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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No.347869

WASHINGTON STATE COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON, Respondent

v.

CARLOS HERNANDEZ II, Appellant

AMENDED APPELLANT'S BRIEF

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I. STATEMENT OF THE CASE

A. Procedural History

Carlos Hernandez, hereinafter "Hernandez" was charged in the Grant County Fifth Amended Information with the following crimes:

1. Rape of a child in the third degree (RCW 9A.44.079);

2. Child molestation in the third degree (RCW 9A.44.089;

3. Count 3 through Count 12 **(9 counts)** Unlawful possession of a firearm in the first degree (RCW 9.41.040(1)(a);

13. Possession of an Unlawful Firearm (RCW 9.41.190(1);

14. Possessing a stolen firearm (RCW 9A.56.310(6) and 9A.20.021(1)(b);

15. Distribution of controlled substance to a person under age 18 (RCW 69.50.406(1).

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.

16. Tampering with a witness (RCW 9A.72.120)

CP 539-545.

Hernandez was convicted on all charges, except witness tampering. CP 670-687. He was sentenced to life imprisonment without the possibility of parole on the third strike offense, Count #15. See CP 818-839. He timely filed a Notice of Appeal to the Court of Appeals, Div. 3. CP 865.

B. General Facts

Hernandez girlfriend, Jessica Cobb, who was also the mother of his child, was also charged with sex offenses arising out of same incidents with Hernandez and minor alleged victim A.G. RP 743; 859-861.

On August 1, 2016, two days before trial, Hernandez moved the court to allow Ms. Anderson to substitute in for public defender Michael Morgan. The court agreed that she could substitute in as counsel, but the court denied her request for a three month continuance, primarily on the

grounds that the case had been continued many times, and because of the concern that another continuance would traumatize the minor alleged victim, A.G. RP 393-431. Ms. Anderson did not substitute in as counsel.

On the first day of trial Hernandez asked to represent himself. RP 3-48. The court granted his motion and appointed public defender Morgan to stay on as standby counsel RP 48-49. **(transcript from August 3, 2016.)**

(Transcript from August 8, 2016): A.G., the minor alleged victim, testified that the Defendant, Carlos Hernandez, hereinafter Hernandez, did not tolerate drugs in the house. RP 59. Hernandez would freak out if anybody did drugs with the mother of his children, Jessica Cobb. RP 62.

A.G. further testified that on January 14, 2015, the defendant Hernandez picked her up around 8 or 9 a.m. at her dad's house. RP 24 through 25. He took her to Hernandez and Jessica Cobb's residence off Wheeler Road in Moses Lake. RP 24 to 25. They probably got there about 9:30 or 10 AM.

A.G. testified that later in the day they started doing drugs. RP 25. At that time, A.G. thought it was cocaine. RP 26. A.G. said that

Hernandez provided her the drugs. She said that she partook about 4-5 times. RP 28. Hernandez was also there, according to A.G. , doing drugs and watching pornographic movies. A.G. went into Hernandez and Jessica Cobb's bedroom. RP 28. Hernandez asked if A.G. wanted to watch Jessica Cobb dance, RP 28, and A.G. said yes. RP 29. Jessica Cobb got up onto the bed, and she started doing sexual things with A.G. RP 30. A.G. testified that Hernandez told Jessica to "go down on him," and Jessica did. RP 32. A.G. testified that thereafter, Jessica performed oral sex on her, and she did the same to Jessica. RP 33. Hernandez was watching. RP 33.

Thereafter, all three started doing sexual things to each other. RP 34. A.G. couldn't remember if Hernandez penetrated her with his fingers. RP 34. A.G. performed oral sex on Hernandez. RP 35. This went on, according to A.G. about 25 minutes before they went back out to the living room. RP 35. A.G. testified that they went back into the bedroom again and did drugs again. RP 35. A.G. testified that they did some "coke" and that they might have smoked some weed. RP 36.

A.G. said that they went back into the bedroom about 6:00 p.m. RP 36. Hernandez performed oral sex on her. RP 37. At that point, according to A.G., Hernandez left for about 45 minutes and then returned.

RP 37. They started doing things again. RP 38. She said that she "went down on Carlos and we fingered each other and ate each other out."

A.G. testified that they all did drugs again before going back into the bedroom for the third time. RP 38. According to A.G., Carlos checked on the kids and then went back into the bedroom and asked A.G. if he could go inside of her with his penis. RP 41. A.G. said that she told him, "no." RP 41. A.G. testified that Hernandez told her that he would not hurt her if he just put the tip in and then he started rubbing his penis on her vagina. RP 41. A.G. then agreed to this. Jessica Cobb was out of the room at this point. RP 42.

A.G. also testified that Hernandez tried to penetrate her rectum, but she said no because it hurt, but he did "successfully" put a little part of his penis into her rectum. RP 43-44. A.G. said that the penetration stopped shortly after that, when her mom, Amy, showed up at the house. RP 42.

A.G. said that her mom arrived, picked her up, and took her to her dad's house to sleep. RP 68. Later she woke up and Hernandez was there. He told A.G. that "it was okay if somebody gave consent or it wasn't against their religion. "

A.G. told her mom and her mom's boyfriend, Robert Gwinn what happened, and her mom, Amy, started freaking out. RP 50. According to A.G., her mom told her that they needed to go to the hospital. RP 50. Her mom took her to Samaritan Hospital in Moses Lake. RP 51.

A.G. confirmed that at the time of the incident she was 14, and that she was not married to Hernandez. RP 54. She told the hospital nurse that she had blacked out at some point. RP 52. A.G. told the nurse that the Jessica and Hernandez told her not to tell anyone because they would get in trouble. RP 54. She testified that what Hernandez told her that he would buy her a car if he could go inside her with this penis. RP 54.

A.G. also testified that she saw firearms inside of Jessica and Hernandez's residence. RP 55-56. She testified that there was some discussion that Jessica would "take the rap" for the firearms if officers found them. RP 57-58. A.G. also admitted that Hernandez shelters and takes care of the most is his family. RP 62.

A.G. testified that she thought Hernandez and Jessica were aware of her age. RP 64-66. During cross examination by Jessica Cobb's attorney, Smitty Hagopian, A. G. admitted that she had not been in school since she was in middle school. RP 70.

During Hernandez's cross examination of A.G., A. G. admitted that her mom, Amy, and Amy's boyfriend Robert have to go to the back lot of Jessica and Hernandez's residence to do drugs because Hernandez would freak out if anyone was doing drugs with Jessica. RP 62. She admitted that Hernandez does not tolerate drugs in the house. RP 59. A.G. also admitted that it was "a rule that meth is not allowed" in the house. RP 59.

(August 9, 2016 testimony) Amy, A.G.'s mother, testified. Amy testified that she knew that A.G. was at Jessica and Hernandez's residence. RP 110. Amy testified that she was using meth that day and that she had received it from Hernandez. RP 112. She admitted that they did not usually do meth when Jessica was present. RP 112. Amy admitted that she didn't keep close tabs on A.G., and that Hernandez showed up to pick up A.G. because she was going to "babysit." RP 114. Amy testified that she showed up at Jessica and Hernandez's residence on the 14th and saw A.G., Jessica, and Hernandez coming out of the bedroom. RP 117. Amy testified that A.G.'s eyes were "jet black" and her color was grey . RP 118. Amy said that A.G. really couldn't talk and that she looked "lifeless." RP 119.

Amy testified that later she went to Hernandez's residence to pick up "tires," RP 121. Amy's boyfriend, Robert Gwinn, asked Amy if "Homie [referring to his friend, Hernandez] is fucking your daughter? " Gwinn confronted Hernandez. RP 124-125. A.G. said that Jessica and Carlos raped her. RP 127. Brandon, A.G.'s brother, called the police. RP 127.

Amy admitted that she had admitted to an investigator, Davie Greer, that Hernandez had asked Amy not to give drugs to Jessica. RP 132. Amy and also admitted that she allows A.G. to smoke marijuana. RP 145. A.G. went to New Hope after she was examined at the hospital.

(Trial Volume II.): Hernandez cross examined A.G. Amy admitted that she would call Hernandez before visiting Jessica, because she would not step over the boundaries. RP 201. Amy admitted that she didn't give Jessica drugs because she knew that it was a "no-no." RP 206. Amy testified that her daughter A.G. was 14 at the time of the incident. RP 209.

Desiree Hamilton was the RN who examined A.G. She testified that there was "no trauma noted to the vagina, the perineum was intact, and there was no tearing of the anus. RP 300. She did not observe any

trauma to the vagina. RP 300. The vulva was unremarkable. RP 300. The was some tearing at the 7:00 position. RP 300.

Desiree Hamilton admitted during Hernandez's cross examination of her that there was no report by A.G. of physical force, verbal threats, or use of a weapon during the sexual encounter. RP 331. She also admitted that if a grown man had sex with a teenage girl there would be no way for her to tell. RP 334 A supervisor for the WashingtonState Patrol Forensic Toxicology Laboratory, Lisa Noble, testified that A.G. had meth and marijuana in in her system, but not cocaine. RP 704-707; RP 724.

Jessica Cobb testified that Hernandez does not tolerate meth in his house or around the children. RP 59. She also admitted that Hernandez was the boss "hands down." RP 60.

Grant County Detective Wallace testified that a search warrant was issued for 4499 Road L. Northeast after the sexual encounter was reported. That residence was actually the residence of Jessica's parents, not the residence Jessica lived in. RP 550. Jessica Cobb's address was actually 4489 Road L Northwest, Moses Lake. RP 548. Nine firearms were found in the home where Jessica was residing. RP 441-442. A sawed off shotgun was also seized. RP 45. According to Wallace, Hernandez had give different statements about his address. RP 550., Hernandez told the

officers that he actually lives at 4499 (Jessica's parents' house) and that he didn't know how his mail ended up at Jessica's residence at 4497. RP 572-578.

Wallace admitted that there were no matches between Hernandez's fingerprints and ANY of the firearms found at the residence. RP 543 **(Trial Volume III).** Nothing came back with Jessica Cobb's fingerprints either. RP 546.

Geoffrey Faulkner testified that the Mosberg shotgun, Ex.#149, was stolen from his apartment. RP 636-637.

On the 7th day of trial, the codefendant, Jessica Cobb, took a plea agreement, and agreed to testify against Carlos Hernandez. RP 743. (Transcript from August 11, 2016). Jessica pleaded guilty to rape of a child with an agreed recommendation of 9 months jail time. RP 859. Amy gave Jessica drugs. RP 861. Jessica had pulled Amy aside and asked her if she would give her drugs. RP 861. Amy gave her a line. She admitted that Hernandez doesn't let her do drugs "on her own." RP 861. Jessica also admitted facts pertaining to molestation and sexual acts with A.G. RP 867-871.

On that same day, Hernandez requested another opportunity to cross examine A.G., because he did not have her interview at the time he first cross-examined her. RP 798. He had just received it on Monday. RP 799.

Jessica testified that Hernandez provided the drugs. RP 866. She also testified that she had seen Hernandez handle firearms in her home. RP 876.

On cross by her attorney, Hagopian, Jessica testified that Hernandez was not living with her at the time of the sexual encounter. RP 878. He was living with another woman, Lacey Gwinn. RP 803-4. Hernandez and Cobb had one child together. Jessica had a son, Gage, from a prior relationship. RP 878. They had been together for 4 years.

Jessica admitted that she still loves Hernandez. RP 879. Jessica also admitted that during one of the jail calls between her and Hernandez, Hernandez said, "Let's tell the truth." RP 880.

Jessica also admitted that Hernandez had helped her get clean for a while. RP 898. She thought Hernandez was her best friend. RP 898. A.G. had admitted in an interview that she and Jessica had set up the whole sexual encounter with Hernandez to keep Hernandez home with

Jessica. RP 901. Hernandez also cross examined Jessica about the jail phone calls where Jessica had admitted that she was stealing Hernandez's dope an and getting high with A.G. without Hernandez's knowledge. RP 903.

Jessica also admitted that Hernandez did not give her permission to take dope out of his pile or out of his bag and give it to anyone. RP 908. Hernandez did not tell Jessica that she could have a line or give one to A.G. RP 906.

Amy's boyfriend, Robert Gwinn testified that he had never seen Hernandez give a child drugs. RP 949. He also testified that he had never seen Hernandez get high around A.G. RP 960. He wanted nothing to do with the case, indicating that he loved both Hernandez and Amy's daughter, A.G. RP 962.

Gwinn had heard, however, that Jessicia had set up the whole sexual encounter. RP 864.

On the 10th day of trial **(August 16, 2016 transcript)** Hernandez reserved the right to recall A.G. RP 982.

A.G. was recalled. RP 1008. **(Trial Volume 6).** Morgan mentions that he had turned over his files to Hernandez on the first day of trial. RP 1052.

A.G. admitted that she and Jessica would wait until Hernandez would leave to do lines because "Jessica couldn't always do them in front of [Hernandez]. " RP 1103.

A.G. testified that she was a senior in high school at the time of trial. RP 1111. Hernandez tried to ask a question about a white and purple vibrator Jessica used on A.G. during the encounter, and Wilmore objected. 1117. Wilmore said that A.G. was" terrified of the Defendant." He said that A.G. had left, and that he didn't think that she intended to return. RP 1119. Wilmore told the court that A.G. had received a phone call that her father, who had had 5 strokes, was rushed to the hospital immediately. RP 1123. A. G. had left with her aunt and her father. RP 1123.

At that point, the Court told Hernandez, "You can call her back as a witness" RP 1124.

Margaret Correa, Hernandez's mother, also testified. She confirmed that her son does not tolerate Jessica using drugs. RP 1160.

Margaret Correa testified that in the past Jessica was on the streets selling herself for methamphetamine. RP 1161.

Hernandez testified in his own defense. RP 1164 He testified that when he saw Jessica at her house on January 14, 2015, she told him that A.G. "wanted to mess around." RP 1167. Hernandez asked her what that means, and Jessica said that she "wants to fuck around." RP 1167. Hernandez went inside and saw that A.G. was in her underwear. RP 1167.

A.G. told him that she had some more nice underwear that she just bought at her dad's house and she asked if Hernandez would take her there to pick it up. RP 1171. He drove her there. When he saw A.G.'s mom Amy there, he told her, that A.G. "wants to fuck around. She says she wants to get down." He asked her, "Is that cool Amy?" Amy told Hernandez, "She does whatever she wants. She always has. And she's gonna do what she wants. She can do whatever she wants." Hernandez told Amy, "Okay Amy." RP 1171.

Hernandez then testified that Amy asked him, "What's in it for me?" RP 1172. Hernandez told Amy, "Like that bitch, you dirty." RP 1172. Amy then asked Hernandez if he had any "shit" on him, and he said , "No." RP 1172.

Hernandez said that they returned to Jessica's residence.. Hernandez described the sexual encounter in detail, admitting acts which by definition fit the charges of rape of a child and child molestation, but he testified that he had a reasonable belief that A.G. was at least 16. RP 1174-1178. At one point during the encounter Hernandez admitted that he was frustrated because A.G. straddled him, but then did not take his penis fully inside her. A.G. then told Hernandez that she is a virgin and that she is scared that it would hurt. RP 1313. Hernandez asked her if she was going to put his penis in her, and at that point he said A.G. admitted to him that she was about to be 15. RP 1178; 1313. . At that point, Carlos pushed her away from him and left the bedroom and told l Jessica that A.G. is "barely going to be 15." RP 1178. Again during his testimony at RP 1312, he testified that he stopped the sexual encounter as soon as A.G. told him her true age. RP 1312.

Hernandez was so upset that he left the house and went out to sit in his truck. RP 1179. He called Amy and asked her why she didn't tell him how old her daughter was. RP 1179. That night Amy came back over to Jessica's residence looking to see if Hernandez had any drugs, but he didn't have any. RP 1180.

Thereafter, Hernandez resumed his cross examination of A.G. RP 1221. Wilmore stated that the court could conclude his questioning. Hernandez had an outburst. See **Contempt and Right to Confrontation Facts,** infra.

Amy had told Hernandez that the incident with A.G. was "no big deal," and that A.G. wasn't trippin." RP 1291. Amy asked Hernandez for drugs and implied that if he would give her some, she wouldn't report the incident. RP 1295. Hernandez told her that he wasn't giving her anything. RP 1295. Amy told Hernandez, "Don't trip Scrump. You know I ain't going to say nothing. It's cool." RP 1298.

Hernandez testified that between January 9-13, he never gave Jessica or A.G. any drugs. RP 1319. He didn't offer them any meth or cocaine. RP 1320. Further, he did not witness them do any meth or cocaine at time between the 13th and the 15th of January, when the sexual encounter occurred. RP 1321. Hernandez also indicated that he sees A.G. and her mother Amy multiple times each day. RP 1323. Hernandez had seen A.G. do "lines" with her mother, Amy. RP 1333.

Wilmore cross examined Hernandez, bringing out the facts that Hernandez was at least 48 months older than A.G. and that he was not

married to her. RP 1342. Hernandez again denied giving Jessica or A.G. any drugs. But he did admit the sexual encounter. RP 1386.

Hernandez testified that he believed that A.G. was 16 because A.G. had told him that she was 16 in front of her mother, Amy, and Amy did not correct her. RP 1388. He also believed that A.G. was at least 16 because of the way she acted, her knowledge of thins, and the fact that she does whatever she wants. RP 1389. Hernandez also said she thought she was 16 because she was allowed to drive the car. RP 1389. Further, A.G. was in the sex swing in Jessica's residence when Hernandez walked in before the encounter began. RP 1397.

Norm Cleary testified that he had seen Amy do meth with her daughter, A.G. RP 1412. He also testified that a few years prior, Amy had thrown a birthday party for A.G.'s 15th birthday or something. RP 1412.

Jessica admitted on one of the jail calls to Hernandez that Amy gave her drugs on the 13th of January. RP 1511. During a jail conversation, Jessica admitted that Hernandez cut up the lines of drugs, and that she and A. G. "pinched them behind your back. " RP 1513. Jessica also admitted that when Hernandez leaves they continued to do lines. RP 1523.

C. Contempt of Court and Right to Confrontation Facts

The following facts occur in Trial Volume VII: The defendant, Carlos Hernandez II became agitated on one of last days of trial and went on a tirade in the courtroom. Grant County Deputy Prosecuting Attorney Wilmore, hereinafter "Wilmore," had made a motion to terminate the cross examination by Hernandez of A. G., the alleged victim. on the grounds that some of his questions were not relevant, and that the court, under Rule 611 has discretion to control the scope of cross-examination and the use of legal questions. RP 1225, lines 1-8.

At that time, the court did not terminate Mr. Hernandez's cross examination, but cautioned Mr. Hernandez that if he continued, quote on the lines of questions that—aren't relevant or haven' t (as stated) been asked already, the court can conclude questioning." RP 1225, lines 23-25.

Mr. Hernandez was upset, indicating," Okay. Before Ms. Cobb did what she did—[apparently referring to Jessica Cobb taking a plea deal and testifying against Mr. Hernandez] I think her doing that switched everything around, so I don't see no reason I should be able to go back to these statements and then other ones." Hernandez explained,

> I'm trying to prove they set me up. They--they discussed this in the home. And without being able to go back to [Detective] Wallace's stuff. They deceived me, man. I don't know why the court is so damn fucking ignorant and they don't want to fucking listen.

Hernandez's tirade continued, the courtroom deputies apparently descended on Mr. Hernandez. RP 1227, lines 2-21.

Wilmore made a motion for the court to hold Hernandez in contempt. RP 1227, lines 2-21. Hernandez began screaming about the courtroom officers having a gun out on his hand. RP 1227 at lines 9-12. Later Mr. Hernandez explained that had felt something in his hand from one of the deputies' belts, and that he was concerned that the last thing he needed was "a firearm going off and somebody getting hit and that's on me too…." RP 1220, lines 14-16.

A.G. said that she wanted out [of the courtroom] and the prosecutor said to take her out. RP 1228, lines 10-25.

Hernandez continued to swear and the court said, "Mr. Hernandez, that's enough." The court then called a recess. RP 1229, lines 23-25. Judge Antosz found Hernandez in contempt of court and gave

Hernandez an opportunity to respond. RP 1230, lines 7-25; RP 1231, lines 1-25; RP 1232, lines 1-2.

The court found that Hernandez was in contempt for his outburst sentenced him to 15 days of confinement, and if it continued 30 days, RP 1232, lines 1-12 and indicated that there could be greater sanctions such as shackling or bounding. RP 1232, lines 13-20. The court also signed a written order regarding the contempt, which is attached as **Appendix A** to this brief.

Wilmore put on the record that Hernandez started screaming and that he had to be escorted out by four deputies. Wilmore put on the record that A.G. was discombobulated. She ran for the jail door because she didn't know where she was. RP 1236, lines 7-14. Wilmore asked to terminate Hernandez's cross examination of A.G. 1236, lines 24-25. 1245, lines 1-5

The court asked Hernandez to speak to Morgan and come up with a list of questions to ask A.G. to present to the judge to see if he would have permission to ask the specific Hernandez indicated that he wanted to ask A.G. the following questions:

1. Did I interact with your mother after my sexual encounter at my residence?

2. Why didn't you call the police after you first got home?

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

4. Did I interact with you at Mando's after the sexual counter in your presence?

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

6. Do you know how your mother got those drugs?

7. Where did she get the drugs?

RP 1255, lines 17-25; RP 1256, lines 6-16.

The court wanted a report on how the victim was affected because of Hernandez's outburst. RP 1258, lines 13-17. After the court received the report, he found that A.G. was "legitimately under stress of the event," and that the "outburst was intimidating." RP 1260, lines 17-22. He court said that she was" legitimately frightened" RP 1260, lines 17-22.

Deputy Prosecutor Wilmore agreed that A.G. was "in no position to testify." Id. at lines 23-25. Wilmore said that she was frightened because Hernandez had access to a weapon and Hernandez had been yelling at the deputies to "get your mace and gun out of my hands." RP 1261, lines 16-23. Wilmore argued that Carlos caused her unavailability so he has waived his right to question her. RP 1262, lines 16-21.

Wilmore also reported that "[A.G] is refusing to testify." RP 1263, lines 14-19. Wilmore also stated that A.G was "unable to testify." RP

1264, lines 1-7. Hernandez told the court that Wilmore had just said , "I just seen her. She's calmed down. She's cool." RP 1265, lines 20-22. Hernandez also said, "She just don't want to testify." RP 1265, lines 23-25. The court ruled that Hernandez had already inquired of her, and that her "unavailability" as a witness was brought about by Mr. Hernandez's behavior. RP 1272, lines 14-18. The court concluded, ***"So her testimony will not proceed further."*** RP 1272, lines 14-18. (Emphasis added.)

Hernandez stated that he wanted to note that the reason A.G. left the day before was because of a family emergency, nothing to do with his outburst or anything." RP 1274.

In the written order of contempt attached hereto as **APPENDIX A**, signed on August 16, 2016, the court made the following Findings of Fact:

a. Shouting and vulgar language in courtroom. The defendant did not cease when directed by the court 9:12-9:16 am.

The court thereafter made the following conclusions of law:

2.1: Defendant Hernandez committed a contempt of Court within the Courtroom and in the presence of the undersigned Judge.

2.2 Sanctions are necessary to preserve order in the Court and to protect the authority and dignity of the Court.

The trial court then checked box 3.3 as follows:

> 3.3 A punitive sanction:
>
> [X] shall be imposed as follows: 15 Days of on confinement

The trial court did not mention that part of the contempt sanction was, in fact, the termination of the cross examination of the alleged victim, A.G. Id.

D. Motion to Dismiss for Failure to Provide Counsel at Critical Stage Facts

The following facts were contained in the declaration of Michael Morgan, signed May 31st, 2016 in n support of the defendant's motion to dismiss related to the fact that Carlos Hernandez was unrepresented from October 19, 2015 until December 1, 2015:

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

On October 26, 2015, the defendant appeared in court without an attorney. On November 17, 2015, the defendant appeared without an attorney. On November 17, 2015, the defendant appeared in court without an attorney. CP 210.

On December 1, 2015, the defendant appeared in court with an appointed attorney, Michael Morgan. CP 210. See also RP 100 **(transcript from December 1, 2015.)**

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 a motion for reconsideration of that decision. 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.

E. Nondisclosure of Jessica Cobb Statements Facts

The following facts appear in Vol. III of the Report of Proceedings: Defendant Hernandez made a motion to dismiss under CrR 8.3 and CrR 4.7(1) (ii) on the grounds that the State had not provided Jessica Cobb's

written statements of Jessica Cobb's "free talk." RP 856 -858. The trial court denied the motion on the grounds that Hernandez had had an opportunity to interview the witness. RP 858.

F. Failure to Grant Pro Se Defendant Access to Research Materials Facts

The following facts appear in volume 3 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 said that he assaulted someone in jail and he had been put in isolation since. Carlos also complained that he didn't have a laptop or disk player. RP 823.

G. Hernandez Right to a Fair Trial Was Denied by Deputy Kissler Facts

After Hernandez's conviction, he filed a Motion for a New Trial based on a number of errors including the issue about Deputy Kissler's misconduct. RP 843-852. Hernandez filed a Declaration on October 7, 2016, explaining the issue as follows:

During one of the breaks during trial, I was being held in a holding cell. I heard one of my subpoenaed witnesses, who was an inmate trustee, Paul Holland, talking to Brian Kissler, who is is a Gant County Sheriff's's deputy who works at the Grant County jail. Earlier that day, the deputies were playing the telephone call tapes between me and Jessica on the loudspeaker in the jail. I heard Deputy Kissler say to Paul Holland, "Carlos Hernandez is a piece of shit. I can't believe you're going to testify for him. If he knew that Jessica was touching that girl, and didn't say nothing about it, then he is just as guilty as she is."

I raised this issue on the record with the court when I got back into court that day, telling the court that the officers, like the jurors, are instructed not to talk about the case. Officer Kistler broke those rules. I noticed that when Paul Holland came up to the courtroom to testify the next day, he was no longer wearing the trustee color, orange; rather he was wearing a green jumpsuit. Before he went up on the stand I asked him if he had been "tanked," which means that he had had his trustee privileges

taken away. He said yes. What was time for Paul Holland to testify for me, he asked the judge if he could talk to someone because he didn't want to get in any more trouble. After Paul Holland had a chance to talk to an attorney, he told the court that he was taking the Fifth Amendment.

Later I saw that he had gotten his trustee status back, even though there's a rule that once inmate loses his trustee status, an inmate is not a lot to get that status back again.

Paul Holland stated that he will testify that he was intimidated from testifying by Officer Kissler. He [Paul Holland] was going to testify about Allison's drug usage and that she lied about her age. If I get a new trial, he will testify for me. Brian Kissler prejudiced my right to a fair trial.

Declaration of Carlos Hernandez in Support of Motions for…A New Trial. CP 858-859.

Here, Hernandez had also brought this issue to the attention of the trial court during the trial when Paul Holland refused to testify after he had been stripped of his inmate trustee status.

Deputy Kissler gave his side of the story beginning at RP 1215, over Hernandez's objections. Kissler stated that he had told Holland that

if Hernandez didn't notify law enforcement, he is just as guilty as [A.G.'s] mom is. Kissler did not mention anything about 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.

II. ARGUMENT

A. The Court Erred In Terminating the Cross Examination of A.G. as a Contempt Sanction In Violation of 7.21 Et Seq and the Constitutional Right to Confrontation.

RCW 7.21.010 provides as follows:

> (1) The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom. If the judge certifies that he or she saw or heard the contempt. The judge shall impose the sanctions immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judgment entered on the record.
>
> (2) A court, after a finding of contempt of court in a proceeding under subsection of this section may impose for each separate contempt of court. A punitive sanction of a fine of not more than $500 or imprisonment for not more than 30 days, or both, or a remedial sanction set forth in RCW 7.21.030(2). A forfeiture imposed as a remedial

sanction under this subsection may not exceed more than $500 for each day the contempt continues.

RCW 7.21.010 defines the meaning of "contempt," and "remedial" or "punitive" sanctions as follows:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

...

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of opposing the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of omission or refusal to perform an act that is yet in the person's is power to perform.

Here, the court indicated in his written order that the court was imposing a punitive sanction. See APPENDIX A. It was clearly imposing a sanction "for the purpose of opposing the authority of the court. Hernandez had already had an outburst using vulgar language after the court had on other occasions warned him against such outbursts.

However, the contempt order does not mention that it was also imposing the sanction on Hernandez *of terminating the cross examination*

of the alleged victim, A.G. The imposition of that sanction occurred right after that contempt and the discussion on the record regarding the contempt. Clearly, the court was also trying to impose *another sanction* without specifying that sanction in the contempt order.

And clearly, had the court specified that it was imposing a punitive sanction, consisting of terminating the cross examination of A.G., that would not have been a proper sanction under the statute. RCW 7.21.010 (2) cited above, limits the sanction to a punitive sanction of "a fine of not more than $500 or imprisonment for not more than 30 days, or both." Clearly, terminating the Defendant's right to cross examine the alleged victim is not one of the contempt sanctions that the court may make "summarily" without a trial.

If the court wishes to impose any other punitive sanction, the court must follow RCW 7.21.040 which provides in pertinent part:

> (1) Except as otherwise provided in RCW 7.21.050, a punitive sanction for contempt of court may be imposed only pursuant to this section.
>
> (2)(a) An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive sanction sought to be imposed.

(b) If there is probable cause to believe that a contempt has been committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.

(c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.

A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial.

(d) If the alleged contempt involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.

(3) The court may hold a hearing on a motion for a remedial sanction jointly with a trial on an information or complaint seeking a punitive sanction.

(4) A punitive sanction may be imposed for past conduct that was a contempt of court even though similar present conduct is a continuing contempt of court.

(5) If the defendant is found guilty of contempt of court under this section, the court may impose for each separate contempt of court a fine of not more than five thousand dollars or imprisonment for up to three hundred sixty-four days, or both.

(Emphasis added.) Clearly, the "contempt" was found by a summary procedure and did not involve a complaint being filed by the prosecuting attorney such as would be required to impose any other form of punitive contempt. The "Order of Contempt" did not mention the court's terminating his cross examination of A.G. as an imposition of the punitive sanction because it was clear that this type of summary contempt was not authorized under RCW 7.21.050.

Although normally a court's decision to limit cross examination is reviewed for a manifest abuse of discretion, See e.g. State v. Garcia, 179 Wn. 2d 828, 844, 318 P. 2d 266 (2014), the court did not make its ruling based on an evidentiary objection, but because the court was holding Hernandez in contempt for his outburst in court. Even though the court did not indicate that in its ruling that he was terminating the cross examination as a result of Hernandez's outburst, it was clear from the transcript that that decision was made on the heels of the contempt discussion, before any further cross examination occurred. The court cannot disguise a sanction as an evidentiary ruling just to avoid the fact that termination of cross examination is not authorized as a punitive sanction in a summary contempt proceeding. See RCW 7.21.040, supra. Any other punitive sanction other than the ones listed in RCW 7.21.010(2) must be

commenced by the State filing an action against the Defendant for punitive contempt sanctions. See 7.21.010(2), supra.

Further, the court imposing a sanction related to terminating the cross examination of the alleged victim implicated the defendant's constitutional right to confront witnesses against him. A review of a trial court's decision to limit cross examination is reviewed for abuse of discretion. Roper v. Maberry, 15 Wash. App. 819, 822-23, 551 P. 2d 1381 (1976). State v. Temple, 5 Wash. App. 1, 4-5, 485 P. 2d 93 (1971). However, an appellate court reviews errors affecting a defendant's constitutional right to a fair trial de novo. State v. Stone, 165 Wn. App. 796, 810, 268 P. 3d 226 (2012))

In re Personal Restraint of Duncan, 167 Wn. 2d 398, 409 219 P.3d 666(2009) discussed the denial of a defendant's right to confront the key witness against him. "The Sixth Amendment to the United States Constitution and Const. art. 1, SS 22 grants criminal defendants the right to confront and cross-examine adverse witnesses, subject to the state's interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the fact-finding process. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

A "compelling state interest" test has been adopted if a ruling is challenged on the grounds it unduly restricted the defendant's right to confrontation. If the evidence is characterized as being of "high probative value," there can be no state interest compelling enough to preclude its introduction. Hudlow, 99 Wn. 2d at 16, citing, Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L. Ed. 2d 347 (1973)). Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed 2d 297 (1973)).

When a state's case rests solely on the testimony of one witness, that witness's credibility is especially relevant and "a criminal defendant is given extra latitude in cross examination to show motive or credibility." State v. York, 28 Wash. App. 33, 35-36, 621 P. 2d 784 (1980). Here, other than Jessica Cobb, whose credibility was questionable because she had taken a plea deal and agreed to testify against Hernandez, A.G. was the only one other person who could testify about the sexual encounter. Some of Hernandez's questions related to the credibility of A.G. and whether Hernandez had a reasonable belief that she was at least 16, and whether he had given her drugs with a sexual motivation. The jury's finding on that special verdict of giving a controlled substance with sexual motivation was the conviction which resulted in life imprisonment for Hernandez, because it counted as his third strike. Thus, his right to

conduct his defense, pro se, on these crucial issues was compromised by the court terminating his cross examination of the State's key witness.

Although the State relied on ER 611 to disguise the contempt sanction as a motion under ER 611, the defendant's constitutional right to confront his witnesses should supercede ER 611. ER 611 provides as follows:

> (a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b) **Scope of Cross Examination.** Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
>
> (c) **Leading Questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Nothing in this court rule suggests that it is intended to supersede the state and federal constitutions:

> [I]t is clear that any attempt to limit meaningful cross-examination, whether it be by legislative act, judicial pronouncement or court ruling

upon the admissibility of evidence, court rule, or the common law, must be justified by a compelling state interest. Where a statute or court ruling is challenged on grounds that it unduly restricts the Sixth Amendment right to confrontation, the state's interest in the rule must be balanced against the fundamental requirements of the constitution.

Hudlow, 99 Wn.2d at 15, citing Davis v. Alaska,; , People v. Kahn, 80 Mich.App. 605, 612; 264 N.W.2d 360 (1978).; People v. Redmond, 112 Mich.App. 246, 255, 315 N.W.2d 909 (1982).

Hernandez indicated that he wanted to ask A.G. the following questions:

1. Did I interact with your mother after my sexual encounter at my residence?
2. Why didn't you call the police after you first got home?
3. How long did you wait to have the police called after the incident?
4. Did I interact with you at Mando after the sexual counter in your presence?
5. Do you know if your mom was high between the 13th and the 17th?
6. Do you know how your mother got those drugs?

These questions touched on the relevant issues in the case concerning A.G.'s credibility in delaying reporting the incident, the issue of Amy Griffith's access to drugs because Hernandez's defense to the delivery of controlled substance with sexual motivation charge was that *Amy* gave Jessica Cobb the controlled substances, and Jessica Cobb gave

those substances to the alleged victim A.G , not Hernandez. So these issues directly related to the charge that carried the life sentence for Mr. Hernandez. Thus these issues directly related to Hernandez's charges and his defenses to those charges.

A constitutional error was harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same verdict without the error. State v. Guloy, 104 Wn. 2d 412, 425, 705 P. 2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L. Ed. 2d 321 (1986). If the error affecting the defendant's constitutional right to confrontation is not harmless beyond a reasonable doubt, the remedy is reversal and remand for a new trial. State v. Jasper et al, 174 Wn. 2d 96, 120, 271 Wn. 2d 876 (2012). The State has the burden to prove that an error is harmless. State v. Caldwell, 94 Wn. 2d 614, 618-19, 618 P.2d 508 (1980). A constitutional error is harmless beyond a reasonable doubt if any reasonable jury would have reached the same result in absence of the error. State v. Guloy, 104 Wn. 2d 412, 705 P. 2d 1182 (1985).

B. **The Trial Court Erred In Denying Hernandez's Motion To Dismiss, Where Grant County Failed To Provide Counsel At Public Expense At A Critical Stage Of The Proceeding.**

Under both the Washington State Constitution and the United States Constitution, a criminal defendant is entitled to assistance of counsel at critical stages in the litigation. U.S. Const. amend VI, Wash. Const. art. 1, SS 22, State v. Everybodytalksabout, 161 Wn.2d 702, 708, 166 P.2d 693 (2007); State v. Heddrick, 166 Wn. 2d 898, 910, 215 P. 2d at 201 (2009).

Critical stages are those "step[s] of a criminal proceeding such as arraignment, that held significant consequences for the accused." Bell v. Cone, 535, U.S. 685, 696 (2002); In re Det. of Kistenmacher, 163 Wn. 2d 166, 186 n.11 (2008). A critical stage is one "in which a defendant's rights maybe lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected. State v. Agtuca, 12 Wn App. 412, 404, 529 P.2d 1159 (1974).

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 and 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 had not waived his right to counsel after Crowley's withdrawal.

"Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is the selection of an attorney." United States v. Gonzalez-Lopez, 399 F. 3d 924, 928 (8th Cir. 2005) aff'd, 548 U.S. 140 (2006). *A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for an* ***automatic*** *reversal.* United States v. Cronic, 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. Chronic, 466 U.S. at 659. The failure of the Defendant to have appointed counsel 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.

In Geders v. United States, 425 U.S. 80, 96 S. Ct 1330, 47 L. Ed. 2d 592 (1976). the court granted a reversal of the conviction where the denial of counsel was less than 24 hours. In the 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 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 not ensuring 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. The case should be reversed and remanded for further

proceedings based on this error.

C. Hernandez Was Denied A Fair Trial Where He Was Not Provided Any Written Or Recorded Statements And The Substance Of Any Oral Statements Made By The Defendant, Or Made By The Codefendant If the Trial Is to be a Joint One pursuant to CrR 4.7(A)(1)(ii).

Defendant Hernandez made a motion to dismiss under CrR 8.3 and CrR 4.7(1) (ii) on the grounds that the State had not provided Jessica Cobb's written statements of Jessica Cobb's "free talk." RP 856 -858. The trial court denied the motion on the grounds that Hernandez had had an opportunity to interview the witness. RP 858.

Under CrR 4.7(a) (1)(ii), a defendant is entitled to a copy of "any written or recorded statements and the substance of any oral statements made by the defendant, or the codefendant if the trial is to be a joint one." The sanctions for not complying with the CrR 4.7 rules for discovery are set forth in CrR 4.7(h)(7) as follows:

> (7) Sanctions.
>
> (i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failedto comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to

> permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.
>
> (ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Here the court denied Hernandez's motion to dismiss, without requiring disclosure of the transcript, granting time for Mr. Hernandez to review the transcript, or providing any other remedy deemed just under the circumstances. Jessica Cobb was the codefendant to the sex crimes until she took a plea, and she was the only other person other than A.G. who was an actual witness to the incident, so her testimony, and Hernandez's cross examination was crucial to the truth finding process. Because he was not allowed copies of her prior statements, Hernandez's ability to prepare for cross examination was impaired. As a result, this is an additional reason to reverse his convictions and remand for a new trial.

D. <u>Hernandez Was Denied A Fair Trial Where He Was Not Provided Access to Resource Materials, such as the Kiosk, or Time to Prepare for Trial.</u>

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 said that he assaulted someone in jail and he had been put in isolation since. Carlos also complained that he didn't have a laptop or disk player. RP 823.

A pro se defendant must be afforded reasonable access to research materials. State v. Silva, 107 Wn. App. 605, 616, 27 P. 3d 663 (Div. 1 2001). In Silva, the court reviewed the factors set forth in State v. Gunwall, 106 Wn. 2d 54, 720 P. 2d 808 (1986) and determined that the Washington Constitution provides rights independent from the United States Constitution.

The court in Silva held that "[a]fter full consideration of the factors outlined above, we conclude that article I, section 22 affords a pretrial detainee who has exercised his constitutional right to represent himself, a right of reasonable access to state provided resources that will enable him to prepare a meaningful pro se defense. What measures are

necessary or appropriate to constitute reasonable access lies within the sound discretion of the trial court after consideration of all the circumstances, including, but not limited to, the nature of the charge, the complexity of the issues involved, the need for investigative services, the orderly administration of justice, the fair allocation of judicial resources (i.e., an accused is not entitled to greater resources than he would otherwise receive if he were represented by appointed counsel), legitimate safety and security concerns, and the conduct of the accused. "Silva, 107 Wn. App at 622-623.

In total, the court in Silva provided to Silva before the expiration of the speedy trial time, the following resources to prepare his defense:

1) Access to legal materials;

2) Pencil and paper;

3) Copying services;

4) Inmates' telephone;

5) Sheriff's office to serve subpoenas;

6) Coordination services through standby counsel (arranging interviews, confirming motions);

7) Blank subpoena forms from standby counsel;

8) Postage;

9) Access to a notary; and

10) Witness interviews.

Silva, 107 Wn.App. at 626. The court held that the trial court had satisfied the obligation of the court to allow Silva access to right of "reasonable access to state provided resources that will enable him to prepare a meaningful pro se defense."

The appellate court reviews a limitation on the scope of cross-examination before a manifest abuse of discretion. State v. Garcia, 179 Wn. 2d 828, 844, 318 P. 2d 266 (2014) A manifest abuse of discretion arises when the trial court's exercise of discretion is manifestly unreasonable based on untenable grounds or reasons. State v. Darden 145 Wn.2d 612, 619, 41 P. 2d 1189 (2002).

Here, Hernandez notified the court that he was only allowed one hour out each day to prepare his defense. And because he asked to represent himself on the first day of trial after the court had denied Ms. Anderson's request for a continuance if she was allowed to substitute in as his attorney, the court abused its discretion in not allowing Hernandez access to research facilities for his trial preparation. The stakes were high because one of the charges carried a life imprisonment sentence because it operated as a third strike. The court did not consider what security provisions would be necessary to grant Hernandez's request, so it the abuse of discretion was apparent because the court did not consider the

factors set forth in Silva in deciding this issue. The court abused its discretion by not looking at the factors set forth in Silva to properly analyze Hernandez's complaints that he was not allowed access to a phone, research materials such as the Kiosk, and the additional time necessary to properly prepare for a trial that potentially carried a life sentence for him if he was convicted of the distributing controlled substances to a minor for the purpose of sexual gratification charge.

E. Hernandez was Denied a Fair Trial, where Deputy Kissler Intimidated Witness Holland who was an Inmate Trustee by Stripping him of his Trustee status, Resulting in that Witness not Testifying because he took the 5th Amendment.

CrR 8.3(b) provides in pertinent part:

> (b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to *arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.* The court shall set forth its reasons in a written order.

As explained in the facts, Deputy Kissler intimidated one of Hernandez's witnesses who was a jail inmate trustee by stripping him of

his trustee status because the Deputy had heard that he was going to testify for Hernandez in the trial.

Here, Hernandez had also brought this issue to the attention of the trial court during the trial when Paul Holland refused to testify after he had been stripped of his inmate trustee status. Hernandez raised the issue after Holland refused to testify on the record after the incident occurred when Hernandez overheard the Deputy telling Holland that Hernandez was a "piece of shit," and after Hernandez observed that Holland had been stripped of his trustee status.

The court did not take any action on Hernandez's complaint about Deputy Kissler's misconduct. Deputy Kissler committed "governmental misconduct" by intimidating witness Holland from testifying for Hernandez. Part of Holland's testimony had to do with the issue concerning Hernandez's defense that he had a reasonable belief that A. G. was at least 16. The conviction on the statutory rape charge, in conjunction with the charge of distributing to a minor for the purpose of sexual gratification, were the convictions which resulted in Hernandez getting his third strike and life sentence. Hernandez notified the court that he believed Kissler had tried to influence Holland , and that Kissler had been talking to Holland about his testimony. RP 976. Another is also mentioned that Kissler was the same officer who had beat him up when he

was shackled. RP 977. Holland took the 5th outside the presence of the jury. RP 1072.

Deputy Kissler gave his side of the story beginning at RP 1215, over Hernandez's objections. Kissler stated that he had told Holland that if Hernandez didn't notify law enforcement. He is just as guilty as [A.G.'s] mom is. Kissler did not mention anything about stripping Holland of his trustee status. RP 1215. The court did not order any relief related to the allegation that Deputy Kissler intimidated Holland into taking the 5th Amendment.

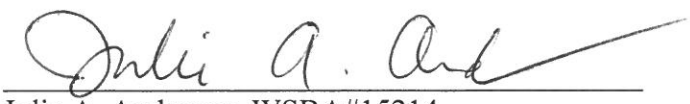
This misconduct by a governmental official denied Hernandez the right to a fair trial, pursuant to CrR 8.3(b) and Hernandez's convictions should be reversed and remanded for a new trial.

III. CONCLUSION

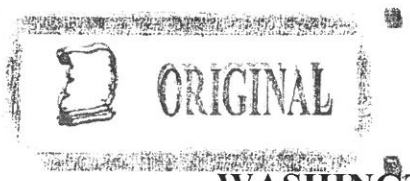
Based on the trial court errors above, Hernandez's convictions should be overturned and the case remanded to the trial court for a new trial.

Respectfully submitted this 3rd day of April, 2018

LAW OFFICES OF JULIE A. ANDERSON



Julie A. Anderson, WSBA#15214
Attorney for Carlos Hernandez II



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**

TO: THE CLERK OF THE ABOVE ENTITLED COURT
AND TO: GREGORY C. LINK., ATTORNEY FOR CARLOS HERNANDEZ II

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 3rd day of April, 2018, at 4 I sent to Kevin J. McCrae the following documents:

- Amended Appellant's Brief;

in the above-entitled action to the following:

Grant County Prosecutor's Office
Deputy Prosecuting Attorney
RE: Kevin J. McCrae
35 C Street NW
Ephrata, WA 98823

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

Date this 3rd day of April, 2018 in Wenatchee, Washington

Blanca Aramburo

Law Office Julie A. Anderson
409 N. Mission St.
Wenatchee, WA 98801
(509) 663-0635 (509) 662-9328 FAX

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**

TO: THE CLERK OF THE ABOVE ENTITLED COURT
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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 3rd day of April, 2018, I sent to Carlos Hernandez II the following documents:

- Amended Appellant's Brief

in the above-entitled action to the following:

Legal mail
Carlos Hernández II
Imite # 741820
Baker -__- 207
1313 N. 13th Ave.
Walla Walla WA 99362

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

Date this 3rd day of April, 2018 in Wenatchee, Washington

Blanca Aramburo

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