

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

V.

LAVELLE XAVIER MITCHELL,

Appellant.

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STATE OF WASHINGTON
DIVISION I
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Reply Brief of Appellant

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A. ISSUES

1. Whether court owes a duty to the laws of both the United States of America and the State of Washington and is bound by jurisdictional laws and rules of procedure and not free to invent rules that serve to defeat the very purposes of the laws regarding jurisdiction.
2. Whether court properly ruled on defendant's 60(b) motion without hearing or oral arguments and summarily ruled based on the precepts espoused with regard to lack of power to hold judges accountable, to the extent that if their rulings, actions and judgments are not in compliance with the law, constitution or natural rights of citizens and person subject to the constitution, and thereby violate the duty imposed by the 14th amendment, section 3, and thereby lost jurisdiction.
3. Whether court abused its discretion when it failed to set the pro se motion to withdraw a plea of guilty aside and made no findings of facts and conclusions of law which supported its ruling denying the defendant's 60(b) motion as is required whenever a hearing is conducted without oral arguments or was it not, in fact, a violation of appellant's fundamental right to access the courts.
4. Whether trial court erred in denying appellant's 60(b) motion and ineffective assistance claims without a hearing is fair to such a defendant so charged and challenging the very nature of the assistance of counsel through Mitch Harrison, who failed to note that his client had a motion before the court.
5. Whether the statutory requirements of counsel was violated and thereby prejudiced appellant when he was counsel failed to advice that since the state is now withdrawing the original charges because they have no witnesses, it is going to amend the charges to VUCSA and I recommend that you plea guilty to it along with your brother, that he need not do anything to assist the state because their case in chief fail apart, as alleged in the appellant's 60(b) motion when counsel for defendant failed to make challenge when state amended charges to one under Chapter 69.50 of the Revised Codes of Washington, as a most serious violation of the appellant's 6th amendment right to assistance of counsel

to defend against, and not promote that one who claims innocence, in counsel's opinion, is better off pleading guilty without ever offering the statutory challenges and thereby received the kind of counsel that the average attorney would want for themselves.

6. Whether an innocent person should be bound by the opinions and system where the process is kept from them and they have no genuine idea when they are making a “good”, “knowing”, “intelligent” decision from the point of view of citizens and not the judicial branch of government, which is never impacted by the acts of attorneys in the course of their living and in general, when they rule without authority suffer no consequence and such behavior is acceptable throughout and does not allow for a defendant to make an effective claim of ineffective assistance of counsel and thus is too high a bar to represent fairness to all parties, especially since no attorney is a party per se, they merely represent the party.

6. Whether any judge would have let the outcome of this case stand if they were the defendant in this matter because they believe that after a complete review of the record the law and fairness was strictly applied on their behalves? Such that the precept of the judge is that “all accused are innocent until proven guilty” over one's attorney saying, as his considered legal advice (even the judge tells the defendant to listen to their counsel, especially when they disagree), “hey, I am the attorney, and I am telling you that you “should” take this deal the state is offering even though they have no evidence, no witnesses, and can't meet the prima facie case for the charges, you are Black and the jury is going to be all white and they are not going to go against the state!!! But, it is up to you.” as the meaning and definition of effective assistance of counsel.

7. Whether there is any checks and balances that assures that government does not overstep the bounds of the restrictions and prohibitions of the Constitution for the United States of America at all the clauses, phrases, sections and amendments that provide certain guarantees that government will never have authority over citizens' rights, including due process of law, (as opposed to due process of

rules that are wholly made and kept secret from the general public, as there is no announcement, commercials, public service announcement when the judicial branch of government changes the rules under which we must all proceed in a materially contrary way to the protections afforded under the constitution, ie.; the Constitution provides, 4th, 5th, 6th and 14th amendments, which states, in pertinent part, that “*No person shall be deprived of life, liberty or property without due process of law*”, and directs that to government, all three branches, and is proscribed that “no laws shall be made or enforced which shall deprive any person of the protections of the laws of the united states, which meant until a jury, non-governmental body, found a person guilty of an offense, the government could not exercise its seizure power, arrest power, saving judicial powers, and that because they had no powers as individuals, their powers stemmed from either enforcement of the law or showing where enforcement of the law would infringe upon the rights of citizens and persons who are subject to the Constitution for the United States of America etc. However, the court makes a rule that states, essentially, if a police officer arrest without a warrant it is still lawful and cannot be challenged on the concept and principle that the law requires that such officer has a warrant in hand or in the case of the stopping of the disturbance of the peace or actually catch someone in the commission of a felony, and those being highly dubious exceptions, and are now common place tools of racism and discrimination and the usurpation of the rights and control of citizens over its government by and through these ever more sophisticated forms of racial discrimination cloaked under the guise of “new rules” that will make the courts run more efficiently, as to the genuine purpose of the laws meaning (since it can be changed without meaningful notice to the public be made or required when a right is being suppressed in enforcement power specifically because government made such a rule, as in this case as regards appellant's claims of ineffective assistance of counsel.

8. Whether trial court erred or abused the court's discretion in accepting a plea of guilty to a person that had not been formally charged nor, consequently, could have gotten “effective assistance of

counsel” where, essentially, the court has placed the cart before the horse, and thus making any such action void for lack of jurisdiction of both the person, for the soon to be amended information, nor the subject matter, since a VUSCA did not exist in the record nor by Information until January 23, 2013, and plea was accepted by the court on January 22, 2013.

B. STATEMENT OF THE CASE

The State charged appellant by information on June 6, 2012. CP 56 – 61. A commencement date for trial was set for September 5, 2012, by CrR 3.3(3), which states, in pertinent part that “the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.”. On September 5, 2012 was the original omnibus application of the state. Defendant objected to counsel advice to waive his right, in this case, to a speedy trial and any excluded periods did not leave the appellant free from the charges, it only favored allowing the state additional time when it would otherwise have violated the rule, thus the rule is ambiguous and thereby unconstitutional application was made in this matter. In general, the rules that allows Court accepts waiver of speedy over the objections of appellant is to overcome or “chill” the clear meaning of both speedy trial guarantee and double jeopardy(during the periods that the state can exclude from the calculation of time solely for the purposes of avoiding actual speedy trial rights and thereby prejudiced the appellant in material ways and are clearly unfair as the appellant can not compel an extension of time to go to trial if there are inherent logistical problems but the state can, which is unfair on every level of fairness. Trial date commenced on appears to have commenced on January 8, 2012 but was continued several times for state to come up with the victim and witnesses. Eventually, the Appellant was at scheduled trial date on January 22, 2013 to begin trial, well past speedy trial, and was told that the trial could commence though the state had no witnesses to present to establish that there was a robbery nor that the appellant was the alleged robber but offered to “let” appellant plea guilty to another charge and then [emphasis added here] they would drop the more serious charges. Hearing for guilty plea only was conducted on

that same day, one day prior to state actually filing an information to the effect that this person is charged with a crime until January 23, 2013, 24 hours after the court had colloquy the appellant on the charges. This is prima facie fundamental constitutional prejudice and violation of the right to know the charges against him yet his counsel did not raise the challenge on behalf of his client. On January 23, 2013 the state filed written charges that notified the defendant of the charges against and would give rise to the commencement of an action and something that counsel for the accused could review and investigate in order to effectively advice a person under the circumstances of the statement of the case described herein and throughout the record and the law of the case with regard to fairness, and effective assistance of counsel and the duty owed the public of the state to not manufacture cases against parties because they are in a superior position to do so.

The state account of the facts of the charges filed by information are accurate and need not be repeated here. CP 56 – 61. The differences of the accounting of the determination of probable cause, which is done by the police, not a magistrate, is that the police's account did not charge a VUCSA nor did the state's information. CP 56 – 61. And when it did file an amended information, it was the day after the trial had commenced and the guilty plea hearing, CP 62 – 92, wherein it misrepresents the facts. The appellant was declared guilty on the 22 day of January 2013, not the date the paperwork represents, which is misleading and false. The police did not make any claims as to the possession of cocaine it believed was evidence of any robbery nor did they attribute what they found to either defendant and thus state used “blanket” charge to cover whomsoever had been alleged to have been in the car and never verified that either brother was involved in any robbery, fleeing the scene, or was in possession of illegal drugs, though at every stage, including this one, the state continues to offer prejudiced, unsupported, self-serving statement as though they are facts of the incident of a robbery, if there was a robbery or any one in possession of any illegal substances in violation of VUCSA. No victims were ever present when the state alleged that they would produce such victims as described in

both their information and the probable cause determination. No evidence of any robbery was ever found nor proved to exist in the first place.

The unsubstantiated accounts of the state that they “were apprehended on foot “after they had abandoned the car”, as though that was an established fact, which it was not and is prejudicial and should not be considered for the purposes of the statement of the case saving to show that the constitutional precepts of per se requiring warrants was not adhered to and thereby fundamentally violating the rights of the accused in a criminal charged case. The state's account, Brief, attempts to show there was a direct link between the defendants in this alleged robbery, the car, and possession of a controlled substance and that there was probable cause to believe that evidence of the crime of robbery would be found in the “abandoned” vehicle, and as such, could not possibly say what or who had been in the vehicle during the time it was unattended. However, and more importantly, the statement of the case offered by the state omits that it could not prove that appellant was ever in the car, on that day or any other day, that he had not been found in possession of any evidence of property alleged to have been stolen nor any weapon, which was alleged to have been used, and that the state tracked the appellant using K-9 sniffers. The state fails to state that the dogs did not sniff out, along the way, anything that may have been discarded by the appellant. Thus the account of the statement of the Case of the respondent is materially misleading and bears no resemblance to the actions taken by the court in this matter nor of the actions taken or what was said between a defendant and his counsel, and so to make the stretch that drugs found in the “abandoned” car, belonging to another is the basis whereby they “amended” the original charges. The state's account, brief, also omits that prior to defense counsel convincing his client to plead guilty, they had no basis for charging appellant with possession of a controlled substance based on it being found in a car he was not found in and did not own, and doing so was not in the interest of justice but in the interest of winning a case. The state's account fails to show there is/was a direct connection between appellant and what was found in someone else's property, yet,

somehow, the state is saying let the judgment stand, that his plea of guilty to a VUCSA anyway because he was originally accused of a greater crime, and essentially, him trusting his counsel's advice to plead guilty to a charge for which none of the elements existed to present to a judge to get a valid warrant to charge such a person, as effective assistance of counsel and that is just absurd.

On January 22, 2013 the state “dropped” the robbery and other charges related to the information filed on June 6, 2012, though the state need not make a record showing that the charges were dropped in any public forum my family could find, and no charges were formally filed for the VUCSA until January 23, 2013 at and that without any motion to the court for leave to do so, which time the appellant had already been found guilty by a judge that either had jurisdiction because of the robbery and assault charges or because of the VUCSA charges, but certainly it could not maintain jurisdiction where the instruments required to give jurisdiction was not ever known to exist until after the trial had commenced. The case at bar is directly in opposition to the holding of well settled matter of **State v Barnes, 146 Wn.2d 74**, which states, in pertinent part, that “*Prior to trial amendments are liberally made . . .*”, however this is an issue involving amending on the day of trial, without making a prior motion for or giving notice that this amending of the information would be taking place. Unlike Barnes, supra. The state did file both the notice of intent to amend and the motion to amend prior to the start of trial, and rightfully so, gives a defendant opportunity to discuss with counsel the import and defense of the new charges before having to make a decision on how to proceed under the charges. In this instant matter no such opportunity existed and that is prima facie ineffective assistance of counsel to encourage a client to plead guilty to a charge on the day his trial for another matter is to be conducted. That is a classic case of trial by “surprise” for the accused even if not for defense counsel. This is more troubling because there has been no showing of any states witnesses on the formally charged matter, VUCSA, and the amendment was and is what the state attributed to the appellant as justification for prosecuting and compelling him to stick to the “deal” or plea agreement. On March 8,

2013 the court conducted a sentencing hearing on the VUCSA and issued and signed a Judgment and Sentence for conviction of VUCSA. CP 81 – 88.

Appellant was formally sentenced on March 8, 2013. On May 3, 2013, less than two months after entering into the plea agreement appellant filed a pro se motion and declaration to withdraw the plea of guilty and sought relief from the operation of the plea agreement because he was not aware that as a result of the plea agreement the state would suspend his driver's license without notice to him and gave other reason why the plea agreement and guilty plea should be set aside. [CP did not come with the motion and declaration, though these were requested clerk's docket subs: 53, 55, 56, 57 and 59, and I don't know why not, yet they are an integral part of this review which supports that I did raise the issue of ineffective assistance of counsel, even though Mitch Harrison did not address the issues of the motion for which he was hired to prosecute it was there and the court represented that it had not been raised and therefore cannot be heard] On September 22, 2014 the court conducted a hearing the motion filed by attorney Mitch Harrison, whose counsel was sought to force the state to hear the motion to withdraw a guilty plea filed by the appellant and noted by the appellant but ignored by the process. Attorney Mitch Harrison did represent appellant at the motions hearing, but the court did not address all of the issues raised by the pro se appellant's brief filed more than a year earlier. Since I am in custody I cannot name the clerks papers that the motion was listed under and would ask that this court review my clerk's paper which are listed on regular clerk's information sheet as subs 53, 54, 55, 56, and 57 on the docket.

When appellant's motion to withdraw was turned into a motion for a new hearing by attorney Mitch Harrison without him first reviewing the motions filed already was brought to the attention of the court in appellant's 60(b) motion and when an attorney fails to meet the objectives for which he was hired, it is per se, ineffective assistance of counsel and violates the 6th amendment to the Constitution for the United States of America.

Moreover, the 60(b) motion is an acceptable form of attack upon a judgment that is a miscarriage. It is available, according to your rules, to both the civil litigant as well as the criminal litigant. I then filed the 60(b) motion after my counsel failed to do what he had said, namely, to file my notice of appeal in a timely fashion or immediately. He did neither. CP 911 – 104 and 105 -116. After the hearing to withdraw a guilty plea counsel apologized because he did not know that appellant had, in fact, and contrary to the court's representation, raised the issue of ineffective assistance of counsel in the motion to withdraw filed less than two months after the judgment and sentence date and stated he would take this appeal on a pro bono basis but failed to timely file notice of appeal and appellant was in custody and only had contact with Mary Mitchell, grandmother of appellant.

Appellant, on other charges, was denied appeal bond and suffered this case being added to his offender's score assuring that he would be beyond a year and a day sentence, which required that he be sent to Shelton Correctional Center for processing into the State of Washington department of corrections system, though he could not be serving time under the law, however, the rule is contrary to the law and either he is serving time regardless of whether he met his statutory obligations under RCW 10.73.040, which states, in pertinent part, that **“In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of the appellant; and the appellant shall be committed until a bond to the state of Washington in the sum so fixed be executed on his or her behalf by at least two sureties possessing the qualifications required for sureties on appeal bonds, such bond to be conditioned that the appellant shall appear whenever required, and stand to and abide by the judgment or orders of the appellate court, and any judgment and order of the superior court that may be rendered or made in pursuance thereof. If the appellant be already at large on bail, his or her**

sureties shall be liable to the amount of their bond, in the same manner and upon the same conditions as if they had executed the bond prescribed by this section; but the court may by order require a new bond in a larger amount or with new sureties, and may commit the appellant until the order be complied with.” The aspect of this statute is confusing in that the court argues that the Criminal Rules supersedes the statute, however, the statute is a codification of the rules of criminal procedure. Both are rules, but the arbitrary way a court can decide not to invoke the protection inherent in every court to release person accused on bail in amounts sufficient, while at the same time saying no defendant is entitled to either the rule or law's operation if the trial judge determines that they should not receive the benefit of the rules or laws regarding releases pending appeal. Clearly, this concept of release, do not release, is at best, ambiguous and does not lend itself to the furtherance of the establishment of justice because while on the one hand admitting that it is wrong to imprison the innocent, and that every criminal defendant is entitled to appeal of a criminal conviction as a matter of right, the right must end there and nothing that is inherent in the protections of guarding against the misuse of any safeguard to the rights of a person subject to the laws, not rules as no person comes into this land is handed a notice of the rules that they must know in order to guarantee their rights will be enforced in a court in America and thereby must prosecute this appeal from jail, not as one that simply cannot post bail rather as one serving a sentence as one that is not up for review for correctness and adherence to well defined laws of the freedoms and rights of process due to all persons charged with a criminal offense and without the assistance of counsel because this experience does not feel like an attorney will argue to protect the rights of African Americans in a judicial system that has a history of treating African American criminal defendants more harshly and without being mindful to remain impartial and fair, though they can all say that they are fair and that they don't discriminate the statistics and facts of life in America does not bare out the truth of those regularly made statement and they serve to prejudice appellant receiving justice in this instant matter and therefore each justice must be

mindful of the form that discrimination against African Americans plays out and how the judicial system is an integral part of the discrimination being quashed or supported. Appellant relies on the facts of this statement of the case to accurately reflect the only fair position and one that seeks to support the laws protections of citizens and not ways to overcome those protections that, if adhered to, would make discrimination impossible or very difficult in the judicial branch of government.

C. ARGUMENT OF APPELLANT IN OPPOSITION TO STATE RESPONSE

The state argues that an appeal of the trial court's a denial on a criminal 60(b) motion is not reviewed de novo and cannot include the nexus information necessary for court to have and maintain lawful original jurisdiction of subject matter, (plaintiff charged appellant by instrument, Information, of robbery and assault under the revised codes of Washington, which was subsequently dropped, and then extended in the form of a day of trial charge, but no written or prior notice given) as well as procedural jurisdiction to show the court the miscarriage of justice. However, the Rules of procedure, which according to the court, supersedes, any legal argument of government that a person is not entitled to the full review on appeal. There are no 60(b) motion that have legs of their own. They must be connected to an action for which one of the available remedies exists. It is unquestioned that CR 60(b) is not prohibited from filing in a criminal court. The rule itself dictates what issues must be raised in a 60(b) motion hearing; Rule 60(b) states, in pertinent part, that “**Procedure on Vacation of Judgment. (1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or the applicant's attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding. (2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted. (3)**

Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.” requires that appellant do exactly as he did. CP 1 – 43. In fact, the Court put the availability of defenses, that were obviously not told to the defendant by his counsel as the court implied counsel should have seen that **“Although there seemed to be some pretty compelling defenses to the robbery charges in any event . . . I had some concerns about the cocaine because there weren't any facts before the court . . . or in the certification for determination of probable case that linked Mr. Mitchell to the cocaine . . . “ VRP, p. 14, lines 3 to 9.** The appellant had no choice but to seek review of the acceptance of a guilty plea under what she described as “concerns”, but taken to mean, counsel why are you allowing your client to plea to a charge where the original charge is defensible and there was nothing, before today, that put your client on notice that he was ever going to face the charge of VUCSA as this case was always about an alleged robbery (to paraphrase the judge). The attorney under such circumstances was ineffective at best and entitled appellant to use the speediest remedy allowed. In this case, it was a 60(b), which would sufficiently allow for justice to be done and a miscarriage of justice from manifesting itself as it has. I am serving an extra 40 months because this court ruled it a conviction for the purpose of future sentences and then denied me admittance to bail pending because it said this charge is not why you are in jail, however, it is the reason why appellant is in jail for the length of time he now serves. Had the court been mindful of the pro se motion for relief from a judgment in May when it was filed it would not have been any additional charges as appellant was

charged based on a traffic stop that produced this case as the cause for his arrest as it was in the plea agreement supplemental that appellant's driver's license was suspended.

Court denied appellant pro se's 60(b) motion without oral argument and summarily, not giving it fair consideration, did not write any conclusions of laws or findings of facts regarding the issues raised in the 60(b) but simply repeated what she had said previously, though she did not allow for the counsel to address the issues in the pro se motion for relief from a judgment, which is, after all, what the criminal motion hearing was all about; ineffective assistance, misrepresentation of the state of the nature of the plea agreement because it failed to inform that appellant would lose the privilege to drive in the United States of America, and failure of the court of the duty to inform appellant that he has the right to remain silent and that if he gives up that right whatever he says can be used against him in a court of law, as is the case; his words are being used against him for the conviction to stand. for the new charges that had not been filed nor any written instruments, discovery, evidence, etc. before the court, as the court expressed so correctly, **“I had some concerns about the cocaine because there weren't any facts before the court . . . or in the certification for determination of probable cause that linked Mr. Mitchell to the cocaine .”** In other words, the trial court was mindful as the Court was in **State v. Barnes, supra**, however, she did not conclude nor analyze the issues as they had with an eye to assurance that jurisdiction did exist with, at least, a showing that the defendant and his counsel had been apprised and motion to amend made with a Determination of Probable Cause which puts the accused and his counsel on notice of the charges against, in the absence of such a determination then file a motion for leave to amend information. In *State v Barnes, supra*, the Court argues that in the absence of timely notice and filing, then the court retains jurisdiction solely over the other properly filed charges but cannot fairly says that in the absence of these procedural requirement and constitutional safeguards that a court has jurisdiction over the person or subject matter if they have not been filed and the charges for which the trial had commenced are dismissed. The Court held that had

the Barnes court been under a circumstance where the *“Amendment to an information may include new charges if completed before trial and no specific prejudice results.”* and *“[T]he primary purpose of [a charging] document is to supply the accused with notice of the charge that [the accused] must be prepared to meet.”* An assignment of error challenging a charging document may be raised for the first time on appeal.” *Barnes, supra.* The gist of which was that the action prejudiced the appellant as this substitution of charges was being made the day of trial and left the appellant without any knowledge of what the charges was even related to as there was not a written charge or filing of information until after the court accepted appellant's guilty plea to the new uncharged, unfiled and unmove for amended information. And, again, as the court said, and you should feel also, in that **“there weren't any facts before the court . . . or in the certification for determination of probable case that linked Mr. Mitchell to the cocaine.”** In fact, it was the court that informed counsel for the appellant that his client had established the case by, in essence, providing the state with the basis that it could, theoretically, go forward with converting the robbery and assault trial into one for a VUCSA, and said, **“So he provided the factual basis”, CP 15, VRP line 22,** which the counsel for defendant failed to give appellant a clear choice and knowing that, simply put, had counsel advised his client effectively, it would have had to be against a deal to plead guilty where there is no “factual basis” in the custody and control of the state and thus only self-incrimination could establish the factual basis used. Appellant asserts that trial attorney should have warned him against self-incrimination where there was no **“factual basis”** for the charge, let alone to amend the charges to include and thus absolutely no legal strategy existed under the skill of this counsel, which was ineffective, and indeed, was the cause of the confession to a charge that was learned of the day of trial and without viewing any record or laws, as the judge noted, there was no factual basis for a charge under VUCSA and had not the appellant confessed it, it could not have been granted. So, counsel was definitely ineffective with regard to recommending that his client plead guilty to a charge that neither of them had seen nor any evidence

related to the charge that connected client to event, and without ever reviewing any record of the charges for which the state has the serious burden of proving every element and counsel should have known that, just as the judge knew it.

Nonetheless, and without competent legal advice, not about trial strategy, but how to answer to a charge that there was not sufficient “factual basis” to form the charge, unless the client is encouraged to waive his right to remain silent, which is exactly what his counsel did. That is not effective for anyone but the state. It turned a non-prosecutable charge into a guarantee of conviction. And while the hearing court made a record that suggested that appellant should be time barred because it has been over a year and a half and that is beyond the 12 months set by rule, it simply is not true, but what is true that this counsel was ineffective because it did not look at the record of what was done nor did he have any competent communications with the appellant as he was in jail, and thus did not know the court was wrong because the appellant had in fact filed his motion to withdraw a guilty plea less than 2 months after sentencing. It should be considered a serious error that prejudiced the appellant from having a fair hearing for that hearing either since the truth was he did file timely but all the duties owed to appellant as a criminal defendant and pro se counsel were ignored to his obvious hurt and harm. And that once the action, filing a motion and declaration to withdraw a guilty plea, was taken within two months and court failed to note the matter for hearing, though appellant filed a note for criminal motions hearing with the motion and declaration [remember, I don't have the **CP** listing for those documents but they are in the custody of the State of Washington and readily accessible to the courts), King County clerk's court docket numbers 53, 54,55,56,57 and 59. They show, for anyone to see, that appellant raised the issues in the 60(b) motion that the trial court would not allow counsel Mitch Harrison to address because of the alleged time bar in the filing of the motion to withdraw a guilty plea, was filed pro se two months after judgment and sentence and of the judgment appellant filed to withdraw his plea of guilty and listed the grounds that the Barnes court said would amount to a

violation of both procedural due process as well as constitutional due process of the defendant to be apprised of the charges against him, to confront the witnesses, examine evidence, conduct scientific tests with regard to any claim that it is a substance that amounts to a crime, if it is scientifically proven to be one of the controlled substance listed in the RCW 69.50 or not. It was and is proper to review the 60(b) motion in context with the underlying circumstances of the original case in chief, as the Court said in “*Want of probable cause and malice are essential elements in an action for malicious prosecution; , Ed Barker vs Vaugh Waltz, et al., 40 Wn.2d 866*, there was clearly “want of prosecution” for the charge of VUCSA, and saving the advice of defense counsel to appellant to waive his rights as an accused, this would be a case ripe for a civil prosecution for malicious prosecution because there was not, still not any evidence to support either original charges. And, again, except for the uninformed legal advice of defendant's counsel, this matter would have been dismissed in its entirety for want of prosecution. Any counsel that advises against Miranda is per se not going to be effective in any further advice as any advice given to a convict does not comport to the meaning of giving assistance of counsel while the person is yet innocent until the state proves them guilty. This lawyer made those safeguard not necessary and did not inform me, neither did the court express its concerns, openly, as she expressed above in the motions hearing, before allowing appellant to confess to it anyway when there could not be an amended information that there was no “factual basis” to grant. And the state did not file a motion to amend, but they were not only allowed to amend, this court wants to bind a person to it and ignore all of the irregularities required in order to accept such a conversion of no charges provable to charges that came from a confession without being advised of right to remain silent because it was a new allegation. No the appellant did not make a knowing and intelligent choice after advice of counsel on the date that the plea agreement to the charge of VUCSA which was entered January 22, 2013, which was the date of the trial under the only known information filed. Any counsel would want to see such instrument before advising a client. This did not happen and

instead counsel failed to inform amounts to turning the matter into scam to cover the state's failures to meet statutory elemental components of the charge for which the defendant had been apprised. In the others, had the attorney for defendant voiced those legal concerns expressed by the court, then appellant would have had effective assistance and would have said simply, "let's go to trial or dismiss it" as those were the realities of the legal options that were proper conduct as long as the Supreme Court still holds that the job of the prosecution is to see to it that justice is done, not win cases.

Appellant asserted in his motion to withdraw that he entered into an agreement to plead guilty without knowledge of his rights to refuse to cooperate, to demand a jury trial and demand proper process, to know the charges and evidence against him, basically to have been told what the judge said from a competent counsel and that did not happen. My lawyer should have known, as the court said, "there was no factual basis" to plea guilty upon and that without the state establishing its existence it could not have granted their untimely motion to amend the information as an extension of the original charges and for the reasons cited by the court this matter should be overturned and orders issued that corrects subsequent sentences that have been imposed based on this case. The state attempts to suggest that conduct of the state's attorney to amend on the day of trial, to omit in the record that no witnesses were available in their case in chief for robbery and assault, nor that they had not and could not establish a "factual basis" with regard to the appellant and such conduct, which borders on malicious prosecution, as to why this court should not hear this appeal and dismiss it. Such a suggestion is bordering on contemptuousness against the constitutional and procedural safeguards to be afforded to every person facing a criminal charge and loss of life, liberty or property and must, therefore, be given the highest effect. The judicial system does not function under the irregularities that can exist in everything and no person subject to the laws of this country should suffer because the state failed to follow fair, impartial, unbiased criminal court procedures in securing a defendant. It is unheard of that appellant has this strike against him and to the lawyer is hailed as competent. That is not fair. Or as I ask, which

justice having had to learn these things after being advised to do them, that had I not followed the advice of counsel there would have been a different outcome. And the outcome of just the fact that if appellant's counsel had known, and she should have known, and was just negligent in informing the appellant of what the legal import of what it means when the state has no "factual basis" to charge the charge of VUCSA alone, factually, legally, the court would not been able to grant the motion to amend the day of trial under the circumstance as the trial court expressed. **Id.** In order to assure that criminal defendants have assistance of counsel that is effective the state must give motion and notice to amend and the charge being amended to prior to trial. None of these things happened for appellant and entitles appellant to reversal of conviction and an order to adjust his current sentencing courts to adjust those sentences in compliance with this court orders granting review and reversing criminal conviction as miscarriage of justice is clear.

Furthermore, the respondent is attempting to put before the court the results as though they are above review because the trial court gave review. It is a very common practice for the state to file, delay filing charges until it suit them and it is in their hands completely. In lack in following the proscribed rules, laws and procedures are not excusable on the trial level. This is especially so where it is obvious that if any member of this court had been faced with the same, then they would have demanded that all procedural safeguard were not only in place but enforced on behalf of the accused. The state is not doing a service to justice when they demand that when they ignore or fail to follow procedural and constitutional safeguards in criminal matters that their failures should be ignored on review. That is a contrary position to well settled laws of review attesting to the fact that final order, judgment in criminal case will be reviewed de novo where constitutional issues are raised for the first time on appeal, though that is not the case here, the court erroneously stated that appellant did not raise the issue of ineffective assistance of counsel and prejudice, see Pro se Motion for Relief from a Judgment 60(b0 motion and declaration, which obviously the trial court did not see though they were

filed before counsel for appellant filed his motion for a new trial based on newly discovered evidence (essentially, counsel thought since he could prove that one of the state's witnesses lied, that that should entitled appellant to a new hearing. However, there never was a hearing on the robbery and assault charges the matter in which it was alleged that the state would be producing witnesses by name.

D. CONCLUSION

Appellant relies on the knowledge and skill that every judge has prior to becoming a judge to see the spirit of the wrongs done and to initiate the proper corrective actions in accordance with the principle espoused under our constitutions and laws, and not focus their efforts to show the sensibilities of the rules of procedure that, in fact, “chill” rights conferred elsewhere. I am a pro se and discovered all these things, not from my attorney, but by talking to other lawyers with regard to how I came to be convicted of a VUCSA and had my driver’s license suspended, without my knowledge. I ask the court to use its vast experience as judicial officers and those who serves the public interest even when it is costly to the state to use your integrity to see the things I could have said, should have said, but am unable because I am subject to the state, plaintiff, control and am thereby limited as to how much time I can spend doing legal research, writing to send to my family, them transcribing it and filing it for me as a consideration of the harm done by this ruling and the lack of due process and strict compliance with the rules of procedure by the state.

Justice demands that every person receives the benefits of the laws and rights as paramount, criminal rules of procedures notwithstanding. Please use your skills to support the laws operation for the protection of citizens where government is involved and by so doing see clearly my counsel of record was not effective when considered with what the outcome could have been if she had advised me to safeguard and not give up my rights to assist the state in making a case that clearly

could not have happened if I had not been advised to plead to a lie by my attorney.

Dated this 16th day of October 2015

Respectfully Submitted,



Lavelle X. Mitchell, Pro Se Appellant

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