

No. 40062-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Aaron Hahn,**

Appellant.

---

Clallam County Superior Court Cause No. 08-1-00195-3

The Honorable Judge George L. Wood

**Appellant's Opening Brief**

**Corrected Copy**

Manek R. Mistry  
Jodi R. Backlund  
Attorneys for Appellant

**BACKLUND & MISTRY**  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501  
(360) 339-4870  
FAX: (866) 499-7475

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... v**

**ASSIGNMENTS OF ERROR ..... 1**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 4**

**ARGUMENT..... 11**

**I. The First Amended Information failed to charge a crime and violated Mr. Hahn’s right to notice under the Fifth, Sixth, and Fourteenth Amendments, and under Wash. Const. Article I, Sections 3 and 22..... 11**

A. Standard of Review..... 11

B. Mr. Hahn was constitutionally entitled to notice that was both legally and factually adequate. .... 11

C. The First Amended Information was legally deficient because it omitted an essential element of Solicitation of Premeditated Murder in the First Degree..... 13

D. The First Amended Information was factually deficient because it failed to allege specific conduct constituting Solicitation of Premeditated Murder in the First Degree..... 15

<b>II.</b>	<b>Mr. Hahn’s statements to the police and their agents were obtained in violation of his right to counsel under Wash. Const. Article I, Section 22 because Mr. Hahn was already represented in a prosecution closely related to the charged crime. ....</b>	<b>16</b>
A.	Standard of Review.....	16
B.	Federal Law .....	17
C.	Wash. Const. Article I, Section 22 provides broader protection to an accused person’s right to counsel than does the Sixth Amendment. ....	18
D.	The police violated Mr. Hahn’s state constitutional right to counsel when they and their agents extracted statements from him after he’d already been charged with and appointed counsel for a “closely related” crime. ....	24
 <b>III.</b>	 <b>Mr. Hahn’s conviction must be reversed because the trial judge erroneously refused to instruct the jury on the lesser-included offense of Solicitation of Assault in the Fourth Degree. ....</b>	 <b>28</b>
A.	Standard of Review.....	28
B.	The refusal to instruct on Solicitation of Assault in the Fourth Degree denied Mr. Hahn his statutory right to have the jury consider lesser-included offenses. ....	28
C.	The refusal to instruct on Solicitation of Assault in the Fourth Degree denied Mr. Hahn his constitutional right to due process under the Fourteenth Amendment.....	30
D.	The refusal to instruct on Solicitation of Assault in the Fourth Degree violated Mr. Hahn’s state constitutional right (under Wash. Const. Article I, Sections 21 and 22) to have the jury consider applicable lesser included offenses.	

<b>IV.</b>	<b>Mr. Hahn’s conviction was obtained in violation of his right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22.</b>	<b>37</b>
	A. Standard of Review	37
	B. Impermissible opinion testimony on an accused person’s guilt violates the constitutional right to a jury trial.	37
	C. Over defense objection, the prosecutor improperly introduced Livengood’s opinion that Mr. Hahn acted with intent to have S.M. murdered.	38
	D. The improper admission of additional opinion testimony addressing Mr. Hahn’s state of mind created a manifest error affecting his constitutional right to a jury trial under the state and federal constitutions.	39
<b>V.</b>	<b>Mr. Hahn was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.</b>	<b>41</b>
	A. Standard of Review	41
	B. Mr. Hahn was entitled to the effective assistance of counsel.	41
	C. Defense counsel was ineffective for failing to object to improper opinion testimony.	43
	D. Defense counsel was ineffective for failing to object to prosecutorial misconduct.	44
	E. If the trial judge’s refusal to instruct on Solicitation of Assault in the Fourth Degree is not preserved for review, then Mr. Hahn was denied the effective assistance of counsel.	45

**VI. The criminal solicitation statute is overbroad because it punishes constitutionally protected speech in violation of the First and Fourteenth Amendments. .... 47**

**CONCLUSION ..... 50**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Beck v. Alabama</i> , 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)	31, 34
<i>Blockburger v. United States</i> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)	18
<i>Brandenburg v. Ohio</i> , 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969)	50, 51
<i>Brewer v. Williams</i> , 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977)	17
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)	49
<i>Brown v. Ohio</i> , 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)	18
<i>Conchatta Inc. v. Miller</i> , 458 F.3d 258 (3d Cir. 2006)	49
<i>Duncan v. Louisiana</i> , 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)	37
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	21, 42
<i>Hodge v. Hurley</i> , 426 F.3d 368 (C.A.6, 2005)	45
<i>McMann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)	42
<i>Michigan v. Jackson</i> , 475 U.S. 625, 89 L. Ed. 2d 631, 106 S. Ct. 1404 (1986)	17
<i>Montejo v. Louisiana</i> , ___ U.S. ___, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009)	17, 18

<i>Murray v. Giarratano</i> , 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) .....	23
<i>Pennsylvania v. Finley</i> , 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987).....	23
<i>Powell v. Alabama</i> , 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932).....	21
<i>Scott v. Illinois</i> , 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed. 2d 383 (1979)....	22
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	42, 43, 45
<i>Tata v. Carver</i> , 917 F.2d 670 (1st Cir. 1990) .....	31
<i>Texas v. Cobb</i> , 532 U.S. 162, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001) .....	18, 24, 25
<i>U.S. v. Arnold</i> , 106 F.3d 37 (3 <sup>rd</sup> Cir. 1997).....	25, 26, 27, 28
<i>U.S. v. Covarrubias</i> , 179 F.3d 1219 (9 <sup>th</sup> Cir. 1999).....	24
<i>United States v. Mandujano</i> , 425 U.S. 564, 96 S.Ct. 1768, 48 L. Ed. 2d 211 (1976).....	22
<i>United States v. Platte</i> , 401 F.3d 1176 (10th Cir. 2005).....	49
<i>United States v. Salemo</i> , 61 F.3d 214 (3 <sup>rd</sup> Cir. 1995) .....	43
<i>Virginia v. Hicks</i> , 539 U.S. 113, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003) .....	49
<i>Vujosevic v. Rafferty</i> , 844 F.2d 1023 (1988) .....	30, 31

**WASHINGTON STATE CASES**

<i>Adams v. Hinkle</i> , 51 Wn.2d 763, 322 P.2d 844 (1958).....	48
<i>Auburn v. Brooke</i> , 119 Wn.2d 623, 836 P.2d 212 (1992).....	13, 15
<i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000) 16, 39, 48, 49	

<i>City of Pasco v. Mace</i> , 98 Wn.2d 87, 653 P.2d 618 (1982).....	32, 33, 34
<i>City of Tacoma v. Belasco</i> , 114 Wn.App. 211, 56 P.3d 618 (2002)...	28, 29
<i>Clarke v. Washington Territory</i> , 1 Wash. Terr. 68 (1859) .....	35
<i>Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004).....	35
<i>In re Detention of Martin</i> , 163 Wn.2d 501, 182 P.3d 951 (2008) .....	16, 37
<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	42
<i>In re Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007).....	46
<i>McClintock v. Rhay</i> , 52 Wn. 2d 615, 328 P.2d 369 (1958) .....	21
<i>Mempa v. Rhay</i> , 68 Wn. 2d 882, 416 P.2d 104 (1966).....	21
<i>See State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	29, 30
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....	33
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	37
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	17
<i>State v. Courneya</i> , 132 Wn.App. 347, 131 P.3d 343 (2006) .....	11, 15
<i>State v. Davis</i> , 38 Wn. App. 600, 686 P.2d 1143 (1984).....	20
<i>State v. Farr-Lenzini</i> , 93 Wn.App. 453, 970 P.2d 313 (1999).....	38
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000) .....	29
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006) .....	19
<i>State v. Gunwall</i> , 106 Wn. 2d 54, 720 P.2d 808 (1986) ..	19, 20, 23, 32, 33, 34, 35, 36
<i>State v. Hess</i> , 12 Wn. App. 787, 532 P.2d 1173, <i>aff'd</i> , 86 Wn. 2d 51, 541 P.2d 1222 (1975).....	21

<i>State v. Hobble</i> , 126 Wn.2d 283, 892 P.2d 85 (1995) .....	32, 34
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	42
<i>State v. Jensen</i> , 164 Wn.2d 943, 195 P.3d 512 (2008) .....	50
<i>State v. Jury</i> , 19 Wn. App. 256, 576 P.2d 1302 (1978) .....	46
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	37, 40, 41
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	11, 13, 14, 15, 16
<i>State v. Leach</i> , 113 Wn.2d 679, 782 P.2d 552 (1989) .....	12, 13
<i>State v. McCarty</i> , 140 Wn.2d 420, 998 P.2d 296 (2000).....	11
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008)..	38, 40, 41, 43
<i>State v. Nguyen</i> , 165 Wn.2d 428, 197 P.3d 673 (2008).....	29, 30
<i>State v. Reed</i> , 150 Wn.App. 761, 208 P.3d 1274 (2009) .....	13
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	43, 46, 47
<i>State v. Royse</i> , 66 Wn.2d 552, 403 P.2d 838 (1965).....	12
<i>State v. Saunders</i> , 91 Wn.App. 575, 958 P.2d 364 (1998) .....	43
<i>State v. Schaaf</i> , 109 Wn.2d 1, 743 P.2d 240 (1987) .....	34
<i>State v. Silva</i> , 107 Wn.App. 605, 27 P.3d 663 (2001) .....	21
<i>State v. Smith</i> , 150 Wn.2d 135, 75 P.3d 934 (2003) ( <i>Smith I</i> ).....	34, 36
<i>State v. Smith</i> , 154 Wn.App. 272, 223 P.3d 1262 (2009) ( <i>Smith II</i> ).....	29
<i>State v. Templeton</i> , 148 Wn.2d 193, 59 P.3d 632 (2002) .....	22, 23
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	46, 47
<i>State v. Toth</i> , 152 Wn.App. 610, 217 P.3d 377 (2009).....	16, 39
<i>State v. Vangerpen</i> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	13, 14, 15

<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994) ( <i>Young I</i> ).....	23
<i>State v. Young</i> , 135 Wn.2d 498, 957 P.2d 681 (1998) ( <i>Young II</i> ) .....	23
<i>Timmerman v. Territory</i> , 3 Wash. Terr. 445 (1888).....	35

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. I.....	48, 49, 50
U.S. Const. Amend. V .....	1, 11
U.S. Const. Amend. VI.....	1, 2, 3, 11, 17, 18, 19, 22, 24, 26, 27, 37, 42
U.S. Const. Amend. XIV .....	1, 3, 11, 30, 37, 42, 48
Wash. Const. Article I, Section 21 .....	32, 33, 34, 35, 36, 37
Wash. Const. Article I, Section 22... 1, 2, 11, 16, 18, 20, 21, 24, 28, 32, 33, 35, 37, 42	
Wash. Const. Article I, Section 3.....	1, 11

**WASHINGTON STATE STATUTES**

RCW 10.27.120 .....	22
RCW 10.61.006 .....	28, 30, 36
RCW 9.92.030 .....	47
RCW 9A.28.020.....	47
RCW 9A.28.030.....	5, 13, 38, 39, 47, 50
RCW 9A.32.030.....	5, 14

**OTHER AUTHORITIES**

1 J. Chitty, <i>Criminal Law</i> (5th Am. ed. 1847) .....	34
---	----

2 M. Hale, Pleas of the Crown (1736) .....	34
2 W. Hawkins, Pleas of the Crown (6th ed. 1787) .....	34
Angela Henson, <i>Now You Have it, Now You Don't: The Sixth Amendment Right to Counsel After Texas v. Cobb</i> , 51 Cath. U.L. Rev. 1359 (2002) .....	18
Benjamin F. Diamond, <i>The Sixth Amendment: Narrowing the Scope of the Right to Counsel</i> , 54 Fla. L. Rev. 1001 (2002).....	18
Beth G. Hungate-Noland, <i>Texas v. Cobb: A Narrow Road Ahead For The Sixth Amendment Right To Counsel</i> , 35 U. Rich. L. Rev. 1191 (2002) 18	
CrR 3.1 .....	22
CrR 3.5 .....	7
CrRLJ 3.1 .....	22
ER 701 .....	44
Justice Robert J. Utter, <i>Freedom and Diversity in the Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</i> , 7 U. Puget Sound L. Rev. 491 (1984) .....	21
RAP 16.15.....	22
RAP 2.5.....	38, 40
T. Starkie, <i>Treatise on Criminal Pleading</i> (2d ed. 1822) .....	34
Territorial Code of 1881 .....	36

## ASSIGNMENTS OF ERROR

1. Mr. Hahn's conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charge against him.
2. Mr. Hahn's conviction violated his state constitutional right to notice of the charges against him, under Wash. Const. Article I, Sections 3 and 22.
3. The First Amended Information was deficient because it failed to allege an essential element of Solicitation of Murder in the First Degree.
4. The First Amended Information was deficient because it failed to allege specific facts describing Mr. Hahn's alleged conduct.
5. The trial court erred by admitting Mr. Hahn's statements to the police and their agents.
6. The erroneous admission of Mr. Hahn's statements violated his right to counsel under Wash. Const. Article I, Section 22.
7. The trial judge erred by refusing to instruct the jury on the lesser-included offense of Solicitation of Assault in the Fourth Degree.
8. The trial judge violated Mr. Hahn's Fourteenth Amendment right to due process by refusing to instruct on Solicitation of Assault in the Fourth Degree.
9. The trial judge violated Mr. Hahn's state constitutional right to a jury trial by refusing to allow the jury to consider the lesser-included offense of Solicitation of Assault in the Fourth Degree.
10. The prosecutor violated Mr. Hahn's constitutional right to a jury trial by introducing opinion testimony that invaded the province of the jury.
11. The prosecutor violated Mr. Hahn's constitutional right to a jury trial by introducing Livengood's opinion on Mr. Hahn's state of mind.
12. The trial judge erred by overruling Mr. Hahn's objection to one portion of Livengood's opinion testimony.

13. The prosecutor violated Mr. Hahn's constitutional right to a jury trial by introducing Hendricksen's opinion on Mr. Hahn's state of mind.
14. Defense counsel was ineffective for failing to object to improper opinion testimony.
15. Defense counsel was ineffective for introducing testimony bolstering the informant's testimony.
16. Defense counsel was ineffective for failing to object to prosecutorial misconduct.
17. Defense counsel was ineffective for failing to offer a complete set of instructions on the lesser-included offense of Solicitation of Assault in the Fourth Degree.
18. The criminal solicitation statute is unconstitutionally overbroad.
19. Mr. Hahn was convicted through operation of a statute that is unconstitutionally overbroad.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An accused person is constitutionally entitled to be informed of the charges against him. The First Amended Information in this case did not outline the essential elements of Premeditated First Degree Murder. Was Mr. Hahn denied his constitutional right to adequate notice of the charge?
2. Wash. Const. Article I, Section 22 provides broader protection to the right to counsel than does the Sixth Amendment to the federal constitution. Here, Mr. Hahn was represented by counsel when the police and their agents obtained statements from him allegedly soliciting the murder of a witness. Were the pending charges "closely related" to the solicitation charge such that the police and their agents violated Mr. Hahn's state constitutional right to counsel by obtaining statements in the absence of his attorney?

3. An accused person is entitled to have the jury instructed on applicable lesser-included offenses. Here, the trial judge refused to instruct on the lesser-included offense of Solicitation of Assault in the Fourth Degree. Did the trial judge's refusal to instruct on Solicitation of Assault in the Fourth Degree violate Mr. Hahn's Fourteenth Amendment right to due process and his state constitutional right to a jury trial?
4. A lay witness may not offer an opinion on the accused person's state of mind. Here, the prosecutor introduced opinion testimony that Mr. Hahn acted with intent to promote or facilitate a murder. Did the improper admission of opinion testimony invade the province of the jury and violate Mr. Hahn's constitutional right to a jury trial?
5. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel objected to only some of the inadmissible opinion testimony offered by the prosecutor. Was Mr. Hahn denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
6. An accused person is constitutionally entitled to counsel who is familiar with the applicable law. Here, defense counsel failed to propose a complete set of instructions on the lesser-included offense. Was Mr. Hahn denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
7. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite "imminent lawless action." The solicitation statute criminalizes certain speech even if it is not directed at and likely to incite "imminent lawless action." Is the accomplice liability statute unconstitutionally overbroad?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Aaron Hahn had a long-term romantic relationship with an underaged female named S.M. . After they broke up, S.M. contacted law enforcement. RP (10/13/09) 16, 17-23, 26. Mr. Hahn was arrested and held in jail, facing multiple sex offenses relating to this relationship. RP (5/27/08) 3-4; State's Motion filed 3/19/09, Supp. CP. The court appointed an attorney to represent Mr. Hahn. State's Motion filed 3/19/09, Supp. CP.

While in custody, Mr. Hahn was very hurt and angry about the breakup, his criminal charges, and his attorney's inaction. Exhibits 27, 29, 31, 33, 35, 37, 39, 41, 42, Supp. CP. He told another jail inmate, Norman Livengood, that he wished that he could make S.M. disappear. RP (10/26/09) 13-76, 88-110. He also had his mother send S.M. emails to encourage her to change the course of the charges, and he eventually spoke by telephone with an undercover detective, posing as a hitman named "Miguel," to arrange a "gift" to be delivered to S.M. . Exhibits 1, 2, 3, 4, 52, Supp. CP.

The police arranged for Livengood to secretly record his conversations with Mr. Hahn. After reviewing these recordings and Mr. Hahn's call to "Miguel", Officer Hall and Detective Madison went to see Mr. Hahn at the jail. RP (9/21/09) 40. They informed him they would be

adding Solicitation of Murder to his booking and left. RP (9/21/09) 40-41. According to a jail sergeant, Mr. Hahn said that he wanted to talk further, and the sergeant passed this information on to the officers. RP (9/21/09) 26-27, 28-29. The sergeant knew that Mr. Hahn was represented by counsel, but did not notify the attorney or remind Mr. Hahn that he had an attorney. RP (9/21/09) 31-32. About two hours later, Hall and Madison returned to the jail and met with Mr. Hahn. RP (9/21/09) 44. After initially refusing to be recorded, Mr. Hahn agreed to a recorded interview. RP (9/21/09) 44-45; Ex. 46, Supp. CP.

Mr. Hahn was charged with Solicitation of Premeditated Murder in the First Degree. The operative language of the Information set out the charge as follows:

On or about the period of time between May 15 and May 22, 2008, in the County of Clallam, State of Washington, the above-named Defendant, with intent to promote or facilitate the commission of First Degree Murder, to-wit: with a premeditated intent to cause the death of another person, to-wit: S.M, offered to give or gave money or other thing of value to another to engage in specific conduct which would constitute such crime and/or would establish complicity of such person in its commission or attempted commission had such crime been attempted or committed; contrary to Revised Code of Washington 9A.28.030 and RCW 9A.32.030(1)(a), a class A felony.  
CP 21.

The state moved to join the case with Mr. Hahn's pending charges, which consisted of Rape of a Child (four counts), Sexual Exploitation of a Minor, Possessing Depictions of Minors Engaged in Sexually Explicit

Conduct, and Stalking (Domestic Violence). State's Motion to Join Offenses and Consolidate for Trial, p. 1, Supp. CP. The state also planned to add charges of "intimidating and threatening a witness and stalking in violation of a protection order." State's Motion to Join Offenses and Consolidate for Trial, pp. 6-7, Supp. CP; *see also* RP (3/20/09) 9 (state plans to add "intimidating a witness, tampering with a witness, and stalking in violation of a protection order.")

According to the prosecution's pleadings, "[t]he defendant could have been charged at the time in one charging document." State's Motion to Join Offenses, p. 2, Supp. CP. The prosecutor indicated that the offenses in both cases were "related and cross admissible... because the conduct shows relevant behavior for [motive], opportunity, intent, preparation, plan, knowledge, identity or absence of mistake..." State's Motion to Join Offenses, p. 5, Supp. CP. The prosecutor also emphasized that the allegations "related to the defendant's conduct in relation to the same victim." State's Motion to Join Offenses, p. 5, Supp. CP. At a hearing, the prosecutor described the two cases as "very inter-related." RP (6/5/09) 4. He went on to specify that the "the stalking and violation of protection order that is in the case is what the attempted murder arose out of, so they're directly related." RP (6/5/09) 11. The court denied the state's

motion for joinder (and a subsequent motion for reconsideration). Minute Order (3/20/09), Supp. CP; RP (6/5/09) 11-12.

At a CrR 3.5 hearing, Mr. Hahn sought suppression of his recorded statements, arguing (in part) that he was represented by counsel on a related matter. RP (9/21/09) 18-89, 105-109. Officer Hall acknowledged that he knew that Mr. Hahn had an attorney, and that neither he nor Madison attempted to contact that attorney before meeting with Mr. Hahn. RP (9/21/09) 49-50, 56. Detective Madison said that Mr. Hahn was wearing handcuffs secured to belly chains during the interview, and that the three of them were locked in a room in the jail. RP (9/21/09) 66-67. Madison also testified that he knew that Mr. Hahn had an attorney and that he did not attempt to contact him. RP (9/21/09) 79-80. The court denied Mr. Hahn's motion, ruling that the investigation related to a new case, that Mr. Hahn had not yet requested an attorney or been charged with a crime, and that Mr. Hahn requested the contact with the police. RP (9/21/09) 105-107, 109.

At trial, the prosecution's theory was that Mr. Hahn's conversations with other jail inmates and his telephone call to the undercover detective ("Miguel") were serious attempts to have S.M. killed. In support of this theory, the prosecutor introduced opinion testimony on Mr. Hahn's state of mind. First, Livengood contrasted Mr.

Hahn's statements from other, normal, everyday jailhouse talk: "I believe that [Mr. Hahn] was serious with what he was talking about." RP (10/26/09) 21. Second, another inmate named Hendricksen opined "that it really sounded like [Mr. Hahn] wanted her dead." RP (10/26/09) 106. Defense counsel did not object to either of these statements. RP (10/26/09) 21, 106.

Defense counsel did object when Livengood was asked if there was "ever any doubt in [his] mind" that Mr. Hahn intended murder. RP (10/26/09) 69. The objection was overruled, and Livengood testified that he had no doubt Mr. Hahn acted with intent to solicit murder. RP (10/26/09) 69.

Mr. Hahn's defense was that he was angry and hurt, and was simply expressing his feelings without intending to have her killed. At worst, his attorney argued, Mr. Hahn wanted to have S.M. assaulted (with the goal of frightening her away from testifying) but that he did not actually solicit her murder. RP (9/30/09) 6-36; RP (10/2/09)9-22; RP (10/5/09) 3-55; RP (10/6/09) 2-41; RP (trial generally). In support of his position, Mr. Hahn relied on the secret recordings made by Livengood. In these recorded conversations Mr. Hahn repeatedly told Livengood that he wanted S.M. "to disappear," but never used the words "kill" or "murder."

He also expressed reservations—and later regret—about talking to Miguel. Exhibit 11, Supp. CP; RP (10/26/09) 13-75.

Mr. Hahn also relied on the recorded interview with Hall and Madison. Exhibit 46, Supp. CP. Mr. Hahn repeatedly told the officers that he did not want S.M. dead, saying:

I don't want her dead. I don't know where that idea came from....It kind of seemed like [Livengood] really wanted to help and the next thing I know, there we were just kind of talking about that over the next couple of days and he was making some phone calls and then, and then he like talked to this guy Miguel, and I ended up talking to this guy, Miguel, and Miguel kept talking about a gift, a gift, a gift. I didn't really know what he was talking about....

Page 3, Exhibit 46, Supp. CP.

I did not want, I did not want her dead. I did not want her dead....  
P. 4, Ex. 46, Supp. CP.

This is not my idea I wanted, I wanted nothing to do with her being dead, absolutely nothing at all. Nothing to do with her being dead. I do not want her dead; I do not want her dead.

P. 5, Ex. 46, Supp. CP.

I thought originally maybe just scare her.

P. 6, Ex. 46, Supp. CP.

I think it was about, it was about, it was about hurting her.... I didn't even really want, not hurt her as in the physical sense. Hurt her as in more like being scared....That's what I thought [the gift] was. ...

P. 7, Ex. 46, Supp. CP.

During cross-examination relating to evidence obtained by Livengood, defense counsel asked the investigating officer about his decision to secretly record Mr. Hahn's conversations:

Q. At that point you weren't willing to just simply accept [Livengood's] word of what you heard, you wanted some conformation from that; correct?

A. Correct.

Q. And that's why you set in motion of providing a recording device to Mr. Livengood?

A. Correct.

RP (10/13/09) 124-126.

The prosecutor called the jury's attention to this testimony during her rebuttal closing argument:

Defense counsel at one point asked Officer Malone...[T]his was Norman Livengood and you didn't believe him. I submit to you ladies and gentlemen that it was not because the police didn't believe Norman Livengood but because they did and they knew that no jury would believe Norman Livengood unless they had a recording of the Defendant's own words saying what he wanted.

RP (10/27/09) 99.

Defense counsel did not object to this argument. RP (10/27/09) 99.

Mr. Hahn proposed instructions on the lesser-included offense of Solicitation of Assault in the Fourth Degree. Defendant's Proposed Jury Instructions, Supp. CP. The court declined to give the instructions. RP (10/27/09) 29-41.

Mr. Hahn was convicted and sentenced to 228 months in prison. He timely appealed. CP 9-20, 3-4.

## ARGUMENT

### **I. THE FIRST AMENDED INFORMATION FAILED TO CHARGE A CRIME AND VIOLATED MR. HAHN'S RIGHT TO NOTICE UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND UNDER WASH. CONST. ARTICLE I, SECTIONS 3 AND 22.**

#### **A. Standard of Review.**

A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.*, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wn.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

#### **B. Mr. Hahn was constitutionally entitled to notice that was both legally and factually adequate.**

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the federal constitution, as well as Article I, Section 3 and Article I, Section 22 of the Washington State Constitution. The right to a constitutionally sufficient Information is one that must be "zealously guarded." *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

A constitutionally sufficient charging document must notify the accused person of the essential elements of the offense and of the underlying facts alleged. The rule

requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged. This is not the same as a requirement to ‘state every *statutory element* of’ the crime charged.

*State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (emphasis in original).

The *Leach* court addressed the rationale for requiring a statement of the essential facts when a defendant is charged by Information:

Complaints must be more detailed since they are issued by a prosecutor who was not present at the scene of the crime. Defining the crime with more specificity in a complaint assists a defendant in determining the particular incident to which the complaint refers... [Where a citation is issued at the scene, the defendant] presumably know[s] the *facts* underlying [the] charges.

*Id.*, at 699.

Following *Leach*, the Supreme Court elaborated on this aspect of the essential elements rule:

The primary purpose is to give notice to an accused so a defense can be prepared. There are two aspects of this notice function involved in a charging document: (1) the description (*elements*) of the crime charged; and (2) a description of the specific *conduct* of the defendant which allegedly constituted that crime. As we recently made clear in *Kjorsvik*, the “core holding of *Leach* requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime.” *Leach* noted that often

charging documents are written by alleging specific facts which support each element of the crime charged.

*Auburn v. Brooke*, 119 Wn.2d 623, 629-630, 836 P.2d 212 (1992)

(footnotes omitted, emphasis in original).

C. The First Amended Information was legally deficient because it omitted an essential element of Solicitation of Premeditated Murder in the First Degree.

An Information charging an inchoate offense (such as attempt, solicitation, or conspiracy) must include the essential elements of the completed offense.<sup>1</sup> *See, e.g., State v. Vangerpen*, 125 Wn.2d 782, 785, 888 P.2d 1177 (1995).

A person is guilty of criminal solicitation when, “with intent to promote or facilitate the commission of a crime, he [or she] offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.” RCW 9A.28.030(1). A person is guilty of Premeditated Murder in the First Degree when, “[w]ith a premeditated intent to cause the death of another

---

<sup>1</sup> This is, apparently, in contrast to the “to convict” instruction, which need not include the elements of the underlying substantive crime. *See, e.g., State v. Reed*, 150 Wn.App. 761, 770, 208 P.3d 1274 (2009).

person, he or she causes the death of such person or of a third person.”

RCW 9A.32.030(1)(a).

Here, the First Amended Information omitted an essential element of Premeditated Murder in the First Degree: nowhere does the charging document make clear that the completed crime requires proof that the accused person “cause[d] the death of [another] person...” as required by the statute. CP 21; *see* RCW 9A.32.030(1)(a). Nor can this element be found by fair construction of the charging language. *See Kjorsvik, at* 105-106.

This is the same problem that arose in *Vangerpen*. In that case, the defendant was charged with attempted murder in the first degree. The operative language in the Information alleged that the defendant attempted to commit first-degree murder, and included the correct citations to the relevant statutes.

However, the prosecutor inadvertently omitted the statutory element of premeditation and therefore, although the charging document purported to charge “attempted murder in the first degree”, the information failed to contain all the essential elements of that crime....

...[T]he information alleged only intent to cause death, not premeditation. Therefore, the State failed to charge one of the statutory elements of first degree murder and instead included only the mental element required for second degree murder.

*Vangerpen, at* 785, 791.

As in *Vangerpen*, the charging document here omitted an essential element of the completed crime. Accordingly, the Information is legally deficient, and does not charge a crime. *Id*; *Kjorsvik, supra*. Since the charging document is constitutionally inadequate and does not charge a crime, no prejudice need be shown. *Courneya, at 351 n. 2*. Accordingly, Mr. Hahn's conviction must be reversed and the case dismissed without prejudice. *Kjorsvik, supra*.

D. The First Amended Information was factually deficient because it failed to allege specific conduct constituting Solicitation of Premeditated Murder in the First Degree.

The First Amended Information was factually deficient, because it did not provide "a description of the specific *conduct* of the defendant which allegedly constituted that crime." *Brooke, 629-630*. In particular, the Information did not specify whether Mr. Hahn "offered to give" or "gave" something to solicit the crime and did not identify what was offered or given. Nor did the Information identify the individual he was alleged to have solicited. Nor did the Information set forth the "specific conduct" Mr. Hahn was alleged to have solicited from this other person. CP 21. Even if the charging document were found to adequately set forth "the description (*elements*) of the crime charged," it does not contain "a description of the specific *conduct* of the defendant which allegedly constituted that crime." *Brooke, at 629-630*.

Nor can the underlying facts be inferred from the language used in the First Amended Information. CP 21. Accordingly, Mr. Hahn need not demonstrate prejudice. *Kjorsvik, supra*. His conviction must be reversed, and the case dismissed without prejudice. *Id.*

**II. MR. HAHN’S STATEMENTS TO THE POLICE AND THEIR AGENTS WERE OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL UNDER WASH. CONST. ARTICLE I, SECTION 22 BECAUSE MR. HAHN WAS ALREADY REPRESENTED IN A PROSECUTION CLOSELY RELATED TO THE CHARGED CRIME.**

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *In re Detention of Martin*, 163 Wn.2d 501, 506, 182 P.3d 951 (2008). Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). 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. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

B. Federal Law

The Sixth Amendment right to counsel attaches with the commencement of adversary proceedings. *See Brewer v. Williams*, 430 U.S. 387, 401, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977). Until recently, the federal constitution prohibited police from approaching an accused person after charges had been filed and counsel appointed, and asking her or him to waive the presence of counsel to further discuss those charges. *See Michigan v. Jackson*, 475 U.S. 625, 633, 636, 89 L. Ed. 2d 631, 106 S. Ct. 1404 (1986), *overruled by Montejo v. Louisiana*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009). As of 2009, however, the Sixth Amendment no longer protects an accused person's assertion of his desire to deal with the government only through counsel. *Montejo*.

Under the earlier regime, lower courts generally assumed that the Sixth Amendment prohibited interrogation on an offense that is “closely related” or “inextricably intertwined” with the charged offense:

[V]irtually every lower court in the United States to consider the issue... [has] defined “offense” in the Sixth Amendment context to encompass... closely related acts... These courts have found offenses “closely related” where they involved the same victim, set of acts, evidence, or motivation.

*Texas v. Cobb*, 532 U.S. 162, 186, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001) (dissenting opinion). The Supreme Court majority in *Cobb*, however, found that questioning about an uncharged crime was prohibited only when it would be considered the “same offense” under the

*Blockburger* double jeopardy test. *Id.* at 172-73 (citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and *Brown v. Ohio*, 432 U.S. 161, 164-166, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)). The majority’s decision in *Cobb* has been sharply criticized. *See, e.g.*, Angela Henson, *Now You Have it, Now You Don’t: The Sixth Amendment Right to Counsel After Texas v. Cobb*, 51 Cath. U.L. Rev. 1359 (2002); Benjamin F. Diamond, *The Sixth Amendment: Narrowing the Scope of the Right to Counsel*, 54 Fla. L. Rev. 1001 (2002); Beth G. Hungate-Noland, *Texas v. Cobb: A Narrow Road Ahead For The Sixth Amendment Right To Counsel*, 35 U. Rich. L. Rev. 1191 (2002).

C. Wash. Const. Article I, Section 22 provides broader protection to an accused person’s right to counsel than does the Sixth Amendment.

The Washington Supreme Court has expressly reserved ruling on the question of whether or not Article I, Section 22 provides broader protection than the Sixth Amendment right to counsel in this context.<sup>2</sup> *State v. Gregory*, 158 Wn.2d 759, 819, 147 P.3d 1201 (2006). In *Gregory*, the Court declined to consider the appropriateness of a “closely related” or “inextricably intertwined” test under the state constitution, because, in that case, the defendant’s charges were not closely related: “[t]hey involved

---

<sup>2</sup> No Washington court has adopted the *Montejo* standard when dealing with an accused person’s right to counsel after charges are filed.

different victims, they occurred two years apart, and they occurred in different locations.” *Id.*, at 819.

Unlike *Gregory*, this case involves charges that are closely related. Accordingly, it is appropriate to decide whether or not the state constitution provides broader protection to Mr. Hahn’s right to counsel than does the Sixth Amendment.

To determine whether the Washington constitution grants more expansive rights than the federal constitution, the court must consider the six nonexclusive *Gunwall* factors: “(1) textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.” *State v. Gunwall*, 106 Wn. 2d 54, 58, 720 P.2d 808 (1986). *Gunwall* analysis suggests that Wash. Const. Article I, Section 22 provides greater protection than the Sixth Amendment.

1. The Text of the Washington Constitution.

The Washington constitution provides: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.” Wash. Const. Article I, Section 22. This explicit guarantee suggests that a defendant’s choice to defend through counsel must be carefully protected.

## 2. Differences Between Parallel Provisions of the Washington and U.S. Constitutions.

The federal constitution provides: “In criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.” U.S. Const. Amend. VI. By adopting different language in the Washington constitution, the framers likely intended Article I, Section 22 to have a different meaning.<sup>3</sup> *Gunwall, at 65*. The phrase “appear and defend . . . by counsel” suggests a more active role than mere “assistance of counsel.” In addition, the Washington constitution contains an economic assistance provision that has no counterpart in the federal constitution: “In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.” Wash. Const. Article I, Section 22. The economic assistance provision was adopted many years before the U.S. Supreme Court first discussed representation of indigent defendants at public expense. *See Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932). It has served as authority for a broader right to appointed counsel under the Washington constitution than the federal constitution. *See State*

---

<sup>3</sup> Even when the federal and state provisions are identical, however, state courts are free to provide greater protection. For example, Washington’s due process clause is phrased identically to its federal counterpart. Nevertheless, the state due process clause provides greater protection. *See, e.g., State v. Davis*, 38 Wn. App. 600, 686 P.2d 1143 (1984) (Washington’s due process clause, unlike its federal counterpart, does not permit an inference of guilt from a defendant’s post-arrest silence).

*v. Hess*, 12 Wn. App. 787, 793, 532 P.2d 1173, *aff'd*, 86 Wn. 2d 51, 541 P.2d 1222 (1975); *McClintock v. Rhay*, 52 Wn. 2d 615, 616, 328 P.2d 369 (1958) (per curiam) (economic assistance clause required appointment of counsel at public expense for indigent defendant), *disapproved on other grounds*, *Mempa v. Rhay*, 68 Wn. 2d 882, 416 P.2d 104 (1966). When *McClintock* was decided, the U.S. Supreme Court had not yet reached a similar interpretation for the federal constitution. *See Gideon v. Wainwright*, 372 U.S. 335, 93 S.Ct. 792, 9 L. Ed. 2d 799 (1963).

### 3. State Constitutional History

Article I, Section 22 is based on the constitutions of other states, rather than on the federal constitution. Justice Robert J. Utter, *Freedom and Diversity in the Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 496-97 (1984). This lends support to an independent analysis, and suggests that the state constitution provides broader protection than the federal constitution. *See, e.g., State v. Silva*, 107 Wn.App. 605, 619, 27 P.3d 663 (2001) (“The decision to use other states' constitutional language also indicates that the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution.”)

#### 4. Pre-existing State Law.

Several non-constitutional sources of Washington law create a broader right to counsel in Washington than under the Sixth Amendment. First, Washington provides for the right to counsel in grand jury proceedings. RCW 10.27.120. The federal constitution does not provide such a right. *United States v. Mandujano*, 425 U.S. 564, 582, 96 S.Ct. 1768, 48 L. Ed. 2d 211 (1976). Second, Washington provides for the appointment of counsel for indigent criminal defendants if there is a mere possibility of imprisonment. CrR 3.1; CrRLJ 3.1. This contrasts with the federal constitution, which requires appointment of counsel for indigent defendants only if there is actual imprisonment. *See Scott v. Illinois*, 440 U.S. 367, 373-374, 99 S.Ct. 1158, 59 L.Ed. 2d 383 (1979). Third, Washington provides for appointment of counsel at an earlier stage than required by the federal constitution. CrR 3.1; CrRLJ 3.1; *State v. Templeton*, 148 Wn.2d 193, 211, 59 P.3d 632 (2002). Fourth, Washington provides for appointment of counsel to obtain post-conviction relief; this contrasts with the federal constitution, which does not guarantee any right to appointment of counsel to obtain postconviction relief. RAP 16.15; *see Murray v. Giarratano*, 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987).

These statutes and rules demonstrate Washington’s long history of providing a broader right to counsel than required by the federal constitution. Accordingly, pre-existing state law favors an independent application of the state constitution.

#### 5. The Structure of the Washington Constitution

The fifth *Gunwall* factor always weighs in favor of an independent state interpretation. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (*Young I*).

#### 6. Matters of State Interest or Local Concern.

Law enforcement is generally a matter of local concern. *State v. Young* 135 Wn.2d 498, 509, 957 P.2d 681 (1998) (*Young II*). The Supreme Court—by passing rules that provide greater protection than the federal constitution—has recognized that the circumstances under which a criminal suspect must be provided counsel is a matter of state interest. *See Templeton, supra*.

#### 7. Summary: all six *Gunwall* factors favor an independent application of Article I, Section 22.

All six *Gunwall* factors support a broader right to counsel under the Washington constitution than under the federal constitution. Accordingly, it is appropriate to independently apply Wash. Const. Article

I, Section 22, to determine whether the state constitution requires exclusion of Mr. Hahn's statements under the facts of this case.

D. The police violated Mr. Hahn's state constitutional right to counsel when they and their agents extracted statements from him after he'd already been charged with and appointed counsel for a "closely related" crime.

Prior to *Cobb*, courts considering whether or one offense was "closely related" to another for purposes of the Sixth Amendment focused on "the nature of the conduct involved rather than on the elements of the offense itself." *U.S. v. Covarrubias*, 179 F.3d 1219, 1225 (9<sup>th</sup> Cir. 1999), *abrogated by Cobb, supra*. The analysis

[R]equires an examination and comparison of all of the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including the victim, if any), and the timing, motive, and location of the crimes. No single factor is ordinarily dispositive; nor need all of the factors favor application of the exception in order for the offenses to be deemed inextricably intertwined or closely related—which concepts we, like some of the other circuits, deem to be the same... The greater the commonality of the factors and the more directly linked the conduct involved, the more likely it is that courts will find the exception to be applicable.

*Id.*

Before the U.S. Supreme Court decided *Cobb*, the Third Circuit faced a case nearly identical to Mr. Hahn's. *U.S. v. Arnold*, 106 F.3d 37, 42 (3<sup>rd</sup> Cir. 1997), *abrogated by Cobb, supra*. In *Arnold*, an armored car courier threatened to kill his ex-girlfriend if she told authorities he'd stolen money from work by stuffing cash into a thermos. He was charged with

financial crimes and intimidating a witness. On the same day the sealed indictment was delivered, the defendant met with an undercover officer posing as a hit man, and was recorded offering \$20,000 to have the witness killed. Based on this recorded conversation, the defendant was convicted of attempted murder. *Id.*, at 38-39. The Third Circuit found the charges “closely related,” reversed the convictions, and excluded the recording from any subsequent trial:

We adopt the “closely related” exception and hold that it applies here. Indeed, it is difficult to understand how the witness intimidation and attempted murder of a witness offenses could be any more closely related. As the record shows, both charges: (1) involve the same witness; (2) arise from the same facts and circumstances; (3) are closely related in time; and, (4) involve conduct related to [the defendant’s] attempt to prevent [the witness] from cooperating with federal authorities concerning his crimes.

More specifically, the indictment for the witness intimidation count explicitly charges that [the defendant] had threatened to kill [the witness] if she told the authorities about his crimes. This charge involved precisely the same type of underlying conduct as the attempted murder charge—violent action taken to impede a witness’s participation in or cooperation with a federal criminal investigation. Given that [the defendant’s] central purpose and the intended results of both offenses were the same, we cannot but conclude that the two offenses were sufficiently related for purposes of the Sixth Amendment exception. Moreover, the crimes [the defendant] sought to conceal by the murder he attempted were the same crimes that motivated his acts of intimidation...

In sum, we are persuaded that [the defendant’s] witness intimidation and attempted murder of a witness were closely related offenses and arose from the same predicate facts, conduct, intent and circumstances. As a result, we hold that [the defendant]s Sixth Amendment right to counsel, which attached to the witness intimidation charge on the morning... he was indicted, carried over to the attempted murder of a witness charge. Consequently, the incriminating statements elicited... during the “sting” operation on [that] afternoon...were obtained in violation of [the defendant’s] Sixth Amendment right to counsel...

*Id.*, at 42.

Here, Mr. Hahn was initially charged with (among other things) stalking S.M. . State’s Motion to Join Offenses and Consolidate for Trial, p. 1, Supp. CP. As the prosecutor noted in the lower court, the offenses were “related” generally (*see* State’s Motion to Join Offenses, p. 5, Supp. CP), “related to the defendant’s conduct in relation to the same victim” (*see* State’s Motion to Join Offenses, p. 5, Supp. CP), and “very inter-related.” RP (6/5/09) 4. Furthermore, the “attempted murder arose out of” the stalking charge, so—as the prosecutor told the trial court judge—the charges were “directly related.” RP (6/5/09) 11.

As in *Arnold*, the police conducted a “sting” operation against Mr. Hahn after he’d been charged and requested counsel. They obtained secret recordings in which Mr. Hahn allegedly solicited S.M. ’s murder in order to prevent her from testifying in the pending case. Exhibits 11, 27, 29, 31, 33, 35, 37, 39, 41, 42, 52, Supp. CP.

As in *Arnold*, both charges involved the same witness, arose from the same facts and circumstances, were closely related in time, and related to Mr. Hahn’s alleged attempt to prevent S.M. from cooperating with the prosecution. Both the stalking charge and the solicitation charge “involved precisely the same type of underlying conduct”—“violent action taken to

impede a witness's participation in or cooperation with a... criminal investigation.” *Arnold*, at 42. “Moreover, the crimes [Mr. Hahn] sought to conceal by the murder he [allegedly] attempted were the same crimes that motivated his [alleged] acts of intimidation.” *Id.* As in *Arnold*, Mr. Hahn’s “central purpose” and “intended results” were the same for both offenses.

*Id.* Accordingly, as in *Arnold*, the two offenses

were closely related offenses and arose from the same predicate facts, conduct, intent and circumstances. As a result, [Mr. Hahn’s] Sixth Amendment right to counsel, which attached to the [stalking charge]... carried over to the [solicitation] charge. Consequently, the incriminating statements elicited... during the “sting” operation... were obtained in violation of [Mr. Hahn’s] Sixth Amendment right to counsel.

*Id.* Neither the police nor their agents should have spoken with Mr. Hahn in the absence of his attorney. Any statements Mr. Hahn made to police or their agents after Norman Livengood began working for the police, and any evidence derived therefrom, should have been suppressed.

Mr. Hahn’s conviction must be reversed, the evidence suppressed, and the case remanded for a new trial. Wash. Const. Article I, Section 22; *Arnold*, *supra*.

**III. MR. HAHN’S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL JUDGE ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF SOLICITATION OF ASSAULT IN THE FOURTH DEGREE.**

A. Standard of Review

A trial court’s refusal to instruct on a lesser-included offense is reviewed *de novo*, if the refusal is based on an issue of law. *City of Tacoma v. Belasco*, 114 Wn.App. 211, 214, 56 P.3d 618 (2002).<sup>4</sup>

B. The refusal to instruct on Solicitation of Assault in the Fourth Degree denied Mr. Hahn his statutory right to have the jury consider lesser-included offenses.

Under RCW 10.61.006, “the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.” An accused person is entitled to an instruction on a lesser-included offense if (1) each element of the lesser offense is a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed.<sup>5</sup> *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008). In evaluating whether a lesser-included instruction is appropriate, the trial judge takes the evidence in a light most favorable to the defendant. *State v.*

---

<sup>4</sup> An abuse of discretion standard applies if the refusal was based on a factual dispute. *Belasco*, at 214.

<sup>5</sup> This two-part legal/factual test is often referred to as the *Workman* test. See *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

*Smith*, 154 Wn.App. 272, 278, 223 P.3d 1262 (2009) (*Smith II*) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000)).

In this case, the trial judge concluded that Solicitation of Assault in the Fourth Degree failed the legal prong of the *Workman* test; accordingly, review is *de novo*. *Workman, supra; Belasco, supra; see* RP (10/27/09) 29-36. In fact, Solicitation of Assault in the Fourth Degree is a lesser-included offense of Solicitation of Premeditated Murder in the First Degree under both prongs of the *Workman* test.

First, Solicitation of Assault in the Fourth Degree meets the legal test for a lesser-included offense of the charged crime. For both offenses, the prosecution must prove that the accused person (a) acted with intent to promote or facilitate the commission of the crime, (b) offered or gave something of value to another person, and (c) sought to induce that other person to engage in specific conduct which would constitute the underlying crime. A person cannot pursue premeditated intentional murder without also seeking to assault the victim, since intentional murder can only be accomplished through some physical contact that falls within the definition of an assault. *See* Defendant's Proposed Instruction No. 9, Supp. CP. Thus each element of Solicitation of Assault is a necessary element of Solicitation of Murder, and the proposed instructions satisfy the legal prong of the *Workman* test. *Nguyen, at* 434.

Second, when taken in a light most favorable to Mr. Hahn, the evidence was sufficient to prove that he committed only the lesser offense. In his recorded statement, he told the investigating officers that he only wanted to scare S.M., and that his intent was to have her frightened and not killed. Ex. 46, Supp. CP. Thus the evidence supported the proposed instructions, establishing the factual prong of the *Workman* test. *Nguyen*, at 434.

Accordingly, Mr. Hahn had a right to have the jury instructed on Solicitation of Assault in the Fourth Degree. RCW 10.61.006. The trial court's refusal to instruct the jury on the lesser-included offense requires reversal of the conviction and remand for a new trial. *Nguyen, supra*.

C. The refusal to instruct on Solicitation of Assault in the Fourth Degree denied Mr. Hahn his constitutional right to due process under the Fourteenth Amendment.

Refusal to instruct on a lesser-included offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). The constitutional right to such an instruction stems from “the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free.” *Vujosevic*, at 1027. See also *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases,

“providing the jury with the ‘third option’ of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...”).<sup>6</sup>

In the absence of instructions on a lesser offense, the jury was forced to either acquit or convict Mr. Hahn; they did not have “the ‘third option’ of convicting on a lesser included offense...” *Beck*, at 634. Because the trial judge refused to instruct the jury on the lesser-included offense of Solicitation of Assault in the Fourth Degree, Mr. Hahn was denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic*. The conviction must be reversed and the case remanded to the superior court. *Schaffer, supra*.

D. The refusal to instruct on Solicitation of Assault in the Fourth Degree violated Mr. Hahn’s state constitutional right (under Wash. Const. Article I, Sections 21 and 22) to have the jury consider applicable lesser included offenses.

Under the Washington constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Furthermore, “[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury...” Wash. Const. Article I, Section 22. As

---

<sup>6</sup> The court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck*, at 638, n.14. Some federal courts only review a state court’s failure to give a lesser-included instruction in noncapital cases when the failure “threatens a fundamental miscarriage of justice...” *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990)

with many other constitutional provisions, the right to a jury trial under the Washington state constitution is broader than the federal right. *State v. Hobble*, 126 Wn.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

As noted previously, Washington state constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *Gunwall*. In this case, analysis under *Gunwall* supports an independent application of the state constitution. These two provisions establish an accused person's state constitutional right to have the jury instructed on applicable lesser-included offenses.

1. The language of Wash. Const. Article I, Sections 21 and 22 supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The first *Gunwall* factor requires examination of the text of the state constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” *emphasis added*. “The term ‘inviolate’ connotes deserving of the highest protection... For [the right to a jury trial] to remain inviolate, it must not diminish over time.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury...” The direct and

mandatory language (“shall have the right”) implies a high level of protection.

Thus an accused person’s right to have the jury consider a lesser-included offense remains the same as it existed in 1889, and “must not diminish over time,” *Sofie v. Fibreboard Corp.*, at 656. *Gunwall* factor one favors an independent application of these provisions.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Wash. Const. Article I, Section 21, which declares “[t]he right of trial by jury shall remain inviolate...,” has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace, supra*, found the difference between the two constitutions significant, and determined that the state constitution provides broader protection. This difference in language also favors an independent application of the state constitution.

3. State constitutional and common law history supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21, Washington

“preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, at 96. See also *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *Hobble*, *supra*; *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (*Smith I*). In 1889, when our state constitution was adopted, the lesser-included offense doctrine was well-established under the common law. *Beck v. Alabama*, *supra*, at 635 n. 9 (citing 2 M. Hale, *Pleas of the Crown* 301-302 (1736); 2 W. Hawkins, *Pleas of the Crown* 623 (6th ed. 1787); 1 J. Chitty, *Criminal Law* 250 (5th Am. ed. 1847); T. Starkie, *Treatise on Criminal Pleading* 351-352 (2d ed. 1822)).

Thirty years prior to the adoption of the state constitution in 1889, the Court for Washington Territory addressed a parallel doctrine (relating to inferior degree offenses), and declared that “There is no better settled principle of criminal jurisprudence than that under an indictment for a crime of a high degree, a crime of the same character, of an inferior degree, necessarily involved in the commission of the higher offense charged, may be found.” *Clarke v. Washington Territory*, 1 Wash. Terr. 68, 69 (1859).

It was against this backdrop that the framers decided that “[i]n criminal prosecutions the accused shall have the right” to a jury trial, and that the jury trial right “shall remain inviolate.” Wash. Const. Article I,

Sections 21 and 22. Accordingly, *Gunwall* factor 3 supports an independent application of Article I, Sections 21 and 22 in this case, and establishes a state constitutional right to instructions on applicable lesser-included offenses.

4. Pre-existing state law supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62). Just one year prior to adoption of the state constitution, the court noted that a jury had the power to convict an accused person “‘of any offense, the commission of which is necessarily included within that with which he is charged in the indictment.’” *Timmerman v. Territory*, 3 Wash. Terr. 445, 449 (1888) (quoting Territorial Code of 1881, Section 1098.) This language endures in the current provision. *See* RCW 10.61.006. Accordingly, *Gunwall* factor four supports a state constitutional right to applicable instructions on a lesser-included offense.

5. Differences in structure between the federal and state constitutions supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The fifth *Gunwall* factor always points toward pursuing an independent state constitutional analysis. *Young I, at 180*. Thus factor five favors Mr. Hahn's position.

6. The right to a jury trial is a matter of particular state interest or local concern, and supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The right to a jury trial is a matter of state concern; there is no need for national uniformity on the issue. *Smith I, at 152*. *Gunwall* factor number six thus also points to an independent application of the state constitution, and supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

All six *Gunwall* factors favor an independent application of Article I, Section 21 and 22 of the Washington Constitution. Our state constitution protects an accused person's right to have the jury consider lesser-included offenses. The trial judge's failure to instruct on the lesser-included offense of Solicitation of Assault in the Fourth Degree violates Wash. Const. Article I, Sections 21 and 22. Accordingly, Mr. Hahn's conviction must be reversed and the case remanded to the trial court for a new trial.

**IV. MR. HAHN’S CONVICTION WAS OBTAINED IN VIOLATION OF HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTIONS 21 AND 22.**

A. Standard of Review

Whether or not opinion testimony impermissibly infringes an accused person’s right to a jury trial is an issue of constitutional dimension; such issues are reviewed *de novo*. *Martin, supra*.

B. Impermissible opinion testimony on an accused person’s guilt violates the constitutional right to a jury trial.

A criminal defendant has a constitutional right to a jury trial.

Wash. Const. Article I, Sections 21 and 22; U.S. Const. Amend VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). Impermissible opinion testimony on the accused person’s guilt violates the constitutional right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987).

A lay witness may not offer an opinion on the accused person’s state of mind. *State v. Montgomery*, 163 Wn.2d 577, 589-595, 183 P.3d 267 (2008); *see also State v. Farr-Lenzini*, 93 Wn.App. 453, 970 P.2d 313 (1999). The erroneous admission of such testimony can create a manifest error affecting a constitutional right, requiring reversal even if raised for the first time on review. *Id.*, at 596 n. 9 (“[I]f there were evidence that these improper opinions influenced the jury’s verdict, we would not

hesitate to find actual prejudice and manifest constitutional error regardless of the failure to object or the likelihood that an objection would have been sustained.”); RAP 2.5 (a)(3).

To convict Mr. Hahn of solicitation of first-degree murder, the prosecution was required to prove that he acted “with intent to promote or facilitate the commission of” first-degree murder. RCW 9A.28.030(1). Under *Montgomery*, any opinion that he acted with such intent was inadmissible. *Id.*, at 589-595.

C. Over defense objection, the prosecutor improperly introduced Livengood’s opinion that Mr. Hahn acted with intent to have S.M. murdered.

Over defense objection, Livengood was allowed to say there was never “any doubt in [his] mind” that Mr. Hahn “wanted” to have S.M. murdered. RP (10/26/09) 69. This was an explicit opinion that Mr. Hahn acted “with intent to promote or facilitate the commission of” first-degree murder, as required under RCW 9A.28.030(1). The trial judge should have sustained Mr. Hahn’s objection to this testimony.

The error is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. The error was not trivial, formal, or merely academic; it prejudiced Mr. Hahn and likely affected the final outcome of the case. *Lorang*, at 32. Mr. Hahn’s defense rested on raising a

reasonable doubt as to his intent. Individual jurors could have entertained a reasonable doubt about his mental state; however, the improper opinion testimony unfairly weighted the scales against Mr. Hahn. Because the error was not harmless beyond a reasonable doubt, Mr. Hahn's conviction must be reversed and the case remanded for a new trial. *Id.*

D. The improper admission of additional opinion testimony addressing Mr. Hahn's state of mind created a manifest error affecting his constitutional right to a jury trial under the state and federal constitutions.

Livengood provided additional improper opinion testimony, beyond that quoted above. In particular he told the jury: "I believe that [Mr. Hahn] was serious with what he was talking about." RP (10/26/09) 21. In addition, the prosecutor brought out Hendricksen's opinion "that it really sounded like [Mr. Hahn] wanted her dead." RP (10/26/09) 106. Because Mr. Hahn's attorney failed to object to these two opinions, review is permitted under RAP 2.5 (a)(3) and reversal is required if "the error caused actual prejudice or practical and identifiable consequences." *Montgomery, at 595.*

Here, the error produced practical and identifiable consequences, and was not mitigated by the court's instructions. First, Mr. Hahn's trial strategy was to raise a reasonable doubt about his mental state. The improper opinion testimony (that Mr. Hahn acted with intent to promote or

facilitate S.M. 's killing) hampered defense counsel's ability to argue that his statements to Livengood and Hendricksen were merely empty jailhouse talk.

Second, the trial court explicitly instructed the jurors that they were "the sole judges of the value or weight to be given to the testimony of each witness." Instruction No. 1, Court's Instructions to the Jury, Supp. CP. This allowed jurors to rely on the improper opinion testimony as proof of Mr. Hahn's intent. Indeed, the jury was entitled to ignore all other evidence relating to intent, and use the inadmissible opinion testimony as proof of intent beyond a reasonable doubt.

Third, the opinion testimony was not directed at witness credibility. Accordingly, the court's instruction that the jurors were "the sole judges of the credibility of each witness" did not mitigate the problem, as it did in *Kirkman, supra*, and *Montgomery, supra*. Instruction No. 1, Court's Instructions to the Jury, Supp. CP; *See Montgomery, at* 595-596.

Fourth, the inmate witnesses were not experts; hence, the court had no reason to instruct the jury that it was not bound by expert opinions. In both *Montgomery* and *Kirkman*, such an instruction was found to ameliorate the effect of improperly admitted opinion testimony. Court's Instructions, generally, Supp. CP; *see Montgomery, at* 595-596.

Livengood’s opinion (that he “believe[d] that [Mr. Hahn] was serious with what he was talking about”) and Hendricksen’s opinion (“that it really sounded like [Mr. Hahn] wanted her dead”) should not have been admitted at trial. RP (10/26/09) 21, 106. The error violated Mr. Hahn’s right to a jury trial, and had practical and identifiable consequences. Accordingly, Mr. Hahn’s conviction must be reversed and the case remanded for a new trial, with instructions to exclude the improper opinion testimony. *Montgomery, supra*.

**V. MR. HAHN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

**A. Standard of Review**

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

**B. Mr. Hahn was entitled to the effective assistance of counsel.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon*, at 342. Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...”

Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); *see also Pittman*, at 383.

Failure to challenge the admission of evidence constitutes ineffective assistance if there is an absence of legitimate strategic or tactical reasons for the failure to object, an objection to the evidence would likely have been sustained, and the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). This same test applies when defense counsel introduces evidence prejudicial to the accused person. *Id.*

C. Defense counsel was ineffective for failing to object to improper opinion testimony.

As noted above, impermissible opinion testimony on an accused person's guilt violates the constitutional right to a jury trial. *Montgomery*, *supra*. Furthermore, the rules of evidence generally prohibit the admission of lay opinion testimony. ER 701.

Here, defense counsel should have objected each time the prosecutor introduced opinion testimony on Mr. Hahn's mental state.<sup>7</sup> RP (10/26/09) 21, 106. No legitimate strategy explains defense counsel's failure to object; the opinion testimony bolstered the state's case, and provided strong and unequivocal testimony that Mr. Hahn was guilty. An objection to the evidence would likely have been sustained (as outlined above). Accordingly, the failure to object constituted deficient performance.

Defense counsel's deficient performance prejudiced Mr. Hahn. The defense strategy was to raise doubt about Mr. Hahn's mental state. Defense counsel's arguments—that Mr. Hahn was venting, that he didn't want S.M. killed, and that, at worst, he wanted her assaulted or frightened—were considerably weaker because of the improper opinion

---

<sup>7</sup> Defense counsel did object on one occasion; however, the objection was overruled. RP (10/26/09) 69.

testimony. Had counsel objected, the jury would likely have acquitted Mr. Hahn of solicitation to commit murder.

D. Defense counsel was ineffective for failing to object to prosecutorial misconduct.

A failure to object to improper closing arguments is objectively unreasonable “unless it ‘might be considered sound trial strategy.’” *Hodge v. Hurley*, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland*, at 687-88). Under most circumstances,

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

*Hurley*, at 386 (citation omitted).

In this case, defense counsel should have objected when the prosecutor mischaracterized the evidence and vouched for Livengood’s testimony by telling the jury that the police believed Livengood. RP (10/27/09) 99. Counsel’s failure to object constituted deficient performance; at a minimum, defense counsel should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

Mr. Hahn was prejudiced by defense counsel’s failure to object. By vouching for Livengood’s testimony, the prosecutor urged the jury to rely

on impermissible factors to convict Mr. Hahn. A specific objection and curative instruction might have alleviated the prejudice. Accordingly, Mr. Hahn was denied the effective assistance of counsel. *Reichenbach*.

E. If the trial judge's refusal to instruct on Solicitation of Assault in the Fourth Degree is not preserved for review, then Mr. Hahn was denied the effective assistance of counsel.

Any trial strategy "must be based on reasoned decision-making..."

*In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). The reasonable competence standard requires defense counsel to be familiar with the relevant legal standards and instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

In this case, defense counsel proposed some instructions relating to Solicitation of Assault in the Fourth Degree, but did not propose a "to convict" instruction for the offense. Defendant's Proposed Jury Instructions Nos. 1, 7, 8, 9, Supp. CP. If the trial court's failure to instruct the jury on Solicitation of Assault in the Fourth Degree is attributable to defense counsel or is not preserved for review, then Mr. Hahn was denied the effective assistance of counsel.

First, by failing to propose a proper "to convict" instruction, defense counsel's performance fell below an objective standard of reasonableness. *Reichenbach, supra*. Defense counsel should have been

familiar with the standard instruction, and should have submitted it in conjunction with the other instructions he submitted. *See Tilton, supra*. There was no strategic reason to offer only some of the required instructions, and the trial judge might have given the lesser-included instructions had he been provided a complete set of the proper instructions.

Defense counsel's deficient performance prejudiced Mr. Hahn. Had counsel proposed a proper instruction, the judge would have instructed the jury on the lesser-included offense, and the jury would not have been faced with the choice of conviction or acquittal. The jury had no choice but to convict or acquit on the charged crime, even if they believed Mr. Hahn only intended to solicit an assault. Furthermore, Solicitation of Premeditated First Degree Murder is a Class A felony; the lesser charge is a misdemeanor. RCW 9A.28.020(3); RCW 9A.28.030(2). Had he been convicted of the lesser charge, he would have faced, at most, 90 days in jail. RCW 9.92.030.

Because Mr. Hahn was prejudiced by his attorney's failure to propose a complete set of instructions on Solicitation of Assault in the Fourth Degree, he was denied the effective assistance of counsel. *Reichenbach, supra*. The conviction must be reversed and the case remanded for a new trial. *Id.*

**VI. THE CRIMINAL SOLICITATION STATUTE IS OVERBROAD BECAUSE IT PUNISHES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.**

The First Amendment to the U.S. Constitution provides that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend I. This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).<sup>8</sup> A statute is unconstitutionally overbroad if it criminalizes constitutionally protected speech or conduct. *Lorang*, at 26.

Any person accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Lorang*, at 26. The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003). Instead of applying the general rule for facial challenges, “[t]he Supreme Court has

---

<sup>8</sup> Washington’s Constitution affords a similar protection: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” Wash. Const. Article I, Section 5.

‘provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or “chill” constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.’” *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005), quoting *Virginia v. Hicks* at 119; see also *Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3d Cir. 2006). Accordingly, an overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Lorang*, at 26.

A statute that reaches a “substantial” amount of protected conduct is unconstitutionally overbroad:

The showing that a law punishes a “substantial” amount of protected free speech, “judged in relation to the statute’s plainly legitimate sweep,” *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973), suffices to invalidate all enforcement of that law, “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression,” *id.*, at 613...

*Virginia v. Hicks*, at 118-119.

The First Amendment protects speech that supports or encourages criminal activity unless the speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

*Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

Criminal solicitation is the most inchoate of all inchoate offenses: “[i]n the crime of solicitation, criminal liability may attach to words alone.” *State v. Jensen*, 164 Wn.2d 943, 952, 195 P.3d 512 (2008). Solicitation “requires no overt act other than the offer itself.” *Id.*

The criminal solicitation statute (RCW 9A.28.030) is unconstitutionally overbroad because it criminalizes a substantial amount of speech (and conduct) protected by the First Amendment. Under the statute, a person may be convicted of solicitation if, “with intent to promote or facilitate the commission of a crime, he [or she] offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.” RCW 9A.28.030(1). In other words, “[s]olicitation involves no more than asking someone to commit a crime in exchange for something of value.” *Jensen*, at 952.

No Washington court has limited the statute to offers directed at inciting (and likely to incite) “imminent lawless action.” *Brandenburg*, at 447-449. Without such a limiting construction, the statute is unconstitutionally overbroad. It sweeps within its reach offers that are not

directed at *imminent* criminality, as well as offers that are unlikely to incite imminent lawless action.

It is possible to construe the solicitation statute in such a way that it does not reach substantial amounts of constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. *Brandenburg, supra*. However, such a construction has yet to be imposed. Therefore, RCW 9A.28.030 is unconstitutional. Accordingly, Mr. Hahn's conviction must be reversed and the case dismissed with prejudice. *Id.*

### **CONCLUSION**

For the foregoing reasons, Mr. Hahn's conviction must be reversed and the case dismissed with prejudice. In the alternative, the case must be dismissed without prejudice. If the case is not dismissed, it must be remanded to the trial court for a new trial.

Respectfully submitted on March 9, 2012.

**BACKLUND AND MISTRY**

A handwritten signature in cursive script that reads "Manek R. Mistry". The signature is written in dark ink and is positioned above the printed name and title.

Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

A handwritten signature in cursive script that reads "Jodi R. Backlund".

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief, Corrected Copy, to:

Aaron Hahn, DOC #332715  
Washington State Penitentiary  
1313 N 13th Ave.  
Walla Walla, WA 99362

Postage prepaid, on March 9, 2012.

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 March 9, 2012.

---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**March 09, 2012 - 11:02 AM**

## Transmittal Letter

Document Uploaded: 400626-Amended Appellant's Brief.pdf

Case Name: State v. Aaron Hahn

Court of Appeals Case Number: 40062-6

**Is this a Personal Restraint Petition?**  Yes  No

### The document being Filed is:

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Answer/Reply to Motion: \_\_\_\_\_
- Brief: Amended Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: \_\_\_\_\_

Sender Name: Manek R Mistry - Email: [backlundmistry@gmail.com](mailto:backlundmistry@gmail.com)

A copy of this document has been emailed to the following addresses:

[bwendt@co.clallam.wa.us](mailto:bwendt@co.clallam.wa.us)