

1 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
2 DIVISION TWO

3  
4 37107-3-II  
5 STATE OF WASHINGTON,  
6 RESPONDANT,  
7 V.

8 HOWARD MATTHEW VAUGHN,  
9 APPELLANT,

FILED  
COURT OF APPEALS  
DIVISION II  
09 NOV 24 AM 9:52  
STATE OF WASHINGTON  
BY DEPUTY

10  
11 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
12 WASHINGTON FOR THE COUNTY OF PIERCE  
13 THE HONORABLE FRANK E. CUTHBERTSON, JUDGE

14 STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW, PRO SE  
15 SUPPLEMENTAL BY APPELLANT.  
16

17 HOWARD M. VAUGHN  
18 PRO SE SUPPLEMENT  
19 LISE ELLNER, ATTY.  
20 FOR APPELLANT

21 HOWARD M. VAUGHN DOC # 748419  
22 WASHINGTON CORRECTION CENTER  
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PM 11-21-08

TABLE OF CASES.

1  
2  
3 Niel v. Biggers, 409 U.S. 188, 93 S.Ct. 357, 34 L.Ed.2d  
401 (1977).

4 Simmons v. United States, 390 U.S. 377, 88 S.Ct. 971,  
5 19 L.Ed.2d 1247 (1968).

5 U.S. Plaintiff-Appellee v. Rodney Merle, 439 F.2d 133  
6 (1971).

7 U.S. v. Gidley, 527 F.2d 1345. (1976).

8 Willie Kimbrough v. J.D. Cox Superintendent Virginia  
9 State Penitentry, 444 F.2d 8 (1971).

10 State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000).

11 State v. Burrell, 28 Wn.App. 606, 975 P.2d 726 (1981).

12 State v. Cook, 31 Wn.App. 165, 639 P.2d 865 (1982).

13 State v. Brown, 27 Wn.App. 639, 620 P.2d 529 (1980)

14 State v. Hall, 40 Wn.App. 162, 697 P.2d 597 (1985).

15 State v. Hoyt, 29 Wn.App. 372, 628 P.2d 515 (1981)

16 State v. Lane, 4 Wn.App. 745, 484 P.2d 432 (1971).

17 State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989).

18 State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006).

19 State v. Nettle, 81 Wn.2d 205, 500 P.2d 1978 (1980).

20 State v. Ortiz, 34 Wn.App. 381, 680 P.2d 768 (1984)

21 State v. Torkelson, 25 Wn.App. 615, 611 P.2d 1278 (1981)

22 State v. Smith, 37 Wn.App. 381, 680 P.2d 768 (1984).

23 State v. Stein, 144 Wn.2d 236, 27 P.3d 184 (2001).

24 State v. Hillard, 84 Wn.2d 430, 573 P.2d 22 (1977).

25 State v. Bar Ass'n. Appellant Desk Book. § 32(3)(c) at  
26 32-6

1 A SHOPLIFT, (GRAB AND DASH TYPE) OCCURED IN PIERCE COUNTY IN THE  
2 CITY OF LAKEWOOD ON 12-20-05, AT THE LAKEWOOD TOWN-CENTER. THE  
3 PERPATRATOR OF THE CRIME FLED THE STORE AND JUMPED INTO A BLACK  
4 CHEVY S-10 PICK-UP TRUCK, THAT WAS REGISTERED TO TIM MCCRAY AND  
5 WAS WAITING IN FRONT OF THE STORE. SEVERAL INDIVIDUALS WITNESSES  
6 THE INCIDENT AT BURLINGTON COAT FACTORY, INCLUDING THE STORE SEC-  
7 URITY, THE STORE MANAGER, THE DOOR PERSONAL, AND OTHER CIVILIAN  
8 WITNESSES WHO WERE PRESENT AT THE TIME THE CRIME OCCURED,  
9 PLEASE SEE THE ORIGINAL LAKEWOOD POLICE REPORT NOTED AS EXHIBIT  
10 NUMBER 12. ALSO THERE ARE A CLAIM THAT DIGITAL SURVEILLANCE RECORD-  
11 ED THE TRUCK PARKED DIRECTLY IN FRONT OF THE STORE FOR OVER TEN  
12 MINUTES BEFORE A SUSPECT JUMPED INTO THE TRUCK, AND FLED THE SCENE

13 LAKEWOOD POLICE DEPARTMENT WAS CALLED AND, [REDACTED] RESPONDING  
14 OFFICERS TOOK A REPORT AND INTERVIEWED THE WITNESSES AND NOTED  
15 THAT THE TRUCK WAS CAPTURED ON SURVEILLEENCE. RESPONDING OFFICERS  
16 ALSO TOOK A DESCRIPTION OF THE OCCUPANTS OF THE FLEEING VEHICLE .  
17 IN THEIR REPORT THEY DESCRIBE A BLACK MAN THAT IS 6 FEET TALL  
18 WITH A BALD HEAD, AND WEARING DARK CLOTHING. OTHER THAN THE FACT  
19 THAT THEY EXISTED, NO OTHER DESCRIPTION WAS OFFERED AS TO WHAT  
20 THE OTHER OCCUPANTS LOOKED LIKE, IN RELATION TO MALE OR FEMALE  
21 BLACK, WHITE, BLONDE OR RED HAIR. THERE IS INDICATION THAT AT  
22 LEAST TWO PEOPLE WERE OCCUPANTS IN TIM MCCRAY'S TRUCK WHEN IT  
23 LEFT THE TOWN-CENTER INCIDENT. A SHORT TIME AFTER THE INITIAL  
24 INCIDENT AT THE TOWN-CENTER, OFFICER SAVENKEO HEARD A RADIO TRAN-  
25 SMISSION REGARDING THE SHOPLIFTING, AND NOTED A DESCRIPTION OF  
26 THE GET-AWAY VEHICLE. SAVENKEO TESTIFIES THAT HE WAS STOPPED AT  
27  
28

1 Red Light Headed South on 108th and South Tacoma  
2 way, when a truck matching the description of the  
3 vehicle used as the get away vehicle approached  
4 the intersection from the west heading east, and  
5 made a right hand turn in front of him heading south  
6 he cannot see who is driving at that time.

7 He then notices the truck doing a u-turn a  
8 long ways ahead of him the traffic light and begin  
9 heading north towards him the truck past him and  
10 savenkeo says that the driver looked at him directly  
11 with a "Suprised" look on his face. He also states  
12 that he seen two other people squeezed close together  
13 in the front, bench seat of the truck.

14 Savenkeo gave no transmission verbally at any  
15 time to his dispatch officers regarding the  
16 description of any occupants or driver of the Chevy  
17 S-10 pick up truck.

18 That just past him savenkeo turned around and  
19 pursued the vehicle from a distance, He does not  
20 contact or request back up for a felony stop. He  
21 declares that the suspect pulled over and it was  
22 at that time that he confirmed that the black truck  
23 was the same truck from the Burlington coat factory  
24 Incident. He state that he saw the driver through  
25 a rearview mirror while approaching the vehicle  
26 from behind.

1 He further states that as he approached the  
2 rear end of the truck the driver sped off and entered  
3 I-5 North bound from the 5-12 on Ramp.

4 He also says that the suspect entered traffic  
5 erratically and maneuvered wrecklessly to the fourth  
6 lane and suddenly exited across the same four lanes  
7 at the next exit 84th street causing the pursuit  
8 to end and forcing the officer to take the next  
9 exit 72nd street & try to double back 2 miles to  
10 the area to continue his search that was ultimately  
11 fruitless. We know from police reports the time  
12 the pursuit ended and began.

13 We know from a map of north Bound I-5, that  
14 the 5-12 entrance to north Bound and the 86th st.  
15 exit off I-5 is a short distance one from the other  
16 about sixteen blocks approximately 5 minutes at  
17 posted speed limits. Savenkeo testifies to high rate  
18 of speed which would suggest a significantly shorter  
19 travel time.

20 We think it is fair to say that this entire  
21 pursuit could have lasted no longer than 5 minutes.  
22 With Savenkeo never looking directly at the driver  
23 of the vehicle.

24 Savenkeo states that from the license plate  
25 of the pursued vehicle he establishes the name,  
26 and Address of the registered owner of the suspect  
27 Truck. It is not determined if he pulled up booking  
28

1 photos before he reached Tim Mcrays House.  
2 Officer Savenkeo does state that him, and several  
3 other officers search the area of 86th, and Hosmer  
4 for some time to try to locate the suspect vehicle.  
5 The searchers never located the vehicle on  
6 12-20-2005.

7 Savenkeo Then went to the Burlington Coat  
8 Factory the crime scene to gather information on  
9 suspects.

10 It was from B.C.F. that the only description  
11 of any truck occupants were recorded, that That  
12 being only that of the 6' Bald, blk, man.

13 From there Savenkeo and another officer arrived  
14 at Tim Mcrays Mothers house looking for Tim Mcray.

15 There first contact at the Mcray residence was  
16 with that of Ms. Guff. ( Tim Mcrays mother) The  
17 officers spoke with Ms.Mcraay at length prior to  
18 speaking to Tim Mcray who was said to have been  
19 home sick in bed that day. When speaking to Tim's  
20 Mother Savenkeo asked about the Truck, Mentioned  
21 that the Truck was used the commission of a crime  
22 and that they were looking for a" 6' BLK" man with  
23 a" bald Head". Which "Guff" decalred that she had  
24 no idea or knowledge of any person matching that  
25 decription.

26 Ms. Guff was never called to testify or  
27 subpoenaed. Despite Vaughans Request Tim Mcray was  
28

1 summoned by his mother and testified that "the  
2 officers spoke mostly to his mother that day"  
3 (12-20-05) Officers told Mcray that his truck was  
4 used in a shoplift grab dash in Lakewood and that  
5 his truck was involved.

6 Tim offered his alibi and said he had loaned  
7 his truck to his daughter Deanna and claimed he  
8 had came home early from work.

9 Driving there dicussion officer Savenkeo  
10 Suggested that the Driver was not a blond girl but  
11 a male and asked about who might be with her driving  
12 if it was not her.

13 Tim Stated that if his Daughter was involved  
14 and not driving it was probably her drugdealing,  
15 controlling boyfriend Howard Vaughn. Tim I submit  
16 that Tim Mcrays assumption was Heresay and it only  
17 manifested because vaughn was the only name he knew,  
18 and because of Vaughn's Significance to Deanna  
19 Mcray's mention of Vaughn was only one possible  
20 driver, not someone who would fit a discription  
21 of " 6ft. Tall Black"" bald man".

22 The Defendant is native American and white  
23 male, armed with the named Howard Vaughn Savenkeo  
24 ran vaughn's Name in his Patroll car and viewed  
25 several booking photo's of Vaughn and alot of other  
26 information on Vaughn's past traffic infractions  
27 including past record and information that vaughns  
28

1 license was suspended in the third degree, after  
2 viewing only pictures of Vaughn.

3 A (single suspect) Savenkeo Began to build  
4 a theory that Vaughn was the person he seen drive  
5 past him going north when he was heading south.

6 Savenkeo is a law enforcement officer who drove  
7 a fully marked police car complete and with on board  
8 camera and operational radio.

9 Savenkeo never utilized his police standard  
10 procedures for correctly identifying a suspect.  
11 He never followed up on any other information that  
12 could. Have eliminated Vaughn as a suspect.

13 Mcray said that he did not know where his truck  
14 was and that he had been trying for some time to  
15 retrieve it unsuccessfully the Lakewood police  
16 incident report states that Denna has had the S-10  
17 for almost a month prior to the incident.

18 Tim Mcray states that he has seen several people  
19 driving his truck during that time, and states that  
20 he does not know all the people Deanna loans the  
21 truck to nor is he familiar with them all one person  
22 Mcray knows is Lamont Howards brother who looks  
23 alot like Howard.

24 Howards brother Lamont was with Denna on the  
25 night of December 20th 2005.. Denna and Howard were  
26 fighting about Denna's relationship with his brother.

27 After that fight Vaughn left alone. 12-19-2005

1 Denna and Lamont were together and had possession  
2 of the S-10 Truck.

3 Tim Mcray did contact Denna on her cell phone  
4 the day of the 20th and when she awoke she was  
5 informed that the truck was gone and she told her  
6 dad that Lamont was gone too but she didn't know  
7 where the truck was. The Police told Tim to report  
8 it stolen and she said to do that she Hadn't given  
9 anyone permission to use it while she slept. The  
10 Fact is that Deanna used Drugs (crank) and anyone  
11 who had drugs took the truck for a small amount  
12 of the drug or money.

13 Savenkeo is the states witness and also the  
14 crime witness.

15 Vaughn maintains that a witness to a crime  
16 is usually required to give a description of a  
17 suspect before looking at someone who may  
18 coincidentally resembles a suspect.

19 Vaughn believes that Savenkeo's Identification  
20 is tainted because he had no discription of a suspect  
21 until he heard Vaughns name and viewed only Vaughns  
22 pic? He also had prevy to Vaughns lakewood prior  
23 record of attempted elude. His being charged amounts  
24 to profiling and charging where No sufficient  
25 admissible evidence exists to supports the charges.  
26 The totality of circumstances suggest a possible  
27 misidentification.

1           Had Savenkeo conducted a through investigation  
2 and determined all other possible drivers who had  
3 access he would had to have ran across Lamont Huston,  
4 and if he had done a proper photographic montage  
5 or line up before seeing a picture of only Vaughn  
6 by himself. The likelihood that he would have picked  
7 someone else is possible.

8           Another person who had access to Tim Mcrays  
9 truck and has used it before is Anthony Cochran  
10 who has since this incident admitted to doing this  
11 crime and is now in DOC custody for 8 plus Robbery  
12 convictions. There are other people who had better  
13 access to Tim Mcrays truck than the Defendant Vaughn.

14           Howard and Denna split up and Denna and Lamont  
15 Had the truck. Stewart picked up Vaughn at Howards  
16 moms house on the 20th for work. Stewart was with  
17 Vuaghn the entire Day at cedar crest apartments  
18 working.

19           They never left before 5PM. Vaughn was allowed  
20 to bail out on these charges after his DOC DOSA  
21 revocation time was served on 10-24-2006. At such  
22 time Vaughns attorney Jeff Kim was certain that  
23 there was insufficient evidence to convict Vaughn  
24 and confident that Vaughn would be acquitted.

25           Vaughn was originally offered a sentence of  
26 credit for time served on DWLS 3rd Degree, Attempted  
27 elude concurrent with the DOSA revoke time, he  
28

1 refused Vaughn showed up for several court dates  
2 while on bail.

3 Vaughn had no money to pay for attorney fee's  
4 but remained in constant contact. Kim was very hard  
5 to reach and his Defense was not impressive he  
6 continued to need continuances and forced Vaughn  
7 to agree to them. He said that he needed to interview  
8 witness.

9 He failed to inform Vaughn of progression of  
10 case. Kim never filed the motion to dismiss for  
11 insufficient admissible evidence (Knapstad) motion  
12 like he said he would.

13 Kim failed to conduct a through pretrial  
14 investigation and ultimately was unprepared for  
15 trial.

16 Vaughn was arrested for Probation violations  
17 for this matter and missed a quash warrant hearing  
18 Defendant had missed court because of a car accident.

19 A unforeseen accident which he did not help  
20 to create. Happened before Vaughn could appear at  
21 the Quash warrant hearing he was arrested on  
22 probation violations and then after release the  
23 proceedings continued.

24 Vaughn was also late for a status conference hearing  
25 that was to be heard on January 24, 2006.

26 He spoke to his attorney that morning and told  
27 him he was running late. Attorney Kim told Defendant  
28

1 , " TO be in the court room before 10 am. and all  
2 would be well." Defendant arrived minutes before  
3 10. However the 2nd roll call was taken before 10  
4 am which is not standard. procedure. Vaughn does  
5 not have the transcripts of all hearings prior to  
6 trial to quote the dates. Defendant declares that  
7 the documents provided at trial amount to paper  
8 shuffling and contends that mistakes of prosecution  
9 were over looked to allow for misrepresentation  
10 in relation to time dates and occurrence.

11 Vaughn maintains that because he would not agree  
12 to a plea bargain that the prosecution turned a  
13 accidental failure to appear into a bail jumping.

14 Vaughn has had the same address and phone number  
15 for over 4 years. He has never lived anywhere else  
16 in the world and was not jumping bail. The bail  
17 bond company as well as his attorney were in constant  
18 contact with him through out these proceedings.

19 Vaughn did not have a drivers license and was  
20 depending on Stephine Johnson and others to travel.

21 Vaughn bail was never revoked for missing a  
22 court date. C.J. Johnsons bail bond company revoled  
23 a \$1,500 Bond when Vaughn was arrested on the  
24 probation violations and only because of situtations  
25 where defendants are in custody and miss a court  
26 date because they are not transported to court.

27 Then the bail bond co. is attacked financially,  
28

1 and tied up in proceedings to exonerate bail after  
2 the missed court date. No evidence was presented  
3 in defense of bail. Defendant was charged with DWLS  
4 3 Degree originally and no investigation was  
5 conducted by the department of licensing, that  
6 reinstated the defendants eligibility to become  
7 licensed again in July 2005 that evidence was not  
8 obtained by defense Counsel and no objection was  
9 offered to the Court or jury when it came to the  
10 amended charges. No objection Vaughn has always  
11 maintained his innocence and suggested no compromise  
12 to these charges other than complete dismissal.  
13 Defendant concludes that the prosecution had no  
14 sufficient admissible evidence to support a  
15 reasonable jurors conviction and thus actions taken  
16 to bring this case to trial amounted to profiling  
17 and aggravated misconduct. The prosecution in this  
18 case has switched the burden of proof and effectively  
19 made the defense attempt to prove it is innocence  
20 of the crime Driving while License suspended third  
21 Degree.

22 The First charge of DWLS 3 Degree/was amended to  
23 first degree through trickery and omission of a  
24 complete department of Licensing record instead  
25 offering a old status report of a Habitual traffic  
26 offender from 1999. In lieu of the factually correct  
27  
28

1 amended D.O.L. Records form 205.

2 This presentation of out dated information in  
3 combination with a more recent letter head containing  
4 the information the prosecution requested on 1999  
5 status that showed the defendants past drivers  
6 license status was to be revoked for seven years,  
7 which must have had a negative affect on the jury  
8 because 7 years had not elapsed when this incident  
9 occurred.

10 However the difference between a person suspended  
11 in the first degree is not to have his license  
12 reinstated until a specific date and consequently  
13 if he is caught driving on such status there is  
14 a mandatory minimum jail sentence of six months  
15 to a year.

16 On the contrary although it is unlawfull to drive  
17 on a license suspended in the third degree- a person  
18 who's license is suspended in the third degree is  
19 eligible to obtain his license at any time. By  
20 fulfilling conditions determined by the department  
21 of licensing.

22 In Vaughns case the department of licensing  
23 removed him from his first degree suspension and  
24 placed him on third degree suspension after a  
25 telephonic reinstatement hearing that took place  
26 in july 2005 and was conducted by the hearings  
27  
28

1 officer of the washington state department of  
2 Licensing.

3 This Hearing over ruled and superseded the prior  
4 1999 order of revocation and for that reason the  
5 charge of driving while license suspended in the  
6 first degree is unlawful on its face value. The  
7 defendant submits that the defense and prosecution  
8 both knew this information as it was explained to  
9 defense counsel and it was available to the  
10 prosecution because the original charging documents  
11 stated that the officers ran Vaughns Name and it  
12 came back that his license was suspended in the  
13 third degree.

14 The prosecution amended the information and  
15 defense counsel failed to object. It was only after  
16 the original shoplift charges failed to be  
17 prosecuted and therefore the prosecution lost its  
18 crime Motive theory and essentially because no other  
19 investigation was properly conducted the actual  
20 perpetrator was not discovered.

THE PROSECUTOR HAD TO PROFILE WUGHAN BACK INTO THIS  
CASE. SAVENKEO SAYS HE SEEN DEF. FOR A split second fleeing  
CRASH AND DASH SHOPLIFT, MINUTES AFTER THE INCIDENT OCCURRED  
IT GIVES NO DESCRIPTION OF SUSPECT, (HE DID NOT ACCUSE ANYONE...  
WUGHAN TESTIFIED UNDER OATH THAT HE HAD NOT SEEN OR HAD  
CONTACT WITH THE DEFENDANT SINCE THE INCIDENT THE DEFENDANT  
USED HIM IN TRAFFIC. (YET THAT IS UNTRUE AND IS PERJURY)  
THE CLAIM OF THINDED J.I. BECAUSE NOT ONLY DID HE  
BE A BETWEEN 12-20-05 AND THE DATE OF TRIAL. HE WAS  
ALSO THE TRANSPORT OFFICER, RESPONSIBLE FOR PICKING THE DEF  
AT P.C.J AND TAKING HIM IN HIS POLICE VEHICLE TO LAKEWOOD  
MUNICIPAL COURT WHERE ULTIMATELY THE CHARGES AGAINST HIM WERE  
DISMISSED. (EVEN AFTER THAT COURT DATE SAVENKEO ALSO TRANSPORTED HIM  
BACK TO P.C.J. DEFENDANT HAD NO Adequate Defense Presented TO  
UPHOLD THIS OCCURRENCE, AS LACK OF DUE PROCESS. - (IN THIS CASE  
HE WITNESS <sup>ALSO</sup> BEING THE INVESTIGATOR, CANNOT HELP BUT DENY APPROPRIATE HIS  
CONSTITUTIONAL RIGHTS Guaranteed BY 6<sup>TH</sup> Amendment. (The foregoing  
A TRUE AND ACCURATE STATEMENT OF FACTS RECOUNTING THE <sup>PREVIOUS</sup> PROSECUTION  
AND THE FOLLOWING <sup>STATEMENT OF ADDITIONAL GROUNDS</sup> IS A LAYMAN'S ATTEMPT TO SHOW BY  
FACT AND VERBATIM REPORT OF PROCEEDINGS, PROVIDED TO HIM FOR THIS PURPOSE THAT  
THE UNAPPROPRIATE PROSECUTION AND IMPERMISSIBLE EVIDENCE AND  
JUDICIAL INVESTIGATION AND PERJURY BY <sup>INVESTIGATORY</sup> WITNESS <sup>SAVENKEO</sup> (THE BAIL  
HOPING CONVICTIONS IS PREDJUDICED BY UNLAWFUL CONVICTIONS OF DEFENDANT AND  
INCLUDING <sup>AND</sup> HAS CAUSED UNFAIR INFLUENCE THAT DAMAGES THE JURY'S DISCRETION  
OF MAGNITUDE IS UNREPAIRABLE, AND THEREFORE THIS COURT IS UNWILLING TO  
DO NOTHING

1  
2 JURY INSTRUCTIONS. RELIEVING THE STATE/PROSECUTION  
3 OF DUTY TO PROVE EVERY ELEMENT OF THE CRIME CHARGED.  
4 DENIAL OF FAIR TRIAL IN VIOLATION OF SIXTH AMENDMENT  
5 TO THE UNITED STATES CONSTITUTION.

6 It must be noted by this Court that the Court did  
7 not Transcribe the Trial Courts Jury Instructions. And  
8 Appellant must rely on the information in the record  
9 therein.

10 A) Under the Laws, And the Constitution of the united  
11 States a Defendant is Entitled to A Fair, and Impartial  
12 Trial. without the Burden of Proof being lowered for the  
13 Prosecution. State v. Anderson, 141 Wn.2d 357, 360, 366-67,  
14 5 P.3d 1247 (2000): State v. Thomas, 150 Wn.2d 821, 844,  
15 83 P.3d 970 (2004).

16 In the case of State v. Levy, 156 Wn.2d 709, at 719-  
17 20, 132 P.3d 1076 (2006) The Washington State Supreme Court  
18 ruled that it is "Impermissible" to shift the burden to  
19 the Defendant to prove beyond a reasonable doubt he is  
20 innocent or to prove elements of the crime.

21 In this Case here, Jury Instructions 9 and 10. Relieved  
22 the State of its Burden. Jury "To Convict" Instruction  
23 9. Describes and Charges Defendant with the Crime of Driving  
24 with out a License. RCW 46.20.015. Which Defendant was  
25 charged with. The Jury given a Verdict Form.

26 Jury "To Convict" Instruction 10. Charged Defendant  
27  
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1 with the Crime of Driving while License was Suspended.  
2 RCW 46.20.342, 46.20.420. A separate Crime Not Charged.  
3 And the Jury was not Given a Jury Verdict Form.

4 Here the simple Truth is that Appellant was Charged  
5 with Two (2) Crimes of Driving. But the Jury had been Given  
6 Only One (1). Verdict Form. and Only One (1) was ever  
7 Charged. RP. 186. 187. RP. 285. lines 6-9.

8 B. Appellant takes Exception and Assigns Error to Jury  
9 Instruction #16, which stated to the Jury that the "Original  
10 Charging Information "May only Be Considered" and is not  
11 Considered Evidence.

12 This Instruction Relieved the State to Prove the  
13 Charges Against him in violation of the Charging Document.

14 How is a Defendant to Defend ~~ant~~ against Multiple  
15 Charging Documents.?

16 How is a Defendant to Make a Defense to One Charge.  
17 And the Prosecution can change it to Another Charge not  
18 before the Jury.?

19 The State was Relieved of its burden and it has cost  
20 Appellant his Constitutional Rights to a Fair and Impartial  
21 Trial.

22 C) The State was Relieved of its Burden when they used  
23 Appellants Prior Criminal History in the Jury Instruction  
24 in violation of RCW 10.40.180.

25 Under the Statutory Laws of the State of Washington  
26  
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1 RCW 10.40.180 the law states that:

2 THE PLEA OF NOT GUILTY IS A DENIAL OF EVERY MATERIAL  
3 ALLEGATION IN THE INDICTMENT OR INFORMATION: AND ALL MATTERS  
4 OF FACT MAY BE GIVEN IN EVIDENCE UNDER IT: "Except a former  
5 conviction or acquittal".

6 Here Jury Instruction #4 Clearly states "Evidence  
7 that the Defendant has previously convicted of a crime  
8 is not evidence of the defendants guilt." But it does inform  
9 the Jury that he has been Convicted of a Prior Crime.

10 Here with Appellant being Convicted of Crimes Not  
11 Charged, and the Crimes Charged is clearly a Sign that  
12 the Jury took into account that Appellant was Guilty of  
13 a Crime. And that the State was Relieved of its Burden.

14 D) Another factor is that Jury Instruction #9 was never  
15 part of the Charging Information, and therefore, any  
16 Evidence presented to the Jury concerning the Driving  
17 without a License was Error. The Charging Information must  
18 be True and Correct. And must contain all Crimes Charged.  
19 State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)

20 Appellant is entitled to Raise the Issues of Jury  
21 instruction for the First Time on Appeal because there  
22 has "Manifest Error" effecting Appellants Constitutional  
23 Rights to a Fair Trial. State v. Stein, 144 Wn.2d 236,  
24 240, 27 P.3d 184 (2001).  
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1 TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT  
2 TO A PRE TRIAL "PHOTOGRAPH", AND THE TRIAL COURT ERRED  
3 BY ADMITTING A PRE-TRIAL IDENTIFICATION PHOTOGRAPH AND  
4 A IN-COURT IDENTIFICATION, THAT WAS SURELY TAINTED BY  
5 THE PRE-TRIAL PHOTO IDENTIFICATION.

6 THE APPELLANT WAS DENIED DUE PROCESS PROTECTION  
7 THAT IS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE  
8 UNITED STATES CONSTITUTION AND ARTICLES ONE SECTION THREE  
9 OF THE WASHINGTON STATE CONSTITUTION, WHEN A PHOTO-  
10 GRAPHIC IDENTIFICATION WAS SO IMPERMISSIVELY SUGGESTIVE  
11 AS TO GIVE RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IR-  
12 REPARABLE MISIDENTIFICATION, WAS ADMITTED AND THEREFOR  
13 VIOLATED PROPER DUE PROCESS.

14 UNITED STATES OF AMERICA PLAINTIFF -APPELLEE V. RODNEY  
15 MERLE FOWLER. NO.20697 U.S. COURT OF APPEALS FOR THE  
16 NINTH CIRCUT 439 F.2d 133 (1971).

17 U.S. APP. STATE V. HILLARD 84 Wn. 2d 430, 573 P 2d.22  
18 (1977)

19 NIEL V. BIGGERS 409 U.S. 188, 93 S. CT. 357, 34 L.ED.  
20 2d 401(1977)

21 STATE V. BURRELL 28 Wn. APP.606,975 P.2d (1978),(1980)

22 USE OF A SINGLE PHOTOGRAPH OR SINGLE COMPUTER GEN-  
23 ERATED PICTURE WAS SO IMPERMISSIBLY SUGGESTIVE TO GIVE  
24 RISE TO A VERY SUBSTANTIL LIKELIHOOD OF MISIDENTIFICA-  
25 TION. SIMON V. UNITED STATES 390 U.S. 377,384 88 S.  
26 CT. 971 19 L.ED. 2d 1247 (1968)

1                    UNITED STATES OF AMERICA V. FOWLER 439 F.2d 133;

2                    (1971)

3                    U.S. APP. WILLIE KIMBROUGH V. J.D. COX SUPERINTENDANT

4                    VIRGINIA STATE PENITENTIARY 444. F.2d 8; (1971)

5                    OFFICER SAVENKEO'S TESTIMONY ON THE PRE-TRIAL ID-  
6                    ENTIFICATION WAS THE DIRECT RESULT OF THE IMPERMISSABLY  
7                    SUGGESTIVE PROCEDURE, SPECIFICALLY BECAUSE HE TESTIFIED  
8                    TO THE FACT THAT THE ONLY "PHOTO" HE LOOKED AT WAS ONLY  
9                    ONE (VAUGHN).

10                    SAVENKEO ALSO TESTIFIED, "TO IDENTIFY SOMEBODY" HE  
11                    WOULD HE WOULD PREPARE A PHOTO MONTAGE OR PHOTOGRAPHIC  
12                    LINE UP", QUOTING SAVENKEO. RP 52 (10-16). THIS SHOWS  
13                    THAT HE IS FAMILIAR WITH THE PROPER TYPE OF IDENTIFICA-  
14                    TION PROCEDURE FOR A WITNESS WHO HAS SEEN A SUSPECT.  
15                    AND IN HIS TESTIMONY HE CLEARLY DECLARES HIMSELF QUOT-  
16                    ING SAVENKEO, "I AM THE WITNESS". RP 53(2)

17                    SAVENKEO ALSO GIVES TESTIMONY THAT WHEN QUESTIONING TIM  
18                    MCRAY, THAT MCRAY GIVES HIM THE NAME HOWARD VAUGHN.  
19                    RP 38 (10,11) FURTHER SAVENKEO NOTES THAT ON THIS OC-  
20                    CASION HE IS WITH HIS PARTNER. RP 38 (2,3). THERE IS  
21                    NO JUSTIFIABLY GOOD REASON WHY SAVENKEO DID NOT TAKE  
22                    THE ACCESSIBLE RESOURCES, AVAILABLE TO HIM WHEN HE REC-  
23                    EIVED THE INFORMATION OF VAUGHN'S NAME, AND HAVE HIS  
24                    PARTNER WHO WAS NOT INVOLVED IN THE FELONY PURSUIT THAT  
25                    GO TO THE POLICE VEHICLE AND HAVE HIM GENERATE SIX OR  
26                    EIGHT, DIFFERENT COMPUTER PHOTOGRAPHS OF PEOPLE THAT

1 HAVE SIMILAR CHARACTERISTICS AS VAUGHN, VAUGHN BEING  
2 ONE OF THE PHOTOGRAPH'S IN THE DISPLAY, TO SEE IF  
3 SAVENKEO COULD CORRECTLY IDENTIFY THE SUSPECT. BEING  
4 SAVENKEO GAVE TESTIMONY TO HOW A PHOTO MONTAGE IS USED  
5 FOR A "WITNESS" TO MAKE AN IDENTIFICATION. RP 58 (5-12)

6 EVEN IF THE POLICE FOLLOW THE MOST CORRECT PHOT-  
7 OGRAPHIC IDENTIFICATION PROCEDURES AND SHOW THE PICTURES  
8 OF A NUMBER OF INDIVIDUALS WITH SIMILAR CHARACTERIS-  
9 TICS AND WITHOUT INDICATING WHO THEY SUSPECT MAY BE THE  
10 PERPATRATOR IS, THERE IS SOME DANGER THAT THE WITNESS  
11 MAY MAKE AN INCORRECT IDENTIFICATION. THIS DANGER WILL  
12 BE INCREASED IF THE POLICE DISPLAY TO A WITNESS ONLY  
13 THE PICTURE OF A SINGLE INDIVIDUAL WHO GENERALLY RES-  
14 EMBLES THE PERSON THE WITNESS SAW. MARTA V. SUMNER  
15 390 U.S. AT 383, 88 S. CT. AT 971 (1980)

16 THE VALIDITY OF A PHOTOGRAPHIC IDENTIFICATION PRO-  
17 CEDURE IS A QUESTION FOR THE JURY'S DETERMINATION AND  
18 THE APPELLETE COURTS WILL REVERSE ONLY WHERE THE IDENT-  
19 IFICATION WAS SO IMPERMISSIBLY SUGGESTIVE. STATE V.  
20 CANE 4 WN. APP. 745, 750, 484 2d 432.

21 STATE V. COOK 31 WN. APP. 165, 172, 639 P.2d 863.

22 STATE V. TORKELOSON 25 WA. APP. 615, 611 P.2d 1278

23 U.S. V. FOWLER 439 F. 2d 133 (1971)

24 KIMBROUGH V. VIRGINIA STATE PENITENTIARY 444. F. 2d  
25 8 (1971) U.S. APP.

1 ALL IN ALL, A PHOTOGRAPHIC IDENTIFICATION PROCEDURE  
2 VIOLATES A DEFENDANTS RIGHTS TO DUE PROCESS OF THE  
3 LAW, IF UNDER THE TOTALITY OF CIRCUMSTANCES, THE  
4 PROCEDURE WAS SO IMPERMISSIBLY SUGGESTIVE TO GIVE  
5 RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IRREPAIRABLE  
6 MISIDENTIFICATION. THE STANDARD FOR REVIEWING PHOTO  
7 GRAPHIC DISPLAYS INVOLVES A TWO PRONG TEST: FIRST  
8 DECIDE IF THE PROCEDURE WAS IMPERMISSIBLY SUGGEST-  
9 IVE. SECOND, DETERMINE IF THE DISPLAY CREATED SUB-  
10 STANTIAL RISK OF MISIDENTIFICATION .

11 STATE V. BROWN 27 Wn. APP. 639, 620 P.2d 529(1980)

12 STATE V. ORTIZ 34 Wn. APP. 694, 664 P.2d 1267 (1983)

13 STATE V. SMITH 37 Wn. APP. 381, 680 P.2d 768 (1984)

14 STATE V. HALL 40 WN. APP. 162 697

15 (WASHINGTON SUPREME COURT) STATE V. NETTLE 81 Wn.

16 2d 205 500 P.2d 752 (1972)

17 (U.S. SUPREME COURT) SIMMONS V. UNITED STATES 390 U.S.

18 377 88 S. CT. 967, 19 L.ED. 2d 1247 (1968).

19 (WASHINGTON APPEALS) STATE V. TORNELSON 25 Wn. APP.

20 615, 611 P.2d 1278 (1981)

21 (WASHINGTON SUPREME COURT) V. HILLIARD 89 Wn. 430

22 573 P.2d 22 (1977)

23 WHEN DETERMINING WHETHER THE PHOTOGRAPHIC DISPLAY  
24 WAS IMPERMISSIBLY SUGGESTIVE, THE RELEVANT FACTORS  
25 IS THE DISPLAY ITSELF. U.S. V. GIDLEY 527 F. 2d 1345  
26  
27  
28

1 SEVERAL POSSIBLE SOURCES OF SUGGESTIVENESS MAY  
2 HEIGHTEN THE DANGER A WITNESS WHO HAD A BRIEF GLIMPS  
3 OF A SUSPECT MAY ERR IN MAKING AN IDENTIFICATION,  
4 A PHOTOGRAPH OF ONE INDIVIDUAL WHO GENERALLY RESEMBLES  
5 THE PERSON THEY SAW. OR IF SOME OTHER INDICATION TO  
6 WHOM IT MAY OF BEEN ,IS NOT PRESENT.

7 STATE V. BURRELL 28 Wn. APP. 606 625 P.2d 726 (1981)

8 STATE V. HOYT 29 Wn. APP. 372 628 P.2d 515

9 SIMMONS V. U.S. 390 U.S. 377 88 S. CT. 967 19 L. ED.

10 2d. 1247

11 MR.VAUGHNS RIGHTS THO DUE PROCESS WERE CLEARLY VIO-  
12 LATED BY A PRETRIAL PHOTOGRAPHIC DISPLAY SPREAD  
13 WHEN MR.VAUGHN WAS THE ONLY PERSON IN THE DISPLAY  
14 SAVENKEO'S IDENTIFICATION WAS ALSO TAINTED WHEN  
15 AFTER HIS "INVESTIGATION" OF A SINGLE SUSPECT, COMPU-  
16 TER GENERATED PICTURE, HE WAS ASSIGNED TO TRANSPORT  
17 MR.VAUGHN FROM PIERCE COUNTY JAIL, WHERE VAUGHN  
18 WAS BEING HELD IN CUSTODY ON THE MATTER MR.VAUGHN  
19 IS NOW APPEALING.

20 SAVENKEO ALSO STATED, "I DID NOT SEE HIS DRIVERS  
21 LICENSE, I DID NOT MAKE ANY CONTACT WITH HIM SINCE  
22 THEN." QUOTING SAVENKEO RP 54 L (23,24)

23  
24 IT IS A FACT, EASILY VERIFIED BY BRIEF EXAMINATION  
25 OF LAKEWOOD POLICE DEPARTMENT RECORDS, THAT PRIOR  
26 TO SAVENKEOS TESTIMONY IN COURT, HE INDEED DID HAVE  
27 FIRST HAND CONTACT WITH VAUGHN, WHEN VAUGHN WAS  
28 TRANSPORTED FROM PIERCE COUNTY JAIL TO LAKEWOOD

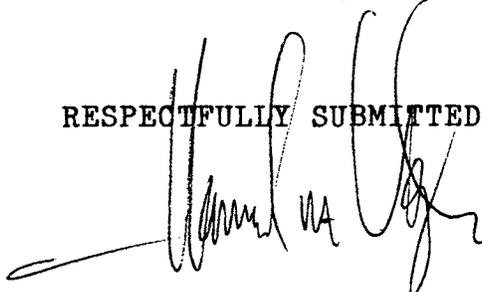
1 MUNICIPAL COURT, OFFICER SAVENKEO AND ANOTHER OFFICER  
2 WERE TRANSPORT OFFICERS, RESPONSIBLE FOR TRANSPORTING  
3 MR.VAUGHN TO AND FROM THE COURT PROCEEDINGS, THAT  
4 INCIDENTALLY WERE DIRECTLY RELATED TO THE OCCURENCE  
5 TO THE INCIDENT IN WHICH SAVENKEO GAVE TESTIMONY  
6 THAT HIS IDENTIFICATION OF THE SUSPECT WAS BASED  
7 OFF OF INFORMATION AND A BOOKING PHOTO ONLY. RP  
8 55 L. (1,2)

9 MR.VAUGHNS RIGHTS TO DUE PROCESS WERE CLEARLY  
10 VIOLATED BY A PHOTOGRAPHIC DISPLAY SPREAD THAT INCLU-  
11 DED ONLY MR.VAUGHN IN THE SAID DISPLAY. MR.VAUGHNS  
12 BAIL JUMPING CONVICTION WAS INCLUDED WITH THE CHARGE  
13 OF ELUDING AND DRIVING WHILE LICENSE SUSPENDED 1st  
14 DEGREE, AND MR.VAUGHN CONTENDS THAT THE GUILTY VERDI-  
15 CT ON THE BAIL JUMPING STEMS FROMT THE UNLAWFUL  
16 CONVICTION OF THE LESSER CHARGES, ARGUING THAT THE  
17 JURY WAS UNREPAIRABLE DAMAGE CAUSED BY THE AFORE  
18 MENTIONED ERRORS.

19 FOR THE AFORE MENTIONED REASONS MR.VAUGHN RESPEC-  
20 TFULLY REQUESTS THIS COURT TO REVERSE HIS CONVICTION  
21 AND REMAND FOR A NEW TRIAL WITH A NEW TRIAL COUNSEL.

22  
23 DATED 11-21-08

24 RESPECTFULLY SUBMITTED,

25 

26 HOWARD M. VAUGHN  
27  
28