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 COURT OF APPEALS
 DIVISION II

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STATE OF WASHINGTON
 BY Cn
 DEPUTY

NO. 41193-8-II

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

STATE OF WASHINGTON,)	
)	
Respondent,)	DECLARATION OF
)	MAILING
v.)	
)	
RICHARD L. HARRINGTON,)	
)	
Appellant,)	
)	

I, RICHARD L. HARRINGTON, hereby declare:

- I am over the age of eighteen years and I am competent to testify herein.
- On the below date, I caused to be placed in the U.S. Mail, first class postage prepaid, TWO envelope(s) addressed to the below-listed individual(s):

PACIFIC COUNTY PROS.	WASH. COURT OF APPEALS
ATTY.	DIVISION TWO
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SOUTH BEND, WA 98586	MS TB-06
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3. I am a prisoner confined in the State of Washington Department of Corrections (“DOC”), housed at the Monroe Correctional Complex (“MCC”), P.O. Box 777, Monroe, WA 98272, where I mailed the said envelope(s) in accordance with DOC and MCC Policy 450.100 and 590.500. The said mailing was witnessed by one or more correctional staff. The envelope contained a true and correct copy of the below-listed documents:

1. DECLARATION OF MAILING

2. STATEMENT OF ADDITIONAL GROUNDS

4. I invoke the “Mail Box Rule” set forth in GR-3.1—the above listed documents are considered filed on the date that I deposited them into DOC’s legal mail system.

5. I hereby declare under pain and penalty of perjury, under the laws of State of Washington, that the foregoing declaration is true and accurate to the best of my ability.

DATED this 23 day of November, 2011.



RICHARD L. HARRINGTON

Appellant, *Pro se.*

DOC #342618, WSRU-B-3-27-L

Monroe Correctional Complex

16700 – 177th Avenue SE

P.O. Box 777

Monroe, WA 98272-0777

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COURT OF APPEALS
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STATE OF WASHINGTON
BY _____
DEPUTY

**IN THE WASHINGTON COURT OF APPEALS
DIVISION II**

STATE OF WASHINGTON,
Respondent,

V.

HARRINGTONHARRINGTONX,
Appellant, Pro-Se.

No. 41193-8-II

**STATEMENT OF ADDITIONAL
GROUND FOR REVIEW
RAP 10.10**

I. STATEMENT

I, Richard L. Harrington have received and reviewed the opening brief prepared by my appellate attorney, Peter B. Tiller, WSBA# 20835. Summarized below are the additional grounds that my appellate attorney did not address in his opening brief on my behalf of Pacific County Superior Court Case Number 10-1-00089-3. Appellant believes that the following issues have merit and should be addressed by this Honorable Court. Appellant understands that the Court will review this Statement of

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Additional Grounds for Review prepared by me when my appeal is considered.

II. GROUND FOR REVIEW

GROUND ONE

RIGHT TO COUNSEL OF CHOICE

1. THE SUPREME COURT HAS LONG RECOGNIZED THAT THE SIXTH AMENDMENT PROTECTS A CRIMINAL DEFENDANT'S CHOICE OF COUNSEL

All Circuits recognize that constitutional right to select counsel of choice. See *United States v Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978); *United States v Neal*, 36 F.3d 1190, 1205-06 (1st Cir. 1994); *Lainfiesta v Artuz*, 253 F.3d 151, 154 (2nd Cir. 2001); *United States v Carey*, 409 F.2d 1210, 1213-14 (3rd Cir. 1969); *United States v Inman*, 483 F.2d 738, 739-40 (4th Cir. 1973); *Gandy v Alabama*, 569 F.2d 1318, 1320 (5th Cir. 1978) (per curiam); *Linton v Perini*, 656 F.2d 207, 209 (6th Cir. 1981); *United States v Carrera*, 259 F.3d 818, 824-25 (7th Cir. 2001); *US v Lewis*, 759 F.2d 1316, 1326 (8th Cir. 1985); *Releford v United States*, 288 F.2d 298, 301 (9th Cir. 1961); *United States v Nichols*, 841 F.2d 1485, 1501-02 (10th Cir. 1988); *In re Bell South Corp*, 334 F.3d 941, 955-56 (11th Cir. 2003).

In *Powell v Alabama*, 287 US 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932), the Supreme Court noted: “[I]t is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair

opportunity to secure counsel of his own choice.” See *Glasser v United States*, 315 US 60, 75, 62 S.Ct. 457, 86 L.Ed. 680 (1942) (“*Glasser* wished the benefit of the undivided assistance of counsel of his own choice. We think such a desire on the part of the accused should be respected.”) Moreover, In *Wheat v United States*, 486 US 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988), the Supreme Court acknowledged that the Sixth Amendment’s guarantee of assistance of counsel comprehends the right to select counsel of one’s choice. See *Morris v Slappy*, 461 US 1, 21-23, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) (Brennan, J., concurring) (discussing cases that protect a defendant’s right to choose his own counsel).

Mr. Harrington retained Michael Turner and he filed a notice of appearance to the case on July 2, 2009 on Pacific County Cause Number 09-2-00245-4. See CP at 4. The 09-2-00245-4 Cause was consolidated with 09-2-00297-7. CP at 11. He maintained representation throughout the investigation that lasted over 10 months. (Those cause numbers later became Cause No. 10-1-00089-3). At the arraignment of May 24, 2010 on Cause No. 10-1-0089-3, Mr. Turner admits to the trial court that he is representing Mr. Harrington and had through the investigative phases of the case. CP 13 – 19; 1RP 8. Mr. Turner also responded to the bail matters. 1RP 11. Before Mr. Harrington entered a plea, Mr. Turner went

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over the information with him. 1RP 20. A plea of not guilty was entered and a trial date was set as well as the omnibus hearing. 1RP 20.

On June 11, 2010 Mr. Turner files a Motion to Withdraw. CP at 21. He did not provide the trial court any with any circumstances that would justify him being removed. There was no conflict of interest, no breakdown in communication, or loss of confidence or trust. The Prosecution objected and asked the court for order showing "good cause" exists to withdraw. 1 RP 32. It was granted at 1RP 33, and Karlsvik was appointed by Honorable Michael J. Sullivan, Pacific County Superior Court Judge. 1RP 34. Then the trial court re-started the speedy trial clock, adding another 60 days based upon the disqualification of counsel. 1RP 35-36.

The right to choice of counsel applies only to persons who can afford to retain counsel. See *Caplin, & Drysdale, Chartered v United States*, 491 US 617, 624, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989). The record clearly indicates that Mr. Harrington hired Turner as counsel.

Here, Mr. Harrington was deprived of his Sixth Amendment right (by the trial court) to the counsel of his choice and is prejudicial per se. See *Flanagan v United States*, 465 US 259, 267-68, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984) ("Obtaining reversal for violation of [the] right [to select counsel of one's choice] does not require a showing of prejudice to

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the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceedings.") *Flanagan*, 465 US 259 at 267-68 (1984).

Paying head to the Supreme Court's recognition and protection of the constitutional right to select counsel of one's choice, the Ninth Circuit has consistently held that a deprivation of this right is per se prejudicial. See *Releford*, 288 F.2d at 301; *United States v Ray*, 731 F.2d 1361, 1365 (9th Cir. 1984); *United States v Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986); *Bland v California Department of Corrections*, 20 F.3d 1469, 1478 (9th Cir. 1994), overruled on other grounds, *Schell v Witez*, 218 F.3d 1017, 1025 (9th Cir. 2000) (en banc); *Schell*, 218 F.3d at 1026. Other Circuits have also held that denial of the right to select counsel of one's choice may never be deemed harmless. See *United States v Panzardi Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987) ("The right to choose one's counsel is an end in itself; its deprivation cannot be [deemed] harmless"); *US v Voigt*, 89 F.3d 1050, 1074 (3rd Cir. 1996) ("[A]rbitrary denials of the right to counsel of choice mandate per se reversal"); *Wilson v Mintzes*, 761 F.2d 275, 281 (6th Cir. 1985) ("Evidence of unreasonable or arbitrary interference with an accused right to counsel of his choice ordinarily mandates reversal without a showing of prejudice").

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Here, Mr. Turner sought withdrawal from the case and presented to the trial court that he could not agree to the time and had an extensive caseload. The trial court accepted this without question and appointed counsel. 1RP 32.

The trial court failed to recognize that Mr. Harrington retained Mr. Turner and Harrington made no request to replace or that another attorney be permitted to substitute for him. In *Faretta v California*, 422 US 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (“It is the defendant . . . who must be free . . . to decide whether in his particular case counsel is to his advantage. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the state, will bear the personal consequences of a conviction”).

Here, the trial court abused its authority in allowing counsel to withdraw without a factual showing of good cause when Mr. Harrington was represented throughout the 10 month investigation by Mr. Turner and the benefit of his knowledge of the case and for trial would have been paramount.

Later, the trial Judge Michael J. Sullivan decided that he [Turner] was disqualified without facts supporting disqualification. Mr. Turner presented to the trial court that he had an extensive caseload and did not agree to the time, these are not sufficient reason for withdrawal from a

case. The judge then extended the trial date based upon the disqualification of Turner to accommodate new counsel. 1RP 32-36; 1RP 49-66. This finding is in error and prejudiced Mr. Harrington. There was no conflict of interest, no breakdown in communication, or loss of confidence or trust. There were no factual reasons to support disqualification. Mr. Turner's withdrawal was entirely not allowed pursuant to Court Rule. See e.g., *State v Lopez*, 79 Wn. App. 755, 765-66, 904 P.2d 1179 (1995) (Unless a substitution motion or the accompanying affidavit of counsel is extremely detailed -- which, as here, is often not the case -- a court cannot make such a determination without conducting a proper hearing at which both attorney and client testify as to the nature of their conflict. For this reason, the courts of appeals have held that "the district court must engage in at least some inquiry as to the reasons for the defendant's dissatisfaction with his existing attorney.). *McMahon v. Fulcomer*, 821 F.2d 934, 942 (3d Cir. 1987) (quoting *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982).

In *State v Fleck*, 49 Wn. App. 584, 744 P.2d 628 (1987) the judge gave articulated and extensive reasoning for not allowing withdrawal of the attorney, including: (1) the extensive preparation already engaged in by counsel; (2) counsel's recognition of his duty to zealously represent the defendant and his assurance to the court that he would do so; (3)

substitution of counsel would cause delay due to the late hour of the request; and (4) delay would likely cause severance of the trials of the defendant and his codéfendant. Division III of the Court of Appeals held: “These are sound reasons for denying counsel's request, and refusing to allow Mr. Fleck to fire counsel; the court did not abuse its discretion.”

Further, CrR 3.1 (e) states:

Whenever a criminal case has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good cause and sufficient reason shown.

Here, (1) the trial court did not give extensive, articulated reasoning for allowing Mr. Turner to withdraw as counsel, or provide “good cause” especially when Mr. Turner had already performed over 10 months of investigative work and representation of Mr. Harrington; (2) counsel never provided detailed explanations to the court why he could not represent Mr. Harrington, other than caseload and time; (3) the substitution caused delay in the proceedings by extending it another 60 days since new counsel had been appointed by the public defenders office, both over objection, based upon Mr. Turner’s withdrawal; and (4) these are not sound reasons for withdrawal or disqualification.

Similarly, in *State v Scott*, 150 Wn. App. 281, 286, 207 P.3d 495 (2009) after more than two years of representation in Pacific County,

Scott's counsel, Michael Turner, moved to withdraw. Scott apposed this motion. The court (Judge Michael Sullivan) granted Turner's motion to withdraw. *Scott*, 150 Wn. App. at 286 ¶12. The same prosecutor (David J. Burke) was handling the case. See Attachment 1. Unlike here, Scott did not consider the withdrawal in his appeal. Seemingly, it appears that Michael Turner, Judge Sullivan and Prosecutor Burke have a history of these withdrawal type motions after months, even years of representation to a client. This suggests he [Turner] does this to prejudice the people he represents, which interestingly enough, are sex offenders.

On July 9, 2010, appointed attorney Karlsvik, makes a statement of Turner's withdrawal, and Mr. Harrington's objection to the setting of a new trial date outside of the speedy trial time clock. 1RP 49. The state called it a disqualification of counsel. 1RP 51. Then on July 23, 2010 the court wanted to bump the trial again based upon court congestion. 1RP 59-63. Mr. Karlsvik addresses the court about Turner's withdrawal is not a disqualification, but a withdrawal. There were not any findings of disqualification. 1RP 64-65. The court is satisfied that Turner was disqualified. 1RP 66. The trial court [Judge Sullivan] should have made a more detailed investigation of the nature of Mr. Turner's conflict with time and case load to maintain the integrity of Mr. Harrington's Sixth

Amendment right to counsel. Its failure to do so was an abuse of its discretion. See e.g., *Lopez*, Supra.

The Rules of Professional Conduct (RPC) 1.16 [Declining or terminating representation.] determines the how and why an attorney can decline or terminate representation. It is as follows:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

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(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expenses that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

(Adopted June 25, 1985, effective Sept. 1, 1985; amended, effective September 1, 2006).

Here, the court did not provide an adequate basis of "good cause" for the withdrawal, and went as far as to call it a disqualification. Clearly, there were no conflicts of interest or other disqualifying conduct to allow the trial court to dismiss Mr. Turner violating Mr. Harrington's Sixth Amendment right to counsel of choice and by extending the trial date.

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2. **WHEN CAN AN ATTORNEY WITHDRAW FROM EMPLOYMENT AND WHAT IS HIS DUTY UPON DOING SO?**

When a lawyer contracts to perform professional services for a client, he is required to carry the matter through to completion unless there is good cause for withdrawal. (CPR) DR 7-101 (A) (2); 7 Am. Jur. 2d Attorneys at Law §§ 143-45 (1963). A decision to withdraw should be made only because of compelling circumstances and with consideration of the possibility of prejudice to the client as a result of the withdrawal (CPR) EC 2-32.

An attorney may withdraw from a case when a client insists upon presenting an unwarranted claim or defense, pursues an illegal course of action or insists that the lawyer do so, makes it unreasonably difficult for the lawyer to work effectively, insists in a non-tribunal matter that the lawyer engage in conduct that is contrary to his judgment and advice, or when the client disregards his obligations as to fees or expenses. A lawyer may also withdraw when his continued employment may result in the violation of a disciplinary rule, when he cannot work with co-counsel, when he cannot mentally or physically carry out the work, when the client agrees to the withdrawal, or when in a matter pending before a tribunal he believes that the tribunal will find other good cause for withdrawal. (CPR) DR 2-110 (C).

An attorney must withdraw when he discovers that the client's position is being asserted merely for the purpose of harassing another, when he knows that continued employment will result in violation of a disciplinary rule, when his mental or physical condition makes performance unreasonably difficult, or when he is discharged by the client. (CPR) DR 2-110(B). An attorney is also required to withdraw when it is obvious that he or a member of his firm should be called as a witness on behalf of the client, (CPR) DR 5-102; when his judgment is likely to be adversely affected by his representation of another client, (CPR) DR 5-105; or when it becomes apparent that he is not competent to handle the matter properly, (CPR) DR 6-101.

When a lawyer decides to withdraw for cause, a duty remains to protect the welfare of the client. The attorney must then give notice of withdrawal, suggest employment of other counsel, return papers and property to which the client is entitled, cooperate with succeeding counsel, refund compensation not earned and minimize the possibility of harm to the client. (CPR) DR 2-110 (A) and (CPR) EC 2-32. See also *In re Fraser*, 83 Wn.2d 884, 523 P.2d 921 (1974); *In re Vandercook*, 78 Wn.2d 301, 474 P.2d 106 (1970). Statutory requisites under RCW 2.44.040 and 2.44.050 for the substitution of counsel that have appeared in court

proceedings must also be met.¹ *Lipp v. Hendrick*, 65 Wn.2d 505, 397 P.2d 848 (1965). Leave of court is not required as between attorney and client, but only may be necessary when an adverse party is involved after an appearance has been filed. *Bostock v. Brown*, 198 Wash. 288, 88 P.2d 445 (1939); *State ex rel. Jones v. Superior Court*, 78 Wash. 372, 139 P. 42 (1914). See e.g., *Hansen v Wightman*, 14 Wn. App. 78, 96, 538 P.2d 1238 (1975) as Attachment 2.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING MR. HARRINGTON'S HIRED ATTORNEY TO WITHDRAW ON UNTENABLE GROUNDS AND REASONS, WHICH PREJUDICED MR. HARRINGTON AND PREVENTED HIM FROM HAVING A SPEEDY TRIAL.

The delay in this case by the trial court was strictly precedent on attorney Michael Turner, who was allowed to withdraw, and what was later called by the trial court a disqualification and was done without any articulated showing [good cause] that would allow for the withdrawal or disqualification. Mr. Harrington finally came to trial; he was already past

¹ RCW 2.44.040 reads:

"The attorney in an action or special proceeding, may be changed at any time before judgment or final determination as follows:

"(1) Upon his own consent, filed with the clerk or entered upon the minutes; or

"(2) Upon the order of the court, or a judge thereof, on the application of the client, or for other sufficient cause; but no such change can be made until the charges of such attorney have been paid by the party asking such change to be made."

RCW 2.44.050 reads:

"When an attorney is changed, as provided in RCW 2.44.040, written notice of the change, and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party; until then, he shall be bound to recognize the former attorney."

the speedy trial date by 12 days due to the courts untenable reasons for withdrawal. Had the court followed the Rule's set out by the Washington State Supreme Court and the State and Federal Constitutions, Mr. Harrington would have received a speedy trial, and equally important, his counsel of choice.

Court rules are interpreted as if drafted by the Legislature. *State v Brown*, 111 Wn.2d 124, 154, 761 P.2d 588 (1988), *adhered to on rehearing*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906, 80 A.L.R. 4th 989 (1989). The Court must construe Court Rules consistent with their purpose. See *PUD 1 v WPPSS*, 104 Wn.2d 353, 369, 705 P.2d 1195(1985). Accordingly, the spirit and intent of the rule should take precedence over a strained and unlikely interpretation. See *Morris v Blaker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992). Under general principles of statutory construction, when interpreting a rule, the court must give effect to the plain meaning of the rules language. *State v Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971(1993). CrR 3.3 (b) (1) plainly states that a defendant detained in jail shall be brought to trial within the longer of: (i) 60 days after the commencement date specified in this rule. The Court is ultimately responsible for ensuring a speedy trial of the defendant under CrR 3.3. See *State v Raper*, 47 WA. App. 530, 538, 736 P.2d 680, review denied, 108 Wn.2d 1023 (1987) (trial court's

reliance on erroneous speedy trial expiration date constituted a reasonably unavoidable or unforeseen circumstances justifying an extension under CrR 3.3 (d) (8)). But counsel for a defendant bears some responsibility for asserting CrR 3.3 rights of a client and assuring compliance with the rule. See *State v White*, 94 Wn.2d 498, 502-03, 617 P.2d 998(1998); *State v Malone*, 72 WA. App. 429, 433, 864 P.2d 990(1994); *State v Raper*, 47 WA. App. 530, 538, 736 P.2d 680, review denied, 108 Wn.2d 1023 (1987).

In the case at bar, the record is clear that the reasoning was based upon the decision of the court to disqualify Mr. Harrington's hired attorney, to replace him with an appointed attorney, without "good cause" being shown. This decision was manifestly unreasonable and exercised on untenable grounds and for untenable reasons. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel, Carroll v Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Simply put, is the fact that Mr. Turner, [retained counsel] allegedly was later disqualified by the trial court without any reasoning i.e. conflict of interest, when he clearly withdrew from the case. The trial court reasoned this was a disqualification, thus allowing for the continuance.

In *State v Corrado*, 94 WA. App. 228, 233, 972 P.2d 515 (1999), a defendant who makes a speedy trial argument must show that the State

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failed to prosecute his case with customary promptness. *Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). If the defendant makes this showing, then the court must consider the extent of the delay. *Doggett*, 505 U.S. at 652. And the presumption that delay has prejudiced the defendant "intensifies over time." *Doggett*, 505 U.S. at 652.

Here, Mr. Harrington had retained counsel and the court allowed him to withdraw, without "good cause." There was no conflict of interest, no arguments on how to proceed other than Mr. Turner had presented to the trial court that he could not agree to the time and had an extensive caseload. 1RP 32.

Mr. Harrington tried through counsel and pro-se to object to any delays to his trial. "Delay which occurs after a speedy trial is demanded should be scrutinized with particular care." *Cain v. Smith*, 686 F.2d 374, 382 (6th Cir. 1982) (citing *United States v. Carini*, 562 F.2d 144 (2nd Cir.1977); *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377-78 (2nd Cir. 1979)).

"Although not essential to finding a violation of speedy trial rights, prejudice is a major consideration." *Corrado*, 94 WA. App. At 233 (citing *State v. Higley*, 78 WA. App. 172, 184-85, 902 P.2d 659 (1995) (citing *Moore v. Arizona*, 414 US 25, 26, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973))).

Prejudice “should be assessed in the light of the interests . . . the speedy trial right was designed to protect.” *Barker v Wingo*, 407 US 514, 532, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). These interests include: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. While such presumptive prejudice cannot alone carry a [speedy trial] claim, its importance increases with the length of the delay. *Doggett*, 505 US at 655-56.

Mr. Harrington argues that his constitutional right to a speedy trial was violated. A criminal defendant’s right to a speedy trial is guaranteed by both our federal and state constitutions. U.S. Const. Amend. VI; Const. Art. I, § 22. “[T]he constitutional right to speedy trial is not violated at the expiration of a fixed time, but at the expiration of a reasonable time.” *State v. Monson*, 84 WA. App. 703, 711, 929 P.2d 1186 (1997) (citing *Higley*, 78 WA. App. at 184-85). Mr. Harrington argues that the trial court violated his constitutional speedy trial rights and CrR 3.3, and requests that the court vacate his conviction and dismiss the charges against him.

CrR 3.3 provides “flexibility in avoiding the harsh remedy of dismissal with prejudice,” including a “30-day buffer period” for excluded periods and a “one-time ‘cure period’ . . . that allows the court to bring a case to trial after the expiration of the time for trial period.” *State v Flinn*,

154 Wash.2d 193, 199 n. 1, 110 P.3d 748 (2005); *see* CrR 3.3 (b) (5) (g). But under CrR 3.3, once the 60 or 90 day time for trial expires without a stated lawful basis for further continuances, the rule requires dismissal and the trial court loses authority to try the case. CrR 3.3 (b), (f) (2), (g), (h). The rule's importance is underscored by the responsibility it places on the trial court itself to ensure that the defendant receives a timely trial and its requirement that criminal trials take precedence over civil trial. CrR 3.3 (a) (1) & (2).

Here, Mr. Harrington consistently resisted extending time for trial while he was incarcerated, awaiting trial on the 10 various charges. The continuances granted are without adequate basis or reason articulated and due to the withdrawal of counsel that was later called by the trial court a disqualification and was done without any articulated showing [good cause] that would allow for the withdrawal.

In *State v Kenyon*, 167 Wash.2d 130, 216 P.3d 1024 (2009) the Washington Supreme Court reversed decisions and dismissed numerous unlawful firearm possession charges based on the "trial court's failure to articulate an adequate basis of continuances beyond the speedy trial limits." *Kenyon*, 167 Wn.2d at 131-32, 138-39, 216 P.3d 1024.

CONCLUSION – GROUND ONE

Reversal is per se required when the Sixth Amendment Violation occurs to the right of counsel of choice is violated. Here, Mr. Harrington had retained counsel, and a trial date set, the court abused its discretion in allowing retained counsel Michael Turner to withdrawal, called it [later] a disqualification when Turner represented Harrington through the entire investigative phases of the case, and then extended the trial by re-setting the speedy trial time clock another 60 days.

Absent any convincing reasons for the withdrawal and the extension of the speedy trial time clock was manifestly unreasonable, [and] exercised on untenable grounds [and] for untenable reasons, creating prejudice to Mr. Harrington by extending his trial date by 18 days, which is 12 days past the 60 day rule for incarcerated persons. The trial court abused its discretion, and under those circumstances, this Court should reverse and remand for entry of an order dismissing the charges against Mr. Harrington under CrR 3.3 (h).

GROUND TWO

PROSECUTORIAL MISCONDUCT

- 1. THE PROSECUTOR ELICITED TESTIMONY FROM HH THAT SHE WOULD TESTIFY TO THE TRUTH OVER TWO DEFENSE OBJECTIONS**

Generally, in order to preserve error for review, counsel must call the alleged error to the court's attention at a time when the error can be corrected. *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975). Failure to object to an improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). This Court reviews a prosecutor's alleged misconduct "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (citing *Russell*, 125 Wn.2d at 85-86).

During trial the Prosecution asked the alleged victim (Heather Harrington, hereinafter ("HH")) whether she was going to tell the truth. It began after swearing in by Mr. Bustamante:

Q: Okay. And, Ms. Harrington, I'm going to be as – just kind of going over a couple ground rules. First of all, it's very important that all of your responses be verbal so that they can be picked up by the recording system. Can you do that for me?

A: Yes.

Q. In other words, don't nod your head or shake your head or things like that because those won't come – be picked up on the record.

A: Okay.

Q: Do you understand?

A: Yes.

Q: And the other thing is can you promise that you will only talk about the truth?

A: Yes.

Q: Okay. And how old are you?

A: Seventeen.

MR. KARLSVIK: Your Honor, I – I'm going to have to object to that last question --

The Court: Sustained. The jury is to disregard the last question and answer given by – question asked by Mr. Bustamante and given by the witness.

You may continue Mr. Bustamante.

Q: (By MR. BUSTAMANTE) Okay. Ms. Harrington, do you understand the possible consequences of not telling the truth when your under oath?

A: yes.

Q: Okay. What could happen to you?

MR. KARLSVIK: Your Honor, I – I object to this. This is basically self-creating credibility for the witness prior to her ever testifying.

THE COURT: Overruled. I'm finding that the line of questioning is to determine whether this witness knows what it means to be under oath. Is that – is that your – direction?

MR. BUSTAMANTE: Yes.

THE COURT: Please get right to it and move on.

Thank you.

Q: (By MR. BUSTAMANTE) So what could be a possible consequence if you were not to tell the truth when your under oath?

A: To get in trouble.

2RP 165-167. Admission of these invaded upon the fact-finding province of the jury and was error of constitutional magnitude because the statements violated the defendant's right to a jury trial. By placing Harrington in a position where he had to challenge the truthfulness or even the accuracy of HH's statements. Thus, this error can be raised for the first time on appeal under RAP 2.5 (a) (3), and because there was no physical evidence or eyewitness testimony to the alleged charges, the constitutional

errors are not harmless. The Court should reverse and remand for a new trial.

Evidence intended to fortify or corroborate the credibility of a witness is admissible only after the credibility of the witness has been put at issue by an attack from the opposing party. *State v. Froehlich*, 96 Wn.2d 301, 635 P.2d 127 (1981). In the absence of an attack upon credibility no sustaining evidence is allowed. E. CLEARY, McCORMICK ON EVIDENCE § 47, at 172 (4th ed. 1992). Here, the State's first question to its witness HH was designed to elicit testimony that the witness was telling the truth and going to tell the truth. This was after she had been sworn to tell the truth. HH is 17 years of age and of sound mind. She did not need to be reminded, nor the jury that she was going to tell the truth. HH's credibility was not in jeopardy, this was on Direct-Examination by Mr. Bustamante. He continued the line of questioning over the ruling that was made by the Court to sustain, making the Defense object a second time. Although the court gave an instruction to the jury, this highly flagrant disregard of the courts ruling prejudiced the rights of the defendant. Improper testimony in a criminal trial bearing on the victim's credibility affects the constitutional right to a jury trial, in that it invades the fact-finding province of the jury. *State v Kirkman*, 126 Wn. App. 97, 107 P.3d 133 (2005) (Holding that the admission of opinion

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testimony regarding the victim's credibility was error of constitutional magnitude and that the error was not harmless given the lack of evidence of the defendant's guilt other than the victim's allegations, the court reverses the judgment and remands the case for further proceedings).

However, the State Supreme Court at 159 Wn.2d 918, 155 P.3d 125 (2007) reversed that saying since his trial counsel failed to object to the error that they were held harmless.

Here, Mr. Harrington's counsel objected to the line of questioning twice. In *State v Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005) during trial, the prosecutor asked Boehning whether the victim had "made [it all] up." This placed Boehning in a position where he had to challenge the truthfulness of the child's testimony. This is flagrant prosecutorial misconduct and highly prejudicial in a case where there were no witnesses or physical evidence to corroborate the victim's testimony. The error is not harmless here because the jury may not have reached the same result absent the errors. Allowing the victim to testify as to her truthfulness was prejudicial since the evidence is not overwhelming of Mr. Harrington's guilt.

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CONCLUSION – GROUND TWO

Based on the prosecutor's misconduct being so flagrant, ill-intentioned and prejudicial to Mr. Harrington that it denied a fair trial the court should reverse judgment and remand for a new trial.

GROUND THREE

SENTENCING

1. **THE TRIAL COURT ALLOWED PEOPLE NOT A PARTY TO THESE PROCEEDINGS TO GIVE CHARACTER EVIDENCE OF MR. HARRINGTON WHICH PREJUDICED HIM BY ALLEGING FACTS NOT PROVEN, CHARGED OR INVESTIGATED TO BE ADMITTED TO THE COURT DURING SENTENCING**

Mr. Harrington was tried on several charges. The Second Amended Information of 8/5/2010: Count I – Child Molestation 1st Degree of 6/5/1999, Exceptional Sentence Guidelines; Count II – Child Molestation 1st Degree of 6/5/2000, Exceptional Sentence Guidelines; Count III – Child Molestation 1st Degree of 6/5/2001, Exceptional Sentence Guidelines; Count IV – Child Molestation 1st Degree of 6/5/2002, Exceptional Sentence Guidelines; Count V – Rape of a Child 1st Degree of 6/5/2003, Exceptional Sentence Guidelines; Count VI – Rape of a Child 1st Degree of 6/5/2004, Exceptional Sentence Guidelines; Count VII – Rape of a Child 2nd Degree of 6/5/2005, Exceptional Sentence Guidelines; Count VIII – Rape of a Child 2nd Degree of 6/5/2006, Exceptional Sentence Guidelines; Count IX – Rape of a Child 3rd Degree

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of 6/5/2007, Exceptional Sentence Guidelines; Count X – Rape of a Child
3rd Degree of 6/5/2008, Exceptional Sentence Guidelines. CP 47-49

Mr. Harrington's verdict of 8/6/2010 was not guilty of Counts I through VII. 4RP 624-27. Mr. Harrington was found guilty of Counts VIII, IX, and X, with the special verdicts forms to each count stating yes. 4RP 627-29. On September 19, 2010 Mr. Harrington was sentenced on Counts VIII, IX, and X which included Special Verdicts to a term of 360 months. 4RP 682.

During colloquy four² people spoke to the court during sentencing. 4RP 638. The [alleged] victim Heather spoke first. 4RP 646. The Defendant's wife spoke second. 4RP 647. Then Minta Harrington the Defendants daughter. 4RP 650. Then Leann Weiss, Heathers Aunt and Jean Harrington's daughter spoke to the court. 4RP 653-668. Throughout her testimony she tells the court and everyone present that Mr. Harrington had groomed her and allowed his son to molest her. She speaks of things that were unrelated to the aspect of this case. Then lastly, Julie Lund, Jean Harrington's sister. She testifies to the fact that Mr. Harrington and her sister Jean have no money and that the financial obligation that are going

² The [alleged] Victim HH; Mr. Harrington's Daughter Minta, and wife Jean Harrington; Leann Weiss (Jean's daughter, and Heather's Aunt); and Julie Lund, Jeans sister.

to need to be paid will only burden Mrs. Harrington, not Mr. Harrington.
4RP 668-669.

Apart from some limited statement based on evidence admissible to rebut the defendant's mitigation evidence, victim impact statements generally are unrelated to the circumstances of the crime, and therefore inadmissible. *State v Bartholomew II*, 101 Wn.2d 631, 642, 683 P.2d 1079 (1984). Such statements are introduced for the purpose of impermissibly inviting a decision on sympathy for the victim or the victim's friends and family, rather than as a moral response to the defendant's background, character, and crime committed. *In re Rupe*, 115 Wn.2d 379, 387-88, 798 P.2d 780 (1990). See *California v. Brown*, 479 U.S. 538, 545, 93 L. Ed. 2d 934, 107 S. Ct. 837 (1987) (O'Connor, J., concurring).

Even if a proffered victim impact statement were relevant to rebut the defendant's mitigation evidence, it would be inadmissible unless its rebuttal value outweighs its prejudicial effect. *State v Lord*, 117 Wn.2d 829, 890-91, 822 P.2d 177 (1991); *Bartholomew II*, 101 Wn.2d at 643. Because victim impact statements are inherently prejudicial, even as rebuttal evidence, such statements are unlikely to be admissible under the Rules of Evidence for any purpose during a capital sentencing proceeding.

Although this is not a capital punishment case, it should be related to one in some sense of the imagination due to the factors relating to the age of Mr. Harrington. The court essentially told him they did not want him out of prison, he was 71 at that time. 4RP 674. Even if he was to receive the standard range sentence, this was more than adequate to make that happen. To give an exceptional sentence is overkill in terms of the appearance of fairness, and does little to voices of reason by allowing the prejudices of all that was heard through sentencing and trial of the 7 counts that Mr. Harrington was found not guilty of.

Just as the admission of evidence of nonstatutory aggravating factors "opens too wide a door for the influence of arbitrary factors on the sentencing determination", *Bartholomew I*, 98 Wn.2d at 195, so does the admission of victim impact statements also defeat the constitutional mandate of channeled jury discretion at the sentencing phase of a capital case. *Arave v. Creech*, 507 U.S. 463, 123 L. Ed. 2d 188, 198, 113 S. Ct. 1534 (1993); *Bartholomew II*, 101 Wn.2d at 639. Admitting victim impact statements impermissibly invites the judge to make an irrational, emotional sentencing decision, rather than one that is and appears to be based on reason. *In re Rupe*, 115 Wn.2d at 388 (citing *Booth v. Maryland*, 482 U.S. 496, 508, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987)).

To ensure the sentence is based on an individualized determination of the defendant's moral blameworthiness, and not on passion and prejudice, the judge must weigh the aggravating factor(s), including the circumstances of the crime, against the evidence presented. A non-victim statement presenting information about the impacts of the crime on the victim's family, friends, and community is not relevant and is inherently prejudicial. Admitting such statements puts the character of the victim on trial and re-traumatizes the victim's friends and family by forcing them to present emotional and graphic testimony to obtain sympathy and to prejudice the defendant.

"It is of vital importance to the defendant and to the community that any decision to impose the sentence be, and appear to be, based on reason rather than caprice or emotion". *Bartholomew II*, 101 Wn.2d at 638 (quoting *Gardner v. Florida*, 430 U.S. 349, 358, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977)). By allowing the court in a sentencing proceeding to consider irrelevant and prejudicial statements as to the victim's worth and the suffering of the victim's friends and family, the majority invites emotional and arbitrary sentencing decisions resting on unreliable information, and allows invidious distinctions by juries impermissibly based on their sympathy with the victim, and privatizes the penalty by

permitting the victim's friends and families to seek vengeance and retaliation through state action.

2. THE TRIAL COURT COULD HAVE TAKEN INTO CONSIDERATION MR. HARRINGTON'S AGE, CRIMINAL HISTORY AND HIS BEING FOUND NOT GUILTY OF 7 COUNTS BY THE JURY.

The trial court could have considered a lower sentence considering the age of the defendant and his likelihood to survive a lengthy prison sentence. See e.g., RCW 9.94A.535 (1) (g). Although RCW 9.94A.535 is discretionary, as it provides that "the court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence" RCW 9.94A.535. RCW 9.94A.010 enumerates the purposes of the SRA, one of which is to "ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history." RCW 9.94A.010 (1).

Here, Mr. Harrington was found not guilty of 7 counts of various sexual violations against a child, but was found guilty of the least serious of the 10 original charges, i.e., rape of a child 2 which is a class A felony, and two counts of rape of child 3 which are class C felonies. Mr. Harrington sentence with 6 points on the scale would have made a sentence of 146 – 194 months on a Level 11 scale. Mr. Harrington would only receive one tenth percent good time in accordance to RCW

9.94A.729 (3) (b).³ This would still ensure a lengthy sentence as statutorily required, and still beyond Mr. Harrington's life expectancy.

Reading these two provisions together, it is clear that the sentencing court had the discretion to consider a downward departure in light of Mr. Harrington's lack of criminal history and the seriousness of his offenses, in addition to any other mitigating factors, but the court was in no way required to depart from the presumptive sentence. It was within the discretion of the sentencing court to impose a sentence within the standard range. See e.g., *State v Korum*, 157 Wn. 2d. 614, 637, 141 P.3d 13 (2006).

In a typical case where a judge considers sentencing below the standard range for a criminal conviction, a finding of substantial or compelling reasons must be found to support the exceptional downward departure. The inquiry is slightly different in choosing the appropriate sentence where RCW 9.94A.535 (1) (g) is invoked. This section requires that where multiple convictions exist, the sentencing court must determine whether the standard range mandated by the guidelines is clearly excessive. The distinction in approach is somewhat subtle but significant. Where a judge makes a "clearly excessive" determination, the substantial

³ In the case of an offender convicted of a serious violent offense, or a sex offense that is a class A felony, committed on or after July 1, 2003, the aggregate earned release time may not exceed ten percent of the sentence.

and compelling reasons to justify a downward sentence departure are satisfied. Most critical is the record the sentencing court must make when imposing the appropriate sentence.

RCW 9.94A.535 (1) (g) provides authority for judges when imposing sentence to consider a departure from the standard range where "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.010 directs that sentencing discretion should be focused to "ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history." RCW 9.94A.010 (1).

While the statute does involve a degree of discretion, in order to facilitate review, the judge when imposing sentence, in cases such as we have here, should make a complete record, which should include a determination of the seriousness of the offense or offenses, the offenders' criminal history, and the proportionality of the sentence imposed. A complete record will facilitate proper appellate review.

CONCLUSION – GROUND THREE

A criminal proceeding is not a private right of action for the victim's benefit; it is a proceeding in which a prosecutor, representing all the people of the State, seeks to deter, punish, restrain, and/or rehabilitate

those whose actions are so dangerous or offensive that they are an affront to a civilized society. See *Bergman v. State*, 187 Wash. 622, 625, 60 P.2d 699, 106 A.L.R. 1007 (1936); *1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law* § 1.3(b), at 17-20 (1986).⁴ Remand for Resentencing.

GROUND FOUR

CUMULATIVE ERROR

Where the cumulative effect of multiple errors so infected the proceedings with unfairness a resulting conviction or death sentence is invalid. See *Kyles v Whitley*, 514 US 419, 434-35, 115 S.Ct. 1555, 131 L.Ed.2d 490(1995). As the Ninth Circuit pointed out in *Thomas v Hubbard*, 273 F.3d 1164(9th Cir. 2001) (“[i]n analyzing prejudice in a case in which it is questionable whether any single error examined in isolation is sufficiently prejudicial to warrant reversal, this Court has recognized the importance of considering the cumulative effect of multiple errors and not simply

⁴ The prosecution of crimes as an affront to the entire community is a fundamental principle of long standing in Anglo-American jurisprudence, already well established by the time of Blackstone:

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals: public wrongs, or crimes and misdemeanors; are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity.

William Blackstone, *Commentaries on Laws of England* 5 (adapted by Robert M. Kerr (1962)).

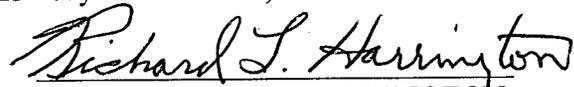
conducting a balkanized, issue-by-issue harmless error review.” Id. At 1178. (Internal quotations omitted) (Citing *US v Fredrick*, 78 F.3d 1370, 1381(9th Cir. 1996)); see also *Matlock v Rose*, 731 F.2d 1236, 1244(6th Cir. 1984) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

CONCLUSION – GROUND FOUR

Mr. Harrington asserts that each of the errors described previously merits relief. However, considered cumulatively, they certainly resulted in sufficient prejudice to merit a new trial or resentencing. The above errors, measured cumulatively, were prejudicial and devastating to Mr. Harrington and his right to fair trial and at sentencing.

Therefore, this Honorable Court should exercise its discretion, and request additional briefing from counsel to address the issues raised in this Statement of Additional Grounds.

Respectfully submitted this 23rd day of November, 2011.


RICHARD L. HARRINGTON,
Appellant, Pro se.

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ATTACHMENT “1”

ATTACHMENT “1”

suant to RCW 34.05.570(3)(c), Mills is entitled to relief from the Board of Trustees' review decision and final order. That order is vacated. Because this court stands in the same position as the superior court and there is no additional relief that the superior court may give, we remand directly to the agency (i.e., the University) for a new hearing.⁸

VII

¶53 Mills requests an award of reasonable attorney fees. RCW 4.84.350(1) provides for such an award, stating that "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." Here, Mills qualifies for an attorney fee award because he is entitled to relief from the unlawful closure of his disciplinary hearing, which was not substantially justified. Upon proper application, our commissioner will enter an appropriate award.

¶54 The Board of Trustees' review decision and final order is vacated. This cause is remanded to the University for a new hearing.

APPELWICK and LEACH, JJ., concur.

Reconsideration denied June 25, 2009.

Review denied for appellant and review of issues raised in respondent's answer granted at 167 Wn.2d 1020 (2010).

⁸ Having resolved this question on statutory grounds, we need not address Mills's related contention that he had a state constitutional right to an open administrative hearing. *Brunson v. Pierce County*, 149 Wn. App. 855, 862, 205 P.3d 963 (2009) (we avoid reaching constitutional issues when able to decide cases on nonconstitutional grounds).

[No. 36846-3-II. Division Two. May 27, 2009.]

THE STATE OF WASHINGTON, *Respondent*, v. RICHARD ROY
SCOTT, *Appellant*.

- [1] **Criminal Law — Plea of Guilty — Withdrawal — Denial — Review — Standard of Review.** A trial court's denial of a motion to withdraw a guilty plea is reviewed for an abuse of discretion. A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons.
- [2] **Criminal Law — Judgment — Vacation — Review — Standard of Review.** A trial court's denial of a motion to vacate a criminal judgment is reviewed for an abuse of discretion. A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons.
- [3] **Criminal Law — Plea of Guilty — Collateral Attack — Timeliness — Statutory Limits — Exceptions — Newly Discovered Evidence — Reasonable Diligence.** Under CrR 7.8(b), RCW 10.73.090, and .100, a motion by a defendant convicted on a plea of guilty to withdraw the plea and vacate the judgment on the grounds of newly discovered evidence made more than one year after the judgment and sentence became final is not time barred if the defendant acted with reasonable diligence in discovering the new evidence and the evidence could not reasonably have been discovered by the defendant at an earlier time.
- [4] **Criminal Law — Plea of Guilty — Withdrawal — Newly Discovered Evidence — Test.** A motion by a defendant convicted on a plea of guilty to withdraw the plea and vacate the judgment may be granted on the grounds of newly discovered evidence if the defendant satisfies the standard for granting a new trial on the grounds of newly discovered evidence. This standard requires the defendant to show that the newly discovered evidence (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before the trial by exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching.
- [5] **Criminal Law — Plea of Guilty — Withdrawal — Newly Discovered Evidence — Recantation of Testimony.** A witness's or victim's recantation of earlier statements generally is considered new evidence that may justify withdrawal of a guilty plea and vacation of the judgment entered on the plea. The trial court must determine whether the recantation is credible before considering the defendant's motion to withdraw and vacate based on the recantation, regardless of whether there is independent evidence supporting the defendant's conviction. This rule applies as well when the defendant has entered an *Alford* plea of guilty. An evidentiary hearing to evaluate the continued reliability of the independent

factual basis of the plea is all the more critical where the defendant's conviction is based on an *Alford* plea rather than on an admission or sworn trial testimony.

- [6] **Criminal Law — Plea of Guilty — Factual Basis — Nonadmission of Guilt — *Alford* Plea — Withdrawal — Newly Discovered Evidence — Hearing — Necessity.** When a defendant convicted of a crime upon an *Alford* plea of guilty moves to withdraw the plea and vacate the judgment on the grounds of newly discovered evidence, a hearing is required to determine the credibility of the evidence if the evidence calls into question whether there remains sufficient evidence independent of the defendant's own incriminating statements to establish the corpus delicti of the crime.
- [7] **Appeal — Record on Appeal — Evidence Not in Record — Citation — Validity — In General.** An appellate court may decline to consider an allegation or assertion of fact in a litigant's brief that is drawn from a trial document that was not designated as part of the record on appeal as required by RAP 9.6(a).

Nature of Action: A defendant who entered an *Alford* plea of guilty to a charge of third degree rape of a child pursuant to a plea bargain with the State but who did not exercise a right to withdraw the plea following a later personal restraint proceeding moved to withdraw the guilty plea and to vacate the conviction on the grounds of "new evidence" that the victim was over the age of consent at the time of the alleged rape and that the victim had recanted.

Superior Court: The Superior Court for Pacific County, No. 01-1-00082-7, Michael J. Sullivan, J., denied the defendant's motion on December 19 and 28, 2007.

Court of Appeals: Holding that the motion was not statutorily time barred and that the defendant is entitled to a hearing on the motion, the court *vacates* the trial court's denial order and *remands* the case for a hearing to determine the credibility of the defendant's "new evidence." If the trial court determines that the new evidence is credible, then the court must reconsider the defendant's motion to withdraw his *Alford* plea. If the trial court determines that the new evidence is not credible, then the plea and the conviction must stand.

Dana M. Lind (of *Nielsen, Broman & Koch, PLLC*), for appellant.

David J. Burke, Prosecuting Attorney, for respondent.

LexisNexis® Research References

Washington Rules of Court Annotated (LexisNexis ed.)
Annotated Revised Code of Washington by LexisNexis

¶1 HUNT, J. — Richard Roy Scott appeals the superior court's denial of his motion to withdraw his third-degree child-rape *Alford*¹ plea. He argues that the court erred (1) in denying his motion as untimely, and (2) in failing to conduct an evidentiary hearing to determine the credibility of recent recantations by the alleged victim and two witnesses. We vacate the superior court's order denying Scott's motion and remand for a reference hearing to determine the credibility of Scott's "new evidence."

FACTS

I. ALFORD PLEA AND SENTENCING

¶2 In 2001, the State charged Richard Roy Scott with one count of third degree rape of a child, alleging that Scott had sexual intercourse with DH, who was under the age of 16, sometime between February 1, 2001, and March 31, 2001. The Pacific County prosecutor filed an affidavit of probable cause on May 11, 2001, outlining the State's evidence supporting the charge.

¶3 On May 25, 2001, Scott entered an *Alford* plea. Scott explained that he was pleading guilty because he did not "see a chance of winning."² In his statement on plea of guilty, he did not check the box allowing the trial court to review the police reports or probable cause affidavit to provide a factual basis for his plea. Nowhere else in his

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

² The verbatim report of the proceedings contains no recitation of facts supporting the plea.

statement on plea of guilty did he mention or incorporate by reference the prosecutor's affidavit of probable cause.³ In the blank asking Scott to describe in his own words why he was guilty, Scott wrote only the words "Alford plea."

¶4 In exchange for Scott's pleading guilty, the State agreed to "terminate investigation of [Scott] and not file additional charges." The plea agreement identified Scott's offender score as one, yielding a standard range of 15 to 20 months' confinement. The State agreed to recommend the high end of that standard sentencing range.

¶5 In its presentence investigation report, the State summarized DH's and Connie DuFour's statements, and an interview with Scott, in which he stated that (1) DH and his parents told Scott that DH was 18 years old; (2) he (Scott) had sex with DH at DH's request when DH stayed overnight at Scott's house; and (3) the next morning, DuFour and a juvenile male had come into the house and observed DH and Scott dressing. At the end of the interview, "Scott stated that 'he (the victim [DH]) wasn't that good anyway' [and] laughed excessively regarding this comment." Clerk's Papers (CP) at 20.

¶6 At the July 6 sentencing hearing, Scott asked the court to consider him for the Special Sex Offender Treatment Program (SSOSA) under former RCW 9.94A.120

³ The prosecutor's probable cause affidavit described several statements that DH made during an interview with a Child Protective Services social worker, including: (1) "[S]ince approximately April 2000, until recently, Richard Scott had been having anal, oral, and digital sex with D.H."; (2) "in the past five to six months [DH] and Scott had engaged in sexual activity approximately 100 times"; (3) Scott made DH engage in sexual activity with Scott "every time [DH] spent the night at Scott's house"; (4) DH spent the night there about one out of every three nights; (5) the sex included "oral sex and anal sex, including Scott performing anal sex on D.H."; and (6) Scott threatened DH "every once in a while." Clerk's Papers (CP) at 143-44.

The affidavit also described the following statements made by Connie DuFour, who had supposedly witnessed the alleged sexual activity between Scott and DH: (1) "[A]t the end of February, 2001, or the beginning of March, 2001, she [DuFour] and J.F. [Johan Fernlund] entered Richard Scott's residence and saw him engaging in anal sex with D.H."; and (2) "the reason she [DuFour] did not tell officers sooner about [the rape] is because she told her father and he told her not to become involved, and after that she was gone for about nine weeks for medical treatment." CP at 144-45.

(2001) (which required an admission of guilt). Scott reiterated that he thought DH was 18 when DH rented a room from him (Scott). Scott stated that he did not allow DH to move in until after DH's 18th birthday in March,⁴ and after DH moved in, they had sex "about three" times over a period of "about three weeks."

¶7 The sentencing court questioned community corrections officer Robert Bromps, the presentence investigation report preparer, about recent unsuccessful attempts to contact DH. Bromps explained that (1) a letter he had sent to DH's last known address had been returned; (2) the telephone number he had for DH was not working; and (3) he (Bromps) knew of no way "of getting a hold of" DH. Scott told the trial court that DH's family had been "evicted twice in the last three months," that "they probably left the state," and that the family was from Montana.

¶8 By the time of sentencing, the State had determined that Scott's actual offender score was three, not one, yielding a standard sentencing range of 26 to 34 months' confinement. His prior convictions also made him ineligible for a SSOSA. Accordingly, the court sentenced him to 34 months' confinement, plus 36 to 48 months' community custody. The court also ordered Scott to have no contact with DH.

II. 2003 PERSONAL RESTRAINT PETITION AND REMAND

¶9 In 2003, Scott filed a personal restraint petition, arguing that his guilty plea was invalid because his offender score had been miscalculated. The Supreme Court ordered the superior court to grant Scott his choice of remedy—withdrawal of his guilty plea or specific performance of the plea agreement, unless the superior court determined after an evidentiary hearing that there were compelling reasons not to allow the remedy Scott chose.

⁴ DH's actual birthday was April 12, 1985, which would have made him only 15 years old at the time of the alleged incidents.

¶10 Thereafter, Scott wrote a letter to the Pacific County prosecutor, offering to “withdraw the right to change [his] plea” in order to save the State money.⁵ Thus, Scott did not withdraw his 2001 *Alford* plea and, instead, left it intact to serve as the basis for his resentencing. On May 16, 2003, in accordance with the original 2001 plea agreement, the superior court sentenced Scott to 20 months’ confinement, followed by 36 to 48 months’ community custody (with the total confinement and community custody not to exceed the statutory maximum of 60 months).

¶11 At that point, Scott had already served 24 months in prison and, apparently, expected to be released to community custody. On May 19, 2003, however, the King County Prosecutor’s Office petitioned to have Scott civilly committed as a sexually violent predator (SVP) under chapter 71.09 RCW. The record on appeal does not show Scott’s current custody status.⁶

III. NEWLY DISCOVERED EVIDENCE; MOTION TO VACATE PLEA

¶12 More than two years later, on October 7, 2005, Scott’s counsel, Michael Turner, moved to withdraw. Scott opposed this motion, arguing that Turner should be investigating his (Scott’s) assertion that he had found DH and that DH had been 18 years old at the time of the alleged rape. The court granted Turner’s motion to withdraw.

¶13 In April 2006, Scott filed a pro se motion asking the superior court to vacate his *Alford*-plea conviction, to appoint an attorney to represent him, and to hear oral argument on his motion. On May 31, with the assistance of standby counsel, Scott supplemented his motion to vacate with two supporting declarations, one from DH and the other from DH’s mother.

⁵ Scott wrote this letter himself, apparently without the assistance of counsel.

⁶ Nor does the record on appeal show the status of King County’s SVP petition.

A. “Victim’s” Recantation

¶14 DH declared that (1) he had never entered Scott’s house; (2) Scott had never forced him to engage in sexual activity; (3) he was aware that Scott had been charged with third degree rape of a child and that he (DH) was the alleged victim; (4) the charge was false because he (DH) had been arrested in February 2001 and incarcerated in Montana from February to May 2001;⁷ and (5) he remembered having been interviewed by police and having “told them distinctly at this time that nothing had happened between Mr. Scott and myself.” CP at 76. DH’s mother declared that DH had been incarcerated in Great Falls, Montana, from February to May 2001.

¶15 In March 2007, represented by new appointed counsel, Scott filed a memorandum in support of his motion to vacate his guilty plea. He outlined and attached as “new evidence” a transcript of a May 11, 2006 interview between DH and a private investigator in which DH stated that Scott never made any sexual advances toward him and that he (DH) had never been in Scott’s house.

B. Other New Evidence

¶16 Scott’s counsel also submitted the following new evidence in support of Scott’s motion to vacate his plea: (1) excerpts from the King County Prosecuting Attorney’s Office’s September 8, 2006 interview of Fernlund; (2) a 2001 statement by Carolyn Yellowhawk,⁸ which the State allegedly never gave to Scott’s trial counsel; and (3) affidavits and declarations indicating that some of the people who had

⁷ On August 15, 2007, during an interview with a private investigator, DH stated that he had been living in Idaho with his grandparents during this same period. During that interview, he again denied having engaged in sexual activity with Scott.

⁸ Yellowhawk was DH’s school counselor, with whom DuFour had spoken in 2001 about the alleged rape.

reported Scott's allegedly illegal sexual activity to the police subsequently took over his lawn care business (without his permission) after he went to jail. At the time Scott submitted this memorandum, he believed that DuFour was deceased.

¶17 During the 2007 interview with the King County investigator, Fernlund stated that (1) his mother said that "the cops" had told her that Scott was a child molester; (2) he (Fernlund) had never "seen" Scott "with any kids"; (3) he (Fernlund) "just said what everybody else was sayin' and like went in there essentially said the same thing" during the 2001 interview with police, CP at 337; and (4) "[l]ike all of us were like all right since he's a queer you know, do whatever. So I guess we all just like . . . I don't know kind a [sic] put together to get him locked up." CP at 336-39. In a separate interview, Fernlund told Scott's private investigator that he (Fernlund) never saw Scott engaged in sex with DH and he never observed Scott engaged in any kind of sex act with anyone during the time he (Fernlund) had known him (Scott).

¶18 On May 1, Scott submitted a second supplemental memorandum with additional "new evidence"—the transcript of King County's recent interview with DuFour, who was still alive and had been found. In her 2007 interview, DuFour stated that, on the day she had observed Scott having sex with DH, (1) she had gone into the house alone while her father⁹ waited outside in his vehicle; (2) when she saw Scott having sex with DH, she had retrieved a camera from her vehicle and had taken two photos of Scott and DH, which she gave to the police; (3) her father told her to go to the police and she went with her father to the police "that night" and "again the next day"; and (4) the police had

⁹ The record does not identify the name of DuFour's father. It appears, however, that DuFour was referring to someone other than Fernlund, whom she had identified in her 2001 statement as having been with her when she observed Scott.

arrested Scott "just a couple days" after she reported the incident.¹⁰

C. Motion To Vacate Plea

¶19 On May 11, the superior court heard oral argument on Scott's motion to vacate his guilty plea. Scott argued that he had been diligent in his investigation of the case, and that the newly discovered evidence (specifically the recent statements of DH, Fernlund, and DuFour) showed that Scott was innocent. The State argued that (1) "this [was] a case about equitable estoppel and finality of judgments"; (2) Scott should have either not entered an *Alford* plea in 2001 or chosen to withdraw his plea in 2003, when he had the chance following the Supreme Court's remand; (3) Scott had not been diligent because he had done nothing between 2003 and 2005; (4) Scott had received the benefit of his plea bargain because the State had stopped investigating other potential charges against him; and (5) the new evidence was unreliable because it conflicted with Scott's own statements in 2001.

¶20 The superior court did not hold an evidentiary hearing to determine whether the new statements were credible. Instead, in a June memorandum opinion, the superior court adopted the State's reasoning and denied Scott's motion to vacate. With regard to Scott's new evidence, the court stated:

The facts presented to the Court regarding key witnesses changing or recanting their testimony is not sufficient to overcome [Scott's] intelligent, knowing and voluntary *Alford* plea. [Scott] was represented by counsel each step of the legal process. [Scott] presented no evidence that he did not understand that he was making a "deal" with the prosecutor.

¹⁰ In contrast with DuFour's 2007 interview, the State's 2001 probable cause affidavit (1) represented DuFour's having stated in 2001 that Fernlund had been with her when she observed Scott and DH having sex; (2) did not mention any photos that DuFour had taken and allegedly given to the police; and (3) indicated that DuFour did not tell the police immediately about her alleged observations because her father had "told her not to become involved, and after that she was gone for about nine weeks for medical treatment."

.....

The newly discovered evidence enumerated in [Scott's] briefs is not unique or compelling to justify vacation of his sentence. Often complaining witnesses change their testimony at a later date for a variety of reasons. [Scott] has failed to demonstrate that the complaining witnesses' statements at the time they were made were untrue. Instead, [Scott] chose not to proceed to a jury trial to flesh out all the various witnesses' testimonies in 2001.

.....

The Court further agrees with the State that Mr. Scott's motion to vacate is untimely [because Scott] failed to adequately demonstrate why he waited so long to vacate his May 16, 2003 judgment, or, for that matter, his 2001 judgment.

CP at 96-98.

¶21 Scott appeals.

ANALYSIS

¶22 Scott argues that the superior court erred by denying his motion to vacate his *Alford* plea without first holding an evidentiary hearing to determine the credibility of the new evidence—victim and witness recantations. The State counters that that the superior court properly denied Scott's motion because it was time barred. We agree with Scott.

I. STANDARD OF REVIEW

[1, 2] ¶23 We review for abuse of discretion the superior court's decision denying vacation of a judgment and a new trial. *State v. Ieng*, 87 Wn. App. 873, 877, 942 P.2d 1091 (1997), *review denied*, 134 Wn.2d 1014 (1998). The superior court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

II. MOTION NOT TIME BARRED

¶24 Scott argues that his motion was not time barred. The State argues that Scott should not be allowed to withdraw his guilty plea because he did not act with reasonable diligence in discovering the "new" evidence or in filing his motion to vacate based on new evidence. We disagree with the State.

[3] ¶25 Criminal Rule (CrR) 7.8(b)(2) provides that "the court may relieve a party from final judgment" based on "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5."¹¹ In general, where the motion is based on newly discovered evidence, the defendant must bring the motion within a reasonable time and within one year after the judgment, order, or proceedings. CrR 7.8. But, where the motion is a collateral attack, such as a motion to withdraw a guilty plea, the one-year time limit does not bar the motion if the defendant acted with reasonable diligence in discovering the new evidence. RCW 10.73.090, .100.

¶26 Scott argues that he could not reasonably have discovered this new evidence earlier because a no-contact order prohibited him from contacting DH. Scott emphasizes that the State similarly had no means to locate DH, one of the grounds the State asserted as a hardship if the superior court allowed Scott to withdraw his plea. The State makes this same assertion here: "The State in 2003 did not know the whereabouts of key witnesses and likely would have had trouble tracking them down."¹² Br. of Resp't at 27.

¹¹ CrR 7.5(b) provides that a motion for a new trial must be served and filed within 10 days after the verdict or decision. In 2001, when Scott allegedly committed his crimes, this provision was contained in former CrR 7.6(b) (2001). Accordingly, former CrR 7.8(b)(2) (2001) referenced CrR 7.6 instead of CrR 7.5.

¹² The State also argues that Scott should not be allowed a "third bite of the apple" because he elected not to withdraw his plea on remand from the Supreme Court in 2003 when he had the chance. But when Scott elected to be resentenced on his original *Alford* plea with the same plea agreement, rather than withdraw his plea, he had already served 24 months of a 20-month sentence. Consequently,

¶27 We note the State's similar inability to stay in contact with DH in 2001 at the time of Scott's sentencing. Yet the State argues that Scott, who was in prison and prevented by court order from contacting the victim, somehow could have discovered this new evidence earlier if he had "made a timelier request to have a new lawyer appointed to investigate any the [sic] possibility of witness 'recantations.'" Br. of Resp't at 28. Scott replies that he made such a request in 2005 when he opposed his attorney's notice of intent to withdraw and moved to vacate his plea based on new evidence.

¶28 It appears from the prosecutor's 2001 probable cause affidavit that the witness statements leading up to Scott's *Alford* plea were consistent. DH claimed that he and Scott had "engaged in sexual activity approximately 100 times." Both DuFour and Fernlund claimed to have witnessed Scott having sex with DH. More recently, Fernlund described the witnesses' attitudes at the time they gave their statements to the police as follows: "Like all of us were like all right since he's a queer you know, do whatever. So I guess we all just like . . . I don't know kind a [sic] put together to get him locked up." CP at 339 (emphasis added). Thus, it is unlikely that these witnesses would have changed their stories earlier or that Scott could have done anything to cause these changes.¹³

¶29 We hold, therefore, the general CrR 7.8 and RCW 10.73.090 one-year time limits do not bar Scott's motion to

it was reasonable for him to believe that when he was resentenced to 20 months' confinement, he would be deemed to have served his full sentence and would be released immediately from confinement. Instead, the State initiated civil SVP commitment proceedings.

The State also argues that fundamental fairness requires that it receive the benefit of its 2001 plea bargain with Scott, in which the State gave up the right to investigate additional charges that it would not now be able to pursue. Contrary to the State's assertion, it appears that the State would be able to pursue these additional charges because the State now knows the location of each of these witnesses, whom the State or Scott's investigators have recently found and who have recently given new statements.

¹³ A defendant cannot precipitate a witness's recantation, especially where the recanting witness's statements are consistent through pretrial investigations and proceedings. *State v. D.T.M.*, 78 Wn. App. 216, 221, 896 P.2d 108 (1995).

vacate his guilty plea, based on new evidence that he acted with reasonable diligence in discovering and could not reasonably have discovered at an earlier time. RCW 10.73.100.

III. EVIDENTIARY HEARING TO DETERMINE RELIABILITY OF NEW EVIDENCE

¶30 Scott asks us to remand to the superior court to conduct an evidentiary hearing to determine whether the witnesses' recantations are credible and, thus, entitle him to a new trial. He argues that the superior court erred by rejecting his new evidence without first holding an evidentiary hearing to determine whether the recanting witnesses' statements were reliable because, if true, DH's, DuFour's, and Fernlund's recent statements prove that Scott did not commit the crime for which he entered an *Alford* plea, based on their earlier statements to the contrary. These witnesses recently declared either that (1) Scott did not have sex with DH; or (2) Scott had sex with DH, but only after DH had turned 16 years old, the age of consent.¹⁴ We agree.

¹⁴ The State argues that (1) we should not remand for an evidentiary hearing because the superior court already determined that the recantation statements were not credible, and (2) an evidentiary hearing is unnecessary because the new witness and victim statements conflict with Scott's own statements that he had sex with DH. Contrary to the State's assertions, the superior court did not make any explicit credibility findings.

Instead, the superior court stated, (1) "The facts presented to the Court regarding key witnesses changing or recanting their testimony is not sufficient to overcome the Defendant's intelligent, knowing and voluntary *Alford* plea." CP at 96-97. (2) "The fact that evidence surfaces later that might cast doubt on the credibility of complaining witnesses will not automatically vacate an underlying sentence based upon a plea agreement that was entered which promised the Defendant unqualified immunity for what the State termed (and the Defendant did not contest) 'numerous other allegations of sexual crimes [in Pacific County]'" CP at 97 (alteration in original). (3) "The newly discovered evidence enumerated in Defendant's briefs is not unique or compelling to justify vacation of his sentence." CP at 98. And (4) "[o]ften, complaining witnesses change their testimony at a later date for a variety of reasons. The Defendant has failed to demonstrate that the complaining witnesses' statements at the time they were made were untrue." CP at 98.

A. Criteria for New Trial

[4] ¶31 A superior court may not grant a defendant a new trial based upon new evidence unless he establishes “that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before the trial by exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (quoting *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)); see also *State v. D.T.M.*, 78 Wn. App. 216, 221, 896 P.2d 108 (1995). The superior court may deny a motion for a new trial “when any one of these factors is absent.” *State v. Macon*, 128 Wn.2d 784, 804, 911 P.2d 1004 (1996).

[5, 6] ¶32 A witness or victim’s recantation of earlier statements is generally considered new evidence. *Id.* at 799-800. The superior court must determine whether a witness’s recantation is credible before considering the defendant’s motion for a new trial based on the recantations, regardless of whether there is independent evidence supporting the defendant’s conviction. *Id.* at 804. This rule applies even where the defendant entered an *Alford* plea. *State v. D.T.M.*, 78 Wn. App. 216, 221, 896 P.2d 108 (1995) (superior court erred by denying defendant’s motion to withdraw *Alford* plea without holding evidentiary hearing to determine whether alleged victim’s recantation was credible).

¶33 In an *Alford* plea, the defendant does not admit guilt but concedes that a jury would most likely convict him based on the strength of the State’s evidence. *Alford*, 400

We note, however, that the superior court did not hold an evidentiary or other hearing at which it could interview these witnesses in person to determine the reliability of their recent recantations. Instead, the court decided that these written statements were unreliable because they conflicted with Scott’s previous admissions to having had sex with DH when Scott believed that DH was of the age of consent. We further note that at the time Scott made this admission, he was seeking a SSOSA sentence, a prerequisite for which is admission to the charged crime.

U.S. at 37; see also *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976).

Ordinarily, when a defendant pleads guilty, the factual basis for the offense is provided at least in part by the defendant’s own admissions. With an *Alford* plea, however, the court must establish an entirely independent factual basis for the guilty plea, a basis which substitutes for an admission of guilt.

D.T.M., 78 Wn. App. at 220. Thus, an evidentiary hearing to evaluate the continued reliability of this independent factual basis is all the more critical where a defendant’s conviction is based on an *Alford* plea rather than on his admission or sworn trial testimony.

¶34 Scott does not challenge on appeal the lack of a factual basis for his 2001 *Alford* plea. Nevertheless, his newly discovered evidence calls into question whether there now remains sufficient evidence admissible under the corpus delicti rule¹⁵ to support his plea and conviction. Independent of his *Alford* plea proceedings, Scott consistently maintained that DH was of the age of consent when they had sex and that he (Scott) had never confessed to having committed a crime. Now, the alleged victim, DH, whom the State could not locate at the time of Scott’s 2001 sentencing, declares that Scott committed no crime against him. Thus, the chances of there being no competent evidence to support Scott’s *Alford* plea are high, and the necessity of an evidentiary hearing is clear.

B. *D.T.M.*

¶35 We find instructive *D.T.M.*, in which Division Three of our court addressed newly discovered evidence in the *Alford* plea context. In *D.T.M.*, the defendant’s stepdaugh-

¹⁵ Under the corpus delicti rule, a defendant’s incriminating statement alone is not sufficient to support the inference that there has been a criminal act. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006) (citing *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996)). “[T]he State must present evidence independent of the [defendant’s] incriminating statement that the crime [the] defendant described in the statement actually occurred.” *Id.* (citing *Aten*, 130 Wn.2d at 656).

ter, MJ, told a neighbor and her mother that DTM had tried to rape her. *Id.* at 218. The State charged DTM with first degree child rape. The court held a hearing to determine MJ's competency and the admissibility of child hearsay. *Id.* DTM accepted the State's plea bargain offer and entered an *Alford* plea to the first degree molestation charge in exchange for the State's dismissing the first degree rape charge. *Id.* Four days later, however, MJ told her mother that she had "made up" the rape allegation because she was angry at DTM and wanted him "to get in trouble." *Id.* DTM moved to withdraw his *Alford* plea. *Id.* Without first establishing whether MJ's recantation was credible, the superior court denied the motion. *Id.* at 219. Division Three of our court reversed. *Id.* at 221.

¶36 Division Three noted that (1) without MJ's statements, DTM's *Alford* plea and conviction lacked factual support because there was no independent evidence supporting the charge; (2) MJ's recantation, if true, met all five criteria for a new trial; (3) DTM could not have discovered the recantation earlier with the exercise of due diligence "[g]iven the consistency of M.J.'s statements throughout the investigation and pretrial proceedings"; (4) DTM "could [not] have precipitated the recantation by acting differently"; and (5) if MJ had adhered to her recantation in open court while subject to cross-examination, existing law would require the superior court to permit DTM to withdraw his guilty plea and proceed to trial. *Id.* at 220-21.

C. If True, New Evidence Would Meet All Five New Trial Criteria

¶37 Scott's new evidence, if true, contradicts and significantly calls into question the evidence available to provide a factual basis for his 2001 *Alford* plea—the original police interview with DH and DuFour's original statements to

police.¹⁶ DH's recent affidavit and Fernlund's recent interview statements, if true, meet the five criteria for a new trial, especially in light of DuFour's significantly changed story. This new evidence meets the first criterion because it would probably change the result of a new trial. DH now indicates not only that he never had a sexual relationship with Scott, but also that he never told anyone that Scott had sex with him; he also claims that he was out of the state during the charging period. Fernlund's statement is clearly a recantation of his earlier statement to police: He now affirmatively admits to having earlier lied about seeing Scott having sex with DH in order to "get [Scott] locked up." If true, these new statements not only undermine the factual basis for Scott's plea but also tend to prove that Scott never had sex with DH and, thus, did not commit third degree rape of a child.

¶38 This new evidence also meets the second and third criteria: It was all discovered after trial. Scott likely could not have discovered the evidence before his guilty plea through the exercise of due diligence; it is highly unlikely that anything Scott could have done would have precipitated Fernlund's recantation. Given that by the time of sentencing, the State was unable to find DH or his family, it is unlikely that Scott could have discovered that DH did not make the statements attributed to him in the probable cause affidavit (or if he did make those statements, that he would later recant).

¶39 Furthermore, the evidence, if true, meets the fourth criterion for a new trial in that it strongly indicates that Scott did not commit a crime; therefore, the evidence is material. Finally, DH's and Fernlund's statements meet the

¹⁶ As we have earlier noted, it appears that only the prosecutor's affidavit of probable cause, which summarizes DH's interview and DuFour's statements, was part of the record at the time Scott entered his *Alford* plea; and again, it is not clear from the record whether the superior court used this affidavit to provide a factual basis for Scott's plea.

fifth criterion because these statements are not merely cumulative or impeaching.¹⁷

D. Credibility Hearing Necessary Despite Statements' Conflict

¶40 Although the superior court did not hold a credibility hearing, the State argues that the superior court properly found DH's statements unreliable because they conflict with Scott's statements. Scott argues that (1) the superior court should have held an evidentiary hearing to determine whether DH's recantation was credible after having the opportunity to observe DH testifying in open court despite his (Scott's) contrary statements; (2) if the statements are inconsistent, "only Scott knows the motivation underlying his statements, whether based on truth or some other concern"; and (3) his (Scott's) statements and DH's statements do not entirely conflict because the sex could have occurred after DH's 16th birthday when he returned to Washington following his release from custody.

[7] ¶41 In 2001, Scott (1) told the sentencing court that he and DH had had sex "about three" times after DH moved in with him, but Scott maintained he had believed DH was 18 years old at the time; and (2) consistently told the corrections officer who prepared the presentence report that he (Scott) had had sex with DH, but that he believed DH was 18 years old at the time.¹⁸ Although Scott's

¹⁷ In contrast, DuFour's recent interview could be considered "merely impeaching." In both her new and old statements, she claims that she observed Scott having sex with DH. While many of the details differ between her 2001 statement and her 2007 interview, DuFour has not recanted her earlier statement. Thus, her new interview might be used to impeach her previous statement that she observed Scott having sex with DH. In this sense, DuFour's recent interview, alone, would not meet all five of the new trial criteria. Thus, we do not consider this new evidence as a basis for reversing the trial court's denial of Scott's motion to withdraw his guilty plea.

¹⁸ In its appellate brief, the State asserts that in a July 8, 2005 interview, Scott stated that DH had sex with him three times. But the State did not designate this interview as part of the record on appeal under RAP 9.6(a). Therefore, we will not consider the State's allegation or this 2005 interview. *Crista Senior Cmty. v. Dep't of Soc. & Health Servs.*, 77 Wn. App. 398, 412, 892 P.2d 749 (1995).

statements are inconsistent with DH's 2007 statement that he (DH) never had sex with Scott, DH's statement—that he was out of state during the charging period—is consistent with Scott's repeated statements that he had sex with DH only after DH was old enough to consent. Neither Scott's nor DH's statements, however, describe a crime.

IV. STATEMENT OF ADDITIONAL GROUNDS: ACTUAL INNOCENCE

¶42 In his statement of additional grounds (SAG),¹⁹ Scott argues that "actual innocence should have been the only grounds raised" by his attorney. Scott attaches his trial attorney's motion for reconsideration, which cites *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). The Washington Supreme Court has cited *Schlup* for the proposition that "actual innocence" may constitute a rare "narrow exception allowed for consideration of a successive [personal restraint] petition" in "extraordinary cases[s]." *In re Pers. Restraint of Turay*, 153 Wn.2d 44, 54-55, 101 P.3d 854 (2004) (alteration in original) (quoting *Schlup*, 513 U.S. at 321).

¶43 Scott is before us on direct appeal from the superior court's denial of his motion to withdraw his *Alford* plea, not on a successive personal restraint petition. Thus, we need not address whether the "actual innocence" successive personal restraint petition exception applies to a direct appeal. Furthermore, it is not necessary for us to delve more deeply into this exception because we are vacating the superior court's order on other grounds and remanding for the reference hearing that Scott has requested.

¶44 We vacate the superior court's denial of Scott's motion to withdraw his guilty plea and remand to the superior court to hold an evidentiary hearing to determine whether his new evidence is credible. If the superior court determines that the new evidence is credible, then the court shall reconsider Scott's motion to withdraw his *Alford* plea.

¹⁹ RAP 10.10.

If the superior court determines that the new evidence is not credible, then Scott's *Alford*-plea based conviction stands.

BRIDGEWATER and ARMSTRONG, JJ., concur.

[No. 36868-4-II. Division Two. May 27, 2009.]

THE STATE OF WASHINGTON, *Respondent*, v. LEIF ALLEN,
Appellant.

- [1] **Criminal Law — Review — Issues Not Raised in Trial Court — Sufficiency of Evidence.** The sufficiency of the evidence supporting a criminal conviction may be challenged for the first time on appeal. (See lead opinion of Armstrong, J., and concurring opinions of Houghton and Hunt, JJ.)
- [2] **Statutes — Construction — Review — Standard of Review.** Questions of statutory interpretation are reviewed de novo. (See lead opinion of Armstrong, J., and concurring opinions of Houghton and Hunt, JJ.)
- [3] **Statutes — Construction — Legislative Intent — In General.** A court's goal in construing a statute is to carry out the legislature's intent. (See lead opinion of Armstrong, J., and concurring opinions of Houghton and Hunt, JJ.)
- [4] **Statutes — Construction — Ambiguity — Legislative Intent — Rules of Statutory Construction — Legislative History.** To discern the legislative intent of an ambiguous statute, a court may employ principles of statutory construction and consider the legislative history of the statute. (See lead opinion of Armstrong, J., and concurring opinions of Houghton and Hunt, JJ.)
- [5] **Assault, Criminal — Domestic Violence — Protection Order — Statutory Provisions — 2000 Amendment — Purpose.** Laws of 2000, ch. 119, § 24 amended RCW 26.50.110(1) to add a cross-reference to RCW 10.31.100(2), which governs warrantless arrests for violating domestic restraining orders and foreign protection orders, and was enacted to strengthen the domestic violence laws. The legislative history of the amendment confirms that a violation of a no-contact order, foreign protection order, or restraining order that does not constitute a class C felony is a gross misdemeanor. The legislative history also confirms that the police must arrest any

person who violates the restraint or exclusion provision of a court order relating to domestic violence. It is the legislature's intent that a person commits a crime by violating any no-contact order and that the violation need not involve an act or threat of violence or presence within a specified distance of a location in order to be criminal. (See lead opinion of Armstrong, J., and concurring opinions of Houghton and Hunt, JJ.)

- [6] **Statutes — Construction — Legislative Intent — Subsequent History.** The subsequent history of a statute may clarify the statute's original legislative intent. (See lead opinion of Armstrong, J., and concurring opinions of Houghton and Hunt, JJ.)
- [7] **Assault, Criminal — Domestic Violence — Protection Order — Statutory Provisions — 2007 Amendment — Purpose.** RCW 26.50.110 was amended by Laws of 2007, ch. 173 to restore and make clear the legislature's intent that a willful violation of a no-contact provision of a court order is a criminal offense. The amendment did not result in a substantive change in the law or broaden the scope of law enforcement. The amendment clarifies that a gross misdemeanor results when a person restrained by a no-contact, protection, or restraining order knows of the order and violates any provision thereof prohibiting acts or threats of violence against, or stalking of, a protected party or prohibiting contact with a protected party. (See lead opinion of Armstrong, J., and concurring opinions of Houghton and Hunt, JJ.)
- [8] **Statutes — Construction — Qualifying Language — Antecedent — Last Antecedent Rule — Ambiguity — Necessity.** The last antecedent rule of statutory construction, under which a qualifying word or phrase is deemed to refer to all prior antecedents if it is preceded by a comma, applies only if a statute is ambiguous. (See lead opinion of Armstrong, J., and concurring opinions of Houghton and Hunt, JJ.)
- [9] **Statutes — Construction — Qualifying Language — Antecedent — Last Antecedent Rule — Applicability.** The last antecedent rule of statutory construction, under which a qualifying word or phrase is deemed to refer to all prior antecedents if it is preceded by a comma, should not be inflexibly applied or taken as universally binding. The rule should not be applied if it would render related statutory provisions meaningless or superfluous, would lead to illogical results, or the resulting interpretation would conflict with the legislature's intent. (See lead opinion of Armstrong, J., and concurring opinions of Houghton and Hunt, JJ.)
- [10] **Statutes — Construction — Rational Interpretation — Avoiding Anomalous or Illogical Results.** A statute should not be interpreted in a manner that would lead to illogical or implausible results. (See lead opinion of Armstrong, J., and concurring opinions of Houghton and Hunt, JJ.)

ATTACHMENT "2"

ATTACHMENT "2"

defendant intended to commit the act. It was not necessary that the term "specific" be used to describe the intent which must be proven to have been fixed in the mind of the defendant. A similar instruction was proposed in *State v. Stewart*, 73 Wn.2d 701, 440 P.2d 815 (1968). It was held that use of the term "specific" in an instruction to the jury was unnecessary, the court stating that it was sufficient if an instruction is given defining the term "willfully" as meaning "intentionally and not accidentally." The defendant could argue his theory of the case, and it was not error to refuse the proposed instruction.

Affirmed.

WILLIAMS, C.J., and ANDERSEN, J., concur.

Petition for rehearing denied December 4, 1975.

Review denied by Supreme Court February 10, 1976.

[No. 2450-1. Division One. August 4, 1975.]

THEODORE HANSEN, ET AL, *Appellants*, v. ROLAND C. WIGHTMAN, ET AL, *Respondents*.

- [1] **Contracts—Parol Evidence—In General.** Parol evidence may not be admitted to vary the terms of a written agreement whose meaning is clear and unambiguous.
- [2] **Contracts—Parol Evidence—Partial Integration—In General.** The doctrine of partial integration may not be applied in the absence of proof that additional terms of an agreement were not incorporated into the writing.
- [3] **Evidence—Photographs—Discretion of Court.** The admission of photographs is within the discretion of the trial court.
- [4] **Trial—Comment on Evidence—Matters Not in Issue.** A trial judge's comments upon a fact which is undisputed and not in issue do not fall within the constitutional prohibition against commenting upon the evidence (Const. art. 4 § 16). The constitution does not prohibit comments which do not express the court's attitude toward the merits.
- [5] **Trial—Comment on Evidence—Effect—Corrective Instruction.** A trial court's inadvertent comment upon the evidence may be corrected by an appropriate instruction.
- [6] **Attorney and Client—Duties to Client—Inquiry.** An attorney has

no duty to inquire regarding matters for which the client assumes responsibility or which are not related to the discharge of the duties he has undertaken on the client's behalf.

- [7] **Attorney and Client—Duties of Client—Informing Attorney.** A client has a duty of reasonable care in providing information to his attorney.
- [8] **Attorney and Client — Duties — Compliance — Determination.** Whether an attorney was negligent in failing to make certain inquiries and whether a client was contributorily negligent in not revealing certain matters is a question of fact except where the respective duties exist as a matter of law.
- [9] **Attorney and Client—Malpractice—Elements.** The elements of legal malpractice are an attorney-client relationship, a duty on the attorney's part, a failure to meet the duty, and damage to the client proximately resulting from such failure.
- [10] **Attorney and Client—Malpractice—Burden of Proof.** In an action against an attorney for malpractice, the plaintiff has the burden of proving each of the elements of malpractice and the defendant has the burden of showing contributory negligence on the plaintiff's part.
- [11] **Appeal and Error—Assignments of Error—Argument in Support—Necessity.** Assignments of error which are supported by neither argument nor citations of authority will not be considered on appeal.
- [12] **Appeal and Error—Review—Issues Not Raised in Trial Court—Instructions.** An appellate court will not consider instructions to which error is assigned unless the record shows that the grounds for objection were presented to the trial court.
- [13] **Damages—Instructions—Harmless Error—Nonliability.** The giving of an erroneous instruction relating to damages is harmless error when the defendant's nonliability is established by a verdict in his favor.
- [14] **Attorney and Client—Malpractice—Standard of Care—In General.** An attorney must exercise the same care, skill, diligence, and knowledge as would a reasonable, careful, and prudent lawyer practicing in the state. He is not an insurer of results.
- [15] **Attorney and Client—Malpractice—Standard of Care—Duty as Fiduciary.** An attorney's duty arising from the fiduciary relationship with a client is included within the reasonable standard of care to which he is held.
- [16] **Trial—Instructions—Evidence in Support—Necessity.** An instruction need not be given when it is not supported by the evidence.
- [17] **Attorney and Client—Malpractice—Standard of Care—Proof.** The standard of care required of an attorney need not be established by

expert testimony of another attorney when the area of alleged malpractice is within the common knowledge of laymen.

[18] **Trial—Instructions—Sufficiency—Test.** A trial court's refusal to give a proposed instruction is not error when the instruction is not necessary to permit the party to argue his theory of the case.

[19] **Attorney and Client—Code of Professional Responsibility—Effect.** The Code of Professional Responsibility has the same force and effect as any other rule adopted by the Supreme Court.

[20] **Trial—Instructions—Comment on Evidence—What Constitutes.** An instruction from which the existence of a fact in issue may be inferred constitutes an impermissible comment upon the evidence and need not be given.

[21] **Municipal Corporations — Nonclaim Statute — Claimants — Later Addition.** The statute which governs claims against cities, RCW 35.31, has the purpose of allowing a municipality to investigate a claimant and the claim at a time close to when it arose, and to anticipate its monetary impact; a claim will not be read to include persons not originally named therein.

[22] **Attorney and Client—Malpractice—Theories Considered—Constitutionality of Statute.** An attorney who acts for a client desiring to comply with a statute is not required to consider the possible unconstitutionality of the statute, nor is he negligent in accepting an interpretation of the Supreme Court or in making a judgment about a matter of doubtful construction.

Appeal from a judgment of the Superior Court for King County, No. 746028, Cornelius C. Chavelle, J., entered July 16, 1973. *Affirmed.*

Action for legal malpractice. The plaintiffs appeal from a judgment entered on a verdict in favor of the defendants.

Jennings P. Felix, Inc., P.S., Jennings P. Felix, and Nicholas F. Corning, for appellants.

McMullen, Brooke, Knapp & Grenier and E. H. Knapp, Jr., for respondents.

CALLOW, J.—The plaintiffs Theodore and Margaret Hansen, parents of Joyce Hansen, brought this action claiming legal malpractice against the members of the Spokane law firm of Cullen, Campbell and Wightman. The plaintiffs appeal a jury verdict in favor of the defendants.

Joyce Hansen, a young amateur swimmer, was participating in a swimming meet in Spokane, Washington, on May 13, 1967. While preparing for an upcoming race, she was knocked down by other child competitors. Her head struck a metal bar embedded in concrete and she was injured.

The plaintiffs contacted a Seattle lawyer who filed a claim against the City of Spokane on June 12, 1967. The plaintiffs later were referred by a friend to Roland C. Wightman, a partner in the Spokane law firm. A retainer agreement signed by the plaintiff father was entered into with the defendants in September 1967, and \$50 was paid to cover filing and service fees at the request of Mr. Wightman. The agreement retained Mr. Wightman to represent the daughter in connection with the injuries she had sustained. The defendants did not file a complaint on behalf of the injured child and did not file a separate claim on behalf of the parents against the City of Spokane.

The plaintiffs claim that the child suffered severe injuries. They testified that they repeatedly requested information as to the progress and status of the litigation and that the law firm failed to reply until it was contacted by another Seattle lawyer on or about September 23, 1970. The defendants' position is that they investigated the accident and concluded that the liability of the City for the child's injury was doubtful and the child's injuries were minor. The defendants testified that the plaintiffs did not respond to their inquiries regarding the child's medical condition, and that there was no claim that the injury to the child caused epilepsy until after the file had been returned to the plaintiffs. The lawyers decided that a lawsuit was not justified. It is further their claim that they were retained to represent the child only, and that the period for filing a claim on behalf of the parents for any cause of action they might have against the City had expired when the defendant lawyers were contacted.

The 17 assignments of error involve primarily the admission or rejection of evidence during the course of the trial

and the instructions given or refused which dealt mainly with the attorney-client relationship. Discussion of the issues follows.

1. *Was testimony that the retainer agreement created an attorney-client relationship between the attorney and the parents, in addition to a relationship regarding the child's claims, improperly excluded on the basis of the parol evidence rule?*

[1] The plaintiff-clients claim that the trial court excluded parol evidence which would have shown that the defendant-lawyers had been contacted by the parents to represent themselves, as well as their child. The retainer agreement entered into between the parties was prepared by the Seattle lawyer as an accommodation to the plaintiffs. It was in the form of a letter dated September 13, 1967, signed by the plaintiff father and mailed to the defendant Wightman, who signed it on September 20, 1967. The document is plain on its face, and is clear and unambiguous. Parol evidence could not have been admitted to vary its terms. *Washington Fish & Oyster Co. v. G.P. Halferty & Co.*, 44 Wn.2d 646, 269 P.2d 806 (1954); *Schinnell v. Doyle*, 6 Wn. App. 830, 496 P.2d 566 (1972).

[2] The retainer agreement which was offered by the plaintiffs and accepted by the defendants clearly pertains only to representation of the father in his capacity as guardian for the child. The agreement itself does not indicate that there was any additional arrangement entered into between the parties, and the plaintiffs did not present evidence of any additional items that were not incorporated into the writing. Absent such proof or an offer thereof, the doctrine of partial integration cannot be asserted as a basis for error. *University Properties, Inc. v. Moss*, 63 Wn.2d 619, 388 P.2d 543 (1964); *Barber v. Rochester*, 52 Wn.2d 691, 328 P.2d 711 (1958).

The defendants further state that the testimony actually presented at the trial did, in fact, cover this aspect of the relationship between the plaintiffs and the defendants. The record discloses that the contention of the defendants is

correct. Defendant Wightman was questioned fully on direct and cross-examination as to whether the defendants were to have any responsibility for any direct claims the parents might have against the City. Our review of the record reveals that the plaintiffs did not attempt to explore this area through other witnesses. We have not found outstanding offers of proof on the subject which were excluded wrongfully by the trial court. Evidence is in the record on the subject, however, and the plaintiffs have not been prejudiced. See *Garratt v. Dailey*, 46 Wn.2d 197, 279 P.2d 1091 (1955); *Akers v. Sinclair*, 37 Wn.2d 693, 226 P.2d 225 (1950).

The agreement is clear on its face, there was no showing or offer of proof of any agreement regarding a direct claim of the parents, and testimony covering the subject was presented in any event. We find no error.

2. *Should certain photographs have been admitted?*

[3] The plaintiffs assert that the exclusion of certain photographs of the scene of the accident taken at a subsequent swim meet was improper. We cannot say that similar circumstances existed at the time the photographs were taken. The admission or rejection of photographs lies in the sound discretion of the trial court. *Rikstad v. Holmberg*, 76 Wn.2d 265, 270, 456 P.2d 355 (1969); *Toftoy v. Ocean Shores Properties, Inc.*, 71 Wn.2d 833, 431 P.2d 212 (1967). Here the trial court ruled that the probable misleading or prejudicial effect of the photographs would outweigh their probative value. This was not an abuse of his discretion.

3. *Did the trial court prejudicially comment on the evidence?*

The Seattle attorney who drew the claim against the City and the retainer letter for the plaintiffs was testifying on cross-examination that there was no co-counsel relationship between himself and the defendant. He answered:

A. . . . But it would seem to me that, unless the individual is performing services and doing something productive with respect to the particular case, it would be unethical and in violation [sic] of the canons to accept, that is, a "kick-back," if you will.

Q. My question—

THE COURT: There was no kick-back, Mr. Jones.

THE WITNESS: Well, I mean, if I perform services.

THE COURT: I know. Usual practice is, if I'm over in Yakima, there's a practicing attorney in Yakima, and you know me, and your client lives in Yakima, and they contact you initially, you refer a case to me, the usual standard is that, what we call a referral fee, is that I receive two-thirds and you receive one-third. Isn't that your practice over a number of years?

THE WITNESS: I've never done that.

At the first opportunity the plaintiffs moved for a mistrial in the absence of the jury and challenged the statement made by the court.

The court denied the motion for mistrial, returned the jury to the jury box, and stated:

Before you call your witness, I want to talk to the jury. While Mr. Jones was on the witness stand I made a remark about referral fees; forwarding attorney gets a certain percentage, and the person who receives the case gets a certain percentage.

I want you not to take that as a comment on the evidence on my part. It's just what my practice, thirty-four years as a practicing attorney, and practices of thousands of attorneys that I know; has nothing to do with this case whatsoever.

Hope you understand that. It was not a comment; was not an intentional comment by me. I was explaining my experience; my background.

Do you all understand that?

JURY RESPONSE: Yes.

THE COURT: Thank you.

[4] The comments of the trial judge, while unfortunate and incorrect as a matter of law, were not upon matters relevant to the action. The prohibition of article 4, section 16 of the Washington State Constitution forbids comment by judges upon matters of fact. However, the comments on dividing fees were comments upon a fact which was not in issue and not in dispute. The constitutional prohibition does not apply to such comments. *James v. Ellis*, 44 Wn.2d 599, 269 P.2d 573 (1954). As stated in *State v. Louie*, 68 Wn.2d

304, 314, 413 P.2d 7 (1966), *cert. denied*, 386 U.S. 1042, 18 L. Ed. 2d 610, 87 S. Ct. 1501 (1967), "adverting to or assumption of an admitted or undisputed peripheral fact does not constitute constitutionally inhibited comment." In addition, the comments did not imply to the jury an expression of the judge's opinion concerning disputed evidence, or express the court's attitude towards the merits of the cause. *State v. Carothers*, 84 Wn.2d 256, 525 P.2d 731 (1974); *State v. Jacobsen*, 78 Wn.2d 491, 477 P.2d 1 (1970); *Risley v. Moberg*, 69 Wn.2d 560, 419 P.2d 151 (1966).

[5] Further, inadvertent remarks of a trial judge which might otherwise be a constitutional violation may be corrected by appropriate instructions. When the trial court explained his prior remarks to the jury and stated that they were not to be taken as comments on the evidence, no objection was made to this explanation and the court in the written instructions instructed the jury to disregard comments made by him during the trial.

In view of their incidental nature and because of the explanation and corrective instructions given, the court's comments were not prejudicial to the plaintiffs. *Blackburn v. Groce*, 46 Wn.2d 529, 283 P.2d 115 (1955); *Jankelson v. Cisel*, 3 Wn. App. 139, 473 P.2d 202 (1970).

4. *What is the duty of the client to inform the attorney about the case? Is the client contributorily negligent if he fails to do so?*

The plaintiffs claim that the instructions imply that the clients must provide information to their attorney or be held to be contributorily negligent if they do not do so. The defendant-lawyers assert that it is the burden of the plaintiff-clients to show that but for the negligence of the lawyers, they as clients would have prevailed.

We do not find in the challenged instructions implications such as those read into them by the plaintiffs. However, even if such implications are raised, the instructions were not erroneous as given. The instructions challenged in the fourth, fifth and sixth assignments of error set forth the

claims of the parties, the burden of proof upon each party, and the definitions of terms. Instruction No. 2 (assignment No. 4) was in the form of WPI 20.01; instruction No. 3 (assignment No. 5) was in the form of WPI 21.03; and instruction No. 4 (assignment No. 6) encompassed WPI 21.01, 10.01, 10.02, 11.01, and 15.01.

[6, 7] Contributory negligence on the part of a client is a question of fact and, if established, would bar a malpractice recovery.¹ *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); W. Prosser, *Torts* § 65 (4th ed. 1971); 7 C.J.S. *Attorney and Client* § 156 (1937). It is a question to be decided by the jury, if a jury is the trier of the facts. Under the instructions, the jury was told that the lawyers claimed the clients were contributorily negligent in failing to supply necessary information, that the burden of proof was on the lawyers to prove failure to supply the information, and that negligence was a failure to exercise ordinary care by failing to do something which a reasonably careful person would have done under similar circumstances. Contributory negligence was further defined for the jury as set forth in WPI 10.01, 10.02, and 11.01.

Under certain circumstances it may be the duty of the lawyer to investigate the facts applicable to a transaction and report the results to the client. *Burien Motors, Inc. v. Balch*, 9 Wn. App. 573, 513 P.2d 582 (1973). If the attorney should have inquired concerning the facts and did not, the client cannot be said to have been negligent in failing to disclose said facts. *Bank of Anacortes v. Cook*, 10 Wn. App. 391, 517 P.2d 633 (1974). However, an attorney need not inquire into matters that do not pertain to the discharge of the duties that he has undertaken. *In re Estate of Novolich*, 7 Wn. App. 495, 500 P.2d 1297 (1972). Likewise, an attorney need not make inquiry where the responsibility for the matter is assumed by the client. *Fisk v. Newsum*, 9 Wn.

¹This cause was tried in June 1972. Contributory negligence as a defense was eliminated by RCW 4.22.010 and .020, which were effective April 1, 1974. The impact of comparative negligence upon malpractice actions is not before us.

App. 650, 513 P.2d 1035 (1973); *Rochester v. Katalan*, 320 A.2d 704 (Del. 1974). Other jurisdictions have held that a client may be contributorily negligent by failure to exercise reasonable care in providing information to the attorney. *Ishmael v. Millington*, *supra*; *Theobald v. Byers*, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864, 87 A.L.R.2d 986 (1961); *Salisbury v. Gourgas*, 51 Mass. (10 Met.) 442 (1845); *Zeitlin v. Morrison*, 167 App. Div. 220, 152 N.Y.S. 1000 (1915); *Rapuzzi v. Stetson*, 160 App. Div. 150, 145 N.Y.S. 455 (1914); Annot., 45 A.L.R.2d 5, 17 (1956).

[8] The evidence in a case may be so clear that there can be no question but that the attorney should have inquired about a matter. *Hecomovich v. Nielsen*, 10 Wn. App. 563, 572, 518 P.2d 1081 (1974). However, if it cannot be said that the duty to inquire or disclose was present as a matter of law, then it is for the trier of the fact to decide, with the guidance of appropriate instructions, whether negligence existed on the part of a lawyer for his failure to inquire about certain matters or whether a client was contributorily negligent for failing to disclose a known fact to the lawyer. *Laux v. Woodworth*, 195 Wash. 550, 81 P.2d 531 (1938); *In re Estate of Novolich*, *supra*. Under the evidence introduced in this action, the instructions given on negligence and contributory negligence were appropriate.

5. *Where does the burden of proof lie in a client's malpractice action against an attorney?*

The trial court instructed the jury that the plaintiffs had the burden of proving (a) that they had hired the defendants to represent them, (b) that the defendants acted negligently, (c) that the plaintiffs would have recovered judgment upon their claim, (d) that the plaintiffs were damaged, and (e) that the negligence of the defendants was a proximate cause of the damage to the plaintiffs. The same instruction also told the jury that the defendants had the burden of proving (a) that the plaintiffs acted negligently, and (b) that the negligence of the plaintiffs was a proximate cause of the plaintiffs' injuries. See WPI 21.03; 7 C.J.S. *Attorney and Client* § 157, at 999 (1937).

[9] The elements of a legal malpractice action are the existence of an attorney-client relationship, the existence of a duty on the part of a lawyer, failure to perform the duty, and the negligence of the lawyer must have been a proximate cause of damage to the client.² *Transcontinental Ins. Co. v. Faler*, 9 Wn. App. 610, 513 P.2d 864 (1973); *In re Estate of Novolich, supra*; *Ishmael v. Millington, supra*; *McGregor v. Wright*, 117 Cal. App. 186, 3 P.2d 624 (1931).

[10] The burden of proving that an attorney has been negligent or failed to act with proper skill and that damages resulted therefrom is on the plaintiff client. *McLellan v. Fuller*, 226 Mass. 374, 115 N.E. 481 (1917). Likewise, the burden is on the plaintiff to show that the negligence of the attorney was a proximate cause of the client's damage. *Maryland Cas. Co. v. Price*, 231 F. 397 (4th Cir. 1916); *Laux v. Woodworth*, 195 Wash. 550, 81 P.2d 531 (1938); *Martin v. Nichols*, 110 Wash. 451, 188 P. 519 (1920); *Meagher v. Kavli*, 256 Minn. 54, 97 N.W.2d 370 (1959); *General Accident Fire & Life Assur. Corp. v. Cosgrove*, 257 Wis. 25, 42 N.W.2d 155 (1950). The burden is on the attorney to prove that the client was contributorily negligent in failing to act or in failing to disclose information to the lawyer. See *Martin v. Hall*, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730, 53 A.L.R.3d 719 (1971); *Lawson v. Sigfrid*, 83 Colo. 116, 262 P. 1018 (1927). The instructions properly placed the burden of proving the attorneys' negligence upon the clients and the burden of showing the clients' contributory negligence upon the lawyers. The assignment of error fails.

6. *Was the jury erroneously instructed on the definitions of preponderance of the evidence, proximate cause, negligence, ordinary care, and contributory negligence?*

[11] The instructions objected to were taken directly from Washington Pattern Instructions—Civil. We find neither argument directly related to the assignment of error, nor citations of authority concerning the challenges raised.

²The plaintiff need not be the client, only an injured party. *Schirmer v. Nethercutt*, 157 Wash. 172, 288 P. 265 (1930).

Therefore, the assignment of error will not be considered on appeal. *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 523 P.2d 193 (1974); *Talps v. Arreola*, 83 Wn.2d 655, 521 P.2d 206 (1974); *Spino v. Department of Labor & Indus.*, 1 Wn. App. 730, 463 P.2d 256 (1969).

7. *Was the jury erroneously instructed on the doctrine of unavoidable accident?*

[12] It is apparent that the trial court and counsel discussed the instructions in chambers, but none of the colloquy concerning the proposed instructions is reflected in the statement of facts. The exception to the instructions does not set forth grounds for objection. This does not comply with CR 51(f), and while counsel may have been aware of a basis for the objection which was made known to the court, we cannot assume this was done. The point in question has not been preserved in the record for review. *Galvan v. Prosser Packers, Inc.*, 83 Wn.2d 690, 521 P.2d 929 (1974); *Holt v. Nelson*, 11 Wn. App. 230, 234, 523 P.2d 211 (1974).

8. *Should an instruction have been given telling the jury that they should award to the plaintiff parents damages for injury to the minor child?*

[13] The trial court, in an instruction other than that proposed by the plaintiffs, properly informed the jury setting forth RCW 4.24.010.³ The subject matter of the proposed instruction was correctly covered by the trial court, the plaintiffs could argue their theory of the case, and they have not been prejudiced. Further, the verdict of the jury in favor of the defendants establishes that they were not negligent, assuming the trial was error free otherwise.

³RCW 4.24.010 states in part:

"The mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent for support: . . .

"In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just."

Therefore, the question of damages becomes irrelevant. In *Adamson v. Traylor*, 66 Wn.2d 338, 402 P.2d 499 (1965), it was said that when the verdict is in favor of a defendant, even though an instruction on damages was erroneous, the error was harmless since the verdict has established that the defendants were not liable. See also *Bissell v. Seattle Vancouver Motor Freight, Ltd.*, 25 Wn.2d 68, 168 P.2d 390 (1946); *Stuart v. Consolidated Foods Corp.*, 6 Wn. App. 841, 496 P.2d 527 (1972).

9. Did the instruction on the standard of care required of lawyers properly set forth that standard?

[14] The standard of care for lawyers practicing law in Washington is a statewide standard set forth in *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 395, 438 P.2d 865 (1968), as follows:

The Restatement (Second) of Torts, § 299A (1965), states the standard as follows:

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

Prosser explains that:

Professional men in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a *standard minimum of special knowledge and ability*. (Italics ours.) W. Prosser, Torts § 32, p. 164 (3d ed. 1964).

The standards of practice for lawyers in this jurisdiction as a qualification for the practice of law are the same throughout the state, and do not differ in its various communities. We therefore hold that the correct standard to which the plaintiff is held in the performance of his professional services is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction.

The court, in *Ward v. Arnold*, 52 Wn.2d 581, 328 P.2d 164 (1958), had said at page 584:

An attorney at law, when he enters into the employ of another person as such, undertakes that he possesses a reasonable amount of skill and knowledge as an attorney, and that he will exercise a reasonable amount of skill in the course of his employment, but he is not a guarantor of results and is not liable for the loss of a case unless such loss occurred by reason of his failure to possess a reasonable amount of skill or knowledge, or by reason of his negligence or failure to exercise a reasonable amount of skill and knowledge as an attorney. *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.

Cook, Flanagan & Berst v. Clausing, *supra*, recognized that the statement in the *Ward* case was consistent with the standard of section 299A of the Restatement.

The exception to the given instruction claimed that it did not contain all the elements of the duty that an attorney has to his client. The plaintiffs state in their brief that the instruction was correct as far as it went, but was insufficient in describing the fiduciary duty of an attorney. The instruction, however, with the exception footnoted, did inform the jury of the standard of proficiency required of lawyers.⁴ The instruction told the jury that an attorney

⁴The instruction was adapted from WPI 105.01. It stated that an attorney must "exercise that degree of care which is ordinarily possessed and exercised by the average attorney acting in the same or similar circumstances." The insertion of the term "average" was error. However, no exception was taken to use of the descriptive word, and no mention of it appears except in the defendants' brief. The instruction in that regard became the law of the case.

e. *Standard normally required*. In the absence of any such special representation, the standard of skill and knowledge required of the actor who practices a profession or trade is that which is commonly possessed by members of that profession or trade in good standing. It is not that of the most highly skilled, nor is it that of the average member of the profession or trade, since those who have less than median or average skill may still be competent and qualified. Half of the physicians of America do not automatically become negligent in practicing medicine at all, merely because their skill is less than the professional average. On the other hand, the standard is not that of the charlatan, the quack, the unqualified or incompetent individual who has succeeded in entering the profession or trade. It is that common to those who are recognized in the profession or trade itself as qualified, and competent to engage in it.

owes to his clients a duty to comply with the recognized standard of practice for his profession prevailing at the time, that he must possess and apply that degree of skill and learning and exercise that degree of care which is ordinarily possessed and exercised by lawyers acting in the same or similar circumstances, and that failure to apply such skill and learning or to exercise such care is negligence. This was proper.

10, 11, and 12. *Was the fiduciary obligation of an attorney to his client understated in the instruction on standard of care? Was it error to refuse the proposed instructions on the duty of an attorney (a) to a client, (b) regarding the filing of claims, and (c) to inform a client on the progress of litigation?*

The issues raised by assignments of error Nos. 10, 11 and 12 all pertain to the standard of care expected of an attorney and his duty under certain circumstances. These assignments will be discussed together.

[15] The standard of care required of attorneys does not impose special or different attention to duty because the relationship between attorney and client is a fiduciary one. The care exercised must still be reasonable. *Burien Motors, Inc. v. Balch*, 9 Wn. App. 573, 513 P.2d 582 (1973). The skill with which a legal task is performed must be the skill, prudence and diligence that would be exercised by lawyers of ordinary skill and capacity. *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961). Existing within the standard, and comprising a component thereof, is the fiduciary duty of the lawyer to the client. That duty does not create a special standard, but sets the standard of performance on a level where conscientious endeavor is expected of ordinary men. The exercise of trust responsibility by the attorney is a part of his work which makes diligence and constancy in the handling of a

Restatement (Second) of Torts § 299A, comment e at 74-75 (1965). See also *Butler v. Rule*, 29 Ariz. 405, 242 P. 436 (1926); *Buckner v. Wheeldon*, 225 N.C. 62, 33 S.E.2d 480 (1945).

client's concerns an element to be reasonably expected of ordinary lawyers as a matter of course. The standard of care was defined properly for the jury and the plaintiffs were able to present their theory of the case under the instructions given. *Hayden v. Insurance Co. of North America*, 5 Wn. App. 710, 490 P.2d 454 (1971).

[16] The instruction proposed by the plaintiffs on the filing of claims was inappropriate. The instruction would have told the jury that it was the duty of the defendants to examine the claim filed by the Seattle lawyer against the City of Spokane, and if they "deemed" the claim defective to amend it or file a new claim within the applicable statutory period to correct the defect. There was neither evidence in the case that the defendant-lawyers "deemed" the claim already filed defective, nor evidence that they would have found it defective after any amount of further examination. The position of the defendant-lawyers throughout the trial was that they were retained to represent only the interests of the child and that, in any event, the time period for filing a claim against the City had expired when they were first retained. The proposed instruction stated that the lawyers had a duty to amend or file a new claim if it was their opinion that they should do so. The evidence as to the opinion of the defendant-lawyers in this regard was that they should *not* do so. A misstatement was made in the proposed instruction. Instructions should not be given on issues which are unsupported by the evidence. *Bartlett v. Hantover*, 84 Wn.2d 426, 526 P.2d 1217 (1974); *Chapman v. Claxton*, 6 Wn. App. 852, 497 P.2d 192 (1972).

[17, 18] The trial court instructed the jury properly that the degree of care, skill and learning which constitutes the recognized standard of practice of a profession must be proved by testimony of a member of that profession. Establishment of the standard of care by expert testimony is unnecessary, however, where the area of claimed malpractice is within the common knowledge of laymen. *Teig v. St. John's Hosp.*, 63 Wn.2d 369, 387 P.2d 527 (1963); *Baker v. Beal*, 225 N.W.2d 106 (Iowa 1975); *Admissibility and Ne-*

cessity of *Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney*, Annot., 17 A.L.R.3d 1442 (1968). From the evidence presented on the duties of lawyers to their clients, including the testimony on the duty of attorneys to keep their clients informed, from the knowledge which the laymen jurors would bring to the trial and which could be applied by them in their deliberations, and under the instruction given on the standard of care to be met by the defendants, the instructions presented by the plaintiffs were unnecessary. The theories of the clients could be argued. *Hester v. Watson*, 74 Wn.2d 924, 448 P.2d 320 (1968); *Harris v. Fiore*, 70 Wn.2d 357, 423 P.2d 63 (1967). We find no error in the failure of the trial court to give the plaintiffs' proposed instructions which elaborated and expounded on the standard of care of the lawyer.

13. *What is the appropriate rule regarding the division of fees between lawyers?*

[19] The Code of Professional Responsibility is comprised of (a) Canons, which express general concepts regarding the standards of conduct expected of lawyers; (b) Ethical Considerations (EC), which represent behavioral aims which lawyers should seek to achieve; and (c) Disciplinary Rules (DR), which set forth levels of deportment which must be met. These rules have the dignity and status of any rule adopted by the Supreme Court. *In re Chantry*, 67 Wn.2d 190, 407 P.2d 160 (1965). They are the standards of ethics for all members of the bar of this state. RCW 2.48.230.

Regarding the division of fees among lawyers (CPR) DR 2-107(A)⁹ states:

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

⁹(CPR) DR 2-107(A) was adopted effective January 1, 1972. However, its predecessor, Canon 34 adopted November 22, 1950, also condemned dividing fees, except with another lawyer, and then only when the division was based upon a division of service or responsibility.

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

This rule stands as a mandatory standard of conduct which imposes upon a lawyer (a) the necessity of disclosing to a client that it is proposed that another lawyer will be employed and that the fee will be divided with him, and (b) achieving the client's consent to the hiring before the other lawyer is employed. When such an arrangement is entered into, fees are then to be divided in proportion to the work performed and the responsibilities assumed, and the total fees charged must not clearly exceed the reasonable compensation for all legal services performed. *See also* (CPR) EC 2-32; H. Drinker, *Legal Ethics* 186-88 (1953).

(CPR) DR 2-107(A) is buttressed by (CPR) DR 2-103(B), which directs lawyers not to compensate or give anything of value to anyone to recommend or secure employment, or as a reward for having made a recommendation resulting in the employment of the lawyer.⁹

State v. O'Connell, 83 Wn.2d 797, 523 P.2d 872 (1974), stands for the proposition that a client may not compel the return of that portion of a fee that has been secretly shared with another lawyer when the division of fees was based on the performance of services and the sharing of responsibility and the total fees paid were reasonable. The decision does not lessen the force of the disciplinary rule condemning the division of fees other than pursuant to its terms.

The plaintiffs proposed an instruction which stated that it was the standard of skill, care and diligence among attorneys in the state to divide fees pursuant to (CPR) DR 2-107(A). The portion of the instruction submitted by the plaintiffs, which was taken directly from (CPR) DR 2-

⁹There are limited exceptions to this rule not pertinent to this inquiry. *See* (CPR) DR 2-103(C), (CPR) DR 2-107(B).

107(A), correctly stated the law, but when the proposed instruction went beyond the rule and said that the division of fees was related to the standard of skill, care and diligence that an attorney owes to a client, it became misleading and confused unrelated concepts. Further, the proposed instruction was not pertinent to the issues as no evidence was presented that fees had been divided between the lawyers involved. *Pancratz v. Turon*, 3 Wn. App. 182, 473 P.2d 409 (1970). It was properly refused.

14. *When can an attorney withdraw from employment and what is his duty upon doing so?*

When a lawyer contracts to perform professional services for a client, he is required to carry the matter through to completion unless there is good cause for withdrawal. (CPR) DR 7-101(A)(2); 7 Am. Jur. 2d *Attorneys at Law* §§ 143-45 (1963). A decision to withdraw should be made only because of compelling circumstances and with consideration of the possibility of prejudice to the client as a result of the withdrawal (CPR) EC 2-32.

An attorney may withdraw from a case when a client insists upon presenting an unwarranted claim or defense, pursues an illegal course of action or insists that the lawyer do so, makes it unreasonably difficult for the lawyer to work effectively, insists in a nontribunal matter that the lawyer engage in conduct that is contrary to his judgment and advice, or when the client disregards his obligations as to fees or expenses. A lawyer may also withdraw when his continued employment may result in the violation of a disciplinary rule, when he cannot work with co-counsel, when he cannot mentally or physically carry out the work, when the client agrees to the withdrawal, or when in a matter pending before a tribunal he believes that the tribunal will find other good cause for withdrawal. (CPR) DR 2-110(C).

An attorney must withdraw when he discovers that the client's position is being asserted merely for the purpose of harassing another, when he knows that continued employment will result in violation of a disciplinary rule, when his

mental or physical condition makes performance unreasonably difficult, or when he is discharged by the client. (CPR) DR 2-110(B). An attorney is also required to withdraw when it is obvious that he or a member of his firm should be called as a witness on behalf of the client, (CPR) DR 5-102; when his judgment is likely to be adversely affected by his representation of another client, (CPR) DR 5-105; or when it becomes apparent that he is not competent to handle the matter properly, (CPR) DR 6-101.

When a lawyer decides to withdraw for cause, a duty remains to protect the welfare of the client. The attorney must then give notice of withdrawal, suggest employment of other counsel, return papers and property to which the client is entitled, cooperate with succeeding counsel, refund compensation not earned and minimize the possibility of harm to the client. (CPR) DR 2-110(A) and (CPR) EC 2-32. *See also In re Fraser*, 83 Wn.2d 884, 523 P.2d 921 (1974); *In re Vandercook*, 78 Wn.2d 301, 474 P.2d 106 (1970). Statutory requisites under RCW 2.44.040 and 2.44.050 for the substitution of counsel that have appeared in court proceedings must also be met.⁷ *Lipp v. Hendrick*, 65 Wn.2d 505, 397 P.2d 848 (1965). Leave of court is not required as between attorney and client, but only may be necessary when an adverse party is involved after an appearance has been filed. *Bostock v. Brown*, 198 Wash. 288, 88 P.2d 445 (1939); *State ex rel. Jones v. Superior Court*, 78 Wash. 372, 139 P. 42 (1914).

⁷RCW 2.44.040 reads:

"The attorney in an action or special proceeding, may be changed at any time before judgment or final determination as follows:

"(1) Upon his own consent, filed with the clerk or entered upon the minutes; or

"(2) Upon the order of the court, or a judge thereof, on the application of the client, or for other sufficient cause; but no such change can be made until the charges of such attorney have been paid by the party asking such change to be made."

RCW 2.44.050 reads:

"When an attorney is changed, as provided in RCW 2.44.040, written notice of the change, and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party; until then, he shall be bound to recognize the former attorney."

[20] The instruction proposed by the plaintiffs covering the withdrawal of attorneys from the attorney-client relationship properly discussed certain aspects of the subject. However, the proposed instruction only highlighted a few of the factors involved and was not apropos under the record. We have noted that the retainer agreement forwarded to the attorney-defendants by the plaintiff-clients was for representation of the interests "of my said daughter." The plaintiffs moved for and were granted a voluntary nonsuit with regard to the cause of action of the daughter against the defendant-attorneys. There was no evidence of a relationship existing between the attorneys and the plaintiffs-parents from which the defendants could withdraw under the retainer agreement entered into and under the defendants' theory of the case. For the trial court to have instructed the jury that a contract of employment existed from which the defendants could only withdraw by taking certain prescribed steps would have inferred that an agreement did exist. This would have been an improper comment on the evidence and therefore was properly refused. *Weber v. Biddle*, 4 Wn. App. 519, 483 P.2d 155 (1971).

15. *Should the trial court have given the plaintiffs' proposed instruction which would have told the jury that the municipal claim filed on behalf of the minor child was in substantial compliance with RCW 35.31.010 and included the cause of action of the plaintiffs for their own injuries?*

The plaintiffs argue that the information provided in the claim that was filed was in substantial compliance with RCW 35.31.010 and gave the City of Spokane notice of the plaintiff-parents' claim. The plaintiffs argue that the defendant-lawyers were negligent in failing to recognize this and pursue the claim on behalf of the parents. The plaintiffs state it was the responsibility of the defendant-lawyers to take the position that the claim included the claim of the parents and assert that position against the City of Spokane, stating that such claim statutes are to be liberally

construed and citing to us *Cook v. Yakima*, 21 Wn.2d 810, 153 P.2d 279 (1944), and *Duschaine v. Everett*, 5 Wn.2d 181, 105 P.2d 18, 130 A.L.R. 134 (1940).

This argument is inconsistent with the other position urged by the parents that they have lost their cause of action against the City because the claim filed was not amended to include the claim of the parents. We will disregard any inconsistency to answer the issue presented.

[21] The purpose of the claim statutes is to allow municipalities the opportunity to investigate (a) the claimant, (b) the claim close to the event producing it so that the true factual situation may be discovered, and (c) to anticipate the possible monetary impact of the claim. It cannot be assumed that a new claimant not named within a claim prepared and filed by another would be pursued by attorneys retained after the expiration of the filing period. The addition of a new party to the claim cannot be justified by an assertion that the claim was broad enough to include the unnamed party. *Olson v. King County*, 71 Wn.2d 279, 428 P.2d 562, 24 A.L.R.3d 950 (1967); *Wagner v. Seattle*, 84 Wash. 275, 146 P. 621 (1915); *Horton v. Seattle*, 53 Wash. 316, 101 P. 1091 (1909). See also *Nelson v. Dunkin*, 69 Wn.2d 726, 419 P.2d 984 (1966).

Further, the proposed instruction would have told the jury that the defendant-attorneys had a responsibility to the plaintiff-clients even though the retainer agreement entered into did not so specify. This would have been an improper comment on the ultimate issue to be decided by the jury. *Hartman v. Port of Seattle*, 63 Wn.2d 879, 389 P.2d 669 (1964); *Weber v. Biddle*, 4 Wn. App. 519, 483 P.2d 155 (1971).

16. *Should the proposed instruction have been given stating that the claim of the parents was barred because it was not brought within 3 years?*

The plaintiffs claim they were precluded from arguing that they lost their right of action against the City because the defendants abandoned the action without informing them and allowed the statute of limitations to run. They

assert the jury should have been instructed that their claims as parents were barred by failure of the defendants to commence suit within 3 years of the injuries.

Here again the record does not contain any statement of the ground for objection made to the trial court. If the record does not show compliance with CR 51(f), an asserted error based upon an objection to the giving or refusal of any instruction cannot be considered on appeal. *Great-West Life Assur. Co. v. Levy*, 382 F.2d 357 (10th Cir. 1967); *Tunney v. Seattle Mental Health Rehabilitation Institute*, 83 Wn.2d 695, 521 P.2d 932 (1974); *Moore v. Mayfair Tavern, Inc.*, 75 Wn.2d 401, 451 P.2d 669 (1969).

17. Was it error to instruct the jury that a statute (35.31.020) provided that claims for damages against a first-class city must be filed within 120 days from the date that an injury is sustained because such statute is unconstitutional?

[22] The plaintiffs say it was error to instruct on the provisions of RCW 35.31.020, the municipal claims statute, because it is unconstitutional. The plaintiffs state that the statute unconstitutionally distinguishes between classes of defendants by requiring plaintiffs with causes of action against municipalities to file a claim within a short period, while plaintiffs with claims against private parties need not do so. They cite to us *Reich v. State Highway Dep't*, 386 Mich. 617, 194 N.W.2d 700 (1972). The constitutionality of RCW 35.31.020 is not before us, however. Lawyers are not required to look to the possibility of the unconstitutionality of statutes in exercising their professional judgment on behalf of the clients on the assumption that the statute was constitutional. The claim that RCW 35.31.020 is unconstitutional is contrary to prior rulings in this state. *Collins v. Spokane*, 64 Wash. 153, 116 P. 663 (1911); *Cole v. Seattle*, 64 Wash. 1, 116 P. 257 (1911). In addition, there is substantial precedent upholding such claim statutes. 56 Am. Jur. 2d *Municipal Corporations* § 680, at 725 (1971).

An attorney is not negligent when he accepts as a correct

interpretation of the law a decision of the highest court of his state, or when he exercises judgment in a matter of doubtful construction. *Martin v. Burns*, 102 Ariz. 341, 429 P.2d 660 (1967); *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961); *Citizens' Loan, Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 23 N.E. 1075 (1890); *Denzer v. Rouse*, 48 Wis. 2d 528, 180 N.W.2d 521 (1970).

We find no error which can be claimed to have prejudiced the plaintiffs. The judgment is affirmed.

FARRIS and JAMES, JJ., concur.

Petition for rehearing denied November 19, 1975.

[No. 1571-2. Division Two. August 6, 1975.]

THE STATE OF WASHINGTON, Respondent, v. KENNETH KNAPP,
Appellant.

- [1] **Witnesses—Impeachment—Prior Conviction—Assistance of Counsel—Necessity.** A witness' conviction for either a felony or a misdemeanor may not be used to impeach his testimony unless he was afforded or effectively waived the assistance of counsel at the trial for the offense in question.
- [2] **Witnesses—Impeachment—Prior Conviction—Assistance of Counsel—Showing in Record.** A witness' effective waiver of counsel in a prior criminal prosecution will not be presumed, for purposes of the admission of the conviction to impeach his testimony, when the record is silent regarding such a waiver.
- [3] **Criminal Law—Witnesses—Cross-Examination—Scope—Discretion of Court.** While a criminal defendant's right to cross-examine witnesses against him is basic and is permitted great latitude, the scope of such cross-examination is within the trial court's discretion; cross-examination which only remotely tends to show bias or prejudice, or which is vague, argumentative, or speculative may be rejected.
- [4] **Witnesses—Impeachment—Credibility—Ability To Recall—In General.** Cross-examination to show a witness' impaired recall ability is permitted only when it relates to the specific details surrounding the case, unusual behavior or an abnormal condition of the witness at the time of the occurrence in question, or previous treatment for or an adjudication of insanity, emotional disturbance, senility, or mental deficiency.