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NO. 62864-0-I

**IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE**

2010 MAR 19 PM 12:51
FILED
CLERK OF COURT
APPELLANT'S DIVISION

STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

TSEGAZEAB ZERAHAIMANOT,

Defendant-Appellant.

APPELLANT'S OPENING BRIEF

Appeal from the Snohomish County Superior Court
The Hon. Michael T. Downes, Superior Court Judge
No. 07-1-03039-0

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I. ASSIGNMENTS OF ERROR

1. Tsegazeab Zerahaimanot assigns error to the entry of the judgment and sentence in this case.

2. Mr. Zerahaimanot's federal and state constitutional rights to an open and public trial were violated when the trial court sealed juror questionnaires without first conducting a hearing as required by *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and its progeny.

3. Mr. Zerahaimanot's Sixth Amendment right to confront the witnesses against him was violated when the trial court admitted numerous cell phone records based on "certifications" provided by non-testifying witnesses, without affording Zerahaimanot the opportunity to cross-examine anyone associated with the preparation or compilation of the records.

4. The trial court's answer to a jury question during deliberations deprived Mr. Zerahaimanot of due process of law

by effectively directing the jury to impute the co-defendant's premeditated intent to kill the victim to Mr. Zerahaimanot.

5. The second amended information violated Mr. Zerahaimanot's rights under the Sixth and Fourteenth Amendments to the United States Constitution and under the Washington Constitution, Article I, §22 to notice of the essential elements of felony murder in the first degree, because the information did not contain the elements of the charged predicate felony.

6. Mr. Zerahaimanot's Sixth Amendment right to effective assistance of counsel was violated when trial counsel failed to argue at sentencing that first degree murder and second degree unlawful possession of a firearm constitute "same criminal conduct" under RCW 9.94A.589(1)(a).

7. Principles of double jeopardy and Washington's merger rule require that one conviction for first degree murder must be vacated.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the sealing of juror questionnaires constitute a “closure” of the courtroom for purposes of a defendant’s right to an open and public trial, thereby triggering the hearing requirements of *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and its progeny? (Assignment of Error No. 2).

2. Is Mr. Zerahaimanot entitled to a new trial where the trial court ordered that juror questionnaires be sealed without first holding a *Bone-Club* hearing? (Assignment of Error No. 2).

3. Were “certifications” created pursuant to statute to enable the admission of cell phone records at trial “testimonial” for purposes of Confrontation Clause analysis? (Assignment of Error No. 3).

4. If the admission of the “certifications”—and hence the cell phone records themselves—violated Mr. Zerahaimanot’s Sixth Amendment right to confront the witnesses against him,

was the error harmless beyond a reasonable doubt?

(Assignment of Error No. 3).

5. Did the trial court's answer to a jury question during deliberations deprive Mr. Zerhaimanot of due process of law where the trial court effectively directed the jury to impute the co-defendant's premeditated intent to kill the victim to Mr. Zerhaimanot? (Assignment of Error No. 4).

6. Did the trial court's answer to the jury's question taint the jury's deliberations on the alternative count of first degree felony murder? (Assignment of Error No. 4).

7. Do the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, §22 of the Washington Constitution, require that an information charging felony murder in the first degree include the elements of the charged predicate felony? (Assignment of Error No. 5).

8. Is this Court's decision in *State v. Hartz*, 65 Wn. App. 351, 828 P.2d 618 (1992), still viable in light of subsequent decisions by the United States Supreme Court and the

Washington Supreme Court? And if *Hartz*—a decision of this Court—is still good law, should this Court overrule it? (Assignment of Error No. 5).

9. Can the elements of second degree kidnapping or attempted second degree kidnapping be found by “fair construction” in count I of the second amended information? (Assignment of Error No. 5).

10. Was trial counsel’s performance deficient when he failed to argue that Mr. Zerahaimanot’s convictions for first degree murder and unlawful possession of a firearm constituted same criminal conduct? (Assignment of Error No. 6).

11. Was Mr. Zerahaimanot prejudiced by trial counsel’s failure to raise the same criminal conduct issue? (Assignment of Error No. 6).

12. When only one homicide occurs, but the defendant is convicted of two separate counts of first degree murder based on alternative means, must one of the convictions be vacated to

comport with double jeopardy and merger principles?

(Assignment of Error No. 7).

III. STATEMENT OF THE CASE

Procedural Overview

Tsegazeab Zerhaimanot (along with co-defendant Steven Lee) was charged by second amended information with one count of first degree felony murder (with second degree kidnapping as the underlying felony), one count of premeditated first degree murder, and one count of unlawful possession of a firearm in the second degree. CP 103-04. Both murder counts were accompanied by firearm enhancements. *Id.* All three counts arose from the shooting death of Forrest Starrett on August 21, 2007. *Id.*

Zerhaimanot and Lee were tried jointly, and both elected to waive jury on the charge of unlawfully possessing a firearm. CP 64. On December 8, 2008, the jury found Zerhaimanot guilty of two counts of first degree murder with firearm enhancements as charged in counts I and II. CP 24-27.

The trial court similarly found Zerahaimanot guilty of the firearm charge alleged in count III. CP 18-19. Lee was convicted of the same charges.

On December 16, 2008, the trial court held a joint sentencing hearing for both defendants. XI RP 2181-2201.¹ On the charge of first degree felony murder (count I), Zerahaimanot was sentenced to 347 months confinement plus the 60 month firearm enhancement, for a total of 407 months confinement. CP 5-17. The trial court merged the premeditated first degree murder (count II) with count I for sentencing purposes. *Id.* On the firearm charge (count III), Zerahaimanot was sentenced to 12 months confinement, concurrent with the 407 months imposed on count I. *Id.*

Zerahaimanot timely filed this appeal. CP 3-4.

¹ Proceedings from November 12, 2008 through December 16, 2008 are numbered as volumes I through XI and will be cited accordingly. Proceedings held prior to November 13th will be cited according to the date of the hearing.

The Charging Document

The second amended information charged Zerahaimanot in count I with first degree felony murder with a firearm enhancement. Second degree kidnapping was alleged as the predicate felony. Count I reads in relevant part:

[T]he defendant, on or about the 21st day of August, 2007, committed or attempted to commit the crime of second degree kidnapping, and in the course of or in furtherance of such crime or in immediate flight therefrom, the defendant, or another participant, did cause the death of another person, to wit: Forrest Starrett, not a participant in such crime...

CP 103. Count I did not allege any of the elements of the predicate felony of second degree kidnapping. Trial counsel did not object to the sufficiency of the charging document.

Sealing of Juror Questionnaires

Prior to commencement of jury selection, the parties and the court agreed that jurors would complete a questionnaire to help determine whether any jurors needed to be questioned individually. RP 8-10 (August 25, 2008); I RP 2-6. In response to a question from defense counsel about whether the attorneys

would be allowed to remove the completed questionnaires from the courtroom, the court made it clear that it considered the questionnaires confidential and not for public consumption:

[Defense counsel]: Two question [sic] I have: Am I correct in assuming that the questionnaires cannot leave the courtroom? Can we take them?

The Court: Let me think about that.

[Defense counsel]: Certainly keep them confidential.

The Court: Let me think about that. Certainly if I do allow you to take them from the courtroom, nobody is going to be allowed to take [sic] copies or anything like that, and I'm going to want them back.

I RP 4-5.

Jury selection commenced on Friday, November 14, 2008. CP ____ (Sub. #152; *Clerk's Trial Minutes*, at 9).²

Questionnaires were submitted to and completed by at least 76

² Voir dire was not transcribed. The *Clerk's Trial Minutes* record the timing of events surrounding jury selection. The minutes were not initially designated as part of the clerk's papers. Mr. Zerahaimanot has filed a supplemental designation of clerk's papers to include the *Clerk's Trial Minutes*.

prospective jurors that day. *Id.* at 9-11. Court recessed for the weekend and reconvened on Monday, November 17th, at which point the court and counsel conducted individual voir dire of numerous jurors. *Id.* at 11-19. On Tuesday, November 18th, the court asked general questions of the remaining venire, and the parties conducted their group voir dire. *Id.* at 19-21. Additional challenges for cause and peremptory challenges followed, and the composition of the jury was finalized at 4:32 p.m. on November 18th. *Id.* at 21-23.

On November 19th, the jury was sworn at 9:43 a.m. *Id.* at 24. That same day, the court entered an order sealing the following documents: “juror biographical forms;” “juror questionnaires/interrogatories;” and “letters from employers of prospective jurors.” CP ____ (Sub. #152.2; *Order Sealing Record*).³ No attorney signatures appear on the order. *Id.* The

³ Mr. Zerahaimanot has filed a supplemental designation of clerk’s papers to include the *Order Sealing Record*. See footnote 2, *supra*.

order states that it was entered pursuant to GR 31(j), which provides:

Access to Juror Information. Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or member of the public, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

The trial court did not hold a hearing to address the necessity for sealing juror forms and questionnaires.

The Evidence at Trial

Pursuant to RAP 10.1(g), Zerhaimanot adopts and incorporates by reference the statement of “Pertinent Facts” of consolidated appellant Steven Lee. *See Opening Brief of Steven Lee*, at 7-12. Zerhaimanot adds the following to Lee’s statement of facts:

In describing what he saw of the shooting, Leroy Holt testified that he saw Forrest Starrett sitting in his truck while Zerhaimanot and Steven Lee stood outside the truck. V RP

824-25. Holt believed that there was a “fight over the gun.” *Id.* at 825. He then saw a “flash” from a gun. *Id.* at 826.

Zerahaimanot was holding the gun and the gun was pointed downward. *Id.* Immediately following the downward shot Zerahaimanot ran away. *Id.* at 827, 889. After Zerahaimanot ran, Lee fired two shots, one of which was a shot to Starrett’s head. *Id.* at 827-28.

Holt later spoke to Zerahaimanot on the phone and Zerahaimanot expressed confusion about what had happened. Holt told Zerahaimanot that “Stevie” shot Starrett in the head. *Id.* at 835-36.

Admission of Cell Phone Records

At trial the State successfully introduced numerous cell phone records belonging to Bristol Chaney (EX 184, 240), Leroy Holt (EX 209, 239), Nicole Jorgensen (EX 228, 240), Danika Medley (EX 229, 240), James Howell (EX 234, 240), Isabel Ellis (EX 237, 240), Steven Lee (238, 239), Dick

Richardson⁴ (EX 239), and Forrest Starrett (EX 240). Admitted with the records were “Affidavits by Certification” executed by employees of the various phone companies who provided the records. Each affidavit contained assertions that (1) the affiant was familiar with the records, as well as with the method of their creation and maintenance; (2) the affiant researched and copied the records; (3) the records were made at or near the time of the events covered by the records; (4) the records were made in the normal course of business; (5) the records were either originals or accurate copies of originals. *See* cited exhibits, *supra*.

The State also called two civilian witnesses employed by the Everett Police Department and the Washington State Patrol to testify regarding the creation and contents of charts and summaries generated from data contained within the various phone records. *See* VII RP 1302-10, VIII RP 1511-38

⁴ The State’s theory was that “Dick Richardson” is Mr. Zerahaimanot.

(testimony of Toan Nguyen); IX RP 1714-45 (testimony of Valentine Lu).

Admission of the records had been a source of controversy prior to trial. The State made it clear from the outset that its purpose in offering the records was to bolster the testimony of its live witnesses: “[T]he State intends to introduce the records and to utilize the information contained within those records to corroborate the witnesses’ testimony at trial.” RP 9 (August 7, 2008). Meanwhile, defense counsel characterized the records as “a critical element of the State’s case” that provided “the essential underpinning of the evidence against” Zerhaimanot. I RP 74-75. Accordingly, the defense objected on confrontation grounds to any records custodians testifying via the internet. I RP 73-75. Ultimately, the State did not call any custodians of records for any of the relevant telephone companies, instead relying on written affidavits from phone

company employees pursuant to RCW 10.96.040⁵ to establish that the records qualified as business records under RCW 5.45.020.

In closing argument, the State, as promised, relied on the phone records in arguing that its witnesses—in particular Leroy Holt—were credible. *See* XI RP 2003, 2005-07.

The Jury's Confusion Over Accomplice Liability, Intent and Premeditation

Instructions Nos. 15 and 16 were the “to convict” instructions on premeditated first degree murder for Zerahaimanot and Lee, respectively. CP 50-51. The instructions are identical but for the names of the defendants.

Instruction No. 15 told the jury that it could convict Zerahaimanot of premeditated first degree if it found the following elements beyond a reasonable doubt:

1. That on or about the 21st day of August, 2007, the defendant Zerahaimanot or an accomplice caused the death of Forrest Starrett;

⁵ This new law went to effect just a few months before trial commenced, and had not yet been codified at the time of trial.

2. That the defendant Zerhaimanot or an accomplice acted with intent to cause the death of Forrest Starrett;
3. That the intent to cause the death was premeditated;
4. That Forrest Starrett died as a result of Zerhaimanot's or the accomplice's acts;
5. That the acts occurred in the State of Washington.

CP 50.

Instruction No. 10 defined accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime, if, with knowledge that it will promote or facilitate the commission of the crime, he either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 45.

Near the end of the first full day of deliberations, the jury submitted the following question to the court:

Regarding jury instructions (part #15 and #16) elements (1), (2), (4) include the word accomplice “or an accomplice.” However element (3) does not include any mention of accomplice. Are we, the jury, aloud [sic] to consider the lack of the word “accomplice” for element (3) as significant?

CP 29. Upon agreement of the parties, the trial court gave the following answer: “You must rely on the instructions you have already been given.” CP 29; *see* XI RP 2159-62 (discussion of question by court and parties).

Midway through the second full day of deliberations the jury asked a similar question, this time specific to

Zerahaimanot’s “to convict” instruction:

On Instruction page #15, are we to interpret that element (3) is a continuation of element (2)? That is, the “intent” referred to in element (2) directly is associated with the “intent” in element (3)?

CP 28. The parties agreed that the court should respond the same as it had the previous day—by directing the jury to rely

on the existing instructions. XI RP 2163-65. The court rejected the advice of the parties, and gave the following answer to the jury:

Regarding instruction number 15, the word “intent” in element number 3 refers to the “intent” required to be proved in element number 2.

CP 28. In deciding to answer the question the trial court found it significant that the jury had been deliberating for a substantial period of time:

I am prone to answer the jury’s question. This is something that they asked us late yesterday afternoon. The jury has been in session—this is their third day in deliberations. They were in session for approximately 45 minutes or an hour the first day. They were in deliberations all day long yesterday. And at the end of the day they asked a very similar question, but they didn’t ask this question directly. And they have now come back after an additional four hours of deliberation and asked the question directly that I thought, frankly, they were trying to get to yesterday but probably inartfully worded.

XI RP 2165. The court justified its answer by observing that the jury was “obviously struggling.” XI RP 2165-66.

Zerahaimanot objected to the answer given to the jury by the court. XI RP 2166-67, 2169. Forty-two minutes after the

court's answer was delivered to the jury, the jury returned with verdicts of guilt. CP ___ (*Clerk's Trial Minutes*, at 55-56).

Sentencing

Zerahaimanot was sentenced on December 16, 2008. At the outset of the hearing the State moved to dismiss count II—the charge of premeditated first degree murder. XI RP 2184. Trial counsel joined in the State's motion. *Id.* The trial court denied the motion to dismiss, instead merging count II with count I for purposes of sentencing, but leaving intact Zerahaimanot's two convictions for first degree murder. *Id.* at 2184-87; CP 5.

On the murder charge the trial court calculated Zerahaimanot's offender score as two—one point for a prior non-violent felony drug conviction, and one point for count III, the firearm charge. CP 6-7. This resulted in a standard range of 261-347 months on the murder charge, plus 60 months for the accompanying firearm enhancement, for a total range of

321-407. CP 7. The court sentenced Zerahaimanot to the top of the range. *Id.*; XI RP 2197.

Trial counsel did not argue that the murder and the firearm charge in count III constituted “same criminal conduct” for sentencing purposes. Indeed, trial counsel agreed with the State’s calculation of Zerahaimanot’s offender score. XI RP 2181.

IV. ARGUMENT

Mr. Zerahaimanot’s Federal and State Constitutional Rights to an Open and Public Trial Were Violated When the Trial Court Sealed Juror Questionnaires Without First Conducting a *Bone-Club* Hearing.

Introduction

The right to a public trial is protected by both the federal and the Washington state constitutions. *See* U.S. CONST. AMEND. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”); WASH. CONST., ART. 1, § 22 (“In criminal prosecutions the accused shall have the right . . . to have a speedy public trial.”); WASH. CONST.,

ART. 1, § 10 (“Justice in all cases shall be administered openly.”). This right includes the right to open jury selection. *State v. Strode*, 167 Wash.2d 222, 226-27, 217 P.3d 310 (2009), citing *In Re PRP of Orange*, 152 Wash.2d 795, 804, 100 P.3d 291 (2005), and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984).

Washington Courts have scrupulously protected the accused’s and the public’s right to open public criminal proceedings. And “[w]hile the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom *in only the most unusual circumstances.*” *Strode*, 167 Wash.2d at 226, citing *State v. Easterling*, 157 Wash.2d 167, 174-75, 137 P.3d 825 (2006) (emphasis supplied). *See also State v. Brightman*, 155 Wash.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant’s public trial rights); *Orange*, 152 Wash.2d at 812 (reversing a conviction where the court was closed during *voir dire* and

holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wash.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed *prior* to closing a courtroom or sealing documents). “[P]rotection of this basic constitutional right clearly calls for a trial court to *resist* a closure motion *except under the most unusual circumstances.*” *Orange*, 152 Wash.2d at 805, citing *Bone-Club*, 128 Wash.2d at 259 (emphasis in original).

A Hearing Must Precede Any Contemplated Closure or Sealing.

The Washington Supreme Court recently re-affirmed the test which must be applied in every case where a closure is contemplated. *Strode*, 167 Wash.2d at 227-28. The factors

which the trial court must analyze prior to any closure or sealing—also known as the *Bone-Club* factors—are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Strode, 167 Wash.2d at 227-28, citing *Bone-Club*, 128 Wash.2d at 258-259 (quotations in original). As the test itself demonstrates, analysis of the five factors must occur *before* the closure or sealing. For example, it is impossible to weigh the reasons given by a member of the press or public opposed to closure if the trial

court fails to expressly invite comment on the matter. *See Strode*,

167 Wash.2d at 228-29:

The determination of a compelling interest for courtroom closure is “the affirmative duty of the trial court, not the court of appeals.” *Bone-Club*, 128 Wash.2d at 261, 906 P.2d 325. Nor is it the responsibility of this court to speculate on the justification for closure. Moreover, even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four *Bone-Club* steps to thoroughly weigh the competing interests. *Id.*

After conducting a full hearing, the trial court must then make findings. The constitutional presumption of openness may be overcome only by

an overriding interest *based on findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Orange, 152 Wash.2d at 806, quoting *Waller v. Georgia*, 467

U.S. 39, 45 (1984) (emphasis supplied). These requirements

are necessary to protect both the accused’s right to a public trial

and the public's right to open proceedings. *Easterling*, 157 Wash.2d at 175.

The Right to an Open and Public Trial and the Requirement of a Hearing Applies to Jury Selection in General, and to Juror Questionnaires in Particular.

It is now beyond dispute that the process of jury selection is subject to the *Bone-Club* requirements. See, e.g., *Strode*, 167 Wash.2d at 226-27; *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009); *Brightman*, 155 Wash.2d at 514; *Orange*, 152 Wash.2d at 804. As the United States Supreme Court stated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. at 505: “(t)he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.”

This Court has recognized that this requirement applies with equal force to the handling of juror questionnaires. *State v. Coleman*, 151 Wash. App. 614, 621-23, 214 P.3d 158 (2009) (notwithstanding GR 31(j), trial court must hold *Bone-Club* hearing before ordering the sealing of juror questionnaires).

Violation of the Right to an Open and Public Trial is a Structural Error Which Necessitates a New Trial.

Determining the harm which flows from the violation of a defendant's right to an open and public trial is not a quantifiable process. Because of the fundamental nature of the public trial right, and because violation of that right does not easily lend itself to harmless error analysis, the Washington Supreme court has announced that the violation of the right to an open and public trial is a structural error, and that the remedy is reversal of the defendant's conviction(s) and remand for a new trial. *Strode*, 167 Wash.2d at 223:

Here, the trial court violated Tony Strode's right to a public trial by conducting a portion of jury selection in the trial judge's chambers in ***unexceptional circumstances*** without first performing the required *Bone-Club* analysis. ***This is a structural error that cannot be considered harmless. Therefore, reversal of Strode's conviction and remand for a new trial is required.***

(emphasis supplied); *see also Easterling*, 157 Wash.2d at 181

("The denial of the constitutional right to a public trial is one of

the limited classes of fundamental rights not subject to harmless error analysis.”).

Momah is Distinguishable Because in that Case the Trial Court Held a Bone-Club Hearing or its Equivalent.

Despite the clear language in *Strode*, some confusion regarding remedy may be engendered by the Washington Supreme Court’s decision in *Momah*. *Strode* and *Momah* were argued on the same day, decided on the same day, and involved similar facts—closure of the courtroom during individual voir dire. However, the Court reached opposite conclusions, affirming in *Momah* and reversing in *Strode*.⁶ Although the Supreme Court could have made the distinction much clearer, the legal line that separates *Momah* from *Strode* is simple. In *Momah*, the trial court conducted a *Bone-Club* hearing or its equivalent. In *Strode*, no *Bone-Club* hearing took place.

⁶ In discussing the two cases, it is worth noting that at the time of this writing, the *Strode* decision is final, the mandate having been issued on January 12, 2010. In contrast, a motion for reconsideration remains pending in *Momah*.

The *Strode* concurrence⁷ noted that “(t)he specific concerns underlying the *Bone-Club* factors were sufficiently addressed by the *Momah* trial court.” *Strode*, 167 Wash.2d at 234 (Fairhurst, J. concurring). While the *Bone-Club* factors could have been more explicitly detailed in the record, the concurrence concluded:

The purpose of the *Bone-Club* inquiry is to ensure that trial courts will carefully and vigorously safeguard the public trial right. Under the circumstances in *Momah*'s case, it is apparent that this purpose was served, and the defendant's right to a public trial was carefully balanced with another right of great magnitude—the right to an impartial jury. . .

Unlike the situation presented in *Momah*, here the record does not show that the court considered the right to a public trial in light of competing interests. The record does not show a knowing waiver of the right to a public trial. Although the dissent addresses the right of jurors to privacy, the record does not show that this interest was considered together with the right to a public trial. I agree with the dissent that “public exposure of jurors' personal experiences can be both embarrassing and perhaps

⁷ Both *Strode* and *Momah* were 6-3 decisions, with Justices Fairhurst, Madsen and Owens changing sides from one case to the next. Justice Fairhurst's concurrence in *Strode* (which was joined by Justice Madsen) is of particular note because it explains the reasoning of two of the three Justices who changed their votes between *Strode* and *Momah*.

painful for jurors.” I agree that jurors' privacy is a compelling interest that trial courts must protect. I agree that had the trial judge failed to close a portion of voir dire to the public, he would have “undermined the court's procedural assurances that juror information will remain private [and] would have jeopardized jurors' candidness and *potentially* the defendant's right to an impartial jury.” ***But the potential for jeopardizing a defendant's right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court. Because, unlike in Momah, the record does not show that this occurred, this case fits into the category of cases where expressly engaging in the Bone-Club analysis on the record is required. The trial court here erred in failing to engage in the Bone-Club analysis.***

Strode, 167 Wash.2d at 233, 235-36 (Fairhurst, J. concurring)

(citations to dissent omitted) (italics in original) (emphasis supplied).

In this case, the trial court did not engage in any weighing of competing interests before entering the sealing order. Indeed, there was no on-the-record discussion at all regarding the sealing order. Moreover, the order's citation to GR 31(j) strongly suggests that it was entered for the sole purpose of protecting juror privacy—rather than to promote

Zerahaimanot's right to a fair trial. *See Momah*, 167 Wash.2d at 151-52 ("Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests."). This case thus falls into the category of cases controlled by *Strode* (where no *Bone-Club* hearing occurred, quasi- or otherwise), rather than those governed by *Momah* (where the trial court substantially complied with *Bone-Club*).

This Court's Decision in Coleman Is Factually Distinguishable, and to the Extent Coleman Suggests that the Error Is Not Structural, Coleman Has Been Overruled In Part By Strode.

This Court decided *Coleman* on August 17, 2009, about three months before *Strode* and *Momah* were issued. In *Coleman*, the Court recognized that the sealing of juror questionnaires must be preceded by a *Bone-Club* hearing. *Coleman*, 151 Wash. App. at 621-23. Despite the fact no such hearing was held in *Coleman's* case, the Court declined to reverse *Coleman's* conviction, instead deciding that "[o]n these

facts, we do not agree that structural error occurred.” *Id.* at 623-24.

The Court’s decision not to apply structural error analysis was based on three factors:

1. “The questionnaires were used only for the selection of the jury, which proceeded in open court.”
2. “The questionnaires were not sealed until several days after the jury was seated and sworn.”
3. “[T]here is nothing to indicate that the questionnaires were not available for public inspection during the jury selection.”

Id. at 624. From these three factors the Court concluded that “the subsequent sealing order had no effect on Coleman’s public trial right.” *Id.*

To the extent that *Coleman*’s harm analysis remains viable in the wake of *Strode*, this case is different from *Coleman* in two important respects. First, the juror questionnaires in this case were sealed contemporaneously with the swearing of the jury. Contrary to the situation in *Coleman*, there was no gap of several days during which the public may (at least theoretically) have had open access to the

questionnaires. And second, unlike in *Coleman*, here there is every reason to believe “that the questionnaires were not available for public inspection during the jury selection.” *Id.* In its discussions with counsel, the trial court made it very clear that it considered the questionnaires to be confidential, that it had reservations about allowing the attorneys to remove the questionnaires from the courtroom, and that the attorneys were forbidden to make copies of the questionnaires. *See* I RP 4-5.

Coleman rejected the argument that a structural error had occurred because it concluded that the record in that case supported an inference that the public had access to the questionnaires for some period of time prior to the sealing order. Here the record supports the opposite conclusion—that the public never had access to the questionnaires, and that the trial court specifically intended that the public not have access. On these facts, the reasoning of *Coleman* is inapposite.

Moreover, it is difficult to defend the outcome in *Coleman* in light of the Supreme Court’s subsequent decision in

Strode. *Coleman* appears to suggest—without explicitly stating—that the violation in that case was not a structural error because it was rendered *de minimis* by the public’s theoretical access to the questionnaires during and for several days following jury selection before the sealing order was entered.

Strode squarely rejects this approach:

Some courts in other jurisdictions have held that there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. Trivial closures have been defined to be those that are brief and inadvertent. This court, however, “has never found a public trial right violation to be [trivial or] *de minimis*.” *Easterling*, 157 Wash.2d at 180, 137 P.3d 825. Furthermore, the closure here was analogous to the closures in *Bone-Club* and *Orange*. *Orange*, 152 Wash.2d at 804-05, 100 P.3d 291; *Bone-Club*, 128 Wash.2d at 259, 906 P.2d 325. As we have stated above, the trial court and counsel for the State and Strode questioned at least 11 prospective jurors in chambers. At least 6 of those prospective jurors were subsequently dismissed for cause during this period. This closure cannot be said to be brief or inadvertent.

Strode, 167 Wash.2d at 230 (federal citations omitted). In Zerhaimanot’s case at least 76 prospective jurors completed the questionnaire to which the public was denied access without

a *Bone-Club* hearing. To the extent that *Coleman* suggests that the sealing of juror questionnaires without a hearing is a trivial or *de minimis* violation of the public trial right and is therefore not a structural error, it has been overruled by *Strode*.

Zerahaimanot Is Entitled to a New Trial.

Dozens of juror questionnaires were sealed in this case. No *Bone-Club* hearing was held. Indeed, there was no mention whatsoever on the record regarding the sealing of the questionnaires. The sealing of the questionnaires without a hearing violated Zerahaimanot's right to an open and public trial. Under *Strode*, this is a structural error, and Zerahaimanot is entitled to a new trial.

Zerahaimanot's Sixth Amendment Right to Confront the Witnesses Against Him Was Violated When the Trial Court Admitted Numerous Cell Phone Records Without Affording Zerahaimanot the Opportunity to Cross-examine Anyone Associated with the Preparation or Compilation of the Records.

The Affidavits Which Paved the Way for Admission of the Records Were Classic Testimonial Hearsay.

This assignment of error is controlled by the United States Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527 (2009). Melendez-Diaz was charged in state court with drug offenses involving the distribution of cocaine. Pursuant to a Massachusetts statute, the trial court admitted three "certificates" prepared by crime lab analysts detailing the results of forensic tests performed on the cocaine seized in the case. Melendez-Diaz was convicted, and the Massachusetts appellate courts affirmed his convictions. *Id.* at 2530-31.

The Supreme Court had little difficulty finding that the certificates constituted classic testimonial hearsay for purposes of the Confrontation Clause analysis detailed in *Crawford v.*

Washington, 541 U.S. 36 (2004).

There is little doubt that the documents at issue in this case fall within the core class of testimonial statements thus described. Our description of that category mentions affidavits twice. . . The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits: “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” Black's Law Dictionary 62 (8th ed. 2004). They are incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . The “certificates” are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination. Here, moreover, not only were the affidavits “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” *Crawford, supra*, at 52, 124 S.Ct. 1354, but under Massachusetts law the *sole purpose* of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance.

Melendez-Diaz, 129 S.Ct. at 2532 (some quotations and citations omitted).

Washington enacted its Criminal Process Records Act—the vehicle through which the cell phone records were introduced at trial—several months prior to the commencement

of trial. The law contains a “findings” section which states in relevant part:

The ability of law enforcement and the criminal justice system to effectively perform their duties to the public often depends upon law enforcement agencies, prosecutors, and criminal defense attorneys being able to obtain and use records relevant to crimes that affect Washington's citizens, businesses, associations, organizations, and others who provide goods or services, or conduct other activity in Washington. In the course of fulfilling their duties to the public, law enforcement agencies, prosecutors, and criminal defense attorneys must frequently obtain records from these entities, and ***be able to use the records in court.***

RCW 10.96.005 (emphasis supplied). In other words, one of the principle purposes of the statutory scheme—as with the Massachusetts statute at issue in *Melendez-Diaz*—is to facilitate the admissibility of records at criminal trials. This purpose is accomplished by allowing records to be introduced into evidence without the burden of requiring live testimony from any records custodian and without any opportunity for cross-examination:

To be admissible without testimony from the custodian of records, business records must be accompanied by an

affidavit, declaration, or certification by its record custodian or other qualified person that includes contact information for the witness completing the document and attests to the following:

- (a) The witness is the custodian of the record or sets forth evidence that the witness is qualified to testify about the record;
- (b) The record was made at or near the time of the act, condition, or event set forth in the record by, or from information transmitted by, a person with knowledge of those matters;
- (c) The record was made in the regular course of business;
- (d) The identity of the record and the mode of its preparation; and
- (e) Either that the record is the original or that it is a duplicate that accurately reproduces the original.

RCW 10.96.030(2).

Put simply, the types of affidavit contemplated by the statute—and the affidavits admitted in this case—are created specifically for use at trial as a substitute for live testimony. Indeed, the affidavits admitted in this case were prepared by the prosecution and then provided by the State to the witnesses for their signatures. *See* RP 3 (August 7, 2008) (trial prosecutor referring to “template” of the “certification” being signed by

phone company personnel). There can be little debate that the affidavits at issue in this case qualify as “testimonial” for Confrontation Clause purposes under *any* definition of that term. *See Crawford*, 541 U.S. at 51-52:

Various formulations of this core class of “testimonial” statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as *affidavits*, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar *pretrial statements that declarants would reasonably expect to be used prosecutorially*; extrajudicial statements ... contained in formalized testimonial materials, such as *affidavits*, depositions, prior testimony, or confessions; statements that were *made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial*. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

(quotations and citations omitted) (emphasis supplied).

“The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the

admission of such evidence against” Zerhaimanot “was error.”

Melendez-Diaz, 129 S.Ct. at 2542.

The State Cannot Meet Its Burden of Demonstrating that the Error Was Harmless Beyond a Reasonable Doubt.

The denial of Zerhaimanot’s right to confrontation entitles him to a new trial unless the State can convince the Court that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). The State cannot meet this heavy burden.

The State’s case rested almost entirely on the testimony of Leroy Holt—the only person who claimed to have witnessed the shooting. His credibility or lack thereof was thus critically important to the outcome of the trial. Holt’s credibility was attacked by both defense counsel in a number of areas—*e.g.*, Holt ran from the scene immediately after the shooting and shed articles of clothing in an effort to avoid detection by police; he eluded the police in a high speed chase several weeks after the shooting; he obtained a dismissal of the eluding charge

in exchange for his trial testimony; he received immunity from the State on a potential charge of failing to register as a sex offender in exchange for his testimony; he had previously expressed fears about being charged as an accessory or accomplice to the murder; he had previously lied to the police about his knowledge regarding the shooting; he was an admitted crack dealer; and, he had previously been convicted of rape of a child. *See generally* V RP 781-918, VI RP 928-1042 (testimony of Leroy Holy).

The State's response to Holt's shaky credibility and checkered history was to buttress his testimony with evidence which the State argued corroborated his account of events. According to the State, the phone records were a critical piece of this corroboration: "But what [Holt] said was corroborated by the autopsy report and by the ballistics and *by the phone records.*" XI RP 1996 (emphasis supplied).

Mr. Holt's phone record, which you will have with you in different forms. There is the actual record themselves [sic]. There are the summaries and the diagram that was

prepared. Mr. Holt testified that he had contact with Keylo, Mr. Zerahaimanot, around closing time at the club and that he could hear music in the background. And he believed that Keylo was at a local club. And the phone records do show the two highlighted sections on the 21st at 2:06 and at 2:07. There are calls back and forth between the two of them, and that is right around closing time.

There was testimony that Michelle Walker called using Forrest's phone from upstairs to downstairs to try to get these people to leave. Again, take a look at the pink highlighted areas with the checks by them. That is Forrest's phone. The termination means it's a call from Forrest to Leroy, because this is Leroy's phone record. So at 4:24 in the morning, there was a call from Forrest's phone to Leroy's phone. And at 4:31 a second time, Michelle is trying to get them to leave. A call to Forrest's phone.

You heard Mr. Holt testify that after the murder happened he and Capone [Chaney] had contact using Steven Lee's phone. Interestingly enough, you will find when you look at Leroy Holt's phone record that there are absolutely no calls between he and Mr. Lee before the homicide happens, because they don't know each other that well. There is no reason for them to be calling each other. After the homicide happens when Capone has that phone, you will see the little stars with the "K" by it [sic]. Those were calls between Leroy Holt and Capone.

The other highlighted calls are the calls that Mr. Holt talked about after the murder happens. He is waiting at the apartment complex and he called Keylo [Zerahaimanot] or Keylo calls him and they have several

conversations, and that's corroborate[d] by the yellow highlighted areas.

Mr. Holt testified that he called a cab. We already have the cab records. And if you look at his phone records on August 21st, about two hours after the homicide happened at seven in the morning, he makes a call, or tried to make a call to Yellow Cab. It's one digit off. What he did after that was he then called 411-connect and was connected to the cab company and that's when he ordered his taxi to get out of there.

Mr. Lee's phone. You will notice that between the 21st of August and the 24th of August that phone was not used. And that corroborates what Mr. Holt said about Capone having a phone, that it be [sic] missing for a few days and that it gets back into Mr. Lee's possession.

XI RP 2005-07.

The affidavits by phone company personnel were a condition precedent to the admission of the underlying phone records. Without the affidavits, none of the phone records would have been admitted into evidence. And without the phone records, the State would have lacked a key piece of evidence with which to corroborate Holt's account of what happened.

Holt was far and away the most important witness in the case. The violation of Zerahaimanot's right to confrontation allowed the State to prop up Holt's testimony with "objective" evidence—the phone records. On these facts, the State cannot meet its burden to show that the error was harmless beyond a reasonable doubt. This Court should reverse Zerahaimanot's convictions and order a new trial.

The Trial Court's Answer to the Jury's Question Regarding Zerahaimanot's "To Convict" Instruction Deprived Mr. Zerahaimanot of Due Process of Law By Directing the Jury to Impute Lee's Premeditated Intent to Kill to Zerahaimanot.

Washington's Law of Accomplice Liability Requires the State to Prove that the Purported Accomplice Shared the Criminal Intent of the Primary Actor.

Accomplice liability is not strict liability. Instead, RCW 9A.08.020(3)(a) "requires the accomplice to have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*. . . [The accomplice] *will not be liable for conduct that does not fall within this purpose.*" *State v. Roberts*, 142 Wash.2d 471, 510-11, 14 P.3d 713 (2000)

(quotations omitted) (emphasis in original). “The Legislature, therefore, intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has ‘knowledge,’ the *mens rea* of RCW 9A.08.020.” *Id.* at 511; see also *State v. Cronin*, 142 Wash.2d 568, 579, 14 P.3d 752 (“[I]n order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged.”) (emphasis in original); *State v. Stein*, 144 Wash.2d 236, 246, 27 P.3d 184 (2001) (“[U]nder this court's holdings in *Roberts* and *Cronin*, the accomplice liability statute, RCW 9A.08.020, requires knowledge of ‘the’ specific crime, and not merely any foreseeable crime committed as a result of the complicity”).

In other words, under *Roberts* and *Cronin*, it is not enough that the accomplice had knowledge that the principal would engage in some kind of crime. He must have had knowledge that the principal would engage in the crime actually

committed. *Roberts*, 142 Wash.2d at 510-11. Put even more simply, for a defendant to be convicted of a crime based on accomplice liability, he or she must have shared the same criminal intent to commit the substantive offense as the principal. At the same time, however, the accomplice need not be a lawyer. That is, he does not need to have “[s]pecific knowledge of the elements of the coparticipant's crime.” *In Re PRP of Domingo*, 155 Wash.2d 356, 365, 119 P.3d 816, 820 (2005).

Consequently, the “in for a penny, in for a pound” theory of accomplice liability is an incorrect statement of Washington law because an accomplice must have knowledge of “the crime” that ultimately occurs. *Roberts*, 142 Wash.2d at 509-11; *see also Cronin*, 142 Wash.2d at 577 (citing with disapproval the State’s closing argument, in which the prosecutor made the “in for a penny, in for a pound” argument). A purported accomplice who knows of one crime—the

penny—is not guilty of a greater crime—the pound—if he has no knowledge of that greater crime.⁸

***The Trial Court's Answer to the Jury's Question
Relieved the State of the Burden of Proving
Premeditation Beyond a Reasonable Doubt.***

According to Leroy Holt—the only purported eyewitness to the shooting—Zerahaimanot assaulted Starrett with a firearm by shooting towards the lower part of his body, in all likelihood causing one or both of the gunshot wounds to Starrett's lower leg. Zerahaimanot (according to Holt) then ran away, after which Lee shot Starrett in the head, killing him.

The jury's second question regarding Instruction No. 15 suggests that the jurors were unsure of the mental state they were required to find in order to convict Zerahaimanot of premeditated first degree murder. Element number 2 of Instruction No. 15 contained the *mens rea* the State would have to prove in order to convict Zerahaimanot of *second degree*

⁸ The trial prosecutor in this case also made the “in for a penny in for a pound” argument in closing while attempting to explain the concept of felony murder to the jury. XI RP 1989.

murder—it required the jury to find that “Zerahaimanot or an accomplice acted with intent to cause the death of Forrest Starrett.” CP 50. Read in conjunction with Instruction No. 10 (CP 45), this sub-part of Instruction No. 15 correctly allowed the jury to find the key element of *second degree* murder if it was convinced that (a) Zerahaimanot intentionally caused Starrett’s death; or (b) Lee intentionally caused Starrett’s death and Zerahaimanot assisted him with knowledge of Lee’s intent to kill.

But element number 3 of Instruction No. 15—the element which differentiated the charged crime of premeditated first degree murder from the lesser crime of second degree murder—did not contain any specific reference to Zerahaimanot’s state of mind *or* to the theory of accomplice liability. Instead, it simply required the State to prove “[t]hat the intent to cause the death was premeditated.” CP 50. The jury, understandably confused, asked the court if “element (3) is a continuation of element (2)? That is, the “intent” referred to

in element (2) directly is associated with the “intent” in element (3)?” CP 28. The State and both defendants urged the court not to provide a substantive answer to the jury’s question, but the trial court—apparently concerned that the jury had been deliberating for too long and might not be able to reach a verdict—could not resist. *See XI RP 2163-66.*

Ultimately it is not the trial court’s decision to answer the question which is the problem. Rather, the error is in the substance of the court’s answer. By telling the jury that the “intent” in element number 3 “refers to the ‘intent’ required to be proved in element number 2” (CP 28)—without also providing the jury with clarifying language regarding accomplice liability—the trial court effectively relieved the jury of finding beyond a reasonable doubt that Zerahaimanot was guilty of premeditated first degree murder.

In order for element number 3 to properly guide the jury in its consideration of premeditation, that portion of Instruction No. 15 needed to convey that either Zerahaimanot or a person

with whom he acted as an accomplice premeditated the intent to kill Starrett. As with element number 2, element number 3—when read in conjunction with Instruction No. 10—needed to convey to the jury that it could only find the element of premeditation if it were convinced beyond a reasonable doubt that (a) Zerhaimanot premeditatedly caused Starrett’s death; or (b) Lee premeditatedly caused Starrett’s death and Zerhaimanot assisted him *with knowledge of Lee’s premeditation*. By instructing the jury that it could conflate the intent from element 2 with the premeditated intent from element 3, the trial court created a situation where the jury could find that Zerhaimanot was an accomplice to an intentional murder, but not an accomplice to a premeditated murder, yet convict him of the latter nonetheless.

The jury’s confusion could only have been exacerbated by the State’s closing argument, which suggested that both Zerhaimanot and Lee were guilty of *any* crime committed by

either man after Lee entered the kitchen—regardless of either man’s state of mind:

Mr. Zerahaimanot and Mr. Lee are both principles and both accomplices, because they were acting together. At least from the point in time that Mr. Lee went into the kitchen and pulled his gun out. And ***from that point until Forrest’s death these two men were acting together. Both principles and both accomplices. An accomplice is someone who helps, by word, conduct or support.***

XI RP 1993-94 (emphasis supplied). By minimizing—indeed, ignoring—the mental state required of an accomplice, the prosecutor primed the jury for the erroneous “clarification” later given by the trial court.

The due process clause requires that the State must prove every element of a crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). When there is a reasonable likelihood that a jury misunderstood the law in a manner that lowered the State's burden of proof on an essential element, the defendant is deprived of this fundamental constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 73 n.4 (1991); *Boyde v.*

California, 494 U.S. 370, 380 (1990) (recognizing that an instruction, “not concededly erroneous,” can be “subject to an erroneous interpretation” that renders it unconstitutional). The “reasonable likelihood” standard refers to a likelihood of jury confusion greater than a bare “possibility,” yet *less* than “more likely than not.” *Boyde*, 494 U.S. at 380.

Here, the jury was clearly confused by the element of premeditation. The trial court’s answer to the jury’s inquiry could reasonably be interpreted to relieve the State of its burden of proof on that element by allowing it to impute Lee’s premeditated intent to Zerhaimanot even if it was not convinced that Zerhaimanot was an accomplice to a premeditated (as opposed to an intentional) murder. Because the trial court’s answer created a reasonable likelihood that the State was relieved of its burden of proof on the element of premeditation, Zerhaimanot’s conviction for premeditated first degree murder must be reversed.

The Error Tainted the Jury's Consideration of First Degree Felony Murder.

As to the alternative charge of first degree felony murder (count I), the jury was again instructed that Zerahaimanot could be convicted based on a theory of accomplice liability. *See* CP 43 (Instruction No. 8). The instructions as a whole did not direct the jury to consider the two counts of first degree murder in any particular order, so there is no way to know if the jury considered felony murder before or after the trial court gave the erroneous answer to the jury's question regarding intent.

Because there is no way to know when the jury considered felony murder, there is also no way to know if the jury used the judge's erroneous answer to its inquiry to also impute Lee's intent to abduct Starrett to Zerahaimanot. If the jury used the judge's answer to impute Lee's intent to Zerahaimanot simply because the two men appeared to have been acting together in a general sense, it is entirely possible that the jury convicted Zerahaimanot of first degree felony

murder based not on his being an accomplice to a second degree kidnapping, but based instead on the jury's assumption (in turn based on the judge's response to the jury's question) that it was permissible to impute Lee's intent to abduct Starrett to Zerahaimanot.

There is a reasonable likelihood that the judge's answer regarding Instruction No. 15 also caused the jury to misunderstand Instruction No. 8 in a manner that lowered the State's burden of proof on the essential element of intent to abduct. This Court should reverse and remand for a new trial.

The Second Amended Information Violated Mr. Zerahaimanot's Constitutional Rights to Notice of the Essential Elements of Felony Murder in the First Degree, Because it Did Not Contain the Elements of the Predicate Felony of Second Degree Kidnapping.

Adequate notice of the specific crime charged is an absolute requirement of law. U.S. CONST. AMEND. VI & XIV; WASH. CONST. ART. I, §22. A charging document must include every "essential element" of a crime, statutory and nonstatutory. *State v. Kjorsvik*, 117 Wash.2d 93, 97, 812 P.2d 86 (1991) ("All

essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.”).

The State charged Zerahaimanot with felony murder in the first degree, and alleged that he committed or attempted to commit second degree kidnapping as the predicate felony. But the second amended information upon which he was ultimately convicted simply recited the name of the predicate crime without delineating its elements. The failure to allege the essential elements of the predicate crime rendered the second amended information fatally defective.

Any fact that the law makes essential to punishment is an element that, under the Sixth and Fourteenth Amendments, must be pleaded in the charging document and proven to the jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004).

Apprendi held that “any fact (other than prior conviction) that increases the maximum penalty for a crime ***must be stated in the indictment***, submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 476 (emphasis supplied), citing *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999); see also *State v. Goodman*, 150 Wash.2d 774, 785-86, 83 P.3d 410 (2004) (relying on *Apprendi* in holding that the nature of a drug possessed must be alleged in an information):

It is clear under *Apprendi* the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant. *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. Axiomatic in Washington law is the requirement that the charging document must *allege facts supporting every element of the offense* in order to be constitutionally sufficient.

(footnote and quotations omitted) (emphasis in original); see also *State v. Powell*, 167 Wash.2d 672, ¶14, ___ P.3d ___ (2009) (“essential elements” which must be included in the information include “those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime”);

State v. Recuenco, 163 Wash.2d 428, 434, 180 P.3d 1276 (2008) (charging document must “allege facts supporting every element of the offense and identify the crime charged. . . ‘Elements’ are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime.”)

Commission of the predicate crime is an element of the crime of felony murder, and the jury must be instructed on, and find beyond a reasonable doubt, each and every element of the predicate offense in order to convict. *State v. Hartz*, 65 Wash. App. 351, 354 & n.2, 828 P.2d 618 (1992). Zerachaimanot is mindful that *Hartz*, which pre-dates *Apprendi*, and which itself relies on ancient authority, holds that the elements of the predicate crime or crimes need not be alleged in a felony murder charging document. *Hartz*, 65 Wash. App. at 354. But this holding strains logic, and contradicts *Kjorsvik*, *Apprendi*, *Goodman*, *Recuenco*, and *Powell*. In light of this more recent authority, *Hartz*'s continued validity is dubious at best. And

even if *Hartz* has somehow survived more recent jurisprudence, this Court should take this opportunity to explicitly overrule its decision in *Hartz*.

When a charging document is challenged for the first time on appeal, the Court liberally construes the document to determine if the essential elements can, by “fair construction,” be found in the information. *Goodman*, 150 Wash.2d at 787-88. Here, the charging document simply names the predicate crime, with no elaboration whatsoever. The crime of second degree kidnapping is defined by statute, and, unlike assault, does not carry with it a commonly understood meaning. Even under the most liberal standard of construction, the elements of second degree kidnapping do not appear in the second amended information.

“If the necessary elements are neither found not fairly implied in the charging document, [the Court] presume[s] prejudice” and must reverse the conviction. *Goodman*, 150 Wash.2d at 788. That is precisely what should happen here.

Trial Counsel Was Ineffective in Failing to Argue that the Murder and the Unlawful Possession of a Firearm Constituted “Same Criminal Conduct” For Purposes of Calculating Zerahaimanot’s Offender Score.

The Legal Standard for a Claim of Ineffective Assistance of Counsel.

Effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that trial counsel’s representation was constitutionally inadequate, Zerahaimanot must show that counsel’s performance was deficient—*i.e.*, that it fell below an objective standard of reasonableness—and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687-88. The proper measure of attorney performance is reasonableness under prevailing professional norms. *Id.* at 688. In order to demonstrate prejudice arising from counsel’s deficient performance, Zerahaimanot must show that there is a reasonable probability that, but for counsel’s errors, the result

of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The "reasonable probability" standard is not stringent, and requires a showing by less than a preponderance of the evidence that the outcome of the proceeding would have been different had the claimant's rights not been violated. *See, e.g., Pirtle v. Morgan*, 313 F.3d 1160, 1172 (9th Cir. 2002), *cert. denied*, 539 U.S. 916 (2003), quoting *Strickland*, 466 U.S. at 694:

A "reasonable probability" is less than a preponderance: "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."

The Murder and the Unlawful Possession of a Firearm Constituted "Same Criminal Conduct" For Purposes of Calculating Zerhaimanot's Offender Score.

When a defendant is convicted of two or more current offenses, each current offense is included in the offender score as though it were a prior conviction. RCW 9.94A.589(1)(a).

However, if the sentencing “court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” *Id.*

“Same criminal conduct” means that two or more crimes

“require the same criminal intent, are committed at the same time and place, and involve the same victim.” *Id.* In

determining whether two crimes encompass the same criminal intent,

trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next. . . [P]art of this analysis will often include the related issues of whether one crime furthered the other. . .

State v. Dunaway, 109 Wash.2d 207, 215, 743 P.2d 1237 (1988).

Here, it is clear that the homicide and the unlawful possession occurred at the same time and place. It is equally clear that the two crimes involved the same objective criminal intent, and that this shared objective is demonstrated by the fact that the unlawful possession furthered the homicide.

More problematic is whether the two offenses involved the same victim. The Washington Supreme Court has examined this issue once, in *State v. Haddock*, 141 Wash.2d 103, 3 P.3d 733 (2000). The Court in *Haddock* held that unlawful possession of a firearm and possession of a stolen firearm did not encompass the same criminal conduct because the victim of the former crime is the “general public,” while the victim of the latter is the owner of the firearm. *Haddock*, 141 Wash.2d at 110-11. But it does not appear that the *Haddock* Court was asked to consider the fact that the specific victim of theft *is* a part of the general public.

Moreover, when the unlawfully possessed firearm is used to commit a crime against another person, it is difficult to posit that the victim of that crime is not also *the*—or at least *a*—victim of the unlawful possession. This particular scenario was not addressed by the Court in *Haddock*, leaving it an open legal question. Zerhaimanot contends that when an unlawfully possessed firearm is used to commit a crime against a specific

victim, then that person is also a victim of the unlawful possession charge. So long as the other two elements of the same criminal conduct test are met (as they are here), the two crimes should be deemed to constitute the same criminal conduct.

Trial Counsel Was Ineffective in Failing to Raise the Same Criminal Conduct Issue.

Trial counsel did not argue that the murder and the unlawful possession of a firearm constituted the same criminal conduct, instead agreeing with the State's calculation of Zerhaimanot's offender score. Where there was a colorable argument for a lower score based on a finding of same criminal conduct, it was objectively unreasonable for counsel to fail to raise and argue the issue. There was no nothing to lose by advancing the argument; the worst possible outcome was that the trial court would reject the defense position and Zerhaimanot would end up exactly where is today. There is

thus no legitimate tactical reason for failing to raise the issue.

Counsel's performance was deficient.

Based on the legal arguments above, there is also a reasonable likelihood that the argument would have succeeded had it been raised. Had this occurred Zerahaimanot's standard range on the murder (not including the enhancement) would have been 250-333 months instead of 261-347 months. Counsel's failure to raise the issue in the trial court has created the additional hurdle of a more difficult standard standard of review in this Court. Had counsel raised the issue and lost Zerahaimanot could simply argue that the trial court abused its discretion in rejecting the same criminal conduct argument. *See State v. Victoria*, 150 Wash. App. 63, 67, 206 P.3d 694 (2009), *rev. denied*, 167 Wash.2d 1004 (2009), citing *Haddock*, 141 Wash.2d at 110 (applying abuse of discretion standard to trial court's decision not to treat offenses as same criminal conduct). Instead, Zerahaimanot must now advance filter claim through

the prism of ineffective assistance of counsel, thereby prejudicing his chances on appeal.

Trial counsel's deficient performance at sentencing prejudiced Zerhaimanot. This Court should reverse and remand for re-sentencing.

Principles of Double Jeopardy and Washington's Merger Rule Require that One Conviction for First Degree Murder Must Be Vacated.

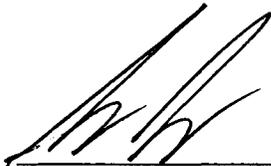
Pursuant to RAP 10.1(g), Zerhaimanot adopts and incorporates by reference the argument of consolidated appellant Steven Lee on this issue. *See Opening Brief of Steven Lee*, at 47-49.

V. CONCLUSION

For the foregoing reasons, this Court should reverse Zerhaimanot's convictions and remand for a new trial (Assignments of Error 1-5), or should vacate the judgment and remand for re-sentencing (Assignments of Error 1, 6 and 7).

DATED this 10th day of March, 2010.

Respectfully Submitted:



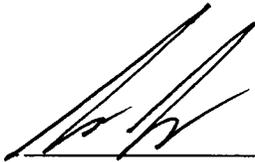
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CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on March 10, 2010, I served a copy of the attached brief on counsel for the State of Washington and on counsel for Steven Lee by causing the same to be mailed, first-class postage prepaid, to:

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