

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In Re the Release of the
Personal Restraint of:

Case No. 45862-4-I

FILED
COURT OF APPEALS
DIVISION II
2014 OCT 27 AM 9:01
STATE OF WASHINGTON
BY KLS
DEPUTY

JERRY LEE SWAGERTY,
Petitioner,

PETITIONER'S FINAL AMENDED REPLY
TO STATE'S SUPPLEMENTAL BRIEF

A. IDENTITY

Pro Se Petitioner, Jerry Lee Swagerty, requests relief designated in Part B, C, D, and E of this Motion.

B. REBUTTAL TO STATE'S SUPPLEMENTAL BRIEF

The "State provided & secured a package deal" that included 3 of the 4 convictions in violation of the statute of limitations at the time that plea agreement was finalized.

The instant case is controlled by State v. Peltier, SC #89509-3, 332 P.3d 457 (2014) pursuant an Order by this Court that the State answer the impact of the Amended information on the statute of limitations for each offense charged. Peltier, supra, clearly states, "statute of

limitations affects the authority of a court to [sentence] a defendant to a crime, but does not affect the subject matter jurisdiction.

In Re Swagerty, COA #45862-4-II, is easily distinguished from Peltier, supra, because Jerry Swagerty did not sign an express waiver before the statute of limitations ran out on 3 of 4 of the charges under review. Thus, the instant case is well grounded in Stoudmire, 141 Wn. 2d 342, 5 P.3d 1240, "where a trial court imposes a [sentence] after the statute of limitations has run, the court exceeds authority given it", making the charges of luring, burg II, and intimidating a witness null & void where the State erred thru no fault except their own.

Therefore, the State must abide by existing plea agreement with the Amended charges, and Amend Jerry Swagerty's current sentence from 360 months to 60 months within the statutory maximum for the remaining crime of child rape in the 3rd degree, and then Amend that sentence so that "confinement & community custody does not exceed the statutory maximum" pursuant a current manditory community custody requirement of 36 months where Jerry Swagerty will conclude 36 months of confinement in June 2015. (see In Re Brooks, 166 Wn 2d 664 under RCW 9A.20.021).

C. PRIMA FACIE STATUTE OF LIMITATIONS VIOLATION

The core argument of Jerry Swagerty is that the State only had evidence of an adolescent girl following a male subject out of a store that may or may not constitute luring of a child, a class c felony with a statute of limitations of 3 years from the time of incident.

Jerry Swagerty proclaims that prosecutor exaggerated circumstances to create (2) 1st degree charges for (1) single alleged incident to

avoid the statute of limitations of (1) 3rd degree alleged crime.

Jerry Swagerty has more than several times requested this Court compel respondent to produce the Hospital Report that provides that no physical crime was evident, and Jerry Swagerty's d.n.a. was not discovered on swabs taken directly from alleged victim. Under RAP 16.9, "respondent is responsible for providing portions of the record related to any relevant proceeding". Since the issue in the instant case does in fact pertain to the statute of limitations in that State proffers that Petitioner could be charged with original charges, this Court should compel prosecutor to not withhold relevant information concerning plea agreement under RCW 9.94A.460.

D. ACTUAL INNOCENCE

Hospital Report in Pierce County Cause No. 12-1-01877-6, dated February 14th, 2004, confirms that Jerry Swagerty's d.n.a. was not discovered on swabs taken directly from alleged victim, and pursuant State v. Thompson, 173 Wn. 2d 865, "vaginal swabs have the potential to produce significant information and defendant is entitled to post conviction d.n.a. testing of evidence collected during investigation".

E. ORAL ARGUMENT

There are multitudes of various mitigating circumstances v. (1) single piece of evidence that was allegedly discovered over 8 years later on alleged victims clothes that Jerry Swagerty proclaims Judge, Prosecutor, and assigned counsel were only concerned with saving face for police, not that actual justice be served where this Court should

consider (3) elements of the instant case outlined in the herein above & below:

JUDICIAL PREJUDICE CLAIM

The fact that the Judge cancelled an evidentiary hearing to instead sentence defendant to excessive consecutive sentences to their statutory maximums outside the guidelines raises *State v. Miller*, 324 P.3d 791, "it's a fundamental defect to not sentence a defendant to concurrent sentences -- even for serious violent offenses -- when mitigating circumstances exist" [see below ineffective assistance of malevolent counsel claim] in review of *In Re Mulholland*, 161 Wn. 2d 322. "Will this Court abuse it's discretion in denying a judicial bias claim?" *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014) says it might be a good idea to review *Stanley v. Schriro*, 598 F.3d 612 (9th Cir. 2010), because Petitioner is entitled to an evidentiary hearing on 6th Amendment violation, notwithstanding an element clause violation under *Fiore v. White*, 121 S.Ct. 712.

PROSECUTORIAL MISCONDUCT CLAIM

There isn't an actual authority like the instant case concerning prosecutorial misconduct in a plea bargain. However, *In Re Swagerty*, COA #45862-4-II, "State exaggerating (2) 1st degree crimes for (1) single alleged incident to avoid statute of limitations where primary evidence only supports (1) 3rd degree crime constitutes Prosecutorial misconduct" sounds exactly like the instant case under review.

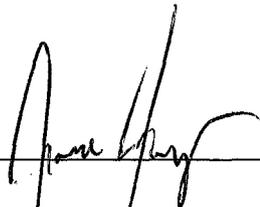
INEFFECTIVE ASSISTANCE OF MALEVOLENT COUNSEL CLAIM

In Pierce County Cause No. 12-1-01877-6, the suspect was described

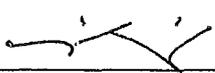
as a 5'9" big kid with all grey hair. Petitioner provided proof in copy of a 2003 issued driver's license that proves that Jerry Swagerty was a 39 year old man, 6'0" with brown hair at the time of the alleged incident. Hospital Report provides that no physical crime was evident, and defendant's d.n.a. was not discovered on swabs taken directly from alleged victim at the time of alleged incident. Defendant has not ever before and/or after even been accused of a sexual crime. Assigned counsel did not schedule 404 hearings to prevent an injustice or preserve a proper defense for a person charged with (2) 1st degree crimes, nor did assigned counsel at any time file a single Motion against alleged evidence to preserve a client's best interest under appeal. Assigned counsel did however try to have defendant deemed incompetent to stand trial, and when that didn't work, assigned counsel negotiated a plea agreement that was described as a male subject licking the privates of an adolescent girl to convictions that are now in appearance that defendant committed a burg II, lured a child outside, raped said child, and then threatened said child not to tell. Totally and ridiculously incompetent of not only (1) but (2) attorney's from the department of assigned counsel!

In a nut shell, Howard v. Clark, 608 F.3d 563 at 579 (9th Cir. 2010) says "defense counsel should have conducted a prompt investigation of the case and explore all avenues leading to the facts relevant to the merits of a case". In extension, Cannedy v. Adams, 706 F.3d 1148 at 1162 (9th Cir. 2013) says "Petitioner received ineffective assistance of counsel that was objectively reasonable of prejudice" where Reynoso v. Guirbino, 462 F.3d 1099 at 1112 (9th Cir. 2006) says, "counsel cannot be said to have made a tactical decision". If we go back a

few years and review In Re Brett, 142 Wn. 2d 868, 16 P.3d 601, it says "multiple errors of counsel constitute ineffective assistance of counsel". And if the herein above weren't enough, Detrich v. Ryan, 740 F.3d 1237 (9th Cir. 2013) says there may be (4) actual prongs of Strickland instead of (2) as proffered. However, under Detrich, supra, 4 more concrete reasons just make it all that much easier for this Court to reach a decision of **reverse and dismiss with prejudice** in In Re Swagerty, COA #45862-4-II, and forever release Jerry Lee Swagerty from any further charges associated with this case.

Signed  and dated this 22nd day of October 2014.

I, Jerry Swagerty, dipose and say, that I am the Petitioner Pro se, and that I have prepared and reviewed this Motion, and believe it is true & correct to the least of my abilities.


NOTARY PUBLIC in and for the State of Washington
Residing at: Connell, WA
My appointment expires: April 30 2018

