

FILED
COURT OF APPEALS
DIVISION II

2013 FEB 21 AM 11:51

STATE OF WASHINGTON
BY  DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL KERBY,

Defendant.

C.O.A. No.: 42425-8-II

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

I, Michael Kerby, have received 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 GROUND NUMBER ONE

The Petitioner was denied his Sixth Amendment of the United States Constitution, right to conflict free counsel and effective assistance of counsel.

Defense counsel Ted Debray did not advocate in the Petitioner's behalf. Debray advocated as a prosecutor for the State as an agent provocateur and saboteur. Ted Debray's conduct was so dishonorable and despicable for an attorney, that the Petitioner would of done a million times better without him. Ted Debray's "objector" was broke or non-existent, as Debray failed to make critical objections throughout trial, and preserve error for appeal that had to be objected at the trial level. Debray severely betrayed Petitioner's trust to the point that Petitioner would no longer talk or confide in him. The trial strategy that Petitioner did initially share with Debray was immediately turned over to the State. Petitioner revealed the existence of the toy water pistol and what was dubbed, the "squirtgun" defense. Debray did not investigate this defense or witnesses. Debray throughout trial refused to test any of the State's evidence to the point of

a "fair trial" being unattainable. Only the Petitioner and Debray knew the location of the water pistol, RP 64, and the witnesses that had seen it. The police went from Aberdeen all the way to Ocean Shores and went exactly to where Petitioner told Debray it was buried. Allowing the State to gain access to the toy water pistol and the defense strategy before the Defense could interview key witnesses Erin Souther who had seen the squirtgun, RP 302, 304-05, 316, and Jerry Chrisman, allowed the State's investigative arm, the police, to garner an edge. The last thing that the State wanted was the only gun being attributed to Petitioner being either a taser or a squirtgun. Without the defense being able to take a statement first, the police bullied and intimidated Jerry Chrisman especially into countering the Petitioner's defense before it could ever get off the ground. The State had the toy gun that was realistic looking that only Petitioner and Debray knew where it was hidden. Right after the shooting, police contacted Jerry Chrisman whom they knew was an accomplice that Ivey relayed she said, "shoot his ass." RP 97, 168-69. Police found Chrisman at the Aberdeen Jack in the Box restaurant. RP 369. In Chrisman's first statement right then and there to Detective Hudson she said nothing about Petitioner having a gun or yelling

anything about shooting anyone. RP 434-35. Jerry Chrisman desperately needed the police to believe she was not involved and particularly, not a suspect. RP 440-41. It all changed after Ted Debray "blabbed" and betrayed his client's confidentiality. Petitioner asked Debray to interview his ex-girlfriend Erin Souther, and then confront his girlfriend Jerry Chrisman about the squirtgun as he knew she had seen it and his taser earlier that evening. Letting the State get a leg up, there was no longer a "squirtgun" defense. The police "bully-boyed," Mutt and Jeffed," Play ball on our team or else, scaring the bejeebers out of Chrisman with threats of prison due to her being an accomplice, made her cave, and cater to anything the police wanted. Her tune changed dramatically to Petitioner having a gun in one hand and a taser in the other. RP 444. Chrisman went the extra mile and told detectives exactly what they wanted her to say, that she saw Petitioner, "fold a black gun into a towel, place it into his backpack, and put the backpack in his vehicle." RP 356-57, 409-10, 453-54, 457. This cooked Petitioner's goose as it purposely enabled his testifying rat of a codefendant Jeffrey Strickland, to corroborate Chrisman with Strickland's statement to police and testimony to the

jury that after Savage and Ivey came out, "Kerby walked to his car." SRP 60. Then Strickland testified he, "started walking through the alley," SRP 61, 75, and when he was in the alley or about half a block away, he heard a, "pop, pop, and ran off in panic." SRP 63. Strickland denied having a gun or shooting anybody. SRP 57, 62. This was the main reason that Petitioner wanted his now sellout lawyer gone, he could not trust him one single bit. The State exerted unbelievable pressure on Jerry Chrisman to be an informant against her boyfriend, the Petitioner. She was given no choice. She met all the elements of accomplice liability and quickly jumped on the deal not to be charged. Petitioner wrote letters to the judge insisting on Debray being fired due to the above, and that he needed new counsel appointed, or would be better off pro se. Ted Debray became obviously vengeful after Petitioner tried to have the judge fire him. An "actual conflict" is a conflict that affected counsel's performance -- as opposed to a mere theoretical division of loyalties." Mickens v. Taylor, 535 U.S. 162, 171, 152 L.Ed.2d 291, 122 S.Ct. 1237 (2002). Ted Debray continued taking every shot possible at derailing the Petitioner's trial

and ensuring that Petitioner be found guilty. (1) Ted Debray represented the interest of the State instead of Petitioner betraying the Defense strategy before it could be investigated. (2) This out-and-out switching teams put an enemy agent in the Defense camp. Debray further acted as such by not objecting to just about anything the State wanted no matter how prejudicial. Debray failed to object to joinder, lamely stating he had no legal footing to oppose it. 6/17/11 RP 1,5. Debray failed to motion for severance when he knew all along that Jerry Chrisman and Jeffery Strickland were going to take the stand and corroborate each other to pin everything on Petitioner, which is clearly a Bruton error. Not motioning, not objecting, agent Debray even wanted Petitioner to have no chance at appeal raising severance. Debray further threw monkey wrench after monkey wrench into the mix. Debray failed to use exculpatory evidence from the interrogation of Petitioner. What is worse is that Debray failed to even motion to suppress the interview in it's entirety due to Miranda violations. The State purposely avoided using the tapes so that they could have their police witness testify to only the incriminating stuff and avoid all of the exculpatory evidence. Agent Debray

obliged the State and let them run amok, and did not get the tapes fixed as the judge directed, 4/8/2011 RP 21-22, so the exculpatory evidence could be used. Prejudice went uncontested when the State portrayed Petitioner as a rat wanting to make a deal as that is exactly what they got their detective witness to say Petitioner "asked for a deal." 3RP 582. Asking for a deal heavily infers guilt. Petitioner is not a rat. The State went hog wild to infer that if you ask for a deal you are guilty, relieving themselves of their burden of real proof. Again, no objection to the tapes not being used, and to Debray it was fine that the detective relayed any and everything about what Petitioner confessed to as Debray trusted the State's evidence and did not listen to the interrogation tapes or take the judge's advice to get them hearable with today's technology. The detective went on to put a gun in Petitioner's hand at the scene and Petitioner getting rid of it. 3RP 582, 583. Agent Debray further feathered Petitioner's strike-three baseball cap by doing a token gesture of lawyering, by motioning for one of this state's leading and most recognized defense experts, Dr. Loftus. Proof is in the pudding, the mire job Agent Debray did here is obvious conflict as every competent

STATEMENT OF ADD. GROUNDS Page 7.

jurist knows that when you make a motion for the services of an expert, you have to make the required showing of why the defense expert is necessary. Agent Debray did not do this very basic requirement and got the result he wanted, no defense expert. Agent Debray thought it was hunky-dory that the Court violated a public trial and conducted voir dare at the sidebar, sure was not going to be any objection to save the issue for appeal. Agent Debray hated both the Petitioner and his codefendent Strickland because they were "Skinheads." Debray reflected this hatred during the picking of the jury by allowing jurors that Petitioner wanted gone, gone, gone due to their obvious prejudice towards Petitioner, which Debray did not challenge. Jury voir dare. Agent Debray refused to work with Petitioner as defense counsel is required and would not strike offensive jurors. Agent Debray constantly "opened the door to suppressed evidence, for no tactical reason. The reason was to get Petitioner a Life Without Parole sentence. Agent Debray did not allow Petitioner to view or have any of the discovery, or legitimately work on this case. After Jerry Chrisman had testified, the Court admonished her to be available to come back so the Defense could call her. Agent

Debray called Jerry Chrisman alright, only it was not as a defense witness to take the stand. He called her at her home and threatened her with perjury and told her under no circumstances was she to show back up for Petitioner's trial. Petitioner told both of his counsel that he wanted a shot at Chrisman to get her original interview tape into evidence before the jury so they could clearly hear that she changed her testimony, and "three times a detective is telling her what to say" in order for her to get her deal and not be charged.

7/1/2011 RP 208. This was witness tampering by the supposed advocate, now traitor through and through, to the Petitioner's defense. 6/25/2011 RP 67. Both required aforementioned prongs (1) and (2), for "conflict of interest" of the United States Supreme Court standard have been met, measured and established in this ground. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The Trial Court Judge, the Honorable Gordon Godfrey did give Petitioner credit to all of his letters and verbal motions asking for another counsel to be appointed. On April 8th, 2011, Petitioner motioned again for new counsel. Judge Godfrey asked Ted Debray, "any comments from you, Mr. Debray?" To which Debray answered, "no your honor." The Court asked Petitioner, "You are in disagreement over

my rulings on consolidating trial; is that correct?" To which Petitioner replied, "Yes. Because he said nothing about it. That's my objection; he didn't mention anything." 4/8/2011 RP 5. The Court ruled not to have Debray changed. The Court added another attorney, Mr. Keenan. Judge Godfrey reams Ted Debray for all the inaction and appoints Mr. Keenan. 4/8/11 RP 5-6. Even with new counsel appointed, Agent Debray was up to his same old tricks. Codefendant Strickland's counsel Mr. Farra was diligently investigating evidence that had not come back yet and asked for a continuence all the needed evidence had not been tested on June 27th, 2011. RP 37. On June 17th, Mr. Farra made a record that much needed evidence had not been turned over. Mr. Farra said they did just receive the two videos from Safeway and from across the street. RP 2. Agent Debray found one last big opportunity to derail Petitioner, and took it. "From my standpoint, Mr. Keenan and I are working to be ready for trial on the 28th. I anticipate that there is an obstacle to that. Mr. Keenan is out of town, but he and I are going to be meeting extensively from here on out, starting this coming monday. Investigation is, to my way of thinking, complete." 6/17/2011 RP 6. Petitioner renewed his motion to fire

Ted Debray, and to get rid of Keenan due to his absence and no lawyering. Petitioner asked to represent himself as a last measure to get rid of Agent Debray. A court learning of a conflict between defendant and counsel has an "obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction," State v. Thompson, 169 Wn.App. 436, 462 (2012); Smith v. Lockhart, 923 F.2d 1314, 1318 (8th Cir. 1991)(quoting United States v. Hart, 557 F.2d 162, 163 (8th Cir. 1977)). Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense. United States v. Trung Tran Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001). A defendant is denied his Sixth Amendment right to counsel when he is "forced into trial with the assistance of a particular lawyer with whom he is dissatisfied, with whom he will not cooperate, and with whom he will not, in any manner whatsoever, communicate." Nguyen, 262 F.3d at 1003-04. Newly appointed counsel, Mr. Keenan was still out of town and only had a few days to prepare for trial. Mr. Keenan had to rely heavily on co-counsel Ted Debray's knowledge of the case. "Conflict of interest of initial counsel affected performance of trial counsel throughout proceeding, and trial counsel conceded that

he relied substantially on initial counsel's knowledge of the case. United States v. Tatum, 943 F.2d 370, 378-79 (4th Cir. 1991). There is "No retreat from the principle that the defendant is entitled to an attorney who acts as his advocate." No actual assistance just will not do. Plumlee v. Sue Del Papa, 426 F.3d 1095, 1103 (9th Cir. 2005). Petitioner's constructive denial of counsel was shown when Judge Godfrey appointed Mr. Keenan. It was a good try, only much too late, and not nearly enough to have given even minimal adequate representation. Conflict of interest is established where client made repeated representations to court regarding the inability to communicate with client. United States v. Moore, 159 F.3d 1154 (9th Cir. 1998). Appointing Mr. Keenan right before the start of trial with no familiarity of the case, denied Petitioner effective assistance of counsel. Singer v. Court of Common Pleas, Bucks County, 879 F.2d 1203, 1210 (3d Cir. 1989). Counsel's failure to challenge two biased jurors was ineffective assistance. Virgil v. Dretke, 446 F.3d 598 (5th Cir. 2006). Petitioner respectfully requests an evidentiary hearing. An evidentiary hearing is required to resolve conflict of interest issue when conflict is called to the court's attention. United

States v. Ziegenhagen, 892 F.2d 937 (7th Cir. 1989).

Ted Debray consciously and deliberately undermined the evidence and testimony to be tailored against Petitioner, instead of advocating "for" the Petitioner. The conflict all started when Debray learned that he had to defend a "skinhead". Without Debray pointing out deliberately to Jerry Chrisman that she did not owe the Petitioner anything, and that she better look out for herself and not return to continue testifying was given a little extra of an Agent Debray "push", Debray lost a "man card" for pointing out to Petitioner's then girlfriend, Jerry Chrisman, that Petitioner had spent the night at his ex-girlfriend, Erin Souther's house, and intended to abscond to California with her. This conflict made Petitioner's trial fundamental unfair.

ADDITIONAL GROUND NUMBER TWO

Petitioner was denied his Sixth Amendment right to effective assistance of counsel for not investigating the interrogation tape and blindly accepting the State's police testimonial version of what was on it.

The State was allowed to cherry pick from the

Petitioner's interrogation. In the State's Motion in Limine, Number 6, the State motioned to allow Petitioner's statement, "I would never, ever, have a firearm. You know it's my third strike." 7/27/2011 RP 46. Ted Debray was told by Petitioner to counter the bad with all of the exculpatory good evidence on the interrogation tapes, or get the intire thing suppressed due to Miranda violations that the Judge Godfrey was well aware of, like many past incidences of selective hard to hear recordings, notice violations, and the starting and ending times that the judge inquired into and the State's witness Sgt. Laur admitted occurred. Agent Debray did not object or ask for suppression. 4/8/2011 RP 21-22. Ted Debray did not take Judge Godfrey's recommendation and get the tape filtered so it would be clearly hearable. Debray took the State's version hook, lin, and sinker. Trial counsel's willingness to accept the Government's version of facts and failure to file any motions because he relied on the Government's version of facts, and not based on his own reasonable investigation. United States v. Matos, 905 F.2d 30 (2d Cir. 1990). Judicial confidence in the voluntariness of a custodial confession rests on requiring corroborating testimony of other officers

present at the scene. State v. Echo, 77 Wn.2d 553, 557-59, 463 P.2d 779 (1970). Under the Fifth Amendment to the United States Constitution, no person "shall be compelled in any criminal case to be a witness against himself." State v. Nysta, 168 Wn.App. 30, 40 (2012). Petitioner told Debray that he was high as a kite when he was interviewed and it would be obvious if Debray listened to the tape. Petitioner also told Debray that he unequivocally stated numerous times that he wanted to stop and have an attorney, that and return to his cell so he could sleep. A waiver of Miranda rights "may be contradicted by an invocation at any time." Berghuis v. Thompkins, _____ U.S. _____, 130 S.Ct. 2250, 2263, 176 L.Ed.2d 1098 (2010). Petitioner's asking directly for a lawyer was an unequivocal request. State v. Pierce, 169 Wn.App. 533, 546 (2012). Debray was unreasonably below the parr in his lack of assistance by not checking this out, garnering exculpatory evidence, and letting the State portray the Petitioner as being guilty as sin due to he wanted a deal.

ADDITIONAL GROUND NUMBER THREE

Failing to ask for an Informer Cautionary Jury

Instruction when the facts demanded one be given due to Jerry Chrisman did get a deal not to be charged, was ineffective assistance of counsel and violated the Petitioner's Sixth Amendment rights.

An informant instruction is necessary when the informant's testimony is uncorroborated by other evidence. United States v. Bosck, 914 F.2d 1239, 1247 (9th Cir. 1990). Jerry Chrisman said exactly what the cops wanted her to say. 7/1/2011 RP 208. Eugene Savage stepped outside of Mac's bar and seen Kerby and Strickland. Savage drunkenly told the smaller men to, "shake the sand out of their pussy." 3RP 37, 56. Daniel Ivey noticed Jerry Chrisman sitting on a bench next to the door where Savage was standing. 3RP 106-08. Ivey heard Jerry Chrisman yell, "shoot his ass." 3RP 97, 156-57, 168-69, 134, 136. Chrisman tried to flip the script and said it was Petitioner who said, "I will shoot you motherfucker." 3RP 432-33, 436-37. Every single witness the State presented, and even codefendant Strickland countered Jerry Chrisman's sole testimony that Kerby had a gun displayed. No other witness testified that Kerby had a firearm. A similar case was reversed because this error is harmful when there are

significant weaknesses in the States case. Guzman v. Dept. of Corr., 663 F.3d 1336 (2011). Trial counsel ineffective for not requesting a "informer instruction" when merited. United States v. Luck, 611 F.3d 183, 186-87 (2011).

ADDITIONAL GROUND NUMBER FOUR

Petitioner was denied his Sixth Amendment right to counsel when Ted Debray failed to object to joinder nor motion for severance when the facts demanded it.

With both codefendants corroborating each others testimony against the Petitioner to place culpability on Petitioner, placing the "smoking gun" in Petitioner's hand, there was very good reason to require severance. Chrisman was more guilty than Petitioner, only she was not charged for her soliciting. Credible eye witnesses said that they clearly seen Jeffrey Strickland as the shooter and the only one with a firearm. 3RP 97-98, 131-32, 134, 150, 159-61, 42. Severing the trial from Strickland would of enabled a more aggressive defense and not have Strickland's attorney Mr. Farra be able to shift the

blame. Petitioner stood a much higher chance at being acquitted not having Strickland's attorney doing everything possible to make Kerby out to be the shooter. Debray's performance was objectively deficient and resulted in prejudice. To establish prejudice based on an improper joint trial, a defendant must show that a competent attorney would have moved for severance, that the motion likely would have been granted, and there is reasonable probability he would have been acquitted at a separate trial. State v. Emery, 174 Wn.2d 741, 755 (2012)(quoting In re Pers. Restraint of Davis, 152 Wn.2d 647, 711, 101 P.3d 1 (2004). Debray failed to raise that Petitioner and Strickland had mutually antagonistic defenses, Kerby saying he did not do anything, when Strickland implied that Kerby did, "walk to the car to retrieve Kerby's gun, bang bang two shots fired. Jerry Chrisman putting a gun in Kerby's car inside Kerby's backpack equalled two against one, with Mr. Farra able to take all the free shots he wanted. Debray cannot be found to be tactical for trying to keep the trials together due to Strickland's greater showing of guilt due to he did not advocate that way due to he trully wanted the Petitioner to go down in flames for trying to get him fired.

ADDITIONAL GROUND NUMBER FIVE

Cumulative error of ineffective assistance of counsel denied Petitioner a right to a fair trial.

The aforementioned grounds of ineffective assistance may when viewed alone not merit reversal, but when combined it is error that has been established. Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002); Taylor v. Kentucky, 436 U.S. 478, n.15, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

ADDITIONAL GROUND NUMBER SIX

Petitioner was denied his Sixth Amendment right to effective counsel when Ted Debray did not properly perfect his motion for appointment of counsel and make the required showing to have Dr. Jeff Loftus appointed as the Defense expert.

Debray did not do his job. This is a motion made all the time by defense counsel in most cases. Failing to lay a proper foundation to build on got the Petitioner nada. This is another United States Supreme Court mandatory must do, that Debray did not. Judges

have a gatekeeping obligation under the Federal Rules of Evidence to insure that expert witness' testimony rests on reliable foundation and is relevant to the fact at hand - held to apply to all expert testimony, not only scientific. Kumho Tire Co. v Carmichael. 526 U.S. 227, 143 L.Ed.2d 238, 119 S.Ct. 1215 (1999).

ADDITIONAL GROUND NUMBER SEVEN

Petitioner was denied Due Process and his right to a fair trial because of prosecutor and police misconduct.

The State did not disclose the deal that it made Jerry Chrisman not to charge her in return for her testimony. The investigating arm of the State is the police, in which the State is responsible for. In this case it has been factually shown that the police forced Jerry Chrisman to do their bidding and say exactly what they wanted her to testify to, three times is the charm. 7/1/2011 RP 208. Berger v. United States, 295 U.S. 78, 88, 79 L.Ed. 1314, 55 S.Ct. 629 (1935). Failure to disclose deal that the defendant could have used to conduct an effective cross examination requires

automatic reversal. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand, 798 F.2d 1297 (9th Cir. 1986). Due Process violated by Government's failure to reveal Government favors given witness because prosecutor's case depended on credibility of this key witness. Monroe v. Angelone, 323 F.3d 286, 314 (4th Cir. 2003).

Respectfully submitted,



Michael Kerby #

Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, Washington 99362

DATED: this 14th day of February, 2013.

DECLARATION

I, MICHAEL KERBY, declare that, on FEB 27 2013
deposited the foregoing document(s),

STATEMENTS OF ADDITIONAL GROUNDS

or a copy thereof, in the internal mail system of Washington State Penitentiary and
made arrangements for postage, addressed to:

MR. DAVID PONZONA CLERK / ADMINISTRATOR
COURT OF APPEALS, DIV II
950 BROADWAY, MS TB-06
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 FEB-17-2013

Signature and number: Michael Kerby 725509

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STATE OF WASHINGTON
BY DEPUTY

Michael Kirby # 725509
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, Washington 99362

February 15th, 2013

Mr. David Ponzoha,
Clerk/Administrator
Court of Appeals, Div. II
950 Broadway, MS TB-06
Tacoma, Washington 98402

RE: State v. Kirby, COA No. 42425-8-II

Dear Mr. Ponzoha,

Please find and file my STATEMENT OF ADDITIONAL GROUNDS
in your respective Court. This is a timely file as I only
recieved my voir dare transcripts, and this filing is
within 30 days of my receiving them.

Thank you for your service in this matter,

Respectfully submitted,

RECEIVED
FEB 21 2013

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON


Michael Kirby

C.C.: File