

67111-1

67111-1

NO. 67111-1-I

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

STATE OF WASHINGTON,  
Respondent,

v.

JOHN E. BETTYS  
Appellant,

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 APR 20 AM 11:33

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

The Honorable David R. Needy, Judge

STATEMENT OF ADDITIONAL GROUNDS BRIEF

JOHN E. BETTYS  
Appellant Pro Se

Clallam Bay Correction Center  
1830 Eagle Crest Way Apt. # BD-04  
Clallam Bay, Wa. 98326

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1RP--October 1, 2010; 2RP--December 16, 2010; 3RP--December 22, 2010  
4RP--January 6, 2011; 5RP--February 16, 2011; 6RP--February 18, 2011;  
7RP--April 28, 2011; 8RP--May 4, 5, 6, 2011; 9RP-- May 5, 2011; 10RP--  
May 6, 2011; 11RP--May 9,2011; 12RP--May 10, 11, 2011; 13RP--Jine 9,  
2011; 14RP--July 20, 2011; 15RP--March 25, 2011; 16RP--March 3, 2011...

Micca Ferrell/King ( Complaining child witness ) 'M.F!' or 'MIF'

Joey Hicks ( Other Child Accused of abusing M.F. ) 'JH'

(This will be the only place that the full names of these childrens' names appear in the text of this briefing, Harley Bettys does appear in one location in the brief also a minor child, which should be redacted before publishing the case results.)

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1. IDENTITY OF PARTY

I, John E. Bettys, Appellant, Pro Se, respectfully request this Honorable Court now adhere to less stringent rules under the HAINES V. KERNER, 404 U.S. 519, S.Ct. 594 (1972), and review this Statement of Additional Grounds Briefing (SAG) submitted by the case Appellant.

2. STATEMENT OF THE CASE

Appellant asks the Court except the Statement of the Case submitted by appellant attorney Andrew Zinner excluding the facts relating to any out-of-court statements made, which the child declarant(s) never actually testified to during the trial or proceedings as is Statutorily and Constitutionally required before admission. The Appellant now objects to Counsels' inclusion of such inadmissible evidence in the Statement of the Case.

Appellant also asks this Court to exclude any reference to any of the other inadmissible evidence, such as prior victims age, and 10.58.090 evidence, which was inadmissible in the trial, but the appellant attorney erroneously included in the Statement of the case in his briefing.

Appellant will adopt the remaining items from the Appellant counsels' opening briefing, and asks this Court review these matters.

3. ISSUE PRESENTED

Please find the issues presented in the "Table of Content, do to the limited space for arguments in these 50 pages, and the vast listing of issues for this Courts' review.

#### 4. ARGUMENTS

##### SENTENCING ERROR(s)

###### A. Did State Carry its Burden at Sentencing?

State made "Bare Assertions" at sentencing, without presenting evidence in support of the alleged criminal history. State knew defense did not stipulate to any prior criminal history allegations, and was directly challenging the 1993 and out-of-state alleged criminal history, for a multitude of reasons, which included constitutional violations. State Chose not to provide the Court with even the bare minimal evidence for the Court to rule under the "preponderance of the evidence", on the current criminal history State alleged. CP 94 # 19... 14RP.

"However, RCW 9.94A.530(2) is facially unconstitutional, in so far as it provides that the defendant's failure to object to the "Bare Assertions" in criminal history summaries constitute acknowledgment. Ford and its progeny makes clear... the State must meet its burden to prove prior convictions by a preponderance of the evidence.

Here, the Statement of the prosecutor is the exact type of "Bare Assertion" rejected in Ford. .,. simply list the crimes that the prosecutor believes Huntley to have been convicted of. Under Ford, such allegations are not evidence. State v. Huntley #39676-9 (2011)

The Trial Court violated Huntley's Right to Due Process of the Law by sentencing him based on facts for which there was no evidence in the record. Therefore, we vacate Huntley's sentence. State V. Huntley, #39676-9 (2011).

Herein, there was no evidence presented from which the Court Could sentence, States mere "Bare Assertions" are not evidence from which the Court could rule.

Worse, since State knew the prior alleged criminal history was directly to be challenged at sentencing by the defense in advance of the sentencing hearing, State clearly made a willful choice not to meet its burden under criminal history.

Defense's challenges operate as objection to the validity of the alleged criminal history, which State knew in advance, (CP 94 at 19) now requires full exclusion of all unsupported "Bare Assertions" listed in the Current Criminal History. There can exist no affirmative acknowledgment, whereby the defense had gave State previous notice it would not stipulate (CP 94 No. 19), and filed the challenges in opposition to the inclusion of the 1993 alleged history, and the out-of-state alleged history in the current Judgment. Which the Judge entered ruling on at the sentencing hearing. 14RP.

"Cadwallader directs that in the event of a remand, State may not present new evidence... because it failed to offer such evidence at sentencing." State V. Cadwallader, 155 Wn2d 867(2005)

Superior Court error in including the challenged criminal history, which must now be excluded for State's failure, and the reasons hereinafter stated in the additional sentencing arguments.

B. Did Court follow the "Due Process of Law" 'Judicially Established' before including out-of-state crimes in current criminal history?

State clearly failed to present the required documentation to support State's burden of proof, "By Preponderance of Evidence", so we know State also failed its burden to present Sentencing Court with the required elements of the alleged out-of-state criminal history, required for Court to consider their inclusion.

Court of Appeals Judicially Interpreted RCW 9.94A.525(3)(former 9.94A.360(3)) to require:

The comparison test: "performed by comparing the elements of the out-of-state crime as they existed on the date of the offense with the elements of the proposed Washington crime as it existed on the date of the offense." State V. Russell, 104 Wa.App. 422(2001).

The date of the Idaho conviction was 1/17/91, therefore we are dealing with the elements of the Washington counter part as they existed on 1/17/91.

"If such reveals the out-of-state crime did not contain one or more of the elements of the Washington crime as of the date of the offense, it also reveals the out-of-state Court did not necessarily find each fact essential to liability for the proposed Washington counter part crime, and thus without more, out-of-state crime cannot count as that Washington crime." State V. Russell, 104 Wa.App. 422(2001).

Based upon the 14th Amendment of the United States Constitution's principles of "Due Process of Law", the Court of Appeals through Judicial Interpretation did clearly and unambiguously establish the proper application of the out-of-state compatibility statute RCW 9.94A.525(3)(formerly 9.94A.360(3)), and thereby such lawful process is due each and every defendant, until such interpretation is overruled by the Court of Appeals. Which is binding on all lower Courts through the doctrine of "Stare Decisis", which states:

"Once we have decided an issue of law, that interpretation is binding (on all lower Courts) until we overrule it." State V. LaChapelle, 153 Wn2d 1, (2004); Soproni V. Polygon Apartment Partners, 137 Wn2d 319(1999); and Hamilton V. Dep't of labor & Indus., 111 Wn2d 569(1988); State V. Gore. 101 Wn2d 481(1984).

"While it is the function of the Legislature to make the laws, its ultimately the function of the Courts to construe the law!" State V. Mann, 146 Wa.App. 349(2008); Marine Power & Equip. Co. V. Human Rights Comm. Hearing Tribunal, 39 Wa.App. 609(1985).

Court of Appeals further Stated:

"The first step in determining the Washington sentencing consequences of an out-of-state conviction, is to convert the out-of-state conviction into its Washington counter part, which ensures the out-of-state Court had necessarily found each element of the proposed Washington counter part...." State V. Russell, 104 Wa.App. 422(2001).

Skagit County Superior Court failed to properly follow this interpretation in

finding compatibility of the Idaho "grandtheft" and "malicious injury" listed on the 2011 judgment & sentence document's facia as "Theft 2~/TMV" and "Malicious Injury" under Washington counter parts. As the judgment & Sentence is the written order of the Court, then the Court failed to follow the judicially established "Due Process of Law", Constitutionally guaranteed each and every defendant now sentenced in Washington State, by and through the 14th amend. United States Const.

Skagit County Superior Court was required to determine the compatibility of the Idaho crime to a Washington counter part, then determine the proper statutory felony classification of that Washington crime, before applying the statutory Wash-out provision of the Washington Laws, to allow exclusion of the Idaho crime as a Class-C felony. see State V. Roche, 75 Wa.App. 500(1994)...

We know this was not done herein, as Washington does not have a felony crime of malicious injury listed statutorily under RCW 9.94A.515, therefore the inclusion of such in the 2011 criminal history is erroneous. CP 275.

Court also could not combine multiple Washington crimes to equal the elements of the single Idaho "grandtheft" crime, which is facially listed a "Theft 2~/Taking Motor Vehicle(TMV) in the 2011 criminal history. If this Could be done without then violating the process of law established by the Court of Appeals in State V. Russell, 104 Wa.App. 422(2001), then we would have no reason to conduct compatibility test, as by combining Washington crimes we could equal the elements of the out-of-state crime each time. This however would and does violate the Due Process established by the higher Court of Appeals. 14RP 18, 24-25...

Defense gave clear notice it would not stipulate to the criminal history in the sentencing hearing, providing State such notice as early as Jan. 6, 2011, and the State willfully chose not to support its "Bare Assertions". CP 94 at 19....

"Cadwallader directs that in the event of a remand, State may not present new evidence... because it failed to offer such evidence at sentencing..."

Defense challenged the Idaho history as invalid, in direct violation of the 6th amendment of the United States Constitution, as Bettys was not provided an attorney in Idaho, and was not Pro Se in the matters. This is a Gideon V. Wainwright, 372 U.S. 335, 83 S.Ct. 792(1963) violation, which cannot be allowed to stand in the record, whereby such record is used to classify and house the defendant in the Washington State Department of Corrections, thereby effecting the actual conditions of confinement. Therefore, this cannot be harmless error.

Had the Court followed Due Process of law established by the higher Court in Russell, and properly compared the Idaho crimes the Court would have excluded the Idaho criminal history, and also the 1993 P.O.A.A. criminal history as invalid. 14RP 47 at 9-17.

C. Did 2011 Sentencing Judge erroneously allow an invalid, an challenged judgment & sentence into current criminal history, causing defendant to suffer "ANEW" the 'Due Process' violation?

"Review of a trial court's calculation of the offender score and sentence under the POAA is de novo." State V. Rivers, 130 Wa.App. 684(2005).

Appellant challenged the 1993 judgment's inclusion at the 2011 sentencing whereby the State admitted such for inclusion in criminal history. CP 262 (defense sentencing report). State argued on merit of the issues at 2011 sentencing, yet willfully chose not to meet the burden "by a preponderance of evidence" as required prior to inclusion as criminal history. 14RP 23-24; 14RP 47 at 9-17.

"Bare Assertions as to criminal history do not substitute for the facts and information a sentencing court requires. State V. Mendoza, 165 Wn2d 913(2009).

State was notified January 6, 2011 that defense would not stipulate to any alleged criminal history presented by the State. CP 94 at 19....

In addition, CP 262 put State on direct notice the 1993 history, and Idaho crimes validity would be challenged at the sentencing hearing, providing State advanced notice it must carry its burden at sentencing. State cannot claim this a mistake, or surprise at sentencing, in State's willful choice not to bring in more than mere "Bare Assertions" to support the alleged history.

"Under the principles of due process, the facts relied upon in sentencing must have some basis in the record." State V. Huntley, 39676-9 (2011); State V. Ford, 137 Wn2d at 482(1999); State V. Bresolin, 13 Wa.App. 386, (1975).

"Our Supreme Court affirmatively held that the State is not allowed a second opportunity to present evidence it should have submitted at the sentencing hearing." State V. Knippling, 141 Wa.App. 50(2007); State V. Lopez, 147 Wn2d 515(2001). "Where the State fails to carry its burden of proof after a specific objection, it would not be provided further opportunity to do so." State V. McCorkle, 137 Wn2d 490(1999); State V. Ford, 137 Wn2d at 485(1999).

Even though defense challenged the inclusion of the 1993 offense history and the Idaho history, the record shows nothing more than "Bare Assertions" from the State, and thereby the appellant is entitled to be resentenced with an offender score of zero, removing all unsupported criminal history. 14RP 45 at 19-25

The Court admitted it ruled on documentation outside of the records before the Court, claiming to have reviewed the 1993 plea agreement, which was found to be invalid in 2002, requiring remand for re-sentencing. 14RP 26.

Court also erroneously found the plea had not been modified in 2002 hearing, which is materially untrue, as criminal history listing was modified by State.

"To determine validity of a prior conviction, the sentencing court may review the judgment & sentence, and any other document that qualifies as 'the face of the conviction'." State V. Gimarelli, 105 Wa.App. 370 (2001). "Sentencing Courts are generally limited to examining statutory definitions; charging documents; written plea agreements; transcripts of plea hearing; and any explicit factual finding by the trial judge to which the defendant assented." Sheppards V. United States, 544 U.S. 13, 125 S.Ct. 1254(2005).

It stands to reason that the Court may view any documents used at the sentence hearing which created the judgment & sentencing document, as the Appellant Courts have expressly found we can view the Plea Documents, so long as they show error on the judgment & sentence documents. State V. Hemenway, 147 Wn2d 529(2002)

Skagit County Superior Court at the 2002 re-sentencing chose to illegally and erroneously combine Two (2) Washington crimes' elements, without any statutory authority, which it used such to prove compatibility of the out-of-state Idaho crime of "grandtheft", which is a direct violation of the "Due Process of Law set forth in the statutory provisions of the Sentencing Reform Act(SRA), and clarified by the Court of Appeals in judicious decision of State V. Russell, 104 Wa.App 422 (2001), prior to the 2002 re-sentencing hearing. 14RP 24-27.

This is a rare case, which shows the violation squarely upon the facia of the 2002 judgment & sentence document, without further elaboration where this Court knows that the use of Two (2) Washington crimes violates the statutory process the sentencing court was required to comport with in entrance of the sentence.

"Whether a defendant is being sentenced for the first time or the fifth time, he is being sentenced, and the sentencing court must compute his criminal history at that moment." State V. Amos, 147 Wa.App. 217(2008). The mere failure to object to a prosecutor's assertions of the criminal history does not constitute such an acknowledgment. State V. Ford, 137 Wn2d at 483(1999).

"Moreover, it is the proper roll of the sentencing court, not the prosecutor to calculate the offender score." State V. Amos, 147 Wa.App. 217 (2008).

The prosecutor can not prove it does not violate the established Due Process of Law created by RCW 9.94A.525(3)(former 9.94A.360(3)(1993)), which the Judiciary interpreted application of in State V. Russell, 104 Wa.App. 422(2001). What is more disturbing is the Court in 2011 admittedly removed documents from the Court's official file, which properly addressed the Russell holding, proving application error, before ruling to uphold the 2002 rulings. 14RP 59.

These documents and affidavits were admittedly not "addressed" by the Court at the hearing, as the Judge refused Bettys Constitutional Right to Pro Se, and such is showing upon the Court record. 14RP 59. Prejudice has now attached to this appeal, where the record before the Court is clearly not complete.

Washington's Theft 2` required a sum of \$250.00 dollars stolen in 1991, and taking parts from a salvage yard from (4) dirtbikes totaling \$150.00 dollars does not meet the elemental compatibility, nor does such parts equate to "Taking a Motor Vehicle (TMV) under Washington law... The proper Washington compatible crime is Theft 3`, a gross misdemeanor offense, which would not have increased the case offender score or sentence. This is however completely irrelevant to the validity arguments regarding the 1993 case inclusion in current history, as we are not to correct the past error, merely find that such is facially showing on the judgment & sentence document, that such violates due process established in law, and we then exclude the 1993 matter from the current criminal history.

"We disagree. It is not a collateral attack because it is directed to the present use of the prior conviction to prove that Carpenter is a presistant offender." State V. Carpenter, 117 Wa.App. 673(2003).

Where the "Due Process violation rest facially in the use of the "Theft 2`/TMV" listed on the face of the 1993 judgment & sentence, to attach the prior case to the current 2011 case, is to renew the prior constitutional violation, which defendant paid for in the previous sentence. In-Fact this Court knows if it upholds the use of combined elements from multiple Washington crimes, merely "pooled" together to equal the elements of an out-of-state crime, there would exist no need to compare, all crimes would be compatible. Such would contravene legislative intent...

Let us look to State's sentencing argument at the 2011 hearing, that defendant had agreed to the compatibility in 2002, at the re-sentencing hearing, which State presented no documentation supporting. Mere Bare Assertions are not evidence, and no documents were provided showing that defendant agree that the Idaho crimes did compare to the "Theft 2`/TMV" as court listed on the judgment & sentence document, nor did the defendant ever agree to such a finding, as defendant knew the elements were legally incompatible. Defendant also knew that the Court was not allowed to use the "Factual Comparison" discussed in State V. Russell, 104 Wa.App. 422 (2001), as such would violate "Ex Post Facto" protections of the constitution, as the part of RCW 9.94A.525(3) did not come into effect until "Laws of 1995 ch316 § 1, and did not apply to a 1993 conviction, even if such was being re-sentenced in 2002, in light of RCW 9.94A.345 which states:

"Any sentence imposed under this chapter shall be determined in accordance with the laws in-effect when the current crime was committed."

The Current crime for the 2002 judgment and sentence was committed in, on, or before 1993, and the laws relevant to the Idaho Crime relate to 1/16/91, as that was when that crime occurred allegedly, therefore we use the elements from that date per the holding in State V. Russell....

"Importantly we have emphasized the need for an affirmative acknowledgment by the defendant of 'facts and information' introduced for the purpose of sentencing". State V. Mendoza, 165 Wn2d 913(2009); State V. Ford, 137 Wn2d at 482-83(1999); State V. Ross, 152 Wn2d at 233(2004).

"Mere failure to object to prosecutor's assertions...does not constitute such acknowledgment". State V. Ford, 137 Wn2d at 483 (Modified in parts).

"Nor, is a defendant deemed to have acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendations." State V. Mendoza, 165 Wn2d 913(2009).

This Court also may look to the statutory provisions when reviewing invalidity of the judgment & sentencing document, which in this case shows the Court in 2002 failed to follow established due process under RCW 9.94A.345, and use the laws in effect in 1993 or before as legislature required and established. The legislature attempted to avoid violations of the "Ex Post Facto" clause of the Constitution in explicitly ensuring sentences were not based on laws modified or enacted after the crime was committed, as the SRA was modified over 200 times in the 1990's, and the majority of these statutory modifications would subject one to Ex Post Facto violation if applied to crimes committed before their enactment.

On the face of this Judgment we see such Ex Post Facto violation, where the 2002 Court used the Judgment document which comported with the laws of 2000, as is stated on the face of the document, those laws did not apply to 1993 crimes, and a multitude of the statutes apply to the defendant at the 2002 sentencing clearly were not in effect in 1993, especially the restitution interest portion, which cost the defendant an additional 1365.00+ in interest on the judgment rendered.

This Judgment is facially invalid for a multitude of reasons, and therefore now should not be used to enhance the current sentence. This does nothing to address the actual 6th amendment violation of the Idaho crime, where the case was heard in 24 hrs without counsel being provided the defendant, as Washington wanted Bettys returned for probation violation of leaving Washington without permission...

The 1993 Judgment & Sentence should be now removed from the criminal history for the prior constitutional violations, which would attach anew to this case in 2011, if we allow the conduct which occurred in 2002 to effect the current matter.

Judge Needy admitted to taking documents from the records on July 20, 2011 in the open Court, damaging the actual records on review, simply because those were not considered by him in his rulings. 14RP 59. The Court interruption of allocution coupled with the damaged records are merely further proof of the impartiality that resulted in the Court refusing to uphold the State V. Russell, 104 Wa.App decision, and causing Bettys to erroneously receive the life sentence. Due Process was not followed in 2002 re-sentencing, and certainly was not followed in 2011 sentencing.

PRO SE ACCESS ISSUE(s)

A. Did Court Violate Right to Pro Se Represent Pretrial?

Court signed an order March 25, 2011 (CP 153), which the Judge entered in a Pro Se hearing under No. 93-1-00180-0, absent forced private counsel's presence, to allow "discretionary Review of Court's decision to force privately paid counsel on an indigent defendant;" making his family paid the cost. Thereby, effectively refusing to uphold the Washington Constitution Article 1 § 22, the Right to then defend in person. 15RP 59; 14RP 43 at 18-25; 14RP 49 at 1-?...

"Right to represent in person is absolute if presented Pretrial."  
United States V. Dougherty, 473 F.3d 1113, 1124 (DC Cir. 1979);  
United States V. Bishop, 291 F.3d 1100, 1114 (9th Cir. 2002)...

"A Court may not deny a motion for self representation based on grounds that self representation would be detrimental to the defendant's ability to present his case or concern that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. State V. Flemming, 142 Wn2d 853(2001).

There can be no question Judge understood that Pro Se representation request was unequivocally presented, or that such was Constitutionally required over two months pretrial, wherefore the Court signed a written Pro Se order to allow the defendant to seek discretionary review of the denial in this Court on March 25, 2011, and trial was not scheduled to begin until May of 2011. 8RP 3... CP 153.

"In Faretta V. California, 422 U.S. 806, 95 S.Ct. 2525(1975), the rule was announced that a court cannot force a defendant to accept counsel if the defendant wants to conduct his or her own defense, as the Sixth amendment grants defendant the right to make a personal defense with or without the assistance of counsel". "The rationale for this rule is respect for defendant's individual autonomy." McKaskle V. Wiggins, 465 U.S. 168, 104 S.Ct. 944(1984); Chapman V. United States, 553 F.2d 886, 891 (5th Cir 1977).

The records of this Court show that Bettys had file for Discretionary Review well pretrial of the Court's refusal of Pro Se Rights, which the Court did not have the authority to refuse pretrial. 15RP 59.

"Both constitutions recognize that the Right to counsel may be waived and that a defendant can engage in self-representation." State V. Madison, 168 Wn2d 496(2010)(citing Wash. Const. 1 § 22)

Thereby, this Court must except the trial Court violated the Constitutional Rights of the defendant, forcing privately paid counsel upon the defendant, when knowing that the defendant wanted to be pro se, and the Court even signed an order to allowed Bettys to seek discretionary review of the denial of the rights. There is no question whether this violated a fundamental right, which requires action.

B. Did Court Violate the Pro Se Access Rights Post-trial and Pre-sentencing?

July 20, 2011 the Counsel of Record presented to the Court, requesting to be removed as Counsel, due to conflicts with the client, and allegations they had somehow interfered in the right to testify. Counsel had sought ethical advice, and informed the Court that it was requesting to withdraw, and have another set of counsel appointed to advise Mr. Bettys, the Court refused, even when Bettys requested to represent his interest Pro Se for sentencing. 14RP 13-20.

Bettys then asked to be Co-counsel and have the motions heard, which the Court also refused. 14RP 19-20.

"A Court, However, has the discretionary authority to permit hybrid representation." State V. Hightower, 36 Wa.App. 536(1984).

Court was aware of the continuing conflict of interest between counsel and the client pretrial, and done nothing to try to correct such, and continued to trial forcing Bettys to pay private counsel, even after Court found Bettys indigent, and Bettys having requested to represent himself, he was forced to have his family continue to pay for private counsel, Bettys had fire to go Pro Se, due to conflict over a plea agreement Bettys refused to enter. Once Court was aware of conflict the Court had a duty to address such on the record, and correct such before trial. 7RP 45-46; 4RP 6-7

Bettys had presented several motions post-trial typed and submitted to Court by the forced counsel of record, which counsel had set a hearing for on July 20, 2011 with the Court administrator, but the Judge classified all these motions as Pro Se Motions and refused to hear such on July 20, 2011. 14RP 20.

Counsel even addressed that an evidentry hearing would be required to then address the issues presented, which included counsel's interfering in the right to testify at trial, and asked that the Court hear such on July 20, 2011, the trial court refused and preserved all the Motions for this Courts review, without any findings of facts or conclusions of law, but specifically preserved for appeal.

"The Right to assistance of counsel free of conflict in the case."  
Wood V. George, 450 U.S. 261, 101 S.Ct. 1097(1981)

Clearly the Court knew there was a conflict with counsel, even Pretrial and did nothing to ensure such would not effect trial, or build a proper record for review by this Court as required. Therefore we have a Sixth amendment violation the Court knew about, and failed to correct, even when the defendant had demanded his Pro Se Rights, both Pre-trial and Post-trial, even seeking discretionary review in this Court of such rights denial, pretrial. COA No. 67111-1-1 Prior to July 2011... This is error for the Court to force conflicted Counsel.

"Trial Court has a duty to investigate an attorney client conflict of interest, if it knows or reasonable should have known a potential conflict existed, the trial may have been effected. State V. Regan, 143 Wa.App.419 ( 2008 )(citing Mickens V. Taylor, 535 U.S. 162, 122 S.Ct. 1237(2002)).

"...overturned a conviction based on an attorney conflict of interest that occurred during trial." Mannhalt V. Reed, 847 F.2d 576 (9th Cir. 1988).

Herein, the Court admitted open knowledge of the conflict between Bettys an his counsel of record pretrial, did nothing to correct such, proceeded to trial, then continued to force the conflicted counsel through sentencing. The records prove the Court failed its duty completely to ensure conflict free counsel, and even violated the Constitutional Rights of the defendant, who merely requested to represent himself. The Court did allow the "Order to seek discretionary review, but failed to properly stay proceeding until a ruling was rendered by this Court.

C. Did Court Violate RAP 7.2 by continuing through trial and Sentencing after entering the written order to allow discretionary review of its Pro Se Rights decision?

This Court of Appeals accepted 'Discretionary Review' of the Rights issue, filed on the pretrial order of March 25, 2011, under COA No.67111-1-1, which was later converted to the direct appeal in July 2011, when the superior Court did enter the Judgement and Sentence in violation of RAP 7.2, which had limited the trial courts authority once this Court accepted the discretionary review.

This in-fact made no sense that the trial court failed to stay any further proceedings, as the Trial Court clearly entered the order March 25, 2011 allowing Bettys to seek the review of the Courts denial of Pro Se Rights, which directly effected the pending trial, if this Court found Bettys had the Right to be Pro Se counsel at the trial. Did the Court properly seek the permission of higher Court of Appeals before continuing the trial and later sentencing hearings is the question presented herein? CP 153, COA #67111-1-I (pre-July 2011)

"RAP 7.2 provides once an Appellant Court has excepted review of a case the Trial Court only has the authority to act in the matter as provided by the rule. But the rule requires the moving party to seek appellant Courts permission prior to the formal entry of a trial court decision if that decision will change a decision then being reviewed by the Court" State V. Pruitt, 145 Wa.App.784(2008).

This Court must agree that holding the trial and sentencing clearly effected the matter being reviewed by the Court of Appeals, and there is no record that the State's Attorney requested the required permission before the matter were continued. This is a clear violation of RAP 7.2, not to stay the proceeding for decision...

"The State Constitution explicitly guarantees both the right to counsel and the right to represent ones self Pro Se and also provides a Pro Se pretrial detainee a greater right of access to the Courts than the federal constitution provides." State V. Silva, 107 Wa.App. 605(2001), State V. Kolocotronics, 73 Wn2d 92(1968); Wash. Const. Art. 1 § 22...

Court did refuse Bettys his Constitutional Rights, and this Court can not now find that such does not require remand, as the Court herein not only knowingly chose to violate such rights, clearly failed to ensure a fair trial was provided, and forced privately paid counsel on the defendant, costing some \$40,000.00+ to defendant's family, after ruling defendant indigent. CP 26, CP 28.

D. Did the Court Violate Post-sentencing Pro Se Access Rights?

This issue involves the Pro Se hearings conducted Dec. 14, 2011, at which the Court found that because Bettys was then represented in this Court by Counsel, then he was represented by the same Counsel of record in Superior Court on the issues presented, even if the issues involved records for Civil Law Suits, or a Personal Restraint Petition being prepared Pro Se by the Defendant, the Court has also refused to hear any CrR 7.8 motion, while Bettys is on appeal, which should be clarified by this Court, as Counsel appointed by the Court of Appeals does not represent any Pro Se motions filed in the Superior Court, as a matter of Law. The matter has been addressed by this Court in COA No. 68212-1-1, and clearly the Superior Court abused discretion find Counsel Zinner was representing in the Superior Court.

E. Does the Court have Authority to Force Privately Paid Counsel on a Indigent Defendant?

Nothing in the Rules allows the Court to force a defendant's family into poverty, or force them to sell their entire business inventory to pay for private counsel, nor may the Court actually force counsel upon a defendant, especially where there exist a knowing direct conflict between counsel and client, which the Court admitted to knowing about pretrial and did noting to correct. see 7RP 45-49; 3RP 90-91; 4RP 6-9; 14RP 42-43, 49-50.

This case involved an issue where the attorney and client disagreed over a plea agreement, the attorney tried to force Bettys to take the illegal plea, and demanded Bettys fire them once Bettys decided he would not agree to such an illegal agreement, as Bettys was actually innocent.

Bettys sought the Court's assistance in March, and was given the written order denying the Right to fire Counsel and be Pro Se on March 25, 2011, whereby

Bettys sought this Court's assistance under Discretionary Review, to order the trial court to allow Bettys to be Pro Se in trial and sentencing. The Trial Court continued to force the privately paid counsel on the Defendant, to the sum of over \$40,000.00 thousand dollars. The fact is the Superior Court Judge Needy does not have the authority to force privately paid counsel on a defendant for the sum of \$50.00 or \$50,000.00 dollars, this is an absolute abuse of Judicial Powers and Constitutionally granted Judicial Authority, for such an action, this is especially true where the Court has ruled the Defendant Indigent, and provided public funds for appointment of expert services. CP 28; CP 110; CP 191.

If the Judge Needy wanted to refuse Pro Se access to Mr. Bettys, the Court was then required to provide Court Appointed Counsel, not continued with the fired privately paid counsel.

Bettys now claims this shows direct judicial impartiality, which shows Bettys could not be provided a fair trial in Skagit County Superior Court, by Judge Needy.

"Due Process, the appearance of fairness, and Cannon 3(D)(1) of the Code of Judicial conduct requires the disqualification of a Judge who is bias against a party or whose impartiality may be reasonably questioned. State V. Perala, 132 Wa.App. 98(2006). A judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties had obtained a fair, impartial, and neutral hearing. State V. Bilal, 77 Wa.App. 720(1995); State V. Ladenburg, 67 Wa.App. 749(1992).

"A trial court should not enter into the 'fray of combat' or assume the role of trial counsel." Edege-Nissen V. Crystal Mountain Inc., 93 Wn2d 127(1980).

Defendant has the constitutional Right to represent himself at trial and at sentencing. State V. DeWeese, 117 Wn2d 369(1991); State V. Buelna, 83 Wa.App. 658 (1996); Faretta V. California, 422 U.S. 806, 95 S.Ct. 2525(1975). Once a defendant unequivocally demands self-representation, the trial court must determine if the defendant has made a knowing, intelligent, and voluntarily waiver of the right to assistance of counsel. State V. DeWeese, 117 Wn2d at 377.

Therefore the Court had no authority to refuse Pro Se access, especially where it forced privately paid, conflicted counsel to continue the representation, after finding defendant pro se in three other cases before the same Court, and knowing Bettys was Pro Se before the Court of Appeals at that time also. Bettys had a clear understanding of his Rights, and demanded the Court follow the Constitution, and allow Bettys to Fire private counsel, therefore the Court is now responsible for the cost of the private counsel, unless this Court finds the superior court had authority to force private counsel on an indigent defendant.

A. What is the proper statutory interpretation?

"We review statutory interpretation de novo? State V. Gonzales, 168 Wn2d 265(2010). "Meaning of a statute is a question of law reviewed de novo." Dept of ecology V. Cambell & Gwinn, 147 Wn2d 1(2002); In Re Williams, 147 Wn2d 476(2002); Optimer Int'l Inc, V. RPBelvue, # 83807-1 (2011) "Similarly, interpretation of an evidence rule is a question of law, which we review de novo." State V. Foxhoven, 161 Wn2d 168(2007). "Further, court rules are interpreted as though they were drafted by legislature." State V. Mendoza, 165 Wn2d 913(2009); state V. George, 160 Wn2d 727(2007). "Statutes must be interpreted and construed so that all language used is given effect, with no portion rendered meaningless or superfluous." State V. JP 149 Wn2d 444(2003). "The plain meaning is to be discerned from the ordinary meaning of the language at issue.... statutory provisions and rules should be harmonized whenever possible." State V. Hirschfelder, #82744-3 (2010).

"When interpreting a statute a court's fundamental objective is to ascertain and carry out the legislative intent." State V. Jacobs, 154 Wn2d 596(2005). "If a statute is unambiguous upon review of its plain language, our inquiry is at an end." State V. gonzales, 168 Wn2d at 263. "If the statute is susceptible to two or more reasonable interpretations, it is ambiguous and we may turn to additional tool of construction in determining the meaning of the statute." Christensen V. Ellsworth, 162 Wn2d 365(2007); In Re Hawkins, 157 Wa.App. 739(2010)

"When the plain language is unambiguous and legislative intent is apparent, we will not construe the statute any differently." State V. JP 149 Wn2d at 450. "We apply the traditional grammar rules to determine the plain language of a statute." State V. Bunker, 169 Wn2d at 587; State V. Neal, # 644475-1-I. "Where ever possible we construe the statutes so as to preserve constitutionality." In Re Matteson, 142 Wn2d 298(2000); Addelmann V. Bd Prison Terms, 107 Wn2d 507(1986). "If the statute is susceptible to more than one reasonable interpretation, it is ambiguous and the Rule of Lienity requires us to interpret it in favor of the defendant absent legislative intent to the contrary." State V. Mandanas, 168 Wn2d 84(2010). "But the proffered interpretation must be reasonable." State V. Evens # 40258-1 (2011); State V. Tili, 139 Wn2d 107(1999).

Appellant presents that application based on recent interpretation is contrary to legislative intent presented in RCW 9A.44.120 (child hearsay exception) and the Appellant presents this reasonable interpretation of the statute's application, restating the law long established, and erroneously discarded in Clark, 139 Wn2d 152(1999). The wording of RCW 9A.44.120 appears plain and unambiguous, therefore should not have been subjected to be construed by the prior Court differently.

"in judicial interpretation of statutes the first rule is 'the court should assume the legislature means exactly what they say'. Plain words do not need construction," State V. McCraw, 127 Wn2d 281 (1995); Snohomish V. Joslin, 9 Wa.App. 495(1973). "Courts will not construe unambiguous language." Vita Food Prod. V. State 91 Wn2d 132(1978).

"The reason for the hearsay rules have been long explained by the U.S. Supreme Court: Hearsay rules which have long been respected and recognized... is based on the experiance and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-Court statements are traditionally excluded because they lack the conventional indicia of reliability.... They are not made under oath or other circumstances that impress the speaker with the solemnity of his statement." State V. PenelopeB, 104 Wn2d 643(1985).

RCW 9A.44.120 States:

A Statement made by a child under the age of ten describing any act of sexual contact performed with or on the child, not otherwise admissible by statute or Court rule, is admissible in evidence in criminal proceedings in the Courts of the State of Washington, if:

(1) The Court finds, in a hearing conducted outside the presence of the jury, that the time content, and circumstances of the statement provides sufficient indicium of reliability; AND

(2) The child either:

(a) Testifies at the proceedings; OR

(b) Is unavailable as a witness, provided that when the child is unavailable as a witness, such statement may be admissible only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding to provide the adverse party with fair opportunity to prepare to meet those statements. RCW 9A.44.120; State V. Swan, 114 Wn2d 613(1990).

The proffered alternative interpretation must be reasonable. The appellant now presents the legislature made clear its intent to conjoin sections 1 & 2 of RCW 9A.44.120, by the use of the punctuation instead of a period ' ; ' combined with the word 'AND' between sections 1 & 2, which conjoined those.

"The word AND is conjunctive." State V. Ryan, 103 Wn2d 165(1984); State V. Carr, 97 Wn2d 436(1982).

"What the Legislature has statutorily conjoined, shall not be judiciously disjoined through application." "The Legislature would have used the word OR if they had intended the disjunctive." State V. Ryan; Childrens V. Childrens, 89 Wn2d 592(1978).

Legislature used both the word OR and the word AND properly between the sections, showing clear intent that sections 1 & 2 were conjoined, and shall not now be disjoined through the application of the statute by the Courts.

Proper reading of the statute is:

"Court finds, in a hearing conducted outside the presence of the jury (evidence hearing) that the time, content, and circumstances of the statements (specifically proffered) provides sufficient proof of reliability, AND The child testifies (at evidence hearing); OR Is unavailable as a witness, which then requires corroborative evidence to support admission of hearsay statements.

Legislature clearly stated this very interpretation in the statute's plain words, but the Washington Courts have failed recently to properly apply such stated intent, choosing to find that the child does not have to testify at the evidence hearing, outside the presence of the jury. Legislature intended to have the evidence (child testimony) that is necessary to determine if the child declarant ever made any of the alleged hearsay statements, prior to admitting such into evidence, as the Court must be sure the child will constitutionally testify to the hearsay in the trial to meet the confrontation clause requirements. Otherwise, Court's ruling will lack supporting facts, and are therefore an abuse of discretion. Legislature intended for the party seeking admission of hearsay, to present the "particulars" (actual words) of a statement intended for admission in advance of the proceedings to allow the adverse party a chance to prepare to meet the statement.

This is not met by simply telling the adverse party that a specific witness will be addressing some hearsay, without saying what was said by the child. Legislature intended the hearsay to address specific acts of "Sexual Contact". This does not mean we can infer potential sexual contact from an act like a poke through clothing, by child's paid caretaker relative, which might remain non-sexual otherwise, but an act of actual sexual contact might be described and then admitted, not inferred.

This is the proper application, intended by legislature, stated in the words of the statute. This is also necessary, as if the child were before the jury when asked about the alleged hearsay statements, then fails to constitutionally "testify" to making such statements, the Court would have to dismiss the prosecution for the tainting of the jury with highly prejudicial sexual abuse testimony, which is merely inadmissible evidence until the child testifies per statutory requirements.

We must distinguish between interpretation of RCW 9A.44.120, and the question of whether the proceedings at trial satisfied the requirements of the confrontation clause. These are two different arguments as the statute may provide greater protections than that guaranteed by the constitution." State V. Clark 139 Wn2d 152(1999).

"Competency to testify is not a prerequisite..." State V. John Doe, 105 Wn2d 889(1986). "Ability to testify at trial does not render inadmissible child's earlier out-of-court statements." State V. Justiniano, 48 Wa.App. 527(1987). "A child's competency to testify at trial is not relevant to the issue of whether her hearsay statements are admissible." State V. Grogan, 147 Wa.App. 511(2008).

Child taking the stand is not the determining factor in the admission of the hearsay statements, which is what is now required by the current interpretation and application used in Washington Courts, as determination must be made both (1) outside the presence of the jury, and (2) prior to trial beginning to allow defense adequate opportunity to prepare to meet the evidence, as how can we have effective opening statements if we do not know what evidence will be admitted to the jury, until the child takes the stand and testifies at the trial. Legislature did not intend defense be prejudice this way in enacting RCW 9A.44.120.

"Once the accused has been characterized as a person of abnormal bent, driven by biological inclinations, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." State V. Saltarelli, 98 Wn2d 358(1982); 41 Iowa Law Review 325.

This Court must except that it is an abuse of discretion for the trial court to admit hearsay statements, unless the trial court has heard the child declarant tell the Court he made such hearsay statements, or at minimum he spoke to the witness now claiming the child made the statements, before the court admits such before the a jury at trial. Legislature intent is clearly stated in RCW 9A.44.120 as the defendant argued this issue to the trial Court. 3RP

"Trial Court abused discretion when the trial Court rules upon unsupported facts, takes a view no reasonable person would take, applies the wrong legal standards, or bases its rulings on an erroneous view of the law." State V. Lord, 161 Wn2d 276(2007).

There is no question the Court's view of the law and interpretation was erroneous and must be corrected by this Court to uphold the Legislative intent. Court's view was also unsupported by the evidence or facts, for the Court to rule upon, this did cause Court to provide an unfair trial, were defendant did not know what evidence would actually be used, even after holding the evidence hearing under RCW 9A.44.120 pretrial, as the Court did not rule on actual admission of the evidence, which left defense to guess what would happen at trial. This proffered clarification is proper.

B. Did the State fail to illicit the required "testimony" from the child declarant to support alleged child hearsay admission?

State on direct examination must address each alleged hearsay statement the State intends to admit in trial, and receive a constitutionally excepted response prior to admitting the child hearsay evidence from other witnesses, as necessary to ensure evidence is substantially truthful in nature.

"Under United State V. Owens, 84 U.S. 554(1988); and California V. Greene, 399 U.S. 149(1970), the admission of hearsay will not violate the confrontation clause if the hearsay declarant is a witness at the trial, is asked about the event and the hearsay statement, and the defendant is provided the opportunity for full cross-examination, neither greene nor owens stand for the proposition that the admission of unreliable hearsay does not violate the confrontation clause..." State V. Clark,

United States Supreme Court specifically holds the child declarant must be "asked about the event and the hearsay statement in the proceedings to meet the confrontation clause requirements of the very constitution.

"The opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness into Court for examination. It requires the State illicit the damaging testimony from the witness, so the defendant may cross-examine if he so chooses... State's failure to adequately draw out testimony from the child witness before admitting the child's hearsay statements puts the defendant in a constitutionally impermissible catch-22 of calling the child for direct or waving his confrontation rights." State V. Rohrich, 132 Wn.2d 477(1997)(citing Lowery V. Collins, 996 F.2d 770, 771-72 (5th Cir. 1993).

State sought and admitted multiple alleged hearsay statements from multiple case witnesses, which declarant was never asked about in any proceeding subject to cross-examination, making all now alleged hearsay staements inadmissible evidence upon this review.

"Under the statute governing admission of child hearsay of physical or sexual abuse, child must take the stand and testify about the abuse or if the child has recanted or does not remember the events described in the hearsay statements..., defendant must have the full opportunity for cross-examination of the child declarant about the statement." State V. Kilgore, 107 Wa.App. 160(2001).

Testifies Means: "Child takes the stand and describes the acts he alleged in the hearsay statements". State V. Rohrich, 132 Wn2d at 481(1997).

Admission of testimonial hearsay statements requires the declarant testifies to the acts described in the statement at the proceedings, which was recently upheld in United States V. Crawford, 541 U.S. 36(2004); United States V. Davis, 547 U.S. 813(2006), which require out-of-court statements now testified to by the declarant before admission from other witnesses. Declarant must constitutionally testify to the alleged hearsay before the Jury hears such hearsay.

In the case here the child was not ask about any specific hearsay statements, was not asked if he stated such to the witnesses claiming he stated such to them.

Child did specifically disavow a great majority of the alleged hearsay that the State relied upon during trial, even after child had testified differently.

Q: ... When uncle John touched you how did it make you feel? A: SAD. SRP 142 #13

Hearsay was admitted that it made him angry, unsupported by live testimony, inadmissible.

Q: Micca, do you know how many times it happened? A: Once. 8RP 142 #19

Hearsay admitted that it happened twice, by two witnesses, unsupported by live testimony, State based the entire second count upon such hearsay, that child disavowed. Inadmissible evidence.

Q: A toilet where was that? A: John's House. 8RP 135 #17-18

Hearsay alleged at sylvia's house, which this testimony disavowed State's inference to poke was done at sylvia's house, child gave live testimony, and was never asked by State on direct about sylvia's house, therefore State did not support its most important case arguments.

Q: What room was this suppose to be in? A: John's Room. 8RP 148 #4-6

Direct testimony disavowed any hearsay about sylvia's, as child did not claim that is where, the hearsay admitted about sylvia's is inadmissible.

Q: Did you talk to a counselor? A: (no audible response)

Q: Did you talk to a social worker? A: Yes.

Q: Did you talk to an attorney? A: I don't have one.

Q: Did you talk to grandma about this? A: Well yeah, but mom talked to the social worker.

Q: Did you tell anyone the same thing? A: Yes Q: Which is? A: what I'm saying. 8RP 149

This in no way supports admission of the hearsay statements, as the child never addressed what was actually said in the hearsay statements as statutorily required under RCW 9A.44.120. This doesn't constitute testimony necessary to support admission of the alleged hearsay statements, nor was this properly asked by the State on direct examination, this is from defense. The State never attempted to carry State's burden and comply with statutory obligations to admit the hearsay State relied upon.

The child merely acknowledged making prior statements and indicated that they were untrue. Such testimony is not a description of the alleged sexual contact any more than telling the Jury the name of her cat." State V. Clark, 139 Wn2d 152(1999).

Herein, this case the child did not even admit making the alleged hearsay statements that the State relied upon in the trial, and to overcome the dismissal motions filed after State rested. Nor, was he even asked about talking to the parties making the hearsay to the Court. The statements actually do not even comport with statutory requirements, as they do not allege actual 'sexual contact' as required, but this did not relieve the State of its burden to seek Constitutional testimony from the child before admitting the hearsay.

Child hearsay statute requires the child testify in the proceedings about the "sexual contact" that he alleged in the hearsay statements, therefore all hearsay was inadmissible evidence under RCW 9A.44.-120, which must now be excluded. The State shall not be given a second chance to present evidence it should have admitted previously. See State V. Ford, 137 Wn2d (1999). Dr. Yuille, child expert witness did review this case and found the child did not allege any kind of sexual abuse, merely a poke. CP 60.

State should have met its burden and received the required testimony from the child declarant about the alleged hearsay State used in its case in chief, If the State had any actual hearsay that met the the statutory requirements of describing the act of "Sexual Contact", Appellant does not believe that a fleeting poke through a pull-up infers sexual purpose of any kind, as necessary for admission under RCW 9A.44.120.

Q: Were you sitting down or standing up...? A: Standing. 8RP 153 #24

Hearsay claimed he was sitting on a couch, child disavowed in live testimony, inadmissible.

Q: Do you remember telling grama John put lotion on you? A: He did not. 8RP 158 #22

Again merely inadmissible evidence that was admitted before the Jury, which declarant never claimed he had said, creating an unfair trial, going to the passions and prejudice of the Jury.

Q: ...Did you wear night time diapers? A: Huh-un Q: No you didn't? A: Pull-ups. Q: You wear pull-ups A: Un-huh 8RP 160 #13. Q: ...did he just come in and touch you really quickly and go back to washing dishes? A: Yeah. Q: ...did he just come in and check you for your pull-up or diaper and you didn't want to be checked? A: Yes. Q: ...Is it embarrassing to wear pull-ups? A: Un-huh. Q: Wasn't very fun A: Why are we even talking about it. 8RP 167 #7

The child specifically testified to a non-sexual purpose for the alleged poke, an State chose to continue to ignore such, continuing to rely on the untested hear-say statements. This would be fine if the child had not completely disavowed the entire group of alleged hearsay with his live testimony. State then chose to ask the child about the diapers on re-direct and child clarified the issue further:

Q: So Pajamma time is when nighttime diapers come on? A: Yes. Q: OK. And when you were with John in the living room you weren't wearing pajamas; is that my understanding? A: No, I was. 8RP 169-170

Child corrected the State attorney about the facts of the poke, that he was in his pull-up and his pajamas, child claimed the alleged child molestation State charged was nothing more than a mere diaper check by his caretaker, uncle John. This seems extreme to issue a life sentence for a diaper check.

Q: When John touched you did he say anything to you? A: He didn't.

Hearsay was admitted, unsupported by the declarant, in violation of RCW 9A.44.120, which prejudiced defendant before the Jury. Child claimed Bettys did not say anything to him, then later we see the State openly address talking to the child about what to say in trial during his testimony, this is leading or tainting of the witness and should not be allowed to go uncorrected, when such involved the State attorney directly. This does nothing to address the fact the hearsay admitted improperly does not allege sexual contact, and effects the Jury's verdict, as without the untested hearsay the jury could not reach a verdict in this case.

The question here is if the child declarant had testified a statutorily required for the admission of the child hearsay statements, as established un RCW 9A.44.120 and the multitude of holding case decisions. "Was the child declarant a witness at trial? (Yes). Was the child declarant specifically asked about the hearsay that was admitted to the Jury, in the "proceedings"? (No).

The hearsay statements are not harmless in nature, and the child did not testify as to the content of the statement, or even that he spoke to the witness who made the hearsay statement to the Jury.

The final question regarding improper admission under RCW 9A.44.120 is "was the alleged hearsay statement admitted actually admissible under the statutory exception, where they did not allege "Sexual Contact" as statutorily required? (No, they should not have been admitted). Did State proffer the specific statement to the Court and opposing party to support the admission of such statement before the Jury as required under RCW 9A.44.120 to allow the defense to meet the alleged hearsay statement in the case proceedings? No, this was also not properly done by the State attorney. Burden was clearly on the State solely regarding this issue, as is defined under the holdings in State V. Rohrich, 132 Wn2d at 477-78.

"State's failure to adequately draw out the testimony from the child witness before admitting the child's hearsay statements puts the defendant in a Constitutionally impermissible catch-22..." Lowery V. Collins, 996 F.2d 770, 771-72 (5th Cir. 1993).

Herein, the child specifically disavowed most of the out-of-court testimonial statements the State relied upon for a conviction, which child never testified to or was asked about by the State.

Worse, child was asked about wearing a diaper and testified that this was the purpose of the alleged poke he was describing, which defendant was convicted under and sent to prison for life because of an alleged diaper check, per complaining State witness M.F. during his live testimony. Did the Court fail its duty in not dismissing the case pre-sentencing, where the alleged child victim testified to a non-sexual purpose for the touching alleged through clothing and through a "pull-up diaper, therefore disavowing all child hearsay not properly admitted.

C. Did Court's "Ryan" findings support admission of hearsay, where Court did not have full information on tainted child witness?

Supreme Court adopted the Ryan factors to assist Courts in admission of hearsay evidence. State V. Ryan, 103 Wn2d 165(1984). Appellant presents Court's rulings are an abuse of discretion, based on the facts Court was not informed of child's other abuse allegations against other people. CP 171 & CP 174. These came to light in April 2011 and hearsay hearing was held in December 2010. Child alleged both oral and anal sex with child friend, which State knew and deliberately did not inform the Court about prior to child comp/ child hearsay evidence hearings.

Appellant presents the State found the child witness "Tainted" and on Mental health medications, which effected his ability to testify on Oct. 1, 2010.

State presented no evidence contradicting these allegations for the Court to now allow this child to testify before the Court. If the child was tainted or the medications interfered in October, the State, who alleged the child incompetent in October carries the burden to prove M.F. untainted now. Knowingly tainted witness?

Therefore, since the Court found the child tainted and medicated, unable to take the stand Oct. 1, 2010, the State would have the additional burden to prove the child was not tainted, or mentally incompetent, due to inflictions or actual medications, before the Court could find the child competent to take the stand at the trial, as the tainting was based upon State's own claim against their child witnesses competency. To knowingly admit tainted testimony before the Jury as fact or to knowingly allow a tainted witness to testify, is to taint the entire Court proceedings. As a matter of law there is no reliability in knowingly tainted fact testimony of any witness, especially the chief complaining witness. see Oct. 1, 2010 VRP... Appellant claims that under the case circumstances the Ryan factors could not be ruled upon until the child testified in trial, therefore the rulings are an abuse of discretions. 7RP 12.

1. MOTIVE TO LIE: "knowingly tainted witness must be telling untruth based on being tainted. State alleged the child herein tainted, but never presented any kind of evidence to prove the child in-fact was not tainted, or tell the Court why the State had alleged the child so tainted "she did not even know if the case could continue", after interviewing the child for over an hour pre-hearing on Oct. 1, 2010. 1RP 4.

MOTIVE: Someone obviously told him to lie apparently, per state's findings of tainting at the Oct. 1, 2010 hearings. 1RP 5.

Child also disclosed sexual abuse by his best friend "Joey"(JH), which the State and CPS were actively investigating, involving oral and anal sexual contact. State failed to disclose this to the defense pre-hearings, and the Court's rulings are based upon such grounds. CP 171's attachments and CP 174's attachments.

CHILD'S MOTIVE: To Protect his childhood best friend from trouble in 2009, as mother's affidavit shows abuse knowingly extended to 2008. CP 285.

STATES MOTIVE: To deliberately keep the second abuse allegation hidden.

Child in live testimony, for the first time gave the reason for the alleged poke on the outside of his clothing, to check his pull-up, which is non-sexual. Live testimony weighs over hearsay... 8RP 167, 170.

2. GENERAL CHARACTER: "When assessing general character, we look to whether child has a reputation for truthfulness." State V. Kennealy, 151 Wa.App. 861(2009), which this case evidences due to child's multitude of stories, statrting with the on the stand descriptions of a dragon 'picture' coming to life and going with him to sylvia's house to play...Unless the Court beleived the story true, and dragons do live, findings of truth based on this type of untrue testimony to the Court would constitute an abuse of discretion. Further, Court heard the mother testify to the untruthfulness of the child. see VRP Dec. 16, 2010. Court found Laurie Ferrell unreliable due to her admitted testimony of 20+ year hatred for defendant, due to the defendants prior status as a registered sex offender.... Appellant presents the child told great stories, which were very detailed, but mostly untrue. Child's general character does not support this factor for admission. 2RP 44-48.

3. PAST FACTS: "It Happened A Long Time Ago", is past fact, not immediately disclosed, Court did not have the necessary knowledge of when it occurred, as child testified to one event extending over 200 years ago in trial.
4. SPONTANEITY: Statements to Lisa Wolff, Kari Cook, and Nicco Flacco are all non-spontaneity and testimonial, based on deliberate questions in relation to the prosecution, where there existed no on going emergency. Also Curt Gracious testified that Laurie Ferrell talk to him about questioning MIF before taking MIF into the car, therefore no spontaneity in those statements, Curt and parents talked to him after Laurie's interrogation in the car, therefore no spontaneity, where child had been told to tell his mom he needed to go to the police station. 12RP 83-89.
5. MORE THAN ONE PERSON HEARD THE STATEMENTS: As no specific statements was ever presented to the Court for consideration, as the statute specifically required, any finds of admissibility of hearsay is an abuse of discretion. State had the burden under RCW 9A.44.120 to present the specific statement it wished admitted to the Jury in advance for the Court's consideration, as only limited statements are admissible under the hearsay rules.

The Child's version of events changed multiple times, even when told just a few minutes apart, it happened once then twice then once then twice, at John's at sylvia's, the dragon was involved, watching TV, playing video games, sitting on the couch, standing on the floor, made angry, made sad, marissa was there, baka was there, no one was there, ect...a long time ago, 200 years ago, while working at the shop, Etc... Ending with the person who touched me still comes by my house, while defendant had been in jail pretrial for over a year. Who allegedly sexulally abused him who knows as it could not have been the defendant, he was in the jail....
6. TIMING AND RELATIONSHIP: Court was not informed on time, as child proved in live testimony, he had no understanding of time, things had happened involving him for over 200 years, and he was five. This does not support a finding child understood timing, or could properly testify to such, and the Court had other facts available which weighed both for and against the factor here. 2RP 3-250 3RP 18-26.
7. POSSIBILITY OF FAULTY RECOLLECTION: Due to the multitude of different versions of events, in hearsay and the known issue of Tainting, this weighs against admission of the hearsay. Child stated a non-sexual reason for the alleged poke, which he had never before been asked why he was poked, the adult just assumed and infered it was sexual in nature, because 20 years prior Bettys committed a sex crime. The adults automatically proved why propensitive evidence is not allowed in trials, as a Jury made up of very similar adults would be asked not to propensitively use the 1993 crime to automatically claim guilt herein. The only act actually alleged in any of the hearsay is a poke to the private area by the paid caretaker, though the clothing, which should not be automatically assumed sexual. Dr. Yuille's report found it to be a disclosure of a non-sexual poke, which no one tried to obtain a reason for. CP 60 attachment.

The Child's knowingly "tainted" memory is enough to excluded this factor. VRP Oct. 1, 2010. This does not even address the mental medications..CP 61

8. WHETHER CROSS EXAMINATION COULD ESTABLISH LACK OF KNOWLEDGE: Child never was properly directly examined as to the alleged hearsay, to allow cross-examination at the trial. denying confrontations rights regarding the hearsay evidence used. The Child while under cross-examination did give a non-sexual purpose for the alleged poke, to check his pull-up, which could have been uncovered months prior had the child properly testified at the hearsay hearing as statutorily required. Cross-examination to acts alleged by the hearsay could have shown the secondary hidden abuse by his friend, could have shown the legitimate reason for the alleged poke, could have shown the child tainted, or medicated... This weighs against this factor of Ryan, and should have been done at the Ryan hearing. 3RP 40, 42-47...

9. SUGGESTED DECLARANT MISREPRESENTED DEFENDANT'S INVOLVEMENT: As the child had not alleged any hearsay statement of any for of actual sexual act, it is hard to weigh this factor. First the statute 9A.44.120 only allows the statements of actual "sex acts" performed on the child. Dr. Yuille, whom has testified in over 1000 sexual and physical child abuse cases, with 40 years expert experiance, review the hearsay, probable cause documents, and child interviews, then found no. disclose sexual abuse in any of the child's actual statments. see CP 60 (Yuille report). If this Court now holds that a poke though clothing, though a pull-up or diaper, by a paid caretaker, is automatically sexual in nature, then every babysitter is subject to sex abuse charging or child neglect charging. The child did not represent that Appellant had actually committed a sexual act, but simply an unwanted touching which is 4th degree assult, per State V. Stevens, 158 Wn2d 304 (2006). Since the child does not actually declare any sexual acts, just an unwanted touching, which was severally over-charged by the State, this factor was not met, even though it is the involved adults who clearly did misrepresent the nature of the fleeting poke herein addressed. Hearsay of sexual abuse acts might be admitted, but no hearsay of such existed herein.

No single Ryan factor is considered in determining the reliability of the Child's hearsay statements, and reliability assessment is based upon an over all evaluation of factors. but since State failed it burdens given direct examination to properly seek the required testimony regarding the hearsay statements, as statutorily and constitutionally required before its admission before the Jury.

Child never testified to each statement admitted into evidence, but Court also erred in Ryan findings whereby no one knew if the hearsay would be in the trial until testimony was given to the hearsay before the Jury, this did not happen herein, yet the inadmissible evidence was still admitted for the Jury.

Court did actually abuse its discretion in relation to the child hearsay on multiple levels, and all such erroneously admitted hearsay must now be excluded.

Whereby, hearsay did not contain the required 'sex abuse' statements per the testimony given, as the child had described nothing more than an unwanted touch fleeting, hardly felt, which made him sad, per live testimony. The Child gave the purpose of this touch, and admitted how embarrassed he was wearing pull-ups at age seven in trial. 8RP 160, 167, 170.

CHILD COMPETENCY

A. Did Court Abuse Discretion in Competency Ruling Under Allen Factors?

Reviewed solely for an abuse of discretion on appeal. "Court has abused its discretion if it takes a view no reasonable person would take, or applies the wrong legal standards, bases its rulings on an erroneous interpretation or view of the law." State V. Hudson, 150 Wa.App. 646(2009); State V. Brown 132 Wn2d 329(1997).

"Discretionary decisions are based on unobtainable grounds or made for unobtainable reasons, if it rest of factors unsupported in the record or was reached by applying the wrong legal standards." State V. Quazimundo, 164 Wn2d 499 (2008); State V. Rohrich, 149 Wn2d 647(2003).

Competency of a young child as a witness consist of the following:

- (1) An understanding of the obligation to speak the truth from the witness stand...

Child understood the requirement to speak the truth, the Court based this finding on the child's story of a dragon picture coming to life, going to his grandma Sylvia's with him. Child gave a detailed description of untrue events unless the Court believed Dragon pictures come to life, Court abused discretion basing ability for truth on untrue testimony. CP 61.

- (2) The mental capacity at the time of the occurrence concerning that which he is to testify, to receive an accurate impression of it...

Child was on mental health medications, which effected the competency at the Oct. 1, 2010 hearings. 1RP 4-5; CP 61 Court knew the child had not been on medications prior to 2010, therefore was unmedicated at the time of the alleged occurrence of the poke. What was his mental capacity without medications was an unknown factor to the Court, as the Court had never seen the child unmedicated, nor viewed the child's medications to know if they effected competency at time of occurrence, but was informed as to his knowingly incompetent on Oct. 1, 2010, requiring continuance, effecting speedy trial rights, were Court failed to rule.

- (3) A memory sufficient to retain an independent recollection of the occurrence...

State alleged at the competency hearing Oct. 1, 2010 the "child was tainted" and she did not know if the case could continue, but we do know the hearing could not be held. 1RP 8 ; CP 61 Dyer had determined her child witness was so tainted prior, and for the Court to allow a knowingly tainted witness to testify, is an abuse of discretion, as the Court's primary duty is to ensure that false testimony is not before the Jury in the truth seeking process. This is a fundamental principle, child was so tainted, therefore false and inadmissible testimony was before the Jury, as Dyer presented no new evidence suggesting child was not

tainted, to overcome State's own admissions of Oct. 1, 2010... Therefore, there is no doubt Court abused discretion admitting under this standard. CP 61.

(4). The capacity to express into words his memory of the occurrence?

This would require Court to have heard child express in his 'own words' his actual memory of events alleged. Court never heard any words pretrial from the child about the alleged event, thereby this "Allen" factor could not be met, and Court abuse discretion to enter a finding on such factor. Child expressed fictional stories about a dragon picture coming to life, in his own words, but never even was asked to describe the alleged criminal actions. Appellant aduers the Court's ruling was based on unobtainable grounds, whereby child never described any act of sexual contact to the Court at the Allen Hearings. 3RP 13-19.

(5). The capacity to understand simple questions about it...

Child never answered one question about the allegations, but the Court might have found child could answer simple question about the Dragon coming to life to find this factor. Did Court still abuse discretion, if it failed to address crime?

Determination of witnesses ability to meet the requirements of this test as promulgated by State V. Allen, 70 Wn2d 690(1967), and the allowance or disallowance of leading questions(State V. Davis, 20 Wn2d 443(1944)), rest primarily with the Trial Judge, who sees the witness, notices his manner, and considers his capacity and intelligence. These are matters not reflected in the written record for appellant review. 3RP 12-20, 14RP, CP 61

"There determinations lies within the sound discretion of the Trial Judge, and will not be disturbed on appeal in the absence of an abuse of discretion. State V. Ridley, 61 Wn2d 457(1963).

Court in this case allowed leading questions, but had found child competent based upon the wrong legal standards, as Court admitted it did not understand the "Allen Factors" requirements, and believed competency is based on the "Ryan factors and rulings under hearsay admission. 3RP 12-20, 8RP 136

Court of Appeals must now consider the "Brady Violation(s)" and the effect the hidden evidence would have had on the impeachment capacity for the defense at these hearings had State properly disclosed the evidence and information then in State's possession, Judge would have made completely different ruling(s).

If this Court finds child was fully competent, State must except the child's live testimony regarding the checking of the 'pull-up'(diaper), even correcting both defense and State attorney that he was in a pull-up. If Competent, the facts of this crime are a fleeting poke through chothing, through pull-up, at John's, by his paid caretaker. State proved child in Bettys care charging the parents for leaving the child in Bettys care, or State admits charges were harassment of witness.

RCW 9A.44.120 (Former 1993 Hearsay)

A. Did Court Error in Rulings Regarding 10.58.090 Witness Hearsay?

State sought admission of "former child hearsay" under the "child hearsay" exception, RCW 9A.44.120... CP 149. Witness Dan King was a prior child victim, allowed to testify under the former RCW 10.58.090 before the Jury. Court on March 25th 2011 excluded prior case hearsay as to prejudicial and unnecessarily cumulative, explaining that it did not believe RCW 9A.44.120 applied to prior 1993 case victim's hearsay statements. Collateral Matters, 15RP 54-55.

Court was informed that Mr. King had absolutely no memory of the prior abuse, as he "chose to block such from his mind", even after reviewing the case notes, therefore could not offer testimony. Court should have immediately excluded the witness from testifying, under former 10.58.090(6)(b), the prior matter was to "remote in time" for proper relevant testimony to be presented by the witness.

Court failed its duty as later discussed under former 10.58.090's section of this briefing.

RCW 9A.04.080(c): ... the longer of seven years from commission of the crime, or three years from the 18th birthday...

Legislature's enactment of a "statute of limitations" suggest that the simple passage of time can fatally compromise the testimony of a child witness.

"Implicit in the statute is the presumption that witnesses recollection would not be stale before the victim's 21st birthday. State V. Rohrich, 149 Wn2d 647(2009).

Court excluded the proffered "10.58.090 hearsay" as to prejudicial and also unnecessarily cumulative, which fell under RCW 10.58.090(6)(e), and RCW 10.58.090(6)(g). Court made clear it did not believe RCW 9A.44.120 entitled the State to "prior case hearsay", from unrelated cases, even if the declarant would testify under former 10.58.090, State was only entitled to what the witness could now remember and testify regarding. 15RP 53-55.

This comports with State V. Scherner, 153 Wa.App. 612(2009):

"First contrary to scherner's characterization, nothing in the text of RCW 10.58.090 permits the admission of "unproven misconduct evidence".

Appellant, never admitted an 1993 alleged child hearsay statements were in fact true, as appellant did not even know such existed until 2011, they were never addressed in the prior case.

"By pleading guilty a defendant admits factual and legal guilt for the charged crime." State V. Bybee, 142 Wa.App. 268(2007)(citing United States V. Broce, 488 U.S. 563(1989). "The guilty plea thus provides the sufficient and independent basis for conviction and punishment." see Haring V. Prosie, 462 U.S. 306(1983)(citing United States V. Menna, 423 U.S. 61, (1975)

Bettys, therefore admitted factual guilt and legal guilt for the charged crime, and "legal guilt" is the statutory elements required proven for conviction, where "Factual Guilt" under a plea contract is the admission, though the "agreed to fact stipulated statement", found upon the plea contract facia, stated in the defendant's own wording, the actions performed by the defendant which made him guilty of the crime charged. If this Court now finds any "facts" not specifically listed on these documents, were agreed or stipulated by the plea entrance, Bettys must withdraw the prior plea, as entered unknowingly, or involuntarily, as Bettys did not have an understanding of the facts in relation to the laws.

Court properly denied admission of the alleged 1993 hearsay on March 25, 2011 excluding such for valid cause. 15RP 52-56.

Defense agree to consider a "stipulated agreement of fact", which State never proffered pretrial for consideration by defense. Burden was the State's to then proffer some type of statement of the facts State wished to admit in State's case in chief, for defenses consideration, just as State was required to proffer the specific 'hearsay statement' to the Court for consideration under 9A.44.120, as without such specific statements nothing exist for consideration on admission.

Defense was left with the belief that the State chose not to use the prior case hearsay in the trial, as State never redressed the matter until calling the witness Det. Coapstick to the Stand.Surprise at the trial... 12RP 3-5

State surprised the defense in trial, claiming it would be admitting the previously excluded prior case hearsay statements, which Court had ruled prior to prejudicial and cumulative on March 25, 2011 "hearsay hearing". State admitted such over defenses objection, and added several hearsay statements of a witness other than Dan King, never before address, in total surprise in trial.

State admitted hearsay directly rule in pretrial hearings as to prjudicial, before the Jury in deliberate disregard for the Court's prior evidentry ruling thereby, "inadmissible evidence" was given the jury deliberately by state, the evidence is highly prejudicial sex offense testimony, which effected the Jury, and where this Court can not say the Jury verdict was uneffected by the use of inadmissible evidence, the error is not harmless. 12RP 16-21.

PROSECUTORIAL ISSUES

A. Did State Commit Brady Violations?

"Violation of the rules promulgated in Brady and its progeny is a violation of Constitutional Due Process." Brady V. Maryland, 373 U.S. 83, 83 S.Ct. 1194(1963). "We review an alleged Due Process violation de novo." State V. Cantu, 156 Wn2d 819(2006).

To comport with Due Process the prosecution has a duty to disclose the material evidence to the defense, and a related duty to preserve any such evidence for use by the defense. State V. Wittenbarger, 124 Wn2d 467(1994).

"In subsequent years the Supreme Court expanded Brady rules reach. Favorable evidence under Brady now includes not only exculpatory evidence, but also impeachment evidence. Giglio V. United States, 404 U.S. 150, 92 S.Ct. 763(1972).

"Brady obligations extend to not only the evidence requested by the defense, but also impeachment evidence not specifically requested by the defense." United States V. Agurs, 427 U.S. 97, 96 S.Ct. 2392(1976)

Government must disclose not only evidence possessed by prosecutors, but evidence possessed by law enforcement as well. Kyles V. Whitley, 514 U.S. 419, 115 S.Ct. 1550(1995).

"Brady obligations include not only evidence in the prosecutor's file, but also evidence in possession of the police and others working on the State's behalf." State V. Lord, 161 Wn2d 276(2007); Kyles, V. Whitley, 514 U.S. at 438...

Defense filed a Brady motion pretrial, seeking Court's action, whereby it was alleged State deliberately withheld evidence from defense and Court.

Prosecutor entered sworn declaration that she had "no knowledge" of the other abuse allegations until April 2011, and had then disclosed such to defense. CP 174 attachments... Prosecutor made this declaration under penalty of Perjury. CP 174... Which due to newly discovered evidence is untrue. CP 171; CP -174

Police records are "in-part" attached to CP 171 including "Det. Hansen's" 10/27/10 report, which he stated: "copy of this report be sent...(CPS) and to Prosecutor Erin Dyer, due to the active case."

This investigation initiated Sept. 14, 2010, disclosed known abuse of MIF by "Joey"(JH) extending to a know disclosure of 4/21/10, per case notes. CP 171 attachments. Evidence is relevant in light of disclosure of Andree King in the affidavit. CP 285 No. 12 thru 16, 20, 22..., and States' belief child has some extended sexual knowledge.

- TEST: 1. "The evidence must be favorable to the accused, either because it is 'Exculpatory' or because it is 'Impeaching';
2. The evidence at issue must have been suppressed by the State, either wilfully or inadvertently; and
3. Prejudice must have ensued"... Stricker V. Greene, 527 U.S. 263, 119 S.Ct. 1936(1999).

Evidence is exculpatory and impeaching both, as it explained child's 'sexual knowledge', went against the Ryan/Allen factors, impeached Dee Thomas, and in light of Andree Kings' affidavit impeached MIF himself. Multiple witnesses claim MIF stated to them: "Person who touched me still comes by my house." 14RP 37 at 1-9

Appellant was in pretrial detention over a year when the child claimed this, making knowledge of the alleged abuse by friend (JH) material and exculpatory.

There is absolutely no question the Prosecution chose to hide evidence, as she declared under penalty of perjury, she did not get Det. Hansen's report until April of 2011, and only disclosed to defense after CPS Records showed in March of 2011 the investigation. CP 171 and CP 174 attachments. Det. Hansen, noted he provided a copy to Dyer directly in relation to the pending case. CP 171.

We can believe Det. Hansen did provide this copy in Oct. 2010 to Dyer and CPS as stated, because CPS included his information in their reports generated in 2010.

Therefore we must except Dyers' actions were willful and deliberate, resulting in perjury to prevail in the Brady motion. CP 171; 7RP 4-8.

Dyer on oath "did not have knowledge", which she did have prior to April of 2011 clearly. see CP 171-174 She post-trial blocked appellant from obtaining the "public records" disclosure of the 'police reports' in APD No. 10-A07012, in an attempt to keep perjury proof from before this Court. see COA No. 68212-1-1.

Evidence was relevant to child competency, child hearsay rulings and weighs against the Ryan/Allen factors, making State's actions prejudicial in nature.

State knew about this investigation in Sept./Oct. 2010, before the hearings.

Det. Hansen was present at the Dec. 2010 hearings and allegedly did not tell the State or Court of child's involvement in other sex abuse allegations, per the sworn declaration of Erin Dyer. CP 174. If this was believable, its irrelevant, as State admitted to knowing about the investigation (CP 174), and Brady clearly required the disclosure of the evidence in law enforcements' possession, especially exculpatory evidence, pre-competency, pre-hearsay, pre-knapstad hearings.

Appellant was prejudiced by State's action, as Court evidence rulings are based on misinformation, requiring dismissal, for an abuse of discretion.

B. Did State Error in Arresting Mike Bettys?

State issued a material witness warrant for the RCW 10.58.090 witness, as the witness chose not to appear for trial testimony, and apparently did not wish to be forced to testify by the State.

The 1993 case witness was entitled to not have to be subject to farther abuse by the State attorney, where the matter being offered was collateral, and the party has a right to finality some 18 years after their case was litigated.

Washington Constitution Article 1 sec. 35 hold victims retain the right not to be forced to even appear for parole hearing in their own case by the State, if they chose to not appear, how can a law that allowed the State to violate such fundamental rights protected by our Washington Constitution, ever stand.

State attorney issued a material witness warrant and had the witness arrested, when the witness chose not to appear for the trial testimony, intimidating the party into testifying, or being subject to continued incarceration at the County Jail, If the State Could not pay a witness to testify, such as "Mathew Shope" as later addressed, then they arrested, charged, and intimidated them into following the State's version of the case, with threats of Jail or loss of children.

Witness was not "material" to the current unrelated case, unless the State now admits the purpose for the witness is merely to show Bettys acted in conformity, and therefore the evidence was for propensity, as the Court found under ER 404(b) at the pretrial hearings. 3RP 94

State can not be allowed to intimidate case witnesses, and since such is clearly done in this case, the State can not be given the opportunity to retry this case, as the witnesses are all tainted by the State's actions, as presented.

The Court had excluded a vast majority of this witnesses testimony, as such had never before been presented to a court, and never before been testified to, the Court specifically found the actual Court records to be more reliable than the live testimony offered some 18-20 years or more after the alleged acts, when defendant had not admitted to the majority of the allegations, therefore they remained mere potential trial evidence never presented in the 1993 case, the Court chose to only admit the proven facts of the prior case. 3RP 94; 15RP; CP 61; CP 153...

State refused to except the limits set by the Court of the RCW 10.58.090 case evidence and presented matters through this witness, not allowed by pretrial rulings, which were highly prejudicial sex abuse evidence. Court limited age to 10-12, but the State illicited age 5-7 in violation. 12RP 117, 120-21.

This does not relieve the question of whether state errored issueing the warrant to have mike bttys arrested to intimidate him, simply because it could not charge him to make sure he testified to what State wanted said in Court about the 1993 case.

C. Did the State Charge/Intimidate Witnesses to Prevail?

Witness tampering is not an excepted practice of law in Washington, and leads to an unfair trial. State deliberately charged MIF's parents for leaving the child in appellants' care, which State knew Appellant's rights had been restored by the Superior Court on June 15, 2005. Therefore, the parents had actually then committed no criminal actions, as a matter of law, yet the State forced them into a plea agreement, under duress of potentially losing their children if they did not agree to plead guilty. CPS would remove the children from their care. CP 63 attachments; CP 65 attachment 1 and 2 (Charging papers "Kings").

"RCW 9A.42.110(2): "It is an affirmative defense to the charge of leaving a child in the care of a sex offender under this section, that the defendant must prove by a preponderance of the evidence, that a Court has entered an order allowing the offender to have the unsupervised contact with children.

State must not prevail on an argument the appellant was not allowed to have contact with children, were the State knew appellant's rights had been restored by the Superior Court, therefore the State's charging the parent(s) appears to be retaliatory, for them not supporting the State's theory of the case. This is extremely relevant, where child's mother entered a sworn statement pretrial that she was forced, under direct threats, to place her child in State approved therapy or face possibly losing all her children, per Det. Hansen's directives. CP 48.

When the parents tried to tell the State that they believed John checked MIF's diaper, State filed charges on them, to clearly intimidate them into testifying to State's version of events. Simply, for them believing what "child expert" 'Dr. John C. Yuille's report stated, that child had disclosed a poke, but had not disclosed actual sexual abuse of any kind. see CP 60.

Since the State had unquestionable evidence that appellant was allowed to care for children, as he had a young son of his own at home, (Harly Bettys), and State also had information from "Officer Del ferrell" Anacortes Police, an a trooper Scott Betts, Washington State Patrol, whom verified Bettys had the right to be at the school, and the right to care for children, as Bettys had "Broken no laws". CP 2 pg.12 (Del Ferrell); and 11RP 72.14RP 37 at 10-18

State chose to wilfully charge the innocent parents and intimidate them into testifying to State's version of events, even if that version of events is later contradicted by the child's live testimony, State continued to force its version and beliefs of what took place, intimidating witnesses as need, and hiding the evidence that did not support State's theories. State knew of parents innocence.

D. Does Prosecutor have a duty to properly quote case laws to the Court?

State mis-advised Court multiple times on case law holdings in Knapstad, Brady, Competency, Ect..., which extends to the Dec. 14, 2011 hearings for case records, in which the Court refused finding appellant counsel represented..COA #68212-1-I...

State argued that State V. Powell, 62 Wa.App. did not apply, claiming Bettys was an unrelated adult with no caretaker function... Powell actually states:

"The Title 'uncle' was honorary, Mr. Powell was just visiting the home... Although he was the only adult present at the time, there is no evidence he had been expressly entrusted with the care of Wendy. Moreover, no touching of the genitals,..., could conceivably be a part of the caretaking function of a 10 year-old girl.

Appellant was a related adult, through infinity of Mr. & Mrs. King's lawful marriage, and evidence, testimony, and affidavits established Bettys care for M.F., even establishing Bettys was paid to provide care for M.F., \$30.00 per month for approximately 6-months, therefore a paid caretaker, a defacto parent... CP2; CP 285; CP 286; 2RP 224-225; 12RP 92; 12RP 94 at 10; 12PR 99 at 13-17; 14RP 54 at 12-25; 8RP 167 at 1-20; CP65 att.-1 & 2; CP 63 att.-A... Bettys was properly on school's pick-up card, approved by the parents to care for the child. CP 63 att.-B....

State could not prevail in arguing that Appellant was not the caretaker, when State charged the parents "illegally" with allowing the Appellant to be the Caretaker of M.F., which should also be corrected.

We have a mere allegation of a fleeting single poke, through clothing and pull-up (diaper), by an actual proven caretaker, described in live testimony as done to check the child for wetness, the same as Appellant done for his own young son's diaper, or same as any reasonable person would adult would check for wetness, would State have charged "Rape" if Bettys had checked to see if the child pooped???

Child interview expert Dr. John C. Yuille reviewed this case and issued an expert opinion report finding the child never disclosed or alleged sexual contact. CP 60....

State argued that State V. Veliz, 76 Wa.App. 775(1995) does not require State to present additional proof of sexual gratification, where the touching is through cloths ... veliz thouched "private spot in front" over clothing and had "rubbed in small circles" for 20-30 seconds. We the Court stated in Veliz:

"We agree that, under powell, because Veliz touched A.F. over clothing, the State was required to prove that he touched her for the purpose of sexual gratification, regardless of whether the are she described is characterised as intimate or sexual parts..."

In the present case the child alleged a poke outside clothing to his private area, State alleged this was automatically sexual in nature, but the child disavowed such from state's case in chief through the live testimony in trial, testifying Bettys had checked his pull-up by the poke, which made him sad, he still hated wearing such in the testimony of the trial, and he clarified that he was in pajammase and pull-up in the

trial. Whereby, the alleged touching is through a pull-up(diaper), through the clothing, and there is no alleged rubbing or touching actions, and the child has gave live testimony explaining the purpose of the touch, even correcting State attorney on re-direct, as to the facts of the 'poke' by the paid caretaker.

In State V. Johnson, 96 Wn2d 926(1982) Supreme Court Stated:

"Evidence an unrelated adult with no care taking function wiped a 5-year old girls genitals with a washcloth might be insufficient to prove he acted for the purpose of sexual gratification, had the act not been followed by his having her perform fellatio on him."

.State mis-argued State V. Stevens, 158 Wn2d 304(2006); State V. French, 157 Wn2d 593(2006); State V. Lorenz, 152 Wn2d 22(2004); State V. T.E.H., 91 Wa.App. 908(1998); Etc... Which all support the State must prove the purpose of touching was sexual gratification, to prove the element of sexual contact, and checking a pull-up for wetness would not necessarily be sexually gratifying, or even sexual, as child testified it was a fleeting poke, hardly felt, only happened once, to simply check his pull-up, per his in trial live testimony.8RP May 4,5,6, 2011...

State inferred such was sexual, but an inference should not arise where there exist another reasonable explanation, as reasonable doubt would still exist, and any inference would be improper, in light of actual explanation.

This child in live testimony testified to the actual purpose for the poke he had alleged, corrected the State on re-direct, that he was in-fact in pajammas and in his pull-up, and his pull-up was checked. 8RP 167-170.

State also mis-argued State V. Harstad, 153 Wa.App. 10(2009) which Stated:

" 'B' said Harstad put his hand over her underwear near her "private spot" and his hand would always be "rubbing like"... 'B' testified Harstad touched her at night when everyone was asleep... that she slept wearing only her T-shirt and underwear... "Testimony 'B' slept in her underwear supports a finding Harstad did not touch her upper thigh over her clothing, which in turn supports an inference of of sexual purpose."

This was only after finding Harstad was not the caretaker, as a caretaker might have a reason for touching the nude thigh of the child.

State's mis-quoting these case holdings to the Court, caused the Court's rulings to be based upon misinterpretations of law in relation to the facts, and such makes Court's rulings an abuse of discretion. Prosecutorial Misconduct is alleged where such is deliberate conduct by prosecutor to prevail in motions.

E. Did State Mis-State the Case Facts to Court?

Dyer deliberately mis-stated facts in evidence to prevail on motions, where

the child was never asked about the hearsay evidence, or the evidence was ruled inadmissible pretrial, or to prejudicial and the State ignored the rulings, and admitted the evidence to the Jury. Child made clear the fleeting poke was through the clothing, over the pull-up, at John's house (not sylvia's house as State had continued to allege), while he was standing (not sitting as State continued to allege), while playing video games (not watching TV as state continued to allege), John was washing dishes (not sitting on couch, watching TV as State alleged), and after making 'corn dogs' for the child, came into the living room and checked his pull-up during a break from the video game, went back to washing dishes, per live testimony in trial. Child claimed he was poked once (State continued charging two counts), Mike Bettys supported live testimony, "there were no video games at all in sylvia's house". 11RP 125. Live testimony, tested through crucible of cross-examination is deemed extremely more reliable than mere hearsay testimony of non-complaining witnesses, that the State never addressed on direct examination of the alleged declarant. Especially where State deliberately chose not to seek the required testimony from the child declarant to support the hearsay admission, and evidence is of record supporting the child's family had attempted to make untrue allegations to assist the State in conviction. CP 285; RPC 3.3(1)

Child's uncle Jake even had family members take note, and made statements in Court Dec. 16, 2010 about being abused, to attempt to support child's allegation.

State asked the Court overlook live testimony of the child, and use all the inadmissible evidence, never tested or addressed to the child declarant, to find and support the guilt. This is misconduct as even when State heard child claim a non-sexual purpose for the poke, State continued to conviction. 2RP 65; RPC 3.3(6)

F. Did the State Commit Misconduct Admitting Criminal Type Person Evidence?

State deliberately admitted "inadmissible evidence", ruled to prejudicial in the pretrial hearings, when she admitted Bettys registration status, and thereby his prior conviction before the Jury. State illicited this information from the parents and teachers...Worse State deliberately introduced Bettys as a criminal type person, by seeking testimony about Bettys beard, hair, weight from these witnesses after his in court identity had already been confirmed. 11RP 32-72.

The fact one Jurior worked with Ms. Bettys, and Joey's mother whom admitted talking about the case around the Jurior, assisted the State in criminal typing Bettys in the Jury room, during deliberations.

"Prosecutor has duty to seek a verdict free of prejudice and based on reason. State V. Hudson, 73 Wn2d 660(1968).

"It is improper to present an argument not based on the evidence that appeals to the Juries passions and prejudice." State V. Echevarria, 71 Wa.App. 595(1993).

Epecially to show appellant as a criminal type person, who merely deserves to be punished, cause he committed prior crimes... RPC 3.3(4).

"State may not use false testimony of a witness if the prosecutor or representative of the State knows or should have known such testimony to be false, and such principles apply equally if the testimony is unsolicited." Rinhart V. Rhay, 404 U.S. 825, 92 S.Ct. 53( ).

Dyer knew the testimony she was admitting from Mike Bettys was false, based in "inadmissible Evedence", excluded pretrial as to prejudicial, and State had deliberately ignore this order, seeking the testimony before the Jury, asking if he could remember what he told Det. Hansen, which Court limited pretrial at the Dec. 22, 2010 hearings, informing the State Mike's age limit was 10-12, not 5-7 as Dyer presented to the Jury, which is misconduct admitting unproven evidence.

"...State although not solliciting false testimony or evidence allows it to go uncorrected when it appears, the Jury's estimate of the truthfulness and reliability of a given witness may be determinate of guilt or innocene, as it is upon such subtle factors as the possibility that the witness has an interest to testify falsely that a defendant's life or liberty may then depend." Brown V. City of Walla Walla, 136 Wash p.1166, 76 Wash 670...

Due to prosecutor's misconduct/mismanagement, perjury, and the Due Process violations alleged herein and in the pre-sentencing motions still pending on the appeal, the Court should dismiss this case with prejudice to the State... at a minimum this case must be remanded for a new trial and further evidentry hearing proceedings in Superior Court. RPC 3.3(1) (Rules of Proffessional Conduct RPC).

State has blocked the appellant from obtaining the necessary records to now fully address the Brady violations, but appellant advers the record on review, found in the clerk's papers are sufficient to prove the State had the copy of the Det. Hansen's report, and knowledge of the (JH) abuse of MIF, well before April 2011, showing State did violate the duty to inform the defense, which is what blocked defense counsel from being effective. State has admitted to knowing about the (JH) abuse earlier than April 2011 disclosure, but chose to claim it was unrelated, when it involved State victim MIF, State was clearly required to still disclose. CP 174...

"In order to warrant dismissal... due to arbitrary actions of governmental agents for misconduct, the misconduct need not be of an evil or dishonest nature, simple mismanagement is enough." State V. Brooks, 149 Wa.App. 373 (2009); State V. Blackwell, 120 Wn2d 882(1993)...

Appellant has proven simple mismanagement at minimum to this Court, dismiss.

G. Did Court Error Allowing Knowingly Paid Testimony Given Without the Limiting Instruction being provided.

State paid witness to testify in the case by reducing sentence, and had told the witness to claim he got nothing, but the witness admitted he got almost a third off his sentence. Most offenders would say anything to get some time off their sentencing, thereby snitch testimony is most unreliable.

"Evidence that a witness has promised to give truthful testimony in exchange for reduced charges may indicate to Jury the prosecutor has some way to independantly verify the credibility..."

"Snitch testimony is inherently unreliable," per justice Sanders in State V. Ish, 170 Wn2d 89 (2010).

"...but Washington Courts recognize that an informant or 'snitch' may have an interest in testifying against the defendant, therefore the trial Court must give" WIPC 6.05, when ever there is uncorroborated accomplice testimony. State V. Sherwood, 71 Wa.App. 481(1993); State V. Harris, 102 Wn2d 148(1984); State V. Statless, 28591-7-III (2011).

Court failed to give the required instruction, therefore Court has caused the Jury to consider testimony of a prejudicial nature, without properly limiting the purpose for which it was alloed to consider such.

"Testimony of the accomplice, given on behalf of the 'Plaintiff' should be subjected to careful examination in light of other evidence in the case and should be acted on with great caution. You should not find the defendant guilty upon such testimony alone unless, after careful consideration of the testimony, you are then satisfied beyond a reasonable doubt of its truth." WIPC 6.05; State V. Ish, 170 Wn2d 89 (2010)...

This Court can not say the snitch testimony herein, is not the sole evidence the Jury used to find guilty upon, this is not harmless error. Prosecution should have provided the proper required instruction to support State's witness.

"...violation of Washington Constitution Art. 1 § 22, as inherent in that is the presumption of the innocence, including the right to the appearance of dignity, an self-respect of a free man". State V. Finch, 137 Wn2d 792(1999)

"The key is the Jury's awareness by whatever means conveyed..." State V. Classen, 143 Wa.App. 45(2008).

H. Did State allow impermissible Testimony Before the Jury From Snitch?

Judge warned the State when the Court had concern where the State's questions where leading, State assured the Court it knew where it was going, and nothing would be prejudicial. VRP May 9, 2011... After Jury leaves the room Judge does admonish the State, because the snitch testimony went to prejudicial comments, and combined with the above error in the WIPC 6.05 instruction the prejudice is compounded on this issue. If this is not grounds for a new trial, it will now weigh to the cumulation of errors, going wholly to prejudice at trial...

## JURY ISSUES

### A. Did Court fail to properly issue a required "corrective instruction to the Jury?"

"We review a claimed error of law in a Jury instruction de novo." State V. Sublett, 156 Wa.App. (2010); State V. Benn, 120 Wn2d 631 (1993). "A Court is required to define 'technical terms' for a jury, when an instruction is requested." State V. Olmedo, 112 Wa.App. 525(2002). "Trial Court has discretion to define words that are of common understanding or self-explanatory". State V. Brown, 132 Wn2d 329(1997).

Court blocked defense from requesting a proper clarifying jury instruction, whereby the Court did not notify the defense of the deliberating Jury's question, merely answering such with a riddle. CP 188.100.

"Where the Jury's question to the Court indicates an erroneous understanding of the applicable law, it is now incumbent upon the Trial Court to issue a corrective instruction, even if the ambiguity of the instructions given was not apparent at the time they were issued, the Jury's question has identified their deficiency." State V. Davenport, 100 Wn2d 757(1984); State V. Cambell, 66732-7-I (2011).

The Jury presented the following question during deliberations, which should have put Court on notice that the Jury did not have an understanding of the Law in respect to this issue they were asked to decide. Clearly the erroneous understanding of the applicable law required the Court to issue the proper clarifying instruction.

"Is there a legal definition of what sexual gratification is? If so may we have the written definition?"

Supreme Court established in State V. Stevens, 158 Wn2d that proof of sexual gratification is an ultimate fact of the essential element of child molestation that the State must prove beyond a reasonable doubt, to prove the "sexual contact" element of the crime. If the Jury did not have a clear understanding of what sexual gratification was, then there is reasonable doubt left in the Jury's question alone. We can not now say that sexual gratification was found beyond a reasonable doubt, where the Jury made clear they did not understand the technical term.

"But if the error goes to an element of the charged crime, (Sexual Contact) then the error is manifest constitutional error." State V. Eastmond, 129 Wn2d at 502. "Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary mind." ID.

Considering the lesser included Jury instruction on 4th degree assault, which is only different based upon the sexual contact element from molestation, if the Jury had not found sexual contact, but merely an unwanted touching, Bettys was guilty of the lesser offense only, unless the Jury also found that a caretaker has a duty to properly check a child's pull-up when the child is in their care.

The Appellant has checked 7 dictionaries, both Black's Law and Standard English, for the definition of sexual gratification, none seems to exist. Sexual predator, sexual offense, sexual assault, sexual abuse, sexual battery, sexual exploitation, sexual activity, sexual orientation, sexual intercourse, ect... no sexual Contact, or sexual

gratification is listed however. This term holds such a vastly wide spread an open meaning in common use, sexual bondage, S&M, Rape, ect... that one might find to fall under Sexual gratification, but I do not believe this would include checking a diaper (Pull-up) through clothing, which a single fleeting poke. Court was required to issue a clarifiying instruction, to ensure the Jury was properly able to understand the law with which it was charged, By not clarifying the ultimate fact sexual gratification to the Jury in this case, the Court here can not say the verdict is not based upon an erroneous understanding of the laws.

B. Did Court Error in not giveing defenses requested jury instructions?

Trial Court refused multiple Jury instructions requested by the defense, which were proper statements of the law, based on the fact they came from the case laws of Washington and not the WIPC Books. Court appears to have taken the role as counsel determining what was and was not proper instructions, based on the facts of the case.

WIPC "Committee urges Judges and attorneys to make similar use of plain language as they draft new or modified instructions for use in a particular case. WIPC 0.10.

"Pattern Jury instructions are not authoritative primary sources of law; rather they state otherwise existing law for the Jurors..." for this reason, pattern jury instructions do not always precisely follow the language of the statute or judicial opinion..."

General purpose of a Jury instruction is to provide the Jury with the law to be applied to the case. State Borrero, 97 Wa.App. 101(2002). It is very clear from WIPC 0.10 enacted in 2010 that the Washington Case opinions are proper law from which to create a proper Jury instruction, whereby the Court was wrong in not properly then allowing the instructions from the case holdings, where they are a proper statement of the Law in respect to the issues of this case the Jury was required to rule under.

Refusal of a proposed Jury instructions is reviewed for an abuse of discretion. In Re Pouncey, 168 Wn2d 382(2010).

Jury instructions must provide an accurate statement of the law for the Jury, and must allow each party to argue its case theory to the extent the evidence supports. In Re Benn, 120 Wn2d at 654.

First, the Court taking such instuctions and arguments on the instructions off the record, is an improper closure of the Court under Bone-Club. The fact that this information is not available for this review, and the defendant was only present for part of these proceedings blocks the defendant from his right to manage his own case, irrespective of whether counsel is present in the Court, a defendant has the right to properly manage his counsel's activities, since the counsel can enter into binding legal issues on the defendant's behalf, defendant has the right to direct his counsel.

Second, the following instructions were refused by the Court:

"A preemption is only permissible when no more than one conclusion can be drawn

from any set of circumstances. An inference should not arise when there exist other reasonable conclusions that would follow from the same circumstances." State V. Bencivenga, 137 Wn2d 701(1999).

This is a very plain and true statement of the Law, as if there exist necessary other reasonable conclusions in the Jury's mind, then there exist reasonable doubt necessary for an not guilty verdict.

"Touching through clothing of an intimate part of a child, when done by a person acting in a care-taking role, is not sufficient to establish sexual gratification, unless there is independent evidence, apart from the act itself, supporting the finding of sexual gratification."

This is a true statement of the law which the Jury has to rule, as they must find the State proved the purpose of the touching was for Sexual gratification, to find proof of sexual contact and essential element of child molestation.

"It is a defense to the charge of child molestation in the first degree and assault in the fourth degree that the touching was lawful as defined in this instruction. The touching of a child's genitals is lawful when it is reasonably necessary for the child's health and well being, and is done by a person authorized in advance by the child's parent or guardian to perform such activities and is for the purpose of cleanliness or medical care of the child.

You must determine whether the touching in this case, when viewed objectively, was reasonable and appropriate. In determining whether the touching was reasonable and appropriate, you shall consider the age, maturity, and the circumstances of the touch to determine whether touching the groin under the circumstances was reasonable.

The State bears the burden of proving beyond a reasonable doubt that the touching of the child by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to the charges of child molestation first degree and/or Assault in the fourth degree.

The Court refused to give any version of these instructions, which is not allowed, as the defense had a right to present their defense and seek instructions which did allow them to argue their defense properly. Where the child testified to a legal and legitimate explanation for any touching the State alleged, "checking a pull-up", then the defense was entitled to have the jury informed that there could exist such a legal purpose, as a defense to the charge alleged of child molestation. As for the touching through clothing, this has been found by the Courts multiple times to then require additional proof, which the Jury should have been informed.

The Judge should have issued at least a modified version of these instructions to allow defense to argue its theory presented by the complaining witness in trial.

C. Did Court error not dismissing a Jury that worked with members of the Child's family and defendant's wife?

Court was informed during Marissa Bettys testimony, by one of the Jury members that he recognized the witness from his working at the Red Cross. The Jury was then asked to step out and the Court talked to the Jury member, in the witnesses actual presence. The Court allowed the member to continue on to deliberations, instead of excusing the Jury member. Then it was discovered that Joey (JH) mother also worked at the Red Cross. CP 282, CP 283. 12RP 64. This later was found to include an uncle who was doing community service at the Red Cross. Half the family worked with a Jury member, and such seems improper, as they admitted talking about the case at work.

## INEFFECTIVE COUNSEL ISSUES

### A. Did Counsel error in allowing a CrR 3.5 hearing under 10.58.090 evidence?

1993 Trial Court chose not to allow the confession used due to the questionable practices by which it was obtained. Court did not even hold a CrR 3.5 hearing in 1993 case, as the State agreed to a quick plea agreement, therefore it was not even "potential trial evidence", prior to 2011 Court's use under 10.58.090.

The 2011 Court was collaterally estopped from holding the CrR 3.5 hearing on the 1993 case 18 years after the plea was entered, even on 10.58.090 evidence, as if such was unproven in the prior case, it cannot be now proven for use in the current collateral prosecution of an unrelated case, this violates the 1993 plea agreement when the State put the prior case detectives on the stand before the current case, and sought admission of the unproven evidence. Counsel was therefore ineffective for allowing the State to use the evidence without an objection, or allowing the hearing without an objection on the records, allowing the willful violation of the 1993 plea.

"The right to counsel is specific to a particular offense and protects the accused throughout the proceedings and following conviction." McNeil V. Wisconsin, 501 U.S. 171(1991).

2011 Court heard from Det. Smith, who admitted to calling Bettys for an unrelated misdemeanor case in 1993, and mirandized him under that case, then told him that Det. Coapstick needed to talk to him about an unrelated case. 5RP 8-13. Det. Coapstick testified that he did not mirandized Bettys prior to talking with him and he got the confession to the 1993 case without miranda protection. Appellant claims the Counsel was ineffective in not arguing the illegal 3.5 hearing, that violated the 1993 plea case. RCW 10.58.090 does not authorize collateral CrR 3.5 hearings to be conducted to determine if previously unproven evidence is admissible. It only was to allow proven evidence before the current court for consideration. The Attorneys failed to properly address these issues, and move for dismissal of the 1993 case for the State's willful violation of the plea agreement 18 years later.

"Sixth amendment guaranty to assistance of counsel attaches when the State initiates adversarial proceedings against a defendant." State V. EverybodyTalksAbout, 161 Wn2d 702(2007). "It applies to every critical stage of a proceedings." State V. EverybodyTalksAbout; State V. Tinkham, 74 Wa.App. 102(1994)(quoting United States V. Wade, 388 U.S. 218(1967)). "Court applies the deliberately illicit standard in determining whether a government agent has violated a defendant's sixth amendment right to assistance of counsel. see Fellers V. United States, 540 U.S. (2004); In Re Benn, 134 Wn2d 868, 1998). "The Sixth amendment deliberately illicit standard has been distinguished from the fifth amendment custodial interrogation standard. Fellers, 540 U.S. at 524. "Sixth amendment provides protections of counsel even when there is no interrogation and no fifth amendment application."(Alteration in original)(Michigan V. Jackson, 475 U.S. (1986)). "Sixth rights were violated, there must be some showing that (Det. Coapstick) made some effort to stimulate the conversation about the crime." Randolf V. California, 380 F.3d 1133, 1144, (9th Cir. 2004)(quoting Henry 477 U.S. at 271).

Det. Coapstick stated that he had not mirandized Bettys prior, and that he had obtained the confession in 1993 without miranda warnings. 5RP 14-24. This does not address the failure of counsel, for even allowing the hearing to even be held.

B. Did Counsel's performance fall below required standards of professional conduct of counsel at trial for failure to Object?

"Decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to state's case, will failure to object constitute actual incompetence of counsel to justify reversal." State V. Madison, 53 Wa.App. 745

Counsel may have felt they did not need to object, beyond the already standing objections from the motions in limine, which the State ignored and entered the ruled inadmissible evidence before the Jury. 3RP 96.

Evidence was clearly central to the State's case, whereby State addressed such a number of times in closing arguments alone. 12 RP 117; 12RP 120; 12RP 120-21; 12RP 128.

There is no question this was central to State's case in chief, were State alleged prior child victims were the same age as the current victim, which was previously found to be untrue under 10.58.090 evidence limitations. 3RP 96. State even conceded that the Court had properly clarified the age issue, which put Mike Bettys at 10-12 years of age, not 5-7 years of age as the State alleged multiple times, in an apparent attempt to appeal to the passions and prejudice of the Jury. Failure of the attorney to object to these points in trial cannot be found to be trial tactics, nor harmless errors, and clearly went to the ineffectiveness of counsel combined with the deliberate prosecutorial misconduct, where State agreed the issues on age was proper pretrial and went against that ruling during trial deliberately. 3RP 96.

Jury was left with the impression the prior victims were of identical age as the alleged current victim, which Court already ruled was not so, limiting the 10.58/090 evidence State was allowed to present. The Current child turned 5 March 24, 2009, in the middle of the current charge period, and was therefore 4-5 years old when his diaper was allegedly checked. CP 285; CP 286; 2RP 101-102...

C. Did Counsel in conflict with client fail to properly inform the Court of the full nature of the conflict issues?

Counsel was ineffective for not bringing their client's issues to the Court for decision, where the Court had addressed the client's objections, and numerous pro se filings, informing the defendant to find a way to work with his conflicted counsel. 7RP 46. Defendant had properly brought the matters to the Court's attention and sought the proper assistance in ensuring counsel properly addressed the matters, but Court failed to take the necessary action. 17RP 6-7; 7RP 45-49; CP 153; 14RP 3-14.

"Trial Court has a duty to investigate an attorney client conflict of interest, if it knows or should have known such potential conflict existed, as the trial may have been effected. State V. Regan, 143 Wa.App. 419(2008)(Mickens V. Taylor, 535 U.S. 163(2002)). "We will reverse a defendant's conviction if he timely objected to an attorney conflict at trial, and trial court failed to conduct an adequate inquiry." State V. Regan, 143 Wa.App. at 425, without an objection the conviction stands, unless the conflict effected attorney's performance."

The purpose of the objection is to give the trial Court adequate notice of the

issue which needs the court's attention, which Mr. Bettys clearly did in this case at hand. The Court knew there was an issue that needed to be addressed over counsel, where the Court even signed the written order about the issues pretrial to allow the discretionary review. CP 153; 7RP 46-47; 15RP 58-59

"To prevail on ineffective assistance of counsel, proof that counsel's performance was deficient, and the deficiency prejudiced the defense must be shown. Strickland V. Washington, 466 U.S. 668(1984); State V. McFarland, 127 Wn2d 322(1995). "We begin with a strong presumption that adequate and effective representation. McFarland at 335... "Deficient performance is that which falls below an objectionable stand of reasonableness." State V. Horton, 116 Wa.App. 909(2003). Prejudice occurs when trial counsel's performance was so inadequate that there is a reasonable probability that the outcome of the trial would have been different, undermining confidence in the outcome." Strickland V. Washington, 466 U.S. at 694.

"Sixth amendment 'assistance of counsel' at trial, representation free of conflicts." State V. Regan, "Sixth amendment right to effective assistance of counsel advances the fifth amendment right to a fair trial. That right to effective assistance includes a 'reasonable investigation' by the defense counsel." Strickland V. Washington... In Re Brett, 142 Wn2d 868(2001).

"Ineffective assistance of counsel is a mixed question of law and fact." Strickland V. Washington... "Because ineffective assistance presents a mixed question of law and fact, this Court reviews de novo." In Re Fleming, 142 Wn2d 853(2001).

Herein, the Court knew of the on-going conflict between forced privately paid counsel and the defendant, through a multitude of pro se filings, which Court failed to properly address pretrial, even when the defendant demanded to be pro se, and filed the oral motion to fire ineffective counsel under CrR 8.2. Counsel continued to appear in Court, and Court continued to force Bettys to pay the counsel, even entering the written order to allow discretionary review of this decision. Counsel continued to fail to address their client's issues and motions, agreeing to address such then not supporting them to the Court. Counsel had a duty to address the matters as the Court directed in the pretrial hearings. This was not done in this case, even when the defendnat entered written objections to forced counsel's conduct, which Judge did not address. CP 130; CP 139.

"That a person who happens to be a lawyer is present at trial, alongside the accused, however is not enough to satisfy the Constitutional command." State V. Boyd, 160 Wn2d 424(2007). "Sixth amendment recognizes the right to the assistance of counsel, because it envisions counsel's playing a role critical to the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays a role necessary to ensure that the trial is fair." State V. Boyd, 160 Wn2d 424(2007).

Counsel's performance was prejudicial to the defense, where Court knew of conflict and failed to properly inquire. Counsel was ineffective for charging client once the private counsel was fired upon there own request.

D. Was Counsel ineffective for failing to call the expert witness counsel had Court hire at public expense?

"Courts have long recognized that effective assistance of counsel rest on access to evidence, and in some cases expert witnesses are crucial elements to due process right to a fair trial." State V. Boyd, 160 Wn2d 424(2007); State V. Greening # 81449-0(2010).

Counsel had retained Dr. John C. Yuille and Dr. Barry Cooper, both long and fully established child expert witness in sexual abuse cases, and child memory issues, with over 60 years combined experience in the field of study. Counsel failing to call such witnesses cannot be said to be merely trial tactics, when such witnesses alleged the child made no actual disclosures of sexual abuse. CP 60.

Jury being given this expert testimony, based on this many years experience in child abuse cases, would have changed the outcome in this case, as if the child was found not to have alleged sexual abuse, Bettys could not be convicted of a sex crime, which supported the child's live testimony that Bettys checked his pull-up diaper.

Counsel's decision cannot be merely tactical, where no reasonable person would have used such a tactic, except to ensure their client was convicted.

E. Did Counsel's failure to require State carry State's sentencing burden prove deficient performance of counsel?

"Court found defense counsel's performance deficient when counsel mistakenly failed to object to sentencing Court's incorrect conclusion that the defendant's prior convictions were legally compatible." State V. Thieffault, 150 Wn2d 409(2007).

"Thieffault Court held counsel's failure to hold State to its burden of proving compatibility before it waived any objections to the inclusion of the prior out-of-state convictions."

In the present case counsel not only objected to the inclusion of the prior erroneously included out-of-state convictions, but filed a motion challenging the out-of-state convictions inclusion in criminal history directly and the use of the prior Washington Judgment which is invalid, for the prior use of out-of-state crimes, by use of two (2) Washington crimes elements combined to equal the single Idaho crime of "Grandtheft", which violated the Due Process of Law established under the 14th amendment through: State V. Russell, 104 Wa.App. 422(2001).

Prejudice under the Current sentencing Court failing to properly compare the out-of-state crimes listed on the Judgment face is seen in the inclusion of "Malicious Injury" on the 2011 judgment, which never appeared under the prior 2002 judgment, as Washington does not have such a criminal statute. RCW 9.94A.515.

This does nothing to address the listing of "Theft2~/TMV", Two (2) Washington crimes as the single Idaho crime of "Grandtheft". Counsel was very ineffective to allow such deliberate acts contravening the Laws of Washington on the Judgment, without an objection, which did effect the Court's ruling on the validity of the 1993 judgment documents, which is the POAA case Bettys received life under.

The mere fact that all of the criminal history was not supported by the State as required, especially where we see a direct defense motion challenging the history, the State has the burden of ensuring the records are provided the Court for sentencing.

Defense gave the State direct notice that defense would not be stipulating to

the alleged criminal history well prior to filing the motions in challenge to the sentencing history use of the out-of-state and 1993 cases. CP 94. This required the State to produce the necessary supporting documents for the Court. Counsel was then defective for not moving to exclude the unsupported criminal history from 2011 Court's consideration, as required. Defendant should have been sentenced at zero or three point of history, as the indecent liberties was not challenged.

"Although failure to object is usually a tactically sound decision we can only conclude that counsel's failure to object to these examples of clearly inadmissible, improper, and highly prejudicial statements by a witness does demonstrate gross incompetence. We conclude defense counsel failed in these instances to exercise 'the customary skill and diligence that a reasonable, competent attorney would exercise under similar circumstances.'" State V. Visitacion, 55 Wa.App. 166(1989); In Re Garrett, # 37293-9-I (1997).

Under each presented section the attorney failed to exercise the diligence a reasonable attorney would use, especially allowing prejudicial witness testimony, ruled inadmissible pretrial to be presented the Jury, on the ages of the prior victims, and failing to hold the State to State's burden at sentencing, before allowing the Court to wash-out the Idaho crimes, the State had to prove the Idaho crimes were then compatible to class-C felonies, which was not properly done. CP 94.

Counsel did not object to or argue the Ryan and Allen factors used in this case properly, as the cases cited by the State did not stand for the position the State presented to the Court. 1993 Child hearsay issue was merely another failure of the counsel in trial, RCW 9A.44.120 did not apply to evidence being admitted from a collateral case, under 10.58.090, which shows the counsel failed to exercise minimum due diligence in this case, allowing highly prejudicial evidence presented to the Jury, merely to appeal to passions and prejudice of the Jury, in effect help convict.

#### EVIDENCE INSUFFICIENT

##### A. Did The State prove the required facts to support a convictions?

"If a child is excused before her hearsay statements are proffered, the defense has no opportunity to cross-examine the child on those statements... Felix V. State, 109 Nev. 151, 849 P.2d 220, 297(1993).

"Where declarant is excused as a witness prior to offering the declarant's out-of-court statements, declarant was 'not subject to cross-examination concerning the statement' and therefore the out-of-court statement was inadmissible. State V. Daniels 210 Mont. 1, 682 P.2d 173, 178-79(1984).

Though these are not binding on the Washington Courts, they should be excepted as informative on the issue of the out-of-court statements, as even the Supreme Court has held that out-of-court statements must be full drawn out through the direct examination to allow a proper cross-examination.

The State cannot rely on the unproven evidence to support a conviction, if the State was required but failed to illicit the testimony. this is in State's best light.

Challenge to the sufficiency of evidence admits the the truth of the State's evidence. We must view the evidence presented in the light most favorable to the State, in determining if there exist support for the finding of guilt.

However, this does not require us to consider legally "inadmissible evidence", no matter how favorable that evidence may be to the State. "Inadmissible evidence" may not be used to support guilt, even under a sufficiency of the evidence test.

First, we must now remove all RCW 10.58.090 evidence from consideration, as the Washington Supreme Court found RCW 10.58.090 unconstitutional Jan. 5, 2012, making all 10.58.090 evidence merely "inadmissible", which Court already ruled to have excluded under ER 404(b), ensuring this Court such is now proper here. 3RP 94.

Second, we must remove all the "child hearsay" evidence, where the State failed to carry both State's statutory and constitutional burden regarding the evidence admission. Statements are therefore merely inadmissible evidence upon this review, whereby the child never "testified" he made the statements, or knew anything about the statements, because State willfully chose not to ask on direct examination of M.F. in trial. The declarant must constitutionally testify about the alleged out-of-court hearsay statements, to support admission before the jury. Failure to now illicit this required testimony, makes the statements inadmissible evidence upon this review, per United States V. Crawford, 541 U.S. (2004) an United States V. Davis, 547 U.S. (2006). This evidence of alleged hearsay must not be considered.

M.F.'s parents Mr. & Mrs. King were found to be legally married. 12RP 87-88. which proves that Bettys, Mr. King's uncle is related to M.F. through infinity of the King's marriage, in the light best to the State.

State cannot prevail arguing Bettys was not the child's caretaker, as State did present multiple witnesses who claimed to see Bettys bring M.F. and pick M.F. up from school, alone multiple times. 12RP 91, 8RP 107, 11RP 32-72, 12RP 95.

Further, the Bettys had the child overnight at their residence multiple times, M.F. Spent the night five time with Marissa and John at their trailer. 12RP 70, 77, 89-90. Which is the truth in the best light to the State.

Additionally, State Chose to charge M.F.'s parents with actually leaving the child in Bettys care, even though State knew Bettys rights to be around children, and the past victims had previously been restored, which State received a plea conviction from the parents, and State cannot now contradict those case facts by claiming Bettys was not the caretaker, or M.F. was not in Bettys care. CP 65 att.-1 & 2, CP 63 att.-A, CP 63 att.-B, see also trial exhibit-11.

Bettys was even paid by the parents to provide services for the child, showing

additional proof of caretaking function. 12RP 92, CP 2 pg 11 of 14 (Andree King).

These facts show that Bettys was a trusted caretaker, entrusted specifically with the care of M.F. by his parents, which State proved in State's case in Chief, as Court later stated. CP 285, 14RP 54 #12-17.

Next we look to the fact that law enforcement was involved at the school prior to the allegations, and the investigative officer Del Ferrell informed the school, parents, and teachers that Bettys was breaking no laws, in being at the school, or dealing with the child. CP 2 at pg 12 of 14 ... Further, one of the school parents was an off duty Washington State Trooper "Scott Betts whom the State called in trial and verified that he had conducted an informal investigation into Mr. Bettys being at the school, finding out that Bettys was breaking no laws caring for the child.

Trooper Betts, admitted he is specifically trained to observe crime and had seen Bettys commit no criminal acts. 11RP 72.

We have established that Bettys was a paid caretaker, whom is related to the child M.F. by marriage, that was violating no laws for being placed in the position of caretaker by the child's parents, as all proven before the Courts in this case, which is taking the actual evidence in the best light to the State as required.

Now, let us look to the facts of the disclosed allegations, in fact we know the child M.F. alleged that Bettys poked him, in the private area, along time ago, on the outside of his clothing. State asked us to automatically find this to be sexual in nature, which would require drawing an unreasonable inference, especially in the light of the facts presented at trial.

Bettys ask we look to the record, whereby Dr. John C. Yuille the recognized and re-nouned international child abuse expert reviewed the case documents, and made an expert statement that the child had never alleged sexual abuse, merely a poke which no one clarified the reason for. CP 60. Dr. Yuille has testified in over 1000 sexual and physical abuse cases in his 40 years in this field, including a number of Washington cases, showing his expertizes are long established.

This again is in the light best suited to the State, unless the State has a means to disprove this parties expert qualifications? We must also consider the actual live testimony of the complaining child M.F. at trial, where he for the very first time is questioned about the reasons for the poke he alleged, which he does testify was to check his pull-up (diaper).

This takes us to know factually that the touch was through clothing, through a pull-up diaper, per live testimony. 8RP 160, 8RP 167, 8RP 170.

State cannot suggest that we overlook the child's live testimony and seek a conviction based solely upon hearsay statements, as this is not allowed.

The right to confrontation would "be a hollow one indeed if prosecutors are permitted to limit the complaining witnesses testimony to wholly innocuous details or recantation of earlier statements, then procure conviction based on out-of-court statements, untested through the crucible of cross-examination." State V. Rohrich, 82 Wa.App. at 678; Smith V. Illinois, 390 U.S. (1988).

The Child was never asked to support the alleged hearsay statements the State relied upon in the trial to support State's case, whereby the conviction is then based on inadmissible evidence.

The Child did testify to the alleged poke being merely fleeting, hardly felt, not very memorable. 8RP 156, 160, 165. Child testified That it was only once, which contradicted hearsay witnesses claim of twice, M.F. testified he was standing in the living room, which contradicted hearsay witness "Flacco" and State's continued inference it happened while sitting on the couch, John was in the kitchen, which contradicted State's continued use of a version where John was sitting in the living room with the child, where child put John washing the dishes in the kitchen, and only coming to the living room during the break in the video game to check his pull-up (diaper). 8RP 167, 155.

Child claimed it happened at John's House. 8RP 144, 148 (picture he drew), and such contradicts State's claims it was done at Sylvia's house as state claimed in all the proceedings. Had the State wished to use the hearsay evidence, the State knew its burden established under United States V. Crawford... This was not met in this case in chief.

The light best to the state requires we determine if the statements were then offered through an exempt hearsay source. Crawford test is very strict, that it is meant to apply to out-of-court declarations, made under testimonial circumstances, be excluded unless the declarant has constitutionally testified to the statement in the proceedings. This would definitely include all hearsay to prosecutor employee Nicco Flacco, who met with the child four days after the initial disclosures, in the meeting M.F. refused to talk until Officer Mike Hansen showed the child his badge and informed the child Ms. Flacco would interview him for officer Hansen, which is clear establishment that the child understood the statements would be used by the law officer, testimonial without question. CP 58 att.-2 pg 128 (child interview).

Then, Kari Cook is a CPS investigator who interviewed the child both in relation to the current case and the other allegation made by M.F. over the course of the years in question. Statements made to CPS have been fundamentally found to be testimonial in nature, when not taken during an on-going emergency, and since the defendant was in the jail on charges when she chose to interview the child, the facts support her statements are testimonial in nature.

Then statements to Lisa Wolff (counselor), whom law enforcement forced the M.F. family to place the child in under threats of further CPS actions, must be deemed

solely for the benefit of law enforcement. testimonial in nature and fact, and since the child apparently did not understand the medical purpose of the counseling the medical exception can not be applied. CP 137, CP 49 (declaration of harassment).

The other alleged hearsay witnesses also were not testified to by the child in the trial as per State's duty to support admission of State's hearsay evidence.

Even had the State managed not to violation of the confrontation rights, this would not overcome the greater protections of RCW 9A.44.120, with was not met by the child hearsay presented in this case.

"Mere repetition does not make something true." State V. Perez, 137 Wa.App. 97(2007)

Other witnesses had merely repeated M.F.'s allegation of a fleeting poke to the outside of his clothing, as no other evidence actually existed. None of the witnesses had actually claimed to have been present during the incident, and none of the witnesses claimed M.F. claimed anything more sexual than the alleged poke outside of his clothing, which he explained in trial, correcting the State and the Defense attorney both that he was not wearing diapers, but actually a "pull-up", and was in his pajamas when the poke happened in Mr. Bettys' livingroom.

Since State chose not to support the alleged hearsay, and all such hearsay is now inadmissible evidence upon this review, all we have is the child's word of an alleged fleeting poke through his pull-up and clothing, by the paid care provider, who was specifically entrusted by the parents with the child's care. This does not allow an inference that a sex crime occurred, nor is this sufficient evidence that the poke was child molestation. Lack of Corpus Dilecti, for charging.

"We agree that, under powell because veliz touch A.F. over clothing, the State was required to prove that he touched her for the purpose of sexual gratification, regardless of whether the area she described is characterized as intimate or sexual part..."

In Powell, 62 Wa.App. 914 there was no caretaker function of a 10 year old which would require touching of the genitals, and the title uncle was honorary, unlike here where defendant was related, and proven to be the caretaker of a 4-5 year old child who wore night time diapers. The Child testified what the purpose of the poke alleged by him was for, but the State did not want the hear this on stand live testimony which was infact the child clarifying State mistake of charging an innocent party in error, simply because no one took the time to consider Bettys was innocent, simply because 20 years ago he was guilty of a criminal act. Even though he has not failed to register even once in those 23 years of life. Merely Propensitive conviction.

"Evidence an unrelated adult with no care taking function wiped a 5-year old childs genitals with a washcloth might have been insufficient to prove he had acted for the purpose of sexual gratification", here we see even less evidence? State V. Johnson, 96 Wn2d 926(1982)

Herein, we look to the best light of the state, after excluding the unproven or merely inadmissible evidence. We are left with a fleeting poke to the child's pull-up (diaper), through the clothing, by a paid caretaker, whom is related to the child through marriage, when the child was somewhere between 4-5 years of age, which was all verified by the case witnesses, and the live testimony of the child. State even charged the parents erroneously with leaving the child in Bettys' care, showing the State knew that Bettys was the caretaker of the child, or those charges would simply be to harass and threaten the parents into complying with the prosecution. These are the facts of this case in the light best to the State. The Child clarified there was but one incidence. 8RP 142 at 19. The child clarified it was at John's house. 8RP 144 at 5; 8RP 148 at 4. This disavows the hearsay the State relied upon which involved another house altogether, which the child never testified to in trial. The Child was able to say why he was poked, to check his pull-up, even correcting the counsel that it was not a "diaper" and he was in his pajamas and pull-up while in the livingroom.

Child's mother further addressed she was the one who normally dealt with his pull-up diapers. 12RP 91 at 1; 12RP 91 at 11-17... Marrison Bettys discussed diaper checks with our son Harley, which the State did not charge for some reason? 12RP 72 at 19-25 73 at 1-14,.. This is the practice taught in the classes, and used on most any child a reasonable person would check. The point is was the State reasonable, in attempting to contradict the live testimony of the complaining witness, who stated the non-sexual purpose for the alleged poke. M.F. had his pull-up diaper checked through his clothing, per live in trial testimony, which the State chose to ignore in an attempt to get a life strike conviction. 8RP 170. This violates RPC 3.3...

"If the touching was accidental or done for some purpose other than sexual gratification, the element of sexual contact is not satisfied." State V. Stevens, 127 Wa.App. 267(2005).

"Our Constitutionally based criminal justice system prefers erroneous acquittals to erroneous conviction, thus, public policy dictates that if there is any doubt about whether the Jury verdict would have been the same" had the issues not occurred, we must reverse... see State V. Koch, State V. Easter 130 Wn2d at 242...

Judge even found that Bettys had been left in care of the child in question, and the sworn affidavit proved such also. CP 285; 14RP 54 at 12-17....

#### ER 612 VIOLATIONS

##### A. Did the State error in allowing an ER 612 violation before the Jury?

Det. Coapstick during his testimony, testified directly from his notes, which did give the impression to the Jury that his testimony was extremely accurate, as he even corrected his live testimony before the jury from on the stand. 12RP 20 at 4.

"Notes are to aid the memory not supplement it" State V. Little, 57 Wn2d...

This goes to improper vouching, as the State specifically asked about the notes.

## CUMULATIVE ERROR DOCTRINE

### A. Does combination of errors require this Courts actions?

Cumulative error requires Court's action even where each error standing alone would be considered to then be merely harmless error. see State V. Grieff, 141 Wn2d 910(2000); State V. Hodges, 118 Wa.App. 668 (2003). But absent prejudicial error, there exist not cumulative error depriving a Fair Trial. see State V. Saunders, 120 Wa.App. 800(2004). This case presented multiple errors raising prejudice, combined????

## CONCLUSIONS

Sexual gratification, an ultimate fact of the essential element sexual contact, which the State merely asks that we infer. M.F. (Complaining witness) testified to the purpose for the alleged poke to the outside of his clothing, by the proven parental agree caretaker and relative of M.F., a 4-5 year old child, who had admitted to still wearing pull-ups at age seven (7) in live trial testimony. The Clearly testified to reason for the alleged poke, to check his "Pull-up" (diaper), even correcting State and Defense attorney(s) both to the facts.. M.F. verified it only happened "Once" per live testimony, and it happened at MR & MRS Bettys' house... Which is consistent with Dr. Yuille's findings almost a year pretrial. CP 60. This is clearly a non-sexual purpose for the poke the child had earlier alleged, but was never asked why he was poked.

Presumption is only permissible if the evidence supports the presumption, but where direct evidence is contradicting the presumption (M.F.'s live testimony), there exist reasonable doubt, and a presumption should not arise. see State V. Graciano, #40289-1-II (2010). There was no proof that anything sexual was the intent of checking M.F.'s pull-up diaper. State did not charge Bettys for checking his son's diapers, Nor Mrs. Bettys who testified how diapers feel different when wet, and M.F.'s mother who testified to helping M.F. with his pull-ups and underwear when needed. Why was Mr. Bettys singled out, because 19 years ago he had committed a terrible, sick, discusting crime and the State did not feel the man here today, the father and loving husband was different. He was charged and convicted for a crime he paid for 20 years ago...even though his rights had been legally restored, and he was breaking no laws caring for M.F. and his son.

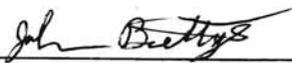
Bettys does not feel this Court should remand this case for 4th degree assault under the facts presented even though an unwanted touch can be assault, this should not be applied where the adult was the approved child caretaker and relative, of a 4-5 year old child, who was wearing pull-up diapers, at the time of the poke (per live testimony on State's redirect), and the mother testified to helping the child with his pull-up diapers and underwear. We know the child stayed the night at the Bettys' home, that Mr. Bettys took him to school.alone, But per the child nothing took place any of these other time while alone, only why another adult was having a smoke just outside the door, nothing in this case supports any kind of crime was even though of being committed, especially a sex crime. State charged a diaper checking of a 4-5 year old child.

'Improper Vouching occurred when the State placed the weight of the government behind a witness or the evidence.' United States V. Roberts, 618 F.2d 530(9th Cir. 1980). Det. Coapstick, Mathew Shope, Ect.....

Mr. Bettys should be allowed to return to his loving wife and son, the case should be dismissed now.

DATED This /8<sup>th</sup> day of April, 2012.

Respectfully Submitted,

  
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John E. Bettys                      Pro Se SAG

DECLARATION OF SERVICE BY MAIL  
GR 3.1(c)

I, John E. Bettys, declare that on this 18<sup>th</sup> day  
of april, 2012, I deposited the following documents:

1. Statement of Additional Grounds Brief (SAG)
2. Letter to the Court Clerk

or a true and correct copy thereof, in the internal mail system of  
Clallam Bay Correction Center, postage affixed, addressed to:

Court of Appeals Div. One  
One Union Square  
600 University St.  
Seattle, Wa. 98101-4170

Mr. Andrew P. Zinner, Attorney  
Nielsen, Broman, & Koch  
1908 East Madison St.  
Seattle, Wa. 98122

Mr. Erik Pedersen, Senior Deputy  
Skagit County Appellant Division  
Skagit County Prosecuting Attorney  
Courthouse Annex  
605 South Third St.  
Mount Vernon, Wa. 98273

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 APR 20 AM 11:33

I declare under the penalty of perjury under the laws of the  
State of Washington that the foregoing is true and correct.

DATED At: Clallam Bay Washington, in Clallam County, On 4/18/12.

John Bettys  
(Signature)

DOC No. 711306 House No. BD-04  
Clallam Bay Correction Center  
1830 Eagle Crest Way  
Clallam Bay Wa. 98326

John E. Bettys  
(Printed Name)