Supreme Court No. 91873-2
No. 45488-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON CAMPBELL,

Petitioner.

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

PETITION FOR REVIEW

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FILED IN COA ON JULY 2, 2015

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A. IDENTITY OF PETITIONER

Jason Campbell was the appellant below in Court of Appeals No. 45488-2-II, decided June 4, 2015. (decision attached).

B. COURT OF APPEALS DECISION

Mr. Campbell seeks review under RAP 13.4(b)(1) and (2) of the Court of Appeals decision affirming his judgment on bail jumping counts by ruling that the trial court did not violate his right to control his defense under State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013), or violate his right to counsel and Due Process, by forcing him to accept an affirmative defense jury instruction over his objection.

C. ISSUES PRESENTED ON REVIEW

1. On charges of two counts of bail jumping, did the trial court violate Mr. Campbell's Sixth Amendment and Article 1, section 22 right to control his own defense, by instructing the jury on the affirmative defense?

3. Did the court also violate Mr. Campbell's Sixth Amendment and Wash. Const. art. 1, § 22 right to counsel and his Due Process rights under the Fourteenth Amendment and Wash. Const. art. 1, § 3, requiring automatic reversal?

D. STATEMENT OF THE CASE

1. Charging. When Jason Campbell refused to plead guilty to trafficking charges of selling some stolen tires, the prosecutor added two additional counts, for bail jumping under RCW 9A.76.170, based on Jason having arrived late to two Kitsap court hearings earlier in the pendency of the case, on January 28 and February 4, 2013. 10/9/13RP at 222-23; CP 18-21 (amended information).

2. Trial. At trial, as to the bail jumping, Mr. Campbell told the jury about how he had no telephone no car and no license; what he did do was carefully and diligently arrange for car rides to court for January 28, and then for February 4, 2013. When these people did not arrive, he begged a ride or walked all the way to the Kitsap court, arriving both times as court was ending.[1] 10/8/13RP at 151-55.

Mr. Campbell objected to the court instructing the jury on the affirmative defense of Uncontrollable Circumstances, a statutory necessity defense to bail jumping that admits proof of the elements of the crime, and which a defendant must prove by a

[1] The record indicates that Mr. Campbell was able to have the bench warrants issued upon each "Failure to Appear" quickly quashed. Docket in 13-1-00077-4 (entries of 1/28/13 to 2/6/13).

preponderance of the evidence. 10/9/13RP at 148-50; 10/9/13RP at 221-22, 227-28.

Following the jury verdict of guilty on the lesser offense of second degree trafficking, and on the two charges of bail jumping, Mr. Campbell was sentenced to standard range terms on the convictions. CP 53-64.

Mr. Campbell timely appealed. CP 65. The Court of Appeals described the procedural facts as involving a defendant who made a choice to testify in which he expressly forewent any possible or future objection to the trial judge setting the form his defense to the criminal case would take, and that his lawyer could argue, and incorrectly ruled that the circumstances below, however characterized, did not violate Mr. Campbell's right to control his defense. Decision, at pp. 9-10. Review is sought.

E. ARGUMENT

THE TRIAL COURT VIOLATED MR. CAMPBELL'S RIGHT TO CONTROL HIS DEFENSE UNDER STATE V. LYNCH, 178 WN.2D 487, 309 P.3D 482 (2013), AND HIS RIGHT TO COUNSEL UNDER HERRING V. UNITED STATES.

1. Review is warranted. Review is warranted under RAP 13.4(b) where the Court of Appeals misapplied this Court's State v.

Lynch decision, discussed at length infra, and misapplied another case when it employed State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012),[2] review denied, 176 Wn.2d 215 (2013), to hold that the affirmative "uncontrollable circumstances" defense-to-bail-jumping instruction had to be given by the court over defense objection since Mr. Campbell testified about his reasons for being late to court, where the case merely states that jury instructions must not be misleading or make the relevant legal standard clear, a matter not disputed in the present case. RAP 13.4(b)(1); RAP 13.4(b)(2).

2. The court instructed the jury on the affirmative defense of Uncontrollable Circumstances over Mr. Campbell's objection. Mr. Campbell was charged with bail jumping for failing to be on time to court hearings in the present case where he had been told to arrive at court at 10:30 a.m. (January 28, 2013 court date, Count 2), and at 10:30 a.m. on a subsequent date (February 4, 2013 court date, Count 3). CP 18 (amended information).

At trial, the State brought forth a criminal division supervisor of the Kitsap County Court who attested that Mr. Campbell was

[2] McCreven merely noted that jury instructions must be accurate and ruled that the self-defense instruction in that case was not. McCreven, 170 Wn. App. at 461-62.

supposed to arrive at court at the designated time(s) of day, and summoned a court clerk to relate to the jury that Mr. Campbell did not timely arrive at said hearing(s), along with sheafs of documentary exhibits from Kitsap County Superior Court cause no. 13-1-000777-4. 10/8/13RP at 112-23, 10/18/13RP at 123-35; (Exhibit list) (exhibit 5A) (exhibit 5B) (exhibit 5C), (exhibit 6A (with attachments) [redacted]) (exhibit 6C), (exhibit 6D), (exhibit 6E).

Bail jumping requires that the State prove to the jury beyond a reasonable doubt that the accused was released on a pending charge, and knowingly failed to subsequently appear as required. RCW 9A.76.170.[3]

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[3] RCW 9A.76.170, the bail jumping statute, provides as follows:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.
>
> (2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.
>
> (3) Bail jumping is:
>
> (a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

Following the State's thorough mounting of its prosecution case for bail jumping, the defense sought to introduce Mr. Campbell's testimony that he had carefully arranged for car rides to court from his home in the Dyes Inlet area. 10/8/13RP at 138-49. Mr. Campbell did not have a telephone,[4] a vehicle, or a driver's license, but he had spoken with friends who said they would come by and drive him to court on January 28. On the appointed morning, they did not arrive. Mr. Campbell walked to his old elementary school and persuaded a former teacher to drive him to the court. 10/8/13RP at 137-40. Unfortunately, he arrived at room 212 of the Superior Court as everybody was filing out for lunch. 10/8/13RP at 137-38.

Mr. Campbell realized that "this can't happen again after I quashed the warrant." 10/8/13RP at 141. For the February 4 court date, Mr. Campbell arranged with his mother that she would come

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> (b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;
>
> (c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;
>
> (d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

RCW 9A.76.170.

[4] David Hogdgon confirmed that Mr. Campbell did not have a telephone. 10/8/13RP at 104.

to his house early and drive him to court; she did not arrive. He learned later that an employee at the tavern where his mother worked had not shown up to open the establishment, and she had been obligated to remain at her job. 10/8/13RP at 141-42. Mr. Campbell walked all the way to the court. He arrived as court was ending, and told the bail study clerk he was late, but she told him "there was nothing they could do." 10/8/13RP at 141. Mr. Campbell did not have money for a taxi (or a phone, in any event), and waiting for the infrequent local bus would have caused him to arrive at court even later than by walking. 10/8/13RP at 141.

Following the defense offer of proof and Mr. Campbell's argument that he was entitled to present relevant testimony for the jury to accept or reject, the trial court allowed portions of this testimony to be heard by the jury. 10/8/13RP at 141-50; see 10/8/13RP at 151-55.

Later, when jury instructions were discussed, the prosecutor again argued that Mr. Campbell must accept the affirmative defense of Uncontrollable Circumstances. 10/9/13RP at 221-

Mr. Campbell renewed his earlier objection to the jury being instructed on this affirmative defense; however, the trial court ruled it would give the instruction because it had earlier allowed the

testimony about Mr. Campbell's rides to court not showing up. Mr. Campbell took exception, which the court noted. 10/9/13RP at 221-22, 227-28. The court therefore gave Instruction 18:

> It is a defense to the charge of Bail Jumping that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.
>
> An "uncontrollable circumstance" means an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.
>
> This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the Defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 46 (Instruction 18).

3. **Forcing an affirmative defense on Mr. Campbell violated his right to control his defense to the charges, protected by the Sixth Amendment.** Instructing the jury on an affirmative defense over the defendant's objection violates the

accused's constitutional right to control his defense. U.S. Const. amends 6, 14; Wash. Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013).[5]

Here, specifically, forcing the defense of Uncontrollable Circumstances on Mr. Campbell was inconsistent with his desired trial strategy of raising reasonable doubt. During argument on the admissibility of Mr. Campbell's testimony about the efforts he made to appear for the two hearings, the prosecutor – ultimately successfully -- contended that the defense would have to shoulder the preponderance burden of proving this affirmative defense, "Uncontrollable Circumstances." 10/8/13RP at 142-49. Defense counsel emphasized that Mr. Campbell was not pursuing any such defense and made clear to the court that the accused was not asking for any such jury instruction or burden, but wished to argue for reasonable doubt acquittal. 10/8/13RP at 148-50.

Rejecting those arguments and instructing the jury in the objected-to manner was error. Implicit in the Sixth Amendment is the criminal defendant's right to control his defense. Faretta v.

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[5] The Court of Appeals reviews alleged constitutional violations *de novo*. State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012) (citing State v. Vance, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010)).

California, 422 U.S. at 819-21; State v. Lynch, 178 Wn.2d at 491-93; State v. Jones, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983) (Faretta embodies the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount).

The Washington courts have recognized that a defendant's right to control his defense is necessary "to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy." State v. Coristine, 177 Wn.2d 370, 376, 300 P.3d 400 (2013); Wash. Const. art. 1, § 22.

Therefore, "[i]nstructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense." Lynch, 178 Wn.2d at 491; Coristine, 177 Wn.2d at 375; see also, e.g., State v. McSorley, 128 Wn. App. 598, 605, 116 P.3d 431 (2005) (trial court violated defendant's right to control his defense by instructing the jury on an affirmative defense to the crime of child luring over defendant's objection); Jones, 99 Wn.2d at 739 (trial court violated defendant's right to control his defense by forcing defendant to argue the insanity defense).

The trial court violated Jason Campbell's right to control his defense by instructing the jury on the affirmative defense of Uncontrollable Circumstances over his objection.

The Court of Appeals erred in reasoning that Mr. Campbell was told by the trial court during the evidence phase that the jury would be instructed on the affirmative defense of uncontrollable circumstances, if Campbell insisted on testifying about his failed arrangements for getting rides to the courthouse. Nothing in Lynch or McCreven, supra, holds that a defendant introduces evidence that is putatively or arguably relevant and pertinent to a matter (here, evidence of the ride arrangements), that such defendant has thereafter forever bound himself to accept an affirmative defense associated with such evidence. The Court essentially held that Mr. Campbell was estopped from later objecting when the affirmative defense was forced upon him over his protest that this was not how he wished to defend the case.

This is what happened in State v. Lynch, and precisely what was disapproved of. There, the defendant introduced evidence that arguably cast doubt on the "forcible compulsion" element of his rape charge. The trial court then instructed the jury on the affirmative defense of consent over objection that the chosen

defense strategy was doubt as to whether the State had met its burden to prove the crime, not the defense that the defendant would affirmatively prove consent by a preponderance. State v. Lynch, 178 Wn.2d at 492-93. The Lynch Court reversed because forcing the defense to be saddled with a defense that was not its defense violated the Sixth Amendment. Lynch, 178 Wn.2d at 493-94. The Court specifically rejected the State's argument that the defendant had to accept the defense since he had introduced evidence that might be considered as going to it. Lynch, 178 Wn.2d at 493-94.

The crux of the decision was that the defendant has a right to autonomy in deciding what the defense will be at trial. Lynch, 178 Wn.2d at 492 ("Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense"). And the Court relied on State v. Coristine, 177 Wn.2d 370, 376, 300 P.3d 400 (2013), where the court improperly instructed the jury on the affirmative defense of reasonable belief and the State argued that the defendant had to accept this defense since he had introduced evidence.

> The State argues that the consent instruction was justified because Lynch introduced evidence that T.S. consented. But in Coristine, we rejected a similar argument made by the State that evidence presented by Coristine bolstering his case somehow justified instructing the jury on an affirmative defense. In accordance with Coristine, we hold that the trial court violated Lynch's Sixth Amendment right to control his defense by instructing the jury on the affirmative defense of consent over Lynch's objection.

Lynch, at 493-94 (citing Coristine, at 374).

Here, Mr. Campbell's evidence that on both occasions he made failed arrangements to make it to the courthouse, only to be told that the hearings were ended and he was too late, arguably went to the element of whether he failed to appear with knowledge within the meaning of the statute. See, e.g., State v. Frederick, 123 Wn. App. 347, 97 P.3d 47 (2004) (State proved knowledge element where "[t]he evidence showed Fredrick knew she had a court date on January 3 [and] also knew she failed to appear because she called her attorney two days after missing her court date.").

A jury might conceivably be well within its rights to determine that this evidence bears on the question of guilt, and creates reasonable doubt.

But notably it makes no difference, however, whether the evidence admitted did or did not go to an element or adequately

proved the affirmative defense in question. The prosecutor was entitled at any time to seek reconsideration of the trial court's earlier ruling allowing Mr. Campbell to present testimony regarding his efforts at arranging rides to the courthouse, and to ask that the testimony be stricken.

The question presented is the defendant's autonomy to choose his defense at trial, including his choice to proceed under the standard defense of showing that the State simply failed to prove the case beyond a reasonable doubt. Forcing an affirmative defense on a defendant is not an allowable form of punishment for the fact that the prosecutor, or the court, believes that evidence admitted earlier in trial was inadmissible.

Indeed, if the Court of Appeals was reasoning that Mr. Campbell had to accept the affirmative defense instruction because he introduced evidence that did not go to it, and was inadequate to meet it, then the giving of that instruction must be all the more harmful, and all the more violative of his Sixth Amendment rights. It must be beyond cavil that a defendant's right to control his defense is violated if the trial court tells the defendant he must accept an affirmative defense that *admits his guilt to the elements of the crime*, and which instruction instead forces him to defend by

making out an affirmative excuse that the court at the same time tells him he *will not be able to satisfy*.

That, of course, is this case. 10/9/13RP at 149 (trial court stating to the defense that the court would instruct his jury on the affirmative defense, even though "it can't be met" by the defendant's testimony).

4. The constitutional error was not harmless. The error in this case must be proved harmless beyond a reasonable doubt, by the Respondent. State v. Lynch, 178 Wn.2d at 494-95. "[I]f trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." Lynch, supra (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Thus in Lynch, where the trial court required the defendant to argue the defense of consent because he introduced evidence of willing participation in intercourse, the error was not harmless because the defendant was forced to shoulder an *affirmative* burden – there, the defense of consent -- that is a greater 'burden' than that normally required for gaining acquittal, i.e., the raising of reasonable doubt. Lynch, 178 Wn.2d at 492-94; see also U.S. Const. amend. 14.

> [I]nstructing the jury that Lynch had the burden of proving consent was inconsistent with Lynch's trial strategy of casting doubt on the element of forcible compulsion. The consent instruction imposed a burden on Lynch that was greater than the burden necessary to create a reasonable doubt about forcible compulsion. See Martin v. Ohio, 480 U.S. 228, 234, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (noting that evidence creating a reasonable doubt about an element of a crime "could easily fall far short" of proving a defense by a preponderance of the evidence).

Lynch, at 494. The same is true here. Uncontrollable Circumstances as a defense to bail jumping is a statutory form of a necessity defense, which admits factual proof of the charged crime's elements but argues justifiable excuse. RCW 9A.76.010(4); 120(2); 11 and 11A Washington Practice, Jury Instructions-Criminal, WPIC 19.17 (Comment), WPIC 120.41 (Comment) (3rd ed. 2008). The defense requires the accused to prove the facts of the defense, and do so by a preponderance. RCW 9A.76.120(2); State v. Frederick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). Mr. Campbell was forced to shoulder an affirmative burden qualitatively different and quantifiably greater than normal trial circumstances where the State must secure the guilty verdict beyond a reasonable doubt. The error in this case was not harmless beyond a reasonable doubt, and reversal is required.

5. The court's ruling also violated Mr. Campbell's right to counsel, causing structural error that requires automatic reversal. Additionally, the court's ruling instructing the jury on the affirmative defense, which set up an obligation in defense counsel to persuade the jury of that defense, violated Mr. Campbell's right to counsel. This is constitutional error, and requires automatic reversal. The trial court does have discretionary power over the scope of counsel's closing argument. Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); State v. Perez–Cervantes, 141 Wn.2d 468, 474-75, 6 P.3d 1160 (2000) (court has power to restrict the argument of counsel to the facts in evidence).

However, it is generally permissible for defendants to argue any defense to the charges -- even inconsistent defenses (not applicable here) -- supported by the evidence. See Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988); State v. Fernandez–Medina, 141 Wn.2d 448, 458–60, 6 P.3d 1150 (2000); State v. Conklin, 79 Wn.2d 805, 807, 489 P.2d 1130 (1971). This right to have one's lawyer argue one's chosen defense in closing is so central to the right to counsel that courts

cannot even compel counsel to argue "logically." City of Seattle v. Arensmeyer, 6 Wn. App. 116, 121, 491 P.2d 1305 (1971).

In this case, the trial court so limited and restricted the scope and viability of the defense to choose its closing argument, as to violate Mr. Campbell's constitutional rights. The court created circumstances in which defense counsel was not left unfettered to argue for acquittal as counsel saw fit, and to do so without contravening the law of the case in the court's instructions. But the Sixth Amendment right to counsel encompasses the delivery of an unfettered closing argument. Herring, 422 U.S. at 858, 95 S.Ct. 2550; U.S. Const. amends 6, 14. This is because closing argument is a centrally important part of counsel's strategic representation of his or her client. Perez–Cervantes, 141 Wn.2d at 474.

Automatic reversal is required because the constitutional violation was structural error. Structural error is a defect affecting the very framework within which the trial proceeds. See Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); see, e.g., United States v. Gonzalez–Lopez, 548 U.S. 140, 148–50 & n. 4, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (denial of Sixth Amendment right to counsel of choice not

subject to harmless error analysis). Unduly restricting defense counsel's ability to argue for acquittal in closing argument in violation of the Sixth Amendment and Due Process is this sort of error, and as such, it is not subject to harmless error affirmance. Frost v. Van Boening, ___ P.3d ___, ___ (9th Cir. No. 11-35114) (April 29, 2014, at pp. 13-17) (finding unreasonable application of federal law in applying harmless error analysis to error where court forced counsel to choose his advocacy between "inconsistent" defenses of either reasonable doubt, or duress which admits the elements).

F. CONCLUSION

For all the reasons above, this Supreme Court should accept review, and reverse Jason Campbell's convictions as argued.

Dated this 1 day of July, 2015.

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON SCOTT CAMPBELL, Appellant.	No. 45488-2-II UNPUBLISHED OPINION

SUTTON, J. — Jason Scott Campbell appeals his convictions for one count of second degree trafficking in stolen property and two counts of bail jumping. He argues that the trial court (1) misstated the "reckless" element of the second degree trafficking jury instruction, (2) erred by instructing the jury on second degree trafficking, (3) violated his right to control his defense by instructing the jury on uncontrollable circumstances, (4) abused its discretion by instructing the jury on missing witnesses, (5) improperly commented on the evidence in answering a jury question, and (6) violated his right to counsel by denying his counsel's motion to withdraw. Holding that (1) the trial court correctly stated the "reckless" element of second degree trafficking in stolen property, (2) Campbell waived his objection to giving the second degree trafficking in stolen property instruction, (3) the trial court did not violate his right to control his defense by instructing the jury on uncontrollable circumstances, (4) the trial court abused its discretion in instructing the jury on missing witnesses, but that error was harmless, (5) the trial court did not

improperly comment on the evidence, and (6) the trial court did not violate Campbell's right to counsel, we affirm.

FACTS

I. Stolen Tires Listed for Sale on Craigslist

While browsing Craigslist for automobile parts, Matthew Knowlton found a for-sale advertisement listing four tires and wheels he recognized as his personal property that had been stolen the week before. Knowlton texted the phone number listed on the advertisement and contacted law enforcement. After deputy Sonya Matthews spoke with Knowlton, she went to the address that Knowlton received from the seller, but no one was home when she arrived. She noticed, however, that the house across the street matched the background in the picture of the tires and wheels included in the Craigslist advertisement; she was unable to contact anyone at that house, either.

The next day, Matthews returned to the house that matched the Craigslist picture and spoke with Jason Campbell. Matthews asked Campbell if he knew anything about stolen tires and wheels for sale on Craigslist, and he replied that he did not know anything. Campbell brought out a set of tires and wheels from the garage for Matthews to examine, saying those were the only tires and wheels on the property. Believing those tires were Knowlton's stolen property, Matthews read Campbell the *Miranda*[1] warning.

Campbell continued to deny knowing about the stolen tires and wheels, but said that he could "probably find something out" from his cousin, Michael Smith. Verbatim Report of

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Proceedings (VRP) (Oct. 8, 2013) at 80. This seemed suspicious to Matthews, so she arrested Campbell. With Campbell secured in her patrol car, Matthews looked closely at the tires and determined that they were not Knowlton's stolen property. Matthews then spoke to Campbell and told him that she "was convinced" he knew more than he was saying because the background of the picture on the Craigslist advertisement matched his property. VRP (Oct. 8, 2013) at 81. Campbell admitted that Smith had brought tires and wheels to his house and Campbell's neighbor had offered to sell them on Craigslist. Campbell told Matthews "he was pretty sure that they were stolen," because Smith had been involved in theft before, but Campbell did not ask where Smith got them. VRP (Oct. 8, 2013) at 81.

The State charged Campbell with one count of second degree trafficking in stolen property. The State later amended the information to increase Campbell's charge to first degree trafficking in stolen property and also charged Campbell with two counts of bail jumping after he failed to appear at two court hearings.

II. TRIAL

Before trial, defense counsel moved to withdraw. Defense counsel asserted a conflict of interest with Campbell because defense counsel's law partner represented Smith on an unrelated misdemeanor traffic crime. Defense counsel explained that if Smith were called as a witness in Campbell's case defense counsel "might get to sensitive information." VRP (July 22, 2013) at 5. However, he did not have specific information in mind. The trial court did not make a conflict of interest finding and denied defense counsel's motion to withdraw.

A. Second Degree Trafficking in Stolen Property Jury Instruction

The State proposed a jury instruction on second degree trafficking in stolen property as a lesser included offense. The trial court asked if Campbell objected and Campbell replied, "Your Honor, there is objection. . . . [Campbell's] position is it's all or nothing." VRP (Oct. 9, 2013) at 222-23. The trial court instructed the jury on second degree trafficking in stolen property.

The "to convict" instruction provided that Campbell was guilty of second degree trafficking in stolen property if the State proved beyond a reasonable doubt that Campbell (1) "trafficked in stolen property," (2) "acted recklessly," and (3) the acts occurred in the state of Washington. Clerk's Papers (CP) at 41. The instructions defined recklessly as follows: "A person . . . acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." CP at 40.

B. Uncontrollable Circumstances and Missing Witness Instruction

When Campbell took the stand, defense counsel asked Campbell why he failed to appear at the two court hearings related to his bail jumping charges. The State objected and Campbell provided an offer of proof outside of the jury's presence. Campbell explained that he had arranged for first his friend and then his mother to drive him to court because he did not have a driver's license. In both instances, the person did not arrive. Campbell received a ride from a teacher at a nearby elementary school one time and walked to court the other time, but each day he arrived at court after the hearing had already ended.

The trial court ruled that if Campbell presented this testimony to the jury, the trial court would instruct the jury on the uncontrollable circumstances affirmative defense. Campbell

testified in front of the jury consistent with his offer of proof, and the trial court instructed the jury on uncontrollable circumstances. CP at 46 ("An 'uncontrollable circumstance' means an act of nature such as a flood, earthquake, or fire . . . or an act of man such as an automobile accident."). The trial court also instructed the jury on missing witnesses over Campbell's objection, reasoning that it was "only fair" to the State to do so because Campbell had given testimony about two people who had failed to give him a ride to court but did not call them as witnesses. VRP (Oct. 9, 2013) at 227.

C. Jury Question

During deliberations, the jury sent a question to the trial court:

> Instruction 15[2] says trafficking in stolen property in the second degree is a class C felony. Is trafficking in stolen property in the first degree a class B or class C felony? We're confused because Instruction No. 10[3] says [Campbell] is charged with one count of trafficking in stolen property in the first degree, while the felony complaint and information seem to show that [Campbell] is charged with trafficking in stolen property in the second degree.

CP at 50. The parties discussed the State's original charging document, which reflected a charge of second degree trafficking in stolen property, but was later amended to first degree trafficking in stolen property and that the jurors probably perceived this as conflicting information.

The trial court read aloud its proposed answer: "The original complaint and information was for trafficking in the second degree, the amended information has been filed. The defendant is currently charged with trafficking in the first degree, each of the charges [are] either a Class B

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[2] Instruction 15 provided that "[t]rafficking in Stolen Property in the Second Degree is a class C felony." CP at 43.

[3] Instruction 10 provided that "[t]he defendant is charged in count one with trafficking in stolen property in the first degree." CP at 38.

or Class C felony." VRP (Oct. 9, 2013) at 267-68. The trial court believed that its answer helped "clarify the confusion they see with one exhibit which had the original complaint and information." VRP (Oct. 9, 2013) at 268. Campbell stated in response, "Your Honor, I'm proposing that we just indicate to them that they have the law and the instructions as given to them and they should decide." VRP (Oct. 9, 2013) at 269. The trial court replied that Campbell's suggestion was "the easy way out, but I don't feel comfortable when [the jurors] raise a specific issue that is legal in nature as opposed to potential comment on the evidence." VRP (Oct. 9, 2013) at 269. The trial court answered the jury's question as it had proposed.

The jury did not reach a verdict on first degree trafficking in stolen property, but found Campbell guilty of second degree trafficking and both counts of bail jumping. Campbell appeals.

ANALYSIS

I. RECKLESSNESS JURY INSTRUCTION

Campbell argues that the jury instruction defining recklessness misstated an element of second degree trafficking because it did not require the jury to find that Campbell acted recklessly in relation to a specific crime.[4] We disagree.

[4] The State argues that we should not review this claim of error because Campbell did not preserve it with an adequate objection. Because it is reversible error to give the jury an instruction that relieves the State of its burden to prove every element beyond a reasonable doubt, Campbell may challenge the jury instruction for the first time on appeal. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011). Thus, we do not address the State's argument that Campbell failed to properly object.

Because the to-convict jury instruction given by the court was correct, it is not necessary to address Campbell's other arguments attacking this jury instruction.

We review legal sufficiency of jury instructions de novo. *State v. Walker*, 182 Wn.2d 463, 481, 341 P.3d 976 (2015), *petition for cert. filed*, (Apr. 22, 2015). Jury instructions are insufficient if they relieve the State of its burden to prove every essential element of the charged crime. *Walker*, 182 Wn.2d at 481. If a to-convict instruction includes every element that the State must prove beyond a reasonable doubt, the generic instruction defining recklessness is sufficient. *State v. Johnson*, 180 Wn.2d 295, 306-07, 325 P.3d 135 (2014).[5] The to-convict instruction in this case satisfies the rule in *Johnson*.

A person commits second degree trafficking in stolen property when he or she "recklessly traffics in stolen property."[6] RCW 9A.82.055(1). Here, the trial court instructed the jury that a person acts "recklessly" when he or she knows of and disregards "a substantial risk that a wrongful act may occur." CP at 40. The to-convict instruction told the jury that it must find Campbell guilty if it found that (1) Campbell trafficked in stolen property, (2) he acted recklessly, and (3) the acts occurred in the state of Washington. Under these circumstances, the specific act of trafficking in stolen property was the only element to which the term "recklessly" could have referred. As in *Johnson*, the to-convict instruction accurately informed the jury of every element necessary to find Campbell culpable of second degree trafficking in stolen property. *Johnson*, 180 Wn.2d at 306. Thus, the jury instructions did not relieve the State of its burden of proof.

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[5] Prior opinions from our Courts of Appeal have held that a recklessness instruction must mention the specific crime that the defendant disregarded a substantial risk of occurring, rather than merely a "wrongful act" occurring. *Peters*, 163 Wn. App. at 847; *State v. Harris*, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011).

[6] A person acts recklessly when he or she "knows of and disregards a substantial risk that a wrongful act may occur" and "disregard of such substantial risk is a gross deviation" from how a reasonable person would act in the same situation. RCW 9A.08.010(1)(c).

II. SECOND DEGREE TRAFFICKING IN STOLEN PROPERTY JURY INSTRUCTION

Campbell next argues that the trial court erred in instructing the jury on second degree trafficking because the evidence at trial did not support a jury finding that he acted recklessly as is required to convict him of second degree trafficking, a lesser included offense. Because we hold that Campbell did not properly preserve the error, we do not reach this issue.

We may decline to review a claim of error that was not raised in the trial court, unless the error was manifest and affected a constitutional right. RAP 2.5(a). The purpose of this rule is to allow the opposing party to respond to the claim of error and give the trial court the opportunity to correct it. *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012), *cert. denied*, 134 S. Ct. 62 (2013). Campbell's objection, that his case was "all or nothing," did not advise the trial court of the basis on which he now claims error: insufficient evidence to support the instruction. VRP (Oct. 9, 2013) at 223. Campbell's objection did not provide the State an opportunity to respond to the claim of insufficient evidence or allow the trial court to consider it. Therefore, Campbell did not preserve the error for review on appeal.

Furthermore, Campbell cannot show that the error is a "manifest error affecting a constitutional right." RAP 2.5(a). A jury may find a criminal defendant guilty of any inferior degree of the charged crime. RCW 10.61.003. RCW 10.61.003 provides criminal defendants with sufficient constitutional notice of the crimes of which they may be convicted. *State v. Berlin*, 133 Wn.2d 541, 545, 947 P.2d 700 (1997). Thus, the trial court's decision to instruct the jury on second degree trafficking in stolen property is not of constitutional magnitude. Because Campbell raises this claim of error for the first time on appeal, we decline to review its merits.

III. UNCONTROLLABLE CIRCUMSTANCES AFFIRMATIVE DEFENSE

Campbell next argues that the trial court violated his right to control his defense when it instructed the jury on uncontrollable circumstances over his objection.[7] We disagree.

An accused has the right to control his or her defense under the Sixth Amendment. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013). Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment when imposing the affirmative defense infringes upon the defendant's "'independent autonomy [he or she] must have to defend against charges.'" *Lynch*, 178 Wn.2d at 493 (quoting *State v. Coristine*, 177 Wn.2d 370, 377, 300 P.3d 400 (2013)). We review constitutional violations de novo. *Lynch*, 178 Wn.2d at 491.

Jury instructions must properly inform the jury of the law, allow each party to argue its case theory, and may not mislead the jury. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012). A jury instruction that fails to make the applicable legal standard manifestly apparent to the average juror amounts to a constitutional error that is presumed prejudicial. *McCreven*, 170 Wn. App. at 462.

When Campbell took the stand, defense counsel asked Campbell why he had not arrived at his court hearings on time. The State objected and, in Campbell's offer of proof, he explained that he arrived late on both days because his friend and mother had failed to give him a ride as

[7] Campbell argues that the trial court's instruction on uncontrollable circumstances also violated his right to counsel. Because we hold that the trial court did not err, we do not address Campbell's Sixth Amendment argument on this issue.

they had agreed. The trial court ruled that Campbell could testify to this information, but if Campbell did testify as to his reasons for not being at his court hearings, the jury would be instructed on the only defense to bail jumping: uncontrollable circumstances. Campbell chose to testify as he wished with full knowledge that the trial court would instruct the jury as it informed Campbell it would. Under these facts, the trial court did not infringe upon Campbell's independent dignity and autonomy to control his defense. *Lynch*, 178 Wn.2d at 493.

Furthermore, once Campbell elected to testify as he wished, the trial court was *required* to instruct the jury on uncontrollable circumstances so as to not allow the jury to be misled. *McCreven*, 170 Wn. App. at 462. Without the affirmative defense instruction, the jury instruction on bail jumping would have misled the jury to believe that Campbell's reason for not appearing excused his absence. The trial court did not violate Campbell's right to control his defense by instructing the jury on uncontrollable circumstances.

IV. Missing Witness Jury Instruction

Campbell argues that the trial court abused its discretion in giving a missing witness jury instruction. The missing witness jury instruction permitted the jury to infer that Campbell's friend's and mother's testimony, the two people who were supposed to drive him to his court hearings, would have been damaging because if their testimony would have been favorable to him, he would have called them as witnesses.[8] The trial court abused its discretion in giving this instruction, but the error was harmless.

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[8] The missing witness instruction provided that:

> If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:

We review the trial court's decision to give a specific instruction for abuse of discretion. *In re Det. of Alsteen*, 159 Wn. App. 93, 99, 244 P.3d 991 (2010). A trial court abuses its discretion when it applies an incorrect legal analysis. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and they properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

Here, Campbell does not argue that the language of the missing witness instruction was legally incorrect; rather, he argues that the trial court incorrectly gave the missing witness instruction because the facts did not permit application of the missing witness doctrine. The missing witness doctrine allows the jury to infer that a witness's testimony would have been damaging where it would be natural for a party to produce a witness because the facts known to the witness would be favorable but that party fails to do so. *State v. Blair*, 117 Wn.2d 479, 488, 816 P.2d 718 (1991). This inference is not permitted, however, if (1) the testimony would be cumulative or unimportant, (2) the witness's absence is satisfactorily explained, or (3) the witness is equally available to both parties. *State v. Montgomery*, 163 Wn.2d 577, 598-99, 183 P.3d 267

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(1) The witness is within the control of, or peculiarly available to, that party;
(2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
(3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
(4) There is no satisfactory explanation of why the party did not call the person as a witness; and
(5) The inference is reasonable in light of all the circumstances.

CP at 47.

(2008). Where the inference is permitted, the party against whom the rule operates has the burden of explaining the witness's absence. *Blair*, 117 Wn.2d at 489.

Campbell testified that he did not appear in court after Campbell's friend and mother failed to give him a ride. Because neither Campbell's friend nor his mother testified, the trial court gave a missing witness instruction. However, the State did not have an opportunity to interview Campbell before trial due to his Fifth Amendment right against self-incrimination. Thus, the State did not have equal access to subpoena Campbell's friend and mother because it did not know the witnesses' names until Campbell testified.

But these witnesses were immaterial, and according to the State, Campbell's testimony about his rides was irrelevant to the bail jumping charge. If Campbell's testimony was not a defense to bail jumping, neither could his friend's nor his mother's testimony operate as a defense. The State does not explain how these witnesses would have been helpful to Campbell's defense and instead relies on its argument that the witnesses were not equally available. The missing witness doctrine, however, does not employ a factor test as the State's argument suggests; the party asserting the missing witness doctrine must satisfy all three prongs of the test stated in *Blair*. *Blair*, 117 Wn.2d at 488-89; *Montgomery*, 163 Wn.2d at 598-99. Because Campbell testified to the same events that his friend and mother would have presumably testified to as well, their testimony would have been both cumulative to Campbell's testimony and immaterial to Campbell's defense to the bail jumping charges. Thus, the trial court abused its discretion by instructing the jury on missing witnesses.

Although the trial court abused its discretion in giving the missing witness jury instruction, any error was harmless. An erroneous instruction is harmless if, based on the facts of the particular

case, it appears beyond a reasonable doubt that the error did not contribute to the jury's verdict. *Montgomery*, 163 Wn.2d at 600. To prove bail jumping, the State must have proved that (1) Campbell knew about the requirement to appear and (2) he failed to do so. RCW 9A.76.170(1). The trial court instructed the jury that it must find both of these elements of the crime beyond a reasonable doubt and Campbell admitted that he knew he was required to come to court on a particular date and that he failed to do so.[9] Even if the trial court had not given the missing witness instruction, there is no likelihood that it contributed to the jury's verdict. Any error in giving the missing witness instruction was harmless.

V. TRIAL COURT'S RESPONSE TO JURY QUESTION

Campbell argues that the trial court improperly commented on the evidence in its answer to the jury's question. We disagree.

A. Campbell Properly Objected

The State argues that Campbell did not preserve this issue for appeal because he did not properly object, citing *State v. Cordero*, 170 Wn. App. 351, 371, 284 P.3d 773 (2012). We disagree.

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[9] The to convict instruction required the jury to find four elements beyond a reasonable doubt:

> (1) That on or about January 28th, 2013, the defendant failed to appear before a court;
>
> (2) That the defendant was charged with a class B or class C felony;
>
> (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
>
> (4) That the acts occurred in the State of Washington.

CP at 44. Elements two and four were undisputed at trial.

In *Cordero*, the defendant did not preserve error when he failed to specifically object to the trial court's proposed answer and, instead, proposed a different answer. *Cordero*, 170 Wn. App. at 371. The record here is distinguishable from *Cordero* because the context of Campbell's discussion with the trial court and the State makes it clear that the trial court understood the nature of Campbell's objection.

After the trial court read aloud its proposed answer to the jury's question, the State said, "I agree. That's fine." VRP (Oct. 9, 2013) at 268. Campbell immediately replied, "Well, Your Honor, you read them the charges against the defendant." VRP (Oct. 9, 2013) at 268. The trial court and the parties then discussed the jury's confusion and the evidence presented to the jury. During this colloquy, the trial court twice acknowledged that the basis of Campbell's objection was to prevent a comment on the evidence. Campbell then proposed an answer at the trial court's urging. VRP (Oct. 9, 2013) at 269 ("The Court: [Defense counsel], any association with you? [Defense counsel]: Your Honor, I'm proposing that we just indicate to them that they have the law and the instructions as given to them and they should decide.").

Campbell's colloquy with the trial court made it clear that he disagreed with the trial court's answer to the jury's question and that the trial court understood the reason for his objection. Campbell properly objected.

B. Trial Court Did Not Comment on Evidence

Campbell argues that the trial court commented on the evidence by telling the jury that the second degree trafficking in stolen property charge against Campbell had been amended to first degree trafficking in stolen property and explaining that first degree trafficking was a class B felony. We hold that the trial court did not improperly comment on the evidence.

The trial court may give the jury additional instructions on a point of law according to its discretion. *State v. Kindell*, 181 Wn. App. 844, 850, 326 P.3d 876 (2014). The trial court cannot answer jury questions in a way that relieves the State of its burden of proof or add a new legal theory that the parties did not have an opportunity to argue. *Kindell*, 181 Wn. App. at 850; *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). We review the legal accuracy of the trial court's jury instructions de novo. *Kindell*, 181 Wn. App. at 850.

The to-convict instruction for the first count of bail jumping in this case required the State to prove that Campbell was charged with a "class B or class C felony" at the time he did not appear for his court hearing.[10] CP at 44. The jury's original instructions did not inform the jury whether first degree trafficking in stolen property, Campbell's charge at trial, was a class B or class C felony; the jury was instructed only that *second* degree trafficking in stolen property, Campbell's charge when he missed two court hearings, was a class C felony. The trial court admitted as an exhibit the State's original felony complaint and information that listed Campbell's original charge of second degree trafficking in stolen property, but the jury was not given information that this charge had been *amended* to first degree trafficking in stolen property. In its answer to the jury's inquiry about this discrepancy, the trial court told the jury that an amended information had been filed and Campbell was currently charged with first degree trafficking in stolen property.

This answer was not a comment on the evidence because the trial court's answer to the jury merely clarified confusion on a procedural issue. The State presented evidence at trial that Campbell was charged with second degree trafficking and that he failed to appear at two court

[10] In contrast, the to-convict instruction for the second count of bail jumping required proof that Campbell was charged with a class C felony at the time he failed to appear.

hearings. The trial court instructed the jury that Campbell's charge at the time he failed to appear was a class C felony, but the to-convict instruction for Campbell's first count of bail jumping stated the elements for first degree trafficking in stolen property. Informing the jury of the amendment of Campbell's charge from second to first degree trafficking in stolen property did not relieve the State of its burden to prove each element of the crimes charged nor did it add a new legal theory the parties did not have an opportunity to argue. Thus, the fact that Campbell's charge was amended does not amount to a new theory of culpability and it did not change any element that the State was required to prove beyond a reasonable doubt. The trial court's answer was not an improper comment on the evidence.

VI. DEFENSE COUNSEL'S MOTION TO WITHDRAW

Lastly, Campbell argues that the trial court improperly denied his counsel's motion to withdraw because defense counsel's duty of loyalty was likely to be materially limited due to defense counsel's firm's responsibilities to Smith, who was a potential defense witness. The trial court properly denied defense counsel's motion to withdraw because he did not present an actual conflict of interest.

The Sixth Amendment guarantees the right to effective assistance of counsel. U.S. CONST. amend. VI; *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 348, 325 P.3d 142 (2014). This right includes the right to conflict-free counsel at all critical stages of prosecution. *Gomez*, 180 Wn.2d at 348. We review de novo whether a conflict of interest precludes continued representation. *Gomez*, 180 Wn.2d at 347.

The trial court has a duty to investigate potential conflicts of interest when it knows or reasonably should know of a conflict of interest between counsel and his or her client. *State v.*

Regan, 143 Wn. App. 419, 425-26, 177 P.3d 783 (2008). When a defendant or attorney alerts the trial court to a conflict, the trial court must appoint substitute counsel or take "adequate steps" to determine whether the risk of a conflict of interest is too remote to require substitute counsel. *Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). On appeal, a defendant must demonstrate that an actual conflict of interest adversely affected trial counsel's performance. *State v. Dhaliwal*, 150 Wn.2d 559, 570, 79 P.3d 432 (2003). A defendant must show how concurrent representation affects trial counsel's performance. *Dhaliwal*, 150 Wn.2d at 573. If two matters in an alleged conflict are not substantially related, we will not presume that confidential information was disclosed requiring disqualification. *State v. Hunsaker*, 74 Wn. App. 38, 47, 873 P.2d 540 (1994).

Here, defense counsel moved to withdraw, claiming a conflict of interest, because his firm represented Smith on a factually unrelated misdemeanor traffic offense. The trial court inquired into defense counsel's asserted conflict of interest. Defense counsel told the trial court that he did not have any information that would lead to uncovering sensitive information from Smith. Thus, the trial court found the record insufficient to find a conflict. The trial court did not err in denying defense counsel's motion to withdraw.

We hold that (1) the trial court correctly stated the "reckless" element of second degree trafficking in stolen property, (2) Campbell waived his objection to giving the second degree trafficking in stolen property instruction, (3) the trial court did not violate his right to control his defense by instructing the jury on uncontrollable circumstances, (4) the trial court abused its discretion in instructing the jury on missing witnesses, but that error was harmless, (5) the trial

court did not improperly comment on the evidence, and (6) the trial court did not violate Campbell's right to counsel, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Bjorgen, A.C.J.
BJORGEN, A.C.J.

J
LEE, J.

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☐ petitioner

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