

COA No. 35492-G-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,  
RESPONDENT,

V.

DANIEL C. JOHNSON,

071101-2 FILED  
STATE OF  
BY [Signature]  
COURT OF APPEALS

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STATEMENT OF ADDITIONAL GROUNDS  
("SAG")

(REQUEST FOR RULING  
ON OCT. 03, 2007 MOTION)

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DANIEL C. JOHNSON PRO SE  
1830 EAGLE CREST WAY  
CIALLAM BAY, WA. 98326-9723

10/31/07  
DATE

## I. IDENTITY OF APPELLANT

Appellant Daniel C. Johnson filing a statement of additional grounds for review, pro se.

## II. INTRODUCTION AND PRAYER FOR RELIEF

As permitted by RAP. 10.10 (e) Johnson requested and received service of what was identified as the Verbatim Report Of Proceedings ("RP") for review, Johnson discovered a considerable amount of it missing due to both the trial courts malfunctioning recording system and the inadequacy of the system itself when functioning properly.

On October 2, 2007 Johnson sent a letter to his Appellate counsel, Lisa Tabbutt, informing her that the RP he received from the Appellate court has an extensive amount missing from it and requested she motion the trial court to reconstruct the trial record. As of the time of this filing counsel has not responded. A copy of the letter was sent to this court.

On October 3, 2007 Johnson became aware that his Appellate counsel failed to file an objection to Johnsons defective RP within 10 days of receipt pursuant to RAP. 9.5 (c). On the same day Johnson filed a motion to this court requesting:

MOTION TO MODIFY CLERKS SEPT. 14, 2007 RULING  
MOTION TO ORDER COUNSEL TO RECONSTRUCT  
THE RECORD (THE TRZAL COURTS) AND MOTION

TO GRANT A STAY OF PROCEEDINGS AND  
EVIDENTIARY HEARING SEE Appendix A

Because Johnson and his motion has yet to receive a ruling by this court, or even an acknowledgment of its receipt, he has no alternative but to file his SAG in a timely manner to stay in compliance with Appellate court rule. However, prior to an evidentiary hearing held on the defective RP, or actions taken by the trial court and the parties to remedy the incomplete record with affidavits or other means, Johnson is in the unfair and unjust position of having to attempt the impossible burden of identifying and arguing issues for an effective appellate review without the benefit of a complete record.

Accordingly, Johnson requests and prays this court finds the particular circumstances he faces here requires his motions be granted and a stay of the proceedings ordered.

Furthermore, in the spirit of serving the ends of justice and pursuant to RAP's 1.2(a), (c) and 10.8(a), Johnson prays this court grant him the opportunity to supplement his SAG once any order the court may grant pertaining to an evidentiary hearing and/or remedies for resolving the incomplete record issues are concluded.

Johnson wants to stress to this court the difficulties he must overcome with an incomplete record, particularly when the majority of his claims for appellate review are ineffective assistance of counsel issues ("IAC").

Finally, Johnson apologizes to the court for citing authority in his arguments without specific pages at times. His access to case law is on a computer which does not display page numbers. Johnson also apologizes for the improper form and the numerous errors he has made in his efforts to request this court for relief in the same filing as his SAG.

### III. ASSIGNMENT OF ERRORS

1. Johnson was denied effective assistance of counsel and a fair trial for failing to motion the trial court for a stenographer when the judge made it clear the recording system was malfunctioning.
2. The trial court erred by not producing a trial record of sufficient completeness to permit an effective appellate review of Johnson's claims in violation of his constitutional right.
3. Johnson is denied effective assistance of counsel on his first appeal for failing to object to the verbatim report of proceedings within ten days after she received it pursuant to RAP. 9.5 (c). In violation Johnson's rights guaranteed in the 6<sup>th</sup> and 14<sup>th</sup> amendments U.S. Const.
4. Appellate counsel was ineffective for failing to motion the trial court to reconstruct the record as requested by Johnson in violation of his 6<sup>th</sup> and 14<sup>th</sup> amendment U.S. Const. rights.
5. Johnson was denied effective assistance of counsel when his counsel's unprofessional performance abandoned his right to a speedy trial, failed to object to an unreasonable length of continuance, presented a defense not legally recognized and completely failed to subject the prosecution to a meaningful adversarial testing.
6. The trial court erred by not dismissing juror Romano for cause without first holding a factfinding hearing to protect Johnson's right to an unbiased jury.

7. Johnson was denied effective assistance of counsel when his counsel failed to object and argue the trial courts failure to dismiss juror Romano for cause.

8. Johnson was denied effective assistance of counsel when his counsel made improper and prejudicial comments to the jury.

9. Johnson was denied a fair trial when cumulative errors rendered the trial process fundamentally unfair.

#### IV. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was Johnson denied effective assistance of counsel and a fair trial for counsel failing to motion the trial court for a stenographer pursuant to RCW 2.32.200 when the judge made it clear the recording system was malfunctioning?

2. Was Johnson denied his constitutional right to a complete record to permit effective Appellate review when the trial court failed to provide an adequate and functioning method of producing a complete trial record?

3. Was Johnson denied effective assistance of counsel and due process on his first appeal for counsel failing to object to the RP within ten days of receiving the RP?

4. Was appellate counsel ineffective for failing to motion the trial court to reconstruct the record as requested by Johnson?

5. Was Johnson denied his 6th Amendment right to competent counsel when counsel abandoned his right to a speedy trial, failed to object to an unreasonable length of continuance, presented a defense not legally recognized and when he failed to subject the prosecution to a meaningful adversarial testing?

6. Did the trial court violate Johnsons constitutional right to an unbiased jury when the court refused to dismiss juror Romano for cause and/or without first holding a fact finding hearing?

7. Was Johnson denied effective assistance of counsel when counsel failed to object and argue at trial the courts failure to dismiss juror Romano for cause?

8. Was Johnson provided effective assistance of counsel and a fair trial when his counsel made improper and prejudicial comments to the jury?

9. Was Johnson denied a fair trial due to the many errors resulting in an unreliable process under the cumulative error doctrine?

## V. ARGUMENT

(1) JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN FAILING TO TAKE AVAILABLE STEPS TO ENSURE A RECORD OF SUFFICIENT

## COMPLETENESS ONCE COUNSEL BECAME AWARE OF THE TRIAL COURTS MALFUNCTION- ING RECORDING SYSTEM

The Washington State and United States Consti-  
tutions guarantee a criminal defendant the right to  
effective assistance of counsel. Const. art. 1, § 22  
(amend. 10) U.S. Const. amend. 14, § 1.

To prevail on a claim of ineffective assist-  
ance of counsel, a defendant must show that "(1)  
defense counsel's representation was deficient, i.e.,  
it fell below an objective standard of reasonableness  
based on consideration of all the circumstances; and  
(2) defense deficient representation prejudiced the  
defendant, i.e., there is a reasonable probability that,  
except for counsel's unprofessional errors, the result  
of the proceedings would have been different."

State v. McFarland, 127 Wn. 2d 322, 334-35, 899 P.

2d 1251 (1995) (citing State v. Thomas, 109 Wn. 2d 222,  
225-26, 743 P. 2d 816 (1987) (Applying the two-prong  
test in Strickland v. Washington, 466 U.S. 668, 687,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))). In weighing  
the two prongs of deficient performance and prejudice,  
the court must begin with "a strong presumption  
counsel's representation was effective" and must base  
its determination on the record below. *Id.* 127 Wn. 2d  
at 335. The defendant alleging ineffective assistance  
of counsel "must show in the record the absence of  
legitimate strategic or tactical reasons supporting  
the challenged conduct by counsel." *Id.* 127 Wn. 2d

at 336. If the defendant's claim rests on "evidence or facts not in the existing trial record," filing a PRP is the appropriate step. *Id.* 127 Wn. 2d at 335.

From the beginning of trial Johnson's counsel was aware of the inadequate recording system used for this case. (RP 630) It is common knowledge in the court system how unreliable a system of recording trial proceedings with microphones can be when it depends on attorneys and other participants to always remember to speak directly into them. Especially attorneys, who are frequently standing and moving about. Any attorney that has been in practice long has experienced terrible and sometimes costly results from the transcription of this recording method. Johnson's case being a felony murder case made it all that more important to ensure his right to a complete record is protected.

If that was not enough to compel an attorney of ordinary training and skills to protect his clients interests, Johnson contends that once counsel was informed of the additional problem of a malfunctioning recording system too, counsel taking none of the available options open to him to ensure an adequate record was being preserved is conduct which clearly falls below an objective standard of reasonableness. (RP 1536-37)

RCW 2.32.200 requires the official reporter to create a full report of oral proceedings only at the

affirmative request of either party or counsel, or at the option of the trial judge. In re Adoption of Caggins, 13 Wn. App. 736, 738, 537 P. 2d 281 (1975) Requesting to review the recording of a day of trial periodically through a 3 week trial was also an option readily available to counsel.

The courts scrutiny of counsels performance must be highly deferential and must attempt to evaluate the conduct from counsel's perspective at the time. Strickland v. Washington, supra, at 689, 104 S. CT 2052.

Generally, a counsels perspective is evaluated in the context of a cases individual circumstances and tends to lean towards a strong benefit of the doubt for counsels conduct. It is the contrary here in many ways. Johnsons sole trial strategy, albeit illegitimate by any standard of reasonableness, depended on a preserved record for appellate review. His defense theory was denied as contrary to law by the court.

In this light it is simply unreasonable to conclude that counsel was functioning at the level guaranteed to Johnson by the 6th Amendment, when understanding the consequences Johnson faced, and just sat on his hands and did nothing to protect the record.

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■ While not in the existing record, it should be noted as reason further to hold an evidentiary hearing and allow supplementation of the record, a murder trial immediately prior to Johnsons trial,

The record is so defective that without the benefit of an order to reconstruct and supplement the trial record, Johnson's ability to fully identify and argue all his claims of error is impossible. Counsel's deficient performance has directly resulted in a violation of both his right to a fair trial and an effective appellate review.

(2) THE TRIAL COURT DENIED JOHNSON'S CONSTITUTIONAL RIGHT TO A RECORD OF SUFFICIENT COMPLETENESS AND AN EFFECTIVE APPELLATE REVIEW

A criminal defendant is constitutionally entitled to a "record of sufficient completeness" to permit effective appellate review of his or her claims. Coppedge v. United States, 396 U.S. 438, 82 S.Ct. 917, 8 L.Ed. 2d 21 (1962)

The usual remedy for a defective record is to supplement the record with appropriate affidavits and have discrepancies resolved by the judge that heard the case.

RAP. 9.3, .4, .5. However, where affidavits are unable to produce a record which satisfactorily recounts the events material to the issues on appeal, the appellate court must order a new trial. State v. Tilton, 149 Wn. 2d (2003).

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and in the same courts, experienced the same malfunctioning system issues and only half of the proceedings was recorded.

There are over [2,200] individual parts of Johnson's RP missing due to both the trial courts recording system malfunctioning and the judge and/or counsel talking over each other, away from a working microphone or creating distorting noises near or on a microphone.

From the beginning of trial, prior to opening statements, the court set up a procedure for making sure the proceedings was being recorded:

" And I'll remind counsel one last time, there are microphones in this courtroom. You need to be near one while you're speaking. If your voice is not being recorded, my judicial assistant will come out and tell you to get near a microphone or speak up ---- " (RP 630)

Through 3 weeks of trial the courts monitoring of the record was completely ineffective. In fact, of the 3 weeks proceeding, the courts assistant came out only once, to inform the state during closing argument he was not close enough to a microphone. It was the 18<sup>th</sup> day of trial. It was not effective either. During the rest of the states closing arguments the RP notes repeated and lengthy incidents of the state off a microphone giving inaudible argument to the jury.

With Johnson limited to arguing only the existing record to this court, the state and co-defendants counsel, in effect, enjoyed ex parte commentary and argument with the jury, and on several occasions for extended periods of time.

And to argue that Johnson's counsel would likely of protected him from anything improper and prejudicial is to completely ignore the facts of this case pertaining to the performance of his representation. Examples of the missing record after the courts assistant came in are:

- STATE: (counsel off microphone and totally inaudible; reading instruction.) 5 other short inaudibles also noted. (RP 2719)
- STATE: (inaudible; counsel has again moved away from microphone). (inaudible sentence) 4 other short inaudibles also noted. (RP 2720)
- STATE: (counsel moves away from a live microphone.) 3 other short inaudibles also noted. (RP 2748)
- STATE: (counsel moved away again from working microphone.) (several inaudible sentences). 7 other short inaudibles also noted. (RP 2751)
- STATE: (Inaudible sentence.) (RP 2760)
- WALKER: (inaudible; counsel speaking into easel.) 3 other short inaudibles also noted (RP 2829)
- HARLAN: (There is so little audible in this argument due to the constant cutting out of microphones,

where Mr. Harlan is standing (in front of the jury and not on a microphone), in addition to the electronic noises inserted, that it is futile to attempt to transcribe.)  
(RP 2874)

HARLAN: (inaudible; counsel speaking off microphone in front of the jury box). (RP 2887)

Hundreds of incidents where the microphone failed to pick up testimony, objections, argument, rulings and other oral proceedings exist throughout Johnson's RP. Unfortunately, the inadequate microphone and monitoring procedure the court set up was not the only problem involving the record. The recording system was seriously malfunctioning as well. Some of these examples are as follows:

(Sentence missing) (RP 363)

(inaudible sentence) (RP 1775)

(inaudible sentence) (RP 1829)

(microphone malfunctioning) (RP 2100)

(sound system malfunctioning) (RP 2191)

(2197 RP microphone completely cut out)

(microphone cut out on both) (RP 2199)

- ( microphone not working) (RP 2200)
- ( microphone completely not functioning) (RP 2212)
- ( microphone continues to cut out) (RP 2258)
- ( failure of recording system) (RP 2264)
- ( system malfunctioning) (RP 2266)
- ( Electronic distortion) (RP 2271)
- ( microphone not working) (RP 2292)

( Other counsel having loud conversations during these proceedings which adds to the inability to make out the testimony in light of the other serious recording issues) (RP 2293)

- ( continuing electronic distortion) (RP 2559)
- ( off microphone) (RP 2629)

- ( CD will not load properly; end of recording) (RP 2562)
- ( lengthy inaudible comments) (RP 2853)

( some further inaudible comments) (RP 2865)

( indiscernible and inaudible), ( the recording is once again too poor and sporadic to transcribe) (RP 2880)

The trial court knew about the malfunctioning recording system by at least the 11<sup>th</sup> day of trial. After the malfunctions forced the move to another court-

room the judge explained the problem. In response to counsel Harlans inquiry into the record being ok or not, "what kind of record we have from last Friday", the court jokes about there being nothing to talk about at a later proceeding, meaning appellate review. Mr. Johnson is not laughing however. (RP 1536-37)

Johnson believes there is strong argument that when looked at as a whole, in the context of multiple issues of ineffective assistance of counsel issues and an incomplete record combined, so much doubt exists on the fairness on the appellate process it should render this courts review of Johnsons constitutional violation claims for harmless error as inappropriate.

Viewed in this light Johnson contends his claims of ineffective assistance of counsel coupled with an extensively defected record constitutes a form of structural error. "It is improper to apply harmless error analysis where structural errors rendered trial fundamentally unfair". Powell v. Golaza, 282 F.3d 1089, 1096 (9<sup>th</sup> cir), vacated on other grounds, 537 U.S. 1616 (2002)

Johnson next asserts that the incomplete record makes it impossible for him to fully and effectively identify and argue claims of ineffective assistance of counsel. On one hand, "the burden is on the defendant alleging IAC to show deficient representation based on the record ...." State v. McFarland, 127 Wn. 2d 322, 335, 899 P.2d 1251

(1995). On the other hand, "Claims of ZAC are not reviewable for the first time on appeal unless the record is sufficiently developed to allow such a determination. United States v. Andrews, 75 F.3d 552, 557 (9<sup>th</sup> cir. 1999)

If this court does not adopt Johnson's argument here and gives no recognition to how unjust it is to leave his appeal issues stranded on some procedural highway to nowhere, he prays consideration will be given to the following relief.

Generally, we consider only those documents that have properly become part of the record on review. Snedegar v. Hodder, 114 Wn. 2d 153, 164, 786 F.2d 781 (1990) However, RAP 9.5(c), 9.9 and 9.10 provide the means by which a party may supplement the record in the event the party believes the record is not adequate. City of Sumner v. Walsh, No. 71451-7 (Wash 02/23/2003). Johnson prays for this relief.

- (3) JOHNSONS APPELLATE COUNSEL DENIED HIM EFFECTIVE ASSISTANCE OF COUNSEL ON HIS FIRST APPEAL IN VIOLATION OF RIGHTS GUARANTEED IN THE 6<sup>th</sup> AND 14<sup>th</sup> AMENDMENTS OF THE U.S. CONSTITUTION BY FAILING TO OBJECT TO THE RP WITHIN TEN DAYS AFTER RECEIVING THE RP PURSUANT TO RAP 9.5(C)

A party who objects to or proposes to amend a report

of proceedings must do so within 10 days after receipt of the report of proceedings, or receipt of notice of filing of the report of proceedings. RAP 9.5(c).

At this time Johnson is concerned that his appellate counsel failing to timely object to the RP may have resulted in the forfeiture of his right to a complete record. If it is this court's decision to deny Johnson the opportunity for supplementing the missing record, due to his appellate counsel's failure to object, he has been denied effective assistance of counsel. His constitutional right to an effective appellate review will be lost.

(4) JOHNSON'S APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOTION THE TRIAL COURT TO RECONSTRUCT THE RECORD AS REQUESTED BY JOHNSON

An appellant has the right to effective assistance of counsel on his first appeal guaranteed by the due process clause in the 14th amendment U.S. Const. Evitts v. Lucey, 469 U.S. 307, 396-99, 105 S.Ct. 830, 836-7 (1985); Pension v. Ohio, 498 U.S. 75, 81, 109 S.Ct. 346, 350 (1988).

Johnson's appellate counsel has abandoned his rights to competent counsel on his first appeal by failing to motion the court to reconstruct the record. He is now at the mercy of this court for relief.

A Washington Appellate Court has the authority to determine whether a matter is properly before the court

and may perform all acts necessary or appropriate to secure fair and orderly review of a case. In addition, the court may waive the Rules of appellate procedure when necessary to "serve the ends of justice." RAP 1.2(c); RAP 7.3; Kruse v. Hemp, 121 Wn. 2d 715, 721, 853 P. 2d 1373 (1993).

Together RAP 1.2(a), RAP 1.2(c), and 18.8(a) make clear that an appellate court should liberally interpret the RAP's and alter any provision included therein when necessary to promote justice and to consider cases and issues on their merits. State v. Olson, 126 Wn. 2d 315, 323, 893 P. 2d 629 (1995). (noting the discretion provided to an appellate court in RAP 1.2(a) "should normally be exercised unless there are compelling reasons not to do so"). [A]pplying strict form would defeat the purpose of the rules to "promote justice and facilitate the decision of cases on the merits." In re Personal Restraint of Benn, 134 Wn. 2d 868, 938-39 952 116 (1998)

Here the procedure of recording the trial record is so flawed there is no way to determine all the issues that violated Johnson's right to a fair trial with no order to reconstruct and supplement the record being granted.

The constitutional mandate is addressed to the action of the state in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law. "Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system

of justice, a serious risk of injustice infects the trial itself. When a state obtains a criminal conviction through such a trial it is the state that unconstitutionally deprives the defendant of his liberty." *Evitts*, 469 U.S. at 396.

- (5) JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL'S DEFICIENT PERFORMANCE VIOLATED HIS RIGHT TO A SPEEDY TRIAL A REASONABLE LENGTH OF CONTINUANCE A LEGITIMATE DEFENSE AND TO A MEANINGFUL ADVERSARIAL PROCESS

Johnson's trial date was set for Feb. 21, 2006 when his co-defendant requested a continuance. On Feb. 2, 2006 Johnson's counsel informed the court he is opposing any continuance. (RP143) Without explanation, Johnson's counsel changes his position on being ready for trial, and despite admitting to already being provided access to critical witnesses, responds to the court's inquiry as to readiness for trial in the negative (RP15B-59)

Counsel for Johnson does put his objection to the continuation of trial on the record. However, when the court settles on a trial date over 6 months away Johnson's counsel does not object or attempt to protect Johnson from such an unreasonable delay period. Counsel failed his duty to protect Johnson's demand for some measure of speedy trial under the guise of him being

able to provide competent representation requires it.

Yet than counsel goes on to convince Johnson of a viable defense theory that ends up requiring no preparation or additional evidence, other than Johnson's own testimony, and one of which is not even legally recognized.

It is clear what his fellow attorneys at law thought about his proposed defense strategy.

COURT: "----- is not going to be allowed,  
(RP 2539) because it's not Washington law".

COURT: "That's not the law"  
(RP 2541)

CO-DEFENDANT COUNSEL: "If he chooses to testify  
(RP 2531) like that, that's fine, but  
he's basically just convicted  
himself"

STATE: "he's --- he, in essence,  
(RP 2665) sealing his fate..."

STATE: "--- Johnson admitted to every  
(RP 2766) element of felony murder"

After the court won't allow counsel's defense theory to be instructed to the jury his next strategy is to preserve it on the record for appeal. (RP 2673 & 2675) while at the same time taking no actions to protect the trial record for review after being informed of malfunctioning recording system.

Finally, one more fellow attorney at law gives a thumbs down to Johnson's counsel's unsound trial strategy. Unfortunately for Johnson it was his appellate counsel refusing to even argue a defense unsupported by law. Such a representation is a complete failure to provide a meaningful adversarial process in Johnson's trial.

Strickland, supra, sums up such representation best:

"... the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"

Prejudice is presumed where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing and the adversarial process itself becomes presumptively unreliable. U.S. v. Cronie, 466 U.S. 648, 659 (1984)

(6) THE TRIAL COURT VIOLATED JOHNSON'S RIGHT TO AN UNBIAS JURY WHEN HE REFUSED TO DISMISS JUROR ROMANO FOR CAUSE

Johnson's argument is simple here. Juror Romano's contact with the victim at the crime scene was so likely to create juror empathy the court

should have dismissed Romano for cause and at the very least held a fact finding hearing to protect Johnson's right to an unbiased jury. Coupled with the fact Romano has a Bi-Polar disorder and prone to emotional ups and downs it was plain error to have failed to not dismiss for cause. Any claim to forfeiture to this issue should be excused to prevent grave injustice.

New trial required because personal contact between detective and 3 jurors may have "created juror empathy" that affected jury's decision. Caliendo v. Warden of Cal. Mens Colony, 305 F.3d 691, 699 (9th Cir 2004)

Failure to assert right usually results in forfeiture, but plain error rule mitigates. The plain error doctrine recognizes that where a defendant's substantial personal rights are at stake, the rule of forfeiture should bend slightly if necessary to prevent a grave injustice. Johnson v. U.S., 520 U.S. 461, 465 (1997)

(7) JOHNSONS COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO ARGUE/OBJECT AT TRIAL THE COURTS FAILURE TO DISMISS JUROR ROMANO FOR CAUSE

Johnson's counsel filed a motion at the end of trial for a new trial due to the court not dismissing Juror Romano for cause. If his failure to not object

during trial forfeits Johnson's right to appeal review of this issue his counsel denied him ineffective assistance of counsel.

However, this issue may not be forfeited. A case on point is U.S. v. Martinez-Salazar, 528 U.S. 304, 314-15 (2000) "defendant not required to use peremptory challenge when district court failed to remove juror for cause to preserve juror bias claim on appeal".

When the court denied Johnson's counsel's motion on the issue he noted that very issue. That counsel had peremptory challenges and failed to use them.

Nevertheless, if this issue is in fact not preserved for appellate review the fact counsel attempted to backdoor his motion shows he knew he had been incompetent when not arguing the issue earlier.

(8)

JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE MADE IMPROPER AND PREJUDICIAL COMMENTS TO THE JURY

With already one issue of possible taint and undue influence on the jury, Johnson's comments are so inflammatory as to be reviewed for a

presumption of prejudice. Johnson's counsel made the following comments:

"Partway through this trial I broke my glasses. Put on a different pair of glasses. It's about that time in the trial that we also decided that I had to become something I typically don't become, which is a mini prosecutor" (RP 2774)

Such a comment to the jury cannot in any circumstances be a sound tactic or strategy. A comment as inflammatory as that will always outweigh any possible rationale to it being a reasonable representation. Johnson was denied effective assistance of counsel for such an unprofessional act. Court need not establish actual prejudice Rickman v. Bell, 131 F.3d (6<sup>th</sup> cir 1997)

9 JOHNSON WAS DENIED A FAIR TRIAL WHEN CUMULATIVE ERRORS RENDERED THE TRIAL PROCESS FUNDAMENTALLY UNFAIR.

Johnson is arguing his IAC claims should be reviewed by considering the cumulative prejudicial effect of errors. Phillips v. Woodford, 267 F.3d 996, 985 (9<sup>th</sup> cir 2000); Male v. Bledgett, 970 F.2d 614, 627 (9<sup>th</sup> cir 1997) (per curiam)

Johnson's SAG includes 7 claims of IAC. Additionally, multiple incidents of his trial counsel's failure to object to improper argument and comment also occurred. However, the record is incomplete for these claims to be supported by the existing record, as required by Washington State and federal law. McFarland and Andrews, supra.

Where each additional claim of IAC lost to the incomplete record may not rise to the level of reversible error when looked at separately, their cumulative effect may nevertheless be so prejudicial to Johnson as to warrant the trial process fundamentally unfair. U.S. v. Wallace, 448 F.2d. 1464, 1475 (9th Cir 1971) "The cumulative effect of errors" violated the due process guaranteed of fundamental fairness" and necessitated new trial Taylor v. Ky., 436, U.S. 478, 488 n 15 (1978)

When viewed in this light Johnson contends it is impossible for this court to determine the tipping point of the scales of justice without a corrected record. And in this case the cumulative effect of all the errors raised in this SAG. And the lack of a complete record is not only a violation of State law it also denied Johnson the Due process of Law in the 5th, 6th and 14th Amendment U.S. Const. Duncan v. Henrey, 513 U.S. 364, 366 (1995).

Please take notice that Johnson is a non-lawyer filing this motion and SAG, without the benefit of counsel and requests this court afford liberal construction to this and all his other Pro Se pleadings submitted to this Court, keeping in accordance with Hains v. Kerener, 404 U.S. 519, 520 (1972).

### Conclusion

For the reasons stated in this SAG In the interests of justice. Mr Johnson respectfully requests this court reverse his conviction and remand for a new trial and grant all the Relief Requested in this SAG and attached motion.

Respectfully Submitted on October 31<sup>st</sup>, 2007

  
Daniel C Johnson Pro. Se.

I Daniel C Johnson declare under the penalty of perjury under the laws of the State of Washington that the facts set out in this SAG are true and correct, and the document I placed in appendix A of this SAG is a true and correct copy and I am competent to testify to the facts stated here in this SAG.

Signed at Clallam Bay Washington October 31<sup>st</sup>, 2007

# APPENDIX

A

APPENDIX

COA No. 35492-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,  
Respondent,

v.

DANIEL C. JOHNSON,  
Appellant.

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MOTION TO MODIFY CLERKS SEPTEMBER 14, 2007 RULING  
MOTION TO ORDER COUNSEL TO RECONSTRUCT THE RECORD  
IN TRAIL COURT AND MOTION TO GRANT A STAY  
OF PROCEEDINGS AND EVIDENTIARY HEARING.

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 10-3-07  
DANIEL C. JOHNSON PRO SE  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 98326-9723

I. IDENTITY OF MOVING PARTY

Appellant Daniel C. Johnson making a special appearance Pro Se. requests relief designated in part II.

I

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 18.8, 17.7, 9.5 and 1.2 and applicable <sup>law</sup> case<sup>s</sup> Mr. Johnson respectfully requests the Judges of this Court modify the ruling filed September 14, 2007 by David C. Ponzoha Court Clerk, limiting appellant Jonson's motion to extend time to file his Statement of Additional Grounds For Review ("SAG") until 10/31/2007.

Johnson request the Judges grant him an extention to file his SAG until 11/30/2007 to insure the record is reconstructed by the trial Court before he files his SAG

Johnson also request this Court grant a "STAY OF PROCEEDINGS" pursuant to RAP 7.3 pending his appellate attorney's motion to the trial court to reconstruct the missing verbatim report of proceedings.

Johnson also request an "EVIDENTIARY HEARING" to find out why the record is incomplete.

Johnson also request this Court order appellate Counsel send him the following materials:

1. A copy of his Clerk's file From Clark County Superior Court No.05-1-01730-9.

2. A copy of all trial exhibits that can be photo copied.
3. A list of all trial exhibits.

### III. RELEVANT FACTS AND GROUNDS FOR RELIEF

Since Johnson has received the verbatim report of proceedings he has discovered that considerable amount of the record is missing due to the trial Court's malfunctioning recording system. The trial Court acknowledge there was a malfunction. See page 630, and 1536-7 in APPENDIX A of this motion.

Johnson sent a letter dated 10/02/2007 to his appellate attorney Lisa Tabbut to inform her that the record is incomplete such as most of counsel Harlan's closing argument. See page 2874 and 2879-80 from the 10/28/2006 and 10/29/2006 report of proceedings in Appendix B of this motion, and he requested Counsel to motion the trial court to reconstruct the trial record so there would be a complete record. Johnson also requested his attorney send him a copy of his Court file and trial exhibits so he could use them to support his pro se issues counsel refused to raise. Johnson also sent a copy of the letter to this Court.

This Court's Clerk also stated in his ruling that Jonson is not entitled pursuant to RAP 10.10 (c) & (e) to the Clerk's papers and trial exhibits to prepare his SAG.

No where in RAP 10.10 does it state the appellant is not entitled to clerk's papers or exhibits. RAP 10.10 (c) states in relevant part: "reference to the record and citation to authorities are not necessary, but the appellate Court will not consider a defendant/appellant's SAG if it does not inform the court of the nature and occurrence of alleged errors."

Further more RAP 9.6 states in relevant part: "Any party may supplement the designation of clerk's papers and exhibits prior to or with the filing of the party's last brief. Thereafter a party may supplement the designation only by order of the Appellate Court upon motion."

The trial exhibits and clerk's papers will be referenced in Johnson's statement of facts in his sag and throughout all of his arguments so its vital for this Court to order his attorney to send him the Clerk's file and trial exhibits that can be photo copied and the list of trial exhibits so Johnson can supplement the designation of clerk's papers and exhibits before he files his SAG and this Court rules on the merits of this case.

For example two of Johnson's arguments are claims of ineffective assistance of counsel and without those trial exhibits and clerk's papers and the reconstruction of the report of proceedings the record would be incomplete and Johnson would not be able to support his claims on direct appeal.

Court's engage in a strong presumption counsel's representation was effective. Where as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. "The burden is on the defendant alleging ineffective assistance of counsel to show deficient representation based on the record..." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Claims of ineffective assistance of counsel not reviewable for the first time on appeal unless the record is sufficiently developed to allow such a determination. United States v. Andrews, 75 F.3d 552, 557 (9th Cir.1999).

A criminal defendant is constitutionally entitled to a "record of sufficient completeness" to permit effective appellate review of his or her claims. Coppedge v. United States, 396 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

This motion has been brought before this Court in the interest of justice and not for the purpose of delay or tactical advantage, but will help insure that the trial court reconstructs the trial record, so the record is complete for this Court to properly review the issues presented to this Court.

Please take notice that Johnson is a non-lawyer filing this action pro se, without the benefit of counsel and request this Court afford liberal construction to his pleadings and filing, in keeping in accordance with Haines v. Kerner, 404 U.S. 519, 520 (1972)

An appellate Court must follow Supreme Court precedent and may not overrule that authority. An Appeals Court may affirm a judgement on any valid grounds supported by the record, whether or not brought as an issue in the briefs. State v. Williams, 93 Wn. App. 340, 343 (1988). Furthermore "the Constitution of the United States is the supreme law of the land." art. 1, §2 Wash. Const.

#### IV. CONCLUSION

Because the record is not complete to support the claims Johnson intends to raise pro se in his SAG Johnson respectfully request this Court grant a stay of proceedings pending the trial Court's reconstruction of the record.

If appellate counsel does not motion the trial Court to reconstruct the record ● Johnson hopes and prays this Court orders the trial trial court to reconstruct the record or order Lisa Tabbut to motion the trial court to reconstruct the record.

Johnson also request this Court grant an EVIDENTIARY HEARING to determine why alot of the verbatim report of proceedings was not recorded in to insure Johnson's constitutional right to a complete record.

RESPECTFULLY SUBMITTED ON OCTOBER 3, 2007

  
DANIEL C. JOHNSON, PRO SE

I DANIEL C. JOHNSON declare under the penalty of perjury under the laws of the State of Washington that the facts set out in this motion are true and correct and the documents I placed in APPENDIX A and B of this Motion are true and correct copies and I am competent to testify to the facts stated herein this motion for which I have first hand knowledge unless otherwise stated.

SIGNED AT CLALLAM BAY, WASHINGTON ON OCTOBER 3, 2007

  
DANIEL C. JOHNSON, PRO SE  
STATE OF WASHINGTON  
COUNTY OF CLALLAM  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA. 98326-9723

# APPENDIX

A

APPENDIX

1 regularly monitoring the courtroom to make sure  
2 that witnesses are not present and that each of  
3 them has instructions as witnesses that they are  
4 not allowed to be in the courtroom during any part  
5 of the trial except their testimony, so --.

6 Since I can't recognize witnesses, then I'm  
7 not in a position to do anything except rely on  
8 that.

9 Anything else?

10 I have permitted the TV camera to be  
11 present. Obviously the jury won't be photographed.

12 (To clerk:) So bring in the jury, then.

13 And I'll remind counsel one last time, there  
14 are microphones in the courtroom. You need to be  
15 near one while you're speaking. If your voice is  
16 not being recorded, my judicial assistant will come  
17 out and tell you to get near a microphone or speak  
18 up. I don't want to have to break up the flow of  
19 your opening, but it needs to be recorded, so --.

20 *(Pause in proceedings; jurors reenter courtroom.)*

21 THE COURT: Welcome back, ladies and gentlemen,  
22 and I hope you had a good recess. I'm now going to  
23 read to you a couple of additional instructions,  
24 then we'll hear the opening statements of the  
25 parties.

P R O C E E D I N G S :

(The following proceedings took place 08/21/06:)

1  
2  
3 THE COURT: I thank everyone for their  
4 cooperation in moving this matter around to this  
5 courtroom. Hopefully we'll be able to get back up  
6 into Department 5 this afternoon, but --.

7 Are we ready to proceed? Matters we need to  
8 deal with before the jury's brought in?

9 MR. HARLAN: Just -- just curious, Judge, in  
10 terms of the -- the malfunction with -- with the  
11 camera. Do we know what kind of record we have  
12 from last Friday prior to --

13 THE COURT: Oh, yes, I don't think you're gonna  
14 have any things you can talk about at a later --

15 MR. HARLAN: (Indiscernible; laughing) --

16 THE COURT: -- proceeding.

17 MR. HARLAN: -- just checking, just checking.

18 THE COURT: No, we do attest every day to -- and  
19 we're constantly monitoring back there to make  
20 sure. That's why Andrea comes out if you're not  
21 around a microphone, and she'll probably have to do  
22 a little more of that today because there are fewer  
23 microphones in the courtroom.

24 But the reason that we were having a --  
25 we're moving today is because this morning when she

1           came in to do the daily test of the system, we  
2           discovered that one of the cameras was showing a  
3           blue screen when it -- and it was the witness  
4           camera. We were picking up audio but not video.

5                     And rather than risk that the audio would go  
6           out, we decided to come down here.

7                     We have somebody coming who is supposed to  
8           make repairs, and hopefully we'll get back up into  
9           the other courtroom, but --

10                    MR. HARLAN: Very good.

11                    THE COURT: No, we -- we constantly check the  
12           system now to make sure that it's recording, so --

13                    MR. HARLAN: I understand.

14                    MR. WEAR: Your Honor, I do have one motion  
15           before we get underway, and that is that the  
16           autopsy photographs, which are on the witness's  
17           chair, that they be reviewed by the Court on the  
18           issue of whether or not they're cumulative and  
19           whether or not they are so inflammatory that they  
20           need to be reviewed and (inaudible) for that  
21           reason.

22                    THE COURT: All right.

23                    MR. HARLAN: Mr. O'Dell would join in that  
24           motion.

25                    THE COURT: Dr. Wickham is the first witness

# APPENDIX

## B

APPENDIX

1 the thoughts going through Mr. O'Dell's head  
2 (inaudible). It's incumbent upon the State to  
3 establish that he had knowledge that -- that  
4 Balaski, Rekdahl and Johnson were going to that  
5 location with the intent to go into Jerry Newman's  
6 home and commit the burglary.

7 They have to prove beyond a reasonable doubt  
8 that he had those thoughts in his head before the  
9 burglary occurred. It's not sufficient to show his  
10 reaction (inaudible) events afterwards to a certain  
11 extent (inaudible).

12 *(There is so little audible in this argument due to the*  
13 *constant cutting out of microphones, where Mr. Harlan*  
14 *is standing (in front of the jury and not on a*  
15 *microphone), in addition to the electronic noises*  
16 *inserted, that it is futile to attempt to transcribe.)*

17 THE COURT: Ladies and gentlemen of the jury,  
18 it's about 6 P.M. Of course, you've been here all  
19 day. Would you prefer to continue to listen to  
20 closing arguments, or are you prepared to take a  
21 break?

22 Let me just see a show of hands as to how  
23 many of you want to take a break at this point.

24 All right. Well, even if one you wants to  
25 take a break, that's good enough for me, so --

P R O C E E D I N G S :

(The following proceedings took place on 08/29/06:)

THE COURT: All right, please be seated.

MR. HARLAN: I just want to put on the record I got on the elevator at (inaudible) 8:30 (inaudible). The door was about to close and juror No. 3 (inaudible), said hello to me. I didn't (inaudible), didn't acknowledge her at all.

THE COURT: All right, well, we've previously instructed them that that would happen, so (inaudible).

Anything else?

(To clerk:) All right, bring in the jury.

(Pause in proceedings; jurors reenter courtroom.)

THE COURT: Welcome back. (Inaudible) arguments in the case, and Mr. Harlan (inaudible).

MR. HARLAN: Thank you, Judge. (Indiscernible) last night at 6:00 and (inaudible) evidence, I want to recap very briefly where we -- where we went, where we came from and where we are right now. Very short, maybe a couple minutes in terms of (inaudible).

Number one, Mr. O'Dell lacked (inaudible) knowledge (inaudible) accomplice in this event because he didn't know (inaudible) Balaski, Johnson

1 and Rekdahl had the intent to commit burglary in  
2 Newman's house (inaudible) vehicle.

3 We talked about the burden of proof and the  
4 three (inaudible), basically the cornerstone of the  
5 American criminal justice system. And we talked  
6 about (inaudible) incorporated into that -- into  
7 that instruction (inaudible). It's the -- it's the  
8 burden of proof, presumption of innocence, proof  
9 beyond a reasonable doubt, we went through that and  
10 incorporated that into a diagram.

11 And ultimately (indiscernible) as it relates  
12 to Mr. O'Dell the only issue here is (inaudible)  
13 Mr. O'Dell is whether or not Mr. O'Dell had that  
14 requisite knowledge or not.

15 And we talked about and we started  
16 incorporating evidence into that diagram. Now,  
17 look at that (indiscernible and (inaudible)).

18 *(The recording is once again too poor and too sporadic*  
19 *to transcribe.)*

20 MR. SENESCU: Ladies and gentlemen, I'm sure the  
21 last thing you want to hear is to have another  
22 lawyer (inaudible). But I can assure you that this  
23 is the last (inaudible), the last argument that  
24 you're gonna hear in this case.

25 And as the State does have the burden of

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
AT DIVISION TWO

DANIEL C. JOHNSON

Appellant,  
vs.

STATE OF WASHINGTON

Respondent.

**PROOF OF SERVICE**

I, DANIEL C. JOHNSON, pro se, do declare that on the 3 day of OCTOBER, 2007. I have served the enclosed MOTION TO MODIFY CLERK'S SEPTEMBER 14, 2007 RULING MOTION TO ORDER COUNSEL TO RECONSTRUCT THE RECORD IN THE TRIAL COURT AND MOTION TO GRANT A STAY OF PROCEEDINGS AND EVIDENTIARY HEARING.

on ever other person required to be served, by presenting an envelope to state prison officials at the Clallam Bay Corrections Center, containing the above documents for U.S. mailing properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

LISA E. TABBUT ATTORNEY AT LAW  
P.O. BOX 1396, LONGVIEW, WA 98632-7822

CLARK CO. PROSECUTING ATTORNEY, 1200 FRANKLIN  
P.O. BOX 5000, VANCOUVER, WA 98666-5000

I declare under penalty of perjury under the laws of the State of Washington, pursuant to RCW 9A.72.085, and the laws of the United States, pursuant to Title 28 U.S.C. § 1746, that the forgoing is true and correct.

Executed on this 3 day of OCTOBER, 2007.

  
DANIEL C. JOHNSON, Pro se  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326-9723

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

Daniel C Johnson

Appellant,

vs.

State of Washington

Respondent.

**PROOF OF SERVICE**

I, Daniel C Johnson, pro se, do declare that on the 31<sup>st</sup> day of October, 2007. I have served the enclosed a statement of additional grounds for review and attached motion and appendix A

on ever other person required to be served, by presenting an envelope to state prison officials at the Clallam Bay Corrections Center, containing the above documents for U.S. mailing properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Michael C. Kinzie Clack Co. Pros. Atty's Office  
1200 Franklin P.O. Box 5000 Vancouver, Wa. 98666  
Lisa Elizabeth Tabbutt Attorney at Law  
P.O. Box 1396 Longview, Wa. 98632

I declare under penalty of perjury under the laws of the State of Washington, pursuant to RCW 9A.72.085, and the laws of the United States, pursuant to Title 28 U.S.C. § 1746, that the forgoing is true and correct.

Executed on this 31<sup>st</sup> day of October, 2007.

Daniel Johnson, Pro se

Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326-9723