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No. 347869

WASHINGTON STATE COURT OF APPEALS

DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON, Respondent

v.

CARLOS HERNANDEZ II, Appellant

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. Hernandez was Denied his Right to Confrontation of A. G., where the Court did not find that he had Intentionally Caused the Unavailability of A.G., and where Hernandez had not had a Previous Opportunity to Ask Certain Questions.

1. Hernandez did not have an opportunity to cross examine A.G. on the questions presented for consideration to the trial judge.

First of all, Hernandez's outburst in the courtroom had nothing to do with A.G. **Trial Volume 7**, the beginning and RP 1221. Hernandez's outburst was related to the State objecting to the questions Hernandez was asking on the basis of relevance, and the trial court warning him that it would conclude his questioning of A.G. under ER 611(a) if he continued to ask questions that weren't

relevant or that had been asked already, at which point Hernandez had an outburst towards the court, shouting, “I don’t know why the court is so damn fucking ignorant and they don’t want to fucking listen.” RP 1227 (Trial Volume 7).

The State asked the court at page RP 1245 Vol. 7 to conclude the defendant’s examination of A.G. After the outburst and the court finding him in contempt of court, the State asked under Rule 611 to conclude the Hernandez’s examination of A.G. RP 1245. The court asked Hernandez to speak to standby counsel, Mr. Morgan, for five minutes to specify what questions he would like to ask the witness. RP 1251.

In State v. Dobbs, 180 Wn. 2d 1, 320 P.3d 705 (2014), the court stated that the Sixth Amendment to the United States Constitution gives criminal defendants the right to confront witnesses against them.” Dobbs, 180 Wn. 2d at 4. However, if a defendant intentionally causes the

absence of a witness from trial, he or she forfeits that right. 180 Wn. 2d at 4. “Forfeiture by wrongdoing requires clear, cogent, and convincing evidence.” Dobbs, 180 Wn. 2d at 16.

In Dobbs, the Dobbs engaged in a campaign of threats, harassment, and intimidation against his ex – girlfriend, C.R. which included a drive-by shooting at her home and warnings that she would “regret it” “if she pressed charges against him.” Dobbs, 180 Wn. 2d at 5. Even after Dobbs was arrested, he made yet another intimidating phone call to C.R., threatening that if she went forward and pressed charges against him, she would regret it. When C.R. failed to show up to testify at trial, the trial judge found that Dobbs intentionally caused C.R.’s absence, and thus Dobbs forfeited his constitutional rights, and the Washington State Supreme Court agreed. Dobbs, 180 Wn. 2d at 18.

C.R. told police that Dobbs had had been harassing

her and stalking her for two weeks, and that Dobbs had left her a note earlier that day which one of the police officers read into the record at trial:

Last days. The count down on your...ass. You should know me by now [C.R.] you fucked up and tripped with...the wrong brother. You will regret what...you did and said to me. You never loved me. You never cared about me and now you will reap a world of trouble and pain... I'm going all out on this with you. You're fucked up, bitch.

Dobbs, 180 Wn.2d at 7. C.R. also showed the police photographed messages from Dobbs and read them aloud at trial, stating, "Next time it is you, bitch. On Bloods."

Dobbs, 180 Wn. 2d at 7.

The evidence in Dobbs indicated that police had

actually found bullet holes on the outside of C.R.'s residence. C.R. played a voicemail for police, indicating that Dobbs had left her a voicemail stating basically that, "You heard that. That was me and that's what I can do. Id. at 5. Dobbs had pulled a gun on her. C.R. was hysterical, upset, and fearful and was concerned that Dobbs would kill her. Dobbs had left her multiple threatening messages. Dobbs, 180 Wn. 2d at 4-5.

In this case, Hernandez, through his standby attorney Mr. Morgan, told the court that he wanted to ask the following questions::

- 1. Did I interact with your mother after the sexual encounter at my residence, and then also the same thing at AGF's residence?**

The State argues that this question was previously "asked and answered." Brief of Respondent, p. 10. However, not only was that question not asked, but the

portion of the transcript cited to by the State was from the Beck transcript, RP 119-120 and RP 124 wherein attorney for **JESSICA**, Mr. Hagopian, was cross examining A.G.'s **mother**, AGF. It was neither **Hernandez's** cross examination, nor was that section the alleged victim A.G.'s testimony. It was very misleading for the State to try to use this testimony for the proposition that *HERNANDEZ* had an opportunity to ask and answer that question.

This question was relevant because it went to Hernandez's theory of the case that A.G. and Jessica invited Hernandez to have a three some, and that it was not Hernandez's idea., which was relevant to Hernandez's theory of the case that A.G. was at least 16.

2. Why didn't you call the police when you first got home? RP 1255.

Again, the State points to the Beck transcript, page

47-48, wherein it was *Deputy Prosecutor Wilmore* asking the questions—not Hernandez, so Hernandez had not had a prior opportunity to ask this question. RP 47-48.

This question was relevant to show that A.G. did not consider herself a victim, because she and Jessica had invited Hernandez to have a three-some, (A.G. actually asked Hernandez to take her home so that she could get some sexy underwear for the encounter), and she did not call the police, also supporting Hernandez’s defense that he reasonably believed that A.G. was at least 16.

3. How long did you wait to have the police called after the incident? RP 12.

The State does not cite to any prior question wherein Hernandez had an opportunity to ask this question. (Brief of Respondent, page 11.) Thus, there is no evidence that Hernandez had an opportunity to confront A.G. on this

question.

This question was designed to elicit testimony that A.G. did not consider herself a victim because she did not call the police or even ask someone to call the police after the sexual encounter. It was also important for Hernandez to ask other witnesses about the same subject to see if someone is not being truthful.

**4. Did I interact with your mother at AGF's
after the sexual encounter in your presence?**

Contrary to the State's assertion, this question is **not** identical to question number 1, as the State argues, because question number 1 also included whether Hernandez had interacted with A.G.'s mother at Hernandez's residence, "and then the same thing at AGF's residence." Hernandez wanted to ask in this question. This question number 4 asks if Hernandez interacted with A.G.'s mother at AGF's

residence after the sexual encounter in A.G.'s presence. So questions number 1 and number 4 are not identical.

This question was relevant to show that Hernandez reasonably believed that A.G. was at least 16 because A.G.'s mother did not object even after the fact that Hernandez and Jessica had a sexual encounter with A.G.

5. Did you know your mom was high between the 13th and the 17th?

Hernandez **did not ask** this question at page 38 or 59 of the **Beck** transcript, nor at page 110 of the **Craver** transcript, so Hernandez was not able to confront A.G. The State's discussion in its Respondent's Brief is again misleading about Hernandez's confrontation of A.G. earlier in the trial. See Respondent's Brief, page 11.

This question was extremely relevant to Hernandez's defense to the charge pertaining to Hernandez

giving A.G. drugs with the motivation of having sex with her. (See Charge #15. “Special Allegation Sexual Motivation (indicating that if the crime of distribution of a controlled substance was committed with sexual motivation, and if the Defendant had previously been convicted on two separate occasions of a ‘most serious offense,’ then a conviction would result in the mandatory sentence of life imprisonment without the possibility of parole.”)

This defense was extremely important as it was this charge which mandated a life imprisonment sentence. It was Hernandez’s testimony that he did not give A.G. or Jessica Cobb drugs before or during the sexual encounter, that he did not allow Jessica to do drugs in the home, and that it was in fact A.G.’s mother who supplied the drugs to Jessica Cobb, who in turn supplied the drugs to A.G. So the fact that *A.G.’s mother* was high on drugs was relevant to the fact that AFG did indeed have access to drugs which

she may have given to Jessica, who in turn gave them to A.G.

**6. Do you know how your mother
got those drugs, where did she
get the drugs?**

Again, the most serious charge that carried a life imprisonment sentence for Hernandez was the charge of 69.50.406(1), charge number 15, quoted supra, related to supplying drugs with sexual motivation. It was relevant to know where A.G.'s mother got the drugs because it makes it more likely for the jury to believe that A.G.'s mother had drugs that she could give to Jessica behind Hernandez's back.

It was highly relevant for Hernandez to prove that he did not supply drugs to A.G. and the fact that *Jessica* had obtained drugs from A.G.'s mother without Hernandez's consent or knowledge, which was consistent

defense that he did not supply drugs to A.G., and that in fact, *Jessica* had supplied the drugs to A.G.

7. Did you know that your mother was meeting up with me repeatedly all the way up to the time of arrest? RP 1255-1256.

This question was relevant to Hernandez's testimony that prior to having a sexual encounter with A.G. and Jessica, Hernandez asked A.G.'s mother if it was ok to sleep with A.G., and her mother did not object stating that A. G. "does what she wants," supporting Hernandez's defense that he reasonably believed that A.G. was at least 16 because her mother did not object, indicating that A.G. could do what she wanted. See Amended Appellate Brief, page 16, RP 1171.

The State did not point to any question by Hernandez earlier in the proceedings that was identical to

that question, so he did not have an opportunity to confront A.G. on that question. (See Brief of Respondent, page 10.)

The court indicated that it wanted a report on how the victim acted after Hernandez's outburst. RP 1258. The court found that "the victim was legitimately under stress of the event" and that "the outburst was intimidating. She was legitimately frightened." Prosecutor Wilmore agreed that A.G. was no position to testify. RP 1260. The prosecutor stated that Hernandez had "scared her" that Hernandez had access to a weapon and was yelling to deputies, " get your Mace and gun out of my hands." RP 1261. Prosecutor Wilmore stated that Hernandez caused A.G.'s unavailability so "he has waived the right to question her." RP 1262 - 1263.

Mr. Hernandez told the court that he had just seen A.G. and noted "she's calmed down. She's cool." RP 1265.

The court ruled that Mr. Hernandez had already inquired about most of the areas set forth in the questions above and that A. G. “unavailable” as a witness brought on by Mr. Hernandez’s behavior, “so her testimony will not proceed further.” RP 1272.

The court **did not make a finding** that Carlos Hernandez II had “**intentionally**” caused A.G.’s unavailability.

Here, the evidence does not compare to the evidence in the Dobbs case. The evidence, on the contrary is that Hernandez *wanted* A.G. to testify, and he *wanted* to confront her. His outburst had to do with the prosecutor asking to conclude his questioning of A.G. and the court’s response to that motion-- not because of anything related to A.G.’s testimony. There was no evidence of Hernandez making any threats to A.G., doing a drive by shooting at A.G.’s residence, sending any threatening messages to A.G. or doing anything similar to the overwhelming evidence in

Dobbs. Hernandez did nothing to intimidate A.G. indicating an *intention of making her unavailable* as a witness.

Further, the trial transcript shows that A.G. was taken out of the courtroom shortly after Hernandez had his outburst. There is **no evidence** that Hernandez had access to a gun; on the contrary, Hernandez was screaming that he wanted *the officers to get the gun they had pointed at his hand away from him*. RP 1227-1228.

2. **The error was not harmless.** Contrary to the State's argument, the questions were relevant to the two primary defenses Hernandez had: 1) that he believed A. G. was at least 16, and 2) that he did not supply drugs to A.G. with sexual motivation, which was the charge which mandated a life sentence for Hernandez.

B. Hernandez did not request his private attorney to withdraw, and in fact he wanted to object to it.

Hernandez was incarcerated on October 19, 2015 when his retained attorney, John Crowley, withdrew as Hernandez's attorney. CP 210. See also RP 86 from transcript October 26, 2015. Hernandez previously had been determined to be indigent and eligible for an attorney at public expense. CP 210.

In this case, the failure of Grant County to ensure that Hernandez was appointed counsel after Crowley withdrew was a critical stage in the proceeding. On April 1, 2016, Judge Knodell denied the defense motion for Mr. Crowley to show cause why his withdrawal as counsel should be authorized. Judge Knodell cited with approval CR 59 for the proposition that the defendant had 10 days from the time of Mr. Crowley's withdrawal as counsel to file an objection to the court's order allowing the withdrawal ex parte. CP 210. On May 25, 2016, Judge Knodell denied the defense motion to reconsider his April 1, 2016 decision. Written findings had not yet been

entered. CP 210. Because Grant County had not appointed counsel within 10 days of the order allowing Crowley's withdrawal ex parte, Hernandez did not have an opportunity to have appointed counsel assist him in contesting that decision. Hernandez did not waive his right to counsel after Crowley's withdrawal.

*A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for an **automatic** reversal.* United States v. Cronin, 466 U.S. 648, 658-59, n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The presumption that counsel's assistance is essential requires a conclusion that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Chronis, 466 U.S. at 659.

In Geders v. United States, 425 U.S. 80, 96 S. Ct 1330, 47 L. Ed. 2d 592 (1976), the court reversed the conviction where the denial of counsel was less than 24 hours. In that case, the judge ordered that the defendant

could not speak to his attorney during the overnight recess during a trial. The court emphasized that a defendant “requires the guiding hand of counsel at every step of the proceedings against him.” By not allowing the defendant to speak to his attorney during the overnight recess, the court held that the court had deprived the defendant of his “right to the assistance of counsel guaranteed by the Sixth Amendment.” Geders, 425 U.S. at 91. The overnight recess in Geders was *17 hours long* in a trial that was ten calendar days long. “Our cases recognize that the role of counsel is important, precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance. “ Geders, 425 U.S. at 91.

The court should find that the court committed constitutional error in failing to ensure that Hernandez was appointed counsel immediately upon Crowley’s withdrawal. As indicated in the facts, this error was

compounded by the fact that Hernandez had no attorney from **October 19, 2016 up until December 1, 2016**. Here he was without an attorney for **42 days**, at a time that he was incarcerated and ill equipped to represent himself. This case should be automatically reversed and remanded for further proceedings based on this error.

The failure of the Defendant to Counsel appointed within ten days of the court allowing Crowley to withdraw ex parte deprived Hernandez of counsel to assist him in making a motion to disallow Crowley to withdraw as his counsel. Crowley was Hernandez's counsel of his choosing.

Although the State argues that the State v. Berrysmith, 87 Wn. App. 269 (1997), review denied, 134 Wn.2d 1008 (1998) case is controlling on the issue and that it cannot be distinguished, the State is mistaken. In Berrysmith, the issue was the withdrawal of Berrysmith's defense attorney in camera without allowing Berrysmith to

be present. The Court of Appeals agreed that the trial court did not commit error, but its reasoning was limited to the fact that the defense counsel wished to withdraw because Berrysmith had told him two different stories, with the second story manufactured to fit the facts of the police report. Defense counsel recommended that Berrysmith not testify, but Berrysmith could not be dissuaded from insisting that he be allowed to testify at trial.

The court in Berrysmith concluded that the withdrawal of counsel under those circumstances is a matter governed by ethical standards, and is, therefore a matter of law. Berrysmith contended that he should have been allowed to be present during the in camera motion to present his testimony that he did not intend to commit perjury. The court held that his exclusion from that hearing was proper, because the issue was whether his defense attorney had sufficient grounds “to reasonably believe” that perjury would occur, and Berrysmith had no

constitutional right to be present at the in camera hearing. Berrysmith, 87 Wn. 2d at 270.

Here, Hernandez's case is distinguishable because although Crowley also raised an ethical issue to support his motion to withdraw, the trial court failed to immediately appoint defense counsel for Hernandez, whereas in Berrysmith the trial court appointed new counsel the same day his counsel withdrew because Berrysmith was unclear as to whether he wanted to represent himself. Berrysmith, 87 Wn. 2d at 271-272.

By contrast in this case, the court did not appoint Morgan as defense counsel Hernandez for 42 days (from October 19, 2015 until December 1, 2015, during which three court hearings occurred with Hernandez present without an attorney. Hernandez was incarcerated during this time. The delay of appointing another defense counsel resulted in Hernandez not being able to contest Crowley's withdrawal because the 10 days to request reconsideration

of the trial court's order allowing Crowley to withdraw had already passed. CP 210 (transcript from October 26, 2015).

Structural error is an error that “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle of determining guilt or innocence.” State v. Paumier, 176 Wn. 2d 29, 45, 288 P. 3d 1126, (2012), quoting, State v. Momah, 167 Wn. 2d 140, 149, 217 P. 3d 321 (2009) (alteration in original). Structural errors affect the entire trial process and deprive the defendant of basic protections without which “no criminal punishment may be regarded as fundamentally fair.” Paumier, 176 Wn.2d_at 46.

The remedy for structural errors is automatic reversal and remand for a new trial. The remedy is truly automatic because unlike most constitutional errors, structural errors are not subject to harmless error review. Paumier, 176 Wn. 2d at 46. Structural errors are rare and encompass only the most egregious constitutional

violations. *Id.*

Examples of structural error include complete denial of counsel. *Id.*, citing, State v. Vreen, 143 Wn. 2d 923, 930, 26 P. 3d 236 (2001). Examples also include a biased trial judge, racial discrimination in the selection of a grand jury, denial of right to self-representation, and a defective reasonable-doubt instruction. *Id.* ; See also State v. Vreen, 143 Wn.2d 923, 930, 26 P.3d 236 (2001) (denial of peremptory challenge is structural error). In Washington, courts have been hesitant to classify errors as structural. See, e.g., In re Pers. Restraint of Benn, 134 Wn.2d 868, 921, 952 P.2d 116 (1998) (rejecting argument that violation of the right to be present is a structural error).

Because in this case Hernandez suffered a complete denial of counsel at critical stages of the proceedings, the court should find that a structural error was committed, reverse his convictions, and remand for a new trial. The issue is not moot, because even if Crowley cannot be

reappointed, Hernandez could have another private or public defense counsel appointed so he did not have to appear at critical stages completely without counsel. The court should not engage in a harmless error analysis because denial of counsel is one of the recognized categories of “structural error.”

C. Hernandez was Denied a Fair Trial Where the Court Never Required that the State Provide a Copy of the Transcript of Jessica Cobbs “Free Talk” Required to be Pronounced under CrR 4.7(a)(1)(i).

CrR 4.7 (a)(1) provides as follows:

- 1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within

the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses; and

2)

(ii) any written or recorded statements and the substance of any oral statements made by the

defendant, or made by a
codefendant if the trial is
to be a joint one;

....

The State argues that the CrR 4.7(a)(1)(i) only requires production “any written or recorded statements and the substance of any oral statements,” so the *audio tape* of the “free talk” was sufficient under the rule. The argument does not take into consideration that Hernandez was locked up 23 hours a day and did not have access to a computer or machine to play the audio recording. RP 816-823.

The court in State v. Silva, 107 Wn. App. 605, 616, 27 P. 3d 663 (Div. 1 2001) concluded that article 1, section 22 of the Washington State Constitution affords a pretrial detainee who has exercised his right to represent himself a right of reasonable access to state provided resources that will enable him to prepare a *meaningful* pro se defense

(Emphasis added). This issue also relates to section C, infra regarding Hernandez being denied access to research materials.

Without Hernandez's ability to play the audio recording, the disclosure audio recording was not sufficient to comply with the spirit of the rule. Hernandez was denied a meaningful opportunity to have access to Jessica Cobb's "free talk" statements because he had no way to play the audio, so he could not adequately prepare for cross examination of Jessica Cobb at trial. The trial court should have either provided a way for Hernandez to listen to the audio or dismissed the case for the State's failure to comply with CrR(a)(1)(i).

This error is not harmless because Jessica Cobb was a co-defendant turned State's witness, and Hernandez being able to cross examine her was crucial to his theory of the case about A.G.'s age and his defense that he did not supply drugs for the sexual encounter.

The remedy for nondisclosure is “to permit the discovery of the material and information not previously disclosed, grant a continuance, dismiss the action, or enter such order as it deems just under the circumstances.” The trial court’s potential remedies available here were simple: the trial court should have allowed Hernandez to listen to the audio in the courtroom, provide him a transcript, or provide him access to a cd player to be used outside the courtroom. The court did not exercise any of those options and the error was not harmless beyond a reasonable doubt.

D. Hernandez was Denied a Fair Trial, Where He was Not Provided Access to Research and Resource Materials.

The following facts appear in volume III of the report of proceedings: Hernandez told the court, “If I’m going to be treated like an attorney, shouldn’t I have access to telephone so I can be contacting people nonstop through this? I’m stuck in a cell 23 hours a day. I get nothing.

Nothing. I'm making my own Post-it notes. I don't have access to the law library all day, to do the legal law kiosk. I-- I got nothing." RP 816.

Hernandez also told the court that he had one hour a day to clean his cell, shower, and make calls. RP 816. Hernandez explained that he assaulted someone in jail and he had been put in isolation since. Hernandez also complained that he didn't have a laptop or disc player. RP 823.

The State argues that Hernandez had access to standby counsel to do research for him. But standby counsel is not required to do research. Criminal defendants have a constitutional right to waive counsel's assistance and represent themselves at trial. State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). In certain circumstances, a pro se defendant may be entitled to have standby counsel provide *technical assistance* in the courtroom. Although appointing standby counsel at the

defendant's request should be encouraged, this right is not absolute. DeWeese, 117 Wn.2d at 379; State v. Christensen, 40 Wn.App. 290, 297 n.2, 698 P.2d 1069, *review denied*, 104 Wn.2d 1003 (1985). There is no absolute right of the pro se defendant to standby counsel. Locks v. Sumner, 703 F.2d 403, 407 (9th Cir.1983).

Taking these authorities as a whole, the law regarding standby counsel is that once appointed as standby counsel, the standby counsel is there to provide technical assistance in the courtroom. There does not appear to be a requirement that the standby counsel research matters for a defendant who has waived his right to counsel. In this case, Hernandez requested access to resources so that he could do the research himself. The court was required to provide the resources necessary for Hernandez to do his own research, and the trial court in this case made no accommodation for Hernandez to either have the time out of lockdown necessary to do the research or the resources

for him to prepare a reasonable defense for himself.

E. The Appellate Court Reviews A Denial of a Constitutional Right De Novo, So the Appellate Court Should Remand For a Fact Finding Hearing on Hernandez's Claim that Holland took the 5th because he had been intimidated and threatened by Grant County Deputy Kissler.

The State claims that the appellate court should not review this issue because Hernandez, representing himself, did not preserve this issue for trial. Hernandez did, however, raise this issue at trial and then signed a post-trial declaration in support of a motion for a new trial. CP 843-852. The State asked for a continuance of that motion because the transcript from the approximately two and a half week trial was not yet ready.

In any event, Hernandez did raise this issue at trial, indicating his concern that Deputy Kissler intimidated Paul

Holland into taking the 5th amendment by stripping Holland of his jail trustee status. Beck RP 977. Hernandez had wanted Paul Holland to testify on his behalf about A.G. and AGF's drug use. Beck RP 979. After Holland consulted his assigned attorney, Holland exercised his right to take the 5th amendment. Beck RP 995, 1002-03; Beck RP 1064.

The court allowed Deputy Kissler gave his side of the story beginning at RP 1215, over Hernandez's objections. Kissler did not mention anything related to him stripping Holland of his trustee status. RP 1215. The court did not order any relief related to Hernandez's allegation that Deputy Kissler had intimidated Holland into taking the 5th Amendment by stripping him of his trustee status.

The trial court did not, however, have the defendant Hernandez testify as to his personal knowledge as to what he had witnessed with respect to Holland being stripped of his trustee status by Deputy Kissler and that he had

overheard Deputy Kissler discussing Hernandez's trial with Holland. See Declaration of Carlos Hernandez in Support of Motion for a New Trial, CP 843-852.

"The fundamental constitutional requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965)). Due process is a flexible concept in which varying situations can demand differing levels of procedural protection. Id. at 334, 96 S.Ct. 893. In evaluating the process due in a particular circumstance, the court must consider (1) the private interest impacted by the government action, (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) the government interest, including the additional burden that added procedural

safeguards would entail. Id. at 335, 96 S. Ct. 893.

Because Hernandez did in fact raise this issue at trial, the court should have allowed him to be heard in a reasonable time in a reasonable manner, which in this case would have been after Deputy Kissler was allowed to give his testimony, instead of only allowing Deputy Kissler to give his side of the issue. This is especially true where the issue involved one of constitutional magnitude in that Hernandez was denied the opportunity to call Holland as a witness in his favor on an important issue, i.e. that A.G. and AGF's had access to drugs independently of Hernandez at the time frame at issue in this case. Because Holland took the 5th, Hernandez informed the court that he believed that Holland had been stripped of his trustee status as a punishment for agreeing to testify for Hernandez, and that Holland was reinstated as trustee after he took the 5th Amendment, leading Hernandez to believe Holland had been coerced into taking the 5th Amendment by the action

Deputy Kissler took against Holland.

Because this issue was raised by Hernandez at trial, and because the issue affected Hernandez's constitutional right of due process, the court should remand this issue for a fact finding hearing to allow Hernandez an opportunity to testify about what he actually personally witnessed about what happened to Paul Holland. Hernandez was denied due process by the trial court only hearing from one side of the issue and not having Hernandez testify.

II. CONCLUSION

The court should reverse and remand for a new trial based on 1) "structural error" and 2) other constitutional and court rule related errors, and remand for an evidentiary hearing related to Deputy Kissler allegedly intimidating witness Paul Holland from testifying.

Respectfully submitted this 20th day of June, 2018

LAW OFFICES OF JULIE A. ANDERSON

A handwritten signature in cursive script, reading "Julie A. Anderson", is written over a solid horizontal line. The signature is fluid and extends slightly beyond the line on both sides.

Julie A. Anderson, Attorney for Appellant

FILED

JUN 29 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

WASHINGTON STATE COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON,
Plaintiff,

v.

Carlos Hernandez II
Defendant.

Appellate Court No. 34786-9- III

PROOF OF SERVICE BY MAIL

TO: THE CLERK OF THE ABOVE ENTITLED COURT
AND TO: KEVIN J. MCCRAE, DEPUTY PROSECUTING ATTORNEY

The undersigned, being first sworn on oath, deposes and says: I am a resident of the State of Washington, over the age of eighteen years. On the 27th day of June, 2018, at I sent to Kevin J. McCrae and the Court of Appeals Div. 3 the following documents:

- Motion for Permission to file Over-Length Reply Brief;
- Appellant's Reply Brief;
- Proof of Service by mail.
-

in the above-entitled action to the following:

Court of Appeals, Div. 3
500 N. Cedar Street
Spokane, WA 99201-1905

Grant County Prosecutor's Office
Deputy Prosecuting Attorney
RE: Kevin J. McCrae

Law Office Julie A. Anderson

409 N. Mission St.

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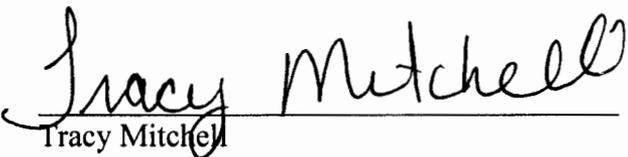
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35 C Street NW
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date this 27th day of June, 2018 in Wenatchee, Washington



Tracy Mitchell
Assistant to Julie A. Anderson