55418-2

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Form 7. Statement of Additional Grounds for Review
[Rule 10.10(a)]

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

STATE OF WASHINGTON, Respondent,	)	Court of Appeals Cause No. 55418-2-I
v.	)	STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW
WILLIAM JENSEN, Appellant.	)	

I William F. Jensen, 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.

Additional Ground I

See attached and incorporated herein by reference.

Additional Ground II

See attached and incorporate herein by reference

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 MAR 17 PM 12:54

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

Date: 3/14/06 Signature: William F. Jensen

ADDITIONAL GROUND 1

ASSIGNMENT OF ERROR

The police and prosecutor violated Mr. Jensen's Sixth Amendment right to effective representation by counsel, Fourteenth Amendment right to due process of law and Fourth Amendment[1] right to be protected against unreasonable search and seizure.

ISSUE

The Fourth, Sixth and Fourteenth Amendments guarantee an individual protection against unreasonable searches and seizures, effective representation by counsel and due process of law. Where the police and prosecutor engage in misconduct by intruding into a defendant's privileged communications with counsel, intentional spying on the privileged communications, and then presents testimony to the jury regarding it, the defendant is denied a fair trial. Did the prosecutor's acquired knowledge from police spying on defendant's privileged communications with counsel during trial, the prosecutor's proffered police testimony thereof to the jury, and search and seizure of attorney-client protected communications violate Mr. Jensen's Sixth Amendment right to effective representation of counsel, Fourteenth Amendment right to due process of law and Fourth Amendment right to protection against unreasonable searches and seizures?

[1] All references to Fourth Amendment hereinafter shall also refer to and be subjoined with WA State Constitution Article 1 § 7 - Right to Privacy.

FACTS

On June 2, 2004, Mr. Jensen elected to testify in his own defense. 6/2/04RP 100. Mr. Jensen's testimony was, in part, to the jury:

> MR. CONROY: Did you keep any proof of the details that you had given him?
>
> MR. JENSEN: Yes, I did.
>
> MR. CONROY: Do you have that with you today?
>
> MR. JENSEN: I think I left it over there. I may have it.
>
> MS. SNOW: Your honor, I'm going to object. This is information that defense counsel knows full well has never, never been provided to the State. I'm going to ask to mark all the documents that's in the defendant's current hands. . .
>
> MR. CONROY: Actually I think the State has seen this information.

6/2/04RP 94.

The jury was recessed. 6/2/04RP 95. The State demanded discovery pursuant to their objection. 6/2/04RP 96. Defense counsel argued:

> MR. CONROY: . . . These are Mr. Jensen's personal notes. They're not discoverable as the State has suggested in their demand when he's on the stand. He is entitled to make notes with respect to his prospective testimony. It's the State's police reports that are discoverable, not Mr. Jensen's

notes that he would like to follow in the course of his testimony in this case involving four counts of Solicitation to Commit Murder in the First Degree.

Now, I'm not intending to offer any of his notes for admissibility purposes. . . I have all the objections in the world to his notes that he wants to follow in the course of his testimony.

He is entitled to make his own notes and he's entitled to try to be somewhat prepared and to give coherent testimony about a case that's been ongoing for a number of years particularly insofar as this divorce is concerned. I'm trying to walk the parameters of the pretrial rulings and do so carefully. Mr. Jensen also needs to be familiar with those particular rulings so that he can do so carefully. We have had this discussion many times. I want to make certain he doesn't run afoul of this Court's rulings.

. . . We don't have a great deal of discovery, if you will.

We have Mr. Jensen's testimony and he's made that election here this morning and not before and not until now. He is entitled to reserve that particular opinion, if you will, and that particular option until this Court compels him to make that particular selection which in fact is what he has done this morning. Everybody has been wondering

whether or not Mr. Jensen would testify. . .

6/2/04RP 98-100.

THE COURT: . . . Let's have it marked for identification.

MR. CONROY: That's fine. Have it marked.

THE COURT: Defendant's Exhibit 27.

MR. CONROY: I would move to admit it unless the State has an objection.

MS. SNOW: I haven't had a chance to see it. I haven't had a chance to see the notes that the defendant is relying on for his testimony.

6/2/04RP 101.

Citing Evidence Rule 612, the State demanded discovery of **ALL** Mr. Jensen's notes laying on Defense Counsel's table, never taken to the witness stand.

6/2/04RP 102.

THE COURT: Show the exhibit to the State.

MR. CONROY: I have.

MS. SNOW: I have one exhibit. I do not have the notes that Mr. Jensen is relying upon for his testimony.

6/2/04RP 102.

MR. CONROY: . . . The rule says they use the writing to refresh their memory for purposes of testifying. Then it might be discoverable. That hasn't happened, not one time with Mr. Jensen. Not one time has he referred to his notes.

. . . Mr. Jensen hasn't referred to his notes one time to refresh his recollection. Those are his personal notes with respect to the course of events that have been transpiring for about a year or so and he hasn't used them one time to refresh his recollection. We haven't offered them. I believe he is entitled to keep his own notes, particularly if they relate to work product as opposed to something that I would tend to offer, if you will.

. . . If he wants to try to prepare himself for testimony in advance of a trial for which he is on trial for life, then I would hope that he would have the opportunity and the right to do so without necessarily telling the State exactly what it is he is going to say when he testifies because they're no entitled to know that because he has the right to remain silent before he testifies. . .

They don't get to interview Mr. Jensen pretrial. They don't get to interview him before he testifies. They get to interview him while he's on the stand and not a second before. They don't get his notes to find out what it is he is going to say before in fact he testifies and takes the stand. That's an improper construction of the rule.

. . . [H]e has the right to prepare his own notes in advance of testimony in this case if in fact he is going to testify and makes the election

to do so. I can't even envision a set of circumstances that would say so otherwise as a practical matter because I don't think they exist. I think it's called the Fifth Amendment to the United States Constitution and it's contained in those notes.

6/2/04RP 103-105.

Defense Exhibit No. 27 was admitted without further objection. 6/2/04RP 101-102.

The Court ordered Mr. Jensen's notes produced, marked for identification, held for an in-camera inspection. 6/2/04RP 109. The Court ruled:

THE COURT: Any objection or any portion withheld is to be preserved by this Court for review by an appellate court.

THE COURT: . . . They'll be marked under seal and filed under seal not subject to review until as I provide or there is a different ruling by this Court or by the appellate court. Counsel, do you have the notes?

6/2/04RP 109.

MR. CONROY: That's fine, Your Honor. I don't have a copy. I would like to get a copy.

MR. JENSEN: It's the only copy.

THE COURT: . . . The parties proceed at their own peril in terms of how they elect to proceed with the notes produced by Mr. Jensen.

THE COURT: Let me see the notes, counsel. 6/2/04RP 110.

Defense counsel handed Mr. Jensen's notes to the Court. 6/2/04RP 110. These notes were marked as Defense Exhibit No. 26; 6/2/04RP 157, Defense Exhibit No. 27; 6/2/04RP 101; and Defense Exhibit No. 28; 6/2/04RP 111.

Then, police detective [Stevens] informed the prosecutor and Court:

> MS. SNOW: Your honor, there appear to be a number of notes that are still remaining on counsel's table that our detective indicates were originally on top of that stack.
>
> MR. CONROY: Your Honor, these clearly go to work product. Clearly. Excuse me, detective.
>
> MR. JENSEN: I'm just saying -- [Objecting to seizure of his work product notes]
>
> MR. CONROY: Excuse me, please.
>
> THE COURT: Counsel for the parties, I have already indicated what I'm going to allow and not allow. Please stop this from now --
>
> MR. JENSEN: I apologize, Your Honor.
>
> MR. CONROY: It's clearly work product. I can show it to the Court. This basically relates to conversations we have had and what it is he wants me to address or not address. I have grave concerns about disclosure of any of this.
>
> THE COURT: The Court will direct the bailiff to make

a copy of all the materials that have been presented to this Court and a copy will be provided to Mr. Conroy. The copy that is being marked right now will be marked as Exhibit No. 28 for the defense. It will be treated as one set of notes. They'll be subject to an in-camera review by the Court.

MR. CONROY: The Court is going to prepare a copy for me?

THE COURT: You'll get a copy, counsel. Now, let me see the next document that you're referring to.

MR. CONROY: These are clearly work product.

THE COURT: Counsel, the Court will rule as follows: These will be marked for identification as Exhibit 29 for the defense. The Court's review of these documents confirm that what is contained in these documents do constitute work product. They will not be subject to disclosure. They're not produced pursuant to Evidentiary Rule 612.

As there's no basis for this Court to conclude that these writings were used to refresh the witness' memory, I think counsel's representation to the Court when she first noted where these materials were still at counsel table when Mr. Jensen took the witness stand, in that regard they were not used for purposes of refreshing his memory, at least there's been no representation to the Court in that context.

Nonetheless, out of abundance of caution these

will be marked Exhibit 28. A copy will be made. That copy will be returned back to counsel, but the original will remain filed under seal with this Court.

Those notes which are now marked for identification as Exhibit No. 29 are not subject to discovery. The Court is confirming that they're work product. Even if they were taken by the witness they still constitute work product.

6/2/04RP 110-112.

The Court Clerk sealed the original copies of Mr. Jensen's notes. 6/2/04RP 151.

[**NOTE:** The Court recessed, not specifically ordering Defense Exhibit **No. 29** copied or returned to the defense.]

The Court indicated Defense Exhibit No. 28 **only** (**not** Defense Exhibit No. 29) was copied and provided the defense. 6/2/04RP 158. The trial Court's report of proceedings is void of any record the Court provided defense a copy of Defense Exhibit No. 29.

The Court identified and clarified Defense Exhibit No's. 26-29. 6/2/04RP 157-158.

Defense Exhibit No. 29 contained summarized communications between Mr. Jensen and his attorney, communications between the attorney representing Mr. Jensen, and trial strategy and tactics. Defense Exhibit No. 29.

The Court retained possession of Mr. Jensen's notes

during his resumed testimony. 6/2/04RP 156.

Without having any copy of Defense Exhibit No. 29 since the Court seized the original, Mr. Jensen was compelled to continue and finish his testimony on June 2, 2004 and June 3, 2004 when the jury was told:

> MR. CONROY: It might be an appropriate time now to take a recess. I would like to briefly confer with my client. I think that's difficult logistically.
>
> MS. SNOW: I don't think that's appropriate at this time. He's had plenty of opportunity to confer with his client. He doesn't get to coach him through --
>
> MR. CONROY: I object to that particular assessment of the circumstances.

6/3/04RP 96.

Present in the courtroom most of the time, Detective Stevens spied on defendant's attorney-client privileged and protected notes and documents on defense table, and just before closing arguments told the jury:

> MS. BRENNEMAN: You've stayed during the prosecution of most of this case?
>
> DET. STEVENS: I have.
>
> MS. BRENNEMAN: Drawing your attention to your observations in the case, did you have opportunity to observe the defendant's actions while seated at counsel table?
>
> DET. STEVENS: I had.
>
> MS. BRENNEMAN: Specifically have you seen him

writing?

DET. STEVENS: I have.

MS. BRENNEMAN: And in conjunction with his writing what was he writing on?

DET. STEVENS: He was writing on a, what I call a legal tablet with wide pages to it with a pen, like a table, like he's doing right now.

MS. BRENNEMAN: And did he have anything in front of him?

DET. STEVENS: He did.

MS. BRENNEMAN: What did he have in front of him?

DET. STEVENS: I saw when he was writing he had a copy of the transcription of the conversation we had on July 26th as well as a copy of my typed three-page statement from our meeting on July 24th.

MS. BRENNEMAN: You made no attempt to see what he was writing?

DET. STEVENS: Not on the pad, I did not.

6/3/04RP 103-104.

On recross examination by defense counsel, Detective Stevens told the jury:

MR. CONROY: Another question very quickly. Is it uncommon for people who are represented by counsel to have paper and pens at their counsel table?

DET. STEVENS: I wouldn't know about uncommon because normally the kinds of cases I come to they don't. I'll say it is rare for me to observe defendants

with paper and pen at counsel table.

6/3/04RP 115-116.

At the same time, Det. Stevens gave contradictory and rebuttal testimony to the jury.[2]

ARGUMENT

1. THE POLICE AND PROSECUTOR'S INTRUSION INTO PRIVATE ATTORNEY-CLIENT COMMUNICATIONS DURING TRIAL INFRINGED ON MR. JENSEN'S DUE PROCESS RIGHT TO A FAIR TRIAL

a. Mr. Jensen had a constitutionally protected right to effective representation of counsel, right to due process of law, right to be protected from unreasonable search and seizure, and a right to a fair trial. The Court held that a police detective's examination of a notepad lying on defense counsel's table during a recess in trial that contained summeries of confidential attorney-client communications violated the defendant's right to the effective assistance of counsel and constituted egregious government conduct warranting dismissal of the prosecution. State v. Granacki, 90 Wn. App. 598 (1998). Detective Steven's misconduct in Mr. Jensen's trial was more egregious. Detective Stevens spied on Mr. Jensen during the entire trial while he sat with his attorney at the defense counsel table. Detective Stevens specifically spied on Mr. Jensen's note-taking and the documents exchanged between him and his attorney.

[2]See Additional Ground for Review No. 2.

While Detective Stevens spied, she intentionally gathered attorney-client privileged communications in detail and informed the prosecutor what she learned. Recalled to the witness stand by the prosecutor, Det. Stevens testified to the jury about Mr. Jensen's note-taking and identified specific documents provided Mr. Jensen by defense counsel during trial.

Moreover, Detective Steven's results of spying on Mr. Jensen and defense counsel during trial were conveyed to the prosecutor, and the prosecutor used that knowledge against Mr. Jensen in presenting last minute testimony to the jury to impugn the defense to obtain a conviction. In Granacki, the detective had not communicated what he saw to the deputy proscecutor. Granacki id., at 604. The court in Granacki found the police misconduct alone sufficient to warrant dismissal of the prosecution. Mr. Jensen's case presents even greater egregious police misconduct, with prosecutorial misconduct and improper testimony to the jury.

Det. Steven's high motives and zeal to convict Mr. Jensen after her undercover police operation, continued into the courtroom via her successful interception of specific details and knowledge from spying on Mr. Jensen's private protected attorney-client privileged communications. Those protected communications were conveyed to the prosecutor. Aside from not having been provided to defense as discovery for pre-trial ruling by

the Court on its admissibility before the State presented it to the jury via Det. Steven's testimony, the State used those protected communications in an effort to impugn and disparage Mr. Jensen's ongoing protected attorney-client privileged communications as being some sort of defense misconduct. This prosecutorial misconduct, placing before the jury specific knowledge acquired from police intruding and spying on protected attorney-client communications, in which the spying event spawned during trial in the courtroom nearly one year after the crimes charged, exceeded the prosecutor's role of presenting only the facts of the alleged crime to the jury, the ultimate trier of fact.

The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial

misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. Davenport, 100 Wn.2d at 762.

In addition, because defendants have a Sixth Amendment right to effective representation and assistance of counsel, any improper intrusion thereof by the prosecutor clearly violates those rights. To prevail on a claim of prosecutorial misconduct alone, the defendant must show both improper conduct and resulting prejudice. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245, cert. denied, 518 U.S. 1026 (1996). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." Id.

Such police and prosecutorial misconduct blended to disparage and impugn Mr. Jensen's attorney-client protected privilege is egregious government misconduct of the worst kind. The Supreme Court observed that a

defendant cannot receive effective representation unless he is able to confer with his attorney in private. Granacki id. at 602 (citing State v. Cory, 62 Wn.2d 371, 374, 382 P.2d 1019, 5 A.L.R.3d 1352 (1963). It noted that intrusion by the State into a defendant's privileged communications with counsel violates not only the defendant's right to effective representation by counsel, but his right to be protected against unreasonable searches and to due process of law. Granacki at 602, (citing Cory at 375).

Even "high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of [a] crime and his counsel." Granacki at 602, citing Cory at 374-75 (quoting Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953)). In Granacki, the detective claimed "he had simply seen his name at the bottom of the top page of one of the tablets on the table, looked at his name, and did not read any other notes." Granacki at 600. The Court in Granacki found the detective's testimony not credible. Granacki, at 601. Detective Steven's claim she also didn't read Mr. Jensen's notes is not credible.

b. Detective Steven's testimony to the jury not credible. Det. Steven's testimony is disturbing in light of the facts and physical Defense Exhibits, No's. 26-29, before this Court. Mr. Jensen's notes, Defense Exhibits 26-29, are on separate sheets of paper, and "not on the pad" as Det. Steven's testimony carefully qualifies. Mr.

Jensen submits, Det. Steven's reply indicates a certain degree of evasiveness.

Mr. Jensen requests this Court take judicial notice of Det. Steven's incredulous testimony, claiming it's rare to see defendants with paper and pen at defense counsel table during trial. Notepads and pens, often provided defendants by counsel during trial, are frequently used for attorney-client privileged communications, writing down questions, thought and ideas regarding their defense and attorney-client interaction while at defense counsel's table. Trial attorneys often prefer clients writing down communications for sharing at the appropriate moment to avoid distracting and interrupting counsel during trial.

Det. Stevens contradicted and rebutted her testimony to the jury at the same time, just before closing arguments.[3] Det. Stevens also told the jury Mr. Jensen was taking notes "like he's doing right now" and had a copy of the "transcript of the conversation we had on July 26th as well as a copy of my typed three-page statement from our meeting on July 24th". These documents contained facts necessary to impeach Det. Steven's rebutted testimony. If the spying and intrusion into Mr. Jensen's protected attorney-client communications, testimony thereof to the jury maligning defense, was intentional distraction to the jury while also impeding

[3]See Additional Ground for Review No. 2.

contemporaneous defense efforts searching these documents for facts therein to impeach Det. Steven's last minute contradictory, rebutted testimony, this Court should take notice and find such government misconduct most reprehensible, even exceeding traditional bounds defining gross miscarriage of justice. Regardless, Det. Steven's testimony was, without argument, not credible.

c. Mr. Jensen's protected right against unreasonable search and seizure of attorney-client privileged communications resulted in denial of effective assistance of counsel. On June 2, 2004, the trial Court seized Defense Exhibit No. 29, Mr. Jensen's private attorney-client protected work product notes. The trial record of proceedings thereafter is void of any indication that a copy, or the original, of Defense Exhibit No. 29 was ever provided the defense. Defense Exhibit No. 29 is distinguished from Defense Exhibit No. 28, which the Court did provide copies to defense. The record is clear the original of Defense Exhibit No. 29 was Mr. Jensen's only copy, the Court seized and sealed it. For the remainder of that trial day and all the next trial day, June 3, 2004, Mr. Jensen was denied the effective assistance of counsel by being deprived of all his trial preparation work product notes, which included all constitutionally protected attorney-client privileged communications regarding trial strategy and tactics. Mr. Jensen's testimony during both those days was critical to

his defense.

d. The actual prejudice to Mr. Jensen's right to counsel can not be isolated. Normally misconduct does not require dismissal absent actual prejudice to the defendant. Granacki, at 604 (citing, e.g., State v. Koerber, 85 Wn.App 1, 931 P.2d 904 (1996)). Det. Stevens conveyed knowledge to the prosecutor obtained from spying on Mr. Jensen's and defense counsel's privileged communications during trial, and testimony thereof to the jury, was the worst kind of prejudice imaginable to a defendant and can never be isolated. As the Cory court noted, there is no way to isolate the prejudice resulting from such an intrusion. Granacki, at 604 (citing Cory, at 377.

e. The issue may be raised in spite of the failure of trial counsel to submit the issue to the trial court, which preserved it for appellate review. The trial Court preserved this issue for appellate court review. 6/2/04RP 109. Then forewarned, "The parties proceed at their own peril in terms of how they elect to proceed with the notes produced by Mr. Jensen". 6/2/04RP 110. As such, Mr. Jensen submits he may raise the Fourth, Sixth and Fourteenth Amendment violations on appeal as it affects a manifest error affecting a constitutional right under RAP 2.5(a).

RAP 2.5(a) allows issues concerning manifest errors which affect a constitutional right to be raised for the

first time on appeal.

> In normal usage, "manifest" means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. "Affecting" means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient.

State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992).

> Under Lynn, an alleged error is manifest only if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record. To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding.

State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

Here the errors of the police and prosecutor intruding into the defense's privileged attorney-client communications, and then presenting evidence thereof to the jury, was concrete detriment to Mr. Jensen's Fourth, Sixth and Fourteenth Amendment rights to effective representation by counsel, due process of law, right to a fair trial, and protection from unreasonable searches and

seizures. As argued, the errors in Mr. Jensen's matter are more egregious from the error in Granacki which affirmed dismissal of the case with prejudice. Thus, under RAP 2.5(a), the error is manifest and may be raised for the first time on appeal.

f. This Court must reverse Mr. Jensen's conviction and dismiss with prejudice. Where the State intrudes on a defendant's right to effective representation by intercepting privileged communications between an attorney and his client, the only adequate remedy is dismissal. Granacki at 602-03 (quoting Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 84 L.Ed. 680 (1942)("No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel."))

There is also more than one purpose for dismissing a case where the State violates a defendant's right to communicate privately with his or her attorney. The dismissal not only affords the defendant an adequate remedy but discourages "the odious practice of eavesdropping on privileged communication between attorney and client." Granacki, at 603 (citing Cory, at 378.)

Likewise, it discourages unreasonable seizures aided by police of these communications violating a defendant's right to privacy under Washington State Constitution Article 1 § 7.

ADDITIONAL GROUND 2

ASSIGNMENT OF ERROR

The police and prosecutor violated Mr. Jensen's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process of law by presenting false, rebutted testimony to the jury, which the prosecutor allowed to stand uncorrected.

ISSUE

The Sixth and Fourteenth Amendments guarantee an individual a fair trial before an impartial jury. Where the State engages in misconduct which seeks a verdict based on false police testimony, left uncorrected by the prosecutor, the defendant is denied a fair trial. Did Det. Steven's rebuttal testimony to the jury, just before closing arguments, changing the future date(s) the crime charged was allegedly to be committed, and the prosecutor allowing it to stand uncorrected, deny Mr. Jensen a fair trial?

FACTS

Det. Steven's written police witness statement describing her July 24, 2003 meeting with Mr. Jensen was marked as State's Exhibit No. 22. 5/26/04RP 86. Det. Stevens referred to this statement in her testimony to the jury, quoting therefrom specific conversation she had with Mr. Jensen. 5/26/04RP 87-93. In regards to the date(s) which the crime charged was to be committed, Det. Stevens told the jury:

MS. SNOW: Did he [Mr. Jensen] have something else?

DET. STEVENS: He did. He stated, yeah, tell him it has to be done by the 1st because my trial starts the 4th or 5th of August.

5/26/04RP 90.

MS. SNOW: He told you my trial starts -- and what was it?

DET. STEVENS: My trial starts the 4th or 5th of August.

MS. SNOW: What did you take that comment to mean, that it had to be done by the 1st, my trial starts the 4th or 5th of August?

DET. STEVENS: That he wanted the murders to be completed before his trial date started.

MS. SNOW: Did you repeat his message?

DET. STEVENS: I did. I again ticked them off one thing at a time on my fingers. I started back at the beginning.

5/26/04RP 91.

MS. SNOW: Did you add that to the message and tick through the points again that he wanted communicated to "G"?

DET. STEVENS: I did.

MS. SNOW: Part of your reason in doing that was to memorize exactly what the defendant had said?

DET. STEVENS: It was.

5/26/04RP 92.

MS. SNOW: Did you repeat the message again?

DET. STEVENS: I did.

5/26/04RP 92.

Det. Steven's witness statement, State's Exhibit No. 22, reads in part:

> Inmate Jensen replied, 'Yeah. Tell him it has to be done by the first because my trial starts the fourth or fifth of August.' I repeated the message stating, '. . . it has to be done by the first because your trial starts the fourth or fifth of August . . .'"
>
> "'. . . it has to be done by the first because your trial starts the fourth or fifth of August . . . '"
>
> "'. . . it has to be done by the first because your trial starts the fourth or fifth of August . . . '"
>
> "'. . . it has to be done by the first because your trial starts the 4th or 5th of August . . . '"

State's Exhibit 22, pages 2-3.

The undercover wiretap recording between Det. Stevens and Mr. Jensen transpired on July 26, 2003, was admitted as State's Exhibit No. 16. 5/26/04RP 104. The transcript of this recording was identified as State's Exhibit No. 23 and each juror was allowed a copy for use in the courtroom only, not the jury room. 5/26/04RP 105. The recording was played to the jury. 5/26/04RP 106. All conversation regarding these date(s) are quoted below from the transcript of this recording and read:

DET. STEVENS: So, he told me he thinks he's out after you start trial, I guess the 4th must be on

Monday. I don't know the damn date on the calendar.

State's Exhibit No. 23, page 2 of 34.

DET. STEVENS: Okay. Well, then, if we're, if we're going to do this without him, 'cause he ain't out in time, I mean he's still insisting that this has to be done before you go to court Monday.

MR. JENSEN: Yeah.

DET. STEVENS: Okay, so . . .

MR. JENSEN: . . . I know that they're getting together to come to court Monday morning, the 28th, you know, just to come down and do a pre-trial, you know, pre-trial . . .

DET. STEVENS: What's the 28th, this coming . . .

MR. JENSEN: Monday.

DET. STEVENS: . . . Monday?

MR. JENSEN: Yeah.

DET. STEVENS: Okay.

MR. JENSEN: So, I know they're getting together, you see what I'm saying?

State's Exhibit No. 23, page 5 of 34.

DET. STEVENS: Alright, what time is court Monday?

MR. JENSEN: Well, I'm guessing somewhere around nine.

State's Exhibit No. 23, page 6 of 34.

DET. STEVENS: . . . And, the only time you think they will be absolutely together is Monday before court?

MR. JENSEN: Yeah.

DET. STEVENS: That's, well, that after, this Monday?

MR. JENSEN: Yeah.

State's Exhibit No. 23, page 13 of 34.

DET. STEVENS: They're coming this coming Monday?

MR. JENSEN: Yeah.

DET. STEVENS: For something for your?

MR. JENSEN: Right, and, and she's, and she's only going to testify Monday and then the rest of the week nothing and then the whole trial starts up, jury selection on the, on the following Monday, I think.

DET. STEVENS: Alright. So, we need to find out a way, either we can get to them before the weekend or . . .

State's Exhibit No. 23, page 14 of 34.

DET. STEVENS: . . . If we do this by the 1st, I don't want to be here.

State's Exhibit No. 23, page 23 of 34.

DET. STEVENS: Tell me what you want me to do. I'm not going to talk to you before the 1st, you understand that? You don't have a visiting day.

State's Exhibit No. 23, page 26 of 34.

DET. STEVENS: I'm not, I, I don't, you won't see me anymore after next Thursday. If we, if we can get this, if we can figure out a way to get this done by . . .

State's Exhibit No. 23, page 27 of 34.

DET. STEVENS: . . . We gotta lot of shit to do in three days.

DET. STEVENS: You might see me Thursday.

State's Exhibit No. 23, page 30 of 34.

Det. Steven's again told the jury:

MR. CONROY: Actually, Detective, the question was whether he agreed to give you any front money before the murders were committed, not sometime thereafter?

DET. STEVENS: Counselor, I would say to you my impression of his agreement for the money is the date was moved up as to when the people had to be murdered and that was the first of the month because of impending hearings according to him. So he couldn't give us the money because the 1st comes before the 14th. That was my impression of what he was saying to me.

5/26/04RP 135.

Det. Steven's next testimony, regarding the murder date(s), to the jury:

MR. CONROY: What was the finalized day wherein which this purported murder was supposed to occur?

DET. STEVENS: When I left the jail I was told that we had to kill his wife and his daughter and now his son and his sister-in-law before he was to appear in court on the 28th for his hearing on what he was incarcerated for.

MR. CONROY: Did you say several times this was August 4th?

DET. STEVENS: I did not. I don't know even know what the date August the 4th is. He had a court date on Monday. I went to see him on a Saturday. At the end of our conversation Saturday I had been told by him that I had to have the murders committed before he went to court that Monday morning.

6/3/04RP 115-116.

ARGUMENT

1. DET. STEVEN'S REBUTTED, FALSE TESTIMONY DURING TRIAL VIOLATED MR. JENSEN'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

a. Det. Stevens gave rebutted, false testimony to the jury. Det. Stevens testified to the jury repeatedly Mr. Jensen told her his trial started August 4th or 5th, therefore the murders needed to be completed by August 1st. Det. Steven's written statement, State's Exhibit No. 22, prepared after meeting Mr. Jensen on July 24, 2003, re-confirms these specific dates. Det. Steven's testimony to the jury, regarding the second meeting with Mr. Jensen on July 26, 2003, re-confirmed the "first of the month". 5/26/04RP 135. After presentation of the defense, which arguably raised doubt regarding Mr. Jensen's intent to go forward with the crimes charged, the State recalled Det. Stevens to testify to the jury.

Det. Stevens stated Mr. Jensen told her to commit the murders "before he was to appear in court the 28th" and "At the end of our conversation Saturday I had been

told by him that I had to have the murders committed before he went to court that Monday morning." 6/3/04RP 115-116. When defense counsel questioned Det. Stevens about the date, August 4, which she had repeatedly testified to the jury about, she stated, "I did not. I don't know even know what the date August 4th is." 6/3/04RP 116. Mr. Jensen submits Det. Stevens egregious and false testimony was most likely a result of high motives and zeal for law enforcement, assuring conviction after her undercover operation. Such motivation is all too often prevalent to deceive a jury.

"Lying is stating something to be true when the speaker knows it is false. As the word 'lie' was used by the prosecutor, it meant giving testimony which the officer witness knew to be false for the purpose of deceiving the jury." State v. Salvador Casteneda-Perez, 61 Wn.App. 354, 358, 810 P.2d 74, 77 (1990). Here, Det. Stevens lied and presented rebutted, false testimony to the jury for the purpose of obtaining a conviction. Rarely does an appeals court have proof of a police officer presenting false testimony, as they do in this matter, to make a proper and reasonable determination that false testimony was truly used to obtain conviction. The entire conversation between Det. Stevens and Mr. Jensen was recorded. Det. Steven's testimony to the jury was:

> "At the end of our conversation Saturday I had been told by him that I had to have the murders

committed before he went to court that Monday morning" "on the 28th".

6/3/04RP 116. See also full transcript, State's Exhibit No. 23.

This is simply not true upon reading the entire transcript and reviewing all of Det. Steven's previous testimony. This false testimony to the jury, just before closing arguments, by Det. Stevens was highly prejudicial to Mr. Jensen.

b. Mr. Jensen's defense embodied his lack of intent to commit the crime charged. "[C]riminal solicitation under RCW 9A.28.030 also requires proof the solicitor intended the crime be committed. See WPIC 105.02 and notes thereto." State v. Duke, 77 Wn.App. 532, 535, 892 P.2d 120 (1995). When Det. Stevens lied to the jury just before closing arguments about the date(s), making the crime charged appear it was to be committed sooner versus later, it is reasonable to conclude such testimony influenced the jury in regards to Mr. Jensen's intent and contributed to the verdict.

c. Det. Steven's false testimony resulted in further egregious misconduct by the State, "allowing false testimony to stand uncorrected". Giglio v. United States, 405 U.S. 150, _____ (1972). The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice

is done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. Davenport, 100 Wn.2d at 762.

To prevail on a claim of prosecutorial misconduct alone, the defendant must show both improper conduct and resulting prejudice. State v. Pirtle, 127 Wn.2d 628, 672,

904 P.2d 245, cert. denied, 518 U.S. 1026 (1996). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." Id. When a prosecutor's misconduct also affects a separate constitutional right, they are subject to the stricter standard of constitutional harmless error. State v. Contreras, 57 Wn.App. 471, 473, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014 (1990).

d. The issue may be raised in spite of the failure of trial counsel to submit the issue to the trial court. This was the last testimony presented during trial, moments before closing arguments, and directly related to other government misconduct.[1] As such, Mr. Jensen's fair trial rights, contemporaneously violated by the State, impeded defense counsel's ability to properly raise this issue before close of trial. As such, Mr. Jensen submits he may raise the Sixth and Fourteenth Amendment violations on appeal as it affects a manifest error affecting a constitutional right under RAP 2.5(a).

RAP 2.5(a) allows issues concerning manifest errors which affect a constitutional right to be raised for the first time on appeal.

> In normal usage, "manifest" means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. "Affecting" means having an impact or impinging on, in short, to make a difference. A purely formalistic error

[1]See Additional Ground for Review No. 1.

is insufficient.

State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992).

> Under Lynn, an alleged error is manifest only if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record. To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding.

State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

Here the errors of false police testimony and the prosecutor allowing it to stand uncorrected to the jury was concrete detriment to Mr. Jensen's Sixth and Fourteenth Amendment rights to present a defense, due process of law and right to a fair trial by an impartial jury. As argued, the errors in Mr. Jensen's matter are egregious government misconduct which had a reasonable likelihood of affecting the jury verdict, therefore the errors were manifest. Thus, under RAP 2.5(a), the error is manifest and may be raised for the first time on appeal.

e. The false police testimony left uncorrected by the prosecoutor infringed upon Mr. Jensen's Sixth Amendment right to present a defense and Fourteenth

Amendment right to a fair trial, and must result in the reversal of his convictions. This Court must reverse Mr. Jensen's conviction and remand for a new trial unless this Court concludes the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn.App. 672, 676, 981 P.2d 6 (1999). Det. Stevens false testimony was material in proving the element of intent to the jury, and contradicted the entire defense presentation that reasonable doubt on the element of intent existed. Therefore, Det. Steven's false testimony was material and the government "knowingly used perjured testimony, or failed to correct what was subsequently learned to be false testimony." Giglio v. United States, 405 U.S. 150, _____ (1972). Here, Det. Steven's false testimony and the prosecutor failing to correct it is sufficient to require a reversal. As a consequence, the false police testimony and misconduct by the prosecutor cannot be deemed harmless and must result in the reversal of Mr. Jensen's convictions.

ADDITIONAL GROUND 3

ASSIGNMENT OF ERROR

The police detective's opinion and impression testimony of defendant's guilt and conduct, solicited by the prosecutor, violated Mr. Jensen's Sixth and Fourteenth Amendment right to a fair trial and due process of law.

ISSUE

The Sixth and Fourteenth Amendments guarantee an individual a fair trial before an impartial jury. Where a prosecutor engages in misconduct which seeks a verdict based on testimony of a police officer's opinion and impression of defendant's guilt and conduct, the defendant is denied a fair trial. Did the prosecutors solicitation of and Detective Steiger's opinion and impression testimony inferring and maligning defendant's guilt and conduct to the jury deny Mr. Jensen a fair trial?

FACTS

On cross-examination, State's witness police Detective Steiger testified regarding Mr. Jensen's arrest and told the jury:

> MS. SNOW: What did you say to Mr. Jensen when you had contact with him on the 28th?
>
> DET. STEIGER: I told him that he was in an unusual predicament, and in fact I said let me think of a word to describe it. Oh, yeah, you're fucked.

MS. SNOW: Detective Steiger, what did you mean when you said that to Mr. Jensen, oh, yeah, you're fucked?

DET. STEIGER: I meant that he had basically gone too far and we had the goods on him.

MS. SNOW: And did you say anything else to Mr. Jensen at the time you had contact with him on the 28th?

DET. STEIGER: Yes, I did.

MS. SNOW: What did you say?

DET. STEIGER: I said that it angered me that he was a former police officer because that's what everyone hears on the news, former police officer tries to kill family. I was insulted as a police officer.

MS. SNOW: Are you still?

DET. STEIGER: I am.

MR. CONROY: I would object to the last particular --

THE COURT: Sustained. The jury is instructed to disregard the last comment by the witness. It will not be a part of your deliberative process.

6/2/04RP 43-44.

On recross examination, Detective Steiger told the jury:

MS. SNOW: When you told the defendant he was a piece of shit, was that based on actions, the acts the defendant had committed?

DET. STEIGER: Right, and combined with the fact that

now all I would hear was a former police officer had his family killed in the news, not just a man had his family killed.

6/2/04RP 47.

ARGUMENT

1. DETECTIVE STEIGER'S OPINIONS AND IMPRESSIONS TESTIMONY, SOLICITED BY THE PROSECUTOR, REGARDING DEFENDANT'S CONDUCT AND GUILT VIOLATED MR. JENSEN'S DUE PROCESS RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY

a. Mr. Jensen had a constitutionally protected right to a fair trial before an impartial jury. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed

by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. Davenport, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct alone, the defendant must show both improper conduct and resulting prejudice. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245, cert. denied, 518 U.S. 1026 (1996). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." Id.

b. The prosecutor solicited and police gave opinions and impressions testimony of Mr. Jensen's conduct and guilt. The prosecutor and police maligned defendant, telling the jury via use of expletive, profane language their opinions and impressions of defendant's guilt referring to having the goods on him and the news reports defendant killed his family were impressionable. The prosecutor's questions and Det. Steiger's testimony imputed

guilt to Mr. Jensen. No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or by inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such opinions violate the defendant's right to a trial by an impartial jury and his right to have the jury make an independent evaluation of the facts. State v. Wilber, 55 Wn.App. 294, 297, 777 P.2d 36 (1989) (citing State v. Carlin, 40 Wn.App. 698, 700-01, 700 P.2d 323 (1985)). "A police officer's impression of a defendant's conduct can constitute an improper opinion as to the defendant's guilt or innocence." State v. Farr-Lenzini, 93 Wn.App. 453, 464 (1999) (citing State v. Sargeant, 40 Wn.App. 340, 698 P.2d 598 (1985), rev. on other grounds, 111 Wn.2d 641 (1988).

c. The errors were not harmless. The standard is the "contribution" and "overwhelming evidence" test. Farr-Lenzini at 465 (citing State v. Johnson, 100 Wn.2d 607, 621, 674 P.2d 145 (1983), overruled on other grounds in State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985)). Det. Steiger's testimony addressed the critical core issue as well as Mr. Jensen's credibility and it cannot be said without a reasonable doubt that it did not contribute to the verdict. "Particularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair trial." Farr-Lenzini at 465 (citing Carlin, id., at 703;

State v. Haga, 8 Wn.App. 481, 492, 507 P.2d 159 (1973).

d. The issue may be raised in spite of the failure of trial counsel to submit the issue to the trial court. As the prosecutor began soliciting these improper opinions and impressions testimony, Mr. Jensen's counsel objected and the trial Court sustained with a jury instruction to disregard the last comment and not let it be a part of their deliberative process. 6/2/04RP 44. Moments later the prosecutor again solicited Det. Steiger's opinion as to Mr. Jensen's guilt and news media impressions in which defense counsel failed to object again. 6/2/04RP 47. Nevertheless, Mr. Jensen submits he may raise the Sixth and Fourteenth Amendment violations on appeal as it affects a manifest error affecting a constitutional right under RAP 2.5(a).

RAP 2.5(a) allows issues concerning manifest errors which affect a constitutional right to be raised for the first time on appeal.

> In normal usage, "manifest" means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. "Affecting" means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient.

State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992).

> Under Lynn, an alleged error is manifest only if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument

> that is supported by the record. To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding.

State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

Here the errors of the prosecutor's comments and Det. Steiger's opinions and impressions testimony to the jury was concrete detriment to Mr. Jensen's Sixth and Fourteenth Amendment rights to present a defense, due process of law and right to a fair trial by an impartial jury. The errors in Mr. Jensen's matter are more egregious than the conduct in State v. Jones, 117 Wn.App. 89 (2003), reversing the conviction because the prosecutor allowed a police officer's testimony indicating he did not believe defendant. Thus, under RAP 2.5(a), the error is manifest and may be raised for the first time on appeal.

e. The police opinion and impression testimony solicited by the prosecutor infringed upon Mr. Jensen's Sixth Amendment right to present a defense and Fourteenth Amendment right to a fair trial, and must result in the reversal of his convictions. When a prosecutor's misconduct also affects a separate constitutional right, they are subject to the stricter standard of constitutional harmless error. State v. Contreras, 57 Wn.App. 471, 473, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014 (1990), quoting

State v. Traweek, 43 Wn.App. 99, 107-08, 715 P.2d 1148, rev. denied 106 Wn.2d 1007 (1986). This Court must reverse Mr. Jensen's conviction and remand for a new trial unless this Court concludes the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn.App. 672, 676, 981 P.2d 6 (1999). Here, the prosecutor's misconduct promoting and fueling the police opinion and impressions testimony that imputed guilt maligning Mr. Jensen is sufficient to require a reversal.

This Court found a prosecutor allowing a police officer to testify that he did not believe defendant was reversible misconduct. State v. Jones, 117 Wn.App. 89 (2003). Here, the solicited police testimony goes beyond not believing Mr. Jensen but imputes guilt forcefully via use of expletive language by both the prosecutor and detective to the jury.

As a consequence, the misconduct by the prosecutor, and resulting police opinion and impressions testimony imputing guilt and maligning defendant's conduct, cannot be harmless and must result in the reversal of Mr. Jensen's conviction.

ADDITIONAL GROUND 4

On December 10, 2004, Mr. Jensen presented to the trial Court a Motion for Order Re: Dismiss Information and Prosecution of All Charges with supporting affidavits and exhibits. 12/10/04RP 28-29. The Court reviewed the Motion. 12/10/04RP 36. The Court considered, denied and dismissed the Motion. 12/10/04RP 37-38. As part of Mr. Jensen's direct appeal he appeals the trial court's denial and dismissal of this Motion and raises all issues therein.

Attached to this Motion is a notarized affidavit by defendant attesting to the fact when he was arrested on the underlying and pending charges to this case he asserted and invoked his right to remain silent and requested an attorney. See affidavit "Arrest History of William F. Jensen, dated and notarized 9/26/04, page 1 of 9. The specific nature of this underlying charge was that Mr. Jensen threatened Ms. Jensen by saying:

> I'll tell you the same thing I told my attorney. If I go to jail you're going to your grave.

5/18/04RP 89.

Trial counsel argued these charges were related to this case. 5/18/04RP 41. Trial counsel objected to the State being allowed to have a prosecutor testify about the pending charges. 5/17/04RP 80. The State argued that the pending charges showed Mr. Jensen's intent and motive and

were "highly relevant" to this case. 5/17/04RP 61. The Court ruled these charges could be used in this case to establish res gestae, intent and motive. 5/18/04RP 73.

Mr. Jensen was in jail on this charge when Det. Stevens, posing undercover, surreptitiously questioned Mr. Jensen about his pending charges. 5/17/04RP 102, 5/26/04RP 61. Ms. Jensen was the victim in underlying charge. 5/18/04RP 9, 11-12, 5/24/04RP 120. Specifically:

> DET. STEVENS: You in here for messing with her? What you in jail for, I don't know?
>
> MR. JENSEN: Oh, fel, telephone harassment.
>
> DET. STEVENS: Oh. Okay.
>
> MR. JENSEN: Yeah.

State's Exhibit No. 23, page 13 of 34 (wiretap transcript).

Det. Stevens obtained numerous incriminating statements from Mr. Jensen regarding his <u>pending charges</u> in addition to the crime for which he now stands convicted. State's Exhibits No 22 and 23 (plus considerable testimony on the record by Det. Stevens). 5/26/04RP 87-93, 112-136.

Mr. Jensen raises the issue herein that since he had previously asserted and invoked his United States Constitutional Fifth Amendment and Washington State Constitution Article I, Section 9 right to remain silent privilege to be free from self-incrimination on January 21, 2003 for the related, underlying pending charges, then Det. Steven's solicitation and obtaining incriminating statements from Mr. Jensen on July 24 and July 26, 2003 regarding those charges, the former used in support of

obtaining a judicially authorized wiretap used to record the latter conversation between Det. Stevens and Mr. Jensen, that all incriminating statements obtained from both meetings should be suppressed as violations of Mr. Jensen's previously asserted and invoked constitutional privilege to remain silent.

Defense counsel made repeated objections at trial as to the admissibility of Mr. Jensen's incriminating statements made to Det. Stevens. 5/18/04RP 40-41, 5/26/04RP 69-70, 111.

The State conceded:

> MS. BRENNEMAN: Had the police sent an undercover officer to **attempt** to get additional information about the crimes for which Mr. Jensen were incarcerated that would have been inappropriate and the court would be in a position to make that right . . . (Emphasis added).

5/18/04RP 48.

The State misled the trial Court by further stating:

MS. BRENNEMAN: [B]ut that was not the case in this case.

5/18/04RP 48.

Apparently, trial counsel failed to realize Det. Stevens directly questioned Mr. Jensen about his pending charges.

In Washington, a defendant's constitutional right to silence applies in both pre- and post-arrest situations. State v. Romero, 113 Wn.App. 779, 786 (2002) (quoting State

v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996). In the post arrest context, it is well-settled that it is a violation for the State to comment upon or otherwise exploit a defendant's exercise of his right to remain silent. Romero id. at 786 (citing Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Fricks, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1978). The right against self-incrimination is liberally construed. Easter at 236 (citing Hoffman v. U.S., 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed 1118 (1951). It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. (citing Doe v. US, 487 U.S. 201, 210-12. The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. The right can be asserted in any investigatory or adjudicatory proceeding. Easter 130 Wn.2d 228, 238 (1996).

ADDITIONAL GROUND 5

A related United States Constitution Fifth Amendment and Washington State Constitution Article 1 § 9 issue is Mr. Jensen being compelled to give evidence against himself on the underlying and related pending charges in this case during trial. See 6/3/04RP 7,11-12,24-25. At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789, (1979); Miranda, 384 U.S. at 461.

ADDITIONAL GROUND 6

Trial counsel objected to and request a mistrial after the State took away use of Mr. Jensen's wheelchair during lunch break and in the middle of his testimony. 6/3/04RP 130-135. Mr. Jensen is physically disabled and requests this Court make judicial exception reviewing this ground by also reviewing Administrative Law Judge Bauer's Social Security Administration Decision, dated 2/19/05 (retroactive to January 2002), regarding Mr. Jensen's disabilities. A copy of this Decision was provided to this Court to obtain defendant's extension of time to file his Statement of Additional Grounds for Review. Mr. Jensen submits that this Court may include it in it's review as an exception to new evidence because it is a judicial decision by a judge.

"[Washington State] 'Section 22, art. 1, of our constitution, declares that, 'In criminal prosecutions the accused shall have the right to appear and defend in person.' The right here declared is to appear with the use of not only his mental but his physical faculties unfettered . . ." State v. Maryott, 6 Wn.App. 96, 99-100, 492 P.2d 239 (1971) (quoting State v. Williams, 18 Wash. 47, 50 P. 580 (1897).

ADDITIONAL GROUND 7

Since the trial court "reinstated all Mr. Jensen's previously submitted motions and denied them in his ruling on December 10, 2004 (12/10/04RP 38) he raises all issues contained in his Motion for New Trial submitted on July 30, 2004.

March 14, 2006

Court of Appeals
State of Washington
Division I
One Union Square
600 University St.
Seattle, WA 98101-4170

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2006 MAR 20 PM 12: 30

RE: State v. William F. Jensen, COA No. 55418-2-I
Supplemental Attachment for Statement of Additional Grounds for Review (Ground No. 8) enclosed

Richard Johnson, Clerk of the Court:

Please find enclosed Additional Ground No. 8, pages 48-53, for attachment to my Statement of Additional Grounds for Review previously mailed to you. My previous mailing included pages 1-47. Please be so kind as to attach the enclosed pages 48-53 to the end of pages 1-47 which you should have by now.

The enclosed pages were accidently not attached to and included in the first mailing.

I also request you accept the over page limit of 50 pages that this represents in my filing, as it is only 2½ pages longer than RAP 10.10 allows and I have formatted all of it double space with RAP wide approved margins.

Thank you in advance for your consideration in this matter.

Very truly yours,

William F. Jensen
DOC 877996
(5-B-16)
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

Enclosure

ADDITIONAL GROUND 8

Mr. Jensen raises ineffective assistance of counsel as an assignment of error and renews his pro se Motion for New Trial filed with the trial court on July 30, 2004. 12/1/04RP 3. Mr. Jensen incorporates herein by reference as if set forth fully that Motion and the Motion for Order Re: Dismiss Information and Prosecution of All Charges with all attachments thereto filed with trial court on 12/10/04 (12/10/04RP 28-29). Mr. Jensen was assigned new counsel - John Hicks for post-trial and sentencing. (Mr. Jensen was not provided a copy of the verbatim report of proceedings regarding this specific trial court hearing but believes the date was July 30, 2004).

Failure to Investigate Competency At Time of Crime, Pending and During Trial

During trial, Mr. Jensen was on a variety of mind-altering and mood altering drugs administered by the jail. 12/1/04RP 4. Mr. Jensen had consistently expressed concern to trial counsel - Mr. Conroy, these medications were having adverse affects on him. 12/1/04RP 4-5. Mr. Hicks confirmed with Mr. Conroy that Mr. Jensen consistently raised issue with the medications adversely affecting him. 12/1/04RP 4. Mr. Jensen, unaware of the serious adverse effects these medications had on him during trial, ceased taking the medications, after trial, on August 25, 2004. 12/1/04RP 8. Mr. Hicks requested leave from the trial Court to further investigate Mr. Jensen's competency to have assisted trial counsel in preparation of

and during trial. 12/1/04RP 4. Mr. Hicks verified Mr. Jensen's medications. 12/1/04RP 4. The trial Court failed to grant sufficient leave (9 days) to investigate this matter and Mr. Hicks so informed the Court. 12/1/04RP 10-11. Mr. Jensen's Motion for Order Re: Dismiss Information and Prosecution of All Charges was filed with the trial court nine days after this hearing. 12/10/04RP 28-29. This Motion consisted of over 200 pages of supporting affidavits and medical records addressing issues of Mr. Jensen's substandard medical care and mismanagement of prescription drugs in jail, for which Mr. Jensen was subjected to not only when the crimes charged occurred but also while pending trial and during trial. (See Motion). While Mr. Jensen has no reference to a trial record regarding Mr. Conroy's assertion the trial court approved his pre-trial motion authorizating public funds for a psychiatrist to examine Mr. Jensen, Mr. Conroy never used those funds for such purpose, nor was Mr. Jensen ever examinied by a psychiatrist (nor a pharmacologist as to the combined effects of all the drugs he was administered by the jail).

Subsection (e) of the Criminal Justice Act, 18 USC § 3006A [18 USCS § 3006A], Congress has provided that indigent defendants shall receive the assistance of all experts "necessary for an adequate defense." See also RCW 10.77.020, 10.77.060 (1983) and State v. Cunningham, 18 Wn.App. 517, 569 P.2d 1211 (1977). Mr. Jensen submits he was denied the effective assistance of counsel by trial

counsel's failure to follow through on retaining a psychiatrist to thoroughly examine these issues. The crime Mr. Jensen stands convicted of in this matter and entire time he awaited trial all occurred while he was being given mind altering and mood altering drugs in addition to narcotic pain relief drugs by the government in jail.

This Court need not look far for case law on this concerning issue. Mr. Jensen's matter is not very distinguishable from the reasoning the Supreme Court granted a new trial in State v. Murphy, 56 Wn.2d 761, 355 P.2d 323 (1960). In Murphy, "the accused was entitled to a new trial, where a showing was made that at the time he testified on his own behalf and admitted committing the murder, he might have been under the influence of certain tranquilizing drugs, which had been administered by a medical trusty, under the supervision of the jail physician, and which tranquilizing drugs, might have caused the accused's attitude and demeanor to become casual, cool and somewhat lackadaisical . . . [this] might well have been their evaluation of the accused's attitude in regard to the crime he had committed."

Failure to Raise Sixth Amendment Violation

Trial counsel failed to raise Sixth Amendment right to counsel, which appellate counsel raised as a Supplement Assignment of Error in Mr. Jensen's amended opening brief. Appellate counsel, arguing grounds for relief, stated "Moreover, Mr. Jensen will have received the ineffective assistance of counsel on appeal if the supplemental

assignments of error and supporting brief are rejected due to counsel's failure to raise the issue." ". . . [T]o ensure Mr. Jensen receives the effective assistance of counsel on appeal, this Court should permit the parties to file supplemental briefing." Motion to File Amended Brief of Appellant, p. 3-4. Simply, trial counsel's failure to raise this issue is sufficient alone to meet the two prong test in Strickland v. Washington, 466 U.S. 668 (1984). First, the attorney's performance fell below standards of reasonableness [was deficient]; and (2) that the deficiency **caused** prejudice to defendant's criminal proceedings.

Pre-trial Ineffectiveness

Mr. Conroy informed the Court he would be out of town for several days. 5/11/04RP 51. Emails were exchanged between the Court and parties during his absence. 5/17/04RP 12-13. Upon return the next weekend, Mr. Conroy learned Monday, Mr. Jensen's pre-trial hearing was set that day. 5/17/04RP 6. Mr. Conroy was ill-prepared for this hearing and made statements to that effect. 5/17/04RP 34, 89-91.

Trial counsel objected to the admissibility of Mr. Jensen's incriminating statements. 5/18/04RP 40-41, 5/26/04RP 69-70, 111. However, trial counsel failed to prepare for, by properly motioning the Court, for a 3.5 hearing regarding Mr. Jensen's incriminating statements. 5/18/04RP 35, 45. Mr. Jensen submits his 17 years in law enforcement with trial experience he's observed and experienced far greater prepared defense attorneys in 3.5 hearings for traffic offenses than he observed and

experienced with trial counsel in this case.

The key case, Illinois v. Perkins 110 S.Ct. 2394, in which the Court relied allowing admissibility of Mr. Jensen's incriminating statements, which included the wiretap recording, was first presented to defense counsel that same day. 5/18/04RP 46, 63. Trial counsel was completely unfamiliar with this case. 5/18/04RP 48-49. The State offered another case, Alexander v. Connecticut, 917 F.2d 747 (2d Cir. 1990), in support of admissibility of Mr. Jensen's incriminating statements. 5/18/04RP 50. The Court reserved ruling until after the lunch hour to rule on the matter. 5/18/04RP 50, 63. Trial counsel returned to Court after lunch claiming to have read Perkins but not "the other one". 5/18/04RP 60. After obtaining a copy of Perkins from the prosecutor, trial counsel stated, "So I think I am prepared to address that". 5/18/04RP 60. The Court then ruled Mr. Jensen's incriminating statements were admissible. 5/18/04RP 63.

Trial Counsel's Personal Conflicts

Mr. Conroy's vacation plans required Mr. Jensen's trial be completed by June 4, 2004. 5/17/04RP 3. Therefore, it is reasonable to conclude that Mr. Conroy's conflict contributed toward trial counsel's deficient performance and thoroughness presenting Mr. Jensen's defense, which began on June 2, 2004. 6/2/03RP 63-64. See also Mr. Jensen's pro se Motions.

Failure to Object to Evidence Suppressed in Pre-Trial Rulings

The Court granted defense' motion prohibiting the State from offering evidence and testimony that Ms. Jensen sought and obtained an order for protection. 5/18/04RP 23-24. Defense counsel failed to object when the State offered this evidence in their case-in-chief via Ms. Russell's testimony. 5/24/04RP 57, Lines 9-22.

Embracement of All Other Trial Counsel Errors

Mr. Jensen requests this Court take judicial notice on other issues raised which support this assignment of error in whole or part, including but not limited to all other assignments of error raised in this matter.

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

STATE OF WASHINGTON,) Respondent,) WILLIAM F. JENSEN,) Appellant.	NO. 55418-2-I **AFFIDAVIT OF SERVICE BY MAILING**

DECLARATION OF SERVICE

I, William F. Jensen **, being first sworn upon oath, do hereby certify that I have served the following documents:**

Statement of Additional Grounds for Review (53 pages consisting of eight (8) Additional Grounds).

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2006 MAR 29 AM 11:27

Upon:

[X] King County Prosecutor's Office
Appellate Division
King County Courthouse, W-554
516 Third Avenue
Seattle, WA 98104

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

I, William F. Jensen, declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

On this 24th **day of** March **,** 2006 **.**

Signed in Walla Walla, Washington.

William F. Jensen
Name & Number
William F. Jensen
DOC 877996

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.