CERTIFICATE OF SERVICE
I certify that I mailed
1 copies of SAG
to App Counsel
& Pros office
1/15/15
Date Signed

FILED
COURT OF APPEALS
DIVISION II

2015 JAN 15 AM 11:29

STATE OF WASHINGTON

BY _____
DEPUTY

THE COURT OF APPEALS IN THE STATE OF WASHINGTON
DIVISION

DONALD McELFISH Appellate,	)	No. 46216-8-II STATEMENT OF ADDITIONAL GROUNDS
V.	)	
STATE OF WASHINGTON Respondant.	)	

I. IDENITY

I, DONALD McELFISH, residing at Washington State Penitentiary 1313 N. 13th Avenue Walla Walla, washington 99362 at all times set forth the following STATEMENT OF ADDITIONAL GROUNDS.

II. RELIEF REQUESTED

I ask the Court for the following relief:

1. I request that the court remand for new Trial.
2. Remand for a Evidentary Hearing to determine the Prejudice that trial counsel was ineffective in doing or not doing.
3. Any other relief In the Interests Of Justice.

III. LEGAL ARGUMENT AND STATEMENT OF GROUNDS

A. DONALD McELFISH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF SIGNIFICANT ERRORS IN DONALD McELFISH TRIAL REQUIRED COUNSEL TO OBJECT OR MOVE FOR MISTRIAL, OR TO INTERVIEW WITNESS FAVORABLE TO McELFISH'S DEFENSE.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and wash. Const. Art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 663, 686 (1984); State v. Miller, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

1. The Error For Allowing the Prosecutor To Vouch For Witnesses.

Defense Counsel did not challenge Prosecutorial Misconduct when prosecutor during closing argument by expressing his opinion regarding the state witness not lieing. (4/14/2014 RP Page 47 line 3;) the state argues the defense witness are not reliable. (4/14/ 2014 RP Page 58 line 9-12).

2. The Error in Admitting Prosecutor's Statement With Prior Bad Acts Go To The Jury Room.

Trial counsel failed to request an instruction limiting the prupose for which the court could consider the prosecuting

attorneys statement that listed Sodomy as a prior, he failed to provide effective assistance of counsel. (See Exhibit 15 CP).

When evidence is admitted for a limited purpose and the party against whom it is admitted requests a limiting instruction, the court is obliged to give it. Counsel's error results in prejudice when there is a reasonable proability that the outcome of trial would have been different absent the errors. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A limiting instruction would have prevented the jury from using the evidence of once a sex criminal always a sex criminal.

3. Counsel Was Ineffective For Allowing Prosecutor to Draw a "Cloak of Righteousness" Around MS. Miranda in Closing.

A prosecutor has a duty to act impartially and in the interest of justice. State v. Rivers 96 Wn. App. 762 at 675, 981 P.2d 16 (1999). Comments that encourage a jury to render a verdict on facts not in evidence are improper. State v. Stith, 71 Wn. App. 14, 356 P.2d 415 (1993).

It is also misconduct for a prosecutor to draw a "cloak of righteousness" around himself in closing. State v Gonzales, 111 Wn. App. 276, at 283, 45 P.3d 205 (2002); U.S. v. Vaccaro, 115 F.3d 1211 (1987).

4. Counsel Allowed Prosecutor to Vouch For Witness, Comment on McELFISH's Right To Remain Silent In violation of Doyle V. Ohio 426 U.S. 610,

State v. Pinson __ Wa.App __, 333 P.3d 528 (Sep. 3,2014). The prosecution may not make any direct, adverse comment on a defendant's decision to remain silent and not to testify. griffin V. California, 380 U.S. 609, 614-15 (1965); Doyle V. Ohio, 426 U.S. 610, 619 (1976); McMillan v. Gomez, 19 F.3d 465, 469-70 (9th Cir. 1994). Indirect commentary on a defendant's silence, however, does not vilae the Fifth Amendment, unless the prosecutor intended the statement to be a comment on the defendant's refusal to testify or the jury would necessarily interpret the statement as such a comment. Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir. 1987); United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. _____).

DONALD McELFISH laims the prosecuterr engaged in misconduct during his closing argument by commenting on his failure to testify. (State's Closing RP 4/14/2014 page 57 line 2-4). The defense counsel failed to object to his blantent violation of DONALD McELFISH Fifth Amendment to U.S. Constitution In not to having attention brought to his right to remain silent.

The state did not limit its arguement to a isolated incident. Id RP at Page 57, and this is a blow to the U.S. Constitution that cannot be ignored. DONALD McELFISH is entitled to relief because the comment caused actual prejudice.

5. Defense was ineffective for failing to object to inadimissible and prejudicial evidence.

failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) and objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel failed to seek suppression of evidence of DONALD McELFISH's prior bad acts (see Prosecution Attorneys statement), Under the Fourth Amendment and under Wash. Const. Article I, § Section 7. The evidence was highly inculpatory- suggesting that DONALD McELFISH is a known sex offender. There was no strategic reason for its admission. Furthermore a motion to suppress would likely have been granted, as outlined above.

6. Counsel Denied DONALD McELFISH a Right To Present a Defense When He Failed To Interview or Call Witness Favorable to His Defense. FAILED TO ARGUE SIGNIFICANT ERRORS THAT REQUIRED REVERSAL.

#7 Counsel Was Ineffective For Not Arguing An Exceptional Sentence Downward Based on Mr. McElfish's Position That Compelling Reasons Exhist Warrants A Downward Sentence But For The State Introduced A Sodomy Crime That Is No Longer A Crime Impacted Sentencing.

The State argued Mr. McElfish prior sentence required a high end upward based on a 1974 Sodomy, but for defense counsels lack of advocate for Mr. McElfish, the record is sufficient to justify a exceptional, downward sentences.

The trial court does have discretion to impose current sentences, thereby creating an exceptional sentence downward, pursuant to RCW 9.94A.535. In Re Mulholland, 161 Wn.2d 322, 339-31, 166 P.3d 677 (2007).

RCW 9.94A.535 provides that an exceptional sentence outside the standard range may be imposed where it is justified by "substantial and compelling reasons...." RCW 9.94A.535. These reasons, or mitigating circumstances, need only be established by a preponderance of the evidence. Id. This Court reviews for:

(1) Whether substantial evidence supports the sentencing judge's reasons [under clearly erroneous review standard]; (2) Whether the reasons, as a matter of law, justify a departure from the standared range [with de novo review]; and (3) Whether the court abused its discretion in

sentnecing the defendant too excessively or too leniently [based on a review for abuse of discretion]."

State v. Smith, 124 Wa. App. 417, 435, 102 P.3d 158 saff'd, 159 Wn.2d 778 (2004)(citing State v Ferguson, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001)).

RCW 9.94A.535 provides a non-exclusive list of bases for imposing an exceptional sentence downward. "When the court identifies 'more than one justification for an exceptional sentence and each ground is an independent justification, we may affirm the sentence if one of the grounds is valid.'" Smith 124 Wn.App. at 435-36 (quoting State v. ZZatkovich, 113 Wn. App. 70, 78, 52 P.3d 36 (2002)).

However, appellate asserts that this court can remand back for findings and conclusions that were not entered when the trial court introduced the Sodomy charge for consideration at Mr. McElfish's trial. Counsel should have argued this submission and argued for a downward sentence based on concurrent sentences, based on a downward. In re PRP of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999).

#8. MR. McELFISH'S ACCOMPLICE LIABILITY WPIC 10.51 AT TRIAL WAS ERROR AND WAS NOT HARMLESS

Appellate now collateraly raises the above issue to supplement defense counsels ineffectiveness at trial on the

issues of Accomplice Libiility . Mr. McElfish is asking this Court to conclude beyond a reasonable doubt that the jury verdict would have been different without the error and reverse under; United States V. Nader, 527 U.S. 1, 6 (1999).

> The fact that a purported accomplice knows that the principal intends to commit a crime does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal.

Thus, following Nader this Court must reeview and acknowledge in the instructions concerning accomplice liability as follows:

1. Determine if the instructions were wrong;
2. Presume that if the instructions were wrong, in that they failed to inshure a jury determine beyond a reasonable doubt about the facts supporting accomplice liability, there were harmfull;
3. Review the facts contained in the record to determine if that presumption of harm was overcome beyond a reasonable doubt; and;
4. (4) consider only the uncontroverted evidence in the record when making this decision.

Washington adopted a stringent form of harmless error review, in which error was to be presumed, but a full review of the facts shown by "Uncontroverted evidence" in the record might overcome the presumption, and overcome it beyond a reasonable

doubt.

The court never made any findings on the merits which never confirmed accomplice liability was considered only with respect to the crimes charged.

Mr. Mcelfish's principal liability for kidnapping and attempted rape was in doubt. Thus, is vigorously controverted in respect to the "Crime" and general cupability is in doubt.

The Supreme Court of Washington erroneous rule undermines the states burden of proving Constitutional Error harmeless, replacing it with substantial evidence standard. Chapman v. California, 386 U.S. 18, at 23 (196), cautioning against overemphasis on overwhelming evidence in determining harmless of constitutinal eror. In Mr. McElfish's case there are missing elements of kidnapping and attempted rape, and the standards pertain to this and not the evidence in general

In State v. Roberts 142 Wn.2d 471 (2000) and State v. Cronin , 142 WN.2d 568 (2000), found reversable error where jury instructions premised accomplice liability on errounious accomplice liability instructions. These instructions permitted attribution of liability for elements on strict liability basis, and are improper even as applied here.

Mr. McElfish's principle liability for Kidnapping and Second Degree Attempted Rape is vigorously controverted. This contention is perhaps best illustrated by the merrits of Mr. McFishs facts.

The trial court was error when appling th MENS REA to the standards to facts and do not show Mr. McElfish intentionally aided the principl's actions in Kidnapping and suffecency of evidence in the other crimes attached to accomplice liabolity.

The defense counsel's contribution of error at trial was not harmless because it relived the state of its burden of proof, which is not harmless.

#9. THE PROSECUTOR ENGAGED IN MISCONDUCT BY COMMENTING ON MR. McELFISH'S FAILURE TO TESTIFY AND BE SUBJECT TO EXAMINATION AND TRIAL COUNSEL NEVER HELD HIM TO HIS BURDEN OF PROOF.

The law in Washington is clear, prosecutors are held to the highest professional standards. A prosecuting attorney is a quisi-judicial officer. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The State Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

> He represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. State v. Case 49 Wn.2d 66, 298 P.2d 500 (1956). State v. Coles, 28 Wn.App. 563, 573, 625P.2d 713 (1981).

A defendant in a criminal case has a constitutional right not to testify at trial, and thus not be subjected to

cross-examination. See, U.S. Constitutional Amendment 5, and Washington Constitution Artical 1 § 9. Drawing attention to the defendant's failure to testify is a constitutional error. State v. Sargent, 40 Wn. App. 340, 347, 698 P.2d 598 (1985).

> Prosecutorial comment on the accused's exercise of his constitutional right to remain silent is forbidden. The state cannot be permitted to put forward and inference of guilt, which necessarily flows from an imputation that the accused has suppressed or is withholding evidence, when as a matter of constitutional law, he is not required to testify. To hold otherwise would render this constitutional privilege meaningless for its exercise would result in a costly penalty to the accused.
>
> Judicial intolerance for prejudicial prosecutorial tactics is another important consideration underscoring the scrumplous regard which the law has for this right.

(Citations omitted). State v. Reed, 25 Wn.App. 46, 48, 604 P.2d 1330 (1979); See also State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976); aand State v. Fiallo-Lopez, 78 Wa. App. 717 (1995).

The test employed to determine if a defendant's 5th Amendment rights have been violated is whether the prosecutor's statement was of such charater that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify. State v. Sargent, 40 Wn. App. at p 346> Reversal is

required only if there is a substantial likelihood the comment affected the jury's decision. **State v. Martin**, 41 Wa. App. 133, 139, 703 P.2d 309 (1985); State v Reed, Supra; State v. Graham, 59 Wn. App. 481, 798 P.2d 314 (1990); **State v. Smith**, 104 Wn.2d 497, 707 P.2d 1306 (1985); State v. Fiallo-Lopez, 78 Wn. App. at p. 729.

Here, during the states closing arguement, the state improperly commented on Mr. McElfis's failure to testify. (Page 57 Lines 2-4).

> "Now, you cannot hold the defendant not testifying against him. Don't do that. It's the State's job to prove the case..."

The sate's comment in rebuttal closing argument was improper, prejudicial, and deprived Mr. McElfish of his constitutional right not to testify. The improper remark by the state was not a pertinent reply to any of defense counsel's argument. But for, counsel's errors as if he was working with the prosecutor, his conviction must be reversed.

REMAND IS REQUIRED IN MR. McELFISH'S TRIAL BECAUSE THE TRIAL COURT ERRED BY SENDING THE POWER POINT PRESENTATION TO THE JURY WITHOUT FIRST CONDUCTING THE REQUIRED BONE CLUB ANALYSIS

Artical I, section 10 of the Washington Constitution provides that "Justice in all cases shall be administered openly." Division One of this Court recently concluded that "the public access plays a significant positive role in the functioning of a particlar process in question." State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). The court must conduct a Bone Club, analysis, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

Here the prosecutor presented a Power-Point presentation to the jury and no where in the record that this was done in open court.

Bone-Club:

The trial court must perform a weighing test consisting of five criteria:

1. The proponet of closure or sealing must make some showing [of a compelling interest], and where that need is bases on a right other than an accused's right to fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anycne present when the closure motion is made

must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the lest restrictive means available for protecting the treatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve it purpose.

Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

Resolution of whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to a proceeding. U.S. Constitutional Amendment 6. Sublett, 292 P.3d at 715; Waller v. Georga, 967 U.S. 39 (1984).

The open operation of our courts is of upmost public importance. Justice must be conducted openly to foster public's understanding and trust in our judicial system and give Judges the check of scrutiny. Secrecy fosters mistrust.

Mr. McElfish submits that this error is not subject to Harmless Error. State v. Wise, 176 Wn.2d 1, 14, 288 P.3d 1113 (2012). Requiring a new trial. State v. easterling, 157 Wn.2d 167 at 181, 137 P.3d 825 (2006).

Failure for counsel to subject the test of the

Bone-Club was ineffective assistance of counsel. In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004).

ARGUMENTS BY THE PROSECUTION SHIFTED THE BURDEN IN MR. McELFISH'S TRIAL AND MISSTATED THE STATE'S BURDEN TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT CONSTITUTED MISCONDUCT.

In the opening statement the State argued what was dietinguished in State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014), as misconduct.

In State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006), The court of appeals found that the prosecutor misstated the burden of proof by comparing the beyond a reasonable doubt standard to figuring out a gig saw puzzle and crossing the street, and by telling the jury to speak the truth. Mr. McElfish's case it was bake a cake.

This case is plainly analogous to State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010) and the court held that "prosecutors arguements discussing the reasonable standard in the context of making an affirmitive decision based on partially compleated puzzle trivialized the state's burden, focosed on the degree of certainty the jurors needed to act, and implied the jury had a duty to convict without a reason to do so." The court reversed the conviction.

The Court of Appeals held that telling a jury to "find the truth" or "Speak the truth" is improper. State V. Anderson, 153 Wa. App. 417, 429, 220 P.3d 1273 (2009).

Mr. McElfish must show prosecutoral misconduct caused prejudice. To show prejudice, the petitioner must show a substantial likelihood that the prosecutors statements affected the jury's verdict. State V. Emery, 174 Wn.2d 741, 167, 278 P.3d 653 (2012). Citing Anderson.

Counsel did not obeject, but even if he did a jury instruction could not of cured the errors. The following statements to the McElfish jury were improper. (Opening statement ___ attachment).

In State v. Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). Here as in Glasmann '[T]he cumulative effect of repetive prejudical prosecutoral misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudical effect." Id.

The prosecutor and defense counsel behaved unprofessionaly and disrespectful toward the defendant, and towards the Court throughout the trial. That disrespect permeated the trial process. Against that backdrop, the prosecutor in his closing and opening arguments, denigrated defense counsel, misstated the burden of proof, expressed his personal belief as to defense witness' veracity. There is a substantial

likelihood of prejudice in Mr. McElfish's case. Reversal is warrante.

THE COURT'S INSTRUCTIONS VIOLATED MR. McELFISH'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING CONVICTION WITHOUT PROOF OF EACH ESSENTIAL ELEMENT OF KIDNAP 1° & SECOND DEGREE ATTEMPTED RAPE.

Due process clause of the Fourteenth amendment requires the state to prove every element of and offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Windship, 397 U.S. 38, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions that relieve the state of its burden to prove every element of an offense violate due process. State v. Thomas, 10 Wn.2d 821, 844, 83 P.3d 970 (2004): State v. Randhawa, 133 Wn.2d 67, 76, 491 P.2d 661 (1997). Such instructions also create a manifest error affecting a constitutional right, and thus can be raised for the first time on appeal. RAP 2.5(a); State v. Chino, 117 Wn. App 531, 538, 72 P.3d 256 (2003).

Juries lack the tools of statutory construction available to courts. See, e.g., State v. Harris, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004). Accordingly, a court's instruction to the jury "must more than adequately convey the law. They must make the relevant legal

standard 'manifestly apparent to the average juror."' State v. Watkins, 136 Wn. App. 240-241, 148 P.3d 1112 (2006)(Quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

Jury instructions that misstate the an element are not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

To convict Mr. McElfish the state was required to prove that he kidnapped and/or attempted to rape the victim.

The circumstances in which Mr. McElfish's accomplice entered his home with a victim and with a gun pointed around, giving commands. Mr. McElfish separated him with his victim and allowed her to flee from the room. The victim left her cloths when she fled. "'[C]ircumstances' include ' the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.'" State v. Skenador 99 Wn. App. 494, 499, 942 P.2d 291 (2000)(quoting State v. Sorenson, 5 Wn. App. 269, 273, 492 P.2d 233 (1972)).

Reversal is warranted and the case remanded for new trial. Winship Id.

THE TRIAL COURT'S FAILURE TO GIVE A UNANIMITY INSTRUCTION DENIED MR. McELFISH'S STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY.

An accuse person has a state constitutional right to an unanimous jury verdict. Wash. Const. Article I, Section 21; State v. Elmore, 155 Wn.2d 758, 771n. 4, 123 P.3d 72 (2005). Before a criminal defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. State v. Coleman, 159 Wn. 2d 509, 511, 150 P.3d 1126 (2007). If the prosecution presents evidence of multiple acts, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act. Coleman, at 511

The Federal constitutional guarantee of a unanimous verdict does not apply in state court. Apodaca v. Oregon, 406 U.S. 404, 406 (1972).

In the absence of and election, failure to provide a unanimity instruction is presumed to be prejudical. State v. Vander Houwen, 163 Wn.2d 25, 38, 177 P.3d 93 (2008). This places on Mr. McElfish the burden of proof of the elements of the crimes he was charged with. State v. W.R., COA # no. 38341-6 (October 30, 2014). Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); State v. Greathouse, 113 Wn. App. 889, 916, 55 P.3d 559 (2002).

In Mr. McElfish's case, the prosecution presented evidence that Mr. McElfish committed two crimes, with two different theorys. One as a Principal and one as a accomplice. The prosecution shifted the burden on the defendant on the elements of second degree attempted rape. The error is not harmless, because a rational juror could have entertained a reasonable doubt as to either act. Therefore in light of State v. D.M. Id. the error was not trivial, formal, or merely academic.

Although the two alleged crimes occurred in sequence, they cannot be considered part of a single continuing course of conduct. Reversal is warranted.

CONCLUSION

Based on the grounds above Appellate asks for the court for the following relief:

1. Remand for a new trial or dismiss the charges.
2. Order a evidentairy hearing on the Ineffective assistance of counsel grounds.
3. Any other relief this court deems in the Interest Of Justice.

DATED THIS 8 day of January 2015.

Donald Mc Elfish 239025
WSP 1313 N. 13th Ave
Walla Walla, WA 99362

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STATE OF WASHINGTON

BY _____
DEPUTY

DONALD McELFISH
Appellate,

State of Washington
Respond nt.

NO. #46216-8-II

AFFIDAVIT OF SERVICE BY MAILING

I, Donald McElfish, **being first sworn upon oath, do hereby certify that I have served the following documents:**

STATEMENT OF ADDITIONAL GROUNDS, PROOF OF SERVICE

Upon:

Cowlitiz County Prosecutor
312 First Ave.
Kelso, WA 98626-1739

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 8 **day of** January, 2015.

Donald M McElfish

Name & Number

Donald McElfish 239025

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