

FILED
COURT OF APPEALS
DIVISION II

2017 MAY -8 AM 11:30

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

STATE OF WASHINGTON
BY _____

DEPUTY
State of Washington,
Respondant,

No. 49204-1-II

v.

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

Christopher Billings,
Appellant

I, Christopher Billings, have received 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 that the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUNDS/
ISSUES FOR REVIEW

Additional Ground No.1

1. Should the Court of Appeals order a transcript of Mr Billings first trial be provided him in the interest of justice and to secure his First Amendment rights of access and petition,

5/14/17
pm

as well as his Fourteenth Amendment right to due process and equal protection?

Additional Ground No.2

Should the Court of Appeals stay the current proceedings to secure appellants' liberty and property interests under the due process and equal protection clauses of the Fourteenth Amendment in order to secure his Sixth Amendment right to the effective assistance of counsel during his first appeal as of right?

Additional Ground No.3

3. Should the Court of Appeals order briefing on the issue of Appellant's right to the effective assistance of trial counsel under the Sixth Amendment on the basis of the difference of counsel's actions during the first and second trials in order to secure his rights of due process and equal protection under the Fourteenth Amendment?

Additional Ground No.4

Should the Court of Appeals, in the alternative accept appellant's contentions in this RAP 10.10 Statement of Additional Grounds, supported by a Declaration and find that trial counsel

was effective in the first trial but that Appellant received ineffective assistance of counsel in the second trial when counsel changed his tactics and strategy and failed to challenge the credibility of the State's witnesses as he did in the first trial and this failure prejudiced Mr Billings defense and resulted in his conviction?

Additional Ground No.5

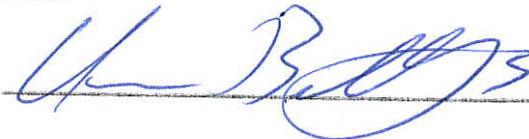
Should the Court of Appeals, in the alternative remand Mr Billings back to the trial court for an evidentiary hearing of the issue of trials counsel's effective assistance in the second trial for failure to employe the successful trial strategy and tactics he employed in the first trial?

Additional Ground No.6

Should the Court of Appeals grant Mr Billings any other relief in the interest of justice and equity?

Appellant has attached additional facts relevant to review and arguement/ supporting caselaw to this statement.

Dated: 5-3, 2017

Signature: 

DOC# 318621

FACTS RELEVANT TO REVIEW
OF ADDITIONAL GROUNDS

1. Appellant Billings had two trials regarding this matter.
2. In the first trial Appellant's trial counsel used a trial strategy and tactics which included challenging the credibility of the state's witnesses.
3. The first trial resulted in a jury verdict of not guilty on one charge and a mistrial on the other two charges.
4. Appellant was informed by counsel that the original jury polled 11-1 in his favor regarding the two charges the jury "hung" on.
5. Appellant was recharged and proceeded to a second trial and was represented by the same attorney.
6. At the second trial, counsel changed tactics and strategy including failing to challenge the credibility of the state's witnesses.
7. The second jury trial resulted in Appellant being convicted on the two remaining counts which the first jury had

"hung" on and mistrialled on while polling favorably at 11-1 for appellant.

8. That there needed to be two trials demonstrates that there was not overwhelming evidence of guilt.

9. Review of appellant's conviction in the interest of justice, equity, and fundamental fairness can only be made by comparing the first effective defense with the second ineffective defense and to do so requires a transcript of the first trial.

10. The State of Washington normally provides appellate review on the basis of a transcript for a trial. However, this case is not the norm and balkanizing the first trial from the second undermines appellant's right to equal protection and due process as well as the fundamental fairness of the appellate proceeding.

11. Appellant believes this balkanization violated both his Fourteenth Amendment rights to due process and equal protection but also his Sixth Amendment right to the effective assistance of appellate counsel because it is a structural defect in the process making it impossible for him to properly assert violations of his Sixth Amendment rights by being able to compare the two transcripts for the presentation of supported pleading to the Court of Appeals.

12. Appellant is not a trained attorney trained in the law or of sufficient knowledge or educational background in order to assert his rights on his own to this court without aid of counsel and required help to present this statement of additional grounds.

13. Since the filing for this extension of time to file his RAP 10.10 statement of additional grounds for review, appellant discovered he has a "right" to the transcript of his first trial.

14. Failure to have a copy of the transcript of his first trial effects his rights regarding the direct appeal of his second trial including his right to the effective assistance of appellate counsel and Fourteenth Amendment rights of due process and equal protection.

15. Appellant believes the Court of Appeals should stay his direct appeal, direct a transcript of the first trial be provided him, and counsel provide additional briefing on the subject of appellant's Sixth Amendment trial rights on the basis of the differential of trial counsel's assistance provided in the first trial compared to the assistance he provided Mr Billings in the second trial.

Petitioner IS Entitled To A Records
Of Sufficient Completeness
In Order To Effect His Appeal

"The state must provide an indigent defendant with a transcript of prior proceeding when that transcript is needed for an effective defense or appeal." Britt v. North Carolina, 404 US 226 227 (1971). See also e.g., State v. Harvey, 175 Wn2d 919, 921 (2012),

"It is well established that [t]he State must provide indigent criminal defendants with a means of presenting their contentions.' State v. Giles, 148 Wn2d 449, 450. (2003)(citing Draper v. Washington, 372 US 487, 496. (1963)). The record must be of sufficiently complete to allow consideration of the defendant's claims. Id. (citing Draper, 372 US at 499)."

(a) Petitioner Need Only Show
A "Colorable" Need

See State v. Harvey 175 Wn2d at 921

"The defendant need not make a particularized factual showing to be entitled to the record. Id. at 451 (citing Britt v. North Carolina, 404 US 226, 228. (1971)). Rather, '[i]t is sufficient if the 'grounds of appeal' make out a 'colorable need' for the requested transcript.' Id. (quoting Mayer v. City of Chicago, 404 US 189, 195...(1971))."

See e.g. , State v. Tilton 149 Wn2d 775 781 (2002).

(b) Which Includes A Transcript
Of A Previous Trial
Relevant To The Current Conviction

See e.g., Kennedy v Lockyer, 379 F3d 1041, 1057 (9th Cir. 2004)(holding that clearly established Supreme Court precedent requires the state to provide an indigent defendant with a full transcript of the entire trial court proceeding for use in a second trial). But, a transcript of a prior mistrial can be assumed to be valuable to a defendant in appeal. See e.g., Britt 404 US at 228. See also e.g., Gardner v. California 393 US 367 371 .. (1969)(holding that the indigent defendant had to be provided with a transcript of an evidentiary hearing from his original trial so that he could file a new habeas petition)

Washington courts have not openly recognized the outer limits for when an indigent is entitled to a transcript of a prior proceeding. State v. Williams, 84 Wn2d 853, 856. . (1975); State v. Cirkovich, 35 WnApp 134 137 (1983)("Clearly the parameters of the Griffin principle are not yet established. Washington courts have held that an indigent defendant is entitled to a transcript of a prior proceeding if he was a party thereto. State v. Williams. Supra; State v. Woodard . supra."). Now, there can be no doubt that the State must provide indigent defendants with proper transcripts of prior proceedings, or ready

access thereto, when such is needed for an effective defense.

Williams, 84 Wn2d at 856; Woodard, 26 WnApp at 736

INEFFECTIVE ASSISTANCE OF COUNSEL

(1) Petitioner Had A Right To Effective Assistance Of Counsel At Both Trials

See e.g., Robinson v. Ignacio, 360 F3d 1044, 1056 (9th Cir 2003),

"The Supreme Court's Sixth Amendment jurisprudence has long recognized that a criminal defendant's right to counsel is a fundamental component of our justice system. See Cronic, 466 US at 654. without aid of counsel, a defendant may be unable to prepare an adequate defense though 'he be not guilty he faces the danger of conviction because he does not know how to establish his innocence.' Powell v. Alabama, 287 US 45 69 (1932); see also Gideon v. Wainwright, 372 US 335, 344-45... (1963)."

See also, In re Personal Restraint of Rice, 118 Wn2d 876, 888 (1992)(constitutional right to counsel includes effective assistance)(citing Strickland, 466 US at 686)).

(2) The Standard Of Reviewing Ineffective Assistance Of Counsel

A claim of ineffective assistance of counsel requires a showing that (1) counsel's performance was deficient, and (2) it

prejudiced the defendant. Strickland v. Washington, 466 US 668, 687 (1984); State v. Grier, 171 Wn2d 17, 32-33 (2011). If one prong of the test fails we need not address that remaining prong. State v. Hendrickson, 129 Wn2d 61, 78 (1996).

(3) The Deficiency Prong

Under the deficiency prong, the court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. State v. West, 185 WnApp 625 638 (2015).

Deficient performance is performance that fell below an objective standard of reasonableness based on consideration of all the circumstances. State v. McFarland, 127 Wn2d 322 334-35 (1995).

The defendant bears the burden to prove ineffective assistance of counsel. State v. McFarland, 127 Wn2d at 335

But that does not mean strategy and tactics are not subject to review because, "[c]ertain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective." United States v. Tucker, 716 F3d 576 586 (9th Cir. 1982)(citing Beasley v. United States, 491 F2d 687 696 (6th Cir. 1974)). See also, e.g., State v. Grier, 171 Wn2d 17, 33-34 (2004),

"[A] criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate trial tactic explaining counsel's performance.' *State v. Reichenbach*, 153 Wn2d 126 130... (2004); *State v. Aho*, 137 Wn2d 736, 745-46 .. (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. 'The relevant question is not whether counsel's choices were strategic, but whether there were reasonable.' *Roe v. Flores-Ortega*, 528 US 470 481... (2000)."

(4) The Prejudice Prong

"Prejudice can be shown if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Johnson*, 143 WnApp 1 16 (2007)(citing *Davis*, 152 Wn2d at 672-73); *Strickland* 466 US at 694; See also *Grier*, 171 Wn2d at 34,

"To satisfy the prejudice prong of the Strickland test the defendant must establish that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn2d at 862 'A reasonable probability is a probability sufficient to under mine confidence in the outcome.' *Strickland* 466 US at 694; *Thomas*, 109 Wn2d at 226; *Garret*, 124 Wn2d at 219 In assessing prejudice 'a court should presume that the judge or jury acted according to law' and must 'exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.' *Strickland* 466 US at 694-95."

DUE PROCESS & EQUAL PROTECTION

(a) Due Process Is Guaranteed

Under Both State & Federal Constitutions

See e.g., State v. Mc Cormick 166 Wn2d 689, 699 (2009)("[W]e have held Washington's due process clause does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution. In re Pers. restraint of Dyer, 143 Wn2d 384, 394 .. (2001)."). See also e.g., State v. Beaver, 184 Wn2d 321, 331-32 (2015),

"Freedom from bodily restraint is at the core of the liberty interest protected by the due process clause. Foucha v. Louisiana, 504 US 71 80 .. (1992).. The due process clause of the Fourteenth Amendment provides that the State shall not 'deprive any person of life, liberty, or property, without due process of law.' U.S. Const. Amendment XIV § 1. The due process clauses confers both substantive and procedural protections. Amunrud v. Bd. of Appeals, 158 Wn2d 208, 216 .. (2006). The substantive component of the due process clause bars wrongful and arbitrary government conduct, notwithstanding the fairness of the implementing procedures. Foucha, 504 US at 80. Even if government conduct satisfied substantive due process, the procedural component of the due process clause requires that government action be implemented in a fundamentally fair manner. United States v. Salerno, 81 US 739, 746 (1987)."

Beaver goes on to say at 336: "Procedural due process requires that when the State seeks to deprive a person of a protected interest, the State provides the individual adequate notice of the deprivation and a meaning opportunity to be heard. Amundrud 158 Wn2d at 216. Due Process is a flexible concept and call for different procedural protections depending on the interests at stake. Matthews v. Ethridge, 424 US 319 334... (1976)."

The Due process Clause also protects property interests. See

e.g., Durland v. San Juan County, 182 Wn2d 55 70-71 (2014),

"'Property under the Fourteenth Amendment encompasses more than tangible physical property. US Const amend. XIV; See Logan v. Zimmerman Broush Co., 455 US 422, 430 (1982). Protected property interests include all benefits to which there is a legitimate claim of entitlement.' Conrad v. Univ. of Wash., 119 Wn2d 519, 529.. (1992)(quoting Roth, 408 US at 577). In Roth, the Supreme Court explained,

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . He must have a legitimate claim of entitlement to it. 408 US at 577 Constitutionally protected property interests may be created through (1) contract, (2) common law, or (3) statutes and regulations. See Conrad 119 Wn2d at 529-30 "

(b) Equal Protection

See Am. Legion Post No. 149 v. Dept of Health, 164 Wn2d 570, 608 (2007),

"Equal protection under the law is required by both the Fourteenth Amendment to the United States Constitution and article 1 section 12 of the Washington Constitution. O'Hartigan, 118 Wn2d at 121. Equal protection requires that 'all persons similarly situated should be treated alike.' Id. (quoting City of Clebourne v. Clebourne Living Ctr., Inc., 473 US 432 439... (1985))."

See also e.g., Mendiola-Martinez v. Arpaio, 836 F3d 1239, 1260 (9th Cir. 2016)("The Equal protection Clause of the Fourteenth Amendment is essentially a direction that all persons similarly situated should be treated alike.' Lee v City of Los Angeles, 250 F3d 668 686 (9th Cir. 2001)(quoting Clebourne v. Clebourne Living Ctr 473 US 432 439 (1985)).")

AS APPLIED

1. Petitioner Billings has a right to a copy of the transcript of his first trial.

2. Failing to have a copy of the transcript of his first trial effects his First Amendment rights of Access and Petition, his Fourteenth Amendment rights of Equal protection and Due Process as well as his Sixth Amendment rights during this first appeal as of right.

3. Petitioner Billings has demonstrated a colorable need for the transcript of the first trial related to his right of the effective assistance of trial counsel under the Sixth Amendment.

CONCLUSION

1. The Court should order a copy of the transcript of Petitioner Billings first trial be provided him to secure his First, Sixth, and Fourteenth Amendment rights.

2. The Appellate Court should stay these proceeding and order briefing on the issue of the effective assistance of trial counsel comparing the first and second trials.

3. In the alternative the Court of Appeals should accept Petitioner Billings' contentions regarding the ineffective assistance of trial counsel in the second trial when compared to the first trial which is supported by a declaration and dismiss his conviction on the issue of ineffective assistance of trial counsel during the second trial.

4. Or in the alternative the Appellate Court should issue any other form of relief within its power in order to secure Petitioner Billings' Constitutional rights of Access, Petitioner, Effective Assistance of Counsel, Due Process and Equal Protection.

OATH

I, Christopher Billings do hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated this 3rd day of May, 2017 at the Coyote Ridge Corrections Center, Connell, Washington.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "C. Billings", written over a horizontal line.

Christopher Billings DOC# 318621

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

State of Washington,
Respondant,

No. 49204-1-II

v.

Christopher Billings,
Appellant

DECLARATION IN SUPPORT OF SAG
CHRISTOPHER BILLINGS

I, Christopher Billings hereby Declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge.

1. I am the Appellant/ Petitioner in the above referenced action, over the age of 18 years old competent to testify regarding the facts contained herein and make this Declaration in support of my RAP 10.10 Statement of Additional Grounds for Review.

2. I had two trials regarding this matter.

3. In the first trial my trial counsel used a trial strategy and tactics which included challenging the credibility of the state's witnesses.

4. My first trial resulted in a jury verdict of not guilty on one charge and a mistrial on the other two charges.

5 I was informed by my counsel that the original jury polled 11-1 in my favor regarding the two charges the jury "hung" on.

6 I was recharged and proceeded to a second trial and was represented by the same attorney.

7 At the second trial, my counsel changed his tactics and strategy including failing to challenge the credibility of the state's witnesses which were successful in the first trial.

8. The second jury trial resulted in me being convicted on the two remaining counts which the first jury had "hung" on and mistrialed on while polling favorably at 11-1 for me.

9. That there needed to be two trials also demonstrates that there was not overwhelming evidence of my guilt.

10 Review of my conviction in the interest of justice, equity, and fundamental fairness but can only be made by comparing the first effective defense from the first trial with

the second's ineffective defense and to do so requires a transcript of the first trial.

11. The State of Washington normally provides appellate review on the basis of a transcript for a trial. However, my case is not the norm and balkanizing my first trial from the second undermines my right to equal protection and due process as well as the fundamental fairness of the appellate process denying me the full benefit of counsel's aid on my direct appeal.

12. I believe this balkanization violates both my Fourteenth Amendment rights to due process and equal protection but also my Sixth Amendment right to the effective assistance of appellate counsel because it is a structural defect in the process making it impossible for me to properly assert violations of my Sixth Amendment rights by being able to compare the two transcripts for the presentation of supported pleading to the Court of Appeals.

13. I am not a attorney, trained in the law or of sufficient knowledge or educational background in order to assert my rights on his own to this court without aid of counsel and required help to present this statement of additional grounds.

14. Since the filing for this extension of time to file my RAP 10 10 statement of additional grounds for review, I discovered I have a "right" to the transcript of my first trial.

15. Failure to have a copy of the transcript of my first trial effects my rights regarding the direct appeal of my second trial including the right to receive the effective assistance of appellate counsel and Fourteenth Amendment rights of due process and equal protection.

16. I believe the Court of Appeals should stay my direct appeal, direct a transcript of my first trial be provided to me, and have counsel provide additional briefing on the subject of my Sixth Amendment trial rights on the basis of the differential of trial counsel's assistance provided me in the first trial compared to the assistance he provided me in the second trial.

Dated this 3 day of May, 2017 at the Coyote Ridge
Corrections Center, Connell, Washington.



Christopher Billings DOC# 318621

FILED
COURT OF APPEALS
DIVISION II

DECLARATION OF MAILING

GR 3.1 COA. No. 49204-1-II

2017 MAY -8 AM 11:30

I, Christopher Billings on the below date, placed in the U.S. Mail, postage prepaid, STATE OF WASHINGTON envelope(s) addressed to the below listed individual(s):

Court of Appeals Division 2
950 BROADWAY, #300
Tacoma, WA. 98402-4454

Nelson, Brown + KOEHL, PLLC
1908 E. MOUNTAIN ST
Seattle, WA. 98122
att: Christopher Gibson.

Pierce County Proseutry Attorney
930 Tacoma Ave S, # 946
Tacoma, WA. 98402

I am a prisoner confined in the Washington Department of Corrections ("DOC"), housed at the Coyote Ridge Correctional Complex ("CRCC"), 1301 N. Ephrata Avenue, Post Office Box 769, Connell, WA 99326-0769, where I mailed said envelope(s) in accordance with DOC and CRCC Policies 450.100 and 590.500. The said mailing was witnessed by one or more staff and contained the below-listed documents.

1. Statement of Add'l Grounds ("RAP 10.10")
2. _____
3. _____
4. _____
5. _____
6. _____

I hereby invoke the "Mail Box Rule" set forth in General Rule ("GR") 3.1, and hereby declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

DATED this 3rd day of May, 2017, at Connell WA.

Signature Chris Billings