

62482-5

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FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

State of Washington)	
Plaintiff,)	No. <u>62482-5</u>
)	
v.)	Cause No. <u>04-1-13920-8 KNT</u>
)	PERSONAL RESTRAINT PETITION
)	
Reynaldo Delgado,)	
Defendant ,)	
)	
)	EVIDENTIARY HEARING REQUESTED

STATUS OF PETITIONER

I Reynaldo Delgado,petitioner,applies for relief from confinement.I am now in custody serving a sentence upon conviction of a crime.

1. The court in which I was sentence is the Superior Court Of King County.
2. I was convicted of the crimes of Rape of a Child in the First Degree(two counts) and Child Molestation in the First Degree.
3. I was sentence after trial on 17 Febuary,2006. The Judge who imposed sentence was Honorable Judge Paris K. Kallas.
4. My lawyer at trial court was Tony Savage, B.S., Lawyer WSBA2208, (206) 682-1882 FAX(206) 682-1885 615 Second Ave., Suite 340 Seattle, WA, 98104-2200
5. I did appeal from the decision of the trial court.I appealed to Court of Appeals Of The State Of Washington,Division One. My lawyer on appeal was the Washington Appellate Project.1405 Fourth Ave.Ste.802. Seattle,WA 98101. telephone (206) 587-2711.*My Lawyer was Nancy Collins*
I do not know if the decision of the appellate court was published.
6. Since my conviction I asked the State Supreme Court for some relief from my sentence.

Relief was denied on 30th day of April, 2008, Olympia, Washington.

7. Since the State Supreme Court denied me some relief I have filed a pro se,

7.8 MOTION to the Superior Court of King County and now this PRP follows.

SUMMARY OF FACTS

I, Reynaldo Delgado work in the State of Alaska. In the year of 2002 I lived in Sunnyside, Washington, Selah, and Yakima Washington. In 6 June, 2004 was the last time I have seen my own family. The Alleged dates of the crime in the State of Washington doesn't collaborate with the date of the jurisdiction of the State of Alaska.

Therefore, a jury cannot convict me on August 1, 2002 and August 31, 2004, when I was not in the jurisdiction of King County.

There is lack of physical proof of the crime. Not one witness can say for sure when it happen, which each element of such crime is to be proved by competent evidence - proof beyond a reasonable doubt. In this case there was no evidence that could support more than one criminal act on the information charge.

The admissibility and admission of out of court statements did implicate confrontation clause, whether evidence is conditionally relevant ER104 (b) preliminary questions; whether a witness has personal knowledge, ER 602 Lack of Personal Knowledge; Requirement of Authentication or Identification (b)(1) Testimony of witness with knowledge; and whether a purported original DVD recording or photograph is in fact that, ER1008.

I have a compulsory process for obtaining witnesses in my favor. The court erred by not letting my witness'es testify before the jury.

Admission of Child Hearsay Statement. There is evidence of prior interviews, prompting, or manipulation by adults. There were more than three child interviews at different times and certain questions planted sexual information in the child mind.

The child was incompetent to testify. The child testimony should be ruled as inadmissible due to lack of evidence and per the ruling that a statement made by a child when under the age of ten is not admissible by statute or court rule.

Jury Instruction fail to inform the jurors of all constitutional requirements of a conviction. I'm questioning the clarity and appropriateness of similar jury instruction that do not unambiguously explain the unanimity requirement for the jury when there are multiple counts of the same offense involving the same charging period.

For my lawyer ineffective assistance of counsel deprive me simply, by failing to render adequate legal assistance, failure to seek formal discovery, to investigate the crime, to interview witness and to develop a working relationship with me.

Translation from foreign language, effects. Spanish extrajudicial statement, admissibility of translated statements and out of court statements, the interpreter didn't competently interpret and thus, if the translator conveyed the translated statement to a third person, another level of hearsay is created, and the third person cannot normally recount the translated statement in court. A neutral interpreter should have been obtained.

I'm entitled to relief and dismissal of the charges. Because my constitutional rights to due process were violated and were clearly established before cause of action arose pursuant to **Schlup v. Delo** "Actual Innocence" which is also an exception to time-bar. But for constitutional violation more likely than not no reasonable juror would have convicted, for the following reasons that are independent errors in themselves requiring reversal of the conviction,

GROUND FOR RELIEF AND ARGUMENT

I'm claiming that there are Fourteen grounds for this court to grant me relief from the conviction and sentence described in **Status of Petitioner**.

FIRST GROUND

The proper Jurisdiction and Venue are in Yakima and Montana not in (King County) Washington State.

ARGUMENT

Superior Court erred in determining that King County was the proper venue for the crime of Child Rape. Does Evidence establish venue in Yakima county? State of Montana? or Mexico?

The Washington Constitution secures a criminal defendant's right to a trial by jury of the county or district in which the offense is alleged to have been committed.

SECOND GROUND

The lack of probable cause, as element of malicious abuse of process claim, must be manifest.

ARGUMENT

Lack of evidence of probable cause issued on 27 October, 2004, is not the only way to establish a misuse of process; that element can also be shown by delay or harassment. see exhibit A (2 Pages)

A crim of this nature has to be reported to authorities when it was initially notified to a Child Protective Service (CPS). CPS Naomi Aina which interview my child Zulay Delgado (herein as ZD) twice maybe more, who is a RES GESTAE WITNESS to my account of what happen to my child. CPS Naomi and the school officials who talk to ZD. on 1 and 2nd of June, 2004 reported no sexual assault. They even told my child to lift up her shirt to inspect her body and it was negative findings. (9RP at 31)* 32, 33, 34, 35, 36,

Z.D. statement to the CPS case worker and school officials, it should be found INDICIA OF RELIABILITY because (1) more than one person was present when the statement's were made; (2) the responses were not spontaneous; (3) Z.D. had no motive to lie and they had relationships of trust with adults.

Z.D. claims that I did not abuse her. (9RP at ^{28, 29,} 30, 31, 38, 50)*. 51, 52.

On 6 June, 2004 was the last time I had contact with my child.

Any evidence or hearsay are inadmissible and improper admission of evidence. Therefore the alleged times and the offenses did not occurred. (9RP at 37). 38, 39, 40.

THIRD GROUND

Errors in the admissibility and admission of out-of-court statements which violated the Confrontation Clause.

ARGUMENT

The court abuse its discretion by excluding Adrianna C. Deldado (herein as Adrianna) testimony and the written CPS case worker Naomi A. evaluation. (5RP at 3; 5RP at 6). State v. Griswold, 98 Wash. App 817, 991 P2d 657 (2000).

* There are 11 volumes of the Verbatim Report of Proceedings, as follows: 1RP-November 8, 2005; 2RP-November 9, 2005; 3RP-November 14, 2005; 4RP-November 15, 2005; 5RP-November 16, 2005; 6RP-November 17, 2005;

ER 602 lack of personal knowledge(2RP at 43;6 RP at 63; 9 RP at 18,29, 30;7RP at13,14,110-117;8 RP at 23;)

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.ER 603 Oath or Affirmation;ER 607 Who May Impeach- The credibility of a witness may be attacked;ER 609 Impeachment By Evidence of Conviction of Crime.

"Other Proceeding" requirements- as the ER rules the rule is designed to remove doubt about the circumstances under which the prior statement was made and provided minimal guarantees of truthfulness "in determining whether evidence should be admitted, reliability is the key." Smith,97 Wash.2d. 856,651 P2d 207.Id at 862,651 P.2d 207(quoting 4D. Louisell and C.Mueller,Federal Evidence § 419 at 169-71(1980).

The trial court erred by telling the jury and everyone else in that "the only evidence you are to consider consist of the testimony of witnesses." If that is the case at bar,then where are my witnesses?(6RP at 83 -"Defense has provided me with notice of about six witness." The court is saying is that testimonial evidence is going to convict me.

Then why? did the court say 6RP at 85 -"I'm not going to call them." That is very prejudicial to me.

The record in case at bar there are contradictions of testimony and false statements not admissible for evidence.The prior false statement was not only relevant to the witness's credibility but also germane to the issue of sexual abuse.It was germane because not all witnesses did not claim the same testimony and because it took too long of time to file an indictment,which gave time to conjure a sexual cause.Rule of Evidence ER 901(b)(1).

FOURTH GROUND

Sixth Amendment right to have compulsory process for obtaining witness in his favor and to have the assistance of counsel fo my defense.

ARGUMENT

7RP -November 21,2005;8RP - November 22,2005;9RP -November 28,2005; 10RP-January 6,2006;11RP-February 17,2006;

The Sixth Amendment ... -Faretta v. California, 422 U.S. 806, 819, 45 LED.2d 562, 95 S.Ct. 2525(1975)... grants to the accused personally the right to make his defense. It is the accused, not the counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' " Id. at 572.

The right to offer the testimony of witness, and to compel their attendance, if necessary, is the right to present a defense, i.e., the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. **U. S.C.A. Constitution Amendment 14.**

The Crawford Rule, that under the confrontation clause testimonial hearsay statements are inadmissible even if they fall within a hearsay exception or bear indicia of reliability, is inapplicable to non-hearsay statements - **U.S.C.A. Const. Amend. 6; ER 801(c).**

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct., 1354, 158 LED2d. 177(2004) the Court changed the admissibility analysis for certain types of hearsay that it ruled violates the confrontation clause of the Sixth Amendment.

Specifically, the Court held that where "testimonial" statements are at issue, the confrontation clause demands face-to-face confrontation of witnesses. I.E. Erica Albarado (herein as Erica) Z.D.'s step-mother (7RP at 93; 4RP at 18; 4 RP at 25;) who Z.D. and the prosecutor testified that Erica knows what has happened. This shows that what they said needed to be clarified and proved in court. This declarant failed to testify at trial violating the ruling in Crawford.

I needed my witnesses to affirmations made for the purpose of establishing or proving some fact. Sixth Amendment provides, in part that in all criminal prosecutions, the accused shall enjoy the right ... to compulsory process for obtaining witnesses in his favor. The right to present a defense. Ohio v. Roberts, 448 U.S. 56, 65 LED2d 597, 100 S.Ct. 2531(1980).

The right to cross-examination, protected by the confrontation clause of the Sixth Amendment to the United States Constitution, is

essentially a functional right designed to promote reliability in the truth-finding functions of a criminal trial. The court today defines petitioner's Sixth Amendment right to be confronted with the witnesses against him as guaranteeing nothing more than an opportunity to cross-examine these witnesses at some point during my trial.

In ER Rule 613(b) Extrinsic evidence of prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same, and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise required. I claim that none of the witnesses at trial said -I committed a crime on a set date. 2RP at 43 -"No adults were able to pin down a time - not even a close time."

FIFTH GROUND

Admissibility of evidence for purpose of impeachment of witnesses, as exception to Exclusionary Rule.

ARGUMENT

Amicus argues that "a criminal defendant cannot be convicted on the basis of hearsay alone." Even if hearsay can pass the admissibility threshold, says Professor Nesson, it is inherently deficient, without other corroborating evidence, for reaching a conclusion of guilt beyond a reasonable doubt. United States v. Sherboudy, 865 F.2d. 996 (9th Cir. 1988), an anomalous case.

When the admissibility of ER 404(b) evidence, "the trial court must identify on the record the purpose for which it is admitted." State v. Brown, 132 Wash.2d 529, 569, 940 P.2d. 546, 571-72 (1997) (citation omitted). According to the proffered cause and allegation, I was not even there on the alleged times. see exhibit(s) A (2 Pages) The evidence that claimed that misconduct did not occur even the victim and school officials and Z.D's step-mother said nothing happen as of 1 June, 2004. (9RP at 28, 29, 30, 31, 32, 33, 34, 35, 36).

The jury should be allowed to hear about each instance in which I behaved in a sexual way toward my daughter. Z.D's mother did not

testified nor did CPS Naomi, where they said the sexual acts were not committed. Since the jury did not hear their testimony my RES GESTAE evidence was prejudice. "under the res gestae exception, evidence of other bad acts is admissible to complete the story of the crime on trial by proving its immediate contexts of happening near in time and place." State v. Powell, 126 Wash.2d. 244,263,893 P.2d. 615,626(1995).

The appellate courts have allowed for the admission of res gestae prior bad acts evidence in order to provide the jury with a context for the crimes and to evaluate the credibility of the state's witnesses. Where is Maria? Traweck, 43 Wash.App. 99,105,715 P.2d. 1148, 1151(1986).

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. State v. Johnson, 90 Wn.App. 54,69,950 P.2d. 981(1998). Courts should zealously guard this right and allow a defendant great latitude to expose a witness's bias, prejudice, or interest. State v. Knapp, 14 Wn.App 101,107-08, 540 P.2d. 898, review denied, 86 Wn.2d. 1005(1975). (9RP at, 29-35.

I want to impeach some of the witnesses, because to call in question the veracity of a witness, by means of evidence adduced for such purpose, or the adducing of proof that a witness is unworthy of belief. See McWethy v. Lee, 1 ILL, App.3d. 80,272 N.E.2d. 663,666. (9RP at 37,38)

SIXTH GROUND

Trial court errs in admitting, pursuant to the child hearsay statute, RCW 9A.44 and admission of child hearsay statements.

ARGUMENT

I have objected to the admission and disclosure of evidence of my child's DVD interview conducted on 24 September, 2004. I have not seen or heard about this DVD interview that took place without my knowledge, until it was played in my trial court. So how can I refute or put on a defense of what it has been said? It is a manifest error affecting a constitutional right. No one interpreted what my daughter said in that DVD before it was played in court nor was I given a copy in Spanish of what was written therein!

I have also objected to everything she said. Z.D. is not competent to testify! If the declarant was not competent at the time of making the statement, the statement may not be introduced through hearsay repetition. See State v. Ryan, 103 Wash.2d. 165, 173, 691 P.2d. 197 (1984). The trial judge erred in his analysis of reliability under the Ryan factors. **RCW 9A.44.120(1)** clearly requires the trial court to review "the time, content, and circumstances of the statement [for] sufficient indicia of reliability".

The plain language of the statute indicates that the individual statements are the proper focus of the inquiry. The Ryan opinion itself stressed the need to evaluate the statement at the time it is made:

adequate indicia of reliability must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act. "The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight."

Therefore, Z.D. statement were based after the too many interview with CPS, step-mother, school officials and interpreters that existed at that time of 1 June, 2004.

In order for a child-victim's statement to be admissible under **RCW 9A.44.120** the court does not need to find that the child was competent at the time the statement was made. State v. C.J., 148 WN. 2d. 672, 63 P.3d. 765 (2003).

Since the court admitted the child-victim's statement as to the crime, why did the court not accept the child-victim's statement, when the victim (Z.D.) says that nothing happen before June 1, 2004? in front of school officials and adults and CPS Naomi?

According to **RCW 9A.44.120** it says that;

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

How can the court accept the child hearsay before June 1, 2004, when nothing happen! (9RP at 49, 50)
H5,

In addition, several of the Ryan factors themselves indicate that an important part of the inquiry is an analysis of the surrounding circumstances at the time the statement was made: how many people heard the statement, whether the statement was made spontaneously, the time of the declaration, the declarant's relationship to the recipient witness and the circumstances surrounding the statement. Thus, the trial court should have applied the Ryan factors to each statement offered for admission in order to properly test reliability.

A court must hold a separate hearing on the reliability of the child hearsay statement even if the child testifies. State v. Sammons, 47 Wn.App. 672, 737 P.2d. 684 (1987).

In State v. Ryan, 103 Wn.App. 165, 691 P.2d. 197 (1984) the court list nine factors a trial court must consider when determining whether the time, content and circumstances surrounding an out-of-court declaration provide sufficient indicia of reliability.

The court should of denied Z.D. testement because there are factors unsupported. The alleged times, I was not there! I was in the State of Alaska. See exhibit A (2 Pages). Z.D. could not give a specific time, more than one person heard different statements (9RP at 33; 4RP at 24, 25)

There were none statement that were made spontaneously. The timing of the declaration and the relationship between the declarant (Z.D.) and the witness was when no one knows when the crime happen (6RP at 57-6) Z.D. statement contains past express assertion of facts (6RP at 14.) out of the jurisdiction of Washington. Even on cross-examination showed the declarant's lack of knowledge.

Therefore, the Ryan factors are not substantially met, the court showed manifest abuse of discretion:

A. Z.D. had motive to lie about the abuse.

Z.D. had motive to lie about the defendant having abused her by her aunts. Her father left for long periods of time to work, he has not been part of her life and have not a good safe place to stay, while he was gone (9RP at 78, 110 and you one of aunt that have a family of ten and the other aunt with eight living with them). It is clear that the only reason Z.D. reported the abuse is because their Aunt

Maria and Aunt Ardrianna was not getting paid by the defendant. So they made Z.D. to say things not true i.e. red marks, get on top etc.etc. everything was fine until after 5 June, 2004 (9RP at 50).

B. Z.D. has character flaws.

I as her father I know when she is lying about things. The court and the prosecutor do not. She had made statements of what they told her to say.

C. Not many people have heard the statement made by Z.D.

The initial statement were insinuated by her aunts. If they were true why didn't the school officials, step-mother Erica and CPS reported the abuse. (9RP at 31)

Furthermore, Dr. O'Brien and Dr. Weister didn't verify by Z.D. parents about the abuse? Why wasn't it noted on the report? Is it because Z.D.'s aunts were there to shup Z.D.? Even the DVD recorded statements to Child Interview Specialist, Ashley Wilske were leading and suggestive.

D. Z.D.'s report of abuse were not timely.

Z.D. initial report were because her aunts initiated the abuse to hurt me and put me in jail, that is what they told me. If you will look at 9RP at 37-38 they were there on June 1, 2004 and nothing was said about the admissibility of said statement.

2. CORROBORATION

All those declaration were not true, the court will then need to conduct an analysis of evidence that corroborates the child's disclosure.

My corroboration requirement is satisfied by evidence of sufficient circumstances to support a logical and reasonable inference that the act of abuse described in the statement did not occur. The trial court must balance the statutory goal of making child hearsay more readily available as evidence against the likelihood that the use of hearsay could lead to an erroneous conviction.

(6RP at 76, 83) (2RP, at 43)

If should be given an evidentiary hearing because I can't afford a lawyer or an investigator. I have corroborative evidence to support a reasonable inference that the alleged acts did not occur.

In Z.D. interview with Dr. Weister and Ashley Wilske, Z.D. demonstrated a great deal of precocious sexual knowledge that is not normal for a child of her age. But the State fail to investigate her mother Erica, failed to investigate her aunt's, their living place and they do drugs and steal and alot more. Adrianna husband showers my daughter's many times, which I'm not happy with. During those times I think and its possible that Z.D. precure those precocious knowledge, also you don't know or disprove that Z.D. might of learned that in **television?**

The Court of Appeals, Division One, held that evidence of changes in personality exhibited by the victim met the test for corroborative evidence. So, after June 1, 2004 Maria and Ardianna could not put me in jail, so they started to put things in my daughter head about me! Telling my daughter precocious sexual knowledge and who knows what else!

Like I said I have not seen my daughters (besides trial) since June 5, 2004. You have CPS, School Officials, Erica, my brothers and I saying that nothing happen! Z.D. even says nothing happen! Why was it not brought up in trial court?

SEVENTH GROUND

State's failure to elect the act upon which it relied for each conviction deprived him of his right to a unanimous jury verdict and trial court's unanimity instruction failed to require jury to unanimously agree on act that was proved beyond a reasonable doubt to support conviction of child rape.

ARGUMENT

A jury must unanimously agree on the act that supports a conviction. State v. Petrich, 101 Wash.2d. 506, 569, 683 P.2d. 173 (1984).

When the State alleges multiple acts, any of which could independently prove a charged count, the State must either elect the act upon which it will rely for conviction or the court must instruct the jury that it must unanimously agree that one particular act was proved beyond a reasonable doubt. Id. at 572, 683 P.2d 173; State v. Kitchen, 110 Wash.2d. 403, 409, 756 P.2d. 105 (1988).

An instruction which incorrectly sets out the elements of the crime with which the defendant is charged was deficient performance where the failure to object permitted the defendant to be convicted of a crime he or she could not have committed under facts presented by the state. State v. Ernest, 94 Wash.2d. 839, 849-50, 621 P.2d. 121().

The jury instruction failed to explain the essential elements of the offenses charged, relieving the state of its burden of proof, depriving me of a fair trial by unanimous jury, and undermining my right to be free from double jeopardy.

The court's instruction must unambiguously set forth all essential elements of a charged crime - I did not understand it myself! The court's instructions also failed to accurately explain the requirement of unanimity and did violate my protection against double jeopardy.

The Washington Constitution requires all facts essential to a verdict be proven beyond a reasonable doubt to a unanimous jury. In the case at bar, the jury instruction failed to inform jurors their verdicts for the multiple offenses charged had to be based upon unanimous finding as to different acts. Since there were multiple incidents upon which jurors could have based their verdicts, but no clear evidence the jurors unanimously agreed as to which acts upon which they based the convictions, did the court's inadequate instructions deprive me of my right to unanimous jury verdict?

Jury instruction must inform the jurors of all constitutional requirements of a conviction. Here, the jury instructions for two charged offenses did not direct the jurors that the prosecution must prove separate acts underlying each conviction.

Recent cases such as State v. Watkins, 134 Wn.App. 240, 246-47, 148 P.3d 1112 (2006), questions the clarity and appropriateness of similar jury instruction that do not unambiguously explain the unanimity requirement for the jury when there are multiple counts of the same offense involving the same charging period. Does substantial public interest require review by this court?

A defendant is entitled to an instruction which precisely and specifically, rather than merely generally or abstractly, points to the theory of the defense. Otherwise, the primary purpose of jury

instructions would be defeated, that purpose "is to define with substantial particularity the factual issues, and clearly to instruct the jurors as to the principals of law which they are to apply in deciding the factual issues involved in the case before them."

State v. Wolfson, 573 F.2d 216, 221 (5th Cir. 1978) (conviction reversed). See also United States v. Ribaste, 905 F.2d 1140 (1990).

Failure to charge each element of the offense may be reversible error, even where the elements not charged have been wholly uncontested by the defendant. United States v. Natale, 526 F.2d 1160, 1167 (1975) cert. denied 425 U.S. 950, 96 S.Ct. 1724, 48 L.E.D.2d 193 (1976).

The jury could have disagreed upon which instances were proven beyond a reasonable doubt and based its verdict upon the same single act for each count. (not two counts or crime).

The jury instruction, when read as a whole, did not correctly instruct the jury about the unanimity requirement and Instruction 8 is not a correct statement of the law under the Petrich.

The court's WPIC instructions failed to explain to the jury the "NOTE ON USE" instruction, with appropriate "to convict" instruction. See court's Instruction Number 8; CP 42.

The "to convict" instruction exacerbated the problem because it failed to distinguish among the two or three alleged acts of rape, chronologically or other wise. The instruction did not clearly distinguish the multiple counts by type of penetration, it did not clarify the unanimity instruction. See court instruction numbers 13 and 14, they are the same as count 1 --- not count 2, or 4 ect..

Here, Instructions 7 and 8 told the jury that its "verdict on one count should not control your verdict on any other count", not as "[the]" verdict. see exhibit B, C. ^{R, D} ~~(pg. 7)~~ The instruction told the jury that one or more particular acts must be proven beyond a reasonable doubt.

The court could not properly instruct the jury to consider the criminal acts that intervening between Aug. 1, 2002 and Aug. 31, 2004 for for both rape counts, when I was not even there! See my time card! In Petrich, the court held that in cases in which the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct,

there is no criminal acts associated with the two counts. The trial court violated my right to a fair trial or to be free from double jeopardy. Id. citing State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911).

Jury instruction should be reviewed de novo and when taken as a whole, do not mislead the jury and properly inform it of the law to be applied. State v. Hunt, 128 WN. App. 535, 538, 116 P.2d. 450 (2005); Hue v. Farmboy Spray Co., 127 WN.2d. 67, 92, 896 P.2d. 682 (1995); Farm Crop Energy, inc. v. Old Nat'l Bank, 109 WN.2d. 923, 933, 750 P.2d. 231 (1988).

EIGHTH GROUND

Ineffective assistance of counsel due to my lawyer failure to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself and failure to seek formal discovery, to investigate the crime, to interview witness and to develop a working relationship with me.

ARGUMENT

Ineffective assistance of counsel based on, no objection to the following: upon questioning of the aunt Maria 8RP at 63(Q&A) she (Maria) denies seeing any marks upon Z.D's. neck, but the state disregarded this fact and told the court that "they were observed by her aunt" obviously untrue and contrary to Maria's.

Ineffective assistance of counsel based on, no objection to testimony of alleged facts out-of-state of Washington, which testimony of the declarant said i.e. Mexico and Montana! *OR YAKIMA WA*

My lawyer had waived valid grounds for objecting to evidence that was inadmissible, and that admission of the evidence violated my constitutional right of confrontation. Further, counsel had failed to object to the admission of testimony that was both irrelevant and very prejudicial.

In Washington Court Rules (2005) in Title/Client - Lawyer Relationship, my lawyer failed to communicate and advise his client. He did not keep me informed about the status of a matter 2RP at 31). (witnesses). He never talked to me about my witnesses. Nor did he promptly comply with reasonable request for information, 8RP at 81.)

He did not explain a matter to the extent reasonably necessary to permit me to make informed decisions. I could not understand my translator and I told him that! and he did not do anything about it.

Strictland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.D.2d 674 (1984) "Representation of a criminal defendants entails certain basic duties" Strictland, 466 U.S. at 688. Among those duties, defense counsel must employ "such skill and knowledge as will render the trial a reliable adversarial testing process." Id.

From a due process standpoint, the adversarial testing process requires the state to prove every element of the crime beyond a reasonable doubt. State v. Davis, 141 WN.2d. 798, 899, 10 P.3d 977. (2000). It follows that defense counsel has a basic duty to protect the defendant's due process interests by challenging the state's failure to prove an essential element of the charged crime. See generally Eure v. State, 764 So.2d 798, 801 (FLA. Dist. Ct. App. 2000) (concluding defense counsel's failure to object to improper remarks by prosecutor constituted deficient performance).

My defense lawyer failed to properly investigate and failed to adequately investigate and provide evidence relating to a substantial defense of misidentification.

My counsel ignored my request to call witnesses, I will also argue that there is no indication in the record that my attorney interview potential witnesses (ERICA) prior to the hearing, this failure to interview was prejudicial that my lawyer conduct prejudiced my defense. If he would of investigated like I told him the investigation would of produce evidence in my defense. SEE EXHIBIT D.

My defense counsel abandoned the require duty of loyalty to his client, he acted with reckless disregard for my best interest and apparently with the intention to weaken my case. I had given a tape recording (I want that tape recording back) to my last defense lawyer Mrs. Vict. Freed, my defense lawyer at trial Mr. A. Savage never notified me that he had recieved it from Mrs. V. Freed.

My defense lawyer failed to informed me of Rule 4.6 Depositions - Z.D's. DVD interview according to the rule no deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking

thereof. How can I object to this denial of right when it was first introduced to me in trial? It was never translated to me! before trial. NOT even the judge seen the DVD!

My defense counsel failure to file motion to suppress in a timely manner, was an abdication of counsel's duty to advocate my case. His failure to move the court for a continuance so that he could insure what the DVD contains or say because I never seen it or understand what it said and not only that, my daughter didn't understand the questions being asked. How can I object to it? when I didn't know anything about this evidence of my daughter being interviewed!

My defense lawyer failed to inform me of this DVD and failed to preserve error constituted ineffective assistance of counsel and requires a remand.

NINTH GROUND

The Admissibility, Extra Judicial and translated statements were not competently interpreted. **RCW 2.43.20, RCW 2.42.110, Rule 604.**

ARGUMENT

The question is whether any inadequacy in the interpretation made the trial fundamentally unfair.

I'm contenting that the interpreter who interpreted the interpreter for the state was not what the interpreter meant, so as to inhibit my comprehension of the communication with counsel, or so as to inhibit such witness comprehension of questions and the presentation of such testimony.

How can the state claim for sure of what the school interpreter interpretation was correctly interpreted?, or all of the interpreters? i.e. my wife (Erica), hospital staff at both hospitals, the hospital interpreters and the DVD interpreter. I don't know what they said.

Extra judicial statement. Admissibility of translated statements the circumstances in which a statement translated by an interpreter is admissible under WA., Law - " 'is based upon the translation alone rather than an understanding of the declarant's own words' " it "is admissible only if it is not offered for the truth of the matters asserted or the interpreter is an agent or authorized to speak

for the declarant."

The issue is whether, under the circumstances, the facts support a finding that the interpreter had a motive to lie (which can be proven) or to deliberately mistranslate. 4RP at 37 -hearsay of what is being interpreted; 2RP at 26. State v. Garcia-Trujillo, 948 P.2d 390, 89 Wn.App. 203 (1997) (out-of-court statement) If the translator conveyed the translated statement to a third person, another level of hearsay is created and the third person can not normally recount the translated statement in court. Commonwealth v. Carillo (1983).

I want and need an evidentiary hearing on the admissibility of translated statements.

TENTH GROUND

The manner in which I was sentence deprive me of due proces of law and on the basis of unproven allegations in violation of my (federal and state) constitutional right to due process of law.

ARGUMENT

I was denied my rights to due process of law and a unanimous jury virdict by failing to instruct the jury as to an essential element differentrating the two counts of child rape.

Sentencing on the basis of inaccurate information itself can violate due process. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.E.D.2d 393 (1977). The Fifth Amendment Due Process Clause requires me that I not be sentence on materially untrue statements or misinformation and I insist also that the state prove disputed con-uct upon which a sentence rest by a preponderance of the evidence.

Failure to charge each element of the offense may be reversible error, even where the elements not charged have been wholly uncontested by the defendant. United States v. Natale, 526 F.2d. 1160, 1167 (2nd Cir. 1975) Cert. denied 425 U.S. 950, 96 S.Ct. 1724, 48 L.E.D.2d. 193 (1976).

Generall, a defendant is entitle to an instruction concerning defendant's theory of the case if it is supported by law and has an evidentiary foundation. United States v. Barker, 930 F.2d. 1408, (9th Cir. 1991). A trial court's refusal to give a defendant's requested

instruction on the presumption of innocence violated the defendant's right to a fair trial under the due process. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.E.D.2d. 468(1978) and 60 L.E.D.2d. 640, Whorton.

Failure to instruct on the presumption of innocence despite the defendant's lack of request in that regard together with other error, required reversal in United States v. Fernandez, 496 F.2d. 1294 (5th Cir.1974).

Exclusion of declarants out-of-court statements exonerating defendant violated his due process rights, and allowing exclusion of statements was unreasonable application of Supreme Court precedent. **360 F.3d 997.**

Prosecutor, duty, under due process clause of federal constitution, to disclose evidence favorable to accused. United States v. Bagley, 473 U.S. 667, 87 L.E.D.2d. 481, 802, 105 S.Ct. 3375(1985).

The state trial court's refusal to allow a defense witness to testify deprived me of my right to a fair trial and my right to present witnesses in my own defense, that the witness list absence from a pretrial hearing violated due process.

Due Process - proof beyond reasonable doubt - Instructions. Victor v. Nebraska, 511 U.S. 1, 127 L.E.D.2d. 583, 114 S.Ct. 1239(1994). The due process clause of the federal constitutions Fourteenth Amendment requires prosecutors to prove beyond a reasonable doubt every element of a charged offense, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires, as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.

Under Cage v. Louisiana, 498 U.S. 39, 112 L.E.D.2d. 339, 111 S.Ct. 328(1990)(per curiam), a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt. (In Cage, this Court observed that a reasonable juror "could have" interpreted the instruction at issue to permit a finding of guilt without the requisite proof, 498 U.S., at 41, 112 L.E.D.2d. 339, 111 S.Ct. 328. The trial court didn't give the proper Petrich instruction. Due process right to a omnibus hearing. The court shall set a time

for an omnibus hearing when the defendant is pleading not guilty. My defense lawyer and judge failed me. I had matters that should be raised at an omnibus hearing. The record is void of evidence that the DVD of Z.D.'s interview was entered before all complete pretrial discovery from the state were received, to deny or explain, but which still provides ample time to schedule and hear evidentiary motions sometimes after the omnibus hearing but prior to trial.

I was denied due process to have my counsel present at my predisposition interview. I'm relying on the case of United States v. Herrera-Figueroa, 918 F.2d. 1430 (9th Cir. 1990), Appellant contends that "fairness" requires the presence of counsel at a presentencing interview if counsel is specifically requested. A panel of the Ninth Circuit in Herrera-Figueroa determined that if a defendant asked for the presence of counsel at a presentence interview, this request should be honored in the interest of justice. Herrera-Figueroa, 918 F.2d. at 1434. I was told by my lawyer not to talk to no one unless he is present and I never seen my presentence report.

ELEVENTH GROUND

Derivative Evidence - Allow the child to describe, in his or her, own words what has physically happened; keep the number of persons interviewing the child to a minimum - to protect the clarity of the details of the case, should it go to court. Therefore, evidence is only inadmissible as "FRUIT OF THE POISONOUS TREE" if it has been gathered by exploitation of original illegality.

ARGUMENT

Z.D. did not claim any sexual abuse in June 2, 2004. 9RP at, 29, 30, 31, 32, 33, 34.

Z.D. did not claim any sexual abuse in the State Of Washington in September 24, 2004, when the Child Interview Specialist, Ashley Wilske. When she asked this question to my daughter - If I [where he goes to the bathroom with in the part where you go to the bathroom with] did it when she [Z.D.] was living here? Z.D. said no. **

My daughter did not testify during court trial, at the witness stand to any penetration.

Under the "fruit of the poisonous tree doctrine" the exclusionary rule applies to evidence derived directly and indirectly from

hearsay and unwaived physicians-patient privilege.RCW 5.60.060, CrR3.5,CrR3.6.

There is evidence of prior interrogation, prompting, or manipulation by adults-Maria D. and Ardianna D..Spontaneity may be an inaccurate indicator of trustworthiness.

Credibility of the reporting witness Ardianna D. confrontation clause does not erect a per se rule barring admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial.

Defense objected to the State's request,for the court to determine the child's competency,with whats is on the DVD interview with the child specialist.

In case in bar,in order for the jury to understand the dynamic of my relationship with my daughter,they must be allowed to hear about unheard testimonies of my witnesses.Too require my daughter and the other witnesses to edit details of the abuse or leave out certain instances all together would be permitting my daughter to prevent the jury from learning about no abuse of her.8RP at 48;9RP at 31,32, 33;9RP at 50;DVD-Interview of Zuley at 18**

My daughter [Z.D.] behavior is inconsistent with abuse.State v. Young,817 P.2d. 412,62 WN. App. 895(1991).

To establish a violation of the right to compulsory process,a fair trial or due process,a defendant must show a denial of fundamental fairness:In order to declare a denial of [fundamental fairness] we must find that the absence of that fairness factually infected the trial!the acts complained of must be of such quality as necessarily prevents a fair trial.56 L.E.D. 66(1941).

Because the victim was abused by others,she could detail a sexual incident even though she had not had on with Mr."Jabina".Someone other than the accused was the cause of the victim's hymental damage.[Z.D. said "Jabina" at 11 **.

In 7RP at 65-66;8RP at 110-111;7RP at 66 it shows that Mrs. Wilske had information about Z.D. interviews.Ashley Wilske,a Child Interview Specialist with the King County Prosecutor's Office,interview Z.D on 24th of September,2004.A Spanish Interpreter was present her name is Jeanine Horton who also interview Z.D.

The whole DVD, Interview of Zuley is leading and suggestive. Mrs. Ashely Wilske used Improper Interviewing Techniqes and two people are doing the interviewing. I know that you are going to tell me that I'm not either. But if you look at these certian discrepencies or irregularities you will have a general idea what I'm talking about this case at bar. Here is one example to think about:

Q. Doesn't the guide that you use to determine whether the child is telling the truth say that you ask the child what is this?

A. I could do it that way.

Q. Well, don't you feel that when you say "this is a pig", that's somewhat leading and suggestive?

A. I suppose it could be.

My lawyer asked those questions to Mrs. Wilske at 7 RP at 5, 13, 12.)

I have a problem with the Child Interview Specialist, Ashley Wilske and the Interpreter, Jeanine Horton, because both were asking questions and there is a third level of hearsay between all three of them. First, I want to talk about the child interview specialist. In DVD Interview of Suley - State's Exh. 6 all were leading and suggestive and certian questions planted sexual information in the child mind! See Exhibit Z of this motion at 12 and 13.

This is showing my daughter is not competent: (Exhibit Z at 2)

Ashley Wilske: Yeah. They do. Not the blue one, but the other ones do.

This is another where she's leading and suggestive when she say's "So here's a pig"... (Exhibit Z at 11)

I want the Court to look at this!!! This is where it all started, one of a "fruit of the poisonous tree". See Exhibit Z at 13 (it is highlighted).

A. Zuley: ... "when he goes to the bathroom"...

Then Ashley Wilske prompt, suggested, lead this lie - "WHERE he goes to the bathroom". This is not what my daughter said!! My daughter said at the begining "WHEN he goes to the bathroom"!! Ashley Wilske, kept repeating and repeating this to Zuley throught the interview to say that and this stuck to Zuley in her mind. See Exhibit Z of this motion at 13 and 15.

Leading or suggesting and prompting of Mrs Ashley Wilske:

Ashley Wilske: Why don't you give her a mark?;

Zuley: Uh,I did it wrong (Wilsk doesn't answer yes or no,just "you did a good job on that one-Exh.Z at 14);

Wilske said "and will you mark the place on the body where your part is where you go to the bathroom?Zuley:"Uh,at the front too." Wilske suggested: "at the front too."(Exh.Z at 15);

Wilske:Uh,okay a bath.She'd put you in a bathtub,a tub? (Exh. Z at 9);

Wilske: "Cause this is the talking room okay?(Exh.Z at 10);

Wilske: okay and you mark this one 'cause he's telling the truth?'(Exh.Z at 12);

Wilske: agian this girl tells a lie.that girl tells the truth.who's going to get in trouble?(Exh.Z at 12);

You can find some more leading,suggesting and prompting in Exh. Z in this motion.

My last serious question about this interview by Ashley Wilske is this,why did Mrs. Wilske showed my daughter a picture of Mrs. Wilske body?(Exh.Z at 12)This frighten my daughter and put her in a spin in her mind,because she responded by saying "OH!".

THIS IS WHERE MRS.ASHLEY WILSKE STARTED TO QUESTION MY DAUGHTER TO PROMPT HER TO TALK ABOUT A SEXUAL ABUSE BY ME!!! OR HER!!!

INTERPRETER - JEANINE HORTON

I have a problem with Jeanine Horton,the Interpreter for the child specialist interviewer Ashley Wilske.I need a Evidentiary Hearing on this third level of hearsay and need to interpret what the interpreter actual interpretation from the actual victim realy said.

Some discrepancies and irregularities in this interview was when, I could not tell who was doing the interviewing or interview.Sometimes the interpreter jumps in without permission,sometimes she say things in English or Spanish to my daughter without permission of Mrs.Wilske.

The interpreter interupts or leads the interview.From page 22 and on,she is either leading or suggesting in the interview of Zuley.See Exh.Z of this motion .

Leading or suggesting and prompting and misinterpreting or misinterpretation of Jeanine Horton:(the page(s) are in Exh.Z.Id.)

Jeanine: "they smell too".(pg.2);

Jeanine: (interupts the interview,two people talking and interviewing) 'Tia's are aunt's'(pg.7);

Jeanine; "excuse me" (interupts,two people interviewing) (pg.8);

Jeanine: "you can say it in Spanish too.(who is interviewing)(pg.13);

Jeanine: Zuley:(speaks in Spanish) then interpreter translate it to Spanish -WHAT WAS SAID OR translated??? HEARSAY???(pg.13);

Jeanine: (speaks in Spanish),Suley:(response in Spanish) What was translated?What was said?;Zuley: my mom,(speaks in Spanish)Jeanine: "I had another mom,her name was Erica." (pg.16);

Jeanine: (speaks in Spanish) Who is interviewing?(pg.18);

Jeanine: (speaks in Spanish)What was said?Who asked her? Who is interviewing? (pg.19).

You can find some more third level of hearsay,misinterpretation, misinterprete and interruption through-out this Exh.Z of this motion.

ZULEY - COMPETENCY ISSUES

Zuley's testimony should be ruled as inadmissible due to lack of evidence and per the ruling "that persons are incompetent". The testimony is unreliable...therefore it is inadmissible,very speculative it is not to the truth of the matter(according to me) as important as the statement of my daughter?Who is the child? Who is the adult,

The Court of the State of Washington cannot claim offenses that occurred outside of the State of Washington(it's inadmissible and prejudicial.

Alleged child sexual abuse victim was incapable of distinguishing truth from fantasy make up any stories but moments later she described in vivid detail how her sister called the police in "Montana" then "Norma called the police" and they talked to the

police,(Exh.Z at 24 and 25)which was impossible because it did not happen and there is no record of this and she believed what she was saying. (3 RP, at,24,25.) and,(4 RP,at,24,25.)

Here are some competency issues worth looking at of Zuley:

Zuley could not hold an intelligent conversation.(Exh.Z at Pg.4), not competent.

Zuley: (unintelligible)hate it.It's,it's weird.; Zuley: and there's a fan that you turn off the light and then its lights,there's circle and then there's lights and then there's lights and then you feel the air and then the lights keep on moving.(pg.4);

Zuley: Moving and it could shows it on the wall everywhere. (whats is she talking about?)(pg.5);

Zuley: I was living with my Tia and my Tia's name is Adrienne.(thats a lie because she lives by water-waves with Eric)(pg.6);

Zuley: page 6 she don't know her other aunt name(Maria). During her interview she could not remember.;

Zuley: Patricia and her husband lived with Erica,she should of known them or at least mention them. (pg.8);

Zuley: She was asked how long she lived with her real mommy,she responded with when she was one year old and that her mom "she was,she left,she was all the time at the morning left and left she was with other boyfriends."(not competent)(pg.9);

Zuley: yeah she put me up,she put us up to water and then when I was two years old.(not competent) (pg.10);

Zuley: She said "because last night I was with him" (I was not there,she's with foster parents. So,that is a lie!)(pg.13);

Zuley: She said she was "sleeping with Adrianna". (not true)(pg.13);

Zuley: She don't ansvere the Question.(not competent) (pg.16);

Zuley: She said "mom was when the door was a little bit open,my mom was seeing alittle bit like this." (not competent)(pg.24)/

Zuley: She said , "She was right there." (not competent)
(pg.25):

Zuley: All of page 27 she does not understand what is
going on.

The spontaneity of the statements is questionable they occurred
some two months after Z.D. initial disclosure and after many inter-
views. My critical factor is the consistency of the statement with
Z.D. earlier allegations.

TWELTH GROUND

SUFFICIENCY OF THE EVIDENCE to support a criminal conviction must
be not simply to determine whether the jury was properly instruct-
ed, but to determine whether the record evidence could reasonably
support a finding of guilt under a standard of proof beyond a rea-
sonable doubt.

ARGUMENT

A.) There is no evidence that I had sexually abuse my young dau-
ghter, Z.D. from August, 2002 thru August, 2004. The court does not
the on or about date! Just because she say so doesn't proof anyth-
ing, they were conclusory allegations because Z.D. allegations lack-
ed supporting evidence, there were merely conclusory, expressing a
factual inference without stating the underlying facts on which the
inference is based.

B.) Z.D. testified that no several incidents of sexual abuse by
me on June 24, 2004. 9RP at 49 and 50. Mrs. Adrianna D. and Maria D.
my nieces, could not give the exact dates nor proof that looks like
red marks on Z.D. body nor anyone else. See 9RP at 31 when the CPS
Said — "if there had been any red marks on her breast, chest area
before, she says she had some little red marks on her chest area,
social worker asked her where did they come from? She said her dad
would hit her yesterday, she says her aunt would hit her also." Now
where are the proof?

C.) When I was in Alaska, Adrianna D. nor Maria D. could not give
a general date or month of my crime! Adrianna was suppose to testify
to the jury, the judge did not allowed her, then why is the Superior

Court, Court of Appeals and State Supreme Court using evidence to convict me, when there is no burden of proof for the jury to hear her or ERica?

D.) Adrianna D. and Maria D. had authority to take Z.D. to the doctor or hospital when ever she was ill. They not needed to asked permission to take her to the hospital. According to Dr. Susan O'Brien the chief complain was adominal pain! 7RP at 14.70)

E.) There are school authorities who were not called to testify or called to court to refute the allegations of contacting Adrianna about Z.D'S unusual behavior and hickeys that they notice on Z.D's body, even CPS Naomi went to school to interview Z.D.. No adult could tell CPS Naomi of what they saw on her.

F.) How can Court of Appeals and State Supreme Court say that Z.D. disclosed the sexual abuse to Maria and Ardianna, and they took her to Highline Hospital? When Erica was the person who took her there. So, who were the people who took Z.D. to Highline Hospital? There are conflicting testimonies and facts. 7RP at 13, 14, 15.

G.) Dr. Susan O'Brien examined Z.D. at Highland Hospital on August 28, 2004. This is Z.D. 4th interview by authorities not to mention other relatives and witnesses who were not called to attest to these allegations or facts of abuse. These are TAINTED EVIDENCE, Z.D. was coached to say things ~~that~~ are not true. See 7RP at 39 to 102 "They will potentially adopt what they think you want to hear."

H.) Dr. O'Brien testified that Z.D. told her that I took off her clothes and climbed on top of her. Who else was there to hear what Dr. O'Brien heard? What the child said what she said? Where are the witnesses or parents? No one can prove that or what was true at that time of the statement! Dr. O'Brien said that "Z.D. said 'I have a hole down there' which her father made and pointed to her private area." Again, who was there to verify what Z.D. said? Is it possible that her father told her not to long ago about her sexuality parts? Everything that happen in that room no one can verify what was really have been said or interpreted in Spanish!?

During Z.D's examination Dr. O'Brien noted scarring consistent with penetrating trauma and sexual intercourse --She is not an expert on

sexual assault.8RP at 23.Then Dr.O'Brien reported her findings to the sexual assault clinic at Harborview Hospital.Whose Authority?
RCW 70.02.50.

I.) On August 30,2004,Dr. Rebecca Wiester,examined Z.D. at Harborview Hospital.She said that Z.D. said "that her father gave her red marks on her neck and described having sexual intercourse with him." Why was this statement not said with Dr.O'Brien?Examination back in August 28,2004?Why did Dr.O'Brien send the reported findings to Dr.Wiester when Dr.Wiester did not read that statement,7RP at 100 and 101? Bare in mind this is Z.D's Fifth interview.Who was with Z. D's interview?What was said and interpreted in Spanish?

Now, according to the jury trial and with Dr.Wiester,Z.D. says "put his thing that he used to go to the bathroom with inside her part that she would use to go to the bathroom." Now this is a different saying/statement from Z.D.,when she told Dr.Wiester that I would "touch her where she 'went pee'". If she can say "went pee" why did she say "inside her part that she would use to go to the bathroom."? Leading and Suggesting from too many interview and coaching from Maria D. and Adrianna D.!!

Then Dr.Weister's examined Z.D. and testifies that the "abnormal hymen that was consistent with healed vaginal penetrating trauma which could have come from a penis". She does not know for a fact what that came from.scientific community ?Speculation? It was not proven in court -7RP at 117 - could have been two tears,it could have been no tears? Dr. Wilske: Answeres "Yes,I don't know what it was...when I see it thats its abnormal." So,can anyone explain to me what "I don't know what it was..." suppose to mean?

J.) The discussions between counsels about the jury instruction was not discussed with me.

K.) That neither party believed knowledge needed to be defined for the jury.Are we sure? Who taught her?

L.) The only exception to the instructions was a different reasonable doubt instruction.Why? Counsel's failure to object to the court about exceptions to the instruction was prejudicial.My counsel should of said yes,look at all the grounds.

THIRTEENTH GROUND

My Miranda Rights were violated. An objective test is used to determine whether a person is in a custodial arrest. State v. Lorenze, 152 WN.2d. 22, 36-37, 93 P.3d. 133(2004).

ARGUMENT

It is undisputed that I was not informed of my miranda rights at any time before or during the police car ride to Seattle Police Department. It is a fact that I after my arrest from my home, I was handcuffed and arrested and placed in the police car and driven to a location near a State Highway for TWO HOURS while the officer was doing illegal procedures. This is also a violation of my CrR 3.1 (c) (1). Right to and assignment of lawyer. State v. Reichenbach, (2004) 153 Wn.2d. 126, 101 P.3d. 80; State v. Mendez, 137 WN.2d. 208, 222, 970 P.2d. 722(1999); State v. Nettles, 70 Wn.App. 706, 709, 855 P.2d. 699(1993); State v. Whitaker, 58 Wn.App. 851, 853, 795 P.2d. 182(1990).

FOURTEENTH GROUND

Violation of RCW 9.94A.100; Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The court shall consider the presentence reports, if any, including... allow arguments from... the offender... as to the sentence to be imposed.

I never seen one, no one ever explain it to me or interpreted in Spanish! or wrote it in Spanish!

ARGUMENT

While a sentence within the standard range generally is not appealable, a defendant may challenge the procedure used by the court to impose a standard range sentence. RCW 9.94A.585.

the presentence investigation report showed two interpretations of the facts.

I could not object to any of the information contained in the presentence report because it was never read or interpreted to me 32(e)(2) nor the sentencing court did not verify that I and my attorney have read and discussed the presentence report. This is a

violation of CrR Rule 32 POST - CONVICTIONS PROCEDURES. **CrR. (e)**
(1).

Now my question is whether as a matter of policy that I should be accorded some opportunity to see and refute allegations made in such reports?

CrR 7.2(c)(1). A hearing was held at which the defendant was given an opportunity to challenge the content of the **PSR**.

CrR 7.2(c)(1). Court shall permit the defendant to read the report of the **PSI**.

I could not dispute material facts when I never seen or heard my **PSR**. I was deprived of my rights in connection therewith. If I challenged the fact I would have been entitled to an evidentiary hearing thereon. Ammons at 185,713 P.2d. 719; McAlpin, 740 P.2d. 824. I have the right to know of and object to adverse facts in the pre-sentence report.

STATEMENT OF FINANCES:

1. I do ask the court to file this without making me pay the \$250 filing fee because I am so poor and cannot pay the fee.
2. I have \$40 in my prison or institution account.
3. I do ask the court to appoint a lawyer for me because I am so poor and cannot afford to pay a lawyer.
4. I am employed. My salary or wages amount to \$39.40 a month. My employer is CCA/Prairie Correctional Facility, P.O. Box 500 EB 112, Appleton, MN 56208.
5. During the past 12 months I did not get any money from a business, profession or other form of self-employment.
6. During the past 12 months I:
 - Did not receive any rent payments.
 - Did not receive any interest.
 - Did not receive any dividends.
 - Did receive any other money. I recieved \$30.
 - Do not have any cash except as said in question 2 of Statement of Finances.
 - Do not own stocks, bonds or notes.
7. I have no real estate and no other property or things of value

which belong to me or in which I have an interest.

- 8. I am married. My wife name is Erica Delgado Alvarado, Address unknown at this time.
- 9. All of the persons who need me to support them is Martin Delgado, 16612 First St. Burien, WA 98148.He is my bother and his age is 47.
- 10. I do not know all of the bills I owe nor do I know the address or the name of the creditor,nor the amount.

REQUEST FOR RELIEF

Therefore, Petitioner prays that this court grant petitioner's relief to vacate my judgment and sentence and reverse and remand or any other relief to which petitioner my be entitled.

I DECLARE, UNDER PENALTY OF PERJURY BY THE LAWS OF THE STATE OF WASHINGTON, THAT THE FOREGOING STATEMENT ARE MADE BY ME, BE TRUE, CORRECT, AND CERTAIN IN PURSUIT OF JUSTICE. GR13; U.S.C. § 1746: Rule 11.

Dated at Appleton, Minnesota on 4 day of February, in the year of 2008.

Reynaldo Delgado

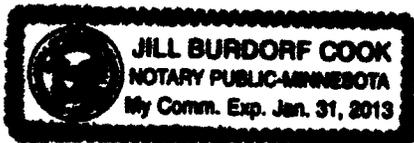
Reynaldo Delgado
DOC# 889357
CCA/PCF
P.O.Box. 500-EB112
Appleton, MN 56208.

SUBSCRIBED AND SWORN TO BEFORE ME

THIS 12th DAY OF November, 2008.

BY _____

Jill Burdorf Cook
NOTARY PUBLIC



04-1-13920-8KNT

ORIGINAL

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE:

That Michael W. Bertucci is a Detective with the Federal Way Police Department and has reviewed the investigation conducted in Federal Way Police Department Case Number 04-8054; and that there is probable cause to believe that Reynaldo Delgado, committed the crime of **Rape of a Child 1st Degree 9A.44.073**. This belief is predicated on the following facts and circumstances:

On 06/01/04 the victim's adult cousins, Adriana Coronilla-Delgado and Maria Coronilla, contacted CPS and filed a report. They stated that their younger cousin, Z.D. (d.o.b. 8/1/92), was possibly being sexually assaulted by her father Reynaldo Delgado. They had noticed red marks around Z.D.'s nipples. They also reported that Z.D. had recently had some type of vaginal irritation and her father refused to take her to the doctor. CPS caseworker Naomi Aina was assigned the case and went to the child's school to interview the child. Aina interviewed the child and stated in her initial report that the child made no disclosures of sexual abuse and the case was closed.

On 08/28/04 the adult cousin (Maria Coronilla) and the victims new stepmother Erica Albarado brought the children into Highline Hospital to have the children examined. While at that Hospital Z.D. made several disclosures about sexual abuse by the father to the hospital staff. The children were referred to Harborview Medical Center for a physical examination. There was also some concern by the cousin and stepmother that the younger child (G.D. (1/5/99)) may also have been sexually assaulted. Both children were examined by Dr. Wiester with the Harborview Sexual Assault Center. After conducting the exams of both girls Dr. Wiester concluded, "Based on the information available to this examiner at this time, this child gives a history consistent with child sexual abuse and physical abuse, and has a genital examination which is concerning for possibly healed vaginal penetrating trauma".

On 09/24/04 both girls were taken to the Regional Justice Center in Kent to meet with Ashley Wilske (child interview specialist). Z.D. was the first child to be interviewed by Wilske. She made several disclosures to include saying that her father wanted to have a baby with her and that he sucks on her neck and leaves marks. She said that she had asked her father about the marks and he told her that her sister put the marks on her neck. The child when talking would refer to her father's penis as, "the thing that he goes to the bathroom with". Wilske asked her what he did with the thing that he goes to the bathroom with. Z.D. replied that he puts it where she went to the bathroom and stated that he has done it more than once. She also stated that he had done that to her when she was six years old and made her bleed. Z.D. said that her mother (Erica) would ask her father why he would do that to her and he would hit her all the time (Erica). She also stated that she saw her father do the same thing to her sister (put it in her pee place). When asked where, as in location that her father would do this to her she said that he would do it to her in their apartment in Federal Way. The child also said that her father would also make her lick the part that he goes pee with. When asked how many times she just replied "many". During the interview she also disclosed that her father makes her get on her sister and he would take both of their pants off. Wilske then began to ask Z.D. about when her father makes her and her sister get on top of each other and started drawing stick figures. She was asking her where each person was laying and she would draw and show the diagram to Z.D. It should be noted that the letters

EXHIBIT A

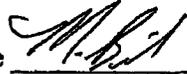
ORIGINAL

on the diagram are as follows Z=~~Z~~.D , G=~~G~~.D , R=Reynaldo, E=Erica. indicated the she and her sister would lay on top of each other and her father would lay behind her and would "lick me where I go poop". He would also tell her to lick her sister where she went to the bathroom.

Wilske attempted to conduct an inter view with G.D. but the child was too young and was not very articulate.

Both interviews were recorded on DVD. The originals were kept by Wilske and I took copies of each interview and booked them into evidence.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 27th day of October 2004, at Federal Way, Washington.

Signature of Assigned Detective 
Michael W. Bertucci

No. 7

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

EXHIBIT B

No. 8

There are allegations that the defendant committed acts of sexual abuse of a child on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

EXHIBIT C

Witnesses For Defendant Reynoldo Delgado

1. Maria Gomez: Babysitter from June 2001 - September 2002, who has information beneficial to my case. (509) 839-6268, Sunnyside, WA.

2. James & Gena Millirion: Babysitters for my 2 daughters from December 2002 - April 2003, are currently caring for my 2' daughters in Selah, WA, as of 4/24/08...

3. Norma Gene Sitton & her mother, Donna Sitton: Character witnesses on my behalf. (206) 727-7265 (Work), or, (206) 901-1593 (Home). Burien, WA.

4. Zoila Mejia: Babysitter for my 2 daughters for a few months in 2003. (206) 243-7868. Seattle, WA.

5. Rogelio Delgado: My younger brother willing to testify on my behalf.

6. Martin Delgado: Twin brother willing to testify on my behalf. (206) 499-1128. Burien, WA.

7. Jose Cervantes: Character witness on my behalf. (509) 469-2868. Yakima, WA. *09-20-2002
September*

In further support of my defense, I have all of my company records from my employment with Peter Seafoods, Inc. Main Office:

Peter Pan Seafoods, Inc.
The Tenth Floor
2200 South Avenue
Seattle, WA 98121-1820.

All of the listed witnesses herein are willing to testify on my behalf as to my innocence to the charges leveled against me in this case.

I can personally testify that I was working for the Peter Pan Seafoods in the State of Alaska at the time of the alleged criminal activity to which I am falsely accused of committing, and the work records prove the fact that I could not be in two places at the same time.

Reynoldo Delgado

Reynoldo Delgado
#889357-WA PFCF,
Box 500, EB-204-L
Appleton, Minnesota
56208-0500

NOTARIZED by, *Jennifer Weckwerth*
on, *April 24*, 2008.

