In the Court of Appeals
For Division I

Keith Blair, Appellant, vs. State of washington, Appellees.	Statement of Additional Grounds Pursuant to R.A.P. 10.10 Case # COA 68971-1-I

I. Facts

The Appellant now comes forth to present additional grounds along with case-law and exhibits to show why this now filed motion has merit and these (5) Five additional grounds shows how the defendant had not received a fair trial and why these issues brings that forth herein.

II. Argument
(Ground 1)

Did the Courts allow this Defendants rights to his private affairs become violated?

Constitutional privacy rights are personal rights that cannot be vicariously asserted. State v. Francisco, 107 wn. App. 247, 252, 26 P.3d. 1008 (2001) (Citing State v. Foulkes, 63 wn. App. 643, 647, 821 P.2d. 77 (1991), whether a particular defendant is entitled to challenge a warrant is sometimes characterized as whether the party has standing to qualify for Fourth Amendment protection. *Francisco, 107 wn. App. at 252*. But for a better analysis forthrightly focuses on the extent of a particular defendants rights under the fourth Amendment rather than on any theoretically seperate, but invaribly intertwined concept of standing. *Rakas v. Illinois, 439 u.s. 128, 139, 99. S.ct. 421, 58 L. Ed. 2d. 387 (1978)*.

In this case it is observed that the officers in question had went to a storage

unit "without a warrant" and had asked the employee to show the written agreement that had all vital information, Drivers license, Date of birth, Social security, ect that was placed on the contract. 2 RP. 8-10, 39-42.

Article 1 §7, of the washington Constitution requires that no person shall be disturbed in his private Affairs without authority of Law. The interpretation of Article 1 §7 involves a two-part analysis. The court begins by determining whether the action complained of constitutes a disturbance of ones private affairs. 2 RP 2-8, 39-42.

The private affairs inquiry focuses on those privacy interests which citizens of this State have held, and Should be entitled to hold, safe from governmental trespass absent a warrant (see): State v. Young, 123 wn. 2d. 173, 181, 867 P.2d. 593 (1994) (quoting State v. Myrick, 102 wn. 2d. 506, 511, 688 P.2d. 157 (1984)).

Courts have ruled that Banking Records are private and then on further to State that long distance phone records are also considered private affairs. State v. Gunwall, 106 wn. 2d. 54, 720 P.2d. 808 (1986). Not only was it based on the information but they also stated

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that these records "<u>did not lose</u>" their privacy interest merely because the phone company, and perhaps some employees had access to the records. That a contractual or business relationship existed with the phone company did not alter a persons expectation of privacy into an assumed risk of disclosure. <u>Id</u> <u>(See also) Gunwall, 106 wn. 2d. at 67 (quoting People v. Sporleder, 666 P.2d. 135, 141 (Colo. 1983))</u>.

The State had tried to cite a new case that was decided called <u>State v. Hathaway</u> on this very issue but what the State "<u>did not</u>" clarify and tried to deceive the court which the court and the attorney of record should have stated is that in that very case the defendant had voluntarily given over the information for review which is the complete opposite here. <u>2 RP 24-25</u>.

Looking at Article 1 § 7, the courts said in the context of Search & Seizure cases there is no need to consider whether to apply an independent State constitutional analysis in a

new context. State v. McKinney, 148 wn. 2d. 20, 26, 60 P.3d. 46 (2002). The only relevant question here is whether Article 1 §7 affords enhanced protection in the particular context. McKinney, 148 wn. 2d. at 26.

There are numerous other ways to look at when you consider that this has been considered governmental intrusion which does constitute a violation of an individuals private affairs under Article 1 §7. (see): State v. Simpson, 95 wash. 2d. 170, 194, 622 P.2d. 1199 (1980) (Privacy interests found in Jail property box which could not be searched without probable cause. State v. Houser, 95 wash. 2d. 143, 156, 622 P.2d. 1218 (1980) (absent manifest necessity, police officers barred from searching the locked trunk of an impounded vehicle in the course of an inventory search) State v. Stroud, 106 wash. 2d. 144, 153, 720 P.2d. 436 (1986) (reasonable expectation of privacy exists in a Locked Container in a vehicle) Seattle v. Mesiani, 110 wash. 2d. 454, 458, 755 P.2d. 775 (1988) (stopping all vehicles at mandatory checkpoints to check whether drivers were intoxicated constituted unreasonable intrusion into a persons private affairs).

When the police violate the private affairs it then opens the door to the Fourth Amendment protection and is now like a warrantless search and the courts then have to review. 2 RP (see also) United States V. Poyck, 77 F. 3d. 285, 290 (9th Cir. 1996)

Probable Cause is hardly a new concept (see): U.S. Const. Amend. IV (the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches & seizures, shall not be violated, and no warrants shall issue, but upon probable cause).

The Supreme court has "emphasized" that probable cause "demands factual specificity" and must be Judged accordingly to an objective standard. Terry V. Ohio, 392 U.S. at 21-22 n.18. Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more than "inarticulate hunches," a result this court has consistently refused to sanction. Id at 22.

As it is seen by what all is said and what was found out about the errors there was no constitutional right for the State and police to violate the private affairs here in this case. 2 RP 41-42.

The supreme court has made it clear that "hunches" are insufficient to establish a probable cause or even reasonable suspicion. 2 RP 30-32. (see) United States v. Wardlow, 528 U.S. 119, 123-24 (2000).

No Amount of probable cause can justify a warrantless search or seizure absent "exigent Circumstances." Horton v. California, 496 U.S. 128, 137 n.7 (1990). (see also): LaLonde v. County of Riverside, 204 F.3d. 947, 954 (9th Cir. 2000).

It is very clear that upon the actions of the police violating the "private affairs" had played into the event of a search warrant that is invalid and all evidence should be suppressed. Wong Sun v. United States, supra (fruit of the poisoness tree).

(Ground 2)

Was the Search warrant for the Storage Unit valid on it's face?

Under the United States Constitution a search warrant is invalid unless it is supported by probable Cause. U.S. Const. Amend. IV. Article 1, § 7, of the washington Constitution provides that no person shall be disturbed in his private affairs, or his name invaded, without authority of Law. (see): Aguilar V. Texas, 378 U.S. 108, 12 L. Ed. 2d. 723, 84 S. Ct. 1509 (1964), Spinelli V. U.S., 393 U.S. 410, 21 L. Ed. 2d. 637, 89 S. Ct. 584 (1969).

A search warrant application must state the underlying facts and circumstances on which it is based. State V. Thein, 138 wash. 2d. 133, 140, 977 P. 2d. 582 (1999) (Citing State V. Smith, 93 wash. 2d. 329, 352, 610 P. 2d. 869 (1980), State V. Helmka, 86 wash. 2d. 91, 92-93, 542 P. 2d. 115 (1975). Probable cause exists if the affidavit supporting the warrant presents facts sufficient for the issuing magistrate to reasonably infer that criminal activity is occuring or that contraband exists at the Place to be searched. (see): In re Yim, 139 wash. 2d. 581, 594, 989 P. 2d. 512 (1999) (Citing State V. Cole, 128 wash. 2d. 262, 268, 906 P. 2d. 925 (1995), Thein, 138 wash. 2d. at 140, 977 P. 2d. 582.

An officers unsupported conclusions or speculations are not enough (see): 2 RP at 14, 15, 16, 17, 30, 31 and 32.

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Thein, 138 wash. 2d. at 145-46, 977 P.2d. 582, State V. Anderson, 105 wash. App. 223, 229, 19 P.3d. 1094 (2001) State V. Hauser, 19 wash. App. 506, 509, 576 P.2d. 420 (1978). But an issuing magistrate may draw reasonable inferences from the surrounding circumstances. Anderson, 105 wash. App. at 229, 19 P.3d. 1094 (citing State V. Garcia, 63 wash. App. 868, 873, 824 P.2d. 1220 (1992)).

Whether facts set out in an affidavit are sufficient to conclude that Probable Cause exists is a question of law, thus, the court will review de novo. 2 RP (see): In re Detention of Petersen V. State, 145 wash. 2d. 789, 799-800, 42 P.3d. 952 (2002).

This defendant comes forth to state that there are false and tainted evidence in the affidavit for search warrant.

In "Exhibit A", Page 2 of 7, the last paragraph and Pg. 3 of 7, the first Paragraph is information that was suppressed in a previous search warrant.

In "Exhibit B", Page 4 of 7, Detective Coblantz had stated that he had probable cause to arrest due to the victim had identified the defendant at a burglary through a photo montage, which is false because the fact is the victim stated he could not identify the defendant in a photo montage

Finally, the officers try to make the co-defendant credible when it clearly shows at trial she wasn't. (see): 6 RP at 97, 181, 183, 191, 193, 194, 195. In "Exhibit C", Pg. 5 of 7, the Fourth Paragraph Detective Grose did an interview

of Co-defendant Johnson, in which he states that during the interview (Johnson) stated that she thought "Blair" (defendant) had the only key for the unit and then states that he told his wife to move the property after he was arrested (1) How would she know of this conversation, and (2) How could his wife do it without a key?

Then she states that she heard the defendant and his wife arguing because his wife moved the property without his knowledge to a storage unit. Well that is a contradiction of the facts here. Then we must also realize that no date is ever placed of when all this information was ever found out by the informant.

What are we as citizens suppose to do in situations such as here pick the one that best fits the officers needs, or just simply allow the officer violate our rights by stating statements that he or she feels will justify a warrant no matter how untruthful in the information there is as long as we get a conviction of the person we want and allow another lie to get out of the situation at hand or is it that the officer is being untruthful. Napue V. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L. Ed. 2d. 1217 (1959), United States V. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed. 2d. 342 (1976), Giglio V. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed. 2d. 104 (1972).

That is something that is at question here. One thing is proven here the statements are false and some information was tainted and should not have been used such as items that were already found. 2 RP 14-17 (see) Franks V. Deleware, 438 U.S. 154, 57 L.Ed. 2d. 667, 98 S.Ct. 2674 (1978).

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Though an affidavit may be facially sufficient to Justify a warrant, a defendant may challenge the affidavit for false Statements. Franks V. Deleware, supra, State V. Larson, 26 wn. App. 564, 613 P.2d. 542 (1980) 2 RP.

The defendant must show the affidavit contains intentional or deliberate falsehoods, negligent or innocent mistakes are not enough which does not apply here. (see): Franks V. Deleware, supra, State V. Larson, supra, State V. Frye, 26 wn. App. 276, 613 P.2d. 152 (1980).

The officer states that a victim identified the defendant in a photomontage (Exhibit B). The State might try to argue that this is not intentional or [illegible] a reckless falsehood as required by Franks. But this could be further from the truth 8RP53.

The word of identified as used in the affidavit conveys to the reader the message that the victim personally saw the defendant do this crime and that this officer observed the victim identify the defendant in a photomontage. State V. Payne, 25 Ariz. App. 454, 544 P.2d. 671 (1976).

The remedy for such a misstatement as mandated by Franks and State V. Sweet, 23 wn. App. 97, 596 P.2d. 1080 (1979) is to excise the offending language and if the remaining information does not show probable cause, the evidence seized "must" be suppressed.

Conclusory Statements alone are not acceptable. The magistrate must be informed of some of the underlying circumstances supporting the affiants

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conclusions. United States v. Ventresca, 380 U.S. 102, 13 L. Ed. 2d. 684, 85 S. Ct. 741 (1965)

Further, in reviewing the validity of any warrant, the courts may only consider only the information before the magistrate at the time the warrant was issued. Seattle v. Leach, 29 Wn. App. 81, 627 P. 2d. 159 (1981) Aguilar v. Texas, 378 U.S. 109, n.1, 12 L. Ed. 2d. 723, 84 S. Ct. 1509 (1964), Giordenello v. United States, 357 U.S. 480, 484 n.2, 2 L. Ed. 2d. 1503, 1509, 78 S. Ct. 1245 (1958).

On occasion, such as this, an instance of deliberate falsity will be exposed and confirmed without a special inquiry either at trial, United States ex rel. Petillo v. New Jersey, 400 F. Supp. 1152, 1171-72 (N.J. 1975) vacated and remanded by order sub nom. Albanese v. Yeager, 541 F. 2d. 275 (CA3 1976), or at a hearing on the sufficiency of the affidavit, C.f. United States v. Upshaw, 448 F. 2d. 1218, 1221-22 (CA5 1971), cert. denied, 405 U.S. 934 (1972)

The Washington courts have consistently held that misstatements or omissions in affidavits supporting search warrants may only affect a warrants validity if they are (1) material, and (2) made deliberately or recklessly. State v. O'Connor, 39 Wn. App. 113, 116-17, 692 P. 2d. 208 (1984), review denied, 103 Wn. 2d. 1022 (1985)

Recklessness is shown where the affiant in fact entertained serious doubts as to the truth of facts or statements in the affidavit. Serious doubts can be shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accur-

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acy of his reports. O'connor, at 117. (see) Exhibits Attached.

Furthermore, as observed in State v. Hashman, 46 wn. App. 211, 217, 729 P.2d. 651 (1986), review denied, 108 wn. 2d. 1021 (1987):

If a defendant claims that a knowingly and intentionally false statement, or one made with reckless disregard for the truth, was included by the affiant in the warrant affidavit, the defendant must establish his allegations by a preponderance of the evidence. (see exhibits).

Then we have an issue of the State and law enforcement using evidence of already suppressed search warrants show a flagrant disregard of the defendants constitutional rights as an American Citizen (see exhibit A).

when evidence is suppressed due to its illegality it doesn't mean that the State can turn around and use it to make another search warrant proper in its fact to establish probable cause. (see) State v. Armenta, 948 P.2d. 1280, 134 wash. 2d. 1 (wash. 1997), washington v. morgan, 32 wash. App. 764, 560 P.2d. 228, (1982) (reversed due to affidavit was tainted with suppressed evidence)

The court now has to establish after seeing all the tainted evidence if the affidavit should still establish probable cause. State v. Ludvick, 40 wn. App. 257, 264, 698 P.2d. 1064 (1985).

In "exhibit C" the informant makes statements but they contradict themselves, it almost as if they are coerced. 6 RP 97.

It seems as if she can't make up her mind what story will work better in order to take the guilt away from her and which lie sounds more truthful. 6 RP at 183, 188, 190-91, 193-95. (see also) State v. Myszkowski, 111 wash. App. 1005 (Div. 3 2002) (C.I. was not credible).

The investigating officers went out of their way to use anything to establish probable cause. To establish probable cause to search, a supporting affidavit must contain facts from which an ordinary, prudent person could conclude that a crime has occurred and that there is evidence of the crime at the location to be searched and without all the false omissions and suppressed evidence this warrants lacks that. State v. Cole, 128 wn. 2d. 262, 286, 906 P.2d. 925 (1995); State v. Perez, 92 wn. App. 1, 4, 963 P.2d. 881 (1998), review denied, 137 wn. 2d. 1035 (1999). A bare suspicion such as here of criminal activity is insufficient. State v. Terrovona, 105 wn. 2d. 632, 643, 716 P.2d. 295 (1986).

It is also obvious that the Search warrant was used as a general warrant and was too overbroad. 2 RP 19, 31, 32, 43-44.

Three factors are relevant to determine whether a warrant is overbroad:

(1) whether Probable Cause exists to seize all items of a particular type described in the warrant,

(2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and

(3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. (see exhibits) (see also); State V. Higgins, 147 P.3d. 649, 136 wash. App. 87 (wash. App. Div. 2 2006); United-States V. Mann, 389 F.3d. 869, 878 (9th cir. 2004) (quoting United States v. Spilotro, 800 F.2d. 959, 963 (9th cir. 1986).

Further, it is only the probability of criminal activity and not a prima facie showing of it which governs the standard of probable cause. State V. Seagull, 95 wn.2d. 898, 907, 632 P.2d. 44 (1981); State V. Fosie, 134 wash. App. 1009 (Div. 2 2006); State V. David C. Diskjose, NO. 39160-1-II (Div. II 2011); State V. Barnes, NO. 21361-3-III (Div. III 1998); State V. Sherman, 157 wash. App. 1050 (Div. III 2010).

The issuance of a search warrant is a matter of Judicial discretion and the courts accord great deference to a magistrates determination of Probable Cause. That deference is not boundless as the courts will not defer to the magistrates decision if the information in the affidavit is insufficient to establish probable cause such as here. State V. Murray, 110 wn.2d. 706, 709-10, 757 P.2d. 487 (1988), Cole, 128 wn. 2d. at 286, State V. Young, 123 wn.2d. 173, 195, 867 P.2d. 593 (1994); Seagull, Supra, Perez, 92 wn. App. at 4. (Illegal Evidence will be excluded). Wongsun V. United States, 371 U.S. at 471 (1963) (see exhibits).

The informant in this case was not even completely reliable when testifying at trial and it also was not what was stated in the search warrant. Had the officers re-

corded the interview then we could see if this whole action was coerced. 6RP 76, 77, 97, 188, 190-91, 193-95.

Affidavits in support of search warrants shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The affiant must testify to facts based on personal knowledge. Grimwood v. University of Puget Sound, Inc., 110 Wn. 2d. 355, 359, 753 P.2d. 517 (1988).

A "fact" is a reality rather than supposition or opinion. Grimwood, supra at 359. A trial court does not abuse its discretion by excluding a declaration containing legal conclusions. King County Fire Protection Dist. No. 16, No. 36, and No. 40 v. Housing Authority of King County, 123 Wn. 2d. 819, 826, 872 P.2d. 516 (1994).

Courts have also on previous occasions admonished the State for affidavits similar to the generic boiler plate computer-generated affidavit. State v. Klinger, 96 Wn. App. 619, 627 n.3, 980 P.2d. 282 (1999).

In closing, we re-examine the issue of "Exhibit A" and the fact that it was previousally suppressed evidence in a previous search warrant and the law is very clear here.

Where evidence is obtained as a direct result of an unconstitutional search, that evidence must also be excluded as fruit as the poisoness tree. Wongsun, supra.

Information contained in an affidavit of probable cause for a search warrant was obtained by an unconstitutional search, that information "may not" be used to

support the warrant. State v. Ross, 141 Wn.2d. 304, 311-12, 4 P.3d. 130 (2000).

The Court must view the warrant without the illegally gathered information to determine if the remaining facts present probable cause to support the search warrant. Id at 314-15.

If the warrant, viewed in this light, fails for lack of Probable Cause, the evidence seized pursuant to that warrant must also be excluded. Id at 315.

Derivative evidence will be excluded unless it was not obtained by exploitation of the initial illegality or by means sufficiency distinguishable to be purged of the primary taint. To prove that the evidence was purged of taint, the "State" must show either that (1) intervening circumstances have attenuated the link between the illegality and the evidence (2) the evidence was discovered through a source independent from the illegality, or (3) the evidence would inevitably have been discovered through legitimate means. State v. Tan Le, 103 Wn. App. 354, 360-61, 12 P.3d. 653 (2000).

Factors to be considered in determining whether intervening circumstances attenuated the link between the original illegality and the evidence are (1) temporal proximity (2) the presence of intervening circumstances, and (3) the Purpose and flagrancy of the official misconduct. Id at 362. (see also): Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d. 416 (1975).

Failure to suppress evidence obtained in violation of a defendants "Fourth Amendment Rights" is constitutional

error and is presumed to be prejudicial. Tan Le, Supra at 103 Wn. App. at 367. The State bears the burden of demonstrating the error is harmless Id. Constitutional error is harmless only if the State shows beyond a reasonable doubt that any reasonable Jury would have reached the same result without the error and that could not have occurred here. State V. Brown, 147 Wn.2d. 330, 341, 58 P.3d. 889 (2002), State V. McReynolds, NO's. 20863-0-III, 20887-7-III, 21222-0-III, 21240-8-III (Div. III 2003).

Evidence that is the product of an unlawful search or seizure is not admissible. mapp. V. ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d. 1081 (1961).

The courts follow the exclusionary rule, which recently, the Supreme Court succinctly reaffirmed that proposition in State V. Kinzy, 141 Wn.2d. 373, 5 P.3d. 668 (2000), cert. denied, 531 U.S. 1104 (2001), stating:

when an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes "Fruit of the Poisoness Tree" and must be suppressed. Kinzy, 141 Wn.2d. at 393 (quoting State V. Ladson, 138 Wn.2d. 343, 359, 979 P.2d. 833 (1999)).

Taking all of this into account there was a lack of nexus to search the storage unit. State V. Dalton, 73 Wn. App. 132, 140, 868 P.2d. 873 (1994) (see also) Commonwealth V. Kline, 335 A.2d. 361, 364 (Pa. 1975); State V. Globe, 88 Wn. App. at 512

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(Ground 3)

Did the Prosecutors Actions Invoke an unfair Trial here?

The courts hold that the Brecht Harmless error test standard applies when there has been a failure to engage in the "Close Appellate Scrutiny" required when a State appellate court engages in a walton analysis. Under Brecht, an error is "not harmless" if it has a substantial and injurious effect or influence in determining the Jury's verdict. Brecht V. Abrahamson, 507 U.S. at 637, 113 S.Ct. 1710 (quoting Kotteakos V. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

The State, rather than the defendant, bears the "risk of doubt" in their harmless-error analysis (see): O'neal V. McAninch, 513 U.S. 432, 439, 115 S.Ct. 992, 130 L.Ed. 2d. 947 (1995).

Thus, the State must provide the court with a "fair assurance" that there was no substantial and injurious effect on the verdict. Gray V. Klauser, 282 F.3d. 633, 651 (9th cir. 2002); United States V. Hitt, 981 F.2d. 422, 425 (9th cir. 1992) (see also) O'neal, 513 U.S. at 443, 115 S.Ct. 992 (the State normally bears responsibility for the error that infected the initial trial) Payton V. Woodford, 299 F.3d. 815, 828 (9th cir. 2002)

(only if the State has persuaded the court that there was no substantial and injurious effect on the verdict do the courts find the error harmless).

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. 2 RP 25, 31, 3 RP 17, 4 RP 11, 5 RP 22-23, 25, 6 RP 97, 181, 183, 195, 7 RP 34-35, 40, 42, 150-151, 8 RP 135, 185, 196, 9 RP 63-66, 97-98.

It is prosecutorial misconduct to elicit a witnesses opinion as to whether another witness is telling the truth 6 RP (see): State v. Jerrels, 83 wn. App. 503, 507, 925 P.2d. 209 (1996), State v. walden, 69 wn. App. 183, 185-86, 847 P.2d. 956 (1993). Such questioning invades the province of the Jury and is unfair and misleading. Jerrels, 83 wn. App. at 507.

There were numerous times that the prosecutor had enacted leading questions in a direct examination. 5 RP 22-23, 25, 7 RP 33, 34-35, 42, 150 151-152, 8 RP 135, 196.

The confrontation clause of the Sixth Amendment to the United States Constitution guarantees a criminal defendant the Right to cross-examine adverse witnesses. State v. clark, 139 wn. 2d. 152, 157-58, 985 P.2d. 377 (1999). And ER 611(c) permits the use of leading questions in cross-examination of a witness. By Highlighting the defendants exercise of a constitutional right and thereby sug-

gesting that the Jury draw a negative inference from the exercise of that right, the State may chill the defendants exercise of his rights. see e.g., U.S. V. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 20 L.Ed.2d. 138 (1968); Griffin V. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d. 106 (1965); State V. Mace, 97 Wn.2d. 840, 844, 650 P.2d. 217 (1982). Thus, such conduct may violate the defendants right to due Process. (See) Jackson, 390 U.S. at 581; State V. Belgrade, 110 Wn.2d. 504, 512, 755 P.2d. 174 (1988).

A leading question is one that suggests the answer desired. State V. Scott, 20 Wn.2d. 696, 698, 149 P.2d. 152 (1944). ER 611(c) provides that leading questions should not be used during direct examination except as may be necessary to develop the witnesses testimony. Although the asking of leading questions is generally not reversible error, the persistent pursuit of such a course of action is a factor to be added in the balance such as here. State V. Torres, 16 Wn.App. 254, 258, 554 P.2d. 1069 (1976).

Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. State V. McKenzie, 157 Wash.2d. 44, 52, 134 P.3d. 221 (2006).

The courts should review a prosecutor comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the Jury instructions. 3 RP 17, 5 RP 22-25, 6 RP 97, 181-83, 193-95, 7 RP 33-35, 40, 42, 65, 150-152, 8 RP 135, 185, 196, 9 RP 63-66. (See): State V. Dhaliwal, 150 Wash.2d. 559, 578, 79 P.3d. 432 (2003).

Defense counsel had objected at one such flagrant and ill-intentioned misconduct that even the Judge had admitted there was no curative instruction. 7 RP 65 (see also): Fisher, 165 wash. 2d at 747, 202 P.3d. 937 (quoting State v. Gregory, 158 wash. 2d. 759, 841, 147 P.3d. 1201 (2006)).

The defendant Just wants to highlight this issue due to Appellate counsel argued this issue. Washington Law recognizes that a prosecutor has a special duty in trial to act impartially in the "interests of Justice" and not as a heated partisan. Washington v. Stith, 71 wash. App. 14, 856 P.2d. 415 (1993); State v. Reed, 102 wash. 2d. 140, 684 P.2d. 699 (1984) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899).

A mistrial is appropiate if the court believes the harm cannot be corrected with curative instructions. Kimball, 89 wn. App. at 178 (quoting WA. Water Power Co. v. Douglas, 105 wash. App. 1054 (Div. 3 2001).

A new trial is appropiate only where the misconduct is so flagrant that no instruction can cure it. State v. Copeland, 130 wash. 2d. 244, 284, 922 P.2d. 1304 (1996), State v. Sourez-Bravo, 72 wn. App. 359, 366-67, 864 P.2d. 426 (1994); and reversal occurs where the court erronously admitted testimony. 2 RP (Recorded Telephone Calls) State v. Stafford, No 40156-8-II (Div. II 2011).

There are numerous cases that have been reversed due to a violation of a motion in Limine.

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Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d. 1488, 1500 (9th Cir. 1986), Palmerin v. City of Riverside, 794 F.2d. 1409, 1413 (9th Cir. 1986), United States v. Lui, 941 F.2d. 844, 846 (9th Cir. 1991); Lasar v. Ford Motor Co., No. 03-35093 (9th Cir. 2005); U.S. v. Avery, 295 F.3d. 1158, 1181 (10th Cir. 2002), Zambrano v. City of Tustin, 885 F.2d. at 1475 n.4 (9th Cir.) Pullman v. Land O'Lakes, Inc., 262 F.3d. 759, 762 (8th Cir. 2001), U.S. v. Vincent, 758 F.2d. 379, 380 (9th Cir. 1985) (Citing U.S. v. Gann, 732 F.2d. 714, 725 (9th Cir.), cert. denied, 469 U.S. 1034, 83 L.Ed.2d. 379 (1984) (Citing Escalante, 637 F.2d. at 1202).

Again, the prosecuting attorneys duty is to see that an accused receives a fair trial. (see): State v. Charlton, 90 Wash.2d. 657, 664-65, 585 P.2d. 142 (1978); State v. Rose, 62 Wash.2d. 309, 312, 382 P.2d. 513 (1963); State v. Reeder, 46 Wash.2d. 888, 892, 285 P.2d. 884 (1955).

The prosecutor, in the interests of Justice must act impartially, seeking a verdict free of prejudice and based on reason. State v. Charton, supra, State v. Huson, 73 Wash.2d. 660, 663, 440 P.2d. 192 (1968), cert. denied, 393 U.S. 1096 (1967)

In Charlton it Stated:

In spite of our frequent warnings that prejudicial prosecutorial tactics will not be permitted the courts still find that some prosecutors continue to use improper, sometimes prejudicial means in

an effort to obtain convictions. In most of these instances, competent evidence fully sustains a conviction. Thus, the courts are hard pressed to imagine what, if anything, such prosecutors hope to gain by the introduction of unfair and improper tactics. It has been thoughtfully observed that if prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means. State v. Torres, 16 wash. App. 254, 263, 554 P.2d. 1069 (1976). (see also): Morton v. Tug "Ironworker" 811 F.2d. 946, 948 (5th cir. 1987), Blevins v. Cessna Aircraft Co. 728 F.2d. 1576, 1579 (10th cir. 1984), Illinois Terminal R.R. v. Friedman, 208 F.2d. 675, 680 (8th cir. 1954) Thomas v. Hubbard, 273 F.3d. 1164 (9th cir. 2001), U.S. v. Wood, 943 F.2d. 1048, 1054 (9th cir. 1991), U.S. v. Gene Camp, 58 F.3d. 941 (9th cir. 1995), State v. Weber, 99 wash. 2d. 158, 164-65, 659 P.2d. 1102 (1983), U.S. v. Walters, No. 08-30222 (9th cir. 2010); State v. Reed, 102 wn. 2d. 140, 145, 684 P.2d. 669 (1984).

Curative steps should be taken immediately following a proper defense objection, (see): U.S. v. Solivan, 937 F.2d. 1146, 1156 (6th cir. 1991), and this did not occur after the proper objection by counsel.

In closing, It has been clearly established since atleast 1935, that the law of the United States that a conviction obtained through testimony the

(P.m.)(6)

Prosecutor Knows to be false is repugnant to the constitution (see): Mooney v. Holohan, 294 u.s. 103, 112, 55 S.ct. 340, 79 L.Ed. 791 (1935). 6RP 97, 191

This is so because in order to reduce the danger of false convictions, the courts rely on the prosecutor not to be simply a party in litigation whose sole object is the conviction of the defendant before him. The prosecutor is an officer of the court whose duty is to present a forceful and truthful case to the Jury, not to win at any cost. 6RP 193-95, 7RP 33-35, 40-42, 65-67, 150-52, 8RP 135, 185, 196, 9RP 63-66, 97-98 (see): e.g. Jenkins v. Artuz, 294 F.3d. 284, 296 n.2 (2d. Cir. 2002) (seek Justice).

In Shih Wei Su v. Fillon, 335 F.3d. 119, 126 (2d. Cir. 2003), the supreme court holdings have long established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. Napue v. Illinois, 360 u.s. 264, 269, 79 s.ct. 1173, 3 L.Ed. 2d. 1217 (1959), (see also): united States v. Agurs, 427 u.s. 97, 103, 96 S.ct. 2392, 49 L.Ed.2d. 342 (1976), Giglio v. united States, 405 u.s. 150, 153, 92 S.ct. 763, 31 L.Ed.2d. 104 (1972).

It is obvious that the actions of the prosecutor here was to reduce the States burden to prove guilt and undermine the defendants due process Rights. (see): State v. Johnson, 158 wash. App. at 685-86, 243 P.3d. 936 (2010) (quoting State v. Bennett, 161 wash.2d. 303, 315, 165 P.3d. 1241 (2007) Anderson, 153 wash. App. at 432, 220 P.3d. 1273, venegas, 155 wash. App. at 526-27, 228 P.3d. 813 (2010)

(Ground 4)

Did the Defendant ever receive Ineffective Assistance of Counsel throughout any Phase of this case?

we must first State that the most critical error that occurred was that the Search warrant for the Storage unit had numerous flaws that the attorney of record should have known about (see exhibits).

These issues were never raised at the Trial Stages and generally an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. R.A.P. 2.5(a)(3), and due to this applys to a defective warrant this applys. *Franks V. Deleware.*

The appellant must show actual prejudice in order to establish that the error is manifest. State V. Munguia, 107 wn. App. 328, 340, 26 P.3d. 1017 (2001) (citing State V. McFarland, 127 wn. 2d. 322, 333, 899 P.2d. 1251 (1995)) review denied, 145 wn. 2d. 1023 (2002); under both the Washington and United States Constitut-ions, a criminal defendant is entitled to effective assistance of Counsel at critical Stages in the litigation. 2 RP (see): State V. Heddrick, 166 wn. 2d. 898, 909-10, 215 P.3d. 201 (2009) (citing U.S. const. Amend VI; wash. Const.

Art. 1 § 22. State v. Everybodytalksabout, 161 Wn. 2d. 702, 708, 166 P.3d. 693 (2007).

Effective Assistance of Counsel is guaranteed under the Federal and State Constitutions. (see): United States Constitution Amendment VI; Washington Constitution Article 1 § 22. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984).

To establish ineffective assistance of counsel the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. 7RP 93, 8RP 125-27, 9RP 63-66, 97-98. (see also): State v. Thomas, 109 Wn. 2d. 222, 225-26, 743 P.2d. 816 (1987). State v. Turner, 143 Wn. 2d. 715, 730, 23 P. 3d. 499 (2001).

Counsels performance is deficient if it falls below an objective standard of reasonableness. State v. McNeal, 145 Wn. 2d. 352, 362, 37 P.3d. 280 (2002); State v. Stenson, 132 Wn. 2d. 668, 705, 940 P.2d. 1239 (1997).

Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. 2RP; (see): Attached exhibits. (see also): In re Personal Restraint of Pirtle, 136 Wn. 2d. 467, 487, 965 P.2d. 593 (1998); Strickland, 466 U.S. at 694. the courts will review ineffective assistance De Novo. Id at 698.

A reasonable Attorneys conduct includes a

(E.A)(2)

duty to investigate the relevant law and we now state this due to the State argued a case of State v. Hathaway pertaining to the private affairs 2RP and that case had it been reviewed by counsel would have known that this person had voluntarily handed over the information during a visit at a correctional facility and does not apply here. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d. 1302 (1978) (see also) State v. Leavitt, 111 Wn. 2d. 66, 72, 758 P.2d. 982 (1988).

These errors made are so serious that counsel was not functioning as the counsel guaranteed to this defendant by the Sixth Amendment. (see), State v. Howland, 66 Wn. App. 586, 594, 832 P.2d. 1339 (1992);

And the Performance fell well below the standard of reasonableness considering all the circumstances. State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d. 991 (2006).

There was absolutely no legitimate strategic or tactical reasons behind this attorney's choices. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d. 10 (2001).

This must constitute a Sixth Amendment violation and error on the counsels part. This can constitute what is called a plain error. Plain error is (1) error, (2) that is plain, and (3) that affects substantial Rights. (see): United States v. Cotton, 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d. 860 (2002), Olano, 507 U.S. at 734, 113 S.Ct. 1770.

These errors concluded in a conviction.

(Ground 5)

Did the Trial Judge in this matter commit any misconduct?

It is apparent that there are numerous issues at hand that have been raised in this petition now and during trial such as:

(1) Invalid Search warrant;
(2) Violation of Private affairs;
(3) Prosecutorial misconduct;
(4) Violation of motion in Limine;
(5) Denial of a mistrial, and
(6) No curative instruction to the Jury.

If the court of appeals was to deny the issues raised at this time then there could only be one justification of this unfair trial and that would be Judicial misconduct.

The courts will reverse a verdict for a general misconduct only if it rendered the trial unfair. 2RP41-44, 6RP25, 7RP42, 65-67, 152 9RP63-67, 97-98, 118-19 (see): Kennedy v. Los Angeles Police Department, 901 F.2d. 702, 709 (9th cir. 1990); (see also) United States v. Singer, 710 F.2d. 431 (8th cir. 1983).

The washington State Constitution, Art. IV, section 16, provides, Judges shall not charge Juries with respect to matters of fact, nor comment thereon, but shall declare the Law. A Judge impermissibly comments on evidence when he conveys a personal attitude toward the merits of the case. 9 RP 118-119 (see): State v. Hughes, 106 wash.2d. 176, 193, 721 P.2d. 902 (1986).

The Jury must be able to infer from what the Judge said or did not say that he personally believed or disbelieved the testimony in question. 6 RP (see): State v. Browder, 61 wash.2d. 300, 302, 378 P.2d. 295 (1963) (citing State v. Reed, 56 wash.2d. 668, 354 P.2d. 935 (1960)

The record must disclose actual bias on the part of the Trial Judge or leave the reviewing court with an abiding impression that the Judges remarks and questioning projected to the Jury an appearance of advocacy or partiality. 9 RP 118-119 (see): Kennedy v. Los Angeles Police Dept., supra (quoting Shad v. Dean Witter Reynolds, Inc. 799 F.2d. 525, 531 (9th cir. 1986).

It would be hard for this court to not recognize that the trial Judge committed misconduct and allowed and assisted with the states misconduct to enter a conviction.

J.M. (2)

III. Conclusion

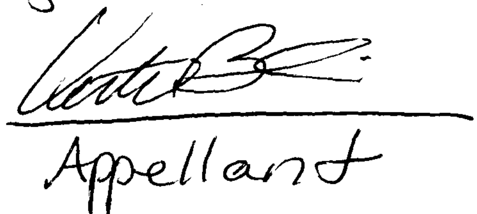
In closing, the appellant has now presented numerous issues that raise sufficient grounds for this court to order:

(1) Dismissal of all charges without a new trial due to minus all the errors there is now insufficient evidence to Present a charge or case, or

(2) Reversal of the charges with a new trial with all evidence from the Search warrant invalid and all evidence Suppressed herein.

I swear under the penalty of perjury that all statements are true to the best of my knowledge.

Dated this 3rd day of December, 2012.



Appellant

Exhibit A

On 8/28/10 victim Lynette Petrie made a burglary report with King County Sheriff's Deputy Jon Coffman. She reported that between 8/19/10 and 8/28/10 someone burglarized her home at 18250 58 Ave NE, Kenmore Washington. The suspects took gold jewelry, a computer, a purse, silverware, new clothing, cash and other items of value. She reported that the new clothing still had the tags from when she purchased them at Nordstrom. She spoke with Nordstrom Loss Prevention Officer Byron "BJ" Zante who confirmed that the clothes she purchased were returned to the store for cash and that the police would have to call to get the name of the person who returned the clothes. On 9/25/10 I contacted Zante who confirmed that the clothes stolen from Mrs. Petrie were returned to the store for cash. He was able to tell me that he checked their computers and found Mrs. Petrie's clothing was returned. He said that when a customer buys clothes a bar code sticker is placed on the tags and links the customer's credit card with the purchase. If the clothes are returned the bar code is read and is linked to the original purchase. One of the items of clothing purchased by Mrs. Petrie was returned on 8/24/10 for cash. When cash is paid out employees are required to get ID. The ID used to return the clothes was "Cherise Chamberlain" and her ID number was written down as "CHAMBCA231JZ" which is her WA license. Her address given was 16816 20 Ave W, Lynnwood WA 98057.

I did some research and found KCSO police reports that listed Chamberlain an associate of Keith Blair and Christopher Rust, who were charged with several burglaries earlier this year.

On 9/27/10 I contacted Chamberlain at her home at 14304 Jefferson Ave, Lynnwood Washington. She told me that she returned the clothes for "Keith Blair." She confirmed knowing that Blair was currently on bail for burglarizing several houses with her brother Christopher Rust, who is in prison after pleading guilty to burglary. She denied having any more property from the burglary and said that Blair probably sold the jewelry to "Ryan" a gold buyer.

I investigated and found that Keith Blair is out on bail after having been charged with Residential Burglary for several burglaries. In these cases Blair sold gold stolen from the burglaries to Ryan Youngberg, who advertises on Craigslist that he buys scrap gold.

On 9/27/10 at 2045 I met with Blair's wife, Rachel Dunham at her home. She told me that Blair was not living full time at the house and he has been staying with his girlfriend "Kelsey Johnson" at motels. She confirmed that he has been out of control burglarizing homes because of his addiction to oxycontin.

On 9/27/10 at 2130 hrs. I went to the home of Ryan Youngberg, who I have been in regular contact with. He denied buying gold from Blair but said he has bought gold from a "Kelsey" several times recently and thought she was suspicious. He takes photos of the gold seller's licenses and gave me a photo of Kelsey M. Johnson (3/3/88)'s driver's license. He said he has bought gold from her three times and provided 2 receipts for purchases. She sold him gold on 8/25/10, which is about the time of the burglary of Mrs. Petrie's home. He has since melted the gold and sent it to California. He did give me photos of gold that he still has that he purchased from Johnson.

I spoke with Snohomish County Sheriff's Detective Montgomery on 9/28/10. He confirmed that he served a search warrant on a hotel room and vehicle belonging to Blair and Johnson. He recovered

Exhibit B

property from a burglary reported to KCSO on 9/15/10 under case number 10-217147. Victims Jeffery Chrisope and his wife reported their vehicle, some jewelry, a backpack, TV, computer, and other items stolen from their home in unincorporated King County, WA. The gold jewelry, a computer, hard drives, and some other items are still missing.

Det. Montgomery also told me that on 6/3/10 his agency investigated a burglary at the home of Brian Self, 20518 Richmond Road, Bothell, Washington under case 10-10226. In that case Self came home and noticed a black Mercedes with chrome rims parked in the driveway of his house. The Mercedes was blocking the "3rd" garage door entrance. Self noticed that the driver was a female. When self went into his home he realized he had been burglarized. He called 911 and reported the vehicle that he thought was involved. Approximately 17 minutes later SCSO Deputy Carlson stopped a black Mercedes matching the description given by Self 4 miles from the crime scene. Rachel Dunham was driving and Keith Blair, her husband, was passenger. Self identified Dunham and her vehicle as having been in front of his house. Blair and the vehicle had property stolen from Self's home. Both Dunham and Blair were arrested for Burglary. A warrant on the vehicle led to the recovery of the rest of Self's stolen property.

I investigated and found that on 9/7/10 Keith Blair and Kelsey Johnson were contacted at the Cycle Barn in Lynnwood WA where they appeared to be preparing to burglarize the business. Their car was seized and a search of it later with a search warrant revealed property stolen in two burglaries. Some items were stolen on 9/6/10 in a residential burglary in unincorporated Snohomish County. Some items were stolen from a residential burglary in Shoreline WA in August 2010.

On 9/28/10 Youngberg arranged to a meet Kelsey Johnson because she wanted to sell him more gold. He arranged to meet her between 2100-2200 hrs at the Safeway at 14400 124 Ave NE, Unincorporated King County Washington. At 2100 hrs. Detectives Grose, Smith, and I saw Kelsey Johnson had arrived at the Safeway in a black 2010 Kia Rio Washington license 630ZVJ. I contacted her as she stepped out of the car to walk her dog. I identified myself. I told her that I was concerned that she and Blair were committing burglaries and selling gold to Youngberg. I asked her what she was doing in the parking lot tonight. She said meeting with a friend and denied she was meeting to sell gold. She told me that I could search her car. I told her that I knew she had been selling gold to Youngberg and asked where she got it. She said that she got it from Keith Blair. I asked where he got it. She said that she didn't ask and didn't want to know. I asked if she thought it was stolen and she said she didn't know. I explained that I was asking for consent to search the vehicle and wanted her to look at a form we had so there was no question about what we were asking. She said she didn't want to sign a consent form and told me to get a search warrant. I believed there was stolen property in the vehicle so I told her that I would apply for a warrant.

I had the vehicle transported via flatbed tow truck to Pct 2. I followed and maintained custody of it the entire time. The vehicle was parked in the secure lot at Pct 2 and sealed up.

On 10/1/10 I spoke with Detective Coblantz. He showed photos of the gold that Kelsey Johnson sold to Youngberg to burglary victim Angela Parvanta. Her home was burglarized on 9/18/10 in Shoreline under case 10-219462. In that burglary jewelry, watches, two Japanese swords, computers, and a purse were stolen. Parvanta positively identified some of the gold as jewelry stolen from her. Det. Coblantz also

Exhibit C

had probable cause to arrest Keith Blair for attempted burglary of a home in Shoreline Washington that occurred on 9/26/10. In that case Blair was on a ladder trying to gain entry to an upstairs window. The victim and witnesses picked Blair's face out of photo montages. A 2010 Kia bearing WA license 630-ZVJ was witnessed as the get-a-way car from that incident. Deputy Coblantz said that the night before I seized the vehicle from Johnson a similar vehicle described as a 4 Door black Sedan, late 90's / early 00's, Japanese make was used in a burglary in Shoreline (KCSO case # 10-226698) where oxycontin, a hand gun, valuable coins, and other items were stolen. In this case a ladder to an upstairs window was used to gain entry to the home.

On 10/3/10 the Honorable Judge D. Smith signed a search warrant for the Kia Rio WA license 630ZVJ authorizing a search for evidence of Burglary, Possession of Stolen Property, and Violation of the Uniform Controlled Substance Act.

On 10/4/10 I search the vehicle pursuant to the warrant. I opened the trunk and it contained a backpack containing: two laptop computers, several hard drives, a DVD rewriter, bail bond receipts for Keith Blair, gloves, handcuff key, Swiss watch, and a Cartier watch. Det. Coblantz later confirmed that the Cartier watch was stolen in the burglary of Angela Parvanta's home in Shoreline. I confirmed with victim Jeffery Chrisope that the DVD rewriter and several hard drives were stolen from his home.

I recovered a Gucci purse from the driver's floor that contained Johnson's license, a black flip nylon pouch with collectible coins, burnt pen tubes that appeared to be used to smoke oxycontin. The coins were later confirmed to be stolen in burglary 10-226698 that occurred in Shoreline at the home of Gary Rollins. Rollins identified the coins as some of the one's missing. He was still missing more coins.

Det. Coblantz found some burnt tinfoil from smoking oxycontin in the glovebox along with Keith Blair's Unemployment paperwork, the vehicle rental agreement with Aaron Knapp, and a Travel Lodge receipt in Knapp's name. Det. Coblantz recovered a black zipper pouch on the passenger floor that contained three watches (Swiss, Rolex, gold). He also found the ripped packaging for a gold Indian head coin. The Rolex watch was confirmed by Rollins to have been stolen from his home in the burglary.

On 10/21/10 at 1850 hrs. Keith Blair and Kelsey Johnson were arrested by deputies with the Snohomish County Sheriff's Office at the Days Inn Motel, 1602 SE Everett Mall Way, room #214, Everett, WA. SCSO Detective Dennis Montgomery applied for and was granted a search warrant for their hotel room and for their vehicle, a black Mercedes WA License 613VZQ. I assisted with the warrant services. Inside the Mercedes I found more collectible coins belonging to Rollins. I also found more dehydrated food belonging to Rollins' roommate, Patrick Murray. Det. Montgomery also recovered a receipt dated 10/13/10 from NorthLynn Self Storage at 15620 Highway 99 S, Lynnwood WA for unit C231 rented to Thida Moan.

Blair and Johnson were booked into the King County jail, where they have remained on burglary, Possession of Stolen Property, and Trafficking in Stolen Property charges.

DECLARATION OF SERVICE BY MAIL

GR 3.1

I, Keith Blair, declare and say:

That on the 3rd day of December, 2012, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. COA 68971-1-I:

Statement of Additional Grounds;

______;

______;

______.

addressed to the following:

Mafe Rajul	Nielsen Broman & Koch	Court of Appeals Div. I
King County Prosecutors office	Casey Grannis	One Union Square
516 3rd Ave Ste W554	1908 E Madison St.	600 University Street
Seattle, Wa. 98104-2362	Seattle, Wa. 98122	Seattle Wa. 98101-4170

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

DATED THIS 3rd day of December, 201__, in the City of Aberdeen, County of Grays Harbor, State of Washington.

[signature]

Signature

Keith Blair

Print Name

DOC 345896 UNIT H5-A30

STAFFORD CREEK CORRECTIONS CENTER

191 CONSTANTINE WAY

ABERDEEN WA 98520