

Case Number 33313-2-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

FILED

MAR 29 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Respondent,

vs.

Ignacio Cobos,

Appellant.

APPELLANT'S OPENING BRIEF

Ignacio Cobos # 920217
Appellant, In Propria Persona
Washington Correction Center
P.O. Box 900
Shelton, WA 98584

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I. Introduction

Ignacio Cobos, the appellant, after "legally" parking in a private property, was questioned by police officer for driving [in a private property] without its headlights, and forced to produce exculpatory evidence for an allegation made by his passenger, and thereafter arrested. At his first court appearance without being "legally" represented by counsel, the court made a determination that probable cause existed for the detention of appellant. Counsel was appointed and a "formal" request was made for an "effective" representation, and thereafter, appellant moved the court for permission to represent himself. Motion was never heard. Appellant made critical objections to pretrial proceedings, and some pleadings were rejected by the clerk of the court. The State untimely disclosed material discovery and provided a late interview with the victim. Numerous continuances of the trial were made, and defense counsel failed to make a decision on whether or not to move to suppress evidence. The trial court denied a defense's request for a continuance to get a critical defense witness. The essential elements of the charges were not proven and the jury was not fully instructed. The appellant was convicted of delivery and possession of methamphetamine, and voyeurism. At sentencing, appellant moved to represent himself and thereafter proceeded to sentencing. The sentencing court sentenced appellant with an unproven offender score

to a sentence in excess of the maximum statutory sentence for the delivery and voyeurism. Imposed conditions unrelated to the crimes and imposed costs without first making a determination on appellant's future ability to pay.

Appellant timely appealed and "forced" to represent himself without the appellate court's permission. The appellate court vacated the sentence and remanded allowing the State a second bite of the apple and prove appellant's prior convictions. The Supreme Court superseded the Court's common law "no second change" rule and affirmed the court of appeals.

Appellant was [re]sentenced. Again, the sentencing court imposed sentences in excess the maximum statutory sentence, imposed unrelated conditions, and costs without making a determination on appellant's future ability to pay. Appellant was informed of his right to appeal. Appellant timely appealed.

Appellant moved appellate court for additional public funds to enhance the audio of pretrial hearing for a "complete" record on appeal. Request was denied. Appellant seeked discretionary review and Supreme Court denied review.

Appellant asked for permission to represent himself, and appellate court did not make a ruling.

II. Assignment of Error

No. 1 Appellant represented himself at sentencing and continued to represent himself on appeal without the appellate court's permission.

- No. 2 Appellant raised a "sole" error pertaining to the "original" sentence in his first direct appeal, and the appellate court attempted to force appellant to raise other available issues.
- No. 3 After "legally" parking in a private property appellant was seized and questioned.
- No. 4 After questioning appellant's passenger, appellant showed officers a security video.
- No. 5 At first court appearance without being legally represented by counsel, the court made a determination that probable cause existed to detain appellant.
- No. 6 Late disclosure of critical and material discovery by the State.
- No. 7 Due to the conversation with the officers concerning passenger's allegation, appellant produced exculpatory evidence for the allegation.
- No. 8 Defense counsel had trouble interviewing the victims and receiving material discovery.
- No. 9 Trial date was continued numerous times based on numerous reasons.
- No. 10 Defense counsel asked for a continuance to get a critical defense witness and the court denied the request.
- No. 11 A detective's testimony was introduced as expert testimony.
- No. 12 The late results from the crime lab tests concluded that there were two controlled substances present in the "sole" pipe tested.
- No. 13 The security video filming took place in appellant's bedroom.
- No. 14 The State amended the information several times.
- No. 15 The jury was not fully instructed on critical definitions.
- No. 16 The jury was pressured for a verdict.

No. 17 The Court's sentence on the delivery and voyeurism was over the maximum statutory sentence.

No. 18 The trial court did not heard appellant's motion to represent himself.

No. 19 Appellant filed several pleadings with the trial court, and some were rejected.

No. 20 The respondent misinformed the court.

No. 21 The respondent used its power to get back at appellant for numerous letters appellant wrote to respondent concerning the respondent's case weakness.

No. 22 The court imposed sentence conditions unrelated to appellant's crime(s).

No. 23 Appellant's future ability to pay was not considered before court imposed costs and fees.

No. 24 Appellant was transferred to the Department of Corrections after his timely notice of appeal.

No. 25 Appellant was not awarded costs after the vacation of his sentence.

No. 26 There are numerous errors for a fair trial.

Issues Pertaining to Assignments of Error

No. 1 Did appellant legally represented himself in his first direct appeal?

No. 2 Is the appellant entitled to raise any and all available issues in his current direct appeal?

No. 3 Was appellant illegally seized?

No. 4 Was the search warrant valid?

No. 5 Did the trial court erred in making a determination of probable cause for the detention of appellant when appellant was not represented by counsel?

No. 6 Did appellant's right to represent himself violated?

- No. 7 Were appellant's statement voluntarily made?
- No. 8 Was appellant's right to prepare a defense violated?
- No. 9 Was appellant's right to speedy trial violated?
- No. 10 Did the trial court erred in allowing the Detective's testimony as an expert's witness?
- No. 11 Is there sufficient evidence to prove beyond a reasonable doubt the elements of delivery of methamphetamine?
- No. 12 Is there sufficient evidence to prove beyond a reasonable doubt the elements of voyeurism?
- No. 13 Did the trial court erred in not fully instructing the jury?
- No. 14 Did the court erred in sentencing appellant in excess of the maximum statutory sentence for the delivery and voyeurism?
- No. 15 Did the trial court erred in imposing conditions unrelated to appellant's crime(s)?
- No. 16 Did the trial court erred in not making a determination of appellant's future ability to pay before imposing legal financial obligations?
- No. 17 Did the Grant County Sheriff Office erred in transferring appellant to the Department of Corrections after his timely notice of appeal?
- No. 18 Is appellant entitled to be awarded costs for his first direct appeal?
- No. 19 Did the officer erred in questioning appellant's passenger?
- No. 20 Did the trial court erred in allowing the amendments of the information?
- No. 21 Was appellant's right to represent himself violated?
- No. 22 Did the trial court erred in not hearing appel-

lant's motion(s)?

No. 23 Did the Clerk of the Court erred in rejecting appellant's pleadings?

No. 24 Was appellant's right to access the court violated?

No. 25 Was the jury pressured for a verdict?

No. 26 Was appellant's right to a complete record on review violated?

No. 27 Is there sufficient evidence to prove beyond a reasonable doubt the elements of possession of a controlled substance, methamphetamine?

No. 28 Did the prosecutor committed misconduct?

No. 29 Should the court apply the cumulative error doctrine?

no. 30 Was appellant's right to a public trial violated?

No. 31 Did appellant suffered vindictive prosecution?

No. 32 Did the trial court erred in denying defense motion to dismiss for failure to make a Prima Facie Case?

No. 33 Did appellant suffered in effective assistance of counsel.

III. Statement of the Case

Ignacio Cobos, residing at 1842 W. Broadway #6, Moses Lake, Washington 98337, had been in a relationship with Jennifer Beth Gruver, for about six months. VRP I, 49-50; VRP II, 139, 219, 235, 242, 245^[1] During this time, Ms. Gruver frequently

[1] The Verbatim report of Proceedings (VRP) for trial (December 14-16, 2011) were generated in three (I, II, III) volumes. Reference to trial VRP would be by volume and page number. Reference to pretrial hearings VRP would be by date and page number.

called Mr. Cobos. VRP II, 238

On August 19, 2011, at approximately 4:30 p.m., Ignacio Cobos got his dirty laundry together, putted in his SUV and left his apartment to a laundry mat. Before leaving, he turned on his security video-recording system. VRP II, 235, 245 While at the laundry mat, he received texts and a call from Ms. Gruver, his girlfriend for the last six months. VRP II, 227, 271 After finishing laundry, Mr. Cobos drove to Cascade Valley and picked her up. Id. Immediately, a discussion initiated concerning their relationship. Mr. Cobos wanted to terminate the relationship. VRP II, 248-49 They agreed to go to Mr. Cobos apartment to discuss the relationship. Mr. Cobos stopped at a Taco Shop and bought dinner for them. VRP II, 273 At the apartment, Mr. Cobos forgot to turn off the security video-recording system. They eat, talked about the relationship and Ms. Gruver pulled out a Methamphetamine pipe from her purse, and started smoking. Mr. Cobos took the pipe away due to concerns about Ms. Gruver being pregnant; took 2-3 hits and returned the pipe to the rightful owner, Ms. Gruver. See, States's Exhibit #9 (video) The discussions continued, including concerning Ms. Gruver being pregnant. Id.; VRP II, 234 They make up, and had intercourse. Id. (video) A friend of Mr. Cobos stopped by. VRP II, 261-62 Ms. Gruver needed to be home. They left the apartment with an agreement for Mr. Cobos to drop Ms. Gruver. On the way to Ms. Gruver's home, Mr. Cobos stopped at the friend's house.

VRP II, 262 At a gas station. VRP II, 263-66 During this period of time the discussion continued on their relationship, and Ms. Gruver asked to return to the apartment because she needed to get her toothbrush. RP II, 251, 266 She left it there because she spent the night occassionally. VRP II, 251 As soon as Mr. Cobos exited the public road, he turned off his headlights to not disturb tenants in the small apartment complex, and immediately parked backwards against some hedges. VRP I, 52, 55 Approximately seventy-five yards away from his apartment. VRP I, 51 There are only seven apartments, in two sets. Apartments 1-4 and 5-7. At the same time, Moses Lake Police Officer Beau Montgomery driving on the public road of Broadway, saw Mr. Cobos' SUV moving without headlights. Id. Officer Montgomery was driving. VRP I, 55 Detective Francis, who was riding with Officer Montgomery, saw the vehicle in the driveway of the apartment complex. VRP I, 54-55 Officer Montgomery made a U-Turn. VRP I, 54 Detective Francis saw Mr. Cobos's SUV backed up to the hedges. Mr. Cobos had turned his car around and started backing up into the hedges. VRP I, 55 Detective Francis did not saw Mr. cobos driving on a road. VRP I, 61 Officer Montgomery stopped his patrol facing the front of Mr. Cobos vehicle. VRP I, 55 Not a traditional traffic stop. Id. Officer Montgomery did not turned the [emergency] lights on. Id.; CP 4-11 Detective Francis initially contacted Mr. Cobos, long enough to ask for his driver's license and registration. VRP I, 46 And informed

Mr. Cobos "Hey we're stopping you because you are operating a vehicle without any lights on." VRP I, 56 Detective Francis did not took the driver's license back to patrol to process it for a ticket because "contacting somebody without their lights on in that type of situation probably would have resulted in probably not a ticket, probably a written warning." VRP I, 54 While talking to Mr. Cobos, Detective Francis didn't have a chance to return to the vehicle [patrol] because he noticed Jennifer Gruver in the vehicle. VRP I, 56-57 Detective Francis traded places with Officer Montgomery and went to the passenger's side and asked Ms. Gruver "What Ms. Gruver is doing in a car with Mr. Cobos." VRP II, 250 "What's Jennifer Gruver doing in here." Id. Jennifer exited Mr. Cobos's SUV was little scared that she was going to be in trouble. VRP II, 251 She told Detective Francis that she had never been Mr. Cobos girlfriend. VRP II, 251-52 And made some allegations. VRP I, 47, 57-58 She appeared under the influence. Detective Francis has had contact with Jennifer Gruver his entire career. VRP I, 58 5½ years. Id.; VRP 10-19-11, 45 Most of the time the contacts with Jennifer Gruver were from her being the reporting party regarding family issues but sometimes were she had been a person of interest in other things. VRP I, 58 Before deciding to further investigate the circumstances Ms. Gruver described Detective Francis wanted to speak to the on-duty Sergeant first. VRP I, 47 While Mr. Cobos was still in his car, sitting in the dri-

ver's seat, Detective contacted Mr. Cobos about what Ms. Gruver had told him. VRP I, 60 Mr. Cobos appeared sober. Id. Detective Francis advised him of his Miranda Warnings by a department issued card. VRP I, 48 Mr. Cobos agreed to give up those rights and speak with Detective Francis. VRP I, 49 Detective Francis detained Mr. Cobos CP 4-11 Mr. Cobos offered to show the apartment security video-recording system. Id. After viewing the video Cobos was transported to the Moses Lake Police Department (MLPD). Sergeant Mier sealed the apartment with evidence tape. Detective Sursely obtained a search warrant for 1842 W. Broadway #6 to recover the computer with the video as well as evidence of narcotics use. CP 4-11, at 7 Mr. Cobos was transported to the County Jail. Id. Sursely photographed the apartment. Francis begun to search. He found several pieces of mail addressed to Ignacio Cobos at 1842 W. Broadway #6. Farmers Insurance Bill was taken into evidence. A small HP Net-book that Cobos had shown Francis the video as well as a jewelers bag containing residue and a torn baggy corner containing a cream colored powder substance which field tested positive for methamphetamine weighing 0.9 grams. Two glass pipes. In the headboard of the bed Sursely located a baggy corner corner with white powder residue, a spoon with white chalky substance on it as well as tweezers with a white powder substance on them. Id.

On August 22, 2011, Mr. Cobos appeared before the Grant County Superior Court for his initial appearance. The State

addressed the Court: "Your Honor, Mr. Cobos is before the court for an initial appearance. He is being assisted by Mr. Kozler because of, I believe, confirmation (unintelligible) Information and Affidavit of Probable Cause." The Court addressed Mr. Cobos concerning time to review charges, Mr. Cobos said no. Mr. Kozler interrupted and assisted Mr. Cobos, without Mr. Cobos consent nor appointment from the court. RP 08-22-11, 3-4 The Court continued to advise Mr. Cobos of his right to be represented by a lawyer, and he accepted appointment.

On August 30, 2011, Mr. Cobos appeared before the Court for arraignment, represented by Ms. Quinn Rosborough. VRP 08-30-11, 10-11 On this same date, Mr. Cobos's counsel filed a Notice of Appearance and Demand for Discovery. CP 14-17 The Court entered a Criminal Case Scheduling Order setting Omnibus Hearing for September 20, 2011; Readiness for October 17, 2011; and trial for October 19, 2011. CP 18

On September 1, 2011, Mr. Cobos filed Defendant's Request to Court Appointed Attorney. CP 19-20

On September 8, 2011, Mr. Cobos filed Defendant's Objection to Preliminary Determination of Probable Cause, based on lack of legal representation, asking for a full hearing. CP 21-23

On September 20, 2011, Mr. Cobos appeared before the Court for an Omnibus Hearing. VRP 09-20-11, 13 An Order was signed. Three issues (Ms. Gruver's criminal history, lab results, enhancement of videotape) were discussed. Id. The Court set the

3.5 hearing for October 5, 2011, and trial for October 19, 2011.
CP 24 The State filed Plaintiff's Compliance With Omnibus Order and CrR 4.7(a). CP 24 On plaintiff's Compliance stated that the State was in compliance with discovery by providing everything to the defense. CP 25 Defense counsel informed the court: "And it's noted on there, but obviously I — I can't anticipate a suppression or any motion regarding the drugs until I have the lab results." VRP 09-20-11, 14 And made a notation (but reserved pending lab results) on the Order on Omnibus Hearing. CP 25

On September 26, 2011, Mr. Cobos filed Defendant's Objection to Omnibus Hearing. CP 26 The objection was based on defense counsel's failure to request "critical" documents concerning the Grant County Superior Court's policy of "refusing" to accept pleadings from a person represented by counsel. Id.

On October 5, 2011, Mr. Cobos appeared before the court for 3.5 hearing. VRP 10-05-11, 2 The case was called, and the court, over defense's objection continued the hearing. The State informed the court that she was in trial. Id. at 2

On October 12, 2011, Mr. Cobos appeared before the court for the 3.5 hearing.^[*] The State moved for a one-day continuance as she had a Ryan hearing that afternoon. Defendant objected, stating that the defense was present and ready to proceed. The

[*] There is no record for this date due to For-The-Record (FTR) malfunction. The appellants are relying on Criminal Minute Sheet made by Deputy Clerk Marla Weeb

case was continued.

On October 13, 2011, the State informed the Court that the State was unable to proceed due to unforeseen circumstances, and asked the 3.5 hearing be continued, and acknowledged Mr. Cobos's trial date, and that if necessary, the trial could proceed after the 3.5 hearing. VRP 10-13-11, 21 Defense counsel informed the court that she had not interviewed Ms. Gruver, and that defense would be ready for trial if the interview was set by the State. That she could not give an effective representation at trial if she had not spoken with the one witness to the alleged crime, and that defendant would not waive his time for trial, and that she still had not received the lab report. The court continued the hearing to October 19, 2011. VRP 10-13-11, 20-28 Mr. Cobos filed Defendant's Motion to Quash Information. CP 28

On October 17, 2011, the parties appeared in court for readiness on the court's weekly motion calendar. VRP 10-17-11, 32 Mr. Mitchell, representing the State informed the court that the officer who advised the defendant of his Miranda Warnings was injured on duty and not cleared to return to work. He further informed the court that this was Ms. Highland's case; that she was ill; . . . Defense counsel informed the court that she had talked with Ms. Highland and the court on Thursday morning; that she had mentioned the officer's concussion, and that it would be ready this week; that she still had not had the interview with Ms. Gruver, and that she and Mr. Cobos were objecting to any continuance. No lab results. A recess was taken. The Court left the case set for trial with the understanding that if Ms. Highland was ill -- and the officer was not there on Wednesday he was going to "very seriously" consider (unintelligible) [dismiss the case]^[3] VRP 10-17-11, 32-41

On October 19, 2011, the date set for trial, Mr. Mitchell representing the State proceeded with the 3.5 hearing. Opening statements were waived by both parties. Detective Richard Francis was called. VRP 10-19-11, 43-44 Detective Francis testified that he had made a vehicle stop. Contacted the defendant. Id. at 46-47 That he read the Miranda Warning to the defendant.

[3] In the brackets appellant writes what he recalls from the hearing. The record is missing.

Id. at 48 That the defendant had no problem understanding the rights. Id. at 49 In cross examination, he testified that he actually didn't see the defendant driving without headlights; that when he saw the vehicle it was in the driveway of the apartment complex; that he didn't make a traffic stop the way people think of a traffic stop because the vehicle was already parked; that he didn't process a ticket; that Mr. Cobos did not appear under the influence of any substance; that he couldn't testify to what Officer Montgomery saw. VRP 10-19-11, 54-61 The defense made a record pointing out that the assigned prosecutor Ms. Highland, was not present. Id. at 70

On October 24, 2011, a readiness hearing, the State moved to amend the information. Defense objected. The court informed the parties that they could take care of that the next day. The Court showed readiness. VRP 10-24-11, 72-73

On October 25, 2011, the court entered Findings of Fact and Conclusions of Law on the 3.5 hearing. The defense objected to one of the findings. VRP 10-25-11, 75 The objection was based on the fact that Detective Francis at the 3.5 testified that he did not see the car being traveled on a public road at the time the lights were off. Id. 75-76 The Court held that: "Because the officers are entitled to rely on the 'fellow officer rule,' I've simply modified the finding to indicate that Montgomery advised Francis of an observation before the stop." Id. at 76 The State's amendment was discussed. Defense objected

on the timeliness when the amendment was adding the count of delivery with special allegation. The defense further objected to the first and second amendments. Id. at 78-81

On October 31, 2011, for a readiness hearing and the Third Amended Information adding the Voyeurism charge. Defense objected. VRP 10-31-11, 83-84 The State asked for a two-week continuance. Id. at 84 Defense counsel informed the court that she had known about the amendment for three working days. Id. at 86 The court allowed the third amendment based on no show of prejudice. Id. at 86

On November 7, 2011, the parties appeared in court for trial docket. VRP 11-07-11, 97 The State informed the court that the State had asked for a continuance. Id. at 97-98 The court asked why the case was not tried on October 19th. Id. at 99 And what had happened on October 26th, Id. The State informed the court about a witness being unavailable. Id. at 99-101 The court explained to the parties about a case concerning a witness being on vacation or training could be good cause for a continuance but that the courts had not addressed whether a witness is on vacation and the parties had known when the matter was set for trial. That the court was not aware what the case law says on that. That what the court would be concerned is when at omnibus they are told that the trial date is good, and then at the eve of trial the officer has a prearranged vacation and knew about it in advance or had some training. That

case law requires from the court to find good cause if at the time of the arraignment or at the omnibus hearing we're told that the date is good date, and thereafter an excuse surfaces. That the only reason the court would not be able to find good cause is if perhaps this was brought up at last moment and it was foreseeable. The court found good cause and continued the case to next week based on "necessary in the administration of justice." and that the defendant was not prejudiced. Id at 101-105 Defendant objected. Id. at 105-106

On Monday November 21, 2011, the case was called for readiness. The State informed the court that she was ready but she was in a Ryan hearing and that her preference was to do that hearing first. VRP 11-21-11, 108

On Monday November 28, 2011, the case was called for trial. VRP 11-28-11, 110 The State informed the court that she may be in three positions (ask for continuance, someone else to take the case, or ask the commissioners to allow her to carry over some of her vacation time):

MS. HIGHLAND: And I would just say this is not a simple case and I've invested hours in it and I'd asked — because I think the Court's going to put me in a position where I'm going to have to lose vacation time. Thank you your Honor. VRP 11-20-11, 110-112

On Monday December 5, 2011, for a readiness hearing, Mr. Gonzalez, representing the defendant, without court appointment and/or authorization from the court or Mr. Cobos, informed the court that the defense was ready. VRP 12-05-11, 114

MS. HIGHLAND: . . . However, I should inform the Court that I have spent hours preparing on this case and I don't believe that's really fair. If this case does not go out this week, the State will be asking for a continuance. I also have an officer who has got military duty again.

. . .
THE COURT: I have (unintelligible) your concerns, I have asked the State to do whatever (unintelligible) attorneys to try the case (unintelligible) I cannot -- I can't -- I can't pre judge the case. There are -- there's standards that I've to be (unintelligible) good cause. And I think I've said -- you know, I've given the attorneys about as much guidance as I can. If this case -- if we don't get this case tried this week and it comes next week, we'll have a full hearing and a questions of whether or not (unintelligible) [to dismiss it].

THE DEFENDANT: Thank you, your Honor.

VRP 12-05-11, 114-117

On December 7, 2011, a notice of hearing was filed. And on December 12, 2011, the case was schedule for a motion hearing, but no record is available. Appellant will ask to supplement record.

On December 14, 2011, the case was called for trial. VRP I, 4 The Court took care of pretrial matters. Id. Defense counsel pointed out that there was no report from Officer Montgomery as she had not received a copy. VRP I, 6 The Court moved to State's motion in limine. Id. at 9-16 The State moved to exclude any evidence that Dr. Nobel (as stated) prescribed Adderall or amphetamine to the defendant. Id. at 16 After a brief recess defence counsel informed the court that her client was concerned. That he would like Dr. Nobel to be able to testify to his prescriptions. That she not included his name on a witness list. That he claims that he never possessed methamphetamine. That Adderall triggers the test. That it was important to her client that Dr. Nobel be present as a witness. The court questioned defendant about his prescriptions and defendant told the court that the prescription was

at home. The Court did not allowed to amend the defense (ghost) witness(es) list:

MS. ROSBOROUGH: . . . — counsel showed you the other day the big stack of mail. She — she clearly knows Dr. Nobel by name because of what my client's written to her. I don't know that it's that such of a surprise that Dr. Nobel — Noble would testify to his medications. So I — I would only — It's clearly not introducing that much since counsel already knows —

THE COURT: It's an entirely new —

MS. ROSEBOROUGH: About Dr. Noble.

THE COURT: — defense, isn't it? It's an entirely new defense.

MS. ROSBOROUGH: Well, it's actually still general denial, general denial that he possessed methamphetamine. Just —

THE DEFENDANT: I did mention in the letters, probably, you know, from a long time a go, it says "If you have methamphetamine" — because I knew — I'm really hard to take the pills. Okay?

. . .
THE COURT: Okay.

MS. ROSBOROUGH: My concern after talking to my client after this motion in limine is that if this case does go — does go and there is a conviction that it's going to be something where it comes back on ineffective assistance of counsel or some —

THE COURT: But, Ms. Rosborough, the Rubicon has been crossed here. I just dismissed all of the other — we're proceeding to trial. And we're going to pick the jury. I'm not — I'm not absolutely foreclosing this. I'm going to hear from you. But I — I'm just telling you I'm skeptical about adding a new witness of this nature at this point.

. . .
MS. HIGHLAND: . . . I am not angry with the Court, obviously. But even suggest that Dr. Noble (as stated) should come and testify at this late date — and I — I disagree with counsel's assessment that this is just general denial. That's tantamount to alibi.

. . .
THE COURT: We'll discuss this after the jury is picked.
VRP I, 33-39

Jury selection took place, the process was not transcribed. VRP I, 39-40 The Clerk sworn in the jury. Id. at 40 A short discussion followed about Ms. Highland's vacation, and Ms. Rosborough's basketball practices:

(By the Court) "Somewhat un-American, though, to put something ahead of sports." VRP I, 52-53 Opening statements followed and were not transcribed. Id. at 53-54 The State called her first witness, Officer Montgomery. Id. at 55

On direct, Officer Montgomery testified that he was on a protective patrol with Detective Rick Francis. Id. at 56 That he had contact with the defendant on August 20th [2011] At approximately 00:45 hours. Id. That the contact took place at 1844 West Broadway. Id. at 56 Due to noticing a vehicle driving in that area without headlights. Id. That he noticed that there was a female in the passenger side of the vehicle. Id. On cross examination, the Officer testified that he did not write a report. That defendant showed Detective Francis a computer. Id. at 62

The State called the second witness, Sergeant Miers. VRP I, 63 On direct, he testified that Officer Francis advised that he was out with a vehicle at 1842 West Broadway, and that he was requesting a patrol officer arrive at that location. Id. at 64 That at one point he learned that there was a videotape that the defendant was showing other officers. Id. at 66 That he informed Ms. Gruver of the video tape. And that at that point she wanted to change her story. Id. at 66-67 That she became nervous. That she had used drugs while in the residence. Id. at 68 Defense counsel objected. The Court instructed the jury that the officer's testimony where he was describing what Ms. Gruver related to him was stricken from the record. To disregard it. Id at 67-68

On cross examination, he testified that Ms. Gruver did not smell of any substance but she was nervous. That Mr. Cobos had glassy eyes, and

that he requested a blood test of Ms. Gruver to substantiate whether or not she was smoking meth. That he did not received the test. Id. at 69-71

The State called the third witness, Detective Francis. VRP I, 71 On direct, he testified that he came into contact with a vehicle in which the defendant was the driver. VRP I, 72 That Officer Montgomery was driving. He saw a vehicle without any lights on the dirt road portion of 1842 west Broadway, which is a road that leads into two trailer parks. That he did not see the vehicle initially. That he contacted the passenger, Jennifer Gruver. That she appeared frightened, very scared. that he knew that something wasn't right with her. Id. at 72-73 That defendant told him that he didn't think Ms. Gruver was aware of being taped. Id. at 76-77

On cross, he testified that when Officer Montgomery and him pulled up to speak with the car that was already parked, he approached the driver's side initially. Id. at 78-79 That he asked for the driver's license and that he could not detect that Mr. Cobos was under the influence. That when Mr. Cobos told him about the videotape he asked Mr. Cobos to see it. That he didn't recall Mr. Cobos showing him a cell phone. Id. at 80-81

On redirect, he testified that the computer was on top of an armoire, overlooking the bed. Id. at 62

On recross, he testified that the computer was not behind anything. Id. at 83

The State called the fourth witness, Detective Sursely. On direct, he testified that he took steps to obtain a search warrant to seize the computer, any drugs, drug paraphernalia associated with drug use, and any documents pertaining to the ownership and dominion and control of the residence. VRP

VRP I, 86 State's Exhibit 1 --HP netbook-- was identified. Id. at 88-89 And admitted. Id. at 91 State's Exhibits 2, 3, 4, 5, 6, and 7 were identified and admitted. Id. at 92-98

Detective Sursely further testified that he got a second search warrant to obtain the videos. VRP I, 98 The jury was excused, and the Court discussed a couple of things, administrative matter. VRP I, 101-02

On December 15, 2011, the trial continued, and the Court made a ruling pertaining to cover up a window. VRP II, 113 The Court ordered the bailiff to cover up the window leaving the courtroom. Id.

Detective Sursely resumed his testimony. He testified the process in collecting the evidence. VRP II, 121-22

(BY MS. HIGHLAND) Q. Now, when you were searching the defendant's apartment did you locate any prescription bottles?

A. Not that I recall. I wasn't necessarily looking for prescription bottles. But I do not recall.

Q. Yesterday you indicated you had four years of experience with INET?

A. Correct.

Q. And could you tell us about your training, education and experience in that?

MS. ROSBOROUGH: Your Honor, I am going to object to this. Detective Sursely was not listed as an expert in the field of narcotics.

THE COURT: Well, there hasn't been an opinion offered at this point. I'll allow the question.

VRP II, 122

Plaintiff's Exhibit 9 (video) was marked and identified. VRP II, 128

On cross Detective Sursely testified that only two of three items sent to the lab came back tested. State objected and Court sustained the objection. VRP II, 151 Detective Sursely further testified on cross that he had not

received the blood results of Ms. Gruver. That he did not had the glass pipes tested for fingerprints, nor DNA or anything like that. VRP II, 158

State's Exhibit #9 (video) was played to the jury. The video shows that Ms. Gruver that Ms. Gruver takes a pipe out of her purse, starts smoking. Mr. Cobos takes the pipe, smokes and returns the pipe to Ms. Gruver. See, video

THE COURT: There is no delivery?

MS. HIGHLAND: Well, I would argue that there us a delivery except that I think a jury would see a pipe being passed back and forth. VRP II, 148

The State called the crime lab expert, Jason Stenzel. VRP II, 193-194 State's exhibits 10, 11, 12, and 13 were marked. No. 13 admitted. Id. at 195-96 Defense counsel complained that she had not been provided with a copy of the notes Mr. Stenzel was testifying from. VRP II, 196-97

(BY MS. HIGHLAND) Q. And based on your analysis of that piece of evidence [#13], what's your opinion as to what that item of evidence contains?

A. I believe that this item contains methamphetamine and dymethyl sulfone.

Q. It is conceivable that the test result -- or is it conceivable that what Plaintiff's 13 contains Adderall?

A. In this case I believe not. Adderall, as I understand it contains amphetamine. Amphetamine and methamphetamine are very close to each other. In fact, they're only one carbon different from each other. But that difference is significant enough to be clearly identified using the techniques that I used.

. . .
Q. And what -- based on the results of your analysis, what did you discern Plaintiff's 12 to be?

A. This material here, the off-white, cream colored chunky material that I looked at, contains both amphetamine as well as methamphetamine.

Q. It is conceivable that one of the products in Plaintiff's 12 is Adderall?

A. It's possible, but I wouldn't be able to tell for sure.
VRP II, 197-200

On cross, Mr. Stenzel testified that No. 12, and 13 were the only items

he tested:

Q. Okay. So I don't want to put words in your mouth, but that is a lot of science and it's — So if something is either an amphetamine or a methamphetamine, it's going to — on just that basic test it's going to both trigger; is that right?

A. On a color test, which is often used as a field test

Q. Okay.

A. — that would be true.

Q. And then when you're testing them at the crime lab it will separate them out?

A. That is true.

Q. You talked about about Exhibit Number 13 has methamphetamine and dimethyl sulfone. What — you said that dimethyl sulfone is not a controlled substance. What is that?

A. Dimethyl sulfone is another organic molecule. It is available commercially. It is a white crystalline solid. And in my experience working methamphetamine cases I find the two of them are often found together in the same sample.

Q. Sorry. Just a few more questions. Did you weight any of these — the amount of controlled substances you found on any of these items?

A. Yes. I did. In item 12 I weighed the chunky material that I had. And the weigh was 0.4 gram.

Q. . . . Are you able out of the .4 grams able to determine how much of that material was amphetamine and how much was methamphetamine?

A. I did no testing to establish that conclusion.

Q. And on the — on — Exhibit Number 13 was a — the pipe. Now, you tested the residue. Did you weight the residue at all?

A. I did not weigh the residue.

Q. And are you able to tell us as a percentage how much was methamphetamine and how much dimethyl sulfone in that residue?

A. I am not able to say that.

VRP II, 207-10

The State called Ms. Gruver to the stand. VRP II, 213 On direct, Ms. Gruver testified that she was 19 years old; that she went to Mr. Cobos apartment very often; that they would talk and smoke crystal meth; that she smoked meth before she met Mr. Cobos; that Mr. Cobos provided the meth. VRP II,

215-19 That she used the cleaner pipe, State's exhibit 13. VRP II, 219

Outside the presence of the jury, the Court pointed out that Ms. Gruver had put her head down on the table and covered her head. Ms. Gruver stated that she was nervous and she didn't wanted to talk about it. VRP II, 221-22. Ms. Gruver continued to testify on direct

Q. (By. Ms. Highland) Did you know about the cameras in the defendant's apartment?

A. Yes, but . . .

Q. Did you know that you were being filmed?

A. No, I didn't.

A. What had the defendant told you about the cameras?

A. He told me that -- he was showing me them to me one day and then he -- oh, my God. He hadn't -- he -- oh, my God, His -- I don't -- I'm trying to think. Oh, so people don't like to break into his apartment. That's probably why he had them. To watch. I don't know.

VRP II, 234-35

Q. When you were with Mr. Cobos did you ever provide the methamphetamine?

A. No. No. Sorry. this is not working right.

Q. Have you ever -- have you ever purchased methamphetamine?

A. Have I ever bought it?

Q. Uh-huh.

A. Yes, I have.

VRP II, 236

On cross, Ms. Gruver testified that she bought methamphetamine on her own, and smoked on her own. RP II, 237-38 That she smoked meth because she like it. Id. at 244 That Mr. Cobos had told her that he didn't want to be in a relationship with her anymore. VRP II, 248

On December 16, 2011, the trial continued. VRP III, 286 The Court took discussion on the second video number 45. Id. at 286-320

THE COURT: Ms. Highland wants to introduce this -- this video because she believes it depicts the delivery, it corroborates what Ms. Gruver is saying . . . Id. at 305

The Court ruled: "So I'm not going to admit 45." VRP II, 321

The jury was called in and the State rested. VRP II, 323 Out of the presence of the jury, the defense made a half-time motion to dismiss the special allegation on the delivery charge and the voyeurism, based on the lack of evidence; that the State had not proved that the filming was done for purposes of arousing or gratifying sexual desire; that the testimony showed that the filming was for home security purposes; that it requires to happen in a place where she would have reasonable expectation of privacy; that it was not her home and not her bedroom; that there was no reasonable expectation of privacy, especially given the fact that Ms. Gruver knew that there was recording all throughout the apartment. The court denied the motions without the State responding. VRP III, 323-26

The rest of video 47, State's exhibit number 9 was published to the jury. And defense rested. VRP III, 328-341

The court instructed the jury. VRP III, 345-361 The parties gave their closing arguments. VRP III, 361-385 The jury initiated deliberations.

The court received a question from the jury: "If both parties possessed meth and were sharing smoking it, would that be delivery." Dated 12-16-11, at 5:03 p.m. VRP III, 393-94 The Court answered: "Please refer to your instructions."

THE COURT: I don't think we've got any indication whether the jury wants to keep on deliberating or not at this time.

MR. BAILIFF: No.

THE COURT: I'm just writing here "Please refer to your instructions." I'm signing it and then today's date, 5:18. Okay.

THE BAILIFF: So, by chance, do you want me to inquire?

THE COURT: I don't know. Counsel, do you want the bailiff to inquire?

MS. HIGHLAND: If he would, sure.

THE COURT: Is that all right with you?

MS. ROSEBOROUGH: That's fine if you ask them if they'd like to stay tonight or come back Monday morning, however, the --

THE BAILIFF: Well, we don't --

MS. ROSEBOROUGH: -- (undecipherable).

THE BAILIFF: We inquire kind of -- we're not trying to pressure them.

MS. ROSEBOROUGH: Yeah, I don't want any pressure.

THE BAILIFF: Just say if they're getting close.

THE COURT: No. I don't want you to ask them that question.

Do you want to just --

MS. HIGHLAND: Ask them if they want to keep deliberating or if they want to come back on Monday.

THE COURT: I think that's fine. Do you --

MS. ROSEBOROUGH: Yeah, that's fine.

VRP III, 394-95

...
THE BAILIFF: They want to keep deliberating and they have another question. VRP III, 395

The jury asked: "If a couple of people pass a meth pipe back and forth, are they both guilty of delivery regardless of who supplied the drug? At 5:31 p.m. VRP III, 395-96 The Court instructed the jury to refer to the instructions at 5:32 p.m. VRP III, 396

The Court mentioned that after 6:00 was going to be a bit of a problem because the Court may not have a Clerk, so the court may have to send the jury home. Id. at 396 The Clerk, Ms. Kimberly Allen informed the court that Marla, the Deputy Clerk could not stay past 6:00. Id. at 397

The jury reached a verdict. The defendant was found guilty of Delivery of Methamphetamine; Possession of Methamphetamine; and Voyeurism. Sentencing was set for January 18, 2012. VRP III, 398-412

On December 20, 2011, a presentence report was ordered. On December 28, 2011, defendant's motion to arrest judgment and sentence was filed. Numerous letters from Jerald W. Thomas were filed on January 9, 2012.

On January 12, 2012, defendant filed a second motion to represent him-

self. On January 13, numerous letters from Jerald W. Thomas were filed. Sentencing hearing stricken on January 18, 2012, and continued to February 7, 2012.

On February 12, 2012, defendant address the Court on his motion for self-representation. The Court granted the motion and sentencing continued for one week.

On February 10, 2012, defendant filed Notice of Appeal. On February 14, 2012, defendant was sentenced.

The matter went to the court of appeals under case number 30658-5-III. The appellate court vacated the sentence and remanded for resentencing allowing the State to take a second bite of the apple. Supreme Court superseded their common law "no second chance" rule and affirmed.

Appellant represented himself in the appellate court and Supreme Court without the permission from the court nor appellant making a motion for self representation.

On March 18, 2015, appellant appeared before the trial court for resentencing. VRP 03-18-15, 2

The State moved the court for an exceptional sentence, and arguments took place. Id. at 5-10 The Court imposed 120 months on Count I (delivery); 24 months on Count III, (possession) and 57 months on Count IV (Voyeurism) to be served concurrently. And 36 months of community custody on Count IV; 12 months on the delivery, and 12 months on the possession. VRP 03-18-15, 11-13 And imposed the same identical costs. Id. at 14

The State asked the court why the court was resentencing the defendant as he was previously sentenced. The Court responded:

THE COURT: I'm concerned about some of the issues that Mr. Cobos has raised. I'm concerned about the possibility that -- well, there are a number -- there are a number of reasons why, but obviously any sentencing decision is difficult --

MS. HIGHLAND: Right.

THE COURT: -- here.

MS. HIGHLAND: I understand that.

THE COURT: The -- let me start with this: Mr. Cobos has raised an issue about the sufficiency of the evidence on the delivery. This was a delivery in which the -- there was a sharing of apparently methamphetamine between Mr. Cobos and the victim. I'm taking into account the nature of the offense itself . . .

-- all these issues and in light of what the actual conduct that was involved here. I think that this -- that the ten years is an appropriate sentence.

MS. HIGHLAND: Your Honor, with all due respect, Mr. Cobos is only now challenging the sufficiency of the evidence.

THE COURT: I'm not ruling on that. I'm not ruling on that.

MS. HIGHLAND: But it does appear that the Court was considering it.

THE COURT: I'm considering the nature of the conduct. I believe -- I'm not ruling on that. I'm considering the nature of the conduct that was testified to and which appeared on the videotape. VRP 03-18-15, 15-16

The Court advised defendant of his right to appeal:

THE COURT: . . . I'd also like to remind you that you have -- to the extent that you still have the right to appeal, you must appeal -- you have the right to appeal to the Court of Appeals this judgment and sentence. Unless a notice of appeal is filed with the clerk of this court within 30 days of the entry of this judgment and sentence, you're going to lose your right to appeal. You have the right to be represented by a lawyer for the purposes of appeal including preparation and filing of the notice of appeal. If you cannot afford to hire a lawyer, the Court will appoint a lawyer to represent you at public expense. You have the right to have those parts of the trial record necessary for appeal prepared at public expense if you cannot afford to pay for such preparations.
VRP 03-18-15, 17-18

A notice of appeal was timely filed. The appellant moved the appellate court for additional public funds to enhance the audio recordings of pretrial

hearings to have the court reported to transcribe the numerous sections transcribed as unintelligible. The Court denied motion and appellant asked the Supreme Court for discretionary review. The Supreme Court declined.

Appellant files his Appellant's Opening Brief.

IV. Argument

1. Did appellant legally represented himself in his first direct appeal?

The Sixth Amendment right to represent oneself at trial does not extend to an appeal. Meyers v. Johnson, 76 F.3d 1330, 1333-34 (5th Cir. 1996); United States v. Gillis, 773 F.2d 549, 559 (4th Cir. 1985) The right of self representation on appeal is neither self-executed nor absolute. State v. Rafay, 167 Wn.2d 644, 652 (2008); State v. Kolocotronis, 73 Wn.2d 92, 98 (1968)

In the present case, the appellant on January 12, 2012, filed a "second" motion with the trial court for permission to represent himself at the sentencing. The Court granted the motion and continued the matter for a week. On February 14, 2012, appellant appeared before the trial court for sentencing. The appellant was sentenced and a notice of appeal was filed.

In the appellate court, appellant at no time, ever, asked the appellate court for permission to represent himself, nor the appellate court made a ruling that appellant could continue representing himself in the appeal, despite the fact that the right of self-representation on appeal is neither self-executed

nor absolute. State v. Rafay, 167 Wn.2d at 652 And said right does not extend to an appeal. Myers v. Johnson, 76 F.3d 1330, 133-34 (5th Cir. 1996)

Therefore, it is crystal clear that the appellant was "forced" to represent himself, and therefore, he should not be punished by preventing him from raising any and all issues that should have been raised on the appeal.

Our Supreme Court in Rafay commented "While the rules on appeal do not specifically address waiver of counsel or self-representation, an appellate court has broad discretion to proceed under RAP 17.1(a) or fashion an appropriate procedure under RAP 1.1(i)."

In order to exercise this right, it is incumbent on the defendant to request it and the right must be exercised knowingly and intelligently. It is well established that pro-se litigants will bear the consequences of his or her representation and cannot on appeal complain of the quality of his defense.

In the present case, the appellant, did not requested the appellate court to represent himself on appeal; did not exercised the right knowingly and intelligently.

Further, the court should not apply the harmless error to this issue based on the fact that appellant will be affected if he is not allowed to raise all available issues. See, next Issue. Appellant should be allowed to raise all available issues, in the interest of justice and fairness.

2. Is appellant entitled to raise any and all available issues in his current direct appeal?

The general rule is that a defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal. State v. Suave, 100 Wn.2d 84, 87 (1983); State v. Mandanas, 163 Wn. App. 712, 716 (2011) However, other cases point out exceptions to the general rule: "The rule does not permit an appellant to raise an issue in a second appeal unless it was considered by the trial court upon remand." RAP 2.5(c)(1) It will consider constitutional issues raised for the first time on appeal. RAP 2.5(a); state v. Contreras, 92 Wn. App. 307 (1998) (other citations omitted)

However, on March 18, 2015, when appellant was resentenced, the sentencing judge did not place a restriction on his appeal. The sentencing judge informed the appellant:

THE COURT: . . . -- to the extent that you still have the right to appeal, you must appeal -- you have the right to appeal to the Court of Appeals this judgment and sentence. VRP 03-18-15, 17

Therefore, appellant is entitled to raise any and all available issues.

An issue on the sufficiency of the evidence is an issue of constitutional magnitude that can be raised for the first time on appeal. State v. Alvarez, 74 Wn. App. 250 (1994), *aff'd*, 128 Wn.2d 1 (1995); State v. Baeza, 100 Wn.2d 487 (1983) However, appellant should not be limited on the issues to present based on the sentencing court's advisement of the right to appeal

and the fact that the self-represented appellant was "forced" to represent himself in his first direct appeal. The sentencing judge did not put a limit on appellant's constitutional right to appeal, therefore, appellant should be entitled to raise any and all available issue in this current direct appeal, to glorify our State Constitution that guarantees appellant the right to appeal. (Citations omitted)

Further, with all due respect, appellant ask the court to not hold these facts against the appellant, and if necessary to appoint a special panel to hear appellant's appeal based on appellant's allegations against this Honorable Court. In appellant's opinion, the best of the three divisions.

3. Was appellant illegally seized?

a) Did the officers conducted a warrantless investigatory stop?

A person operating a motor vehicle is seized when a police officer conducts a traffic stop. Since Terry v. Ohio, 392 U.S. 1 (1968), a traffic stop is considered an investigative detention and such detention, no matter how brief, must be justified at its inception. State v. Ladson, 138 Wn.2d 343, 350 (1999)

In the present case, appellant exited a public road (Broadway West) and immediately turned off his headlights and entered a private dirt road portion of 1842 W. Broadway; a road that leads into two trailer parks. VRP I, 72; VRP I, 56 And immediately parked backwards against some hedges. VRP I, 52,

55 At the same time, Moses Lake Police Officer Beau Montgomery and Detective Richard Francis went by. Officer Montgomery, the driver of the patrol saw Mr. Cobos's SUV moving without headlights. Detective Francis actually didn't saw defendant driving without headlights, when he saw the vehicle it was in the driveway of the apartment complex, backed up to the hedges. VRP I, 51-55 Officer Montgomery made a U-Turn, and stopped his patrol facing the front of Mr. Cobos's vehicle. Id. at 54-55 The officer did not turned the (emergency) lights on. Id. Not a traffic stop the way people think of a traffic stop because the vehicle was already parked. VRP 10-19-11, 54-61 Not a traditional stop. VRP I, 55

Detective Francis initially contacted Mr. Cobos, long enough to ask for his driver's license and registration. VRP I, 46 To inform Mr. Cobos "Hey we're stopping you because you are operating a vehicle without any lights on." VRP I, 56 He did not took the driver's license back to the patrol to process it for a ticket because "contacting somebody without their lights on in that type of situation probable would have resulted in a written warning." VRP I, 54

Our Supreme Court has held that warrantless seizure are per se unreasonable, and the state bear the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. Those exceptions are jealously and carefully drawn. State v. Williams, 102 Wn.2d 733, 736 (1984); Arkansas v. Sanders

442 U.S. 753, 759 (1979)

A Terry stop --a brief investigatory seizure-- is one such exception to the warrant requirement. Terry v. Ohio, 392 U.S. 1 (1968) However, a Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct. Id. at 21; State v. Garving, 166 Wn.2d 242, 250 (2009) To justify the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. Id.; State v. Kennedy, 107 Wn.2d 1, 4 (1986)

In the present case, the facts establish that the officer(s) did not make a traditional stop, and they did not process a ticket, therefore, the officers conducted an illegal warrantless investigatory stop, and illegally seized the appellant.

Detective Francis, while talking^{to} Mr. Cobos about the lights and asking for his driver's license and registration he noticed Jennifer Gruer in the vehicle, and traded places with Officer Montgomery and went to the passenger's side, and asked Ms. Gruver "what Ms. Gruver is doing in a car with Mr. Cobos." VRP II, 250 Thereafter, due to Ms. Gruver's allegation, defendant had to show the officer a video, exculpatory evidence, and despite the exculpatory evidence that showed that Ms. Gruver was lying, a Detective obtained a search warrant and seized drugs. However, had the Detective not talked to the passenger, which the passenger was NOT asking to speak with him, appellant would not be before this court, after serving already six and a half years. Detective Francis had no authority to talk to the passenger, when there was no safety issue, nor the passenger request it.

b) Did the officer had authority to investigate the passenger?

Except in unusual circumstances, there will obviously be no well-founded suspicion to believe that a passenger, as well as the driver, were responsible for the traffic infraction, therefore, the facts of the present case, to an extent, makes this case unique, and therefore, appellant is not able to provide case law exactly on point, however, there are few case to present this argument to the court.

It is well established that an officer has the authority under well-founded suspicion of criminal activity to stop a vehicle, and to make sure to secure the scene for his safety, however, when there is no safety issue, it is appellant's position that, the officer has no authority to investigate the passenger, especially when the passenger is not requesting the officer's protection and/or is asking to speak to the officer. In State v. Larson, 93 Wn.2d 638 (1980) our Supreme Court held that "A stop based on a parking violation committed by the driver does not reasonably provide an officer with grounds to require identification of individuals in the car other than the driver, unless other circumstances give the police independent cause to question passengers." See also, State v. Broadnax, 98 Wn.2d 289, 295-95; Minnesota v. Dickerson, 508 U.S. 366 (1993) RCW 46.64.015 forbids detention for issuing a traffic citation to last no more than a reasonable amount of time.

In the present case, the facts establish that, there was no safety issue, there is no record what-so-ever pertaining to the officer being concerned on their safety, and the passenger did not asked for any assistance, therefore, the officer had no authority to talk to the passenger under our precious Washington Constitution Art. I, § 7, and therefore, the officer exceeded its authority, and therefore, any statement made to the officer by the passenger must be suppressed pursuant to Art. I, § 7, of our precious Washington Constitution.

Detective Francis had known Ms,. Gruver for his entire career. VRP 10-19-11, 58 Five and a half years. Id. To the point of describe her behaviors. Id. at 57 And to be able to alert him that there was something wrong with her, so he wanted to ask her if anything was wrong. Id. at 57 He concluded that she had smoked some methamphetamine. Id. at 58 So he asked her "What Ms. Gruver is doing in a car with Mr. Cobos." VRP II, 250 He did not asked "Is something wrong with you Jennifer? He was concerned for her, she appeared scare, but failed to immediately verify his concern. After some time, Ms. Gruver made an allegation against Mr. Cobos. And Mr. Cobos had to, was forced to, produce exculpatory evidence, the video.

Sergeant Miers on direct testified that at one point he learned that there was a videotape that the defendant was showing the officers. VRP I, 66 And he informed Ms. Gruver of the videotape. Id. And asked her if she wanted to change her story. Id. at 67 She pulled away just a little bit. She became nervous and told the Sergeant that she had smoked meth. Id. at 68

Based on the foregoing, it is clear that the officer had no authority

to investigate the passenger, especially when she was NOT asking for help; she was bias because the appellant had told her that he was terminating the relationship with her. VRP II, 248

c) Did the officers conducted a pretextual stop?

A pretextual stop disturbs private affairs WITHOUT valid justification and is unconstituional. State v. Chacon, 176 Wn.2d 284 (2012) TO determine whether a traffic stop is pretextual, a court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior. State v. Ladson, 138 Wn.2d 343, 358 (1998) The State must show that the officer, both subjectively and objectively is actually motivated by a percived need to make a community caretaking stop aimed at enforcing the traffic code. State v. Ladson, 138 Wn.2d at 359

In the present case, it is clear, crystal clear that there is no evidence whether or not the appellant was driving without headlights in a "public" road. Detective Fracis testified that when he saw the vehicle it was in the driveway of the apartment complex; that he didn't make a traffic stop the way people think of a traffic stop because the vehicle was already parked; that he didn't process a ticket. VRP 10-19-11, 54-61 That he did not see the car being traveled on a public road at the time the lights were off. The officer saw the vehicle on the "dirt portion of 1842 West Broadway, which is a road that leads into

two trailer parks. VRP I, 72 That in a situation like this there is no ticket written only a warning. VRP I, 54 The officer didn't even turned their emergency lights. Id. at 61

Therefore, it is clear that the officers were not aiming to enforce the code, and therefore, the so-called stop was a pretextual stop, and therefore, unconstitutional.

Under the totality of the circumstances did not had a reasonable suspicion of criminal activity, since the State did not demonstrated that appellant was driving without headlights in a public road.

d) Is this error a harmless error?

Certainly not. This error should be considered as a structural error because the unconstitutional stop infected the entire trial process and deprived the appellant of basic protections, and therefore, case should be reversed, and dismissed, to glorify our precious Washington Constitution.

4. Was the search warrant valid?

A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. There must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. CrR 2.3(c); State v.

Spencer, 9 Wn. App. 95 (1973)

In the present case, due to Ms. Gruver's -untruthful- allegations the appellant was "forced" to produce exculpatory evidence in the form of a security video, therefore, the search warrant for evidence of drugs had nothing to do with the allegation, and therefore, shall be suppressed. Franks v. Delaware, 438 U.s. 154 (1978) It shall be noted that when Ms. Gruver was confronted and asked her if she knew that there was a video she became nervous. VRP I, 67 Generally a warrant is valid if a reasonable prudent person would understand from the facts contained in the officer's affidavit that a crime has been committed and that evidence of the crime is located at the place to be searched. State v. Wible, 113 Wn. App. 18, 21 (2002) Therefore, had he described the conduct on the video, the judge would have not issue a warrant. Further, the appellant had offered the video, therefore, there was no necessity to search the appellant's residence, a victim of a sexual assault shows specific signs, none were here. State v. Strauss, 119 Wn.2d 401, 416-17 (1992); State v. Thomas, 46 Wn. App. 280, 282, 284-85 (1986) State v. Flett, 40 Wn. App. 277, 278-79 (1985); Wash. Const. art. I, § 7

5. Did the Court erred by making a determination of probable cause for the detention of appellant, when appellant was not represented by counsel?

A person arrested shall have a judicial determination of probable cause no later than 48 hours following the arrest, unless probable cause has been determined prior to the arrest. CFR 3.2.1 At this preliminary appearance the court shall provide for a lawyer pursuant to 3.1. Id. The preliminary appearance is a critical stage of the proceedings. At this

appearance a prepared court-appointed could attack the lack of probable cause, and obtain the defendant's release.

In the present case, the Court asked the appellant if he had the opportunity to review the charges, and appellant responded in the negative. Mr. Kozar, a public defender interrupted and assisted appellant without being appointed and/or with appellant's authorization. After the court made a determination of probable cause, the court appointed counsel on appellant's request, and the Court informed the appellant "assuming that you qualify financially, the public defenders will represent you. Mr. Kozar will assist you today." VRP 08-22-11, 4-5 Mr. Kozar was not prepared to represent appellant at this critical stage of the proceedings, and the Court had no authority to tell Mr. Kozar to represent appellant, therefore, appellant's due process, and right to be effectively assisted by a lawyer were violated. Sixth, Fourteenth Amendments (other citations omitted)

6. Did appellant's right to represent himself violated?

The State and Federal Constitutions guarantee a defendant the right to self-representation. Sixth Amendment to the United States Constitution; Wash. Const. art. I, § 22 To exercise this right, a defendant's request must be both unequivocal and timely. State v. Eredlove, 79 Wn. App. 101, 106 (1995); Farretta v. California, 422 U.S. 806 (1975)

In the present case, the appellant filed a motion for self-

representation on October 13, 2011, however, after stamping the motion the (deputy) clerk returned the motion to appellant with a Note To Criminal Case Defendant Represented By An Attorney.

RCW 2.3.05⁽⁴⁾ states that the clerk of the court shall file the documents the clerk receives, and the Court has 90 days to hear and decide the motion. [4] Further, appellant has the right to access the court under the First Amendment to the United States Constitution. In re Pers, Restraint of Adleman, 139 Wn.2d 752 (1999) As well as the Fourteenth Amendment. Ching v. Lewis, 895 F.2d 608, 609-10 (9th Cir. 1990) That right can be limited by the court only if the litigant abuses that right. Cello-Whitney v. Hoover, 769 F.Spp. 1155 (W.D. Wash. 1991)

Therefore, the (deputy) had to authority to return the motion after lawfully filing it. And therefore, appellant's right to self-representation was violated, and reversal is mandated.

7. Was appellant's statement voluntarily made?

After the hearing, the court shall set forth in writing (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons thereof. CrR 3.5(c)

In the present case, defense counsel made an objection to a finding of fact that "Detective Francis did not see a car being traveled on a public road at the time the headlights were

[4] Appellant just realized that he has been looking at the Clerk's Papers from the first appeal, and therefore, appellant will refer to the document by title and as the court to incorporate the clerk's papers from the first appeal

off." The Court held that "Because the officers are entitled to rely on the fellow officer rule," the Court simply modified the finding to indicate that Montgomery advised Francis of an observation before the stop." VRP 10-25-11, 76 At the hearing, Francis testified that "he couldn't testify to what Officer Montgomery saw." VRP 10-19-11, 54-61 Therefore, it is clear that despite of the "fellow officer rule" the record demonstrates that Montgomery, at no time, ever, told Francis that he saw the vehicle moving without headlights, and therefore, the court erred in correcting the finding of fact when the record does not established that fact. State v. Broadway, 133 Wn.2d 118 (1997); State v. Kelly, 33 Wn. App. 541 (1982)

8. Was appellant's right to prepare a defense violated?

A criminal defendant has a constitutional right to prepare a defense under the 6th Amendment and Wash. Const. art. I, § 22 (amendment 10); State v. Mupin, 123 Wn.2d 918, 924 (1996) The prosecutor owes a duty to defendant to see that his rights to a constitutionally fair trial are violated. State v. Monday, 171 Wn.2d 607, 676 (2011) No court can question the principle that a criminal defendant has a constitutional right to present evidence in his own defense, and relevant observation testimony tending to rebut any element of the State's case State v. Jones, 168 Wn.2d 713, 719 (2010) Further, the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. Id. at 720 (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973))

In the present case, on the date set for trial, and during State's motion in Limine, the State moved to exclude any evidence that Dr. Nobel (as stated) prescribed Adderall or amphetamine to the defendant. VRP I, 16 Defense counsel informed the court that Dr. Nobel was not on the witness list. That she would not be calling the Doctor. That she should be able to question the State's expert witness regarding the drugs as to whether or not those drugs that were tested could have been Adderall or amphetamines and if that test result could have been triggered by that drug. VRP I, 16-

17 Defense counsel informed the court that she need it to speak with her client. VRP I, 32 A recess was taken. Id. at 33 And thereafter defense counsel informed the court that appellant was concerned, that he would like to have Dr. Nobel testify to his prescriptions. The Court responded that at the time the court was not going to allow an amendment to the witness list, and advised defense counsel that if she wanted to bring that later, that she could based on the court's belief that that would be an entire new issue into the case. Defense counsel informed the court that the State had showed the court the stack of mail her client had sent to the State, and at she clearly knew of Dr. Nobel, and therefore, it was not a surprise. The court expressed its concern about being an entire new defense, and counsel said that it's actually still general denial. Counsel pointed her concern that if the case goes to trial and there is a conviction that it was going to be something where it comes on ineffective assistance of counsel. The State argued she was led to believe that case was going to trial. Thatto suggest that Dr. Noble should come and testify at this late date; That she disagreed with counsel that this was still general denial, "that's tantamount to alibi. VRP I, 33-39

At trial, on direct examination of Detective Sursely, the State asked:

Q. Now, when you were searching the defendant's apartment did you located any prescription bottles?

A. Not that I recall. I wasn't necessarily looking for prescription bottles. But I do not recall.

VRP II, 122

During direct examination of the crime lab expert, Jason Stenzal:

Q. It is conceivable that the test result that what plaintiff's 13 contains Adderall?

Q. So your testing procedure would have identified if, in fact the substance was Adderall?

The State opened the door despite the court's ruling, and on cross Mr. Stenzel testified that Adderall would have tested positive for amphetamine with a color test. VRP II, 207-10

Appellant had sent numerous letters to the prosecutor in which he mentioned that the substance found in his apartment was Adderall and that he had a prescription from Dr. Nobel, and Mr. Stenzel testified that he could have pin point the substance with additional tests, therefore, Dr. Nobel's testimony was critical for appellant's defense, and therefore, appellant's due process right and the right to prepare a defense was violated

This error could be subject to the harmless error analysis. State v. Lord, 161 Wn.2d 276, 295 (2007) Under that test (Overwhelming untainted evidence), error is harmless if the untainted admitted evidence is so overwhelming as to necessarily lead to a finding of guilt. Id. at 296 Error is no prejudicial if the evidence is of minor significance when compared to the overall weight of the evidence. Id

The evidence concerning the possession of a controlled substance was Plaintiff's admitted exhibit #s 5 and 12, that contained a controlled substance, therefore, with Dr. Nobel's testimony, that he prescribed Adderall to appellant, a controlled substance that triggers a test as positive of meth. Nothing more. However, additional test could have been performed to separate the molecules and with certainty identify each substance, therefore, this error can not be subject to the harmless error analysis. And therefore, appellant's right to prepare and present a defense as well due process were violated, and a reversal shall be required.

9. Was appellant's right to speedy trial violated?

Pursuant to CrR 3.3 an in-custody defendant must be brought to trial within

60 days from arraignment. However, some continuances are allowed under certain circumstances. State v. Angulo, 69 Wn. App. 337 (1993); State v. Kelley, 64 Wn. App. 755 (1992); State v. Purdom, 106 Wn.2d 745 (1986); State v. Kokot, 42 Wn. App. 733 (1986); State v. Yuen, 23 Wn. App. 377 (1979) (other citations omitted) The granting of a continuance rests with the discretion of the trial court, which will not be disturbed without a showing that the defendant was prejudiced or that the result of the trial would have been different. State v. Turner, 16 Wn. App. 292 (1976) A continuance may only be granted before the defendant's right to dismissal has accrued under this rule. State v. Jack, 87 Wn.2d 467 (1976) Once an initial continuance is granted a criminal case may be continued beyond the 60-day limit of this rule in exceptional circumstances. State v. Perez, 16 Wn. App. 154 (1976)

In the present case, when defense counsel filed Notice of Appearance, counsel made a demand for discovery. Further, counsel requested "Any vacations, trainings, medical appointments, or other obligations of witnesses which may conflict with required court appearances, together with the scheduled dates and nature of the activity (because hearings and trial dates are often continued well beyond the dates originally scheduled, the information requested includes any potential conflict within one month of the scheduled date. See CP 14-17 (under case no. 306585, which will be incorporated to this case)

In the present case, the State DID NOT provided the requested information, and the continuances were made pursuant to what defense counsel had asked for. VRP (there is no record of this hearing due to malfunction of

the equipment); VRP 10-13-11, 20-28; VRP 10-17-11, 32-41; VRP 10-31-11, 84; VRP 11-7-11, 97-98, 99-101, 101-105; VRP 11-28-11, 110-12; VRP 12-05-11, 114-17

Based under the foregoing facts, it is crystal clear that appellant was brought to trial until December 14, 2011, when the original trial date was set for October 19, 2011, and the basis for the continuances should have been disclosed to the defense pursuant to defense counsel's demand for those dates of pre-planned vacations, training, and so forth, and therefore, appellant's speedy trial was violated and he was prejudiced. CrR 3.3

10. Did the trial court err in allowing the Detective's testimony as an expert witness?

The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in informing an opinion on the subject to which his or her testimony relates. Briceno v. Scribner, 555 F.3d 1069 (9th Cir. 2008); U.S. v. Tamman, 782 F.3d 543 (9th Cir. 2014)

In the present case, during the testimony from State's witness Detective Sursely, defense objected to that fact that the Detective was not listed as an expert in the field of narcotics. VRP II, 122 The second objection was based on the testimony from Detective Sursely called for speculation, and again informed the court that the detective was not listed as an expert. RP II, 123-125 The second objection was sustained and the jury instructed to disregard it and answer stricken. VRP II, 126 However, Detective was not listed as an expert, therefore, the court erred.

11. Is there sufficient evidence to prove beyond a reasonable doubt the elements of delivery?

Evidence is sufficient to support a conviction if viewed in the light most favorable to the prosecutor, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Andy, 182 Wn.2d 294 (2014); Jackson v. Virginia, 443 U.S. 307, 319 (1979) (other citations omitted)

In the present case, for the delivery charge, the jury was instructed that "It is a crime for any person to deliver a controlled substance that the person knows to be a controlled substance except as authorized by law." Instruction No. 11 The "to convict" instruction (No. 12) instructed the jury that "To convict the defendant of the crime of delivery of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about August 19, 2011, the defendant delivered a controlled substance; (2) That the defendant knew that the substance delivered was a controlled substance, methamphetamine; and (3) That the acts occurred in the State of Washington." Further, the jury was instructed that "Deliver or delivery means the actual or constructive or attempted transfer of a controlled substance or legend drug from one person to another." See Instruction No. 13; RCW 69.50.101(f); State v. Campbell, 59 Wn. App. 61 (1990) (citing Davila v. State, 664 S.W.2d 722, 724 (Tex. Cr.App. 1984); State v. Devries, 149 Wn.2d 842 (2003); State v. Hernandez, 85 Wn. App. 672, 675 (1997); State v. Eddie A., 40 Wn. App. 717, 720 (1985); State v. Goodman, 150 Wn.2d 774 (2004); State v. Langworthy, 92 Wn.2d 148 (1979)(Substantive offense of delivery of controlled substance necessarily requires participation of two persons, the deliverer and the intended recipient, and if there is no intended recipient, there can be no delivery under this section); State

v. Werry, 6 Wn. App. 540 (1972)(Passing control, such as momentarily handling drugs would NOT BE sufficient evidence to constitute a prima facie case of possession); State v. Morris, 72 Wn. App. 948 (1995); State v. Shupe, 172 Wn. App. 341 (2012)(No buyer was ever specifically asked about the identity of the seller); U.S. v. Ramirez, 608 F.2d 1261 (1979); U.S. v. Meyers, 601 F.Supp. 1072 (1984)

Therefore, in short, the State had to prove that, appellant possessed the controlled substance, transferred---pass, handover, sell, or give--- and relinquished possession ---control to another--- and the controlled substance was not returned.

In the present case, there was very little testimony from Ms. Gruver, pertaining to the allegation of deliver; she was the only witness that testified concerning the allegation of delivery. On direct examination she testified that she was 19 years old, had no job, and when asked if she knew anybody in the courtroom she asked for a minute, and acknowledged that she knew Mr. Cobos, and that he was in the courtroom. VRP II, 215-16 That Mr. Cobos provided the meth. Id. at 218

The alleged transferred substance in this case was in a glass pipe, and when asked which of the two pipes she used, she picked the only pipe that was tested, the cleaner one, she described, being State's exhibit no. 13. VRP II, 219 Further, she testified that she had bought meth, not from appellant. VRP II, 236 On cross examination, Ms. Gruver clarified that she had bought meth on her own. VRP II, 237-38

Ms. Gruver was never asked if Mr. Cobos delivered meth to her on August 19, 2011; whether or not Mr. Cobos had given her meth on that day, therefore,

there is insufficient evidence to prove, beyond a reasonable doubt, the elements of delivery.

A prosecutor must enforce the law by prosecuting those who violate the peace and dignity of the state by breaking the law. At the same time, the prosecutor functions as a representative of the people in a quasijudicial capacity in a search for justice. The prosecutor does not fulfill either role by securing a conviction based on proceedings that violate defendant's right to a fair trial, such a conviction in fact undermines the integrity of the entire criminal system. The prosecutor is presumed to act impartially in the interest only of justice. If s/he lays aside the impartiality that should characterize his or her official action to become a heated partisan and by vituperation of a prisoner and appeals to prejudice seeks to procure the conviction at all hazards he or she ceases to properly represent the public interest, which demands no victim and asks no conviction through through aid of passion, sympathy or resentment. People v. Fielding, 158 N.Y. 452, 53 N.E. 497 (1899) These words of Fielding clearly describes the prosecutor in this matter, based on the fact that she knew that the appellant did not had in his possession the controlled substance in the glass pipe, in order for him to transfer the drug to Ms. Gruver, based on the fact that Ms. Gruver was the person that supplied the controlled substance.

A person charged criminally has a constitutional right to a fair trial and to require that the State establish guilty beyond a reasonable doubt through testimony, evidence and exhibits. State v. Barry, 183 Wn.2d 297 (2014)

Please keep in mind that this delivery case is not like this court usually gets. In fact, please take notice that in this matter there was no

law enforcement nor a confidential informant involved. This matter involves an unlawful Terry stop that because one of the officers knew appellant's passenger the officer unlawfully contacted the passenger, Ms. Gruver, and she made an allegation against the appellant and the appellant produced a security video (State's exhibit No. 9) which shows Ms. Gruver, and appellant smoking meth in a pipe. The video demonstrates where the meth came from, and therefore, shows that the prosecutor charged appellant with delivery because she was looking for a conviction since she knew that the original sex case would not be sticking up. The prosecutor in this case, based on the video, undermined the integrity of the entire system by allowing the charge to proceed to a jury trial when she knew that there was insufficient evidence for a conviction. Unfortunately, the jury returned a verdict of guilty at the last minute of a Friday evening after being pressured and asking two "critical" questions: (1) "if both parties possessed meth and were sharing smoking it, would that be delivery?" At 5:03 p.m.; and (2) "If a couple of people pass a meth pipe back and forth, are they both guilty of delivery, regardless of who supplied the drug?" At 5:31 p.m.

From the second question, it is reasonable to conclude that they knew that the meth did not come from appellant.

For a typical delivery, as well known to this court, involves two people whom made an agreement between the two; one to bring the drugs, which would have possession of the drug, and transfer the drug to the other person, which would prove that the person possessing the drug relinquished the drug. To complete a delivery, requires the transferor to relinquish possession to the transferee. In order to be able to relinquish possession that trans-

feror had to have possession. A defendant possesses a controlled substance when the defendant knows of the substance's presence, the substance is immediately accessible, and the defendant exercises dominion and control over the substance. State v. Hornaday, 105 Wn.2d 120, 125 (1986); State v. Langworthy, 92 Wn.2d 148 (1979) (Where a substantive crime necessarily requires the conceded participation of two persons, we may say that an agreement between those two persons is implied): State v. Wilson, 98 Wn.2d 828 (1985)

Based on the foregoing, appellant's conviction of delivery must be reversed, in the interest of justice and fairness.

12. Is there sufficient evidence to prove beyond a reasonable doubt the elements of voyeurism?

Evidence is sufficient to support a conviction if viewed in the light most favorable to the prosecutor, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Andy, 182 Wn.2d 294 (2014); Jackson v. Virginia, 443 U.S. 307 (1979) (other citations omitted)

In the present case, for the voyeurism charge, the jury was instructed that "A person commits the crime of voyeurism when, for the purposes of arousing or gratifying the sexual desire of any person, the person knowingly films a second person without the second person's knowledge and consent, and while the second person is being filmed, the second person is in a place where he or she would have a reasonable expectation of privacy or the intimate areas of a second person without the second person's knowledge and consent and under circumstances where the second person

had a reasonable expectation of privacy." See, Instruction No. 24 The "to convict" instruction (No. 25) instructed the jury that "To convict the defendant of the crime of voyeurism, each of the following five elements of the crime must be proved beyond a reasonable doubt: (1) That on or about August 19, 2011, the defendant knowingly filmed a second person or the intimate areas of a second person; (2) That the filming was for the purpose of arousing or gratifying the sexual desire of any person; (3) That the filming was without the second person's knowledge and consent; (4) (a) That the second person was filmed in a place where he or she would have a reasonable expectation of privacy; or (b) That the intimate areas of the second person were filmed under circumstances where she had a reasonable expectation of privacy; and (5) That any of these acts occurred in the State of Washington."

The crime of voyeurism consists of (1) intentionally and knowingly; (2) viewing another person or that person's intimate areas for more than a brief period of time; (3) for purposes of sexual gratification; (4) without that person's knowledge and consent; and (5) in a place or under circumstances where the person has a reasonable expectation of privacy. RCW 9A.44.115; State v. Fleming, 137 Wn. App 645, 647 (2007); State v. Glass, 147 Wn.2d 410 (2002); State v. Myers, 117 Wn.2d 332, 346 (1991); State v. Boot, 81 Wn. App. 546 (1990); Minnesota v. Carter, 525 U.S. 83 (1998); Minnesota v. Olson, 495 U.S. 91 (1990) (other citations omitted)

In the present case, there was very little testimony from Ms. Gruver, pertaining to the allegation of voyeurism. On direct, she testified that she went to appellant's apartment very often. VRP II, 217 They would talk and smoke meth. Id. at 218 That she didn't know she was being filmed. That

appellant told her about the cameras; showed them to her; told her that they were for security purposes so people don't break into his apartment. To watch. VRP II, 234-35 On cross, she verified that appellant had talk to her about the cameras that he had recording his place; for security purposes, he recorded his apartment because of break-ins or thefts or people stealing things. VRP II, 245

Therefore, the third element of the "to convict" instruction is questionable, based on the fact that there is a reasonable probability that she knew that she was being filmed.

Pertaining to the fourth element--that the second person was filmed in a place where she had a reasonable expectation of privacy-- there is no direct and/or circumstantial evidence that Ms. Gruver, appellant's girlfriend for about six months, had an expectation of privacy at appellant's bedroom, therefore, there is insufficient evidence for a conviction of voyeurism.

It should be noted that the incident of the filming took place at appellant's apartment, and it is appellant's position that Ms. Gruver had no expectation of privacy at his apartment, and therefore, there is insufficient evidence to prove the elements of the crime of voyeurism, and therefore, it must be reversed and dismissed with prejudice. The due process guarantee in our state and federal constitutions allow the reviewing court to uphold a criminal conviction only if the State has proved each element of the charged offense beyond a reasonable doubt. State v. O'Hara, 167 Wn.2d 91, 105 (2009) When a criminal defendant claims that the evidence against him was insufficient to support his conviction, the reviewing court reviews whether a rational trier of fact could find the elements of the charged crime

beyond a reasonable doubt on the basis of the State's admitted evidence. State v. Kintz, 169 Wn.2d 537, 551 (2010) Of course, by challenging the evidence against him, appellant admits the truth of the State's evidence and all inferences that may reasonably be drawn therefrom. State v. Kintz, 169 Wn.2d at 551

In the present case, the appellant admits all the evidence as truth, any inferences drawn therefrom and in the light most favorable to the State, and argues that Ms. Gruver had no expectation of privacy at appellant's bedroom., and therefore, conviction must be reversed and dismissed with prejudice.

RCW 9A.44.115(1)(c)(ii) clarifies that a place where a person would have a reasonable expectation of privacy is "a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance." Ms. Gruver had no expectation of privacy at appellant's bedroom. State v. Howell, 2003 Wash. App. LEXIS 514 (The bedroom is not a public or semi-public place)

A person's own bedroom is the most frequently recognized example of a person's private zone of privacy. State v. Falling, 56 Wn. App. 47 (1987); RCW 9A.44.115(1)(b)(ii); State v. Glas, 147 Wn.2d 410 (2002)

Ms. Gruver had gone to the apartment to discuss her relationship with the appellant, appellant terminated the relationship, and Ms. Gruver pulled out a pipe with meth, they smoked and thereafter, had sex, while the security video was running in appellant's bedroom apartment. Therefore, conviction must be reversed and dismissed with prejudice.

13. Did the trial court err in not fully instructing the jury?

It is clear that RCW 69.50.401 does not define "transfer" when the statute defines delivery as a "transfer".

In the present case, the jury's questions related to their confusion about "transfer," and an appellate court presumes that the jury follows the judge's instructions, and a "proper" and timely instruction can neutralize prejudice. State v. Weber, 99 Wn.2d 158, 166 (1983); U.S. v. Tootick, 952 F.2d 1073, 1092 (1991)

Further, an instruction can be given even after deliberations has started. (citations omitted) Therefore, the trial court, sua sponte, could have instructed the jury as to "transfer."

14. Did the court err in sentencing appellant in excess of the maximum statutory sentence for the delivery and the voyeurism?

Sentence for the delivery: Originally and at resentencing, the court imposed 120 months as a sentence, and ordered appellant to serve 12 months of community custody, for the total of 132 months and the maximum statutory sentence for delivery of a controlled substance, a class B felony, is ten (10) years.

At the resentencing hearing, on March 18, 2015, because the State was seeking an exceptional sentence, the court and the State talked that in order to do that, to make sure the sentences does not go beyond the statutory maximum was to run the sentences consecutively. VRP 03-18-15, 5-6, 9-12 The State, then asked for the court to lower the 120 months to allow for the community custody, and the court refused, therefore, the statutory maximum for the deliver exceeds, and therefore, the court erred, and the appellant must be resentenced to 120 months for the delivery with NO community custody,

or to 108 months with 12 months of community custody. State v. Wilborne,
167 Wn. App. 320 (2012)

The SRA directs that a court may not impose a sentence providing for a term of confinement and community custody which exceeds the statutory maximum for the crime. State v. Torngren, 147 Wn. App. 556 (2008); State v. Land, 172 Wn. App. 593 (2013)

Sentence for the Voyeurism: Originally and at resentencing, the court imposed 57 months as sentence, and ordered appellant to serve 36 months of community custody, for the total of 93 months when the statutory maximum for this class C is five (5) years.

At the resentencing, the State asked the court to impose 43 months to allow for 17 months of community custody. VRP 03-18-15, 13; State v. Wilborne, 167 Wn. App. 320 (2012)

Therefore, the appellant's sentence should be vacated and remanded for resentencing.

15. Did the trial court err in imposing conditions unrelated to appellant's crime?

The Sentencing Reform Act (SRA) of 1981; RCW 9.94A.505(8) authorizes the trial court to impose "crime-related prohibitions" as a condition of sentence. State v. Warren, 165 Wn.2d 17, 32 (2008) Nevertheless, because the imposition of crime-related prohibitions is necessary fact-specific and based upon the sentencing judge's inperson appraisal of the trial and the offender, the appropriate standard of review remains abuse of discretion. A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong standard. State v. Loxd, 161 Wn.2d 276, 284 (2007)

Further, the maximum operative length of the prohibitions is the statutory maximum for the crime. State v. Armendariz, 160 Wn.2d 106, 118-20 (2007) Crime-related prohibition includes no contact with the victim.

In the present case, the court imposed the prohibition of no-alcohol, however, there is no "nexus" for this condition. The testimony at the 3.5 hearing establishes that appellant did not appear under the influence of drugs and/or alcohol. Therefore, that condition should be reversed.

Furthermore, at the resentencing hearing, on March 18, 2015, three and some months after the original sentencing, the Court: "We'll make that ten years from today's date which will be '25." February 14, 2025, using the date of the original sentence and the maximum no contact order can not exceed five (5) years. VRP 03-18-15, 17; State v. Parmelee, 121 Wn. App. 707 (2004) (Trial court erred by imposing another no-contact order when it resentenced defendant for the crime of stalking because the length of the order was not permitted to exceed the maximum sentence available for the crime, which was five years); State v. Manoz-Rivera, 190 Wn. App. 870 (2015)

16. Did the trial court erred in not making a determination of appellant's future ability to pay before imposing legal financial obligations?

In the present case, at the original sentencing the court did not make a determination on appellant's ability to pay, at the resentencing the court did, however, the court did not question appellant about his health, about the type of work he performed, his age, . . . appellant should be resentenced and the court hold a hearing to make a correct determination on appellant's future ability to pay. RCW 9.94A.760; 10.01.160; State v. Blazina, 182 Wn.2d 827 (2015)

17. Did the Grant County Sheriff Officer errred in transferring appellant to the Department of Corrections after his timely notice of appeal?

Appellant withdraws this issue based on the fact that he can not find his notes, and time is running out for the due date of the brief, and appellant cannot go to the law library before the due date.

18. Is appellant entitled to be awarded costs for his first direct appeal?

The appellant timely filed a cost bill in the appellate court under case number 30658-5-III, and respondent filed an objection to the cost bill. The court denied the request despite the fact that appellant prevailed. RAP 14.2 (other citations omitted)

Appellant's sole issue was the miscalculation of his offender score by the State's failure to present evidence of his criminal history, this court remanded for resentencing, and the Supreme Court affirmed, therefore, appellant prevailed and therefore, entitled to costs.

19. Did the officer errred in questioning appellant's passenger?

Plainly, in any traffic stop, concerns about officer safety and control of the situation are entirely relevant. In the present case, keep in mind that the officers did not conducted a typical traffic stop, appellant was already parked in a private property and the officer did not turned on the emergency lights. However, when the patrol was stopped in front of appellant's vehicle, the patrol passenger, Detective Francis approached appellant and asked for his driver's license and registration, and in the process he saw the passenger, a known person to him, and he immediately traded spots with Officer Montgomery, whom had gone to the passenger side, and asked the passenger: "What Ms. Gruver is doing in a car with Mr. Cobos." VRP II, 250 "What's

Jennifer Gruver doing in here?" Id. Ms. Gruver, at no time, ever, asked to speak to the Detective and/or cried for help. There was no safety concerns. When Ms. Gruver exited appellant's SUV she was a little scared that she was going to be in trouble. VRP II, 251 Appellant was sitting in his SUV, with door open. VRP I, 60

A police officer may order passenger of lawfully stopped vehicle to exit for safety purposes. Maryland v. Wilson, 519 U.S. 408 (1997) However, there is no testimony from anybody involved in this case that when the officers contacted appellant's lawfully parked vehicle that there was a concern for the officer's safety. Ms. Gruver had nothing to do with the so-called allegation of appellant's driving in a (private) road without headlights, therefore, Detective had no grounds to question the passenger. State v. Larson 93 Wn.2d 638 (1980); State v. Broadmax, 98 Wn.2d 289 (1982); Minnesota v. Dickerson, 508 U.S. 366 (1993)

In fact, RCW 46.64.015 forbids detention for issuing a traffic citation to last no more than a reasonable amount of time. Therefore, the officer erred when he questioned Ms. Gruver, the passenger, and any and all, information obtained from Ms. Gruver must be suppressed.

20. Did the trial court erred in allowing the amendments of the information?

On August 30, 2011, at the arraignment hearing, the Court set the trial date for October 19, 2011. VRP 08-30-11, 10-12 On October 19, 2011, the State moved the court for permission to amend the information and was granted. On October 25, 2011, the respondent moved the court for a second amendment of the information. Defense objected based on the timeliness by adding the delivery charge. VRP 10-25-11, 78-81 On October 31, 2011, the respondent moved the court for the third time to amend the information and add the charge of voyeurism. Defense objected. VRP 10-31-11, 83-90

The court may permit any information or bill of particulars to be

amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced. CrR 2.1(d)

The prejudice herein is that the respondent kept adding additional counts when the discovery had not been fully supplied to the defense. State v. Michielli, 132 Wn.2d 229 (1997); State v. Thompson, 60 Wn. App 662 (1991); State v. Carter, 56 Wn. App. 217 (1989)

On October 25, 2011, the court granted the motion to amend information recognizing that it was granted on the eve of trial, and defense counsel informed the court that she was being forced to choose between her client's right to speedy trial and right to an effective assistance of counsel. VRP 10-25-11, 80 Trial was scheduled for the next day. Respondent argued that: "It's highly unlikely that this case is going out tomorrow. We're number seven." Id. at 79

Thanks to the all those defendants that were not forced to plea and pushed for trial, defense was somehow given few days to research on the new charge with special allegation. However, on October 31, 2011, respondent moved to amend the information for the third time and added the charge of voyeurism. VRP 10-31-11, 83-84 And trial was schedule in two days. Id.

21. Did appellant's right to represent himself violated?

On October 13, 2011, appellant, after a heated discussion with defense counsel, filed a Motion for self-representation. The motion was stamped and filed, and appellant received his copy. The clerk of the court pursuant to RCW 2.32.050(4), must file the documents they receive, regardless of whether or not the litigant is represented by counsel.

The constitution guarantees criminal defendants the right to representation by a competent attorney at all stages of a criminal proceeding, as well as the collary right to waive counsel and represent oneself. 6th and 14th Amendments; Wash. Const. art. I, § 22; Farretta v. California, 422 U.S. 806, 807 (1975); State v. Madsen, 168 Wn.2d 496 (2010) The court is not free

to ignore a request for self-representation. This right is so fundamental that it is afforded despite its potential detrimental impact on both the defendant and the administration of justice. State v. Madsen, 168 Wn.2d at 503. The unjustified denial of a pro se right requires reversal. Id.

In the present case there were numerous pleadings filed by appellant, however, the only motion one of the documents not filed, but stamped with the date filed was returned to appellant, was the motion for self-representation, and therefore, this matter should be reversed.

22. Did the trial court err in not hearing appellant's motion?

In the present case, despite the fact that appellant, together with the motion, filed a Notice of Motion and served copies upon the prosecutor and defense counsel, the motion was not noted, however, pursuant to RCW 2.08.240, the court has ninety days to resolve a motion, and therefore, the trial court erred in not hearing and/or deciding the motion without a hearing. Therefore, reversal is required. State v. Madsen, supra

23. Did the clerk of the court err in rejecting appellant's pleadings?

Pursuant to RCW 2.32.050(4), the clerk is required to file all documents received. In the present case, appellant filed a motion for self-representation, however, the motion was never noted on the court's motion calendar, therefore, the clerk must have rejected the motion, however, appellant received his conformed copy stamped with date filed. Therefore, it is clear that the motion was lost, hid or destroyed by the clerk or court.

24. Was appellant's right to access the court violated?

The right to access the courts is rooted in the petition clause of the the First Amendment to the United States Constitution. Every prisoner has a constitutional right of access to the courts to present any complaints he might have. Said right should not be denied or obstructed. Wolf v. McDonell 418 U.S. 539 (1974)

In the present case, the clerk of the court apparently obstructed appellant to present the complaint that appellant's counsel was not doing her job and he wanted permission from the court to represent himself.

25. Was the jury pressured for a verdict?

After jury deliberations have begun the court cannot instruct the jury in a way that suggests the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate. CrR 6.15(f) (2); State v. Watkins, 90 Wn.2d 166 (1983); State v. Booghard, 90 Wn.2d 737, 736 (1978) The right to a jury "embodies the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions and the arguments of counsel. State v. Watkins, 90 Wn.2d at 176; State v. Booghard, 90 Wn.2d at 736

In the present case, on the Friday evening of December 16, 2011, at approximately 5:15 p.m., the court received a question from the jury: "If both parties possessed meth and were sharing smoking it, would that be delive-ry?" The court answered the question: "Please refer to your instructions." But before the Bailiff went back with the answer, the court asked the Bailiff: "I don't think we've got any indication whether the jury wants to keeps deli-berating or not at this time. The Bailiff said No, VRP III, 393-95 At this time the Bailiff asked: "So, by chance, do you want me to inquired?" The Court didn't know, and asked the parties. Respondent said "sure." Defense counsel: "That's fine." "I don't want any pressure." Id. Bailiff suggested: "Just say if they're getting close." Court: "No. I don't want you to ask

them that question." Respondent, Ms. Highland, said: "Ask them if they want to keep deliberating or if they want to come back on Monday?" The Court I think that's fine. Id. at 394-95

Bailiff: "They want to keep deliberating and they have another question." VRP III, 395 "If a couple of people pass a meth pipe back and forth, are they both guilty of delivery regardless of who supplied the drugs? Five minutes later they reached a verdict.

Therefore, the jury was pressured, and therefore, dismissal is required with prejudice.

26 Was appellant's right to a complete record on review violated?

The record must be sufficiently complete to allow consideration of the defendant's claims. State v. Harvey, ___ Wn. App. ___ (Nov. 8, 2012) (citing Draper v. Washington, 372 U.S. 487, 496 (1963)); RAP 9.10 The defendant need not make a particularized factual showing to be entitled to the record. State v. Harvey, supra Further, under RAP 10.3(a)(5)(b) and 10.7, an appellate court may strike a portion of a brief that is not supported by evidence in the record. State v. Leach, 113 Wn.2d 679 (1989)

In the present case, the verbatim report of proceedings for the pretrial hearings contains "numerous" unintelligible sections. Appellant asked for additional funds to enhance the audio to allow the court reporter to do a "complete" transcription. The request was denied. Appellant sought discretionary review, and Supreme Court declined.

Therefore, appellant is unable to make a "correct" reference to the pretrial record.

27 Is there sufficient evidence to prove beyond a reasonable doubt the elements of possession of a controlled substance, methamphetamine?

In the present case there is no question, and appellant is not challenging the fact that the substance found was in his possession; appellant's argument is that the cream colored chunky substance was not methamphetamine, and therefore, the possession of meth was not proven.

At trial the crime lab expert, Jason Stenzel testified that the off-white, cream colored chunky material contained both amphetamine as well as methamphetamine, and the one of the products was Adderall. However, there was no testimony pertaining to the amount of the methamphetamine, therefore, there is no evidence of possession. VRP II, 199-200

Further, for the sake of argument, based on this court's extensive knowledge and experience with cases where meth is involved, appellant argues that the reason the expert said that contained both amphetamine and methamphetamine was because the substance was Adderall, a prescription of appellant. This court is well aware that 100% of the test where meth is involved, dimethyl sulfone is present because it is used as a cutting agent. State v. Lambert, 199 Wn. App. 51 (2016)

In Lambert, the Washington State Patrol Crime Lab scientist Daniel an Wyk testified that the white powder the police seized from Lambert's pocket was a substance "very frequently used as a cutting agent for methamphetamine, dimethyl sulfone. If this substance in question was methamphetamine the test would have showed dimethyl sulfone. It did not.

28. Did the prosecutor committed misconduct?

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution, and article I, § 22 of the Washington Constitution. Estelle v. Williams, 425 U.S. 501, 503 (1976) Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762 (1984) The appellant bears the burden of showing that (1) the state committed misconduct, and (2) the misconduct had a prejudicial effect. State v. Lindsay,

___ Wn. App. ___ (Nov. 7, 2012)

In the present case, the prosecutor's misconduct consists of not proving material evidence in a timely manner to the defense and then amending the charges. Further, by asking for continuances that were not allowed, and prosecuting appellant without any evidence. State v. Emery, 174 Wn.2d 741 (2012); VRP I, 33-39, VRP III, 286-305; VRP III, 394-95; VRP II, 142-148

29. Should the Court apply the cumulative error doctrine?

Under the cumulative error doctrine this court may reverse a defendant's conviction when the combined effect of trial errors effectively denies the defendant his right to a fair trial, even if each error alone would be harmless. State v. Weber, 159 Wn.2d 252, 279 (2006) However, the defendant bears the burden to show multiple errors and that the accumulated prejudice from those errors affected the outcome of his trial. In Re Pars, Restraint of Cross, 180 Wn.2d 664, 690 (2014)

In the present case, appellant submits the contents of this brief to show that the accumulated errors affected his right to a fair trial. The State did not requested ALL available tests from the Washington State Patrol Crime Lab. Defense counsel did not do so, also. Defense counsel failed to call a critical witness, State objected and fought against that, and the court denied defense's motion to call Dr. Nobel. Defense counsel further failed to move the court to sever the charges. The court asked her if she thought to do so, but counsel argued that she had not received all the discovery.

Further, under the cumulative error doctrine embodied in the Due Process Clause of the Fourteenth Amendment, reversal of a conviction may be required

due to the cumulative effect of trial court errors. Parle v. Runnels, 505 F.3d 922 (9th Cir. 2007)

30. Was appellant's right to a public trial violated?

Art. I, § 22 of our State Constitution and the Sixth Amendment to the United States provides a criminal defendant with the right to a public trial by an impartial jury. Additionally, art. I, § 10 provides that "Justice in all cases shall be administered openly," granting the public an interest in open, accessible proceedings. State v. Lומר, 172 Wn.2d 85, 91 (2012) And before closing courtroom, the five guidelines developed in our art. I, § 10 cases and embraced in Bone-Club in compliance with Waller requirements, must be met.

In the present case, the court ordered the Bailiff to block the window(s) of the courtroom, and respondent argued that the court should be careful because of the decisions from the appellate courts. VRP II, 113 And the court did not applied the Bone-Club analysis, therefore, appellant's right to public trial was violated.

31. Did appellant suffered vindictive prosecution?

A claim of vindictive prosecution cannot insulate the defendant from the lawful consequences of his tactical choices. State v. Korum, 157 Wn.2d 614 (2006) The term prosecutorial vindictiveness describes the actions of the government when it "acts against a defendant in response to the defendant in response to the defendant's prior exercise of constitutional or statutory rights." *Id.* at 627

In the present case, appellant wrote numerous letters to the prosecutor. VRP I, 33-36 In those letters appellant took the State's case apart, and

explained to the prosecutor that she was not going to be able to prove the elements of a sexual assault, and when the State amended the information, appellant showed the State that there was insufficient evidence for a delivery charge based on the fact that the controlled substances in question for the delivery were not originally in appellant's possession, and therefore, he never relinquished possession, Again when the State added the voyeurism charge. In fact, this court is well aware that 89% of the cases ends in a plea, and in ALL cases the prosecutor makes a plea offer. In the present case, Ms. Highland did not, and on resentencing she attempted to ask for an exceptional sentence of 20 years. VRP 03-18-15

Further, after moving the court to exclude any testimony from the defense concerning appellant's prescription of Adderall, the State opened the door on direct examination of the crime law expert. On the Friday evening of December 16, 2011, proposed to ask the jury if they wanted to continue deliberating or come back on Monday. Ms. Highland was already on her vacation, and made a comment that the court was going to force her to come back on Monday if the jury didn't reach a verdict by 6:00 p.m. on that Friday. VRP III, 394-97

32. Did the trial court err in denying defense motion to dismiss for failure to Make a Prima Facie Case?

A prima facie showing requires evidence of sufficient circumstances supporting a logical and reasonable inference that the charged crime occurred. City of Bremerton v. Corbett, 106 Wn.2d 569, 578 (1986)

In the present case, after the court ruled that it was not going to admit video 45, the jury was called and in and the State informed the court

and the defense that the State rested. VRP III, 323, and the defense asked the court to excuse the jury to argue a defense motion to dismiss. The defense asked the court to dismiss the voyeurism for lack of sufficient evidence because the filming was not done for purposes of arousing or gratifying sexual desire. VRP III, 326 That the court had heard that the filming was done for home security purposes, that it also requires that it's done without the second person's knowledge, and that the court heard testimony that Ms. Gruver knew that he was recording his apartment. That it also requires that it happens in a place where she would have reasonably expected privacy, and that being that it is not her bedroom, there's was no reasonable expectation of privacy, especially given the fact that Ms. Gruver knew that there was recording all throughout the apartment. Without the State responding, the court denied the motion. VRP III, 326

Because the defense had not presented any defense, appellant did not waived his challenge, this court is limited on what it reviews to make a determination whether it is sufficient to support the jury's verdict. State v. Dodgen, 81 Wn. App 487, 493 (1996)

Based on the evidence presented on the State's case in chief, there was no evidence, and therefore, the State failed to make a prima facie case, and therefore, the voyeurism shall be reversed and dismissed with prejudice, in the interest of justice and fairness.

33. Did the appellant suffered ineffective assistance assistance of counsel?

To establish ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that prejudice resulted from

the deficiency. Starickaland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222 (1987)

Here, appellant contends that counsel's failure to (1) file a CrR 8.3(b) motion (prosecutor's failure to (1) timely produce all discovery; (ii) set witnesses interviews; (iii) victim's interview; (iv) produce lab reports; (v) amendments of information; (vi) continuances; (vii) having other hearings; . . .); (2) file a motion to suppress; (3) conduct an investigation; (4) prepare a defense; and (5) call witness(es), is sufficient to prove ineffective assistance of counsel and demonstrate prejudice to entitled him a reversal and dismissal with prejudice, because no conviction can stand if defendant suffered ineffective assistance of counsel.

To judge a claim of ineffective assistance of counsel under the 6th Amendment is "whether counsel's conduct undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686 In determining whether counsel's performance has met this standard, the United States Supreme Court has set a two part test. First, a convicted defendant must show that trial counsel's performance fell below the required of a reasonably competent defense attorney. Second,

the convicted defendant must then go on to show that counsel's conduct caused prejudice. Strickland, 466 U.S. at 687 The prejudice part is "whether there is a reasonable probability that, but for counsel's errors the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Church v. Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) In essence the standard under our Washington Constitution is identical. State v. Cobb, 22 Wn. App. 221 (1978)(counsel must have failed to act as a reasonably prudent attorney); State v. Johnson, 29 Wn. App. 607 (1981)

Failure to investigate: Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In re Pers. Restraint of Davis, 152 Wn.2d 647 (2004) An attorney breaches the duty to her client if she fails to make reasonable investigations. Strickland, 466 U.S. at 691 The interrelated obligations of thoroughness and preparation require a lawyer to investigate the facts of the matter and research the applicable law. People v. Boyle, 942 P.2d 1199 (Colo. 1997); State ex rel. Nebraska State Bar Association v. Holscher, 230 N.M.2d 75 (Neb. 1975); In re Green, 557 p.2d 644 (Ore. 1976); Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987); Towns v. Smith, 395 F.3d 251 (6th Cir. 2005) A criminal lawyer owes a duty to defend even a guilty client. RPC 3.1; Washington Defender

Association Standards for Public Defense Services

In the present case, due to appellant's wish to represent himself he was reviewing all the discovery that was being provided by prosecutor, and conducting a research, and preparing numerous letters for the prosecutor and defense counsel. In fact during the argument concerning defense counsel's failure to call a witness, Dr. Nobel, defense counsel brought to the attention of the court appellants numerous letters: (By Ms. Roeborough: Well, Your Honor, I guess my -- my cli -- my -- my client -- counsel showed you the other day the big stack of mail. She -- she clearly knows Dr. Nobel by name because of what my client's written to her, . . .

VRP I, 33-35) Further, appellant made a written request from counsel for an effective representation, and on the interviews with defense counsel to view the videos in this case, appellant informed counsel that he had a valid prescription of Adderall, a controlled substance that trigger positive a test for meth, and that an expert should be called. When counsel finally received the lab results, appellant pointed out the demethyl sulfo- ne substance in one of the test and not the other, the one for the posses- sion. With all this information on hand, defense counsel failed to conduct an investigation, and therefore, unable to prepare a defense.

Failure to prepare a defense: No court can question the principle that a criminal defendant has a constitutional right to present evidence in his own defense, and relevant observation testimony tending to rebut any element of the State's case, including mens rea. State v. Jones, 168 Wn.2d 713, 719 (2010); This right is based on the right to due process of law. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3 The right of

of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. State v. Jones, 168 Wn.2d at 720; (quoting Chambers v. Mississippi, 410 U.S. 284, 303 (1973)) However, this right to present a defense extends only to relevant evidence. State v. Hudlow, 99 Wn.2d 1, 16 (1983)

In the present case, if defense counsel had interviewed the crime lab scientist, she would have known in advance of the trial that Mr. Stenzel had not performed the appropriate tests to separate meth from dimethyl sulfone and establish with reasonable certainty the "correct" amount of meth, if any, in [Ms. Gruver's] pipe, State's exhibit 13. Further, counsel would have known that the cream colored chunky substance contained meth and amphetamine, and she need it another expert to conduct a test to separate meth and the amphetamine and establish with reasonable certainty the correct amount, if any, of meth. Duncan v. Ornaski, 528 F.3d 1222 (9th Cir. 2008); Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002)

Failure to call witness(es): The decision to call witness(es) is generally presumed to be a matter of legitimate trial strategy. However, this presumption can be overcome by showing that counsel failed to investigate. In re Pers, Restraint of Davis, 152 Wn.2d 647 (2004) (other citations omitted) Our Supreme Court has reaffirmed that "a criminal defendant can rebut the presumption of reasonable performance by demonstrations that there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 71, 73 (2011)

In the present case, two of the four charges against appellant, involved controlled substances, while appellant had a prescription for

Adderall, a substance that could trigger positive for methamphetamine. At trial, defense counsel requested a recess to discuss a brief matter with appellant, concerning appellant's wish to have Dr. Nobel testify, as the State was moving the court to exclude any testimony that appellant had a prescription for Adderall, to wit: amphetamine. Appellant claimed that he never possessed methamphetamine. Defense counsel informed the court: "I understand that's last minute. I've talked that over with my client." VRP I 33-35 Defendant informed the court that his prescription was at home. Id. Therefore, counsel, through a proper investigation, she could have arranged appellant's medicine to be at trial; she could have arranged to have Dr. Nobel being subpoena; . . . She could have done a lot more. In fact, defense counsel informed the court that she was concerned that if the court did not allowed her to call Dr. Nobel: "(By Ms. Rosborough) My concern after talking with my client after this motion in limine is that if this case does go -- does go and there is a conviction that it's going to be something where it comes back on ineffective assistance or some --." [5] VRP I, 33-39

A test for determining whether a criminal defendant was afforded effective assistance of counsel, at trial, is whether it appears from the entire record that the defendant was afforded an effective representa-

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[5] The link if defense counsel's argument should be taken into consideration by this court, based on the fact that this case, due to Ms. Gruver (untruthful) allegation of a sexual assault appellant was original charged with the sexual assault only, which was amended to a lower degree, and then added as much as she could.

tion and a fair and impartial trial. State v. Hess, 12 Wn. App. 787, modified on other grounds, 86 Wn.2d 51 (1975); State v. Monday, 171 Wn.2d 667, 676 (2011)(The prosecutor owes a duty to defendants to see that their rights to a constitutional fair trial are not violated)

Failure to file a motion to suppress: Counsel's failure to move to suppress does not support an ineffective assistance of counsel unless the defendant can show that the trial court would have granted the motion. State v. Jamison, 105 Wn. App. 572, 590-91 (2001); State v. Tarica, 59 Wn. App. 363, 373 (1990)

In the present case due to the prosecutor's failure to timely produce all the discovery, including the crime lab results, defense counsel, on September 20, 2011, pointed out to the court that Ms. Highland knew what the defense still need it in discovery (Lab results; criminal history of the victim, video(s) that were sent to Spokane to clarify the sound). VRP 09-20-11, 13-14 Despite this items not being produced, the State filed Plaintiff's Compliance With Omnibus Order and CrR 4.7(a). Cp 24; VRP 09-20-11, 14 Almost a month later, on October 17, 2011, defense counsel informed the court: "As of yet, I haven't even received the lab results which could prove that the substance was methamphetamine, so -- and it's -- the incident is on videotape as is alleged methamphetamine use, so I don't think severance would work. But I don't even -- I don't even have the lab report. As of now, the State can't prove that it's methamphetamine based on a missing lab report, so it would be a little premature." VRP 10-17-11, 33-34 Defense counsel complained and complained about the lab reports, as on September 20, 2011, she made a notation on the criminal case scheduling order that she was reserving the right for a motion to suppress. Maybe this prevented her from filing the motion.

However, it is clear, crystal clear that the officers conducting the investigation on appellant's driving without headlights, did not produced any evidence that appellant was driving, moving, for the matter, in a public road. Detective Francis described the road as a dirt road that separates the entrance to two trailer parks. They testified that appellant had already backed on some hedges, and certainly, the passenger was not crying for help and/or asking for protection, therefore, the officer exceed his authority in a so-called traffic stop to question the passenger, therefore, the motion would have been granted if defense counsel would have conducted an investigation of the road from the city and so forth, but it failed to do so. The city had the answer.

Failure to file a CrR 8.3(b) motion: On a CrR 8.3(b) motion a simple mismanagement, not an evil and/or dishonest one, grants a dismissal in the furtherance of justice. (citations omitted)

Therefore, based on the foregoing (late discovery, continuances, amendments, . . .) defense counsel could have filed a CrR 8.3(b) motion to dismiss.

In United States v. Cronk, 466 U.S. 648, 659 n.25 (1984), the United States Supreme Court held that "the court presume that a defendant was denied his constitutional right to counsel when counsel is prevented from assisting the accused during a critical stage of the criminal proceedings, and that the error is prejudicial and will not conduct a harmless error analysis when the trial court denies the defendant a right to counsel and assume prejudice because the error is structural in nature. In re Det. of Kistenmacher, 163 Wn.2d 166, 185 (2008); In re Pers. Restraint of Orange, 152 Wn.2d 795, 814 (2004); State v. Harall, 80 Wn. App. 802, 805 (1996); State v. Watt, 100 Wn.2d 626, 632-33 (2007); State v. Hughes, 154 Wn.2d 118, 142-43 (2005) Prejudice presumed where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Bell v. Cove, 535 U.S. 685, 695-96 (2002)

In the present case, counsel's strategy and/or tactic not to call Dr. Nobel was not reasonable. Cave v. Singletary, 971 F.2d 1513, 1514 (11th Cir. 1992); Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984)

The foregoing described performance can be not, characterized as legitimate trial strategy or tactic. State v. Kylo, 166 Wn.2d 856, 863 (2009) Despite the fact that surmounting Strickland's high bar is never

an easy task. Padilla v. Kentucky, 559 U.S. 356, 371 (2010)

V. Conclusion

Based on the foregoing there are three questions for the court^[6]

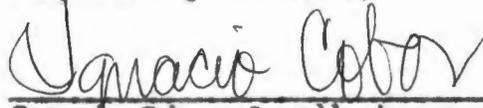
(1) Did the appellant originally possessed the glass pipe with meth and dimethyl sulfone; produced the pipe, transferred to Ms. Gruver, and Ms. Gruver kept the pipe? (2) Did Ms. Gruver had a reasonable expectation of privacy at appellant's bedroom?; and (3) Was the chunky cream colored substance methamphetamine or amphetamine, how much of each? Based on the foregoing, it is appellant's position that this court should answer No. to these three questions, and therefore, based on the foregoing (A) appellant did not had originally in his possession the meth/dimethyl-sulfone pipe, did not transferred to Ms. Gruver, and appellant did not relinquished possession; (B) Ms. Gruver knew about the cameras, Ms. Gruver did not had an expectation of privacy in appellant's apartment, and the filming was not for the purposes of sex gratification; and (C) We don't know how much meth was in the chunky cream colored substance as Adderall can trigger the test to be positive for meth.

[6] Please keep in mind that assuming the stop was lawful, and the officers had issued that written warning for driving on a (public/private) road, and had not questioned the broken heart passenger she would have never made the false allegation of sexual assault. Appellant refers to as "false" because the the jury found him not guilty of that charge, Appellant would not be taking the court's time. The original charge was dismissed from the exculpatory evidence, the video, the State added the possession and delivery

Therefore, based on the foregoing appellant respectfully asks this court to reverse and dismiss with prejudice, in the interest of justice and fairness to glorify our precious United States and Washington's Constitutions, and to keep the law alive by respecting it.

DATED THIS 21st day of March, 2018.

Respectfully submitted,



Ignacio Cobos, Appellant,
In Propria Persona