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COA NO. 65214-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES O. WIGGIN

Appellant.

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COURT OF APPEALS  
16

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Michael T. Downes, Judge

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**STATEMENT OF ADDITIONAL GROUNDS**

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**TABLE OF CONTENTS**

I. ADDITIONAL GROUNDS.....1

II. ISSUES PERTAINING TO THE ADDITIONAL GROUNDS.....1

III. CASE HISTORY.....2

IV. STATEMENT OF THE CASE.....3

V. LEGAL ARGUMENT.....14

    (1) The State failed to preserve material exculpatory evidence.....14

    (2) The State used perjured testimony “knowingly or unknowingly”.....34

    (3) The representation of defense counsel was Constitutionally deficient.....37

        (a) My attorney failed to take appropriate actions towards the States’  
            failure to preserve material evidence.....38

        (b) My attorney undermined and sabotaged my defense .....41

VI. CONCLUSION.....50

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

State v Brett  
126 Wn.2d 136, 198-99, 892 P.2d 29 (1995), 516 U.S. 1121, 133 L.Ed.2d 858,  
116 S. Ct. 931 (1996).....38

City v Fettig  
10 Wn. App. 773 P.2d 1002 (1974).....30

State v King  
130 Wn.2d 517, 531 925 P.2d 606 (1996).....38

State v Wittenbarger  
124 Wn.2d 467, 880 P.2d 517 (1994).....32

State v Wright  
87 Wn.2d 783, 786, 557 P.2d (1976).....15, 20, 21, 34, 40

State v Vaster  
99 Wn.2d 44, 53, 659 P.2d 528 (1983).....15, 24, 25, 34, 40

**OTHER CASE CITATIONS**

United States v Agurs  
427 U.S. 97, 49 L.Ed.2d 342, 96 S. Ct. 2392 (1976).....15, 31, 33, 40

Avery v Alabama  
308 U.S. 444, 446, 84 L.Ed 377, 60 S. Ct. 321 (1940).....37

United States v Bryant  
439 F.2d 642, 651 (D.C. Cir. 1971).....15, 21

Mazloun v D.C.  
530 F. Supp.2d 282.....40

Moore v Demsey  
261 U.S. 86, 67 L.ed 543, 43 S. Ct. 265.....34, 36

United States v Frederick  
78 F.3d 1370, 1381 (9<sup>th</sup> Cir. 1996).....50

Mooney v Holohan  
294 U.S. 103, 79 L.Ed 791, 55 S. Ct. 340, 98 ALR 406 (1935).....34, 35, 36

**OTHER CASE CITATIONS CONTINUED**

Thomas v Hubbard  
273 F.3d 1164 (9<sup>th</sup> Cir. 2001).....50

Moore v Illinois  
408 U.S. 786, 810, 33 L.Ed.2d 706, 92 S. Ct. 2562 (1972).....31

Napue v Illinois  
360 U.S. 264, 269-272, 3 L.Ed.2d 1217, 79 S. Ct. 1173 (1959).....34

Evitts v Lucey  
469 U.S. 387, 395-396, 83 L.Ed.2d 821, 105 S. Ct. 830 (1985).....37

Frank v Mangum  
237 U.S. 309, 59 L.ed. 969, 35 S. Ct. 582 (1915).....36

Brady v Maryland  
373 U.S. 83, 10 L.Ed.2d 215, 83 S. Ct. 1194 (1963).....15, 34, 40

People v Mooney  
175 Cal. 666 166 P. 999; 176 Cal. 105, 167 P. 696, 177 Cal. 642, 171 P. 690.....36

Kimmelman v Morrison  
477 U.S. 365, 91 L.Ed 305, 106 S. Ct. 2574 (1986).....37

Main v Moulton  
474 U.S. 159, 168-170, 88 L.Ed.2d 481, 106 S. Ct. 477 (1985).....37

United States v Perry  
471 F.2d 1057, 1063 (D.C. Cir. 1972).....15

Matlock v Rose  
731 F.2d 1236, 1244 (6<sup>th</sup> Cir. 1984).....50

California v Trombetta  
467 U.S. 479, 81 L.Ed.2d 413, 104 S. Ct. 2528 (1984).....15

Lovitt v True  
403 F.3d 171; (2005) U.S. App. LEXIS 438.....32

Strickland v Washington  
466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).....37, 38

Arizona v Youngblood  
488 U.S. 51, 102 L.Ed.2d 281, 109 S. Ct. 333 (1988).....40

**RULES, STATUTES, AND OTHER AUTHORITIES**

CrR 8.3 (b).....39, 40

RAP 2.5 (a) (3).....34, 38

Wash. Const. art. I, § 3.....14, 34

Wash. Const. art I, § 22.....37

United States Const. Amend. 14.....14, 34, 36

United States Const. Amend 6.....37

**The verbatim report of proceedings is references as follows:**

1RP- 1/19/10; 2RP- 2/5/10; 3RP- 3/4/10; 4RP- 3/12/10 (morning session); 5RP- 3/12/10 (afternoon session); 6RP- 3/16/10; 3/17/10; 3/18/10 and 3/24/10 (three consecutively paginated volumes). And States Exhibit 21B is [St Ex 21B] (is the unredacted version of interview transcript with Det. Adams)

## **I. ADDITIONAL GROUNDS**

- (1) The State failed to preserve material exculpatory evidence and violated my Constitutional right to the Due Process of Law.
- (2) The State violated my right to Due Process of Law by using what it knew to be or should have reasonably known was perjured testimony.
- (3) The representation by defense counsel, Caroline Mann, was ineffective, caused Constitutional errors and amounted to a complete breakdown of the adversarial system and violated my Constitutional right to the effective assistance of counsel for my defense.

## **II. ISSUES PERTAINING TO THE ADDITIONAL GROUNDS**

- (1) The State violates a defendants' Constitutional rights when it fails to preserve material evidence in a criminal case. The issues I raise are (a) What was the real scope of all the available evidence in this case that was not preserved? (b) Was there video evidence from the event "outside" the Macys store that was not preserved in this case? (c) Did Lynnwood Police Officials fail to preserve the material exculpatory evidence that was available in this case? (d) Is a Loss Prevention Officer considered a citizen acting under police authority, having the duty to preserve evidence and was the failure by the loss prevention officer in this case to preserve the video evidence from the Macys store done in good or bad faith? (e) Does the alleged 8 hour Macys' policy which was injected into the trial and place upon the court record have any relevance to the failure to preserve all the available evidence in this case? (f) Is there any evidence on the court record to support a claim that the prosecuting authority and my own attorney had any part in the suppression of the impeaching evidence in this case? (g) Was there any other available evidence that could have been used to replace the lost evidence in this case? and (h) What was the character of the evidence that was not preserved?
- (2) The State violates a defendants' Constitutional right to Due Process of Law if it uses what it knows to be or should reasonably have known was perjured testimony. Is there

sufficient evidence that Mr. Smith was deceptive and offered false testimony before the jury? And did Mr. Stemler solicit or allow the false testimony to stand uncorrected and violate my Constitutional rights?

(3) Defense counsel must perform at a reasonable level of competency and must also act in a role as vigorous advocate for the defendant, seeking an acquittal by all means fair and honorable in order to satisfy the Constitutional guarantee of the assistance of counsel for the accused. The purpose of counsel is to preserve the rights of the accused. Did my attorneys' performance meet the standards reasonably expected by a BAR appointed attorney? Did Caroline Mann cause or allow violations of my Constitutional rights? Did Ms. Mann act as vigorous advocate or is there sufficient enough of a showing to prove that Ms. Mann acted contrary and cause severe prejudice to my defense and so adversely affected the outcome of my trial by her conduct, actions, and/or inactions that the cumulative effect is grounds in and of itself for a reversal of the conviction in this case?

### **III. CASE HISTORY**

I was arrested on December 23, 2009 and booked into the Lynnwood County Jail for the charges of first degree robbery with a deadly weapon. I was transported to the Snohomish County Jail on December 24, 2009 and brought before a District Court Judge who arraigned me on the charges.

The State then filed formal charges in the Superior Court on January 15, 2010 and I was arraigned in Superior Court on January 19, 2010 and entered a plea of not guilty for the charges of second degree robbery with a deadly weapon. The State then amended the charges back up to first degree robbery just 4 days before my trial on March 12, 2010 and the case proceeded to trial on March 16, 2010. And after 3 days of trial, the jury returned a verdict of "guilty" on the charges of first degree armed robbery and "guilty" on a special allegation of "armed with a deadly weapon".

I was sentenced on March 24, 2010 to 116 months for the first degree robbery and 24 months on the weapons' enhancement and I appealed the case at my sentencing and the Court received and filed the "Notice of Appeal" on April 12, 2010.

#### IV. STATEMENT OF THE CASE

The event at Macys took place on December 23, 2009 at approximately 11:00 am. 6RP 129 (20-24)

According to Loss Prevention Officer, Brandon Smith, he has been employed by Macys as a loss prevention assistant manager for two years; and has completed training on Macys policies; he has worked in the loss prevention field for 10 years; and has stopped over a thousand shoplifters. 6RP 56 (19) – 57 (22).

Mr. Smith claimed that I stole a pair of pants 6RP 61 (18-21); that he isn't really sure what he did with the security tags that he found from those jeans, he either put them in his pocket or maybe dropped them on the ground. 6RP 83 (9-17); claimed I stole a scarf. 6RP 63 (10-25); but can't remember if he saw me remove the tags from that scarf or not. 6RP 84 (17-18); claimed that I stole a bottle of perfume 6RP 64 (4-10); that the cologne was a tester bottle 6RP 73 (18-19); he saw me speak with another employee in the fragrance department, he doesn't know her name, she didn't write a report, and she didn't see me take anything because **"it wasn't her area"**. 6RP 86 (5-19); and claimed that I cussed very loudly in the cosmetic area to that female associate. 6RP 66 (7)

Mr. Smith claims that upon stopping me in the south entrance of the Macys store, I took a knife out of my pocket and flipped it into an open position and "held it up a little bit" toward him. 6RP 68 (19-22); that I pointed the knife at him 6RP 68 (23-24); uttered a profanity and stated, "try to stop me". 6RP 69 (21-22); Mr. Smith said he can't describe the manner in which I pulled the knife or flipped it open, whether that was with one or two hands. 6RP 76 (8-13); that there were customers in the area. 6RP 84 (17-18); he told them to stay back 6RP

72 (11); that he backed up immediately into the store for his safety 6RP 69 (4); said that it's Macys' store policy to break off any sort of contact and contact police if there was any sight of a knife, for safety reasons. 6RP 242 (15-19); and said that he did "not" see me pull the knife out inside the store or as I was exiting the store and that the knife was only made visible to him in the front of the Macys store. 6RP 242 (20-24)

Mr. Smith claimed that I walked through and/or across the length of the Macys parking lot towards the furniture gallery while displaying a knife in the open position as he spoke to the 911 operator. 6RP 71 (5-11); and stated that he followed me across the parking lot but can't remember if I threatened him any further or not as he was giving the 911 operator a play by play, and he followed me the entire distance to the Fitness Center 6RP 94 (5-14); and said that he didn't see what happened to the customers who would have been witnesses to all of this. 6RP 72 (15-16)

Mr. Smith testified that he did not view the evidence on the scene 6RP 95 (21-25); he thinks that it was Officer Miller who returned the items to the Macys after the incident 6RP 73 (7-8); and that the items were delivered to the Loss prevention office as he was filling out his report 6RP 88 (15) – 89 (10); that David Thomas was not on duty and only arrived on the scene where I was being arrested 6RP 88 (3-4); and that he was only listed as a witness because he arrived to see the merchandise being returned to the store by Officer Miller. 6RP 88 (6-11).

According to Mr. Smith, there are 60 plus cameras scattered about the Macys store and the cameras are running all the time 6RP 77 (17-23); the cameras are always recording but just because I am walking around the store doesn't mean that I'm on any cameras because even though there are cameras over several walkways, they're not always pointing at them, and though there are many cameras in any particular area, most of the cameras were pointing at the registers 6RP 86 (25) – 87 (24); that there are cameras by the doors pointed at the

entrances to capture footage, but not at the south entrance, and though there is a camera at that entrance, that camera is pointed at the jeans 6RP 96 (4-22); and there is also cameras by the fitting rooms, but all of those were also pointed at the registers, and there is another camera at the “T” at the juncture aisle, but that one’s pointing at the registers next to the demo and if anybody walks past this camera over here, it won’t pick nothing up, because it’s up too high 6RP 97 (3-25); and there was no camera pointed at the south entrance where the alleged robbery took place to capture any footage 6RP 96 (4) – 97 (25); that the surveillance system at the Macys has the ability to pull “both still shots and videos” off the cameras in order to preserve them 6RP 80 (1-5); that it’s common practice to do so “if it pertains to a case” 6RP 80 (4-7); Mr. Smith said that the camera on which he originally observed me did capture footage of me 6RP 98 (1-5); and that there was a fair amount of video showing a shoplift in progress 6RP 90 (13-15); that Macys destroys its’ video surveillance footage after 8 hours per company policy 6RP 79 (6); that Macys only preserves video that pertains to an actual shoplift per their policies 6RP 90 (4-5); and claimed that he “did not” preserve them in the next 8 hours because “Macys does not actually apprehend people for taking one item, so it didn’t pertain to Macys’ policies.” 6RP 90 (22-25); and in spite of the fact that it was a fairly unique situation involving a weapon which had been allegedly pulled on him, he did not feel that it was significant to preserve what evidence he had 6RP 91 (8-10); and Mr. Smith admitted that because the tape was not preserved, the truth of the issue with the scarf could not be known 6RP 98 (3-14).

Mr. Smith said that he is not a police officer and doesn’t carry a gun 6RP 99 (23) – 100 (1); that he is not trained to gather witnesses or evidence 6RP 92 (18-20); and Mr. Smith admitted that he viewed the video footage from this case when he said, “...the camera kind of moved a little bit, and focused in on him....” 6RP 98 (20-25); and stated that he did not tell the

Lynnwood Police Officials, to his recollection, that there was no surveillance footage available. 6RP 90 (1-2).

**An interview was conducted at the Lynnwood Jail** at 14:12 hours by Detective Adams [St Ex 21B p 1] where I provided my version of the event [St Ex 21B p 1-29]; and I admitted to shoplifting [St Ex 21B p 2]; to having a knife [St Ex 21B p 7]; stated that I wasn't using the knife as a weapon, I'm not trying to rob anybody, I've never had a robbery, that I've got shoplifting [St Ex 21B p 7]; I claimed I only stole a pair of jeans and pointedly denied stealing the "scarf" and the "cologne" from the Macys and informed Detective Adams that surveillance footage would prove that [St Ex 21B p 2, 3, 4]; and then corrected my own statement to include the sunglasses as also being stolen [St Ex 21B p 12]; and told Detective Adams that I was on medications and diagnosed schizophrenic [St Ex 21B p 9]; I stated that sometimes my medications will affect me for days and I won't even know what day it is, and I might wake up tomorrow and have missed 4 or 5 days, I lose days all the time and can't keep track of that kind of stuff and only know whether it's day or night [St Ex 21B p 10]; and that I did not wield a knife against anybody or threaten anyone with a knife [St Ex 21B p 6, 15, 17, 24] and that I did not flip the knife open as Mr. Smith claimed [St Ex 21B p 6]; that I did not say "try to stop me" [St Ex 21B p 20]; and I guaranteed 100% that any and all footage captured would prove that I was not holding any knife up and/or making any threats to anybody at any time in any way [St Ex 21B p 26]; and that if I was so desperate to get away, I could have easily knocked Mr. Smith out at the door and gotten away and that pulling the knife would not be the reasonable thing to do if I was so desperate in getting away [St Ex 21B p 21]; and I offered to take a polygraph. [St Ex 21Bp 25]

**Detective Adams** stated in that interview that he was aware the Mall and the Macys store each have their own security surveillance systems [St Ex 21B p 10]; and so "footage is likely captured" [St Ex 21B p 11]; and he said that he was going to "go get the footage and take a

look at it” [St Ex 21B p 17]; and said that “there are two sides to every story..” .. “but video don’t lie.” [St Ex 21B p 26].

According to Officer Miller, who responded to the 911 call, he responded to the call which originally came out as a theft at Macys 6RP 102 (4-5); he met Mr. Smith on the scene near the area of the Fitness Center 6RP 102 (10-22); he found the knife in some bushes 6RP (9-13); and said that I stated, “I didn’t take anything” or “I didn’t do anything” 6RP 103 (14-17); and claimed that when asked where the knife was, I stated, “I don’t have a knife.” 6RP 103 (23-24); and Officer Miller estimated the distance between the Macys south entrance of the store and where I was apprehended, to be around one thousand feet. 6RP 108 (4-9); that all of my belongings were spread out on the squad car 6RP 109 (6-8); and he believed that Mr. Smith was there on the scene to identify the items stolen from the Macys, and that that took place at the scene where my belongings were spread out on the police car; and said that sometimes items are returned to the store and not booked into evidence; but to the best of his knowledge, the items in this particular case were taken down to the police station and held 6RP 111 (1-19).

According to Detective Adams, “he spoke to Officer Miller and informed him that the Investigations Division would be happy to conduct an interview of the suspect and he then conducted that interview at the jail. 6RP 131 (2-6); he said he had previous experience pulling up security video; he was aware of the security system at the Macys store; and that he had previous dealings with shoplifting incidents from that Macys before 6RP 139 (11-33); and said that he was aware that there was an issue surrounding what I had worn into the store with regards to the “scarf”. 6RP 141 (18) – 142 (1); but that he “**did not**” inquire into security video from inside the Macys store 6RP 142 (2-8); and stated that Lynnwood Police “**only**” inquired about video pertaining to the confrontation “**outside**” the Macys store. 6RP 136 (19-21).

According to Detective Adams, at the time he conducted the interview of me at 14:12 hours, he had already spoken with Officer Miller and Officer Miller had already spoken to Mr. Smith and inquired about video from loss prevention at the Macys store. 6RP 140 (21-25); and Detective Adams stated that although he did not personally look into it, he had been informed that there was no surveillance **“of the confrontation”** available through Officer Miller 6RP 141 (9-11); that he already knew that no footage was available, and he only stated that he was going to go obtain the surveillance footage evidence as a ruse to elicit a response. 6RP 141 (2-5)

According to Mr. Stemler, the prosecuting authority, Mr. Smith had told him and the police officials that there was “no video tape” from the very beginning of him taking the case but that when he spoke to Mr. Smith on March 12<sup>th</sup>, 2010, he wasn’t sure if there was or wasn’t any video but he was going to look into it. 5RP 5 (13-20); that, “all the talk of video tape really isn’t helpful to resolve the elements of the crime in this case.” 6RP 263 (21-23); because “where they were outside, was not video recorded and so “there is no video of that particular area”. 6RP 263 (13-15); and you can bet that Mr. Wiggin “knows where all the security cameras are and he only told Detective Adams that he wouldn’t be seen stealing stuff on videotape because he knew how to avoid being captured on the cameras and he was clearly checking out what their security systems were, how they worked and what they would see and how they would do that.” 6RP 291 (2-11); and said, “the videotape from inside the store isn’t going to be able to help you.” 6RP 263 (11-12); “because a robbery, or the knife, the threat, that came outside.” 6RP 263 (19-20); and “even if the video did show that Mr. Wiggin didn’t steal the scarf, that would not resolve whether he committed a robbery or not.” 6RP 263 (15-19); “whether he stole the scarf that day is not in the elements and whether he stole the perfume that day is not in the elements.” 6RP 272 (16-19); “whether there was videotape or whether there was another witness who might have seen this that were not

found, those are not in the elements of the crime.” 6RP 272 (17-22); “he admitted he stole the pants and the sunglasses” 6RP 263 (23-24); “he didn’t need the jeans, he just put them on, that’s kind of what he does” 6RP 263 (2); “to him, stealing is nothing.” 6RP 267 (11-12); “he’s got the big knife, the knife is open even going into the store” 6RP 274 (18-20); “there’s foul language and he admits he said “F you” 6RP 264 (9-11); “he’s perfectly willing to use force or threats to hold on to those jeans.” 6RP 271 (11-12); “he’s stolen from Macys, left the store without paying for merchandise, Mr. Smith followed him, and police found him with a knife, he admitted to shoplifting and having the knife open in the store.” 6RP 260 (24) – 261 (11); “what’s going through his head is “F this Brandon guy, he’s just a little punk”. 6RP 271 (5-6); “the State has to prove that in the commission of the acts or in the immediate flight therefrom that the defendant was armed with a deadly weapon and “the knife is deadly” and can cause substantial bodily harm.” 6RP 269 (5-12); “Mr. Smith has been doing loss prevention for 10 years and has made a thousand contacts with shoplifters. 6RP 262 at (1-3); he has nothing to gain for saying things that are not true” where as Mr. Wiggin is a thief and doesn’t want to accept the consequences of the robbery. 6RP 292 (18-25); and “there is no evidence that there ever was any evidence of what happened outside the Macys where the knife was used in a threatening manner. So this whole thing about video really doesn’t help at all.” 6RP 290 (17-21)

**According to Ms. Mann,** on March 12<sup>th</sup>, 2010, “Mr. Smith, who is the primary witness in this case and certainly the only witness to the actual alleged crime, has been indicating for a couple of weeks that there was no videotape and that was surprising due to the fact that this is a store that generally does videotapes.” 5RP 3 (5-11); “but then Mr. Smith said he didn’t know whether there is or isn’t any video” 5RP 3 (17-18); “and it does involve critical information,” 5RP 3 (24); “because what happened in the store is fairly critical to the defense”. 5RP 4 (2-3). “We were told that no video existed then told there was some, just

none outside and, given the position of the camera, that seems reasonable.” 4RP 20 (12-19); and, “the store security guard has not been particularly cooperating with the defense. 4RP 21 (2-5).

According to Ms. Mann, she “doesn’t feel that Mr. Stemler has done anything wrong, nor his office.” 5RP 4 (13-15); and she stated that I had “been struggling in the past year, had been homeless, had been struggling with drug addiction, had been hospitalized a couple times for mental health issues, that I had been struggling with medications” and said, “she had seen the records on that”. 6RP 315 (2-8); and said that she didn’t have any objections to the States’ motion to suppress and exclude that I had been diagnosed with mental problems and/or that I was taking any medications for mental issues, and in fact, “that was one of the major redactions that she wished to have. 6RP 7 (11-21).

**According to Ms. Mann during her closing remarks,** “Mr. Smith is asking you to believe everything he says when there is physical evidence that was in his possession, that is routine for them to preserve, that he chose not to in this case. Evidence that would absolutely show whether or not he’s a credible witness.” 6RP 278 (11-18); “we know that Brandon Smith is not a credible witness, maybe it’s not because he’s lying.” 6RP 279 (3-5); “maybe he was sort of filling in the gaps”, “based on what the police had shown him”, “kind of making himself out to be a little bit better of an observer than he was”, “maybe he believes he saw something, maybe he looked at that scarf and said, I think that came from us. He must have stolen it.” 6RP 279 (6-13); “a great deal of evidence in this case was not preserved by the store security officer, Brandon Smith, maybe he didn’t think it would be significant, maybe it was just carelessness.” 6RP 278 (10-13); “we’re talking about somebody wielding a knife in a public area close enough to alarm people into stepping back.” 6RP 280 (7-9); “he doesn’t know what other customers are around because he’s not daring to take his eye away. He’s looking at the knife.” 6RP 280 (12-14); “December 23<sup>rd</sup>, busy holiday season, an

individual strolling across the parking lot. Well, Mr. Smith is correct, the individual is walking across the parking lot with his knife held out like this, despite the fact there's nobody around him." 6RP 281 (21-25); "he is following this individual who is not only threatening him with a knife, but is still carrying and displaying that knife in the open position, according to him, across a parking lot and around a building." 6RP 282 (19-23); and "why is he going around and risking meeting this guy with a knife against store policy?"....because the police are right there already. 6RP 283 (1-3); "...the issue in this case is, was there any force being used to keep the property? Mr. Wiggin tells you that the knife was clipped and away....in the pocket of his jeans.....**interestingly enough**....this is exactly how the store security guard displayed his badge. 6RP 285 (4-9); "I ask you to consider this for a second. Mr. Smith tells you, **as anybody would**, when a knife was pulled on him from a distance of about five feet...he doesn't remember how he opened the blade, whether it was with his thumb or whether it was a two-handed kind of thing. He remembers it coming out and pointing directly at him as he says, "F you, try to stop me", Tells you, **which makes perfect sense**, his attention is on that blade so much, he just knows that there are customers over there out of the corner of his eye, he's not taking his eye off that blade." 6RP 287 (7-18); "we've got surveillance tapes. He says, Good. Bring it on. It will show I'm telling the truth. I didn't steal the scarf, and I didn't wave the knife at him. Surveillance tapes absolutely would have proved **the first part of that**." 6RP 289 (1-5).

According to Ms. Mann, this is a case that is just about the most minimal 1<sup>st</sup> degree robbery case that she has ever seen, no physical contact of any kind, "the weapon never got within two feet of Mr. Smith, there was only brief exchange, and Mr. Wiggin simply turned and walked away." 6RP 314 (11-17); "Mr. Wiggin exercised his Constitutional rights to go to trial, and he received a trial and has lost. He has, if you will, gambled and lost." 6RP 314 (24-25). "The State has charged this to the absolute maximum they could." 6RP 314 (24-25).

According to me, my attorney and I were not getting along and we were at an impasse. 2RP 5 (3-7); I was not being represented by an attorney, that my attorney was simply not available. 2RP 5 (17-20); and that since the beginning of the case I had tried to have my attorney dismissed as counsel because she was refusing to meet with me and not doing anything in my case et cetera 3RP 4 (8-14); that I had only met with my attorney for about one or two minutes on this entire case all the way up to March even 3RP 7 (10-11); and that now the State is retaliating against me. 2RP 4 (4-5), & 5 (10-13).

According to me, I went to Lynnwood to get a reduced-fare bus card 6RP 154 (7-11); that defense Exhibit 14 "is" that reduced-fare bus pass 6RP 160 (9) – 161 (15); that the bus card reflects a picture of me wearing..... "my scarf"....6RP 161 (6-15). I testified that I was shoplifting and I sometimes carry scissors or screwdrivers to use as tools 6RP 162 (12-13); I had my knife up my sleeve when I entered the store 6RP 181 (18-21); that I use it as a tool to cut through things 6RP 182 (8-21); I stole the sunglasses 6RP 166 (23-25); I stole the jeans 6RP 184 (13-14); I said "the scarf was mine." 6RP 161 (20-24); I was wearing the scarf when I entered the store. 6RP 162 (2-4); I did not steal the cologne either. 6RP 189 (14-25); the bottle was brand new, not a tester anything 6RP 190 (11-12); that when I entered the fragrance department, I had immediate contact with two female employees and spoke to one of them. 6RP 189 (1-13); and that "I never touched a bottle of cologne and had they saved the surveillance, that would have been proven." 6RP 222 (14-16); I said that I saw another man other than Mr. Smith surveilling me from inside the Macys and I saw that same man on the scene where I was being arrested 6RP 191 (19-23). I testified that I left my knife in the open position in my pocket because I was rushing to collect my things in the dressing room, I heard a door, so I rushed out and intended to leave the store 6RP 221 (5-15); as I was leaving the store, I removed the knife and collapsed it, because it was open and I didn't know if security might grab onto my arm or something in an attempt to apprehend me, and I didn't

want it open. 6RP 197 (14-21); that Mr. Smith was not right there to grab me so I didn't think it was a threat to pull the knife out to collapse it and that I felt it best that it was closed 6RP 226 (19-23); and I said, "you should have surveillance of me walking out the door where I'm trying to collapse my knife." [St Ex 21B p 26]; and that I did not point it at anybody 6RP 198 (20-21); I closed it and by the time I was exiting the store, I was tucking the knife into my jeans. 6RP 200 (14-15); I testified that Mr. Smith was 50 feet away as I was leaving the store 6RP 201 (9); that I did not run from the store or the parking lot 6RP (20-21); there were customers coming in the store 6RP 201 (25); I cleared the way for those customers and stopped to look back to deal with the confrontation (verbal), whether it be that they saw me steal something or whether they want to tell me not to ever come back the their store. 6RP 202 (2-11); I did not run as Mr. Smith came out 6RP 202 (25); he said, "I suggest you take that knife.." or words to that effect, and "throw it on the ground", the knife was "NOT" out, it was clipped to the pocket of my jeans and I said, "F You, I didn't do nothing." 6RP 203 (2-8); I testified that I made no threatening gestures towards Mr. Smith 6RP 203 (9-11); I began to comply and pulled the knife out 6RP 203 (17); I was going to go back into the store 6RP 203 (22-24); but decided not to comply and put the knife in my pocket as I walked away but "I never flipped it open." 6RP 203 (19-20);

And as I was walking away, Mr. Smith said, "I'm going to call the police." And I used an expletive at him, he was 5 feet away, I never made any threatening gestures 6RP 204 (9-16); that I didn't comply because I wanted to get rid of my paraphernalia 6RP 205 (2-3); and that I didn't run because I came on the bus and I just wanted to bide my time, get rid of my paraphernalia and smoke a cigarette 6RP 206 (10-17). I testified that I threw the knife because I didn't want to get shot by police for having it 6RP 208 (14-19); that it was not open when I tossed it and the major impact of the ground likely triggered the knives' spring mechanism 6RP 239 (2-6); or the branches from the bushes 6RP 238 (14).

I said I took it to trial because I didn't really do what Mr. Smith claimed I did 6RP 316 (9-10) and that my attorney had told me through the whole case that I was going to lose the trial 6RP 317 (1-2); "I've never taken anything to trial. I've always accepted responsibility when I did something wrong. This is a time that, I knew that I had not done what this man said I did." 6RP 316 (11-14); "I know I did a lot of dirt in my lifetime, but I didn't do this dirt. I didn't do a robbery. I committed a theft, and then I failed to cooperate with the store security." 6RP 317 (8-11).

**According to the Court**, because the defense has not raised any mental defense, any mention of my being diagnosed with mental problems or any mention of my medications issues is prejudicial to the States' case against me and is inadmissible at my trial. 6RP 7 (11-15); and that my admission of going out the door of the Macys and collapsing my knife with customers were coming into the store, and security coming out after, was just ripe for something very bad to happen 6RP 319 (19-25); that it is hard to predict how that situation could go wrong other than it certainly could go wrong. 6RP 320 (1-2); and said that that jury made the decision to convict with "substantial" evidence to support their verdict. 6RP 318 (7-9).

## **V. LEGAL ARGUMENT**

(1) The State failed to preserve material exculpatory evidence and violated my right to Due Process of Law. The Washington State Due Process Clause provides the same degree of protection as its' federal counterpart with respect to the States' duty to preserve potentially exculpatory evidence in a criminal prosecution. See: Washington State Const. Art. 1, sec. 3 and United States Const. 14<sup>th</sup> Amendment.

The Fourteenth Amendment requires that criminal prosecutions conform with prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful

opportunity to present a complete defense. California v Trombetta, 467 U.S. 479, 81 L Ed.2d 413, 104 S. Ct. 2528 (1984).

To comport with Due Process, the prosecution has a duty to disclose material exculpatory evidence to the defense for use by the defense. Brady v Maryland, 373 U.S. 83, 10 L Ed.2d 215, 83 S. Ct. 1194 (1963); United States v Agurs, 427 U.S. 97, 49 L Ed.2d 342, 96 S. Ct. 2392 (1976); California v Trombetta, supra

The Brady Court adopted a materiality test holding that Due Process requires a State to disclose evidence when it is material to the issue of guilt or innocence irrespective of the good faith or bad faith of the prosecution.

In order to render the duty to disclose an effective obligation, “..before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.” State v Wright, 87 Wn.2d 783, 786, 557 P.2d (1976) quoting from United States v Bryant, 439 F.2d 642, 651 (D.C. Cir 1971).

The obligation to preserve evidence includes not only the prosecution but its’ agents, such as police or private citizens acting under police authority. State v Vaster, 99 Wn.2d 44, 53, 659 P.2d 528 (1983).

Due Process imposes certain obligations on law enforcement and investigatory agencies to insure every criminal trial is a “search for truth”, not an “adversary game.” United States v Perry, 471 F.2d 1057, 1063 (D.C. Cir. 1972).

The police and prosecutor have an obligation to preserve all evidence material in a criminal case until the defendant has been given reasonable notice that they intend to destroy it or otherwise cease to preserve it. State v Wright, supra.

From the onset of this case, I told police officials that the surveillance footage would exonerate me of this charge and prove that the States’ only witness, Brandon Smith, was not a credible witness.

Lynnwood Police Detective Ross Adams stated in the interview conducted approximately two-and-a-half hours after the event at Macys, “..we got to look at the surveillance...and you know, and the **“videos don’t lie”**..” [St Ex 21B p 26]; and he said, “Well Jimmy, what’s going to happen is um, we’re gonna get that footage and I’m gonna take a look at it.” [St Ex 21B p 17]; and he said, “..you know, I haven’t looked at the video, but you know Macys and Alderwood Mall, they’ve all got their own surveillance.” [St Ex 21B p 10]; “so this probably shows something up on video.” [St Ex 21B p 11].

Mr. Smith claimed that I stole a scarf. 6RP 63 (10-25); I said, no way, “I was wearing the scarf when I entered the Macys store.” 6RP 162 (2-4); “The scarf is mine.” 6RP 161 (20-24); and, “If they recorded at Macys at all, they’ll see me come in with my cap and with my scarf on...” [St Ex 21B p 3]. Mr. Smith claimed that I stole a bottle of perfume. 6RP 64 (4-10); I said, “I never touched a bottle of cologne and had they saved the surveillance, that would have been proven. 6RP 222 (14-16). And Mr. Smith claimed that I pulled a knife on him and raised it up at him. 6RP 68 (19-24); and I said, “I did take the knife out of my pocket, but I was collapsing it and clipping it to my belt as I was exiting the store.” 6RP 197 (14-21); and I also said from the onset, “..you should have surveillance of me walking out the door where I’m trying to collapse my knife.” [St Ex 21B p 26]; and I also guaranteed 100% to Detective Adams from the onset of this case that, “..any footage captured would prove that I was not holding any knife up or making verbal threats to anybody.” [St Ex 21B p 26].

It is an undisputed fact in this case that video evidence existed from inside of the Macys store which was not preserved. The State has offered Mr. Smith up as the scapegoat to the failure to preserve the material exculpatory evidence in this case.

Mr. Stemler says, “I don’t have a video to provide to defense. I’m certainly happy to speak to the store security guard again who previously informed me he didn’t have any video. 4RP 21 (12-15).

My attorney, Ms. Mann said, “I don’t think Mr. Stemler has done anything wrong here... it was sort of the security guards’ actions have kind of put us in this position...” 5RP 4 (13-17); and then Detective Adams said that he spoke to Officer Miller who had spoken with Mr. Smith, who had indicated at that time that there was no video. 6RP 140 (21-25); but then Mr. Smith testified that, to his recollection, he “did not” tell police officials that there was no video. 6RP 90 (1-2).

It is my claim that it is not a matter of one or the other party in this case as to who is particularly responsible for the failure to preserve all the material exculpatory evidence that was available and not preserved and that just because Mr. Smith admits that he didn’t save the video, that doesn’t mean that his actions or admissions somehow relieves the State of their responsibility in preserving the evidence in this case.

It is my claim that it was the Lynnwood Police, Brandon Smith, the prosecuting authority, and my own attorney, all acting in a concerted effort to suppress the video evidence. That each of them played their own part in the scheme to deliberately suppress the exculpatory evidence in order to preserve Mr. Smiths’ credibility and to prevent me from the use of the favorable, exonerating video evidence so that they could gain a conviction against me.

It is my claim that there is far more evidence missing than what the State conceded to in my trial and that the suppression of the evidence was not limited to what evidence existed from inside that Macys store.

In this case, it was certainly conceded that there was in fact video evidence available from inside the Macys store that was not preserved. It is clear from the court record that the police officials were made aware from early in the investigation that there were discrepancies in the versions given by Mr. Smith and I with regards to the event inside and outside the store and issues arise in this case with regards to what video evidence existed from “inside” that

Macys store and whether or not any video evidence existed from what happened “outside” of the Macys store at all.

**(a) We know there is video evidence missing from inside the Macys store, but What was the real scope of that available evidence?**

Mr. Smith conceded in his testimony that there had to of been at least some footage captured of me when he first picked me up on the camera. 6RP 98 (1-11), but isn’t it reasonable to expect that there has to of been far more footage captured than that one little segment of video that he and Ms. Mann referred to in my trial? After all, Macys has an excellent video surveillance security system. Mr. Smith said that there are more than 60 cameras scattered about the Macys store 6RP 77 (17-23) and the cameras are always running and recording. 6RP 87 (15-16).

Mr. Stemler suggested that I must have been so good as to have figured out, upon glance, how to successfully navigate this mine field of cameras in order to avoid being captured on video but certainly this Court would not entertain such unreasonable argument and considering the number of cameras that we’re talking about, coupled with the fact that it is virtually impossible to even tell what direction the cameras are facing because of the tinted bubbles in which they use these days, specifically to conceal that very thing, I think it’s safe to say and far more reasonable an argument that I “**did not**” avoid being captured on video as suggested and the truth of the matter is, we are missing a whole lot more video evidence from inside that Macys store than that one small segment they referred to in my trial and though they did admit that there was “**some**” video captured but not preserved, they were intentionally deceptive in the scope of that evidence available but not preserved in this case.

I came in one entrance, went to two major departments, almost left by another exit but turned around and went through several other different major departments, making a complete circle of the Macys store in the process, and finally left through the south entrance

of the store 6RP 163 (22) – 188 (25), so certainly I was captured on more than just the one of more than 60 cameras in that store.

Mr. Smith claims that there was no camera pointed at that south entrance. Well, according to Mr. Smith, there are all those cameras but every one of them were all pointing at the registers, and yea, there are some on the walkways but maybe not where I walked, and these ones are **“too high”** up to capture anything, and yea, we got cameras at the doors but not on that particular door, and even though he did a complete tour of our store and we have the state-of-the-art surveillance equipment, that doesn't mean that he's necessarily on any of our video footage. Is it Mr. Smiths' assertion that Macys only watches for shoplifters at their registers? I think it safer to say that this testimony given by Mr. Smith was nothing more than an attempt to underscore the amount of video missing in the case and meant to confuse the jury more than anything else and safer also to say that there was far more video evidence from inside that Macys store.

The State says that there was no evidence of what happened “outside” the Macys store because where the incident with the knife happened was not video recorded. 6RP 263 (13-15) And maybe there was no actual footage of what happened at that south entrance of the store but that doesn't even begin to answer the real question with regards to the available video evidence from “outside” the Macys store.

**(b) Was there video evidence from the event “outside” the Macys store that was available but not preserved in this case?**

Mr. Smith claimed that I pulled a knife on him in the south entrance of that Macys store. 6RP 68 (19-24), but he also claimed that I fled the scene through that Macys parking lot while displaying the knife in the open position. 6RP 71 (5-11). And Officer Miller estimated the distance between the south entrance of the Macys store and where I was apprehended behind the Fitness Center to be roughly **“one thousand feet.”** 6RP 108 (4-9).

Detective Adams said that he was aware that the Alderwood Mall and the Macys store have their own security systems [St Ex 21B p 10], and as he was referencing the systems in our interview he stated, “So this probably shows up on video.” [St Ex 21B p 11]. I believe it safe to say that Detective Adams was and is 100% correct in that presumption, the Mall itself has a very good surveillance security system as well as the Macys store and there was absolutely video footage captured of the event that day in that Macys parking lot. Even if none existed from that south entrance, there has to of been some of me walking across that parking lot.

Surely the State is not going to make further unreasonable argument that I must have figured out a way to successfully navigate “**two**” state-of-the-art security surveillance systems in order to avoid being captured on any footage and it seems more than convenient for the State to do so when I’m claiming that any and all footage caught would exonerate me.

Where then is the video footage from the Mall security tapes on that Macys parking lot? It cannot be reasonably argued that none existed. Where then is the video footage from the Fitness Center where I was arrested? They have their own surveillance cameras as well. And why no mention of the video systems from the Mall security cameras on that parking lot? If everything was on the up and up, wouldn’t the Lynnwood Police have brought forward all the video even if you couldn’t quite make out the scene from the actual video?

Mr. Stemler said, “There is no evidence that there ever was any evidence of what happened “outside” the Macys, **‘where the knife was used in a threatening manner’**. So this whole thing about video really doesn’t help at all.” 6RP 290 (17-21).

In State v Wright, supra the court extended the application of the duty to preserve material evidence to governmental loss or destruction of such evidence, reasoning that “If the Constitutional duty to disclose applied only when the exact content of non-disclosed material was known, the disclosure duty would be an empty promise, easily circumvented by

suppression of evidence by “**means of destruction**” rather than mere failure to reveal.” Wright at 788 (quoting United States v Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971)).

Because the State failed to preserve the video evidence from the Mall security officials that would have had to of captured something of the event in that parking lot, whether it be of the south entrance or even the scene of me allegedly fleeing the Macys store across their parking lot with a knife in the open position as Mr. Smith claims, we will never know what was available on any of that footage from the Mall security tapes and whether or not the exact content of those tapes can be proven is irrelevant next to the States’ obvious duty to seek out that evidence and preserve it and the failure to do so violated my Constitutional rights and prevented me from receiving a fair trial.

It is reasonable to strongly presume then, that the video footage reflected that Mr. Smith lied about what happened in the flight across that parking lot as well, and the footage proved that I was not walking across that parking lot while displaying a knife, it was favorable to me and corroborated my version of the event just as I said that all video would and that is why no video was brought forward by Lynnwood Police or the States’ attorney. If the tapes would have shown me fleeing while displaying a knife as the State claimed or even anything remotely resembling such activity, those tapes most assuredly would have been produced and used against me at my trial.

**(c) Did Lynnwood Police Officials fail to preserve the material exculpatory evidence in this case?**

Detective Adams has received training in a variety of topics, including crime scene investigation, crime scene management, interrogation, advanced homicide investigations and said, “a detective requires aptitude for investigations.” 6RP 129 (2-12).

In court, Detective Adams sat in as the States’ managing witness 6RP 8 (16-17) and testified to his role in this case and he said, “I spoke with Officer Miller, informed him that

the Investigations Division would be happy to conduct an interview of the suspect. And he agreed.” 6RP 131 (2-5); Mr. Adams said that he had previous experience pulling up security video 6RP 139 (11-12); that he was aware of the security system at the Macys store 6RP 139 (24) – 140 (1); that he was also aware that there was an issue surrounding what I had worn into the store with regards to the scarf 6RP 141 (18) – 142 (1); but that he **“did not”** inquire into security video from inside of the Macys store. 6RP 142 (2-8).

Detective Adams said that he didn’t look into the surveillance footage because he had already been told by Officer Miller that there was none, **“of the confrontation”** 6RP 140 (18) – 141 (11); and said, “Officer Miller, like I said, was still investigating that scene at that point. I was charged with the, just the interview at that point. 6RP 145 (5-9); and he stated that Lynnwood Police **“only”** inquired about video pertaining to **“the confrontation outside”** the Macys store. 6RP 136 (19-21).

Lynnwood Police knew that there was video evidence from inside of that Macys store. Detective Adams was clearly investigating the crime by conducting the interview of me at the Lynnwood jail. Police Officials have a duty to follow up on any leads they may gather through the course of their investigations and whether it was Officer Millers’ responsibility from investigating the actual crime scene or from following up on newly discovered leads in the case, it is without a doubt, the Lynnwood Police who had the duty to gather **“all”** of the evidence and preserve it.

It is not general practice for Police to only look into **“some”** of the evidence. Why would Lynnwood Police only inquire about the video of the confrontation outside of the store? That certainly seems more than convenient for them to say now, considering that there was material exculpatory evidence that existed from “inside” that Macys store that was not preserved and that evidence would have discredited the States’ only witness to the crime.

Whether the evidence is exonerating or incriminating, the Police have an absolute duty to go collect that evidence and the video from inside the Macys store was never even looked into according to Detective Adams and because Officer Miller was not asked in trial, we never actually get to the bottom of what he “did” or “did not” look into with respect to video evidence whether it be from the Macys or the Mall et cetera.. At least not by the copies of the transcripts that were provided to me. In my copy of the court record, there is not one single question posed in direct or during cross-examination of Officer Miller in regards to when he arrived at the Macys to return the merchandise, what video, if any, did he inquire about, and why he did not preserve the video evidence from inside of the Macys store or from Mall security et cetera. Nor is there any questions posed in any form with regards to any video of the Macys parking lot from any other possible source. If this court is looking at anything different, please advise me and I will send you a copy of the transcripts which were provided to me for this appeal.

Officer Miller was on the scene immediately, and was back at the Macys store shortly after my apprehension. 6RP 140 (21-25). Detective Adams was made aware of the issues surrounding whether I was wearing the scarf when I entered that store and he knew that the video would reflect the absolute truth and either discredit me or Mr. Smith. Police Officials either deliberately suppressed the video evidence at the direction of Mr. Stemler or of their own accord, or they were so grossly negligent in their investigations that the evidence was lost through their neglect in the case and my Constitutional right to that evidence was violated by their failure to preserve it and however the cause, this conviction must be set aside because of this failure by Police Officials to preserve the video evidence.

**(d) Is a “Loss Prevention Officer” or “Store Detective” considered a citizen acting under Police authority? Did Brandon Smith have a duty as such to preserve the video evidence in his control and was the failure to preserve it done in good or bad faith?**

In State v Vaster, supra, the duty to preserve evidence extends to police but it also extends to citizens acting under Police authority. If the Court reasoned in State v Wright, supra that the duty to disclose material exculpatory evidence would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal, then it would also be reasonably argued that the “duty of Police Officials to preserve evidence” would also be an empty promise and just as easily circumvented, if the State were allowed to suppress the exculpatory evidence and then escape the responsibility by claiming that it was the store security guy who did it rather than the prosecutor or Police agents.

Mr. Smith is given a badge, given the title of loss prevention “officer” or store “detective”, given authority, albeit limited, to detain suspects that commit a theft, some carry hand cuffs and use them when needed, they are trained in policies concerning the apprehension of suspects as Mr. Smith said himself, “...and they train you on the ways that Macys actually **apprehends** people.” 6RP 57 (18-20). In fact, Mr. Smith says he identifies himself by badge. 6RP 58 (2-4); said, “It’s company policy for us to have them exit the store before we **apprehend** them.” 6RP 66 (2-3); and said that he keeps his badge in his pocket “until he’s actually going to **apprehend** someone.” 6RP 71 (3-4).

Mr. Smith has been employed at Macys as a loss prevention “assistant manager” for two years 6RP 56 (19-22); has completed a several month training program dealing with Macys’ loss prevention policies 6RP 57 (16-22); and according to Mr. Smith, it is common practice to preserve video that pertains to a case 6RP 80 (4-7); Macys preserves video evidence that pertains to an actual shoplift per their policies 6RP 90 (4-5); and he said that there was a fair amount of footage captured of a shoplift in progress 6RP 90 (13-15); but said that he didn’t preserve that video because, “Macys doesn’t actually apprehend people for taking one item, so it didn’t pertain to Macys’ policies.” 6RP 90 (22-25).

Mr. Smith clearly had the duty to preserve the evidence, was trained to do so, and absolutely failed to in order to cover up his deception in this case with regards to the items he claimed that I had stolen from Macys and his reasoning on the stand with regards to his failure to preserve the video is evidence enough of his “good or bad faith” intentions on allowing the video evidence to be destroyed.

I would make argument that a loss prevention “officer” is certainly reasonably covered by the ruling held in State v Vaster, supra and if no such ruling or consideration exists to place a loss prevention officer in that category as a “citizen acting under Police authority”, with the duty to preserve material evidence, then I most humbly request and pray that this court please consider that issue now in the present case and set precedence in the matter. And I ask this court to set aside the conviction in this case based on Mr. Smiths’ failure to preserve the video evidence from inside that Macys store.

**(e) Is the store policy referred to in my trial to destroy or recycle its’ video after 8 hours in any way relevant to the issues of the States’ failure to preserve the material exculpatory evidence in this case?**

Mr. Smith offered through testimony that Macys destroys its’ video after 8 hours. 6RP 79 (6). I am of the opinion that this whole 8 hour policy issue was just intentionally injected into the case in an effort to establish some sense of a good faith showing on the part of the parties who failed to preserve the video evidence from inside that Macys store and any argument now that this 8 hour policy is somehow relevant to why the video evidence was not preserved lacks merit and fails for several reasons. **(1)** The Macys’ store policies were never substantiated on the court record so we don’t even know that any such policy even exists. **(2)** By Mr. Smiths’ own testimony, Macys does preserve its’ video if it pertains to a case and the video not preserved was certainly in that category of video and so that would be the controlling Macys policy in any event. And **(3)** Police Officials were on the scene

immediately, the duty to preserve evidence reasonably attaches at that time, (4) Officer Miller had apparently made contact with the store and Brandon Smith prior to the passing of 8 hours. And (5) Detective Adams had also conducted the investigation of the crime by interviewing me at the Lynnwood jail and that too was done within 2.5 hours or so, so this 8 hour issue is clearly just not relevant to anything concerning why Lynnwood Police or Brandon Smith failed to preserve the video evidence from inside the Macys store.

**(f) Is there evidence on the court record which raises any reasonable doubt as to whether or not the prosecuting authority in this case or even my own attorney, had conspired in this case and were actual parties to the suppression of the exculpatory evidence that would have discredited the States' only witness and exonerated me of the charges?**

The Prosecution has a duty in protecting the truth finding process not only to disclose favorable evidence to an accused but to preserve such evidence available and that duty to preserve evidence extends to what is in the possession of his agents such as Police officials.

I informed the court on February 5<sup>th</sup>, 2010 that my attorney and I were at an impasse and that I was concerned that I was not being represented by an attorney and said that my attorney was unavailable to me. 2RP 5 (3-20); and claimed that the State was now “retaliating” against me for the airing of the same issues in court the day prior to that hearing on February 5<sup>th</sup>. 2RP 4 (4-5) & 5 (10-13).

Mr. Stemler then stated on the court record at that time that there is no retaliation of any kind and says that either I take the States' deal or the charges are being raised to Robbery 1 with a deadly weapon, which is considerably higher in range than the Robbery 2 offer and that's just the bottom line of it. 2RP 7 (11-19).

A month later after that hearing, I came before the court once again and claimed, “I have tried to have my attorney dismissed as counsel because she is refusing to meet with me and

she is not doing anything in my case.” 3RP 4 (8-14); and said, “I only have met with my counsel for about one or two minutes on this entire case.” 3RP 7 (10-11). There was then a brief exchange between the Judge and I as I am clearly frustrated at my situation and as I was leaving that hearing, Mr. Stemler lashed out at me vindictively and stated quite pointedly, “The State is going to amend the charge to First degree robbery with a deadly weapon. He’s been aware of that.” 3RP 7 (19-21), and I was certainly well aware of that. The Honorable Linda Krese then stated to Mr. Stemler, “If it’s on the record, we don’t need to put it on the record again.” 3RP 7 (22-23).

All parties in this case were well aware of the video surveillance issues surrounding the events both inside and outside of the Macys store and there had been absolutely no mention on the court record as to any issues of there not being any video footage captured, whether it concerned video from inside or outside of the Macys.

Mr. Stemler had clearly lashed out at me at that hearing on March 4<sup>th</sup>, 2010 and just eight days later, on March 12<sup>th</sup>, 2010, he and my attorney, Ms. Mann, came before the court in two separate hearings that day, and began to inject a bunch of issues surrounding the video evidence in this case.

Ms. Mann came before the court and said, “We finally interviewed the store security guard..yet that interview was post-poned twice.” 4RP 20 (4-7); and, “we had been told by counsel, who I believe obtained that information from his victim advocate through the store security guard, that no video of this incident existed 4RP 20 (11-15); “then we were told yesterday that, oh, that’s incorrect, there actually is video. There is not video outside. Given the placement of the camera, that actually seems to be reasonable. 4RP 20 (3-19). Ms. Mann also said, “The situation we ended up in is the security guard who is the primary witness in this case and certainly the only witness to the actual alleged crime has been indicating for a

couple of weeks that there is no video tape of, essentially, the genesis, the shoplifting. 5RP 3 (5-10).

On the same exact day, Mr. Stemler states on the court record that when he spoke to Mr. Smith when he first charged the case, Mr. Smith indicated to him at that time that there was no video tape. And that when he (Mr. Smith) spoke to the police officer, he indicated that there was no video tape. However: Mr. Stemler then said that Mr. Smith isn't sure now whether there is or isn't any video but he's going to check it out when he comes into work that day on March 12<sup>th</sup>. 5RP 5 (13-17).

Mr. Smith testified that it was the Macys store policy to destroy or recycle its' video footage after 8 hours 6RP 79 (6); and said that he did not preserve the video. 6RP 90 (3-25). And so after all of that, several questions now come to my mind; **(1)** What is the double hearsay with regards to where my attorney had received her information about the video evidence in this case? **(2)** Wouldn't Ms. Mann have gotten her information regarding video evidence from Mr. Stemler as part of the States' discovery? And **(3)** if Mr. Smith had already informed Mr. Stemler and police officials from the very start of the case, as Mr. Stemler said, that there was no video available from inside or outside the store, then, why would Ms. Mann be trying to get any video at all just 4 days before my trial? and **(4)** Why is the issue of video evidence just now just now being brought before the court? and **(5)** If my attorney had just spoken to Mr. Smith, as she said, just the day before this hearing on March 12<sup>th</sup>, and if he had already indicated to Mr. Stemler and the police that video didn't exist, as both Mr. Stemler and Detective Adams had asserted was the case, who then had Mr. Smith been indicating anything to over the past two weeks, as Ms. Mann claimed, with regards to any video tapes whether it be concerning video from inside or outside the store? **(6)** Why is Mr. Smith claiming that, to his recollection, he never told the police officials that there was no video? **(7)** And if it is truly the Macys store policy to destroy its' footage after 8 hours, as was

injected into my trial, and if Mr. Smith knew that he did not preserve the footage before the passing of 8 hours, then why would Mr. Smith tell Mr. Stemler that he wasn't sure if there was video or not but would check when he came in that day for work?

If any of what Mr. Stemler and Ms. Mann were claiming at this hearing on March 12<sup>th</sup> were rooted in truth, it would add up, but it's not based upon truth and the only thing it adds up to is the governmental misconduct to suppress the exonerating exculpatory evidence and the conspiracy between Ms. Mann and Mr. Stemler to deprive me of the use of that evidence that was favorable to my defense because they believed that their theory in the case justified this.

There is **no** video, wait, "This is a store that generally does video tape.", and "this is a store that has a very good video system", so that won't be reasonable will it, so, Oh yea, I got a notion, "we were told yesterday that, oh, that's incorrect, there actually **is** store video. There **is not** video "**outside**". And "given the placement of the camera, that actually seems to be reasonable." See 4RP & 5RP sessions.

If there is any doubt whether or not Mr. Stemler and Ms. Mann conspired in this case, I ask this court to consider this, On March 16<sup>th</sup> if you go to page 18 at (10-12) you will see that Mr. Stemler tips his entire hand when he pointedly stated, "Throughout this document there are a number of potential concerns that Ms. Mann and I have discussed in the context of the theory of "**our**" case..." (emphasis added) 6RP 18 (10-12). Not "the case" or "this case" but "our case", and when you view the context of the entire court record, it is quite clear in all that was said and done through the course of my trial that Mr. Stemler and Ms. Mann did have a shared theory in this case and it amounted to a conviction against Mr. Wiggin.

We actually get a good glimpse of Mr. Stemlers' theory on the video evidence in this case when he said, "the video tape from inside the store isn't going to be able to help.." 6RP 263 (11-12); and "even if the video did show that Mr. Wiggin didn't steal the scarf, that would not resolve whether he committed a robbery or not . 6RP 263 (15-19); "whether he stole the

scarf that day is not in the elements and whether he stole the perfume that day is not in the elements.” 6RP 272 (16-19). Clearly, Mr. Stemler was of the mind that the video evidence from inside that Macys store was just **not material** to his case against me and Ms. Mann also shows us a little of her theory with regards to the video evidence about the scarf issue when she said, “..Maybe it’s not because he’s (Mr. Smith) lying..” “maybe he was sort of filling in the gaps..” “kind of making himself out to be a little bit better of an observer..” “maybe he just thought he saw something..” 6RP 279 (3-13); and Ms. Mann also said, “Mr. Wiggin says bring on the video, it will show I’m telling the truth. I didn’t steal the scarf, and I didn’t wave the knife at him.” then she says.. “Surveillance tapes absolutely would have proved **“the first part of that”**. 6RP 289 (1-5)

It is quite apparent what Mr. Stemlers and Ms. Manns’ theories were in the case regarding the video evidence. This is about as obvious a case as can be that the prosecutor engaged in misconduct to not only suppress the impeaching evidence but also to solicit the aid of my own attorney, knowing that we were in a conflict of interest position and knowing that her loyalties lied with the court and the State above me.

In City v Fettig, 10 Wn. App. 773 P.2d 1002 (1974), the court held that “suppression by the police or prosecution of material evidence favorable to a criminal defendant violates his Due Process protections despite the fact that such suppression was not deliberate and evidence “is material if it rebuts evidence offered by the prosecution, it is favorable to the defendant if there is a reasonable possibility that it would rebut the prosecution evidence or corroborate that of the defense.”

“One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its’ zeal to convict a defendant, not suppress

evidence that might exonerate him.” Moore v Illinois, 408 U.S. 786, 810, 33 L.Ed.2d 706, 92 S. Ct. 2562 (1972) (Opinion of Marshall, J); Agurs, supra at [427 U.S. 116].

My defense was absolutely impaired by the loss of the video evidence in this case and that means the evidence from both inside the Macys store and that footage of the Macys parking lot from either the Mall security officials and/or the Fitness Center tapes.

Evidence existed that proved beyond all doubt that I did not steal that scarf and Ms. Mann knew it and the police knew it, Mr. Smith knew it, and Mr. Stemler certainly knew it and absent the video, I could not prove the absolute truth to the jury and the prosecuting authority knew that the evidence of character that was manifest in this case would weigh so heavily against me, so he knew that to remove any chance of me raising a proper defense, all he had to do was get rid of that evidence and whether he ever had control of the evidence personally himself is irrelevant.

**(g) Was there any evidence available that could have been used which had an equal or comparable impact as the actual evidence that was not preserved in this case?**

Nothing was available or used in my trial that could have replaced the absolute truth that was contained and captured on the video footage not preserved in this case. Detective Adams said it best when he said, “There is two sides to every story...but video don’t lie.” [St Ex 21B p 26]

**(h) “If the suppression of evidence results in Constitutional error, it is because of the character of the evidence, not the character of the prosecutor.” Agurs, supra at [427 U.S. 110]. “What was the character of the evidence not preserved in this case?**

Mr. Smith maintained and presented through testimony that I had in fact stolen that scarf 6RP 63 (10-25); and I maintained and testified that, “I was wearing the scarf when I walked into the store.” 6RP 160 (6-8); and because Mr. Smith did not concede the point and because Mr. Stemler, the States’ attorney, further maintained and claimed to the jury

that I “did steal the scarf.” 6RP 262 (25) – 263 (1), the video then from inside of that Macys store was clearly “**material exculpatory evidence**” because it possess(ed) an impeaching value on its’ face and it rebuts(ed) the States evidence. (emphasis added)

“Evidence to impeach a witnesses’ credibility counts as **exculpatory** for purposes of a Brady claim.” Lovitt v True, 403 F.3d 171; 2005 U.S. App. LEXIS 5438

The video evidence from outside the Macys store from the Mall security officials covering that parking lot was also impeaching evidence that would have proven beyond all doubt that I did not wield any knife in the open position as I walked across that parking lot and could also be reasonably characterized further as “fleeing man evidence.”

“The State violates a defendants’ Due Process rights by failing to preserve “potentially useful” evidence while acting in bad faith or by failing to preserve “materially exculpatory evidence” regardless of whether it acted in bad faith.” State v Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994).

The evidence destroyed, lost, suppressed, and/or not preserved in this case was “essential to and determinative to the outcome of the case” and was clearly “material exculpatory” and “impeaching” evidence that would have discredited Mr. Smith completely and exonerated me of the charge and would have proven the truth in this case.

There is nothing upon the court record that establishes any good faith showing on any part of the Lynnwood Police officials for their failure to preserve the video evidence in this case. The negligent or reckless failure to preserve important evidence and their offer that they only looked into “**some**” of the video evidence “from where the confrontation was”, just cannot be “in accord with – normal practice” (emphasis added). In fact, principles of sound investigations certainly would demand that such evidence be sought and preserved, both from inside the Macys store and from the Mall security officials

and/or the Fitness Center. And there is clearly no good faith showing on the part of Mr. Smith as to why he failed to preserve the video evidence in his control.

Mr. Stemler and my attorney conspired in this case to suppress the impeaching evidence and they deliberately eluded from the mention of any available footage from the Alderwood Mall which has its' own surveillance system and every party in this case was actually quite careful even to always say that there was no video of **outside** that Macys store, but always with **“where the confrontation took place.”** They omitted any and all mention of the Macys parking lot footage and had that been addressed in my trial, it is likely that the jury would have viewed the States' failure to preserve the evidence in this case quite differently and that may have been the impetus that shifted the verdict in this case to “not guilty”.

The State had absolute evidence from inside that Macys store that proved that Mr. Smith lied about what I stole that day, and the State also had video evidence in their possession or had the ability to obtain that footage from the Mall security officials and that was absolute evidence as to whether or not I had that knife open as claimed.

“It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, Constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.” Agurs, supra at [427 U.S. 112-114].

In this case, the States' conviction is based and hinged upon the credibility of its' one and only witness. A witness who was successfully impeached and proven to be an unreliable witness and even to have perjured himself in a court of law. A witness who

filed a false police report, and when confronted with the video evidence which proved it, he aided in the destruction of that evidence to cover up his deception.

My attorney did not object to the States' failure to preserve the evidence in this case but I raise it on direct appeal because it is a manifest error which affects a Constitutional right RAP 2.5 (a) (3). If this argument is inartful, I beg this Courts' pardon. I am not an attorney and I have presented it the very best that I can. I believe that relief can be granted in this case under Brady v Maryland supra, State v Vaster supra, State v Wright supra, Mooney v Holohan, 294 U.S. 103, 79 L.Ed 791, 55 S. Ct. 340, 98 ALR 406 (1935), Moore v Demsey, 261 U.S. 86, 67 L.ed 543, 43 S. Ct. 265, any one of these or all. The State failed to preserve the material exculpatory exonerating evidence in this case and the conviction was obtained through the violation of my Due Process right. See U.S. Const. 14<sup>th</sup> Amend; and Wash. St. Const. Art. 1, Sec. 3 and this conviction must be set aside and a new trial granted.

**(2) The State used what it knew, or should have known was perjured testimony.**

My attorney did not raise objections to Mr. Smiths' testimony or seek to have his testimony suppressed but again I raise this issue on direct appeal because it is a manifest error affecting a Constitutional right RAP 2.5 (a) (3).

Not only did the State suppress all of the video evidence which was favorable to me, those same authorities deprived me of my liberty by the use of testimony of which the State knew, or should have reasonably known was perjured testimony.

"The most rudimentary of the access-to evidence impose upon the prosecution a Constitutional obligation to report to the defendant and to the Court whenever government witnesses lie under oath." Napue v Illinois, 360 U.S. 264, 269-272, 3 L.Ed.2d 1217, 79 S. Ct. 1173 (1959); See also, Mooney v Holohan, supra. A criminal defendant is entitled to protection against perjury and much more.

Mr. Smith was successfully impeached on the stand about a number of things and proved not only to be “not credible” but also to have been “outright deceptive” and one thing is certain in this case, Mr. Stemler, the Lynnwood Police, my own attorney, and certainly Mr. Smith himself, all knew that I did not steal that scarf as Mr. Smith claimed.

Defense Exhibit 14 is the reduced-fare bus pass which I obtained just 30 minutes prior to going into that Macys store and it proves, next to everything that I was wearing that day, that I was wearing that scarf when I took that photo and so certainly had it on when I entered that store and the reasonable inference to be drawn from Mr. Smiths’, the Police Officials’, and the States’ suppression of that evidence, is that the evidence corroborated my version of things and proved that I did not steal that scarf et cetera.

Mr. Stemler said in his closing argument, “If the video had shown he came in, and assume what Mr. Wiggin told you was true for a moment, that he came in with a scarf and a full, unopened bottle of cologne in his pocket. That wouldn’t help you resolve whether he committed a robbery or not...” 6RP 263 (15-19).

Is Mr. Stemler of the mind that even if his witness had lied on the stand, that it wouldn’t help to resolve the case? Mr. Stemlers’ remarks in this case clearly demonstrate that he not only didn’t feel that the video evidence was relevant, he also expressed to the jury and felt that even if his witness gave false testimony, it just wouldn’t matter and if Mr. Stemler felt or believed that Mr. Smith had told the honest truth about the scarf, then why on earth would he even begin to concede the point at all in his closing remarks? He absolutely knew that I did not steal that scarf and he was fully aware of the video evidence that proved it and he also saw the bus-pass that proved it and he allowed the perjury to stand uncorrected because he wanted his conviction at any cost.

In Mooney v Holohan, supra, the Court said, “The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.”

Mr. Stemler had a duty to seek the truth, but sought the conviction at all hazards and not only suppressed the impeaching evidence that was favorable to me, he knowingly used or allowed perjured testimony to stand uncorrected and false evidence was allowed to go before the jury. In the words of the Court in United States v Augenblick, the States' case was "more a spectacle or trial by ordeal, than a disciplined contest."

In Mooney v Holohan, supra the court also said, "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." And the Court also said, "The knowing use by a State of perjured testimony to obtain a conviction is as much a denial of Due Process of Law as for a State to dominate a court by military force, or permit it to be dominated by mob violence, since in all these instances, while there is the form of a hearing, a hearing in substance, within the meaning of Due Process of Law, is denied." And finally, "The denial by a State of any judicial process by which a conviction is obtained through the admitted or **"proved"** use by the State, "knowingly or unknowingly", of perjured testimony, and the suppression of impeaching evidence, may be set aside, is a deprivation of liberty without Due Process of Law in violation of the Fourteenth Amendment." Moore v Demsey, 261 U.S.86, 67 L.ed. 543, 43 S. Ct. 265; Frank v Mangum, 237 U.S. 309, 59 L.ed. 969, 35 S. Ct. 582; People v Mooney, 175 Cal. 666 166 P. 999; People v Mooney, 176 Cal. 105, 167 P. 696, 177 Cal. 642, 171 P. 690; [Mooney v Holohan, supra]

There is evidence that the State suppressed the impeaching evidence in this case and there is absolute evidence that Mr. Smith lied about me stealing that scarf and Mr. Stemler allowed that testimony to stand uncorrected and the State did use perjured testimony in this case to obtain the conviction and that conviction must be set aside.

**(3) The representation by defense counsel, Caroline Mann, was Constitutionally deficient in violation of the United States Constitution, 6<sup>th</sup> Amendment, and Article 1, Sec. 22 of the Washington State Constitution.**

The Sixth Amendment to the United States Constitution guarantees that the accused in all criminal prosecutions shall enjoy the right to the assistance of counsel for his defense and the Constitution assures a defendant effective representation by counsel, effectiveness however, is not a matter of professional competence alone. “Without counsel, the right to a fair trial would be of little consequence.” Kimmelman v Morrison, 477 U.S. 365, 91 L.Ed. 305, 106 S. Ct. 2574 [377] (1986). “..for it is through counsel that the accused secures his other rights.” Main v Moulton, 474 U.S. 159, 168-170, 88 L.Ed.2d 481, 106 S. Ct. 477 (1985).

The Constitutional guarantee, however, “cannot be satisfied by mere formal appointment.” Avery v Alabama, 308 U.S. 444, 446, 84 L.Ed. 377, 60 S. Ct. 321 (1940). “An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” Strickland v Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). In other words, “the right to counsel is the right to effective assistance of counsel.” Evitts v Lucey, 469 U.S. 387, 395-396, 83 L.Ed.2d 821, 105 S. Ct. 830 (1985).

A criminal defendant received Constitutionally inadequate representation only if (1) the defense attorneys’ performance was deficient, i.e., fell below an objective standard of reasonableness based on a consideration of all the circumstances, and (2) such

deficient performance prejudiced the defendant, i.e., there is a reasonable probability that the outcome would have been different had the representation been adequate. State v Brett, 126 Wn.2d 136, 198-99, 892 P.2d 29 (1995), cert denied, 516 U.S. 1121, 133 L.Ed.2d 858, 116 S. Ct. 931 (1996); State v King, 130 Wn.2d 517, 531, 925 P.2d 606 (1996); Strickland v Washington, supra,

Every defendant in a criminal case is entitled to a full and vigorous defense and the purpose of defense counsel is to ensure the integrity of the trial and preserve the adversary systems' function whereby the States' evidence is properly challenged and subjected to adversarial testing so that the result of the trial can be said to be reliable.

My attorneys' performance was grossly deficient and caused severe prejudice to my defense but the inadequate representation afforded to me by Ms. Mann, was more than just errors of counsel or incompetence, it amounted to a complete breakdown of the adversarial system and had the representation of counsel been adequate and fair, there is no doubt that the outcome of my trial would most assuredly have been different absent all of my attorneys' deficient performance and errors. My attorney essentially allowed the tampering of the evidence in this case to go unchecked and then Ms. Mann systematically dismantled my defense nearly point for point and her conduct was egregious and prevented me from receiving a fair trial.

**(a) My attorney did not take appropriate action towards dealing with the failure to preserve the material exculpatory and impeaching evidence in this case.**

My attorney did not object to the States' failure to preserve the evidence in this case nor did she seek any sanctions but I raise this issue on direct appeal because it is a manifest error affecting a Constitutional right. RAP 2.5 (a) (3).

The State has the duty to preserve material evidence and the failure to do so in this case was a violation of my Due Process right to a fair trial and my attorneys' inaction in

response to the States' failure to preserve material exculpatory evidence amounted to a Constitutionally deficient performance of counsel because the purpose and duty of defense counsel is to preserve the adversarial process by protecting the accused from any encroachments by the government on Constitutionally assured rights.

Upon discovery of the States' failure to preserve evidence, my defense attorney had the duty but failed to **(1)** File a motion for an evidentiary hearing to determine the cause and circumstances of the failure to preserve the evidence. And **(2)** Defense Counsel failed also to seek any other appropriate sanctions on the government for its' failure to preserve the material evidence in this case and **(3)** Defense Counsel failed to file an appropriate motion to dismiss the charges pursuant to CrR 8.3 (b).

**(1)** Had an evidentiary hearing been conducted prior to trial, the details surrounding the character of the evidence lost in this case could have been set before the court along with the relevant sets of circumstances which led to the States' failure to preserve the evidence and a "good" or "bad" faith showing would have been determined at that time and thereby established in a pre-trial hearing whether the case should justly proceeded to trial or not.

**(2)** After a full hearing and consideration of all the evidence presented at that evidentiary hearing, had the court opted to proceed to trial, my attorney had a duty to seek appropriate sanctions on the government in order to balance the prejudice caused to my ability to raise an adequate and full defense absent the lost evidence and my attorneys' failure to seek sanctions caused an undue burden on my defense and in light of the character of the evidence that was lost and the circumstances surrounding its' loss, an adverse inference instruction by the court to the jury was both warranted and needed to afford me any chance at facing the States' case without the exculpatory impeaching evidence that was not preserved, lost, destroyed, and/or suppressed.

In Arizona v Youngblood, 488 U.S. 51, 102 L.Ed.2d 281, 109 S. Ct. 333, the trial court “instructed the jury that if they found that the State had destroyed or lost evidence, they might **“infer that the true fact is against the States interest.”**”

And in Mazloum v District of Columbia, 530 F. Supp. 2d 282, the court stated that the appropriate sanction for the destruction of evidence by the State is a dismissal of the charges or an **“adverse inference instruction to the jurors”** that the reasonable conclusions to be drawn is that the evidence supports the claims of the defense and was unfavorable to the State and that is why it was not preserved.

(3) CrR 8.3 (b) provides

*On motion of court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial. The court shall set forth its’ reasons in a written order.*

Washington Superior CrR 8.3 (b) exists to ensure that a defendant gets a fair trial. The State denies a defendant that right to a fair trial when it losses or destroys evidence material either to guilt or punishment. United States v Agurs, supra, State v Wright, supra, Brady v Maryland, supra, State v Vaster, supra.

My attorney had a duty to ensure the trial was fair and to file an appropriate motion to conduct an evidentiary hearing on the failure to preserve the material evidence in this case and without appropriate sanctions i.e. “the adverse inference instruction from the court”, my defense relied solely upon Ms. Manns’ delivery to the jury with regards to the proper inference to be drawn from the destruction of the evidence and we see in Ms. Manns’ closing remarks that the proper inference was never delivered in this case and my defense was without a doubt prejudice by her actions and inactions with regards to the States’ failure to preserve the evidence and certainly prejudice is apparent in the

fact that Ms. Mann did not file the appropriate motion to dismiss the charges in this case which was justified by the States' failure to preserve that evidence.

**(b) My attorney undermined and sabotaged my defense nearly point for point.**

(i) I claimed there had to be some kind of surveillance footage of me walking out that door at Macys that proved that I was just trying to collapse my knife. [St Ex 21B p 26].

First My attorney clearly reasoned on the court record on March 12<sup>th</sup>, 2010, during the (am) session that "given the placement of the camera" things will seem "reasonable" as to what was or was not captured on video. 4RP 20 (18-19), and she then came into court at my trial and on cross examination of Mr. Smith, they presented testimony before the jury to place all of the cameras in that store anywhere other than where I happened to be except one particular shot of when Mr. Smith first observed me on camera. 6RP 86 (25) – 87 (24); 6RP 96 (4) – 98 (8).

Interestingly, Ms. Mann obviously slips up in this presentation and begins to actually finish an answer for Mr. Smith in order to aid him in the delivery of his testimony or perhaps they had just rehearsed it together prior and Ms. Mann just simply forgot where she was for a second and let this slip out. On page 97 on March 16<sup>th</sup> cross examination of Mr. Smith beginning at (3) **Q.** There's also cameras down here before you get to the fitting rooms, right? **A.** Yes **Q.** So there should have been videos from this camera as well as walking past the other camera, correct? **A.** The other cameras all were pointing to the registers. **Q.** Even this one in the cross area? **A.** Yes. **Q.** If somebody walks through, because they're not above the register, right? **Now I would point out with emphasis here that this question posed by my attorney absolutely made no sense at all and it is clear that she is leading the witness in any event but now Mr. Smith answers this question which made no sense at all with what was obviously a programmed response and said, A.** Several are, yes.

My attorney then goes on to ask, **Q.** But the one down by the fitting room, isn't, correct? **(and here again she is clearly leading the witness), A.** There is one down by the fitting room at the T at the juncture of the aisle... **And now my attorney begins to finish this with.... Q.** But that's pointing at.... **And then Mr. Smith finishes the statement with, A.** That one's pointing at the registers next to the demo.

Why on earth is my attorney leading the States' witness and even finishing his statements for him? Ms. Mann and Mr. Smith go on to present a ridiculous theory before the jury that all of the cameras were just not positioned in the places I was or they were all pointing here, there, up too high, over but not on, and everywhere else except to capture any footage that I claimed had to exist.

**(ii)** I was claiming that I "did not" throw the knife down in the open position and that it must have been the "**major impact**" from the knife hitting the ground that likely triggered the knife open. 6RP 239 (2-6), but before I could deliver that theory and/or defense, my own attorney deliberately undermined my claim by soliciting and/or suggesting through her questioning of Officer Miller on cross examination as follows: **Q.** And the knife was located just a couple feet off the pathway behind that building, correct? **A.** Correct. **Q.** So it "hadn't been thrown with any great force?" **A.** Right. **The question has been asked and answered but my attorney goes on with... Q.** It has to have been tossed "fairly gently" to have landed there? **A.** That's what I would guess. **Q.** Just because it was so close to the pathway? **A.** Right. 6RP 108 (10-19).

Clearly Ms. Mann had a point to be made with this line of questioning and then she asks me as well on direct, **Q.** "Did you toss it hard, ...or just a couple feet? 6RP 208 (17); And because Ms. Mann never made any point in her closing remarks to suggest any other inference or point to be made with this line of questioning, I think it reasonable to say that she planted a seed of an idea that the knife was not thrown hard and so there was not any

kind of a “**major impact of the ground**” as I was claiming and if there was any other point to be made other than what I point out, Why wasn't it made in summations?

Anything else said with regards to the knife at any other point in her closing remarks cannot explain why my attorney made these comments or suggestions especially in light of my claimed defense as to how it likely was discovered in the open position, nor can it be said that the prejudicial effects are nullified by another remark somewhere else in closing. Clearly it is recognized in law that the injury can be sustained even in the mere asking of a question so it should stand to reason then that such remarks can only be seen as prejudicial and in this case, unwarranted and without any other legitimate cause.

(iii) I was claiming from the very onset of this case that I did not point the knife at anybody and that I did pull the knife out to collapse it as I was exiting the store but I was clipping it to my belt as I exited the store. [St Ex 21B p 11, 26, & 27] and I also claimed that I just assumed that Mr. Smith must have just **noticed my knife clipped to my belt** and that's when he directed me to throw it down on the ground. [St Ex 21B p 11].

The State then brings ridiculously coincidental testimony to say that Mr. Smith identified himself by voice and badge and that his badge was clipped to his belt. 6RP 68 (16-17), and that he had removed it from his pocket and then clipped it to his belt as he was exiting the store as to display it. 6RP 71 (1-4). This was clearly one of the theories of their case that Mr. Stemler spoke of and an obvious adversarial game rather than any base of truth in it.

My greater issue with this is that my attorney, Ms. Mann, did not point this out as “ridiculously coincidental testimony” and instead, aided in the delivery of this notion in both her line of questioning of Mr. Smith and essentially came behind the States' attorney blowing horns and whistles, beating drums, waving flags and flares and deliberately drew as much attention to the suggestion as humanly possible and really, Mr. Stemler only made light mention of this theory next to my own attorneys' presentation of this theory of theirs

both in her line of questioning and without any doubt in her closing remarks to the jury in regards to this whole “displaying the knife theory” they shared.

Ms. Mann: **Q.** You describe yourself as identifying yourself by voice and badge. By that you mean you took your badge out of your pocket and hung it on your belt, right? **A.**

Yes. **Q.** As you were outside the doors, you were reaching into your pocket, pulling out your badge, hanging it on your belt? **A.** I probably set it up beforehand.. 6RP 93 (15-25)

**Q.** So when you say that you identified yourself as voice and badge, you mean they **happened to notice the badge on your belt?** **A.** Yes 6RP 94 (1-4).

It is quite clear that Ms. Mann completely tailored her line of questioning to suggest that Mr. Smith had done precisely what I claimed I did with the knife with his badge and even covered the point where I had said that Mr. Smith must have “**just noticed**” the knife attached to my belt line area and this line of questioning cannot be argued as coincidental and the States’ attorney doesn’t even mention this theory again in his closing remarks yet my attorney once again felt compelled to hammer this theory home with the jury and her comments with regards to this theory came directly behind her saying essentially that “robbery is theft plus force; force can be used to either get the property, which it absolutely was not here.., or to keep the property after you’ve been stopped.” Then she says, “That is the issue in this case. Was there any force being used to keep the property?” 6RP 284 (23) – 285 (4), **and immediately after that, my attorney makes the following comments**, “Mr. Wiggin tells you that the knife was clipped and away. It wasn’t in his belt like I’m demoing here. It was in his front pocket of his jeans. That’s approximately the position. Interestingly enough, the prosecutor says, what is that all about? This is exactly how the store security guard displayed his badge. 6RP 285 (4-9).

First of all, the States’ attorney never made any such comment and his presentation with regards to this theory was absolutely minimal next to Ms. Manns’. In fact Mr. Stemler

even made the comment that he kind of neglected the issue in his direct of Mr. Smith. 6RP 70 (21-22) and there is not one single reference in Mr. Stemlers' closing argument to this theory so he clearly neglected to mention it again and it is just as clear that my own attorney was making absolutely sure that she did not neglect this suggestion herself in her closing remarks and she delivered a direct inference to the jury and whether she said, "the prosecutor tells you..." or not, she is the one who delivered the inference and she is the one who said, "Interestingly enough,...this is exactly how Mr. Smith displayed his knife." Those words came from her mouth, not Mr. Stemlers' and the extra few words in between or any remarks elsewhere cannot erase the prejudice caused by those remarks.

(iv) I claimed that I did pull the knife out, but only at the direction of Mr. Smith and that "**I put the knife back in my pocket as I simply walked away.**" 6RP 203 (16-20).

Mr. Smith had claimed that I did walk through the parking lot with the knife in the open position. 6RP 76 (1-2); and the States' attorney, Mr. Stemler claimed in his closing argument that, "he walked through the parking lot with that knife open just like Brandon Smith said." 6RP 272 (9-10).

**My issue is this**, my own attorney comes behind all of that and states in her closing argument that, "**Well, Mr. Smith is correct**, the individual is walking across the parking lot with his knife held out like this, despite the fact that there's nobody around him." 6RP 281 (22-25).

Now I am no attorney but I do believe that this is an issue where it is apparent that the adversary system is certainly broken down here. It's three against one here and why on earth is my own attorney siding with the States' witness and essentially confessing or conceding a point that I said was absolutely not the truth and also basically said that Mr. Smith was telling the truth and that I was not.

(v) I said Brandon Smith was embellishing things [St Ex 21B p 17]. I said Mr. Smith was calling it dirty and fabricating his story. [St Ex 21B p 20]. Essentially, I was claiming that Mr. Smith deliberately lied about what I stole from that Macys, that he deliberately fabricated and embellished the event with regards to the knife, and lied about me displaying that knife across the Macys parking lot as I left the scene.

Mr. Smith was absolutely impeached in his testimony on several points and proved unreliable as a witness but also clearly deceptive in his version of the events at that Macys store yet my attorney felt compelled to vouch for his credibility several times on different points and all of the testimony and evidence from the testimony pointed at anything other than what my attorney suggested to be so with respect to Mr. Smiths' possible motives for destroying the video evidence or about why he reported what he did with regards to the scarf and as to why he couldn't describe the manner in which I allegedly pulled the knife.

(1) Mr. Smith testified that he's not trained to preserve witnesses and evidence. 6RP 92 (18-21); but yet he admitted that he reviewed the video that was captured that day. 6RP 98 (24) – 99 (3). If you're not trained to preserve evidence, then why are you reviewing the video tape at all Mr. Smith?; Mr. Smith said he is the "assistant manager of loss prevention" at that Macys and has completed training on Macys policies and he even referred to the second loss prevention officers from that store, David Thomas, as not being a fellow security guard as suggested by Ms. Mann but rather one of "**his officers**". 6RP 95 (13-15); and Mr. Smith absolutely denied that he had viewed the merchandise (evidence) directly on the scene. That he only saw it when it was returned to the loss prevention office at Macys by Officer Miller. 6RP 95 (21-23), but I testified that I saw Mr. Smith view the evidence on the hood of the squad car in which I was detained. 6RP 241 (1-2); and Officer Miller had testified and corroborated my version of that issue and said that the merchandise was spread out on the police car and that he believed that the store security guard "was"

there on the scene to identify the items that were allegedly stolen from the Macys store. 6RP 111 (10); and how else would I have known from the onset of the case and been making remarks to what they took from me unless I did view them sorting through it?

(2) Mr. Smith said that I pulled a knife on him but he couldn't describe or recall the manner in which that knife had been allegedly flipped open on him whether that was with the thumb of one hand or if it was done with two hands or not. 6RP 76 (8-16)

I got up and gave demonstrative evidence before the jury, both closing the knife to rebut Detective Adams notion and allegation that it couldn't be closed one-handed but I also showed the jury exactly what it looks like for me to flip that knife open. 6RP 158 (20).

Mr. Stemler rightly comes in behind all of that and points out quite clearly to the jury in his closing argument that, "You saw the Detective and you saw Mr. Wiggin with that knife. They both demonstrated for you how it opened. **It's a quick flip**, just that fast, just that fast from five feet away. 6RP 291 (17-20), and then Mr. Stemler said, "And both the defendant and Detective Adams demonstrated that for you. And really, **based on what you saw both of them do, there can be no confusion** between this motion of getting it open and even the one-handed motion the defendant showed you of how he closes his knife. **There's really no confusing that.**" 6RP (11-20); and Mr. Stemler is without any doubt correct in that statement. There would be no confusing it at all about how that knife was flipped open whether it was with one or two hands yet Mr. Smith couldn't describe it.

(3) Mr. Smith testified that he couldn't remember what he did with the security devices and tags that he found from the second pair of jeans, he either dropped them on the floor or maybe he put them in his pocket. 6RP 83 (9-17); and said that there wouldn't have been any security device on the scarf but admitted that there would have been store tags but Mr. Smith said he was "unclear" if he saw me remove the tags from the scarf. 6RP 84 (17-18); and he couldn't remember if I did anything with the tags from that scarf. 6RP 85 (10-11).

Mr. Smith also testified that there absolutely was footage that would have proven whether or not I had that scarf on prior to the time he alleged I had stolen it. 6RP 98 (1-14); and he said that Macys preserves video that pertains to a shoplift or “to a case” and said that there was in fact a fair amount of video captured of a shoplift in progress but stated that his reasoning for not preserving it was because, “we do not apprehend people for taking one item, so it didn’t pertain to my policies.” 6RP 90 (4-25).

And there is actual physical evidence that proves that I did not steal that scarf. Defense Exhibit 14 is the reduced-fare bus pass that was obtained just 30 minutes prior to me entering that Macys store and that bus pass contains a photo of me that reflects everything that I was wearing from the shoulders up and the scarf is surely visible in that photo.

My attorney came in behind all of that, and didn’t even pursue Mr. Smith on the fact that he was impeached on whether or not he viewed the evidence on the scene where I was arrested and she didn’t pursue a line of questioning with regards to his reasoning on not preserving that video as he said it was because, “we don’t apprehend someone for taking one item.”? Why on earth would Ms. Mann just accept that as a valid answer and just move on in her line of questioning without challenging that kind of an answer and why wouldn’t she point that kind of ridiculous reasoning out in closing argument?

All of the evidence of Mr. Smiths’ testimony supported my claim that the man had intentionally lied about what I stole, that obviously he wasn’t a credible witness and there was absolutely reasonable enough doubt to question why on earth this man couldn’t describe the manner in which the knife was allegedly flipped open on him when it is so clearly **unmistakable**, as even the States’ attorney pointed out from his own mouth, and that it was more reasonable and likely as not that the reason Mr. Smith couldn’t describe it, is because I never pulled the knife on him as he claimed and also more likely than not that when confronted with the video evidence that proved his deception with regards to that

scarf, he deliberately aided in the destruction of that evidence that proved his deception. And yet my attorney presented to the jury in her closing remarks that, “Whether it was through carelessness, indifference, a great deal of evidence in this case was not preserved by the store security guard.” 6RP 278 (9-11); Mr. Smith didn’t preserve the evidence, but **“maybe he didn’t think it would be significant”, “maybe it was just carelessness”** 6RP 278 (10-13); He chose not to save the video because he said he didn’t think it was significant. 6RP 279 (14-15); “They keep these videos routinely. **Is it carelessness? Is it indifference?** 6RP 288 (17-19). And Ms. Mann leaves it all in the air just like that, that the evidence was just not preserved because Mr. Smith was just careless or indifferent and didn’t think that it was significant and in fact Ms. Mann goes on to argue that, “We know that Brandon Smith is not a credible witness, **maybe it’s not because he’s lying.**” 6RP 279 (3-5); **“maybe he was sort of filling in the gaps”** “kind of making himself out to be a little bit better of an observer than he was.” 6RP 279 (6-13); **“maybe he believes he saw something,** maybe he looked at that scarf and said, I think that came from us. He must have stolen it.” 6RP 279 (11-13); and Ms. Mann also goes on to vouch for Mr. Smith when she said, “Mr. Smith tells you, **“as anybody would”**, when a knife is at waist level, it’s pulled out facing toward him. He doesn’t remember how he opened the blade, whether it was with his thumb or whether it was a two-handed kind of thing.” 6RP 287 (7-13) and then right behind that said, “He remembers it coming out and pointing directly at him as he says, “F You, try to stop me.” Tells you, **“which makes perfect sense”**, his attention is on that blade so much, he just knows that there are customers over there..” 6RP 287 (7-16).

If these comments are not lending credibility or vouching for the States’ witnesses’ version of things, I don’t know how else to characterize it and considering the fact that the States’ entire case hinged upon the credibility of this one and only witness, I think the prejudicial affects of my attorneys’ comments towards essentially underscoring Mr.

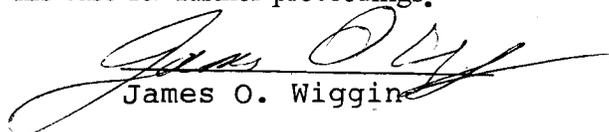
Smiths' possible motives and/or reasoning for that which he said with regards to the scarf and the knife, and why he didn't preserve material evidence that was in his control, can only be seen as creating an unfair advantage of the State over me in my trial and I would argue further that even if one or the other issue raised on this ground wouldn't necessarily constitute reversible error, then the cumulative effect of these multiple errors certainly should be considered as establishing the deficient performance prong of the ineffective assistance claim I raise in this appeal.

Where the cumulative effect of multiple errors so infected the proceedings with unfairness, a resulting conviction or death sentence is invalid. See Kyles v Whitley, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995). As the Ninth Circuit pointed out in Thomas v Hubbard, 273 F.3d 1164 (9<sup>th</sup> Cir. 2001), "[i]n analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review." (citing United States v Frederick, 78 F.3d 1370, 1381 (9<sup>th</sup> Cir. 1996); See also Matlock v Rose, 731 F.2d 1236, 1244 (6<sup>th</sup> Cir. 1984) ("Errors that might not be so prejudicial as to amount to a deprivation of Due Process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.").

The representation by Ms. Mann was Constitutionally deficient, caused prejudice, and adversely affected the outcome of my trial and I ask that this conviction be set aside and that this court order a new trial be granted whereby I am lawfully represented by counsel.

#### **VI. Conclusion**

I was denied a fair trial by the State because of the grounds contained herein and I ask that this court reverse the conviction and remand this case for further proceedings.

  
James O. Wiggin

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

2010 MAR 27 09:10:28  
COURT OF APPEALS  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JAMES O. WIGGIN

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Michael T. Downes, Judge

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**SUPPLEMENTAL BRIEF -- ADDITIONAL PAGES FOR**

**STATEMENT OF ADDITIONAL GROUNDS**

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**TABLE OF CONTENTS**

**CONTINUATION OF LEGAL ARGUMENT OF GROUND 3**.....51

(C) Defense Counsel failed to bring the 911 tape and the C.A.D. reports forward to be used in my trial.....51

(d) Defense Counsel failed to conduct proper cross-examination of Officer Miller.....52

(e) Defense Counsel allowed the late discovery of the 29 page transcript.....53

(f) Defense Counsel failed to properly subpoena two material witnesses.....55

(g) Defense Counsel suppressed my testimony in trial.....60

(h) Defense Counsel allowed the States’ attorney to engage in misconduct.....63

(i) Defense Counsel allowed prejudicial inadmissible evidence to come before the jury.....66

(j) Defense Counsel allowed the State to suppress relevant and admissible evidence.....70

**VII. CLOSING LEGAL ARGUMENT**.....77

**VII. SECONDARY CONCLUSION**.....79

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>State v Devlin</u> 145 Wash. 44, 258 P. 826 (1927).....	67, 78
<u>State v McFarland</u> 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).....	76
<u>State v Miles</u> 73 Wn.2d 67; 436 P.2d 198.....	67
<u>State v Mitchell</u> 102 Wn. App. 21; 997 P.2d 373 (2000).....	73
<u>State v Renfro</u> 96 Wash. 2d 902, 639 P.2d 737, 739 (1982).....	67
<u>State v Smith</u> Wash. P.2d 1075, 1078.....	63

### OTHER CASE CITATIONS

<u>State v Ferrone</u> 96 Conn. 160, 113 A. 452.....	67
<u>Worden v Gore-Meehan Co.</u> 83 Conn. 642, 652, 78 A. 422.....	67
<u>People v Molineux</u> 168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193 (1901).....	67
<u>Mapp v Ohio</u> 367 U.S. 643, 6 L.Ed.2d 1081, 81 S. Ct. 1684 (1961).....	78
<u>People v Sharp</u> 107 N.Y. 427, 14 N.E. 319, 1 Am St Rep; 851.....	67
<u>United States v Smith</u> 451 F.3d 209, 2006 U.S. (4 <sup>th</sup> Cir. 2006).....	52
<u>Olmstead v United States</u> 277 U.S. 438, 485, 72 L.ed. 944, 959, 48 S. Ct. 564, 66 A.L.R. 376 (1928).....	78

<u>Wolf v Strankman</u> 392 F.3d 358, 362 (9 <sup>th</sup> Cir. 2004).....	77
<u>Washington v Texas</u> 388 U.S. 14, 19, 18 L.Ed.2d 1019, 87 S. Ct. 1920 (1967).....	60
<u>Strickland v Washington</u> 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).....	74, 75

**RULES, STATUTES AND OTHER AUTHORITIES**

<u>Wash. State Const. Article 1, sec. 22</u> .....	56, 60
<u>United States Const. 5<sup>th</sup> Amend</u> .....	52
<u>United States Const 6<sup>th</sup> Amend</u> .....	52, 56
<u>Wash. R. Evid. 401</u> .....	67, 73
<u>Wash. R. Evid. 402</u> .....	73
<u>Wash. R. Evid. 403</u> .....	67
<u>Wash. R. Evid. 702</u> .....	73
<u>Fed. R. Evid. 607</u> .....	52
<u>CrR 4.7 (a)(1)(i)</u> .....	53, 54
<u>RAP 2.5 (a)(3)</u> .....	56, 60
<u>9A.56.050</u> .....	77
<u>9A.84.040</u> .....	78
<u>9A.72.150</u> .....	78
<u>9A.72.020</u> .....	78
<u>USCS § 241</u> .....	78

**The verbatim report of proceedings is references as follows:**

1RP- 1/19/10; 2RP- 2/5/10; 3RP- 3/4/10; 4RP- 3/12/10 (morning session); 5RP- 3/12/10 (afternoon session); 6RP- 3/16/10, 3/17/10, 3/18/10 and 3/24/10 (three consecutively paginated volumes). And [St Ex 21] is State Exhibit 21 (audio recording of interview); [St Ex 21B] is 29 page unredacted transcript of interview and [St Ex 22] is the 29 page redacted version of the transcript of interview.

Continuation of Legal Argument of Ground 3

(c) **Defense counsel was ineffective for failing to order the Lynnwood Police to provide copies of the tape recording of Mr. Smiths' 911 call to the Police Officials and to provide the C.A.D. printouts of the 911 call and this failure caused prejudice to my defense and prevented me from raising a full defense to the States' case against me.**

Tapes of calls placed to the 911 operator contain valuable and relevant information and are discoverable to be used to either substantiate claims made by witnesses or for the purposes of impeachment on points raised or asserted in trial through the detailed report that was given at the time the call was placed which described the event et cetera at the time that it was unfolding or being reported.

Mr. Smith said that he was on the phone telling 911 what was going on. 6RP 70 (15-18); and said, "the knife is in his hand as I'm calling 911." 6RP 71 (9); and said that as I continued across the parking lot, he pursued and gave 911 a "**play by play**" (emphasis added) 6RP 94 (5-7); and Detective Adams gave testimony with regards to C.A.D. printouts, 6RP 142, 143, 144 and Officer Miller also gave testimony with regards to C.A.D. printouts 6RP 112, 113; yet no actual 911 tape or any actual C.A.D. reports were presented to substantiate and prove any of the assertions made by any of the States' witnesses and I was denied any use of what the actual reports and/or 911 tape contained. And though I may not know what was on the tapes, we know that there was, by Mr. Smiths' own words, a "**play by play**" accounting of the event as reported by Mr. Smith at the time the scene was unfolding.

Justice cannot be equal if a defendant is unable to participate meaningfully in the judicial proceeding that determines whether the defendant remains at liberty or is

confined and the right to participate fully includes the right to counsel but also to expert services necessary to the preparation of a defense. My attorney said in her closing remarks, “Is it carelessness? Is it indifference? **Nobody is going to take this tattooed guys’ word for it. I don’t have to back up anything I say.**” 6RP 288 (18-21); and by her inaction in this case, that is exactly what Ms. Mann allowed to happen. Mr. Smith and Lynnwood Police Officials were allowed to assert things that were not substantiated and there were sources of evidence to either corroborate or impeach them and those sources of evidence were not brought forward in my trial. I had a right to the access of the 911 tape and the C.A.D. reports that were not produced at my trial.

**(d) Ms. Mann was ineffective for failing to conduct a meaningful cross examination of Officer Miller.**

“The right to cross-examination is a precious one, essential to a fair trial. In a criminal context, cross-examination is an important element of the right of confrontation. And although a trial court necessarily possess wide latitude to impose reasonable limits on cross-examination premised on such concerns as prejudice, confusion, repetition, and relevance, its exercise of such discretion is limited by the Constitution and the rules of evidence. Both the Fifth and the Sixth Amendments guarantee an accused a meaningful opportunity to present a complete defense. Indeed the U.S. Supreme Court has consistently recognized that a trial court should accord a criminal defendant a reasonable opportunity to conduct cross-examination that might undermine a witnesses testimony and the rules of evidence authorize the cross-examination of witnesses on matters affecting their “credibility” Fed. R. Evid. 607. And the availability of appropriate cross-examination by an accused is even more essential when the physical evidence, about which the witnesses are testifying to no longer exists.” United States v Smith, 451 F.3d 209; 2006 U.S. (4<sup>th</sup> Cir. 2006).

Ms. Mann knew of the issues surrounding the lost video evidence in this case and was put on notice by Mr. Smiths' report to the Lynwood Police that Officer Miller was the one who returned the merchandise to the Macys store, 6RP 88 (24-25); yet she poses no questions of Officer Miller with regards to when he arrived at the Macys store to return that merchandise and asks absolutely no questions of this Officer with regards to what video evidence he looked into whether it be from inside or outside the Macys store. 6RP 107 (24) – 112 (4). Again, at least not by the copy of the transcripts provided to me.

Ms. Mann then was made aware through the offered testimony of Detective Adams that Officer Miller was essentially the lead investigating Officer in this case and Ms. Mann still did not recall Officer Miller at the close of the States' case in chief in order to ask him of his role in the collection of the video evidence from inside or outside the Macys store or of any other issues with regards to preserving video evidence from any source.

The right to effective cross-examination for my defense should arguably exist and be considered a part of me receiving a fair trial and my attorneys' failure to perform reasonably here with respect to conducting a meaningful cross-examination of the alleged lead investigator in this case cannot be said to be a legitimate trial strategy and the prejudice is apparent in that, the truth of the video evidence and the States' failure to preserve it was not effectively pursued and revealed to the jury at my trial.

**(e) Defense counsel was ineffective for allowing the State to deliver late discovery of the 29 page transcript of the taped interview between Detective Adams and I.**

**Rule 4.7. Discovery. (a) (Prosecutor's obligations)** provides in relevant part:

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or

recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one.

Mr. Stemler had a duty to turn over all written and/or recorded statements made by me to any party by the rules of discovery “as early as the Omnibus hearing” and that was not done in this case. As of March 4<sup>th</sup>, 2010, my attorney had still not even seen the 29 page transcript nor had she heard the audio recording of the interview between Detective Adams and I that the State had in its’ possession from the very onset of the case and according to Mr. Stemler, Detective Adams had not even made this material available as of March 4<sup>th</sup>, 2010. 3RP 2 (14-19); and then my attorney, Ms. Mann, said on March 12<sup>th</sup>, 2010, that she had “just been handed a copy of the 29 page transcript that very morning” 5RP 4 (4-7), so that is clearly not in a timely manner nor consistent or in compliance with the discovery rule. 4.7 (a) (1)

The prejudice caused by the late discovery is apparent on the record. My attorney said on March 12<sup>th</sup>, 2010 that I had not even had a chance to see the whole thing but had indicated that there were some errors, 5RP 4 (6-7), so that is just 4 days before my trial and I have not even been allowed to **fully** see the States’ discovery of the 29 page transcript nor had I been allowed to hear the audio recording of my prior statement given to police and on March 16<sup>th</sup>, 2010, at the start of my trial, there were redactions that needed to be made but they were not yet done because my attorney allowed the late discovery of the transcript and tape recording and failed to get it done in a timely manner prior to my trial. 6RP 4 (5-17). And I had expressed to the Court at that time on March 16<sup>th</sup>, 2010, that the transcript was not properly transcribed et cetera. 6RP 36 (3)- 37 (3). The State and my attorney went on to make last minute redactions and I was

never allowed an opportunity to participate in that and the Judge simply said that I was represented by an attorney and he would hear me through her. 6RP 115 (1) – 116 (3).

There is a couple of references made by the States' attorney and my attorney essentially suggesting that it was somehow my fault that these things were not done because I wanted a speedy trial. I do not think that it is a reasonable argument to make that a defendants' rights to a speedy trial and the States' obligations to follow the criminal rules set forth to govern the proceedings somehow clash and that if a defendant choses to assert his right, then a States' attorney and/or my own attorney can operate outside of the criminal rules and then chalk it all up to the defendants' fault for daring to assert Constitutional rights and say that it's somehow acceptable then that they failed to act in a timely manner or within the parameters of the rules. Certainly a defendant has the right to both a speedy trial and the right to have the States' attorney comport with the criminal rules and surely a violation of the rules of discovery is an error that cannot be simply ignored and I would venture further to say my attorney had a duty to protect my rights to a fair trial and to ensure that I was not snowballed at the last minute with a 29 page transcript and furthermore; how could my attorney have been prepared to address the transcript or the statement in general when she was just given the material a couple days before my trial?

I think it is seen in what was said and done that I was not allowed to fully address the States' discovery evidence with regards to my prior statement and it is clear that my attorneys' failure to demand this material sooner and/or her failure to seek sanctions for the States' failure to produce the audio and 29 page transcript was prejudicial to my defense and is yet another example of the inadequate assistance rendered in this case.

**(f) Defense counsel was ineffective for failing to properly subpoena two material witnesses from the Macys store who had direct knowledge of the event and this**

**failure was a violation of my Constitutional rights.**

Again, this is a manifest error affecting a Constitutional right so I bring this issue forward and raise it on direct appeal. RAP 2.5 (a) (3).

Article I, sec. 22 of the Washington State Constitution provides in part that in all criminal prosecutions the accused shall have the right to.. *“have compulsory process to compel the attendance of witnesses in his own behalf..”* and Its’ federal counterpart also provides that in all criminal prosecutions, the accused shall enjoy the right to.. *“have compulsory process for obtaining witnesses in his favor...”* United States Constitution 6<sup>th</sup> Amendment.

There were two material witnesses in this case that should have been brought forward at my trial..

(i) There was a young lady sales associate from the Macys store who had direct knowledge of the event at the Macys store who could have provided relevant and material testimony to issues raised at my trial through the testimony provided by Mr. Smith and I.

Mr. Smith claimed that I had stolen a bottle of cologne 6RP 64 (4-10); and he also claimed that I had “cussed several times **‘very loudly’** in the cosmetic department to actually an associate there, sitting there...” 6RP 66 (7-8).

I claimed and testified, “I didn’t take the cologne. It’s a brand new bottle, it didn’t come from that Macys, it was mine. 6RP 190 (4-18); and I was essentially saying that there was a witness to that very fact. That I had made immediate contact with 2 female employees upon entering that fragrance department and I even had a conversation with one of those associates and I didn’t even pick up a bottle of cologne. 6RP 189 (1-13).

Obviously, this associate from that fragrance department, who was an eye-witness to me entering that fragrance department, who had direct contact with me the entire time I

was in that department, who carried on a conversation with me and, considering all that was said in our conversation, I would say it's safe to say she certainly watched me as I walked away and left that department which was exactly the time I was leaving the Macys store as well and so certainly she had relevant testimony as to whether or not she saw me pick up a bottle of cologne and stick it in my pocket as Mr. Smith claimed and she absolutely could have testified as to whether or not I cussed at her very loudly as Mr. Smith had said in his testimony to the jury at the very least.

(ii) David Thomas was a second loss prevention Officer who works at the Macys and was a material witness who also had direct knowledge of the event at the Macys store that day and who was originally listed as a witness in this case.

Mr. Smith testified that he did not review the evidence on the scene where I was arrested 6RP 95 (21-25); that David Thomas was not on duty and only arrived at the time I was being arrested 6RP 88 (3-4); and that he was only listed as a witness because he arrived to see the merchandise exchanged from Officer Miller to himself. 6RP 88 (6-11).

I testified that because I saw Mr. Smith talking on a radio while I was in the fragrance department, I looked around to see who he was talking to and I actually eye-witnessed this man, David Thomas, inside the store surveilling me and that he most certainly was a witness. 6RP 191 (14-23); I said he was on the scene where I was arrested and he was also on the scene and inside that Macys store. 6RP 191 (21-22); and I said that I saw Mr. Smith going through the evidence on the hood of the police squad car where I was being arrested. 6RP 241 (1-2).

David Thomas was originally listed as a witness on Mr. Smith's report to Lynnwood Police and he was on the scene and had direct knowledge of the event. And Mr. Smith even referred to David Thomas again later in his testimony and said, "David Thomas,

the witness, too, had just arrived.” 6RP 95 (9-12). David Thomas was a witness and he certainly could provide relevant testimony as to what he observed inside the store but also as to what he saw and heard et cetera from the scene of where I was arrested and that testimony was relevant and material as to whether or not Mr. Smith had viewed the evidence on the hood of the squad car or not and maybe Mr. Smith had told David Thomas originally that I had only stolen the pants, maybe David Thomas wasn't as willing to perjure himself as Mr. Smith was in any event, he had direct knowledge of the case and should have been subpoenaed to testify.

Both of these witnesses worked at the Macys store and with any due diligence and honest effort on the part of my attorney, they could have been properly interviewed and compelled forward to testify in my trial and because each one was a material witness to claims made by Mr. Smith at my trial, their testimonies should have been brought forward to either corroborate and substantiate Mr. Smiths' claims or to impeach him and support my version of the events which is what I am now claiming would have been the case. They would have been favorable to me and that is why they were not brought forward, just like the physical evidence was suppressed in this case, so too were these witnesses.

And again, I would point out that there were no issues brought before the court and placed upon the record concerning evidence issues or witness issues until after I had attempted to fire my attorney several times and then claimed “retaliation” by the State, and no issues were raised at all until just 4 days before my trial. I believe it is safe to say that Ms. Manns' offers with respect to locating the female sales associate from the Macys store was simply lip service to the court meant to establish some sense of a good faith effort showing on her part towards investigating the case to counter my claims that she wasn't doing anything to assist me.

The truth is self evident in that Ms. Mann did not file any motion to compel the Macys to provide the name of the sales associate nor did she ever prepare any subpoena to compel this witness forward and I ask this court to also consider this, **If my attorney had any intentions on bringing any witnesses forward, then why on earth didn't she subpoena David Thomas?** (emphasis added).

Ms. Mann offered to the court that she just simply didn't know this female associate by name and said, yea, she **"may or may not be a critical witness"** 5RP 4 (22-24); and it may very well be true that she didn't know this persons' name but she certainly knew David Thomas' name and she never subpoenaed him either and rather than bring these witnesses forward, my attorney opted to solicit hearsay testimony with regards to both witnesses and allowed Mr. Smith to offer to the jury that the young lady was not known by name, did not fill out a report, and just **"did not see me take the cologne"** or "anything", because **"it wasn't her area"** 6RP 86 (14-19); and Mr. Smith was allowed to assert that David Thomas was just simply **"not on duty yet"** et cetera... and so he essentially insinuated that David Thomas just didn't see much. 6RP 88 (3-11).

I had Constitutional guaranteed access to these witnesses and my attorney was ineffective in failing to bring these material witnesses forward and my defense was prejudiced in that I was not given the opportunity to present a full defense because without their testimony, Mr. Smith was allowed to take the stand and present whatever claims he wished without the actual witnesses being there to provide their own testimonies to their versions of the event and to substantiate whether or not they did or did not see anything relevant to the issues raised at my trial or to rebut Mr. Smiths' claims that these two witnesses just didn't see anything.

The Supreme Court said, "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the

right to present the defendants' version of the facts as well as the prosecutions to the jury so it may decide where the truth lies." Washington v Texas, 388 U.S 14, 19, 18 L.Ed.2d 1019, 87 S. Ct. 1920 (1967).

In short, the right to compulsory process is essential to a fair trial and this is a manifest error of counsel that did violate my Constitutional right to compulsory process and I humbly request this court to reverse the conviction in this case and to order that a new trial be granted where these witnesses are made available to me and that they be properly interviewed and compelled to provide their testimonies at my trial.

**(g) My attorney was ineffective and violated my Constitutional right to testify on my own behalf by suppressing and/or limiting the scope of my testimony during my trial.**

This is a manifest error affecting a Constitutional right so I raise it for the first time on direct appeal. RAP 2.5 (a) (3).

Article I, sec. 22 provides in part that in all criminal prosecutions the accused shall have the right... "*to testify in his own behalf.*" and to "*meet the witnesses against him face to face.*"

My attorney prevented me from being heard through my testimony and violated my Constitutional right to a fair trial. The right to a fair trial is the right to be heard and the right to testify on your own behalf is that right to be heard and to present a full defense to the States' case. Ms. Mann deliberately silenced my voice and limited the scope of my testimony with regards to my prior statement given to Detective Adams and also with respect to the alleged statement I made to Officer Miller.

**(i)** I told the court that I had concerns with the accuracy of the transcript that was provided just a couple of days before my trial. 6RP 36 (3) – 37 (3); and the court then

said in reply, “Mr. Wiggin, the jury will be informed that it’s the audio itself that controls and **“you’ll have a chance to testify, if you choose to.”**” 6RP 37 (4-6).

The court and the States’ attorney goes on to make redactions along with my own attorney without any opportunity on my part to personally participate in any of the process and they all geared up then to present this audio tape along with the 29 page transcript to the jury. **(which I said was inaccurate and did not reflect the truth of what I said)** (emphasis added) and when I said, “How am I supposed to review the tape?” the court responded with, “You are represented by an attorney.” And “I’ll hear you through your lawyer.” 6RP 115 (1) – 116 (3).

On direct examination of Detective Adams, the State asks Mr. Adams if the States’ Exhibit No. 21 is the CD of the audio between himself and I, and as to what was on the CD itself, whether it was true and accurate as to what was said by himself and I and then Detective Adams was further asked if he had a chance to review Exhibit No. 22 and whether that the transcript was accurate as best as he could be certain. Detective Adams answered to the affirmative to all and the State then offered Exhibits 21 and 22 6RP 133 (7-25).

I took the stand in my own defense as was my Constitutional right to do so and I was not asked in any form about whether or not I had any issues with the transcript or the audio and I certainly had expressed that I did have issues with that transcript to the trial judge and all other parties in this case.

The State had no concerns about what I had to say about any of their evidence and they used my own attorney to suppress my voice in that my attorney simply controlled my testimony by only asking the questions she wished to ask and she brought my testimony up to the point where I threw the knife down and then arbitrarily dropped off with, “no further questions”. 6RP 209 (12), and thus aiding the State in its case.

Ms. Mann herself had also acknowledged herself on the court record that I wished to provide testimony to the interview given to Detective Adams. **Ms. Mann: “It is something that my client wants very much to testify about, that in a discussion with the Officer about the surveillance video...”** 6RP 22 (24) – 23 (3); and I assure this court that I had a number of things I wished to testify about with regards to that interview given to Detective Adams but my attorney kept me from doing so.

(ii) I also did not concede to what Officer Miller had claimed that I said to him at the time I was apprehended. Officer Miller said that I stated, “I didn’t take anything.” But the truth was, I did make a comment to him but the comment was, “I don’t have anything.” Referring only to not having a knife on me. I had thrown my hands up in the air, Officer Miller was 50 to 60 feet away, I had a cigarette protruding from my mouth and Officer Miller was looking down a gun barrel at me at the time I made the comment and he was mistaken and my attorney did not allow me to provide this relevant and important testimony to rebut Officer Millers’ claim with regards to this alleged statement and this statement was used against me to attack my credibility before the jury and the State also used my statement which was given to Detective Adams against me towards attacking my credibility and I was not even allowed to provide any direct testimony to explain any issues I raised with the interview, what was said and why and/or to explain the condition I was in et cetera at the time I did the interview and then Mr. Stemler also attacked me on cross examination with respect to issues he wished to raise from that statement but my attorney failed to allow me to properly address the interview in my direct testimony and in the redirect of me by her.

The court said that I’d get a chance to testify to the jury and address any of my concerns with that transcript and I had a Constitutional right to be heard at my trial to defend myself against the States’ charges and my attorney was fully aware that I

wished to testify with regards to that interview but deliberately denied me that right and I ask this court to acknowledge this violation of my right to fully testify at my trial and set this conviction aside because of this error and I further ask that this court grant me a new trial wherein I am allowed to present my full testimony before the jury so that I may truly be heard.

**(h) My attorney was ineffective and prejudiced my defense by allowing the States' attorney to engage in misconduct which violated my right to a fair trial.**

My attorney sat idly by while Mr. Stemler engaged in misconduct by subjecting me to an inflammatory and repetitive line of questioning which amounted to badgering Mr. Stemler clearly meant to build resentment against me in the minds of the jurors by repeating these prejudicial questions over and over and by the inappropriate comments he made throughout this case and my attorney had a duty but failed to object to his misconduct and/or seek sanctions by way of motioning for a mistrial.

In State v Smith, (Wash.) P.2d 1075, 1078, the court found that a question can be highly prejudicial and of such a nature that the prejudice largely consists in the mere asking of the question. Mr. Stemler presented the following:

*Q. All right. You were kind of put out by the security y guard following you around for stealing stuff inside of Macys? 6RP 211 (4-5)*

**Now that is a harmless enough question and I answered it but Mr. Stemler did not leave it at that and he posed the following later in his questioning:**

*Q. This guy is following you is pissing you off, right? 6RP 211 (23)*

The question had been asked and answered yet my attorney makes no objection here and it becomes quite clear that Mr. Stemler wished to utilize his line of questioning to build resentment as he goes on to ask further still yet:

*Q. You really don't think much of Brandon Smith as a security officer when he was following you through the store, right? 6RP 222 (17-19)*

**And Mr. Stemler asked or says really:**

**Q.** *Tell us a little bit about what was going through your mind, **this punk is following you around**, that sort of thing? 6RP 222 (21-23)*

This seems an appropriate enough place for an objection and this was clearly a prejudicial and inappropriate comment by the States' attorney but my attorney fails to make any objection here and it is seen that Ms. Mann actually made only one objection in the entire cross-examination done of me even in light of the misconduct that is so apparent on the record **SEE:** 6RP 209 – 240, and the one objection made, I had to spur on myself 6RP 215 (11-13), and Mr. Stemler goes on to also say:

**Q.** *That's at the time when you said, "**Fuck you punk**" you walked away. 6RP 239 (24-25)*

That too would be an objectionable inappropriate comment by Mr. Stemler and yet none is made and Mr. Stemler also went way overboard with regards to pointing out the profanity used by me and he had already solicited the fact that I had used expletives towards Mr. Smith **SEE:** 6RP 69 (5-9); and I had also placed the same evidence and facts on the record through my direct testimony 6RP 203 (7-8); 6RP 204 (10), (23); 6RP 206 (2-3); but clearly this was not enough for Mr. Stemler as he posed the following in his line of questioning:

**Q.** *Didn't swear words exit your mouth while he was following you? 6RP 211 (10-11)*

Ms. Mann should have made a timely objection here such as, already on the record and now I point out that Mr. Stemler already knew what was said by me to Mr. Smith and so does the jury but he wants it repeated over and over so he asks it again:

**Q.** *You said?*

And I was unaware of the injury being inflicted so I was naïve to answer with:

A. ***"Fuck you, punk. I didn't do anything.... Then I said, "No, Fuck you".... "call the police, you little bitch"..... 6RP 228 (17-25)***

**And Mr. Stemler goes on with the misconduct...**

Q. That's at the time when you said, **"Fuck you, punk."** You walked away 6RP 239 (24-25)

I did not know the laws of evidence and I'm not an attorney and so at the time this is all happening, I have no clue as to what Mr. Stemler is doing but it is clear that my attorney is not protecting me from this prejudicial line of questioning and the misconduct of Mr. Stemler in making me repeat the same prejudicial evidence over and over before the jury.

**Mr. Stemler then makes the following remarks in his closing comments:**

*"Now there's some foul language, apparently swearing by the defendant. He admits that he said, "Fuck you." 6RP 264 (9-11); and Mr. Stemler goes on to say, "And then Mr. Wiggin says on the tape, then it was like, "Fuck you, punk." He thinks this guy is a punk." 6RP 267 (15-16); and then says, "...he says, Like **who the fuck** is this Brandon Smith guy? **He's just a little punk.**" 6RP 271 (5-6); and goes on even further to say, "He's being told to drop the knife and come back inside the store, and he said, "Fuck you." He's threatening the store security officer." 6RP 275 (21-23); and finally he also said, "In this case what he decided to do was open up that blade, tell Brandon Smith, "Fuck you." 6RP 291 (25) – 292 (1).*

In viewing the line of questioning during the cross-examination conducted of me at my trial, it is evident that the prosecuting authority in this case believed that the expletives I uttered to Mr. Smith along with other evidence of character manifest in this case would weigh heavily against me and that the prejudicial effect of my profanity to Mr. Smith could be utilized to build resentment in the minds of the jurors whereby the conviction could easily be obtained, not in the presentation of any real evidence of

conduct, which was without a doubt absent in this case, but rather in the appealing to the passions, prejudices, and resentments raised and formed by the evidence of bad character and in the fact that I had called or referred to Mr. Smith as a “punk”.

Evidence of character is not evidence of conduct but the human nature is to punish and the prosecutor in this case counted upon that human tendency and appealed to the jury that I should be punished, not because there was sufficient enough evidence to convict, but simply because I was a bad man who had used foul language and called Mr. Smith a “punk” and said “fuck you” to a store security guard and because the question of character bears with peculiar force upon the issue of intent, which is certainly at issue in a charge of robbery, by putting my character in issue in such a manner as to repeatedly state the same prejudicial information over and over, is to deny me of a fair trial and my attorney had the duty to ensure that I received a fair trial.

The prosecutor may prosecute vigorously but he is to seek equal and impartial justice and it is his duty to see that one accused of a crime is given a fair trial and the purpose of counsel is also to ensure that one accused of crime receives that fair trial. Mr. Stemler engaged in misconduct but he was only allowed to do so by my own attorney who failed to properly address Mr. Stemlers’ misconduct and I ask this court to reverse the conviction in this case because of Mr. Stemlers’ misconduct and to rule that my attorney did not perform her function as defense counsel by failing to take action here.

**(i) My attorney was ineffective for allowing prejudicial information, which was inadmissible evidence of character, to reach the jury.**

The laws of evidence allow that evidence can and should be excluded if it is irrelevant and/or the probative value of the evidence is outweighed by the prejudicial effect that the evidence may have on a particular party in the case and the courts and the law say that evidence is relevant if it tends to make the existence of a material fact more

or less probable than it would have been without the evidence. State v Renfro, 96 Wash. 2d 902, 639 P.2d 737, 739 (1982) . To be "material," the fact must be "of consequence to the determination of the action. SEE also Rules of Evid. 401. And Evid. Rule 403 which provides in relevant part that:

*Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.*

A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial. State v Devlin, 145 Wash. 44, 258 P. 826 (1927); and in State v Ferrone, 96 Conn. 160, 113 A. 452, the Supreme Court, in speaking on this subject, said, "Therefore our law sedulously guards against the introduction of evidence of any matter immaterial or irrelevant to the single issue to be determined. The purpose of these salutary laws might often be defeated if the minds of the jurors were subjected to the influence of facts or considerations having no legitimate bearing on the only question they have to decide, and their verdict be reached under the impulse of passion, sympathy, or resentment. Such a verdict is illegal and will be set aside. Worden v Gore-Meehan Co., 83 Conn. 642, 652, 78 A. 422; People v Sharp, 107 N.Y. 427, 14 N.E. 319, 1 Am. St. Rep: 851; People v Molineux, 168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193 (1901).

"The rule everywhere enforced excludes not only evidence of another crime, but also evidence tending to degrade the accused, to prejudice the jury against him, to divert their minds from the real issue which they have to determine, or to persuade them by matters which they have no legal right to consider that the accused, for reasons other than those based upon legitimate evidence, was more likely to have committed the particular crime for which he is on trial." State v Miles, 73 Wn.2d 67; 436 P.2d 198;

There are several issues I raise with regards to the irrelevant and inadmissible evidence that was allowed into my trial because my attorney failed to properly motion for the suppression of that evidence.

(1) The fact that I was homeless was introduced into the trial through the audio and transcript of the interview given by me to Detective Adams. SEE: [St Ex 21](audio recording) & [St Ex 22 p 8, 9, 12] (29 page redacted transcript), but also through my own attorneys' questioning of me. In fact, one of the very first questions Ms. Mann posed to me on direct exam was **Q.** And Mr. Wiggin, in December of '09, where were you living? 6RP 153 (25); **A.** Actually, I was homeless. I was on the streets. 6RP 154 (1).

(2) The fact that I was on Welfare and getting food stamps et cetera was also introduced into my trial through the audio recording of the interview with Detective Adams and the 29 page transcript provided to the jury. [St Ex 21]; [St Ex 22 p 8, 9]

(3) **And** finally, the following political statement which I made during the interview with Detective Adams was not suppressed and was allowed before the jury:

*"I don't like stealing from people, you know. I'd rather steal from corporations or businesses. And I think its retarded and way ridiculous that they make so much money off of providing uh... especially grocery stores, you know. I mean they're driving out in yachts and they're billionaires you know, off of having a grocery store chain, or whatever. (Inaudible) people that.... have to eat." "And you know it's nice that you're a millionaire off of people having to eat, you know. But...But um, in any case....." [St Ex 22 p 14] and See also audio recording [St Ex 21].*

The rule which excludes evidence of the bad character of the accused is grounded on the policy of avoiding uncontrollable and undue prejudice and possible unjust condemnation, which such evidence might induce.

The fact that I was homeless and on Welfare just can't be said to be relevant to whether or not I committed the crime alleged against me and certainly this evidence of character can only be prejudicial evidence that served no purpose in my trial other than to degrade

me as both a human and as a citizen. Who is to say that the jury didn't consider that I was disposable because I didn't have a home and/or a job as others and view me as a blight on the face of society and so they saw fit to remove from the community not because I was guilty of the crime, but rather because they didn't see me as worthy to remain in the community.

And certainly my political views on corporate America just can't be said to have any bearing whatsoever on the issue of guilt or innocence in this case and who is to say that this did not weigh heavily against me with a juror perhaps who was a small business owner et cetera.. This was prejudicial evidence of character that should have never gone before the jury just as the fact that I was homeless and on Welfare should also have never made it before the jury and my attorney was ineffective by failing to suppress this highly prejudicial irrelevant and inadmissible evidence of character. In fact, the following also was highly prejudicial:

*".....Gota survive. And I tried panhandling and (Inaudible), you know didn't get any..." [St Ex 22 p 12]*

How could my being on the streets and panhandling and being on State benefits be relevant to the case? And how could it not be prejudicial evidence that should have been suppressed to protect me from the risk of undue condemnation from such degrading information? Certainly it can't be argued that any testimony provided by me with regards to these issues constitutes a trial strategy on my part to rely on this or that in my defense because I had never been to trial before, so clearly, I have no trial strategy; I have no knowledge of the rules of evidence at the time I'm in trial and I have an attorney for a specific reason, to protect my rights to a fair trial and to bring certain skills and knowledge to the table in my defense. i.e. The Rules of Evidence and the proper motions for the suppression of prejudicial, irrelevant, and inadmissible evidence and my attorneys' failure to suppress this information caused prejudice to my defense and prevented me from

Receiving a fair trial. I humbly request this court reverse the conviction in this case and grant me a new trial where this prejudicial evidence is not improperly brought before the jury as it was.

**(j) Ms. Mann was ineffective and caused severe prejudice to my defense by allowing the State to suppress relevant, material, and admissible evidence with regards to my mental health diagnosis and/or medications issues.**

I told Detective Adams during our interview that I was on medications and under professional psychiatric care and was diagnosed schizophrenic. [St Ex 21B p 9]; and I stated that sometimes my medications will adversely affect me for days and I lose track of time and even lose days et cetera [St Ex 21B p 10].

Ms. Mann admitted in my sentencing hearing that she had seen all the records and documentation of my mental health conditions and the two recent hospitalizations for mental health reasons in which I was suffering from medications issues. 6RP 315 (2-8); yet she still allowed the State to suppress this relevant and material information from my trial and allowed the State to take an unfair advantage over me and suppress the truth from my trial. 6RP 7 (11-21).

Mr. Stemler motioned to suppress that I was diagnosed with mental issues and taking medications. 6RP 7 (11-13); then posed the following in his cross-examination:

*Q. Were you able to keep track of what it was you stole from Macys when you were talking to Detective Adams?*

*A. When? When I was –*

*Q. After you were arrested and after you were you talking to Detective Adams, were you clear on what you had stolen from Macys that day? 6RP 213 (17-22)*

I answered the question with, “Detective Adams woke me up. I had just woken up. I was sleeping in my cell. I was a little bit befuddled...6RP 213 (23-24), and it certainly

was the truth but it was not the whole truth because there was much more to it than just that. I was heavily sedated on Benzodiazapines and other medications and under professional psychiatric care but I couldn't say that in my defense even though that was the truth of the matter because the State had suppressed that truth from my trial and then capitalized from that suppression in that Mr. Stemler used my inconsistency to attack my credibility and put the intent of my inconsistent statements at issue by posing through his line of questioning:

*Q. Were you deliberately telling him something that wasn't true, or did you not think about it or what?*

And then Mr. Stemler used my slightly inconsistent statements against me in his closing remarks. 6RP 266 (4-13); 268 (19-21); 270 (13-25)

Mr. Stemler also capitalized from the suppression of my mental health issues and/or medications issues when he asked me in his cross-examination the following:

*Q. I want to know why you decided to pull the knife out while you are being followed by store security inside a store you've stolen from. 6RP 226 (16-18).*

And again, this is a moment when I needed to be able to tell the whole truth in order to raise a full a fair defense to the States' case against me but I was unable to raise the truth that, "I'm on medications Mr. Stemler. I'm in a diminished capacity state of mind and not making rationale decisions but I am not **intending** to "use" the knife to threaten or intimidate and I'm not **intending** to "display" a weapon in the act of removing the knife from my coat pocket in order to collapse it as I am leaving the store.

Mr. Stemler then came in behind all of that and told the jury in his closing argument, "He's still got the knife in his pocket, but as he's heading to brave the door, as he says, that's when he decides to pull the knife out of his pocket while store security is following him. It's out now. **Does that make sense to you at the time he's pulling**

**the knife out of his pocket when you know store security is watching you and you're heading for the door?** 6RP 274 (24) – 275 (5), so clearly Mr. Stemler has now posed to the jury that they should evaluate my motives, intentions, and/or reasoning for not only being inconsistent in my statements but in the actions and decisions I made that day with regards to taking that knife out as I said, to collapse it and Mr. Stemler says, “Does that make sense?”, and then he says right behind that, “There is **one reason** you pull the knife out of your pocket. That’s because **you want to threaten somebody** if they try to stop you.” 6RP 275 (5-7). Mr. Stemler has just made an argument on the intent element of my actions and has posed that there is no possible explanation other than what he poses as the truth and so, what other conclusion can be made from this issue other than, the State suppressed the relevant and material information that answered and explained the facts of the case and thereby stripped me of my defenses and then raised issues surrounding the facts that could have easily been defended against with the evidence that they themselves suppressed.

I did not claim to be delusional or incoherent at the time of this event at the Macys store but I did however, claim and explain to Detective Adams and my attorney that I was on medications that were adversely affecting me and I did also explain that I was professionally diagnosed as paranoid schizophrenic.

Diminished capacity is available for a defense where a mental disorder or impairment exists but does not amount to insanity. My attorney had a duty to raise the diminished capacity defense in this case and there was actual records and recent mental health history to support the defense and an expert could and would have been helpful to support my defense.

In a diminished capacity case, expert testimony can be used if it is helpful to the trier of fact in assessing the defendants’ mental state at the time of the crime. It is not necessary

that the expert be able to state an opinion that the mental disorder actually “**did**” produce the asserted impairment at the time in question only that it “**could have**” and because expert testimony is helpful to the trier of fact, it is thus admissible under ER 702 if the testimony is relevant to a disputed issue of fact. State v Mitchell, 102 Wn. App. 21; 997 P.2d 373 (2000). And the law of evidence in the State of Washington says that “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the “action” more probable or less probable than it would be without the evidence. See: ER 401 and says also that “All relevant evidence is generally admissible and evidence which is not relevant is inadmissible. See: ER 402.”

The Court said that any mention of my medications issues and/or the fact that I was diagnosed with mental issues was prejudicial to the States’ case and inadmissible as evidence because my attorney failed to raise a diminished capacity defense 6RP 7 (11-17), and my attorney did fail to raise the diminished capacity defense but does that mean that the information about my mental health diagnosis and/or the affects of impairment caused by my medications issues are inadmissible in my trial and/or irrelevant to the issues raised by the State in that trial? By the very definition of relevancy of evidence and by the laws governing what is admissible or inadmissible in court, the answer is obvious that the evidence was both relevant and therefore admissible.

Mr. Stemler argued that I pulled the knife on Mr. Smith as claimed but he also made alternative argument that “even under the defendants’ version of the event, there is trouble for the defendant.” 6RP 264 (21-22) and this is where the real issue of “intent” now comes into play and makes the suppressed information very relevant and actually paramount to the question of “**Why would Mr. Wiggin do this?**” and “**Why were you inconsistent and/or unclear about what all you took that day?**”

If the jury believed that I pulled the knife as Mr. Smith claimed that would be one thing, but Mr. Stemler argued in the alternative that because I pulled the knife out while exiting the store...et cetera then essentially posed to the jury, “what other reason would there be to do that, if not **“intending”** to **“use”** the knife as a weapon.” and so now there is no telling whether the jury did in fact believe that I pulled the knife as Mr. Smith claimed or if they just subscribed to the alternative argument that Mr. Stemler posed to them with regards to my actions in taking the knife out to collapse it et cetera.

So clearly the question now becomes, Did I lack the ability to form a specific intent and/or could the medications I was on and under have caused an impairment of my better judgement and is that relevant and admissible for the jury to consider with regards to whether or not my actions and decisions satisfied the requisite **“intent”** element to be able to conclude from all the evidence that I did in fact **“use”** force or threats to either obtain or retain the merchandise in this case? And How can the truth be “prejudicial” to the States’ case? Isn’t the purpose of a trial to seek the truth? Why would the State seek to suppress relevant evidence and then use that suppression of evidence as an unfair advantage over me in trial?

An essential element of the crime of Robbery is that there has to be the **“use”** of force or threats and so there must be an **“intent”** element proven beyond reasonable doubt that the accused formed the requisite intent to commit the crime to justly substantiate that the crime was committed and support the conviction. That did not happen in this case and it is clear that my attorney allowed the State to capitalize from suppressing the facts and information of my mental disorders and medications issues.

The court said in Strickland v Washington, supra that “counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” Strickland, supra, at [466 U.S. 688] “Thus a fair trial is one in which evidence

subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsels' skill and knowledge is necessary to accord the defendants the ample opportunity to meet the case of the prosecution to which they are entitled." Strickland, supra, at [466 U.S. 685].

My attorney did not perform the proper functions of defense counsel in this case and whether the issues raised in this ineffective assistance ground are per se reversible errors or whether these issues raised support an overall case of prejudicial affect caused by the cumulative impact of the multiple errors outlined, this court must see after a fair assessment of the overall representation and performance of Ms. Mann in this case, there is an obvious breakdown in the adversarial system and find it reasonable to conclude then that her representation in this case was Constitutionally deficient. Ms. Mann engaged in misconduct and conspired with Mr. Stemler and I was denied a fair trial. My attorney essentially held me down while the State violated my Constitutional rights and though I begged the court for reappointment of counsel from the onset of the case, I was denied that motion (apparently I needed legal aid just to get a new attorney) and the State took an unfair advantage over me in trial in that, the attorney that they assigned me served only as a mole, and appears to have been planted to undermine my defense and aid the State in obtaining a conviction against me even in light of having no real evidence and I was only found guilty by the incompetent evidence because my own attorney argued for the States' witness and aided in the delivery of the States' theory of the case.

The State of Washington uses the Strickland test in reviewing ineffective assistance of counsel claims and "...deficient performance and prejudice are identified as the two components of any ineffective assistance claim." Strickland, supra. And to demonstrate ineffective assistance of counsel, both prongs of the two-prong test must be satisfied.

State v McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First it must be shown that the representation was deficient. Second, the deficient performance must be shown to have caused prejudice to the defense and that there is a probability that, but for counsels' errors, the result of the trial would have been different.

There is no doubt as to whether or not the issues raised in this ineffective assistance of counsel claim support a deficient performance of counsel. Unless Ms. Mann wants to make argument that it is a legitimate trial strategy to aid the State in its' case, then I think there can be no valid reasoning for the actions and inactions taken in this case by my defense counsel and her failures in this case just can't be seen as legitimate trial strategy.

Ms. Mann allowed the State to suppress all of the video evidence which impeached their one and only witness, then failed to file a proper motion for an evidentiary hearing on the States' failure to preserve the evidence, did not seek appropriate sanctions on the government for their failure to preserve the video evidence and finally did not file a proper motion to dismiss the charges for the misconduct of the States' failure to preserve the evidence, Ms. Mann allowed the State to snowball me with a 29 page transcript just days before my trial, she failed to bring forward the 911 tape or demand the C.A.D. reports be placed upon the record to support claims by the States' witnesses, she allowed the State to suppress two material witnesses that could have been easily brought forward, allowed inadmissible irrelevant prejudicial and degrading information to get before the jury, suppressed and limited my testimony and allowed the State to use my prior statement to police against me without affording me any opportunity to explain myself on the many points raised in my trial with what I did or did not say et cetera, failed to conduct a proper cross-examination of the leading investigative officer in this case, did not pursue the impeachment of Mr. Smith, and then argued for the States' witness in her closing arguments and vouched for his version of the event and offered explanations as to

why he might have given false information to the police and/or failed to preserve evidence and why he couldn't describe the manner in which the knife was allegedly pulled on him, Ms. Mann failed to make appropriate and timely objections and allowed the States' attorney to badger me on the stand and subject me to an inflammatory line of questioning, and allowed Mr. Stemler to build resentment by making inappropriate comments and repeating the same prejudicial evidence, and then Ms. Mann flat told the jury that I "did carry the knife in the open position across the parking lot just as Mr. Smith claimed" even though that was not my version of the event. So I now pose to this court, How could this not be seen as having caused prejudice to my defense? The prejudice is obvious and there is no doubt as to whether or not the outcome of this case would have been different except for the errors and/or misconduct of defense counsel.

I humbly ask this court to reverse the conviction in this case and to remand this case for further proceedings where I can be properly represented by an attorney who will professionally and fairly mitigate the case and properly address the issues which are manifest in this case.

## **VII. CLOSING LEGAL ARGUMENT**

Again, if the arguments contained herein are less than artfully presented, I beg this courts pardon and pray this court make request of Casey Grannis, who is my appellate attorney in this case, to file supplemental briefing to properly address the Constitutional issues which I have raised through this Statement of Additional Grounds or grant the appropriate relief due me in this case based on the merits of the argument presented herein. "Pro se complaints are to be liberally construed." Wolf v Strankman, 392 F.3d 358, 362 (9<sup>th</sup> Cir. 2004).

I make no claims in this case to be innocent. The law says that it is a crime to commit theft 9A.56.050 I do maintain however; that Mr. Smith embellished the event and lied

about what I stole that day and committed a crime (9A.84.040), and when confronted with the video evidence, he tampered with that evidence in order to cover up his deception and committed another crime (9A.72.150), and finally Mr. Smith also lied and embellished the event with regards to the scarf and the knife and he committed a crime when he offered that false testimony to a jury under oath in a court of law (9A.72.020).

The law also says that it is a crime where “two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.” USCS § 241. Mr. Stemler and Ms. Mann engaged in a conspiracy to deny me of a fair trial and retaliated against me for the lawful exercise of my Constitutional rights, and it matters not whether they feel that their actions are justified or that it is harmless error because Mr. Wiggin is a criminal and committed unlawful behavior on December 23, 2010. It is no answer to say that we commit crime but only in response to crime. The law knows nobody above it. Justice cannot be said to be fair and impartial if the laws do not apply to everyone and Mr. Stemler had a duty as a government representative acting in an official capacity to follow the laws himself.

In Mapp v Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S. Ct. 1684 (1961), the court said, “nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence.” And the court said in Olmstead v United States, 277 U.S. 438, 485, 72 L.ed 944, 959, 48 S. Ct. 564, 66 A.L.R. 376 (1928) that “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself, it invites anarchy.”

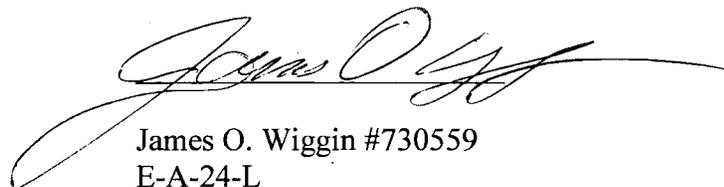
It is the duty of the prosecuting attorney to assess the cogency of the evidence against the accused and consider the credibility of its witnesses and to be fair and impartial in the administration of justice and it is the duty of the States' attorney to seek the truth in court and to ensure that the accused is given a fair trial. And it is the duty of defense counsel to vigorously represent the accused and seek an acquittal in the case whereby it can be said that the trial was fair and that the States' evidence was put to a true adversarial testing.

As judge Mitchell put it in State v Devlin, supra, "In the maintenance of government to the extent it is committed to the courts and lawyers in the administration of the criminal law, it is just as essential that one accused of crime shall have a fair trial as it is he be tried at all."

#### **VIII. SECONDARY CONCLUSION**

This case was a complete miscarriage of justice and I ask this court to reverse the conviction in this case based upon the grounds contained herein and remand back to the Snohomish County Superior Court for further proceedings so that this case might be properly mitigated and disposed of where the end is fair and just and where my record reflects the truth of the criminal behavior in which I engaged in on December 23, 2010.

Humbly and Respectfully Submitted this 21<sup>st</sup> day of December, 2010



James O. Wiggin #730559  
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