

No. 36143-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

ANDREW KIMBROUGH,
Appellant.

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS

Andrew Kimbrough
DOC # 989047
Olympic Correction Ctr.
11235 Hoh Mainline
C/W Unit
Forks, WA 98331-9492

FIRST GROUNDS

The State denied Defendant his U.S. Constitutional right to a fair trial, to confront witnesses against him, and to due process per Amendments VI and XIV, by not allowing the "Confidential Informant" to testify.

This case involved a videotaped "drug sale" transaction. Police recruited a drug user to pose as a customer and buy drugs, while police video and audio taped the transaction. RP1 36.

The police referred to this drug buyer as a confidential informant, or "CI". This is the foundation of their error. Detectives may use a Confidential Informer (CI) for mafia-type crimes, to prevent retaliation upon the CI. They may offer anonymity to corporate whistle-blowers to prevent corporate backlash. But to have someone solicit drugs on video, to show that video in a court, openly identifying the person police name a "CI" on both occasions, defies the "CI" purpose, and instead becomes merely a trick for the State to refuse to allow Defendant to confront witnesses

against him, thus depriving him of Due Process.

U.S. Constit. Amend. VI, XIV.

For reasons not clear to me, but which I believe contribute to Ineffective Counsel (covered later in this brief), the audio portion of the Police recording was barred at pretrial. This audio would show that I had no interest in selling drugs to the "CI", but was only interested in inviting her to join a party my friends and I were having down the street.

During the trial, police who testified made much of the length of our "transaction"; since the "CI" stood next to the phone while I tried to call my friends in the hotel next door. The audio even showed the "CI" telling me, "Try the White Pages." A jury could have assumed I was not looking up "Cocaine Dealers" for her in the Yellow Pages. But the length of time she sat at my elbow was presented by the State as proof that we were both engaged in a drug deal. This was not true, and the CI could have cleared that confusion up. RP1 46, Sgt. Lane's testimony that the "deal" took several minutes. There was no "deal". The video made it seem like there was, and the audio was

ruled inadmissible before trial. The audio was certainly flawed, since all that is audible is the "CI"s overly aggressive attempts to buy "rock", but my responses - "I'm just trying to call this hotel", and "Do you have a boyfriend, pretty lady?", can be inferred by the CI's responses to that.

Instead of providing testimony from the state's "confidential" informer, who I met, and whose image was clearly presented in the State's video, the State had Police observing the CI that day provide conjecture about what the CI would have testified to. This is backdoor hearsay, and is should have been objected to and ruled inadmissible by the Court.

Examples of this "backdoor hearsay" are found in the Report of Proceedings (RP) at Volume 1, Page 40, lines 20-22. RP1 40/20-22. See also RP1 58/24-25, RP1 60/14-15, RP1 63/5-8, RP2 8/22, RP2 26/16-19, RP2 27/17-20, RP2 32/1. All of these make a priori assumptions that the CI, whose actions are out of camera and out of police range or view on several occasions, has purchased the crack rock she obtained from Mr Faison. Making that assumption, police testify and act as they did, but the CI was

not presented for testimony, so she was not able to tell the jury that, NO, the Defendant did not offer to sell her crack, nor did he set a price, nor did he have any involvement with the sale, except to accept the prerecorded \$20 from the actual dealer or middleman to buy, at that man's request, some liquor for them to share; I mean, all 3 of us to share. The middle man, Mr. Faison, told me he knew the "CI", and I asked him to get her to come party with us.

Per ER 801(c), Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible. But in State v. Walker, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998), the Washington Supreme Court found that the State "dodged" the hearsay rule by rephrasing its questions in a way that avoided direct quotes from an out of Court declarant. The State has done the same in this case. In Walker, the Court found this constituted "backdoor hearsay". And they ruled it was an error that required reversal.

"Inadmissible evidence is not made admissible by allowing the substance of a testifying witness' evidence to incorporate out-of-court statements by

a declarant who does not testify. United States v Sanchez, 176 F.3d 1214, 1222 (9th Cir 1999). (Citing United States v. Check, 582 F.2d 668, 683 (2nd Cir 1978).

In Check, supra, the State asked Police Officers to recount - without telling the Court what the absent informant actually said - what the Officer's reactions were and the state of his knowledge after the CI spoke. The Court ruled this was a "transparent conduit for the introduction of inadmissible hearsay information obviously supplied by and emanating from the CI. Id., at 678.

In this case, no officer testified they ever saw, nor did the video capture, any hand to hand drug transaction between the "CI" and Mr. Faison, whom the police officers testify acted as my accomplice or "middler". And the CI's testimony could have cleared up that he was not my middler.

The error is not harmless. Confrontation violations "must be evaluated in the context of all other evidence to determine whether it is a harmless error." Arizona v. Fulminate, 499 U.S. 279, 307-308, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Harmlessness must be determined on the basis of

the remaining evidence. Coy v. Iowa, 487 U.S. 1021, 1021-1022, 108 S.Ct. 2789, 101 L.Ed.2d 857 (1988). State v. Palomo, 113 Wn.2d 789, 783 P.2d 575 (1985).

As in Check, having a Detective testify to that nature of his understanding after talking to a witness, instead of reporting what the witness said, is simply an attempt to circumvent the hearsay rule. The evidence is inadmissible hearsay.

Here, the primary evidence that was provided to establish the knowledge or intent elements of the crimes charged was the Officers' second-hand account of the CI's out-of-court activities: her non-presented statement. The testimony the police provided of the CI's actions and speech, is therefore inadmissible hearsay. And it was introduced in violation of the Sixth Amendment's confrontation clause. The error was not harmless.

The only evidence State presented is that I was there, and Mr. Faison gave me \$20 to buy liquor for him, which I did, on video. RP2 _____. This is not enough evidence to prove the crimes charged at bar. State v. Amezola, 49 Wn.App 78, 88-90, 741 P.2d 1024 (1987).

Defendant requests reversal and retrial, with

"CI" present to testify. Her name and personal information can be suppressed if the State desires to. Her face is known. It is on the video. Defense will stipulate that the woman in the video is a police informant.

SECOND GROUNDS

Defense Counsel was ineffective. His performance fell below an objective standard and prejudiced the defense. Strickland v. Washington, 466 U.S. 668, at 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This deficiency and prejudice denied me the right to counsel embodied in the US Constitution's Sixth Amendment.

The Court of Appeals and I probably have different ideals about this. For me, since I was convicted of crimes I never committed (possession with intent and distribution); when I volunteered to accept responsibility and plead guilty to the crime I did commit (possession); with the same number of months of incarceration the State offered for a plea on the convicted charges; I'd consider

my counsel ineffective. But since we're using the U.S. Supreme Court's standard from Strickland, supra, I will show my counsel's failures to this standard.

Atty. Ryan is a fine attorney and provided some excellent seat-of-his-pants advocacy. But trials are not usually won at trial, but by investigating the facts before trial begins. This, Atty. Dana Ryan never did.

The man arrested with me, Mr. Faison, was, as police surmised, a "middler". But he was never my middler. An hour before my arrest, he took my money and purchased the cocaine police recovered on me, from Mr. Faison's dealer. For his "service", he charged me a "cut" of my purchase, which, notwithstanding Special Investigator Stringer's testimony that users always keep their 8-ball uncut, and all dealers always cut it into \$20, .2 gram shards for sale, was all in .2 gram form, called "rocks".

RP2 43/24 - 44.

This Special Investigator (SI) Stringer testimony creates the question, that Atty. Ryan never asks, "Well then how do users come by 8-balls if dealers invariably slice them up into shards to sell?"

My purchase from Mr. Faison arrived in all .2

gram rock form; possibly so that he could take his cut off the top, and put those in his pocket, which he did. Is this what he later sold to the "CI"?

Mr. Faison was homeless when I met him. My first attorney for this case, before he withdrew, located Mr. Faison and recorded his statement that I had nothing to do with the sale to the "CI", and that he, Mr. Faison, gave me the pre-recorded police \$20 when we were on the street (as recorded on the video, just before I went into the liquor store) to buy him liquor. We had smoked my crack, and he wanted to "buy a round", in appreciation.

Before my trial, Mr. Faison took a plea bargain from the State, and we can surmisethat had Mr. Faison told State that I was involved in the sale, State would certainly have presented him as a State's witness. If State objects to this "circumstantial evidence", I refer State to RP2 68, State's close.

In any case, my first attorney located Mr. Faison, got his statement I wasn't involved in the sale, and Atty. Ryan had that work product.

So why wasn't Mr. Faison called to testify?
RP2 57 (Defense rests.) A witness present at the time, with the credibility of already having admitted

his guilt, testifying the sale had nothing to do with me; I didn't profit by it, I didn't use Mr. Faison as a "middler", and it wasn't my crack he sold to the "CI"; would create a reasonable doubt of my guilt for the jury. Atty. Ryan had his statement!; and failed to investigate and produce him to testify.

My counsel's failure to conduct meaningful investigation was deficient performance which prejudiced the outcome of my trial. Strickland. "The pretrial period constitutes a critical period in criminal proceedings because it encompasses counsel's constitutionally imposed duty to investigate the case." Mitchell v. Mason, 325 F.3d 732 (6th Cir 2003).

The reason police assert they planted a "CI" to begin with is that they received "complaints" from business owners about drug sales. RP1 561. This is hearsay, and Atty. Ryan never objects to it. Did Sgt. Ryan get these business calls personally? And how can a drug deal disrupt business when a team of 7 to 10 officers are all surrounding a CI to observe a drug sale, yet it is so quick and discreet that not one of them ever sees it? Then, per the

police testimony, the drug money is "washed" by spending it immediately at a local business! The "business owners complaints" was hearsay, and Attorney Ryan never objected to it.

My counsel, Atty. Ryan, told the Court he'd been working on drug cases for 20 years. RP3 8. Couldn't he find just one ex-client to expose the untrue and harmful assertions police testified to (see next Grounds), with all his contacts? Any expert could easily have refuted most of the circumstantial claims police and state made purely in order to sway a jury - not with facts, but with illusory "anecdotes" or fabricated "statistics" from their "experience", to wit:

- that 2.6 grams is not typical of a user. RP1 64/24 (see State v. Hagler, 74 Wn.App 232, 236, 872 P.2d 85, (1994).

- that 999 times in 1000, dealers use a "middler". RP1 47.

- that drug sales normally take several minutes, just as the police video in this case purports to show. RP1 40/20-25.

- that drug users never carry \$400. RP2 46.

- that dealers need \$20 bills to make change. RP2 50.

- dealers sell only .2 gram rocks but users buy only whole 3.5 gram 8-balls of cocaine. RP1 ____.

Any drug dealer or user - and certainly Atty. Ryan knows many - can refute all of these police assertions, made solely to point the jury toward a "guilty" verdict, but having no basis in fact.

Atty. Ryan asks the narcotics police about common drug terms like "washing money". RP1 ____.

I can only hope the police's ignorance is feigned. This term means a dealer spends or exchanges money from a drug sale immediately in case it is pre-recorded drug money used in a police sting, as in this case. It is exactly what Mr. Faison did, by giving me that \$20 from his sale, for alcohol. But I did not use this \$20 to buy the alcohol when I went into the liquor store (on police video), because I did not know it came from a drug sale. Atty. Ryan knew this, but never goes beyond asking the narcotics officers what the term means. The term is never explained to the jury, and this defense is never presented at trial. Ineffective counsel.

I was arrested with \$425 in cash (of mine). Police and state made much of this, pointing to it as guilt of being a drug dealer. My counsel never

made any attempt to explain where, if not from drug sales, this money came from. It was such a compelling question, the Court inquired about it after the verdict was rendered. RP 3 10. And I (then) told her - from my sister, from helping my in-laws pack up their house to move, and from a moving company I sub-contracted to. All the people who handed me this money were available and willing to testify. Accounting for it severely damages State's case; a circumstantial case with all the exculpatory evidence ignored by defense counsel. Counsel's failure to call any witnesses to defend my case, to rebut State's circumstantial case, and expose State's assumptions as false, destroyed the adversarial trial process, and resulted in an unmerited conviction.

My counsel's refusal to insist the audio to the police recorded video must be played was also prejudicial to my case. True - the audio was deficient, as nearly all the usable audio is the "CI" and her repetitious requests for "rock". - it does not capture the conversation of the "suspect". But audible on the audio is the "CI" saying, "Try the white pages." AP2. For what? Crack dealers weren't listed in the yellow pages? I wasn't selling

her drugs, I was trying to make a phone call. The "CI" says, "You mean like a boyfriend?" AP2. Why? Am I recruiting "middlers"? No! I'm trying to pick her up! I ask her to go "back to the trail, down by the water". AP2. Why? To make a \$20 sale? No! Because I'm inviting her to party with us! When I was arrested, there were 4 people there: 2 men, and 2 women. It wasn't a drug sale police busted up, it was just 4 consenting adults.

So was the CI standing next to me for several minutes because I promised her drugs? No, as she could testify, if she had been produced. We spoke because I was complimenting her, and asking her to come party with Mr. Faison and me. Not because she had found a dealer. RP2 66/17. To allow that false, unsupported evidence to go unchallenged, by never playing the audio for the jury, was prejudicial. Strickland, supra. The audio was readily available.

"Defendant is guaranteed the opportunity to advance a 'theory of the case' from a defense perspective." United States v. Roberts, 119 F.3d 1006 (1st Cir 1997). My counsel called no witnesses, ignored most of state's groundless circumstantial assertions, failed to investigate; to prove my

innocence. "Suppression of evidence material to guilt or punishment violates defendant's fundamental due process rights." Dowthitt v. Johnson, 230 F.3d 733 (5th Cir 2000).

The police video recorded me buying alcohol in a brown paper bag for Mr. Faison. RP _____. Police admitted Mr. Faison and I went to the woods with other women (not the CI, who I invited, AP2) to party, and were there 10 minutes before our arrest. RP2 35/5. Mr. Faison gave me \$20 for the alcohol I bought (for everyone) in the woods. RP2 35/21. The facts support this alternative theory of events, but ineffective counsel never presented it.

"A criminal defendant is entitled to a jury instruction on any defense for which there is a foundation in the evidence." United States v. Ansaldi, 372 F.3d 118, (6th Cir 2004).

"Reversal is proper where jury instructions inaccurately state the law or fail to present a theory of defense supported by the evidence." United States v. Smith, 223 F.3d 554 (7th Cir 2000).

Sgt. Stranger apprehended me in the woods. He had a gun drawn and pointed at me, as if I were a violent criminal. In fairness to Sgt. Stranger,

apparently actual drug dealers often carry weapons to protect the thousands of dollars in money and drugs they carry. (Another fact my attorney ignored.) But with gun drawn, he asked me if I had any drugs. I answered smartly and honestly, "Yes, sir." THEN, Sgt. Stranger read me my Miranda rights. To his credit, he records this sequence in his report, honestly. AP1. But my ineffective counsel never even attempts to have evidence seized pursuant to questions before a Miranda, suppressed.

"When a government agent does more than just listen, but also initiates discussion which leads to incriminating statements from an accused after right to counsel has attached, a Sixth Amendment violation occurs." Blackmon v. Johnson, 145 F.3d 205 (5th Cir 1998).

For all these reasons, as well as the failure of counsel to object to the police and prosecutor misconduct illustrated in the next grounds, I assert my counsel at trial was ineffective, to a standard that meets the rigorous benchmark set in the U.S. Supreme Court case, Strickland v. Washington, supra.

THIRD GROUNDS

Police and Prosecutor Misconduct

State employees who enforce a State's laws hold a sacred public trust. This trust demands sterling honesty and integrity; indeed, such qualities are presumed by an ordinary juror. In this case, the Prosecutor and Police have not met this standard, and have not been worthy of this public trust.

Instead, they have shown they will say anything, true or not, to obtain a conviction. It is far past the hour when Courts of Appeal must raise the bar for police and prosecutors' truth and objectivity, and give it the sanctity of a Miranda warning. If the Court of Appeals begins to sanction public officers for perjury or even blatant exxageration or selective amnesia, these thorns in the brows of Justice will be lifted, and this dishonesty attenuated.

The Court ruled at pretrial to suppress the audio to the video Police recorded of the CI, and this audio is attached to this brief at AP 2-3. It helps my case. But the Court ruled it out at pretrial. It is therefore tantamount to misconduct

for State's first police witness, Det. Higgins, to deliberately and repeatedly refer to Police creating Audio recordings that were not allowed into evidence, and therefore never played for the jury. Det. Higgins does this four times. RP1 32/15, RP1 33/17, RP1 34/22 and RP1 34/24. The jury could easily infer from this that the audio was damaging to defense, and was suppressed to protect the accused.

The government bears the burden of establishing that the erroneous admission of evidence was harmless error. United States v. Garcia-Morales, 382 F.3d 12 (1st Cir 2004). I assert it wasn't.

Sgt. Ryan testifies that since being assigned to Narcotics detail in 1997, he has participated in or observed 200-250 drug transactions. RP1 45/17.

He then testifies, under oath, that in 999 cases out of 1000, a drug dealer doesn't want to be caught with the actual "hand to hand" transaction, so he uses a "middler", to perform the actual drug transaction. How would he know? Sgt. Ryan just testified he has only seen 200-250 cases. How can he assert that in 999 out of 1000 cases a middler is used? Only to imply my guilt, without foundation.

Special Investigator Quinn has 12 years experience in narcotics and has also observed 200 drug transactions. RP2 21/9-15. He tells it how it is. In a typical street-level drug transaction, the buyer contacts the seller, and there is a hand-to-hand exchange. No "middler" is used. RP2 21. But this is damaging to the State's circumstantial case, so State leads the witness, until he reaches the scenario state is propounding in this case. But Special Investigator (SI) Quinn only goes half way, and testifies the "middler" only brings the user or buyer to the dealer, who then makes the actual sale. RP2 22. Finally, State gets SI Quinn to admit that in some cases, the middler might handle the money and the drugs. RP2 22. This is economically unfeasible for a \$20 sale. No one does it. This is why SI Quinn was so confused by the State's leading questions. But SI Quinn contradicts Sgt. Ryan, by telling the truth.

Regarding Sgt. Ryan's testimony that drug deals usually take several minutes, exactly like the case the jury just witnessed in the (audioless) video, SI Quinn tells the truth again. Drug deals take

only a few seconds. RP2 22/12. Not a half hour, Sgt. Ryan. What drug dealer can take a half hour to gross \$20?

Perhaps (pure conjecture) SI Quinn was remembering a different arrest. This seems likely, as he believed the IC was a male, not a female. RP2 28. The prosecutor corrects SI Quinn's gender error; repeatedly. Ineffective counsel never explores whether SI Quinn is remembering a different bust.

Ineffective counsel also refuses to expose this same CI gender confusion when Off. Ellis testifies the CI was a man. RP2 7/12. And doesn't object when the state testifies for the officer that the CI was a woman, correcting the witness' mistake not once (RP2 8/11), twice (RP2 8/14), thrice (RP2 8/17), or four times (RP2 9/1), but five times (RP2 9/4) before the witness orients on the correct CI gender.

Sgt. Ryan testifies that it is not typical for a user to have 2.6 grams of cocaine - only dealers carry that much. RP1 64/24. Yet on cross-examination, Sgt. Ryan correctly identifies the most common drug transaction as an "8-ball" of cocaine sale, correctly identifies this as 3.5 grams, correctly identifies the street value of these 3.5 grams (1/8 oz.) as \$100, and correctly estimates this 3.5 grams

could last a typical user one-half a day. RP1 72-73.

According to RCW 9A.72.050, Sgt. Ryan has just committed Perjury 1. He is so eager for a conviction, he will testify that my 2.6 grams must mean I am a dealer, when in reality, as Sgt. Ryan himself testifies later, it only means I spent \$100 on an 8-ball and haven't finished smoking it yet.

"(1) Where, in the course of one or more official proceedings, a person makes inconsistent material statements under oath", he is guilty of perjury. "In such a case, it shall not be necessary for the prosecution to prove which material statement was false, but only that one or the other was false, and known ... to be false." RCW 9A.72.050.

The statement that 2.6 grams a dealer makes is very material; State depends heavily on it during closing argument. RP2 96/15-17. RP2 98. And it is a lie.

"A new trial is required if perjured testimony could in any reasonable likelihood have affected the judgment of the jury." United States v. Vaziri, 164 F.3d 556 (10th Cir 1999).

Despite his commendable honesty, SI Stringer

is not above trying to slide a circumstantial knife in between the defendant's ribs himself. He testifies the money recovered from me was, "all smaller bills: \$20 bills and smaller." RP2 53/6-8. Because "a dealer needs 20s, to make change." RP2 50.

To his credit, when confronted with irrefutable proof of his mistake, that 4 \$100 bills and one \$20 bill was taken from me, IS Stringer is quick to recant. But he never recanted on his own; he was forced to. It is an attempt to push the jury toward a circumstantial "guilty" verdict. And it is no credit to SI Stringer the attempt was aborted.

Later, SI Quinn testifies that we (the "2 black male suspects and 2 black females", AP1.) were apprehended and had alcohol in a brown bag, which was left at the scene - in the woods - not taken into evidence or examined. RP2 35/21.

The Prosecutor cunningly takes this bag of alcohol that Mr. Faison paid me \$20 for buying (me going into the liquor store after Mr. Faison hands me money, RP2 84/24) is recorded on the police video. If I had known the \$20 was from a drug sale - if I had been a dealer - wouldn't I have "washed" that \$20 and used that to buy the alcohol?) and he

suggests that, in the video, shot from 100 yards away, the brown bag, which is closed, looks like it contains a 40 oz. bottle of beer. RP2 74. I was not aware alcoholic beverages in closed brown paper bags were so easily identifiable.

But now that the State has planted the "40 oz beer" idea in the jury's mind, he subsequently takes it as gospel that this is what that unconfiscated, untested bag contains. He tells the jury I handed Mr. Faison a beer. RP2 94/11.

What evidence at trial establishes this bag contained beer? Exactly none. No lab test, no police report, no bottle of beer, no evidence at all. But this idea is manufactured by State and presented as established fact. And that "fact" is used to convict me of selling drugs, as opposed to what it really was; buying a bottle of alcohol for a friend, with the friend's money.

"Prosecutor's closing argument cannot roam beyond the evidence presented during trial." United States v. Machuca-Barrera, 261 F.3d 425 (5th Cir 2001). And yet, propounding his own "beer" theory isn't enough for this Prosecutor. What if Defendant spent \$20 on imported beer for Mr. Faison?

State attacks this potential jury objection to his beer theory by baldly & insultingly asserting, "And I doubt Mr. Kimborough was buying the expensive stuff." RP2 74/15. Why is that? I had \$400 cash.

"It is improper for a prosecutor to inject his personal beliefs about the evidence into closing argument." United States v. Nickens, 955 F.2d 112, (1st Cir 1992). "A prosecutor cannot express his personal opinions before the jury." United States v. Golloway, 316 F.3d 624 (6th Cir 2003).

State asserts I bought the "cheap stuff" only because State wants a conviction. If there is \$20 worth of liquor in that brown bag, there goes the state's case. Because, state claims, "to think that that \$20 was in payment for that bottle of beer is absurd. It defies common sense!" RP2 74.

"Jury exposure to facts not in evidence deprives defendant of rights to confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." Eslaminia v. White, 136 F.3d 1234 (9th Cir 1998). "While government's proof is entirely in circumstantial evidence, the Court of Appeals is loath to stack inference upon inference to uphold the jury's verdict." United States v. Ruiz,

105 F.3d 1492 (1st Cir 1997).

Prosecutor breaks out of the constricting confines of the actual evidence presented at trial, in order to secure an unmerited conviction.

State tells jury, "you have officers (plural) saying if you are a user you don't break your 8-ball into pieces." RP2 75/4. No, only Sgt. Stringer ever said this; not "officers" plural; but like other officers testifying in this case, he will say that any circumstance peculiar to this case indicates a drug "dealer", because he, like the others, is fighting for a drug dealer conviction. For if dealers uniformly break up their 8-balls to sell, then how do users ever come by entire 8-balls?

In reality, on the street, it's about 50-50. When you buy an 8-ball, it's in pieces or it's whole about the same percent of the time. But the State multiplies its witnesses creating "officers" (many) who told the jury that pieces equates to a dealer. RP2 75/4. When it was only one officer who did.

Likewise State tells jury (many) "officers" testified the quantity recovered (2.6 grams) indicated a dealer, not a user. RP2 78/25 and RP2 96/16.

State tells jury, "You've heard a couple officers testify to this." RP2 96/17. That's a lie.

The jury heard Sgt. Ryan claim this, then contradict himself. I had 2.6 grams. The most common drug transactin for cocaine is the 3.5 gram, \$100, 8-ball like the one I purchased earlier that day, in .2 gm rock form, and hadn't finished. As Sgt. Ryan testified, a user can smoke a 3.5 gram 8-ball in just a half a day. RP1 72/23 - 73/1.

The Prosecutor completely mischaracterizes the nature of circumstantial evidence, RP2 68, equating it to seeing 3" of snow in the morning, as a "circumstance" that it snowed. The 3" of snow is really direct evidence. State is trying to lend the conflicting assertions of its police witnesses the force of nature! But their testimony has none of nature's force & power; only nature's capriciousness and her unpredictability.

State is eager to show only the last 5 minutes of the 30-minutes of police video. RP1 39 - 40/1. Possibly this is so State can later tell jury that the CI stayed and spoke to me for a few minutes only because I must be a drug dealer. RP2 66/17 and RP2 70/2. The audio shows this isn't true. AP 2-3. She stayed to help me find a number I was trying to call, and to shoot me down when I asked her to come

into the woods and drink with us. But it is still nice to be asked. AP 2-3.

State objected to the entire 30 minutes of the video being shown, perhaps because the CI spent the same amount of time with other passers-by on the street as she did with me, and those people didn't sell her drugs, either. But that destroys State's "drug deals take this long, that's why the CI stays next to Mr. Kimbrough" assertions. Plural. RP2 66, RP2 70. You'd think that SI Quinn's testimony that a typical drug transaction takes just a few seconds (RP2 21, 22), with his 12-years narcotics experience and over 200 drug transactions, would persuade the State not to build their case on the "CI spoke to Mr. Kimbrough for several minutes" assertion. RP2 66, 70. You'd think the video showing the CI spoke just as long to several people without making any "buy" would discourage state from claiming that this circumstance is proof I was dealing drugs.

But the State is liberal in its accusations. They don't even have to be established at trial. State tells the Jury the Confidential Informer testified in this case. RP2 70/25. I must have missed that day. Though I am sure that if the CI would have assisted State's case, she'd be there.

Therefore, since the CI's testimony and also Mr. Faison's testimony, would have been favorable to my case, and not the State's, I assert I was due, and was denied, a Missing Witness Jury Instruction, conforming to WPIC 5.20. Because, "the circumstances establish, as a matter of reasonable probability, that the State would have produced the witness if the facts by him were favorable to the state." State v. Malone, No. 38326-4-I (Div. 1, 1997).

Finally, Prosecutor shows the Jury a photo of the Space Needle and Mt. Rainier (we assume). RP2 102 - 103. State tells the jury that if they take the 2 landmarks they see, they can conclude beyond a reasonable doubt that this is a photo of Seattle. This is misconduct, as well. For as the Prosecutor plainly says, it is a photo of the Space Needle and Mt. Rainier. The entire city is missing. It is just like this case. The CI had a \$20, pre-recorded (Space Needle), and at the end of the day, Mr. Kimborough is holding the hot potato (Mt. Rainier). Case closed. The reality is, there's no city of Seattle in the photo. In Tokyo they have a Space Needle and Mt. Fuji. It could be there. In Niagara Falls they have a

Space Needle and snow capped peaks in the distance. It could be there. Without the city, you can't really tell. Without the facts in evidence, without the reasonable doubts that occur between the ends of the voyage of the \$20, you can't tell. And here is the prosecutor, at the end of his closing, telling the jury to ignore all the reasonable doubts, all the evidence, everything but the large bookmarks, to reach a verdict. RP2 102 - 103. State misleads the jury to conclude that they can render a verdict when "a big piece of the puzzle is still missing." Id., 102/21. The reasonable doubts all fit within those pieces that are missing. It is a masterful illusion, but the jury was deceived by it.

Police and Prosecutor misconduct warrants reversal. It may possibly warrant dismissal with prejudice. And again, I'm still willing to admit my mistake of possessing cocaine and to plead guilty to the crime I actually committed; possession.

FOURTH GROUNDS

Prosecutor's closing argument convicted the Defendant of two separate criminal charges for the same criminal behavior, violating Defendant's right to avoid Double Jeopardy, embodied in the U.S. Constitution's Fifth Amendment. State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995).

State told jury,

"Finally, but certainly not least, ladies and gentlemen, how do we know that the defendant intended on delivering the crack that he had? He, again, with the help of Mr. Faison, had just finished selling some to the informant moments before." RP2 99/21-25. AP 4.

So the alleged sale (when NEITHER of the two sale participants were produced for trial, and the audio of the recorded/shown video was not allowed to be played for the jury), means there was future intent to sell. That's double jeopardy.

The police testified that we were apprehended in the woods; 2 men and 2 women, with a bottle of alcohol and several crack pipes, and my 2.6 grams of cocaine. Not only were we going to smoke it, we were when people ran into the woods, so we, like

high school kids sneaking a cigarette, put out the pipes, before police barged into the clearing, weapons drawn. Does this look more like a drug sale, or a drug consumption scene?

But State tells Jury I'm guilty of intending to sell, because I'm guilty of selling. Double Jeopardy. No intent to sell was evident.

Yet State harps on it, again. "Have they done it before? Ladies and gentlemen, not only has Mr. Kimbrough done it before, but he did it just moments before." RP2 100/5-7. Guilty of selling? Guilty of intent to distribute. Double Jeopardy.

Sgt. Ryan and Sgt. Stringer both testified to multiple crack pipes recovered from the 4 people in the woods. RP2 99. What they never testified to, but what state baldly & wrongly asserts to the jury that they did, was that none of our crack pipes were mine. RP2 99/9-11. AP 4. This is yet another prosecutor prevarication or invention.

It is designed to convict me of intent to distribute, for the same criminal activity state alleges in the sale to the CI. When the "circumstance" and the reality was, we were in the middle of smoking it, when police crashed the party, with weapons drawn.

Offense Details: 8910 - Criminal Arrest Warrant

Domestic Violence:	No	Child Abuse:	Gang Related:	Juvenile:	
Completed:	Completed		Crime Against:	Hate/Bias:	None (No Bias)
Criminal Activity:				Using:	
Location Type:	Street/Right of Way		Type of Security:	Tools:	
Total No. of Units Entered:			Evidence Collected:		
Entry Method:					
Notes:					

Investigative Information

Means:		Motive:	
Vehicle Activity:		Direction Vehicle Traveling:	
Synopsis:			

Violation
4 and 5
suppress

Narrative: On the listed date and time R/Sgt supervised a "Hot Pop" street drug operation. The C/I was released in the 8600 Blk of S Hosmer Street. The C/I met up with two black males and drug transaction occurred. The suspects then went into a secluded grassy area behind the strip mall on the east side of the 8600 Blk of Hosmer Street. R/Sgt and several other officers then contacted the two black male suspects and two black females.

motion to suppress

yes Q answered

R/Sgt then asked A/Kimbrough if he had any narcotics on him. He stated that he had some rock in his left front pants pocket. I then advised him of his Miranda rights. He stated that he understood his rights. I then asked him if he meant that he had crack cocaine in that pocket. He said yes. I then searched the pocket and found only money. I asked A/Kimbrough if the crack could be in his right front pocket and he said yes. I then searched that pocket and located a plastic baggy containing seven pieces of suspected crack cocaine. The substance was later field tested positive for cocaine.

R/Sgt then removed A/Kimbrough's wallet from his right rear pants pocket. Inside the wallet I located a \$20.00 bill bearing serial number EL65036340C. The bill matched the pre-recorded and photocopied bill that was given to the C/I to complete the narcotics transaction. The money was secured and a photocopy was placed into evidence. R/Sgt also located \$425.00 in U.S. Currency inside the wallet. The money was seized as drug proceeds.

R/Sgt turned the cocaine, recovered buy money (20.00 bill) and seized money (\$425.00) over to Officer Lane to place into property.

Reviewed By:	Reviewed Date:
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I removed my wallet, started to read off my drivers licenses my address the officer took it and would not count my money in the wallet in front of me

API

TAPE OF CI / DELIVERY/RECEIVED 2/14/07

**C/I : anything going on? Yes, no maybe?
there is something going on?
right on right on**

I,m dying here

Ok, I'll be patient

Did you look in the white pages?

I just want a 20 hard

AK: Who you lookin for

C/I You mean like a boyfriend

C/I I don't want to go back behind the building

AK; ...go back to the trail, down by the water, you know

**C/I; No, I don't want to do that. Nothing personal I've had
some bad shit happen, I,m not saying**

C/I; Do you know him? Is he still back there

**(AT THIS POINT SOMEONE SAYS, OK YOU DO
THAT AND I'LL GIVE YOU A BIG ONE)**

C/I: I need a dub, that was a really good deal, thank you]

My names Kim, all right baby

1 typical of an addictive crack user.

2 Now, Mr. Ryan said a couple of pipes were
3 recovered. I think Sargent Stringer said, yeah, a
4 couple of pipes may have been recovered from the scene.
5 A couple of other people were arrested at the same
6 time. Certainly Mr. Faison was arrested at the same
7 time. What he said is what I can tell you personally,
8 is that "I searched the defendant, Mr. Kimbrough. He
9 didn't have a pipe." ^(perjury) I asked him, "Did he have any way
10 of using the crack cocaine on his person? No. He had
11 no way of using the crack cocaine on his person."

12 I then asked him again, "Would a crack user
13 usually have a supply of crack and no way to use it?"
14 No. No. And Mr. Kimbrough didn't need a way to use it
15 because he wasn't planning on using it. He was
16 planning on selling it.

17 Now, other people there they may have had
18 pipes. Again, remember what Sargent Stringer said, and
19 it should come as no shock. Again, common sense:

20 "Dealers are often in the company of users."

21 *Double jeopardy* → Finally but certainly not least, ladies and
22 gentlemen, how do we know that the defendant intended
23 on delivering the crack that he had? He, again, with
24 the help of Mr. Faison, had just finished selling some
25 to the informant moments before.