

No. 45165-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In Re the Personal Restraint of:

**Raymond Garland,**

Petitioner.

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Pierce County Superior Court Cause No. 04-1-05384-8

The Honorable Judge Thomas J. Felnagle

**Petitioner's Supplemental Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Garland was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel provided deficient performance by failing to communicate a plea offer to Mr. Garland.

**ISSUE 1:** The Sixth Amendment guarantees an accused person the effective assistance of counsel during plea negotiations. Here, counsel failed to communicate a plea offer to Mr. Garland. Was Mr. Garland prejudiced by his attorney's failure to communicate a plea offer made by the prosecuting attorney prior to the third trial?

3. Defense counsel provided deficient performance by adopting a strategy that involved violating her duty of candor to the tribunal and her discovery obligations.
4. Defense counsel provided deficient performance by failing to research relevant law.
5. Mr. Garland was prejudiced by his attorney's deficient performance.

**ISSUE 1:** The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, defense counsel unreasonably adopted a strategy that involved violating her duty of candor to the tribunal and her discovery obligations. Was Mr. Garland denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

6. Mr. Garland was denied his Sixth and Fourteenth Amendment right to the effective assistance of appellate counsel.
7. Mr. Garland was denied his state constitutional right to appeal because appellate counsel provided ineffective assistance.
8. Mr. Garland's appellate counsel provided ineffective assistance by failing to argue that the initial search warrant (designated a "trespass order") was unsupported by probable cause.
9. The police unlawfully conducted a search by spying on Mr. Garland from an area of the curtilage of the home, which was not open to the public.

10. The “trespass order” was executed in violation of Mr. Garland’s right to be free of unreasonable searches and seizures.
11. The “trespass order” was executed in violation of Mr. Garland’s Wash. Const. art. I, § 7 rights.
12. The “trespass order” was not supported by probable cause because the affidavit did not establish a nexus between the place to be searched and evidence of the crime.

**ISSUE 2:** Appellate defense counsel provides ineffective assistance by failing to properly raise and argue meritorious issues. Here, Mr. Garland’s appellate attorney did not raise meritorious challenges to the search warrants in his case. Was Mr. Garland denied his right to appeal and his right to the effective assistance of appellate counsel under the Sixth and Fourteenth Amendments?

**ISSUE 3:** Officers conduct a search of a home by entering curtilage areas of a home that are not impliedly open to the public. Here, two deputies climbed over the fence to the home under cover of darkness and spied on the occupants from the bushes. Did the officers conduct a search of the home under the Fourth Amendment and art. I, § 7?

**ISSUE 4:** Probable cause for a search warrant requires a nexus between the place to be searched and evidence of a crime. Here, the only information in the “trespass order” affidavit linking Mr. Garland to the home to be searched was an informant’s tip that Mr. Garland’s mother was hiding him in an unnamed place. Was the “trespass order” unsupported by probable cause in violation of art. I, § 7 and Mr. Garland’s Fourth and Fourteenth Amendment rights?

13. Mr. Garland’s appellate counsel provided ineffective assistance by failing to argue that the warrant to search the interior of the Graham home was unsupported by probable cause.
14. The warrant to search the Graham house was executed in violation of Mr. Garland’s Fourth Amendment rights.

15. The warrant to search the Graham house was executed in violation of Mr. Garland's art. I, § 7 rights.
16. The warrant to search the Graham house was not supported by probable cause because the affidavit did not establish a nexus between the place to be searched and evidence of the crime.
17. The warrant to search the Graham house cannot be supported by information obtained pursuant to the unconstitutional "trespass order."

**ISSUE 5:** A search warrant cannot be supported by evidence obtained during a prior unconstitutional search. Here, the warrant to search the interior of the Graham house was based in part on information derived from the illegal "trespass order." Does the search warrant affidavit fail to establish probable cause when the unconstitutionally-obtained evidence is stricken?

**ISSUE 6:** A search warrant is not supported by probable cause absent a nexus connecting the place to be searched with evidence of the crime. Here, the only evidence that Mr. Garland lived at the Graham house was an informant's tip that his mother was hiding him at an undisclosed location, and the officers' one-time sighting of him in the home during his mother's birthday party. Did the search of the Graham house violate art. I, § 7 and the Fourth and Fourteenth Amendments because the warrant was not supported by probable cause?

18. Mr. Garland's appellate counsel provided ineffective assistance by failing to challenge the search warrants on the basis of the affiant's reckless material omissions?
19. Mr. Garland's appellate counsel provided ineffective assistance by failing to challenge the search warrants based on lack of probable cause, taking into consideration the detective's reckless and material omissions.
20. The detective recklessly omitted material information regarding a pending Internal Affairs investigation lodged against her by Mr. Garland's mother.

21. The detective recklessly omitted material information that Mr. Garland had phone and utility bills in his name at another residence.
22. The detective recklessly omitted material information that Mr. Garland's car was registered at a different address.
23. The detective recklessly omitted material information that Mr. Garland's mother told the detectives that he did not live with her.
24. The trial court erred by finding that the detective's omissions from the search warrant affidavits were negligent, rather than reckless.

**ISSUE 7:** When an officer recklessly omits material information from a search warrant affidavit, the warrant fails unless it provides probable cause even after the omissions are corrected. Here, the detective left out significant evidence that Mr. Garland did not live at the Graham home, and information of a pending Internal Affairs investigation into her prior misconduct against Mr. Garland's mother. When the detective's reckless material omissions are corrected, is the warrant to search the Graham house unsupported by probable cause?

25. The trial court erroneously admitted irrelevant and prejudicial gang evidence.
26. The erroneous admission of gang evidence violated ER 402, ER 403, and ER 404(b).
27. The erroneous admission of gang evidence resulted in a conviction based in part on propensity evidence.

**ISSUE 8:** Before gang evidence may be admitted against an accused person, the trial court must find that the gang exists, that it qualifies as a criminal gang, and that the accused person is a member. Here, the trial court admitted gang evidence without making the required findings. Did the trial court erroneously admit irrelevant and prejudicial gang evidence that allowed the jury to convict based in part on propensity evidence?

28. The trial court infringed Mr. Garland's right to be present by holding a secret in-camera hearing and sealing the transcript without cause.
29. The trial court violated the constitutional requirement that criminal justice be administered openly and publicly.

**ISSUE 9:** An accused person has a constitutional right to be present at all critical stages. Here, the trial judge held a secret closed-door hearing (and subsequently sealed the transcript) to discuss defense counsel's conflict of interest. Did the trial court violate Mr. Garland's constitutional right to be present?

**ISSUE 10:** Criminal proceedings must be open and public. The trial court held a closed hearing and subsequently sealed the transcript of the hearing. Did the trial court violate the constitutional requirement that criminal justice be administered openly and publicly?

30. Cumulative error denied Mr. Garland a fair trial.

**ISSUE 11:** The combined effect of multiple errors may require reversal even when each error is harmless when considered on its own. Here, defense counsel's unreasonable trial strategy combined with the improper admission of gang evidence and items illegally seized, denying Mr. Garland a fair trial. Does cumulative error require reversal of Mr. Garland's convictions?

31. Inconsistent verdicts and the doctrine of transferred intent violated Mr. Garland's Fourteenth Amendment right to due process.

**ISSUE 12:** Should Mr. Garland's personal restraint petition be granted based on the issues he raised and the arguments he presented therein?

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

Raymond Garland turned 21 on November 11, 2004. RP (9/22/09) 2851. He had dinner out with family, and then went to a bar to celebrate further. RP (10/1/09) 3392-3393. Mr. Garland was in the parking lot with a friend who was smoking. RP (10/1/09) 3397, 3414. A car pulled up and hit a pole. As the driver got out, Mr. Garland made jokes about the person's driving. RP (10/1/09) 3415-3419.

The driver, Keyon Brock, took offense, and the two argued. RP (8/18/09) 939-943. They had not met previously. The two strangers yelled at each other, then gunshots rang out and both ran away. RP (8/16/09) 778-786; RP (8/18/09) 939-943; RP (10/1/09) 3453-3454. Brock was hit, and died inside the bar. RP (8/11/09) 313-340; RP (8/18/09) 944-947. His companion Marcy was also hit and sustained an injured testicle. RP (8/26/09) 1588-1591. Mr. Garland wasn't hit, but he was arrested days later. RP (10/1/09) 3453. The gun was not found.

Pierce County Sheriff detective Deborah Heishman investigated the shooting. She had investigated Mr. Garland for an unrelated case a few months earlier. RP (1/17/07) 15. During the course of that first investigation, Heishman went and spoke with Mr. Garland's mother at her home. RP (1/17/01) 16. Mr. Garland's mother told the detectives that Mr.

Garland did not live with her. RP (1/18/07) 148. She told them that Mr. Garland had phone and utility bills in his name at another address. RP (1/18/07) 148.

During the prior investigation, Mr. Garland's mother filed a complaint with the sheriff's office. She alleged that Heishman had assaulted her.<sup>1</sup> RP (1/17/07) 21. The complaint was investigated by Internal Affairs<sup>2</sup> and Mr. Garland's mother eventually received a settlement of over \$5,000. RP (1/17/07) 21; 1CP<sup>3</sup> 65 Defendant's Motion for Frank's Hearing, p. 3 (filed 1/17/07), Supp CP. Mr. Garland's mother's complaint was pending with Internal Affairs throughout Heishman's investigation into the shooting. RP (1/17/07) 22.

Prior to the shooting, Mr. Garland's mother moved from Tacoma to Graham, WA. RP (1/17/07) 18. Mr. Garland's car remained registered at his Tacoma address. RP (1/17/07) 18.

After the shooting, Heishman did not know where Mr. Garland lived. RP (1/17/07) 32. She wanted to find out whether he lived at the

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<sup>1</sup> At some point, Mr. Garland's mother revoked her consent for the police to enter the house, and an altercation ensued. RP (1/17/07) 16, 21.

<sup>2</sup> Not all complaints against sheriff's deputies are investigated by Internal Affairs. RP (1/18/07) 102. Many are quickly disposed of by Independent Police Review. RP (1/18/07) 102. In the case of the complaint against Heishman, the initial review determined that transfer to Internal Affairs was appropriate. RP (1/18/07) 103.

<sup>3</sup> Two volumes of Clerk's Papers have been filed. 1CP refers to the indexes filed in the direct appeal (Cause No. 40945-3-II). 2CP refers to the index under this cause number.

house in Graham, where his mother had moved. RP (1/17/07) 32.

Heishman did not go to the Graham house to ask Mr. Garland's mother if he lived there. Nor did she observe the residence to see whether Mr.

Garland came and went from the Graham house. RP (1/17/07) 33.

Instead, she asked the court for a "trespass order," which would permit officers to trespass on the property to determine whether or not Mr.

Graham lived there. RP (1/17/07) 32.

Heishman's affidavit for the "trespass order" did not include the information that Mr. Garland's car was registered to the Tacoma address. 1CP 70-78 Defendant's Motion for Frank's Hearing, pp. 8-16 (filed 1/17/07), Supp CP.. Nor did she tell the judge that Mr. Garland had bills in his name at another residence or that his mother had said that he did not live with her. 1CP 70-78 Defendant's Motion for Frank's Hearing, pp. 8-16 (filed 1/17/07), Supp CP. Finally, the affidavit did not disclose the Internal Affairs investigation that resulted from Mr. Garland's mother's complaint. 1CP 70-78 Defendant's Motion for Frank's Hearing, pp. 8-16 (filed 1/17/07), Supp CP..

The affidavit for the "trespass order" outlined information connecting Mr. Garland to the shooting. 1CP 70-78 Defendant's Motion for Frank's Hearing, pp. 8-16 (filed 1/17/07), Supp CP.. The only information linking Mr. Garland to his mother's house in Graham was an

allegation from one of the mother's coworkers that Mr. Garland's mother was hiding him to avoid arrest.<sup>4</sup> The coworker had not indicated where Mr. Garland's mother was allegedly hiding him. 1CP 77 Defendant's Motion for Frank's Hearing, p. 15 (filed 1/17/07), Supp CP..

A judge approved the "trespass order." 1CP 79 Defendant's Motion for Frank's Hearing, p. 17 (filed 1/17/07), Supp CP. That night, two sheriff's deputies climbed the fence at the Graham house and hid in the bushes in the back yard. RP (1/18/07) 162, 175. It was Mr. Garland's mother's birthday. RP (1/18/07) 189. The entire family, including Mr. Garland, was at the house for the celebration. RP (1/18/07) 189. Using binoculars and a spotting scope, the officers saw Mr. Garland in a public area of the house. RP (1/18/07) 162, 174, 176. They reported the sighting back to Heishman. RP (1/18/07) 181.

Based on this information, Heishman obtained a warrant to search the interior of the Graham house for evidence of the shooting, and to arrest Mr. Garland there. 1CP 87 Defendant's Motion for Frank's Hearing, p. 25 (filed 1/17/07), Supp CP.. Her affidavit described the one-time sighting

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<sup>4</sup> The affidavit also provided that Mr. Garland's car was previously impounded from a home on K Street in Tacoma. 1CP 76 Defendant's Motion for Frank's Hearing, p. 14 (filed 1/17/07), Supp CP. The affidavit mentioned Mr. Garland's mother in connection with that impoundment, but does not state whether she lived at the K Street home. 1CP 66 Defendant's Motion for Frank's Hearing, p.3 (filed 1/17/07), Supp CP.. Accordingly, the affidavit does not state whether Mr. Garland had ever lived with his mother as an adult. 1CP 70-78 Defendant's Motion for Frank's Hearing, pp. 8-16 (filed 1/17/07), Supp CP.

from the bushes, but did not contain any additional information connecting Mr. Garland to the Graham house. 1CP 88-93 Defendant's Motion for Frank's Hearing, pp. 26-31 (filed 1/17/07), Supp CP. The second affidavit, likewise, omitted the evidence indicating that Mr. Garland had another residence and that an investigation was pending regarding Heishman's previous conduct toward his mother. 1CP 88-93 Defendant's Motion for Frank's Hearing, pp.26-31 (filed 1/17/07), Supp CP..

Officers executed the warrant on the Graham house, arrested Mr. Garland, and seized photographs that were found hidden in the ceiling of a bedroom.<sup>5</sup> RP (9/9/09) 2077-78. Those photos depicted a shirtless Mr. Garland posing with several firearms.<sup>6</sup> These photos were later admitted at Mr. Garland's trial. RP (9/9/09) 2119-2120.

The state charged Mr. Garland with premeditated murder in the first degree and felony murder in the first degree in the alternative. CP 54-55. The state also charged murder two, assault one, and unlawful possession of a firearm. CP 55-56. The first four charges carried firearm enhancements. CP 54-56.

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<sup>5</sup> Other items were seized but only the photos were admitted at trial.

<sup>6</sup> Mr. Garland testified that they were air guns; however, everyone agreed that the weapons looked like real firearms. RP (10/8/09) 3806.

Mr. Garland moved to suppress the evidence seized during the search of the Graham house. 1CP 63-105 Defendant's Motion for Frank's Hearing (filed 1/17/07), Supp CP. The court held a *Franks*<sup>7</sup> hearing regarding Heishman's omissions from the warrant affidavits. RP (1/17/07); RP (1/18/07).

At the hearing, the alleged informant testified that he had never told Heishman that Mr. Garland's mother was hiding her son. RP (1/18/07) 120.

The court found that Heishman had negligently omitted evidence from the search warrant affidavits. RP (1/18/07) 270. The court provided that Heishman should have included information regarding the Internal Affairs investigation, as well as the material linking Mr. Garland to another address. RP (1/18/07) 260, 265. Even so, the court denied Mr. Garland's motion to suppress. RP (1/18/07) 270.

In two omnibus orders, the general nature of the defense was described as self defense. Omnibus Order (filed 3/25/05), Supp CP.<sup>8</sup> CP 1447. The second omnibus order also listed "General Denial." Neither order indicated that the shooting was an accident. Mr. Garland signed both orders, each of which included the statement "I approve my attorney's

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<sup>7</sup> *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978).

actions as indicated by this Order...”. Omnibus Order (filed 3/25/05), Supp CP. CP 1447.

Trial was held in 2007, but after twelve days of trial, the court declared a mistrial when conflicts and illness reduced the number of jurors to 11. RP (1/29/07) 701-702, 746-756; RP (2/7/07) 1004-1013. Trial began again, and after twenty-two days, another mistrial was declared. RP (9/24/07) 2572. This time, the presiding judge recused herself from future proceedings due to a conflict. RP (9/24/07) 2574. Mr. Garland did not have the opportunity to testify before either mistrial was declared.

The third trial began in July of 2009. RP (7/27/09).

Attorney Barbara Corey represented Mr. Garland through all three trials. In the first trial, she gave her opening statement right after the prosecutor gave his. RP (1/24/07) 182-183; Ex. 354. She told the jury that Mr. Garland brought a gun to the bar. Ex. 354, page 3. In the second trial, she did the same: she gave the opening statement immediately after the state’s, and told the jury Mr. Garland brought a gun. RP (8/21/07) 1265-1266; Ex. 355, page 3.

The state sought sanctions under CrR 4.7, alleging that Corey had not outlined the general nature of the defense. CP 673-676. In response,

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<sup>8</sup> The first order was signed by a different attorney.

Corey indicated that the defense would be the same as at the two prior trials. CP 739-50.

At the start of the third trial, the court judge asked defense counsel about her failure to propose jury instructions:

COURT: I guess what I want to know is, are there going to be any theories that have not been advanced such that the state has to be considering them? I don't want the state to have to go into an opening blind here, or into the trial blind, and one of the ways they can do that is to see what the proposed jury instructions are.

COREY: I don't – I mean, obviously, we are going to ask for lesser or manslaughters and assaults, assuming that can make out a prima facie case, but they know what our defense are. I mean we have tried this case kind of through much of their evidence two times, and I am not aware of anything that would be potentially prejudicial to them at this point by not having my instructions. I'm sure if it later looks like there is, they will let us know, but I honestly don't know of anything. This is a pretty straightforward case.

PROSECUTOR: And just to make sure I'm aware, Ms. Corey has endorsed both identity and self-defense as her defenses, and I'm prepared to give an opening with those in mind. I'd ask the court to inquire if there are any other theories I should be aware of.

COURT: Are there?

COREY: Well, I believe that I've endorsed general denial and/or self-defense.

COURT: General denial means prove it, but it doesn't necessarily answer the question the state raised, which is are there any other theories that are being advanced?

COREY: No.

RP (8/10/09) 133-134.

Ms. Corey reserved her opening statement until after the state had rested its case. RP (8/10/09) 42; RP (9/16/09) 2420; Ex. 357. Then, for the first time, she told the jury that she expected the evidence to show that

Mr. Garland was not armed, and that only Brock was armed. She said that the shooting resulted from the struggle over the gun. Ex. 357, pages 3, 9-11, 15.

Mr. Garland testified at the third trial. RP (10/1/09) 3385-3470; RP (10/8/09) 3798-3487. He told the jury that he did not bring a gun to the bar. RP (10/1/09) 3469. He described a struggle with Brock over a gun that Brock's companion Marcy handed him. RP (10/1/09) 3439-3454. He said that it was during this struggle that the shots were fired. RP (10/1/09) 3448-3452. He said that he left the area not knowing that anyone had been hit, and fearing for his safety. RP (10/1/09) 3452-3462.

When Mr. Garland testified that the shooting was an accident during the struggle for the gun, the state sought to challenge this testimony using prior opening statements made by Ms. Corey. RP (10/8/09) 3798-3799. The trial court judge ruled the impeachment evidence admissible, in part, because the defense team had two years to correct the misimpression left by the opening statements in the first two trials, and they had not done so. RP (10/8/09) 3723-3727, 3747-3748, 3779-3788.

Prior to trial the judge heard a motion relating to the admission of gang evidence. RP (8/3/09) 4-27. The judge excluded all of the evidence the state sought to introduce except for a photograph of Mr. Garland's

allegedly gang-related tattoo and a statement of gang affiliation he made right before the shooting. RP (8/3/09) 4, 25-27.

Throughout the trial, the prosecution introduced allegations of Mr. Garland's possible gang involvement. Marcy said he heard a statement about "the 26<sup>th</sup> street", and also that he had earlier said that Mr. Garland said that he was in the 26<sup>th</sup> street crips. RP (9/15/09) 2295, 2305-2306. A witness from Brock's party said that during the argument, Mr. Garland told him that he (Mr. Garland) was a member of the "3-6 Crips", which he told the jury was a subset within a gang. RP (8/20/09) 1218, 1300-1301. The witness said that Mr. Garland then showed him a tattoo indicating his membership in the gang. RP (8/20/09) 1218. Another in Brock's party reiterated that Mr. Garland said he was a member of the "3-6 Crips". RP (8/24/09) 1443-1446. A close friend of Mr. Garland's testified that Mr. Garland did have a 2 and a 6 tattooed onto his arms. The court admitted photographs showing Mr. Garland's tattooed numbers and accompanying barbed wire. RP (8/25/09) 1692, 1703-1721; RP (10/8/09) 3810-3811.

The jury convicted Mr. Garland of felony murder two and assault two. Mr. Garland waived jury as to the unlawful possession of a gun charge, and the court found him guilty. RP (11/18/09) 4066-4070.

Before sentencing, Mr. Garland expressed dissatisfaction with Ms. Corey. He asked to have a new attorney assigned. RP (6/4/10) 4228-

4244. Ms. Corey indicated that she did not have a conflict, but wished to discuss an ethical matter in chambers. RP (6/4/10) 4229, 4235.

The following week, Mr. Garland repeated his request. This time, Ms. Corey indicated that she *did* have a conflict. RP (6/4/10) 4228-4244. Corey took the position that she could tell the judge and prosecutor her reason for requesting withdrawal, but not Mr. Garland himself. RP (6/8/10) 4248-4261. The court conducted a closed hearing in chambers. When the case came back on the record, the court authorized Corey's withdrawal and ordered the transcript from the hearing sealed.<sup>9</sup> RP (6/8/10) 4254-4261. The court did not enter a written order sealing the transcript, and did not explain the need for the closure.

Mr. Garland appeared at sentencing with a new lawyer. Following the sentencing hearing, Mr. Garland timely appealed. CP 1422-1431.

Mr. Garland's appellate attorney did not raise any suppression issues related to the "trespass order" or the search warrant for Mr. Garland's mother's home. 2CP 176-203. Instead, the primary subject of his direct appeal was the court's decision allowing the state to impeach

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<sup>9</sup> Court-appointed counsel is working to gain access to this sealed record.

him with Corey's prior opening statements. The Court of Appeals upheld the lower court's decision and affirmed his convictions.<sup>10</sup> 2CP 176-203.

In 2013, Mr. Garland timely filed this *pro se* Personal Restraint Petition. One of the issues he raised concerned his attorney's failure to communicate a plea offer.<sup>11</sup> Petition, pp. 15-16. In its response, the state disclosed that a plea offer *had* been made prior to Mr. Garland's third trial. State's Response to Petition, pp. 30-31, Appendix D, Exhibit 1. Mr. Garland would have accepted the plea offer, had his attorney properly communicated it to him.<sup>12</sup> The offer involved fewer convictions and a prison term ten years shorter than the one imposed following trial. State's Response to Petition, Appendix D, Exhibit 1; 1CP 1399-1412 Warrant of Commitment and Judgment and Sentence (filed 7/9/10), Supp CP.

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<sup>10</sup> In the unpublished portion of its decision, the Court of Appeals addressed an issue relating to the trial court's failure to set a date for a hearing on a defense motion to dismiss.

<sup>11</sup> At the time he filed the petition, he mistakenly believed that a plea offer had been made based on references in the transcript to plea offers provided to various state witnesses. Petition, p. 15-16; State's Response to Petition, pp. 29-30.

<sup>12</sup> Mr. Garland's declaration on this issue will be filed shortly.

## ARGUMENT

### I. MR. GARLAND RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

#### A. Standard of Review.

To prevail on a personal restraint petition, the petitioner must establish a constitutional error resulting in actual and substantial prejudice. *In re Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014). Claims of ineffective assistance are reviewed *de novo*. *Id.* A personal restraint petitioner who establishes ineffective assistance under the *Strickland*<sup>13</sup> standard has necessarily met the threshold burden to show the “actual and substantial prejudice” required for collateral relief. *Id.*

#### B. Mr. Garland’s trial attorney unreasonably failed to convey a plea offer that would likely have resulted in dismissal of a firearm enhancement and a sentence ten years less than that imposed after trial.

The state and federal constitutions guarantee an accused person the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Wash. Const. art. I, § 22.

The right to the effective assistance of counsel applies to the plea bargaining stage of a criminal prosecution. *Lafler v. Cooper*, 132 S.Ct.

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<sup>13</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

1376, 1384, 182 L.Ed.2d 398 (2012). Because the vast majority of criminal cases are resolved through guilty pleas, plea bargaining “ ‘is not some adjunct to the criminal justice system; it *is* the criminal justice system.’” *Missouri v. Frye*, --- U.S. ---, \_\_\_, 132 S.Ct. 1399, 1407, 182 L.Ed.2d 379 (2012) (emphasis in original) (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992)). Thus “the negotiation of a plea bargain, rather than the unfolding of a trial, is *almost always* the critical point for a defendant.” *Frye*, 132 S.Ct. at 1407 (emphasis added).

During plea negotiations, defendants are entitled to the effective assistance of competent counsel. *Lafler*, 132 S.Ct. at 1384. Anything less would deprive the defendant of effective representation “at the only stage when legal aid and advice would help him.” *Frye*, 132 S.Ct. at 1407-1408.

Defense counsel has a duty to convey to the defendant any formal plea offers from the prosecution.<sup>14</sup> *Id.* Failure to do so constitutes deficient performance under the *Strickland* standard.

To show prejudice, defendants must demonstrate a reasonable probability that “[1] they would have accepted the earlier plea offer had

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<sup>14</sup> In Washington, defense counsel is required to do so by RPC 1.2(a); RPC 1.4.

they been afforded effective assistance of counsel... [2] the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it... [3] the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.” *Frye*, 132 S.Ct. 1409; *see also Lafler*, 132 S.Ct. at 1385, 1387.

Where the plea offer included elimination of a mandatory sentence enhancement or dismissal of a charge, the prosecutor should be required to “reoffer the plea proposal.” *Lafler*, 132 S.Ct. at 1389. The trial judge “can then exercise its discretion in determining whether to vacate the convictions and resentence [the defendant] pursuant to the plea agreement, to vacate only some of the convictions and resentence [the defendant] accordingly, or to leave the convictions and sentence from trial undisturbed.” *Id.*, at 1391.

Here, defense counsel provided deficient performance under *Frye* and *Lafler* by failing to communicate a plea offer. *See* Petition, pp. 15-16;<sup>15</sup> State’s Response to Petition, pp. 30-31 and Appendix D, Exhibit 1. Respondent provides no direct evidence contradicting Mr. Garland’s assertion that “[t]here was no plea offer ever communicated to me by my

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<sup>15</sup> Mr. Garland will shortly file a declaration with additional details not set forth in his petition.

defense counsel during the entire pendency of the case, from the initial arraignment period, through her withdrawal.” Petition, p. 16.

Instead, Respondent asks the court to draw unwarranted conclusions from defense counsel’s email correspondence with the prosecutor. Respondent argues that the “clear implication” from the email correspondence “is that she was communicating with him about the plea offer,” and that the email “clearly suggests that trial counsel was in communication with Garland regarding a resolution.” State’s Response to Petition, p. 31.

These conclusions are not nearly as “clear” as Respondent suggests. Corey’s initial email to the prosecutor contained her proposal, but did not indicate that she’d first discussed it with her client. State’s Response to Petition, Appendix D, Exhibit 1. The prosecutor’s counter offer was sent at 2:43 p.m., and she replied to it only 30 minutes later. Response to Petition, Appendix D, Exhibit 1. When the prosecutor rejected her last proposal, and reiterated that his “last, best offer” was still available, Corey replied “Happy Turkey Day to you and your family” only ten minutes later. Response to Petition, Appendix D, Exhibit 1. Nothing about this correspondence shows that defense counsel had communicated or intended to communicate with Mr. Garland about pleading guilty.

Furthermore, even if the emails showed that she was “communicating” and was “in communication with Garland regarding a resolution,” such proof would not satisfy the requirements of *Frye* and *Lafler*. Response to Petition, pp. 30-31. Counsel was obligated to convey the specific plea offer made by the prosecutor, even if she didn’t believe she “could sell” the proposal. Response to Petition, Appendix D, Exhibit 1.

Mr. Garland avers that he would have accepted the plea had it been communicated to him.<sup>16</sup>

There is a reasonable probability that the offer would not have been withdrawn, given that the assigned prosecutor made it based on his “own best judgment,” after speaking with “Costello”<sup>17</sup> and getting advice from “other DPAs [who were] wiser and more experienced.” State’s Response to Petition, Appendix D, Exhibit 1. For the same reason, it is likely that the plea agreement would not have been rejected when presented to a judge.

Had defense counsel performed effectively by communicating the plea offer, “the end result of the criminal process would have been more

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<sup>16</sup> Declaration to be filed shortly.

<sup>17</sup> At the time, Mr. Jerry Costello was the lead deputy prosecuting attorney of the homicide unit at the prosecutor’s office. See [www.co.pierce.wa.us/documentcenter/view/23093](http://www.co.pierce.wa.us/documentcenter/view/23093) (accessed 11/5/2014).

favorable.” *Frye*, 132 S.Ct. 1409. First, Mr. Garland would have entered pleas to only two convictions (second-degree murder and second-degree assault) rather than three.<sup>18</sup> Second, he would not have faced the 36-month mandatory consecutive sentencing enhancement attached to the assault charge. Third, his standard sentence range would have been calculated using four points instead of five. Fourth, had the court accepted the state’s low-end recommendation, Mr. Garland would have received 225 months instead of 346 months in prison, a reduction of slightly more than 10 years. State’s Response to Petition, Appendix D, Exhibit 1; *see also* former RCW 9.94A.525 (2004).

Respondent erroneously suggests that Mr. Garland’s evidence, on its own, would be insufficient to determine the issue. State’s Response to Petition, pp. 31-32, citing *State v. James*, 48 Wn. App. 353, 739 P.2d 1161 (1987). This argument is based on a misreading of *dicta* in *James*.

In *James*, the Court of Appeals remanded the case for a reference hearing. *James*, 48 Wn. App. at 359. The superior court heard testimony, but apparently entered incomplete findings: “[T]he reference hearing and the resultant findings did not resolve this court’s major concerns.” *Id.*

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<sup>18</sup> Although not specifically mentioned in the email, the parties clearly contemplated dismissal of count four, the UPF charge. CP 55-56; State’s Response to Petition, Appendix D, Exhibit 1.

The *James* court reversed both defendants' convictions based on counsel's actual conflict of interest. *Id.*, at 364-369. The court noted in passing that it "would have no hesitation" in reversing based on defense counsel's failure to communicate the plea offer if it "were presented with a finding, supported by substantial evidence, that in fact [defense counsel] failed to convey the plea negotiation to his clients." *Id.*, at 364.

Contrary to the state's position, the problem in *James* was not the "after-the-fact, self-serving assertion[s]" of the defendants, or the lack of testimony from defense counsel (although the court was clearly frustrated by the absence of direct evidence from the defendants' attorney). Instead, what prevented the Court of Appeals from ruling on the issue was the superior court's failure to enter adequate findings.<sup>19</sup>

Mr. Garland has met the requirements of *Frye* and *Lafler*. His attorney failed to communicate a plea offer that he would have accepted. There is a reasonable probability that the offer would not have been withdrawn, and that the judge would have accepted it. Had the judge

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<sup>19</sup> In any event, the language relied upon by the state is *dicta*. It cannot control the issue here. See *Gabelein v. Diking Dist. No. 1 of Island Cnty. of State*, 182 Wn. App. 217, 328 P.3d 1008 (2014) ("A statement is dicta when it is not necessary to the court's decision in a case' and as such is not binding authority") (quoting *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914, review denied 178 Wn.2d 1022, 312 P.3d 651 (2013)).

followed the prosecutor's recommendation, Mr. Garland would have received fewer convictions and a lighter sentence.

Accordingly his petition must be granted. The case should be remanded to the trial court with an order requiring the prosecutor to reoffer the plea proposal. *Lafler*, 132 S.Ct. at 1389. The trial judge can then exercise its discretion in accordance with the rules set forth in *Lafler*. *Id.*, at 1391.

In the alternative, the court should remand the case for a reference hearing, with instructions to appoint new trial counsel for Mr. Garland. At the reference hearing, both parties should be given the opportunity to develop the record further. RAP 16.11(b), RAP 16.12, RAP 16.13.

C. Mr. Garland's trial attorney undertook a strategy that was unreasonable *per se* because it involved violating her duty of candor toward the tribunal and violating her discovery obligations.

An appellant claiming ineffective assistance at trial must show (1) that defense counsel's conduct was deficient, falling 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). The strong presumption of adequate performance is overcome when "there is no conceivable legitimate tactic explaining counsel's performance."

*Reichenbach*, 153 Wn.2d at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007).

1. Defense counsel’s performance fell below an objective standard of reasonableness when she violated her duty of candor toward the tribunal and misrepresented the general nature of Mr. Garland’s defense in response to a direct inquiry from the trial court.

Counsel’s duty to zealously represent a client “is limited by an equally solemn duty to comply with the law and standards of professional conduct.” *Nix v. Whiteside*, 475 U.S. 157, 168, 106 S. Ct. 988, 995, 89 L.Ed.2d 123 (1986). A defense attorney’s “breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel;”<sup>20</sup> however, “[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable....” *Strickland*, 466 U.S. at 688.

When ethical standards reflecting prevailing norms of practice “‘speak with one voice’ as to what constitutes reasonable attorney performance, departure from ethical canons and ABA guidelines ‘make[s] out a deprivation of the Sixth Amendment right to counsel.’” *McClure v.*

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<sup>20</sup> *Nix* at 165.

*Thompson*, 323 F.3d 1233, 1242 (9th Cir. 2003) (quoting *Nix*, 475 U.S. at 166).<sup>21</sup>

Washington’s Rules of Professional Conduct impose a duty of candor toward the tribunal. RPC 3.3 provides that an attorney shall not knowingly

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false.

RPC 3.3(a). The duty of an attorney as advocate for a client “is subordinate to [t]he requirements” imposed by RPC 3.3. Comment, RPC 3.3 (citing *State v. Berrysmith*, 87 Wn. App. 268, 944 P.2d 397 (1997), *review denied*, 134 Wn.2d 1008, 954 P.2d 277 (1998)).

Washington is not unique in this regard. Indeed, “for the last seven hundred years, the duty of candor to the tribunal has stood as a lawyer’s *primary obligation*.”<sup>22</sup> Raymond J. McKoski, *Prospective Perjury by A*

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<sup>21</sup> More accurately, such a departure establishes deficient performance; the defendant must still show prejudice to meet the second prong of the *Strickland* test.

<sup>22</sup> By contrast, the ethical duty of client confidentiality has existed for only two hundred years. Since that time, “legal ethicists, ethics codes, courts, and the American Bar

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*Criminal Defendant: It's All About the Lawyer*, 44 Ariz. St. L.J. 1575, 1580 (2012) (emphasis added). Since its origin, counsel's "duty of truthfulness in dealings with the tribunal [have never] been rendered subservient to the competing ethical obligation of client loyalty." *Id.*, at 1582.

This rule is supplemented by rules aimed at preserving the integrity of the profession. Under RPC 8.4(c), an attorney may not engage in conduct "involving dishonesty, fraud, deceit, or misrepresentation." Furthermore, an attorney may not engage in conduct "prejudicial to the administration of justice." RPC 8.4(d).

The Rules of Professional Conduct also require fairness to opposing counsel. RPC 3.4. Under this provision, a lawyer may not "knowingly disobey an obligation under the rules of a tribunal."<sup>23</sup> RPC 3.4(c). Nor may a lawyer "fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." RPC 3.4(d). In trial, counsel may not "allude to any matter...that will not be supported by admissible evidence." RPC 3.4(3).

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Association (ABA) have agreed that candor trumps client loyalty and confidentiality" when a client plans to lie in court. McKoski, 44 Ariz. St. L.J. at 1580.

<sup>23</sup> There is an exception for "an open refusal based on an assertion that no valid obligation exists." RPC 3.4(c).

One of the “rules of a tribunal” referred to in RPC 3.4(c) is CrR 4.7, which governs discovery in a criminal trial. Subject to constitutional limitations, an accused person may be required to “state the general nature of the defense.” CrR 4.7(b); *see also* CrR 4.5. Requiring such disclosures does not violate due process or the privilege against self-incrimination because the information

must ultimately come to light should the defendant choose to proceed with a defense. The rules simply ‘accelerate the timing of his disclosure.’ The purpose of the rules is to prevent last-minute surprise with its trial disruption and continuances...

*State v. Nelson*, 14 Wn. App. 658, 664, 545 P.2d 36 (1975).<sup>24</sup> Failure to state the general nature of the defense may result in a finding of contempt and confinement in jail. *Id.*, at 667.

Here, the court entered two omnibus orders in which the general nature of the defense was described as self defense.<sup>25</sup> Although the second order also listed “General Denial,” neither order indicated that the shooting was an accident. Mr. Garland also signed both orders, each of which included the statement “I approve my attorney’s actions as indicated by this Order...” Omnibus Order (filed 3/25/05), Supp CP. During each of the first two trials, defense counsel outlined a self-defense

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<sup>24</sup> Of course, a court may not order disclosure of evidence “from the lips of the accused.” *State v. Johnston*, 27 Wn. App. 73, 76-77, 615 P.2d 534 (1980).

case in her opening statements. She indicated at both trials that Mr. Garland had his own firearm, which he drew and fired. Ex. 354, 355.

Given this history, defense counsel should not have said “No” when the court asked two direct questions about whether she would be presenting any “new theories” prior to the start of evidence in the third trial. RP (8/10/09) 133-134. Given her answer and her decision to reserve opening, it is apparent that counsel hoped to conceal her change in strategy until the last possible moment.

Instead of responding “No,” defense counsel should either have notified the court and the prosecutor of the “accident” defense, or declined to answer and cited authority for her refusal. *See* RPC 3.4(c). Ethical standards and prevailing norms of practice “speak with one voice” in this regard. *Nix*, 475 U.S. at 166. Defense counsel violated her duty of candor toward the tribunal when she responded untruthfully to the trial judge’s direct questions. RPC 3.3(a)(1).

Because the duty of candor toward the tribunal is an attorney’s primary obligation and has been so for seven-hundred years,<sup>26</sup> defense counsel’s blatant violation of this ethical guideline cannot be a reasonable trial strategy. If defense counsel felt the court was asking her to disclose

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<sup>25</sup> The first order was signed by a different attorney.

privileged information, she should have objected and made “an open refusal based on an assertion that no valid obligation exists.” RPC 3.4(c). She did not have the option of responding untruthfully. RPC 3.3.

Her statement also violated a number of other ethical rules. Specifically, by answering “No,” she made a statement “involving dishonesty... or misrepresentation,” (RPC 8.4(c)), and arguably engaged in conduct “prejudicial to the administration of justice” under RPC 8.4(d). In addition, she violated her CrR 4.7 obligation to “state the general nature of the defense;”<sup>27</sup> as a result of this violation, she “knowingly disobey[ed] an obligation under the rules of a tribunal” (RPC 3.4(c)) and “fail[ed] to make reasonably diligent effort to comply with a legally proper discovery request...” RPC 3.4(d).

Her violation of CrR 4.7 and the other ethical rules provide additional confirmation that her strategy was unreasonable. The ethics rules and CrR 4.7 “are guides to determining what is reasonable.” *Strickland*, 466 U.S. at 688. A reasonable trial strategy cannot be premised upon a violation of a discovery obligation and multiple ethical rules.

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<sup>26</sup> McKoski, 44 Ariz. St. L.J. at 1580.

<sup>27</sup> CrR 4.7(b).

Defense counsel's overall strategy also raises other ethical problems. In trial, counsel may not "allude to any matter...that will not be supported by admissible evidence." RPC 3.4(3). Furthermore, when counsel discovers that a prior "statement of law or fact to a tribunal" is false, she must "correct [the] false statement of material fact or law previously made to the tribunal." RPC 3.3(a)(1). This duty continues "to the conclusion of the proceeding." RPC 3.3(b).

It is unclear that defense counsel had any admissible evidence supporting her theory of the case as expressed in her first two opening statements.<sup>28</sup> If she did not, her opening statements violated RPC 3.4(3). If she *did* have admissible evidence (in the form of testimony from her client and from Mr. Behe), it would likely have been perjured testimony, in light of their testimony at the third trial.<sup>29</sup> RP (8/19/09) 1128-1176; RP (10/1/09) 3385-3470. Once she realized that her original opening statements were untrue, counsel's duty of candor toward the tribunal required her to correct her "false statement[s] of material fact... previously made to the tribunal." RPC 3.3(a)(1).

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<sup>28</sup> Counsel's cross-examination of state witnesses did not reveal any basis.

<sup>29</sup> If the testimony she intended to present at the first two trials was truthful, then Mr. Behe and Mr. Garland testified falsely at the third trial.

For all these reasons, defense counsel's decision to answer untruthfully was an unreasonable implementation of her strategy. Even if the trial judge had no basis for his questions, she could not mislead the court (and opposing counsel) through a false statement. By choosing to provide a false answer, and failing to correct her false statement, defense counsel violated RPC 3.3, CrR 4.7, and several other ethical rules. Accordingly, defense counsel's performance was deficient.

2. Defense counsel's performance fell below an objective standard of reasonableness when she failed to research the law regarding impeachment of an accused person with an attorney's opening statement.

An attorney has "the duty to research the relevant law." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). An unreasonable failure to do so constitutes deficient performance. *Id.*, at 868.

It is well-established that an accused person may be impeached with prior statements made by defense counsel. *State v. Rivers*, 129 Wn.2d 697, 708-09, 921 P.2d 495 (1996). In *Rivers*, the Supreme Court upheld a trial court decision allowing the prosecution to impeach the defendant with his attorney's opening statement.<sup>30</sup> *Id.* Washington courts have also upheld the admission of other kinds of statements made by counsel earlier

in the proceedings. *State v. Dault*, 19 Wn. App. 709, 717-18, 578 P.2d 43 (1978); *State v. Acosta*, 34 Wn. App. 387, 391-92, 661 P.2d 602 (1983) *reversed on other grounds at* 101 Wn. 2d 612, 683 P.2d 1069 (1984).

Cases from other jurisdictions have applied this general rule to statements counsel made during a prior trial. *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984); *see also United States v. Pursley*, 577 F.3d 1204 (10th Cir. 2009) (discussing admission of counsel's opening statement from another trial involving the same defendant); *United States v. Salerno*, 937 F.2d 797, 812 (2d Cir.) *opinion modified on rehearing on other grounds*, 952 F.2d 623 (2d Cir. 1991) *amended*, 952 F.2d 624 (2d Cir. 1991) *reversed on other grounds*, 505 U.S. 317, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992) (applying rule to prosecutor's statements from prior trial) *Hoover v. State*, 552 So. 2d 834, 840 (Miss. 1989) (applying rule to prosecutor's statements from prior trial of codefendant).

In *Acosta*, the court specifically noted that counsel's prior representations are admissible as prior inconsistent statements, at least when "there had been a change in the plan of defense after the

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<sup>30</sup> An attorney's statement will not qualify as an admission if the attorney "is pleading alternatively or inconsistently on the client's behalf." *State v. Williams*, 79 Wn. App. 21, 28, 902 P.2d 1258 (1995), *amended* (Sept. 26, 1995).

representations were made but the defense had not notified the court or counsel.” *Acosta*, 34 Wn. App. at 391-392.

The record here shows that defense counsel was caught off guard and quite surprised when the prosecutor sought to impeach Mr. Garland with her prior statements. RP (9/23/09) 3032-3036; RP (10/8/09) 3718-3722, 3727-3731, 3744. Even after she’d had a chance to do research she characterized the court’s decision as a “surprise ruling.” RP (10/8/09) 3744. Until the prosecutor brought up the issue, defense counsel had not contemplated the possibility that her prior opening statements would be used to impeach Mr. Garland. RP (10/8/09) 3727-3744.

Her ignorance of the law on this point constituted deficient performance. It fell below an objective standard of reasonableness. *Reichenbach*, 153 Wn.2d at 130. Before attempting to conceal a change in the general nature of the defense, defense counsel should have known that her prior opening statements could be used in this way. Without such knowledge, her decisions to change the defense case and to mislead the court and the prosecutor were unreasonable.

3. Mr. Garland was prejudiced by his attorney’s unreasonable trial strategy and failure to research applicable law.

When a petitioner has shown deficient performance, the court must reverse if there is a reasonable possibility that the outcome of the

proceeding would have differed had counsel performed adequately. *Reichenbach*, 153 Wn.2d at 130. Here, there is such a reasonable possibility.

If defense counsel had performed adequately, the trial court would have ruled in Mr. Garland's favor on the impeachment issue. A trial court has broad discretion when ruling on the admission of evidence. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). As long as the court's decision rests on a reasonable application of the correct legal standard to facts in the record, such a decision will not be disturbed on appeal. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009).

Here, the court's decision permitting impeachment with counsel's opening statements was not a foregone conclusion. Had counsel responded honestly (or argued a right not to respond) to the judge's questions at the start of trial, the court may well have exercised its discretion to exclude the impeachment evidence. See RP (10/8/09) 3724-3727, 3745, 3748, 3779-3783.

After counsel's opening statement, the judge admonished that she "needed to be more up front..." RP (9/29/09) 3123. Furthermore, the judge's primary concern in ruling on the motion was "the fairness and the integrity of [the] whole system." RP (10/8/09) 3725. This can also be

seen from the court's comments during argument on a motion to reconsider:

You can't *mislead the State*, can you? You can't *lead them down one path* and say, "Oh, aha, now it's really different than what I said." Maybe you don't have an obligation to come forward initially—and I don't even agree with that proposition—but you certainly must have an obligation not to speak one thing *in an open courtroom setting* and then turn around and proffer something completely different the next time...It's not fair... *You've got an obligation to be fair... To be truthful.*  
RP (10/8/09) 3782-83 (emphasis added).

The court's emphasis on fairness and truthfulness shows that the trial judge was concerned about the effect of counsel's tactics on the state's ability to receive a fair trial.

Those concerns would have been alleviated had counsel answered forthrightly when asked about new defenses. The questions were posed by the judge prior to the start of evidence, at a time when the state could still change the way it presented its case. RP (8/10/09) 133-134. An honest answer at that time would have resulted in a different ruling.

Alternatively, the judge might have ruled in the same manner, giving counsel early warning about what was to come. Counsel might well have presented Mr. Garland's defense differently—for example, by advising him not to testify. Absent his testimony, the prosecution would not have been able to use the prior statements for impeachment. *See State v. Johnson*, 90 Wn. App. 54, 64, 950 P.2d 981 (1998). But counsel could

not give this advice, because the court's ruling did not come until midway through Mr. Garland's testimony. RP (10/8/09) 3785.

Mr. Garland's credibility was undermined by the impeachment. He emphatically committed himself to the single-gun theory, asserting that the shooting was an accident that occurred during a struggle. RP (10/1/09) 3469-3470. Having committed himself, he then had to admit that he was twice present in court when his attorney set forth the two-gun/self-defense theory. RP (10/8/09) 3798-3799.

Absent the impeachment, there is a reasonable possibility that at least one juror would have had a reasonable doubt as to Mr. Garland's guilt. *Reichenbach*, 153 Wn.2d at 130. Accordingly, Mr. Garland was denied the effective assistance of counsel. *Id.*

**II. MR. GARLAND'S APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO RAISE MERITORIOUS CLAIMS REGARDING THE SEARCH WARRANTS.**

Due process and the right to counsel guarantee the effective assistance of appellate counsel. *In re Pers. Restraint Petition of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004) (citing *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)). Furthermore, Washington's constitution specifically includes a constitutional right to appeal. Art. I, § 22; *State v. Chetty*, 167 Wn. App. 432, 438, 272 P.3d 918 (2012). Appellate counsel provides ineffective assistance in a criminal

appeal by failing to raise meritorious legal issues on direct review. *In re Morris*, 176 Wn.2d 157, 165, 288 P.3d 1140 (2012).<sup>31</sup>

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>32</sup> Similarly, art. I, § 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. art. I, § 7. Art. I, § 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.<sup>33</sup> *State v. Meneese*, 174 Wn.2d 937, 946, 282 P.3d 83 (2012). Constitutional protections of privacy are strongest in the home. *State v. Ruem*, 179 Wn.2d 195, 200, 313 P.3d 1156 (2013).

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<sup>31</sup> The standard for ineffective assistance of appellate counsel is the same as that for trial counsel: reversal is required if counsel’s performance was deficient and the accused was prejudiced. *Morris*, 176 Wn.2d at 166.

<sup>32</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>33</sup> Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to art. I, § 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998) (White I); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Under both constitutional provisions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). 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 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause “requires more than suspicion or conjecture. It requires facts and circumstances that would convince a reasonably cautious person.” *Ruem*, 179 Wn.2d at 202.

Probable cause for a search warrant requires a nexus between criminal activity, the item to be seized, and the place to be searched. *Thein*, 138 Wn.2d at 140. A warrant is not supported by probable cause absent sufficient factual basis to conclude that evidence of a crime will be found in the place to be searched. *Id.* at 147.

A. Appellate counsel should have raised on appeal the suppression issue relating to the “trespass order,” which was a search warrant unsupported by probable cause.

Police conduct a search when they enter curtilage areas of a home that are not impliedly open to the public. *State v. Ross*, 141 Wn.2d 304, 314, 4 P.3d 130 (2000). In *Ross*, the officers conducted a search by furtively approaching a home’s garage, late at night, and without any attempt to contact the residents. *Id.*

Here, the officers spied on the Graham house after climbing over a fence under cover of darkness and hiding in the bushes in the backyard. RP (1/18/07) 162, 174-76. The officers conducted a search under the state and federal constitutions. *Ross*, 141 Wn.2d at 314. Accordingly, the “trespass order” is subject to the same scrutiny as any other search warrant.

But the “trespass order” was not supported by probable cause to believe that evidence of a crime would be found at the place searched. The only information in the affidavit connecting Mr. Garland to the Graham house was an informant’s allegation that Mr. Garland’s mother was hiding her son in an undisclosed location. The affiant did not claim to have any evidence that Mr. Garland’s mother was hiding him at her own house. 1CP 77 Defendant’s Motion for Frank’s Hearing, p. 15 (filed 1/17/07), Supp CP.

Indeed, the purpose of the “trespass order” was to attempt to collect the additional information necessary to obtain a warrant to search the home. RP (1/17/07) 32. But the “trespass order” was a warrant to search the home. *See Ross*, 141 Wn.2d at 314. If the officers did not have enough evidence to search the home, they did not have enough evidence to climb over the fence and spy on the home from the bushes either. There was no nexus between the allegations against Mr. Garland and the Graham

house. The “trespass order” fails for lack of probable cause. *Thein*, 138 Wn.2d at 140.

Mr. Garland’s appellate attorney provided deficient performance by failing to argue on direct appeal that the “trespass order” was not supported by probable cause. *Morris*, 176 Wn.2d at 165. The order’s constitutional infirmities are conspicuous in the record. Failure to raise the issue on appeal fell below an objective standard of reasonableness. *Id.* at 167.

Mr. Garland’s appellate counsel provided ineffective assistance by failing to challenge the “trespass order.” The order was a search warrant, and was not supported by probable cause. *Morris*, 176 Wn.2d 166. Mr. Garland’s petition must be granted. *Id.* His convictions must be reversed and the case remanded for a new trial.

B. Appellate counsel should have raised on appeal the constitutionality of the warrant to search the Graham house, which was based on information unconstitutionally obtained.

A search warrant cannot be supported by information obtained pursuant to a prior unconstitutional search. *Ross*, 141 Wn.2d at 311-12. When assessing the sufficiency of a search warrant affidavit, the court must excise any evidence gathered during a previous illegal search. *Id.* at 314-15. The subsequent warrant can only stand if the remaining information is adequate to provide probable cause. *State v. Ollivier*, 178

Wn.2d 813, 847 n. 14, 312 P.3d 1 (2013) *cert. denied*, No. 13-10090, 2014 WL 1906694 (U.S. Oct. 6, 2014).

Here, the affidavit in support of the warrant to search the interior of the Graham house mirrored that supporting the “trespass order.” The only additional fact was that officers had seen Mr. Garland inside the home during a birthday celebration for his mother. This information stemmed from the incursion onto the property pursuant to the “trespass order.” 1CP 88-93 Defendant’s Motion for Frank’s Hearing, pp. 26-31 (filed 1/17/07), Supp CP. Because the officers hiding in the bushes were executing a warrant unsupported by probable cause, the information they acquired could not lawfully be used to support the subsequent search warrant. *Ross*, 141 Wn.2d at 311-12.

Once that unconstitutionally-obtained information is excised, the second affidavit suffers from the same infirmities as the first, outlined above. The affiant’s speculation that Mr. Garland lived in Graham was based only on an informant’s allegation that Mr. Garland’s mother was hiding him at an undisclosed location. 1CP 88-93 Defendant’s Motion for Frank’s Hearing, pp. 26-31 (filed 1/17/07), Supp CP. Such conjecture is insufficient to establish a nexus between the criminal activity and the place to be searched. *Thein*, 138 Wn.2d at 140; *Ruem*, 179 Wn.2d at 202.

Accordingly the warrant to search the interior of the Graham house fails for lack of probable cause.<sup>34</sup> *Thein*, 138 Wn.2d at 140.

Defense counsel provided ineffective assistance by failing to argue on direct appeal that the search warrant was not supported by probable cause. *Morris*, 176 Wn.2d 166. The infirmities in the affidavits are apparent on their face. Furthermore, trial counsel actually raised and litigated the issue. Appellate counsel's failure to raise the issue fell below an objective standard of reasonableness. *Id.* at 167.

C. Appellate counsel should have raised on appeal Heishman's reckless omission of material facts from each affidavit.

A search warrant may be invalidated if it is supported by an affidavit containing material omissions made with reckless disregard for the truth. *Ollivier*, 178 Wn.2d at 847. Once the accused establishes that the affiant made the omissions, the eliminated information must be added to the affidavit for subsequent analysis. *Id.* If the modified affidavit fails to support a finding of probable cause, the warrant is void and any evidence obtained must be suppressed. *Id.*

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<sup>34</sup> Indeed, even if the officer's one-time sighting of Mr. Garland inside the house is not removed, the affidavit still lacks probable cause. An informant's claim that Mr. Garland's mother was hiding him in an unnamed location and the officers' one-time sighting of him in the house during a family function is insufficient to establish a nexus between the Graham house and evidence of the crime.

An affiant's material omissions are reckless if s/he entertained serious doubts about the veracity of the evidence provided to the magistrate. *State v. Chenoweth*, 160 Wn.2d 454, 479, 158 P.3d 595 (2007). A reviewing court can infer "serious doubts" if there were obvious reasons to doubt the accuracy of information in the affidavit. *Id.*

Here, both warrants to search the Graham house are invalid because Heishman recklessly omitted information material to whether Mr. Garland lived at the house. Heishman withheld evidence from the magistrate that (1) Mr. Garland's car was registered at another address, (2) Mr. Garland's mother had previously told the police that Mr. Garland did not live with her, (3) Mr. Garland had phone and utility bills in his name at another residence, and (4) Internal Affairs was investigating a complaint against Heishman made by Mr. Garland's mother. 1CP 70-83 Defendant's Motion for Frank's Hearing, pp. 8-21 (filed 1/17/07), Supp CP.; RP (1/18/07) 260, 265.

Heishman's omissions were material because they were directly relevant to whether a nexus existed between the Graham house and evidence of the crime. The pending complaint was also relevant to Heishman's credibility and bias.

The omissions from the affidavits were reckless. There were serious reasons to doubt the accuracy of the allegation that Mr. Garland

lived at the Graham house. *Chenoweth*, 160 Wn.2d at 479. As outlined above, the allegation of a nexus between the Graham house and evidence of a crime already rested on shaky ground.<sup>35</sup> There was reason to disbelieve that Mr. Garland lived at the house, based on the information Heishman possessed. Accordingly, a court could infer that Heishman harbored “serious doubts.” *Id.* The trial court erred by finding that Heishman’s omissions were merely negligent. *Id.*, RP (1/18/07) 270.

Once the omitted information is included in the warrant affidavits, the evidence regarding the Graham house boils down to the following: an informant said that Mr. Garland’s mother was hiding him at an unnamed location and the police saw him at the house during a party, but Mr. Garland’s mother said that he did not live with her and he had his car registered and bills in his name at other addresses. When considered as a whole, the affidavit combined with the recklessly omitted information is insufficient to establish a nexus between the Graham house and evidence of a crime. Any tenuous connection is further undermined by the pending Internal Affairs investigation. Accordingly, the warrant is not supported by probable cause. *Thein*, 138 Wn.2d at 140.

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<sup>35</sup> Indeed, as argued above, the warrants were unsupported by probable cause even before the omissions are taken into account. Mr. Garland’s argument about Heishman’s material and reckless omissions is presented in the alternative.

Mr. Garland’s counsel provided deficient performance by neglecting to raise this issue on direct appeal. *Morris*, 176 Wn.2d 166. All of the necessary information was set forth in trial counsel’s briefing and the evidence at the *Franks* hearing. Appellate counsel should have known to raise the issue. *Id.* at 167. Failure to raise the argument fell below an objective standard of reasonableness. *Id.*

D. The unlawfully seized evidence was not admissible as impeachment evidence.

1. Under the state constitution, there is no “impeachment exception” to the exclusionary rule.

Art. I, § 7 requires exclusion of evidence unlawfully obtained.

*State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (White II). The provision’s language mandates “that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” *Id.* Our “constitutionally mandated exclusionary rule ‘saves article 1, section 7 from becoming a meaningless promise.’” *State v. Ladson*, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999).<sup>36</sup> It “provides a remedy for the citizen in question *and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence.*” *Ladson*,

138 Wn.2d at 359-360 (emphasis added); *see also State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009).

Washington courts have consistently “recognized that ‘whenever the right is unreasonably violated, the remedy must follow.’” *Winterstein*, 167 Wn.2d at 632 (quoting *White II*, 97 Wn.2d at 110). Thus “violation of a constitutional immunity automatically implies exclusion of the evidence seized.” *State v. Boland*, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990). The rule is “nearly categorical.” *Winterstein*, 167 Wn.2d at 636.

The Supreme Court has never recognized an “impeachment exception” to the exclusionary rule under art. I, § 7. Nor has any Court of Appeals decision allowed the admission of illegally seized physical evidence for impeachment purposes.<sup>37</sup> Without citation to authority, Respondent suggests that physical evidence may be admitted for impeachment purposes even if unlawfully seized. State’s Response to Personal Restraint Petition, pp. 40-41. This is incorrect. Art. I, § 7 does not permit the use of illegally obtained evidence for any purpose,

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<sup>36</sup> Quoting Sanford E. Pitler, *The Origin and Development of Washington’s Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L.Rev. 459, 508 (1986).

<sup>37</sup> The Court of Appeals has upheld the use of a defendant’s prior statements that were obtained following an unlawful seizure. *State v. Greve*, 67 Wn. App. 166, 173, 834 P.2d 656 (1992). Although the *Greve* court purported to analyze the issue under art. I, § 7, it relied on cases applying the federal exclusionary rule. *Greve*’s rule regarding a defendant’s prior statements should not apply to this case.

including impeachment. Decades of Supreme Court precedent contradict the state's unsupported argument. Respondent's suggestion that an evidentiary ruling could "supersede[ ] any ruling on the legality of the search" would expose the judiciary to the taint of illegally obtained evidence.

The evidence should not have been admitted for impeachment.

2. The federal exclusionary rule prohibited admission of the unlawfully seized evidence for impeachment of Lachapelle.

Under the Fourth Amendment, evidence that is otherwise inadmissible can be used to impeach a false statement by the accused.

*United States v. Havens*, 446 U.S. 620, 627-28, 100 S.Ct. 1912, 64

L.Ed.2d 559 (1980).<sup>38</sup> The rule prevents an accused person from taking advantage of a suppression order to commit perjury at trial. *Id.*, at 626.<sup>39</sup>

The exception to the federal exclusionary rule applies only to impeachment of the defendant. *James v. Illinois*, 493 U.S. 307, 314, 110

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<sup>38</sup> See also *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954) (accused's testimony that he had never possessed drugs permitted impeachment with unlawfully seized evidence of prior drug possession). The rule has also been applied to voluntary statements obtained in violation of the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination. *Kansas v. Ventris*, 556 U.S. 586, 129 S.Ct. 1841, 173 L.Ed.2d 801 (2009); *Oregon v. Hass*, 420 U.S. 714, 724, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975).

<sup>39</sup> The Fourth Amendment permits this result because the federal exclusionary rule is intended to deter police misconduct. *Chenoweth*, 160 Wn.2d at 472 n. 14. It applies only when the benefits of its deterrent effect outweigh the cost to society. *Id.*; see e.g. *United States v. Leon*, 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

S.Ct. 648, 107 L.Ed.2d 676 (1990). The Supreme Court has specifically declined to extend the exception to cover other defense witnesses, finding that such an expansion “would frustrate rather than further the purposes underlying the exclusionary rule.” *Id.*

Here, though, the photographs were introduced not to impeach Mr. Garland, but to impeach a state witness (Lachapelle). RP (8/26/09) 1626-28; 1667-1683; RP (9/9/09) 2077-2113, 2129-2138. This is prohibited under *James*. The state cites no authority suggesting otherwise. State’s Response to Petition, pp. 40-41. Likewise, the state cites no authority for its argument that the unlawful seizure was “superseded” by the trial court’s ruling admitting the photos for impeachment purposes. State’s Response to Personal Restraint Petition, pp. 40-41. Where no authority is cited, counsel is presumed to have found none after diligent search. *In re Griffin*, 181 Wn. App. 99, 107, 325 P.3d 322 (2014).

The unlawfully seized evidence could not legitimately have been introduced to impeach Lachapelle.<sup>40</sup> *James*, 493 U.S. at 314. Mr.

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<sup>40</sup> Nor could the photos be introduced as a general attack on an impression given by Mr. Garland. Only evidence that directly contradicts a specific statement is admissible to prevent perjury. *See e.g. Havens*, 446 U.S. at 621-623; *Walder*, 347 U.S. at 62-64. The federal impeachment exception should not be expanded to allow use of unlawfully-obtained evidence that generally contradicts the flavor and tone of the accused’s testimony. Such an expansion would completely subsume the exclusionary rule whenever the accused exercises the right to testify at trial. The exception would swallow the exclusionary rule, because the accused will generally assert innocence, while the suppressed evidence will generally be consistent with guilt.

Garland's claim of ineffective appellate counsel cannot be defeated by this spurious argument. *Id.*

E. Mr. Garland was prejudiced by appellate counsel's deficient performance.

Appellate counsel should have challenged the "trespass order" and the subsequent search warrant. Neither was supported by probable cause. Had appellate counsel properly raised these issues, there is a reasonable probability that the Court of Appeals would have reversed Mr. Garland's convictions and ordered the evidence suppressed.

The prosecutor argued vigorously for introduction of the evidence, and relied on it at trial. RP (10/8/09) 3806-3807; RP (8/26/09) 1667-1683; RP (9/9/09) 2077-2129. The court admitted the evidence "as impeachment." RP (9/9/09) 2109. The photographs showed Mr. Garland holding what looked very much like a real gun. RP (10/8/09) 3806-3807. The judge described the photographs as an "ominous overlay," contradicting Mr. Garland's "Brady Bunch" image. RP (10/8/09) 3764.

The evidence suggested to the jury that Mr. Garland held himself out as a gang member, contradicting his earlier testimony. RP (8/20/09) 1218, 1300-1301; RP (9/15/09) 2205. In addition it allowed the prosecutor to point out that Mr. Garland had developed these photographs after the shooting. RP (10/8/09) 3807.

Appellate counsel's deficient performance affected the outcome of Mr. Garland's case. *Morris*, 176 Wn.2d 166. Mr. Garland's appellate attorney provided ineffective assistance. *Id.* Mr. Garland's petition must be granted. *Id.*

**III. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL GANG EVIDENCE.**

A. Standard of Review

To prevail on a collateral attack based on nonconstitutional error, the petitioner must show that the error has caused a complete miscarriage of justice. *Gomez*, 180 Wn.2d at 347. Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, 150 Wn. App. at 652.

- B. The trial judge abused his discretion by admitting evidence suggesting Mr. Garland belonged to a gang.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “evidence having 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.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Under ER 404(b), “[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Before evidence of prior bad acts may be admitted, the trial court is required to analyze the evidence and must “(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.”

*State v. Asaeli*, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009) (quoting *State v. Pirtle*, 127 Wn.2d 628, 648-649, 904 P.2d 245 (1995)).

The analysis must be conducted on the record.<sup>41</sup> *Asaeli*, 150 Wn. App. at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wn. App. 727, 733, 25 P.3d 445 (2001). Evidence that an accused person is affiliated with a gang is subject to analysis under ER 401, ER 402, ER 403 and ER 404(b). *Asaeli*, 150 Wn. App. at 576-577.

In addition, the trial court must find (by a preponderance of the evidence) that the group actually exists, that the accused person belongs to it, and that the group really qualifies as a criminal gang. *Asaeli*, 150 Wn. App. at 577. Furthermore, “there must be a nexus between the crime and gang membership.” *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009).

Here, the trial court erroneously admitted evidence suggesting that Mr. Garland had some affiliation with an alleged gang. RP (8/20/09) 1218, 1300-1301; RP (9/15/09) 2205. As in *Asaeli*, the prosecution did not establish that Mr. Garland actually belonged to a gang, that the alleged

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<sup>41</sup> However, if the record shows that the trial court adopted a party’s express arguments addressing each factor, then the trial court’s failure to conduct a full analysis on the record is not reversible error. *Asaeli*, 150 Wn. App. at 576 n. 34.

gang actually existed, or that that the group actually qualified as a criminal gang. Instead, at best, the prosecution showed that Mr. Garland held himself out as a member of a group with a name that sounded like the name of a gang. RP (8/20/09) 1218, 1300-1301; RP (9/15/09) 2205. There was no nexus between the crime and Mr. Garland's alleged gang membership. *Scott*, 151 Wn. App. at 526. The evidence was not relevant under ER 402, and the court did not conduct the analysis required by ER 403 and ER 404(b).

As in *Asaeli*, nothing established that Mr. Garland actually belonged to the "26 Blocc Crips", that the group actually exists, or that it qualifies as a criminal gang. *Asaeli*, 150 Wn. App. at 577-578. Instead, the evidence of purported gang affiliation showed at best that Mr. Garland held himself as a member of a group that sounded like it might be a gang. RP (8/20/09) 1218, 1300-1301; RP (9/15/09) 2205.

The court's limiting instruction did not solve the problem. Under the instruction as given, jurors were free to discount Mr. Garland's testimony based simply on his alleged gang affiliation. RP (10/8/09) 3809.

The evidence did not relate to any element of the charged crimes, and painted Mr. Garland in a bad light. It should have been excluded under ER 402, ER 403, and ER 404(b). Furthermore, the court failed to

conduct an adequate analysis on the record, and failed to make the required findings. *Asaeli*, 150 Wn. App.543.

The error resulted in a complete miscarriage of justice. *Gomez*, 180 Wn.2d at 347. It created a likelihood that jurors convicted on the basis of propensity evidence. *See State v. Slocum*, 333 P.3d 541, 550 (Wash. Ct. App. 2014) (discussing the reason for excluding propensity evidence). Jurors who believed Mr. Garland belonged to a real criminal gang would have viewed him in a negative light, discounted his testimony, and believed that he had a predisposition toward violence.

Because the improper admission of gang evidence caused a complete miscarriage of justice, the petition must be granted. *Gomez*, 180 Wn.2d at 347. Mr. Garland's convictions must be reversed and the case remanded with instructions to exclude evidence of gang affiliation at any subsequent trial. *Id.*

**IV. THE TRIAL COURT AND INFRINGED MR. GARLAND'S RIGHT TO BE PRESENT BY HOLDING A SECRET IN-CAMERA HEARING IN HIS ABSENCE, AND BY SEALING THE TRANSCRIPT OF THAT HEARING WITHOUT CAUSE.**

**A. Standard of Review.**

On collateral review, a constitutional error requires reversal if it causes actual and substantial prejudice. *Gomez*, 180 Wn.2d at 347.

B. The court should not have held an in-camera hearing in Mr. Garland's absence, and should not have ordered the transcript of the hearing sealed.

1. The closed hearing violated Mr. Garland's right to be present.

An accused person has a fundamental right to be present for all critical stages of trial. *State v. Irby*, 170 Wn.2d 874, 880-881, 246 P.3d 796 (2011) (citing *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983)). This right is rooted in the Sixth Amendment confrontation clause. *Id.*; U.S. Const. Amends. VI, XIV; art. I, § 22. Additionally, due process guarantees the right to be present, even when the accused is not confronting adverse witnesses. U.S Const. Amend. XIV; *Irby*, 170 Wn.2d at 881. The Washington State Constitution guarantees an accused person the right to "appear and defend in person." art. I, § 22. This right is interpreted separately from the federal due process clause. *Irby*, 170 Wn.2d at 885.

A hearing may qualify as a critical stage even if it involves a purely legal matter. *Berrysmith*, 87 Wn. App. at 273-74. If "a fair and just hearing [is] thwarted by [the defendant's] absence," the proceeding is a critical stage. *Id.*

An *in camera* hearing relating to defense counsel's ability to represent the defendant may be a critical stage. *Bradley v. Henry*, 428 F.3d 811, 818-19 (9th Cir. 2005) *on reh'g en banc*, 510 F.3d 1093 (9th Cir.

2007) amended on denial of reh'g, 518 F.3d 657 (9th Cir. 2008); *Campbell v. Rice*, 302 F.3d 892, 899-900 (9th Cir. 2002) on reh'g en banc, 408 F.3d 1166 (9th Cir. 2005); *State v. Lopez*, 271 Conn. 724, 736-37, 859 A.2d 898 (2004). Exclusion of the defendant from such a proceeding can amount to structural error.<sup>42</sup> *Campbell*, 302 F.3d at 899-900; *Lopez*, 271 Conn. at 736-37.

In *Campbell*, the prosecutor revealed that defense counsel was being prosecuted by his agency. The court held a hearing in chambers, and concluded there was no conflict. *Campbell*, 302 F.3d at 895-896. In *Lopez*, the court held an *in camera* hearing because defense counsel was a potential defense witness. The attorney decided he wouldn't testify, and the trial court considered the conflict resolved. *Lopez*, 271 Conn. at 729.

In this case, when Mr. Garland sought to discharge his attorney, defense counsel initially indicated she had no conflict but did have "an ethical concern." RP (6/4/10) 4235. Four days later, she announced that she did have a conflict, which she was willing to confide to the prosecutor and the judge, but not to her own client. RP (6/8/10) 4248-4261.

Following an *in camera* hearing from which Mr. Garland was excluded,

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<sup>42</sup> In some circumstances the exclusion of defendant from such a hearing does not require automatic reversal. *Hovey v. Ayers*, 458 F.3d 892, 902-03 (9th Cir. 2006); *Berrysmith*, 87 Wn. App. at 273-74; *State v. Rooks*, 130 Wn. App. 787, 800, 125 P.3d 192 (2005).

the court allowed counsel to withdraw. RP (6/8/10) 4261. The court sealed the transcript of the hearing, but did not follow the procedures spelled out in GR 15(c). RP (6/8/10) 4255-4260.

The hearing in chambers was a critical stage of the proceedings. This is so because Mr. Garland's presence was necessary to "a fair and just hearing." *Berrysmith*, 87 Wn. App. at 273-74. Whatever counsel's ethical concern or a potential conflict, she should have disclosed it in Mr. Gardner's presence. This is especially true given her willingness to share the information with the prosecutor. Because she refused to do so, it is clear that her interests had diverged from Mr. Garland's. He should have been permitted to attend the hearing, so that he could voice his own concerns.

Although both Mr. Garland and his attorney wanted her off the case, the closed hearing violated his right to be present. With no one in the judge's chambers representing his interests, Mr. Garland was left to wonder whether his attorney would reveal his confidences, fabricate some accusation against him, or reveal a conflict that may have affected her performance at trial. Furthermore, the judge to whom she spoke was the same judge who would soon sentence Mr. Garland. Any negative information she conveyed might have a subconscious effect at that sentencing hearing.

The problems could have been ameliorated had the judge not sealed the transcript of the hearing. Mr. Garland's new attorney could have had the hearing transcribed, to ensure that nothing transpired that would negatively affect Mr. Garland's rights at sentencing. A transcript would also have revealed any conflict that could have affected defense counsel's performance at trial.

For all these reasons, the in-chambers conference violated Mr. Garland's right to be present. *Irby*, 170 Wn.2d at 880-81. This constitutional violation was structural error. *Campbell*, 302 F.3d at 899-900; *Lopez*, 271 Conn. at 736-37. It also caused actual and substantial prejudice. *Gomez*, 180 Wn.2d at 347. Mr. Garland's conviction must be vacated and the case remanded for a new trial. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing.

2. The closed hearing violated Mr. Garland's right to the effective assistance of counsel.

The effective assistance of counsel guaranteed by the Sixth Amendment is premised on the attorney's undivided loyalty toward the client. *See James*, 48 Wn. App. at 368-69 ("The undivided loyalty necessary for effective assistance of counsel is missing where counsel must slight the defense of one defendant to protect another.") In this case,

defense counsel demonstrated her divided loyalties when she shared information with the prosecutor and the judge that she was unwilling to share with her own client. RP (6/8/10) 4248-4261.

Counsel's divided loyalties—whatever their source—prevented her from representing Mr. Garland's interests at the closed hearing. This resulted in “a complete denial of counsel” at that proceeding. *United States v. Cronin*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984). This requires reversal without any showing of prejudice. *Id.*

3. The closed hearing violated the requirement that criminal justice be administered openly and publicly.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amends. I, VI, XIV; Wash. Const. art. I, §§ 10 and 22; *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). The public trial guarantee belongs both to the accused person and to the public (including the press).<sup>43</sup> The individual and the public right “serve complementary and interdependent functions in assuring the fairness of [the] judicial system.” *Bone-Club*, 128 Wn.2d at 259.

Proceedings to which the public trial right attaches may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, 128 Wn.2d at 258-259. An accused person “cannot waive the public’s right to open proceedings,”<sup>44</sup> and may win reversal of a conviction based on a violation of the public’s right. *Easterling*, 157 Wn.2d at 179-80.

Here, the trial court held a closed hearing in chambers without going through the *Bone-Club* factors. Because of this, Mr. Garland’s conviction must be reversed and the case remanded for a new trial. *Presley*, 558 U.S. at 216; *Easterling*, 157 Wn.2d at 179-80.

**V. MR. GARLAND’S CONVICTIONS MUST BE REVERSED BECAUSE OF CUMULATIVE ERROR.**

The cumulative error doctrine requires reversal “when the combined effect of errors during trial effectively denied the defendant... a fair trial, even if each error standing alone would be harmless.” *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). On collateral review, “petitioner bears the burden of showing multiple trial errors and

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<sup>43</sup> The accused person’s public trial rights stem from the Sixth Amendment and art. I, § 22. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The public’s open trial rights are protected by the First Amendment and art. I, § 10. *Id.*, at 179-80.

<sup>44</sup> *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009) (plurality); see also *Presley*, 558 U.S. at 214 (“The public has a right to be present whether or not any party has asserted the right.”)

that the accumulated prejudice affected the outcome of the trial.” *In re Cross*, 180 Wn. 2d 664, 690, 327 P.3d 660 (2014).

In Mr. Garland’s case, defense counsel’s unreasonable tactics combined with the improperly admitted gang evidence and the evidence unlawfully seized from Mr. Garland’s mother’s home to deny him a fair trial. Each of these things undermined his credibility; taken together, they made him impossible to believe. Because Mr. Garland’s credibility was central to his defense, the combined effect of these errors was sufficient to change the outcome of trial.

Accordingly, cumulative error denied Mr. Garland a fair trial. *Venegas*, 155 Wn. App. at 520. The petition must be granted and his convictions reversed.

**VI. INCONSISTENT VERDICTS AND THE DOCTRINE OF TRANSFERRED INTENT VIOLATED MR. GARLAND’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

Mr. Garland rests on the argument and authority set forth in his petition. Petition, p. 13.

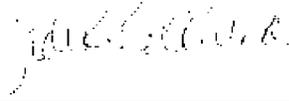
**CONCLUSION**

Mr. Garland’s convictions must be vacated and the case remanded for a new trial. If the convictions are not overturned, his sentence must be vacated and the case remanded for a new sentencing hearing. In the

alternative, the case must be remanded for a reference hearing in the superior court.

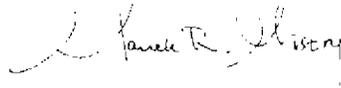
Respectfully submitted on November 6, 2014,

**BACKLUND AND MISTRY**



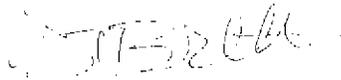
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Attorney for the Petitioner



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



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Skylar T. Brett, WSBA No. 45475  
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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Raymond Garland, DOC #834942  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

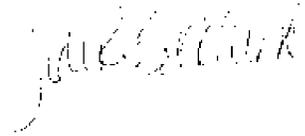
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney  
pcpatcecf@co.pierce.wa.us  
steve.trinen@co.pierce.wa.us

I filed the Petitioner's Supplemental 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 November 6, 2014.



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

## **APPENDIX**

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No. 45165-4-II  
COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

In re the Personal Restraint of: )  
Raymond Garland ) Declaration of Raymond Garland  
 ) in Support of Personal Restraint Petition  
Petitioner. )  
\_\_\_\_\_ )

Raymond Garland declares as follows:

I was the defendant in Pierce County Cause No. 04-1-05384-8. I am the petitioner in this case. My attorney for my three trials was Barbara Corey.

I've reviewed the email containing a plea offer from the prosecutor. The email is attached to the state's response to my personal restraint petition.

Barbara Corey never told me about the plea offer. I did not know I could plead guilty to two charges, and that the state would dismiss one charge and one firearm enhancement.

If I had known about the prosecutor's plea offer, I would have accepted it instead of going to trial.

I didn't find out about the plea offer until this proceeding, when the prosecutor served me with the state's response to my personal restraint petition. That was the first time I heard of the plea offer.

*Declaration of Raymond Garland - 1*

**BACKLUND & MISTRY**  
Attorneys at Law

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

Signed at \_\_\_\_\_ [place], Washington on \_\_\_\_\_ [date].

\_\_\_\_\_  
Raymond Garland  
Petitioner

## BACKLUND & MISTRY

**November 06, 2014 - 2:47 PM**

### Transmittal Letter

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Case Name: In re the Personal Restraint of Raymond Garland

Court of Appeals Case Number: 45165-4

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Brief: Supplemental 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

Petition for Review (PRV)

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