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

STATE OF WASHINGTON Respondent, v. DAVID HAVILAND, Respondent.	NO: 45048-8 STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, David Haviland, 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.

GROUND ONE FOR REVIEW

THE TRIAL COURT ERRED BY IMPOSING AN EXCEPTIONAL SENTENCE OUTSIDE THE STATUTORY MAXIMUM BASED UPON A "CONCEPT" NOT COVERED UNDER THE SENTENCE REFORM ACT (SRA)

During the sentencing phase of this trial, the State moved the Court to impose an exceptional sentence based upon uncharged and untried offenses under the "real facts doctrine", the judge denied the State's request for the exceptional sentence as unconstitutional. Instead, the trial Court quoted the "Free Crimes" concept, based upon the appellant's offender score to justify an exceptional sentence. [RP pg 22 Ln 10-25 & RP 23 Ln 1-4].

When the legislature passed the Sentencing Reform Act (SRA), they did not add to the language of that bill "anything over

the offender score of 9 the Court may impose an exceptional sentence" Instead they created the sentencing grid to establish a guideline for sentencing. They gave the Courts leeway to sentence within a range, i.e. a "minimum sentence all the way to a maximum sentence based upon that offender score. The legislature created this point system and grid to assure that all offenders received a fair sentence. The created the Sentencing Reform Act to make certain that the sentences handed down were such that justice would be served. They did not stop there. They also produce methods for the trial Courts to follow if they determined that an exceptional sentence outside the statutory maximum was warranted. Nowhere does the method rely on a "concept". The mere presence of the Sentencing Reform Act indicates the legislatures intent to remove concepts out of the sentencing phases of the trial. However, if the Court deemed that an exceptional sentence was warranted, they could do so [i]f they followed the guidelines required to impose that exceptional sentence. This appellant searched the Sentencing Reform Act for any language that suggested that the offender could be sentenced based upon a "concept" but none was found.

There is no indication that any of the crimes the appellant committed prior to trial went unpunished, they were not. It was the additional counts upon conviction that placed the appellant into the 9+ points category. The 9+ category on the sentencing grid indicates and allows for the highest range possible for all crimes named in the Revised Code of Washington. It is that range the trial Court should have followed if they choose

not to have a separate hearing to determine weather or not an exceptional sentence was warranted.

On June 26, 2000, Apprendi v. New Jersey, the Supreme Court stated:" any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. State v. Blakely (2002) 111 Wash App 851, 47 P.3d. 149, provides that the sentencing Court may not use facts that establish a more serious crime or additional crimes as a basis for a sentence outside the presumptive range.

The trial Court imposed a sentence for each count they found the appellant guilty of committing, running them all concurrent which was correct based upon "same criminal conduct" and as provided in the Revised Code of Washington. All save one count that was ordered to run **consecutive** for the sole purpose of imposing an exceptional sentence beyond the statutory maximum provided by under the Sentencing Reform Act (SRA). The one count [Count 5], the Court imposed a 60 month sentence to run consecutive. [RP 22 Ln 15-17]. Even though count 5 was the same criminal conduct, same theme and same victim(s) as the other counts of conviction and according to the SRA guidelines should have been ordered to run concurrent. The appellant holds that if the trial wanted to impose an exceptional sentence outside the statutory maximum, it should have ordered a hearing to determine if an exceptional sentence was appropriate.

GROUND TWO FOR REVIEW

THE TRIAL COURT ERRED WHEN IT ALLOWED THE PROSECUTION TO ENTER A CLAIM THAT THE DEFENDANT WAS THE SOURCE OF AN STD (CHLAMYDIA) BEING TRANSFERRED TO THE VICTIM DURING THE ALLEGED CRIME(S)

At trial and during cross examination by the State the prosecution questioned the defendant and inferred that he had given the victim an STD during the commission of the alleged crime(s) and then disregarding defendant's exculpatory evidence offered in rebuttal by way of medical records indicating that the defendant was examined and found not to currently have and was recovering from an STD of any kind to include that which the prosecution claimed he infected the victim with during the alleged crime(s) charged. In doing so, the Court violated the defendant's Sixth Amendment "right to confront". The evidence submitted also violated the Rules of Evidence as the statement(s) made by the prosecutor were highly prejudicial and had zero probative value as the State failed to offer any proof in support of the allegation(s). The State was allowed to make these allegations without objection by defense counsel and or a warning from the trial judge, [RP pg 247 Ln 25, pg 252 Ln 13, pg 255 Ln 16, pg 256 Ln 25]. One can only assume that as a result of this allegation being entered into the record, that it had a prejudicial effect during the judges deliberation and review of the evidence and testimony of the trial and prior to the guilty verdict being delivered. The Rules of Evidence are very clear on evidence that is presented to the Court that it's prejudicial value outweigh it's probative value.

At sentencing was the first opportunity for defense counsel to confront these allegations as they were not notified of the claim during discovery and prior to this case being brought to trial. The defendant had been in custody prior to and after the claim made by the prosecution so he requested a medical exam be administered while in the county jail in order to rebutt the claim made by the State. As stated, the results of the examination showed that the defendant did not currently have, nor was he recovering from the specific infections claimed by the State or any other infectious disease. When the defense attempted to submit the findings to the Court, the Court refused to consider the evidence or enter the findings into evidence. [RP pg 303 Ln 10-21] This issue encompasses one of the many reasons the Court of Appeals frown upon bench trials. Here, the trial judge is also the jury and heard the claim made by the prosecutor. With no objection, it is not difficult to assume that the claim affected the judge's thought while he deliberated on the defendant's guilt or innocence. It would be a violation of Due Process to even consider this allegation without allowing a defense counsel to offer argument and evidence in rebuttal especially when that evidence would prove to be exculpatory in nature. In this case, the State was allowed to make prejudicial allegations, allegations void of any proof or documentation. The accusation made by the State held no probative value and under the Rules of Evidence 403 (a) and (b). Anchondo Sandavol U.S. 910, F.2d. 1234 (5th Cir. 1990) improper comments

by a prosecutor may constitute reversible error where the defendant's right to a fair trial is substantially affected. The pertinent fats to consider include (1) the magnitude of the prejudicial effect of the statement(s) (2) the efficacy of any cautionary instructions and (3) the strength of the evidence of the defendant's guilt. Here, first it cannot be disregarded that the trial judge was swayed by the prosecutor's allegations that the defendant gave the victim an STD during the commission of the charged offenses. Secondly, as the judge was also the jury, no cautionary instructions were given as the judge is the one to offer the instructions to the jury. Finally, this allegation in connection with all of the other hearsay evidence would have a strong effect on the trial judge during his deliberations.

ADDITIONAL GROUND THREE

THE TRIAL COURT ERRED WHEN IT ALLOWED TESTIMONY FROM WITNESSES THAT WERE FOUND TO BE TAMPERED WITH BY ANOTHER STATE'S WITNESS

During testimony, the child advocate was seen relaying witness testimony to other State's witnesses that had yet to testify and had been ordered to wait outside the courtroom until called to testify. The court was made aware of the advocates actions and was, at that time, ordered to stop **[RP pg. 216 Ln 16-25]** and **[RP pg. 217 Ln 1-4]**. Even though the advocate admitted to this behavior, she was still allowed to remain in the courtroom where she continued to relay testimony via text messaging while using the restroom at the courthouse. The defendant will be asking this court to accept affidavits in support of this claim. The affidavits will be submitted

to the defendant's appellate counsel and offered as amendments to the defendant's opening brief, if the court will allow it. In a case such as this where there is no forensic or tangible evidence, and the only evidence presented is in the form of hearsay, uncharged and untried allegations by the prosecutor, the relaying of testimony would allow the States witnesses to sound more cohesive. If on the other hand, the defendant was found in violation of this admitted claim of tampering, it is quite possible and even probable, that the State and trial court would have brought new charges against the defendant. The defendant holds that after the child advocate admitted to tampering with witnesses, those who were undoubtedly influenced by what the advocate was telling them should not have been allowed to testify. The defendant also holds that as a result of the actions committed by the advocate, the trial judge should have banned the advocate from the courtroom until all of the States witnesses had been called. Allowing tampered with witnesses to testify on behalf of the state when the state already has the luxury all testimony and evidence is seen in the light most favorable to that prosecution, prohibited the defendant from getting a fair trial. The court of appeals does not say the defendant has to have a perfect trial but they do insist that it be fair. The testimony presented by the state should be based upon fact and best recollection. It is not far-fetched to assume that the testimony offered by the "tampered with" States witnesses effected the judges deliberations.

ADDITIONAL GROUND FOUR

THE TRIAL COURT COMMITTED PLAIN ERROR

As shown in all three grounds now brought by the defendant. Under Rules of Criminal Procedure Rule 52, plain errors are those errors that are obvious and have an impact on the substantial rights of a party in a legal case. When a party does not offer an argument about an error in the initial trial, usually by way of an objection, then the appellate court will review the error under the "plain error standard". In reviewing plain errors, appellate courts will determine if the alleged error seriously affected the fairness of justice of the judicial proceeding. Those errors that do not meet this criterion are considered harmless error.

The defendant holds that none of the three issues presented in his "Statement of Additional Grounds for Review" can be deemed harmless error. First, the exceptional sentence beyond the statutory maximum based upon a concept that is not addressed in the Sentencing Reform Act cannot be considered harmless error.

U.S. v. Buchanan, 70 F.3d 818 (5th Cir. 1995): "Plain errors are errors which are both obvious and which affect the defendant's substantial rights. U.S. v. Calverley, 37 F.3d 160 (5th Cir.)(en banc), Cert den, 115 S.Ct. 1266,131 L.Ed. 2d. 145 (1995). Upon showing of plain error, an appellate court is empowered, but is not required, to correct the error, Id. At 164. We will only correct a plain error if it seriously affected the fairness, integrity, or public reputation of the judicial

proceedings. Because the defendant was forced into a Bench Trial there is no record to offer how much weight a jury could have put on the accusations made by the prosecution as to other victims and future charges. The prosecution did however inform the court that the charges they would be filing at a later date were of the same nature to that which the defendant now stood convicted of. How could this not influence the bench when it came time to hand down the sentence. Then because the trial court knew it could not impose an exceptional sentence based and the "real facts doctrine" they imposed a sentence that resulted in an exceptional sentence outside the statutory maximum based upon a concept. The mere possibility that the mention of the uncharged and untried crimes could have affected the sentence also affected the fairness and integrity of the judicial proceedings because the appellant believes that it influenced the trail court to rely on the concept of "free crimes" to impose the exceptional sentence when it could not on the "real facts" doctrine.

Second, when the trial court considered the prosecutors claim that the defendant passed an STD to the victim in an attempt to prove the crime(s) charged, it did so with no supporting evidence. Such evidence that would certainly prejudice a jury can also be presumed to prejudice the trial judge, as it held zero probative value. U.S. v. Davis, 974 F.2d. 182 (DC Cir 1992); "For appellate court to overturn a conviction under (plain error standard), the error complained of must meet at least three requirements: It must be a plain one, i.e. so obvious that the judge should have recognized on its own; it must affect the substantial rights of the parties, i.e. cannot be harmless.

Finally, it must be one that 'seriously affects the fairness, integrity, or public reputation of judicial proceedings. "See U.S. v. Young 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed. 2d 1 (1985).

Under the first requirement, "so obvious that the judge should have recognized it on its own" is clearly supported by the record when first the State made the claim without any supporting evidence and secondly when the trial court refused to consider documentation by way of exculpatory and rebuttal evidence presented by the defendant at sentencing. How can it be considered harmless error for a trial court to allow a statement to be considered during trial but disallowed documented, exculpatory evidence when it becomes available? The defendant holds that it cannot be deemed harmless under the 3rd requirement, the record will support that the defendant was denied the opportunity to present evidence that would render the prosecutions claim of the STD being transferred as a result of the alleged crimes without merit and purely prejudicial, thus seriously affecting the fairness and integrity of the judicial proceedings.

In the third additional ground, the court was made aware that the child advocate, a States witness, had been relaying testimony to other States witnesses that had yet to testify, a form of witness tampering. Even after the bench was made aware of this activity, it still allowed those same witnesses to testify at trial. U.S. v. Hoac, 990 F.2d 1099 (9th Cir 1993): "the language of Rule 52, which defines harmless error as one 'which does not affect substantial rights' and plain error as

one 'affecting substantial rights' is logically read to suggest that the two are mutually exclusive… our search for a 'harmless plain error' leads us to conclude that there is no such animal". "our plain error analysis must therefore turn not on any per se rule, but on whether the courts failure was so prejudicial that it tainted the verdict or deprived the defendant of a fair trial.

The defendant holds that the issues brought forth in this Statement of Additional Grounds for Review and that of the appellate counsels opening brief, clearly show "plain error". That if the trial court had not committed these plain errors, the State could not have received a guilty verdict. U.S. v. Nichols, 937, F.2d 1257 (7th Cir 1991): there is plain error where a conviction results when, but for the error, the defendant would have been acquitted. U.S. v. Felton, 908 F.2d. 186, 188 (7th Cir. 1990).

Dated this 19th day of January 2014

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