

NO. 38244-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

EUGENE RANCIPHER

Appellant.

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

The Honorable Katherine M. Stoltz, Judge

OPENING BRIEF OF APPELLANT

STATE OF WASHINGTON
DEPUTY
Ksa

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant of a fair trial.
2. The trial court erred in denying appellant's motion for a mistrial due to prosecutorial misconduct.
3. Appellant was denied his state and federal constitutional right to effective assistance of counsel.
4. The trial court erred in finding the first defense attorney was not ineffective in failing to properly investigate an expert before listing him as a witness.
5. The trial court erred in denying the second defense attorney's motion to withdraw due to the conflict created by her colleague's ineffectiveness.
6. The trial court erred in denying appellant's motion to exclude handwriting analysis testimony without holding a Frye¹ hearing.
7. Cumulative trial error denied appellant a fair trial.
8. Appellant's multiple convictions for the same conduct violate the state and federal constitutional protections against double jeopardy.
9. The trial court erred in denying appellant's motions to dismiss and for judgment notwithstanding the verdict on double jeopardy grounds.

¹ Frye v. United States, 293 F. 1013, 54 App. D.C. 46 (D.C. Cir. 1923).

10. The court erred in delegating the setting of restitution payments to the Department of Corrections.

Issues Pertaining to Assignments of Error

1. Did prosecutorial misconduct render the trial unfair?

a. Was appellant's right to counsel violated when the prosecutor asked whether appellant's attorney was giving him answers, asked whether he had gone over the evidence with his attorney before trial, and twice whispered audibly that she did not have copies of defense exhibits?

b. Did the prosecutor violate ER 404 and the court's order in limine by 1) arguing appellant committed "time fraud" by not working when scheduled, 2) asking whether he paid taxes on outside income, and 3) presenting and relying in part on evidence of appellant's drinking alcohol and gambling and 4) commenting appellant was "to use defense counsel's phrase, living high on the hog"?

c. Did the prosecutor commit misconduct in closing argument by arguing there was no evidence appellant might face a loss of liberty if convicted?

d. Was appellant prejudiced by the cumulative effect of prosecutorial misconduct when the prosecutor also repeatedly asked leading questions despite frequent admonitions by the court?

2. Did appellant receive ineffective assistance of counsel?
 - a. Was his first attorney ineffective in failing to investigate the handwriting analyst's opinion before naming him as a potential witness and soliciting a report she was then required to disclose?
 - b. Was his second attorney ineffective due to a conflict of interest when she 1) was forced to argue a member of her firm was ineffective and 2) was a necessary witness about the handwriting analyst's qualifications?
3. Did the court err in admitting handwriting analysis testimony without a Frye hearing when appellant presented a law review article showing dispute in the scientific community?
4. Did cumulative error violate appellant's right to a fair trial?
5. Do dual convictions for theft occurring on the same date violate state and federal double jeopardy provisions?
 - a. Do the dual convictions violate double jeopardy when appellant was convicted of taking money by presenting two refund slips to the cashier at virtually the same time?
 - b. Do the dual convictions violate double jeopardy when identical jury instructions allowed two convictions for the same act?
6. Did the court err in delegating the setting of restitution payments to the Department of Corrections?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Eugene Rancipher with 59 counts of second-degree theft and 31 counts of third-degree theft. CP 151-192. A jury found him guilty on all but six counts. CP 302-392. He was sentenced to concurrent felony and consecutive misdemeanor sentences totaling 65 months plus three years of community supervision. CP 423, 435.

2. Substantive Facts

a. Testimony

Rancipher was good at catching shoplifters. 9RP² 772, 774-76. He was less good at paperwork and was ultimately let go from his position as loss prevention manager at the University Place Fred Meyer store in Tacoma for missing work without notifying his supervisor. 8RP 583; 9RP 655, 686. Nearly two years later, he was charged with multiple counts of theft. CP 1-6.

The thefts involved Fred Meyer's two programs for motivating employees to catch shoplifters. 14RP 1305. Under the "Buck-a-Beep" program, employees received one dollar each time they responded to the

² There are 22 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 1, 2008; 2RP – June 23, 2008; 3RP – June 26, 2008; 4RP – July 7, 2008; 5RP – July 8; 6RP – July 9, 2008; 7RP – July 10, 2008; 8RP – July 14, 2008; 9RP – July 15, 2008; 10RP – July 16, 2008; 11RP – July 17, 2008; 12RP – July 21, 2008 (morning); 13RP – July 21, 2008 (afternoon); 14RP – July 22, 2008; 15RP – July 23, 2008; 16RP – July 24, 2008; 17RP – July 28, 2008; 18RP – July 29, 2008; 19RP – July 30, 2008; 20RP – Aug. 4, 2008; 21RP – Aug. 22, 2008; 22RP – Aug. 25, 2008.

alarms at the door. 6RP 168-69. Under the “Recoveries” program, employees received 10% of the value (up to a maximum of \$100) of losses prevented by, for example, catching a shoplifter. 6RP 171. The loss prevention manager administered both programs. 6RP 167, 171-74, 179-80; 8RP 567-68.

The rewards were distributed once per fiscal period (28 days). 6RP 172, 174. The loss prevention manager was to tally up the amount necessary for each program and write up a refund slip. 6RP 175. Two slips were necessary because each program had its own account number. 7RP 385. The loss prevention manager would take the refund slips to the customer service desk, where the cashier would give him the cash. 6RP 176. One copy of the refund slip was returned to the loss prevention officer, while another was submitted to the store’s teller along with all the daily receipts. 7RP 352-54. The employees were to sign a form indicating their receipt of the cash from the loss prevention manager. 6RP 211. Finally, the relevant documentation was attached to the refund slip, and the whole packet filed in the loss prevention office. 6RP 190-91.

Rancipher’s replacement, Christopher Voelker,³ was assigned to investigate losses at the University Place Fred Meyer store. 6RP 187.

Voelker found many refund slips without documentation, for unusually large

³ Voelker previously worked under Rancipher as a loss prevention specialist during part of the time the store had the high losses. 6RP 163, 187.

amounts of money, and which had been processed more frequently than usual. 6RP 220. The regional loss prevention manager testified 90 refund slips processed on 45 different days over the course of 7 months appeared fraudulent. 7RP 370, 376-407; 8RP 447-99. The amounts ranged from \$152 to \$1,161. 8RP 550. Most bore Rancipher's name, and many bore a signature purporting to be his. Id. A handwriting expert testified the printing on six of the refund slips conclusively matched Rancipher's. 12RP 51.

The customer service employees who processed the refund slips all recalled that they processed slips for Rancipher, but did not specifically remember any of the fraudulent transactions. 10RP 865; 11RP 1010, 1042. They also testified it was possible other people could have taken blank refund slips and that they may have processed slips presented by someone other than Rancipher for these programs. 10RP 860; 11RP 1019. It was disputed whether the loss prevention specialist, working under the loss prevention manager, ever obtained the cash for the incentive programs from the tellers. 6RP 180. In addition to the loss prevention manager and the loss prevention specialist working under him or her, other persons with access to loss prevention files and equipment included the so-called "blitz" teams, a group of personnel from several stores who gathered together to catch and deter shoplifters in one store. 9RP 687-88.

Rancipher admitted the refund slips appeared fraudulent. 15RP 1496-97. With a few exceptions, he testified they were not in his handwriting, did not bear his signature, and he had not seen them before. 15RP 1411-1422. The exceptions were the slips from Jan. 13, 2005 and May 1, 2005. 15RP 1422, 1525. These he admitted that the hand printing was his, but denied having signed them. 15RP 1425. He explained he might have filled them out while training the loss prevention specialists. 15RP 1423.

Two of the refund slip transactions occurred on July 9, when Rancipher and his former girlfriend, Robin Weiland, testified he was with Weiland and her family in Cle Elum celebrating a long July 4th vacation. 14RP 1220; 15RP 1449. Weiland also presented a receipt from the Puyallup Fred Meyer using Rancipher's employee discount card on May 21, 2005 less than a half an hour after one of the transactions occurred. Ex. 141; 14RP 1194-95, 1246; 15RP 1370, 1380. She testified she and Rancipher usually shopped together. 14RP 1210.

b. Charges

The State initially aggregated all the fraudulent refund slips in each fiscal period into 14 counts of first-degree theft. CP 1; 2RP 13. Defense counsel moved to dismiss 13 of the 14 counts on double jeopardy grounds, arguing the proper unit of prosecution was the continuing course of conduct. CP 9-16. The court ruled that selective aggregation based on the 28-day

fiscal cycle was not permitted under RCW 9A.56.010(18), which permits only a one-time aggregation of third-degree theft charges. 2RP 33-36. The court ruled the State must charge all 59 refund slips amounting to second-degree theft separately. CP 48-49. The 31 slips amounting to third-degree theft could either be consolidated into one first-degree theft charge or be charged individually. CP 48-49.

The next day, the State filed an amended information alleging 45 counts of second-degree theft. CP 50. While not agreeing with the court's ruling, the defense objected to the amended information because it violated the court's ruling. 3RP 5. The court repeated its ruling that the charges could not be selectively aggregated based on date. 3RP 10.

The State then filed a second amended information, charging each refund slip separately, for a total of 90 counts, 59 of second-degree theft and 31 of third-degree. CP 151-192. After trial, the defense renewed the double jeopardy argument in a motion for judgment notwithstanding the verdict. CP 393-94.

c. Handwriting Expert

In support of a motion to continue, Rancipher's original defense attorney, Kerry Glassoe-Grant of the Department of Assigned Counsel (DAC), cited a heavy court schedule and the 4,000 pages of discovery in this

case. Appendix A (Motion to Continue, Mar. 17, 2008)⁴. She also mentioned she had just obtained a handwriting analyst's report. *Id.* She then listed Robert Floberg as a witness and gave the State his report. Appendix B (Defendant's List of Witnesses, Mar. 17, 2008). Later, the State named Floberg as a witness. Appendix C (State's List of Witnesses, June 26, 2008).

Rancipher's new counsel, Linda King, filed a motion to withdraw as counsel or to exclude Floberg's testimony. CP 77; 4RP 50. She argued Glassoe-Grant was ineffective in disclosing Floberg as a potential witness and soliciting his report before thoroughly investigating his opinion. CP 79. King argued the conflict that arose through Glassoe-Grant's ineffectiveness was imputed to her as a member of the same firm, the DAC. CP 79. King also argued handwriting analysis was inadmissible under Frye and as an opinion on guilt. CP 83.

The court denied the motion to withdraw and reserved ruling on admissibility. 4RP 58, 61. King renewed her motion to withdraw or exclude the handwriting analysis just before Floberg's testimony. 11RP 1087-1092. Alternatively, she requested the court limit Floberg to pointing out similarities and differences and prevents him from offering conclusions as to authorship. 11RP 1098. The court again denied the motion to withdraw and admitted Floberg's testimony. 11RP 1096-97. The court also found Glassoe-

⁴ Undersigned counsel filed a supplemental designation of clerk's papers on March 20, 2009. The supplemental clerk's papers are attached as appendices.

Grant was not ineffective in turning over Floberg's report because the discovery rules required her to do so, and disclosure was potentially reasonable as part of settlement negotiations. 11RP 1096-97.

King pointed out there were no settlement negotiations. 11RP 1098. The court granted King's alternative motion to exclude the fact that Floberg was initially retained by the defense. 11RP 1097. King also noted she was prepared to testify she decided not to call Floberg because his work was sloppy, but the court's denial of her motion to withdraw prevented her from doing so. 11RP 1099. On six of the refund slips, Floberg testified the printed handwriting matched Rancipher's "conclusively." 12RP 51. The jury found Rancipher guilty on all six related counts. CP 309-10, 321-22, 355-56.

d. Judgment and Sentencing

The jury found Rancipher guilty on 56 of 59 counts of second-degree theft and 28 of 31 counts of third-degree theft. CP 303-392. It acquitted on four counts and was unable to reach a verdict on two more. CP 303-392.

Following the State's recommendation, the court imposed concurrent 29-month sentences on the felony charges. CP 422-23. On three of the misdemeanor third-degree theft charges, the court imposed 365 days each, consecutive to each other and to the felony sentence, for a total of 65 months. CP 423, 434-35. On three other misdemeanor counts, the court

suspended the sentence and imposed 365 days of community supervision after confinement. CP 431, 435. On all the remaining misdemeanors, the court suspended a 365-day sentence, to be reinstated in case of a probation violation. CP 430.

C. ARGUMENT

1. PERVASIVE PROSECUTORIAL MISCONDUCT
DEPRIVED RANCIPHER OF A FAIR TRIAL.

Prosecutorial misconduct is shown when the prosecutor's improper comments and conduct were substantially likely to affect the outcome of the trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The touchstone of a prosecutorial misconduct analysis is the fairness of the trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Here, the misconduct permeated the trial and rendered it unfair in several ways. First, the prosecutor commented on Rancipher's right to counsel. On this basis alone, the trial court erred in denying Rancipher's motion for a mistrial. Additionally, the prosecutor argued guilt based on propensity and character evidence and told the jury there was no evidence Rancipher's liberty was at stake. The prosecutor also persisted in asking leading questions despite repeated admonitions from the court. Both individually and cumulatively, the prosecutor's misconduct unfairly tipped the scales toward the State.

a. Prosecutorial Misconduct Violated Rancipher's Constitutional Right to the Assistance of Counsel.

The aid of counsel is one of the surest safeguards against injustice and oppression. State v. Moneymaker, 100 Wash. 463, 464, 171 P. 253 (1918) (quoting State v. Phillips, 59 Wash. 252, 109 Pac. 1047 (1910)). Thus, the constitutional right to counsel is basic to all other rights, and must be accorded careful treatment. United States v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980); Const. art. I, sec. 22; U.S. Const. amend. IV. “‘Lawyers in criminal cases are necessities not luxuries,’ and even the most innocent individuals do well to retain counsel.” Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983) (quoting Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)).

Thus, the State may not argue or imply that the exercise of the right to an attorney suggests guilt. State v. Nemitz, 105 Wn. App. 205, 214, 19 P.3d 480 (2001) (citing State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996)). Nor may the State denigrate the role of defense counsel by arguing or implying defense counsel is unethical. United States v. Friedman, 909 F.2d 705, 708-09 (2d Cir. 1990). Such comments violate due process. Nemitz, 105 Wn. App. at 215. Here, the prosecutor interrupted Rancipher’s testimony four times with negative comments on his right to counsel.

i. Facts Relating to Comments on Right to Counsel

While Rancipher was on the stand, the prosecutor whispered to defense counsel she did not have copies of all the defense exhibits. 15RP 1372. This comment implied defense counsel was either deceptive or incompetent in failing to provide copies. 15RP 1372-73. The court did not hear the comment, and the transcript shows only a pause. 15RP 1372, 1375. But the court acknowledged the jury may have heard because it sits nearer the prosecutor. 15RP 1375. The court warned the prosecutor she should either take up such issues when the jury is out or write a note. 15RP 1374.

This was not the first time the prosecutor emphasized defense counsel had not provided copies of exhibits. During Rancipher's girlfriend's testimony, defense counsel refrained from objecting when the prosecutor asked on the record, "May I look at it again? I don't know that I was provided with a copy of that exhibit?" 14RP 1203.

Only minutes after the court's warning, the prosecutor again whispered to defense counsel that she needed copies of the exhibits. 15RP 1392. Rancipher heard this comment, and the court noted jurors one, two, and three might have heard. 15RP 1396, 1399. The court denied the mistrial motion but told the prosecutor, "[Y]ou're either not paying

attention to what I'm saying or you're deliberately violating the court's orders." 15RP 1392, 1398-99.

Comments on the right to counsel continued during cross-examination. When Rancipher hesitated because he could not recall the date he began work at Fred Meyer, an undisputed fact, the prosecutor commented, "You're looking at your defense attorney. She's not giving you the answer, is she?" 15RP 1494-95. Defense counsel's objection was sustained. 15RP 1495.

A few minutes later, the prosecutor asked about the refund slips saying, "Did you go through the slips with her [defense counsel] before you testified in preparation?" 15RP 1517. Again, the court sustained the objection, but the prosecutor went right back to the same theme, beginning her next question with, "You indicated you went through the slips with Ms. King." 15RP 1517.

The court denied defense counsel's mistrial motion, opting instead to try to mitigate the harm through a jury instruction.⁵ 16RP 1545-46; 18RP 1757; CP 134-35, 204. However, the court also commented, "I would not be astonished if this case does not come back on appeal having

⁵ The instruction reads in full, "You must disregard all questions which were asked regarding the defendant looking at his attorney during cross examination, or which referred to his reviewing evidence with his attorney in preparation for trial. The defendant has a constitutional right to counsel." CP 204.

been reversed for cumulative error on the prosecuting attorney.” 18RP 1757.

ii. Rancipher’s Convictions should be Reversed because the Prosecutor Repeatedly and Deliberately Violated His Right to Counsel.

The prosecutor’s comments violated Rancipher’s right to counsel because they had no probative value and served only to draw negative inferences from the exercise of a constitutional right. Nemitz, 105 Wn. App. at 215. In Nemitz, the court reversed the defendant’s conviction because at trial, the prosecutor asked the defendant what was on the back of defense counsel’s business card that his wife handed him as he was being arrested. Id. at 208, 213. The defendant replied there was a paragraph explaining a person’s rights when arrested. Id. at 213. The court held this evidence was inadmissible because it had no probative value other than to suggest that “only a person disposed to drink and drive would take anticipatory steps to avoid self-incrimination and to assert the right to counsel.” Id. at 215.

As in Nemitz, the prosecutor’s comments in this case had no bearing on any element of the crime. They served only to suggest Rancipher was guilty because his attorney failed to give the State copies of the exhibits, because he looked at his attorney and because he prepared for trial with her.

Just as the lower court in Nemitz erred in denying the motion to exclude, here the trial court erred in denying Rancipher’s mistrial motion.

105 Wn. App. at 208. In reviewing a ruling on a mistrial motion, the appellate court examines: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court instructed the jury to disregard it. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000) (citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

Violation of the constitutional right to counsel is a serious irregularity, far more serious here than in Nemitz because the prosecutor repeated her comments even after admonition from the court. 15RP 1393. Nor did the prosecutor's comments impact evidence that was merely cumulative. Instead, the comments unfairly implied deception during essential defense testimony, interrupting Rancipher as he presented his version of events and his alibi to certain transactions.

The court's instruction was insufficient to protect Rancipher's right to counsel because it did not address the prosecutor's whispered comments and simply was too little, too late. Rather than instructing the jury at the time, the court added a written instruction. But by the time the jury was charged at the conclusion of all the testimony, the negative impression jurors may have drawn of Rancipher based on the prosecutor's misconduct had already had time to solidify, making them more inclined to convict.⁶

⁶ After the two whispering incidents, the court should have at least questioned the jury to determine whether they had heard. See State v. Buggs, 581 N.W.2d 329 (Minn. 1998) (prosecutor whispered, "she's lying" during defendant's testimony and mistrial would

Prosecutorial misconduct that violates the constitutional right to counsel is presumed prejudicial. Nemitz, 105 Wn. App. at 215. The State has the burden of proving the error was harmless beyond a reasonable doubt. State v. Guloy, 104 Wn. 2d 412, 425, 705 P.2d 1182 (1985); Nemitz, 105 Wn. App. at 215. Error is harmless beyond a reasonable doubt only if the untainted evidence is so overwhelming that any reasonable jury would have come to the same conclusion even without the error. Guloy, 104 Wn.2d at 426. That is not the case here. No definitive link connected Rancipher to the fraudulent refund slips. See section C.3, infra. None of the customer service cashiers specifically remembered any of the fraudulent transactions. 10RP 865; 11RP 1010, 1042. Several other people including the loss prevention specialists who worked under Rancipher and the roving “blitz teams” had both access and opportunity. 9RP 687; 10RP 860; 11RP 1019. Thus, the court erred in denying Rancipher’s motion for a mistrial where prosecutorial misconduct repeatedly violated his constitutional right to the assistance of counsel.

b. Improper Character and Propensity Evidence
Rendered Rancipher’s Trial Unfair.

“The purpose of the rules of evidence is to secure fairness and ensure that truth is justly determined.” State v. Wade, 98 Wn. App. 328, 333, 989

have been necessary but for the court’s extensive voir dire in which jurors who heard the comment affirmed they could still render an impartial verdict).

P.2d 576 (1999). It is well established that, “Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith.” Id. at 334; ER 404(a), (b). Additionally, it is misconduct for a prosecutor to ask one witness to comment on the credibility of another witness. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996). Likewise, flagrant misconduct occurs when a prosecutor disregards a well-established principle of law. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996). Here, the prosecutor repeatedly attempted to present improper propensity evidence and opinions on credibility. There is a substantial likelihood the prosecutor’s action affected the jury’s verdict.

i. Facts Regarding Improper Character and Propensity Evidence

Defense counsel moved to exclude the reasons Rancipher was fired for fear they would be used as propensity evidence. 3RP 16-17. The State wanted to show that in addition to not working his hours, Rancipher was suspected in two thefts shortly before he was fired. 3RP 17-19. The court excluded the thefts as unsubstantiated and prejudicial, but allowed testimony that Rancipher was let go for not working his hours. 3RP 20.

The prosecutor presented voluminous and repetitive testimony about Rancipher’s failure to always be at work when scheduled. 9RP 656-66, 681-

87, 779-80; 12RP 64-66. Defense counsel moved for a mistrial arguing the prosecutor violated the court's motion in limine by focusing on the reason for Rancipher's firing as showing a propensity for crime. 16RP 1548. Then, during closing, the court sustained counsel's ER 404(b) objection when the prosecutor argued, "Please recall that Mr. Rancipher was terminated for time fraud." 19RP 1818.

The prosecutor also tried to present other prior bad acts when she asked Rancipher whether he reported income from his side jobs to the Internal Revenue Service (IRS). 15RP 1455. Although the court sustained the objection and Rancipher did not answer, the implication was clear. Id. The court found it "highly prejudicial," and noted the jury "may conclude he wasn't paying it." 15RP 1457-58.

The prosecutor also asked witnesses to comment directly on Rancipher's character. First, she asked Tina Roberts, the teller from Fred Meyer, "Did you think [Rancipher] had good moral character?" 7RP 439. The court sustained the relevancy objection, and the witness did not answer. Id. Another objection was sustained when the prosecutor questioned Voelker extensively about why he and Rancipher were no longer friends:

A. Uh, I felt myself, you know, wanting to settle down and kind of figure myself out. I just wasn't wanting to do all the things that he did.

Q. What types of things were you not wanting to do?

A. Uh, go out to the bars often, you know.

17RP 1659-60. The court explained, “[Y]our might be allowed one properly phrased question regarding that, but the rest of this is getting into impermissible character evidence.” 17RP 1663.

All of this occurred in addition to extensive evidence and testimony of Rancipher buying rounds of drinks for people and gambling, with occasional defense objections. *See, e.g.*, 6RP 227-28; 12RP 68-69; 15RP 1469. When defense counsel challenged the relevance of the pervasive testimony that Rancipher was a drinker and a gambler, the prosecutor stated, in the presence of the jury, “it’s relevant, I guess, to living high on the hog, as Ms. King characterized it.” 14RP 1223.

The prosecutor also asked Rancipher to comment on the credibility of his girlfriend Robin Weiland. Weiland previously testified Rancipher helped pay for their tent trailer. Rancipher denied making any payments, and the prosecutor asked him, “To the extent that Ms. Weiland thought that you did, was that a mistake?” 15RP 1466. The prosecutor ultimately withdrew the question after defense counsel objected. 15RP 1467.

ii. The Prosecutor’s Repeated Attempts to Demonstrate Bad Character and Propensity were Prejudicial Misconduct.

When the State focuses on prior misconduct to try to persuade the jury of the defendant’s propensity for crime, prosecutorial misconduct requires reversal of the conviction. *See State v. Fisher*, ____ Wn.2d ____,

____ P.3d ____ (No. 79801-0, Mar. 12, 2009). Fisher was accused of sexually molesting the daughter of his former wife. Slip op. at 1. Before trial, the court excluded evidence Fisher physically abused his biological child and his stepchildren unless the defense made delayed reporting an issue. Slip op. at 1-2. Despite this ruling, the prosecutor brought up the past abuse, and generated a theme throughout the trial that Fisher's molestation of the victim was consistent with this history. Slip op. at 19-20. In closing argument, the prosecutor focused on linking the molestation at issue to the past abuse. Slip op. at 19-20. The court held the prosecutor committed misconduct in violating the court's ER 404(b) ruling and far exceeding its permissible purpose of rebuttal. Slip. Op. at 19.

Here, the court never identified a permissible purpose for admitting that Rancipher was fired for not working his hours. But even assuming there was a permissible purpose, the prosecutor violated ER 404(b) and the court's ruling when she used it to "generate a theme throughout the trial." Fisher, slip op. at 19. She brought up the reason for Rancipher's firing repeatedly and with several witnesses. 9RP 656-66, 681-87, 779-80; 12RP 64-66. Then, during closing argument she referred to it as "time fraud," explicitly linking it with the fraudulent refund slips at issue in this case. 19RP 1818. As in Fisher, the jury was left with the wrong impression, and was not instructed

that it could not consider Rancipher's failure to stick to his schedule at work as evidence of his guilt. Fisher, slip. op at 21.

In addition to the reason for Rancipher's firing, the prosecutor's other attempts to present character evidence and comments on credibility created a running theme, whereby the trial was about not about whether Rancipher was guilty of theft, but about his bad character. Fisher, slip. op. at 19-20. The prosecutor's question implying Rancipher had not paid his taxes and her comment about his living "high on the hog" only contributed to this theme. 14RP 1223; 15RP 1455. By attributing this latter comment to defense counsel, the prosecutor again burdened Rancipher's right to counsel.

Although some of this testimony was not objected to at trial, Rancipher respectfully requests this Court exercise its discretion to consider even unpreserved errors to gauge the cumulative effect of prosecutorial misconduct. RAP 2.5(a)(3); State v. Alexander, 64 Wn. App. 147, 150, 822 P.2d 1250 (1992). The repeated use of propensity evidence, in violation of the court's order in limine, and repeated reliance on character evidence both to denigrate Rancipher and to bolster the State's witnesses was prosecutorial misconduct that likely affected the verdict.

iii. Alternatively, the Court Erred in Admitting Evidence of the Reason for Rancipher's Firing Without Balancing the Probative Value Versus the Prejudice on the Record.

Evidence of prior bad acts is presumptively inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). This includes acts that are merely unpopular or disgraceful. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). The Supreme Court has warned of the potential prejudice of this type of evidence and cautioned courts to be wary of situations “where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986).

Because of the high risk of prejudice, evidence of prior bad acts must be closely scrutinized and admitted only if certain criteria are met. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). To admit such evidence, a trial court must determine: (1) the prior bad act occurred by a preponderance of the evidence; (2) the evidence is offered for an admissible purpose; (3) it is relevant to prove an element or rebut a defense; and (4) the evidence is more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). A trial court should resolve doubts as to admissibility in favor of exclusion. Smith, 106 Wn.2d at 776. Failure to adhere to the requirements of an evidentiary rule can be considered an abuse

of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001) (citing State v. Rivers, 129 Wn.2d 697, 706, 921 P.2d 495 (1996)). The trial court abused its discretion here because it did not perform the above analysis before admitting the reason for Rancipher's firing. 3RP 20.

The court did not identify any admissible purpose or relevancy to the fact that Rancipher did not always work to his schedule. 3RP 20. Even the official reason why Rancipher was fired was entirely irrelevant to any element of theft. The fact that he failed to present an accurate schedule to his supervisors, or to always be at work when required does not show any intent to permanently deprive Fred Meyer of property or any other element of theft. Nor does it show any motive to commit theft. The only reason to admit this evidence was to show that because Rancipher was a poor employee in other respects, he had the propensity to steal. As discussed above, this is exactly what the prosecutor ultimately did.

Additionally, the court failed to give an instruction limiting the jury's use of this evidence. See Saltarelli, 98 Wn.2d at 362 (where evidence of past misconduct is admitted, cautionary instruction to the jury is required). This failure allowed the jury to consider Rancipher's failure to be at work as scheduled as evidence of his bad character or criminal propensity.

When the trial court erroneously admits ER 404(b) evidence, the question is whether there is a reasonable probability the outcome of the trial

would have been different but for the court's error. Smith, 106 Wn.2d at 780. Here, there is a reasonable probability the outcome of Rancipher's trial would have been different without the impermissible propensity evidence because credibility was paramount. By portraying him as someone who cheated in other areas of life, the State greatly increased the likelihood the jury would resolve any doubts against Rancipher. Thus, Rancipher is entitled to a new trial.

c. The Prosecutor Improperly Implied Rancipher Might Not Be Imprisoned If Convicted.

During closing argument, defense counsel tried to impress upon the jury the seriousness of their task, asking them to be careful, as the instructions require. She responded to the prosecutor's discussion during voir dire, saying:

Now, in jury selection, the State talked about peanut butter and jelly and cookie crumbs. That's not what this is about. This is about loss of liberty. This is a serious matter. This is where you have to really take the instructions at heart and consider what is behind our judicial system, the fact that your verdict can take away the liberty of Mr. Rancipher; and it's a serious matter, and it requires you to They say that the fact that the punishment may follow conviction, you shouldn't consider it, except insofar as it may tend to make you careful; and that's what I'm asking you to do when you go into the jury room is be careful Now that's not peanut butter and jelly. That's not cookie crumbs and see who took the cookies out of the cookie jar.

19RP 1840-41. On rebuttal, the prosecutor attacked this line of argument:

let me remind you, as well, that when Ms. King stood up here and talked about the fact that his liberty is at stake, that's a comment which has no support testimony behind it. Did anyone come up here and say that he's going to go to jail? No one came up and said that. Ms. King is the only person who said that.

Ms. King: Objection to this argument, Your Honor.

The Court: I'll sustain the objection. Rephrase it, counsel.

Ms. Platt: That is not testimony. No witness has testified to that, and so you are to consider that only as argument by counsel. There is no support for that in any of the evidence in this case.

19RP 1862-63.

This argument was prosecutorial misconduct, particularly when it continued after the objection was sustained. State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976). In Torres, defense counsel made a very similar argument to the one made by defense counsel here, saying, "We are dealing with a serious charge, a charge that if it results in conviction, can lead to serious consequences that would affect the liberty of my client." Id. at 261. As here, the prosecutor's rebuttal argument did not merely focus the jurors on their task as fact finders, but actually implied that that task was less vital because the result might be no punishment at all. Id. The prosecutor in Torres argued, "Punishment, if any, in this case will be determined by Judge Stephens." Id. Defense counsel's objection was sustained, but the prosecutor continued, "Judge Stephens has a lot of alternatives open to him, and he can choose anything from a deferred sentence on this--." Id. at 261-62. On

appeal, the court concluded this exchange was “indicative of the penchant of the prosecutor for persisting in pursuing matters that were not properly before the jury.” Id. at 262.

Not only did the prosecutor’s argument encourage the jury not to take their task seriously, it was also disingenuous given that the prosecutor later recommended Rancier serve 65 months in prison. 21RP 1919; Torres, 16 Wn. App. at 262. When the prosecutor re-emphasized the same argument before continuing after the objection was sustained, it showed the “penchant of the prosecutor for persisting in pursuing matters that were not properly before the jury.” Id. As in Torres, the prosecutor’s improper argument about the possibility of loss of liberty “added to the unfairness that permeated the trial.” Id.

d. The Prosecutor’s Persistent Use of Leading Questions Despite Repeated Admonitions Tainted the Trial with Testimony by the Prosecutor.

Persistent use of leading questions and testimony by the prosecutor may also factor into a finding a trial is permeated by prosecutorial misconduct. Id. at 258. In Torres, the prosecutor also persistently asked leading questions despite repeated warnings. Id. The court described the prosecutor’s opening argument as “almost testimony by the prosecutor who is not under oath.” Id.

Here, the prosecutor likewise persisted with leading questions and questions that amounted to testimony despite repeated warnings. The first day of trial, the court sustained four defense objections to leading questions before warning the prosecutor, "I realize it's hard sometimes not to ask leading questions, but it is an objectionable practice, so be more careful." 6RP 145-46, 165, 173-74, 189. Later that day, the prosecutor again asked a leading question and the court sustained the objection. 6RP 238.

The next day was no better. Again, the court sustained five objections to leading questions, questions amounting to testimony by the prosecutor, and the prosecutor's practice of summarizing each answer before moving on to the next question. 7RP 279, 284, 301-06, 343-44, 345. The court noted, "This isn't helping either of you with the jury." 7RP 304.

Despite the two previous admonitions, six similar defense objections were sustained the following day. 8RP 460, 466, 484-85, 591, 592-93, 621. Over the next four days, eight more defense objections to leading questions and the prosecutor testifying were sustained. 9RP 709; 10RP 856, 905; 11RP 1021, 1023, 1059; 12RP 27, 45-46, 65, 66. The court again admonished the prosecutor. 12RP 45-46. But that same morning after the warning, the prosecutor attempted to instruct a witness on the stand as to what he could say in terms of hearsay testimony, "You can tell hearsay in this. You can tell the jury what Mr. Rancipher--." 12RP 65. Moments later, she attempted to

put words in the witness' mouth and disparage Rancipher's character saying, "Was he hostile or--." 12RP 66. Again, defense objections were sustained. Id. at 65, 66.

The Torres court reversed the defendant's convictions and remanded for a new trial because the incidents of misconduct were "so numerous as to irreparably taint the proceedings." 16 Wn. App. at 263. In this three-week trial, the prosecutor's misconduct occurred on a near daily basis and lent a disparaging tone to the entire trial, forcing defense counsel to object repeatedly and the jury to be sent out of the courtroom. In the event this Court concludes no one instance of prosecutorial misconduct requires reversal, Rancipher asks this Court to grant him a new trial due to the cumulative effect of the numerous instances of misconduct.

2. INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVED RANCIPHER OF A FAIR TRIAL.

The constitutional right to counsel includes the right to effective assistance of counsel. Const. art. I, § 22; U.S. Const. amend VI; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). It is violated when counsel's performance is unreasonably deficient and the client suffers prejudice as a result. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Ineffective assistance of counsel is a mixed question of

law and fact that appellate courts review de novo. State v. Meckelson, 133 Wn. App. 431, 435, 135 P.3d 991 (2006) (citing Strickland, 466 U.S. at 698).

Rancipher's first attorney was ineffective in failing to investigate an expert's opinion before soliciting his report and disclosing him as a potential witness. The second was ineffective due to the conflict created by prior counsel's ineffectiveness. As a result of this deficient performance, the handwriting expert was allowed to testify, conclusively linking Rancipher's handwriting to the fraudulent refund slips, and counsel was unable to present testimony rebutting his qualifications, experience, and competence.

Rancipher thus suffered prejudice from both his attorneys' ineffectiveness, and his convictions should be reversed due to this second series of violations of his constitutional right to counsel.

a. Rancipher's First Attorney Was Ineffective Because She Failed to Investigate an Expert's Opinion Before Soliciting a Report and Naming Him as a Witness.

The trial court erred when it found Glassoe-Grant provided effective assistance. Essentially, by failing to properly investigate Floberg's opinion and background before naming him as a witness, Glassoe-Grant violated her professional duties of diligence and confidentiality. RPC 1.3, 1.6.

A lawyer may not divulge information relating to representation. RPC 1.6. This confidentiality rule applies to all information relating to the representation whatever its source. RPC 1.6 cmt. 3. None of the listed

exceptions applies. There was no informed client consent, the disclosure was not necessary to carry out the representation, and none of the circumstances requiring disclosure (such as to prevent a crime or to follow a court order) applied. The court's omnibus order required counsel to turn over all expert reports. But to fail to inquire about the substance of the expert's opinion before soliciting the report was unreasonably deficient performance.

Rancipher's second counsel explained standard practice is to "find out orally what the report is before you ask for a written report because once you have a written report its fair game for the other side." 11RP 1097.

The failure to investigate has been held to be deficient performance in Washington. State v. Crawford, 159 Wn.2d. 86, 98-99, 147 P.3d 1288 (2006). Specifically, New Mexico has held that defense counsel's failure to secure and review the expert's opinion before soliciting a report was "such obvious attorney incompetence it cannot be rebutted." State v. Grogan, 142 N.M. 107, 112, 163 P.3d 494 (2007).

There can be no strategic reason for this error. The expert report was not necessary to her motion for a continuance; the voluminous discovery and her heavy trial schedule alone were convincing. She named 48 trials in the upcoming weeks. App. A. She could also have requested more time to continue to investigate a potential expert witness without naming or disclosing him. She was required by the omnibus order to turn over expert

reports, but nothing requires defense counsel to turn over work product or disclose as a potential witness every person she interviews. See RPC 1.6 cmt 3. Nor was there any settlement negotiation to justify disclosure in a bargaining process. 11RP 1098.

Glassoe-Grant's deficient performance likely affected the outcome of the trial because the damaging testimony was put before the jury. Cf. State v. Clemons, 82 Ohio St. 3d 438, 450, 696 N.E.2d 1009 (1998) (no prejudice from failure to investigate mitigation specialist's opinions because State did not call the witness either and damaging testimony was kept from the jury). Here, the handwriting expert told the jury six of the refund slips were conclusively in Rancipher's handwriting, and the jury convicted him on the related counts. 12RP 51; CP 309-10, 321-22, 355-56.

Additional prejudice occurred because subsequent counsel had to limit her cross-examination of Floberg in order to prevent opening the door to the fact that this damaging expert was initially retained by the defense. To prevent that testimony from coming in, King had to refrain from cross-examining Floberg about the fact that he testifies for the State 99% of the time in criminal cases. 13RP 1164; Ex. 161. On direct examination, Floberg minimized the imbalance, saying he had testified "a lot" for the prosecutors but had also done defense side and civil work. 11RP 1111. Given that Floberg's testimony was the only conclusive link between Rancipher and the

fraudulent refund slips, Rancipher was prejudiced by the disclosure of this witness to the State, and his attorney was hamstrung in her attempts to cross-examine this crucial witness.

b. Rancipher's Second Attorney Was Ineffective Due to an Actual Conflict of Interests.

The Sixth Amendment guarantees the right to counsel free of conflicts of interest. State v. Myers, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Prejudicial ineffective assistance is presumed when counsel is forced to serve two masters due to an actual conflict of interest. In re Pers. Restraint of Benn, 134 Wn.2d 868, 890, 952 P.2d 116 (1998). This situation is a breach of counsel's duty of loyalty, "the most basic of counsel's duties." Strickland, 466 U.S. at 692. A defendant asserting ineffective assistance due to a conflict of interest need only show the conflict adversely affected the attorney's performance to establish a Sixth Amendment violation requiring reversal. Mickens v Taylor, 535 U.S. 162, 173-74 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); State v. Dhaliwal 150 Wn.2d 559, 571, 79 P.3d 432 (2003).

i. An Actual Conflict Arose when Counsel was Forced to Argue a Member of Her Own Firm was Ineffective.

Arguing one's own incompetence creates an actual conflict of interest. United States v. Del Muro, 87 F.3d 1078 (9th Cir. 1996). This

conflict is imputed to other members of the same firm. Thus, Glascoe-Grant's conflict in arguing her own ineffectiveness also disqualified King.

“[W]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so.” RPC 1.10. According to the “terminology” section of the RPC, public defender agencies qualify as “law firms” for purposes of application of the rules. State v. Hunsaker, 74 Wn. App. 38, 42, 873 P.2d 540 (1994).

Other jurisdictions have specifically held that an actual conflict exists when one member of a public defense agency must argue that another member is ineffective

In McCall v. District Court, the Colorado high court held, “A local public defender faced with the prospect of arguing his or her own incompetence to protect a client’s interests on appeal clearly has a conflict of interest requiring disqualification.” 783 P.2d 1223, 1224 (Colo. 1989). Additionally, to require a member of the appellate division of the same office to argue that a local deputy provided ineffective assistance “would have a deleterious effect on relationships within the public defender system and would be destructive of an office upon which the criminal justice system relies.” Id. at 1228. For these reasons, the court held that the lower court abused its discretion in denying counsel’s motion to withdraw. Id. at 1228;

see also Cannon v. Mullin, 383 F.3d 1152, 1173 (10th Cir. 2004) (discussing appellate and trial attorneys from same firm and concluding, “Presenting an ineffective-assistance-of-counsel claim may well damage the reputation of the trial attorney and the office for which both trial and appellate counsel work.”); People v. Close, 180 P.3d 1015, 1020 (Colo. 2008) (“The public defender’s office cannot argue the claim of ineffective assistance of counsel against itself.”).

As in McCall, being forced to argue a member of her own agency was ineffective created an actual conflict of interest for King. The trial court therefore abused its discretion in denying her motion to withdraw.

ii. King Also had an Actual Conflict because She was a Necessary Witness to Rebut the Testimony of the Handwriting Expert.

A lawyer cannot act as an advocate in a matter to which she is a necessary witness. RPC 3.7. Where defense counsel has relevant testimony or knowledge which should be presented to the jury, the fact that counsel should be called as a witness creates an automatic conflict of interest. Cf. State v. Philips, 108 Wn.2d 627, 642- 43, 741 P.2d 24 (1987) (rejecting claim of ineffective assistance because defendant did not show his attorney had any relevant testimony or ought to have been called as a witness). King was a necessary witness in two respects. First, she was a witness to Glassoe-Grant’s ineffectiveness, and even attempted to give testimony showing the

standard of care that required proper investigation of an expert's opinion before soliciting a written report. CP 82. Second, her own experience with the investigator made her a necessary rebuttal witness regarding the expert's qualifications, experience, and conclusions. 11RP 1099. Because King was a necessary witness, the court erred in denying her motion to withdraw.

As an alternative to permitting counsel to withdraw, the court should have granted defense counsel's request to exclude the expert testimony. According to the four dissenting Justices in State v. Crawford, "The remedy for counsel's ineffective assistance can be only to put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred." Crawford, 159 Wn.2d. at 107-08 (C. Johnson, J., dissenting). For example, the remedy for ineffective appellate assistance is reinstatement of the appeal. In re Pers. Restraint of Theders, 130 Wn. App. 422, 435 n.35, 123 P.3d 489 (2005). Likewise, where ineffective assistance results in the admission of evidence, the remedy should be to restore the fairness of the trial by excluding the evidence.

3. THE COURT ERRED IN ADMITTING EXPERT TESTIMONY ON HANDWRITING ANALYSIS WITHOUT A FRYE HEARING.

Washington has adopted the Frye test for evaluating the admissibility of new scientific evidence. State v. Gregory, 158 Wn.2d 759, 820, 147 P. 3d 1201 (2006). The goal of the test is to determine whether scientific evidence

is based on established scientific methodology. State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). There must be both general acceptance in the relevant scientific community of the theory and of the technique used to implement the theory. Id.; State v. Cauthron, 120 Wn.2d 879, 889, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997). Unanimity is not required. State v. Copeland, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996). But if there is a significant dispute among qualified scientists in the relevant scientific community, the evidence may not be admitted. State v. Gentry, 125 Wn.2d 570, 585-86, 888 P.2d 1105 (1995). If the Frye test is satisfied, the trial court must then determine admissibility under ER 702. Copeland, 130 Wn.2d at 256.

Once the Washington Supreme Court determines the Frye test is met as to a specific novel scientific theory or principle, Washington trial courts can generally rely upon that determination as settling admissibility in future cases. Cauthron, 120 Wn.2d at 888 n.3. But trial courts must still undertake the Frye analysis if one party produces new evidence that seriously questions the continued acceptance or lack of acceptance as to that theory. Id.

- a. Reversal is Required Because the Court Failed to Hold a Frye Hearing.

Here, Rancipher provided the trial court with a recent law review article showing the theories and methods employed in handwriting analysis are not generally accepted in the relevant scientific community. 11RP 1089. Because the State failed to rebut Rancipher's prima facie evidence of the theory's current lack of general acceptance, the trial court should have held a Frye hearing. See State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999) ("When general acceptance is reasonably disputed, it must be shown, by a preponderance of the evidence, at a hearing held under ER 104(a).") Failure to do so constitutes error. Cauthron, 120 Wn.2d at 888 n.3.

Although the court heard argument from both sides on the Frye issue, see 11RP at 1087-97, it ultimately abdicated its responsibility to determine the reliability of the evidence before admitting it, explaining, "whether or not handwriting analysis is a junk science is not for a trial court to determine, but is a Court of Appeals issue; and so far, the State of Washington does allow handwriting testimony." 11RP 1096. But, as Cauthron noted, "the relevant inquiry is the general acceptance by scientists, not by the courts." 120 Wn.2d at 888. The issue is a factual one to be resolved by the trial court, although it is reviewed de novo on appeal. Id. The court erred in relying on prior Washington precedent when faced with evidence of a significant dispute based on far newer evidence. Id. at 888 n.3.

The cases the court relied on were decided decades before the recent disputes in the scientific and legal communities over the validity of handwriting analysis. Compare State v. Haislip, 77 Wn.2d 838, 467 P.2d 284 (1970) with Simone Ling Francini, Note: Expert Handwriting Testimony: Is the Writing Really on the Wall?, 11 Suffolk J. Trial & App. Adv. 99 (2006). See also David L. Faigman, Symposium: Anecdotal Forensics, Phrenology, and Other Abject Lessons from the History of Science, 59 Hastings L.J. 979 (2008) (comparing handwriting analysis and other “anecdotal” forensics to phrenology, the defunct science of deducing personality traits from bumps on the skull).

The trial court’s gatekeeper role under Frye requires “careful assessment of the general acceptance of the theory and methodology of novel science, thus helping to ensure, among other things, that ‘pseudoscience’ is kept out of the courtroom.” Copeland, 130 Wn.2d at 259. The court failed utterly to apply the Frye analysis and inquire whether the underlying principles and the techniques used are generally accepted in the scientific community. This Court should therefore reverse and remand for a Frye hearing.

- b. Handwriting Analysis Is Not Generally Accepted in the Relevant Scientific Community.

Appellate review of a Frye ruling after a hearing is de novo, and the court may consider evidence not in the record, including scientific and law review articles. State v. Leuluaialii, 118 Wn. App. 780, 789, 77 P.3d 1192 (2003). Since there was not actually a full Frye hearing in this case, it would be appropriate simply to remand for a hearing. But if this Court should engage in a Frye analysis on appeal, appellant presents the following brief discussion of legal and scientific literature on handwriting analysis.

As a preliminary matter, practitioner-only acceptance is not enough. See Frye, 293 F. at 1014 (rejecting systolic blood pressure test despite its acceptance by its founder and his disciples because it was not accepted in the wider “physiological and psychological authorities”). The relevant scientific community is the wider scientific community, rather than simply other handwriting analysts, who have a commercial incentive to maintain their status as paid expert witnesses. See, e.g., United States v. Downing, 753 F.2d 1224, 1236 (3d Cir. 1985); United States v. Alexander, 526 F.2d 161, 164 n.6 (8th Cir. 1975); Contreras v. State, 718 P.2d 129, 135 (Alaska 1986); People v. Kelly, 17 Cal.3d 24, 37-38, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976); State v. Thompkins, 891 So.2d 1151, 1152 (Fla. App. 2005). The strength of the Frye analysis is its reliance on “the collective wisdom of an institution that commands great epistemic prestige in contemporary society: . . . the ‘scientific community.’”

Simon A. Cole, Out of the Daubert Fire and into the Fryeing Pan? Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in Frye Jurisdictions, 9 Minn. J.L. Sci. & Tech. 453, 456 (2008).

Floberg claims his handwriting analysis can identify the author of hand printed material, despite attempts by the author to disguise his writing, and “exclude everybody else on the planet.” 11RP 1113. But research shows the ability of handwriting analysis to individualize is on shaky scientific footing. According to the National Academy of Sciences, “The scientific basis for handwriting comparisons needs to be strengthened.” Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United States: A Path Forward 122 (2009) (hereinafter Strengthening Forensic Science).

Moreover, studies show analysis of hand printed samples (as opposed to signatures) or intentionally disguised writing, such as the samples examined by Floberg in this case,⁷ are even more likely to be wrong. See, e.g., United States v. Fujii, 152 F. Supp. 2d 939, 941-42 (N.D. Ill. 2000); Roger C. Park, SYMPOSIUM: Signature Identification in the Light of Science and Experience, 59 Hastings L.J. 1101, 1141 (2008). The National Academy of Sciences noted there may be a scientific basis for handwriting

⁷ In this case, the only thing that appears certain about the writing on the refund slips was that someone was trying to disguise it. Rancipher implicitly argued someone else must have forged his name, while the State tried to show that Rancipher himself was trying to disguise his writing for later deniability. 12RP 28; 19RP 1842.

analysis, “at least in the absence of intentional obfuscation or forgery.”

Strengthening Forensic Science at 122.

The number of samples is also crucial to handwriting analysis. See Park, supra, at 1117-18, 1123-24, 1131. Here, Floberg looked at only 10 known samples, with a very small amount of hand printing on each. 7RP 389; 11RP 1116-17. As one federal judge aptly noted regarding similarly disputed toolmark forensic science, “The more courts admit this type of toolmark evidence without requiring documentation, proficiency testing, or evidence of reliability, the more sloppy practices will endure; we should require more.” United States v. Green, 405 F. Supp. 2d 104, 109 (D. Mass. 2005).

It appears what little acceptance there is in the scientific community of handwriting analysis fades into non-existence if the expert claims the ability to individualize based on a small number of samples that may have been intentionally disguised. That is exactly the situation here. Thus, under Frye, the court should have excluded the evidence, or at a minimum, limited Floberg’s testimony to pointing out similarities and differences, as defense counsel requested. 11RP 1089.

- c. This Error Requires Reversal Because the Handwriting Expert’s Testimony Was Critical and the Remaining Evidence Was Circumstantial.

The erroneous admission of expert testimony is reversible error when the expert testimony was critical and the other evidence was not overwhelming. State v. Huynh, 49 Wn. App. 192, 198, 742 P.2d 160 (1987). In Huynh, an arson case, a so-called expert testified that the gas recovered from the fire “matched” gas found in the defendant’s car. 49 Wn. App. at 193-94. On appeal, the court held the testimony was not admissible under Frye because the scientific community was divided on the effectiveness of gas chromatography when the sample gas has been burned. Id. at 196-98. The only other evidence linking Huynh to the fire was that the victim was his recently estranged girlfriend, the victim accused him of starting the fire and of threatening and beating her on other occasions, and a car Huynh sold to the victim was vandalized the same morning. Id. at 193. The court reversed Huynh’s conviction because the remaining evidence was circumstantial, and the expert’s testimony probably affected the outcome of the trial. Id.

As in Huynh, admission of Floberg’s testimony was prejudicial because the other evidence was circumstantial and not overwhelming. The jury convicted Rancipher on each of the counts pertaining to slips Floberg testified were written by Rancipher. 12RP 51; CP 309-10, 321-22, 355-56. Had a Frye hearing resulted in the exclusion of Floberg’s testimony, the jury would have been far more likely to conclude someone else had forged Rancipher’s name on the refund slips. Rancipher had an alibi for several of

the dates and showed that others had the opportunity to commit these crimes. 9RP 687-88; 14RP 1220; 15RP 1449.

“The expert who assumes the aura of science while really basing her testimony on unsystematic inductions creates the worst of both worlds.”

Park, supra at 1104. This “expert” testimony should have been excluded.

Rancipher requests this Court reverse his conviction because it is reasonably likely it affected the outcome of the trial.

4. CUMULATIVE ERROR DENIED RANCIPHER A FAIR TRIAL.

Even if this Court concludes that the above errors do not individually require reversal, their combined effect does. Every defendant has the right to a fair trial. U.S. Const. amend. VI; Const. art. 1, § 22. Cumulative error may deprive a defendant of this right. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). During Rancipher’s three-week trial, multiple instances of prosecutorial misconduct occurred on a daily basis. This misconduct denigrated Rancipher’s character and that of defense counsel. Ineffective assistance of defense counsel led to the admission of damaging and scientifically dubious expert testimony. Further, that ineffectiveness prevented defense counsel from effectively rebutting the testimony. The cumulative effect of these pervasive and insidious errors deprived Rancipher of a fair trial, and his convictions should be reversed.

5. RANCIPHER’S MULTIPLE CONVICTIONS FOR THE SAME COURSE OF CONDUCT VIOLATE DOUBLE JEOPARDY.

The double jeopardy provisions of our state and federal constitutions provide the same protection and prohibit multiple punishments for the same offense. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000); U.S. Const. amend. V; Const. art. I, § 9. Rancier’s convictions violate double jeopardy in two ways. First, the two fraudulent refund slips on each date constitute only one act of taking per date. Second, even if the Court concludes each slip is a separate taking, the identical jury instructions for second-degree theft charges on the same date permitted the jury to convict Rancier twice for the same act.

a. Refund Slips Processed at the Same Time Constitute Only One Act of Taking.

Under double jeopardy principles, a person cannot be convicted of violating the same statute numerous times unless each conviction is a separate unit of prosecution. Turner, 102 Wn. App. at 206. “[T]he unit of prosecution analysis is designed in part to avoid overzealous charging by the prosecution.” Id. at 210.

Courts should first apply rules of statutory construction to determine what amount of conduct the Legislature intended to make a punishable act. Id. at 206-07. Any ambiguity is construed in favor of lenity. Id. at 207. The theft statute does not explicitly state the unit of prosecution. See generally

Chapter 9A.56 RCW. It defines theft as “to wrongfully obtain or exert unauthorized control over” the property of another. RCW 9A.56.020(1)(a). The Legislature has defined “wrongfully obtain or exert unauthorized control” as meaning (a) a taking, or (b) for an employee with authorized control, converting property to personal use. RCW 9A.56.010(19).

The plain language of the statute indicates the unit of prosecution is an employee’s exertion of unauthorized control. Turner, 102 Wn. App. at 208. However, the statute is ambiguous as to whether multiple theft schemes over the same period of time against the same victim may be punished separately. Id. at 211. Because of this ambiguity, the rule of lenity requires that multiple schemes against the same victim over the same period of time be counted as one theft. Id. at 209.

This case involved only one unauthorized exertion of control per date. As here, the issue in Turner was multiple schemes of theft over a period of time. Over the course of 10 months, there had been 72 unauthorized payments from the employer’s accounts and charges to the employer’s credit card. Id. at 204. The State charged four counts of first-degree theft, aggregating by “scheme.” Id. The court held that these four convictions for different schemes over the same period of time violated double jeopardy. Id. at 209, 212.

By contrast, in State v. Kinneman, 120 Wn. App. 327, 84 P.3d 882 (2003), the court held that no theft occurred until the lawyer “made an unauthorized removal” of a sum of money from the IOLTA account. Id. at 338. In supporting the 67 different theft charges in that case, the Kinneman court relied in part on State v. Carosa, in which an employee stole cash from the register on three different work shifts and was convicted on three counts of theft. Kinneman, 120 Wn. App. at 337 (citing State v. Carosa, 83 Wn. App. 380, 921 P.2d 593 (1996)).

Unlike in Carosa, the pairs of fraudulent refund slips in this case were not processed on separate dates or work shifts. They were presented to the cashiers at virtually the same time.⁸ 7RP 375-87; 8RP 533-56. Separating them by the accounts they were drawn from is as arbitrary as separating them by scheme in Turner. Because no authority supports the idea that fraudulent withdrawals from different accounts at the same time should constitute separate units of prosecution for theft, this Court should reverse his convictions on one of the two counts on each date.

The proper remedy for violations of double jeopardy is to vacate the lesser offense. State v. Weber, 159 Wn.2d. 252, 266, 149 P.3d 646 (2006).

Thus, on each date for which two counts of second-degree theft are charged,

⁸ On only two occasions were the slips time stamped more than a few minutes apart. 8RP 542-43, 567 (slips processed 11 minutes and 17 minutes apart). The time gaps are likely due to the cashier not having the right denominations of cash on hand or being busy with customers. 8RP 565, 592.

one must be reversed. On each date for which a count of third degree and a count of second-degree theft are charged, the third degree theft charge must be reversed. This would result in 45 convictions for second-degree theft. CP 414-18. Since all Rancipher's misdemeanor convictions should be reversed, his misdemeanor sentence should also be vacated.

b. The Jury Instructions Failed to Protect Rancipher from Being Convicted Twice for the Same Offense.

The instructions also violate double jeopardy in that they fail to inform the jury it could not convict Rancipher twice for the same act. State v. Berg, 147 Wn. App. 923, 931, 935, 198 P.3d 529 (2008). Even though Rancipher did not object to the instructions⁹ a double jeopardy violation may be raised for the first time on appeal because it is a manifest error of constitutional magnitude. Id. at 931.

This Court reviews challenges to jury instructions de novo, within the context of the instructions as a whole. Id. "Jury instructions must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (citation and internal quotation marks omitted). The jury instructions in Rancipher's case do not satisfy this standard.

⁹ 18RP 1771.

Borsheim holds that where multiple counts are alleged to have occurred within the same charging period, an instruction that the jury must find “separate and distinct” acts for each count is required. 140 Wn. App. at 368. Without such an instruction, a defendant is exposed to multiple punishments for the same offense, in violation of double jeopardy. Id. at 364, 366-67. More recently, the court in Berg followed Borsheim in vacating a conviction on double jeopardy due to inadequate jury instructions. Berg, 147 Wn. App. at 935.

As in Borsheim and Berg, the State alleged multiple counts of the same crime within the same period, namely, two counts of second-degree theft per day on thirteen dates.¹⁰ Berg, 147 Wn. App. at 934-35; Borsheim, 140 Wn. App. at 367. The two identical instructions for each date, like those in Borsheim and Berg, exposed Rancipher to multiple punishments for the same crime because none specified the jury must find “separate and distinct” acts to convict on each count.¹¹ Borsheim 140 Wn. App. at 367, 369; Berg, 147 Wn. App. at 934-35.

¹⁰ Jan 3, Jan. 21, Jan. 27, Feb. 1, Mar. 11, Mar. 31, Apr. 24, May 17, May 21, May 26, June 1, June 8, and June 24, 2005. CP 151-52, 155-57, 158-59, 165-66, 168-69, 173-74, 178-80, 182-85, 187-88. The jury was unable to agree on the May 21 charges. CP 365-66.

¹¹ The to-convict instructions for the two counts on each date were identical except for the Roman numeral designating the count. CP 209-210, 219-22, 225-26, 239-40, 247-48, 257-58, 269-72, 275-78, 281-82, 287-88.

Berg and Borsheim distinguished State v. Ellis because those instructions explicitly stated the act underlying each count must have occurred “on a day other than [the other count],” and the two other identically charged counts occurred during a different time period. Berg, 147 Wn. App. at 933 (quoting State v. Ellis, 71 Wn. App. 400, 401-02, 859 P.2d 632 (1993)). In contrast to the Ellis instructions, the instructions here did not state that the underlying act had to be separate from the one charged in the other instruction for the same date. Ellis, 71 Wn. App. 406. Instead, the instructions referred to the same crime, on the same date, triggering under Borsheim an unequivocal need to include the “separate and distinct acts for each count” language.

Nor did the verdict forms specify the jury had to find a separate and distinct act for each count.¹² As in Berg, the verdict forms were identically worded save for the count number and did not make it manifestly clear that separate and distinct acts needed to be found. 147 Wn. App. at 935, 937.

Prosecutor’s arguments do not protect the defendant from double jeopardy. Id. at 935. Thus, although the State mentioned in closing there were two counts per date, one for each account, this is insufficient. 19RP 1811,

¹² CP 303-04, 313-16, 319-20, 333-34, 341-42, 351-52, 363-64, 369-72, 375-76, 381-82.

The double jeopardy error in Rancipher's case is identical to the error in Borsheim and Berg. The corresponding remedy is to vacate one of Rancipher's convictions for second-degree theft for each of the 13 dates where the jury was instructed on two identical counts.¹³ Berg, 147 Wn. App. at 935; Borsheim, 140 Wn. App. at 371.

6. THE TRIAL COURT IMPROPERLY DELEGATED THE COURT'S DUTY TO SET TERMS OF RESTITUTION.

The sentencing court may require restitution "on such terms as [the court] deems appropriate under the circumstances." RCW 9.95.210(2). The duty to set the "terms" of restitution includes the duty to set a payment schedule. Nothing in the statute allows the court to delegate this duty to another body such as the Department of Corrections (DOC). It is an unlawful delegation of judicial authority to authorize the probation officer to fix the amount of the payments. State v. Summers, 60 Wn.2d 702, 708, 375 P.2d 143 (1962). This Court should construe RCW 9.95.210 as requiring the sentencing court, not the DOC, to set a payment schedule for restitution as part of the "terms" of restitution.

¹³ This would reduce Rancipher's current felony convictions from 56 to 43, and his offender score from 55 to 42. CP 414-18.

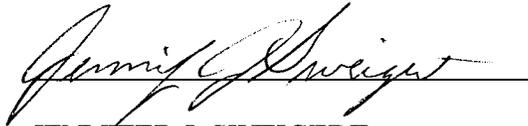
D. CONCLUSION

For the reasons discussed above, this Court should reverse Rancipher's convictions or, alternatively, vacate his sentence and remand for resentencing.

DATED this 31st day of March, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", is written over a horizontal line.

JENNIFER J. SWEIGERT

WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

APPENDIX A

1 STATE OF WASHINGTON)
 2 ss.) DECLARATION OF COUNSEL
 3 COUNTY OF PIERCE)

4 I, KERRY L. GLASOE-GRANT, being first duly sworn upon oath as an attorney in the
 5 State of Washington, hereby deposes and says as follows:

- 6 1. That I am the assigned attorney for the Defendant;
- 7 2. That the Defendant is set for trial on March 26, 2008 in Pierce County Superior
 8 Court;
- 9 3. On May 3, 2007, the defendant was arraigned on 14 counts of Theft in the First
 10 Degree. Due to the large amounts of discovery, documents, and information it
 11 took the State nearly 2 years to charge this case.
- 12 4. A subsequent court date was set for the defendant to retain an attorney. The
 13 defendant was unable to retain an attorney. On May 31, 2007, the Court found the
 14 defendant indigent and appointed the Department of Assigned Counsel. On June
 15 1, 2007, the Department of Assigned Counsel filed a notice of appearance on the
 16 defendant's case and I was assigned to his case.
- 17 5. Due to the large amount of discovery in this case (over 4,000 pages) the
 18 defendant's case was continued several times.
- 19 6. On March 13, 2008, this case scheduled for a status conference. That same day,
 20 the defense moved for a continuance in the case due to the volumes of discovery
 21 and continued investigation. The state was not opposed to the continuance. The
 22 defendant was also in agreement with the continuance and is NOT in custody.

23 The Court denied the request for a continuance and noted there would be no
 24
 25
 26

1 further continuances, in light of the fact that the case was over 300 days old.

2 Attached are also copies of the Pierce County Superior Court's new protocol for
3 cases, which appears to be the driving force behind the denial for the continuance.

4 7. Defense counsel is out of town on a previously scheduled vacation from March
5 18 – March 23, 2008.

6
7 8. Defense counsel is a public defender and currently has 48 pending trials (Class B
8 and C felonies) set between March 17, 2008 and May 20, 2008 (with the
9 exception of one case set for trial in August of 2008). See attached criminal trial
10 docket. Defense counsel is typically in court Monday through Friday in both the
11 mornings and afternoons. Defense counsel has also been working late evenings
12 and typically works on the weekends. Because of the constant court schedule,
13 this leaves defense counsel little time to conduct interviews, write briefs, and
14 conduct investigations. Additionally, defense counsel has retained a handwriting
15 expert and the analysis is finally complete, and defense counsel will file a witness
16 list with the handwriting expert as a potential witness.

17
18 9. This case involves a multiplicity of factual and legal issues that requires extensive
19 investigation and intensive witness interviews and preparation. Due to a simple
20 lack of time resulting from an overwhelming caseload, defense counsel has been
21 literally unable to prepare this case for trial as her ethical duty and the Sixth
22 Amendment requires.

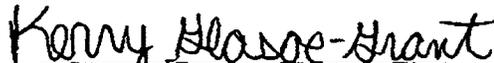
23
24 10. It should also be noted that defense counsel waited 14 days to be assigned out to
25 a trial court on her recent trial, State v. Dorn, 07-1-03815-1. Mr. Dorn was IN
26

1 custody and the trial was expected to last 3 days. On the contrary, here, the
2 defendant is NOT in custody and his trial is expected to last 1 – 2 weeks.

3 11. This case is set for trial on March 26, 2008. Defense counsel will not be ready to
4 proceed to trial on March 26, 2008 and respectfully requests a continuance to
5 adequately prepare for trial. It would be impossible for defense counsel to
6 adequately prepare and be ready to go to trial on a case involving over 4,000 pages
7 of discovery. Should the continuance request be denied, the defendant would
8 receive ineffective assistance of counsel because counsel is currently not prepared
9 to go to trial on the currently scheduled trial date.
10

11 FURTHER your affiant sayeth not.

12 **RESPECTFULLY SUBMITTED** this 17th day of March, 2008.

13 
14 Kerry L. Glasoe-Grant
15 Attorney for Defendant
16 WSBA #34011

17 **MEMORANDUM OF LAW**

18 An accused's right to be represented by counsel is a fundamental component of our
19 criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Gideon v.
20 Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). "Of all the rights that an
21 accused person has, the right to be represented by counsel is by far the most pervasive for it
22 affects his ability to assert any other rights he may have." Schaefer, Federalism and State
23 Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).
24

25 It has long been recognized that the right to counsel is the right to effective assistance of
26 counsel. McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763
27

28 DEFENDANT'S MOTION FOR CONTINUANCE
PAGE - 4

1 (1970). Pursuant to the Sixth Amendment of the United States Constitution and article I, section
 2 22 of the Washington State Constitution, a defendant is guaranteed effective assistance of
 3 counsel. See In re Pers. Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). To
 4 successfully challenge the effective assistance of counsel, the defendant must satisfy a two-part
 5 test. The defendant must show that defense counsel's representation was deficient and defense
 6 counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322,
 7 334-35, 899 P.2d 1251 (1995) (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816
 8 (1987) (applying the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct.
 9 2052, 80 L. Ed. 674 (1984)). In certain limited cases prejudice is presumed. The result of a
 10 criminal trial is presumptively unreliable where "counsel entirely fails to subject the prosecution's
 11 case to adversarial testing," and no particular showing of prejudice is required. United States v.
 12 Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

13
 14
 15 In State v. Hartwig, the defendant sought review of a judgment of the Superior Court
 16 convicting him of grand larceny, larceny by check and petit larceny. 36 Wn.2d 598, 219 P.2d 564
 17 (1950). In Hartwig, on October 11, 1949 the court set the defendant's case for trial on November
 18 9th. Previously in August, the Washington Supreme Court had already set a case for November
 19 9th that the defendant's attorney was the attorney of record. The attorney assumed from his
 20 previous experience that he would have no difficulty securing a continuance of the defendant's
 21 trial. On November 6th, the defendant's attorney sought the prosecutor's approval of the
 22 continuance, but was unable to secure his consent. The attorney then filed a motion for a
 23 continuance supported by an affidavit and presented it to the court. The court denied the motion
 24 for a continuance. Id. at 600. The appellant made a personal request to continue the trial, basing
 25 it upon the ground that his counsel was appearing before the Washington Supreme Court. The
 26
 27

1 court denied the request and instead appointed an attorney to represent the defendant and recessed
 2 for 45 minutes. After the recess, newly appointed counsel made a motion for a continuance of
 3 the trial, explaining to the court that he was not prepared to represent the appellant; that he had
 4 not had an opportunity to discuss the facts of the case with him nor study the charges made
 5 against him. The prosecutor opposed the motion. The court denied the motion and ordered the
 6 case to proceed to trial. Id.

7
 8 On appeal, the Washington Supreme Court reversed and remanded the case for a new
 9 trial. Id. at 602. The court explained that it is within the discretion of the trial court to grant or
 10 deny an application for a continuance of the trial of a case, but such discretion necessarily has
 11 limitations and the action taken must not be arbitrary or without justification under the
 12 circumstances then existing. The Hartwig court further explained that:

13
 14 When the court recognized the constitutional right of appellant to have counsel and
 15 appointed an attorney to represent him, it then became the duty of the court to allow the
 16 appointed attorney a reasonable time within which to consult his client and make adequate
 17 preparation for trial. **The constitutional right to have the assistance of counsel, Art. I, § 22, carries with it a reasonable time for consultation and preparation, and a denial is more than a mere abuse of discretion; it is a denial of due process of law in contravention of Art. I, § 3 of our constitution.** (emphasis added; citations omitted).

18
 19 Although it may have been made to appear to the court that the issues of fact and law were
 20 comparatively simple, and hence a continuance was not needed, nevertheless it was the
 21 duty of appointed counsel to make a full and complete investigation of both the facts and
 22 the law in order to advise his client and prepare adequately and efficiently to present any
 23 defenses that he might have to the charges against him. No sufficient time was allowed
 24 for such purposes.

25 Hartwig, 36 Wn.2d at 601.

26 ARGUMENT

27 In this case, the defendant is charged with 14 counts of Theft in the First Degree. The
 28 discovery in the case is well over 4,000 pages. The state took nearly 2 years to investigate and

1 charge this case. The Department of Assigned Counsel has been appointed to the case for less
 2 than one year. The defendant is currently NOT in custody and is facing substantial time in
 3 jail/prison if convicted of the charges. This case is complex, with over 4,000 pages of discovery
 4 which took the state nearly 2 years to file charges. Pretrial motions, including motions to dismiss,
 5 exclude ER 404(b) evidence, and other motions in limine are certain to be filed and will need to
 6 be heard. Additionally, there is no suggestion in this record that any party will be prejudiced as
 7 a result of the continuance. When defense counsel requested the continuance, the state was not
 8 opposed. There is no allegation that any of the state's witnesses become unavailable due to the
 9 continuance, or that any party will be prejudiced by the continuance. Instead, the Court inquired
 10 of the state whether or not she would be ready for trial on March 26, to which she responded she
 11 would be.
 12

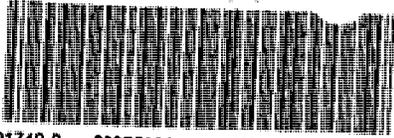
13
 14 To deny the defendant's request for a continuance would deny him effective
 15 representation of counsel as guaranteed by the Sixth Amendment and article I, section 22. The
 16 defendant respectfully requests that the Court grant his request for a continuance. To order
 17 defense counsel to trial would require her to "violate her professional obligation" to her client
 18 "both under the state and federal Constitutions" and the Rules of Professional Conduct. In re
 19 Sherlock, 525 N.E.2d 512, 519 (Ohio Ct. App. 1987).
 20

21 **RESPECTFULLY SUBMITTED** this 17th day of March, 2008.

22
 23 
 24 Kerry L. Glasoe-Grant
 25 Attorney for Defendant
 26 WSBA #34011
 27

28 DEFENDANT'S MOTION FOR CONTINUANCE
 PAGE - 7

APPENDIX B



07-1-01749-8 29375936 DFLW 03-17-08

FILED
IN COUNTY CLERK'S OFFICE

A.M. MAR 17 2008 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

GERALD A. HORNE
PIERCE COUNTY PROSECUTING ATTORNEY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 v.)
)
 EUGENE MICHAEL RANCIPHER,)
)
 Defendant.)

NO. 07-1-01749-8

DEFENSE WITNESS LIST

 ORIGINAL

COMES NOW the Defendant, EUGENE MICHAEL RANCIPHER, by and through his attorney, KERRY L. GLASOE-GRANT, of the Pierce County Department of Assigned Counsel, and gives notice that they may call the following witnesses:

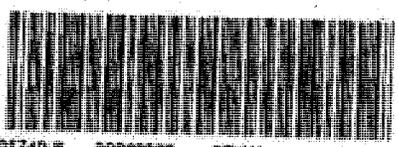
Robert G. Floberg
Forensic Document Examiner
P.O. Box 199
Fox Island, WA 98333

Dated: March 17, 2008

Presented by:

Kerry Glasoe-Grant
Kerry L. Glasoe-Grant
Attorney for Defendant
WSBA #34011

APPENDIX C



07-1-01749-8 30208578 STLW 06-05-08

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

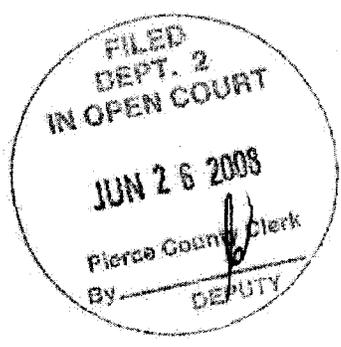
NO. 07-1-01749-8

Plaintiff,

vs.

EUGENE MICHAEL RANCIPHER

Defendant(s).



LIST OF WITNESSES

TO: EUGENE MICHAEL RANCIPHER, defendant, and

TO: KERRY L GLASOE-GRANT, his/her attorney

The following is a list of witnesses in the above entitled cause for JURY TRIAL on 3/28/2008

FLOBERG, ROBERT G
PIERCE COUNTY SHERIFF #31
060211054

Dated this 26th day of June, 2008.

Mailed/Faxed/Received copy this _____
day of March, 2008.

GERALD A. HORNE
Prosecuting Attorney

To: KERRY L GLASOE-GRANT

By: Karen D Platt
KAREN D. PLATT
Deputy Prosecuting Attorney
Washington State Bar # 17290

By: _____

