No. 45724-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

SIDNEY POTTS,
Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. FACTS 10

The State generally accepts Appellant's recitation of facts, except where noted within the State's arguments. 10

II. THE TRIAL COURT PROPERLY DECLARED A MISTRIAL BASED ON MANIFEST NECESSITY 10

III. APPELLANT'S CONVICTION FOR LEADING ORGANIZED CRIME AND THE PREDICTE OFFENSES DID NOT VIOLATE DOUBLE JEOPARDY 18

IV. THE CONVICTIONS SHOULD NOT BE VACATED BECAUSE OF THE ATTORNEY/CLIENT PHONE CALL ISSUE 20

a. APPELLANT WAIVED ATTORNEY CLIENT PRIVILEGE IN MAKING PHONE CALLS TO HIS ATTORNEY ON AN UNPROTECTED LINE 20

b. THERE WAS NO PREJUDICE TO APPELLANT 22

c. THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO DETERMINE WHETHER THERE WAS PREJUDICE TO APPELLANT .. 24

d. THERE WAS NO PREJUDICE RELATED TO THE SPECIAL PROSECUTOR'S INABILITY TO DETERMINE WHO IN THE DEPARTMENT OF CORRECTIONS MAY HAVE ACCESSED THE CALLS 25

e. THERE IS NO EVIDENCE THAT THE JAIL SYSTEM WAS NOT WORKING 25

f. THE STATE PROVIDED "EXHIBIT 1" TO THE COURT 26

g. THERE IS NO EVIDENCE THAT THE SPECIAL PROSECUTOR OR THE INVESTIGATOR WERE BIASED 27

V. THE WIRE RECORDINGS WERE APPROPRIATELY ADMITTED AT TRIAL 28

a. OVERVIEW 28

b. THE RECORDED PHONE CALLS DID NOT EXCEED THE SCOPE OF THE WIRE AUTHORIZATION 29

c. LIVE TESTIMONY OF THE AUGUST 10th TRANSACTION WAS APPROPRIATELY ADMITTED 30

d. THE WIRE AUTHORIZATIONS ADEQUATELY DESCRIBED THE LOCATIONS OF THE INTERCEPTS 33

e. DEFICIENCIES IN THE DISPOSITION REPORTS DID NOT RENDER THE RECORDED CONVERSATIONS INADMISSIBLE 36

f. THIS COURT SHOULD NOT OVERTURN *KNIGHT* OR *MOORE* 36

g. THE TRIAL COURT PROPERLY ALLOWED THE RECORDINGS TO BE ADMITTED AND THE EVIDENCE CONSIDERED FOR LEADING ORGANIZED CRIME 37

VI. THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF LEADING ORGANIZED CRIME 38

VII. THE JURY WAS APPROPRIATELY INSTRUCTED ON LEADING ORGANIZED CRIME AND ACCOMPLICE LIABLITY 40

VIII. THERE WAS NO PROSECUTORIAL MISCONDUCT 42

IX. THERE WAS NO SPEEDY TRIAL VIOLATION 45

X. THE SEARCH WARRANT IN THIS CASE WAS VALID 48

a. GENERAL OVERVIEW 48

b. THE WARRANT AUTHORIZED THE SEARCH OF ALL THREE RESIDENCES 50

c. THE WARRANT AUTHORIZED THE POLICE TO SEARCH THE PROPERTY, BUT OFFICERS HAD AN INDEPENDENT BASIS TO SEIZE THE TOOLS 50

d. THE AFFIDAVIT ESTABLISHED A NEXUS BETWEEN THE PROPERTY TO BE SEARCHED AND THE CRIMINAL ACTIVITY 51

e. THE AFFIDAVIT ESTABLISHED SUFFICIENT INDICIA OF RELIABLITY FOR THE CONFIDENTIAL INFORMANT 54

f. THE INFORMATION IN THE AFFIDAVIT WAS NOT STALE 55

g. THE SEARCH WARRANT WAS NOT OVERBROAD AND THE AFFIDAVIT ESTABLISHED PROBABLE CAUSE FOR THE REQUESTED ITEMS 57

XI. THE MAJOR VUCSA VIOLATION AGGRAVATOR WAS APPROPRIATELY APPLIED TO THE LEADING ORGANIZED CRIME CHARGE 62

XII. CONCLUSION 64
APPENDICES..68

TABLE OF AUTHORITIES

Cases

Andersen v. Maryland, 427 U.S. 463 (1976) 58
Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) 11
Blockburger v. United States, 284 U.S. 299, 304 (1932) 19
Brady v. Samaha, 667 F.2d 224 (1st Cir.1981) 11
Carlton v. State, 418 So.2d 449 (Fla.App. 1982)..................................... 59
Illinois v. Gates, 462 U.S. 213, (1983) 51
In re Glasman, 175 Wn.2d 696, 286 P.3d 673 (2012) 43
Renico v. Lett, 559 U.S. 766, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) .. 11
State v. Browning, 38 Wash.App. 772, 689 P.2d 1108 (1984)................ 11
State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) 19
State v. Castro, 39 Wn.App. 229, 692 P.2d 890 (1984), review denied 103 Wn.2d 1020 (1985) 55
State v. Chamberlin, 161 Wn.2d 30, 162 P.3d 389 (2007)....................... 48
State v. Chambers, 88 Wn.App. 640, 945 P.2d 1172 (1997).. 58, 59, 60, 61
State v. Chasengou, 43 Wn.App. 379, 717 P.2d 288 (1986) 56
State v. Christiansen, 40 Wn.App. 249, 698 P.2d 1059 (1985)............... 61
State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003) 43
State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006)............................... 10
State v. Fjermestad, 114 Wn.2d 828, 791 P.2d 897 (1990) 28, 31
State v. Forest. 85 Wn.App. 62, 930 P.2d 941 (1997), review denied 133 Wn.2d 1015, 946 P.2d 403 (1997) 30
State v. Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014) 22, 24
State v. G.M.V., 135 Wn.App. 366, 144 P.3d 358 (2006)........................ 52
State v. Harris, 167 Wn.App. 340, 272 P.3d 299 (2012), review denied 175 Wn.2d 1006, 285 P.3d 885 (2010) 18, 19, 20
State v. Hayes, 164 Wn.App. 459,262 P.3d 538 (2011)..................... 19, 41
State v. Higby, 26 Wn.App. 457, 613 P.2d 1192 (1980).......................... 56
State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010).................................. 43
State v. Jimenez, 128 Wn.2d 720, 911 P.2d 1337 (1996)....... 28, 29, 32, 37
State v. Jones, 97 Wn.2d 159, 641 P.3d 708 (1982) 11
State v. Knight, 79 Wn.App. 670, 904 P.2d 1159 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996) 31, 35
State v. Maddox, 152 Wn.2d 499, 98 P.3d 1199 (2004)........................... 53

State v. Melton, 97 Wn.App. 327, 983 P.2d 699 (1999) 11
State v. Moore, 70 Wn.App. 667, 855 P.2d 306 (1993) 31, 32
State v. Olson, 32 Wn.App. 555, 648 P.2d 476 (1982) 58, 59
State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992) 57, 58
State v. Petty, 48 Wn.App. 615, 740 P.2d 879 (1987)........................ 55, 56
State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993) 58, 60
State v. Riley, 34 Wn.App. 529, 663 P.2d 145 (1983) 55
State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). 39
State v. Salinas, 121 Wn.2d 689, 853 P.2d 439 (1993) 28
State v. Scott, 21 Wn.App. 113, 584 P.2d 423 (1978).............................. 58
State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)........................ 51
State v. Smith, 85 Wn.App. 381, 932 P.2d 717 (1997) 29, 34, 35
State v. Starrish, 86 Wn.2d 200, 544 P.2d 1 (1975) 20
State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997) 57, 58, 59
State v. Strine, 176 Wn.2d 742, 293 P.3d 1177 (2013) 10, 11
State v. Thein, 138 Wash.2d 133, 977 P.2d 582 (1999) 51
State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011) 43
State v. Vickers, 148 Wash.2d 91, 59 P.3d 58 (2002) 49
State v. Withers, 8 Wn.App. 123, 504 P.2d 1151 (1972) 61
United States v. Gomez-Soto, 723 F.2d 649 (9th Cir. 1984).................... 58
United States v. Lynch, 598 F.2d 132 (D.C.Cir.1978) 12
United States v. Starling, 571 F.2d 934 (5th Cir.1978) 11
Vega v. United States, 709 A.2d 1168 (D.C.1998).................................. 12

Statutes

RCW 9.73.230 .... 28, 31, 32

Other Authorities

FINAL LEGISLATIVE REPORT, 48th Leg. (Wash. 1984).................... 20

Rules

CrR 3.3 .... 45, 46, 47, 48
CrR 4.1 45

ANSWERS TO ASSIGNMENTS OF ERROR

1. Appellant's second trial did not violate his right to be free from Double Jeopardy.
2. The trial court did not err in declaring a mistrial.
3. The trial court did not declare a mistrial before allowing defense counsel to explain their position.
4. The trial court did consider available alternatives before declaring a mistrial.
5. The trial court conducted the appropriate analysis before declaring a mistrial.
6. The trial court made the appropriate finding of manifest necessity.
7. The trial court conducted the appropriate analysis before declaring a mistrial.
8. The trial court did not violate Appellant's right to be free from Double Jeopardy
9. Appellant's convictions on drug charges did not constitute Double Jeopardy
10. The trial court did not place Appellant in Double Jeopardy by allowing Appellant to be sentenced for Leading Organized Crime, as well as the three predicate crimes.
11. The State did not violate Appellant's right to counsel and due process when detectives listened to phone calls to his attorney made on an unprotected line and where Appellant was warned these specific calls were recorded and monitored.
12. The State did prove beyond a reasonable doubt that there was no prejudice from the detectives listening to the calls.
13. The trial court did not assess the question of prejudice, because the court found waiver.
14. The trial court correctly concluded that Appellant waived his right to privacy when he made calls to his attorney on an open, recorded line, after multiple admonishments that the calls were recorded.
15. The trial court correctly found that Appellant heard warnings that calls to his attorney were being recorded.
16. The trial court correctly found that when Appellant was warned on multiple occasions that the calls were monitored, that he waived his right to private communication.

17. The trial court correctly concluded that Appellant waived his right to private communication when he contacted his privately retained counsel through a public line. The court did not implicitly find that Appellant should have used his attorney's son's phone number.
18. The trial court correctly found that Appellant was warned on multiple occasions that his call was being recorded and persisted in making calls anyway.
19. The trial court did not utilize the wrong legal standard, because waiver was a threshold issue. If the communication was not private, there was no governmental misconduct.
20. The trial court correctly found the wire recording complied with RCW 9.73.
21. The admitted recordings complied with RCW 9.73.
22. Defense counsel was not ineffective in arguing the RCW 9.73 violations.
23. Defense counsel was not ineffective for failing to raise certain arguments regarding RCW 9.73.
24. There was sufficient evidence for the jury to convict Appellant of Leading Organized Crime.
25. There was sufficient evidence for the jury to convict Appellant of Leading Organized Crime and that he directed, supervised, or financed Christian Velasquez.
26. The court's instructions did not relieve the state of its burden to prove the essential elements of the crime.
27. The courts instructions were appropriate.
28. The court's instructions did not allow a conviction if the State failed to prove essential elements of Leading Organized Crime.
29. The trial court did not err in giving Instructoin 10.
30. The trial court did not err in giving Instruction 18.
31. The trial court did not err when it did not use Appellant's proposed elements on Leading Organized Crime.
32. The trial court did not err when it refused Appellant's instructions on accomplice liability.
33. The prosecutor did not commit misconduct.
34. The prosecutor did not misstate the law.
35. The trial court appropriately overruled the objection by Appellant.

36. The trial court's instructions to the jury were appropriate. If not, then any issue was harmless with regards to the verdict.
37. Appellant was not denied his right to a speedy trial.
38. Appellant had a constructive arraignment date set and his trial was set within allowable limits.
39. The trial court appropriately set a constructive arraignment date for the Appellant.
40. The trial court did not err in denying Appellant's motion to suppress regarding items seized during a search of several houses.
41. The trial court did not err in denying Appellant's motion to suppress regarding items seized during a search of several houses.
42. The trial court correctly adopted finding of fact No. 1.
43. The trial court correctly adopted finding of fact No. 3.
44. The trial court correctly adopted finding of fact No. 4.
45. The trial court correctly adopted Conclusion of Law No. 1.
46. The trial court correctly adopted Conclusion of Law No. 2.
47. The trial court correctly granted the State's motion to reconsider.
48. The trial court correctly denied Appellant's motion to reconsider.
49. The aggravator was correctly applied.
50. The trial court correctly allowed the major trafficking violation aggravator.

I. FACTS

The State generally accepts Appellant's recitation of facts, except where noted within the State's arguments.

II. THE TRIAL COURT PROPERLY DECLARED A MISTRIAL BASED ON MANIFEST NECESSITY

The trial court did not violate the Appellant's right to be free of double jeopardy when it declared a mistrial. Generally, the double jeopardy clause "applies where (1) jeopardy has previously attached, (2) jeopardy has terminated, and (3) the defendant is in jeopardy a second time for the same offense in fact and law." *State v. Strine*, 176 Wn.2d 742, 752, 293 P.3d 1177 (2013), *citing State v. Ervin*, 158 Wn.2d 746, 752, 147 P.3d 567 (2006). There is no question that jeopardy previously attached and that the defendant was tried for a second time for the same offense in both fact and law, the only issue is whether jeopardy was terminated. Jeopardy is terminated either through acquittal, final conviction, or through the court's dismissal of the jury without the defendant's consent, where the dismissal was not done in the interest of justice. *Id., citing State v. Ervin*, 158 Wn.2d at 752-53, 147 P.3d 567. Thus, the issue is whether the trial court's declaration of a mistrial was done in the interest of justice. It was.

In determining whether the mistrial declaration was done in the interest of justice, and generally when evaluating a court's decision to declare a mistrial, appellate courts give "'great deference' to the trial court's decision to declare a mistrial." *Id.* at 753, 293 P.3d 1177, *citing State v. Jones*, 97 Wn.2d 159, 163, 641 P.3d 708 (1982). To declare a mistrial over the defendant's consent, the court must find there was a "manifest necessity," or a "high degree of necessity." *Id.* at 754, 293 P.3d 1177, *citing Renico v. Lett*, 559 U.S. 766, 130 S.Ct. 1855, 1863-64, 176 L.Ed.2d 678 (2010), *citing Arizona v. Washington*, 434 U.S. 497, 506, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). The evaluation of whether manifest necessity exists is guided by three main questions, (1) did the court act hastily in declaring the mistrial, (2) did the court give both defense counsel and the State an opportunity to explain their positions, and (3) did it consider alternatives to declaring a mistrial. *See generally State v. Melton*, 97 Wn.App. 327, 332, 983 P.2d 699 (1999). *See also State v. Browning*, 38 Wash.App. 772, 689 P.2d 1108 (1984)(noting that trial court had given neither counsel an opportunity to explore or suggest solutions other than a mistrial); *Brady v. Samaha*, 667 F.2d 224 (1st Cir.1981)(abuse of discretion where mistrial declared abruptly without input from either standby defense counsel or the prosecutor); *United States v. Starling*, 571 F.2d 934 (5th Cir.1978); *Vega v. United States*, 709 A.2d

1168 (D.C.1998)(defense counsel should be accorded meaningful participation and hearing); *United States v. Lynch*, 598 F.2d 132, 136 (D.C.Cir.1978)("[t]he nature of the adversary process requires that defense counsel be accorded a meaningful participation and hearing, rather than a cursory opportunity to comment, in a decision to declare a mistrial based on manifest necessity. The decision is of great significance, involving as it does the defendant's constitutional right to be protected from double jeopardy.").

The trial court's decision in this case was well-reasoned and the declaration of a mistrial was based on a manifest necessity. First, there is simply no evidence to suggest the court acted in an unreasonable, hasty, or ill-considered manner. The issue that ultimately led to the mistrial declaration was raised in the afternoon of September 6th, 2013, a Friday. Defense counsel moved to dismiss on grounds of a discovery violation and an CrR 8.3 violation, and ultimately argued that a fair trial could not be had by Appellant because his preparation, closing argument, and cross examination strategies had all been based on information that was incorrect. RP 1115. The court decided to break for the weekend, specifically to give both parties ample time to brief the issue. RP 1121. The court said, "I want to give the parties an opportunity to chime in, in case there's something that I'm not seeing, or…missing as far as potential

remedies." RP 1121. The court recessed for the weekend and Monday of the following week, so that the attorneys could prepare their arguments regarding the appropriate remedy. RP 1123-24.

When the court reconvened the following Tuesday, defense counsel presented a motion to dismiss based on CrR 8.3, which encompassed both the discovery violation and an argument that continued deception by the informant, acting as an agent of the State, was a separate basis to dismiss. RP 1131. Defense counsel noted specifically that the new information made it "impossible to prepare for trial…" RP 1137. Defense counsel also argued that the jury had been "tainted by the testimony of Detective Epperson." Defense counsel noted several times that it was "impossible to prepare" given what had occurred. RP 1147. The court then asked defense counsel about a mistrial vs. a dismissal as a remedy, specifically suggesting that a mistrial would grant the defense a fresh start. RP 1147-48. Defense counsel replied by arguing that a mistrial did not "address the misconduct," and that a mistrial, if requested, would give up any double-jeopardy claim. RP 1148. Defense counsel then argued that this case was "just like in *Martinez* when the Court said that a continuance certainly wasn't enough because the jury's already been tainted. And the jury's already been tainted by Detective Epperson's testimony." RP 1148-49.

After hearing from the State, the court asked defense counsel about his feelings regarding a mistrial. RP1163. Defense counsel clarified a point regarding the mistrial, but did not state whether the defense objects to the mistrial. RP 1163. The court ultimately recessed for the morning around 10:30am to review additional caselaw and conduct additional research. RP 1170. The court reconvened at 1:26pm and offered defense counsel an opportunity to make additional argument. RP 1170. At this point, defense counsel was well aware that the court was considering a mistrial as an option and had plenty of time to address alternatives.

Defense counsel's argument made it plain to the court that moving forward with the trial would render him ineffective, leaving the court no choice by to declare a mistrial. Defense counsel argued that he had listened to "hours…of tapes," that covered multiple controlled buy operations and interviews, all to prepare for a given defense, but had not reviewed the tapes with "an eye towards what might be useful if I knew the information I know now." RP 1172. Defense counsel continued, noting that he "certainly" did not "have the time to go back and listen to all those tapes," and that he had "painstakingly went through" them. RP 1172. He had refined his strategy to the point where "if testimony from a witness is this, I'm going to play on this particular tape from 20 minutes and 35 second to 20 minutes and 55 seconds." RP 1172. He noted that

there were five additional interviews which had to be processed. RP 1172. He indicated this preparation was "not able to be redone for our purposes now." RP 1172. He asked the court to "image what my opening statement, how much different it would have been…" and that he would have highlighted the information he now possessed. RP 1174-75. He emphasized that "opening statement, cross examination of witnesses would have been different." RP 1175. He argued that the jury would have heard all of the State's witnesses through the perspective of the State's principle witness being a liar. RP 1175. He told the court that "The jury is now tainted by information that we now know is not true." RP 1175. He stated that he could not "re-listen to all of those hours of tapes with a new eye and a new … ear…" RP1175-76. Defense counsel concluded that it was "simply not possible for [him] to provide effective assistance of Counsel…" RP 1176. Defense counsel continued to say that he could not proceed given what had occurred. After some additional argument, defense counsel ultimately concluded that he was "simply…not able to be effective," that there was no proper opening statement given what he now knew, and that "the trial simply cannot proceed and dismissal is the appropriate remedy." RP 1181. Based on that record, the trial could simply could not have continued the trial without essentially guaranteeing that it would be reversed on appeal for ineffective assistance of counsel.

The argument by defense counsel fully contemplated the possibility of a continuance. There was no ambush by mistrial in this case, defense counsel was fully aware of the issues and couched the defense argument in terms that made it clear that a continuance would not be a sufficient remedy. If the trial court attempted to keep the trial moving, defense counsel made it abundantly clear that he could not be effective, that he would have to deal with the taint of the jury, and a trial strategy that was framed incorrectly with the jury. The trial court had no choice but to declare a dismissal.

The trial court's decision was deliberate and contemplated the available options. The trial court recognized that the defense claimed that "the jury is tainted" and that there was "no other remedy than dismissal." RP 1186. This indicates that based on defense counsel's argument, the court believed that Appellant did not consider continuance an appropriate remedy. The court recognized defense counsel's insistence that proceeding with the trial would make him ineffective. RP 1193. The court considered that it would be possible to proceed because the issues could be cleared up with vigorous cross-examination, but goes on to note that "the issue of ineffective assistance of counsel looms fairly large." RP 1194. The trial court noted that a continuance was not a viable option due in part to the possibility of fading memories of jurors, but also notes that

"Mr. Mulligan needs to get up to speed again with new information and review." RP 1195. This is clearly a nod toward defense counsel's ineffective assistance claims. The trial court did carefully consider the alternatives and rendered a just decision.

The trial court further clarified the specific facts upon which the mistrial was declared during a subsequent motion to dismiss based on the alleged double-jeopardy violation. During that hearing defense counsel argued that the court did not sufficiently consider a continuance or suppression of the evidence as viable alternatives to a mistrial. RP 1252-53. The court then explicitly stated that suppression was not an appropriate remedy and referred to statements the court made in response to the original motion to dismiss, i.e. that suppression would only work to the disadvantage of the defense since it would foreclose "juicy" cross-examination, and was thus not an option. RP 1270-71. In terms of the continuance, the trial court noted that the main concern was "the kind of scrupulous, careful, meticulous manner in which Mr. Mulligan reviewed the tapes of the interviews," and that "he was prepared based on what a witness would say, then he said if they say that, he does down this prong, he's going to play this tape. If they say something else, he goes down on this prong." RP 1272. The trial court further noted that a continuance did not appear to provide defense counsel with the kind of time to repeat the

painstaking preparation. RP 1272. The trial court specifically considered all the alternatives and gave both sides ample time to address the court.

The declaration of a mistrial was based on manifest necessity. The three-part test for determining whether there was manifest necessity was met in this case. The trial court did not act hastily and recessed trial several times to give itself and trial counsel the opportunity to conduct additional research and present additional argument. The trial court gave both sides ample opportunity to respond. Finally, the trial court noted and considered each of the available options, from suppression to dismissal, before declaring a mistrial. There was a manifest necessity and the mistrial declaration was appropriate.

III. APPELLANT'S CONVICTION FOR LEADING ORGANIZED CRIME AND THE PREDICTE OFFENSES DID NOT VIOLATE DOUBLE JEOPARDY

The Appellant's convictions for Leading Organized Crime and the predicate offenses do not violate Double Jeopardy. *State v. Harris* is directly on point and holds that convictions for "predicate offenses and for the crime of leading organized crime do not constitute double jeopardy." 167 Wn.App. 340, 358, 272 P.3d 299 (2012), *review denied* 175 Wn.2d 1006, 285 P.3d 885 (2010). This same holding also emerged from Division One in *State v. Hayes*, where the court held that "it is abundantly clear that the underlying offenses… are not the same offenses as leading

organized crime." 164 Wn.App. 459, 484-85,262 P.3d 538 (2011). The court also noted that "the underlying offenses are not the same as leading organized crime in law and fact under *Blockburger." Id., citing Blockburger v. United States*, 284 U.S. 299, 304 (1932). This, as a threshold issue, should resolve the Appellant's claim.

There is no double jeopardy violation for the Appellant's multiple convictions because the predicate offenses are different in both law and fact from leading organized crime. As in *Harris*, leading organized crime requires proof of leading three or more persons and that the predicate offenses were completed for financial gain. *Id.* at 353-354, 272 P.3d 299. Even if the State proved all of the predicate felonies, that evidence alone would not be sufficient to convict Appellant of leading organized crime, again, as in *Harris*. *Id., citing State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

Even if the court were to find that the convictions failed the "same evidence" test, where there is clear evidence of contrary intent, double jeopardy is not violated. *Calle*, 125 Wn.2d at 780, 888 P.2d 155 (1995). This was a crucial point raised in *Harris* that the Appellant does not address. The *Harris* court looked to the legislative purpose behind the leading organized crime charge and found that "the legislature intended to create '[n]ew crimes' because the legislature did not intend for the

predicate crimes to merge with the new crime of leading organized crime." *Harris*, 167 Wn. App. at 357, *citing* FINAL LEGISLATIVE REPORT, 48th Leg., at 1987 (Wash. 1984).

This court should not overturn *Harris* and should affirm the Appellant's convictions.

IV. THE CONVICTIONS SHOULD NOT BE VACATED BECAUSE OF THE ATTORNEY/CLIENT PHONE CALL ISSUE

a. APPELLANT WAIVED ATTORNEY CLIENT PRIVILEGE IN MAKING PHONE CALLS TO HIS ATTORNEY ON AN UNPROTECTED LINE

Waiver is a threshold issue in this case. The trial court found that Appellant had knowingly and voluntarily waived his right to private communication with counsel by making phone calls to his attorney on a public unprotected line. The facts in this case support the court's finding of a knowing, intelligent and voluntary waiver and subsequent denial of the CrR 8.3(b) motion to dismiss. Denial of such a motion is reviewed for abuse of discretion. *State v. Starrish*, 86 Wn.2d 200, 209, 544 P.2d 1 (1975). The trial court did not abuse its discretion in denying the Appellant's motion to dismiss under CrR 8.3(b).

The State requested that the court appoint a special prosecutor to conduct an investigation into the breach of attorney-client privilege. The report of the special prosecutor, along with transcripts of interviews,

photographs of the phones used for the phone calls, a log of calls between Appellant and his attorney James Morgan that had been accessed by detectives, and a log of ALL the calls that had been made by Appellant while in custody, were attached as an appendix to the State's response to the motion to dismiss. CP 134-352. This is the evidence which the court used to make its findings. CP 433-435.

The evidence established that the Appellant waived his right to private communication with defense counsel. The special prosecutor's detailed the investigation and highlighted several important points. First, every time an inmate at the jail makes a call on a non-attorney number, they are warned that "the call is subject to recording and monitoring." CP 158. The receiver of the call, in this case James Morgan's law office, is also told that the call is subject to recording and monitoring. CP 158. Both parties are required to acknowledge this warning by explicitly accepting the call. CP 158. Appellant made a number of phone calls to his attorney at the time, James Morgan, using the number 360-426-3091. CP 158. This number was not logged in the call system as an attorney number. CP 158. Local attorneys provide certain numbers to the jail and calls to those numbers are blocked from access by the jail phone recording system. CP 158. James Morgan had a separate line specifically for accepting jail phone calls that was blocked in the system. CP 158. That

number was 360-425-0943. CP 158. Inmates are provided access to handbooks that explain the use of the phone system and indicating that non-attorney calls were subject to monitoring ad recording. CP 159. Each phone accessible to the inmates has a sign posted above it warning inmates that phone calls were recorded. CP 159.

Each time Appellant placed a call at issue in this case, he was required to affirmatively acknowledge that such a call would be monitored. Signs were posted above the phones. There is little more that could be done to inform Appellant that the calls would be monitored. The trial court considered all of these facts when it determined that Appellant had waived his right to confidential communication and denied the motion to dismiss.

b. THERE WAS NO PREJUDICE TO APPELLANT

Where there was a breach of attorney-client privilege, the court presumes prejudice, although that presumption is rebuttable. *State v. Fuentes*, 179 Wn.2d 808, 819, 318 P.3d 257 (2014). The standard of review, as in a CrR 8.3(b) motion, is that the trial court's decision is reviewed for abuse of discretion. *Id.* The officers' actions, while reprehensible, did not prejudice Appellant in this case.

Several Detectives with the Longview Police Department that were involved with the case were interviewed. Detective Sgt. Hartley told

investigators that he did listen to several calls and hung up when he determined that the calls were monitored. CP 161. He told investigators that he was surprised he was able to access calls involving an attorney since they were normally blocked and that all the information he recalls hearing was something about a pay dispute between Appellant and his attorney. CP 161. Detective Meadows listened to several calls, but hung up when he determined they were attorney calls. CP 161. He recalled only that two of the calls seemed to be Appellant leaving messages for his attorney and in one call his attorney told him to stop calling on the recorded line. CP 161. Detective Epperson documented each of the phone calls he listened to in a phone log that was included as part of the special investigators report. CP 162. Detective Sawyer reported that he did not listen to any of the calls, but may have overhead one played by Detective Sgt. Hartley. CP 162. Detective Libbey reported he only heard calls that were played by other detectives. CP 162. One other officer, Scott McDaniel, reported listening to a single call and that it involved the filing of a document and the Appellant being warned not to use the recorded line. CP 164. None of the officers reported developing new information or leads in the case based on what was heard. None of the officers reported hearing anything of consequence to the case, based on what was heard. The special prosecutor concluded that based on their

investigation, there was "no indication that any new or additional investigation was initiated based off of the information overheard…" CP 162.

The evidence established beyond a reasonable doubt that the Appellant suffered no prejudice. Each officer was asked to describe what they overheard and none reported any information related to the investigation. No useful information was gained and the only information communicated to the prosecutor was related to fees and not to any substantive information related to the case. No new leads or investigation were developed, nor was there anything offered at the subsequent jury trial. All the charges that went to trial were based on investigation that occurred before the breach. There is no evidence of any prejudice.

c. THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO DETERMINE WHETHER THERE WAS PREJUDICE TO APPELLANT

The special prosecutor's report, with attached documents and transcripts provided sufficient information for the court to make its findings. *Fuentes* did not create a requirement of sworn-testimony. The *Fuentes* court had only the single declaration by the prosecutor, which is why it was remanded for additional discovery. 179 Wn.2d at 821, 318 P.3d 257. In this case, the court had the complete report of the appointed

Special Prosecutor, transcripts of interviews done with the principle officers involved in the case, photographs, and call logs.

d. THERE WAS NO PREJUDICE RELATED TO THE SPECIAL PROSECUTOR'S INABILITY TO DETERMINE WHO IN THE DEPARTMENT OF CORRECTIONS MAY HAVE ACCESSED THE CALLS

The special prosecutor interviewed the only DOC officers who had any relationship with the case or the detectives involved in the case and found that those officers had not accessed any of the calls. The fact that the special prosecutor was unable to determine who in the Department of Corrections office may have accessed the calls is irrelevant, since the investigation revealed that none of that information was relayed to detectives involved. CP 164.

e. THERE IS NO EVIDENCE THAT THE JAIL SYSTEM WAS NOT WORKING

The jail call system was working to block registered numbers. Appellant alleges that because the jail system recorded blocked calls, the State cannot prove the system was working correctly and thus ALL subsequent calls by Appellant to his parade of attorneys are presumed to have been recorded. This allegation seems to be based on a misunderstanding of the exhibits attached to the special prosecutor's report. The report had two separate call logs attached, one which documented the calls to James Morgan's main line that were accessed, and

the other, which detailed "all of the calls made by Mr. Potts since his incarceration." CP 159. There are several calls listed on that log that show numbers apparently attributable to Sam Wardle and Michael Long, but there is NO evidence in the record, anywhere, that suggests that those calls were accessed. The source of this misunderstanding is likely the "Defendant Potts' Supplemental Motion to Reconsider CrR 8.3 Ruling," filed by Appellant's then-lawyer Bruce Hanify. CP 390. He stated that calls to Wardle and Long were accessed and the attached "Exhibit A" shows a list of calls with references to specific page numbers. CP 395. This document is clearly a reference to the log of ALL phone calls that was provided by the Special Prosecutor. There is no evidence whatsoever that these calls were accessed. Even numbers that are blocked show up in the call list, they are just not accessible. CP 313. Detective Epperson stated that there was calls in the list he could not open and that he was told by Detective Sawyer that those were likely attorney calls that he was blocked from accessing. CP 313. There is no evidence anywhere in the record that any attorney calls other than the ones listed in Exhibit 1/Appendix B were accessed by law enforcement, or that any subsequent calls were available to law enforcement.

f. THE STATE PROVIDED "EXHIBIT 1" TO THE COURT

The State provided "Exhibit 1" to the court and the court considered it in rendering its decision. Appellant alleges that the State failed to include this exhibit and that the State's failure to include the "critical document" makes it impossible for the State to prove beyond a reasonable doubt that no prejudice occurred. "Exhibit 1," was just a list of calls to 360-425-3091 (James Morgan's public line) and was referred to as "Appendix B" in the special prosecutor's report. CP 159. The report/exhibit is CP 167-68.

g. THERE IS NO EVIDENCE THAT THE SPECIAL PROSECUTOR OR THE INVESTIGATOR WERE BIASED

Neither the special prosecutor nor the investigator exhibited bias in the case. There is no evidence that either individual had an interest in the outcome of the case and every part of their investigation, including transcripts of their interviews was provided for review. Appellant contends that their failure to document other attorney calls that were accessed suggests that they were biased, but that contention is based on the mistaken belief that attorney calls other than the ones at issue were actually accessed. As previously addressed, that is not the case.

There is no evidence that officers listened to any other phone calls between Appellant and his various attorneys. Appellant returns several time to the idea that somehow the officers kept listening to the phone calls

between Appellant and his various lawyers. As was pointed out in court at the time the motion was heard, the call log that is repeatedly referenced by the Appellant as showing that calls to his other attorneys were recorded was a general call log that simply showed ALL calls made by the Appellant. RP 169. There is nothing in the record to show that those calls were recorded.

V. THE WIRE RECORDINGS WERE APPROPRIATELY ADMITTED AT TRIAL

a. OVERVIEW

The intercepts from the first three controlled buy operations, all admitted at trial, were appropriately authorized under RCW 9.73.230. As a general matter, Appellant's repeated reliance on *State v. Fjermestad* for the proposition that RCW 9.73.230 violations are tantamount to unlawful recordings under RCW 9.72.030 is incorrect. The Washington State Supreme court clarified in *State v. Jimenez* that *Fjermestad* and *Salinas* only applied where there was "the absence of any attempt by the investigating officers to comply with RCW 9.73.230." 128 Wn.2d 720, 726, 911 P.2d 1337 (1996), *citing State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d 897 (1990) *and State v. Salinas*, 121 Wn.2d 689, 853 P.2d 439 (1993). The detectives in this case only made recordings of conversations after being granted authorization pursuant to RCW 9.73.230. Appellant's

claims that any suppression of the wire recording should also include suppression of the related testimony simply do not apply to any of the recordings at issue in this case. For authorizations that are not compliance with RCW 9.73.230, only the "intercepted or recorded communication itself will be inadmissible." *Id.* The suppression of other evidence is precluded by the "unaided evidence provision" in RCW 9.73.230. *Id.*

If the court were to find any of the authorizations failed to comply with the exact requirements of RCW 9.73.230, any such error would be harmless, because the informant and all the involved detectives testified as to their live experience at trial. Under *Smith II*, where there is a genuine effort to comply, the underlying testimony is still admissible even if the wire recordings are not. *State v. Smith*, 85 Wn.App. 381, 392, 932 P.2d 717 (1997). The court in *Smith II* found that because the authorization was otherwise compliant with the statute, in spite of the generic location, it demonstrated good faith and found that the detectives live testimony would have been admissible, rendering the admission of the recording harmless. *Id.* The same would hold true in this case, so even if the court finds deficiencies in the authorizations, any claimed error is harmless.

b. THE RECORDED PHONE CALLS DID NOT EXCEED THE SCOPE OF THE WIRE AUTHORIZATION

RCW 9.73.230 authorized detectives to capture more than a single conversation. This exact scenario was contemplated in *State v. Forest*. 85 Wn.App. 62, 930 P.2d 941 (1997), *review denied* 133 Wn.2d 1015, 946 P.2d 403 (1997). In the *Forest* case, appellant argued that the authorization only applied to a single conversation. *Id.* at 68, 930 P.2d 941. The court ruled that "the Legislature did not intent do limit agency authorization to one conversation per authorization." *Id.* The court recognized that it is the norm, rather than an exception, that a drug transaction involve multiple contacts in order to actually complete the transaction. *Id.* Nor is it beyond the scope of the authorization that the initial phone contact to set up the transaction be recorded. It is all part of the same transaction and it is certainly contemplated by the authorization that the detectives would attempt to capture the entire transaction.

c. LIVE TESTIMONY OF THE AUGUST 10th TRANSACTION WAS APPROPRIATELY ADMITTED

The witnesses to the August 10th controlled buy operation were appropriately allowed to testify by the trial court. Appellant claims that because there was no disposition report for the August 10th wire authorization, any evidence related to that authorization must be suppressed. First, to be clear, the State did produce the authorization for the August 10th controlled buy intercept, it was only the disposition sheet

that was to be filed with the court that could not be located. RP 518. This is important, because the court is not faced with a situation akin to *State v. Fjermestad*, where officers intercepted communications without any lawful authority under the Privacy Act. 114 Wn.2d 828, 791 P.2d 897 (1990). When the State discovered that the disposition sheet could not be found, it stipulated to suppression of the recording. RP 518. Live testimony from the witnesses was, however, offered at trial.

The interception was obtained with a lawful authorization. In this case, officers procured an authorization prior to the interception, but failed to file the disposition report. RP 518. Washington courts have recognized that two separate states exist for evaluating compliance with RCW 9.73.230, pre-intercept and post-intercept. *State v. Knight*, 79 Wn.App. 670, 686, 904 P.2d 1159 (1995), *review denied,* 129 Wn.2d 1005, 914 P.2d 65 (1996), *State v. Moore*, 70 Wn.App. 667, 855 P.2d 306 (1993). In fact, in *Moore*, the court found that RCW 9.73.230 only considered whether the authorization met the appropriate requirements when determining admissibility of the evidence, referencing subsection (8) which stated that the evidence was admissible if the court found that "the requirements of subsection (1) of this section were met." RCW 9.73.230(8). The court admitted a tape recording in *Moore* where there was no record of judicial review, essentially the trial court examined the

authorization for the recordings and found them in compliance. *Moore*, 70 Wn.App. at 673, 855 P.3d 306. This admission was upheld. *Id.* at 675, 855 P.3d 306.

In this case, where there was an attempt at compliance and the error occurred after the interception of the communication and that interception was appropriately authorized, suppression of the live testimony of the witnesses would have been inappropriate. Because the interception occurred based on a lawful authorization, there was substantial compliance with the statute, even though no disposition sheet was ever filed. When law enforcement officers make a genuine effort to comply with the Privacy Act, the statute does not require the suppression of evidence other than the intercepted or recorded communication itself. *State v. Jimenez*, 128 Wn.2d 720, 722, 911 P.2d 1337 (1996).

Moreover, the Privacy Act specifically notes that even if the requirements of RCW 9.73.230(8) are not met, "nothing in this subsection bars the admission of testimony of a party or eyewitness to the intercepted, transmitted, or recorded conversation or communication when that testimony is unaided by information obtained solely by violation of RCW 9.73.030." There was no claim at any point that any of the live witnesses at the trial had been aided in their testimony by the suppressed recording.

The live witnesses to the August 10th transaction were appropriately allowed to testify and this court should affirm the Appellants convictions.

d. THE WIRE AUTHORIZATIONS ADEQUATELY DESCRIBED THE LOCATIONS OF THE INTERCEPTS

The wire authorizations in this case contained sufficient specificity under the statute, given the circumstances of each transaction. While, as Appellant points out, the operations plan in each of the controlled buys was to make contact at Dairy Queen, it is important to note that none of the buys took place inside the Dairy Queen. Nor did Appellant ever get out of his car and enter the Dairy Queen. In each case, Appellant took the informant into his vehicle and drove away from the initial meeting location. RP 2301, RP 2303. For the first transaction, Appellant drove down the street before providing the drugs to the informant. RP 2257-58. For the second transaction, the same procedure occurred. RP 2259-2260. For the third transaction, the initial meeting location changed, but the deal was done in the informant's vehicle at least several blocks from the original intended location. RP 2262. In each transaction, the deal was done in a different location, in a different car, and in a place that law enforcement could not have anticipated. RP 2257-58, RP 2259-2260, RP 2262. Presumably, if the authorizations had indicated that "the plan was

to record conversations or communications at the Dairy Queen," as suggested by the Appellant in their brief, an objection would have been raised that neither of the parties ever entered the Dairy Queen and the officers exceeded the scope of the authorizations. App. Opening Brief pg. 60. Officers were aware, based on information provided by Hellesly, that Potts conducted all of his transactions while in a vehicle. CP23.

Officers provided as much information as was known at the time. In *Smith II*, officers devised a plan to send an informant to the apartment of a suspected drug dealer to conduct a drug transaction. 85 Wn.App. at 385, 932 P.2d. The authorization listed the expected location as "the greater [S]eattle, [K]ing [C]ounty area." *Id.*, 932 P.2d 717. The court found that this was insufficient, because the officers likely expected the recording to take place in the apartment and knew before the authorization was given. *Id.* at 390, 932 P.2d 717. A different wire in that case with the same boilerplate language was acceptable because at the time of the authorization, the officers did not have an expected location. *Id.*

Unlike *Smith*, the officers in this case did not know where the interception was going to take place. In this case, officers had a general plan to contact the individual and to meet at a Dairy Queen, but with no real expectation where the actual recording would take place. If an informant goes to the home of a drug suspect, it is reasonable to think that

the transaction would occur in that home. The same cannot be said where the informant is just going to try and meet someone at a specific location. What actually happened in this case bears this out, in that none of the communications were done in the Dairy Queen, they were each done in a different vehicle, and done in different locations. The officers in this case simply had no idea where the actual interception would take place.

Even if the court were to find that the authorizations were inadequate, any error in this case was harmless. Under *Smith II*, where there is a genuine effort to comply, the underlying testimony is still admissible even if the wire recordings are not. *Id.* 392, 932 P.2d 717. The court in *Smith II* found that because the authorization was otherwise compliant with the statute, in spite of the generic location, it demonstrated good faith and found that the detectives live testimony would have been admissible, rendering the admission of the recording harmless. *Id.* The same would hold true in this case, where the detectives and the informant both testified.

Additionally, reversal is only warranted if "the State fails to show substantial compliance, or the defendant shows prejudice due to the absence of strict compliance." *Knight*, 79 Wn.App. at 685, 904 P.2d 1159. There is evidence of substantial compliance by the State and the Appellant

has established no prejudice arising from the technical defects in the authorizations, so reversal is not warranted.

e. DEFICIENCIES IN THE DISPOSITION REPORTS DID NOT RENDER THE RECORDED CONVERSATIONS INADMISSIBLE

Omission of the time and location of recording from the disposition reports should not render the wire recordings inadmissible. This technical defect is exactly the sort envisioned by the *Knight* court in examining RCW 9.73.230. There is no allegation in this argument that the authorizations were not based on probable cause, or were insufficient in a way related to their actual authority. Rather, Appellant's claim is essentially one of technical compliance. As previously noted regarding several other issues raised by the Appellant, where there is substantial compliance, the court will any error harmless. Reversal is not warranted unless the Appellant can show some prejudice arising from the technical defects. None are alleged. The Appellant's convictions should be affirmed.

f. THIS COURT SHOULD NOT OVERTURN *KNIGHT* OR *MOORE*

Knight and *Moore* remain good law and this court should absolutely consider those prior decisions. Appellant's argument regarding strict compliance stands in stark contrast to the Washington State Supreme

Court's holdings in this area of law, specifically in *Jimenez*, where the court recognized that where there is a genuine effort to comply the unaided evidence provision of RCW 9.73.230(8) applies. 128 Wn.2d at 725, 911 P.2d 1337. Again, the claimed violations in this case all amount to defects that apply to the structure of the authorization, or defects in the disposition reports, not to whether or not the authorization was proper and based in probable cause. This court should not depart from established caselaw and should decline Appellant's invitation to overrule *Knight* and *Moore*.

g. THE TRIAL COURT PROPERLY ALLOWED THE RECORDINGS TO BE ADMITTED AND THE EVIDENCE CONSIDERED FOR LEADING ORGANIZED CRIME

As a threshold issue, Appellant did not raise the issue of cross-admissibility or an instruction relating to the jury's consideration of the wire authorizations for the leading organized crime charge at trial and this failure to object or propose should constitute a waiver of the issue. A curative/cautionary instruction could have been crafted had such an objection been made at the trial level, but without an objection, this issue cannot be raised.

The trial court properly admitted the wire recordings and their consideration by the jury was appropriate. There is no requirement in law

that the court must craft an instruction barring the jury from considering the intercepts when deciding the leading organized crime charge. Assuming the intercepts were properly admissible to establish the predicate charges for leading organized crime, it would frustrate the purpose of RCW 9.82.060, and well as the purpose for RCW 9.73.230. Such a ruling would make inadmissible the evidence necessary to prosecute the most powerful individuals in the narcotics trafficking world with the specific statute designed to apply to them. A generic citation to *Jimenez* by the Appellant cannot be enough to satisfy the court that the evidence was not cross-admissible. Again, the intercepts were introduced to prove the predicate crime. It only makes sense that they be admissible and open for the consideration by the jury for the overall crime. The trial court was not required to craft an instruction limiting the use of the intercepts.

VI. THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF LEADING ORGANIZED CRIME

There was sufficient evidence to convict Appellant of leading organized crime. For purposes of a sufficiency challenge, the court "reviews whether, taking the evidence and all inferences therefrom in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *State v. Salinas*, 119

Wn.2d 192, 201, 829 P.2d 1068 (1992). This is an intentionally generous standard, with significant deference given to the verdict rendered by the jury. Under this standard, there was sufficient evidence to convict the Appellant of leading organized crime.

Angelita Llanes came to Longview specifically to deliver four pounds of methamphetamine to the Appellant. RP 2212. Appellant introduced her to his network of drug dealers and told her "who you can trust and who you can't." RP 2215. Appellant told her who to sell to and how much to charge, information she stored in a notebook. RP 2224. Appellant also rented a house specifically for her, "and for the person who was going to come and stay, and work." RP 2218. Christian Velasquez was Llanes' replacement. RP2221. Based on the facts elicited at trial, 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. Llanes was not even supposed to be working for Appellant, it was supposed to be Velasquez, but for some reason or other, she was pressed into service. RP 2217. Llanes filled a role in Appellant's criminal enterprise and the replacement for that role was Velasquez. In every way that she was supervised, financed, or managed by Potts, so was Velasquez, because they were, for purposes of the criminal enterprise, the exact same person.

When Velasquez and Llanes were finally arrested on August 10th, there is no doubt that they did not own the narcotics that were seized, rather the person responsible for the narcotics was Appellant. Taking the evidence, and reasonable inferences drawn therefrom, in the light most favorable to upholding the jury's verdict, there was sufficient evidence to convict Appellant of leading organized crime.

Even if the court were to find that Appellant did not supervise, manage, or direct Velasquez, the evidence clearly shows that Appellant financed Christian Velasquez. Again, Appellant rented a house for Llanes and the one who was to replace her, Velasquez. RP 2218. Appellant offers no explanation how this did not constitute "financing" Christian Velasquez. The jury found Appellant guilty under each alternative means, including "financing." CP 1420-21. This court should affirm Appellant's conviction for leading organized crime.

VII. THE JURY WAS APPROPRIATELY INSTRUCTED ON LEADING ORGANIZED CRIME AND ACCOMPLICE LIABLITY

The "to convict" instruction was sufficiently clear and a reasonable jury could not have convicted Appellant of leading organized crime under an accomplice liability theory. The State did not argue accomplice liability as a basis for conviction under leading organized crime. The accomplice liability instruction in the case explicitly referred only to

delivery of a controlled substance, though Appellant suggests that it was a "general definition." CP 1405. There is no evidence or compelling argument for this court to consider that the instructions in any way suggested to the jury that accomplice liability was appropriate to apply to leading organized crime.

This specific issue arose in *State v. Hayes*, where the court was faced with a jury instruction essentially the same as the one provided in this case, with one important exception, it specifically authorized accomplice liability for leading organized crime. *State v. Hayes*, 164 Wn. App. 459, 470-71, 262 P.3d 538 (2011). The "to convict" instruction in that case stated that "the defendant, or an accomplice, intentionally…" *Id.* at 468, 262 P.3d 538. The accomplice liability instruction also explicitly stated that leading organized crime was subject to accomplice liability. *Id.* Ultimately, the court found that leading organized crime was not subject to accomplice liability and reversed the conviction. *Id.* at 471, 262 P.3d 538.

Unlike *Hayes*, the instructions in this case did not include accomplice liability as a valid option for leading organized crime. Where the accomplice liability specifically mentions certain offenses and omits others in its definition, the court should consider that absence when attempting to determine if the instructions were accurate. The instructions, as provided, were an accurate statement of the law.

Appellant's argument is based on the possibility of confusion, which, when considered in the context of all the instructions, the actual argument by counsel at trial, and the facts of the cases, is not sufficient.

Even if the court considers the instructions in error, such error was harmless beyond a reasonable doubt. The State did not argue accomplice liability as it applied to leading organized crime, and argued it specifically for the crimes mentioned in the accomplice liability instruction. RP 2596. The reference to the jury question is a "red herring," in that an order given through a subordinate is a completely different scenario than an "accomplice." A "director" who gives a command to a "supervisor," who then passes the command to his front-line staff is not an "accomplice" to the supervisor. Whether the command is given face-to-face, or through an intermediary, the Appellant could only be convicted of leading organized crime by virtue of his own specific actions, not the actions of another. The instructions were sufficiently clear and did not relieve the State of having to prove an essential element of the crime.

VIII. THERE WAS NO PROSECUTORIAL MISCONDUCT

There was no prosecutorial misconduct with regards to the State's use of the word "speculation." To prevail on a claim of prosecutorial misconduct, the Appellant must show that "in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both

improper and prejudicial. *In re Glasman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012), *citing State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice, the Appellant must show a substantial likelihood that the misconduct affected the jury verdict. *Id.*, *citing Thorgerson*, 172 Wn.2d at 442, 258 P.3d 43; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Considering the State's argument in the context of the entire closing arguments, there was no prosecutorial misconduct, nor can the Appellant establish that the alleged misconduct affected the jury verdict.

Appellant advances three arguments to characterize the State's use of the word "speculation" as misconduct. First, they argue that the State's argument was not confined to the law as set forth in the instructions, but if the court reviews the entire context of the statement, both before and after the objection, it is clear the State was only making an argument within the law. The State explained exactly what it meant, which was that what the defense considered "speculation" in close, was not speculation at all, but in fact reasonable inferences drawn from the facts established. Defense counsel specifically addressed his speculation argument to the evidence regarding Appellant's responsibility for Christian Velasquez. RP 2624. His closing ended almost immediately after telling the jury that essentially the evidence tying Velasquez to the Appellant was "pure speculation." RP

2624. The State, speaking in rebuttal, specifically tied the argument regarding speculation to defense counsel's closing statements about Velasquez and the State prefaced the statement about speculation by reading the jury instruction regarding the definition of evidence to the jury. RP 2627. Immediately after the objection, the State read the definition of "circumstantial evidence" to the jury, and then explained that the reference to "speculation" was in relation to the many connections that could only be built in a complex case through "circumstantial evidence." RP 2627-28. The State referred repeatedly throughout closing argument to the argument that inferences drawn from the evidence presented amounted to circumstantial evidence and NOT speculation. RP 2638, RP 2644-45. This was at worst a failed attempt at a clever quip in the heat of the moment during rebuttal. In the context of what was actually said and the closing arguments as a whole, it was not misconduct.

Nor did the argument serve to exhort the jury to convict based on theory or speculation. Again, in the context of the entire argument, the State clearly established it was simply arguing circumstantial evidence and the reasonable inferences drawn therefrom.

Finally, the argument did not undermine the presumption of innocence, the burden of proof, or reasonable doubt, because the argument did not encourage the jury to speculate. Again, the State prefaced the

statement by discussing the instruction on evidence and followed it up with a specific reference to the jury instruction on circumstantial evidence. The State did not commit prosecutorial misconduct.

IX. THERE WAS NO SPEEDY TRIAL VIOLATION

The trial court properly set a constructive arraignment date and did not violate Appellant's right to a speedy trial. The State concedes that the Hon. Judge Gary Bashor was, in all likelihood, disqualified and lacking jurisdiction when it arraigned Appellant. If Appellant was not arraigned in a timely fashion, the remedy under CrR 4.1(b) is for the court to "establish and announce the proper date of arraignment." Since the rule requires that arraignment take place within 14 days of the filing of the information, the court properly announced the date as August 29th, 2012. This date represents that date of arraignment for all purposes, under both CrR 3.3 and CrR 4.1.

The Appellant does not proffer any argument regarding prejudice suffered as a result of the trial court's action, nor do they demonstrate a constitutional speedy trial violation, or a violation of CrR3.3. There is no allegation that if constructive arraignment date set by the court was the "actual" arraignment date, a speedy trial violation occurred. Rather, the Appellant's argument is premised on the idea that the constructive arraignment date, established under CrR 4.1, is not the "actual arraignment

date" as referenced in CrR 3.3(d)(1). To be clear, there is NO allegation that any of the trial dates set by the court violated the Appellant's time for trial rights, i.e. that he receive a trial within 60 days of the date of commencement per CrR 3.3(b)(1). Rather, the Appellant argued that because a trial date was not set within 15 days of the date of the "actual arraignment," there was a violation of the speedy trial rules as written and therefore the case should be dismissed. This is simply not the case.

The arraignment date established by the court pursuant to CrR 4.1 is the only arraignment date; it is both constructive and actual for purposes of CrR 3.3. CrR 4.1(b) specifically states that the constructive arraignment date is "the arraignment date for purposes of CrR 3.3." The commencement date under CrR 3.3(c)(1), the date from which all speedy trial calculations begin, is "the date of arraignment as determined under CrR 4.1." So, for purposes of speedy trial calculation, the constructive arraignment date established pursuant to CrR 4.1 is the only arraignment date. Because of this explicit reference by both rules, the only reasonable interpretation is that **the** arraignment date for purposes of either CrR 3.3 or CrR 4.1 is the constructive arraignment date.

The arraignment date established by the court pursuant to CrR 4.1 is the only arraignment date, constructive or otherwise, because CrR 3.3 specifically defines "arraignment" as "the date determined under CrR

4.1(b). CrR 3.3(a)(3)(iv)." The citation of the CrR 4.1 section that addresses whether a constructive arraignment date needs to be set, by the definitions section of CrR 3.3, is dispositive of this issue. The "arraignment" for purposes of CrR 3.3, including CrR 3.3(d)(1), is "the date determined under CrR 4.1(b). CrR 3.3(a)(3)(iv).

Because the constructive arraignment date is the only applicable date, there was no violation of CrR 3.3(d)(1) and the Appellant's claim must necessarily fail. The Appellant points to the language in CrR 3.3(d)(1) and the inclusion of the word "actual" to suggest that the constructive arraignment date set in CrR 4.1 is not the date for purposes of determining when a trial date must be set. The use of the word actual in this case is irrelevant since the <u>only</u> arraignment date, actual or otherwise, for purposes of CrR 3.3, is the date established by the court pursuant to CrR 4.1(b). The date that CrR 3.3(d)(1) is referring to <u>must</u> be the constructive arraignment date established by the court.

Even if this court were to find that there was a violation of CrR 3.3(d)(1), the remedy is not a dismissal. A plain reading of CrR 3.3(h), the provision upon which Appellant rests their dismissal request, shows that it simply does not apply. CrR 3.3(h), in relevant part, reads "a charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice." There is <u>no</u> allegation that the actual trial

occurred outside the allowable period under CrR 3.3. The only allegation is that the initial trial date was set more than 15 days before the "actual" arraignment. The speedy trial commencement date is the date established pursuant to CrR 4.1. The only reference to "actual" is the reference in "Initial Setting of Trial Date," which ultimately has nothing to do with whether or not a "charge" was brought to trial "within the time limit determined under this rule." CrR 3.3(h).

The court should deny the Appellant's request for dismissal because the trial court properly set a constructive arraignment date pursuant to CrR 4.1 and that date becomes the only arraignment date for purposes of CrR 3.3. CrR 4.1, CrR 3.3(1)(3)(iv).

X. THE SEARCH WARRANT IN THIS CASE WAS VALID

a. GENERAL OVERVIEW

The State did not introduce any evidence obtained from the search warrants at trial and does not intend to should a retrial be necessary. The State responds only to avoid the invalidation of the warrant being used as a collateral attack in a related forfeiture matter. The general requirements for search warrants are well settled. A search warrant may only issue on a determination of probable cause. *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007). The affidavit must set forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably

involved in criminal activity and that evidence of the crime may be found at a certain location. *State v. Vickers*, 148 Wash.2d 91, 108, 59 P.3d 58 (2002). A judge's decision to issue a warrant is reviewed for abuse of discretion and great deference is given to that original decision. *Id.* Affidavits for search warrants are evaluated using common sense and are not subject to a hyper-technical analysis. *Id.* Any doubts are resolved in favor of the warrant. *Id.* The court must conduct its analysis with this deference firmly in mind.

Generally, the search warrant established a number of important facts:

- X had provided info that was corroborated by other sources and made statements against interest, establishing reliability
- X had been selling methamphetamine for POTTS for the last 18 months, meeting him approximately twice a week to pick up drugs for sale and to make cash payments
- Informant X said that POTTS had driven a red Chevrolet Corvette to meet with him to deliver drugs within the last 30 days
- Detectives had seen the red Chevrolet Corvette parked in front of 2839 Louisiana several times in the two weeks before the search warrant was signed
- Detectives had seen the red Chevrolet Corvette parked in the backyard at 2839 Louisiana on the day the warrant was signed
- X had seen POTTS at 2839 Louisiana numerous times, as well as vehicles POTTS used to deliver drugs
- POTTS has listed 2839 Louisiana as his home with the U.S. Department of Probation and Parole
- POTTS was in the house at 2839 Louisiana immediately before the second of three controlled buys, each within the

30 days prior to the signing of the warrant

- Detective Sawyer saw a vehicle previously driven by POTTS parked in front of 2839 Louisiana when X contacted detectives and said that POTTS was going to deliver some drugs and that POTTS was at home
- 5 minutes after Detective Sawyer saw POTTS' vehicle at 2839 Louisiana, it was seen at the location of a controlled buy where POTTS delivered more than an ounce of methamphetamine

CP 22-27.

b. THE WARRANT AUTHORIZED THE SEARCH OF ALL THREE RESIDENCES

The search warrant authorized detectives to search all three locations. Again, search warrants are to be evaluated using common sense and are not subject to a hyper-technical analysis. When the court examines the search warrant and affidavit, it is clear that is established probable cause for multiple locations, was captioned with the address and information for each of the locations, and was intended to authorize the search of each of those locations. The search warrant did incorporate the affidavit by reference. A plain reading of the warrant shows that it was intended to cover all three locations, even if a scrivener's error omitted two of the three locations to be searched from the "ordered to search" section.

c. THE WARRANT AUTHORIZED THE POLICE TO SEARCH THE PROPERTY, BUT OFFICERS HAD AN INDEPENDENT BASIS TO SEIZE THE TOOLS

The detectives did not seize the tools at issue in this case for the purposes of the criminal case. The State concedes that there is no probable cause to seize the tools established by the search warrant affidavit and would stipulate as to their inadmissibility should a subsequent trial occur in this case.

d. THE AFFIDAVIT ESTABLISHED A NEXUS BETWEEN THE PROPERTY TO BE SEARCHED AND THE CRIMINAL ACTIVITY

There was a sufficient nexus established by the search warrant affidavit for the court to find probable cause for each of the locations in the search warrant. Generally, search warrants must establish a nexus between the criminal activity and the item to be seized, and also a nexus with the item and the search target. *State v. Thein*, 138 Wash.2d 133, 140, 977 P.2d 582 (1999). Probable cause for establishing that nexus requires only a showing of criminal activity, not a prima facie showing of criminal activity. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). As in *Thein*, it is the relationship of the evidence sought to the target location that is at issue in this case. There is a sufficient nexus between the evidence sought and the three locations at issue in this case.

Specifically, like in *G.M.V.*, the affidavit established that a drug buy happened immediately after Appellant left 2839 Louisiana, his

residence. *State v. G.M.V.*, 135 Wn.App. 366, 372, 144 P.3d 358 (2006). This alone is enough to create a sufficient nexus under Washington caselaw, and is much more powerful than the general assertions contained in the *Thein* search warrant. The reasonable inference when Appellant told X that he was at home and detectives saw Appellant's vehicle in front of 2839, was that Appellant was at 2839 Louisiana and so were the drugs that he delivered. Appellant showed up in the same vehicle at the controlled buy location and delivered over an ounce of methamphetamine. Further, the informant noted that Appellant was known to use at least 10 different vehicles to deliver narcotics, which implies the reasonable inference that Appellant does NOT store the narcotics in the vehicles, meaning they are either on his person or at the various properties he occupies. This is different than the bare assertion in *Thein* that because a drug dealer always takes his stuff home, his home is fair game. Rather, this is based on actual observation, which at the very least the *G.M.V.* court has recognized takes it out of the realm of *Thein*.

Separate and apart from the controlled buy "nexus," there is significant evidence from the affidavit to establish that even if there is no nexus for "drugs" in the affidavit, there exists a strong likelihood that paperwork, paraphernalia, and other instrumentalities of the long term criminal enterprise would be found at the location. The Washington State

Supreme Court considered a similar circumstance in *State v. Maddox*, 152 Wn.2d 499, 511, 98 P.3d 1199 (2004). In that case, an informant with a longstanding relationship to the target (though not as significant, since the informant in this case was actually selling narcotics for Appellant as opposed to simply buying them) made some observations during a controlled buy that later led a search warrant. *Id.* at 501. While there were many issues at play in *Maddox*, a key take-away from that case was the idea that even though an informant never sees the "instrumentalities" of an on-going criminal enterprise, the magistrate is allowed to infer their existence. *Id.* at 511. This is important and ultimately, intuitive. If someone is selling methamphetamine for a year and a half to the same person, twice a week, over an ounce at a time, there is going to be some evidence of that recurring business. Moreover, given the scope of the operation, which the affidavit noted was extensive and included bringing in people from California to take over his drug trafficking business (later determined to be Llanes and Velasquez), that he financed the car lot with drug sales, and that he gave specific instructions to undercut his competition, there is probable cause to believe that evidence is going to be left behind. The search warrant included more than just methamphetamine, but also paraphernalia, business records, and paperwork relating to the "possession, processing, or distribution of

controlled substances, and/or leading organized crime."

The Appellant's reference to specific facts in a vacuum, like the sales volume of the car lot, or the fact that loans or other sources of income were not investigated are not dispositive. When the court reviews the validity of the search warrant, every reasonable presumption is drawn in favor of upholding the search warrant. Here, where controlled buy operations were conducted that specifically involved all three locations and there was evidence presented in the affidavit that showed the ongoing nature of the narcotics distribution activity by the Appellant, a sufficient nexus was established between each location.

e. THE AFFIDAVIT ESTABLISHED SUFFICIENT INDICIA OF RELIABLITY FOR THE CONFIDENTIAL INFORMANT

The search warrant affidavit established sufficient indicia of both the informant's basis in knowledge and his reliability. The Appellant's argument that the controlled buy operations discussed in the search warrant affidavit were not specific enough to be considered "true" controlled buys must fail. To evaluate the search warrant in such a manner is contrary to the established maxims that reviewing courts grant deference to the magistrate and the possible inferences that can be drawn from the statements in the affidavit. Here, the search warrant affidavit

established the background and qualifications of Detective Epperson, discussed the background of the confidential informant, and provided the court with information regarding three controlled buy operations. CP 23. Even if some information was missing regarding the "controlled" nature of the buys, a reviewing court must indulge all reasonable inferences that could be drawn. In this case, such indulgence extends to the magistrate finding that the controlled buys were sufficiently described to satisfy the requirements of probable cause. At the very least, the description of the controlled buys was sufficient for the magistrate to find that they "[went] in empty and [came] out full," which is all that's necessary to satisfy *Aguilar-Spinelli*. *State v. Castro*, 39 Wn.App. 229, 234, 692 P.2d 890 (1984), *review denied* 103 Wn.2d 1020 (1985). The search warrant affidavit established sufficient indicia of reliability for the confidential informant.

f. THE INFORMATION IN THE AFFIDAVIT WAS NOT STALE

The information contained within the search warrant affidavit was not stale. The test for staleness of information in a search warrant affidavit, like the federal rule, is one of common sense. *State v. Petty*, 48 Wn.App. 615, 740 P.2d 879 (1987), *citing State v. Riley*, 34 Wn.App. 529, 534, 663 P.2d 145 (1983). The amount of time between the known

criminal activity and the issuance of the warrant is only one factor and should be considered along with all the other circumstances, including the nature and scope of the suspected criminal activity. *State v. Petty*, 48 Wn.App. at 621, 740 P.2d 879, citing *State v. Higby*, 26 Wn.App. 457, 460, 613 P.2d 1192 (1980). Moreover, a "magistrate is entitled to draw reasonable inferences from the facts and circumstances set forth in the affidavit." *State v. Petty*, 48 Wn.App. at 622, 740 P.2d 879, *citing State v. Chasengou*, 43 Wn.App. 379, 385, 717 P.2d 288 (1986). Here, there was evidence of a longstanding relationship as well as a track record of narcotics trafficking activity. CP 23. Again, as noted previously in the discussion regarding nexus, the focus on a case like this is not only on whether narcotics would be present at the location, but also whether the instrumentalities related to the crime, would be found. Items such as baggies, scales, and other evidence of a drug trafficking operations would be found at the location, regardless of whether the informant's information that he had done three-buys in 30 days was sufficiently close in time to the application for the search warrant.

All reasonable inferences are indulged in favor of the warrant's validity. Appellant's argument that the informant's claim to an 18 month relationship was unverified is not relevant where the basis in knowledge and reliability of the informant was established as it was in this case. Nor

does it matter that the transactions themselves took place in a car and not at any of the locations. There was sufficient evidence provided in the affidavit for the magistrate to find that there was probable cause to believe that items related to drug trafficking, outside of the drugs themselves, would be found at the three different locations.

g. THE SEARCH WARRANT WAS NOT OVERBROAD AND THE AFFIDAVIT ESTABLISHED PROBABLE CAUSE FOR THE REQUESTED ITEMS

The search warrant was sufficiently particular as to its contents and there was probable cause to support the request for all the evidence requested in the search warrant. There was probable cause for the search and seizure of cellular phones, cash, documents, letters, papers, and personal items. The question of whether probable cause for the crime and the instrumentalities of the crime exists is fundamentally different than the question put forward in *Thein* regarding the nexus between the probable cause for a crime and the location to be searched.

The requirement for particularity is that the warrant must be sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997). The degree of specificity required varies according to the circumstances and type of items involved. *State v. Perrone*, 119 Wn.2d 538, 546, 834 P.2d 611 (1992). A description of

items to be searched is valid if it is as specific as the circumstances and the nature of the activity, or crime, under investigation permits. *Stenson*, 132 Wn.2d at 692, *citing Perrone*, 119 Wn.2d at 547, *State v. Riley*, 121 Wn.2d 22, 27-28, 846 P.2d 1365 (1993). Nor are generic classifications such as "business records" or certain kinds of documents automatically impermissibly broad. *Stenson*, 132 Wn.2d at 692, *citing Riley*, 121 Wn.2d at 28. Where the specific identity of items sought cannot be determined at the time the warrant is issued, a vague or general description is permissible if probable cause is shown and a more specific description is impossible. *Id.*, *citing Perrone*, 119 Wn.2d at 547, *Andersen v. Maryland*, 427 U.S. 463, 480 (1976), *State v. Scott*, 21 Wn.App. 113, 118, 584 P.2d 423 (1978) (warrant authorizing a search for and seizure of "employment and business records" was not impermissibly broad), *United States v. Gomez-Soto*, 723 F.2d 649, 653 (9th Cir. 1984) (search of records relating to international travel not impermissibly broad as it related to crimes under investigation).

Additionally, courts have drawn a distinction between property that is "inherently innocuous" and property that is "inherently illegal." *State v. Chambers*, 88 Wn.App. 640, 644, 945 P.2d 1172 (1997), *citing State v. Olson*, 32 Wn.App. 555, 557-58, 648 P.2d 476 (1982), *Carlton v. State*, 418 So.2d 449, 450

(Fla.App. 1982), 2 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment,* Section 4.6(a), at 550 (3d ed.1996). As the *Chambers* court notes, "there is a sound rationale for this distinction – the risk of an invasion of constitutionally protected privacy is minimal when there is probable cause to search for a controlled substance." *Id.* at 645. The court goes on to note that "officers executing a warrant for marijuana are authorized to inspect virtually every aspect of the premises." *Id., citing Olson*, 32 Wn.App. at 558-559.

Stenson is particularly instructive because it examined the relationship between the evidence sought and the probable cause for the crime. In that case, business records were at issue and the contention was that the language authorizing the search and seizure of "evidence of a business relationship and financial records, cash brought to the location by Mr. HOERNER in a black brief case, personal records, correspondence, photographs and film which may indicate a relationship or association between the STENSONS and the HOERNERS…" was impermissibly overbroad. *Id.* at 693. The crime at issue in the case was a shooting of a Denise Stenson and a Frank Hoerner and since there was a limitation to seizing documents that showed a relationship between the Hoerners and the Stensons, the warrant was not impermissible broad. *Id.*

State v. Chambers is also instructive and analyzed the issue specifically as it applied to illegal narcotics cases. The warrant in that case allowed the police to search for any controlled substances, as well as:

> related items such as those used for growing, selling, storing, ordering, transporting, manufacturing, purchasing, and distributing controlled substances; proceeds from the manufacture, possession, and distribution of controlled substances; weapons and ammunition for the protection of the premises from law enforcement; and indicia of ownership or dominion and control of the premises.

Chambers, 88 Wn.App. at 643, 945 P.2d 1172.. In finding the warrant sufficiently particular, the court focused on the fact that the warrant was captioned as "Violation of the Uniform Controlled Substance Act" and that the crime under investigation could be inferred from the items to be seized, "any and all controlled substance." *Id.* at 646. They held that "reading the warrant as a whole in a commonsense, nonhypertechnical manner, it is clear that RCW 69.50.401(a) was the crime under investigation and that the search was circumscribed by reference to the crime." *Id., citing State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). The court further reasoned that the body of the warrant itself limited the items subject to seizure by specifically limiting the seizure to items related to controlled substances, paraphernalia, drug transactions, or manufacturing, and that the remaining evidence authorized to be

seized related to necessary proof of the crime under investigation.

Id.

The *Chambers* court compared their holding with a similar holding in a similar narcotics case, *State v. Christiansen*, 40 Wn.App. 249, 698 P.2d 1059 (1985). That case also dealt with marijuana distribution and overbreadth where the search warrant authorized the search and seizure of "all evidence of fruits of the crime(s) of manufacturing, delivering or possessing controlled substances..." *Id.* at 251. That court reached the same conclusion as the *Chambers* court in finding that the description of the items seized was confined to evidence of the suspected crime. *Id.* at 254. The court concluded with a parting statement that "a grudging and overly technical requirement of elaborate specificity has no place in determining whether a warrant satisfies the Fourth Amendment requirement of particularity." *Id., citing State v. Withers*, 8 Wn.App. 123, 126-27, 504 P.2d 1151 (1972).

The warrant at issue in this case created clear restrictions be declaring its purpose related to the distribution of controlled substances and the criminal enterprise operating to further that goal. That limited the scope of the seizure to various pieces of evidence relating to the possession, processing, or distribution of controlled substances, or the instrumentalities of an on-going criminal enterprise. All of the evidence

that the search warrant authorized seizing would be related to proving the crime of conspiracy, delivery, or possession with intent to deliver narcotics. The search warrant limited officers to controlled substances, paraphernalia related to distributing controlled substances, personal items including books, pictures, etc. that relate to the possession, processing, or distribution of controlled substances, and letters and property that show ownership or occupancy of the residence, as well as business records related to the criminal enterprise. All of this evidence is evidence directly related to the crime under investigation and for which probable cause exists.

It would not be possible to provide more specific descriptions or limitations than those contained in the warrant. Two different courts have upheld searches with similar lists of items to be searched where the crime was identified and limitations were made restricting the seizure to evidence of the crime. Given the circumstances, the limitations were appropriate, specific, and satisfied the particularity requirement of the 4th Amendment.

XI. THE MAJOR VUCSA VIOLATION AGGRAVATOR WAS APPROPRIATELY APPLIED TO THE LEADING ORGANIZED CRIME CHARGE

The plain language of RCW 9.94A.535 does not preclude the application of the major violation of the UCSA from applying to offenses outside RCW 69.50. The relevant section reads, "The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition..." RCW 9.94A.535(3)(e). The statute goes on to list a number of factors. By the bare facts alleged in this case, in the course of leading organized crime, Appellant's conduct amounted to a major violation of the UCSA. Appellant had arranged for out-of-state individuals to deliver four pounds of methamphetamine, then used the delivery person to deal that methamphetamine in amounts ranging from 1ounce to 4 ounces for resale. RP 2210-2215. The explicit conduct contemplated by the leading organized crime charge absolutely satisfies the requirements of RCW 9.94A.535(3)(e).

Even if the court finds that RCW 9.94A.535(3)(e) does not apply, the sentence should be upheld. The trial court indicated that it would impose the same sentence based on any of the exceptional sentence factors individually. CP 1543. Even if this court finds that the major trafficking violation aggravator does not apply to leading organized crime, remand for re-sentencing is not necessary. Since Appellant has only challenged

one of the aggravating factors, if any of the others remain valid, the error is harmless and this court should not remand for resentencing. *State v. Coleman*, 152 Wn.App. 552, 568, 216 P.3d 479 (2009), *citing State v. Harding*, 62 Wn.App. 245, 250, 813 P.2d 1259, *review denied*, 118 Wn.2d 1003, 822 P.2d 287 (1991). So, regardless of the court's finding regarding the aggravator for leading organized crime, the court should affirm the sentence.

XII. CONCLUSION

This court should affirm the convictions of the Appellant. While detectives engaged in reprehensible behavior in listening to phone calls between Appellant and one of his attorneys, such calls were made on a public line, subject to recording, and after many warnings that such calls were not private. The trial court ultimately determined that this amounted to wavier of the privilege and denied the motion to dismiss. The evidence, presented to the trial court, consisted of the reports, transcripts of interviews, call logs, photographs, and was sufficient for the court to determine whether any prejudice arose. There was no prejudice. The trial court found that there was no evidence that any information discovered by listening to the phone calls was usable, relevant, or resulted in prejudice to the Appellant. The State did prove beyond a reasonable doubt that there was no prejudice.

The State and/or the trial court did not violate Appellant's rights regarding double jeopardy. The mistrial was declared by the trial court based on manifest necessity, with such findings only determined after careful research and deliberation. Because the mistrial was based on manifest necessity, jeopardy was terminated and no double-jeopardy violated has occurred.

Nor was Appellant put into double jeopardy by being convicted of both leading organized crime and the predicate offenses. There are two court of appeals cases directly on point on this issue and this court should decline Appellant's request to overturn those cases.

Further, the wire recordings presented at trial were admitted appropriately. The authorizations met the requirements of the statute and should this court find otherwise, any error stemming from that failure was harmless and reversal is not required. Nor should the court take Appellant's suggestion of overturning *Moore* or *Knight* in this case.

There was sufficient evidence to find that Appellant supervised, directed, managed, or financed Christian Velasquez. All reasonable inferences are made to uphold the verdict and even if the court were to find the evidence insufficient on the various alternative means, there was certainly no doubt that Appellant financed a house for Velasquez to stay in and thus satisfied one of the alternative means.

The jury was appropriately instructed on both accomplice liability and leading organized crime and there is no danger, either from the instructions, or the arguments made by counsel, that the jury could be confused or hold Appellant accountable for leading organized crime under an accomplice liability theory.

There was no prosecutorial misconduct in this case. Taking the prosecutor's statement in the context of the entire closing argument, it was not misconduct, did not shift or diminish the State's burden, or otherwise confuse the jury. Even if the court considered the statement misconduct, it was harmless and the convictions should be unaffected.

There was no speedy trial violation. Appellant makes no argument regarding prejudice, the claimed right is not constitutional in nature, and at best, the setting of a constructive arraignment date and the failure to set a trial date within 15 days of the "actual" arraignment date is a technical violation that does not warrant dismissal.

Even though the State did not and will not seek to admit any of the evidence obtained through the search warrant, the State maintains that the warrant passed constitutional muster.

Finally, the major narcotics violation aggravator was appropriately applied in this case and if this court should find otherwise, the trial court appropriately indicated that the same sentence would be applied based on

one of the numerous other aggravators, so the sentence should be affirmed.

Based on all of these arguments, the State respectfully requests that this court affirm all of the Appellants convictions.

Respectfully submitted this 6th day of April, 2015.

RYAN JURVAKAINEN

Prosecuting Attorney

By:

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Deputy Prosecuting Attorney

Representing Respondent

APPENDICES

9.73.230
Intercepting, transmitting, or recording conversations concerning controlled substances or commercial sexual abuse of a minor — Conditions — Written reports required — Judicial review — Notice — Admissibility — Penalties.

(1) As part of a bona fide criminal investigation, the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor may authorize the interception, transmission, or recording of a conversation or communication by officers under the following circumstances:

(a) At least one party to the conversation or communication has consented to the interception, transmission, or recording;

(b) Probable cause exists to believe that the conversation or communication involves:

(i) The unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW; or

(ii) A party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102; and

(c) A written report has been completed as required by subsection (2) of this section.

(2) The agency's chief officer or designee authorizing an interception, transmission, or recording under subsection (1) of this section, shall prepare and sign a written report at the time of authorization indicating:

(a) The circumstances that meet the requirements of subsection (1) of this section;

(b) The names of the authorizing and consenting parties, except that in those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged;

(c) The names of the officers authorized to intercept, transmit, and record the conversation or communication;

(d) The identity of the particular person or persons, if known, who may have committed or may commit the offense;

(e) The details of the particular offense or offenses that may have been or may be committed and the expected date, location, and approximate time of the conversation or communication; and

(f) Whether there was an attempt to obtain authorization pursuant to RCW 9.73.090(2) and, if there was such an attempt, the outcome of the attempt.

(3) An authorization under this section is valid in all jurisdictions within Washington state and for the interception of communications from additional persons if the persons are brought into the conversation or transaction by the nonconsenting party or if the nonconsenting party or such additional persons cause or invite the consenting party to enter another jurisdiction.

(4) The recording of any conversation or communication under this section shall be done in such a manner that protects the recording from editing or other alterations.

(5) An authorization made under this section is valid for no more than twenty-four hours from the time it is signed by the authorizing officer, and each authorization shall independently meet all of the requirements of this section. The authorizing officer shall sign the written report required under subsection (2) of this section, certifying the exact date and time of his or her signature. An authorization under this section may be extended not more than twice for an additional consecutive twenty-four hour period based upon the same probable cause regarding the same suspected transaction. Each such extension shall be signed by the authorizing officer.

(6) Within fifteen days after the signing of an authorization that results in any interception, transmission, or recording of a conversation or communication pursuant to this section, the law enforcement agency which made the interception, transmission, or recording shall submit a report including the original authorization under subsection (2) of this

section to a judge of a court having jurisdiction which report shall identify (a) the persons, including the consenting party, who participated in the conversation, and (b) the date, location, and approximate time of the conversation.

In those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged.

A monthly report shall be filed by the law enforcement agency with the administrator for the courts indicating the number of authorizations granted, the date and time of each authorization, interceptions made, arrests resulting from an interception, and subsequent invalidations.

(7)(a) Within two judicial days of receipt of a report under subsection (6) of this section, the court shall make an ex parte review of the authorization and shall make a determination whether the requirements of subsection (1) of this section were met. Evidence obtained as a result of the interception, transmission, or recording need not be submitted to the court. If the court determines that any of the requirements of subsection (1) of this section were not met, the court shall order that any recording and any copies or transcriptions of the conversation or communication be destroyed. Destruction of recordings, copies, or transcriptions shall be stayed pending any appeal of a finding that the requirements of subsection (1) of this section were not met.

(b) Absent a continuation under (c) of this subsection, six months following a determination under (a) of this subsection that probable cause did not exist, the court shall cause a notice to be mailed to the last known address of any nonconsenting party to the conversation or communication that was the subject of the authorization. The notice shall indicate the date, time, and place of any interception, transmission, or recording made pursuant to the authorization. The notice shall also identify the agency that sought the authorization and shall indicate that a review under (a) of this subsection resulted in a determination that the authorization was made in violation of this section provided that, if the confidential informant was a minor at the time of the recording or an alleged victim of commercial child sexual abuse under RCW 9.68A.100 through 9.68A.102 or 9[A].40.100, no such notice shall be given.

(c) An authorizing agency may obtain six-month extensions to the notice requirement of (b) of this subsection in cases of active, ongoing

criminal investigations that might be jeopardized by sending the notice.

(8) In any subsequent judicial proceeding, evidence obtained through the interception or recording of a conversation or communication pursuant to this section shall be admissible only if:

(a) The court finds that the requirements of subsection (1) of this section were met and the evidence is used in prosecuting an offense listed in subsection (1)(b) of this section; or

(b) The evidence is admitted with the permission of the person whose communication or conversation was intercepted, transmitted, or recorded; or

(c) The evidence is admitted in a prosecution for a "serious violent offense" as defined in RCW 9.94A.030 in which a party who consented to the interception, transmission, or recording was a victim of the offense; or

(d) The evidence is admitted in a civil suit for personal injury or wrongful death arising out of the same incident, in which a party who consented to the interception, transmission, or recording was a victim of a serious violent offense as defined in RCW 9.94A.030.

Nothing in this subsection bars the admission of testimony of a party or eyewitness to the intercepted, transmitted, or recorded conversation or communication when that testimony is unaided by information obtained solely by violation of RCW 9.73.030.

(9) Any determination of invalidity of an authorization under this section shall be reported by the court to the administrative office of the courts.

(10) Any person who intentionally intercepts, transmits, or records or who intentionally authorizes the interception, transmission, or recording of a conversation or communication in violation of this section, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

(11) An authorizing agency is liable for twenty-five thousand dollars in exemplary damages, in addition to any other damages authorized by this chapter or by other law, to a person whose conversation or communication was intercepted, transmitted, or recorded pursuant to an authorization

under this section if:

(a) In a review under subsection (7) of this section, or in a suppression of evidence proceeding, it has been determined that the authorization was made without the probable cause required by subsection (1)(b) of this section; and

(b) The authorization was also made without a reasonable suspicion that the conversation or communication would involve the unlawful acts identified in subsection (1)(b) of this section.

RCW 9.94A.535

Departures from the guidelines.

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range,

and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

(dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW 9A.36.031(1)(k), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the offense.

(ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW 46.04.350, with a posted speed limit of forty-five miles per hour or greater.

RULE CrR 4.1
ARRAIGNMENT

(a) Time.

(1) Defendant Detained in Jail. The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court, if the defendant is (i) detained in the jail of the county where the charges are pending or (ii) subject to conditions of release imposed in connection with the same charges.

(2) Defendant Not Detained in Jail. The defendant shall be arraigned not later than 14 days after that appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay. For purposes of this rule, "appearance" has the meaning defined in CrR 3.3(a)(3)(iii).

(b) Objection to Arraignment Date---Loss of Right to Object. A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of the arraignment. If the court rules that the objection is correct, it shall establish and announce the proper date of arraignment. That date shall constitute the arraignment date for purposes of CrR 3.3. A party who fails to object as required shall lost the right to object, and the arraignment date shall be conclusively established as the date upon which the defendant was actually arraigned.

(c) Counsel. If the defendant appears without counsel, the court shall inform the defendant of his or her right to have counsel before being arraigned. The court shall inquire if the defendant has counsel. If the defendant is not represented and is unable to obtain counsel, counsel shallbe assigned by the court, unless otherwise provided.

(d) Waiver of Counsel. If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes.

Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. Waiver of counsel at arraignment shall not preclude the defendant from claiming the right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed. If such claim for counsel is not timely, the court shall appoint counsel but may deny or limit a continuance.

(e) Name. Defendant shall be asked his or her true name. If the defendant alleges that the true name is one other than that by which he or she is charged, it must be entered in the minutes of the court, and subsequent proceedings shall be had by that name or other names relevant to the proceedings.

(f) Reading. The indictment or information shall be read to defendant,unless the reading is waived, and a copy shall be given to defendant.

RULE 3.3

TIME FOR TRIAL

(a) General Provisions.

(1) *Responsibility of Court.* It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime

(2) *Precedence Over Civil Cases.* Criminal trials shall take precedence over civil trials.

(3) *Definitions.* For purposes of this rule:

(i) "Pending charge" means the charge for which the allowable time for trial is being computed

(ii) "Related charge" means a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.

(iii) "Appearance" means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) "Arraignment" means the date determined under CrR 4.1(b).

(v) "Detained in jail" means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) *Construction.* The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) *Related Charges*. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) *Reporting of Dismissals and Untimely Trials*. The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g).

(b) Time for Trial.

(1) *Defendant Detained in Jail*. A defendant who is detained in jail shall be brought to trial within the longer o

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) *Defendant Not Detained in Jail*. A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5)

(3) *Release of Defendant*. If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) *Return to Custody Following Release*. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) *Allowable Time After Excluded Period*. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not

expire earlier than 30 days after the end of that excluded period

(c) Commencement Date.

(1) *Initial Commencement Date.* The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) *Resetting of Commencement Date.* On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification

(d) Trial Settings and Notice--Objections--Loss of Right to Object

(1) *Initial Setting of Trial Date.* The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2) *Resetting of Trial Date.* When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(3) *Objection to Trial Setting.* A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) *Loss of Right to Object.* If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) *Competency Proceedings.* All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) *Proceedings on Unrelated Charges.* Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) *Continuances.* Delay granted by the court pursuant to section (f).

(4) *Period between Dismissal and Refiling.* The time between the dismissal of a charge and the refiling of the same or related charge.

(5) *Disposition of Related Charge.* The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) *Defendant Subject to Foreign or Federal Custody or Conditions.* The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) *Juvenile Proceedings.* All proceedings in juvenile court.

(8) *Unavoidable or Unforeseen Circumstances.* Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) *Disqualification of Judge.* A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as follows:

(1) *Written Agreement.* Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) *Motion by the Court or a Party.* On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

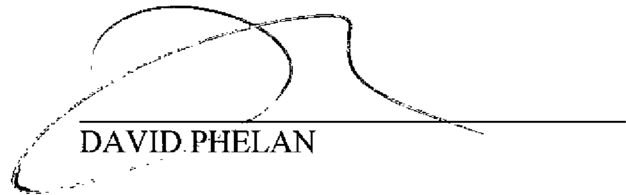
CERTIFICATE OF SERVICE

DAVID PHELAN, certifies that opposing counsel was served electronically via the Division II portal:

JODI BACKLUND & MANEK MISTRY
BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
backlundmistry@gmail.com

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

Signed at Kelso, Washington on April 7, 2015.



DAVID PHELAN

COWLITZ COUNTY PROSECUTOR

April 07, 2015 - 5:19 AM

Transmittal Letter

Document Uploaded: 1-457245-Respondent's Brief.pdf

Case Name: State of Washington vs. Sidney Potts
Court of Appeals Case Number: 45724-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers
Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): ________

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ________

Comments:

No Comments were entered.

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