69812-5

KING COUNTY CAUSE NO. 11-C-02230-3 KNT

COA NO. 69812-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN CLARDY, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Hollis Hill, Judge

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

KEVIN CLARDY, JR.

Appellant

KEVIN CLARDY, JR. 314747

WASHINGTON STATE PENITENTIARY

D/W-217

1313 N. 13th Avenue

WALLA WALLA, WA 99362

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON	)	
	)	
Respondent,	)	No. 69812-5-I
	)	
v.	)	STATEMENT OF ADDITIONAL
	)	GROUNDS FOR REVIEW
	)	
KEVIN CLARDY, JR.,	)	
(your name)	)	
Appellant	)	

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

Additional Ground 1

I). TESTIMONY: VARIATIONS IN STATEMENTS & TESTIMONY UNDER THE PENALTY OF PERJURY. CrR. 7.8 . . . US V. FAWLEY, 137 F3d 458. ENTITLEMENT TO FUNDAMENTALLY FAIR PROCEDURES; STATE V. LAPAGE, 231 F.3d 488, 491 (9th Cir. 2000) CONSTITUTIONAL LAW 257, 268 (9) . . . U.S.C.A. Const. Amend. 5./ FOURTEENTH AMENDMENT. IMPORTANCE OF TRUTHFUL TESTIMONY. MESABOSH V. U.S., 352 U.S. 1, 1 Led.2d 1, 77 S.Ct. 1. "STARE DECISIS."

Additional Ground 2

II). ELEMENTS: INITIATIVE 159 . . . STATE V. BERRIER, 143 Wn. App. 547, 178 P.3d 1064, (Wash. App. Div. 2 2008). FIREARM COULD NOT BE USED TO ENHANCE PUNISHMENT DUE TO NECESSARY ELEMENTS OF CRIMES; STATE V. CALDWELL (1979) 23 Wash. App. 8, 591 P.2d 849, review granted, remanded 94 Wash. 2d 614, 618 P.2d 508. U.S. V. JONES, 16 F.3d 487; 122 F.3d 487; 122 F.3d 1058. STATE V. WOMAC, 160 P.3d 40, 160 Wn.2d 643 (2007)

If there are additional grounds, a brief summary is attached to this statement. . . (To Follow)

Date: 10-23-13 Signature: Kevin Clardy

BRIEF SUMMARY ATTACHMENT OF STATEMENT OF ADDITIONAL GROUNDS:

III). EVIDENCE: CrR 8.3(b); CrR 4.7. DNA — DEFINITION OF "INCONCLUSIVE". PRESUMPTION OF INNOCENCE & GUILT / BURDEN OF THE PROSECUTION. RESOLVING ANY AMBIGUITY UNDER "THE RULE OF LENITY". CONTAMINATION OF EVIDENCE. MISSING VERBATIM. RAP 9.5

IV). IDENTIFICATION: 'GENERIC TESTIMONY'... Also refer back to: ▶ U.S. V. FAWLEY, 137 F3d 458; STATE V. LAPAGE, 231 F. 3d 488, 491 (9th Cir. 2000) CONSTITUTIONAL LAW 257, 268(9)... DUE PROCESS CLAUSE OF U.S.C.A. Const. Amend. 5. & U.S.C.A Const. Amend. 14; ALONG WITH EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATE'S CONSTITUTIONAL AMENDMENT. Also See ▶ MESAROSH V U.S., 352 U.S. 1, 1 Led. 2d 1, 77 S.Ct. 1. — LACHES DOCTRINE:—

V). PROSECUTORIAL MISCONDUCT: Refer back to ▶ CrR 7.8. PROSECUTORIAL MISREPRESENTATION & KNOWINGLY USED PERJURED TESTIMONY. DUTY OF THE PROSECUTING ATTORNEY.

DATE: 10-23-2013 SIGNATURE: Kellin Charley

Dao's Testimony:

On March 8, 2011 Anthony Dao stated upon opening the front door he saw a black man with a shotgun outside who immediately tried to break into his home. 2RP 298-300. Dao said the man tried to break in the storm door by hitting it with the butt of the shotgun, but it would not break. 2RP 302-03. Dao said he then saw the man & woman run around to the back of the house & shove the barrel of the gun through a back window. 2RP 304-05. Dao said the robbers taunted him as they ran away, even firing the shotgun at him once, & that he responded by telling them he had called police & that they were all going to jail. 2RP 319, 321.

At that point Dao abandon his foot chase & decided to try to pursue the robbers in his minivan. 2RP 289-90, 320-23. According to Dao, one of the women was the one he first encountered at his front door, & one of the men was the one with the shotgun he had seen at his house. 2RP 324-25. Dao claim that as he followed the car the man with the shotgun fired at him three to four times as they drove along. 2RP 329-31. Dao also claim that at one point the red car stopped in a neighborhood, the man with the shotgun got out, fired two (or) three shotgun blasts at him from a distance of between 30 & 60 feet, picked up the spent shotgun cartridges & then got back in the car, which sped off again. 2RP 333-36.

At trial, Dao, for the first time, identified clearly as the man he "thought" was wielding the shotgun the night

at the robbery. 2RP 301, 342, 353-54.

- Merriam-Webster's Pocket Thesaurus -

thought (syn) IDEA, concept, conception, notion, impression (rel) opinion, view, sentiment, belief, conviction, persuasion.

- Webster's New Pocket Dictionary -

thought (thôt). v. p.t. & p.p. of think. - n. 1. The act of thinking. 2. An idea. 3. Consideration; concern. 4. A trifle. - thought'ful adj. - thought'less adj.

think (thingk) v. thought (thôt), thinking. 1. To formulate in the mind. 2. To ponder. 3. To reason. 4. To believe. 5. To remember. 6. To imagine. 7. To devise (or) invent. 8. To consider. - think'er n.

Dao admitted, however, that he only got a "glimpse" of the man with the shotgun at his front door, & that the man he saw with the shotgun in the back of the car was only "possibly" the same man he had seen at his front door. 2RP 334, 388.

- Merriam-Webster's Pocket Thesaurus -

glimpse (syn) look, glance, peep, peek, sight, view.

- Webster's New Pocket Dictionary -

glimpse (glimps) n. A brief look. - v. glimpsed, glimpsing. To catch a brief view of.

possible (pŏs'ə-bəl) adj. Capable of happening, existing, (or) being accomplished. - pos'si-bil'i-ty n. - pos'si-bly adv.

Dao eventually admitted he was "not sure" it was Clardy he saw in the backseat of the red car when they were stopped at the stoplight. 2RP 403.

— Merriam-Webster's Pocket Thesaurus —

* Sure 1 (syn) CONFIDENT, assured, sanguine, presumptuous (rel) relying, trusting, depending, counting, banking; inerrant, unerring, infallible; safe, secure 2. having no doubt (or) uncertainty (syn) certain; positive, cocksure (rel) decisive, decided; self-assured, assured, self-confident; dogmatic, doctrinaire, oracular, dictatorial (ant) unsure — as in "not sure"

This is showing the change in Anthony Dao's testimony during trial. The multiple variations, from positively identifying; to stating that he was "not sure" all on record. 2RP 301, 342, 383-84. 2RP 334, 388. 2RP 403. Before concluding my "ADDITIONAL GROUND (1); TESTIMONY", I would also like to examine Danielle Wright's testimony with you, (THE COURT).

According to Danielle Wright, when Dao answered the late-night knock, she saw a short, stocky Samoan-looking woman with a hood on her head, & no one else. 2RP 468-69, 471. Wright stated as she passed the stairs on the way to B.D.'s bedroom she saw at least two black men, one larger than the other, & maybe a third person, coming up the stairs at her. 2RP 477-78, 480-81. Wright said she saw the two men & a woman fleeing back downstairs with one of the men carrying Dao's briefcase. 2RP 489-90. Just as Anthony Dao claimed at trial that Clardy was the man with the shotgun, even saying

she had positively identified Clardy as one of the robbers during a show-up of four of the suspects arrested near where the red car had crashed. 2 RP 479, 507, 518-19, 550, 554. Wright admitted to being intoxicated & a (law) enforcement officer stated he could still smell alcohol on Wright's breath, hour after the incident. 2 RP 395, 464, 545, 1029-30, 1048. During the show-up identification, officer Andrew Hensing, said Wright flew into a tirade of profanity & yelling, & was unable to make a positive (or) negative identification of any suspect. 2 RP 575-76. Lieutenant Kurt Schwan, said he only showed her three suspects, none of whom were Clardy. 2 RP 713-14.

RCW 9A.72.080: Statement of what one does not know to be true. — Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he (or) she knows to be false.

— Merriam Webster's Pocket Thesaurus —

* perjure • to make a false swearer of oneself by violating one's oath to tell the truth (syn) forswear (rel) deceive, delude, mislead, beguile; lie, prevaricate.

— Webster's New Pocket Dictionary —

* per·jure (pûr'jər) v. - jured, - juring. To testify falsely under oath. — per'jur·er n. — per'ju·ry n.

U.S. V. FAWLEY, 137 F3d 458 (7th Cir.) "Perjury" requires willful intent to provide false testimony, rather than confusion, mistake (or) faulty memory.

COURTROOM HANDBOOK ON WASHINGTON EVIDENCE (5D):

RULE (613). PRIOR STATEMENTS OF WITNESSES:

(B) Extrinsic Evidence of Prior Inconsistent Statements of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain (or) deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, (or) the interests of justice otherwise require.

— GILBERT'S LEGAL DICTIONARY —

* justice • Title given to judges, particularly those that sit on the United States & State Supreme Courts. A standard of conduct that requires persons to fulfill their social, legal, & moral obligations to society. To do that which is right (or) equitable. Proper administration of laws.

* CrR 7.8 — Relief from Judgment (or) Order

(B) Mistakes; Inadvertance; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion & upon such terms as are just, the court may relieve a party from a final judgment, order, (or) proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect (or) irregularity in obtaining a judgment (or) order;

3) Fraud (whether heretofore denominated intrinsic (or) extrinsic), misrepresentation, (or) other misconduct of an adverse party;

4) The judgment is void; (or)

5) Any other reason justifying relief from the operation of the judgment.

The entitlement to a fundamentally fair procedure is covered in ► STATE V. LAPAGE, 231 F.3d 488, 491 (9th cir. 2000) Constitutional law 257, 268(9)... DUE PROCESS CLAUSE entitles defendants in criminal cases to fundamentally fair procedures, & it is fundamentally unfair for prosecutor to knowingly present perjury to jury U.S.C.A. Const. Amend. 5. because use of known lies to obtain conviction violates due process of law, such a conviction must be reversed unless false testimony is harmless beyond reasonable doubt; conviction must be reversed if there is any reasonable likelihood that false testimony could have affected judgment of jury. U.S.C.A. Const. Amend. 5.

Over forty years ago, The SUPREME COURT made it clear that a conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the FOURTEENTH AMENDMENT. The same result obtains when the state, although not soliciting false evidence allows it to go uncorrected when it appears.

The Court explained that this principle does not cease to apply merely because the false testimony goes only to the credibility of the witness. Rather (A) lie is a lie, no matter what its subject, because the use of known lies to get a conviction deprives a defendant of his constitutional right to DUE PROCESS of LAW, WE MUST REVERSE conviction unless mens rea's false testimony was harmless beyond a reasonable doubt, that is, we must reverse, if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

I am not asking for favor... I am requesting that the Equal Protection Clause which is guaranteed by the U.S.CA. Const. Amend. 14 be invoked. Furthermore, the SUPREME COURT has already made it clear that "The United States government will not allow a conviction of a person based on tainted testimony of a witness to stand"; MESAROSH V U.S., 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1.

* STARE DECISIS:

STATE V. RAY, 130 Wn. 2d 673, DOC: 926 P.2d 904, pg: 926 P.2d 905, (Wash. 1996) ▶ [1] If this court abandoned the corpus delicti rule, it would have to overrule nearly 100 years of well-settled case law. SEE ▶ State V. Marselle, 43 Wash. 273, 276, 86 P. 586 (1906). This court has

infrequently discussed under what conditions it should disregard the doctrine of "Stare decisis", & overturn an established rule of law. An eloquent opinion on the matter was given by Justice Hale in State ex rel. State Fin. Comm. v. Martin, 62 wash. 2d 645, 665-66, 384 P. 2d 833 (1963):

"Through "stare decisis", the law has become a disciplined art -- perhaps even a science -- deriving balance, form & symmetry from this force which holds the components together. It makes for stability & permanence, & these, in turn, imply that a rule once declared is & shall be the law. "Stare decisis" likewise holds the courts of the land together, making them a system of justice, giving them unity & purpose, so that the decisions of the courts of last resort are held to be binding on all others.

Without "stare decisis", the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations & assertions -- a kind of amorphous creed yielding to & wielded by them who administer it. Take away "stare decisis", & what is left may have force, but it will not be law."

The statements & testimony given by Anthony Davo & Danielle Wright were not fact, so they can only be false; prima facie, with scrutiny to oral changes in statements made under oath.

ADDITIONAL GROUNDS (2)

ELEMENTS:

Initiative 159:

"Hard Time for Armed Crime", was passed during the 1995 legislative session & became effective for offenses committed after July 23, 1995. This initiative increased penalties & expanded the range of crimes eligible for weapon enhancements. For specified crimes, when a court makes a finding of fact (or) when a jury returns a special verdict finding that the accused (or) an accomplice was armed with a deadly weapon at the time of the commission of the crime, the sentence must be enhanced. The same is true if the offender (or) an accomplice was armed with a firearm at the time of the crime.

Enhancements apply to all felonies except where the USE OF A FIREARM IS AN ELEMENT OF THE OFFENSE. These sentence enhancements also apply to anticipatory offenses, which include attempts, conspiracies & solicitations to commit a crime. (RCW 9.94A.533(3)(4)). Additional time under either enhancement is added to the sentence after it has been calculated based on the particular seriousness level & the offender score (RCW 9.94A.530), & after the range adjustment for any anticipatory offense (if appropriate). If the presumptive standard range sentence exceeds the statutory maximum for the offense, the statutory maximum sentence becomes the presumptive sentence, unless the offender is a persistent offender, as defined in RCW 9.94A.030(37). The 1998 Legislature required that if the firearm enhancement (or) the deadly weapon enhancement increases a sentence so that it

would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced. As a result, in such a case the underlying sentence must be reduced so that the total confinement time does not exceed the statutory maximum. This takes effect for crimes committed on (or) after June 11, 1998.

STATE V. CALDWELL, (1979) 23 Wash. App. 8, 591 P. 2d 849, review granted, remanded 94 Wash. 2d 614, 618 P. 2d 508. Sentencing & Punishment 139 ... Defendant's use of firearm could be used to enhance the punishment to be meted out for offense of second-degree assault but could not be used to enhance punishment for first-degree assault, in light of fact that possession of the firearm was a necessary element of the first-degree assault but was not a necessary element of second-degree assault. Also SEE STATE V. BERRIER, 143 Wn. App. 547, 178 P. 3d 1064, (Wash. App. Div. II 2008) Also SEE The STATE of WASHINGTON, Respondent, V. ABE I. J. WILLIAMS-WALKER, Petitioner. — The STATE of WASHINGTON, Respondent, V. CURTIS EUGENE GRAHAM, Petitioner. — The STATE of WASHINGTON, Respondent, V. MATTHEW ROBERT RUTH, Petitioner.

SUPREME COURT OF WASHINGTON

167 Wn. 2d 889; 225 P. 3d 913; 2010 Wash. LEXIS 57 No. 78611-9, No. 78876-6, No. 79074-4.

FEBRUARY 10, 2009, Argued

JANUARY 14, 2010, Filed

NATURE OF ACTION: In separate prosecutions, defendant William-Walker

was charged with first-degree robbery & first-degree felony murder; defendant Graham was charged with first-degree assault & second-degree unlawful possession of a firearm; & defendant Ruth was charged with two counts of first-degree assault. In each case, for sentencing purposes, the state alleged that the defendant committed one (or) more of the charged offenses while armed with a firearm.

SUPERIOR COURT: The Superior Court for Spokane County, No. 03-1-01867-9, Jerome J. Leveque, J., on May 14, 2004; the Superior Court for Snohomish County, No. 04-1-00138-7, Ellen J. Fair, J., on August 31, 2004; & the Superior Court for Snohomish County, No. 03-1-02451-6, David F. Hulbert, J., on February 4, 2005 entered judgments on verdicts of guilty & imposed sentences that included 60-month firearm sentence enhancements based on special verdicts finding that the defendants were armed with deadly weapons at the time they committed their offenses.

COURT OF APPEALS: In the Williams-Walker case, the court affirmed the convictions, reversed the firearm sentencing enhancement, & remanded the case for resentencing consistent with the deadly weapon special verdict in an unpublished opinion noted at 132 Wn. App. 1009 (2006). In the Graham & Ruth cases, the COURT affirmed the convictions & sentences in unpublished opinions noted at 132 Wn. App. 1053 (2006) & 134 Wn. App. 1018 (2006)

SUPREME COURT: Holding that the defendants' sentences could be enhanced only on the basis of the facts as found by the juries; that, because the juries found only that

the defendants were armed with deadly weapons when committing their offenses, the trial courts erred by imposing 60-month firearm sentence enhancements; & that the error is not subject to harmless error analysis, the COURT affirms the decision of the COURT of Appeals in the Williams-Walker case, reverses in part the decisions of the COURT of Appeals in the Graham & Ruth cases, & remands all three cases to their respective trial COURTS for resentencing. ALSO SEE ▶ U.S. V. JONES, 16 F.3d 487; 122 F.3d 487; 122 F. 3d 1058.

WEST'S RCWA 9A.36.011

WEST'S REVISED CODE OF WASHINGTON ANNOTATED

TITLE 9A. WASHINGTON CRIMINAL CODE

CHAPTER 9A.36. ASSAULT -- PHYSICAL HARM

9A.36.011. Assault in the first-degree:

1) A person is guilty of assault in the first degree if he or) she, with intent to inflict great bodily harm:

2) Assaults another with a* firearm (or) any deadly weapon (or) by any force (or) means likely to produce great bodily harm or) death; (or)

3) Administers, exposes, (or) transmits to (or) causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, (or) any other destructive or) noxious substance; (or)

(c) assaults another & inflicts great bodily harm.

(2) Assault in the first-degree is a class A felony.

WEST'S RCWA 9A.56.200

WEST'S REVISED CODE OF WASHINGTON ANNOTATED

TITLE 9A. WASHINGTON CRIMINAL CODE

CHAPTER 9A.56. ROBBERY -- PHYSICAL HARM

9A.56.200. Robbery in the first degree:

(1) A person is guilty of robbery in the first-degree if:

(a) In the commission of a robbery (or) of immediate flight therefrom, he (or) she:

(i) Is armed with a *deadly weapon; (or)

(ii) Displays what appears to be a *firearm (or) other deadly weapon; (or)

(iii) Inflicts bodily injury; (or)

(b) He (or) she commits a robbery within and against a financial institution as defined in RCW 7.88.010 (or) 35.38.060.

(2) Robbery in the first-degree is a class A felony.

[2002 c 85 § 1; 1975 1st ex. s.c 260 § 9A.56.200.]

WEST'S RCWA 9A.36.045

WEST'S REVISED CODE OF WASHINGTON ANNOTATED

TITLE 9A. WASHINGTON CRIMINAL CODE

CHAPTER 9A.36. ASSAULT -- PHYSICAL HARM

9A.36.045 DRIVE-BY SHOOTING:

1) A person is guilty of drive-by shooting when he (or) she recklessly discharges a *firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death (or) serious physical injury to another person & the discharge is either from a motor vehicle (or) from the immediate area of a motor vehicle that was used to transport the shooter or) the firearm, (or) both, to the scene of the discharge.

2) A person who unlawfully discharges a *firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness.

3) Drive-by shooting is a class B felony.

Attorney Christopher H. Gibson, has covered the issue of "recklessness" in his brief under "ASSIGNMENTS OF ERROR." Now moving from the issue of the *firearm enhancement. I would like to bring to the attention of the COURT that "ASSAULT IN THE FIRST-DEGREE", & "DRIVE-BY SHOOTING" are covered under the "same statue"; CHAPTER 9A.36. ASSAULT -- PHYSICAL HARM.

DOUBLE JEOPARDY PRINCIPLES protect a defendant from being convicted more than once under the "same statue", if the defendant commits only one "unit of the crime." STATE V. WESTLING, 145 Wn. 2d 607, 610, 40 P.3d 669 (citing STATE V. ADEL, 136 Wn. 2d 629, 634, 965 P.2d 1072 (1998)). ALSO SEE ▸ BELL V. UNITED STATES, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955)

STATE V. LINDSAY, 171 Wn. App 808, 825 (2012)

— ASSAULT & ROB., KIDNAPPING & ROB., CONVICTIONS. —

The COURT of Appeals reviews de novo "DOUBLE JEOPARDY" claims. The legislature may constitutionally authorize multiple punishments for a single course of conduct USCA. Const. Amend. 5; RCWA Const. ART. 1 § 9. Where the Legislature has provided a statutory scheme distinguishing different degrees of a crime, the court of Appeals may determine that the legislature intended a "single" punishment for a higher degree of a "single" crime rather than multiple punishments for several, separate, lesser crimes. . .

STATE V. WOMAC, 160 P.3d 40, 160 Wn. 2d 643 (2007)

SUPREME COURT of WASHINGTON

En Banc.

STATE of WASHINGTON, Respondent,

V.

BRIAN ZANE WOMAC, Petitioner.

No. 78166-4

Argued Oct. 26, 2006.

Decided June 14, 2007.

Both the federal DOUBLE JEOPARDY CLAUSE & THE WASHINGTON

UBLE JEOPARDY clause prohibit: (1) a second prosecution for
e same offense after acquittal; (2) a second prosecution for
e same offense after conviction; & (3) multiple punishments
r the same offense imposed in the same proceeding.
.S.C.A. Const. Amend 5 ▸ West's RCWA Const. Art. 1, §9.

efendant suffered "jeopardy," for DOUBLE JEOPARDY purposes,
here trial court entered judgment on jury's convictions
; defendant for homicide by abuse, second-degree felony
rder, & first-degree assault, relating to death of defendant's
our-month-old son, though trial court sentenced defendant
nly for his conviction for homicide by abuse; defendant
emained exposed to danger because three separate convictions,
rising from "same criminal conduct", remained on his record,
< multiple convictions could bring adverse collateral consequences
> the future. U.S.C.A. Const. Amend. 5; West's RCWA Const. Art. 1, §9;
West's RCWA 9A.32.050(1)(b), ▸ 9A.32.055(1), ▸ 9A.36.120
1)(2), (1)(b)(ii).

I am also making an observation of the guarantee of the
supremacy clause; U.S. Const. Art 6 § Sect. 2— which establishes
that the laws, treaties & actions of the Federal Government
pursuant to the Constitution are Superior to those of the
State. Thus, if a federal & State law conflict, federal law
governs.
I also covering the definition in depth of "intent" & the
elements defined in "DRIVE-BY SHOOTING"; "Substantial risks of death"—
"grievous physical injury": recalling expert testimony in the following topic of (SAG).

ADDITIONAL GROUND (3)

EVIDENCE:

CrR 8.3 (b):

Mistakes, Inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion & upon such terms as are just, the COURT may relieve a party from a final judgment order, (or) proceeding for the following reasons:

(1) INADVERTENCE: The Prosecutor's improper definition of "recklessness" which was given to jurors' — covered in Attorney Christopher H. Gibson's brief. The Allowance of perjured testimony by Anthony Dao & Danielle Wright to be presented to jury. Pointed out in pages (1-8) of "ADDITIONAL GROUND" (1) & on the COURT record during testimony. The presentation of a sweat shirt that was not covered under CrR 4.7 & no one had any record (or) knowledge of how it showed-up in the evidence locker; which I'll also raise a point in "Contamination of evidence" the viewpoint to follow in this ADDITIONAL GROUND (3)

DNA. which was presented to jurors' for no other reason, but confussion. To an ordinary civilian / citizen "INCONCLUSIVE" only signifies "it doesn't rule him out!" which is a reasonable doubt...

— GILBERT'S LAW DICTIONARY —

* inconclusive — Possible of being disproved (or) rebutted by additional evidence.

A defendant is innocent until proven guilty, & the finding

if guilt has to be beyond a reasonable doubt; U.S.C.A. Const. Amend. 5; U.S.C.A. Const Amend. 14.

BALANCING TEST:

1) What is the purpose of a scientific test that does not give a definite reading of positive (or) negative?
2) Does it benefit the citizen who is on trial to maintain the presumption of innocence?
3) Is the burden of proof lifted from the prosecution when the test reads an unsure answer?
4) What is the significance of a test with no factual data being shown to people who really don't understand the meaning of the "data" the test is reading? "Inconclusive"...

First, the question has to be pondered... Does a DNA test read negative (or) positive?
Second, Why does a DNA test have a negative & positive read?
Next, we have to weigh the effects that an "inconclusive" reading has on the average thought pattern... The first question that comes to mind would be; "why didn't it come back negative?" Rather than; "it didn't come back positive;" the fact was not proven!" A citizen, no matter if he is a defendant has the right to a fair trial U.S.C.A Const. Amend. 5. A defendant is presumed innocent until "proven" guilty, this is a guarantee of the constitution of United States. Also the grace of the Rule of Lenity which enforces that the prosecutor has to prove their case without "doubt;" but rather than, the burden of having facts that are solid.

The prosecution presenting "doubt" for evidence can only cause confussion. It also causes the juror to lose sight of the law, & what was given as a jury instruction..."BEYOND A REASONABLE DOUBT". Presenting "doubt" as evidence is careless, heedless; & thoughtless; "*INADVERTENT".

(2) The testimony that was allowed in evidence, given by Anthony Dao & Danielle Wright; the oral statements which changed multiple times under oath & the testimony that was given to initiate this case; equal five words. Deceptive, deceitful, fake, false, counterfeit & these five words add to define *FRAUD. To start-off saying you're not sure is one thing, but to start-off positive & end up unsure is fabrication of the clearest form. 2RP 301, 342, 383-84, 2RP 403, 2RP 479, 507, 518-19, 550, 554, 2RP 575-76, 2RP 713-14. RCW 9A.72.080 ... ADDITIONAL GROUND (1) "TESTIMONY" (pgs. 4-7) ... BILL OF REVIEW requested.

GILBERT'S LEGAL DICTIONARY-

*evidence: All the means legally presented at trial to persuade the court (or) jury as to the truth of a matter in question. Evidence includes testimony by witnesses, records, photographs, & exhibits. Although "evidence" & "proof" are used interchangeably, there is a distinction between the terms: "Evidence" is the means by which the truth (or) falsity of a matter is established, & "proof" is the result of evidence, although not all evidence establishes proof. SEE ► "proof".

▶ (FN9.) A "reasonable doubt" has often been described as one "based on reason which arises from the evidence (or) lack of evidence." ▶ Johnson v. Louisiana, 406 U.S. 356, 360, 92 S.Ct. 1620, 1624, 32 L.Ed.2d 152 (Citing cases). For a discussion of variations in the definition used in jury instructions, see ▶ Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (rejecting contention that circumstantial evidence must exclude every hypothesis but that of guilt). The Constitution prohibits the criminal conviction of any person except upon proof sufficient to convince the trier of fact of guilt beyond a "reasonable doubt". Cf. ante, at 2784. This rule has prevailed in our courts "at least from our early years as a Nation." ▶ In re Winship, 397 U.S. 358, 361, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368. SEE ▶ McDaniel v. Brown, 588 U.S. 120, 130 S.Ct. 665

CONTAMINATION OF EVIDENCE:

A miscellaneous sweat shirt, that: (1) no one knew how it appeared; (2) no police officer made any record of it; (3) it gave the jury an unnecessary idea that it belonged to me; (4) no one made any claim of being responsible, of placing the contents of the sweater into the evidence locker; (5) it was never placed into evidence of discovery.

* CrR 4.7 (DISCOVERY RULES) — CUSTODIAL OF RECORDS:

A) Prosecuting Authority's Obligations.

1) Except as otherwise provided by protective orders (or) as to matters not subject to disclosure, the prosecuting authority

shall, upon written demand, disclose to the defendant the following material & information within his (or) her possession (or) control concerning:

(i) the names & addresses of persons whom the prosecuting authority intends to call as witnesses at the hearing (or) trial, together with any written (or) recorded statements & the substance of any oral statements of such witnesses;

(ii) any written (or) recorded statements & the substance of any oral statements made by the defendant, (or) made by a co-defendant if the trial is to be a joint one;

(iii) any reports (or) statements of experts made in connection with the particular case, including results of physical (or) mental examinations & scientific tests, experiments, (or) comparisons;

(iv) any books, papers, documents, photographs, (or) tangible objects which the prosecuting authority intends to use in the hearing (or) trial (or) which were obtained from (or) belonged to the defendant;

(v) any record of prior criminal convictions known to the prosecuting authority of the defendant & of persons whom the prosecuting authority intends to call as witnesses at the hearing (or) trial;

(vi) any electronic surveillance, including wiretapping, of the defendant's premises (or) conversations to which the defendant was a party & any record thereof;

(vii) any expert witnesses whom the prosecuting authority

will call at the hearing (or) trial, the subject of their testimony, & any reports relating to the subject of their testimony, & any reports relating to the subject of their testimony that they have submitted to the prosecuting authority;

viii) any information indicating entrapment of the defendant;

ix) specified searches & seizures;

x) the acquisition of specified statements from the defendant and

xi) the relationship, if any, of specified person to the prosecuting authority.

- Merriam-Webster's Pocket Thesaurus —

* contaminate · to debase by making impure (or) unclean

syn taint, attaint, pollute, defile (rel) debase, vitiate, corrupt, deprave; impair, spoil, injure, harm

- Webster's New Pocket Dictionary —

* contaminate (kən-tăm'ə-nāt') v. -nated, -nating. To make impure. — con·tam'i·na'tion n.

There's evidence in a locker that record is to be made of all entrance, allowing any exposure to the content which are inside, yet a sweat shirt that no one can identify shows up into my trial without record.

Meaning that, although there was no evidence against me, the evidence in this case would be considered contaminated on the basis of the sweat shirt. Case-in-point planting evidence,

taking evidence from that could have shown clear innocence, mixing other cases evidence-up, (or) simply adding evidence without knowledge thereof. There was no control of the contents of the locker, securing the purity of evidence.

MISSING VERBATIM:

On (pg. 14) of Attorney Christopher H. Gibson brief at the bottom of the page a note is made... [14] Missing from the appellate record is the verbatim report of proceedings from the in-court presentation of the verdicts, which occurred on November 21, 2012. The transcript has been ordered but not yet received."

STATE V. TILTON, 72 P.3d 735, 149 Wn. 2d 775 (2003) Tilton contends he was prejudiced by an incomplete record on review. Record was not sufficiently complete. ▶ SEE ▶ RAP 9.5 (b) (c) SEE ▶ HARGROVE V. RILEY, E.D. Wash. (2000) 100 F. Supp. 2d 1271 / Civil Rights.

DEFINITION OF "DRIVE-BY SHOOTING":

According to Anthony D20's testimony the person who shot at them did that at a distance of "between" 30 and 60 feet. 2 RP 333-36.

* Expert Testimony - stated it was nearly impossible to be in danger from a shotgun while 40-50 feet away. The evidence did not meet the requirements of the elements of "Drive-by Shooting." (Refer to pg. 14.)

— GILBERT'S LEGAL DICTIONARY —

† intent: The purpose, design, (or) resolve with which a person acts. Since intent is a state of mind, it can rarely be proven directly, but must be inferred from facts (or) circumstances. In criminal law, the "mens rea" (or) criminal intent requirement is that a person knows what he is doing & desires (or) anticipates the results of his act at the time that he commits the offense. Intent, the perpetrator's state of mind at the time of acting, differs from motives, which is what causes a person to act (or) refrain from acting.

There are two types of "intent" in criminal law: "General intent" is the "intent" to commit a crime. Proof of general "intent" is required in all criminal prosecutions, but does not involve demonstrating that the defendant "intended" the precise harm which he caused. E.g., shooting into a crowd is proof of general "intent" to commit murder, even though the accused did not intend" to injure any person in particular." Specific intent" is the intent to accomplish the precise act which the law prohibits. Proof of "specific intent s essential for certain crimes, such as "assault" with intent" to rape.

Assault in the first-degree" specifically list intent as one of the main elements of the crime. As this section of my "Additional Grounds" clearly shows the evidence was not sufficient enough "beyond a reasonable doubt" for a conviction; intent falls into

the same catalog. The following "Additional Ground", questions a very important point...

ADDITIONAL GROUND (4)

IDENTIFICATION:

GENERIC TESTIMONY relates to a characteristic of an entire group (or) class of related things; general... For example: Black, White, Asian, mexican (or) tall, short (or) male/female.
Relating to a description that relates of the typical; nothing to define a difference.

The testimony was given that was typical which did not Identify me in any way. 2RP 298-300. 2RP 477-78. 2RP 489-90.
The identification did a roller coaster of unsure, sure, possibly, unsure. 2RP 301, 342, 383-84. 2RP 334, 388. 2RP 403. Remember, testimony identified the same man with the shotgun in the back seat. 2RP 384-25. Then to admitting not being sure if I was the man he saw in the back seat. 2RP 403. Also Keep in mind that I never was place in the show-up identification. 2RP 713-14. Although, Wright said I was in the line-up. 2RP 479, 507, 518-19, 550, 554... And the reason for this. 2RP 395, 464, 545. 2RP 1029-30, 1048.

From the record, which shows I never was placed in any line-up; other then prejudicial one I received

during trial.

CHAPTER 110 IDENTIFICATION EVIDENCE:

The Court also held relevant the manner in which the lineup (or) other out-of-court (and now suppressed) identification was conducted. 81 The similarity of these factors to those utilized in assessing "Due Process" reliability challenges to out-of-court identifications is clear. Should a court find that an out-of-court identification was unreliable, it would then be hard-pressed to claim that the in-court was nonetheless admissible as having a basis independent of the tainted procedure.

Even if the in-court identification is not suppressed, suppression of the out-of-court procedure(s) can be critical. This means that a jury will only hear the witness identify the accused at a time & place far distant from the original crime, with no corroborative proof of prior identifications that occurred in potentially more objective surroundings (as in a multi-person line-up (or) photo display) & at a time close to the incident when the memory of the perpetrator's appearance should have been most fresh.

SEE ▶ PERRY V. NEW HAMPSHIRE, ___ U.S. ___, 132 S.Ct. 716, 181 L.Ed 2d 694 (2012) (The Due Process clause of the U.S. Constitution did not require trial judges to conduct preliminary assessments of the reliability of eyewitness identifications that were made under suggestive circumstances when the circumstances were not created by law enforcement personnel).

▶ SEE MANSON V. BRATHWAITE, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed. 2d 140, 154 (1977), (quoting) NEIL V BIGGERS,

409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972) MANSON TEST FOCUSES ON RELIABILITY. SEE ▶ UNITED STATES V. WADE, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967). (Refer to pgs 1-8 of SAG.) to address changes in testimony of identification.

LACHES DOCTRINE: Which prevents enforcement of a claim (or) right which, because of neglect, lapse of time, & other circumstances, has resulted in some change in the condition (or) relationship of the property (or) parties that is prejudicial to the adverse party.

WHAT IS VALIDITY WITHOUT LAW?

ADDITIONAL GROUND (5)

PROSECUTORIAL MISCONDUCT:

Appellant Attorney Christopher H. Gibson addressed some issues on "misconduct" in his brief, i'm going to take the time to address my own.

Prosecutor knowingly used perjured testimony. SEE ▶ NAPUE V. ILLINOIS, 360 U.S. 264 1959. Also see ▶ "BRADY VIOLATIONS." "FACINUS QUOS INQUINAT AEQUAT"... It is as much the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. ▶ BERGER V. UNITED STATES, 295 U.S. 78,

88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) (emphasis added); SEE ALSO ▶ UNITED STATES V. O'CONNELL, 841 F. 2d 1408, 428 (8th Cir. 1988) ("the prosecutor's special duty as a government agent is not to convict, but to secure justice"). SEE DEFINITION OF "JUSTICE" pg.5 of SAG. Prosecutors are unlike other attorney & enjoy special status as "quasi-judicial officers." SEE ▶ STATE V. SUAREZ-BRAVO, 72 Wn. App. 359, 367, 864 P. 2d 426 (1994). Along with the status, however, comes responsibility, including the duty to ensure that a defendant receives a constitutionally fair trial & to seek a verdict free of prejudice, based on reason & law. SEE ▶ STATE V. MONDAY, 171 Wn. 2d 667, 257 P. 3d 551 (2011); BERGER V. UNITED STATES SEE ▶ STIRONE V. UNITED STATES, 361 U.S. 212, 80 S.Ct. 270, 4 L.ED. 2d 252 (1960). As a result, prosecutor must act in seeking justice instead of making himself a "partisan" who is trying to "win" a conviction at all costs. SEE ▶ STATE V. RIVERS, 96 Wn. App. 672, 981 P. 2d 16 (1999). ("A single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated".) ▶ (quoting) ▶ UNITED STATES V. JOHNSON, 968 F. 2d 768, 771 (8th Cir. 1992); ▶ UNITED STATES V. CARTER, 236 F. 3d. 777, 788-89 (6th Cir. 2001) (stating that "even a single misstep on the part of the prosecutor may be so destructive of the right of the defendant to a fair trial that reversal must follow"). (refer to pgs 1-8 of SAG & the record of testimony). ▶ ALSO CrR 7.8.

In closing my "Additional Grounds" of Appeal's, Bill of Exceptions; I would like to reiterate "The Rule of Lenity" (pg. 18 of SAG)... I'm not looking for Mercy of the Court, but the Compassion of "JUSTICE"... A conviction without solid "evidence", no identification & falsified "testimony"; has no "proof"... A conviction in this matter goes against the foundation that this Country is built on; THE LAW — THE PROPER ADMINISTRATION of "JUSTICE"... "POTENTIA NON EST NISI AD BONUM", for if it was not for that reason, it could only be labeled oppressive; crumbling the structure that the Great UNITED STATES of AMERICA has become, from the blood, sweat, & tears that our forefather's; Grandparent's, parent's; sibling's, & relatives; have stood & died for... Erasing the Sacrifices made for us as a whole.

The Court is fully doli capax; the reason I have based my S.A.G off-of the reflection of the record. I'm requesting a thorough examination of the record, remanding & vacating my Sentence. Thank you for your time & consideration. Truly Signed under the penalty of perjury.

Respectfully Submitted,

Kellin Claudy

10-23-2013

KEVIN CLARDY, JR.