No. 100455-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JERRY GEORGE WOOD, JR,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT RULES

OTHER AUTHORITIES

I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied. If review is granted, the State asks the court to review the issue set out in part II.

II. ISSUE RAISED BY RESPONDENT

For crimes committed before 2021, can a constitutionally-valid out-of-state conviction for possession of a controlled substance be counted towards the offender score?

III. STATEMENT OF THE CASE

The facts are set out in the Court of Appeals opinion. State v. Wood, ___ Wn. App. 2d ___, 498 P.3d 968, 974-78 ¶¶ 2-28 (2021) (Slip op. at 2-10). A detailed summary of the evidence at trial is set out in the Brief of Respondent at 3-12.

Although the defendant was tried for four crimes, the jury found him guilty of only two: soliciting first degree murder and soliciting first degree kidnapping. 1 CP (J&S)

69-70.[1] The most significant evidence on these charges consisted of messages that the defendant wrote to A.B., a fellow jail inmate. Those messages were written into two books. The pages containing the messages were introduced into evidence. Ex. 11, 12. A handwriting expert testified that they were written by the defendant.[2] 10/29/19 RP 2324.

Transcripts of Exhibits 11 and 12 are attached to this brief. They asked A.B. to kidnap or kill the person that the defendant had allegedly raped. They described her,

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[1] The Court of Appeals opinion resolved two separate appeals: one from the judgment and sentence (no. 80692-1-I), and a second from the denial of the motion to vacate judgment (no 81660-8-I). Separate clerk's papers were filed for each appeal. They will be referred to as "CP (J&S)" and "CP (vacate)."

[2] The petition for review states that these messages were "consistent with Wood, Jr.'s handwriting." PRV at 3. The defendant's brief contained a similar statement. Brief of Appellant at 15. In response, the State pointed out that the expert testified to an "identification," which is the strongest conclusion that he can draw. Brief of Respondent at 8 n. 2.

gave her address, and explained how to carry out the abduction. The defendant promised to post bail for A.B. and give him money, a car, and other financial benefits. Ex. 11, 12. The same day that A.B. received a book from the defendant, the defendant's mother paid money towards A.B.'s bail. 10/25/19 RP 1944-45.

The messages in the books repeatedly emphasized the importance of carrying out the crimes. For example, they said: "This must be done soon as you get out of here im counting on you." Ex. 12 at 190. "This must be done and the person must disappear before the 5th homie." Ex. 11 at 235. "Homie I cant stress enough this must be done by the 5th." Id. at 157.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. THE COURT OF APPEALS PROPERLY DETERMINED THAT AFTER THE STATE DECIDED NOT TO INTRODUCE CERTAIN EVIDENCE, THE DEFENDANT HAD NO NEED TO CALL HIS ATTORNEY AS A WITNESS TO REBUT THAT EVIDENCE.

The petition for review seeks to raise four issues. Each of these involves the application of settled law to the facts of this case. None of them warrant review.

The defendant first claims that his attorney had a disqualifying conflict of interest. The Court of Appeals stated the rule as follows: "To establish a constitutional violation based on a conflict of interest, a defendant must demonstrate both that his attorney had a conflict of interest and that the conflict adversely affected counsel's performance." Wood, 498 P.3d at 978 ¶ 30 (Slip op. at. 11), citing State v. Dhaliwal, 150 Wn.2d 559, 570, 79 P.3d 432 (2003). The petition for review cites an identical rule. PRV at 29.

The defendant claims that defense counsel created a conflict of interest when he provided the prosecutor a non-privileged letter written by a third party. He argues that this prevented counsel from presenting evidence as to the origins of the letter. PRV at 31. As the Court of Appeals pointed out, such evidence became essentially irrelevant when the prosecutor agreed not to introduce the letter into evidence. Wood, 498 P.3d at 980 ¶ 41 (Slip op. at 16). This supposed "conflict" thus worked out to the defendant's advantage. Instead of having to provide explanations for the damaging letter, counsel got it excluded entirely. The Court of Appeals correctly concluded that there was no disqualifying conflict of interest. This incident does not warrant review.

B. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE DEFENDANT WAS NOT ENTITLED TO HAVE THE CONVICTION VACATED BASED ON NEWLY DISCOVERED EVIDENCE, WHEN THE TRIAL COURT DETERMINED THAT THE EVIDENCE WAS NOT CREDIBLE.

The defendant next claims that he was entitled to have the judgment vacated based on newly discovered evidence. The governing standard is the same as the standard for obtaining a new trial on this basis. See State v. Statler, 160 Wn. App. 622, 631-32 ¶¶ 17-18, 248 P.3d 165 (2011).

> A new trial will not be granted on that ground unless the moving party demonstrates that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; *and* (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new trial...

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981) (court's emphasis, citation omitted). A trial court's decision to deny a new trial is reviewed for abuse of

discretion. State v. Perez-Valdez, 172 Wn.2d 808, 819 ¶ 20, 265 P.3d 853 (2011).

Here, the "newly discovered evidence" consisted of the testimony of a jail inmate. This inmate had purportedly overheard a conversation between the defendant and A.B. In it, the defendant allegedly said that he "didn't want [A.B.] to do whatever he'd agreed to do as part of their deal." 1 CP (vacate) 20. The trial court found this testimony not to be credible. 1 CP (vacate) 7, finding no. 12. In deciding whether evidence will probably change the result of the trial, "the trial court must evaluate the credibility, significance and cogency of the new evidence." State v. Hutcheson, 62 Wn. App. 282, 297, 813 P.2d 1283 (1991). Appellate courts do not decide witness credibility. In re A.W., 182 Wn.2d 689, 711 ¶ 53, 344 P.3d 1186 (2015). The trial court's credibility determination is therefore not subject to review.

Moreover, there is ample reason to doubt the witness's credibility. The witness claimed to remember that the defendant had told A.B. not to carry out a "deal." The witness did not, however, know what this "deal" was. Why would he remember this incident almost two years later?

It is also questionable whether the witness was in a position to hear what he claimed. At the time, A.B. and the defendant were on the same tier, four cells apart. The witness was on a higher tier at the other end of the cell block. 2 CP (vacate) 220, 223.[3] Because the testimony was not credible, the trial court properly determined that it would not probably change the result of the trial.

Additionally, the trial court correctly found that the defendant had failed to exercise due diligence to locate this witness. 1 CP (vacate) 7, finding no. 18. When an

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[3] The defendant is thus incorrect in claiming that the witness was "housed directly above [A.B.]." PRV at 37.

absent witness is known to the defense, "due diligence" requires them to seek a continuance in order to obtain that witness's presence. State v. Jackman, 113 Wn.2d 772, 781-82, 783 P.2d 580 (1989). It is undisputed that the defense never sought a continuance to locate this witness. For this reason as well, the trial court correctly denied the defendant's motion to vacate.

C. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL, WHEN COUNSEL'S FAILURE TO LOCATE A WITNESS STEMMED FROM TACTICAL DECISIONS, AND THE WITNESS'S TESTIMONY HAD LITTLE PROBATIVE VALUE.

The defendant next claims that he received ineffective assistance of counsel. This claim is again governed by a well-established legal standard. To establish ineffective assistance, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. State v. Grier, 171 Wn.2d 17, 32-33 ¶ 40, 246 P.3d 1260 (2011).

When the claim is brought on appeal, the court may consider only facts within the record. Id. at 29 ¶ 32.

The defendant claims that counsel's lack of diligence in locating the witness establishes deficient performance. The record shows, however, that counsel made a tactical decision to focus his investigative efforts elsewhere. 6/18/20 RP 20. Nothing in the record demonstrates that this decision was unreasonable.

Additionally, whether to seek a continuance is a tactical decision. See Jackman, 113 Wn.2d at 782 n. 3. Depending on the circumstances, delaying the trial can greatly help or greatly harm a defendant. Again, there is no showing that counsel's decision was unreasonable.

Even if counsel's actions are considered deficient, there is no showing of prejudice. The new witness would have provided little if any evidence to refute the solicitation charges. A person commits that crime "when, with intent to promote or facilitate the commission of a

crime, he or she offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime." RCW 9A.28.030(1). Subsequent abandonment is not a defense to this charge. See State v. Workman, 90 Wn.2d 443, 450, 584 P.2d 382 (1978) (abandonment not defense to charge of attempt); United States v. Preacher, 631 F.3d 1201, 1204 (11th Cir. 2011) (abandonment not defense to charge of solicitation under 18 U.S.C. § 1958).

The new witness would not dispute that the defendant offered A.B. money to carry out the crimes of murder and kidnapping. To the contrary, he would corroborate that the two of them had made a "deal." 1 CP (vacate) 20. Even if the jury believed that the defendant changed his mind later, that would not constitute a defense. Given the defendant's repeated and emphatic statements about the importance of carrying out the plan, there is no likelihood that a jury would believe that he

never intended for the crimes to be carried out. Ex. 11, 12. Consequently, even if the absence of this witness stemmed from deficient performance, there is no showing of prejudice. This issue does not warrant review.

D. THE COURT OF APPEALS PROPERLY DETERMINED THAT AFTER THE DEFENDANT MADE A DELIBERATE TACTICAL DECISION NOT TO TESTIFY ABOUT SOME OF THE CHARGES, HE HAD NO RIGHT TO RE-OPEN HIS CASE TO PRESENT THAT TESTIMONY.

Finally, the defendant claims that he was denied his constitutional right to testify. The record refutes this claim. The defendant *exercised* that right. In doing so, he made a deliberate decision *not* to testify on certain subjects. See 10/31/19 RP 144. After a defendant rests, he has no constitutional right to re-open his case. United States v. Orozco, 764 F.3d 997, 1001 (9th Cir. 2014). Rather, allowing re-opening lies within the court's discretion. State v. Partin, 88 Wn.2d 899, 902, 567 P.2d 1136 (1977); State v. Barnett, 104 Wn. App. 191, 199, 16 P.3d 74

(2001). The application of that discretion under the particular facts of this case does not warrant review.

The defendant claims that "the Court of Appeals appears to apply this standard differently depending on which party is seeking to reopen its case." PRV at 43. He points to cases upholding trial courts' exercises of discretion in allowing the State to re-open. See State v. Brinkley, 66 Wn. App. 844, 848-49, 837 P.2d 20 (1992). These cases do not establish any inconsistency.

As a practical matter, appellate review of decisions to allow or deny re-opening will be limited. The only decisions that will be reviewed are those *allowing* a State's request to re-open or *denying* a defendant's request. If a trial court makes the opposite decision (*denying* a State's request or *allowing* a defendant's request), the issue will almost never reach an appellate court: it will be harmless error if the defendant is convicted, or unreviewable if he is acquitted. If an

appellate court decides that *allowing* re-opening was not an abuse of discretion, that does not mean that *denying* re-opening *would* have been an abuse.

Furthermore, few if any of the cited cases involve the situation in the present case: where a party makes a deliberate tactical decision to present particular evidence, and then changes its mind. There is no authority that under such circumstances, denying permission to re-open is an abuse of discretion. Like the other issues raised by the defendant, this issue does not warrant review.

V. ARGUMENT WHY RESPONDENT'S ISSUE SHOULD BE CONSIDERED

THERE IS A CONTINUING QUESTION OF SUBSTANTIAL PUBLIC INTEREST CONCERNING HOW TO COUNT CONSTITUTIONALLY-VALID OUT-OF-STATE DRUG CONVICTIONS.

At sentencing, the trial court counted New York convictions towards the defendant's offender score. The Court of Appeals held that there was inadequate proof of the comparability of these convictions. It therefore

remanded the case for re-sentencing. Wood, 498 P.3d at 989 ¶ 99 (Slip op. at 37). The State does not challenge that holding.

In so holding, however, the Court of Appeals considered the effect of a New York conviction for drug possession. It held that even if that crime was comparable to the former Washington crime of possession of a controlled substance, it would not count towards the offender score. Id. ¶ 102 (Slip op.at 38). This portion of the Court of Appeals decision presents a significant recurring issue.

The relevant scoring rule is set out in RCW 9.94A.525(3): "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." On remand, the State would seek to prove that the New York conviction is comparable to the crime of possession of a controlled substance under former RCW

69.50.4013(1). If that fact is established, the conviction should count towards the offender score.

This court held the Washington statute unconstitutional in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). The reason was that the statute lacks a knowledge element, so it can penalize innocent conduct. The court pointed out, however, that this problem does not apply to the statutes of any other state. Id. at 186 ¶ 30. In particular, the New York crime of drug possession includes that element. N.Y. Penal Law § 220.06. Since the New York conviction is constitutionally valid, the reasoning of Blake does not apply.

The Court of Appeals nonetheless relied on its recent decision in State v. Markovich, ___ Wn. App. 2d ___, 492 P.3d 206 (2021), review denied, 2022 WL 43647

(2022).[4] The court reasoned that since a Washington conviction for drug possession would not be counted, an out-of-state conviction should not be counted either. Id. at 216 ¶ 35. The problem with this reasoning is that it is based on nothing in the statute. RCW 9.94A.525(3) says that courts should use "comparable offense definitions ... provided by Washington law." There is nothing that limits this to *constitutionally valid* offense definitions.

If the out-of-state statute shared the same constitutional problem as the Washington statute, there would be no issue. The unconstitutional out-of-state conviction would not be any more valid than an unconstitutional Washington conviction. Here, however, there is no constitutional obstacle to counting the New York conviction.

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[4] This court denied the defendant's petition for review. The State did not cross-petition on the offender score issue.

The question is thus purely one of legislative intent. At the time of the New York offense, the Washington legislature intended to treat unlawful drug possession as a felony. That intent has been thwarted as to Washington crimes. That does not mean, however, that courts should equally disregard the legislative intent as to out-of-state crimes.

Subsequent statutory amendments have not eliminated the continuing importance of this issue. Effective May 13, 2021, the Legislature reduced drug possession to a misdemeanor. Laws of 2021, ch. 311, § 9. Out-of-state convictions are, however, compared with the law that existed in Washington at the time of the prior offense. State v. McCorkle, 88 Wn. App. 485, 495, 945 P.2d 736 (1997), aff'd, 137 Wn.2d 490, 973 P.2d 461 (1999). This question thus remains significant for all out-of-state crimes that were committed before the effective date of the 2021 amendment.

There are numerous offenders who have out-of-state drug convictions for crimes committed before that date. How to count such convictions is a continuing question of substantial public interest. If review is granted, the court should review this issue under RAP 13.4(b)(4).

VI. CONCLUSION

This court should deny review. If review is granted, the court should determine that at re-sentencing, any New York convictions for possession of a controlled substance should count towards the offender score.

This brief contains 2810 words (exclusive of appendices, title sheet, table of contents, table of authorities, certificate of service, and signature blocks).

Respectfully submitted on January 7, 2022.

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APPENDIX A
Handwritten messages in "Rogue Lawyer"
(Exhibit 12; 10/28 RP 2112-13, 2117-22)
(Addresses omitted)

[p. 372] If you go handle this very important business I will give you the money you need to bail [p. 352] plus a car and 200 a day to baby sit for 40 days

[p. 328] You will get payment every two week unless [p. 300] you want the hole 3000 at once but than you will have to [p. 268] get 2-3 grams of brown and shoot it into the vains of this person

[p. 237] Once I see it in the paper or my people tells me the word you will get a call to meet.

[p. 223] If you babysit you will have to take the person far away from that house very important

[p. 216] [House number] [p. 214] [street name] Lynnwood

[p. 203] If the dad say she is not there go in the house anyway cause he's lying

[p. 190] This must be done soon as you get out of here Im counting on you

[p. 188] Everyone is out the way this person is the last one and Im paying very good for this one plus [p. 160] I will keep putting you on money missions when I get out of here

[p. 152] Her and the dad live alone together so if you go in and wait she will show up.

[p. 138] It's a white house with a wheelchiar ramp

[p. 129] She white with dark hair and a big ass nose and her best friend lives at [p. 101] [address] LW

[p. 88] She lives with her boyfriend Amber & Jay

[p. 65] Get this done and I have a 300K lick that I will share with you homie

[p. 35] Can you handle this. It has to be done now and I swear you [p. 27] will never have to worry about shit as long as Im around money, car, places to stay nothing.

APPENDIX B

Handwritten messages in "The Visitor"
(Exhibit 11; 10/28/19 RP 2123-27)

[p. 369] Katherine – 44 yrs old – white with black long hair the color could have changed

[p. 351] Little white house with a wheelchair ramp. She do not have a car.

[p. 321] I heard that she was clean but not sure. It dont mater tho

[p. 281] Remember that the dad might lie and say she's not home. I need you to wait if you have to zip tie his ass and make him text her to come home

[p. 235] This must be done and the person must disappear before the 5th homie

[p. 207] I will upgrade the car if you get it done before the 5th from a 02 Buick to a 07 X5 BMW white

[p. 191] Homie Im about business money aint no problem for me I just need someone that I can count on and trust

[p. 171] You make this happen and I promise you wont have to worry about shit cause I got you with whatever work, money, house anything.

[p. 157] Homie I cant stress enough this must be done by the 5th.

[p. 129] I got court on the 15th and she can't show up then or on the 2nd of March homie very important

[p. 119] As you will see today Im a man of my word I dont lie.

[p. 107] Just in case we never do no talking at all right?

[p. 95] We have known each other since 2015 and smoked weed and shit

[p. 63] When I seen you here you needed help and as a friend that's what I did.

[p. 53] That I just to cover all angles it's better to be safe than sorry feel me.

[p. 47] Can you handle this and make sure that it's done right? Im counting on you homie

[p. 35] Make her disappear by any means homie

[p. 25] It's your move now!

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, JERRY GEORGE WOOD, Jr., Petitioner.	No. 100455-9 DECLARATION OF DOCUMENT FILING AND E-SERVICE

DECLARATION OF DOCUMENT FILING AND SERVICE

I, DIANE K. KREMENICH, STATE THAT ON THE 7th DAY OF JANUARY, 2022, I CAUSED THE ORIGINAL: ANSWER TO PETITION FOR REVIEW TO BE FILED IN THE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED IN THE FOLLOWING MANNER INDICATED BELOW:

Sloanej@nwattorney.net;
steedj@nwattorney.net;

[X] E-SERVICE VIA PORTAL

SIGNED IN SNOHOMISH, WASHINGTON, THIS 7th DAY OF JANUARY, 2022.

DIANE K. KREMENICH
APPELLATE LEGAL ASSISTANT
SNOHOMISH COUNTY PROSECUTOR'S OFFICE

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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