71631-0

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

STATE OF WASHINGTON, Respondent, v. THOMAS GAUTHIER Appellant.	No. 71631-0-I STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, THOMAS GAUTHIER, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See PETITIONER'S BRIEF STATEMENT OF ADDITIONAL GROUNDS ATTACHED.

Additional Ground 2

If there are any additional grounds, a brief summary is attached to this statement.

Date: 11-24-14 Signature: Thomas Gauthier

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A. IDENTITY OF THE PARTY

I, Thomas Gauthier , Appellant, pro se, asks the Court accepts review of the additional grounds listed in Part-B below.

B. ASSIGNMENT OF ERRORS

1. Does violation of public trial right by closure of the Court proceedings warrant a new trial?

2. Does due process clause prohibit requiring a Defendant to prove consent as affirmative defense?

3. Does prosecution misconduct violate the right to fair trial in this instance?

4. Does attorney conduct prove ineffective assistance of counsel, implicating right to fair trial?

5. Did the Judge abuse discretion, and provide unfair or non-impartial proceedings in the court?

C. STATEMENT OF THE CASE

Appellant incorporates the statement from Appellant's opening briefing on appeal. The Appellant would point out the attorney did error alleging appellant could not make photo identification, where Appellant was never shown any pictures for such identifications.

The Appellant will show that the error raised regarding this prosecutor's misconduct is different that the argument presented by the attorney's briefing, and addresses a pattern before closing of the trial arguments, therefore can be reviewed together.

D. ARGUMENTS PRESENTED ON GROUNDS

1. DOES MEETING OUTSIDE DEFENDANT AND JURY PRESENCE IN THE CHAMBERS VIOLATE THE RIGHT TO PUBLIC TRIAL BY CLOSURES OF THE COURT PROCEEDINGS?

The Washington Constitution requires that all court proceedings be open to the public. Article 1 Section 10. Further, it guarantees public trials to Defendants in criminal case at Aticle 1 Section 22 which provides public trial by impartial jury.

Courts may only close proceedings after a proper balancing of the competeing interest. State V. BoneClub, 128 Wn.2d 254, 906 P.2d 325 (1995). The Boneclub balancing test is applicable to both Federal and State constitutional provisions. The experiance and logic test thats required makes courts consider both History (experiance) and purpose of the open trial provisions(logic), to determine if the open Court Room provision applies. State V. Sublett, 176 Wn.2d at 73, 292 P.3d 715 (2012).

The hearing addressed recusal of a prejudicial jury member, the Court caught sleeping several times in the trial, and the defense is the one that brought a motion for recusal in chambers of the closed Courtroom. 14 RP at 391-394.[1]

A review of Washington State case law likewise confirms that a recusal motion, and judicial recusals frequently arise in the trial courts, and makes its way to the Appellant Courts e.g. State V. Thompson, 169 Wa. App. 436, 290 P.3d 796 (2012); State V. Chamberlin, 161 Wn.2d 30, 162 P.3d 389 (2007); State V. Leon, 133 Wa. App. 810, 138 P.3d 159 (2006); In Re Parentage J.H., 112 Wa. App. 486, 49 P.3d

1. 14 RP Vol. - IV November 19, 2013 at Page 391-394.

154 (2002); State V. Graham, 91 Wa. App. 663 960 P.2d 457 (1989); In Re PRP of Mail, 65 Wa. App. 295, 828 P.2d 70 (1992); State V. Palmer, 5 Wa. App. 405, 487 P.2d 627 (citing Barnett V. Ashmore, 5 Wash 163, 31 P.466 (1882). Not all of the opinions in these cases address where the court heard the issue, but many of them reflect that the recusals issue was heard in the courtroom.

Nonetheless, the court believes in State V. Rocha, __Wa. App. __, __ P.3d __ (June 17, 2014 Div. III No. 32064-2-III[2]), the experiance prong confirms that when recusals are litigated in Washington, they are typically litigated in open courtrooms.

The purpose of the public trial rights are to ensure a fair trial and to remind the officials and officers of the court of the importance of their functions, to encourage witnesses to come forward, and also to discourage perjury. see State V. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) for this very point.

The Court held in Rocha that recusal motions argued to the court are subject to our constitutional commands of the open proceedings with the test of the Boneclub applied properly.

The relevant distinction, rests in courts opinions, between the mere conveying of information and requesting action. In Re Detention of Reyes, 176 Wa. App. 821, 309 P.3d 745 (2013), the Court held it is error for the trial judge to hear arguments on a motion to dismiss in chambers, via telephonic hearing, without first conducting Bone-Club's analysis. State V. Rocha, __ Wa. App. __, __ P.3d __ (June 17, 2014[2].

Therefore, it is ovisously error for the Judge to hear arguments.

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2. The opinion of the Court is to new in the system to have the complete citing number, however the appellant number is provided.

2. DOES THE DUE PROCESS CLAUSE PROHIBIT REQUIRING THE DEFENDANT PROVE CONSENT BY PREPONDERANCE OF THE EVIDENCE AS A DEFENSE?

The Washington Supreme Court recently determined whether it violated due process to assign a defendant the sole burden for a proof of consent as a defense. The Supreme Court determined the defendant cannot be burdened with such requirements of proof, as to do so would shift the State's burden to the defendant, where a defense of consent is being made.

The present case trial was held under the rule announced in State V. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989), and affirmed in State V. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), which a recent decision in State V. W.R. jr., __ Wn.2d __, __ P.3d ___ (October 30, 2014 No. 88341-6) overturned.

The Supreme Court found that a legislature may burden the defendant with the proof of an affirmative defense, when it merely "excuses conduct otherwise punishable" see Smith V. United States, __ U.S. __, 133 S.Ct. 714 (2013); Dixon V. United States, 548 U.S. 1, 126 S.Ct. 2437 (2006); Martin V. Ohio, 480 U.S. 228, 107 S.ct. 1089 (1987).

"When a defense necessarily negates an element of an offense, it is not a true affirmative defense, and legislature may not allocate the burden to the defendant of proving the defense. see State V. W.R. jr., __ Wn.2d __, __ P.3d __ (2014)(citing State V. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010); Mullaney V. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975).

The Appellant was forced to prove the defense by preponderance of the evidence in this trial proceedings, and therefore based on a

holding over-ruling the State V. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989), which established the rule allowing defendant's duty to prove by preponderance of the evidence a defense of the consent at trial. Therefore, the Appellant should be granted a new trial, where the burden is on the State properly, whereby a showing the trial in this case was a violation of due process clause protections.

> "The State is foreclosed from shifting the burden of proof to the defendant only 'when an affirmative defense does negate an element' of the crime." State V. W.R. jr., __ Wn.2d __, __ P.3d __ (October 30, 2014 No. 88341-6).

Neither of the cases over-ruled explain how the consent and forceful compulsion can exist together, as "conceptual oppisites cannot co-exist without negating each other".

There simply is no time or circumstance that a defendant is able to forcefully compel a victim to engage in consentual type sexual intercourse.

The rulings in Gregory and Camara are harmful, in violation of the defendant's due process right to have the State prove all elements of the crime, impermissibly shifting the burden to this defendant to negate forceful compulsion by establishing consent.

This impermissible shifting of the burden is not merely an academic, but risks compartmentalizing forcible compulsion and consent, raising a very real possibility of wrongful convictions.

The Supreme Court has found sufficient justification for it to over-rule prior decisions with arguably less harm. State V. Davin, 158 Wn.2d 157, 167, 142 P.3d 599 (2006)(overruling State V.

Furth, 82 Wn.2d 665, 667, 144 P.907 (1914), because collateral consequenses including depriving crime victims of compensation, causing emotional distress, and impacting family court proceeding); State V. Abdulle, 174 Wn.2d at 420(overruling State V. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968). The due process violation created by the rule in Camara and Gregory is plainly harmful.

The defense attorney in the present case gave this Appellant the choice of taking the stand to affirmatively testify about the consent, or foregoing this defense completely, thereby violating not only the due process clause, but the defendant's rights not to take the stand and testify in the trial.

Therefore, in the present case the jury, in making their credibility determinations, acted within the incorrect framework establishing the defense had a duty to prove consent.

The defense and prosecution both relied on an incorrect understanding of the law when they fashioned and presented their arguments surrounding consent, including making the defendant's right not to testify central to the consent defense. Creating a reasonable doubt for the defense is far easier than proving the defense by a preponderance of the evidence.

Where the defense of consent negated an element of the crime charged, the defense is entitled to have the State carry a burden of proof, and that is the case presented by this Appellant. The issue is not harmless, where establishing a reasonable doubt is easy, and does not required the defendant take the stand, thereby allowing the defendant's right not to testify upheld, while State proves the consent does not actually exist for the charged crime.

3. DOES PROSECUTION MISCONDUCT VIOLATE RIGHT TO FAIR TRIAL WHERE INTENTIONALLY APPEALING TO PASSION AND PREJUDICED OF THE JURY DURING EXAMINATION OF WITNESSES INFORMED A JURY OF BOTH DEFENDANT'S GUILT AND PRIOR TRIAL?

The Appellant presents argument regarding State's attorney's conduct before closing arguments, which is separate from counsel's arguments regarding misconduct of this attorney.

The State's attorney in several instances, with several of the trial witnesses, intentionally made reference to Defendant's guilt, and the prior trial proceedings or transcripts, directly implicating the right to a fair trail.

"Prosecutor's are quasi-judicial officers charged with ensuring that a defendant receives a fair trial. State V. Boehring, 127 Wa. App. 511, 111 P.3d 399 (2005). "As a quasi-judicial officer that is representing the State, a prosecutor has a duty to act impartially in the interest of justice" State V. Warran, 165 Wn.2d 17, 195 P.3d 940 (2008).

Although, it is hard to act impartially in such a case as the one presented here, the State's attorney could not ignore that duty to the Court. In this instance the prosecutor's conduct was clearly so flagerantly ill intentioned that no instruction could have cured the resulting prejudice. see State V. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012). The only thing that would have been accomplished with defense objecting over and over to the comments made, would be for the prejudice to be increased ten fold, therefore counsel limited objections on the issue.

The prosecutor had witnesses reading testimony from the prior trial proceedings into the record from transcripts; mentioning the

prior trial proceedings on record; asking question about the prior prosecutor and trial counsel's conduct to witnesses, all of which effected the right to a fair and impartial trial process.

The State's attorney directly asked about the "Sexual Assault" sexual assault unit, instead of the allowed "Special Assault Unit". 13 RP at 251 Line 12; 21-22; 13 RP at 352 Line 9; 13 RP 260 "Raped Her" 13 RP 262 "Person Who Attacked Her". These were all prejdicial to the Defendant, where it comments directly on the guilt, if this Defendant "Raped Her".

The State mentioned transcripts, prior trial; and Interviews transcripts at: 14 RP 254 "This is Testimony from 2011"; 14 RP 366 "Interview with defense and prosecutor": 14 RP at 367, 368, 319.

The State's attorney used the word "Attacked" 14 RP at 401; 402; to describe defendant's conduct, as if he was already found guilty of the matters before the jury. This is improper comments on guilt and nothing shows that if this had not occured the Jury verdict would be be same in this case.

The State's attorney used the word "rape or raped" at 14 RP 406 Lines 11, 13, 16, 18; 407 Lines 8, 20; 408 Lines 2, 7, 16, 22; 414 at Lines 1; 415; 416; 417; 418; 420; However prejudicial this might be during a trial for rape, it should not have occured in light of the pretrial rulings in limine.

The most egregious conduct is informing the jury of the prior trial, which occured directly at 16 RP 68-69. The trial court's own pretrial ruling is violated, and the trial court had directed that a witness giving testimony must be informed not to discuss prior trial hearings in the current testimony, therefore surely the State's own

attorney was informed not to mention the prior trial, as the Judge did not want the current jury informed of the prior trial.

Inherent in the presumption of innocence is the right to now appear with the dignaty and appearance of a free man, and the "key is the Jury's knowledge and awareness by whatever means conveyed" that freedom might not exist. see State V. Classen, 143 Wa. App. 45, 176 P.3d 582 (2008). The State's attorney robbed Defendant of this right to appear as a freeman, when informing the Jury that a prior trial was conducted, and that thought could not be removed from the minds of those juriors after hearing about the trial. see State V. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996); State V. Trickel, 16 Wa. App. 18, 553 P.2d 139 (1976), "A bell once rung can not be unrung." Once the Jury heard about the prior trial, there is no instruction that can cure the prejudice created in their minds, as the Jury will have that in their thoughs during deliberations.

The State's attorney having transcripts read into the records by the witnesses under guise of refreshing their memories cannot be allowed, however this record shows several instances of this conduct during the trial process, and therefore violation of ER 612 has been established on the records.

"An attorney, including a prosecutor may not "coach" a witness, i.e. urge a witness create testimony, under guise of refreshing that witnesses recollection with a writing. State V. McCreaven, 170 Wa. App. 444, 284 P.3d 793 (2012). "A witness is not coached by use of a writing to refresh the memory... if the witness is using notes to aid, not supplement his own memory." McCreaven, 170 Wa. App. 444, 284 P.3d 793 (2012). Therefore, in those instances where witnesses are

testifying from the transcripts and notes directly into the case record during trial, are prejudicial to the defense, when witness memory is key to the conviction, as in this case.

"Even relevant evidence may be inadmissible if the danger of unfair prejudice exists and substantially outweighs the probative value." see ER 403.

"The danger of unfair prejudice exists when evidence is likely to stimulate an emotional response rather than a rational response." State V. Powell, 126 Wn.2d at 264, 838 P.2d 615 (1995). ER 404(b) specifically prohibits admission of evidence to show the persons acted in conformity with it on a particular occasion.

Therefore, the Prosecutor's conduct regarding the references to the prior trial; the words "Rape; Raped; Attacked; Sexual Assault" are all excluded as appealing to the prejudice and passions of the jury during the trial process.

"To make successful claim of prosecutor misconduct the defense must establish that the prosecutor's conduct was both improper and prejudicial. State V. Yates, 161 Wn.2d 714, 774 168 P.3d 359 (2007); State V. Hoffman, 116 Wn.2d 51,

Conduct is improper if, for example it encouraged the jury to make a decision based on passion or prejudice,or if it refered to a matter outside the record, or infered the guilt of defendant. see State V. Belgrade, 110 Wn.2d 504, 755 P.2d 174 (1988). To be preju--dicial a substantial likelihood must exist that the misconduct does effect the Jury's verdict. State V. Yates, 161 Wn.2d at 774, 168 P.3d 359 (2007). The defense attorney did object several time to these comments and remarks, which perserves them for appeal.

The "cumulative error doctrine" applies where a combination of trial errors denies the accused of a fair trial, even where any one error, taken individually, would be harmless. In Re Detention Coe, 175 Wn.2d 482, 286 P.3d 29 (2012). In other words, Petitioner bears the burden of showing multiple trial errors and that when the errors acculated the prejudice affected the outcome of the trial. United States V. Solorio, 669 F.3d 943, 956 (9th Cir. 2012).

When the reviewing court looks into the error raised by this appointed Apellant's attorney in "Opening Brief" on misconduct and combine such with Appellant's Statement of Additional Grounds for misconduct not addressed in the "Opening Brief", the prejudice can be seen trough-out the entire trial proceeding, prejudicing Jury's verdict without question. The Jury simply could not ignore those prejudicial comments, references, and knowledge of prior trial at the time the verdict was decided, and nothing could unring the bell in this matter, once the Jury knew of the other trial.

4. DOES THE LACK OF OBJECTIONS TO THE MULTIPLE IMPROPER, INADMISSIBLE, AND HIGHLY PREJUDICIAL STATEMENTS IN A TRIAL DEMONSTRATE THE INCOMPETENCE OF THE COUNSEL?

"To prevail of ineffective assistnace of counsel, proof that counsel's performance was deficient, and the deficiency prejudiced the defense must be shown. Strickland V. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); State V. McFarland, 127 Wn.2d 322, 889 P.2d 1251 (1995). "We begin with a strong presumption that adequate and effective representation is provided" McFarland, 127 Wn.2d at 335. "Deficient performance is that which falls below an objecti--onable standard of reasonableness" State V. Horton, 116 Wa.App.

909, 68 P.3d 1145 (2003). Prejudice occures when trial counsel's performance was so inadequate that there exists a reasonable pro--ability that the jury verdict would have been different, undermining confidence in the outcome." Strickland V. Washington, 466 U.S. 688 (1984); State V. Brett, 142 Wn.2d 868, 16 P.3d 601 (2001).

The Sixth amendment guarantee to effective assistance of the counsel advances the Fifth amendment right to a fair trial, this ensures the Defendant counsel that represented the parties best interest in the proceedings.

That a person happened to be an attorney standing beside an accused is simply no enough to satisfy the constitutional commands for provision of counsel. see State V. Boyd, 160 Wn.2d 424, 153 P.3d 54 (2007). "Sixth amendment envisions under the right to a counsel, that the counsel will play a role critical to the system of adversary, to produce just results." see State V. Boyd, 160 Wn.2d 424 (2007).

The attorney in the present matters did not provide such basic legal defense to the accused, where he failed to object to multiple instances of prejudicial comments, statements, hearsay, and words of the State's attorney, witnesses, and Judge, that should have not been included before the Jury in this action. The defense counsel allowed evidence into the hearings that should have been excluded, failed to seek proper limiting instruction in motion in limines, and failed to conduct proper pre-trial hearsay hearings on State's evidence, which prejudiced the trial process.

The attorney failed to inform the trial court that forcing a defendant to prove the affirmative defense of consent violated the

due process protections of the constitutional rights of both the State and Federal constitutions. Therefore, Defendant was forced to choose between his right not to testify and right to have this affirmative defense presented the Jury, when he should have only had to raise a reasonable doubt.

The attorney allowed 4 photos of prior jail bookings given to the Jury as evidence of the change in Appellant's looks, and did allow in court identification, without even attempting a line-up or photo montoge identification with the witnesses before trial, thereby conducting even a minimal investigation.

The admission of evidence that was over 10 years old does not properly inform the Jury of material facts.

> "Detail leading to a crime prior are not admissible, and the evidence of other misconduct, not resulting in convictions are irrelevant and not admissible" State V. Cole, 28 Wa.App. 563, 625 P.2d 713 (1981).

> "Testimony regarding un-proven charges atleast 10 years old, does nothing to assist the Jury in determining any consequense or fact" State V. Acosta Jr. 123 Wa.App. 424, 98 P.3d 503 (2004).

Based on these factors and case law, it appears from the record that defense counsel error allowing the prior booking photos thats over ten years old before this Jury, and such cannot be said to not effect the Jury verdict, where it informed the Jury the Defendant's prior arrest.

"Once the accused has been characterized as a person of abnormal bent, driven by biological inclinations, it is relatively easy to arrive at the conclusions he must be guilty" State V. Saltarelli, 98 Wn.2d 358, 98 P.2d 503 (1982). This attorney allowing State's use of the photos in trial, without proper objections, established

a presumption before the Jury the Defendant was of abnormal or questionable bent, therefore prejudiced the Appellant before the Jury in the trial.

"Evidence causes unfair prejudice when it is more likely to arose an emotional response, than a rational decision by the Jury." see State V. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000); State V. Gould, 58 Wa. App. 175, 791 P.2d 569 (1990).

The allowance of adult hearsay evidence without objections in trial and pre-trial hearings prejudiced Defendant, which have been excluded under ER 803 standards with proper objections. There is a clear showing that "state has the burden on appeal of establishing the statements non-testimonial", therefore even without objections the issue is properly before this Court. see State V. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009).

The attorney refused Defendant's choice for pre-emptively challenging juror #49, therefore Defendant was not given Jury of his peers that he agrred with.

The Appellant can list over 50 places in 13 RP; 14 RP; 15 RP; 16 RP, that shows failure to object on central testimony and the prejudicial statements before the Jury, and no reasonable persons mind could forget such prejudicial statements, even had objections been raised properly.

> "Although failure to object is usually a tactically sound decision, the court can only conclude that counsel's fail--ure to object to these examples of inadmissible, improper, and highly prejudicial statements by a witness does demon--strate gross incompetence. The Court concludes defense

failed in these instances to exercise the customary skill and diligence that a reasonable, competent attorney would exercise under similar circumstances." State V. Visitac, 55 Wa. App. 166, 776 P.2d 986 (1989).

Appellant has established the record shows this defense attorney failed in the same fashion in the action being reviewed, and thereby Appellant should be given a trial with competent counsel's assistance and exclusion of the improper comments or statements, which prejudiced the jury herein.

"Only in egregious circumstances, on testimony centeral to the State's case, will failure to object constitute incompetence of an attorney justifying reversal." State V. Madison, 53 Wa. App. 754, 770 P.2d 662 (1989). The Appellant believes that the State's comments identifying the prior trial transcript as from a prior trial, does establish such reversal issue for failure to object.

There simple is no trial tactics that would allow references to defendant's guilt, the use of "rape or raped" to appeal to passions and prejudice of the Jury, and refusal to challenge juror's actual bias or misconduct during the trial. The defense attorney "Motion to Recusal of Juror" brought in chambers improperly established the sufficient basis for incompetence of the attorney, as it violated his clients right to open public trial proceedings.

The failure to object to comments about the serial killers "Gary Ridgeway" by prosecutor during trial is enough to show that counsel is ineffective.

Based on these points in counsel's trial conduct, and failure to act for the interest of Appellant at all times, relief is needed.

5. DID JUDGE ABUSE DISCRETION ALLOWING JUROR/WITNESS INTERACTION OUTSIDE THE COURTROOM DURING TRIAL?

"Due process, the appearance of fairness, and Cannon 3(D)(1) of the code of judicial conduct requires the disqualification of a judge who is bias against one of the parties or whose impart--iality may be reasonably questioned." State V. Perala, 132 Wa. App. 98, 130 P.3d 852 (2006). A judicial proceeding is valid only if it has an appearance of impartiality, such that a reas--onable, prudent, and disinterested person would conclude that all party(s) had obtained a fair, impartial, and neutral type hearing." see State V. Bilil, 77 Wa. App. 720. 893 P.2d 674 (1995).

The Appellant presents the Sheriff's Officer who spoke with a juror outside the courtroom. "I can't believe howmuch you remember", per juror's admission to the Judge when questioned about speaking to Officer Lysen about the case outside the courtroom. 13 RP 214.

There is more testimony on the records about the juror's who committed the misconduct, showing clearly an inability to follow simple Court's instructions in the trial process, however there is showing the Judge kept the juror on the Jury after the misconduct, which effected the verdict issues the matter.

The Defense moved, in chambers improperly, for recusal of the Juror, and the record shows the recusal motion was considered with respect to this juror, after return from chambers, however there is no excusal of the juror for misconduct.

The trial court's findings show there was not sufficient facts the juror's misconduct prejudiced the Appellant, however any juror that refused to follow Court instructions about the case causes the

sufficient prejudice to warrant a new trial, if they sat on the Jury that rendered the verdict of guilt in the case, as it leads a reasonable person to the presumption of misconduct during those Jury deliberations, in addition to misconduct pre-deliberation.

The fact the judge denied a motion brought to ensure that the Appellant had a completely fair trial process provided, would be enough for any reasonable person to find misconduct. 13 RP 232.

"It is presumed that a Jury will follow court's instructions during proceedings" State V. Ingles, 64 Wn.2d 491, 392 P.2d 442 (1964); State V. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1977); State V. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995); State V. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008).

Herein, the record established the Juror did not follow this trial court's instructions not to discuss the case outside Court's doors, thereby a reasonable presumption exists that fruit from the tainted tree, obtained by the juror from the officer/witness from Court's hallway area, was used in the Jury's verdict of guilt that is rendered with assistance of the juror committing misconduct.

The Court knew of the juror's own admitted bias from Officer's testimony as to the questions asked by the Juror, yet the Judge's choice is to allowed the Juror to continue, this is why alternate Jurors exist in the trial process, to aviod this prejudice.

"The appropriate standards to apply in review of trial court's dismissal of a juror depends on the nature of the request for the dismissal" State V. Berniard, __ Wa.App. __, __ P.3d __ (June 24, 2014 COA# 42579-3-II) (The number is not available, where case is to new in the computers system of Washington DOC's Law Library.)

"[p]laces a continuous obligation on the trial court to excuse any juror who is unfit or unable to perform the duties of a juror." State V. Jordan, 103 Wa.App. 221, 11 P.3d 866 (2000)

Both the Federal and State constitutions guarantee criminal defendants the right to trial by impartial jury. U.S. Const. amend. VI; Wash. Const. Art. 1 Sec. 22.

"A trial court abuses discretion if its decision is manif--estly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State V. Rundquist, 79 Wa. App. 786, 905 P.2d 922 (1995).

Herein, the trial court's decision not to excuse the juror knowing to have committed misconduct in violation of Court's own instructions to the Jury, would constitute sufficient basis for a finding of an abuse of discretion, as no reasonable person in there right mind would keep a juror knowingly unable to follow simple instructions, or willfully ignoring such instructions of the Court during the trial process.

"There was substantial evidence sufficient to persuade the fair-minded person of the truth of the matter asserted." State V. Katare, 175 Wn.2d 23, 283 P.3d 564 (2012). Therefore, Appellant believes this is sufficient to establish bias on the part of the Judge whom kept the juror on the Jury for a verdict of guilt in this instance, and such should be corrected.

The trial Court abused discretion involving admission of the 911 tapes; 4 Booking Photos; and Hearsay evidence from adults in the action, when records established the witness had calmed down, before making the 911 tapes and hearsay statements admiitted into

this trial process as evidence. Under the holdings in both the rulings of Crawford V. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) and United States V. Davis, 547 U.S. 813, 126 S.Ct. 2266 (2006), there is a burden established for "hearsay" and "911 call tapes" to be non-testimonial before admission. The State's burden cannot be shifted to the defense counsel, and nothing in records establish the burden was proven before admission, therefore this evidence is improperly admiited by the Judge.

Doctrine of Stare Decisis requires the trial court uphold a ruling of the higher courts until the higher courts overrule its decisions, therefore the ER 803 evidence should not have been in front of this Jury.

For this reason the Appellant believes sufficient showing is made as to the judicial impartiality violations, and abuse of the discretion standards, for relief to be granted of new trial.

E. CONCLUSIONS

For the reasons stated herein relief should be granted, either on an idividual issue, of cumulatively with all issues presented in both this and appellant counsel's brief combined.

DATED This 24 day of November, 2014.

Respectfully Submitted,

Thomas Gauthier

Thomas Gauthier, Pro Se

Sanders, Laurie

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