

74304-3

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STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 PEDRO CRENSHAW)
 (your name))
)
 Appellant.)

No. 74304-3-I

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, PEDRO CRENSHAW, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

SEE ATTACHMENT

Additional Ground 2

SEE ATTACHMENT

2016 AUG 16 11:10 AM
STATE OF WASHINGTON
COURT OF APPEALS
CLERK

If there are additional grounds, a brief summary is attached to this statement.

Date: AUGUST 10, 2016

Signature: 

GROUND #1

Did the Prosecutor commit misconduct by failing to give defense information on expert testimony used in manifest throughout the State's case-in-chief against Mr. Crenshaw?

The sixth amendment guarantees the right to confrontation via due process of the fourteenth amendment to ensure that defendants receive a fair trial. The State failed to give the defendant discovery information on the State's expert opinion testimony used to convict Mr. Crenshaw. The State was in direct violation of federal rule of criminal procedure (16) "Government Disclosure" and CrR 4.7 "Discovery Rules" as the State provided no expert witness summary of "Retrograde Analysis." State v. Olsen, 157 WN. APP. 1019 (2010): Quoting State v. Hutchinson, 135 WN. 2d at 882 (1998). Violation of discovery rules warrants dismissal of evidence, time to interview witness, or time to prepare to address new evidence. In keeping with this court decision. State v. Sherman, 59 WN. APP. 763 (1990) "In preparation, the defense should be allowed to prepare an adequate defense."

Ultimately, the prosecutor cannot control a witness' testimony. However, the prosecutor should adequately prepare a witness as to what they can and cannot testify to, especially in regards to the defense's Motions in Limine. In the State's response to the defendant's trial brief, more specifically the State's "response to defendant's motions in limine" (Motion #9 Retrograde Analysis), the State agreed to not pursue the use of retrograde analysis against Mr. Crenshaw. The prosecutor showed willful disregard in pursuing and expanding upon the improper testimony of retrograde analysis by the

GROUND #1 cont'd

State's toxicologist (RP 543 - 545). The court then abused its discretion in overruling the defense's objections (RP 542, 543, 545) to the State's testimony of retrograde analysis. State v. Powell, 126 WN. 2d 244, 258, 893 P. 2d 615 (1995) on "Untenable Grounds." State v. Lamb, 175 WN. 2d 121, 127, 285 P. 3d 27 (2012).

The trial testimony of ASA Louis (RP 542 - -561) concerning "Retrograde Analysis" was improper, prejudicial, and damaging beyond any curative instruction as it was used to prove a necessary element of the crime charged. State v. Thorgerson, 172 WN. 2d 438, 442, 258 P. 3d 43 (2011): quoting State v. Magers, 164 WN. 2d 174, 191, 189 P. 3d 126 (2008).

The misconduct of the prosecutor resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." State v. Lindsay, 180 WN. 2d 423 (2014). The jury would have believed after Mr. Louis' testimony that the State did in fact provide actual scientific data or evidence that Mr. Crenshaw was indeed over the legal limit at the time of the incident.

Under constitutional error and the harmless error theory, a violation of the defendant's constitutional rights must be dismissed unless the State proves beyond a reasonable doubt that the violation did not prejudice the defendant. State v. Watt, 160 WN. 2d 626, 635, 160 P. 3d 640 (2007).

Ground #2

Did the State fail to prove the necessary elements of the crime charged under REW 46.61.506.

This charge has two prongs as provided under jury instruction #19 (WPIC 90.06). Under the first prong the State failed to provide that within “two hours” after driving that Mr. Crenshaw was over the legal limit of “0.08 Blood Alcohol Concentration” as in RCW 46.61.506 and RCW 46.61.502. City of Seattle v. Norby, 88 WN. APP. 545 (1997).

Under the first prong the “Two Hour Rule” is an additional “Implied Element” and must be proven beyond a reasonable doubt. The State must show a connection between the results from the blood or breath test, which was taken at 10:15 p.m. and (recorded by the Washington State Toxicology Lab as containing a “BAC” of “0.089”) to the time of driving at 7.21 p.m. when the emergency call was placed. State v. Creditford, 130 WN. 2d at 747 (1996).

The State attempted to use Retrograde Analysis to show the jury that Mr. Crenshaw’s “BAC” was outside of the legal limit within “two hours” from the testimony of State Toxicologist Mr. Asa Louis using “Widmark Formula” (RP 542 – 561); over the defendant’s objections (RP 542). However, to tell Mr. Crenshaw’s “BAC” level backward through time using this method of Retrograde Extrapolation would be impossible without the scientific variables needed, i.e., Mr. Crenshaw’s (height, weight, metabolic rate, amount and types of alcohol consumed, food consumption, time of last drink, etc.), as Stated by the scientific community. Mr. Louis admitted in open court to not having any of the scientific variables needed to make any assumptions

Ground #2 cont'd

(RP 560: 6– 2). Any opinion given under this testimony would have been improper as it was not built on a tier of fact and was in violation of Fed. Evid. Rule 702, which requires any expert opinion testimony to be based on sufficient facts or data. The prosecutor soliciting Mr. Louis' opinion of the "BAC" in question as to would it have been higher or lower with respect to time using "Widmark Formula" knowing that Mr. Louis did not have the supporting facts was unlawful. "Shopping for a Dubious expert opinion is fabricating evidence." Mulstein v. Cooley, 257 F. 3d 1004 (2001). An objection was made by the defense but was overruled by the court (RP 544).

Mata v. Texas, 46 S.W. 3d 902 (2001) States that "expert testimony of retrograde calculations based on what is known as Widmark's Formula has been excluded on the basis of both unfair prejudice and insufficient information about variables used in the formula under other circumstances; absorption versus elimination phase. After one or more hour has passed a large amount of scientific uncertainty exist" "The greater the time, the greater the variables." See also: Frye/Daubert Hearing State of New Jersey v. Jayson Williams (2003).

Under the second prong of this charge as in RCW 46.61.506 also requires the State to prove beyond a reasonable doubt that Mr. Crenshaw's ability to drive was diminished to any appreciable degree. State v. Distefano, 764 A. 2d AT 1156 (2000). The State failed to present "Under the Influence" testimony by a qualified "medical" expert. United States v. Tsosie, 791 F. Supp 2d 1099 (10th CIR. 2011) referring to Daubert. The State offered some broad speculation and general assumptions as to how alcohol could affect a person but never addressed how Mr. Crenshaw's driving

Ground #2 cont'd

ability was affected, if any, (VRP 546 – 549). Nor, was any testimony given to support that Mr. Crenshaw exhibited any intoxicated behavior or appeared as such during direct observation in which this court has outlined. Faust v. Albertson, 143 WN. APP. 272, 281; 178 P. 3d 358, 363. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F. 3d AT 1311, 1319 (9th CIR. 1995) requires the court to scrutinize the proffered expert's reasoning is sound, the court must not only decide whether the expert is qualified to testify, but whether the opinion testimony is the product of reliable methodology.

In a criminal prosecution, the fourteenth amendment's due process clause requires the State to prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. At 460, 476 – 477 120 S. Ct 2348, 147 L. Ed. 2d 435 (2000).

Ground #3

Did the State allow false testimony from State's witness and fail to correct; therefore, violating the confrontation clause and due process?

The sixth amendment of the United States Constitution and Wash. Const. Article 1, Section 22 guarantee's a criminal defendant the right to confront and cross-examine witnesses. Delaware v. Van Arsdall, 475 U.S. 673, 679 106 S. Ct. 1431, 189 L. ED 2d 674 (1986), States that there is error if there is a substantial likelihood that the jury's impression of the witness's credibility would have been changed if not due to the exclusion of special lines of cross-examination.

In order to prevail on a due process claim based on the prosecution of false evidence or false testimony, a petitioner must show that 1) the testimony was false, 2) the prosecution knew or should have known that the testimony was actually false, and 3) the Statement was material. Hayes v. Brown, 399 F. 3d AT 972, 984 (9th CIR. 2005).

First, the prosecutor allowed the State's witness Jennifer Quintanilla (wife of the victim) to testify under oath as to not having tried to record conversations with Mr. Crenshaw (RP 171 – 172) and then failed to correct the false Statement. However, during Mrs. Quintanilla's pre-trial interview, (recorded on video by the State), with the prosecutor and defense counsel present, Mrs. Quintanilla explained in detail her filing of a civil suit against Mr. Crenshaw and her attempt to illegally record their phone conversations for use in her civil litigation at her civil counsel's request. Mr. Crenshaw's appellate counsel retains a copy of the interview to be viewed at the courts discretion as evidence. With the aid of the prosecutor Mrs. Quintanilla hid from the court her attempt

Ground #3 cont'd

to illegally record Mr. Crenshaw to gain evidence for her civil suit against him in violation Washington State Law RCW 9.73.030 (Illegal Recording).

Secondly, the prosecutor failed to inform the jury and the court of the civil suit (see exhibit #1) Juan Quintanilla v. Pedro Crenshaw [Case No: 13-2-08711-0]. Which was served to Mr. Crenshaw at his house on November 8, 2013 shortly after the accident occurred on September 12, 2013, in which Jennifer Quintanilla is listed as joint petitioner. If the prosecution would have corrected the false testimony (RP 171 – 172), the defense could have shown that the witness perjured herself in a criminal proceeding and that the reason she tried to illegally record Mr. Crenshaw was because her civil suit was effectively stalled without a criminal conviction. This provides Mrs. Quintanilla's motive to lie in a criminal court United States v. McKenna, 327 F. 3d 830 (2003), by committing perjury under Napue v. Illinois, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959) and RCW 9A. 72. 010.

The prosecutor knew that the Statement was false and that the law suit between the Quintanilla's and Mr. Crenshaw was factual as it actually existed and is on-going. It is not fictitious or a future "potential law suit" as the prosecutor lead the jury to believe (RP 173). In State's response to defendants' motions in limine (motion #3 to exclude prior bad acts), the prosecutor "agrees" that these acts should be excluded as it was "Mrs. Quintanilla that investigated these acts on the advice of her civil counsel." This reinforces the fact that the prosecutor knew of things that Mrs. Quintanilla was asked to do by her civil counsel including trying to illegally record Mr. Crenshaw. The record demonstrates that the prosecutor was aware or should have been aware of the civil suit

Ground #3 cont'd

and the false testimony. Hoover v. Carry, 508 F. Supp 2d 775 (9th CIR. 2007) States that, lawyers are required to correct false testimony in accordance with RPC 3.3 (9) (2); quoting State v. Gregory, 158 WN. APP. 2d AT 759 (2005). "The Exposure of a Witness' Motivation in Testifying is Proper and Important Right of Cross-examination." Gregory, 158 WN. 2d AT 833.

Clutchette v. Montgomery, (9th CIR. 2015) States that perjured testimony is not subject to separate harmless error review under Napue, to be materially false a Statement need only be "Relevant to any Subsidiary Issue Under Consideration." United States v. Locco, 450 F. 2d AT 1196, 1199 (9th CIR. 1972) States that we need not prove that the perjured testimony actually influenced the relevant decision making body. *Ld.*, Further, materiality is tested at the time the alleged false Statement was made: "Later proof that a truthful Statement would have not helped the decision making body does not render the false testimony immaterial." *Ld.*, AT 1199.

Mrs. Quintanilla's false Statement and the prosecutors mis-representation of the civil suit were material as they were favorable to the defendant as impeachment evidence would influence the jury's impression of the witness United States v. Leon-Reyes, 177 F. 3d AT 816-820 (9th CIR 1999) and as in United States v. Dunnigan, 507 U.S. 87, 94, 122 L. Ed. 2d 445, 113 S. Ct. 111 (1993) and U.S.C. Section 1623 (a), by casting a shadow of doubt on the entire testimony. The financial motive was material as the introduction of a criminal conviction would virtually guarantee a win in the civil court for the Quintanilla's. State v. Apodaca, 99 WN. APP. 1052 (2000): See also Commonwealth v. Bowie, 243 F. 3d AT 1109, 1116 (9th CIR. 2001).

Ground #3 cont'd

The prosecutors job is not just to win but to win fairly. United States v. Hill, 953 F. 2d 452, 458 (9th CIR 1991). Carey, 508 F. Supp. 2d AT 775 States “A conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the fourteenth amendment.” Ld., citing Napue, 360 U.S. AT 269. “Indeed, if it is established that the government permitted the introduction of false testimony reversal is virtually automatic.” Ld., Even false testimony that goes to the credibility of the witness is “Implicit in any concept of ordered liberty.” As Stated in Re Personal Restraint of Benn. 134 WN/ 2d/ 868 (1998): quoting United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49. There is no excusable reason to allow for the violation of a defendant’s constitutional right of due process “Even if the government unwittingly presented false evidence.”

EXHIBIT 1

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IN THE SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

Juan Quintanilla and Jennifer Quintanilla,
husband and wife, and their marital
community property,

NO. 13-2-08711-0

Plaintiff,

COMPLAINT FOR DAMAGES

v.

Pedro Crenshaw, a single individual; Jane
and John Does 1-10; ABC DEF GHI JKL
Corporations,

Defendants.

NOW COMES the plaintiff, JUAN QUINTANILLA, by and through her attorneys of record. EDWARD K. LE, PLLC, who appears before the Court complaining against the defendant, PEDRO CRENSHAW, a single individual, as follows:

I. INTRODUCTION AND JURISDICTION

1.1 This is a complaint for bodily injuries arising out of an automobile collision occurring on or about September 12, 2013.

1.2 All acts and omissions herein described occurred in Snohomish County, Washington.

1.3 Further, at all times material hereto, the above-named parties resided in Snohomish County, Washington.

1.4 Consequently, this court has subject matter and personal jurisdiction over this cause.

1.5

COMPLAINT FOR DAMAGES- 1



EDWARD K. LE, PLLC
ATTORNEYS AT LAW
136 Park Avenue North

1 **II. LIABILITY**

2 2.1 On or about September 12, 2013, the plaintiff was a passenger in a vehicle being driven
3 by Defendant Pedro Crenshaw travelling eastbound in the 6300 block of Lowell Larimer Road.
4 in Snohomish Washington. Defendant drove his vehicle into a ditch, taking out several sections
5 of a fence. Defendant then continued to drive in the ditch before colliding into another vehicle.

6 2.2 Defendant, through common law, statute, regulation, and/or ordinance, owed Plaintiff the
7 duty to ensure that the vehicle being driven by Defendant was operated in observance of duties
8 which include, but are not limited to: exercising due care and caution as the conditions required;
9 maintaining a proper lookout; keeping defendant's vehicle within the proper lane of travel;
10 observing and obeying all rules of the road pursuant to RCW 46.61 et seq; and otherwise
11 insuring that the defendant driver exercised the ordinary and reasonable care required of a
12 reasonable and prudent driver under the circumstances while operating a motor vehicle within
the State of Washington.

13 2.3 Defendant breached his duties as set forth in paragraph 2.2.

14 2.4 The above collision was directly and proximately caused by defendant's breach of duties
15 and his negligence as set forth in paragraph 2.1 and 2.2.

16 **III. DAMAGES**

17 3.1 As a direct and proximate result of the said collision, the plaintiff was severely injured; and
18 that although medical attention and supportive remedies have been resorted to, said injuries,
19 together with pain and suffering, emotional distress, discomfort and limitation of movement,
20 prevail and will continue to prevail for an indefinite time into the future; that it is impossible at
21 this time to fix the full nature, extent, severity and duration of said injuries, but they are alleged
22 to be foreseeable, permanent, progressive and disabling in nature; that the plaintiff has incurred
23 and will likely continue to incur medical expenses and other expenses to be proved at the time of
24 trial, added to his general damages, in an amount now unknown.

25 3.2 Plaintiff Jennifer Quintanilla, has lost the love, care, comfort, support, and society of
26 husband, Juan Quintanilla, and has had to provide services for Juan Quintanilla, all to their
27 general damages, in an amount now unknown.
28



1 3.3 As a direct and proximate result of the said collision, plaintiff is entitled to a prejudgment
2 interest on all medical and other out-of-pocket expenses directly and proximately caused by the
3 said collision.

4
5 **IV. PRAYER FOR RELIEF**

6 WHEREFORE, the plaintiffs prays for judgment against the defendants and each of
7 them, jointly and severally, for the following damages

- 8 1. For an award of damages compensating Plaintiffs for his physical injuries in an amount to
9 be proven at trial;
- 10 2. For an award of damages compensating Plaintiffs for his past and future medical and out-
11 of-pocket expenses, in an amount to be proven at trial;
- 12 3. For an award of damages compensating Plaintiffs for his past and future pain and
13 suffering in an amount to be proven at trial;
- 14 4. For an award of damages compensating Plaintiffs for his past and future mental and
15 emotional distress in an amount to be proven at trial;
- 16 5. For an award of damages compensating Plaintiffs for diminished earning capacity in an
17 amount to be proven at trial;
- 18 6. For an award of prejudgment interest on all medical and out-of-pocket expenses directly
19 and proximately caused by the negligence herein in an amount to be proven at trial;
- 20 7. For an award of damages compensating Plaintiffs for his costs and disbursements herein
21 in an amount to be proven at trial; and
- 22 8. For such other and further relief as the court may deem just and equitable.

23 Dated: November 8, 2013.

24 By: EDWARD K. LE, PLLC



25 Edward K. Le, WSBA No. 27086
26 Kagnar Som, WSBA No. 43898
27 Attorneys for Plaintiff
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