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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

CARLOS BENITEZ, JR.,
Appellant,

)
)
) No. 65942-1-I
)
) STATEMENT OF ADDITIONAL
) GROUNDS FOR REVIEW
)
)
)

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

I, Carlos Benitez, Jr., (hereinafter Benitez), 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.

A. POINTS TO CONSIDER

Mr. Benitez respectfully asks this Court to consider that pleadings prepared by "pro-se litigants are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers; if Court can reasonably read pleadings to state valid claim on which litigant could prevail, it should do so despite failure to cite proper authority, opinion of legal theories, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirements." Haines v Kerner, 404 U.S. 519; Zickhov v. Idaho, 247 F.3d 1015 (9th Cir. 2001).

B. ADDITIONAL GROUNDS

Ground One:

The trial court erred when it denied Benitez's motion to dismiss at the close of the State's case because the State's evidence was insufficient to establish the elements of the crimes charged.

1 Ground Two:

2 Benitez did not receive effective assistance of counsel in this case, under
3 circumstances which justify reversal of his convictions and remand for a new trial.

4 Ground Three:

5 The trial court abused its discretion in denying Benitez's motion for a mis-
6 trial and deprived him of a fair trial.

7 C. ISSUES PERTAINING TO ADDITIONAL GROUNDS

8 1. Did the State present sufficient evidence to prove that Benitez construc-
9 tively possessed the drugs and firearms? (Additional Ground 1)

10 2. Did the State present sufficient evidence to prove that Benitez acted as
11 an accomplice to the crimes charged? (Additional Ground 1)

12 3. Did the State present sufficient evidence to prove all the essential ele-
13 ments of a Conspiracy to Deliver a Controlled Substance, specifically an agreement?
14 (Additional Ground 1)

15 4. Did defense counsel's failure to object to inadmissible and prejudicial
16 evidence fall below an objective standard of reasonable representation, and deny
17 Benitez due process of law? (Additional Ground 2)

18 5. Did the trial court abuse its discretion when it denied Benitez's motion
19 for a mistrial and deprive him of a fair trial? (Additional Ground 3)

20 D. ARGUMENT AND AUTHORITIES

21 1. THE TRIAL COURT ERRED WHEN IT DENIED BENITEZ'S
22 MOTION TO DISMISS AT THE CLOSE OF THE STATE'S
23 CASE BECAUSE THE STATE'S EVIDENCE WAS INSUFFICIENT
TO ESTABLISH THE ELEMENTS OF THE CRIMES CHARGED.

24 As a part of the due process rights guaranteed under both the Washington
25 Constitution, article 1, § 3, and United States Constitution, Fourteenth Amendment,
26 the State must prove every element of a crime charged beyond a reasonable doubt.

27 City of Seattle v. Slack, 113 Wn.2d 850, 784 P.2d 494 (1989); State v. Baeza, 100

1 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct.
2 1068, 1073, 25 L.Ed.2d 368 (1970). Evidence is sufficient to support a conviction
3 only if, viewed in the light most favorable to the prosecution, it permits a rat-
4 ional trier of fact to find the essential elements of the crime beyond a reasonable
5 doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of
6 insufficiency admits the truth of the State's evidence and all inferences that
7 reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

8 **a. The State failed to present sufficient evidence to prove that Benitez**
9 **constructively possessed the drugs and firearms.** To convict Benitez as a principal
10 to the crimes of Possession with Intent to Manufacture or Deliver a Controlled
11 Substance, Unlawful Possession of a Firearm in the First Degree, Possession of a
12 Stolen Firearm, and Unlawful Possession of a Short-Barrel Shotgun or Rifle, the
13 State was required to prove that Benitez possessed the controlled substances and
14 firearms. RCW 69.50.401(1),(2)(a); RCW 9.41.040(1)(a); RCW 9A.56.310; RCW 9.41.190
15 (1). Possession may be either actual or constructive. State v. Callahan, 77 Wn.2d
16 27, 29, 459 P.2d 400 (1969). Callahan, and the cases that interpret it all concern
17 possession of controlled substances, rather than firearms. The laws of possession
18 for controlled substances and firearms, however, are practically identical, and
19 courts often consider the laws of possession for controlled substances to define
20 possession for firearms. See e.g., State v. Simonson, 91 Wn. App. 874, 881 & nn.12-
21 13, 960 P.2d 955 (1998), review denied, 137 Wn.2d 1016 (1999). Because Benitez did
22 not have physical custody of the controlled substances or firearms, the question is
23 whether the State proved that he had constructive possession of the substances and
24 firearms.

25 Constructive possession is proved when the person charged with possession has
26 has dominion and control over either the items or the premises where the items are
27 found. Callahan, 77 Wn.2d at 30-31. IN establishing dominion and control the

1 totality of the circumstances must be considered. No single factor is dispositive.
2 State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). Factors which point
3 to dominion and control include knowledge of the illegal item on the premises and
4 evidence of residency or tenancy. State v. Paine, 69 Wn. App. 873, 878-79, 850 P.2d
5 1369, review denied, 122 Wn.2d 1024 (1993). Evidence of temporary residence or the
6 mere presence of personal possessions on the premises, however, is not enough. State
7 v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977); Collins, 76 Wn. App. at 501.

8 In Partin, a finding of occupancy was based on photographs and articles featuring
9 the defendant, a payment book for the purchase of the premises with Mr. Partin's
10 paycheck stubs inside, three letters addressed to him, and his unemployment documents.
11 Mr. Partin gave out the address as his own and acted as if he owned the
12 place on a previous police visit. Partin, 88 Wn.2d at 907-08.

13 In Callahan, two books, two guns, and a broken scale belonging to the defendant,
14 plus evidence the defendant had been staying on the premises for two or three days
15 was not enough. Even evidence that a person received some mail at a residence and
16 lived there off and on was not sufficient to show constructive possession. State
17 v. Hagen, 55 Wn. App. 494, 500, 794 P.2d 892 (1989). Some evidence of participation
18 in paying rent is generally required. Callahan, 77 Wn.2d at 31.

19 In this case, Detective Floyd testified that during his search, one of the
20 things he looked for were items of dominion and control. The reason he looks for
21 this is because it will help determine who lives at the residence or who has control
22 7/2/2010 RP 750. During his search Det. Floyd came across items of dominion and
23 control. He testified that exhibit 106 appeared to be an item of dominion and con-
24 trol for two people he talked about in this case. 7/2/2010 RP 752. He stated that
25 it was mail addressed to occupants at 216 South Cherry and the names on the mail
26 were Abel Cantu, Jr. and Jesus Hernandez, Jr. Det. Floyd testified that exhibit
27 107 appeared to be something he would associate with a document of dominion and

1 control. He stated it was a copied image of a check with the name Abel Cantu and
2 the address 216 South Cherry. 7/2/2010 RP 753-54. He also states that exhibit 108
3 is something he recovered as an item of dominion and control and that it is a piece
4 of mail addressed to an occupant of the residence with the name Jessica Gonzales and
5 the address 216 South Cherry. Despite all of this, Det. Floyd states that, to his
6 recollection, during the course of serving the search warrant, he did not find any
7 similar mail or documents with the name Carlos Benitez. 7/2/2010 RP 755. Detective
8 Kading testified he found documents that represented dominion and control for Abel
9 Cantu and Jessica Gonzales but none for Benitez. RP 306. Jessica Gonzales, Cantu's
10 fiancée testified that there were only two keys for the garage, one for her and one
11 for Mr. Cantu. RP 347. And the court made a definitive finding that Abel Cantu and
12 Jessica Gonzales were the renters of the home and Benitez temporarily stayed in the
13 garage. Supp. CP ___, Sub. No. 123 (Findings of Fact 2, 5). Accordingly, there was
14 no evidence to support that Benitez exercised dominion and control over the items
15 or garage.

16 Where the evidence is insufficient to establish dominion and control of the
17 premises, mere proximity to the item is not enough to support a finding of constu-
18 ctive possession. State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990);
19 See also State v. Cote, 123 Wn. App. 546, 548-50, 96 P.3d 410 (2004).

20 For example, in Spruell, police entered a room and found codefendant Luther
21 Hill and another individual near a table on which there was cocaine residue, a
22 scale, vials, and a razor blade. Hill's conviction for possession of the cocaine
23 was reversed for insufficient evidence:

24 There is no evidence in this case involving Hill other than the
25 testimony of his presence in the kitchen when officers entered...
26 There is no evidence relating to why Hill was in the house, how
27 long he had been there, or whether he had ever been there on days
previous to his arrest. There is no evidence of any activity by
Hill in the house. So far as the record shows, he had no connection
with the house or the cocaine, other than being present and having

1 a fingerprint on a dish which appeared to have contained cocaine
2 immediately prior to the forced entry of the police. Neither of
3 the police officers testified to anything that was inconsistent
4 with Hill being a mere visitor in the house. There is no basis
5 for finding that Hill had dominion and control over the drugs.
Our case law makes it clear that presence and proximity to the
drugs is not enough. There must be some evidence from which a
trier of fact can infer dominion and control over the drugs themselves.

6 Spruell, 57 Wn. App. at 388-89.

7 In State v. Echeverria, the defendant was the driver of a vehicle registered to
8 another person. 85 Wn. App. 777, 780, 934 P.2d 1214 (1997). He was charged with
9 unlawful possession of a firearm and unlawful possession of a dangerous weapon (a
10 martial arts throwing star) 85 Wn. App. at 779. On appeal, the Court found suffi-
11 cient evidence that Echeverria constructively possessed the firearm because it was
12 plainly visible, but insufficient evidence to support possession of the martial
13 arts weapon because it was not. 85 Wn. App. at 783-84.

14 And in Cote, the evidence was insufficient to prove constructive possession
15 where the defendant was a passenger in a truck containing components of a methamph-
16 etamine lab, and his fingerprints were found on Mason jars containing chemicals in
17 the back of the truck. 123 Wn. App. at 550.

18 Here, the State presented no evidence that established a connection between
19 Benitez and the drugs or guns. There was no evidence or testimony that Benitez
20 ever touched the drugs or guns. None of Benitez's fingerprints were found on the
21 drugs or guns. The drugs and guns were not plainly visible. Officer Goss and Sgt.
22 Rogge testified that the firearms were located behind the headboard and under the
23 mattress of the bed. 6/28/2010 RP 133, 144, 191. 198. The State relied on proxim-
24 ity alone to establish constructive possession, but this is not sufficient to sup-
25 port a conviction. See Cote, 123 Wn. App. at 550; Spruell, 57 Wn. App. at 388.

26 **b. The State failed to present sufficient evidence to establish that**
27 **Benitez acted as an accomplice.** The State charged Benitez as a principal with

1 Conspiracy to Deliver Methamphetamine, Ecstasy, Cocaine, and Heroin; one count each
2 of possessing Heroin , Methamphetamine, and Ecstasy with Intent to Deliver, each
3 with a firearm and school zone enhancement; one count of Manufacturing Marijuana;
4 one count of Criminal Impersonation; one count of Identity Theft; seven counts of
5 First Degree Unlawful Possession of a Firearm, and two counts of Possession of a
6 Short-Barrel Shotgun or Rifle. **CP 27, 34.** The court gave an accomplice liability
7 instruction and the to-convict instructions for Possession of Heroin, Methampheta-
8 mine, and Ecstasy with Intent to Deliver; Identity Theft, and Manufacture Marijuana
9 included accomplice language. **CP 45, 60, 61, 62, 64, 67.**

10 A person is an accomplice of another person in the commission of a crime if he
11 or she knowingly facilitates, encourages or aids in the planning or commission of
12 the crime. **RCW 9A.08.020(3)(a).** The State Supreme Court has repeatedly stated that
13 one's presence at the commission of a crime, even coupled with a knowledge that
14 one's presence would aid in the commission of the crime, will not subject an accu-
15 sed to accomplice liability. To prove that one present is an accomplice it must be
16 established that one is " 'ready to assist' " in the commission of the crime. **State**
17 **v. Rotunno**, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); **In re Wilson**, 91 Wn.2d 487, 491
18 588 P.2d 1161 (1979).

19 In denying Benitez's motion to dismiss, the Court based its decision primarily
20 on presence and knowledge. The Court reasoned:

21 One by taking the evidence in the light most favorable to
22 the State could conclude that Mr. Benitez was, in fact, **residing**
23 **or spending time in that garage and would, therefore, know about**
and be contributing to the manufacturing of the marijuana by allow-
ing the plants to exist and grow, and possibly aiding in the process.

....

24 As to count 9, possession of the stolen firearm, as Ms. bouwens
25 points out, there is no doubt that the firearm was stolen. However,
the question becomes any connection of that firearm to Mr. Benitez.

26 **The same conclusion could be drawn based on his presence in the**
garage and evidence presented at trial....

27 That's an assumption in taking the evidence in the light most

1 favorable to the State.

2 I'm not going through all other 15 of the remaining counts,
3 but the Court will find taking the evidence in the light most
4 favorable to the State that there is a basis for reasonable trier
5 of fact to possibly conclude that Mr. Benitez could be found guilty
6 of all those charges...

7 On those findings and basis, the Court will deny all of motions
8 to dismiss all of the counts.

9 **(emphasis added) 7/2/2010 RP 768-69.** The State must prove more than a person's
10 physical presence at the crime scene and knowledge of ongoing activity to establish
11 accomplice liability. **State v. Everybodytalksabout**, 145 Wn.2d 456, 472-73, 39 P.3d
12 294 (2002).

13 In the present case, Jeremiah Winchester, the State's star witness, testified
14 that Benitez pretty much just took care of the garage. That Benitez wasn't involv-
15 ed in large drug dealings or things like that. Benitez pretty much just hung out
16 in the garage. **RP 389-90.** The only thing he witnessed Benitez do was trade some-
17 thing with some people once and getting high with some people. **RP 390.** Winchester
18 also testified that he couldn't remember clearly if Benitez was in the garage on
19 the first transaction but he wasn't going to say he was. **RP 439.** None of the offi-
20 cers have anything about Benitez in their reports until October 25, 2009.

21 Detective Richardson testified that on Sept. 4, 2009, he was doing surveillance on
22 the residence. **RP 220.** He testified that he didn't have any photos of Carlos
23 Benitez from Sept. 4th. **RP 236.** Detective Kading testified that he participated in
24 surveillance of 216 South Cherry on Sept. 4, 2009. **RP 245.** And there was no photo
25 he took of Carlos Benitez on Sept. 4, 2009. **RP 294.** Detective Kading was also in-
26 volved in surveillance on Sept. 17, 2009. **RP 252.** Detective Kading took pictures
27 again on Sept. 17, 2009, and during that time he didn't see Carlos Benitez. **RP 295.**

Detective Shepard testified that he has no documentation that the CI told him
Benitez was in the garage on Sept. 4th or Sept. 17th, 2009. **RP 658-59,663-64.**

Detective Floyd testified that he did not mention Jr. or Carlos in any of his

STATEMENT OF ADDITIONAL GROUNDS

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1 reports. **RP 740.** In his report from Sept. 17th he didn't mention Jr. or Carlos.
2 **RP 742.** And on Sept. 23rd he doesn't recall writing anything about Jr. or Carlos.
3 **RP 745-46.** Here, the State has proved nothing more than Benitez's presence in the
4 garage on October 25, 2009, the night of his arrest, and that he might be a drug
5 user.

6 c. **The State did not prove all of the essential elements of a Conspiracy**
7 **to Deliver a Controlled Substance.** The State must show an actual agreement, rather
8 than a feigned agreement with at least one other person to prove conspiracy. **State**
9 **v. Pacheco,** 125 Wn.2d 150, 159, 882 P.2d 183 (1994). The State does not need to
10 show a formal agreement. **State v. Barnes,** 85 Wn. App. 638, 664, 932 P.2d 669 (1997).
11 The agreement may be shown by a "concert of action", all the parties working
12 together understandingly, with a single design for the accomplishment of a common
13 purpose. **State v. Casarez-Gastelum,** 48 Wn. App. 112, 116, 738 P.2d 303 (1987)
14 (quoting **Marino v. United States,** 91 F.2d 691, 694, 113 A.L.R. 975 (9th Cir. 1937),
15 cert. denied, 302 U.S. 764 (1938)). This proof may be circumstantial. **State v.**
16 **King,** 113 Wn.App. 243, 284, 54 P.3d 1218 (2002).

17 Here, the State charged Benitez with conspiracy to deliver a controlled substa-
18 nce, in violation of **RCW 69.50.407,** which provides:

19 Any person who attempts or conspires to commit any offense
20 defined in this chapter is punishable by imprisonment or fine or
21 both which may not exceed the maximum punishment prescribed for
22 the offense, the commission of which was the object of the attempt
23 or conspiracy.

24 In the charging informations the State applied the definition of conspiracy
25 under the general conspiracy statute, **RCW 9A.28.040.(1),** which provides:

26 A person is guilty of criminal conspiracy when, with intent
27 that conduct constituting a crime be performed, he agrees with
one or more persons to engage in or cause the performance of such
conduct, and any one of them takes a substantial step in the
pursuance of such agreement.

CP 1, 13, 338. In **State v. Pacheco,** 125 Wn.2d at 159, the Court held that **RCW**

1 9A.28.040 and RCW 69.50.407, require the defendant to reach a genuine agreement
2 with at least one coconspirator. An agreement to commit a crime is an essential
3 part of conspiracy. State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994).

4 In this case, the only basis for the conspiracy charge can be the September 4th
5 and 17th, 2009 transactions. There is no evidence of activity, attempted trans-
6 actions, or deliveries that occurred after and between September 17th and October
7 25, 2009. The evidence at trial showed that on September 4, 2009, Agent Hess,
8 Jeremiah Winchester, and another individual went to the Cantu residence to purchase
9 methamphetamine from Abel Cantu. **RP 396-97**. Winchester testified that on September
10 4, 2009, he didn't purchase the drugs directly from Cantu. He handed the money to
11 his friend and his friend handed the money to Cantu. The drugs were then handed
12 back by Cantu. **RP 402**. There is no question whether a conspiratorial agreement
13 occurred on this date. Indeed, Cantu conspired with Winchester's friend to deliver
14 the drugs to Winchester. On September 17, 2009, Hess and Winchester again went
15 back to the Cantu residence. **RP 407**. Winchester testified that on September 17th
16 the deal for drugs occurred between him and Cantu. **RP 408**. There is no evidence
17 or testimony that anyone other than Winchester and Cantu were involved in the
18 transaction. In fact, a delivery of drugs did occur. The crime of delivery re-
19 quires the participation of two persons, if only those two persons have participa-
20 ted in the illicit agreement, the charge of conspiracy cannot lie. State v.
21 Langworthy, 92 Wn.2d 148, 152, 594 P.2d 908 (1979). There was no evidence or test-
22 imony that Benitez participated or was involved in either of the transactions. Nor
23 is there any evidence that Benitez agreed to deliver a controlled substance. The
24 evidence is insufficient to support Benitez's conviction.

25 2. DEFENSE COUNSEL'S FAILURE TO OBJECT TO INADMISSIBLE
26 AND PREJUDICIAL EVIDENCE AT TRIAL FELL BELOW AN OBJECTIVE
27 STANDARD OF REASONABLE REPRESENTATION, AND DENIED BENITEZ
DUE PROCESS OF LAW

1 Prior to trial, the State and Benitez entered into a stipulation that Benitez
2 had previously been convicted of a serious offense. The purpose for this was, that
3 by stipulating that he does, in fact, have a prior serious felony conviction, then
4 his prior judgement and sentence would not go to the jury and would not be part of
5 the evidence in the case. RP 9 (6/24/2010).

6 The stipulation, in relevant part, provided:

7

8 (e) At trial I may choose to assert my constitutional right not
to testify in this matter, in which case the jury will not be
told of my prior criminal history;

9
10 (f) My lawyer has advised me to enter into this stipulation to
avoid undue prejudice to my case and the risk that the jury might
11 decide the matter unfairly on the basis of the particular serious
felony conviction if my prior judgement and sentence are admitted
into evidence.

12 ...

13 The Prosecution and the Defense agree that Carlos Benitez, Jr., has
been previously convicted of a serious felony offense.

14 An element of Counts 8, 10, 11, 12, 13, 15, 17.

15 CP 25 See Ex. 1.

16 At trial, in the presence of the jury, the Court read the charges against
17 Benitez directly from the charging information. Counts 8, 10, 11, 12, 13, 15, 17
18 of the information stated, in full;

19 On, or about October 25, 2009, in the County of Skagit, State
of Washington, the above named Defendant, having previously been
20 convicted in this state or elsewhere of a serious offense as defined
in RCW 9.41.010 (12)(a), to wit: **ASSAULT IN THE SECOND DEGREE,**
21 **07-1-00441-5, VIOLATION OF PROTECTION, 08-1-00021-3, UNLAWFUL POSSESSION**
OF A CONTROLLED SUBSTANCE, 07-1-00945-0, AND OR RIOT, 93-1-00005-7,
22 did knowingly own or have in his her possession or under his her
control a firearm to wit.... contrary to Revised Code of Washington
23 9.41.040 (1)(a).

24 CP 1, 13, 338 See Declaration of Appellant, App. A, (emphasis added). The information
25 as read, told the jury of Benitez's prior convictions. Specifically a conviction
26 for Possession of a Controlled Substance, a crime similar to one for which he was
27 on trial for. The Court also gave instruction No. 37 and provide it to the jury

1 during deliberations. Instruction No. 37 stated as follows:

2

2 The parties have stipulated that the Defendant has previously been convicted of a ~~serious offense~~.

3 CP 75 See Ex. 2. The State also introduced the testimony of several witnesses concerning Benitez's warrants for previous crimes and gang evidence. The pertinent testimony of those witnesses in response to questions by the prosecutor

6 (Ms. Johnson) was as follows:

7 Q. Ms. Johnson: And then in relationship to Mr. benitez did you also identify--did you also identify whether he had any warrants for his arrest under the name Carlos Benitez, Junior?

9 A. Officer Goss: The dispatcher later confirmed he did have several warrants for various crimes.

10 RP 83 (6/29/2010).

11 Q. Ms. Johnson: At that point in time were you also informed that Carlos Benitez had warrants?

12

A. Sgt. Rogge; Yeah.

13

RP 164 (6/29/2010).

14

Q. Ms. Johnson: Was there any graffiti on the walls?

15

A. Officer Goss: There was red and blue graffiti on the walls.

16

Q. Ms Johnson: What do you mean by red and blue graffiti on the walls?

17

A. Officer Goss: The house is known to be a gang house, for lack of better terms, frequented by gangs that associate with each other. One would be considered red. The other one blue.

18

19 RP 73 (6/29/2010). The State also presented photographs of graffiti during Officer Goss' testimony.

20

21 Q. Ms. Johnson: And K, can you notice anything particular in K?

22

23 A. Officer Goss: This is the window officers contacted the individual through and gang graffiti.....

24

24 RP 88 (6/29/2010).

25

Q. Ms. Johnson: And why -- why was it you called them?

26

A. Jeremiah Winchester: ...-- I have had friends in the past lose innocent family members on drive-bys and stuff.

27

I don't know alot about gangs, but I knew they were well

1 organized. This one was...

2 RP 425 (6/30/2010).

3 Q. Ms. Johnson: Okay. First, general information.

4 A. Detective Shepard: General information that we got from Skagit was that
5 there was a person first name Abel, street name of Bulldog that did
6 live in Burlington and that was known to be associated with a gang down
7 there that dealt in stolen property, drugs, weapons.

8 RP 628 (7/1/2010).

9 Q. Ms. Johnson: Can you give us the, kind of brief rundown of what your
10 debrief of the informant entailed....

11 A. Detective Shepard:... I asked about any gang attire that might be worn.
12 ...

13 RP 631 (7/1/2010).

14 Q. Ms. Johnson: Can you show that to the jury and tell me how those are
15 significant to you?

16 A. Detective Shepard: -- if we go out and purchase two different kinds of
17 drugs from one group of people that are a gang, we will consistently
18 get -- ...

19 RP 645 (7/1/2010). In closing argument, the State reiterated the fact that Benitez
20 had warrants and a prior conviction. The prosecutor stated:

21 This is where the defendant was concealing his location from
22 law enforcement because he had warrant.

23 RP 773 (7/2/2010).

24and that Carlos Benitez, Junior had warrants and warrants for
25 his arredst.

26 We also heard Jessica Gonzales, talking about the same things,
27 that she knew the defendant had warrants.

28 RP 793 (7/2/2010).

29 Now, No. 2 here, there is a stipulation to that that's included
30 as Plaintiffs exhibit 37. The defendant had stipulated that he had a
31 prior-- previously been convicted of a serious offense. So he's not
32 supposed to have guns. He's not supposed to have guns. The defendant
33 knowingly had a firearm in his possession or control, and he's
34 previously been convicted of a serious offense.

35 RP 801 (7/2/2010). Benitez contend he received ineffective assistance of counsel

1 when defense counsel failed to object to the reading of the charging information,
2 any of the testimony and evidence regarding prior crimes, bad acts or gang evidence
3 Benitez asserts the evidence was inadmissible and highly prejudicial and denied him
4 a fair trial.

5 **a. Benitez was entitled to the effective assistance of counsel.** A
6 criminal defendant's right to effective assistance of counsel is guaranteed by both
7 the Washington State and United States Constitutions. Washington Constitution,
8 article I, section 22; U.S. Constitution, Amendment 6 and 14:

9 The test for ineffective assistance of counsel has two parts.
10 One, it must be shown that the defense counsel's conduct was
11 deficient, i.e., that it fell below an objective standard of
12 reasonableness. Two, it must be shown that such conduct
prejudiced the defendant, i.e., that there is a reasonable
possibility that, but for the deficient conduct, the outcome
of the proceeding would have been different.

13 **State v. Mcfarland**, 127 Wn.2d 322,334-35, 899 P.2d 1251 (1995); **State v. Thomas**,
14 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

15 Trial counsel's performance is presumed to be competent and decisions to omit
16 questions or arguments at trial will normally be presumed to be "legitimate trial
17 strategy". **State v. Mak**, 105 Wn.2d 692, 731, 718 P.2d 407 (1986). When no tactical
18 reason would justify the omission, however, the failure to present valid objections
19 or positions to the court will be deemed to be deficient performance. **State v.**
20 **Carter**, 56 Wn. App. 217, 783 P.2d 589 (1989); **State v. Aho**, 137 Wn.2d 736, 975 P.2d
21 512 (1999). Such a failure can be grounds for reversal, if trial counsel knew or
22 reasonably should have known of the omitted favorable material or position. **State**
23 **v. Byrd**, 30 Wn. App. 794, 800, 638 P.2d 601 (1981).

24 Generally, when trial counsel's actions involve matters of trial tactics,
25 appellate courts hesitate to find ineffective assistance of counsel, **State v. Jones**
26 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983), and will
27 indulge in the strong presumption that counsel's performance was reasonable. **State**

1 v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or
2 whether to object is a classic example of trial tactics. State v. Madison, 53 Wn.
3 App. 754, 763, 770 P.2d (1989). However, "in egregious circumstances, on testimony
4 central to the State's case,...the failure to object will constitute incompetence
5 of counsel justifying reversal." Madison, 53 Wn. App. at 763 (citing Strickland v.
6 Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); State v. Emert, 94
7 Wn.2d 839, 621 P.2d 121 (1980), review denied, 113 Wn.2d 1002 (1989)). A counsel's
8 failure to notice and except to an erroneous jury instruction may demonstrate a
9 lack of effective assistance of counsel if the defendant can show that the
10 inaccurate jury instruction prejudiced him or her. State v. Wilson, 117 Wn. App. 1,
11 17, 75 P.3d 573 (2003).

12 In this case, the evidence resulted from reading to the jury the charging
13 information, instruction No. 37, photos, and the testimony of the witnesses, all of
14 which was central to the State's case. Although, as argued in the next section,
15 there were ample reasons to object, trial counsel made no effort to object to this
16 evidence. There was no possible advantage to be gained by defense counsel's
17 failures to object. IN these circumstances, failure to object will constitute
18 incompetence of counsel justifying reversal. State v. Madison, supra. See also
19 State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001)(counsel's deficient
20 performance is the failure to object to erroneous oral instructions to the jury).

21 **b. Gang evidence and evidence of Benitez's prior convictions and**
22 **warrants for his arrest was inadmissible.** Trial counsel's failure to object to the
23 evidence was deficient performance. Benitez must also establish, however, that
24 counsel's deficient performance prejudiced him. Where a claim of deficiency rests
25 on counsel's failure to make an objection, a defendant must show that the objection
26 would likely have been sustained. State v. McFarland, 127 Wn.2d at 337. Here, the
27 objections would have been sustained, because ER 404(b) prohibits evidence of any

1 prior crimes, wrong, or acts to establish the defendant's propensity to behave in a
2 certain manner. The evidence was offered only to show Benitez's propensity to
3 commit the criminal acts.

4 ER 404(b) provides;

5 Other crimes, Wrongs, or Acts. Evidence of other crimes, wrongs
6 or acts is not admissible to prove the character of a person in
7 order to show action in conformity therewith. It may, however,
8 be admissible for other purposes, such as proof of motive,
9 opportunity, intent, preparation, plan, knowledge, identity, or
10 absence of mistake or accident.

11 Evidence of prior bad acts is presumptively inadmissible. State v. DeVincentis
12 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "To admit evidence of other crimes or
13 misconduct under ER 404(b), the trial court must identify on the record the purpose
14 for which it is admitted." State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997).
15 ER 404(b) evidence must also be relevant to a material issue and its probative value
16 must outweigh its prejudicial effect. Id. at 571.

17 ER 403 governs the exclusion of relevant evidence when it is unfairly
18 prejudicial, confusing or misleading to the jury. Id. The danger of unfair
19 prejudice exists when evidence is likely to stimulate an emotional rather than a
20 rational response. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). In
21 determining whether the probative value of the evidence outweighs its unfair
22 prejudice, a court should consider the availability of other means of proof and
23 other factors. Powell, 126 Wn.2d at 264. When evidence is unduly prejudicial,
24 "the minute peg of relevancy is said to be obscured by the dirty linen hung upon
25 it." State v. Turner, 29 Wn. App. 282, 289, 627 P.2d 1324 (1981).

26 Evidence of prior misconduct "is inadmissible to show that the defendant is a
27 dangerous person or a 'criminal type' and is thus likely to have committed the
28 crime for which the [defendant] is presently charged." Karl B. Tegland, Washington
29 Practice: Courtroom Handbook On Washington Evidence. Author's cmt. (3), at 207(2002)

1 "Acts" inadmissible under ER 404(b) include any acts used to show the character of
2 a person to prove the person acted in conformity with it on a particular occasion.
3 Gang evidence falls within the scope of ER 404(b). State v. Boot, 89 Wn. App. 780,
4 788-89, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998).

5 Here, the State never presented evidence that Benitez was a gang member. The
6 gang-related evidence was not relevant to prove any essential element of the crimes
7 charged. Evidence of Benitez's warrants for his arrest was evidence of prior
8 crimes and misconduct. Instruction No. 37 was erroneous because it indicated
9 Benitez had a prior serious conviction. The giving of jury instructions which
10 imply that a defendant has prior convictions is erroneous when a defendant has not
11 testified or other wise exposed himself to such incriminating evidence. 13 Royce A.
12 Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 4414 at 280
13 (3d ed. 2004); State v. Christopher, 20 Wn. App. 755, 583 P.2d 638 (1978). The
14 reading of the charging information violated the stipulation when it disclosed
15 Benitez's prior convictions. The gang evidence was introduced to show that Benitez
16 was a dangerous , criminal type and was likely to commit the crimes. This is
17 precisely the type of evidence forbidden under ER 404(b). The evidence indicated
18 his bad character, which is inadmissible to show conformity, and highly prejudicial.
19 State v. Acosta, 123 Wn. App. 424, 98 P.3d 503 (2004). Had counsel objected to
20 such damaging and prejudicial evidence, it would have been ruled inadmissible.
21 Benitez was prejudiced by counsel's deficient performance, he was deprived of a
22 fair trial. Thus, Benitez's convictions should be reversed.

23 3. THE TRIAL COURT ABUSED ITS DISCRETION IN
24 DENYING BENITEZ'S MOTION FOR A MISTRIAL
AND DEPRIVED HIM OF A FAIR TRIAL

25 Benitez contends that the trial court abused its discretion when in denying
26 him a mistrial. Benitez asserts that extraneous information prejudiced the jury
27 and deprived him of a fair trial. At trial the Court notified the attorneys that

1 there had been communication from the jury. Defense counsel moved for a mistrial
2 based on the information introduced. The entire mistrial proceedings occurred as
3 follows:

4 The Court: ...The bailiff has been contacted independently by more
5 than one juror who is expressing concern about who they
6 believe are friends or family members of the defendant
7 milling around their parking areas during lunch and after
8 court, and some believe that perhaps their license plates
9 are being recorded.

They're concerned about any repercussions, and they're
expressing those concerns to the bailiff.

10 RP 568 (7/1/2010).

11 Ms. Bouwens (Defense): Your Honor, this raises a great concern for me.
12 As you can understand, that it might somehow unduly
13 influence the jury....

14 RP 569 (7/1/2010).

....

15 There is a prejudice that they might be walking
16 around outside and somehow writing down license plate
17 numbers. It's concern. It's also a concern, the
18 testimony that came from the confidential informant, that
19 he was concerned at all. He testified that he was
20 concerned that someone was trying to find where he lived
21 or something. That was allowed in.

I'm not sure that my client is going to be able to
get a fair result. If they're expressing this right now
that says to me they're already concerned about the
community right here.

22 RP 570 (7/1/2010).

....but this shows clearly to me that they are concerned,
and it has nothing to do with my client.

23 The Court; It may have something to do with your client. I don't
24 know. I'm passing on information, and I share your
25 concern....I don't know of any remedy. That's why I
26 said I'm letting you know...

....Whats happened since then, I don't know. I don't
know of any way to instruct or correct or assure the
jury without potential further taint to the jury....

27 RP 571 (7/1/2010).

Ms. Bouwens (Defense): Your Honor, I have done everything I can
to make sure that this trial is fair, both to the State
and my client....

1 The Court: We're all trying to do everything we can to assure
2 both sides a fair trial. And all I can do is
3 communicate the information.

4 If I had anything more specific by a particular
5 juror, we could perhaps talk to them, but I don't think
6 by talking to them we're going to do any good.

7 The issue is recorded for whatever purpose, appeal
8 or otherwise, if that becomes necessary in the future, if
9 there is a conviction.

10 RP 572 (7/1/2010).

11 I think that's all we can do, is simply record the
12 information. If you come up with some other proposed
13 remedy--

14

15 Ms Bouwens, I've made the bailiff's note--

16

17 Let me make this record, please. I've made the
18 bailiff's note part of the record so it's preserved
19 and signed by her.

20 RP 573 (7/1/2010) See Ex. # 3.

21 The Court; I would further add that I doubt that any similar concerns
22 would be raised if the jury wasn't being exposed to so
23 many firearms, drugs, and all of the testimony that goes
24 along with that. I don't believe the same level of
25 concern would be present if the charges and allegations
26 were somewhat different. So for whatever that's worth--
27 that's just my personal opinion. And I would be happy to
28 consider any type of remedial instruction, but I think
29 that will only emphasize the matter. There may be many
30 jurors that have not expressed any concerns and aren't
31 aware of those concerns being expressed.

32 Ms. Bouwens (Defense): Okay. So it was individually given, it was
33 not discussed as a group.

34 The Court: It was individually given.
35 Was it discussed as a group or individually?

36 The Bailiff: I believe it was discussed as a group. I had one of
37 the jurors speak with me, and then someone else said
38 something. I would imagine--that's my impression
39 anyway.

40 Ms. Bouwens (Defense): Your Honor, I'm going to ask right now for a
41 mistrial. I have worked so hard on this, and we've come
42 so far, but I cannot risk the jury making its decision
43 based on extraneous facts.

44

45I have to ask for a mitrial. I don't want to, but--

1 | RP 574-75 (7/1/2010). Benitez's motion for a mistrial was denied.

2 | A trial court's denial of a motion for mistrial is reviewed under the abuse of
3 | discretion standard. State v. Crane, 116 Wn.2d 315 ,332-33, 804 P.2d 10, cert.
4 | denied, 501 U.S. 1237 (1991). "The trial court should grant a mistrial only when
5 | the defendant has been so prejudiced that nothing short of a new trial can insure
6 | that the defendant will be tried fairly. Only errors affecting the outcome of the
7 | trial will be deemed prejudicial." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d
8 | 1014 (1989)(quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied,
9 | 479 U.S. 995 (1986). In determining the effect of an irregular occurrence during
10 | trial, we examine "(1) its seriousness; (2) whether it involved cumulative
11 | evidence; and (3) whether the trial court properly instructed the jury to
12 | disregard it." Hopson, at 284; State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d
13 | 190 (1987); State v. Weber, 99Wn.2d 158, 164-65, 659 P.2d 1102 (1983).

14 | a. The trial court abused its discretion when it denied Benitez
15 | a mistrial. Discretion is abused when it is exercised on untenable grounds or for
16 | untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775
17 | (1971). In this case, the Court acknowledged that the jury had been tainted when
18 | it stated "I don't know of anyway to instruct or correct or assure the jury
19 | without potential further taint to the jury..." RP 571. Yet, in denying Benitez's
20 | motion for mistrial, the trial court reasoned:

21 | I have no basis to grant mistrial. At this point we'd have to
22 | have interviews with individual jurors before we even had a basis
23 | to consider that motion.

24 | If you're asking me to recess the trial at this point in time
25 | and start conducting individual interviews with the jurors I would
26 | consider that. The information I have been given is not enough
27 | information to grant a motion for mistrial at this point.

28 |
29 | So your motion at this point will be denied. If you're asking
30 | me to take further steps, I wil certainly consider that request.

31 | RP 575-76. The trial court must "engage in a 'scrupulous exercise of judicial

1 discretion' before foreclosing a defendant's 'valued right to have his trial
2 completed by a particular tribunal' " State v. Melton, 97 Wn. App. 327, 332, 983
3 P.2d 699 (1999) (footnote and internal quotation marks omitted) (quoting State v.
4 Browning, 38 Wn. App. 772, 775, 689 P.2d 1108 (1984); Arizona v. Washington, 434
5 U.S. 497, 519, 98 S.Ct. 824, 832 54 L.Ed.2d 717 (1983). "In evaluating the manner
6 in which the trial court exercised its discretion, the fundamental question is
7 whether it acted in a precipitate or unreasoning fashion." Melton, 97 Wn. App. at
8 333 (citing Arizona v. Washington, 434 U.S. at 514-15.

9 Here, the trial court failed to engage in a " 'scrupulous exercise of judicial
10 discretion.' " Melton, 97 Wn. App. at 332 (quoting Browning, 38 Wn. App. at 775).
11 The trial court acted "precipitately" by failing to question the affected jurors.
12 Instead, it allowed unprepared oral argument by defense counsel before rendering its
13 decision. The trial court was in a unique position to determine whether juror taint
14 occurred, and if so, to implement a remedy that would preserve Benitez's
15 constitutional right to a fair trial. The court did not discuss and weigh whether
16 the alleged information might prejudice Benitez. See State v. Hopson, 113 Wn.2d
17 273, 284, 778 P.2d 1014 (1989) (prejudice to defendant is key question in trial
18 court's decision to grant or deny a mistrial.) The court denied the motion based
19 on the information the court was given. Simply put, these are untenable grounds or
20 untenable reasons for the trial judge to deny the motion. The trial court abused
21 its discretion in denying a mistrial.

22 **b. A mistrial should have been granted.** When a defendant's right
23 to a fair trial has been violated and he moves for mistrial, the motion should be
24 granted. State v. Weber, 99Wn.2d 158, 165, 659 P.2d 1102 (1983); see also Holbrook
25 v. Flynn, 475 U.S. 560, 567-72, 106 S.Ct. 1340, 89L.Ed.2d 126 (1976); Estelle v.
26 Williams, 425 U.S. 501, 503-04, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); United States
27 v. Waldon, 206 F.3d 597, 607 (6th Cir.), cert. denied, 531 U.S. 881 (2000); United

1 States v. Pina, 884 F.2d 1, 8 (1st Cir. 1988); State v. Ford, 278 Mont. 353, 359-60,
2 926 P.2d 245 (1996); see also generally 13 Royce A. Ferguson, Jr., Washington
3 Practice: Criminal Practice and procedure § 4216 (1997).

4 One of the propositions of the orderly administration
5 of the law is that a defendant, either guilty or innocent
6 , shall be accorded a fair trial. The fact that this
7 or the trial court may consider the accused to be guilty
8 in no wise lessens the court's duty to see that he has a
9 a fair trial. A fair trial implies among other things
10 that the court exclude all evidence that has no material
11 bearing on the case.

12 State v. Robinson, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). Benitez never received
13 that which he is constitutionally entitled: a fair trial. The proper remedy is to
14 grant a new trial.

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CONCLUSION

For the above reasons, this Court should reverse Benitez's convictions
and order a new trial or any other relief the Court deems necessary.

Dated this 29, day of January, 2012.

Respectfully Submitted,


CARLOS BENITEZ, JR. #715131
AHCC R-A-37-1
P.O. BOX 2049
AIRWAY HEIGHTS, WA. 99001

DECLARATION OF SERVICE BY MAIL

I Carlos Benitez, Jr., declare that on January 29, 2012, I deposited the foregoing documents, or a copy thereof, in the internal mail system of Airway Heights Corrections Center and made arrangements for proper postage, to all parties listed below.

I further declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

DOCUMENTS

1. Statement of Additional Grounds for Review (COA No. 65942-1-I).
2. Declaration of Service By Mail

PARTIES SERVED BY FIRST CLASS MAIL

Erik Pedersen

Skaqit County Prosecuting Attorney's Office
605 S. 3rd St.

Mount Vernon, WA. 98273

Declaration of Service By Mail

Page 1 of 2

Richard D. Johnson
The Court of Appeals, Division One
One Unionsquare
600 University Street
Seattle, WA. 98101-4170

Gregory C. Link
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA. 98101

Dated this 29 day of January, 2012.

Carlos Benitez
CARLOS BENITEZ, JR., #715131
AHCC R-A-37-L
P.O. BOX 2049
AIRWAY HEIGHTS, WA. 99001

Declaration of Service By Mail
Page 2 of 2

EXHIBIT # 1

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2010 JUN 24 PM 3:40

IN THE SKAGIT COUNTY SUPERIOR COURT, STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff,

v.

CARLOS BENITEZ, JR.
Defendant.

Case No. 09-1-00867-1

DEFENDANT STIPULATION
AND WAIVER OF RIGHT
TO JURY DETERMINATION
OF ONE ELEMENT to wit:
'prior serious felony conviction'

COMES NOW the Defendant, Carlos Benitez, Jr. and makes the following stipulation and waiver of right to jury determination of one element to wit: 'prior serious felony conviction'.

I, Carlos Benitez, Jr., do hereby acknowledge that I have the following important right and acknowledge that I give it up by entering into the attached Stipulation #1 in this case:

- (a) The right to have a jury determine the element whether or not I have
 - 1. a prior serious felony conviction or
 - 2. whether or not I have a prior felony conviction.

I enter into this stipulation with the following understandings:

- (a) This element is one of the elements of UPF 1 and the lesser included UPF 2 respectively;
- (b) I have been advised that if the determination was left to the jury, that my prior judgment and sentence would be offered into evidence as proof of a prior serious felony conviction;
- (c) This element is not the only element of the UPF 1 or UPF 2 charges;
- (d) By agreeing to this stipulation I do not stipulate to the other elements of UPF 1 or UPF 2;
- (e) At trial I may choose to assert my constitutional right not to testify in this matter. in which case the jury will not be told of my prior criminal history;

- (f) My lawyer has advised me to enter into this stipulation to avoid undue prejudice to my case and the risk that the jury might decide the matter unfairly on the basis of the particular prior serious felony conviction if my prior judgment and sentence are admitted into evidence;
- (g) I acknowledge my right to enter into this stipulation under the U S Supreme Court case *Old Chief* and the subsequent line of Washington cases.
- (h) It is my choice, after being fully informed of my rights, to enter into this stipulation;

Content of Stipulation #1

Stipulation #1

The Prosecution and the Defense agree that Carlos Benitez, Jr. has been previously convicted of a serious felony offense.

An element of Counts 8, 10, 11, 12, 13, 15, 17.

Dated: 6-24-10

x Carlos Benitez
Defendant Carlos Benitez, Jr

Copy received:

Trisha Johnson
Trisha Johnson WSBA #24437
Senior Deputy Pros. Atty

Presented by:

Jennifer Bouwens
Jennifer Bouwens WSBA #32768
Counsel for Benitez

EXHIBIT # 2



INSTRUCTION NO. 37

The parties have stipulated that the defendant has previously been convicted of a serious offense.

EXHIBIT # 3

09-1-867-1

SKAGIT COUNTY, WA
FILED
IN OPEN COURT
Date 7/1/10 Time 1:41
NANCY R. SCOTT, CO. CLERK

Your Honor:

I'm at a loss for what to say except "I will take your concerns to the Judge"

He all voice to me about the defendant's friends milling around the parking lot during lunch hour & after court. Some are concerned that they are taking their license plate #'s down.

I asked them if they had seen anyone do that... they said "No" but are very concerned that after this is over there will be repercussions.

So... I've just told them I'd let you know.

Kelli Frazier Swenson
Bailiff 7/1/2010

VS

APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

)	
)	
STATE OF WASHINGTON,)	
Respondent,)	No. 65942-1-I
)	
v.)	
)	DECLARATION OF APPELLANT
)	
CARLOS BENITEZ, JR.,)	
Appellant,)	

I, Carlos Benitez, Jr., state; That I am the Appellant in the above entitled case and

1. That on April 3, 2011, I requested, by way of letter, from my appellate attorney Gregory C. Link portions of the report of proceedings pertaining to jury selection (Voir Dire), and opening statements. (See attached letter).

2. That I requested these additional transcripts for the purpose of preparing my Statement of Additional Grounds.

3. That I never did receive the requested transcripts.

4. That I make this declaration in support of the trial court's reading of the charging information at trial.

5. That to the best of my recollection the trial court read the charging information as I have stated in my Statement of Additional Grounds.

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 29 day of January 2012, at Airway Heights, WA. 99001.

Carlos Benitez
 CARLOS BENITEZ, JR. #15131
 AHCC R-A-37-L
 P.O. BOX 2049
 AIRWAY HEIGHTS, WA. 99001

ATTACHMENT

Charles Ramirez #715731
Rm 37-L
Aurora Heights Corrections Center
P.O. Box 2649 Legal Mail
Aurora Heights, WA 98001

April 3rd, 2011

Gregory C. Link
Washington Appellate Project
1511 Third Ave. Ste. 701
Seattle, WA 98101

RE: Assistance requested of assigned appellate counsel to file
and follow up on the filing...

Dear Mr. Link,

Please understand that I feel utterly wronged
by the court and believe that I don't assist in my appeal & will
continue to wrongfully suffer. I am not claiming to have been an
angel, but I can say that I did not deserve how the court
treated me. The following requests are pertinent to my appeal.

1. Transcripts: "Would you please file the appropriate motions to
see that my transcripts are complete, to include pre-trial
hearings (especially 3.5, 3.6), jury selection (voir dire) and
jury instructions, sentencing, and opening/closing arguments
by both parties (please note - no audio tapes only, please) if a
colorable need should be noted. I would note that one of the
potential jurors made comments RE to "mexicans are always
guilty," "not another mexican drug dealer," and either the same
or another potential juror stated "hispanics always have guns
and drugs."

Assigned counsel (trial), refused / failed to object nor asked for
a mistrial and I should not be placed into a position where I
have to guess or speculate as to the record as the court's focus
on that.

2. Please note my request to review your opening brief in my
behalf, prior to you forwarding it to the Divisional Court
for filing.

Assistance requested of assigned appellate counsel to file and follow up on filing.

As my research time is drastically limited, my appeal issues are more than numerous and I read every minute I can get prior to filing my RAP 10.10. I am preparing an itemized/detailed list of issues and will forward them to you as soon as I can in the event that you believe you should or wish to include any of them in your opening brief.

3. Would you please update me on any/all motions or issues in the court or ones that you are considering. I have not heard anything on the "motion to Dismiss Untimely Cross-Appeal (Div. 1 #65942-1-2)" yet and am in concern that a ruling may have not made it to me.
4. Date of sentencing being 8-25-2010 and the sentencing Judge (Dave Needy) did not supply his "findings of fact" until 12-8-10; during which I was processed out of the county, through Shelton and to my mother institution. Therefore I was denied an opportunity to object/file on the Judge's misstated facts he used, misstated facts, due to the impeachment of the State's witness testimony during trial, example: of whether I resided in the garage and established by the court that I did not.
5. Regarding the Amended informations that prosecutor (T. Johnson) filed under the alleged grounds of "incomplete/incorrect RW's" I would like to file on her egregious misconduct as the record is perfectly clear and does prove the fact that she abused her position/authority and used it as an opportunity to surreptitiously modify the amended information to include dates never being alleged "key dates" that allowed/enabled her to bring in the confidential informant's testimony, dates that were not included previously also noting that all RW's were ever corrected and noting that an information cannot be deemed amended to conform to the evidence.
6. I understand that I may be extending the time frame you may have originally wished to have my brief filed by. But, as you can tell it may take twice as long as I have yet to send you a detailed list of additional grounds/issue. Please don't be alarmed because if I didn't have faith in you I wouldn't bother and as you know I was given way more time than I should have gotten.

Assistance requested of assigned ~~counsel~~ appellate counsel to file and follow up on filing...

7. In the event that you didn't receive notice of the order denying my motion for discovery entered on May 23, 2011 in the (Skagit County Superior Court.) I have filed a pro se motion for reconsideration. I wish you had the chance to help with it. I would more than appreciate it if you assist in obtaining all of the discovery and other documents, like the Bill of Particulars.

I would close with asking that my Brief be filed under a Petition for Accelerated Review as a successful opinion would immediately remove me from prison.

Respectfully,
Carlos Benitez