

No. 49444-2-II  
(CONSOLIDATED CASE)

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

MAZZAR GERALD ROBINSON,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 13-1-02554-1  
The Honorable Frank Cuthbertson, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court's failure to properly memorialize its repeated sidebar conferences violated Mazzar Robinson's constitutional right to an open and public trial.
2. The State failed to meet its constitutional burden of proving beyond a reasonable doubt all of the elements of the crime of attempted first degree robbery.
3. Mazzar Robinson's convictions for both attempted first degree robbery and first degree felony murder with attempted robbery as the felony predicate violates double jeopardy.
4. The sentencing court erred in relying on the facially invalid 1998 first degree robbery conviction to sentence Mazzar Robinson to life in prison as a persistent offender.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the trial court violate Mazzar Robinson's constitutional right to an open and public trial when it repeatedly held private sidebar conferences at the bench but failed to properly memorialize the contents and substance of the conferences in open court and on the record? (Assignment of Error 1)

2. Did the State fail to prove beyond a reasonable doubt all of the essential elements of attempted first degree robbery where the crime requires proof that the defendant intended to take property from or in the presence of another person, and where the State's evidence shows that Mazzar Robinson did not believe the apartment he entered was occupied? (Assignment of Error 2)
3. Did the trial court violate Mazzar Robinson's double jeopardy protections when it entered judgment and sentenced Robinson for the crime of attempted robbery and the crime of first degree felony murder with attempted robbery as the felony predicate? (Assignment of Error 3)
4. Did the sentencing court improperly sentence Mazzar Robinson to a life sentence as a persistent offender when it relied at sentencing on a 1998 conviction for first degree robbery that was facially invalid because it shows that Robinson was affirmatively misinformed that the crime was a most serious offense? (Assignment of Error 4)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Mazzar Gerald Robinson by Information

with one count each of first degree felony murder (RCW 9A.32.030), conspiracy to commit first degree murder (RCW 9A.28.040), first degree burglary (RCW 9A.28.040), attempted first degree robbery (RCW 9A.52.020), and unlawful possession of a firearm (RCW 9.41.010, .040). (CP 379-81) The State alleged that Robinson was armed with a firearm during the commission of the murder, burglary, and attempted robbery. (CP 379-81)

Robinson and his co-defendant, Michael Rowland, were tried together. The first jury was unable to unanimously agree on a verdict and so the court declared a mistrial. (09/15/15 RP 2536-37)<sup>1</sup> But a second jury found Robinson guilty of all charges. (07/25/16 RP 7-10; CP 757-64) At sentencing, the trial court rejected Robinson's assertion that a prior guilty plea to a strike offense was invalid and should not be considered by the court. (09/15/16 RP 2595-96, 2587-88, 2598; CP 388-400, 855-87) The trial court sentenced Robinson as a persistent offender to a sentence of life without the possibility of parole. (CP 987; 09/15/16 RP 2603) Robinson filed a timely appeal. (CP 1009)

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<sup>1</sup> The transcripts will be referred to by the date of the proceeding contained therein.

## B. SUBSTANTIVE FACTS

Juan Hidalgo Mendoza supplied illegal drugs to several dealers in the Tacoma area. (06/22/16 RP 738-39) Two of those dealers were Mendoza's roommate, Jamie Diaz Solis, and Alberto Mendoza Ortega, also known as "Yeto."<sup>2</sup> (06/21/16 RP 606; 06/22/16 RP 737-38; 06/29/16 RP 1263) Yeto had several other men working for him, including William Alvarez Calo. (06/22/16 RP 739; 06/29/16 RP 1264) Calo in turn had several men working for him. (06/22/16 RP 741; 06/29/16 RP 1261, 1263, 1264-65)

Yeto discovered that Calo was stealing money from him so he fired Calo. (06/22/16 RP 742; 06/29/16 RP 1266-67) This made Calo very angry, and he started telling people that he wanted to rob and kill Yeto. (06/22/16 RP 742-43; 06/29/16 RP 1267, 1275-77)

Jiffary Mendez was one of Calo's drug dealers and entered a very beneficial plea bargain with the State in exchange for his testimony. (06/29/16 RP 1264, 1272-73) According to Mendez, Calo told several friends, including Mazzar Robinson, Michael Rowland, Ray Turner, Gaytan "Vinnie" Gutierrez and Robert Smith, to come to his auto repair garage on November 12, 2012 so that

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<sup>2</sup> Alberto Mendoza Ortega was referred to as "Yeto" (or Geto) throughout the trial, and in the interest of consistency will be referred to by that nickname in this brief as well.

they could discuss a plan to steal Yeto's drugs and money. (06/20/16 RP 431; 06/29/16 RP 1280-81, 1283, 1286; 07/13/16 1811-12, 1813-14) Calo wanted the men to go first to Yeto's home, rob him, then leave him tied up so that another man could come later and kill him. (06/29/16 RP 1285) Next, Calo wanted the men to go to Yeto's "stash house," an apartment where Mendoza and Solis stayed, and steal any money and drugs stored there. (06/29/16 RP 1285)

Before the men left, Calo handed guns to Robinson and Mendez. (06/29/16 RP 1286; 07/13/16 RP 1814-15) Smith, Turner and Robinson rode in Robinson's car, and Rowland, Mendez and Gutierrez rode in a different car. (06/29/16 RP 1287; RP 07/13/16 RP 1815-16) The men decided to drive to the stash house first, because they agreed that Calo was acting crazy and they did not really want to tie up or kill Yeto. (07/11/16 1539, 1545) However, they were all under the impression that Mendoza and Solis would not be present at the apartment. (07/11/16 RP 1520, 1527; 07/13/16 RP 2020, 2022)

Then men parked the two cars a short distance away from the apartment and approached on foot. (06/29/16 RP 1290; 07/13/16 RP 1817) The sliding glass door to the apartment was

unlocked so Robinson, who was still holding a gun, opened the door and stepped inside. (06/29/16 RP 1290; 07/13/16 RP 1820-21)

Mendez and Smith immediately heard a gunshot. (06/29/16 RP 1292; 07/13/16 RP 1824) The men all turned and ran back to their cars. (06/29/16 RP 1292-93; 07/13/16 RP 1824) But Robinson could not find his car keys. (06/29/16 RP 1293; 07/13/16 RP 1827)

Calo asked another one of his associates, Jacinto Fernandez, to go pick up the men and bring them back to his garage. (07/12/16 1677, 1687) Fernandez testified that he picked up Robinson and another man from the area near Mendoza and Solis' apartment. (07/12/16 RP 1687-88) Fernandez and Smith testified that Robinson said someone was inside the apartment and he saw the person reach for something, so he shot them. (07/12/16 RP 1690; 07/13/16 RP 1831-32)

Mendoza and Solis were at the apartment when the men arrived. Mendoza testified that he was in his bedroom and could hear Solis talking on the phone. (06/21/16 RP 585-86) Mendoza heard voices followed by a gunshot. (06/21/16 RP 589) Mendoza jumped out of the window, ran to his neighbor's apartment, and

asked them to call the police. (06/21/16 RP 590) He then ran back to his apartment, and found Solis lying on the floor in a pool of blood. (06/21/16 RP 592-93) He dragged Solis' body out the front door, then proceeded to hide guns, drugs and cash under the porch and in his truck so responding police officers would not find them. (06/21/16 RP 593-95, 625)

Responding officers and medical personnel found Solis already deceased on the ground outside of his apartment. (06/20/16 RP 431, 446, 448-49, 466) The officers also found a rifle and what appeared to be a large amount of heroin under the neighbor's patio. (06/21/16 RP 536, 538; 06/22/16 RP 650-51, 653) Investigators also found \$37,800 in cash and evidence of a cutting and distributing operation in the apartment and in Mendoza's car. (06/27/16 RP 911, 912-14)

The next day, Smith asked his friend Elvester Miller to tow Robinson's car to a Dodge dealership in Tacoma. (07/12/16 RP 1662, 1665; 06/27/16 RP 889) The dealership's service department made a new key for Robinson's vehicle. (06/27/16 RP 884, 887-88)

Cellular phone records showed incoming and outgoing calls on Robinson's phone to the other participants in the area of

Mendoza and Solis' apartment, before, during and after the shooting. (Exh. 279, 335, 336A; 06/27/16 RP 992-94; 09/26/16 RP 1201-12)

Robinson testified on his own behalf. He denied being involved in planning to rob or kill Yeto, and denied being present when the men went to the apartment to steal Yeto's stash. (07/19/16 2315) Calo had asked Robinson to participate, but he refused. (07/19/16 RP 2315, 2327) Robinson did loan Smith his car that night, and Smith lost the car keys. (07/19/16 RP 2318, 2326) Robinson called several people to find out where his car was, then went to its location and looked for the keys. (07/19/16 RP 2331, 2336) While he was there, he called his girlfriend, Lea Hayes, and asked her to come pick him up. (07/19/16 RP 2333) Hayes testified and confirmed Robinson's alibi. (07/19/16 RP 2271-73)

#### **IV. ARGUMENT & AUTHORITIES**

##### **A. ROBINSON'S RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN THE COURT FAILED TO PROPERLY MEMORIALIZE ON THE RECORD ITS REPEATED SIDEBAR CONFERENCES.**

The trial court repeatedly held sidebar conferences during the trial, but failed to properly and publicly memorialize the content of those conferences on the record, in violation of Robinson's right

to an open and public trial. Defendants have a constitutional right to a public trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22. A violation of the public trial right can be raised for the first time on appeal. State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). Whether a defendant's right to a public trial has been violated is a question of law, subject to de novo review on direct appeal. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995)).

The first step in analyzing whether a defendant's right to a public trial has been violated is to inquire whether the court proceeding implicated the right. State v. Smith, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014). If the public trial right is implicated, the second step inquires whether there was a closure, and the third step inquires whether the closure was justified. Smith, 181 Wn.2d at 513 (quoting State v. Sublett, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring)).

To determine whether a closure was justified, the trial court must use the five factor analysis articulated in Bone-Club.<sup>3</sup> A trial

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<sup>3</sup> Bone-Club requires that trial courts at least: name the right that a defendant and the public will lose by conducting the proceedings in private; name the compelling interest that motivates closure; weigh these competing rights and interests on the record; provide the opportunity for objection; and consider alternatives to closure, opting for the least restrictive. 128 Wn.2d at 258-59.

court must consider the five Bone-Club factors on the record before closing the courtroom. Wise, 176 Wn.2d at 10.

In Smith, the Court noted that sidebars “have traditionally been held outside the hearing of both the jury and the public,” and “[b]ecause allowing the public to ‘intrude upon the huddle’ would add nothing positive to sidebars in our courts.” 181 Wn.2d at 519. Accordingly, Smith held that a sidebar conference does not implicate Washington’s public trial right. 181 Wn.2d at 519. However, the Smith court explicitly limited its holdings to sidebars in fact.

*We caution that merely characterizing something as a “sidebar” does not make it so. To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record.*

Smith, 181 Wn.2d at 516 n. 10 (emphasis added).

In State v. Whitlock, Division 3 determined that an in-chambers evidentiary conference was not a sidebar as contemplated by the Smith court because “the trial was to the bench. There was no expediency justification for holding an evidentiary conference outside the courtroom.” 195 Wn. App. 745,

753, 381 P.3d 1250 (2016).<sup>4</sup> The trial court's decision to hear argument and rule on an evidentiary objection in chambers was therefore a court closure, and its failure to weigh the Bone-Club factors was a structural error requiring reversal and a new trial. Whitlock, 195 Wn. App. at 755.

The Whitlock court was also swayed by the fact that "the in-chambers argument and ruling were neither recorded nor promptly memorialized on the record. Rather, quite some time passed between when the in-chambers argument and ruling concluded and when the in-chambers argument and ruling were placed on the record." 195 Wn. App. at 753.

In this case, the trial court held multiple private conferences at the bench throughout the trial. While some conferences were memorialized that same day<sup>5</sup>, others were not memorialized until the following trial day<sup>6</sup>, and several were never memorialized at all.<sup>7</sup> Although each conference may have had the appearance of

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<sup>4</sup> *Review granted*, 187 Wn.2d 1002, 386 P.3d 1080 (2017).

<sup>5</sup> See 06/20/16 RP 484, 496; 06/22/16 RP 758, 762; 06/23/16 RP 868, 876; 06/28/16 RP 1110, 1121, 1136, 1157; 07/11/16 RP 1514, 1516, 1522, 1568-69; 07/13/16 RP 1902, 1928; 07/14/16 RP 1995, 2049, 2070, 2071-74; 07/19/16 RP 2236, 2257.

<sup>6</sup> See 06/14/16 RP 269; 06/16/16 RP 270; 06/29/16 RP 1172; 06/29/16 RP 1324-25; 06/30/16 RP 1326; 07/18/16 RP 2110-11; 07/19/16 RP 2256, 2262-63, 2299; 07/20/16 RP 2454-55.

<sup>7</sup> 06/16/16 RP 384, 395; 06/27/16 RP 980; 07/20/16 RP 2444.

traditional sidebars, it is impossible to know whether each of these conferences were “limited in content to their traditional subject areas” because they were off the record and not always “promptly memorialized in the record.” Smith, 181 Wn.2d at 516 n. 10.

The court’s decision to hear argument and rule on evidentiary issues, and to discuss matters relating to trial in private without placing those discussions on the record or properly memorializing the conversations, amounts to a court closure. The court’s failure to weigh the Bone-Club factors in any way was a structural error requiring reversal and a new trial. Whitlock, 195 Wn. App. at 755; State v. Shearer, 181 Wn.2d 564, 569, 334 P.3d 1078 (2014).

B. ROBINSON’S ATTEMPTED ROBBERY CONVICTION MUST BE VACATED AND DISMISSED.

1. *The State did not prove beyond a reasonable doubt all of the elements of attempted first degree robbery.*

The State did not prove that Robinson intended to take property from or in the presence of another person, as required to support a conviction for attempted robbery. “Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re

Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

To convict a defendant of attempted robbery, the State must prove that the defendant had the intent to commit the crime of robbery. RCW 9A.28.020. A robbery conviction requires the taking of property “from the person of another or in his or her presence[.]” RCW 9A.56.190. Accordingly, to convict Robinson of attempted robbery, the State was required to prove that he intended to take property from or in the presence of another person. But the evidence presented by the State showed that Robinson and the other men thought the apartment would be unoccupied. (07/11/16 RP 1520, 1527; 07/13/16 RP 2020, 2022) They did not expect or intend to take the money and drugs from or in the presence of Mendoza and Solis.

The reviewing court should reverse a conviction and dismiss

the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Because no rational trier of fact could have found that Robinson intended to take property from or in the presence of another person, Robinson's attempted first degree robbery conviction and its associated firearm special verdict must be reversed and dismissed with prejudice.

*2. Robinson's convictions for both attempted robbery and felony murder with an attempted robbery predicate violates double jeopardy.*

Robinson cannot be convicted and sentenced for both attempted robbery and felony murder with attempted robbery as the predicate felony without offending double jeopardy. The double jeopardy clauses of the United States and Washington Constitutions prohibits multiple punishments for the same offense.<sup>8</sup> See e.g. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).

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<sup>8</sup> The Fifth Amendment to the United States Constitution provides "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." Article I, section 9 of the Washington Constitution mirrors the federal constitution stating "[n]o person shall be ... twice put in jeopardy for the same offense." Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. See In re Personal Restraint of Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003). RCW 10.43.050 also affords defendants protections against double jeopardy.

A double-jeopardy violation may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2007).

The merger doctrine is another means by which a court may interpret legislative intent to determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy. State v. Frohs, 83 Wn. App. 803, 809, 811, 924 P.2d 384 (1996). Whether the merger doctrine implicates double jeopardy is a question of law, which is reviewed de novo. State v. Williams, 131 Wn. App. 488, 498, 128 P.3d 98 (2006). Two offenses merge if, to prove a particular degree of crime, the State must prove that the crime “was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.” State v. Vladovic, 99 Wn.2d 413, 419 & n. 2, 662 P.2d 853 (1983).

Here, Robinson was convicted of felony first degree murder as defined in RCW 9A.32.030(1)(c). (CP 379) The elements expressly require an associated conviction for another crime:

(1) A person is guilty of murder in the first degree when:

....

(c) He or she commits or attempts to commit the crime of ... (1) robbery in the first or second degree ... [or] burglary in the first degree ... and in the course of or in furtherance of such crime or in immediate flight

therefrom, he or she, or another participant, causes the death of a person other than one of the participants.

RCW 9A.32.030. In order to find Robinson guilty of first degree murder, the jury had to find him guilty of attempted robbery or first degree burglary, and of killing Solis in the course of, in furtherance of, or in immediate flight from those crimes.<sup>9</sup> (CP 647)

Both the United States Supreme Court and Washington Supreme Court have recognized that entering convictions for both felony murder and the underlying felony violates the Fifth Amendment right to be free from double jeopardy. Harris v. Oklahoma, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977); In re Personal Restraint of Francis, 170 Wn.2d 517, 522 n.2, 242 P.3d 866 (2010); In re Personal Restraint of Orange, 152 Wn.2d 795, 818, 100 P.3d 291 (2004) (citing Harris, 433 U.S. 682). This is because “[t]o convict a defendant of felony murder the State is required to prove beyond a reasonable doubt each element of the predicate felony.” State v. Quillin, 49 Wn. App. 155, 164, 741 P.2d

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<sup>9</sup> The jury was not required to identify which predicate felony it was relying on to convict Robinson of first degree murder. (CP 647) The jury convicted Robinson of the separate crimes of attempted first degree robbery and first degree burglary. (CP 760, 762) However, the burglary anti-merger unequivocally provides that an offender can be punished separately for both burglary and any other crime committed during the commission of the burglary. RCW 9A.52.050.

589 (1987). It is therefore impossible to commit felony murder without committing the underlying felony, and entering convictions for both violates double jeopardy. See Jackman, 156 Wn.2d at 749.

In violation of the Fifth Amendment and Harris, the trial court here entered convictions and life sentences for both attempted robbery (count four) and felony murder based on the robbery (count one). (CP 981-82, 987) But when a conviction violates double jeopardy, it must be wholly vacated. State v. Womac, 160 Wn.2d 643, 658, 160 P.3d 40 (2007); State v. Weber, 159 Wn.2d 252, 266, 149 P.3d 646 (2006) (remedy for double-jeopardy violation is vacation of the lesser offense). Therefore, the remedy is vacation of Robinson's attempted robbery conviction and its associated firearm enhancement.

C. ROBINSON SHOULD NOT HAVE BEEN SENTENCED AS A PERSISTENT OFFENDER BECAUSE ONE OF HIS PRIOR MOST SERIOUS OFFENSE CONVICTIONS IS FACIALLY INVALID.

Robinson's 1998 second degree robbery conviction is facially invalid because he was affirmatively misinformed about a collateral consequence of the conviction. Because the conviction is not facially valid, Robinson's persistent offender sentence must be reversed and his case remanded to the trial court for resentencing

within the standard range.

The State is not required to prove the constitutional validity of prior convictions before they can be used at sentencing. State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719 (1986). Generally, the defendant has no right to contest prior convictions at a subsequent sentencing because there are more appropriate methods for contesting the validity of prior convictions. Ammons, 105 Wn.2d at 188. But it is error for a prior conviction that is constitutionally invalid on its face to be considered at sentencing. Ammons, 105 Wn.2d at 187-88.

“Constitutionally invalid on its face” means a conviction that without further elaboration evidences infirmities of a constitutional magnitude. In re Personal Restraint of Clark, 168 Wn.2d 581, 585-86, 230 P.3d 156 (2010); In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002); In re Personal Restraint of Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000). “On its face” includes the judgment and sentence and documents signed as part of a plea bargain. Clark, 168 Wn.2d at 585-86; Thompson, 141 Wn. App. at 866-67; State v. Phillips, 94 Wn. App. 313, 317, 972 P.2d 932 (1999) (citing Ammons, 105 Wn.2d at 187-89).

The constitutional validity of a guilty plea turns, in part, on

whether the defendant was informed of the direct consequences of his plea. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A sentencing consequence is direct when “the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” Ross, 129 Wn.2d at 284.

Under RCW 9.94A.570, a persistent offender shall be sentenced to life in prison without the possibility of release. A persistent offender is a defendant who has been convicted of a most serious offense and has two prior felonies that are also most serious offenses. RCW 9.94A.030(38). Robinson pleaded guilty in 1998 to second degree robbery. (CP 872) Second degree robbery is a “most serious offense.” RCW 9.94A.030(33)(o).

In State v. Lewis, 141 Wn. App. 367, 395, 166 P.3d 786 (2007), this court determined that whether a crime is a most serious offense is a collateral consequence of the defendant’s sentence because it “neither increases the punishment for that crime nor automatically subjects a defendant to a future sentence of life without parole.” But, here, Robinson’s counsel did not merely fail to inform Robinson that second degree robbery was a most serious offense, he affirmatively and incorrectly informed Robinson that it was not a most serious offense.

On the form Robinson signed as part of his guilty plea, there is one paragraph that explains to the defendant that he or she is pleading guilty to a most serious offense, and that an offender with two prior most serious offense convictions will be subject to life in prison without the possibility of parole. (CP 873) The paragraph also states that, “[i]f not applicable, this sentence should be stricken and initialed by the defendant and the Judge.” (CP 873) The paragraph is crossed out and Robinson’s initials appear next to the deletion. (CP 873)

“During plea bargaining, counsel has a duty to assist the defendant ‘actually and substantially’ in determining whether to plead guilty.” State v. Stowe, 71 Wn. App. 182, 186, 858 P.2d 267 (1993) (internal quotation marks omitted) (quoting State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)). Defendant’s counsel need not advise him of all collateral consequences of the plea. State v. Ward, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994). But counsel may provide ineffective assistance by making an affirmative misrepresentation regarding a collateral consequence if the defendant relies on that information in pleading guilty. Stowe, 71 Wn. App. at 187-88.

Robinson was incorrectly informed that the crime of second

degree robbery was not a most serious offense. It is clear from the plea documents that counsel affirmatively misrepresented a collateral consequence of Robinson's plea to second degree robbery, and the judgment and sentence is therefore constitutionally invalid on its face. The trial court erred when it considered Robinson's 1998 robbery conviction as a most serious offense for persistent offender purposes. Robinson's persistent offender life sentence must be reversed and his case remanded for resentencing without the 1998 robbery.

#### **V. CONCLUSION**

The trial court's failure to properly memorialize in open court and on the record all of the private sidebar conferences held during the trial violated Robinson's constitutional right to an open and public trial. As a result, Robinson's convictions should be reversed and his case remanded for a new trial.

Alternatively, Robinson's attempted robbery conviction must be vacated because the State failed to prove all of the elements of the crime and because convictions for both attempted robbery and felony murder with the same crime as the predicate felony violate double jeopardy. And finally, the sentencing court erred in relying on the facially invalid 1998 second degree robbery conviction to

sentence Robinson to life in prison as a persistent offender. For these reasons, Robinson's case should be remanded to vacate the attempted robbery conviction and for resentencing.

DATED: April 29, 2017



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STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Mazzar G. Robinson

**CERTIFICATE OF MAILING**

I certify that on 04/29/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Mazzar G. Robinson, DOC# 972823, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,

vs.

MAZZAR GERALD ROBINSON,  
Appellant.

No. 49444-2-II  
(CONSOLIDATED CASE)

CERTIFICATE OF SERVICE

I, Stephanie C. Cunningham, court-appointed counsel for Appellant Mazzar G. Robinson, certify that I provided a PDF copy of the OPENING BRIEF OF APPELLANT and this CERTIFICATE OF SERVICE, via e-mail attachment sent to Washington Appellate Project, counsel for co-appellant Michael Rowland, at [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org).

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

DATED: May 1, 2017



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STEPHANIE C. CUNNINGHAM, WSB #26436  
Attorney for Appellant Mazzar G. Robinson

**CUNNINGHAM LAW OFFICE**  
**May 01, 2017 - 9:52 AM**  
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