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I. STATEMENT OF FACTS

The State accepts, in part, the statement of fact set forth by the attorney on appeal. Additional information is referred to by the trial court in the Findings of Fact and Conclusions of Law on Contempt Sanctions (CP 58). A copy of those Findings of Fact and Conclusions of Law are attached hereto and by this reference incorporated herein. As part of the findings, the court makes reference to materials found as supplements to the Supplemental Memorandum of Law filed by the State on April 24, 2009 (CP 8). A copy of the Supplemental Memorandum of Law and the attached Appendices are attached hereto and by this reference incorporated herein.

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defense attorney is that she was not in contempt of court as found by the trial court. The defense attorney argues that the trial court, in issuing sanctions for contempt, exercised its discretion in a manifestly unreasonable manner, and further, that the trial court based its decision to order sanctions for contempt on untenable grounds or reasons. Part of the argument being made was that the trial court did not specifically cite to factual instances in the record. (Appellate Brief, pages 12-13).

The inherent authority of the trial court to find an attorney in contempt of court is spelled out in a few cases but has been discussed recently in Division II in the case of State v. Jordan, in the Matter of Michael Nagle, 146 Wn. App. 395, 190 P.3d 516 (2008). The Court of Appeals looked at the issue of contempt proceedings against an attorney and made the following observations:

A trial court may impose a contempt sanction using its inherent constitutional authority or under statutory provisions found in Title 7 RCW. A.K., 162 Wn.2d at 645, 652. A finding of contempt and punishment, including sanctions, lies within the sound discretion of the trial court. State v. Dugan, 96 Wn. App. 346, 351, 979 P.2d 885 (1999). We will not disturb a trial court's contempt ruling absent an abuse of that discretion. Dugan, 96 Wn. App. at 351. A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons. State v. Berty, 136 Wn. App. 74, 83-84, 147 P.3d 1004 (2006) (citing State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

-(State v. Jordan, in the Matter of Michael Nagle, 146 Wn. App. at 402)

In this case, the trial court did not specify the basis for its contempt authority, referring only to "direct contempt." We agree with the State, however, that it appears the trial court was attempting to use its summary contempt authority under RCW 7.21.050(1). Nagle argues that summary proceedings for contempt can only occur for disruptive behavior in the courtroom and his absence from the hearing

was outside of the court's presence and, thus, the trial court lacked authority to summarily impose sanctions against him for his nonappearance.

RCW 7.21.050(1) provides in pertinent part: “The person committing the contempt of court *shall* be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise.” (Emphasis added.) The legislature's use of the term “shall” is mandatory, and a court acting without having complied with the statutory mandate does so without authority. State v. Martin, 137 Wn.2d 149, 154-55, 969 P.2d 450 (1999). Here, the trial court's imposition of two days in jail occurred before Nagle was provided an opportunity to explain or mitigate the sanction; thus, the contempt sanction was punitive and the error could not be cured by the show cause hearing conducted after the sanction was imposed.

-(State v. Jordan, in the Matter of Michael Nagle, 146 Wn. App. at 403)

The distinction between our situation and the Jordan/Nagle case is that the attorney, in our situation, was given an opportunity, prior to the entry of the Findings of Fact, to state her position. The court felt that her conduct was contemptuous at the time of the trial, had been committed in the presence of the court, and had been done so after repeatedly being warned to avoid these areas with the jury. Further, there is ample evidence and information contained in the Findings of Fact and in the Supplemental Memorandum of Law, which sets forth exactly the areas that were of

concern to the trial court and were the basis of her decision to find the attorney in contempt.

Contempt sanctions were properly imposed against an attorney because the attorney disobeyed the court's rulings regarding questioning of a witness by stating that he wished he could tell the jury "all of the motives" the witness had to lie, and stating, "I even had to go so far as to say she was not telling the truth". In addition, the trial court certified that he saw the contempt when he notified the attorney during closing argument that the attorney's comments were sanctionable.

-(State v. Berty, 136 Wn. App. 74, 147 P.3d 1004 (2006))

Our situation is similar in that the defense attorney repeatedly tried to introduce to the jury information that the court had previously ruled could not be delved into. The defense attorney was attempting to use statements from a dead witness to establish the basis of the defense. This was discussed pre-trial and during trial repeatedly, and the defense attorney continually attempted to circumvent the rulings of the court. Whether contempt is warranted is a matter within the trial court's discretion and the appellate court will not disturb the trial court's order on appeal absent abuse of discretion. Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). The Appellate Court reviews fines and sanctions

imposed for contempt for abuse of discretion. State v. Berty, 136 Wn. App. at 83. A finding of contempt will be upheld on any proper basis. *Id.* at 84. The State submits that in these proceedings, a proper basis can be found for the finding of contempt. State v. Hobbie, 126 Wn.2d 283, 292, 892 P.2d 85 (1995). The authority to impose the sanctions for contempt may be either statutory or under the inherent power of the court. State v. Hobbie, 126 Wn.2d at 292. It has long been the rule that repeated violations of rulings of the court can rise to contumacious conduct, especially when an attorney violates the court's instructions not to pursue a particular line of questioning. Pounders v. Watson, 521 U.S. 982, 989-991, 117 S. Ct. 2359, 138 L. Ed.2d 976 (1997).

The State submits that there have been clear instances in this record to substantiate the finding of contempt by this attorney. It's interesting to note that the trial court is more concerned with helping the attorney than in necessarily punishing her. This is obvious from the fact that either she can pay the fine or take continuing CLE courses in Evidence. Obviously, the court thought there was something lacking in her ability to try a case, properly, before a jury.

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III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 12 day of June, 2009.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:   
MICHAEL C. KINNIE, WSBA#7869  
Senior Deputy Prosecuting Attorney

# **APPENDICE A**

§ 2.28.010. Powers of courts in conduct of judicial proceedings

Every court of justice has power -- (1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority. (3) To provide for the orderly conduct of proceedings before it or its officers. (4) To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein. (5) To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto. (6) To compel the attendance of persons to testify in an action, suit or proceeding therein, in the cases and manner provided by law. (7) To administer oaths in an action, suit or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers or the performance of its duties.

7.21.010. Definitions

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

## **APPENDICE B**

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Sherry W. Parker, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
Plaintiff,  
v.  
KEVIN SCOTT VINSONHALER,  
Defendant.

No. 08-1-01728-1

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW ON CONTEMPT SANCTIONS

This matter having come before the court on May 1, 2009, the State of Washington represented by Deputy Prosecuting Attorney Abigail Hurd, the Defendant, Kevin Vinsonhaler present, defense attorney Darquise Cloutier present and represented for this action by her attorney, Anthony Lowe, and the Court having reviewed the briefs of the attorneys and having heard the trial upon which sanctions for contempt have been requested, the Court makes the following:

**FINDINGS OF FACT**

The Court incorporates all that was entered in the record in this matter within the FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. Attorney Darquise Cloutier defended Kevin Vinsonhaler on charges of Residential Burglary and Theft in the Third Degree.

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AS

1 2. The state's allegation was that the defendant entered a mobile home belonging to  
2 Harold Lee (through a back window and in the middle of the night) and removed a water  
3 heater from the mobile home. The defendant did so without Harold Lee's permission to  
4 enter his mobile home or to take his property.

5 3. Defense attempted to argue that Tim Grace (an alleged "maintenance person" at the  
6 mobile home park), gave the defendant permission to take the water heater.

7 4. Tim Grace was found dead in his adjacent mobile home some time after this incident  
8 took place; it is unknown how for long he had been deceased. Tim Grace's name was  
9 not mentioned in any police report related to this incident.

10 5. Before trial, the state filed a Motion in Limine to prohibit the defense from making any  
11 reference to Tim Grace, any statements made by Tim Grace, or any general argument  
12 that permission may have been given by someone who is now deceased, during  
13 defendant's voir dire, defendant's opening and closing statements, cross-examination of  
14 State's witnesses, or direct/re-direct examination of defendant's witnesses.

15 6. The Court granted the state's Motion in Limine. *as to the out of court*  
16 *statement of permission made by Tim Grace to the defendant*

17 7. The defense attorney repeatedly violated the Court's ruling, to the extent that (1) the jury  
18 had to be excused on several occasions in order for the Court to revisit its prior ruling  
19 and (2) on the second day of trial, the Court had to re-state its prior ruling before  
20 allowing the trial to re-commence.

21 8. During closing argument, the state argued the property owner, Harold Lee, never gave  
22 the defendant permission to enter his mobile home or to take his property. In response,  
23 the defense attorney stated the following:  
24

25 We all want to think that in a trial there's an inherent search for the truth. What truly  
26 happened on the date in question, in this case on May 12, 2008, and I'd like to think  
27 that the jury's job is to find out what truly happened, and it is, it truly is.

1 The problem is that you might see a lot of trial attorneys carrying a book like this, this  
2 is called "The Courtroom Handbook on Washington Evidence". This tells us lawyers  
3 what kind of testimony, what kind of evidence we can bring before the jury and what  
4 kind of evidence is not admitted. Quite a bit is not admitted. So you're probably still  
5 kind of puzzled about what went on in May 2008 and I don't blame you [be]cause  
6 there is some stuff that the rules of evidence prohibited us from discussing about.

7 You probably heard something called the hearsay rule. Hearsay is essentially a  
8 statement made by somebody else that the witness wants to talk about. That's  
9 always an issue at trial.

10 There [are] also certain rules that apply to people who are dead at the time of trial.  
11 And some cases we just can't talk about things. And when you have a case where  
12 the most important witness is dead...

13 [state objects – Court sustains objection]

14 Okay, when one of the possible witnesses is dead... defense's case can be very  
15 constrained. So I think that would explain some of the puzzle you all are facing right  
16 now. And I can definitely sympathize with that. *Report of Proceedings*, at 400-401.

- 17 9. These statements were made in the presence of the Judge and jury.
- 18 10. The Court did not make any contempt rulings that were contemporaneous with any  
19 remarks made by the defense attorney during the trial.
- 20 11. Prior to the jury rendering a verdict, the state indicated to the Court and to the defense  
21 attorney that it would be seeking sanctions.
- 22 12. On April 15, 2009, after approximately one day of deliberation, the jury informed the  
23 Court it was unable to render a verdict.
- 24 13. On April 17, 2009, the state filed a motion for sanctions for comments made by the  
25 defense attorney during the trial. The state filed an accompanying memorandum that  
26 detailed statements made by defense counsel during closing argument. The state  
27 indicated it would file a supplemental memorandum in regards to statements made by  
defense counsel during other portions of the trial.
14. The Court set a hearing date regarding the sanctions motion for May 1, 2009.

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15. On April 24, 2009, the state filed a supplemental memorandum that detailed statements made by the defense attorney during opening statement.

Based upon the above findings of fact, the Court makes the following:

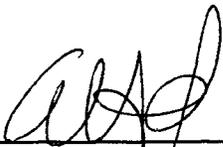
### CONCLUSIONS OF LAW

1. The Court, in reviewing RCW 7.21.010 and RCW 7.21.050, has decided the summary contempt statute is <sup>m</sup>adequate, and will proceed under its inherent authority rather than the statutory contempt scheme.
2. The Court has reviewed the following materials and has found them instructive:  
Washington State Court Rules: Rules of Professional Conduct ("RPC") Preamble, RPC 3.2 (Expediting Litigation), RPC 3.5 (Impartiality and Decorum of the Tribunal), *State v. Berty*, 136 Wn. App. 74, 147 P.3d 1004 (2006), and *State v. Pedro*, 148 Wn. App. 932, 201 P.3d 398 (2009).
3. The Court finds that Attorney Darquise Cloutier repeatedly violated the Court's orders.
4. Attorney Cloutier's words and behavior were disrespectful of the Court's authority and were an affront to its dignity. In addition, Attorney Cloutier's words and behavior violated the cornerstone of trial practice: fundamental fairness.
5. The Court concludes ~~beyond a reasonable doubt~~ that Attorney Cloutier's conduct was willful and intentional. *and affected the outcome of the trial by her improper argument.*
6. The Court concludes a punitive sanction for Attorney Cloutier's words and behavior is necessary to ~~punish a past contempt of court~~ for the purpose of upholding the authority and dignity of the court.
7. The Court concludes a sanction of \$500.00 is appropriate and shall be paid to the Clerk of the Superior Court in one year. In the alternative, Attorney Cloutier may cure her

1 financial obligation to the Court by completing one CLE in Evidence and one CLE in Trial  
2 Practice within one year of its ruling.

*Atty Cloutier is a  
report CLE's to the indigent  
defense coordinator who will  
determine the appropriateness  
and report to the Court*

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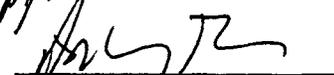
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The Honorable Diane M. Woolard

*Exceptions stated on record,  
Approved as to form; copy.  
Received*

  
Darquise Cloutier, #21865

*Anthony Lowe 17690*

## **APPENDICE C**

FILED

2009 APR 24 PM 4: 27

Sherry W. Parker, Clerk  
Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,  
v.

KEVIN SCOTT VINSONHALER,

Defendant.

**SUPPLEMENTAL MEMORANDUM OF  
LAW**

No. 08-1-01728-1

On April 17, 2009, the State filed a motion, and supporting memorandum, for sanctions in regards to statements made by defense counsel during closing argument, and during the course of, the trial of *State v. Kevin Vinsonhaler*. The state indicated to the court that it would file this supplemental memorandum in order to detail the conduct that took place during the trial. This conduct is, specifically, statements that were made by defense counsel during opening statement that were in direct violation of the court's pre-trial ruling.<sup>1</sup>

**FACTUAL SUMMARY**

**1. BACKGROUND**

The defendant, Kevin Vinsonhaler, was charged by Information, with one count of Residential Burglary and one count of Theft in the Third Degree. The allegation was that the defendant entered a mobile home belonging to Harold Lee and took a water heater belonging to Harold Lee, without Harold Lee's permission.

<sup>1</sup> A transcript of the court's rulings is attached as "Exhibit A" to this supplemental memorandum.

1 On a later date, after charges were filed, defense counsel informed the State that the  
2 defendant said he had permission from Tim Grace to take the water heater. Tim Grace was  
3 apparently a resident of the mobile home park who also acted as a maintenance man. He was  
4 found dead in his mobile home approximately eight hours after the crimes at issue took place.  
5 The name "Tim Grace" was nowhere mentioned in any police report for this case.

## 6 7 **2. STATE'S MOTION IN LIMINE**

8 On April 10, 2009, the State filed a motion in limine with the court and provided a copy to  
9 defense counsel. In its motion, the State requested the court:

10 PROHIBIT the defense from making any reference to Tim Grace, any statements made  
11 by Tim Grace, or any general argument that permission may have been given by  
12 someone who is now deceased, during defendant's voir dire, defendant's opening and  
13 closing statements, cross-examination of State's witnesses, or direct/re-direct  
14 examination of defendant's witnesses.

15 *State's Motion in Limine*, p. 6.

16 The basis for the State's argument was that any reference to statements made by Tim  
17 Grace (1) was prohibited by RCW 5.60.030 (Washington's "Dead Man's Statute"); (2) was  
18 irrelevant; and (3) was hearsay (hearsay that was self-serving and that was not a dying  
19 declaration).

## 20 21 **3. COURT'S PRE-TRIAL RULING**

22 On April 13, 2009, trial went forward in the matter of *State v. Vinsonhaler*. Prior to trial,  
23 the court granted the State's motion in limine. In so doing, Judge Diane M. Woolard stated the  
24 following:

25 JW: When I, when I looked at this issue, I was thinking what kind of a cautionary instruction  
26 can I give. Does it really go to the heart of the matter and I couldn't think of a cautionary  
27 instruction because it goes to the heart of the matter. Um and so there we are with  
28 regard to Mr. Grace, so I'm going to grant the State's motion because it is hearsay. It  
29 does go to the heart of the matter. It's not a dying declaration. It's just like bringing  
somebody else in and saying they did it. It's the same issue only in this case, you know,  
it happens to be someone who's deceased but it's, you know, the same issue. You can't  
go ahead and say well know it wasn't me, it was somebody else especially when we  
don't have any um any person to deal with.

1 Following the court's ruling, defense counsel requested the following clarification, for  
2 which she received the following response from Judge Woolard:

3  
4 DC And Your Honor, is the court prohibiting my client from testifying as to his understanding

5 JW Well I

6 DC regarding permission

7 JW I try, you know, it's hard to control what comes out of people's mouths a head of time but  
8 they certainly are risking objections and things like that when they do so he would not be  
9 able to.

10 *Transcript of Proceedings<sup>2</sup>, p. 5.*

11  
12 **4. DEFENSE COUNSEL'S OPENING STATEMENT**

13 During opening statement, defense counsel said the following:

14 DC: In May, 2008, which is when this incident happened, uh, living there included uh  
15 Vickie Peterson, uh the McClures, of which the State will call Brian McClure, he's  
16 the a, the, the young man living, who had been living there with his brothers, and  
17 his mom, their pit bull, and there pet raccoon. Uh, you'll hear of Tim Grace who  
18 was the

18 AH: Objection, Your Honor

19 DC: Who was the uh maintenance man

20 AH: Pre-trial ruling

21 JW: I've noted that opening argument is not evidence, so move on.

22 DC: Thank you. May I have a side-bar Your Honor?

23 DC: Okay you will hear testimony regarding the residents that still resided there.  
24 Which included Vickie Peterson, my client who spent some time there, uh, Tim  
25 Grace...

26 *Recording of Proceedings<sup>3</sup>, April 13, 2009, 2:01:54 – 2:03:16*

27  
28 <sup>2</sup> Dialogue identified as "Transcript of Proceedings" is directly taken from the transcript prepared by Abby  
29 Rowland, legal assistant for the Clark County Prosecuting Attorney's Office. This transcript is attached to  
the supplemental memorandum as "Exhibit A".

1  
2 DC: My client, uh, tries to explain that he had permission to take the water heater.  
3 The police officers aren't able to verify that information. Um, unfortunately, uh,  
4 that information, uh, was never able to be verified. Um, Mr. Tim Grace who was  
5 the maintenance man there, uh, was found dead the next day. Totally unrelated,  
6 totally unrelated to the alleged burglary or theft here; however, the reason we're  
7 here today is because

8 AH: Objection, Your Honor

9 JW: Sustained

10 DC: In any event, we're here today in the trial of Mr. Vinsonhaler...

11 *Recording of Proceedings, April 13, 2009, 2:05:38 – 2:06:18.*

12 It should be noted that, following the events that occurred during the first day of trial, on  
13 the second day of trial, the court reiterated its pre-trial ruling in regards to the admissibility of  
14 any testimony concerning Tim Grace. The court stated:

15 JW: [u]nder both ER 403 as well as the hearsay rules, any mention of any permission, or any  
16 mention of, of the Timothy Grace, the decedent, is improper.

17 DC Well, Your Honor, we would ask the court to reconsider that, a

18 JW I reconsidered it and there's no further argument; nor discussion.

19 *Transcript of Proceedings, p. 5-6.*

20 **ARGUMENT**

21 "Contempt of court" includes...intentional "[d]isobedience of any lawful  
22 judgment, decree, order, or process of the court." *State v. Berty*, 136 Wn. App. 74, 147  
23 P.3d 1004 (2006), RCW 7.21.010(1)(b).<sup>4</sup>

24 In its pre-trial ruling, the court in our case specifically prohibited defense counsel  
25 from discussing Tim Grace during opening argument. Defense counsel, however,  
26 brought up Tim Grace repeatedly during opening statement, over the State's objection.

27  
28 <sup>3</sup> Dialogue identified as "Recording of Proceedings" was transcribed by the author of this memorandum  
29 and was taken directly from the trial CD. A written transcription, transcribed by Abby Rowland, will be  
provided to the court.

<sup>4</sup> See "Exhibit B"



**EXHIBIT A**

**STATE V. KEVIN VINSONHALER  
CASE NO. 08-1-01728-1**

**JW: Judge Diane Woolard**  
**AH: Abigail Hurd, Deputy Prosecuting Attorney**  
**DC: Darquise Cloutier, Defense Attorney**  
**KV: Kevin Vinsonhaler, Defendant**

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**April 13, 2009 – 9:23:45 – 9:36:10**

AH: Your Honor, though I did, I did just realize though, we actually would ask the court to address the motion in limine that we filed with the court on Friday as far as what the defense can and can't address during voir dire with the jurors and that has to go with this defense that a dead person, named Timothy Grace, gave the defendant permission to enter this mobile home.

JW: Any problems with not mentioning that?

DC Yes,

JW (Unintelligible – voices overlapping)

DC Yes, I would object to the State's uh

JW Well I'll guess we'll deal with that now. From the State.

AH Thanks, Your Honor. The defendant was arrested on May 12, 2008. He admitted to entering a mobile home that belonged to Harold Lee. He admitted to taking a water heater that belonged to Harold Lee. He gave a couple different stories to the officers at the time of arrest; agreed to talk to them. Uh, told the officer, Officer Gabriel that he had permission from the owner to take that water heater. He couldn't provide a name of the owner, however. At no time did he mention that somebody by the name of Timothy Grace gave him permission to enter the mobile home that is owned by Harold Lee. At no time did he say Timothy Grace gave him permission to take the water heater that's located inside this mobile home owned by Harold Lee. Um, we later found out that Timothy Grace was a maintenance man at this mobile home park. The mobile home park is owned by Harold Lee. Uh, Timothy Grace was found dead in his trailer that he lives in at the mobile park. Later that day,

JW Is that a different, now is this a different trailer?

AH It's a different trailer.

JW Okay.

AH He lived um it looks like down the road in the mobile home park. He was a maintenance man. He had no keys to any of the units. He had no authority to allow anybody into any of these mobile home units so what he did or didn't say are first argument, Your Honor, is totally irrelevant because the only person who can give permission to enter the property that was entered is the owner, Harold Lee. So what Tim did or didn't say isn't relevant and there's no reason to believe this statement was ever said in the first place since it was never mentioned to the arresting officers.

JW Was Mr. Grace, um, part of the people who went in?

AH No.

JW So he's not, there isn't anything that ties him to the scene except Mr. Vinsonhaler's statements?

AH Right, absolutely nothing that ties him to the scene. He was found a dead, deceased in his mobile home later that day. He could have been dead for up to six days prior to that. We just don't know.

JW Okay.

AH And in addition, Your Honor, the only reason the defense would be seeking to admit this entire argument is for the truth of the matter asserted that Timothy Grace did in fact say the defendant had permission to enter. Those were the words he said. So that would be going to the truth of the matter asserted. It's hearsay. It's inadmissible on those grounds. Since Tim Grace is deceased, he can't testify for us today. We can't test the credibility of the statement. The only hearsay exception it could fit under is a dying declaration and there's absolutely no evidence that Tim Grace's dying statement on his death bed was that the defendant had permission to enter a mobile home owned by Harold Lee. So we would also ask that the statement, any reference to it be kept out. Because it's hearsay, it would be offered for the truth of the matter asserted. Um, as far as getting any other witness to testify to this statement made by Timothy Grace that would be uh hearsay as well, offer for the truth of the matter asserted, inadmissible. For any witness to testify to the defendant saying Tim Grace gave him permission that's self-serving hearsay, inadmissible, only statements offered against a party are admissible. It'd be double hearsay because if a witness was recounting what the defendant said that's self-serving. If they were recounting the defendant said Tim Grace gave him permission to enter, that's self-serving plus not a dying declaration so not admissible. If the court does allow this evidence to be admitted, it could only be admitted through the defendant if he chose to testify if the court decided it could go to the defendant's state of mind. But of course, no other witnesses can testify to the defendant's state of mind but him. Any other witness testifying to this would be testifying to it as the truth of the matter asserted. Since we don't know if the defendant's going to testify that's the reason we would ask that there not be any mention of this defense whatsoever during voir dire, during opening statement, during questioning of any other witness besides the defendant. Thanks Your Honor.

JW Counsel?

DC Well obviously, Your Honor, I, I disagree with the State's uh argument that ah first of all the, the statements made by Mr. Tim Grace are hearsay. Uh there not being ah, ah. They would not be offered for the truth of the matter asserted rather to explain my client's state of mind. The crux of the defense case here, as he has maintained right from day one, was that he had permission to enter this trailer to get the water heater. He had permission from Mr. Tim Grace. He informed the officers at the scene that he had permission. He may or may not of, under, in his nervousness remember the actually name of, of the individual. However, officers did try to verify that he, that my client had permission to take thee the water heater. Ah, Mr. Grace apparently was, was well according to the reports that I included in ah my response to the State's motion in limine ah was found dead the next day. Um, we don't know how long he was dead, whether it was six days, two weeks, or, or whatever. We just don't know. We know that he was found dead on the 12<sup>th</sup> which was a later in the day of this incident. Ah and there's absolutely no connection obviously between the death and my client entering the um the trailer to, to get the ah water heater. Um, it's very important that Mr. Grace is dead and, and can't testify here a as to a giving my client permission or not. Um, ah to prohibit the defense from um presenting the case a basically ah, ah allowing the jury to decide whether ah it's believable or not. Ah, ah is, is really atrocious, I believe, ah um, I believe we're here to let the jury decide what actually happened; what the truth is. Um, my client certainly can testify as to what his understanding was regarding permission to take the water heater as well ah the witnesses. We have other witnesses who also heard Mr. Tim Grace say that my client had permission to take the water heater. Um and that would be absolutely relevant as to whether my client's understanding and belief that he was able to take the water heater was reasonable. Um, obviously this is, that is the crux of the defense case. The State's trying ah obviously gut the defense case. Um, um we're just here to ask the jury to decide what really happened; what is the truth of this matter. We're not trying to a, a hide any, any relevant evidence. Ah this is something the jury needs to decide whether it's credible or not and ah, ah I do think they'll find that it's credible. Um and I, I don't know if we're just discussing this right know in terms of whether we can mention it during voir dire or during the whole trial. Ah but it is highly

JW Any ruling that I make now is going to for all intensive purposes probably be throughout the trial.

DC Okay, okay, but my argument obviously is first of all, it's not hearsay. It's not asserted for the truth of the matter. Um, it's unfortunate that Mr. Grace isn't here. Ah we're here to explain my client's state of mind and whether that's reasonable or not. Whether his, his understanding was reasonable or not ah can be aided by having the other witnesses who heard Mr. Grace say the exact same thing testify.

JW Is any of this in the police reports anywhere?

AH It's no where mentioned in the police reports whatsoever because it was never told to the police officers at the time of the arrest.

DC Your Honor, that, that's absolutely false. We have interviewed police officers who have indicated that they went, they tried to check to see if it was true that my client had permission from the owner a to take the water heater. So it was mentioned in the police; it was mentioned to the police and even if it's not in the police report doesn't mean my client didn't say, hey I had permission. They just don't put everything in the police reports.

JW So they went to ask, the officers went to check with Mr. Lee?

DC Yes, they did check with Mr. Lee who is the owner. Ah Tim Grace was the, who my client thought was the manager/maintenance man

JW Okay

DC on the site. A we believe that some officers a actually did go talk to or try to talk to Mr. Lee. Ah I'm still trying to reach ah there were 8 to 10 officers involved there. I'm still trying to figure out who actually went to talk to Mr. Lee, tried to talk to Mr. Grace I mean. Um, that I don't know. Only two police officers wrote reports regarding the incident ah but I'm still having my investigator try to check that out. Yes it was mentioned at the scene. Ah, I, Mr. Grace's ah name is not in the reports of course, but ah in interviews, Your Honor, the officers knew that my client claimed he had permission.

JW Okay.

DC Thank you

JW The State

AH Thank you, Your Honor, just to clarify. Um among the stories the defendant told the arresting officers was that the owner of the unit gave him permission to enter the mobile home. When asked specifically the name of the owner of the unit, the defendant could not provide any name. Officers on their own figured out that the owner of the unit was Harold Lee. That any mention of a maintenance man or the name Tim Grace was never brought up in anyway whatsoever, Your Honor. This is hearsay. It's being offered for one reason; that's the truth of the matter asserted. Tim Grace is deceased. He can't corroborate the story. He's being accused as being an accomplice in this crime. He can't defend himself so any mention of this is prohibited by State v. Crawford. Thanks Your Honor.

DC And Your Honor, my client will testify that he did indicate to the officers that maintenance man gave him permission. Um, Your Honor, this is

(unidentified voice) Wow

DC a matter of, of deciding ah what facts the, the jury will decide to believe. It's, we're all of us at a disadvantage because Tim Grace died and he can't help us explain the story

(unidentified voice) fuck

DC and I, it would be absolutely unfair ah for the State to take advantage of, of the death of Mr. Grace in order to convict ah my client.

JW Isn't just as unfair for the defense then to take advantage of that?

DC Well he's not Your Honor. He's just telling the truth.

JW I see, okay. When I, when I looked at this issue, I was thinking what kind of a cautionary instruction can I give. Does it really go to the heart of the matter and I couldn't think of a cautionary instruction because it goes to the heart of the matter. Um and so there we are with regard to Mr. Grace, so I'm going to grant the State's motion because it is hearsay. It does go to the heart of the matter. It's not a dying declaration. It's just like bringing somebody else in and saying they did it. It's the same issue only in this case, you know, it happens to be someone who's deceased but it's, you know, the same issue. You can't go ahead and say well know it wasn't me, it was somebody else especially when we don't have any um any person to deal with.

AH Thank you, Your Honor.

JW If there's something that, that

(male unidentified voice) (unintelligible)

JW comes along to change my mind. If the testimony of officers or whatever, we can always revisit it, but absent anything further, that's where we are.

DC And Your Honor, is the court prohibiting my client from testifying as to his understanding

JW Well I

DC regarding permission

JW I try, you know, it's hard to control what comes out of people's mouths a head of time but they certainly are risking objections and things like that when they do so he would not be able to.

Now, I've got, are there any other motions in limine . . .

**April 14, 2009 – 9:15:56 – 9:23:30**

JW I spent some time with Tegland last night and um it's kind of, of interesting. You know, Tegland talks about um spite the success of the argument several recent cases, the argument remains an argument of last resort. Many trial judges instinctively regard the argument as all too clever maneuvering to try to avoid the hearsay rule and instinctively believe that hearsay objection

should be sustained. Moreover, the argument is a clear signal that the preponderant of the evidence has a serious hearsay problem, is forced to make a questionable argument in an effort to introduce the evidence. And then it goes on to a case, in the prosecutor for a possession of a controlled substance with intent to deliver, the trial court allowed a detective to testify that confidential informant told him that the defendant was dealing cocaine. Defendant was convicted and on appeal argued that the defendant, detective's testimony constituted inadmissible hearsay. The State argued that the detective's testimony was not offered to prove the truth of the matter asserted that the defendant was dealing cocaine. The State steadfastly maintained the officer's testimony was admissible for the limited non-hearsay purpose of explaining the impetuous, the motivation for the police investigation. Despite the fact a number of appellate court opinions have leaned on the direction sought by the State, Division III declined the State's invitation to follow the trend. The Court of Appeals said that the reason the detective started an investigation, the defendant was not even an issue in controversy and thus informant's statement was irrelevant when offered for this purpose. The Court said the only reason this statement was irrelevant in the present case was to prove that the defendant was dealing cocaine and thus the informant's statement was hearsay and should have been excluded. And this is kind of the, you know, antithesis of that case which was State v. Edwards, 131 Wn. App. 611 (2006). Um, and then I go to another portion of a Tegland, that again State v. Collin, 76 Wn. App. 496, prosecution for possession of cocaine with intent to deliver, the trial court properly allowed a police officer to testify been in defendant's apartment before, yah, dah, dah. However implicit statements in the collars statements in the, is the belief that they could get drugs they sought through Larry at his apartment. This implied belief provides the evidentiary value of the statements. Nevertheless, the courts have often been reluctant to admit implied ascertain particularly when they are unduly prejudicial. Exclusion of such statements is often justified on the basis of rule 403 and cites State v. Stenson, 132 Wn.2d 668 which is a Division II case but nevertheless a Supreme Court case. The court refused to allow the defendant to introduce a recording from the defendant's telephone answer machine. Caller's asking whether defendant still intend to go to Texas to complete it a business transaction. Defendant argued the recording was relevant to show his intent to go to Texas thus showing he was in Texas at the time of the murders. The defendant argued the recorded statement was not objectionable as hearsay because it was being offered not for the matter asserted but the caller believed the defendant intended to go to Texas but for the statements implication that the defendant must have told the caller he intended to go to Texas. As might be expected, the defendant cited and relied heavily on State v. Collins, the court disagreed however, saying a recording was admissible hearsay. Interestingly enough, the court in Stenson acknowledged Collins but did not go into any detail in how Collins was distinguishable. The court did not express any particular disapproval of Collins having some uncertainty about whether the document of implied ascertain does, does not remain viable in Washington. So, under both ER 403 as well as the hearsay rules, any mention of any permission or any mention of, of the Timothy Grace the decedent is improper.

DC Well, Your Honor, we would ask the court to reconsider that, a

JW I reconsidered it and there's no further argument; nor discussion.

DC Well, we have several witnesses who a witnesses (unintelligible overlapping voices)

JW Well you better go talk to them

DC that they, that their understanding was that they had permission. So just to clarify, Mr. Visonhaler can't indicate that he had permission to go into the

JW He can't

DC his understanding was like he had permission, well how's he going to explain to the jury that he, why he went in?

JW If Mr.

DC He can't make up a story, he has to tell the truth.

JW It, it is improper under the rules of evidence and criminal procedure for the defendant to get up and say somebody else did it. The State has the burden of proof with regard to this defendant. Um, nor can he say that, you know, that some fictitious person out there said he had permission and what Timothy Grace amounts to at this point is a fictitious person out there who gave him permission to go in the window at two in the morning. And so, that's my ruling.

DC Could I make an offer of proof?

JW No, we're done. That's it. It's over.

DC Thank you

JW I made my ruling.

AH Your Honor,

JW And the issue is that Timothy Grace isn't here for the State to cross examine.

DC But Your Honor, the State shouldn't be able to take advantage of that. (Unintelligible overlapping voices)

JW And it nobody's fault, it's not, it's not a viable defense.

DC Well see, it's not, if I can reiterate. It's not hearsay because it doesn't matter what if what Mr. Grace said truthful or not but it's more my client's state of mind what he believed. That's why it's on hearsay.

JW I know, that's, I know that that's your argument but I'm finding it clearly is hearsay and clearly not allowed under several sections in Tegland and the court rules.

DC And I would like to have the time to research that further if we could to

JW I'm sorry, we're in the middle of trial and we're going to finish up today.

Now you both need to go talk to the witnesses and make sure we don't have this issue.

AH Can I get just ah another little clarification from the Court? Thank you for your ruling first of all. Um, just so I'm clear so may I object if defense attorney for example asks the co-defendant did Kevin tell you he had permission?

JW Right.

AH And may I object if defense counsel asks defendant did you think you had permission?

JW Correct.

AH Thank you.

JW Now then, the opposite of that would be, did you think you were doing any wrong? That would be an okay question.

AH But then, if the follow-up question is why not?

JW Well we can't

AH Because we thought we had permission.

JW We can't, we can't go there. Um, you know, also just as if you're asking one of the witnesses do you have any criminal history. Yes and they have to leave it at that because it isn't the issue of going into detail of the criminal history and at this point I'm not allowing Mr. Visonhaler's criminal history to come in at all.

**April 14, 2009 – 10:31:50 – 10:32:37**

AH Your Honor, may I also ask the court for a ruling but whether the defense attorney can keep asking Mr. Adam's about a manager? And his understanding about what a manager said could or couldn't be done? At this point, I, if I were the jury I'd be incredibly confused. The manager has been brought up so many times in this case.

JW And, and I think I made a ruling about the manager, didn't I?

AH Yes

DC And Your Honor, I believe it was on direct that Mr. Adams brought up the manager. Um, a witness has, has the right to testify as to what he knows of this particular event.

JW So let's move on. No more, no more discussion of the manager cause that was the direct basis of my ruling.

DC Yeah, that's fine, that's fine.

JW Okay ...

**April 14, 2009 – 1:42:28 – 1:46:25**

DC Well, I would argue it is, but um

JW I understand, otherwise, otherwise you wouldn't be proposing it. I understand that

DC Right, right

JW I understand we have a difference of opinion about that and I don't know whether you feel you've made your record clear enough by what she would testify to or whether you need to make an offer of proof and my then denying the fact that she should testify.

DC Well, whatever the court prefers, Your Honor. If it prefers

JW I'd prefer to speed this up

DC Yeah, me too but I ah, I would assume that the issue would be preserved for possible appeal later on by my, my verbal offer of proof is that good enough for the court? Otherwise, I'd be glad

JW That's

DC to call

JW That's

DC her a witness

JW That's fine for me

DC Okay

JW Okay. Now, who else do we have?

DC Well, Vickie Peterson, um she, I thought she'd meet us here at 1:00 but she's not here and ah I was in the little conference room. I don't know if she tried to meet me and didn't come in, but

ah she essentially ah would ah, she was here yesterday as well. Ah same type of testimony ah she currently lives at the trailer park. Um, ah she also was present when Tim Grace ah told Kevin Vinsonhaler he could take the water heater. Um several other residents, she was with several of the residents went in and out of the various ah condemned trailers ah and that ah parts of ah the condemned trailers were, were ah taken ah, um to a, ah to help fixed up other ah trailers. Um she ah knew Tim Grace. She ah obviously knows Harold Lee. She's had ah various dealings with both of them. Um and a she's aware that Tim Grace ah has since died. So her similar testimony to Jennifer Sloan, however, Ms. Peterson does actually live on site.

JW Counsel?

AH We'd object to all of ah Ms. Peterson's testimony for the same reasons. It's all going to this statement made by Tim Grace that the court has already said can't come in either way so none of this testimony's relevant.

JW And it's interesting, the clerk just passed me a note, and this, this kind of gets to the heart of the problem that Tim Grace had a prior conviction for trafficking in stolen property. So you see why everybody's hampered by his not being here in terms of talking to him about that.

AH And, Your Honor, I honestly, I don't know what to do at this point. I mean this name, Tim Grace has been brought up so many times throughout this trial and whether he gave permission and at this point I, I would like to admit the fact that this dead person has a trafficking in stolen property conviction and I'm honest, I'm not really sure what to do with where we're at with this trial. If the State could ask for a mistrial, we would at this point.

JW Oh, I don't know that I'd grant a, a mistrial.

DC I'm not sure what the basis of the mistrial would be. There was a Tim Grace

JW But

DC that lived there

JW but let's not, let's not go there. At the, the Ms. Peterson who isn't here, I guess will cross that bridge when we get to it if she comes here.

DC And I would obviously object to any reference to Tim Grace having a prior trafficking conviction. We can't even, we can't even ah, um question Mr. Grace because

JW Both (unintelligent overlapping voices)

DC he's dead which, which obviously

JW There in is the problem. This is why we aren't going to talk about Tim Grace.

**EXHIBIT B**

**RCW 7.21.050**  
**Sanctions — Summary imposition — Procedure.**

\*\*\* CHANGE IN 2009 \*\*\* (SEE 1218.SL) \*\*\*

(1) The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom if the judge certifies that he or she saw or heard the contempt. The judge shall impose the sanctions immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.

(2) A court, after a finding of contempt of court in a proceeding under subsection (1) of this section may impose for each separate contempt of court a punitive sanction of a fine of not more than five hundred dollars or imprisonment in the county jail for not more than thirty days, or both, or a remedial sanction set forth in RCW 7.21.030(2). A forfeiture imposed as a remedial sanction under this subsection may not exceed more than five hundred dollars for each day the contempt continues.

[1989 c 373 § 5.]

**EXHIBIT C**

**RCW 7.21.050**  
**Sanctions — Summary imposition — Procedure.**

**\*\*\* CHANGE IN 2009 \*\*\* (SEE 1218.SL) \*\*\***

(1) The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom if the judge certifies that he or she saw or heard the contempt. The judge shall impose the sanctions immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.

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[1989 c 373 § 5.]

**RCW 7.21.010  
Definitions.**

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

[1989 c 373 § 1.]

