

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

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STATE OF WASHINGTON

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STATE OF WASHINGTON,
Respondent,
v.
Calvin Artie Eagle
Appellant.

No. 65098-0-1
STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Calvin Artie Eagle, 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

STATE FAILURE TO PROVE THE ELEMENT OF THE CRIME (SEE ATTACH)
PROSECUTOR MISCONDUCT A-E (SEE ATTACHED)

Additional Ground 2

INEFFECTIVE COUNSEL #2-2(A) (SEE ATTACHED)

ADDITIONAL GROUND 3

COURT ERRORS #3 A-D (SEE ATTACHED)

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

Date: 10-19-2010

Signature: *Calvin A. Eagle*

GROUND #1

THE STATE FAILED TO PROVE ITS BURDEN ON THE CHARGE OF FIRST DEGREE.

DID THE STATE FAIL TO PROVE ITS BURDEN WHEN IT DID NOT PRESENT ANY PHYSICAL EVIDENCE TO SUPPORT THE CHARGES AGAINST THE DEFENDANT?

Defendant was charged with one count first-degree rape of a child and two second degree rape of child. The State did not submit a jury instruction for the lesser-degree crime. The trial court and the state erred by not giving a lesser-degree instruction because neither the victim's testimony nor defendants' evidence supported a first or second degree rape.

The victims testimony consistently reflected rape. They testified that they had sex multiple times with the defendant. S. Mallak the step daughter and one of the alleged victims even informed and willingly gave the lead investigator detective Hertz her bedding stating that, " that a week before the bedding was collected the defendant had ejaculated on her bedding" as he had done over fifty times before. This action giving investigators reason to believe they would find evidence of the acts, conducted a DNA test that presented the presence of two semen samples, None belonging to the defendant.

The defendants' statements and the evidence supported only that no rape occurred. An appellate court reviews de novo a trial court's decision to give a jury instruction based on a ruling of law. If the trial court's decision is based on a factual dispute, an appellate court reviews it for an abuse of discretion. A trial court may not submit a theory to a jury for which there is insufficient evidence. An appellate court reviews the evidence in the light most favorable to the instruction's proponent.

The Court in this case did not give a jury in instruction on any lesser charge, in fact neither the State nor defense attempted to give such an instruction. The law states that in the **RCW 9A.44.073. Rape of a child in the first degree.**

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

And

RCW 9A.44.076. Rape of a child in the second degree.

(1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

This statute does not alter the obligation of the prosecutor to prove every element of the charge. State v. Kalamarski, 27 Wn. App. 787, 620 P.2d 1017 (1980).

The Washington Pattern Jury Instructions - WPIC -44.11 & 44.12 (Vol. 11)

Presents the elements and the same requirement in every degree: That to convict the defendant of the crime of rape of a child in the first and second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about _____, the defendant **had sexual intercourse** with _____ .

The record shows that the element of sexual intercourse was not, and could not be proven beyond a reasonable doubt by the States case.

In Rp. 134-135 Direct of S. Mallak & Rp. 299 at 15-25 Direct of B.Baker both alleged victims, state that they did not get or want a physical examination after they accused the defendant of the charges. The State charged Mr. Eagle with first and second degree rape of a child and failed to submit an alternative charge or jury instructions, knowing there was no physical evidence to support the charges.

In Rp. 967 at 13-17 the prosecutor maintained that the jury could find that the "there was no DNA found or none of the defendants DNA was found on Shilair's bed and I say so what. I mean that's just an absence of evidence. Who cares. That does not prove anything. So what.

The evidence was insufficient to support a first or second degree rape instruction. A trial court may not submit a theory to the jury for which there is insufficient evidence. State v. Munden, 81 Wn. App. 192, 195, 913 P.2d 421 (1996). We review the evidence in the light most favorable to the instruction's proponent. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Under RCW 10.61.003, "the jury may find the defendant not guilty of the degree charged in the indictment or information and guilty of any degree inferior thereto" For the trial court to instruct on an inferior degree offense, the evidence must support an inference that only the lesser crime was committed. Ieremia, 78 Wn. App. at 754-55. 1 In other words, the evidence must permit a rational juror to find the defendant guilty of the lesser offense and acquit him or her of the greater. Fernandez-Medina, 141 Wn.2d at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

This opportunity is not even considered the court and the State had full knowledge that there was no physical evidence that could support sexual intercourse beyond a reasonable doubt to satisfy the jury instructions given on the charges.

To prove first and second degree rape, the State must present evidence that the defendant had sexual intercourse with the victim. There was no evidence of physical trauma to the either victim because they never submitted to a physical examination as require in a rape allegation. The State presented evidence from which the jury could only find that a lesser degree offense could have been committed.

Here, on the other hand, the record does not show that either rape in the first or second degree or rape in the third degree could have occurred; the State presented evidence only Unsupported testimony.

The only attempt to present physical evidence was done by the state solicitation for perjured testimony from the alleged victim statements on the bedding.

When a trial court's decision to give an instruction rests on a factual determination, we review the decision for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Jensen, 149 Wn. App. 393, 399,

203 P.3d 393 (2009). *State v. Gostol*, Division One also noted that a lesser included offense instruction analysis does not necessarily turn on the argument or theory advanced by the party who asks for a lesser included offense instruction. Rather, it turns on whether evidence is presented by either party from which the necessary inference may be drawn. A defendant may argue for acquittal and yet also be entitled to an instruction on a lesser included offense.92 Wn. App. 832, 838, 965 P.2d 1121 (1998) (footnote omitted).

This would require the judge presiding at a jury trial to weigh and evaluate evidence, and would run afoul of the well-supported principle that "[a]n essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses." *Id.* at 460 (alteration in original) (quoting *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)).

Accordingly, the Supreme Court held that an inferior degree offense instruction is warranted when substantial evidence in the record raises an inference that only the lesser included or inferior degree offense was committed, even if this lesser included or inferior degree offense is inconsistent with another theory of the case proposed by the party requesting the instruction. *Id.* at 460-61.

The State failed to prove the element of Sexual intercourse.

GROUND #1 (A)
PROSECUTOR MISCONDUCT

The State Prosecutor known use of perjured testimony "central to an accurate determination of innocence or guilt."

Did the prosecutor knowingly allow a state witness to commit perjury?

The Supreme Court has held that a "conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 {134 Wn.2d 937} L. Ed. 2d 342 (1976) (footnote omitted).

In the case of Eagle the prosecution case in chief was based on an allegation by the alleged victim that Mr. Eagle had ejaculated multiple times on her bedding. This accusation leads to a DNA search by the lead investigator. The investigation presents exculpatory evidence in which Eagles' DNA is excluded from the findings of the test.

The prosecutor having knowledge that the alleged victims' statement was disproved by the DNA test in April 24, 2009, continued to conceal the results from the defense until the day of trial on December 1, 2009.

Rp. 23 at 10 Motions in Limine

The Court: Is the state aware of any exculpatory evidence?

Mr. Richey: No.

The states prosecutor was aware that his main allegation was dismissed by the DNA test and still continued to allow the alleged victim to state the allegation in court without correcting the accusation.

Rp. 78 t 10-17 Direct of S. Mallak

Q. Did you see him ejaculate in your mothers' room, in his room and your mothers' room?

A. In his bed yes.

Q. In his bed? Okay. Did you see him do that in your room?

A. Yes, on my bed.

Q. On your bed?

A. Yes.

The knowing use of false or perjured testimony against a defendant to obtain a conviction is unconstitutional. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). An allegation that false or perjured testimony was introduced is not a constitutional violation, absent knowing use by the prosecution. *Carothers v. Rhay*, 594 F.2d 225, 229 (9th Cir. 1979). It is petitioner's burden to show that a statement was false. *Id.* Mere inconsistencies in testimony do not establish knowing use of perjured testimony. *United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1992). The prosecution's presentation of contradictory testimony is not improper. *U.S. v. Necoechea*, 986 F.2d 1273, 1280 (9th Cir. 1993). There must be an allegation of specific evidence that the prosecutor knew to be false. Where credibility is fully explored by the jury, it is properly a matter for jury consideration. *United States v. Zuno-Arce*, 44 F.3d 1420, 1423 (9th Cir. 1995); *Carothers v. Rhay*, 594 F.2d 225, 229 (9th Cir. 1979). The petitioner's burden for perjured testimony is a reasonable likelihood that the false testimony could have affected

Eagles additional grounds

the verdict. *U.S. v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *Giglio v. U.S.*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 10 (1972)

In the case of Eagle the prosecutor knowingly undermined the outcome of the trial by allowing perjured testimony to go on and he himself committed perjury by stating that he knew of no exculpatory evidence. Alleged use of perjured testimony to obtain a conviction will only succeed when

Alleged use of perjured testimony to obtain a conviction will only succeed when.

(1) In this case the testimony (or evidence) was actually false, and was proven by the DNA test.

(2) The prosecution knew or should have known that the testimony was actually false. The prosecutor had been presented to the prosecutor on April 24, 2009. (SEE DNA TEST ATTACHED)

(3) The false testimony was material. The accusation by the alleged victim S. Mallak drove the investigation of the DNA search and brought the case to trial using the same false accusation and was uncorrected.

The government's knowing use of perjured testimony constitutes a denial of due process because such a deliberate deception of the court and jury is inconsistent with the rudimentary demands of justice. Quoting *Mooney v Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935)

In the case of Eagle the prosecutor knowingly undermined the outcome of the trial by allowing perjured testimony to go on and he himself committed perjury causing an unfair trial.

GROUND #1 (B)

PROSECUTOR MISCONDUCT

THE STATE VIOLATED CrR 4.7 AND VIOLATED THE BRADY RULE OF EVIDENCE.

DID THE STATE VIOLATE BRADY BY NOT DISCLOSING REQUESTED INFORMATION AND DELAYING THE PRESENTATION OF EXCULPATORY EVIDENCE UNTIL THE DAY OF TRIAL?

In the case of Mr. Eagle the defense counsel maintained a chronological record of the States actions through the proceedings. This chronological record presents the continuous request from the defense to the State, these request for all Brady materials including all exculpatory evidence known to State went unanswered and only partly surfaced at the day of trial. (See attached chrono. Of defense counsel Jeffrey Lustick attachment 2)

Defendant requested, early production of all evidence falling within *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Under *Brady* and *Giglio*, the prosecution must disclose all material and favorable evidence to an accused, including material impeachment evidence. *See Giglio*, 405 U.S. at 154. Evidence is material if there is a "reasonable probability" that the outcome of the trial would have been different had the evidence been disclosed to the defense. *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*

Rp. # 31 at 2-20

Mr. Lustick: I think there is a prejudice, your honor, in this case because of the repeated breaches of court procedure that has happened with respect to discovery, noncompliance with court orders. You could not have been clearer in telling Mr. Richey that he needed to file the affidavit back in February and he's just not done so.

Generally, "*Brady* is not violated when the material requested is made available during the trial." *United States v. Young*, 45 F.3d 1405, 1408 n.2 (10th Cir. 1995) (citing *United States v. Rogers*, 960 F.2d 1501, 1510 (10th Cir. 1992)). However, the prosecution's disclosure of favorable evidence during trial may give rise to a *Brady* violation if the delay in disclosure renders the defendant unable to make use of the benefits of the material at trial. *See, e.g., Knighton v. Mullin*, 293 F.3d 1165, 1172-73 (10th Cir. 2002) (finding that *Brady* is not violated when government makes material available during trial, "as long as ultimate disclosure is made before it is too late for the defendants to make use of any benefits of the evidence.") (quoting *United States v. Scarborough*, 128 F.3d 1373, 1376 (10th Cir. 1997)); *United States v. Beale*, 921 F.2d 1412, 1426 (11th Cir. 1991)

In the case of Eagle the prosecution presented the defense on the day of trial, with the results of a DNA test which eliminated the alleged victims' statement "that he had ejaculated multiple times on the bedding", the results showed findings of semen not belonging to Eagle (excluding him). The State had been given the results on April 24, 2009, but the prosecutor withheld the findings until the trial in December. Rendering the defendant unable to make use of the benefits of the material at trial.

("A *Brady* violation can . . . occur if the prosecution delays in transmitting evidence during a trial, but only if the defendant can show prejudice, *e.g.*, the material

came so late that it could not be effectively used."). See also United States v. Warhop, 732 F.2d 775, 777 (10th Cir. 1984)

The Court cannot order the Government to disclose material covered by the Jencks Act before trial. However, the Jencks Act does not bar the Court from ordering the Government to disclose all other evidence falling under *Brady* and *Giglio* before trial.

Given the nature of this case, the Court cannot be assured that Defendant will be able to make effective use of the remaining undisclosed material impeachment evidence if the Government waits until trial to disclose it.

Here the DNA evidence was exculpatory to the direct accusation of the State, the alleged victim and the police investigation and its concealment by the prosecutor and intentional delay was without a doubt, prejudicial to the defendant and his right to fundamental fairness, impartial trial and presentation of a proper defense by use of his Due process rights under the 6th and 14 Amendment of the Constitution of the United States.

GROUND #1 (C)

PROSECUTOR MISCONDUCT

THE STATE MISREPRESENTED THE LAW AND FACTS OF THE CASE TO OBTAIN A CONVICTION.

DID THE MISREPRESENTATION OF THE LAW AND FACTS OF THE CASE WARRANT BAD FAITH?

In the case of Mr. Eagle the misrepresentation thus involved a mixture of law and relevant facts. The state presented a lead detective who failed to comply with the standards of investigation in a rape of a child charge according to RCW 26.44.031

Records - Maintenance and disclosure - Destruction of screened-out, unfounded, or inconclusive reports - Rules - Proceedings for enforcement.

(1) To protect the privacy in reporting and the maintenance of reports of nonaccidental injury, neglect, death, sexual abuse, and cruelty to children by their parents, and to safeguard against arbitrary, malicious, or erroneous information or actions, the department shall not disclose or maintain information related to reports of child abuse or neglect except as provided in this section or as otherwise required by state and federal law.

(2) The department shall destroy all of its records concerning:

(a) A screened-out report, within three years from the receipt of the report; and

(b) An unfounded or inconclusive report, within six years of completion of the investigation, unless a prior or subsequent founded report has been received regarding the child who is the subject of the report, a sibling or half-sibling of the child, or a parent, guardian, or legal custodian of the child, before the records are destroyed.

(3) The department may keep records concerning founded reports of child abuse or neglect as the department determines by rule.

(4) An unfounded, screened-out, or inconclusive report may not be disclosed to a child-placing agency, private adoption agency, or any other provider licensed under chapter 74.15 RCW.

(5) (a) If the department fails to comply with this section, an individual who is the subject of a report may institute proceedings for injunctive or other appropriate relief for enforcement of the requirement to purge information. These proceedings may be instituted in the superior court for the county in which the person resides or, if the person is not then a resident of this state, in the superior court for Thurston county.

(b) If the department fails to comply with subsection (4) of this section and an individual who is the subject of the report is harmed by the disclosure of information, in addition to the relief provided in (a) of this subsection, the court may award a penalty of up to one thousand dollars and reasonable attorneys' fees and court costs to the petitioner.

(c) A proceeding under this subsection does not preclude other methods of enforcement provided for by law.

(6) Nothing in this section shall prevent the department from retaining general, nonidentifying information which is required for state and federal reporting and management purposes.

[2007 c 220 3; 1997 c 282 1.]

Effective date - Implementation - 2007 c 220 1-3: See notes following RCW 26.44.020.

Effect of Amendments. 2007 c 220 3, effective October 1, 2008, added (2) through (6), and added the (1) designation; and in (1), added "disclose or," deleted "unfounded referrals in files or" after "related to" and "for longer than six years" before "except as provided" and added "or as otherwise required by state and federal law" in the first paragraph, and deleted the second paragraph, which read: "At the end of six years from receipt of the unfounded report, the information shall be purged unless an additional report has been received in the intervening period."

and RCW 26.44.040 (3) (5) (6)

26.44.040. Reports - Oral, written - Contents.

An immediate oral report must be made by telephone or otherwise to the proper law enforcement agency or the department of social and health services and, upon request, must be followed by a report in writing. Such reports must contain the following information, if known:

(1) The name, address, and age of the child;

(2) The name and address of the child's parents, stepparents, guardians, or other persons having custody of the child;

(3) The nature and extent of the alleged injury or injuries;

(4) The nature and extent of the alleged neglect;

(5) The nature and extent of the alleged sexual abuse;

(6) Any evidence of previous injuries, including their nature and extent; and

[1999 c 176 32; 1997 c 386 27; 1993 c 412 14; 1987 c 206 4; 1984 c 97 4; 1977 ex.s. c 80 27; 1975 1st ex.s. c 217 4; 1971 ex.s. c 167 2; 1969 ex.s. c 35 4; 1965 c 13 4.] Findings - Purpose - Severability - Conflict with federal requirements - 1999 c 176: See notes following RCW 74.34.005.
Application - Effective date - 1997 c 386: See notes following RCW 13.50.010.

In the defendants case the alleged victims refused to be examined by a physician making it impossible to find and evaluate the nature and extent of the alleged injury or injuries, the nature and extent of the alleged sexual abuse, and any evidence of previous injuries, including their nature and extent in accordance with the law. (SEE Rp. # 134 - 135 Direct of S. Mallak) & (SEE Rp.# 299 at 15-25 Direct of B. Baker) The lead detective failed to follow and find any physical evidence through examination.

26.44.035. Response to complaint by more than one agency - Procedure - Written records.

(1) If the department or a law enforcement agency responds to a complaint of alleged child abuse or neglect and discovers that another agency has also responded to the complaint, the agency shall notify the other agency of their presence, and the agencies shall coordinate the investigation and keep each other apprised of progress.

(2) The department, each law enforcement agency, each county prosecuting attorney, each city attorney, and each court shall make as soon as practicable a written record and shall maintain records of all incidents of suspected child abuse reported to that person or agency.

(3) Every employee of the department who conducts an interview of any person involved in an allegation of abuse or neglect shall retain his or her original written records or notes setting forth the content of the interview unless the notes were entered into the electronic system operated by the department which is designed for storage, retrieval, and preservation of such records.

(4) Written records involving child sexual abuse shall, at a minimum, be a near verbatim record for the disclosure interview. The near verbatim record shall be produced within fifteen calendar days of the disclosure interview, unless waived by management on a case-by-case basis.

(5) Records kept under this section shall be identifiable by means of an agency code for child abuse.

[1999 c 389 7; 1997 c 386 26; 1985 c 259 3.]

Application - Effective date - 1997 c 386: See notes following RCW 13.50.010.

Legislative findings - 1985 c 259: See note following RCW 26.44.030.

Effect of Amendments. 1999 c 389 5, effective July 25, 1999, added the subsection designations, and inserted present (3) and (4).

In Rp.404 at 2-15 detective Hertz testified that she destroyed her notes. The alleged victims also state that Hertz did an audio recording of the interviews which later was unavailable, detective Hertz testifies that she did not record the interviews.

In Rp.426 at 9-25 Detective Hertz testifies that she did not present the notes of the interview or reports to neither defense nor prosecutor for over a year.

In Rp. 427 at 7-10 Hertz testifies that there would be no way of telling any differences between her first notes and present reports.

26.44.080. Violation - Penalty.

Every person who is required to make, or to cause to be made, a report pursuant to RCW 26.44.030 and 26.44.040, and who knowingly fails to make, or fails to cause to be made, such report, shall be guilty of a gross misdemeanor.

While the reporting requirement is permissive as to "other persons" not specifically defined, *see* RCW {138 Wn.2d 727} 26.44.030(3), the Legislature has made clear that the prevention of child abuse is of "the highest priority and all instances of child abuse must be reported to the proper authorities who should diligently and expeditiously take

appropriate action" LAWS OF 1985, ch. 259 (legislative findings appended to RCW 26.44.030).

Detective Hertz being the lead investigator testified to an extremely negligent investigation causing an immense amount of prejudice to the defendant. The investigation being negligent the state continued to present a first degree rape charge in which it could not support without any evidence.

The states only alleged physical evidence consisted of the alleged victim giving the investigator her bedding in which according to her sworn testimony contained the semen of Mr. Eagle. This entire accusation was dismissed by the findings of a DNA test conducted eight months before trial, which found two different semen samples "non belonging to the defendant."

The State presented the alleged victim and in direct, allowed her to state that the defendant had ejaculated multiple times on the bedding, the State did this and did not correct the statement knowing it was proven false by the DNA test (soliciting perjury).

The States action in misrepresenting facts and laws is clear through the entire record and at closing arguments makes it clear on

Rp.967 at13-17 ...there was no DNA found or none of the defendant's DNA was found on Shilair's bed and I say so what. I mean that's just an absence of evidence. Who cares? That does not prove anything. So what.

Willful misrepresentation of the facts and/or the law in a submission to the court constitutes bad faith, see Chambers, 111 S. Ct. at 2131, and In re Gorshtein, 285 B.R. at 124.

The State violated Eagles right to defend himself, and rights to a fair trial, due process, under the Constitution of the United States. In all the fundamental fairness of the judicial system was absent, allowing a violation of all his right under the law.

**GROUND #1 (D)
PROSECUTOR MISCONDUCT**

DESTRUCTION OF EVIDENCE

Rule 4.7. Discovery.

The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.

In the case of the appellant, the prosecutors staff Detective Hertz concedes to the fact that she destroyed the initial notes on the case after one year.

Rp. 404 at 2—3 Q. Do you have any other notes other than your report?

3. A. I had them but I only keep them a year and they were destroyed.

Rp404 at 11-15 Q. What do you do with your notes?

12 A. I shred them.

13Q. Prior to shredding them do you use them for any purpose?

15A.No well

The destruction of evidence has a uniquely damaging effect on the administration of justice, for once evidence has been destroyed it cannot be retrieved for judicial review. And the destruction is irrevocable, with a concomitant impossibility of vindication by a wronged defendant and an accompanying subversion of the public interest in correct, not merely swift, justice.

This action violated Discovery Rule 4.7 and denied the appellant the initial information in the alleged victims' complaint. Information to which the detective could not remember details, bringing uncertainty to her answers, and denying the appellant vital initial information that could have possibly been rebutted by exculpatory scientific evidence. .

Suppression by the police or prosecution of material evidence favorable to criminal defendant violates his due process protections, despite the fact that such suppression was not deliberate. Evidence is material if it rebuts evidence offered by the prosecution; it is favorable to the defendant if there is a reasonable possibility that it would rebut prosecution evidence or corroborate that of the defense. *City of Seattle v. Fettig*, 10 Wn. App. 773, 519 P.2d 1002 (1974).

A prosecutor's duty under this rule to disclose all matters within the knowledge or control of his staff relating to statements of intended witnesses is all-inclusive without regard to "relevance" or "connection" to the case at hand. *State v. DeWilde*, 12 Wn. App. 255, 529 P.2d 878 (1974).

The state had participation in and/or knowledge of illegal policy activity; destruction of evidence and giving false testimony concerning exculpatory evidence

RCW 26.44.031. Records - Maintenance and disclosure - Destruction of screened-out, unfounded, or inconclusive reports - Rules - Proceedings for enforcement.

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child who is the subject of the report, a sibling or half-sibling of the child, or a parent, guardian, or legal custodian of the child, before the records are destroyed.

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(2) The department, each law enforcement agency, each county prosecuting attorney, each city attorney, and each court shall make as soon as practicable a written record and shall maintain records of all incidents of suspected child abuse reported to that person or agency.

(3) Every employee of the department who conducts an interview of any person involved in an allegation of abuse or neglect shall retain his or her original written records or notes setting forth the content of the interview unless the notes were entered into the electronic system operated by the department which is designed for storage, retrieval, and preservation of such records.

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(5) Records kept under this section shall be identifiable by means of an agency code for child abuse.

The material information contained in the original notes was destroyed making it impossible to compare the original statements to the now inconsistent testimony.

GROUND #1 (E)

PROSECUTOR MISCONDUCT

THE STATE FAILED TO ARRAIGN THE DEFENDANT AND FAILED TO PROVIDE AN AFFIDAVIT OF PROBABLE CAUSE UNTIL THE DAY OF TRIAL.

DID THE STATE VIOLATE THE DEFENDANTS' RIGHTS UNDER THE 6TH AMENDMENT?

It is fundamental that an accused must be informed of the charge he is to meet at trial and that he cannot be tried for an offense not charged. U.S. Const. amend. 6; Const. art. 1, 22 (amendment 10); *State v. Frazier*, 76 Wn.2d 373, 456 P.2d 352 (1969).

In the case of Mr. Eagle the defense counsel objects to the failure of the state to arraign the defendant on and its failure to present an affidavit of probable cause.

Rp.24 at 1-25 Defense motion in Limine;

Mr. Lustick: Here's the issue I have your honor. First of all, back in February 19, 2009, we were before the court and it was at that time Mr. Richey said he wanted to amend the charges from two counts of rape of a child second degree to four counts of rape of a child in the first degree. The court was asked to arraign the defendant.

Wash. Super. Ct. Crim. R. 3.3(e) required the defendant to raise an objection to the failure to promptly arraign him at the time of his arraignment. Here the request is clear.

The Court: Excuse me. That was from two rapes second to four rapes first?

Mr. Lustic: Yes. The defendant was asked to be arraigned. Then you said to Mr. Richey, where's the probable cause affidavit? Has probable cause been found? And he said I will provide that and we'll do that. And then the court said the existing affidavit may not cover it.....

We are now in December, eight months have passed. Mr. Richey has not, until just a few seconds ago, filed the Amended Affidavit of probable cause for the First Amended Information. So I have really been unable to fully prepare for the charges we are facing here today.....

CrR 4.1(a) provides: "Promptly after the indictment or information has been filed, the defendant shall be arraigned thereon in open court."

State's failure to promptly arraign the defendant did deprive him of his constitutional right to a fair and impartial trial. This violation was clearly stated by defense counsel who reminded the court of the states unreasonable delay. Clearly stating that he was unable to fully prepare for the new charges filed.

Failure to arraign a defendant on amended information is a due process violation when it "results in failure to give the accused and his counsel sufficient notice and adequate opportunity to defend." *State v. Alferez*, 37 Wn. App. 508, 516, 681 P.2d 859, review denied, 102 Wn.2d 1003 (1984). The defendant bears the burden of establishing such prejudice. *State v. Royster*, 43 Wn. App. 613, 619-20, 719 P.2d 149 (1986).

A delay between arrest and arraignment which is deemed "not prompt" in violation of CrR 4.1(a) is not reversible error absent prejudice of a constitutional nature. *State v. McFarland*, 15 Wn. App. 220, 548 P.2d 569 (1976). In the defendants case the prejudice is clearly stated by his counsel inability to present a proper defense under the 6th Amen. Rights of the defendant.

In Rp. 25 at 2-15 Defense presents the states acts of Bad Faith by; (1) not asking the court permission to amend, acting sua sponte, (2) in February there was no showing that there

was permission or leave of the court granting to make the amendment, (3) the charges were not supported by probable cause sufficient to give the defendant information from which to draw any reason why he would be guilty of these offenses as amended.

Under State v. Striker, 87 Wn. 2d 870 (1976), a defendant is entitled to dismissal of the charge with prejudice where there is a long, unnecessary delay between the filing of the information and the arraignment, State v Greenwood, 120 Wn.2d 585,591 845 P 2d 971 (1993)

The appellate court should consider the potential issues raised by counsel, including: whether the failure to arraign the defendant within 14 days of the information resulted in a violation of his speedy trial rights and that the punishment was altered by the addition of the new charges..

Here, failure to amend the information and arraign Eagle with an affidavit of probable cause implicates a violation of his constitutional right to a fair trial.

GROUND #2 INEFFECTIVE COUNSEL

That counsel was ineffective regarding the State's DNA evidence.
WAS DEFENSE COUNSEL INEFFECTIVE WHEN AT MOTIONS IN LIMINE HE
WAS PRESENTED WITH EXCULPATORY DNA EVIDENCE?

Strickland v. Washington instructs us that the benchmark for judging a claim of ineffective assistance of counsel is whether counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In order to prevail on an ineffective-assistance-of-counsel claim, a petitioner must establish two things. First, he must prove that counsel's performance was deficient. "Second, the [petitioner] must show that the deficient performance prejudiced the defense." Id. at 687, 104 S.Ct. at 2064.

In motions in Limine the defense counsel was presented with DNA evidence that had been obtained by the State since April 24, 2009. The DNA evidence discredited the alleged victim statement that she had observed Mr. Eagle ejaculate various times on her bedding while he allegedly had sex with her, and that she had lead the police to the bedding in question . The evidence now at hand eliminated Eagles DNA from the bedding and placed two other different traces of semen found on the material.

There is a reasonable probability that the outcome of the trial could have been affected by the DNA evidence to the extent that confidence in the trial results could have undermined without a doubt, much of the evidence hinged on the jury's assessment of the credibility of the witnesses. In this in which defense could have directly confronted the accuser with the findings impeaching (discrediting) her accusation. The findings completely refuted the direct accusation of the alleged victim. No competent defense lawyer would pass up the opportunity to allow his client to refute the accusations against him. This action was clearly deficient in regard to the defendants right to confrontation under the Sixth Amendment.

The Ninth Circuit had held that "a lawyer who fails adequately to investigate, and to introduce into evidence,(evidence) that demonstrates his clients factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance." Avila v. Galarza, 297 F.3d911, 919 (9th Cir. 2002)(quoting Hart v. Gomez 174 F.3d 1067,1070(9th Cir. 1999) Jones v Wood,207 F. 3d 557 (9th Cir. 2000) Sanders v Ratelle, 21 F.3d1446 (9th Cir. 1994): SEE also Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996) (counsels failure to develop and follow up on DNA evidence suggesting that the defendant was not the actual assailant in a rape case was considered ineffective assistance of counsel.)

On Eagles case there was no Medical exam for either alleged victim (they refused to be examined)(see Rp. # 209 at 2-6), the lead detective had destroyed her copious notes leaving defense counsel without the information of the first interview and the lack of audio or videos of the interviews of the alleged victims. The findings of the DNA test could have turned the tides for the defendant and not using it properly, caused a devastating prejudice in his trial. Violating his rights to fair and effective defense.

GROUND #2 (A) INEFFECTIVE COUNSEL
COUNSEL ATTEMPTED TO ARRANGE A PLEA WITHOUT HIS CLIENTS
KNOWLEDGE OR CONSENT.
DID DEFENSE COUNSEL PREJUDICE THE DEFENDANT WHEN HE
ATTEMPTED TO OBTAIN A PLEA WITHOUT CONSENT OR
KNOWLEDGE OF HIS CLIENT?

The strategic decision by defense counsel to obtain a plea with the State's prosecutor without consulting defendant was tantamount to entering a renegotiated plea agreement without defendant's knowledge or consent. Defendant had no input into a situation where the original plea of not guilty, was prejudiced by the counsels action which limited the defendants arguing for his innocence to a presumption of guilt caused by his counsels request. It had morphed into one in which the State and the court were under the impression that a guilty man was trying to abuse the court resources to deny his counsels presentation of an admission of guilt. Hence, defense counsel's performance was deficient. Because defense counsel's deficient performance involved the attempt to obtain a plea agreement, without his knowledge or consent defendant was automatically prejudiced through the entire proceeding.

Rule 4.2. Pleas.

(d) *Voluntariness.* The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) *Agreements.* If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

The existence of a plea agreement must be stated on the record to the court, but the agreement need not be set forth in writing. State v. Jones, 46 Wn. App. 67, 729 P.2d 642 (1986). The necessary factual basis for acceptance of a guilty plea may be established from any reliable source, even other than the defendants' admissions. State v. Lewis, 9 Wn. App. 839, 515 P.2d 548 (1973). The reliable source in Eagles case turned out to be his counsel who in attempting to obtain a plea presented the assumption of guilt.

In Rp. 17 Sentencing hearing at 4-18

Mr. Lustick: First of all, Your Honor, this was a long trial and it could have been avoided. I want to put on the record that on numerous attempts Mr. Eagle authorized me to pursue a settlement. In fact, during one of the very first court hearings on this matter I went into a room where the alleged victims and victims' families were and at this point I discussed with them the possibility of going through a SSOSA process and that was

something that they rejected. At no time did Mr. Eagle know or consent to such an action.

The Court: How could you have a ssosa disposition when he continues to maintain a lack of guilt? He is not eligible for ssosa.

Under *Strickland*, in which the Court held that {173 L. Ed. 2d LEdHR6}[6] a defendant must show both deficient performance and prejudice in order to prove that he has received ineffective assistance of counsel, 466 U.S., at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

Eagles' entire proceeding was prejudiced by defense counsels' action which presented deficient performance in accordance with his duty and loyalty to his client under the RPC. It was deficient in accordance with court rules 4.2 on pleas.

These actions prejudiced Mr. Eagle by presenting an assumption of guilt that was not in any way requested by the defendant, and brought unwanted doubt to the eyes of the State and the court concerning the innocence of the defendant.

Mr. Lustick only notified his client months after the fact of his attempt. And I Calvin Eagle does swear under penalty of perjury that I was not aware of the actions taken by Mr. Lustick. I am including a letter in which Mr. Lustick admits on page #2 para. #3 that states; Artie , I completely accept the fact that you do not want to plead guilty. (SEE ATTACHMENT #3)

Failure of defendant's counsel to advice defendant of plea bargain offer violates defendant's Sixth and Fourteenth Amendment rights to effective assistance of counsel. United States ex rel. Caruso v Zelinsky (1982, CA3 NJ) 689 F.2d 435

Defendant is denied right to effective assistance of counsel by failure of attorney to inform defendant of plea offer in manner which makes it clear that defendant, and not attorney, has right to accept or reject offer. State v Ludwig (1985) 124 Wis 2d 600, 369 NW2d 722

Eagles counsel was ineffective and violated his right to a fair trial, and fundamental fairness, under the Sixth and Fourteenth Amendment rights to effective assistance of counsel.

GROUND # 3(A) THE COURT VIOLATED THE DEFENDANTS RIGHT TO CONFRONTATION GUARANTEED IN THE SIXTH AMENDMENT.

The Court erred when it directed the defense to cross examine the lab technician about the findings of the DNA test, if the door was opened.

Did the Court deprive the defendant of his Constitutional Right to Confrontation?

Rp.6 Motions in Limine at 3-8

The Court: Okay. Your motion is going to be granted. If the evidence is that the defendant is alleged by the victim to have ejaculated a week before and the officers went out and seized it, then the defense will be permitted to ask a lab tech was the defendant's DNA discovered on the comforter.

A criminal defendant has the right to present a defense. State v .Hudlow, 99Wn. 2d 1, 14-15,659 P.2d 514(1983) (Citing Washington v. Texas, 388 U.S. 14, 23 ,87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) A defendant also has a right to "be confronted with the witnesses against him." U.S. CONST. amend. VI. The goal of confrontation clause is to allow reliability of the accuser to be assessed through cross-examination. Crawford v. Washington, 541 U.S. 36, 61,124 S. Ct.1354, 158 L. Ed. 2d 177(2004). The right to confront must be zealously guarded. State v. Darden, 145 Wn. 2d 612,620, 41 P.3d 1189 (2002).

In the case of the appellant the court directed the defense to cross examine the lab tech on the findings of the DNA test, but it did not direct the defense to direct the questions of the findings against the accuser. Who according to the record;

Rp.5 Motions in Limine at 2-5

The Court: It is the State's case one that the alleged victim says there was sexual intercourse and that the defendant ejaculated prior, just prior to the time that the quilt was taken from the bed?

The baseline requirement of the Confrontation Clause is that the accused be given "a full and fair opportunity "to establish before the factfinder that reason exist to discredit the witness's testimony. Fenster, 474 U.S. at 22, 106 S. Ct. at 296. The question is whether the jury is in possession of facts sufficient to make a discriminating appraisal of the witness's credibility. "Coto v. Herbert, 331 F.3d 217,249 (2d Cir.2003). Accordingly, a "court should avoid any blanket prohibition on exploration of an area that is central to an assessment of the witness's reliability. " United States v. Maldonado- Rivera, 922 F.2d 934,955 (2d Cir. 1990).

The Supreme Court has determined, as a general matter, DNA evidence itself is admissible. United States v. Martinez, 3F. 3d 1191, 1198-99 (8th Circ.).Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of the trial judge to preclude repetitive and unduly harassing interrogation, the cross examiner is not only permitted to delve into the witness's story to test the witness's perceptions and memory, but the cross examiner has traditionally been allowed to impeach, i.e. discredit the witness. The more essential the witness is to the prosecutor case the more latitude the defense should be given to explore elements such as motive, bias, credibility, or foundational matters. The Court deprived Mr. Eagle of his right of confrontation guaranteed by the Sixth Amendment, Wash. Const. art. I, 22, .

GROUND # 3(B) THE COURT THE DEFENDANTS RIGHT TO CONFRONTATION GUARANTEED IN THE SIXTH AMENDMENT.

The Court erred when it did not allow the defense counsel to re-cross examine the states lead detective in the case on matters of evidence and law.

Did the Court deprive the defendant of his Constitutional Right to Confrontation of a state witness?

Rp.351 at 24-25 Defense counsel:

Cont. on Rp. 352 at 1-16

Mr. Lustick: one more thing. I have a concern about the availability of this police officer and I wanted to just let the State know this is not designed to be some game or some strategy here. When Miss Hertz walks through that door I'm prepared to have her served with a subpoena for Monday. We have a strategic reason for calling her in our case in chief which I have already notified the prosecutor of.

The Court: And that reason is what?

Mr. Lustick: The reason is that I want to separate her testimony regarding what she did in the investigation for the State and I want to talk to her about the DNA and seizing the blanket. And I want to emphasize that by placing it within the confines of our case in chief. So I want to have her available to have me call her to the witness stand as I had planned to do from the beginning of the case when I filed my witness list.

Rp. 353 at6-12

The Court: And your purpose is with regard to her seizing sheets and sending it to the lab?

Mr. Lustick: That's right.

The Court: Then why can't you ask it today?

Mr. Lustick: The reason I can't ask her today is we are in the States case in chief.

The Court: I will not hold her over until Monday.

In the case of Mr. Eagle the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence but the Court limited the time for cross-examination by not allowing defense counsel to subpoena the lead detective to take the stand at a time slotted for the defense

. The Supreme Court has identified a series of factors to consider in determining whether an erroneous limitation on cross- examination was harmless;

(1) The importance of the witness testimony to the prosecutions case.

Detective Hertz was the lead investigator in the case.

(2) Whether the testimony was cumulative.

Hertz investigation and testimony was essentially vital to the presentation of the case to the court and jury.

(3) The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points.

Detective Hertz had been in charge of seizing the sheets and blankets for DNA testing; she had interviewed the alleged victims, and conducted recordings of the interviews.

The record shows (Rp. 404 at 2-4) that Detective Hertz had destroyed evidence of the written statements made by the alleged victims, the alleged victims swore that she had

recorded their interviews (Rp.206 at 5-17), and that Hertz was aware that there was no DNA match against the defendant.

At trial in direct (Rp. 407 at 19) Hertz stated she did not record the interviews, she conceded to destroying the notes, and at Rp. 411 Hertz states that she collected the bedding as a "common procedure" when at Rp. 440 at 5-7 she states the alleged victim had told her that the "act had happened in her bed. Hertz was aware that there was no match to Mr. Eagles DNA, and that other DNA was found. All in violation of RCW 26.44.030

(4) The extent of cross-examination otherwise permitted.

On Rp.353 at17

Mr. Lustick: I hope the court will allow my cross-examination to go into areas that he will not.

The Court: Oh I will not limit you just within the scope. That's fair enough. Then you can ask her the other questions.

The court then at Rp.427 at 16-25 and cont. to 429 when the court does not allow defense to question Hertz on the matter of the collection of the evidence, "the bedding.

(5) The overall strength of the prosecutors' case.

The state found exculpatory evidence in the DNA testing, excluding the defendant from the alleged victims' accusation that the defendant had ejaculated multiple times on the sheets, the state also lacked written testimony and recordings in the investigation procedures carried out by the lead detective Hertz, and ran into inconsistencies in the testimony of state witnesses leading to impeachment.

Courts have recognized the effectiveness in certain cases of attacking the quality of the police investigation. United States v. Howell, 231 F.3d615, 625 (9th Cir 2000)(finding that the government has a "duty to disclose evidence of a flawed police investigation," which could be used by defense counsel "to attack the thoroughness, and even good faith, of the investigation") Bowen v Maynard, 799 F2d 593,613 (10th Cir.1986) (a common trial tactic of the defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation. ; Lindsey v. King 769 F. 2d 1034, 1042 (5th Cir.1985)(granting a new trial to prisoner convicted in a state court where evidence withheld by prosecution "carried within it the potential for the discrediting of the police method employed in assembling the case against the defendant. Orena v. United States, 956 F. Supp.1071, 1100 (E.D.N.Y.19970 (destroying the bona fides of the police is a tactic that has never lost its place in the criminal defense reasonable doubt armamentarium

The court violated Mr. Eagles Constitutional Right to confrontation of a state witness by not allowing the defense to cross-examine Det. Hertz at the time for defense case in chief on matters dealing with the evidence and law. Leading to an unfair trial

GROUND #3 (C) THE COURT VIOLATED THE DEFENDANTS RIGHT TO CONFRONTATION GUARANTEED IN THE SIXTH AMENDMENT.

The court erred when defense counsel request for the opportunity to impeach the state witnesses was denied by the judge.

Did the court violate the defendants' sixth amendment right to confrontation when it denied the defense access to witnesses?

Rp.468 at 21--

Mr. Lustick: well, it's the court's ruling. You said that the actual document, that is, the transcript from the interview, would not be admissible and if I wanted to impeach someone I would have to have that person come in and testify who observed it.

Rp. 470 at 11--

Mr. Lustick: Then I'd like to call these witnesses back to the stand for the limited purpose of confronting them on those inconsistencies.

The court: They've been excused. At this point I don't know if they're available or not. You can proceed however you can proceed on that.

Rp. 535 at 16

Mr. Lustick: Again, I think she should be able to come back and we should be able to do it in our case in chief. It would be different if I rested and we are in States' rebuttal, but I haven't' rested.

Rp. 536 at 6-

The court: Her testimony is done. She's been excused by the court.

Mr. Lustick: We are just noting all this for the record.

The Sixth Amendment of the U.S. Constitution and this section (Amend. 10) grant criminal defendants the right to confront and cross-examine adverse witnesses. *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

The requirement of this rule concerning admission of prior statements of witnesses that the declarant testify at trial and be subject to cross-examination concerning his or her prior statements ensures that the right to confrontation will be protected. *State v. Makela*, 66 Wn. App. 164, 831 P.2d 1109, review denied, 120 Wn.2d 1014, 844 P.2d 435 (1992).

The United States and Washington constitutions guarantee defendants the right to confront and cross-examine adverse witnesses. U.S. Const. amend. VI; Wash. Const. art. I, 22; *State v. McDaniel*, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). The trial court exercises its discretion in determining the scope of cross-examination. *State v. Dixon*, 159 Wn.2d 65, 75, 147 P.3d 991 (2006). We reverse only if the trial court abuses this discretion; it does so when it bases its decision on untenable or unreasonable grounds. *Dixon*, 159 Wn.2d at 75-76.

Here Eagles defense counsel was plainly denied the opportunity to exercise his right to confrontation and impeachment of states witnesses in trial. The defense was still presenting his case in chief and should have been allowed to impeach the witnesses on the inconsistencies of their prior statements and testimony. These actions by the court deprived Eagle of a fair and impartial trial under the U.S. Constitution.

GROUND #3 (D)

THE COURT VIOLATED DEFENDANTS RIGHT TO A FAIR TRIAL BY LIMITING THE DEFENSE IN ITS PRESENTATION OF WITNESSES. DID THE COURT VIOLATE THE DEFENDANTS RIGHT TO PRESENT A DEFENSE AND ABUSE ITS DISCRETION BY LIMITING THE DEFENSE ON PRESENTING WITNESSES FOR ITS CASE IN CHIEF?

Appellants states that the court committed reversible error by unfairly limiting the time available to defense counsel to exercise their case in chief and presenting defense witnesses.

In Rp. 651 at16-25

Mr. Lustick: Here's what I'm going to ask, your honor. I want time to digest what it is you're saying. It's already 3:45. I'm asking you to take a recess for the rest of the day.

The court: No, I'm not going to take a recess for the rest of the day. we told the jury the case is going to them this afternoon and now it's going to be Wednesday .That's two days later than I told them. There's nothing to digest. I think you understand my ruling.

Mr. Lustick: I'm not responsible for this matter not going to the jury anymore than the State is.

The court: I don't care who is responsible. It just took longer. Whether it was direct or cross, I don't know. I'm just saying it's taking longer than you both represented so I'm not going to recess for the rest of the day.....

Mr. Eagle argues that the court abused its discretion in limiting the time allowed for defense counsel's case in chief argument. Decisions regarding the conduct of a trial are left to the sound discretion of the trial court. See *Wengerd v. Rinehart*, 114 Wis.2d 575, 580, 338 N.W.2d 861, 865 (Ct. App. 1983).

In Eagles case the Court clearly impeded the defense presentation of character witness on behalf of the defendant. Under Evidentiary Rule 608:

Washington Evidence Rule 608(a) provides:

Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.ER 608(a).

Character evidence is generally inadmissible under the Federal Rules of Evidence, subject to certain exceptions. Fed. R. Evid. 404(a). Rule 608. See Fed. R. Evid. 404(a) (3) **(noting that evidence admissible under Rule 608 is not barred by Rule 404(a)).**

An accused does not have an unfettered right, under compulsory process clause of Sixth Amendment, to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *Taylor v Illinois* (1988) 484 US 400, 98 L Ed 2d 798, 108 S Ct 646, reh den (1988) 485 US 983, 99 L Ed 2d 494, 108 S Ct 1283

The court abused its discretion by limiting the defense, and denied the defendant his right under the Sixth amendment to compel witnesses on his behalf. Accused's right to compel witness' presence in courtroom embraces right to have witness' testimony heard by trier of fact. Taylor v Illinois (1988) 484 US 400, 98 L Ed 2d 798, 108 S Ct 646, reh den (1988) 485 US 983, 99 L Ed 2d 494, 108 S Ct 1283.

Judgment of conviction is unconstitutional where accused is forced to trial without fair opportunity to procure attendance of witnesses. Paoni v United States (1922, CA3 Pa) 281 F 801

Sixth Amendment right to have compulsory process for obtaining witnesses is violated when state arbitrarily denies defendant opportunity to put on stand witness whose testimony would be relevant and material to his defense. Singleton v Lefkowitz (1978, CA2 NY) 583 F.2d 618, cert den (1979) 440 US 929, 59 L Ed 2d 486, 99 S Ct 1266

The Court actions violated Eagles right to have compulsory process to obtain witnesses on his behalf and arbitrarily deny defendant opportunity to put on stand witness whose testimony would be relevant and material to his defense.

CONCLUSION:

In the case of the defendant Calvin Artie Eagle the intentional delay of the prosecution in complying with defense request for discovery, shows a tactical intent to violate the rules of discovery under Brady v Maryland. In this delaying tactic that shows that the State lacked sufficient evidence to support a charge of rape of a child on any degree. The State was successful in impeding the defendant from building a proper defense against a case in which the State could not prove its burden.

In its misconduct the State relied on perjured testimony from its alleged victims and other state witnesses, allowed its staff to destroy evidence in a pending criminal case in violation of CrR 4.7 and RCW 26.44. The State misrepresented the law and facts of the case in bad faith, up until the day of trial the state moved for the arraignment of the defendant still without an affidavit of probable cause in violation of court rules and Sixth Amendment.

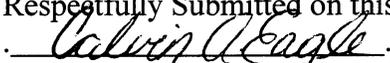
The proceedings in the case were also deprived of fundamental fairness when actions (errors) by the court seemed to have no reasonable grounds. In an act that deprived the defendant of his right to confrontation guaranteed by the constitution, the court did not allow the defense to confront the alleged victim with scientific evidence that rebutted her accusation. The court abused its discretion in this manner on several occasions by denying defense its right to impeach, re-cross State witnesses, and limiting the defense on examination of character witnesses on its case in chief.

The defense counsel also played its part in the manner of being ineffective to the defendant in failing to follow up on DNA evidence that was exculpatory and impeaching and also prejudice the defendant by attempting to obtain a plea agreement without the knowledge or consent of the defendant.

The actions in the case of the defendant Calvin Eagle were a manifest injustice, clear in the manner by which the State violated the court rules and the laws of the State of Washington along with the courts clear violation of the constitutional rights of the defendant Under the Fifth, Sixth, and Fourteenth Amendment Rights to a fair and impartial trial, equal protection of the law, right to confrontation and right to compel witnesses on his behalf, and right to effective counsel.

The defendant Calvin Eagle prays for the appellate court to see these violations of the defendants Constitutional Rights and that it reverses the conviction and vacates the sentence to correct a manifest injustice.

Respectfully Submitted on this 19 day of October 2010


Calvin A. Eagle # 337694 DB-24
Coyote Ridge Corrections Center
P.O. Box 769
Connell, Wa. 99326

Eagles Additional Grounds

ATTACHMENT 1

DNA TEST RESULTS

CHRISTINE O. GREGOIRE
Governor



JOHN R. BATISTE
Chief

STATE OF WASHINGTON
WASHINGTON STATE PATROL

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CRIME LABORATORY REPORT

Agency: Blaine Police Department
Agency Rep: Officer Debra Hertz
Subject: Suspect – EAGLE, CALVIN A.
Victim – MALLAK, SHILAIR

Laboratory Number: 409-000368
Agency Case Number: 2008-1831
Request Number: 0001, 0002

Items examined:

- E-1: A sealed paper bag containing one yellow, flat sheet.
- E-2: A sealed paper package containing one multi-colored comforter.
- E-3: An envelope containing two swabs said to be a known sample from Calvin Eagle.

Procedures and results:

The sheet (item E-1) was examined for semen stains by testing for the substance acid phosphatase. Acid phosphatase is found in high amounts in semen and in lower amounts in some other body fluids, such as vaginal secretions. No acid phosphatase was detected on the sheet. Numerous possible hairs were collected from the sheet, sealed into a plastic bag, and then packaged with the sheet. No further testing was attempted.

The comforter (item E-2) was examined for semen stains using an alternative light source (ALS). An ALS is an instrument which delivers a high intensity light of adjustable wavelength. Different types of physical evidence, such as semen or fibers, may fluoresce during exposure to this light. Three fluorescent stains were detected. These three stains were then tested for the presence of acid phosphatase and all three stains gave a positive reaction. These stains were designated E-2-1, E-2-2, and E-2-3. All three stains were sampled and the samples were separately extracted with phosphate buffered saline. A portion of each extract was microscopically examined for spermatozoa with spermatozoa detected in all three extracts. The extracts were then separately processed with a differential DNA extraction procedure that attempts to separate spermatozoa DNA from non-spermatozoa DNA. This procedure produces two extracts: the sperm fraction, which should contain mostly spermatozoa DNA and the non-sperm fraction, which should contain mostly non-spermatozoa DNA. These extracts were further processed as explained below. Possible hairs were collected from the comforter, sealed into a plastic bag, and then packaged with the comforter.

The known sample from Calvin Eagle (item E-3) was sampled, the sample was processed with a DNA extraction procedure, and the extract was processed further as explained below.

The amount of human DNA in the prepared extracts was determined using the Quantifiler® kit from

Greg R. Frank
Greg R. Frank, Forensic Scientist

April 24, 2009
Date



Agency: Blaine Police Department
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Applied Biosystems. The amount of male DNA in the sperm fraction extracts was determined using the Quantifiler® Y kit from Applied Biosystems. The extracts were then processed via a polymerase chain reaction (PCR) procedure using the AmpFISTR® Profiler Plus® kit from Applied Biosystems. The Profiler Plus® genetic markers examined for this report were D3S1358, vWA, FGA, D8S1179, D21S11, D18S51, D5S818, D13S317, D7S820, and amelogenin (a sex determination marker). The sperm fraction extracts and the known sample extract were also processed via a PCR procedure using the AmpFISTR® COfiler® kit from Applied Biosystems. The COfiler® genetic markers examined for this report were D3S1358, D16S539, TH01, TPOX, CSF1PO, D7S820, and amelogenin. The resulting PCR products were typed using an ABI Prism® 310 Genetic Analyzer from Applied Biosystems. A threshold of 150 relative fluorescence units and above was used for allele designations.

Conclusions:

Semen was detected on the comforter (item E-2).

No indication of semen was detected on the sheet (item E-1).

The interpretable DNA typing results obtained from stain E-2-1, the sperm fraction extract of stain E-2-2, and stain E-2-3 on the comforter (item E-2) are consistent with having originated from one male individual. The donor of the known sample, item E-3 (Calvin Eagle) was excluded as the source of these DNA typing results. This unknown male was designated Individual A for the purposes of this report.

DNA typing results of mixed origin consistent with having originated from two (or more) individuals (male and female) were obtained from the non-sperm fraction extract of stain E-2-2 on the comforter (item E-2). The donor of the known sample, item E-3 (Calvin Eagle) was excluded as possible contributor to this mixture. Individual A is a possible contributor to this mixture.

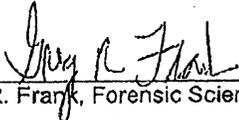
Remarks:

During one step of the extraction procedure used on the semen stains from the comforter (item E-2), an incorrect reagent was used. It was determined that this had no effect on the DNA typing results of these semen stains.

A one-time search of the DNA typing results for the known sample, item E-3 (Calvin Eagle) against the Washington State Patrol Combined DNA Index System (CODIS) data bank was conducted and no matches were found.

Based on the scenario, the DNA typing results designated Individual A are not eligible to search against the Washington State Patrol CODIS data bank.

The submitted items and the prepared spermatozoa microscope slides will be returned to the Blaine Police Department. The extracted DNA from the known sample was discarded. Any other remaining extracted DNA will be retained at the Washington State Patrol Crime Laboratory in Marysville.


Greg R. Frank, Forensic Scientist

April 24, 2009
Date

PRIMARY AGENCY CASE NUMBER: <i>2008-1831</i>	WASHINGTON STATE PATROL CRIME LABORATORY SYSTEM REQUEST FOR LABORATORY EXAMINATION	WSP LABORATORY CASE NUMBER: <i>1020016 R(22)</i>
AGENCY CROSS-REFERENCE NUMBER:		INTER-LAB TRANSFER

HAS OTHER EVIDENCE IN THIS CASE BEEN PREVIOUSLY SUBMITTED TO THIS WSP CRIME LAB? YES NO

OFFENSE: *16AFC 228* DATE OF OFFENSE: *06/30/08*

SUSPECT(S) LAST, FIRST, MI. (SID #, if available)	DOB	VICTIM(S) LAST, FIRST, MI.	DOB
<i>Engle, Calvin A.</i>	<i>042970</i>	<i>Mallak, Shilain</i>	<i>10/7/93</i>
2			
3			
4			

EXAMINATION REQUESTED BY Can be different from submitter RUSH COURT DATE: *050409*

NAME (TYPE OR PRINT) (LAST NAME, FIRST NAME) RANK/POSITION BADGE # SIGNATURE DATE

Wentz, Deborah Officer 819 *[Signature]* *022009*

AGENCY STREET ADDRESS CITY STATE ZIP CODE PHONE

Blaine PD 322 H St Blaine WA 98220 509-676-6767

AGENCY ITEM #	ITEM DESCRIPTION	EXAM CODE	SPECIAL INSTRUCTIONS
<i>E-1</i>	<i>1 Red shirt W</i>	<i>RED/DNA</i>	<i>Same as</i>
<i>E-2</i>	<i>1 Red Computer Ink</i>	<i>RED/DNA</i>	<i>Same as</i>

FOR LAB USE ONLY
AFFIX BARCODE STICKER HERE

FOR LAB USE ONLY *2008*

SUBMITTED BY (PRINT NAME LAST NAME, FIRST NAME) SIGNATURE DATE TIME

SARAH L. HOLMES *[Signature]* *7/23/09* *01800*

SUBMITTAL METHOD: UPS # U.S. CERT. MAIL # IN PERSON FED EX # *3963 163013958* U.S. REG. MAIL #

RECEIVED BY (PRINT NAME LAST NAME, FIRST NAME) SIGNATURE DATE TIME

SARAH L. HOLMES *[Signature]* *7/24/09* *10365*

FOR LAB USE ONLY

TOTAL PARTIAL TRANSFER TO

VIA: DATE

RELEASED BY: RECEIVED BY: DATE DATE

VIA: DATE DATE

RELEASED BY: RECEIVED BY: DATE DATE

RELEASED BY: RECEIVED BY: DATE DATE

RELEASED TO (PRINT NAME LAST NAME, FIRST NAME) SIGNATURE DATE TIME

RELEASE METHOD: UPS # U.S. CERT. MAIL # IN PERSON FED EX # U.S. REG. MAIL #

RELEASED BY (PRINT NAME LAST NAME, FIRST NAME) SIGNATURE DATE TIME

GAIL BRUDER *[Signature]* *7/23/09* *10365*

40

PRIMARY AGENCY CASE NUMBER <i>2008 1831</i>	WASHINGTON STATE PATROL CRIME LABORATORY SYSTEM REQUEST FOR LABORATORY EXAMINATION	WSP LABORATORY CASE NUMBER <i>1013568</i> <i>R-1002</i>
AGENCY CROSS-REFERENCE NUMBER	NOTE: SEE REVERSE SIDE OF FORM FOR CRIME LABORATORY LOCATIONS & INSTRUCTIONS FOR USING FORM	
INTER-LAB TRANSFER		

HAS OTHER EVIDENCE IN THIS CASE BEEN PREVIOUSLY SUBMITTED TO THIS WSP CRIME LAB? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	OFFENSE <i>Rape 2nd</i>	DATE OF OFFENSE <i>06/13/08</i>
SUSPECT(S) LAST, FIRST, MI (SID #, if available)	DOB	VICTIM(S) LAST, FIRST, MI ALSO USE THIS SPACE FOR ELIMINATION PRINTS
1 <i>Eagle, Calvin A.</i>	<i>042970</i>	<i>Mattaly, Shari</i> <i>101493</i>
2	3	4

EXAMINATION REQUESTED BY <small>Can be different from submitter</small>		<input checked="" type="checkbox"/> RUSH	COURT DATE: <i>May 4, 2009</i>
NAME (TYPE OR PRINT) (LAST NAME, FIRST NAME)	RANK/POSITION	BADGE #	SIGNATURE
<i>Hart, Robin</i>	<i>Officer</i>	<i>817</i>	<i>[Signature]</i>
AGENCY	STREET ADDRESS	CITY	STATE ZIP CODE PHONE
<i>Blaine Police</i>	<i>322 HST</i>	<i>Blaine</i>	<i>WA 98008 3826167</i>

AGENCY ITEM #	ITEM DESCRIPTION	EXAM CODE	SPECIAL INSTRUCTIONS
<i>F-2</i>	<i>Physical Swabs for</i>	<i>PRO/DNA</i>	<i>Compare to known samples if found on F1 & E2</i>

FOR LAB USE ONLY
AFFIX BARCODE STICKER HERE

FOR LAB USE ONLY: *Good use related item #1 with message son can contain to verify correct*
provide message from victim #12 with item #1 & 5, in case of physical swabs

SUBMITTED BY (PRINT NAME - LAST NAME, FIRST NAME)	SIGNATURE	DATE	TIME
<i>SARTAIN, DAN</i>	<i>[Signature]</i>	<i>2/27/09</i>	<i>0800</i>
SUBMITTAL METHOD: <input type="checkbox"/> UPS # <input type="checkbox"/> U.S. CERT. MAIL # <input checked="" type="checkbox"/> IN PERSON <input checked="" type="checkbox"/> FED EX # <i>797372500334</i> <input type="checkbox"/> U.S. REG. MAIL #			
RECEIVED BY (PRINT NAME - LAST NAME, FIRST NAME)	SIGNATURE	DATE	TIME
<i>SARAH L. HOLMES</i>	<i>[Signature]</i>	<i>3/3/09</i>	<i>1040</i>

FOR LAB USE ONLY			
<input checked="" type="checkbox"/> TOTAL	<input type="checkbox"/> PARTIAL	<input type="checkbox"/> TRANSFER TO	<input type="checkbox"/> TOTAL
VIA	DATE	VIA	DATE
RELEASED BY	DATE	RECEIVED BY	DATE
RECEIVED BY	DATE	VIA	DATE
RELEASED BY	DATE	RECEIVED BY	DATE
RECEIVED BY	DATE	RELEASED TO (PRINT NAME - LAST NAME, FIRST NAME)	SIGNATURE
RELEASED TO (PRINT NAME - LAST NAME, FIRST NAME)	SIGNATURE	DATE	TIME
RELEASE METHOD: <input type="checkbox"/> UPS # <i>179120103587005</i> <input type="checkbox"/> U.S. CERT. MAIL # <input checked="" type="checkbox"/> IN PERSON <input checked="" type="checkbox"/> FED EX # <input type="checkbox"/> U.S. REG. MAIL #			
RELEASED BY (PRINT NAME - LAST NAME, FIRST NAME)	SIGNATURE	DATE	TIME
<i>GAIL L. BRUDER</i>	<i>[Signature]</i>	<i>4/21/09</i>	<i>0800</i>

4th Corner Network, Inc.
 110 Prospect St. Bellingham, WA 98226
 Call Us At 360-671-2455 / 800-321-2455
 Fax Us At 360-734-1286 / 888-861-0287

605 S 2nd St. Mount Vernon, WA 98273
 Call Us At 360-336-5711 / 866-423-7170
 Fax Us At 360-336-2412 / 866-423-7348

2009 JUL -9 PM 13

Legal Messenger Form

DO NOT USE THIS FORM FOR SERVICE OF PROCESS

DEADLINE	Firm Name	Whatcom County Prosecutor		
	Case Name	EAGLE, Calvin 4-29-1970		
	Cause #	2009J1831	Date	7-7-1970
	Client Ref.		Attention	Eric Richay

Documents: Crime Lab Report

Copy Receive	Deliver Only	File First Then Deliver	File First Then SERVE	Signature Required
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Filing Instructions

Superior Court -- Specify

District Court -- Specify

Higher State Courts -- Specify

Federal Courts -- Specify

Auditor Treasurer Assessor -- Specify

Eagles Additional Grounds

ATTACHMENT 2

CHRONOLOGICAL LOG OF STATE DELAYS KEPT BY DEFENSE ATTORNEY

**INCLUDES MOTION FOR SHORTENING TIME FOR SETTING OF HEARING
DATE.**

MOTION TO DISMISS DUE TO PROSECUTOR MISCONDUCT

SCANNED

JANICE L. EAGLE
PROSECUITOR AT LARGE

FILED
COUNTY CLERK

2009 NOV 10 PM 4:02 2009 NOV 10 PM 4:02

WHATCOM COUNTY
WASHINGTON

BY 
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

STATE OF WASHINGTON,

No. 08-1-00814-5

Plaintiff,

**ORDER SHORTENING TIME
FOR THE SETTING OF A
MOTION HEARING DATE**

vs.

CALVIN ARTIE EAGLE,

Defendant.

THIS MATTER coming on ex parte before the court on the motion of the defendant, who being represented by Jeffery A. Lustick and the Court being fully advised in the premises, now therefore,

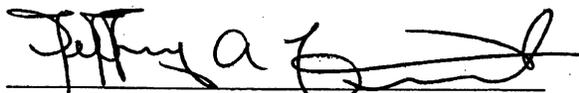
FINDS, ADJUDGES, AND DECREES, that there is good cause to grant the request for an Order Shortening Time for the setting of a motion hearing; and

FURTHERMORE this matter is set for the said status hearing at 9:00 AM on Nov 16, 2009 or sooner or later as it may be heard on that date, in the Juvenile Division of the Whatcom County Superior Court.

Dated and entered on this 10 day of November 2009 at Bellingham, WA.


Judge Steven J. Mara

Presented by:


JEFFREY A. LUSTICK, WSBA # 27072
Attorney for the Defendant

57

SCANNED 1

DAVID J. PROSELMAN
PROSELMAN & ASSOCIATES
2009 NOV 10 PM 4:02

FILED
COUNTY CLERK
2009 NOV 10 PM 4:02
WASHINGTON
04 [Signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CALVIN ARTIE EAGLE,

Defendant.

No. 08-1-00814-5

MOTION FOR ORDER
SHORTENING TIME FOR THE
SETTING OF A STATUS
HEARING DATE

COMES NOW the defendant, by and through his counsel, Jeffrey A. Lustick, of the Lustick Law Firm in Bellingham, WA, and moves the court for an **Order Shortening Time for the setting of a motion hearing** in this matter on November 12, 2009 before Judge Mura.

THIS MOTION is based upon the records and files submitted herein and upon the subjoined affidavit of Jeffrey A. Lustick.

SIGNED and DATED this foregoing 10th day of November 2009.

[Signature]
JEFFREY A. LUSTICK, WSBA # 27072
Attorney for the Defendant

[Handwritten initials]

ORIGINAL

1 STATE OF WASHINGTON)
2 :SS
3 COUNTY OF WHATCOM)

4 Jeffrey A. Lustick, first being duly sworn upon oath, deposes and says: That he is a licensed
5 defense attorney in and for the State of Washington. He is over 18 years old and is making this
6 statement based on his own personal knowledge and belief.

7 1. On June 19, 2008, the defendant was charged with rape of a child on a criminal information.
8 See Docket @ # 6.

9 2. On June 26, 2008, defense counsel appeared on Mr. Eagle's behalf and filed a notice of
10 appearance. See Docket @ # 10A. The next day, at an arraignment hearing, the court set a
11 status hearing for August 27, 2008 and a jury trial for September 8, 2008. See Docket @ # 16.

12 3. On July 18, 2008, defense counsel filed an Agreed Omnibus Application and Order
13 requesting full discovery on this case. The request specifically requested contact information
14 for all witnesses, summaries of their testimony expected at trial, and notice of any expert
15 witnesses. See Docket @ # 19.

16 3. On August 29, 2008, Judge Mura held a status conference and ordered a continuance. The
17 reason stated for the continuance was so the parties could conduct further discovery. At this
18 hearing, Mr. Eagle's matter was set for another status hearing on October 29, 2008 and a jury
19 trial on November 10, 2008. See Docket @ # 20 and 21.

20 4. On October 29, 2008, Judge Snyder held a status hearing at which time the case was
21 continued again, this time so the parties could conduct pre-trial interviews of the prosecutor's
22 witnesses. See Docket @ # 29. At this hearing, news dates of January 7, 2009 for status and
23 January 20, 2009 for the jury trial were set by the court. See Docket @ # 30.

24 5. On January 7, 2009, a status hearing was held by Judge Mura and the matter was confirmed
25 for trial over the defense objections. The main defense objection was that the prosecutor had
26 not yet filed a witness list nor complied with the discovery demands in the omnibus order. See
27 Docket @ # 31.

28 6. On January 15, 2009, the defense brought a motion to continue where in the lack of
29 adherence to the discovery demands was cited as the basis for the continuance. Judge Mura
30 granted the continuance, setting February 29, 2009 for trial and no status was set. The judge
also noted that there would be no further continuances in this matter. See Docket @ # 34.

7. On February 5, 2009, the prosecutor finally filed the state's list of witnesses. See Docket @
35. On February 10, 2009, the defense filed its initial listing of witnesses. See Docket @ #
37.

8. On February 17, 2009, just 12 days before the trial was set to begin, the prosecutor filed an
amended criminal information, adding two additional rape charges. He also filed an amended

1 witness list that contained the names of people not previously known to the defense and who
2 were not names anywhere in the police reports. *See* Docket # 38 and 39.

3 9. On February 19, 2009, Judge Mura signed another trial setting order setting the matter for a
4 status hearing on April 22, 2009 and a jury trial on May 4, 2009. The reason stated on the
5 docket for granting this motion was "time needed to interview witnesses." *See* Docket # 41
6 and 42.

7 10. On April 22, 2009, Judge Snyder continued the matter one additional week because the
8 defense had requested DNA evidence which it believed was exculpatory. This evidence was
9 being processed under the state's purview at a WSP crime lab. *See* Docket # 43.

10 11. On April 29, 2009, the matter returned to court for a new status hearing at which time the
11 state verbally informed the defense of the "surprising" results from the DNA test. However, at
12 that time, the state did not present the defense with any written reports or factual circumstances
13 regarding the DNA results. At that hearing, Judge Snyder set a new scheduling hearing date of
14 Friday, May 1, 2009. *See* Docket # 44.

15 12. On Friday May 1, 21009, the matter was reset to a status date of May 27, 2009 and a June
16 8, 2009 trial date. *See* Docket # 46.

17 13. On May 27, 2009, Judge Uhrig held the status hearing. The defense asked for yet another
18 continuance because by this time, the state still had not provided full discovery in this matter
19 nor had it supplied any reports regarding the exculpatory DNBA test results. The continuance
20 was granted to July 22, 2009 for status and August 3, 2009 for a jury trial. *See* Docket # 47
21 and 48.

22 14. On July 7, 2009, defense counsel sent an e-mail asking for the report and information
23 regarding the DNA test. Despite all of the requests made in court, nothing in writing regarding
24 the DNA test results had been provided to the defense. A copy of this e-mail is attached to this
25 declaration as Exhibit # 1.

26 15. On July 14, 2009, defense counsel still had not received any reports from the state
27 regarding the exculpatory DNA test results. Defense counsel sent another e-mail regarding this,
28 which is attached as Exhibit # 2. The prosecutor did not reply to that e-mail.

29 16. On July 21, 2009, one day before the status hearing was set to occur, the defense counsel
30 sent a third e-mail to the prosecutor once again requesting the DNA results. The prosecutor
did not reply to this e-mail. *See* Exhibit # 3.

17. On July 22, 2009, Judge Snyder conducted the status hearing and continued the matter at
the defense's request to October 7, 2009 for status and October 19, 2009 for a jury trial. *See*
Docket # 49 and 50.

18. On October 7, 2009, Judge Mura confirmed the trial date of October 19, 2009.

1 19. On October 12, 2009, defense counsel sent an e-mail to the prosecutor renewing the
2 defense's request for full discovery. In that e-mail, the defense counsel asked again for the
3 things originally stated in the omnibus order (July 18, 2008), specifically:

- 4 (1) NCIC/Criminal History on all of the state's witnesses.
- 5 (2) Summaries of testimony of witnesses that state intends to call. (I do not
6 need this for V-1, V-1s mother, or V-2) but it is needed for all of the
7 rest. Otherwise, if a summary cannot be given to me, I will need to
8 interview each one.
- 9 (3) List of and copy of any documents you intend to offer at trial;
- 10 (4) Notice of any expert witnesses and their qualifications.

11 A copy of this e-mail is attached as Exhibit # 4.

12 20. On October 13, 2009, the defense filed a second demand for discovery. *See* Docket # 53.

13 21. On October 19, 2009, on the morning set for trial Judge Mura, found that no Superior
14 Court courtrooms would be available to hear the trial in this matter. He also heard arguments
15 from the defense counsel that the prosecution had not complied with discovery in this case.
16 Based on all of these factors, Judge Mura reset the trial to November 30, 2009 with a priority
17 setting. Judge Mura also ordered the prosecutor to fully answer the omnibus questions and
18 provide this information to the defense by close of business on October 30, 2009. *See* Docket
19 # 54.

20 22. On October 27, 2009, defense counsel filed a third demand for discovery. This demand
21 asked for nothing new and restated the original unanswered requests that were originally stated
22 in the omnibus application and the second discovery demand. *See* Docket # 55.

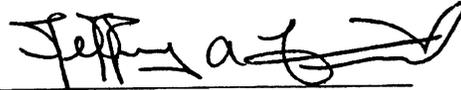
23 23. On October 30, 2009, the defense received nothing from the prosecutor regarding this
24 case. And at the time of this writing, the prosecutor still has not responded to discovery nor
25 has he complied with the court's discovery order issued on October 19, 2009.

26 24. The issue from the prosecutor's lack of discovery is access to the witnesses and being able
27 to interview them prior to trial. The current witness list from the prosecution lists names of
28 people not named in any of the police reports and who are unknown to the defense and the
29 defendant. Some of the names have no address or phone number and the defense has no way
30 of reaching those people. The defense also has not received any summaries of expected
testimony, although the defense has already provided that to the prosecutor. The defense has
not been notified of any expert witnesses the state wishes to call at trial or what any expert may
say if taking the state. The defense also does not have any criminal histories on any of the
state's witnesses or a listing of any documents or exhibits the state wishes to present at trial.

25. Because of these deficiencies in the discovery process, the defense is not going to be
prepared for trial on November 30, 2009. In getting ready for trial, the defense has had to
purchase non-refundable airline tickets for some of its witnesses.

1 26. At this point, a shortening of time to resolve these discovery problems is highly warranted.

2 The foregoing is sworn under penalty of perjury under the laws of the State of Washington on
3 November 10, 2009 at Bellingham, WA.

4
5 

6 Jeffrey A. Lustick, WSBA # 27072
7 Attorney for Mr. Eagle
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jeff

From: Jeff Lustick [jeff@lustick.com]
Sent: Tuesday, July 07, 2009 9:38 AM
To: 'Eric Richey'
Subject: Artie Eagle - DNA

Eric:

I really need any and all information on the DNA testing the state did on V-1's bedding and my client's DNA sample. I am talking about lab reports, police reports, witness statements, basically whatever you have. Time is of the essence since I may need to hire a defense expert and will need some lead time. If I don't get this soon, I may need to ask for a continuance.

Can you please provide me this information this week?

Jeff Lustick

EXHIBIT 1

jeff

From: Jeff Lustick [jeff@lustick.com]
Sent: Tuesday, July 14, 2009 4:20 PM
To: 'Eric Richey'
Subject: RE: Artie Eagle - DNA

Hi Eric -

Still nothing has been received on this...

Jeff

-----Original Message-----

From: Eric Richey [mailto:ERichey@co.whatcom.wa.us]
Sent: Tuesday, July 07, 2009 11:42 AM
To: Jeff Lustick
Subject: Re: Artie Eagle - DNA

I think so. I just called the crime lab, and apparently they sent a report to Blaine. I called Blaine, and they will be sending it to me 4th corner. I'll get it to you real soon. Thanks, Eric.

>>> "Jeff Lustick" <jeff@lustick.com> 7/7/2009 9:37 AM >>>
Eric:

I really need any and all information on the DNA testing the state did on V-1's bedding and my client's DNA sample. I am talking about lab reports, police reports, witness statements, basically whatever you have. Time is of the essence since I may need to hire a defense expert and will need some lead time. If I don't get this soon, I may need to ask for a continuance.

Can you please provide me this information this week?

Jeff Lustick

EXHIBIT 2

jeff

From: Jeff Lustick [jeff@lustick.com]
Sent: Monday, October 12, 2009 5:04 PM
To: 'Eric Richey'
Subject: Status of Discovery: State v. Eagle

Eric:

I was reviewing the Eagle case and I noticed that discovery is not nearly complete as I thought. Here are some of the items still outstanding which the defense is able to get under the discovery rules in the Criminal Rules :

- (1) NCIC/Criminal History on all of the state's witnesses.
- (2) Summaries of testimony of witnesses that state intends to call. (I do not need this for V-1, V-1s mother, or V-2) but it is needed for all of the rest. Otherwise, if a summary cannot be given to me, I will need to interview each one.
- (3) List of and copy of any documents you intend to offer at trial;
- (4) Notice of any expert witnesses and their qualifications.

Thanks,

Jeff

EXHIBIT 4

FILED
COUNTY CLERK
2009 OCT 27 PM 3:42
2009 OCT 27 PM 3:37
SCANNED 4
BY _____ W

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

STATE OF WASHINGTON,

No. 08-1-00814-5

Plaintiff,

DEFENDANT'S THIRD DEMAND FOR
DISCOVERY

vs.

CALVIN ARTIE EAGLE,

Defendant.

TO: The Clerk of the Court;
AND TO: The Whatcom County Prosecuting Attorney

PLEASE TAKE NOTICE that the undersigned attorney having twice previously filed a formal demand for discovery (Omnibus order dated July 18, 2008, Defendant's Second Demand for Discovery dated October 12, 2009) comes again now and makes this third demand and request for discovery in the matter pending under the above cause number:

1. Copies of any and all police or investigative reports and statements of claimed experts made in connection with this case, including results of physical or mental examinations and scientific tests, experiments, or comparisons made in connection with the Defendant's arrest;
2. Copies of any and all officer's notes regarding this case, to include but not be limited to field notes, blue book notes, rough notes;
3. The names and addresses of any and all persons whom the prosecution intends to call as witnesses

ORIGINAL

LUSTICK LAW FIRM
222 GRAND AVE SUITE A
BELLINGHAM, WA 98225
Tel: 360-685-4221

1 at any hearing or trial, together with any and all written or recorded statements, and the substance of any oral
2 statements of such witnesses, together with a summary of the expected testimony of any witness the
3 prosecution intends to call if the substance of the expected testimony is not contained in the materials
4 otherwise provided.

5
6
7 4. Copies of any and all forms read to or signed by the Defendant containing information regarding
8 his rights under CrR 3.1 and (2) and/or RCW 46.61.506 and 46.20.308, including information regarding the
9 claimed basis for the arrest of the defendant and allegedly giving rise to the mandatory provisions of RCW
10 46.20.308;

11
12 5. Copies of any written or recorded statements and the substance of any oral statements made by the
13 defendant or by any co-defendant if the trial is to be a joint one;

14
15 6. A list of, copies of, and access to any books, papers, documents, photographs, or tangible objects
16 which the prosecuting attorney intends to use in any hearing or trial;

17
18 7. A list of all items or things which were obtained from or belonged to the defendant, regardless of
19 whether the prosecutor intends to introduce said items at any hearing or trial;

20
21 8. A description of any other tangible evidence which the prosecution intends to use at any hearing or
22 trial which are not contained in the materials otherwise provided pursuant to these demands;

23
24 9. Copies of or access to any recordings or video tapes made of the defendant for viewing by the
25 defendant and/or his attorney prior to trial;

26
27 10. Any record of prior criminal convictions known to the prosecuting attorney of the defendant and
28 person whom the prosecuting attorney intends to call as witnesses at any hearing or trial;

29
30 11. Any electronic surveillance, including wiretapping of the Defendant's premises or conversations
31 to which the Defendant was a party and any record thereof;

32
33 12. Any information which the Prosecuting Attorney has indicating entrapment of the Defendant;

1 Any material or information within the Prosecutor's knowledge which tends to negate the Defendant's guilt as
2 to the offense(s) charged;

3
4 13. Any expert witnesses whom the Prosecuting Attorney will or may call at any hearing or trial, the
5 subject of their testimony, and any reports they have submitted to the Prosecuting Attorney; Defendant further
6 demands that such expert witness be produced for testimony at trial;
7

8 14. Preservation and access to any blood, breath, or urine samples taken from the Defendant as a
9 result of the investigation of the charges now pending;

10
11 15. A copy of any tape recording of all radio broadcasts and transmissions occurring between the
12 police officer who detained, arrested and/or transported the Defendant on the date of the alleged charge herein,
13 and any other agency, officer or station during the course of the detention, arrest, transportation, testing and
14 booking or citation of the Defendant, which relates to this Defendant;

15
16 16. A copy of any tape recording or radio or telephone communications made over or through the
17 "911" system and relating to the identity, detention, arrest and booking or citation of the Defendant;

18
19 17. Notice and an opportunity to interview any confidential informants or expert witnesses in this
20 case.
21

22
23 18. An interview with the arresting and investigating police officers is hereby requested to be
24 scheduled and conducted within 45 days of the date hereof. Defense Counsel is willing and able to meet with
25 the police officer(s) at nearly any location in Bellingham or Whatcom County at nearly any time in order to
26 accommodate the police officer's schedule.
27

28
29 19. Please provide any other evidence in the possession of the government or otherwise known to the
30 prosecution which reasonably may tend to:

31 (a) Negate the guilt of the defendant;

32 (b) Reduce the guilt of the defendant to the offenses charged; or
33

1 (c) Reduce the potential punishment.

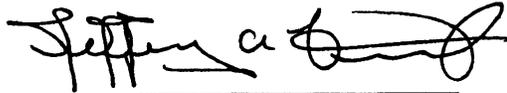
2 YOU ARE FURTHER NOTIFIED that the purpose of these demands is to enable the Defendant to properly
3 prepare to defend against the charges file herein, to adequately prepare to examine all witnesses who may
4 testify in this case, and to eliminate the element of surprise or the need for a continuance on the day of trial.
5

6 THEREFORE, in the event of the Prosecution's failure to disclose the above-requested information at least
7 FOURTEEN (14) days prior to trial, the Defendant will move to suppress and exclude all nondisclosed
8 evidence.
9

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11 YOU ARE FURTHER NOTIFIED that the failure to comply with these requests will result in the Defendant
12 moving for all appropriate relief from the court.
13

14 Dated this 27th day of October, 2009.
15

16 LUSTICK LAW FIRM,
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20 Jeffrey A. Lustick, WSBA # 27072
21 Attorney for Defendant
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CRIMINAL STATUS CALENDAR MINUTE SHEETS

JUDGE Mora REPORTER Quinn CLERK O'Brien

State of Washington vs:

DATE 10/19/09

SCOMIS CODES: STAHRG

HSTK SCANNED 1

Def't's Name and Case Number	Def. Appeared / In Custody	Attorney(s) for:	Waiver Entered	Waiver to be Entered / Advised of Rights	BW Signed	BW Auth.	Cont'd to Friday Calendar	Cont'd to Thurs Calendar	Court - 5 Day Bump	Court orders:
<u>Calvin Eagle</u>	<u>YES</u> NO	State: Richey ✓		YES NO						Priority date Nov 30 ST to provide info to defense by 10/30
08-1-00814-5	<u>YES</u> NO	Def: Lustick ✓		YES NO						
Francisco Compean	<u>YES</u>	State: Richey ✓		YES NO					✓	
09-1-00657-4	<u>YES</u> NO	Def: Olson ✓		YES NO						
Jenita Blount	<u>YES</u> NO	State: Gigliotti ✓		YES NO						Cont to 11/30 order signed
09-1-00667-1	<u>YES</u> NO	Def: Brown Olson ✓		YES NO						
Tanisha Woods	<u>YES</u> NO	State: Gigliotti ✓		YES NO						Cont to 11/30 order signed
09-1-00664-7	<u>YES</u> NO	Def: Devlin ✓		YES NO						
	YES NO	State:		YES NO						
	YES NO	Def:		YES NO						

54

DAVID S. McFADYEN
PROSECUTING ATTORNEY

2009 OCT 13 PM 1:30

SCANNED *4*
FILED
COUNTY CLERK

2009 OCT 13 PM 2:31

WHATCOM COUNTY
WASHINGTON

BY *m*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CALVIN ARTIE EAGLE,

Defendant.

No. 08-1-00814-5

DEFENDANT'S SECOND DEMAND FOR
DISCOVERY

TO: The Clerk of the Court;
AND TO: The Whatcom County Prosecuting Attorney

PLEASE TAKE NOTICE that the undersigned attorney having previously appeared as counsel for the above named Defendant and having duly and regularly requested discovery in the Agreed Omnibus Application and Order dated July 18, 2008, comes again now and makes this second demand and request for discovery in the matter pending under the above cause number:

1. Copies of any and all police or investigative reports and statements of claimed experts made in connection with this case, including results of physical or mental examinations and scientific tests, experiments, or comparisons made in connection with the Defendant's arrest;

2. Copies of any and all officer's notes regarding this case, to include but not be limited to field notes, blue book notes, rough notes;

3. The names and addresses of any and all persons whom the prosecution intends to call as witnesses at any hearing or trial, together with any and all written or recorded statements, and the substance of any oral

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1 statements of such witnesses, together with a summary of the expected testimony of any witness the
2 prosecution intends to call if the substance of the expected testimony is not contained in the materials
3 otherwise provided.
4

5 4. Copies of any and all forms read to or signed by the Defendant containing information regarding
6 his rights under CrR 3.1 and (2) and/or RCW 46.61.506 and 46.20.308, including information regarding the
7 claimed basis for the arrest of the defendant and allegedly giving rise to the mandatory provisions of RCW
8 46.20.308;
9

10
11 5. Copies of any written or recorded statements and the substance of any oral statements made by the
12 defendant or by any co-defendant if the trial is to be a joint one;
13

14 6. A list of, copies of, and access to any books, papers, documents, photographs, or tangible objects
15 which the prosecuting attorney intends to use in any hearing or trial;
16

17 7. A list of all items or things which were obtained from or belonged to the defendant, regardless of
18 whether the prosecutor intends to introduce said items at any hearing or trial;
19

20 8. A description of any other tangible evidence which the prosecution intends to use at any hearing or
21 trial which are not contained in the materials otherwise provided pursuant to these demands;
22

23 9. Copies of or access to any recordings or video tapes made of the defendant for viewing by the
24 defendant and/or his attorney prior to trial;
25

26 10. Any record of prior criminal convictions known to the prosecuting attorney of the defendant and
27 person whom the prosecuting attorney intends to call as witnesses at any hearing or trial;
28

29 11. Any electronic surveillance, including wiretapping of the Defendant's premises or conversations
30 to which the Defendant was a party and any record thereof;
31

32 12. Any information which the Prosecuting Attorney has indicating entrapment of the Defendant;
33

34 Any material or information within the Prosecutor's knowledge which tends to negate the Defendant's guilt as

1 to the offense(s) charged;

2 13. Any expert witnesses whom the Prosecuting Attorney will or may call at any hearing or trial, the
3 subject of their testimony, and any reports they have submitted to the Prosecuting Attorney; Defendant further
4 demands that such expert witness be produced for testimony at trial;
5

6 14. Preservation and access to any blood, breath, or urine samples taken from the Defendant as a
7 result of the investigation of the charges now pending;
8

9 15. A copy of any tape recording of all radio broadcasts and transmissions occurring between the
10 police officer who detained, arrested and/or transported the Defendant on the date of the alleged charge herein,
11 and any other agency, officer or station during the course of the detention, arrest, transportation, testing and
12 booking or citation of the Defendant, which relates to this Defendant;
13

14 16. A copy of any tape recording or radio or telephone communications made over or through the
15 "911" system and relating to the identity, detention, arrest and booking or citation of the Defendant;
16

17 17. Notice and an opportunity to interview any confidential informants in this case.
18

19 18. An interview with the arresting and investigating police officers is hereby requested to be
20 scheduled and conducted within 45 days of the date hereof. Defense Counsel is willing and able to meet with
21 the police officer(s) at nearly any location in Bellingham or Whatcom County at nearly any time in order to
22 accommodate the police officer's schedule.
23

24 19. Please provide any other evidence in the possession of the government or otherwise known to the
25 prosecution which reasonably may tend to:
26

27 (a) Negate the guilt of the defendant;
28

29 (b) Reduce the guilt of the defendant to the offenses charged; or
30

31 (c) Reduce the potential punishment.
32

33 YOU ARE FURTHER NOTIFIED that the purpose of these demands is to enable the Defendant to properly
34

1 prepare to defend against the charges file herein, to adequately prepare to examine all witnesses who may
2 testify in this case, and to eliminate the element of surprise or the need for a continuance on the day of trial.
3

4 THEREFORE, in the event of the Prosecution's failure to disclose the above-requested information at least
5 FOURTEEN (14) days prior to trial, the Defendant will move to suppress and exclude all nondisclosed
6 evidence.
7

8 YOU ARE FURTHER NOTIFIED that the failure to comply with these requests will result in the Defendant
9 moving for all appropriate relief from the court.
10

11 Dated this 17 day of February, 2009.
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14 LUSTICK LAW FIRM,

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18 Jeffrey A. Lustick, WSBA # 27072
19 Attorney for Defendant
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DAVID S. McLAUGHLIN
PROSECUTING ATTORNEY

FILED
COUNTY CLERK

SCANNED 2

2009 OCT 13 PM 1:30

2009 OCT 13 PM 2:31

WHATCOM COUNTY
WASHINGTON

BY MA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY, WASHINGTON

STATE OF WASHINGTON,

No. 08-1-00814-5

Plaintiff,

DEFENDANT'S
1st AMENDED WITNESS LIST

vs.

CALVIN EAGLE,

Defendant.

TO: Clerk of the Court;
AND TO: Whatcom County Prosecuting Attorney.

PLEASE TAKE NOTICE that if this matter proceeds to trial, the defendant may call in its case in chief or on rebuttal the following individuals as witnesses:

1. Mr. Robert Grine, 1210 Carriage Street, Longmont, CO, (720) 364-9370, is a twenty-year friend of the defendant; will testify about the parenting relationship between V-1 and the defendant and on the specific layout of the home where the earlier events allegedly occurred.
2. Ms. Judy Eagle, 11035 Clayton Street, North Glenn, CO 80233, (303) 667-0167, who is the defendant's mother. She personally knows V-1 and V-1's mother and will testify as to their home life while the defendant was living there.
3. Mr. Jose Trejo, 3173 Bakers Lane, Custer, WA 98240, (360) 303-3166, is a close personal friend who has spent numerous hours with the defendant, V-1, and her mother in their home, and he will testify as to the nature of the parenting relationship between V-1 and the defendant as well as to the relationship between Shelia and the defendant.

DEFENDANT'S 1st AMENDED WITNESS LIST

 ORIGINAL

THE LUSTICK LAW FIRM
ATTORNEYS AT LAW
222 GRAND AVE SUITE A
BELLINGHAM, WA 98225
Tel: (360) 685-4221

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1 4. Ms. Ana Portez, 2306 Douglas Rd, Ferndale, WA 98248, (360) 778-3261, co-worker
2 of the defendant, personally knows the defendant and V-1's mother, will testify to defendant's
3 character.

4
5 5. Mr. Jamal B. Mallak, 636 "C" Street, Blaine, WA 98230, is the brother of the alleged
6 victim, who is expected to testify that the alleged victim never told him that she was being
7 sexually abused by anyone. He will also provide insight into the behaviors of the defendant
8 toward the alleged victim.

9
10 6. Mr. Alzod Mallak, 636 "C" Street, Blaine, WA 98230, is the brother of the alleged
11 victim, who is expected to testify that the alleged victim never told him that she was being
12 sexually abused by anyone. He will also provide insight into the behaviors of the defendant
13 toward the alleged victim.

14 7. Mr. Greg R. Frank, Forensic Scientist, WSP Lab Facility, 2700-116th Street NE Suite
15 P, Tulalip, WA 98271, (360) 651-6503, who will testify as to the results of the DNA test on the
16 alleged victim's bedding in that it did not have the defendant's semen but did have some other
17 man's semen on the bedding.

18
19 8. Officer Debra Hertz, Blaine Police Department, who will testify as to the seizure of
20 certain bedding and why it was seized and what she did with the bedding preceding the DNA
21 test.

22
23 9. Officer Dan Sartain, Blaine Police Department, Evidence Officer, who will lay the
24 foundation for admissibility of the test done on the bedding.

25 Dated this 12TH day of October 2009.

26 LUSTICK LAW FIRM,

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28
29 JEFFREY A. LUSTICK, WSBA #27072
30 Attorney for Defendant

FILED

NOV 16 2009

WHATCOM COUNTY CLERK
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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY**

STATE OF WASHINGTON,

Plaintiff,

vs.

CALVIN ARTIE EAGLE,

Defendant.

No. 08-1-00814-5

**COURT'S RULING ON
DEFENDANT'S MOTION TO
DISMISS**

THIS MATTER having come before the court on November 16, 2009 for a hearing on the defendant's motion to dismiss; and the defendant being present and represented by Jeffrey A. Lustick, and the plaintiff being represented through Deputy Prosecutor Eric Richey, and the court having reviewed the pleadings and declarations of each party, and having heard the oral arguments made in open court, **DENIES** the defendant's motion to dismiss.

However, in lieu of a dismissal of this case or a continuance of the trial date, the court hereby **GRANTS** and **ORDERS** the following appropriate relief:

(1) The state has already conceded and the court hereby finds that the prosecutor did not comply with the court's discovery order (Docket # 54) which required the state to disclose summaries of each of the state's witness's testimony to the defense by close of business on October 30, 2009.

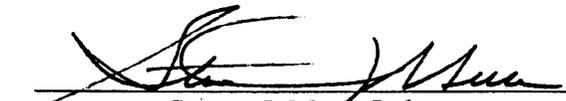


1 (2) As a result of this violation, the court orders that no expert witnesses may be called
2 by the state in this matter and in particular, Ms. Joan Gaslin-Smith is hereby excluded from
3
4 testifying as an expert in trial for this matter.
5

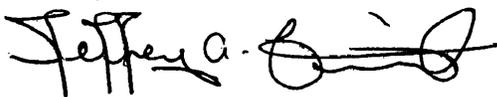
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8 (3) Furthermore, Ms. Cassie Richardson is excluded from testifying as a witness for the
9 state in trial for this matter; and
10

11
12 (4) All witnesses called by the state in the trial for this matter are limited to testify only
13 within the scope of summary of testimony produced by the prosecutor and which was provided
14 to defense counsel on November 13, 2009. No testimony from any state witness outside this
15 summary of testimony shall be permitted.
16
17

18
19 It is so **ORDERED** this 16th day of November 2009.
20

21
22 
23 Steven J. Mura, Judge
24 Whatcom County Superior Court
25
26

27 Presented by:

28 
29

30 Jeffrey A. Lustick, WSBA # 27072
Attorney for the Defendant

Approved for Entry and
Notice of Presentment Waived



Eric J. Richey, WSBA # 22860
Deputy Prosecutor

FILED
COUNTY CLERK

2009 NOV 13 PM 3: 32

WHATCOM COUNTY
WASHINGTON

BY _____

SCANNED 10

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CALVIN ARTIE EAGLE,

Defendant.

No. 08-1-00814-5

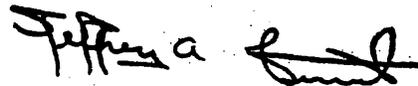
(1) MOTION TO DISMISS
(2) DECLARATION OF
COUNSEL
(3) LEGAL MEMORANDUM

I. MOTION

COMES NOW the defendant, by and through his counsel, Jeffrey A. Lustick, of the Lustick Law Firm in Bellingham, WA, and moves the court for an **Order Dismissing the Case Due to Prosecutorial Mismanagement/Misconduct CrR 8.3(b)**

THIS MOTION is based upon the records and files submitted herein, the subjoined affidavit of Jeffrey A. Lustick, as well as the legal memoranda.

SIGNED and DATED this foregoing 13th day of November 2009.



JEFFREY A. LUSTICK, WSBA # 27072
Attorney for the Defendant

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II. DECLARATION OF COUNSEL

STATE OF WASHINGTON)

:SS

COUNTY OF WHATCOM)

Jeffrey A. Lustick, first being duly sworn upon oath, deposes and says: That he is a licensed defense attorney in and for the State of Washington. He is over 18 years old and is making this statement based on his own personal knowledge and belief.

1. On June 19, 2008, the defendant was charged with rape of a child on a criminal information. *See Docket @ # 6.*

2. On June 26, 2008, defense counsel appeared on Mr. Eagle's behalf and filed a notice of appearance. *See Docket @ # 10A.* The next day, at an arraignment hearing, the court set a status hearing for August 27, 2008 and a jury trial for September 8, 2009. *See Docket @ # 16.*

3. On July 18, 2008, defense counsel filed an Agreed Omnibus Application and Order requesting full discovery on this case. The request specifically requested contact information for all witnesses, summaries of their testimony expected at trial, and notice of any expert witnesses. *See Docket @ # 19.*

3. On August 29, 2008, Judge Mura held a status conference and ordered a continuance. The reason stated for the continuance was so the parties could conduct further discovery. At this hearing, Mr. Eagle's matter was set for another status hearing on October 29, 2008 and a jury trial on November 10, 2008. *See Docket @ # 20 and 21.*

4. On October 29, 2008, Judge Snyder held a status hearing at which time the case was continued again, this time so the parties could conduct pre-trial interviews of the prosecutor's witnesses. *See Docket @ # 29.* At this hearing, news dates of January 7, 2009 for status and January 20, 2009 for the jury trial were set by the court. *See Docket @ # 30.*

5. On January 7, 2009, a status hearing was held by Judge Mura and the matter was confirmed for trial over the defense objections. The main defense objection was that the prosecutor had not yet filed a witness list nor complied with the discovery demands in the omnibus order. *See Docket @ # 31.*

6. On January 15, 2009, the defense brought a motion to continue where in the lack of adherence to the discovery demands was cited as the basis for the continuance. Judge Mura granted the continuance, setting February 29, 2009 for trial and no status was set. The judge also noted that there would be no further continuances in this matter. *See Docket @ # 34.*

7. On February 5, 2009, the prosecutor finally filed the state's list of witnesses. *See Docket @ # 35.* On February 10, 2009, the defense filed its initial listing of witnesses. *See Docket @ # 37.*

1 8. On February 17, 2009, just 12 days before the trial was set to begin, the prosecutor filed an
2 amended criminal information, adding two additional rape charges. He also filed an amended
3 witness list that contained the names of people not previously known to the defense and who
4 were not names anywhere in the police reports. *See* Docket # 38 and 39.

5 9. On February 19, 2009, Judge Mura signed another trial setting order setting the matter for a
6 status hearing on April 22, 2009 and a jury trial on May 4, 2009. The reason stated on the
7 docket for granting this motion was "time needed to interview witnesses." *See* Docket # 41
8 and 42.

9 10. On April 22, 2009, Judge Snyder continued the matter one additional week because the
10 defense had requested DNA evidence which it believed was exculpatory. This evidence was
11 being processed under the state's purview at a WSP crime lab. *See* Docket # 43.

12 11. On April 29, 2009, the matter returned to court for a new status hearing at which time the
13 state verbally informed the defense of the "surprising" results from the DNA test. However, at
14 that time, the state did not present the defense with any written reports or factual circumstances
15 regarding the DNA results. At that hearing, Judge Snyder set a new scheduling hearing date of
16 Friday, May 1, 2009. *See* Docket # 44.

17 12. On Friday May 1, 21009, the matter was reset to a status date of May 27, 2009 and a June
18 8, 2009 trial date. *See* Docket # 46.

19 13. On May 27, 2009, Judge Uhrig held the status hearing. The defense asked for yet another
20 continuance because by this time, the state still had not provided full discovery in this matter
21 nor had it supplied any reports regarding the exculpatory DNBA test results. The continuance
22 was granted to July 22, 2009 for status and August 3, 2009 for a jury trial. *See* Docket # 47
23 and 48.

24 14. On July 7, 2009, defense counsel sent an e-mail asking for the report and information
25 regarding the DNA test. Despite all of the requests made in court, nothing in writing regarding
26 the DNA test results had been provided to the defense. A copy of this e-mail is attached to this
27 declaration as Exhibit # 1.

28 15. On July 14, 2009, defense counsel still had not received any reports from the state
29 regarding the exculpatory DNA test results. Defense counsel sent another e-mail regarding this,
30 which is attached as Exhibit # 2. The prosecutor did not reply to that e-mail.

16. On July 21, 2009, one day before the status hearing was set to occur, the defense counsel
sent a third e-mail to the prosecutor once again requesting the DNA results. The prosecutor
did not reply to this e-mail. *See* Exhibit # 3.

17. On July 22, 2009, Judge Snyder conducted the status hearing and continued the matter at
the defense's request to October 7, 2009 for status and October 19, 2009 for a jury trial. *See*
Docket # 49 and 50.

1 18. On October 7, 2009, Judge Mura confirmed the trial date of October 19, 2009.

2 19. On October 12, 2009, defense counsel sent an e-mail to the prosecutor renewing the
3 defense's request for full discovery. In that e-mail, the defense counsel asked again for the
4 things originally stated in the omnibus order (July 18, 2008), specifically:

- 5 (1) NCIC/Criminal History on all of the state's witnesses.
6 (2) Summaries of testimony of witnesses that state intends to call. (I do not
7 need this for V-1, V-1s mother, or V-2) but it is needed for all of the
8 rest. Otherwise, if a summary cannot be given to me, I will need to
9 interview each one.
10 (3) List of and copy of any documents you intend to offer at trial;
11 (4) Notice of any expert witnesses and their qualifications.

12 A copy of this e-mail is attached as Exhibit # 4.

13 20. On October 13, 2009, the defense filed a second demand for discovery. *See* Docket # 53.

14 21. On October 19, 2009, on the morning set for trial Judge Mura, found that no Superior
15 Court courtrooms would be available to hear the trial in this matter. He also heard arguments
16 from the defense counsel that the prosecution had not complied with discovery in this case.
17 Based on all of these factors, Judge Mura reset the trial to November 30, 2009 with a priority
18 setting. Judge Mura also ordered the prosecutor to fully answer the omnibus questions and
19 provide this information to the defense by close of business on October 30, 2009. *See* Docket
54.

20 22. On October 27, 2009, defense counsel filed a third demand for discovery. This demand
21 asked for nothing new and restated the original unanswered requests that were originally stated
22 in the omnibus application and the second discovery demand. *See* Docket # 55.

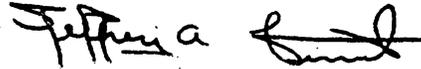
23 23. On October 30, 2009, the defense received nothing from the prosecutor regarding this
24 case. And at the time of this writing, the prosecutor still has not responded to discovery nor
25 has he complied with the court's discovery order issued on October 19, 2009.

26 24. The issue from the prosecutor's lack of discovery is access to the witnesses and being able
27 to interview them prior to trial. The current witness list from the prosecution lists names of
28 people not named in any of the police reports and who are unknown to the defense and the
29 defendant. Some of the names have no address or phone number and the defense has no way
30 of reaching those people. The defense also has not received any summaries of expected
testimony, although the defense has already provided that to the prosecutor. The defense has
not been notified of any expert witnesses the state wishes to call at trial or what any expert may
say if taking the state. The defense also does not have any criminal histories on any of the
state's witnesses or a listing of any documents or exhibits the state wishes to present at trial.

1 25. Because of these deficiencies in the discovery process, the defense is not going to be
2 prepared for trial on November 30, 2009. In getting ready for trial, the defense has had to
3 purchase non-refundable airline tickets for some of its witnesses.

4 26. At this point, a shortening of time to resolve these discovery problems is highly warranted.

5 The foregoing is sworn under penalty of perjury under the laws of the State of Washington on
6 November 10, 2009 at Bellingham, WA.

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9 Jeffrey A. Lustick, WSBA # 27072
10 Attorney for Mr. Eagle

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III. LEGAL MEMORANDUM

The remedies for discovery violations are set forth in CrR 4.7(h)(7)(i), which states that if a party fails to comply with an applicable discovery rule, the court may “grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.” State v. Ramos, 83 Wn.App. 622, 636, 922 P.2d 193 (1996). CrR 4.7(h)(7)(i) (If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.)

While CrR 4.7(h)(7)(i) regulates discovery in the possession or control of the prosecutor, CrR 8.3(b) address government misconduct, specifically the actions of the prosecutor. CrR 8.3(b) states that: the court in furtherance of justice, after notice and hearing may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.

The term governmental misconduct has been reviewed in a number of Washington cases interpreting the CrR 8.3(b). In these cases the courts have determined that it is not necessary for a defendant to demonstrate evil intent or actions of a dishonest nature have occurred to demonstrate governmental misconduct because simple mismanagement is sufficient to show government misconduct.

[G]overnment misconduct ‘need not be of an evil or dishonest nature; *simple mismanagement* is sufficient’ to warrant dismissal.

1 State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993); State v. Teems, 1997 WL
2 793272, 948 P.2d 1336 (1997)(State's failure to provide defendant with notice of refiling of
3 charges after a mistrial until only twelve days prior to end of speedy trial constituted simple
4 mismanagement that was government misconduct), citing State v. Michielli, 132 Wn.2d 229, 239,
5 937 P.2d 587 (1997) (State's filing of additional charges five days before trial thereby forcing
6 defendant to waive speedy trial in order to prepare defense to new charges constituted simple
7 mismanagement that was government misconduct), quoting State v. Blackwell, 120 Wn.2d 822,
8 831, 845 P.2d 1017 (1993).

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13 In this case the mismanagement stems from the State's blatant disregard of the court's
14 order, answering the questions posed in the omnibus order, resulting in a deliberate discovery
15 violation.

16
17 In determining whether dismissal is an appropriate remedy for discovery violations, the
18 court must engage in a fact-specific analysis that must be resolved on a case-by-case basis. State
19 v. Ramos, 83 Wn.App. 622, 637, 922 P.2d 193 (1996). Discovery rules are intended to prevent a
20 defendant from being prejudiced by surprise, misconduct, or arbitrary action by the State. State v.
21 Cannon, 130 Wash.2d 313, 328, 922 P.2d 1293 (1996).

22
23
24 The Sherman court found that the State had agreed to undertake production of the
25 Internal Revenue Service (IRS) records of one of its witnesses, as reflected on the omnibus
26 order but the state failed to produce the records by the court imposed deadline even though the
27 State was given several weeks to comply. . . . The Sherman court ruled that such
28 mismanagement amounted to prosecutorial misconduct. State v. Sherman, 59 Wash. App. 763,
29 801 P.2d 274 (1990). Although the Sherman trial court gave 4 reasons for its CR 8.3(b)
30

1 dismissal, the Court of Appeals held that the State's failure to produce IRS records was enough
2 in and of itself. See id.
3

4 The discovery violations outlined in Sherman directly parallel those found in this case.
5 The State was clearly ordered to comply with answering the omnibus questions; the State's
6 failure to do this has clearly prejudiced the defendant. The State's failure to provide a
7 significant number of crucial documents to the defense has created a Hobson's choice, forcing
8 the defendant to chose between the right to speedy trial and the right to adequately prepared
9 counsel, materially affects a defendant's right to a fair trial, ultimately resulting in prejudice.
10 Michielli, 132 Wash.2d at 240, 937 P.2d 587 (1997) citing State v. Price, 94 Wash.2d 810,
11 814, 620 P.2d 944 (1980). Dismissal is the remedy when speedy trial becomes the issue. State
12 v. Wilson, 149 Wash. 2d 1, 65 P.3d 657 (2003). When the defendant is forced to abridge his/her
13 speedy trial right in order to obtain discovery necessary to prepare his/her defense, trial court
14 may properly exercise its discretion by granting dismissal of charges. State v. Smith, 67 Wash.
15 App. 847, 841 P.2d 65 (1992).
16

17 In a case such as this, where speedy trial is expiring, a continuance will not remedy
18 the damage. A defendant need not give up his speedy trial rights in order to minimize
19 prejudice from the State's failure to timely fulfill its obligations under CrR 4.7(h)(7)(i). State v.
20 Sherman, 59 Wash. App. 763, 801 P.2d 274 (1990).
21

22 Before the defense can adequately prepare for trial, we must know what the witnesses
23 will testify at to the trial. We must receive complete witness summaries or have ample
24 opportunity to interview them sufficiently in advance of trial to meaningfully prepare. The
25 prosecution's mismanagement of this case has prevented either of these possibilities. Instead,
26 we are faced with trial less than two weeks away, involving very serious charges that will
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1 likely result in life altering consequences. Most of the witness interviews have not occurred.
2 Most of the necessary motions have not been filed and none of the post-interview work has
3 occurred. The interviews may well give rise to additional legal issues of which the Defense is
4 unaware at this time. None the less, if Mr. Eagle wishes to have adequately prepared counsel
5 he is in a position where he will be forced, once more, to waive his right to a speedy trial due
6 to the Prosecutor's mismanagement.
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10 Like the court in Sherman, this court should recognize the undeniable prejudice that
11 will result from the defendant's Hobson's choice. Failure to produce the documents the court
12 ordered makes it impossible to provide adequate and effective counsel to the defendant, and
13 therefore the court should follow the Sherman court and dismiss this case.
14

15 IV. CONCLUSION

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17 The prosecutor's blatant negligence and mismanagement of this matter are now forcing
18 Mr. Eagle to choose, between being adequately prepared at crucial stages of these proceedings
19 and his right to a speedy trial. Under current case law, criminal defendants are not required to
20 make such a choice between guaranteed Constitutional rights. No defendant should be placed
21 in a position where his constitutional right to a speedy trial is sacrificed to ensure that his
22 constitutional right to be adequately prepared is safeguarded, or vice versa. The government's
23 actions in mismanaging this case are inexcusable, and have severely affected Mr. Eagle's
24 constitutional rights and repeatedly placed him in an untenable position. As a result, this
25 matter should be dismissed under both CrR 8.3(b) and CrR 4.7(h)(7)(i).
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SIGNED and DATED this foregoing 13th day of November 2009.

Jeffrey A. Lustick

JEFFREY A. LUSTICK, WSBA # 27072
Attorney for the Defendant

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ATTACHMENT 3

LETTER FROM DEFENSE COUNSEL TO DEFENDANT

(Defense counsel concedes that defendant did not want a plea
and that defendant was not aware of defense counsel attempt)



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June 5, 2009

Jeffrey A. Lustick, Esq.
Mark A. Kaiman, Esq.
Daelyn R. Julius, Esq.

Dear Artie,

I received your letter today. It is obvious that we are not effectively communicating with each other, which is something that has plagued much of our attorney-client relationship. So I write this letter with the hopes of improving on that, and also to make a few new points which I feel need to be made.

First off, your letter assumes that "I think you are a child molester" and that I assume you are guilty. I think nothing of the sort. I know that you are a gentleman who had only the best intentions with Sheila and Shilair. I know that at one time, you considered yourself a husband to Shelia and a father-figure to Shiliar. I understand how these changes have impacted your life and how, even if the charges are ultimately dismissed, you will be impacted from this experience forever.

What I *have* continuously said and will continue to say is that the evidence against you will, in my experienced opinion, stand up in court, and it is likely you will be convicted of the pending two counts of rape of a child 1st degree and two counts of rape of a child 2nd degree. This is Whatcom County, and it is, in my opinion, a very backwards thinking community when it comes to criminal justice issues. Typical jurors bristle at allegations like these and they rarely stop to consider that a teenage girl would lie, much less that two separate teenagers would lie. According to statistics from the Washington State Office of the Court Administrator, the Whatcom County prosecutor wins over 90% of all trials in this county's superior court which proceed to a fully litigated jury-trial case. I am sure this number is even higher in cases like yours where child-sex is alleged.

We have exhausted the list of names of people you provided us as prospective witnesses. Most live out of state and none were here when the alleged events occurred. Most of the witnesses haven't been to the places where you lived with Shelia and Shiliar in Washington State. Although they could perhaps discuss your character, such testimony would be likely to be limited at the trial and it would potentially open the door to the prosecution introducing evidence of your past criminal history. That may be a risk we have to take, but if the evidence of the prior domestic violence comes in, it will definitely hurt your credibility at trial.

Beyond these names, you have nothing else which we can use at trial except your direct testimony. This may be enough for you to win, but probably not. Remember we have two separate teenage girls saying pretty much the same things about you and we have no clear motive

for them to be making this up. It is likely that the jury will see it that way. This is why I have been saying we should try and get you a reasonable resolution.

I am also basing this on cases which have been tried recently in the same court you are in now. As I mentioned to you, only a few weeks ago, a grandfather was convicted of seven counts of child rape of his granddaughter after a fully litigated multi-day trial with Attorney Peter Mazone. In that case, there was conflicting testimony as to what happened and no eye-witnesses except for the little girl. The jury took almost three days to decide, but in the end they convicted the defendant on seven of eight counts. This case is *State v. Grubb* and I am attaching the Bellingham Herald newspaper account of the trial.

As this case represents, even a vigorous defense always comes down to what she says and what he says. Most of the time, the jury will ignore its instructions to give the defendant the benefit of reasonable doubt and will convict the defendant unless the victim is completely outrageous on the witness stand.

Artie, I completely accept the fact that you do not want to plead guilty. If you want to reject the offer of the prosecutor, that is your choice. I do not like the offer much either. That's precisely why I asked you if there was anything at all you could possibly plead to. I suppose you are referring in your e-mail to a charge of assault 4th degree with sexual gratification when you say you may be willing to plead and take 12 months in jail, probation, and treatment. If this is correct and you are serious, let me know. However, I cannot see the prosecutor accepting this. Assault 4th is a gross misdemeanor. Right now you are charged with two class A felonies and two class B felonies. He thinks his case is strong and by local standards, he is correct. He has no reason to reduce your charges down that far. The revelation that someone else's semen was found in Shiliar's bedding is important and it goes to her credibility, but it does not result in a dismissal of these four charges.

In light of your letter, I am once again urging you to contact other attorneys who may be able to assist in this case either as co-counsel working with me or who may be able to take on your case alone without me.

First, I recommend you contact Mr. Peter Mazone in Everett, who I know and respect. He can be reached at phone number (425) 259-4989. Peter was the lawyer who had the case I referred to above. He is a stalwart fighter and a compassionate attorney. I would really welcome the chance to work with him on your case.

The other referral I have is for Seattle Attorney James Newton. I do not know Mr. Newton personally, but he states he has experience in handling sexual offenses and his practice is devoted to that entirely. His phone number is (253) 859-4600.

These referrals *are not* being made because I have no confidence in you or your case. I have and will continue to work for you with all I have. I want to win your case despite the issues we

are facing. But you are advised that you are not in any way obligated to remain with me as your counsel. You can direct me to withdraw whenever you want, and you can select an entirely new lawyer. Alternatively, you can hire additional counsel to work with me if that is what you choose to do.

You are a compassionate and intelligent man. I like your personality and do not want to see you go to prison or be wrongfully convicted. I want to do what is right in your case and most of all; I want you to have confidence in my legal ability and in my sincerity. It appears to me that you need to take this opportunity and seek additional or alternative legal counsel before the time for trial is upon us once again. I shall await your further guidance on what shall be done.

Very Sincerely Yours,

A handwritten signature in black ink, appearing to read "Jeffrey A. Lustick". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

Jeffrey A. Lustick

CASE # 65098-0-I

CERTIFICATE OF SERVICE

I, Calvin A. Eagle, being first duly sworn on oath, depose and says:

That I am a citizen of the United States over the age of eighteen years and competent to be a witness herein.

That on the 19 day of October, 2010, I delivered true and correct copies of the following documents in the above-entitled cause, to which this certificate is attached, by

US Mail: From Coyote Ridge Correction Center

Copies of the Additional Grounds for review to;

Court of Appeals Division I

Attorney Dana Lind (defense)

Whatcom County Pros. Office



Signed