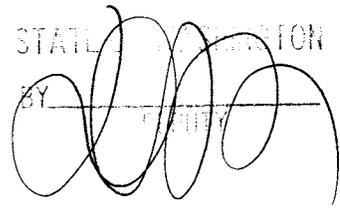


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STATE OF WASHINGTON

BY 

Court of Appeals No. 39992-0-II  
Clark County No. 09-1-00952-0

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JOHN CLARK POWELL.**

**Appellant.**

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

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**C. STATEMENT OF THE CASE**

## **1. Factual History**

On June 2, 2009 Daniel Mackey shoplifted \$434.96 worth of clothing from J.C. Penney in Vancouver. RP II, p. 251. He traveled to Vancouver from Longview with his girlfriend Michelle Powell, her best friend Angela Carey, and her uncle John Powell. RP II, p. 112-13. John Powell drove while Mr. Mackey rode in the passenger seat. RP II, p. 113. Mr. Mackey and John Powell went into J.C. Penney together while the young ladies remained in the car. RP II, p. 114. After Mr. Powell left the store Mr. Mackey remained in the store for five to seven minutes. RP II, p. 72. Mr. Mackey ultimately fled the store carrying a bevy of clothing he didn't pay for, and got into Mr. Powell's car. RP II, p. 116-17. Mr. Powell then drove away. RP II, p. 117. Shortly after driving from the store Mr. Powell was pulled over by Corporal Burgara of the Vancouver Police Department on suspicion that he was a suspended driver. RP II, p. 263-64. Shortly after pulling to the side of the road Mr. Mackey jumped out of the front passenger seat and fled on foot, carrying a small bag containing methamphetamine. RP II, p. 267.

## **2. Trial Testimony**

### **a. Michelle Powell**

Michelle Powell was living with Daniel Mackey on June 2, 2009. RP I, p. 69. She wanted to go shopping and got a ride with her uncle, John

Powell. RP I, p. 70. Daniel rode in the front seat with John while she and Angela rode in the back. RP I, p. 70. After making a number of stops, they went to J.C. Penney and Daniel and John went into the store. RP I, p. 71. She testified that John was in the store approximately five minutes before he came out. RP I, p. 72. They were parked in a parking slot in front of the store but after returning to the car John moved it to the area of the side door. RP I, p. 72. At some point after that Michelle looked behind her and saw Daniel running toward the car with one hand holding up his pants and the other hand carrying clothes. RP I, p. 73. She heard John say something to the effect of “what are you doing?” or “what is he doing?” to Danny when he returned to the car. RP I, p. 77.

Michelle claimed that as the car was being pulled over John pointed to the glove box and said “my dope’s in there.” RP I, p. 79. Michelle claimed that John told Danny to “take the heat” for the dope and Danny complied, running from the car with the dope. RP I, p. 80. Michelle confirmed that she didn’t hear any conversation between John and Danny about the shoplifting, either before or after it occurred. RP I, p. 86. Michelle initially told the police she had no information about the incident, but then admitted that she was angry at her uncle and wanted him to go down so that he couldn’t go home while Danny sat in jail. RP I, p. 101. On cross-examination, Michelle was asked whether Danny used

drugs and she said he did. RP I, p. 83-84. On re-direct, the prosecutor asked Michelle whether Mr. Powell was a drug user, and she said that he was. RP I, p. Defense counsel objected (prior to the answer) on the ground that the question exceeded the scope of both cross and direct examination, and the court ruled that defense counsel had opened the door to the question by asking the witness whether Daniel Mackey used drugs. RP I, p. 103-04. Michelle said that she wasn't allowed to be around him as a child because of "drug usage," at which point defense counsel objected for lack of foundation. RP I, p. 104. The prosecutor responded that there is an exception to the rule that witnesses must have a foundation upon which to testify where "you're dealing with the family and what the family relationship and whatnot." RP I, p. 105. The court overruled the objection. RP I, p. 105. Michelle confirmed that she had no personal knowledge that John used drugs, had never seen him use drugs, and based her answer entirely on gossip. RP I, p. 108.

**b. Angela Carey**

Angela testified that after the car was pulled over John told Danny he would have to take the heat for the clothes, and Danny said "that sucks." RP I, p. 118. She testified that John said the dope in the glove box was his. Id. Danny took it and "dipped" out of the car. Id. She

didn't hear any conversation, in advance of Danny stealing the clothes, about a plan to steal clothes. RP I, p. 119.

Although none of Angela's statements to the police were admitted because they were inadmissible hearsay, the prosecutor asked Angela whether her statements to the police were consistent with her testimony. RP I, p. 120. Defense counsel objected because none of her statements to the police had been admitted, and the court overruled the objection. RP I, p. 120-21. Angela answered "yes" to the question. RP I, p. 121.

At the close of Angela's testimony, while the jury was still present in the courtroom, the attorneys and the court discussed scheduling and Judge Wulle said to the prosecutor: "Do you want to send the police officers back to the streets where they can do some good?" RP I, p. 142. Four police officers testified for the government in this case. Report of Proceedings.

**c. Daniel Mackey**

Daniel testified that he was currently in custody at the Olympia Correction Center, having been convicted of organized retail theft in the second degree and possession of methamphetamine. RP II, p. 291. He testified that he and John planned to go to Vancouver to steal clothes and exchange them for drugs. RP II, p. 292-94. He testified that the conversation occurred in the car on the way down to Vancouver, contrary

to both Angela and Michelle who never heard such a conversation in the car. RP II, p. 295. Daniel claimed that once inside the store, John instructed him which clothes to pick and instructed him to go out the fire escape once he was done. RP II, p. 299-300. Once he got in the car he threw the clothes in the back seat. RP II, p. 301. Daniel also claimed that after the car was pulled over, John told him there was dope in the glove box and that he, acting out of altruism, volunteered to take the dope so that no one else would get in trouble for it. RP II, p. 303. He testified John gave him the key to the glove box and he retrieved the dope and ran out of the car with it. RP II, p. 303-04. At the close of Mackey's testimony, the prosecutor asked him if his statement to the police (which had not been admitted into evidence) was consistent with his testimony. RP II, p. 344. Defense counsel objected and the court overruled the objection. Id. Mr. Mackey replied that it was. Id.

**d. Officer Anderson**

VPD Officer Eric Anderson received a call of a reported shoplift at J.C. Penney and responded to the store to speak with the store manager. RP II, p. 245. He also responded to the scene of the traffic stop to collect the clothes and take them back to J.C. Penney so they could be totaled. RP II, p. 249. During direct he testified that he didn't interview anybody and merely touched base with other officers, telling them he was going to

take the clothes and go back to J.C. Penney. RP II, p. 249. During cross examination, defense counsel confined his questions to what could be seen on the store security video tape, asking Anderson to view it throughout the examination. RP II, p. 253-55. During re-direct examination, the prosecutor asked Anderson about what information he received from others during his investigation about what Mr. Powell and Mr. Mackey did, and defense counsel objected that it was beyond the scope of both direct and cross examination. RP II, p. 256. The prosecutor responded by saying: "Your Honor, Counsel is trying to paint a picture that the Defendant was completely innocent. Nothing is in a vacuum, obviously. The officer was still conducting his investigation." RP II, p. 256. The court overruled the objection. *Id.* Officer Anderson then began to testify about specific things he was told and defense counsel again objected as to hearsay. RP II, p. 257. The court overruled the objection, stating its belief, oft stated during the trial, that statements made by one officer to another, irrespective of whether they themselves contain hearsay, can never constitute hearsay based on the "fellow officer rule." RP II, p. 257. Anderson then stated: "That everybody in the car, or at least multiple people in the car, had a plan to steal clothes from J.C. Penney's." RP II, p. 257. Anderson did not state who told this to him, it was never stated

whether he heard this from another officer, and the original source of this statement was not identified. *Id.*

**e. Closing Argument**

During closing argument, the prosecutor made the following improper arguments:

“The Defendant made a choice. He chose to get Daniel Mackey involved in this scheme...Daniel Mackey made the choice to assist him...Daniel Mackey made the choice to accept responsibility. He knew that he was caught. He made the choice to cooperate with the police. He made the choice to come back here and testify.” RP III, p. 387. Defense counsel did not object.

“The State called a number of police officers to testify regarding their investigation and their participation into this case. Most of it was just standard police work. And it just actually shows is that sometimes things go right. That the police, you know, can do their job...*But there wasn't a whole lot that I can see that was wrong with the investigation in this case, other than there were some minor discrepancies. But that's—it's no biggie. It's not a critical thing.*” RP III, p. 393. (Emphasis added). Defense counsel did not object.

“All three—Daniel Mackey, Michelle Powell and Angela Carey—had testimony consistent to each other. Okay. And their testimony in

court was *consistent with what they told the police that evening* immediately after the vehicle was pulled over and the apprehension happened.” RP III, p. 394 (emphasis added). Defense counsel did not object.

In rebuttal closing argument, the prosecutor made this argument:

I read a piece by an experienced criminal defense attorney...In that piece he talked about some of his cases, some of the strategies he used as a criminal defense attorneys [sic] in the defense of his clients throughout the years...It was really profound for me. And this is not to quote him verbatim...[i]t goes something like, from his perspective as a criminal defense attorney, if the facts are on my side, I argue with the facts. If the law is on my side, I argue with the law. If neither the facts nor the law are on my side, I argue with everybody. I argue with the judge, with the witnesses, with the prosecutor, with the cops, whoever.

I put the cops on trial. I put the State’s witnesses on trial. I put the investigation on trial. I focus on every inconsistency that the prosecution’s witness has. I do everything I can to muddy the water, to create a diversion so that the jury can’t focus on the guilt of my client.

I found that pretty profound. Because from my perspective as a prosecutor, if I don’t have the facts on my side, if I don’t have the law on my side, or if I don’t have either on my side, I don’t have a case. I don’t have the option of muddying the water. I only have the option of presenting the facts, the evidence that I have, and then obviously the Court will provide you with the law. So you can apply the facts to the law or the (inaudible)—I can never do that right—to come to a decision. So I thought it was pretty profound...I submit to you that this trial has some of that flavor.

Defense counsel did not object. RP III, p. 424-25.

The prosecutor continued:

The Defense made the insinuation that the State was hiding some video surveillance from J.C. Penney...All the evidence we had we presented to you. There's nothing else to hide. We have a moral and ethical obligation to turn everything that we have in terms of evidence over to the Defense.

Defense counsel did not object. RP III, p. 428.

### **3. Procedural History**

The State charged Mr. Powell with Organized Retail Theft in the Second Degree and Possession of Methamphetamine. CP 1. He was convicted of both charges after a jury trial. CP 30-31. He was given a standard range sentence. CP 34. This timely appeal followed. CP 47.

### **D. ARGUMENT**

#### **I. JUDGE WULLE VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE BY EXPRESSING BIAS IN FAVOR OF POLICE OFFICERS AND SUGGESTING THAT MR. POWELL WAS WASTING THEIR TIME, AND TAXPAYER MONEY, BY EXERCISING HIS RIGHT TO A TRIAL.**

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV. Similarly, Article I, § 3 of the Washington Constitution provides that “No person shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. Article I, § 3. Under both constitutions, due process secures for an accused the right to a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S. Ct. 1793 (1997). Furthermore, “to perform its high function in the best way ‘justice must

satisfy the appearance of justice.” *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623 (1955), quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11 (1954). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). “The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence or bias or prejudice.” *Madry*, at 70; *Brister v. Tacoma City Council*, 27 Wn. App. 474, 486, 619 P.2d 982 (1980), *review denied*, 95 Wn.2d 1006 (1981).

A decision may be challenged under the appearance of fairness doctrine for “partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party....” *Buell v. City of Bremerton*, 89 Wn.2d 518, 524, 495 P.2d 1358 (1972), quoted with approval in *OPAL v. Adams County*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996).

To prevail under the appearance of fairness doctrine, a claimant must only provide some evidence of the judge’s actual or potential bias. *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 85 (1999). The appearance of fairness doctrine can be violated without any questions as to the judge’s integrity. *See, e.g., Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966).

Here, Judge Wulle, in the presence of the jury, told the prosecutor that he ought to release his officers for the day so that they could get back to the streets and do some good. There are so many offensive aspects to this comment that it is difficult to separate them. First, the comment conveyed a clear deference to, and institutional admiration for, the police officers. This is highly improper. A judge should be neutral and detached, and should not behave as though he is part of one side's team. Second, the comment suggested that the officers had better things they could be doing with their time, and the taxpayers' valuable money, than to be testifying in Mr. Powell's trial. Trials, with all of their interruptions and strict rules are inherently inconvenient for the citizen juror. For the judge to suggest, as Judge Wulle did here, that Mr. Powell was wasting everyone's time, the noble police officers in particular, by exercising his right to a trial was thoughtless and offensive. Judge Wulle's comment constitutes some evidence of potential bias under *Dugan*, supra. Accordingly, Mr. Powell's convictions must be reversed and the case remanded for a new trial before a different judge.

## **II. REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT DENIED MR. POWELL A FAIR TRIAL**

“In order to establish prosecutorial misconduct, [a defendant] must show that the prosecutor's conduct was improper and prejudiced his right

to a fair trial. *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where ““there is a substantial likelihood the instances of misconduct affected the jury's verdict.”” *Dhaliwal*, 150 Wash.2d at 578 (quoting *State v. Pirtle*, 127 Wash.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)).” *State v. Boehning*, 127 Wash.App. 511, 518, 111 P.3d 899 (2005).

A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). In determining whether the misconduct warrants reversal, reviewing courts considers its prejudicial nature and its cumulative effect. *State v. Suarez-Bravo*, 72 Wash.App. 359, 367, 864 P.2d 426 (1994); *Boehning* at 518-519. The four instances of prosecutorial misconduct outlined below cumulatively and individually denied Mr. Powell a fair trial.

**A. Alluding to evidence not admitted at trial**

In this case the prosecutor, like the prosecutor in *Boehning*, supra, sought to admit inadmissible hearsay statements through the back door, by

asking the witnesses (and arguing during closing argument) whether their testimony was consistent with their pre-trial statements (that were not admitted at trial). This is improper and Mr. Powell objected. In *Boehning*, the prosecutor repeatedly referenced a witnesses' inadmissible pre-trial statement in order to bolster her credibility and this Court characterized the prosecutor's behavior as flagrant and ill-intentioned. *Boehning* at 518-19. The prosecutor in that case sought to justify this behavior by arguing that the consistency of the statements could be reasonably inferred by defense counsel's failure to impeach the witness with an inconsistent statement, which is precisely the argument the prosecutor made in this case. See RP III, p. 428-29. This Court was not persuaded by this argument, and it should be equally unmoved here. The credibility of Mr. Mackey, in particular, was central to this case. In order to prove organized retail theft, the State had to prove that Mr. Powell and Mr. Mackey acted in concert with one another. CP 16. Although Mr. Mackey testified that they formed the plan to steal in the car during the drive to Vancouver, the two other witnesses in the car (who couldn't have been more than a few feet from Mr. Powell and Mr. Mackey) heard nothing of such a plan. And while Mr. Mackey claimed that Mr. Powell accompanied him through the store telling him which clothes to pick, the video tape from the security camera failed to capture any such activity. As

such, it was flagrantly improper for the State to bolster his negligible credibility by referring to pre-trial statements he made.

**B. Disparaging defense counsel and suggesting his role in the system is to behave unethically, whereas the role of the prosecutor is to wear a white hat.**

A prosecutor is not permitted to draw a “cloak of righteousness” around the State’s position and thereby disparage the role of the defense attorney. *State v. Gonzales*, 111 Wn.App. 276, 282-83, 45 P.2d 205 (2002). In *Gonzales*, the prosecutor made the following argument:

STATE. I have a very different job than the defense attorney. I do not have a client, and I do not have a responsibility to convict. I have an oath and an obligation to see that justice is served.

DEFENSE: Objection. Misconduct. As if I'm not out to seek justice, too.

COURT: Overruled.

STATE: The defense has an obligation to a client.

DEFENSE: Objection.

COURT: Counsel, that objection is not well taken. It's overruled.

STATE: Thank you. [Defense counsel] has a client to represent, I don't. Justice, that's my responsibility and justice is holding him responsible for the crime he committed[.]

*State v. Gonzales* at 283. Here, the prosecutor’s diatribe was far more egregious than the argument made in *Gonzales*. Here, the prosecutor

sought to put himself, the police officers on one side (the side of justice), and the defendant and his attorney on the other by stating:

If neither the facts nor the law are on my side, I argue with everybody. I argue with the judge, with the witnesses, with the prosecutor, with the cops, whoever.

The prosecutor suggested that defendants are all guilty, and a trial is merely a game, by stating:

[F]rom his perspective as a criminal defense attorney, if the facts are on my side, I argue with the facts. If the law is on my side, I argue with the law.

By quoting this unnamed and likely non-existent prominent defense attorney in this manner the prosecutor suggested that defense attorneys approach this process as though it were a farce, disbelieving their clients and not caring about truth.

The prosecutor further suggested that he wore a white hat when he told the jury that he had an ethical and moral obligation to provide discovery to defense counsel. Referring to his “moral obligation” further wrapped him, as the government’s lawyer, in the cloak of righteousness he sought to construct throughout this argument. The prosecutor continued wrapping himself in the cloak of righteousness and again suggested that the judge played for his team by stating:

...[F]rom my perspective as a prosecutor, if I don’t have the facts on my side, if I don’t have the law on my side, or if I don’t have either on my side, I don’t have a case. I don’t have the option of

muddying the water. I only have the option of presenting the facts, the evidence that I have, and then obviously the Court will provide you with the law.

Thus, according to the prosecutor, he presents the facts and his teammate the judge presents the law, and the defense attorney simply lies and muddies the waters. This argument was grossly offensive and flagrantly improper and ill-intentioned. It is difficult to imagine why, if the prosecutor really believed the facts and law were on his side, he felt the need to engage in mud-slinging which only served to distract the jury from the real issues to be decided in the case.

**C. Suggesting that Mr. Powell should have pled guilty rather than exercise his right to a trial.**

Mr. Powell had a right to trial, irrespective of whether it caused inconvenience to the prosecutor, the court, or the police officers who, the court opined, would have done better to spend their time protecting citizens on the street rather than attending Mr. Powell's trial.

"A prosecutor is prohibited from, however, from arguing unfavorable inferences from the exercise of a constitutional right and may not argue a case in a manner which would chill a defendant's exercise of such a right." *State v. Johnson*, 80 Wn.App. 337, 339-40, 908 P.2d 900 (1996), citing *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984), and *State v. Fiallo-Lopez*, 78 Wn.App. 717, 728, 899 P.2d 1294 (1995).

The prosecutor placed a cloak of righteousness around admitted thief Daniel Mackey by reminding the jury that unlike Mr. Powell, he didn't exercise his right to a trial and made life easy for the government by pleading guilty because he knew he was "caught." In so doing, the prosecutor argued an unfavorable inference from Mr. Powell's exercise of perhaps the most sacred constitutional right. This was flagrantly improper and could not have been anything but ill-intentioned in light of the fact that it was the prosecutor's opening salvo and not offered in response to any argument or issue raised by Mr. Powell.

**D. Vouching for the credibility of the officers and expressing his personal opinion about the quality of the investigation.**

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The error will be found prejudicial if it is "clear and unmistakable" that counsel is expressing a personal opinion. *Brett*, 126 Wn.2d at 49; *State v. Sargent*, 40 Wn.App. 340, 344, 698 P.2d 598 (1985).

Here, the prosecutor vouched for police officers when he expressed his personal opinion that the investigation had been proper. He could have argued that the officers had conducted an adequate investigation without personally opining on its quality and giving the jury the impression that

he, as a lawyer for the government, had given it his seal of approval. This was improper and denied Mr. Powell a fair trial.

Here, the cumulative effect of prosecutorial misconduct denied Mr. Powell due process and his right to a fair trial. When a prosecutor makes several errors, each constituting misconduct, the cumulative effect of the errors may become “so flagrant that no instruction or series of instructions can erase it and cure the error.” *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

The repeated instances of prosecutorial misconduct prejudiced Mr. Powell because the evidence that Mr. Powell acted in concert with Mr. Mackey in the retail theft rested entirely on the testimony of Mr. Mackey. As the alleged accomplice, Mr. Mackey’s testimony, under Washington law, was inherently suspect. See Court’s Instruction to the Jury number 8, CP 13. Further, because Mr. Powell was not found to be in actual possession of the methamphetamine, the evidence against him on the charge of possession of methamphetamine rested entirely on the credibility of Mr. Mackey and the two young ladies in the back seat. Had the prosecutor confined his remarks solely to the evidence, or lack of evidence, rather than suggesting that defense counsel was manipulative and interested in obstructing the search for truth, the jury’s verdict likely would have been different. Mr. Powell should be granted a new trial.

**III. MR. POWELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO OBJECT TO REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT.**

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. "Representation of a criminal defendant entails certain basic duties...Among those duties, defense counsel must employ 'such skill and knowledge as will render the trial a reliable adversarial testing process.'" *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

Should this Court find that Mr. Powell's claims of prosecutorial misconduct are waived by virtue of his attorney's failure to object, his attorney provided deficient representation and he was prejudiced because, again, the State's case against Mr. Powell rested entirely on the testimony of the witnesses in the car, Mr. Mackey in particular. Mr. Powell should be granted a new trial.

**IV. MR. POWELL WAS DENIED HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION WHEN OFFICER ANDERSON TESTIFIED THAT SOMEONE, WHO WAS NOT IDENTIFIED, TOLD HIM THAT EVERYONE IN THE CAR HAD A PLAN TO STEAL CLOTHES.**

It is now well-settled that a "testimonial" statement to the police is inadmissible unless the accused person is afforded the opportunity to confront and cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354 (2004). A statement to the police officer in the course of a police investigation is the "core class" of statements considered testimonial. *Crawford* at 68-69; *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266 (2006). Statements made in response to formal police questioning, for which the primary purpose is not to explain an on-going emergency, are testimonial and confrontation is mandated under the Sixth Amendment.

Here, Officer Anderson testified, over Mr. Powell's objection, that someone told him that everyone in the car had a plan to steal clothes from a store. Although the court assumed he got that information from another officer, Anderson never stated who told him this. This could have been based on someone's assumption alone. This is precisely the type of information that must be tested by confrontation and cross-examination. The trial court erred allowing Officer Anderson to make this statement to the jury. Mr. Powell was harmed by this statement because it served to bolster the testimony of Mr. Mackey, on whose testimony the charge of organized retail theft entirely relied. Mr. Powell should be granted a new trial.

**E. CONCLUSION**

Mr. Powell should be granted a new trial.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of June, 2010.

  
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ANNE M. CRUSER, WSB#27944  
Attorney for Mr. Powell

**CERTIFICATE OF MAILING**

I certify that on 06/2/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Mike Kinnie, P.O. Box 5000, Vancouver, WA 98666; (2) David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; and (3) Mr. John Powell, DOC#910742, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, WA 99001-1899.

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## APPENDIX

### **9A.56.350. Organized retail theft**

- (1) A person is guilty of organized retail theft if he or she:
  - (a) Commits theft of property with a value of at least seven hundred fifty dollars from a mercantile establishment with an accomplice;
  - (b) Possesses stolen property, as defined in RCW 9A.56.140, with a value of at least seven hundred fifty dollars from a mercantile establishment with an accomplice; or
  - (c) Commits theft of property with a cumulative value of at least seven hundred fifty dollars from one or more mercantile establishments within a period of up to one hundred eighty days.
- (2) A person is guilty of organized retail theft in the first degree if the property stolen or possessed has a value of five thousand dollars or more. Organized retail theft in the first degree is a class B felony.
- (3) A person is guilty of organized retail theft in the second degree if the property stolen or possessed has a value of at least seven hundred fifty dollars, but less than five thousand dollars. Organized retail theft in the second degree is a class C felony.
- (4) For purposes of this section, a series of thefts committed by the same person from one or more mercantile establishments over a period of one hundred eighty days may be aggregated in one count and the sum of the value of all the property shall be the value considered in determining the degree of the organized retail theft involved. Thefts committed by the same person in different counties that have been aggregated in one county may be prosecuted in any county in which any one of the thefts occurred.
- (5) The mercantile establishment or establishments whose property is alleged to have been stolen may request that the charge be aggregated with other thefts of property about which the mercantile establishment or establishments is aware. In the event a request to aggregate the prosecution is declined, the mercantile establishment or establishments shall be promptly advised by the prosecuting jurisdiction making the decision to decline aggregating the prosecution of the decision and the reasons for such decision.