

67525-7

67525-7

NO. 67525-7-I

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

STATE OF WASHINGTON,

RESPONDENT,

V.

ALVIN BURNS
APPELLANT.

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

THE HONORABLE MONICA J. BENTON

STATEMENT OF ADDITIONAL GROUNDS
PRO SE

MR. ALVIN BURNS
980694
MSU-A-410-L
P.O. BOX 7001
MONROE, WA.
98272

TABLE OF CONTENTS

PAGE

A. **STATUS OF APPELLANT**.....1

B. **BRIEF HISTORY**.....1-2

C. **ILLEGALLY SEIZED EVIDENCE**.....2-3-4

D. **TRIAL COURT ABUSED DISCRETION**.....5-6

E. **TRIAL COURT ABUSED DISCRETION JACKET EVIDENCE**.....6-7

F. **DENIAL OF RIGHT TO TESTIFY**.....7

G. **FAILURE TO HOLD CRR. 3.5 CONFESSION HEARING**.....7

H. **INEFFECTIVE ASSISTANCE OF COUNSEL**.....9-10

I. **REASONABLE RIGHT TO PRIVACY**.....4-5

J. **PROSECUTORIAL MISCONDUCT**.....10

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>WASHINGTON CASES</u>	
<u>STATE V. SMITH</u> 165 WN.2D 511, 199 P.3d 386 (2009).....	4
<u>STATE V. AUDLEY</u> 77 WN.App. 897,907, 894 P.2d 1359 (1995).....	4
<u>STATE V. COUNTS</u> 99 Wn.2d 54, 60, 659, P.2d 1087 (1983).....	4
<u>STATE V. TERROVONA</u> 105 Wn.2d 632, 716 P.2d 295 (1986).....	4
<u>STATE V. PATTERSON</u> 112 Wn.2d 731,735,774 P.2d 10 (1989).....	4
<u>STATE V. DETAZI</u> 165 Wn.2d 842, 858, 204 P.3d 217 (2009).....	6
<u>STATE V. PORTER</u> 5 Wn.App. 460,488 P.2d 773 (1971).....	7
<u>STATE V. TIBBLES</u> 236 P.3D 885, (WASH. 8/5/2010).....	4

TABLE OF AUTHORITIES CONT

PAGE

FEDERAL CASES

<u>CHILDRESS V. CITY OF ARAPAHO</u> 210 F.3D 1154 (10 TH CIR. 2000).....	3
<u>MIRANDA V. ARIZONA</u>	7,8
<u>HART V. GOMEZ</u> 174 F.3D 1067, 1073 (9 th cir. 1999).....	9
<u>NORTHROP V. TRIPPETT</u> 265 F.3D 372,383 (6 TH CIR. 2001).....	9
<u>GROSECLOSE V. BELL</u> 130 F.3D 1161,1170 (6 TH CIR. 1997).....	10
<u>WILLIAMS V. WASHINGTON</u> 59 F.3D 673 (7 TH CIR. 1995).....	10
<u>PAVEL V. HOLLINS</u> 261 F.3D 210,216 (2 ND CIR. 2001).....	10
<u>NORTHERN MARIANA ISLAND V. BOWIE</u> 243 F.3D 1109,1118, (9 TH CIR. 2001).....	10
<u>MORRIS V. YLST</u> 447 F.3D 735 (9 TH CIR. 2006).....	10
 U.S. SUPREME COURT CASES:	
<u>BOND V. U.S.</u> 529 U.S. 334,338, 1205 S.CT. 1462,1466 L.ED.2D 365 (2000).....	4
<u>MICHIGAN V. TYLER</u> 436 U.S. 499,504,508, 56 L.ED.2D 486, 985 S.CT. 1942 (1978).....	5
<u>STRICKLAND V. WASHINGTON</u> 466 U.S. 668 (1984).....	9
<u>KIMMELMAN V. MORRISON</u> 477 U.S. 365,385, (1986).....	9

TABLE OF AUTHORITIES CONT.

	<u>PAGE</u>
<u>WASH. STATE CONST.</u>	
<u>ARTICLE I SECTION 7</u>.....	5,9
<u>ARTICLE I SECTION 22</u>.....	5,9
 <u>U.S. CONSTITUTION</u>	
 <u>FOURTH AMENDMENT</u>.....	3,5,9
<u>SIXTH AMENDMENT</u>.....	5,9

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

THE STATEN OF WASHINGTON)
RESPONDENT)
) *COA. NO.67525-7-I*
)
) *APPELLANT STATEMENT OF ADDITIONAL GROUNDS*
V.)
)
)
)
)
ALVIN BURNS,)
APPELLANT.)
-----)

A. STATUS OF APPELLANT:

APPELLANT, ALVIN BURNS JR. # 980694, P.O. BOX 7001, MONROE, WA., 98272

B. BRIEF HISTORY:

On or about January 13, 2010 the appellant was seriously medically ill, and while suffering severe pain and awaiting emergent medical treatment at Green Community College, states witness security guard Fred Creek arrived to assist the appellant Mr. Burns with his medical emergency, and when the E.M.T. arrived they said, "In order for us to take your vital signs you must remove your jacket." And I told them I could not remove it alone and would need they're assistance. With the assistance of the EMT the jacket was removed, and the security guard Fred Creek instantly seized the jacket. While the EMT was taking my vital signs the security officer Fred Creek told the EMT that, they should be careful because he had found drugs after searching the jacket, so he might become combative. Mr. Burns then stated what is that", what are you doing? Nevertheless, to no avail the security guard Fred Creek did not answer. The EMT started packing so Mr. Burns though impossible due to his severe illness tried to get up to leave but was unable to make it very far because the pain caused him to sit on the parking curb. While waiting on the ambulance one police officer arrived and the security guard handed the police officer Mr., burns coat and Laptop computer and said, "Quote", "there are drugs in the jacket pocket," "Unquote." The security guard then asked if Mr. Burns would be arrested. The police officer stated, "No he will not be going to jail but will have to go to the hospital emergency room." An ambulance arrived and transported Mr. Burns to the hospital for emergent medical care. After arriving at the hospital numerous tests was performed on Mr. Burns and numerous medications was given by I.V., when the first dose of medications did not help after several minutes a second dose was given at this time the police officer arrived in the emergency room to try and question Mr. Burns but

medical staff asked the police officer to leave due to Mr. Burns being seriously ill. The police officer returned five minutes later and again tried to question Mr. Burns and Mr. Burns did his best to respond, due to being seriously ill, the police officer asked, "Do you know what this is? And Mr. Burns responded, "No." He also asked, "Is this yours? And again Mr. Burns responded, "No."

Mr. Burns was officially charged with possession with intent to deliver a controlled substance, and was arraigned 3-2-2010 where Mr. Burns plead, "not guilty." Trial started June 13, 2011 and due to ineffective assistance of counsel, abuse of discretion of the court and illegally seized evidence Mr. Burns was found guilty as charged on June 15, 2011.

I. (GROUNDS)

GROUND # 1:

A. The evidence was seized illegally:

States witness the security guard Fred Creek seized Mr. Burns jacket without probable merit while Mr. Burns was being emergently treated by medical staff. The security officer Fred Creek then without consent searched Mr. Burns's jacket and allegedly found drugs in the jacket pocket.

Mr. Burns raises this ground for the first time as a constitutional violation and as such can raise it for the first time in his direct appeal.

B. Argument :

Mr. Burns's attorney raised this issue in his pretrial motion to dismiss but due to ineffective assistance failed to raise the issue pursuant to **CRR RULE 3.6 Suppression hearing**, had defense counsel filed a motion to suppress the illegally seized evidence Mr. Burns would have been found "**NOT guilty.**"

The trial court erred when it allowed the evidence found illegally in the coat to be admitted in to evidence this violated Art. I section 7 of the Washington state constitution, therewith the 4th Amendment of the U.S. Constitution which prohibits illegal searches and seizures.

The Government cannot violate the 4th amendment law through use of its agents and use the fruits of such unlawful conduct to secure a conviction. Nor can the government make indirect use of such evidence for its case or support a conviction on evidence obtained through leads from the unlawfully obtained evidence. All these methods are outlawed, and convictions obtained by means of them are invalidated because they encourage the kind of society that is obnoxious to free men. See, **Walder V. U.S. 347 U.S., 62,64-65, 74 S.CT. 354, 98 L.ED. 503 (1954)**

Violation of the 4th **Amendment** requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be “willful.” See, **Childress V. city of Arapaho 210 F.3d 1154, 1156 (10th Cir. 2000).**

See, (**verbatim reports June 13, 2011, Page 12-#19**): states witness Fred creek testifies that part of his official duties is to assist “law enforcement” on campus. This shows that the security officer was working as an agent of the Government/state police. States witness security officer Fred Creek goes on in his testimony describing the jacket where the drugs was allegedly found, where he describes the positioning of the pockets of the jacket, stating that there was “**numerous pockets**” certifying the fact that he had searched Mr. Burns jacket without his consent. See, (**Verbatim Reports June 13, 2011 page 23-#23-25**)-(**Verbatim reports June 13, 2011, page 28-#4-5**).

Again describing the jacket, see, (**verbatim reports June 13, 2011 Page 26-#7-9**). The foregoing testimony certifies that states witness security guard Fred Creek on the date in question was acting as an agent of the government and thus violating Mr. Burns 4th Amendment guarantees to be free from his property being seized and searched.

Seizures of property are subject to 4th Amendment scrutiny even though no search within the meaning of the Amendment has taken place. 4th **Amendment** safeguards apply to commercial premises as well as homes. Further, an individual and his property are fully protected by the 4th **Amendment even when the individual is not suspected of criminal activity.**

The exclusionary rule requires that evidence obtained in violation of the 4th Amendment cannot be used in a criminal proceeding against the victim of an illegal search.

Further more the evidence used at trial should have been excluded as the result of violation of the 4th **Amendment** illegally seized and searched.

Defense witness Vernice McAllister testified and described the jacket the pockets and so forth, and stated she was quite familiar with the jacket and the jacket contents See, **(verbatim reports June 14, 2011, page 51#5-26 and page 52# 1-8)** Further more she testified that she searched the jacket and that it did not contain drugs, she also testified that someone else wore the jacket the night before Mr. Burns put on the jacket to go to school, she also testified that it is impossible for anyone just by looking at the jacket to see what's in the pockets without opening the flaps of the jacket which states witness security officer Fred Creek corroborate in his testimony. This supports the fact that the security officer as an agent of the state of Washington and without probable merit did illegally seize and search Mr. Burns's jacket spoiling the fruits of the search.

See, **(verbatim Reports June 14, 2011 page55#25)**: Where defense witness on cross-exam states that the only thing that was in the right pocket was bank receipts and a cell phone belonging to Mr. Burns which contradicts states witness security officer Fred Creek testimony that he found the alleged drugs in the right pocket of the jacket. Exigent circumstances do not exist, See, **state v. Tibbles, 236 P.3d 885, 169 (wash.08/05/2010)** The exigent circumstances exception to the warrant requirement applies where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence. See, **State v. Smith 165 Wn.2d, 511, 517, 199 P.3d 386 (2009). Quoting State v. audley, 77 Wn.app. 897, 907, 894 P.2d 1359 (1995).**

This court has identified 5 circumstances from federal cases that could be termed exigent circumstances. **State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983). They include (1) hot pursuit, (2) fleeing suspect, (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence. See also, State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986). However just because one of these circumstances exist does not mean that exigent circumstances justify a warrant less search E.g. State v Patterson, 112 Wn.2d 731, 735, 774 P.2d 10 (1989) A court must look to the totality of the circumstances in determining whether exigent circumstances exist.**

Reasonable right to privacy

The alleged evidence was not in plain view because the "right" pocket had a flap covering it and which had to be removed to see in to the pocket.

Actual expectation of privacy= (loop flap was closed and buttoned. **No plain view possible. Bond v. U.S 529 U.S. 334,338, 1205 S.CT. 1462, 1466 L.ED.2d 365 (2000).**

Does an individual by his conduct exhibit actual expectation of privacy?

Our 4th Amendment Analysis embraces 2 questions (A) we ask Whether the individual, by his conduct, has exhibited an actual expectation of privacy, that is, whether he has shown that he sought to preserve something as private. (B) we inquire whether the

individuals expectation of privacy is one that society is prepared to recognize as reasonable.

Fire fighters, like policeman, are subject to 4th Amendment, See, Michigan v. Tyler 436 U.S. 499,504,508, 56 L.ed.2d. 486, 985 S.CT. 1942 (1978).

Washington state constitution article I section 7 gives Mr. Burns a right to privacy and on the day of January 13, 2010 his privacy rights was violated.

GROUND # 2:

A. TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED DEFENSE WITNESS FROM TESTIFYING IN VIOLATION OF THE 6TH AMENDMENT OF U.S. CONSTITUTION:

The trial court abused its discretion when it granted the states motion to exclude defense witness Amber Clifton when Ms. Clifton's testimony supports Mr. Burns defense that someone else wore the jacket and if the drugs was actually discovered in the jacket the person that had the jacket prior to Mr. Burns had to have placed the drugs in the coat un-be-known to Mr. Burns.

B. ARGUMENT:

On June 9, 2011 the trial court heard the states motion to exclude defense witness Ms. Amber Clifton and granted the motion based on the states argument that Ms. Clifton did not know what was in the jacket pocket and because Ms. Clifton testimony would be cumulative because it was the same testimony as defense witness Ms. McAllister.

The trial court also stated that the testimony, quote, **"The jury is distracted and looking down the road at something that is purely speculative."** Unquote. See,- **(verbatim reports June 9, 2011 page 4 # 21-25).**

The Washington state Constitution article I section 22 States: In part, "In criminal prosecutions the accused shall have the right to have compulsory process to compel the attendance of witnesses in his own behalf."

United States constitution amendment 6th also gives the accused the right to call witnesses on his behalf.

Mr. Burns's right to call witnesses on his behalf was denied by the abuse of trial court's order denying this right. Ms. Amber Clifton's testimony would have supported Mr. Burns's defense that he did not know of the drugs in the jacket and in fact knew of another person that had possession of the jacket in question the night before Mr. Burns wore the "heavy" jacket to school.

Is two witnesses called by defense cumulative when one knew what was in the jacket and the other didn't but both knew that someone other than Mr. burns had the jacket?

The trial court should have allowed defense witness Ms. Clifton testify on Mr. Burns's Behalf and denial of such right calls for reversal of his conviction.

Witness testimony shows possibility of other suspect possibility. If allowed could have convinced jury of the possibility that drugs were left in jacket pocket by another individual. State did not show any due diligence to seek other suspects. Judge listened to prosecutor without considering impact of denial of one witness to corroborate another.

A. Trial court abused its discretion and denied Mr. Burns's rights to submit evidence on his behalf when it would not allow the jacket to be admitted into evidence:

The trial court stated the jacket was inadmissible when states witness testified about the jacket, See-(**Verbatim reports June 13, 2011 page 20-21-26-28**). And when defense witness testified about the jacket, See,-(**Verbatim reports June 14, 2011 page 8,-20, 51,-59,-60**)

B. Argument:

The trial court abused its discretion when it held that the jacket in which the drugs were allegedly discovered was inadmissible because defense counsel failed to move to admit it within a reasonable time. This is abuse of discretion because both parties was aware of the presence of the jacket and both parties open the door to have the jacket admitted in to evidence when both parties testified about the jacket and also describing how the jacket was made.

Abuse of discretion occurs when a courts decision is manifestly unreasonable or based on untenable grounds. See, **State v. Detazi 165 Wn.2d 842, 858, 204 P.3d. 217 (2009).**

Suppression of evidence=1) Denial of evidence I.E. jacket. Both campus security witness and Auburn P.D. witness both testified that jacket had no flap. Object was not in plain

view. Jacket evidence would have **directly** contradicted both witnesses testimony, which was a blatant lie.

The jacket should have been allowed in to evidence and if it were there is no doubt that, the outcome of the trial would have been completely different reversal is compelled.

Trial court abused its discretion when it continued to interfere with Mr. Burns while he exercised his undeniable right to give testimony and the interferences was so grave as to altogether deny him the right to testify.

Ground # 3:

A. The trial court made error when it failed to hold a CRR 3.5 Confession Hearing:

The trial court did not hold a 3.5 confession hearing to determine whether Mr. Burns alleged incriminating confession to the police officer while he was under duress in the emergency room hospital was admissible at trial.

See,-(Verbatim reports June 14, 2011 pages 6,7,8, Thru): testimony of police officer Michael Steven Burris, that proves that Mr. Burns was not in any condition to be questioned-See (verbatim reports June 14, 2011 page 8 #24), where police officer Burris stated, quote, "He was in an examining room and he was lying on a, uh, on the, uh, uh bed and he was in **quite a bit of pain.**" Unquote.

States witness police officer goes on to state that Mr. Burns was being treated with all kinds of medicines and was even asked to leave by medical staff due to Mr. Burns serious condition.

B. ARGUMENT:

CRR rule 3.5 Confession Procedure:

(a) When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing. If not previously held, for the purpose of determining whether the statement is admissible.

An appellate court will remand a case for the required hearing under this rule on the voluntariness of a confession where no hearing was held prior to trial and the appellate court was unable to determine whether the trial court had determined that the appellant's statement after arrest was made voluntarily, with "full comprehension of his constitutional rights. See, **State v. porter, 5 Wn.App. 460, 488 P.2d 773 (1971).**

Mr. Burns was given intravenous drugs twice at Auburn General hospital. I had I.V. drip in my arm administering this medication when given **Miranda warning**, which at the time I did not understand. In addition, it is indisputable that I was under the influence because Auburn P.D. was informed of the fact by nurse.

Mr. Burns's ability to answer questions was impaired due to administration of drugs. Any answers given should not be allowed to be admitted as evidence due to questionable ability to provide cognizant answers.

A trial court must suppress a defendant's incriminating statement if the defendant made it during a custodial interrogation conducted without the safeguards set forth in **Miranda v. Arizona**.

In this case the record is clearly showing that the police officer used duress I.E.- (Appellant's Life threaten pain and administered drugs) - to get a confession. It is also clear that the appellant was in grave fear for his life as divulged from the police officer testimony.

If the trial court would not have failed to hold a **CRR 3.5**, hearing Mr. Burns's testimony would have been suppressed and the outcome of the trial would have been different.

GROUND # 4:

TRIAL COUNSEL WAS INEFFECTIVE:

(1). Trial counsel was ineffective when he failed to file a motion to suppress the evidence allegedly discovered in the jacket after illegal seizure and search. Had trial counsel filed a motion to suppress due to illegal search and seizure the results of the trial would have been different.

(2). Trial counsel was ineffective when he again failed to submit the jacket to the court to be admitted into evidence. The jacket would have proving that states witnesses committed perjury being states witness security officer Fred Creek and police officer Burriss when they both stated that the drugs was in plain view in the jacket pocket, because if the trial court would have allowed the jacket to be admitted to the jury Mr. Burns would have shown that the jacket pockets had **"flaps with buttons"** thus making plain view completely impossible, thus proving that the security officer unlawfully searched Mr. Burns jacket while he was receiving life saving medical care from the EMT'S.

It is very important to admit the jacket into evidence to allow the jury to see the jacket and the impossibility to see inside the pockets without opening the flaps. This would also give a clear reason why Mr. Burns did not know what was in the pocket after another individual wore his jacket the night before he wore it to school.

(3). Trial counsel was ineffective when he failed to submit any pre-trial motions to challenge the custodial interrogation, to admit the jacket into evidence, to suppress the alleged evidence discovered in the jacket, and to prevent defense witness amber Clifton from being excluded from testifying because his objection was not on point as to the violation of the Washington state constitution article I section 22 therewith U.S. constitution amendment six both guaranteeing Mr. Burns right to call witnesses in his behalf.

B. ARGUMENT:

Mr. Burns meets the first prong of **Strickland** showing that (1) trial counsel's performance fell below an objective standard of reasonableness when (2) trial counsel failed to file a motion to suppress the illegally seized evidence, (3) trial counsel failed to submit the jacket to be admitted into evidence, when the jacket would have rebutted states witnesses that falsely testified that they could see the drugs just by looking at the jacket." (4) When trial counsel failed to make timely and constructive objections to the court excluding defense witness amber Clifton from testifying about someone else wearing the jacket in question prior to Mr. Burns wearing the jacket.

Mr. Burns meets the second prong of **Strickland** because counsel's deficient performance beyond any doubt prejudiced Mr. Burns, if the jacket would have been admitted into evidence the jury would have been able to acknowledge that states witnesses was testifying falsely about being able to see the contents of the jacket just by looking at the jacket, **See Hart v. Gomez, 174 F.3d , 1067, 1073 (9TH Cir. 1999).** (2) Had trial counsel filed a motion to suppress the illegally seized evidence all criminal charges would have had to be dismissed? See, **kimmelman v. Morrison, 477 US 365, 385 (1986).** See also, counsel's failure to seek suppression of only evidence against defendant was ineffective assistance because evidence was clearly obtained in violation of the **4th Amendment and Washington state const. Art. I section 7, See, Northrop v. Trippett, 265 F.3d 372,383 (6th cir. 2001).**

In addition, trial counsel was deficient in jury selection and repeatedly asked Mr. Burns who knows nothing of the process what he thought he should do.

Trial counsel failed to make proper objections to the court's order excluding Mr. Burns only one of two witnesses from testifying about **someone else** wearing the jacket before Mr. Burns put it on the next morning.

Trial counsel failed to contact all defense and states witness to interview them before testifying.

Trial counsel failed to file any pretrial motions and to prepare a proper defense, See, **Groseclose v. Bell, 130 F.3d 1161, 1170 (6th cir. 1997), See also, Williams v. Washington, 59 F.3d, 673, 679-83 (7th cir. 1995).**

__ Trail counsel never called as witnesses E.M.T. personnel or school personnel, who were present, to testify as to the illegal search and seizure of Mr. Burns property by security personnel. Trial counsel failed to prepare Mr. Burns to testify or to inform him of the hearsay rule. See, **Pavel v. Hollins, 261 F.3d, 210, 216 (2nd cir. 2001).**

Trial counsel failed to request a jury instruction for a lesser included charge or sentence.

As shown above Trial counsel's performance fell below an objective standard of reasonableness and (2) Trial counsel's deficient performance prejudiced Mr. Burns resulting in an unreliable or fundamentally unfair outcome in the trial.

Ground # 5:

Prosecutorial misconduct where prosecutor failed to fully investigate based on two defense witnesses including Mr. Burns stating that the drugs belonged to someone else.

Prosecutor must at least investigate to conquer reasonable doubt in the states mind as well as the jury. See, **Northern Mariana island v. Bowie 243 F.3d 1109, 1118 (9th cir. 2001)** ; See also, **Morris v. Ylst, 447 f.3d 735 (9th cir. 2006).**

Defense witness Ms. Amber Clifton, Vernice McAllister and the defendant Mr. Burns all stated that someone else had control and used the jacket prior to Mr. Burns and also testified about how large the jacket was and the many pockets with "flaps and buttons" even making the person wearing the jacket not be able to know what's in jacket without a thorough search.. This should have convinced the prosecutor to at least look into the foregoing facts and the possibility that the alleged drugs belonged to someone else.

Ground # 6:

Trial court abused its discretion when it denied defendant's timely motion/letter to the court for removal of trial counsel due to trial counsel being very ineffective:

B: argument:

Prior to sentencing Mr. Burns made two attempts to have trial counsel removed and to have a different counsel at sentencing by motion and by letter, and again through Ms. Amber Clifton by phone to trial counsel. See, **-(Verbatim report July 8, 2011 pages 2, 3, 4, 5, and 6)**. The court contradicts it self by stating only one letter was filed **page 3 at 18** then states at **page 4 at 11** that she passed the request to defense table in court. The defendant made a valid timely request for new counsel at sentencing due to trial counsel being completely ineffective.

Trial court should have granted the defendant's request for discharge of trial counsel because the request was timely and mature and the record reflects that trial counsel was completely ineffective.

II. (CONCLUSION)

Errors of constitutional magnitude was committed at this trial being, **(1)** abuse of discretion, **(2)** Prosecutorial misconduct, **(3)** Ineffective trial counsel, **(4)** Denial of defendant's right to testify, **(5)** denial of right to defend, **(6)** Denial of right to call witnesses on defendant's behalf, **(7)** illegally seized evidence and other errors herein stated.

There is no doubt this conviction must be reversed and dismissed with prejudice in accordance with the laws of Washington State and of America.

MOREOVER, MR. BURNS PRAYS...

I certify and or verify that the foregoing is true and correct to the best of my knowledge under penalty of perjury pursuant to the laws of Washington signed and executed this ___ day of _____, 2012. @ Monroe, WA.

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