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No. 51698-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Kenneth Hart,**

Appellant.

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Clark County Superior Court Cause No. 16-1-02245-6

The Honorable Judge Derek Vanderwood

**Appellant's Opening Brief**

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iii**

**ISSUES AND ASSIGNMENTS OF ERROR..... 1**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3**

**ARGUMENT..... 10**

**I. The court violated Mr. Hart’s confrontation right and his right to present a defense by excluding critical evidence..... 10**

A. By prohibiting the defense from cross-examining Erin Hart about her memory problems, the trial court violated Mr. Hart’s constitutional rights to confrontation and to present his defense. .... 11

B. The violation is not harmless beyond a reasonable doubt. .... 14

C. The Court of Appeals must review the trial court’s decision *de novo* because it infringed Mr. Hart’s constitutional rights..... 15

**II. Mr. Hart’s harassment conviction must be reversed because he was denied the effective assistance of counsel..... 19**

**III. The sentencing court violated the separation of powers by delegating to the Department of Corrections the authority to set Mr. Hart’s conditions of community custody. .... 21**

**IV. The trial court violated Mr. Hart’s double jeopardy rights by vacating Count II “without prejudice.” ..... 23**

**CONCLUSION ..... 24**

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	19
<i>United States v. Melendez-Santana</i> , 353 F.3d 93 (1st Cir. 2003).....	22
<i>United States v. Morin</i> , 832 F.3d 513 (5th Cir. 2016) .....	22
<i>United States v. Padilla</i> , 415 F.3d 211 (1st Cir. 2005).....	22

### **WASHINGTON STATE CASES**

<i>Carrick v. Locke</i> , 125 Wn.2d 129, 882 P.2d 173 (1994) .....	21
<i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000).....	14
<i>Lenander v. Washington State Dep't of Ret. Sys.</i> , 186 Wn.2d 393, 377 P.3d 199 (2016).....	15
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010).....	11
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010) .....	20
<i>State v. Aguirre</i> , 168 Wn.2d 350, 229 P.3d 669 (2010).....	16
<i>State v. Armstrong</i> , 188 Wn.2d 333, 394 P.3d 373, 377 (2017).....	18
<i>State v. Blair</i> , --- Wn.App. ---, 415 P.3d 1232 (2018).....	18
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	14
<i>State v. Clark</i> , 187 Wn.2d 641, 389 P.3d 462 (2017).....	17, 18
<i>State v. Darden</i> , 145 Wn.2d 612, 26 P.3d 308 (2002).....	10, 11, 12, 13, 15
<i>State v. Dye</i> , 178 Wn.2d 541, 309 P.3d 1192 (2013).....	16, 17, 18
<i>State v. Franklin</i> , 180 Wn.2d 371, 325 P.3d 159 (2014).....	14, 15

<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983) .....	13
<i>State v. Iniguez</i> , 167 Wn.2d 273, 217 P.3d 768 (2009) ....	15, 16, 17, 18, 19
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010) 10, 11, 13, 14, 15, 16, 17, 18, 19	
<i>State v. Jones</i> , 183 Wn.2d 327, 352 P.3d 776 (2015) ( <i>Jones II</i> ).....	20, 21
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009) .....	20
<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002) .....	21
<i>State v. Posey</i> , 161 Wn.2d 638, 167 P.3d 560 (2007).....	16
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	20
<i>State v. Sansone</i> , 127 Wn. App. 630, 111 P.3d 1251 (2005).....	22, 23
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	13
<i>State v. Turner</i> , 169 Wn.2d 448, 238 P.3d 461 (2010).....	23, 24
<i>State v. Womac</i> , 160 Wn.2d 643, 160 P.3d 40 (2007) .....	24
<i>Washington v. Farnsworth</i> , 185 Wn.2d 768, 374 P.3d 1152 (2016) .....	11

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. V .....	23
U.S. Const. Amend. VI.....	1, 11, 19, 21
U.S. Const. Amend. XIV .....	1, 21
Wash. Const. art. I, §22.....	1, 11
Wash. Const. art. I, §3.....	1, 11
Wash. Const. art. I, §9.....	23
Wash. Const. art. IV, §1.....	22

**WASHINGTON STATE STATUTES**

RCW 9.94A.703..... 22, 23  
RCW 9.94A.704..... 22

**OTHER AUTHORITIES**

ER 401 ..... 11

## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The court violated Mr. Hart's right to present a defense under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§3 and 22.
2. The trial court violated Mr. Hart's confrontation right under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22.
3. The court violated Mr. Hart's constitutional rights by excluding critical evidence that was relevant and admissible.
4. The court erred by refusing to allow cross-examination of Ms. Hart regarding her "Poor memory/confusion," "memory issues," and "Impairment of... short term [and] long term memory."

**ISSUE 1:** An accused person has a constitutional right to confront adverse witnesses and to present relevant, admissible evidence necessary to the defense. Did the court violate Mr. Hart's constitutional rights by prohibiting him from cross-examining Ms. Hart about her memory problems?

5. Mr. Hart was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Mr. Hart's attorney provided ineffective assistance of counsel when he forgot to elicit his client's denial regarding the harassment charge.

**ISSUE 2:** Defense counsel provides ineffective assistance by forgetting to offer exculpatory evidence that counsel intended to introduce at trial. Was Mr. Hart denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel when his attorney forgot to elicit Mr. Hart's own exculpatory testimony regarding the harassment charge?

7. The sentencing court violated the separation of powers doctrine.
8. The sentencing court improperly delegated to DOC the authority to impose core conditions of Mr. Hart's community custody.
9. The trial court erred when it entered Order 4.2 in the Judgment and Sentence. CP 167.

**ISSUE 3:** The separation of powers doctrine is violated when one branch of government impermissibly delegates its constitutionally-conferred powers to another branch. Did the sentencing court violate the separation of powers doctrine by

allowing DOC to set core conditions of Mr. Hart's community custody?

10. The sentencing court violated Mr. Hart's double jeopardy rights under the state and federal constitutions.
11. The sentencing court erred by dismissing Count II "without prejudice."
12. The sentencing court erred when it entered Judgment 3.2 in the Judgment and Sentence. CP 166.

**ISSUE 4:** A court violates double jeopardy by vacating a conviction on double jeopardy grounds while directing that the conviction remains valid. Did the sentencing court violate Mr. Hart's double jeopardy rights by dismissing Count II "without prejudice"?

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

Kenneth Hart began his relationship with his wife-to-be when he was 18, and they got married five years later, in 2007. RP (2/13/18) 450; RP (2/14/18) 723. Ken and Erin Hart had 2 sons and owned their home. RP (2/13/18) 450.

But in August of 2016, Mr. Hart discovered that his wife was conducting an online relationship with another man. RP (2/13/18) 451, 497; RP (2/14/18) 725, 735. This strained their marriage severely. RP (2/13/18) 452; RP (2/14/18) 744, 756, 780. Ms. Hart's diagnosis of bipolar disorder came around this same time. RP (6/2/17) 7.

Ms. Hart underwent mental health therapy and took prescribed medications. Notice of Medical Records Offered Under ER 904 filed 10/11/17 Supp. CP. Her medical records supported the conclusion that she was undergoing a manic episode in late October of 2016. RP (2/2/18) 204-206.

The couple argued and worked on their relationship that late summer. Mr. Hart was very hurt and angry about the betrayal. RP (2/14/18) 780.

The evening of October 22, 2016, Mr. Hart came home after 10 pm.<sup>1</sup> RP (2/13/18) 513-514. Mr. and Mrs. Hart both drank whiskey and Coke. RP (2/13/18) 514. They had sex, argued, and Ms. Hart went across the street and told the neighbor that Mr. Hart had beat her. Police came and arrested Mr. Hart for assault. RP (2/13/18) 462-465, 481-482, 487-488, 566-570, 608-611.

The State charged Mr. Hart with two counts of assault in the second degree and felony harassment.<sup>2</sup> CP 1-2, 84-90.

By the time the case came to trial, the Harts were embroiled in an acrimonious divorce. RP (2/13/18) 500; RP (2/14/18) 724-725. The pair disagreed sharply about who would have custody of their two boys, as well as most other issues related to their breakup. RP (2/13/18) 499.

The defense theory was that Ms. Hart's mental illness, combined with her medications, undermined the reliability of her perceptions and memory. RP (2/17/17) 2-4; RP (4/13/17) 2; RP (10/12/17) 135-136. In support of this, the defense attorney subpoenaed records from Ms. Hart's treatment around that time. RP (2/17/17) 2-4, 11; CP 78-83.

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<sup>1</sup> Ms. Hart thought he had come home earlier; in any event, both agreed the incident at issue took place after the children had been put to bed. RP (2/13/18) 461-462.

<sup>2</sup> Originally, the State had also charged an additional assault four count, as well as multiple aggravators. These were withdrawn prior to trial. RP (2/8/18) 244-246; CP 3-7, 87-90.

At her defense interview, Ms. Hart claimed that she had multiple medications in her system at the time of the incident, including Lamictal and Cymbalta. RP (2/17/17) 2-3. She said she had a severe reaction to the Lamictal. RP (2/17/17) 2-3, 9.

The court reviewed the records in camera. RP (4/13/17) 1; RP (6/2/17) 20; RP (8/17/17) 34.

When the trial began in October of 2017, the trial judge granted the State's motion in limine to exclude reference to Ms. Harts's mental health condition and medications. RP (10/12/17) 135-148; CP 68-69. The court indicated that the only way such evidence would be admissible is if there was testimony that her mental health had an impact on her perceptions during the incident. RP (10/12/17) 145-146. Mr. Hart's attorney sought, and obtained, a continuance of the trial so that an expert could review the materials and render an opinion on the impact of her mental illness and medications on her perceptions and memory. RP (10/12/17) 147-158.

Dr. True reviewed the records and prepared a report. RP (2/2/18) 204-239; RP (2/8/18) 263-266. He stated that there was support for the conclusion that she may have been in an altered state of mind during the incident. RP (2/2/18) 207-208, 210. He also opined that the records also supported the conclusion that her memory may have been poor at the time. RP (2/2/18) 208. The defense filed Dr. True's report, which the court

sealed, which outlined the relevance of the mental health records. RP (2/2/18) 209, 211, 222, 235, 271-275.

But the trial judge ruled that the defense could not impeach Ms. Hart with her medical records. RP (2/8/18) 275. The court noted that the records did indicate that Ms. Hart had described events as a blur, and that Ms. Hart worked to piece together events from September 2016 in her sessions. RP (2/8/18) 255. In fact, the judge said that the words “like a blur” were repeated multiple times in the records, though the judge discounted the repetition as likely the result of cut-and-paste. RP (2/8/18) 256, 257.

Judge Vanderwood summarized the record from the beginning of October 2016 as confirming the bipolar disorder diagnosis. RP (2/8/18) 256. Another record from that same week included “poor memory” in the intake form. RP (2/8/18) 259. The record from the day before the first hearing about the defense request for the records noted that in fact Ms. Hart did not suffer from bipolar disorder. RP (2/8/18) 258; RP (2/17/17) 1-14.

Concluding that the records did support a bipolar disorder diagnosis having been made, but not supporting Dr. True’s conclusion that Ms. Hart was still in a manic phase during the incident at issue, the trial judge granted the State’s motion to prevent inquiry. RP (2/8/18) 261, 268.

Later in his ruling, Judge Vanderwood noted that he did not agree with Dr. True's reading of the medical records. RP (2/8/18) 264-265. The court held that the records had some but "not much" relevance, little probative value, and risked prejudice. RP (2/8/18) 262, 267.

At trial, Erin Hart testified that she and her husband were having sex when he became angry and started hitting her. RP (2/13/18) 463-466, 468. She claimed that once he found out she had been unfaithful, Mr. Hart became physically abusive, culminating in the alleged attack in late October of 2016. RP (2/13/18) 454-459. Ms. Hart said Mr. Hart strangled her and gave her black eyes and other injuries. RP (2/13/18) 468-473, 484-485.

Ms. Hart did admit that she had asked Mr. Hart to choke her during sex that night, and he did. RP (2/13/18) 463, 465, 487. But she claimed her black eyes and bruising were from non-consensual assaults. RP (2/13/18) 484.

Ms. Hart told the jury that Mr. Hart threatened her, telling her he would kill her if she failed to kill herself. RP (2/13/18) 454, 467, 470, 475. In order to support their theory that Ms. Hart had reasonable fear that Mr. Hart would carry out a threat to kill her, the State offered testimony about an earlier alleged assault. RP (10/12/17) 70-94; RP (2/13/18) 454-460.

In addition, the couple's neighbor, a friend of Ms. Hart and the doctor who saw Ms. Hart also testified, all supporting her statement that she claimed injuries from her husband. RP (2/13/18) 561-598,

Mr. Hart testified. He explained the "rough sex" the couple engaged in, noting that it was at his wife's request and with her consent. RP (2/14/18) 743-748. He said that Ms. Hart could have been bruised from that, or from normal activities like yard work or self-massage and the like. RP (2/14/18) 746-748, 752.

Mr. Hart told the jury that when they were having sex, Ms. Hart bit him on his penis, twice, causing a significant amount of pain and blood.<sup>3</sup> RP (2/14/18) 761-763. In response to the sharp and surprising pain, Mr. Hart struck out and acknowledged he may have caused bruises in so doing. RP (2/14/18) 761-762, 782-783.

After cleaning up, he told his wife they needed to divorce. RP (2/14/18) 768. He told her to leave in the morning when she'd sobered up, and that the boys should stay in the home with him. RP (2/14/18) 770. Mr. Hart testified that Ms. Hart's response to that was to tell him that she would make sure he never saw his children again. RP (2/14/18) 770.

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<sup>3</sup> He still had scarring from this injury by the time of trial. RP (2/14/18) 763-766.

Mr. Hart's attorney asked him about both assaults, but never asked about the felony harassment charge. RP (2/14/18) 723-785. Even later, when he realized his oversight, the defense attorney did not ask to reopen his case. Instead, he told the jury that he meant to ask about it and just overlooked it. RP (2/15/18) 898-899.

In his closing argument to the jury, Mr. Hart's attorney told jurors that "what I neglected to do was, not paying attention, was I really didn't direct [Mr. Hart's] attention to the third count, which was harassment, okay?" RP (2/15/18) 898. The attorney argued that without specific facts and denials, the jury could still imply his denial. RP (2/15/18) 899.

The jury returned verdicts of guilty to all three offenses. RP (2/15/18) 915-918. At the sentencing hearing, the State acknowledged that one of the assault convictions must be vacated to avoid a violation of double jeopardy. RP (3/21/18) 926.

The court vacated the conviction. RP (3/21/18) 940; CP 166. Without comment or argument, the judge checked a box indicating: "The court dismisses Count 02 without prejudice in the charging document due to double jeopardy." CP 166; RP (3/21/18) 925-951.

The court further ordered that Mr. Hart be subject to 18 months of community custody. CP 167. The terms included performing affirmative acts as required by DOC, participating in crime-related treatment or

counseling services as directed by DOC, and complying with crime-related prohibitions as directed by DOC. CP 167-168.

Mr. Hart timely appealed. CP 177.

### **ARGUMENT**

**I. THE COURT VIOLATED MR. HART’S CONFRONTATION RIGHT AND HIS RIGHT TO PRESENT A DEFENSE BY EXCLUDING CRITICAL EVIDENCE.**

Erin Hart indicated on her intake form with Western Psychological that she had “Poor memory/confusion.” Notice of Medical Records Offered Under ER 904 filed 10/11/17, Supp. CP. During the intake session, she “talked about having... memory issues.” Notice of Medical Records Offered Under ER 904 filed 10/11/17, Supp. CP. The counselor described “Impairment of... short term [and] long term memory.” Notice of Medical Records Offered Under ER 904 filed 10/11/17, Supp. CP.

The trial judge refused to allow Mr. Hart to cross-examine Ms. Hart regarding her medical records. RP (2/8/18) 261-268. This violated Mr. Hart’s right to confront the state’s witnesses and his right to present a defense. *State v. Darden*, 145 Wn.2d 612, 620-626, 26 P.3d 308 (2002); *State v. Jones*, 168 Wn.2d 713, 719-720, 230 P.3d 576 (2010).

- A. By prohibiting the defense from cross-examining Erin Hart about her memory problems, the trial court violated Mr. Hart’s constitutional rights to confrontation and to present his defense.

The constitution guarantees an accused person the right to confront adverse witnesses and to present a defense. U.S. Const. Amends. VI, XIV; art. I, §§3, 22; *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 620. The right to present a defense includes the right to introduce relevant and admissible evidence. *Jones*, 168 Wn.2d at 720.

Evidence is relevant “if it has any tendency to make the existence of any consequential fact more probable or less probable.” *Washington v. Farnsworth*, 185 Wn.2d 768, 782–83, 374 P.3d 1152 (2016) (citing ER 401). The threshold to admit relevant evidence is low; “even minimally relevant evidence is admissible.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010) (internal quotation marks and citation omitted).

Evidence that meets the “minimally relevant” standard can only be excluded if the State proves that it is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 622. No state interest is compelling enough to prevent evidence that is of high probative value (or if the defendant’s need for the evidence outweighs the state’s interest in exclusion). *Jones*, 168

Wn.2d at 720; *Darden*, 145 Wn.2d at 619, 622. Here, the State advanced no justification strong enough to warrant excluding the proffered evidence.

Erin Hart was the State's primary witness; the prosecution rested almost entirely on her testimony. Just weeks before the offense date, Ms. Hart indicated that she had "Poor memory/confusion." Notice of Medical Records Offered Under ER 904 filed 10/11/17, Supp. CP. This is reflected in her Western Psychological intake form and reiterated in the provider's Diagnostic Assessment Summary. Notice of Medical Records Offered Under ER 904 filed 10/11/17, Supp. CP.

Furthermore, during her intake interview, she "talked about having... memory issues." Notice of Medical Records Offered Under ER 904 filed 10/11/17, Supp. CP. The provider's assessment of her mental status indicates that Ms. Hart had "Impairment of: Attention/ Concentration Short term Long term Memory." Notice of Medical Records Offered Under ER 904 filed 10/11/17, Supp. CP.

Ms. Hart's description of the offense differed significantly from Mr. Hart's account. Her credibility was an important issue at trial. Her admission that she suffered from "Poor memory/confusion" and that she had "memory issues" would have cast doubt on her testimony regarding both the offense itself and the September incident. Notice of Medical Records Offered Under ER 904 filed 10/11/17, Supp. CP.

Defense counsel made clear that he hoped to use Ms. Hart’s prior statements to impeach her “in terms of her ability to remember things accurately.” RP (2/2/18) 222. He argued that the records were relevant “for purposes of showing... memory, jumbled thoughts.” RP (2/2/18) 223.

The evidence was more than “minimally relevant.”<sup>4</sup> *Jones*, 168 Wn.2d at 720. It went to the very heart of the case, because it cast doubt on the alleged victim’s testimony. Indeed, even the trial judge recognized that the records had some relevance. RP (2/8/18) 262.

The excluded evidence was critical to the defense. Because it was “of *high* probative value... ‘no state interest can be compelling enough to preclude its introduction.’” *Jones*, 168 Wn.2d at 720 (emphasis in original) (quoting *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). Accordingly, the trial court violated Mr. Hart’s constitutional rights to confrontation and to present a defense when it barred any reference to the records. *Id.*, at 721; *Darden*, 145 Wn.2d at 622.

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<sup>4</sup> Even if the excluded evidence were only minimally relevant, it should not have been excluded absent prejudice so great “as to disrupt the fairness of the fact-finding process.” *Jones*, 168 Wn.2d at 720. The State did not show prejudice of that magnitude. Furthermore, any improper prejudicial effect could have been cured with an instruction. *See, e.g., State v. Sublett*, 176 Wn.2d 58, 70 n. 5, 292 P.3d 715 (2012) (“[L]imiting instructions are assumed to cure most risks of prejudice.”)

B. The violation is not harmless beyond a reasonable doubt.

Constitutional violations require reversal unless the State can establish harmlessness beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). Even non-constitutional error is prejudicial unless it can be described as trivial, formal, or merely academic. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). The State must show that any reasonable jury would reach the same result absent the error. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Here, the State cannot prove beyond a reasonable doubt that the error was trivial, formal, or merely academic, and that “any reasonable jury would have reached the same result without the error.” *Jones* 168 Wn.2d at 724; *Lorang*, 140 Wn.2d at 32. The trial amounted to a contest between Mr. Hart’s version of events and those presented through Ms. Hart’s testimony.

The two witnesses described what happened very differently. Cross-examination regarding the memory problems reflected in Ms. Hart’s medical records would have cast doubt on her testimony. It was therefore critical to the defense, and its exclusion was not trivial, formal, or merely academic.

The trial court violated Mr. Hart's constitutional right to present a defense and to confront adverse witnesses. *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 620-622. The State cannot show that the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. Mr. Hart's convictions must be reversed, and the case remanded with instructions to admit the excluded evidence. *Id.*

C. The Court of Appeals must review the trial court's decision *de novo* because it infringed Mr. Hart's constitutional rights.

The Supreme Court has issued conflicting opinions on the proper standard of review of discretionary decisions violating an accused person's constitutional rights. The better approach is to review *de novo* a trial court's evidentiary rulings (and other discretionary decisions) where they infringe constitutional rights. Appellate courts review constitutional issues *de novo*. *Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016).

The Supreme Court has applied the *de novo* standard to discretionary decisions that would otherwise be reviewed for abuse of discretion. *Jones*, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). In *Jones*, for example, the court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to

present a defense. *Jones*, 168 Wn.2d at 719.<sup>5</sup> Similarly, the *Iniguez* court reviewed *de novo* the trial judge’s discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court specifically pointed out that review would have been for abuse of discretion had the defendant not argued a constitutional violation. *Id.*

However, the court has not applied this rule consistently. For example, one month prior to its decision in *Jones*, the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones*—the defendant alleged a violation of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

This inconsistency should not be taken as a repudiation of *Jones* and *Iniguez*. This is so because cases applying the more deferential abuse-of-discretion standard to errors that violate constitutional rights have not grappled with established law requiring *de novo* review of constitutional issues. *See, e.g., State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013). In *Dye*, the court indicated that “[a]lleging that a ruling violated the defendant’s right to a fair trial does not change the standard of review.” *Id.*, at 548.

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<sup>5</sup> Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

The *Dye* court did not cite *Iniguez* or *Jones. Id.*, at 548.

Furthermore, the petitioners in *Dye* did not ask the court to apply a *de novo* standard. See Petition for Review<sup>6</sup> and Petitioner’s Supplemental Brief.<sup>7</sup> As the *Dye* court noted, the petitioner “present[ed] no reason for us to depart from [an abuse-of-discretion standard].”<sup>8</sup> *Id.* There is no indication that the *Dye* court intended to overrule *Iniguez* and *Jones. Id.*

In a more recent case, the court applied an abuse of discretion standard despite the petitioner’s claim of a constitutional violation. *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017). In *Clark*, the court announced it would “review the trial court’s evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court.” *Id.* (internal quotation marks and citations omitted). Upon finding that the lower court had excluded “relevant defense evidence,” the reviewing court would then “determine as a matter of law whether the exclusion violated the constitutional right to present a defense.” *Id.*

Although the *Clark* court cited *Jones*, it did not suggest that *Jones* was incorrect, harmful, or problematic, and did not overrule it. See *State v.*

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<sup>6</sup> Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf> (last accessed 1/23/19).

<sup>7</sup> Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf> (last accessed 1/23/19).

<sup>8</sup> By contrast, the Respondent in *Dye* did argue for application of an abuse-of-discretion standard. See *Dye*, Respondent’s Supplemental Brief, pp 8-9, 17-18, available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20Obrief.pdf> (last accessed 1/23/19).

*Armstrong*, 188 Wn.2d 333, 340 n. 2, 394 P.3d 373, 377 (2017) (“For this court to reject our previous holdings, the party seeking that rejection must show that the established rule is incorrect and harmful or a prior decision is so problematic that we must reject it.”)

The *Clark* court did not even acknowledge its deviation from the standard applied by the *Jones* court. *Id.* Nor does the *Clark* opinion mention *Iniguez*. Furthermore, as in *Dye*, the Respondent in *Clark* argued for the abuse-of-discretion standard, and Petitioner did not ask the court to apply a different standard. *See* Respondent’s Supplemental Brief, p. 16;<sup>9</sup> Petitioner’s Supplemental Brief.<sup>10</sup>

This court should follow the reasoning in *Iniguez* and *Jones*. This is especially true given the absence of any briefing addressing the appropriate standard of review in *Dye* and *Clark*.

Constitutional errors should be reviewed *de novo*. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. This rule encompasses discretionary decisions that violate constitutional rights.<sup>11</sup> A rule that would permit review for abuse of discretion would leave the constitutional rights of an accused person up to the discretion of the individual judge presiding over that person’s trial.

Furthermore, the standard set forth in *Clark* makes the *de novo*

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<sup>9</sup> Available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf> (accessed 1/23/19).

<sup>10</sup> Available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf> (accessed 1/23/19).

<sup>11</sup> *But see State v. Blair*, --- Wn.App. ---, \_\_\_, 415 P.3d 1232 (2018).

standard meaningless: an abuse of discretion resulting in the exclusion of relevant and admissible defense evidence will always violate the right to present a defense. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. Such cases will turn on harmless error analysis, not on *de novo* review of the error's constitutional import.

*Jones* and *Iniguez* set forth the proper standard. Given the Supreme Court's inconsistency on this issue, review here should be *de novo*. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281.

**II. MR. HART'S HARASSMENT CONVICTION MUST BE REVERSED BECAUSE HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Defense counsel did not ask his client about the harassment charge during Mr. Hart's testimony. RP (2/14/18) 723-786. He later admitted to the jury that this was an oversight. RP (2/15/18) 898-899. As a result, the jury heard only Ms. Hart's version of the alleged threat. Counsel's oversight prejudiced Mr. Hart, and requires reversal of the harassment conviction.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To obtain relief on an ineffective assistance claim, a defendant must show "that (1) his counsel's performance fell below an objective standard of reasonableness

and, if so, (2) that counsel's poor work prejudiced him."<sup>12</sup> *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010); *see also State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Although courts apply "a strong presumption that defense counsel's conduct is not deficient," a defendant rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Here, defense counsel acknowledged that he forgot to elicit Mr. Hart's denial of the harassment charge. RP (2/15/18) 898-899. Because counsel admitted his mistake, there is no legitimate tactic explaining the error.

There is a reasonable probability that the error affected the outcome. *See, e.g., State v. Jones*, 183 Wn.2d 327, 340, 352 P.3d 776 (2015) (*Jones II*). In *Jones II*, defense counsel failed to investigate and introduce exculpatory evidence supporting his client's self-defense claim. The Supreme Court reversed, finding a reasonable probability that counsel's failures affected the outcome of trial. *Id.*

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<sup>12</sup> Ineffective assistance is an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kylo*, 166 Wn.2d at 862; RAP 2.5 (a)(3).

Here, as in *Jones II*, defense counsel failed to introduce exculpatory evidence. Mr. Hart was prejudiced by his attorney's failure to elicit his testimony regarding the harassment charge. Absent Mr. Hart's denial of the threat, the jury was left with only one version of events regarding the harassment charge. Had counsel given Mr. Hart an opportunity to explicitly deny threatening to kill Ms. Hart, some jurors may have had a reasonable doubt as to his guilt.

By failing to elicit Mr. Hart's denial, trial counsel deprived Mr. Hart of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* The harassment conviction must be reversed, and the charge remanded for a new trial. *Id.*

**III. THE SENTENCING COURT VIOLATED THE SEPARATION OF POWERS BY DELEGATING TO THE DEPARTMENT OF CORRECTIONS THE AUTHORITY TO SET MR. HART'S CONDITIONS OF COMMUNITY CUSTODY.**

The separation of powers doctrine is derived from the constitution's distribution of governmental authority into three branches. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The doctrine serves to ensure that the "fundamental functions" of each branch remain inviolate. *Carrick v. Locke*, 125 Wn.2d 129, 134-135, 882 P.2d 173 (1994).

The state constitution vests the judicial power in the judiciary. Wash. Const. art. IV, §1. Sentencing is a judicial function. *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005). Sentencing courts “may not delegate excessively.” *Id.*; see also *United States v. Morin*, 832 F.3d 513, 516 (5th Cir. 2016); *United States v. Melendez-Santana*, 353 F.3d 93, 101 (1st Cir. 2003), *overruled on other grounds by United States v. Padilla*, 415 F.3d 211 (1st Cir. 2005).

Under the Sentencing Reform Act, courts are required to set conditions for any offender sentenced to community custody. RCW 9.94A.703. In setting conditions, a judge may require the offender to “[p]articipate in crime-related treatment or counseling services” or to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3).

The court must also “[r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704.” RCW 9.94A.703(1)(b). However, the department’s authority, as outlined in that provision, does not include the power to require treatment or to impose crime-related prohibitions. RCW 9.94A.704. The authority to impose those conditions are expressly reserved to the sentencing court. RCW 9.94A.703(3).

Here, the court erroneously delegated to the Department of Corrections the power to direct Mr. Hart to engage in “crime-related

treatment or counseling services.” CP 167. It also improperly delegated to DOC the power to define any “crime-related prohibitions.” CP 168.

These are core conditions of community custody that must be imposed by the sentencing court. RCW 9.94A.703(3). They are not “administrative detail[s] that could be properly delegated.” *Sansone*, 127 Wn. App. at 642.

By allowing DOC to set these conditions of community custody, the court abdicated its responsibility. *Id.* As a result, Mr. Hart was not “put on notice as to what would result in [him] being sent back to prison.” *Id.*, at 643. The improper delegations violated the separation of powers. *Id.* They must be stricken, and the case remanded to the trial court for a new sentencing hearing. *Id.*

#### **IV. THE TRIAL COURT VIOLATED MR. HART’S DOUBLE JEOPARDY RIGHTS BY VACATING COUNT II “WITHOUT PREJUDICE.”**

The constitution protects an accused person “from being twice put in jeopardy for the same offense.” *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. Const. Amend. V; U.S. Const. Amend. XIV; Wash. Const. art. I, §9. This prohibits courts from “imposing multiple punishments for the same criminal conduct.” *Id.*

The term ‘punishment’ encompasses more than just an offender’s sentence. *Id.* This is so because adverse consequences attach to a

conviction, even if no sentence is imposed. *Id.*, at 454-455. At a minimum, “a conviction carries a societal stigma.” *Id.*, at 464.

The remedy for a double jeopardy violation is to vacate one of the underlying convictions. *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007). However, a court violates double jeopardy by vacating a conviction “while directing, in some form or another, that the conviction nonetheless remains valid.” *Turner*, 169 Wn.2d at 464.

In this case, the sentencing court violated the principle outlined in *Turner*. Instead of vacating Mr. Hart’s conviction in Count II, the court “*dismiss[ed]* Count 02 without prejudice.” CP 166 (emphasis in original). By dismissing the charge ‘without prejudice,’ the court directed “in some form or another, that the conviction nonetheless remains valid.” *Id.* The dismissed conviction continues to “carr[y] a societal stigma,” a result prohibited by the constitution. *Id.*

Mr. Hart’s case must be remanded. The court must amend the Judgment and Sentence to vacate Count II, without any reference to the continuing validity of the conviction. *Id.*

### **CONCLUSION**

For the foregoing reasons, Mr. Hart’s convictions must be reversed, and the case remanded for a new trial. In the alternative, the case

must be remanded with instructions to amend the Judgment and Sentence,  
removing the improper delegation to DOC and any indication that the  
conviction for Count II remains valid.

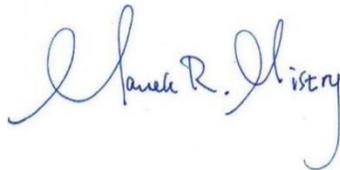
Respectfully submitted on January 25, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

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

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

Signed at Olympia, Washington on January 25, 2019.



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