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Court of Appeals No. 51469-9-II

In the  
*Court of Appeals of the State of Washington*  
Division Two

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In Re the Personal Restraint of:

AZIAS ROSS,

Petitioner.

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**REPLY BRIEF IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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Pierce County Superior Court No. 12-1-03305-8

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## I. INTRODUCTION

Azias Ross (“Mr. Ross”) filed a Personal Restraint Petition (“opening brief” or “PRP brief”), seeking reversal of his convictions on multiple grounds and, alternatively, requesting remand for a full resentencing. In its October 11, 2019, Response Brief (“Resp. Br.”), the State contests Mr. Ross’ challenges to his convictions, but consents to Mr. Ross’ alternative request for relief, agreeing that Mr. Ross is entitled to a full resentencing hearing.

As set forth in Mr. Ross’ opening brief and as further elaborated herein, Mr. Ross’ convictions were obtained through several prejudicial trial errors and constitutional violations and, as such, should be reversed. In the alternative, in the event the Court rejects Mr. Ross’ challenges to his convictions, Mr. Ross accepts the State’s gracious assent to full resentencing, and respectfully requests that the Court likewise accept the State’s concession and remand this matter for full resentencing.

## II. ARGUMENT

### A. **Mr. Ross’ Convictions were Obtained in Violation of His Confrontation Clause Rights.**

#### 1. **Mr. Ross Duly Preserved his Confrontation Clause Challenge.**

In its Response, the State argues Mr. Ross failed to preserve for review his challenge under the Confrontation Clause to the Sixth Amendment because his counsel did not make a Confrontation Clause

objection to admission of Nolan Chouap’s (“Mr. Chouap”) statement at trial. A closer review of the record reveals that this claim is inaccurate, as Mr. Ross’ attorney clearly and unequivocally objected to admission of Mr. Chouap’s statement in a motion in limine argued on the record,<sup>1</sup> expressly citing Bruton v. United States, 391 U. S. 123, 135- 36, 88 S. Ct. 1620, 20 L.Ed. 2d 476 (1968) , Richardson v. Marsh, 481 U. S. 200, 211, 107 S. Ct. 1702, 95 L.Ed.2d 176 (1987), and Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). ***See Supplemental Appendix, Attachment “L,” Excerpts from 1.22.2014 Trial Transcripts*** (“1.22.2014 RP,” hereinafter). Specifically, counsel for Mr. Ross argued prior to trial:

This is a conspiracy indictment. They are alleging a conspiracy, so I don't think they should be able to mention the names of anyone pursuant to Bruton, and pursuant to Crawford, because how am I supposed to cross-examine Mr. Chouap, should he choose not to testify about whether or not Azariah was really there, as to whether or not, what was his motive to lie? What would he say? And then to say Azariah was found with them at the mall, I mean that's an end run into a conspiracy with a non-present co-defendant and I think it's incredibly prejudicial.

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<sup>1</sup> Mr. Ross referenced this motion in limine in his opening PRP brief. PRP Br. at 3-4 (“Over trial counsel’s objections on confrontation grounds (Def.’s Mot. in Limine Re: Bruton Issues, Feb. 10, 2014), the unrecorded statements of Ms. Oeung, Mr. Chouap, and Mr. Ross were all introduced at trial through the testimony of Det. Baker, in that order. 2.11.2014 RP 85-169”).

1.22.2014 RP 211. She further added that admission of Mr. Chouap's statement identifying Azariah Ross by name as a co-conspirator would be "significantly prejudicial to Azias Ross because Azariah Ross is not only a very similar name but it's going to be fairly clear that they are related." 1.22.2014 RP 214.

Ms. Oueng's counsel joined in the argument and articulated precisely the argument set forth in Mr. Ross' PRP brief, explaining to the court that the other evidence in the case would readily reveal any names redacted from Mr. Chouap's statement. 1.22.2014 RP 222. Thus, by allowing the statement, counsel argued, it "completes the circle" and creates a situation in which the State is "backdooring and bringing in Mr. Chouap's statement that is then used by the jury against the current Mr. Ross that we have here." 1.22.2014 RP 222.

The Court initially reserved ruling on Mr. Ross' Bruton objection (1.22.2014 RP 222) and then ultimately allowed Mr. Chouap's statement, and the other statements, to be introduced (2.11.2014 RP 85-169). Mr. Ross' counsel also made her own proposed "extensive redactions" and, prior to the court's final ruling, made a general objection to the entire redaction process and admission of Mr. Chouap's statement, albeit this time citing the fact that no direct quotes were included in Det. Baker's recording of the statement. 2.11.2014 RP 48-49.

Thus, the issue presented is not whether Mr. Ross made a Confrontation Clause objection to Mr. Chouap's statement – it is clear he did. Rather, the issue is whether Mr. Ross waived his initial Confrontation Clause objection under Crawford by asserting a different basis for objecting immediately prior to the introduction of the evidence. There is no basis for finding waiver under these circumstances.

When an initial ruling on a motion in limine is tentative, "any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling." State v. Powell, 126 Wn. 2d 244, 256, 893 P.2d 615 (1995) (citing State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991)). Here, the court made no ruling on Mr. Ross' motion in limine. When the matter was raised again through Mr. Ross' general objection to the manner in which the statements were being introduced, the court clearly had an opportunity to then rule on Mr. Ross' previous specific Confrontation Clause objection. There was no waiver of the initial Confrontation Clause objection, but rather an additional objection asserted. Thus, Mr. Ross' Confrontation Clause argument was preserved for appeal and should be considered in the merits.

**2. The State Concedes the Merits of Mr. Ross' Confrontation Clause Challenge.**

The State does not challenge Mr. Ross' Confrontation Clause challenge on the merits, instead relying only on waiver and lack of actual and substantial prejudice. As set forth above, the challenge was duly preserved. Therefore, the State should be deemed to have conceded that Mr. Ross' Confrontation Clause rights were in fact violated. See State v. Ward, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005) (holding that the State conceded a defendant's double jeopardy argument on appeal by failing to respond to it).

**3. Mr. Ross Suffered Actual and Substantial Prejudice as a Result of the Confrontation Clause Violation.**

The State argues Mr. Ross has failed to show actual and substantial prejudice resulting from the Confrontation Clause violation. Resp. Br. at 36-39. Although Mr. Ross cited the actual and substantial prejudice standard in his Standard of Review, as the State points out, he mistakenly couched his Confrontation Clause argument in terms of harmless error. However, the substance of that argument readily meets the actual and substantial prejudice standard for the same reasons.

As articulated in detail in the Statement of the Case and Argument sections of Mr. Ross' PRP brief, Mr. Chouap's statement served as overwhelmingly harmful substantive evidence of Mr. Ross'

guilt, as it was apparent that the “someone” identified in the statement was Mr. Ross. PRP Br. at 4-7, 15-20. Mr. Chouap’s statement caused further prejudice to Mr. Ross because, in addition to Mr. Ross clearly being implicated, Azariah Ross’ name remained in the statement unredacted.

As noted by trial counsel, the names “Azariah Ross” and “Azias Ross” are very similar, and, even if the jury succeeded in separating the two in their minds, the jury was able to conclude that the two were related. 1.22.2014 RP 122. To further confuse matters, Det. Baker repeatedly referred to Azariah Ross as “Azzi” throughout his testimony, a nickname that is closer to “Azias” than to “Azariah”. 2.11.2014 RP 120-21, 139, 143, 157. Thus, in addition to Mr. Ross being clearly implicated as the unnamed co-conspirator, the statement also associated Mr. Ross with his brother, who was implicated by name, and further opened the possibility that the jury would mistakenly attribute Azariah’s or “Azzi’s” actions to Azias.

The State argues Mr. Ross’ prejudice argument is deficient because “Petitioner presents several conclusory statements and no citations to the record.” Resp. Br. at 37. The State argues also that the purported failure to object suggests the evidence was not “critically prejudicial.” Id. The State is incorrect on both counts.

Mr. Ross detailed the harmful elements of Mr. Chouap's statement, and the State's case in general, in the Statement of the Case section of his PRP brief with citation to the record for each fact. PRP Br. at 4-7. He referenced the salient facts in summary form in his Argument section. PRP Br. at 15-20. The State presents no authority suggesting this approach is improper, or that, as the State's argument implies, a litigant must copy the entirety of its statement of the facts into its argument.

As detailed in Mr. Ross' opening brief, the evidence supporting the majority of his convictions consisted entirely of the statements of Mr. Ross and Mr. Chouap. Mr. Chouap's statement amounted to a substantial portion of the State's case against Mr. Ross, even though it was ostensibly not admitted for that purpose. Mr. Chouap's statements regarding his use of a .38 revolver, although not the only evidence, constituted direct evidence in support of the firearm enhancements imposed on Mr. Ross. 2.11.2014 RP 147. Against the overwhelming prejudice of Mr. Chouap's statement, the weaknesses in the remainder of the State's case against Mr. Ross are apparent – there was a lack of physical or eyewitness evidence connecting Mr. Ross to the burglaries and robberies. Mr. Chouap's statement aided the State considerably in overcoming that evidentiary gap.

As to the State's argument that Mr. Ross' failure to object suggests admission of the statement was not "critically prejudicial", this misstates the record for the reasons set forth above. Mr. Ross did object to the admission of the statement at the pretrial stage specifically on Confrontation Clause grounds and then objected again to the redaction process right before the statement's admission.

The jury was instructed to consider Mr. Chouap's statement only as to Mr. Chouap's guilt, but then was ultimately not asked to determine Mr. Chouap's guilt. The only purpose Mr. Chouap's statement served when the jury went back into deliberations was as evidence against Mr. Ross. It is inconceivable that Mr. Chouap's statement stayed out of the minds of the jurors during deliberations. Under these circumstances, the introduction of Mr. Chouap's statement caused actual and substantial prejudice and warrants reversal of Mr. Ross' convictions.

**B. The State Fails to Materially Distinguish the Prosecution's Misconduct Here from the Misconduct Warranting Reversal in Glasmann and Walker.**

In response to Mr. Ross' argument that he was unfairly prejudiced by the prosecution's improper slides asserting that Mr. Ross is guilty, the State argues that the offending slide "was a legal argument, not an expression of improper opinion". Resp. Br. at 39. In advancing this argument, the State asserts, on the one hand, that the prosecutor was

making legal argument rather than expressing opinions, while on the other hand, that Mr. Ross' references to the context in which the slide was presented, i.e. oral assertions of guilt, is irrelevant to the issue of whether use of the slide constituted prosecutorial misconduct. Resp. Br. at 39-41.

The State is correct to point out that the surrounding context in which the slide was shown is important to this analysis. It is wrong, however, that its argument consisted solely of legal argument as opposed to expressions of opinion of guilt. In fact, the record is clear that it contained both.

As the State argues, the prosecutor at trial discussed jury instructions 6 and 7 prior to displaying the slide that showed Mr. Ross' name connected by an arrow to the word "guilty." Resp. Br. at 39-41 (citing 3.3.2014 RP 2248-52). In discussing the jury instructions in reference to the slides that preceded the offending slide, the prosecutor explained the applicable law and then posed a number of questions to the jury. 3.3.2014 RP 2248-52. Mr. Ross does not take issue with this portion of the State's closing argument.

That the State engaged in legal argument prior to showing the jurors a slide with an arrow between Mr. Ross' name and "guilty" while telling the jury that Mr. Ross was in fact guilty does not negate the impropriety of the slide. While explaining the law and posing questions to

the jury does not constitute improper expressions of opinion, going on to answer those questions does. This is precisely what the prosecutor did in this case.

In addition to showing a slide saying “Azias was selling it at the time → Guilty”, following several other slides asserting Mr. Ross was “still guilty” of other charged offenses, the prosecutor told the jury “it is beyond a reasonable doubt that they were down for home-invasion robberies,” “[t]hese defendants are guilty of the charges with which they have been charged,” “[t]hey're guilty,” and “these defendants are all guilty of all crimes charged.” 3.3.2014 RP 2244-45, 2268:16-19, 2272:9-11, 2352:11-12.

These basic facts render this case are not materially distinguishable from In re Pers. Restraint of Glasmann, 175 Wash. 2d 696, 702, 286 P.3d 673, 676 (2012) and State v. Walker, 182 Wn.2d 463, 471-472, 341 P. 3d 976 (2015). Showing the jury a slide saying “Azias was selling it at the time → Guilty” is not materially distinguishable from placing the word “guilty” over the defendant’s forehead or stating on slides that the defendant is guilty beyond a reasonable doubt. See Id.

Like the prosecutor in Glasmann, the prosecutor in Mr. Ross’ case reinforced the message of the improper slide with improper oral assertions of his opinion that the defendant is guilty. Glasmann, 175 Wash. 2d at

707. Moreover, with the benefit of the Glasmann decision, the case law advising the prosecutor of the impropriety of using slides and making argument of this nature was all the more "available for the prosecutor" and more "clearly warned against the conduct here". Id. at 707.

In nonetheless seeking to distinguish Glasmann and Walker, the State offers little more than conclusory assertions, such as that the prosecutor "did not use his 'position of power and prestige to sway the jury,'" "did not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case", and "certainly was not making 'clear efforts to distract the decision maker'". Resp. Br. at 41. However, the State presents no material factual differences between the circumstances presented in this case and those presented in Glasmann and Walker to support these assertions.

It is beyond reasonable dispute that the prosecutor in Mr. Ross' case expressed an individual opinion of Mr. Ross' guilt, telling the jury "[t]hese defendants are guilty of the charges with which they have been charged," "[t]hey're guilty," and "these defendants are all guilty of all crimes charged." 3.3.2014 RP 2244-45, 2268:16-19, 2272:9-11, 2352:11-12. Contrary to the State's argument, the fact that the prosecutor also discussed evidence at various points in his closing is of no moment, as the prosecutor's in Glasmann and Walker did likewise. In Mr. Ross' case,

these oral assertions of guilt, bolstered by the improper slides asserting guilt, constitute use of the prosecutor's "position of power and prestige to sway the jury" and "clear efforts to distract the decision maker" to the same extent as the misconduct in Glasmann and Walker.

In response to this argument, the State employs a misguided "divide-and-conquer" approach, characterizing Mr. Ross' reference to the prosecutor's oral assertions of guilt as "other prosecutorial misconduct claims", separate from his challenge to the offending slides. Resp. Br. at 41-44. Because Mr. Ross did not object to the oral assertions, the State argues, he must meet the higher flagrant and ill-intentioned conduct standard, which the State argues he cannot meet. Resp. Br. at 41-44. The State misses the mark entirely.

Mr. Ross has not made any "other prosecutorial misconduct claims" regarding the prosecutor's oral expressions of opinions of guilt. As in Glasmann, the impropriety of and prejudice from the offending slides was compounded by the fact that the prosecutor supplemented the slides with oral argument expressing opinions of guilt. As held in Glasmann, "[b]y expressing his personal opinion of Glasmann's guilt *through both his slide show and his closing arguments*, the prosecutor engaged in misconduct." Glasmann, 175 Wash. 2d at 707 (emphasis added). Mr. Ross makes precisely the same argument here for the same

reasons. In Mr. Ross' case, as in Glasmann, the prosecutor committed misconduct "through both his slide show and his closing arguments" reinforcing the assertion of guilt. Glasmann, 175 Wash. 2d at 707. As in Glasmann, Mr. Ross presents a single claim of prosecutorial misconduct, not separate claims for improper slides, on the one hand, and improper argument, on the other. As in Glasmann, the improper oral assertions of guilt brought the offending slides outside the boundaries of proper conduct and compounded the prejudice caused.

The State also seeks to distinguish Glasmann and Walker on the grounds that the offending slides did not involve alteration of exhibits. However, the use of an exhibit was not a dispositive fact in either case. The misconduct in both cases consisted of the use of visual aids to tell the jury that, in the prosecutor's opinion, the defendant is guilty. This is precisely what occurred in Mr. Ross' case.

The State argues also that Mr. Ross failed to rely upon the correct standard in his opening brief. However, the State seems to confuse the standard for establishing prosecutorial misconduct with the applicable standard for establishing harm. The standard for establishing prosecutorial misconduct is the same regardless of whether the matter is raised in a personal restraint petition or on direct appeal: a showing of improper and prejudicial conduct. State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d

43 (2011). Then, personal restraint petitioners must meet the additional actual and substantial prejudice standard.

In both briefs, Mr. Ross has established prosecutorial misconduct under the standard set forth in Thorgerson. Mr. Ross has also analyzed the facts of his case in light of Glasmann, another personal restraint petition matter. By citing Glasmann as the controlling authority, Mr. Ross clearly asserts he is entitled to relief under the actual and substantial prejudice standard. In fact, Glasmann applies a higher standard than that applicable to Mr. Ross because, unlike the defendant in Glasmann, Mr. Ross timely objected. Mr. Ross neither referenced nor relied upon an incorrect standard. Glasmann is the controlling authority and warrants the conclusion that, like the petitioner in that case, the prosecutor committed prejudicial misconduct against Mr. Ross, and that misconduct caused actual and substantial prejudice. Glasmann, 175 Wash. 2d at 707.

Again, satisfaction of the actual and substantial prejudice standard is supported by the fact that the State's case relied almost entirely on Mr. Ross' own statement, along with the statement of Mr. Chouap, which was not supposed to be considered as evidence against Mr. Ross. Aside from this evidence, no eyewitness or physical evidence directly implicates Mr. Ross in the burglaries and robberies. Under these circumstances, the prosecutor's misconduct quite likely swayed the jury's verdict as to one or

more counts. Mr. Ross suffered actual and substantial prejudice and, like the petitioner in Glasmann, is entitled to a new trial.

**C. The State Fails to Defend the Special Verdict Forms and Related Jury Instructions from the Holding in Williams-Walker.**

In response to Mr. Ross’ argument that counsel was ineffective for failing to object to the special verdict forms and related jury instructions, the State asserts that the jury was properly instructed as a result of Concluding Instruction No. 59, which instructed the jury that “In order to answer a special verdict form ‘yes,’ all twelve of you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer.” Resp. Br. at 44-45. However, this instruction is insufficient under the holding in State v. Williams-Walker, 167 Wn. 2d 889, 898, 225 P.3d 913 (2010). In striking down firearm enhancements as unconstitutional based on lack of clarity as to the nature of the jury’s special verdict findings, the Williams-Walker Court recognized:

that a sentencing court violates a defendant's right to a jury trial if it imposes a firearm enhancement without a jury authorizing the enhancement by ***explicitly finding that, beyond a reasonable doubt***, the defendant committed the offense while so armed.

Williams-Walker, 167 Wn. 2d at 898 (citing State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008)) (emphasis added).

In Mr. Ross’ case, the jury did not make an “explicit[] finding

[...] beyond a reasonable doubt” that Mr. Ross, as principal or accomplice, was armed with a firearm. *Id.* Instead, the jury was specifically instructed as follows with respect to the special verdict:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant, Azias Ross, was armed *with a deadly weapon* at the time of the commission of the crime in Counts I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, LIX, and/or LXXI.

*See Appendix, Attachment “K,” Excerpts from Jury Instructions and Verdict Forms (emphasis added).* The special verdict forms then asked the jurors:

QUESTION ONE: Was the defendant or an accomplice armed with a deadly weapon at the time of the commission of the crime in Count \_\_\_?

ANSWER: \_\_\_\_\_ (Write “yes” or “no”)

QUESTION TWO: Was the deadly weapon a firearm?

Answer: \_\_\_\_\_ (Write “yes” or “no”)

*See id.*<sup>2</sup> Thus, the jury was presented with a general instruction advising that special verdicts must be answered unanimously applying the beyond a reasonable doubt standard and a specific instruction advising that only

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<sup>2</sup> Mr. Ross mistakenly asserted in his opening brief that some forms stated “Was the defendant or an accomplice armed with a firearm at the time of the commission of the crime in Count [\_\_\_\_]?” This was a mistake because this language in fact came from the verdict forms in the prosecution of Mr. Ross’ brother, Azariah Ross. This again illustrates how susceptible the two names are to confusion.

deadly weapon findings needed to be made beyond a reasonable doubt.

Given the existence of a specific instruction advising the jurors to make deadly weapon findings beyond a reasonable doubt, and the conspicuous absence of an instruction advising the jurors to make firearm findings beyond a reasonable doubt, it cannot be said that the jury “explicitly [found] that, beyond a reasonable doubt, the defendant committed the offense while [] armed [with a firearm].” Williams-Walker, 167 Wn. 2d at 898. Based on this record, it is uncertain whether the jury would have applied the “beyond a reasonable doubt” standard to question one, while declining to do so as to question two, instead treating question two as a mere afterthought. Under these circumstances, Williams-Walker, 167 Wn. 2d at 898, controls and stands for the proposition that the jury was inadequately instructed regarding the burden of proof applicable to firearm findings.

Therefore, defense counsel’s failure to object to these instructions amounts to deficient performance, and Mr. Ross suffered prejudice *per se* as a result. In re Gunter, 102 Wash. 2d 769, 774, 689 P.2d 1074, 1077 (1984) (“the trial court's failure to require proof beyond a reasonable doubt on the firearm allegation [for sentencing enhancement purposes] was *per se* prejudicial”).

**D. The Cumulative Impact of the Errors Raised Herein in Addition to Those Found On Appeal Warrants a New Trial.**

As set forth herein, in Mr. Ross' opening brief, and in the order from the Court of Appeals on direct appeal, Mr. Ross' convictions are tainted by numerous errors. The State's Response Brief fails to establish otherwise. In the event the Court determines no single error meets the actual and substantial prejudice standard, it is submitted that the cumulative impact of the errors meets that standard and warrants remand for a new trial. See State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006) ("Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless.").

**E. The State Agrees that Mr. Ross is Entitled to Full Resentencing.**

In the alternative to the foregoing, Mr. Ross is entitled to a full resentencing. The State graciously agrees with Mr. Ross on this point, and its concession should be accepted by the Court. The State asserts that Mr. Ross is entitled to full resentencing because the court on resentencing imposed a downward exceptional sentence to bring the sentence within the applicable statutory maximums, but failed to write down its reasons for imposing an exceptional sentence. Resp. Br. at 31-33. Thus, Mr. Ross' sentence on resentencing was imposed in violation of RCW 9.94A.535, which requires a sentencing court, without exception, to make a finding

that “there are substantial and compelling reasons justifying an exceptional sentence” whenever imposing an exceptional sentence.

The State agrees to resentencing on this ground, and this concession should be accepted. For this concession, the State also deserves high praise for exemplifying the prosecutor’s duty to place the pursuit of justice over the maximization of prison terms. See The American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2 (2017) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”)

Additionally, by declining to respond to the grounds for resentencing set forth in Mr. Ross’ opening brief, the State concedes those issues as well. See Ward, 125 Wn. App. at 143-44 (holding that the State conceded a defendant's double jeopardy argument on appeal by failing to respond to it). This Court may therefore remand this matter for full resentencing on the ground offered by the State or upon any ground, or combination of grounds, for resentencing set forth in Mr. Ross’ opening brief, despite intervening Supreme Court case law (adversely and beneficially) impacting some of those arguments. See PRP Br. at 33-50 (citing U.S. Const. Amend. VIII; Wash. Const. Art. I, § 14; State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017); State v. Houston-Sconiers, 188 Wn.2d 1, 18, 391 P.3d 409 (2017); State v. O'Dell, 183

Wn.2d 680, 695, 358 P.3d 359 (2015); State v. Bassett, 198 Wash. App. 714, 394 P.3d 430 (2017); State v. McGill, 112 Wn. App. 95, 47 P. 3d 173 (2002)). Accordingly, for any or every reason presented, Mr. Ross respectfully requests, in the alternative to reversal of his convictions, that this matter be remanded for full resentencing.

#### V. CONCLUSION

For the foregoing reasons, this Court should grant Mr. Ross' Personal Restraint Petition and reverse his convictions and/or firearm enhancements. Alternatively, the Court should accept the State's partial concession and remand this matter for full resentencing.

Respectfully submitted this 10th day of December, 2019.

LAW OFFICE OF COREY EVAN PARKER

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\_\_\_\_\_  
Corey Evan Parker, WSBA #40006  
Attorney for Petitioner, Azias Ross

**CERTIFICATE OF SERVICE**

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on December 10, 2019, I caused to be served the document to which this is attached to the parties listed below in the manner shown next to their names:

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- By Hand Delivery
- By Messenger

*Corey Evan Parker*  
\_\_\_\_\_  
Corey Evan Parker

# Supplemental Appendix

Attachment “L”

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

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STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	Superior Court
vs.	)	No. 12-1-00305-8
	)	No. 12-1-03300-7
AZIAS DEMETRIUS ROSS,	)	
SOY OEUNG,	)	Court of Appeals
	)	No. 46425-0-II
Defendants.	)	

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**VERBATIM TRANSCRIPT OF PROCEEDINGS**  
**Volume II**

January 22, 2014  
Pierce County Superior Court  
Tacoma, Washington  
Before the  
**HONORABLE THOMAS J. FELNAGLE**

Sheri Schelbert  
Official Court Reporter  
930 Tacoma Avenue  
334 County-City Bldg.  
Department 15  
Tacoma, Washington 98402

A P P E A R A N C E S

FOR THE PLAINTIFF:

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1 of thing as relying or commenting on the veracity of a  
2 witness, so-and-so is lying, so-and-so's got it wrong.  
3 Just be careful in that regard. That should be as far as  
4 we want to go.

5 Are there any other areas of concern that you  
6 want to raise with regard to motions in limine or the  
7 evidence that we are anticipating?

8 MR. THORNTON: The Bruton issue, we were going  
9 to go back to the Bruton issue.

10 THE COURT: Before we do that, is there  
11 anything else? Okay, Bruton, we have had some changes in  
12 the landscape since Judge Lee made her redactions. I  
13 haven't gone over her redactions in relation to the  
14 posture the case is in now to know whether or not there  
15 are changes that need to be done. Has anybody got any  
16 thoughts they want to offer on where we are with regard to  
17 Bruton and/or the redactions that Judge Lee has proposed.

18 MR. GREER: Yes, sir. Your Honor, you know,  
19 of course, two defendants now, two former defendants to  
20 this trial that were were excised out, no mention of them,  
21 except for when they're speaking, those were excised.

22 I read a lot of cases last night, and going  
23 back over the issue, and Richardson v. Marsh for instance,  
24 there's three people charged in that case. There's one  
25 person that's a fugitive at the time of trial. His name

1 is mentioned in the statement of the other person, the  
2 person that is quoted as being the confessor. The person  
3 that they leave out is the co-defendant sitting in there,  
4 and there's no mention of her name, and that's approved,  
5 so then I looked for other cases, and there are a lot of  
6 other cases where similar situations occurred.

7 THE COURT: So is that offered as a statement  
8 against interest or how does it come in?

9 MR. GREER: Well, it's a statement by a party  
10 opponent, of course.

11 THE COURT: Okay.

12 MR. GREER: It's not -- I think the confusion  
13 is coming from, and I will just focus on this case. Okay,  
14 so if we have Nolan Chouap for instance, a defendant  
15 sitting here today talking about his involvement in  
16 robberies with Azariah Ross, that should all come in, and  
17 there's seven of those. Azias Ross is only charged with  
18 three of the incidents, so there's no sense in excising  
19 Azariah certainly from the other four as relates to him.  
20 He's not implicated in any of them, and it's just his  
21 statement. It's Nolan Chouap's statement, and that's what  
22 the defense -- I'm sorry -- the rule would be then, that  
23 the Court can tell the jury they can only consider Nolan  
24 Chouap's statement as against him in his case.

25 THE COURT: I don't have any problem with that

1 as the analysis of the Bruton issue, if we just focus on  
2 Bruton, but I guess what I'm wondering is does it play  
3 itself out in a different way possibly if the name is  
4 mentioned, and then that person can't be called as a  
5 witness, because they're still in jeopardy. Is there  
6 anything there, and I am not sure there is, but I am not  
7 smart enough to think my way through the implications of  
8 that.

9 MR. GREER: No, and if you read Marsh, that's  
10 what I am saying, Marsh, there's a fugitive, he's still  
11 subject to being prosecuted. He's unavailable.

12 THE COURT: So it's not his state, so it's not  
13 testimonial against the speaker whose statement you are  
14 using. And the only person that the jury can use that  
15 statement against is, in that case, I think the person's  
16 name was Marsh. Richardson was the prison person.

17 THE COURT: And if you were to call the person  
18 as a witness, and they declined to testify, that's just  
19 the way it works.

20 MR. GREER: There's another case, the person  
21 is deceased. There's three people. One of them since has  
22 died, they don't say how, and the other two are indicted  
23 and that person's name is mentioned.

24 THE COURT: Okay.

25 MR. GREER: If you look through Marsh, and

1 the -- there's a strong, strong policy issue regarding  
2 that issue itself in there, and you just have to take the  
3 time to read it completely.

4 THE COURT: What is the need to name the  
5 person specifically, as opposed to if you wanted to  
6 generalize the name as you do in other parts of Bruton?

7 MR. GREER: And I wanted to make a couple of  
8 other comments, too. Okay, so a defendant and, use this  
9 case again, who gives the name Azariah. Azariah has been  
10 found with the other five, and property is found on him,  
11 and he's, you know, involved in physical evidence in the  
12 search warrant for instance where he lives and things like  
13 that.

14 THE COURT: I can see that argument.

15 MR. GREER: Then the other issue in this case  
16 is not only would we have in those situations where Azias  
17 Ross, and Nolan Chouap were together admitting offenses,  
18 one confesses to his own involvement, the other also  
19 confesses to his own involvement. We are excising out the  
20 fact that they talk about each other, but both of their  
21 statements come in, let's say you excise out other than  
22 their own statement of their own complicity. They are  
23 both confessing to being there doing the crime.

24 THE COURT: Interlocking statements.

25 MR. GREER: Correct, correct. We're not

1 seeking a bad ruling but harmless error type, you know,  
2 ruling from the Court.

3 THE COURT: Well, that's good.

4 MR. GREER: But that's what these cases, in  
5 part, focus on, is I guess the value, the weight of the  
6 inadmissible aspect.

7 THE COURT: I think that's the key. It's the  
8 need, the value of the evidence to the one party weighed  
9 against the potential inflammatory prejudice to the other,  
10 if there is prejudice.

11 What does the defense think?

12 MR. GREER: Judge, I'm sorry --

13 THE COURT: Were you done? Go ahead.

14 MR. GREER: One last thing, you know this, but  
15 to focus on it, Soy Oeung is only charged in one. So we  
16 are talking different parts of the statement, different  
17 incidents, that when we offer Nolan Chouap's statement can  
18 be compartmentalized. On this day, he's talking about  
19 doing this particular crime, and maybe he mentions who he  
20 does it with, and it's not these two. So that should in  
21 and of itself not be a problem for any of the defendants.  
22 When we get to the one --

23 THE COURT: Well, is it potentially a problem  
24 if the person with one count has associated with a person  
25 with lots of other counts, it becomes more likely that the

1 person with the one count did a crime, because they're  
2 hanging out with somebody that does crimes all the time.

3 MR. GREER: No. Well, that would be a  
4 severance issue, first of all, on different grounds than  
5 Bruton. But if you are focused on Bruton, at least the  
6 way the law reads and repeats this over and over again, is  
7 jurors are presumed, and they use stronger terms, I think,  
8 to follow the Court's instructions. So the limiting  
9 instruction is going to say, this statement can only be  
10 used when considering the case against Nolan Chouap, and  
11 no other defendant.

12 THE COURT: Okay.

13 MS. MARTIN: I just want to make sure I'm  
14 hitting all the high marks. The State is not alleging  
15 they can use any of the statement of Azariah Ross,  
16 correct?

17 MR. GREER: Correct.

18 MS. MARTIN: So we are just talking about  
19 references Azariah by the three co-defendants in court  
20 today?

21 MR. GREER: Correct.

22 MS. MARTIN: Okay, I just wanted to narrow.  
23 Your Honor, the reason defense always seeks  
24 severance, and the State often opposes it is not just for  
25 judicial economy, it is because I think the case law says

1 that when a co-defendant is removed from a trial, you then  
2 can't discuss that co-defendant at all. This is a  
3 conspiracy indictment. They are alleging a conspiracy, so  
4 I don't think they should be able to mention the names of  
5 anyone pursuant to Bruton, and pursuant to Crawford,  
6 because how am I supposed to cross-examine Mr. Chouap,  
7 should he choose not to testify about whether or not  
8 Azariah was really there, as to whether or not, what was  
9 his motive to lie? What would he say? And then to say  
10 Azariah was found with them at the mall, I mean that's an  
11 end run into a conspiracy with a non-present co-defendant  
12 and I think it's incredibly prejudicial.

13 THE COURT: Isn't it permissible to have  
14 unindicted co-conspirators and proceed with the  
15 prosecution with the State, and status as such?

16 MS. MARTIN: I can call an unindicted  
17 co-conspirator to the stand. The co-conspirators are  
18 indicted and currently pending trial. In Richardson, it  
19 was a fugitive matter. The person was not available to  
20 any party. Here, the other Mr. Ross is sitting in the  
21 Pierce County Jail. He is in control of the Court. He is  
22 in control of the State. I am pretty sure, knowing  
23 Ms. Corey, if I call him to the stand, he is not going to  
24 testify. But I don't see how, in a conspiracy indictment,  
25 where it is not alleged who the co-conspirators are, it's

1 just a blanket conspiracy indictment that we can bring in  
2 other actors who are not uncharged co-defendants, they are  
3 charged co-defendants and say, yeah, these people were  
4 involved, and here's their names, and then there's the  
5 additional --

6 THE COURT: I am not following through with  
7 the concern of that, though. What is the specific legal  
8 impediment to doing just that, saying, yeah, there are  
9 other people involved, here they are, they are not in  
10 front of you for trial right now.

11 MS. MARTIN: Because it's someone else in the  
12 conspiracy that they are alleging.

13 MR. STEINMETZ: They aren't indicted in the  
14 conspiracy.

15 THE COURT: True, but what is the legal  
16 impediment to mentioning those people in a confession of a  
17 defendant who's on trial, and you are telling the jury  
18 that the confession of the person on trial is to be used  
19 only against them, themselves?

20 MS. MARTIN: The reason we redact out names,  
21 the reason that we go through all of this Bruton analysis  
22 is because of an inability by the defense under Crawford  
23 to --

24 THE COURT: But it's not to protect the person  
25 making the statement, it's to protect the person who the

1 statement is made against, and in this situation, those  
2 people aren't on trial, so there's no need to worry about  
3 them being implicated by a confession that a defendant on  
4 trial has made.

5 MS. MARTIN: But I think in a conspiracy  
6 indictment, anyone who is alleged to have been involved is  
7 subject to the conspiracy analysis, which is agreeing with  
8 one or more persons. In this case no one is going to say  
9 Azias Ross went in the house. No one is going to say  
10 Azias Ross was in the house. No one is going to say that.  
11 He is charged purely as an accomplice and a  
12 co-conspirator.

13 So if the State proves that Mr. Chouap is in  
14 the house, and then they say Azariah was also in the house  
15 because they bring in Mr. Chouap's statement, that's the  
16 conspiracy.

17 THE COURT: If one of the defendants whose on  
18 trial were to say in their statement, so-and-so, who's not  
19 on trial, was in the house, and he's a co-conspirator and  
20 did these things along with me, why shouldn't that come  
21 in? It doesn't -- it's not a problem with regard to the  
22 person who was associated with the defendant on trial  
23 because they themselves are not on trial, so you don't  
24 have to worry about it being used against them. It's  
25 accurate as to the person on trial, and why can't it be

1 used?

2 MS. MARTIN: Well, in this case, I would argue  
3 that it's significantly prejudicial to Azias Ross because  
4 Azariah Ross is not only a very similar name but it's  
5 going to be fairly clear that they are related.

6 THE COURT: But if he says it out of his mouth  
7 in his statement, why do we need to sanitize it? What's  
8 the legal reason to sanitize it other than we don't like  
9 it and it doesn't help us.

10 MS. MARTIN: Well, the legal reason is --

11 THE COURT: It hurts us.

12 MS. MARTIN: -- is that the Court indicates  
13 that the only issue of Richardson was whether a statement  
14 was made. No mention of the defendant's existence, much  
15 less name her, presented the same confrontation violation  
16 found in Bruton. The Court's conclusion was accordingly,  
17 "Limited to holding the confrontation clause is not  
18 violated by the admission of a non-testifying  
19 co-defendant's confession with the proper limiting  
20 instruction, if it's redacted to eliminate, not only the  
21 defendant's name, but any reference to his or her  
22 existence."

23 So, I just don't see how we bring in a  
24 co-defendant who was charged in this indictment, who was  
25 severed last minute, who is not available to testify for

1 either party, who cannot be crossed, brings in a statement  
2 by someone sitting at the table, charged in the conspiracy  
3 indictment where they are all alleged to have conspired  
4 together to do this and say, this guy was with me when I  
5 have no ability to cross-examine on that.

6 Maybe it wasn't Azariah Ross. Maybe it was  
7 Tom Green. Well, who do I ask about that? Who do I ask  
8 about -- there are a lot of mistakes in the police reports  
9 between Azias and Azariah Ross where even the officers  
10 couldn't keep them straight. So the confessions are not  
11 recorded, and how far do I have to go to sort of impeach a  
12 statement where not only is the declarant not present to  
13 testify, but the person whom the statement is about is  
14 also --

15 THE COURT: You are impeaching what statement?

16 MS. MARTIN: Any of the statements.

17 MR. STEINMETZ: Mr. Chouap's statement, for  
18 example.

19 THE COURT: You are impeaching his own  
20 statement?

21 MR. STEINMETZ: She doesn't represent  
22 Mr. Chouap. She represents Mr. Ross. Mr. Chouap is  
23 making statements about Mr. Ross's brother being included.  
24 That's where she has no ability to cross-examine on that  
25 statement.

1 THE COURT: Oh, I see now what you are saying.

2 MS. MARTIN: Yeah, it's convoluted, and it's  
3 complex, and that is my objection.

4 THE COURT: I see what you are saying. You  
5 are taking the State's argument to the next level, they  
6 ought to be able to utilize the association between the  
7 two as evidence against the confessing defendant, and you  
8 are saying that the other defendant can't -- you can't get  
9 to another defendant to show that this wasn't accurate --

10 MS. MARTIN: Exactly.

11 THE COURT: -- that this association ought not  
12 to be viewed as evidence against my client. I see the  
13 argument, okay. Any further comments?

14 MR. GREER: That issue, as I understand it, I  
15 am getting confused as to what is being articulated by  
16 defense, frankly, but the issue I think being discussed is  
17 called contextual implication under the law, and there is,  
18 again, multiple cases on point with that issue.

19 It's not -- the overall evidence in the case,  
20 the Court doesn't preview the effect of the admissible  
21 statement with the proper limiting instruction, and  
22 properly excised portions, and make a determination of  
23 what effect now will that statement, as admitted, have in  
24 totality on the non-testifying co-defendant. And the  
25 cases talk about that. That's not something that is going

1 to be put on the courts to do.

2 The jury will link evidence, but they can only  
3 use that statement, the substance of that statement  
4 against the one defendant who it's offered against,  
5 period. And they have to -- you just have to presume and  
6 comply with it. That's what the cases say. And they talk  
7 about the limited circumstances where jurors are presumed  
8 not to be able to do that. And that's Bruton. That's  
9 exactly what Bruton is about.

10 It says, if you have a facially incriminating  
11 statement, where I say Mr. Williams and I did a robbery,  
12 and the Court, you know, gives an instruction to the jury,  
13 you are only to consider that against me and not  
14 Mr. Williams, Bruton says, that's the type of situation  
15 that the jury -- you cannot presume that they can follow  
16 the law. They're just human. This is different. And  
17 that's why you have the subsequent case law that says now  
18 it's going to be Mr. Greer and another person.

19 THE COURT: It seems to the Court that the  
20 analysis ought to be, how valuable, how -- what is the use  
21 of the evidence to the State's case? Is it tangential and  
22 inflammatory, or is it important and central, and does it  
23 create more light than heat, and I guess that's what you  
24 have to determine. And if it involves central characters  
25 doing acts that are central to each other, all of which is

1 coming in in one way or another, and you give a proper  
2 limiting instruction, it seems like it's heavy on value to  
3 aid the jury in understanding, and light on heat. If it  
4 has very little use in the State's case, and it's  
5 gratuitous, and it raises an association between a bad  
6 actor and a non-testifying defendant, then it has more  
7 heat than light. So I think it's the classic weighing of  
8 the evidence, and I don't see, on its face, that there's a  
9 reason to exclude it outright. It has to be put into some  
10 context as to how the case is unfolded, I believe, and it  
11 seems to me that, on its face, it's appropriate to tell  
12 the story to the jury, but I think that could change,  
13 based on how the case presents.

14 If I needed to make a ruling at the moment,  
15 I'd say that the State is right in its analysis, and that,  
16 as long as it's not unduly inflammatory, they are entitled  
17 to have the associations as outlined by the confessing  
18 defendant presented just as the defendant testified, with  
19 any limiting instruction accompanying it.

20 MR. GREER: And Your Honor --

21 MR. STEINMETZ: If I may --

22 MR. GREER: I propose to provide the Court and  
23 defense with a new proffer, just adding back in those  
24 things that are relevant as to Mr. Azariah Ross,  
25 et cetera.

1 THE COURT: And I suppose the defense may want  
2 to propose the opposite, which is a redaction that takes  
3 certain things out.

4 MS. MARTIN: Uh-huh (affirmative).

5 MR. GREER: I think we've already got the  
6 baseline, which is Judge Lee's ruling.

7 THE COURT: But that doesn't mean that they  
8 can't now say, hey, we have to look at this again, because  
9 there are defendants out of the case that were in at that  
10 time, and advance the argument they're making. They are  
11 certainly entitled to make their record, which may include  
12 a proposal for a new redaction.

13 MR. GREER: I don't have an objection to that,  
14 I am just -- what I propose to do is go back through it,  
15 provide it to the Court, and if the Court, based on your  
16 analysis, less heat, more heat, et cetera, decides  
17 something needs to be done differently in this particular  
18 place or not, you know, then that's available.

19 THE COURT: Okay. Well, at the moment --

20 MR. STEINMETZ: Your Honor, if I may --

21 THE COURT: Go ahead.

22 MR. STEINMETZ: I think you are really missing  
23 a crucial point and it needs to be part of the record  
24 here, which is in accusing Mr. Chouap, and I am going to  
25 use you as my example, if Mr. Chouap's statement that I

1 did this crime with two other guys is the essence of the  
2 statement that the State wants to bring in, his confession  
3 that he was involved in this crime, and the jury already  
4 knows there are co-conspirators and the jury hears down  
5 below different evidence from, say, Mr. --

6 MS. MARTIN: Ross, Ms. Martin's client --

7 MR. STEINMETZ: Ms. Martin's client, Azias. I  
8 can't keep them straight myself.

9 MS. MARTIN: That's a problem.

10 MR. STEINMETZ: That he was involved in the  
11 crime, that's one thing if the jury makes the connection  
12 as to who the two other guys might possibly have been.

13 THE COURT: All right.

14 MR. STEINMETZ: It's a whole different animal,  
15 though, if the State brings in Mr. Chouap's statement that  
16 I did this crime with Azariah Ross and another guy, and  
17 then they hear from different people that Mr. Azias Ross  
18 is involved in that crime, and perhaps maybe he made some  
19 connection back to Azariah Ross or they hear from a third  
20 party. That's where the problem lies, because that  
21 completes the circle, then by implication, and you are  
22 backdooring and bringing in Mr. Chouap's statement that is  
23 then used by the jury against the current Mr. Ross that we  
24 have here.

25 THE COURT: Well, I understand.

1                   MR. STEINMETZ: That's where you get more heat  
2 than light on the situation.

3                   THE COURT: I understand.

4                   MR. STEINMETZ: The light is that Mr. Chouap  
5 has said I did this crime with some others. That's all  
6 the light that is necessary. There is nothing gained to  
7 the State's case --

8                   MS. MARTIN: No.

9                   MR. STEINMETZ: -- by naming the conspirator  
10 that is not here, except the possibility and likelihood,  
11 frankly, given the similarity of names, given the  
12 relationship, that they are going to use that against  
13 somebody else. And that is true as to Ms. Oeung and  
14 that's true as to everybody in this case. That's why we  
15 need to keep the names out, and I think it's pretty clear  
16 that it doesn't add anything more to the State's proof  
17 that Mr. Chouap was involved in the crime that they are  
18 wanting to use that statement for, even with limiting  
19 instruction.

20                  THE COURT: Well, I think we need to see what  
21 the State is proposing, and then I need to see what the  
22 defense is proposing and make a decision based on that. I  
23 am still of a mind that the analysis doesn't prohibit  
24 this, and that the Court needs to presume that a limiting  
25 instruction is followed by the jury, but I do want to hear

1 what your proposals are. So, at the moment, what I was  
2 about to say, was Judge Lee's redactions are still the  
3 order of the Court until you propose to me what changes  
4 you want to make, and we take a look at them, and then we  
5 can argue with a little more specificity how there may be  
6 a backdoor disadvantage to the defendants that take us out  
7 of that traditional Bruton sort of analysis.

8 MR. STEINMETZ: Thank you. I jumped the gun  
9 on you, I'm sorry.

10 THE COURT: That's fine.

11 MR. STEINMETZ: I wanted to make sure it was  
12 clear.

13 THE COURT: I can use all the help I can get  
14 on this. It's complicated.

15 So is there anything else on Bruton at the  
16 moment? We will take it up again when we have the  
17 proposals.

18 MR. GREER: No, sir.

19 MR. STEINMETZ: No, sir.

20 THE COURT: Okay, anything else we need to  
21 deal with? Let me kind of look at my list of things I had  
22 that I wanted to talk about today.

23 I am advised that Juror Number 88 did not  
24 appear. Jury Administration attempted to contact 88, and  
25 was unable to. I propose that we excuse 88. Is there any



**LAW OFFICE OF COREY EVAN PARKER**

**December 10, 2019 - 11:44 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
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**Appellate Court Case Title:** State of Washington, Respondent v Azias Demetrius Ross, Appellant  
**Superior Court Case Number:** 12-1-03305-8

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