

70069-3

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The Court of Appeals State of Washington
Division 1

State of Washington
Respondent

vs.

JoJo - Ejongu - D
Appellant

NO# 70069-3-1

The Amending
Pro-se Brief In Support
of Statement of
Additional Grounds

2014 OCT -1 11:11:58
COURT OF APPEALS
STATE OF WASHINGTON

I, JoJo - Ejongu - D, respectfully file an
Amending Brief In Support of The Statement of
Additional Grounds. After reviewing the brief and the
amending brief by attorney Mitch Harrison, filed on
August 15, 2014, I've realized that there were imperative
issues left unargued. In light of how mr. Ejongu - D,
received an unfair trial, In good faith, I whole heartedly
believe these issues should be heard. The issues brought
forth are a display of prosecuter misconduct, ineffective
assistance of counsel and the abuse of discretion by
the trial judge. With high regard to this court, I
would ask that this brief in support of additional
grounds be considered.

1 PROSECUTORIAL MISCONDUCT (DUE PROCESS AND NARUE VIOLATION)

2 INEFFECTIVE ASSISTANCE OF COUNSEL

Grounds

1.) Prosecutorial Misconduct - DUE PROCESS VIOLATION (NARUE)
Prosecutor presented false, invalid and unproven ~~and~~ evidence to the jury. Leading to undue prejudice, depriving Mr. Ejongu of the right to a fair trial.

2.) Ineffective Assistance of Counsel -

Counsel's failure to object to the prosecutors false, invalid and unproven statement of evidence.

2

9-24-14

JOTO EJONGU (A.D.)

 EJONGU (A.D.)

Argument # 1, in
Support of (SAG)

Prosecutor Miscconduct & DUE PROCESS VIOLATION AND NARVE VIOLATION

When in focus, Exhibit B, the state trial ~~Page 33~~ memorandum. The prosecutor misled, not only the court, but the jury by putting forth inaccurate facts and false evidence. In the course of trial, the prosecutor deliberately made an allegation that Mr. Ejongca, not only stole money from victim Estella Nyandwi bank account, but that he also created damage to victim Valerie Maganyas vehicle.

The problem that Mr. Ejongca asks this court to consider, is the fact that Mr. Ejongca was never questioned by the police or any other law enforcement pertaining to this accusation. In fact, Mr. Ejongca never received a conviction, nor were there ever charges brought against Mr. Ejongca regarding these allegations made by the prosecutor. The rule 404(b) does not apply to this case. PROSECUTOR ACTION OF USING FALSE EVIDENCE & TESTIMONY VIOLATE THE NARVE RULE, AND MOST FALL UNDER 14TH AMENDMENT

The prosecutor had no authority to prove or present such a damaging accusation in order to demonstrate intent or motive in this case against Mr. Ejongca. THE PROSECUTOR KNOWINGLY USED FALSE AND IMPROVED TESTIMONY OR EVIDENCE TO OBTAIN A CONVICTION WHICH THE U.S SUPREME COURT RULES AND STATED IN NARVE V. ILLINOIS, 360 U.S. 264, 269 79

S.Ct 1173, 3 L.Ed.2d 1217 (1959) A CONVICTION OBTAINED THROUGH USE OF FALSE EVIDENCE BY STATE OFFICIALS VIOLATES DUE PROCESS OF U.S. CONST. 14

AMENDMENT

Mr. Ejongca does consider the difference it would have made, (if) he had been convicted of the accusations made by the prosecution. The prosecution would have then, had the liberty to present such an accusation in order to prove that there was intent. ^(MOTIVE & PREMEDITATION) The law clearly indicates that you are innocent until proven guilty. The allegations made by the prosecutor did not fall into accordance with the United States Constitution, (Amend - 5 # 14). The reckless statements made by the prosecutor was a clear misleading of the Court as well as the Jury. To be cut and dry, the prosecutor made the United States Constitution, Amendment 5 and 14 (Right to due process) look useless and ineffective.

PREMEDITATION

Without the allegations that Mr. Ejongca stole money from Estera Nyandwi's bank account and created damage to victim Valerie's Maganya's vehicle, the prosecutor could have never proven Motive or intent or PREMEDITATION in the charges of 1st degree assault and 1st degree attempted murder. 9A.36.011 RCW indicates that a person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (emphasis added)

The first degree attempted ^(AND PREMEDITATION) murder ^{also} carries the essential element of intent or motive. Therefore the element of intent became the key factor in proving the prosecutors case. The only way the state could have proven its case is through the misleading accusations given to the court and to the jury.

The state added pieces to the puzzle that don't legally fit. Such misconduct becomes a destruction to the defendants right to a fair trial. The weight of such an allegation could do nothing but create imbalance to the jury's judgement. In view, Mr. Ejongwa stands on the reality, that the state cannot justify the reckless conduct made by the prosecutor.

A due process claim 'UNDER NARVE' will succeed when (1) The testimony or evidence was actually false. (2) The prosecution knew or should have known that the testimony was actually false. (3) The false evidence or testimony was material. SEE *SIVAK V. HARDISON* 658 F.3d 898. ALSO SEE *HAYES V. AYERS* 632 F.3d 500.

The fact that Mr. Ejongwa was never charged with such an accusation as stealing money from Estelita Nyandwi's bank account and damaging Valerie

Maganya's vehicle, it becomes a clear indication that the prosecutor fabricated this evidence in order to prove intent for these charges. 7th DEGREE ATTP MURDERS Without this piece of evidence the state could not prove the required element of intent to convict Mr. Ejanga of first degree assault and first degree attempted murder. See Sivak v. Hardison, 658 P.3d 898, where Due process was violated in this case.

Mr. Ejanga has proved the three requirements to the due process claim. When put in light, it ~~(MAY BE)~~ becomes clear that such a misstep by the prosecutor ~~(MAY BE)~~ or creates destruction to the defendant's right to a fair trial. Under U.S. v. Johnson, 968 F.2d 768 (8th Cir) Dismissal is required.

~~THE~~ ~~THE~~ Conviction obtained THROUGH knowing use of FALSE TESTIMONY or EVIDENCE VIOLATES DUE PROCESS (Morales v. Johnson 659 F.3d

588 (U.S. CA 1475) Argument # 2, in Support of (SAB)

Ineffective Assistance of Counsel

In view of the false accusations made by the prosecutor against Mr. Ejanga. Ejanga was also prejudiced by his trial counsel for deficient performance and representation, when counsel failed to object

to a critical portion of the prosecutors strategy to present an alleged act of theft and vehicle damage. Considering the weight of this allegation, there is a high possibility that if the trial counsel objected to this unproven accusation, the trial judge would have granted or ruled against the prosecutor, in favor of the defendant.

In order to prevail on an ineffective assistance of counsel claim, the petitioner must demonstrate, both, that counsels performance was indeed deficient and that the defendant became prejudiced by the deficient performance. State v. Thomas, 109 Wn. 2d 222, 225, 226, 743 P.2d 816 (1987). Also see Strickland v. Washington 466 U.S. 668, 687, 80 L.Ed. 2d 674, 104 S.Ct 2025 (1984).

In this case, Mr. Ejonga received deficient representation due to the trial attorneys failure to object to the most critical accusation presented by the prosecution. By the prosecutors willingness to use a fabricated statement that Mr. Ejonga committed theft, it damages Mr. Ejongas credibility, misleads the jury, misinforms the court, all for the purpose of its theory of intent. MOTIVE & PREMEDITATION

Do to the fact that the defence counsel knew, and yet decided not to object to such a polluted accusation to the jury. It cripples Mr. Ejongas means of defending himself effectively. Thus depriving Mr. Ejongas right to a fair trial. The prosecutors actions were unexceptionable by presenting an accusation to the jury that Mr. Ejonga stole money from victim Estella Nyandwi's bank account and damaging Valerie Maganya's vehicle, when Ejonga was never charged with such an accusation, nor was it presented to a jury to be proven beyond a reasonable doubt.

Therefore Mr. Ejongas trial counsel became equally in error by failing to object to the prosecutors presentation of FALSE AND UNPROVED EVIDENCE (ALLIGATION) PRESENTED BY THE PROSECUTOR

If the trial counsel would have objected to the prosecutors claims, there is the high possibility that the judge would have ruled against the state in favor of the defendant. This would have left the prosecutor empty handed of intent, MOTIVE,

?REMEDIAATION This, the state would not have lawful proof that Mr. Ejongas had the intent to harm, his then, friends. (The victims).

The trial counsel's performance fell below an objective standard of reasonableness. According to the U.S. Supreme Court, ineffective assistance of counsel requires the defendant to show based on circumstances that defense counsel's performance fell below an objective standard of reasonableness. (Strickland, 466 US 689).

State v. McFarland, 127 Wn. 2d 322, 334-35 899 P.2d 1251 (1995). Trial counsel's decision to not object was unreasonable and her actions were not a legitimate decision of trial strategy or tactic.

State v. Crenfuegos, 144 Wn. 2d 222, 227, 25 P.3d 1011 (2001). State v. Hendrickson, 129 Wn. 2d 61, 77-78, 917 P.2d 563 (1996).

Mr. Ejongca was prejudiced when counsel failed to object and argue the invalidity of the prosecutors' alleged claim of theft of Estelita Nyandwi's bank account and destruction to Valerie Maganya's vehicle. This subverts the fundamental obligation embodied in the due process clause of the 5th and 14th amendments to provide every criminal defendant with a fair and impartial trial.

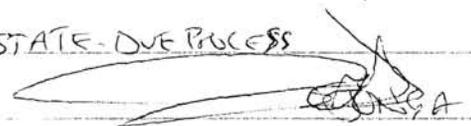
CONCLUSION 1

When THE GOVERNMENT OBTAIN A CRIMINAL CONVICTION BASED ON FALSE

EVIDENCE OR TESTIMONY VIOLATE DUE PROCESS UNDER THE CONSTITUTION OF UNITED STATES.

OF AMERICA CONSTITUTION AMENDMENT 5 AND 14 DUE PROCESS CLAUSE.
Citing Phillip v. Ornoski, 673 F.3d 1168 Amended
on denial of rehearing certiorari denied 133 S.Ct.
2020, 185 L.ED 2d 888 certiorari denied. Chappell v.
Phillips 133 S.Ct 2020, 183 L.Ed. 2d 905 on remand
2013 WL 2896809. A PROSECUTOR KNOWING USE OF FALSE
TESTIMONY OR EVIDENCE TO GET A CONVICTION VIOLATES DUE PROCESS
U.S.C.A 14TH AND 5TH AMEND. Citing JONES V. RYAN. 691 F.3d
1093 133 S.Ct. 2831 ALSO SEE MORALES V. JOHNSON 699 F.3d
588

By the prosecutors willingness to create an
fallacious presentation to the Jury, Mr. Ejunga became
prejudiced and flat-out denied his right to a fair trial.
A false and unproven allegation should never be used
by an officer of the court room to secure a conviction.
Mr. Ejunga, as well, became prejudiced by the
trial counsels misrepresentation and ineffectiveness,
when failing to object to the prosecutors misconduct.
In light of such violations, this court should either
dismiss the charges based on prosecutorial misconduct.
Or at least grant Mr. Ejunga a new and fair trial.
This form of misconduct is not harmless error and
such prejudice cannot be undone. THIS IS NOT A MATTER
OF TECHNICALITY IT IS A MATTER OF LAW Respectfully,
THE CONSTITUTION OF UNITED STATE DUE PROCESS
OF LAW AND A RIGHT TO A
FAIR TRIAL TO THE ACCUSED.


EJUNGA-JJ

FINAL-CONCLUSION AND PRAYER TO THE COURT

PUTTING FORT THE MISCONDUCT FROM THE PROSECUTOR OF THE STATE BY PRESENTING FALSE EVIDENCE AND ALLEGATIONS TO THE COURT AND TO THE JURY, THIS ALLEGATIONS WAS MISLEADING TO THE COURT AND TO THE JURY IN MR EJONGA TRIAL. PUTTING FORT IN LIGHT THE DESTRUCTION OF EVIDENCE BY THE STATE OFFICIAL OF THE GOVERNMENT AS ATTORNEY MITCH HARRISON STATED AND ARGUED IN THE (AMENDING BRIEF) TOGETHER WITH THE PROSECUTOR MISCONDUCT IN THIS AMENDING STATEMENT OF ADDITIONAL GROUND SHOWS NOTHING BUT OUTRAGEOUS MISCONDUCT VIOLATING MR EJONGA CONSTITUTIONAL RIGHT GUARANTE RIGHT TO A FAIR TRIAL AND RIGHT UNDER THE U.S.C.A. AMENDMENT - 5 AND 14 THE DUE PROCESS RIGHT. AND MR EJONGA WAS PREJUDICED BY GOVERNMENT ACTION OR MISCONDUCT THIS PREJUDICE CANT BE UNDO THIS MISCONDUCTS WAS SO DESTRUCTIVE TO MR EJONGA TRIAL THIS IS NOT JUST ONE MISTAKE OR MISCONDUCT, AS REQUIRED IN U.S. V. JOHNSON, 968 F.2d 768 (8th Cir) JUST ONE SINGLE "MISTAKE" ON THE PART OF THE GOVERNMENT OR PROSECUTION MAY BE SO DESTRUCTIVE TO DEFENDANT RIGHT TO A FAIR TRIAL UNDER THE U.S.C.A CONST. 6TH AMENDMENT AND RIGHT TO DUE-PROCESS RIGHT UNDER THE CONST. 5TH AND 14TH U.S.C.A. DISMISSAL IS REQUIRED.

PROSECUTORIAL MISCONDUCT DOESN'T HAVE TO BE OF EVIL OR DISHONEST NATURE SIMPLE MISMANAGEMENT IS ENOUGH SEE STATE V. BICKS, 149 WASH APP. 373, 203 P.3d 397 (2009). MR EJONGA PRAY OR RESPECTFULLY ASK THIS HONORABLE COURT TO DISMISS ALL CHARGE OR AT LEAST GRANT A NEW AND UNFAIR TRIAL. TO MR EJONGA.

CERTIFICATE OF SERVICE

I JOJO-EJONGA DEGRACIAS DECLARE UNDER PENALTY OF PERJURY UNDER THE LAW OF STATE OF WASHINGTON THE FOLLOWING IS TRUE AND CORRECT.

ON: 9-24-2014 I JOJO-EJONGA THE APPELLANT SENT: THE PROSE STATEMENT OF ADDITIONAL GROUNDS AMENDED OR SUPPLEMENTAL BRIEF. TO THIS FOLLOWING PERSONS

1 ATTORNEY MITCH HARRISON AT HARRISON LAW
101 WARREN AVENUE NORTH
SEATTLE, WASHINGTON 98109
AS LEGAL MAIL

2 KING COUNTY PROSECUTOR'S ATTORNEY'S OFFICE
APPELLATE UNIT AT ROOM W554, 516 THIRD AVENUE
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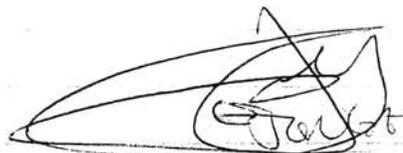
3 COURT OF APPEALS DIVISION I
ONE UNION SQUARE
600 UNIVERSITY STREET
SEATTLE WASHINGTON: 98101-1176
AS LEGAL MAIL

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THE FOREGOING IS TRUE AND CORRECT. DATED 9-24-2014 EJONGA JOJO-D

DOC# 366372 FOX-EAST-233. WASHINGTON STATE PENITENTIARY. 1313 N 13TH AVENUE WALLA WALLA WASHINGTON. 99362. JOJO-EJONGA-D.

LEGAL AUTHORITIES. (CASE LAWS)

1. SIVAK V. HARDISON, 698 F.3d 898.
2. HAYES V. AYERS, 632 F.3d 500
3. MORALES V. JOHNSON, 659 F.3d 588
4. STATE V. THOMAS, 109 Wn.2d 222, 225, 226, 743 P.2d 816 (1987)
5. STRICKLAND V. WASHINGTON, 466 U.S. 668, 687 80 L.Ed. 2d 674, 104 S.Ct. 2025 (1984) (STRICKLAND, 466 U.S. 689)
6. STATE V. MCFARLAND, 127 Wn.2d 322 334-35 899 P.2d 1251 (1995)
7. STATE V. Cienfuegos, 144 Wn.2d 222, 25 P.3d 1011 (2001)
8. STATE V. HENDRICKSON, 129 Wn.2d 61, 917 P.2d 563 (1996)
9. PHILLIP V. ORNOSKI, 673 F.3d 1168 AMENDED ON denial of rehearing certiorari denied 133 S.Ct. 2020, 185 L.Ed.2d 888 certiorari denied
10. CHAPPELL V. PHILLIPS, 133 S.Ct. 2020, 183 L.Ed.2d 905 on remand 2013 WL 2896809. 133 S.Ct. 2831
11. JONES V. RYAN, 691 F.3d 1093
12. MORALES V. JOHNSON, 659 F.3d 588
13. U.S. V. JOHNSON, 968 F.2d 768 (8th Cir)
14. STATE V. BROOKS, 149 WASH APP, 373, 203 P.3d 397 (2009)
15. U.S.C.A-5
16. U.S.C.A AMEND-C
17. U.S.C.A AMEND-14
18. NAPUE V. ILLINOIS 360 U.S. 264, 269, 79, S.Ct 1173, 3 L.Ed.2d 127 (1959)
- 19.



9-24-14
JESSE E. JONES, A.B.

DECLARATION

I, EJONGA JORD, declare that, on 9-24-2014, I

deposited the foregoing document(s),

SUPPLEMENTAL OR AMENDING PETISE BRIEF IN SUPPORT OF
STATEMENT OF ADDITIONAL GROUNDS

or a copy thereof, in the internal mail system of Washington State Penitentiary and

- ① made arrangements for postage, addressed to: MITCH-HARRISON (Attorney) HARRISON LAW
101 WARREN AVENUE NORTH SEATTLE WA. 98109.
 - ② KING COUNTY PROSECUTING ATTORNEY OFFICE, APPELLATE UNIT ATT ROOM W554
516 THIRD AVE SEATTLE WA. 98104-2362.
 - ③ COURT OF APPEALS DIVISION I, ONE UNION SQUARE 600 UNIVERSITY STREET
SEATTLE WA. 98101-1196
- ALL AS LEGAL MAIL

I declare under penalty of perjury under the laws of the State of Washington
that the foregoing is true and correct.

Dated at Walla Walla, Washington on 9-24-2014,

Signature and number:  366372 - FAX - EAST - 233

EXHIBIT - B

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FILED
KING COUNTY, WASHINGTON
DEC 04 2012
SUPERIOR COURT CLERK
BY NANCY L. SLYE
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No. 11-1-05704-2 KNT
vs.)	
)	STATE'S TRIAL MEMORANDUM
)	
Jojo Ejonga,)	
)	
)	Defendant,
)	
)	

I. CHARGE

The defendant is charged by amended information with three counts of Attempted Murder in the First Degree with deadly weapon enhancements and three counts of Assault in the First Degree with deadly weapon enhancements. Counts three and six also allege a pregnant victim aggravator.

II. TIME ESTIMATES

The jury trial should last approximately 8 to 10 days.

III. POTENTIAL WITNESSES

- Estella Nyandwi (interpreter)
- Valerie Maganya
- Tuwalole Mwamba
- Paulin Maganya
- Yves Maganya
- Anthony Salvatierra

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Prosecuting Attorney
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- Felipe Urbano Nunez
- Richard Urrutia
- Christine Uhlman
- Tabitha Boshart
- Officer S. O'Flaherty
- Officer K. Montgomery
- Officer T. Trykar
- Officer D. Arico
- Officer J. Coppedge
- Officer Chevallier
- Detective Ross Stuth
- Detective Cathy Savage
- Detective Mike Thomas
- Dr. Brandon Backlund
- Dr. Sarah Prager
- Dr. Lisa Cooper
- Dr. Sweeney
- Sergeant Hicks
- Detective Laura Hoffenbacker
- Detective Rodger Kellams
- Sherrie Wraspir (WSPCL)
- Mark Roberts (WSPCL)
- Andrew Szymanski (WSPCL)
- Amy Jagman (WSPCL)
- Andrew Hays
- Flora Kponton
- Shannon Haley

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The State reserves the right not to call any of the above witnesses. If the defense intends to call any of these witnesses, they should make appropriate arrangements for their presence and testimony.

IV. FACTS

(For a more detailed factual background, please refer to the attached Certification for Determination of Probable Cause).

Valerie Maganya moved to the United State from the Congo with her family in approximately 2003. Valerie met the defendant through a mutual friend at school. The defendant also became

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1 friends with Valerie's brother. Because they had the common background of coming from the Congo,
2 Valerie's family treated the defendant as family.

3 On a number of occasions, the defendant stayed over night at Valerie's residence. This
4 occurred after staying out late at clubs and also when the defendant claimed his mother was out of
5 town and he didn't want to stay alone at his residence.

6 While the defendant was staying at Valerie's residence, her mother, Estella, noticed that she
7 only had \$16 in her account. Approximately \$3,000 was missing. She contacted the bank to learn that
8 money had been withdrawn and checks had been written in Valerie's name. Estella asked Valerie
9 about it and Valerie stated that she did not withdraw the money. Valerie looked at the checks and
10 suspected that the defendant might have taken the money. Valerie confronted the defendant, but he
11 initially denied the theft. When she told him that he was on video, he confessed to the thefts and said
12 he was sorry. He agreed to pay them back. After learning of the theft, Jojo was asked to the their
13 residence.

14 A short time later, Valerie and her family were attending a birthday party. The defendant was
15 also at the party. There was a discussion about moving a car in the parking lot when people were
16 getting ready to leave. The defendant jumped into the car without permission and accidentally backed
17 into Valerie's car causing damage. He agreed to pay her for the damage. This was added to the
18 \$3,000 he already owed her family from the thefts.

19 The defendant was an avid Facebook user. After he posted a message, Valerie posted that she
20 hoped people would not let the defendant into their home. This posting upset the defendant and he
21 asked her to take it down in exchange for him paying the money back. Valerie apparently removed the
22 posting.

1 On May 8, 2011, Valerie, Tuwalole, and Estella were celebrating Mother's Day by going out to
2 dinner together. The defendant called Valerie and told her that he had the money that he owed her.
3 The defendant asked her to come over. Valerie's mother, Estella, did not want Valerie to go alone, so
4 all three women went to meet the defendant. The defendant got into the back seat of the car with
5 Tuwalole, who was eight months pregnant with Valerie's brother's baby. Valerie was driving and
6 Estella was in the front passenger seat. The defendant provided directions as they drove to another
7 apartment complex. Once there, the defendant got out of the car and said he was going to get the
8 money. He called Tuwalole's phone and said he had accidently dialed the wrong number. The
9 defendant reentered the car and began brutally stabbing Tuwalole with a large kitchen knife. He then
10 turned his attention to Valerie and Estella, stabbing them in the head, face, neck, and chest. Tuwalole
11 was able to escape from the car. The defendant ran after her, stabbing her several more times until a
12 bystander yelled at him.

13 The defendant fled from the scene. As he was fleeing, he removed some of his bloody clothes
14 and threw them over a fence. A short time later, Officer Montgomery approached the defendant and
15 asked him his name. The defendant gave the false name of "Eric," but Officer Montgomery recognized
16 the defendant from a picture that had been distributed to patrol. The defendant was arrested and his
17 bloody shoes were taken into evidence. The officers also recovered the kitchen knife near where the
18 defendant was apprehended. A number of the items were tested by the Washington State Patrol
19 Crime Laboratory. Both the victim's and the defendant's blood was identified (the defendant had cut
20 his own hand during the attack when the knife slipped in his hand).

21 After the defendant was in custody, he started claiming that the incident was not his fault and
22 that Al-Qaida was somehow involved. The King County Prosecutor and the Presiding Judge received

1 threat letters. The defendant also received a threat letter telling him to keep his mouth shut about the
2 terrorist organization. While he was in custody, the defendant's mother reported a burglary. Papers
3 were messed up, but nothing was stolen. Another threat letter was left. Unfortunately for the
4 defendant, his fingerprint was recovered from the threat letter left at his mother's residence. She
5 apparently was involved in his efforts to set up a defense. The jail also recovered another threat letter
6 that the defendant was attempting to mail to himself. The letters were sent in for handwriting analysis
7 and the lab determined that it was highly probable that the defendant wrote the letters himself.

8 In addition to fleeing the scene, disposing of his clothes, giving a false name, and creating a
9 fictitious defense, he also personally filed several motions trying to get his case dismissed. The
10 defendant has been evaluated by both the defense's and the State's experts.

11 V. PRETRIAL RULINGS

12 This case was preassigned to Judge Oishi after Judge Roberts was notified that the defendant
13 sent the threat letter she received. There have been no substantive pretrial rulings in this matter.

14 VI. EVIDENTIARY ISSUES

- 15 A. Statements of Defendant
- 16 B. Criminal History of Defendant
- 17 C. Defense Witnesses
- 18 D. Claimed Defenses
- 19 E. 404(4) Evidence

20 A. Statement of Defendant

21 The State will not be introducing evidence of statements made by the defendant to law
22 enforcement personnel other than the defendant's giving of a false name at the time of his arrest. The

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1 State will be calling the arresting officer during the pretrial hearing. The defendant's statement was
2 made prior to his arrest, so Miranda does not apply. Moreover, asking someone their name is not a
3 question "intended to elicit an incriminating response.

4 **B. Criminal History of Defendant**

5 The defendant has no known convictions in the United States.

6 **C. Defense Witnesses**

7 The Defense has only endorsed the defendant's mother, the defense investigator, and their
8 expert witness. The State does not expect the defense to call any additional witnesses. If the
9 defense elects to call its investigator, the State requests all the investigator's notes and statements
10 that were reviewed or prepared in the course of their investigation. As of today's date, the State has
11 not had the opportunity to interview the defense's expert witness. The interview of the defense's
12 expert is scheduled for Friday, December 7, 2012.

13 **D. Claimed Defenses**

14 The defense is apparently claiming general denial. If that fails, they are claiming not guilty
15 by reason of insanity. If that fails, they are claiming diminished capacity. The State believes that
16 the defense is going to introduce its mental defense after the State has rested. It will then be
17 addressed in the defense's case and during the State's rebuttal. The defenses of diminished capacity
18 and not guilty by reason of insanity are inconsistent with a general denial defense. The defense
19 should be required to elect their defense. In re Woods, 154 Wn.2d 400, 421 (2005).

1 **E. 404(b) Evidence**

2 The defense may attempt to exclude evidence in this case. It is difficult to anticipate what
3 they may attempt to exclude. Additional time may be necessary to address their motions after
4 receiving their brief.

5 One such item that the defense may attempt to exclude is the defendant's theft from the
6 victims and the damage to the victim's vehicle. This is admissible under several theories.

7 Rule 404(b) provides:

8 Evidence of other crimes, wrongs, or acts is not admissible to prove the character
9 of a person in order to show action in conformity therewith. It may, however, be
10 admissible for other purposes, such as proof of motive, opportunity, intent,
11 preparation, plan, knowledge, identity, or absence of mistake or accident.

12 In determining whether ER 404(b) evidence is admissible, the court must first identify the purpose
13 for which the evidence is offered. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing
14 State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Second, the court must determine
15 whether the evidence is of consequence to the outcome of the action. Smith, 106 Wn.2d at 776
16 (citing Saltarelli, *supra*). Finally, the court must, on the record, balance the probative value of the
17 evidence against its potential prejudicial effect. Smith, 106 Wn.2d at 776 (citing Saltarelli, *supra*);
18 State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). The rule's list of purposes is neither
19 exclusive nor exhaustive. State v. Kidd, 36 Wn. App. 503, 505, 674 P.2d 1983). The following
20 illustrate the various cases in which courts have admitted ER 404(b) evidence.

21 a. Admissibility as Inseparable Part of Crime Charged (res gestae)

22 Other misconduct is admissible if it is so connected in time, place, circumstances, or means
employed that proof of such other misconduct is necessary for a complete description of the crime
charged, or constitutes proof of the history of the crime charged. State v. Tharp, 96 Wn.2d 591

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1 (1981). In the present case, the crimes are so connected in time, place, and circumstances that it
2 would be impossible to separate them. The defendant stole money from the two victims and
3 damaged their car. The monetary debt and the interactions of the parties surrounding that debt is an
4 integral part of this case. Without that information, the jury would not know why the parties were
5 meeting when the defendant attempted to take their lives. Moreover, the jury would also not
6 understand the conflict between the parties and why the defendant was kicked out of their residence.

7 b. Admissible as a Common Plan or Scheme

8 The evidence is also admissible to show that the defendant had a common plan or scheme.
9 The plan was to convince Valerie to meeting him by claiming that he was going to repay her the
10 money he owed her.

11 c. Admissible to Show Motive

12 The evidence is also admissible to show the defendant's motive. The defendant stole from
13 the victim and he was caught. The theft was reported to the police. He also damaged the victim's
14 car. As a result, the defendant owed the victim as significant amount of money. The conflict
15 resulted in the defendant being asked to leave the victim's home. There were also Facebook
16 postings that could have embarrassed the defendant and caused him to lose face in front of his
17 family and friends. The victim removed the posting after the defendant promised to pay her back.
18 The defendant's inability to pay the victim back and the embarrassment the victim caused by
19 posting comments on Facebook, are motives for the assault.

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d. Admissible to Show Intent

The defendant's conduct is also admissible to establish that he intended to assault the victim. Intent is at issue because the State must establish an intentional assault. Attempted Murder in the First Degree is also a specific intent crime.

e. Admissible to Rebut a Material Assertion

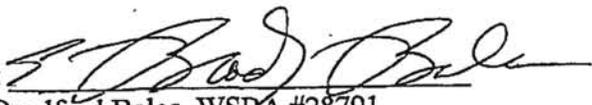
Finally, prior misconduct may be admissible for the purpose of rebutting any material assertion by the defendant, regardless of whether the evidence fits within one of the traditional categories such as motive, intent, or identity. Here, the defendant is asserting the claim of not guilty by reason of insanity. This is clearly a material assertion and the State is allowed to rebut that assertion with the defendant's conduct leading up to the stabbing. Evidence that the defendant stole from the victims and then led them to a location under the ploy of paying them back, rebuts his assertion that he had some kind of psychotic flash back while in the car. He had armed himself with a knife, led them there, and had no ability to pay them.

VII. CONCLUSION

This memorandum has been prepared solely to acquaint the trial court with the issues as they will be presented at trial.

DATED this 4th day of December, 2012.

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