Supreme Court No. 90240-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

Jeffrey Strickland

Appellant/Respondent

Grays Harbor County Superior Court Cause No. 11-1-00084-5

The Honorable Judge Gordon Godfrey

AMENDED ANSWER TO PETITION

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant/Respondent

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

SUMMARY OF ANSWER 1

FACTS PERTAINING TO STATE'S PETITION 1

ARGUMENT 3

The Petition should be denied because the case does not meet any of the criteria set forth in RAP 13.4(b). 3

A. Petitioner's dissatisfaction with the result reached by the Court of Appeals does not present an issue appropriate for review. 3

B. The Court of Appeals correctly reversed based on a prejudicial violation of Mr. Strickland's Sixth Amendment confrontation right. 3

RESPONDENT'S CROSS PETITION 6

I. If the court accepts review, it must review additional issues for a fair and complete resolution of the case. 6

A. The Court of Appeals failed to reach ten issues, and erroneously decided three issues against Mr. Strickland. 6

B. Statement of Additional Issues for Review 6

C. Applicable Standards of Review 8

D. Facts Pertaining to Additional Issues 9

II. The Supreme Court should accept review and hold that Mr. Strickland was denied his right to a speedy trial. 14

III. The Supreme Court should accept review and hold that the trial court infringed Mr. Strickland's rights to due process and to present a defense. 16

A. Due process guarantees a meaningful opportunity to present a defense. 16

B. The exclusion of Dr. Loftus's testimony denied Mr.

Strickland his constitutional right to present a defense. ... 17

C. The court's decision denying Mr. Strickland's request for a continuance infringed his constitutional right to present a defense. ... 21

IV. The Supreme Court should accept review and reverse the convictions for insufficient evidence. ... 24

A. The prosecution must prove each element beyond a reasonable doubt. ... 24

B. The prosecution did not prove the elements of accomplice liability. ... 25

C. The Supreme Court should accept review, reverse the convictions, and prohibit retrial on an accomplice theory. 25

V. The Supreme Court should accept review and hold that the trial court erred by denying Mr. Strickland's severance motion. ... 26

A. The court should have severed the defendants' trials because sanitizing Kerby's statement did not "eliminate any prejudice." ... 26

B. Severance should have been granted under CrR 4.4(c) because Kerby and Mr. Strickland presented mutually antagonistic defenses. ... 27

VI. The Supreme Court should accept review and hold that Mr. Strickland was denied the effective assistance of counsel. ... 28

A. An accused person is entitled to effective defense counsel. 28

B. Defense counsel failed to timely consult with Dr. Loftus. 29

C. Defense counsel unreasonably failed to raise a clear objection to Kerby's testimonial statements and to request instructions prohibiting jurors from using those statements against Mr. Strickland. ... 31

D. Defense counsel was ineffective for failing to object to instructions allowing conviction under a theory of accomplice liability. ... 32

VII. The Supreme Court should accept review and hold that the trial judge violated the "appearance of fairness" doctrine and thereby infringed Mr. Strickland's Fourteenth Amendment right to due process. ... 33

VIII. The Supreme Court should accept review and impose a limiting

construction on the accomplice liability statute, because the prevailing interpretation violates the First Amendment. 34

IX. If the Supreme Court reinstates Mr. Strickland's convictions, it must vacate his sentence because the sentencing court failed to properly determine his offender score and standard range 36

A. The prosecution produced insufficient evidence to prove that Mr. Strickland had an offender score of eight. 36

B. The sentencing court failed to determine whether or not any of Mr. Strickland's prior convictions comprised the same criminal conduct 38

CONCLUSION 40

TABLE OF AUTHORITIES

FEDERAL CASES

Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997)33

Brandenburg v. Ohio, 395 U.S. 444, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969) 34, 35, 36

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) 3, 4, 26

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 16

Conchatta Inc. v. Miller, 458 F.3d 258 (3rd Cir. 2006) 35

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) 4, 6, 27, 31

Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) .. 37

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 28

Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998) 4

Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) 16, 21

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 33

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 24

Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) 37

Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) 33

Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) 3

Smalis v. Pennsylvania, 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986) 24, 25

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 28, 29

United States v. Downing, 753 F.2d 1224 (3d Cir.1985) 18

United States v. Flynt, 756 F.2d 1352 (9th Cir. 1985) 21, 22, 24

United States v. Freeman, 761 F.2d 549 (9th Cir. 1985) 34

United States v. Lankford, 955 F.2d 1545 (11th Cir. 1992) 16

United States v. Platte, 401 F.3d 1176 (10th Cir. 2005) 35

United States v. Salemo, 61 F.3d 214 (3rd Cir., 1995) 28

United States v. Sebetich, 776 F.2d 412 (3d Cir. 1985) 18

Virginia v. Hicks, 539 U.S. 113, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003) 35

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) 16

WASHINGTON STATE CASES

Bellevue School Dist. v. E.S., 171 Wn.2d 695, 257 P.3d 570 (2011) 8

Brister v. Tacoma City Council, 27 Wn. App. 474, 619 P.2d 982 (1980), *review denied*, 95 Wn.2d 1006 (1981) 33

Buell v. City of Bremerton, 80 Wn.2d 518, 495 P.2d 1358 (1972) 33

City of Bellevue v. Lorang, 140 Wn.2d 19, 992 P.2d 496 (2000) 5, 6, 8

City of Seattle v. Holifield, 170 Wn.2d 230, 240 P.3d 1162 (2010) 26

City of Seattle v. Webster, 115 Wn.2d 635, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991) 35

Dimmel v. Campbell, 68 Wn.2d 697, 414 P.2d 1022 (1966) 34

In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005) 37, 38, 40

In re Detention of Anderson, 166 Wn.2d 543, 211 P.3d 994 (2009) (Anderson I) 9

In re Detention of Post, 145 Wn. App. 728, 187 P.3d 803 (2008) 37

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001) 29

Miller v. Likins, 109 Wn. App. 140, 34 P.3d 835 (2001) 17

OPAL v. Adams County, 128 Wn.2d 869, 913 P2d. 793 (1996) 33

Philippides v. Bernard, 151 Wn.2d 376, 88 P.3d 939 (2004) 17, 18, 21

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583 (2010) 17

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 29

State v. Anderson, 72 Wn. App. 453, 864 P.2d 1001 (1994) (Anderson II) 38

State v. Berube, 150 Wn.2d 498, 79 P.3d 1144 (2003) 24, 32

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) 1, 6
State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998) 21
State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008) 8
State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003) 17, 20, 21
State v. Clausing, 147 Wn.2d 620, 56 P.3d 550 (2002) 24, 32
State v. Coleman, 155 Wn. App. 951, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011) 36
State v. Dent, 123 Wn. 2d 467, 869 P.2d 392 (1994) 23
State v. Depaz, 165 Wn.2d 842, 204 P.3d 217 (2009) 16
State v. Dugan, 96 Wn. App. 346, 979 P.2d 85 (1999) 33, 34
State v. Early, 70 Wn. App. 452, 853 P.2d 964 (1993) 21
State v. Elliott, 121 Wn. App. 404, 88 P.3d 435 (2004) 17
State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) 26, 27
State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009) 9
State v. Ferguson, 164 Wn. App. 370, 264 P.3d 575 (2011) 36
State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009) 17
State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013) 38
State v. Haddock, 141 Wn.2d 103, 3 P.3d 733 (2000) 38
State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 28
State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006) 29
State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236 (2009) 16
State v. Immelt, 173 Wn.2d 1, 267 P.3d 305 (2011) 35
State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009) 16
State v. Knippling, 166 Wn.2d 93, 206 P.3d 332 (2009) 37
State v. Lord, 161 Wn.2d 276, 165 P.3d 1251 (2007) 17
State v. Madry, 8 Wn. App. 61, 504 P.2d 1156 (1972) 33
State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) 16
State v. Mehaffey, 125 Wn. App. 595, 105 P.3d 447 (2005) 39
State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009) 37

State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997) 39
State v. Poulsen, 45 Wn. App. 706, 726 P.2d 1036 (1986) 24
State v. Purdom, 106 Wn.2d 745, 725 P.2d 622 (1986) 21
State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) ... 28, 30, 32, 33
State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009) (Saunders I) 15
State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998) (Saunders II) 31, 32
State v. Sims, 171 Wn.2d 436, 256 P.3d 285 (2011) 9
State v. Taylor, 50 Wn. App. 481, 749 P.2d 181 (1988) 18
State v. Vincent, 131 Wn. App. 147, 120 P.3d 120 (2005) 31
State v. Watson, 69 Wn.2d 645, 419 P.2d 789 (1966) 21
State v. Watt, 160 Wn.2d 626, 160 P.3d 640 (2007) 8
State v. Williams, 135 Wn.2d 365, 957 P.2d 216 (1998) 39

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I 8, 34, 35
U.S. Const. Amend. V 37
U.S. Const. Amend. VI 3, 7, 8, 16, 26, 28
U.S. Const. Amend. XIV 3, 7, 8, 21, 33, 37
Wash. Const. art. I, § 22 ..... 8, 28

WASHINGTON STATUTES

RCW 9.94A.500 37
RCW 9.94A.525 ..... 37, 38, 39
RCW 9A.08.020 ..... 25, 35, 36

OTHER AUTHORITIES

CrR 3.3 ..... 6, 14, 15, 21
CrR 4.4 ..... 7, 26, 27
ER 401 ..... 17, 20, 21
ER 402 ..... 17, 20, 21
ER 702 ..... 17, 20, 21, 30

RAP 13.4 ..... 3, 36, 40

RAP 13.7 6

Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases," New Jersey Supreme Court Press Release (July 19, 2012) available at http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm 19

Weiser, B. "New Jersey Court Issues Guidance for Juries About Reliability of Eyewitnesses," *New York Times* (July 19, 2012).Available at http://www.nytimes.com /2012/07/20/ nyregion/judges-must-warn-new-jersey-jurors-about-eyewitnesses-reliability.html#h[] 19

WPIC 10.51 ..... 25, 35

SUMMARY OF ANSWER

The court should deny review. The Court of Appeals correctly found that the erroneous admission of testimonial hearsay violated Mr. Strickland's right to confrontation. As the Court of Appeals determined, the error prejudiced Mr. Strickland. In closing argument, the prosecutor pointed to the statements of Mr. Strickland's non-testifying codefendant as evidence of Mr. Strickland's guilt. The testimonial hearsay went directly to the primary dispute at trial.

If the court does accept review, it should also review additional issues raised by Mr. Strickland. These include three arguments rejected by the Court of Appeals, and nine issues that that the Court of Appeals declined to reach[1] in light of its decision reversing Mr. Strickland's convictions on confrontation grounds.

FACTS PERTAINING TO STATE'S PETITION[2]

Following a shooting[3] at a tavern in Aberdeen, Jeffrey Strickland was charged with two counts of first-degree assault.[4] CP 1-2. Prior to trial, the state moved to join his case with that of another suspect named Michael Kerby.[5] CP 18-19. Mr. Strickland objected to the joinder. RP (4/4/11) 6-12.

The prosecutor told the court he did not plan to offer any of Kerby's statements that implicated Mr. Strickland.[6] CP 20-31. The state acknowledged Kerby's statements could only be admitted if properly redacted and if "the court gives a cautionary instruction". CP 20-31. Over Mr. Strickland's objection, the court joined the two cases for trial. CP 35; RP (4/4/11) 12-13.

---

[1] Mr. Strickland is not pursuing a tenth issue, which relates to *State v. Bone-Club,* 128 Wn.2d 254, 906 P.2d 325 (1995).

[2] Additional facts are set forth in Mr. Strickland's cross-petition, below.

[3] Two men were shot. RP (6/28/11) 40, 96-99; RP (6/29/11) 154-155, 377. That night, both shooting victims told police that they did not know who shot them. RP (6/27/11) 34; RP (6/28/11) 47, 120-121, 150. No bystanders were able to say who had fired the shots.

[4] The state also alleged facts supporting a firearm enhancement on each charge. CP 1-2.

[5] Both Strickland and Kerby denied they had fired the shots. RP (6/30/11) 578-583,

[6] In its memorandum on the issue, the state acknowledged that Kerby's statement could only be admitted if properly redacted and if "the court gives a cautionary instruction". CP 20-31.

At the start of trial, the prosecutor announced which of Kerby's statements to police he planned to offer. RP (6/27/11) 43-44; CP 27-31. Mr. Strickland again urged the court to sever the two defendants' cases.[7] RP (6/27/11) 46-47. The judge denied Mr. Strickland's severance request. RP (6/27/11) 48.

Two detectives relayed Kerby's statements to the jury. RP (6/30/11) 565-567, 578-580. Kerby initially denied seeing or touching a gun. RP (6/30/11) 565-567, 579-580. Kerby later said that he had not pulled the trigger. RP (6/30/11) 582. He told police that he'd had the gun in his hand but had disposed of it, and that he'd done nothing wrong. Kerby also said that "if [the police] asked the little Mexican guy, he can't state who actually pulled the trigger." RP (6/30/11) 582.

The court did not instruct the jury that these statements could only be considered against Kerby. CP 53-72. After the state rested its case, Mr. Strickland renewed his motion to sever his trial from Kerby's. The court again denied the request. RP (7/1/11) 20-22. In closing, the prosecutor used Kerby's statements as substantive evidence of Mr. Strickland's guilt. RP (7/1/11) 134.

Following conviction, Mr. Strickland moved for a new trial. CP 75-79. He argued that his confrontation rights had been violated by the admission of Kerby's out-of-court statements. CP 75-79; RP (7/25/11) 71-75. The court denied the motion. RP (7/25/11) 76.

Mr. Strickland appealed. CP 13. The Court of Appeals reversed, agreeing that the jury's consideration of Kerby's testimonial hearsay had violated Mr.

[7] Defense counsel also argued that the entire statement should be admitted, without redaction, as evidence of Kerby's guilt. RP (6/27/11) 46.

Strickland's confrontation rights. Opinion, p. 13.[8]

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE THE CASE DOES NOT MEET ANY OF THE CRITERIA SET FORTH IN RAP 13.4(B).

A. Petitioner's dissatisfaction with the result reached by the Court of Appeals does not present an issue appropriate for review.

The Supreme Court will only accept review of a Court of Appeals decision if it conflicts with another appellate decision, raises a significant constitutional question, or presents an issue of substantial public interest. RAP 13.4(b).

Applying these criteria, the petition does not merit review. Petitioner fails to cite to RAP 13.4(b). Petitioner also fails to present argument supporting acceptance of review. Petitioner's sole issue relates to the application of well-established law. Petition, pp. 2-4. Petitioner does not contend the Court of Appeals applied the wrong standards. Petition, p. 2 (citing, *inter alia, Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)).

Instead, Petitioner complains about the result reached by the Court of Appeals. Petition, pp. 2-4. A party's disagreement with the outcome of the case does not provide a basis for review under RAP 13.4(b). The Supreme Court should deny the Petition.

B. The Court of Appeals correctly reversed based on a prejudicial violation of Mr. Strickland's Sixth Amendment confrontation right.

The Sixth Amendment[9] guarantees the right to confront witnesses. U.S. Const. Amend. VI. Admission of testimonial hearsay violates this right unless

[8] The Court of Appeals ruled against Mr. Strickland on three issues, and declined to reach ten other issues.

[9] Applicable in state court through the due process clause. *Pointer v. Texas,* 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV.

the declarant is unavailable and the accused had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

But the *Bruton* exception to the constitutional prohibition against testimonial hearsay permits admission of a codefendant's statement, but solely for use against the codefendant. *Gray v. Maryland*, 523 U.S. 185, 197, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998). The state may not take advantage of the *Bruton* exception unless the court instructs jurors that they may not use the codefendant's statement against the defendant.[10]

Here, the trial court allowed the state to introduce Kerby's testimonial statement, but didn't provide a proper instruction. CP 53-72. Because the jury was allowed to consider the testimonial hearsay when deciding Mr. Strickland's guilt, the admission of the hearsay violated the confrontation clause. *Crawford,* 541 U.S. at 59.

The Court of Appeals recognized this. Opinion, p. 13. Petitioner bases its claim of error on a misunderstanding of the confrontation clause. Petitioner erroneously suggests testimonial hearsay statements are admissible without limitation if they "make no reference whatsoever to any other participant." Petition, p. 3. This is incorrect. *Crawford* bars the admission of testimonial hearsay, regardless of its content. *Crawford*, 541 U.S. at 59. There is no exception for statements that don't refer to the defendant.[11] The admission of

[10] The court must also redact the statement so it is facially neutral and free of obvious deletions.

[11] Petitioner apparently misunderstands the applicability of *Crawford* and *Bruton. Crawford* makes testimonial hearsay inadmissible. *Bruton* provides a narrow exception, allowing jurors to hear certain testimonial hearsay during joint trials. If testimonial hearsay doesn't fall within *Bruton,* as Petitioner suggests (see Petition, p. 3), *Crawford* requires its exclusion.

testimonial hearsay violated Mr. Strickland's confrontation right. *Id.*

Courts presume prejudice from a showing of constitutional error. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Violation of a constitutional right requires reversal unless the state proves harmlessness beyond a reasonable doubt. *Id.* The state must show that the error was "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." *Id.*

Contrary to Petitioner's assertion, the error was not harmless beyond a reasonable doubt. Petition, p. 4. First, the general instruction requiring jurors to consider each defendant's case separately did not cure the error. *See* Petition, pp. 3-4. The instruction did not address the confrontation issue. Even with the instruction, jurors were allowed to consider Kerby's testimonial hearsay against Mr. Strickland. The instruction could not solve the confrontation problem.

Second, the evidence of guilt was not overwhelming. Mr. Strickland denied possessing a gun or participating in the shooting. He testified that he had already left the scene at the time of the incident. Ivy never saw him in possession of a gun, and Savage did not know who had shot him. RP (6/27/11) 34; RP (6/28/11) 47, 120-121, 150. Under these circumstances, jurors were required to weigh conflicting evidence, assess credibility, and decide whether or not the state proved its case beyond a reasonable doubt.

The admission of Kerby's testimonial hearsay was not "trivial, or formal, or merely academic." *Lorang*, 140 Wn.2d at 32. Instead, these statements implied Mr. Strickland's guilt, and went directly to the heart of the case. The state cannot show the error "in no way affected the outcome of the case." *Id.*

The trial court violated Mr. Strickland's confrontation rights. *Crawford,* 541 U.S. at 59. The error prejudiced Mr. Strickland. *Lorang*, 140 Wn.2d at 32. The Court of Appeals correctly reversed his convictions and remanded the case for a new trial. *Id.;* Opinion, p. 13.

RESPONDENT'S CROSS PETITION

I. IF THE COURT ACCEPTS REVIEW, IT MUST REVIEW ADDITIONAL ISSUES FOR A FAIR AND COMPLETE RESOLUTION OF THE CASE.

A. The Court of Appeals failed to reach ten issues, and erroneously decided three issues against Mr. Strickland.

Although the Court of Appeals ruled in Mr. Strickland's favor on one issue and reversed his conviction, it decided three issues against him and declined to reach ten other issues. If this Court accepts review of the issue identified by the Petitioner, it should also review the twelve issues set forth below.[12] In the alternative, the court should review Mr. Strickland's issues relating to speedy trial and accomplice liability, and remand the case to the Court of Appeals for resolution of the remaining issues. RAP 13.7(b).

B. Statement of Additional Issues for Review

1. CrR 3.3 requires the court to bring an in-custody defendant to trial within 60 days, unless the time for trial is reset pursuant to the rule. Here, the court erroneously continued the case beyond Mr. Strickland's speedy trial expiration date. Did the unwarranted delay violate Mr. Strickland's right to a speedy trial under CrR 3.3?

2. An accused person has a constitutional right to present relevant admissible evidence. Here, the trial judge excluded expert testimony that would have helped the jury understand how a witness's fragmented perceptions while intoxicated can coalesce into solid but erroneous memories, leading to overstated confidence during testimony. Did the trial judge violate Mr.

[12] Respondent does not pursue a *Bone-Club* issue raised in the Court of Appeals. *Bone-Club,* 128 Wn.2d 254.

Strickland's Sixth and Fourteenth Amendment right to present a defense by excluding relevant, admissible evidence?

3. The constitution guarantees an accused person a meaningful opportunity to present his or her defense. Here, the trial judge refused Mr. Strickland's request for a continuance to allow him to secure expert testimony relevant to his defense. Did the trial judge violate Mr. Strickland's Fourteenth Amendment rights to due process and to present a defense by unreasonably denying his request for a continuance?

4. To convict Mr. Strickland of assault as an accomplice, the prosecution was required to prove that he aided or agreed to aid Kerby in the shooting. Here, nothing in the record suggested that Mr. Strickland aided or agreed to aid Kerby, or that he acted with knowledge that his actions would promote or facilitate the commission of each assault. Did the convictions infringe Mr. Strickland's Fourteenth Amendment right to due process because they were based on insufficient evidence?

5. Under CrR 4.4(c), a motion to sever defendants must be granted unless sanitizing a codefendant's out-of-court statements eliminates "any prejudice." Here, the trial judge refused to sever Mr. Strickland's case from Kerby's, but Kerby's sanitized statements remained prejudicial to Mr. Strickland. Did the trial court abuse its discretion by failing to sever Mr. Strickland's trial from Kerby's?

6. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, Mr. Strickland's defense attorney failed to clearly object to the admission of testimonial hearsay and failed to request an instruction prohibiting the jury from considering it as proof of Mr. Strickland's guilt. Was Mr. Strickland denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

7. The guarantee of effective assistance requires defense counsel conduct adequate investigation. Here, counsel failed to investigate a potential defense prior to Mr. Strickland's trial. Was Mr. Strickland denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

8. To be effective, an attorney must be familiar with the law, and should raise appropriate objections to the court's instructions. Here, defense counsel failed to object to the trial court's instructions on accomplice liability, despite the absence of evidence suggesting that Mr. Strickland was an accomplice to the shootings. Was Mr. Strickland denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

9. A judge violates the appearance of fairness doctrine when there is some evidence of the judge's actual or potential bias. In this case, the judge

described defense counsel's theories and conduct as "nonsense," "dishonest," and "foolish." Did the trial judge violate the appearance of fairness doctrine, in violation of Mr. Strickland's Fourteenth Amendment right to due process?

10. An accused person has the constitutional right to counsel at all critical stages of trial. In this case, the court answered a jury question without conferring with counsel. Did the trial judge violate Mr. Strickland's right to counsel under the Sixth and Fourteenth Amendments and under Wash. Const. art. I, § 22?

11. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite imminent lawless action. The accomplice liability statute criminalizes words that facilitate or promote commission of a crime, even if not directed at and likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

12. At sentencing, the prosecution must prove criminal history by a preponderance of the evidence. Here, the prosecutor failed to present sufficient evidence establishing Mr. Strickland's criminal history. Did the trial court violate Mr. Strickland's Fourteenth Amendment right to due process by finding that he had numerous prior felony convictions and sentencing him with an offender score of eight?

C. Applicable Standards of Review

Constitutional errors are reviewed *de novo. Bellevue School Dist. v. E.S.,* 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Constitutional errors are presumed prejudicial, and the prosecution bears of the burden of establishing harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, 140 Wn.2d at 32. The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke,* 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The interpretation of a statute is reviewed *de novo,* as is the application of law to a particular set of facts. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009); *In re Detention of Anderson*, 166 Wn.2d 543, 555, 211 P.3d 994 (2009) (Anderson I). The interpretation of a court rule is an issue of law, reviewed *de novo*. *State v. Sims*, 171 Wn.2d 436, 441, 256 P.3d 285 (2011).

D. Facts Pertaining to Additional Issues

1. Events of February 3, 2011

On the evening of February 3, 2011, Jeffrey Strickland went to Mac's Tavern in Aberdeen, along with his friend Michael Kerby, and Kerby's girlfriend Jerri Crissman. RP (6/29/11) 277. Earlier in the evening, while Kerby and Crissman were getting ready to go out, Crissman saw Kerby wrap a gun in a towel. RP (6/30/11) 426, 453-455.

The bar was crowded that evening. RP (6/28/11) 47, 110; RP (6/29/11) 182, 225. Among those present was a group of men working a construction job in Cosmopolis. The group, which included Eugene Savage and Daniel Ivy, sat at the bar and listened to the band. RP (6/28/11) 32, 82-84; RP (6/29/11) 249; RP (6/30/11) 523.

At some point, Savage went outside to smoke a cigarette in front of the tavern. RP (6/28/11) 36. He was intoxicated, having consumed a fair amount of alcohol throughout the evening. RP (6/28/11) 35, 37; RP (6/29/11) 198. Kerby, Crissman and Strickland were already outside, and Savage said something to them in Spanish. RP (6/29/11) 360-362. Kerby and Strickland were offended. RP (6/28/11) 37. The men exchanged words and had a face-to-face confrontation visible through the window in the tavern's door. RP (6/28/11) 88; RP (6/29/11) 229. Savage told the other men they should "shake

the sand out of their pussies." RP (6/28/11) 58. Ivy came out and tried to stop the argument. RP (6/28/11) 89. When told that Savage had been disrespectful, Ivy responded that the issue was "ridiculous." RP (6/28/11) 89-90. Someone suggested that the issue could be resolved in the parking lot. RP (6/28/11) 60, 91. Ivy tried to get Savage to walk to the parking lot with him, following Strickland and Kerby. RP (6/28/11) 91-93.

When Ivy realized Savage was not following him, he walked back toward the bar. On his way there, he was shot in the chest. RP (6/28/11) 96-99; RP (6/29/11) 154-155. After Ivy was shot, Savage went toward the men to "have it out" with them. RP (6/28/11) 67-69. He was shot in the leg. RP (6/28/11) 40; RP (6/30/11) 377.

Police and medical assistance came shortly after the shooting. RP (6/29/11) 266. Mr. Strickland was arrested five blocks from the bar. He was unarmed. RP (6/29/11) 210, 213, 221. On the ground outside the bar, police found two spent .380 caliber shells and one unused round. RP (6/29/11) 186. The gun that fired the shots was never located.

Before the police arrived, Kerby fled the scene. He put his vehicle in an ex-girlfriend's garage and stayed in a rented hotel room in another town. RP (6/29/11) 293, 299, 302. He was arrested on February 4th, and he gave a statement to police. RP (6/30/11) 484-486, 578-583. Before any questions were asked, he said that he'd neither seen nor touched a gun. After denying any knowledge or involvement in the shooting, he told police that he "didn't pull the trigger," and that "the gun never went off in his hand." RP (6/30/11) 582. He also said that he got rid of the gun. CP 27-31; RP (6/30/11) 578-583.

2. Pre-trial and Trial Proceedings

The state charged Mr. Strickland (and Kerby) with two counts of Assault in the First Degree, and alleged that "the defendant, or an accomplice, was armed with a firearm." CP 1-2. The court arraigned Mr. Strickland on March 7, 2011. CP 17. At the end of March, the prosecution asked to continue the trial beyond Mr. Strickland's speedy trial expiration date. Mr. Strickland objected. RP (4/4/11) 3-15; CP 32-35. The reason for the continuance was the state's desire to have the shell casings recovered from the scene tested for DNA evidence. RP (4/4/11) 3, 5. The materials hadn't been sent to the lab until February 28, 2011, and the prosecution hadn't yet received any results. RP (5/9/11) 17; RP (4/4/11) 3.

The court granted the prosecutor's motion, and continued the trial beyond Mr. Strickland's speedy trial expiration date:

> Regarding your request for a continuance. I believe it is appropriate on this evidentiary matter. And that is that the state crime lab being required to produce the evidence that could exculpate or work to the benefit of either party and/or obviously work to the detriment of either party but the evidence is obviously crucial, so therefore based upon the State's motion I believe a continuance is appropriate.
>
> I am going to require that [the prosecutor] find out from the crime lab when the reports are anticipated to be received by him and I will expect that once he receives them that they will immediately or within 48 hours make certain copies of the evidence and/or crime lab reports are given to counsel. And I will grant the continuance at this point in time, but if there is an issue brought by the parties regarding the time involved I will allow them to make subsequent motion accordingly.

RP (4/4/11) 13.

Mr. Strickland moved for dismissal for violation of speedy trial, which the court denied. CP 37-44; RP (5/9/11) 16-17, 19. In mid-June, the parties learned that the DNA sample was too small to permit testing. RP (6/17/11) 4.

The primary issue for trial was whether Kerby or Mr. Strickland was the

shooter. Of all the people at the bar that night, only two—Savage and Ivy—planned to testify that Mr. Strickland was the shooter. Both had been drinking; neither had identified Mr. Strickland as the shooter in their initial statements. RP (6/27/11) 34; RP (6/28/11) 47, 120-121, 150.

Mr. Strickland wanted to use expert testimony to challenge their in-court identifications. Defense counsel – who had consulted with an expert, but had not yet retained him—requested a continuance, and renewed Mr. Strickland's motion to sever the codefendants. RP (6/17/11) 1; RP (6/27/11) 34, 36, 46; CP 45-48. The court denied the motion. RP (6/27/11) 40-42. In his rulings, the judge repeatedly referred to defense arguments as "nonsense," accusing counsel of raising a "litany" of problems to obtain severance.[13] RP (6/27/11) 40-42. Defense counsel later filed an offer of proof regarding the proposed expert testimony. Ex. 1; RP (7/1/11) 18-20. He renewed the motions for a continuance and severance, which the court denied. RP (7/1/11) 20, 21-22.

At trial, Savage testified that he was intoxicated at the time of the incident and did not have a clear memory of all that had happened.[14] RP (6/28/11) 35, 45, 54. He testified that he did not see who had shot Ivy, but claimed that right

[13] The court made another comment about defense counsel later in the trial, with the jury present, when counsel asked the court for permission to move an easel the state had used during their direct. RP (6/30/11) 419. The trial judge responded, in front of the jury, that the question was "foolish." RP (6/30/11) 419. After the jury left the room, Mr. Strickland moved for a mistrial; the motion was denied. RP (6/30/11) 419-421.

[14] Despite the number of people present, there was much confusion as to what actually happened that night. Some witnesses believed Crissman said "shoot his ass;" others said she left the area before the men walked toward the parking lot. (RP (6/29/11) 168, 365). There were also questions as to whether or not Kerby brandished or used a taser during the argument. RP (6/28/11) 59, 107; RP (6/29/11) 230; RP (6/30/11) 460. Witness memories conflicted on what Kerby wore, and which of the two defendants wore a black puffy coat that was found outside the bar. RP (6/29/11) 158, 173, 256. On this last point, Detective Cox testified that Mr. Strickland was arrested within hours of the assault wearing a jacket that was not the black puffy jacket later found and admitted into evidence. RP (7/1/11) 35-37.

before his leg was hit, he saw a muzzle flash near Mr. Strickland. RP (6/28/11) 38-40. In his initial statement to police, shortly after the incident, he had said that he didn't know who had shot him; however, he refused to affirm that statement at trial. RP (6/28/11) 46-47. He did acknowledge that he hadn't seen a gun in Mr. Strickland's hands. RP (6/28/11) 66, 70.

Ivy also testified that he had been drinking that night, but asserted that he had not been intoxicated. RP (6/28/11) 102-105, 109. In his initial statement to police (given at the hospital after the shooting), he had not identified Strickland as the person with the gun. Despite this, he testified that Mr. Strickland had shot him. RP (6/28/11) 98; RP (6/29/11) 150, 178.

Crissman said that she believed she saw Kerby pulling out his gun right before she ran away from the area. RP (6/29/11) 356, 365-366; RP (6/30/11) 409-410, 425. No witnesses (besides Ivy and Savage) suggested that Mr. Strickland had been the shooter. RP (6/29/11) 230, 235, 245.

Physical evidence showed that the bullet entered Ivy's chest just below the nipple before passing through his lungs, diaphragm, liver, and near his adrenal gland, suggesting that the shot was fired downward by someone tall (like Kerby) rather than someone short (like Mr. Strickland).[15] RP (6/29/11) 261, 385-389; RP (6/30/11) 527-528, 530, 540.

Mr. Strickland testified. He acknowledged that he'd been present during the verbal altercation, but told the jury he left the scene before the shooting occurred. RP (7/1/11) 56-62.

3. Court's Instructions, Jury Question, and Verdicts

[15] This is especially true given Ivy's great height.

Following the presentation of evidence, the court instructed the jury. The court's "to convict" instructions allowed the jury to convict if it found that Mr. Strickland "or a person to whom he acted as an accomplice" assaulted Ivy and Savage. CP 58-60. The court also defined accomplice liability (using the standard pattern jury instruction). CP 61. Jurors submitted a written question to the court regarding accomplice liability and the firearm enhancement. CP 73-74. The matter was not addressed on the record in open court. Nor is there any indication in the record that the court consulted with counsel prior to responding to the question. CP 49-52, 73-74.

Mr. Strickland was convicted of both charges. At sentencing, Mr. Strickland objected to the state's assertions about his criminal history. RP (7/25/11) 63-66; CP 91-95. The state presented the court with a Defendant's Case History (DCH) printout and some (but not all) of the Judgment and Sentence documents listed in the state's sentencing materials. RP (7/25/11) 67-687; CP 80-.90. The defense notified the court that at least some of the convictions did not belong to Mr. Strickland, and that his brother had falsely used his name and date of birth when in trouble. RP (7/25/11) 69. The judge overruled Mr. Strickland's objections and included all of the contested priors in the criminal history and offender score. The court reasoned that all of the contested priors could be included because they were listed in a Judgment and Sentence from October of 2007. RP (7/25/11) 70. The court sentenced Mr. Strickland with 8 points. CP 5.

II. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT MR. STRICKLAND WAS DENIED HIS RIGHT TO A SPEEDY TRIAL.

CrR 3.3(h) requires dismissal of any charge not brought to trial within

speedy trial. Responsibility lies with the court to ensure compliance with the rule. CrR 3.3(a)(1). The court "loses authority to try the case" after expiration of speedy trial. *State v. Saunders*, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009) (Saunders I). A continuance may only be granted if "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2).

Here, the trial court should not have continued the case beyond speedy trial, over Mr. Strickland's objection. The record suggests that the need for delay resulted in part from the government's lack of diligence.[16] In addition, the court failed to ask whether testing could be expedited. RP (4/4/11) 3-13; CP 35. Nor did the court determine the likelihood that the testing would provide useable information material to the prosecution or defense. The court did not acknowledge its duty to ensure Mr. Strickland a speedy trial, and did not balance his speedy trial right against the prosecution's desire for the evidence it sought. RP (4/4/11) 3-13; CP 35. Finally, the court did not find that "the administration of justice" required the continuance and that it would not prejudice Mr. Strickland's defense.[17] CrR 3.3(f)(2); RP (4/4/11) 3-13; CP 35.

Given the inadequate inquiry and insufficient findings, the record does not support the court's decision to postpone the trial beyond the speedy trial expiration. Accordingly, the convictions must be reversed and the charges dismissed with prejudice. CrR 3.3(h); *Saunders* I, 153 Wn. App. at 216-217.

[16] It appears that police obtained the shell casings on February 3, but didn't send them for analysis until February 28. RP (4/4/11) 3-13; CP 35.

[17] The court did find "good cause" for the continuance, but did not explain further. CP 35.

III. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE TRIAL COURT INFRINGED MR. STRICKLAND'S RIGHTS TO DUE PROCESS AND TO PRESENT A DEFENSE.

Although evidentiary rulings and denials of continuances are ordinarily reviewed for an abuse of discretion,[18] this discretion is subject to the requirements of the constitution: a court necessarily abuses its discretion by denying an accused person her or his constitutional rights. *See, e.g., State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009); *see also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992). Where the appellant makes a constitutional argument regarding the exclusion of evidence or the denial of a continuance, review is *de novo. Id.*

A. Due process guarantees a meaningful opportunity to present a defense.

The Fourteenth Amendment's due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L.Ed.2d 503 (2006). The accused must be able to present his version of the facts, so the fact-finder may decide where the truth lies. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has called this right "a fundamental element of due process of law." *Washington*, 388 U.S. at 19.

The right to present a defense includes the right to introduce relevant and

[18] A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

admissible evidence. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). Denial of this right requires reversal unless it can be shown beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wn. App. 404, 410, 88 P.3d 435 (2004). An appellate court will not "tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt." *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Unless otherwise limited, all relevant evidence is admissible. ER 402. The threshold for admission is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

B. The exclusion of Dr. Loftus's testimony denied Mr. Strickland his constitutional right to present a defense.

ER 702 governs testimony by experts. Under the rule, expert testimony is admissible if it will be helpful to the trier of fact. "Helpfulness" is to be construed broadly. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (citing *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001)). This means the rule favors admissibility in doubtful cases. *Likins,* 109 Wn. App. at 148. Where the accused person seeks to use an expert to challenge the reliability of eyewitness testimony, "[T]he trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony." *State v. Cheatam*, 150 Wn.2d 626, 649, 81 P.3d 830 (2003).

Here, the defense sought to introduce the expert testimony of Dr. Loftus. RP (6/27/11) 34-36, 39-40; RP (7/1/11) 18-20. The main purpose of the evidence was to undermine Savage's and Ivy's testimony, since their confidence did not relate to the accuracy of their memory. Studies show that jury's use a witness's level of confidence primarily to determine whether or not to accept eyewitness testimony. This is so because "in most of normal, everyday life, high confidence *is* predictive of high accuracy." Ex. 1, p. 2 (emphasis in original). However, certain factors, present in this case, can lead to the expression of a high level of confidence about factually erroneous content. Ex. 1, p. 3. This is counterintuitive; the average juror does not know these studies. This renders expert testimony on the subject "helpful" within the broad definition adopted by the Supreme Court. *Philippides,* 151 Wn2d at 393.

Two circumstances that have a great impact on eyewitness testimony are the conditions under which the event was witnessed and exposure to suggestive information after the event. The original conditions under which an event is witnessed can interfere with the ability to form an accurate impression (i.e. intoxication, stress, poor lighting, short duration of event). Later exposure to suggestive input can alter the memory and increase the witness's confidence, creating the possibility that erroneous testimony is delivered with a high degree of confidence. Ex. 1, pp. 3-5. Similar expert testimony has been held admissible in other cases,[19] and the New Jersey Supreme Court has

[19] *See, e.g., State v. Taylor*, 50 Wn. App. 481, 489, 749 P.2d 181 (1988) ("[E]xpert testimony on the unreliability of eyewitness identification can provide significant assistance to the jury beyond that obtained through cross examination and common sense"); *see also United States v. Sebetich*, 776 F.2d 412, 419 (3d Cir. 1985) (interpreting federal Rules of Evidence); *United States v. Downing*, 753 F.2d 1224 (3d Cir.1985) (same).

recently adopted court rules and jury instructions aimed at mitigating the problems inherent in eye-witness testimony. *See* "Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases," New Jersey Supreme Court Press Release (July 19, 2012).[20],[21]

Here, Savage and Ivy saw the shooting in poor lighting and after consuming alcohol. RP (6/28/11) 35, 37, 45, 51, 68, 84. Both were likely under some stress from the ongoing confrontation; Savage was under additional stress at the time he was shot because Ivy had just been shot in the chest seconds earlier. RP (6/28/11) 38, 67-68, 74, 100. The shootings happened very quickly and without warning. Neither Savage nor Ivy identified Mr. Strickland as the shooter when they initially spoke to police. RP (6/28/11) 47, 62, 150, 178. Two weeks after the shooting, Savage and Ivy had the chance to discuss the events. RP (6/28/11) 65, 97-98. At trial, both expressed confidence that Mr. Strickland had the gun and shot each of them. RP (6/28/11) 40, 159-160.

Under these circumstances, it is highly likely that each witness's original statement to police—in which neither had been able to say who had fired—was more accurate than the highly confident trial testimony—that each witness knew that Mr. Strickland had fired the shots. However, jurors had no reason to believe defense counsel's suggestion that this was the case. RP (7/1/11) 155-161. Without testimony outlining the problems with perception,

---

[20] Available at http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm.

[21] *See also* Weiser, B. "New Jersey Court Issues Guidance for Juries About Reliability of Eyewitnesses," *New York Times* (July 19, 2012).Available at http://www.nytimes.com /2012/07/20/ nyregion/judges-must-warn-new-jersey-jurors-about-eyewitnesses-reliability.html#h[].

memory, and confidence under circumstances such as these, jurors were far more likely guided by their erroneous belief that confidence correlates with accuracy. Ex. 1, p. 3.

Without Dr. Loftus's testimony, the jury likely gave greater deference to each witness's confidence level than was warranted under the circumstances. As a result, jurors were more likely to believe that Mr. Strickland was the shooter. Furthermore, the identity of the shooter was not merely "any fact that [was] of consequence to the determination of the action;"[22] instead, it was *the* contested fact at Mr. Strickland's trial. Dr. Loftus's testimony would have made it less probable (in the jury's eyes) that Mr. Strickland was the shooter, thus his testimony was relevant under ER 401 and admissible under ER 402.

Because the average juror is unfamiliar with the scientific basis for questioning Savage's confidence, the testimony would have been "helpful" to the jury under ER 702. It would have helped the jury to "understand the evidence" (each witness's confidence) and to "determine a fact at issue" (the identity of the shooter). ER 702.

For these reasons, Dr. Loftus should have been allowed to testify. Instead of "carefully consider[ing] the proposed testimony, the trial court dismissed it as "nonsense." RP (6/27/11) 40-42; *Cheatam,* 150 Wn.2d at 649. The exclusion of this evidence prejudiced Mr. Strickland: without expert testimony, jurors were left with their common-sense understanding that confidence necessarily correlates with accuracy in eyewitness testimony—an idea that has been discredited by scientific studies. Ex. 1.

[22] ER 401.

Given the Supreme Court's broad definition of "helpfulness," the evidence should have been admitted. *Philippides,* 151 Wn.2d at 393. By excluding relevant and admissible evidence, the trial court violated Mr. Strickland's right to present a defense. U.S. Const. Amend. XIV; *Holmes,* 547 U.S. 319. His convictions must be reversed and the case remanded for a new trial, with instructions to permit Dr. Loftus to testify on Mr. Strickland's behalf. ER 401, ER 402, ER 702; *Philippides,* 151 Wn.2d 376; *Cheatam,* 150 Wn.2d at 649.

C. The court's decision denying Mr. Strickland's request for a continuance infringed his constitutional right to present a defense.

As noted above, trial continuances are governed by CrR 3.3: the court "may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). Failure to grant a continuance may deprive a defendant of a fair trial. *State v. Purdom*, 106 Wn.2d 745, 725 P.2d 622 (1986); *see also United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985). Furthermore, "the defendant's rights must not be overlooked...through overemphasis upon efficiency and conservation of the time of the court." *State v. Watson*, 69 Wn.2d 645, 651, 419 P.2d 789 (1966).

Factors relevant to the trial court's decision on a continuance motion include the moving party's diligence, due process considerations, the need for orderly procedure, the possible impact on the trial, whether prior continuances have been granted, and whether the purpose was to delay the proceedings. *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998); *State v. Early*, 70 Wn. App. 452, 458, 853 P.2d 964 (1993).

For example, in *Flynt,* the defendant sought a continuance to enable him to

consult with a psychiatrist in anticipation of presenting a diminished capacity defense to a contempt charge. *Flynt,* 756 F.2d at 1356. The trial court refused the request, and the case proceeded to hearing without expert testimony. *Flynt,* 756 F.2d at 1356-1357. The 9th Circuit Court of Appeals reversed the convictions, finding that

> Flynt's only defense... was that he lacked the requisite mental capacity. The district court's denial of a continuance... effectively foreclosed Flynt from presenting that defense.

Flynt, 756 F.2d at 1358.

Similarly, in this case, the trial court's refusal to grant a continuance prevented Mr. Strickland from presenting his only possible defense: that witnesses who testified he was the shooter were likely mistaken. Furthermore, the factors outlined above weighed in favor of granting the continuance.

Diligence. Defense counsel had consulted with Dr. Loftus in advance, and was still awaiting a report at the time the continuance request was made. The judge did not reject the continuance request because it was untimely; instead, the court believed that the proposed testimony would be "nonsense." RP (6/27/11) 40-42. While it may have been preferable for counsel to have retained Dr. Loftus earlier, this should not be held against Mr. Strickland.

Due process. Mr. Strickland's only defense hinged on whether or not the jury believed the testimony of those witnesses who claimed he, not Kerby, was the shooter. Given the confidence those witnesses expressed, Dr. Loftus's testimony would have provided important ammunition for the defense to argue that those witnesses were mistaken. Accordingly, due process considerations supported the requested postponement.

Orderly procedure. The motion was made before the start of trial, and Mr. Strickland was willing to waive his right to a speedy trial.[23] RP (6/27/11) 36. The state raised no objection to a continuance; instead, the prosecutor argued only that the evidence sought was unnecessary. RP (6/27/11) 38-39. Accordingly, the continuance would have interfered only minimally with the need for orderly procedure.

Prior continuances. The trial date had previously been reset only once, at the state's request. RP (4/4/11) 14.

Impact on trial. The evidence sought would have had a significant impact on the trial. If Mr. Strickland had been permitted the time necessary to secure the attendance of Dr. Loftus at trial, he would have been able to cast significant doubt on the testimony of those witnesses who claimed that he personally had fired the shots. Because there was no additional evidence suggesting Mr. Strickland acted in concert with Kerby, he could not have been convicted as an accomplice. Thus, Dr. Loftus's testimony would have provided a complete defense to the charge.

Effort to delay. There was no indication that the continuance was sought in order to merely delay the trial. As counsel indicated, he had consulted with Dr. Loftus, but had not yet received a written report, and would not have been able to secure his attendance at trial without a short continuance. Given the gravity of the offenses—felonies carrying the possibility of significant

[23] Furthermore, Kerby had apparently sought to waive his right to a jury; thus, the two cases could have been tried separately, with Kerby submitting his case to the bench. *See* CP 47-48; RP (6/27/11) 36; RP (6/29/11) 141. Even if a joint trial were considered necessary, a continuance could have been granted over Kerby's objection without violating his right to a speedy trial. *See State v. Dent*, 123 Wn. 2d 467, 484-85, 869 P.2d 392 (1994).

confinement in prison—the continuance request was not unreasonable.

The denial of the continuance prevented Mr. Strickland from presenting his only possible defense to the charge. As in *Flynt,* the trial court's decision prejudiced Mr. Strickland. *Flynt,* 756 F.2d at 1358; *see also State v. Poulsen,* 45 Wn. App. 706, 711, 726 P.2d 1036 (1986). The conviction must be reversed and remanded for a new trial. *Flynt,* 756 F.2d at 1358.

IV. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE THE CONVICTIONS FOR INSUFFICIENT EVIDENCE.

A. The prosecution must prove each element beyond a reasonable doubt.

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction based on insufficient evidence must be reversed and dismissed with prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The jury cannot be instructed on "a theory for which there is insufficient evidence." *State v. Berube,* 150 Wn.2d 498, 510-11, 79 P.3d 1144 (2003).[24] Evidence is insufficient unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel,* 166 Wn.2d at 576.

To convict Mr. Strickland as an accomplice, the prosecution was required to establish that he aided or agreed to aid Kerby in planning or committing each assault, and that he acted with knowledge that his participation would

[24] *See also State v. Clausing,* 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002) ("It is prejudicial error to submit an issue to the jury that is not warranted by the evidence.")

promote or facilitate the assaults. RCW 9A.08.020.

B. The prosecution did not prove the elements of accomplice liability.

Two different versions of the shooting emerged at trial. In one, Mr. Strickland obtained the gun from Kerby and shot the two men himself. In the other, Kerby brought the gun to the bar and shot Ivy and Savage in Mr. Strickland's presence, but without his involvement. RP (6/28/11) 40, 98; RP (6/29/11) 365-367; RP (6/30/11) 409-410, 425.

When taken in a light most favorable to the prosecution, this evidence was insufficient to prove accomplice liability (even though it might have been sufficient to prove Mr. Strickland's guilt as a principal). This is so because "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." WPIC 10.51. If Mr. Strickland was not the shooter, then he was guilty of no more than being present when Kerby shot Ivy and Savage. Thus, the evidence was insufficient to prove accomplice liability.

It was error to instruct the jury on accomplice liability as to Mr. Strickland. His convictions must be reversed. *Smalis,* 476 U.S. at 144. Upon retrial, the prosecution may not pursue a theory of accomplice liability. *Id.*

C. The Supreme Court should accept review, reverse the convictions, and prohibit retrial on an accomplice theory.

The jury did not return special verdicts on Mr. Strickland's mode of participating in the crime. This makes it impossible to tell whether Mr. Strickland's convictions rested on a finding of guilt as a principal or an accomplice. Because the evidence was insufficient to prove accomplice

liability, the convictions must be reversed, and the case remanded for a new trial. Upon retrial, the state may not proceed on a theory of accomplice liability.

V. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE TRIAL COURT ERRED BY DENYING MR. STRICKLAND'S SEVERANCE MOTION.

A. The court should have severed the defendants' trials because sanitizing Kerby's statement did not "eliminate any prejudice."

Court rules are interpreted with reference to principles of statutory construction. *City of Seattle v. Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010). Interpretation starts with the plain language of the rule. *Id.* If the plain language is subject to only one interpretation, the inquiry ends, "because plain language does not require construction." *Id.*

Under CrR 4.4(c), a motion to sever "*shall* be granted" unless sanitizing a nontestifying codefendant's statement "will eliminate *any* prejudice." CrR 4.4 (emphasis added). Under the rule's plain language, the admission of a nontestifying codefendant's statement requires severance unless "any prejudice" can be eliminated by deleting references to the defendant. This rule thus provides greater protection than the Sixth Amendment's confrontation clause. *Cf. Bruton,*391 U.S. 123. Denial of a motion to sever is reviewed for abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012).

Here, Mr. Strickland sought severance from Kerby, and the state agreed to delete from Kerby's statements all references to Mr. Strickland. These deletions may have mitigated the prejudice against Mr. Strickland; however, they did not eliminate it. Instead, jurors were free to consider Kerby's statement that he did not pull the trigger as proof that Mr. Strickland did.

Severance should have been granted under CrR 4.4(c). Accordingly, Mr. Strickland's convictions must be reversed and the case remanded for a new trial. CrR 4.4(c).

B. Severance should have been granted under CrR 4.4(c) because Kerby and Mr. Strickland presented mutually antagonistic defenses.

Defense are mutually antagonistic if they "depend on propositions that cannot both be true." *Emery*, 174 Wn.2d at ___. If codefendants with mutually antagonistic defenses are tried together, reversal is required upon a showing of prejudice. *Id.* Kerby's defense was that he did not pull the trigger, while Mr. Strickland's was that Kerby *did* pull the trigger. These propositions cannot both be true; the two defenses were antagonistic and mutually exclusive. *Id.*

Reversal is required because Mr. Strickland was prejudiced by the court's failure to grant his motion for severance. *Id.* Unlike the defendant in *Emery,* the prosecutor's case against Mr. Strickland was not strong: of the numerous witnesses present, none claimed in their initial statements that Mr. Strickland was the shooter. And only two witnesses, Savage and Ivy, later concluded that Mr. Strickland fired the gun, while Crissman testified it was Kerby. RP (6/28/11) 40, 47, 62, 98, 150; RP (6/29/11) 366; RP (6/30/11) 425-426. Further, the trial court failed to instruct jurors that Kerby's statement could not be used against Mr. Strickland.[25] CP 53-72; *cf. Emery,* 174 Wn.2d at ___. Finally, Kerby's statement that he did not pull the trigger would not have been admissible against Mr. Strickland if the trials had been severed, as it would have violated *Crawford. Cf. Emery,* 174 Wn.2d at ___.

[25] The court did instruct jurors to decide each defendant's case separately; however, jurors could not accept both Kerby's position (that he did not pull the trigger) and Mr. Strickland's position (that Kerby did pull the trigger). CP 55-56.

The trial judge should have recognized that Kerby's and Mr. Strickland's defenses were mutually antagonistic. *Id.* The court's failure to grant Mr. Strickland's severance motion requires reversal. *Id.*

VI. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT MR. STRICKLAND WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. An accused person is entitled to effective defense counsel.

The Sixth Amendment guarantees the right to the effective assistance of counsel. U.S. Const. Amend. VI, XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Wash. Const. art. I, § 22 affords similar protection. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) defense counsel's conduct was deficient, in that it fell below an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately, but it is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach,* 153 Wn.2d at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy.[26]

[26] *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's

Continued

These are guidelines only, not "mechanical rules." *Strickland,* 466 U.S. at 696. Instead, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* In every case, the court must consider whether the result is unreliable because of a breakdown in the adversarial process. *Id.* An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. Defense counsel failed to timely consult with Dr. Loftus.

To be effective, counsel must conduct an adequate investigation. *State v. A.N.J.*, 168 Wn.2d 91, 110-112, 225 P.3d 956 (2010). This requires counsel to consult with experts, where appropriate. *Id,* at 112.

Here, the primary issue at trial was the shooter's identity. The prosecution had little (if any) evidence that Mr. Strickland was involved as an accomplice; absent proof that he personally shot Ivy and Savage, he would have been acquitted. Mr. Strickland's strategy at trial involved pointing to Kerby as the shooter. Only the testimony of Ivy and Savage implicated Mr. Strickland rather than Kerby. RP (6/28/11) 40, 160. Ultimately, defense counsel sought the assistance of Dr. Loftus, who would have helped to cast doubt on Savage's confident identification of Mr. Strickland as the shooter.

However, instead of contacting Dr. Loftus during the first few weeks of the case, defense counsel apparently delayed, and did not even obtain an order

---

argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

authorizing consultation at public expense until after trial had been completed. In this belated motion, counsel indicates that "this was an emergency situation," but does not explain the delay. It appears that counsel hoped to get a continuance to enable him to consult with Dr. Loftus; when the continuance request was denied, Mr. Strickland was left without the option of presenting the expert testimony. CP 96-97, 186-188. Had defense counsel timely consulted with Dr. Loftus, he would have been able to present the court with the doctor's expert report. Information in the report suggests that the proffered testimony should have been admitted at trial: it was based on theories generally accepted in the scientific community, and it explained the relationship between eyewitness confidence and accuracy. Ex 1; *see* ER 702.

At trial, Crissman testified that Kerby was the shooter, Ivy and Savage testified that Mr. Strickland was the shooter, and several more saw the confrontation but did not know who had been the shooter. RP (6/28/11) 40, 160, 229-231, 272; RP (6/29/11) 365-366; RP (6/30/11) 530. This balance would have been altered if counsel had timely consulted with Dr. Loftus and secured his attendance at trial. Dr. Loftus's testimony would have explained to the jury how Ivy and Savage could be confident and yet wrong about which person pulled the trigger. Ex. 1.

Counsel's error prejudiced Mr. Strickland. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Reichenbach,* 153 Wn.2d at 130.

C. Defense counsel unreasonably failed to raise a clear objection to Kerby's testimonial statements and to request instructions prohibiting jurors from using those statements against Mr. Strickland.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (Saunders II).

Here, defense counsel should have made a clear objection[27] to the admission of Kerby's statements to Detectives Green and Laur, and sought an instruction prohibiting jurors from considering those statements against Mr. Strickland. Even if defense counsel wished to have the statements in evidence (to suggest that Kerby fired the gun), no reason justified allowing the testimony to be used as substantive evidence against Mr. Strickland.

The statements were testimonial hearsay; thus an objection would likely have been sustained and the required instruction given. *See Crawford,* 541 U.S. at 52; *State v. Vincent*, 131 Wn. App. 147, 120 P.3d 120 (2005). Had the evidence been excluded (or the jury instructed not to consider the statements against Mr. Strickland), there is a reasonable probability that the outcome of trial would have been different. Kerby admitted that he had a gun, and told police that he was not the shooter. RP (6/30/11) 582. The obvious inference to be drawn from his statement was that Mr. Strickland fired the gun. Absent Kerby's statements, the jury would have been left with the conflicting

[27] Prior to trial, counsel's objections and argument relating to Kerby's statements were unclear at best.

accounts of the eyewitnesses (one of whom testified that Kerby fired the gun) and the physical evidence of the bullet's trajectory (which suggested that a tall person—Kerby—shot Ivy). Under these circumstances, it is likely that at least some jurors would have voted to acquit.

Counsel's failure to object and seek a proper instruction fellow below an objective standard of reasonableness. *Reichenbach,* 153 Wn.2d at 130. The error prejudiced Mr. Strickland, and deprived him of the effective assistance of counsel. *Saunders* II, 91 Wn. App. at 578. His convictions must be reversed, and the case remanded for a new trial. *Id.*

D. Defense counsel was ineffective for failing to object to instructions allowing conviction under a theory of accomplice liability.

It is error to instruct on a theory for which there is insufficient evidence. *Berube*, 150 Wn.2d at 510-11; *Clausing*, 147 Wn.2d at 626-27. Here, the evidence suggested either that Mr. Strickland was the shooter or that he was merely present (as a bystander) when Kerby fired the gun. Under these circumstances, defense counsel should have objected to the instructions on accomplice liability as they pertained to Mr. Strickland.

Had defense counsel objected, the instruction would not have been given, and there is a reasonable probability that the outcome of trial would have differed.[28] Because the jury was given the option of convicting Mr. Strickland as an accomplice (even in the absence of sufficient evidence), it is likely that at least some jurors voted to convict on the theory that he was present and approved of Kerby's decision to shoot.

[28] Accomplice instructions were, however, appropriate for Kerby, on the state's theory that he provided the gun to Mr. Strickland, who fired.

Mr. Strickland was denied his right to the effective assistance of counsel. *Reichenbach,* 153 Wn.2d at 130. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Id.*

VII. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE TRIAL JUDGE VIOLATED THE "APPEARANCE OF FAIRNESS" DOCTRINE AND THEREBY INFRINGED MR. STRICKLAND'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Due process secures the right to a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). Indeed, "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (quoting *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954)). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). "The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." *Id.,* at 70; *Brister v. Tacoma City Council*, 27 Wn. App. 474, 486, 619 P.2d 982 (1980), *review denied*, 95 Wn.2d 1006 (1981).

A decision may be challenged under the appearance of fairness doctrine for "partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party..." *Buell v. City of Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972), *quoted with approval in OPAL v. Adams County*, 128 Wn.2d 869, 890, 913 P2d. 793 (1996). To prevail, a claimant must only provide "some evidence of the judge's... actual or potential bias." *State v. Dugan,* 96 Wn. App. 346, 354, 979 P.2d 85 (1999). The appearance of fair-

ness doctrine can be violated without any question as to the judge's integrity. *See, e.g., Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966).

In this case, the trial judge made comments providing "some evidence" of a potential for bias. First, he described the expert testimony proffered by counsel as "nonsense," and asserted that he didn't "need to listen to this nonsense..." RP (6/27/11) 40-42. He questioned defense counsel's competence and implied that counsel was dishonestly raising a "litany" of issues in an effort to manufacture a reason to sever the cases. RP (6/27/11) 42. Finally, he criticized counsel in front of the jury for his "foolish" request (for permission to move an easel). RP (6/30/11) 419.

The judge's conduct showed at least "some evidence" of potential bias. *Dugan,* 96 Wn. App. at 354. Accordingly, Mr. Strickland's convictions must be reversed and the case remanded for a new trial. *Id.*

VIII. THE SUPREME COURT SHOULD ACCEPT REVIEW AND IMPOSE A LIMITING CONSTRUCTION ON THE ACCOMPLICE LIABILITY STATUTE, BECAUSE THE PREVAILING INTERPRETATION VIOLATES THE FIRST AMENDMENT.

Speech advocating criminal activity may only be punished if it "is directed to inciting or producing imminent lawless action..." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969). This standard requires proof of *intent*; knowledge is insufficient. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). In addition, *Brandenburg* requires proof that speech "is likely to incite or produce such [imminent lawless] action." *Brandenburg,* 395 U.S. at 447.

A statute is overbroad if it sweeps within its prohibitions a substantial

amount of constitutionally protected speech.[29] *State v. Immelt*, 173 Wn.2d 1, 267 P.3d 305 (2011). The prevailing interpretation of Washington's accomplice liability statute violates the requirements of *Brandenburg*. As currently interpreted, the statute is overbroad.

Accomplice liability can attach when a person provides "aid" by means of "words" or "encouragement." RCW 9A.08.020; WPIC 10.51. The only limitation on this criminalization of pure speech requires proof that the person acted "[w]ith knowledge that [the aid] will promote or facilitate the commission of the crime." RCW 9A.08.020.

Liability does not require proof of intent; nor does it require proof of the likelihood of imminent lawless action. *Brandenburg*, 395 U.S. at 447-449. Accordingly, the statute (as currently interpreted) violates *Brandenburg*.

The Court of Appeals erroneously upheld the prevailing interpretation of RCW 9A.08.020 based on a misreading of *Brandenburg*. The court apparently believed that *Brandenburg* requires only proof of knowledge. Opinion, p. 7 (The statute "has been construed to apply solely when the accomplice acts *with knowledge* of the specific crime that is eventually charged...") (emphasis

[29] Anyone accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Immelt*, 173 Wn.2d 1. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Immelt*, 173 Wn.2d 1. In other words, "[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds." *City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991). The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003). Instead of applying the general rule for facial challenges, "[t]he Supreme Court has 'provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.'" *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005) (quoting *Hicks*, 539 U.S. at 119); *see also Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3rd Cir. 2006).

added). This is incorrect. Under *Brandenburg,* speech may not be criminalized unless it is actually "*directed to* inciting or producing imminent lawless action." *Brandenburg,* 395 U.S. at 447 (emphasis added). A person's speech is not "directed to inciting or producing imminent lawless action" if it is made with mere knowledge that such action might result.

The Court of Appeals ignored the second requirement of *Brandenburg.* To obtain a conviction, the prosecution must prove speech is "*likely* to incite or produce [imminent lawless] action." *Id.* (emphasis added).

Brandenburg requires proof of intent and likelihood. *Id.* The accomplice liability statute (as currently interpreted) requires neither. The Court of Appeals decision cannot stand.[30] The Supreme Court should accept review and construe RCW 9A.08.020 in a manner that comports with the First Amendment. The Court of Appeals decision upholding the prevailing interpretation conflicts with *Brandenburg.* Furthermore, this Petition raises a significant question of constitutional law that is of substantial public interest. RAP 13.4(b)(1), (3) and (4).

IX. IF THE SUPREME COURT REINSTATES MR. STRICKLAND'S CONVICTIONS, IT MUST VACATE HIS SENTENCE BECAUSE THE SENTENCING COURT FAILED TO PROPERLY DETERMINE HIS OFFENDER SCORE AND STANDARD RANGE.

A. The prosecution produced insufficient evidence to prove that Mr. Strickland had an offender score of eight.

At sentencing, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the

[30] Divisions I and II have also upheld the prevailing interpretation of RCW 9A.08.020. *State v. Coleman,* 155 Wn. App. 951, 231 P.3d 212 (2010), *review denied,* 170 Wn.2d 1016, 245 P.3d 772 (2011); *State v. Ferguson,* 164 Wn. App. 370, 264 P.3d 575 (2011).

convictions it has found to exist." RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

A criminal defendant has a constitutional privilege against self-incrimination, which includes a constitutional right to remain silent pending sentencing. U.S. Const. Amend. V; U.S. Const. Amend. XIV, *Mitchell v. United States,* 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); *Estelle v. Smith,* 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from silence pending sentencing. *Mitchell*, 526 U.S.at 328-329.

The prosecution bears the burden of proving any prior convictions. *In re Detention of Post*, 145 Wn. App. 728, 758, 187 P.3d 803 (2008); *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); *State v. Knippling*, 166 Wn.2d 93, 206 P.3d 332 (2009). If the offender objects to the sufficiency of the evidence, the state is held to the existing record on remand. *In re Cadwallader*, 155 Wn.2d 867, 878, 123 P.3d 456 (2005).

At sentencing, Mr. Strickland disputed nine of the ten felony charges alleged by the prosecution. *See* CP 80-85, 98-99. He noted numerous problems with the materials provided by the prosecution, including the absence of the defendant's signature on one Judgment and Sentence, discrepancies in the recitation of criminal history, and lack of proof that he was the same person named in each document. CP 98-99. Defense counsel argued that some of the prior convictions were not Mr. Strickland's, noting Mr. Strickland's brother had previously used his name. RP (7/25/11) 63-64,

69.

Despite the problems with the documentary evidence and the defense objections, the prosecutor did not present additional proof of the validity of each prior conviction. *See* RP (7/25/11) *generally.* Nor did the prosecutor present evidence proving that the person named in each document was the same person before the court. *See* RP (7/25/11).

In light of this failure of proof, Mr. Strickland's sentence must be vacated. The case must be remanded for resentencing with an offender score of zero.[31] *Cadwallader,* 155 Wn.2d at 878.

B. The sentencing court failed to determine whether or not any of Mr. Strickland's prior convictions comprised the same criminal conduct.

A sentencing court is required to analyze multiple prior convictions to determine whether or not they are based on the "same criminal conduct." RCW 9.94A.525. The burden is on the defense to establish that multiple convictions stem from the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

The analysis requires examination of the extent to which the offender's criminal intent, objectively viewed, changed from one crime to the next. *State v. Haddock*, 141 Wn.2d 103, 113, 3 P.3d 733 (2000); *see also State v. Anderson*, 72 Wn. App. 453, 464, 864 P.2d 1001 (1994) (Anderson II). Sometimes this necessitates determination of whether one crime furthered

[31] The only prior conviction Mr. Strickland did not dispute was a 1996 juvenile conviction from Skagit County, which scored only half a point, yielding an offender score of zero.

another. *Haddock,* 141 Wn.2d at 114. A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter,* 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

The sentencing court is bound by prior determinations that multiple offenses comprise the same criminal conduct. RCW 9.94A.525(a)(i). However, in the case of multiple offenses not previously found to be the same criminal conduct, the sentencing court *must* exercise its discretion and decide whether multiple prior offenses should count separately or together. *State v. Mehaffey,* 125 Wn. App. 595, 600-01, 105 P.3d 447 (2005).

The court here failed to make the required determination for two pairs of Mr. Strickland's prior convictions. First, Mr. Strickland was convicted as a juvenile of Taking a Motor Vehicle Without the Owner's Permission (TMVOP) and Attempting to Elude. CP 83, 181-182. The two offenses were sentenced on the same date under the same cause number. This suggests that they involved a single criminal episode, consisting of a car theft followed by a police chase. The prosecution did nothing to rebut this. RP (7/25/11).

Second, Mr. Strickland was later convicted as an adult of the same two crimes. CP 83. The offenses were both committed on the same day, and (as with the 1995 juvenile offenses) were sentenced under a single cause number on the same date. CP 153-157. Again, the record strongly suggests the two crimes involved a single criminal episode. The prosecution did nothing to rebut this. RP (7/25/11). Defense counsel specifically noted a "question of sa[m]e criminal activity." CP 98-99.

Because the record suggests these offense pairs scored separately, they

should have scored as the same criminal conduct. This would reduce Mr. Strickland's offender score by 1.5 points. Accordingly, the sentence must be vacated and the case remanded for resentencing with a corrected offender score. *Cadwallader,* 155 Wn.2d at 878. The state must be held to the existing record on remand. *Id.*

CONCLUSION

Petitioner has failed to provide a proper basis for review. This Court should deny the Petition. If review is accepted, this Court should also review additional issues raised by Mr. Strickland. The court should dismiss the charges, or, in the alternative, remand the case for a new trial. If the court accepts review and reinstates Mr. Strickland's convictions, it must vacate the sentence and remand for resentencing with a corrected offender score.

Mr. Strickland's arguments address significant constitutional issues that are of substantial public interest. In addition, Mr. Strickland's accomplice liability challenge highlights a conflict between the Court of Appeals decision and the U.S. Supreme Court's decision in *Brandenburg.* The Supreme Court should accept review. RAP 13.4(b)(1), (3), and (4).

Respectfully submitted on June 4, 2014.

BACKLUND AND MISTRY

Jodi R. Backlund, No. 22917
Attorney for the Appellant

Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of this Amended Answer to the State's Petition postage pre-paid, to:

Jeffrey Strickland, DOC #788803
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

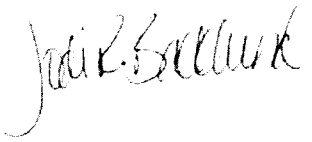
And I sent an electronic copy, via email, to:

Grays Harbor County Prosecuting Attorney
gfuller@co.grays-harbor.wa.us

I filed the Appellant's Amended Answer electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 4, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, June 04, 2014 11:17 AM
To: 'Backlund & Mistry'; Gfuller@co.grays-harbor.wa.us
Subject: RE: 90240-2-State v. Jeffrey Strickland-Amended Answer to Petition

Rec'd 6-4-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----
From: Backlund & Mistry [mailto:backlundmistry@gmail.com]
Sent: Wednesday, June 04, 2014 11:13 AM
To: OFFICE RECEPTIONIST, CLERK; Gfuller@co.grays-harbor.wa.us
Subject: 90240-2-State v. Jeffrey Strickland-Amended Answer to Petition

Attached is the Amended Answer to Petition

Thank you.

--
Backlund & Mistry
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870