

NO. 78156-7

IN THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of

SCOTT W. SKYLSTAD,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. When an appellate court vacates a judgment and remands the case to the trial court for resentencing does the one year time limit for filing a collateral attack run from the date the new judgment becomes final or (as the State argues) is the case split into two parts with separate time limits running from the conviction and the sentence?

2. Should this Court remand this case to Spokane Superior Court pursuant to RAP 16.11 for an evidentiary hearing and determination on the merits where Skylstad has made a *prima facie* showing of constitutional errors, but where the petition cannot be decided on the current record?

B. STATEMENT OF THE CASE

Scott Skylstad was convicted in 2002 of first degree robbery and attempting to elude a pursuing police vehicle. He appealed. The State filed a cross-appeal. Division Three of the Court of Appeals affirmed Skylstad's conviction, but reversed and remanded for resentencing; agreeing with the State that Skylstad should have been sentenced to two, not one, deadly weapon enhancements. *See State v. Skylstad*, 118

Wn.App. 1062, 2003 WL 22293605 (2003) (unpublished opinion).

Skylstad petitioned this Court for review. Review was denied. *State v. Skylstad*, 151 Wn.2d 1023, 91 P.3d 95 (2004). A mandate was issued on May 14, 2004.

Skylstad was then resentenced. A new judgment was entered by the Spokane County Superior Court on July 24, 2004. Skylstad appealed the new judgment, arguing that imposition of the second deadly weapon enhancement violated *ex post facto* protections. The Court of Appeals affirmed the new judgment. *State v. Skylstad*, 129 Wn. App. 1050, 2005 WL 2503117 (2005) (unpublished opinion). Mr. Skylstad petitioned for review. This Court is scheduled to conference his petition for review on September 6, 2006. No. 78126-5.

Meanwhile, on November 21, 2005, Skylstad filed a *Personal Restraint Petition* in the Court of Appeals. As detailed in part 2 of the argument section, Skylstad challenges his convictions on several grounds, including ineffective assistance of counsel and prosecutorial misconduct. The Court of Appeals dismissed the *PRP*, reasoning that Skylstad had filed too late, i.e., that his one year to file began running on May 14, 2004—the

date of the mandate returning Skylstad's case to the Superior Court for resentencing. This Court accepted review and appointed counsel.

C. SUMMARY OF ARGUMENT

A criminal defendant appeals from a judgment which encompasses both a conviction and the sentence. When a sentence is reversed and the case remanded for resentencing, the original judgment is vacated and a new judgment entered. Thus, the original vacated judgment never becomes final, even if the underlying conviction is affirmed. Instead, the post conviction time clock begins running when the new judgment becomes final.

D. ARGUMENT

1. SKYLSTAD'S PETITION IS TIMELY.

Introduction

There can be only one "final judgment" in a case. When a defendant's conviction is affirmed on appeal, but his sentence (or a portion of his sentence) is reversed, the judgment is vacated. At resentencing a new judgment is imposed.

The one year time limit to file a collateral attack runs from the time that new judgment becomes final, rather than from the vacated judgment. This follows from the plain language of the statute. It also makes good sense from a policy perspective.

The Plain Language of the Statute

In 1989, the Washington State Legislature enacted RCW 10.73.090-140. RCW 10.73.090 creates a one year time limit for filing a PRP. It provides that “(n)o petition or motion for collateral attack on a *judgment and sentence* in a criminal case may be filed more than one year after the judgment becomes final if the *judgment and sentence* is valid on its face and was rendered by a court of competent jurisdiction.” (emphasis added). The statute further provides that a “*judgment* becomes final on the last of the following dates:

- (a) The date it is filed with the clerk of the trial court;
- (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
- (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.090 (3).¹

When this Court construes a statute, the various provisions of that statute “should be read in relation to the other provisions, and the statute should be construed as a whole.” *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 133, 814 P.2d 629 (1991) (citing *State v. Sommerville*, 111 Wn.2d 524, 531, 760 P.2d 932 (1988)). Courts “will avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences.” *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002), citing *State ex rel. Royal v. Yakima County Comm'rs*, 123 Wn.2d 451, 462, 869 P.2d 56 (1994) and *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989)).

The statute provides that the post-conviction time clock begins running when a “judgment” becomes final. A conviction, without a sentence, does not constitute a judgment. Numerous courts have determined that a judgment is not final without the sentence. The United States Supreme Court stated this principle succinctly: "Final judgment in a

¹ RCW 10.73.090-140 was an attempt by the Legislature to further streamline post-conviction proceedings. Previously, in 1976, this court adopted Rules of Appellate Procedure 16.3-16.15, which created a unitary post-conviction remedy and replaced the former miscellaneous post-conviction procedures, including most petitions for a writ of habeas corpus. See *Toliver v. Olsen*, 109 Wn.2d 607, 610-11, 746 P.2d 809 (1987).

criminal case means sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212 (1937). Further, the Court explained why this is so: "To create finality, it [is] necessary that petitioner's conviction should be followed by sentence." *Id.* That a final criminal judgment requires a sentence to be imposed has been reaffirmed by the Supreme Court and others. *See Teague v. Lane*, 489 U.S. 288, 314 n.2 (1989) ("As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant."); *Ft. Wayne Books v. Indiana*, 489 U.S. 46, 54 (1989); *Parr v. United States*, 351 U.S. 513, 518 (1956) (citing *Berman*); *Jefferson v. United States*, 191 F. Supp. 123, 128 (D. Minn. 1961) ("The lawful sentence is the judgment."). The 4th Edition of Black's Law Dictionary (the version in use at the time the Legislature passed RCW 10.70.090) defined "judgment of conviction" as setting forth "the plea, the verdict or findings, and the adjudication and sentence." *See also Black's Law Dictionary* 847 (7th ed.1999) (defining "judgment of conviction" as "[t]he written record of a criminal judgment, consisting of the plea, the verdict or findings, the adjudication, and the sentence."

When a sentence is reversed the judgment is vacated. In other words, the finality of the previous judgment is destroyed. *State v. Harrison*, 148 Wn.2d 550, 61 P.3d 1104 (2003) (“Reverse” and “vacate” have the same definition and effect in this context.). When a new judgment and sentence is entered this new judgment becomes *the* judgment of conviction in the case. For this reason, this Court has held that it was improper after resentencing to enter a judgment *nunc pro tunc* to the date of the original judgment. *See State v. Smissaert*, 103 Wn. 2d 636, 641, 694 P.2d 654 (1985) (“If the court has not rendered a judgment that it might or should have rendered, or it has rendered an imperfect or improper judgment, it has no power to remedy these errors or omissions by ordering the entry *nunc pro tunc* of a proper judgment.”).

Likewise, where there are multiple convictions on one information or indictment, there is only one judgment even if one of those convictions is reversed on appeal and a new judgment entered. The United States Supreme Court has frequently referred to multiple convictions and sentences arising from a single indictment as "*the* judgment of conviction." *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64, 67, 115

S.Ct. 464, 130 L.Ed.2d 372 (1994) (describing convictions and sentences on three crimes); *United States v. Miller*, 471 U.S. 130, 131, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (describing convictions and sentences on two crimes); *Goldberg v. United States*, 425 U.S. 94, 99, 112, 96 S.Ct. 1338, 47 L.Ed.2d 603 (1976) (describing "multiple" mail fraud convictions and sentences). *See also United States v. Monsanto*, 491 U.S. 600, 602, 605 n. 4, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989) (referring to convictions and sentences under "multi-count indictment" as "a judgment of conviction" (emphasis added)).

The State focuses (in its *Answer*) on subsection (3)(b), which states that a judgment may become final on "[t]he date that an appellate court issues its mandate disposing of a timely direct appeal from the *conviction*." (emphasis added). Reading this portion in isolation, the State maintains that an appeal which results in reversal of the sentence does not toll the time for filing a PRP challenging the conviction. While other statutes define "conviction" as a "verdict of guilty" or "acceptance of a plea of guilty," (*See e.g.*, RCW 9.94A.030(9)), that is not the only definition of "conviction" and RCW 10.73.090 would make no sense if "conviction"

were interpreted in that manner here.

It is clear that in drafting this statute the Legislature used the terms “judgment,” “judgment and sentence,” and “conviction” interchangeably. For example, the statute refers to a “direct appeal from the conviction.” If “conviction” means only a finding or verdict of guilt, the statute conflicts with other provisions of law because a defendant can appeal only from a “final judgment,” not from a verdict or finding of guilt. *State v. Thorne*, 39 Wn.2d 63, 234 P.2d 528 (1951); *State v. Goard*, 32 Wn.2d 705, 203 P.2d 355 (1949). Because one cannot appeal from a mere finding of guilt, absent a final judgment, interpreting the statute in the manner suggested by the state means that subsections (3)(b) and (c) never apply *in any case*. Obviously, the Legislature did not intend its words to have no effect.

Many years ago this Court recognized that the word “conviction” in criminal statutes has more than one meaning; it may mean a finding of guilt or in other circumstances and in a different context may mean a formal finding or declaration of guilt--as in a judgment and sentence. *State ex rel. Brown v. Superior Court*, 79 Wash. 570, 140 Pac. 555 (1914).

Consistent with that view, as well as with Skylstad’s argument here, this

Court in *Kitsap County Republican Central Committee v. Huff*, 94 Wn.2d 802, 809, 620 P.2d 986 (1980), held “for the purpose of disqualification from public office following a verdict of guilty, a conviction has not been completed until a court has entered judgment and sentence.”

Interpreting the statute in the manner suggested by the State renders the statute meaningless. Interpreting the statute in the manner suggested by *Skylstad* gives each provision meaning and is consistent with accepted legal definitions and caselaw.

Cases Interpreting the Federal Habeas Time Bars are Helpful

In the context of the federal habeas statutes, 28 U.S.C. §2254 and §2255 (which also start their one year clock when the judgment becomes final), the statute of limitations runs from the date of resentencing and not the date of the original judgment. *See Maharaj v. Secretary*, 304 F.3d 1345, 1348-49 (11th Cir. 2002) (in a case where an appellate court partially or wholly reverses a defendant’s conviction or sentence and remands to the district court, the petitioner’s judgment is not final until the amended judgment is entered and either the time to appeal that judgment has run or that appeal has become final); *United States v. Dodson*, 291 F.3d 268,

275-76 (4th Cir. 2002) (in a multi-count case district court erred in treating counts affirmed on appeal as final where appellate court vacated and remanded for resentencing on other counts); *Hepburn v. Moore*, 215 F.3d 1208, 1209 (11th Cir.2000) (plain meaning of the federal habeas statute supports the conclusion that the statute of limitations runs from the date of the resentencing judgment and not the original judgment); *Burris v. Parke*, 95 F.3d 465, 467 (7th Cir. 1996) (judgment refers to sentence, not conviction).

A recent case from the Ninth Circuit (*United States v. Colvin*, 204 F.3d 1221 (9th Cir. 2000)) is instructive. In *Colvin*, on direct appeal the Ninth Circuit reversed the defendant's conviction as to count nine, and affirmed as to all other counts. 204 F.3d at 1222. The Ninth Circuit also affirmed defendant's sentence because his base offense level remained unchanged. *Id.* Finally, the Ninth Circuit remanded the case to the district court "with directions to strike the conviction on count nine and to reduce the special assessment." *Id.* The mandate was issued on July 29, 1997, and received by the district court on August 4, 1997. On October 16, 1997, the amended judgment was entered in the district court. On October

5, 1998, the defendant filed a § 2255 motion. The district court dismissed the motion as untimely, finding that the limitations period ran from either the date the court received the mandate (August 4, 1997) or when the date had passed for appealing the Ninth Circuit's decision to the Supreme Court, which was September 15, 1997. *Id.*

In reversing the district court, the Ninth Circuit stated that the key inquiry was whether the amended judgment could have been appealed. *Id.* at 1224. The Ninth Circuit found that the district court's amended judgment was appealable and that the defendant's conviction became final after the time for appealing the amended judgment had passed. *Id.* at 1225. “The Supreme Court has defined a final judgment in the retroactivity context as one where the availability of appeal has been exhausted and we think it clear that a judgment cannot be considered final as long as a defendant may appeal either the conviction or sentence.” *Id.* at 1224 (internal quotations and citations removed). *See also Richardson v. Gramley*, 998 F.2d 463, 465 (7th Cir.1993) (“A judgment is not final if the appellate court has remanded the case to the lower court for further proceedings, *unless* the remand is for a purely 'ministerial' purpose,

involving no discretion, such as recomputing prejudgment interest according to a set formula.").

The reasoning of the federal courts, while not binding, is persuasive. This Court should adopt the same rule.

Compelling Policy Reasons Support Skylstad's Reading of the Statute

Not only is Skylstad's argument consistent with the statute read as a whole, but such a bright-line rule serves to avoid litigation over the finality question and to achieve one of the purposes of a statute of limitations, which is to clearly define the time period in which suit must be commenced. This rule will also allow defendants to exhaust their appeals on direct review before bringing collateral attacks.

Under the State's suggested interpretation, a defendant whose conviction is affirmed and sentence reversed must pursue direct and collateral relief at the same time. Take, for example, a capital case where this Court affirms the conviction, but reverses a death sentence. In that situation, the case would be remanded for a second penalty phase trial. Meanwhile, the defendant would need to file a PRP (and this Court would presumably be obligated to appoint capital qualified counsel) within one

year of the mandate. If the defendant were sentenced to death a second time he could then file an appeal and later, if unsuccessful, another PRP (limited to the second penalty phase). If, on the other hand, the PRP attacking the conviction was successful, the death sentence proceeding would become moot. In short, the State's interpretation creates a procedural nightmare. Considering the implications of such a system for purposes of federal habeas review only complicates matters more.

In addition to creating confusion, requiring a defendant to seek collateral review prior to the time his sentence becomes final will only serve to increase litigation.

The statute was adopted to streamline post-conviction proceedings. The State's interpretation of the statute will serve the opposite purpose.

Even if the Court Accepts the State's Interpretation, it Should Equitably Toll the Statute of Limitations

Even if this Court were to interpret RCW 10.73.090 to mean that the one year began to run after the first appeal, Mr. Skylstad should be excused from that rule by the principle of equitable tolling. "Equitable tolling 'permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.'" *State v.*

Littlefair, 112 Wn. App. 749, 759, 51 P.3d 116 (2002), quoting *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997), *review denied*, 134 Wn.2d 1012, 954 P.2d 276 (1998). Justice requires tolling Mr. Skylstad's deadline where his interpretation of the statute of limitations is reasonable, and there is no appellate decision to the contrary.

This Court addressed a similar issue in *Scannel v. State*, 128 Wn.2d 829, 912 P.2d 489 (1996). Mr. Scannel filed a late notice of appeal in a civil case because he believed the time for filing was tolled while the court considered his motion for an order of indigency. Scannel had misread the rules. *Id.* at 832-33. His "confusion," however, "was caused by his understandable misinterpretation of a recently amended rule" which had yet to be construed by the courts. *Id.* at 834. The Court excused Mr. Scannel of this "innocent mistake." *Id.* The same reasoning applies here. No court has interpreted RCW 10.73.090 to bar relief in the situation presented here, and Skylstad reasonably believed that it would not. Any contrary ruling should apply prospectively only. *See Scannel* at 835-36.

Federal law is also helpful on this point. “Washington courts have expressed a desire to look to federal law for nonbinding guidance on state collateral attack and equitable tolling issues.” Mark A. Wilner, *Justice at the Margins: Equitable Tolling of Washington's Deadline for Filing Collateral Attacks on Criminal Judgments*, 75 Wash. L. Rev. 675, 692-93 (2000), cited with approval in *State v. Littlefair*, 112 Wn. App. at 759 n.22. The Ninth Circuit has applied the doctrine in a situation similar to that presented here. *Calderon v. United States Dist. Court for Cent. Dist. of Cal.*, 163 F. 3d 530, 541 (9th Cir. 1998) (equitably tolling federal habeas deadline when petitioner reasonably relied on prior court order).

Conclusion

As of this writing, Skylstad’s judgment is not final because his appeal from the judgment is still pending. Therefore, his PRP is timely. Any other interpretation of the statute fails to consider the statute as a whole and will create confusion and chaos.

2. **SKYLSTAD HAS MADE A SUFFICIENT SHOWING OF ERROR TO JUSTIFY REMAND TO THE TRIAL COURT FOR A DETERMINATION ON THE MERITS.**

Introduction

Skylstad's *pro se* petition contains several claims of constitutional error, including various claims of ineffective assistance of counsel.

Although Skylstad has ably supported his claims with evidence, because it appears that at least some of Skylstad's other claims cannot be determined solely on the record, this Court should transfer the petition to superior court for a determination on the merits. RAP 16.11.

Two of Skylstad's claims are highlighted below. Counsel does not intend to slight any of Skylstad's claims not mentioned below. However, since the two claims discussed below each justify remand of this PRP so that all of Skylstad's claims can be determined on the merits, there is no need to discuss other claims in this pleading.

Conflict of Interest

Skylstad was represented at trial by a public defender. Another attorney employed by the same public defender office represented Shawn Moller. Prior to trial, Moller and his public defender entered into a

“cooperation agreement” where Moller provided information to the State *about this crime* in return for “concessions” on an unrelated crime. A summary of the information provided by Moller, which clearly implicates Skylstad and others, is contained in the Spokane County Sheriff Department’s *Additional Report* attached as Appendix A (this document was obtained through a public disclosure request made by the Innocence Project Northwest of the University of Washington Law School). Although Moller did not testify at Skylstad’s trial, the information that he provided later resulted in a co-defendant, Russell Crosswhite, entering into a plea deal and testifying against Skylstad. RP 329-378.

Skylstad has made a sufficient showing that counsel was improperly burdened with a conflict of interest to support his ineffective assistance of counsel claim. It is well established that the Sixth Amendment includes the right to representation free from conflicts of interest. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To establish a Sixth Amendment violation, a defendant who did not object at trial must demonstrate an actual conflict of interest adversely affected his attorney's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct.

1708, 64 L.Ed.2d 333 (1980). A conflict exists when lawyers from one law office represent individuals (whether co-defendants or witnesses) with competing interests. *See Lockhart v. Terhune*, 250 F.3d 1223 (9th Cir. 2001) (Counsel in murder and attempted murder trial had an actual conflict of interest that adversely affected counsel's representation where prosecutors presented evidence that petitioner had committed a second, earlier murder and his appointed counsel was also representing another man implicated (but not charged) in that earlier homicide); *Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000) (Counsel in capital trial had actual conflict of interest that adversely affected defendant's representation due to prior and concurrent representation of the state's star witness); *People v. Thomas*, 545 N.E. 2d 654 (Ill. 1989) (Counsel had *per se* conflict in murder case where counsel simultaneously represented government witness on unrelated charges); *Commonwealth v. Green*, 550 A.2d 1011 (Pa. Super. Ct.1988) (Counsel had actual conflict that adversely affected representation in burglary case where defendant's counsel and codefendant, who pled guilty and testified against defendant, were members of the same public defender office).

As demonstrated above, there are instances when prejudice conclusively or presumptively flows from a conflict of interest. *See also State v. Davis*, 141 Wn.2d 798, 864, 10 P.3d 977 (2000). However, this Court does not need to decide that issue here. Instead, because Skylstad has made a sufficient threshold showing this Court should remand this case to the trial court for an evidentiary hearing and determination on the merits. RAP 16.11.

Failure to Investigate Kiss' Sudden Refusal to Testify

Jason Kiss was Skylstad's co-defendant. The cases were not joined for trial. Counsel for Skylstad called Kiss as a witness at trial. Kiss, who was still pending trial, initially indicated that he was willing to testify about the robbery despite his obvious Fifth Amendment privilege. RP 668. However, the next day Kiss stated that he was unwilling to testify about the robbery. Consequently, Kiss' testimony was largely unhelpful to Skylstad. RP 701 - 712.

Kiss has since signed an affidavit stating that he committed the robbery with Crosswhite, but that Skylstad was uninvolved. *See Affidavit of Jason Kiss* attached as Appendix B. In that document, Kiss also states

that he reversed his position after the prosecutor threatened him with additional charges if he testified. In his PRP, Skylstad argues that his counsel was ineffective for failing to investigate Kiss' change of position, because if counsel had conducted a competent investigation counsel would have uncovered the prosecutor's misconduct and Kiss would have been free to testify. RP 700.

Obviously, additional facts need to be developed on this issue. However, it is well established that a failure to investigate and present exculpatory evidence constitutes ineffective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374, 162 L.Ed.2d 360, 125 S.Ct. 2456 (2005); *Lin v. Ashcroft*, 356 F.3d 1027 (9th Cir. 2004). Kiss' testimony is indisputably exculpatory. Thus, Skylstad has made a *prima facie* showing of ineffectiveness. If Skylstad can establish at an evidentiary hearing that, but for trial counsel's unreasonable investigation, he would have discovered that the prosecutor was unlawfully interfering with his right to call Kiss as a witness, he should be granted a new trial. *See United States v. Meyer*, 810 F.2d 1242, 1245 (D.C.Cir.1987) (Prosecutorial vindictiveness occurs when the prosecution acts in response to the exercise

of constitutional or statutory rights) (cited with approval in *State v. Korum*, ___ Wn.2d ___, ___ P.2d ___, 2006 WL 2382278 (2006)). Further, this factual issue is relevant to Skylstad’s “conflict of interest” claim if the trial court concludes that Skylstad must prove prejudice.

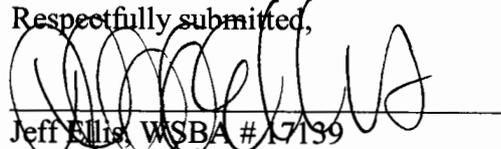
E. CONCLUSION

When this Court upheld RCW 10.73.090’s general 1-year time limit against a constitutional challenge, it found that the statute created a reasonable and constitutional method for ensuring that collateral review “does not degenerate into such a procedural merry-go-round.” *In re Runyan*, 121 Wn.2d 432, 454, 853 P.2d 424 (1993). The State’s interpretation of the statute encourages such degeneration.

This Court should hold that if any portion of a defendant's conviction or sentence is reversed and remanded to the trial court, the judgment of conviction does not become final until after the trial court has entered a new or amended judgment and, if an appeal is filed, the date the mandate is issued or *certiorari* denied. This Court should then remand Skylstad’s PRP to the superior court for determination on the merits with the assistance of counsel who is not burdened with a conflict. RAP 16.11.

DATED this 1st day of September, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeff Ellis", written over a horizontal line.

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APPENDIX A

SPOKANE COUNTY SHERIFF DEPARTMENT

ADDITIONAL REPORT

DATE: 11/20/01

REPORT NO.: 01 282599

X-REF NO.: 01 282365

CHARGE / INCIDENT: ARMED ROBBERY (BANK)

COMPLAINANT: [REDACTED]

LOCATION OF INCIDENT: 11016 E. Montgomery – Mountain View Credit Union

VICTIM #2: [REDACTED]

ARRESTED:

- 1) CROSSWHITE, RUSSELL K., W/M, 06/04/82
- 2) SKYLSTAD, SCOTT W., W/M, 01/06/70
- 3) KISS, JASON L., W/M, 08/29/79

M.I.R./WITNESS: [REDACTED]

11/07/01

Previously I was notified by Deputy Prosecutor Sharon Hedlund that she had been advised that a defendant involved in a case being handled by her possessed information probably important to this robbery investigation. Subsequent to that, a "free talk" was undertaken with the subject in the presence of his attorney, Kari Reardon (Public Defender's Office), and DPA Hedlund. It became apparent that he did have significant knowledge that would further this investigation. Thus, a cooperation agreement was developed allowing some concessions for him on (unrelated) criminal charges pending against the subject in return for him fully cooperating as a witness in this case, including court testimony if necessary. The agreement that was drawn up was signed by the subject and his attorney, after which a Superior Court Judge released him from jail with the listed conditions pending trial. [REDACTED]

[REDACTED] gained the following information primarily from Russell "Russ" Crosswhite while both of them were incarcerated at the Spokane County Jail. He first met Crosswhite there when [REDACTED] was assigned to cell #5E-3. Crosswhite was housed next door. [REDACTED] described him as real talkative as they became acquainted. Crosswhite explained to him what he had been charged with, then subsequently described many details about what had happened.

(Henderson)

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Crosswhite told [REDACTED] that he had been the getaway driver for Scott Skylstad and Jason Kiss while they committed three separate armed robberies. The first one was at a Super 8 Motel. Crosswhite said they used his Nissan Altima car for that one. Skylstad and Kiss wore dark black nylon stockings over their faces to disguise themselves, which had eyeholes cut into them. [REDACTED] was not told whatever other clothing they wore, but Crosswhite did state that each of them had a gun. He was uncertain how much money they got away with, but thought that Crosswhite indicated it totaled several hundred dollars, maybe as much as \$500. Crosswhite laughed when relating how a witness mistakenly described his car as a gold Honda Accord when seen at the time of the robbery. [REDACTED] did not know how Crosswhite knew that.

The next two robberies that Kiss and Skylstad committed were done because they were "down and out" with financial problems. Crosswhite explained that he was selling lots of marijuana regularly, making plenty of money, so he did not need to get involved in any robberies himself. He mentioned having four really good connections, but he agreed to assist the other two nonetheless because he just wanted to help them out. Crosswhite told [REDACTED] he did not need the money himself such as they did.

The next two robberies took place on the same day. Crosswhite described how he drove Skylstad and Kiss to both of them in his Nissan Altima car again. The first one was at the Tidyman's store on Argonne Road. Skylstad and Kiss committed the robbery while Crosswhite waited somewhere nearby in the vehicle. Those two again wore dark nylon stockings pulled down over their heads to disguise their faces. They also had on hats. [REDACTED] said he did not hear whatever else they were wearing and whether that included any gloves or not. Both suspects carried guns once again.

Crosswhite did describe to him how Scott Skylstad had worried afterward that his face may have been seen by at least one of the witnesses or victims. That was because the nylons were on top of their heads under the hats as the two suspects initially approached the store entrance. They pulled them down over their faces near the door before proceeding inside. Skylstad pulled too hard on his evidently and it ripped, somewhat exposing his face better. Thus, it could have been seen. (I later examined the recovered baseball hat and black nylon stocking on Property No. 194995 and found that nylon to have a tear in it that would be consistent with that statement.)

Crosswhite further described how the two robbers returned to the getaway car quite upset. They explained to him how they had only gotten into one cash drawer where they had intended on gaining access to the store safe as part of the robbery. As a result, they were only able to successfully steal approximately \$200, which was

(Henderson)

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substantially less than what they had expected to obtain during this robbery. Crosswhite described that they were not at all satisfied with that result.

The three of them drove to a "Denny's" restaurant following the robbery and ate breakfast, according to Crosswhite. He told ██████ that while discussing what had happened at Tidyman's, they all decided that they needed to do another robbery that same day. So they next went to the "Albertson's" store in Millwood and bought two Halloween scare masks to use for that robbery, which was at a credit union.

Crosswhite told ██████ how he went to the credit union first and opened an account so he could "scope" the place out beforehand for the other two. ██████ thought that Skylstad and Kiss waited in his car for Crosswhite. When he returned, they all left the area for a short while before driving back to then proceed with the armed robbery. Once again Skylstad and Kiss went in carrying handguns while Crosswhite waited in his car for them.

This robbery resulted in them stealing a lot of money, which ██████ thought Crosswhite said was somewhere between \$10,000 and \$15,000. While driving away from the credit union, Crosswhite saw Skylstad and Kiss throwing their masks and other clothing articles out of the windows. He drove them to one of their homes and dropped them off, after which Crosswhite said he left alone to go wash his car. Skylstad and Kiss took the stolen money with them. Crosswhite met up with another friend of his who knew nothing about the robberies. Crosswhite indicated that he had not told that friend anything up until the time police showed up at the carwash with guns drawn on them. Crosswhite said that scared all of them pretty badly. He was subsequently arrested.

Furthermore, ██████ was told by Crosswhite that the two handguns found later in his room during the police search belonged to him. He also admitted that they were the same guns used by Skylstad and Kiss to commit the robberies described by him beforehand. ██████ did not know anything else about the weapons.

Crosswhite indicated to ██████ that he intended on keeping his mouth shut about all of this and not admit to anything. He did not mention that he had already given an incriminatory statement to police or anyone else for that matter, besides ██████. He explained to ██████ though, how he expected Skylstad to take full responsibility for these crimes and to get Crosswhite out of trouble because Skylstad had promised him he would do that if they got arrested. Thus, Crosswhite was then just waiting for Skylstad to follow through on that promise.

(Henderson)

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I asked if mention was ever made to him about why any of these particular businesses were targets for robbery. [REDACTED] said only that he was told by Crosswhite that the credit union location was "isolated" so evidently thought by them to be a good place to attack. There was nothing else beyond that that [REDACTED] could recall being mentioned.

[REDACTED] was then asked who else may have heard this same information from Crosswhite besides him. He said only his roommate at the time in cell #5E-3, whose name he could not now recall (but sounds something like "Hine"), probably overheard at least some of it. That subject has since been transferred to prison in Western Washington, according to [REDACTED]

Next [REDACTED] answered that he had not known or heard of either Scott Skylstad or Jason Kiss before meeting Russ Crosswhite in jail. However, since then, he met Skylstad. That occurred when [REDACTED] was sent to the jail medical unit. Skylstad was also being treated there for an arm injury he had received when bitten by a police dog supposedly. [REDACTED] stated that when he mentioned to Skylstad where he normally was housed, Skylstad evidently recognized that Crosswhite was housed there, too, because he then asked about him. [REDACTED] affirmed to Skylstad that he and Crosswhite had become friends. Skylstad then asked [REDACTED] to deliver a note from him to Crosswhite containing a message to "hold his mud." [REDACTED] understood that to mean for Crosswhite to keep his mouth shut and not admit anything to anyone. [REDACTED] took the note, but instead turned it over to his lawyer, Kari Reardon. (She said it was currently in the file back at her office.) [REDACTED] consented to her releasing the note to me through the deputy prosecutor. He added that he did not discuss any particulars of these robberies with Skylstad. Thus, all of the information known by him about them came exclusively from Russ Crosswhite.

When Crosswhite was preparing to be released from jail, he and [REDACTED] spoke about getting together once [REDACTED] got out also. Crosswhite gave [REDACTED] his personal cell phone number to use to reach him at. That number was turned over to [REDACTED] attorney as well. It, too, will be relayed to me with [REDACTED] permission. The only other related information that [REDACTED] could think of that needed to be mentioned, he said, was that Jason Kiss may have fled to "Mexico" to avoid arrest again. That was mentioned to him by either Skylstad or Crosswhite.

Several photographs were then shown to [REDACTED] to confirm the identities of whom he had learned this information from. He readily identified photographs correctly of Russ Crosswhite and Scott Skylstad, and he did not recognize one of Jason Kiss.

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██████ agreed to abide by the terms of the agreement drawn up between his lawyer and the deputy prosecutor, which will include him testifying in court to any of this if necessary. He added that any further information, either recalled or learned by him in the future about this matter, will be forwarded to me immediately.

Investigation continuing.

CRIMES AGAINST PERSONS

Detective Mark Henderson, #261
Major Crimes Unit

wij

cc: Detective Ricketts
Detective Thompson
Prosecutor's office

5 of 6

APPENDIX B

1 SCOTT W. SKYLSTAD, Defendant Pro-Se
DOC#931646
2 Washington State Penitentiary
1313 N.13 Ave.
3 Walla Walla Wash.

4
5 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

6 IN AND FOR THE COUNY OF SPOKANE

7 STATE OF WASHINGTON,) Case No.: 01-1-02301-3
8)
Plaintiff,) Newly Discovered Evidence (AFFIDAVIT
9) OF JASON KISS)
vs.)
10)
SCOTT W. SKYLSTAD,)
11)
Defendant)
2)

13 STATE OF WASHINGTON)
14) ss. Affidavit of JASON KISS
15)
16 COUNTY OF WALLA WALLA)

17 I, JASON KISS, Being first duly sworn upon oath, depose and state:
18

- 19
20 1. In March of 2002, I was subpoenaed to testify at the trial of the
21 above-entitled case on behalf of the defendant. Prior to testifying,
22 deputy prosecuting attorney, Ed Hay, threatened me with additional
23 charges, if I testified on behalf of the defendant, regarding the
4 robbery, as mentioned herein. Fearing additional charges, if I
25 testified, I exercised my Constitutional Right, and refused to testify,
based on the FIFTH AMENDMENT.

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2 2. I now testify regarding the September 17, 2001, robbery of the Blue
3 Mountain Credit Union, as described herein. I attest to these
4 statements knowingly, intelligently, and willingly.
5

6 3. Prior to September 17, 2001, as described herein, Mr. Crosswhite and
7 myself were involved together in the distribution, delivery, and sales
8 of large quantities of marijuana and opium. Due to an incident in-
9 which Mr. Crosswhite thought he was going to be stopped in his vehicle,
10 searched and apprehended, in possession of a brick of opium, Mr.
11 Crosswhite threw the brick from his car. The brick of opium was
12 unrecoverable and lead to Mr. Crosswhite and me becoming indebted to
13 our Colombian drug connection for over \$10,000.00. This, as described
14 herein, is the event that led to the robbery of the Blue Mountain
15 Credit Union on September 17, 2001.
16

17 4. On September 17, 2001, at approximately 9:30am, at the residence of
18 East 7420 Liberty, Mr. Crosswhite and myself were asked by the
19 defendant if we would give him a ride to the store. It is noteworthy
20 that at that time Mr. Skylstad did not have a driver's license. With
21 this in mind, Mr. Crosswhite and myself agreed to give Mr. Skylstad a
22 ride to the store.
23

24 5. Before stopping at the store, Mr. Crosswhite stopped at the Blue
25 Mountain Credit Union where Mr. Crosswhite told Mr. Skylstad that he
was going to open an account. Mr. Skylstad and myself waited outside

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7

1 for Mr. Crosswhite while he opened an account. The time was
2 approximately 10:00am.

3
4 6. Upon leaving the Credit Union, as described herein, Mr. Skylstad, Mr.
5 Crosswhite, and I, then proceeded to a near-by Albertson's grocery
6 store where Mr. Skylstad purchased a pack of cigarettes, and Mr.
7 Crosswhite, and I, bought two Halloween masks.

8
9 7. Back in the vehicle, I specifically remember Mr. Crosswhite hand me the
10 scream mask still in the package. Mr. Crosswhite kept the skull mask
11 for himself, which he removed from the package. Mr. Crosswhite then
12 asked Mr. Skylstad to hold the mask and pump accessory, to extended and
13 expose the feed-line plastic hose, so Mr. Crosswhite could remove the
14 pump apparatus from the mask, by burning through the hose attachment
15 connecting to the bottom of the mask. Mr. Skylstad complied, and held
16 the mask as Mr. Crosswhite used a lighter to burn through the plastic
17 hose, as described herein, and remove the pump therefrom.

18
19 8. Mr. Crosswhite and myself the returned and dropped-off Mr. Skylstad at
20 the residence of E. 7420 Liberty. It was there, at the request of Mr.
21 Crosswhite, that Mr. Skylstad threw away, the burnt-off, hose-line-feed
22 and pump apparatus. The time was approximately 10:30am.

23
24 9. After departing from Mr. Skylstad, as described in 8 herein, Mr.
25 Crosswhite and myself returned to the Blue Mountain Credit Union. At
approximately 11:15am Mr. Crosswhite and myself robbed the Credit Union

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1 for over \$15,000.00. Mr. Crosswhite wore latex gloves and the skull
2 mask, brandishing a black Smith & Wesson 9mm handgun. I wore latex
3 gloves, the scream mask, and carried a black Smith & Wesson .380. Both
4 guns belonging to Mr. Crosswhite.

5
6 10. After successful completion of the robbery, as described herein, and
7 returning to the residence of E. 7420 Liberty, Mr. Crosswhite and
8 myself counted out the money taken in the robbery, which exceeded
9 \$15,000.00. Mr. Crosswhite then made plans to meet with the
10 Colombians, to pay of our debt, as described in 3 herein. To the best
11 of my knowledge, nobody else was at the residence at this time. The
12 time was approximately 11:45am

13
14 11. In the afternoon of September 17, 2001, I returned to residence of E.
15 7420 Liberty, as I was unable to reach Mr. Crosswhite by phone. Mr.
16 and Mrs. Skylstad told me that they had not seen Mr. Crosswhite sense
17 that morning. I then invited Mr. Skylstad to go to the Casino with me,
18 in which he complied. Because Mrs. Skylstad seemed upset at Mr.
19 Skylstad going without her, I gave Mrs. Skylstad \$300.00 and told her
20 the money did not come from me.

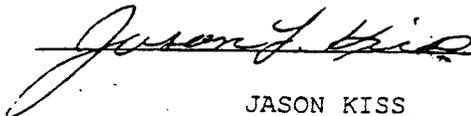
21
22
23 12. Early morning of September 18, 2001, Mr. Sylstad called and learned
24 that while we where at the Casino, Swat-team and detectives raided his
25 residence of E. 7420 Liberty, and had killed his dog. Mr. Skylstad was
told that he was wanted for the robbery as described herein. It was at

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1 this time that I told Mr. Skylstad that Mr. Crosswhite and myself had
2 robbed the credit union for \$15,000.00.

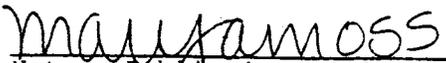
3
4 13. On the evening of September 19, 2001, I returned Mr. Skylstad to his
5 residence of E. 7420 Liberty. After dropping-off Mr. Skylstad, police
6 chased me. I drove down Up-River Drive, turned-off at a school, looped
7 around onto Market Street, turned-off on Liberty and was struck by a
8 truck, but kept going. I then got back on Up-River Drive, and drove
9 back out to the valley; police pursued me the whole way. It was right
10 around Park and Liberty where I lost sight of police. I then abandoned
11 the car I was in, in front of E. 7420 Liberty and proceeded on foot,
12 getting away from police.

13
14 14. Mr. Skylstad did NOT have ANY involvement in the robbery and/or the
15 eluding, as described herein.

16
17 
18 JASON KISS

19
20 SUBSCRIBED AND SWORN TO before me this 14 day of August, 2002.



26
27 
28 Notary Public in and for the
29 STATE OF WASHINGTON
30 Commission expires: 9-1-04

(3) In addition to paragraph 10 on page 4, it is noteworthy that 3015 N. Edgerton is approximately 3 blocks away from E. 7420 Liberty. Mr. Crosswhite had rooms at both places and this is how mistake was made.

(4) After the robbery of the Mountain View credit Union, as described in Appendix B, Crosswhite and I, did NOT go to E. 7420 Liberty, we went to N. Edgerton, and counted the money.

(5) The two guns found in Mr. Crosswhite's drawer at E. 7420 Liberty, the Smith & Wesson 9mm and Smith & Wesson .380, were NOT used in the robbery.

(6) On February 6, 2002, on the record (Verbatim Report page 668), I waived my rights ^(Memoranda) to testify about the Mountain View credit Union robbery, as described in Appendix B. Off the record, Mr. Hay offered me a 10 year "deal" to turn states evidence on Mr. Skylstad. When I informed Mr. Hay that Mr. Skylstad was NOT involved in anyway with the Mountain View Credit Union robbery, as described in Appendix B, Mr. Hay told me that if I testified regarding the Mountain ^{view} robbery, He (Mr. Hay), would ask me questions about other non-relevant, non-charged, crimes I may of been involved in. Mr. Hay said I would have to answer these questions even though they had nothing to do with the Mountain View Credit Union robbery. Mr. Hay said he would personally make sure I got 30 years in prison if I testified regarding the Mountain View Credit union robbery. I told Mr. Hay that under thoughts circumstances I would NOT testify about the credit union robbery. Mr. Hay then informed the court that I invoked my 5th Amendment rights regarding the robbery, as described in Appeddix B.

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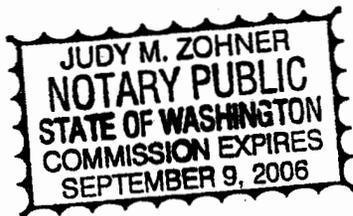
(7) I did not invoke my 5th Amendment right because of any reprobations and/or penalties for my involvement in the Mountain View Credit Union, ^{robbery} and in fact, plead guilty to that (Cause No. 01-1-0313501) charge in Spokane County Superior Court. I plead the 5th, as described in 6 herein, and page 1, paragraph 1 (Appendix B) because I feared additional charges and 30 years imprisonment based on Mr. Hay's threat described in paragraph (6) herein.

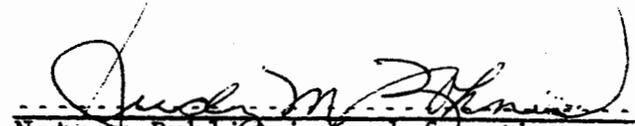
(8) If I would NOT of been threatened with additional non-relevant charges by Mr. Hay, I would have testified and would have explained why Crosswhite and I did the robbery and what happened to all the money therefrom.

SIGNED AND DATED this 19th day of March 2003.


JASON KISS

SUBSCRIBED AND SWORN to before me this 19 day of March 2003.




Notary Public in and for the
State of Washington,
Residing in Walla Walla,
Washington. My commission
expires: 9/9/06

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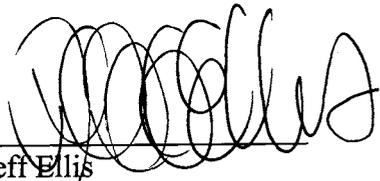
CERTIFICATE OF SERVICE

I, Jeff Ellis certify that on January 4, 2006, I served the party listed below with a copy of *Petitioner's Supplemental Brief* by placing a copy in the mail, postage pre-paid, addressed to:

Kevin Korsmo
Deputy Prosecuting Attorney
Spokane County Prosecutor
1100 W. Mallon Avenue
Spokane, WA 99260

9/1/06 SEATTLE, WA

Date and Place


Jeff Ellis