# Case # 299163

## Statement of Additional Grounds for Review

# State of Washington
# v.
# Chad Edward Duncan

COURT OF APPEALS
DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHAD EDWARD DUNCAN,

Defendant.

No.: 299163

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, Chad Edward Duncan, have received and reviewed the opening brief prepaired 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.

Chad Edward Duncan #349049
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ADDITIONAL GROUND 1

**Petitioner's Fifth Amendment protection against self-incrimination was violated when his admission was obtained during police interrogation in which he was denied the right to have counsel present.**

Petitioner was made to exit his dad's vehicle at what Yakima City Police testified to what was described as a "high risk stop". The Petitioner was made to back out of the vehicle and lay flat on his belly with his hands and feet spread wide. Petitioner was immediately hand-cuffed and placed into the back of a Yakima Police Department marked patrol car. All of the patrolmen of the Yakima Police Department are intensively trained regarding how to make an arrest and the proper procedure that is required under Miranda. The Yakima Police Department has issued Miranda waiver forms, and provides each member of the Yakima Police Department with a laminated card to be sure the rights are clearly given and understood. Standard procedure for the Yakima Police Department when a waiver form is unavailable is to turn on the patrol car recording device to ensure that a proper waiver is freely given and that the Miranda rights are clearly understood. Petitioner did invoke his right to remain silent, and asked for a lawyer. It was the testimony of Yakima Police Department Officer Baker that he undisputeably heard Petitioner invoke his right to have a

lawyer present, and to stop the questioning. No Miranda waiver form was used on purpose. No patrol car recording devices were activated also on purpose. No excuse in the world not to use the patrol car recording device because multiple Yakima Police Department patrol cars were on the scene that all possessed the recording device, and had a surplus of Miranda waiver forms on hand if needed. Yakima Police Department patrolwoman Tarin Miller swore Petitioner freely admitted his statement and did not invoke his right to stop and have a lawyer be present. Miller did testify that it would surprise her that Yakima Police Department Officer Baker who was directly within inches of Petitioner, put in his report that he heard Petitioner invoke his right to have a lawyer when she started questioning Petitioner. **VRP 16.** The very unlawful act was further compounded by the heavily biased Trial Court in it's unjust finding where the Trial Court on record does the Prosecutor's job trying to clean up and condone Patrolwoman Miller's actions. **VRP 47.** It was so axiomatic that the Trial Court's findings and ruling was such an abuse of discretion that Defense attorney Rick Hernandez made a very bold statement that was clearly made for the appellate record. "I think there is something sinister going on there. I cross-examined... the Court indicated something about her acknowledging - Officer Miller acknowledging in its findings right now that Duncan had asked - Mr. Duncan had asked for an attorney and then the questioning at

that point ceased, and those facts aren't in the record to my knowledge." **VRP 48.** This could be shrugged off as if it was only one instance, or bad apple. This is not the case here. The whole barrel of the Yakima Police Department has more than just one rotten apple that has complete disregard for the law when it concerns a prisoner's Miranda rights. The two juvenile girls that were also made to back out of Petitioner's father's car were not spared the same treatment of being made to lay face down spread limbs, hand cuffed, and placed in separate Yakima Police Department patrol cars and also given their **Miranda** rights sans waiver form or patrol vehicle recording. These two little girls had it much worse than Petitioner. Jaimee Butler was terrorized by the Yakima Police Department. Defense attorney Rick Hernandez questioned Butler on the stand, "You told him, after he read your Miranda warnings, that you did not want to make a statement, right?" To which Butler answered under oath, "Yes". **VRP 648.** The multiple present Yakima Police Department detectives and officers all totally ignored the law and their duty under Miranda. They verbally abused this little girl. They threatened her and poured on the pressure making her burst into tears and had her so worked over that she could bearly breathe. They told little Jaimee Butler that she would be charged with murder and never be be able to see her mother again. They told her she would be going to prison for a very long time. **VRP 648.** Jaimee Butler was a

witness for the State, she had no reason to lie on the stand that all of this happened. Butler's testimony exactly corroborates the testimony of the State's other juvenile girl witness Alexis Brock-Sturtevant. **VRP 753.** Defense attorney, Rick Hernandez, inquired during trial of the other juvenile girl arrested with Petitioner. This girl was Alexis Brock-Sturtevant. Hernandez asked her, "When you were arrested and taken down to the police station, you were advised that you had a right to a lawyer, is that right?" Alexis Brock-Sturtevant answered, "Yes, I wanted to talk to him the whole time." Hernandez further inquired, "And you asked for a lawyer and the officer refused to provide you with a lawyer?" Brock-Sturtevant answered, "Yes." Hernandez finished his Miranda violation inquiry with, "And continued to ask you questions?" Brock-Sturtevant answered, "Yes." **VRP 753.** Alexis Brock-Sturtevant was also beaten down mentally and verbally by multiple Yakima Police Department detectives and officers with exact bully-boy tactics as young Jaimee Butler and forced at the time to say whatever the police wanted her to say in order for her not to be charged and go home. **VRP 753.** The statement that the Petitioner made was it was not him, he had let another male use the car and the video at the AM/PM would prove when he got out of the car and the time that he got back in it right before his arrest shortly thereafter. **VRP 349.** The video was purposely not obtained by police so his statement could be used against him and was. Petitioner was not allowed time to test late witnesses.

Yakima Police Department Officer Chance Belton testified that the patrol car audio-video computer aided recording device is called "COBAN". Officer Belton explained, "COBAN's automatically activate when the lights come on." **VRP 61.** Officer Tarin Miller, who gave Petitioner his Miranda warning, and placed Petitioner in the back of her patrol car, testified, "We try to have COBAN on at all times." **VRP 22.** Responding Yakima Police Department Officer Mark Scherzinger testified that his vehicle was equiped with COBAN, and that his COBAN was "Activated". **VRP 91.** Officer Scherzinger followed procedure and kept his COBAN running. The COBAN video from his patrol car was played in court and showed at 9:07 minutes after arriving at the scene when he searched the Petitioner's occupantless vehicle. **VRP 97.** Officer Scherzinger was questioned by defense counsel Rick Hernandez about this spot in the COBAN video, "Okay. And all three occupants were hand-cuffed and placed in patrol cars; is that correct?" **VRP 102.** Officer Scherzinger answered, "Correct." **VRP 102.** The Defense did request in the Discovery Request that it be given all video and and audio recordings. What is clearly apparent here is that the Yakima Police Department did one of two things, (1) they produced the one video only most favorable to them and decided the others were not needed, or (2) the officers purposely switched "off" the COBAN in the three patrol cars so the Miranda warning would not be recorded and their would be no proof of "lawyering up."

Custodial interrogation must be proceeded by advice to the accused that they have a right to the presence of an attorney. Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Petitioner alerts this Court to the federal claim that is prevalent by his repeated requests to stop and have counsel present, was a violation of Due Process, and freedom versus self incrimination guaranteed by the Fifth Amendment of the United States Constitution. Butler v. McKeller, 494 U.S. 407 (1990). Miranda distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney was present only if the individual stated that he wanted counsel. State v. Robtoy, 98 Wn.2d 30 (1982)(quoting Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)). The Petitioner and both juvenile females he was arrested with had repeatedly requested the arresting police officers on the scene to stop and provide a lawyer, as they all repeated to the detectives at the station who purposely ignored these requests and kept on threatening them until their will was broke. Police cannot exert reinforcing pressures to overcome a defendant's will during interrogation. Illinois v. Perkins, 496 U.S. 292, 297 (1990). Invocation of Petitioner's right to silence not scrupulously honored because detective continued questioning defendant after request for an attorney. Garvin v. Farmon, 258 F.3d 951, 954-55 (9th Cir. 2001). The privilege against self-

incrimination applies to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 8 (1964). Washington State Courts have been very clear what the law is here when a right to have an attorney present is invoked. Once a person in custody indicates a desire for a lawyer, CrR 3.1(c)(2) requires that a reasonable effort be made to contact that person with a lawyer. State v. Kirkpatrick, 89 Wn.App. 882 (1997). Once a criminal defendant's Sixth Amendment right to counsel has attached upon the initiation of adversarial proceedings, the defendant may not be interrogated by a State Agent without counsel present, nor may incriminating statements made by the defendant in the course of such an interrogation be used against the defendant, if the right to counsel has not been waived by the defendant. State v. Everybodytalksabout, 161 Wn.2d 702, 166 P.3d (2007). The Trial Court hearing these exact facts abused it's discretion not suppressing Petitioner's statement. It violated due process not to suppress the interview. Moran v. Burbine, 475 U.S. 412, 421 (1986). Defense attorney made a overwhelming objection stating that something "sinister" was going on about any judge disregarding the law so blatently regarding allowing the number of police involved to get away with this Miranda plain as the nose on your face violation. The Fifth Amendment right to counsel exists soley to guard against coercive, and therefore unreliable, confessions obtained during custodial interrogations. State v. Stewart, 113 Wn.2d 462 (1989). The facts of the case and

the State's two juvenile witnesses having no reason to lie that were corroborated by Yakima Police Department Officer Baker who only inches away heard Petitioner crystal clear invoke his right to counsel and that he wanted to stop talking. What begs an evidentiary hearing by an unbiased judge is the illegal conduct of so many Yakima Police Department officers. Officer Tarin Miller seemed upset that Officer Baker told the truth and implied she was lying through her teeth that Petitioner trully did invoke his right to an attorney and ask to stop. Officer Baker wrote it in his report exactly as such. Officer Scherzinger did not cross the "blue line" when asked under oath if he heard Sergeant Willard make any threats to Jaimee Butler. He answered, "Nah, I did not." **VRP 453.** This in itself is countered by his answer to the next five questions that were asked and testified occured. Because of the horrible abuse that these very young girls had to suffer that had them crying non stop, snot running out their noses and Butler not able to breath for a spell, it is very obvious that they were not being asked about there grades in school. Standing in the same room, Officer Scherzinger heard what was said. Instead of answering "No, that was not asked," he gave the standard dirty cop answer of "I do not recall," to all five critical questions: (1) So you never heard Sgt. Willard tell her that he was going to charge her with murder if she did not make a statement? (2) Okay, and at no time did you hear Sgt. Willard

tell Jaimee Butler that she was not going to see her mother until she made a statement? (3) She was going to prison for a long time unless? (4) Your going to kiddie prison or juvenile detention if you don't? (5) Never heard Jaimee Butler tell Sgt. Willard that she wanted to remain silent? **VRP 423.** At the station there is a plethora of Miranda waiver forms and recording devices that are intended for the use of conducting a legal interrogation. These were purposely not used on the Petitioner or the two juvenile girls arrested with him. The reason that they were not used is that it would not be able to be used for the Petitioner's behalf that the police exerted illegal pressure without a lawyer to be present to stop them. RCW 9.73.090(1)(b) requires that an arrested person must be fully informed of his or her constitutional rights at the begining of the recording. In order to satisfy this statutory requirement, a recorded statement must include a complete statement of the accused's Miranda rights. State v. Mazzante, 86 Wn.App. 425, 428, 936 P.2d 1206 (1997). The requirement demands strict compliance to ensure that consent to the interrogation is capable of proof and to avoid a "swearing contest" regarding whether such consent actually occured. The signing of a Miranda waiver prior to the recording does not satisfy the statutory requirement. State v. Courtney, 137 Wn.App. 376, 153 P.3d 238 (2007). Under RCW 9.73.090(1)(c), which exempts certain provisions of the Privacy Act (chapter 9.73 RCW) sound recordings that correspond to images recorded by video cameras

mounted in law enforcement vehicles, police officers are required to inform all traffic stop detainees that they are being sound recorded not just having private conversations. Police officers must strictly comply with the RCW 9.73.090(1)(c) duty to inform, even if the recording of the traffic stop conversation is not "private" within the meaning of the statute. Lewis v. Dep't of Licensing, 157 Wn.2d 446, 465, 139 P.3d 1078 (2006). What did happen in Petitioner's case that smacks complicity and duplicity beyond any doubt is that the three Yakima Police Department patrol vehicles that all three arrestees were placed separately in, all had there COBANs turned on and recording both with audio and video, but were intentionally turned off when the questioning of the three prisoners were to begin and the Miranda rights given which begs any competent jurist to reach that it is an impossible coincidence, and only to avoid Miranda protection. Because the one Yakima Police Department Officer Baker corroborated that the Petitioner invoked his right to a lawyer, and wrote it in his incident report, and all of the intentional spoilation by other Yakima Police Department Officers to avoid the Miranda violations ever coming to light, Petitioner was prejudiced. This is error of a harmful nature because it is a constitutional error and it was preserved at trial by objection. The threshhold of how it did effect the outcome of trial is that Petitioner's statement to Officer Miller was used against him. It was used by the State in

their attack on the Petitioner's credibility. Petitioner stated after his rights were ignored and the questioning kept hammering upon him that he was innocent, and the AM/PM store video would prove that he got out of the car and stayed when the car left and that he was not involved with any crime. Officer Tarin Miller did go that night and try and view the AM/PM video. Officer Miller was unable to see the video because the store clerk could not get access to the video equipment without the store manager's keys. Officer Miller told the scene Sergeant and scene Detective Kasey Hampton about the statement Petitioner had made regarding the AM/PM video being exculpatory in nature and her failed attempt to get it, and the need for them to get it. Officer Miller put it in writing in her report also so it would not be ignored. The video was intentionally ignored for over a week so it would not be able to to prove the Petitioner's innocence. Under oath Detective Hampton testilied about reviewing Officer Miller's report, "I reviewed it, but I missed the part with the AM/PM." **VRP 790.** This too, is unacceptable to reasonable jurists that know that trained veteran Detectives do not miss such a significant piece of evidence so important that it is the linchpin on the guilt or innocence of the defendant in their case. When asked if he did check for the tape, Detective Kasey Hampton answered, "I did, after 7 days they lose the video." **VRP 790.** It is of particular note that Detective Hampton is very familiar with this exact AM/PM store and the video tape practices because of the prior

cases that he investigated at this AM/PM store. Compounding the prejudice further is the fact that the bias Trial Court allowed Prosecutor Ramm to add three expert witnesses mid trial and did not allow the defense a continuence to investigate what the were testifying to, that it completely blindsided the Defense. **VRP 581.** The Prosecutor sent out three police to do trial runs to be able to time the route to disprove the Petitioner's statement he was not in the car and at the AM/PM store where he was picked back up. Defense counsel Rick Hernandez stated the following objection, "It's totally unfair, your honor. It's just a pattern that he's adopted in this case and the Court needs to put a stop to it. And I'm, asking the Court to go into recess until monday so I can investigate this further to determine whether or not this is based on accurate facts or whether I need my own investigator or a known someone to challenge what is being said." **VRP 583.** The Court replied, "We're going to continue trial." **VRP 583.** Officer Ely said he spotted the Petitioner driving the Ford Taurus. Officer Ely notes what time it is near. This is what the State relied the heaviest upon to gain conviction. The timing is crucial to the State's case because it is a very narrow window of how much time was expended before Petitioner was picked up at the AM/PM store. The State relied the heaviest upon this piece of evidence to sway the jury talking about officer Miller, "And then gets information from him as to where he has been, he basically tells her that he loaned his car -- his father's car, the Ford

Taurus - to a friend just minutes before and he met up with him at the AM/PM. Well, that's inconsistant with what officer Eli saw." **VRP 349.** This polluted the jury completely. Prosecutor Ramm vouched for Officer Eli seeing what occured at the AM/PM, when that is not what Officer Eli testified to in the first place as he did not spot the car until after it had traveled by the AM/PM store. Petitioner's statement was further used to inflame the jury as Prosecutor Ramm went hog wild and testified about what was the content of Petitioner's statement, "She gets information to whether or not he bangs. Says he is and has ink on his chest." **VRP 350.** This impacted the three jurors that the State found out during Voir Dare that were personally effected by gangs, impaneled on the jury. **VRP 289.** The Sixth Amendment's guarantee of counsel during criminal prosecutions includes the right to counsel during post-indictment police interrogations. The Supreme Court has made clear that once the right to counsel has attached, "the defendant's own incriminating statements [elicited surreptitiously by the police without counsel present] may not constitutionally be used by the prosecution as evidence against him at his trial." United States v. Geittman, 733 F.2d 1419, 1426 (9th Cir. 1984)(quoting Massiah v. United States, 377 U.S. at 20, 84 S.Ct. at 1203). We hold that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a

process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with a lawyer... the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," and that no statement elicited by the police during the interrogation may be used against him at a criminal trial. Escobedo v. State of Ill., 678 U.S. 480, 12 L.Ed. 2d 378, 84 S.Ct. 1758, 1765 (1964). The threatening that happened to Petitioner and the two juvenile girls in custody, all being bullied without their requested lawyers was prejudice. Police interrogation of a suspect in custody threatens the exersize of the Fifth Amendment privilege against self-incrimination by providing officers with an opportunity to: (1) actively compel confessions through overtly coercive interrogation or (2) passively compel confessions by exposing suspects to the "inherently coercive" environment created by custodial interrogation. N.Y. v. Quarles, 467 U.S. 649, 654 (1984). "Will overborne" if statement not "product of an essentially free and unconstrained choice by its maker." Culombe v. Conn., 367 U.S. 568, 602 (1961). The Trial Court erred when it improperly did admit over objection the Petitioner's statement that was obtained illegally in violation of the exclusionary rule and reversal is required because the error was harmful. Chapman v. Cal., 386 U.S. 18, 23-24 (1967).

ADDITIONAL GROUND 2

**Petitioner's conviction was obtained on the basis of a "detention" which was not supported by probable cause.**

This violated Petitioner's right to have freedom from unreasonable search and seizure under the Fourth Amendment. Terry v. Ohio, 392 U.S. 1 (1968). Not a single eyewitness seen who was in the car, the sex of the car's occupants, nor the number of occupants in the car. During Petitioner's trial, all of the State's witnesses said they never saw anyone in the car at the scene of the shooting, when asked. **VRP 475-560.** None of the police reports mention the identity of anyone inside the car that was involved in the shooting, including race or the sex of the car's occupants up to the point that it left the area of the shooting. No one seen the actual shots being fired it happened so fast. Yakima Police Department Officer Jeff Ely did boldly lie when he swore under oath and gave testimony to justify having probable cause for his Terry stop. Officer Eli said, "Someone called out there was two females in the car." **VRP 71.** All of the Yakima Police Department calls, radio transmissions were made available through discovery. Every minute of these calls and radio traffic were listened to in their entirety. No such radio transmission that Officer Eli testified to ever happened. Officer Jeff Eli committed perjury in making this false declaration in support of gaining probable cause. The bias Trial Court abused

it's discretion ruling that it was a proper Terry stop, when all of the hard evidence proved to the contrary. Because every single word that the Yakima Police Department made on their police communication equipment was recorded, and no words were said that Officer Eli testified to that there was females in the vehicle at the time of the shooting, it was clearly proven that this did not happen, and as such, no probable cause existed. A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A search or seizure unsupported by probable cause is generally unlawful. Carroll v. United States, 267 U.S. 132, 155-56 (1925). When actions by police exceed the bounds permitted by reasonable suspicion, the seizure becomes an arrest and must be supported by probable cause. Florida v. Royer, 460 U.S. 491, 502-03 (1983). By not even considering the physical evidence that proved Officer Eli lied to establish probable cause for the Terry stop, Trial Court did not provide a fair and reliable determination of probable cause which did violate the Petitioner's rights under the Fourth Amendment. State Courts must provide a fair and reliable determination. Lawhorn v. Allen, 519 F.3d 1272, 1287 (11th Cir. 2008)(quoting Gertein, 420 U.S. at125, 95 S.Ct. at 868-69.) A State must provide a full and fair opportunity for full and fair litigation. Stone v. Powell, 428 U.S. 465, 49 L.Ed.2d 1076, 96 S.Ct. 3037, 3052 (1976). Not considering the tapes was error.

ADDITIONAL GROUND 3

**Petitioner was denied exculpatory evidence in the form of the AM/PM video that the Yakima Police Department clearly knew about and had a duty to get and preserve.**

Yakima Police Department Officer Tarin Miller testified that the Petitioner had told her he, "had loaned his car, his father's car, the Ford Taurus, to a friend just minutes before he met up with him at AM/PM." **VRP 349.** Officer Miller went to the AM/PM and tried to view and retrieve the store's video tape. Because the night clerk was unable to access the video equipment, he told Officer Miller to come back when the Manager was there and had the keys. Yakima Police Department Detective Kasey Hampton was present at the scene and the lead detective processing everything and in charge of the investigation. Detective Hampton spoke to Officer Miller and also reviewed her report that included Petitioner's statement of other suspect evidence and the claim that the AM/PM video was exculpatory towards Petitioner's actual innocence. This report also alerted the Detectives of Officer Miller's failed attempt to retrieve the AM/PM store video and the need to still get it. **VRP 793.** Detective Hamilton testified that it was his responcibility to follow up with Officer Miller's report to obtain the surveillance video, but admitted that he did not. **VRP 794.** The AM/PM store video was proof of another suspect, and it would of shown the exact times when any car

drove by the AM/PM store which would of disputed Officer Jeff Eli's testimony, and impeached both State witnesses that said under duress that the Petitioner was the driver. Defense witness Marlene Goodman, an ex police detective, now private investigator testified that she was hired to investigate this case and did. Goodman testified that, "the position of cameras would of captured Duncan and proved he was there." **VRP 821.** State witness Jaimee Butler testified that, "We got gas at the AM/PM on First Street." **VRP 630.** She also testified that after the shooting the first time she raised her head to see where she was at was, "We were by the AM/PM again." **VRP 636.** This counters Officer Eli's route testimony and would of been corroborated by the AM/PM store video. What was destroyed forever is the video that shows that Petitioner did loan his dad's car to his friend who was dating one of the juvenile girls, and that he was in the car and not the Petitioner who waited at the AM/PM store and was on video the exact moment that calls came in that shots were fired. The whole shooting arrived over a girl fight that had taken place in the park accross the house between the juvenile girl who's boyfriend had just borrowed Petitioner's vehicle and the girlfriend of one of the occupants of the house that was shot at. A Facebook message was testified to that said to the girl, "Why don't you meet me in the park so I can beat you down." **VRP 506.** It is also fact that Detective Hamilton had responded to the AM/PM store on

other occassions for crimes that happened there. Detective Hamilton was aware of the video policy of the store only keeping their videos for one week. Detective Hamilton did not go to the AM/PM store to take into evidence this exculpatory video until after the time he knew it would be destroyed so the defense could not utilize it. **VRP 790.** Under both the state and federal constitutions, due process in criminal prosecutions requires fudemental fairness and a meaningful opportunity to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994)(citing California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). To comport with due process, the prosecution has a duty not only to disclose materially exculpatory evidence, but it also has a related duty to preserve the evidence. Wittenbarger, 124 Wn.2d at 475. If the evidence meets the standard as materially exculpatory, criminal charges against the defendant must be dismissed if the State fails to preserve it. State v. Copeland, 130 Wn.2d 244, 279, 922 P.2d 1304 (1996). Evidence is materially exculpatory only if it meets a two-fold test: (1) its exculpatory value must have been apparent before the evidence was destroyed, and (2) the nature of the evidence leaves the defendant unable to obtain comparable evidence by other reasonably available means. Wittenbarger, 124 Wn.2d at 475 (citing Trombetta, 467 U.S. at 489). If the evidence does not meet this test and is only "potentially useful" to the

defense, failure to preserve the evidence does not constitute a denial of due process unless the criminal defendant can show bad faith on the part of the State. Wittenbarger, 124 Wn.2d at 4477 (citing Arizona v. Youngblood, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)). Detective Hamilton knew that he only had a week to get the AM/PM store video because of his previous investigations there involving videos, he purposely did not get the video in time as it would show the Petitioner's innocence. Suppression by the police or prosecution of material evidence favorable to criminal defendant violates his due process protections, despite the fact that such suppression was not deliberate. Evidence is material if it rebuts evidence offered by the prosecution; it is favorable to the defendant if there is reasonable possibility that it would rebut prosecution evidence or corroborate that of the defense. City of Seattle v. Fettig, 10 Wn.App. 773, 519 P.2d 1002 (1974). Prosecutor's disclosure of some but not all exculpatory evidence contained in police reports violated discovery rules. State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984). For purposes of the Brady rule, the prosecutor's office and investigators in a case are treated as a "prosecution team." United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979). Knowledge by any member of that team is imputed to the prosecutor. United States ex rel. Smith v. Fairman, 769 F.2d 386, 391-92 (7th Cir. 1985). In State v. Lord, our Supreme Court held:

The prosecution has a duty to disclose all evidence in its possession that might be favorable to the defense, Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This court has also recognized that "[t]o comport with due process, the prosecutor has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense." State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). The duty to disclose includes anyone working on the State's behalf, including police. Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Detective Kasey Hampton was not only the Yakima Police Departments lead detective in this case, Detective Hampton was appointed to assist Prosecutor Ramm in the courtroom during trial to coordinate witnesses, evidence and he even continued investigating the case all the way up to the closing arguments due to the Trial Judge was allowing the State carte blanche to add evidence and witnesses not previously disclosed or on any evidence or witness lists. The Trial Court allowed a manifest injustice of constitutional magnitude when it did not dismiss outright this cause of action when the facts that were before it that the AM/PM store video did exist and two of the witnesses indicated it showed both of the times that the Ford Taurus came into the parking lot. Because this was proof of other suspect, proof that Petitioner was not at the shooting, impeached not one but three of the State's witnesses, it was absolutely

unacceptable that the Trial Court allowed Detective Kasey Hampton to get away with letting the biggest and most obvious piece of crystal clear exculpatory evidence of total exhonoration be destroyed because he, "missed the part with the AM/PM." **VRP 790.** The destruction of evidence offends due process if the evidence was materially exculpatory and was destroyed in bad faith. State v. Straka, 116 Wn.2d 859, 884, 810 P.2d 888 (1991). Detective Hampton did not overlook something this important and of such a vital caliber to the Defense. He was told in person about it. He read it in the police report and no veteran police detective can honestly say that proof of another suspect and the actual innocence of the suspect they have in custody is not the biggest red flag they immediately have to check out. The Trial Court very much shows bias not allowing for a hearing or letting this one fly. Evidence is material and therefore must be disclosed if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. State v. Gentry, 137 Wn.2d 378, 396 (2007); United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Because Detective Hamilton had been to the same AM/PM store investigating other crimes, he knew the video procedure there implicitly. His inaction was deliberate and as such, deceitful police conduct. Police in Washington State are not allowed to do that. State v. Athan, 160 Wn.2d 354 (2007).

The Constitution requires the government to preserve evidence "that might be expected to play a significant role in the suspect's defense." California v. Trombetta, 467 U.S. 479, 488, 81 L.Ed.2d 413, 104 S.Ct. 2528 (1984). In Petitioner's case, it was "bad faith" as there is no innocent, believable explination of why the AM/PM store tape of great exculpatory and impeachment value was not obtained by police in the one week period they knew they had to get it or it would be forever lost. The AM/Pm video tape not being preserved was a due process violation because the tape was 100% proof of an integral part of this case. United States v. Bohl, 25 F.3d 904, 911-12 (10th Cir. 1994). Failure of the Yakima Police Department to preserve and disclose to the Defense the known exculpatory AM/PM store video was prejudice because the "nondisclosure of recording of defendant deprived defendant of opportunity to investigate circumstances of statement and to design intelligent litigation strategy." United States v. Lanoue, 71 F.3d 966, 977-79 (1st Cir. 1995). Mistrial and suppression appropriate because government failed to disclose tape recordings of its witnesses and the tapes had been erased. United States v. Well, 572 F.2d 1383, 1385 (9th Cir. 1978). With the allowance of Petitioner's statement to Officer Miller to come in about the AM/PM store stop and the State being allowed to pick his statement apart, about there being another person, not him, and the loss of the crucial tape "proof", the State denied him reciprocal discovery. Wardius v. Oregon, 412 U.S. 470 (1973).

ADDITIONAL GROUND 4

**Petitioner was denied exculpatory evidence in the form of COBAN videos that the Yakima Police Department clearly possessed and had a duty to preserve and turn over to the Defense.**

The State tailored the evidence to show only what was favorable to their case and committed "spoliation" (Defined by Black's Law Dictionary as: "The intentional destruction, mutilation, alteration, or concealment of evidence, usually a document, if proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible.) Yakima Police Department Officer Jeff Ely heard his dispatcher say that a white vehicle was involed in a shooting, and gave the address of the shooting. The direction the vehicle was headed was the only other thing said on Officer Ely's Yakima Police Department radio. Officer Ely took it upon himself to deduce that it was a gang related shooting because of the address being in known "Sureno" turf. Officer Ely testified that he figured that a "Norteno" was the rival gang that would be responsible for the shooting and have to go by the street that he was waiting with his lights off in a observation advantage point to get back to the "Norteno" side of Yakima. "Within a couple minutes of the call coming out I located the car." **VRP 70.** At seeing a white car drive by with a male and two females, Officer Ely testified, "I activated my overhead lights, red and blue lights." **VRP 69.** Yakima Police Department

Officer Chance Belton testified for the State and idicated that the police cruiser's COBAN audio/video units automatically activate and turn on when the cruiser's lights come on. **VRP 61.** Yakima Police Department Officer Tarin Miller testified for the State, "We try to have COBAN on at all times." **VRP 22.** Officer Jeff Ely said that his COBAN did not activate automatically when his lights were turned on. Four other responding Yakima Police Department vehicles that responded to Petitioner's arrest all had their COBAN's automatically activate when the police cruiser lights were turned on. **VRP 22, 61, 75, 91.** It is worth noting that the Yakima Police Department patrol car maintenance logs do not show anything wrong with Officer Ely's COBAN, or that he had reported any problem with it for not automatically activating when he turned his lights on like it is suppose to. What is very clear and meets the "bad faith" requirement is that the COBAN from Yakima Police Department vehicle driven that evening by Officer Mark Scherzinger was used and showed the Petitioner and the two juvenile girls being removed from Petitioner's father vehicle, and all the other COBAN's did not record the three Miranda warnings, or show the route Petitioner took and exact time that is recorded on the film with the date. The Yakima Police Department Officers of the four vehicles other than the one that recorded the evidence most favorable to the State, all had to have their COBAN's manually turned off. This is exactly

what was intentionally done to avoid recording a proper Miranda warning of all three arrestee's. This is what was exactly done to intentionally not have it recorded that Yakima Police Department Officer Jeff Ely testilied to obtain probable cause for the stop by saying that it was called in that two females were in the white car. His COBAN would of recorded that and he was not laying in wait responding to the call. Officer Ely's COBAN would of had the exact time that Petitioner passed and where. This was crucial evidence because the State relied heavily on the police timed trial runs allowed to dispute Petitioner's statement that he was at the AM/PM store and the car had stopped there. The timing was the State's main evidence that impeached Petitioner. Prosecutor Ramm laid it on thick and heavy to sway the jury, "and then gets information from him as to where he has been. He basically tells her that he loaned his car, his father's car, the Ford Taurus, to a friend just minutes before he met up with him at AM/PM. Well that's inconsistant with officer Ely saw." **VRP 349.** Prosecutor Ramm further vouches for Yakima Police Department Officer Tarin Miller, without the COBAN to dispute it, that, "She gets information as to whether or not he bangs. She says he is and has ink on his chest." **VRP 350.** Brenda Cantu works for the City of Yakima as the CAD, Computer Aided Dispatch 911 Manager. She was a State witness that testified that it takes about 60 seconds to dispatch Yakima Police department Officers "from when the call is received." **VRP 588.** No one "called out that two females were in

the white vehicle fleeing." This was not on any of the 911 calls that came in. Cantu testified that she is the custodian of records, and State law says "have to keep calls 90 days." **VRP 588.** Yakima Police Department Officer Scherzinger's COBAN started recording the moment the dispatch sent out to respond to shots fired and that someone had been shot at 316 Cherry Avenue, and he immediately activated his lights, which did automatically turn on his cruiser's COBAN. This audio/video was played on the trial record. **VRP 114.** The 911 tapes were played at trial for the jury also. **VRP 651-66.** Both the COBAN, that recorded all Yakima Police Department radio traffic, and the 911 tapes, had any recording of anyone calling out that there was two females in the white car. Yakima Police Officer Jeff Ely purposely testilied to gain his probable cause and intentionally flipped of his COBAN to make sure the time and date was not given to the Defense when he did spot Petitioner's vehicle and more-so, where. Because of the late allowed witnesses that were able to ambush the Defense about the timed trial runs the Prosecutor, mid trial, sent out three Yakima Police Department Officers to make, from the 316 Cherry Avenue address to where Officer Ely said that he encountered Petitioner, **VRP 581,** and the intentional spoliation of the COBAN's, it was not a fair trial. Predjudice is met by the intentional police and prosecutor misconduct here. Evidence is material "only if there is a reasonable probability that, had the evidence been

disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); In re Pers. Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998). In applying this "reasonable probability" standard, the question is whether the defendant received a fair trial without the evidence, that is, "a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Benn, 134 Wn.2d at 916, 952 P.2d 116; State v. Thomas, 150 Wn.2d 821, 849, 83 P.3d 970 (2004). If the Yakima Police Department Officers not committed spoliation, and had honorable kept their COBAN videos on, instead of intentionally flipping them off, Petitioner would of had grounds to suppress under the Miranda violations, and impeached the State witnesses. When the prosecutor's failure to disclose may have had an effect upon the outcome of the trial, reversal is warranted. State v. Finnegan, 6 Wn.App. 612, 620, 495 P.2d 674 (1972). The State's failure to generate and preserve the COBAN videos from all five responding Yakima Police Department vehicles violates Petitioner's due process rights under article 1, section 3 of the Washington State Constitution. State v. Furman, 122 Wn.2d 440, 858 P.2d 1092 (1993). The State's agents destroyed material exculpatory evidence in bad faith. This violated Petitioner's due process and Fifth Amendment rights. Arizona v. Youngblood, 488 U.S. 451 (1998). Not giving Petitioner all five COBAN's in their entirety denied a fair trial. Smith v. Cain, 565 U.S. _____ (2012).

ADDITIONAL GROUND 5

**It was an abuse of discretion for the Trial Court to allow the State to add surprise, never previously disclosed, both new expert witnesses and new factual evidence aquired at mid trial, and not allow the Defense a continuence or adequate time to investigate and test the evidence.**

Yakima County Senior Deputy Prosecutor Ken Ramm, at the mid-point of trial, instructed his Yakima Police Department appointed trial trial assistant, Detective Kasey Hampton, to send out three of his police investigator experts to do timed trial runs from the 316 Cherry Avenue address where the shooting happened, to the three points in question location wise at trial: (1) the AM/PM store, (2) where Yakima Police Department Officer Jeff Ely said he spotted the Petitioner's vehicle, (3) the point where the Petitioner was apprehended at the high-risk stop initiated by by multiple Yakima Police Department units. The State did this to gain an unfair, untested, unopposed advantage due to Prosecutor Ramm had Petitioner's statement made to Yakima Police Department Officer Tarin Miller for over a year and a half. The Defense duly objected, "It's totally unfair, your honor. It's just a pattern that he's adopted in this case and the Court needs to put a stop to it. And I'm, asking the Court to go into recess until monday so I can investigate this further to determine whether or not this is based on accurate facts or whether I need my own

investigator or a known someone to challenge what is being said." **VRP 582.** The Trial Court did not stop the State from polluting the jury and refused to grant the Defense motion to, there and then, go into recess. **VRP 583.** This greatly effected Petitioner's right to a fair trial. Testing should of been made available to the Defense and the jury should of been the judge of the evidence here, not unqualified patrolmen doing things by eye, with a stop watch. Miller v. Vasquez, 868 F.2d 1116 (9th Cir. 1989). The not allowing Defense counsel Rick Hernandez to have the State, on the spot, stop it's testimony regarding the timed trial runs, and to go into recess until the Defense had adequate time to test this "ambush" evidence, made the Defense counsel ineffective. The Trial Court created this ineffecetiveness. The right to effective assistance of counsel, Washington Constitutional Article I, §22,; United States Constitutional Amendment VI; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is violated when counsel's performance is unreasonably deficient and the client suffers prejudice as a result. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Prejudice occurs when the defendant is deprived the benefit of expert testimony that would corroborate or show the reasonableness of his version of the events. Thomas, 109 Wn.2d at 231-32. The Trial Court did abuse it's discretion not allowing the witnesses and their evidence to be tested by the Defense. The more essential the witness is to the State's case, the more latitude the trial court

should give the defense to explore fundamental elements, such as motive, bias, credibility, or foundation. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). The Trial Court's preventing the Defense adequate time to test the evidence denied a fair trial and Petitioner's ability to defend himself. A criminal defendant has the right to present a defense. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). The goal of the Confrontation Clause is to allow reliability of the accuser to be assessed through cross-examination. Crawford v. Washington, 541 U.S. 34, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The combined timed trial runs by the three Yakima Police Department Officers were testified to by Detective Hampton. The out-of-court statements by these three Officers that are testimonial are barred, under the Confrontation Clause, unless the witnesses are unavailable and defendants had prior opportunity to cross examine witnesses, regardless of whether such statements are deemed reliable by court. Crawford, 124 S.Ct. at 1354; United States Constitutional Amendment VI. Permitting a police officer to summarize or outline an out-of-court statement in no way corrects for the affront to the purpose of the Clause, as it was explained in Crawford. The Confrontation Clause provides a procedural check on "[t]he involvement of government officers in the production of testimonial evidence." Crawford, 541 U.S. at 53. The right to cross-examine an out-of-court declarer applies full force. United States v. Meises, WL 1817855 (1st Cir. 2011).

ADDITIONAL GROUND 6

**Petitioner was denied the opportunity to effectively confront and cross-examine the witness and evidence against him regarding DNA.**

The trial court abused it's discretion by allowing the State to add a never before disclosed expert witness, Washington State Patrol Crime Lab Forensic Scientist Heather Pyles, ambush style, the day of trial. Defense counsel Rick Hernandez duly objected, "We would object, your honor, to adding witnesses the day of trial." **VRP 171.** The Trial Court further abused it's discretion by allowing DNA evidence never before disclosed introduced also in an untimely manner. Again, Hernandez preserved the record by objecting, "I'm arguing that I did not receive the discovery in a timely manner. A year and a half late." **VRP 169.** The State had acted in "bad faith" the whole time to keep the Defense in the dark about this last minute evidentiary bomb they dropped on them after trial had started. The State failed to give notice that they motioned to obtain a warrant so it would be unopposed, and it would not tip their hand or let the Defense be able to have a clue what was coming. Hernandez motioned for the DNA evidence to be suppressed, because the warrant was aquired by unfair means, "allow me an opportunity to be heard before they actually get the DNA evidence obtained by a means of a search warrant once charges have been filed. And it's undisputed that at the time that the

police officer obtained the search warrant for DNA evidence that I had already been appointed as counsel. CrR 4.7 creates an additional requirement beyond just the warrant requirement." **VRP 167-68.** The Trial Court would not allow the Defense a continuence nor would it suppress the DNA evidence or disallow the State's expert. Defense attorney made record, "Discovery rules require that specifically 4.7(a)(2) says the prosecuting attorney will disclose to the defendant subsection (ii) any expert witnesses who the prosecuting attorney that hasn't been done in this case. But more importantly, they haven't disclosed what the subject of the expert's testimony is going to be." **VRP 178.** The State didn't test anyone else in the car, or the boyfriend. **VRP 473.** Pyles did testify that DNA was found on the gun belonging to Petitioner and one other individual. **VRP 605.** Not being granted the time needed to investigate and acquire the Defense's own expert to test the DNA evidence and the State expert's findings, denied Petitioner a fair trial. "Effectively" is the key word here as not knowing the evidence, nor what the expert would say denied confrontation and clearly was a Sixth Amendment violation. Pointer v. Texas, 380 U.S. 400 (1965). Had the defense not found out during the actual trial testimony that the DNA found on the gun used had two sets of DNA on it, the Defense could of had time to have the two girls and the boyfriend of one, who Petitioner said he loaned his dad's car to, tested and a DNA comparability analysis done for a match.

The Trial Court made Defense counsel ineffective in assistance from not allowing for adversarial testing of the scientific expert and DNA evidence to prove "other suspect", and corroborate the Petitioner's statement that he remained at the AM/PM store. Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002), cert. denied, 536 U.S. 1247 (2002). Under Washington law, a criminal defendant has a constitutional right to present expert witnesses as part of a "complete defense." State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003). This was a "one-way" use of evidence. The State's expert, Heather Pyles, was allowed to make the Petitioner the one who was the shooter when there was an unaccounted DNA suspect the Defense was not allowed to investigate. Jurors have a tendency to give greater weight to testimony of experts, particularly those cloaked in science. An experts testimony may be given greater weight by the jury due to the expert's background and approach. Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). When a deprivation without due process has been effected pursuant to established State procedure, a federal constitutional claim will exist. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982). A criminal defendant has a constitutional right to present a defense consisting of relevant, admissible evidence. State v. Rehak, 67 Wn.App. 157, 162 (1992). That is the only standard to be applied to proposed "other suspect" evidence. Holmes v. South Carolina, 547 U.S. 319 (2006). Right to present "other suspect" evidence as guilty party. State v. Condon, 78 Wn.App. 471 (1995).

ADDITIONAL GROUND 7

**Petitioner was denied the opportunity to effectively confront and cross-examine the witness and evidence against him regarding the Petitioner's advisement of rights at his juvenile sentencing that were admitted late during trial.**

The State called Yakima Police Department Sergeant Kelly Willard to the stand during trial. Defense counsel Rick Hernandez duly again makes a record, "We object to that. First of all it's untimely. The State has not, didn't give us any notice of that, they're doing it right before the witness is called." **VRP 670-71.** The Defense had no clue who this State witness was or what the witness would testify to. The hearing and record of the juvenile sentencing was incomplete. The Defense had no time to review the evidence or gain counter evidence. This "blind-siding" was very much intentional to prevent the Defense from gaining the proper paperwork that reflects that all imposed conditions would be over when Petitioner was an adult. This was crucial to the Ex-Felon in Possession of a Firearm count the Petitioner was found guilty of. Prejudice was that without investigation, the Defense was ambushed unfairly. The same past arguments in the last two grounds apply here. Without knowing the precise parameters of the "expert" testimony offered by an investigating officer it is highly prejudicial and should not be allowed. United States v. Mejia, 545 F.3d 579 (2d Cir. 2008). This repeating behavior did deny a fair opportunity to defend. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038, 1045 (1973).

ADDITIONAL GROUND 8

**Petitioner was denied the opportunity to effectively confront and cross-examine the witness and evidence against him regarding his past juvenile convictions that were admitted mid trial.**

Yakima Police Department Cheif Diaz was called on the 7th day of trial in an on-going pattern of prosecutor misconduct and extreme judicial biasness to keep on allowing this late violation of the last minute additions to the State's witness list. Defense counsel Rick Hernandez did his best with such adversity by the Trial Court forced upon him. Hernandez objected, "I will be interviewing him at once." "I'm not sure what he's testifying to." **VRP 667.** Prosecutor Ramm used Cheif Diaz to authenticate that it was the Petitioner who was in the courtroom, and that he had a juvenile conviction. This was inflamatory window dressing to pile high the flames of dangerousness and the propensity to be the baddest of the bad, by having the head of the Yakima Police Department come in full regalia to make a mere identification for the sole purpose of prejudice by using the weight of his office and prestige to gain a conviction. The ambushing of the Defense by adding surprise witnesses and non-disclosed evidence without adversarial testing was prosecutor misconduct that the Cumulative Error doctrine applies to. These errors denied Petitioner a fair trial, "even though no single error warrants reversal." State v. Sao, 156 Wn.App. 67, 230 P.3d 277 (2010).

ADDITIONAL GROUND 9

**Petitioner was convicted on less than proof beyond a reasonable doubt of every element of the crime charged in Count VII. There was not adequate notice given by the Juvenile Sentencing Court of his being prohibited for more than one year to possess firearms.**

The Defense motioned for Count VII to be dismissed for lack of notice. This was denied by the Trial Court. **VRP 577-80.** There was no written order at all regarding firearms. Hernandez stated, "My client was not advised of his rights on the plea form either." **VRP 577.** The Trial Court surmised, "It is true, as Mr. Hernandez points out, that Judge Gavin did not read the paragraph on right to possess firearms. It seems to me that what Judge Gavin did substantially complies with statute here. If we did everything we were suppose to, Mr. Duncan would read this , he would sign it, he would be reminded that he read it when he signed it, the judge would read it for him again at the time of the guilty plea and read it for him again at the time of disposition. And it seems to me that that is too much." **VRP 725.** The CD of the Juvenile Court proceeding was played for the jury, "The Court: Could end up with him having his right to own, use or possess or (inaudible) controlling a firearm taken away. You know that?" **VRP 710.** The prejudice of this charge was damaging to the propensity of prior gun violence that made the jury more likely to convict Petitioner as aptly pointed out in the State's opening statement. **VRP 712.**

Normally, it would not matter about a felon in possession of a firearm, as the caselaw has been cut and dry regarding notice and those from Washington State not being able to get their gun rights restored, except a very slim set of exceptions. This is not the case here. What we have here is unique circumstances. The attorneys on both sides and the Court all led Petitioner to the belief that the firearm possession restriction, and all of the other restrictions, were for only a period of one year. RCW 13.40.300(3): In no event may the Juvenile Court have authority over any juvenile offender beyond the Juvenile offender's twenty-first birthday except for the purpose of enforcing an order of restitution or penalty assessment. This is what was read to the Petitioner by his attorney in order to secure the plea bargain. Petitioner thought that this was a condition of parole that went away at age twenty-one. "Where a defendant can demonstrate actual prejudice arising from a sentencing court's failure to comply with the statute's mandate to advise him about the statutory firearm-possession prohibition, RCW 9.41.047 cannot serve as the basis for convicting him of unlawful firearm possession." State v. Leavitt, 107 Wn.App. 361, 26 P.3d 622 (2001). Due process requires that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Leavitt, 107 Wn.App. at 372, f.n. 8 (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

ADDITIONAL GROUND 10

**Prosecutor misconduct deprived petitioner of a fair trial due to highly inflamatory disparaging comments that was improper and did impact the jury in rendering their verdict.**

The State during closing likened the Petitioner to what is worse than jackal hyenas. Prosecutor Ken Ramm insulted and made the Petitioner as low down and despicable as they come. "Word I looked up, RECALCITRANT, that's him, he didn't care about whether or not he'd been prohibited from owning a firearm." **VRP 949.** Webster's Dictionary defines a recalcitrant person as someone who kicks with heels. This implied Petitioner is gay, cowardly, the type that would stab you with stiletto heels, not a knife. A criminal defendant does not waive a claim of prosecutor misconduct by failing to object to the prosecutor's improper remarks at trial if the remarks are so flagrant and ill intentioned that they evince an enduring and resulting prejudice that could not be neutralized by an admonition to the jury. State v. Dixon, 150 Wn.App. 46, 207 P.3d 459 (2009). Inflammatory rhetoric, personal opinion, or facts unsupported by the record is error. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). Instead of focusing the jury's attention properly on the elements of the crime and the State's burden of proof, the prosecutor resorted to ill-conceived rhetoric aimed squarely at the jury's passion. State v. Rivers, 96 Wn.App. 672, 981 P.2d 16 (1999).

ADDITIONAL GROUND 11

**The Trial Court clearly abused it's discretion in overturning the prior ruling it made, and allowed the State to have a missing witness instruction for Lorena Barragon who was in no way under the influence and control of the Petitioner, and had the ironclad explination for not being able to be in court. The Prosecutor did commit grave misconduct by improperly shifting the burden of proof to the defendant calling him a liar due to her absence.**

Yakima County Deputy Prosecutor Ken Ramm took advantage of the ultra bias Trial Court that was letting him get away with every rule violation and was on a tangent ruling against the Defense by slipping in another stab at an obvious motion that was shot down in the begining of trial, but very ripe due to the extreme bias. Ramm put in a "Missing Witness" jury instruction after the Trial Court initially said he could not have it. Defense attorney Rick Hernandez made an offer of proof in the capacity as an officer of the Court and told the Trial Court, "Lorena Barragon was at Children's Hospital due to a hole in her baby's spine," and therefore was unavailable. The Trial Court initially agreed that the witness was therefore unavailable. **VRP 884.** Ramm slipped Jury Instruction Number 31, into the packet and when it was noticed, persuaded the very biased Trial Court to let him keep it there. **VRP 918.** No new evidence or any reason to change the ruling was

needed, nor made part of the record. Ramm strikes foul blows by, "Your honor, I also filed supplemental instructions asking for a failure to call a witness, basically a missing witness instruction. We had testimony from the defendant that he had been with Lorena Barragon. **VRP 871.** Defense attorney Rick Hernandez duly objected. **VRP 871.** The Petitioner told the Trial Court, "she's at Children's Hospital with my godson Isaiah. He's got like, a hole in his spine. She's the mother. **VRP 838.** In closing arguments, the State finished with, "where was Lorena Barragon? Do you believe that he, that she's off at Children's Hospital?" **VRP 940.** Jury Instruction 31 read, "Missing Witness - If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. (4) There is no satisfactory explination of why the party did not call the person as a witness." Ramm's improper closing remarks not only made the Petitioner out to be a liar, Ramm implied the Defense attorney Rick Hernandez was a liar to for making the affidavit to the court corroborating exactly what Petitioner said. With the entire Yakima Police Department at the snap of his fingers from trio's of Patrolmen to do timed trials, all the way to Cheif Diaz to come running when he whistled for "clout", Ramm was way out of line infering dishonesty when he knew that his investigating side kick assigned to the case, Detective Kasey Hampton, within a few minutes of Hernandez attesting to the Court about Barragon, that

Hampton would have Barragon checked out completely. It is like the State made up their own known perjury asking the jury those two questions, when the State knew the answer to be true that a mother was frantic about her baby at Children's Hospital. A hole in the spine is like a baby born with a hole in the heart, it does not get more serious than that due to the spine being one of the two major pieces of the central nervous system with the brain being the other. The missing witness instruction is appropriate only when the uncalled witness is "peculiarly available to one party to an action." State v. David, 118 Wn.App. 61, 74 P.3d 686 (2003). The missing witness doctrine does not apply because Ramm presnted no evidence that Petitioner had control over the witness and the Petitioner had a legitimate explination for the witness's absense. Petitioner was prejudiced by prosecutorial misconduct that improperly shifted the burden of proof to the defendant. State v. Dixon, 150 Wn.App. 46, 54, 207 P.3d 459 (2009). The inference arises only where the witness is peculiarly available to the party, i.e., peculiarly within the party's power to produce. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). What is clear is that neither Petitioner nor the State could produce a mother in court with her baby under these life threatening circumstances, and the State took full unfair advantage to wrongly infer guilt at any means possible since the Trial Court would let the State do or say anything it wanted.

ADDITIONAL GROUND 12

**The Trial Court abused it's discretion in denying the Defense the asked for jury instruction for, "Drive-By Shooting," be included.**

Defense attorney Rick Hernandez properly motioned for a jury instruction of "Drive-By Shooting" be included due to the First Degree assault charge and the factual nexus that merited such. **VRP 869.** The Trial Court denied the requested instruction to be added. **VRP 881.** Past Appellate Court decisions have held that Drive-By Shooting is not a lesser included offense of First Degree Assault. State v. Ferreira, 69 Wn.App. 465, 850 P.2d 541 (1993); State v. Rivera, 85 Wn.App. 296, 932 P.2d 701 (1997). The Petitioner asks this Appellate Court to consider the never before raised argument that, because Second Degree Assault "is" a lesser included offense of First Degree Assualt, and Drive-By Shooting is the exact very same as Second Degree Assault RCW 9A.36.021(1)(e). First Degree Assault, as charged here by the State, required proof that a firearm was used. A firearm is a deadly weapon. Second Degree Assault includes an alternative of assault with a deadly, RCW 9A.36.021(1)(c). It also includes an alternative of intent to commit a felony on another person, RCW 9A.36.021(1)(e). Drive-by shooting is a felony. Drive-by shooting involves the use of a firearm. This foregoing analysis clearly indicates that the lesser included offense should of been included as it arose from the same act as the greater offense. This respective Court has

held that because each crime requires proof of facts not required by the other, that double jeopardy rights were not violated. State v. Statler, 160 Wn.App. 622, 638-39, 248 P.3d 165 (2011). Again, the actual elements of Second Degree Assualt under RCW 9A.36.021(1)(e), were not factually raised in this analysis of Statler, because it was not presented to the Court for your consideration as such. This has been overlooked by all Defense appellate attorneys in past reviews. The elements match, and the facts match exactly on the alternative of intent to commit a felony on another person of Assault in the Second Degree, RCW 9A.36.021(1)(e). The exact same "proof" is required. This meets the test that it is a inferior degree of the offense, and that, evidence supports a rational inference that only the inferior degree offense was committed to the exclusion of the charged offense. State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000). A Trial Court's failure to give a criminal defendant's proposed jury instruction that is supported by the evidence constitutes reversible error. State v. Harvill, 169 Wn.2d 254, 234 P.3d 1166 (2010). When the Legislature enacted the Drive-By Shooting statute, RCW 9A.36.045, it did not intend for the State to purposely avoid ever using it to give out longer sentences by only charging First Degree Assault in every instance of drive-by shooting when a weapon was discharged, or they would not have wasted their time writing this statute. A Court's fundemental objective when interpreting a statute is to ascertain and carry out the legislature's intent. Triplett v. DSHS, 166 Wn.App. 423, 427 (2012). This needs addressing to ensure the law is followed.

ADDITIONAL GROUND 13

**The State was relieved of it's burden to prove all elements of First Degree Assault by using improper inferences as the evidence at trial was insufficient to establish the "intent" required.**

Defense attorney Rick Hernandez did a very good job for having the Trial Court forcefully allow a year and a half worth of unknown discovery and last minute witnesses added. Hernandez was swamped, overwhelmed and saturated with a huge unfair burden that would of broke most attorneys will. Hernandez was sharp enough in spite of this railroad ride to still keep his wits and catch the State red-handed trying to pull another fast one regarding the element of intent. Hernandez, despite the Trial Court doing the State's job for them and allowing the State the moon, objected, "The State's evidence presented just indicates that a car pulled up to the house at 316 Cherry Avenue and fired shots at the house at a living room window, which the State's witnesses have testified had a curtain that didn't allow anybody from the outside to see anybody in the inside." **VRP 801.** The Court denied the Defense motion to dismiss all counts of First Degree Assault stating, "The Defendant should of known that there were persons inside this home. **VRP 804.** Derrick Rivera testified that you could not see into the house because of the curtain. **VRP 481.** Manual Villa testified that the door was shut prior to the shooting. **VRP 527.** Manual Villa also testified that the curtain was transparent enough to see out, but that no one could see in

to the house from outside. **VRP 960.** Prosecutor Ramm during his closing argument committed prosecutor misconduct that greatly influenced the jury in reaching it's verdict, by vouching that window was transparent, infering that you could see right into the house, meeting the elements required for intent. This was the reason that the Trial Court used to deny the Defense motion to dismiss, misstating the fact that the curtain was "transparent", when the evidence cleary showed that it could not be seen through from the outside. It was an abuse of discretion to base the denial of the Defense motion on evidence created out of thin air by the State and not anywhere in the record or facts testified to at trial. The State did not bring in the curtain as evidence for the jury to test because that would be detrimental to the State's case and ability to get away with this travesty of justice that was allowed in their favor. When the defendant's intent is inferred from the evidence, the inference must be logical and probable. State v. McPherson, 111 Wn.App. 747, 759, 46 P.3d 284 (2002)(quoting State v. Compos, 100 Wn.App.218, 224, 998 P.2d 893 (2000)). This is not the case here as the evidence before the Court clearly proves opposite what the State and the Trial Court both say is evidence of intent. This was illlogical, and hence, constitutional error. This wrong fact relieved the State of it's burden. The Due Process Clause of the Fourteenth Amendment protects a defendant in a [state] criminal case against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Jackson v. Virginia, 443 U.S. 307, 315 (1979).

ADDITIONAL GROUND 14

**The Trial Court abused it's discretion not suppressing highly prejudicial gang evidence that was clearly more prjudicial than probative on the fact that there is a boundry line drawn in the city of Yakima that denotes half of the city belongs to one gang, and the other half of the city belongs to it's rival gang, and when anyone crosses that line wearing the color clothing of the rival gang, that is proof enough to let any gang evidence in.**

Everyone at the 316 Cherry Avenue address said it was not a gang house, or that anyone there was gang anything. **VRP 452-54, 505, 552.** The State eluded to any crime committed on one side of the railroad tracks, was committed against the other side by a rival gang. The State elicited opinion testimony from it's police witness that was only basing an opinion. The Trial Court issued it's ruling, "There was testimony that this was done on behalf of Mr. Duncan moving into another territory. That would be sufficient as far as the Court's concerned to show motive." **VRP 844.** Speculation by police after the fact is not evidence the Court can rely on to make this determination. In closing the State inflamed the jury with this prejudicial gang evidence, "They go to the opposing gang, and shoot up their neighborhood. He has motive." **VRP 939.** On review of the denial of a motion to suppress, this Court must determine "whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." State v. Diluzio, 162 Wn.App.

585 (2011) (quoting State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009)). Substantial evidence is the "quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true." Clayton v. Wilson, 168 Wn.2d 57, 63, 227 P.3d 278 (2010). The Trial Court here based it's decision on clearly on untenable grounds or untenable reasons. It was error to admit prejudicial evidence in it's entirety without having personally evaluating the evidence. United States v. Curtin, 489 F.3d 935 (9th Cir. 2007). Gang evidence is always considered prejudicial.

ADDITIONAL GROUND 15

**The Trial Court was not fair and impartial. The outcome of the trial was a conviction caused by judicial bias. The Petitioner's conviction as a result of the Trial Court's bias is reverseable error as it violated the right to a fair trial.**

The Trial Court was biased from the start to the finish. All of the previous facts cited to the record in this Statement of Additional Grounds are reasserted here in this ground as factual. Allowing six undisclosed witnesses for the State to testify after trial started was multiple bias that does not go away. The late admission of State evidence was also unfair to the Defense by not having an opportunity to investigate. Refusing to grant any kind of hearing regarding security prejudiced the Petitioner. **VRP 943.**

The judge allowed leading questions and the State to testify for the witness. Proof of bias is what the Trial Court said in a very disparaging way to Defense counsel, "That's enough." **VRP 639.** The biggest proof is what the Trial Court told the Petitioner's own mother, "The answer to the gang problem was giving gang members large sentences." Ninety-six years to a twenty year old kid is more than cold blooded murderers get and shows the Trial Court's disparity in sentencing. Denying the motions to dismiss on the elements of intent for all counts of assualt of those not in the room or area shot was prejudice. **VRP 800.** Ruling against common sense, and the actual factual evidence in the majority of rulings was bias and denied a fair trial. Liteky v. United States, 510 U.S. 540 (1994); Arizona v. Fulminante, 499 U.S. 279 (1991). The law requires not only an impartial judge, but that "The judge appear to be impartial." Saldivar v. Momah, 145 Wn.App. 365, 186 P.3d 1117 (2008).

I, Chad Edward Duncan, swear under oath and the penalty of of perjury of the laws of Washington State that all facts in the STATEMENT OF ADDITIONAL GROUNDS are true and correct to the best of my knowledge.

DATED: June 28, 2012. SIGNED: Chad Edward Duncan
Chad Edward Duncan, Pro se.

Above S.A.G. pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright, 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of the law and does not have to be verified by Notary Public.