COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
)
Respondent,)
)
v.)
)
Leo Andrew Fannon)
(your name))
)
Appellant.)

No. 47528-6-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Leo Andrew Fannon, 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

The prosecutor failed to preserve material evidence, and the defense counsel failed to object or investigate, thereby denied the defendant due process to a fair trial.

Introduction Attached

Additional Ground 2

The prosecutor failed to disclose excalpatory material evidence and used misleading questions of directing the location of material evidence to cause deficient representation or ineffective assistance of counsel by cummulative errors.

Introduction Attached

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

Date: 17th of Nov. 2015

Signature: Leo Andrew Fannon

Form 23

"Introduction"

To inform the Court of the nature and occurrence of the alleged errors:

1. According to the testimony of Officer Hartley; a black leather, medium size jacket was found in a bedroom, and drugs, scales and packaging material was found inside the jacket. This jacket is material to the guilt or innocence of the defendant, but was not preserved. RP: 144

"Law enforcement and investigatory agencies have the duty to preserve material evidence not only for benefit of the State but for defendant also." State v. James 26 Wash App 522, 614 P.2d 207 (1980) "The purpose of Discovery Rules in Criminal Prosecutions are to prevent defendant from being prejudiced by surprise, misconduct, or arbitrary action by government." State v. Cannon 130 Wash 2d 313, 922 P.2d 1293 (1996)

RP: 133 Sergeant Raymond Hartley

Witness: I believe it was a black leather jacket.

Mr. Suryan: Do you know what size?

Witness: Mr. Fannon's size, actually; it looked to be about a medium.

Mr. Suryan: When you say Mr. Fannon's size, did you try it on him?

Witness: No.

The defendant did not live at that house. At arrest the defendant weighed over 220 pounds, slightly overweight.

The defendant has not worn size medium clothes for over forty years. The jacket was in States possession and it was withheld, because it would be Like O.J. Simpson's glove, too small to fit. The prosecutor asked a Leading question to Officer Hartley about the Location of the jacket. Officer Hartley pointed at the defendants extra Large brown jacket on his chair. This was abuse of discretion.
RP: 144 Prosecutor questioning Officer Hartley
Q. Would you recognize Mr. Fannon's jacket if you saw it again?
A. yes.
Q. And do you see it here in the courtroom today?
A. I do.
Q. Where is it Located?
A. It's on The back of his chair over there.

"A Leading question is one that suggests the desired answer. The trial court has broad discretion to permit Leading questions and will not be reversed absent abuse of that discretion". Stevens V. Gordon 118 WashApp 43, 74 P.3d 653 (2003)

"The prosecutor, Like any other attorney has the duty of candor toward a Tribunal which precludes it from making false statements of material fact or Law to such Tribunal." State V. Talley 134 Wn2d 176, 949 P.2d 358 (1998)

The prosecutor was well informed of this mismanagement of material evidence, and the defense counsel failed to object or motion against it. The defense counsel failed to raise

the different between the extra Large brown jacket the defendant had in court, and Officer Hartley's black Leather medium sized jacket he claimed to have found, in a bedroom, with the drugs, etc, in its pockets. Hartley claimed he possessed the black jacket four months before the trial, but the defense counsel failed to cross examine of how he lost custody of it, or that it was a womens jacket belonging to one of the six people who acually Lived there. The photos of the evidence would show it's a womens jacket. after conviction this was found out, because at trial the defendant was not aware of a jacket being material evidence, or any of the statements against him, there was no disclosure,

The defense counsel also failed to object to the States Leading questions that coached Officer Hartley to mis-direct the jury away from the truth about the Location of the defendants wallet and money. The defendant was in the hallway with his wallet and money in his pocket when arrested, and his pickup was running in the front yard. The defendant just stop there to get a car battery out of his motor home, which was just moved there for storage. The wallet and money being in the defendants pocket did not support the elements of the crime, so Hartley falsely claimed he found them with the jacket and drugs, etc, in the bedroom. The prosecutor was misdirecting material evidence.

RP: 144 Prosecutor questioning Officer Hartley
Q. Okay, thankyou. Sergeant Hartley, you also indicated that -- actually, did you Locate anything else of interest inside of Mr. Fannon's room at this time?
A. I did.
Q. What else did you Locate?
A. I Located some US currency, along with his wallet. RP: 232 Detective Libbui said it was in his pockets
RP: 156 Mr. Suryan questioning Officer Hartley
Q. When you went inside, wasn't there a truck that was running outside the house?
A. Yes.

"The Supreme Court was authorized to promulgate rules providing for the advisement of the right to counsel as soon as feasible after arrest, rules affected and regulated the process of taking and obtaining evidence and preservation of such evidence, and purpose of rules was to regulate an aspect of the criminal process ensuring that persons arrested know their right to counsel in time to decide whether to aquire exculpatory evidence. The State Court rules providing for the advisement of the right to counsel immediately upon the arrest goes beyond the Constitutional requirements of the Fifth and Sixth Amendments of the United States Constitution."
State v. Templeton 148 Wn2d 193, 59 P.3d 632 (2002)

These rules of due process would include the right to have the original black jacket, and the other exculpatory evidences such as disinterested witnesses who were present at time of arrest. These people were in the court room during Trial, but were never called to testify. The police cruiser video camera recording would have been exculpatory evidence too, but wasn't disclosed. The video would have shown the defendant being wisked out and transported to jail, unlike the story alleged by States witnesses. Not preserving the jacket was misconduct, and misleading the wallet and money was abuse of discretion.

Q. This pattern of abuse started at Pre-Trial. The discovery shown to the defendant was a false statement to force a plea, namely a statement by Ann Steptoe who was present, and whom denied making such a statement. There was no disclosure of witness statements, or record of any audio, or video recordings, or documents of any kind. At the beginning of the trial four days later, the defendant asked the Court for permission to hire another attorney, for a second opinion, the Judge missunderstood and refused his request. The defendant feared his rights to a fair Trial was in jeopardy.

RP: 4 Defendant addresses the court

Defendant: Sir, why is today so important?

Judge Warning: Because this is the day your trial starts.

Defendant: Yes. Alright. -- We don't really have time to talk about a statement that I supposedly said. I would like to understand, you know, if I am I'm going to testify. Exactly how am I going to turn around and -- and say the obvious that I did not say such a thing, that he is a liar? He's a -- he's an officer, you know? That's just cutting my own throat.
Judge Warning: I'm not sure what your question is,
Defendant: Now I'm -- it's my life, your Honor.
Judge Warning: So what is it you're asking me?
Defendant: To have a little bit of time and understanding, and a second opinion. I'm trying to raise money for another attorney.
Mr. Suryan: Your Honor, if I could help? Mr. Fannon told me this morning that he needed a new attorney, and I thought he should address that to the court.
Judge Warning: Well, Mr. Fannon, the case has been pending since November. Today is the day set for trial. You were here last Thursday, told it would start today. The idea that now you're going to start searching for another trial is far too late. Alright.
Defendant: I am not searching for another trial.
Judge Warning: Pardon?
Defendant: I just question why on this testimony the discovery says that I made a statement. Why was there not audio and video with the discovery if I made such a statement?

Judge Warning: Well, I'm sure that's something you can raise in the course of the trial.

"Issues of trial counsel's effectiveness is appropriately raised at any point in the proceedings, and the standard for determining the existence of a violation is whether, considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial." State v. Ermert 94 Wn.2d 839, 621 P.2d 121 (1980)

The case laws and court rules that are included as examples are devices of learning found in West's Washington Court Rules for procedures prior to trial in criminal cases, and RAP rules reguarding review.

The prosecutor requested the court to allow the 3.5 hearing to be held off until the second day of trial. He was not prepared with his witnesses, since the defendant didn't change his plea of not guilty. The Judge said it was crazy. RP: 3, 4

Judge Warning: And why didn't we have that information Thursday, when we were scheduling this?

Mr. Brittain: I didn't know. I thought he was going to be back on -- I mean, it wouldn't have changed --

Judge Warning: Well, it's not secret information. I -- you know, at this point, to be trying to do a 3.5 hearing the second day of a two-day trial is a little bit crazy.

The 3.5 hearing was not followed according CrR 3.5, 3.6 with the proper time and notification to prepare an adiquate defense, also CrR 4.5, 4.7 the court failed to ascertain if the discovery was complete, or the prosecutors obligations were fulfilled. The defendant did not see any discovery for over four months. Five days before trial the defense counsel showed a fake discovery prepared by the State. Passive colusion was evident and defense counsel being restricted of proper disclosure did cause deficient representation. Procedures set forth by Washington Court Rules would guarrantee a fair trial by due process.

Outside the presence of the jury, the prosecutor admitted that none of the detectives could confirm the testimony of any of the others. But defense counsel never brought this admission to the jury's attention, through cross examination, thus allowing the jury to assume each detective's testimony could be confirmed by the other detectives.

RP: 3

Judge Warning: Mr. Suryan?

Mr. Brittain: And I can say that neither other detective would be testifying to any statements. They don't have any knowledge of it.

Mr. Suryan: I--I think on that one, I have to defer to the court.

"A showing that a government agency has failed to comply with its own rules or regulations is sufficient for relief upon the filing of a personal restraint petition." In re Lopez 128 WashApp 891, 110 P.3d 764 (2005) habeas corpus 210

"The purpose behind discovery disclosure is to protect against surprise that might prejudice the defense." State v. Barry 184 WashApp 790, 339 P.3d 200 (2014)

According to Barry's case dismissal was caused by misconduct. In this pattern of conduct Fannon prays for consideration to review the discovery violations. The Officers statements were not disclosed. The police cruiser camera's recordings were not disclosed. The search warrant was not disclosed to the defense, and when the jury asked the Judge, What was the actual address that the warrant was issued on? The Judge simply said, you must rely on your memories of the testimony presented. So neither the defense nor the jury has ever seen the search warrant. Exhibit of, guestion from the deliberating jury and Court's response. (Attached)

"Search Warrant is a procedural step. Where procedure is relating to arrest and search is provided, it must be strictly followed, in view of Federal and State Constitutional guarantee of individual rights." State v. Miles 29 Wn2d 921, 190 P.2d 740 (1948)

"Court reviews validity of search warrant under abuse of discretion standard." USCA Constitution Amendment 4, State v. Creelman 75 WashApp 490, 878 P.2d 492 (1994)

The defendant requested permision to call a witness from the list of people present at time of arrest. The defense attorney sounded, caught off guard, and signs of reluctancy to carry it out. No motions were made by the defense, no witnesses called.
RP: 208, 209
Defendant: May I have other people that was with me, a person that was with me when I went to the house? I Left a vehicle running outside of the house. I want that person to come in to witness the -- the -- things that go along with my statement, otherwise corroboration.
Judge Warning: Okay. you're free to call anybody that you wish. If you've gone over that with your attorney, I assume its been covered. ALright, Mr Suryan?
Mr. Suryan: -- OKay. Your Honor, the person that my client is referring to would be available, but probly not for -- until close to noon.
Mr. Brittain: I would also point out that the defense never disclosed a witness in this case.
Judge Warning: Mm
Mr. Suryan: I didn't realized that that would be some-body we would be wanting To call this morning.
Judge Warning: Right. I understand. We're going to proceed with the 3.5 hearing now.

The defense counsel failed to call any witnesses was in fact were present in the courTroom and prepared to testify that I had nothing to do with any drugs or coat found in that house. That I was handcuff and

rushed out of the house and transported to jail. They would have confirmed that blue uniformed police Officers, not detectives, did the arrest. The defendant's testimony was short just like the arrest. RP: 210, 211 Defendants testimony

The prosecutor laid the foundation of expertise and training and well grounded reputation of these Officers from Longview Street Crimes Unit. They are professionals that are equiped with high Level technology and resources for conducting proper investigatory process, and safety precautions, but why did the prosecutor fail to turn over disclosures of the aforementioned recordings, and why did defense counsel fail to insist on such disclosures?

The defendant had to direct questions to his counsel, and one was about his protective barking dog that he was affraid the police were going to shoot. The witnesses recalls my running pickup in the front yard, but don't recall my protective barking dog, they were not there! The defendant addressed the court just before sentencing and asked the Judge if he would please check the time cards for the detectives whereabouts on November 12th 2014, because they weren't there, and made the whole story up. The Judge answered; It doesn't matter! The defendant just graduated Drug Court whom Judge Warning is overseer. The defendant has no use for drugs anymore and did not do this crime. The money possessed took over a year for the defendant to save up. It was easy saving money

while Living sober. The defendant was on a bail bond until the second day of trial. AT the end of the first day of trial the Judge told the counsels that court wouldn't start until 9:15 AM the second day. The Judge also told the jury at another point that court wouldn't start until 9:15 AM, but when the defendant showed up at 8:50 AM the Judge revoked his bail and put him into custody, plus deprecated him. That day the defendant Lost everything he owned.

RP: Detective D.J. Mortensen 168

Q. – did you recall a vehicle with the engine running outside the house?

A. Yes, we did.

Q. Okay. Did you hear a dog barking?

A. I do not recall hearing a dog bark, no.

RP: 170

Q. Okay. And did all of those people live there?

A. I don't know if Everybody Lived there —

PP: 172 Judge Warning actual start next day at 9:15.

Judge Warning: And tomorrow morning, Counsel, we're going to acually start at 9:15. I've got an attorney swearing in at nine o'clock.

RP: 180, 181 Judge Warning telling jury start at 9:15

Judge Warning: — it will be short, so we'll start at 9:15 tomorrow. So be back here shortly before that.

RP: 193 Defendants bail is revoked
(court reconvenes on this matter at 8:51:59 AM)
Judge Warning: It is now ten 'til. Mr. Fannon, where have you been?
Witness: I'm awake.
Judge Warning: Alright. Youre also going into custody.
Judge Warning: -, but I can't run this Court whenever Mr. Fannon decides RP-144 he's going to show up.
RP: Detective Libbui don't recall a barking dog 238
Q. Do you recall a dog barking?
A. I-I-I don't recall.
On RP: 238 the detective said Fannon was one of the first people he hand cuffed after entering the house, because Fannon was in the hallway and not running.
RP: 332 Defendant asking prosecutor for the records
A. Well, the Time that they arrived there is probly Logged, and the Time that I'm booked into the County jail probly would coincide with what I'm saying.
Q. Okay, Okay. So-
A. Could I have those records, Prosecutor?
The transcript of RP: 409-411 is attatched with the exhibit of the jury's question about the search warrant. The trial record of the alleged allocution, which is not followed by the proper format. It also has the reply from the Judge to the defendant deleted, where the Judge said, It doesn't matter! The whole

reply is not on record. It shows the Judge ignored the defendant's words at the time of the unlawfully conducted "allocution" (where that unlawfullness is itself evidence of the court's bias), and matches how the Judge falsified defendant as being "late" to court when in fact he appeared before the 9:15 AM time set by that same Judge the day before.

The bias, abuse of discretion, misconduct, discovery violations, and ineffective assistance of counsel are too many to express as shown by the record.

The detectives were never present at the address of defendant's arrest, but were used as false witnesses as if they had been present for the advantage of undeserved extra credibility because of the prestige of their titles as "detectives". Instead, their testimony was merely a combination of dishonest perjury, sprinkled with selected points from notes by the officers who had been present.

That was the reason defendant asked the court at "allocution" for the detectives' time cards and assignment records for that day, and prove they were never there at the scene and that their testimony was deliberately fabricated, and lied about even being present.

The defendant also asked his attorney for the public records of all search warrants issued for 2121 Sycamore Place, Longview, WA during Oct. and Nov. 2014. The defendant never lived there nor had anything to do with any coat, drugs, nor drug paraphenalia supposedly found there.

Defense attorney further failed to call defendant's witnesses, including those there present in the courtroom who would have testified that the detectives were never there and the defendant never had anything to do with any drug activity there.

Defense attorney failed to object to any issues or errors, or file or make any motions for the defense. The vehicles bought and sold by the defendant are a matter of D.M.V. record, and account for the cash found on him, plus the reason for possessing it on his person, but defense attorney again failed to investigate.

> "To show actual prejudice a successful ineffective assistance of counsel claim requires the defendant to show that counsel's performance was deficient and that the defendant was prejudiced by the deficient perfomance." STrickland 466 US 668, 104 SCt 2052 State v. Thomas 109 Wn2d 222, 743 P.2d 816 (1987)

The defendant believes the deficient representation is brought about by discovery violations and abuse of discretion, plus failure of due process in not abiding to Washington Court Rules under the State and Federal Constitutions.

"Presumptions of trial counsel's competence can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or Legal, to determine what matters of defense were available or failed to allow himself enough time for reflection and a preparation for trial."
State v. Byrd 30 WashApp 794, 638 P.2d 601 (1981)
How did a search warrant at 2121 Sycamore have the defendants name on it? Why wasn't the search warrant shown to the jury? Did the request for a second attorney cause the defendant to be placed in custody and bail revoked? Was the comment by the Judge, "it doesn't mater" deleted because it shows bias? When perjury causes a conviction, isn't That a crime? Are they not accountable for their actions?

The defendant prays the Court of Appeals will review in Light, an example of a parallel case to conclude this introduction. Quoted From; State v. PRP Hoyt W. Grace 174 Wash2d 835, 280 P.3d 1102 (2012)
174 Wash2d 842, "the court noted this test finds its roots in the test for assessing the materiality of exculpatory information the prosecutor fails to disclose or of testimony made unavailable to the defense by the governments actions." (citing US v. Agurs 427 US 97, 96 SCt 2392, 49 L.Ed2d 342 (1976) US v. Valenzuela-Bernal 458 US 858, 102 SCt 3440, 73 L.Ed2d 1193 (1982)

174 Wash2d 843, "More over, we are mindful that the constitutional claims arising from ineffective assistance of counsel on one hand, and claims arising from withheld or undisclosed material evidence on the other hand, share another important characteristic, one that makes them natural companions in this analytical framework. In these types of claims, prejudice inheres in the violation. That is to say, a petitioner who proves a violation shows prejudice."

Writing in context of undisclosed exculpatory evidence, Justice Souter explained: Assuming, arguendo, that a harmless error enquiry were to apply, [an error arising from the nondisclosure of material evidence] could not be treated as harmless, since "A reasonable probibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." U.S. v. Bagley 473 US [667] 682, 105 SCt [3375] 3383, 87 L.Ed2d 481 (1985)

It is difficult to conceive of how much more actually and substantially a petitioner could be prejudiced than by unfavorable result, which was caused by a breakdown in the adversarial process that our system counts on to produce just results. The court emphasized that this concern is the same in a collateral attack as on direct appeal, and this case should be vacated for extreme prejudice.

Thank you for your consideration.

Respectfully Lee Andrew Fannon

IN THE Appeals COURT FOR WASHINGTON
IN AND FOR Division Two COUNTY

State of Washington,
Plaintiff

v.

Leo Andrew Fannon
Defendant.

No. 47538-6-II

DECLARATION OF SERVICE BY MAILING

I Leo Andrew Fannon, the Defendant, in the above entited cause, do hereby declare that I have served the following documents;

Statement of Additional Grounds for Review

PARTIES SERVED:

CLERK OF THE COURT
Court of Appeals, Division II
950 Market Street, Suite 300
Tacoma, WA 98402

PLAINTIFF / PROSECUTOR
Mr Ryan Jurvakainen, Cowlitz County
312 S.W. First Avenue
Kelso, WA 98626

That I deposited in with the Unit Officer's Station, by processing as Legal Mail, with First Class Postage at: SCCC H5-A 191 Constantine Way, Aberdeen WA 98520

Dated this 17Th day of Nov., 2005

I certify under the penalty of perjury under the laws of Washington that the aforementioned is true and correct.

Leo Andrew Fannon

(Signature)

exceed his lifespan in any event. I would ask the Court to consider not rushing to go to the top end and to sentence him at the minimum, 84. That's still more than he's going to probably survive anyway.

JUDGE WARNING: Mr. Fannon, anything you wish to say?

DEFENDANT: Yes, Your Honor. You've known me for a long time, and I graduated drug court. I was very proud of it. You know, what I had during this time was loneliness and maybe a little bit too much (inaudible) but I'm not what I was brought in here for. I requested -- I can't subpoena the time card from the detective, but I'm positive that he was never there, and that's what I'm going to try to request up in the federal courts. I plan on appealing this. If I was to do this, you know, I would admit it, it was just a relapse. But Your Honor, the thing was infatuated. The coat was a medium coat. I weighed 230 pounds. There was no way I could put that jacket on me. I'm just asking you to understand what -- I'm not going to actually beg, but I would really want access to that officer's time card and to get my life back. If it needs to be relocated, I will move to any

other part of this country.

JUDGE WARNING: Alright. Counsel, the judgment and sentence shows a score of nineteen.

MR. BRITTAIN: That was prior to my conversation with --

JUDGE WARNING: Okay.

MR. BRITTAIN: -- Mr. Suryan about that first. If we could just be --

JUDGE WARNING: So the number of other non-drug felony convictions should be five and not six, is that right?

MR. BRITTAIN: Correct, Your Honor. That -- that -- that --

JUDGE WARNING: Okay. I'll make those changes.

MR. BRITTAIN: -- point would be changed.

JUDGE WARNING: Alright. Mr. Fannon, you're right: we have seen a lot of each other over time and I was hopeful when you made it through drug court. You know, frankly, the fact that we ended up in trial and he's facing what he's facing now was, more than anything, the result of just some really, really seriously impaired decision making from Mr. Fannon. And it strikes me that seven years is plenty to pound

somebody with for a few hundred dollars' worth of drugs, even if he was dealer not user amounts. That's still an awful long period of time to do because your brain is too fogged by dope. So I'm going to impose sixty months plus 24 months for the enhancement.

Mr. Fannon, because you were convicted by a jury after trial, you have an absolute right to appeal. If you need some assistance in filing your notice of appeal, if you'll contact the clerk's office, they'll provide that to you. If you need an attorney appointed to represent you, one will be provided. You can have whatever parts of the record are necessary to perfect your appeal at no expense to you. It's important for you to understand that your right to appeal is lost forever unless that notice of appeal is filed within thirty days of today's date. You understand that?

DEFENDANT: Can I verbally request it right now?

JUDGE WARNING: I'm sure your attorney will get it filed right away.

MR. SURYAN: Your Honor, for the record, I'm informed Mr. Fannon that as soon as we have the judgment and sentence, which has to be attached to

DO NOT DESTROY / RETURN TO BAILIFF

FILED
SUPERIOR COURT
2015 MAR 25 P 4:57
COWLITZ COUNTY
STACI L. MYKLEBUST, CLERK
BY

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

State of Wa.,
Plaintiff(s),

vs.

Leo Andrew Fannon,
Defendant(s).

No. 14-1-01367-9

QUESTION FROM THE DELIBERATING JURY AND COURT'S RESPONSE

Do NOT indicate how the jury has voted.

JURY QUESTION: What was the actual address that the warrant was issued on.

Elena Russell 3/25/15
Presiding Juror / Date

Date and time received by the Bailiff: 3:16 pm 3/25/2015

COURT'S RESPONSE: (After affording all counsel/parties opportunity to be heard.)

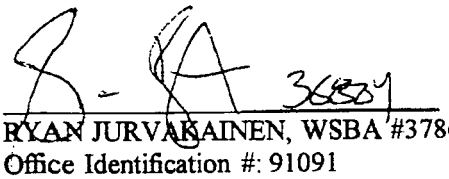
You must rely on your memories of the testimony presented,

Judge

Date and time returned to the jury: 3/25/15 3:45 pm.

Scanned

DATED: Tuesday, March 24, 2015



RYAN JURVAKAINEN, WSBA #37864
Office Identification #: 91091
Cowlitz County Prosecuting Attorney

DEFENDANT INFORMATION						
NAME: LEO ANDREW FANNON				DOB: 1/27/1957		
ADDRESS: 244 18TH AVE				CITY: Longview		
STATE: WA		ZIP CODE: 98632		PHONE #(s): ( ) -		
DRIV. LIC. NO.: FANNOLA433	DL ST : WA	SEX: MALE	RACE:	HGT: 5'05"	WGT: 165	EYES: BRO
HAIR: BLK	OTHER IDENTIFYING INFORMATION: TAT R HND CROSS					

STATE'S WITNESSES:

SCU RAY HARTLEY
SCU BJ MORTENSEN
SCU SETH LIBBEY
DEBORAH PRICE – WSP FORENSIC SCIENTIST
RICK LECKER
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35