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ARGUMENT

I. THE ACCOMPLICE LIABILITY STATUTE VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Washington's accomplice statute criminalizes pure speech.

Liability attaches whenever someone with the appropriate mental state solicits, commands, encourages, requests, or aids ("by words... encouragement, support, or presence") another to commit a crime. RCW 9A.08.020(3); WPIC 10.51. The statute does not require proof that speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," as required by the U.S. Supreme Court. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969). Accordingly, the statute is overbroad. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000).

Respondent erroneously and irrelevantly suggests that, under the statute, any speech "must be *intended* to promote or facilitate the crime..." Brief of Respondent, p. 14. This argument is erroneous because the statute does not require proof of intent; knowledge is sufficient. RCW 9A.08.020(3). The argument is irrelevant because even speech intended to promote or facilitate a crime is protected by the First Amendment, unless (a) it is directed to inciting *imminent* lawless action, and (b) is likely to incite or produce such imminent action. *Brandenburg, supra*.

The fact that liability only attaches to speech directed at a specific crime (“the crime”)—rather than crime generally—does not save the statute. *See* Brief of Appellant, pp. 16-17. If speech is not directed at producing *imminent* criminal activity, or if it is not likely to produce such activity, it is protected. *Brandenburg, supra*.

Despite its substantial overbreadth, the accomplice statute need not be invalidated; this court can impose a limiting construction bringing the statute into conformity with the *Brandenburg* standard. However, “[i]n terms of remedy, ‘[a]n appellate court must “ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written.”’” *State v. Williams*, 144 Wn.2d 197, 213, 26 P.3d 890 (2001) (quoting *Lorang*, at 33 (quoting *Osborne v. Ohio*, 495 U.S. 103, 118, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990))). Because the trial court did not instruct the jury in a constitutional manner, prejudice is presumed. *See Lorang*, at 33. To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32-33. Respondent does not suggest the error here was harmless beyond a reasonable doubt. *See* Brief of Respondent, p. 18 (“Moreover, the appellant suffers no prejudice under a limiting construction... There was no argument that the

court should find Iata even where she merely encouraged Blakeney to commit the crime [sic].”)

The jury was not asked to specify whether it convicted Ms. Iata as a principal or as an accomplice. The prosecution provided only indirect evidence of her guilt, either as principal or accomplice, and the jury could have believed her participation was limited to verbal support and encouragement. Without an instruction on the *Brandenburg* standard, the convictions cannot stand. Accordingly, Ms. Iata’s convictions must be reversed and the case remanded to the trial court for a new trial.¹ *Lorang, supra.*

II. THE COURT’S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE MS. IATA COMMITTED AN OVERT ACT.

Ms. Iata rests on the argument made in the opening brief.

¹ Respondent suggests that Ms. Iata cannot raise a First Amendment challenge to the statute on appeal, because her attorney failed to object to the court’s instructions at trial. Brief of Respondent, p. 19. This is incorrect. Conviction under an unconstitutional statute will always raise a manifest error affecting a constitutional right. RAP 2.5(a).

III. THE COURT'S KNOWLEDGE INSTRUCTIONS CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN OF PROVING KNOWLEDGE (ARGUMENT INCLUDED FOR PRESERVATION OF ERROR)

The Supreme Court has accepted review of this issue. *State v. Sibert*, review granted at 163 Wn.2d 1059, 187 P.3d 753 (2008). Ms. Iata stands on the argument made in her opening brief.

IV. THE TRIAL COURT SHOULD NOT HAVE INSTRUCTED THE JURY ON ACCOMPLICE LIABILITY AFTER ARGUMENT COMMENCED.

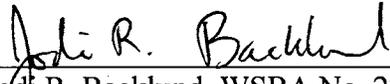
Ms. Iata stands on the argument made in her opening brief.

CONCLUSION

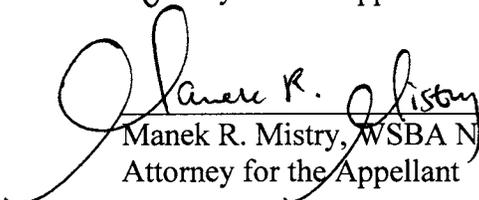
Ms. Iata's convictions must be reversed and her case remanded to the superior court.

Respectfully submitted on May 21, 2008.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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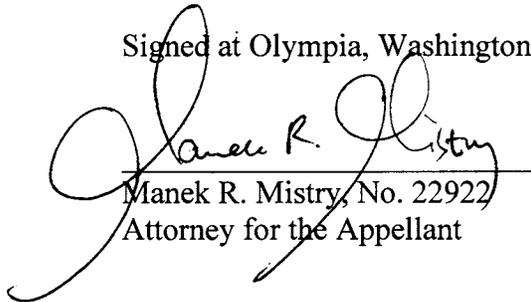
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 21, 2008.

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

Signed at Olympia, Washington on May 21, 2008.


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