COURT OF APPEALS
DIVISION ~~THREE~~ TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. ANTHONY MORETTI (your name) Appellant.	))))))))))	No. 47868-4-II STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

FILED
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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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

P/M: 9/27/16

Additional Ground 1

PLEASE SEE ATTACHED.

Additional Ground 2

PLEASE SEE ATTACHED.

If there are additional grounds, a brief summary is attached to this statement.

Date: 9-26-16

Signature: [signature]

Form 23

THE JURY WAS PRESSURED INTO FINDING THE DEFENDANT GUILTY BECAUSE THEY WERE NOT ALLOWED TO BE HUNG.

The jury was instructed, "You must fill in the blanks provided in verdict form - in the verdict forms the words 'not guilty' or the word 'guilty,' according to the decisions you reach for each count. Because this is a criminal case, each of you must agree for you to return a verdict on each Count when all of you have so agreed, fill in each verdict form to express your decision on each count." **RP 7/16/2013, pages 15-16.**

The Defendant's constitutional due process rights and Sixth amendment right to a jury trial were violated by a conviction that resulted from jury instructions that were fundementally defective. Richardson v. United States, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). The Washington Supreme Court made a ruling to clarify common law that at the time served policy considerations of judicial economy and finality, rather than constitutional grounds. State v. Guzman Nunez, 174 Wn.2d 707, 713, 285 P.3d 21 (2012). In overturning Washington's past two precedent cases on unanimity and the nonunanimity rule, the Court justified this landmark abrogating decision because of their previous holding in State v. Brett, 126 Wn.2d 136, 172-73, 892 P.2d 29 (1995), and the "out" found in the majority of these particular kind of jury instructions; "If, after fully and fairly

considering all of the evidence or lack of evidence you are not able to reach a unanimous decision as to any one of the aggravating circumstances, **do not fill in the blank** for that alternative." The Court held that Goldberg was incorrect because of the Brett "out." Guzman Nunez, 174 Wn.2d at 714. This would be all fine and dandy if those instructive words were included in the Defendant's case on appeal here, but they were not. The Defendant's jury was left very confused and could not never get passed being deadlocked without a lot of pressure because they had no Brett "out." The reasonable doubt standard did not exist here because the pressure eroded it. "Regardless of the statutory source of the aggravator, the jury must find beyond a reasonable doubt any aggravating circumstance that increases the penalty for a crime." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 313-14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Guzman Nunez, 174 Wn.2d at 712. These mainstay cases do not say, the jury must unanimously find beyond a reasonable doubt "no." The Defendant's jury instructions did force the jury to pick one or the other and not be hung. This tainted and diluted the reasonable doubt standard. Cage v. Louisianna, 498 U.S. 39 (1990); Victor v. Nebraska, 511 U.S. 127 (1994). What we have here is coersion. The trial court's use of this incomplete (no Brett "out") jury instruction forced the Defendant's jury to continue past being deadlocked until their will was bent one way

or the other. United States Supreme Court precedent spanning more than a century permits a trial judge to instruct a deadlocked jury about its duty to deliberate, but bars the judge from trying to force or coerce a verdict. Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed 528 (1896); Smith v. Curry, 580 F.3d 1071, 1073 (9th Cir. 2009). This is exactly what has happened here without the Brett "out" to make it a fair trial. "When unanimity is required jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed, therefore we cannot conclude beyond a reasonable doubt that the jury instruction was harmless." Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). In Neder v. United States, 527 U.S. 1 (1999), it says that when there is constitutional error involving a jury instruction, the court "must" reverse. The holding in Guzman Nunez does not apply and is constitutional error here in the Defendants case due to the absence of the Brett **"or leave it blank"** fix. The only remidy is to retry the Defendant on all charges.

One more point on
The Jury was pressured into finding defendant guilty because thay were not allowed to be hung.

Not only was the Jury instructions wrong for leaving out the do not fill in the blank but the Judge told them as early as voir dire that all 12 Jurors have to agree before you can render a verdic

quoting Judge M^c^ cauley July 14, 2015
Voir dire and opining statements PR page 11-12

Also, in a criminal case we require that all 12 Jurors are unanimous in their decision. If you've ever been to a civil case you can have a 10 to two verdict or 11 to one verdict, that cannot happen in a criminal case. All 12 Jurors have to agree before you can render a verdict.
End quote.

IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT NOT TO GRANT THE ASKED FOR MISTRIAL OVER A JUROR SEEING THE DEFENDANT FETTERED IN SHACKLES.

Upon inquirey, a court detail jail guard testified that juror number 7, unmistakenly had seen the Defendant fettered in shackles, and identified the juror as Christina Kost. The jail gaurd was specific in saying the Defendant was six feet away and the juror seen them both. It was obvious that from what the gaurd said it was imposible for the juror not to have seen the chains and shackles. **RP 269-271.**

It is well settled that a defendant in a criminal case is entitled to appear free from all bonds or shackles except in extraordinary circumstances. State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999); Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981); State v. Williams, 18 Wash. 47, 50 P. 580 (1897). The United States Supreme Court has held that the Due Process Clause prohibits "The use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a State interest specific to a particular trial." Deck v. Missouri, 544 U.S. 622, 125 S.Ct. 2007, 2012, 161 L.Ed.2d 953 (2005). Defendant was not a problem.

"Partial and fleeting opportunity for the jury to see visible shackling or handcuffing a defendant during trial is likely to prejudice defendant." In re Pers. Restraint of Davis, 175 Wn.2d 647, 694-95, 101 P.3d 1 (2004)(quoting Rhoden v. Rowland, 172 F.2d 633, 636 (9th Cir. 1999)). "Shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large." Holbrook v. Flynn, 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). "Central to the right to a fair trial, guaranteed by the Sith and Fourteenth amendments, is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined soley on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or circumstances not adduced as proof at trial. Taylor v. Kentucky, 436 U.S. 478, 484, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). The Defendant was prejudiced here as the judge refused the request also to dismiss the juror in an abundance of caution. The juror seen the Defendant fettered and denied it.

A to convict instructions on first degree robbery is erroneous if it does not include essential elements of the crime.
First degree robbery.
An implied element of first degree robbery is that the victim has an ownership, representative, or possessory interest in the property taken. This implied essential element must be included in the "to convict" instructions. WPIC 37.02 must be modified to include this implied element. 191 Wn. APP.916::State vs Richie::December 22, 2015

A to convict instructions on first degree robbery is erroneous if it does not include the essential elements of the crime that the victim have ownership, representative, or possessory interest in the property taken. This element also is absent from Washington pattern Jury in instructions; criminal 37.02. the fact that the instructions are patterned after the Washington pattern instructions does not change the conclusion.

Taken all the above into consideration. Mr. Moretti's jury instructions under robbery one to convict instructions Pg-9-10 you will see leaves out the same implied elements of the crime.

Mr. Moretti should be granted a new trial with correct Jury instructions

THE RECENT RECIDIVIST AGGRAVATOR IS UNCONSTITUTIONALLY VAGUE. Regardless of the evidence actually presented in this case, the exceptional sentence should be reversed because the recent recidivist aggravator is unconstitutionally vague. "A statute is void for vagueness if it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." State v. Duncalf, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013)(internal quotation omitted). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. Id. at 297. A statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973). The Court reviews a vagueness challenge de novo. State v. Williams, 159 Wn.App. 298, 319, 244 P.3d 1018 (2011). The constitutional requirement must be applied to sentencing aggravators in light of recent federal cases. In State v. Baldwin, our Supreme Court held "the void for vagueness doctrine should have application only to laws that 'proscribe or prescribe conduct' and that it was 'analytically unsound' to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.'" 150 Wn.2d 448, 458, 78 P.3d 1005 (2003)(quoting State v. Jacobson, 92 Wn.App. 958, 966, 965 P.2d 1140 (1998)). But this holding is incorrect in light of Blakely, 542 U.S. 296 and

Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013). Baldwin's holding that aggravating factors "do not...vary the statutory maximum and minimum penalties assigned to illegal conduct by the Legislature" cannot withstand these United States Supreme Court decisions finding statutory factors do alter the statutory maximum for the offense and must be found by a jury beyond a reasonable doubt. E.G., Blakely, 542 U.S. at 306-07. The United States Supreme Court has also made it clear that "due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." Apprendi, 530 U.S. at 484. Apprendi and Alleyne clearly establish that aggravating factors affect a liberty interest protected by the Due Process Clause; this Court should adhere to those precedents rather than to the conflicting holding in Baldwin. The recent recidivism aggravator is impermissibly vague because it is impossible to know what the term "shortly after being released from incarceration" means. The statute provides no standards against which the jury, the accused, or the trial judge can measure what is "shortly." See RCW 9.94A.535(3)(t). A jury has no reference point from which to determine the conduct that constitutes "shortly after being released," just as the public has no way of knowing which conduct is proscribed. In this case at present in particular, the jury had no reference point with regard to measure how much is "shortly" after being released; one day, one week, one month, ect. This statutory provision is vague because it is ripe for arbitrary enforcement. Goquen, 415 U.S. at

578. This Court should grant a new trial because of the incurable prejudice that this vague statute waged havoc on the juries propensity at finding guilt. Hearing that the Defendant was freshly out of prison made a huge difference in weighing guilt or innocence. Because the statute is vague, it never should of been allowed for the State to bring in evidence of being fresh out of prison which is hugely prejudicial. A new trial is requested on all counts as the only remidy for this ground.

IT WAS POLICE MISCONDUCT PRESSURING AND THREATENING MS. HALLI HOEY IN ORDER TO GET HER TO TESTIFY FALSELY FOR THE STATE.

Ms. Hoey had her will beaten into smithereens by police who she testified, "they were screaming and yelling at me and threatened to take my kids away from me and all of that." **RP 269.** Ms. Hoey was pressured into signing what was known perjury. **RP 333.** "Q. So is it fair to say that the officer put words in your mouth? A. Yeah. I could say that. Put stuff down I didn't write or say. Switched my story around. Yes." **RP 334.**

The statement that the State used was coerced by officers that knew it was false and actually made the statement themselves. This was done at the threat of taking Ms. Hoey's kids away if she did not cooperate. This is reveseable error as found by the United States Supreme Court in a very similar case. Lynumm v. Illinois, 372 U.S. 528, 534, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963). "Governmental threats of criminal sanctions against relatives are relevant to the voluntariness determination." Johnson v. Wilson, 371 F.2d 911, 912 (9th Cir. 1967). The State is precluded from using known false evidence to gain a conviction. What happened here is a clear cut violation of the false evidence statndard. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

"A conviction obtained by the knowing use of perjured testimony is fundementally unfair." In re Pers. Restraint of Benn, 134 Wn.2d 868, 936-37, 952 P.2d 116 (1998). "A State may not knowingly use false evidence, including false testimony to obtain a conviction." United States v. Agurs, 427 U.S. 97, 103-04, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In this present case the police made Ms. Hoey their smoking gun to pin the culpability on the Defendant instead of who they knew was the true perpatrator. Ms. Hoey told them it was Mr. Jonathan Charlie, not the Defendant who started the assault. The police changed her statement and tailor-made it to get the Defendant, knowing full well it was Mr. Charlie whom they initially wanted. "Use of known lies calls for reversal when it could have effected the jury." United States v. LaPage, 231 F.3d 488 (9th Cir. 2000). "Deliberate deception of a Court and jurors by the presentation of known false evidence is incompatable with 'rudimentary demands of justice.'" Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). "Knowing use of false evidence violates due process." Perry v. New Hampshire, ___ U.S. ___, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012).

The State errored in convicting defendent of two assalts and one robbery in the first degree due to double jeoperdy and merging crimes.

Under the staturorty doctrine of merger, two offenses constitute a single crime where, in order to establish the element of one offince, The state must prove that a secont crime was commetted, here the State had to prove the assalts to astablish robbery in the first degree.

quoting Tved 153 Wn. 2d at 720.8
the legislator has defined the crime of robbery as both a crime against property and a crime against the person, the unit of prosicution must incompass both the taken of property and a forcible taken against the will of the person from whom or from whose presence the property is taken accordingly a conviction on the count of robbery May result from each sepret taking of property from each person, however, multiple counts may not be based on multiple items of property taken from the same person at the same time, nor may multiple counts be based on a single taking of property from or from the presence of multiple people even if each has a intrest in the property.

In order to prove guilty of robbery in the first degree, The State must prove infliction of bodily injury in commission of a robbery or in immediate flight there from, the infliction of bodily injury upon Mike Knapp and Tyson Ball would merge with the offince of first degree robbery if the bodily injury was done during commisson of robbery. The rule against double Jeoperdy would prohibit finding Moretti guilty of robbery in the first degree and assalt in the second.

One Just has to read the Juiy instruction to see the double Jepperdy issues at hand.

In Jury instructions Page PR 9-10
Instructions number 10. A person commits the crime the crime of robbery in the first degree when he unlawfully and with intent to comit theft therof takes property from the person or in the presence of another against that persons will by the use or threatend use of immediate force, violince or fear of injury to that person or to the person or property of anyone, the force or fear must be used to obtain or retain possion of the property or to prevent or overcome resistance to the taking to the taking in either case the degree of force is immaterial

instructions Number 11. to convict the defendent of the crime of robbery in the first degree each of the following elements of the crime must be proved beyond a reasonable doubt: Number 1, that on or about September 11th, 2014 the defendent unlawfully took personal property from the person of another: Number two, that the defendant intenda to commit theft of the property: Number three, that the taking was against the persons will by the defendant's use of threatend use of immediate force, violence, or fear of injury to that person: that the - number 4, that the force or fear was used by the defendant to obtain possession of the property, or to prevent or overcome Resistence to the taking: Number 5, that in the commission of these acts, the defendant was armed with a deadly weapon: that any of these acts occured in the State of Washington.

if you find from the evedence that the element one, two, thrice, four, five and six have been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilt.

The key words in this Jury instruction is 1, that the defendant intended to commit theft of the property, 2, that the takang was against the per-sons will by the defendants use of ~~fore~~ threatend use of immediate ~~o~~force, violence, or fear of injury to the person: →

3. That in the commission of these acts, the defendant was armed with a deadly weapon, and most of all 4. That the ~~force~~ force or fear must be used by the defendant to obtain possession of the property, or to prevent or overcome resistance to the taking

Why is the to prevent or overcome Resistance to the taking so important because it proves that the State should have merged both of the Assalt charges because on direct from the State the following took place between ~~Sa~~ MS. Jany and Tyson Ball PR 118

A. I pushed Mike behind me and I got hit with the bat in the Arms.
Q. Okay and so the defendant attacted you with the baseball bat, is that
A. yeah
Q. Okay and why was that? was that Just you were closer?
A. Because I got in between...
Q. Okay and why did you do that?
A. Because Mike is a old man.
Then on PR 123 Tyson Said.
Q. Okay and if anything were the men Saying at the time when they were either attacking you or MR. knapp

A. Give - give me the money

So this proves that both assalts happend in the commition of the robbery. And due to Tyson balls not only resistance but tryed prevention to the robbery Just more establishes the elements of the robbery in the first degree. the Courts should and should have droped not one but both assalts because thay not only used it to inhanse the robbery to robbery one but alsol charged Moretti with the assalt two's. So under Tved 153 Wn. 2d at 720.8 and double Jepperdy laws and Merjer crime law the court should have droped both assalt charges and I beleave that is what should happen here anything else but to drop both assalt charges would put Mr Moretti in double Jeoperdy.