

Form 7. Statement of Additional Grounds for Review

IN THE COURT OR APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]
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STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 MARTIN ARTHUR JONES)
)
 Appellant)

Court of Appeals Cause
No. 41902-511
STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Martin A. Jones, have receive and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Background Facts

I am 47 years old. I have been married to my high school sweetheart for 28 years. We have 2 sons and 3 grandchildren. I have no history of violence, and have worked all my life. I have worked as a catering manager for conventions, have owned ~~two of my own businesses, one in real-estate, the other in bail~~ bonds, and my current trade is a tower crane operator in which field I have worked for 22 years. My wife and I own a home in Seaview, Washington. I have no record of any issues or complaints with any police officers anywhere. In fact, we have active duty police officers and others who work in that capacity in our family. I attend church meetings regularly throughout each week, doing so for the last 17 years, 7 of those engaging in full time volunteer activities.

The suggestion that I would shoot an officer as some sort of retaliation for his ticketing my wife for driving under the influence makes no sense. Such an action would be totally out of character with my history and who I am. This is something that I would not do.

Additional Facts Related to My Rights Pertaining to Jury Selection

My appellate counsel has very ably established why my right were violated because I was not allowed to be present during the process in which four jurors who sat through the trial were released from final deliberation. I would add that I was upset about the particular jurors who were released. I had felt very favorably about those jurors, especially the only African-American juror who sat in judgment. Chiefly, where there are a limited number of minority members of a community in the jury box, release should be done in an open process that I could observe to assure a fair trial.

Additional Ground 1

My trial attorneys properly and timely sought an Affidavit of Prejudice under RCW 4.12.050 against Judge Hogan prior to any ruling in the case. The affidavit was filed because Judge Hogan is married to a retired police officer and therefore could not be impartial in my case involving an alleged shooting of a police officer. She subsequently displayed her prejudice in her rulings, mannerisms, and non-verbal cues to the jury. She improperly denied my Affidavit of Prejudice resulting in an unfair trial. As a matter of constitutional and statutory law I am guaranteed the right to have my case heard by a judge who in fact and in appearance is impartial. I was denied that right.

I acknowledge that I had previously served an Affidavit of Prejudice in ~~Thurston County when my case was first transferred from Pacific County to~~ Thurston County. But, I was entitled under the rules including RCW 4.12.140 to have a new judge assigned from Thurston County. Rather than having a judge assigned from Thurston County, the case was transferred to Pierce County and assigned to Judge Hogan. I promptly filed an affidavit for the reasons stated above and because my affidavit in Thurston County had been rendered ineffective by the re-transfer of my case. If I had known my case would be transferred ultimately to Pierce County, I would have reserved my right to file an affidavit in the first instance.

Regardless, Judge Hogan was obligated to step aside under CJC 2.11 [1] & [2].

Additional Grounds II

-----In addition to the wrongful denial of my motion to suppress the eye-witness identification of Trooper Johnson discussed in my brief, I believe that a cautionary instruction should have been given to the jury regarding the unreliability of eye-witness identification. I understand that the issue potentially may be addressed by the Washington Supreme Court in State v. Allen, which is set for oral argument in March 2012. The Court of Appeals' decision in State v. Allen acknowledged the problem with eye-witness identifications as follows:

Mistaken eyewitness identification is a leading cause of wrongful conviction. See State v. Riofta, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) ("The vast majority of [studied] exonerates (79%) were convicted based on eyewitnesses testimony; we now know that all of these eyewitnesses were incorrect." (alteration in original) (quoting Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55 60 (2008)); see also Eyewitness Identification Reform, Innocence Project, http://www.innocenceproject.org/Contact/Eyewitness_Identification_reform.php (last visited Jan. 25, 2011).

Eyewitness identification evidence is among the least reliable forms of evidence and yet is persuasive to juries. See Riofta, 166 Wn.2d at 377 & n.5 (Chambers, J., concerning in dissent) (quoting Bernal v. People, 44 P.3d 184,190 (Colo. 2002) (citing Gary L. Wells et al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603 605 (1998) and other legal and psychological studies of the identification problem)). Recognition accuracy is poorer when the perpetrator is holding a weapon. Bernal, 44 P.3d at 190 (quoting Vaughn Tooley et al., Facial Recognition: Weapon Effect and Attentional Focus, 17 J. Applied Soc. Psychol. 845, 854 (1987)).

The Court there further stated:

~~Recognition of difficulties associated with the identification of~~
strangers is not new. State v. Romer, 191 N.J. 59,73,922 A.2d 693 (2007). Eighty-four years ago, Justice Frankfurter called "[t]he identification of strangers... proverbially untrustworthy." Felix Frankfurter, The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen 30 (1929). Justice Brennan observed in 1967 that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor--perhaps it is responsible for more such errors than other all other factors combined." United States v. Wade, 388 U.S. 218, 229, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (alteration in original) (quoting Patrick M. Wall, Eye-Witness Identification in Criminal Cases 26 (1965)). "Indeed, academics have long questioned the reliability of eyewitness identifications." Romero, 191 N.J. at 73-74 (citing Hugo Munsterberg, On the Witness Stand: Essays on Psychology and Crime 49-56 (1923) ("discussing early twentieth century experiments that revealed people's inability to recall details of witnessed crimes"));

Edward Borchard, *Convicting the Innocent: Errors of Criminal Justice* xiii-xiv (1932) ("early case study of sixty-five exonerated defendants finding that 'the major source' of wrongful conviction was witness misidentification").

Some jurisdictions have permitted the use of some form of instruction addressing the validity of eyewitness identification evidence. See *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972); *State v. Long*, 721 P.2d 483, 494-95 (Utah 1986); *Cromedy*, 158 N.J. at 131; *Commonwealth v. Hyatt*, 419 Mass. 815, 818-19, 647 N.E.2d 1168 (1995); *United States v. Cannon*, 26 M.J. 674, 675 (A.F. Ct. M.R. 1988); *People v. Palmer*, 154 Cal. App. 3d 79, 89, 203 Cal. Rptr. 474 (1984); *State v. Hunt*, 275 Kan. 811, 817-18, 69 P.3d 571 (2003); see also Judicial Council of Cal., *Criminal Jury Instructions* 315 (2011) (permitting witnesses to consider whether the witness and defendant are of different races); Ninth Circuit Jury Instructions Comm., *Manual of Model Criminal Jury Instructions: for the District Courts of the Ninth Circuit* 4.11 (2010).

Although I understand that there is old Washington case-law from the Court of Appeals rejecting instructions on the unreliability of eye-witness identification, the Washington Supreme Court has not yet addressed the issue. Moreover, more recent research further demonstrates the problems with this case-law. Again, as described by the court in *State v. Allen*:

Traditional trial protections of suppression hearings, voir dire, cross-examination of witnesses, closing arguments and general jury instructions on the credibility of witnesses do not adequately address the special recognition impairments present in cross-racial eyewitness identification. Criminal Justice Section Report at 7. "Although cross-examination is a powerful tool for exposing lies, it is not particularly effective when used against eyewitnesses who believe they are telling the truth." Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convections*, 42 Am. Crim. L. Rev. 1271, 1277, (2005); see also Clopten, 223 P.3d at 1110.

~~I believe that such an instruction is required even where, as here, limited expert testimony was permitted on the issue.~~

Additional Ground III

The court violated my Eighth and Fourteenth Amendment rights under the U.S. Constitution when it imposed excessive bail of \$5,000,000. In addition, my constitutional rights were violated under the Washington Constitution Article 1, Sections 14 and 20.

The Eighth Amendment to the United States Constitution provides that

"[e]xcessive bail shall not be required." The Fourteenth Amendment forbids a State to "deprive any person of life, liberty, or property, without due process of law; nor deny any person within the jurisdiction the equal protection of laws." The United States Supreme Court has incorporated into the Due Process Clause of the Fourteenth Amendment, and thus made binding upon the states courts, most major criminal procedure guarantees of the Bill of Rights. While the Eighth Amendment has never been specifically made applicable to the states, the limitation on excessive bail is presumed applicable to the states. Schilb v. Kuebel, 404 U.S. 357, 92 S.Ct. 479, 30 L.Ed.2d 502 (1971) ("Bail, of course, is basic to our system of law, and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment") (citations omitted).

Even though the Eighth Amendment is not specifically incorporated, the Due Process Clause of the Fourteenth Amendment requires the allowance of some form of conditional release in cases in which pretrial incarceration adversely affects the defendant's right to a fair trial. Here, the court's imposition of excessive bail interfered with my capability to fund a defense to the crimes charged. Even more so, I was unable to participate in making an adequate defense for myself, including not being able to examine some 10,000 pages of discovery which would have exonerated me of this crime. The due process and equal protection clauses require that all state-law rules be fairly and evenly applied, particularly where liberty interests are at stake in their application.

Article 1, Section 14 of the Washington State Constitution contains language identical to it's federal counterpart in providing that "[e]xcessive bail shall not be required." Article 1, Section 20 guarantees greater freedom from pretrial detention than under the Federal Constitution, however, by granting an absolute ~~right to bail before conviction in all noncapital criminal cases: "All persons~~ charged with crime shall beailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great."

I have followed the news the best I can since my arrest and do not believe that bail has been set at \$5,000,000 for any alleged crimes, including murder. I do not believe that bail has been even set as high as \$1,000,000 in any case of attempted murder in Washington. This is especially egregious considering my lack of any prior criminal record and my roots in the community, including home ownership, a wife, and grandchildren.

Additional Ground IV

Originally, I had received a Change of Venue from Pacific County to Thurston County. But, without the knowledge or presence of either myself or my attorneys, Judge Sullivan changed my trial to be held in Pierce County, the county that would likely show the most prejudice because of four police officers being gunned down and murdered just a few months before the news of Trooper Johnson being maliciously shot.

Because the court proceedings at this closed door hearing was not opened to the public nor was I allowed to be present, this once again violating my right to public hearings and the public's right to open proceedings. Furthermore, State v. Irby shows that I had a right to "appear and defend in person" and as a consequence, Const. art. 1, § 22 shows I am entitled to reversal of my convictions.

Additional Ground V

There were a number of issues pertaining to the warrants. My attorneys made a motion to disallow the warrant issued for the search of my residence because of these issues. Judge Hogan ruled against it. A new warrant had to be previously ~~been~~ reissued to collect my DNA because of these issues. The authorities were aware of erroneous information on the warrants and continued to use the same information over and over again on subsequent warrants.

Additional Ground VI

There were probable cause issues. My first attorney, Eric Kupka, made ~~statements and objections that would clearly identify these issues. In part,~~ the prosecutor, under oath, swore to things that were changed the very morning of the Probable Cause Hearing that were known to be untrue, at best, misleading.

Additional Ground VII

The judge ruled not to allow "other suspect" evidence in my defense during the trial. Subsequently, Judge Hogan allowed the prosecution to say that all other suspects in this case had been cleared. When in reality, it was reported that there were about 1,600 tips called in from citizens, and only a few were followed up on. Some of those were dismissed after finding that they were not connected in any way to my wife or myself, as brought

out in police reports.

The Judge's ruling that no "other suspect" evidence be mentioned, and then allowing statements made by the prosecution to remain on the record, shows prejudice.

Additional Ground VIII

Before being charged with any crime, during questioning I twice made requests to interrogators that they allow me to speak to an attorney. They continued questioning even after these requests were made. Judge Hogan ruled that most of these statements could be permitted. While these statements were not damaging to my defense in any way, it once again shows the prejudice, unfairness, and unconstitutionality of this trial.

Additional Ground IX

Judge Hogan would not allow the inventory list from my home with the ammo included on it to be admitted into evidence after the parties had rested, yet she allowed the state to submit the misleading phone records after the fact, stating that the state could instruct the jury on how to read them.

Federal ATF agent, Matt Olson from Portland, initialed a handwritten inventory list which specified how many rounds of ammo were in each of the three boxes of ammo collected from my house. Matt Olson testified about the contents of that list on 2-1-11. The evidence clearly showed that that evidence had been tampered with.

Additional Ground X

Judge Hogan placed a time constraint on my attorney, David Allen, during closing arguments. This caused him to rush through closing arguments, missing some key points that I wanted mentioned. The state was then allowed to finish their arguments uninterrupted, running well over the specified time limit set by the judge.

Additional Ground XI

It is my belief that my right to a speedy trial was not upheld. This was brought out in a hearing in Nov. 2010. The attorney for the state had a vacation already booked, so my trial was set for a later date.

Additional Ground XII

A member of the jury was allowed to sit on the jury that should have been disqualified. Her husband and the husband of the judge are considered to be friends, having socialized outside the realm of the work environment.

Additional Ground XIII

I believe there are issues involving jury instructions, including, but not limited to, gun enhancements. See State v. Ryan 160 Wn. App. 944, and State v. Bashaw 169 Wn.2d 133.

Additional Ground XIV

My attorneys made a motion to not allow butner mark statements in for evidence because it is not an established science. The motion was denied.

A congressionally mandated report from the National Research Council said, "With the exception of nuclear DNA analysis, no forensic method has been rigorously shown able to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." "There has been little rigorous research to investigate how accurately and reliably many forensic science disciplines can do what they purport to be able to do." "In contrast [to DNA], for many other forensic disciplines such as fingerprints and toolmark analysis- no studies have been conducted of large populations to determine how many sources might share the same or similar features." "Because the judicial system embodies a case-by-case adjudicatory approach, the courts are not well-suited to address the systematic problems in many of the forensic science disciplines." "The words commonly used- such as "match," "consistent with," and "cannot be excluded as the source of"- are not well defined or used consistantly, despite the great impact they have on how juries and judges perceive evidence."

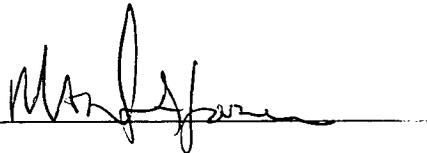
"In addition, any testimony stemming from forensic science laboratory reports must clearly describe the limits of the analysis; currently, failure to acknowledge uncertainty in findings is common. The simple reality is that interpretation of forensic evidence is not infallible- quite the contrary." (a podcast of the public briefing held to be released is available at [HTTP://NATIONAL-ACADEMIES.ORG/PODCAST](http://NATIONAL-ACADEMIES.ORG/PODCAST)) (Feb. 18, 2009)

I would have been able to expound more on some of these additional grounds, but were unable to due to never receiving my transcripts. I wrote a letter sent off on Dec. 5, 2011 to the court clerk requesting an extension to file my additional grounds. I received a letter of denial dated Dec. 14, 2011 explaining that "the transcripts were sent on 12/07/11 and therefore the statement is due 01/06/12."

I sent another letter dated Dec. 27, 2011 requesting, again, an extension, and have yet to hear back, perhaps due to the holiday breaks. However, even if the transcripts were sent at that time, does that constitute "service", or more appropriately, is service of my transcripts when received, thus starting the 30 day deadline?

I have made attempts to locate the transcripts, and as of yet, have not had any success, further showing the legal problems and lack of protection of my rights during this ongoing legal matter.

Dated: 1-2-12

Signed: 

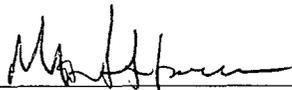
DECLARATION

I, Martin A. Jones, declare that, on January 4, 2012, I deposited the foregoing STATEMENT OF ADDITIONAL AUTHORITIES, or a copy thereof, in the internal mail system of Walla Walla Department of Corrections and made arrangements for postage, addressed to:

Court of Appeals Division II, 950 Broadway, Suite 300, Tacoma, WA 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Walla Walla, Washington on this 4 day of January, 2012.



[signature of Martin A. Jones]

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