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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
Respondent,)	No. <u>36534-1-II</u>
)	
V.)	STATEMENT OF ADDITIONAL
)	GROUND FOR REVIEW
)	PURSUANT RAP 10.10
KENNETH LANE SLERT)	
Appellant,)	

I, KENNETH LANE SLERT, have recieved and reviewed the opening brief prepared by my attorney. Summarized in this brief are the additional grounds for review that are not addressed in their brief. I understand the Court will review this Statement of Additional Grounds for Review when my new appeal is considered on the merits. I do hereby bring to the attention of this Honorable Court that this is the second time this case is on Appeal in this Court, I respectfully request that this Court will carefully weigh the balance of this case to suit the equality of justice, thus reviewing all the facts set forth by the record's of this case.

PVI 2-8-08

1) 1

ADDITIONAL GROUNDS ONE

2 A. DID THE PRECEDING JUDGE COMMIT JUDICIAL MISCONDUCT
3 BY NOT RECUSING HIMSELF, THEREFORE VIOLATING THE
4 APPEARANCE OF FAIRNESS DOCTRINE AND CANNON 3 (D)
5 (1)(a) OF THE CODE OF JUDICIAL CONDUCT ?

6 Any allegation the appellant claims he must show that
7 it is not mere speculation and/or conjecture, therefore set-
8 ting forth the truth, facts, and evidence of the allegations
9 in the case, he will prevail. The evidence presented here is
10 part of the record of this case, as you will review the trial
11 transcripts marked as Exhibit(s). There has been a magnitude
12 of prejudice and bias, by and through the act of Judicial
13 Misconduct of the preceding judge in this case, and due to
14 the fact that recusal is a base issue here there has been a
15 violation of Appearance of Fairness of Doctrine. Recusal lies
16 within the discretion of the trial judge, whose decision will
17 not be disturbed absent a clear showing of abuse of that
18 discretion. In re Marriage of Farr, 87 Wn.App.177,188,940
19 P.2d 679 (1997). The court abuses its discretion only when
20 its decision is manifestly unreasonable or is exercised on
21 untenable grounds or for untenable reasons. State ex rel.
22 Carrol v. Junker, 79 Wn.2d 12,26,482 P.2d 775 (1971).

23 Due process, the appearance of fairness, and Cannon 3
24 (D)(1) of the Code of Judicial Conduct require disqualificat
25 ion of a judge who is biased against a party or whose impart
26 iality may be reasonably questioned.

1 State v. Dominguez, 81 Wn.App.325,328,914 P.2d 141 (1996).

2 The trial court is presumed, though, to perform its function
3 s regulary and properly without bias or prejudice. Kay Corp.
4 v. Anderson, 72 Wn.2d 879,885,436 P.2d 459 (1967); Jones v.
5 Halvorson-Berg, 69 Wn.App.117,127,847 P.2d 945 (1993).A part
6 y claiming to the contrary must support the claim; prejudice
7 is not prusumed as it is when a party files an affidavit of
8 prejudice under RCW 4.12.050. Dominguez, 81 Wn.App. at 328-
9 29. In appellant Slert's case his trial lawyer never filed
10 an affidavit of prejudice, and/or even objected to the known
11 fact of the judges bias and prejudice of the case as to the
12 (3) three State witness's, especially former Deputy Prosecut
13 ing attorney Accuri, whom the judge completely discretited
14 of credibility because of his bias in the case. See Exhibit
15 (1) trial transcripts pages 106-109 judge Hunt's prejudiced
16 and bias statement.

17 **CANNON 3 JUDGES SHALL PERFORM THE DUTIES OF THEIR OFFICE**
18 **IMPARTIALLY AND DILIGENTLY. (D) Disqualification**

19 (1) Judges should disqualify themselves in a proceeding
20 in which their impartiality might reasonably be question
21 ed, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concernin
22 g a party, or personal knowledge of disputed evidentiary
23 facts concerning the proceeding;

24 A party asserting an appearance of fairness claim must
25 show evidence of actual bias to support that claim.Swoboda
26 v. Town of La Conner, 97 Wn.App.613,628,987 P.2d 103 (1999).

The party must produce sufficient evidence demonstrating
bias, e.g., personal or pecuniary interest on the part of

1 the decision maker; mere speculation is not enough. In re
2 Pers. Restraint of Haynes, 100 Wn.App.366,377 n.23,996 P.2d
3 637 (2000). Here there is no speculation the language is
4 clear on the face of the documents, (Exhibit 1 pages 106-109)
5 the judge was percise and clear to his judgment between the
6 (3) three State witness's, as he spoke about the credibility
7 of these men, by his own admission of all their dealings in
8 the judicial system, and association outside of the workplace
9 he is adamant about his decision, he even admitted that he
10 should of recused himself from the case but did not do so.

11 Decisions on recusal are reviewed for an abuse of
12 discretion, Due process, appearance of fairness and cannon
13 3 (D)(1) of the Code Of Judicial Conduct require a judge to
14 recuse himself where there is bias against a party or where
15 impartiality can be questioned. The test for whether a judge
16 should disqualify himself where his impartiality might
17 reasonably be questioned is an objective one. Here the judge
18 blatantly explained his relationship with the (3) State's
19 witnes's, Accuri, Randolph, and McCrowskey, elaborating on
20 who's testimony had credibility. Where a judge's decisions
21 are tainted by even a mere suspicion of partiality, the
22 effect on the public's confidence can be debilitating. The
23 cannons of judicial conduct should be viewed in broad fashon,
24 and judges should err on the side of caution. Under Cannon
25 3 (D)(1) Judges should disqualify themselves in a proceeding
26 in which their impartiality might reasonably be questioned.

1 In Sherman, the court found that where a trial judge
2 may have invertently obtained information critical to a
3 central issue, and that a reasonable person might question
4 his impartiality. The appearance of bias or prejudice can be
5 as damaging to public confidence in the administration of
6 Justice as would be the actual presence of bias or prejudice.
7 State v. Madry, 8 Wn.App.61,70,504 P.2d 1156 (1972); Brister
8 v. Tacoma City Council, 27 Wn.App.474,486,619 P.2d 982 (1980)
9 "The critical concern in determining whether a proceeding
10 appears to be fair is how it would appear to a reasonably
11 prudent and disinterested person". Brister, 27 Wn.App. at
12 486-87 (citing Chicago, M., St.P. & Pac.R.R. v. State Human
13 Rights Comm'n, 87 Wn.2d 802,557 P.2d 307 (1976). To prevail
14 under the appearance of fairness doctrine, the claimant must
15 provide some evidence of the judge's or decision maker's
16 actual or potential bias. State v. Post, 118 Wn.2d 596,619
17 n.9,826 P.2d 172,837 P.2d 599 (1992). Here the appellant has
18 shown the evidence on the face of the documents, see Exhibit
19 (1) pages 106-109 (2) pages 54,55 & 65-82. In State v. Slert
20 the judge was adamant about his relationship with the State
21 witness's , whom were prior close co-workers and friends, as
22 to his viewing of their credibility as to their testimonies
23 and said reports. The judge by law and rules should have at
24 best recused himself from this case, he even stated in his
25 own words he should have recused himself, see Exhibit (1)
26 pages 107-109, just as the judge did so in State v. Graham,

1 91 Wash.App.663,960 P.2d 457 (Wash.App.Div.2)7/17/1998) the
2 judge was aware that he was in violation of a Code of Judici
3 al Conduct rule and therefore recused himself. Judges should
4 disqualify themselves in which their impartiality might
5 reasonably be questioned.

6 § 1180. In General D. Remarks and conduct of Trial Judge
7 The trial judge should at all times be cautious in what
8 he says and does in the presence of the jury, and his
9 remarks and conduct in participatating in the trial and
10 facilitating its progress should be impartial and not
11 prejudicial to either the prosecution or the accused.

12 (Criminal Law-654,655 (1-3,7)660.

13 In addition, he must take care to maintain a properly
14 judicious role, and not interject himself into the
15 trial improperly, and assume a role of an advocate, but
16 must, instead. in conducting the trial, respect the
17 traditional rules and concepts which guarantee defendan
18 ts right to a fair trial. He has a responsilbility to
19 direct the trial in a manner which facilitates the
20 ascerntainment of truth, insure fairness, and obtain
21 economy of time and effort commensurate with the rights
22 of both society and defendant.

23 Appearance of Fairness Doctrine, A Judicial proceeding
24 is valid under the appearance of fairness doctrine only if
25 a reasonable prudent and disinterested observer would includ
26 e that all parties obtained a fair, impartial and neutial
hearing. State v. Ladenburg, 67 Wash.App.749,754-55,840 P.2d
228 (1992); State v. Post, 118 Wash.2d 596,618,826 P.2d 172,
modified,837 P.2d 599 (1992). The doctrine is directed at
the evil of a biased or potentially interested Judge or
quasi-judicial decision maker. Post 118 Wash.2d at 619; see
also State v. Perez, 77 Wash.App.372,378,891 P.2d 42. The
appearance of fairness doctrine requires that a judge not
only be impartial, but also appear impartial.

1 State v. Martinez, 76 Wash.App. 1,8,884 P.2d 3 (1994);
2 State v. Bilal, 77 Wn.App.720,722,893 P.2d 674 (1995);
3 State v. Dugan, 96 Wn.App.346,354,979 P.2d 885 (1999); Here
4 appellant Slert in his claim of appearance of fairness has
5 produced the evidence of actual bias of the judge by the
6 judges own statements. In State v. Chamberlin, No.79712-9
7 (Wash.07/19/2007), The United States Supreme Court reasoned
8 that what the judge learned in his secret sessions was likely
9 to weigh far more heavily with him than any testimony given
10 in subsequent open hearings. Murchison, 349 U.S. at 138. In
11 explaining his guilty finding the judge "called on his own
12 personal knowledge & impression of what occurred in the Grand
13 Jury room" an impression that could not be tested by adequate
14 cross-examination. Murchison. 349 U.S. at 138. Under these
15 circumstances, the U.S. Supreme Court Reversed the Convictio
16 ns. Chamberlin argues judge Hancock should have recused
17 himself, citing actual Bias & the Appearance of Fairness,
18 the right to a fair hearing under the federal Due Process
19 clause prohibits actual bias and the probability of unfairne
20 ss. Withrow v. Larkin, 421 U.S. 35,47,95 S.Ct. 1456,43 L.Ed.
21 2d 712 (1975)(quoting In re Murchison, 349 U.S. 133,13675
22 S.Ct.623,99 L.Ed.942 (1955). In certain instances the duty
23 to recuse is non-discretionary because the probability of
24 actual bias on the part of the judge or decision maker is to
25 be constitutionally tolerable. Withrow,421 U.S. at 47. These
26 instances include the adjudicator has pecuniary interest in

1 the outcome or where the judge has been the target of
2 personal abuse or criticism from the party before him. An
3 assertion of an unconstitutional risk of bias must overcome
4 a presumption of honesty & integrity accruing to judges. See
5 Withrow, 421 U.S. at 47; See also Jones v. Halvorson-Berg,
6 69 Wn.App. 117,127,847 P.2d 945 (1993) Presumption judges
7 perform functions regularly & properly & without bias or
8 prejudice. The right to procedural due process is guaranteed
9 under the Washington Constitution article 1 section 3 and
10 the United States Constitution amendments V and XIV, section
11 1. The Washington Constitution provides the same scope of
12 protection as the United States Constitution. Manussier, 129
13 Wn.2d at 679. "A reasonable probability is a probability
14 sufficient to undermine confidence in the outcome".

15 It is obvious that the magnitude of bias and prejudice
16 in this case is overwhelming as to the judges statements on
17 his opinion of the State's witness's, Accuri, Randolph, and
18 McCrowskey and their credibility as to their testimony in
19 this case; please see Exhibit (1) pages 106-109, & 97-100. As
20 you will notice the judge has sided with Randolph and his
21 good friend McCrowskey, thus disputing the credibility of a
22 former Deputy Prosecuting Attorney Mr. Accuri, who was in
23 office at the time of the initial incident. Mr. Accuri did
24 advise Mr. Randolph, and Mr. McCrowskey both that it would
25 be a violation of Defendant/Appellant Slerts Constitutional
26 rights if the attempted to prosecute him due to the illegal

1 tape recording that Mr. McCrowskey taped of Slert on the drive
2 to Lewis County Jail, as McCrowskey never informed Slert that
3 he was recording him thus violating his rights, please see
4 Exhibit (2) pages 65-87. Seeing the relationship that the
5 judge had with former prosecutor Randolph and former Sheriff
6 McCrowskey, it's apparent that the (3) three are siding all
7 together in this case to get a conviction. The major concern
8 lies to the fact that the Lewis County Prosecuting Attorney's
9 office waited until Deputy Prosecuting Attorney Accuri was
10 out of office before they pursued Kenneth Slert (4) four or
11 so years later to charge him with the crime and seek a felony
12 murder conviction, knowingly that only Accuri, Randolph, and
13 McCrowskey were the only individuals that knew of the taped
14 recording that originally prevent the State from prosecuting
15 Kenneth Slert due to the magnitude of the Constitutional
16 violation that was committed in that act by McCrowskey. Now
17 (4) Four plus years later Accuri is gone and it's swept up
18 in secret, and Randolph and McCrowskey suddenly have a case
19 of amnesia and cannot remember anything about this illegal
20 tape recording by former Sheriff McCrowskey, which was the
21 sole reason the State never charged Kenneth Slert for the
22 crime. These facts are evidence and are of record by and
23 through the transcripts of this case, it is apparent that due
24 to the friendship of the Judge, Randolph, and McCrowskey that
25 there is more than just bias and prejudice, it seems to be
26 that there is favoritism as to Mr. Randolph and Mr. McCrowskey by the

1 judge in his own words, see Exhibit (1) pages 97-100 & 106-109. Trial
2 Court Misconduct, actually Judicial Misconduct are at best viewed here
3 in this case. The law goes further than requiring an impartial judge;
4 it also requires that the judge appear to be impartial. State v. Madry,
5 8 Wn.App. 61,70,504 P.2d 1156 (1972). Appellant Slert has produced the
6 evidence needed to prove the judges actual bias and prejudice to prove
7 his claim of Judicial Misconduct, and Appearance of Fairness Doctrine
8 as to this case. Appellant has obviously been a victim of Judicial
9 Misconduct by and through the actions and statements of the judge, and
10 need this court look any further as to the favoritism, closeness, and
11 freindship the judge has with Mr.Randolph and Mr.McCrowskey from his own
12 statements as seen in the transcripts. Due Process, the appearance of
13 fairness, and canon 3 (D)(1) of the Code of Judicial Conduct require
14 disqualification of a judge who is biased against a party whose
15 impartiality may be reasonably questioned. Wolfkill Feed & Fertilizer
16 Corp. v. Martin, 103 Wn.App.836,841,14 P.3d 877 (2000). Here it is truly
17 unquestionable that there was severe biased against a party in this case
18 as to Mr.Accuri and even the Defendant/Appellant Mr.Slert, therefore
19 the judge should have recused himself from this case. Since the judge
20 chose not to do so there has been a wide magnitude of Misconduct, thus
21 violating the appearance of fairness doctrine, causing a complete
22 miscarriage of justice with this case. Due to the facts and evidence set
23 forth in this (SAG), Appellant Slert respectfully requests that this
24 court will carefully weigh the balance of this case to suit the equality
25 of justice, therefore seeking the reversal of his conviction(s) and a
26 dismissal with prejudice, or whatever this court deems appropriate.

2)

ADDITIONAL GROUNDS TWO

1
2 A. DID THE STATE'S PROSECUTING ATTORNEY COMMIT PROSECUTORIAL
3 MISCONDUCT, PROSECUTORY ERROR, PREJUDICIAL ERROR AND AT BEST
4 VINDICTIVE PROSECUTION, WHEN HE ALLOWED A JAILHOUSE SNITCH
5 INFORMANT TO TESTIFY TO ASSIST THE STATE IN SUPPORT OF A
6 CONVICTION AGAINST KENNETH L. SLERT ?

7 Did the prosecution rely on the help of a convicted felons said
8 testimony to obstruct justice by tainting the jury, as to the information
9 the the informant claimed he recieved by the defendant/appellant Slert
10 while they were together serving time in the Lewis County Jail ? There
11 is a two prong test for the use of an infomants testimony, and in this
12 case that test was not satisfied. When it comes to informant credibility
13 in reviewing an informants tip, we apply the Aquilar-Spinelli test,
14 under this, "When the existance of probable cause depends on an informan
15 ts tip, the informants information as well as the credibility of the
16 informant". State v. Cole, 128 Wash.2d 262,287,906 P.2d 925 (1995)
17 (citations omitted). In Washington State v. Hensley, No.20629-3-II
18 (Wash.App.Div.2 08/28/1997) [22] The privacy act.[23] A police officer
19 may obtain judicial authorization to record conversations with a non-
20 consenting party if there is probable cause to believe that the party
21 has committed, is engage, or is about to commit a felony. RCW 9.73.090
22 (2). The application for authorization must be in writting & contain
23 [A] particular statement of facts showing that other normal investigative
24 procedures with respect to the offense have been tried & have failed
25 or reasonably appear to be unlikely to succeed if tried or to be too
26 dangerous to employ, RCW 9.73.130 (3)(f). In Washington State v. Reed,
No.19798-7-II (Wash.App.Div.2 08/22/1997). [42] The basis of information
prong is satisfied if the informant is passing on firsthand information

1 i.e., informant saw the facts asserted. State v. Jackson, 102 Wash.2d
2 432,437,688 P.2d 136 (1984).[43] The "Credibility Prong" is satisfied
3 by the officers oath that the informant has furnished reliable informati
4 on in the past. Jackson, 102 Wash.2d at 437. The most common way to
5 satisfy the "Veracity Prong" is to evaluate the informants 'track record
6 i.e., has he provided accurate information to the police a number of
7 times in the past ? Jackson, 102 Wash.2d at 437. If the informants track
8 record is inadequate, this prong can be satisfied by indications that
9 the statements were against the informants penal interest. Jackson, 102
10 Wash.2d at 437. If the informants tip fails under either or both prongs
11 probable cause still may be established by independant police investiga
12 tion. Hupt, 106 Wash.2d at 210. Due to the fact that it was an ongoing
13 case pobable cause was at best probable, but why and how the prosecution
14 out of no where produces this jail house informant and do note in the
15 informants testimony it cooborates with the majority of the discovery
16 to this case, and what ever else the informant decided to add to it,
17 please see Exhibit (3) pages 10,11,110-113,116-19,297-332..

18 Here the State claims there was no deal made with their
19 informant Douglas Schwenk, the question arises that was he
20 given any leniency given the fact that it is a rarity that
21 any person who is an informant will be willing to testify
22 without some type of deal made with the prosecution on their
23 own case and/or charges pending. In Washington State v. Soh,
24 No.48433-8-I (Wash.App.Div.1 02/03/2003) the State failed to
25 disclose a promise of leniency made to its key witness.

26 [13] Prosecutorial Misconduct may require dismissal of all

1 charges where it results in prejudice to the right to a fair
2 trial, here the State failed to disclose a promise of lenien
3 cy made to its key witness. [16] Thomas had previously worked
4 as an informant for the WSP. He immediately agreed to coopor
5 ate with law enforcement by providing information on his
6 dealings with Soh & by testifying in Soh's trial for exchange
7 for consideration at sentencing.FN 1 This agreement was
8 disclosed to Soh in discovery, & Soh's counsel intervieded.
9 Both Thomas & Detective Liburdi reguarding their expectations
10 from Thomas cooperation. Charges against Thomas were servered
11 [17] On Februaury 27, shortly after Thomas trial was servered
12 an exchange occured involving Thomas's attorney, the Deputy
13 Prosecutor, & Detective Liburdi. The meeting apparently
14 resulted in a promise of a substantial reduction of the
15 charges*Fn2 against Thomas. Specifically in exchange for his
16 ~~cooperation~~ & testimony against Soh, the WSP agreed not to
17 pursue charges relaiting to numerous auto theft offenses
18 outside Whatcom County to which Thomas had confessed upon
19 his arrest.[18] This agreement was not disclosed to Soh, it
20 came to the attention of Soh's attorney, however, who filed
21 a motion to dismiss Pursuant CrR 8.3 (b). [19] The State
22 denied that any agreement had been made in an in camera
23 proceeding. Thomas'attorney testified that there had in fact
24 been such an agreement. She testified that she had not
25 revealed those further promises to her client. The court
26 found the additional agreement had been made, but denied

1 Soh's motion to dismiss because Thomas had never learned of
2 it, and Soh was therefore not prejudiced. The facts here are
3 that it is more than likely that the State definitely offered
4 Douglas Schwenk some type of deal for his testimony against
5 Slert, due to the fact of his prior convictions, and the
6 considerable amount of time he spent in the Lewis County
7 jail awaiting Kenneth Slert's trial, if you were to look
8 beyond the scope, no one is going to just offer testimony
9 against a person who was charged with murder, unless there
10 was a sweet deal and/or agreement made. May the court please
11 take note that Defendant/Appellant Kenneth L. Slert has never
12 been in trouble in his whole 54 years of life, not even to
13 go as far as receiving a traffic ticket, but yet the State
14 Prosecuting Attorney was allowed to bring forward a jailhouse
15 informant that has an outstanding felony conviction record.
16 One need not look any further to the fact that vindictive
17 prosecution, by and through Prosecutorial Misconduct has at
18 best played a role in the admission of the jailhouse "snitch"
19 informant, and by the State only allowing a certain part of
20 the informant Douglas Schwenk's past record to be available
21 for the jury, shows prejudice to the defendant/appellant
22 Kenneth L. Slert's right to a fair trial. In State of Washin
23 gton v. Gary Michael Benn, No.31122-4-II (Wash.App.Div.2
24 11/15/2005) [19] The States theory was that Benn planned the
25 killings to cover up his participation with the victims in
26 an arson insurance fraud scheme, Benn 283 F.3d at 1044.

1 To prove the theory, the prosecution relied on statements
2 that Benn had allegedly made to Roy Patrick, a Jailhouse
3 informant who was Benn's cellmate before trial, Benn,283 F.3
4 d at 1044-45. [20] Even though the prosecuting attorney's
5 had first interviewed Patrick more than a year before trial,
6 they did not identify him as a witness until the day before
7 trial, Benn,283 F.3d at 1048. Moreover, Pierce County assist
8 ant Prosecuting Attorney Michael Johnson lied to the defense,
9 stating that patrick's identity could not be disclosed becau
10 se he was in a witness protection program, Benn,283 F.3d at
11 1048. Later, it came out that Patrick was never in such a
12 program, Benn,283 F.3d at 1048. In addition, the prosecution
13 failed to disclose impeaching evidence relating to Patrick
14 as well as critical exculpatory evidence showing that the
15 fire in Benns trailer, the alleged arson, was an accident,
16 Benn,283 F.3d at 1050 *Fn1 [143]*Fn1 Later, the Ninth Circuit
17 held that the withheld impeachment evidence revealed that
18 Patrick, a critical witness for the State was completely
19 unreliable, a liar for hire, (and) ready to perjure himself
20 for whatever advantage he could squeeze out of the system.
21 Benn,283 F.3d at 1059.(quoting Benn v. Wood, No.C98-5131 FDB.
22 2000 U.S. Dist. Lexis 12741 at*13-14 June 2000). Same holds
23 true here in Slert's case prosecution withheld impeachment
24 evidence relating to Douglas Schwenk's credibility and his
25 testimony that the State and prosecution relied on to taint
26 the jury and obtain a murder conviction against Slert.

1 Due to the fact that the State withheld evidence about
2 their jailhouse informant as to his record and credibility,
3 Slert asserts the Gentry case in similarity to his own case.

4 In re Personal Restraint Petition of Gentry, 137 Wash.
5 2d 378,972 P.2d 1250 (Wash. 02/18/1999), [145] 1. Probative
6 value of evidence withheld [146] At Gentry's trial Timothy
7 Hicks, a jailhouse informant, testified that while he was
8 imprisoned with Gentry, Gentry not only confessed to murder-
9 ing this young girl, but called her a "bitch", callously
10 blaming the victim by claiming this small child was leading
11 him on. Report of proceedings (RP)(6-4-91) at 4489.Fn18.
12 Hicks also testified that he recieved no benefit from the
13 State in exchange for his damning testimony against the
14 accused.RP (6-4-91) at 4491. In initial closing arguments
15 the prosecution made much of Gentry's reference to his young
16 victim as a "bitch", using the term no less than 13 times.
17 RP (6-25-91) at 5400-19 & 5542-43. The prosecution's emphasis
18 of the word"bitch" added nothing to its proof of Gentry's
19 guilt. However, it would inflame the listener's anger at
20 Gentry for further demeaning his innocent victim by referring
21 to her in such a cold & remorseless way, thus increasing the
22 likelihood that the jury would find no mercy in their hearts
23 for such a callous killer. The prosecution also asserted Mr.
24 Hicks must be believed because he didn't try to hide anything
25 RP (6-25-91) at 5545, & further elaborated that the defense
26 can show absolutely no bias & no reason why Timothy Hicks

1 came forward, except that the defendant told him about it at
2 the card table in Shelton, Washington. RP(6-25-91) at 5545-46.
3 Of course, in truth, the defense could make no such showing
4 because the prosecution withheld important information it
5 could have used to impeach Hicks. Same holds true here in
6 this case the prosecution withheld evidence about their jail
7 house informant, so the jury would sway in favor of the State
8 and believe the credibility of Douglas Schwenk the Informant.

9 Banks v. Dretke, No.02-8286 (U.S. 02/24/2004) [76] The
10 State here nevertheless urges, in effect, that the prosecution
11 can lie & conceal & the prisoner still has the burden to...
12 discover the evidence, TR of oral ARG.35, so long as the
13 potential existence of a Prosecutorial Misconduct claim might
14 have been detected, ID., at 36. A rule thus declaring Prosec-
15 utor may hide, Defendant must seek, is not tenable in a syste
16 m constitutionally bound to accord defendants due process.

17 Ordinarily, we presume that public officials have proper
18 ly discharged their official duties. Bracy v. Gramly, 520
19 U.S. 899,909 (1997)(quoting United States v. Chemical Found-
20 ation, Inc. 272 U.S. 1,14-15 (1926). We have several times
21 understood the special role played by the american prosecut-
22 or in the search for truth in criminal trials. Stricklen,527
23 U.S. at 281, accord, Kyles,514 U.S. at 439-440; United States
24 v. Bagly, 473 U.S. 667,675,N.6 (1985); Berger, 295 U.S. at 8
25 88. See also Olmstead v. United States, 277 U.S.,438,484
26 (1928)(Brandeis, J.,Disenting). Courts, litigants, & juries

1 properly anticipate that obligations (To refrain from impro-
2 per methods to secure a conviction)... Plainly rest(ing) upon
3 the prosecuting attorney, will be faithfully observed, Berger,
4 295 U.S., at 88. Prosecutor's dishonest conduct or unwarrant-
5 ed concealment should attract no judicial approbation, see
6 Kyles, 514 U.S., at 440 (The prudence of the careful prosecu-
7 tor should not...be discouraged). In the first trial of this
8 case of State v. Slert there were cumulative error's made,
9 just as in this second trial, even more so now than before.

10 It truly appears that the prosecution had an agenda
11 to get a conviction this time around, due to the fact that
12 there was a liar for hire, one who the prosecutor vouched
13 for as appellant will show in his next additional ground.

14 The prosecution needed the jury one sided because the
15 evidence truly shows that Slert was actually defending his
16 life from his attacker, whom initiated the disturbance to
17 begin with, this is why they wittingly pursued a jailhouse
18 informant to help secure the conviction. Due to the fact that
19 Slert's first trial the jury chose murder in the second,
20 instead of murder one that shows the vindictiveness in the
21 prosecution, and their desperation to win this murder case,
22 by and through the State's attorney withholding information
23 from the jury, this is a recipe for Prosecutorial Misconduct,
24 Prosecutory Error, Prejudicial Error, thus violating Due
25 Process and denying appellant Slert a fair trial, therefore
26 Defendant/Appellant Slert seeks by and through this court

1 a reversal of his convictions, and dismissal with prejudice,
2 or whatever this court deems appropriate to suit the equality
3 of justice. Please see Exhibit (3) pages 10,11,110-19,297-332.

4 3) ADDITIONAL GROUNDS THREE

5 B. DID THE STATE'S PROSECUTING ATTORNEY COMMIT
6 PROSECUTORIAL MISCONDUCT, PROSECUTORY ERROR,
7 PREJUDICIAL ERROR AND VINDICTIVE PROSECUTION
8 WHEN HE VOUCHERED FOR THE WITNESS, A JAILHOUSE
9 INFORMANT, DOUGLAS SCHWENK ?

10 If the court will review the Exhibit(s) in this (SAG)
11 the court will see that the Prosecuting attorney vouched for
12 the State's witness, their jailhouse informant, Douglas Schwe
13 nk. United States v. Frederick, 78 F.3d 1370 (9th cir.03/05/
14 1996), No.95-10135. [88] The Ninth Circuit rule on vouching
15 is clearly expressed in United States v. Roberts, 618, F.2d 2
16 530 (9th cir.1980), cert.denied, 452 U.S. 942, 69 L.Ed.2d 957,
17 101 S.Ct. 3088 (1981).[89] Vouching may occur in two ways:
18 the prosecution may place the prestige of the government
19 behind the witness or may indicate that information not
20 presented to the jury supports the witness's testimony. The
21 first type of vouching involves personal assurances of a
22 witness's veracity and is not at issue here.[90] The second
23 type of vouching involves prosecutorial remarks that bolster
24 a witness's credibility by reference to matters outside the
25 record. It may occur more subtly than personal vouching,
26 and is also more susceptible to abuse. This is the case here
as the prosecutor did knowingly vouch for their informant

1 Douglas Schwenk, and was vouching for other State witness's
2 as well. Please see Exhibit(s)(3) pages 118-19,297-332; &
3 especially closing arguments (4) 747-754, as the court will
4 see the amount of vouching done. United States v. Frederick,
5 78 F.3d 1370 (9th cir.03/05/1996) [94] Analysis of the harm
6 caused by vouching depends in part on the closeness of the
7 case. Kerr, 981 F.2d 1050 at 1054. As we stated above, the
8 outcome of Frederick's case was dependent almost entirely on
9 the testimony of S.F. which was at times unclear and incons-
10 istent. The prosecutor's impermissible remarks could have
11 helped to establish S.F.'s credibility in the minds of the
12 jury, thus affecting their verdict. We often found that
13 vouching is an error that is potentially prejudicial. In
14 Roberts we stated, "vouching for a government witness in
15 closing argument has often been held to be plain error,
16 reviewable even though no objection was raised." Roberts,
17 618 F.2d at 534. see also Kerr, 981 F.2d at 1054. (We find
18 that the repeated instances of prosecutorial vouching
19 affected the jury's verdict... and we reverse for plain
20 error); United States v. Smith, 962 F.2d 923 (9th cir.1992)
21 (reversing under plain error for prosecutorial vouching).

22 In Washington v. Sargent, 40 Wash.App.340,698 P.2d 598
23 (wa.app.04/22/1985) No.14103-1-I; The prosecuting attorney
24 in closing arguments vouched for the State's witness Jerry
25 Lee Brown Sargent's cellmate as to his credibility and the
26 testimony that he was giving against Sargent at trial.

1 Division One reversed Sargent's judgment & sentence, and
2 remanded the case back for a new trial. Improper vouching,
3 consists of placing the prestige of the government behind
4 a witness through personal assurances of the witness's
5 testimony. United States v. Leon-Reyes, 177 F.3d 816, 822
6 (9th cir.1999)(quoting United States v. Necoechea,986 F.2d
7 1273,1276 (9th cir.1993). It is not misconduct for the
8 prosecutor to argue reasonable inferences based on the record
9 Cabrera, 201 F.3d at 1250 (internal quotations and citations
10 omitted) Renderos v. Ryan, No.05-16454 (9th cir.11/08/2006)
11 Please see United States v. Younger, 398 F.3d 1179 (9th cir.
12 03/01/2005). In United States v. Kerr, 981 F.2d 1050 (9th
13 cir.12/08/1992) The court found so much Prosecutorial
14 Misconduct throughout his trial, that it affected the jury's
15 verdict and they reversed for plain error, please see
16 United States v. Wallace, 848 F.2d 1464,1473 (9th cir.1988)

17 To determine whether the prosecutor's misconduct affect-
18 ed the jury's verdict, the courts look first to the substan-
19 ce of a curative instruction. See United States v. Simtob,
20 901 F.2d 799,806 (9th cir.1990). In Slert's case there were
21 no curative instructions given, and if there were, the fact
22 that the Prosecution erred in so many areas, by their
23 comments, vouching, and asserting their own opinions, those
24 instructions would at best be void. State v. Pirtle, 127
25 Wn.2d 628,672,904 P.2d 245 (1995). A Prosecutor may not
26 appeal to the jury's passions or prejudice at any time of

1 the trial, as was done here. State v. Claflin, 38 Wn.App.847
2 850-51,690 P.2d 1186 (1984), review denied, 103 App. at 213.

3 In Washington State v. Anderson, No.45855-8-I (Wash.App
4 Div.1 08/05/2002, another case similar to Slert's case as to
5 the prosecution's actions and behavior towards the State's
6 witness's. Where improper argument is charged, the defense
7 bears the burden of establishing the impropriety of the
8 prosecuting attorney's comments as well as their prejudicial
9 effect. Russell, 125 Wn.2d at 85 citing State v. Hoffman,
10 116 Wn.2d 51,93,804 P.2d 577 (1991); State v. Huges, 106 Wn.
11 2d 176,195,721 P.2d 902 (1986). Reversal is not required if
12 the error could have been obviated by a curative instruction
13 which the defense did not request. Russell, 125 Wn.2d at 85
14 citing Hoffman, 116 Wn.2d at 93; State v. York, 50 Wn.App.
15 446,458,749 P.2d 683 (1987). Allegedly improper arguement
16 should be reviewed in the context of the total argument, the
17 issues in the case, the evidence addressed in the arguement,
18 and the instructions given. Russell, 125 Wn.2d at 85-86,
19 citing State v. Graham, 59 Wn.App.418,428,798 P.2d 314 (1990)

20 Remarks of the prosecutor, even if they are improper are
21 not grounds for reversal if they were invited or provoked by
22 defense counsel and are in reply to his or her acts and
23 statements, unless the remarks are not a pertinent reply or
24 are so prejudicial that a curative instruction would be totaly
25 ineffective. Russell, 125 Wn.2d at 86 (citing State v. Denn-
26 ison, 72 Wn.2d 842,849,435 P.2d 526 (1967).

1 Here in Slert's case the prosecutor tainted the jury when
2 he vouched for Douglas Schwenk's credibility as to his said
3 testimony against Slert, and the prosecution repeated the state-
4 ments made by Schwenk to the jury as to Slert being a cold....
5 blooded.... murderer, please see Exhibit (4) pages 719-56, the
6 closing arguements. Appellant/Defendant Slert respectfully
7 requests that due to the facts set forth here in his (SAG), &
8 the evidence which is on the face of the documents, that this
9 court will reverse his convictions and dismiss with prejudice,
10 or whatever this court deems appropriate to suit the equality
11 of justice in this case.

12 4)

ADDITIONAL GROUNDS FOUR

13 C. DID THE STATE'S PROSECUTING ATTORNEY COMMIT
14 PROSECUTORIAL MISCONDUCT, PROSECUTORY ERROR,
15 PREJUDICIAL ERROR, AND VINDICTIVE PROSECUTION
16 WHEN HE ASSERTED HIS PERSONAL OPINION IN THE
17 CLOSING ARGUEMENTS AND THROUGH OUT THE TRIAL,
18 THEREFORE VIOLATING DUE PROCESS ?

19 The question arise's as to why the prsecution all
20 through Slert's trial violated due process, and due to the
21 fact that his appellate attorney's won the ineffective assist-
22 ance of counsel first time on appeal, they are also addressing
23 here on the second appeal this same issue, but new counsel and
24 new case. Appellant/Defendant Slert was denied a fair trial,
25 and the evidence is in the transcripts, that are presented in
26 the Exhibit(s) in this (SAG). To save time and space, only
a part has been brought into as evidence, to justify these
allegations against the State's Prosecuting Attorney's, as it
is the true facts and not mere speculation and/or conjecture.

1 Slert asks the court to see Washington v. Belgarde, 110
2 Wash.2d 504,755 P.2d 174 (wa.05/26/1988), State v. Reed,Supra,
3 State v. Charlton,Supra, and State v. Clafin,Supra, In Reed,
4 the prosecutor called the defendant a liar, stated defense
5 counsel didn't have a case, referred to the defendant as clear
6 ly a murder too, and asked the jury if they were going to let
7 city lawyers make their decision. This court reversed the
8 conviction in Reed because there existed a substantial likelih
9 ood the remarks affected the jury's decision. Reed, at 147-48.
10 the Reed misconduct was mild compared to the prosecutor's
11 arguments in this case. In Charlton the prosecutor remarked
12 briefly on the defendant's spouse's failure to testify. This
13 court held such reference to be flagrant and ill intentioned
14 and reversed the conviction in spite of a failure to request
15 a curative instruction. In Clafin, the prosecutor read a poem
16 by a rape victim and the conviction was reversed because no
17 curative instruction could erase such an appeal to passion and
18 prejudice..A prosecutor's statement of personal opinion in
19 closing argument is a violation of CPR DR 7-106 (c)(4).
20 Prosecutorial Misconduct does not constitute impropriety of
21 the prosecuting attorney's comments and their prejudicial
22 effect. State v. Russell, 125 Wash.2d 24,85,882 P.2d 747 (1994,
23 cert.denied, 131 L.Ed.2d 1005,115 S.Ct.2004 (1995),A new trial
24 is appropriate if defendant's right to a fair trial was indeed
25 prejudiced. State v. Lord, 117 Wash.2d 829,887,882 P.2d 177
26 (1991). Due Process imposes certain obligations on law
enforcement and investigatory agencies to insure every

1 criminal trial is a "search for truth, not an adversary game".
2 United States v. Perry, 471 F.2d 1057,1063 (D.C.Cir.1972) One
3 such constitutional obligation, the disclosure of evidence to
4 the defendant, is well established. As in Guilliot, Slert's
5 case is at best simular as to the prosecutor asserting his own
6 opinion and vouching for the State's witnesses credibility.
7 State v. Guilliot, No.25686-0-II, please see State v. Miller,
8 No.47254-2-I (Wash.App.Div.1 02/19/2002) also State v. Brett,
9 126 Wn.2d 136,174,892 (1995); also State v. Sargent, 40 Wn.App
10 340,698 P.2d 598 (1985); also State v. Hoffman, 116 Wn.2d 51,
11 94-95,804 P.2d 577 (1991). Here appellant Slert has beared the
12 burden in showing the impropriety of the conduct and its
13 prejudicial effect. State v. Bryant, 89 Wn.App.857,873,950 P.
14 2d 1004 (1998) review denied, 137 Wn.2d 1017 (1999). At best
15 Prosecutorial Misconduct, it would render a trial "Fundamenta-
16 lly Unfair". Darden v. Wainwright, 477 U.S. 168 (1986) The
17 appellate court must review the record to determine whether
18 the prosecutor's remarks so infected the trial with unfairness
19 as to make the resulting conviction a denial of due process.
20 Hall v. Whitley, 935 F.2d 164,165 (9th cir.1991)(quoting
21 Donnelly v. Dechristoforo, 416 U.S.637,642 (1974). A defendant
22 alleging prosecutorial misconduct must establish improper
23 conduct and resulting prejudice. State v. Luvene, 127 Wash.2d
24 690,701,903 P.2d 960 (1995)(citing State v. Mak, 105 Wash.2d
25 692,726,718 P.2d 407,cert.denied,479 U.S. 995,93 L.Ed.2d 599,
26 107 S.Ct.599 (1986); please see Lincoln v. Sunn, 807 F.2d 805,
809 (9th cir.1987) citation omitted.

1 The Sixth & Fourteenth Amendments to the United States
2 Constitution guarantee the right of an accused in all criminal
3 prosecutions to trial by an impartial jury. The Washington
4 Constitution provides a similar guaranty, under the laws of
5 Washington, the right to a jury trial includes the right to an
6 unbiased & unprejudiced jury. The failure to accord an accused
7 a fair hearing violates the minimal standards of Due Process,
8 more important than speedy justice is the recognition that
9 every defendant is entitled to a fair trial before (12)
10 unprejudiced & unbiased jurors, not only should there be a fair
11 trial, but there should be no lingering doubt about it. Slert
12 has brought these allegations against the State's Attorney's,
13 and has set forth in this (SAG) the facts, and the evidence, as
14 to the facts to his allegations against the State. The proof
15 and evidence is of the record in the Exhibit(s) please see
16 all Exhibit(s) attached herein (1-4) and as to the closing
17 arguments pages 719-56 for the fact of the prosecution and
18 their assertion of personal opinions, and there vouching for
19 their witnesses, and their unjustifiable comments made about
20 appellant Slert, his guilt, and being a "Cold Blooded Murderer"

21 Issues of witness credibility are for a jury alone to
22 decide. State v. Alexander, 64 Wn.App.147,154,822 P.2d 1250
23 (1992). Whether an opinion of guilt is expressed directly or
24 through inference, such opinion is equally improper and equally
25 inadmissible because it invades the province of the jury. See
26 State v. Hagg, 8 Wn.App.481,492,507 P.2d 159, review denied,
82 Wn.2d 1006 (1973). Constitutional due process principles

1 prohibit Prosecutorial vindictiveness. See generally,
2 United States v. Goodwin, 457 U.S. 368,372-85,102 S.Ct.2485
3 73 L.Ed.2d 74 (1982). Appellant Slert asks this court to
4 examine the facts set forth in this (SAG) as to the amount
5 of violation(s) that have denied him a fair trial in his
6 case, he respectfully requests that all Exhibit(s) (1-4) are
7 reviewed, and that the court with respect carefully weigh
8 the balance of this case to suit the equality of justice.

9 Therefore Slert does hereby seek that this court will
10 reverse the conviction(s) and dismiss this case with prejudi-
11 ce, and/or what ever this court deems appropriate.

12
13 I, Kenneth Lane Slert, am over the age of majority and
14 competent to testify and herein attest under penalty of
15 perjury of the State of Washington that all statements
16 contained herein are to the best of my knowledge correct &
17 true.

18 Affidavit pursuant to 28 U.S.C. § 1746 and DICKINSON V.
19 WAINWRIGHT, 626 F.2d 1184 (1980) sworn true and correct
20 under penalty of perjury has full force of and does not have
21 to be verified by notary public.

22 Respectfully Submitted on this 07, day of February, 2008.

23 Kenneth L. Slert
24 Kenneth L. Slert 872135
25 Stafford Creek Corr. Ctr.
26 191 Constantine Way
Aberdeen, Washington 98520

CERTIFICATE OF SERVICE BY MAIL

This is to certify and state under the penalty of perjury under the laws of the State of Washington that I have mailed a true and correct copy of the following documents(s):

(1) One ADDITIONAL (SAG) STATEMENT OF ADDITIONAL GROUNDS WITH EXHIBITS 1-4, (100 pages total) (1) ONE CERTIFICATE SERVICE BY MAIL, AND (1) COVER LETTER

By depositing in the United States mail, marked *Legal Mail*, postage prepaid, on this 7 day of FEBRUARY, 2008 to the following: WASHINGTON STATE COURT OF APPEALS DIVISION TWO, 950 BROADWAY, STE 300, Tacoma, Wash 98402-4454; LEWIS COUNTY PROSECUTING ATTY. OFC, 345 W. MAIN ST. FL 2, CHEHALIS, WASH 98532-4802 BACKLUND AND MISTRY ATTORNEY'S AT LAW, 203 FOURTH AVENUE E., Suite 404, Olympia, Wash 98501

THIS declaration of service by mail is in compliance with G.R. 3.1,

Respectfully Submitted,

Kenneth L. Siert

Signature

KENNETH L. SIERT

Print Name

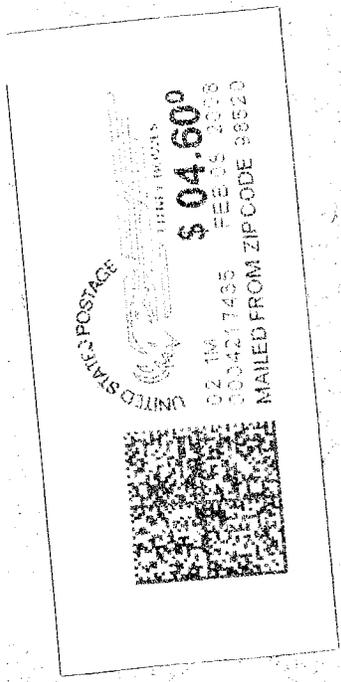
D.O.C.# 872135 Unit # 43A Cell # 23

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