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DIVISION II

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STATE OF WASHINGTON
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CS. # 34149-2-11

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON
Respondent,
v.

RICHARD DONNELL SMITH,
Appellant.

STATEMENT OF Additional GROUNDS

CERTIFICATE OF MAILING

I [illegible] SAG
Brief to M. Bacon Adams
& R. Hayes
9-11-06 [signature]
Date Signed

Ground 1

The right to counsel is the right to the effective assistance of counsel. Stricland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). The assistance of counsel is deemed fundamental and essential to a fair trial of the accused as a matter of due process of law. The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Article 1, Sec, 22 of the Constitution of the State of Washington. The Court in Kimmelman v. Morrison, 477 U.S. 365, 374 91 L.Ed. 2d 305, 106 S.Ct. 2574, 2582 (1986) Stated that "the essence of an ineffective assistance claim is that counsels unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." In the present case, defense counsel elicited defendant by telling the State that the alledged victim called him and said "I'm not going to testify." VRP-477 and violating attorney/client privileges bringing forth a conflict of interest being that this is a he-say she-say case between the victim and the defendant and, which would have destroyed the prosecutors case.

Moreover, the trial counsel failed to produce the defenses chief witness and made no objections to missing witnesses VRP 47-48 See; Benn 134 Wn. 2d

In the case at hand, the trial counsel failed to include a lesser included offense instruction on the first degree rape charges. State v. Lyon 96 Wn. App. For the above stated reasons, Appellants trial counsels performance was under all the circumstances, unreasonable under prevailing professional norms and leaving a "reasonable probability" that but for counsels unprofessional cum-

ulative errors the results would have been different, thereby, the conviction should be reversed and remanded.

Ground 2

Prosecutorial Vindictiveness is the "intentional filing of a more serious crime in retaliation for a defendants lawful exercise of a Procedural right." State v. Bockman 37 Wn. App. 477, 488, 682 P.2d 925, Rev. denied, 102 Wn. 2d 1002 (1984) quoting State v. Mckenzie, 31 Wn. App. 450, 642 P.2d 760 (1981).

In State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), The court held "as a matter of law that the prosecutor acted vindictively in adding charges following Korums exercise of his right to trial." Korum, at 687 In the present case, the State filed several additional charges after the Appellant declined its' proposed plea offer prior to trial in violation of his due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. U.S. v. Sanders, 211 F 3d 711 (2nd Cir. 2000).

Conclusion

For the above stated reasons, this court must reverse and remand Appellant Smiths sentence and conviction.

Respectfully Submitted

Richard Smith

Mr. RICHARD D. SMith