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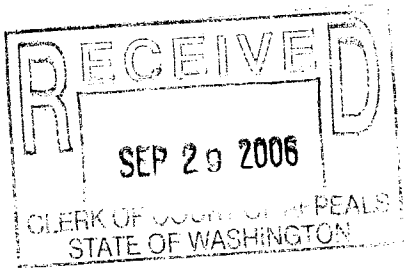

September 27, 2006

Mr. David C. Ponzoha, Court Clerk
WA. St. Court of Appeals Division Two.
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Re: Case #: 34133-6-II

Mr. Ponzoha,

Please find enclosed my statement of additional grounds for review.

Also find enclosed my personal restraint ~~petion~~ petition/Motion to proceed in forma pauperis/motion to consolidate personal restraint petition and statement of additional grounds for review.

I am in hopes that all my papers are in order. please take the necessary actions to file all the papers enclosed.

Thank you.

Truely yours

Jayson Smith

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

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DIV. TWO

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STATE OF WASHINGTON
BY [illegible]
DEPUTY

STATE OF WASHINGTON, Respondent, v. Jayson T. Smith, Appellant.	NO. 34133-6-II Statement Of Additional Grounds for Review

I, Jayson T. Smith, have received and reviewed the opening brief prepared by my attorney. Summarized below are 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 of merits.

Additional Ground 1

The trial court erred in granting the State's motion to withdrawing the amended information and entering an order withdrawing the amended information and allowing the State to reinstate the original information an add on the alternat means of of extreme indifference, that was never aparte of the original 1991 information.

Additional Ground 2

The trial court erred in not granting the Appellants motion to dismiss the case in furtherance of justice, when it was brought to the court's attention that the prosecution had violated and order of a disclosure request and that Governmental Misconduct by the prosecutions mismanagement of the case denied the Appellant his to counsel and a fair trial ~~finally the assects th~~

Statement Of Additional Ground Summary

Additional Ground 3

Ineffective assistance of counsel. Defense counsel failed to adequately investigate the case, which contributed to his failure to present a ~~the~~ coherent line of defense. The Appellant wishes to bring up issues in his statement of additionals for review that require evidence and facts not in the existing trial ~~recor~~ record. The Appellant request that this Court consolidate Additional Ground 3, ineffective assistance of counsel with the Appellant's Personal Restraint Petition. And at the time of review of the Appellant's Statement of additional grounds he ask that this Court reviews the Personal Restraint Petition concurrently.

Executed this 27th day of September, 2006

Respectfully Submitted

Jay Don Smith

Statement Of Additional Ground Summary

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Substantive Facts

Introduction

Additional Ground - 1

Now on appeal the Appellant maintains certain errors were made by the trial court, thus error placing the Appellant in double jeopardy, when the trial court granted the States Motion to withdraw the amended information and entering an order withdrawing the amended information and allowing the State to reinstate the original information as add the alternat Means of extreme indifference, which was never apart of the original 1991 information. The Appellant maintains that his conviction of felony Murder in the Second Degree (predicated on second degree assault) and one count of Assault in the Second Degree were vacated by operation of Law and not by the Appellants deception to procure the filing of an amended information in order to facilitate a plea bargain, but then fails to plea. The general rule is that an amended information supersedes the original. The courts have held that a guilty plea is equivalent to a conviction and has the same effect as a verdict of guilty following a jury trial. Therefore placing the Appellant in double jeopardy by recharging him with the crimes of Premeditated Murder in the First Degree and one count of Assault in the Second Degree.

Statement of Facts

On July 30, 1991, the State filed and original information against the Appellant charging with one count of Murder in the First Degree (Premeditated) and one count of assault in the Second Degree. As a result of a plea bargin, the State filed an

amended information and allowed the Appellant to plea guilty to one count of Felony Murder in the Second Degree (predicated on a second degree assault) and one count of Assault in the Second Degree. The State also agreed to recommend sentences of 298 months (low end of the standard range of 298-397) and 63 months concurrent on the assault count. The Appellant entered his guilty plea on February 3, 1992, the Honorable J. Kelley Arnold presiding. At a sentence hearing held June 18, 1992 the Appellant was sentenced to the recommended sentence of 298 months in prison.

Thereafter on October 21, 2002, the Washington Supreme Court decided In re Hinton, 152 Wn.2d 853, 100 P.3 801 (2004), which made its 2002 decision in In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), retroactive to 1976. By operation of law these cases invalidated the Appellant's conviction and sentence. Pursuant to these decisions on June 6, 2005, the Honorable Ronald Culpepper signed two orders, one vacating the Appellant's sentence, the other allowing the State to withdraw the amended information. However, the judge refrained from signing a motion by the State ordering the the Appellant's guilty plea be withdrawn.

Thereafter, on September 2, 2005, the Honorable Thomas J. Felnagle presiding, at a pretrial motions hearing the following motions were heard and ruled upon, 1: defense motion to have the court enter a finding of guilty on Manslaughter in the First Degree, this motion was withdrawn by the Appellant's counse, due to State V. Gamble where the Washington State Supreme Court ruled Manslaughter in the First Degree is not a lesser-included of Felony Murder. 2: Motion for the Court to formally enter an order withdrawing the Appellant's guilty plea to the charge of Felony Murder in the Second Degree. 3. Defense motion to strick and prohibit the State from ~~ch~~ recharging the Appellant~~s~~ with First Degree Murder. 4: The State's motion to amend, add an alternative of extreme indifference to the charge of First Degree Premeditated Murder.

At the said hearing, the Court failed to ~~order~~ formally enter an order withdrawing the Appellant's guilty plea to Felony Murder. Yet the issue was revisited on November 7, 2005. Verbatim Transcript

of Proceedings Trial November 7, 2005 (TP1) at 53-57. At such time the court did sign the order that withdrew the Appellant's guilty plea against his desire to do so. As to the other [illegible] in the September 2, 2005 hearing the Court granted those allowing the State to re-charge the Appellant with First Degree Premeditated Murder. The trial court signed the order allowing the State to amend and add an alternative of extreme indifference to the charge of First Degree Premeditated Murder. The trial Court was never clear as to the fact of whether ones conviction is vacated or the plea is withdrawn. The Appellant was under the understanding that the Supreme Court ordered the charges ~~vacated~~ vacated in their November 18, 2004 order in the matter of the Personal Restraint Petition of Hinton. In such order there was no mention of pleas of guilty being ordered withdrawn. Defense Counsel argued that there is a difference between a conviction being vacated or a plea being withdrawn, yet never specified what the differences between a conviction being vacated or a plea being withdrawn. Surely that is a difference for this Court to give an opinion to.

Argument

What is the result of the Appellant's plea being vacated?

1. Once a plea has been vacated, the State, in accordance with RCW 10.43.050, cannot charge the Appellant with a crime consisting of different degrees for the same crime in another degree.
2. In addition, the principle of due process require that the terms of a plea agreement be enforced not withstanding the explicit, contrary terms of a statue. State v. McRae, 96 Wn.App. 298, 303, 979 P.2d 911, 913 (1999) (citing State v. Shineman, 94 Wn.App 57, 971 P.2d 94 (1999)

When a plea agreement is invalidated through circumstance not of the defendant's creation, the defendant has the choice either to demand specific peformance of the agreement or to withdraw the plea.

E.g., State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). The defendant's choice of remedy controls, unless there are compelling reasons not to allow that remedy. State v. Miller, 110 Wn.2d 528, 535, 756 P.2d 122, 126 (1988). Such reasons might include a showing of prejudice to the State, or proof of fraud or deceit on part of the defendant. Shiverdecker, 94 Wn. App. at 61, 971 P.2d at 97.

In State v. Miller, the defendant entered a plea of guilty to first degree pursuant to a plea agreement that he would be free to argue his sentencing, including recommending an exceptional sentence of less than 20 years. Both he and the prosecutor mistakenly believed that the possibility of a sentence less than 20 years existed, when in fact the mandatory minimum term imposed by statute for first degree murder was 20 years. Miller sought to withdraw his guilty plea, believing that the plea agreement not legal, was not legal, was consequently unenforceable, and that therefore a withdrawal of the plea was the only available remedy. The Supreme Court disagreed, however, holding that fundamental principles of due process so dictate[d], the specific terms of a plea agreement on a mistake ... despite the explicit terms of a statute" 110 Wn.2d at 532, 756 P.2d at 125. After noting that a defendant's constitutional right under plea agreements take priority over statutory provisions", the Court concluded "To place the defendant in a position in which he must again bargain with the state is unquestionably to his disadvantage. The security he had gained as a result of a the plea negotiation from being charged with the more grievous offense would be lost.... The defense is entitled to the benefit of his original bargain." Id. at 533, 756 P.2d at 125.

3. Under CrR 4.3.1(b), related offenses must be joined for trial. A plea agreement has the same effect as a trial. The State would be precluded from charging the Appellant with any other related offense unless the exception under the 'ends of justic' is found. Several cases ruled that a Defendant whose charges have been vacated under 'Andress' may be charged with intentional murder in the second degree or manslaughter in the first or second degree. State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004). The Appellate Court then remanded the case to the Superior Court to determine if the ends of justice would be defe-

ated by not trying Ramos for manslaughter.

4. The general rule is that an amended information supersedes the original. State v. Oestreich, 83 Wn. App. 648, 922 P.2d 1369 (1996) (citing State v. Johansen) An exception exists when a defendant procures a filing of an amendment, but then fails to plead. This did not happen in the instant case. The conviction was ~~vact~~ vacated by operation of law and not by means manufactured by the Appellant.

5. When a conviction is reversed, due to an insufficient charging document, the result is a dismissal of charges without prejudice to the right of the State to recharge and retry the offense for any lesser included offense. State v. Vangerpen, 125 Wn. 2d 782, 791, 888 P.2d 1177 (1995)

6. The federal double jeopardy clause bars trial if three elements are met: (a) jeopardy previously attached; (b) jeopardy previously terminated; and (c) the defendant is again in jeopardy for the same offense. State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). Jeopardy attached for Murder in the First Degree when charges were filed and terminated with the plea to felony murder in the second degree. Therefore the trial court erred when it allowed the State to refile the original information, thus, placing the Appellant in double jeopardy.

CONCLUSION

The Appellant ask that this Court vacate the conviction of Murder in the First Degree (Premeditated, Extreme Indefference) and Assault in the Second degree, remand the Appellant back to the Superior Court to be charged and tried for the charge of Intentional Murder in the Second Degree.

Dated this 21st day of September 2006

Jayson Smith
Appellant

STATEMENT OF ADDITIONAL GROUND FOR REVIEW

Substantive Facts

Introduction

Additional Ground-2

On appeal the Appellant maintains certain pretrial errors or their cumulative effects deprive him of a fair trial and counsel and resulted in his conviction. In particular he argues that the trial court erred in not granting his motion to dismiss the case in furtherance of justice, when it was brought to the courts attention that the prosecution had violated an order of a discovery request and that governmental misconduct by the prosecutions mismanagement of the case denied the Appellant his right to counsel and a fair trial. Finally, he assert that if this Court's finds the individual errors alone's require reversal, it should hold that all the errors taken together requires reversal.

The Facts at Pretrial

On September 2, 2005, in the Superior Court of the State of Washington in and for the County of Pierce, the Honorable Thomas J. Felnagle presiding, held a pretrial motion hearing. In attendance Mr. Jayson T. Smith, the Appellant, Mr. Ronald Heslop, defense Counsel for the Appellant, Mr. John Need, the State, for the Plaintiff. Verbatim Report of Proceedings, motion September 2, 2005 (RPM) at 32-33. Defense Counsel Made a disclosure request be ordered, that the State provide a list of their witnesses, Civilian and police officers, ~~whithi~~ within a week. The State agreed and so did the Court ordered.

On November 7, 2005, the day of trial set to begin. Verbatim Transcript of Proceedings:, Trial, November 7th and 8th, 2005. Verbatim Transcript of Proceeding Trial, November 7, 2005. (TP1)

Verbatim Transcript of Proceedings, Trial, November 8th (TP2).

TP1 at 3-5. Defense Counsel brings to the trial Court's attention that the State has violated the disclosure request ordered by the Court, that the State had not disclosed their witness list of whom they intend to call to trial. On September 9th the State gave defense counsel a list of 8 of their civilian witnesses and their addresses, that list contained none of the police officer witnesses as requested by defense Counsel. And of the 8 civilian addresses given, only 2 were currently where the witnesses lived. TP1 at 3-45. Defense Counsel describes to the Court the diligent efforts they made to get the State to comply with the Courts order, also explaing how the State had been dilatory and defiant to complying with the order, and how the State's arbitrary actions denied defense counsel compulsory access to the State's witnesses and their ability to have an opportunity to prepare for trial. TP1 at 37. The State feign to be cooperating with defense Counsel and in compliance with the Courts order, by claiming to file a witnesses list on October 7th, thus, to pacify defense counsel and stop the defense from badgering him with the request for his witness list and witnesses addresses. TP1 at 15. The State claims to have had requested to have Detective Barnes reappointed to the case to find the State's witnesses. TP1 at 36. It was discovered by defense Counsel when interviewing Detective Barnes, that he in fact had been working the Puyallup fair and not out searching for the State's witnesses. TP2 at 13. And that Detective Barnes had not started searching for the State's witnesses until the Thursday before the week trial was set to begin. TP2 at 49. The State claims because of the fact there never was an omnibus hearing held, that he in fact never violated an order of a disclosure request, feign as though he had not indeed agree to the order. TP2 at 60. The Court rejects this line of defense from the State and

clerks records giving the order, had it been an omnibus hearing or not. TP1 at 36-37; TP2 at 9, TP2 at 49-50. In several instances the State perjures himself in order to keep from being found in violation of a disclosure request order, because he was in fact requested for a list of their police officer witnesses, and he did indeed violate the order, for no list of police officers were listed in the State's September 9th witness list given to defense Counsel. TP1 at 11-12. The State did not provide the defense with their witness list until November 2nd, which consisted only of names and addresses, and on November 7th, the day of trial, the State finally submits their formal witness list to the court and defense, again no addresses. The State's November 7th witness list consisted of 39 names of witnesses, some in which the State themselves had not yet found to interview, some witnesses maiden names, and in one or two cases names of witnesses whom were in fact deceased. TP1 at 13. The State on the day of trial extends their November 7th witness list to include expert witnesses Lenny Hebert and Ted Schlosser, whom were not on the November 2nd or September 9th witness list given to Counsel. The Court did ~~not~~ order to suppress Hebert though, due to the fact his reports and name were not disclosed in discovery, when defense was initially issued a copy of discovery, in several instances defense was deprived several reports when initial issued discovery. TP1 at 11-12. The discovery was issued to defense incomplete and the missing documents were in control by the State and had not been given to defense Counsel until 4 to 5 days before trial was set to begin, crucial documents and material evidence that could have proven to be of great importance to the Appellant's defense on cross-examination TP2 at 6-6. As a remedy to dismissing the case the court rules to suppress the newly provided ballistic evidence. TP2 at 8. In furtherance of the State's witness list it was deter-

noted that of the State's November 7th witnesses list contain-
39 witnesses. 14 of those witnesses were not disclosed to
defense counsel in the November 2nd witness list the State
gave him. Concluding the State on the day of trial extended
their witness list to include 14 witnesses, that defense
counsel never had the opportunity to interview witnesses in
advance to trial and adequately prepare a defense.
TP2 at 56-7. The trial court issues its opinion and ruli-
ng to the Appellants motion to dismiss the case. TP2 at 57
The trial Court recognizes the State's obligation to ident-
ify who they are going to call as witnesses to trial and
turning over all discovery in their custody to defense and
how they did not do that. However, the court contends, ess-
entially, that defense had an obligation to independ-
ently find the State's witnesses, if it intend to use those
witnesses for different purposes than the State's prop-
osed to use them for. TP2 at 60. The Trial Court excuses
the State for not providing their witness list sooner,
stating reasons, such as, the case is 14 years old and
witnesses being hard to find or reluctant to being involved
with a dangerous high profile case. The trial Court continues
to give excuse for the State's being dilatory in preparing the
case for trial. TP1 at 15-16. Although the State confesses, not
earnestly preparing for trial until ten days before trial
is set to begin. TP1 at 21-22. However, in a span of five days,
the Thursday ore for trial is to begin, Detective Barnes lo-
cates the were abouts of all the States witnesses addresses.
So the trial courts excuse for the ~~wit~~ State, of witnesses,
being hard to find, because the case is 14 years old carries
no weight. TP2 at 61. The trial Court faults defense Counsel
for not for not Motioning the Court in regards to the State's
obligation of either providing defense with a specific witness-
list or only up dating some witness information. TP2 at 62-63.
The trial court determined the State did not act with subver-

sure intent to disadvantage the defense, yet recognizes the State's failure to act diligent in preparing the case did disadvantage the defense. All the while ignoring the fact the State Misconduct need not be of mal evil or dishonest nature; simple mismanagement falls within such a standard. TP2 at 63. The trial court rules not to grant the Appellant's Motion to dismiss the charges, reasoning defense had had a great bulk of the information and the State in Good Faith Made and attempted to get what information they had to the defense. TP2 at 63-71. The trial court gives its ruling of remedies to lessen the burdens on defense by suppressing evidence and witnesses. Verbatim Report of Proceedings, Volume 3, November 14, 2005. (RP3) at 53-65. The evidence of the photomontage was not properly memorialized. the State, its Staff and the Detectives failed to adequately preserve the photomontage and a very crucial and important piece of evidence in the favor of the Appellant's defense at trial was compromized and lost to the Appellant due to the Fact a proper foundation for the photomontage could not be provided to introduce in to evidence and presented to the jury. TP3 at 59. The State concedes to the fact one of the photomontages was indeed missing. Missing do to the derelict of the State and their staff not maintaining the evidence and failing to make sure it stayed intact. RP3 at 76-91 The defense counsel argument to suppress the ballistic evidence deficient and not in the best interest to the Appellant's defense at trial and in no way can ~~the~~ it be considered a tatic of defense, because with the ballistic evidence suppressed so was the defense for the Appellant at trial. There was eyewitness testimony of there being 2 Shooters at the Seen of the crime. The jury did not get to hear such evidence. The trial court should have recognized the error by defense counsel and reasoned the suppression of the ballistic evidence would only prove to be more prejudicial to the Appellant. However, the trial court ruled to suppress the ballistic evidence. Evidence that could have proven crucially important in the role of the Appellant's defense at trial. The State is not without fault in the ballistic. There is no excusing the State's failure in not providing ballistic

reports to defense counsel where discovery was disclosed. The courts have observed that the actions of the employees of the crime lab are considered actions of the State. The State had an obligation to Manage all Material evidence, documents and reports in their control that Made up the discovery. The State failed to check to Make sure the discovery was complete when issuing a copy to defense counsel. This error was harmfully prejudicial to the Appellant. Therefore denying his right to counsel. For counsel was denied the opportunity to adequately prepare the evidence and Make a full investigation of the evidence, facts and laws applicable to the case.

TP1 at 20; RP3 at 100-101. As to the ballistic evidence the same errors were Made with the State's Mismanagement of the fingerprint evidence. The State did not even bother to process the fingerprints recovered, by having comparisons Made. Yet again another crucial piece of evidence that could have proved important to the role of the Appellant's defense at trial was not presented to jury. This due to the State's Mismanagement of the case. This error and all the collective errors the State Made in Management of the evidence in this case, was extremelly harmful errors that ultimately were prejudicial and violated the Appellants right to counsel and a fair trial. By no stretch of the imagination can it be considered inadvertent or coincidental that every piece of Material evidence, report and document that could have proved beneficial to the defense of the Appellant at trial, was either not provide to counsel until the week before trial was to begin or was missing or had not been processe in order to be presented at trial. This Court can surely recognize that Mismanagement by the State was prevalent through out the preparation leading up to trial. And find either those acts were intentionally subversive to disadvantage the Appellant at trial or that the State was grossly negligent in their Management of case. And due to that Mismanagement it violated the Appellants right to counsel and a fair trial. Therefore find ample reasons to order a reversal of the trials Court decision not to dismiss the charges against the appellant.

Argument

TP2 at 71. The trial courts admission to his prejudice to his discretionary authority to dismiss a case was of such a bias nature that it distorted his comprehension of the facts and it reflected in his opinion and ruling decision, as such to make excuses for the State and their arbitrary acts and gross negligence of managing the case and preformance of their obligatory duties. Such acts by the State were impermissible prejudicial to the Appellant that they deprived him of his right to counsel and violated his right to a fair trial.

The State failed miserably in his obligatory duty to follow the rules set forth in CrR 4.7 Rules of Discovery (2) Prosecuting Authorities Obligations, specifically rules (a)(1)(i)(iii)(vii)(2)(4). And under CrR 4.7 (7)(i)(ii) the court need not find it to be a willful act. However, gross negligence will suffice. TP2 at 62 The trial court recognized the States failure to carrie out their obligatory duty in handling discovery. TP2 at 63. And the States lack of diligentee in handling the case which ultimately disadvantaged the Appellants counsel in preparation to trial. The Trial Court had ample instances of MISMANAGEMENT by the State in the case which to support the trial courts discretionary decision to dismiss the charges. TP2 at 62. And goes on record to State so. However, rather than dismiss the charges in the furtherance of justice by imposing a severe sanction, the trial court admonish the State and excused their inexcusable acts. And hands down a pusillanimous ruling of alternative remedies in a meager attempt to lessen the burden on the Appellant. Those remedies only promoted the furtherance of the disadvantages to the Appellant and advanced the prejudice to his right to a fair trial. Thus, by not presenting all the facts and evid-

exist to the jury to be capable of making a well informed decision as to the Appellants innocent or guilt. And as a consequent to the trial courts, overrated ruling, led to the Appellant being unfairly tried and convicted.

The proceedings leading to trial were unpermissible slower, it's evident is in the failure of all parties involved that an omnibus hearing was not held. The absence of an omnibus hearing in this case acted as a cancer and led to the decay of the Appellants right to a fair trial. Thus, by causing the inexcusable failures of the prosecution preforming their obligatory duties to Rule CrRLJ 4.7 Discovery (a)(1)(i)(iii)(vii)(2)(4). Had the rules of CrR 4.5 Omnibus hearing (b)(i)(ii) and CrR 4.5 (c)(ii) been strictly adhered to as the laws of due process insist upon. Then all necessary steps would have been put in place to assure the Appellant's right to a fair trial was protected and his right to counsel and cleared him of any Governmental mismanagement of a prosecution that prejudices the defense counsel's ability to adequately prepare for trial. Verbatim Report of Proceedings Volume 3 November 14, 2005 (RP3) at 86-87. The absence of the omnibus was note worthy of the court and how the state failed in their obligation. TP2 at 71-72. Though the State has tried to use the absence of an omnibus as a legal standing for not fulfilling his discovery obligations, it still does not excuse his violations of discovery. Surelly in the State's lengthy 13 almost 14 years of practic, the process of dealing with discovery and the obligation is habitual. So there is only one of two choices as to the reason the State failed in supplying counsel with all discovery, in order to adequately prepare for trial and those choices are either the State willfully with held discovery in

order to subvert defense counsel to adequately prepare for trial to disadvantage the Appellant's counsel at defending him at trial, or the State was grossly negligent in his duty of managing the case. Whichever of the two it may be, a simple "OPPS I'm sorry" from the State does not cure the prejudice to the Appellant. Even with the courts orders to remedy the disadvantages placed upon him by the State's failure to produce all discovery in a timely fashion for his counsel to adequately prepare for trial, the State's violation/gross negligent/mismanagement still proved to be prejudicial to the Appellant at trial.

The absence of ~~a~~ an omnibus hearing in this case proved to play a crucial role in ~~the~~ counsel's deficiencies or the Appellant's rights to counsel and a fair trial. The Appellant was at the mercy of all partys involved in this case and ~~a~~ laws have been put in place to assure each party member preforms their individual duties and obligations to assure the Appellant receives a fair trial, and each party Member failed in their duties in regards to the rules of the Omnibus hearing and therefor failed the ~~def~~ Appellant, which in turn deprived his right to counsel and a fair trial.

The State's failure to identifying their witnesses in a timely fashion denied the Appellants right to counsel. State v. Burri, 87 Wash. 2d 175, 183, 550 P.2 507 (1976) The unauthorized interference described, violates the defendants constitutionally protected right to a fair trial. U.S. Const. amend. 6; const. art. 1, §22 (amend Ment 10) A fair trial contemplates the defendant will not be prejudiced by the denial to him of his right to counsel and compulsory attendance of witnesses. Wood v. State, 155 Fla. 256, 260, 19 So. 2d 872. (1944) See State v. Pryor, 67 Wash 216, 219, 121 P. 56 (1912) As next appears, these rights include the opportunity to prepare for trial.

A defendant is denied his right to counsel (U.S. amend 6; Const. art. 1 §22 (amendment 10) if the act of the prosecution denies the defendant's attorney the opportunity to prepare for trial. Such preparation includes the right to have a full investigation of facts and law applicable to the case. State v. Hartwig, 36 Wash 2d 596, 601, 219 P. 2d 561 (1950), states: The constitutional right to have the assistance of counsel, Art. I §22, carries with it a reasonable time for consultation and preparation. ... Preparation for trial also includes the right to confer with ones own witnesses In the case at bar, that would infer to the Appellants counsel to confer with the State's witnesses as well.

The State's violation of CrR 4.7 Discovery (a)(1)(i) denied counsel compulsory access to the States witnesses in advance to trial. See State v Page, 32 RT 1153, 1159, 80 A. 12 (1911), the defendants right to compulsory process includes the right to interview a witness in advance of trial. Defense Counsel was put in a position to interview witnesses by the State as trial was in process and ~~as~~ at times only Moments before witness were to take the stand and testify. in this case.

Due to the State's, failure to provided the current address of all the witnesses in the discovery in a timely fashion it deprived defense Counsel the right to ~~#~~ interview every single witness connected to this case. The attorney of the Appellant not only had the right but it was his plain duty toward his client to. Fully investigate the case and interview and examine as Many possible of the eye witnesses to the shooting and murder in question, together with any other person who might be able to assist him in ascertaining the truth concerning the event in controversy.... The Appellant has ~~the~~ the constitutional right to have compulsory process for obtaining witnesses to testify in his behalf, to ascertain what their testimony will be. Accord, Wisniewski v. State, 51 Del. 48, 92. 138 A. 2d 333 (1957).

The State's violation of Rule CrR 4.7 Discovery (a)(1)(i) caused a rippled effect that prejudiced the defense Counsel in Making

a full investigation of all the facts, and had the potential of leading to witnesses in behalf of the ~~defense~~ Appellant. The trial Court contend that the defense Counsel had an obligation to independently find the State's witnesses if he wanted to use the State's witnesses for different reason that the State proposed to use them. However, defense Counsel is not clairvoyant and cannot foresee what a state witness will tell him until he interviews them. In State v. Sherman 59 Wash App. 763, 801 P 2d 274 (1990) See 59 Wash App at 769. The fact that the State did not have physical control of the records, or that the defense did not independently attempt to locate the records, does not excuse the State's actions. . . "The defense had no obligation to attempt to get the records from the State's complaining witness because the State agreed to provide them." Id. So it should have been determined ~~by~~ the ~~the~~ trial Court in the Appellant's case.

~~The State argued for a continuance to allow defense time to~~

It can not be considered the State attempted in good faith to get their witnesses addresses to defense, when the September 9th, Witness List of 8 names and addresses, only 2 of the addresses were current. And but only one of those witnesses did the State actually intend to call to trial and not even ~~that~~ was that witness address ~~was~~ current. And the November 2nd witness list contained no address of witnesses at all and the names of 14 witnesses were absent in that list ~~and~~ ~~then~~ yet were added on to the November 7th witness list at the day of trial, and not until the day of trial and at the order of the court did the State produce contact information of their witnesses to defense counsel. See State v. Sherman 59 Wash App at 770. The State argues for a continuances for defense to interview the witnesses of the State that the State failed to act with due diligence to make available before trial.

Turning this Court's attention to the issue of discovery in this case. Three quintessential piece of evidence in the

control of the State, were in one form or another ~~[illegible]~~ had been compromised by the State's governmental Misconduct. Therefore MISMANAGED. State v. Burri, 87 Wash 2d 175, 550 P 2d 507 (1976). Held "It should be noted that governmental misconduct need not be of evil or dishonest nature: simple MISMANAGEMENT also falls within such a standard."

1: Ballistic report and evidence. The State and its their staff failed to produce the ballistic report, when requested counsel his copy of discovery CrR 4.7 (a)(1)(2)(3)(4) obligate the the State to supply and disclose such discovery to defense counsel in a timely fashion. So defense counsel could process the evidence in order to have an opportunity to adequately prepare. TP1 at 20-21. The State offers and excuse as to why he did not provide defense counsel with the ballistics report until the week trial was to begin. The State's excuse does not excuse the fact, the report was in the control of the State and or their staff. Was this a harmless error? No. This is a murder case and assault where a person was shot and killed and another shot and assaulted, COMMONsense allows there is potentially ballistics information and evidence recovered that plays a crucial role in the case. And the State's commonsense failed him and he failed to MANAGE such evidence with the importance it so deserved. Therefore a crucial ~~piece~~ piece of evidence was failed to be provide in a timely fashion and unfortunately was suppressed and with it the secret of what potential benefits it may of had for the Appellant at trial. ~~[illegible]~~ The trial Courts decision to suppress the ballistics due to the State's tardy compliance with discovery, only succeeded in furthering the prejudices to the Appellants right to a fair trial, the remedy should not been to suppress the ballistics, but should have been to dismiss the Charges. As done in State V. Sherman 59 Wn App. (1990). Where the State in that case fail to provide IRS records

2: Photomontage Evidence: Due to the Sloppy discovery practices of the State and their staff, they failed to properly Memorialize and adequetly preserve the photomontage (in which contained a photo of the Appellant), caused for the evidence to be compromised and unable to be used in its entirety at trial. RP3 at 51-65. The photomontage was a crucial and pertinent piece of evidence in the Appellants defense and the State lost this very valuable piece of evidence. And as a result proved to been prejudicial to the Appellant at trial. For witnesses Weisenbach and Hardy/Mooney were but two of many shown the photomontage, where the Appellant appear in the photo line up that they and all other witnesses had not picked the photo of the Appellant. However, 14 years after the fact Weisenbach and Hardy/Mooney take the Stand and claim to now be able to identify the Appellant. Where on cross-examining the photomontage would have proved crucial to defense in questioning those witnesses identification of the Appellant. If they were unable to ID the Appellant when shown his photo 14 years ago in hours after the shooting, how can they be so sure now. Had the jury had such a piece of evidence to deliberate they would have been furnished with all the facts, instead of only what the State wanted the jury to believe was all of the facts. As in the ballistics all the same authorities that apply their only here to the photomontage as well.

3: Fingerprint Evidence: Again the discovery disclosed to the defence Counsel was deficient of this evidence. The discovery supplied to defense only ~~made~~ made reference to latent prints being taken. However, like all other Material evidence in this case the Sloppy discovery practices of the State and their staff persevere yet again. RP3 at 100-101. The State failed to process this evidence and did not Make any Comparison of the 5 Latent prints that were gathered to determine

whom those prints belong to. The discovery reports many witnesses having witnessed two shooter and two suspects at the scene of the shooting. The State and their staff failed to process all the evidence in this case to determine all the participants in this crime in order to identify just whom the perpetrator actually is. And therefore denied the Appellant the right to a fair trial by offering all evidence generated in this case to the jury.

With this collection of discovery violation or prosecutorial Mismanagements in this case, surely this court can see how the Appellant [redacted] was prejudiced by the actions of the State. Actions in which denied the Appellants counsel the ability to adequately prepare for trial-- a denial of the defendants right to counsel. Burri, 87 Wn. 2d at 180. As noted by the court in Burri, the right to counsel is an ingredient of a fair trial. 87 Wn. 2d at 183.

For the Lack of a better Metaphor the States actions amounted to Stacking the deck against the Appellant. As in State v. Sherman, 59 Wash App 763, 801 P. 2d 274 (1990) (Citing) State v Daile, 93 Wn. 2d 454, 610 P. 2d 357 (1980) "The Mismanagement here is similar to that in State v. Dailey. There the trial court relied on numerous instances of prosecutorial mismanagement occurring throughout the proceedings as grounds for dismissal of a charge of Negligent homicide. On review, the Supreme Court found that incidents of mismanagement in the case-- the State's late compliance with the omnibus order; its failure to disclose its witness list until 1 day before trial, its dilatory compliance with the bill of particulars, and late dismissal of charges against a codefendant-- amply supported the trial court's discretionary decision to dismiss the charges because of due process violations 93 Wn. 2d at 459.

Once this Court has the opportunity to examine the State's

errors, in this case, I trust that this Court will conclude that the trial court erred in not granting the Appellant's motion to dismiss the charges and this Court will recognize that the trial court's rulings to cure the prejudices inflicted upon the Appellant only achieved to further the prejudices against the Appellant.

The Appellant therefore, respectfully request of this Court to reverse the trial court's decision not to dismiss charges, and dismissing the charges with prejudice to the State, that the State's errors were prejudicial to the Appellant and beyond a reasonable doubt did violate ~~the~~ ~~Defs~~ his constitutional rights to counsel and a fair trial.

If this Court does not find any of the above-described errors to require reversal individually, this Court should order a reversal as the total effect of the errors deprived the Appellant of his right to a fair trial. The cumulative error doctrine applies when individual trial errors may not be sufficient to compel a new trial, but taken together, deprived the ~~at~~ Appellant of a fair trial. See, e.g., State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, the errors ~~deer~~ described above, taken together, deprived the Appellant of a fair trial and require reversal.

Conclusion

For all of these reasons, Jayson Thomas Smith respectfully request this Court to reverse his convictions.

Dated this 27th day of September 2006

Respectfully submitted,

Jayson Smith

Jayson T. Smith
The Appellant