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SUPREME COURT OF THE STATE OF WASHINGTON

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State of Washington, Respondent

Brief of Appellant for  
 Direct Review by the  
 Supreme Court

v.

Steven Andrew Janda, Petitioner

Cause No. ~~85909-4~~

68456-6

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Review from King County Superior Court No. 10-1-05571-8KNT

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Prepared by

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ORIGINAL

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4. Did the state meet its “higher burden” to contest the evidence presented by the defendant?

#### Assignment of Error No. 2

The court committed an error constituting a manifest abuse of discretion when it ruled the language “not an active member” includes persons who were never members of the bar under RCW 2.48.180.

#### Issues Pertaining to Assignment of Error No. 2

1. Are not active members under the plain meaning rule members?
2. Are persons who were never members under the plain meaning rule not active members?
3. Are suspended and disbarred person expressly included as not active members?
4. Does the canon of *expressio unius est exclusio alterius* bar implied inclusion when the statute specifically expresses the exceptions in the statute?
5. Did the Court violate the canon of *expressio unius est exclusio alterius*?
6. When the Court ruled “not active members” applies to “persons who were never members” did the court create an oxymoronic meaning that persons “who were never members” were members?
7. Would suspended and disbarred persons be included as not active members if not expressly included in the not active member class of persons?

#### Assignment of Error No. 3

The Court committed a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5 (a) (3) when the court granted the motion in limine that instructed both parties not to argue or otherwise

imply or infer during trial that RCW 2.48.180 excludes from the definition of “nonlawyer” individuals who have never been active members of the state bar.

Issues pertaining to assignment of error no. 3

1. Was the order in limine used by the state to exclude argument before the jury regarding the threshold element of the crime a violation of the Sixth Amendment right of the defendant?
2. Was the order in limine improperly used to take the threshold element of the offense from the jury contrary to *in re Gaudin and Johnson*?
3. Did ordering the defendant not to argue the threshold element of the crime violate of his Sixth Amendment right to defend himself?
4. Is relieving the state of its burden to prove an element of the crime beyond a reasonable doubt before the jury a violation of the Fifth Amendment right of the defendant?
5. Was the order in limine improperly used to exclude hypothetical questions on cross-examination to attorney witnesses for the state who testified regarding the crime charged under RCW 2.48.180?

ASSIGNMENT OF ERROR NO. 4

The court committed a manifest error affecting a constitutional right by ruling on October 27, 2010, and the subsequent order, dated on November 9, 2010, that persons who paid the defendant for services were not to be joined to the indictment as defendants.

Issues Pertaining to Assignment of Error No. 4.

1. Is a person who pays another person to commit an act that constitutes a crime liable for the crime if committed?
2. Is planning a crime with another person make both persons liable for the crime?

3. Hypothetical: If Bonnie pays Clyde to rob a bank for her, is Bonnie liable for the robbery, too, if Clyde robs the bank?
4. Did the state represent the legislature define the elements of crimes or the judicial branch?
5. Did the state have the authority to only charge one person when the alleged offense required to persons to commit?

#### ASSIGNMENT OF ERROR NO. 5

The court committed a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5 (a) (3) by referencing, admitting, and instructing the jury by GR 24.

#### Issues pertaining to assignment of error no. 5

1. Did the state hold out court rule GR 24 is a law?
2. Did the state hold out that court rule GR 24 was enacted and codified as a law by the Washington State Supreme Court?
3. Was the jury instructed to rely on court rule GR 24 as an element that constitutes the offense of the unlawful practice of law?
4. Was court rule GR 24 adopted to expand the practice of law or to threaten and prosecute persons for conduct that is protected by the legislature from allegations of unlicensed practice of law pursuant to RCW 18.130.190 and RCW 18.130.040?
5. Did the jury instructions include the element of “entitlement to practice law” according to RCW 2.48.180 (2) (a) or the definition of the practice of law under court rule GR 24?
6. Did the state hold out attorneys in Washington State are not license holders subject to RCW 18.130.180?

#### ASSIGNMENT OF ERROR NO. 6

The court committed manifest errors affecting constitutional rights of the defendant pursuant to RAP 2.5(a) (3) for improper jury instructions.

Issues pertaining to assignment of error no. 6

1. Did the court commit a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5(a) (3) by substituting the term “person” in place of “nonlawyer” in the jury instruction no. 7?

ASSIGNMENT OF ERROR NO. 7

The court committed a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5(a) (3) by admitting evidence obtained in violation of the Fourth Amendment.

Issues pertaining to assignment of error no. 7

1. Did the court commit a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5(a) (3) by admitting evidence obtained in violation of the Fourth Amendment?

ASSIGNMENT OF ERROR NO. 8

The court committed an error pursuant to RAP 2.5 (a) (2) by finding the defendant guilty of theft in the first degree under RCW 9A.56.030 (1) (a) and 9A.56.020 (1) (b) and the unlawful practice of law under RCW 2.48.180 (2) (a) for failure to establish facts upon which relief can be granted.

Issues Pertaining to Assignment of Error No. 8

1. Were Counts I, II, III, and IV above the third degree value limit of \$250, and not qualified for aggregation under RCW 9A.56.010 (18) (c) at the time of the alleged offense?
2. Was the jury given an improper instruction to consider the element of a continuing course of conduct and a continuing criminal impulse?

3. Was the third degree value limit omitted from the jury instruction for aggregation pursuant to RCW 9A.56.010 (18) (c)?
4. Were values aggregated that were above the third degree threshold limit of two hundred fifty dollars when considered separately at the time of the alleged conduct pursuant to RCW 9A.56.010 (18) (c)?
5. Did aggregation of amounts above the third degree threshold value constitute a violation of Due Process and Equal Protection considering that doing so abrogates the legislative intent of RCW 9A.56.010 (18) (c) under the guise that the statute does not abrogate the common law, thereby nullifying the third degree threshold limit of the legislature that gave express notice otherwise to the defendant?

#### ASSIGNMENT OF ERROR NO. 9

The court committed a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5 (a) (3) by ordering restitution to Irene Frelin and William McGraw.

#### Issues pertaining to assignment of error no. 9

1. Was the order of restitution a violation of Due Process?

#### ASSIGNMENT OF ERROR NO. 10

The court committed a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5 (a) (3) by ordering a no contact order with Julie Kanikkeberg, Irene Frelin, Peter Perron, and William McGraw.

#### Issues pertaining to assignment of error no. 10

1. Was the no contact order a violation of Due Process?

#### ASSIGNMENT OF ERROR NO. 11

The jury verdict is clearly not supported by substantial evidence and must be overturned on all counts.

Issues pertaining to assignment of error no. 11

1. Was the exclusion of the element of “nonlawyer” from argument from the before the jury a violation of the Sixth Amendment right of the defendant?
2. Did the state prove the defendant held himself out as “entitled” to practice law?
3. Does the record clearly show the verdict was unsupported by substantial evidence?

STATEMENT OF THE CASE

On June 10, 2010, the defendant was charged with two counts of unlawful practice of law under RCW 2.48.180 (2) (a) and two counts of theft by aid and deception for the fees in exchange for the services to two clients pursuant to RCW 9A.56.030 (1) (a) and RCW 9A.56.020 (1) (b).

On June 23, 2010, the defendant was arraigned. On October 27, 2010, the defendant filed a motion to dismiss based upon the allegation of the state that he was “not an active member of the bar” The state admitted in ordinary colloquial speech a not active member indicates a prior active member, but declared that the plain meaning does not apply to RCW 2.48.180 because it is a definition of a crime. VRP Vol. dated October 27, 2010, Page 23, lines 8-19. The state argued implied inclusion, despite the fact that the plain language excludes persons who were never members since the phrase “not active member” requires prior active status. The

court denied the motion to dismiss and entered findings of fact and conclusions of law that “not an active member” applies to “persons who were never members” thereby ordering an oxymoron-like meaning of the element that constitutes the offense. CP at 76-80

The defendant filed a second motion to dismiss on March 1, 2011, which was the first scheduled day of the trial. CP 89-102 The state did not respond in writing to the motion, but claim the motion was brought on the same grounds. VRP Vol. dated March 1, 2011, Page 18, lines 8-12. The Verbatim Report of the Proceedings is proof. The canons were not in the record in the first motion. The state was dodging the motion. The state motioned to “slew” arguments of the defendant from the jury. VRP Vol. dated March 1, 2011, Page 18, line 18 to Page 19, line 14.

The case proceeded to trial and the court expanded the suppression of the order in limine to render all questions regarding the class of persons irrelevant on cross-examination of attorney witnesses who appeared to testify regarding the crime charged under the definitional statute pursuant to RCW 2.48.180.

Per the GR 24 jury instructions of the Court, the defendant was convicted on all charges.

#### APPLICABLE STANDARDS

#### Review by the Supreme Court

The defendant seeks direct review under RAP 4.2(a) (4) contending the case involves a fundamental and urgent issue of broad public import which requires prompt and ultimate determination by the Supreme Court. RCW 2.06.030 (d)

## ARGUMENT

### ASSIGNMENTS OF ERROR

#### Assignment of Error No. 1

1. The court committed a manifest error affecting a constitutional right pursuant to RAP 2.5 (a) (1) for lack of jurisdiction of the defendant for charges in the indictment under RCW 2.48.180 (2) (a) for the unlawful practice of law.

#### Issues pertaining to assignment of error no. 1

1. Did the court commit a manifest error affecting a constitutional right pursuant to RAP 2.5 (a) (1) for lack of jurisdiction of the defendant for charges in the indictment under RCW 2.48.180 (2) (a) for the unlawful practice of law?

Standard of Review Jurisdiction is the power to hear and determine a cause or proceeding. A court has complete jurisdiction if the court has (1) jurisdiction of the subject matter, (2) jurisdiction of the person, and (3) the power or authority to render the particular judgment. *State v. Hampton*, 9 Wn.2d 278, 281 114 P.2d 992 (1991)

A defendant contesting the jurisdiction of the court over him does not have to prove the court does not have jurisdiction over him beyond a reasonable doubt, but only evidence sufficient to establish the burden of contesting. The burden of contesting an element of jurisdiction over the person is addressed *In re State v. L.J.M.*, 129 Wn.2d 386, 918 P.2d 898 (1996). Where a defendant can show by the “totality of evidence” in the

record that the charge requires a higher burden of proof on jurisdiction, the state has a higher burden of proof. The defendant is only required to show the amount of evidence that would cause a court to reasonably question whether jurisdiction properly lies in the state court. It is similar to that which a defendant must present when raising an affirmative defense of self-defense. In such cases “the amount of evidence necessary to create a reasonable doubt in the minds of the jurors only needs to be some evidence, admitted in the case from whatever source to raise the issue of self-defense.” *State v. McCullum*, 98 Wn.2d 484, 488, 500, 656 P.2d 1064 (1983)

Whatever is the particular defense, the court in *State v. L.J.M* said “applying such a rule in this context also avoids a potential constitutional problem inherent in the position WAPA advances to the effect that the defendant must establish his or her Indian status by a preponderance of the evidence. *State v. Camara*, 113 Wn.2d 631, 638, 781 P.2d 483 (1989) (citing *In re Winship*, 397 U.S. 358, 90 S. Cr. 1068, 25 L. Ed. 2d 368 (1970) (constitutional error results if the burden of proof on a necessary element of the crime shifts to the criminal defendant)). This burden, which the Court of Appeals aptly called a “burden of contesting” does not require a defendant to persuade the trial court that the state jurisdiction is improper. *L.J.M.*, 79 Wn. App. At 141. Rather, it requires only that the

defendant point to some evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat state jurisdiction.

Here, Steven was charged with the unlawful practice of law under RCW 2.48.180 (2) (a), specifically, “A nonlawyer practices law or holds himself or herself out as entitled to practice law.” The statute provides a meaning for nonlawyer for use in the statute under RCW 2.48.180 (1) (b), specifically,

“Nonlawyer means a person to whom the Washington supreme court has granted a limited authorization to practice law, but who practices law outside that authorization, and a person who is not an active member in good standing with the state bar, including persons who are suspended and disbarred from membership;”

There are two primary classes of nonlawyers in the statute. The first class of nonlawyer has a limited authorization to practice law. Washington has one type of limited legal provider, which is the real estate closing officer. Such persons with a limited authorization to practice law are not members of the bar. The state does not allege the defendant is a nonlawyer under the limited authorization classification.

The state alleges in the Information and three times as amended that the defendant, “while not an active member of the bar”. CP at 1-8, 9-11, 81-83, 175-177, 178-192. The information indicates during a time period with the word “while” and a person who is not an active member is a member, thereby denoting an allegation of prior active status. This was

one of the arguments of the defendant at the first motion to dismiss on October 27, 2010. VRP Vol. dated October 27, 2010, Page 10, lines 2-24. The state conceded that under the plain meaning the defendant is not included in the statute, but contended the plain meaning is not the meaning of the statute, thereby admitting the state is prosecuting the defendant contrary to the plain meaning under color of law because “not an active member” excludes persons who are not members. Then the state made a false declaration and stated the colloquial or plain meaning does not apply because this is “legal definition of a term that is used in a criminal statute” VRP Vol. dated October 27, 2010, Page 23, lines 8-14. In doing so, the state proclaimed the plain meaning does not apply to criminal statutes, contrary to the principles of statutory construction that a statute is understood according to its natural and ordinary sense and meaning. *State v. Lewis*, 86 Wn. App. 716, 717-18, 917 P.2d 1325 (1997)

Therefore, the state misrepresented the rules of construction, thereby depriving the defendant of Due Process under color of law in open court. The burden of contesting the charge was satisfied because the defendant is only required to show some evidence in the record, if true, would be sufficient to defeat state jurisdiction, per *State v. L.J.M. and State v. McCullum*. The defendant proved the plain meaning did not include the defendant and the state admitted to prosecuting the defendant

contrary to the plain meaning. Since the defendant only has to present some evidence, if true, would prove the court does not have jurisdiction over him, the Court should have dismissed the information because the counter-argument of the state was oxymoronic. The state cannot argue that the legislature intended to include the defendant when the plain language expresses exclusion. The defendant does not have the burden of beating the state in a verbal wrestling match over legislative intent, but he did. The court merely has to find evidence that the defendant may be right and, here, the acknowledgement of the state provides the evidence. At that juncture, the Court should have dismissed the information for lack of jurisdiction, but crafted an order asserting an oxymoronic meaning of the statute, providing that persons who were never members are not active members and instructed the jury the oxymoron was the law. CP 78-80.

Then on March 1, 2011, the defendant presented a second motion based upon different grounds, including the canons of statutory interpretation such as *expressio unius est exclusio alterius*, *eiusdem generis*, and *noscitur a sociis*. The defendant even included several major dictionaries to show the primary meaning on “inactive” is not active, showing that the not active class includes inactive members of the bar. CP at 89-102. VRP Vol. dated March 1, 2011, Page 9, line 15 to Page 15, line 25. The state did not like the first motion and they like the second even

less. The prosecution motioned in limine to “slew” all the arguments from before the jury and the defendant instantly contested the motion on Fifth Amendment grounds that the state has a burden to prove every element of the offense beyond a reasonable doubt before the jury. VRP Vol. dated March 1, 2011, Page 18, line 18 to Page 19, line 14. The court granted the motion of the prosecution and asked the state to write an instruction of what it means to be a not active member. VRP Vol. dated March 1, 2011, Page 20, lines 12-16.

The state asserted the motion was based on the same grounds as the first motion, so they did not respond. VRP Vol. dated March 1, 2011, Page 18, lines 8-12. The Verbatim Report of the Proceedings do not lie. There is no mention of the canon of *expressio unius est exclusio alterius* in the first motion on October 27, 2010. The implied inclusion argument of the state was vaporized by the canon of *expressio*. In a definitional class of persons statute like RCW 2.48.180, the court must conclude the legislature considered all the persons who should be included in the statute and intentionally excluded and barred all others from being implied. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, (1999), and likewise, in re *Washington Natural Gas Co. v. Public Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

When the state received the motion to dismiss, the state had a burden to respond to the evidence and to prepare to satisfy a higher burden of proof on jurisdiction over the defendant. But how did the state react instead? The state called the arguments of the defendant dishonest and the canons confusing, thereby resorting to name calling in open court. VRP Vol. dated March 1, 2011, Page 20, lines 1-9. Without any effort to respond intelligently, the state motioned in limine to “slew” the arguments of the defendant from before the jury on grounds of confusion. VRP Vol. dated March 1, 2011, Page 18, line 18 to Page 19, line 14.

However, the naked assertion of confusion of the state is without merit because the canon clarifies how the statute is constructed according to the law. The statement that persons who were never members are not active members is confusion because the classes exclude each other.

The burden of the state to prove every element of the offense beyond a reasonable doubt before the jury under the Fifth Amendment and per *Gaudin* and *Johnson* by the U.S. Supreme Court. In re United States v. Gaudin, 515 U.S. 506, 509-10, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) United States v. Johnson, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)

When the Court granted the motion in limine for the defendant not to argue the “nonlawyer” element of the offense, the Court violated the

Sixth Amendment right of the defendant to argue his case, which *Gaudin* and *Johnson*, confirmed that whenever an issue is an element of a crime the issue must be argued and proven before the jury and decided by the jury because the state has a burden to prove the element of the offense beyond a reasonable doubt. The evidence in the instant case shows the jury had its hands tied with an order in limine that was intended to thwart all attempts of the defendant to argue his case and that is exactly how the state and the court enforced the order many times.

Therefore, the defendant met his “burden of contesting” to satisfy the evidence requirement in *McCullum* and in *L.J.M.* that, if true, the evidence was sufficient to defeat jurisdiction over him since the evidence proved the legislature intentionally excluded persons who were never members of the bar in RCW 2.48.180, and the state failed to respond to the evidence, thereby establishing the affirmative defense to jurisdiction.

#### Assignment of Error No. 2

##### Issues Pertaining to Assignment of Error No. 2

1. Did the court violate the right of the defendant to Due Process under the Fourteenth Amendment to the U.S. Constitution and the Wash. St. Const. Art. 1 § 12 by redefining the statutory element of “nonlawyer” under RCW 2.48.180 (1) (b) pursuant to the crime charged in the information under RCW 2.48.180 (2) (a)?

Standard of Review “A court abuses its discretion when an “order is manifestly unreasonable or based on untenable grounds.” *Wash. State*

Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). "Since the court must give effect to the plain meaning of the statute, the court does not have the authority to alter the plain meaning." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "Plain words do not require construction . . . This court will not construe unambiguous language." State v. McCraw, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (quoting Sidis v. Brodie/Dohrmann, 117 Wn.2d 325, 329, 815 P.2d 781 (1991)). The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of an accused in all criminal prosecutions to trial by an impartial jury. Turner v. Murray, 476 U.S. 28, 36 n.9, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986).

The statutory language at issue is "not an active member of the state bar" under RCW 2.48.180 (1) (b). The court redefined the plain meaning of "not an active member" to be inclusive of persons who "were never members" CP 76-80. Since persons who are not active members excludes persons who were never members, the statutory language of not an active member casts out the notion of implied inclusion of persons who were never members.

The legislature enlarged the not active bar member class with express exceptions including persons who are suspended disbarred thereby excluding all persons who might otherwise be implied by the expressed exceptions to the plain meaning under the canon of *expressio unius est exclusio alterius*. Under the canon of *expressio*, "Where a statute provides for a stated exception, no other exceptions will be assumed by implication." Jepson v. Department of Labor & Indus., 89 Wn.2d 394, 404, 573 P.2d 10 (1977); Sulkosky v. Brisebois, 49 Wn. App. 273, 277,

742 P.2d 193 (1987). The exceptions become exclusive. *State v. Somerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988).

The result of the oxymoronic reasoning is an absurd interpretation which suggests persons who were never members were members once upon a time. The state explains the meaning in very eloquent terms suggesting it merely requires simple logic. The state pontificates, “So again, simple logic indicates that -- that those are among the people included who are not -- who are not active members in good standing of the State Bar, but they’re not the entire class.” VRP Vol. dated October 27, 2010, Page 23, line 23 to Page 24, line 12. Here again, the logic of the state expresses a contradiction, which is not the legislative intent. The state contends, “Mr. Janda says we’re saying everybody in the world who’s not a lawyer is a non-lawyer (under the statute) and that’s pretty much it. That’s what the statute says. If you’re not a member of the State Bar in good standing you’re not a lawyer, you’re a non-lawyer for purposes of the statute.” VRP Vol. dated October 27, 2010, Page 24, lines 13-17. Here, Mr. Carver openly admits the state is prosecuting the defendant in violation of the law by declaring a meaning that contradicts the plain meaning of the statute, thereby manifesting malice in deprivation of the defendant. The state says that the whole world is included in the statute by saying “...that’s pretty much it” and “That’s what the statute

says” thereby intentionally declaring the opposite of the statute. VRP Vol. dated October 27, 2011, Page 23, line 8 to Page 24, line 17. The arguments of the state implicate the state for expressly rejecting the plain meaning of the law and declaring a polar opposite meaning that the law excludes under the plain meaning.

The state did not reach the constitutionally overbroad results of its “interpretation” with respect to the statutory meaning as a whole argued by the defendant showing that the statute bars financial activity between active and not active members. VRP Vol. dated October 27, 2010, Page 11, line 15 to Page 12, line 21. The state contended at trial all those provisions were irrelevant and used the order in limine as a basis to exclude all such arguments.

Therefore, when the court ruled on October 27, 2010, that the language in RCW 2.48.180 “...not an active member of the bar...” applies to persons who have never been members of the bar, the court modified the plain meaning of “not an active member” to include persons who are excluded under the plain meaning, thereby constituting a manifest abuse of discretion, depriving the defendant of his Due Process right under the Fifth and Fourteenth Amendment of the U.S. Constitution and Wash. St. Const. Art. 1 § 12.

ASSIGNMENT OF ERROR NO. 3

Issues pertaining to assignment of error no. 3

1. Did the Court commit a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5 (a) (3) when the court granted the motion in limine that instructed both parties not to argue or otherwise imply or infer during trial that RCW 2.48.180 excludes from the definition of “nonlawyer” individuals who have never been active members of the state bar?

Note - The defendant contested the motion in limine in the record, thereby securing his right to raise the issue on review without having to prove the issue qualifies for review under RAP 2.5 (a) (3). VRP Vol. dated March 1, 2011, page 18, line 18 to page 19, line 14. Many of the manifest deprivations stemmed from the assertion that the order in limine rendered the element of “nonlawyer” excluded from questioning before the jury, but the order in limine only excluded argument of the nonlawyer element of the offense by the parties before the jury. Consequently, the unlawfulness of the order in limine was broadened in scope by the court every time the court sustained an objection to questions based upon relevancy because the court cited the order in limine as the basis for sustaining the objection.

Standard of Review The defendant has a constitutional right under the Fifth and Sixth Amendments to have a jury determine the elements of the crime beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 509-10 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). An element of a crime cannot be taken from the jury, *in re Gaudin and in re Johnson, id.*

Here, the prosecution did not respond to the second motion to dismiss. Instead, the prosecution motioned the court in limine to exclude all argument of the defendant raised in his motion to dismiss regarding the threshold element of “nonlawyer” and when the court granted the motion the defendant was deprived of his right to argue his case under the Sixth Amendment constituting an error under RAP 2.5 (a) (3), and grounds for reversal. VRP Vol. dated March 1, 2011, Page 18, line 8 to Page 19, line 14.

The court followed the motion in limine with this statement. “I’m going to need an additional instruction that defines what it means to be a not active member of the bar.” VRP Vol. dated March 1, 2011, Page 20, lines 12 – 16. However, the status element of nonlawyer is not a question of law, but a question of fact, which is only verifiable by the custodian of bar records at the WSBA. VRP Vol. dated March 9, 2011, Page 127, lines 4-15. All bar member classifications are registered and absolute. Membership status is not discretionary. The meaning of “not an active member” is plain and used only in the state bar act to provide a basis to distinguish status among members. *In re the Marriage of Dahlthorp*, 23 Wn.App. 904 (1979)

The questions to the witnesses of the state all reveal the class of nonlawyers in the statute cannot include the nonlawyers in the court rules.

The following is a sampling from the record manifesting the deprivation, resulting from errors committed by the court by sustaining objections based upon relevancy, which were sustained on the grounds that the order in limine removed the law defining the threshold element of “nonlawyer” as defined under RCW 2.48.180 (1) (b) from argument, contrary to the U.S. Supreme Court rulings *in Guadin and Johnson, id* which held the element of a crime must be argued before the jury and decided by the jury in compliance with the Fifth and Sixth Amendment.

1) Steven questioned Attorney Julie Shankland on cross-examination: Have you ever heard of the rule *expressio unius est exclusio alterius*? Prosecutor John Carver: Objection, Your Honor, relevance. Mr. Janda: The relevance is, Your Honor, when the legislature defines the specific elements in a statute, it is against the law according to the canon of *expressio* to add one little tiny *iota*. There is an intentional consideration that everything was considered and intentionally omitted everything else that might reasonably be implied. The court: Well, the witness may answer the question whether she's familiar with the term. Julie Shankland: I've heard the term. I have no idea how it applies here. VRP Vol. dated March 9, 2011, Page 151, line 13 to Page 152, line 2

Here, Ms. Shankland testifies she has heard of the *expressio* canon, but she has no idea how it applies to RCW 2.48.180, which is a

definitional statute defining classes of persons. She had a duty to research if Steven Janda was defined as a nonlawyer in RCW 2.48.180 prior to rendering opinions concluding he was engaged in the unlawful practice of law.

2) The prosecution objected to the admission of the Washington State Pattern forms which distinguish persons who are “not members” from persons who are “not active members” in the military. VRP Vol. dated March 10, 2011, Page 39, line 8-13, sustained.

3) A question regarding distinct classifications in military, whether active or not active, VRP Vol. dated March 10, 2011, Page 39, line 20, sustained.

4) A question regarding the difference of the nonlawyers in the court rules compared to the nonlawyers in the state bar act, VRP Vol. dated March 10, 2011, Page 40, 1-21, sustained with a comment by the court, “The objection is sustained as it refers to the motion in limine that's already been decided in this case” thereby showing how the court relieved the state of its burden to prove the essential element of the offense beyond a reasonable doubt before the jury.

5) “If a person is not a member of the bar would it be misleading to say the person is not an active member?” Objection, sustained. VRP Vol. dated March 10, 2011, Page 41, line 6

6) “Do misleading statements constitute professional misconduct?” Objection, sustained VRP Vol. dated March 10, 2011, Page 41, line 11

7) Since status is official with the bar, why would you use the homonym from the court rules? Objection, “sustained” VRP Vol. dated March 10, 2011, Page 42, line 15-18

8) “When the lawyer is transferred to inactive status is he given a not active membership card?” Objection relevance, “sustained” VRP Vol. dated March 10, 2011, Page 43, line 20-23

9) “Is he transferred on a bar roster to not active {sic} status?” Same objection, your Honor, “sustained” VRP Vol. dated March 10, 2011, Page 43, line 24 to Page 44, line 3

10) Objection to business regulation question, which was sustained, VRP Vol. dated March 10, 2011, Page 45, line 12

11) Objection to how the expressio canon affects business regulation, VRP Vol. dated March 10, 2011, Page 46, line 5, The court orders Shankland to answer the question, but the response of Shankland reveals she perceives trouble with the question and answers, paralegals do not appear because they cannot practice law. VRP Vol. dated March 10, 2011, Page 48, lines 21-25.

12) The state objected to questions regarding the reinstatement of members, which was sustained. VRP Vol. dated March 10, 2011, Page 53, line 5-13

13) Steven had Ms. Shankland read RCW 18.130.190, which states the authority to investigate businesses for unlicensed conduct listed on RCW 18.130.040 VRP Vol. dated March 10, 2011, Page 55, line 18 to Page 58, line 17. The court ruled the list of professions on RCW 18.130.040 were irrelevant and sustained the objection of the prosecution.

14) The state objected to the following question, Do legislators make legal decisions and argue the law on behalf of all of us? “Sustained” VRP Vol. dated March 10, 2011, Page 61, lines 13-16

15) Finally, the state objected in the midst of the closing arguments when the defendant was arguing the nonlawyer issue. The court declared, “Jurors again will rely on the Court’s statement of the law (inaudible) case,” meaning the extension of “not an active member” in RCW 2.48.180, to apply to persons who were never members from the ruling of the court on October 27, 2010, and dated November 9, 2010, and the motion and order in limine instruction from March 1, 2011. VRP Vol. dated March 15, 2011, Page 92, line 16.

Therefore, the court ordered in limine deprived the defendant of his Sixth Amendment right to argue his case and his right to have a

meaningful opportunity to present his case to the jury, thereby constituting grounds of reversible error, and the entire conviction must be reversed.

#### ASSIGNMENT OF ERROR NO. 4

##### Issues Pertaining to Assignment of Error No. 4.

1. Did the court commit a manifest error affecting a constitutional right by ruling on October 27, 2010, and the subsequent order, dated on November 9, 2010, that persons who paid the defendant for services were not to be joined to the indictment as defendants due to the separation of powers?

Standard of Review In re State v McDonald, 138 Wn.2d 680,693,981 P.2d 443 (1999) “The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal.”

1. Does the contract for services require joinder of parties in contract?

RCW 9A.08.020 (3) provides a person is an accomplice of another person in the commission of a crime if: (a) with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in the planning or committing it; or (b) His conduct is expressly declared by law to establish his complicity.

Here, the evidence in the record shows the accusers hired the defendant to perform services for them. Ms. Frelin admits to paying the defendant and cites the amounts and dates of the checks over many years with many months in between payments. She testified to the nature of the conduct she paid as being legal, but without facts with respect to terms, conditions, promises of certain performance.

The evidence in the record and the evidence in the state's exhibits shows the dates and amounts of the last several payments of Ms. Frelin to the defendant were all over the \$250 aggregation threshold limit of third degree theft and do not qualify for aggregation under RCW 9A.56.010 (18) (c), including \$1,662.50 paid on July 14, 2009, Exhibit No. 41, VRP Vol. dated March 10, 2011, Page 151, lines 4-22; \$1,515 paid on November 13, 2008, Exhibit No. 40, VRP Vol. dated March 10, 2011, Page 149, lines 8-23; \$1,515 paid on October 6, 2008, Exhibit No. 39, VRP, dated March 10, 2011, Page 142, line 20 to Page 143, line 10; \$1,900 paid on July 3, 2008, Exhibit No. 38, VRP Vol. dated March 10, 2011, Page 140, line 22 to Page 141, line 21; \$500 paid to an attorney, Exhibit No. 37, VRP Vol. dated March 10, 2011, Page 139, line 18 to Page 140, line 1; and \$1,500 paid on January 24, 2008, Exhibit No. 36, VRP Vol. dated March 10, 2011, Page 138, line 14 to Page 139, line 17. There is also a list of these payments in the record under State's Exhibits. VRP Vol. dated March 10, 2011, Page 5. Exhibit Nos. 36, 37, 38, 39, 40, and 41.

William McGraw paid Steven to prepare documents for his mother and also satisfies all of the above elements. Steven was the subagent of Mr. McGraw, who was the agent of his mother Mary McGraw, but the

prosecutors intentionally omitted that material fact and shifted all liability over to Steven.

Judge Hill said the separation of powers allowed the prosecution, if you will, to charge Clyde for a crime Bonnie paid Clyde to commit for her benefit without charging Bonnie, thereby holding out the separation of powers is grounds for violating the Equal Protection Clause of the Fourteenth Amendment, contrary to the Court in *re McDonald*, supra, and the statutory requirement that a person is an accomplice of another person when his or her conduct is expressly declared by law to constitute a crime. VRP Vol. dated October 27, 2010, Page 3, line 18 to Page 5, line 21.

The state contended that prosecutor discretion gave them the sole authority to decide who shall be joined to the indictment. However, there is no prosecutor discretion when parties in contract perform conduct the state contends is expressly declared by law to establish complicity pursuant to RCW 9A.08.020 (3) (b).

Therefore, since the state contends the underlying conduct is unlawful, the state must join the persons whose conduct establishes their complicity and the failure to charge both persons under the authority of the separation of powers deprived Steven of his right of Equal Protection under the Fourteenth Amendment, constituting a manifest error affecting the constitutional rights of the defendant under RAP 2.5 (a) (3).

## ASSIGNMENT OF ERROR NO. 5

### Issues pertaining to assignment of error no. 5

1. Did the court commit a manifest error affecting a constitutional right of the defendant by referencing, admitting, and instructing the jury by and with GR 24?

Standard of Review *In re State v. Sibert*, 168 Wn.2d 306, quoting *State v. Brown* 147 Wn.2d 330 (2002) “An instruction that relieves the state of its burden to prove every element of a crime beyond a reasonable doubt to the jury requires “automatic reversal”.

*In re State v. Miller*, 131 Wn.2d 78, an error which infringes upon the equal protection rights of the defendant is presumed prejudice because a defendant has the right to have a jury base its decision on accurate statements of law applied to the facts. When a constitutional error can be characterized as a “structural defect” automatic reversal is required. GR 24 and 25 are not laws, but court rules and cannot be imposed to define or to affect standards of liability for professional conduct. Crimes must be defined by the legislature. GR 24 and 25 was adopted by the Washington Supreme Court for the expansion of the practice of law in 2001.

Here, Steven Janda is charged with violating RCW 2.48.180 (2) (a) and satisfying the threshold element of “nonlawyer” as defined under RCW 2.48.180 (1) (b) by not being an active member of the bar. GR 24 does not constitute the elements of the unlawful practice of law under RCW 2.48.180, which reads as amended in 1995. GR 24 was adopted six years later in 2001, so GR 24 was in response to the amended statute. The expansion efforts to authorize persons to practice law with a limited authorization under GR 24 and 25 have been contested by the members of the bar twice, thereby preventing the purpose of GR 24 and 25. Since the state relied on GR 24 as evidence of the unlawful practice of law in its

case in chief, and admitted GR 24 as evidence of the unlawful practice of law pursuant to the charge under RCW 2.48.180 (2) (a), the jury relied on GR 24 as an Exhibit and Instruction for deliberation under Exhibit no. 65, thereby evidencing a violation of the Fifth Amendment which requires the state to prove the elements of the crime charged by the elements that constitute the offense in the “statute”. GR 24 is not a statute and cannot be asserted as evidence of criminal liability against a person who is not authorized to practice law as a limited legal provider, but the court relied on GR 24 as a standard for evidence constituting the unlawful practice of law against the defendant, thereby depriving him of Due Process of law under the Fifth and Fourteenth Amendment.

2. Where in the record did the state hold out under color of law that GR 24 was a law to prove the offense of the unlawful practice of law in violation of the right of Due Process of under the Fifth and Fourteenth Amendment?

Prosecutor John Carver for the state asked Ms. Shankland “...who defines what is meant by the practice of law?” Ms. Shankland responds, “Currently, there is a court rule GR 24 that is the definition of the practice of law.” VRP Vol. dated March 9, 2011, Page 114, lines 21- 25.

Prosecutor Carver asks Ms. Shankland, who issued GR 24 and she answers, the Supreme Court. VRP Vol. dated March 9, 2011, Page 114, Line 25 to Page 115, Line 1. Carver asks Ms. Shankland the name of the

rule and she recalls, “GR 24”. VRP Vol. dated March 9, 2011, Page 115, Line 2 – 3. Then Prosecutor Carver adds the word “enacted” by asking when was GR 24 enacted? Prosecutor Carver omits the material fact that court rules are distinct from statutes, which are “enactments” carrying the force of law, thereby holding out the Supreme Court has passed a new law called GR 24, thereby violating the separation of powers and Ceasarizing the judicial branch, meaning one branch performing the roles of all three branches, since the legislative role is to define elements of crimes, not the court. Here, the judicial branch adopted GR 24, which would be the legislative role if GR 24 was a law, and then enforces GR 24 as a law, which is an executive function, thereby officially performing all three branches of government by the members of the WSBA.

Then Prosecutor Carver motions to admit GR 24, which contains over five hundred words as Exhibit 65. GR 25 was adopted in conjunction with GR 25 and has over five thousand words. Steven contested the admission of GR 24 and the court overruled the objection and admitted GR 24, despite the fact that Steven cited the *Hizey* case in the pre-trial hearing and GR 24 says the rule shall not be used to define or to affect standards of professional conduct. VRP Vol. dated March 9, 2011, Page 114, line 21 to Page 115, line 1.

The court instructed the jury to apply the law to the facts. VRP Vol. March 9, 2011, Page 105, lines 11-16. Then the court referred to GR 24 as the law, thereby misrepresenting to the jury GR 24 was the law of the case in violation of the Fifth Amendment right of the defendant for the state to prove the elements which constitute the offense by the law, not court rules, which are not laws. VRP Vol. dated March 14, 2011, Page 108, line 2.

Therefore, when the court entered GR 24 as an exhibit and referenced GR 24 during the trial and as a jury instruction, the court applied court rule GR 24 with statutory force and violated the Due Process right of the defendant, thereby, shocking the conscience of an ordinary person under the Fourteenth Amendment of the defendant, and a manifest error, affecting a constitutional right pursuant to RAP 2.5(a) (3), constituting reversal of the conviction of all charges.

#### ASSIGNMENT OF ERROR NO. 6

##### Issues pertaining to assignment of error no. 6

1. Did the court commit a manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3) by substituting the term “person” in place of “nonlawyer” in jury instruction no. 7?

Standard of Review Washington appellate courts generally do not consider issues raised for the first time on appeal. However, a party may raise an issue for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). “An instruction that relieves the state

of its burden to prove every element of a crime beyond a reasonable doubt to the jury requires "automatic reversal". *State v. Sibert*, 168 Wn.2d 306, quoting *State v. Brown* 147 Wn.2d 330 (2002).

In several cases, the courts have held that instructional errors which are "of a constitutional magnitude" may be raised for the first time on appeal, without considering the degree to which the asserted errors were "manifest". *State v. McCullum*, 98 Wn.2d 484, 487-88, 487-88, 656 P.2d 1064 (1983); *State v. Peterson*, 73 Wn.2d 303, 306, 438 P.2d 183 (1968).

Here, the meaning of nonlawyer is an essential element that constitutes the offense, which the state has the burden to prove beyond a reasonable doubt. The jury instruction no. 7 reads in relevant part, "A 'person' commits the crime of the Unlawful Practice of Law when, not being an active member of the State Bar, he practices law or holds himself out as entitled to practice law." The term "person" in the instruction is not the law. RCW 2.48.180(2)(a) does not say any person, it is says a "nonlawyer" which identifies a certain class of persons defined under RCW 2.48.180(1)(b). Since Due Process under the Fourteenth Amendment requires the state must prove every element beyond a reasonable doubt to the jury, the instruction was improper because the instruction switched the term "nonlawyer" that defines the status of the person in RCW 2.48.180 in exchange for "person" which is a false statement of the element of "nonlawyer" thereby constituting a jury instruction error which held out any person could commit the offense.

Therefore, the court erred by incorrectly instructing the jury in jury instruction no. 7 regarding the essential element that constitutes the offense and prejudiced the right of the defendant for the jury to be given accurate statements that define the elements that constitute the offense, thereby depriving the defendant of his Due Process right of under the Fourteenth Amendment, constituting a manifest error affecting a constitutional right under RAP 2.5(a) (3).

ASSIGNMENT OF ERROR NO. 7

1. Did the court commit a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5(a) (3) by admitting evidence obtained in violation of the Fourth Amendment?

Standard of Review All evidence obtained in violation of the right of the intrusion of the reasonable expectation of privacy under the Fourth Amendment must be suppressed as fruit of the poisonous tree.

Here, the Practice of Law Board represented to the clients of the defendant that the services he provided to his clients were in violation of RCW 2.48.180 and GR 24. The PLB held out under color of law that the defendant was a nonlawyer as defined under RCW 2.48.180. The PLB held out that GR 24 was evidence of unlawful practice of law.

Julie Kanikkeberg, the daughter of Irene Frelin, testified she read information published by the Washington State Bar Association on the internet that Steven “was not suppose to be doing what he’s doing because it was “illegal” and that the bar had “warned” him to stop doing what he

was doing many years ago, thereby constituting a defamatory statement for many years made by the WSBA about Steven whom the bar had no authority to discipline, much less hold out to the world the bar had the authority to order him to stop being an independent paralegal, contrary to RCW 18.130.190 and RCW 18.130.040 VRP Vol. dated March 10, 2011, Page 185, lines 8-10.

When Julie Kanikkeberg read defamatory statements regarding Steven published on the global internet by the WSBA she concluded the statements were true, which resulted in her inciting her mother to breach her contract with Steven. The state repeated the defamations in open court. Through false statements the PLB obtained consent from Ms. Frelin, thereby constituting an unlawful interference into the private affairs of Steven and Ms. Frelin under Wash. St. Const. Art. 1 § 7, from the beginning of the investigation by the PLB, contrary to RCW 18.130.040, in violation of the Fourth Amendment right of privacy under the U.S. Constitution. The defendant moved to suppress all documents accordingly in open court. VRP Vol. dated March 10, 2011, Page 75, Line 22 and Page 113, Lines 21-25.

Therefore, when the court admitted documents prepared by Steven obtained under color of law from Irene Frelin and the Estate of Mary McGraw, the court violated the Fourth Amendment rights of the defendant

under the U.S. Constitution and the Wash. St. Const. Art. 1 § 7, thereby, manifesting the error under RAP 2.5 (1) (c), by admitting evidence obtained in violation of the reasonable expectation of privacy under the Fourth Amendment, the jury was misled to believe the defendant was guilty on all charges, including both counts of theft by aid and deception under RCW 9A.56.030 (1) (a) and RCW 9A.56.020 (1) (b) and both counts of unlawful practice of law under RCW 2.48.180 (2) (a), constituting grounds for reversal of all the convictions.

#### ASSIGNMENT OF ERROR NO. 8

The court committed an error pursuant to RAP 2.5 (a) (2) by finding the defendant guilty of theft in the first degree under RCW 9A.56.030 (1) (a) and 9A.56.020 (1) (b) and the unlawful practice of law under RCW 2.48.180 (2) (a) for failure to establish facts upon which relief can be granted.

#### Standard of Review

The Fifth Amended requires the state to prove every element of the crime beyond a reasonable doubt before jury. Aggregation is limited to third degree values under RCW 9A.56.010 (18) (c), thereby removing the element from the discretion of the court to aggregate when the values at issue exceed third degree. The third degree threshold was two hundred fifty dollars at the time of the conduct in the instant case and for allegations prior to September 1, 2009 pursuant to RCW 9.94A.863.

The statute was codified under RCW 9A.56.010 (18) (c), at the time of the conduct in the instant case, and provides in relevant part, “whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value

considered in determining the degree of theft involved.” This is the proper instruction from RCW 9A.56.010 (18) (c) according to the Court *in re Garman* 100 Wn. App. 307 (Decided September 20, 1999)

The following was the jury instruction in the instant case in re State v. Steven Andrew Janda with the language underlined in italics being omitted from the jury instructions:

Whenever any series of transactions which constitute theft *would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are* is (sic) part of a common scheme or plan, then *the transactions may be aggregated in one count and* the sum of the value of all said transactions shall be the value considered in determining the *degree of theft involved* amount of value.” The last three words “degree of theft” were replaced with “amount of value.”

Here, in the instant case, the aggregation element expressing the third degree threshold element in the middle of the statute and the degree element at the end of the statute was omitted from the jury instructions regarding a common scheme or plan to read as follows:

*“Whenever any series of transactions which constitutes theft is part of a common scheme or plan, then the sum of the value of all transactions shall be the value considered in determining the amount of value.” CP 256-281*

The omission of the third degree threshold element improperly instructed the jury without the third degree theft value element since all values at issue in the instant case exceeded the third degree limit, thereby improperly instructing the jury differently that any value in a series of transactions may be aggregated, instead of being limited by the statutory value of third degree theft. The amputated jury instruction abrogates the

legislative intent under the guise that the statute does not purport to abrogate the common law, but such logic is error *in Barton, supra* since it renders the express terms of the statute false and contradicts the express legislative intent to limit aggregation to third degree values. *In re the State v. Barton*, 28 Wn. App. 690 (1981)

The payments of William McGraw were for \$750 and \$950, respectively. VRP Vol. dated March 9, 2011, Page 91, line 19 and Page 92, line 4.

The evidence in the record shows the dates and amounts of the last several payments of Ms. Frelin to the defendant were all over the two hundred fifty dollar aggregation value limit of third degree theft under RCW 9A.56.010 (18) (c), including \$1,662.50 paid on July 14, 2009, Exhibit No. 41, VRP Vol. dated March 10, 2011, Page 151, lines 4-22; \$1,515 paid on November 13, 2008, Exhibit No. 40, VRP Vol. dated March 10, 2011, Page 149, lines 8-23; \$1,515 paid on October 6, 2008, Exhibit No. 39, VRP, dated March 10, 2011, Page 142, line 20 to Page 143, line 10; \$1,900 paid on July 3, 2008, Exhibit No. 38, VRP Vol. dated March 10, 2011, Page 140, line 22 to Page 141, line 21; \$500 paid to an attorney, Exhibit No. 37, VRP Vol. dated March 10, 2011, Page 139, line 18 to Page 140, line 1; and \$1,500 paid on January 24, 2008, Exhibit No. 36, VRP Vol. dated March 10, 2011, Page 138, line 14 to Page 139, line

17. There is also a list of these payments in the record under State's Exhibits. VRP Vol. dated March 10, 2011, Page 5. Exhibit Nos. 36, 37, 38, 39, 40, and 41.

While the state was assuring the jury it was their duty to apply the law to the facts and they swore an oath to do so, the state crafted the jury instructions to assure their duty would conform to the leprous jury instructions. VRP Vol. dated March 15, 2011, Page 100, Lines 15-29.

Therefore, since the defendant was charged and convicted on two counts of first degree theft and two counts of unlawful practice of law, all convictions must be reversed, since all values at issue exceed two hundred fifty dollars and the improper jury instruction excluded the third degree value element which limits aggregation of offenses at the time of the conduct under RCW 9A.56.010 (18) (c) to two hundred fifty dollars when considered separately, the jury was unable to establish facts required for the aggregation element and the evidence in the record proves the element could not have been satisfied according to the statutory threshold requirement, consequently, the jury was improperly instructed, thereby requiring reversal of all convictions and resulting orders therein and thereto as an error pursuant to RAP 2.5 (a) (2) CP 282-283 and 304-313; VRP Vol. dated March 9, 2011, Page 16, Line 13 to Page 17, Line 7.

ASSIGNMENT OF ERROR NO. 9

Did the court commit a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5 (a) (3) by ordering restitution to Irene Frelin and William McGraw.

Standard of Review

Restitution restores the parties to their positions before the contract was formed.

Here, restitution in the Judgment and Sentence was based upon convictions of all charges. Since the state did not prove the element of a continued course of conduct and a continuing criminal impulse beyond a reasonable doubt to the jury, the convictions must be reversed and the order of restitution must be vacated.

ASSIGNMENT OF ERROR NO. 10

Did the court commit a manifest error affecting a constitutional right of the defendant pursuant to RAP 2.5 (a) (3) by entering a no contact order against the defendant with respect to the following persons, including Julie Kanikkeberg, Irene Frelin, William McGraw, and Peter Perron?

Issues pertaining to assignment of error no. 10

1. Was a provision prohibiting contact warranted considering the circumstances of the case?

Standard of Review

RCW 9.94A.030(13) defines a "crime-related prohibition" as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted . . . ." RCW 9.94A.030 (13).

As a part of the judgment and sentence the court entered a provision that the defendant have no contact with the following persons for ten years including, Julie Kanikkeberg, Irene Frelin, William McGraw, and Peter Perron. An impromptu no contact order is a violation of Fifth Amendment requirement of Due Process secured to every citizen under the Fourteenth Amendment and Wash. St. Art. 1 § 7. The state must give notice and show cause for grounds sufficient to enter a no contact order and that is directly related to the nature of the crime for which the offender has been convicted. There is no such evidence warranting a no contact order in this case. The defendant was asked at the arraignment on June 23, 2010, if he would agree to an order prohibiting contact with Irene Frelin and obliged the state in good faith provided the order would expire when the trial of the cause concluded. The defendant has no criminal history. The defendant has not contacted Irene Frelin, or has ever had an adverse encounter with her or any of the other persons listed in the no contact provision in the judgment and sentence.

Therefore, a no contact order is without cause, thereby depriving the defendant of his right to Equal Protection under the Fourteenth Amendment, thereby constituting a manifest error affecting the constitutional right of the defendant under RAP 2.5 (a) (3).

ASSIGNMENT OF ERROR NO. 11

The jury verdict is clearly not supported by substantial evidence and must be overturned on all counts.

Standard of Review

A jury verdict will not be overturned on appeal unless it is clearly unsupported by substantial evidence. *Herring v. DSHS*, 81 Wn. App. 1, 914 P.2d 67 (1996)

Did the jury make a factual determination that the defendant was “not an active member of the bar” as alleged in the information and as an element of the charge under RCW 2.48.180 (2) (a)? The answer is “no” because the Court removed the element from the jury under the guise that the order in limine allowed the Court to remove the element from argument and jury consideration as an issue of law, contrary to the U.S. Supreme Court holdings in *Gaudin* and in *Johnson*, supra, thereby proving the verdict was not supported by substantial evidence because the argument on the evidence was removed by the order in limine. Bar status is a question of fact, not a question of law. VRP Vol. dated March 9, 2011, Page 127, Lines 4-15

Did the court allege the defendant was a “not active bar member” and prosecute him as a “limited legal provider” under GR 24 and 25?

The information alleged the defendant was not an active member of the bar, but the case in chief of the state was based on an authorization to practice law as a limited legal provider under GR 24 and 25. There are

no limited legal providers authorized to practice law under GR 24 and 25, so the case in chief of the state was fictionally based, constituting an imaginary offense, which is a structural defect and grounds for reversal. The testimony in the record proves the defendant has never been a member of the bar, thereby disproving the allegation of membership altogether. VRP Vol. dated March 9, 2011, Page 127, lines 4-15.

Does the evidence in the record prove a continuing course of conduct and a continuing criminal impulse?

Standard of Review The determination of a common scheme or plan is a question of fact for the jury which the courts have said boils down to common sense. The jury must consider the nature of the acts to decide the time of completion. *State v. Mervis*, 105 Wn. App. 738 (2001) The state must prove a connection between all the acts to join them into one common scheme or plan and that the last act was the final act necessary for completion in the series of acts. This issue is critical since all counts in the information include the common scheme or plan language for aggregating offenses. The circumstances of the case must be considered by the jury.

So does the evidence show by the nature of the acts, a common scheme or plan that was not complete until the last act? The defendant completes documents, thereby showing the nature of the act is document

completion. The state presented the documents into exhibits to show the documents were completed. The record is full of documents, which were completed, signed, sealed, and delivered, thereby evidencing the last act was completed when the documents were completed, thereby disproving the absence of a continuing criminal impulse or continuing course of conduct in a common scheme or plan by many separate completed contracts. Ms. Frelin cancelled her final services with the defendant when her daughter Julie read the defamation letter published online by the WSBA, so any incompleteness of services with respect to Frelin were proximately caused by her. Mr. McGraw had two contracts with the defendant. The first was completed when the documents were notarized for his mother. The second contract was an executory contract to settle the estate of the Mary McGraw when she passed away. This contract could not be performed until the condition precedent of the passing of Mary McGraw. However, Mr. McGraw hired Attorney Peter Perron to settle the estate of his mother and made performance of the contract by the defendant impossible, thereby evidencing by the record Mr. McGraw was the proximate cause of any services not performed under the second contract. The remedy could have been rescission and restitution of the agreement. The fact that Mr. McGraw testified he contracted with the defendant to settle the estate of his mother is in the record, thereby,

proving he had a contract with the defendant, which required a contract remedy, not a criminal action. VRP Vol. dated March 14, 2011, Page 23, line 8 to Page 24, line 22.

Does the evidence in the record show the state proved the element of “entitlement to practice law” or held out conduct defined as the practice of law under GR 24 constitutes strict liability for the unlawful practice of law under RCW 2.48.180? The evidence in the record is that the state held out the completion of documents as evidence of strict liability as the mens rea for the unlawful practice of law under RCW 2.48.180. The accusers merely verified the documents were prepared for them and testified to the date and the amount they paid for the documents. Under these facts, the preparation of documents would have to be defined by the legislature as the sole element that constitutes the offense with no intent requirement. The accusers would be implicated for paying for the conduct. Ironically, the only person implicated in the absence of the intent requirement is the defendant. The intent requirement to hold out the entitlement to practice law in an attorney-client contractual relationship requires a manifestation of a present intent to be bound within the status relationship of the parties. Here, the defendant is accused of having not active bar status so the intent of an attorney-client contract for services is required. The mere completion of a form is not the practice of law unless

the attorney-client contractual element is satisfied first. *In re Hizey v. Carpenter*, 119 Wn.2d 251, P.2d 646 (1992)

The state deceived the jury by holding out court rule GR 24 was a law in presently in force in the state of Washington. VRP Vol. dated March 9, 2011, Page 116, lines 6-9. This is where the case of the state brakes down hard by being shaken by the earthquake element of “entitlement” to practice law under RCW 2.48.180 (2) (a). A person who holds himself out as entitled to practice law makes a very prestigious claim that comes with lots of bells and whistles to distinguish his status in the community. The tremors of the entitlement element instantly sent shock waves through the prosecutors as they replied in a rage of insults during closing arguments that the defendant found a loophole in law, but actually the loophole was the law that the prosecutors ignored for nine months. VRP Vol. dated March 15, 2011, Page 102, line 16 to Page 103, line 11. When the state referred to the element of “entitlement” as a loophole, the state acknowledged overlooking the element of the offense, thereby proving in the record the state did not prove the entitlement element beyond a reasonable doubt, even if the meaning of “nonlawyer” was not an element before the jury.

A person who is entitled to practice law under RCW 2.48.180 has either an authorization to practice law within a limited scope or a full

authorization. The defendant refers to the limited scope person as a limited legal provider. The limited legal providers are not members of the bar, consequently, if “not active member” includes “never a member” limited legal providers are both simultaneously, which is an oxymoron. The full legal providers are the members of the bar. The full legal provider has an authorization from the Supreme Court to practice law and is an active member in good standing with the state bar. The defendant is alleged to have “not active membership” status, thus he is accused of having had a full authorization to practice law but at sometime thereafter he incurred a change of status and lost the authorization and is now a “not active member” thereby inherently requiring a career history as an attorney at law. Accordingly, the allegation against the defendant requires the state to prove the highest credentials as a legal provider were held by the defendant. So what did the state present as evidence of the “entitlement” to practice law?

Did the state present evidence the defendant held out an authorization to practice law from The Washington State Supreme Court? No. Did the state present evidence to show the defendant held out he is an active member in good standing with the state bar? No. Does the evidence show that the defendant has a bar card? No. Does the evidence show the defendant held out a not active member card? No. Does the

evidence show the defendant has a bar number? No. Does the evidence show the defendant has a degree in his office holding out a Supreme Court authorization to practice law? No. Do any of the accusers suggest any of the above? No. Does the evidence show the defendant has ever held out he is a legal provider? No. These are all express representations which cannot be implied by knowledge of the law. These are official status elements. The statute requires “holding out himself or herself as entitled” to practice law. Knowledge is not status. A person could memorize all the laws on earth, but that is not holding out an entitlement to practice law under RCW 2.48.180. The defendant argued the element of entitlement at the first motion to dismiss and extensively at trial during closing arguments. VRP Vol. October 27, 2010, Page 14, line 14 to Page 16, line 7; VRP Vol. dated March 15, 2011, Page 73, line 4 to Page 76, lines 6.

Does the evidence show the state did not know the elements of a legal provider? Yes, and it is disturbing considering their zealous intent to prosecute a crime they seemingly have redefined for their own pleasure. The chief witness of the state, Julie Shankland, admitted she did not know if there were entitlement elements to practice law or the elements of a legal provider or if attorneys were license holders under RCW 18.130.180. VRP Vol. dated March 10, 2011, Page 60, line 21 to Page 61, line 1. These are the facts in the record.

The attorneys for the state never discussed or mentioned the title of the person entitled to practice law is a legal provider under the charging statute, yet they contend the defendant has unlawfully practiced law, and the record shows the attorneys did not know or argue the elements that constitute the offense, so how could the elements have been proven beyond a reasonable doubt to the jury. The state motioned to suppress the meaning of the element of the crime defined in the statute and was granted the order on the first day of trial. If that frightens you, imagine the intentional infliction of emotional distress that went through the veins of the defendant when he witnessed the state and the court torch his Sixth Amendment right to argue the element of the crime charged in open court.

A constitutional error results if the burden of proof on a necessary element of the crime shifts to the criminal defendant. *In re Winship*, 397 U.S. 358, 90 S. Cr. 1068, 25 L. Ed. 2d 368 (1970) How can the accused receive a fair trial when he is not given a meaningful opportunity to be heard? It is a violation of the Sixth Amendment to order the accused to walk on eggshells when arguing the allegations against him are false. The only protection the accused has is his freedom to exercise his ability to defend himself. Even if the whole world stands against him, the power of the Bill of Rights must protect his right to defend himself in open court or his civil rights are a pretense. Here, all the proof regarding the meaning of

the statute as a whole was provided by the defendant. The state did not respond to most of the arguments of the defendant and motioned to have him silenced in the name of the law. His Sixth Amendment right was infringed and his Fifth Amendment right was lip service only. The state was completely relieved from proving the elements that constitute the offense beyond a reasonable doubt before the jury.

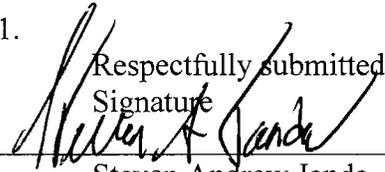
Therefore, considering all these elementary failures and deprivations, the evidence in the record shows the verdict of the jury to be unsupported by substantial evidence and all convictions should be overturned.

#### CONCLUSION

1) The verdict in its entirety should be reversed in the matter of The State of Washington v. Steven Andrew Janda together with all resulting convictions, restrictions, no contact orders, penalties, fees, costs, etc.

I prayerfully request the Supreme Court to grant my petition for Direct Review together with the relief sought.

November 30, 2011.

Respectfully submitted,  
Signature  
  
\_\_\_\_\_  
Steven Andrew Janda

Affidavit of Service to Parties is filed together with this Brief.