

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,
Respondant,
v.s.
KIRK M. HERNANDEZ, Jr.,
Appellant.

Case No. 44771-1-II

STATEMENT OF ADDITIONAL
GROUNDS UNDER RAP 10.10

FILED
COURT OF APPEALS
DIVISION TWO
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CLERK OF COURT
WASHINGTON STATE

I. JURISDICTION

This court has jurisdiction pursuant to
RCW 2.06.030(d) and CJC 1.2 through RAP 4.7(b)(2).

II. ERROR

Assignment of Additional Grounds No. 1: Mr Kurtz's
failure to seek appointment of qualified lead
co-counsel for Hernandez's defense in second
strike a persistent offender case violated
SID 14.2, V, VI, § XIV Amendment of the
United States Constitution.

III. ISSUES RELATED TO ERROR

- 1). Mr. Kurtz's complete failure towards
qualification for Hernandez's persistent
offender case falls below an objective
standards of reasonableness and has
prejudiced Hernandez's second strike defense.
- 2). Under RAP 2.5(a)(3) raised for the
first time on appeal Mr. Kurtz's manifest
breach of contract and conflict of interest
for Hernandez's constitutional right to indigent
defense qualified as lead co-counsel in

"second strike" a persistent offender case.

3) Under RAP 1.2(a), this court should consider the Clark County Superior Court contract with Mr. Kurtz in order to Promote Justice, Facilitate a Decision on the Merits and Promote Judicial Economy,

a) Since Mr. Kurtz's breach of contract and conflict of interest non-authorized-payment of services to unqualified Mr. Kurtz's representation proof of ineffective assistance of counsel case on the Merits

b) Considering the Clark County Superior Court contract with Mr. Kurtz will Promote Justice and Facilitate a Decision of the Case on the Merits.

c) Consideration of the Clark County Superior Court contract with Mr. Kurtz will Promote Judicial Economy and Prevent Waste of Limited State Resources.

IV. ADDITIONAL STATEMENT OF FACTS AND PROCEDURE

On January 2, 2013, signed contract for Indigent Defense Services entered into by Clark County and Contractor, David S. Kurtz, for legal representation in Clark County Superior Court felony probation violation cases and

felony cases, other than ~~any~~, persistent offender ~~in~~ cases, as attached at Exhibit #1 and incorporated by reference as if fully set forth herein.

On February 6, 2013, First Appearance Court, ordered appointment of contractor, Mr. Kurtz for Defendant, Hernandez Jr. indigent defense. (CP, 2). On February 8th, filed in Superior Court Clerk's Office the Information count #1 between September 20-21, 2012, the Defendant inflicted bodily injury upon Patrick H. Wade, robbery in the first degree a persistent offender case, (CP, 3), notice of special punishment "second strike" a persistent offender. (CP, 4).

On February 20, 2013, Initial Arraignment. (CP, 6M). On February 28th, Mr. Kurtz's invoice form "A" indigent defense appointment report for defendant Kirk Hernandez Jr. Case No. 13-1-00236-1 Most Serious Robbery 1st Additional Compensation \$ 700.00 as attached Exhibit #2 and incorporated by reference as if fully set forth herein.

On April 11, 2013, Pre-trial management hearing, (CP, 23M), motion and affidavit to amend information, (CP, 23), order amending information (CP, 24), amended information count #1 between

September 20-21, 2012, the Defendant inflicted bodily injury upon Patrick H. Wade, attempted robbery in the first degree a persistent offender case, (CP, 25), notice of special punishment "second strike" a persistent offender case. (CP, 26).

On April 15, 2013, Jury panel, (CP, 28), evidentiary hearing before trial judge, Honorable John F. Nichols. (CP, 31), On April 16th, jury trial, (CP, 32), verdict guilty. (CP, 36). On April 17th, sentencing hearing, (CP, 39M), judgment and sentence (CP, 43). On April 30th, Mr. Kurtz's invoice form "B" indigent defense disposition report for defendant Kirk Hernandez Jr. Case No. 13-1-00236-1 jury trial compensation \$1,200.00 as attached at Exhibit #3, and incorporated by reference as if fully set forth herein.

V. ARGUMENT

Assignment of Additional Grounds No. 1: Mr. Kurtz's failure to seek appointment of qualified lead co-counsel for Hernandez's defense in second strike a persistent offender case violated SID 14.2, V, VI, ~~VII~~ Amendment of the United States Constitution.

In Gideon v. Wainwright, held that the Sixth Amendment right to counsel was "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment" 372 U.S. 335, 340, 83 S.Ct. 792, 794, 9 L.Ed.2d 799 (1963).

In Strickland v. Washington, "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command."

An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."

446 U.S. 668, 685, 104 S.Ct. 2652, 2663, 80 L.Ed.2d 674 (1984).

Under Strickland, an unconstitutional denial of effective counsel occurs when defense counsel's performance falls below an objective standard of reasonableness, resulting in prejudice to the defendant. State v. A.N.J., 168 Wn.2d 91, 110, 225 P.3d 956 (2010).

The objective standard of reasonableness is derived from relevant professional and ethical standards.

A.N.J., 168 Wn.2d at 112. Prejudice is presumed from some breaches of some standards, such as the ethical rules relating to conflicts of interest. Id. Prejudice also exists if there is a "reasonable probability" that counsel's misconduct affected the outcome of the case. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (citation omitted).

1) Mr. Kurtz's complete failure towards the qualification for Hernandez's persistent offender case falls below an objective standard of reasonableness and has prejudiced Hernandez's second strike defense.

It is undisputed that Mr. Kurtz never qualified for persistent offender representation for Hernandez's second strike case, clear, cogent, and convincing evidence of the breach of contract. Under professional and ethical standards, this falls below an objective standard of reasonableness.

According to the Washington Supreme Court Standards for Indigent Defense (SID) 14.2 states, in relevant parts:

"Attorneys working towards qualification for a particular category of cases under this standard may associate with lead counsel who is qualified under this standards for that category of cases."

Washington State Court Rules, at p. 554, fn. 1 (Westlaw 2013).

SID 14.2 § F "Persistent Offender (Life without Possibility of Release) Representation." *Id.* at p. 552.

Furthermore, according to the Washington's Rules of Professional Conduct (RPC) 3.2 states:

"A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

Id., at p.

Mr. Kurtz's could and should have promptly sought the appointment of qualified lead co-counsel.

E.g. In re PRP of Brett, 142 Wn.2d 868, 883, 16 P.3d 601 (2001). Under these professional and ethical standards, the duty to seek the timely

appointment of qualified lead co-counsel as persistent offender representation.

The lack of qualified lead co-counsel prejudiced Hernandez Jr. As noted above, prejudice is presumed where ineffective assistance of counsel arises from a conflict of interest. Here, the funding dynamics of Mr. Kurtz's public defense contract required duty states: "Contractor shall not charge or accept any fee or other compensation for services rendered pursuant to this contract except as provided for herein." Attached Exhibit #1 at p. 3, § 2(d). This created a strong disincentive for "Contractor shall provide each client the time and effort necessary to ensure effective representation," Attached Exhibit #1 at p. 3 § 2(c). So strong in fact Mr. Kurtz's invoice form "A" appointment for Hernandez Jr. compensation \$700.00 Attached Exhibit #2 and invoice form "B" disposition for Hernandez's jury trial compensation \$1,200.00 Attached Exhibit #3. This is precisely the sort of conflict - arising from the attorney's own "financial interest" - that establishes a presumption of prejudice in ineffective assistance of counsel cases. See In re PRP of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001).

Even if prejudice were not presumed,

however, Hernandez Jr. suffered demonstrable prejudice from Mr. Kurtz's failure to timely seek qualified lead co-counsel persistent offender representation under SID 14.2. Thus, Mr. Kurtz's "engage in conduct that is prejudicial to the administration of justice." RPC 8.4(c).

2) Under RAP 2.5(a)(3) raised for the first time on appeal Mr. Kurtz's manifest breach of contract and conflict of interest for Hernandez's constitutional right to indigent defense qualified as lead co-counsel in "second strike" a persistent offender case.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). State v. Kerwin, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).

Breach of Contract the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present by named in contract, the defendant had not received the type of case assistance constitutionally required to render the defendant proceedings fair. Strickland supra. On January 2, 2013, Mr. Kurtz signed indigent defense contract declaring Contractor has practical experience in criminal law and meets Standard Fourteen,

'Qualification of Attorneys', of the Washington Supreme Court's Standards for Indigent Defense Services (adopted June 15, 2012) for the level of felony case complexity for which Contractor is contractor is contracting. By entering into this Contract, "for legal representation in Clark County Superior Court felony probation violation cases and felony cases, other than non-support, contempt, persistent offender and attempted homicide or homicide cases." Attached Exhibit #1 at p.1. "[T]he contract may be considered as evidence of ineffective assistance of counsel." A.N.J., 168 Wn.2d at 113.

Conflict of Interest due to a within 30 days of appointment compensation \$700.00 will be re-credited or re-paid to the County. Attached Exhibit #1 at p.7 §5(e); and Exhibit #2. "[S]onflict counsel fees out of the defender's fee." A.N.J., 168 Wn.2d at 113.

Laws of 2005, ch. 157, § 4, added RCW 10.101.060(1)(a)(iii) provides that counties receiving funding from the state office of Public Defense that statute

must require "attorneys who handle the most serious cases to meet specified qualifications as set forth in the Washington state bar association endorsed standards for public defense services or participate in at least one case consultation per case with office of public defense resource attorneys who are so qualified. The most serious cases include all cases of murder in the first or second degree, persistent offender cases, and class A felonies," SID 14.2

Washington State Court Rules, at p. 554, fn. 3.

"Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty." Cavler v.

Sullivan, 446 U.S. 335, 344, 100 S.Ct. 1708, 1715, 64 L.Ed. 2d 333 (1980) (citations omitted).

"The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the

individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible. Lawyers, as guardians of the law, play a vital role in the preservation of society." A.N.J., at fn. 2 (RPC, Fundamental Principles of Professional Conduct). "Due process and equal protection principles converge in the Court's analysis in these cases." Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 2068, 76 L.Ed.2d 221 (1983).

"Those same attorneys who prosecute crimes often provide legal advice to county officials on the public defense contracts."

Christine Cook "deputy prosecuting attorney drafted the contract in question." A.N.J., at fn. 3. DPC Christine Cook's "engage in conduct that is prejudicial to the administration of justice." RPC 8.4(d).

3) Under RAP 1.2(a), this court should consider the Clark County Superior Court contract with Mr. Kurtz in order to

Promote Justice, Facilitate a Decision
on the Merits and Promote Judicial Economy.

"Only an aggrieved party may seek review by the appellate court." RAP 3.1, Opening the door to RAP 2.5(a)(3), Hernandez "may raise the following claimed errors for the first time in the appellate court ... manifest error affecting a constitutional right." Therefore, RAP 1.2(a) states:

"Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b)."

RAP 1.2(a)

a) Since Mr. Kurtz's breach of contract and conflict of interest non-authorized-payment of services to unqualified Mr. Kurtz's representation proof of ineffective assistance of counsel case on the Merits.

It is appellant's duty to perfect the record so that the appellate court has

all relevant evidence before it.
State v. Garcia, 45 Wn. App. 132, 140, 724
P.2d 412 (1986).

Washington taxpayers has compelling financial interest in public defense contracts. See RCW 2.06.030(d). "Washington is among 16 states that require local governments to bear a majority of the cost of indigent defense." A.N.J., at fn. 4 (The Constitution Project, *supra*, at 53-54). This court judges have an ethical duty to promote community respect for public defense contracts. See CJC 1.2. Division Two Court of Appeals holds jurisdiction over Clark County Superior Court's contracts with Indigent Defense Contractors under RAP 4.1(b)(2).

Breach of Contract

"Contractor has practical experience in criminal law and meets Standard Fourteen, 'Qualification of Attorneys', of the Washington Supreme Court's Standards for Indigent Defense Services (adopted June 15, 2012) for the level of felony case complexity for which Contractor is contracting. By entering into this Contract — for legal representation

in Clark County Superior Court felony probation violation cases and felony cases, other than — persistent offender — cases," Attached Exhibit #1 at p. 1, nevertheless, "Contractor may seek to modify" under SID 14.2 fn. 1: "Attorneys working toward qualification for a particular category of cases under this standard may associate with lead counsel who is qualified under this standard for that category of cases." SID 14.2 § F: "Persistent Offender Representation." Accordingly "this Contract for reasons other than material breach, upon proper notice to the County." Attached Exhibit #1 at p. 10 § 12 (SID 14.2 added). Mr. Kurtz's knowingly and willingly material breaches contract and ethical duty: "Contractor shall provide each client the time and effort necessary to ensure effective representation," Attached Exhibit 1 at p. 3 § 2(c); "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client," RPC 3.2; and "[a] lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law." RPC 7.4(a).

Conflict of Interest

"Contractor shall not charge or accept any fee or other compensation for services rendered pursuant to this Contract, except as provided for herein." Attached Exhibit #1 at p. 3§2(d)

On February 8, 2013, Mr. Kurtz had knowledge or should have known of Hernandez's charge include second strike a persistent offender representation (CP, 3§4) two days after appointed (CP, 2). Clear, cogent, and convincing evidence Mr. Kurtz's "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." RPC 8.4(c). Mr. Kurtz's invoice form "A" indigent defense appointment compensation \$700.00 Kirk Hernandez Jr, Most Serious Robbery 1^o Attached Exhibit #2; and Mr. Kurtz's invoice form "B" indigent defense disposition jury trial compensation \$1,200.00 for defendant Kirk Hernandez Jr, Attached Exhibit #3. Mr. Kurtz's "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." RPC 8.4(b).

b) Considering the Clark County Superior Court contract with Mr. Kurtz will Promote Justice and Facilitate a Decision of the Case on the Merits,

Under RAP 1.2, the Rules of Appellate Procedure should be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." Considering Hernandez's argument on the Clark County Superior Court contract with Mr. Kurtz will promote these two goals. First, it will "promote justice" in so far as the appellate courts defines justice to include the principle that after the State filing the Information a persistent offender case (CP, 3) and Notice of second strike a persistent offender case. (CP, 4), Mr. Kurtz had two choices to withdrawal or request to modification of contract for SID 14, 2 to be subject to qualification establish the persistent offender representation incorporate the Standard for Indigent Defense. Indeed, it is the taxpayers public defense contract concept of "Justice" some how imprinted by preventing a fair trial to convict the innocent. Second, a refusal to consider Clark County Superior Court contract with Mr. Kurtz for facilitate a decision of the case on the merits, particularly because the business record as evidence

raise for the first time on appeal. Thus, considering unqualified Mr. Kurtz for second strike persistent offender representation is ineffective assistance of counsel in this case will promote the goals set out in RAP 1.2(a).

c) Consideration of the Clark County Superior Court contract with Mr. Kurtz will promote Judicial Economy and Prevent Waste of Limited State Resources.

As was previously set out above to direct this court to the filing of Clark County Superior Court contract with Mr. Kurtz non-persistent offender's second strike representation. Thus, the objectives of qualified lead co-counsel which requires the knowledge and skill of jury trial experience in two strike and three strike for persistent offender representation. This includes giving advice, drafting and completion of legal documents which affects the jury trial procedure for second strike a persistent offender representation. (CP, 3, 4, 25 & 26). "If the appellate court concludes that an issue which is not

set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court." RAP 12.1(b).

As a result, if this court refuses to consider Hernandez's SAG because Clark County Superior Court contract with Mr. Kurtz was not raised below, then Hernandez will be free to file a new collateral attack under RAP 16.4, this court will then open a new file to consider the same constitutional right to effective assistance of qualified lead counsel that is currently before this court. Consequently, the consideration of this case at this time will also conserve judicial resources.

Respectfully submitted this 26, day of Nov. 2013



Kirk M. Hernandez Jr.

DOC # 3036³⁸ JC-B-64-2

Coyote Ridge Corrections Center

P.O. Box 769

Connell, WA 99326-0769

WASHINGTON STATE
COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,

Respondant,

v.s.

KIRK M. HERNANDEZ JR.

Appellant

Case No. 44771-1-II

AFFIDAVIT OF MAILING

I, Kirk M. Hernandez Jr, declare under the penalty of perjury that I deposited into this envelope the attached SAG and placed into the legal mail under GR 3.1 with Custody Officer signature and dated on this envelope addressed to the parties as follows:

Anne M. Cruser	Judi Backland	David C. Panzoha
Deputy Prosecutor	Appellate Counsel	Appellate Clerks
PO Box 5000	PO Box 6490	950 Broadway
Van., WA 98666-5000	Olympia, WA 98507	Tacoma, WA 98402

Respectfully Submitted on this 26th day of Nov. 2013

Kirk M. Hernandez Jr.

DOC#303638, C-B-18-1

Coyote Ridge Corr. Str.

PO Box 769

Connell, WA 99326-0769

FILED
COURT OF APPEALS
DIVISION II

2013 DEC -2 AM 10:27

STATE OF WASHINGTON

BY DEPUTY

EXHIBITS

Exhibit #1

Contract For Indigent Defense
For Superior Court
David S. Kurtz

Exhibit #2

Mr. Kurtz's invoice for appointment
Compensation \$700.⁰⁰

Exhibit #3

Mr. Kurtz's invoice for disposition
Jury Trial Compensation \$1,200.⁰⁰

Exhibit #1

Contract for Indigent Defense
for Superior Court
David S. Kurtz

**CONTRACT FOR INDIGENT DEFENSE SERVICES FOR
SUPERIOR COURT
FELONIES AND FELONY PROBATION VIOLATIONS**

THIS CONTRACT IS entered into by CLARK COUNTY, a political subdivision of the State of Washington, hereinafter referred to as "County", and DAVID S. KURTZ, hereinafter referred to as "Contractor".

THIS CONTRACT IS for legal representation in Clark County Superior Court felony probation violation cases and felony cases, other than non-support, contempt, persistent offender and attempted homicide or homicide cases. This Contract is a two-year contract.

WITNESSETH:

Clark County is required to provide legal representation for individuals who are in jeopardy of loss of liberty and who are financially unable to obtain legal counsel.

Clark County Superior Court determines indigency and appoints attorneys to represent individuals, as is necessary.

Contractor is admitted to practice law in the State of Washington and has been actively engaged in the practice of law for a minimum of one year prior to January 1, 2013. Contractor has practical experience in criminal law and meets Standard Fourteen, "Qualifications of Attorneys", of the Washington Supreme Court's *Standards for Indigent Defense Services* (adopted June 15, 2012) for the level of felony case complexity for which Contractor is contracting. By entering into this Contract, Contractor represents that Contractor is fully qualified to perform the professional services hereinafter set forth in this Contract.

NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

1. **Term of Contract.** The term of this Contract is from January 1, 2013 through December 31, 2014. Contractor shall assume responsibility for all cases assigned January 1, 2013,

through December 31, 2014. If this Contract is not renewed, Contractor has the duty to complete all cases assigned under this Contract. The provisions of this Contract shall continue in full force and effect beyond the expiration date of the Contract, without additional compensation, until all assigned cases have been completed.

2. **Duties of County.**

(a) County shall issue annual payment to Contractor in the sum of FORTY THOUSAND, and no/100 Dollars (\$40,000.00), payable in eleven (11) equal installments of \$3,333.33 and a twelfth payment of \$3,333.37, no later than the twenty-seventh day of the month. This is Contractor's "base payment" for the annual number of felony "points" set forth in paragraph 3(a) of this Contract. The base payment equals the annual number of felony points multiplied by the Class C felony rate of \$800 per case ("base rate"). In addition, County shall issue payment to Contractor for "additional compensation", as set out in section 5 of this Contract, by the 27th day of the month that Contractor submits a correct monthly report listing a jury trial or appointment to a case in which additional compensation is due.

(b) County shall be responsible for the cost of providing conflict counsel, upon the court's approval of Contractor or Contractor's attorney(s) withdrawal from representation.

(c) County is responsible for payment of pre-approved non-attorney service (e.g., investigation and/or client evaluation) separately from this contract.

(d) Scheduling and the method of assignment of indigent defense attorneys is the responsibility of the Superior Court, subject to rotation and assignment information provided to the court by the Indigent Defense Coordinator.

3. **Duties of Contractor.**

(a). Contractor shall provide representation in cases totaling 50 felony "points" per year, as

defined and set forth in section 5 of this Contract.

(b) Contractor shall advise and provide legal representation for all defendants whose case(s) has been assigned to Contractor by a Superior Court Judge, pursuant to this Contract. Representation continues until Contractor is authorized, by written court order, to withdraw or judgment and sentence are entered.

(c) All services and representation by Contractor shall be consistent with the *Indigent Defense Standards for Superior Court* as adopted by the Clark County Board of Commissioners on December 11, 2002 and the Washington Supreme Court *Standards for Indigent Defense* (adopted June 15, 2012, as the standards are effective) and comply with all professional rules and standards. Contractor shall adopt and maintain practices that best ensure attorney contact with clients; e.g., visiting and/or talking with in-custody clients on a regular basis. Contractor shall provide each client the time and effort necessary to ensure effective representation. Contractor shall not allow non-contract work to interfere with adequate representation of court-appointed clients under this and any other indigent defense contract with the County.

(d) Contractor shall not charge or accept any fee or other compensation for services rendered pursuant to this Contract, except as provided for herein.

(e) Contractor shall present the Indigent Defense Coordinator with a monthly report of Case Appointments on a form provided by the County, or as otherwise agreed. The first report shall be due no later than February 4, 2013. Subsequent reports are due monthly thereafter, not later than the second judicial day of each month. The purpose of the monthly reports is for Contractor, County and the Indigent Defense Coordinator's office to accurately account for Contract services.

(f) Contractor shall report Case Dispositions monthly on a form provided by the County, or as otherwise agreed. The first report shall be due no later than February 4, 2013. Subsequent reports are

due monthly thereafter, not later than the second judicial day of each month. The purpose of the monthly reports is for Contractor, County and the Indigent Defense Coordinator's office to accurately account for Contract services.

(g) At least annually, Contractor shall report non-public defense legal services, including the number and types of private cases on a form provided by the County, or as otherwise agreed.

RCW 10.101.050.

(h) Contractor shall employ on-line case reporting tools as implemented by County.

(i) Contractor shall have Internet access, voice mail, answering machine or an answering service, and an e-mail address available to the County, including the Indigent Defense Coordinator, judges, court administration and staff, and prosecutors.

(j) Contractor shall maintain an office in or within 10 miles of Clark County and maintain sufficient staff, resources and/or other means to ensure timely court appearances and timely meetings and contacts with clients and others in order for Contractor to perform contract services.

(k) Retention of Clark County indigent defense client files shall be at least seven years after the judgment in the case is entered.

(l) Once each year, Contractor shall attend a Continuing Legal Education (CLE) seminar or training approved by the Washington State Office of Public Defense; e.g., a CLE sponsored by the Clark County Indigent Defense Coordinator, Washington Defender Association or Washington Association of Criminal Defense Lawyers. The Indigent Defense Coordinator may request documentation of such attendance. RCW 10.101.050 and RCW 10.101.060.

(m) Contractor shall comply with all federal, state and local laws, regulations, and ordinances applicable to the services performed under this Contract. Such laws include, but are not limited to, those pertaining to tax liability, workers compensation and independent contractor status.

(n) Contractor shall comply with all federal, state and local non-discrimination laws and requirements.

4. Mutual Duties and Agreements.

(a) Periodic Reviews. Contractor and County will periodically review the number and case types of appointments to Contractor and all contractors. If a review shows that there is a substantial disparity in the appointment rate, the Indigent Defense Coordinator shall notify the court and the contractors that appointment rates must be adjusted, to the extent total cases are available.

(b) Requests for Increased Compensation – Extraordinary Case. Contractor may request, in writing, that Contractor be compensated an increased amount for a case of extraordinary complexity or time commitment. Requests will be considered by the Indigent Defense Coordinator on a case-by-case basis. The decision of the Coordinator is final.

(c) County and Contractor may mutually agree in writing to modify, suspend or terminate this Contract at any time. Unless otherwise agreed in writing, modification, suspension, termination or expiration of this Contract shall not affect any existing obligation or liability of either party.

(d) Annual compensation rates and amounts apply to the period January 1, 2013 through the day prior to the effective date of Standard 3.4, Caseload Limits, of the Washington Supreme Court *Standards for Indigent Defense* (hereafter, 'Standards'). Pursuant to the Standards on case counting, case weighting and maximum caseloads (Standards 3.3, 3.4, 3.5 and 3.6), caseloads, 'points', case values or case weights, and maximum workload per attorney will be reviewed in accordance with the Standards prior to the effective date of Standard 3.4 (currently, October 1, 2013). Based on changes resulting from that review, amendments to contracts will be proposed to then-current contractors at least 60 days prior to the effective date of Standard 3.4.

5. **Base Compensation, Additional Compensation, Overage or Shortage, Case/ Point Equivalencies, Additional Compensation, Withdrawal, Trials, New Charges and Reappointments.**

(a) Base Compensation and Additional Compensation. Contractor and County agree that the annual “base” compensation set out in section 2 of this Contract is based on an anticipated number of case appointments that equal the total number of felony points set forth in paragraph 3(a) annually, valued at the Class C felony “base rate.” Contractor shall be entitled to “additional compensation” for limited case types and jury trial per diem, based on the amounts listed below in paragraphs 5(d) and 5(f).

(b) Overage or Shortage. Contractor shall be paid at the “base rate” for each point assigned to Contractor over and above the annual contracted number of points. Contractor shall be responsible to the County for repayment of any amount not earned during a calendar year, including any shortage in assigned points and any loss of point credit or additional compensation for withdrawal from a case.

(c) “Points.” One “point” is valued at \$800. The following point equivalencies apply to each appointment of a case to Contractor.

Case Type	Point Equivalency
New Felony Appointment (Class A, B or C)	1
Exonerated Case	0.25
Probation Violation *	0.25 *
Material Witness appointments; Post-Judgment Matters, including Motions to Withdraw Guilty Plea or Resentencing (following appellate remand), conditional release court hearings pursuant to RCW 10.77.150; and Diversion or Sentencing Alternative Contested revocation hearings held more than 365 days from counsel’s original appointment or for counsel who did not previously represent defendant	0.5

* Maximum of one-half point for multiple probation violation cases involving substantially the same alleged violations.

(d) “Additional Compensation” for Certain New Felony Case Appointments. The following amounts will be paid as “additional compensation” to Contractor. The highest level felony on the

charging document controls the amount of compensation.

Felony Type	Value	Additional Compensation
Non-Sex Offense Felonies		
Class A Non-Sex Offense	\$1,500	\$700
Class B Non-Sex Offense	\$1,000	\$200
Class C Non-Sex Offense	\$800	\$0
Sex Offense Felonies		
Class A Sex Offense	\$2,250	\$1,450
Class B Sex Offense	\$1,500	\$700
Class C Sex Offense	\$800	\$0

(e) **Withdrawal.** If, due to a conflict of interest or other reason such as a client retains other counsel, Contractor or Contractor’s attorney is permitted by the Court to withdraw from a case, the following point adjustments apply.

Withdrawal Time Frame	Point LOSS
Withdrawal within 30 days of appointment	0.75
Withdrawal between 31 and 60 days of appointment	0.5
Withdrawal after 60 days of appointment	None

In addition, any “additional compensation” paid by County to Contractor for a case in which counsel withdraws within 30 days of appointment will be re-credited or re-paid to the County.

(f) **“Additional Compensation” for Trials.**

- i. **Jury Trials:** \$600 per full day of jury trial, excluding jury deliberations, will be paid as additional compensation to Contractor in one-half day increments. Jury deliberation time is limited to a total of one-half day, absent extraordinary circumstances. A jury trial begins with *voir dire* and ends with a verdict, plea, dismissal or declaration of a mistrial.
- ii. **Bench Trials:** \$300 total. Counsel may request additional compensation by submitting a written request to the Indigent Defense Coordinator. The decision of the coordinator is final.

(g) **“Bail Jumping.”** The addition of a “bail jumping” charge to the original Information is

not an additional case or felony point credit. The filing of a new Information charging bail jumping alleged to have occurred on Contractor's pending case is not an additional case or felony point credit.

(h) **New Crime.** If a defendant is charged with a new crime and that crime is added to an existing Information, an additional point shall be credited only if the court grants Contractor's motion to sever or the new charge does not meet the criteria for joinder under CrR 4.3(a). The burden is on Contractor to show that the new charge does not meet the criteria for joinder under CrR 4.3(a).

(i) **Reappointment Following Issuance of Warrant.** Reappointment to represent a former client, who has failed to appear and where a warrant has been issued, on the same cause number results in an additional point, but no "additional compensation", only if the reappointment occurs 180 days or more after the issuance of the warrant.

6. **Limitations.** Contractor's Class A sex offense cases shall not exceed ten percent of Contractor's annual contract caseload, without written agreement otherwise. Other limitations: none. Contractor prefers appointment to Class A and Class B felonies.

7. **Liability Insurance.** Contractor shall carry professional liability (malpractice) insurance in the minimum amount of \$200,000 per incident and \$500,000 aggregate. Contractor is solely responsible, and shall hold the County harmless, for any and all liability arising from the representation of clients as outlined in this Contract. Unless Contractor has current proof of insurance on file with the Indigent Defense Coordinator's office, Contractor shall provide proof of insurance to the office by January 2, 2013 or the date this Contract is fully executed, whichever occurs last, and upon each renewal of insurance coverage. Contractor shall notify the Indigent Defense Coordinator if Contractor's insurance coverage lapses.

8. **Non-Assignment or Subcontract.** Contractor shall not assign or subcontract this Contract or any rights or duties hereunder, absent prior written approval.

9. **Funding Modification, Suspension or Termination.**

(a) Payments under this Contract are subject to the availability of funds. The County may propose to modify, suspend or terminate this Contract if the County reasonably believes that funds will not be sufficient to pay anticipated costs of indigent defense contracts.

(b) If the Indigent Defense Coordinator reasonably believes that funds will not be sufficient to pay anticipated costs of indigent defense contracts, the Coordinator shall seek additional funds from the Board of County Commissioners if possible, before modifying, suspending or terminating this Contract.

(c) If sufficient funds are not available, the County shall first seek to modify the Contract with Contractor. In negotiating any modification, the parties will consider both cost and the level of representation that meets minimum allowable professional standards. The County may suspend or terminate the Contract if the parties cannot agree to modification.

(d) County shall ensure sufficient funds are available to pay Contractor for any potential trials, "additional compensation" for clients appointed to Contractor, and any overage of points not previously compensated, prior to any modification, suspension or termination.

10. **Modification, Suspension or Termination Due to Legislative Action or Court**

Interpretation. County may modify, suspend or terminate this Contract due to amendments to or court interpretations of state or federal statutes that make some or all contract services ineligible for county funding.

11. **Contract Modification, Suspension or Termination by County for Cause.** Upon proper notice, this Contract may be modified, suspended or terminated by the County, if the County determines Contractor is not in compliance with the terms of this Contract. County may terminate this Contract for cause for reasons including, but not limited to the following:

- (a) Contractor's material breach of this Contract including material misuse of contract funds;
- (b) Contractor's willful or habitual disregard of the procedures required by the court(s) in which Contractor provides services;
- (c) Contractor's demonstrated continued inability to adequately serve the interests of its contract clients;
- (d) Contractor's willful or habitual failure to abide by minimum standards of performance and rules of professional ethics; and
- (e) other cause which has substantially impaired Contractor's ability to provide adequate legal services under this Contract or fulfill the obligations of this Contract.

The County shall first provide Contractor with the problem areas and expected corrections in writing. The County may modify, suspend or terminate the Contract if the remedial actions of Contractor are not deemed adequate by the County. At the sole discretion of the County, cases already assigned to Contractor may be reassigned, or Contractor shall be responsible for the completion of all cases previously assigned to Contractor. When Contractor receives the County's notice of termination for cause, Contractor shall not accept any additional cases under this Contract, unless the County otherwise agrees in writing.

12. **Contract Modification, Suspension or Termination by Contractor.** Upon proper notice, Contractor may terminate this Contract for cause should the County materially breach any duty or obligation under this Contract. Contractor may seek to modify, suspend or terminate this Contract for reasons other than material breach, upon proper notice to the County.

13. **Notice of Contract Modification, Suspension or Termination.** A notice to modify, suspend or terminate this Contract shall:

- (a) be in writing;

(b) state the reasons therefor and may specify what may be done to avoid the modification, suspension, or termination;

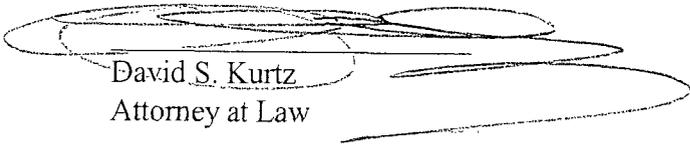
(c) become effective for willful breach not less than 14 days from delivery of the notice by certified mail or in person; and

(d) become effective not less than 30 days from delivery by certified mail or in person for non-willful breach.

14. **County Not Obligated to Third Parties.** The County shall not be liable to any person or entity other than Contractor because of this Contract. Contractor agrees to hold the County harmless and to defend any action arising against the County because of the alleged negligent or intentional misconduct of Contractor, its employees, independent contractors or agents. In the event of a claim, County shall promptly tender defense of said claim to Contractor.

15. **Integration Clause.** This Contract constitutes the entire agreement between County and Contractor. No other promises or obligations either implied or express have been made relative to this Contract.

DATED this 2nd day of January, 2013


David S. Kurtz
Attorney at Law


Bill Barron
Clark County Administrator

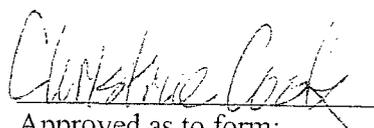
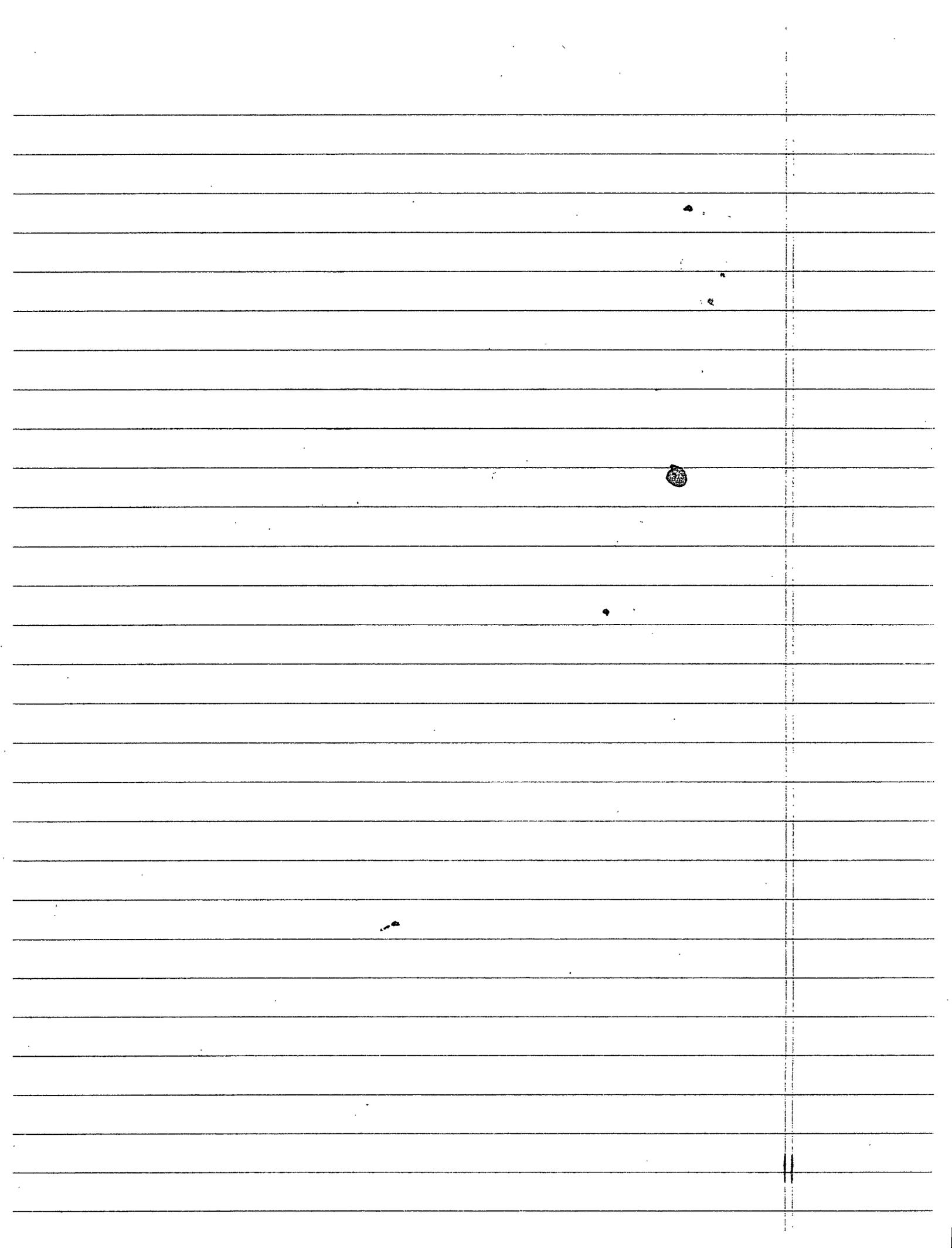

Approved as to form:
Christine Cook
Deputy Prosecuting Attorney

Exhibit #2

Mr. Kurtz's invoice for appointment
Compensation \$700.00



FIRST ADDENDUM
CONTRACT FOR INDIGENT DEFENSE SERVICES FOR
SUPERIOR COURT
FELONIES AND FELONY PROBATION VIOLATIONS

THIS ADDENDUM modifies the contract (hereafter "Contract") entered into on January 2, 2013, by and between CLARK COUNTY, a political subdivision of the State of Washington, hereinafter referred to as "County", and DAVID S. KURTZ, hereinafter referred to as "Contractor". Other than the specific modifications herein, all conditions, provisions, considerations, covenants, agreements and valid amendments to the original Contract remain in full force and effect unless specifically modified herein. **These contract amendments are effective October 1, 2013. Amendments to the Contract are shown in bold. Deletions are shown by ~~strike-through~~ and additions are underlined**

3. **Duties of Contractor.**

* * * * *

(b) Contractor shall advise and provide legal representation for all defendants whose case(s) has been assigned to Contractor by a Superior Court Judge, pursuant to this Contract. Representation continues until Contractor is authorized, by written court order, to withdraw, new counsel is appointed, or judgment and sentence are entered. If a Superior Court case is dismissed in exchange for a client agreeing to plead guilty to a new case filed in District Court (e.g., DUI), Contractor's representation continues to District Court.

5. **Base Compensation, Additional Compensation, Overage or Shortage, Case/ Point Equivalencies, Additional Compensation, Withdrawal, Trials, New Charges, Severance, and Reappointments.**

* * * * *

(c) "Points." One "point" is valued at \$800. The following point equivalencies apply to each

appointment of a case to Contractor.

Case Type	Point Equivalency
New Felony Appointment (Class A, B or C)	1
Exonerated Case	0.25
Probation Violation *	0.25 0.333 *
Material Witness appointments; Post-Judgment Matters, including Motions to Withdraw Guilty Plea or Resentencing (following appellate remand), conditional release court hearings pursuant to RCW 10.77.150; and Diversion or Sentencing Alternative Contested revocation hearings held more than 365 days from counsel's original appointment or for counsel who did not previously represent defendant	0.5

* Maximum of ~~one-half~~ two-thirds point for multiple probation violation cases involving substantially the same alleged violations.

* * * * *

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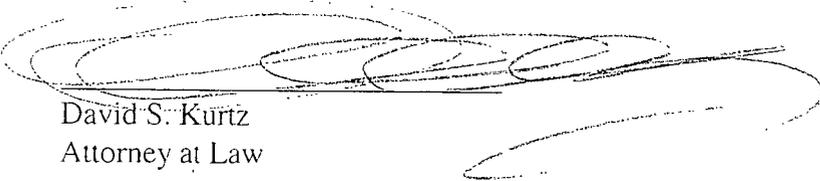
(h) **New Crime.** If a defendant is charged with a new crime and that crime is added to an existing Information, an additional point shall be credited only if the court grants Contractor's motion to sever or the new charge does not meet the criteria for joinder under CrR 4.3(a). The burden is on Contractor to show that the new charge does not meet the criteria for joinder under CrR 4.3(a).

(i) Severance of Charges in Original Information. An additional point shall be credited if the court grants Contractor's motion to sever charges filed in an original Information or Contractor otherwise shows one or more charges do not meet the criteria for joinder under CrR 4.3(a). The burden is on Contractor to show that the new charge does not meet the criteria for joinder under CrR 4.3(a).

(j) Reappointment Following Issuance of Warrant. Reappointment to represent a former client, who has failed to appear and where a warrant has been issued, on the same cause number results in an additional point, but no "additional compensation", only if the reappointment occurs 180 days or more after the issuance of the warrant.

15. **Integration Clause.** ~~This~~ The original contract and this Addendum constitutes the entire agreement between County and Contractor. No other promises or obligations either implied or express have been made relative to this contract.

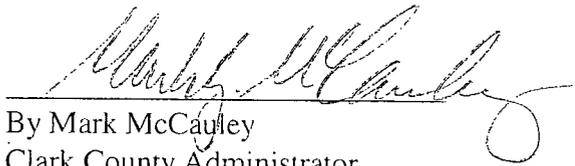
DATED this 24 day of September, 2013



Handwritten signature of David S. Kurtz, consisting of several overlapping loops and a long horizontal stroke.

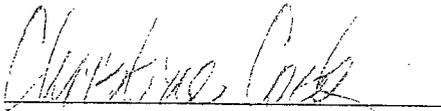
David S. Kurtz
Attorney at Law

CLARK COUNTY



Handwritten signature of Mark McCauley, written in cursive with a long, sweeping tail.

By Mark McCauley
Clark County Administrator



Handwritten signature of Christine Cook, written in cursive.

Approved as to form:
Christine Cook
Deputy Prosecuting Attorney

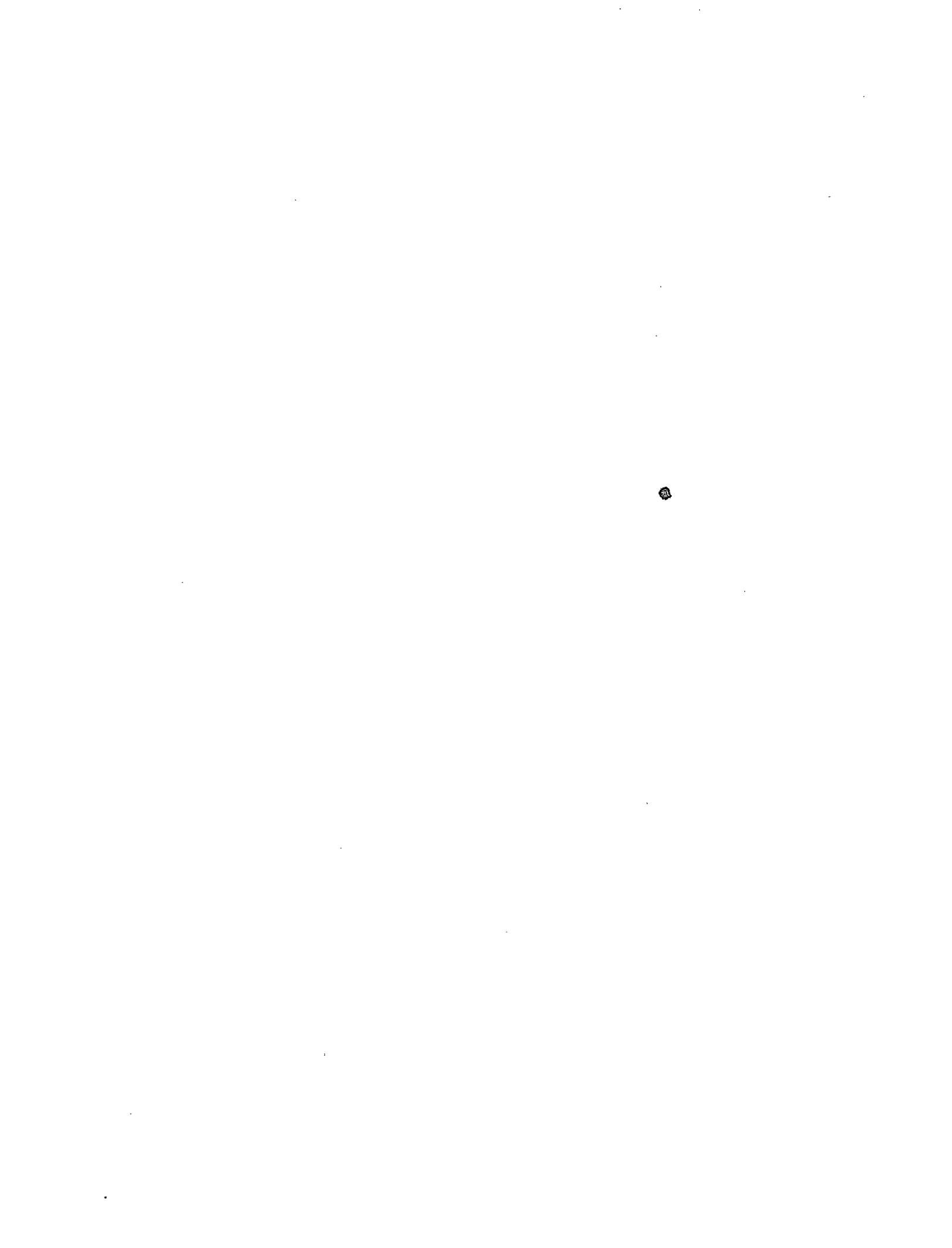
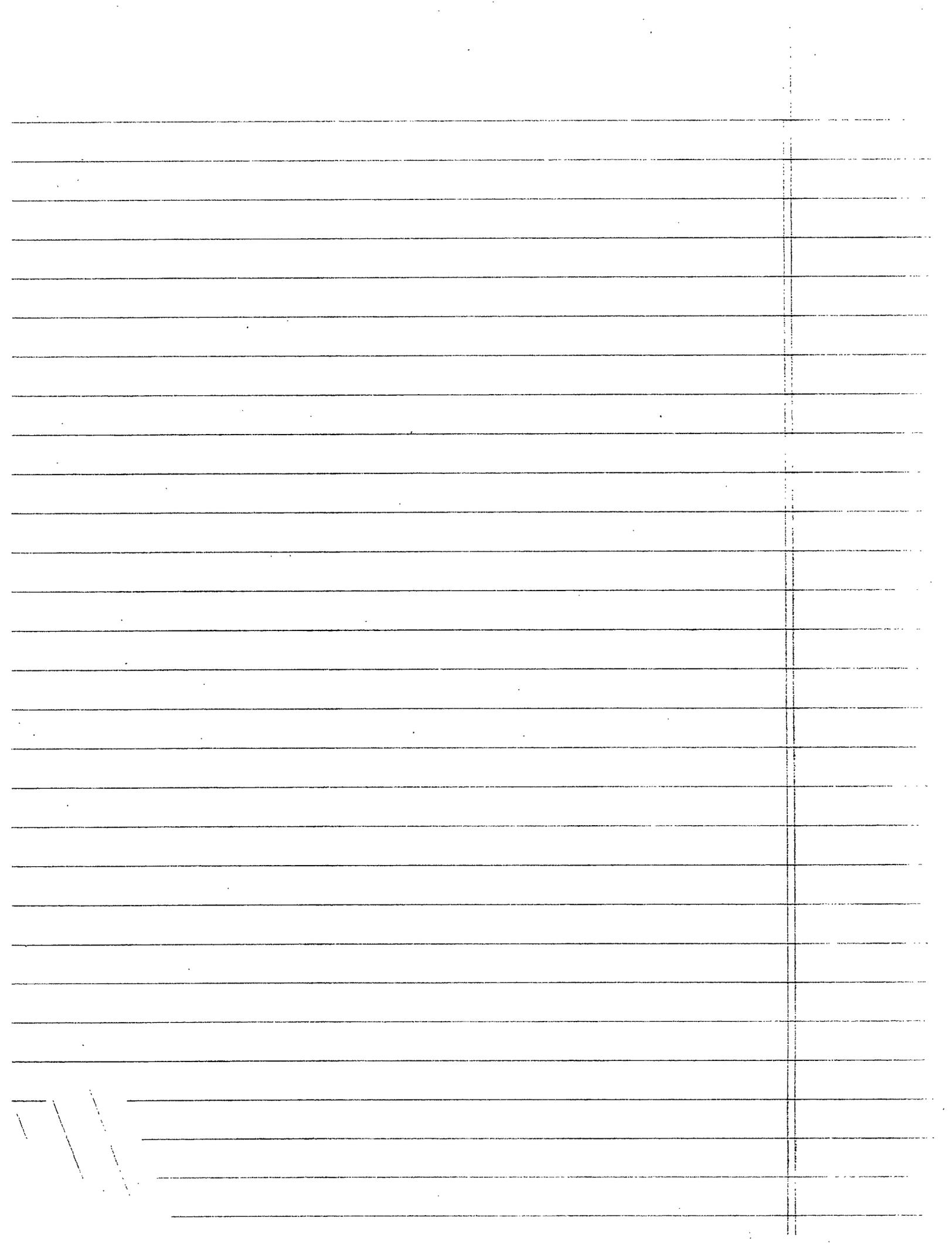


Exhibit #3

Mr. Kurtz's invoice for disposition
Jury Trial Comperation \$1,200.00



5

SUPERIOR COURT - FELONY
INDIGENT DEFENSE DISPOSITION REPORT

INVOICE COMPLETE 1/17/2013 10:00 AM
DATE: 30 APR 2013
ARRB Form 673111

FORM "B"

April, 2013

CF7

Invoice # 823

Authorized Signature [Signature]

CASE #	DEFENDANT NAME (Last Name, First Name)	DATE DISPOSED	CLASS A, B or C "EX" or "PV"	DISPOSITION CODE (See below)	JURY TRIAL? Check if Yes	Number of Days	JURY TRIAL COMPENSATION (Administrative Use Only)
13-1-00236-1	Kirk Hernandez Jr.	4/17/13	A	TG 4/17/13	X	2 days	\$1,200.00
Total Compensation							\$1,200.00

DISPOSITION CODES: PG - plead guilty/admit PV; EX - exoneration; DM - dismissed/no PV; WD - withdrawal; DCR - drug court referral; DIV - diversion;
TG - trial guilty; TS - trial split-verdict; TGLI - trial guilty lesser included; TMIS - trial mistrial/hung jury; TNG - trial not guilty;
BW - bench warrant

SUBMIT REPORT TO THE INDIGENT DEFENSE OFFICE BY THE SECOND BUSINESS DAY OF EACH MONTH FOR THE PRECEDING MONTH
CERTIFICATION: I declare under penalty of perjury that the above disposition report is a true and accurate list of cases disposed during the month, pursuant to my 2011/2012 indigent defense contract.

David Kurtz; P.O. Box 897, Battle Ground, WA 98604

