

FILED  
Court of Appeals  
Division II  
State of Washington  
2/28/2018 4:03 PM  
NO. 50631-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RUBEN SOLOVIOV,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CLARK COUNTY

The Honorable David Gregerson, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. Mr. Soloviov was denied his constitutional right to confront and cross-examine witnesses and present a defense when the trial court ruled defense counsel could not cross-examine the complaining witness Steven Garrison regarding alleged methamphetamine use.

2. The trial court erred by sentencing Mr. Soloviov with an offender score of “6” for Count I and Count III.

3. The trial court erred in concluding that a 2009 Oregon conviction for assault in the second degree with a firearm in the offender score is legally comparable to a Washington felony.

4. The trial court erred in concluding a 2002 Oregon conviction for unauthorized use of a motor vehicle in the offender score is legally and factually comparable to a Washington felony.

5. Mr. Soloviov was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing.

6. Defense counsel provided ineffective assistance by failing to argue same criminal conduct at sentencing and by failing to ask the sentencing court to exercise its discretion under the burglary antimerger statute.

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

1. A criminal defendant has the constitutional right to present a defense and to confront and cross-examine witnesses. The rules of evidence provide discretion to the trial court regarding cross-examination related to a

witness's truthfulness. But that discretion is constrained when the witness is crucial to the State's case. Did the trial court violate Mr. Soloviov's constitutional right and abuse its discretion when it prevented his counsel from cross examining the complaining witness Steven Garrison regarding alleged drug use and his ability to perceive and recall the events in question? Assignment of Error 1.

2. In determining the defendant's offender score under the Sentencing Reform Act of 1981 ("SRA"), the State bears the burden of proving the existence and comparability of prior out-of-state convictions. The trial court included in the offender score two prior Oregon convictions: one for assault in the second degree with a firearm and another for unauthorized use of a vehicle.

3. The trial court included in the offender score a prior Oregon conviction for second degree assault with a weapon. Did the trial court err in including the Oregon conviction in Mr. Soloviov's offender score? Assignments of Error 2 and 3.

4. The trial court included in the offender score a prior Oregon conviction for unauthorized use of a vehicle. Did the trial court err in including the Oregon conviction in Mr. Soloviov's offender score? Assignments of Error 2 and 4.

5. Multiple offenses score as the same criminal conduct if they occurred at the same time and place, against the same victim, and with the same criminal intent. Did the sentencing court improperly fail to exercise its

discretion by scoring Mr. Soloviov's two offenses separately? Assignments of Error 5 and 6.

6. Defense counsel provides ineffective assistance by failing to argue same criminal conduct when warranted by the facts. Did Mr. Soloviov's attorney provide ineffective assistance by failing to argue same criminal conduct at sentencing? Assignments of Error 5 and 6.

### C. STATEMENT OF THE CASE

#### 1. Procedural facts:

Ruben Soloviov was charged by information filed in Clark County Superior Court with first degree burglary (RCW 9A.52.020), first degree robbery (RCW 9A.56.190), and second degree assault (RCW 9A.36.021(1)(a)) Clerk's Papers (CP) 1. The State alleged that Mr. Soloviov committed the offenses against Steven Garrison on January 12, 2016 at Mr. Garrison's apartment in Vancouver, Washington. CP 1-2. The State alleged that Mr. Soloviov shoved open the door to Mr. Garrison's apartment and forced his way inside, hit Mr. Garrison with objects including a lamp, a stick, and a commemorative whiskey bottle, and took his cell phone and money from his pockets. CP 1-2.

The matter came on for jury trial on March 27, 28, 29, and 30, 2017, the Honorable David Gregerson presiding. 1Report of Proceedings<sup>1</sup> (RP) at

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<sup>1</sup>The record of proceedings consists of seven volumes, which are designated as follows: March 13, 2017 (motion hearing); March 14, 2017 (motion hearing); 1RP March 27, 2017

50-98, 2RP at 101-369, 3RP at 371-639, and 4RP 642-766.

The jury returned guilty verdicts as first degree burglary (Count I) and second degree assault (Count III). 4RP at 762-63; CP 152, 154. Mr. Soloviov was acquitted of first degree robbery as alleged in Count II. 4RP at 762-63; CP 153.

At sentencing the State presented evidence of Mr. Soloviov's prior convictions in Oregon for unauthorized use of a motor vehicle in 2002, second degree assault with a firearm in 2009, and delivery of methamphetamine in 2015. RP (4/25/17) at 775-76, 778-81; CP 170-273. Defense counsel argued that the convictions for second degree assault and unauthorized use of motor vehicle are not comparable to Washington felonies. Counsel did not present argument that the conviction for delivery of methamphetamine was a comparable felony in Washington, but did not stipulate that it was a comparable offense. RP (4/25/17) at 782-98.

The trial court accepted the State's calculation of Mr. Soloviov's offender score and found that the Oregon convictions for unauthorized use of a vehicle and second degree assault with a firearm are comparable to Washington felonies. RP (4/25/17) at 804. The court found that Mr. Soloviov had an offender score of "6" with a standard range of 57 to 75 months for Count I, and 33 to 43 months for Count III, and imposed 75 months for first degree

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(motions in limine, jury trial); 2RP March 28, 2017 (jury trial); 3RP March 29, 2017 (jury trial); 4RP March 30, 2017 (jury trial); and RP 4/25/17, (sentencing).

burglary and 43 months for second degree assault, to be served concurrently, followed by 18 months of community custody. RP (4/25/17) at 821-23; CP 276-28. The court ordered legal financial obligations of \$500.00 crime victim assessment, \$200.00 court costs, attorney's fees, expert witness fees, and a \$100.00 DNA fee. CP 279.

Timely notice of appeal was filed on April 28, 2017. CP 290. This appeal follows.

**2. Trial testimony:**

Steven Garrison was in a car crash in August 2013, which according to his sister, Kimberly Faley, resulted in impairment to some of his cognitive abilities including his ability to quickly understand what people were saying. 3RP at 512. Where he had previously worked for a printing business and could readily add numbers in his head, after the accident he frequently lost things and needed assistance, and she would visit him several times a week to check on his well-being. 3RP at 512-15. Mr. Garrison stated that as a result of the wreck he suffered a brain injury, and injury to his neck, back, legs and arms. 3RP at 385. His former wife Theresa Garrison stated that his personality changed after the accident and that he started using alcohol. 3RP at 573. Mr. Garrison separated from Theresa Garrison in 2015 and got an apartment in Vancouver in July 2015. 2RP at 321, 3RP at 513. They have a son named Ramon. Ms. Garrison stated when visiting his apartment, she noticed that

“things were disappearing” and she thought that he was associating with the ‘wrong’ people. 3RP at 515.

Mr. Garrison’s dissolution from Theresa Garrison was finalized in December 2015. 3RP at 570. After he moved into the apartment in Vancouver she continued to see him three to four times a week to help him. 3RP at 578. She described her former husband as not being street smart and being naïve, and that she sometimes needed to kick people out of his apartment. 3RP at 579.

Mr. Garrison knew a woman named “Luda,” who needed a place to stay and he allowed her to move into the apartment in September 2015. 2RP at 322. Luda stayed at his apartment for a month and then moved out, and he saw her again when she came to his apartment in January 11, 2016 and asked him if he wanted to buy some watches. 2RP at 325. Luda was with Ruben Soloviov when she went to Mr. Garrison’s apartment. 2RP at 327. Luda and Mr. Soloviov remained at the apartment overnight, and in the morning Mr. Garrison stated that Mr. Soloviov hit him in the face as he and Luda were cooking in the kitchen, and accused Mr. Garrison of stealing the key to his truck. 2RP at 329. After the incident they ate and then Mr. Soloviov again became agitated about the missing truck key. 2RP at 330. Later Mr. Garrison’s sister, Ms. Faley, arrived at the apartment to check on her brother and made Mr. Soloviov and Luda leave. 2RP at 334.

Ms. Faley testified that on the afternoon of January 12, 2016, she went to check on her brother and saw him, Luda and Mr. Soloviov in her brother's apartment. 3RP at 517-18. She had found Luda and Soloviov at the apartment a few weeks earlier when she stopped by to check on him. 3RP at 518. On January 12, upon discovering they were there, Ms. Faley, again told Luda and Mr. Soloviov to leave. 3RP at 518. Luda asked Ms. Faley for a ride to her house, and then asked for a ride to Jantzen Beach, Oregon to play video poker. 3RP at 520. Ms. Faley agreed to give Luda a ride and they left the apartment 3RP at 521. Mr. Soloviov also left the apartment, but did not go with Luda and Ms. Faley to Jantzen Beach. 3RP at 521. Ms. Faley agreed to take Luda to an address in Vancouver, but Luda later decided to play video poker at Boomers, a restaurant at Jantzen Beach, Oregon. 2RP at 334. Ms. Faley drove Luda to Jantzen Beach, and Luda asked her to come with her to play video poker. Ms. Faley went inside the restaurant and played \$20.00, which she lost. 3RP at 522.

As Mr. Soloviov, Luda and Mr. Garrison were all leaving Mr. Garrison's apartment and being told to leave by Ms. Faley, Mr. Soloviov told Mr. Garrison that he had left a jacket in the apartment and Mr. Garrison agreed to look for it. 2RP at 331. Mr. Garrison, who was leaving the apartment along with Luda and Mr. Soloviov because the situation "was agitated," agreed to go back and look for the jacket and told Mr. Soloviov to wait outside. 2RP at 335.

He said that he went inside the apartment and closed the front door and looked in the bedroom for a missing jacket but did not find anything. 2RP at 335. As he opened the front door to leave the apartment, Mr. Soloviov forced the door open and hit Mr. Garrison on the face with his fists, and pushed him backwards into the apartment. 3RP at 336, 412. After being hit several times, Mr. Garrison stated that he grabbed a table lamp and tried to break a window to get away or get the attention of neighbors, but hit the window blind and the window did not break. 2RP at 336; 3RP at 414. He stated that Mr. Soloviov grabbed the lamp and struck him on the head and the arm with the base of the lamp. 3RP at 417. Mr. Garrison said that as Mr. Soloviov continued to hit him with his fists while on a couch, he grabbed a stick used to keep a sliding window from being forced open and used it in an attempt to break the window. 3RP at 375, 420. He identified the stick depicted in Exhibit 17 as the stick that Mr. Soloviov used to assault him. 3RP at 375. He hit the window with the stick but it did not break and did not make a loud sound. 3RP at 375, 421. He testified that Mr. Soloviov grabbed the stick and started beating him with it on the body, head and his arms, which he held up to protect his head. 3RP at 423. Mr. Garrison testified that he then grabbed a commemorative Jack Daniels bottle to break the window, and that Mr. Soloviov also took that from him and hit him with it. 2RP at 377, 424-25. When he stopped, he stated that Mr. Soloviov took about \$200.00 from Mr. Garrison's pockets and a cell

phone, and said that he would kill him if he told the police. 2RP at 341. Mr. Soloviov then left, leaving the door open. 2RP at 344.

While at Boomers at Jantzen Beach with Luda, Ms. Faley received two calls from her brother, telling her that he had been beaten up. 3RP at 522. Ms. Faley, however, did not leave and continued to gamble. 3RP at 522. Mr. Garrison called his sister a second time, telling her that he was beaten up and telling her to get away from Luda because he had been assaulted by Mr. Soloviov. 3RP at 523. After the second call she retrieved Luda's purse from her car, which Luda had left in her vehicle, and left Luda in Jantzen Beach and drove home. 3RP at 545. She did not see her brother until a few days later when she went to his apartment, and saw that he was "battered up" and had bruises and "a broken arm." 3RP at 546.

Mr. Garrison testified that ten to fifteen minutes after the assault he left his apartment and went to Sellburg's Tavern, which is located near his apartment. 3RP at 388. He stayed there about ten minutes and asked if he could use the phone, and called Theresa Garrison and Kim Faley. 3RP at 388-89. He told his sister that he had been beaten and robbed. 3RP at 390. He knew that she had given Luda a ride and told her that she should "get away from Luda . . . as fast as she can." 3RP at 390. After going to the tavern, he stated that he went to a Chinese restaurant across the street for a short time, then to a convenience store about a block away to get bandages and something

to eat using a debit card, and then returned to Sellburg's Tavern. 3RP at 397-99. He stated that he also got in Ms. Garrison's car, and then got out, and then went to McDonalds. 3RP at 400-01. At McDonalds he noticed after he placed his order that Mr. Soloviov was also in the restaurant. 3RP at 401. He stated that he did not initially see Mr. Soloviov, who was seated in the back of the McDonalds, until he went back in and ordered food. 3RP at 451. He said he went outside the apartment to be "somewhere safe" and to "have protection." 3RP at 451.

Video from McDonalds, which is located at Fort Vancouver Way and 4th Mill Plain Blvd., was shown to the jury. Mr. Garrison testified that the video showed him asking people if they had a cell phone he could borrow because his cell phone had been taken from him by Mr. Soloviov. 3RP at 378. He identified Mr. Soloviov as the person who attacked him as the same person depicted in the video. 3RP at 380.

Zachary Berkeley was working the cash register at the McDonalds on January 12, 2016 when Mr. Garrison came into the restaurant. 3RP at 473-74. Mr. Berkeley knew him from previous visits and thought that something appeared to be wrong because Mr. Garrison was usually smiling and talkative, but on this occasion he did not speak, and motioned that he needed a pen and paper. 3RP at 475. Mr. Berkeley gave him a pen and paper, and Mr. Garrison wrote that needed to use a phone. Mr. Berkeley told him "no" and that he would

“get in trouble if he used my phone or it has to be an emergency,” and stated that he would not tell me why he needed to use a phone. 3RP at 475. Mr. Berkeley said that Mr. Garrison had blood on his ear. 3RP at 475. Mr. Garrison then asked other customers if he could use their phone using the paper to communicate. 3RP at 475. Mr. Berkeley said that “something was really wrong with him,” that he was not responding when he spoke to him, and he “seemed really incoherent[.]” 3RP at 475. A man Mr. Berkeley identified as Ruben Soloviov ordered food, and then was “floating around” the inside of the restaurant and appeared to be trying to make contact with Mr. Garrison as he was trying to borrow a phone. 3RP at 476-77. Mr. Berkeley then asked his manager to call police. 3RP at 477. Mr. Berkeley said that someone called police for another incident at the restaurant, and the police arrived “[w]ithin a few hours.” 3RP at 491. Mr. Garrison left through a back door of the restaurant, and then Soloviov left through the same door after him. 3RP at 494-96.

After leaving McDonalds Mr. Garrison stated that he went to a vacant house with a friend of a friend, stated that he “seemed welcome there by the people that were already there,” and that there “was electricity, a washer and dryer running.” 3RP at 404. He remained there for “[a] couple hours[.]” but did not make any calls while at the house. 3RP at 404, 405.

After he left the vacant house, he used a pay phone at a convenience

store and then walked back to his apartment. 3RP at 409. He stated that the door was left open during the time that he was gone, and he closed and locked the door when he got back. 3RP at 411.

Theresa Garrison stated that on January 12th she received a call from Mr. Garrison telling her that she was at Sellburg's Tavern and that he had been assaulted and needed a ride to the hospital. 3RP at 580. She met him at Sellburg's, where he was sitting at a table and had bandaged up injuries on his hands, arms and face. 3RP at 581. He told her that he was assaulted, and that Mr. Soloviov had taken \$200.00 and his cell phone. 3RP at 582-83. He told his sister that he did not want to go to the hospital. She stated that she took him to his apartment, locked the door and told him to stay there. 3RP at 585. After she left, she got a phone calls from him "throughout the night," saying that he wanted to be rescued. She testified that she tried to call his missing cell phone and somebody answered and she told the person that the phone was being traced and that the person had better give it back, but "they didn't fall for it." RP at 586.

The following day Theresa Garrison had their son Roman go to his father's apartment to check on his condition, and later she had Roman take him to the emergency room at Peace Health Hospital in Vancouver.

Mr. Garrison told the hospital staff that he did not leave his apartment until the day following the alleged assault because he was afraid of leaving his

apartment open and unlocked. 3RP at 394.

Mr. Garrison was treated by Dr. Dina Brothers at Peace Health Southwest Hospital on January 13, 2016 at about 6:00 p.m. 3RP at 455. following an x-ray, he was found to have a fracture to a bone in his left hand. 3RP at 457, 459. Dr. Brothers stated that he was awake and alert did not appear to be in distress when evaluated. 3RP at 457. He had multiple bruises, contusions, a small laceration behind his left ear, abrasions on his left and right ears, and a large abrasion on his forearm. 3RP at 458. There was also swelling on his upper arm and bruising and swelling on his left hand. 3RP at 458.

Vancouver police officer Adam Millard responded to a call at Peace Health Southwest Hospital on January 13, 2016, regarding an alleged assault. 1RP at 109-10. He met Mr. Garrison at the hospital and noted that he had cuts on his ears and scratches on his face and his left arm looked like it had contusions and abrasions. 1RP at 115. He also saw that his hand was swollen and he had bruises on his back. 1RP at 115. Mr. Garrison said that Ruben Soloviov was the boyfriend of "Luda." 1RP at 116-17. Officer Millard went to the McDonalds and was told they could put video surveillance on a thumb drive. RP at 121. The McDonalds staff was unable to put the video on the thumb drive and Officer Millard recorded the video using an iPhone. 1RP at 121. The iPhone recording was transferred to DVD and played to the jury. 1RP at 161. Exhibit 1. Using the names Ruben and Luda, Officer Millard

obtained a photo of a man identified as Ruben Soloviov who matched the individual seen on the McDonalds video. 1RP at 123. During a photo lay down on January 17, 2016, Mr. Garrison identified Ruben Soloviov as the person who assaulted him. 1RP at 130-31, 157-58. Exhibit 37.

Officer Millard went to Mr. Garrison's apartment and located a stick used to keep the window from being opened, and antique whiskey bottles located on a side table by the couch. 1RP at 216. Officer Millard stated that he did not examine the bottle, stick, or lamp for fingerprints and the items were not collected as evidence. 1RP at 216.

Forensic pathologist Dr. Carl Wigren testified that Mr. Garrison had been in a physical altercation, that there was injury to the bridge of his nose and forehead that were due to blunt force trauma and could have been caused by a fist. 1RP at 284.

#### **D. ARGUMENT**

- 1. BY REFUSING TO ALLOW MR. SOLOVIOV TO CROSS-EXAMINE THE COMPLAINING WITNESS ABOUT ALLEGED DRUG USE AND THE EFFECT ON HIS ABILITY TO PERCEIVE AND RECALL EVENTS, THE TRIAL COURT VIOLATED MR. SOLOVIOV'S CONSTITUTIONAL RIGHTS AND ABUSED ITS DISCRETION**

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee the

right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide persons accused of crimes the right to present a complete defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Cheatam*, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). The right to present a defense is a fundamental element of due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Relevant evidence may only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." *State v. Harris*, 97 Wn.App. 865, 872, 989 P.2d 553 (1999).

The State's case against Mr. Soloviov rested in large part on Mr. Garrison, the complaining witness. Only Mr. Garrison could testify as to each of the charges against Mr. Soloviov and he was the only one present, aside from Mr. Johnson, for the alleged assault and burglary. Therefore, he was the

primary witness.

The State moved in limine to prohibit defense counsel from questioning Mr. Garrison about drug use in order to challenge his credibility and ability to perceive events. 1RP at 80; CP 48-53. After hearing argument, the court reversed its ruling until the evidence was presented. 1RP at 80-81.

During cross-examination of Officer Millard, defense counsel argued that he should be allowed to cross-examine the officer regarding photographs he took of Mr. Garrison's apartment "in that there are---there's methamphetamine found and scales found at that time." 2RP at 195. Counsel sought to ask Officer Millard if, during the course of the investigation at the apartment and in photographing the scene, "[w]as methamphetamine found in the apartment in plain view?" 2RP at 198. Counsel argued that it was evidence that methamphetamine was used very close in time to the alleged burglary and assault, and that the drug "could certainly have an effect on someone's ability to perceive and/or memory." 2RP at 198. The State argued that the genesis of the photograph of the scales and woman and her dog in Mr. Garrison's apartment was taken by Officer Millard who was investigating a separate allegation that the woman allegedly committed fraud by taking a \$5000.00 insurance settlement that belonged to Mr. Garrison, and the officer was "laying the groundwork in the event that Mr. Garrison was, in fact, the victim of this theft or fraud." 2RP at 200. The prosecution stated that the allegation turned out to be unfounded and that Mr. Garrison retained the

check. 2RP at 200.

The court, weighing the evidence under ER 403, ruled that risk of unfair prejudice to the state is substantial and sustained the State's objection to the defense motion. 2RP at 203.

The issue was revisited when, during his testimony, Mr. Garrison stated that he missed work due to the 2013 accident and returned to work for a short time. 3RP at 386. Defense counsel during an objection and argument made outside the presence of the jury, argued that Mr. Garrison made a conflicting statement to a defense investigator during a pretrial interview, and stated that he was unemployed and had lost his job due to methamphetamine use. 3RP at 437. The court overruled the objection, stating that the risk of unfair prejudice outweighed any probative value and sustained the State's objection regarding cross-examination of Mr. Garrison regarding allegations of drug use.

*a. The court's ruling denying cross-examination of Mr. Garrison regarding the effect of alleged methamphetamine use on his ability to perceive and recall violated Mr. Soloviov's constitutional right to confront and cross-examine witnesses and was an abuse of discretion.*

A criminal defendant must be allowed to confront and cross-examine adverse witnesses under the federal and state constitutions. Const. art. I, § 22; U.S. Const. amend. VI; *State v O'Connor*, 155 Wn.2d 335, 348, 119 P.3d 806 (2005). Though the right is not absolute, it "must be zealously guarded." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The right to confront

and cross-examine is limited by “general considerations of relevance.” *Id.* at 621.

Though evidence of a witness’s character is not typically admissible “for the purpose of proving action in conformity therewith on a particular occasion[,]” ER 608 specifically provides for inquiry on cross-examination into specific instances of a witness’s conduct for the purpose of attacking her credibility. Compare ER 404(a) with ER 608(b). It is within the discretion of the trial judge to admit evidence under ER 608. ER 608(b). “In exercising its discretion, the trial court may consider whether the instance of misconduct is relevant to the witness’s veracity on the stand and whether it is germane or relevant to the issues presented at trial.” *O’Connor*, 155 Wn.2d at 349; see ER 405.

Trial court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds. *Id.* at 351. It is an abuse of discretion not to allow cross-examination where a witness is crucial and the alleged misconduct constitutes the only available impeachment. *State v. Clark*, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001). “The more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.” *Darden*, 145 Wn.2d at 619. Evidence of a witness’s drug use is admissible to the extent it affects her ability to perceive or testify accurately about the events in question. Particularly where the evidence is crucial to the

defense, exclusion of drug use evidence is reversible error.

In *State v. Brown*, this Court reviewed the trial court's exclusion of (1) evidence that the complaining witness used LSD on the night of the alleged crime and (2) expert testimony that LSD may affect the user's ability to perceive. *Brown*, 48 Wn. App. 654, 655, 739 P.2d 1199 (1987). During her testimony, the complaining witness denied using LSD. See *Id.* at 659. Defendants sought to admit testimony that the complaining witness said she was using LSD around the time of the crime and from a psychiatrist who would testify that "the drug can cause perceptual distortions and mood swings." *Id.* at 657. The trial court excluded the evidence under ER 403, finding that the prejudicial effect outweighed its probative value. *Id.* at 658. On appeal, Division Three found that the evidence of the witness's ability to perceive was crucial to the defendant. *Id.* at 660. Consequently, the trial court's ruling withheld an abuse of discretion and not harmless. *Id.* at 660-61. This Court reasoned that such "crucial evidence relative to the central contention of a valid defense" could not properly be excluded under ER 403. *Id.* at 660.

***b. The State opened the door by admitting photo and testimony regarding methamphetamine use in Mr. Garrison's apartment.***

Mr. Soloviov should have been allowed to cross-examine Ms. Garrison regarding his ability to perceive and recall. Once the State opened the door by admitting photographs of a scale, purportedly as part of another, unrelated

investigation of fraud in which Mr. Garrison was the victim, the defense should have been permitted to question the officer regarding the methamphetamine. Otherwise, the jury was left to speculate why the scales, presumably for use in drug transactions, was in Mr. Garrison's apartment.

*c. Mr. Soloviov's convictions must be reversed because the exclusion of evidence crucial to his defense cannot be harmless error.*

An error of this constitutional magnitude can only be harmless if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). This case boiled down to whether the jury believed Mr. Garrison.

This Court cannot determine the jury would necessarily have reached the same result if the jury had heard evidence tending to impeach Mr. Garrison's believability. "Credibility determinations 'cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpatory story is not facially unbelievable.'" *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004) (quoting *State v. Gutierrez*, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)).

Mr. Soloviov had the right to present evidence that might influence the determination of guilt. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). The court improperly precluded cross examination of Officer Millard regarding discovery of evidence of

methamphetamine use in the apartment and cross examination of Mr. Garrison regarding methamphetamine use around the time of the alleged assault and burglary under ER 403. 2RP at 203; 3RP at 441.

Reversal is required unless the State demonstrates the error was harmless beyond a reasonable doubt. *State v. Kilgore*, 107 Wn. App. 160, 177, 26 P. 3d 308 (2001), aff'd, 147 Wn.2d 288, 53 P. 3d 874 (2002). It cannot do so on these facts and therefore Mr. Soloviov's convictions should be reversed.

The evidence related to the possible methamphetamine use by Mr. Garrison was crucial to Mr. Soloviov's defense that Mr. Garrison had significant cognitive difficulties originating from his car accident in August, 2013, and exasperated by alleged drug use, and therefore could not accurately report events. That the jury had at least some reservations about Mr. Garrison's ability to accurately perceive events is shown the jury's decision to acquit Mr. Soloviov of robbery. Accordingly, Mr. Soloviov's convictions must be reversed. See *Brown*, 48 Wn.App. at 661; accord *Darden*, 145 Wn.2d at 626, 628 (exclusion of cross-examination of key witness not harmless and remanding for new trial); *Jones*, 168 Wn.2d at 724-25.

**2. REMAND FOR RESENTENCING IS NECESSARY BECAUSE MR. SOLOVIOV'S OREGON CONVICTIONS FOR UNAUTHORIZED USE OF A MOTOR VEHICLE AND SECOND DEGREE ASSAULT IS NOT LEGALLY OR FACTUALLY COMPARABLE TO WASHINGTON FELONIES**

Calculating Mr. Soloviov's offender score, the State included a prior

second degree assault with a firearm conviction from Oregon. CP 170. Oregon's second degree assault statutes are broader than the Washington statutes. The State did not produce any documentation establishing the facts of the crime. The State therefore failed to prove the assault conviction is legally or factually comparable to a Washington felony. This Court should vacate Soloviov's sentence and remand to the trial court for resentencing.

- a. *The inclusion of out-of-state offenses in the SRA offender score violates due process unless the foreign conviction is legally and factually comparable to crimes in Washington.*

Where the defendant's offenses resulted in out-of-state convictions, RCW 9.94A.525(3) provides that such offenses "shall be classified according to the comparable offense definitions and sentences provided by Washington law." This statute requires the sentencing court to make a factual determination of whether the out-of-state conviction is comparable to a Washington conviction. *State v. Morley*, 134 Wash.2d 588, 601, 952 P.2d 167 (1998). The State bears the burden of proving the existence and comparability of those convictions. RCW 9.94A.525; *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). Courts review a challenge to the comparability of an out-of state conviction de novo. *State v. Moncrief*, 137 Wn. App. 729, 732, 154 P.3d 314 (2007). "'Bare assertions' as to criminal history do not substitute for the facts and information a sentencing court requires." *State v. Mendoza*, 165 Wn.2d 913, 929, 205 P.3d 113 (2009)

(quoting *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999)).

Washington courts employ a two-part test to determine the comparability of a foreign offense. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. *Ford*, 137 Wn.2d at 479 (citing *Morley*, 134 Wn.2d at 606). The sentencing court determines whether the offenses are legally comparable—whether the elements of the out-of-state offense are substantially similar to the elements of the Washington offense. *Thieffault*, 160 Wash.2d at 415, 158 P.3d 580. If the elements of the out-of-state offense are broader than the elements of the Washington offense, they are not legally comparable. If the elements of the foreign conviction are comparable to the elements of a Washington offense on their face, the foreign offense counts toward the offender score as if it were the comparable Washington offense. *In re Personal Restraint of Lavery*, 154 Wn.2d 259, 255, 111 P.3d 837 (2005). “If the elements of the foreign offense are broader than the Washington counterpart,” that is, if the out-of-state statute criminalizes more conduct than the comparable Washington statute, the elements are not legally comparable. *Thieffault*, 160 Wn.2d at 415.

Even if the offenses are not legally comparable, the sentencing court can still include the out-of-state conviction in the offender score if the offense is factually comparable. *Thieffault*, 160 Wash.2d at 415; *Lavery*, 154 Wash.2d at 255. Where the elements of the out-of-state crime are different or broader,

the sentencing court must examine the defendant's conduct as evidenced by the undisputed facts in the record to determine whether the conduct violates the comparable Washington statute. *Morley*, 134 Wn.2d at 606; *Lavery*, 154 Wn.2d at 255. "In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." *Id.* When a foreign conviction is neither legally nor factually comparable, it cannot be counted in an offender score. *Id.*

b. *Mr. Soloviov's Oregon convictions for second degree assault and unauthorized use of a motor vehicle are not legally comparable to Washington felonies*

i. Mr. Soloviov's conviction for second degree assault with a firearm is not legally comparable to a Washington felony.

Mr. Soloviov's 2009 Oregon conviction for assault was not legally comparable to a Washington felony. In *Lavery, supra*, the Washington Supreme Court ruled that the comparability analysis is based, first and foremost, on a side-by-side comparison of the elements of the Washington and out-of-state crimes. A comparison of the assault statutes from Washington and Oregon shows that the Oregon statute criminalizes more conduct than the Washington statute. Or.Rev.Stat. § 163.175 provides:

Assault in the second degree, provides that (1)  
A person commits the crime of assault in the second degree if  
the person:

- (a) Intentionally or knowingly causes serious physical injury to another;
- (b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or
- (c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

RCW 9A.36.021 provides as follows:

Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
- (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
- (c) Assaults another with a deadly weapon; or
- (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
- (e) With intent to commit a felony, assaults another; or
- (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
- (g) Assaults another by strangulation or suffocation.

A key difference between the two state's charges is the *mens rea*.

In Oregon, a second degree assault can be based upon either intentional or knowing conduct. The Oregon statute requires either a knowing or an intentional mental state. Or.Rev.Stat. § 163.175. Washington's second degree assault statute requires specific intent. In Washington, a second degree assault is only found if the conduct of the actor is intentional. The *mens rea* element

of the Oregon offense is broader than Washington's and dispositive of the legal comparability question in this case. The *mens rea* under ORS 163.175(1)(b) is “intentionally or knowingly” and the *mens rea* under RCW 9A.36.021(1)(c) in this case is intentionally. *Williams*, 159 Wn.App. at 307.

Under ORS 163.175(1)(b), “A person commits the crime of assault in the second degree if the person ... [i]ntentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon.” But under RCW 9A.36.021(1)(c), “A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree ... [a]ssaults another with a deadly weapon.”

The term assault in RCW 9A.36.011(1)(a) constitutes an element of the crime of first degree assault. *State v. Smith*, 159 Wash.2d 778, 788, 154 P.3d 873 (2007) “The term ‘assault’ is not defined in the criminal code, and thus Washington courts have turned to the common law for its definition.” *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. *Smith*, 159 Wash.2d at 785.

The Washington statutes define the offense of second degree assault more narrowly than the Oregon statutes. Washington distinguishes the mental states of “intentionally” and “knowingly” and therefore the Washington

statute defines the offense of second degree assault more narrowly than the Oregon statute.

**ii. The State failed to prove factual comparability of second degree assault with a firearm**

Where a foreign conviction is not legally comparable to a Washington felony, the sentencing court may look at the record to assess whether the underlying conduct would have violated the comparable Washington statute. *Morley*, 134 Wn.2d at 606; *Lavery*, 154 Wn.2d at 255. If a foreign statute is broader than the Washington statute, like here, courts then consider whether the offenses are factually comparable. *State v. Olsen*, 180 Wn.2d 468, 473, 325 P.3d 187 (2014). The State provided no evidence whatsoever to show Soloviov's Oregon convictions for second degree assault is factually comparable to any Washington felony.

The indictment alleges that Mr. Soloviov, on or about October 30, 2008, "unlawfully and knowingly caused physical injury to Thao Phuong Nguyen by means of a deadly weapon, to-wit: a firearm, by using and threatening to use a firearm against [the victim.]" CP 202. The plea agreement and Judgment however, which were both entered February 25, 2009, do not allege any facts regarding the underlying crime other than the identity of the crime and that the offense was committed in violation of ORS 163.175. CP 204-08. No facts were stipulated to or proven beyond a reasonable doubt at sentencing. Therefore, the evidence is insufficient to

support the trial court's finding that Soloviov's conviction for second degree assault with a firearm in Oregon would be a felony under Washington law.

**iii. Mr. Soloviov's 2002 Oregon conviction for unauthorized use of a vehicle is not comparable to a Washington felony**

Mr. Soloviov was convicted of unauthorized use of a vehicle in Oregon based on an incident that occurred in 2002. CP 173, 180. At sentencing, defense counsel argued that the Oregon and Washington offenses were not legally comparable. The court found that Mr. Soloviov's conviction for unauthorized use of a motor vehicle was comparable to a Washington felony. RP (4/25/17) at 804. The trial court's ruling constitutes error. In *State v. Jackson*, 129 Wash.App. 95, 107–08, 117 P.3d 1182 (2005), this Court held that Oregon's former unauthorized use of a vehicle offense was not legally comparable to Washington's taking a motor vehicle without permission offense because the former Oregon statute prohibited a broader range of activity than the former Washington statute. Former ORS 164.135 (1990) provides:

(1) A person commits the crime of unauthorized use of a vehicle when:

(a) The person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner; or

(b) Having custody of a vehicle, boat or aircraft pursuant to an agreement between the person or another and the owner thereof whereby the person or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, boat or

aircraft, the person intentionally uses or operates it, without consent of the owner, for the person's own purpose in a manner constituting a gross deviation from the agreed purpose; or

(c) Having custody of a vehicle, boat or aircraft pursuant to an agreement with the owner thereof whereby such vehicle, boat or aircraft is to be returned to the owner at a specified time, the person knowingly retains or withholds possession thereof without consent of the owner for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement.

(2) Unauthorized use of a vehicle, boat or aircraft is a Class C felony.

The most closely analogous statute to Oregon's unauthorized use of a vehicle is Washington's taking a motor vehicle without permission, which stated that:

(1) Every person who shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, the property of another, shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of taking a motor vehicle without permission.[13]

(2) Taking a motor vehicle without permission is a class C felony.

Former RCW 9A.56.070 (1990). The Oregon statute under which Mr. Soloviov was convicted is not comparable to a Washington felony because it

criminalizes conduct not included in the analogous Washington statute. *Thiefault*, 160 Wn.2d at 415. Specifically, the Oregon offense encompasses situations in which a person does not intend to deprive the owner of the vehicle. The Washington statute criminalizes intentionally taking, driving away, or riding in a vehicle without the owner's permission. Former RCW 9A.56.070. The two statutes are not legally comparable. *Thiefault*, 160 Wn.2d at 415.

The comparability examination must then proceed to a factual comparison. The former Washington statute for taking a motor vehicle without permission requires (1) intentionally taking or driving away a motor vehicle without permission of the owner or person entitled to the possession thereof or (2) voluntarily riding in a motor vehicle with knowledge that it was unlawfully taken. See *Jackson*, 129 Wash.App. at 108, 117 P.3d 1182.

In this case, Mr. Soloviov was charged with taking a 2001 Chevrolet Camaro from Capital Chevrolet between May 31, 2002 and June 1, 2002. CP 180. A sentencing court properly can consider facts conceded by the defendant in a guilty plea as an admitted fact. *State v. Arndt*, 179 Wash.App. 373, 320 P.3d 104 (2014) (citing *Thiefault*, 160 Wash.2d at 415). Mr. Soloviov stated in his change of plea that "on May 31, 2002, I knew I took and operated a motor vehicle that did not belong to me, and it was worth more than \$10,000." CP 182. The statement in his change of plea form is not a model of clarity; his statement is that he "knew," but the statement does not show that

he intentionally took the Camaro. The language of the Oregon statute prohibited a broader range of activity than the former Washington statute and therefore it cannot be ascertained if the vehicle was taken “intentionally,” as was required by the Washington statute, or if it was under other circumstances such as misunderstanding the time to return a leased vehicle, return of a “loaner” car from a dealership, or during a test drive in which the return time for the vehicle was misunderstood by the parties.

**iv. Mr. Soloviov must be resentenced with an offender score of “3”**

Where a sentence is erroneous due to the miscalculation of the offender score, the defendant is entitled to be resentenced. Here, Mr. Soloviov’s score should have been "3" instead of "6" for first degree burglary and second degree assault, resulting in a standard range of 31 to 41 months rather than 57 to 75 months for Count 1, and 13 to 17 months instead of 33 to 43 months for Count 2. *Ford*, 137 Wn.2d at 485.

**3. MR. SOLOVIOV’S COUNSEL WAS INEFFECTIVE AT SENTENCING BECAUSE HE FAILED TO REQUEST THAT THE COURT TREAT THE CONVICTIONS AS THE SAME CRIMINAL CONDUCT**

Mr. Soloviov’s two crimes comprised the same criminal conduct. The burglary anti-merger statute gave the sentencing judge discretion to score them together. This would have resulted in a lower offender score and standard range. Despite this, defense counsel failed to ask the sentencing judge to exercise his

discretion to score the two offenses together. This deprived Mr. Soloviov of the effective assistance of counsel at sentencing.

*a. Defense counsel deprived Mr. Soloviov of the effective assistance of counsel at sentencing by failing to argue same criminal conduct.*

The federal and state constitution's guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. The accused is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 845 P.2d 289 cert. denied, 510 U.S. 944 (1993) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993).

*b. Crimes arising from the same criminal conduct count as a single offense for purposes of sentencing.*

A sentencing court must determine the defendant's offender score. RCW 9.94A.525. The sentencing judge must determine how multiple current offenses are to be scored. Offenses that comprise the "same criminal conduct" are "counted as one crime." RCW 9.94A.589(1)(a). Mr. Soloviov's convictions encompass the "same criminal conduct" and should have been counted as one crime when calculating his offender score. When a court

sentences a defendant for more than one felony offense, each current offense affects the offender score unless the court finds that some or all of the current offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). Current offenses that encompass the same criminal conduct “shall be counted as one crime.” RCW 9.94A.589(1)(a). Whether two crimes constitute the same criminal conduct involves a determination of fact as well as the exercise of trial court discretion. *State v. Nitsch*, 100 Wn. App. 512, 519-20, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000). Because the two crimes comprised the same criminal conduct, the sentencing court had discretion under the burglary anti-merger statute to score them as one. RCW 9A.52.050. That statute provides that “Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary...” RCW 9A.52.050. A sentencing court “may, in its discretion, refuse to apply the burglary anti-merger statute based on the facts of the case before it.” *State v. Davis*, 90 Wn. App. 776, 783–84, 954 P.2d 325 (1998).

As an initial matter, the trial court failed to exercise its discretion because it did not determine whether or not the two offenses comprised the same criminal conduct, and did not determine whether or not the facts warranted application of the anti-merger statute. RP (4/25/17) at 823. As argued below, the two crimes comprised the same criminal conduct, and the sentencing court therefore had discretion under the burglary anti-merger statute to score them as one. RCW 9A.52.050. That statute provides that “Every

person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary...” RCW 9A.52.050. A sentencing court “may, in its discretion, refuse to apply the burglary anti-merger statute based on the facts of the case before it.” *State v. Davis*, 90 Wn. App. 776, 783–84, 954 P.2d 325 (1998).

However, the issue of same criminal conduct may be raised for the first time on appeal as an ineffective assistance of counsel claim. *State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 232 (2004). Failure to argue same criminal conduct when such an argument is warranted constitutes ineffective assistance. *Id.* at 824-25.

*c. The burglary and assault convictions encompass the same criminal conduct.*

“Same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). The burglary and assault in this case were the same criminal conduct because the burglary was committed in furtherance of the assault against Mr. Garrison, the intent did not change in the course of committing the burglary as opposed to the assault, and both crimes occurred at the same time in the same place against the same victim. According to Mr. Garrison, Mr. Soloviov forced open the apartment door and immediately began hitting Mr. Garrison. 2RP at 336. Inside the apartment, he slammed the door closed and continued to hit him, then took the lamp from him and hit him with it, then, after Mr. Garrison

grabbed the stick, took the stick and hit him with it, and then Mr. Garrison got the Jack Daniels bottle and Mr. Soloviov took that and hit him with it. 2RP at 338-39.

Thus, the intent throughout the entry into the apartment and assault remained constant: the goal was to assault Mr. Garrison. The burglary and assault involved the same victim –Mr. Garrison – because the burglary was elevated to the first degree as a result of the assault against him. CP 1-2.

***d. Both prongs of the Strickland test are met.***

Counsel's representation was deficient when he failed to challenge the State's offender score calculation by requesting that the convictions be scored as the same criminal conduct. There was no tactical reason for not asserting the challenge to the offender score, and no reason why the argument should not have been made at sentencing. Defense counsel's performance was deficient because there was no legitimate reason not to ask to the trial court to find that his convictions for first degree burglary and assault constituted the same criminal conduct. A finding of same criminal conduct would have lowered the applicable standard range sentences for both counts, decreasing Mr. Soloviov's sentence. RCW 9.94A.510, 9.94A.515.

The deficient performance was prejudicial because Mr. Soloviov's offender score and corresponding standard range would have been one point lower, and would have resulted in a shorter sentence. The appropriate remedy is to reverse the calculation of Mr. Soloviov's offender score and remand for sentencing. Assuming *arguendo* that the Court determines that the Oregon convictions challenged in section 2, *supra*, are comparable to Washington felonies, Mr.

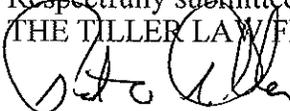
Soloviov's offender score would be "5" for the assault and burglary convictions if they are considered same criminal conduct, resulting in a standard range sentence of 41-54 months for the first-degree burglary, and 22-29 months for the second-degree assault. There is a reasonable probability that counsel's deficient performance affected the outcome of the sentencing proceeding. *Phuong*, 174 Wn. App. at 548, His sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

**E. CONCLUSION**

For the foregoing reasons, Mr. Soloviov respectfully requests this Court reverse and remand for a new trial. Alternatively, this case should be remanded for resentencing.

DATED: February 28, 2018.

Respectfully submitted,  
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Of Attorneys for Ruben Soloviov

CERTIFICATE OF SERVICE

The undersigned certifies that on February 28, 2018, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Rachael Rogers at Clark County Prosecutor's Office and copies were mailed by U.S. mail, postage prepaid, to the following:

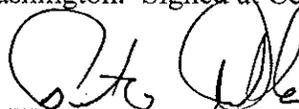
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 28, 2018.



PETER B. TILLER

**THE TILLER LAW FIRM**

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