

NO. 335 80-8 - II

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COURT OF APPEALS

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STATE OF WASHINGTON

Respondent,

Vs.

RICHARD PLECHNER

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable James B. Sawyer II, Judge
Cause No. 04-1-00283-4

(AMENDED)

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

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EXHIBIT No. 2 A, 2B & 2C
(Local News Reports)

EXHIBIT No. 3
(Represents the form the Judge was writing on while he was talking)

NOTE:
A BASIC OVERVIEW OF CASE CAN BE FOUND IN EXHIBIT 2A, 2B,& 2C

A. ASSIGNMENT OF ERROR No.1

The trial court erred in calculating my (Plechner's) sentence and exceeded statutory maximum sentence for what I was convicted.

On page 591 volume IV of the Partial Report of proceedings, Line 21 it says ;" I believe that a midrange sentence is appropriate and will impose on count III, 50 months, on count II, 14 months, on count III;- on count I, 29 months, on count I, 9 to 18 months of community custody with standard conditions, ..."

Consequently, if you use their erroneous range of 43 to 57 months; the sentence is excessive, and exceeds statutory maximum, because 50 months of custody and 18 months of supervision, equals a 68 month sentence, and the maximum by their calculation was only 57 months. (EXHIBIT 3) represents what the Judge was writing on while he was talking. This is his standard form and the way he dose it. (See Exhibit 3).

In State vs. 2 AVAL- REYNOSO 127 Wn, App. 119 April, 2005. It says, "[9] pr. 13 Under R.C.W. 9. 9 41A 505. (5) " Except as [other wise} provided....A court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum of the crime as provided in chapter 9A. 20 RCW."

(Emphasis added). Since the sentencing court imposed a sentence exceeding Mr. Zavalla - Reynoso's statutory maximum, we vacate his sentence and remand for resentencing in a manner consistent with this opinion. KATO, C.J., and Sweeney, J., Concur.

B. ASSIGNMENT OF ERROR No. 2

The trial should have dismissed the charge of Hit and Run after the trial if not before: Because....Part (c) of the charge requires: "Render to any person injured in such accident reasonable assistance, including the carrying or making of arrangements for carrying of such person to a physician or hospital for medical treatment If it is apparent that such treatment is necessary or if such carrying is requested by or on behalf of the injured person, contrary to R.C.W. 46.52.020 (4) (b).

In the the trial, page 253 Volume II of Partial Report of Proceedings, it clearly shows that there was no reason for me to think that he needed to go to the hospital or seek medical treatment. He had no apparent serious injuries. Further, there was no medical evidence that he needed to go to the hospital, and/or testimony from any medical professionals. Therefore, the jury was left to guess what a medical person would say about his need to go to the hospital

In State vs. Melrose, 2 Wn. App. 824, 831, 470 P.2d 552 (1970). States:
When Substantial evidence is present. The drawing of reasonable inferences there from and the doing of some conjecturing on the basis of such evidence is permissible and acceptable.... If, however, the necessity for conjecture results from the fact that the evidence is merely scintilla evidence, then the necessity for conjecture is fatal.

The jury was told by the prosecutor to basically Second Guess, My Guess, as to whether: "Otto Holz really needed to go the hospital," without offering any medical proof!

State vs. Harris, 14 Wn. App 414, 542 P.2d 122 (1975) {3} Evidence - Use of conjecture - In General. While inferences and conjecture are valid when based upon substantial evidence, their use is not permitted to form conclusions from mere Scintilla Evidence.

Also the Prosecutor and Judge decided for the jury if I intended to comit taking the motor vehical without the owner's permission, Hit and Run and Assault. The way the jury instructions were writen they never had to decide if I had intent.

In the case of Frank Quattrone v.s. the United States of America, a New York Federal Appeals Court, this year, threw out the conviction of Frank Quattrone because the jury instructions were flawed and because the Judge's comments during trial rose beyond mere impatience or annoyance. His lawyers argued that the Judge's Instructions allowed the Jury to convict Quattrone without first determining whether he knew he was obstructing a Federal Investigation. Citing the Supreme Court's decision to overturn a guilty verdict against "Arthur Anderson," last year. The Appellate Court agreed, writing: "Under the Charge, the Jury was allowed to convict regardless of whether he intended such." This is all most exactly what happened in my case!

C. ASSIGNMENT OF ERROR No. 3

On page 120 Volume I, Partial Report of Proceedings. The Court Errored in not suppressing the conversation with officers Campbell and Rhoades. If you believe Officer Campbell, then it's very unlikely, at the least, that I believed or had the intent, to think that I was involved in a "Hit and Run" or "Assualt 3". Because if my state of mind was such, there is no way I would make any statements to the officers without the bennifit of an attorney, or you can believe Officer Campbell...which takes us to:....

State vs. Woods, Supra at 695, which quotes from Miranda vs. Arizona, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974 (1966), as follows:

[T]he Prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrataes the use of procedural safeguards effective to secure the privilege against self-incrimination.
;n other words ... The Statements made to Campbell and Rhoades should be suppressed.

D. ASSIGNMENT OF ERROR No. 4

The trial court was in error when it did not dismiss my case with prejudice on January 4th, instead of without prejudice, because it violates my constitutional prohibition against "double jeopardy." I had already had to bail; out on the charge (4) times ...then the prosecutor pulled this trick, to in effect, get a continuance and exceed my right to a speedy trial. If it is not violation of my constitutional prohibition against double jeopardy ... what would stop the prosecution from perpetually continuing to dismiss the case... then just re-charging it, over and over? Forcing me to make bail, over and over, until I was broke,... and that's exactly what happened.

In State vs. R Rinehart 21 Wn. App. 708,586, P. 2d 124

"This case should be dismissed for the additional reason that the trial court's order of dismissal, the subject of this appeal, is barred by the Double Jeopardy Clause of the State Constitution. (Const. art. 1 9). RAP 2.2 (b) provides: the State or a local government may appeal in criminal case only from the following Superior Court Decisions and only if the appeal will not place the defendant in double jeopardy.

(1) *Final Decision, Except Not Guilty.* A decision which in effect abates, discontinues, or determines the case other than by judgment or verdict of not guilty, including but not limited to a decision setting aside quashing, or dismissing an indictment or information.

The fundamental rule that judgments of acquittal, no matter how erroneous, bar any retrial and thus forbid appeal by the state where reversal would require a retrial has recently been affirmed in *United States v. Scott* 437 U.S. 82, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978). Notwithstanding its overruling of *United States v. Jenkins*, 420 U.S. 358, 43 L. Ed. 2d 250, 95 S. Ct. 1006 (1975). *United States v. Scott*, supra, stated at page 91:

A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.

(Italics mine.) Also, *United States v. Scott*, supra, citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 1 L. Ed. 2d 642, 97 S. Ct. 1349 (1977) with approval, stated at page 97:

A defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, supra, at 571.

An important reason for applying the double Jeopardy rule has been stated in yet another case, *Burks v. United States*, 437 U.S. 1, 11, 57 L. Ed. 2d 1, 9-10, 98 S. Ct. 2141 (1978).

The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State...to make repeated attempts to convict an individual for an alleged offense," since "[the constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184m 187 (1957; see *Serfass v. United States v. Jorn*, 400 U.S. 470, 479 (1971).

(Footnote omitted.)

In addition, this court in *State v. Jubie*, 15 Wn. App. 881, 552 P.2d 196 (1976), held that a trial court's dismissal of an information following a challenge to the sufficiency of the State's evidence was in essence a judgment of not guilty and an acquittal when the trial court weighed some or all of the evidence in arriving at its conclusion. It was reasoned that in such a case an appeal would be violative of the double jeopardy clause.

In the subject case RAP 2.2(b) specifically prohibits the State's appeal since it would place the defendant in double jeopardy. The State is without authority to appeal.

E. ASSIGNMENT OF ERROR No. 5

The trial court Judge should have recused himself, as the judge should have done in, "Quattrone v. The United States of America."

In that case the New York Federal Appeals Court throughout the conviction of Quattrone in part because of the comments of U.S. District Judge Richard Owen. They said: that his comments during trial which rose "beyond mere impatience or annoyance." "were part of that reasoning." Also, he denied Quattrone's request for a different Judge.

In my case I was denied a change of venue despite my name and facts plastered all over the local papers. The stories took up almost three (3) full 8.5 x 11 pages. See (Exhibit 2-A). I live in a town of less than 25,000 people and almost everybody in town had read and/or and or heard of the case. Therefore, the necessity instruction should have been added to the Jury Instructions Regarding the Assault Charge.

Further, the Judge failed to take in consideration the Exceptional Sentence Rules, in the R.C.W.'S. Namely, 9.94A.010 and 9.94A535, as well as, Rule 7.8....I feel the following comments from the Judge reflect the merits of my position. They also show that the court didn't even consider the law. (R.C.W.'S 9.94A.010 and 9.94A535 as well as, Rule 7.8)

My testimony was stricken and sustained seventeen times. Line 19, page 353, Line 2 page 354, Line 22 page 358, Line 10 page 361, Line 9 page 365, Line 2 page 366, Line 23 page 369, Line 7 page 384, Line 12 page 385, Line 1 page 390, Line 1 page 392, Line 1 page 397, Line 2 page 401, Line 23 page 403, Line 24 page 407, Line 13 page 435, Line 15 page 436, (All From Volume 1). Therefore, if you removed all my sustained

testimony from the report, it would look as if I never testified. My Attorney was not able to fix this deficiency. In addition, At my sentencing hearing the Judge stated: "And that's why, in this case the assault does not fall into the Necessity Instruction so far as I'm concerned, because the conduct was - even if acting in necessity - necessary for him to act with reasonable care, that includes not committing criminal negligence and injuring another person." Line 4, page 495, Vol. III Partial Report of proceedings.

There could and is, many situations where the "greater good" could only be accomplished by a minor assault. This should have been a question for the Jury. It is a national mandate that "Friends don't let friends drive drunk. As a practical matter, have you ever tried to stop a Drunk from driving? Drunks by their very nature are not reasonable.

Further on page 496 Vol. 1 of the Partial Report of Proceedings, Defense Attorney Pimentel said: "And I don't know to what extent appeals lawyers read these, what we're saying here, but I do want to say something in case they do. And that is that I guess what I'm saying all along is that, if the State recognizes the mistake of overlooking a potential danger, which in essence, what criminal negligence is. That's what the reasonable man is." Then on line 9 page 496 the Judge responds with: "That's where you and I disagree counsel, and that, is that ."

First of all, even though the judge got the "jest" of what my Attorney said ... you can clearly see just how bad his A.D.D. is. Also, on the same note, you can also see how the Judge showed prejudice against me. I personally do not see how anyone placed in the middle of every conceivable mess, could always preserve the "Greater Good," and never violate the law.

In Real Life situations there would be at least Three (3) diametrically opposing factors. (1) Do not do anything that could be "second guessed" at a later date by someone who has all the time in the world to mull over every conceivable option. (2) Insure that in every instance nobody gets hurt. (3) Act fast enough, so that, one has at least the expectation of having a reasonable chance of success, yet not so fast as to be considered negligent.

I feel the Judges standard of what a "reasonable man would conclude" Standard," was unrealistic, a superman couldn't maintain such a lofty virtue.

The Judge clearly made certain that the jury instructions reflected his point of view. Rather than giving the jury the question of weather I had intended such. (See Exhibit 1-A). Finally, on Page 592 Vol. IV Line 18 the Judge say's, "You believe, Mr. Plechner, that everybody in the world bends the law the way you do." Clearly, the Judge is mind reading because, I never said or testified, in any way, about people "Bending the Law." Obviously, the Judge was prejudiced against me, and should have recused himself.

Laws that I feel the Court did not consider at my Sentencing are as follows: Exceptional Sentence - 9.94A.535.

The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences - Mitigating Circumstances.

1. To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.
2. The offense was principally accomplished by another person and the defendant was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well - being of the victim.
3. The operation of multiple offense policy of R.C.W. 9.94A 589 results in presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in R.C. W. 9.94A010.
4. 9.94A.010 Purpose: To ensue that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history.
5. Be commensurate with the punishment imposed on others committing similar offenses; offers the offender and opportunity to improve him or herself. D.O.S.A.. And makes frugal use of the States and Local Government Resources.

Rule: 7.8 Relief from Judgment or Order

Clerical mistakes - Clerical mistakes in Judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any , as the court orders. Such mistakes may be so corrected as the court orders. Such mistakes may be so corrected BECAUSE REVIEW IS ACCEPTED BY AN APPELLATE COURT, AND THEREAFTER MAY BE CORRECTED PURSUANT TO RAP 7.2. (E).

Mistakes; Inadvertence: Excusable Neglect, Newly Discovered Evidence, Fraud, ect., on motion and upon such terms as are just, the court may relieve a party from a final judgment order, or proceeding for the following reasons:

1. Mistakes, in advertence, surprise, excusable neglect or irregularity in obtaining a judgment or order:
2. Any other reason justifying relief from the operation of the judgment

F. ASSIGNMENT OF ERROR No. 6

My lawyer was not only deficient he was borderline in competent: in fact, in one situation he forgot the question he was asking me. (See Volume III page 401, line 3). On page 547 line 5 of Vol. IV of the Partial of Proceedings my attorney say's: "And you know, on of the things I want to tell you as we start off is that, that I am un - medicated A.D.D. and if at any time I've appeared abrupt or disrespectful or anything like that, I don't mean to be. I made the choice not to be on medication and I manage it by just really struggling along. But - and so I oftentimes forget things, I forget the mike, I , do things like that

After my Attorneys was appointed in the court room , he came down to the jail to see me. We spoke for no more than approximately thirty (30) minutes, on that Thursday morning. At that time, it seemed to me, that he had a problem, however, I was concerned about how unprepared we were for trial and I did not realize just how sever his problem with A.D.D. could be, then it was to late.

I feel the facts I have presented, along with the evaluation my Appeal Attorney submitted, with reference to my Defense Attorney, clearly show that my Attorney was both deficient in his preparation for the trial, and ineffective in my defense.

This situation was further compounded, by the fact, that during that thirty (30) minute meeting, prior to the trial, my Attorney revealed to me, his belief about the justice system. He said: "look, the law say's you have a right to an attorney And a defense ... not a "Cadillac Defense" but a "Yugo" defense ... one that gets you from here to there.

Once the trial started, and my Attorney started asking prospective jurors questions, my concerns mounted.... But at that point what could I do? Two months earlier I had asked for a new counselor, but the state strongly objected. But now on such short notice I was struck with a "Yugo" for an attorney ... one that wasn't technically prepared to properly represent me at this trial.

In fact, on line 7, page 561, Vol. IV, the Prosecutor had to correct him for making a massive blunder. He says: "No, No, No, No, that's not right," And then my lawyer says: "If you- yeah, it's the other way around." "If you prove - I'm a Dummy." If you prove this, you've proven all of these because They re- it's all encompassing. At this point it seemed he was out of control. I strongly believe, if I had been represented by a competent Attorney, the jury would have acquitted me of all charges.

G. ASSIGNMENT OF ERROR No. 7

The trial court erred when it included instructions No. 19 line 22 page 513 in volume IV, in the Partial Report of Proceedings. The instruction is unfair because it says: " (C) should give his name, address, insurance company, insurance policy number and vehicle

license number and exhibit his driver's license to any person struck or injured, or the driver or any person attending such vehicle collided with; and ...

Let me explain, Otto Holtz was far to "Drunk" to comprehend this information and, furthermore, it was impossible to communicate with him regarding these details, even if I had them available.

Consequently, the way I read the rule ... if a person's only "deficiency or legal short coming," in an accident, was that they did not have insurance ... they still would be guilty of Hit and Run, regardless of how long they stayed at the scene. It would not have mattered how long I stayed there. ... I still would not have been able to produce a drivers license or insurance. I feel the jury instructions was unfair and a violation of my "Protective Rights" under the Washington State and United States Constitution.

H. ASSIGNMENT OF ERROR No. 8

The trial court was in error because it allowed multiple sentences for an act, which constituted impermissible pyramiding of sentences (3 counts one act.)

In Gratton Earl Moore, Appellant v. United States of America 432 f. 2d 730, 1970, U.S. App. Lexis 7216., the defendant was convicted and sentenced on for (4) counts, charging offenses, based on a single bank robbery. The voluntary defender, who represented the defendant at trial, did not meet the defendant until the day before trial, unsuccessfully sought a continuance to enable him to better prepare for trial. In a pro - se application for post conviction relief, Under 28 U.S.C.S. §.2255, defendant claimed that his right to effective counsel was denied. The trial court denied defendant's application without and Evidentiary Hearing, and the court reversed. Belated appointment of counsel did not raise a presumption of ineffective representation. The adequacy of representation provided to defendant raise factual issues that could not be decided without and evidentiary hearing . The objection to the composition of the petit Jury was raised too late and was foreclosed. The four sentences imposed for offenses arising from a single robbery were impermissible pyramiding. The case was remanded for an evidentiary hearing and with directions to vacate all but on sentence.

The outcome of the order denying defendant's application for post - conviction relief was reversed and the case was remanded with direction to vacate the sentences on all but one count, and to hold and evidentiary hearing on appellant's claims. The Defendant's claims were not so unfounded that it was proper to reject them without an evidentiary hearing. The multiple sentences constituted impermissible pyramiding of sentences.

In my case, the Basic Facts are almost exactly the same. I wanted a change of venue, and I only saw my attorney for 30 minutes, on a Thursday, just prior to trial. The following Tuesday was our first day of trial. I never saw him again till then, he would not ask for experts or anything else. I did ask for a continuance and was denied.

I. ASSIGNMENT OF ERROR No. 9

I feel that Jury instructions 16 item (1), 18 item(2), and 19 item (3) all suffer from the same deficiency ... they do not take into account or offer the jury well established rules that they should use in determining a charge.

In State of Washington on v. Hubert Byron Gillingham, Jr. Respondent, 33 Wn. 2d 847, 207 P. 2d 737, 1949 WASH.. LIXIS 489. [3] says; "It is a well stabilized rule that, in order to sustain a conviction on circumstantial evidence, the circumstances proved by the State must not only be consistent with each other and consistent with the hypothesis that the accused is guilty, but also must be inconsistent with any hypothesis or theory which would establish, or tend to establish, his innocence. 23 C.J.S. 149, criminal law ..§. 907; 20 Am. Jury. 1069, Evidence, §1217.

In State v. Payne, 6 WASH. 563, 34 PAAC. 317 this court, in reversing a judgment of conviction for the crime [16] of grand larceny said: {855} "No man ought to be convicted of a crime upon mere suspicion, or because he may have had and opportunity to commit it, or even because of bad character, and where circumstances are relied on for a conviction they ought to be of such a character as to negative every reasonable hypothesis except that of the defendant's guilt. And a new trial should be granted where a conviction is had on evidence not connecting the defendant with the crime beyond a reasonable doubt. Williams v. State, 855 Ga. 535 (11 S.E. Rep. 859).

There was never one scrap of evidence that I intended to, or intentionally took away, Otto Holz truck. And that I intended or intentionally committed a hit and run, or any kind of assault. I did not want Otto Holz to get another D.U.I. And have the truck impounded. (Because then I could not buy it.) Nor did I wish to get a D.U.I either, but at no time did it ever cross my mind, that I was involved in the above charges. In fact, nothing in the record is inconsistent with that theory.

J. ASSIGNMENT OF ERROR No. 10

The trial court failed to include the proper instructions relating to "knowing" in all 3 charges, in the instant case. The Jury instructions were flawed in my case. I feel that in State of Washington v. Richard Daniel Tembruell, 50 Wn. 2d 456 312 P.2d. 809 1957, WASH. LEXIS 365 (reported in 312 P. (2d) 809 clearly show that my jury instructions were highly prejudicial. The overview of the case is that the defendant assigned error in the trial courts instruction's relating to definition of the word "knowing" in relation to larceny cases.

The court held that the instruction did not properly inform the jury as to the statutory test by which they could infer guilty knowledge on the part of defendant. The court held that the instruction erroneously announced the law and was prejudicial.

Under the instruction, the trial court, rather than Jury, determined that defendant had guilty knowledge. The State argued that if the instruction issue was erroneous, any error was cured by the correct statements of the law in other instructions. The court disagreed and held a new trial be granted to defendant. The court held that the trial court also improperly admitted evidence relating to alleged liquor violations because the evidence was immaterial and had no probative value in determination of the guilt or innocence of defendant. Further, evidence concerning defendant's failure, after his arrest, to respond to an investigator's question of whether he knew the property had been stolen was not proper and should have been excluded. The court reversed and remanded with instructions to grant a new trial in this case.

K. ASSIGNMENT OF ERROR No. 11

The trial court prejudiced my case by first violating my right to speedy trial. By first granting the prosecutor 3 continuances, then failing to dismiss with prejudice, then refusing to grant me a continuance.

By the time all this happened the State Witness for the prosecution had completely changed her story. This fact, came to light, just before I was finally granted new counsel. Dan Moris the investigator for the defense testified that just a few days after said event, he interviewed the lead witness. When the new Attorney came on board (Mr. Pementel) It was discovered by all that the witness planned to completely change his story. At that point I felt strongly that the case needed to be Re-investigated and my Attorney would need time to assimilate the new information.

In *STATE v. Cannon* 130 Wn. 2d 313 [9-11] "A trial court's grant or denial of motion for a CrR 3.3 continuance or extension will not be disturbed absent a showing of manifest abuse of discretion" *State v. Silva*, 72 Wn. App. 80, 83, P. 2d 597 (1993)

L. ASSIGNMENT OF ERROR No. 12

Regarding the charge of taking a motor vehicle without permission, ... Jury instructions No. 16 (1) was a highly prejudicial error. The instruction fails to define "possession" It also implies, by default, that a person found guilty of this charge, had "possession "by the use of the word "took." (This can be found on page 511, Vol. IV, Partial Report of Proceedings.)

In *United States of America v. Kenneth Landry*, United States of Appeals Seventh Circuit 257 F. 2d 425, (1958) U.S. App Lexis 4507 July 30, 1958 we find I believe a good definition. It says; "It would not be helpful to quote the numerous definitions of the words "possess" and "possession" which have been called to our attention. As good a definition as we have seen is that of this Court in a criminal case, *United States v. Wainer*, 77 Cir. 170 F. 2d 603, 606. The Court stated: "To "Possess" means to have actual control, care and management of, and not a passing control fleeting and shadowy in its nature."

No one in my case said that I had control of the truck more than a few fleeting seconds. In fact, just enough time to drive ten (10) feet or less. The prosecutor even tried to make light of this fact. Because, on line 25, page 542 Vol. IV it says; "and I'm not here to tell you that this is the longest taking a motor vehicle case that ever came across the -around the corner, this is a short one."

So, even the prosecutor acknowledged that the time that I was "in control" of the truck, was extremely short. In fact, fleeting.

M. ASSIGNMENT OF ERRORS No. 13

The trial court was in error when it did not dismiss all charges when it found out that the Prosecutor and Otto made a total mockery of the court., and in fact, the prosecutor new or should have known, that his star witness was committing a crime every day to come to court. And a crime to go from court to his home. Yet, the Prosecutor let him sit on the stand, day after day like he was just some honest victim, doing his civic duty. Mr. Otto Holz, had told me when I first met him about his driving practices, taking back roads everywhere, so that he wouldn't be pulled over by the Mason Co. Sheriff's or the Washington State Patrol. In Mason County, the Superior Court is in the same building as the Sheriff's Department. Yet, for the entire week of my trial, Otto Holz would drive right through the middle of town, then up to the Sheriff's Office/Court House, with impunity..

I believe this act was a fraud on the court, and it undermines the integrity of the court. Everything Otto Holz said when he was on the stand was "tainted". Line 1 page 234 Mr. Holz told Mr. Plechner that he had four Prior D.U.I's, and that he had a significant drinking problem.

In line 13, "that's why we requested - there was no other way for me to get that information except from Mr. Plechner. I requested the D.C.H. from Mr. Schuetz to confirm what Mr. Holz had told Mr. Plechner, and it was accurate.." He does have four D.U.I.'s. How could the prosecutor not know that Otto Holz doesn't have a Drivers License? He gave my Attorney the D.C. H..

Early in the trial, it came to light that Otto Holz had four (4) D.U.I.s. Then the Prosecutor on line 21, asked Otto Holz, are you here today with the same vehicle, the Mitsubishi, Silver Mitsubishi Truck, that is involved in this case?

- A. Correct
Q. O K, is it outside?
A. It's outside
Q. OK, when you drive it, do you have - is the, is the bench seat - I believe you testified it has a bench seat?
A. Correct
Q. Is it adjusted for leg length?
A. Yes, it is

- Q. And where do you have it for your driving pleasure, racked all the way back or somewhere forward?
- A. Somewhere a little bit forward.

The prosecutor knew that Otto Holz is driving around town with impunity, four (4) D.U.I.s and no fear of prosecution. The Prosecutor knowingly let Otto Holz, with four known D.U.I.s, drive through town, to testify against me. Everyone in town including the Jury saw this!

On page 453, with the jury in recess, line 3, my lawyer accidentally brings up something that had nothing to do with what the prosecutor breaks out with next. On line 3 the Prosecutor says: "Well my objection here, your Honor, Frankly, is that counsel is now trying to create a mini trial that I would have to be a witness in, because he's asserting that the State is in general and personally actively coddling this witness, knowing that he has no license, and having him drive back and forth, which is absolutely not the case."

The Prosecutor made this statement to the Judge, but not to my 12 Jurors. It is now obvious to him, that he has prejudiced the Jurors against me with his "hands off" treatment of Otto Holz. He then has a "viewing of the truck", for the Jurors, right in front of the Court House, and there is Otto Holz holding the keys to his truck, in plain sight, with no other friend or potential driver around.

By now, the whole town knows that Otto Holz is the "Golden Boy" of the deputy prosecuting attorney and thanks to the local paper (See Exhibit 2A, 2-B and 2-3) they know he is a four time loser, actually five, because the prosecutor didn't charge him with driving under the influence on this occasion. The "integrity" of the court was jeopardized when Otto Holtz was represented to the jury as a victim with "Clean Hands."

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People v. Savvides*, 1 N. Y. 2d 554, 557; 136 N. E. 2d 853, 854-855; 154 N. Y. S. 2d 885, 887:

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter [*270] what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Alcorta v. Texas*, 355 U.S. 28; *United States ex rel. Thompson v. Dye*, 221 F.2d 763; *United States ex rel. Almeida v. Baldi*, 195 F.2d 815; *United States ex rel. Montgomery v. Ragen*, 86 F.Supp. 382. See generally annotation, 2 L. Ed. 2d 1575. **ALSO 360 US, 264**

In CONCLUSION, *My Rights were Violated Because :*

1. Conviction on testimony known to prosecution to be perjured as denial of due process, 2 L ed 2d 1575 and 3 L ed 2d 1991.
2. Unfairness or corruption of officers in performance of administrative functions in civil or criminal cases in state court as in violation of the Fourteenth Amendment, 98 ALR 411.
3. Suppression of evidence by prosecution in criminal case as vitiating conviction under principles of due process of law, 33 ALR2d 1421.

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." *The Court's have said; ... Also,*

"It is now so well settled that the Court was able to speak in *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110, 121, of the "long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." n4 As [***1223] previously [**1179] indicated, our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial. Accordingly, the judgment below must be

Reversed. "

n4 See, e. g., *Payne v. Arkansas*, 356 U.S. 560, 562; *Leyra v. Denno*, 347 U.S. 556, 558; *Avery v. Georgia*, 345 U.S. 559, 561; *Feiner v. New York*, 340 U.S. 315, 322, 323, note 4 (dissenting opinion); *Cassell v. Texas*, 339 U.S. 282, 283; *Haley v. Ohio*, 332 U.S. 596, 599; *Malinski v. New York*, 324 U.S. 401, 404; *Ashcraft v. Tennessee*, 322 U.S. 143, 149; *Ward v. Texas*, 316 U.S. 547, 550; *Smith v. Texas*, 311 U.S. 128, 130; *South Carolina v. Bailey*, 289 U.S. 412, 420. See also, e. g., *Roth v. United States*, 354 U.S. 476, 497 (dissenting opinion); *Stroble v. California*, 343 U.S. 181, 190; *Sterling v. Constantin*, 287 U.S. 378, 398; *Southern Pacific Co. v. Schuyler*, 227 U.S. 601, 611; *Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 261.

Mr. Justice Holmes, writing for the Court, recognized the principle over 35 years ago in *Davis v. Wechsler*, 263 U.S. 22, 24:

"If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of a state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

DECLARATION

I RICHARD PLECHNER DO HEARBY DECLAIR THAT THE FOREGOING IS MY STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW. I HAVE RECEIVED AND REVIEWED THE OPENING BRIEF PREPARED BY MY ATTORNEY. IN PREVIOUS PAGES OF MY STATEMENT I TRIED TO SUMMORIZE THE MAJOR ISSUES THAT I BELIEVE ARE ADDITIONAL GROUNDS FOR REVIEW. AND ISSUES THAT WERE NOT ADDRESSED IN MY ATTORNEYS BRIEF.

I UNDERSTAND THE COURT WILL REVIEW THIS STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW WHEN MY APPEAL IS CONSIDERED ON THE MERITS.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed in: Monroe , [City] Washington [State] on May 26, 2006 [Date]
AMENDED JULY 15, 2006 [Date]

Richard Plechner

Signature

Richard Plechner
Print or Type