

NO. 66795-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW G. SILVA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
120

DAVID L. DONNAN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF APPEAL.

Mr. Silva was convicted of robbery in the first degree, but sought relief from the judgment and sentence, and a new trial, on several grounds including procedural irregularities, conflicts of interest and ineffective assistance of counsel. Mr. Silva's motions were denied, but he did not receive notice and now appeals seeking relief in this Court.

B. ASSIGNMENT OF ERROR.

1. The trial court abused its discretion in denying Mr. Silva's motion for new trial based upon ineffective assistance of defense counsel, pursuant to CrR 7.8(b) and the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution.

2. The trial court abused its discretion in denying Mr. Silva's Motion for Relief from Judgment pursuant to CrR 7.8, CR 60(b), Art 1 sec 22 of the Washington Constitution, and the First, Fifth, Sixth and Fourteenth Amendments of the U. S. Constitution.

3. The trial court abused its discretion in denying Mr. Silva's Motion to Stay Execution of Judgment.

4. The sentencing court erred in accepting and considering the State's presentence package in the absence of proper service on Mr. Silva, and relying upon the criminal history alleged therein to determine Mr. Silva's offender score.

5. The court's failure to timely rule on Mr. Silva's post-trial motions was an abuse of discretion warranting reversal of his conviction.

6. Cumulative error denied Mr. Silva his constitutional right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Mr. Silva was entitled to zealous representation by defense counsel. Mr. Silva's motion for new trial outlined the significant constitutional deficiencies in his representation including the failure to pursue inconsistencies in witnesses' statements and testimony regarding "bait money" and the triggering of the silent alarm. Furthermore, the failure to adequately investigate the source of the cocaine Mr. Silva consumed to establish it was tainted with a strong hallucinogen and establish the necessary evidentiary foundation for the defense expert's exculpatory testimony prejudiced his ability to receive a fair trial.

2. Criminal defendants are entitled, by the due process clause, to an unbiased and impartial tribunal with appearance of fairness. A judge must disqualify himself if he appears biased against a party. Where one judge bases his denial of a request to continue on the interjection of inaccurate facts by another judge, and the defendant is prejudiced by this improper influence in the

denial of his request to continue and the failure to consider the merits of his motion to disqualify the prosecutor, is he entitled to relief from the judgment and sentence?

3. The trial court is granted discretion to stay the enforcement of a judgment and sentence where necessary in order to ensure justice. Mr. Silva outlined significant issues involving government corruption and felonious criminal activity by local, state and federal officials which needed to be resolved before he was turned over to DOC custody. Did the trial court abuse its discretion in failing to grant the stay?

4. The SRA and constitutional due process require notice and a fair hearing regarding sentencing. The State failed to timely provide Mr. Silva copies of the documents it offered to establish his offender score. Does this violation of statute and constitution, require reversal and remand for a new sentencing hearing?

5. Whether cumulative error denied Mr. Silva his constitutional right to a fair trial and sentencing?

D. STATEMENT OF THE CASE.

1. The events of April 5, 2004.

At about 12:30 p.m., Mr. Silva went to Specialty Auto Sales in Lynnwood, from whom he had purchased a couple of cars in the past, and met Kimberly Ann Gregg. 2/10/05RP 64-65. Ms. Gregg

had met Mr. Silva several times previously and testified she had experience with people on drugs as a result of her work as an EMT and firefighter. 2/10/05RP 65, 69. She believed Mr. Silva was "jonesing really bad" that afternoon, i.e. coming down from a drug high. 2/10/05RP 67, 71-72. She described him as agitated and pacing, going from nice to volatile, while twitching and pacing during the 20 to 30 minutes he was at the business. 2/10/05RP 65-67.

Ms. Gregg testified that Mr. Silva had come looking for a "faster car." 2/10/05RP 67. She contacted, Kevin Hart, who owned the car dealership, but he declined to provide another car, perhaps she speculated because of Mr. Silva credit status. 2/10/05RP 73-75. Mr. Silva ultimately got back in the car he had arrived in, and left. 2/10/05RP 75.

About three hours later, at 4:55 p.m., Mr. Silva drove up to and parked at the front door of the Washington Federal Savings & Loan branch in Federal Way. 2/8/05RP 21. Mr. Silva walked into the bank wearing cutoff shorts and a tee-shirt, carrying a car radio in one hand and an envelope in the other. He went to closest teller, Carrie Ridlon. 2/8/05RP 22-25, 35. Mr. Silva set the radio down and asked about the bank's surveillance cameras. 2/8/05RP 25-26. Ms. Ridlon initially thought Mr. Silva's car had been

vandalized, but after a moment, he said "this is a robbery."

2/28/05RP 26.

Ms. Ridlon testified that Mr. Silva continued to talk, saying "he had been driving up and down Highway 5 all day, and people from the internet were trying to get him, or just for what was done to him, someone was going to pay. I was going to pay." 2/8/05RP 26-27. Shari Tuttle, a teller working next to Ms. Ridlon, heard Mr. Silva say "he was being chased and that he was giving us a car stereo, and that he was robbing us." 2/8/05RP 65-66. Teller Anna Kungbouakhay heard Mr. Silva say that "internet people are following him." 29/05RP 21. Teller, Michelle Castro testified Mr. Silva walked in swinging the radio and then pointing to the surveillance cameras and asked if they were working. 2/9/05RP 9. He then said in a loud voice "his name was Matt Silva and that he wanted to get caught." 2/9/05RP 10-11.

When Ms. Ridlon did not promptly produce any money, Mr. Silva's voice got louder and "asked for \$3,000, demanded it." 2/8/05RP 28. Then he asked for just a \$1000. 2/8/05RP 66. Although Mr. Silva was speaking clearly, Ms. Ridlon noted that he was not making sense. 2/8/05RP 40.¹ He was not wearing gloves,

¹ Ms. Tuttle testified Mr. Silva was speaking clearly, without slurring, and she did not notice signs of intoxication. 2/8/05RP 71.

a disguise, or brandishing a weapon, and Ms. Ridlon indicated she did not have any reason to believe he was armed. 2/28/05RP 39.²

When Ms. Ridlon was unable to make out Mr. Silva's name he offered to write it down on the envelope he had carried in.

2/8/05RP 28-30.

The assistant branch manager, Jamie Wilson, noticed Mr. Silva getting louder and saying he was going to leave the radio behind as evidence. She went to Ms. Ridlon's teller station and told Mr. Silva he could not "leave his evidence there...." 2/8/05RP 30-31, 51.³ It was only after Ms. Ridlon told Ms. Wilson that they were "being robbed" that she nodded, indicating Ms. Ridlon should comply with his request. 2/8/05RP 31.

Ms. Ridlon then produced \$1000 in the form of ten \$100 bills. Mr. Silva snatched the money from her hand, said thank you, turned, and headed out the door. 2/8/05RP 32, 60. As he went to his car and drove off, Ms. Wilson locked the doors and yelled out the license plate number of Mr. Silva's vehicle for someone to record. 2/8/05RP 54.

² Ms. Tuttle noted that Mr. Silva said that "he was being chased and he wanted to be caught." 2/8/05RP 66. He was not wearing gloves and seemed to be intentionally touching surfaces in order to leave fingerprints. 2/8/05RP 74-75.

³ Ms. Tuttle testified Ms. Wilson came up to the teller's window to figure out what was going on after Mr. Silva said he was leaving the stereo as evidence. 2/8/05RP 67.

Washington State Patrol Trooper Nicholas Brewer was on duty around 7:30 p.m. that night when he received a radio advisory and found Mr. Silva's vehicle on Interstate 5 near James Street. 2/8/05RP 75-80. Another trooper pulled in and they both activated their lights, but Mr. Silva continued to drive another four to five miles before troopers were able to bring him to a stop. 2/8/05RP 83-85.

Trooper Brewer testified he observed a strong odor of intoxicating beverages on Mr. Silva and his speech was noticeably slurred.⁴ Mr. Silva told the trooper that "people are all under the control of the government and they're brainwashed." 2/8/05RP 86.

Trooper Brewer testified Mr. Silva continued to make random statements, indicating he did not want to go to jail because he thought he would be tortured, and saying he was afraid they would electronically control his body and forcibly give him cocaine. 2/8/05RP 86-87. The trooper concluded that this paranoia could be from cocaine or methamphetamine. 2/8/05RP 88.

Dr. David M. Dixon, a clinical psychologist with specialized expertise in alcohol and drug addiction, testified Mr. Silva was probably affected by cocaine dependence and associated paranoid

⁴ When the car was searched officers found two packs of cigarettes, a lighter, six cans of beer (mostly opened), two bags of Chex Mix, a candy bar wrapper, and a tomato juice bottle. 2/9/05RP 47-48.

delusions. 2/10/05RP 85-88. The symptoms of such a delusional disorder include persecutorial concerns, bizarre behavior, some incoherence and affected judgment, and are consistent with the circumstances described by the witnesses. 2/10/05RP 90. Mr. Silva himself reported he had been on a five day escapade which involved severe insomnia and a lack of sleep for 48 to 72 hours before the incident. 2/10/05RP 100-01. In Mr. Silva's case, sleep deprivation was also a significant factor exacerbating delusions and paranoid ideation. 2/10/05RP 94. As a result, Dr Dixon concluded Mr. Silva was fearful and looking for safety because he thought he was being chased by a gang of people and being harmed by high technology and electronic devices. 2/10/05RP 103. Caught in this dilemma, he was hopeful the police could save him from his pursuers and was "[a]t least in part" so motivated when he took the money. 2/10/05RP 104.

2. The Superior Court Proceedings

Mr. Silva was charged by information with Robbery in the First Degree (RCW 9A.56.200(1)(b) and RCW 9A.56.190) filed in King County Superior Court on April 8, 2004. CP 1-4.

Mr. Silva moved to dismiss the prosecution based on a violation of his right to speedy trial. CP 37-49; 50. He contended that the withdrawal of his former attorney, Mark Flora of SCRAP,

was improper given Mr. Silva's willingness to waive any potential claim or conflict of interest in light of the burden it ultimately placed on his right to a speedy trial. CP 37-38. The motion was denied following a hearing before Judge Gregory P. Canova on January 6, 2005. 1/6/05RP 6-17; CP 53. Judge Canova explained "The presiding judge already found a conflict sufficient to support withdrawal by previous defense counsel. State v. Vicuna 119 Wash.App. 26 is on point and resolves this issues." CP 53.

The case proceeded to bench trial before Judge Douglas McBroom on February 8, 2005, after Mr. Silva waived his right to jury. 2/8/05RP 3; CP 54. Judge McBroom rejected Mr. Silva's defense of voluntary intoxication, concluding Mr. Silva had formed the requisite criminal intent and was guilty of robbery in the first degree. 2/14/05RP 138-43; CP 75-78.⁵

Mr. Silva subsequently moved to dismiss the case based on procedural irregularities in his arrest and charging.⁶ CP 80-125. Mr. Silva argued the arresting officers did not have probable cause to arrest him for robbery or attempting to elude. CP 84. Furthermore, because troopers believed he had been driving while

⁵ After the guilty finding as to robbery, the State moved to dismiss a pending charge of possession of methamphetamine. 2/14/05RP 151-52.

⁶ Mr. Silva was permitted to represent himself during his post trial motions and sentencing. 2/22/05RP 9-10. Standby counsel was initially appointed but subsequently withdrew at Mr. Silva's request. CP 149; 6/22/05RP

intoxicated, their failure to preserve evidence in the form of breath or blood tests which would have been crucial to his defense of voluntary intoxication, was a constitutional violation requiring dismissal. CP 84.

Mr. Silva filed a motion for Arrest of Judgment on March 11, 2005, asserting the evidence did not establish robbery because any inherent force or fear was insufficient to actually cause the victim to part with property. CP 126-27.

On June 16, 2005, Mr. Silva filed another motion to dismiss based upon interference with his confidential communications and his ability to represent himself in ongoing litigation while incarcerated in the King County Jail, citing State v. Garza, 99 Wn.App. 291 (2000). The prosecutor responded that Mr. Silva was being provided with adequate resources to assist him in preparing for sentencing and that any limitations were not material. CP 128-35. A hearing was held before Judge Michael Trickey on June 22, 2005, at which time the parties reviewed the materials Mr. Silva required and the limitations being imposed by the jail. 6/22/05RP 2-32.

Following this hearing, Mr. Silva filed a motion to reconsider the specific requests he had made regarding his access to legal

2; 8/26/05RP 4-7.

materials. CP 136-38. The parties returned to court again on July 29, 2005, in a continuing effort to resolve problems with the record and Mr. Silva's access to legal materials. 7/29/05RP 2-3.

The case was then called on August 26, 2005, but Mr. Silva explained he had no notice of the hearing and, therefore, did not bring the supporting documentation he required in order to present his claims. 8/26/05RP 3. As a result he indicated he was "withdrawing the motion at this time." 8/26/05RP 3. Judge Trickey quickly acceded to this request and set the case over for sentencing. 8/26/05RP 4.

Sentencing occurred on September 2, 2005, before Judge Richard McDermott. 9/2/05RP 2-30. Although Mr. Silva objected to the inclusion of prior criminal history based on lack of timely notice and other irregularities in the documentation, he was sentenced to 150 months confinement and 18-36 months community custody. 9/2/05RP 24-25.

Mr. Silva returned to court on September 7, 2005 in order to renew his motions to dismiss. 9/7/05RP 2-5.⁷ The prosecutor

⁷ The various motions and supporting documents include Sub 211 (Declaration of Defendant); 212 (Motion to Disqualify Prosecutor); 213 (Motion to Dismiss re Fraud), 214 (Motion for Garza hearing); 215 (Motion to Note Amended Motion to Dismiss); 216 (Supplemental Facts re Mtn to Dismiss), 217 (Motion to Note Amended Motion to Dismiss); 218 (Motion to Dismiss), 219 (Letter from Defendant)

argued Mr. Silva had waived these motions when he declined to have Judge Trickey hear them at the August 22nd hearing. 9/7/05RP 5. Judge McDermott declined to rule on the motions citing CrR 7.8 and the discretion provided to defer to the appellate courts. 9/7/05RP 7-9.

Mr. Silva continued to seek relief from his conviction including the filing of a Motion for Relief from Judgment. CP 140-255 (dated September 22, 2005). Mr. Silva also filed an Emergency Motion to Stay Execution of Judgment and a Motion for New Trial. CP 263-307 (dated September 27, 2005); CP 308-402 (file stamped September 27, 2005). Mr. Silva specifically identified the failure to rule on his motion to disqualify the prosecutor's office, the appearance of fairness and challenged the assertion that he had waived the right to raise these issues. CP 146-48. Mr. Silva went on to outline inadequacies in the preparedness and representation he received from defense counsel. CP 160-78; 311-28.

When Mr. Silva inquired about the status of a ruling on his motions, Judge McDermott informed him by letter dated February

3, 2011, that he had ruled on all three of the motions on October 13, 2005. CP 260.⁸

Mr. Silva continues to seek relief from his conviction and confinement in the appellate courts. CP 413-18.

E. ARGUMENT.

Mr. Silva sought relief from the judgment and sentence, and a new trial, shortly after the sentencing hearing before Judge McDermott in 2005. CP 141-255. Mr. Silva grouped his arguments for relief into three separate pleadings:

- (1) Motion for New Trial (CP 308-402);
- (2) Motion for Relief From Judgment (CP 141-255);
- (3) Emergency Motion to Stay Execution of Judgment (CP 263-307).

1. Mr. Silva's constitutional right to the effective assistance of counsel was violated by his attorney's failure to fully investigate and defend against the allegations.

- a. Mr. Silva described ample grounds to call into question the defense he received.
 - i. Bait Money.

Mr. Silva sought a new trial on the grounds that he received constitutionally deficient representation where his attorney, *inter*

⁸ The electronic court records do not list an order regarding Mr. Silva's motions having been entered on or around October 13, 2005, as mentioned by

alia, failed to present evidence regarding the use of “bait money” by the bank teller, Ms. Ridlon, contrary to her trial testimony.⁹ CP 311-18.¹⁰ Furthermore, Mr. Silva alleged the State’s witnesses’ perjured themselves regarding the use of “bait money,” as well as the manner in which he displayed the car radio he was carrying, and that defense counsel failed to establish these crucial facts for the jury. CP 317-19; 9/30/04RP.

Mr. Silva explained to his attorney that bank teller Carrie Ridlon and bank manager Jami Wilson had lied in their statements to police about the use of so called “bait money.” CP 311-12. Mr. Silva noted that when he had been in the bank, Ms. Ridlon tried to hand him a tall stack of money but he declined. CP 311-12. Mr. Silva subsequently learned from reading the police reports that the tall stack of money had been “bait money.” CP 311-12. Mr. Silva explained to defense counsel that the bank employees were intentionally lying and the bank surveillance and alarm records

Judge McDermott. A copy of the order was filed on February 4, 2011. CP 261-62.

⁹ Mr. Silva’s motion for new trial appears in the record both as an appendix to his Motion for Relief from Judgment (CP 159-255) and was also filed separately. (CP 308-402). For clarity, we will cite here to the separately filed copy of the motion.

¹⁰ Mr. Silva noted that he sought new counsel after Mr. Morgan provided deficient representation with regard to a hearing on his motion alleging jail retaliation and by failing to address the jail’s claim that the superior court did not have “jurisdiction” to order jail personnel cease ongoing violations of his constitutional rights. CP 311.

would establish this fact. CP 312. Although Mr. Morgan said he would investigate the issue, it did not appear that he did. CP 312.

Mr. Silva noted with particularity that when Ms. Wilson filled out a work sheet following the incident, she wrote that there had been "no bait money given." CP 312-13, 330-33. Ms. Ridlon signed the document as well. CP 312-13, 330-33. Mr. Silva noted in his motion, however, that:

Any bank, police, state, federal or public defense official who actually viewed the bank surveillance footage would know that Carrie Ridlon had offered me a large sum of money, that I had turned it down, and that bank manager Jami Wilson had stood right there looking on as this took place.

CP 313.

Mr. Silva further explained that:

The fact that the bait money alarm had been pulled is apparent from the state's evidence at trial. None of the bank employees testified to having actually activated an alarm. However, Ridlon and Shari Tuttle testified that as my car was leaving it passed directly by the first responding police unit. See February 8, 2005 Transcript of Proceedings ("RP"), p.51 (Ridlon) and p.93, line 19 (Tuttle).

CP 314. Mr. Silva explained that the timing of the police response relative to the pulling of the bait alarm could readily have been deciphered by viewing the bank surveillance footage, consulting the alarm company and attaining the computer aided dispatch (CAD) records. CP 314-15. Defense counsel failed to investigate any of

these points. CP 315. Mr. Silva's own personal request for access to the bank surveillance footage was also refused by the prosecutors. CP 315, 338-39.

Mr. Silva further noted that the records of defense interviews illustrated that the defense investigators were not familiar with the bank surveillance footage "because there was no focus on the bank employees' concerted misrepresentation as to the bait money." CP 316, 346-378.

Mr. Silva asserted therefore that two the state's primary witnesses, Ms. Ridlon and Ms. Wilson,

actually perjured themselves under oath at trial. Ms. Ridlon directly stated that no bait money had been offered. RP 1, p.53. Ms Wilson omitted the fact of the bait money from her story. Id., p.69.

CP 317.

ii. Mr. Silva's intoxication.

Mr. Silva also alleged his attorney failed to adequately investigate his concerns that the cocaine he consumed before the incident had been tainted or to call additional witnesses to establish his state of insobriety. CP 320-24. These errors were exacerbated by the testimony of the defense witness, Ms. Gregg, which was so ineptly presented that she effectively turned into an expert witness for the State. CP 326. Finally, the failure to provide the foundation

necessary to allow Dr Dixon to opine favorably about Mr. Silva's level of intoxication was constitutionally inadequate. CP 326-28.

Judge McDermott denied the motion by written order dated October 13, 2005, although neither the motion nor the order were filed until 2011. See CP 409-12; Suppl CP __ (Sub 279 Order Denying Motion for New Trial). Mr. Silva contends this was error for which he is entitled to relief.

b. Accused persons are entitled to effective assistance of counsel.

A criminal defendant has a right to the assistance of counsel at every critical stage of a criminal proceeding. U.S. Const. amend VI;¹¹ WA Const. art. 1, sec 22;¹² State v. Robinson, 153 Wn.2d

¹¹ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

¹² Article 1, section 22 (Amend. 10) of the Washington Constitution provides in pertinent part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases In no instance shall any accused person before final

689, 694, 107 P.3d 90 (2005). “[T]he right to counsel is the right to the effective assistance of counsel.” United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)); see also State v. Crawford, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006). “If no actual ‘Assistance’ ‘for’ the accused’s ‘defense’ is provided, then the constitutional guarantee has been violated.” Cronic, 466 U.S. at 654.

The right to counsel requires that defense counsel be permitted to participate fully and fairly in the adversary fact-finding process. Herring v. New York, 422 U.S. 853, 858, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); State v. Perez-Cervantes, 141 Wn.2d 468, 490, 6 P.3d 1160 (2000). “[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” Cronic, 466 U.S. at 659.

The right to counsel requires that the defense be permitted to participate fully and fairly in the adversary fact-finding process. Herring v. New York, 422 U.S. 853, 858, 95 S.Ct. 2550, 45 L.Ed.2d

judgment be compelled to advance money or fees to secure the rights herein guaranteed.

593 (1975). “[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” Cronic, 466 U.S. at 659.

When challenging the effective assistance of counsel, the defendant bears the burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109-12, 225 P.3d 956 (2010); Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Because claims of ineffective assistance of counsel present mixed questions of law and fact, they are reviewed *de novo*. In re Pers Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Though the degree and extent of investigation required in a particular case will vary depending upon the issues and facts presented, at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to how to proceed. Washington courts have already established that the failure to investigate, at least when coupled with other defects, can amount to ineffective

assistance of counsel. In re Brett, 142 Wn.2d 868, 882-83, 16 P.3d 601 (2001).

Second, and more importantly, the fact that defense counsel believes a client is guilty is not enough to excuse some investigation. A criminal defense lawyer owes a duty to defend even a guilty client. RPC 3.1; Am. Bar Ass'n, Standards For Criminal Justice Prosecution Function And Defense Function 4-41(a) (3d 1993). Counsel has a duty to assist a defendant in evaluating the case and his defense. RPC 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires ... thoroughness and preparation reasonably necessary for the representation"); State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether or not to proceed to trial or plead guilty. Missouri v. Frye, 566 U.S. ___, 132 S.Ct. 1399, 1407, 182 L.Ed.2d 379 (2012). The degree and extent of investigation required will vary depending upon the issues and facts of each case, but at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.

Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012). Counsel cannot properly evaluate the merits of a case without evaluating the State's evidence. See State v. Zhao, 157 Wn.2d 188, 205, 137 P.3d 835 (2006) (Sanders, J., concurring). Therefore, the failure to investigate, at least when coupled with other defects, can amount to ineffective assistance of counsel. In re Brett, 142 Wn.2d at 882-83.

These important constitutional standards are embodied in Washington's Rules of Professional Conduct which state "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." RPC 1.1. Pursuant to RPC 1.3, "[a] lawyer shall act with reasonable diligence and promptness in representing a client."¹³

¹³ The ABA standard reads:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Std. 4-4.1(a) (available at www.abanet.org/crimjust/standards).

Zealous advocacy, therefore, requires thorough investigation and thoughtful presentation of the evidence developed in order to test the allegations of the State. In the absence of this degree of constitutionally directed representation, relief is required.

- c. Defense counsel's performance was deficient under these recognized constitutional and professional standards.

As noted already, defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 690-91; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002); see also Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir. 1999).

A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance.

Id. (alterations in original). Defense counsel must, "at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." In re Brett, 142 Wn.2d at 873 (alterations in original) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994)); see also Kimmelman v. Morrison, 477 U.S. 365, 385, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) ("Respondent's lawyer neither investigated, nor made a

reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an "ample opportunity to meet the case of the prosecution" and the reliability of the adversarial testing process.").

The duties of defense counsel include investigating all reasonable lines of defense. Morrison, 477 U.S. at 384 (The adversarial "testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies...."); Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001), amended by 253 F.3d 1150 (9th Cir. 2001) (quoting Sanders, 21 F.3d at 1457). Counsel's "failure to consider alternate defenses constitutes deficient performance when the defense attorney 'neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so.'" Rios, 299 F.3d at 805 (alterations in original) (quoting Sanders, 21 F.3d at 1456).¹⁴

¹⁴ The duty to investigate does not necessarily require that every conceivable witness be interviewed, however, defense counsel has an obligation to "provide factual support for [the] defense where such corroboration is available." Hendricks, 70 F.3d at 1040 (quoting United States v. Tucker, 716 F.2d 576, 594 (9th Cir. 1983)).

Generally the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics. This presumption of counsel's competence can be overcome, by showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses. Not pursuing such corroborating evidence with an adequate pretrial investigation may, therefore, establish constitutionally deficient performance. See Baumann v. United States, 692 F.2d 565, 580 (9th Cir. 1982) ("We have clearly held that defense counsel's failure to interview witnesses that the prosecution intends to call during trial may constitute ineffective assistance of counsel.").

Mr. Silva has thoroughly detailed the shortcomings in the trial preparation of defense counsel and his performance at trial. CP 311-19. This included the continuing violations of Mr. Silva's constitutional rights during his pretrial detention. CP 311.

The failure to establish for the jury that Ms. Ridlon and Ms. Wilson "lied in their statements to police in regard to 'bait money'" which would certainly have effected the weight given to their respective testimony. CP 312. The misstatements of Ridlon and Wilson could have been established by "[a]ny bank, police, state,

federal or public defense official who actually viewed the bank surveillance footage....” CP 313. Furthermore, the fact that the bait money alarm was pulled is illustrated clearly by the fact that as Mr. Silva was leaving the first responding police unit was already arriving. CP 314. The necessary forms of proof were readily available, yet counsel failed to marshal them together and present them to the jury. CP 315. Defense investigators were also unfamiliar with the bank surveillance footage as well because there was no focus on the bank employees’ misrepresentations regarding the bait money. CP 316. When Mr. Silva sought the assistance of standby counsel, she also failed to provide the assistance that was required. CP 316.

Defense counsel’s stipulation allowing Ms. Wilson to remain in the courtroom after she testified was also materially deficient and prejudicial. This was inexplicable after defense counsel had reported to Mr. Silva that Ms. Wilson was overheard before trial telling other witnesses that she “wanted to make sure [Mr. Silva] was found guilty and severely punished.” CP 317. What followed was that all the bank employees embellished their concerns about the car radio being used as a weapon in order to bolster the robbery charge. CP 318. None had previously described Mr. Silva

as threatening or “swinging the radio around,” or that they had been concerned in any way. CP 318-19.

Finally, Mr. Silva explained to his attorney that he “had been awake for several days prior the April 5th incident and ... had injected a significant amount of cocaine before and after.” CP 320.

Mr. Silva further explained that he thought the cocaine had been laced with some other substance, possibly a hallucinogenic, given the severity and clarity of the delusions that resulted. CP 320.

Defense counsel failed, however, to find and preserve the small amounts of cocaine and drug paraphernalia inside the car after Mr. Silva was arrested. CP 321. Defense counsel also failed to address the law enforcement officers turning over the vehicle to a private tow yard and failing to preserve this crucial exculpatory evidence. CP 321-22. This impact of this deficient and prejudicial conduct was compounded by the failure of officers to preserve a blood sample to test for toxicity. CP 322.¹⁵

Mr. Silva also told his attorney this delusional experience had happened on one other occasion when he purchased cocaine

¹⁵ Mr. Silva further noted that it was important that the trial record reflect that he did not spend any of the \$1000, however, defense counsel failed to investigate or present evidence to establish this fact. CP 322. Mr. Silva explained that immediately following the bank incident he gave a man \$900 for his cell phone in an effort to “get help.” CP 322. Jail records would have confirmed that Mr. Silva had the remaining \$100 on his person when he was booked into jail. CP 323.

from a certain area in Everett. CP 171. Mr. Silva advised defense counsel there were still small amounts of cocaine and paraphernalia with drug residue in the car when he was arrested. CP 171. Counsel did not seek to have this highly relevant evidenced located and tested. CP 171. Mr. Silva also complained about the failure to address the arresting officer's destruction of evidence by turning the car over to a private to yard and by failing to preserve a sample of Mr. Silva's blood to establish toxicity to no avail. CP 171-72.

Mr. Silva further explained that he told defense counsel that he had spoken to his mother and a friend, Michele Saunders, just prior to and immediately after the bank incident. CP 173. Both would have testified they were aware of Mr. Silva's drug problem, his intoxicated state that day, his normal behavior both sober and intoxicated, and to his the and once previous delusional states after having interested cocaine from this certain Everett neighborhood. CP 173, 323. Defense counsel, however, did not investigate any of these witnesses, nor did he use the cell phone records to corroborate Mr. Silva's explanations. CP 174, 324.

The prejudice from this error was compounded by the trial testimony of Kim Gregg to the effect that Mr. Silva was not

intoxicated, but was instead “jonesing” for drugs, which was contrary to the statement she had provided to police (“cracked out”) or told the defense investigator (“higher than a kite”).¹⁶ CP 174, 324. The failure to present this crucial evidence and challenge the State’s witnesses on cross examination was highly prejudicial to Mr. Silva’s ability to persuasively present his defense before the jury. All the more so because Dr Dixon was left without the necessary factual foundation from which to opine regarding Mr. Silva’s state of intoxication. CP 326.

Finally, Mr. Silva contends the failure to address, pretrial, the limited effectiveness of Dr. Dixon’s testimony given these foundational shortcomings, i.e., at best it could not have supported a voluntary intoxication defense, was below the standard of care for reasonably competent defense counsel. CP 176, 326.

Specifically, when Mr. Silva met with defense counsel on February 13, 2005, to discuss his potential testimony, he was advised that the prosecutor had withdrawn her objection to Dr. Dixon’s testimony and as a result it was not necessary that Mr. Silva testify.

¹⁶ Mr. Silva further challenged Ms. Gregg’s testimony that he was there for a faster car and that he had previously failed to pay debts in dealing with the auto dealership. CP 175. He noted that Kevin Hart, the owner of Special Touch, told police that Mr. Silva had never been a problem and on that basis he had given Silva a Toyota on credit, with no down payment. CP 175, 252.

CP 177, 327. The record was ultimately left devoid of the evidence essential to Mr. Silva's defense.

- d. The prejudice to Mr. Silva's right to a fair trial was so significant that a new trial is required.

Notwithstanding the numerous grounds identified by Mr. Silva, his motion for substitute counsel was summarily denied by Judge Trickey. CP 5. Mr. Silva's more exhaustive Motion for New Trial was in turn denied by Judge McDermott. CP 413-18. A court, however, "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting State v. Perez, 137 Wn.App. 97, 105, 151 P.3d 249 (2007)). Where the claim is of a denial of constitutional rights, it is reviewed de novo. Iniguez, 167 Wn.2d at 280. The decision in question is manifestly unreasonable "if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Lewis, 115 Wn.2d 294, 298, 797 P.2d 1141 (1990)).

Mr. Silva has detailed the considerable shortcomings in the preparation and presentation of his defense to the robbery charge.

He requests this Court reverse his conviction and remand for a new trial, or in the alternative, order the case dismissed.

2. Constitutional guarantees of due process of law bar the presentation of perjured testimony, independently warranting relief.

Mr. Silva specifically advised the prosecutors in his case, by letter and in person, about the information available on the bank surveillance tapes and the apparent perjury of the State's witnesses. CP 315-16. Nevertheless, two of the prosecution's witnesses testified under oath that no bait money had been offered or omitted mention of the bait money entirely. CP 317. Where the State knowingly uses false or perjured evidence, including false testimony, to obtain a tainted conviction a violation of the most fundamental constitutional. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

In Napue, the U.S. Supreme Court held that a state may not present false testimony, or fail to correct testimony when the prosecutor later discovers it to be false. 360 U.S. at 269. The prosecutor's duty to disclose evidence favorable to a defendant had already been recognized long before. Mooney v. Holohan, 294 U.S. 103, 112-15, 55 S.Ct. 340, 79 L.Ed. 791 (1935). The Court subsequently extended the rule promulgated in Mooney to the

prosecutor's use of evidence known to be false. Alcorta v. Texas, 355 U.S. 28, 31, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957),

On appeal in circumstances like these, a conviction must be reversed whenever the prosecution knowingly presented false evidence or testimony at trial and there is a reasonable likelihood that the false evidence or testimony could have affected the jury's decision. Morris v. Ylst, 447 F.3d 735, 743 (9th Cir. 2006), cert. denied, 127 S.Ct. 957 (2007). The prosecutor's duty not to suborn perjury or to use evidence known to be false extends to placing on the prosecutor an affirmative duty to correct state witnesses who testify falsely. Napue, 360 U.S. at 264. The failure of the prosecutors to meet these obligations would be an independent basis for reversal.

3. Mr. Silva was entitled to relief from the judgment and sentence based upon violations of the appearance of fairness doctrine, the constitutional right to due process and violations of the Canons of Judicial Ethics.

- a. Mr. Silva made a substantial showing of the violations he alleged.

Mr. Silva specifically alleged that the judgment was void and he was entitled to relief pursuant to CrR 7.8,¹⁷ CR 60(b),¹⁸ Article 1,

¹⁷ CrR 7.8 (b) provides:

On motion and upon such terms as are just, the court may

sec. 22 of the Washington Constitution and the First,¹⁹ Fifth,²⁰ Sixth and Fourteenth²¹ Amendment of the United States Constitution.

CP 141.

relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

¹⁸ CR 60(b) provides in part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
- (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
- (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (5) The judgment is void;

....; or

- (11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

¹⁹ The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

Mr. Silva explained that on September 2, 2005, he appeared before Judge Brian Gain for sentencing. At that time he filed an Affidavit of Prejudice as to Judge Gain and sought to have the proceedings heard by a different judge. CP 143.

At the same time, Mr. Silva also served the prosecutor with his "Motion to Disqualify Prosecutor," "Motion for a Garza Hearing" and "Motion to Dismiss for Fraud on the Court." CP 143.²² The motions were in turn supported by the "Declaration of Matthew Silva" and a "Formal Criminal Complaint." CP 143. When Mr. Silva

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

²⁰ The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

²¹ The Fourteenth Amendment provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

²² These motions and supporting declaration were the subject of a supplemental designation on June 21, 2012. As of this submission, we are still awaiting receipt of the index to those portions of the record.

sought to file his motions in open court he was precluded by corrections officers who were escorting him. CP 143-44.

At the direction of the presiding judge, the sentencing was then transferred to Judge McDermott. CP 144. After some delay, the matter was called before Judge McDermott and Mr. Silva again sought to file his motions. CP 145. Although Mr. Silva explained the necessity of ruling on the motion to disqualify the prosecutor before sentencing, Judge McDermott refused to permit the filing, or make a ruling, before the completion of the sentencing hearing. CP 146.

Judge McDermott disclosed that he had been told my Judge Trickey that the sentencing had been continued numerous times and all motions had been decided. CP 146. Mr. Silva advised the Court that this *ex parte* information it had received from Judge Trickey was not accurate. CP 146-47. The prosecutor exacerbated the error, however, by telling Judge McDermott that Mr. Silva had “waived those motions.”²³ CP 147.

Finally, Judge McDermott’s decision to proceed to sentencing without the opportunity to become familiar with the

²³ Mr. Silva specifically noted that the August 26, 2005 order entered by Judge Trickey which characterized Mr. Silva as having withdrawn his motions was inaccurate. Mr. Silva expressly stated that he did not acquiesce to Judge Trickey’s presiding over the case and was not in court when the order was presented and signed. CP 147-48.

important aspects of the case, without a presentence report and in the face of the prosecutor's acknowledgement that Mr. Silva had not been served with any sentencing documentation, was a violation of the most fundamental aspects of constitutional due process. CP148.²⁴

b. The right to an impartial tribunal is paramount.

An accused person is entitled to a hearing before an unbiased and impartial tribunal. A fair trial requires the absence of actual bias or even the appearance of bias. State v. Degenais, 47 Wn.App. 260, 261, 734 P.2d 539 (1987).

For a judge to be biased or prejudiced against a person's cause is to have a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge. It is a particular person's state of mind that affects his opinion or judgment. Bias or prejudice on the part of an elected judicial officer is never presumed.

In re Borchert, 57 Wn.2d 719, 722, 359 P.2d 789 (1961).

Constitutional due process, the appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) all require that judges disqualify themselves if they are biased

²⁴ Mr. Silva also argued in his motion for relief from judgment that King County had a political and financial interest in having him moved out the Regional Justice Center where he was being held because there was a pending appeal on his request for a preliminary injunction then scheduled to be decided around October 2005. CP 149. Furthermore, Mr. Silva noted his continuing objection to

against a party or their impartiality may reasonably be questioned. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); State v. Dominguez, 81 Wn.App. 325, 228, 914 P.2d 141 (1996). A judicial proceeding is valid only, therefore, if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing. State v. Gamble, 168 Wn.2d 161, 187-88, 225 P.3d 973 (2010).

A party claiming bias or prejudice must, however, support the claim. Evidence of a judge's actual or potential bias is required before the appearance of fairness doctrine will be applied. State v. Post, 118 Wn.2d 596, 618-19 & n.9, 826 P.2d 172 (1992); State v. Carter, 77 Wn.App. 8, 11-12, 888 P.2d 1230, rev denied, 126 Wn.2d 1026 (1995); State v. Bilal, 77 Wn.App. 720, 722, 893 P.2d 674, rev denied, 127 Wn.2d 1013 (1995).

Under the Code of Judicial Conduct, designed to provide guidance for judges, “[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.” CJC Canon 3(D)(1); State v. Chamberlin, 161 Wn.2d 30, 37, 162 P.3d 389 (2007); see also State v. Dominguez, 81 Wn.App. 325, 328, 914 P.2d 141 (1996). Furthermore, except to a

the participation of DPA Zeldenrust who was representing the county in the federal case addressing the constitutionality of D-Unit. CP 149.

limited extent otherwise authorized by law, a judge may not initiate or consider ex parte communications concerning a pending proceeding. CJC 3(A)(4).²⁵

c. Judge McDermott's denial of the continuance was improper.

Judge McDermott expressly denied Mr. Silva's request to continue the sentencing hearing based upon Judge Trickey's interjection of inaccurate facts, i.e. that the sentencing hearing had been previously continued and all his motions had been heard. CP 151; 9/2/05RP 2-5.

It was improper, however, for Judge Trickey to attempt to influence Mr. Silva's sentencing judge in this way. Judge Trickey's adverse impression of Mr. Silva was already established, as a matter of record, by the earlier grant of Mr. Silva's motion for recusal. CP 152. Judge Trickey was the "assigned judge" but by the April 13th order he assigned the sentencing to another judge. See also the Order of August 26, 2005. CP 152. Judge McDermott's denial of Mr. Silva's request for a continuance based

²⁵ The particular Canon provides:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the

on the ex parte communication of another judge was contrary to the canons, rules and caselaw cited.

d. Prejudice to Mr. Silva's right to a fair hearing was well established.

Mr. Silva was prejudiced by the improper ex parte communications in this case. First, his motion for a continuance of the sentencing hearing was denied even though neither he, nor Judge McDermott had ever seen the State's sentencing material. CP 152. Second, Judge McDermott refused to address the disqualification motion based on the prosecutor's conflict of interest based on the erroneous premise that "all [Mr. Silva's] motions had already been ruled on." CP 152-53. Finally, a sentencing hearing conducted by an ill-advised judge following the recommendation of a prosecutor who labored under multiple actual conflicts of interest is inconsistent with the process to which Mr. Silva was constitutionally due.

Judge McDermott's erroneous assumption that Mr. Silva's motions and continuance request were merely efforts to further delay sentencing, clearly illustrate the prejudice flowing directly from the improper and inaccurate ex parte communication. CP 153. Judge McDermott's actions thereafter illustrate the actual bias

law applicable to a proceeding before him, by amicus curiae only,

and prejudice manifested against Mr. Silva's cause and to rule without even looking at them displays a partiality of the most inappropriate form. CP 153. The remedy for this error, i.e., appearance before a biased judge, is to set aside the judgment. Edwards v. Balisok, 520 U.S. 641, 647, 117 S.Ct. 1584, 127 L.Ed.2d 906 (1996); Arizona v. Fulimante, 499 U.S. 279, 308, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

The constitutional right to due process of law encompasses notice and a hearing before a court of competent jurisdiction and in accordance with established modes of procedure. Memphis Light, Gas & Water v. Craft, 436 U.S. 1, 14, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). A court "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." State v. Iniquez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). Where, as here, the judgment is the product of due process violations, it is void. In re Center Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir. 1985). Because the judgment and sentence are void, Mr. Silva was entitled to vacation under CrR 7.8(b)(4) and CR 60(b)(5) as he requested. The failure to grant relief was an abuse of discretion for which he should obtain relief. See e.g. Leen v. Demopolis, 62 Wn.App. 473, 482-83, 815 P.2d 269 (1991).

if he affords the parties reasonable opportunity to respond.

4. The trial court abused its discretion by failing to grant Mr. Silva's Motion to Stay Execution of Judgment.

a. Mr. Silva's motions presented serious issues which required timely resolution.

Mr. Silva's Emergency Motion cited the areas of government corruption, including allegations of felonious activity by prosecutors and judges, as well as local, state and federal officials. CP 266 and sources cited therein. The repeated failure of the courts to provide any relief exacerbated the situation. CP 266. Mr. Silva was forced to seek relief in the United States Supreme Court by extraordinary writ. CP 267.

Mr. Silva further alleged that his mail was being obstructed by corrections, and perhaps USPS personnel. CP 267. Mr. Silva also outlined the threats of violence to which we was subjected. CP 268. The failure of the courts to timely act on Mr. Silva's requests for relief had the ultimate effect of frustrating his rights. CP 269. Mr. Silva therefore asked for a hearing at which he could make a record documenting his allegations. CP 270.

The history of DOC officials seizing Mr. Silva's legal files in order to obstruct his pursuit of justice was further outlined. CP 271. Mr. Silva incorporated a copy of his habeas corpus petition to the U.S. Supreme Court which further outlined the history of

governmental misconduct in destroying Mr. Silva's legal materials.
CP 283-84.

- b. Mr. Silva established a motive for the alleged misconduct in potential unlawful monitoring of jail telephone calls.

Mr. Silva alleged that the misconduct which was visited upon him was in retaliation for his challenges the county's operations of an unlawful system of monitoring and recording telephone calls by pre-trial detainees. CP 290. The calls in question included confidential communications between attorneys and their clients. Because of the potential impropriety of this practice, the constitutional validity of thousands of convictions were brought in question. CP 290; State v. Garza, 99 Wn.App. 291, 296-97, 994 P.3d 868 (2000).

Mr. Silva further alleged that the judges of the King County Superior Court were aware of his efforts to challenge this practice because after he filed a writ it was immediately transferred to the Court of Appeals. This despite the obvious need to conduct a fact finding hearing. From Mr. Silva's perspective, such action would most logically be categorized as a further obstruction of justice. CP 291.

c. Mr. Silva is prejudiced by the governmental misconduct.

The substantial prejudice suffered by Mr. Silva in the inability to obtain relief “in the present time,” was quite cognizable. CP 286, citing Christopher v. Harbury, 536 U.S. 403, 413, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002). The loss of personal freedom and access to the courts represent irreparable injuries for which relief was plainly warranted. Sammartono v. First Judicial Dist. Ct., 303 F.3d 959, 973 (9th Cir. 2002); Jackson v. Proconier, 789 F.2d 307, 310 (5th Cir. 1986). Where fact finding was required in order to fully document the grounds for relief, the denial of Mr. Silva’s request was improper and highly prejudicial. The transfer to DOC custody has in fact resulted in years of delay in Mr. Silva’s efforts to obtain judicial review of the errors in these proceedings.

5. The trial court’s failure to file and notify Mr. Silva of its decisions on his post-trial motions for over 5 years violates due process and the right to a speedy appeal.

a. Mr. Silva filed several substantive post trial motions.

At the September 7, 2005 hearing on Mr. Silva’s motions, the State argued he had waived any claim for relief based on his withdrawal of the motions when previously set before Judge Trickey. 9/7/05RP 5. Judge McDermott declined to rule on the

motions on the premise that he did not have the necessary authority after sentencing. 9/7/05RP 6. Mr. Silva objected to court's refusal to rule on his post trial motions given the authority provided by CrR 7.8 and CR 60(b). 9/7/05RP 7. Judge McDermott then opined that it would be more efficient for the Court of Appeals to consider Mr. Silva's motions. 9/7/05RP 8. Mr. Silva noted the fact-intensive nature of the motions and encouraged the court to retain them pursuant to CrR 7.8. 9/7/05RP 9. Judge McDermott concluded, however, "I don't choose to rule on the motions,...., I believe it would be more appropriate for the Court of Appeals to rule on them." 9/7/05RP 9.

Mr. Silva subsequently filed his Motion for New Trial (CP 309-402); a Motion to Stay Execution of Judgment (CP 264-307); and a Motion for Relief from Judgment (CP 141-255), that are the subject of this appeal.

b. The trial judge abused his discretion in declining to rule on Mr. Silva's post trial motions.

CrR 7.8 provides specific guidance regarding when motions should be transferred to the Court of Appeals and when they should be heard in the trial court. Subsection (b) of CrR 7.8 specifically directs:

The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

Although the superior court has authority to transfer a defendant's motion for new trial to Court of Appeals for consideration as personal restraint petition; this transfer should not be automatic. State v. Smith, 80 Wn.App. 462, 469-70, 909 P.2d 1335 (1996), rev on other grounds, 131 Wn.2d 258 (1997). While it may be appropriate to transfer the case when the new trial motion raises legal issues only and does not require factual determinations that are province of trial court, that was not the circumstance presented here. In Mr. Silva's case, the failure to exercise judicial discretion in a manner consistent with the practice described in the court rules was an abuse that warrants relief.

c. Mr. Silva is entitled to a full and fair hearing on his motion before a different judge.

An appellate court may order reassignment of a case to a different judge in the exercise of the court's inherent power to administer the system of appeals and remand. See e.g., Cange v. Stotler and Co., 913 F.2d 1204, 17 Fed. R. Serv.3d 1295 (7th Cir. 1990); Brown v. Baden, 815 F.2d 575 (9th Cir. 1987). This authority

has been applied in criminal cases. See eg U.S. v. Torkington, 874 F.2d 1441 (11th Cir. 1989)

In the federal court, an appellate court may remand a case to a different district judge if a party can show personal biases or unusual circumstances, based on three factors: (1) whether on remand the district judge can be expected to follow the dictates of the court of appeals, (2) whether reassignment is advisable to maintain the appearance of justice, and (3) whether reassignment risks undue waste and duplication. U.S. v. Lyons, 472 F.3d 1055 (9th cir. 2007), cert. denied, 2007 WL 1106996 (2007).

The federal authority to assign a case to a different judge on remand derives not from the recusal statutes alone, but on the appellate courts' power to require such further proceedings to be had as may be just under the circumstances. Liteky v. U.S., 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), citing 28 U.S.C.A. secs 144, 455, 2106. In Mr. Silva's circumstances, this Court should exercise its authority to direct the matter be heard by a different judge on remand.

6. Cumulative error deprived Mr. Silva of a fair trial and sentencing.

Mr. Silva was denied a fair trial and sentencing by the accumulation of the errors alleged above. Under the cumulative error doctrine, Mr. Silva is entitled to a new trial or sentencing when errors cumulatively produced a proceeding that was fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, 123 Wn.2d 737, cert. denied, 513 U.S. 849 (1994). While Mr. Silva bears the burden of proving the accumulation of errors of such magnitude that rehearing is necessary, on this record he most certainly established the errors that cumulatively denied him his right to a fair trial and sentencing.

F. CONCLUSION.

Mr. Silva requests this Court order his conviction reversed and the case remanded for dismissal or new trial consistent with the opinion of the Court.

DATED this 16th day of July 2012.

Respectfully submitted,



David L. Donnan (WSBA 19271)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66795-5-I
v.)	
)	
MATTHEW SILVA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JULY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> MATTHEW SILVA 957176 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) () ()	U.S. MAIL HAND DELIVERY _____

2012 JUL 16 11:4:51
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF JULY, 2012.

X _____ *gmy*

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710