitutional rights as afforded under Washington State Constitutional Article I, § 22, U.S.C.A. 6 and RCW 10.52. "Testimony about a telephone conversation will normally be irrelevant unless the person at the other end is identified." United States v. Pool, 660 F.2d 547 (5th Cir. 1981). "Recording must be authentic in the sense that it is a recording of the conversation in question and the speakers voices are identified." United States v. Albert, 595 F.2d 283 (5th Cir. 1979). For a 911 call, ER 901 requires that the recording be authenticated or identified before it is admitted into evidence." State v. Hurtado, 173 Wn.App. 592, 294 P.3d 838 (2013) quoting State v. Williams, 136 Wn.App. 486, 150 P.3d 111 (2007). The declarant on the 911 tape was never identified, not from lack of trying because the State was given numerous opportunities during direct examination and voire dire in questioning the alleged declarant about the 911 call. "Q: and its your testimony here today that you did not call 911 on July 24, 2013? A: I don't recall making a phone call." RP 52. See also RP's 53, 57, 58, 60, 122, 125, 128. The record clearly shows that the State never laid the foundation as required within the prong of ER 801(d). The fact that the

court denied the State's previous motion to introduce this very 911 call for impeachment purposes being blatently obvious that the 911 call is hearsay. Mr. Cloud not only argues the fact that he was not provided the adequate opportunity to cross-examine the true declarant of the 911 call which his constitutional rights of right for "every person accused of a crime shall have the right to meet the witness produced against him face to face," but Mr. Cloud argues that the 911 call was not authenticated. "Confrontation Clause violation not harmless error." State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). ER 901(5)(6) says this needs to happen. It is a requirement to assure evidence is what it purports to be. Vol. 5c Karl B. Tegland, Wash. Pract.. When Mr. Davy, the prosecutor, attempted to authenticate the 911 call through "self authentication," he asked the alleged declarant if he made the 911 call. The State even played the recording to refresh the alleged declarants memory. Mr. Davy came up with "no dice," as what is set forth in State v. Jackson, 113 Wn.App. 762, 54 P.3d 739 (2002). "Just as a proponent can authenticate a photo by 'eyewitness comparison,' a

proponent can authenticate a tape recording by 'ear-witness comparison'...by calling a witness to testify (a) that the witness has personal knowledge of the events recorded on tape; (b) that the witness has listened to the tape and compared it to those events; (c) and that the tape accurately portrays those events." However, "...if the tape records human voices, the foundation witness usually must identify those voices. The witness testimony is what provides the necessary foundation." Id at 767. Within Mr. Cloud's case and the Jackson case, the State played the recording for the witness and asked all the requisite questions. The difference between Mr. Cloud's case and Jackson, is that within Jackson the witness admits to calling 911. The witness in Jackson admits to making the statements on the 911 recording in Jackson. The witness/victim in Jackson identifies the identity of the relevant speaker. Id at 767. In Mr. Cloud's case, Mr. Kyle Fortuna never testified to the events in question, and he was adamant that he was not the person on the 911 tape. The trial court knew that this was the case and properly denied the 911 call to be admitted. The trial court put the State on notice that, "Potentially, the 911 call could be admitted for other purposes if there's foundational testimony laid related to the 911 operator and what not." RP 65. No one was called to verify this 911 call. The State did not lay any foundation to get this in by calling a single witness after the trial court put them on notice. Admitting the 911 tape

for any purpose was error when it was not properly verified. This was a Constitutional error and a violation of RCW 5.45.020. "Must be verified by the custodian of record or another qualified witness who can attest to the records identity and mode of preparation." Lodis v. Corbis Holdings, Inc., 172 Wn.App. 835, 292 P.3d 779 (2013). The 911 tape was admitted over Defense objections. RP 118. The 911 tape was not authenticated, but admitted as Exhibit Number 10. RP 119. This 911 call could have been made up by the police or the prosecutor in his office, as nothing established where or who made this tape. "Courts need to be certain that it is the witness, not the police (or the prosecutor), who made the identification." State v. McDonald, 40 Wn.App. 743, 746, 700 P.2d 327 (1985). The State did not adequately prove that the 911 tape was genuine beyond a reasonable doubt. This violated Mr. Cloud's Due Process rights. Rita v. United States, 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007); Fry v. Pliler, 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007). The law in this state is crystal clear about evidence of this nature only being used, "if the custodian or other qualified witness testifies to it's identity and the mode of it's preparation." RCW 5.45.020; WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, ER, 803(a)(6)(7) p. 400, State v. Devries, 149 Wn.2d 842, 72 P.3d 748 (2003)("The custodian of the record should be a person who can testify from first hand knowledge that a record is authentic."). This did not happen here.

ER 901(6), REQUIREMENTS OF AUTHENTICATION OR IDENTIFICATION, states, "Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called..." Pursuant to RCW 10.96.030, the 911 call was never authenticated as being made by Mr. Kyle Fortuna the alleged declarant. RP 52. Nor was there any cell phone records presented as evidence to authenticate that the 911 call was made from Mr. Fortuna's cell phone. "This court reviews a trial court's decision regarding the authenticity of an exhibit under an abuse of discretion standard. Authentication is a threshold requirement to assure that evidence is what it purports to be." State v. Payne, 117 Wn.App. 99, 106, 69 P.3d 889 (2003). Shortly after the trial court denied the State admission and notified them what it would take to authenticate the 911 with properly laid foundation, the prosecutor motioned to admit "portions" of the 911 call under 801(d)(1). The trial court erroneously granted the State's motion without a proper authentication having taken place, thus, deliberate constitutional error. This is an abuse of discretion for the trial court to not make the State prove authentication. Also, because Mr. Fortuna as the supposed declarant of the statements never authenticated the 911 call, and said it was not him, but "that guy" making sure that the trial court knew it was not

him, these statements should not have been allowed under the 801(d)(1) rule. The statements are attributed to the wrong person, not Mr. Fortuna, the victim of this crime. These statements are unsubstantiated hearsay and the trial court abused it's discretion in admitting them. Mr. Kyle Fortuna testified in open court that Mr. Aaron Cloud was not the person who shot at him after directly getting a good look up close in the courtroom at Mr. Cloud's face. Mr. Fortuna testified he was sure that it was not Mr. Cloud who shot at him. RP 52. The State's sole purpose for motioning the trial court under RCW 801(d)(1) and then sneaking in the evidence without authentication, was to admit hearsay and unauthenticated statements of the 911 call so it could present such prejudicial and unsubstantiated evidence as truth of the "prosecutions theory" for the jury to look at a photo of Mr. Cloud and the vehicle Mr. Cloud was in. The State went way out of it's way not to introduce a photo of the other occupant that exactly matched the description of the shooter, or let Mr. Fortuna see him. The State went so far as it made Defense counsel ineffective for stopping Mr. William Houser, the Defense attorney from being able to show Mr. Fortuna a picture of Brandon Egeler. The 911 caller, thus remained anonymous due to no authentication. There was absolutely no evidence other than hearsay impeachment evidence that should not have been admitted because it was not substantive or circumstantial. This only evidence can not be argued as anything but analyzing witness credibility.

The 911 call was the cornerstone of the State's case which everything else was built upon. The 911 call was central to the State's case and greatly emphasized with extreme prejudice in the State's opening and closing statements. The State had no case without it, especially with the victim saying without a doubt that Mr. Aaron Cloud was not the man who he seen that shot him. State court's admission of 911 call was unreasonable application of federal law warranting Habeas Corpus relief; and error not harmless. In light of the prosecution's overall case and the manner in which the prosecutor stressed the tape at trial, we cannot find that it's admission was harmless error. We agree with the District Court that it "had substantial and injurious effect or influence" on the verdict. Brown v. Keane, 355 F.3d 82, 92 (2d Cir. 2004) quoting Brecht v. Abrahamson, 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). This too factually matched Mr. Cloud's case as it was an "anonymous 911 call." The prejudice was the jury was made to believe because of the 911 tape that Mr. Cloud was the only one possible who could of done this. The State admitted Exhibit #7 (the photo of the passenger side of the Jetta) and Exhibts #'s 28-29 (photos of Mr. Cloud) and infered that because of the 911 call that Mr. Cloud was the shooter and Mr. Fortuna was the 911 caller. Without these "portions" of the 911 tape being played to the jury, the jury would not have made any such comparison between the photos of the Defendant and the vehicle as painted improperly by the State

through the 911 call. Looking at the record, it is obvious as to what the State's dishonorable intentions were, to prejudice Mr. Cloud's defense. Rule 802 has a purpose and its scope is to "exclude untrustworthy evidence that may prejudice the litigants cause or defense." State v. Picard, 90 Wn.App. 890, 954 P.2d 336 (1998). Because the 911 caller was not established and remains anonymous, prejudice is met. Mr. Cloud's Sixth Amendment right to Confrontation was violated from not being able to cross examine not only the 911 caller, but the authenticator of the 911 call itself. When evidence is admitted at trial and later held to violate the confrontation clause, the proper remidy is to remand for retrial. State v. Rainey, 319 P.3d 86 (2014).

ADDITIONAL GROUND 3.

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO INVESTIGATE ANOTHER SUSPECT WHEN EVIDENCE CONNECTED ALTERNATIVE SUSPECT TO CRIME, WHICH DENIED MR. CLOUD HIS ONLY DEFENSE.

"Shots fired" and the shooter was exactly described as Mr. Brandon Egeler. The police broadcast consisted of a "white male with a shaved head," in a car that was described similar to the one that Mr. Egeler was removed from in a high-risk stop at gun point. RP 198. Mr. Kyle Fortuna was the victim that was shot at. Mr. Fortuna was the only eye witness that seen the shooter actually shoot from a distance of only a few feet. What is significant is that Mr. Fortuna was never shown a picture of Mr. Egeler. No photo montage was prepared by police and shown Mr. Fortuna that had a picture of Mr. Egeler in it. No police line-up was conducted with Mr. Egeler as a participant. Mr. Egeler was not present during Mr. Cloud's trial where Mr. Fortuna could be asked if he recognized Mr. Egeler as the shooter in a show-up at trial for identity. Mr. Fortuna was never shown Mr. Egeler at the scene that he was drove to for identification purposes. Mr. Cloud was appointed Mr. William Houser to represent him in this action. Mr. Houser did not investigate this case. Mr. Houser solely relied on the police reports

and police investigation. Mr. Houser did not interview Mr. Egeler who was clearly listed on the Prosecution's witness list. **CLERK'S PAPERS, State's Witness List.** Mr. Houser did not present any evidence or motion for any pre-trial matters. **RP 22.** Mr. Houser did not investigate any line of defense, or determine what could or could not be used as a defense by doing any competent lawyering. Mr. Robert Davy, the prosecutor, introduced a motion in Limine that precluded an "Alternate Suspect" defense. **CLERK'S PAPERS, Motion in Limine, Nunmber 7.** The State's motion in Limine stated, "No reference to 'other suspect' evidence, including but not limited to evidence pertaining to Brandon Egeler, without prior finding by the trial court that the other suspect evidence is established by proper foundation." **CLERK'S PAPERS, Motion in Limine, Number 7.** Mr. Houser did not demand to be allowed to present a defense. Mr. Houser tapped-out and sat on his hands in response to the State's motion by answering, "I'm going to go ahead and not object to the request by the State as it's written there." **RP 10.** Facts kept coming out during trial that Mr. Houser should have previously discovered that pointed to Mr. Egeler as the possible shooter, not Mr. Cloud. The main piece of evidence is that Mr. Fortuna emphatically testified that it was not Mr. Cloud that he seen as the person that shot at him. **RP 52.** Being able to clearly see Mr. Cloud in a well lit courtroom made the identification positive in Mr. Fortuna's

mind, compared to it being dark at night over sixty feet away. Mr. Fortuna was visably upset that an innocent man was being tried for shooting at him and the real shooter was running free with the police making no effort to find him. Officer Stephen Forbragd testified at trial that Mr. Egeler was described that night as a, "white male with a shaved head." RP 297. Detective Crystal Gray testified that Mr. Cloud that night had a haircut with, "a bit of stubble." RP 507. Nr. Egeler had access to both side car windows being the lone occupant of the back seat. Mr. Cloud was in the front passenger seat. Miss Michelle Ross was the driver of the vehicle. Miss Ross does not have eyes in the back of her head. Miss Ross testified, "I never saw a gun." RP 87. Miss Ross testified that they did not get along with Mr. Egeler because of a prior situation. Miss Ross suspected Mr. Egeler of always being armed. Miss Ross severely distrusted Mr. Egeler and did not even want him in her car because of his pistol packing demeanor and testified that she was not sure if Mr. Egeler had a gun that night or not saying, "I don't know if he was carrying one because I could'nt see the back side of him. We did'nt pat him down." RP 82. Defense attorney, Mr. Houser, did not ask for a continuence to investigate Mr. Egeler as an alternate suspect after hearing all of the above prior cited trial testimony. Mr. Houser did belatedly try to motion the trial court to be allowed to argue an alternate suspect defense indicating that now

proper foundation had been laid to strike the State's Motion in Limine, number 7. RP 581. The trial court refused to allow the alternate suspect defense that, "Brandon Egeler must have been the shooter." RP 585. Not investigating Mr. Egeler who was listed as a witness on the State's witness list is unexcusable practice a reasonable attorney in a serious criminal trial would not do. Mr. Egeler was on the State's witness list and not charged as a co-defendant. Any competant attorney would have had bells going off sceaming in their head wondering why was Mr. Egeler, an ex felon, not charged? No police reports or interviews of Mr. Egeler's arrest, no deals disclosed, nothing. Competent jurists know that Mr. Houser at the very least should of showed Mr. Fortuna a picture of Mr. Egeler as an alternate suspect. Especially after all of the testimony that came out at trial and Mr. Houser's attempted motioning to be able to pursue an alternate suspect defense equates lawyering well below the ABA standard of reasonableness. Wiggins v. Smith, 539 U.S. 510, 522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Mr. Houser was ineffective in his assitance of counsel because he, "failed to interview or attempt to interview key witnesses." United States v. Tucker, 716 F.2d 576, 584 (9th Cir. 1983). "Failure to investigate witnesses is deficient performance." Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 2466, 162 L.Ed.2d 360 (2005). Mr. Cloud is an innocent man and in prison because too date, Mr. Kyle Fortuna has never been

shown a picture of Mr. Brandon Egeler. "Counsel has a duty...to investigate all witnesses who allegedly possessed knowlege concerning <defendant's> guilt or innocence." Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990). The Washington State Supreme Court summed this situation up best when it held, "All of the evidence could have been discovered before trial had his attorney exersized reasonable due diligence." State v. Macon, 128 Wn.2d 784, 799-800, 911 P.2d 1004 (1996). Mr. Houser was grossly ineffective in his assistance of counsel. "Where a counsel's failure to investigate indicates a complete lack of trial preparation, such performance falls below the level of reasonable assistance and is constitutionally deficient." Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574 (1986). "The deference generally granted to strategic choices of counsel is not justified when lack of adequate preparation is at issue." Young v. Riveland, 29 F.3d 638 (9th Cir. 1994). Not interviewing a key witness, in this case Mr. Egeler, or showing Mr. Fortuna a picture of Mr. Egeler, is ineffective assistance of counsel with prejudice met. Riley v. Payne, 352 F.3d 1313 (9th Cir. 2003). Mr. Houser's performance was the same as having no lawyer at all. The proof is piled high: not investigating key state eye witnesses, no pre-trial motions, no Defense witness list, and without the benefit of investigation - not objecting to the State's Motion in Limine precluding the only possible

defense of alternate suspect as an available line of defense. Mr. Houser shirked his, "duty to make reasonable investigations or to make a resonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). "A purportedly strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Ramonez v. Berghuis, 490 F.3d 482, 488 (6th Cir. 2007). It is axiomatic that Mr. Houser accepted the State's version of facts, hook, line and sinker. Mr. Houser was Strickland deficient equal to no attorney at all in basing his case consisting of solely, "reviewing the investigative file of the prosecuting attorney." Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984). "Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against persuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." United States v. Gray, 878 F.2d 702 (3d Cir. 1989). "Failure to investigate and interview witnesses is ineffectiveness of counsel." State v. Sutton, 99 Wn.App. 1022 (2000). "An attorney breaches his duty to his client if he fails to make reasonable investigation or to make reasonable decision that makes investigation unnecessary." In re Pers. Restraint of Davis, 152 Wn.2d 647 (2004). The

evidence pointed to Mr. Egeler being the white male with the shaved head, combined with Miss Ross testifying she did not see a gun, which makes perfect sense if Mr. Egeler was the shooter sitting in the back seat. The main evidence is the victim, Mr. Fortuna testifying evoquivically that Mr. Cloud was not the man who shot at him. Mr. Houser should of investigated an "alternate suspect" defense. Mr. Houser, "failed in his duty to conduct a reasonable investigation relevant to making an informed defense theory." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). "Petitioner's attorney was ineffective for not investigating all reasonable lines of defense." In re Pers. Resytraint of Elmore, 162 Wn.2d 236, 172 P.3d 335 (2007). "Where defense counsel fails to identify and present the sole available defense to the charged crimes and there is evidence to support that defense, a defendant has been denied a fair trial due to ineffective assistance of counsel." In re Pers. Restraint of Hubert, 138 Wn.App. 924, 158 P.3d 244 (2007). Mr. Houser should of investigated the alternate suspect defense as soon as he received the State's Motion in Limine that emphasized Mr. Brandon Egeler by name being the alternate suspect. Mr. Houser should of at the very least have shown Mr. Fortuna a picture of Mr. Egeler and was ineffective in his assistance of counsel and not corroborating an alternate suspect defense with a corroborating victim/witness. Neely v. Cabana, 764 F.2d 1172, 1177-78 (5th Cir. 1985). Washington

state law permits a criminal defendant to present evidence that another person committed the crime when he can establish, "a train of facts or circumstances as tend clearly to point out someone besides the prisoner as the guilty party." State v. Downs, 168 Wn. 664, 667, 13 P.2d 1 (1932): State v. Rehak, 67 Wn.App. 157, 162, 834 P.2d 651 (1992), cert. denied, 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993). Mr. Egeler fit the description of the suspect that the police were thoroughly searching for, more so than Mr. Cloud. Mr. Egeler's head was completely shaved, while Mr. Cloud had "stubble". Not investigating a known suspect who fit the description was ineffective assistance. Jones v. Woods, 207 F.3d 557 (9th Cir. 2000). A defendant is entitled to offer, "evidence of the same character tending to identify some other person as the perpetrator of the crime." State v. Clark, 78 Wn.App. 471, 898 P.2d 854, 858, (1995), quoting, Leonard v. Territory, 2 Wash.Terr. 381, 7 P. 872, 878 (1885). "It was proper for the defendant to disprove government's contention that he was guilty of the crime charged by proving that someone else had committed the crime." United States v. Robinson, 544 F.2d 110 (2d Cir. 1976). The evidence here established a nexus between Mr. Egeler and the crime. "Other suspect" evidence must be allowed when this nexus exists. State v. Condon, 72 Wn.App. 157, 162 (1993). Being denied an alternate suspect defense with the evidence at hand denied Mr. Cloud a fair trial.

"Being denied the right to present a defense is harmful error." Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The harmful prejudice here is Mr. Houser's deficient performance in not interviewing Mr. Egeler, nor showing Mr. Fortuna a picture of Mr. Egeler explicitly because, "there is a reasonable probability that the outcome would have been different." In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A picture is said to be worth a thousand words, and in this case, it would have been worth alot more if it had been viewed by Mr. Fortuna, as the outcome of Mr. Cloud's trial would have been aquittal. An attorney breaches his duty to a client if he fails, "to make reasonable decision that makes particular investigations unnecessary." In re Pers. Restraint of Hacheney, 169 Wn.App.1, 288 P.3d 619, 630 (2012)(quoting Strickland v. Washington, 466 U.S. at 690-91, 104 S.Ct. 2052).

ADDITIONAL GROUND 4

ABUSE OF DISCRETION NOT ALLOWING THE DEFENSE TO PURSUE "ANOTHER SUSPECT" DEFENSE WHEN THE FOUNDATION WAS LAID AND THE EVIDENCE MERITED SUCH.

Re-raising the facts stated in the previous grounds cited to the record, it was pointed out during the State's Motion in Limine, Number 7, that no mention of Mr. Brandon Egeler was to be made as another suspect unless proper foundation was laid. This was done repeatedly with State witness police officers testifying that both males in the car matched the description of the shooter, and that Mr. Egeler matched it even more so because his head was completely shaved similar to the prosecutor Mr. Devy's smooth shaven bald head. RP 507. Again, the Appellant Mr. Cloud was described as having a haircut short with "stubble." RP 507. Defense attorney Mr. Houser motioned the trial court to be allowed to pursue the "other suspect" defense; "Your honor, I guess there is one other thing. One of the motions in limine had to do with other suspect evidence as far as the introduction of the evidence based on State v. Mak, M-A-K. There was other evidence - - there was

other evidence produced during the course of the trial that would - - I would normally argue that there's potentially another suspect in that definition given by - - or the description given by Mr. Fortuna, the 911 call, is a white male with shaved head, and there's at least two people described under those circumstances in that car." RP 581. Added to the weight of this is the victim, Mr. Kyle Fortuna adamantly testifying that beyond any doubt what-so-ever that Mr. Cloud is not the man that he seen shoot at him. RP 52. The trial court did not seriously weigh or consider anything and curtly held; "I'm not going to, Mr. Houser, allow you to argue at this point that - - or make a statement indicating that Brandon Egeler must have been the shooter." RP 585. This violated the province of the jury to be the judges of evidence of who really was the shooter and was prejudice against Mr. Cloud's defense and "reasonable doubt" constitutional standard. The foudation evidence that Mr. Egeler was the shooter was enough to be, "substantial evidence" and the, "quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true." Clayton v. Wilson, 168 Wn.2d 57, 63, 227 P.3d 278 (2010). "State courts have a broad latitude under the Constitution to establish rules excluding evidence from

criminal trials; however, criminal defendant's constitutional right to a meaningful opportunity to present a complete defense limits this latitude." U.S.C.A. Const. Amend. 6, State v. Donald, 178 Wn.App. 250, 316 P.3d 1081 (2013). The evidence of flight was not allowed to be countered and made the jury prejudiced toward Mr. Cloud. The evidence showed that Mr. Egeler fit the shooter's description, was in the same car as Mr. Cloud, and had the exact opportunity due to access to both side windows in the back seat. Mr. Brandon Egeler, Officer May testified, "gave a false name initially, gave his brother's name, but eventually his name -- his real name came out." **RP 198.** It was prejudice that Mr. Cloud was precluded from showing the same propensity of dishonesty and guilt to the jury of Mr. Egeler's lie to weigh. In determining the admissibility of the defendant's evidence implicating a third party, the evidence cannot be excluded soley on the basis of the strength of the prosecution's evidence against the defendant." Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). "A criminal defendant has a constitutional right to present evidence in his own defense." State v. Hilton, 164 Wn.App. 81, 261 P.3d 683, 692 (2011)(quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). The trial court missed the main point her and did not give a chance for the truth

to be brought forth. "the ultimate purpose of the trial court's discretion in admitting or excluding evidence is to assure 'that the truth may be ascertained and proceedings justly determined.' In light of this purpose, we reverse and remand for a new trial. in which the jury should be allowed to determine the weight and credibility of Clark's evidence regarding Arrington." State v. Clark, 78 Wn.App. 471 (1995). This Division held in Clark that the other suspect evidence should of been allowed. Clark is directly on point to the abuse of discretion here in Mr. Cloud's case.

*Paramount to this ground, it should be noted that Mr. Cloud objects to the inclusion of wrong fact that was in Appellate counsel's Opening Brief, Page 14, quote: "the court granted the defendant's motion and gave the defense leave to argue that Mr. Egeler was the perpetrator of the offense the state alleged the defendant had committed, RP 581-586." The opposite is true as the trial court held explicitly that the defense could not argue the Mr. Brandon Egeler was the perpetrator. RP 585.

ADDITIONAL GROUND 5

INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT CONSULTING AN EXPERT, FAILING TO CONDUCT ANY RELEVANT RESEARCH, AND FAILING TO INVESTIGATE OR CONDUCT TESTING TO PROVE INNOCENCE

The State used it's experts heavily to infer guilt over shoddy at best evidence, to tie Mr. Cloud to the pistol found near "Dave's Gun Shop." RP 161, all the while discounting that Mr. Cloud's blood did not necessarily need to be found on it, "if Aaron Cloud is so chewed up from falling, then his blood must be on that gun. There's no blood on the gun; therefore, the DNA test should be more conclusive. Ite not Aaron. How do you know that is not a valid argument is looking at the timing. The defendant is not all bloodied up yet." RP 602. Prosecutor Mr. Davy was clearly wrong and vouching for evidence opposite what was testified to. Again, Mr. Davy uses his station and status of a prosecutor to wrongly vouch, "we shouldn't expect to see it covered in blood or parts of his hand because he has not torn himself up until down here when he's fleeing from police. Again timing." RP 603. All of the police officers that testified corroborated the opposite of what Mr. Davy vouched. Mr. Cloud fled from the vehicle and fell twice so hard that he skinned his knees and the palms of his hands till they were missing layers of skin and bloody, between the car and where Officer Meador found the gun. Officer

Meador testified, "He fell here, very hard, probably due to the speed that he was running at the time, and then he fell again right here." RP 156. When asked how hard he fell, Officer Meador replied, very, very hard." RP 158. When asked how hard Mr. Cloud fell the second time, Officer Meador replied, "About as hard as the first time." RP 158. Mr. Davy knew he was testilying because Officer Meador was demonstrating where Mr. Cloud had fell twice before where Officer Meador found the gun, not after. RP 156-161. Mr. Davy asked Officer Meador, "the first time he fell hard. Did he go down on his hands and knees, or did he go down flat?" RP 188. Officer Meador answered, "Looked like he hit on his hands and knees as if he was skidding on concrete." RP 188. Mr. Cloud's shredded palms are well documented in the photo entered as State's EXHIBIT 29. Not objecting to this obvious twisting of the facts was prejudice. Defense attorney Mr. Houser was asked by the Court, "Have you filed a witness list, or do you have a witness list you intend on filing?" RP 12. Mr. Houser responded, "I do not your honor. I will rely on the witnesses the State calls to present my case in chief." RP 12. The Court further inquired, "Mr. Houser, do you have any pre-trial motions or anything we haven't addressed up until this point?" RP 12. Mr. Houser replied, "No, your honor." RP 12. "Trial counsel's willingness to accept the Government's version of facts and failed to file any motions because he relied on the Government's version of facts, and not based on his own reasonable investigation,

calls counsel's representation into serious question of inadequacy." United States v. Matos, 905 F.2d 30 (2nd Cir. 1990). Reading the police and lab reports alone would have demanded that experts for the Defense be contacted, if not retained. A competant defense attorney worth his salt would have got an order for Mr. Egeler's fingerprints, blood and DNA, and had Mr. Egeler's clothes that were taken into evidence (Mr. Egeler was booked into jail in his boxer shorts) to be tested for gunshot residue. None of this was done, which denied Mr. Cloud of very strong exculpatory evidence of his innocence. The State's witnesses testified that Mr. Cloud severely cut, scraped and bloodied both palms of his hands between the car and where a gun was found. WSP Scientist Chris Sewell testified to testing the gun, "The genetic information that I got off these samples indicated that I had atleast three diffrerent individuals. I also had a partial profile." RP 380. Mr. Cloud was not the owner of the DNA from the gun. Mr. Egeler was not tested and should have been. The naked eye was the State's big proof that no blood was found on the gun. Mr. Houser failed to ask that question of the State's scientist expert. Mr. Davy asked lead Evidence Technician Marika Ann Scott, "Did you notice anything like blood on the gun?" She replied, "No, I didn't." RP 350. Officer Matthew Thuring testified that Mr. Cloud had, "Abrasions on the palms of his hands." RP 290. Mr. Davy further questioned, "Both hands had abrasions?" to which Officer Thuring answered, "Yes." Mr. Davy pressed,

"Were they deep enough to cause bleeding," to which Officer Thuring replied, "I believe so." RP 291. Officer Stephen Forbragd described the cuts, "to me it looked like a blister bleeding, and there were a couple scraps and scratches on his hands." RP 299. Detective Harker described Mr. Cloud's hands as, "They were definitely skinned up, abrasions, large abrasions." Asked further by Mr. Davy, "was he missing a layer of skin; could you tell?" Detective Harker replied, "That's correct, he was." RP 449. Detective Crystal Gray answered Mr. Davy's question of, "Was that weapon covered in any type of blood you could tell?" with, "No, it didn't appear to be." RP 506. Defense attorney Mr. Houser should of demanded an independant test of the gun, exculpatory facts in the many police reports merited such. Officer Meador testified that he saw Mr. Cloud badly fall to his hands twice between running from the car and prior to where a gun was found. Four businesses sell firearms in the area where a gun was found, Mr. Houser did not investigate this or raise this fact that would of greatly affected the juries verdict. No firearm ballistics matched from this gun found, to the shell casing recovered at the area where the State based there case the shot was fired involving Mr. Fortuna. Combine all this with the physical imposibility of this gun found not being covered in Mr. Cloud's blood, and ineffectiveness is met below the bar of reasonableness. Additional facts make not investigating or testing Mr. Egeler for being the shooter is that, when Mr. Cloud was standing at Miss Ross's

car, he was totally illuminated by Officer Meador's police cruiser's spotlight and seen clearly, RP 145, also under "a street light clearly lighting the entire corner there," RP 146, when shot was fired, RP 153. Officer Meador testified that he did not see a muzzle flash, RP 153, and did not shoot Mr. Cloud who was lined up dead in his gunsights because, "seen arms outside of car and no gun when shot fired." RP 187. The police spent hours searching for a shell casing or gun in a storm drain and found neither to prove the gunshot was fired from, or near, Miss Ross's car. They found no evidence in this extensive search inwhich the inside of the drain catch basin was grid-searched inch by inch and all muck taken out. RP 504. Mr. Egeler's gun and the shell casing had to go somewhere, and could of washed down the drainpipe? The police spending hours to search and calling in city maintanance workers reflects the State's only possible theory if a gun was fired near or from inside Miss Ross's car. Mr. Davy asked Detective Gray, "Was there a gunshot residue taken from Mr. Egeler, Brandon Egeler?" Detective Grey testified, "No, there was not." RP 516. Mr. Davy opined and vouched that gunshot residue tests are "not helpful, they are inconclusive." RP 607. Detective Harker testified he, "Swabbed the right front passenger door area of the vehicle." RP 446. Then to discredit the testing, Detective Harker testified in response to Mr. Davy's very leading questioning, "You never know if a testing proceedure

could be developed in the future," Q. "In your experience, have you had a -- well, let me ask you, have you ever been able to get conclusive results from gun residue testing?" A. "No." RP 447. Mr. Houser should have had tested the exculpatory swabs taken from Mr. Cloud's hands to show that they contained no gunshot particle residue. Had Mr. Houser prepared even half-heartedly and called the laboratory company that provided the Bremerton Police Department these test kits used, he would of been able to counter all this malarky. Not testing the window area Mr. Egeler shot from, and only swabbing the front passenger door, and not swabbing Mr. Egeler, was intentional. The fact that no obvious gunshot residue was recovered needed to be proven badly as exculpatory evidence for the Defense. A Defense expert was also needed for Mr. Cloud's cut up, bleeding, chunks of skin missing palms not leaving any blood or DNA on the gun that was found that the State based it's case in chief upon. "Counsel was constitutionally ineffective by failing to investigate the State's DNA testing, consult an expert in DNA, and because of his inability to challenge DNA." Leonard v. Michigan, 287 F.Supp.2d 765, 791 (W.D. Mich. 2003). Mr. Cloud had a, "constitutional right to the assistance of an expert as provided for in CrR 3.1." State v. Cuthbert, 154 Wn.App. 318, 330, 225 P.3d 407 (2010)(quoting State v. Heffner, 126 Wn.App. 803, 809, 110 P.3d 219 (2005). "Counsel's failure to call expert witness to rebut blood and fingerprint evidence," was ineffectiveness. Pheonix v.

Matesanz, 189 F.3d 20 (1st Cir. 1999). "Petitioner demonstrated 'good cause' for conducting discovery to obtain notes for trial counsel implicating another suspect and to conduct tests on blood samples." Jones v. Woods, 114 F.3d 1002 (9th Cir. 1997). "Trial counsel's failure to conduct any forensic testing of the physical evidence constitutes ineffective assistance." Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994). Defense counsel's failure to investigate state forensic evidence fell below an objective standard of reesonableness." Maddox v. Lord, 818 F.2d 1058 (2nd Cir. 1987). "Trial counsel's failure to investigate expert's opinions constituted ineffective assistance where expert opinion could have resulted in different degree of verdict." Rogers v. Isreal, 746 F.2d 1288 (7th Cir. 1984); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988). Counsel for Mr. Cloud failed to subject the Prosecution's case to "a meaningful adversarial testing process," and therefore was ineffective. Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002)."Defense counsel's failure to consult expert, failure to conduct any relevant research, and failure even to request copies of underlying studies...contributed significantly to his ineffectiveness." Lindstadt v. Keane, 239 F.3d 191 (2nd Cir. 2001). Both gunshot residue and DNA tests have both exhonorated and convicted defendant's accross America, prejudice here is presumed.

ADDITIONAL GROUND 6

PROSECUTOR MISCONDUCT FOR IMPROPER REMARK THAT DISPARAGED DEFENSE COUNSEL FOR NOT KNOWING THE LAW, AND BEING WRONG ABOUT WHAT IS "REASONABLE DOUBT."

Prosecutor Robert Davy addressed the jury directly with, "Mr. Houser just finished up explaining to you, and I - - I don't think he intended to, but he's not telling you the law correctly. He's telling you that a piece of evidence may cause reasonable doubt or any lack of evidence." RP 657. Reasonable doubt was thrown out the window because of this comment. Miss Michelle Ross's testimony of her car being chased aggresively by a car "weaving in and out of cars," RP 85, by a cocky person that, "kept staring us down," RP 80, with a "macho attitude," RP 81, she was afraid of the guy chasing her, "because of the demeanor of the other guy in the truck," RP 84, that, "in the rearview mirror, I saw the truck had actually made an illegal turn and start chasing us," RP 85, "gaining speed," RP 85, "going fast around vehicles." RP 85. This combined with Mr. Fortuna testifying that Mr. Cloud was not the shooter when he had a clear view in court of Mr. Cloud's face, RP 52, with Mr. Davy opining that Mr. Fortuna was changing his tune because he was in fear being in the same room with Mr. Cloud, RP's: 593, 612, 613, 660. Mr. Cloud was denied a fair trial. Reasonable doubt was eroded by prosecutor misconduct and false testimony. Mr. Fortuna was not afraid, far from it. Mr. Fortuna was indignant that Mr. Davy was

prosecuting the wrong man and would not believe Mr. Fortuna that was purposely never shown a picture of Mr. Egeler. "A prosecutor should refrain from personally attacking defense counsel, impunging the character of the defendant's lawyer or disparaging defense lawyers in general as a means of imputing guilt to the defendant." State v. Fisher, 165 Wn.2d 727, 202 P.3d 937, 959 (2009)(citing State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984)). It is improper for a prosecutor to disparage defense counsel's role or impugn counsel's integrity. State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). "The prosecutor may not simply belittle the defense's witnesses or deride legitimate defenses, and should not directly or implicitly impugn the integrity or institutional role of defense counsel." Wogenstahl v. Mitchell, 668 F.3d 307 (6th Cir. 2012), 133 S.Ct. 311, 184 L.Ed.2d 185 (2012). Mr. Davy's attacking the "reasonable doubt" by saying Mr. Houser was wrong on the law mislead the jury to a point unfixable. "When a prosecutor compares reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role." State v. Lindsay, 171 Wn.App. 808, 288 P.3d 641 (2012). "It is improper to disparage defense counsel." United States v. Ford, 618 F.Supp.2d 368 (E.D. Pa. 2009). The reasonable doubt standard "provides concrete substance for the presumption of innocence - - that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." In re Winship, 397 U.S. 362, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

ADDITIONAL GROUND 7

PROSECUTOR MISCONDUCT FOR IMPROPER OPINION OF "STATE OF MIND (VOUCHING) OF BOTH THE DEFENDANT AND THE VICTIM.

Mr. Davy, the prosecutor vouched for facts not in the record and facts that he knew were to be false. No one ever testified to seeing Mr. Cloud point a gun at Mr. Fortuna and "lined a shot up," to, "put a bullet in Kyle Fortuna." Yet, when instructing the jury on finding intent, Mr. Davy did violate Mr. Cloud's right to a fair trial gauranteed by the Fifth and Fourteenth Amendments to the Constitution, because Mr. Davy's misstatement and misrepresentation of facts, vouching for the credibility of State witnesses and outrageous misconduct knowingly presenting evidence that Mr. Davy knows to not be true. Mr. Davy isnt a psychologist or a mind reader, yet, he vouched for Mr. Cloud's state of mind. "You are to evaluate the Defendant's intent when he puts his finger on the trigger and squeezes it. And at that time, ladies and gentlemen, he had in his head a shot lined up, and he pulled that trigger to cause that weapon to fire and put a bullet in Kyle Fortuna." RP 614. Mr. Davy further intrudes into the state of mind of Mr. Kyle Fortuna, falsely claiming that Mr. Fortuna was "scared to be in the same room with Mr. Cloud." There was absolutely no testimony or evidence of this. Mr. Fortuna fights professionally as a mixed martial artist. Mr. Fortuna casually walked by Mr.

Cloud each time he was called to the stand outside the presence of the jury, and once in the presence of the jury. It was 100 percent false testimony, proven by the fact that Mr. Fortuna was indignant that Mr. Davy was trying the wrong man, and Mr. Aaron Cloud was identified up close by Mr. Fortuna as not the man who was the shooter. **RP 52.** Mr. Davy committed uncurable misconduct by pointing his finger at Mr. Cloud , and vouched that, "This white male with the shaved head shot at me...Do we need gunshot residue testing to believe that? No. Aaron Cloud shot at me. He was sitting in the front." **RP 609.** Again, no testimony was made by Mr. Fortuna that Mr. Clould had shot at him, or that Mr. Cloud was identified as, "sitting in the front." Repeatedly, Mr. Davy rubbed it in to sink it home that Mr. Fortuna was scared to be in the same room with Mr. Cloud, so much so that it became subliminal rote. "Kyle doesn't want to put the gun back in Aaron Cloud's hand in the same room that he's with him." **RP 613.** "A man who's been shot at then has to come into the same room as the shooter and point at him in court?" **RP 612.** "Scared" state of mind. **RP 593,** Mr. Fortuna's "believeability" due to this. **RP 660.** Mr. Fortuna's "credibility" because of this. **RP 665.** A prosecutor cannot vouch for what is in someone's head. Mr. Davy opined on Mr. Cloud's state of mind and polluted the jury. "But what was in his head when he fired at Kyle was that he wanted to cause great bodily injury, if not death." **RP 615.** "The prosecutor owes a duty to defendants to see

that their rights to a constitutionally fair trial are not violated." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 43 (2011). Using facts that did not exist, when knowing that did not happen, encouraged the jury to make a decision based "on passion or prejudice, and improper conduct." State v. Davis, 175 Wn.2d 287, 331 (2012). "Persistant misconduct of vouching and using known perjury caused prejudice that demands a new trial." In re Pers. Restraint of Glesmann, 175 Wn.2d 696 (2012). Assessing the state of mind of both Mr. Cloud and Mr. Fortuna was absent any real evidence or testimony other than that of Mr. Davy. "The jury was inclined to give weight to the prosecutor's opinion in accessing the credibility of witnesses, instead of making the independant judgement of credibility to which the defendant is entitled." United States v. Young, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Mr. Davy, "misrepresented physical evidence." No one testified that Mr. Cloud lined up a shot to kill Mr. Fortuna. This is reverseable error. Miller v. Pate, 386 U.S. 2, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967). This also applies to the misconceived use of gunshot residue to infer guilt. The main core of prejudice here is that Mr. Davy used the credibility of his office and stature and acted in misconduct as a witness for facts not true or in evidence. It is prosecutor misconduct, "in acting as both witness and prosecutor in murder proceeding was so egregious and prejudicial to fair trial as to undermine confidence in its outcome." Walker v. Davis,

840 F.2d 834 (11th Cir. 1988). The not objecting prong is obvious ineffective assistance of counsel. "Defense counsel's failure to move to correct testimony, which he knew was false or misleading, constitutes ineffective assistance of counsel." Mills v. Scully, 653 F.Supp. 885 (S.D. N.Y. 1987). Mr. Davy shifted the burden to the Defense vouching for Mr. Fortuna's state of mind. Mr. Davy repeatedly asked the jury to consider Mr. Fortuna's "state of mind" when determining his credibility. "He would confirm those issues, those facts, because facts cannot hurt him. He doesn't have to be AFRAID of those facts." **RP 592.** "When it comes to identifying that person in court - - he couldn't remember. And the way he couldn't remember is important for you to consider." **RP 593.** The most prejudicial lie that Mr. Davy told the jury was, "when it comes to identifying that person - - he couldn't remember." **RP 593.** The testimony in trial was that Mr. Cloud was definitely not the man who shot Mr. Fortuna. **RP 52.** "Prosecutor's comments will be held to violate the Constitution only if they ' so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Parker v. Mathews, ___ U.S. ___, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012). Mr. Davy's pointing his finger at Mr. Cloud an vouching he had the shot lined up to kill was improper. "The prosecutor's facial expressions and gestures in this case were clearly improper." State v. Fisher, 165 Wn.2d 727, 202 P.3d 937, 959 (2009). "Although a prosecutor has wide latitude in commenting on the evidence

during closing argument, it is not enough that his comments are based on testimony in evidence, his comments must also be legitimate." State v. Tuua, 250 P.3d 273 (Haw. 2011). Mr. Fortuna never testified or said that he was shot at from anyone in the "front window." It was the State's way of using false testimony, in this case, Mr. Davy's, to illicit a conviction, with "Kyle ducks away because he sees a gun coming from the passenger side in the front window of Michelle's car, where Aaron's sitting, RP 5, and, "at the same time, Aaron Cloud jumps from the passenger side of the vehicle, from the front seat, from where the shots came." RP 6. "A person being tried on a criminal charge can be convicted only by evidence, not by innuendo." State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950). Therefore, all advocates have a duty not to intentionally introduce prejudicial inadmissible evidence." State v. Montgomery, 163 Wn.2d 577, 593, 183 P.3d 267 (2008). Mr. Davy's misstatements of facts in this case was so prejudicial, where evidence abounds that Mr. Egeler was the shooter, is so prejudicial "as to require a new trial." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

ADDITIONAL GROUND 8

PROSECUTOR MISCONDUCT FOR VOUCHING FOR THE CREDIBILITY OF THE STATE'S WITNESSES AND FACTS NOT IN EVIDENCE.

As previously cited to factually throughout this brief to RP, Mr. Davy used his influence and standing of his office to sway the jury to corroborate his witnesses and all his evidence. Aaron Cloud's DNA was not found on the gun, nor his fingerprints. Mr. Davy vouched that the lack of blood on the gun was because Mr. Cloud was "not all boodied up yet," RP 602, and because of his witnesses, "DNA tests should be more conclusive," RP 291, 299. 603. All witnesses testified no blood or skin was on the gun of Mr. Cloud's, RP 350, 449, 505-06. Mr. Egeler's DNA was not taken nor tested for. Mr. Davy did the same thing for the gunshot residue testing, vouching the tests were not valuable or had any validity. RP 392, 424-25, 446-47. Mr. Davy vouched the tests were not helpful or inconclusive. RP 607. Mr. Egeler again was not tested, nor the rear door that he shot from. Mr. Davy put words in Mr. Fortuna's mouth that were never testified to saying Mr. Cloud shot him, lined up a shot to kill, sat in the front seat, and that Mr. Fortuna testified he called police and said Mr. Cloud shot him. RP 591-592. Mr. Davy wrongly tells the jury that identification of Mr. Cloud is the shooter by Mr. Fortuna is "substantive evidence to be considered." RP 538. Mr. Davy kept all pictures of Mr.

Egeler from the defense and made sure Mr. Egeler was never shown to Mr. Fortuna. The pictures entered into Exhibits were only of the car and Mr. Cloud. **EXHIBITS 7-8, 28-29.** Mr. Davy's admitting Mr. Fortuna called police was clearly not what was true. **RP 60,** nor substantive evidence. "A prosecutor may not express his personal opinion of the credibility of a witness or the guilt or innocence of the accused. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). "Prosecutor impermissably argued prejudicial facts not in the record, permitting the jury to speculate on facts not before it." State v. Warren, 165 Wn.2d 17, 195 P.3d 940, 951 (2008). "It is improper for the prosecutor to vouch for the credibility of a government witness." State v. Coleman, 155 Wn.App. 951, 957, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016, 245 P.3d 772 (2011). Mr. Davy opined that blood not on the gun and "This white male (pointing his finger at Mr. Cloud) shot at me...Do we need gunshot residue testing to believe that? No." **RP 609.** Mr. Davy shifted the burden to prove intent. **RP 614.** This was misconduct. State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006). "A prosecutor's statement of personal opinion about a witness' credibility has only a single vice: It must not convey the impression that the prosecutor knows facts that the jury does not." Lawn v. United States, 355 U.S. 339, 359 n.15, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). Evidence was not allowed in to show Mr. Egeler fit the description more than Mr. Cloud, and should have been. State v. Briejer, 172 Wn.App. 209, 289 P.3d 698, 706 (2012).

ADDITIONAL GROUND 9.

JURY INSTRUCTION NUMBER 10, RELIEVED THE STATE OF IT'S BURDEN OF PROVING THAT MR. CLOUD RECKLESSLY INFLICTED BODILY HARM, WHICH WAS A SEPARATE ELEMENT OF THE CHARGED CRIME.

The jury was given jury instruction number 10 which read: "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that death or a serious physical injury to another person may occur and this disregard is a gross deviation from conduct that a reasonable person would exersize in the same situation. When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally." CLERK'S PAPERS. This instruction was given in October of 2013. This was known to be a bad jury instruction that required reversal since 2009, but still used regardlessly. Jury instruction in a trial for second degree assault which defined "recklessness" and stated it was "also established if a person acts intentionally" impermissibly allowed the jury to find the defendant recklessly inflicted substantial bodily harm if it found that defendant intentionally assaulted victim; instruction conflated the intent the jury had to find regarding the

assault with the intent to cause substantial bodily harm required by the recklessness mental state into a single element and relieved the state of its burden of proving defendant recklessly inflicted bodily harm, which was a separate element of the charged crime. State v. Hayward, 152 Wn.App. 632, 217 P.3d 354 (2009). Mr. Cloud's conviction resulted from "jury instructions that were fundamentally defective," that violated his Sixth Amendment right to Due Process and Right to Jury Trial. Richardson v. United States, 526 U.S. 813 (1999). Mr. Cloud's same Sixth Amendment rights were violated because his conviction was tainted by jury instructions "which diluted the reasonable doubt standard of proof." Cage v. Louisiana, 498 U.S. 39 (1990); Victor v. Nebraska, 511 U.S. 127 (1994). Mr. Cloud was convicted on less than proof beyond a reasonable doubt of every element of the charged crime. In re Winship, 397 U.S. 358 (1970). Using Jury Instruction 10 violated Mr. Cloud's right to a Fair and Jury Trial because his conviction resulted from a jury instruction which omitted an essential element of the charged offense. Osborne v. Ohio, 495 U.S. 103 (1990). The knowledge requirement was omitted and violated Mr. Cloud's Fifth Amendment right of Due Process being convicted based on a jury instruction that failed to require consciousness of wrongdoing. Arthur Anderson LLP v. United States, 544 U.S. 696 (2005).

ADDITIONAL GROUND 10.

CUMULATIVE ERROR REQUIRES REVERSAL AND A NEW TRIAL.

Individual errors may be deemed harmless when viewed in isolation, but may, in the aggregate, amount to an unfair trial and a denial of due process. United States v. Parker, 997 F.2d 219, 221 (6th Cir. 1993); U.S. Const. amend. 14; Wash. Const. Art. 1, § 22. Here, Mr. Cloud's convictions are tainted by multiple instances of error. Bad jury instruction, judicial abuse in evidentiary rulings/denying defenses , serious ineffective assistance of counsel and multiple instances of prosecutor misconduct, that are all listed as grounds in this vehicle. Mr. Cloud was denied his right to fundamental fairness. Defense counsel's failure to prepare, failure to interview and call witnesses, failure to investigate both "alternate suspect" and "self-defense" defenses, or to reasonably investigate to rule these defenses out, combined with failing to object where there is no tactical reason not to on mandatory occasions like to the State's Motion in Limine where a competent attorney should of at critical stages of trial, was cumulative error. The cumulative acts of these many manifest constitutional and non-constitutional error violations that are cumulative prejudice from trial counsel's deviances that amount to sufficient grounds for finding ineffective assistance of

counsel. Silva v. Woodford, 279 P.3d 825 (9th Cir. 1995); United States v. Tory, 52 F.3d 207 (9th Cir. 1995); Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1992). A new trial may be required for accumulation of errors even though no one of them, standing alone, would be of sufficient gravity to constitute grounds for reversal. State v. Marks, 71 Wn.2d 295, 427 P.2d 1008 (1967); State v. Vadda, 63 Wn.2d 176, 385 P.2d 859 (1963). The prosecutor's improper remarks, vouching and disparaging counsel rate relief under the cumulative error doctrine. State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009); State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The cumulative error doctrine applies when several errors occurred, denying the defendant a fair trial, even though no single error warrants reversal. State v. Hodges, 118 Wn.App. 668, 673-74, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031, 94 P.3d 960 (2004). The errors in Mr. Cloud's case had a substantial injurious effect on the jury as he was precluded from presenting any defense or witnesses. The cumulative effect of the errors in this case deprived Mr. Cloud of a fair triel and requires a new trial. United States v. Tory, 52 F.3d at 211. Mr. Cloud's conviction was a result of all the judicial, prosecutorial cumulative errors and the cumulative errors of counsel, i.e., errors that, although not prejudicial individually, are cumulatively prejudicial. U.S. Const. amend. 6; Mak v.

Blodgett, 970 F.2d 614 (9th Cir. 1992), applying Strickland v. Washington, 466 U.S. 668 (1984). The cumulative effect of prosecutor misconduct requires reversal. State v. Walker, 164 Wn.App. 724 (2011); State v. Jones, 144 Wn.App. 285, 183 P.3d 307 (2008).

Respectfully submitted on September 16, 2014.

SIGNED: Aaron B. Cloud

Mr. Aaron Cloud

PROOF OF SERVICE

I, Aaron Guster Cloud, declare that I am depositing in the Prison Legal Mailbox at the Washington State Penitentiary, with proper First Class postage, my STATEMENT OF ADDITIONAL GROUNDS, addressed to:

1. Washington State Court of Appeals, Division II, c/o; Mr. David Ponzoha, Clerk/Administrator, 950 Broadway, Suite 300, Tacoma, Wa. 98402-4454; and

2. Mr. John A. Hays, Attorney, 1402 Broadway, Longview, Wa. 98632; and

3. Kitsap County Prosecuting Attorney's Office, c/o Mr. Jeremy Morris, 614 Division Street, MS-35, Port Orchard, Wa. 98366-4681.

DATED: September 16, 2014.

SIGNED: Aaron G Cloud
Aaron Guster Cloud.