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FILED
COURT OF APPEALS
DIVISION II

2020 MAR 13 PM 1:05

STATE OF WASHINGTON
BY

No. 53771-1 II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

Wendell Maurice Clark,
Appellant,

v.

STATE OF WASHINGTON,
Appellee.

STATEMENT OF ADDITIONAL GROUNDS, RAP 10.10

name: Wendell Maurice Clark
DOC# 416403, Unit G-A20-U
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520-9504

- Assignments of Error's cont.

I, Wendell Maurice Clark, for the purpose of My statement of additional grounds, to be added onto My direct appeal brief, state the following in regard to My Jury trial: that there was an additional act of prosecutorial misconduct (besides the two other instances brought forth by appellate counsel) that trial court erred at least twice, once by allowing in evidence and testimony and secondly by allowing in an instruction for jury to consider during deliberations. In addition there were at least five other instances (besides the one incident of deficient counsel mentioned by appellate attorney) that defense counsel was deficient. Those are:

A.) Trial counsel performed deficiently, by stating in court, something that counsel, knew in Fact, to be the opposite, of what I had previously discussed with him [redacted], which was opposite also of the facts I reasonably expected counsel to relay to the court.

B.) Trial counsel performed deficiently and provided ineffective assistance of Counsel, when defense counsel contradicted and impeached testimony, that I gave during his direct exam of me on witness stand. Trial counsel, inexplicably, stated during his closing argument that I had done exactly what I had testified under oath to not doing, during his direct exam of me.

 - Assignment of Errors - cont

C.) Trial court performed deficiently when he failed to cross examine one of the State's two forensic witnesses, Forensic scientist and DNA expert Trevor Chowen.

D.) Trial counsel performed deficiently when he introduced instruction number ten in for jury deliberations.

E.) Trial counsel performed deficiently when he failed to present evidence or present a theory based on that evidence, that could cast doubt on my guilt.

2.) Prosecutorial misconduct - Occurred, when prosecutor expressed a personal and decogatory opinion at sentencing.

3.) Trial court error happened at least twice:

A.) Trial court erred in allowing in physical evidence, specifically 'blue towel' evidence and forensic testimony specifically about that evidence.

- Assignment of Error's-cont

B.) Trial Court erred in allowing in instruction number ten for Jury deliberations.

- Issues Pertaining to Assigment of Error -

1.) Did counsel provide ineffective assistance and violate My constitutional right(s), by prejudicing me before the Jury, when he made a statement about my actions, ~~that~~ during his closing argument, that was the opposite of what I had testified to?

2.) Did Counsel provide ineffective assistance when he introduced instruction number ten in for jury deliberations?

3.) Did counsel provide ineffective assistance when he failed to introduce evidence which could cast a doubt on my guilt?

4.) Did counsel provide ineffective assistance when, he failed to cross examine Forensic scientist, and DNA expert Trevor Chowen?

5.) Did counsel provide ineffective assistance and violate my constitutional rights, when counsel presented plaintiff's statements in open court, when I had, previously discussed with him, an opposing viewpoint about the very same subject matter?

- Assignment of Error's - continued

6.) Did the prosecutor committ prosecutorial misconduct by stating a personal opinion and making a derogatory comment about me during sentencing? Was this an unfair and prejudicial attempt to influence the judge to give me the maximum sentence?

7.) Did the court allow in highly prejudicial evidence that should have been kept out?

8.) Did the court err in allowing in instruction number ten? Was instruction number ten prejudicial towards or a violation of the constitutional rights of defendant?

Additional Ground #1

"Ineffective Assistance of Counsel" - Violated my due process ~~due~~ right to a fair trial and my sixth amendment constitutional right to control my own defense. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975) says in part: "Although not stated in the [Sixth] Amendment in so many words, the right... to make one's own defense personally is thus necessarily implied by the structure of *492 Amendment." State v. Jones, 99 Wash.2d 735, 740, 664, P.2d 1216 (1983) says: "Faretta embodies

- Additional Ground #1 - continued

"the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount." Right at the start of my trial, prior to my jury being seated, there were very troubling signs that my counsel was both ignoring pertinent facts and details of my case ~~as well as~~ that I was trying to share with him, as well as outright mis-represent my position too the court. Unfortunately, for me at the outset, I did not recognize fully the seriousness of defense counsel's actions before the court.

On RP 56, defense counsel states: "And that I asked her [plaintiff] was it your understanding that Mr. Clark was interested in a- someone who was Caucasian? Yes. And based on his profile? Yes. And ~~were~~ based on your profile were you interested in an African-American Male to meet on this web site? And she said yes. And so that shows a mutual attraction for one another." The problem with this statement is that it was untrue [At least as far as counsel inferring that either myself or my profile indicated that I was interested in dating Caucasian women.] I was adamantly opposed to myself being mis-represented like this before the court. This false reprensentation before the court bothered me so much that on RP 58, I address the court directly asking if I may speak.

- Additional Ground #1- continued

However, I never got a chance too specifically address the judge because on RP 59, after asking the court May I speak and the judge replying in the affirmative, defense counsel immediately interjects saying: "All right. So Mr. Clark wanted me to clarify that he himself, did'nt specifically put out that he was only seeking a Caucasian person." In fact my dating profile on the website that me and plaintiff met, did'nt specify any racial preference, for women that I wanted to date. Counsel Knew this. Now it's my understanding

that I can not get into personal conversations at this time between trial counsel and myself that is not part of the court record, however there is an important point that I would like to make here and that is: How would defense counsel Know to clarify my position before the court, without first coming over too the defense table and speaking with me? Counsel self corrected himself mid-sentence, without having to speak with me at that particular Moment, first. Since I can not speak during this direct appeal about any off the record conversations specifically, I would submit to this court, that it is proper for this court to infer that there had to be a previous conversation about this subject between myself and Counsel or how else would Counsel Know to

- Additional Ground #1 - continued

clarify his position (my position) before the court without speaking to me first? I would also like this court to consider, is there an inference, that there could have been a recent or even very recent interaction between myself and counsel about this very subject? I say this because of the dozens of issues, or multiplicity of issues, that need to be addressed at a jury trial, how would counsel out of all these issues, know that I wanted to clarify this specific issue, that there was some type of racial preference that I had? In Faretta v. California 422, U.S. 806, 819, 95, S. Ct 2525, 45 L. Ed 2d 562 (1975) although Faretta v. California deals with a higher court, reversing the trial courts decision not to allow defendant to serve as his own counsel, I believe that "Faretta", narrowly applies in my case, (even though of course I was not seeking to be my own counsel) in the sense that my counsels willful disregard of my version of events and willingness to present the Plaintiff's version of events RP 56, violated my constitutional Sixth amendment right to present my own defense. State v. Jones, 99 Wash. 2d 735, 740, 664, P.2d 1216 (1983) Focuses even more on this right saying: "The Conviction that a defendant has the right to decide

-Additional Ground #1- continued

Within limits, the type of defense he wishes to mount." Just because I accepted court appointed counsel does not mean, should not mean, that counsel gets to run roughshod over his clients constitutional rights, nor should it mean that counsel get's to present falsehoods or inaccurate portrayals of his client before the court. In United States v. Laura, 607 F.2d 52, 56 (3rd cir 1979) the defendants right to control his defense is necessary "To further the truth seeking aim of a criminal trial and to respect individual dignity and autonomy."

"U.S. v. Laura" is important because if counsel didn't believe my version of events he could have easily gotten the truth by subpoenaing my dating profile records and fact checked what Plaintiff (RP,56) told him. Clearly, counsel was not seeking the truth or respecting my individual dignity, or MY version of events which happen to be the truth. Counsels actions here bring up some troubling questions. Such as:

How effective can counsel be if he is advocating Plaintiffs position moreso than clients position? Why was counsel fixated on a racial attraction? RP 56 Why did counsel assume that Plaintiff was telling

-Additional Ground #1- cont

him the truth but I was lying? Why was it so difficult for my counsel to believe that there were'nt other factors that caused me to want to meet the plaintiff such as a physical attraction independent or regardless of race? Or an attractio based on common values listed in plaintiffs profile? While, it's true that if this was the only issue at trial, harm to me would have been minimal. However, I would argue that counsel was showing his implicit bias (towards interracial rape? interracial dating?) if not overtly explicit bias, and mind set, at this opening incident. Unfortunately, for me, counsels actions were about to become, I would argue, even more egregious, outrageous, and prejudicial to my rights as a defendant at trial.* (Please, look at video or listen to audio to substantiate that counsel did not come and talk to me first before self-correcting himself.)

Additional Ground #2

Ineffective Assistance of Counsel

(1) State V. Davis, 141. Wn. 2d 798 (2000) 152. Wn. 2d 647 (2004). (2) Strickland V. Washington, 466 U.S. 688, 694 104 S Ct. 2052, 80 L. ed 2d 674 (1984).

During Counsels closing argument he stated as fact, me doing something that I had emphatically denied doing, during Counsels direct exam of me on witness

- Additional Ground #2 - continued

stand. On RP 868, Counsel, during his closing argument say's: "They had breakfast - breakfast is made - they share it together. Yes, he got upset about some bacon rations and things perhaps she said but otherwise it was good." Not only was this statement by counsel not true, it comepletely undermined and contradicted testimony that I gave under direct exam (by Counsel) either earlier that day or the day before. On RP 753, I was emphatic in denying that I ever got angry over plaintiff's daughter eating breakfast or upset or argumentative about bacon rations as stated by plaintiff on RP's 634-635.

In State V. Davis, 141. WN. 2d 798 (2000), An offender convicted of aggravated first degree Murder and sentenced to death sought relief from personal restraint on several claims including the claim that defense counsel was ineffective for failing to object to the petitioner being shackled at trial. The court granted the petition in part, denied it in part, and vacated the sentence of death and ordered a new sentencing trial (152. Wn. 2d 647 (2004)). Counsel's actions I argue were a manifest error affecting my constitutional rights in several ways: number one counsel was violating my constitutional riaht

 - Additional Ground #2 - continued

(once again) to control my own defense. Number two counsel was violating my rights to due process and effective counsel, by impinging on my constitutional rights and U.S. jurisprudence rights, by usurping the two party adversary system. In essence, counsel took on an adversarial role towards me (for the second time at trial) presenting plaintiff's version of events, instead of my own. He did this even though there was absolutely no proof that plaintiff was being truthful. In a sense counsel was acting as a defacto prosecutor, totally violating my rights as a defendant, to fair and reasonable counsel.

I would also submit to this court, that counsels actions were every bit as prejudicial towards me before the jury, as counsels actions were in State V. Davis (in not objecting to Davis being shackled before jury). There's a case to be made that my counsel's actions were even more prejudicial, because counsel at my trial, had the added emphasis, of contradicting my testimony during his closing argument. Which in turn followed my very recent, opposing testimony. How does the court quantify the possible prejudicial harm done to me if a jury thought to themselves: "His lawyer is saying something completely different than what defendant said. If his lawyer doesn't believe him then he must be guilty!" In Strickland →

- Additional Ground #2 - continued

v. Washington 466 U.S. 688, 694, 404 S. Ct. 2052, 80. L Ed. 2d 674 (1984) turning to the merits, the court of appeals stated that the sixth amendment right to assistance of counsel afforded criminal defendants a right to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Obviously, Counsels reprensentation fell below an objective standard of reasonableness, in regards to counsel RP 868, impeaching and contradicting testimony that I had Just given, RP 753. This deficient counsel is especially apparent, because there were troubling signs that plaintiff was not telling the truth or had major inconsistencies throughout this trial. For example

on RP 707, plaintiffs daughter is asked does she remember anything about breakfast being made the next morning. Plaintiff's daughter responds "yes" to this question Prosecution say's: "Well tell me about that." Plaintiff's daughter responds: "So from what my Mom told me-", now this is a very strange and peculiar reply! IF Plaintiff's daughter had an independent recollection of me getting angry over breakfast rations, then why does she start off by saying: "So, from what my mom told me", RP 707.

This coincides, completely, with the emphatic denial (I gave during my testimony) of ever getting angry about breakfast, RP 753. I also intimated that plaintiffs daughter had been coached by plaintiff. RP 753 ↓ In addition plaintiff's daughter states on RP 708, that her MOM cooked breakfast for everyone → next page

- Additional Ground #2 - continued

Which is not what happened and contradicts what plaintiff said on RP 634 (that myself and plaintiff both cooked breakfast). The reason that I am pointing out these inconsistencies in plaintiff and daughter's testimony, is to highlight and show that there was no valid reason for counsel to contradict my testimony. Especially, before a Jury. There was no evidence that pointed towards me lying and plaintiff telling the truth. IF anything It was the other way around. From the very beginning My version of events remained remarkably consistent. Finally, the recklessness or incompetence counsel showed

in contradicting my testimony (during his closing argument) RP 868, should not be taken lightly. In "Bias on Trial: Towards an Open Discussion of Racial Stereotypes in the Courtroom," Mikah K. Thompson, 2018 Mich. St. L. Rev. 1243, 1261 (2018) Says jurors tend to be "More suspicious of witnesses who do not share there Identity." Id. at 1262. Jurors also tend to believe "Stereotype consistent information," and "ignore information that is inconsistent with their expectations." Especially, concerning "stereotypes concerning violence or sexual behavior are particularly corroborative of a witnesses testimony. Thus a racial stereotype regarding the sexual proclivities or super-sexuality of Blackmen might work to corroborate the testimony of a White woman who says a Black man raped her." Id. at 1263 (citing Joseph W. Rand, "The Demeanor Gap: Race, Lie Detection and the Jury, 33 Conn. L. Rev. 1, 41 (2000). Counsel was deficient and unreasonably ineffective Not only because he made a statement during closing argument that was not based on fact and therefore rejected by

- Additional Ground #2 - continued

Me as a possible defense, but Counsel also caused extreme and prejudicial harm to me when he did this. Not only was the prejudice towards me, in that, a Jury could possibly question my innocence disproportianately (Based on counsels outright contradiction of my testimony) but prejudice also could have happened if juror(s) believed that if I actually got angry over an issue so trivial as bacon or breakfast rations, then it was possible that I raped plaintiff. This is especially, true, since both the alleged crime of rape and alleged anger over breakfast fit the hyper-sexual, angry black male, narrative/stereotype so well. Therefore, in conclusion, I believe

it is more than reasonable for the court to conclude that this was a manifest error affecting my constitutional rights. This was harmful error, both extremely prejudicing me before the jury as well as providing me with deficient and ineffective assistance of Counsel.

- Additional Ground #3 -

Ineffective Assistance of Counsel
State v. Lynch, 178 Wash.2d 487 (2013)
State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) State v. Coristine, 177 Wash.2d 370, 376, (2013

- Additional Ground #3 - cont

Counsel specifically requested instruction number ten to be included at trial for jury deliberations RP's 800-803. This instruction was extremely prejudicial towards me as a defendant, claiming a defense, of consent against a second degree rape allegation. Instruction number ten reads: "Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse." I do not think that there should have been an instruction on consent for the jury to consider. I believe that the evidence in my trial, without instruction number ten, would have at the least, cast serious doubt, reasonable doubt, on whether or not there was forcible compulsion, especially since in this case, both parties testified that the sexual intercourse began consensually, and there was also the inconsistent nature of plaintiff's testimony. I believe legal precedent supports this. In State v. Lynch, 178 Wash. 2d 487 (2013) (A case remarkably similar to mines) The state charged Jeffrey Thomas Lynch with indecent liberties and second degree rape. At trial Lynch's defense to the rape charge, was that the State failed to prove forcible compulsion because the alleged victim T.S. consented to sexual intercourse. Over Lynch's objections the trial court instructed the jury that Lynch had the burden to prove consent by a →

- Additional Ground #3 - cont

'preponderance of the evidence'. The jury found Lynch guilty of the crimes charged. The court of appeals affirmed Lynch's second degree rape conviction, but reversed the indecent liberties conviction, Like Lynch, my defense at trial, was that state failed to prove forcible compulsion because the alleged victim consented to the sexual intercourse. Unlike Lynch both parties at my trial testified that sexual intercourse began consensually. At the Lynch trial, the Court of Appeals affirmed the second degree rape conviction but reversed the indecent liberties conviction, the court also vacated the community custody conditions that Lynch protested and remanded for further proceedings.

Counsel, should have been aware of Lynch (and similar cases where a consent instruction was contested) and realized how prejudicial instruction number ten was and objected to it. Counsel should have also requested a motion for a new trial based on the lack of evidence. Unlike in State v. Lynch there was no requirement that I prove that the sexual intercourse was consensual, by a 'preponderance of the evidence', (in consent instruction at my trial). However, I would submit to this court, that instruction number ten was still prejudicial towards me. That's because instruction number ten was purposely worded in a way that is confusing. Instruction ten reads: "Evidence of consent may be taken into →

- Additional Ground #3- cont

Consideration in determining whether the defendant used forcible compulsion." A lay person someone who is not an attorney or judge, could almost infer from the instruction that it is stating: "Even if there is evidence of consent, after consideration, you can still find forcible compulsion". This was a very prejudicial instruction towards me. Counsel should have never asked for this instruction to be included at my trial. The fact that he did include this instruction at my trial, is further evidence of just how deficient and ineffective my counsel was. Nowhere in the court record does it suggest that Counsel told the trial court, that he was considering the instruction but would like to confer with his client first? Nowhere in the court record does the judge ask if I fully understand the legal ramifications of this instruction being included. How could I object or protest something, that legally I am unaware of? Counsel should have, in preparation ~~of~~ For my case been well aware of other legal cases such as "Lynch", or "Cocistine", in which counsel adamantly contested the state using a 'consent' instruction for deliberations. Yet, my counsel's enormous ignorance on this issue, includes him doubling down, on his decision to use a consent instruction even after prosecution warns, that she wants it made clear, that Counsel is asking for the instruction, RP307 because this has been an appelate issue for ineffective Assistance of

- Additional Ground #3 cont

counsel, counsel willfully plows right on ahead, insisting on this instruction being included. What the prosecution said about, being clear that opposing counsel was asking for this instruction, RP 807, should have been a clear signal, to either come and confer with me about the legal ramifications, of including this instruction, or Counsel could have told the court that he would delay a decision on including the instruction until he could inform himself about case law surrounding this issue. There was a pattern of willful disregard of any questions or facts that I wished to present or ask of counsel, this can be seen in the first two additional grounds I have presented here, not just this one. For that reason I submit, that counsels actions were not just

deficient, but far fall below any objective standard of reasonableness or effectiveness. Instruction number ten violated my sixth Amendment right to control my defense, in that, I never agreed to this instruction, nor was I ever presented with pro's or con's by counsel where I could make an informed decision. Although, there was no by a 'preponderance of the evidence' clause in instruction number ten (as there was in State v. Lynch) or in (State v. Caristine) the instruction used at my trial was still prejudicial and served the same purpose: It transferred the burden from the State of proving guilt 'beyond a reasonable doubt',

- Additional Ground #3 - cont

to me having to carry the burden of proving 'consent'.

- Additional Ground #4 -

Ineffective Assistance of Counsel
Strickland v. Washington 466 U.S. at 694
Kimmelman v. Morrison 477 U.S. at 382
Murtishaw v. Woodford, 255 F.3d 926, 939 (9th cir 2001)

One of counsels numerous blunders at trial, was his refusal to cross examine Forensic Scientist Trevor Chowen. This made no sense. Counsel had already argued for a motion blocking the introduction of a blue towel into evidence, RP 76. There ~~were~~ was no scientific or DNA evidence that tied me to a rape or assault of plaintiff. There was no physical evidence that tied me to a rape or assault of plaintiff. However, there were numerous and key questions, that would have been important for a jury to hear. For example; On RP 466, Forensic scientist, Trevor Chowen, describes receiving a sexual assault evidence collection kit which included: bedding, a shirt and underwear and a towel as well as buckle swabs ~~from~~ from Wendell Clark, that were tested for my dna, No dna was found, that specifically indicated that it was my DNA, a jury should have heard this. under cross exam No [redacted] ~~=~~ semen was found on anal swabs, a jury should have heard this RP 468. under cross exam On RP 440, Forensic scientist

-Additional Ground #4- cont

Ethan Smith says that he wasn't asked by prosecution to test blue towel for DNA. RP 439 Counsel could have asked DNA expert/Forensic Scientist Trevor Chowen, if this was the same towel mentioned on RP 466, that was a part of the 'sexual assault evidence collection kit'? If it was not the same towel, that under went DNA testing, counsel could have asked is that standard procedure in most cases, that physical evidence in a rape case, where the plaintiff say's defendant ejaculated directly onto said physical evidence, RP 425, it's IS not tested for DNA? On RP 462, the prosecution asks If a male having a vasectomy would effect the amount of DNA or semen found? Forensic Scientist Scientist Chowen says that would effect the amount

of DNA or Semen found. Counsel could have asked Forensic scientist Chowen, is it common, in cases where no condom was wore, and defendant has not had a vasectomy (I have not had a vasectomy) and plaintiff says he ejaculated directly onto item's, for None of that person's DNA to be found? There are many other fruitful questions, beneficial questions, before the jury, that counsel could have asked had he cared enough to cross examine Forensic scientist and chief DNA expert Trevor Chowen. In Strickland v. Washington 466 U.S. at 694 the court states: "The defendant must show that there is a reasonable probability that but for counsels unprofessional errors, the

Additional Ground #4 cont

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In Kimmelman v. Morrison, 477 U.S. at 382 (1986) the court states: "Only those habeas petitioners who can prove under Strickland that they have been denied a fair trial by gross incompetence of their attorneys will be granted the writ and will be entitled to retrial." And in Murtishaw v. Woodford 255 F. 3d 926, 939, (9th Cir 2001) the court states: "He bears the heavy burden of proving that counsels assistance was neither reasonable nor the result of sound trial strategy." I would submit that all three of these cases apply to the affirmative in my case.

I believe that on just the cross examination of Forensics expert Trevor Chowen it's possible my proceedings would have gone differently. I believe counsel showed gross incompetence during my trial. If you add up all the blunders in my case I submit that it's very reasonable to conclude that but for counsel's unprofessional errors the result of my proceedings would have been different. Trial counsel also showed very unsound trial strategy acting as my adversary instead of as counsel. He acted almost like a defacto prosecutor presenting plaintiffs version of events, while ignoring mines. Counsel's actions were deficient, ineffective unprofessional and fall below an objective standard of reasonableness

- Additional Ground #5 -

- Additional Ground #5 -

- Ineffective Assistance of Counsel -
Strickland v. Washington 466 U.S. at 694
Kimmelman v. Morrison 477 U.S. at 382 (1986)
Murtishaw v. Woodford, 255 F.3d 926, 939 (9th cir 2001)

From the very beginning it was clear to everyone (counsel, judge and prosecution) that plaintiff had memory issues due to a medical condition, RP 19 of court report, RP's 24, 25, 26 of Defense investigate Defense counsel report. Prosecution mentions problems with Plaintiffs memory on page/RP 63, of court report. The judge weighs whether to allow state's expert witness, to help explain away plaintiff's memory gap on RP 609, of court report. In addition there were at least five or six times where plaintiff either contradicted her previous testimony or said she did not remember making a statement to law enforcement or sexual assault nurse. These contradictions of previous statements made by plaintiff include: 1.) Sabrina/Plaintiff states there was a 2nd rape of forced (that was ~~never~~ originally not reported to law enforcement) oral, that she mentions to sexual assault nurse for the first time RP 402, however on RP 620 she recants that there was forced oral. 2.) RP 621, Plaintiff denies that it was her handwriting on sexual assault paperwork that she filled out.

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3.) On RP ~~625~~ 407, Plaintiff states that I bit her on the shoulder, however on RP 625, plaintiff states that she can't remember if I ever bit her. (Plaintiff never mentioned me biting her to law enforcement, originally. Only mentioning it later to the sexual assault nurse. No bite mark, No saliva, no DNA of mines or a male, was found on shoulder where plaintiff said I bit her). 4.) On RP 425, Plaintiff says that I ejaculated on a blue towel, however on RP 546, She say's she does'nt know if I ejaculated.

on blue towel. 5.) RP 548, Plaintiff says she does'nt remember if she wiped her anus, with the blue towel she said she wiped her vagina with and that she said I wiped my penis with. 6.) RP 613, Plaintiff says she can't remember if she mentioned a second rape act (forced oral) to law enforcement. 7.) On RP 652, Plaintiff states that her text messages to her friend do not indicate that she was planning to have sex with me again, but on RP 653, she changes that and states that her texts were indicative of planning to have sex with me again (after alleged rape). This is the inconsistent and contradictory testimony I was convicted on! The last contradictory, inconsistent testimony on RP's 652-653 are terribly important because I was always very honest with law enforcement from the very beginning. One of the things I first mentioned to law enforcement after being mirandized,

- Additional Ground #5 - continued

is that me and the plaintiff had sexual intercourse three times, (including twice more after alleged rape). For counsel not to bring up plaintiff's severe memory issues, either while on the stand (counsel never asked plaintiff while cross examining her if she had any memory issues due to medical condition or medications that she was taking, even though he knew she did) or too re-inforce or offer Memory Problems as a possible theory, during his closing argument was 'unprofessional, and undermined the outcome of my trial', Strickland 466 U.S. at 694. 'Denied me a fair trial due to gross incompetence', Kimmelman v. Morrison 477 U.S. at 382, was 'Unsound trial strategy', Strickland 466 U.S. at 689, and 'was neither reasonable, nor the result of sound trial

Strategy', Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir 2001). Counsel should have especially known too offer to the jury a plausible or reasonable explanation, such as ~~memerigg~~ memory problems due to medical condition or medication, because of the implicit bias and sensitivity associated with an interracial rape allegation. "Interracial rape" is "A classic catalyst of racial prejudice", in American soceity. Dukes v. Waitkevitch, 536 F.2d 469, 471 (1st cir 1976) "Black males have been characterized traditionally as hyper sexual, lascivious, sexual monsters who preyed upon white women". Susan Hanley Kosse, Race, Riches and Reporters - Do race and Class impact Media Rape

- Additional Ground #5 - continued

Narratives? An Analysis of the Duke Lacrosse Case, 31 S. Ill. U. L. J. 243, 251 (2007). Because of this, counsel should have been cognizant of possible implicit (or explicit) bias in a mostly Caucasian jury, with no African-American jurors, (and there possible prejudices and biases) and advanced to the jury a fourth option that plaintiff had some memory loss (admittedly) due to medical condition, and medication that she was taking. This would have been both logical, truthful, and perhaps a more palatable alternative to a jury, whom no matter How Many inconsistencies, or outright holes in ~~her~~ plaintiff's story, found it impossible, to believe that a white woman, could lie and say that a black man raped her! For this reason, counsel was deficient and ineffective and it would be reasonable for this court to concur that counsel's service fell far below an objective standard of reasonableness.

- Additional Ground #6 -

Trial Court Error

State V. McKee 193 Wn. 2d 273, State V. Jasper 174 WN. 2d 96, 120, 271, P. 3d (2012) 403 (●) Evidentiary Law State of Washington

Trial court erred in allowing in any forensic evidence or testimony, I believe. I base this assertion on the

- Additional Ground # 6 cont

fact, that this was a trial, where I was charged with second degree rape, where no condom was used, yet not a shred of DNA, nor physical evidence, tied me to the sexual assault or rape of plaintiff. Even if this court, finds that trial court, was proper in allowing in forensic evidence and testimony, I strongly believe trial court erred in allowing in blue towel as physical evidence, presented to jury. I believe it was also improper for any forensic testimony about blue towel to be introduced as evidence. On RP 77, trial court justifies there reasoning for allowing in blue towel physical evidence and testimony stating: "~~And it's squarely~~ "I'm allowing the evidence. Here's why: it's only going to inflame the jury if it's in - if they believe it is an involuntary sexual act - forcible sexual act. And even then I don't think it's going to inflame. And it's squarely on the issue of the elements that the state has to prove. Under 403 - to address that rule squarely the probative value is high and that he wiped himself in the front as I understand it with this towel. And it has fecal matter on it. That's highly probative of a fact at issue and that's whether this anal intercourse occured Whether the defense stipulates to that - which they're not - or is not attacking that issue directly is beside the point. The fact is the state has to prove their facts beyond a reasonable doubt. So it is highly probative of ~~a~~ that fact ~~at issue and that's whether this~~

- Additional Ground #6 cont

and it - that probative value substantially outweighs any danger of unfair prejudice or cumulative evidence concerns - anything along those lines. And so I'm allowing it for that reason and that's my 403 analyisis on the record." The Washington Rules of Evidence - 403 rule stipulates: "Although relevant evidence may be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Trial court erred on allowing in this physical evidence (Blue towel) and testimony because it violated the very essence of what the 403 rule is meant to

prevent: The judge allowed in highly inflammatory and prejudicial evidence with scant probative value. Trial court could have set a much higher bar to clear before allowing in this evidence. Such as: First, asking if DNA testing was done on towel? According to state Forensic expert Ethan Smith on RP 439, there was no request for semen or DNA testing. Only fecal matter testing. Trial court could have followed up, asking why wouldn't you test for DNA on a towel that plaintiff says that defendant ejaculated on? RP 425, Or wiped himself on RP 74, (which doesn't seem to make much sense). In regards to the fecal matter on towel trial court could have asked, has defendant ever

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- Additional Ground #6 - cont

conceded to wiping himself with this towel? (RP 788 I denied ever using blue towel) The Judge could have followed up that question with IF the defendant has never conceded to wiping himself with this towel is there any way fecal matter could have ended up on blue towel other than defendant wiping his Penis with it? (In fact plaintiff testified on RP 548 that she does not remember if she wiped her anus with towel). All of these questions could have been asked by the judge. Trial court could have asked these questions and more which would have been highly probitive, and helped winnow out highly prejudicial evidence, that had very little probative value. I also find it very

interesting in trial courts comments for allowing in this evidence, RP 77, trial court says ~~they don't~~ He doesn't believe it will inflame the jury. By trial court using the word inflame, shows he in fact knew the fecal matter (or anal sex) on blue towel, would more likely than not, be inflammatory to the jury. Trial court also states that defense was not stipulating to anal sex occurring. But that's not true. I have never denied anal sex between myself and plaintiff. Consent has been the only point of difference in this case! Trial court should not have allowed in this evidence for several reasons. #1) There was no DNA or physical evidence which linked me too blue towel #2) Plaintiff said she could not remember if she wiped her anus with blue towel

- Additional Ground #6 - cont

#3) Trial court should have questioned why DNA testing was not done on blue towel. (How does that even make sense in a sex offense case in which plaintiff claims that I wiped my penis and ejaculated on towel?) RP 425, #4) Without any evidence that tied me to blue towel, the probative value, was slim. However the inflammatory and prejudicial nature of evidence was high. In an interracial rape case, where there was bound to be some implicit bias, by a mostly Caucasian jury, trial court should have known that both anal sex ~~or~~ and fecal matter on a towel, could possibly gross some jurors out, thus the inflammatory and prejudicial nature of evidence far outweighed any probitive value. Trial court erred in allowing in

blue towel evidence as well as Forensic testimony about said blue towel. * Please see State V. Mckee 193 Wn. 2d 273, and Jasper V. State 174 Wn. 2d 96, 120, 271 P.3d (2012)

Additional Ground #7

Trial Court Error

State V. Jasper 174 Wn. 2d 96, 120, 271 P.3d (2012) State v. Mcsorley 128 Wash. App 598, 605, 116 P.3d 431 (2005), State V. Lynch, 178 Wash. 2d 487 (2013) State v. Coristine, 177 Wash. 2d 370, 376, 300 P.3d 400 (2013) Trial court should have never allowed in instruction #10 and erred in doing so. Instruction

- Additional Ground #7- cont

number ten was a consent instruction, for jury deliberations, at a trial for second degree rape, where consent was the defense. Multiple cases have addressed this issue and trial court erred based on these other cases. In State v. Coristine, 177 Wash 2d 370, 376, 300 P.3d 400 (2013) Washington Supreme Court determined: "Instructing the jury on an affirmative defense over the defendants objection violates the sixth amendment by interfering with the defendants autonomy to present a defense." Id at 375, 300 P.3d 400. In State v. Mesorley, 128 Wash. App. 598, 605, 116 P.3d 431 (2005) (trial court violated defendants right to control his defense by instructing the jury on an affirmative defense to the

Crime of child luring over defendants objection). In "Coristine", State v. Coristine, 177 Wash.2d 370, 376, 300 P.3d 400 (2013) The state charged Brandon Coristine with second degree rape after he had sexual intercourse with L.F. after L.F. had been drinking at a party at Coristines ~~house~~ house. The State charged Coristine under RCW 9A.44.050(1)(b), which states that a person is guilty of second degree rape if the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." Coristines trial strategy throughout the case was to show that the state failed to prove that L.F. was physically helpless or mentally incapacitated during sexual intercourse.

- Additional Ground #7 -

The trial court instructed the jury under RCW 9A.44.030(1) a * 493: defendant is not guilty of second degree rape if the defendant "reasonably believed" that the alleged victim was not mentally incapacitated or physically helpless. The trial court instructed the jury on the 'reasonable belief' affirmative defense over Coristines objections, and the jury found Coristine guilty. The Court of Appeals affirmed. A higher court reversed the Court of Appeals determining that: "The Sixth Amendment right to control one's defense encompasses the decision to present an affirmative defense." Id. at 376, 300 P.3d 400. The higher court also reasoned: "Imposing a defense on an unwilling defendant impinges on the independent autonomy the accused must have to defend against charges." In the previously mentioned, State v. Lynch (a case remarkably similar to mines) 178 Wash. 2d 487 (2013), Washington Supreme Court, determined that; "The trial court violated defendants right to control defense by instructing jury on affirmative defense over objection, and violation did not constitute harmless error." Jeffrey Thomas Lynch was charged by the State with second degree rape and indecent liberties At trial, Lynch's defense was that the state failed to prove forcible compulsion, because the alleged victim, T.S. consented to the sexual intercourse. Unlike Lynch, at my trial, both parties, testified that sexual →

- Additional Ground #7 - cont

intercourse began consensually. The Court of Appeals would ultimately affirm the second degree rape conviction but reverse the indecent liberties conviction in Lynch. The Court of Appeals also vacated the community custody conditions that Lynch contested and remanded for further proceedings. Ultimately, the Washington Supreme Court would reverse the Court of Appeals on the second degree rape conviction and remand for a new trial. Ultimately, trial court in my case, should have realized, that a consent instructio in a second degree rape case, was highly prejudicial to defendant, who claimed a defense of consent. Consent

instruction (ten) at my trial, was confusingly worded, and unfairly transferred burden of proof from State having to prove guilt 'beyond a reasonable doubt', to me having to prove that a rape did not occur. For, this reason, trial court erred in allowing in instruction number ten.

- Additional Ground #8 -

Prosecutorial Misconduct

State v. Belgarde 110 Wn. 2d 504 285 P.2d 174 (1988)

Clark County, Washington, prosecutor Anne Klein, at Sentencing, made a personal remark, that was both derogatory and demeaning and I believe trampled on my rights as a defendant. On RP 898, Ms. Klein says:

- Additional Ground #8 - cont

"Testimony in this case shows the defendant is totally deluded in his thinking and has a sense of entitlement." My question to the court, is what exactly was I delusional about? Was I delusional for claiming and professing my innocence? What did I have a sense of entitlement about? That as a wrongfully charged person, I excercised my constitutional right, to a jury trial? What the prosecution said, didn't fit my charges nor make sense at sentencing. I obeyed courtroom decorum. I was respectful to both plaintiff and prosecution. I didn't always like, what I knew were untrue comments about me, made in the courtroom.

But I always was respectful. I never glared at plaintiff or prosecution. I was'nt an adversarial or a confrontational witness under cross examination by the prosecution. So, I am unclear still, about what, exactly I was delusional about? What was my sense of entitlement? Was my sense of entitlement, that as an African-American man charged with the second degree rape of a white woman (and all of the inherent bias and controversy associated with those charges) that I had the audacity to believe I could get a fair shake in the U.S. criminal justice system? In State v. Belgarde 110 Wn. 2d 504, 285, P.2d 174 (1988) Defendant Belgarde was convicted of first degree Murder. During the prosecutors closing argument He encouraged the jury to render a verdict based

- Additional Ground # 8 - continued

on defendant's association with the American Indian Movement (AIM) which he described as a "deadly group of madmen" and "butcher's that kill indiscriminately," the Court of Appeals upheld defendants convictions. The Supreme Court, held that the prosecutor's closing argument deprived defendant of a fair trial, the court reverses the decision of the Court of Appeals and the judgement was vacated. Word's matter! Whether, during trial, at closing argument, or during sentencing. The state's prosecutor (Ms. Klein) made improper comments calling me 'delusional', or saying that I had a sense of 'entitlement'. The comments did not make sense. Even though I disagreed vehemently with most of plaintiff's testimony, I never said anything demeaning, about her. I never attacked her personally. So, I am unclear, still on what makes me delusional? I do believe prosecutors comments were improper and also served too incite the court to give me a maximum sentence. Which is exactly what the judge did, Bypassing and going beyond DOC sentencing reccomendations, which of course, was in his discretion to do.

- Conclusion -

I, Wendell Maurice Clark, was wrongfully accused and convicted and was sentenced to 9 ½ years for crimes I did not committ. There was scant physical

#36
pg [redacted]

- Conclusion - continued

evidence and no scientific or DNA evidence that tied me specifically to the crimes of second degree rape, dv assault four, or witness tampering. There was, from the very beginning, willful ignoring of pertinent facts. Those facts, if not exculpatory, at the least, should have cast serious doubt as to the credibility of plaintiff's allegations. There was a rush to judgment, in this case, rather than a methodical investigation, to find the truth. When I was first interviewed by detective Deb Libby and asked If I would be willing to take a lie detector test I responded: "Absolutely." That is nowhere in the police report. Law enforcement, the prosecution and

counsel knew from the very beginning, that plaintiff had memory issues and severe inconsistencies with her version of events (defense Investigator/counsel report pp 24, 25, 2

so court RP 19 → (RP's 24, 25, 26). Meanwhile, my version of events remained remarkably consistent. From my very first statements to law enforcement, after being read my Miranda rights, I was honest and straight forward. I told law enforcement that I did not rape plaintiff. I admitted to not only having sexual intercourse and anal sex, the one time (that plaintiff originally mentioned to law enforcement,) but that myself and the plaintiff actually had sex three times total. Including two other times, hours after the alleged rape, RP 288. I won't mention all of the inconsistent statements of plaintiff (of which there are at least six or seven) but here are two key

- Conclusion - continued

inconsistencies testified too by plaintiff. Plaintiff does not originally mention a secondary sex act to law enforcement RP 288, but at the hospital mentions a secondary act of rape (forced oral copulation) RP 402, However, plaintiff recants that there was a second act of rape on RP 620, Most importantly plaintiff confirms that there were multiple acts of sex, besides the alleged rape, which is what I always contended. Plaintiff told nurse that I ejaculated on a blue towel (but never told law enforcement that originally) however on RP 546, Plaintiff says she does'nt know or does'nt remember if I ejaculated on a blue towel. There were many other inconsistencie by plaintiff at trial. There was prosecutorial Misconduct in this case. Including Personal comments made ~~at~~ during closing argument RP 848 and RP's 861 and sentencing, RP 898, that were prejudicial and harmful to me as a defendant. As part of the 'win at all cost' mindset of the prosecution in this case, they were willing to ignore blatant inconsistencies in plaintiffs testimony. Prosecution, also was willing to use race bias, in a highly charged, and emotionally charged race trial. On RP 57, prosecutor Klein states, that she does'nt see the relevance of whether she said (Plaintiff) she was looking for a blackman and he said he was looking for a white woman. Apparently, this worried the prosecution so much (that a Caucasian woman said

she was looking for an African-American male to date) that prosecutor Klein on "States Trial Memorandum and Motions" In-Limine-1-14-10, "and the state Moves to exclude testimony ~~testimony~~ that plaintiff posted on POF (Plenty OF Fish) that she was interested in dating Black men." Why was prosecution so worried about a jury hearing the truth? Apparently, plaintiff told defense counsel that she was interested in dating a Black man RP 56. To me this was another sign of prosecution willing to do whatever, to win at at all costs. I would also point out that this is comepletely different, than my objection, RP 58-59 to counsel on same RP 56, that states: "there was a mutual attraction between the two of them - in part because of their racial differences." Which was untrue in regards to Me or what my dating profile said on Plenty of Fish, where there was no mention of a specific race I

Wanted to date. There was no mention of race at all on my dating profile on POF, other than me stating that I was an African-American Male. I objected on RP's 58 and 59, too a falsehood, being mentioned in open Court by counsel, not from trying to block the truth. Finally, I would like to comment on the deficient and subpar performance of counsel during this trial. From the very beginning, counsel ignored Pertinent facts, that I had to share with him about specific elements of my case. He was adversarial towards me in that,

there were no facts, that I presented to him that were in turn, presented to the court. In fact, counsel was so ineffective and so deficient that at times I struggle with the question of was counsel just incompetent or was he actively sabotaging my case? How else does one explain counsel saying that I had a 'mutual attraction', based 'partly on racial', differences, RP 56. Which was not only untrue, and something that I adamantly opposed him expressing to the court, ~~but~~ RP's 58-59, but was something that counsel could have easily fact checked, had he cared enough to even take a look at my dating profile on 'Plenty of Fish'. Or counsel

contradicting and impeaching (during his closing argument) testimony, that he himself elicited from me, (me getting angry about breakfast/bacon rations) on the witness stand RP's 753, 868. Or that counsel asks for a consent instruction to be included (ignoring both my question's about consent instruction and prosecution stating for the record that the state was not asking for this consent instruction RP 807). If this court looks at the totality of the court record I believe there is ample evidence of counsel's representation being deficient, ineffective, unsound, and falling far below ~~a reasonable~~ an objective standard of reasonableness. I would ask, that this court dismiss my case, with prejudice, due to 'insufficient evidence', of any crime, having been committed. If that action is something the court would be unwilling to consider

-Conclusion- cont

I would then, respectfully submit, that this Court vacate my second degree rape and fourth degree assault charges. I would ask that this court under the standard set forth by State v. Lynch 178 Wash. 2d 487 (2013) set aside any community custody conditions as they relate to the 'ISRB' or Indeterminate Sentencing Review Board. In a case such as mines, where there was scant physical evidence, and no scientific or DNA evidence that specifically pointed to me, where there were numerous and major inconsistencies in plaintiff's testimony, where any injuries claimed by plaintiff are equivocal, I would respectfully, and humbly, submit, that my case has more question after trial and my conviction, than it did at the start, of trial. To know the facts of this case personally and to know that I have been wrongly convicted, is deeply disturbing and painful. To have to serve a potential life sentence, for a crime I did not committ is beyond cruel.

Sincerely,

x Wendell Maurice Clark

x Wendell Maurice Clark

03/05/2020