

FILED
COURT OF APPEALS
NO. 50397-2-II
DIVISION II

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

2017 NOV 15 AM 11:53

STATE OF WASHINGTON

BY
DEPUTY

STATE OF WASHINGTON,

Respondent,

V,

ALBERT SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Kevin D. Hull, Judge

ADDITIONAL GRUONDS

Albert K. Smith
Stafford Creek
Correctional Center
191 Constantine Way
Aberdeen, WA. 98520

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ADDITIONAL GROUNDS

- 1) Improper Issuance Of Warrant
- 2) Prosecutorial Misconduct Violation Of Appellate's 4th, 5th, and 6th Amendment Rights
- 3) Probable Cause Contained False Statements
- 4) Presumptions
- 5) Burden Shifting
- 6) Improper Conduct
- 7) Structural Error
- 8) Multiple Incidences
- 9) Aggravating Factor Must Have More Than One Victim
- 10) Basis For Confrontation Violation
- 12) Prejudice And Unreasonable Judgement At Trial Due To Close Relationship Of Judges And Mr. Loidhamer
- 13) Material Departure From Statutory Jury Selection Resulting In Court Granting Extra Peremptory Challenges

PURPOSE OF GROUNDS

On March 2nd 2017, I [Mr. Smith] was found guilty of Count 1, 1° ID theft economical factor with accomplice liability and Count 2, 1° theft economical factor with accomplice liability.

The State's case-in-chief mentioned in the warrant, was not only different and distinct from the police affidavit of probable cause, but changed completely by adding a whole new Count of 1° ID theft thereby prejudicing me. I had no advance notice and court denied my defence counsel's request of a continuance.

The state openly violated my 6th Amendment right of confrontation, allowing unprecedented burden shifting. Thus, relieving the state of its burden of proof and without satisfying the fact finder.

The court broke its chain of custody allowing evidence to be removed from the court room. When the evidence came back, the witness was not able to recognize all of this evidence, now "tainted" and just "assumed" this evidence was the evidence given him, and the court admitted this tainted evidence.

Trial court's gross and unauthorized departure from both court rules and statute in jury selection process, allowed prosecutor to pick jurors favorable to the state. Departure from constitutional jury selection requires reversal and remand for new trial.

GROUND 1. IMPROPER ISSUANCE OF WARRANT

The court errs in issuance of arrest warrant. The affidavit is invalid for false statements and due process violation for not following procedure of law. The accompanying affidavit serves the dual purpose of limiting the officer's discretion and informing the person subject to the search which items the officer may seize. See, e.g., United States v. Hayes, 794 F.2d 1348 (9th Cir. 1986). At the same time, some courts decline to decide whether the affidavit must be explicitly referenced in the warrant and accompany the warrant. United States v. Hamilton, 591 F.2d 1017 (8th Cir.2010).

Each case, here, states that, [warrant purposes] is based on affidavit information. The argument in the [two] cases cited is: Does the affidavit need to accompany the appellee's warrant. Mr. Smith's argument is that the affidavit must be addressed in the warrant as its chief reason for the warrant. The issue, here, is that a prosecutor cannot amend a police affidavit for the prosecution's own charge and/or purposes. Prosecutor can request for summons and attach it to the officer's request for arrest of first degree stolen property.

The court errs in arrest warrant for the first degree theft. Judge either "rubber stamped" warrant or simply misread it. Because first degree stolen property is its own distinct crime. As is first degree theft. Therefore, the warrant issued is

invalid.

In Katz v. United State, 389 U.S. 347, 88 S.Ct. 507 (1967) states that warrantless searches are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions to satisfy the warrant requirements which applies to search and arrests. An impartial judicial officer must assess whether police have probable cause to make an arrest, conduct or seize evidence, instrumentalities, fruits of a crime or contraband.

In Johnson v. United States, 333 U.S. 10, 13-14 (1948). The point of the Fourth Amendment is not to deny law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in an often competitive enterprise of ferreting out crime. See also, Steagald v. United States, 451 U.S. 204, 212 (1981). Warrant necessary because law enforcement may lack sufficient objectivity,

**GROUNDS 2. PROSECUTORIAL MISCONDUCT VIOLATING
 APPELLANT'S 4th, 5th, AND 6th AMENDMENT RIGHTS**

 Because Kelly Montgomery, the prosecuting attorney representing the government branch, is not neutral and cannot alter an affidavit. Nor can she swear to her own affidavit requesting a warrant to arrest. She can request a summons to

appear warrant. The warrant to arrest comes from the investigative branch. Because, Kelly Montgomery is in the prosecutorial branch, she is not a neutral party. She can request a warrant for first degree possession of stolen property then attach her amended charges. But here, she swore out a complaint for arrest using her own charges, based on Officer Rivera's charges, and failed to get a warrant for the first degree possession of stolen property.

Federal Rules of Criminal Procedure -- Title II Preliminary Proceedings Rule 4. Arrest Warrants or Summons on a Complaint. (A) Issuance: If complaint or one or more affidavit[s] filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it. The judge must issue an arrest warrant to an officer authorizing the officer to execute it. At a request of the attorney for the government, the judge must issue a summons instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may upon request of an attorney for the government, issue a warrant. If an organizational defendant fails to appear in response to a summons, a judge may take action by its law.

(b) Form.

(1) Warrant: A warrant must:

(A) Contain the defendant's name or description by which the

defendant can be identified with certainty.

(B) Describe the offense[s] charged in the complaint.

(C) Command defendant to be arrested and brought without necessary delay before a magistrate judge or if none is reasonable available before a State or local judicial officer; and

(D) Be signed by a Judge.

(2) Summons: A summons must:

(A) Be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.

(B) Execution or service and return.

(1) By whom: Only marshal or other authorized officer may execute a warrant, any person authorized to serve summons.

(2) Location: A warrant may be executed or a summons served within jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under rule 4(c)(3)(D) may also be served at a place not within the jurisdiction of the United States.

(3) Manner:

(A) Warrant is executed.

(B) Application for a warrant must be supported by a

law enforcement officer appearing before a neutral judge or magistrate.

The Supreme Court has said that probable cause exists when the facts and circumstances within police officer's knowledge provide a reasonable trustworthy basis for a man of reasonable caution to believe that a criminal offense has been committed, or is being committed. See, Carol v. United States, 267 U.S. 132 (1925).

Officer Rivera's police report states Sharly Smith was fired for depleting company account, and claimed she ordered an authorized checkbook. Both statements were false.

GROUND 3. PROBABLE CAUSE
CONTAINS FALSE STATEMENTS

The certificate of Probable Cause claims Sharly Smith stole money from Spaeth Allied Van Lines at 1229 Hollis St. in Bremerton, where she worked from 2012 to 2015. Her termination was a direct result of Spaeth Allied Van Lines' staff discovering she had exhausted the company's bank account without authorization, and later discovered she had ordered a book of checks without company knowledge. See Exhibit C.

Defense attorney, Joe McPearson clarified without dispute from the prosecutor by Motions in Limine that if the prosecution wished to make the claim that, Sharyl Smith was fired for depleting the company finances, defense is prepared to introduce a statement from DSHS unemployment, to clarify that Robert Loidhamer stated:

Sharyl Smith was fired for work performance at work. Confirming that the State was fully aware of the false police report, and confirms the State knew an invalid warrant was executed.

FALSE AFFIDAVITS

The defendant is entitled to a hearing when he makes specific allegations of deliberate or reckless material false statements in the affidavits upon which a search warrant was issued.

The United States Supreme Court has stated. Suppression remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit in which the affiant knew was false or would have known was false except for his reckless disregard for the truth. United States v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1988). Where the defendant makes a substantial preliminary showing that false statements knowingly and intentionally or with reckless disregard for the affidavit and if alleged false statements to the finding of probable cause.

The Fourth Amendment exclusionary rule should be modified so as not to bar use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause, United States v. Leon, 468 U.S. 897, 900, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The exclusionary rule is designed to deter police misconduct rather than to punish errors of judges and magistrates. There exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanctions of the exclusion. United States v. Leon, 468 U.S. at 916.

The court errs in abuse of discretion by issuing arrest warrant for unsupported charges of first degree theft, unsupported with affidavit from police. First degree theft is a separate and distinct crime. United States v. Hotal, 143 F.3d 1223, 1226-27 (9th Cir. 1998). Anticipatory warrant not valid because did not specify condition precedent to execution.

Court errs in issuance of warrant because prosecution should have incorporated first degree theft [with] Officer Rivera's probable cause first degree stolen property. Instead, prosecution requested their own warrant. It should have been an amendment to first degree stolen property.

In Franks v. Delaware, 438 U.S. 154, 165 (1978), held deliberately or recklessly false allegations is invalid unless the remaining portions of the affidavit provide probable cause. Thus, a court considering whether to suppress evidence based on an allegations that the underlying affidavit contains false statements must apply a two part test: (1) whether the defendant

has proven by a preponderance of the evidence that the affidavit contains deliberately or reckless false statements, (2) whether the affidavit provides the required probable cause to sustain a warrant. United States v. Charles, 138 P.2d 257, 263; FED APP 0074P (6th Cir. 1998).

The police report was false and had untrue claims proven by the Motion in Limine with no argument and did not support charging document for warrant of appellant's arrest. Supporting contemplated action against the individual's interests in protecting his own liberty.

A sworn affidavit, usually completed by an investigating police officer must establish grounds for issuance of a search or arrest warrant. Fed. R. Crim. P. 41(d).

Based on prosecutor's declaration and requesting an arrest warrant claiming police officer's probable cause. Fed. R. Crim. P. 4(a) Arrest warrant issued if affidavit shows probable cause to believe offense was committed and defendant committed it. Payton v. New York, 445 U.S. 573, 602 (1980) (arrest warrant required evidence of participation in crime and interpose[s] the magistrate's determination of probable cause between the zealous officer and the citizen).

The state official who was the chief investigator and prosecutor, in this case, was not a neutral and detached magistrate as required by the Constitution. Coolidge v. New

Hampshire, 403 U.S. 443, 453, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Under the Federal Rules of Criminal Procedure, a complaint requesting an arrest warrant must contain essential facts constituting the offense charged. Fed. Crim. P.3. Information supporting probable cause must also be truthful in the sense that the information put forth is believed or appropriately accepted by the affiant as true. Frank v. Delaware, 438 U.S. 154, 165 (1978); Illinois v. Gates, 462 U.S. 213, 238-39 (1963) (probable cause "does not lend itself to a prescribed set of rules"). Each case must be judged on its own facts. Unites States v. Khounsavanh, 113 F.3d 279, 285 (1997); Johnson, 333 U.S. 10, 13-14 (1948). See also Steagald v. United States, 451 U.S. 204, 212 (1981) (warrant necessary because law enforcement may lack sufficient objectivity to weigh correctly the strength of evidence).

Because the Fourth Amendment protects people and not places, individuals may enjoy an objectively reasonable expectation of privacy in public places under circumstances in which one would reasonable expect temporary freedom from intrusion. This intrusion to Mr. Smith's freedom is a violation of the 4th, 5th, and 6th amendment to the U.S. Constitution.

GROUND 4. PRESUMPTIONS

A permissive presumption allows the jury to presume the elemental fact - The element of the crime - if the prosecution

proves certain basic facts beyond a reasonable doubt. But it does not require a jury to do so. Cty. Ct. of Ulster City v. Allen, 442 U.S. 140, 157 (1979). See e.g., United States v. Camuti, 78 F.3d 774 (1st Cir. 1996). Instruction that jury may infer knowledge from willful blindness permissive presumptions do not violate due process clause if a rational, common sense connection exists between the basic facts proved and the presumed element fact. A rational connection exists if the connection is rational on its face and if it is more likely than not that presumed facts flow from the proved facts. Francis v. Franklin, 471 U.S. 307, 314-15 (1985); Allen, 442 U.S. 140, 157, 165 (1999); Barnes v. United States, 412 U.S. 837, 845-46 n. 11 (1993).

Presumption of knowledge that property was stolen rationally connected to proof defendant unexplained possession of recent stolen property because common sense and experience supported inference that petitioner must have high probability that checks were stolen.

Presumption is an evidentiary device that enables the fact finder to find a statutory element of a crime called an ultimatum or element fact--from basic or evidentiary facts already proved beyond a reasonable doubt. Allen, 442 U.S. at 156

The U.S. Supreme Court has cautioned that presumption is unconstitutional if it undermines the fact finder responsibility to find elements of a crime beyond a reasonable doubt. Allen, 442

U.S. at 307. Due process prohibits use of presumption that relieves the state of the burden of persuasion on essential elements of intent. The Court states: March 2, 2017, page 378 lines 23-25 and page 379 lines 1-7:

The Court: The motion to dismiss is denied on both counts and the jury will be allowed to proceed to determine whether or not prosecution has in fact proved its case beyond a reasonable doubt based on the evidence or lack of evidence that's been presented in this case. I am going to allow the jury to proceed in this regard to determine whether or not reasonable inference can be made with regards to the evidence that has been submitted. I understand your position Mr. McPherson, but I am denying your motion. Anything else?

Davila, 569 U.S. 2139, 133 S.Ct. 2139, 2149 (2013); Francis, 471 U.S. at 316. Due process prohibits use of presumption that relieves State of burden of persuasion on essential elements of intent.

COURT'S ABUSE OF DISCRETION

The Court failed to instruct jury with presumption instruction as required. The Court clearly used the word "inference" and the Court errs when it gave no jury instruction to "presumptive inference." Allen, 442 U.S. at 157.

There are two types of mandatory presumptions, (1) Conclusive, and (2) Rebuttable. A conclusive presumption is required by a jury to infer the element fact upon proof of the basic fact and therefore remove the presumed fact from the case. Technically, a conclusive presumption is not a presumption, but rather an irrebuttable direction by the court to find the element. A jury may not reject a presumption nor may a defendant argue against it. Sandstorm v. Montana, 442 U.S. 510, 517 (1979); Francis, 471 U.S. at 318-20; Patterson v. Gomez, 223 F.3d 959, 966-68 (9th Cir. (2000)). Jury instructions enabling jury to presume mental conditions had several definitions affecting state's burden of proof on intent, and therefore unconstitutionally shifted burden to defendant, United States v. Gaudin, 515 U.S. 506, 522-23 (1995). In addition, the prosecutor in her closing arguments, instructed the jury on inferences in order to help convince the jury to find guilt. March 2, 2017, page 432 lines 1-9.

GROUND 5. BURDEN SHIFTING

Court errs by allowing the prosecution to improperly shift burden of proof toward defendant using improper tactic in Jennay Ingall's stating Sharyl Smith signed checks. Defense attorney, [Joe McPherson] objected to statements and court sustained with little remedy other than a basic instruction, that jury was not to consider. Defense requested a mistrial in regards to statement that prosecutor's witness, [Jennay Ingalls], violated court's

direct rule. Ms. Goodell, as an experienced prosecutor, was well informed and aware, stating she would let her witness, know that she cannot mention who wrote checks. An experienced and responsible prosecutor knows that, this was a tactical way to allow unauthorized evidence, for the jury to hear. This tactic violates the court's fair trial rules and undermines a defendant's right to a fair trial. This devious and unauthorized introduction of evidence was devastating to the defense and improperly shifted the burden of proof to the defendant. This tactic is also a violation of the Confrontation Clause on the introduction of hearsay as evidence. In addition this is a violation of the Crowford rule, i.e., the improper shifting of the burden to the defense.

The burden of proof consists of two parts. (1) The burden of production, and (2) the burden of persuasion. The party having the burden of production, must produce enough evidence to allow a fact finder to determine that the fact in question occurred. The party who first pleads the existence of a fact not yet in issue usually has the burden of production, but this burden can shift from one party to another. If a party fails to sustain its burden of production, that party is subject to an adverse ruling by the court. For instance, the prosecution has the burden of production of every element of the offense charged. If the government fails to produce sufficient evidence for any element, thereby not bring the fact into issue, the judge may direct a verdict in defendant's

favor. LaFave, Criminal Law § 1.8, (5th Ed 2010). McCormick Evidence §§ 336-37 (6th Ed 2006).

The party bearing the burden of persuasion must convince the fact finder that a fact is issue should be decided a certain way. See United States v. Winship, 397 U.S. 358, 364 (1970). The due process clause places on the prosecution the burden of persuasion for every element of the crime charged and only in rare circumstances does the burden shift to the defendant. Any shifting of the burden of persuasion must withstand Constitutional scrutiny. See Patterson v. new York, 432 U.S. 197, 210 (1977); United States v. Davis, 735 F.3d 194, 202 (5th Cir. 2013). Prosecution failure to prove beyond a reasonable doubt that defendant committed bank fraud, were evidence presented was insufficient to prove that the defendant defrauded company was a financial institution required reversal of conviction for aiding and abetting bank fraud. United States v Parks, 668 F.3d 295, 300-03 (6th Cir. 2012). Prosecution's failure to prove beyond a reasonable doubt that defendant knowingly defrauded or intended to defraud required reversal of conviction for bank fraud.

BURDEN SHIFTING AND PROSECUTION'S VIOLATION
OF PRESENTATION USED FOR JURY INSTRUCTIONS

Trial Court errs in allowing prosecutor, in her closing arguments to the jury, to read instructions and then, the prosecutor, told the jury how they are to find Mr. Smith guilty.

This resulted in improper burden shifting which prejudiced the defendant. March 2nd, 2017, pages 430-433.

Mr. McPherson objected to the burden shifting and even though the court sustained, the court still allowed Ms. Goodell to continue her burden shifting, and did not issue a curative instruction. United States v. Marcus, 560 U.S. 262 (2010); United States v. Gonzalez Aguilar, 718 F.3d 1185, 1187 (9th Cir. 2013); United States v. Jones, 504 F.3d 1218, 1219 (11th Cir. 2013). Plain error because jury instructions were improperly coercive. United States v. Baker, 432 F.3d 1189, 1231 (11th Cir. 2005); United States v. Weather Spoon, 410 F.3d 1142, 1151 (9th Cir. 2005); United States v. Del Toro-Barboza, 673 F.3d 1136, 1150 (9th Cir. 2012). Prosecutorial misconduct is a ground for reversal only if it was so gross as probably to prejudice the defendant and the prejudice has not been neutralized by trial judge.

Judge Hull showed great prejudice and was egregiously bias by allowing the confrontational hearsay violation and then giving no meaningful curative remedy. The judge sustained defense attorney's objection to burden shifting but again gave no curative remedy. This bias continued well into the sentencing phase.

GROUND 6. IMPROPER CONDUCT

Courts review de novo whether a challenged statement by a prosecutor is improper. United States v. Diaz-Castro, 752 F.3d 101, 110 (1st Cir. 2014). Appellate Courts review de novo whether

challenged comment is improper. United States v. Collings, 401 F.3d 212, 215 (4th Cir. 2005); United States v. Meza, 701 F.3d 411, 429 (5th Cir. 2012) (same); United States v. Tragas, 727 F.3d 610, 614 (6th Cir. 2013) (same); United States v. Sand Storm, 594 F.3d 634 662 (8th Cir. 2010) (same); United States v. Reyes, 660 F.3d 454, 461 (9th Cir. 2011) (same); United States v. Anaya, 727 F.3d 1043, 1052 (11th Cir. 2013) (same); United States v. McGarity, 669 F.3d 1218, 1232 (11th Cir. 2012) (same).

The line between proper and improper advocacy is not always clear, courts have consistently found certain types of prosecutor misconduct improper. A prosecutor may not cite information from a defendant outside the presence of the defense counsel. Massiah v. United States, 377 U.S. 201, 204 (1964); Beardslee v. Woodford, 358 F.3d 560 (9th cir. 2002).

As mentioned previously, the prosecutor made a direct implication in her closing arguments by walking the jury through some elements, not letting the jury form their own opinion, and saying Mr. Smith is guilty. In addition, the prosecutor not only intentionally coaxed Ms. Ingalls [the witness] into saying that Sharyl Smith wrote checks, but also vouched for the validity of her own witness's statements in her closing arguments. Thus, violating Mr. Smith's right to a fair trial. Thus conduct had little if any curative measure issued by the court.

GROUND 7. STRUCTURAL ERROR

On Monday morning, February 27, 2017, at the start of trial, defense attorney was prepared to defend on the original charge of first degree theft when the prosecutor, without notice, filed a new amended information charging the additional charge of first degree identity theft, with an aggravator of economic factor and accomplice. Thus, Mr. Smith was now charged with two counts and needed additional time to prepare his defense. The court errs by denying counsel a continuance for this new matter.

The court only gave a ten minute recess for Mr. Smith to address issues with his counsel. Defense requested a continuance because Mr. Smith is a contractor and needed to complete an unfinished project and the additional issues with the new charges. Appellate, in private discussion told Joe McPherson [his counsel], to continue due to new evidence and completely new charge. A reasonable attorney would request time to investigate. Bell v. Cone, 535 U.S. 685, 697-98 (2002). Counsel's failure to oppose prosecution at specific points warranted Strickland, 466 U.S. 668 (1984), analysis rather than prejudice presumption because counsel representation was not complete failure to test prosecution. Williams v. Taylor, 529 U.S. 362, 393 (2000); Glover v. United States, 531 U.S. 198, 202-04 (2001). Because of prosecutors's new charges, defense counsel should have requested a continuance in order to prepare a defense to investigate. Strickland, 466 U.S. at

692, 697; Lockhart v. Fretwell, 506 U.S. 364 (1993); Glover v. United States, 531 U.S. 198, 202-04 (2001). However, if the error involved is constitutional, the court will determine whether the error was structural trial error looking not only at the right violated, but also at the particular nature context and significance of the violation. United States v. Gonzales, 110 F.3d 936, 946 (2nd Cir. 1997); Yoroborough v. Keane 101 F.3d 894, 897 (2nd Cir. 1996), error that undermines structural fairness may be structural error even when lesser violation of same constitutional rights subject to harmless error review. Arizona v. Fulminante, 499 U.S. 2799, 390 (1991) (structural error as opposed to trial errors, involves defects in fundamental framework by which criminal trials assess guilt.).

If the error involved is nonconstitutional, it is harmless unless it affects a substantial right of the defendant. To find a nonconstitutional error harmless, a court need only conclude that the judgment was not substantially swayed by the error.

However, if the error involved is constitutional, the court will determine whether the error was structural or trial error. Looking not only at the right violated, but also at the particular natural context and significance of the violation. United States v. Gonzales, 110 F.3d at 946. See e.g., Yoroborough v. Keane, 101 F.3d at 897 (errors undermine structural fairness may be structural error even when lesser violation of some constitutional

right is subject to harmless error review.

Court errs by allowing the state to amend charges when in fact it was charging a whole new charge, changing its case-in chief from first degree theft to first degree identity theft with economic factor and accomplice. This allowed the prosecutor to bypass the normal arraignment, pretrial / omnibus hearings and do everything all in one day, on the first day, at the start of trial. The prosecutor, now charged Mr. Smith with two different crimes, giving him no warning and no time to prepare a defense to the new charges of first degree identity theft.

The court also errs in allowing the introduction of "codes" [codes need to cash each check] evidence at trial which was never properly entered as evidence. This is a violation of ER 901(a). This is a direct result of the court allowing new charges to be filed without going through the proper pretrial / omnibus hearings. Thus, giving the State an improper advantage at trial and prejudicing defendant.

The court errs in allowing the prosecutor to admit evidence of codes without notice to defense. Defense counsel's tactical decision not to object at trial usually will preclude a finding of plain error. Ohler v. United States 529 U.S. 753, 757-58 (2000). Defense attorney, Joe McPherson, should have objected to any admission of codes without proper investigation and statements in connection with these codes. United States v. Baker, 432 F.2d

1189, 1231 (11th Cir. 2005). Plain error because prejudicial effects of hearsay testimony outweighed evidence against defendant. The State showed no evidence that Mr. Smith had any knowledge of codes. The State's witness [Mr. Baze] testified his company verified the validity of the checks and got the codes from the company. This makes it clear Mr. Smith is not involved with any codes nor posses any codes.

Ground 8. MULTIPLE INCIDENCES

The Legislature has omitted multiple incidences. See Exhibit D, § 3905 and E, § 3913, Major Economic Factor. State v. Baldwin, 111 Wn. App. 631, 643-45, 45 P.3d 1093, 1100-01 (2002) aff'd on other grounds, 150 Wn.2d 448, 78 P.3d 1005.

In Baldwin there were multiple victims. His argument was double jeopardy, but because the state never put a degree on any one of the three charges, he had no lesser of the charged counts, therefore, he received a substantial sentence. In this case, Mr. Smith is charged with first degree identity theft and first degree theft. First degree identity theft is a level IV, and first degree theft is a level II, Making first degree theft the lesser of the charged counts. The jury never received instructions for lesser included offenses.

GROUND 9. AGGRAVATING FACTOR MUST HAVE MORE THAT ONE VICTIM

See Exhibit B. Aggravating Factors Criminal Law With

Sentences Forms, Seth Fine, November 2016-2017. In chapter 39 § 3901, (highlighted), it's clear and unequivocally stated: When a person is convicted as an accomplice, an exceptional sentence can be imposed. There must, however, be a specific jury finding that defendant had knowledge of the facts underlining the aggravator factor. For example, any exceptional sentence can be imposed for a major economic offense which includes offenses that have more than one victim. This requirement applies whenever the conviction could have been based on accomplice liability. If the jury is instructed on both principle and accomplice liability there is no specific finding concerning the defendant's knowledge and an exceptional sentence cannot be imposed. See Exhibit B.

Prosecution charged Mr. Smith as an accomplice, but at trial the prosecutor opined to the court in her jury instructions and in her closing argument, that Mr. Smith is the principle actor and accomplice. However, the jury did not find that there were more than one victim. Thus, an exceptional sentence cannot be imposed.

THE KEY WORD HERE IS INSTANCES

The Legislative intent is in its plain language of the omitting of all non-statutory aggravators. This includes multiple instances. This word is used in economic factor, and in the review of historical use of economic factor, as in Baldwin, each case involves multiple victims. In the case at bar, the prosecutor errs in using a statutory aggravator based on the historic use of

economic factor. See Exhibit A, Criminal Law With Sentencing Forms. Seth Fine, November, 2016-2017, Chapter 39, Aggravating Factor. The prosecutor misused the aggravator and its application according to the historic use of this aggravator in the following cases. State v. Fisher, 108 Wn.2d 419, 425-26, 739 P.2d 863, 686-87 (1987); State v. Argo, 81 Wn. App. 552, 570-71, 915 P.2d 1103, 1112-13 (1996); State v. Branch, 129 Wn.2d 635, 647-48, 919 P.2d 1228, 1234 (1996); State v. Armstrong, 106 Wn.2d 547, 550 723 P.2d 1111, 1114 (1986).

A historic review of cases with economic factor shows the state has repeatedly relied on other aggravating factors or multiple victims to apply an economic factor. This is why there are so few cases of economic factor. When an economic factor was used, it was to another aggravator.

In the case at hand, sophisticated and person of trust could of been applied under accomplice but not economic factor based on one victim. In reviewing each exhibit by its plain language when an economic factor is applied, there must be more than one victim, or its prescribed aggravator. This is why § 3913 was deleted [multiple instance]. Therefore, accomplice liability requires multiple victims to apply. In addition the word instances was deleted by the legislature when it removed § 3913, [multiple instances]. See Exhibit E.

Mr. Smith's claim is that the legislature's intent is

ambiguous, and must clarify [the court must explicate the legislature's intent], and apply the rule of lenity in favor of the defendant. Mr. Smith also claims the legislature's intent is that an economic factor is to be applied to multiple victims as a single aggravator, in order for the jury to find guilt. Because there is only one victim, the state errs in applying the economic aggravator.

GROUND 10. REMOVAL OF EVIDENCE FROM COURT ROOM

The court errs by allowing the prosecutor to remove evidence from the courtroom, i.e., "files exhibits and checks" without a proper chain of custody of the evidence requirement. The purpose of this removal of evidence from the courtroom was for the state's witness to "review and compare" the evidence. The prosecutor then used this evidence against the defendant. When the evidence came back to the courtroom, the state's witness [Officer Riviera] was not able to recognize a portion of the evidence that Mr. Loidhamer had allegedly given him. But the witness now "assumes" that a portion of this evidence is what Mr. Loidhamer had given him. The jury is excused. Defense counsel objected to this evidence, citing, the witness's statement that he was unfamiliar with a portion of this evidence. See March 1, 2017, page 279 line 20-24, and page 281 lines 10-13. The court, however, argues for the state and the state's witness in re-testifying saying, yes, these are the copies of checks he had received from Mr. Loidhamer. But, the

evidence now before the court has been tampered with and mixed up with other evidence and maybe even additional material added for all the defendant knows while it was outside the court's custody. Therefore, the evidence is now tainted and suspect. It is impossible to know what evidence was legally admitted and what evidence was illegally admitted. Even though the jury was informed about the evidence, the officer did not recognize it, the jury was not able to make a determination themselves of the evidence's authenticity.

[The Washington Supreme Court] has held that it is error to submit evidence to the jury that has not been admitted at trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, at 705, 286 P.3d 673 (2012). See also State v. Pete, 152 Wn.2d 546, 553-55, 98 P.3d 803 (2004). The "long standing rule" is that "consideration of any material by a jury not properly admitted as evidence validates a verdict that the defendant may have been prejudiced." Id at 555 n. 4 (quoting) State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967); See also State v. Boggs, 22 Wn.2d 921, 207 P.2d 743 (1940, overruled on other grounds by State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980)).

Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same as when the crime was committed. State v. Campbell, 103 Wn.2d

1, at 21. 691 P.2d 929 (1984); Brown v. General Motors Corp., 67 Wn.2d 278, 285, 407 P.2d 461 (1965); Gallego v. United States, 276 F.2d 914 (9th Cir. 1960). Factors to be considered "include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers with it." Gallego, at 917. The Gallego, Court said, "The proponent need not eliminate every possibility of alteration or substitution. And went on to say, "The jury is free to disregard evidence upon its finding that the article was not properly identified or there has been a change in its character." Gallego, at 917. However, this premise is based on a jury being present and able to hear the facts and controversy surrounding the evidence.

In Mr. Smith's case, the jury was not present during the debate over the evidence and thus have no knowledge upon which they can make any determination of what weight to give the evidence. ...[T]he Courts of Washington will clearly understand that we [the Court] will not tolerate criminal convictions based on tainted evidence, but will insist upon proper standards of conduct and procedure. Brennan, 72 P.3d 182 (2003) (citing) State v. Roche, 114 Wn. App. 424, 59 P.3d 682 (2000).

Again, in Mr. Smith's case, the prosecutor did not follow the proper standards of conduct and procedure. [T]he prosecutor is indeed obliged to establish the chain of custody. State v. Lui,

179 Wn.2d 457, at 481, 315 P.3d 493 (2014). And this the prosecutor failed to do. The evidence should have been suppressed.

GROUND 11. BASIS FOR CONFRONTATION VIOLATION

Under 404(b) evidence that has not previously been ruled admissible precludes the state from offering this evidence unless it can establish what, if any exception the evidence would fall under and the purpose for which it would be offered. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

In Croeford v Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), the U.S. Supreme Court held that if an out-of-court statement is testimonial in nature, the state cannot introduce it at trial unless the defendant has had an opportunity to cross-examine at an earlier hearing or during trial. If the out-of-court declarant is unavailable as a witness at trial, and if the defendant had no opportunity to cross-examine the declarant under oath, the declarant's out-of-court statement is inadmissible. Id.

A key question analyzing confrontation under Crawford is whether or not a statement is testimonial. If the out-of-court statement is testimonial, and the declarant is unavailable, the statement is inadmissible regardless of any exception to the hearsay rule. Id. However, if the out-of-court statement is nontestimonial in nature, the right to confrontation does not apply. Admissibility of a nontestimonial statement is then governed by hearsay and its exceptions.

The U.S. Supreme Court was unclear how to test to determine whether or not a statement is testimonial. The Crawford decision suggested the declarant's state of mind about whether the statement would be used prosecutorially was relevant. Id. However, other portions of the opinion suggest a more objective test turning on whether a reasonable person would expect the statement to be used as evidence. Id. The Washington State Supreme Court has approved on an objective test. State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007). See also, State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2010) (objective test applied in deciding that excited utterances were not testimonial); State v. Hopkins, 137 Wn. App. 441, 154 P.3d 250 (2007) (some statements of a young child to a social worker were testimonial regardless of the child's state of mind); State v. Anderson, 171 Wn.2d 764, 254 P.3d 815 (2010) (focus in on nurse investigator's state of mind without any question about child declarant's state of mind). The State has the burden of proving that a statement is not testimonial for questions of confrontation. State v. Alvarez-Abrego, 154 Wn.App. 351, 255 P.3d 396 (2010).

Mr. Loidhamer reported this incident to the Bremerton police, but based on the timing of the report to law enforcement, this was a testimonial statement. State v. Koslowski, the court looked at several factors when a person makes a report to police. (1) was the speaker talking about events as they occurred or was the

speaker describing past events, (2) would a reasonable listener conclude that there was an ongoing emergency, (3) what was the nature of what was asked and answered, and (4) what was the level of formality of the interrogation. Id. At the time Mr. Loidhamer reported this incident, any alleged theft or crime had occurred in the past. There is no indication that police were responding to an ongoing emergency. Given these criteria, Mr. Loidhamer's statements to law enforcement including Officer Riviera and anything attached to those statements is testimonial. Under Crawford these statements are testimonial and therefore prohibited.

Mr. Smith has suffered prejudice even after defense counsel made repeated objections, the prosecutor's statements was nevertheless still heard by the jury, for once the jury has heard the statement, it sticks in their minds. Once rung, you can't unring the bell.

Generally, a business record is considered non-testimonial. This is because, business records are prepared for business purposes, not for testimony. Business records frequently consist of clerical information, such as bank statements, employee records or other accounting information. None of these types of records are produced with litigation in mind. However, an insurance claim is not a document that is produced in the ordinary course of business. Insurance claims are made in response to an unexpected,

non-routine event. An individual or a business who files a claim should reasonably expect that the claim can become the subject of litigation. For example, if a car accident occurs, and a driver makes a report to his or her insurer that the other driver was at fault, that would be testimonial. That statement has a very high likelihood of being disputed and winding up in a court case. A reasonable person would expect such a claim to be used as evidence. Therefore, any evidence or statements made by Mr. Loidhamer is testimonial. Defense moved the court to prohibit any reference to police report or officer Riviera. The claim for insurance is based upon statements made by Mr. Loidhamer. Again these statements are prohibited by Crawford, because they are testimonial, including physical evidence given to police.

Mr. Loidhamer was the one who Officer Riviera spoke to, which suggests even further, that it was a testimonial statement. As previously mentioned, Mr. Loidhamer was not able to be confronted about any statements made in this case. Therefore, any statements or references made or evidence given to Officer Riviera would be inadmissible under Crawford. See pages 230 lines 3-25; 231 lines 1-25; 232 lines 1-25; 234 lines 1-25; 235 lines 1-25; and 236 lines 1-21. Court errs in allowing prosecutor to present Officer Riviera's statement. Once his statement was admitted, the court contradicted its reasoning and told jury, they were not to consider this as evidence. The jury could only use this

information to show Officer Riviera was investigating. See pages 304 lines 1-25; and 305 lines 1-25.

All speculation without foundation to the point Mr. Smith made a clear indication that the State was fabricating evidence against him. By his objections, Crawford was argued through out the trial including in jury instructions. See pages 365 lines 10-25 and 366 lines 1-25. Defense attorney also objected to any evidence introduced by Officer Riviera. The court implemented a double standard by telling the jury they are not to consider Officer Riviera's statements and tangible evidence as evidence but use it to understand his investigation. However, the court allowed the same evidence for the jury to make inferences on. At this point, all evidence including tangible is inadmissible. See defendant's closing Motion to the Court, pages 374 lines 1-25; 375 lines 1-25; 376 lines 1-25; 377 lines 1-25; 378 lines 1-25 and 379 lines 1-25. The Court errs in allowing prosecutor to violate Crawford thus prejudicing Mr. Smith through out trial using unprecedented circumstantial evidence, and prejudicial inference with improper foundation.

The defense moved the court to prevent testimony by Ms. Ingalls that checks written to Mr. Smith were unauthorized by Speath Transfer because Ms. Ingall lacks the knowledge to know about these transactions. Even the prosecutor, confirmed that Ms. Ingalls had no personal knowledge about who authorized these

transactions.

The proponent of evidence has the burden of laying a foundation to show personal knowledge. Staes v. LeFever, 102 Wn.2d 777, 787, 690 P.2d 574 (1984) (overruled on other grounds); see also State v. Smith, 87 Wn. App. 345, 941 P.2d 725 (1997). The relevant question for the court is whether or not the witness had an adequate opportunity to observe the events in question. State v. Vaughn, 36 Wn. App. 171, 672 P.2d 771 (1983).

Ms. Ingalls did not have any authority over company finances or company decision making at the time that these Comdata checks were written to and cashed by Mr. Smith. MS. Ingalls lack of knowledge as to who authorized or who was permitted by Mr. Loidhamer, the company owner and manager at the time, is not in dispute. Even the prosecutor verified that Ms. Ingalls had no knowledge.

Further proof that Ms. Ingalls lacked personal knowledge during this time frame of the check transactions can be shown by the fact that she was working as a Relocation Consultant for the company. Her job consisted primarily of working on sales in which her duties involved traveling to customer's homes and or businesses and giving them estimates on moving costs. Her assigned duties did not involve bookkeeping or any management decisions. Ms. Ingalls, therefore, had no knowledge or interaction with the company's banking or accounting. Under ER 602, she lacks any

knowledge about the company's financial accounts and who was or was not authorized to make transactions, during the period checks were written to Mr. Smith. Due to Ms. Ingalls lack of knowledge, her statements are barred under hearsay and under the right to confrontation. Trial Court violated both the hearsay and confrontation rules.

Defense moved the court to prohibit testimony about the reason Mrs. Smith was terminated, because it is irrelevant to the elements of these charges. The fact of her termination only invites negative inferences and speculation from the jury. ER 401, 403, & 412.

Additionally, Ms. Ingalls had no supervisory or management authority and thus was not Mrs. Smith's supervisor, and she had no authority over company employees. Since Ms. Ingalls' information is not based on personal knowledge, and therefore, there was no foundation for her testimony. ER 602. See page 48 line 7-25; 49 lines 1-25; and 50 lines 1-16. At this point the court is well aware of defense counsel's objection based on Crawford. This is a clear confrontation issue. The prosecutor, though out the course of the trial continued to present speculation as evidence combining it with confrontation violations as if her evidence were facts.

The real reason for Mrs. Smith's termination is documented in a letter Mr. Loidhamer wrote to DSHS on November 25, 2015, in

which he said Mrs. Smith was terminated solely as a result of work performance issues. Mr. Loidhamer makes no mention of any accounting discrepancies or thefts. The letter makes no mention of any allegation that company funds were spent or transferred in any unauthorized way. ER 103. The court erred in allowing anything attached to Mr. Loidhamer as evidence because Mr. Smith was unable to challenge the validity of statements or physical evidence under the Sixth Amendment confrontation clause. This is a Sixth Amendment Confrontation Clause violation requiring Remand for new trial.

GROUND 12. PREJUDICE AND UNREASONABLE JUDGEMENT
AT TRIAL DUE TO CLOSE RELATIONSHIP
OF JUDGES AND ROBERT LOIDHAMER

Judge Hull, Judge Houser and Prosecutor Tina Roberson, along with Judge Hemstreet [Judge Hemstreet, to her credit recused herself] are all in one way or another, interconnected to each other and to Mr. Loidhamer and the defendant.

Judge Houser was the President of the Lions Club and, along with Mr. Loidhamer [a 25 year long member] were both members of the Kitsap Lions Club of Poulsbo, Washington. Both Judge Houser and Mr. Loidhamer also worked together as Chamber of Commerce Board Members. Judge Houser was biased because of his good friendship with Mr. Loidhamer, who through his company [Speath Allied Van Lines] donated money to the Judge's political campaign [for Judge]. In addition, Judge Houser and Tina Robinson [Chief

Prosecutor of Kitsap County], before she became a county prosecutor, and Judge Houser became a Judge, were defense attorneys and had a close working relationship. For example, in 2013, they defended Casey Cutlip in his murder trial [case # 12-1-006022], in Kitsap County.

Judge Hull was the Assistant Chief County Prosecutor from 2005 to 2014. Thus, Tina Robinson worked directly with Judge Hull as prosecutors. Judge Hull and Judge Hemstreet are the Chamber's attorneys for Judge Houser when Judge Hull was Chief Assistant Prosecutor from 2005 to 2015. His office convicted Mr. Smith on five previous occasions. Consequently, the Judge was very prejudicial toward Mr. Smith. The Judge simply had his mind already made up before trial, and it all shows in his treatment of Mr. Smith's defense attorney's objections by not issuing proper curative remedies. Judge Hull should have recused himself, and in fact Judge Houser as well. Even defense counsel Joe McPherson should have recused himself due to his former associate now Judge Hemstreet.

Judge Hemstreet, before she became a County Superior Court Judge, was Mr. Smith's defense attorney in one of his cases when Judge Hull was Chief Prosecutor. At this time, Mrs. Hemstreet was a defense attorney with the law firm of Hemstreet & Associates. The same law firm that Mr. Smith's current defense attorney, Mr. McPherson is registered with. In all, Hemstreet & Associates

represented Mr. Smith in 3 of his prior cases. Thus, Judge Hemstreet took the proper action to recuse herself.

As for Tina Robinson, she further took improper action by being in the front row [in full view of the jury] and with her cell phone took videos and photos of the proceedings and gave these photos to local news media. Just how the jury reacted to a prosecutor sitting in the front row of Mr. Smith's trial taking photos, we may never know, but it does show the prejudice of these judicial officials showed with the exception of Judge Hemstreet. She was the only judge that showed the proper respect for the judicial system when she recused herself from sitting on this case, not just once, but five times.

If only Judge Hull had followed the proper ethics and also recused himself as he clearly was too biased to hear this case against Mr. Smith.

Mr. McPherson's connections to Judge Hemstreet was not known until Mr. Smith was in Stafford Creek Correction Center's law library, looking up cases law and came across Washington State Attorney Registration list and noticed Joe McPherson's was registered with Hemstreet and Associates. As mentioned earlier, in this additional grounds, Mr. McPherson did not completely fail as a defense attorney. Trial records will show that Mr. Smith questioned his actions during trial. Mr. McPherson should have recused himself because of his connections with Judge Hemstreet

and Judge Hull.

Mr. Smith was unaware until after trial of each individual's connections. Based on an investigation of another defense firm. Because of the issues at hand, it would be more likely than not that the Judicial actor or actors in this case were likely biased on Mr. Smith's criminal history, and their connections in the past with the victim and one another both professionally and as friends, and too the fact that Mr. Loidhamer had given to at least one Judge's political campaign fund. Therefore, prejudice is very likely to have played a large part in this case. It also explains, why the jurors were all closely connected, by either work, past jury duties, or connection with law enforcement. It would be difficult for a reasonable person to think given all the facts, to not consider some type of bias and prejudicial foul play. For out of such a small jury pool of only 39 people, so many connected to law enforcement and knew each other.

For so many elements to be connected, a new trial should be granted, with a truly random selected jury.

GROUND 13. MATERIAL DEPARTURE FROM STATUTORY JURY SELECTION
RESULTING IN COURT GRANTING EXTRA PEREMPTORY CHALLENGES

The trial court abused its authority and discretion when it allowed Ms. Goodell [the prosecutor] by the court's interpretation and application of both court rule 6.4(e)(2), and statutory law, RCW 4.44.210 governing jury selection, with the unauthorized

granting of peremptory challenges to the prosecutor. The following discussion will show the deception, Ms. Goodell [the prosecutor] with the court's help put over on the defense. This dialog will show that the Devil is in the details. At the outset of jury selection, the court gave the normal six peremptory challenges with one additional challenge for the alternate juror selection process, for a total of seven challenges for each party. Ms. Goodell took three peremptory challenges and then for the next three jurors, Ms. Goodell three times, in a row, accepted the jury. Then after the defense exercised his sixth peremptory challenge. Ms. Goodell simply takes an unauthorized strike [unauthorized strike #1] which the Judge allows her to take, [court's 1st unauthorized action] and the court excused juror # 32 [court's 2nd unauthorized action], and:

The Court: "Okey, we have our jury."

Ms. Goodell: "No, I still have peremptories left."

At this point, a controversy breaks out. See March 1, 2017 page 218 line 4 through page 221 line 25. See Exhibit F.

In this controversy and over defense counsel's objection the court, makes a gross departure from the statutes and court rules, thereby abusing its discretion, granting Ms. Goodell another strike, [unauthorized strike #2]. The following narrative explains how Ms. Goodell, with the court's help, selected a jury panel favorable to the prosecution.

After the defense took his sixth peremptory challenge, Ms. Goodell simply took another strike which the court allowed her to have, [unauthorized strike # 1]. At this point the Judge should have told Ms. Goodell, that once she accepted the jury panel, she was done. But, the judge was compliant and said nothing, and the defense now took his seventh strike, the one in theory that is allowed for the alternate juror. After this strike, the judge said, "Now we have our jury," but Ms. Goodell said "No, I still have peremptories left." Then the controversy breaks out. Ms. Goodell wants to challenge seat # 6, but, in fact Ms. Goodell, can not for she has already accepted the jury panel. However, the judge now intentionally construed the meaning of both the court rule 6.4(e)(2) and the statute, RCW 4.44.210 to allow Ms. Goodell another strikes, [unauthorized strike #2], and the court excuses juror # 36. Giving the State two unauthorized peremptory challenges, and now the court dismissed the last juror # 39. By this process, Ms. Goodell, with the court's help, was able to pick jurors favorable to the prosecution.

It is inconceivable that an experienced Judge with 15 prior years as a prosecutor could misapply the plain language meaning of both the CrRs and the RCWs which clearly do not allow any more strikes by that party after that party has accepted the jury panel. No more peremptory challenges can be made of jurors still left in the group from which challenges are then being made. If that party still has peremptory challenges left [not used] that

party may only be able to use those remaining challenges for any jurors later added to that group. (Emphasis added).

Rule 6.4(e)(2) states in pertinent part:

...[P]eremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall now waive any remaining peremptory challenges to jurors subsequently called.

(Emphasis added).

The companion statute to CrR 6.4, RCW 4,44.210 further defines how peremptory challenges shall be taken. RCW 4.44.210 states in pertinent part:

The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenge, shall be exhausted. During this alternating process, if one of the parties declines to exercise a peremptory challenge, then that party may no longer peremptory challenge any of the jurors in the group for which challenges are then being considered and may only peremptory challenge any jurors later added to that group. A refusal to challenge by either party in the said order of alternation shall not prevent the adverse party from using the full number of challenges.

(Emphasis added).

Mr. Smith's constitutional public trial rights under both the United States Constitution, Sixth Amendment and the Washington State Constitution, Article 1, Section 22 were violated by the trial court. A criminal defendant's constitutional right to a public trial extends to the entire jury selection, including the exercise of, for cause and peremptory challenges to prospective jurors. State v. Marks, 185 Wn.2d 143, 145, 368 P.3d 485 (2016).

State Constitution, Article 1, Section 22 were violated by the trial court. A criminal defendant's constitutional right to a public trial extends to the entire jury selection, including the exercise of, for cause and peremptory challenges to prospective jurors. State v. Marks, 185 Wn.2d 143, 145, 368 P.3d 485 (2016). See also State v. Love, 183 Wn.2d 598 at 605, 354 P.3d 841 (2015). ...[W]e reaffirm that the right attaches to jury selection, including for cause and peremptory challenges. Id.

[A] litigant is entitled to have his case submitted to a jury selected in the manner required by law; and further, that, if the selection is not made substantially in the manner required by law, an error may be claimed without showing prejudice, which will be presumed. But it will only be presumed when there has been a material departure from the statute. Rocke Fruit Co. v. Northern P. Ry, 18 Wn.2d 484, 487, 139 P.2d 714 (1943) (If there has been a material departure from the statutes, prejudice will be presumed.).

Mr. Smith's rights were violated by the trial court's gross departure from statute and court rules governing peremptory challenges to prospective jurors.

Statutory interpretation is a question of law review de novo. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1 at 9, 43 P.3d 4 (2002). We [Washington Supreme Court] give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statutes. C.J.C v. Corporation of the Catholic

Bishop, 138 Wn.2d 699 at 708, 985 P.2d 862 (1999); Erection Co. v. Department Labor & Indus., 121 Wn.2d 513, 518, 852 P.2d 288 (1993).

Where the statutory language is clear and unambiguous, the statute's meaning is determined from its language alone; we [the court] may not look beyond the language nor consider the legislative history. See also Multicare Med. Ctr. v. Department of Soc. & Health Servs., 114 Wn.2d 572, 582, 790 P.2d 124 (1990). We [the court] construe an act as a whole, giving effect to all the language used. State v. S.P., 110 Wn.2d 886, 890, 756 P.2d 1315 (1988).

This court [Washington Supreme] interprets court rules as though they were drafted by the legislature. State v. Greenwood, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). The court interprets court rules the same way it interprets statutes, using the tools of statutory construction. See State v. George, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007) ("[T]his court gives effect to the plain language of a court rule, as discerned by reading in its entirety and harmonizing all of its provisions."). Id at 735.

As already discussed, both the court rules and the Washington statute make it very clear that the party that accepts the jury panel can no longer make any more peremptory challenges to perspective jurors from the current group of jurors. That party may still use their remaining challenges to a new group of perspective jurors only. (Emphasis added).

The plain language is unambiguous clear. Trial court simply

did not follow the law and made unauthorized peremptory excuses of jurors.

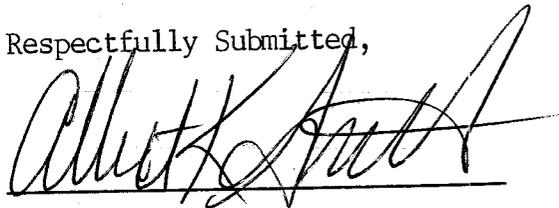
Material departure from the statutory jury selection requires reversal and remand for new trial. City of Bothell v. Barnhart, 172 Wn.2d 233 at 234 (2011). Departure from constitutional jury selection requirements can require no less. State v. Tingdall, 117 Wn.2d 595, 602-03, 817 P.2d 850 (1991).

CONCLUSION

For the foregoing reasons, this Court should review Mr. Smith's conviction and dismiss, or in the alternative, reverse and remand for a new trial.

DATED this 10 day of NOVEMBER, 2017

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Albert K. Smith", written over a horizontal line.

Albert K Smith 987262 / H5-A19
Staffo Creek Correction Center
191 Constantine Way
Aberdeen Wa. 98520

EXHIBIT A

Chapter 39

Aggravating Factors

- § 3901 Aggravating factors—Generally
- § 3902 Statutory aggravating factors—Deliberate cruelty
- § 3903 Statutory aggravating factors—Victim vulnerability
- § 3904 Statutory aggravating factors—Violent offense against pregnant victim
- ~~§ 3905 Statutory aggravating factors—Major economic offense~~
- § 3906 Statutory aggravating factors—Major drug offense
- § 3907 Statutory aggravating factors—Sexual motivation
- § 3908 Statutory aggravating factors—Pattern of sexual abuse
- § 3909 Statutory aggravating factors—Aggravated domestic violence
- § 3910 Statutory aggravating factors—Multiple offense policy
- § 3911 Statutory aggravating factors—Unscored criminal history
- § 3912 Statutory aggravating factors—Resulting pregnancy of child victim of rape
- § 3912.30 Statutory aggravating factors—Predatory relationship with runaway youth *[New]*
- § 3912.50 Statutory aggravating factors—Sabotage of health care, research, or commercial production *[New]*
- § 3912.70 Statutory aggravating factors—Trafficking in minors *[New]*
- § 3913 Nonstatutory aggravating factors—Multiple incidents *[Deleted]*
- ~~§ 3914 Statutory aggravating factors—Sophistication or planning *[Retitled]*~~
- ~~§ 3915 Statutory aggravating factors—Abuse of trust *[Retitled]*~~
- § 3916 Statutory aggravating factors—Future dangerousness *[Retitled]*
- § 3917 Statutory aggravating factors—Invasion of privacy *[Retitled]*
- § 3918 Statutory aggravating factors—Lack of remorse *[Retitled]*
- § 3919 Statutory aggravating factors—Impact on persons other than victim *[Retitled]*
- § 3920 Statutory aggravating factors—Excessive bodily harm *[Retitled]*
- § 3921 Statutory aggravating factors—Other factors *[Retitled]*
- § 3922 Improper aggravating factors *[Deleted]*
- § 3923 Practical considerations

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

EXHIBIT B

conduct, and the defendant paid to view the depictions;²⁸ (29) the offense was intentionally committed because the defendant perceived the victim to be homeless;²⁹ and (30) the offense was a felony against persons that occurred in a courtroom, jury room, judge's chamber, or adjoining waiting room or corridor, while the room was being used for judicial purposes during court proceedings.^{29,50}

The SRA also lists four factors that can be determined by a court without a jury determination: (1) the defendant has committed multiple current offenses and the defendant's high offer score results in some of the current offenses going unpunished;³⁰ (2) the defendant's prior unscored misdemeanor or foreign criminal history results in a presumptive sentence that is clearly too lenient;³¹ (3) the defendant's prior unscored criminal history results in a presumptive sentence that is clearly too lenient;³² and (4) the parties stipulate to an exceptional sentence.³³ It is questionable whether denial of a jury trial on some of these factors is constitutionally proper.³⁴

Case law dealing with aggravating factors should be viewed with caution. Most of the cases arose from the procedure under former law, when judges determined the existence of aggravating factors. Current law has transferred the fact-finding power to jury. Review of jury verdicts may be more deferential than review of judicial findings.³⁵

When a person is convicted as an accomplice, an exceptional sentence can be imposed. There must, however, be a specific jury finding that the defendant had knowledge of the facts underlying the aggravating factor. For example, an exceptional sentence can be imposed for a "major economic offense," which includes offenses that have more than one victim.³⁶ If a person is convicted as an accomplice to such an offense, the jury must find that the person knew that the crime had more than one victim. This requirement applies whenever the conviction could have been based on accomplice liability. If the jury is instructed on both principal and accomplice liability, and there is no specific finding concerning the defendant's knowledge, an exceptional sentence cannot be imposed.³⁶

The following pattern instructions may be applicable:

WPIC 300.02, Aggravated Circumstance Procedure—Factors Alleged—Unitary Trial;

WPIC 300.03, Aggravating Circumstance Procedure—Advance Oral Instruction for Stand-Alone Sentencing Proceeding;

WPIC 300.04, Conclusion of Trial—Introductory Instruction, Stand-Alone Sentencing Proceeding;

WPIC 300.05, Aggravating Circumstance Procedure—Advance Oral Instruction for Bifurcated Trial;

WPIC 300.06, Aggravating Circumstance Procedure—Fac-

EXHIBIT C

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FILED
KITSAP COUNTY CLERK
2015 JUN 7 PM 1:25
DAVID W. PETERSON

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
)	No. 16 1 00732 3
Plaintiff,)	INFORMATION
v.)	(Total Counts Filed - 1)
ALBERT KEVIN SMITH,)	
Age: 54; DOB: 09/23/1961,)	
Defendant.)	

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney, KELLY [REDACTED] WSBA No. 28296, Deputy Prosecuting Attorney, and hereby alleges that contrary to the form, force and effect of the ordinances and/or statutes in such cases made and provided, and against the peace and dignity of the STATE OF WASHINGTON, the above-named Defendant did commit the following offense(s)-

~~CRIMINAL~~
~~Theft in the First Degree~~

On or between ~~December 1, 2014 and October 28, 2015~~ in the County of Kitsap, State of Washington, the above-named Defendant did wrongfully obtain or exert unauthorized control over the property or services of another, to-wit: ~~STABLE TRANSFER~~ or the value thereof, with intent to deprive said person of such property or services, such property or services being in excess of five thousand dollars (\$5,000.00) in value; contrary to the Revised Code of Washington 9A.56.020(1)(a) and RCW 9A.56.030(1)(a).
(MAXIMUM PENALTY-Ten (10) years imprisonment and/or a \$20,000 fine pursuant to RCW 9A.56.030(2) and RCW 9A.20.021(1)(b), plus restitution and assessments.)

JIS Code: 9A.56.030 Theft First Degree

CHARGING DOCUMENT; Page 1 of 3



Tina R. Robinson, Prosecuting Attorney
Adult Criminal and Administrative Divisions
614 Division Street, MS-35
Port Orchard, WA 98366-4681
(360) 337-7174; Fax (360) 337-4949
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I solemnly (or decline) under penalty of perjury under the laws of the State of Washington
that I have probable cause to believe that the above-named Defendant committed the above
offense(s) and that the foregoing is true and correct to the best of my knowledge, information and
belief.

DATED: June 1, 2016
PLACE: Port Orchard, WA

STATE OF WASHINGTON
Kelly McMonaghan
KELLY McMONAGHAN, WSBA No. 28296
Deputy Prosecuting Attorney

All suspects associated with this incident are:

Sharyl Marie Smith
Alben Isaac Smith



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FILED
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DAVID W. PETERSON

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
)	No. 16 1 00732 3
Plaintiff,)	
)	MOTION FOR WARRANT OF ARREST
v.)	AND SETTING BAIL
)	
ALBERT KEVIN SMITH,)	
Age: 54; DOB: 09/23/1961,)	
)	
Defendant.)	

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney of record below-named, and having informed the Court that the Prosecution is filing an Information charging the above-named Defendant with the following ~~in the first degree, hereby~~ moves the Court to determine that there is probable cause to believe the Defendant has committed the crime(s) alleged, to issue a warrant for the arrest of the Defendant, and to set bail in the amount of \$25,000.

~~In support of this motion, the State incorporates by reference the Certification for Determination of Probable Cause affixed to the Information, a copy of which is attached to this motion.~~

DATED this 1st day of June, 2016.

STATE OF WASHINGTON
Kelly Montgomery
KELLY M. MONTGOMERY, WSPA NO. 28296
Deputy Prosecuting Attorney

Prosecutor's File Number-16-140415-14

MOTION FOR WARRANT OF ARREST; Page 1



Tina R. Robinson, Prosecuting Attorney
Adult Criminal and Administrative Divisions
614 Division Street, MS-35
Port Orchard, WA 98366-4681
(360) 337-7174; Fax (360) 337-4949
www.kitsapgov.com/pros

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STATEMENT OF PROBABLE CAUSE

Clerk Code _____

CERTIFICATE OF PROBABLE CAUSE

(Required for all probable cause arrests and all cases submitted for criminal prosecution)

SUSPECT NAME: ALBERT K SMITH (09/23/1961)

COURT: Superior District Juvenile Bremerton Municipal

ARREST CRIME: 1) Possession of Stolen Property, 1st Degree

2)

3)

ARREST DATE & TIME:

ARREST LOCATION:

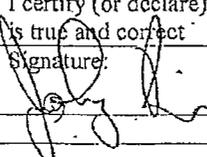
Determined via investigation that probable cause exists to arrest ALBERT SMITH for the above mentioned offense.

ALBERT was issued numerous checks by his wife SHARYL SMITH who was employed at Spaeth - Allied Van Lines at 1229 Hollis St in Bremerton from Oct 2014 until Oct 2015. The termination was a direct result of [redacted] staff discovering that SHARYL had exhausted the company bank account without authorization.

[redacted] was later discovered that SHARYL had ordered a book of checks without company knowledge, wrote checks from the company account from the book of checks she had no authorization ordering and issued the checks to her husband ALBERT SMITH without company knowledge or authorization.

I discovered via investigation, SHARYL wrote 176 unauthorized checks to ALBERT from Dec 2014 to Oct 2015, totaling \$264,500.00. I obtained SHARYL's signature sample via Washington (WA) State DOL to compare the writing I located on the checks. I discovered numerous similarities between SHARYL's DOL signature sample and the writing on the checks issued to ALBERT.

It should be noted, ALBERT has never been employed by Spaeth - Allied Van Lines.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.		
Signature: 	Print Name: [redacted]	Badge # 425

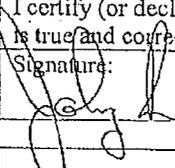
[redacted]	Place: Bremerton, WA	Agency: Bremerton PD
[redacted]	Case #: B15-008697	Page 1 of 2

RECEIVED: 2/25/2016
Kitsap County Prosecuting Attorney

STATEMENT OF PROBABLE CAUSE

During my investigation I obtained ALBERT's signature sample from the Washington State DOL and discovered numerous similarities between the DOL signature sample and ALBERT's signature on the back of the checks issued by SHARYL.

The frequency of the written checks were written either every day or every other day and issued to ALBERT who would cash the checks at Money Tree locations in Silverdale or Bremerton.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct		
Signature: 	Print Name: J Rivera	Badge # 425
Date: 02/24/2016	Place: Bremerton, WA Case #: B15 008697	Agency: Bremerton PD Page 2 of 2

~~RECEIVED~~
Kitsap County Prosecuting Attorney

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IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
)	No. 16 1 00732 3
Plaintiff,)	
)	WARRANT OF ARREST
v.)	
)	
ALBERT KEVIN SMITH,)	
Age: 54; DOB: 09/23/1961,)	
)	
Defendant.)	

To: THE SHERIFF OF KITSAP COUNTY—GREETINGS:

An Information having been filed in the Superior Court of the State of Washington for the County of Kitsap charging the above-named Defendant, ALBERT KEVIN SMITH, with the crime(s) of ~~theft in the first degree~~

YOU ARE THEREFORE commanded forthwith to arrest the above-named ALBERT KEVIN SMITH and bring him or her before this Court to answer the said Information. Or, if the said Court has adjourned for the session, that you deliver him or her to the custody of the Jailer of the County of Kitsap.

By order of the Court.

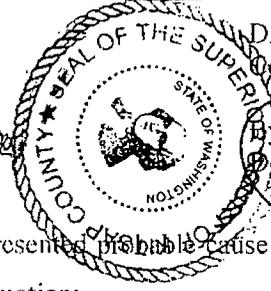
WARRANT OF ARREST; Page 1



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WITNESS the Honorable WILLIAM C. HOUSER, Judge of the said Superior Court, and
the seal of said Court affixed this 7 day of June, 2016.



DAVID W. PETERSON
County Clerk and Clerk of the Superior Court

[Signature]
Deputy

Bail fixed at ~~\$25,000~~ ^{\$60,000}.

The State having presented probable cause to arrest the above-named Defendant for the
felony charged in said Information;

IT IS THE ORDER of this Court that if said Defendant cannot be located within the
jurisdiction of Kitsap County, State of Washington, service of this warrant upon the Defendant by
telegram or teletype to police officers outside the jurisdiction of said County, pursuant to RCW
10.31.060, is hereby authorized.

DATED this 7th day of June, 2016.

[Signature]
JUDGE

WILLIAM C. HOUSER

WARRANT OF ARREST; Page 2



Adult Criminal and Administrative Divisions
614 Division Street, MS-35
Port Orchard, WA 98366-4681
(360) 337-7174; Fax (360) 337-4949
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EXHIBIT D

²⁹State v. Ramires, 109 Wn.App. review denied, 146 Wn.2d 1022, 52 749, 764-65, 37 P.3d 343, 351-52, P.3d 521 (2002).

§ 3904 Statutory aggravating factors—Violent offense against pregnant victim

- n. 1. *(Replace footnote with the following):*
West's RCWA 9.94A.535(3)(c).
- n. 2. *(Replace footnote with the following):*
West's RCWA 9.94A.030(45).

~~**§ 3905 Statutory aggravating factors—Major economic offense**~~

- n. 1. *(Replace footnote with the following):*
West's RCWA 9.94A.535(3)(d).
- n. 2. *(Replace footnote with the following):*
West's RCWA 9.94A.535(3)(d)(i).
- n. 3. *(Replace footnote with the following):*
(Add after footnote 10):
~~An identity theft was held to be a major economic offense when the defendant used three different false identities to acquire title to several different assets, including a house.~~
- n. 4. *(Replace footnote with the following):*
West's RCWA 9.94A.535(3)(d)(ii).
- n. 5. *(Replace footnote with the following):*
West's RCWA 9.94A.535(3)(d)(iii).
- n. 5. *(Replace footnote with the following):*
West's RCWA 9.94A.535(3)(d)(iv).

~~¹⁰⁵⁰State v. Baldwin, 141 Wn.App. 631, 643-45, 45 P.3d 1093, 1100-01 (2002); ¹⁰⁶⁹State v. [redacted], 150 Wn.2d 448, 78 P.3d 1055 (2002).~~

(Replace the last paragraph with the following):
~~The apparent reason that there are so few cases on major economic offenses is that planning and sophistication,¹⁴ and abuse of trust¹⁵ are both independent aggravating factors for both economic and non-economic offenses. Multiple incidents were also formerly recognized as a nonstatutory aggravating factor. Accordingly, when these factors were present, there has been little reason to take the further step of characterizing the crime as a major economic offense.~~

The following pattern instruction may be applicable:
~~WPIC 300.13, Aggravating Circumstance—Major Economic Offense.~~

¹⁴*(Replace footnote with the following):*
West's RCWA 9.94A.535(3)(n); see § 3915.

¹⁵*(Replace footnote with the following):*
State v. Armstrong, 106 Wn.2d 547, 550, 723 P.2d 1411, 1414 (1986).

§ 3905. Statutory Aggravating Factors—Major Economic Offense

It is an aggravating factor that the crime constituted a major economic offense or series of offenses.¹ Such an offense is identified by consideration of the following factors: (1) the offense involved multiple victims or multiple incidents per victim;² (2) it involved attempted or actual monetary loss substantially greater than typical;³ (3) it involved a high degree of sophistication or planning or occurred over a lengthy period of time;⁴ (4) the defendant used her or his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense.⁵ This aggravating factor is an exception to the rule against basing an exceptional sentence on facts that establish additional crimes.⁶

There are relatively few cases dealing with major economic offenses. The first case to rely on this factor involved the "quintessential crime" of this category: a multi-million dollar securities fraud. Misappropriation of \$390,000 in partnership funds over a 27-month period of time was held to involve a monetary loss greater than typical for first degree theft. It also satisfied the factor that the crime occur over a lengthy period of time.⁸ Although the crime of securities fraud typically requires some degree of sophistication, a finding of a high degree of sophistication or planning was deemed warranted where the defendant's scheme was sufficiently elaborate.⁹ The factor addressing use of a position of trust, confidence, or fiduciary responsibility has been held to be a valid aggravating circumstance for crimes committed by employees against their former employers.¹⁰

§ 3905

1. West's RCWA 9.94A.390(2)(d).
2. West's RCWA 9.94A.390(2)(d)(i).
3. West's RCWA 9.94A.390(2)(d)(ii).
4. West's RCWA 9.94A.390(2)(d)(iii).
5. West's RCWA 9.94A.390(2)(d)(iv).
6. West's RCWA 9.94A.370(2). See, e.g., *State v. Argo*, 81 Wn.App. 552, 570-71, 915 P.2d 1103, 1112-13 (1996) (noting that the trial court had properly taken into account additional uncharged crimes of a similar nature in finding that the offense involved multiple victims). The statute that creates the exception, West's RCWA 9.94A.370(2), refers to West's RCWA 9.94A.390(2)(c) (d), (f), and (g). At the time these references were updated in 1996, the "major economic offense" aggravating factor was codified as West's RCWA 9.94A.390(2)(c). A 1996 amendment resulted in the "major economic offense" factor being moved to subdivision (2)(d). Laws of 1996, ch. 121, § 1. As indicated in the Reviser's Note, West's

RCWA 9.94A.370(2) does not reflect this change. Although section 390(2)(d) is among the exceptions, the congruence is at present fortuitous.

7. *State v. Oxborrow*, 106 Wn.2d 525, 532-33, 723 P.2d 1123, 1128 (1986).

8. *State v. Branch*, 129 Wn.2d 635, 646-47, 919 P.2d 1228, 1234 (1996).

9. *State v. Argo*, 81 Wn.App. 552, 571, 915 P.2d 1103, 1113 (1996); see *State v. Branch*, 129 Wn.2d 635, 649, 919 P.2d 1228, 1235 (1996) (declining to address issue of whether finding of "considerable planning" sufficed to establish "high degree of ... planning" as required by statute); *State v. Ford*, 87 Wn.App. 794, 942 P.2d 1064 (1997) (trial court found high level of planning and sophistication based on defendant's con scheme used to dupe several elderly victims out of savings).

10. *State v. Elza*, 87 Wn.App. 336, 341-42, 941 P.2d 728, 731 (1997) (to facilitate robbery, defendant shared with accomplices

Although the statute allows a finding of a major economic offense to be based on the existence of multiple victims or incidents, this can only be true if the multiple victims or incidents are not made the basis of separate counts. Otherwise, the multiplicity is taken into account in determining the standard range.¹¹ Thus, it was held that the trial court properly relied on the existence of multiple incidents as an aggravating factor where each count of conviction encompassed multiple acts as to each victim.¹² Similarly, an exceptional sentence for one count of theft was proper where 180 limited partners lost money as a result of defendant's personal use of partnership funds.¹³

The apparent reason there are so few cases on major economic offenses is that multiple incidents,¹⁴ planning and sophistication,¹⁵ and abuse of trust¹⁶ have all been recognized as independent aggravating factors for both economic and non-economic offenses. Accordingly, when one of these factors is present, there is little reason for the court to take the further step of characterizing the crime as a major economic offense.

Library References:

C.J.S. Criminal Law § 1479.
West's Key No. Digests, Criminal Law ⇨1275.

§ 3906. Statutory Aggravating Factors—Major Drug Offense

It is an aggravating factor that the offense was a major violation of the Uniform Controlled Substance Act related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition.¹ This aggravating factor is an exception to the rule against basing an exceptional sentence on facts that establish additional crimes.² The presence of any of the following factors identifies a drug

information gained during prior employment, such as location of side door, victim's schedule, location of office, and victim's money handling procedures); *State v. Bissell*, 53 Wn.App. 499, 767 P.2d 1388 (1989) (defendant used keys and knowledge about former employer's alarm system to facilitate burglary).

11. Cf. *State v. Fisher*, 108 Wn.2d 419, 425-26, 739 P.2d 683, 686-87 (1987) (multiple sex offenses against same victim).

12. *State v. Argo*, 81 Wn.App. 552, 570-71, 915 P.2d 1103, 1112-13 (1996).

13. *State v. Branch*, 129 Wn.2d 685, 647-48, 919 P.2d 1228, 1234 (1996).

14. *State v. Armstrong*, 106 Wn.2d 547, 590, 725 P.2d 1114, 1124 (1986). See § 3913.

15. *State v. Nguyen*, 68 Wn.App. 906, 919, 847 P.2d 936, 943, review denied, 122

Wn.2d 1008, 859 P.2d 603 (1993); *State v. Wood*, 57 Wn.App. 792, 801, 790 P.2d 220, 225, review denied, 115 Wn.2d 1015, 797 P.2d 514 (1990); see § 3914.

16. *State v. Fisher*, 108 Wn.2d 419, 427, 739 P.2d 683, 687 (1987); see § 3915.

§ 3906

1. West's RCWA 9.94A.390(2)(e).

2. The statute that creates the exception, West's RCWA 9.94A.370(2), refers to West's RCWA 9.94A.390(2)(c), (d), (f), and (g). At the time these references were updated in 1996, the "major VUCSA" aggravating factor was codified as West's RCWA 9.94A.390(2)(d). But another 1996 amendment resulted in the "major VUCSA" factor being moved to subdivision (2)(e). Laws of 1996, ch. 121, § 1. As indicated in the Reviser's Note, West's RCWA 9.94A.370(2)

EXHIBIT E

§ 3912.50 Statutory aggravating factors—Sabotage of health care, research, or commercial production [New]

It is an aggravating factor if a crime is committed with the intent to obstruct or impair health care (either human or animal), agricultural or forestry research, or commercial production.¹ As yet, there are no published cases construing this factor.

¹West's RCWA 9.94A.535(3)(k).

§ 3912.70 Statutory aggravating factors—Trafficking in minors [New]

When a defendant is convicted of trafficking in the first or second degree, it is an aggravating factor that any victim was a minor.¹ The crime of trafficking involves recruiting, harboring, transporting, or obtaining persons who have been caused to engage in forced labor or involuntary servitude by force, fraud, or coercion. The crime also applies to defendants who benefit financially from participating in a venture that engages in such acts.² As yet, there are no reported decisions construing this factor.

¹West's RCWA 9.94A.535(3)(l).

²West's RCWA 9A.40.100.

~~**§ 3913 Nonstatutory aggravating factors—Multiple incidents [Deleted]**~~

(Delete entire section.)

§ 3914 Statutory aggravating factors—Sophistication or planning [Retitled]

(Replace text preceding footnote 3 with the following):

It is an aggravating factor that the offense involved a high degree of sophistication or planning.¹ This was previously recognized as a non-statutory aggravating factor.²

¹*(Replace footnote with the following):*

West's RCWA 9.94A.535(2)(m). This factor is also a defining characteristic of both major economic offenses

and major drug offenses. West's RCWA 9.94A.535(3)(d)(iii), (3)(e)(v); see §§ 3905, 3906.

²State v. Wood, 57 Wn.App. 792, 801, 790 P.2d 220, 225 (1990).

(Add after footnote 4):

~~A high degree of sophistication and planning is required.~~^{4.05}

EXHIBIT F

10:02 Court and parties discuss if there are enough jurors remaining. Ms. Goodell will not use all of her peremptory challenges if need be. Mr. McPherson agrees that will be acceptable since he will be allowed his 7 challenges.

10:08 The jury panel enters the courtroom.

10:10 Court informs the jury panel that the court has been busy working this morning. The court inquires if anyone knows the name Sharyl Smith. No one indicates they know her.

10:10 Court informs the jury panel how the peremptory challenges are done.

10:11 Peremptory Challenges

<u>STATE</u>	<u>DEFENSE</u>
1	5
8	12
10	4
Accepts	6
Accepts	29
Accepts	31
32	34

10:17 Ms. Goodell argues to use a peremptory challenge. Court informs Ms. Goodell that she has used her 7 challenges. Ms. Goodell requests to be heard outside the presence of the jury panel.

10:18 Jurors leave the courtroom.

10:18 Court hears argument regarding peremptory challenges as to whether an accepted constitutes a challenge. Court cites case law. Mr. McPherson requests a short recess to get his rule book. Court grants.

10:21 Court is at recess.

10:26 Court is in session.

10:26 Court – Ms. Goodell can only challenge seat #6.

10:27 Jurors enter the courtroom.

10:28 Peremptory Challenges

<u>STATE</u>	<u>DEFENSE</u>
30	

10:28 Court thanks and excuses juror #39 – the only juror left after the peremptory challenges.

Rnd No	Seat No	Candidate ID	Name	Outcome (see Legend below)																		
				J	A	CP	CD	PD	PP	JC	C	NU										
24	<u>5</u>	0000248257	LEMLEY, TRAVIS	X																		
25	<u>8</u>	0000342410	SILVA, LEROY	X																		
26	<u>12</u>	0000074966	SWEET ROBINSON, ROBIN	X																		
27	<u>10</u>	0000301429	CAMELIO, PAUL	X	X																	
28	<u>4</u>	0000305576	LOZINSKI, CATHLIN	X																		
29	---	0000186514	THOMAS, RUTH								X											
30	---	0000150402	SMITH, CLIFFORD								X											
31	---	0000177886	VILLIERS, MISHELE									X										
32	---	0000352665	JOHNSON, JUSTIN										X									
33	---	0000263704	BRANAUGH, DAVID									X										
34	---	0000050486	TRIMBLE, STEPHEN										X									
35	---	0000111203	ONEIL, PATRICK									X										
36	---	0000098864	DAVIS, NICHOLAS											X								
37	<u>6</u>	0000343717	JOHNSTON, BRIAN	X																		
38	---	0000033053	GOODMAN, JAMES																	X		
39	---	0000217679	ROBINSON, MARK																			X

Legend

J = Juror, A = Alternate, CP = For Cause (P), CD = For Cause (D), PD = Peremptory (D), PP = Peremptory (P), JC = Joint Cause, C = Court, NU = Not Used

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

STATE OF WASHINGTON

VS

ALBERT SMITH

Hon: KEVIN D. HULL

Court Reporter: LISA McANENY

Court Clerk: TONI JONKER

Date: February 27, 2017

Cause No: 16-1-00732-3

Day 1 of 4

Page 1 of 19

This matter comes before the Court for Trial.

The State of Washington appeared through counsel, Deputy Prosecuting Attorney, Emily Goodell.

The respondent is present, not in custody, with his counsel Joseph McPherson.

THE FOLLOWING JURORS WERE DULY SWORN AND IMPANELLED TO TRY THIS CASE:

- | | |
|--------------------------|----------------------------------|
| 1) Darold Bivens - 22 | 8) LeRoy Silva - 25 |
| 2) Martha Schoemaker - 2 | 9) David Donovan - 16 |
| 3) Thomas Henning - 21 | 10) Paul Camelio *Alternate - 27 |
| 4) Cathlin Lozinski - 4 | 11) Norma Domingo - 14 |
| 5) Travis Lemley - 24 | 12) Robin Sweet Robinson - 26 |
| 6) Brian Johnston - 37 | 13) Tony Fassio - 13 |
| 7) Sandra Robbins - 7 | |

~~THE NUMBERS TO THE RIGHT OF EACH JUROR INDICATES THEIR ORIGINAL PANEL NUMBER # BEFORE BEING SELECTED AS JUROR.~~

DECLARATION OF SERVICE BY MAIL
GR 3.1

FILED
COURT OF APPEALS
DIVISION II

2017 NOV 15 AM 11:52

STATE OF WASHINGTON

BY Ch ~~DEPUTY~~

I, Albert K. Smith, Declare and say:

That on the 10th day of November, 2017, I deposited the following documents in the Stafford Creek Corrections Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 50397-2-II/State v. Albert K. Smith:

Additional Grounds

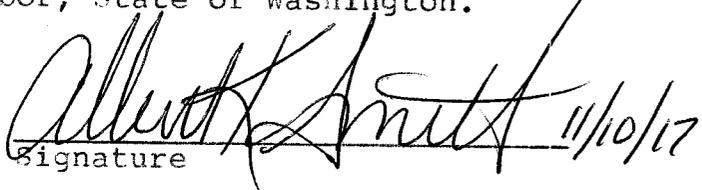
Addressed to the following:

Washington State
Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454
Derek Byrne, Clerk/Administrator

Randall Avery Sutton
Kitsap C. Dep. Pros. Atty.
614 Division St.
Port Orchard, WA 98366-4614

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

DATE THIS 10th day of November, 2017, in the City of Aberdeen, County of Grays Harbor, State of Washington.

 11/10/17
signature

Albert K. Smith
Print Name

DOC 987262 Unit H5A19U
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520