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No. 51994-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

RODNEY TAYLOR FRANCK, Appellant.

Appeal from the Superior Court of Pacific County
The Honorable Douglas E. Goelz
No. 15-1-00178-5

BRIEF OF APPELLANT
RODNEY TAYLOR FRANCK

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I. ASSIGNMENTS OF ERROR

1. Defendant is entitled to a sentence based on a correct offender score and sentencing conditions.
2. The State's repeated mismanagement prejudiced the defendant by forcing him to waive his right to a speedy trial in order to have prepared and effective counsel.
3. Defendant's right to effective counsel was violated when his attorney stipulated to the admission of video evidence that denied him a fair trial and the presumption of innocence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1a.) Defendant Is Entitled To A Remand To Correct His Offender Score And Sentencing Conditions.
- b.) The Appendix H Provision Of His Felony Sentence That Allows Unfettered Searches By His DOC Probation Officer Is Unlawful And Must Be Stricken.
- c.) The Court Erred When It Imposed The \$100.00 DNA Fee Because Mr. Franck Has Already Provided A DNA Sample Pursuant To His 2014 Adult Conviction for Malicious Mischief In The First Degree.
2. Defendant Was Entitled To A Dismissal For Repeated State Mismanagement of The Case.

3. Defendant's right to effective counsel was violated when his attorney stipulated to the "Brawl on the Beach" video that included improper evidence of arrest, improper opinions of guilt and improper opinions of blood evidence.

a) The video depicts Mr. Franck being restrained and in the custody of multiple law enforcement officers, thus infringing on right to a fair trial and to be presumed innocent.

b) The video contains improper opinions of guilt and assertions of unsubstantiated facts that prejudiced his right to a fair trial.

c) Blood opinion testimony was unreliable.

d) If the Reviewing court finds that any of the sentencing arguments were waived by the failure of defense counsel to object, Mr. Franck received ineffective assistance of counsel.

III. STATEMENT OF THE CASE

On the Long Beach Peninsula, in Pacific County, Washington, July 4, 2015 was an evening that combined all the elements for a "perfect storm. RP 498. It was a Saturday night; the weather was good and the beach area thronged with more people than law enforcement had ever seen before. RP 498, 473 (beach – chaotic). Washington State Department Fish and Wildlife

officers were assisting local law enforcement on this evening. RP 497-98. A camera crew from the Animal Planet television show "Rugged Justice" was riding along with Fish and Wildlife personnel. RP 506.

Two couples, Dan and Karen Finlay and Richard and Amy Mehas decided to leave the Finlay beach house sometime between 9 and 10:30 p.m. and walk down to the beach. RP 336, 369, 499. After only 10 minutes or so on the beach the couples decided to head back down the beach trail to G Street and back to the beach house. RP 365. While on the trail, Mr. and Mrs. Mehas were confronted by 2 -3 young women who blocked the beach path and began using abusive language. RP 338. More young people started to appear. RP 339. Mr. Mehas felt threatened and called to his friend, Mr. Finlay, for help. RP 367-68. When Mr. Finlay came up the path to see what the matter was he was immediately struck twice in the head. RP 417. He was unable to identify his assailants or recall anything else until he was receiving aid. RP.417-18. He was taken to the emergency room in Ilwaco Washington. RP 454.

Mrs. Mehas was also unable to identify any of the assailants other than report a very large group of juveniles blocked the beach path and then attacked Mr. Finlay. RP 347. She was unable to see what happened because she fell off the path and twisted her ankle. RP 347. She was also examined at the Ilwaco ER. RP 347. She was diagnosed with a sprained ankle. RP 347.

Mr. Mehas's testimony and statements of the evening varied widely. On July 4, 2015 he said he could not identify his attacker from the large group of 30 to 40 juveniles involved in the assault. RP 353, 512. At trial Mr. Mehas claimed he had been strangled in addition to being hit in the head over 50 times. RP 371. Mr. Mehas was permitted to narrate and explain statements on the Rugged Justice "Brawl on the Beach" video. RP 380-81, Ex. 9, including "they're guilty as hell and where I'm from they will do jail time." RP 404. Like his wife and Mr. Finlay, he was examined at the Ilwaco ER. RP 458.

Dr. Mark Waliser testified as the State's medical expert regarding his medical credentials and examination of the Mehases and Mr. Finlay. He testified that Mr. Finlay had a fractured left maxillary sinus and that Mr. Mehas had a fractured rib. RP 456-458. He described his procedures and testified he did not note any evidence of strangulation or bruising around any of the alleged victims' necks. RP 464. The defense was not permitted to cross examine him regarding a subsequent medical board inquiry into his fitness to practice medicine based on concerns with substance abuse impairment. RP 440, CP 149-154.

Four law enforcement officers testified for the State. Three of them were asked about a stain on Mr. Franck's pants that appeared to be blood. RP 474(Goodwin), RP505(Chadwick), RP 532(Woodby). No one collected

the pants or took any evidentiary samples. RP 476, 488, 513,534. The officers recounted their contact with Mr. Franck and the filming of their interactions with him their apprehension of him . RP 473-74, 488-89, 504-507,

Pacific County Sheriff Deputy Rick Goodwin described the scene on the beach as chaotic, fireworks going off and people everywhere. RP 473. After getting details from the complaining witnesses (RP 472) he came into contact with a person (the defendant) whom he believed was involved in the assault. RP 472. Mr. Franck was brought up to him and Mr. Mehas for an identification by 2 or 3 officers. RP 473-74. He said while patting Mr. Franck's down he noticed a large blood spot on his pants. RP 474. He questioned Mr. Franck about the blood, however, he did not collect the sweatpants or take any samples of the substance for DNA analysis or testing.. RP 474, 476, 488. He did take a picture of them. RP 476, Ex. 8. He further testified, without objection, that he believed that the blood on the pants was consistent with Mr. Finlay's injuries. RP 487

Fish and Wildlife officer Chadwick testified the camera crew was accompanying him, as they had on numerous occasions. RP 510-11. Despite describing the scene on the beach was the "perfect storm" he opined that Mr. Franck must have known he was law enforcement when he walked away from the area. RP 498, 504-5. He then him to stop. RP 504-505. He

also testified he observed dry “blood” on Mr. Franck’s pants but he that he did not collect any evidence. RP 505, 513. The State played the video again during his testimony. Ex. 9, RP 507.

Pacific County Sheriff Department reserve officer Ben Woodby also testified that he and other officers went onto the beach to locate and identify the person suspected to be involved in the assault. RP 530. They contacted a person who was walking away from the officers. RP 530. He testified he saw what appeared to be relatively fresh blood on the defendant’s pant leg. RP 531. He said he did not know if the blood was wet or dry but that he meant fresh in that as blood ages it gets browner. RP 533. He did not collect the sweatpants, RP 534. He said his role was to accompany the other officers in taking the defendant to another officer to interview. RP 534.

The final officer that testified for the state was Pacific County Sheriff Sgt, Michael Ray. Sgt. Ray Pacific County Sheriff Sgt Ray also testified that the beach scene was “pretty out of control” that night due to the large number of people out on the beach. RP 537. He said he was there to try and to contain the scene. RP 539. He did not conduct any interviews. RP540.

The State charged Mr. Franck with one count of assault in the second degree, alleging he intentionally assaulted Daniel Finlay and

recklessly inflicted substantial bodily harm, in violation of RCW 9A.36.021(1)(a). CP 14.

Mr. Franck responded to his summons to appear and first appeared in Pacific County Superior Court on October 30, 2015. Over the course of the next two and a half years he missed only 2 court dates, for which the court permitted the State to amend the Information to added two counts of bail jumping. CP 79=80. (September 8, 2017.) The two counts of bail jumping were ultimately severed from the assault charges. RP 102.

The State was permitted, over defense objection, to file a third amended Information adding a second count of assault in the second degree naming Richard Mehas as the victim. CP109-111 (December 1, 2017), RP

On December 1, 2017 the State was permitted, over objection, to file a third amended Information identifying a new victim and adding a second count of assault in the second degree. CP 109-111 (third amended information), CP 96-98 (defense memorandum "Objection to Motion to Amend Information and Motion to Dismiss), RP 141. Defense objected to the late amendment adding a new felony count and a new victim, Richard Mehas, 7 business days before the scheduled trial date of December 13, 2017. RP 143, 145. Defense renewed his motion to dismiss on December 13, 2017. CP 113-116.

The court was concerned about the late amendment but because the court was scheduled to handle another trial set for the same date, the court found the defendant was not prejudiced by a continuance. RP 145.

The trial was reset to January 3, 2018. On December 29, the State requested a continuance for witness unavailability. RP 149. Defense objected, pointing out Ms. Mehas was not a critical witness because she was not a named victim nor had she identified Mr. Franck. RP 151. Defense counsel also pointed out this case had previously been continued due to State and Court conflicts. RP 151-52. The court granted the continuance finding good cause for the request to continue by the State for witness unavailability. RP 153-155. Trial was reset to February 14, 2018. Defense again objected to the trial date being set for more than 30 days. RP 159.

As the February trial date approached, on February 8, 2018 the State provided discovery concerning criminal histories of State witnesses, including crimes of dishonesty, and evidence that the State's medical expert had a suspended license for working while impaired and criminal histories. CP 146-155.

The December 13, 2017 scheduled trial had to be moved because of potential trial scheduling conflicts in a jurisdiction with a single Superior Court trial department and a single Judge and because of the late amendment adding a new felony count and new named victim. The January

3, 2018 trial date was then continued due to State witness unavailability, and the next trial date, February 14, 2018, was continued due to late discovery by the State. No alternative such as trailing the other scheduled matters, exclusion of witnesses or denial of amendment were offered by the State or considered by the Court.

The defense stipulated to the admission of the Rugged Justice video entitled “Brawl on the Beach”. CP 143-144.

Trial commenced on May 29, 2018. Verdicts of guilty on both counts of assault in the second degree were returned by the jury. CP 210, 211. He was sentenced on June 15, 2018. The court rejected the defense request for an exceptional sentence below the standard range and sentenced Mr. Franck to concurrent 29 month sentences, the high end of the standard range for an offender score of 5. RP 284, CP 220-232. The court did not consider whether his June 24, 2010 juvenile residential burglary and theft in the first degree convictions were the same criminal conduct for purposes of calculating his offender score. CP 222. The court stated its intent was to waive all “financials” (RP 284) but the judgment and sentence included a \$100.00 DNA collection fee even though he had a prior adult felony for which DNA collection would have been court ordered. CP 222, 226.

At the sentencing hearing the court expressed its opinion that the stipulated video was the deciding factor in establishing guilt. RP 283-284..

IV. ARGUMENT

1a.) Defendant Is Entitled To A Remand To Correct His Offender Score And Sentencing Conditions.

A defendant may raise an offender score challenge for the first time on appeal. *State v. Allen*, 150 Wn. App. 300, 314, 207 P.3d 483 (2009).

The appellate courts review an offender score calculation de novo but review a determination of what constitutes the same criminal conduct for abuse of discretion or misapplication of the law. *State v. Wright*, 183 Wn. App. 719, 733, 334 P.3d 22 (2014).

The “mere failure to object to a prosecutor's assertions of criminal history does not constitute such an acknowledgement.” *State v. Mendoza*, 165 Wn.2d 913, 928, 205 P.3d 113 (2009), overruled on other grounds, *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014). Here, Franck’s criminal history was included on his felony judgment and sentence. Counsel never agreed to the State's articulation of his criminal history and Mr. Franck had previously asserted his offender score was only a 4. RP 256. At sentencing, no one addressed whether his 2010 juvenile theft in the first degree and burglary charge were the same criminal conduct and were both properly included as separate scoring offenses. Therefore, Franck did not affirmatively acknowledge that these two offenses were separate for purposes of scoring. *State v. Mendoza*, 165 Wn.2d 913, 928,

205 P.3d 113 (2009), *overruled on other grounds, State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

A defendant is entitled to a sentence based on a correct offender score. The Sentencing Reform Act of 1981 (SRA) requires sentencing courts to count prior convictions that encompass the same criminal conduct as a single offense when calculating an offender score. RCW 9.94A.525(5)(a). The burglary antimerger statute permits courts to punish and prosecute separately crimes committed during the commission of a burglary. RCW 9A.52.050. *State v. Williams*, 181 Wn.2d 795, 796, 336 P.3d 1152 (2014) addressed the issue of whether sentencing courts have discretion to count prior convictions separately under the burglary antimerger statute notwithstanding a finding that they encompass the same criminal conduct under the SRA. The Court held they do not. *State v. Williams*, 181 Wn. 2d at, 796.

Here the trial court calculated the juvenile Clark County burglary and theft that occurred on June 24, 2010 and sentenced on December 1, 2010 each as .5. CP 222. Because the court did not conduct a same criminal conduct analysis as required by the same criminal conduct provision of the SRA, this case requires a remand to correctly calculate Mr. Franck's offender score.

If the reviewing court finds this challenge to his offender score was waived, Mr. Franck received ineffective assistance of counsel. See Argument in Section 3.

1b.) The Appendix H Provision Of His Felony Sentence That Allows Unfettered Searches By His DOC Probation Officer Is Unlawful And Must Be Stricken.

Article I, section 7 of the Washington Constitution provides a robust privacy right. It states that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. The “authority of law” needed is generally a warrant, “subject to ‘a few jealously and carefully drawn exceptions.’ ” *State v. Ladson*, 138 Wash.2d 343, 349, 979 P.2d 833 (1999) (internal quotation marks omitted) (quoting *State v. Hendrickson*, 129 Wash.2d 61, 70, 917 P.2d 563 (1996)).

However, individuals on probation are not entitled to the full protection of article I, section 7. *State v. Olsen*, 189 Wash.2d 118, 124, 399 P.3d 1141 (2017). They have reduced expectations of privacy because they are “ ‘serving their time outside the prison walls.’ ” *Id.* at 124-25, 399 P.3d 1141 (quoting *State v. Jardinez*, 184 Wash. App. 518, 523, 338 P.3d 292 (2014)). Accordingly, it is constitutionally permissible for a CCO to search an individual based only on a “well-founded or reasonable suspicion of a probation violation,” rather than a warrant supported by probable cause. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). The

legislature has codified this exception to the warrant requirement at RCW 9.94A.631.² The statute reads in relevant part, “If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a [CCO] may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.” RCW 9.94A.631(1). *State v. Cornwell*, 190 Wn. 2d 296, 301–02, 412 P.3d 1265, 1268 (2018).

It is already established that in accordance with article I, section 7, individuals on probation do not forfeit all expectations of privacy in exchange for their release into the community. *Olsen*, 189 Wash.2d at 125, 399 P.3d 1141. While the State may closely supervise them to advance the probation system's goals of promoting rehabilitation and protecting public safety, its authority is limited. *Id.* at 128-29. Individuals' privacy interest can be reduced “only to the extent ‘necessitated by the legitimate demands of the operation of the [community supervision] process.’ ” *Id.* at 125, 399 P.3d 1141 (quoting *Parris*, 163 Wn. App. at 117, 259 P.3d 331).

When there *is* a nexus between the property searched and the suspected probation violation, an individual's reduced privacy interest is safeguarded in two ways. First, a CCO must have “reasonable cause to believe” a probation violation has occurred before conducting a search at the expense of the individual's privacy. RCW 9.94A.631(1). This threshold

requirement protects an individual from random, suspicion-less searches. Second, the individual's privacy interest is diminished only to the extent necessary for the State to monitor compliance with the particular probation condition that gave rise to the search. The individual's other property, which has no nexus to the suspected violation, remains free from search. *State v. Cornwell*, 190 Wn. 2d at 303–04.

In this case the second paragraph of Appendix H permits random, suspicion-less searches without notice or a nexus requirement. CP 230. The paragraph states:

Defendant must consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection all areas of the residence, in which the offender lives or has exclusive/joint control/access.

Because this provision does not comport with constitutional protections guaranteed to protect an individual privacy rights, defendant requests this court remand to the trial court with directions to strike the provision.

1c.) The Court Erred When It Imposed The \$100.00 DNA Fee Because Mr. Franck Has Already Provided A DNA Sample Pursuant To His 2014 Adult Conviction for Malicious Mischief In The First Degree.

Since *State v. Blazina*, , 182 Wn.2d 827, 344 P.3d 680 (2015) addressed discretionary legal financial obligations, the courts are sensitive to the impact legal financial obligations have on indigent defendants. The

trial court expressly stated it was not imposing costs, however, the DNA fee was included on the judgment and sentence as part of Mr. Franck's legal financial obligations. RP 284, CP 226. This was in error. RCW 43.43.7541 does not impose the \$100.00 fee if the State has previously collected the offender's DNA as a result of a prior conviction. The Statute provides:

**RCW 43.43.7541. DNA identification system--
Collection of biological samples--Fee**

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754. This fee shall not be imposed on juvenile offenders if the state has previously collected the juvenile offender's DNA as a result of a prior conviction.

Imposition of the \$100.00 DNA fee was error because Mr. Franck had previously supplied his DNA as a result of prior conviction. CP 222. His criminal history includes an adult 2014 conviction for the class C felony

of malicious mischief in the second degree. This conviction required he provide a DNA sample. For these reasons Mr. Franck requests the court remand this case to allow the court to correct the error of including a \$100.00 DNA collection fee as part of his legal financial obligations.

2. The Court Erred When It Denied Mr. Franck's CrR 8.3(b) Motions To Dismiss.

Dismissal is an extraordinary remedy, however, this is an extraordinary case. Over the course of several years, discovery violations, late amendments to the charging documents, continuances for State witness unavailability and court room congestion worked together delay trial for almost 3 years. The events underpinning the charges occurred on July 4, 2015. There were a number of motions to continue the trial, but the delays became prejudicial to the defendant in 2017 when he ceased to agree to continue his case.

Mr. Franck was summoned in and appeared for his in Pacific Cuntly Superior Court for one count of assault in the second degree, identifying Mr. Daniel Finlay as the victim on October 30, 2015. CP 14-15, RP 5-8. The Court determined he qualified for court appointed counsel on November 13, 2015 and counsel was appointed. RP 13. On November 20, 2015, court appointed counsel appeared with Mr. Franck and a plea of not guilty was entered. RP 16. On December 1, 2017 the State was permitted,

over objection, to file a third amended Information identifying a new victim and adding a second count of assault in the second degree. CP 109-111 (third amended information), CP 96-98 (defense memorandum “Objection to Motion to Amend Information and Motion to Dismiss), RP 141. Defense objected to the late amendment adding a new felony count and a new victim, Richard Mehas, 7 business days before the scheduled trial date of December 13, 2017. RP 143, 145. Defense renewed his motion to dismiss on December 13, 2017. CP 113-116.

The court was concerned about the late amendment but because the court was scheduled to handle another trial set for the same date, the court found the defendant was not prejudiced by a continuance. RP 145.

The trial was reset to January 3, 2018. On December 29, the State requested a continuance for witness unavailability. RP 149. Defense objected, pointing out Ms. Mehas was not a critical witness because she was not a named victim nor had she identified Mr. Franck. RP 151. Defense counsel also pointed out this case had previously been continued due to State and Court conflicts. RP 151-52. The court granted the continuance finding good cause for the request to continue by the State for witness unavailability. RP 153-155. Trial was reset to February 14, 2018. Defense again objected to the trial date being set for more than 30 days. RP 159.

As the February trial date approached, on February 8, 2018 the State provided discovery concerning criminal histories of State witnesses, including crimes of dishonesty, and evidence that the State's medical expert had a suspended license for working while impaired and criminal histories. CP 146-155.

In Summary, the December 13, 2017 scheduled trial had to be moved because of potential trial scheduling conflicts in a jurisdiction with a single Superior Court trial department and a single Judge and because of the late amendment adding a new felony count and new named victim. The January 3, 2018 trial date was then continued due to State witness unavailability, and the next trial date, February 14, 2018, was continued due to late discovery by the State. No alternative such as trailing the other scheduled matters, exclusion of witnesses or denial of amendment were offered by the State or considered by the Court. Rather, the court tried to force compliance by granting continuances as an alternative to dismissal. Ultimately, the court's offers to extend time to counter the State's mismanagement materially prejudiced Mr. Franck's ability to obtain a fair trial. The Court abused its discretion its discretion by denying his motion to dismiss despite the extraordinary facts of this case.

CrR 8.3(b) provides:

(b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due

to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Dismissal under CrR 8.3(b) requires a showing of arbitrary action or governmental misconduct, but the governmental misconduct need not be of an evil or dishonest nature, simple mismanagement is enough. *State v. Brooks*, 149 Wn. App. 373, 376, 203 P.3d 397, 398–99 (2009); *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). It also requires the defendant to show that such action prejudiced his right to a fair trial. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). “Such prejudice includes the right to a speedy trial and the ‘right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.’ ” *Michielli*, 132 Wn.2d at 240, 937 P.2d 587 (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). But dismissal under CrR 8.3 is an extraordinary remedy, one that the trial court should use only as a last resort. *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003).

A trial court's decision on a motion to dismiss is reviewed for an abuse of discretion. *State v. Brooks*, 149 Wn. App. 373, 383–84, *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable, when it exercises its decision on untenable grounds, or when it makes its decision

for untenable reasons. *Blackwell*, 120 Wn.2d at 830, 845 P.2d 1017. The State cannot by its own unexcused conduct force a defendant to choose between his speedy trial rights and his right to effective counsel who has had the opportunity to adequately prepare a material part of his defense. *Price*, 94 Wn.2d at 814.

The interjection of new facts can establish prejudice, *Price*, 94 Wn.2d at 814, however, governmental mismanagement arises from other forms of prejudice as well. These include the State's failure to provide discovery, *State v. Brooks*, 149 Wn.App. 373, 387–88, *State v. Sherman*, 59 Wn.App. 763, 768, 801 P.2d 274 (1990), the State's addition of new charges the day before trial, *Michielli*, 132 Wn.2d at 245, and the State's failure to provide a witness list along with its encouragement that a witness disobey a court order. *State v. Stephans*, 47 Wn.App. 600, 604, 736 P.2d 302 (1987).

All of these forms of prejudice occurred in this case. As the *Brooks* court summarized, the actual test for prejudice requires the trial court to find governmental mismanagement and prejudice. Here, Mr. Franck was required to waive his right to a speedy trial or to have effective representation, not once but several times. The State offered excuses but did not offer any alternatives to the court other than to continue the matter.

The defendant requests this court find the trial court erred and abused its discretion for the same reasons as set out in in *Brooks*, *Michielli*

and *Sherman*. Like the argument made by the State in *Brooks*, 149 Wn.App. at 387–88 and *Sherman*, 59 Wn.App. at 768, the State argued that no new facts supported the objection to the late amendment even though a new count and a new victim were added. RP 144. Like the situation in *Michielli*, 132 Wn.2d at 245, the State moved to amend the Information just days before the trial. RP 142. On December 29, 2017, the State again requested a continuance for witness unavailability, RP 149, and again on February 14, 2018, the State argued that the fact that the medical licensing review of its endorsed medical expert for performing duties while impaired and then violating a treatment agreement was either not relevant or the limited information provided was sufficient to go forward with the trial. RP 183. Nor did the State see the provision of CrR4.7 mandated criminal histories just days before the trial any problem. RP 184. The Court held that even though the revelation of this information was made only 3 court days before the trial, the solution is not to dismiss, not to suppress or not to keep State witnesses from testifying, but rather that the solution is to “admonish” the State for its late discovery. RP 186. Like the situation presented in *Price*, 94 Wn.2d at 814 the Court attempted to cure prosecutorial mismanagement and the essential need for effectively prepared counsel by extracting a waiver of speedy trial from the defendant to continue the case. RP 202.

The unusual facts here establish this case is extraordinary. Mr. Franck is entitled to the relief afforded in to the defendants in in *Brooks*, *Michielli* and *Price*. Mr. Franck's was prejudiced. He was forced to waive his right to a speedy trial in order to have prepared counsel due to the State's untimely amendment of the charges and untimely production of essential impeachment discovery concerning the State's medical expert. The Court abused its discretion by repeatedly continuing the case to cure the State's mismanagement.

3. It Was Ineffective Assistance of Counsel to Stipulate to the "Brawl on the Beach" video.

The Sixth Amendment to the United States Constitution and article I, §22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland*, 466 U.S. at 685–86, 104 S.Ct. 2052; *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, ineffective assistance is a two-pronged inquiry:

“First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by

the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.” *Thomas*, 109 Wn.2d at 225–26, 743 P.2d 816 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001) (“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.”).

Under this standard, performance is deficient if it falls “below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *McFarland*, 127 Wn.2d at 335, 899 P.2d 1251. Claims of ineffective assistance of counsel are reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

“When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Kyllo*, 166 Wn.2d at 863, 215 P.3d 177; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (“[T]his court will not find ineffective assistance of counsel if ‘the actions of counsel complained of go to the theory of the case or to trial tactics.’ ” (quoting *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982))). Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the prejudice prong of the *Strickland* test, the defendant must establish that “there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862, 215 P.3d 177. “A reasonable probability is a probability sufficient to undermine confidence in the

outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *Thomas*, 109 Wn.2d at 226, 743 P.2d 816; *Garrett*, 124 Wn.2d at 519, 881 P.2d 185. In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law” and must “exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification’ and the like.” *Strickland*, 466 U.S. at 694–95, 104 S.Ct. 2052.

Ineffective assistance of counsel is a fact-based determination that is “generally not amenable to per se rules.” *Cienfuegos*, 144 Wn.2d at 229, 25 P.3d 1011; *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052 (“Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.”).

Finally, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. *State v. Grier*, 171 Wash. 2d 17, 32–34, 246 P.3d 1260, (2011).

Here, as described below, multiple constitutional rights are implicated in the stipulated video that worked together to deny Mr. Franck effective counsel and a fair trial that undermine the confidence in the outcome.

- a.) The video depicts Mr. Franck being restrained and in the custody of multiple law enforcement officers, thus infringing on right to a fair trial and to be presumed innocent.

Our state constitution provides that “[i]n criminal prosecutions the accused shall have the right to appear and defend in person.” Wash. Const. art. I, § 22. The right to appear and defend in person includes “the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty.” *State v. Damon*, 144 Wn.2d 686, 690, 25 P.3d 418 (citing *Williams*, 18 Wash.47, 50, 51, 50 P. 580 (1897)), *as modified*, 33 P.3d 735 (2001). “[R]egardless of the nature of the court proceeding or whether a jury is present, it is particularly within the province of the trial court to determine whether and in what manner shackles or other restraints should be used.” *State v. Walker*, 185 Wn. App. 790, 797, 344 P.3d 227 (addressing the defendant’s right to be free from restraints at sentencing), *review denied*, 183 Wn.2d 1025, 355 P.3d 1154 (2015). Restraints are disfavored because they may interfere with

important constitutional rights, “including the presumption of innocence”. *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981). *State v. Lundstrom*, ____ Wn. App. ____ 429 P.3d 1116 (Wash. Ct. App. 2018) *State v. Williams*, 18 Wash. 47, 51, 50 P. 580 (1897). This is to ensure that the defendant receives a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution. *See Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Hartzog*, 96 Wash.2d at 397-98, 635 P.2d 694.

Finch

The stipulated video of the Rugged Justice television series, Brawl on the Beach episode (Ex. 9 & Order CP 143-44, RP 361) is described by the State as depicting “the apprehension” of Mr. Franck “as the assailant” on Mr. Finlay and Mr. Mehas. RP 200, 201. Mr. Franck is shown being questioned and the closely escorted by multiple police officers to be confronted by the Mr. Mehas. RP 473 – 475. Law enforcement are depicted ordering Mr. Franck to stop and then submit to their authority. RP 503. At sentencing the Court evaluated the impact of the video and said, that by the time defense counsel was done cross examining Mr. Mehas, the only witness identifying Mr. Franck, the jury did not believe the witness.

RP 283. However, the court also concluded that it was the video of Mr. Franck “fleeing the scene”, “blood on [his] knees”, lead the court to find there “can’t be any question your fate was doomed regardless of who was his attorney.” RP 283 – 284.

In light of the paucity of eye witness identification and physical evidence, no reasonable tactical or defense strategy supports the stipulation to the Rugged Justice “Brawl of the Beach” video depicting the apprehension of Mr. Franck. Multiple officers are depicted escorting him to be confronted by Mr. Mehas. The video infringes on his right to a fair trial and to be presumed innocent.

b.) The video contains improper opinions of guilt and assertions of unsubstantiated facts that prejudiced his right to a fair trial.

The role of the jury is to be held “inviolable” under Washington's constitution; Wash. Const. art. I, §§ 21, 22; and the United States constitution. U.S. Const. amend. VII; *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). The right to have factual questions decided by the jury is crucial to the right to trial by jury. *Id. citing, Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Our constitutions consign to the jury “the ultimate power to weigh the evidence and determine the facts.” *Id. citing, James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971).

Our Supreme Court has held there are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. *Montgomery*, 163 Wn.2d at 591 citing *n5 Demery*, (n5 “This rule is well grounded in the rules of evidence. Testimony that tells the jury which result to reach is likely not helpful to the jury (as required by ER 702), is probably outside the witness's area of expertise (in violation of ER 703), and is likely to be unfairly prejudicial (in violation of ER 403.”) 144 Wn.2d at 759; *Kirkman*, 159 Wn.2d at 927; *State v. Farr-Lenzini*, 93 Wn. App. 453, 463, 970 P.2d 313 (1999).

A witness cannot give an opinion on the guilt of the defendant because such evidence violates the defendant's right to a jury trial that includes the jury's independent determination of the facts. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2201).

Additionally, it invades the province of the jury for a witness to express an opinion as to whether another witness is telling the truth and it is improper for the State to elicit such testimony. *State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996); *State v. Carlson*, 80 Wn. App. at 123; *State v. Casteneda-Perez*, 61 Wn. App. 354, 360, 810 P.2d 74 (1991). See

also *City of Tacoma v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (credibility issues strictly reserved for the trier of fact). Such testimony is also argumentative, unfair and misleading. *State v. Walden*, 69 Wn. App. 183, 186-87, 847 P.2d 956 (1993); *State v. Casteneda-Perez*, 61 Wn. App. at 362-63.

Officer opinions are especially problematic. Our State and federal courts have long recognized the inherent danger in admitting opinion testimony of law enforcement officers. *State v. Carlin*, 40 Wn. App. 698, 700 P.2d 323 (1985) (statement made by a government official or law enforcement officer is more likely to influence the fact finder; *United States v. Gutierrez*, 995 F.2d 169, 172, (9th Cir. 1993) (statements of law enforcement officers often carry "an aura of special reliability and trustworthiness") quoting *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987); *Demery*, 144 Wn.2d at 765. (police officer's testimony carries an "aura of reliability."); *State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d (2004) (law enforcement officer's opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial). Not only is such testimony a highly improper invasion of the province of the jury, but police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt. See Deon J. Nossel, Note:

The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials, 93 Colum. L. Rev. 231, 244 n.70 (1993) (“Once [the expert] had testified as to the likely drug transaction-related significance of each piece of physical evidence, the jury was competent to draw its own conclusion as to [the defendant’s] involvement in the distribution of cocaine.” (alterations in original) (quoting *United States v. Boissoneault*, 926 F.2d 230, 233 (2d Cir. 1991))); *Montgomery*, 163 Wn.2d 577, 595.

There were 3 lay witnesses, Mr. Mehas, Mrs. Mehas and Mr. Finlay. Mrs. Mehas and Mr. Finlay were not able to identify Mr. Franck as one of the assailants. RP 347-348 (Mrs. Mehas); RP 424 (Mr. Finlay). Only Mr. Mehas identified Mr. Franck, basing his identification on the apparent blood from Mr. Franck’s sweat pants and his review of an Animal Planet video during his testimony. RP 373, 381. No physical evidence was collected or analyzed. The stipulated video of the Rugged Justice television series, Brawl on the Beach episode (Ex. 9 & Order CP 143-44, RP 361) is described by the State as depicting “the apprehension” of Mr. Franck “as the assailant” on Mr. Finlay and Mr. Mehas. RP 200, 201. It was played during Mr. Mehas in-court testimony. RP 378-381. The video also includes audio in which a male voice, presumably an officer, can be heard to say, “One of the ones. For Sure. Obvious.” These statements are made in

reference to Mr. Franck and clearly express a belief he is one of the “mob” of 20 to 30 juveniles suspected of injuring Mr. Mehas and Mr. Finlay. RP 383.

In the video Mr. Mehas said there were 20-30 juveniles, at trial he reduced the number to 10 -15 young adults. RP 383. Mr. Mehas also testified his voice can be heard on the video saying, “They’re guilty as hell and where I am from they’ll get jail time.” RP 404. This was in stated in reference to Mr. Franck. Additionally, to add to this opinion of guilt, the State and Mr. Mehas repeatedly referred to Mr. Franck as the “perpetrator”, not the defendant, not by his name, but as a statement of belief or fact that he committed the crime. RP 372, 375. There was no objection by the defense counsel.

c.) Blood opinion testimony was unreliable.

The audio portion of the film also captures an officer expressing his opinion that the stain on Mr. Franck’s pants is blood and that he sees blood on his hands. The officer asks him to explain how he got the blood on his pants. This evidence was never collected or analyzed. There is no proof that the stain is in fact blood or that he had blood on his hands. There is no proof that, even if the stain is blood, that it came from either Mr. Mejas or Mr. Finlay, yet, the officer’s opinion that the “blood” on his pants came from one of the named victims undoubtedly became a “fact”

that the jury considered. These expressions of opinion, especially by law enforcement officers are highly prejudicial and invade the province of the jury. There was no objection to the testimony by multiple witnesses regarding the suspected blood on Mr. Franck's clothing.

ER 401 defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under the evidence rules, irrelevant evidence denotes evidence that does not logically tend to prove or disprove any material fact or proposition. Evidence that at best produces only speculative inference is irrelevant evidence. Irrelevant evidence is not admissible. ER 402, 403. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997) directly addresses the admissibility of such "blood" testimony when there has only been a presumptive test but no confirmatory test. In the case where there is visual observation and only a presumptive test the jury must be informed by means of a limiting instruction that that testimony does not establish the presence of human blood. Here, there is not even a presumptive test, thus the potential prejudice outweighs any slight relevance and the testimony should have been excluded. *See State v. Halstine*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993) (law enforcement officer's testimony in a juvenile bench trial that a substance appeared to semen should have been excluded under

ER 403 but because nothing in Court's finding indicated the court relied on the testimony the error was harmless.)

Because the video permitted the jury to consider the officers statements and opinions that the stain on Mr. Franck's pants was blood, and this evidence was crucial to the State's case. As the trial court remarked at the sentencing, "once the jury saw the video and the blood on your pants, your case was doomed." RP 283, 284. Stipulating to the video cannot be deemed a reasonable tactical decision. Moreover, considering the paucity of any physical evidence linking Mr. Franck to the assault, one's confidence in the outcome of the trial is undermined. Thus, both prongs are met. Mr. Franck requests this matter be reversed and remanded for a new trial.

In sum, no reasonable defense attorney would stipulate to this video because it violates defendant's constitutional right to a fair trial, to be presumed innocent, and to have a jury decide the facts uninfluenced by witnesses' opinions of guilt or veracity. There is no conceivable trial tactic or strategy justifying this decision. As the Court said at the sentencing hearing, it was the video that convicted him. RP 283,284.

d.) If the Reviewing court finds that any of the sentencing arguments were waived by the failure of defense counsel to object, Mr. Franck received ineffective assistance of counsel.

As argued above, Mr. Franck was entitled to a sentence based on a correct offender core and correct conditions and only statutorily mandated fines. See Section 1. As discussed above, an ineffective assistance of counsel claim requires a showing that counsel's performance was deficient. And secondly, the defendant must show that the deficient performance prejudiced the defense. Imposing a sentence for a higher offender score than is required and incorporating sentencing conditions that exceed constitutional requirements and fines in excess of what is mandated by the DNA statute, all demonstrate deficient performance and prejudice to the defendant. He should not be sentenced to an unlawful term of confinement or have to submit to unreasonable searches. As well, he is indigent, and the imposition of additional fines creates an unfair and undue financial burden.

V. CONCLUSION

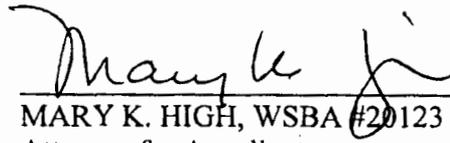
Mr. Franck asks this court to hold that the trial court abused its discretion when it denied his motions to dismiss for prosecutorial mismanagement that forced him to waive his right to a speedy trial in order to have prepared counsel and to vacate and dismiss the convictions.

Mr. Franck also asks this court to find that he received ineffective assistance of counsel because his attorney stipulated to the admission of the video "Brawl on the Beach" without authentication and this video became the deciding evidence that was used to convict him. The video contained

improper opinion and apprehension evidence that denied him a fair trial by an impartial jury.

Finally, Mr. Franck is entitled to a remand for resentencing.

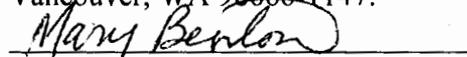
RESPECTFULLY SUBMITTED this 10th day of December 2018.



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Certification of Service

I hereby certify that on December 10th, 2018 I delivered via Email, Eservice through the COA website a true copy of the document to which this certificate is attached for delivery to Mark D. McClain, Pacific County Prosecuting Attorney (mmclain@co.pacific.wa.us) and sent a hard copy via US Mail to Rodney Franck CFN# 209025, Clark County Jail, PO Box 1147, Vancouver, WA 98666-1147.



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PIERCE COUNTY ASSIGNED COUNSEL

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