

original

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

STATE
WASHINGTON,
Respondent,
Vs.
Joshua Calkins,
Appellant.

OF CASE NO: 34748-2-II
STATEMENT OF
ADDITIONAL GROUNDS
PURSUANT TO
RAP 10.10

FILED
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DIVISION II
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BY [Signature] DEPUTY

In addition to the issues raised by appellate counsel the appellant would like to bring to the court's attention the following grounds for review. It is the contention of this defendant that the accumulation of numerous errors by the trial court deprived him of a fair trial.¹ This Court has the authority under RAP 2.5(a) (3) to review error claims whether they be properly preserved or not, if the cumulative effect of all errors denies the defendant the constitutional right to a fair trial.² Although it is my contention that many of the errors listed warrant reversal on their own merit, this appellant would ask this court to also view all of the errors in light of, "The total effect of a series of incidents creating a trial atmosphere which threatens to deprive the accused of the fundamentals of due process."³ "The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors materially affects the outcome of a trial."⁴ "In analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently

¹ US Constitution 5th and 14th Amendments

² St. v. Alexander 64 Wn. App 147 150-151, 822 P.2d 1019 (1992)

³ St. v. Swenson 62 Wn. 2d 259, 382 P.2d 614 (1963)

⁴ St. v. Newbern 95 Wn. App. 277, 297, 975 P.2d 721 (1999)

prejudicial to warrant reverse, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanize, issue-by-issue harmless error review.” *Thomas v. Hubbard*, 273 F.3d 1164, 1178 (9th Cir.2001), (citing *United States v. Fredrick*, 78 F.3d 1370, 1381 (9th Cir.1996); *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir. 1984) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”)).

Following is a list of the issues this defendant wishes to raise before this Court:

SUMMARY OF ADDITIONAL GROUNDS

ADDITIONAL GROUND #1

The prosecution flagrantly engaged in improper and unlawful tactics which undermined the trial process. This denied Mr. Calkins his due process rights under both the State and Federal Constitutions.

ADDITIONAL GROUND #2

Governmental misconduct undermined Mr. Calkins defense when the police failed to collect, test, and turn over to the defense exculpatory evidence. Then place their thumb on the scale of justice by attempting to influence witness testimony.

ADDITIONAL GROUND #3

The trial court erred and undermined Mr. Calkins due process rights by failing to admonish the prosecution for its misconduct in front of the jury. By providing weak, belated curative instructions just prior to deliberations the court skewed the jury's perceptions and evaluations during the proceedings undermining Mr. Calkins' defense and due process rights.

ADDITIONAL GROUND #4

The trial court improperly and coercively influenced the jury's deliberations when it directed the jury to come to a unanimous decision. This violated Mr. Calkins' Sixth Amendment and due process rights to have a panel of

**impartial jurors which are able come to their own verdict
or no verdict whatsoever.**

ADDITIONAL GROUND #5

**The appellant was deprived of his Constitutionally
guaranteed right to the effective assistance of counsel at
trial.**

ADDITIONAL GROUND #1

**The prosecution flagrantly engaged in improper and
unlawful tactics which undermined the trial process. This denied
Mr. Calkins his due process rights under both the State and
Federal Constitutions.**

Due process requires that not only does the State need to prove
that a crime occurred and assign blame for that crime. It is well

established law that the State must also obtain a fair conviction, Berger 55 S.Ct. 629 (1935). That when the prosecutor's behavior becomes egregious that the issue of guilt or innocence becomes a non-issue and any sentence derived from such a conviction must be set aside.

In this trial the prosecution repeatedly undermined the trial process by its misconduct:

1. The prosecutor amended the indictment by information in limine without proper notice being given to the defense disregarding the purpose of an indictment (VRP 4).
2. The prosecutor told the court he had a game plan of burden shifting (VRP pg 12). Then the prosecutor again tells the court he intends improper tactics and try's to excuse his behavior in advance (VRP pg 18).

3. The prosecutor repeatedly lied to the court to allow prejudicial evidence to be admitted into court (VRP pgs 16, 24).

He described described the victim as “she also had a 4-inch knife in her face.” (VRP pg 16). Later in the testimony of Wilma Wixon we find out that no such thing ever happened (VRP pg 36-37). She testified that, the knife was “partway open...” “in hand...” “below the counter...” and that Ms. Wixon, “thought it was a joke.”

Later the prosecutor falsely portrayed Officer Maxine Abundis as having known Mr. Calkins so she could make identification. (VRP 24). Later we find out that she has no clue as to who Mr. Calkins is. (VRP 74). She only took his fingerprints and in relating how the prints were taken it circumvented the orders in limine. Additionally Ms. Abundis came to court in jail uniform. While the prosecutor denies knowledge of this prejudicial act it fits the pattern of behavior.

The prosecutor clearly knew he was misrepresenting the facts to the court. He had the discovery. He had interviewed the witnesses prior to trial. This was not a slip in the heat of argument but a cold and calculated plan to unfairly weight the scales against Mr. Calkins and violate his right to due process.

Mooney v. Holohan, Alcorta v. Texas, Napue, Berger and their entire prodigy would dictate this kind of clear and knowledgeable misbehavior by the states representative be punished.

4. The prosecutor brought witnesses not on the witness list nor properly notified the defense until the start of trial (VRP pgs 26-27).
5. The prosecutor brought “coached testimony” after being aware the police had attempted to influence the witness to alter

her trial testimony from her “excited utterance” statements (VRP pgs 35...).

In Ms Wixon’s statement she plainly said the robber had a tattoo on his right arm. “As far as I remember it was on the right arm, then I am wrong because...” (VRP 35). Later we find out that, “Yes, the police did tell me I had it on the incorrect arm.”

The police can easily be said to have “coached and lead the testimony” of Wilma Wixon. The larger question then becomes “How much else of the states case was tailored to fit Mr. Calkins and his situation?” How can He receive a fair trial with due process if the police and prosecution are so willing to shave the corners of the testimony to create a fit?

6. Prosecutor misconduct is alluded to in the opening statements (VRP pg 29). Mr. Calkins’ defense is prejudiced not just from the actions of the prosecution but also by the State

denying him access to a full and complete record of such accuracy to be able to defend him when it failed to have jury selection and opening statements transcribed. (VRP pg 26).

7. The prosecutor preyed upon the jury's fears and prejudices.
8. Prosecution introduces hearsay and pollutes the trial violating Mr. Calkins' right to confront under Crawford. (VRP 63).

“It is therefore particularly important that the government discharge its responsibilities fairly, consistent with due process. The overwhelming majority of prosecutors are decent, ethical, honorable lawyers who understand the awesome power they wield, and the responsibility that goes with it. But the temptation is always there: **It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win.**” US v Kojayan 8

F3d 1315, 1324 (9th Cir 1993). Here the prosecutor set aside the responsibilities dictated to him under the due process provisions of the Constitution to provide for a fair trial. Rather than fairly arguing his weak case on its merits he set out to deprive Mr. Calkins his right to a fair trial in order to chalk up another win. “Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.” State v. Flemming 83 Wn App 209,215, 921 P2d 1076 (1996).

By the Appellate Court’s definition the State’s case was weak. Otherwise the prosecutor wouldn’t have degraded the court by stooping to improper tactics. How weak was the state’s case?

A) The prosecution had no positive ID.

- 1) him in his Tattoo on wrong arm (VRP 35)

- 2) "It could be him?" (VRP39) "at the end of counsel table"
- 3) Didn't remember if anyone in the next booth over. (VRP40)
- 4) Not able to give positive ID from photo by police. (VRP 43)
- 5) Police told her she had the wrong description prior to testimony and gave correct description. (VRP44)
- 6) ID'd 2 out of 6 photos from montage. (VRP42). The form of montage was not provided to Mr. Calkins further prejudicing defense by not allowing him to challenge the photo montage.
- 7) Victim's statement change with Police coaching. (VRP44).
- 8) Couldn't remember if anyone in the booths around (VRP47)
- 9) Another witness (Mase) said that there were other people seated in the corner. The description of the scene varies as to there even being the potential of a perpetrator coming from another booth. (VRP 53-54).
- 10) Mase couldn't give positive ID either (VRP 55)
- 11) Mase didn't see what table the robber came from. (VRP57-58)

- 12) Jensen couldn't give positive ID.
- 13) Jensen changes testimony several times. (VRP 61-65)

B) The State has no weapon only allegations

- 1) Wilma Wixon gives only a vague description of a weapon:
 - A) It's alleged to be a pocket knife.
 - B) It's small enough to be held partially open in the robber's left hand. (A very dexterous feat for a person who is right handed like Mr. Calkins).

C) The police improperly and unlawfully coached and influenced the witness statements and testimony in order to obtain a tainted conviction.

D) The prosecution violated Mr. Calkins right to be adequately prepared for trial by improperly amending his indictment information in Limine.

The prosecution totally missed the correct function of an indictment! “A defendant is entitled to know what he is accused of doing in violation of the criminal law, so that he can prepare for his defense, and be protected against another prosecution for the same offense.”.... “The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.” U.S. v. TSINHNAHIJINNIE 112 F.3d 988 (9th Cir. 1997), citing, Berger v. United States, 295 U.S. 78, 82 55 S.Ct. 629, 630-31, 79 L.Ed. 1314 (1935).

Here the prosecution disregarded its legal and moral obligations in an attempt to ambush Mr. Calkins at trial. By waiting until the trial was about to start the State forced the defendant to enter the arena of

the court only partially prepared. This violated some of the most venerable precepts of our legal system and the proper function of an indictment by information. (see VRP pg 4)

E) The prosecution told the court that it intended to use improper tactics and asked the court's forgiveness in advance. This showed premeditation on the State's behalf of its unlawful behavior in violating Mr. Calkins' due process rights.

“Anyone can make a mistake. Words uttered spontaneously sometimes come out wrong; the exigencies of trial may make it hard to consider all the implications of a particular assertion. The mere fact of a misstatement to the jury therefore isn't the end of the matter. In determining the proper remedy, we must consider the government's willingness in committing the misconduct and its willingness to own up to it. See pp. 1323-24 *infra*; *United States v. Lopez-Alvarez* 970 F2d 583, 597 (9th Cir 1992). We also must consider whether the

misstatement likely affected the verdict.” **US v Kojayan 8 F3d 1315 (9th Cir 1993).**

The prosecution asked the court for forgiveness in advance for misconduct (VRP 18). This shows intent on the state’s behalf to violate Mr. Calkins rights. It definitely fits into a pattern of behavior that starts in Limine and continues through final close.

Nothing the prosecution did in Mr. Calkins case could be deemed spontaneous. It was cold, it was calculated and it deprived Mr. Calkins is Constitutionally derived right to a fair trial and due process of law.

F) The prosecution violated the prohibition against lying to the court in order to be able to admit highly prejudicial evidence and violated Mr. Calkins’ due process rights.

“When the Preamble, of the Constitution consecrates the mission of our Republic in part to the pursuit of Justice, it does not contemplate that the power of the state thereby created could be used improperly to abuse its citizens, whether or not they appear factually guilty of offences against the public welfare. It is for these reasons that Justice George Sutherland correctly said in *Berger* that the prosecution is not the representative of an ordinary party to a lawsuit, but of a sovereign with a responsibility not just to win, but to see that justice be done. 259 U.S. at 88, 55 S.Ct. 629. Hard blows, yes, foul blows no. The wise observation of Justice Louis Brandeis bears repeating in this context:

“In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example... If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to

become a law into himself.” Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed 944 (1928).

“It is a less evil that some criminals should escape than that the government should pay an ignoble role.” Id at 469, 48 S.Ct. 564 (Holmes, J., dissenting). It is for this reason that the law places the duty to manage this difficult business with the utmost care upon those in the best position and with the power to insure that it does not go awry. Although the public has an interest in effective law enforcement, and although we expect law enforcement officers and prosecutors to be tough on crime and criminals, we do not expect them to be tough on the Constitution. As Justice Clark remarked in Mapp v. Ohio, 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed.2d. 1081 (1961). “Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”

“These duties imposed on police and prosecutors by the requirements of due process are hardly novel or burdensome. Investigating and verifying the credibility of witnesses and the believability of testimony and evidence is a task which they undertake every day in the regular discharge of their ordinary responsibilities, and we cannot conceive of any fair-minded prosecutor chaffing under these mandates. All due process demands here is that a prosecutor guard against corruption of the system caused by fraud on the court by taking whatever action is reasonably appropriate given the circumstances of the case.” Bowie 243 F3d 1109, 1123-24 (9th Cir 2001)

G) The prosecution participated in impermissible vouching in its closing arguments. It made statements not supported by the record, placed the prestige of the government behind witnesses,

and stated personal beliefs as to credibility and guilt. The prosecution also made false statements when vouching for the witnesses. This denied the defendant his right to a fair trial and due process of law under the 5th and 14th Amendments of the United States Constitution.

Several impermissible statements were made by the State during closing arguments. “ As we have frequently observed, ‘**the government may not vouch for the credibility of its witnesses,** either by putting its own prestige behind a witness, or by indicating that extrinsic information not presented in court supports the witness’ testimony.” United States v. Garcia-Guziar, 160 F.3d 511, 520 (9th Cir 1998) citing United States v. Rudberg, 122 F.3d 1199, 1200 (9th Cir. 1997) (citing United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980)).

Neither may a prosecutor “express his opinion of the defendant’s guilt.” United States v. Molina, 934 F.2d 1440, 1444 (9th Cir. 1991); see also State v. Reed, 102 Wn2d 140, 145 (1984).

The prosecution led the jury into several false impressions designed to prejudice them against Mr. Calkins. This undermined his rights to have a fair and unbiased jury and due process.

In order to hold that there was reversible error from prosecutorial misconduct, we must find that the prosecutor's comments were both improper and that there is a substantial likelihood that they impacted the jury.' [Defendant] 'bears the burden of establishing the impropriety and prejudicial when considering the entire context of the record and circumstances at trial.' [The Court] has a responsibility to insist upon and enforce minimum standards of professionalism in the conduct of our system of criminal justice. The highly inflammatory comments utilized by the prosecutor in this case fall well below the standards appropriate to the conduct of the State's case. **[The Court] cannot countenance such tactics, which were clearly intended to inflame the jury's passion and prejudice.** The error was not harmless. The State's burden to prove harmless error is

heavier the more egregious the conduct is. The burden here is heavy indeed State v. Rivers, 96 Wn. App. 672, 674-75 (1999); see, State v. Dhaliwal, 150 Wn.2d 559 (2003); State v. Pirtle 127 Wn2d, 628 672 (1995); State v. Furman 122 Wn2d 440, 445 (1993); State v. Brown 132 Wn2d 559, 567 (1997).

It is a well established principle that the prosecution is prohibited from misrepresenting the truth to the jury. See Miller v. Pate, 87 S.Ct. 785 (1967); Mooney v. Holohan, 294 US. 103, 55 S.Ct. 340, 79; Napue v. People of State of Illinois, 360 U.S. 264, 79 S.Ct. 1173; Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177; Alcorta v. State of Texas, 355 U.S. 28, 78 S.Ct. 103.

“Misrepresenting facts in evidence can amount to substantial error because doing so, may profoundly impress a jury and may have a significant impact on the jury’s deliberations.” Donally v. DeChristoforo, 94 S.Ct. 1868 (1974). For similar reasons, asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way. **This is particularly true when a prosecutor**

misrepresents evidence because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of sovereignty. Berger, 55 S.Ct.629.

Here as in Kojayan 8 F3d 1315 (9th Cir 1993) the larger issue is not what the prosecution did wrong. It's that **the prosecution lacked the moral compass to even know that it violated Mr. Calkins' Constitutional rights.** This sociopathic approach to representing the state undermines the law, the intent of the law and the public's confidence in the law and its enforcement. When the prosecutor makes a misstatement to jury, the proper remedy depends on government's willfulness to own up to it, as well as whether statement likely affected the verdict. US v Kojayan 8 F3d 1315 (9th Cir 1993).

Let's see what the prosecution did in it's own words in closing:

keep in mind; “Even when grounded in an inference from the evidence, a prosecutorial statement may nevertheless be considered impermissible vouching if it places the prestige of the government behind the witness by providing personal assurances of a witness’s veracity.” US v. Weatherspoon 410 F3d 1142 (9th Cir 2005)

The prosecutor said: “When box cutters pull down a Jumbo Jet” (VRP 231); “When box cutters can be used to take down Jumbo Jets...” (VRP 232).

It is well established that the prosecution has a Constitutional level duty to insure the fairness and integrity of the trial process not just to win. In tying Mr. Calkins to the 9-11 terrorists and Alkida the prosecution preyed on the fears and passions of the jury. In post 9-11 America to say comments like this don’t undermine the impartiality of the jury is to disregard all reality. This very flagrant attempt by the prosecution to undermined Mr. Calkins in this way is repugnant to the Constitution and demands dismissal on its own.

The prosecutor said: “Textbook case of good police investigation.” (VRP 220); “This is a good police investigation.” (VRP 223); “Evidence that here in the 21st century is overwhelming and compelling.” (VRP 222).

In other words the prosecution vouched for the quality of the investigation, accuracy of the evidence, and integrity of the police officers involved. He lent the credibility and prestige of the government behind them and raised them in the eyes of the jury. All the while knowing that the police had tampered with the witnesses by unlawfully trying to influence and correct their testimony to make the conviction. The prosecutor in effect told the jury that this is legal behavior.

As for the overwhelming and compelling evidence, Ms. Wixon had testified to 1 piece of evidence that would have proved if Mr. Calkins was actually the robber. Ms. Wixon testified that; “When he came up to the till, he put his ticket on the counter.” (VRP 36). That ticket was the only definitive piece of evidence that would have

proved who the robber was. **However, this “Textbook case of good police investigation” failed to collect, test and provide to the defense the key piece of exculpatory evidence which would have proved the case as is required of them by both the State and Federal Constitutions.**

The prosecutor said: “She is being completely honest with you.”
“she hasn’t been manipulated in any way.” (VRP 230).

The best way to tell a lie is to wrap it in the truth. The prosecution has mastered this technique. Ms Wixon’s honesty and her having been manipulated by the police and prosecution to obtain a tainted conviction are not related. The police informed her, that her statement wasn’t correct and didn’t fit the defendant. Then they planted the seed of a new and improved testimony in order to aid in the prosecution of Mr. Calkins. In what way exactly wasn’t Ms. Wixon manipulated?

The prosecutor said: “It is overwhelming evidence.” (VRP 231)

“There is no reasonable doubt in this case.” (243)

“The defendant robbed the Denny’s” (VRP 244)

These are all unlawfully offered opinion and vouching statements not argument. Since the state chose not to collect and offer the only piece of inculpatory or exculpatory evidence that would make the case definitive. The police had a Constitutional level duty to collect the sales check left on the counter by the robber. Ms Wixon testified to it so why didn’t the police meet this duty in their “Textbook case of good police investigation.” As described by the prosecutor. (VRP 220). The one piece of evidence that was mandatory to be able to prove the case beyond reasonable doubt was not made available by the state as required of them. Thus by definition there was reasonable doubt.

The prosecutor said: “Some people, Ordinary evening.” (VRP 221).

This statement totally disregards all the testimony. The restaurant had about 20 people in it. They were understaffed. None of the staff actually saw the robber coming from a specific table only the general direction. None of the staff could say that there wasn't anyone else in the corner of the restaurant. However they were busy enough that nobody could give a positive ID of Mr. Calkins. On top of all that the police failed to collect the one piece of evidence that could be said to have been handled by the robber (the sales check).

The prosecutor refers to inked print card taken when the defendant was 12 (VRP 225).

Here the prosecution preys upon the fears and prejudices of the jury. He just told them that Mr. Calkins that has been in trouble with the law since he was 12. **This is all the more egregious sine the prosecution actually lied to the trial judge in order to get the fingerprint card admitted in the first place.**

The prosecution says: That knowing where Kelso is evidence of guilt... (VRP 226).

Since when is knowledge of geography equated with guilt in a crime? By the prosecutions logic Mr. Calkins is guilty of crimes in New York, Chicago, Los Angeles, Washington DC, and Miami and hundreds of other cities around America. The absurdity of the prosecutions argument needs no more comment.

The prosecution said: “Armed robbery”... “indicates a consciousness of guilt” (VRP 227).

Here the prosecution misrepresented what is a common English language synonym as being a legal statement of guilt. This unlawfully indoctrinates the jury to false standards and shifts the burden of proof to the defendant. Since when is not knowing arcane legal definitions, jargon, and semantics equate to a “consciousness of guilt”?

The prosecution said: “Now the defense is going to say that the police manipulated her into changing her story. They didn’t. They went back to her and said, Hey he has a tattoo on the other arm and she said over the course of thinking about it... I’m not sure.” (VRP 229).

Once again the prosecution unlawfully indoctrinates the jury by excusing blatant police misconduct and condoning witness tampering.

The prosecution referred to: “3 1/2 to 4 inch Knife” (VRP231)

However it never offered a knife. Where was the weapon? It didn’t see fit to even provide an example of a 3 1/2 to 4 inch folding pocket knife to show the jury that a robber could hold, unseen a partially open folding knife in his non-dominant hand.

The prosecution said: Tattoos match's color, shape, size" (VRP 243).

However all Wilma Wixon said: "He had a tattoo on his arm, like between the elbow and the shoulder." "It was on his right arm, but if it is on his right arm, then I am wrong because" (VRP35).

"It was all black. It didn't have any other color to it. It wasn't anything specific, it was some kind of design, I really don't know how to explain it." (VRP 36).

Police tried to influence testimony (VRP 44). At no point was the jury ever presented with Mr. Calkins' tattoos to compare to the testimony to the actuality. No rational trier of fact could come to a reasoned conclusion that the testimony matched Mr. Calkins.

The prosecution said: "Jason Jenson testified the person driving the car was ...Josh Calkins." (VRP 244).

This is clearly not what Jason Jensen said on the stand! He said:
“He was Caucasian. Wore dark colors.”(VRP60). The robber got in
“A grayish or lt. blue - - I think it was a 2-door, a later model,
something like a Mustang 2 or something like that.” (VRP 64).
Nowhere in Direct, Redirect, Cross, Reopen, or Recross did Mr.
Jensen positively identify Mr. Calkins as the robber. Nor did the state
show that Mr. Calkins owned a Mustang 2 or similar vehicle at that
time. That’s because they couldn’t.

The prosecution said: “There was no license plate on the front.”
...“The area where he was parked was not lit.” (VRP 245).

Again the prosecutor lies to the jury. Mr. Jensen said the car
had a plate on the front but he couldn’t read it. (VRP 64). The
ramifications are completely different. The prosecution infers that the
plate was removed from the car to not be seen. That is not the case,
and was intentionally said to mislead the jury.

The prosecution said: “The robber is Josh Calkins. The defendant is guilty.” (VRP245).

This can only be viewed as the prosecutor’s personal opinion and improper vouching. It is not inference. It doesn’t ask the jury to draw reasonable conclusions. However it is prosecutorial misconduct which started at the onset of the trial and weaved its way throughout the proceeding until the very end.

Any analysis will show that (1) what the prosecution argued was actually false, (2) the prosecution knew or should have known that it was actually false, and (3) that the misconduct was material

The prosecution flagrantly engaged in improper and unlawful tactics which undermined the trial process. This denied Mr. Calkins his due process rights under both the State and Federal Constitutions.

Due process requires that not only does the State need to prove that a crime occurred and assign blame for that crime. It is well established law that the State must also obtain a fair conviction. That when the prosecutor's behavior becomes egregious that the issue of guilt or innocence becomes a non-issue and any sentence derived from such a conviction must be set aside.

ADDITIONAL GROUND #2

Governmental misconduct undermined Mr. Calkins defense when the police failed to collect, test, and turn over to the defense exculpatory evidence. Then place their thumb on the scale of justice by attempting to influence witness testimony.

In the case of Northern Marianna Islands v. Bowie 243 F3d. 1109, 1110-11 (9th Cir 2001) The panel unanimously held:

“we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery.” United States v

Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993) Finally, we come to the rule that “a bad faith failure to collect potentially exculpatory evidence would violate the due process clause.” Miller v. Vasquez, 868 F.2d 1116, 1120 (9th Cir. 1989). Relying on Arizona v Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), we made it abundantly clear that due process requires law enforcement not just to preserve evidence already in hand, but to gather and to collect evidence in “those cases in which the police themselves by their conduct indicate that the evidence could form the basis for exonerating the defendant.” Miller, 868 F2d. at 1121 (citing Youngblood, 488 U.S. at 58, 109 S.Ct. 333). Cf. Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (an individual prosecutor has “a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”

It’s the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor’s job is simply to win. See, e.g., United States v. Montgomery 988 F2d 1468, 1477 (9th Cir. July 13,

1993) (finding a “complete absence of effort, a complete absence of demonstrated cooperation” on part of government in producing confidential informant); *United States v. Wallach* 935 F2d 445, 457 (2nd Cir 1991) (“We fear that given the importance of [a witness’s] testimony to the case, the prosecutors may have consciously avoided recognizing the obvious-[that he] was not telling the truth.”⁰); *Brown v. Borg* 951 f2d 1011, 1015 (9th Cir 1991) (state prosecutor kept exculpatory evidence secret); *Reutter v. Solem* 888 F2d 578, 581 (8th Cir 1989) (state prosecutor withheld Brady information and made grossly misleading statements in closing argument); *United States v. Kattar* 840 F2d 118, 127 (1st Cir 1988) (“[I]t is disturbing to see the justice Department change the color of its stripes to such a significant degree, portraying an organization, individual, or series of events variously as virtuous and honorable or as corrupt and perfidious, depending on the strategic necessities of the separate litigations.”)

In **Illinois v. Fisher 124 S.Ct. 100, 1202 (2004)** the Supreme

Court held:

“We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. See *Brady v. Maryland*, 373 US 83, 83 S.Ct. 1194 (1963); *United States v. Agurs*, 427 US 97, 96 S.Ct. 2392 (1976). In *Youngblood*, by contrast, we recognized that the Due Process Clause “requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” 488 US at 57, 109 S.Ct. 333. We conclude that the failure to preserve this “potentially useful evidence” does not violate due process “unless a criminal defendant can show bad faith on the part of the police.” *Id.*, at 58, 109 S.Ct. 333 (emphasis added).”

In Mr. Calkins’ case the bad faith on the part of the police is demonstrated in their attempt to influence the testimony of Wilma Wixon. The prosecution exacerbated this by misrepresenting law and facts to the jury, by lying to the trial court to had highly prejudicial

items admitted and generally undermining Mr. Calkins due process rights from start to finish.

ADDITIONAL GROUND #3

The trial court erred and undermined Mr. Calkins due process rights by failing to admonish the prosecution for its misconduct in front of the jury. By providing weak, belated curative instructions just prior to deliberations the court skewed the jury's perceptions and evaluations during the proceedings undermining Mr. Calkins' defense and due process rights.

In, *US v. Weatherspoon* 410 F3d 1142 (9th Cir 2005) the 9th Cir held: "To determine whether the prosecutor's misconduct affected the jury's verdict, we look first to the substance of a curative instruction" (Kerr, 981 F2d at 1053). In that respect, even in the absence of objections by defense counsel, a "trial judge should be alert to

deviations from proper argument and take prompt corrective action as appropriate” (id at 1054).

In this instance the trial was doubly flawed: Objections were indeed made by defense counsel, and whatever curative statements were provided by the district judge were inadequate. As for the objections, some were overruled, those that were sustained did not produce any meaningful alteration of the prosecutor’s arguments, and the manner in which such objections were sustained unfortunately did not deliver the required strong cautionary message (indeed as quoted earlier, one response by the trial judge actually chilled further objections). Such failures to correct the improper statements at the time they were made cannot be salvaged by the later generalized jury instruction reminding jurors that a lawyer’s statements during closing argument do not constitute evidence (*United States v. Simtob*, 901 F2d 799, 806 (9th Cir 1990)). In short, the curative instructions offered here did not neutralize the harm of the improper statements because of the prosecutor and were not given immediately after the damage was done” (*Kerr*, 981 F2d at 1054).

Mr Calkins prosecutor never changed stride. He flagrantly committed misconduct remorselessly. The defense was forced to flounder and the jurors had to presume everything was alright due to the lack of curative action by the court. By waiting until the end of trial to provide meaningless curative instructions the court endorsed the prosecution's actions through inaction.

ADDITIONAL GROUND #4

The trial court improperly and coercively influenced the jury's deliberations when it directed the jury to come to a unanimous decision. This violated Mr. Calkins' Sixth Amendment and due process rights to have a panel of impartial jurors which are able come to their own verdict or no verdict whatsoever.

The trial court provided the jury extensive instructions prior to deliberations. Included were strong and explicit admonishments to only follow the instructions which the judge provided:

- “It is your duty to accept the law from my instructions regardless of what you personally believe the law is or what you personally think it should be.” (VRP pg 211);
- “You must apply the law from my instructions to the facts that you have decided that have been proven, and in this way decide this case.” (VRP pg 211);
- “As jurors you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict.” (VRP pg 214);
- “You must fill in the blank provided in each form the words not guilty or the word guilty, according to the decision you read.” (VRP pg 219);
- “In order to answer the special verdict form yes, you must unanimously be satisfied beyond a reasonable doubt that yes is the correct answer. If any one of you has a reasonable doubt to that question, you must answer no.” (VRP pgs 219-220);

- **“Because this is a criminal case, each of you must agree to return your verdict. When you have all agreed, fill in the verdict form to express your decision.”(VRP pg 220).**

“It is error to tell a jury that it cannot hang.” U.S. v. Robinson, 953 F2d 433, 437 (8th Cir 1992) (citing Jenkins v. United States 85 S.Ct. 1059 (1965)). The trial court framed the structure of the deliberations in a way no reasonable juror would believe they could hang. The jurors were explicitly ordered to only follow the judge’s directions. Those instructions forced the jury to come to a unanimous verdict. The only choices available to the jury by those directions were **guilty or not guilty**. Coming to no verdict or “hanging” was not an option available to Mr. Calkins’ jury. Doing so would have violated the judge’s directions to them. Thus by default, the jury received an implied instruction to not hang violating Mr. Calkins Constitutional rights under the 6th Amendment and due process clauses.

In State v. Goldberg 149 Wn2d 888, 892, 72 P.3d 1083, 1085 (Wash 2003) the Washington Supreme Court said; "The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court's proper instructions, and arguments of counsel." (Citing State v. Boogaard, 90 Wn2d 773 (1978)). "Washington requires unanimous jury verdicts in criminal cases." (Const. art I, § 22; State v. Stephens, 93 Wn2d 186, 190 (1980)). "As for aggravating factors, jurors must be unanimous to find that the State has proved the existence of the aggravating factor beyond a reasonable doubt." State v. Boogaard, 90 Wn2d 773 (1978). However, regardless of Washington States' desire and law requiring a unanimous vote to convict or acquit a defendant both the jury and the defendant have a right to render no verdict under the United States Constitution. Thus the trial courts instructions which denied the right to come to no resolution was unlawful.

"An instruction which suggests that a juror who disagrees with the majority should abandon his opinion for the sake of reaching a

verdict invades that right, however subtly the suggestion may be expressed.” State v. Boogaard, 90 Wn2d 773 (1978); See also, State v. Ring, 52 Wn2d 423 (1958); Iverson v. Pacific Am. Fisheries, 73 Wn2d 973 (1968). Here a minority juror who had reasonable doubt was coerced by the court’s instructions to abandon the moral position of conscience for the sake of obtaining a verdict. No reasonable juror could have concluded they had a right or duty to come to no verdict due to the nature of the trial court’s instructions and the force in which they were presented.

The 9th Circuit Court of Appeal held in U.S. v. Sarkisian, 197 F3d 966 (9th Cir 1999). “The Sixth Amendment right to a jury trial “guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent jurors.’” Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639 (1961). “Thus, the defendant’s Sixth Amendment rights are violated even if only one juror was unduly biased or improperly influenced.” See United States v. Keating, 147 F3d. 895, 903 (9th Cir. 1998) (citing Dickson v.

Sullivan, 849 F2d 403, 408 (9th Cir 1988)). In this trial it was the court itself which aided in biasing and improperly infecting the jury's deliberations violating Mr. Calkins Constitutional rights.

ADDITIONAL GROUND #5

**THE APPELLANT WAS DEPRIVED OF HIS
CONSTITUTIONALLY GUARANTEED RIGHT TO THE
EFFECTIVE ASSISTANCE OF COUNSEL BY HIS
ATTORNEY AT TRIAL.**

Mr. Calkins trial counsel was deficient in two areas. First he failed to obtain the sales receipt left behind by the robber. This was the only piece of potentially inculpatory and exculpatory evidence available. This was further aggravated by counsel's failure to question the police as to why it was not collected and tested being that it is the single piece that with certainty can be linked to the robber. Secondly counsel was ineffective by not objecting to jury instruction which in effect compelled the jury to come to a unanimous verdict.

Defendants are constitutionally guaranteed reasonably effective representation by counsel. U.S. Constitution, Amend.6. Strickland v. Washington 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Ineffective assistance is established when a defendant shows that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687

The first prong of the *Strickland* test requires "a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987).

The second prong of *Strickland* requires the defendant to show only a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. Strickland v. Washington 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." A reasonable probability is one sufficient to undermine the confidence in the outcome of the case,

Strickland v. Washington 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

In the present case, it is well established that the state must collect and turn over all exculpatory evidence in its possession. In this case the state it failed to collect obvious evidence or allowed it to be destroyed. Trial counsel failed to meet his Constitutional level duties to his client by failing to obtain and confront states witnesses in regard to this key evidence. While generally counsel is presumed effective the Supreme Court and 9th Circuits have both found that failure to spend time in adequate client consultation negates this presumption. This failure to consult with Mr. Calkins lead to this failure to obtain exculpatory evidence and lack of preparation. Failure to bring exculpatory evidence is presumed ineffective assistance of counsel. See *Bowie* 243, F3d 1109 (9th Cir 2001).

Then counsel failed to object to a jury instruction that relieved the state of its burden of proof. There is no tactical advantage to having the jury receives an instruction that they must come to a unanimous decision. In effect have the court ordering them to not

hang and freely vote their consciences. This violated Mr. Calkins Sixth Amendment rights.

Conclusion

As previously stated this appellant would ask this Court to consider the cumulative effect of all the errors that deprived this appellant of due process as guaranteed under the 5th and 14th Amendments to the United States Constitution.

The cumulative effect of all the errors in the present case deprived this appellant of a fair trial. This appellant would respectfully ask this court to reverse the conviction against him.

Dated this 7th day of December, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Joshua T. Calkins', written over a horizontal line.

Joshua T. Calkins, Pro se

State of Washington

FILED
COURT OF APPEALS
DIVISION II

06 DEC 12 PM 12:57

STATE OF WASHINGTON

DECLARATION OF MAILING

Petitioner,

Joshua T Calkins,

Respondent.

CAUSE NUMBER 34748-2-II

I, Joshua T Calkins, declare that on the 7 of

December, 2006, I deposited the foregoing (name documents sent below)

Statement of Additional Grounds (Ryp 10.10)

or a true copy thereof, in the internal mail system of the MONROE CORRECTIONAL COMPLEX - WSR-UNIT and made arrangements for postage, addressed to:

Washington Courts of Appeals
Div 2
950 Broadway Suite 300
TACOMA WA 98402-3094

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

Dated this 7 day of December, 2006.

[Signature]
Petitioner pro se

FILED
COURT OF APPEALS
DIVISION II

06 DEC 12 PM 12:57

STATE OF WASHINGTON

BY _____
DEPUTY

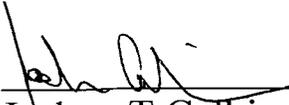
Declaration

I, Joshua T Calkins that on December 7, 2006, I deposited the foregoing RAP 10.10 Statement of Additional Grounds, or a copy thereof, in the internal mail system of Monroe Correctional Complex – Washington State Reformatory and made arrangements of postage, addressed to:

Washington Courts of Appeals Division II
950 Broadway, Suite. 300
Tacoma, WA. 98402-3094;

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

Date at Monroe, Washington on December 7th, 2006



Joshua T Calkins, Pro Se