No. 328660-III

IN THE COURT OF APPEALS - DIVISION THREE
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

DANIEL BLIZZARD, Appellant

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# APPELLANT'S AMENDED OPENING BRIEF

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# I. STATEMENT OF CASE

## A. SUBSTANTIVE FACTS

### 1. The Allegations

Daniel Blizzard was charged with attempted first degree murder and first degree assault on September 18, 2013. CP 14-15. Those charges were revised by amended information on January 30, 2014, following the death of the victim, to a single count of premeditated murder in the first degree. The amended information also included the aggravating factors of deliberate cruelty to the victim, and particular vulnerability of the victim. CP 37-38.

The State summarized its case in its *Determination of Probable Cause.* CP 3-12. According to that document, the assault of Mr. Holbrook, a 78 year old real estate broker, occurred on May 25, 2013 when he was found in a pool of blood in a vacant house near Cowiche, a house he was reportedly showing a couple. He was severely beaten, suffered multiple skull fractures and had his throat cut. CP 4. Two days later, Luis Gomez-Monges, 38, and Adriana Mendez, 23, were arrested in connection with the assault. They were held in the Yakima County jail awaiting trial on first-degree attempted murder charges. CP 6-7.

Mendez reportedly said that she went to the house showing with Gomez-Monges and her children. While there she saw Gomez-Monges

hit Holbrook in the head as she was leaving the house to check on the children who had remained in the car. CP 6. Within a few minutes Gomez-Monges quickly left the house, they both got into the car, and Gomez-Monges began driving fast toward Yakima to drop Mendez off at the motel where she was staying. She said he was breathing heavy, turned the radio up loud, and appeared to have thrown something out of the car while driving. CP 6. Gomez-Monges reportedly told investigators that he only contacted Holbrook about selling his mother's mobile home, but said he had not viewed any homes. CP 7.

Mr. Blizzard was a former business associate of the victim, Vern Holbrook. CP 5. The two had negotiated a deal for the sale of Holbrook's real estate business, Aspen Real Estate. CP 7. That deal, included Mr. Blizzard and his two brothers buying Aspen Real Estate from Mr. Holbrook and setting up a new company, Aspen Blizzard. CP 7. Under the sale agreement, Mr. Holbrook would remain an employee and manage the realty while Aspen Blizzard would purchase a $1.58 million life insurance policy on Holbrook as part of the business deal. CP 7-8. The deal initially went forward, but less than a year later, fell through.

The reason for the failed venture, as summarized in the *Determination of Probable Cause* was due to the failure of Aspen Blizzard to pay Mr. Holbrook for the purchase of the company while at the same

time continuing to pay the life insurance premiums on the Holbrook policy. CP 7. As a result, Mr. Holbrook took the business back from Aspen Blizzard. Aspen Blizzard in turn filed a civil lawsuit against Holbrook, and continued to maintain a life insurance policy on him. CP 7; VPR 2309.

The State alleged that Blizzard was upset about his failed effort to buy Aspen Real Estate from Holbrook and, as a result, conspired with a female acquaintance, Mr. Holbrook's former daughter in law Jill Taylor, who introduced him to Gomez-Monges and Mendez, to kill him. CP 10. The corroborating evidence for the State's theory regarding Blizzard's involvement, according to the *Determination of Probable Cause,* consisted of the following: 1) Adriana Mendez was friends with Blizzard; 2) Mendez and Blizzard had exchanged text messages the day before, and the day of, the attack on Mr. Holbrook; 3) Adriana Mendez was friends with Jill Taylor; 4) Jill Taylor was also friends with, and possibly romantically involved with, Blizzard; 5) Nicky Vargas, an acquaintance of Jill Taylor had stated that she had heard Taylor planning Holbrook's death in detail; and 6) Nicky Vargas had heard both Jill Taylor and Blizzard say that Blizzard was willing to pay someone to kill Holbrook. CP 8-11. The May 24, 2015 and May 25, 2015 text messages between Blizzard and Mendez,

as summarized in the *Determination of Probable Cause,* consisted of the following:

05-24 1610 hrs Adrianna: "if we get to go shoping today we wont see each other til thn right?"
1611 hrs Daniel: "Yea"
1611 hrs Adriana: "u wont give me money to go shopping til we r able to go right"
1612 hrs Daniel: "Exactly"
1612 hrs Adriana: "thn never mind"
1613 hrs Daniel: "Y, what u thinking?"
1617 hrs Adriana: "no is just cuz Jason at the front office came looking for me whn we were gon to ask me for the rent cuz his uncle told him that anybody without at least ½ the rent are getting kicked out today and if they had at least ½ that they had til Monday to pay the rest or they will get kicked out Monday no more chances"
1620 hrs Daniel: "Sheesh...! :O I have to run a few errands after I get sis & I can swing by later in the evening with ½ of rent"
1621 hrs Adriana: "at what time do u think so I can let him know"

05-24 1856 hrs Adriana: "waiting for my rise to go to my appointment was wondering if theres ant proper way to dress or is is what I had on fine"
1827 hrs Daniel: "Ur fine"
2010 hrs Adriana: "my dad didn't want to babysit but I called and made an appointment for tomorrow at 10:15"
2013 hrs Daniel: "K"
2014 hrs Adriana: "im sorry for the inconvenience plz dnt be mad"
2015 hrs Daniel: "No worries. Long as ur on top if it"
2016 hrs Adriana: "I am and I will I promise"
2017 hrs Daniel: "K"

05-25 0924 hrs Daniel: "Don't b late for shopping"

0924 hrs Adriana: "im bout to hop in the shower waiting on my ride"
0926 hrs Adriana: "I was thinking about taking a pic"
0926 hrs Daniel: "Oh? :O"
0928 hrs Adriana: whn I go shopping"
0928 hrs Adriana: "whn im ready to go shopping"
0929 hrs Daniel: "As u wish :D"

05-25 1204 hrs Adriana: "we r going shopping"
1207 hrs Daniel: "Alright"
1209 hrs Adriana: "I only got $40 I thought I would of hd more"

05-25 1354 hrs Adriana: "let me know whn ur here"
1424 hrs Daniel: "Here"

CP 8-10. According to detective Perrault, as stated in the *Determination of Probable Cause,* "it appeared that Adriana [Mendez] and Daniel [Blizzard] had decided to use the code word 'shopping' to describe her real estate appointments with Vern [Holbrook]." CP 8. The detective also opined that "Adriana mentioned taking a picture when she went shopping, which may indicate a trophy photograph or a photograph for proof of the deed, which likely would have been taken with her cell phone, and may have been forwarded to the other participants of the scheme." CP 9-10. The *Determination of Probable Cause* document, as penned by Perrault, concluded as follows:

> Based on the totality of the circumstances a person of reasonable caution would believe that Daniel Blizzard knowingly promoted and facilitated the plan to murder Vernon Holbrook. Daniel solicited and encouraged

> Adriana Mendez and Luis Gomez-Monges to kill Vernon Holbrook. In exchange for monetary benefit, paid by Daniel, Adriana and Luis beat Vernon Holbrook severely, fracturing his head in multiple places. They slit Vern's throat, and left him to die without any provocation. Adriana and Luis acted with premeditated intent, on Daniel's behalf, to cause the death of Vernon Holbrook, and took a substantial step towards the commission of the crime. Due to the use of aliases and false cover stories there was clearly a plan in place to get Vern alone at a residence. Daniel Blizzard did nothing to terminate his complicity, and met with Adriana and Luis after the attack. I request that Daniel Blizzard be charged as an accomplice to attempted first degree murder.

CP 11-12.

**2. RELEVANT PROCEDURAL FACTS**

A criminal information was filed on 9/18/13 charging Daniel Blizzard with attempted murder in the first degree. CP 14. Mr. Holbrook passed away from the injuries from his attack on January 26, 2014, and the State filed amended charges against Mr. Blizzard on January 30, 2014. CP 37-38.

Three others were also charged: *State v. Jill Taylor*, Yakima Superior Court No. 13-1-01343-1; *State v. Adriana Mendez*, Yakima Superior Court No. 13-1-00795-4; *State v. Luis Gomez-Monges*, Yakima Superior Court No. 13-1-00805-5. Both defendant Taylor and defendant Mendez escaped prosecution for murder. Charges against Ms. Taylor were dismissed *in toto* in exchange for her testimony while Ms. Mendez

was given a deal of assault in the second degree and rendering criminal assistance with credit for time served in exchange for hers. VRP 2469-2470; 2476-2478; 2634-2636; 2675-2677. Defendant Gomez-Monges' trial was scheduled to follow Blizzard's trial. VRP 830; 872.

With respect to pre-trial proceedings, three significant defense pre-trial motions and associated court rulings are relevant to this appeal. The first involved a defense motion to dismiss for prosecutorial misconduct based on Yakima County's elected prosecutor James Hagerty sending an intimidating letter, dated May 21, 2014, to Yakima County's then presiding judge (Judge David Elofson). The letter requested removal of the trial judge, Judge Ruth Reukauf, from the case the weekend before a dispositive defense suppression motion was to be ruled on by the court. CP 832; 833-836; 922-934; 911-921; VRP 455-576. The court denied that motion on July 9, 2014 stating as follows:

> "Obviously if these cases proceed forward and they are subject to appellate review, the appellate courts have been doing some interesting things in this area as to what they feel rises to the level of outrageousness that would, in fact, result in structural error."

VRP 572.

The second involved a defense motion to dismiss the seizure of text messages obtained without warrants, and issued without authority of law and without probable cause. CP 115-193; 226-304; 305-328; 405-

417; 589-819; 820-826. VRP 312-430; 606-642. In denying that motion, also on June 9, 2014 immediately after ruling on the intimidating letter from Hagarty, the court stated the following:

> Although I'm still conceding that I do not believe the district court had the authority to issue those warrants, that the cell phone companies still chose to release the information pursuant to those warrants, and did not challenge whether district court, in fact, had the authority or not and released the information to detective Perrault. Based upon those cell phone companies choosing to comply with the search warrant, again, I'm just supplementing the record. The information is valid. The defendants' remedy lie [sic] with the cell phone companies and not suppression of the evidence since they did meet that definition.

VRP 634.

The third also involved a defense motion to dismiss based on state misconduct stemming from the Yakima County Jail's confiscation and review of Blizzard's attorney-client communication. CP 197-219; CP 338-364; 365-371; 372-377; 378-381; 382-404; VRP 917-1108; 1130-1160. That motion was denied by the Court. VRP 1181-1209. In denying that motion the court noted that the issue was one that "an appellate court is going to take a serious look at and they should continue to give us guidance." VRP 1209.

The jury found defendant Blizzard guilty of the crime of first degree murder, and also found by special verdict that defendant Blizzard

was armed with a deadly weapon at the time of the commission of the crime. They also found that the defendant or an accomplice should have known that the victim was particularly vulnerable. VRP 3169-3170.

Sentencing occurred on October 30, 2014 and the court imposed a 320 month sentence (high end of the range), 24 months consecutively for the deadly weapon enhancement; and 72 additional months on the vulnerability of the victim. VRP 3218 - 3219. The trial court noted the troublesome issues caused by the prosecutor in the case:

> It will be up to the appellate courts to make determinations as to whether this trial court, whether issues that were brought forward based upon discovery that the jail had access to, based upon the elected prosecutor's concerns about this particular trial court and the issues that placed into this case that, quite frankly, someone might ponder the question why, but they're there.
>
> Mr. Blizzard's case, perhaps even more so than Mr. Gomez-Monges' case, is fraught with legal issues. They are going to be difficult legal issues that the appellate court will be charged with the responsibility to sort through.

VRP 3214.

In explaining its sentence, the trial court specifically stated that "I don't want to give anymore fodder, to be blunt, for the appellate court to send this case back." VRP 3219.

### 3. RELEVANT TRIAL TESTIMONY

#### a. The Primary Witnesses Were Codefendants Who Escaped Prosecution For Accomplice Liability.

The two primary witnesses against Blizzard were co-defendants Jill Taylor and Adriana Mendez, who were good friends. The two escaped prosecution in exchange for their testimony. Without their testimony the State had no case against Blizzard.

Jill Taylor was Vern Holbrook's ex-daughter in law. Holbrook had helped her out financially, but stopped after a custody dispute with her ex-husband. She testified that she dated Daniel Blizzard for 5 years; claimed Daniel would make comments that he was tired of their business deal (between Blizzard and Holbrook) and could not wait until the old man was gone. According to Ms. Taylor, he talked about having him killed so much that Jill Taylor was tired of it. He attempted 2 or 3 times to have Jill give Holbrook poison, which she just threw out. She invited Adriana Mendez to stay with her while Adriana was having trouble at home. When Adriana moved in, she brought her three kids and Luis Gomez-Monges. Adriana came to her on her own and stated that she would kill Holbrook for Blizzard. Taylor testified that she never heard any actual plans, just negotiations. She was testifying in exchange for having the murder charges dropped. VRP 2409, 2410, 2414, 2428, 2429, 2430, 2431, 2436.

Adriana Mendez was a friend of Jill Taylor. She and her three children stayed with Jill at the Lake Aspen apartment. Adriana met Daniel Blizzard through Jill, and over the course of time heard several

conversations about Daniel paying someone $10,000.00 to kill Vern Holbrook. According to Adriana, she told Daniel she and her boyfriend, Luis Gomez-Monges, were interested in doing it, because they needed the money for her kids and a house, and Luis was soon to be deported. She testified that Daniel suggested they make an appointment to view a property as a reason to meet with Mr. Holbrook. Adriana, Luis and her 3 kids drove to a property to meet Holbrook; the kids stayed in the car while Adriana and Luis went in with Holbrook. As they were looking around the house, Luis punched Holbrook. Adriana was walking out of the room when she saw Luis hit Mr. Holbrook and heard a loud "thump." She went out and waited in the car with her kids, then Luis came out and they drove back to Yakima. She also testified that she lied a lot in her first interview with the police, to protect herself, her kids, Daniel Blizzard and Luis Gomez-Monges. She testified that Daniel told her that he would not take any part in whatever happened after the assault and that he would look out for himself. VRP 2555, 2556, 2560, 2566, 2567, 2572, 2579, 2598-2601, 2606, 2634, 2804. Phone messages obtained through faulty warrants issued from Yakima District Court show several text messages from Mendez's phone to Blizzard's on the day of the attack. VRP 2671-2673, 2986-2988.

## II. ARGUMENT

### A. IN THIS CASE OF FIRST IMPRESSION, THE PROSECUTOR'S ATTEMPT TO INTIMIDATE THE TRIAL COURT REQUIRES REVERSAL.

The legitimacy of this prosecution is mangled by two extraordinary events: (1) a May 21, 2014 letter from the Yakima County Prosecutor to the criminal presiding judge disparaging the trial judge and asking for recusal for bias; and (2) the court's refusal to remove itself from the case despite the obvious appearance of unfairness and a subsequent ruling on a critical suppression motion favoring the prosecution.

This is an issue of first impression in Washington - i.e., the improper and unethical conduct of an elected prosecutor to influence a trial court judge.

#### 1. Violation of Separation Of Powers.

As explained in *State v. Rice*, 174 Wn.2d 884, 901, 279 P.3d 849 (2012), the separation of powers and division of authority is especially important within the criminal justice system, given the substantial liberty interests at stake and the need for numerous checks against corruption, abuses of power, and other injustices. See also *State v. Pettitt*, 93 Wn.2d 288, 294-95, 609 P.2d 1364 (1980) (noting that a prosecutor's decision to file criminal charges entails " 'awesome consequences' " (quoting *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)).

Separation of powers ensures that individuals are charged and punished as criminals "only after a confluence of agreement among multiple governmental authorities, rather than upon the impulses of one central agency." *Id.* at 901. As the Washington Supreme Court explained 100 years ago, legislative authority defines the crimes and sentences; executive power is applied to collect evidence and seek an adjudication of guilt in a particular case; and third, judicial power is exercised to confirm guilt and to impose an appropriate sentence. See *State v. Case*, 88 Wash. 664, 668, 153 P. 1070 (1915). The state constitution grants inherent powers to each separate branch to undertake these functions, including the distinct role of prosecuting attorneys within the executive branch. *Rice*, 174 Wn.2d at 901.

Most importantly, although a violation of the separation of powers doctrine "accrues directly to the branch invaded," the underlying purpose of the doctrine is " 'the protection of institutions,' " *Carrick v. Locke*, 125 Wn.2d 129, 136, 882 P.2d 173 (1994); *Guillen v. Pierce County*, 144 Wn.2d 696, 731, 31 P.3d 628 (2001) (quoting *New York v. United States*, 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992)).[1]

[1] The Washington Supreme Court in *Rice* further noted that "we have reasoned that the " 'division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.' " (cites omitted) *Id.* at 901. Although "a long history of cooperation between the branches" in any given context might show that no violation has occurred, (cite omitted)

In this case, the elected prosecutor for Yakima County, James Hagarty, sent an intimidating, four page single-spaced letter, dated May 21, 2014, to the criminal presiding judge (Judge David Elofson), requesting removal of the trial judge, Judge Ruth Reukauf, the weekend before an important suppression motion. VRP 456-457 (05/28/14). The letter was an attack on Judge Reukauf generally, and an attack on two of the defense attorneys in this particular case. It also included a request for her to be removed from this case and any other pending homicide cases in Yakima County. CP 833-836. It complained of Judge Reukauf's rulings in four cases, including Mr. Blizzard's case, and concluded as follows:

> Judge Reukauf has an agenda, and that agenda is to discredit my office every chance she gets. It is impossible for the State to get a fair trial in front of her. I am requesting that Judge Reukauf recuse herself from the pending cases involved in the Vern Holbrook murder, and any other pending homicide case, or that you as Chief Judge remove her from these cases in the interest of fairness and justice, and because of a clear and pervasive bias and prejudice against my office. While I suspect my request will fall on deaf ears and there will be some retribution for this letter against my office, I hope that the Yakima County Superior Court will take these matters seriously and strongly consider our request in the interest of justice and fairness.

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one branch cannot simply consent to a separation of powers violation by another branch. This is especially true regarding a fundamental executive power to be exercised by locally elected officials; such officials cannot cede their inherent authority in order to deflect accountability to voters or when otherwise convenient.

Judge Reukauf's subsequent ruling in favor of the State, which denied suppression of cell phone records and text messages obtained through use of clearly unlawful warrants (discussed *infra*), resulted from the obvious threatening tone of prosecutor Hagarty's letter. To that extent, the prosecutor's egregious misconduct and intimidating tactics affected the trial court.

### 2. The Prosecutorial Misconduct in This Case Borders on Criminality.

Defense attorney for co-defendant Adriana Mendez, Mickey Krom, raised the issue of criminal intimidation of a judge. VRP 553-554 (06/09/14). It is a crime to intimidate a judge. RCW 9A.72.160 (Intimidating a judge) provides:

> (1) A person is guilty of intimidating a judge if a person directs a threat to a judge because of a ruling or decision of the judge in any official proceeding, or if by use of a threat directed to a judge, a person attempts to influence a ruling or decision of the judge in any official proceeding.
>
> (2) "Threat" as used in this section means:
>
> (a) To communicate, directly or indirectly, the intent immediately
> to use force against any person who is present at the time; or
> (b) Threats as defined in RCW 9A.04.110 (25).[2] (emphasis added)

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[2] (28) "Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; or
. . .

(3) Intimidating a judge is a class B felony.

Intimidation of the court also violates various ethics rules for prosecutors:

> **ABA Standard 3-5.2 *Courtroom Professionalism***
>
> (a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.
>
> . . .
>
> (c) A prosecutor should comply promptly with all orders and directives of the court, but the prosecutor has a duty to have the record reflect adverse rulings or judicial conduct which the prosecutor considers prejudicial. The prosecutor has a right to make respectful requests for reconsideration of adverse rulings.

> **ABA Rule 8.4-2(e) Conduct Prejudicial to the Administration of Justice.**
>
> It is professional misconduct for a lawyer to:
>
> . . . (d) engage in conduct that is prejudicial to the administration of justice;

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(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or . . .
(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or . . .
(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships. . . (underlining added)

> There do not appear to be any cases on prosecutors intimidating judges. However, there are a few analogous cases on intimidating judges by lawyers and *pro se* litigants. *Federal Grievance Committee v. Williams*, 743 F.3d 28 (C.A.2 (Conn. 2014), involved a speeding ticket issued to a lawyer (Williams) and whether it was properly served by mail.[3] Respondent Williams had sent a letter to a state court deputy chief clerk stating that (a) the prosecutor intended to subpoena her to testify regarding a mandamus petition and "to defend [her]self and [her] office"; (b) respondent believed it would be an "ethical violation" for the "prosecutor" to represent her; and (c) she should consider obtaining independent counsel. The court found that a reasonable person could have found that the letter was "intimidating," as found by the state court. At the very least, a reasonable person in Williams's position would have known that the letter likely would cause concern and possibly interfere with the deputy chief clerk's duties (and, in fact, it did interfere with her duties, as it caused her to, *inter alia,* seek advice from a judge).

In *Amoresano v. Laufgas*, 171 N.J. 532, 796 A.2d 164 (N.J., 2002), the City of Paterson and its chief of police brought an action seeking to enjoin Laufgas' alleged disruptive conduct directed toward city employees and offices. During the course of the action, the defendant was found to be in contempt on three separate occasions. The Superior Court entered the first contempt adjudication based on letters and certifications that were sent to, or filed with, the judge during the course of the litigation, and sentenced the defendant to 60 days in the county jail. The New Jersey Supreme Court held that the decision to hold Loufgas in

[3] The facts are set out in *In re Williams*, 978 F.Supp.2d 123 (D.Conn., 2012.)

contempt for filing the letters and certifications with highly disparaging comments about the trial judge was reasonable and sustainable – and "necessary to permit the trial of this matter to proceed in an orderly and proper manner, to preserve the integrity and dignity of this court." *Laufgas*, 796 A.2d at 170.

Similarly, a reasonable person in the Yakima County Prosecutor's position would have known that the letter likely would cause concern and possibly interfere with the trial court's duties. In fact, it did interfere with the court's duties, as it caused Judge Reukauf to set aside a critical pending motion, seek consultations with the Administrative Office of the Courts and Ethics Advisory Committee, consult the Code of Judicial Conduct, and set additional briefing and hearings on the matter. VRP 456-498.

In addition, it is the defense's position that the Yakima Prosecutor in this case took the calculated risk that his misconduct was immune from any consequences.[4] Knowing that any attempts to remove the judge, if her

[4] A prosecutor is absolutely immune from any suit arising out of his duties as an advocate, regardless of the egregious nature of the allegations. *Imbler v. Pachtman,* 424 U.S. 409 (1976) (prosecutor absolutely immune from liability where he knowingly used perjured testimony, deliberately withheld exculpatory evidence, and failed to disclose all facts casting doubt upon state's testimony); *Esteves v. Brock,* 106 F.3d 674 (5th Cir.1997) (prosecutor absolutely immune from claims of using peremptory challenges in racially discriminatory manner); *Brandley v. Keeshan,* 64 F.3d 196 (5th Cir. 1995) (prosecutor absolutely immune from claim of witness intimidation and suppression of evidence, even if prosecutor knew of and directed witness intimidation and suppression of evidence); *Boyd v. Biggers,* 31 F.3d 279, 285

rulings went against the State, would go unpunished, the prosecutor felt he had a win-win situation. In addition, to the extent that the trial judge was not removed by the Criminal Presiding Judge, but her rulings on the pending suppression motion (discussed *infra*) favored the State despite the fact that the district and superior courts issued warrants without authority, the prosecutors' calculated and intimidating tactics succeeded.

The problem created by the elected prosecutor evokes the considerations made in *In re Martin-Trigona*, 573 F. Supp. 1237 (D. Conn. 1983). *Martin-Trigona* involved cases with Martin-Trigona and New Haven Radio, Inc., an asset in which Martin-Trigona claimed an interest. Martin-Trigona filed lawsuits against the district judge who wrote the opinion, the judge's wife, and the law firm which handled the judge's personal matters. *Id.* at 1242. During his oral argument before the Massachusetts Bankruptcy Court, Trigona told the court, "You will go to bed at night saying I wish that Martin-Trigona case would go away." The district court observed that:

> It may be that Mr. Martin-Trigona, recognizing his legal and factual problem, is attempting by his wild accusations of venal conduct on the part of all the lawyers, trustees, and bankruptcy judges involved in the administration of the

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(5th Cir.1994) (prosecutor immune from suit alleging knowing use of perjured testimony, malicious prosecution, and conspiring with the judge to predetermine the outcome of a judicial proceeding). In this case, Phillips simply claims that the Assistant District Attorney listed him as a possible witness in the prosecution of his cell mate, an act which does not rise to the level of a nefarious act.

> estates in both Massachusetts and Connecticut, **in the words of former Justice Jackson, to pound loudly on the table in the hope that if he becomes enough of a problem, that by either intimidation or weariness, he may accomplish some part of his purpose.** Since he is already in bankruptcy, what does he have to lose? The result is that the accusations increase, the motions, pleadings, complaints, and suits multiply, courts and lawyers are buried in mountains of time-consuming paper. If there is one truth, it is that the estate will be bled white by the costs and legal fees engendered by this "crusade." ***Id. at 1242***

Like *Martin-Trigona*, Prosecutor Hagarty "pound(ed) loudly on the table in the hope that if he became enough of a problem, that by either threat, intimidation or weariness, he may accomplish some part of his purpose." He did accomplish his purpose – through his egregious misconduct he received the suppression ruling he wanted.

**3. Appearance of Judicial Unfairness.**

The appearance of fairness doctrine has its roots in the due process and fair trial provisions of the United States Constitution. *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Even the appearance of unfairness threatens the integrity of the judicial process. As CJC 3(D)(1) states:

> Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party.

Courts "analyze whether a judge's impartiality might reasonably be questioned under an objective test that assumes a reasonable person to know and understand all relevant facts." *Sherman v. State*, 128 Wn.2d 164, 205-206, 905 P.2d 355 (1995). The effect on the judicial system can be debilitating when 'a trial judge's decisions are tainted by even a mere suspicion of partiality.' *Id.* at 205.

Examples of judicial unfairness or at least the appearance of judicial unfairness are well documented through precedent in various jurisdictions. For example, In *State v. Finch,* 181 Wn.App. 387, 326 P.3d 148 (Div. 2, 2014), the judge used his juvenile court authority over the juvenile A.W.'s SSODA (in *State v. A.W.)* to order a polygraph test to investigate A.W.'s allegations. The court held:

> A reasonably prudent and disinterested person who knew these facts would conclude that the judge ordering A.W. to take a polygraph to investigate the criminal case in which A.W. is the victim, in spite of a therapist's testimony that polygraph tests could be harmful to A.W., could not give all parties a fair, impartial, and neutral hearing.

*Finch,* 181 Wn.App. at 399.

Thus, the court held that the judge's dual role as judge for A.W.'s juvenile disposition and Finch's criminal case and the judge's attempts to investigate the truth of A.W.'s allegations in *State v. Finch,* resulted in a "reasonably prudent and disinterested person who knew these facts question(ing) whether the judge could act fairly in presiding over this

case." *Finch*, 181 Wn.App. at 399. The case was remanded to a different judge to maintain the appearance of fairness.

In the *Matter of Disqualification of Winkler*, 135 Ohio St.3d 1271, 986 N.E.2d 996 (Ohio, 2013), defendant requested that Judge Winkler be disqualified from resentencing him on operating a vehicle under the influence of alcohol and two counts of aggravated vehicular homicide because Judge Winkler made "biased and prejudiced" comments about the defendant at his initial sentencing. Judge Winkler responded in writing to Campbell's affidavit. He denied any bias or prejudice against Campbell and explained that all of his comments about Campbell were based on evidence in the trial court record and presentence-investigation ("PSI") report. In remanding the matter to a different judge the Ohio Supreme Court explained that:

> "Campbell's affidavit is well taken—not because Campbell has proven that Judge Winkler is personally biased or prejudiced against him, but because the circumstances here indicate that the judge's removal is necessary to 'avoid even an appearance of bias, prejudice, or impropriety, and to ensure the parties, their counsel, and the public the unquestioned neutrality of an impartial judge.'"
> *Winkler*, 135 Ohio St.3d at 1272.

Washington's Code of Judicial Conduct (CJC) requires judicial fairness in order to preserve procedural due process and public confidence in the courts. The Preamble begins, "[o]ur legal system is based on the

principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us." CJC, Preamble. This principle is so integral to our adversarial system that the Code of Judicial Conduct repeats it in the first Canon: "An independent and honorable judiciary is indispensable to justice in our society." CJC, Canon 1.

In furtherance of these ideals, judges must not only be impartial, but also appear impartial because judicial fairness is violated when the appearance of fairness is ignored. *State ex rel. McFerran v. Justice Court of Evangeline Starr,* 32 Wash.2d 544, 549, 202 P.2d 927 (1949) (" 'The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts' " (quoting *State ex rel. Barnard v. Bd. of Educ.,* 19 Wash. 8, 17, 52 P. 317, 320 (1898)); *Dimmel v. Campbell,* 68 Wn.2d 697, 699, 414 P.2d 1022 (1966) ("It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties"). This is more than idealistic sentiment. "Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of the judges." CJC, Canon 1, cmt.

In *Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966), the Washington Supreme Court held that the trial judge did not abuse his discretion in granting a new trial upon discovering that his former law

partner had expressed in writing a professional opinion corresponding to the legal conclusion the trial judge had reached in the case. The court stated:

> We are in complete agreement with the observation made by appellants that the record does not give the slightest hint that the forthright trial judge gave other than open mind and impartial ear to the cause tried before him. Even so, we are not disposed to hold that the trial court abused its discretion in granting respondents a new trial. While we are of the opinion that the cause was impartially decided, the conclusion cannot be escaped that the very existence of the letter beclouded the entire proceeding. It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties.

*Dimmel*, 68 Wn.2d at 699.

Like the letter in *Dimmel*, the prosecutor's letter in Blizzard's case created a situation where "*the conclusion cannot be escaped that the very existence of the letter beclouded the entire proceeding.*" While critical and potentially dispositive motions concerning suppression of items seized from invalid warrants were pending (CP 464-465; 481-483), the elected prosecutor went to the criminal presiding judge, ex-parte, and delivered a letter accusing the trial judge of bias against his office and requesting that the judge be removed from the case! VRP 468-469; 566. CP 464-465; 481-483. The trial court wrestled with the problem created by the elected

prosecutor, but essentially failed to address the appearance of unfairness despite being fully aware of it. VRP 456-513. The court noted as follows:

> The other unfortunate reality today, though, that is created if this case proceeds forward, that regardless of what my ruling is in this case, it has been set up to fail. Because if I, applying the law to the facts and in that way decide the suppression motions and rule in favor of the defendants in this matter, then the state can simply say, see; we told you so. She's obviously prejudiced and biased against us and has proven it once again. If I rule in favor of the state based upon the law and the facts in this case, then it leaves the question mark potentially in the defendants' mind whether I have given into the pressure that has been -- Let me be clear. I think it is a fair assessment of this letter to say that it is filled with potential intimidation on this bench.

VRP 462-463.

The prosecutor's May 21, 2014 letter constituted intimidation of the trial court. It succeeded. In her findings of fact and conclusions of law on the suppression motion (VRP 622-642) the court found that the district and superior courts issued unlawful warrants for out-of-state cell phone records but would not suppress those records.

#### 4. The Prosecutor Created Structural Error Such That Mr. Blizzard Could Not Get A Fair Trial.

Structural error is a special category of constitutional error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Our State Supreme

Court has recognized that "the right to a public trial serves to ensure a fair trial, *to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions*, to encourage witnesses to come forward, and to discourage perjury." *State v. Sublett*, 176 Wn.2d 58, 72 (2012). "[B]asic fairness of the criminal trial and the appearance of fairness [is] essential to public confidence in the system." *Id.* at 75, quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

Where there is structural error "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). A defendant "should not be required to prove specific prejudice in order to obtain relief." *Waller v. Georgia*, 467 U.S. 39, 49, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). As noted by our Supreme Court, in structural error situations, "prejudice is presumed." *State v. Wise*, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012). "The reason such structural error is rightly presumed prejudicial is that it is often difficult[t] to asses[s] the effect of the error." *Id.* at 17, quoting *United States v. Marcus* __ U.S. __, 130 S.Ct. 2159, 2165, 176 L.Ed.2d 409 (2010).

Structural defect – a defect affecting the framework within which the trial proceeds - has been found in a variety of settings. *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)) (complete denial of counsel); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable doubt instruction); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.2d 749 (1927) (biased trial judge despite a lack of any indication that bias influenced the decision). These types of errors affect "fundamental values of our society and undermine the structural integrity of the criminal tribunal itself and are not amenable to harmless error review." *Vasquez v. Hillery*, 474 U.S. 254, 263-264, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

It is axiomatic that an elected prosecutor trying, at the very least, to undermine a judge's impartiality by way of ex-parte communication, affects the entire judicial system. "In the drive to achieve successful prosecutions, the end cannot justify the means." *Olmstead v. United*

*States*, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J. dissenting).

> "[d]ecency, security and liberty alike demand that governmental officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by example."

*Id.*

In the instant case the Yakima County Prosecuting Attorney wrote a letter accusing an elected judge presiding over a pending criminal trial of "bias", "prejudice", and "an agenda" to discredit his office. The letter, which contained no corroboration whatsoever, constituted an ex-parte communication designed to, at the very least, intimidate the bench. As a result, the actions taken by the prosecutor infected the very framework within which defendant Blizzard's trial proceeded and amounted to structural error. The Appellate Court needs to send a message to the Yakima County Prosecutor that such misconduct will not be tolerated.

### B. THE SEIZURE OF TEXT MESSAGES WAS WITHOUT WARRANT ISSUED WITHOUT AUTHORITY OF LAW, AND LACKED PROBABLE CAUSE.

#### 1. Facts Related To Warrants.

Immediately following its ruling on the prosecutorial misconduct issue, the trial court ruled on the State's warrantless seizure of phone

records and text messages. Despite acknowledging that the court that issued the warrants for the phone records and text messages lacked authority to do so, the court held that the records were admissible. This decision, particularly given the court's factual findings, clearly suggested that the prosecutor's intimidating tactics affected the court's ruling.

In its January 6, 2015 Findings of Fact and Conclusions of Law,[5] the trial court summarized how Det. Perrault went about getting warrants for Blizzard's cell phone records and text messages.[6] CP 3273-3280. Initially, in May and June of 2013, the detective obtained search warrants for defendant Blizzard's phone records and text messages from a Yakima County District Court judge. (FF # 16, 17, 18, 19).[7] The phone company holding the records eventually honored the search warrant requests in June of 2013. (FF, # 20).[8] In September of 2013, after receiving the records and evaluating them, the detective arrested defendant Blizzard. (FF # 21). Following the arrest detective Perrault was advised that the district court

[5]The trial court orally ruled on the issue on June 9, 2014. Findings of Fact and Conclusions of Law, however, were not finalized and filed until Jan 6, 2015 after trial and sentencing had been concluded.

[6] Blizzard was believed to have three active phone numbers, 509-654-0283, 509-774-6199 and 509-774-6192. Identical warrants were issued for each phone number every time additional warrants were sought.

[7] FF denotes Finding of Fact by the Court.

[8] The May 31, 2013 warrants regarding 509-774-6199 and 509-774-6192 were not initially honored. They were sent to Level 3 Communications believed to be in possession of the requested information. However, Level 3 Communications informed detective Perrault that GOGII Inc. actually possessed the data. For that reason a new set of unauthorized warrants was obtained from the district court on June, 21, 2013 and sent to GOGII, Inc.

was unauthorized to issue the warrants. As a result the detective rewrote the warrant affidavits[9] and submitted them to a Yakima County Superior Court judge. (FF # 22). Those new warrants were approved by the Superior Court judge, but did not comply with the requirements of RCW 10.96.020(2) for the issuance of warrants under that statute.[10] (FF # 23). The phone companies, however, once again complied with the warrant requests. Then in March of 2014, after defendant Blizzard challenged the validity of the district court and superior court warrants, detective Perrault submitted new affidavits and requested new warrants from a superior court judge asking for the same information once again. (FF # 24, 25). The phone company once again complied.

The Superior Court held that these facts supported at least two conclusions of law. CP 3277-3280. The first was that "[a] district court judge may not issue a search warrant for property located outside of the county" (CL #5)[11]. And the second was that "the required language of RCW 10.96.020 was missing from the September 26, 2013 warrant" (CL #15). Despite these findings, the court held that the phone records and

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[9] As noted *infra,* these affidavits contained information obtained from the initial invalid warrants.

[10] Criminal process under RCW 10.96.020 mandates that the following language appear in bold type on the first page of the warrant: This warrant is issued pursuant to RCW 10.96.020. A response is due within 20 business days of receipt unless a shorter time is stated herein or the applicant consents to a recipient's request for additional time to comply."

[11] CL denotes Conclusion of Law.

text messages were admissible. CP 3277-3280 (CL 1-19). The defense asserts that the result of these two conclusions of law acknowledged by the court required suppression of the evidence.

**2. Privacy, Standing and the Seized Text Messages**

It is now settled in Washington that a person has a privacy interest in the content of their cell phones, emails and text messages. In *State v. Roden*, 179 Wn.2d 893, 321 P.3d 1183 (2014), the Washington Supreme Court held that a dealer's text messages on a cellular telephone were "private" communications within the meaning of privacy act, and that (2) an officer in possession of an alleged drug-dealer's telephone "intercepted" the defendant's text messages within the meaning of privacy act. See also *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014) (a police detective's conduct in reading text messages on arrestee's cell phone, responding to an incoming text message from defendant, and arranging a drug deal with defendant invaded defendant's private affairs and was not justified by authority of law.)

Mr. Blizzard had an expectation of privacy in his electronic data and text messages because those data represented private communications for purposes of Fourth Amendment protection and State Constitutional analysis. *California v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625, 100 L.Ed.2d 30 (1988); *State v. Roden*, 179 Wn.2d 893, 321 P.3d 1183 (2014).

It necessarily follows that defendant Blizzard has standing to challenge the search and seizure of his cell phone data, records and text messages.

### 3. The District Court Warrants Were Void At Inception Because The District Court Had No Authority To Issue Them.

Under the Washington Constitution, the Legislature has the sole authority to establish the jurisdiction and duties of district and municipal courts. Washington Constitution article IV, § 1 provides, "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." Courts of limited jurisdiction are created by statute, and their jurisdiction must be expressly defined by statute. The subject matter jurisdiction of district courts is therefore limited to that affirmatively granted by statute or court rule.

Whether a district court has subject matter jurisdiction is a question of law reviewed de novo. *Crosby v. Spokane County,* 137 Wash.2d 296, 301, 971 P.2d 32 (1999). In Washington, CrRLJ 2.3(b)(1) grants courts of limited jurisdiction authority to issue warrants to search for evidence of any crime. See *City of Seattle v. McCready,* 124 Wn.2d 300, 877 P.2d 686 (1994). There is no statutory authority or court rule, however, granting a district court jurisdiction for statewide and interstate execution of warrants. The authority of a district court to issue a warrant is limited to

the county in which it is located. RCW 3.66.060; *State v. Davidson*, 26 Wn.App. 623, 613 P.2d 564 (1980). This general rule, is common to many jurisdictions.

In *State v. Jacobs*, 185 Ohio App.3d 408, 924 N.E.2d 410 (Ohio App. 2 Dist., 2009), Jacob, a Californian, stole property from Schulz, an Ohioan. Schulz filed a complaint in Ohio. Eventually, Ohio authorities asked an Ohio municipal court judge for a warrant to search Jacob's home in California. The Ohio municipal court judge granted the warrant, even though the Ohio warrant statute only allows magistrates to issue warrants to search within the court's jurisdiction. Ohio authorities faxed the warrant to California state law enforcement authorities, and California authorities executed the warrant at Jacob's home. The search uncovered the stolen property, leading to Jacob's arrest in California and extradition to Ohio where he faced criminal charges. Jacob moved to suppress the evidence seized in California on the ground that an Ohio judge has no power to issue a warrant for a search in California:

> [A] magistrate who acts beyond the scope of his authority ceases to act as a magistrate for Fourth Amendment purposes. We agree that, in Jacob's situation, a violation of statutory provisions that a judge can issue a valid search warrant only within his or her court's jurisdiction is a fundamental violation of Fourth Amendment principles. As Justice Holmes said in a different context in *Silverthorne Lumber Co. v. United States* (1920), 251 U.S. 385, 40 S.Ct.182, 64 L.Ed. 319, a line must be drawn somewhere to

> prevent the Fourth Amendment's guarantee against unreasonable searches and seizures from becoming no more than a "form of words." Crossing state lines by allowing an Ohio court to determine when California citizens and property are subject to search and seizure crosses this constitutional line. . . .
>
> Allowing one state's court to determine when property, residences, and residents of another state may be subject to search and seizure would trample the sovereignty of states to determine the procedures by which a warrant may be issued and executed and of their courts to determine the consequences of a failure to follow those laws.

Similarly in *State v. Dulaney*, 997 N.E.2d 560 (Ohio App. 3 Dist., 2013) in a prosecution for aggravated vehicular homicide, a county court judge who signed a search warrant lacked statutory authority to issue a warrant for the seizure of the defendant's blood samples which were located in a Medical Center in another county outside of the judge's jurisdiction. The warrant was held to be void as a matter of law and the police officers' seizure of the evidence pursuant to an invalid warrant was found to have violated the defendant's Fourth Amendment Rights. See also *United States v. Master*, 614 F.3d 236 (6th Cir. 2010) (concluding that search of defendant's home violated Fourth Amendment when it was undisputed that judge lacked statutory authority under Tennessee law to issue authorizing warrant).

Warrants issued by courts without jurisdiction are void *ab initio*. *United States v. Scott*, 260 F.3d 512, 515 (6th Cir. 2001). In *Bosteder v.*

*City of Renton*, 155 Wn.2d 18, 34, 117 P.3d 316 (2005), the Washington Supreme Court agreed:

> In sum, federal decisions outlining the requirements for valid search warrants presuppose, for the most part, that persons issuing those warrants have been authorized to do so. The concern, therefore, in those cases is whether delegation was proper under the federal constitution. *Scott* [12] and *Neering* [13] appear to address a newer question of what happens when an individual does not have the delegated authority to issue a warrant he or she purports to issue, concluding that the warrants are void from inception. Similarly here, we have an instance where the judge did not have the inherent or delegated power to issue the warrant involved in this case. The warrant was issued without authority and, therefore, was void from the start.

In the instant case, the warrants for defendant Blizzard's phone records and text messages were issued by a judge who lacked authority to do so. As such, the warrants were void *ab initio*, or void from the start. As a result the evidence illegally obtained through the warrants should have been excluded by the trial court.

**4. The Independent Source Doctrine Did Not Cure the Unlawful Seizure of the Cell Phone Records and Text Messages Because the Warrants Issued by the Superior Court Were Defective and Incorporated Information Received Through the District Court Warrants.**

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[12] *United States v. Scott,* 260 F.3d 512, 515 (6th Cir.2001).
[13] *United States v. Neering,* 194 F.Supp.2d 620, 628 (E.D.Mich.2002).

The trial court concluded that the Superior Court warrants approved after the unauthorized district court warrants[14] "cured" unlawful seizures because: 1) the cell phone companies chose to release the information and, therefore, the information was valid; 2) the superior court judge had authority to issue the requested warrants (in September 2013 and March 2014) pursuant to RCW 10.96.060; 3) the required language of RCW 10.96.020 did not invalidate the September 2013 warrant because material defects in search warrants were cured; 4) *although the superior court affidavits were not exactly the same as those of the district court, other than the Level 3 Communications versus GOGII information* no other information had been received pursuant to the district court warrants; and 5) under the independent source doctrine, the district court warrants did not invalidate the superior court warrants. CP 3278-3280; CL 7,8,9,10,11,12. (emphasis added).

The court relied on *State v. Miles*, 159 Wn.App. 282, 244, P.3d 1030 (2011), in concluding that the independent source doctrine provided a cure for the unauthorized district court warrants. But, as the trial court painstakingly explained in detail, the warrants reissued to the superior court were not the same as those issued by the district court. VRP 359-

[14] These included the September 26, 2013 warrants authorized after defendant Blizzard was arrested, and the March 26, 2014 warrant authorized after defendant Blizzard filed his motion challenging the validity of the warrants.

372; CP 229-231. Instead, evidence obtained from the initial district court warrants (in May and June 2103) was incorporated into the warrants submitted to the superior court in September 2013 and March 2014. VRP 360-372.[15] Among other significant information, the identification and location of the specific carrier possessing the cell phone records and text messages for Blizzard's phone were specifically obtained through the unauthorized district court warrants. CP 305-328. As the trial court explained:

> The Court: how do you save GOGII?
> Mr. Guzman: I'm sorry?
> The Court How do you save GOGII? How do you save the information contained in GOGII?
> Mr. Guzman: Again if the court can follow me on this your honor.
> The Court: You understand my question. He [detective Perrault] would not have known about GOGII had the information not been obtained through the district court warrant that pointed out that Level 3 Communications no longer has control of the information that, in fact, they supplied him the information that it's GOGII.

VRP 406-407, April 28, 2014). And later during the hearing:

> I guess, I just don't know how you get around GOGII. I'm going to be blunt. I keep going in a circular way in my head as to how you get GOGII in the mix because that information came from the district court warrants that were not properly issued. That information

[15] A simple comparison of the May 31, 2013 warrant affidavit (CP 317-323), the June 21, 2013 warrant affidavit (CP 243-249), the September 26, 2013 warrant affidavit (CP 134-141) and the March 26, 2014 warrant affidavit (CP 292-301) underscores this fundamental defect.

> would not have been known if it hadn't been received from those warrants, correct?

VRP 412. In addition, the prosecutor acknowledged that information obtained from the unauthorized district court warrants had been included in the affidavits for the superior court warrants, explaining as follows:

> Mr. Guzman: ...As I said before, it's our understanding he [detective Perrault] combined- -tried to combine all the information from each of the district court warrants into one. Then when he did that, he used the same probable cause for each of the ten superior court warrants that he requested and had granted on September 26, 2013. (VRP 367).

The independent source exception applies where the government lawfully seizes evidence that was originally seized by means of an unlawful search *"[s]o long as [the] later, lawful seizure is genuinely independent of [the] earlier tainted one*. *Murray v. United States*, 487 U.S. 533,542, 108 S.Ct. 2529, 101 L.Ed. 472 (1988)(emphasis added). In the instant case, as noted above, the two prior unlawful seizures obtained through the district court warrants provided evidence to detective Perrault that he then used in obtaining the superior court warrants. CP 115-193; 226-304; 305-328. As a result, the subsequent seizures were not "genuinely independent" of the earlier tainted ones. Therefore, the independent source doctrine was not available, and the cell phone records and text messages should have been suppressed.

The trial court also noted that omission of the mandated language with respect to warrants issued under RCW 10.96.020 did not invalidate the superior court warrants because; 1) the language is designed to help the entities in possession of the evidence sought; 2) there was no evidence that the shortening of time to respond (mentioned in the mandated language) was a problem; 3) the cell phone companies chose to comply with the warrant; and 4) defendant Blizzard's remedy lied with the phone companies and not suppression of the evidence. VRP 378-380; CL 8,9,15,16,17, 18).

We note that RCW 10.96.020 (2) states as follows:

> Criminal process issued under this section ***must*** contain the following language in bold type on the first page of the document: "This warrant is issued pursuant to RCW 10.96.020. A response is due within twenty business days of receipt, unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to comply."

(emphasis added). Whether this language is designed to aid the applicant or the recipient of the warrant is irrelevant; the language is mandatory. In addition, we fail to see how compliance by the recipient validates an otherwise unlawful warrant. We also disagree that the remedy available to Blizzard lies with the cell phone company, particularly because admission of the evidence at trial contributed to defendant Blizzard's loss of liberty – something the cell phone company was powerless to remedy. Finally,

even assuming, *arguendo*, that the superior court warrants were valid, given that they were executed following two unauthorized district court warrants, and incorporated evidence obtained through them, suppression of the evidence was the appropriate remedy.

**5. Lack of Probable Cause**

The defense moved to suppress the items seized through the issuance of warrants because of their invalidity and for lack of probable cause. CP 120-121; 125-159. The court, however held that probable cause was found because "a neutral and detached magistrate made a decision under oath and record." CP 3273-3280; (CL #6).

At the suppression hearing, the trial court was obligated to act in an "appellate-like capacity." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing *State v. Murray*, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988)). Because the trial court is supposed to perform the same appellate function as the Court of Appeals, the trial court does not receive the same deference the appellate court gives to the issuing magistrate. Rather, the trial court's assessment of probable cause to support a warrant is a legal conclusion that the Court of Appeals reviews de novo. *Neth*, 165 Wn.2d at 182, 196 P.3d 658 (citing *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007)); see also *State v. Espey*, ---Wn.App.---, 336 P.3d 1178, 1184 (Div. 2, 2014).

A *de novo* review shows a total lack of probable cause. The district court warrants in this case contained no facts and circumstances from which a magistrate could find probable cause and was no more than a declaration of suspicion and belief; thus, the affidavits lacked probable cause to seize cell phone records and text messages. *State v. Patterson*, 83 Wn.2d 49, 52, 515 P.2d 496 (1973). Looking at the original, invalid district court warrants that were initially issued in this case underscores this fundamental fact. CP 317-323; 243-249.[16] For example, the first district court warrant affidavit of May 31, 2013, sent to Level 3 Communications (CP 317-323), only mentions defendant Blizzard in passing and presents no facts with respect to how defendant Blizzard's cell phone was connected to criminal activity or involved in a crime. CP 317-323. Indeed, the only references to Blizzard are the following:

> 1) "Soon after Vern was located and family and friends were notified of what had happened, people started to call the Yakima County Sheriff's Office (YCSO). They were concerned that Daniel Blizzard had been involved in the attack on Vern. Daniel was said to have been a former business associate of Vern's and their business dealings had gone badly. He was known to carry a million dollar life insurance policy on Vern. Other family members called to report that Jill Taylor was dating Daniel, and had recently made indirect threats toward Vern saying things similar to

[16] These affidavits were written on May 31 and June 21, 2013 respectively for phone number 509-774-6192 belonging to Blizzard. Other warrant affidavits written for other cell numbers belonging to Blizzard were identical to these and are not included to avoid confusion.

> "Vern needs to be careful who he makes an enemy." CP 318.
>
> 2) "Adriana's call detail records show that there were several text messages between her phone and a number that she identified as belonging to Daniel Blizzard on the day of the attack. The number was (509) 774-6192. Fonfinder.net and the NPAC listed that number as belonging to Level 3 Communications. She also said that Daniel came to her hotel room on Saturday afternoon and drove her around to run errands." CP 320.
>
> 3) "Luis said that Saturday afyernoon Adriana's friend, who he knew as Daniel or 'Papoy', came over to the motel room, and hung out with them." CP 320.

The June 13, 2013 affidavit prepared by Detective Perrault for the search and seizure of Blizzard's phones was identical to the May 31, 2013 affidavit, but was sent to GOGII Inc. after he learned that Level 3 communications was not in possession of the records.[17] CP 243-249; 260-261; 317-323; 325-326. Finally, the September 13, 2013 search warrant affidavit presented in Superior court, included information gained from the June 21 district court warrant:

> "Adriana's call detail records show that there were several text messages between her phone and a number that she identified as belonging to Daniel Blizzard on the day of the attack. The number was (509) 774-6192. NPAC listed that number as belonging to Level 3 Communications. *However, a representative from Level 3 later told me that the number had been sold to GOGII, Inc.* She also said that Daniel came to her hotel room on Saturday afternoon and

[17] He learned this from Level 3 Communications after they could not honor the initial unlawful warrant because they were not in possession of the requested data.

drove her around to run errands." (CP 137) (emphasis added). [18]

It is well established that without "a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched," there is no probable cause to support a warrant. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting *State v. Goble*, 88 Wn.App. 503, 509, 945 P.2d 263 (1997)). Such is the case here. None of the facts presented in any of the 2013 unauthorized district court warrants, and defective superior court warrants, demonstrated any connection between Mr. Blizzard, his cell phone and the assault of Vern Holbrook. As a result, the warrants issued without probable cause and the evidence gained from those warrants should have been suppressed.

### C. GOVERNMENT MISCONDUCT IN INTERCEPTING ATTORNEY CLIENT COMMUNICATIONS

The defense moved to dismiss this action for other government misconduct - the Yakima jail's confiscation and review of Blizzard's attorney-client communication. CP 197-219.

[18] Whereas additional information regarding Daniel Blizzard was included in the September 13, 2013 affidavit that was not included in the May 31 and June 21, 2013 warrants, none of the new information, in the opinion of the undersigned authors, established probable cause for the search and seizure of his cell phone records (see, e.g. CP 134-141).

In a hearing on the matter on July 28, 2014, Lt. Marta Keagle testified that Blizzard's legal materials were taken from him on February 22, 2014, were stored in her office on February 24, 2014, and were reviewed by her on February 27, 2014. VRP 997-1000. Thereafter, some materials were given back to Blizzard, but the discovery with his personal notes on it was kept, unlocked, on an officer's desk in the module where anybody could read it. VRP 1000-1002.

Daniel Blizzard testified that he had two manila envelopes and folder of legal materials. VRP 1021. Among other things, the materials contained defense investigative memos and Blizzard's personal notes for his attorney. VRP 1022-1023. "Those were thoughts, insights, analysis, conclusions that I had made based on my legal discovery or my discovery packet and thoughts that I was communicating to you or would have been discussing with you in a future time." VRP 1024, 1029. This included notes on at least 14 - 15 witnesses. VRP 1035-1036. Mr. Blizzard further testified that, to his knowledge, the legal materials and personal notes for his attorney had been sitting out at the officer's desk for the last 5 or 6 months. VRP 1029. (Confiscated materials were marked as Exhibits Ex. A thorough Ex. J and admitted at the July 28, 2014 hearing. VRP 120-121, 131-132, 139).

The trial court ultimately denied the motion to dismiss for intrusion on the attorney-client relationship. VRP 1207. In doing so, the trial court stated that it relied on *Fuentes* which "specifically adopt(ed) the reasoning behind the *Shillinger* case at 70 F.3rd 1132."[19] VRP 1182; CP 3286-3288, CL #5, 6).

The trial court reasoned that:

> (1) ". . . that Lieutenant Keagle, that if anybody reviewed these documents in any meaningful way it would have been her, that there has been no communication. There is nothing that convinces me in any way, shape or form that anything has been put forth that could then be used against Mr. Blizzard;" VRP 1204.
>
> (2) "The second prong is will or has the prosecution used the confidential information pertaining to defense strategies. Again, there is no indication here." VRP 1205.
>
> (3) "The third factor is whether the intrusion has destroyed Mr. Blizzard's confidence in Mr. Mazzone. I have no indication of that." VRP 1205.
>
> (4) the intrusion did not give the state an unfair advantage. VRP 1206.

First, as far as defense counsel can see, the Supreme Court in *Fuentes* did not rely on the *Shillinger* case to remove, switch, defeat or relieve the burden on the State to disprove the presumption of prejudice raised by intrusion into the attorney-client relationship. Second, it does

[19] *Shillinger v. Haworth*, 70 F.3d 1132 (C.A.10 (Wyo.),1995).

not appear that the *Shillinger* court engaged in the four-prong test the trial court used to determine prejudice.[20]

In making its findings the trial court rejected a presumption of prejudice. CP 3287, CL VII). The trial court found "legitimate justification" for the jail search and seizure of the materials (i.e., jail safety): "Again, because I do find that there is a legitimate justification, I cannot find that prejudice is presumed." VRP 1203. This finding appears inconsistent with other findings of the trial court in the same ruling:

> Clearly in this case on February 22nd there was a purposeful intrusion. You can't qualify it as anything but purposeful. There was a shakedown. These documents were taken from Mr. Blizzard. So I am clearly finding there was a purposeful intrusion. VRP 1197; CP 3287, CL V).
> . . .
> I guess I want to emphasize I'm not thrilled about the procedure and how things are handled and the cavalier, my words, perhaps cavalier attitude as to these discovery materials. I think there needs to be a very serious discussion that hopefully the prosecutor's office will have with Director Campbell about this process and the extent I think he does appreciate it. If he doesn't, the extent that this could potentially put cases in jeopardy. It needs to happen. It needs to be reviewed. VRP 1206.

As noted above, the trial court expressly relied on *State v. Fuentes,* 179 Wn.2d 808, 318 P.3d 257 (2014), where the Supreme Court held that it's the State's burden to rebut the presumption of prejudice from

[20] The test was actually articulated in *State v. Garza*, 99 Wn.App. 291, 994 P.2d 868 (2000), but appears to have no application in the instant case given the specific jail security concerns and the level of intrusion discussed *infra*. The "test" was never applied because defendant Garza resolved his case.

governmental misconduct - i.e., that the State's eavesdropping on privileged attorney-client communications did not cause prejudice to the defendant beyond a reasonable doubt. However, the *Fuentes* court observed that the defendant was hardly in a position to show prejudice when only the State knew what was done with the information gleaned from the eavesdropping. ("Because the State holds all of the information regarding the eavesdropping and any results thereof, Peña Fuentes cannot make any showing of prejudice [or rebut the State's arguments regarding lack of prejudice] without discovery of information related to the eavesdropping." *Fuentes*, 179 Wn.2d at 821).

The *Fuentes* court was dealing with a situation where a police detective knowingly listening in, after defendant was found guilty of child rape and child molestation, to six telephone conversations between defendant and defense counsel. This was egregious misconduct and gave rise to a presumption of prejudice, for purposes of defendant's motion to dismiss for government misconduct. The *Fuentes* court remanded the case to the trial court to consider whether the State has proved the absence of prejudice beyond a reasonable doubt.

Before *Fuentes*, both the federal and state constitutions were held to protect the attorney-client relationship. Due process under Fifth and Fourteenth Amendments and effective assistance of counsel under Sixth

Amendment, United States Constitution; Article I, Section 22, WASH. CONST.[21] For example, in *State v. Cory,* the State eavesdropped via microphone on conversations between prisoners in the jail and their attorneys. *State v. Cory,* 62 Wn.2d 371, 372, 382 P.2d 1019 (1963). The court dismissed the charges against the defendant, finding that such "eavesdropping upon the private consultations between the defendant and his attorney" deprived him of his right to effective counsel. *Id.* at 378.

In *State v. Granacki,* 90 Wn.App. 598, 959 P.2d 667 (1998), a detective read some of defense counsel's notes during a trial recess. The notes reflected trial strategy and confidential communications with the defendant. Although the detective did not tell the prosecutor what he had seen, the trial court dismissed the charges. The Court of Appeals affirmed the dismissal, noting that "dismissal not only affords the defendant an adequate remedy but discourages 'the odious practice of eavesdropping on privileged communication between attorney and client.' " *Id.* at 603.

In *State v. Garza,* 99 Wn.App. 291, 994 P.2d 868 (2000), there was a potential " 'intentional intrusion into the attorney-client relationship' " when jail officers searched inmates' legal materials. *Garza,* 99 Wn.App. at

[21] See also *Strickland v. Washington,* 466 U.S. 668, 684–85, 104 S.Ct. 2052, 2062–63, 80 L.Ed.2d 674 (1984); *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976). The "benchmark" of a Sixth Amendment claim is "the fairness of the adversary proceeding." *Nix v. Whiteside,* 475 U.S. 157, 175, 106 S.Ct. 988, 998, 89 L.Ed.2d 123 (1986) (citing *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2068).

299 (quoting *Shillinger v. Haworth,* 70 F.3d 1132 (C.A.10 (Wyo.),1995). When the materials were returned to the inmates, it was clear they had been examined and possibly even read. *Id.* at 296. The appellate court concluded that the State intruded upon the defendants' private relationships with their attorneys. *Id.* The court remanded for additional fact-finding to determine if the jail's security concerns justified the purposeful intrusion. *Id.* at 301. The court noted that a precise articulation of what the officers were looking for, why it might have been contained in the legal materials, and why closely examining the materials was required. *Id.* If the concerns did not justify the specific level of intrusion, a presumption of prejudice, and constitutional violation would result. *Id.*

As the Washington Supreme Court emphasized in *State v. Fuentes*:

> The constitutional right to privately communicate with an attorney is a foundational right. We must hold the State to the highest burden of proof to ensure that it is protected.

*State v. Fuentes,* 179 Wn.2d 808, 820, 318 P.3d 257 (2014).

In this case, unlike *Fuentes*, the intrusion into Mr. Blizzard's attorney-client relationship occurred before trial, it was deliberate and long-lasting, and it was purposeful and presumptively prejudicial. The jail's security concerns did not justify the purposeful intrusion and close examination of Blizzard's legal documents. In addition, Blizzard's

discovery, along with his handwritten notes to his lawyer, was left unlocked, on a desk, in a place where anyone could read it. Under these circumstances the State cannot rebut the presumption of prejudice to defendant Blizzard. The trial court should have found prejudice and dismissed, especially in combination with other misconduct by the State.

### D. ADDITIONAL PROSECUTORIAL MISCONDUCT EXACERBATED THE STRUCTURAL ERROR CAUSED BY THE STATE'S RECUSAL LETTER

As mentioned above, structural errors defy harmless error review because they are "defects in the constitution of the trial mechanism." *Arizona v. Fulminante*, 499 U.S. 279, 309 - 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Structural errors are said to taint the entire proceeding because their specific prejudicial consequences are "necessarily unquantifiable and indeterminate." *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); see also *Neder v. United States*, 527 U.S. 1, 7 - 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

By contrast, a trial-type error occurs "during the presentation of the case to the jury" and may be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-08. However, there can be a "hybrid" type of error involving both structural error and prosecutorial misconduct, which is seen in this case.

In *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Supreme Court held open "the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceedings as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht,* 507 U.S. at 638 ftnte. 9. The Ninth Circuit has recognized this type of "hybrid" violation which it refers to as "Footnote Nine error." *Hardnett v. Marshall,* 25 F.3d 875, 879 (9th Cir.1994) .

Mr. Blizzard believes and asserts that prosecutorial misconduct and a pattern of trial errors in this case were so egregious that they infected the fairness of the entire trial. In sum, Blizzard's case is the "unusual case" described in *Brecht. Brecht,* 507 U.S. at 638, ftnte. 9.

**1. Failure of The State To Identify Text Messages It Intended To Use In Violation Of The Court's Order Was Misconduct.**

The trial court ordered production of text messages the State intended to use. VRP 304-308; 580-585. Defense counsel argued that it was misconduct for the prosecutor not to obey the court's order noting as follows:

> "The specific orders were to provide a summary of the 150 text messages, the 150 pages of text messages and provide an individualized witness list for these defendants. . . He

didn't do it. That's additional misconduct, but it's probably better saved for another hearing." (VRP 544-545).

Thus, the State failed to provide those items, the defense repeatedly objected, but to no avail. The State's failure to identify the specific text messages they intended to use before trial placed the defense in a "guessing" posture which ultimately led to surprise testimony from codefendant Jill Taylor that Blizzard caused her three abortions he refused to pay for.

**2. Highly Prejudicial Character Evidence Was Admitted Through The Guise Of Redirect Examination - i.e., That Blizzard Caused Jill Taylor Three Abortions For Which He Did Not Pay.**

At trial Jill Taylor was asked questions about text messages between her and Daniel Blizzard.[22] On redirect examination, over defense objection, the State was allowed to elicit the following testimony:

> Ms. Taylor, can I ask you again, I believe it's Exhibit No. 83. If you could look at that. That would have been the last two pages there of the text messages. Now, you were testifying when defense counsel was cross-examining you and talking about on that second page. I think what you have in your hand would be the last page that you're looking at. Do you remember, as I was showing you on the left-hand side, they were mobile phone numbers 55171 and 55172 and 55173?

[22] During direct examination Ms. Taylor was asked about a text message she sent to Mr. Blizzard essentially telling him that she was tired of hearing about killing Mr. Holbrook. (VRP 2464). On cross examination when asked whether Mr. Blizzard responded to that statement by saying "where is all this coming from", she said that comment was not until an additional text was sent to him stating that she had "killed three kids" for him and "paid for it too." (VRP 2504-2505). Defense counsel moved on.

A. Okay.
Q. Are you looking at those text messages, those lines?
A. Yes.
Q. What is it that you're talking about in those three lines?
MR. MAZZONE: I object as to relevance.
MR. GUZMAN: Your Honor, I think counsel covered it in his cross-examination.
THE COURT: I'm going to overrule it.
MR. MAZZONE: All right.
Q. (By Mr. Guzman) What were you talking about there?
A. I got pregnant three times within my relationship with Daniel and I had three abortions.
Q. Do you know who the kids were from?
A. They were Daniel's.
Q. You're mentioning in there you paid for it, too.
A. Yes.

VRP 2545 - 2546.

First, the defense never asked Ms. Taylor about her abortions, who paid for her abortions, or whether Daniel Blizzard made her pregnant. VRP 2504-2505. This was extremely prejudicial and excludable under ER 404(b). See also *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014) (probative value of evidence of a prior domestic violence incident between defendant and one of two alleged victims was outweighed by its prejudicial effect).

Second, the prosecutor argued that the abortion evidence was evidence of Blizzard's bad character and guilt in closing:

> She also talked about, I killed three kids for you and paid for it, too, talking about abortions. What was the response from Mr. Blizzard? Where is all this coming from? It's not I didn't do this or I don't know what you're talking about. It's

just, where is all this coming from. As if he's shocked that she's bringing it up again now.

VRP 2782.

In essence, the prosecutor argued that Mr. Blizzard's lack of denial of abortion and abortion payments was an admission of guilt from a person of bad character, which was totally improper. Had the prosecutor identified the text messages as ordered by the court, the defense would have challenged the use of such evidence under ER 404(b). Mr. Blizzard was prejudiced by such inflammatory evidence - i.e., that he caused her to have three abortions and ran out on the three abortion bills.

### 3. Admission Of Evidence For Which The State Knew It Could Not Establish Foundation.

The State sought to introduce text messages taken from various cell phones including Blizzard's cell phone. The defense objected due to lack of foundation. VRP 1740-1755; 1925-1931; 1971-1982. Defense counsel pointed out that ". . . we started out with 17,000 pages of text messages. Then that boiled down to 150 pages of text messages" (VRP 1218) and that "You just don't say I've got 2,000 text messages here and I want to introduce them. There is foundation. There is relevance. There is hearsay, coconspirator issues. It just raises - - each one of those text messages may raise any of those or multiple issues. " VRP 595.

The State claimed it would lay a foundation later in the trial and, based upon those representations, the trial court allowed the admission of the evidence. VRP 1929-1941. The trial court expressed concern with the whole concept of conditional admission of the evidence because the predicament it might create - evidence coming before the jury without foundation being laid:

> THE COURT: So what happens -- this is my scenario for a second. What happens if I admit this information, I allow Mr. Baunsgard to testify to it right now, and the state doesn't link it up? How do you unring that bell in front of the jury?
>
> MR. CASHMAN: I understand that, your Honor. I would have to do some case research on that. I don't want to point you in the wrong direction.
>
> MR. RAMM: If I can answer the question, your Honor. If we're not able to connect it up, there will be a halftime motion and we'll lose. That's how it plays out. It's like a puzzle. We can identify the corners of the puzzle, put them in place, and then fill the rest in.
>
> THE COURT: Let's talk about that halftime motion for a second, Mr. Ramm. It's a very low standard that I let this go forward to the jury. That's what I'm concerned about. I'm more concerned about this than in other cases because of the witnesses that we're speaking of. I don't have any idea. At least in some of the other cases where I've danced on this limb I've done it with some certainty. This one I don't dance with certainty.
>
> MR. RAMM: Part of the text messages contain information that also support the relevancy. I would call it internal relevancy. Some of the text messages themselves, maybe not the GOGII ones, some of the other ones contain relevant evidence about the discussions to kill Vern Holbrook.

VRP 1929-1930.

Prosecutor Ramm explained the State's theory on conditional admission of evidence:

> MR. RAMM: This is kind of a chicken and the egg argument by counsel. We need to use those text messages, which are writings and are admissible as writings, when we question the two witnesses, the former codefendants. So what do you do first? Do we going to talk to them and then break and introduce all this evidence? No. That is the purpose for this rule, Rule 104(b). It's relevancy conditioned on a fact. It's conditionally admitted in order to present the evidence. Then the relevance is ultimately determined based upon the other evidence.

VRP 1933.

The promised foundation was never established. VRP 1936. The trial court allowed testimony about text messages but the print-outs were kept from the jury. VRP 1933, 1942. Defense counsel vigorously objected to testimony of text messages without proper identification and authentication. VRP 1933-1942; 2620-2621. Discussion with respect to Exhibit #86 (call records from Sprint Nextel for 509-910-6581) illustrates the point:

> DEFENSE: ". . The problem has always been that we started talking about these things. I objected to them. Then it was only after they were talked about that somehow they were admitted.
> Then the court's position was, well, we'll admit it but not to go back to the jury. We'll see if you tie it in later. It was never tied in. We've confirmed that because Ms. Anderson has gone through and told us there was never any testimony about that."

COURT: "I'm not going to allow it. . . "

VRP 3002.

The court allowed testimony as to text messaging for which foundation was not laid. The Exhibit List for trial noted defense objections and the fact that the item would not go back to the jury room - "admitted over objection; not for deliberation." Appendix #1 (Exhibit list). These items included Exhibit #72 (GOGII records), Exhibit #83 (extraction report from Blizzard's cell phone); Exhibit #85 (Blizzard phone download); and Exhibit #99 (AT&T for subscriber information for Maria Blizzard). With respect to Exhibit #86 - call records from Sprint Nextel for 509-910-6581, that item was not admitted. VRP 3002. With respect to the phone numbers in a search warrant with phone numbers (Exhibit #72 - VRP 2614), Ms. Mendez could not identify Mr. Blizzard's phone number off that item:

> COURT: Mr. Guzman, she didn't point out the right thing on the document. You know that. We all know that . . . No. 72 that you have attempted to bring in, I think Mr. Blizzard's number, didn't work out. . . .

VRP 2621.

> COURT: She gave the conversation ID rather than the phone number.

VRP 2665.

Ms. Mendez did no better when shown a prior interview with detectives. When asked "And do you recall now, after looking at that, what his number was that you were texting him?" she responded "Off the top of my head I don't know. Every time I went under his phone number it was under his name or his nickname." VRP 2625-2626.

In rebuttal closing the prosecutor argued about the texting by Mendez to Blizzard based on the records not admitted:

> More importantly, more importantly, on 5-24-13, the day before Vern Holbrook was assaulted, from the hours of 1610 to the hours of 2312, from 4:00 to 11:00, there is constant texting going on between Adriana Mendez and Daniel Blizzard. VRP 3129.

The texting records never should have been admitted through testimony. In *Patterson v. Horton,* 84 Wn.App. 531, 543, 929 P.2d 1125 (1997) Division 2 explained how conditional admission of evidence works:

> When evidence is relevant only if supported by proof of supplemental facts, the trial court "shall" conditionally admit the primary evidence subject to the introduction of further "evidence sufficient to support a finding of the fulfillment of the condition." ER 104(b). But, if this condition is not satisfied, the court should strike the primary evidence. 5 Karl B. Tegland, Washington Practice, § 19 (3rd ed.1989). Here, Patterson made no showing of reasonableness and necessity and, thus, never fulfilled the condition. Thus, the trial court erred when it admitted the documents as proof of past medical expenses and when it shifted to Hundley the burden of proving that the costs and care were unreasonable and unnecessary.

The situation in *Horton* is the same as Mr. Blizzard's case - there was a promise of foundation but no foundation established.

**a. Failure To Authenticate Text Messages Rendered Them Inadmissible.**

ER 901 provides:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Mr. Blizzard objected at trial that the State failed to lay a foundation for the text messages in that they were never properly authenticated. VRP 1906. One Washington appellate case addressing the issue of text messaging and authentication under ER 901 is *State v. Bradford*, 175 Wn.App. 912, 308 P.3d 736 (Div. 1 2013). *Bradford* enunciated the following test under ER 901 for text messages:

> This requirement is met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." cite omitted Furthermore, the trial court is not bound by the rules of evidence when making a determination as to authenticity. cites omitted

*Bradford*, 175 Wn.App. at 928.

The *Bradford* court found sufficient evidence to support a finding that the text messages that were read to the jury and contained in the 12-page examination report were what the State purported them to be: text messages written and sent by Bradford. For a substantial period of time,

Bradford telephoned Vilayphone and appeared at her place of employment on a frequent basis. He also regularly appeared outside of her house. These actions demonstrated Bradford's desperate desire to communicate with Vilayphone. It was consistent with this obsessive behavior that he would also send text messages to Smith as part of his efforts to contact Vilayphone. *Bradford,* 175 Wn.App. at 929.

No such authentication occurred in Mr. Blizzard's case. Testimony regarding text messages was admitted without proper foundation, identification and authentication. The testimony should have been excluded especially since the text messages from which the testimony derived, were unlawfully seized as argued above.

**4. Additional Prosecutorial Misconduct Occurred When The State Introduced Testimony Regarding Cell Phone Records And Expert Testimony On Cell Phone Location Without Proper Foundation.**

Detective Sam Perrault was allowed to testify to cell phone business records (Ex. #100) received from AT&T and the call history for Aspen Real Estate (VRP 2329), Vern Holbrook's business. Defense counsel objected but was overruled. VRP 2330. As Detective Perrault testified concerning his investigation, his review of cell records, and what various people told him, defense counsel objected to hearsay. VRP 2332. Detective Perrault was allowed to testify to Ms. Mendez's phone number [509-910-6581] and the fact that he saw it on Mr. Holbrooks's call records.

VRP 2334. Detective Perrault described call detail records and subscriber information for the phone number (509) 910-6581 (Ex. #86 - Mendez's cell phone number). VRP 2335. The State did not qualify the cell phone records as business records through Detective Perrault and the defense properly objected to hearsay.

The State also called a cell phone engineer to establish location of cell phone calls from Mendez to Holbrook and Mendez to Blizzard. Christopher Burden, a radio frequency engineer with Sprint, testified for the State on the position of Adriana Mendez's phone on the day of the murder. VRP 2353. He testified that a review of the records showed that a cell phone call was made from Mendez's phone number (509) 910-6581 (VRP 2334) to Vern Holbrook (509) 952-3300 (VRP 2402 - 2403) on May 25, 2013 at 11:15 am for 36 seconds. VRP 2360 - 2361. He also testified that the call was made from cell tower #325 located off of Mahoney Road in Yakima. VRP 2362. He was allowed to use cell phone area maps that were not to scale and did not show the entire areas involved and he could not testify to the location of the Mendez cell phone. VRP 2368.

The defense objected profusely to the admission of such expert testimony without foundation and/or relevance. During cross-examination, of Mr. Burden, the engineer for Sprint, defense counsel obliterated any

grounds for allowing the testimony (VRP 2368-2370) and once again, repeated his objection to the continued lack of foundation:

> . . . I think the problem that I've been trying to point out really throughout this whole trial and why it's a big problem now really can best be described once again by what happened with this map of the tower that we were talking about, the cell tower. We let in all kinds of things regarding the cell tower information. The engineers were allowed to take the stand, and the custodian of records were allowed to take the stand because we were reminded over and over and over again that the time would come when everything would be laid out perfectly.
>
> What happened? What happened was that the engineer came in and he had a map with no scale, a map whose sector goes off the map. There's nothing he can say about the map. That's the problem. We're doing it again. We've been doing it throughout this trial. I'm sick of it. That's my objection. That's it . . .

VRP 2620.

The cell phone engineer should not have been allowed to testify with respect to cell phone placement, especially with maps that were not drawn to scale or demonstrative of the area described.

**5. Cumulative Error**

The cumulative error doctrine warrants reversal of a defendant's conviction where the combined effect of several errors deprived the defendant of a fair trial, even though no error standing alone would warrant reversal. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)). When

applying the cumulative error doctrine, the appellate courts consider errors committed by the trial court as well as instances of misconduct by other participants, such as prosecutors or witnesses. See *Greiff*, 141 Wn.2d at 929; *State v. Venegas*, 155 Wn.App. 507, 520, 228 P.3d 813 (2010).

In the recent case of *State v. Allen*, --Wn.2d--, 341 P.3d 268 (2015), the Supreme Court found that repetitive misconduct could be grounds for a new trial. In the *Allen* case the prosecutor repeatedly misstated that the jury could convict Allen if it found that he "should have known" Clemmons was going to murder the four police officers (as opposed to actual knowledge). *Allen*, 31 P.2d at 273. The court set out the standard for cumulative error:

> Once we find that a prosecuting attorney's statements were improper, we must then determine whether the defendant was prejudiced under one of two standards of review. *State v. Emery*, 174 Wash.2d 741, 760, 278 P.3d 653 (2012). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Id.* However, if the defendant failed to object, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61, 278 P.3d 653. Because Allen objected at trial, we proceed under the first standard and ask whether there was a substantial likelihood that the misconduct affected the jury verdict.

*Allen*, 31 P.2d at 273.

The prosecutor's May, 2014 letter to the criminal presiding judge requesting recusal of the trial judge in the instant case was clearly misconduct. Indeed, on June 9, 2014, the trial court found misconduct:

> I want to make this record abundantly clear that Mr. Hagarty's letter constitutes prosecutorial misconduct. There is absolutely no doubt that this was an ex parte communication with the trial judge in a pending matter that is prohibited by the Rules of Professional Conduct, 3.5. For the state to suggest otherwise is, worst case scenario, disingenuous or, best case scenario, naive. . . VRP 566.

The timing of the letter immediately before the trial court ruling on a crucial suppression issue was telling. The trial court specifically found that "the assertion by the defendants that the impartiality of this process has been corrupted in a manner which can't be repaired, I would certainly agree that the attempt was perhaps made to corrupt the process but has, in fact, failed" and "because if it was an attempt to get me to recuse it hasn't been successful, and any prejudice that may still result from this conduct is premature to assess." VRP 570.

The defense asserts that the prosecutor's letter was part of a broader effort to undermine Mr. Blizzard's right to a due process and a fair trial. Additional errors during trial cumulated to prevent a fair trial. These errors included the State's failure to identify emails and text messages intending to be used at trial (in violation of the trial court's order), the introduction of evidence of three alleged abortions and Blizzard's failure to pay for those

abortions, and the admission of expert/officer testimony regarding cell phone records without authentication or proper foundation. Collectively, this misconduct prevented Mr. Blizzard from receiving a fair trial. Defense counsel repeatedly objected at trial, but the prosecutor's consistent and continuous misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. The court should reverse for a new trial.

## III. CONCLUSION

For all of the foregoing reasons, This Court must remand for a new trial to clearly communicate to elected prosecutors that judicial intimidation and related misconduct will not be tolerated. Such misconduct has no place in a system where a fair trial is guaranteed.

DATED AND SUBMITTED: This ____ day of June, 2015.


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## III. CONCLUSION

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DATED AND SUBMITTED: This 30th day of June, 2015.

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## CERTIFICATE OF SERVICE/PROOF OF FILING

I, Aleshia Cooke, hereby certify that the following information is true and correct: That the original pleading of the foregoing document entitled "Appellant's Amended Opening Brief" was filed via Federal Express, with the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201 on This 2nd Day of July, 2015. And further, that a true and correct copy of the foregoing pleading was served by U.S. Priority Mail, correct postage paid, on the following parties on this 2nd Day of July 2015:

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