

No. 43413-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Danielle Newton,**

Appellant.

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Clark County Superior Court Cause No. 11-1-02073-8

The Honorable Judge Scott A. Collier

**Appellant's Opening Brief**

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## **ASSIGNMENTS OF ERROR**

1. The trial court erred by admitting evidence obtained in violation of Ms. Newton's right to be free from unreasonable searches and seizures under the Fourth Amendment.
2. The trial court erred by admitting evidence obtained in violation of Ms. Newton's right to privacy under Wash. Const. Article I, Section 7.
3. The trial court erred by allowing the jury to consider evidence seized pursuant to an overbroad search warrant.
4. The police violated Ms. Newton's right to privacy under Wash. Const. Article I, Section 7 by seizing evidence under authority of an overbroad warrant.
5. The police violated Ms. Newton's Fourth Amendment right to be free from unreasonable searches and seizures by seizing evidence discovered pursuant to an overbroad warrant.
6. The search warrant was overbroad because it authorized police to search for and seize items for which the supporting affidavit did not establish probable cause.
7. The search warrant was overbroad because it failed to describe the things to be seized with sufficient particularity.
8. The search warrant unlawfully authorized police to search for and seize items protected by the First Amendment.
9. The search warrant was overbroad because the affidavit failed to establish probable cause to search in some of the places authorized by the warrant.
10. If Ms. Newton's suppression issues are not preserved for review, she was denied the effective assistance of counsel by her attorney's failure to file a written motion to suppress.
11. The trial court erred by giving Instruction No. 17(a).
12. Instruction No. 17(a) unconstitutionally shifted the burden of proof.

13. Instruction No. 17(a) failed to make manifestly clear the state's burden to prove Ms. Newton's knowledge (as a component of her alleged intent to deliver).
14. Ms. Newton was denied the effective assistance of counsel when her attorney sought an instruction that erroneously shifted the burden of proof.
15. Ms. Newton's convictions infringed her Fourteenth Amendment right to due process.
16. The trial judge violated Ms. Newton's Sixth and Fourteenth Amendment right to present a defense by excluding evidence that was relevant and admissible.
17. The trial court erred by admitting one portion of Ms. Newton's statement to police while excluding another portion.
18. The trial court erred by refusing to admit a portion of Ms. Newton's statement under ER 106 and the common law rule of completeness.
19. Ms. Newton was convicted through the operation of a statute that is unconstitutionally overbroad.

The trial judge erred by giving Instruction No. 12, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.

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

1. A search warrant is overbroad if it authorizes police to search areas and to seize items for which probable cause does not exist. In this case, police lacked specific information suggesting that evidence would be found in places other than the passenger compartment of the car; police also lacked specific information indicating that evidence would be found on the iPhone located in the front seat. Must the evidence obtained from execution of the overbroad search warrant be suppressed?
2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel objected to the admission of evidence unlawfully seized pursuant to an overbroad search warrant, but failed to file a written motion to suppress. If Ms. Newton's suppression issues are not preserved for review, was she denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel?
3. A trial court may not instruct jurors in a way that shifts the burden of proof. Here, the trial judge erroneously instructed the jury that Ms. Newton bore the burden of proving lack of knowledge, a necessary component of the "intent" element in a charge of possession with intent to deliver methamphetamine. Was Ms. Newton's conviction for Possession with Intent to Deliver Methamphetamine entered in violation of her Fourteenth Amendment right to due process?
4. To obtain a conviction for Possession of Methamphetamine with Intent to Deliver, the state was required to prove that Ms. Newton possessed the substance with the intent to deliver it, which necessarily includes proof of knowing possession. Defense counsel erroneously proposed an instruction requiring Ms. Newton to prove unwitting possession by a preponderance of the evidence. Was Ms. Newton denied her

Sixth and Fourteenth Amendment right to the effective assistance of counsel?

5. An accused person has a constitutional right to present relevant admissible evidence. Here, the trial judge admitted one portion of Ms. Newton's statement to police, while excluding another portion that should have been admitted under ER 106 and the common law rule of completeness. Did the trial judge violate Ms. Newton's Sixth and Fourteenth Amendment right to present a defense by excluding relevant, admissible evidence?
  
6. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite imminent lawless action. The accomplice liability statute criminalizes speech made with knowledge that it will facilitate or promote commission of a crime, even if the speech is not directed at inciting imminent lawless action or likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

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

Police surveilled Nathan Gadberry and Danielle Newton and discovered Gadberry had an arrest warrant. RP 154-156. Gadberry pulled into a Chevron station Vancouver, and police surrounded his vehicle. RP 108, 114, 203, 377. Several officers approached with guns out and ordered the car's occupants to show their hands. RP 208, 211, 271, 380. Gadberry didn't show his hands, but instead moved one hand around in a manner that could not be seen clearly by the officers. RP 209-210, 272, 308, 320, 326, 380.

His passenger, Danielle Newton, had crouched down in the front passenger seat in a near-fetal position. RP 271, 311, 354-355. In the back seat, Angela McCaleb could not be seen at all by the officers due to the car's tinted windows. RP 209, 260, 352. An officer used his flashlight to break open one of the windows. RP 210, 321, 356. At that point, all hands were raised and the occupants were removed from the car. RP 211-212,

Gadberry had a scale in his pocket. RP 233, 322. During the search of Newton, officers asked if she had any weapons or sharp objects. RP 11-112, 131-133, 338. She said that she had a needle in her pocket

with methamphetamine in it. RP 111-112, 127, 131-133, 232. She said that it was the only methamphetamine that she had. RP 274.

Through the broken window, police could see a tub with crystals as well as an iPhone. Both could have been reached by all of the car's occupants. RP 223-230, 247-248, 274, 310.

Law enforcement requested a search warrant. The affidavit in support of the warrant described the facts surrounding the vehicle stop and the search of Gadberry and Ms. Newton. Other than the tub of crystals and the phone police saw from outside the car, the affiant provided no specific information suggesting that additional evidence would be found in the vehicle. Ex. 62, Supp. CP. Instead, the affidavit included the following language:

I am aware from training, knowledge, and experience that persons involved with the distribution of drugs often use cellular phones to set up such transactions. I know from my training, knowledge, and experience that text messages are also regularly used to plan and set up drug transactions, and that incoming and outgoing phone numbers and text messages are stored in a phone's memory. Those numbers and messages may help link co-conspirators and the defendant to the crime of Possession of a Controlled Substance with Intent to Deliver. I am seeking to seize any and all cell phones located within the vehicle, and have the information stored within the phones examined and copied, which may involve moving the phone from secured evidence storage to another location to conduct the examination.

I know from my training, knowledge, and experience that persons involved in possession of controlled substances possess items of

identification (including but not limited to driver's licenses, rent receipts, bills and address books). I also know these items are relevant to the identity of the possessor of the controlled substances, possessor of other items seized, and owner and user of the vehicle searched. It is therefore more likely than not those items of identification will be in the black colored 2001 4 door Honda Accord...

I am aware, based on my training, knowledge, and experience, that individuals involved in criminal activity will at times take photographs or videos of themselves and co-conspirators engaged in criminal activity, such as drug possession, drug use, and drug distribution. These videos and photographs are stored within digital cameras, camcorders, and cellular telephones. I have located photographs and videos of defendants engaged in illegal weapons possession, possession of stolen property, illegal drug possession and use, and manufacturing and distribution of drugs. This evidence is often kept within the defendant's residence or vehicles. Because the defendants mentioned above are involved in the possession and suspected distribution of controlled substances, it is more likely than not that photographs and/or digital images, including still photos and videos of the defendants and co-conspirators, will be found within the black colored 2001 4 door Honda Accord...  
Ex. 62, Supp. CP.

A search warrant was issued; it did not identify the crime under investigation. It authorized seizure of methamphetamine and drug paraphernalia, and allowed police to take photographs. Ex. 62, Supp. CP.  
In addition, it directed police to search for and seize:

(4) Personal property, including but not limit [sic] to mail, receipts, photographs or identification cards, in order to establish dominion and control of the vehicle, as well as to confirm the identity of the defendant(s);

(6) Cellular telephones and their electronically stored memory, which may be examined and copied.

Ex. 62, Supp. CP.

The warrant also granted the officers

(5) Access into any locked container, such as: safe, locked box, briefcase, or glove box, which can be used for securing or concealing illegal substances;

Ex. 62, Supp. CP

The officers searched the car, and found several phones in a bag in the trunk, as well as a pipe, a scale, spoons, and plastic bags. RP 399-413, 497-500, 519-524, 539-547. The police downloaded the contents of the iPhone that had been plugged in between the driver and passenger seats. RP 687-715. The phone contained several texts from the date of arrest, as well as photos of all three occupants of the car. RP 705-714. The texts were requests directed at Gadberry:

Nate it would be cool if youd [sic] kick me some shit so I can smoke

Hey how much do you want to charge me for an 8<sup>th</sup> of shit

Can you call me when you get a chance please Nathan  
Ex 75, Supp. CP.

The state charged both Gadberry and Newton with Possession of Methamphetamine with Intent to Deliver, and also charged Ms. Newton with Possession of Methamphetamine. CP 1-2. The prosecution also alleged that the activities took place in a school zone. CP 1-2.

Two working days before trial, the state provided Ms. Newton a CD that contained records and texts loaded from the phones retrieved during the police search. RP 13, 19-23, 72-76, 93-94, 100-102. Both defendants objected and moved to suppress any evidence contained on the disk due to discovery rule violations. RP 13-24, 33-44, 72-76, 94-100, 153-171. The court did not suppress any of the texts or photos.

After receiving the CD, defense counsel objected to the introduction of evidence seized pursuant to the search warrant, arguing that the warrant was overbroad. RP 157-159, 168-169; Ex. 62, Supp. CP. However, because the prosecution didn't provide the disk until just before trial, and didn't disclose what evidence from the phone would be offered at trial, defense counsel did not file a written motion to suppress. RP 19, 20, 22, 82, 93-94, 95, 160. Counsel repeatedly asserted that Ms. Newton was not waiving any CrR 3.6 issues. RP 82, 93-95, 99, 171, 176.

The court did not suppress any of the fruits of the search. The court also admitted the texts loaded from the iPhone, over defense objection. RP 658-659, 715, 758-761, 800-804; Ex. 75, Supp. CP.

Ms. Newton also sought suppression of her initial statements to the officers, regarding the syringe with methamphetamine found in her pocket. RP 106-154. The court denied the motion and this statement was admitted to the jury. RP 145-151, 274. After the jury heard this

statement, Ms. Newton sought to introduce the rest of what she had said - that the syringe contained the only methamphetamine she had. The court denied the motion. RP 274-276, 280-284.

The court gave the standard instruction defining accomplice liability for the jury, which included the following:

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

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

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

No. 12, Court’s Instructions, Supp. CP.

Defense counsel did not object to this instruction. At Ms. Newton’s request, the court also gave an instruction on unwitting possession as to Count I only (the possession with intent charge):

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in her possession as to Count I only.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded,

considering all of the evidence in the case, that it is more probably true than not true.

No 17a, Court's Instructions, Supp. CP.

The jury found Ms. Newton guilty as charged, and endorsed the special verdict regarding a school zone. CP 3. The court sentenced her within the standard range. CP 3-17. Ms. Newton timely appealed. CP 18.

### **ARGUMENT**

#### **I. THE EVIDENCE ADMITTED AT TRIAL WAS UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7.**

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

Constitutional questions are issues of law, reviewed de novo.

McDevitt v. Harborview Med. Ctr., \_\_\_ Wash.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_

(2012). Whether a search warrant meets the probable cause and

particularity requirements is an issue of law reviewed de novo. State v.

Garcia-Salgado, 170 Wash.2d 176, 183, 240 P.3d 153 (2010); State v.

Reep, 161 Wash.2d 808, 813, 167 P.3d 1156 (2007). A manifest error

affecting a constitutional right may be raised for the first time on review.<sup>1</sup>

RAP 2.5(a)(3); State v. Kirwin, 165 Wash.2d 818, 823, 203 P.3d 1044

(2009).

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<sup>1</sup> The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); see State v. Russell, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

- B. Search warrants must be supported by probable cause and must particularly describe the places to be searched and things to be seized.

Under the Fourth Amendment to the U.S. Constitution,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.<sup>2</sup>

Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.<sup>3</sup> *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999).

Under both constitutional provisions, search warrants must be based on probable cause. *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d

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<sup>2</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

<sup>3</sup> Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998) (White I); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

593 (1994). An affidavit in support of a search warrant “must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate.” *State v. Thein*, 138 Wash.2d 133, 140, 977 P.2d 582 (1999). The facts outlined in the affidavit must establish a reasonable inference that evidence of a crime will be found at the place to be searched; that is, there must be a nexus between the item to be seized and the place to be searched. *Young*, at 195; *Thein*, at 140.

Generalizations cannot provide the individualized suspicion required under the Fourth Amendment and Article I, Section 7 of the Washington Constitution. *Thein*, at 147-148. Under *Thein*,

[P]robable cause [must] be based on more than conclusory predictions. Blanket inferences... substitute generalities for the required showing of reasonably specific ‘underlying circumstances.’

*Id.*; see also *State v. Nordlund*, 113 Wash. App. 171, 182-184, 53 P.3d 520 (2002) (“Nor is the [warrant] salvageable by the affidavit’s generalized statements about the habits of sex offenders... These general statements, alone, are insufficient to establish probable cause.”)

A search warrant must also describe the items to be seized with sufficient particularity to limit the executing officers’ discretion to those items for which probable cause exist, and to inform the person whose

property is being searched what items may be seized. *State v. Riley*, 121 Wash.2d 22, 27-29, 846 P.2d 1365 (1993).

The particularity and probable cause requirements are inextricably interwoven. *State v. Perrone*, 119 Wash.2d 538, 545, 834 P.2d 611 (1992). A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to describe the things to be seized with sufficient particularity.<sup>4</sup> *State v. Maddox*, 116 Wash. App. 796, 805, 67 P.3d 1135 (2003) (citing, *inter alia*, *Perrone*, *supra*, and *Riley*, *supra*).

The search warrant in this case was overbroad for several reasons.

- C. The search warrant in this case was overbroad as a matter of law because it failed to specify the crime under investigation and did not limit the officers' discretion in any other way.

The Supreme Court has indicated that a search warrant may include generic lists of items rather than specifying the particular items sought, but only if the officers' discretion is limited by tying the generic lists to the crime under investigation: "A search warrant that fails to specify the crime under investigation without otherwise limiting the items

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<sup>4</sup> One aim of the particularity requirement is to prevent the issuance of warrants based on facts that are "loose, vague, or doubtful." *Perrone*, at 545. The requirement also prevents law enforcement officials from engaging in a "'general, exploratory rummaging in a person's belongings..." *Perrone*, at 545 (citations omitted). Conformity with the rule "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Perrone*, at 546.

that may be seized violates the particularity requirement of the Fourth Amendment.” *Riley*, at 27.

In this case, the search warrant employed general lists of items, but did not specify the crime to be investigated, and thus vested the officers with unfettered discretion in executing the warrant. Ex. 62, Supp. CP. Even assuming that the warrant was valid as to the methamphetamine itself (since the substance is itself contraband and cannot be lawfully possessed), the remainder of the items listed—including “Personal property” and “Cellular telephones and their electronically stored memory” were not themselves of an illegal character.

Because the warrant did not name the crime under investigation, the warrant failed the particularity requirement as a matter of law. *Riley*, at 27. Ms. Newton’s conviction must be reversed. The evidence seized pursuant to the warrant must be suppressed, and the case remanded for a new trial. *Id.*

D. The search warrant was overbroad because it authorized police to search for and seize items protected by the First Amendment that were not described with sufficient particularity and for which the affidavit did not provide probable cause.

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*,

436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)); *Perrone* at 547. In keeping with this principle, the particularity requirement “is to be accorded the most scrupulous exactitude” when the materials to be seized are protected by the First Amendment. *Stanford*, at 485. Furthermore, “the use of a generic term or general description is constitutionally acceptable only when a more particular description of the items to be seized is not available at the time the warrant issues.” *Perrone*, at 547.

In this case, the warrant authorized police to search for and seize

(4) Personal property, including but not limit[ed] to mail, receipts, photographs or identification cards... [and] (6) Cellular telephones and their electronically stored memory...  
Ex. 62, pp. 6-7, Supp. CP.

These items are protected by the First Amendment. Accordingly, the heightened standards outlined above apply. *Stanford*, at 485; *Perrone*, at 547.

The warrant was overbroad with regard to these two categories of items. First, the affidavit acknowledges that the broad categories of personal property sought—“mail, receipts, photographs...”—were not actually evidence of a crime, but were sought instead for other reasons—to show dominion and control over the vehicle. None of the personal

property listed was evidence of wrongdoing, and thus could not be sought or seized as evidence of a crime as permitted by the constitution. Neither the Fourth Amendment nor Article I, Section 7 allow police to search for or seize items that are not themselves contraband or evidence of a crime, no matter how helpful they might be to the government. See, e.g. *United States v. McMurtrey*, \_\_\_ F.3d \_\_\_, \_\_\_ (7<sup>th</sup> Cir. 2013) (probable cause established when a “reasonably prudent person [would] believe that a search will uncover evidence of a crime”) (emphasis added); *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993) (noting that the incriminating character of evidence must be immediately apparent to justify seizure under plain view doctrine).

Second, the affidavit provides no specific information suggesting that any cell phones or personal property in the vehicle—including the iPhone that was in the center console area—had been used in connection with any crime. Instead, the police relied on conclusory predictions and blanket inferences, “substitute[ing] generalities for the required showing of reasonably specific ‘underlying circumstances.’” *Thein*, at 147-148. The affiant’s basis for believing that cell phones and other personal property had been used in criminal activity and would be found in the vehicle consisted solely of statements such as those found on page 4 of the affidavit:

I am aware from training, knowledge, and experience that persons involved with the distribution of drugs often use cellular phones... [and] that text messages are also regularly used to plan and set up drug transactions... I know from my training, knowledge, and experience that persons involved in possession of controlled substances possess items of identification (including but not limited to driver's licenses, rent receipts, bills and address books)... I am aware, based on my training, knowledge, and experience, that individuals involved in criminal activity will at times take photographs or videos of themselves and co-conspirators engaged in criminal activity, such as drug possession, drug use, and drug distribution. These videos and photographs are stored within digital cameras, camcorders, and cellular telephones. Ex. 62, Supp. CP.

Under *Thein*, generalizations and boilerplate of this type is insufficient to establish probable cause. *Id.* Because the affidavit relied entirely on the officer's general knowledge for these items, and because it contained no particularized information relating to Ms. Newton with respect to these items, it was overbroad. *Perrone, supra*; *Maddox, supra*.

Third, the police had information that would have allowed them to provide a narrow particularized description—naming the iPhone they'd observed in the center console—rather than requesting permission to search for and seize all cellular telephones. This failure to use the most “scrupulous exactitude” in describing the iPhone renders the warrant invalid, because the availability of a more particularized description invalidates use of a general description. *Stanford*, at 485; *Perrone*, at 547.

Furthermore, the warrant did not include any language limiting the officers in their search through the “electronically stored memory” of the cell phones they came across. Under these circumstances, officers were permitted to rummage through—and copy—any information, including private texts, emails, photographs, and documents, as well as web browsing history, stored passwords, and so forth, regardless of whether or not they had anything to do with the crimes under investigation. The absence of any limiting language renders the warrant invalid for failure to comply with the particularity requirement. *Riley*, at 27.

E. The search warrant was overbroad because it authorized police to search places in the absence of any indication that evidence of a crime would be contained therein.

A search warrant affidavit must establish probable cause to believe that evidence will be found in the place to be searched. *Young*, at 195; *Thein*, at 140. Here, the warrant authorized a search of locked or closed areas of the car, including the “trunk, engine compartment, glove box and door panels.” *Ex. 62*, Supp. CP.

Nothing in the affidavit established probable cause to believe that any evidence would be found in locked and closed areas of the car. Once the officers seized the container of methamphetamine and anything else discovered in plain view, they had no basis to believe any additional items would be found elsewhere; no particularized information justified entering

the trunk, the glove box, the engine compartment, or the door panels. In fact, the affiant did not even include the kind of generalized statements forbidden under *Theyin* by claiming, for example, that criminals often hide evidence of crime in the door panels of their vehicles. *Ex. 62, Supp. CP.*

Because the warrant was overbroad, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. *Perrone, supra.*

**II. THE COURT’S INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN OF PROOF AND RELIEVED THE PROSECUTION OF ITS BURDEN TO PROVE MS. NEWTON’S MENTAL STATE WITH RESPECT TO THE CHARGE OF POSSESSION WITH INTENT TO DELIVER.**

A. Standard of Review

Constitutional questions are issues of law, reviewed de novo. *McDevitt, at \_\_\_.* Jury instructions are also reviewed de novo. *Anfinson v. FedEx Ground Package Sys., Inc., 174 Wash.2d 851, 860, 281 P.3d 289 (2012).* Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).* A manifest error affecting a constitutional right may be raised for the first time on review.<sup>5</sup> *RAP 2.5(a)(3); Kirwin at 823.*

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<sup>5</sup> The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. *RAP 2.5(a); see Russell, at 122.*

- B. The state was required to prove that Ms. Newton possessed methamphetamine with intent to deliver.

Due process requires the state to prove every element of a criminal offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Reversal is required whenever jury instructions “have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution.” *Francis v. Franklin*, 471 U.S. 307, 326, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

An essential element of the crime charged in this case is the intent to deliver methamphetamine. RCW 69.50.401; see also Instructions Nos. 8, 16, Supp. CP. The prosecution bore the burden of proving not only that Ms. Newton possessed methamphetamine, but also that her possession was specifically “with the intent to deliver.” Instruction No. 16, Supp. CP.

This mental element—intent to deliver—implicitly requires proof of knowledge as a component of intent to deliver. This is so because

[i]t is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly... Without knowledge of the controlled substance, one could not intend to manufacture or deliver that controlled substance.

*State v. Sims*, 119 Wash.2d 138, 142, 829 P.2d 1075 (1992).

As the Supreme Court recognized in *Sims*, a person whose possession is unwitting does not possess with the intent to deliver. The state therefore bears the burden of proving knowing possession, not as a separate element of the offense, but as a necessary part of its proof on the accused person's intent to deliver. See *Sims*, *supra*.

Accordingly, the accused person has no burden to prove unwitting possession where the charge is Possession with Intent to Deliver. *Sims*, at 142. An instruction that obligates the accused person to prove unwitting possession in such a case unconstitutionally shifts the burden of proof.

C. The court's instructions unconstitutionally shifted the burden of proof, and failed to make manifestly clear the state's burden to prove knowledge, a component of the intent to deliver.

In this case, the court instructed the jury on the affirmative defense of unwitting possession.<sup>6</sup> Instruction No. 17(a), Supp. CP. The instruction told jurors that "[t]he burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly." Instruction No. 17(a), Supp. CP.

This instruction unconstitutionally shifted the burden of proof, and conflicted with the Supreme Court's decision in *Sims*, *supra*. Because the

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<sup>6</sup> The instruction was requested by defense counsel, and hence was likely invited error. See *State v. Ellison*, \_\_\_ Wash. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2013). However, the court has discretion to review the error, either under RAP 2.5(a)(3), under *Russell*, *supra*, or in the context of Ms. Newton's ineffective assistance claim, as set forth elsewhere in this brief.

court failed to make manifestly clear the state’s burden to prove knowledge—as a component of the intent to deliver—the instructions violated Ms. Newton’s Fourteenth Amendment right to due process. *Kyllo*, supra; *Francis*, supra. Accordingly, Ms. Newton’s conviction must be reversed and the case remanded for a new trial. *Id.*

**III. MS. NEWTON WAS DENIED HER 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. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

**B. An accused person is constitutionally 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 v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). 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 “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd 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 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.”)

C. If Ms. Newton's suppression arguments are not preserved for review, she was denied the effective assistance of counsel by her attorney's unreasonable failure to file a written motion to suppress.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash. App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel objected to the admission of evidence and argued that the search warrant was overbroad. RP 93, 157. However, because the prosecution provided late discovery and failed to timely notify defense counsel which pieces of evidence seized pursuant to the warrant would be offered at trial, Ms. Newton's lawyer did not have the opportunity to file a motion pursuant to CrR 3.6. Nonetheless, counsel repeatedly asserted that his client was not waiving her rights under that rule. RP 13-24, 33-44, 72-76, 94-100, 153-171. Counsel was thus not pursuing any strategy that involved introduction of the unlawfully seized evidence.

Had counsel included filed a written motion, the trial court would likely have suppressed the evidence: as noted above, the warrant was overbroad for a number of reasons. Suppression of the evidence would

have significantly weakened the prosecution's case, if it did not result in outright dismissal of the prosecution.

Thus, if the suppression issues are not preserved for review, Ms. Newton was denied the effective assistance of counsel. *Saunders*, at 578. Her conviction must be reversed and the case remanded. *Id.*

D. Ms. Newton was denied the effective assistance of counsel when her attorney requested an instruction that erroneously shifted the burden of proof.

To be minimally competent, an attorney must research the relevant law. *Kyllo*, at 862. Familiarity with the law allows counsel to seek appropriate instructions at trial. A failure to propose proper instructions constitutes ineffective assistance of counsel. *State v. Woods*, 138 Wash. App. 191, 156 P.3d 309 (2007); see also *State v. Rodriguez*, 121 Wash. App. 180, 87 P.3d 1201 (2004). Thus, for example, it is ineffective assistance for an attorney to propose an unwitting possession instruction in an unlawful possession of a firearm case. *State v. Carter*, 127 Wash. App. 713, 112 P.3d 561 (2005).

Here, as in *Carter*, defense counsel erroneously proposed—and the court gave—an unwitting possession instruction regarding count one. Instruction No. 17(a), Supp. CP. This instruction shifted the burden of proof, relieving the state of its obligation to prove knowledge, and thus conflicted with the Supreme Court's clear holding that knowledge is a

component of intent to deliver which the state must prove to establish the offense. *Sims*, at 142. A reasonable attorney would not have proposed such an instruction. *Carter*, *supra*. Accordingly, counsel's performance was deficient.

The unwitting possession instruction unconstitutionally shifted the burden of proof and prejudiced Ms. Newton. First, the instruction was inconsistent with the "to convict" instruction, which required the prosecution to prove that Ms. Newton "possessed the substance with the intent to deliver a controlled substance – Methamphetamine..." Instruction No. 16, Supp. CP. The inconsistency resulted from a clear misstatement of the law regarding the burden of proof, and is therefore presumed prejudicial. *Carter*, at 718.

Second, the instruction undermined the very heart of Ms. Newton's defense. In closing, defense counsel repeatedly stressed Ms. Newton's lack of involvement in any drug dealing operation, suggested that she did not possess the tub of methamphetamine, and argued that any possession was unwitting. RP 1037-1057. The erroneous instruction unconstitutionally transferred the burden and required Ms. Newton to prove her innocence.

Under proper instructions, a reasonable doubt about Ms. Newton's knowledge would have required acquittal. The erroneous instruction

allowed the jury to convict even if it believed that Gadberry had placed the drugs in the center console while Ms. Newton was curled in a fetal position, and even if jurors had a reasonable doubt that Ms. Newton knew the methamphetamine was present.

Accordingly, there is a reasonable probability that the erroneous instruction affected the verdict. *Reichenbach, supra*. Because Ms. Newton was denied the effective assistance of counsel, her conviction must be reversed. The case must be remanded to the trial court for a new trial. *Reichenbach, supra*.

**IV. MS. NEWTON WAS DENIED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND TO PRESENT A DEFENSE WHEN THE TRIAL COURT REFUSED TO ADMIT A PORTION OF HER STATEMENT UNDER ER 106 AND THE COMMON LAW RULE OF COMPLETENESS.**

**A. Standard of Review**

Constitutional errors are reviewed de novo. *McDevitt, at \_\_\_\_*.

Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,<sup>7</sup> this discretion is subject to the requirements of the constitution: a court necessarily abuses its discretion by denying an

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<sup>7</sup> A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wash. App. 646, 652, 208 P.3d 1236 (2009).

accused person her or his constitutional rights. See, e.g., *State v. Iniguez*, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009); see also *United States v. Lankford*, 955 F.2d 1545, 1548 (11<sup>th</sup> Cir. 1992). Where the appellant makes a constitutional argument regarding the exclusion of evidence, review is de novo. *Id.*

Constitutional errors are presumed prejudicial, and the prosecution bears of the burden of establishing harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). 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 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury 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 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. Due process guaranteed Ms. Newton a meaningful opportunity to present her defense.

A state may not “deprive any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process)

guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The accused must be able to present her version of the facts, so the fact-finder may decide where the truth lies. *State v. Maupin*, 128 Wash.2d 918, 924, 913 P.2d 808 (1996); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has called this right “a fundamental element of due process of law.” *Washington v. Texas*, at 19.

The right to present a defense includes the right to introduce relevant and admissible evidence. *State v. Lord*, 161 Wash.2d 276, 301, 165 P.3d 1251 (2007). Denial of this right requires reversal unless it can be shown beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wash. App. 404, 410, 88 P.3d 435 (2004). An appellate court will not “tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt.” *State v. Fisher*, 165 Wash.2d 727, 755, 202 P.3d 937 (2009).

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Unless otherwise limited, all relevant evidence is admissible. ER 402. The

threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 669, 230 P.3d 583 (2010).

- C. The court's decision excluding a portion of Ms. Newton's statement to police violated her constitutional right to present a defense.

The common law rule of completeness requires that "when a confession is introduced, the defendant has the right to require that the whole statement be placed before the jury." *State v. Stallworth*, 19 Wash. App. 728, 734-735, 577 P.2d 617 (1978), citing *United States v. Wenzel*, 311 F.2d 164 (4th Cir. 1962); *United States v. Kaminski*, 692 F.2d 505, 522 (8<sup>th</sup> Cir. 1982) (quoting *Wenzel*, supra); see also *Carver v. U.S.*, 164 U.S. 694, 697, 17 S.Ct. 228, 41 L.Ed.602 (1897) and *White v. Territory*, 1 Wash. 279, 284, 24 P. 447 (1890) (*White II*). This is so even where the evidence would have not have been admissible in the first place. *State v. West*, 70 Wash.2d 751, 754-755, 424 P.2d 1014 (1967).

The rule applies to the entire confession (including when the defendant's statement is given piecemeal during a series of interrogations) so long as the proponent specifies testimony which is relevant to the issue and which qualifies or explains portions of the statement(s) already admitted. *U.S. v. King*, 351 F.3d 859, 866 (8<sup>th</sup> Cir. 2003); *U.S. v. Webber*, 255 F.3d 523, 526 (8<sup>th</sup> Cir. 2001).

The common law rule has been partially codified by ER 106:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106.<sup>8</sup> Although ER 106 codifies the common law in part, the common law doctrine of completeness survives the partial codification and continues to have force and effect. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988).

The purpose of ER 106 is “to prevent a party from misleading the jury.” *U.S. v. Moussaoui*, 382 F.3d 453, 481 (4<sup>th</sup> Cir. 2004) (quoting *United States v. Wilkerson*, 84 F.3d 692, 696 (4<sup>th</sup> Cir. 1996)). The rule applies to oral, written, and recorded statements. *State v. Larry*, 108 Wash. App. 894, 909-910, 34 P.3d 241 (2001), review denied, 146 Wash.2d 1022 (2002).

A statement is admissible under ER 106 if it passes either of two tests. Under the first test (the “Alsup” test), a partial statement must be completed where the partial statement distorts the meaning of the whole or excludes information that is substantially exculpatory. *Larry*, at 909 (citing *State v. Alsup*, 75 Wash. App. 128, 133-134, 876 P.2d 935 (1994)).

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<sup>8</sup> The Washington rule is substantially the same as the federal rule. Comment to ER 106.

Under the second test (the “Velasco” test), a statement must also be admitted if it (1) explains other statements already admitted, (2) places the previously admitted portions in context, (3) helps avoid misleading the trier of fact, and (4) helps ensure fair and impartial understanding of the evidence. *Larry*, at 910 (citing *United States v. Velasco*, 953 F.2d 1467 (7<sup>th</sup> Cir. 1992)).

In this case, the prosecution introduced a portion of Ms. Newton’s statement to police; she sought to introduce the balance of the statement. RP 232, 274-284. Her statement should have been admitted under the common law rule of completeness and ER 106. By admitting only a portion of Ms. Newton’s statement, the court left the jury with the impression that her statement to police regarding the loaded syringe in her pocket was her complete statement, and that she didn’t address the large tub of methamphetamine found in the center console.

In fact, she admitted to possessing the syringe while denying possession of the tub. The jury should have been allowed to hear the second portion of her statement. *Stallworth*, *supra*; ER 106. The exclusion of this evidence violated Ms. Newton’s right to present a defense. Accordingly, her conviction for possession with intent must be reversed and the case remanded for a new trial, with instructions to admit

the balance of her statement if any portion is introduced at trial.

Stallworth.

**V. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.**

A. Standard of Review.

Constitutional violations are reviewed de novo. McDevitt, at \_\_\_.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); Kirwin, at 823. Free speech challenges are different from most constitutional challenges to statutes; under the First Amendment, the state bears the burden of justifying a restriction on speech.<sup>9</sup> State v. Immelt, 173 Wash.2d 1, 6, 267 P.3d 305 (2011).

B. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds.

The First Amendment to the U.S. Constitution provides that “Congress shall make no law... abridging the freedom of speech.” U.S. Const. Amend. I. This provision is applicable to the states through the

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<sup>9</sup> Ordinarily, the burden is on the party challenging the statute to show beyond a reasonable doubt that it is unconstitutional. Washington Off Highway Vehicle Alliance v. State, \_\_\_ Wash.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2012).

action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wash.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).<sup>10</sup> A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. *Immelt*, at \_\_\_\_.

Anyone accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Immelt*, at \_\_\_\_.

An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Immelt*, at \_\_\_\_.

In other words, “[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds.” *City of Seattle v. Webster*, 115 Wash.2d 635, 640, 802 P.2d 1333 (1990), cert. denied, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

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 ‘provided this expansive remedy out

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<sup>10</sup> Washington’s constitution gives 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.

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 *Hicks*, at 119); see also *Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3rd Cir. 2006).

Ms. Newton’s jury was instructed on accomplice liability. Instruction No. 12, Supp. CP. Accordingly, Ms. Newton is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of her case. *Hicks*, at 118-119; *Webster*, at 640.

C. The accomplice liability statute is overbroad because it criminalizes pure speech that is not directed at and likely to incite imminent lawless action.

The First Amendment protects speech advocating criminal activity: “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Because of this, speech advocating criminal activity may only be punished if it “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).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech protected by

the First Amendment. Under RCW 9A.08.020, one may be convicted as an accomplice if she, acting “[w]ith knowledge that it will promote or facilitate the commission of the crime... aids or agrees to aid [another] person in planning or committing it.” The statute does not define “aid.” No Washington court has limited the definition of aid to bring it into compliance with the U.S. Supreme Court’s admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) “imminent lawless action.” *Brandenburg* , at 447-449.

Washington courts, including the trial judge here, have adopted a broad definition of aid: “The word ‘aid’ means all assistance whether given by words, acts, encouragement, support, or presence.” See WPIC 10.51; Instruction No. 12, Supp. CP. By defining “aid” to include assistance... given by words... [or] encouragement...”, the instruction criminalizes a vast amount of pure speech protected by the First Amendment, and runs afoul of the U.S. Supreme Court’s decision in *Brandenburg*.

Thus, for example, Washington’s accomplice liability statute would criminalize the speech protected by the U.S. Supreme Court in *Hess v. Indiana*, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (“We’ll take the fucking street later [or ‘again’]”), in *Ashcroft* (virtual child pornography found to encourage actual child pornography), and

Brandenburg itself (speech “advocat(ing) \* \* \* the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform”) (quoting Ohio Rev. Code Ann. s 2923.13). Each of these cases involved words or encouragement made with knowledge that the words or encouragement would promote or facilitate the commission of the crime, yet the Supreme Court found this speech—criminalized by RCW 9A.08.020—to be protected by the First Amendment.

It is possible to construe the accomplice statute in such a way that it does not reach 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. The prevailing construction—as expressed in WPIC 10.51 and adopted by the trial court in Instruction No. 12—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Brandenburg, supra*.

Ms. Newton’s convictions must be reversed and the case remanded for a new trial. *Brandenburg, supra*. Upon retrial, the state may not proceed on any theory of accomplice liability. *Id.*

D. The Coleman and Ferguson courts applied the wrong legal standard in upholding RCW 9A.08.020, and should be reconsidered in light of established U.S. Supreme Court precedent.

The Court of Appeals has upheld Washington's accomplice liability statute. *State v. Coleman*, 155 Wash. App. 951, 231 P.3d 212 (2010), review denied, 170 Wash.2d 1016, 245 P.3d 772 (2011); *State v. Ferguson*, 164 Wash. App. 370, 264 P.3d 575 (2011). In *Coleman*, Division I concluded that the statute's mens rea requirement resulted in a statute that "avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime." *Coleman*, at 960-961 (citations omitted). In *Ferguson*, Division II court adopted the reasoning set forth in *Coleman*. The court's decisions in *Coleman* and *Ferguson* are incorrect for two reasons.

First, Division I's analysis in *Coleman*—that the statute is constitutional because it does not cover "protected speech activities that are not performed in aid of a crime and that only consequentially further the crime"—is severely flawed, because the First Amendment protects much more crime-related speech than the "speech activities" described by the court. *Coleman*, at 960-961. For example, the state cannot criminalize speech that is "nothing more than advocacy of illegal action at some indefinite future time." *Hess*, at 108.

Contrary to Division I's reasoning, speech encouraging criminal activity is protected even if it is performed in aid of a crime and even if it directly furthers the crime, unless it is also "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* at, 447; cf. *Coleman*, at 960-961. Merely examining the mens rea required for conviction is insufficient to save the statute, because a person can engage in criminal advocacy with the intent to further a particular crime and still be protected by the constitution.

Speech that "encourage[s] unlawful acts" is protected, unless it falls within the narrow category outlined by *Brandenburg*. *Ashcroft*, at 253. The state cannot ban all speech made with intent to promote or facilitate the commission of a crime; such speech can only be criminalized if it also meets the *Brandenburg* test. A conviction can only be sustained if the jury is instructed that it must find that the speech was (1) "directed to inciting or producing imminent lawless action..." and (2) "likely to incite or produce such action." *Brandenburg* at 447. The jury was not so instructed in this case. Thus, assuming (as the *Coleman* court claims) that the accomplice liability statute avoids the "protected speech activities" described, such avoidance is not enough to render the statute constitutional, if it also reaches other protected speech.

Second, the Coleman court applied the wrong legal standard in evaluating the statute. The U.S. Supreme Court has drawn “vital distinctions between words and deeds, between ideas and conduct.” Ashcroft, at 253. The accomplice liability statute reaches pure speech: “words” and “encouragement” are sufficient for conviction, if accompanied by the proper mens rea. See WPIC 10.51; Instruction No. 12, Supp. CP. Because the statute reaches pure speech, it cannot be analyzed under the more lenient First Amendment tests for statutes regulating conduct.

But the Coleman court ignored this distinction. Specifically, the Coleman court relied on cases dealing with laws regulating behavior. The court began its analysis by noting that “[a] statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute’s plainly legitimate sweep.” Coleman, at 960 (citing Hicks, at 122 and Webster, at 641.) The court then imported the Supreme Court’s rationale from Webster and applied it to the accomplice liability statute:

We find Coleman's case similar to Webster. Webster was charged under a Seattle ordinance banning intentional obstruction of vehicle or pedestrian traffic. The Washington Supreme Court explained the ordinance was not overbroad because the requirement of criminal intent prevented it from criminalizing

protected speech activity that only consequentially obstructed vehicle or pedestrian traffic... In the same way, the accomplice liability statute Coleman challenges here requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime.

Coleman, at 960-61 (citation omitted). But (as noted) Webster involved the regulation of conduct—obstruction of vehicle or pedestrian traffic—and therefore, the statute could be upheld based on the distinction between “innocent intentional acts which merely consequentially block traffic...” and acts performed with the requisite mens rea. Webster, at 641-642.

No such distinction is available here, because the accomplice liability statute reaches pure speech, unaccompanied by any conduct—i.e. speech that knowingly encourages criminal activity, including speech (words or encouragement) that is not directed at and likely to incite imminent lawless action. See WPIC 10.51; Instruction No. 12, Supp. CP. The First Amendment does not only protect “innocent” speech; it protects free speech, including criminal advocacy directly aimed at encouraging criminal activity, so long as the speech does not fall within the rule set forth in Brandenburg.

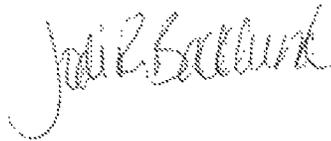
The Coleman court applied the wrong legal standard in upholding the accomplice liability statute. It should have analyzed the statute under Brandenburg instead of the test for conduct set forth in Webster. Accordingly, Coleman and Ferguson should be reconsidered.

**CONCLUSION**

For the foregoing reasons, Ms. Newton's conviction for possession of methamphetamine with intent to deliver must be reversed. Evidence seized pursuant to an overbroad search warrant must be suppressed, and the case must be remanded for a new trial. Ms. Newton may not be tried on a theory of accomplice liability.

Respectfully submitted on January 22, 2013,

**BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Danielle Newton, DOC #790279  
Washington Corrections Center for Women  
9601 Bujacich Rd. NW  
Gig Harbor, WA 98322

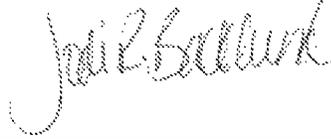
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 January 22, 2013.



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Jodi R. Backlund, WSBA No. 22917  
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# BACKLUND & MISTRY

January 22, 2013 - 12:24 PM

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