FILED
COURT OF APPEALS
DIVISION II
08 DEC 22 AM 11:17
STATE OF WASHINGTON
BY _____
DEPUTY

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

Jeremey Gene Dunn, Petitioner, vs. State of Washington, Respondent	COA No. 37845-1-II STATEMENT OF ADDITIONAL GROUNDS, PURSUANT TO RAP 10.10

I, Jeremy Gene Dunn, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that not addressed in the brief. I understand the Court will review this Statement of Additional Grounds for review when my appeal is considered on the merits.

ASSIGNMENT OF ERROR 1

Cumulative Constitutional Error - The "Cumulative" Johnson, 90 Wn.App. 54,74 effect of Trial Attorney Brittnalls' "Ineffective Assistance of Counsel", the denial of Defendant Dunn's fundamental and "structural" right to an impartial jury and the violation of his unequivocal right to a "Presumption of Innocence" cohesively served to deny then-defendant Dunn a fair trial.

"Pro-se pleadings are to be construed liberally and held to less stringent standard than formal pleadings drafted by lawyers; if court can reasonably read pleadings to state valid claim on which the litigant could prevail, it should do so despite opinion of legal theories, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirements." Haines Kerner, 404 U.S. 519, Zickhov v. Idaho, 247 F.3d 1015 at 1020 (9th Cir. 2001). For petitioner Dunn to prevail in this matter, his allegations "must be supported by citation to authority, references to the record, or persuasive argument." Pers. Rest. of Waggy, 111, Wn.App. 511 (2002). Herein Petitioner Dunn has met the afore-stated criteria.

"Issues raised for the first time on appeal are generally not subject to review unless the defendant can show a manifest error affecting a Constitutional Right. RAP 2.5 (a)(3). To meet the requirements of RAP 2.5 (a)(3), the defendant must identify a Constitutional Error and demonstrate actual prejudice. "State v. McFarland, 127 Wn.2d 322, 334-35 (1995). "An Appellant must show the likelihood of ACTUAL PREJUDICE in order to establish that the error is "manifest'. State v. Lynn, 67 Wn.App. 339,346 (1992). "Constitutional errors are treated specially under RAP 2.5 (a) because they often result in serious injustice to the accused (as we have here in the instant case) and may adversely affect public perceptions of the fairness and integrity of judicial proceedings." State v. Scott, 110 Wn.2d at 686-687. "Claims of ineffective assistance of counsel...are of Constitutional magnitude and may be raised for the first time on appeal. RAP 2.5 (a)(3). "State V. Davis, 60 Wn.App. 813, 822-23 (1991). "An error that violates a Constitutional right is PRESUMED TO BE PREJUDICIAL." State v. Finch 137, Wn.2d 792, 859 (1999).

"We review alleged violations of the right to an impartial jury de novo." State v. Johnson, 125 Wn.2d 443, 457 (2005) At Petitioner Dunns trial, sitting Judge Barbara Johnson formally

expressed "Serious Concerns" about Juror No.10 (Mr. Clark's) ability to be impartial stating, "I Think Juror No.10 may have difficulty with impartiality based on comments made to me prior to moving into the jury box." VRP. Vol.III at p.14, Lines 14-16. Both sides here stipulated to further inquiry (VRP. Vol.III p. 15, lines 9-14). During this inquiry Judge Johnsons fears were "AFFIRMED" by Juror No.10's formal admissions to his "Bias". "Its' going to impact, you know, MY ABILITY TO BE OBJECTIVE. "Juror No.10, Mr. Clark, VRP. Vol. III p.19, lines 6-7. Mr. Clark, Juror No.10 then went on to make a statement which soundly violated Defendant Dunns right to a "Presumption of innocence" Estelle, 425 U.S. at 503 stating "We wouldn't be here if you didn't have any evidence." VRP. Vol. III p.20, lines 17 & 18. "An inculpatory statement admits a fact." Blacks Law Dictionary, 6th Edition, copyright 1990, Wests, p.768. These "Inculpatory statements" made by Juror No.10 "Admitted a fact" into the record, that fact being that Juror No.10 was "BIASED" against Defendant Dunn "Before" the trial even started and that he had already CONCLUDED that there was evidence to convict Defendant Dunn "before" any evidence had been heard. "Evidence is the demonstration of a fact. "31A C.J.S. Evidence ss 3, at 62-68 (1996) and "NOT" the "presumption" of a fact. This is diametrically opposed to Defendant Dunns fundamental and Constitutional right to be "Presumed Innocent" until "Proven Guilty". "The accused defendant retains a presumption of innocence throughout the trial process." Martinez v. Court, 120 S.Ct 684 (2000), No.98-7809 at No.43. Our Judicial system requires reviewing courts to "Provide CONCRETE SUBSTANCE for the presumption of innocence," Winship, 397 U.S. at 363 (see also Apprendi, No.99478 at No.56) This is the quintessential, case and point example of lack of objectivity; Objectivity would be "I don't know if theres any evidence for or against Defendant Dunn at this point. After both cases have rested, then and only then will I know if there's evidence to convict Defendant Dunn."

This statement would be keeping with the controlling dictates of the Martinez Court, "THROUGHOUT THE TRIAL PROCESS." (emphasis added) "Every criminal defendant is entitled to a fair trial by an impartial jury. U.S. Const. Amends VI, XIV sec.1; Wash. Const. Art. I, Sec. 3, 21, 22. The right to a fair trial includes the right to a presumption of innocence. Estelle v. Williams, 425, U.S. 501, 503 (1976); State v. Crediford, 130, Wn.2d 747, 759 (1996). This Constitutionally guaranteed presumption is the bedrock foundation in every criminal trial. Morrissette v. United States, 342 U.S. 246, 275 (1952). It is the duty of the court to give effect to the presumption by being alert to any factor that could undermine the fairness of the fact-finding process' Williams, 425 U.S. at 503." State v. Gonzales, No. 23180-III (2005) at No. 29. The trial court here in the instant case failed in the afore-stated duty at Petitioner Dunns trial. "The 6th Amendment jury." Turner v. Murry, 476 U.S. 28, 36 n.9 (1986). "A defendant does not waive that right merely by failing to object at trial". State v. Johnson, 90 Wn.App. 54, 72 (1998). "This right applies to defendants in the state court through the action of the 14th Amendment. Williams v. Florida, 399 U.S. 78, 86 (1970). The right includes the presumption of innocence. State v. Finch, 137 Wn.2d 792, 844, (1999). "The principle that there is a presumption of innocence in favor of the accused is the undisputed law, axiomatic and elementary, and its' enforcement lies at the foundation of the administration of our criminal law." State v. Finch, 137 Wn.2d 792, 844 (1999). "Courts of other jurisdictions including our own, have long recognized the substantial danger of destruction in the minds of the jury of the presumption of innocence and have found in favor of the defendant upon such a finding; See Allen, 397 U.S. at 344, Hartzog, 96 Wn.2d at 398, Hickson, 472 So. 2d 379, 383 (Miss 1985), Brewster, 745 F.2d 913, 916-18 (4th Cir. 1984), Zygadio, 720 F2d 1221, 1223 (11th Cir. 1983), People v. Boose, 66 Ill 2d 261, 265, 362 N.E.2d 303, S.Ill Dec, 832 (1977),

Kennedy, 487 F.2d at 105-06, Hernandez, 443 F2d 634, 636-37 (5th Cir. 1971)." Finch, 137 Wn.2d at 844. Here in the instant case, there was no "PRESUMPTION OF INNOCENCE" by juror No.10 as this presumption had been effectively "destroyed" Finch, 137 Wn.2d at 844 "in his mind" as he had already "CONCLUDED BEFORE TRIAL" even started that there was neccessarily "evidence" VRP. Vol. III p.20, lines 17 & 18 to convict defendant Dunn. "Short of taping jury deliberations, there is NO WAY OF KNOWING exactly how the error affected the outcome. "State v. Vreen, 143 Wn.2d 923 at 931 (2001). "The Appellant Court determines whether the state has overcome the presumption (of prejudice from Constitutional Error) from an examination of the record, from which it must "affirmatively appear" the error is harmless beyond a reasonable doubt." State v. Finch, 137 Wn.2d at 859 (1999). It will "NEVER" affirmatively appear" the error is harmless because as the Vreen, (143 Wn.2d at 931) Court correctly held, there is no way to measure or quantify the prejudice resulting from the error under these circumstances. "We hold that Mr. Vreen is entitled to a new trial." State v. Vreen, No.17868-4-III at No.42 (reversed & remanded). At Mach v. Stewart, the 9th Circuit correctly held that "the jurors statements were imflammatory AND DIRECTLY CONNECTED TO GUILT." Mach v. Stewart, 137 F.3d 630 at 663 (9th Cir, 1998). The "statements of juror No.10 are "INDISTINGUISHABLE" from those at Mach 137 F.3d at 633 as they were also "DIRECTLY CONNECTED TO GUILT". As Justice Black observed at In Re Michael, 326 U.S. 224, 228 (1945): "(I)t is difficult to conceive of more effective obstruction to the judicial process than a juror who has PREJUDGED THE CASE." Whether juror No.10 "injected his bias overtly in the jury's deliberations is irrelevant. "See Allison, 66, Wn.2d at 265, Mathison, 187 WASH. 240, 246, Alexson, 186 WASH. 188, 192. Juror No.10's bias violated Petitioner Dunn's "Constitutional right to trial by impartial jury." Cho, 108 Wn.App. at 321. "The Constitutional right to a jury trial

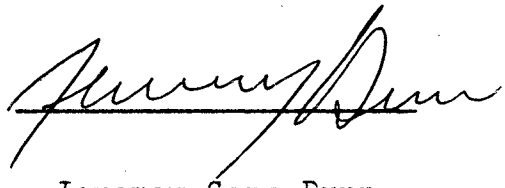
embodies "a profound judgment about the way in which law should be enforced and Justice administered."Duncan v. Louisiana, 391 U.S. 145, 155 (1968). "It is a "STRUCTURAL" guarantee (emphasis added) that "reflects a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." Duncan, 391 U.S. at 156. "Structural errors require AUTOMATIC REVERSAL." U.S. v. Beard, 161 F.3d 1190 at 1195 (9th Cir.1998) State v. Zimmerman, No.31648-0-II at No.28. "Structural defects in the Constitution of the trial mechanism "are per-se prejudicial." Arizona v. Fulminante, 499 U.S. at 309, 111 S.Ct. 1246. "If a biased juror is allowed to deliberate, the defendant is denied his Constitutional right to trial by an impartial jury, REQUESTING DISMISSAL." State v. Gonzales, 111 Wn.App 276, 282 (2002). "The 6th Amendment right to a jury trial "guarantees to the criminaly accused a fair trial by a panel of impartial, indifferent jurors."Irvin v. Dodd, 366 U.S. 717, 722 (1961) "Even if only one juror is unduly biased or prejudiced, 'the defendant is denied his Constitutional right to impartial jury." U.S. v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979)." Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990), No. 87-2238 at No.26. Because Attorney Brittnalls "deficient performance" Strickland, 466 U.S. 688, 687 (1984) in failing to strike (peremptory) juror No.10 "prejudiced" Strickland, 466 U.S. at 687 then-defedant Dunn. To demonstrate Constitutionally deficient ineffective assistance of counsel, Petitioner Dunn must show that "Counsels performance was deficient. "Second, he must show that the deficient performance prejudiced him. This occurs when "there is a "REASONABLE PROBABILITY" that, but for counsels unprofessional errors the outcome of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 77-78 (1996) (see also Red, 105 Wn.App. 62, 66 (2001) & State v. Lord, 117, Wn.2d 829, 833 (1991). "THE REASONABLE PROBABILITY of different result" standard means "simply a probability sufficient to

undermine confidence in the outcome of the case, a standard LESS THAN proof by a preponderance of the evidence. "Agan v. Singletary, 12 F.3d 1012, 1018-19 (11th Cic. 1994) 1st.) The record reflects that Judge Johnson was "Seriously Concerned" about juror No.10's ability to be impartial. (see VRP. Vol III p.14, lines 14 16 2d.) Juror No.10 "admitted a fact" into the record by formally disclosing his "BIAS" as a juror (see VRP. Vol. III P.19, lines 6-7) and 3rd.) Juror No.10 formally made statements "Directly connected to Guilt" Mach, 137 F.3d 630 at 633 "Prior to trial" thereby effectively violating petitioner Dunns fundamental right to "a presumption of innocence." Juror No.10 should have been stricken and Attorney Brittnalls failure to strike Juror No.10 cannot be attributed to sound or competent trial strategy. Brittnalls "omission" constitutes "deficient performance" which "prejudiced" then-defendant Dunn requiring reversal under Strickland, 466 U.S. 668, 687.

"A criminal conviction may be reversed on the basis of Cumulative trial error (where) it is "REASONABLE PROBABLE" (see (Agan, 12 F.3d 1012, 1018-19) that the Cumulative effect of several errors materially affected the outcome of the case." State v. Johnson, 90 Wn.App. 54 No.25 (1998) (Reversed Judgement) (See also Clark, 143 Wn.2d 731 No.36 (2001) "Even if an individual error "appears harmless" Johnson, 90 Wn.App at 74, it can still contribute "to the Cumulative effect of a fundamentally unfair trial." Johnson, 90 Wn.App at 74. "Multiple errors, even if harmless individually, may entitle a petitioner to ...relief if the cumulative effect prejudiced the defendant." Ceja v. Stewart, 97 F.3d 1246, 1254 (9th Cir. 1996) (see also Mancuse v. Olivarez, 282 F.3d 728 No.37 (9th Cir. 2002). Here in the instant case we have numerous "Constitutional Errors" Mancuse, 282 F.3d at 745 and the "Cumulative Effect" of these errors "operated to deprive Dunn (Alcala) of a fundamentally fair trial."Alcala v. Woodford, 334 F.3d 862,893 (9th Cic. 2003) Grant of Petition Affirmed) "In cases of grave doubt (i.e. an

evenly balanced record) as to harmlessness the petitioner must win." O'Neal v. McAninch U.S. Sup. Ct. Cs. No.93-7407 at No.25. "If one is left in grave doubt, the conviction cannot stand. Kotteakas v. U.S. 328 U.S. 750 at 764-65 and In Re. Pers. Rest. of Smith, No.49843-6-I at No.56. Accordingly, Petitioner Dunn Respectfully moves to have your distinguished Court reverse his Unconstitutional Conviction and remand for a new trial.

Respectfully Submitted,
Mr. Jeremy Gene Dunn,
The Appellant.



Jeremey Gene Dunn

December 26, 2008.

Jeremy Gene Dunn
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA. 98520

FILED
COURT OF APPEALS
DIVISION II

08 DEC 30 AM 11: 17
STATE OF WASHINGTON
BY _____
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGON

Jeremy Gene Dunn **Plaintiff,**	)	**Cause No.** 37845-1-II
State of Washington **Defendant**	)	**DECLARATION OF SERVICE BY MAIL**

This is to certify and state under the penalty of perjury under the laws of the State of Washington as well as the United States of America, that I have mailed a true and correct copy of the following document(s). STATEMENT OF ADDITIONAL GROUNDS RAP 10.10

By submitting the same to correctional officers for processing as Legal Mail and forwarding to the Clerk of this court, and then depositing in the United States Mail, marked Legal Mail, postage prepaid, on this the 26 day of December, 20 08, to the following:

THE COURT OF APPEALS
DIVISION II
950 BROADWAY STE 300
TACOMA, WA. 98402-3694

Respectfully Submitted,

Signature

Jeremy Gene Dunn
Print / Type Name

9 FD