STATE OF WASHINGTON COURT OF APPEALS
DIVISION II

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY CRC
DEPUTY

STATE OF WASHINGTON, RESPONDENT, V. ADAM JOSEPH PERSELL, APPELLANT.	COURT OF APPEALS NO. 52236-5-II STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (RAP 10.10)

A. IDENTITY OF APPELLANT. ADAM JOSEPH PERSELL, AN INMATE INCARCERATED AT WASHINGTON STATE PENITENTARY, HEREBY BRINGS FORTH THIS PRO SE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW. APPELLANT HAS RECEIVED AND REVIEWED THE OPENING BRIEF PREPARED BY APPELLATE COUNSEL. SUMMARIZED BELOW WITHOUT REFERENCE TO THE RECORD OR CITATION OF LEGAL AUTHORITIES ARE THE ADDITIONAL GROUNDS FOR REVIEW NOT ADDRESSED IN THAT BRIEF.

B. GROUNDS AND ARGUMENTS.

ADDITIONAL GROUND 1. APPELLANT CONTENDS THAT HIS CONVICTION UNDER THE PERSISTENT OFFENDER ACCOUNTABILITY ACT (POAA) VIOLATES HIS 5TH AMENDMENT CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY. BOTH THE U.S. CONSTITUTION AND THE WASHINGTON STATE CONSTITUTION PROHIBIT PLACING ANY PERSON IN JEOPARDY TWICE FOR THE SAME OFFENSE. BY CONVICTING THE APPELLANT WITH A SENTENCE OF LIFE WITHOUT PAROLE BECAUSE HE HAS A PREVIOUS FELONY CONVICTION, HE IS BEING PUNISHED TWICE

FOR AN OFFENSE HE HAS ALREADY BEEN PUNISHED FOR. WITHOUT A PREVIOUS CONVICTION, APPELLANT'S CONVICTION ON THE MOST RECENT CHARGES WOULD HAVE RESULTED IN A STANDARD RANGE SENTENCE OF 120.5 MONTHS, IF RUN CONCURRENT. BY SENTENCING HIM UNDER POAA TO A LWOP SENTENCE, HE IS PLACED AT JEOPARDY A SECOND TIME FOR A PREVIOUS CRIME, IN VIOLATION OF THE 5TH AMENDMENT.

ADDITIONAL GROUND 2. APPELLANT CONTENDS THAT THE NECESSARY ELEMENT OF HIS CRIMES OF ATTEMPTED RAPE 1 AND ATTEMPTED RAPE 2, WHICH BOTH RELY ON EVIDENCE THAT HE TOOK A "SUBSTANTIAL STEP" TOWARD COMMITTING THAT CRIME, IS CONSTITIONALLY VAGUE AND GROUNDS FOR REVERSAL. THE PHRASE "SUBSTANTIAL STEP" IS NOT DEFINED BY STATE OR FEDERAL STATUTE, AND APPELLANT CONTENDS THAT IT IS AN IMPRECISE, OBSCURE EXPRESSION OF UNCERTAIN AND DUBIOUS DEFINITION. IN THE JURY INSTRUCTIONS FOLLOWING HIS TRIAL, THE COURT INSTRUCTED THE JURY THAT A "SUBSTANTIAL STEP" WAS "CONDUCT THAT STRONGLY INDICATES A CRIMINAL PURPOSE AND THAT IS MORE THAN MERE PREPERATION." APPELLANT CONTENDS THAT HIS CONDUCT DID NOT RISE TO THE LEVEL OF CRIMINAL CONDUCT MERELY BECAUSE HE SHOWED UP AT AN APARTMENT TO MEET WHAT HE BELIEVED TO BE WAS AN ADULT MOTHER OF THREE CHILDREN, AND THAT THE JURY WOULD NOT HAVE CONVICTED IF THE ELEMENT OF A "SUBSTANTIAL STEP" WAS NOT SO NEBULOUS AND CONFUSING. APPELLANT CONTENDS THAT THIS PHRASE IS SO VAGUE THAT IT PREVENTED HIM FROM RECEIVING A FAIR TRIAL, AND THEREFORE VIOLATES HIS 6TH AMENDMENT RIGHT TO DUE PROCESS.

ADDITIONAL GROUND 3. APPELLANT CONTENDS THAT THE TRIAL COURT ERRED IN FAILING TO ALLOW AN ENTRAPMENT DEFENSE, WHICH WAS DENIED BY THE COURT IN A PRE-TRIAL HEARING. LAW ENFORCEMENT DID MORE THAN MERELY PROVIDE THE APPELLANT AN OPPORTUNITY TO COMMIT A CRIME HE WAS ALREADY PREDISPOSED TO COMMIT: THEY DESIGNED THE CRIME, ENGINEERED THE DETAILS TO MEET PRECISE STATUTORY REQUIREMENTS OF SPECIFIC CRIMES, CONSTANTLY REDIRECTED THE CONVERSATIONS VIA TEXT MESSAGES TO FOCUS ON CHILDREN OR OTHER CRIMINAL ELEMENTS, REPEATEDLY RECONTACTED THE APPELLANT AFTER HE SHOWED DOUBT, HESITATION AND RELUCTANCE, AND LURED HIM INTO COMING TO THE TRAP SITE AFTER HE REPEATEDLY REQUESTED TO SIMPLY MEET IN A PUBLIC PLACE WHERE THERE WOULD BE NO POSSIBLE QUESTION THAT HE HAD NO INTENT TO ENGAGE IN CRIMINAL SEXUAL ACTIVITY. THE REQUISITE ELEMENTS OF "INTENT" AND "SUFFICIENT STEP" WERE IN FACT NOT SATISFIED IN LAW ENFORCEMENT'S MIND UNTIL THE APPELLANT WAS BADGERED INTO DRIVING TO THEIR TRAP SITE BY THE UNDERCOVER OPERATIVE, AFTER CLEARLY BEING RELUCTANT TO DO SO. THE APPELLANT WAS NEVER ALLOWED TO PRESENT EVIDENCE TO THE JURY TO ESTABLISH A DEFENSE OF ENTRAPMENT.

ADDITIONAL GROUND 4. APPELLANT CONTENDS THAT THE STATE SHOULD ADOPT THE FEDERAL STANDARD FOR ENTRAPMENT REQUIRING THAT THE DEFENDANT DEMONSTRATE HE WAS PREDISPOSED TO COMMIT THE CRIME BEFORE THE CRIMINAL ACTS WERE ACTUALLY COMMITTED, RATHER THAN THE STATE STATUTORY STANDARD OF MERELY SHOWING THAT HE DID NOT OTHERWISE INTEND TO COMMIT THE CRIME. THE APPELLANT RESPONDED TO AN AD ON CRAIGSLIST FOR ADULTS IN THE "18 AND OLDER" SECTION, AND CONDUCTED AN EXCHAGED OF TEXT MESSAGES WITH "HANNAH," WHO HE

BELIEVED TO BE AN ADULT FEMALE. APPELLANT NEVER AGREED TO ANY SEXUAL CONTACT WITH "HANNAH'S" THREE CHILDREN, DESPITE HER CONSTANT OFFERS. HE REQUESTED TO MEET IN A PUBLIC PLACE WHERE THERE WOULD HAVE BEEN NO CONFUSION ABOUT HIS LACK OF INTENT TO HAVE SEX WITH ANYONE, AND ONLY AFTER PERSISTENT INDUCEMENT BY POLICE DID HE CAPITULATE AND AGREE TO A BRIEF "MEET AND GREET" DURING HIS DINNER BREAK FROM WORK. THE APPELLANT HAD NO INTENT TO COMMIT THE CRIMES CHARGED ON THE EVENING OF SEPTEMBER 9, 2016, AND DID NOT ARRIVE AT THE LOCATION WITH ANY CONDOMS, LUBRICANT, DRUGS OR ALCOHOL, OR SEX TOYS, EVEN THOUGH HE HAD BEEN REPEATEDLY CAUTIONED THAT SOME OF THESE ITEMS WOULD BE MANDATORY FOR ENGAGING IN ANY SEXUAL CONTACT. IN THE ONLY SPONTANEOUS DECLARATION MADE AT THE TIME OF HIS ARREST, HE AGAIN ASSERTED THAT HE HAD COME TO MEET THE "MOTHER", THE SO-CALLED "HANNAH" HE HAD BEEN TEXTING. NOT ONLY WAS THERE INSUFFICIENT EVIDENCE TO PROVE THAT THE APPELLANT HAD INTENT TO COMMIT THE CRIMES CHARGED, OR THAT HE TOOK ANY SUBSTANTIAL STEP TOWARD THEIR COMMISSION, THERE WAS AMPLE EVIDENCE TO ESTABLISH AN AFFIRMATIVE ENTRAPMENT DEFENSE. THE SIMPLE TRUTH IS THAT THE APPELLANT WOULD NOT HAVE GONE TO THAT APARTMENT THAT NIGHT, AND WOULD NOT BE IN PRISON TODAY, EXCEPT FOR THE EGREGIOUS MISCONDUCT OF LAW ENFORCEMENT IN DESIGNING A CRIME, ENGINEERING ITS DETAILS, AND LURING AND INDUCING HIM INTO ACTS HE OTHERWISE HAD NO INTENT TO COMMIT.

<u>ADDITIONAL GROUND 5.</u> APPELLANT CONTENDS THAT THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CHARGES AFTER THE MARCH 26, 2018 HEARING ON DEFENSE COUNSEL'S MOTION TO DISMISS BASED ON OUTRAGEOUS

GOVERNMENTAL CONDUCT AND EGREGIOUS CONSTITUTIONAL VIOLATIONS.

THE POLICE INSTIGATED A CRIME; PERSISTENTLY SOLICITED THE APPELLANT TO COMMIT THE CRIME; THE POLICE CONTROLLED, AND IN FACT ENGINEERED, THE CRIMINAL ACTIVITY; AND THE POLICE COMMITTED CRIMINAL CONDUCT IN OPERATING THE "STING OPERATION" BY CORRUPT PROFITEERING AND ILLEGAL FUNDRAISING WITHOUT STATUTORY AUTHORITY.

ADDITIONAL GROUND 6. APPELLANT SEEKS TO RAISE AND PRESERVE THE ISSUE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. TRIAL COUNSEL'S DEFICIENT PERFORMANCE FELL BELOW THE OBJECTIVE STANDARD OF REASONABLENESS, AND BUT FOR COUNSEL'S PERFORMANCE, THE OUTCOME OF HIS TRIAL WOULD HAVE BEEN DIFFERENT. THEREFORE, APPELLANT'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE 6TH AMENDMENT WAS VIOLATED. APPELLANT AGREED WITH TRIAL COUNSEL THAT HE WOULD NOT TESTIFY, BUT UNBEKNOWNEST TO HIM, TRIAL COUNSEL HAD NO INTENTION OF PRESENTING ANY DEFENSE AT ALL, AND APPELLANT WAS SHOCKED AND HORRIFIED WHEN HIS COUNSEL RESTED HIS CASE IMMEDIATELY AFTER THE PROSECUTION RESTED, WITHOUT CALLING ANY WITNESSES OR PUTTING ON A DEFENSE. TRIAL COUNSEL FAILED TO RAISE THESE ISSUES IN DEFENSE:

(6A) Phone records show that on September 9, 2016, after appellant's arrest at 9:12pm, police accessed his unlocked cell phone and sent four (4) test text messages from it at 10:43pm, 11:14pm, 11:46pm, and 11:46pm, all to a police cellphone (360-529-3536). However, police failed to secure a search warrant for the phone until September 12, 2016 at 3:15pm. Accessing appellant's cellphone and sending test text messages without a search warrant constituted an illegal search in violation of appellant's

4th Amendment rights protecting him from illegal search and seizure. Therefore, all of the evidence recovered from appellant's cellphone, including all text messages and confirmation texts to establish that it was his phone are fruits of the poisioness tree and should be excluded. Defense counsel failed to raise this issue.

(6B) A police investigator testified for the prosecution that the last time the police sent a text message to the appellant's cellphone was a 9:12pm "Confirmation" text at the time of arrest on September 9, 2016. This testimony was given under oath, and is contradicted by phone records. Defense counsel failed to challenge the testimony and impeach the witness.

(6C) An investigator for the defense, Dave Matthews, gathered potentially exculpatory evidence prior to trial, and defense counsel failed to present evidence and/or witnesses to illustrate the results of his investigation. This included evidence about the appellant's work history and behavior, attendance record, and the time restrictions on the appellant on the evening of his arrest, which would have clearly precluded any opportunity to engage in anything beyond the "meet and greet" that he agreed to in a text message with police undercover officers.

(6D) Defense counsel failed to call any witnesses and elicit any testimony about appellant's work record and history, attendance record, time restrictions on the evening he was arrested, degree of freedom during work hours to engage in non-work activity, and/or testimony about appellant's character.

(6E) Defense counsel failed to object to Detective McDonald's prejudicial and inadmissable testimony about the notification ring-tone on appellant's cellphone. The detective offered opinion testimony without

sufficient factual basis when she testified that the ringtone said "Woo-hoo ha ha, touch my dick," and the prosecution used this unchallenged testimony during closing arguments to the jury to imply that it demonstrate that the appellant possessed the requisite intent to commit the crimes of Rape of A Child 1 and/or 2. The detective's testimony inappropriately encroached on the duties that are the purview of the jury. The 6th Amendment to the U.S. Constitution gives the jury alone the ultimate power to weigh evidence and determine facts, and to determine guilt or innocence. Parenthetically, the trial court erred in admitting this evidence, but that issue is addressed in the Appellant's Brief prepared by appellate counsel. Defense counsel should have objected to this testimony at trial.

(6F) Defense counsel ignored appellant's requests that the cellphone itself be presented to the jury, and that the video of the arrest be played for the jury, so that the jury could hear that the notification ringtone said "Woo-hoo haha, text message" and not "touch my dick." The only testimony offered about the ringtone was that offered by the prosecution, and was prejudicial and went toward establishing intent.

(6G) At defense counsel's direction, a psychological evaluation was conducted on appellant prior to trial by a psychologist and sexual deviency expert, whose findings indicated no mental disease or defect and the presence of no compelling or overwhelming deviant sexual compulsion. However, defense counsel failed to submit the report as evidence or call the examiner as a witness, and allowed the prosecution to paint the appellant as a sexual deviant inclined to commit sexual offenses against children, thereby establishing the element of intent for the prosecution's case without challenge.

(6H) Defense counsel failed to pursue an entrapment defense and failed to object on the record to the court's refusal to allow this defense.

In summary of Ground 6, appellant contends that his trial counsel's performance fell below a standard of reasonableness and was deficient beyond a mere disagreement about legitimate trial strategy. Therefore, his right to a fair trial was violated, in contradiction to the 6th Amendment of the U.S. Constitution and Article 1, Section 22 of the Washington State Constitution, which both guarantee the right to a fair trial before an impartial trier of fact.

C. Conclusion.

Appellant asks the court to review his issues stated in this Statement of Additional Grounds, and reverse his convictions.

Per DOC Policy 590.500, appellant received assistance of another prison inmate to complete this SAG, but hereby adopts it entirely as his own. However, appellant asks the court to take notice that this SAG was completed in 6 hours without access to the prison law library or appellant's legal paperwork, because his Motion for An Extension of Time filed on May 28, 2019 was denied by the court clerk.

Dated this 7th Day of June, 2019.

Respectfully submitted

X

Adam Joseph Persell DOC# 838791
Appellant Pro Se

State of Washington v. Adam J. Persell	COA NO. 52236-5-II Affidavit of Service By Mailing

I, Adam J. Persell, being sworn upon oath, do hereby certify that I have served the following documents:

Statement of Additional Grounds

Upon: Washington State Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

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BY _____
DEPUTY

By placing same in the United States mail at:
Washington State Penitentary
1313 N. 13th Ave.
Walla Walla, WA 99362

On this 7th Day of June, 2019.

X _____
Adam J. Persell # 838791
Ranier Unit B-310
Washington State Penitentary
1313 N. 13th Ave.
Walla Walla, WA 99362

Affidavit pursuant to 28 USC 1746 Dickerson v. Wainwright, 626 F.2d. 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.