

IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION ONE

~~FILED~~  
OCT 23 11:11 AM  
CLERK OF COURT

THE STATE OF WASHINGTON )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 JOSHUA CARGILL )  
 )  
 Appellant. )

No. COA 71291-8-I  
STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW  
RAP 10.10

I, Joshua Cargill, have received and reviewed the opening brief prepared by my attorney, Elaine L. Winters. I believe that I have additional grounds for review that are not addressed in Ms. Winters' opening brief. I do understand that the Court will review this statement of additional grounds when my appeal is considered on the merits.

FIRST ADDITIONAL GROUND

**Prosecutorial Misconduct**

Prior to the start of Mr. Cargill's criminal trial, his defense attorney, Jennifer Bartlett, submitted a Defense Trial Brief to the trial court in which she motioned that the court prohibit any State witnesses from testifying that Mr. Cargill was eluding or willfully failing to stop or refusing to immediately bring the vehicle to a stop or that he was driving in a reckless manner. Appendix 1 at 5. Defense Counsel was mostly concerned about the use of the term "reckless driving" being used by the testifying police officer's whom were involved in the pursuit of Mr. Cargill and very important State witnesses. 1RP 19-21. Testimony by police officer's are presumed to be very persuadable on a jury. And in Mr. Cargill's trial, the State had the burden of proving the elements charged beyond a reasonable doubt. Therefor the trial court properly ruled that it would not allow the term "reckless driving" be used, but that the officer's can describe their

1  
2 observation of the driving that they witnessed. 1RP 21. Deputy Prosecuting  
3 Attorney, Robert Grant, violated that court order, and Mr. Cargill's Const.  
4 Right's to fair trial and Due Process, when he elicited Officer Michael  
5 Sargent to testify that the Defendant was "recklessly driving." 1RP 48.  
6 Grant further committed prosecutorial misconduct when he asked Officer  
7 Sargent to speculate (guess) on the number of vehicles Defendant forced to  
8 the side of the road which was at least 20 according to Officer Sargent.  
9 Even though that number was clearly a speculation. Grant deliberately used  
10 it to his advantage in his Rebottle Argument to the jury when he told them  
11 "the Defendant didn't drive in a reckless manner. He just forced over 20  
12 cars off the road in a reckless manner. He forced over 20 cars off the road  
13 using whatever lane of travel that he could at a high enough rate of speed."  
14 And that that was "absolutely reckless, absolutely reckless." 1RP 50-51;  
15 1RP 78.

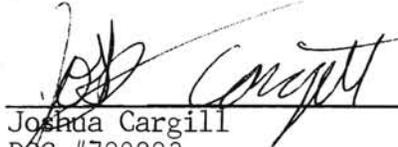
## 16 SECOND GROUND

### 17 INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

18 Mr. Cargill did not receive a fair trial because of ineffective  
19 assistance of counsel. The Federal and State Constitution guarantees a  
20 criminal defendant the right to effective assistance of counsel. U.S.  
21 CONST. amend. VI; WASH Const. article I, § 22. This court reviews an  
22 ineffective assistance claim de novo as a mixed question of law and fact.  
23 State v. Sutherby, 165 Wash.2d 870, 883, 204, P.3d 916 (2009). In order to  
24 show ineffective assistance of counsel, Mr. Cargill must show (1) that  
25 defense counsel's conduct was do deficient, and (2) that the deficient  
26 performance prejudiced him. State v. Reichenbach, 153 Wash. 2d 126, 130,  
27 101, P.3d 80 (2004). To show deficient performance, Mr. Cargill must show  
28 that defence counsel's performance fell bellow an objective standard of  
reasonableness. Reichenbach, 153 Wash. 2d. at 130, 101, P.3d 80. In Mr.  
Cargill's case, his attorney presented-before the court-very important  
Pre-Trial Motions, only to fail throughout his trial to object to  
prosecutorial misconduct that were in violation of those same motions.  
Defendant's trial attorney, Ms. Bartlett, asked the court in Pre-Trail

1  
2 motion's that the State not be able to elicit testimony from State  
3 witnesses that Mr. Cargill was eluding or willfully failing to stop or  
4 refusing to immediately bring the vehicle to a stop or that he was driving  
5 in a reckless manner. Appendix 1 at 5; 1RP 20-21. This motion was very  
6 important to the Defence, because any use by police officer's of those  
7 statements invade the province of the jury sitting as the fact finder.  
8 Const. Art. I, § 22; U.S. Const. Amend. VI. However, throughout Defendant's  
9 trial, Ms. Bartlett set back and failed to make any objection to the  
10 State's continued disregard for the Defendant's Const. Right's to fair  
11 trial. (a) She failed to object to Officer Sargent's use of the term  
12 "reckless driving." (b) She failed to properly question that officer on  
13 the fact that it was possible that if one of the so called "20 cars" that  
14 supposedly pulled off to the side of the road could have just been a chain  
15 reaction from one or two cars pulling over or off to the side of the road  
16 and that this event may have had nothing to do with Mr. Cargill. And (c)  
17 She failed to object to State attorney's rebuttal argument, when he  
18 used the term "reckless driving, further prejudging the jury. It's no  
19 wonder they found Mr. Cargill guilty. For all these reason's, Mr. Cargill  
20 humbly request that this court over turns his conviction and remand for a  
21 new trial.

22  
23 Respectfully Submitted this 17th day of October 2014.

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26  
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28  
  
\_\_\_\_\_  
Joshua Cargill  
DOC #788283  
Coyote Ridge Correctional Center  
1301 N. Ephrata Avenue  
P.O. Box 769  
Connell, WA 99326-0769

APPENDIX

1  
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3  
4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
5 IN AND FOR SNOHOMISH COUNTY  
6

7 STATE OF WASHINGTON, )  
8 Plaintiff. ) Cause No. 13-1-01971-4  
9 vs. ) DEFENSE TRIAL BRIEF  
10 JOSHUA O. CARGILL, )  
11 Defendant. )  
12

13 **INTRODUCTION**

14 The State of Washington has charged the defendant, JOSHUA O. CARGILL, with one  
15 count of ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE under Revised Code of  
16 Washington (RCW) 46.62.024. Furthermore, an aggravator is alleged that one or more person  
17 other than the defendant or pursuing law enforcement were threatened with physical injury while  
18 committing the crime of attempting to elude a pursuing police vehicle under RCW 9.94A.024.  
19 The alleged crime occurred on June 28, 2013. The defendant has entered a plea of not guilty.  
20

21 **TIME ESTIMATES**

22 It is anticipated that this trial will last between one to one and half days.

23 **FACTS**

24 On June 28, 2013, Detective Phillips of the Arlington Police Department was off duty  
25 and at Wal-Mart at approximately 4:30pm. He observed an individual known to him as Joshua

1 Cargill based on prior police contacts. Detective Phillips knew that Mr. Cargill had a felony  
2 warrant outstanding for Possession of Stolen Vehicle.

3 After Detective Phillips recognized Mr. Cargill he went to the Loss Prevention Office to  
4 track Mr. Cargill on Wal-Mart video surveillance. Detective Phillips also contacted Officer  
5 Sargent to notify him of Mr. Cargill's whereabouts. Based on the surveillance video, Detective  
6 Phillips notified Officer Sargent of Mr. Cargill's location, the suspected license plate of the  
7 vehicle that Mr. Cargill was in, the general direction of travel of the vehicle, and other  
8 surrounding vehicles.

9 Officer Sargent observed the suspected vehicle traveling eastbound on 172 St. NE. He  
10 made visual confirmation that the driver was Mr. Cargill. He has also known Mr. Cargill through  
11 prior police contacts. Officer Sargent made a u-turn, activated his emergency lights, and got  
12 behind the vehicle traveling southbound on 51<sup>st</sup> Ave NE. The vehicle pulled to the right  
13 shoulder.

14 Officer Sargent approached the vehicle and ordered Mr. Cargill to get out of the vehicle  
15 as he was under arrest. Mr. Cargill responded "no" and revved the engine. Officer Sargent heard  
16 a female passenger say "No...what are you doing?" Officer Sargent observed Mr. Cargill put the  
17 car into gear and say "You gonna shoot me...there is a kid in the vehicle."

18 Mr. Cargill then left the scene at a high rate of speed. Officer Sargent observed Mr.  
19 Cargill splitting traffic which moved towards the shoulder. Officer Sargent proceeded to his  
20 patrol vehicle but did not pursue the vehicle.  
21

22 **POTENTIAL WITNESSES**

23 Defense reserves the right to call rebuttal/impeachment witnesses based on the actual  
24 testimony of the State's witnesses.  
25

**LESSER INCLUDED OFFENSES**

1 A criminal defendant is entitled to jury instructions that accurately state the law, permit  
2 him or her to argue his theory of the case, and are supported by the evidence. *State v. Clausing*,  
3 147 Wn.2d 620 (2002).

4 The defendant proposes Failure to Obey Officer as a lesser included offense. *State v.*  
5 *Gallegos*, 73 Wn. App. 644 (1994) (holding that failure to obey officer is a lesser included  
6 offense of attempting to elude a pursuing police officer).

### 8 MOTIONS IN LIMINE

9  
10 **1. Exclude the Defendant's prior convictions and bad acts. ER 402, 403, 404(a),  
404(b), and 609.**

11 This includes any testimony that Mr. Cargill had an active warrant out for his arrest, Mr.  
12 Cargill's statements of "No" in response to demands to get out of the vehicle and be placed  
13 under arrest for active warrants. These facts are not relevant to the charged offense and are  
14 unfairly prejudicial. The State is not required to prove Mr. Cargill's intent in a charge of  
15 attempting to elude a police vehicle. *See State v. Gallegos*, 73 2n. App. 644 (1994).

16 Furthermore, this motion includes any testimony regarding Mr. Cargill's prior  
17 convictions. The State may not elicit testimony with regard to a prior conviction unless the State  
18 has requisite proof thereof. *State v. Reed*, 74 Wn.2d 335, 339 (1868); *State v. Dixon*, 17 Wn.  
19 App 859, 864 (1873). Mr. Cargill has five prior felony convictions which are crimes of  
20 dishonesty. He also has four misdemeanor convictions which could also be considered crimes of  
21 dishonesty. Those convictions may only be introduced for the purposes of impeachment if Mr.  
22 Cargill testifies.

23  
24  
25 **2. Motion to exclude any testimony from Detective Phillips and Officer Sargent  
regarding prior contacts with Mr. Cargill and his family.**

1  
2 Any testimony regarding the officers' prior contacts with Mr. Cargill is inadmissible  
3 under ER 404(b). "Evidence of other crimes, wrongs, or acts is not admissible to prove character  
4 of a person in order to show action in conformity therewith." Detective Phillips and Officer  
5 Sargent have indicated in defense interviews and in their police reports that they are familiar  
6 with Mr. Cargill and his family through prior police contacts. Furthermore, that they had  
7 responded to the Cargill residence on past incidents.

8 The introduction of prior wrongs, acts or misconduct inevitably shifts the jury's attention  
9 to the defendant's propensity for illegal conduct, thus stripping away the normal presumption of  
10 innocence. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Accordingly, courts  
11 must be very cautious in admitting such evidence. When in doubt, "the scale must tip in favor of  
12 the defendant and exclusion of the evidence." Smith, supra, 106 Wn.2d at 776; State v. Myers,  
13 49 Wn. App. 243, 247, 742 P.2d 180 (1987).

14 For evidence to be admissible under ER 404(b), the court must: (1) find by a  
15 preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which  
16 the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove  
17 an element of the crime charges, and (4) weigh the probative value against the prejudicial effect.  
18 See State v. Lough, 125 Wn.2d 847, 853 (1995). The evidence is not relevant to any elements of  
19 the charge presently and the prejudicial effect greatly outweighs any probative value that this  
20 evidence might have.

21  
22 Any testimony by the officers with regards to prior contacts with Mr. Cargill and his  
23 family would be highly prejudicial and would outweigh any probative effect. There is no  
24 indication that prior contacts are in anyway related to the issues before the court presently.  
25

1 Furthermore, any testimony would merely serve to bolster's the officer's creditability and would  
2 go towards establishing the defendant's propensity for criminal acts.

3 **3. Motion to limit the testimony of Detective Phillips and Officer Sargent to lay**  
4 **opinion testimony.**

5 Neither officer was disclosed as an expert to the Defense beyond the general disclosure  
6 submitted on the witness list provided by the state. No basis was provided to the Defense, which  
7 would provide the foundation for the officers to classify as an expert. The Defense will object to  
8 any attempt to lay a foundation that any officer testifying as an expert in any area other than  
9 routine police procedure. ER 701,702.

10 **4. Prohibit Officer Sargent from estimating how fast Mr. Cargill was driving.**

11 Officer Sargent did not use a radar or laser nor did he properly pace the vehicle in order  
12 to estimate how fast the vehicle was driving. Any method which Officer Sargent would guess  
13 the speed of the vehicle is not generally accepted in the scientific community. *Frye v. U.S.*, 293  
14 F. 1013 (D.C. Cir. 1923).

15  
16 **5. Prohibit any State witnesses from testifying that Mr. Cargill was eluding or**  
17 **willfully failing to stop or refusing to immediately bring the vehicle to a stop or**  
18 **that he was driving in a reckless manner.**

19 Such statements invade the province of the jury sitting as the fact finder. Const. Art. I, §  
20 22; U.S. Const. Amend. VI.

21  
22 **6. Motion to exclude any statements made by the passenger as inadmissible**  
23 **hearsay pursuant to ER 801, 802.**

24 **7. Motion to exclude Mr. Cargill's prior booking photo. ER 404(b).**  
25

1           **8. Motion to exclude any testimony from Detective Phillips as what vehicle Mr.**  
2           **Cargill got into, the license plate of the vehicle, the direction of travel of the**  
3           **vehicle, and the location of the vehicle. ER 1001 and 1002.**

4           Any testimony as to the contents of the surveillance video should be prohibited under the  
5           Best Evidence Rule because Detective Phillips' testimony is to prove the contents of the  
6           surveillance video. At this time, no surveillance video has been provided to the defense. ER 1001  
7           and 1002.

8           **9. Order that no reference be made by any counsel nor any witness to matters**  
9           **previously excluded by the Court, nor comment on any rulings that the Court**  
10           **has made with respect to pretrial motions. ER 103(c), 401.**

11           **10. Order that witnesses be separated and excluded from the courtroom. ER 615.**

12           Defense moves to exclude witnesses pursuant to ER 615 and asks that the State be  
13           ordered to admonish all State witnesses not to discuss their testimony with each other until the  
14           close of the proceedings, including police officers.

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16           Respectfully submitted this 22nd day of November, 2013.

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19           \_\_\_\_\_  
20           Jennifer Bartlett, WSBA #43171  
21           Attorney for the Defendant