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NOV 28 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30437-0-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent,

v.

KATHY ANN HENDRICKSON,
Appellant.

STATEMENT OF ADDITIONAL GROUNDS

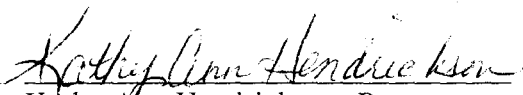

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Issues Pertaining to the

Assignment of Errors

1. The trial court erred in finding evidence, in which the appellant cyber stalked, Greg Riordan, from 09/09/05 to 06/29/09, to support a conviction.
2. The evidence of Identity Theft in the Second Degree was insufficient to support a conviction.

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IN THE COURT OF APPEALS
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THE STATE OF WASHINGTON)	
)	
Respondent,)	No. 30437-0-III
)	
v.)	STATEMENT OF
)	ADDITIONAL GROUNDS
<u>KATHY ANN HENDRICKSON,</u>)	
)	
Appellant.)	

I, KATHY HENDRICKSON, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUND ONE

The handwriting analysis was not conclusive and did not prove to be the appellants. Dissatisfaction and nature of any conflict with appellant's counsel concerned of the sufficiency of computer forensic expert evidence and counsel's decision not to

seek and/or call as witness of experts and handwriting expert evidence done by Ron Emmons of the Oregon State Police Forensic Laboratory. Exhibit 4, RP 85 Lines 17-20, RP 86 Lines 12-16, RP 87 Lines 21-25, RP 88 line 1. Exhibit 5, RP 91 Lines 10-12, 17-25, RP 99 Lines 21-25, RP 100 Lines 8-13, RP 102 Lines 1-9, 16-25, RP 103 Lines 1-4, *Schell v. Witek*, 218 F. 3d 1017 (9th Cir 2000). The expert must demonstrate a proper factual foundation for his testimony, through handwritten testing of the appellant. The expert may not under the Federal Rules of Evidence offer an opinion on the ultimate issues of whether the appellant was in fact the person to commit the crime or lacked predisposition. *US v. Lueben*, Fed. R. Evid. 704 (b), 812 F. 2d 179, 22. Fed. R. Evid. Serv. 981(5th Cir. 1987), opinion vacated in part on other grounds, 816 F. 2d 1032, 22. Fed. R. Evid. Serv. 1816 (5th Cir. 19897).

When an appellant makes a specific request for exculpatory evidence, even after the verdict, a court should allow the defense to conduct discovery into facts supporting the request, if the evidence would demonstrate a Brady violation. *US v. Velarde*, 485 F. 3d 553 (10th Cir. 2007).

ADDITIONAL GROUND TWO

The ineffective assistance of counsel, due to the trial attorney's failure to call witnesses on appellant's behalf, caused detrimental damage to the defense. In *Strickland v. Washington and State v. Thomas*, appellants are entitled to relief under the Sixth Amendment when trial attorneys fail to assist rights that may have altered the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 689, 1045 ct. 2052, 80 L.ed 2d 674 (1984) and *State v. Thomas*, 109 Wn 2d 222, 225-226, 743 P. 2d 816 (1987). In *Kimmelman v. Morrison*, the appellant's counsel's assistance was ineffective because he failed to put witnesses on the stand. *Kimmelman v. Morrison*, 477 U.S. 365, 91 L.ed.2d 305, 106 S ct. 2574- criminal law § 46.6 Evidence § 419. See also, *Toliver v. McCaughty*, 539 F. 3d 766 (7th Cir 2008). The appellant's trial counsel was ineffective because he failed to put on the stand, 3 witnesses who observed her on a daily basis in the classroom. The trial attorney also failed by not calling a witness who could testify to the character of Mr. Fisk, as well as, testify on the appellant's behalf as to the facts and events which occurred during this situation. This witness testimony was crucial and the ineffectiveness of counsel proved damaging to the appellant's case. On RP 341 Lines 9-25,

~~RP~~ 342 Lines 1-3, 12-13 ~~RP~~. As in *Harris v. Reed*, these additional 3 witnesses would have confirmed the appellant's innocence had they been allowed to testify. *Harris v. Reed*, 894 F. 2d 871-878 (7th Cir. 1990), see also, *Chambers v. Armontrout*, 907 F. 2d 825 (8th Cir. 1990).

ADDITIONAL GROUND THREE

Emily Banks, Computer Lab Supervisor of Walla Walla Community College, gave conflicting versions of the events surrounding when and where she observed appellant was, at the time of the event had occurred. ~~RP~~ . 120 lines 13-24, ~~RP~~ 126 lines 1-11, and ~~RP~~ 127 lines 12-18. Ms Banks does not testify to which classroom she observed appellant in, to which there were several classrooms on the same floor next to each other. Ms. Banks does not testify to whose name she had seen on the assignment. ~~RP~~ . 128 lines 9-11, lines 19-21, and ~~RP~~ 129 lines 1-13. Ms. Banks testifies that she had seen dating site and then schoolwork and that's how she determined that the name marked the picture. Then Ms. Banks states that she does not remember the name on the site. ~~RP~~ 128 lines 1-21. Ms Banks testifies that she doesn't really recall much by referring to "I imagine". ~~RP~~ . 129 lines 1-4. Appellant argues that she had no dating site profile since January of 2005.

Then Ms. Banks testifies she is not certain to what time of day this occurred. RP 130 lines 1-4. Ms. Banks is not even sure how many students were in the classroom or which classroom she is referring to. RP 130 lines 11-24. Ms. Banks police statement says a different version. RP 130 lines 21-24. *Chambers v Armontrout*, 907 F.2d 825 (8th Cir. 1990). When counsel failed to produce the witnesses to support appellants version, the jury likely concluded that counsel could not live up to the claims made in the opening or closing statements. *Toliver v McCaughtery*, 539 F.3d 766 (7thCir. 2008). *Id.* at 879 (citing *Anderson v Butler*, 858 F.2d 16, 29 (1stCir. 1988)).

In failure to introduce evidence, *DeCoteau v State*, 1998 ND 199, 586 N.W.2d 156, 157-158 (N.D. 1998). Counsel's failure to show that the appellant had given her counsel a statement of her attendance at Walla Walla Community College in 2009. The allegations to her threatening judges, who were not appointed judges at the time of events in July and August of 2008, could not have happened, for appellant was not present or ever was at the college at this time.

Counsels failure to show evidence that the appellant had given her counsel, which could prove her innocence and show the

courts Mr. Riordan's false statements of identity theft against her. Mr. Riordan testified that someone had stolen his tax information. **RP** 138 lines 15-18. Statement shows that Mr. Riordan said his tax statements were taken while Melissa, his housekeeper, worked for him. Mr. Riordan testified that he believes appellant stole his identity. If that being the case, then why would Mr. Riordan keep maintaining contact with appellant as shown on **RP** 43 lines 7-25 and **RP** 44 lines 1-15. Mr. Riordan had continually sent appellant gifts from Fingerhut, **RP** 22 lines 8-25 and **RP** 23 lines 1-4.

How would Mr. Riordan know e-mails coming from a community college, unless he was there himself as presented on **RP** 48 lines 11-15. Mr. Riordan knew appellant did not own a computer, nor did appellant have one at her residence. Keep in mind Mr. Riordan still resided in Oregon, one hour away from where the appellant lived.

ADDITIONAL GROUND FOUR

Ineffective assistance of counsel's failure to investigate a hand analysis expert and a computer analysis expert prior to trial. *Strickland v Washington*, 466 U.S. 668, 689, 1045 Ct. 2052, 80

L.Ed.2d 674 (1984) (citation omitted). *State v Hottle*, 197 W.VA. 529, 476 S.E.2d 200, 205 (1996), quoting *State ex rel Ms. B v LeMaster*, 173 W.VA. 176, 313 S.E.2d 453, 454 (1984) (footnote omitted). *Sims v Livesay*, 970 F.2d 1575 (6thCir. 1992). Appellant requested to have another expert to look further in to the computers. For instance, whose IP address was going to and from where sent. Who logged on to the computers. Mike Boettcher, who testified that he was an expert in computers, failed to show who logged on to the computers. Failure to investigate other individuals that the appellant requested to have investigated shows prejudice from her counsel and Det. Roger Maidment.

ADDITONAL GROUND FIVE

Appellant received ineffective assistance of counsel resulting from her trial counsels failure to investigate a piece of evidence, exhibit 9, that could have helped corroborate the appellants version of the events surrounding the evidence found at appellants apartment. **RP** 167 lines 21-24. Counsel's failure and refusal to ask appellant about the evidence when appellant took the stand to

testify. Appellant wanted to clarify the actuality of evidence. *Sims v Livesay*, 970 F.2d 1575 (6thCir. 1992).

The prosecutor and the appellants counsel failed to ask the appellant about the evidence, Exhibit 9 and 10, found in her apartment that she could have explained. Appellant argues that it shows on Exhibit 9 and 10, a name and phone number to a Margaret Johnson from the Federal Bureau of Investigation. Appellant argues that the information on the stenobook was a conversation between her and Ms. Johnson. Everything that was discussed between them was written down by the appellant that Ms. Johnson was questioning her about. Appellant was only writing down what Ms. Johnson told her.

ADDITIONAL GROUND SIX

Defense counsel's "failure" to investigate (Gregory Riordan's) background and present mitigating evidence of his life history constitutes ineffective assistance of counsel. *Wiggins v Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2531, 156 L.Ed.2d 471 (2003). *State v Pace*, 602 N.W.2d 764, 744 (Iowa 1999). See also *Everett v State*, 789 N.W.2d 151, 158 (Iowa 2010) (In determining

whether an attorney failed in performance of an essential duty, we avoid second guessing reasonable trial strategy). The Supreme Court of Idaho Constitution, in an ineffectiveness case, in evaluating counsels conduct, this Court has used as a starting point, The American Bar Associations standards entitled "The Defense Function". *Aragon v State*, 114 Idaho 758, 760 P.2d 1174, 1177 (1998). The Idaho Court of Appeals has simply applied the federal *Strickland* test. Under the Federal standards for ineffective assistance of counsel, an appellant must show that his or her attorney's performance fell below an objective standard of reasonableness, and that "there is reasonable probability that, but for counsels unprofessional errors, the results of the proceeding would have been different." *People v Bodden*, 82 A.D.3d 781, 918 N.Y.S2d 141 (2nd Dept 2011) (citation omitted). Appellant's counsels and prosecutions failure to prove evidence of count 3, cyber stalking Gregory Riordan from 9/9/2005 through 6/29/2009. Appellant did not own a computer after May of 2005, nor had appellant ever been a student or been at the Walla Walla Community College between 2005 through 2008. Appellant has never been at the Whitman College to which Roger Maidment falsely testified that he had seen the appellant at the Whitman

College using a computer. Roger Maidment failed to show proof that it was actually the appellant. Mr. Maidment's failure to present a photo of appellant using the computer. **RP** 321 lines 6-8. Mr. Maidment's failure to take fingerprints from the computers being used. **RP** 321 lines 3-5. Mr. Maidment admits to taking Mr. Riordans handwriting sample, but not submitting them to Oregon Sate Patrol or the Washington State Crime Lab. **RP** 321 lines 9-13. Mr. Maidment testified that he did send handwriting analysis of appellant, to two of the Washington Sate Crime Labs and found them to be inconclusive. **RP** 321 lines 14-24 and **RP**. 220 lines 15-18. Appellant's attorney objected to have appellants daughter Kirsten, witness anyone else besides her or appellant using computer would have testified to other parties using her (Kirsten's) computer. **RP** . 321 line 25 and **RP**. 322 lines 1-3. Mr. Maidment was asked if he knew where Mr. Riordan was at the time of these occurrences. **RP** 322 lines 19-25 and **RP**. 323 lines 1-10. Mr. Riordan was not living in Kentucky at the time; he was living in Oregon, one hour away. **RP** 12, lines 17-20.

ADDITIONAL GROUND SEVEN

Appellant argues that cyber stalking 9.61.260 1(c) 3(b), between dates of 9/9/05 - 6/29/09, shows no evidence of cyber stalking Gregory Riordan. Appellant had no computer after May of 2005. There was no evidence to substantiate that appellant made threats to Mr. Riordan, nor evidence of appellant damaging property. No evidence or exhibit shows any such act that proves appellant made. Mr. Riordan testified that his power and cable were going to be shut off. **RP**. 19 lines 20-25 and **RP**. 20 lines 1-4. Mr. Riordan testified that he was getting harassing phone calls. Mr. Riordan refers to a "he and pal" in his testimony. **RP**. 20 lines 5-20. It is insufficient to support findings that appellant committed these acts. Evidence was insufficient to support Mr. Riordan's testimony. If Mr. Riordan felt this way about appellant, then his actions of maintaining to keep a relationship with appellant should show cause of concern for his actions. **RP**. 43 lines 7-25, **RP**. 44 lines 1-5 and **RP**. 46 lines 13-17.

ADDITIONAL GROUND EIGHT

Appellant argues that she was not a student, nor at the Walla Walla Community College on 7/31/08 and 8/24/08 to commit the crimes of Counts 1 and 2 of Cyber Stalking. Appellant argues that she was not a student, nor at the Walla Walla Community College on 7/31/08 and 8/14/08 to commit the crimes of Count 4 and 5 of Threatening To Bomb or Injure Property. Appellant argues that she was not a student, nor at the Walla Walla Community College on 7/31/08 and 8/14/08 to commit the crime of Count 6 and 7 of Harassment, nor was appellant at the Walla Walla Community College on 7/31/08 and 8/14/08 of Counts 8 and 9 of Intimidating a Public Servant. Emily Banks testified that she did not see me in the Walla Walla Community College library. ~~RP~~ 120 lines 18-20. Ms. Banks testifies that she seen me in the computer lab during the School year of 2009 to which appellant was a student then. ~~RP~~ 120 lines 21-24. Ms. Banks testified that she is not aware of the library rules. ~~RP~~ 118 lines 9-13. There were no witnesses to verify that the appellant committed these crimes.

ADDITIONAL GROUND NINE

In Ms. Mulhern's closing arguments, **RP**. 392 lines 14-17, Appellant argues that she did not steal Mr. Riordan's identity to obtain jewelry from Fingerhut. Exhibit 2 will show that the jewelry size was too big to fit the appellant. Appellant herself turned the Fingerhut jewelry over to the police. **RP** 392 lines 21-25. Ms. Mulhern also states that appellant misused financial information to apply fraudulently for credit cards in Mr. Riordan's name with the appellant's handwriting as testified by Ron Emmons. As you will see the conclusions set forth in the original analytical report were not adequately supported, nor were the analytical findings in the analytical report accurate within the generally accepted practices of the Forensic Document Profession.

RP 393 lines 10-11, Ms. Mulhern's closing argument that appellant accessed personal information on her daughters' computer. Appellant argues that it was Mr. Riordan who had access to her daughters' computer on several occasions. **RP**. 343 lines 24-25, **RP**. 344 lines 1-25, **RP**. 345 lines 1-3, **RP**. 338 lines 21-25, and **RP**. 344 lines 8-25. Appellant argues that she did not slash Mr. Riordan's tires and is not liable for any damages that

supposedly occurred to him. RP 339 lines 1-2. Where is the evidence to show that this actually occurred. Statements or receipts should show evidence or proof that this actually did occur.

Appellant argues that the outcome with Mr. Fisk is all hearsay on Mr. Fisk's allegations. RP 394 lines 16-25, and RP. 395 lines 1-9. Appellant testified to the fact that she took an Alford Plea and why she took that Alford Plea. RP 341 lines 9-25 and RP. 342 lines 1-17. Because of the constant stalking and harassment by Mr. Fisk, appellant, under duress, pled the Alford Plea to keep Mr. Fisk away from her family and herself. Appellant had a witness to testify on her behalf but her court appointed attorney's failure and neglect to call witness to testify on Appellant's behalf. Mr. Riordan had full knowledge of the incident with appellant and Mr. Fisk. Appellant knows Mr. Riordan created and had a hand at his own alleged occurrence that he testified that occurred to him to set up the appellant, because appellant refused to marry Mr. Riordan. RP. 341 lines 6-8, RP. 339 lines 1-14 and RP. 340 lines 7-25. Mr. Riordan knew the anguish it caused the appellant in her ordeal with Mr. Fisk and knew she would be looked upon as being a person with a criminal history.

Appellant argues that she never had Casablanca@hotmail.com as her alternative email, as Det. Roger Maidment testified to. RP 308 lines 2-7. Appellant has never had a reunion site. Mr. Maidment did not show actual evidence that show of such. Appellant testified that someone stole her address book that had her email and passwords. RP . 356 lines 20-25 and RP. 357 liens 1-14. Appellant argues that the Qwest bill left at her residence was left by Mr. Riordan himself. Exhibit 14, RP. 300 lines 2-4. Mr. Riordan was constantly showing up at appellant's residence. RP 345 lines 7-11 and RP. 347 lines 9-16. Mr. Maidment testified that he found an envelope in the Appellant's' apartment that had a 1-800 number to Fingerhut. Exhibit 11, RP 300 lines 20-21. Appellant argues that the reason it was there was because she called and told Finger hut to put a stop to sending anymore merchandise to her residence from Mr. Riordan, and that the last items sent to appellant were at the police department. Appellant was constantly sending back items from Fingerhut that Mr. Riordan kept sending appellant. Mr. Riordan did testify that he was sending appellant gifts from Fingerhut to her residential address. Exhibit 2, RP . 32 lines 5-12. Mr. Maidment also testified that he found on the backside of the envelope with Fingerhut on the front was

yahooinformationcenter@yahoo.com. **RP** . 179 lines 21-23.

Appellant argues that she was emailing them about someone getting into her email address because appellant was having a hard time getting into her email account, and that her email information had been stolen. **RP** , 356 lines 20-25, and **RP** , 357 lines 1-10.

Exhibit 16, **RP** . 193 lines 17-25 and **RP** . 194 lines 1-17, appellant argues that they assumed it was the appellant logging into various accounts and looking up various items on Steve Hendrickson's residence. Mr. Hendrickson's computer was never seized nor had an expert look into his computer. Ms. Mulhern's closing argument stating that appellant had a beef with Diana Duede. **RP** 401 lines 24-25 and **RP** . 402 lines 1-3. Diana Duede testified that she never had any problems with the appellant or her daughter. **RP** . 108 lines 11-14. Appellant argues that appellant's daughter never told her of the incident about a customer complaint. **RP** 108 lines 17-25 and **RP** . 109 lines 1-3. Appellant argues that she had no knowledge about a letter to Wal-Mart and never wrote the letter. Diana Duede also testified that she did not have an email account. **RP** . 107 lines 14-17. Diana Duede of College Place, Washington; does in fact have a My Space account. In order to have an account with My Space, you need an email address. Appellant argues that she has

known Diana and her two sisters since High School and appellant's family and Diana's family have know each other since then. Both families got along fine for years and appellant knew the correct spelling of Diana's name. Ms. Mulhern was trying to stipulate that appellant wrote the letters in her closing argument. Appellant argues that her daughter did not talk to appellant about her mishaps at work; to which appellant had no knowledge of any customer complaint towards her daughter, nor would it have any concern or value to the appellant.

ADDITONAL GROUND TEN

Restitution - (findings). Where restitution is ordered, record must permit reviewing court to determine exactly what figure is established by evidence; otherwise, case must be remanded for resentencing based on appropriate finding establishing actual victim loss. *State v Pollard*, (1992) 66 Wn. App 779, 834 P.2d.51, 120 Wn2d 1015, 844 P.2d 436. Criminal law - 1086, 13-1181.5(8). Appellant requests submission of the "support documentation" to which Mr. Riordan and the prosecution had referred at the restitution hearing to show proof of what was lost and

documentation of what prosecution and Mr. Riordan are claiming is owed to them in restitution. When amount of restitution exceeds that proven at trial, under this section permitting restitution of double victims' loss, trial court should enter findings as to amount of loss suffered by victims. *State v Slemmer*, (1987) 48 Wn. App 48, 738 P.2d 281. Evidence presented at restitution hearings, however, must meet due process requirements, such as providing appellant with opportunity to refute evidence presented and being reasonably reliable. *State v Kisor*, (1993) 68 Wn. App 610, 844 P.2d 1038. Also, 121 Wn2d 1023, 854 P.2d 1084.

ADDITIONAL GROUND ELEVEN

Evaluation/Counseling. On the Appellant's Judgment and Sentencing, it states that appellant is to partake in a mental health evaluation/counseling. Appellant argues that she has indeed taken and paid for, herself, an evaluation from a licensed Psychologist/Psychiatrist in Walla Walla, Washington. Appellant sent the evaluation to Judge Donald Schacht's prior to her trial, to which is in her case file. The evaluation has indeed concluded that the appellant has no mental, psychological or drug/alcohol issues.

CONCLUSION

At this time for the reasons stated in my Appellants Brief, in my Statement of Additional Grounds, and as justice requires, I would respectfully ask the court to remand my case back for new trial or reverse and vacate my convictions with prejudices.

Dated: Nov. 28, 2012 Kathy Hendrickson
Signature

Kathy Hendrickson # 895317
PRINT NAME & DOC
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