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AMENDED

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON, RESPONDENT, v. JIMI JAMES HAMILTON, APPELLANT.	**NO. 72516-5-1** **AMENDED STATEMENT OF ADDITIONAL GROUNDS**

I. IDENTITY OF MOVING PARTY

I have reviewed the opening brief prepared by my attorney. Summarized in Section III are additional grounds for review that are not addressed in that opening brief. I understand that the court will review this Statement of Additional Grounds when my appeal is considered on the merits.

II. STATEMENT OF FACTS REGARDING GROUNDS

1. Statement of Facts Regarding Grounds 1- 16 Findings and Conclusions on Defendants Second Motion to Dismiss. SUB No. 194.

On March 21, 2014 Hamilton filed a second motion to dismiss based on *State v. Cory 62 Wn.2d* and CrR 8.3. CP 344-68; SUB NO. 194. The March 21, 2014 motion to dismiss raised several issues to include the Department of Corrections non-compliance with the courts orders regarding mail to and from Hamilton's attorneys and location and manner of attorney visits. CP 344-68; SUB NO. 194.

On May 11, 2014 after the March 21, 2014 motion to dismiss was filed, but before the evidentiary hearing for the motion to dismiss, another intrusion into attorney-client communication occurred, where Correction Officer's performing a cell search on Hamilton's cell examined discovery documents 624-849 that counsel had redacted and sent to Mr. Hamilton to review, comment on, and return to counsel. Appendix I, Declaration of Kelly Canary.

An evidentiary hearing was held and extensive testimony was adduced from Mr. Hamilton, Attorney Kelly Canary, Correction Officer's, and others.

On August 19, 2014 the Trial Court made an oral ruling on the March 21, 2014 motion to dismiss and included the May 11, 2014 cell search. The August 19, 2014 findings were incorporated into conclusions of law. 16 VRP at 89. When the court gave its decision on August 19, 2014, the state did not propose findings to the court and did not advise the court or the defendant it would propose findings on the August 19, 2014 decision on motion. Nor did the state propose findings on September 15, 2014 when the court addressed defense counsels request to clarify findings; in which the court did clarify findings on September 15, 2014. 18 VPR at 7.

On October 2, 2014 trial counsel withdrew as counsel.

On October 2, 2014 the state noted a hearing to present proposed findings to the defendant's 2014 second motion to dismiss under *State v Cory* and CrR 8.3. 30 VPR at 3.

On October 27, 2014 the defendant Pro Se sent a motion to the Snohomish County Superior Court titled, "Defendant's objections to the states proposed findings regarding defendant's second motion to dismiss under *State v. Cory* and CrR 8.3." In that motion, received by the court on October 30, 2014, the defendant requested to be transferred to the jurisdiction of Snohomish County to hear argument and objections to the states proposed findings. Appendix II.

The defendant argued that the Trial Court had no authority to grant the states untimely proposed findings under Superior Court Civil Rule 52 (B). The defendant also argued that the Trial Court had no authority to hear the states proposed findings, as Superior Court Civil Rule 52 (5) (C) requires that the defeated party receive a copy of the proposed findings and he had not received the proposed findings. Appendix II.

On November 3, 2014 a hearing was held in Snohomish County Superior Court. The defendant was only allowed to appear telephonically and asked the court to represent himself and informed the court he had not been given a copy of the states proposed findings. 31 VRP at 3.

The defendant objected to the court hearing or granting the states proposed findings under CR (5) (B), as they are "additional findings." 31 VRP at 4. The defendant also asked the court to order the state to provide him a copy of the proposed findings.

The court refused to allow the defendant to represent himself and had counsel represent the defendant. 31 VRP 8. Counsel for the defendant also objected to the states additional untimely findings and reconsideration of findings already made on August 19, 2014. 31 VRP at 9.

The written findings entered on November 3, 2014 make a substantial amount of additional findings that the court did not announce on the August 19th 2014 decision on motion. Appendix III; 16 VRP 89-120.

The November 3, 2014 findings also omits findings made on August 19, 2014 and relies on evidence not presented at the evidentiary hearing; specifically 2 ½ weeks of trial testimony and observing the defendant during trial.

In a Statement of Additional Grounds the defendants assigns error to the courts findings and conclusions made on August 19, 2014 and November 3, 2014. 16 VRP 89-120; Appendix III.

III. ADDITIONAL GROUNDS, ISSUES PERTAINTING TO GROUNDS, AND ARGUMENTS

Additional Ground 1:

The Trial Courts finding on August 19, 2014 and November 3, 2014 written findings that the state and the Department of Corrections did not obtain confidential

attorney-client communication, is based on untenable gourds. 16 VRP at 89-120; Appendix III, page 22.

Issues Pertaining to Ground 1:

Did the confiscated and examined discovery documents removed in the May 11, 2014 cell search fall under the work product and attorney-client privilege, because the identity of the documents are integral parts of the communication between client and counsel?

Argument for Ground 1:

Communications amongst counsel and client are protected by the Attorney-Client Privilege and Work Product Doctrine. The Work Product Doctrine is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy, with an eye towards litigation free from unnecessary intrusions by his adversaries; *United States v. Adlman, 134 F.3d 1194, 1196 (2nd Cir 1998)*; quoting *Hickman v. Taylor 329 U.S. 495, 510-11 67 S. Ct. 385 91 L. Ed. 451 (1947)*. Work product refers to documents prepared by counsel in anticipation of litigation; *Heidebrink 104 Wash.2d at 396*. There are two categories (1) factual information and (2) attorneys mental impressions, research, legal theories, opinions, and conclusions; *Limstrom 136 Wash.2d at 605-06*. Work product documents need not to be prepared personally by counsel, they can be prepared by or for the party, or the parties representative so long as they are prepared in anticipation of litigation; *Heidebrink 104 Wn.2d at 396*.

Washington's Attorney-Client Privilege is found at RCW 5.60.060 (2). The privilege applies to communications and advice between an attorney and client and extends to documents; *State v. Perrow 156 Wn.App. 322 (2010)*; citing *Dietz v. Doe 131 Wash.2d 835 (1997)*. It applies to any information generated by a request for legal advice; *Perrow*; citing *Soter v. Cowles Publ'g Co. 131 Wn.App. 882 aff'd 162 Wn.2d 716 (2007)*.

It is undisputed that discovery documents 624-849 were sent to the defendant by counsel as a communication. Clearly, the documents were gathered and sent by and in response for legal advice and to prepare and develop legal theories and strategy. Appendix I, Declaration of Kelly Canary.

Discovery documents 624-849 are integral parts of that communication. For example, if the attorney was in a meeting with the defendant and they verbally went over these same

documents, the fact they went over these documents is a privileged matter. The state does not get to know that counsel and client focused on discovery pages 624-849. That communication is fully privileged. Meaning, the state does not get to know the identity of the documents or the subject of the documents. Such information that counsel discussed with client is fully privileged and so is the documents identity.

The state intruded, seized, and examined communications between attorney and client intended to remain confidential. The assertion that the Department of Corrections did not see or read any notes from Mr. Hamilton misses the point. The identity of the documents and the subject of the documents are integral parts of confidential communication, which were revealed by the Department of Corrections and the state did therefore obtain privileged communication, as did the Department of Corrections.

The court finding to the contrary is based on untenable grounds or it obviously did not use the proper legal standard for protected materials and what constitutes privileged communication.

Additional Ground 2:

The defendant was prejudiced by the May 11, 2014 cell search and confiscation of the discovery documents 624-849, which were given to the defendant by counsel to review, comment on, and return. The state was given an unfair advantage and there is not sufficient evidence to support the courts findings on August 19, 2014 and November 3, 2014 written findings that the state has proven the absence of prejudice beyond a reasonable doubt. 16 VRP at 102; Appendix III.

Issues Pertaining to Ground 2:

Is there sufficient evidence in the record to support the courts finding that the state proved beyond a reasonable doubt that there is no possibility of prejudice resulting from the May 11, 2014 cell search, where the state offered no evidence to rebut the presumption of prejudice pertaining to the defendants claim that the states witness list changed after the May 11, 2014 cell search?

Argument for Ground 2:

The state gained an unfair advantage at trial through the May 11, 2014 cell search, in which Correctional Officers seized/confiscated discovery pages 629-849[1]. In which counsel had prepared and sent to the defendant to review, comment on, and return to counsel. Appendix I, Declaration of Kelly Canary.

Some of the documents involved a former Washington Department of Corrections employee by the name of Wendy Lee, who was investigated internally by the Department of Corrections for sexual relationships with inmates at the Monroe prison. Admitted June 6, 2014, Exhibit No. 33, pages 000644-000683 and 000722-000849.

The day before the August 23, 2012 incident, Wendy Lee complained to staff at the prison that the defendant was watching her. In which Supervisor Deb Franek gave staff instructions on how to address the issue of Wendy Lee's complaints. September 18, 2014, 21 VRP at 118, 119.

On August 23, 2012 within seconds after the incident Wendy Lee assisted the injured Corrections Officer with Leroy Sykes. September 19, 2014, 22 VRP at 113-116. However, the state elected not to call Wendy Lee as a witness, although Wendy Lee was a listed witness; see states trial brief SUB No. 217.

Obviously, the intrusion into the defendant's communications with counsel (when the Department of Correction employees confiscated discovery documents 629-849; prepared and sent to the defendant for the purposes of communication between attorney and client) revealed the defenses mental impressions, in so far as it pertained to a heightened interest in Wendy Lee's misconduct at the Department of Corrections. The state electing to not call Wendy Lee as a witness was an advantage to the state because of the intrusion on May 11, 2014, as the state clearly learned that the defense was especially interested in Wendy Lee's misconduct.

Wendy Lee was not equally available as a witness to the defense. The availability of a witness is not determined by the mere accessibility to subpoena him or her. On the contrary, his or her availability depends on other things such as the relationship to one or the other parties and the nature of expected testimony; *State v. Blair 117 Wash.2d 479 (1981)*. Wendy Lee at the time of the alleged assault on August 23, 2012 was a Washington Department of Corrections

[1] Exhibit No. 33 is not an actual document that was taken out of the defendant's cell but instead a copy of discovery 629-849 and submitted by the prosecution to show the court what those documents would have been. 16 VRP at 106.

employee who assisted and attended to the Correction Officers injuries seconds after the alleged assault. 22 VRP at 113-116. Wendy Lee was a party for the state and within the central control of the state, whose interest it would be to produce such witness.

Did the state put forth sufficient evidence to rebut this prejudice beyond a reasonable doubt? The question here is, is there sufficient evidence in the record to persuade a fair minded rational person that the declared premise is true; *In re Stenson 179 Wn.2d 474 (2012).* In other words, is there sufficient evidence to persuade a fair minded person that there is no prejudice to the defendant beyond a reasonable doubt?

Here, the state did not even attempt to rebut this claim of presumed prejudice. On June 17, 2014 defense counsel stated in relevant part; 12 VPR at 46, 47:

> [Defense Counsel] Just a couple other things, Mr. Hamilton has given us work product before and while I can't say it definitely reached the state, the state has made some decisions that correspond to information that Mr. Hamilton gave us about what witnesses to call and what witnesses not to call.
>
> [The Prosecutor] I'm going to object to this as testimonial and I have no idea what she's talking about.
>
> [The Court] Sustained.

The state did not even attempt to argue or put forth any evidence its witness list specifically electing not to call Wendy Lee as a states witness was not the result of strategic decision by the state, after learning that defense counsel prepared and sent the defendant discovery documents 629-849 to review, comment on, and return to counsel. Without question revealing to the state the defense had a specialized interest in Wendy Lee's misconduct, as the majority of documents were two internal investigations of Wendy Lee. Admitted June 6, 2014, Exhibit No. 33, pages 000644-000683 and 000722-000849.

The state has not shown beyond a reasonable doubt that this presumption of prejudice; i.e. the state did not gain an unfair advantage, because the state did not rebut this kind of presumed prejudice. The courts August 19, 2014 findings that the state proved the absence of prejudice beyond a reasonable doubt cannot stand. 16 VRP at 102. Additionally the courts November 3, 2014 findings I. Conclusions related to all allegations # 4 cannot stand. Appendix

III, page 22. The conviction should be vacated without remand under authority of *State v. Pena Fuentes 179 Wn.2d (2014).*

Additional Ground 3:

There's not sufficient evidence in the record to support the courts August 19, 2014 finding that there was no testimony that Mr. Hamilton believed the video recorded visit with counsel interfered with the attorney-client relationship. 16 VRP at 102.

Issues Pertaining to Ground 3:

Is there sufficient evidence in the record to support the courts August 19, 2014 finding that there was no testimony that Mr. Hamilton believed the video recorded visit with counsel interfered with the attorney-client relationship? 16 VRP at 102.

Argument for Ground 3:

In the August 19, 2014 findings and conclusions the court stated. 16 VRP at 101:

> While the videotaping may interfere with the attorney-client relationship, there was no testimony that Mr. Hamilton believed it interfered with their relationship. As I indicated, he testified that the camera was pointed at the back or top of his head and it was monitoring the attorneys.
>
> I don't find that this action interfered with the attorney-client relationship and furthermore he was - - I think - - well, I guess I'll strike that.

In challenging the sufficiency of the finding this court must look for substantial evidence in the record. Substantial evidence exist when the record contains evidence of sufficient quantity to persuade a fair minded person that the declared premise is true; *In re Stenson 174 Wash.2d 474 (2012)*; quoting *Ino Ino Inc v. City of Bellevue 132 Wash.2d 103 (1997).*

The defendant testified on June 16 and June 17, 2014. On June 17, 2014 the following exchange occurred. 12 VRP at 15:

> [Defense Counsel] In your opinion, what confidence has been lost as a result of the Department of Corrections actions?
>
> [Defendant] Well, if you'll allow me to explain this a bit. There's - - when I think of that word, there's more than one thing that

> comes to mind and how it could apply. There's the confidence that you can have that your lawyers are the best, and they know how to do this, and they know how to do that, and that's not the confidence I speak of.
>
> The confidence I speak of is the ability to make full complete disclosures to you without fear that it's going to be discovered by DOC and get back to the prosecution, that's the confidence that has been destroyed and that's and that's - - that's the confidence, it's gone, I have none.

The "actions" of the Department of Corrections includes the video recorded visit at Stafford Creek Corrections Center. When the defendant testified on both days, June 16 and June 17, 2014, he testified to the actions of the Department of Corrections violating both court orders; handling of legal materials, and attorney visits. Furthermore, when the defendant testified regarding the attorney visit in the no contact room June 16, 2014 the following exchange occurred. 12 VPR 102:

> [Prosecution] Where is the video camera located?
>
> [Defendant] It's on my side, in the upper right hand corner.
>
> [Prosecution] As you're facing towards your attorneys or as you're facing - -
>
> [Defendant] It shows - - it's up in the right hand corner facing towards you but it shows me as well.
>
> [Prosecution] What I'm asking is the location? So if you're facing towards your attorneys.
>
> [Defendant] Yes.
>
> [Prosecution] Is it on your right or left side?
>
> [Defendant] It's on my right hand side, in the right, in the upper right hand corner.

The defendant's testimony as to his destroyed confidence came at the conclusion of his testimony on re direct examination on June 17, 2014. 12 VRP at 15. The finding that the defendant did not testify that the video tape of his visit with counsel interfered with his

relationship with counsel is manifestly unreasonable. Clearly, the defendant's explanation of destroyed confidence by the actions of the Department of Corrections at the conclusion of re direct on June 17, 2014, included the video taping of the visit with his attorney and investigator. 12 VRP at 15.

Additionally, a court's decision on a motion to dismiss is review for an abuse of discretion; *State v. Moen 150 Wash.2d 226*. Discretion is abused if the Trial Court's decision is based on untenable grounds or manifestly unreasonable; *State v. Rohrich 149 Wash.2d at 654*. A decision is based on untenable grounds if it rest upon facts not supported by the record; *State v. Martinez 121 Wn.App. 21 (2004)*.

Here, the Trial Courts decision regarding prejudice caused by interference with the attorney-client relationship was based on facts not supported by the record, as the court made its decision by erroneously finding that the defendant did not testify that the video recorded visit interfered with the attorney-client relationship; August 19, 2014, 16 VRP 101; when the defendant did testify to his destroyed confidence in counsel due to the actions of DOC. June 17, 2014, 12 VRP at 15.

For these reasons the Trial Court abused its discretion. The conviction should be vacated without remand.

Additional Ground 4:

There is not sufficient evidence in the record to support the courts finding on August 19, 2014 that there is no evidence that anything was obtained from the recording, no indication the video was ever viewed, and no one learned anything. 16 VRP at 102.

Issues Pertaining to Ground 4:

Is there sufficient evidence in the record to support the courts August 19, 2014 findings that there's no evidence that anything was obtained from the recording, no evidence the video was ever viewed, and no one learned anything? 16 VRP at 102. Where, the burden was on the state and the state did not put forth sufficient evidence for this finding?

Argument for Ground 4:

On August 19, 2014 the court stated. 16 VRP 102 :

> I also in a abundance of caution analyzing this under the *Pena Fuentes* framework, as I previously indicated. Yes, it was a purposeful intrusion, but it was - - it was actually videotaped, but I don't find there is any prejudice resulting from this intrusion.
>
> Sorry it was purposeful, I don't see that it was justified, but the state has proven beyond a reasonable doubt there was no prejudice resulting from this intrusion. There was no sound recording, nothing was obtained from the taping, no indication that it was ever viewed, and no one has learned anything from it.

On September 15, 2014 the court at the request of the defense counsel on August 19, 2014, reconsidered a few findings and made additional findings. The following exchange occurred. 18 VRP at 7:

> [The court] Ms. Rancourt, you asked me to look at the notes. I think mostly about - - from Karl Loftren.
>
> [Counsel] Correct.
>
> [The Court] There were a few findings that you wanted me to address. One of the issues was where the cameras were. They were in the cell. Although Mr. Hamilton testified he believed the cameras were pointed at him.
>
> Mr. Loftren testified that the no contact room was, the quote: focus of the cameras, he also indicated that the camera did record, it was no sound but just visual recording and they can't be turned off, and that anyone could view the recording from the monitoring area.

The question here is, is the sufficiency of the evidence to support the courts findings that nothing was obtained from the taping, no indication it was ever reviewed, and no one has learned anything from it? August 19, 2014, 16 VRP at 102.

First off, the state must prove beyond a reasonable doubt there is no possibility of prejudice to the defendant when the state intrudes into privileged communication as noted in

Pena Fuentes 179 Wash.2d; the defendant is hardly in a position to know what information was gleaned from the eavesdropping.

Here, the state did not call a single witness who was in the monitoring area of the video recorders on March 12, 2014, the day of the visit at Stafford Creek Corrections Center; nor did the state call any witnesses who had access to the recording to testify that nothing was learned. The court found on September 15, 2014. 18 VRP at 5, 6:

> [Defense Counsel] I did, I also objected your Honor to the finding that they're taped over, that these particular ones were taped over.
>
> [The Court] And I did not see that these particular ones were taped over.

The state's failure to offer testimony/evidence from the individuals, who had access to this video, is critical when the burden is on the state to show no possibility of prejudice beyond a reasonable doubt.

The state submitted declarations from some, not all, of its trial witnesses who worked at the Monroe prison to assert that they have not been told of attorney-client communication, or don't know what the defense strategy is, etc. The problem is these witnesses wrote these declarations four months before trial. They could have been contacted after they wrote the declaration. Furthermore, the state provided no testimony from the three Department of Corrections Psychologist, who was used as the states rebuttal witnesses to the defendant's diminished capacity defense; Dr. Arthur Davis, Dr. Tanya Browne, and Dr. Cynthia Goins.

The findings that there is no indication that the video was ever viewed, nothing was obtained from the taping, and no one ever learned anything from it, is not supported by substantial evidence; being that the burden is on the state to prove such matters beyond a reasonable doubt and the state offered no testimony by the prison staff at the Stafford Creek Corrections Center who had access to the recording on the day of the visit and after the recorded visit.

The conviction should be vacated without remand.

Additional Ground 5:

The repeated intrusion into the attorney-client communication caused actual prejudice as the defendant was put into a position to choose between his Fifth Amendment and Sixth

Amendment Rights. There is not sufficient evidence in the record to support the courts finding on August 19, 2014 and November 3, 2014 that the state has proven the absence of prejudice beyond a reasonable doubt, where they did not even attempt to rebut this prejudice. 16 VRP at 102; Appendix III.

Issues Pertaining to Ground 5:

Did the repeated intrusions cause prejudice as it compelled the defendant to choose between his Fifth Amendment and Sixth Amendment Rights, where the defendant testified to protect his Sixth Amendment Right only to forfeit his Fifth Amendment Right; and did the state rebut this prejudice beyond a reasonable doubt making the courts August 19, 2014 and November 3, 2014 findings not supported by evidence?

Argument for Ground 5:

Our Washington Courts have long recognized that the prejudice occurs when the defendant is placed in a position to choose between one foundational right over the other.

In *State v. Earl 97 Wn.App. 408 (Div.III 1999)*, the court found prejudice where the states actions put Mr. Earl in a position to choose between his speedy trial rights or effective assistance of counsel.

In *State v. Michielli 132 Wn.2d 229 (1997)*, the Supreme Court held that the defendant was prejudiced, as he was compelled to waive his speedy trial rights and ask for a continuance to prepare for the surprise charges. As the defendant had to prepare for the surprise charges the defendant had to choose between going to trial unprepared or waving his rights to a speedy trial. The court said this can reasonably be mismanagement and prejudice sufficient to satisfy dismissing under CrR 8.3 (B).

Mr. Hamilton's case mirrors the prejudice found in *Earl's, Michielli's,* and other Washington cases where actions by the state placed the defendant in a position to choose between one foundational right over the other.

The repeated actions from the Department of Corrections spying upon and intruding into the defendants communications with counsel compelled the defendant to testify to enforce his Sixth Amendment Right, only to forfeit his Fifth Amendment Right to not give evidence against one's self at the evidentiary hearings.

Both the Fifth Amendment and Sixth Amendment are foundational rights and not trivial matters. Again, the state put on no evidence to rebut this kind of prejudice beyond a reasonable doubt. The intrusions gave the state an unfair advantage. On August 12, 2014 during closing arguments for the motion to dismiss, counsel stated. 15 VRP at 28:

> The defendant has been prejudiced, by this the state takes advantage - - is advantaged by the fact Mr. Hamilton has to take the stand in his own defense here to defend his right to counsel. He's being deprived of his right to remain silent only to enforce his other right.

The state put forth no evidence to rebut this presumption of prejudice. Here, the court found that the state proved the absence of prejudice beyond a reasonable doubt in the August 19, 2014 findings and in the November 3, 2014 findings. 16 VRP at 102; Appendix III, I. Conclusions related to all allegations # 4, page 22.

The question here is, if there is substantial evidence in the record to support the courts finding that the state has proven the absence of prejudice beyond a reasonable doubt when the state offered no rebuttal for this argument at all?

Substantial evidence exist when the record contains evidence of sufficient quantity to persuade a fair minded person that the declared premise is true; *In re Stenson 179 Wn.2d 474 (2012)*; quoting *Ino, Ino Inc. v. City of Bellevue 132 Wash.2d 103 (1997)*. Because the state offered no evidence to rebut this prejudice, the state has failed to meet its burden of proof and the prosecution/conviction should be vacated without remand.

Additional Ground 6:

The Trail Court violated the defendant's right under the Washington State Constitution Article I Section 22 by denying the defendants request to Pro Se representation at the November 3, 2014 presentation of findings hearing.

Issues Pertaining to Ground 6:

Did the Trial Court's denial of the defendants request to represent himself and appear at November 3, 2014 findings hearing violate Article I Section 22 of the Washington State Constitution?

Argument for Ground 6:

On October 30, 2014 the defendant appearing Pro Se noted a motion to (1) deny the states proposed findings and (2) order the Department of Corrections to transfer the defendant to the jurisdiction of the Snohomish County to hear oral argument and objections to the states proposed findings. Appendix II.

On November 3, 2014 the defendant appeared telephonically. At the November 3, 2014 hearing, Mr. Hamilton reiterated that he did not want counsel representing him and informed the court that he has not seen the states proposed findings, and he has not seen or spoken to counsel since counsel withdrew the day the defendant was sentenced on October 2, 2014. 31 VRP at 3. Mr. Hamilton then asked the court to have the state send him a copy of the states proposed findings so the defendant can comply with CR 52 and submit proposed changes in opposition. The court decided to have counsel represent the defendant at the hearing. 31 VRP at 8.

Article I Section 22 of the Washington State Constitution's Declaration of Rights is titled, "Rights of Accused" and provides in relevant part "in criminal prosecutions the accused shall have the right to appear and defend in person or by counsel." This right has been interpreted by our courts as the rights of accused to be present at trial; *State v. Finch 137 Wash.2d 792 (1999)*. But the phrase has also been interpreted as unequivocally guaranteeing an accused the Constitutional Right to represent himself; *State v. Silva 45371-8;* citing *State v. Kolocotronis 73 Wash.2d 97 (1968); State v. Barker 75 Wash.App. 236 (1994); State v. Breedlove 79 Wash.App. 101 (1995).*

The Trial Court violated the defendant's right under Washington State Constitution Article I Section 22 to Pro Se representation by not allowing the defendant to represent himself as requested.

Additional Ground 7:

The Trial Court had no authority to enter/grant the states proposed findings because the defendant was not given 5 days notice as required by CR 52 (5) (c).

Issues Pertaining to Ground 7:

Did the Trial Court have authority to enter the states proposed findings on November 3, 2014 when the defendant specifically requested 5 days notice of the proposed findings by requesting a copy of the proposed findings under CR 52 (5) (c)?

Argument for Ground 7:

Under Superior Court Civil Rule 52 (5) (c) Presentation of Findings, the rule states in relevant part:

> The court shall not sign findings of fact or conclusions of law until the defeated party has received 5 days notice of the time and place of submission and have been served with copies of the proposed findings and conclusions.

Regardless if this court finds the defendant was not entitled to Pro Se representation, 5 days notice should have been given to the defendant and appellate counsel.

Again, this case is distinguished from *State v. Corbin 79 Wn.App. (Div. I 1995)* for several reasons, (1) in *Corbin* the court held as long as the defendant is represented by counsel, he or she has no role at presentation hearing and ordinarily would have no opportunity to speak.

Mr. Hamilton's case was not ordinary, as the trial Judge allowed Mr. Hamilton all throughout the entire case to go on record and state his objections for the record. Furthermore, at the November 3, 2014 hearing the Trial Court said. 31 VRP at 8:

> [The Court] So I'm going to have Ms. Rancourt participate in this hearing. Mr. Hamilton if there's anything else after I've heard from Ms. Rancourt; I will listen to what you have to say.

The defendant was clearly in the dark at the hearing on November 3, 2014 and had no idea what the proposed and actual findings were, and stated this fact on record. 31 VRP at 15.

Mr. Hamilton's situation mirrors that in *State v. Pruitt 145 Wn.App. 784 (Div. I 2008)*. Where the Division I declined to apply *State v. Corbin 79 Wn.App. (Div. I 1995)*. In *Corbin 79 Wn.App.* the court held the defendant wasn't denied the right to be present at a critical stage of trial because the 3.5 hearing findings were merely the Trial Courts oral ruling, in which the defendant was present at the oral hearing.

In *Pruitt 145 Wn.App. 784* the court made written findings that <u>did not</u> memorialize the courts earlier oral ruling and held that *State v. Corbin 79 Wn.App* did not apply.

Like that in *Pruitt 145 Wn.App. 784* the Trial Courts November 3, 2014 written rulings did not merely memorialize the courts oral ruling on August 19, 2014, it altered findings, omitted findings, and considered evidence not present at the hearing; specifically 2 ½ weeks of trial testimony and observing the defendant at trial. Appendix III, page 2.

Finally, the defendant's case is different from *Corbin 79 Wn.App.* because the *Corbin* court said the defendant generally has no role in a presentation of findings hearing.

Mr. Hamilton had a role at the presentation of findings and he was allowed to speak, be heard, and should have been given 5 days notice pursuant to CR 52 (5) (c). The court had no authority to sign the findings, as the defendant was not given 5 days notice. The Trial Court abused its discretion.

Additional Ground 8:

The defendant was denied his right under U.S.CA. 6 and the Washington State Constitution Article I Section 22 to appear in person and review the presentation of findings entered on November 3, 2014. 31 VRP; Appendix III.

Issues Pertaining to Ground 8:

Was the defendant denied his right to appear at a critical stage in the proceedings where additional findings were made, modification of prior findings were made, new evidence used, and the hearing was not a mere memorialization of the evidentiary hearing where the defendant was present?

Argument for Ground 8:

A defendant's due process right to be present at all critical stages of a trial is not absolute: rather the presence of a defendant is conation of due process to the extent that a fair and just hearing would be thwarted by his absence.

The United States Supreme Court has recognized that this right is also protected by the due process clause in some situations where the defendant is not actually confronting witnesses against him; *United States v Gagnon 470 U.S. 522, 526 105 S.Ct. 1482 84 L.Ed.2d 486 (1985).*

Article I Section 22 of the Washington State Constitution provides an explicit guarantee of the right to be present in criminal prosecutions; *State v. Irby 170 Wn.2d 874 (2011).*

In *State v. Corbin 79 Wn.App. (Div. I 1995)* the Trial Court entered written findings of facts in a 3.5 certificate. The juvenile was not present at the hearing. The Court of Appeals held that the 3.5 findings were not a critical stage of trial because the hearing was already held and the defendant was present. The written findings were the Trial Courts oral ruling.

In a later case involving the defendants right to be present at all critical stages; *State v. Pruitt 145 Wn.App. 784 (Div. I 2008)*, the state relied on *State v. Corbin 79 Wn.App. (Div. I*

1995) for the proposition that the entry of findings of fact and conclusions of law is not a critical stage of the proceedings. The Division I said the states reliance on *Corbin* is misplaced based on what occurred. In *Corbin* the entry of findings merely memorialized the Trial Courts oral ruling after the 3.5 hearing.

The *Pruitt* court said, here the written findings and conclusions that the drug court entered in January did not memorialize the courts earlier ruling, rather the Trail Court found *Pruitt* guilty of a different charge, in short *Corbin* does not control.

Mr. Hamilton's case mirrors that in *Pruitt.* The written findings and conclusions did not completely memorialize the courts earlier ruling. Rather, the court made additional findings based on evidence not presented at the first hearing; such as 2 ½ weeks of trial testimony and observing the defendant at trial. Appendix III, page 2.

The late untimely written findings make a substantial amount of additional findings that were not in the courts August 19, 2014 findings and conclusions, and completely omitted others.

For example, in the August 19, 2014 findings the court specifically found that DOC did not follow the courts orders regarding Mr. Hamilton's visit and treatment of his legal mail. 16 VRP at 89-100. The court stated in relevant part; August 19, 2014. 16 VRP at 98, 107:

> It's absolutely ridiculous that they would ignore that order and apparently rely on somebody that doesn't even have a law degree to interpret it. It is incomprehensible to me that Stafford Creek did not share the information about this order to the people who are - - to the people who are interacting with Mr. Hamilton on a day to day basis.
>
> Even as recently as last week people didn't seem to have an clue about any of my orders, either reviewing mail or with the visits. So I am mad that the Department of Corrections violated my orders and apparently had a legal assistant who didn't even go to college advising the custody unit about whether to follow my orders.
>
> Yes on many levels, one its violating my order, two it is affecting a person who has a right to have a trial and a right to have his

> attorney present. If the Department of Corrections and the AG's office do not like my orders they have a remedy, which is to note a hearing and contest it, not to ignore it.

This finding is completely omitted from the late findings on November 3, 2014. CP 16. As is the August 19, 2014 finding. 16 VRP at 107 :

> I cannot say DOC's behavior has been shocking and unpardonable, it has been ridiculous, and shoddy, and mismanaged.

Additionally, the August 19, 2014 findings found that the actions of DOC exacerbated Mr. Hamilton's mental health symptoms. 16 VRP at 108. The list of differences and omissions from the August 19, 2014 findings and conclusions compared to the November 3, 2014 findings go on and on. Appendix III. Like the court in *Pruitt 145 Wash.App.* there is a lot more going on here than in *Corbin 79 Wn.App. (Div. I 1995).*

Here, the state took advantage of the courts lack of memory from significant time passage and tailored the findings. The state has the burden of providing harmless error beyond a reasonable doubt; *Irby 170 Wn.2d 874.*

Additional Ground 9:

The Trial Court had no authority to grant the states untimely proposed findings on November 3, 2014 that amount to additional findings and modification of findings made on August 19, 2014. 16 VRP 89-120.

Issues Pertaining to Ground 9:

Did the Trial Court have authority to enter/grant untimely findings proposed by the state that amount to "additional findings" and reconsideration and modification of findings on November 3, 2014?

Argument for Ground 9:

The Civil Court Rules apply to criminal as well as civil cases; *State v. Wilks 70 Wn.2d 626 (1967).*

Under CR 52 (5) (B) amendment of findings upon motion of a party, shall be filed no later than 10 days after entry of the judgment; the court may amend its judgment or make additional findings.

Under CR 59 motion for reconsiderations shall be filed no later than 10 days of the judgment, ruling, or other decision.

The court gave its decision on the defendant's motion to dismiss on August 19, 2014 and at that time incorporated into findings of fact and conclusions of law. 16 VPR at 89. Prior to the court making its decision on August 19, 2014 the prosecution did not propose findings. When the court gave its decision on August 19, 2014 the state did not propose findings.

On August 19, 2014 counsel for the defendant noted a motion for the court to reconsider some findings the court had made. 16 VRP at 118. At that time the state did not propose findings.

On September 15, 2014 the Trial Court addressed the findings the defendant wanted the court to relook at. The court made additional findings. 18 VRP at 5. Again the state did not propose findings.

On October 2, 2014 after the defendant was found guilty, the state proposed findings of fact and conclusions of law for the decision that was orally decided on August 19, 2014 and incorporated into findings of fact and conclusions of law. A hearing was held on November 3, 2014 and the defendant appearing telephonically objected to the states proposed findings on the grounds that they were untimely under CR 52 and the court lost jurisdiction. Counsel for the defendant objected on the grounds the states proposed findings amount to reconsideration of facts already made. 31 VRP at 3, 4, 9.

The November 3, 2014 proposed findings are unquestionably additional findings that the court did not note or propose within 10 days after the court made its decision on August 19, 2014. 16 VRP at 89. The term judgment is the decision as well. But most importantly some of the proposed findings are in opposite of what the court actually found on August 19, 2014 and can therefore only be a reconsideration. For example on August 19, 2014 the court found that under the *Pena Fuentes* framework there was a purposeful intrusion and that the intrusion <u>was not justified</u>. 16 VRP at 102. In contrast the November 3, 2014 finding conclusion of law # 2 says in relevant part, it was a purposeful intrusion but it was justified for security reasons. Appendix III, page 22.

Another example is on August 19, 2014 the court found that DOC's conduct was shoddy and mismanaged, clearly meeting the standard for arbitrary government action or misconduct.

16 VRP at 107. In contrast the courts November 3, 2014 written findings I. Conclusions to all allegations # 2 states, the defendant has not shown arbitrary action or government misconduct. Appendix III, page 21. There is an abundance of findings omitted from the August 19, 2014 findings and a substantial amount of additional findings. See findings, Appendix III.

Additional Ground 10:

The November 3, 2014 written findings violates due process as it considered evidence not presented at the evidentiary hearing:

Issues Pertaining to Ground 10:

Did the November 3, 2014 findings violate due process as the court incorporated evidence not presented at the evidentiary hearings; specifically 2 ½ weeks of trial testimony and observing the defendant at trial, where the defendant was not given the chance to rebut the evidence?

Argument for Ground 10:

1. **The November 3, 2014 findings violated due process, as it considered evidence not presented at the evidentiary hearing.**

Due process requires that a party gets to present evidence in rebuttal to a party opponent and be heard; *LLC v. City of Edgewood Local Improvement District 179 Wn.App. 917 (Div. II 2014)*; citing *Olympic Forest Products 82 Wash.2d at 422.*

The November 3, 2014 findings considers evidence not presented at the evidentiary hearing; specifically 2 ½ weeks of trial testimony and observing the defendant during trial. Appendix III.

Additional Ground 11:

The Trial Courts August 19, 2014 oral decision has a binding effect as it was incorporated into findings of facts and conclusions of law. 16 VRP 89, 120.

Issues Pertaining to Ground 11:

Are the Trial Courts August 19, 2014 findings a binding decision when the oral decision was finding of facts incorporated into conclusions of law? 16 VRP at 89, 120.

Argument for Ground 11:

It is long settled law that once a court incorporates its oral decision into findings and conclusion of law that the decision is final and has a binding effect; *Ferree v. Doric Co. 62*

Wash.2d 561 (1963), Wagner v. Wagner 1 Wn.App. 328 (Div. I 1969), Johnson v. Whitman 1 Wn.App. 540 (Div. I 1969).

Here, the trail courts oral decision on the defendant's motion to dismiss was announced on August 19, 2014 at which time the court incorporated its decision into findings and conclusions of law. 16 VRP at 89, 120.

It is fundamentally unfair to allow the state to propose findings three months after the decision in which has a binding effect. At the November 3, 2014 hearing the state argued written findings are required. The Division I in *State v. Vaillancourt 81 Wn.App. 372 (Div. I 1996)* stated, generally decisions on motions do not require written findings. Under CrR 8.3 (B) the rule specifies that when a court dismisses a prosecution, there will be a written order. The court did not dismiss the prosecution, therefore written findings are not required.

The states proposed findings changes several findings the court made on August 19, 2014. 16 VRP at 89. Since the Trial Courts oral decision was incorporated into findings and conclusion, the August 19, 2014 decision has a biding effect; see *Johnson v. Whitman 1 Wn.App. 540 (Div. I 1969).* The findings entered on November 3, 2014 that are inconsistent with the August 19, 2014 findings should be stricken.

Additional Ground 12:

The Trial Court abused its discretion by applying the wrong legal standard when reaching finding #59 on the November 3, 2014 hearing. Appendix III, page 16.

Issues Pertaining to Ground 12:

Did the Trial Court abuse its discretion by using the framework in the *United States v. Danielson 325 F.3d 1054 (9th Cir. 2003)* in the November 3, 2014 finding #59, instead of *State v. Pena Fuentes 179 Wn.2d (2014)*? Appendix III, page 16.

Argument for Ground 12:

Finding # 59 states. Appendix III, page 16:

> The court does not find that requiring the defendant to meet with his attorneys on March 12, 2014 in the no contact room used for all professional visits in the SCCC-IMU was a purposeful intrusion into the attorney-client relationship. However, there was no intentional "eavesdropping" like there was in the cases cited by the

> defense in support of their motion to dismiss. The surveillance camera, does not have audio enabled and is not used to record confidential communication. There is no evidence that anyone has watched or saved a recording of the visit or passed any information to anyone involved in the prosecution in this case.
>
> Further, the level of intrusion involved in requiring the defendant to meet with his attorneys in the no contact room is justified by the need for safety and security of the inmate, staff, and the public, including the defendant's attorney and investigator. The inability to pass documents back and forth on this one occasion cannot be found to have damaged the attorney-client relationship.

This court must go to the August 19, 2014 oral decision findings and conclusions to see the legal analysis the court used to make this finding. 16 VRP at 92. The court applies *United States v. Danielson 325 F.3d 1054 (2003).* Under *Danielson* there's a two step analysis the court applies. First, the defendant must show the prosecution acted affirmatively to intrude into the attorney-client relationship and thereby obtain privileged information. Once the defendant shows the state deliberately and affirmatively took steps to obtain that information, the burden is then shifted to the prosecution to prove beyond a reasonable doubt there is no prejudice resulting from the purposeful and unjustified intrusion.

The court then looks at the video recorded attorney visit under *Untied States v. Danielson* and finds. 16 VRP at 99:

> Yes, there was a purposeful intrusion into the attorney-client relationship, yes; but the court couldn't find the Department of Corrections ignorance of my orders was done with the purpose of intruding into the attorney-client relationship. It appears to have been done for safety reasons.

The courts position under the *United States v. Danielson* analysis is clear. Because the Department of Corrections purpose was for security and the defendant didn't show the prosecutor took affirmative and deliberate steps to intrude, the intrusion was somehow "justified."

At 16 VRP 102 the court states:

> In abundance of caution looking at the intrusion under the *Pena Fuentes* framework it was a purposeful intrusion and the court did not see it was justified.

Clearly, if the courts November 3, 2014 findings are valid and the court finds the intrusion was justified, the court abused its discretion as it reached its findings using the wrong legal analysis; i.e. *United States v. Danielson 325 F.3d.*

First of all, no Washington Court has ever used the analysis in *United States v. Danielson 325 F.3d 1054 (9th Cir. 2003).* Our Supreme Court in *Pena Fuentes 179 Wn.2d (2014)* gives the proper analysis.

Under *Pena Fuentes* a violation occurs when the state intrudes into the defendant's right to confer in private with counsel. Once that is established, prejudice is presumed and that prejudice can only be rebutted by proof beyond a reasonable doubt there's no possibility of prejudice to the defendant. Under *Pena Fuentes,* the defendant does not have to show that the prosecution took an affirmative step to obtain attorney-client communication.

The Trial Courts reliance on Federal 9th Circuit persuasion in *Danielson;* while ignoring our Supreme Court is an abuse of discretion and it misplaced our Supreme Court. *State v. Martin 171 Wn.2d 521 (2011)* held Washington State Constitution Article I Section 22 Amendment 10, provides greater protection than its Federal Sixth Amendment counterpart. For this reason the decision was reached applying the wrong legal standard or the court granted an untimely reconsideration of a finding at the state's requested proposed findings.

Under CR 59 motion for reconsideration must be filed within 10 days of the decision. The decision was rendered on August 19, 2014. 16 VRP 89-102. The proposed findings were on November 3, 2014, well after the expiration of the 10 day deadline.

The Trial Court abused its discretion.

A court's decision to dismiss is review for an abuse of discretion; *State v. Moen 150 Wash.2d 226.* Discretion is abused if the court's decision is based on untenable ground or is manifestly unreasonable; *State v. Rohrich 149 Wash.2d at 654.* A decision is based on untenable grounds if the decision was reached applying the wrong legal standard; *State v. Martinez 121 Wn.App. 21 (2004).*

Additional Ground 13:

The Trial Court erred/abused its discretion by adopting a view no other person would make in its November 3, 2014 written findings and conclusions related to allegation 2. Appendix III, page 21.

Issues Pertaining to Ground 13:

Did the Trial Court adopt a view no other reasonable person would? Did Mr. Hamilton show arbitrary government action or misconduct by the Department of Corrections failure to follow the courts orders addressing the treatment of the defendant's mail from attorneys and attorney visit?

Government misconduct does not need to be evil or dishonest in nature, simply mismanagement is sufficient; *State v. Michielli 132 Wash.2d 229 Id. At 239, 937 P.2d 587 (1997).*

Argument for Ground 13:

On August 19, 2014 the Trial Court states. 16 VRP at 97, 98:

> The conclusions of law that I have regarding that visit, well, I have to say that this incident was completely incompetently handled by the Department of Corrections, the March 3, 2014 visit. They had knowledge of my order well before Mr. Hamilton's - - at least one attorney drove from Everett to Aberdeen for an important visit with their client.
>
> CUS Swain did nothing other than ask Sherry Izatt, who apparently told him to follow policy. Inexplicably neither of them thought it might be important to actually speak with an attorney about the court order, either the Attorney General, the prosecutor, the defense attorney, or perhaps the Judge who signed the order.
>
> It is absolutely ridiculous that they would ignore that order and apparently rely on somebody who doesn't even have a law degree to interpret it. It is also incomprehensible to me that the Stafford Creed did not share the information about this order to the people

> who are - - to the people who are interacting with Mr. Hamilton on a day to day basis.
>
> Even as recently as last week people didn't seem to have an clue about any of my orders, either reviewing mail or with visits. So am I mad that the Department of Corrections violated my orders, and apparently had a legal assistant who didn't even go to college advising the custody unit Supervisor about whether to follow my order?
>
> Yes on many levels, one it is affecting a person who has a right to a fair trial and a right to have his attorneys present. If the Department of Corrections and AG's office do not like my orders they have a remedy, which is to note a hearing and contest it, not ignore it.

Clearly, the courts August 19, 2014 conclusions found the actions of violating the courts orders as "inexplicable," "ridiculous," "completely incompetently mishandled," and "incomprehensible." 16 VRP at 98, 99. This strong language clearly demonstrates "simple mismanagement."

Either the Trial Court did not apply the correct legal standard (which simple mismanagement will support a finding of arbitrary government action or misconduct; which constitutes an abuse of discretion) or the Trial Court applied the correct legal standard to the supported facts adopts a view that no reasonable person would take; *State v. Lewis 115 Wash.2d 294 (1990)*, and finally on August 19, 2014 the court states. 16 VRP at 107,110:

> So in terms of conclusions of law, again I'm looking at *Cory* and *Progeny,* and what they talk about is shocking and unpardonable conduct, and I cannot say DOC's behavior here has been shocking and unpardonable. It has been ridiculous, shoddy, and mismanaged.

In that same oral ruling the court analyzed the recorded visit under *Pena Fuentes 179 Wash.2d (2014)* and found that it was a purposeful intrusion, it was not justified. 16 VRP at 102.

The November 3, 2014 written findings found, the defendant has not shown arbitrary or government misconduct. Appendix III, page 21, I. Conclusions related to all allegations #2.

Clearly, the defendant has shown arbitrary and government misconduct by the courts analysis under *Pena Fuentes* that the recorded visit was a purposeful intrusion and not justified.

Additional Ground 14:

The Trial Court abused its discretion regarding the November 3, 2014 finding 74 and 76 as it reached a decision no other reasonable person would make. Appendix III, page 21.

Issues Pertaining to Ground 14:

Did the Trial Court adopt a view no other reasonable person would after finding on August 19, 2014 that the actions of DOC's intrusions exacerbates the defendant's mental health symptoms? 16 VRP at 108. Then in November 3, 2014 written findings found the defendants issues and concerns he had with counsel appear to stem from his own various mental health problems/personality disorders. Reactions to defense counsel appear, to this court to be consistent with his mental health diagnosis. Appendix III, page 21, 74. But could not find the intrusion destroyed confidence in his attorneys?

Argument for Ground 14:

The November 3, 2014 written finding # 74 states. Appendix III, page 21:

> As the defendant has stated, the issues and concerns he had with defense counsel appear to stem from his own paranoia and various mental health problems/personality disorders. His reactions to defense counsel appear, to this court to be consistent with his mental health diagnoses.

This court must go to the August 19, 2014 oral ruling that was incorporated into conclusions of law on August 19, 2014, which is a binding decision.

In the August 19, 2014 ruling the Trial Court found that the actions of the Department of Corrections intrusions, exacerbates the defendants mental health symptoms. 16 VRP 108. If the actions of the Department of Corrections intrusions exacerbates the defendants mental health symptoms as found on August 19, 2014 and the court finds on November 3, 2014 that the issues and concerns the defendant had with defense counsel appear to the court to be consistent with his mental health diagnosis, indeed there's government influence that has destroyed the defendants

confidence in counsel. See *State v. Garza 99 Wn.App. 291*; citing *United States v. Irwin 612 F.2d at 1187*, noting ways in which prejudice may manifest when there's been an intrusion into the attorney-client relationship. Prejudice occurs when there's government influence that destroys the confidence in counsel.

Given the facts that on August 19, 2014 the Trial Court made a finding that the actions of the Department of Corrections exacerbated the defendant's mental health symptoms (that decision is binding as it was incorporated into conclusions of law); 16 VRP at 108; then on November 3, 2014 # 74 finds that the defendants issues and concerns stem from his own paranoia and various mental health problems, making finding # 76 based on untenable grounds. Appendix III, page 21.

Finding # 76 states; Appendix III, page 21:

> The court cannot find that the defendant's confidence in his attorneys has been destroyed as he appeared to work with them effectively throughout the motions. To the extent the defendant lacked confidence in his attorneys; this does not appear to be the result of any actions by the state or the Department of corrections, but rather a result of the defendant's personality and mental health issues.

On the outset it should be noted that working with counsel effectively throughout motions is not the question that needs to be answered. The question is, did the defendant work with counsel effectively during trial? The answer is, No. That is why the court crossed out the wording "and trial."

However, the reason finding # 76 is based on untenable grounds is because it's a finding no other reasonable person would make. Its only common sense that if an individual has mental health issues that cause concerns of distrust and paranoia or lack of confidence in counsel, and the Department of Corrections exacerbates those mental health symptoms by their continued intrusions, indeed there's been destroyed confidence through government influence; i.e. actions that exacerbates the defendants mental health symptoms.

Finding # 76 is based on untenable grounds, as only two possibilities exist (1) It's a finding no other reasonable person would make or (2) the court did not apply the appropriate

legal standard. Which clearly the legal standard recognizes prejudice manifesting through destroyed confidence in counsel through government influence; *State v. Garza 99 Wn.App. 291*; citing *United States v. Irwin 612 F.2d 1185.*

The conviction should be vacated.

Additional Ground 15:

The Trial Court abused its discretion regarding the November 3, 2014 written findings as it reached its conclusion by adopting a view no other reasonable person would take and applying the wrong legal standard.

Issues Pertaining to Ground 15:

The Trail Court abused its discretion regarding the November 3, 2014 written findings as the court adopted a view no other reasonable person would make and applying the wrong legal analysis, using *Untied States v. Danielson 325 F.3d 1054 (9th Cir. 2003)* instead of *State v. Pena Fuentes* or *State v. Garza 99 Wn.App. 291?* Appendix III, page 21, I. Conclusions to all allegations.

Argument for Ground 15:

1. **Finding # 1 states; Appendix III, page 21, I. Conclusions related to all allegations:**

   Although the defendants behavior has improved over the past several years, any intrusion into the defendants private affairs were necessary and justified by legitimate security concerns inherent with the fact that the defendant is serving a sentence in prison for two violent offenses, and by the defendant's high security level, and propensity for violent outburst, property destruction, and other harmful behaviors.

For the Trial Court to say that the Department of Corrections actions of violating the Judges court orders as (which expressly prohibited scanning the defendants legal mail absent of a search warrant, prohibits making the defendant visit with counsel in a no contact room, prohibits recordings, and authorizes documents must be passed to and from counsel) "inexplicable," "ridiculous," "completely incompetently mishandled," and "incomprehensible;" 16 VRP at 98, 99, it's hard to imagine how the court could use such strong language but find that security

concerns justified the intrusions, especially when the Trial Court placed such orders on August 26, 2013. After it already decided that security concerns did not justify scanning legal materials from counsel or having the defendant visit with counsel in a no contact room and such visits shall not be recorded.

There were no new security concerns from the time the court order found scanning legal material inappropriate in addition to requiring the defendant to visit in a no contact room on August 26, 2013.

At the August 19, 2014 findings and conclusions of law, the following exchange occurred. 16 VRP at 155:

> [Defense Counsel] That again is all generalized, none specific to a change in circumstances to Mr. Hamilton?
>
> [The Court] That's correct, those are all generalized safety concerns and I guess one other finding I didn't put in there is, Mr. Hamilton not having any infractions in the past year.

For these reasons the court adopted a view no other reasonable person would take.

2. The Trial Court applied the wrong legal standard in reaching its decision that general security concerns justified the intrusions.

In *State v. Garza 99 Wash.App. 291 (2000)* the Division III had to consider whether and in what circumstances jail officials may seize and examine criminal defendants legal documents. No other Washington Court has done so.

In *Garza*, jail staff conducted a search after an attempted escape. The inmate's personal property, including legal documents containing private communications with their attorneys was seized and "gone through."

The Trial Court made the following conclusions:

1. There was a reasonable ground to believe that an escape was attempted and that a cutting tool was used in the attempt.
2. The search of the jail pod was legal and the seizure of the defendant's items was legal.

3. The search was done in good faith for objective security reasons. A thorough search of all items, including legal paperwork was necessary due to the fact that the item was small in nature.
4. The defendants had a diminished expectation of privacy with regards to their personal items located in jail. In balancing the defendant's right to private communication with their attorneys and the institutional concerns for security, the court finds no misconduct.
5. There is also no foreseen prejudice in this case and no evidence that any confidential communication was obtained.
6. The defendant's paperwork should have been returned in a more timely fashion.
7. Any misconduct arising from the delay of returning the paperwork did not cause the defendants to be prejudice. All defendants were represented by counsel and when a request was made to the court, the paperwork was returned.
8. The state acted in good faith throughout the process.

The court of appeals held in this case, the Superior Courts written and oral findings indicate the jail officer's examination of the defendant's legal materials was purposeful. The court concluded however, that the examination of the legal materials was justified by the jails legitimate security concerns about the attempted escape. This conclusion misses the point. Certainly the escape attempt justified the search, but the precise question is whether the security concerns justified such an extensive intrusion into the defendant's private attorney-client communication. This determination requires a precise articulation of what the officers were looking for. Why it might have been contained in the legal materials and why closely examining or reading the materials was required.

In the present case; 16 VRP, 89-120, November 3, 2014, Appendix III, Findings and Conclusions, page 21:

1. There was no precise articulation of what the officer was looking for on the May 11, 2014 cell search. The court stated it was a general search.

2. There was no precise articulation of why it might be in the content of the legal materials.
3. There was no was required precise articulation as to why closely examining or reading the materials.

Although the Department of Corrections said they were concerned that Mr. Hamilton had legal documents with another offenders name, this concern became the concern AFTER they intruded by scanning/reading his legal documents. Our Untied States Supreme Court has underscored the importance of the attorney-client privilege, even when an attorney seeks to invoke the Crime Fraud Statue Exception.

In *United States v. Zokin 491 U.S. 554 109 S.Ct. 2619 105 L.Ed.2d 496 (1989)* a District Court could not consider the contents of a privileged letter in assessing the governments prima facie case until the government had threshold matter presented; non-privileged evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exceptions applicability.

Even high motive and zeal for law enforcement cannot justify spying upon and intruding into the attorney-client communications; *State v. Cory 62 Wash.2d 371 (1963).*

The Department of Corrections general security concerns are nothing more than high motives and zeal for prison law enforcement that cannot justify spying upon and intrusion into the relationship between a person accused of a crime and his counsel.

Under *State v. Garza 99 Wash.App. 291* a precise articulation of what the officers are looking for requires a specific concern or threat. The Department of Corrections doesn't get to intrude, find something they claim is concerning and justify the intrusion on what they found that they shouldn't have been looking at in the first place.

Correction Officer Karlyanna Roberts testified the Department of Corrections policy requires her to scan/read legal materials to make sure it is legal mail and not a love letter and she scans content. August 11, 2014, 14 VRP 76, 91.

In the August 19, 2014 findings the court relies on Deputy Director Scott Frakes testimony that 70 percent of the offenders in prison are there for violent conviction, so they search for contraband regularly and randomly; including combustibles, bugs, weapons, drugs, and alcohol. 14 VRP at 102. He testified that letters can contain drugs. He testified that inmates

are not allowed to have another inmate's legal material, its called paper checking. June 19, 2014, 13 VRP at 7, 19. However, Deputy Director Scott Fakes was not involved in the cell search on May 11, 2014.

Additionally, if the Department of Corrections had a "specific intelligence" that the defendant had another inmate's legal paperwork and was misusing it, scanning might be a necessary intrusion, but this is not the case.

The Trial Court has set a dangerous precedent that no court in our history has ever done and that is, give prison officials free range to scan/read an inmate's attorney-client communications under general security practices. This is not consistent with the case law that exists.

On August 19, 2014 the following exchange occurred. 16 VRP at 116:

> [Defense Counsel] Your Honor, I don't know if this is, was clear in the findings, but witness after witness testified that this was a general search. There was no specific threat really to Mr. Hamilton, no intelligence related to Mr. Hamilton posing a specific threat at that time.
>
> [The Court] That's correct. I thought I indicated that, but there was no specific threat by Mr. Hamilton. This is something they testified they did every Sunday.

Even high motives and zeal for law enforcement cannot justify spying upon and intruding into the relationship between a person accused of a crime and his counsel; *State v. Garza 99 Wn.App.* Furthermore, WAC-137-48 Inmate Mail and Communication; WAC 137-48-030 (3), prohibits reading mail without a search warrant.

The Department of Corrections scans/reads for content to ensure it's legal. Reading is reading and the Department of Corrections general security concerns do not justify violating the attorney-client privilege, found at RCW 5.60.060 (2) and right to counsel under Washington State Constitution Article I Section 22 Amendment 10.

It is important to note that when the court made its oral decision on August 19, 2014, the court did not analyze the intrusions under *State v. Garza 99 Wn.App. 291*, it analyzed the intrusion under *Untied States v. Danielson 325 F.3d 1054.*

When the Trial Court did the analysis framework under *Pena Fuentes,* it found the intrusion was purposeful and not justified by general security concerns. If the court now finds the intrusions were justified by general security concerns, the decision could of only been reached by relying on *United State v. Danielson 325 F.3d 1054 (9th Cir. 2003)*, which is the wrong legal standard. The correct legal standard is *State v. Pena Fuentes 179 Wash.2d (2014)* or *State v. Garza 99 Wn.App. 291 Div. III (2000)*[2].

Additional Ground 16:

The Trial Court abused its discretion regarding the conclusions related to allegation 5 on November 3, 2014 written findings as it improperly shifted the burden to the defendant to show prejudice by destroyed confidence in counsel. Appendix III, conclusions related to allegations 5, page 22.

Issues Pertaining to Ground 16:

Did the Trial Court abuse its discretion when it improperly shifted the burden on the defendant to show destroyed confidence in counsel, instead of the state rebutting the presumption beyond a reasonable doubt? Could the defendant be assured his communication to counsel would remain confidential?

Argument for Ground 16:

The Trial Court improperly placed the burden on the defendant to show that the intrusions have destroyed Mr. Hamilton's confidence in his attorneys. See Appendix III, page 22, written Findings and Conclusions related to all allegations #5.

State v. Garza 99 Wn.App. 291 (2000); quoting *United State v. Erwin 612 F.2d at 1187*, prejudice can manifest in several ways (1) that evidence gained through the intrusion will be used against them at trial, (2) that the prosecution is using confidential information pertaining to defense strategies, (3) that the intrusions have destroyed their confidence in their attorneys, or (4) the intrusions will otherwise give the state an unfair advantage at trial; see *Irwin 612 F.2d at 1187.*

[2] It remains unclear if *State v. Garza 99 Wn.App. 291 Div. III (2000)* is overruled by *State v. Pena Fuentes 179 Wash.2d (2014)* insofar as it is inconsistent with the burden of proof and who bears the burden of proof when the state intrudes into attorney-client communication.

If the prejudice is presumed, destroyed confidence in counsel is definitely a prejudice that is presumed and the Trial Court applied the wrong legal standard by placing the burden on the defendant to show the intrusions destroyed his confidence in counsel.

In *State v. Cory 62 Wn.2d 371 196,* our Supreme Court said the following:

> It is also obvious that an attorney cannot make a full and complete investigation of both the facts and the law unless he has the full and complete confidence that his disclosures to his client are strictly confidential.

Our Supreme Court said such confidence cannot exist if the defendant cannot have the assurance that his disclosures to counsel are strictly confidential.

So the question for the court is, could Mr. Hamilton be assured that his disclosures to counsel are strictly confidential? Of course not; first, he's forced to visit with counsel in a sound recording room at Clallam Bay Corrections Center, then a corrections officer reads his legal material to see how someone can sucker punche a CO and not form intent, then the video of the search is tampered with, the court writes orders prohibiting scanning of legal mail and recording visits and disregards those orders.

So, if the court cannot assure the defendant that his disclosures to counsel will remain strictly confidential with valid court orders being violated, it's a fact there was no assurance at all that Mr. Hamilton's disclosures to counsel would remain strictly confidential; in reality they weren't. The Department of Corrections repeatedly violated Mr. Hamilton right to confidential assistance of counsel and vitiated the entire proceeding.

As our Supreme Court in *State v. Cory 62 Wash.2d 371* found long ago, it is obvious that an attorney cannot make a full and complete investigation of both the facts and law unless he has the full and complete confidence of his client, and such confidence cannot exist if the defendant cannot have the assurance that his disclosures to counsel are strictly confidential.

The Trail Court abused its discretion by improperly shifting the burden to the defendant to prove destroyed confidence in counsel; and finally, the court specifically would not find that the defendant worked with counsel effectively throughout trial. See Appendix III, page 21, finding #76; the court specifically crossed out "and trial." This only proves the prosecutor did

not prove the absence of prejudice beyond a reasonable doubt. The conviction should be vacated without remand.

Additional Ground 17:

Ineffective assistance of counsel resulting from counsels failure to object to the states propensity argument during closing arguments.

Argument for Ground 17:

The Sixth Amendment to the United States Constitution and Article I Section 22 of the Washington State Constitution guarantees the right to effective assistance of counsel; *Strickland v. Washington 466 U.S. 668, 691 (1984); State v. Thomas 109 Wn. 2d 222, 229 (1987).* In *Strickland,* the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel; *466 U.S. 688* under *Strickland* ineffective assistance is a two prong inquiry.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed to the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

1. Counsel's performance was deficient by failing to object to the prosecutor's propensity argument during closing arguments.

Counsel can render ineffective assistance of counsel by failing to object to the states closing arguments; *In re Pers. Restraint of Cross 181 Wn.2d.* Here, counsel failed to object to the prosecutor's clear and unmistakable improper use of ER 404 (b) evidence during closing arguments.

To understand the gravity of counsel's deficient performance, this court must look at the testimony given by two psychologists who were the states rebuttal witnesses, where the state elicited ER 404 (b) evidence without counsel objecting; Dr. Clair Sauvagnat and Dr. Cynthia Goins.

On September 25, 2014, Dr. Sauvagnat testified for the state. 26 VRP at 54; 26 VRP at 59:

> [Dr. Sauvagnat] To Anti-Social Personality Disorder, the first one is failure to conform to social norms, which I already mentioned.

The, deceitfulness, impulsivity, irritability, and aggressiveness; reckless disregard for the safety of self and others is also something that fits.

[Prosecutor] What else? .

[Dr. Sauvagnat] The next one is inappropriate, intense anger, or difficulty controlling anger; which can result in fights, outburst, yelling, throwing things, smearing feces. Things like that.

[Prosecutor] Did you see evidence of that as well?

[Dr. Sauvagnat] Yes.

On September 30, 2014 Dr. Goins testified. 28 VRP at 14, 21, 59, 60:

[Dr. Goins] Mr. Hamilton presented with - - with behaviors symptoms that were consistent with Anti-Social Personality Disorder and Borderline Personality Disorder. He - - so do you want me to describe those or - -

[Prosecutor] In a general sense, sure.

[Dr. Goins] In a general sense, those disorders are considered what we call Cluster B Personality Disorders; tend to have very chaotic, emotional, interpersonal relationships. They tend to have a more impulsive behaviors. They often engage in reckless behaviors, they have little regard for the needs of others, often engage in criminal activities, often will engage in self injurious behaviors, suicide attempts.

They tend to have a great deal of distress around loss or perceived abandonment, and loss, and a lot of the anxiety and the stress that they experience can look and be - - exhibited as persecutory thinking, paranoia that's related to the beliefs that somehow people aren't working with them.

[Prosecutor] And did that continue to be your opinion of Mr. Hamilton throughout the time you treated him?

> [Dr. Goins] Well in terms of - - yes, I believe that this act of betrayal of him.

At 28 VRP 21, Dr. Goins states:

> The behaviors, symptoms that remained consistent over that period of time were the Axis II Personality Disorders. Mr. Hamilton showed consistently over those years a propensity to act out, to have little regard for others behaviors, to incur a great deal of infractions, which indicates a history of fairly consistent rule breaking behaviors.
>
> He often felt as though other people were somehow not helpful to him. And at those times he would act out and often harm himself as a way to engage others or as a way to cope with his distress.

The prosecutor asks do you know what kinds of things would trigger Mr. Hamilton acting out? 28 VRP at 59. Dr. Goins then testified that he broke a sprinkler in the infirmary in part because he was angry at staff. 21 VRP 60. The prosecutor then asked again what types of things triggered Mr. Hamilton, in which Dr. Goins responded with a list of things that triggered the defendant. To include, that he believed other people were saying things about him that were untrue, that officers are targeting him and then he would threaten or engage in self harm behaviors or property destruction. This solicitation of ER 404 (b) evidence went un-objected.

ER 404 (b) states evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewithin. It may however be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior to trail the defendant moved in limine to exclude all jail and prison misconduct. CP 216. The motion was granted and the court instructed the state not to go into prior prison or jail misconduct, unless the state brought it up outside the presence of the jury. 16 VRP 33. Obviously, the state did not heed this warning or instruction from the court.

During closing arguments the prosecutor made the most of her solicitation of the defendant's prior prison misconduct in violation of the motion in limine during examination of her witnesses. The prosecutor made a clear unmistakable argument that the defendant has a bad

character and acted in conformity with that bad character. The prosecutor made the following argument. September 30, 2014, 28 VRP at 169, 170; 28 VRP 171:

> And you heard from other evaluations where he indicated, I did this because I needed spending money, or I did this because I wanted to get someone's attention. I broke this because you didn't send me to the other side of the mountains. He doesn't feel bad about it. He justifies it and that's what he has done here, justified his behavior. DOC was treating me badly, it's their fault.
>
> And you have heard from multiple doctors that said Anti-Social Personality Disorder fits. It's been there consistently through his history, even back when he was in juvenile, before he was housed in solitary confinement.
>
> Effective instability due to marked reactivity of mood; clearly, that has been shown. He reacts very strongly when he's upset. When he's not getting his way, he reacts.
>
> Chronic feeling of emptiness, which he has described; inappropriate intense anger, or difficulty controlling anger, and that's what we're seeing on August 23, 2012 and that's what they've seen many times before; and shows the jury the video of the assault.

First, the prosecutor violated the motion in limine by eliciting evidence of other wrongs or acts by the defendant in prison and the defense counsel raised no objection, nor did counsel request a limiting instruction on what the evidence purpose was when Dr. Clair Sauvagnat and Dr. Cynthia Goins testified.

When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient; *Kyllo 166 Wn.2d at 863*. However, not all strategies or tactics on part of defense counsel are immune from attack. The relevant question is not whether counsels choices were strategic but whether they are reasonable; *Roe v. Flores-Ortega 528 U.S. 470, 481 (2000).*

In the context of whether counsels decision not to object to the state misusing highly prejudicial propensity evidence during closing arguments, is in no way reasonable. Generally, evidence of a defendant's prior misconduct is inadmissible to demonstrate the accused propensity to commit the crime charged; ER 404 (b); *State v. Fisher 165 Wn.2d 727.*

The prosecutors theory of the case was, that the defendants actions on August 23, 2012, was in conformity of his character/Anti-Social Personality Disorder; which consisted of deceitfulness, reckless disregard of the safety of self or others, impulsiveness, irritability, aggressiveness, and to incur a great deal of infractions. The prosecutor clearly and unmistakably used the unproved evidence of other wrongs or acts to prove the character of the defendant and that the defendant acted in conformity therewithin.

The prosecutor stated. September 30, 2014, 28 VPR at 169, 179:

> And you heard from other evaluations where he indicated, I did this because I needed spending money, or I did this because I wanted to get someone's attention. I broke this because you didn't send me to the other side of the mountain. He doesn't feel bad about it, he justifies it and that's what he's done here, justified his behavior. DOC was treating me badly, it's their fault.
>
> And you heard from multiple doctors that said Anti-Social Personality Disorder fits. It's been there consistently through his history, even back when he was a juvenile, before he was housed in solitary confinement.
>
> Effective instability due to marked reactivity of mood; clearly, that has been shown. He reacts very strongly when he's upset. When he's not getting his way, he reacts.
>
> Chronic feelings of emptiness, which he has described; inappropriate intense anger or difficulty controlling anger and that's what we're seeing on August 23, 2012 and that's what they've seen many times before; and proceeds to show the jury the video of the assault.

Again, this court must look at the testimony from Dr. Clair Sauvagnat and Dr. Cynthia Goins who testified for the state to understand the gravity of the prosecutor's highly prejudicial propensity argument; both doctors testified to the defendants prior recklessness, deceitfulness, aggressiveness, impulsivity, irritability, inappropriate intense anger resulting in fights, outburst, yelling; Dr. Sauvagnat, 26 VRP at 54, 59; Dr. Goins, 28 VRP at 14, 21, 59, 60.

There is absolutely no conceivable legitimate trail strategy for defense counsels failure to object to the states propensity argument during closing argument when the defense moved in limine to exclude ER 404 (b) evidence and the court granted the motion. 16 VRP at 33. Additionally, the propensity argument was highly prejudicial given the circumstances of the case and the defendant's diminished capacity defense.

Additionally, before the court can admit other wrongs or acts, the court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of the evidence, (3) determine whether the evidence is relevant to prove an element of the crime, (4) weigh the probative value against the prejudicial effect; *State v. Lough 125 Wn.2d 847 (1995).* This was not done by the court.

Dr. Cynthia Goins works at the Monroe prison and did not evaluate Mr. Hamilton to determine his capacity to form the mental elements of the crime. In fact Dr. Goins last evaluation of Mr. Hamilton occurred 2 years prior to the alleged assault on Nicholas Trout. No objectively reasonable attorney would fail to object to the introduction of inadmissible and extremely prejudicial propensity evidence and argument during closing, which directly undermined the sole defense of diminished capacity. No tactical or strategic reason can explain such failure.

Where a failure to object is unjustified on grounds of trial tactics, it constitutes deficient performance; see e.g. *State v. Henderson 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996)* holding failure to object to defendants prior drug conviction no tactical decision but deficient performance; *State v. Klinger 96 Wn.App. 619, 623 (1999)* holding no strategic reason for not moving to suppress marijuana found in a shed behind the defendants cabin, counsels lapse constituted deficient performance; *State v. V.C.D.W. 76 Wn.App. 761, 764, 887 P.2d 911 (1995)* holding failure to object to admission of defendants confession was inexcusable omission rather than legitimate trial strategy.

Because there was no legitimate reason for defense counsels failure to object to the prosecutor's propensity argument during closing and because counsel's failure to object to the propensity argument during closing arguments was not reasonable, counsel's performance fell below an objective standard of reasonableness.

2. The defendant was prejudiced by counsel's deficient performance, as counsels deficient performance severely undermined the defendants diminished capacity defense.

As for ineffective assistance of counsel, prejudice is proved when the accused shows a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case; *Strickland 466 U.S. at 693; Thomas 109 Wn.2d 226.* A reasonable probability is one sufficient to undermine confidence in the outcome of the trial; *Strickland 466 U.S. at 694; Thomas 109 Wn.2d at 226.*

The defendant's only defense at trial was diminished capacity. To support the defense Hamilton testified at trial providing his version of the events immediately before Trout's alleged assault. The defendant said he got this "eerie feeling" that he was about to be attacked. 24 VRP 130. Based on this feeling he turned back and ran. 24 VRP at 130. As he was running he perceived the presence of another inmate, a white supremacist James Curtis and he perceived James Curtis had a knife; 24 VRP at 128-31; and did not have a set plan but felt the instinct to run towards the door for his own safety because he thought he was going to be stabbed. 24 VRP at 133. The defendant stated he heard the inmate say something like "I'm going to get him out now;" which the defendant took as he was going to be stabbed. 24 VRP 133. The defendant testified he recalled running and then colliding with Curtis but then his mind went blank. 24 VRP at 131-32. He had no memory of assaulting Trout.

The defendant described experiencing hallucinations, which he stated occurred three times. 24 VRP at 160. On all three occasions Hamilton engaged in self harm behaviors; cutting his self, attempting to hang his self, or overdosing on medication.

The defendant primarily presented his diminished capacity defense through his expert Dr. Grassian, who testified at length about the mental health issues Hamilton suffered as a result of spending significant periods of time in solitary confinement. 23 VRP 57, 64-66, 68-69, 76-77, 89-90, 94-99, 105-6. Dr. Grassian concluded that the alternative that the defendant actually

intended to harm a corrections officer, just really doesn't make a lot of sense psychologically. 23 VRP 105-06.

The prosecutor's propensity argument unquestionably prejudiced the defense. Again, when Dr. Sauvagnat and Dr. Goins testified for the state, the jurors were not given any limiting instruction on the purpose of their testimony. The jury heard from the states witnesses that the defendant was reckless. Recklessness is an element of Second Degree Assault, reckless infliction of substantial bodily harm. WPIC 35.13. The jury heard from these doctors that reckless disregard for the safety of other and self is the defendant's character trait. That he's deceitful, impulsive, aggressive, a propensity to act out to incur a great deal of infections, to display inappropriate intense anger resulting in fights, outburst, and yelling; Dr. Sauvagnat, 26 VRP at 54, 59; Dr. Goins, 28 VRP 14, 21, 59, 60.

Again, during closing the prosecutor stated. September 30, 2014; 28 VPR at 169, 179:

> And you heard from other evaluations where he indicated, I did this because I needed spending money, or I did this because I wanted to get someone's attention. I broke this because you didn't send me to the other side of the mountain. He doesn't feel bad about it, he justifies it and that's what he's done here, justified his behavior. DOC was treating me badly, it's their fault.
>
> And you heard from multiple doctors that said Anti-Social Personality Disorder fits. It's been there consistently through his history, even back when he was a juvenile, before he was housed in solitary confinement.
>
> Effective instability due to marked reactivity of mood; clearly, that has been shown. He reacts very strongly when he's upset. When he's not getting his way, he reacts.
>
> Chronic feelings of emptiness, which he has described; inappropriate intense anger or difficulty controlling anger and that's what we're seeing on August 23, 2012 and that's what they've seen many times before; and proceeds to show the jury the video of the assault.

The jury was given a clear unmistaken attractive invitation to conclude that the defendant has a bad character that consist of reckless disregard for the safety of others, deceitfulness, aggressiveness, impulsivity, irritability, inappropriate anger, etc. and the defendant acted in conformity with that bad character on August 23, 2012.

Given the amount of propensity evidence, the circumstances of the case, other errors raised in counsels opening brief, and because of counsel's deficient performance, reasonable probability exist that counsel's deficient performance prejudiced the outcome of the case.

Counsels performance was deficient and denied the defendant effective assistant of counsel. A new trial should be granted.

Additional Ground 18:

The Trail Court erred by not giving a limiting instruction at the defendants request which is of constitutional magnitude, as the court violated the defendants Sixth Amendment Right to control important strategic decisions.

Issues Pertaining to Ground 18:

Did the Trial Courts refusal to give a limiting instruction upon request from the defendant violate the defendant's Sixth Amendment Right to control important strategic decisions at trial? Even if the error was not of constitutional magnitude was the error harmless?

Argument for Ground 18:

During closing arguments the state clearly used ER 404 (b) evidence to demonstrate the defendant's bad character and that the defendant acted in conformity with that bad character on the day and time of the alleged assault on Nicholas Trout.

Again, during closing arguments the prosecutor made an unmistakable propensity argument to show the defendant had a bad character and acted in conformity with that character. September 30, 2014; 28 VPR at 169, 179:

> And you heard from other evaluations where he indicated, I did this because I needed spending money, or I did this because I wanted to get someone's attention. I broke this because you didn't send me to the other side of the mountain. He doesn't feel bad

about it, he justifies it and that's what he's done here, justified his behavior. DOC was treating me badly, it's their fault.

And you heard from multiple doctors that said Anti-Social Personality Disorder fits. It's been there consistently through his history, even back when he was a juvenile, before he was housed in solitary confinement.

Effective instability due to marked reactivity of mood; clearly, that has been shown. He reacts very strongly when he's upset. When he's not getting his way, he reacts.

Chronic feelings of emptiness, which he has described; inappropriate intense anger or difficulty controlling anger and that's what we're seeing on August 23, 2012 and that's what they've seen many times before; and proceeds to show the jury the video of the assault.

Counsel did not object.

After closing arguments on September 30, 2014, the court recessed for the afternoon and instructed the jury not to begin deliberating on the case. 28 VRP 179. On October 1, 2014, court resumed and wanted to take up a few evidentiary issues. 29 VRP at 1. During that hearing counsel for the defendant informed the court that Mr. Hamilton was requesting a limiting instruction but wasn't sure of the exact wording.

Defense Counsel stated. 29 VRP at 1:

> I can let the court know that Mr. Hamilton is requesting a limiting instruction. I am not sure the exact wording he is requesting, that is not my request. I have, well; I'm making a strategic decision not to make that request.

The defendant then explained to the court why he wanted a limiting instruction due to the prosecutors closing arguments. The defendant also argued ineffective assistance of counsel. 29 VRP at 7-9. The Trial Court refused to give a limiting instruction and failed to inquire from defense counsel or clarify from defense counsel, if defense counsel was making a strategic decision not to request the wording Mr. Hamilton was requesting or making a strategic decision

not to request a limiting instruction no matter the language. The court told the defendant it understood his position. 29 VRP at 9.

1. The defendant was entitled to a limiting instruction upon request.

When evidence of a defendant's prior crimes, wrongs, or acts is admissible for a purpose, the defendant is entitled to a limiting instruction upon request; *State v. Foxhoven 161 Wash.2d at 175.*

An adequate ER 404 (b) instruction must at a minimum inform the jury of the purpose for which the evidence is admitted and the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character; *State v. Gresham 173 Wn.2d 405 (2012).*

Mr. Hamilton's case mirrors *State v. Gresham 173 Wn.2d 405 (2012).* In *Gresham 173 Wn.2d,* defense counsel proposed a limiting instruction but the limiting instruction was flawed. Our Supreme Court held that while it was not error for the Trial Court to refuse to give the proposed erroneous instruction, it was error for the court to fail to give a correct instruction.

Once a criminal defendant request a limiting instruction the Trial Court has a duty to correctly instruct the jury, notwithstanding defense counsels failure to propose a correct instruction. Our Supreme Court in *Gresham 173 Wn.2d* said this follows the Supreme Court's decision in *State v. Goebel 36 Wash.2d 367, 379, (1950)* that the court should state to the jury whatever it determines is the purpose or purpose's [emphasis added] of the evidence.

As in *Gresham 173 Wash.2d* Mr. Hamilton himself may have had the limiting instruction language wrong but this wrong language did not relieve the court of its duty to give a proper limiting instruction. Mr. Hamilton clearly stated his request for a limiting instruction was in response to the prosecutor closing argument and particularly the prosecutor making an inference on the element of the crime "recklessness." 29 VRP at 7-9. During closing arguments the prosecutor argued personality disorder fits.

The prosecutor states. September 30, 2014, 28 VRP at 169-170:

> And you heard from multiple doctors that Anti-Social Personality Disorder fits, it's been there consistently throughout his history.

Again, the doctors the jury heard from that said Anti-Social Personality Disorder fits, in particular was Dr. Clair Sauvagnat and Dr. Cynthia Goins who testified for the state. Dr.

Sauvagnat testified on September 25, 2014, that Mr. Hamilton had Anti-Social Personality Disorder and described how it fits and told the jury to Anti-Personality Disorder, the first one is failure to conform to social norms, which I already mentioned; the deceitfulness, impulsivity, irritability, aggressiveness, reckless disregard for safety of self or others is also something that fits. 26 VRP at 54.

Dr. Sauvagnat further stated inappropriate intense anger or difficulty controlling anger which can result in fights, outburst, yelling, throwing things, smearing feces, things like that. The prosecutor then asked "did you see evidence of that as well?" and Dr. Sauvagnat answered with yes.

When Dr. Goins testified for the state on September 30, 2014; 28 VRP 14, 21, 59, 60, she stated that Mr. Hamilton presented with behaviors, symptoms that were consistent with Anti-Social Personality Disorder and stated people with Anti-Social Personality Disorders often engage in reckless behaviors, they have little regard for the need of others. When the prosecutor asked did that continue to be your opinion of Mr. Hamilton throughout the time you treated him. Dr. Goins answered with yes. 28 VRP at 14.

Dr. Goins further testified that the behaviors that remained consistent over that period of time she treated him were Personality Disorders. Mr. Hamilton showed a propensity to act out, to have little regard for others, to incur a great deal of infractions, which indicates a history of fairly consistent rule breaking behaviors. 28 VRP 21, 22.

The prosecutor asked Dr. Goins what types of things would trigger Mr. Hamilton acting out. 28 VRP 59. Dr. Goins testified that Hamilton broke a fire sprinkler in the infirmary in part because he was angry at staff. 28 VRP at 59. Dr. Goins also testified that things that triggered Mr. Hamilton were when he believed other people were saying things about him that were untrue, that officers were targeting him, and then he would threaten or engage in self harm behaviors or property destruction. 28 VRP at 60.

Again, when Dr. Sauvagnat and Dr. Goins testified for the state, the jury was not instructed on the purpose of their testimony. Clearly, the state made a propensity argument during closing that directly went to Dr. Sauvagnat and Dr. Goins testimony regarding other wrongs or acts by the defendant that include recklessness, deceitfulness, inappropriate intense anger, fights, irritability, property destruction, etc.

Even though the defendant himself had the language wrong the court was required to give a proper limiting instruction under ER 404 (b) and at a minimum a limiting instruction must inform the jury that evidence may not be used for purposes of concluding that the defendant has a particular character and has acted in conformity with that character; *State v. Gresham 173 Wn.2d 405 (2012).*

The jury should also have been instructed under ER 703 and 705 to properly limit the use of Dr. Sauvagnat and Dr. Goins testimony.

2. The Trial Courts failure to give a limiting instruction due to counsel stating she made a strategic decision not to request one, the court violated the defendants right under the Sixth Amendment to control important strategic decisions.

In 2013 our Supreme Court held that the Sixth Amendment recognizes the defendant rights to control important strategic decisions; *State v. Coristine 177 Wn.2d 370 (2013).*

The Supreme Court said to further the truth seeking function at trial and to respect the defendant's dignity and autonomy the Sixth Amendment recognizes the defendant's right to control important strategic decisions.

Here, the defendant Mr. Hamilton specifically wanted a limiting instruction and informed the court of such, and went further to inform the court that counsels decision not to ask for a limiting instruction was dumb, not strategic, and made no sense, and was ineffective assistance of counsel. 29 VRP at 8, 9.

The Trial Court refused to let Mr. Hamilton exercise his right under the Sixth Amendment to control important strategic decisions at trial by denying his request for a limiting instruction after expressly stating to the court counsel was ineffective for not requesting a limiting instruction. Since this is an error of constitutional magnitude the burden is on the state to prove error was harmless.

3. If the court finds this was not a Sixth Amendment violation the error was still not harmless.

An evidentiary error not of constitutional magnitude requires reversal if the error, within reasonable probability materially affected the outcome; *State v. Stenson 132 Wn.2d 668, 709, 940, P.2d 1239 (1997).*

Had a limiting instruction been given and the court instructed that the jury was prohibited from considering the evidence of other wrong doings or acts for the purposes of showing Mr. Hamilton's character and action in conformity with that character, there's a reasonable probability the outcome of the trial would have been different.

Hamilton presented a diminished capacity defense. The defendant said he got this "eerie feeling" that he was about to be attacked. 24 VRP 130. Based on this feeling he turned back and ran. 24 VRP at 130. As he was running he perceived the presence of another inmate, a white supremacist James Curtis and he perceived James Curtis had a knife; 24 VRP at 128-31; and did not have a set plan but felt the instinct to run towards the door for his own safety because he thought he was going to be stabbed. 24 VRP at 133. The defendant stated he heard the inmate say something like "I'm going to get him out now;" which the defendant took as he was going to be stabbed. 24 VRP 133. The defendant testified he recalled running and then colliding with Curtis but then his mind went blank. 24 VRP at 131-32. He had no memory of assaulting Trout.

Hamilton also described experiencing hallucinations, in which he stated had occurred three times. 24 VRP 160. He described the voice of god telling me, I need to be punished. 24 VRP 160. On all three occasions Hamilton engaged in self harm behaviors; cutting his self, attempting to hang his self, or overdosing on medication. 24 VRP 160.

Hamilton primarily presented his diminished capacity defense through his expert Dr. Grassian, who testified at length about the mental health issues Hamilton suffered as a result of spending significant periods of time in solitary confinement. 23 VRP 57, 64-66, 68-69, 76-77, 89-90, 94-99, 105-6. Dr. Grassian concluded that Mr. Hamilton suffered from a mental illness that impaired his ability to form intent and recklessly inflict substantial bodily harm.

The state had Western State evaluate the defendant to determine his ability to form intent on August 23, 2012 for Second Degree Assault. Dr. Clair Sauvagnat testified it was her opinion Hamilton would have been capable of forming intent. 28 VRP 65. However, Dr. Sauvagnat did not evaluate if Mr. Hamilton was capable of forming the mental element of reckless infliction of substantial bodily harm, therefore Western State only addressed intent not recklessness. 28 VRP 72.

Reckless infliction of substantial bodily harm is an element of Second Degree Assault. RCW 9A.36.021; WPIC 35.13. The state had no evidence of recklessness other than the

impermissible argument that Mr. Hamilton has Personality Disorder and that's what they're seeing on August 23, 2012. The only evidence of the element of recklessness came from Dr. Sauvagnat and Dr. Goins testimony that Anti-Social Personality Disorder fits because of prior behavior, which include reckless disregard for the safety of other and recklessness is part of his character and he acted in conformity with that character on August 23, 2012.

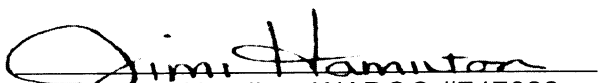
Finally, the prosecutor's whole theory was that the defendant has a bad character, that he's deceitful, Impulsive, aggressive, has inappropriate intense anger, difficulty controlling anger, and acted in conformity with that bad character as the prosecutor directly said seconds before showing the jury the video of the assault.

Effective instability due to marked reactivity of mood; clearly, that has been shown. He reacts very strongly when upset. When he's not getting his way, he reacts.

Chronic feelings of emptiness which he has described inappropriate intense anger or difficulty controlling anger, and that's what we're seeing on August 23, 2012, and that's what they've seen many times before; 28 VRP 171; referring to testimony of bad character and other wrongs and acts, testified to by Dr. Sauvagnat and Dr. Goins. This is extremely prejudicial evidentiary error materially affected the outcome of the trial.

A new trial should be granted.

Respectfully submitted this 8th day of September, 2015



Jimi James Hamilton WADOC #747622
Clallam Bay Corrections Center
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Clallam Bay, WA 98326

APPENDIX I

DEFENSE REPLY TO SECOND MOTION TO DISMISS WITH ATTACHED DECLARIONT OF KELLY CANARY

ORIGINAL

CL16719743

SUPERIOR COURT FOR THE STATE OF WASHINGTON

SNOHOMISH COUNTY

STATE OF WASHINGTON Plaintiff, vs. Jimi Hamilton, Defendant.	NO. 12-1-01937-6 Second Motion To Dismiss Pursuant To State v. Cory and State v. Pena Fuentes DEFENSE REPLY BRIEF

Attached Declaration of Kelly Canary and accompanying exhibits.

SNOHOMISH COUNTY PUBLIC DEFENDER ASSOCIATION
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184

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON, Plaintiff, vs. JIMI J. HAMILTON, Defendant.	NO. 12-1-01937-6 DECLARATION OF: KELLY CANARY

DECLARATION

I, Kelly Canary, declare as follows:

1. I am an attorney with the Snohomish County Public Defenders' office. I am one of the attorneys of record in State v. Hamilton.

2. On May 15, 2014, defense counsel sent a subpoena to the Stafford Creek Correctional Center requesting, among other things, a cell search report from May 11, 2014. Exh. A.

3. Stafford Creek complied with the subpoena signed by this Court. At no time did the Attorney General or the Department of Corrections argue that this Court did not have jurisdiction to issue the subpoena duces tecum to Stafford Creek Correctional Center.

4. On June 4, 2014, the Department of Corrections sent over most of requested material except for the requested videotape of the incident.

5. On June 4, 2014, defense counsel called Sheri Izatt to ask why the video tape was not disclosed. She provided that the camera placed near Mr. Hamilton's cell does not record. She provided that it merely monitors the activity in Mr. Hamilton's cell and area around his cell so no video tape exists of the incident. Exh. B.

6. The DOC did however provide all of the other requested materials in the subpoena, including the cell search report. Exh. C.

7. The cell search report provides that the DOC "pulled one envelope for review by SGT for suitability," from Mr. Hamilton's cell.

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8. Later that same day, DOC employee Rick Richardson sent an email to Ms. Izatt providing that Hamilton

> "had some "legal" (quotes in original) paper work taken from his cell. The paperwork looked like legal paperwork but had Offender Payment's name on it. Hamilton stated that he had a court order that said DOC couldn't read his legal mail. ... Lieutenant Casey gave the paperwork back stated it had a public disclosure number on it."

9. This material did not have a public disclosure number on it. Rather, it was bate stamped by the Snohomish County Prosecutor office as part of discovery.

10. The discovery that was read by a DOC officer was in a manila envelope. It has Mr. Hamilton's name as well as his DOC number written on it as well as "legal" and "new discovery material." The email from DOC employee Richardson even acknowledges that the paperwork looked like legal paperwork.

11. The DOC's response that they seized the material because it had Offender Payments name on it is disingenuous. The DOC had to have already searched and read the discovery and determined prior to the cell search that the discovery "needed to be reviewed" by a sergeant.

12. The search that lead to the discovery of Kyle Payment's name clearly violates this Court's order and Mr. Hamilton's right to attorney-client privilege.

13. The actual seizure of the legal mail for review clearly violates this Court's order and attorney client privilege.

14. The searched material was in fact discovery. Defense received these materials from the Snohomish County Prosecuting Attorney's office. We redacted personal identifiers as required and then sent the discovery to Mr. Hamilton for his review.

15. We requested that he comment on the discovery and send it back.

16. Mr. Hamilton did in fact comment on the discovery that was "pulled for review." The legal materials that were taken from Mr. Hamilton's cell did in fact contain his mental impressions and fall under any definition of "attorney client privileged materials."

17. This is the first batch of discovery defense counsel sent to Mr. Hamilton since counsel realized that they were reading Mr. Hamilton's legal mail. Mr. Hamilton has repeatedly complained to this Court that he is not getting his discovery.

SNOHOMISH COUNTY PUBLIC DEFENDERS
1721 HEWITT AVENUE - SUITE 100
EVERETT, WASHINGTON 98201
425-339-6300

18. We have sent copies of motions to Mr. Hamilton, which are also considered legal mail but did not ask him to make comments and to record his mental impressions on the motions we had already filed.

I, Kelly Canary, hereby certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen, have personal knowledge of the facts stated above, am competent to be a witness herein, and that the above is true and correct:

Signed in Everett, Washington, this 10th day of June, 2014.

Kelly Canary, WSBA # 39217

SNOHOMISH COUNTY PUBLIC DEFENDERS
1721 HEWITT AVENUE - SUITE 100
EVERETT, WASHINGTON 98201
425-339-6300

APPENDIX II

DEFENDANTS OBJECTIONS TO THE STATES PROPOSED FINDING REGARDING DEFENDANTS SECOND MOTION TO DISMISS UNDER STATE V. CORY AND CrR8.3 (B)

CL17006378

IN The Superior Court of the State of Washington
in and for the County of Snohomish

The state of WASHINGTON plaintiff. V. Jimi James Hamilton defendant.	NO. 12-1-019376 Calendar notice.

FILED
2014 OCT 30 PM 1:39
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

To: CINDY A Larsen and to the Clerk of the above entitled Court:

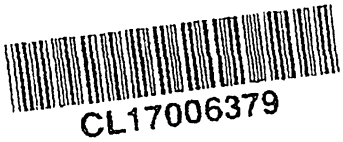
Please take notice that the following issue: Defendants objection to The states proposed findings regarding the defendants and motion to dismiss under state V. Cory and CrR 8.3 will Be Brought for A hearing at whatever date the Court has elected to hear and Review the States proposed findings submitted By the state on 10-22-2014

Jimi Hamilton
10-27-2014

272

calendar notice

The Honorable mary Beth Dingledy



FILED
2014 OCT 30 PM 1:39
SOHYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE Superior Court of the state of Washington
in and for the County of Snohomish

State of Washington Vs. Jimi Hamilton	Defendant's OBJections to the States proposed findings regarding defendants and motion to dismiss under State v. Cory and 8.3

A. Idenity of party: the defendant appearing pro se Moves this Court for the Relief Sought in part B of this motion.

B. Relief Sought:

(1) Deny the States proposed findings.

(2) order the Department of Corrections to transfer The defendant to the Jurisdiction of the Snohomish County To Hear oral argument and objections to the states proposed ~~objections~~ findings.

27

Argument

The trial Court has no Authority to grant the states proposed findings as they are untimely pursuant to CrR 52(B)

The state's proposed findings are Time Barred under superior Court Civil rule 52(5)(B) which mandates that Additional findings may only Be Sought By motion By a party no later Than 10 days after the entry of Judgement.

Here, the states proposed orders / findings are past 10 days.

When the Court announded its findings of facts and Conclusions of Law on the same day the motion in Limine hearing the state did not Submitt proposed findings nor did the state put on the record that the state intended to Submitt proposed findings, instead The state put on record it wanted the Court to re-Consider A finding of fact only.

This Court has no Authority to
Grant the states proposed
findings under Superior Court Rule (52)(5)(C)

Superior Court Rule 5 (C) Presentation states the Court shall not sign findings of fact or Conclusions of law until the defeated party has received 5 days notice of the Time and place of submission and have been served with Copies of the proposed findings and Conclusions.

Here the state has not informed the defendant of The Time and place of submission or provided the defendant With A Copy of the proposed findings. (Declaration of Defendant.) futhermore, the defendant is no longer represented By the Snohomish County Public defenders Assoc As Jennifer Rancourt Withdrew as Counsel on 10-2-2014.

(Conclusion) The states proposed findings are time Barred pursuant to Superior Civil Rule 52(5)(B) and the Court has no Authority to grant the proposed findings.

Respectfully submitted

Jim Hamilton

CL17006380

IN The Superior Court of the state of Washington
IN and for the County of Snohomish

FILED
2014 OCT 30 PM 1:38
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

State of Washington

v.

Jimi James Hamilton

NO. 12-1019376

Defendants Declaration in support of motion objecting to the states proposed findings

I Jimi James Hamilton Declare that:

1. I am the defendant in this Case.

2. I have not Been provided A Copy of the states proposed findings.

3. I learned of the states proposed findings through my Wife Sara Hamilton who saw that the proposed findings were submitted on 10-22-2014.

4. Jennifer Rancourt Withdrew as Counsel on 10-2-14

5. I am unable to Contact the snohomish County public defenders Assoc Regarding this matter.

270

6. Jennifer Rancourt and Kelly Canary will not respond to messages.

7. I have not received a copy of my Judgement and sentence

8. I have not spoke to Counsel since my Sentencing on 10-2-2014

9. on 10-2-2014 at my Sentencing hearing, The Court, my Defense Attorneys and the State failed to inform me that the State was seeking Additional findings in relation to my 2nd motion to dismiss under State V. Cory and CrR 8.3.

I Assumed (Because nobody clarified) the Additional findings Were in Regards to the finding of Guilt Because it was Raised at my Sentencing hearing.

I had absolutely no idea that the state was seeking to propose findings Regarding My 2nd motion to dismiss under State V. Cory Had the Court informed me, or Counsel informed me or the State informed me I Would of Requested to Be present and presented my objection and argument in open Court.

10. If the Court is going to Consider the states proposed findings it should Be done in open Court and I would like to Be present.

I declare under the penalty of perjury of the laws of The state of Washington that the statements Contained herein are true and Correct to the Best of my Knowledge.

Signed this 27th day of October 2014 in Aberdeen Washington

Jimi Hamilton

Jimi Hamilton 10-27-2014.

APPENDIX III

NOVEMBER 3, 2014 WRITTEN FINDINGS OF FACTS AND CONCLUSIONS OF LAW REGARDING DEFENDANTS SECOND MOTION TO DISMISS UNDER STATE V. CORY AND CrR 8.3

FILED

2014 NOV -3 PM 3:54

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

CL16654347

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington,

Plaintiff,

vs.

vs.

HAMILTON, JIMI J.

Defendant.

No. 12-1-01937-6

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DEFENDANT'S SECOND MOTION TO DISMISS UNDER CORY AND CrR 8.3

This matter came on for the Defendant's Second Motion to Dismiss under Cory and CrR 8.3 on June 16, 2014, June 17, 2014, June 19, 2014, August 11, 2014, August 12, 2014, and August 19, 2014. The Court considered: the records and files in this cause number; the testimony and exhibits admitted at this hearing; the testimony and exhibits admitted during the Defendant's First Motion to Dismiss Under Cory and CrR 8.3; statements numbered 1, 2, 3, and 6 of the declaration of Jennifer Rancourt dated March 17, 2014 relating to property left at Stafford Creek Correctional Center in the fall of 2013; the March 17, 2014 declaration of Jennifer Rancourt related to the March 12, 2014 visit to the defendant at Stafford Creek Correctional center with the exception of

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274

the statement numbered 3; the declaration of Kelly Canary dated June 10, 2014 with the exception of statements numbered 10, 11, 12, 13, the first sentence of 14, and number 16; the declaration of Cindy Larsen filed on June 14, 2014 with the exception of statements numbered 3, 5, 7, 22, and those portions of 23 after the first sentence; and the declaration of Cindy Larsen filed on December 3, 2013. The Court has also had the opportunity to observe the defendant in court and heard testimony during the 2 ½ week trial in this case. The Court now makes the following Findings of Fact and Conclusions of Law:

General Findings:

1. The defendant has spent the vast majority of his adult life in the custody of the Washington State Department of Corrections (DOC). As a juvenile, he was frequently in the custody of the Juvenile Rehabilitation Administration (JRA). ~~He has spent a large portion of his incarceration in solitary confinement and has generally been considered a high security risk by JRA and DOC due to impulsive, violent, aggressive and destructive behaviors.~~ MOD

2. ~~On November 17, 2007, the defendant was sentenced by the Pierce County Superior Court to serve 171 months in the Department of Corrections for two counts of First Degree Robbery.~~ The defendant is still serving a sentence unrelated to this matter with a release date well after the date of trial. MOD The defendant is still serving that sentence.

3. The Washington State Department of Corrections is, by necessity, a system run by rules and regulations. There are rules and regulations related to "legal mail", "legal property", attorney-client visits. The rules and regulations are necessary to

maintain the safety and security of the prisoners, prison staff, and the community. ~~Deviation from these rules would put prison staff, inmates, and the public at risk.~~ LBD

4. The Department of Corrections has experienced the import of drugs into their facilities through mail purported to be from attorneys in the past including through the use of paper soaked in methamphetamine, drugs hidden behind stamps or in the envelope seal, and other means. There is no indication that Mr. Hamilton's counsel attempted to ~~deceive~~ bring drugs or contraband into any facility LBD LBD

5. The defendant has ~~frequently~~ represented himself in Personal Restraint Petitions and lawsuits against the Department of Corrections. ~~During the time period relevant to this motion,~~ the defendant was also representing himself in a small-claims action that victim Nicholas Trout had filed against the defendant in Evergreen District Court. At the times relevant to this motion, he had what he calls "legal property" in his cell that was related to cases other than the criminal case at issue here. He typically has a large amount of "legal material" that he keeps with him. NBD until November 2013 LBD

6. On August 23, 2012, the defendant was transferred from the Monroe Correctional Complex to the Snohomish County Jail. He was arraigned on the current charge on September 14, 2012 and bail was set at $10,000.00 (bondable). The defendant posted that bail so that he would be returned to the Department of Corrections rather than remaining at the Snohomish County Jail.

7. When the defendant is housed at the Snohomish County Jail, he is allowed to meet with his attorneys in a private and confidential setting where they are allowed to pass documents back and forth.

8. At no time during the pendency of this case, has the defendant alleged that the Snohomish County Jail employees have kept his legal paperwork from him, read his legal material or have otherwise interfered with his ability to communicate with his attorneys and assist in his defense.

9. The defendant has been housed at the Snohomish County Jail on multiple occasions while this case was pending including: 8/23/12 – 9/14/12; 10/30/12 – 11/6/12; 7/30/13-8/27/13; 9/17/13-9/24/13; 12/3/13-1/28/14; 3/28/14-4/7/14; 5/13/14-5/20/14; and for periods of time in June 2014 and August 2014, as well as during trial.

10. Defense counsel has met with the defendant ~~numerous times~~ at the Snohomish County Jail MBD and taken advantage of the meeting accommodations provided there.

11. After the September 14, 2012 hearing the defendant was sent to Clallam Bay Correctional Complex (CBCC) where he was assigned to the Intensive Management Unit (IMU). The Intensive Management Unit is generally used to house offenders who are considered a high security risk. CBCC IMU was the defendant's primary housing location between September 14, 2012 and August 27, 2013.

Findings related to transport of "legal" material between CBCC/SCCC and the Snohomish County Jail in August-September 2013 and November-December 2013.

12. Generally, when the defendant was being transported to Snohomish County from CBCC (or later Stafford Creek Correctional Center) he would be transported on the "chain bus" system which is used to move DOC inmates from one facility to another and then to court. Property that an inmate brings with him on the bus

is transported in a separate area of the bus for safety and security. The bus only operates on certain days of the week. Generally, the bus brings the inmates from other facilities to the Washington State Correctional Center in Shelton (WCC) where they are then held for transport to the various Counties for court. At times it is necessary for the defendant to remain at WCC for a week or two during this process, but WCC was not intended to be a permanent placement for the defendant during the pendency of this case. When the defendant was at WCC, he was housed in IMU.

13. Because WCC is a Reception Diagnostic Center, and not generally used for long term placement, and because all levels and types of offenders are often housed together, WCC is the only DOC facility where offenders are generally NOT allowed to possess their personal legal documents/papers in their cells. DOC Policy 310.000(I) & 590.500(VI)(a). Pursuant to those policies, offenders may access their legal documents through the law librarian or if there is a court or statutorily imposed deadline within 45 days or if necessary to prepare legal pleadings. An Offender housed in IMU may request legal paperwork by sending a kite to the law librarian or the IMU property officer.

14. On July 24, 2013, the defendant was transferred from CBCC-IMU to WCC-IMU. On that day, the defendant sent a kite to the WCC IMU property officer, asking for the legal material that had been transported on the bus from CBCC to WCC. In the kite, the defendant said "it's in a box in receiving". His material was provided to him the following day.

15. On July 30, 2013, the defendant was transferred from WCC-IMU to Snohomish County Jail, where he remained until August 27, 2013.

16. On August 27, 2013, after the hearing on the defendant's first Motion to Dismiss under St. v. Cory and CrR 8.3, the defendant was transferred back to WCC-IMU.

17. On September 3, 2013, after the three day labor day holiday weekend, the defendant filed an "emergency grievance" stating that he had a criminal case with scheduled court appearances and two civil cases against DOC with deadlines and needed his legal material. On that day, John Thompson, the legal librarian brought the defendant a "package" of "legal work".

18. On September 4, 2013, the defendant filed another emergency grievance claiming that he only received half of his legal work and alleging that John Thompson "either intentionally left the other half there over in receiving or overlooked it". He said he had "3 pending Court matters with deadlines and scheduled Court appearances. I believe WCC is examining my Attorney Client privileged material in direct violation of a court order issued by the Snohomish County Superior Court on 8-26-13. You would think DOC would play it a little smarter but theres no accountability for government mismanagement inside DOC. Make no mistake this is a Court matter and it will stay a court matter quit reading my legal material and hand it over!!!" There is no evidence that anyone was reading his legal material. This grievance was treated as "non-emergent" and, as such, was not responded to until September 9, 2013, when the defendant received the remainder of his "legal paperwork". His "legal paperwork" then

remained in his possession until he was transported to the Snohomish County Jail on September 17, 2013.

19. He then had possession of all of his "legal paperwork" between September 17, 2013 and the Court hearing on September 24, 2013. Thus, in total, he had access to all of his legal paperwork for 15 days prior to the September 24, 2013 court appearance.

20. In late August and early September 2013, the defendant did not have any immediate need to prepare legal pleadings for this case, or otherwise prepare for an impending court hearing; nor was there a court or statutorily imposed deadline within 45 days. The court appearance on September 24, 2013 was for purposes of the Court issuing its ruling on the first Motion to Dismiss. There were no defense interviews of State's witnesses scheduled between August 26, 2013 and November 25, 2013 and there is no evidence that any other interviews were being conducted by the defense during that time period.

21. The Court has not been provided with copies of the "legal paperwork" that was kept in receiving at WCC between August 27, 2013 and September 9, 2013. There is no credible evidence that is attorney-client privileged material or work product or that it was necessary that the defendant have possession of it in order to prepare for this case during that time period.

22. Similarly, there is no credible evidence the paperwork was read or even "scanned" by anyone during the time it was not in the defendant's possession or in his presence between August 27, 2013 and September 9, 2013.

23. On September 24, 2013, the Court issued its ruling denying the defendant's first Motion to Dismiss under St. v. Cory and CrR 8.3.

24. The defendant was transported back to WCC-IMU on September 24, 2013.

25. On September 24, 2013, the defendant sent a kite to IMU property officer Boren requesting his "legal work" that had been brought with him on "chain". Officer Boren provided the defendant with his "legal" the following day.

26. On September 27, 2013, the defendant was transferred from WCC-IMU to Stafford Creek Correctional Center (SCCC) IMU.

27. The defendant was next transported from SCCC to WCC on Monday November 25, 2013. He was held at WCC for 8 days until December 3, 2013, when he was transported to the Snohomish County Jail.

28. Prior to leaving SCCC on November 22, 2013, the defendant gave William Crane a large box of "legal" paperwork for transport. The box was separated into two boxes due to weight limitations for transport.

29. It does not appear that the defendant sent a kite to either the law librarian, John Thompson, or the IMU property officer, Travis Boren, requesting his paperwork during this stay, despite the fact that he knows this is the procedure required to obtain his paperwork.

30. On December 2, 2013, the defendant wrote a grievance stating that he brought 2 boxes of legal material with him from SCCC and that he had asked "receiving staff" to send his 2 boxes over to the IMU with him. He claimed the receiving

staff had left his boxes in receiving. A response was provided to the defendant on 12/3/13, indicating that the defendant's "2 boxes are in IMU property; however, Officer Boren (WCC IMU Property Officer) stated you have yet to submit a kite request for property."

31. The defendant was transported to Snohomish County Jail that same day (12/3/13), but the 2 boxes remained in the WCC IMU property room. Of the 8 days the defendant was at WCC between November 25, 2013 and December 3, 2013, 4 of those days were the Thanksgiving Holiday weekend.

32. The defendant did not see the "legal" paperwork again until approximately December 10, 2013, when they arrived at the Snohomish County Jail. The defendant complains that his paperwork seemed out of order when he received it.

33. As with each of the defendant's claims that DOC staff has been reading his "legal" paperwork, the defendant has again failed to provide the court (under seal or otherwise) with that paperwork so that the court or an independent party could assess whether the "paperwork" is in fact attorney-client privileged material, work product, or even related to this case.

34. On November 20, 2013, the defendant sent a letter to the court scheduling a motion to proceed pro se for December 4, 2013, however on December 4, 2013, the defendant chose to defer that motion to a later date and it was heard on January 2, 2014 (at which time the defendant again chose to defer the motion to a later date). The next substantive motion was the 3.5 hearing, which was held on January 8, 2014 and January 21, 2014.

35. Again, the defendant has not shown that anyone actually read, or even scanned, the defendant's paperwork between the time it left his custody at SCCC and the time he received it at the Snohomish County Jail. The defendant states that he has approximately 25 large manila envelopes filled with legal paperwork and he thought the papers in one of them was "out of order" when he got it back. He does not describe in what way they were out of order. He also testified that the corners were slightly bent, though not significantly enough for him to mention in his declaration. The envelopes were not sealed or clasped and they were transferred into bags at the Snohomish County Jail.

36. ~~The Court does not find the defendant's claim that the documents were out of order credible under these circumstances~~. The court also ~~does not find~~ finds that, even if the documents were out of order, ~~that this~~ does not show an intentional intrusion into the attorney-client relationship or the defendant's privileged legal materials ~~as opposed to the possibility that the documents slid out of the open envelope during transport and had to be placed back inside.~~ Again, there is no evidence that any State employee read the defendants materials.

37. The Court finds that manner in which the defendant's legal documents are packaged, stored, and transported when he is being moved from facility to facility and while he is held at WCC is consistent with DOC policies and is necessary to maintain the safety and security of the prisoners, staff and community. The limited amounts of time that the defendant was without his paperwork were not a result of intentional or

purposeful intrusion into the attorney-client relationship or the defendant's confidential legal materials and were justified by legitimate security concerns of the institution.

38. Finally, the court finds, beyond a reasonable doubt, that the defendant has not been prejudiced by not having possession of his legal materials during these time periods (August 27, 2013-September 9, 2013 and November 22, 2013-December 10, 2013).

Missing (LBD) Envelope

39. The defendant claims that on the night of December 2, 2013, just before leaving for the Snohomish County Jail, he handed an envelope that was addressed to his attorneys to an unknown officer and asked that it be added to his other property for transport. He claims he never saw that envelope again. The defendant admits that he did not follow the correct procedure regarding postage and mailing documents.

40. Based on the limited information provided about this ~~mystery~~ missing (LBD) envelope by the defendant, the court cannot find that there was any intentional or purposeful intrusion into the defendant's attorney-client relationship or that any State agent read or even scanned attorney-client privileged material, work product or any other relevant document.

Property Destroyed at SCCC

41. Pursuant to an agreement between DOC and the Snohomish County Jail, and over the objection of the defendant, the defendant was housed at the Snohomish County jail from December 3, 2013 –January 28, 2014. At that time, trial was set to begin in February. However, on January 8, 2014, the trial was continued to May 5,

2014. Thus, the defendant was transferred back to DOC shortly after the completion of the 3.5 hearing, which ended January 21, 2014.

42. Prior to the defendant leaving SCCC in late November 2013, the defendant asked that his cell be held for him upon his return. At that time, it had not been decided that the defendant would stay at the Snohomish County Jail indefinitely. Property Officer William Crane said that he would try to hold the cell but that the defendant should take all "legal" with him. The defendant interpreted that to mean all "legal" that he needed.

43. Either because of a misunderstanding or because the defendant did not return in December, his cell was not held for him and any remaining property was cleaned out and thrown away.

44. Despite the fact that trial was set for February 2014 and it was anticipated that the defendant would remain at the jail until trial, the defendant never requested that the "legal" property he claims to have left at SCCC.

45. The defendant returned to SCCC-IMU on February 3, 2014 and was told his property was likely thrown away. The defendant filed a grievance a month later on March 2, 2014 claiming that the documents that the lost property contained documents relevant to his defense in this case and "protected by the attorney client privilege and 2 personal legal books necessary for his defense in this case, as well as personal property.

46. At the hearing on this matter, the defendant testified that he had left his court rules book, some other "court books" and some notes he wrote down in case he went pro se.

47. The defendant has failed to establish that anyone intentionally or purposefully interfered with his attorney-client relationship or read any confidential attorney-client communication or work product. The contents of the alleged "legal" property is vague at best and the court cannot find that it contained trial strategy information or attorney-client privileged information based on the evidence offered.

48. The defendant did not represent himself at any point during this case. He was represented by two experienced and capable attorneys and had the services of a defense investigator. The court finds beyond a reasonable doubt that he was not prejudiced by the loss of the books or documents.

Findings related to attorney-client meeting at SCCC on March 12, 2014

49. Prior to March 12, 2014, staff from defense counsel's office contacted SCCC-IMU counsellor Sarah Sullivan to set up a professional (attorney-client) visit.

50. Attorney-client meetings with offenders housed in IMU at SCCC are MBD ~~always~~ set up in the no-contact booth in IMU. The attorneys and their clients are not allowed to pass documents back and forth during those meetings and are separated by [redacted] clear plexi-glass. DOC staff cannot hear what is being said in that meeting room. There is a surveillance camera in the room that records video but it does not have audio on it. The video is recorded over on a regular loop in 30 days or less.

51. These security measures for the high-risk inmates in IMU like the defendant are necessary to protect the inmates, staff and the public, in particular the defense attorney and investigator in this case. DOC needs to be able to monitor the activity of the prisoners during the visits to prevent unwanted exposure, sexual acting out, gestures, and property destruction. Keeping visual observation without listening to the conversation is necessary and justified by the security needs of the Intensive Management Units in the prison.

52. Prior to the meeting, the defendant had informed DOC employee William Swain of the Court's prior order that he be allowed to meet with his attorney in a room where papers could be passed back and forth. William Swain had notified the legal liaison of that request. Sarah Sullivan was not aware of the court's prior order.

53. Investigator Jan Mortenson and defense attorney Rancourt were both present for the March 12, 2014 visit. At some point during that meeting Ms. Rancourt told William Swain that she needed legal papers from the defendant. William Swain told counsel that he had already discussed the issue with the defendant and they would not be allowed to pass papers at the meeting, but could mail them. Ms. Rancourt explained the Court order and asked Mr. Swain to contact AAG Doug Carr. At that time the legal liaison attempted to call Doug Carr but couldn't reach him; within several minutes of Ms. Rancourt's conversation with Mr. Swain, visiting hours ended and Ms. Rancourt and Ms. Mortenson were escorted out of the facility.

54. During the initial hearing in this matter, the Court inquired of Superintendent Patrick Glebe if he could make a different arrangement for future

attorney-client meetings. Counsel again travelled to SCCC in July of 2014. This time, arrangements were made to place the defendant in the staff lunch and break room. This room also has computer equipment, telephones, and staff lockers. ~~Staff were not allowed to access this room during the several hours that the defendant and~~ his ~~counsel were in the room.~~ LBO

55. This room contains many items that could be used as weapons and that prisoners are not allowed to have. Additionally, defense counsel was not searched prior to entering the room. or the facility in general. LBO

56. ~~This clearly is not a situation that meets the institutions~~ security needs, nor is it ~~practical to hold lengthy attorney-client meetings in the staff break/lunch/locker room on any sort of a regular basis.~~ LBO

57. During the visit, the defendant was in arm, leg and waist restraints and was chained to the wall. He was seated on a stool with a table in front of him so that he could review documents. Counsellor Sarah Sullivan was required to maintain "eyes-on" contact with the defendant from a room separated by two windows and a hallway from where the attorneys met with the defendant. Ms. Sullivan could not hear the conversation or see the documents the attorneys and the defendant were discussing.

58. Ms. Sullivan is aware of only one other occasion when the break/lunch room has been used for an attorney-client meeting. On all other occasions, those meetings have been held in the no-contact room used for the March 12, 2014 meeting. ~~That meeting was with inmate Kyle Payment within a couple of weeks of the meeting~~

between the defendant and his counsel in this case. Kyle Payment has testified for the defendant at a previous hearing in this matter and has filed motions to dismiss his own charges based on similar allegations against DOC that the defendant is raising in this case. It has been used for inmate hearings. (LCO)

59. The Court does find that requiring the defendant to meet with his attorneys on March 12, 2014 in the no-contact room used for all professional visits in the SCCC-IMU was a purposeful intrusion into the attorney-client relationship. However, there was no intentional "eavesdropping" like there was in the cases cited by the defense in support of their motion to dismiss. The surveillance camera, does not have audio enabled and is not used to record confidential communication. There is no evidence that anyone has watched or saved a recording of the visit or passed any information on to anyone involved in the prosecution in this case. Further, the level of intrusion involved in requiring the defendant to meet with his attorneys in the IMU no-contact room is justified by the need for safety and security of the inmate, staff and the public, including the defendant's attorneys and investigator. The inability to pass documents back and forth on this one occasion cannot be found to have damaged the attorney-client relationship or otherwise prejudiced the defendant.

Scanning "legal mail"

60. There has been no showing that DOC has been reading or scanning the defendant's legal mail contrary to this court's prior order or in a manner inconsistent with the defendant's Constitutional rights.

May 11, 2014 Cell Search

61. On Sunday, May 11, 2014, the defendant had approximately 25 legal sized manila envelopes containing "legal paperwork" in his cell.

62. At approximately 7:45, Corrections Officer Roberts entered the defendant's cell for a routine cell search. The defendant was in the "yard" across from his cell and saw Roberts go in and come out. Roberts was in the defendant's cell for approximately 5 minutes and then left. During those 5 minutes, Roberts did a quick search of the cell and quickly flipped through the defendant's paperwork looking for contraband. She noticed that one of the defendant's envelopes contained paperwork with the name Kyle Payment on top in what looked like a legal caption. She recognized Kyle Payment as another inmate housed in SCCC-IMU and went to ask another guard if the defendant was allowed to have Kyle Payment's paperwork. 5 minutes later Officer Roberts came back to the defendant's cell with Officer Green. Officer Green flipped through the envelope and said they should take it to the Sergeant. Roberts and Green left the cell with the envelope and informed Sgt. Richardson. The envelope was then locked in Sgt. Richardson's office (or the "cage") where no one had access to it until Sgt. Richardson had an opportunity to get it. Sgt. Richardson was assisting with "med pass" and could not get to it immediately. During "med pass" the defendant complained to Sgt. Richardson about the envelope being taken. He then filed an emergency grievance. Sgt. Richardson took the grievance and the envelope containing Hamilton's paperwork to Lt. Casey. Sgt. Richardson did not look at anything inside of the envelope. Lt. Casey quickly flipped through the

paperwork from the envelope and noticed numbers on it consistent with Bates stamping. Believing the documents were properly obtained through public disclosure, he directed that they be returned to the defendant. The documents were returned to the defendant no later than 10:20 am.

63. The envelope contained pages 624-849 of discovery that the prosecutor had provided to the defense in this case. These pages primarily contained pleadings from Kyle Payment's criminal case and documents regarding two internal investigations into custodial misconduct by Wendy Lee at the Monroe Correctional Complex. It had been redacted and copied using both sides of the paper so there were a little over 100 pieces of paper in the envelope. The defendant testified that he had written some notes in the margins for his attorneys, but there is no evidence about what that might have been or how it would have been relevant to this case. Neither Wendy Lee nor Kyle Payment were called as witnesses at the trial in this case. Although Wendy Lee and her misconduct were discussed at trial, none of those facts were contested.

64. No one other than C/O Green, C/O Roberts, and Lt. Casey looked at the defendant's documents. Each of those individuals testified that they only very quickly flipped through the documents. None of them noticed any notes written in the margins that were not part of the electronically copied discovery documents.

65. DOC regulations do not allow an offender to possess another offender's legal paperwork except with permission. At some point Mr. Hamilton had permission with regards to Mr. Payment for a [illegible] arrangement [illegible] MBD 20[illegible] This is to ensure the safety of the inmates and to prevent extortion, bribery, threats or physical assaults based on information that night be contained in

those types of documents about the offender's charges or the nature of what they have been convicted of.

66. The cell search and brief confiscation of the defendant's paperwork in this case was justified by legitimate security concerns of DOC. The intrusion, though purposeful, was not done for the purpose of obtaining privileged information and was not done on behalf of the prosecution team. The intrusion was no longer than necessary to ensure compliance with DOC regulations and the documents were quickly returned to the defendant without being copied or read, other than the brief scanning described above. No confidential or attorney-client privileged information was read or obtained by any State actor and the defendant was not prejudiced in any way by the withholding of these documents for approximately 2 ½ hours.

Findings related to attorney-client relationship.

67. On January 30, 2013, the defendant wrote a letter to the Court indicating that his only defense is a diminished capacity defense and asking that the court appoint a new attorney who was not in the Snohomish County Public Defender's Office. He indicated that he did not trust his attorney, Jennifer Rancourt, ~~for various reasons that appear to have nothing to do with the Department of Corrections or any intrusions by the State into the Attorney-client relationship~~. LBD

68. On January 31, 2013, the defendant wrote another letter to the Court indicating that he was withdrawing his request for new counsel and admitting that he has difficulties with paranoia and thinking people are against him. He also indicated that he was satisfied with the representation of co-counsel Kelly Canary.

69. The defendant's first Motion to Dismiss under St. v. Cory and CrR 8.3 alleging that DOC was interfering with the defendant's right to counsel was heard on August 22, 2013, August 23, 2013, and August 26, 2013. The Court gave its decision denying this Motion to Dismiss on September 24, 2013.

70. Between September 25, 2013 and January 8, 2014, the defendant made several requests to proceed pro se or act as co-counsel, but then revoked those requests, either by letter to the court or after a colloquy with the court.

71. On August 5, 2014, the defendant again filed a letter requesting to go pro se. At that time, his complaint was that he was "incommunicado with" defense counsel as they were not responding to his e-mails, regular mail, or telephone calls. He was upset that the State had filed motions in limine on August 1, 2014 that defense counsel had not yet discussed with him (per Court order, the motions in limine were not due until August 8, 2014). The defendant said that he did not want Jennifer Rancourt to represent him in any more court matters, and requested that if defense counsel Kelly Canary was not available to finish the evidentiary hearing scheduled for August 11, 2014, then he wanted to represent himself at that hearing.

72. On August 11, 2014, Kelly Canary was present at the hearing. After a colloquy with the Court, the defendant again withdrew his motion.

73. The Court has observed that the defendant has been very actively involved in his defense in this case, and has filed numerous declarations in support of the various motion to dismiss filed by the defense. ~~has assisted his counsel by providing areas of cross-examination of witnesses during the motion hearings (and trial), by~~

~~suggesting objections which defense counsel then made on his behalf, and suggesting arguments that defense counsel then appeared to make on his behalf.~~ LBD

74. As the defendant himself has stated, the issues and concerns he had with defense counsel appear to stem from his own paranoia and various mental health problems/personality disorder(s). His reactions to defense counsel appear, to this court, to be consistent with his mental health diagnosis ~~and with his relationship style~~. LBD

75. The fact that defense counsel was able to represent the defendant's interests so zealously and comprehensively is a testament to the patience and communication skills of the defense attorneys assigned to represent the defendant in this case.

76. The Court cannot find that the defendant's confidence in his attorneys has ~~been~~ destroyed as he appeared to work with them effectively throughout motions ~~and the trial~~. To the extent the defendant lacked confidence in his attorneys; this does not appear to be the result of any actions by the State or the Department of Corrections, but rather a result of the defendants personality and mental health issues. LBD

I. Conclusions related to all allegations:

Although the defendant's behavior has improved over the past several years

1. Any intrusions into the defendant's private affairs were necessary and justified by legitimate security concerns inherent in the fact that the defendant is serving a sentence in prison for two violent offenses and by the defendant's high-security level and propensity for violent outbursts, property destruction, and other harmful behaviors. LBD

1.5. All searches were based on general, as opposed to specific threats.

2. The defendant has not shown arbitrary action or government misconduct. LBD

3. The assault alleged to have occurred in this case occurred at the Monroe Correctional Complex – Special Offender Unit. The DOC employees from Clallam Bay Correctional Center, Washington Correctional Center, and Stafford Creek Correctional Center, are not involved in the prosecution of this case, are not witnesses in this case, and do not have a significant relationship with the prosecution team.

4. The Court finds, beyond a reasonable doubt, that no part of the prosecution team nor any of the State's witnesses have obtained any defense strategy, attorney-client privileged communication, work product, or any other confidential information as a result of any intrusions into the defendant's privileged communications. The prosecution did not obtain or use confidential information to disadvantage the defendant in this case. The state has gained no unfair advantage at trial.

5. Finally, the defense has not shown that the alleged intrusions have destroyed Mr. Hamilton's faith in his attorneys.

Conclusions of Law

1. Any intrusion by the Department of Corrections in this case do not rise to the level of violating the defendant's Constitutional rights to counsel and a fair trial under St. v. Cory, Pena-Fuentes, and Garza nor do they constitute grounds for dismissal under CrR 8.3(b).

2. The intrusions were justified by legitimate general security concerns.

2.5 The court does not believe that the cell search + document confiscation on 5/14/14 should be analyzed under Rena-Fuentes because there was no ~~[illegible]~~ eavesdropping. Regardless, the court will analyze it under the Rena-Fuentes analysis (CCD)

3. The court finds, beyond a reasonable doubt, that the actions complained of by the defendant have not prejudiced the defendant's right to a fair trial in this case.

4. The Motion to Dismiss is denied.

DONE IN OPEN COURT this 3 day of November, 2014.

JUDGE MARY E. DINGLEDY

Presented by:

CINDY A. LARSEN, #26280
Deputy Prosecuting Attorney

Approved as to Form; without waiving any objections previously made either in writing or on the record on 11/3/14

Jennifer Rancourt # 30474
ATTORNEY FOR DEFENDANT

NIELSEN, BROMAN & KOCH, PLLC

September 08, 2015 - 4:05 PM

Transmittal Letter

Document Uploaded: 725165-Jimi's SAGAmended.pdf

Case Name: Jimi Hamilton
Court of Appeals Case Number: 72516-5

Party Respresented:

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
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- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
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- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◯ Petition for Review (PRV)
- ◉ Other: Amended SAG and Cover Letter

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

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