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In the Court of Appeals
For Division I

Keith Blair, Appellant. Vs. State of Washington, Respondents.	Statement of Additional Grounds Pursuant to RAP 10.10 Case# 67875-2

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I. Facts

The appellant now comes forth to state that had he been able to continue to have the right to Counsel of choice. that these arguments that follow would have never occurred and this case would have been dismissed or found not guilty.

was the defendants right to Counsel by choice violated in this present case herein?

The states argument to have the defendants attorney removed was due to the state calling him as a witness in this present case which as seen never occurred and now violates this defendants rights.

The right to counsel does include a limited right to counsel of choice. E.g., United States V. Washington, 797 F.2d. 1461, 1465 (9th Cir. 1986)(It is settled Law that under the sixth Amendment criminal defendants who can afford to retain counsel have a qualified right to obtain counsel of their choice, (quoting United States V. Ray, 731 F.2d. 1361, 1365 (9th Cir. 1984)).

A recent United States Supreme Court decision, United States V. Gonzalez-Lopez, 126 S.Ct. 2557, 165 L.Ed. 2d. 409, 2006 U.S. Lexis, 5165 (2006), provides an absolute right to

Counsel of choice.

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. They have previously held that an element of this right of a defendant who does not require appointed counsel to choose who will represent him. (see): Wheat v. U.S., 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d. 140 (1988). C.F. Powell v. Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

Gonzalez-Lopez, 126 S.Ct. at 2561, Further Stated:

So also with the Sixth Amendment right to Counsel of choice it commands, not that a trial be fair, but that a particular guarantee of fairness be provided to-wit, that the accused be defended by the counsel he believes to be best. The constitution guarantees a fair trial through the due process clause, but it defines the basic elements of a fair trial largely through the several provisions of the sixth Amendment

including the counsel clause. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial and that right was violated because the deprivation of counsel was erroneous. No [redacted] additional showing of prejudice is required to make the violation complete.

The state must now convince the court beyond a reasonable doubt that the appellants trial outcome would have been the same absent the errors. State V. Guloy, 104 Wash. 2d. 412, 425, 705 P.2d. 1182 (1985).

Due to the [redacted] Ex Parte Judge ruled to disqualify the counsel of choice in this matter, the misconduct committed is so serious that it constitutes reversible error. The courts will reverse a verdict for general Judicial misconduct only if it rendered the trial unfair. Kennedy V. Los Angeles Police Department, 901 F.2d. 702, 709 (9th cir. 1990); (see also); United States V. Singer, 687 F.2d. 1135 (8th Cir. 1982).

Does the Prosecution in this matter show vindictiveness?

It was clear that the prosecution was

upset that the defendant would not Plea guilty in these matters and did everything in her power to make this defendant suffer by disqualifying counsel, add this charge to the docket and manipulate the ineffective Counsel stipulate to the burglary charge to get a clear and easy conviction. 1RP 134, 135, 1RP 34, 35

Prosecutorial vindictiveness is an intentional filing of a more serious crime in relation for a defendants lawful exercise of a procedural right which adding this charge made this probable cause a more serious crime. State v. Borisisio, 92 wn. App. 783, 790, 964 P.2d. 1222 (1998) (quoting State v. Lee, 69 wn. App. 31, 35, 847 P.2d. 25 (1993). (quoting State v. McKenzie, 31 wn. App. 450, 452, 642 P.2d. 760 (1981)), review denied, 137 wn.2d. 1024 (1999).

Was the Prosecutors misconduct so flagrant that it caused unfair trial?

(A). Leading questions.

The prosecutor had taken advantage of having ineffective assistance now representing

this defendant and had made a stipulation to yes and no questions that result in leading questions to where all the answers wanted was received and left the burden of counsel unable to properly cross-examine this crucial witness 1RP6061.

The confrontation clause of the Sixth Amendment to the United States constitution guarantees a criminal defendant the right to cross-examine adverse witnesses. State v. Clark, 139 Wn.2d. 152, 157-58, 985 P.2d. 377 (1999). And E.R. 611(c) permits the use of leading questions in cross-examination of a witness. By highlighting the defendants exercise of a constitutional right and thereby suggesting that the jury draw a negative inference from the exercise of that right, the state may chill the defendants exercise of his rights. See e.g., United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed. 2d. 138 (1968); Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d. 106 (1965). State v.

Mace, 97 Wn.2d. 840, 844, 650 P.2d. 217 (1982), Thus, such conduct may violate the defendants right to Due Process. Jackson, 390 U.S. at 581, State v. Belgrade, 110 Wn. 2d. 504, 512, 755 P.2d. 174 (1988).

A leading question is one that suggests the answer desired. State v. Scott, 20 Wn.2d. 696, 698, 149 P.2d. 152 (1944); (See also) 1 RPC 68-71.

ER 611(c), provides that leading questions should not be used during direct examination except as may be necessary to develop the witnesses testimony. Although the asking of Leading questions is generally not reversible error, the persistent pursuit of such a course of action is a factor to be added in the balance. State v. Torres, 16 Wn. App. 254, 258, 554 P.2d. 1069 (1976).

When determining the prejudicial effect of the conduct, the courts look to the context of the entire argument, the issues of the case, the evidence, and the Jury Instructions. State v. Brown, 132 Wn.2d. 529, 561, 940 P.2d. 546 (1997).

(B). Misstatement of facts (Harmless error test).

when the prosecutor in closing Arguments stated that the defendant payed the amount of $340,000.00 and the $30,000.00 could have made the Jury believe that there was substantial amounts of money involved due to the fact that the prosecuter was try to establish that this was the amount proven in the previous trial with all the matters combined. 1RP150.

The courts hold that the Brecht Harmless error standard applies when there has been a failure to engage in the "close appellate Scrutiny" required when a state appellate court engages in a walton analysis. under Brecht, an error is "not harmless" if it has a substantial and injurious effect or influence in determining the Jury's verdict. Brecht V. Abrahamson, 507 U.S. at 637, 113 S. Ct. 1710 (quoting Kotteakos V. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

The State, rather than the defendant, bears the "risk of doubt" in their harmless-error analysis. (see): O'Neal v. McAninch, 513 U.S. 432, 439, 115 S.Ct. 992, 130 L.Ed.2d. 947 (1995).

Thus, the state must proulde the court with a "fair assurance" that there was no substantial and injurious effect on the verdict. Gray v. Klauser, 282 F.3d. 633, 651 (9th Cir. 2002); United States v. Hitt, 981 F.2d. 422, 425 (9th Cir. 1992); See also O'Neal, 513 U.S. at 443, 115 S.Ct. 992 (the state normally bears responsibility for the error that infected the initial trial), Payton v. Woodford, 299 F.3d. 815, 828, (9th Cir. 2002) (only if the state has persuaded the court that there was no substantial and injurious effect on the verdict do the courts find the error harmless).

(C). Improper comments

The prosecutor during her arguments

made numerous improper comments that could establish misconduct in this trial that could substantiate reversable error or possibly dismissal. 1 RP. 61, 68, 69, 71, 117, 120, 134-36, 149-50.

To establish prosecutorial misconduct, a party must show that the prosecutors improper conduct caused prejudice in the context of the entire record and circumstances at trial. State v. Hughes, 118 wash. App. 713, 727, 77 P.3d. 681 (2003), review denied, 151 wash. 2d. 1039, 95 P.3d. 758 (2004).

A prosecutor improperly comments when he or she encourages a jury to render a verdict on facts not in evidence. State v. Stover, 67 wash. App. 228, 230-31, 834 P.2d. 671 (1992), review denied, 120 wash. 2d. 1025, 847 P.2d. 480 (1993). A Party establishes prejudice if there is a substantial likelihood that the misconduct affected the verdict. State v. Pirtle, 127 wash. 2d. 628, 672, 904 P.2d. 245 (1995), Cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d. 1084 (1996).

Was Kelsey Johnson actually a rellable witness or a person trying to avoid a conviction?

There was numerous times during the questioning of even leading questions that the States leading witness Kelsey Johnson was shown as unrellable. 1RP.120, 135-36. That is why the court should now defer from all the statements that were made by her, due to the courts in the past have deferred to the factfinder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 wn.2d. 821, 874-75, 83 P.3d. 970 (2004), Carnarillo, 115 wash.2d. at 71, 794 P.2d. 850.

Just as affidavits in support of search warrants shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent

to testify to the matters stated therein. The affiant must testify to facts based on personal knowledge. Grimwood v. University of Puget sound, Inc., 110 wn.2d. 355, 359, 753 P.2d. 517 (1988). A "fact" is a reality rather than supposition or opinion, Grimwood, 110 wn.2d. at 359.

Did the Detective Commit Misconduct During Testimony?

It was obvious that the detective during his testimony knew if he was completely honest of how his interview went with Kelsey Johnson it would make her credibility weakened and untruthful, and that had now given him motivation to be untruthful. IRP 135-36. Judge Schultheis of the court of Appeal (Div. 3), characterized such behavior as outrageous Police misconduct and in possible violation of the Due Process Clause of the Fourteenth Amendment so as to shock the Judicial Conscience. State v. Valentine, 75 wash. App.

611, 625, 879 P.2d. 313 (1994), review granted, 128 wash.2d. 1001, 907 P.2d. 298 (1995), (see also): State v. Lively, 130 wash.2d. 1, 921 P.2d. 1035, 1044-49, 65 U.S.L.W. 2180 (1996)

Did this Ineffective Assistance of Counsel result in Manifest ERROR?

Generally, an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. R.A.P. 2.5(a)(3). The appellant must show actual prejudice in order to establish that the error is manifest. State v. Munguia, 107 wn. App. 328, 340, 26 P.3d. 1017 (2001) (citing State v. Mcfarland, 127 wn.2d. 322, 333, [redacted] 899 P.2d. 1251 (1995)), review denied, 145 wn.2d. 1023 (2002), under both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at critical stages in the litigation. State v. Heddrick, 166 wn. 2d. 898, 909-10, 215 P.3d. 201 (2009) (citing U.S. Const. Amend VI; Wash. Const. Art. I § 22. State v.

Everybody talks about, 161 Wn.2d. 702, 708, 166 P.3d. 693 (2007).

Sentencing is also considered a critical stage of a criminal proceeding. State v. Robinson, 153 Wn.2d. 689, 694, 107 P.3d. 90 (2005).

Effective assistance of counsel is guaranteed under the Federal and State Constitutions. U.S. Const. Amend. VI; Wash. Const. Art. I § 22.

A criminal defendant has the right under the Sixth Amendment to effective assistance. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984).

To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. State v. Turner, 143 Wn.2d. 715, 730, 23 P.3d. 499 (2001); State v. Thomas, 109 Wn.2d. 222, 225, 226, 743 P.2d. 816 (1987).

Counsels Performance is deficient if it falls below an objective standard of reasonableness. State v. McNeal, 145 Wn.2d. 352, 362,

37 P.3d. 280 (2002). State v. Stenson, 132 Wn. 2d. 668, 705, 940 P.2d. 1239 (1997).

Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed which in this case is clear that it would by the State Prosecutors actions in this matter at hand herein. In re Personal Restraint of Pirtle, 136 Wn. 2d. 467, 487, 965 P.2d. 593 (1998).

The test for determining whether a constitutional error is harmless is whether it appears "beyond a reasonable doubt" that the error complained of did not contribute to the verdict obtained. Neder v. U.S., 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d. 35 (1999) (quoting Chapman v. Cal., 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d. 705 (1967), (See also): State v. Easter, 130 Wn. 2d. 228, 242, 922 P.2d. 1285 (1996) (court finds constitutional error harmless "only" if convinced beyond a reasonable doubt that any reasonable Jury would reach the same result without the error).

Did the actions of all Parties Amount to a dismissal of Charges?

Under C.r.R.8.3(b), a court may dismiss any criminal prosecution due to Arbitrary Action or Governmental Misconduct when there has been prejudice to the rights of the accused which materially effect the accused's right to a fair trial. To obtain dismissal, a defendant must show (1) arbitrary governmental action or misconduct that (2) Prejudices the defendants right to a fair Trial. State v. Miller, 92 wn. App. 693, 702, 964 P.2d. 1196 (1998) (citing State v. Michielli, 132 wn. 2d. 229, 239-40, 937 P.2d. 587 (1997)). The misconduct need not be of an evil nature, simple mismanagement is enough. Michielli, 132 wn. 2d. at 239. The Court of Appeals will review an issue of manifest abuse of discretion, i.e., a ruling based on untenable grounds or reasons. Miller, 92 wn. App. at 702.

Did the Prosecutor Once Properly establish the Law Surrounding Money Laundering?

The courts must look at the record at a hole and decide whether the prosecutor had actually applied the State interpretation of Money Laundering to the actions of what the defendant is now being accused of and decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. 2781.

III. Conclusion

The Appellant asks that this court now concludes that this case should now be "dismissed with Prejudice" at hand.

I swear under the penalty of perjury that all statements are true to the best of my knowledge.

Dated this 6th day of February, 2013.

Appellant