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COURT OF APPEALS  
DIVISION II

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NO. 37686-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
BY cm DEPUTY DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MARCUS E. SHAW,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Lisa Worswick Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural Facts</u> .....	2
2. <u>Substantive Facts</u> .....	4
C. <u>ARGUMENT</u> .....	5
1.   THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE THE AUDIO RECORDING OF THE INTERACTION BETWEEN THE CONFIDENTIAL INFORMANT AND MR. SHAW BECAUSE THE RECORDING WAS NOT PROPERLY AUTHENTICATED	
2.   MR. SHAW WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ARTICULATE THE PROPER GROUNDS FOR SUPPRESSION OF INADMISSIBLE EVIDENCE WHICH ULTIMATELY DENIED MR. SHAW HIS RIGHT TO A FAIR TRIAL.	
3.   THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE THE AUDIO RECORDING OF THE INTERACTION BETWEEN THE	

CONFIDENTIAL INFORMANT AND  
MR. SHAW BECAUSE ITS  
ADMISSION VIOLATED HIS RIGHTS  
UNDER THE CONFRONTATION  
CLAUSE OF THE SIXTH  
AMENDMENT

D. CONCLUSION..... 20

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	12
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	5
<u>State v. Calegar</u> , 133 Wn.2d 718, 949 P.2d 235 (1997).....	10, 18
<u>State v. Danielson</u> , 37 Wn. App. 469, 681 P.2d 260 (1984).....	6
<u>State v. Jackson</u> , 113 Wn. App. 762, 54 P.3d 739 (2002).....	9, 10
<u>State v. McFarland</u> , 127 Wn.2d 332, 899 P.2d 1251 (1995).....	12
<u>State v. Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	13, 14, 15
<u>State v. Payne</u> , 117 Wn. App. 99, 69 P.3d 889 (2003).....	5,6
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	12, 13, 14,15
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	10
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	11, 13

**TABLE OF AUTHORITIES**

	Page
<u>WASHINGTON CASES, Continued</u>	
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972).....	12
<u>State v. Williams</u> , 136 Wn. App. 486, 150 P.3d 111 (2007).....	6, 9, 10, 16
<u>FEDERAL CASES</u>	
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	8, 15, 16, 17
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).....	9, 17, 18
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984).....	12, 13
<u>OTHER RULES AND STATUTES</u>	
RCW 69.50.101(p).....	14
<u>OTHER RULES AND STATUTES, Continued</u>	
RCW 69.50.401(1)(2)(a).....	2
ER 901.....	5, 6 10, 14, 19
5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 900.2 at 175; § 901.2 at 181-82 (4 <sup>th</sup> ed. 1999).....	5



A. ASSIGNMENTS OF ERROR

1. The trial court erred by overruling defense objection to the admission of the audio tape of an alleged drug transaction on grounds of lack of authentication.
2. The trial court erred by overruling defense objection to the admission of the audio tape of an alleged drug transaction on confrontation clause grounds.
3. Appellant was denied his right to due process by the introduction of an audio and video tape of a confidential informant without the opportunity to cross examine the confidential informant.
4. Appellant was denied effective representation when his attorney failed to object to and move to strike statements of Detective Yenne in violation of the court's ruling in limine which constituted the only evidence of a delivery.
5. Appellant was denied effective representation when his attorney failed to articulate appropriate grounds for suppression of the audio tape of the alleged delivery transaction.

Issues Pertaining to Assignments of Error

1. Did the trial court err by overruling defense objection to the admission of the audio tape of an alleged drug transaction on grounds of lack of authentication?

2. Did the trial court err by overruling defense objection to the admission of the audio tape of an alleged drug transaction on confrontation clause grounds?
3. Was appellant denied his confrontation clause rights by the introduction of an audio and video tape without a corresponding opportunity to cross examine the confidential informant?
4. Was appellant denied effective assistance of counsel when his attorney failed to articulate proper grounds for suppression of the audio tape?
5. Was appellant denied effective assistance of counsel when his attorney failed to object to and move to strike officer Yenne's statement in violation of the courts order in limine that the CI asked for narcotics.

B. STATEMENT OF THE CASE

1. Procedural Facts

Marcus Shaw was charged with unlawful delivery of a controlled substance (RCW 69.50.401(1)(2)(a) and unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401(1)(2)(a)) CP 1-2.

Before and during trial defense moved to suppress the audio and video tapes produced during the alleged transaction. RP 63-90.

The Court ruled that the audio of the CI was not admissible, but the video would be admissible if properly redacted, as well as the defendant's conversation during the alleged drug transaction. RP 89-90, 414 -15, 462.

Following a jury trial, the honorable Lisa Worswick presiding, Mr. Shaw was found guilty of unlawful delivery of a controlled substance and unlawful possession of a controlled substance. CP 37-39. This timely appeal follows. CP 53.

2. Substantive Facts

Tacoma City Police officer Colleen Johnson drove a confidential informant ("CI") with a body wire for transmitting audio to Tacoma Avenue near Wrights Park. RP 144, 181, 183. The CI is a mercenary which means that she looks for drug dealing targets in exchange for money and has a narcotics criminal history. RP 159-60, 168, 171-72, 210-211.

On September 25, 2007, a team of police set out to observe the CI attempt to find a drug dealer. Officer Barry McColeman operated a camera mounted on a vehicle that was also monitoring the C,I in addition to following the audio from the CI's body wire. RP 276, 278. McColeman observed the CI make contact with a black male with long hair. RP 279. Patrick Stephens one of the officers

heard the CI make contact with a person by listening through a monitor, but he did not see the contact. RP 148.

After the CI made contact with the black male, McColeman observed the man enter an apartment building on 4<sup>th</sup> Ave. and Fawcett. RP 279. Officer Richard Caron saw the CI milling around Wright's Park and later meet up with Mr. Shaw on a gravel footpath. RP 393, 468. Over objection Detective Yenne testified that he saw the CI approach Mr. Shaw and ask for narcotics. RP 468-69.

After the CI was unable to loan Mr. Shaw a phone he walked to a building and was gone for 5 minutes. RP 469. When he returned, Mr. Shaw told the CI that that a supplier would arrive in 10 minutes. RP 469. According to Yenne, the CI gave Mr. Shaw money and then Mr. Shaw entered a Red Ford Explorer, left the area and returned a few minutes later. RP 394, 469-70.

When Mr. Shaw exited the car and re-approached the CI, Yenne testified that he observed Mr. Shaw drop what "appeared to be small objects into her hand", "but [] [he] could not tell". RP 471.

Officer Brian Kim and Rosmaryn detained Mr. Shaw, but he did not speak with Mr. Shaw and did not recall seeing Mr. Shaw with anyone before the arrest. RP 320-21. After Mr. Shaw was transported to the police station area, but before he was booked into jail, officer O'Neill found narcotics later identified as cocaine in Mr. Shaw's hands RP 335-37, 434, 440, 441.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE THE AUDIO RECORDING OF THE INTERACTION BETWEEN THE CONFIDENTIAL INFORMANT AND MR. SHAW BECAUSE THE RECORDING WAS NOT PROPERLY AUTHENTICATED.

The trial court erred by admitting into evidence the audio portion of the video of a transaction between an unidentified confidential informant and Mr. Shaw. The court of appeals reviews a trial court's decision regarding the authenticity of an exhibit under an abuse of discretion standard. State v. Payne, 117 Wn. App. 99, 110, 69 P.3d 889 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Authentication is a basic foundational requirement designed to assure that the proffered item is what it purports to be. 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 900.2 at 175; § 901.2 at 181-82 (4<sup>th</sup> ed. 1999). To satisfy ER 901, the evidence rule addressing authentication, the state must introduce sufficient proof to permit the jury to find in favor of

authenticity. State v. Williams, 136 Wn. App. 486, 499-500, 150 P.3d 111 (2007), quoting State v. Payne, 117 Wn. App. at 106, citing, State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984).

ER 901 provides in relevant part:

(a) General provision The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge Testimony that a matter is what it is claimed to be.

.....

**(5) Voice identification**  
**Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.**

.....

(10) Methods provided by statute or rule Any method of authentication or

identification provided by statute or court rule.

(Emphasis added). The state introduced the audio and video of a recording purporting to be Mr. Shaw and the unidentified confidential informant. Defense counsel objected to the introduction of the audio portion under CrR 4.6(a)(2)(i) arguing that the defense had not received "All of the requisite information as part of discovery". RP 63. Specifically the defense had not received a complete record of the audio recording. RP 63.

Defense also objected under RCW 9.73.230 which requires a supervising police officer to authorize use of a body wire interception. RP 64-65. Defense cited to RCW 9.73.050 to support his motion to suppress the audio recording. The trial court suppressed the confidential informant's statements but allowed the defendant's voice to be presented to the jury. RP 89-90.

There was no evidence from any witness identifying the voice of Mr. Shaw or the voice of the CI.

Detective Yenne was involved in the buy-bust operation involving Mr. Shaw. RP 465. Yenne's role was to monitor the audio portion of the body wire. RP 466. Yenne also had a visual line of sight on the CI for part of the incident. RP 467. Yenne saw the CI

meet up with Mr. Shaw. RP 467-68. Without objection from defense, Yenne was permitted to testify that he heard the CI ask Mr. Shaw for narcotics. RP 468. The trial court in her ruling on the motion in limine had however ruled that all statements of the CI were inadmissible under Crawford. RP 90.

Yenne testified that he was listening to a body wire attached to the CI. RP 466. He did not testify to having any familiarity with the CI's voice, rather he only knew what the CI looked like. RP 467. Yenne testified that the redacted CD of the video and audio tape numbered Exhibit 6, and a copy of the original Exhibit 3B depicted what he remembered observing on September 25, 2007. RP 467 (Original tape Ex. 3B RP 284).

Officer Stephens testified that officer Higgins or McColeman actually put the wire on the CI. RP 144. McColeman testified to operating the camera system and a recording system for the audio recording, not the camera. RP 276. The audio portion is a transmitter worn by the CI connected to a receiver with a tape. RP 276-77. McColeman testified that his role was "just pressing the play/record". RP 278. McColeman could also see what was on the video monitor. RP 279. McColeman testified that the tape

recording was in working condition but there was no testimony that the wire was in good operating condition. RP 279-81.

Officer Higgins did not testify.

In State v. Jackson, 113 Wn. App. 762, 54 P.3d 739 (2002), the Court addressed the issue of voice identification in a 911 call. Therein a witness with personal knowledge of the original conversation was able to identify each voice heard on the tape. Jackson, Wn. App. at 769.

In Williams, supra, the Court addressed the issue of voice identification in a 911 call. Therein the trial court: (1) listened to the voice of the person on the 911 tape; (2) listened to the person's voice in court; (3) the person admitted to calling 911; and (4) his name was identified as the caller in the 911 tape. With this abundant identifying information, the trial court was able to identify and authenticate the voice. Williams, 136 Wn. App. at 501; see also Davis v. Washington, 547 U.S. 813; 126 S. Ct. 2266; 165 L. Ed. 2d 224 (2006) (the Court affirmed that the statements of a 911 caller to obtain protection from an emergency situation was not testimonial; while statements made to police by an alleged victim identifying the perpetrator were testimonial).

In Mr. Shaw's case, the state was not able to present any evidence of voice identification of Mr. Shaw or the confidential informant because neither testified in court. Notwithstanding the purported good working condition of the tape player, there was no evidence that the wire was working properly and there no evidence was presented to identify the voices on the tape. Under Williams, supra, Jackson, supra and ER 901, the evidence presented did not meet the standard required to authenticate the audio tape introduced during trial. The trial court should have sustained the defense motion to suppress.

The trial court's error was not harmless, given the unfair prejudice of the tape. An error is harmful if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Calegar, 133 Wn.2d 718, 727, 949 P.2d 235 (1997), quoting, State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

In Mr. Shaw's case, had the jury not heard the tape recording of the drug transaction that allegedly occurred between the CI and Mr. Shaw, the jury would not have had any evidence of a delivery of a controlled substance beyond mere speculation. The audio was evidently important to the jurors because they asked to

listen to it a second time after they began their deliberations. RP 549-550. Without the audio portion of the tape, there was insufficient evidence of a delivery or possession with intent to deliver. Rather, the only evidence was that of possession of a small amount of rock cocaine after the purported transaction. RP 423.

The audio tape was therefore a significant portion of the state's case, and the trial court's erroneous admission of it was harmful error that requires a new trial.

2. MR. SHAW WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ARTICULATE THE PROPER GROUNDS FOR SUPPRESSION OF INADMISSIBLE EVIDENCE WHICH ULTIMATELY DENIED MR. SHAW HIS RIGHT TO A FAIR TRIAL.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (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 counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. 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, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Courts engage in a strong presumption counsel's representation was effective. State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). ). However, where there is no conceivable legitimate tactic explaining counsel's performance, the presumption is rebutted. State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

In State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004), the state introduced a baggie of methamphetamine which was the most important evidence the State offered, but counsel did not object to its admissibility despite serious questions about the validity of the warrant upon which the search was based. The Supreme Court agreed with the Court of Appeals and held that because the warrant was invalid at the time of its execution, counsel's failure to challenge the search based upon an invalid warrant could not be considered as a legitimate tactic. The Court

held that counsel's conduct was deficient. Reichenbach, 153 Wn.2d at 130-31.

The Supreme Court held that Reichenbach was prejudiced by counsel's failure to move to suppress the illegally seized methamphetamine. Reichenbach's conviction for possession of methamphetamine was dependent on the baggie that was seized. Without that evidence, the State could not prove possession beyond a reasonable doubt. Reichenbach's right to the effective assistance of counsel was violated. Reichenbach, 153 Wn.2d at 137.

In State v. Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), citing Thomas, supra and Strickland, supra, the Supreme Court held that appellate counsel's failure to raise on appeal the trial court's closure of the trial proceedings to the public was prejudicial error that denied Orange his right to the effective assistance of counsel. Orange, 152 Wn.2d at 814. The remedy for counsel's failure to raise on appeal the violation of Orange's public trial right was remand for a new trial. Id.

- (i) Failure to Articulate Sufficient Grounds for Suppression of the Audio Tape.

Reichenbach and Orange are squarely legally on point and factually analogous. In Mr. Shaw's case, counsel did make a motion to suppress the audio portion of the tape, the only evidence of a delivery, but failed to articulate sufficient appropriate grounds for the motion. In Reichenbach, counsel failed to move to suppress the illegally obtained evidence and in Orange, counsel failed to argue the trial closure issue on appeal. There were no valid tactical reasons for any of these failures.

In Shaw's case, ER 901 has clear foundational prerequisites for admission of audio evidence which were not met. Without a proper foundation, the audio portion of the tape was inadmissible and there was no tactical reason to fail to articulate proper grounds for suppression. As in Reichenbach, and Orange, counsel's failure to argue and articulate proper grounds for suppression was deficient. Reichenbach, 153 Wn.2d at 130-31.

Mr. Shaw was prejudiced by counsel's failure to move to suppress the tape under ER 901 and under the confrontation clause. Without the audio, in Count II, the State could not prove possession or possession with intent to deliver beyond a reasonable doubt. Mr. Shaw's right to the effective assistance of

counsel was violated. Reichenbach, 153 Wn.2d at 137. The remedy is remand for a new trial on Count II. Orange, 152 Wn.2d at 814.

(ii) Failure to Object to Recitation of CI's Request for Narcotics.

The trial court granted the defense motion to suppress all of the CI's audio conversation under Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). RP 89-90. Detective Yenne introduced the audio portion of the tape and testified that the tape revealed that the CI asked Mr. Shaw for narcotics. RP 468. Defense counsel failed to object to this inadmissible testimony, thus allowing the state to introduce the only evidence of a narcotics delivery, in violation of the court's ruling in limine and in violation of Mr. Shaw's confrontation clause rights. This failure constituted both deficient performance and prejudice to Mr. Shaw's right to a fair trial. As stated supra, the remedy is remand for a new trial on Count II. Orange, 152 Wn.2d at 814.

3. THE TRIAL COURT ERRED BY  
ADMITTING INTO EVIDENCE THE  
AUDIO RECORDING OF THE  
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The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to confront the witnesses produced against them. U. S. Const. amend. VI. Accordingly, a testimonial statement of a witness not present for trial may only be admitted where (1) the declarant is unavailable and (2) the defendant has had a prior opportunity to cross-examine the declarant. Williams, 136 Wn.3d at 501-02; citing Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Testimony" is typically defined as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Williams, 136 Wn. App .at 502, quoting, Crawford, 541 U.S. at 51 (quoting 1 Noah Webster, An American Dictionary of the English Language (1828)).

Statements are .... testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

In Davis the Court determined that the interrogation that took place in the course of a 911 call did not produce testimonial statements because the McCortty was speaking about events as they were actually happening, rather than "describ[ing] past events. Davis, 547 U.S. at 846. In Crawford, supra, at 53, 124 S. Ct. 1354, 158 L. Ed. 2d 177, the Court held that statements were testimonial when elicited from interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. Davis, 547 U.S. 826-27.

By contrast, the Court in Davis determined that the statements elicited from police interrogation in the companion case Hammon did produce testimonial statements because that interrogation was part of an investigation into past criminal conduct and there was no emergency in progress. Davis, 547 U.S., at 829-30.

In Mr. Shaw's case unlike in Davis, but as in Hammon, the CI's asking Mr. Shaw for narcotics was aimed at obtaining evidence to use against Mr. Shaw in trial. There was no emergency and no

other purpose other than to describe ongoing criminal conduct. Even though the trial judge agreed, the evidence was admitted without objection in violation of Mr. Shaw's confrontation clause rights and in violation of Davis v. Washington, supra. RP 90.

The remedy is remand for a new trial. RP 90. Calegar, 133 Wn.2d at 727.

D. CONCLUSION

Mr. Shaw was denied effective representation to his prejudice, and the trial court permitted the admission of overly prejudicial and impermissible evidence under ER 901. Further, neither of these errors were harmless because absent the errors, it is likely that the outcome of the trial would have differed. For these reasons, Mr. Shaw respectfully requests this Court reverse and remand for a new trial.

DATED this 14th day of September 2008.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER

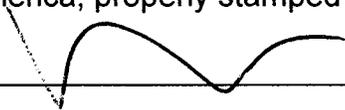
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LISE ELLNER



WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor 930 Tacoma Ave S. Rm. 946 Tacoma, WA 98492 and Marcus Shaw DOC# 758231 Clallam Bay Corrections Center 1830 Eagle Crest way Clallam Bay, WA 98326 a true copy of the document to which this certificate is affixed, On September 15, 2008. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



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