IN THE COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

State of Washington, Plaintiff,	)	No. 46687-2-II
v.	)	STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW RAP 10.10
Darrell Parnel Berrian, Appellant,	)	

A. OPENING STATEMENT

Appellant (Darrell Parnel Berrian) have received and reviewed the opening brief prepared by his attorney. Summarized below are the additional grounds for review that are not addressed in that brief. Appellant understanding the Court will review this Statement of Additional Grounds for Review when Appellant appeal is considered on the merits.

Appellant expressly apprising this Court that the errors alleged for each argument presented in Appellant's appeals are violations of State and Federal Constitutions, Fifth, Sixth, and 14th Amendment U.S Constitutions and Washington State Constitution Art I, § 22 for all the claims herein to the below:

B. ASSIGNMENTS OF ERROR

1. The trial court violation Appellant's the right to a public trial by considering a jury question without open court.

2. Appellant was denied his constitutional rights public trial was violated, due process, the right to a fair trial, and equal protection was violation.

3. Criminal Appellant has a right to effective assistance of trial counsel was violated.

4. The presumption of innocence clearly overcome the prosecuting Attorney's failure to establish and or carry its burden of pursue and proof as to introduction of the second photographic identification (photomotage II) into evidence.

5. The State refused to introduce any Georgia State statutes what may be found to be comparable to any Washington State statutory language.

6. Trial Counsel was ineffective for not challenging the State on the issues.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the trial court violation defendant right to public trial State of Washington Constitution guaranteed by Art 1 § 22 and United States Constitution 6 and 14 Amendments were violated?

2. Whether the public trial was violated by not open court? The trial court failure to apply the 5 factors under Bone-Club?

3. Whether Appellants's defense counsel failure to proposal self-defense-instruction when the evidence testimony by the State's eye witness were violated?

4. Whether the State was under a positive obligation to properly set

forth a true foundation for asserting and or offering the guilt potential of a second suspect (defendant) over the suspect originally chosen?

5. Whether the informant(s) testimony was not within the exception to the hearsay rule and should have been objected to and found to be inaddmissible?

6. Whether failure by trial counsel to challenge the State on any and or all of these issues cannot be said to be a strategic method and must be found to deprive the trial court of its jurisdiction over the defendant?

E. STATEMENT OF THE CASE

Because, Appellant is time restriction, only the relevant facts pertaining to each argument and assignments of error are presented. Appellant generally agree with the Statement of the case as presented by Ms. Stephanie C. Cummingham, Esquire in the Appellant's Brief and appellant's adopt and incorporate it herein by reference. Ms. Cunningham has fairly developed this section and Appellant's compelled per RAP 10.3(d) not to duplicate her work.

D. ARGUMENT

1. Whether the trial court violated the right to a public trial by consideration a jury question in camera, without apply (5) factors Bone-Club

Appellant (Darrenll PArnel Berrian) contend that the trial court violated his public trial right when the court responded to a jury question in without open court, with only counsels signatures and that this violation requires automatic revesal. Where the right to a public trial has been violated is structural error. See State v. Bone-Club, 128 Wash.2d 254, 256, 906 P.2d 325 (1995). There is a strong presumption that courts are to be open at all stages of the trial. A criminal appellant's right to a public trial is found

in Article I, Section 22 of the Washington State Constitution and Sixth Amendment to the United States Constitution, both of which provided a criminal defendant which a "public trial by an impertial jury". Additionally, Article I, Section 10 of Washington Constitution provides that "[j]ustice in all cases shall be administered openly". Granting both the defendant and the public an interest in open, accessible proceedings. Seattle Times Co v. Ishikaw, 97 Wash.2d 30, 36, 640 P.2d 716 (1982) This right is mirrored federally by the first Amendment. Press-Enter Co. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 628 (1984).

The public trial right is not absolute but may be overcome to serve an override interest base on finings that closure is essential and narrowly tailored to preserve higher values. Waller v. Georgia, 467 U.S. 39, 45 104 S.Ct. 2210 81 L.Ed.2d 31 (1984).

The court had already discussed the importance of accuse to criminal trials under the first Amendment in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-06, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), As recognized by both experience and logic because criminal trials were historically open, and the right of access "play a particularly significant role in the functioning of the judicial process and the government as a whole." The Globe court required the state to identify a compelling government interest prior to closure and to narrowly tailor the denial of access to serve to interest. Globe 457 U.S. at 606 102 S.Ct. 2613.

Before close a proceeding to the public, the trial court is required to consider the following factors and enter specific findings on the record to justify any ensuing closure: (1) the proponent of closure must show a compelling interest, and if based on anything other than defendant's right

to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests of the proponent if the closure and the pubic; and (5) the order must be no broader in application or duration than necessary. See State v. Bone-Club 128 Wash.2d at 258-59, 906 P.2d 325. (1995) These are consistent with the factors required by Waller 467 U.S. at 47, 104 S.Ct. 2210. Although a recent decision Preley v. Georgia, 558 U.S. 209, 130 S.Ct. 721 724, 175 L.Ed.2d 675 (2010) clarifies that the trial court must, sua sponte, consider reasonable alternative to closure.

> CrR 6.15(f(1) this rule requires:
> (1) The jury shall be instructed that any question it wish to ask the court about the instruction or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written question from the jury, the court's response and any objections thereto shall be made a part of the record the court shall respond to all questions from a deliberation jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the
>
> evidence, in a way that is not unfairly prejudicial an in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

(CrR 6.15(f)(1) This Rule Requires Original Emphasis added).

Here is Appellant's (Mr. Berrian) case, on Friday August 8, 2014, the Honorable Jerry T. Costello, Judge the following proceeding (RP 125, 126, 127, 128)

The Court: Have counsel had a chance to read this jury question.

Mr. Maltby: Yes, Your Honor.

The Court: This is what I am thinking about putting as a response. Please read again Instruction No. 1. The only evidence you are to consider consists of testimony, stipulations, and exhibits.

Mr. Maltby: What -- can I see Instruction 1 again.

The Court: The third paragraph of Instruction No. 1. says, "The evidence that you are to consider during your deliberations consists of the testimony you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial. "This question from the jury, it seems to the Court, is asking for information completely outside of the evidence presented. And my inclination is to remind the jury to only consider the evidence presented, but I want to hear what the attorneys think.

Mr. Williams.

Mr. Williams: I don't have any thoughts to be honest. I'm not sure --the Court's proposal is, I think, sufficient.

The Court: What do you think, Mr. Maltby?

Mr. Maltby: Would you read your response again, pleas?

The Court: This is what I am thinking about saying: Please read again Instruction No. 1. The only evidence you are to consider consists of testimony, stipulations, and exhibits."

Mr. Maltby: I think that's fair. It doesn't say anything other than go back -- keep doing what you are doing.

The Court: Well, I think it says a little more. I am trying to refocus them on what they are to consider and only to consider.

Mr. Maltby: I understand you are trying to get them to refocus. I could simply just say, "The Court cannot respond to your question."

Mr. Maltby: I think that might be a better one. Because it's kind of-

The Court: What I am concerned about, as I say, they appear to be dwelling on some issue regarding your relationship with your client. I mean, that has nothing to do with any evidence that's been presented here. You see what I am driving at, what I am concerned about?

Mr. Maltby: Yeah, I do. To be frank, I have never seen such a question.

The Court: Nor have I.

Mr. Maltby: And it's --

The Court: Mr. Williams, any other thoughts?

Mr. Williams: No.

The Court: Well, Mr. Maltby, what are you recommending here? The simplest answer is to say the Court can't answer your question and leave it at that. I am willing to do that. That seems to be what you would like.

Mr. Maltby: I think I would ask for that.

The Court: Mr. Williams, do you have any objection to the Court saying only that?

Mr. Williams: No.

The Court: That's what I am going to write:
"The Court cannot answer your question." This form, I'am not sure why but it calls for signatures from the attorneys. I suppose there's some value in it. By Signing it, you are acknowledging that's what the Court's response is.

Let me say for the record, Ms. Prichard delivered the Court's answer, or nonresponse, to the jury question. And they have advised Ms. Prichard they jury has -- that they will be concluding for the day. It's 4:10. They

will be concluding shortly. And at this time, they are not writing up another question. So we will be at recess. (Emphasis Added) August 8, 2014 RP 125, 126, 127, 128.

As the lead opinion notes above was actually a trial court closure public trial proceeding. The trial's court failure to apply the (5) factors of the Bone-Club of the Supreme Court consistent precedent, this is "structural error" therefore violation his public trial under article I, § 22 of the Washington State Constitution, and United States Constitution. Becuse they 'affec[t] the framework within the trial proceeds, and are not 'simply and error in the trial process itself. Gonzalez-Lopez 548 U.S. at 148, 126 S.Ct. 2557 (Alternation in original) (quoting Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 1991). As the Court explained the "structural error" is fundamental constitution framework trial proceeding. Fulminante, 499 U.S 279. The trial court failure to apply Supreme Court (5) factors of Bone-Club, the error must be automaticly reversed and remanded for a new trial.

2. Trial counsel was ineffective in failing to proposal self-defense Instruction when the evidence was requiring the jury instruction.

Both the federal and State Constitution guarantee a criminal appellant the right to effective assistance of counsel. U.S. Const. Amend VI; Wash. Const. Art. 1 § 22. A Appellant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-688, 80 L.Ed.2d 674 104 S.Ct. 2052 (1984)), cert. denied 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the appellant must

show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances". State v. Benn, 109 Wn.2d 222, 229-30 743 P.2d 816 (1987). To establish the second prong, the appellant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case". in order to prove that he receive ineffective assistance of counsel Thomas, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. Strickland 466 U.S at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

In this case, defense counsel's failure to proposal self-defense-instruction constitutes ineffective assistance of counsel.

"To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defense produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. State v. McCreven, 170 Wn. App at 463, 284 P.3d at 803 (Wash. App. Div. II 2012) citing State v. Walden, 131 Wash.2d 469 473-74, 932 P.2d 1237 (1997) citing State v. Janes, 121 Wash.2d 220, 237, 850 P.2d 495 (1993); State v. Acosta, 101 Wash.2d 612, 619 683 p.2d 1069 (1984). "[t]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the condition as they appeared to the defense." Walden 137 Wash.2d at 474 932 P.2d 1237 (citing State v. Bailey, 22 Wash. App. 646, 650, 591, P.2d 1212 (1979). See Also, State v. McCreven 170 Wn. App at 463 284 P.3d at 803.

Here is Appellant's case, the State's eye-witnesses friends Tavaris

Morriel, Revvaneishea Brown, and Kamonua Brown testimony they were spent the evening of November 13, 2012, together, hanging out and drinking alcohol. (3RP 70, 71, 72, 73, 157, 176-77, 179) They were all intoxicated, especially Morriel, when they decided around 11:00 PM to walk to a nearby Texaco gas stattion/convenience store to purchase beer. (3RP 74, 75, 155, 158, 179, 180)

The description of what transpired at the Texaco differs from witness to witness. According to Morriel, he was inside the store purchasing beer when he saw a unknown African-American man with dreadlocks arguing with a Texaco cashier in the parking lot. (3RP 75-76 77, 96, 97) It appeared to Morriel that the clerk was having trouble with the man, so Morriel decided to intervene and try to "calm the situation down". (3RP 76) When he approached and told the men to "chill out", the unknown man swung at Morriel. (3RP 76)

According to Morriel, he and the man fought in the parking lot for five to 10 minutes. 3RP 77) Eventually, they both ended up on the ground. (3RP 77) The man tried to get up, but Morriel grabbed his dreadlocks and pulled him back down. (3RP 78).

The Texaco clerk, Linson Tara, testified that he went outside to clean up the parking lot, and saw two men fighting. (3RP 54, 55) He testified that the men were both African-American, but he could not remember what they looked like. (3RP 56-57)

Dyeshanae May was Morriel girlfriend at the time, and testified that she was asleep when Morriel came to her apartment. He told her he had been stabbed, and he was bleeding and having trouble breathing. (2RP 105, 107, 110) She also testified that he looked like he had been in a fight and seemed intoxicated. (2RP 110, 117).

There was no legitimate reason for counsel's failure to

proposalself-defense instruction. If the jury were instructed that Appellant's had the right to defend himself, because Morriel was intoxicated, especially Morriel. The jury could concluded no assault committed and acquit the Appellant of the charge crime, or the jury may convict Appellant lesser included offense.

Thus, the failure to properly proposal self-defense-instruction is not the product or "strategic" or "tactical" thinking and it deprived Appellant's of the opportunity to have the acquit, or could not convicted Appellant in the first degree assault charned.

3. I-II) The two prong burden for the admissibility of photo-motage II is long and well established

The Appellant is of the belied and opinion that objection made and properly preserved in the trial court should have been susstand in accordance with the prevailing landscape. See Mason v. Brathwaite, 423 U.S. 98, 99 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Accord State v. Thorkelson, 25 Wn. App. 615, 619, 611 P.2d 1278 (1980). In the alternative, and upon those objections, Appellant argues that the admissibility of evidence and the examination -- before a jury -- of witnesses and other alleged evidences are strictly questions of law not as a matter of policy but of laws in the first instance and shall not be for a jury. See, RCW 4.44.080 ("All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it")

Appellant argues that because the "legislature is presumed to know the law in the area in which it is legislating" these statutes, rules and or judicial decisions in pursuit of the evidentiary objects of the courts of

this state, the courts must not construe this statute "in derogation of the common law absent express legislative intent to change the law." See, Wynn v. Earin, 163 Wn.2d 361, 371, 181 P.3d 806 (2008) (relying on Briscoe v. La Hue, 460 U.S. 325, 332-33, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). Thus, an Appellant Court "will only review claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. RAP 10.3(g). See also RAP 10.3(a)(3); RAP 12.1(a), Pettet v. Wonders, 23 Wn. App. 795, 599 P.2d 1297 (1979)". Accord CrR 7.5(a)(6) (The Court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected: (a)(1) receipt by the jury of any evidence, paper document or book not allowed by the court, (a)(6) error of law occurring at the trial and objected to at the time by the defendant).

Appellant is of the belief and opinion that as to Photo-Montage II the trial court's error is harmfully prejudicial and toxic to the defenses burdens and presumptions. Id. Brathwaite, 432 U.S. at 103-04: (In brief summary, the court felt that evidence as to the photograph should have been excluded, regardless of reliability, because the examination of the single photograph was unnecessary and suggestive), accord Thorkelson, 25 Wn.App. at 618. From these case histories it is clearly established that before a trial court shifts such a weighty burden upon the defense to argue any alleged suggestiveness induced at a photographic line-up procedure, the state must carry the burden of proving the need to exercise such strongly of procedure.Id. Thorkelson, supra, at 618 ("Our Supreme Court in dicta on two occasion disproved of the use of photographis indetification procedures when

a suspect is in custody").

A trial court is said to abuse its discretion when it exercises it in a manifestly unreasonable manner or bases its decision upon untenable grounds or reasons. A trial court also abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies an incorect legal standard, or bases its ruling on an erroneous legal view. See, State v Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007); Accord State v. Embry, 171 Wn. App 714, 732, 287 P.3d 648 (2012). A trial court is further abusing its discretion when it exercises it contrary, to established law. Id. State v. Madsen, 153 Wn.App 471, 476, 228 P.3d 24 (2009). In the present matter, the trial court must clearly have overlooked the well established court made law noted herein. See Kenneth Davis an approach to problems of of Evidence in the administrative process, 55 Harv. L. Rev. 364, 404-07 (1942), also see a System of Judicial Notice Based on fairness and convenience, in perspective of law, 69, 82 (1964). Appellant argues that although the " totality of the circumstances" analysis applies in the judicia review of both the states(s) need to rely upon photo-motage II, as well as in the court's review of any allegedly suggestive acts engaged in by government actors during a photographic lineup, the two affairs will naturally occur at the pace of the former prior to the later. Thus, the factors of necessity comes on prior to any arguments over any percieved suggestiveness allegation raised by a montage. Id. Brathwaitel 432 U.S. at 108 ("these was no emergency and little urgency. The court said that prior to the decision in biggers, except in cases of harmless error, 'a conviction secured as the result of admitting an identification obtained by impermissibly suggestive

and unneccessary measures could not stand") Brathwaite, supra at 109 ("Appellant at the outset acknowledges that the procedure in the instant case was suggestive (because only one photograph was used) and unnecessary (because there was no emergency or exigent circumstance)", Thorkelson, 25 Wn. App. at 619 ("In view of the disregard for our Supreme Court's longstanding disapprovl of such practices, we conclude identification evidence in coneccetion with the noble pharmacy robber should have been suppressed. We hold that, absent extenuating circumstances, photographic identification procedures of an in-custody defendant should not be used"). Accord State v. Nettles, 81 Wn.2d 205, 209-10, 500 P.2d 752, (1972) (We cannot comment the identification procedure which was used in this case. Where a defendant is in custody and available for a line-up, a line-up identification procedure would usually be a more effective, less questionable law enforcement technique, and should be used, following the requirements or standards prescribed in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). Where a line-up is impracticable, photographic identification should be conducted with the maximum degree of impartiality, under the standards set forth in State v. Lane Supra.").

Appellant argues that it does not appear in the official transcript nor does appellant counsel seem able to specifically address this prong to the objective standard. Trial counsel and the court apparently overliiked the subject and thereby forced the defense to argue a burden not properly before the court. We submit that" the facts preliminary to such admission" are simply not within the transcript provided to Appellant. Id. See RCW

4.44.080, Also se Issel v. State, 39 Wn. App 485, 488, 694 P.2d 34 (1984) "(Procedural due process applies only to deprivations of liberty or property interest. Board of Regents v. Roth, 408 U.S. 564, 11 L.Ed.2d 548, 92 S.Ct. 1701 (1972).

"Issues of constitutional magnitude may raised for the first time on appeal. RAP 2.5(a)(3). Appellant argues that this preliminary procedural step to the admission of photo-montage II into the record must sound in violation of the United States Constitution. Id.

"[A]n identification procedure using a photomontage where the suspect is in custody, absent extenuating circumstances, inherently taints subsequent identifications to the extent that those identifications must be suppressed to afford, the defendant constitutional due process guarantees. "We agree that the identification evidence should not have been admitted." Id. Thorkelson, supra at 618. Appellant argues that no material exception to the superior court rules of evidence (ER) are of record herein.

4. II Exceptions to the Admission of Evidence .

In the matter of State v. Whilaker, 133 Wn. App. 199, 222-23, 135 P.3d 923 (2006), the Court of Appeals relied on State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995), to reason as follows:

> An out of court assertion offered for the truth of the matter asserted is not hearsay if offered against a party and made by a coconspirator of that party" during the course and in furtherance of the conspiracy. "ER 801(d)(2)(v). Before admitting statements under this rule, the trial court must make an independent determination that a conspiracy existed and that the defendant was a member of the conspiracy. State v. Halley, 77 Wn. App. 149, 152, 890 P.2d 511 (1995). Both must be shown by substantial evidence independent of the statements the seeks to admit, and must be established by a preponderance of the evidence. State v. Pierrey, 111 Wn.2d 105, 118 759 P.2d 383 (1988). Id.

Whitaker, 133 Wn. App. at 222-23. In light of the above noted case law, the trial court's reasoning appears somewhat convoluted in a striking way, to wit:

> I read the materials submitted in support to the defendant's motion to suppress the photo lineup, so I have a pretty good understanding of the issue you are talking about and those are jury questions. No doubt. I am concerned about the probative value versus the potential unfair prejudice to the defendant with the particular phone call. Id.

RP at 28 (4-10).

The argument by the parties here was to the admissibility of phone calls from the jail, not the photograph montages. Id. RP at 25-28.

Yet those calls wee never addmitted. And when the judge, the Honorable Jerry T. Castello Judge and/or Court), did dig into the photograph issue it was not to address photo-montage II. RP at 30-35. When the judge finally got around to specifically addressing photo-montage II, the colloquy is clearly misguided at best:

> "... Mr. Maltby, argue as you wish. I am sure you wish. I am sure you will keep it brief. I have read everything carefully. The key thing that I am really interested in hearing from you about is what impermissible suggestions detective Martin may have made here..." Id.

RP at 37-38.

Appellant argues that even if the judge was specifically concerned with the "standards set forth in State v. Lane, "the court was not" interested" in any indepth discussions thereon. RP at 37-38, Accord Nettles, 81 Wn.2d at 210:

> "The witness should be shown the pictures of a number of possible suspects. The pictures of those suspects upon whom police suspicion has alighted at the time should not be particularly distinguishable from the other photographs shown to the witnesses, nor should any words or actions on the part of the police indicate the 'favored' suspect." Id.

The record on appeal clearly established that must, if not all, of the "general guidelines" which" emerge from these cases as to the relationship between suggestiveness and misidentification" go plainly ignored by the trial court. Id. Thorkelson, 25 Wn. App. at 618; Accord Neil v. Bigger, 408 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). In Biggers the courts enjoy a hard synthasis of the best case law aimed at preventing the "subversion of the truth-finding [mission], so carefully monitored in its formal stages, by unreviewed government decision making in its informal stages". See, State v. Wright, 87 Wn.2d 783, 788, 557 P.2d 1 (1976). Indeed, we know from the case law that the courts of our nation were aiming to provide strategic fortifications to shield the Appellant(s) presumption of innocence against mere government technical overreaching and prosecutions resting outside the public welling. Id. Biggers, 409 U.S. at 198. "Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is first of all, apparent that the primary evil to be avoided is' a very substantial likelihood of irreparable imsidentification! Simmons v. United States 390 U.S at 384, 88 S.Ct. at 971. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in foster. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance

of misidentification is grantuitous." Id. Biggers, Supra at 198.

Appellant argues that the reasoning in Biggers is not of the vacuum variety. Appellant argues that the good faith presumptions that are automatically granted to government of the public trusts here at stake, are in abundance in the case law above cited. Such generous kindnesses however must be abolished in the face of the objective worse case scenario. Witnesses tampering.

5. Witness Tampering and Biggers Object Core

Of the possible potentials and evils of an unregulated and unreviewed re-trial procedure, Appellant realizes that at the core of these questions raised in Biggers lies the influences which so easily abolish at worst or corrupt at best, the memory of a witness. See State v. Thompson, 153 Wn. App. 325, 335, 223 P.3d 1165 (2009). "An express threat or a promise of reward is evidence that may support a charge of witness tampering, but it is not an element of the charge". Id. Thompson, supra at 335.

Appellant argues that if "due process requires the trial judge to be ever watchful to prevent prejudicial occurrances, "when should the trial court have realized that both the investigator(s) unnecessary use of the photographic identification procedure and said investigator subtly offering an opinion on the evidence to the victim/will plainly punch through the shadow that separates a suggestive procedure from witness tampering per se. Id. Thompson supra at 335, Accord State v. Rempel, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990). "An attempt to induce a witness to withhold testimony does not depend only upon the literal meaning of the words used. The state is entitled to rely on the inferential meaning of the words and the context in which they were used." Id. Rempel supra. at 83-84, Biggers, 409 U.S. at 197, Also

See, State v. Gonzalez, 129 Wn. App. 895, 901, 120 P.3d 645 (2005). Appellant argues that upon any learned fact finder will rest the dark cloud that comes from the rapidity with which one transitions from being a party of influence to a party caught tampering with a witness. Id Rempel, supra at 83 n.1. Appellant argues that in the terms of "context", first there is a procedure at work that is highly frowned upon. Id. Thompson, 25 Wn. App. at 618 (Here, the State concedes that "(i)t is clear in this state that when a suspect is in custody, a line-up is the preferred procedure.... (T)he state will concede that (there were) no overwhelming reasons to have shown the montage, and it should not have been done"). Id. Thorkelson, supra at 618. Because the objective standard applies, we must be moved to presume that both the investigator and the state are well aware, they both enjoy actual knowledge, that with the Appellant being in custody the courts will frown upon the use of the photographic procedure. Yet, with this same knowledge the State did not offer into evidence, which may be said to mitigate, any circumstance material to this issue. RP at 11-38. In the context of the circumstances in evidence, the investigator did enjoin the exercise of photo-montage II and, went a step further by notifying the victim that the investigator had acquired a preferred target.

(Q: Now do you recall the officer had told you something prior to looking at the second set of photographs?

A: Yeah. That's what it seemed like, yea.

Q: What did they tell you?

A: That I might have been right.

Q: About being wrong?

A: Yeah.) Id. RP at 130.

Appellant argues secondly that the judge was not present during the investigator(s) institution of photo-montage II, the said judge remains unable to review the body-language of the investigator, the bearing of the investigator or, the way in which the victim accepted this government officials suggestion, other than observing the fact that the victim was of the opinion that the investigator was "tell[ing]" The victim something as a drill instructor tells a new recruit that the army is no place for slackers. The investigator did not merely offer an opinion, but according to the victim, the officer gave an instruction aimed at the new introduction of photo-montage II. RP at 128-131.

At this juncture, Appellant respectfully requests the Court of Appeals take judicial notice of the fact that Appellant has not been provided with a copy of any of the trial court order, minute entries or, others relevant materials that Appellant may use to better focus the issues. See, RAP 9.11.

6. III Errors

Appellant is of the belief and opinion that the uncostitutional and fundamentally unfair shifting of the preliminary burden of proof upon the defense did unlawfully relieve the State of its burden of proving every element essential to the crime charged beyond a reasonable doubt. See State v. Williams, 136 Wn. App. 486, 493, 150 P.3d 114 (2007). Appellant thereby argues that said error did result in the trial court "failing to accurately instruct the jury as the each element" critical to the allegations. Id. Williams, supra, at 495:

> (" Accordingly, a trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves

> the State of its burden of proving every essential element of the crime beyond a reasonable doubt. State v. Smith, 131 Wn.s2d 158, 263, 930 P.2d 917 (1997), State v. Stewart, 55 Wn. App. 552, 554-55, 667 P.2d 1139 (1983). Such an error is harmless only if it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained.") Id.

Willaims, 136 Wn. App. at 493 (relying on State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (202)).

Again, the Appellant is forced to apply to this Court of Appeals for judicial notice of the fact that Appellant has not been provided with a true, accurate, and correct certified copy of an of the court's jury instructions from this case -- again, forcing the Appellant argues in virtual blindness. See Nieshe v. Concrete Sch. Dist. 129 Wn. App. 632, 640, 127 P.3d 713 (2005). Also See CrR.6.15 (d) (The Court shall read the instructions to the jury.) The due process clause provides two kinds of protection, procedural due process and substantive due process. Procedural due process refers to those procedures that the government must follow before it deprives a person of life, liberty, or property. Id. Nieshe, supra at 640. A liberty right is implicated where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him. Id. Nieshe, supra, at 641. Appellant argues that irregularities "in the proceedings" of the trial court," or any order of court, or above of discretion, by which the defendant was prevented from having a fair trial", must constitute cause for overturning a jury verdict. CrR. 7.5 (a)(5) "The trial court's decision will be disturbed only for a clear abuse of that discretions or when it is predicated on an erroneous interpretation of the law". See State v. Carlson, 61 Wn. App. 865, 871, 812 P.2d 536 (1991). Appellant argues that in Carlson, the importance of qualifying the distinctions differentiating an "excited utterance" for" child hearsay" were made plain. Id. Carlson,

supra at 871. Appellant argues that as the lone expositor of U.S.-jurisprudence, the trial court was not authorized to leave this critical distinction to the jury. And, before the State was allowed to introduce photo-montage II or any testimony thereon the judge must receive testimony from the State established the specific grounds that circumstance warranted this frowned upon procedure. Id. Willaims 136 Wn. App. at 493. The judge did not do this. This judicial shortsightedness clearly establish that on this issues, this judge was clearly unable to submit a proper set of instructions to the jury on what the elements of the crime charged. Id. Thorkelson, supra, at 618; Accord Willaims supra at 493.

The trial court did not hear any evidence from the State which established beyond a reasonable doubt that a knife three inches long, or shorter, have. See, State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985): Under the "overwhelming untainted evidence" test, the appellant court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. See Parker v, Rondolph, 442, U.S. 62, 70-71, 60 L.Ed.2d 713, 99 S.Ct. 2132 (1979); Brown v. United States, 411 U.S. 223, 231, 36 L.Ed.2d 208, 93 S.Ct. 1565 (1973).

F. CONCLUSION

The Court reversed and remanded in State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995), because, "[t]he trial court failure to apply the (5) five factors Supreme Court requirement this Rule 6.15(f)(1)". The same is true here. Thus, even if this Court declines to dismiss Appellant's conviction, it should vacate and reverse Appellant's for a new trial. Because, his State and Federal Constitutions right were violated the plublic

trial proceedings. And the trial court failure to suppress an inadmissible evidence photo-montage, those substantial prejudice Appellant's for a fair trial.

DATED in this 08 day of, April, 2015.

RESPECTFULLY SUBMITTED

Darrell Parnel Berrian

Darrell Parnel Berrian, #377195, BA-22-L
Coyote Ridge Corrections Center
P.O. Box, 769, Connell, WA 99326

IN THE COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

State of Washington, Plaintiff,	No. 46687-2-II
v.	CERTIFICATE SERVICE BY MAIL
Darrell Parnel Berrian, Appellant,	

I, Appellant Darrell Parnel Berrian, do hereby and I have mailed and prepaid by the United States Postage Office from staff prison at Coyote Ridge Correction Center, P.O. Box, 769, Connell, WA 99326, and sending the original copy of "Statement Additional Grounds for Review 23 pages to the parties are following:

To: Court of Appeals Division II, 950 Broadway Suite 300, Tacoma, WA 98402-3694.

To: Ms. Stephanie C. Cunningham, Attorney at Law, 4616-25th Avenue NE, No. 552, Seattle, WA 98105.

To: Pierce County, Prosecuting Attorney Office, County-City Building, Room, 534, 930 Tacoma Avenue S. Tacoma, WA 98402-2108.

I, Berrian, is hereby stated under penalty of perjury that the information contained in this above list is true, and correct to the best of my knowledge and belief.

DATED. 4/08/2015 DARRELL PARNEL BERRIAN Darrell Parnel Berrian