

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON }
RESPONDENT, }
V. }
LARRY TARRER }
APPELLANT. }

CASE No. 41347-7-11

STATEMENT OF ADDITIONAL GROUNDS
FOR REVIEW, AND BRIEF SUMMARY

I LARRY TARRER, APPELLANT hereby submit this STATEMENT OF ADDITIONAL GROUNDS and a BRIEF SUMMARY IN SUPPORT:

ADDITIONAL GROUND 1

TRIAL COURTS ORDER DENYING ADMISSIBILITY OF VICTIMS MEDICAL RECORDS VIOLATED THE APPELLANTS CONSTITUTIONAL RIGHT TO A FAIR TRIAL TO PRESENT A COMPLETE DEFENSE, AND EFFECTIVE ASSISTANCE OF COUNSEL.

ADDITIONAL GROUND 2

ADMISSION OF EYEWITNESS IDENTIFICATION VIOLATED APPELLANTS CONSTITUTIONAL RIGHTS UNDER FEDERAL AND STATE LAW.

ADDITIONAL GROUND 3

THE STATES FAILURE TO PRESERVE EXCULPATORY EVIDENCE, AND TO AUTHENTICATE PHOTOCOPIED MONTAGE VIOLATED APPELLANTS CONSTITUTIONAL RIGHTS.

BRIEF SUMMARY IN SUPPORT OF STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

ADDITIONAL GROUND: 1. ARGUEMENTS.) Trial Courts order denying admissibility of Victims Harborview Medical Records violated appellants constitutional right to present a complete defense, and effective assistance of counsel.

A.) MEDICAL RECORDS SHOULD HAVE BEEN ADMISSIBLE IN TRIAL.

i.) Relevant Facts.

The Harborview Medical Records of the victim Claudia McCorvey contain 3 pages of the observations of three separate surgeons who treated Ms. McCorvey for her gunshot wounds. In the Appellants first trial in 2009 the medical records were submitted as exhibit #59. on these pages the three physicians each individually described with notes, and sketchings that the victims "entrance" gunshot wounds were located in her back, and the "exit" gunshot wounds were on her chest. The Defense made every possible attempt available to locate the each of the three surgeons to testify to the medical records for trial, and were never able to find any of them . see 10-13-2009 MEMORANDUM RE; ADMISSIBILITY OF HARBORVIEW TREATMENT RECORDS OF VICTIM.

Because the Defense could not locate the three doctors the defense moved to have the medical records exhibit#59 made admissible pursuant to ER 803 (a) (6) BUSINESS RECORDS, RCW 5.45.020 UNIFORM BUSINESS RECORDS AS EVIDENCEACT (U.B.R.E.A.) The States theory of the case was that Claudia McCorvey was the sole witness to her shooting, that she identified the Appellant as the shooter because she was facing the shooter when she was shot. On 10-14-09 The Trial Court ruled the medical records were inadmissible because they are "opinion hearsay" and can only be admitted if at least one of the three doctors from the medical records can testify to them.

ii.) Trial Court erred in ruling H.M. Records Inadmissible Hearsay.

Medical Records have long been ruled a reliable source, and as Business Records an exception to the hearsay bar. pursuant to ER.(a) (6) Business Records, RCW5.45.020 (U.B.R.E.A.)The WA. State Supreme Court set requirements for admissibility under this hearsay rule exception in State v. Kreck 86 wn.2d 112, 542 P.2d 782 (1975) they are; 1.) the evidence was in the form of a "record", 2.) the record was of an "act, condition, or event", 3.) the record was made in the regular cours of business 4.) it was made at or near the time of the "act, condition; or event", and, 5.) the court was satisfied that "the sources of information,

method, and time of preparation were such as to justify its admission ".Id. at 118-19,542 p.2d 782

The state actually conceded on the record that thier is no dispute as to four out of five requirements, and the State provided no information, nor cited any authority that the medical records Did not meet all five requirements,see Trial Records dated 10-14-09, and 10-13-09 MEMORANDUM re: ADMISSIBILITY ofHARBORVIEW TREATMENT RECORDS of VICTIM. The State did make severalfruitless arguements for inadmissibility of the medical records, but the only arguement the trial court ruled the medical records were inadmissible on was that the three surgeons descriptions of the victims wounds are" inadmissible opinion hearsay". The trial courts ruling was clearly erroneous. The reality is all information contained in business records is hearsay evidence. That is the purpose of the U.B.R.E.A. statute to provide an exception to the rule for hearsay business record evidence. Hospital records are normally admissible as an exception to the hearsay bar in order to show events, conditions, or, acts under RCW 5.45.020, YOUNG v. liddington 50 wn.2d 78, 83-84, 309 P.2d (1957); BRADLE v. MAURER 17 Wn.App..24,30,560 P.2d 719 (1977) Medical Records have been ruled by the court to be particulary trustworthy because the hospital relies on its physicians to perform thier duties when making often crucial life and death decisions. The descriptions of the victims gunshot wounds are not an opinion, and the court had no basis to say thier depictions of the wounds as "exit" or "entrance" wounds was an opinion verses the three surgeons observation of the condition of the wounds. Furthermore all of the information and evidence presented to the trial court clearly showed that by law the three doctors task as physicians's was to observe Ms. McCorveys condition as they did by accurately noting and sketching illustrations of thier observations of the wounds as they individually and independantly observed them then reporting the record of the "non-fatal gunshot wounds" they observed as required.see RCW43.20.050 and WAC246-101-301 (COLLECTION of DISEASE and INJURY INFORMATION for Dept. of HEALTH by all medical facilities). It should be taken under consideration that on 10-29-2009Id. 26-28 during the States case in chief the States own expert witness- Medical Examiner Dr.Howard testified concerning photos of the "entrance" and "exit" gunshot wounds of victim Laverne Simpkins how easy it is to see the difference between the two types of wounds, by how the flesh

of the "entrance wounds" perforated inwards and the flesh of the "exit wounds" perforated outwards. So its logical that three veteran gunshot trauma surgeons did not have to form an "opinion". They could easily recognize the difference between the two different "conditions" of the gunshot wounds they observed, and believed it necessary to report this valuable information to the authorities. Furthermore it was the physicians task as it was part of Harborview Medical Centers protocol for the physicians to accurately describe thier observations of the gunshot wounds for thier reports to insure Harborview Medical Center maintained trustworthy record keeping and accurate records in the normal course of the hospitals business and recording responsibilities. Moreover undermining the trial courts ruling that the descriptions were an "opinion" was the fact that three individual surgeons described and sketched the wounds similary. So the three physicians observations are not in dispute, nor based upon speculation, nor are they opinions as to causation, but were factual information relating to conditions they observed on the victim Ms. McCorvey. Clearly the trial court errored. furthermore RCW 5.45.020 does not require the testifying witness to personally supervise all individuals who have contributed to a patients medical file. STATE v. GARRETT 76wn.App.719,720,887 P.2d 488 (1995) As in State v. Garrett the medical records of this case are admissible in the same way. The defense even stipulated that the State could also present its own records on the description of the wounds, or thier own expert to contradict the records accuracy.

No party niether the defense, the state, nor the trial court were able to find a single case to coincide with the trial courts erroneous inadmissibility ruling. For over 50 years all Washington State Courts have firmly upheld the admissibility of medical records as an exception to the hearsay bar under the Uniform Business Records as Evidence Act. Accordingly this court should do the same and find the trial court abused its discretion, and the medical records were admissible under the U.B.R.E.A. Statute.

B.) Denial of admissibility of Victims Harborview Medical
Records violated the Appellants constitutional rights to
a fair trial, and to present a complete defense.

At the time of the Appellants first trial, and the Defense's motion to admit the medical records this case was 18 years old. Despite every available effort the defense was unable to obtain any of the Three physicians presence to testify at trial to thier observations in the medical records. The defense then had to

rely on presenting the information in the medical records in the manner set forth under ER (a)(6) Business Records and Rcw 5.45.020 U.B.R.E.A. see: court records dated 10-14-09 and MEMORANDUM re: ADMISSIBILITY of HARBORVIEW TREATMENT RECORDS of VICTIM. The trial courts denial of admissibility of the medical records violated any possibility of the Appellant receiving a fair trial. The Defense "needed" the admission of the medical records for an opportunity to present a complete defense. Ms. McCorvey was the only witness to her shooting, she claims being shot facing the Appellant, and the defense had no other means to attack her identification, or to call into question her testimony concerning her shooting. The medical records directly contradict her testimony that she was facing the shooter when she was shot! The Appellant should not have been denied his constitutional right to "a meaningful opportunity to present a complete defense" HOLMES v. So. CAROLINA 547 U.S.319,324,126 S.Ct.1727,164 L.Ed.503(2006) and CHAMBERS v. MISSISSIPPI 410 U.S. 284, 93 S.Ct.1038,35 L.Ed.2d 297 (1973). This case is similar to any sexual assault case in which the doctors who recorded the rape victims wounds was unable to be located by the State to testify to their observations. Surely no Prosecutor, nor any trial court would ever suggest, nor rule the medical records in that scenario are inadmissible! STATE v. GARRETT 76 Wn.App. 719,720,887 P.2d 488(1995). The Appellant should be afforded the same right, and not prejudiced because this evidence was not to the "liking" of the State. Furthermore the trial court had no authority to take the extraordinary remedy of excluding such crucial evidence for the defense. The courts exclusion "of evidence is an extraordinary remedy" which it should "apply narrowly" STATE v. HUTCHINSON 135Wn.2d 863,882,959 P.2d 1061 (1998) Clearly the trial court erred, and violated the Appellants right to a fair trial, and a meaningful opportunity to present a complete defense.

C.) The Inadmissibility of Victims Harborview Medical Records rendered the Appellant Ineffective Assistance of Counsel, and was not harmless error.

i.) INEFFECTIVE ASSISTANCE OF COUNSEL.

The Appellants trial attorney Philip Thornton informed the trial court his entire defense theory relied upon admission of the Harborview Medical Records see: TRANSCRIPTS of 10-1 -09 and 10-13-09 MEMORANDUM re: ADMISSIBILITY of HARBORVIEW TREATMENT RECORDS of VICTIM When the trial court denied the admissibility of the medical records on 10-14-09 Mr. Thornton told the court "your gutting my case"! Id. at 16 The appellant does not need to argue to this court that his trial attorney was ineffective due to the inadmissibility of the H.M. records because Mr. Thornton

purposely made every effort to inform the trial court that although he wanted to be, he could "not" be effective assistance of counsel without the admission of the Harborview Medical records. Accordingly this court should grant the Appellant relief.

ii.) INADMISSIBILITY RULING WAS NOT HARMLESS ERROR.

Ruling inadmissible the Harborview medical records was not harmless error. The medical records were crucial evidence to this case. see: Affidavit of Philip Thornton The Appellants trial attorney immediately interviewed the jurors after both trials in 2009 and 2010. Mr. Thornton in turn informed the Appellant as to his conversations with the jurors at these interviews. During the interviews with the jurors Mr. Thornton disclosed to the jurors the evidence in the victims medical records, at that time every single juror said had they heard this evidence they would have found the Appellant not guilty. not only does this show the court the serious weight of this evidence, but also this was not a clear cut case of guilt for the jury, nor did the state present, nor have an insurmountable case. The trial court's error of ruling the Harborview medical records inadmissible can not be harmless when two separate juries unanimously say they would have acquitted the Appellant if the records were presented in trial! Accordingly this court should grant the Appellant relief.

RELEVANT FACTS FOR BOTH ADDITIONAL GROUNDS ARGUMENTS 1 and 2.

On January 9th, 1991 Claudia McCorvey was using her apartment to sell and smoke crack cocaine. at around 1:00a.m. on January 9th, 1991 Claudia McCorvey while in her apartment was smoking crack cocaine with a woman unknown to her named Laverne Simpkins. At this time both women were shot. Laverne Simpkins died on the scene. Within a minute neighbors, and Officer Barnhill arrived at Claudia McCorvey's apartment. At this time Ms. McCorvey was able to speak and she made several statements in response to their questions. But when asked repeatedly by Officer Barnhill, and her neighbors who shot her Ms. McCorvey could not identify, describe, nor provide any information at all about who shot her. see: 1-9-1991 report of Officer Barnhill Additionally when paramedics and Fire Dept. personnel arrived she was unable to tell

them who shot her. From the crime scene Claudia McCorvey was first taken to Madigan Medical Center wherein an emergency c-section was performed and her unborn child died. A high amount of cocaine was found in the child's system. Claudia McCorvey was later transported to Harborview Medical Center where at 6:14 a.m. on January 9th, 1991 a second emergency surgery for her gunshot wounds was performed on her.

On January 9th, 1991 Pierce County Sheriff Detective Fred Reinicke and other detectives collected several photographs of individuals they believed were present at Claudia McCorvey's apartment the previous night, and during the shooting. The information necessary to assemble these photographs was obtained from other witnesses and detectives in the Lakewood area of Pierce County. At 12:15 p.m. on January 9th, 1991 Detective Reinicke appeared at Harborview Medical Center to interview Claudia McCorvey. Accompanied with Det. Reinicke was Detective Knabel ("who is now deceased"). Upon arrival at Harborview Medical Center the detectives were told by Dr. Forte prior to entering Claudia McCorvey's hospital room that Ms. McCorvey just completed two major surgeries, she was on heavy anesthesia, and morphine. She also could not breathe on her own so a breathing tube was placed in her throat. The detectives were told Claudia McCorvey would not be able to talk. According to both Detective Reinicke's report dated January 22nd, 1991, and Detective Knabel's report dated January 14th, 1991, when the detectives entered Claudia McCorvey's room (a) no other witnesses were present for their interview. (b) no taperecording nor videotaping was done of their interview. (c) neither detectives asked nor tested Ms. McCorvey to see if she understood the detectives. (d) Ms. McCorvey was not asked if she knew why she was shot. (g) she was not asked if she knew who shot her, and (i) Ms. McCorvey was not given any type of admonishment concerning the photographs prior to being shown the photographs by Det. Reinicke.

In Detective Knabel's report dated January 14th, 1991 he reports "Det. Reinicke and I introduced ourselves to victim McCorvey and told her we had pictures of subjects who we thought may be responsible for SHOOTING HER". According to Detective Reinicke's report dated January 22nd, 1991 he reports "I advised Claudia that Laverne was dead, and she nodded her head indicating she understood. I asked her verbally if she could nod her head yes or no and she demonstrated that she could. I showed Claudia McCorvey six photographs of blackmales, one at a time.

As I showed her a picture I asked her, "is this the man that shot you?" According to Det. Reinicke, Ms. McCorvey identified a photograph which he verbally numbered "3" as the person who shot her. According to his report, Det. Reinicke advised Ms. McCorvey that "the person depicted in photo number three was named LARRY TARRER" herein the Appellant. According to Det. Reinicke's report he says the name LARRY TARRER at least three different times throughout the identification. Additionally Claudia McCorvey was shown a photograph numbered "4" by Det. Reinicke and asked if she knew him and she indicated that she did. Det. Reinicke then asked Ms. McCorvey "is this Benny Shell"? Additionally Det. Reinicke asked Claudia McCorvey if there was a large black male at her apartment with Larry Tarrer. According to Det. Reinicke's report Claudia McCorvey "became excited, tried to talk and had to be sedated by hospital personnel.

According to Det. Reinicke's report dated January 22nd., 1991 Det. Reinicke returned to Claudia McCorvey's hospital room on January 11th, 1991 and obtained a taped statement from Claudia McCorvey. Det. Reinicke's report asserts that he brought with him the same six photographs that he showed Ms. McCorvey on January 9th., 1991, and that the photographs were numbered in the same order.

According to the January 11th, 1991 taped interview, Claudia McCorvey was heavily medicated and she was repeatedly told by Det. Reinicke to wake up. Additionally Ms. McCorvey was not asked if she could provide a description of the shooter, nor was she given any type verbal nor written admonishment concerning the photo montage. Also according to the taped interview prior showing Ms. McCorvey the photo montage Det. Reinicke labels his suspect by labeling him "was there a subject named Larry". (the detective does not address any of the other names mentioned as the subject any where in the interview) When asked if she can identify him Ms. McCorvey says "we went through this the other day. we asked ... you Larry shot me" Det. Reinicke continues asks "okay. this is number three. you've seen number three before. Who's number three?" Claudia McCorvey identifies photo number three which (according to Det. Reinicke) is a booking photo of Larry Tarrer. According to the tape recorded statement Claudia McCorvey was not asked to sign the photo "3" nor any other documents concerning the alleged identification of the Appellant.

Additionally in the January 11th, 1991 taped interview Ms. McCorvey was shown another photo montage of six different photographs of other individuals that may have been present at her apartment.

Also according to the taped recorded interview 1-11-91 Ms. McCorvey did not know the description of the Appellant's vehicle, and she states "I don't know nothing about guns, just like cars, I don't know nothing about cars."

According to Det. Reinicke's report dated January 22nd, 1991 On January 16th, 1991 he returned alone to Claudia McCorvey's hospital room to interview her. This interview was not recorded, nor witnessed by anyone else.

On January 23rd, 1991 Det. Reinicke filed a "COMPLAINT FOR SEARCH WARRANT" in the the Superior Court of Pierce County in the complaint Det. Reinicke states sworn and under oath that "Claudia McCorvey" states that Larry Edward Tarrer drives a 1980's Oldsmobile Cutlass Supreme, medium blue in color, with a white hood, either white or red primer front fender. The interior of the vehicle is blue plus."

On January 25th, 1991 Det. Reinicke arrested the Appellant. At that time there was media coverage in the Tacoma News Tribune, and on Television news broadcast that the Appellant was arrested for the shooting of Claudia McCorvey and Laverne Simpkins.

According to Det. Reinicke on February 12th, 1991 while the Appellant was in custody Det. Reinicke alleges to have met with another witness named Ricky Owens. Det. Reinicke alleges to have shown Ricky Owens six photographs that included a booking photo of the Appellant. The photo also had been signed by Det. Reinicke on the back stating " I'd by claudia McCorvey on 1-9-1991. Det Reinicke says Ricky Owens identified the Appellant Larry Tarrer as a person he saw at 7 or 8 p.m. (the Det.'s report gives no date as to when this was.) This alleged meeting with Ricky Owens was not witnessed by anyone. There is no record of where, nor what time this meeting took place. Det. reinicke did not make any type of recording of Ricky Owens interview, nor is there any record of Ricky Owens being given an admonishment of any type.

On April 3rd, 2009 for the first time in the history of this case the Defense interviewed Claudia McCorvey. The interview was

preserved by a court reporter. In the April 3rd, 2009 interview, Claudia McCorvey brought to light several previous unknown facts. According to Claudia McCorvey prior to being shot she was never introduced to the Appellant. Id.12-13,30-31,43. She was never introduced by a street name to the Appellant Id.43-44. She did not know the Appellant's last name Id.44,53-54, and she believes she learned the Appellants name through prosecutors Id.53-54. She did not know the Appellant's age Id.12. She never saw the Appellant prior to January 9th, 1991 Id.12-13. Additionally Ms. McCorvey states she has no recollection of the Appellant coming to her apartment, nor leaving her apartment Id.29-33. She has no recollection of what the Appellant was wearing Id.29. Ms. McCorvey also states she never had any communications, nor disputes, nor drug dealings with the Appellant Id.14,27,41-42. She also states she has no recollection, nor able to describe who was coming and going from her apartment because she was not paying attention Id.22-24,27-29. She says she did not know Laverne Simpkins Id.28. Ms. McCorvey also says she was smoking crack cocaine the entire evening until the time she was shot Id.20-21,25,31. Furthermore Claudia McCorvey verifies that her shooting happened so fast, she was not able to pay attention, and when Questioned about the first time she noticed the shooter she said "when I saw the gun flashing" Id.33. She does not know if she, or Laverne Simpkins was shot first, and she did not see Laverne Simpkins get shot. Id.33,40. She also has no recollection how the shooter entered her studio apartment Id.38-39. When asked about her identification's at Harborview Medical Center Ms. McCorvey says all she remembers is waking up in the hospital "days" after being shot, and the police showed her pictures, but she was "totally out of it. they had me on really good medication !" Id.44-46.

During the discovery process the Appellant's trial attorney Philip Thornton was provided the opportunity to review the photographs allegedly shown to Claudia McCorvey. When Philip Thornton reviewed the photos they were in the "case file". At that time he discovered there were only "7" photographs in the "case file". "3" of the present photos were from the photo montage that contained the Appellant's photo, and they were labeled 1-1,1-3.and 1-4. The other present "4" photographs were from the second photomontage of other

individuals who might have been present at Ms. McCorvey's apartment. It is curious that the only photos that were preserved are the ones that Claudia McCorvey recognized in her January 11th, 1991 taped recorded interview.

On June 24th, 2009 the Defense interviewed retired Det. Fred Reinicke with a court reporter present. In the June 24th, 2009 Det. Reinicke states "whatever it says in his report he did" Id.35. Det. Reinicke also says he has no recollection of who prepared the photos for the montages, nor who was in them. Id.21-22. Additionally Det. Reinicke says that it was his responsibility to preserve the photos from the montages, and it was the Sheriff's Dept.'s policy to put the photos into evidence, and he states he did not put the "5" missing photos into evidence because the Appellant plead guilty in 1991. Id.22-23,26-28.

On July 10th, 2009 the Appellant's trial attorney filed (a) DEFENDANT'S MOTION TO EXCLUDE EYEWITNESS IDENTIFICATION" to suppress the identifications by Claudia McCorvey on January 9, and 11th, 1991, and by Ricky Owens on February 12th, 1991. and (b) "DEFENDANT'S MOTION TO DISMISS INFORMATION, or IN THE ALTERNATIVE, MOTION TO SUPPRESS IDENTIFICATION re: VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS" for the failure to preserve the "5" missing photographs. and (c) "DECLARATION OF PHILIP THORNTON IN SUPPORT OF DISMISSAL"

On July 14th, 2009 the State provided the Defense five black and white photocopied photographs that the State alleges are photocopies of the original "5" missing photographs.

On July 22nd, and 23rd, 2009 in the presence of the trial court a "PRESERVATION DEPOSITION OF FRED REINICKE" was taken. In the Deposition of Det. Reinicke were these relevant facts; The State stipulates that the five original photos are missing. Id.98. Det. Reinicke testifies it was his responsibility to preserve the photos, and that he did not put the photos into evidence, and he did not record the identities of the people in the photos. Id.153-54 Det. Reinicke also testifies he has no recollection of making the photocopies of the originals. Id.179. He also says he has no recollection of showing Claudia McCorvey the photos. Id.26. The State also stipulates that Det. Reinicke does not know where the photocopies came from. Id.182. Det. Reinicke also says that Det. Knabel would not materially misrepresent anything in his reports, that he would rely on Det. Knabel's reports, and he would trust

Det. Knabel's reports especially if he was with Det. Knabel.
Id.80.

On August 31st, 2009 An Evidentiary Hearing was held on the Defense's "Motion to Dismiss". At this Evidentiary hearing the Defense presented testimony from Eyewitness Identification Expert Dr. Jennifer Devenport. Dr. Devenport's research has been cited in the "National Institute of Justice" Training report for "Best Practices" for Eyewitness Identification, published Attorney Janet Reno (1999) and Attorney John Ascroft (2003). see. 8-31-09 Id. at 15 - 16. Dr. Devenport testifies that the Best Practices have been adopted by Law Enforcement across the nation. And that it is important to adhere to those practices as a way of reducing false identification in eyewitness identification procedures. see Id. at 16-17. She also explains what are the established practices in the Best Practices for Identification Procedure Manual. see Id. 17-24. Dr. Devenport states she reviewed all of the discovery pertaining to the Identification of the Appellant. Id at 24. Devenport further testified that the identification procedures used by Det. Reinicke were suggestive unreliable, and are in complete violation to the Best Practices Guidelines. Id 24-42 She also testifies that she would not testify that the identification was suggestive, unless she firmly believed it was unreliable. Id. 44-45, and that this was the first case she has ever testified as a paid expert. Id. 46-47.

On September 1st, 2009 The Trial Court denied The Defense's "Motion to Dismiss", and gave the oral ruling; (Motion denied. Court is not inclined to dismiss this case, and I am not going to suppress the Eyewitness Identification. We do have the black and whites. And while they are not of the best of quality, if you want to paraphrase Donald Rumsfeld: "You go to trial with the Evidence you have, and not the Evidence you wish you had." Id. 21.

The Defense in arguing their "Motion to Exclude Identification" asked the court to consider the credibility of Det. Reinicke. see Id. 37-41. The Trial Court denied the Defense's "Motion

to Exclude Identification, and gave the oral ruling "So I'm going to deny the motion. I think its a question for the jury as to whether or not this line-up -- and setting aside the best standards, you could still have had a line-up or photo montage or whatever in 1991 that could have been suggestive. But thats going to be a question for the jury. Id. at 41-42.

On September 21st, 2009 some three weeks later the State submitted to the Court "An Order Denying Defendants Motion To Suppress Evidence or Identification at Trial", and an "Order Denying Defendants Motion to Dismiss (Failure to Preserve Evidence)". see 19-21-09 Id. at 15. The Defense filed an objection that the Court had already made a clear Ruling and it would be improper to now adopt a Ruling created by the State, and that the State was now trying to "fill in factors" that the Court did not find, and "add Language" that the court did not state. see Id. at 15-16. The trial Court signed both Orders of Denial created by the State. see Id. at 16.

ADDITIONAL GROUND 2. Arguments.

Admission of Eyewitness Identification (by Claudia McCorvey on January 9th, and 11th, 1991 and Ricky Owens on February 12th, 1991) Violated Appellants Constitutional Rights Under Federal and State Law.

A.) Historical Analysis of Eyewitness Identification under the Due Process Clause.

1.) Federal Application of Due Process and Identification.

For nearly four decades, Courts have concluded that the Due Process protects against unreliable Eyewitness Identification. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L. ed. 2d 1199 (1967) Identifications that are "So unnecessarily suggestive and Conducive to irreparable mistaken identification

that denies Due Process of Law. In Stovall, The United States Supreme Court first considered whether, under what circumstances, an out-of-Court identification procedure could implicate a defendant's due process rights. Although the out-of-court identification in Stovall was not suppressed, the Stovall decision "established a due process right of criminal suspects to be free from confrontations that, under all circumstances, are unnecessarily suggestive. The right was Enforceable by Exclusion at trial of evidence of the constitutionally invalid identification " Manson v. Brathwaite, 432 U.S. 98, (1977) (Marshall, J., dissenting).

On the same day the United States Supreme Court decided Stovall, it also decided United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.ed. 2d 1149 (1967), and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.ed. 2d 1178 (1967) The Foundation of this "trilogy" of cases was "the Court's recognition of the high incidence of miscarriage of justice resulting from the admission of mistaken eyewitness identification evidence at criminal trials. "Brathwaite, 432 U.S. at 119, (Marshall, J., dissenting. In Wade, the Court made strong statements about the dangers involved with eyewitness identifications;

The confrontation compelled by the state between the accused and the victim, or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. the vagaries of eyewitnesses identification are well known; The annals of criminal law are rife with instances of mistaken Identification. Wade 388 U.S. at 228, 87 S.Ct. 1926 (foot note committed).

Five years later The United States Supreme Court shifted its reliance on the "necessity" of the out-of-court identification to an emphasis on the standard of reliability Neil v. Biggers, 409 U.S. 188, 198, 92 S.Ct. 275, 34 L.ed. 2d 401 (1972). In essence, the court concluded that evidence from a suggestive

identification could be admissible if a court can find it reliable under the totality of the circumstances. The Court then developed a five-part test to determine reliable identifications: (1) the opportunity of the witness to view the defendant at the time of the crime; (2) The witness degree of attention; (3) The accuracy of the witness prior description of the defendant; (4) The level of certainty demonstrated by the witness at the confrontation; and (5) The length of time between the crime and the confrontation. Biggers, 409 U.S. at 199-200, 93 S.ct. 375. The Court reaffirmed the Biggers test in Manson v. Brathwaite, 432 U.S. at 106

(2) Identifications And the Due Process in Washington State.

When reviewing reliability of eyewitness identifications, Washington State has taken similar path as its federal counterpart and adopted the test set forth in Biggers and Brathwaite. An out-of-court photographic identification violates due process if it is impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. State v. Vickers, 148 Wn 2d 91, 118, 59 p.3d 58, 72 (2002); State v. Unares, 98 Wn. App. 297,401, 989 p 2d 591 (1999) (citing State v. Vaughn, 101 Wn 2d 604, 682 p.2d 878 (1984) review denied, 140 Wn. 2d 1027, 10 p.3d 406 (2000)). Washington State first addressed identifications under the Due Process Clause in State v. Nettles, 81 Wn. 2d 205, 500 p.2d 752 (1972). In Nettles, The Court held the test for determining whether or not an identification procedure violate due process was set out in Simmons v. U.S., 390 U.S. 377, 88 S.ct. 957, 19 L.ed. 2d 1247 (1968);

Each case must be considered on its own facts, and... convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Nettles, 81 Wn.2d 205,500 P.2d 752 (1972).

Later, in State v. Thorkelson, 25 Wn.App. 615, 611 P.2d 1278, review denied, 94 Wn.2d 1001 (1980), a photo montage was used in which only two out of four witnesses were able to make even a tentative identification. The Thorkelson court, stating its disapproval of photo montage procedures concluded:

"In view of the disregard for our Supreme Court's longstanding disapproval of such practices, we conclude (this) identification evidence...should have been suppressed. We hold that, absent extenuating circumstances, photographic identification procedures of an in-custody defendant should not be used. State v. Thorkelson, 25 Wn.App. 615, 619, 611 P.2d 1278, 1281 (1980).

In State v. Burrell, 28 Wn.App. 606, 625 p.2d 726 (1981) the court acknowledged the Biggers factors and noted that the absolute rule of exclusion was too broad and instead concluded:

A photographic identification procedure violates the due process if, under the totality of the circumstances, the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Where the identification procedure is suggestive, "the corrupting effect of the suggestive identification itself" must be weighed against other factors probative of the reliability of the witness's identification. State v. Burrell, 28 Wn.App. at 609 (1981).

In State v. Cook, Wn.App. 165, 639 P.2d 863 (1982), the court reaffirmed the tests set out in Brathwaite and Biggers, concluding:

The test by which out-of-court identifications must be measured was given in Simmons v. United States, 390 US 377, 19 L.Ed 2d 1247, 88 S.Ct 967 (1968). Each case must be considered on its own facts. An out-of-court identification is inadmissible if the identification procedure was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification". Simmons, at 384. The inquiry ends if no suggestiveness is present but even the use of the suggestive procedures does not necessarily compel the exclusion of the identification. Exclusion is required only where the suggestiveness results in a very substantial likelihood of misidentification. Paramount in determining the likelihood of misidentification is the reliability of the witness's identification. Manson v. Brathwaite, 432 US 98, 53 L.Ed 2d 140, 97 S.Ct. 2243 (1977)

Neil v. Biggers, 409 U.S. 188, 34 L.Ed 2d 401, 93 S.Ct. 375 (1972).

The Appellate court must balance the reliability of the witness against the harm of the suggestiveness, considering the totality of the circumstances. The court should consider certain factors in this process, including (1) the opportunity of the victim to observe the subject at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation.

The case law therefore establishes a two part test under the traditional Due Process analysis: first, a defendant asserting that the police identification procedure denied him due process must show that the procedure was unnecessarily suggestive. State v. Traweck, 43 Wn.App. 99, 103, 715 P.2d 1148 (1986) (citing Foster v. California, 394 U.S. 440, 22 L.Ed2d. 402, 89 S.Ct. 1127 (1969); Stovall v. Denno, 388 U.S. 293 (1967)). Then, if the defendant makes such a showing, the court reviews the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. Id., 43 Wn.App. at 103 (citing Manson v. Brathwaite, 432 U.S. 98, 53 L.Ed2d 140, 97 S.Ct. 223 (1977); State v. Hewett, 86 Wn.2d 487, 545 P.2d 1201 (1976)).

B.) FLAWED PROCEDURES IN THE ADMINISTRATION OF THE IDENTIFICATION DIRECTLY CREATED AN IMPERMISSIBLY SUGGESTIVE AND UNRELIABLE IDENTIFICATION OF THE APPELLANT.

Since "reliability is the linchpin in determining the admissibility of identification testimony" Brathwaite, 432 U.S. at 114, the circumstances surrounding the administration of an identification are crucial. For example, even if a photo spread or line-up is not, on its face, impermissibly suggestive, the process under which it is given may be. See e.g., State v. Dubose, 285 Wis.2d 143, 699 N.W.2d 582 (2005). Empirical evidence and real life experiences have proven that the type of identification procedure conducted in this case leads to unreliable results: see for example;

See for example: Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 L. & Human Behav. 523 (2003); Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 Wis. L.Rev. 529; Gary L. Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277 (2003); Tiffany Hinz & Kathy Pezdek, *The Effect of Exposure to Multiple Lineups on Face Identification Accuracy*, 25 L. & Human Behav. 185 (2001); U.S. Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999); Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. Appl. Psych. 360 (1998); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Human Behav. 603 (1998); U.S. Department of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, (1996), available at: <http://www.ncjrs.org/pdffiles/dnaevd.pdf>.

(1) THE CAUSES OF EYEWITNESS ERROR.

Eyewitness misidentification is the most important contributor to wrongful convictions. Of the 130 DNA exonerated cases, 101 involved mistaken identification. see: INNOCENCE PROJECT (last visited July 16th, 2006): <http://www.innocenceproject.org/causes/>; see also; GARY L. WELLS, EYEWITNESS IDENTIFICATION PROCEDURES, 22L. & Human Behav. at 6. In a study conducted by the United States Dept. Of Justice of 28 wrongful convictions, it determined that 24 (85 percent) of the erroneous convictions were based on the misidentification of the defendant by a witness. see: WINN S. COLLINS, IMPROVING EYEWITNESS EVIDENCE COLLECTION PROCEDURES IN WISCONSIN, 2003 Wis. L. Rev. at 532-33. The statistics certainly substantiate Justice William J. Brennan's concerns in WADE that "the annals of criminal law are rife with instances of mistaken identification." Wade, 388 U.S. at 228, 28 S.Ct. 1926 (footnote omitted).

The causes of error are many, but all stem from the recent understanding that human memory does not function like a video camera, permanently and accurately recording a pre-existing reality. see: ANDREW E. TASLITZ & MAGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 788-96 (2d Ed. 2003). Rather each of us selects (either consciously or unconsciously) a minimal number of salient environmental stimuli-- a piece of the picture rather than its entirety-- to which we attend. see Id. at 790. Furthermore, the information that we "store" can change or be lost over time or can be fleshed out with new details that never happened or that happened at another time and place. see id. at 788-96, DANIEL L. SCHACTER, THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS 9 (2001). Differences in what we deem important, in how we expect the world to be, and in post-event life experiences therefore account both for why several observers can remember the same event differently and why memories change over time. Id. Our memories "recreate or reconstruct our experiences rather than retrieve copies of them." Id. at 9.

Harvard Psychology Professor Daniel Schacter identifies seven sins that explain the dangers of our reconstructive memory process. Id. at 5. The first three sins-- "transience, absentmindedness, and blocking"-- are relevant but refer respectively to the common sense problems

that memories fade with time; are never registered adequately in the first place when we are disstracted; or cannot readily be retrieved when needed, though we may eventually recover them. These are all sins of ommission: "the inability to remember". Id.

Of the seven sins, three are directly linked to erroneous eyewitness identifications. The first, the sin of bias, involves our unknowingly and unconsciously editing or even rewriting our past in light of our current knowledge or beliefs. Id. The new narrative "can be a skewed rendering of a specific incident...which says more about how we feel now than what happened then." Id.at 5.(emphasis original). Equally important are the sins of "misattribution" and "sugesstibility", which Schacter explains thus:

"The sin of misattribution in volves assigning a memmory to the wronge source: mistaking fantasy for reality, or incorrectly remembering that a friend told you a bit of trivia that you actually read in the newspaper. Misattribution is far more common than most people realize, and has potentially profound implications in legal settings. The related sin of suggestibility refers to memories that are implanted as a result of leading questions, comments, or suggestions when a person is trying to call up a past experience. Like misattribution, suggestibility is especially relevant--and can sometimes wreak havoc within-- the legal system. " Id.

One especially important contributor to sugesstibility is the use of "relevant judgement process" by eyewitnesses. see, e.g., GARL L. WELLS, et.al., EYEWITNESS IDENTIFICATION PROCEDURES: RECOMMENDATIONS FOR LINEUPS AND PHOTOSPREADS, 22L.& Human Behav.603,613 (1998). That process describes the reality " that eyewitnesses tend to select whoever looks most like the perpetrator regardless of whether the actual perpetrator is in the line-up. Id.at 11. Restated, eyewitnesses often believe at some level that they must, and therefore do, identify someone. An "absolute judgement" process, by contrast, would involve the eyewitness compring each lineup member to the witness's memory of the perpetrator alone in a search for andequate threshold of similarity--a "match"-- rather than also comparing line-up members to each other. Id.at11.

Many of the proposed solutions to eyewitness error are efforts to move witnesses away from supposed relative judgement processes and closer to absolute ones. Solutions also seek to reduce other

sources of misattribution and suggestion or to remedy an undue willingness to identify despite a failure adequately to recall certain details or to recognize faces.

(2) PROTOCOLS AND PROCEDURES THAT MINIMIZE SUGGESTIVE, AND THUS

UNRELIABLE IDENTIFICATIONS, WERE NOT IMPLEMENTED IN THIS CASE.

The State of research into the causes of, and cures for, eyewitness error is, fortunately, advanced that there is widespread agreement on better and more reliable procedures. see: 8-31-2009 Dr. Devenport. The research supports: (i) the use of "sequential" line-ups; (ii) carefully instructing eyewitness not to assume that the suspect is in the spread; (iii) using "double-blind" procedures in which no one involved in administering a photo spread knows who the suspect is; (iv) whenever practical videotaping or recording the eyewitness procedure. An increasing number of jurisdictions, acknowledging the importance of reliable identifications, have supported, adopted, and implemented these better practices, and protocols; (v) increasing the "foils" in the line and selecting them to match the particular eyewitness's description of the perpetrator; and (vi) having the eyewitness recite in her own words how confident she is regarding her selection. Examples include: United States Dept. of Justice's National Institute of Justice (NIJ) (1999, 2003); New Jersey (2001); Illinois (2002); Wisconsin (2005); California Commission on Fair Administration of Justice (2006), King County, Washington (2003).

Reviewing the list of better protocols coupled with the facts of this case demonstrate the victim Claudia McCorvey did not choose the Appellant Larry Tarrar because she thought he was the perpetrator; but rather because she believed she had to choose someone; believed the suspect had to have been in the montage; and given the pictures in the montage, made her choice based on relative judgement.

(i) THE EYEWITNESS KNEW THE SUSPECT WAS ONE OF THE PHOTOS; LEADING TO AN UNRELIABLE AND SUGGESTIVE IDENTIFICATION.

Eyewitnesses approach line-ups (or photo spreads) with the goal of finding the offender. see: ROY S. MALPASS & PATRICIA G. DEVINE, EYEWITNESS IDENTIFICATION: LINEUP INSTRUCTIONS AND THE ABSENCE OF THE OFFENDER, 66 J Applied Psychol. 482,486(1981). The instructions given by the lineup administrator can significantly raise the risk of false identification, even where the biases are subtle. WELLS et al., supra, at 624. Eyewitnesses must be told that the perpetrator may not be in the lineup, that they should not therefore feel compelled to make an identification. Id. at 616. Not only was this not done in this case, but the witness was told the suspect was in the montage.

(ii) THE "DOUBLE-BLIND" PROCEDURE WAS NOT IMPLEMENTED; LEADING TO AN IMPERMISSIBLE IDENTIFICATION PROCEDURE AND AN UNRELIABLE RESULT.

Traditionally, lineups have been administered by a police officer who has worked on the case and knows which of the people or photos the suspect is. If the lineup administrator is aware of who the suspect is, she may consciously or unconsciously influence the decision of the witness. see: WELLS et al., supra, at 624. The exchange between the lineup administrator and the witness is highly interpersonal. The administrator has often already had substantial contact with the witness. That interpersonal relationship is extremely powerful in the lineup setting, leading the witness to feel she will disappoint the administrator if she does not make the correct choice. The witness may therefore respond to even unconscious signs by the administrator, such as eye contact, facial expression, and tone of voice, pauses, or verbal exchanges. Lineups can be thought of as experiments run by the police. In each case, the police have a hypothesis (the suspect is the perpetrator of the crime), and they run an experiment designed to test the hypothesis. As noted by scientific studies, "it is well established that people have natural propensities to test a hypothesis in ways that tend to bias the evidence toward confirming the hypothesis!" Id. at 616. Therefore, in a good lineup procedure like in a good experiment, the administrator of the test must be blind to the identity of the suspect.

empirical research has made it clear that double-blind lineups are far more reliable than non-double-blind lineups, and courts have begun to recognize this overwhelming evidence. New York courts have ordered lineups to be conducted in a double-blind manner, finding that "[d]ouble-blind testing has long been a nearly universally accepted staple of scientific research. Matter of Wilson, 191 Misc. 2d 224, 228 (N.Y. Sup. Ct. 2002). The 1999 report on eyewitness identifications published by the United States Department of Justice also encourages the use of double-blind lineups, finding that "investigators' unintentional cues (e.g. body language, tone of voice) may negatively impact the reliability of eyewitness evidence. See: United States DOJ Report, *Supra*.

It is clear from the discovery that Det. Reinicke clearly had an intended suspect in mind when he approached Claudia McCorvey at Harborview on January 9th, 1991. It is also clear that he had made a false assumption that Ms. McCorvey knew "his" suspect and the rest of the information of the case he had gathered prior to seeing Ms. McCorvey. The underlining purpose for double-blind testing is to prevent conscious or unconscious cues that may trigger, or prompt a witness to identify a specific person, and also to prevent bias prejudicial decisions. Here, Det. Reinicke made the biased prejudicial decision not to wait, but instead Administer an identification on a heavily medicated witness that could not speak, without any video record, and then not only did Det. Reinicke suggest who he thought the suspect was, but he also provided the witness with information that she did not know previously, such as the suspects name, he had chosen.

- (iii) The "foils" in the photos chosen by Reinicke were not chosen to match the Appellant and not consistent with any particular eyewitness description of the perpetrator; leading to an unreliable suggestive identification.

Foils should be selected so that they fit the witness's description of the suspect rather than that they and the suspect look like one another. see: Penrod, supra, at 45-46. If all foils fit the suspect description, then a witness cannot guess based on who comes closest to that witness's description--a relative judgment process and a reasoned guess. see: Wells et. al., supra, at 632. On the other hand, if every effort is made to select foils because they all look so much like the suspect rather than because they fit the suspect description, then, at some point, "the lineup would be composed of clones," unduly interfering with recognition of a guilty suspect, Id. At the same time, the lineup must be designed to avoid the suspect's standing out unduly from the foils. See: Wells, et al., supra

Here the Detective Reinicke has no idea how or why certain photographs were selected for inclusion into the photograph collection to be shown to McCorvey. That information is supplied by the detective who accompanied Det. Reinicke to the Harborview Hospital-Det. Knable (now deceased). His report suggests the photographs were selected with the assistance of other detectives from the Lakewood Juvenile Section. There were essentially no foils employed in this selection shown to Ms. McCorvey or Mr. Owens. The detective did not select foils that matched the description of the suspect by any witness nor that of Ms. McCorvey because she had not given a description of the shooter. Basically the Detectives obtained photographs of persons who they thought might have been at the victim's apartment or their associates. Of course this is understandable since Ms. McCorvey could not give a completed description. Nevertheless, looking at photos chosen for the array in light of the lack of description by Ms. McCorvey, demonstrates an impermissibly suggestive photo array. Moreover, given that we have only three of the alleged six photographs, the photographs of the individuals look nothing alike. Thus leading to an impermissibly suggestive photo array which would suggest that she should pick someone.

she recognized not necessarily the shooter.

Furthermore Ms. McCorvey allegedly recognized two of the people in two of the original photographs, and she indicated that those two people were not at her apartment, so with that knowledge and the Detectives saying their suspect is in the montage it becomes a suggestibly unreliable identification through the process of elimination even if she has never seen the suspect before, see: Devenport 8-31-2009 Id. at 40-42.

(iv) FAILURE TO VIDEOTAPE THE IDENTIFICATION RENDERED THE IDENTIFICATION UNRELIABLE AND UNCREDIBLE.

The Best Practices guidelines for identification procedures insist on videotaping identifications so that behavioral queues can be recorded of both the witness and the investigating officer. see 8-31-2009 DEVEPORT Id. at 22-23. Even though this case is from 1991, video recording was in standard use by law enforcement. There is no practical reason why video recording was not used in the identifications by Claudia McCorvey and Ricky Owens. Moreover a video record should have been the "only practical" method of recording the identifications by Claudia McCorvey and Ricky Owens considering the skeptical circumstances surrounding these identifications and the fact that the only record of Det. Reinicke doing the identifications are the detectives brief report that they were done. Claudia McCorvey has absolutely no memory of her identifications and the photograph of the Appellant that Det. Reinicke claims she identified. see:McCorvey 10-4-2010 Id.at56-60., nor was Ms. McCorvey able to identify the Appellant in trial, see:McCorvey 10-12-2009 Id.at 61. Also in contradiction to Det. Reinicke's report Ricky Owens state in his court transcribed interview on May 5th, 2009 that he did not know the Appellant's name. see:5-15-2009 Id.at 42, and 10-13-2009 Id.at 62-65. Additionally Ricky Owens has little if any recollection of his identification with Det. Reinicke on February 12th, 1991. see OWENS 10-5-2010 Id.at 10-15. Furthermore videorecording the identifications insures that there is an independant "authentication" record of a reliable identification. Unlike this case where there is only Det. Reinicke's word of which even Det. Reinicke either has no recollection of the identifications or he is in constant contradiction every time he offers testimony

concerning the identifications that he performed. see: REINICKE, at 6-24-2009, 7-22-2009, 7-23-2009, 10-13-2009, and 10-5-2010. Identity expert Dr. Devenport after reviewing Det. Reinicke's identification procedures also testified that the lack of video record clearly rendered uncredible identifications and she states "I would be concerned about any identification that was obtained from this procedure". see: DEVENPORT, 8-31-2009 Id. at 84-85.

(v) THE WITNESS'S LEVEL OF CERTAINTY REGARDING THE RELIABILITY OF THE IDENTIFICATION CONCLUSIVELY DEMONSTRATES AN IMPERMISSIBLE EYEWITNESS PROCEDURE.

Empirical studies have also made it clear that the confidence of the eyewitness is by far the most important factor for the jury when considering the reliability of an eyewitness identification. see: WELLS et.al., supra, at 621; also STEVE PENROD, EYEWITNESS IDENTIFICATION EVIDENCE: HOW WELL ARE WITNESSES AND POLICE PERFORMING? 18 Crim.J.37 (2003)

Unfortunately, studies also show that when eyewitnesses become more confident about their identification as a result of events that occur after the identification has been made. Any response from police officers or others after the identification has been made may alter the eyewitness's confidence in her identification. By the time an eyewitness testifies in court, she has often been told repeatedly that she identified the correct person—that is, the person believed by the police to be the perpetrator. Ideally, the witness should never be told whether she selected the "right man" so that her confidence is not artificially inflated by the time of trial. Such is the case here, Dr. Devenport testified on 8-31-2009 to the correlation between accuracy, and confidence levels does not necessarily go hand in hand. see: Id. at 23, 94-99, 102-109. Ms. McCorvey was never asked her confidence level at the time she made any of her identifications in 1991.

C. A REVIEW OF THE TOTALITY OF THE CIRCUMSTANCES DEMONSTRATE THE UNRELIABILITY OF THE IDENTIFICATION.

1.) THE OPPORTUNITY OF THE WITNESS TO VIEW THE CRIMINAL AT THE TIME OF THE CRIME.

During her interview, Ms. McCorvey stated that she could not describe the person who shot her but rather she was focused on the gun and

the flashes. She also stated the the entire time of the incident for her was; "I remember seeing at least the flash of the gun twice, but after that, I dont-- I dont know."see: MCCORVEY 4-3-2009 Id.at 33. Admittedly, Claudia McCorvey had been smoking crack cocaine all evening and even moments proir to the shooting. According to Ms. McCorvey, she was approached from front but her opportunity to view the shooter was less than a second. Her ability to observe the perpetrator was minimal at best.

2.) THE WITNESS'S DEGREE OF ATTENTION.

The victim's degree of attention is described by her as almost non-existent. Ms. McCorvey says prior to the gun being fired she did not even see the shooter see: 4-3-2009, Id.at 33,38-40. So she had no attention focused on the perpetrator, she was unable to describe what type of clothing the perpetrator was wearing, and how the shooter entered the studio apartment. This is somewhat understandable in that she she did not have sufficient opportunity to the perpetrator. The victims attention was more apppropriately focused on the firearm as opposed to the identification of the shooter, and then her attention was redirected to her injury once she was shot. Which is why Ms. McCorvey did not know whether she or Laverne Simpkins was shot first, she did not see Laverne Simpkins get shot, and she did not know where she was shot first. see: MCCORVEY,4-3-2009 Id.at 33, 40-41, and 43.

3.) THE ACCURACY OF THE WITNESS'S PRIOR DESCRIPTION OF THE CRIMINAL.

As mentioned above, Ms. McCorvey was never given the opportunity to provide a description of the shooter prior to being shown the photographs. The detective's did not provide the opportunity for her to suuiciently describe the shooter. Rather, as mentioned above, Det. Knable informed her that they had photographs of individuals "they" thought might have shot her.

4.) THE LEVEL OF CERTAINTY DEMONSTRATED AT THE CONFRONTATION.

The detectives report does not mention the level of certainty expressed by the victim upon making the identification of the Appellant. The report merely states that the officer asked the victim if this was the person and then provided to the victim the

person she selected name. This is troubling for a number of reasons. Namely, as mentioned above, Detective Reinicke asked Claudia McCorvey if there was a large black male at her apartment with Larry Tarrar. According to Det. Reinicke's report, Claudia McCorvey became excited, tried to talk and had to be sedated by hospital personnel. The spontaneous expressions of certainty are missing from this identification. Crying or becoming upset does not necessarily equate to certainty but it certainly is indicative of something. The court should consider with assertions that the victim became upset when asked about another person but not when viewing the Appellant. One of the more disturbing aspects of this procedure employed by law enforcement in this instance is the failure to advise the victim that the photographs she was viewing might not contain the perpetrator. The detectives did not advise her that she was obligated to identify anyone and that it was just as important to eliminate an innocent person from suspicion as to identify the attacker. The court is undoubtedly is aware that the policy and procedure of the Pierce County Sheriff's Department is to admonish an individual prior to viewing a photographic montage that the perpetrator might not be in the montage. The purpose of this admonition is to not to unduly influence the witness into making an identification. Further, the police officers did not obtain and document a description of the perpetrator prior to the show-up. The victim was not interviewed by law enforcement until after the identification was made by the victim. The necessary procedural safeguards were not undertaken to insure this court of the reliability of the identification in this matter.

5. The time between the crime and the confrontation

The amount of time between the crime and confrontation is not a factor in this matter. The police and victim differ as to when the photographs were presented to her. The police report refers that the photographs were presented to McCorvey

after she was heavily medicated and recovering from emergency surgery and had a breathing tube in her throat.

A defendant is guaranteed no more than a fair identification process, that is, a process, that is not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. State v. Ortiz, 34 Wn. App. 694, 699, 664 P.2d 1267 (1983).

The Appellate Courts of Washington have not established a set guideline for these type of identity cases, but have ruled that each case stands, or falls on its own particular merits and circumstances. For this case the Appellant pleads with the court to consider Detective Reinicke's credibility. Whether Det. Reinicke willfully, consciously, unconsciously, or out of just plain old ignorance repeatedly made bad decision after bad decision in the identification procedures he employed it is all the same! The Detective violated and denied the Appellant, and Claudia McCorvey the right to a fair identification process. And just because this case is from 1991 is not an excuse for Det. Reinicke nor a reason to deny the Appellant a Fair identification process! In the same way that in the 1800's they beat confessions out of defendants, and denied them trial attorney's, their rights were still violated.

On August 31st, 2009 Dr. Devenport testified that when the individual factors employed by Det. Reinicke are all added up together they create identifications that are suggestive and unreliable. And as Dr. Devenport states "I would be concerned about "any" identification that was obtained from this procedure. "Id. at 85.

And so should the court in this matter, in consideration of the totality of the circumstances should hold that the suggestive procedure employed by Detective Reinicke created a substantial likelihood of irreparable misidentification. As such, this court should rule the identifications by Det. Reinicke were inadmissible, And reverse.

ADDITIONAL GROUND 3, ARGUMENTS) The States Failure To preserve

Exculpatory Evidence, and to Authenticate Photocopied Montage Violated Appellants Constitutional Rights.

A.) The Admission of the Alleged Photographic Identification of the Appellant denied the Appellant's Right to Due Process and an Opportunity to Present a Defense.

1.) The States Failure to Preserve Exculpatory Photo montage should have required Dismissal of charges Against the Appellant.

Under both the state and federal constitutions, due process in criminal prosecutions requires fundamental fairness, and a meaningful opportunity to present a complete defense. State v. Wittenbarger, 24 Wn. 2d 467, 474-75, 880 P.2d 517 (1994). Suppression by the State of Evidence That is favorable to the defendant violates due process if the evidence is material either to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L. ed. 2d 215 (1963). The State's failure to preserve material exculpatory evidence requires dismissal of the charges against the defendant. State v. Copeland, 130 Wn. 2d 244, 279, 922 P. 2d 1304 (1996). However, the court uses a different test if the evidence at issue is merely potentially useful. Id at 280.

The Appellant request this court to first determine if the five missing photographs from the alleged identification interviews given by Detective Reinicke are "materially exculpable evidence."

In determining that evidence has "materially exculpable" the court does not need to determine if the State failed to preserve the evidence, because the State stipulated that the photographs are missing see Transcripts 7-22 & 23rd-2009 Id. at 98. And Det. Reinicke further testified he willfully did not preserve the photographs. Id. at 153-154, and on 6-24-2009 Id. at 22-23, 26-28. Additionally irrelevant to the analysis of the evidence being "materially exculpable" is the State's "good" or bad faith in failing to preserve the evidence. Arizona v. Youngblood, 488 U.S. 51, 58, 109 S.Ct 333, 102 L. ed. 2d 281 (1988); State v. Copeland, 130

For the Court to determine that the photographs are "materially exculpable," the evidence must both (1) possess an exculpable value that was apparent before it was destroyed, and (2) be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

California v. Trumbetta, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L. ed. 2d 413 (1984) If the evidence in question that the State did fail to preserve meets this standard dismissal of charges is required. Copeland.

(i) The Exculpable value was Apparent before it was Destroyed. The Policy of the Pierce County Sheriffs Dept. is to preserve and place into evidence all photo montages. Det. Reinicke has stated that he knew this policy, but still decided on his own accord to destroy the photos from the montages. In a case like this where there is no other evidence against the Appellant it would defy all logic not to recognize the value of the photo montages. Especially but not limited to the consideration of the facts that (a) there is no videotape nor cassette record of the identification of January 9th, 1991. (b) there is no signed authentication of all of the photographs presented in any of the identifications employed by Det. Reinicke. (c) There is no record of where the photographs came from the identity of the people in the photographs or proof that they ever existed in the first place. It is abundantly clear from the record that there was exculpatory value that was "apparent" before the evidence was destroyed, and it is also clear that the value of the missing photographs was irrelevant to Det. Reinicke or they never existed so he had nothing to preserve.

(ii) The Evidence Was of such nature That The Appellant was Unable to obtain Comparable Evidence by other reasonably Available means.

The Exculpatory Evidence, and circumstances of this case are similiary with State v. Burden, 104 Wn. App. 507,

512, 17 P. 3d 1211 (2001), wherein the Court of Appeals affirmed the trial Court's dismissal of charges for the State's loss/destruction of evidence. In Burden, the police arrested Burden for driving under the influence and discovered a paper bag containing cocaine in the pocket of the coat. Burden, 104 Wn. App. at 509. At trial, Burden presented an unwitting possession defense, claiming that he had borrowed the coat when he left a lounge to ride his motorcycle home on a cold night. Burden, 104 Wn. App. at 509. Burden tried on the coat to show the jury. Burden, 104 Wn. App. at 510. In addition, as Burden argued during closing, a different person's name was in the coat. Burden, 104 Wn. App. at 510.

The jury was unable to reach a verdict, and the court declared a mistrial. Burden, 104 Wn. App. at 511. After the court impaneled another jury for retrial, the State could not locate the exhibits, including the coat, and the court declared a second mistrial. Burden, 104 Wn. App. at 511. Burden moved to dismiss the charges based on the State's destruction of evidence, Burden, 104 Wn. App. at 511. Trial court granted the motion, concluding that "the appearance and physical nature of the missing exhibits assisted the jury in assessing the credibility of Burden and his witness's." Burden, 104 Wn. App. at 511. The Court of Appeals affirmed the trial court's dismissal, holding that the missing evidence was materially exculpatory. Burden, 104 Wn. App. at 514. The court of Appeals reasoned,

There was no testimony at the trial regarding some of the specifics about the coat, since the coat was physically present as an exhibit. Even with a stipulation, a jury would have no foundation to determine whether the thickness and fit of a "substitute coat" were the same as the original. Burden, 104 Wn. App. at 514.

Just as the State in Burden argued it could just go get a copy of the lost coat, The State in this case submitted 5 black and white photocopies that the State alleges are photocopied from the originals. And the trial court made the erroneous ruling that the Black And White photocopies

are "comparable evidence".

The Trial Courts ruling was erroneous and an abuse of discretion for two reasons. (a) The photocopies have to first be authenticated before they can even be considered evidence. ER 602 (b) (1), 1001 (d), 1003

In this case not only were the 5 black and white photocopies not authenticated, but neither have the alleged original photocopies been authenticated. Nor is there any way to authenticate the original photographs because Det. Reinicke claims to not know where, and when he specifically obtained the photographs. Who was depicted in the photographs, nor does he know how he specifically destroyed the photographs! see 6-24-2009 Id at 21-23, 26-28. also 7-22 & 23-2009 Id 153-54. Furthermore Det. Reinicke is the only person who can authenticate the black and white photocopies, and he has no recollection of ever making the photocopies, he has no recollection of showing them to any witness, and the State, stipulated that Det. Reinicke does not know where the photocopies came from see Transcripts 7-22 & 23-2009 Id. at 29, 179, 182. This court has already made it clear in Burmeister, v. State Farm Insurance company cite as: 92 Wash. App. 359, 966 P. 2d 921 That evidence has to be authenticated by a person with personal knowledge and the photocopies fell into the categories ER 901 (b) : (4) Distinctive Characteristics and the like.

The fact that the black and white photocopies cannot be authenticated alone makes them inadmissible, and "non-comparable".

If this court finds that authenticity is not a factor in whether the Black and White photocopies are comparable evidence. The court should still find that the trial court erred; (b) The Black and White photocopies are exactly similar to the possible "substitute coat" in Burden, supra. This is an eyewitness case. There is no other evidence trying the Appellant to the shooting of the victims. The original photographs were critical to the Appellant's case and theory

of the case. The Defense's theory was one of misidentification and the only witness to the shootings was allegedly shown the now missing photographs. Simply put, there was no way to cross examine the veracity of the victim's alleged identification of Det. Reinicke without the complete original set of photographs allegedly shown to Claudia McCorvey on January 9th, 1991. First there is no proof that she was ever truly shown allegedly six photographs. Further the appearance and physical nature of the missing photographs are critical to assessing the credibility of the victim Claudia McCorvey and Detective Reinicke, and there is no way to compare all of the physical attributes of the individual's depicted in the original photographs, nor in the black and white photocopies and how they are dissimilar to the Appellant.

On August 31st, 2009 Dr. Deavenport also testified to the importance of this. Id at 27-28, 32, In Burden the Appellate Court ruled " Even with a stipulation, there would be no foundation to determine that the substitute coat was the same as the original, since the "new" jury never saw the original. In this case not only did the trial court recognize the terrible quality of the photocopies, but also the trial court has never seen the "original photographs"! So it was completely erroneous for the trial court to rule that the black and white photocopies are comparable to the original color photographs that "no one" has even seen. There is no way the photocopies submitted by the State can be comparable evidence. Furthermore there is absolutely no means the Appellant can obtain comparable evidence for the presentation of the jury to demonstrate such disparities because the lead detective did not record the names of the individuals who comprised the photographs shown to the victim. The trial Court erred in refusing to recognize that what was critical to the Defense is what the witness was shown in 1991, and not what the court falsely assumes is a shabby black and white photocopy of what might have been. In Burden the court has already ruled that that is not good enough' to

meet the test of comparable evidence.

Furthermore the missing photographs are materially exculpatory in that the victim could not speak when originally shown these photographs and was heavily medicated after having only moments been returned to her hospital room from two major emergency surgeries. Law Enforcement had no description of the shooter from her or any other witness prior to compiling the photographs. Yet, photographs were compiled by the Detective which contained at least one photograph of the Appellant.

The victim is said to have nodded her head when presented the photograph of the Appellant, and asked if he was the person who shot her. But once the lead detective asked whether there was a "large person" with the Appellant, Claudia McCorvey becomes so excited and anxious that she tried to talk with a breathing tube in her throat and has to be sedated by the hospital staff. This court should find that all of the photographs shown to the victim, Claudia McCorvey are critical to the circumstances surrounding the alleged identification, and are materially exculpatory similar to the coat was materially exculpatory in Burden, supra. Accordingly, this case should be dismissed for violation of the Appellant's due process rights.

2.) If this Court finds the original photographs were not materially exculpatory, the Court should certainly find the original photographs were potentially useful in presenting a defense.

Where evidence does not rise to the level of being materially exculpatory but is only potentially useful, a failure to preserve evidence does not constitute a due process denial unless defendant can demonstrate the State's bad faith. Younblood, 488 U.S. at 58.

1. Illustrative of this Court's analytical framework is outlined in the holding of State v. Vaster, 99 Wn. 2d 44, 659 P. 2d 528 (1982) In Vaster, the court articulated a two-part balancing test. "A court should first consider whether there exists a "Reasonable possibility" that the

missing evidence would have affected the defendant's ability to present a defense. Vaster, 99 Wn. 2d at 52, 659 P.2d 528. The Defendant bears the burden of establishing that reasonable possibility. Vaster, 99 Wn. 2d at 52. Then" the court must balance the consideration of "reasonableness" against the ability of the prosecution to have preserved the evidence". Vaster, 99 Wn. 2d at 52.

"We must balance the consideration of Reasonableness" against the ability of the prosecution to have preserved the evidence. Further, in determining the appropriate sanction, a court should consider procedures established for preserving evidence, the nature of the lost evidence, and the circumstances surrounding its loss. Vaster, at 52

Clearly the original photographs at the very least fall into the category of potentially useful in presenting at a defense in this case. And the court should certainly find that there existed a "reasonable possibility" that the missing photographs affected the ability of the Appellant to present a defense. As outlined in this argument this entire case was based on the Identification made by the montage shown to the victim, and the State had the advantage of only presenting one piece of that montage "The Appellants" photograph in trial. But the victim was allegedly shown a complete montage of "six photographs" not just "one Photo". So the missing photographs were critical to assessing the credibility of the victim's alleged identification in light of all of the evidence. Which makes the balance scale in Vaster clearly tip into the Appellant's favor, because the absence of the photographs are solely explained by the bad faith of law enforcement. By Det. Reinicke's own admission he purposely did not admit the photographs in the property room, nor any other secure facility despite the long held protocol to do so. As the lead detective, and administer of the identification Det. Reinicke knew the critical importance of the entire photo montage, and by him admittedly discarding

only the photographs the victim could not identify should clearly show this court that despite protocol Det. Reinicke purposely and intentionally destroyed critical evidence for the defense that can never be obtained nor replaced. Accordingly this court should grant the Appellant relief by finding the trial court erred and the Defense's Dismissal Motion should have been granted.

B.) ADMISSION OF THE ALLEGED PHOTOGRAPHIC IDENTIFICATION OF THE APPELLANT VIOLATED THE APPELLANT'S CONFRONTATION CLAUSE RIGHT AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Notwithstanding the violation of the Appellant's due process right's as argued above, the admission of the testimony concerning the photographic identification of the Appellant by the victim violated the Appellant's right to confront the witnesses as guaranteed by the Sixth Amendment of the United States constitution, and Article 1, Section 22 of the Washington State constitution.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." U.S.Const.amend V.I. likewise, Article 1, Section 22 of Washington's State constitution states that, "in criminal prosecutions the accused shall have the right to...meet the witnesses against him face to face." The Appellate Courts of Washington have not differentiated between the two provisions. State v. Saunders, 123 Wn.App.592,132 P.3d 743(2006).

As mentioned above ,the State admitted the January 9th,1991 and January 11th,1991 alleged photographic identifications of the Appellant The Trial court allowed the admission of this hearsay testimony through the lead detective Fred Reinicke as an exception to the hearsay rule pursuant to ER 801(d)(1)(iii)statement of identification. see:transcripts 10-5-2010 Id.at 35-41. The victim testified to having no recollections of the alleged identification, and photomontage shown to her in January 1991. Moreover on January 9th,1991 Claudia McCorvey did not sign, or make any notation on the photograph that she allegedly identified as the person who shot her. The Appellant moved to prevent the admission of such testimony as it would violate the Appellant's right to confront the witness. see: transcripts: 9-1-2009.

The right to confrontation and the hearsay rule serve similar objectives to allow a criminal defendant to test the perceptions, memory, credibility, and narrative powers of the witnesses against him. State v. Paris, 98 Wn.2d 140, 654 P.2d 77 (1992). They are, however two different rules. Each is an independent ground for objection that may be invoked with regard to whether the evidence is objectionable under the other. California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

In this case, the Appellant was denied the right to confront the witnesses against him due to the State's action in destroying the the very evidence which was admitted--the photographs used for identification of the Appellant. There can be no substantive, meaningful cross examination of a witness when only the State's actions prevent such confrontation. The situation in this case with regard to the destroyed photographs is analogous to the trial court permitting the State to admit fingerprint evidence against the defendant despite the fact that the very fingerprint they claim is the defendant's was immediately discarded by forensics officers. The Trial court left the Appellant with no meaningful, realistic or substantive ways of testing the witnesses credibility, the witness's perception, or the witness's memory with regard to the missing photographs. The inability to do so is the direct result of the State's action in the matter. The State had the ability, duty, and obligation to preserve the evidence. Yet the State chose not to do so. They should not have been permitted to benefit from their own misdeeds at the expense of the Appellants constitutional rights. The alleged photographic identification of the Appellant as the shooter was the State's one and only witness as to identification. This court should find the admission of the alleged photographic identifications of the Appellant by the victim was a violation of the Appellant's right to confrontation.

Part and parcel of the right of the Appellant to confront the State's witness against him is also the right to the assistance of an attorney to help the Appellant confront the witnesses. The State's actions have denied the Appellant his right to effective assistance of trial counsel under the Sixth Amendment to the United States constitution and Article 1, Section 22 of the Washington State constitution. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). The Appellant's trial attorney Philip Thornton, who has for over 20 years, been a trial attorney including a certified death penalty defense

attorney, under oath with the full weight of his reputation and duty as an officer of the court informed the trial court that there was no way that he could adequately assist the Appellant in his defense due to the actions of the State's destroying of the photographic evidence. see: 9-1-2009 Id.at 3-9. For this reason, the Court should rule the photographic identification of the Appellant by the victim should have been suppressed as a violation of the Appellant's right to effective assistance of counsel.

CONCLUSION.

For all the reasons stated herein, and based upon the cited authority the Appellant Larry Tarrer respectfully request the court to grant a reversal.

submitted this 16th day of November, 2011



Appellant, Larry Tarrer.

RUSSELL SELK LAW OFFICES

November 30, 2011 - 12:38 PM

Transmittal Letter

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Case Name: State v. Tarrer

Court of Appeals Case Number: 41347-7

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- Answer/Reply to Motion: _____
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- Statement of Additional Authorities
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- Letter
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- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
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