No. 45724-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sidney Potts,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-00876-8

The Honorable Judges Michael Evans, Stephen Warning,

and Gary Bashor

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ARGUMENT

I. MR. POTTS'S CONVICTIONS VIOLATED HIS RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

A. The trial court should not have granted a mistrial and dismissed the jury without first asking Mr. Potts if he preferred a continuance over a mistrial.

Following a discovery violation that came to light mid-trial, the trial court *sua sponte* declared a mistrial over defense objection.[1] RP 1184-1197. Mr. Potts's second trial violated double jeopardy. *State v. Hall*, 162 Wn.2d 901, 910, 177 P.3d 680 (2008).

Neither side had asked for a mistrial. RP 1097, 1125, 1158-1162, 1179, 1198. After denying Mr. Potts's motion to dismiss, the judge did not ask whether—given the adverse ruling—he preferred to take a recess or have a new trial.[2] RP 1184-1196.

The discovery violation put Mr. Potts in a difficult position. He was forced to choose between effective assistance of counsel and his "'valued right'"[3] to have the trial run its course with the jury he'd selected.

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[1] In fact, Mr. Potts did not have the opportunity to object until after the court made its ruling. RP 1197.

[2] Or whether to avail himself of the prosecutor's offer to suppress evidence relating to the discovery violation. RP 1117-1118.

[3] *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949)).

He should have been allowed to make that choice, or at least to voice his preference.

A mistrial granted without the defendant's consent precludes retrial unless "taking all of the circumstances into consideration, there is a high degree of manifest necessity to avoid defeating the ends of public justice." *Hall*, 162 Wn.2d at 910. The burden is on the prosecutor to establish such manifest necessity. *Id.* Here, the state failed to establish a manifest necessity under the totality of the circumstances.

1. The court did not give Mr. Potts a full opportunity to explain his position.

The court ordered a mistrial immediately after denying Mr. Potts's motion to dismiss. RP 1125-1198. No motion for a mistrial was pending.[4]

Mr. Potts would have been disadvantaged by both a mistrial and by a recess. Only dismissal would have protected his right to effective assistance *and* his right to be free from double jeopardy. When asked to choose between dismissal and a mistrial, defense counsel could do nothing but argue in favor of dismissal. RP 1125-1148, 1163-1184.

The judge never revisited the issue after denying the motion to dismiss, and did not ask Mr. Potts to choose between a mistrial and a

[4] The judge had floated the idea of a mistrial as an alternative to dismissal; however, at that point, defense counsel had an ethical obligation to argue in favor of dismissal. S*ee* Brief of

recess. RP 1184-1198. It is true that the judge did not act "precipitously" when only the length of time is considered. Brief of Respondent, pp. 13-14.

But length of time is not the only consideration. *Id.*

Instead, the court must give the accused person a "full opportunity to explain [his] position[ ]." *State v. Robinson*, 146 Wn. App. 471, 480, 191 P.3d 906 (2008) (internal quotation marks and citation omitted). The court did not do so in this case. The court gave Mr. Potts *no* opportunity after ruling on the only pending motion—the motion to dismiss. Thus the court did not learn how Mr. Potts would decide if given the choice between a mistrial or a recess. RP 1184-1198.

Both courses of action would have had advantages and disadvantages for Mr. Potts. He may have placed a high value on his right to have the case resolved quickly in a single proceeding, even if it meant his attorney could be less than fully prepared. Alternatively, he might have preferred to sacrifice his double jeopardy rights (and the possibility of a speedy resolution) to make sure his attorney had adequate time to prepare to meet the new information.

Respondent, p. 13. When the judge floated the idea of a mistrial, the only alternative proposal was dismissal. Between those two options, any defendant would prefer dismissal.

Both options were problematic. The judge shouldn't have decided the issue for Mr. Potts by concluding that his right to effective assistance was more important than his double jeopardy right. *Id.* This is especially true given that the judge believed that the newly discovered information could be addressed, that Mr. Potts's right to a fair trial was not impacted, and that "there's no actual prejudice at this point." RP 1193-1194.

The primary beneficiary of the court's decision was the state.

When the court ordered a mistrial, Mr. Potts lost his right to have the trial finished in a single proceeding. He also lost the chance to expose Hellesley's lies to the very jury that heard his perjured testimony. Similarly, the court denied Mr. Potts the chance to show this same jury that Epperson concealed Hellesley's lie even after he'd finished testifying. RP 1098-1101, 1129.

By contrast, the state received two primary benefits.

First, the state got a second chance to prosecute Mr. Potts, with an improved chance of conviction. The perjured testimony and Epperson's treachery became a routine matter of impeachment, rather than the dramatic cross-examination that could have devastated the prosecution during the first trial.

Second, the state got a preview of the defense theory. The prosecution team heard the defense themes during *voir dire* and opening

statements. Prosecution witnesses got a practice run, which allowed the government to evaluate the defense strategies for cross-examination. All of this information would prove helpful to a prosecutor preparing for trial.

The double-jeopardy clause was adopted to prevent such abuses.[5]

Instead of protecting the defendant's rights, the court rewarded the state for its misconduct. The prosecution should not have received this windfall. The trial court should have given Mr. Potts a "full opportunity" to point out the drawbacks of a mistrial. *Robinson*, 146 Wn. App. at 480.

2. The judge failed to consider Mr. Potts's double jeopardy rights when ordering the mistrial.

In granting a mistrial without the defendant's consent, a court must "accord[ ] careful consideration to the defendant's interest in having the trial concluded in a single proceeding." *Id.* (internal quotation marks and citation omitted). Here, the court only referred to "jeopardy" in passing once. RP 1195.

Respondent does not dispute this, and makes no argument that the court gave due consideration to Mr. Potts's double jeopardy rights. Brief

[5] *See Blueford v. Arkansas*, 132 S.Ct. 2044, 2058, 182 L.Ed.2d 937 (2012) (Sotomayor, J., dissenting) ("in light of the historical abuses against which the Double Jeopardy Clause guards, a trial judge must tread with special care where a mistrial would 'help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused'") (quoting *Gori v. United States,* 367 U.S. 364, 369, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961)).

of Respondent, pp. 10-18. Respondent's failure to argue this point may be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

3. The court did not adequately consider alternatives to a mistrial

After refusing to dismiss the case, the judge didn't allow Mr. Potts to weigh in on the choice between a mistrial and a recess. RP 1184-1196. Both would have violated important constitutional rights—the right to effective assistance and the right to be free from double jeopardy. Since these rights belonged to Mr. Potts, the court should have allowed him to choose which to give up. RP 1184-1196, 1198.

Mr. Potts notified the court that he objected to the mistrial after the court's ruling. RP 1197. When he voiced his objection, the court had not yet excused the jury, and the judge could have reconsidered his ruling. RP 1196-1197. Instead of asking Mr. Potts if he would prefer a recess (given the denial of the dismissal motion), the court merely noted the objection and moved on. RP 1197.

Although the court gave *some* consideration to other alternatives (besides mistrial), the judge did not give *adequate* consideration.

Robinson, 146 Wn. App. at 480. The court should not have ordered a mistrial.

4. The remedy is dismissal with prejudice.

A defendant has an "inviolable" right to be tried "by the jury first chosen and sworn to try his case. *State v. Connors*, 59 Wn.2d 879, 885, 371 P.2d 541 (1962). Respondent has failed to demonstrate "a high degree of manifest necessity" under all the circumstances of this case. *Hall*, 162 Wn.2d at 910.

Mr. Potts's convictions violate double jeopardy. *Id.* The convictions must be reversed and the charges dismissed with prejudice.

B. The "same evidence" test precludes conviction on three of Mr. Potts's charges.

Under the "same evidence" test, two convictions violate double jeopardy if evidence necessary to convict on one is sufficient to convict on the other. *In re Orange*, 152 Wn. 2d 795, 816, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005). The test does not rest on a comparison of the legal elements. *State v. Hughes*, 166 Wn.2d 675, 684, 212 P.3d 558 (2009).

Here, the "same evidence" test prohibits convictions for both leading organized crime and the predicate offenses used to prove leading organized crime. *Orange,* 152 Wn.2d at 818-820. This is so because the

evidence necessary to convict Mr. Potts of leading organized crime sufficed to convict him of three of the crimes charged in counts two through six.

Mr. Potts's convictions for three of the drug offenses must be reversed. *Hughes*, 166 Wn.2d at 681. The charges must be dismissed with prejudice. *Id.*

Respondent misapplies the "same evidence" test. Brief of Respondent, pp. 18-20. Properly stated, the test is satisfied because the specific evidence *necessary* to convict for leading organized crime was *sufficient* to convict for three drug offenses. Double jeopardy thus precludes conviction under the "same evidence" test. *Id.*

Respondent's misunderstanding is shown by its attempt to use the "same evidence" test in reverse: "[e]ven if the State proved all of the predicate felonies, that evidence alone would not be sufficient to convict Appellant of leading organized crime." Brief of Appellant, p. 19.

This is correct, but irrelevant. Proof of leading organized crime is sufficient to establish the three drug crimes, not the other way around. The test need not work in both directions. *Id.* Instead, where the evidence necessary to convict on one offense is sufficient for conviction on the other(s), double jeopardy is violated. *Id.*

The *Harris* court made a similar mistake. *State v. Harris*, 167 Wn.

App. 340, 353, 272 P.3d 299 *review denied,* 175 Wn.2d 1006, 285 P.3d 885 (2012). That court noted that leading organized crime requires proof of an element not necessary to prove predicate drug offenses. *Id.,* at 352-354. But this is only one part of the "same evidence" test.

When applied correctly, double jeopardy is violated unless "*each offense* includes an element not included in the other, and *each* requires proof of a fact the other does not." *Hughes*, 166 Wn.2d at 682 (emphasis added). The *Harris* court found that *one* offense includes an extra element and requires proof of an extra fact. This is not the correct formulation, as outlined by the *Hughes* court; instead, it is only half the proper test. *Id.; see also Orange*, 152 Wn.2d at 816-822.

In addition to applying only half the test, the *Harris* court also examined the crimes in the abstract. The Supreme Court has explicitly repudiated this approach. *Orange*, 152 Wn.2d at 817-18. *Harris* should be overruled. *Id.*

When correctly applied, the "same evidence" test bars conviction for the three predicate offenses. *Hughes*, 166 Wn.2d at 682. Mr. Potts's convictions for three of the drug offenses must be reversed, and the charges dismissed with prejudice. *Id.*

II. THE CONVICTIONS WERE OBTAINED IN VIOLATION OF MR. POTTS'S RIGHTS TO COUNSEL AND TO DUE PROCESS.

A. Government agents intentionally and repeatedly intercepted Mr. Potts's communications with his attorney, and Respondent can't show there is no possibility of prejudice.

1. Even when considered in isolation, Detective Epperson's misconduct requires reversal.

Epperson, the lead investigator in Mr. Potts's case, improperly listened to numerous telephone calls between Mr. Potts and his attorney.[6] CP 299-324. Epperson kept a chart in which he summarized entire phone conversations between Mr. Potts and his lawyer's office. CP 304-306, 325, 326, 328.

This alone requires reversal.

When the state eavesdrops on attorney-client communications, prejudice is presumed. *State v. Fuentes*, 179 Wn.2d 808, 819-20, 318 P.3d 257 (2014). Only in "rare circumstances where there is no possibility of prejudice" will the state be given the opportunity of showing beyond a reasonable doubt that the defendant was not prejudiced. *Fuentes*, 179 Wn.2d at 819-20.

Here, Epperson admitted that one intercepted call related to the subject of a follow-up investigation. He could not definitively say that he

listened to the call after completing this follow-up investigation. CP 307-308, 321, 328.

Furthermore, it is possible that Epperson's intentional and repeated misconduct affected him subconsciously, in ways that he could not have articulated to the investigator. The calls he listened to might have helped him make a connection that had previously eluded him. They might have inspired additional investigation. They might have shaded what he told the prosecutor, or even his testimony at trial. All of this could have occurred without his conscious awareness.

There is some possibility of prejudice. The state cannot show otherwise. Accordingly, Detective Epperson's misconduct requires reversal. *Fuentes*, 179 Wn.2d at 819-20.

2. The state failed to explain a significant number of government interceptions of Mr. Potts's attorney calls.

Epperson's colleagues in the department also listened to attorney-client calls. CP 434. Although some officers stopped listening when they realized what they were hearing, certain officers continued to listen, and shared the calls with their colleagues. CP 261, 293.

No one explained discrepancies between the phone records and the

[6]Instead of hanging up when he realized the calls were between attorney and client, Epperson intentionally continued listening. CP 306-307, 309-310.

officers' accounts. For example, as Respondent acknowledges, the officer(s) who used DOC credentials to access calls never came forward.[7] Brief of Respondent, p. 25; CP 163, 164. Nor does it seem likely that the few officers interviewed accounted for the volume of calls accessed.

In other words, the state could not even account for all of the interceptions. Without at least accounting for all the interceptions, Respondent has no hope of proving the absence of all possible prejudice. *Fuentes*, 179 Wn.2d at 819-20.

3. The state failed to prove beyond a reasonable doubt that the prosecuting attorney learned only innocuous information from the eavesdropping.

The officers revealed some information to the prosecuting attorney assigned to Mr. Potts's case. CP 79-80, 159. They may have shared other improperly obtained information as well without disclosing its source.

This would have left the prosecutor with the information but without the knowledge that it was illegally obtained. This is especially true because the prosecutor did nothing about the eavesdropping problem for six days after it came to light. CP 79, 82, 159.

[7] DOC officers shared space with the very officers who investigated Mr. Potts's case and testified at his trial. CP 250, 268-269.

Thus, the state failed to prove the complete absence of prejudice.[8] *Fuentes*, 179 Wn.2d at 819-20.

4. Respondent's Brief misrepresents the record.

The state did *not* submit to the court a copy of the critical document in the case. *See* Appellant's Opening Brief, p. 34-35 (discussing "Exhibit 1," employed during questioning by the special prosecutor). Respondent claims otherwise; however, Respondent is mistaken. Brief of Respondent, pp. 26-27.

Contrary to Respondent's assertion, "Exhibit 1" is not the same document referred to as "Appendix B" in the special prosecutor's report. Brief of Respondent, pp. 26-27. The Clerk's Papers citation offered by Respondent (CP 167-168) is quite clearly not the report used by the special prosecutor in his interviews.

This can be seen by even a cursory comparison between CP 167-168 and even a few of the details revealed by the interview questions.

[8] Furthermore, it is not enough for the state to show that intercepted information was not communicated to the prosecutor. *Id.* Prejudice may still arise, even when the prosecutor learns nothing from the intercepted calls. *Id.*

Reference to Exhibit 1 in special prosecutor's interview	Comparison to CP 167-168
I'm going to hand you a summary that we got from the jail . . .I'm going to call that Exhibit 1, which is a call to Jim Morgan's telephone number that shows up there at the top, 360-425-3091. . .and starts with the date of September 5th. CP 264.	No phone call at all on September 5 to 360-425-3091
If you go across it says the date and time that it was accessed. CP 265.	There is nothing referring to "accessed"
My question is when it says "download" does that mean it was downloaded on to whoever was listening to this computer? CP 266.	There is nothing referring to "download"
On 10/2 again, it appears there's somebody listening, because you have 15:34, one of the times listened is called playback. CP 275.	There is nothing referring to "playback"
Do you see over there on the right? It has DOC, and then most of it says LPD, it says REM LPD or -- CP 268.	There is no reference to this
. . .but then on 9/18 it—it says playback at 8:53 by Longview Police Department. At 11:32, it's playback by Longview Police Department. CP 270.	There is no reference to this

"Exhibit 1" contained critical information. The report indicated which calls were accessed, and includes the specific access codes used. CP 264-272, 274-277, 314-315, 318. This could have helped the court identify which officers accessed the calls and how often they did so.

The prosecutor did not submit "Exhibit 1" to the judge, and it is not part of the record on appeal. Without Exhibit 1, Respondent cannot prove the absence of prejudice. *Fuentes*, 179 Wn.2d at 819-20. Indeed,

Respondent can't even define the scope of the problem: the state can't quantify the number of calls the government failed to account for at the hearing below.[9]

5. Respondent wholly failed to prove an absence of prejudice.

The state did not submit any sworn testimony or evidence under oath from those having first-hand knowledge.[10] The court had no opportunity to judge the demeanor of the malefactors, and they were not subjected to cross examination.

In addition, the prosecution didn't establish what topics were covered in the intercepted attorney/client conversations. Although many calls were recorded and improperly accessed, officers interviewed by the special prosecutor accounted for only a few of those calls. CP 159-164.

Other shortcomings infect Respondent's attempt to show a lack of prejudice. The state did not prove that downloaded copies of recordings were ever erased. CP 266-270, 277, 311. Nor did the state prove that access was retroactively blocked for calls made prior to October 16th.

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[9] Exhibit 1 might have cleared up whether additional problems affected the system, including the possibility that police intercepted calls to appointed counsel Sam Wardle. No call report shows whether or not calls to Wardle were accessed by police. It would have been helpful to have a call report showing all calls made *along with* information showing which of those calls had been accessed. Respondent claims that "there is no evidence whatsoever that these calls were accessed." Brief of Respondent, p. 26. However, the prosecution bears the burden of proving that these other attorney calls were secure.

[10] Thus, the court had no actual "evidence" before it. *See In re M.B.*, 101 Wn. App. 425, 471, 3 P.3d 780 (2000).

Detective Epperson and his colleagues may well have had ongoing access to a set of attorney calls, even after the special prosecutor filed his report. Respondent does not address these issues. Brief of Respondent, pp. 20-28. Respondent's failure to argue these points may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

Furthermore, the special prosecutor's conclusions are untrustworthy and reflect a prosecutorial bias. Appellant's Opening Brief, pp. 41-42. For example, the special prosecutor concluded that the officers "inadvertently" listened in on attorney-client calls, despite Epperson's admission that he intentionally listened to the calls and even made a chart summarizing what he'd learned. CP 156, 164, 299-324, 325, 326, 328. With only one exception, Respondent fails to address Mr. Potts's arguments regarding the special prosecutor's bias. Brief of Respondent, pp. 27-28. Respondent's failure to argue these points may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

When the judge made his decision, he did not know why there were discrepancies between the phone records and the information provided to the special prosecutor. Nor did the judge know the exact number of calls recorded, which officers listened to the calls, whether others heard the calls, what was said during each call, whether previously recorded calls remained accessible to law enforcement, or if the phone

system could be trusted going forward. CP 1531.

In fact, the judge did not even know all of the information Epperson himself received. CP 299-324. Because of his involvement in the case, Detective Epperson was uniquely situated to take advantage of any revelations, whether consciously or subconsciously, as outlined above.

The court heard multiple defense motions while the eavesdropping was ongoing. CP 82, 255. This increases the likelihood of prejudice. Police did more than merely listen in after all matters had concluded. *Cf. Fuentes.* Instead, the illegal intercepts occurred during the most important period of attorney-client communication about the facts and about defense strategy.

The state failed to meet its burden of proving a complete lack of prejudice. *Fuentes*, 179 Wn.2d at 818. Mr. Potts's convictions must be reversed and the case dismissed with prejudice. *Id.*

B. Mr. Potts did not waive his right to confidential communication with his attorneys.

Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The state bears the "heavy burden" of proving a knowing, intelligent, and voluntary waiver. *Matter of James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982); *State v. Hos*, 154 Wn. App. 238, 250, 225

P.3d 389 (2010).

Here, the state did not prove beyond a reasonable doubt that Mr. Potts knowingly, intelligently, and voluntarily waived his right to private communication with counsel. Nothing in the record showed that Mr. Potts understood which number he was supposed to use to call his attorneys. Nothing showed what information he'd been provided about the jail's phone system. Although reference was made to a handbook, the record doesn't contain a copy of the handbook. CP 158. The record doesn't set forth the handbook's explanation of the phone system, and doesn't show whether the handbook explained the difference between an attorney's regular phone number and the special number to be used by inmates.[11] CP 134-352.

In addition, the court's own findings undermine a finding of waiver. According to the court, Mr. Potts called his attorneys on their regular phone line "for unknown reasons." CP 434. The court also found that "Mr. Potts made multiple calls to counsel and, to no one's surprise except apparently that of Mr. Potts, the calls were recorded." CP 434. These findings suggest that Mr. Potts didn't understand the phone system or made a mistake by calling the wrong number. They do not suggest a

[11] Also, the state didn't prove that Mr. Potts had even glanced at any relevant sections of the handbook.

knowing, intelligent, and voluntary waiver.

Furthermore, a waiver cannot be found on the basis of imputed knowledge. The state must establish actual knowledge to support waiver of a constitutional right. Waiver of a constitutional right must be knowing, voluntary, and intelligent. *State v. Humphries*, 181 Wn. 2d 708, 717, 336 P.3d 1121 (2014). Nor was the imputation of knowledge warranted. A reasonable person might well believe that the jail's computerized phone system automatically stops recording during attorney-client calls, even if the automated warning continues to play. The surrounding circumstances supported such a reasonable belief. *See* Appellant's Opening Brief, pp. 47-48. In addition, the law doesn't charge Mr. Potts with reasonableness when evaluating his purported waiver. Even an unreasonable belief that the phone system worked would prohibit a knowing waiver.

Finally, the state failed to prove that the Securus system worked properly. Defense counsel alerted the court that calls to other attorneys may have been accessed. CP 390-395. Under the circumstances, the prosecution bore the burden of proving beyond a reasonable doubt that calls to Mr. Potts's first appointed counsel (Sam Wardle) were not improperly accessed.

This is especially true given Epperson's demonstrated willingness

to deliberately and repeatedly listen in on attorney-client calls in this case. Respondent's assertion that "no evidence whatsoever" suggests these calls were accessed turns the burden on its head. Brief of Respondent, p. 26. The prosecutor should have provided call records showing that the calls were not accessed. The special prosecutor's interviews make clear that such reports could be generated by the Securus system. CP 264-272, 274-277, 314-315, 318.

Respondent cannot prove that there is no possibility of prejudice to Mr. Potts. The intentional and repeated interceptions by the lead investigator, the failure to explain who accessed certain calls, and the other gaps in the record are insurmountable obstacles.

There is at least some possibility of prejudice. *Fuentes*, 179 Wn.2d at 818. This requires reversal. *Id.*

C. The trial court failed to make findings beyond a reasonable doubt.

The trial court's decision preceded *Fuentes*. The court did not make any findings beyond reasonable doubt. RP 174-176; CP 434. Respondent implicitly concedes this issue by failing to address it. *Pullman*, 167 Wn.2d at 212 n.4.

If the Court of Appeals does not reverse Mr. Potts's convictions, it must nevertheless remand the case for an evidentiary hearing. On remand, the trial court must take evidence. It must enter findings, applying the

beyond a reasonable doubt standard. *Fuentes*, 179 Wn.2d at 818. If the court determines that the eavesdropping had no effect, it must find facts beyond a reasonable doubt to support that conclusion. *Id.*

III. THE CONVICTIONS REST ON EVIDENCE OBTAINED IN VIOLATION OF THE PRIVACY ACT.

A. Police did not comply with the Privacy Act.

Officers must strictly comply with the provisions of RCW 9.73.230; otherwise "privacy might be invaded improperly and the intent of RCW 9.73.230 defeated." *State v. Knight*, 79 Wn. App. 670, 685, 904 P.2d 1159 (1995). Here, police failed to comply with the statute in three different ways: they intercepted and recorded telephone conversations that were not authorized, they failed to include known information in each authorization, and they failed to file proper disposition reports, frustrating judicial review.

1. Police violated the Privacy Act by intercepting and recording telephone conversations not covered by the authorizations.

Each authorization permitted in-person recordings. None mentioned interception or recording of telephone conversations. CP 669, 673, 678, 683. Despite this, police recorded numerous telephone conversations. RP 1992-2012, 2030-2037, 2044-2048, 2054-2058.

Respondent fails to address this argument.[12] Brief of Respondent, pp. 29-30. The state's failure to argue this point amounts to a concession. *Pullman*, 167 Wn.2d at 212 n.4. This concession requires reversal.

Mr. Potts's convictions must be reversed. The case must be remanded with instructions to suppress the illegal recordings and any related information. *State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d 897 (1990).

6. Police knew the anticipated location of each recording but improperly used general descriptions.

When police have specific information on the expected location of a conversation, they must include that specific information in the authorization. A more general description will not suffice. *State v. Smith*, 85 Wn. App. 381, 386-390, 932 P.2d 717 (1997).

Here police planned to have the informant meet Mr. Potts at the local Dairy Queen.[13] RP 1990, 1993, 1994-1997, 2012, 2030; CP 580-582, 586, 604. None of the authorizations mentioned the Dairy Queen; instead, each listed the location as "Longview" or "Cowlitz County." CP

[12] Instead, under a heading that appears intended to address the argument, Respondent merely points out that a single authorization may cover more than one conversation. Brief of Respondent, pp. 29-30 (citing *State v. Forest,* 85 Wn. App. 62, 930 P.2d 941 (1997), *review denied* 133 Wn.2d 1015, 946 P.2d 403 (1997)). This is irrelevant. Mr. Potts made no argument regarding the number of conversations. Instead, Mr. Potts challenges the interception or recording of telephone conversations when police were only authorized to record in-person conversations. Appellant's Opening Brief, pp. 55-57.

668, 669, 673, 674, 678, 679, 683, 684. As in *Smith*, police "fail[ed] to fulfill the statutory requirement." *Id.*

Respondent falsely states that officers "provided as much information as was known at the time." Brief of Respondent, p. 34. This is patently untrue: Respondent agrees that police planned to have each meeting occur at the Dairy Queen, and that the authorizations make no mention of this planned location. Brief of Respondent, pp. 33-34.

Respondent attempts to excuse this failure by pointing out that the parties left the Dairy Queen together on each occasion. Brief of Respondent, pp. 33-34. This doesn't change the expected meeting place. *Cf. Smith*.

This is not a case where police obtained the authorizations and then learned of a planned meeting place. The expected meeting place was always the Dairy Queen. It is irrelevant that police couldn't predict what might happen next. The information should have been included in the authorization. *Id.*

The statute doesn't ask officers to guess about future events; it merely requires them to specify what is known. Their failure to do so in this case violated the Privacy Act. *Smith*, 85 Wn. App. at 386-390. The convictions must be reversed and the case remanded with instructions to

[13] They also had three addresses associated with Mr. Potts. CP 22-27.

suppress the illegal recordings and any related information. *Fjermestad,* 114 Wn.2d at 829, 835.

7. Det. Epperson failed to file proper disposition reports.

Police must file reports containing specific information following interception or recording; this allows a reviewing judge to ensure compliance with the Privacy Act. (6), (7). Detective Epperson's brief *pro forma* "reports" were insufficiently specific to allow for proper judicial review.[14] CP 670, 675, 680, 685.

This is not a matter of mere "technical defects." Brief of Respondent, p. 36. The legislature allows police to record and intercept without prior court authorization because of the reporting system and associated judicial oversight. Without proper reports, judicial oversight becomes a meaningless exercise, and the only neutral protection built into RCW 9.73.230 disappears.

Deficiencies in Epperson's reports require suppression of the recordings and any related information. *Fjermestad,* 114 Wn.2d at 829, 835. Epperson's cavalier attitude toward the reporting requirement precludes a finding of "genuine effort." This requires suppression of the recordings and any related information. *Id.*

[14] In addition, as the state conceded at trial, there is no evidence of any report filed following the August 10th recording. RP 393-394.

Even if Epperson's inadequate reports reflect a genuine effort to comply, the recordings themselves must be suppressed.[15] *State v. Jimenez*, 128 Wn.2d 720, 724-725, 911 P.2d 1337 (1996). The Supreme Court requires suppression of recorded conversations whenever the state shows only substantial compliance with the Privacy Act.[16] *Id.* It has not endorsed any exceptions to this rule. *Id.* Mr. Potts's convictions must be reversed.

B. The appropriate remedy is reversal.

Unless police make a "genuine effort" to comply with the Act, illegal recordings and other information must be suppressed. *Jimenez*, 128 Wn.2d at 724-725; RCW 9.73.050; RCW 9.73.030. Where police do make a "genuine effort," only the recordings are suppressed. *Id.*

The remedy for a Privacy Act violation thus depends on the genuineness of the police effort. Respondent erroneously contends that failure to comply with RCW 9.73.230 can only result in suppression of illegal recordings. Brief of Respondent, p. 28-30. According to Respondent, *Fjermestad* never applies when police make "any attempt" to

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[15] Epperson made no effort to comply with the reporting requirements as to the August 10th recording. All information relating to that authorization must be suppressed.

[16] For the reasons outlined in the Opening Brief, the Court of Appeals' contrary holdings should be reconsidered. Appellant's Opening Brief, pp. 61-62. Detective Epperson's wholly inadequate reports illustrate the reason for the *Jimenez* rule: reports such as his allow interception and recording of private conversations without meaningful judicial review.

comply with the statute. Brief of Respondent, p. 28 (quoting *Jimenez,* 128 Wn.2d at 726).

Respondent's reading of *Jimenez* is incorrect.

The *Jimenez* court created a limited exception to *Fjermestad's* exclusionary rule. The exception requires proof of a "genuine effort." *Jimenez,* 128 Wn.2d 722. Only when the state shows a "genuine effort" at compliance can the prosecution take advantage of the exception.

Respondent's misreading of *Jimenez* stems from the Supreme Court's passing reference to a police failure to make "any attempt" at compliance in *Fjermestad* and another case. *Jimenez,* 128 Wn.2d at 726. This passing reference preceded the *Jimenez* court's clear statement of its holding:

> We hold that where law enforcement officers make a genuine effort to comply with the privacy act and intercept a private conversation pursuant to an RCW 9.73.230 authorization, the admissibility of any information obtained is governed by the specific provisions of RCW 9.73.230(8).

Jimenez, 128 Wn.2d at 726 (emphasis added). The court did not apply the unaided evidence provision of RCW 9.73.230(8) when the police made *any* effort or *any* attempt to comply; instead, it reserved that provision for *genuine* efforts. *Id.*

In this case, Epperson made no effort to obtain proper authorization to record telephone conversations. All of the authorizations

contemplated face-to-face conversations. None of them mentioned telephone conversations. This shows a lack of genuine effort.

Similarly, Epperson made no effort to include known information about the expected location of each recording. Police expected each face-to-face conversation to start at the Dairy Queen. None of the authorizations mentioned the Dairy Queen. This, too, shows a lack of genuine effort.

Furthermore, although Epperson filed reports (after all but one of the recordings), his reports did not provide an adequate basis for the exercise of judicial oversight.[17] These *pro forma* reports cannot be described as genuine efforts to comply with the statute.

Furthermore, even if Epperson's efforts did qualify as genuine, reversal would still be required. At trial, testimony provided by the informant and other witnesses was bolstered by the recordings. If the recordings were suppressed (under *Jimenez*), jurors might have questions about the veracity of the informant and the other witnesses.

The improper admission of the illegal recordings cannot be described as harmless. *See* Brief of Respondent, p. 29. The illegal recordings went to the heart of each charge. The defense vigorously

[17] As noted, Epperson made no effort—genuine or otherwise—to comply with the reporting requirement as to the August 10 recording.

contested Mr. Potts's guilt, and did not concede the truth of any of the state's evidence relating to the purported drug transactions.

There is a reasonable probability that the erroneous admission of the evidence materially affected the outcome of trial. *State v. Christensen,* 153 Wn.2d 186, 200, 102 P.3d 789 (2004). Mr. Potts's convictions must be reversed and the case remanded for a new trial, with instructions to exclude the illegal recordings and any related evidence.

C. RCW 9.73.230 does not apply to prosecutions for leading organized crime.

Recordings made under RCW 9.73.230 are not admissible to prosecute leading organized crime. RCW 9.73.230(1)(b), (8). The evidence should not have been admitted to prove count one. The court should either have excluded the evidence or limited the jury's consideration of it.[18] RCW 9.73.230(8).

Respondent asks this court to ignore the statute's plain language, which clearly limits the use of recordings made without prior court approval. Brief of Respondent, pp. 37-38. Respondent cites no authority in support of its position.

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[18] Respondent claims that the issue is waived, but fails to address Mr. Potts's two alternative arguments addressing the purported waiver. First, the legislature intended Privacy Act violations to be available for the first time on review. Appellant's Opening Brief, pp. 63-65. Second, if the issue is not preserved, Mr. Potts was denied the effective assistance of counsel. Appellant's Opening Brief, pp. 65-67. Respondent's failure to address these arguments may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

This court can presume that the state found no such authority after diligent search. *In re Griffin*, 181 Wn. App. 99, 107, 325 P.3d 322 (2014). Furthermore, Respondent does not suggest that any error was harmless. Accordingly, the conviction in count one must be reversed and the charge remanded for a new trial, with instructions to exclude the recordings. RCW 9.73.230(1)(b), (8).

IV. THE STATE DID NOT PROVE THAT MR. POTTS INTENTIONALLY LED "THREE OR MORE PERSONS" IN CRIMINAL ACTIVITY.

The evidence at trial suggested that Mr. Potts intentionally led two people in criminal profiteering. He knew the informant (Helsley) and he met Llanes when she came to town. He had no knowledge of Velasquez, or of any other third participant. Appellant's Opening Brief, pp. 68-69. Any evidence that he led Helsley and Llanes was insufficient to prove leading organized crime, absent some showing that he intentionally organized, managed, directed, supervised, or financed Velasquez's involvement. CP 1397; RCW 9A.82.060.

Without any citation to the record, Respondent asserts that "there is no reason to doubt that Velasquez was responsible to Appellant for his actions, that Appellant was aware of Velasquez, and that Appellant's wishes and directives were to be carried out by Velasquez." Brief of Respondent, p. 39. Instead of citing relevant testimony establishing Mr.

Potts's knowledge, Respondent only references evidence that Llanes knew of Velasquez's involvement. Brief of Respondent, p. 39 (citing RP 2212, 2215, 2217-2218, 2221, 2224).

Respondent provides no authority suggesting that Llanes's knowledge can be imputed to Mr. Potts. This failure suggests that Respondent found no such authority. *Griffin*, 181 Wn. App. 107. The state failed to prove that Mr. Potts knew of Velasquez, either by name or as an unnamed third-party. Without such proof, the state failed to show that Mr. Potts intentionally led "three or more" others, as required for conviction

Respondent also asserts that Mr. Potts "financed Christian Velasquez." Brief of Respondent, p. 40. But Respondent does not claim that he *intentionally* or even *knowingly* financed Velasquez. Evidence suggested that he provided a house for Llanes; nothing establishes that he knew that Velasquez (or anyone else) had come to replace Llanes.

The state makes no response to Mr. Potts's argument regarding any indirect interactions with Velasquez. Appellant's Opening Brief, pp. 69-70. This failure to argue may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

The evidence failed to prove the elements of leading organized crime. Mr. Potts's conviction must be reversed and the charge dismissed with prejudice. The remedy when the State presents insufficient evidence

is dismissal with prejudice. *State v. Irby*, 347 P.3d 1103, 1113 (Wash. Ct. App. 2015).

V. THE COURT'S INSTRUCTIONS ALLOWED JURORS TO CONVICT MR. POTTS OF LEADING ORGANIZED CRIME AS AN ACCOMPLICE.

A person may not be convicted of leading organized crime as an accomplice. *State v. Hayes*, 164 Wn. App. 459, 470, 262 P.3d 538 (2011). The court's instructions did not make this manifestly clear to the average juror. Appellant's Opening Brief, pp. 70-74.

Under the court's instructions, a reasonable juror could have convicted even absent proof that Mr. Potts intentionally led three or more people. Jurors may have been convinced that he led Helsley and Llanes, and that he was an accomplice to Niki and/or Alfredo, who directed Velasquez. Appellant's Opening Brief, pp. 72-74. The jury's question shows that jurors were confused on this point. CP 1418.

The court's instructions did not resolve this issue. CP 1397, 1405. First, the "to convict" instruction did not tell jurors how to decide the case if they believed Mr. Potts was both a leader and a member of a criminal organization. CP 1397. Second, although the accomplice instruction referred jurors to two drug offenses, it did not preclude them from applying the instruction's general definitions to the crime of leading organized crime. CP 1405.

The state argues harmless error, but fails to address the correct legal standard. Brief of Respondent, p. 42. The state must prove harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only when the state shows that it is trivial, formal, or merely academic, that it did not prejudice the defendant's substantial rights, and that it had no effect on the outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Respondent's cursory argument does not meet this standard. Brief of Respondent, p. 42.

The court should have given the instructions requested by Mr. Potts. CP 1367, 1370, 1374, 1375. This is especially true in light of the jury's question.[19] CP 1418; RP 2652.

Mr. Potts's conviction in count one violated due process. It must be reversed and the charge remanded for a new trial with proper instructions. *Watt,* 160 Wn.2d at 635; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

[19] Respondent dismisses the jury's question as a "red herring," and goes on to discuss differences between directors, supervisors, and accomplices. Brief of Respondent, p. 42. The court's instructions did not define the terms "director" or "supervisor." CP 1385-1417.

VI. THE PROSECUTOR IMPROPERLY EQUATED "SPECULATION" WITH CIRCUMSTANTIAL EVIDENCE, URGING CONVICTION ON LESS THAN PROOF BEYOND A REASONABLE DOUBT.

The prosecutor in this case suggested that jurors could convict based on speculation. RP 2627. This was reversible misconduct. The error was compounded by the trial court's refusal to sustain counsel's objection. RP 2627.

A prosecutor commits misconduct by mischaracterizing the presumption of innocence, the burden of proof, or the reasonable doubt standard. *State v. Lindsay*, 180 Wn.2d 423, 434-438, 326 P.3d 125 (2014). Such misconduct is given "additional credence" when the court fails to sustain a defense objection. *State v. Gonzales,* 111 Wn. App. 276, 283-284, 45 P.3d 205 (2002).

A defendant cannot open the door to misconduct. *State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008). Respondent nevertheless implies that the prosecutor's statement was a proper response to defense counsel's closing. Brief of Respondent, pp. 43-44. But a prosecutor may not ask the jury to convict based on speculation under any circumstances. *See, e.g., Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 148, 381 P.2d 605 (1963) (addressing the civil standard). Defense counsel did not invite the misconduct. *Id.*

Furthermore, after telling jurors that 'circumstantial' is "another word for speculation," the prosecutor responded to the unsuccessful objection by saying "[D]on't take my word for it; there is a jury instruction." RP 2627. The prosecutor never backed away from his statement equating speculation with circumstantial evidence.

Respondent also attempts to recast the argument as a plain and simple reference to circumstantial evidence. Brief of Respondent, p. 44. In doing so, Respondent ignores the actual language used: the prosecutor equated circumstantial evidence with speculation. RP 2627.

Finally, Respondent neglects an important part of the context surrounding the statement: defense counsel's objection and the court's refusal to sustain the objection or to instruct the jury to disregard the comment. RP 2627. Defense counsel even pointed out that "[c]ircumstantial evidence is not speculation." RP 2627. The court refused to affirm this basic principle. RP 2627. This was error.

The prosecutor's misconduct was an egregious misstatement of the burden of proof, the presumption of innocence, and the reasonable doubt standard. It was compounded by the trial court's failure to sustain defense counsel's objection. The convictions must be vacated and the case remanded for a new trial. *Lindsay*, 180 Wn.2d at 434-438.

VII. THE TRIAL COURT VIOLATED MR. POTTS'S RIGHT TO A SPEEDY TRIAL.

Respondent concedes that the court "in all likelihood lack[ed] jurisdiction when it arraigned [Mr. Potts.]" Brief of Respondent, p. 45. This concession requires dismissal for violation of speedy trial.

Mr. Potts was arrested on August 10, 2012, but he had no actual arraignment until May of 2013. CP 778; RP 600-602, 2081. Absent an arraignment, the court did not "acquir[e] jurisdiction in the manner sanctioned by the Constitution and the statutes." *See State v. Hamshaw*, 61 Wash. 390, 392, 112 P. 379 (1910). Without jurisdiction, the court's orders were void. *See, e.g., Buecking v. Buecking*, 179 Wn.2d 438, 446, 316 P.3d 999 (2013) *cert. denied,* 135 S.Ct. 181 (2014). This includes any continuances or scheduling orders.[20] *Id.*

Under the speedy trial rule, an initial trial date must be set with reference to the "defendant's *actual* arraignment." CrR 3.3(d)(1) (emphasis added). Here, Mr. Potts's "actual arraignment" occurred (over objection) in May of 2013. CP 778; RP 600-602. At that time, and in the

[20] Likewise, any waivers signed by Mr. Potts were not "knowing, intelligent, and voluntary," as required for waiver of the right to speedy trial. *State v. Davis*, 69 Wn. App. 634, 638, 849 P.2d 1283 (1993). At the time he signed any waivers, Mr. Potts did not know he hadn't been properly arraigned.

absence of properly entered orders, Mr. Potts's speedy trial period had long expired.[21] *See* Appellant's Opening Brief, pp. 78-82.

Respondent makes a convoluted argument, the essence of which is that the court should disregard the word "actual" in CrR 3.3(d)(1). Brief of Respondent, pp. 45-48. But a court rule, like a statute, must be interpreted so that no words are superfluous, void, or insignificant. *State v. Osman*, 168 Wn.2d 632, 638, 229 P.3d 729 (2010). The word "actual" must be given its ordinary meaning; it cannot be ignored as Respondent suggests. *Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 174 Wn.2d 304, 307, 274 P.3d 1025 (2012).

Furthermore, where different words or phrases are used, a different meaning is presumed. *Ass'n of Washington Spirits & Wine Distributors v. Washington State Liquor Control Bd.*, 182 Wn.2d 342, 353, 340 P.3d 849 (2015); *see also State v. Hawkins*, 181 Wn.2d 170, 183, 332 P.3d 408 (2014), *as amended* (Sept. 30, 2014), *reconsideration denied* (Oct. 1, 2014) ("This court interprets court rules the same way it interprets statutes, using the tools of statutory construction.") Other references to arraignment in CrR 3.3 do not use the phrase "actual arraignment." *See,*

[21] Furthermore, a court may not retroactively set a constructive arraignment date long after the time for a speedy trial has elapsed. A constructive arraignment date that is not calculated until months after expiration of the time for trial cannot cure a violation of CrR 3.3 that has already passed.

e.g., CrR 3.3(e)(5) (referring to "the defendant's arraignment in superior court on a related charge"). Because the rule uses different terms, different meanings are presumed. *Id.* The phrase "actual arraignment" means something different from "arraignment." *Id.*

The remedy for a violation of CrR 3.3 is dismissal with prejudice. CrR 3.3(h). Respondent's contrary argument reflects a misunderstanding of Mr. Potts's position. Brief of Respondent, pp. 47-48. The rule requires dismissal here because the charge was brought to trial long after the speedy trial time limit had expired. CrR 3.3(h).

Because the initial time for trial had already expired when Mr. Potts had his "actual arraignment", his right to a speedy trial under CrR 3.3(d)(1) was infringed. His convictions must be dismissed with prejudice. CrR 3.3(h).

VIII. THE COURT IMPROPERLY DENIED MR. POTTS'S SUPPRESSION MOTION .[22]

The search warrant's "command line" did not allow police to search two of the locations searched. CP 22-29. The search of those places violated Mr. Potts's rights under the Fourth Amendment and Wash. Const. art. I, § 7.

[22] The state did not introduce any of the evidence seized from Mr. Potts's property. CP 423,726-727. Respondent has agreed that no evidence seized in this case will be offered, should the case go to trial again. Brief of Respondent, p. 48.

The "command line" of a search warrant limits the areas police may search in executing the warrant. *United States v. Robinson*, 358 F. Supp. 2d 975 (D. Mont. 2005). This is so even if the issuing magistrate finds probable cause for those places, and the body of the warrant describes them.[23] *Id.*

Here, the warrant listed one address. CP 22-29. Police were authorized to search that address. They were not permitted to search any other addresses, even if the magistrate found probable cause and described them elsewhere in the warrant. *Id.*

The constitution prohibits a reviewing court from finding "through divination" that the issuing magistrate intended to authorize the search of premises omitted from the command line. *Id.,* at 980. Even when the omission is "almost certainly a mistake," it may not be corrected after the fact. *Id.*

The right to privacy is "too precious to entrust to after-the-fact conjecture about a magistrate's intentions." *United States v. Evans*, 469 F. Supp. 2d 893, 899 (D. Mont. 2007). If the judiciary were allowed to engage in such speculation, then

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[23] In *Robinson,* the government described the omission of a residence from the warrant's command line as "a minor 'cut and paste' error. *Robinson*, 358 F. Supp. 2d at 978.

> what prevents it from surmising what a magistrate would have done? Why not permit officers to come before [a court] after a search has been conducted to seek admission of seized evidence on the ground that if a warrant had been presented to a magistrate before the search, the magistrate would have issued the warrant?

Id.

The warrant here did not authorize police to search two of the three places they searched. CP 22-29. This court should reverse the lower court's ruling, suppress the evidence, and direct the trial court to order return of any property improperly seized.

Mr. Potts relies on the argument set forth in the Opening Brief to address the remaining points made by Respondent.

IX. THE DISPUTED AGGRAVATING FACTOR APPLIES ONLY IF THE *CURRENT OFFENSE* IS A MAJOR VIOLATION OF RCW 69.50.

The "major violation" aggravating factor applies only if "the *current offense* was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA)..." RCW 9.94A.535(3)(e). The statute is clear and unambiguous: the aggravating factor applies only to violations of RCW 69.50. Leading organized crime is not a violation of RCW 69.50; therefore, the trial court should not have submitted the aggravating factor to the jury on count one.

Respondent's contrary argument ignores the plain language of the statute. Brief of Respondent, pp. 62-63. According to respondent, Mr.

Potts's *conduct* satisfies the requirements of RCW 9.94A.535(3)(e). This is insufficient: the statute applies only to major violations "of the Uniform Controlled Substances Act, chapter 69.50 (RCW (VUCSA), related to trafficking in controlled substances..." RCW 9.94A.535(3)(e). The offense must qualify before the conduct can be considered.

The aggravating factor and exceptional sentence must be vacated and remanded for a new sentencing hearing. Absent the aggravating factor, the sentencing court lacked authority to run Count I consecutive to the rest of the sentence. Under the SRA sentences "shall be served concurrently; [c]onsecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a). On resentencing, the court may still order Counts II and III to run consecutively to each other (for a total of 240 months plus an additional 24 months for the enhancement), but this 264-month period must run concurrent with whatever sentence is imposed on Count I. RCW 9.94A.489(1)(a).

Furthermore, despite the court's boilerplate language in the findings,[24] the appropriate remedy is remand for resentencing, regardless of the court's authority. The standard range on Count I (149-198 months) was significantly longer than the standard ranges on Counts II and III (60-

120 months each). If the aggravating factor is stricken from the most serious offense, the sentencing court should have the opportunity to rethink the total sentence.

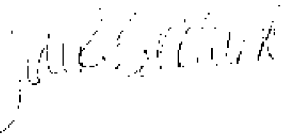
CONCLUSION

Mr. Potts's convictions must be reversed and the case dismissed with prejudice. If the Court of Appeals orders dismissal of some but not all charges, Mr. Potts is entitled to a new trial on any remaining charges.

If Mr. Potts's conviction for leading organized crime is not reversed, the aggravating factor on Count I must be reversed and the case remanded for a new sentencing hearing.

Respectfully submitted on June 5, 2015,

BACKLUND AND MISTRY



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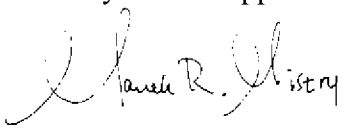

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[24] CP 1543.

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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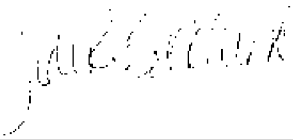
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 5, 2015.



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