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No. 52104-1-II

Pierce County # 17-1-04795-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LUCAS R. EWING,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Stanley Rumbaugh, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. QUESTIONS PRESENTED..... 1

C. STATEMENT OF THE CASE..... 1

 1. Procedural facts..... 1

 2. Testimony at trial..... 3

D. ARGUMENT..... 7

 THE TRIAL COURT VIOLATED THE MANDATES OF
 CRIMINAL RULE 3.2, AS WELL AS MR. EWING’S RIGHTS
 TO DUE PROCESS, TO BE FREE FROM EXCESSIVE BAIL
 AND TO BE GIVEN EQUAL PROTECTION AND THIS
 COURT SHOULD GRANT RELIEF..... 7

 a. Relevant facts..... 9

 b. The trial court violated CrR 3.2, the
 presumption of release on personal
 recognizance and fundamental state and federal
 constitutional principles in imposing bail on an
 indigent..... 16

E. CONCLUSION..... 34

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cert. denied, 456 U.S. 984 (1982). 31, 32

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(2011). 26

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(1988). 32

In re Det. of M.W., 185 Wn.2d 633, 374 P.3d 1123 (2016)... 31

Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974).. 26, 27

State ex rel Wallen v. Judges Noe, Towne, Johnson, 78 Wn.2d 484,
475 P.2d 787 (1970). 7

State v. Barton, 181 Wn.2d 148, 331 P.3d 50 (2014)... 8, 17, 18, 27

State v. Heslin, 63 Wn.2d 957, 389 P.3d 892 (1964)... 17, 27

State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012). 31, 32

State v. Simmons, 152 Wn.2d 450, 98 P.3d 789 (2004)... 27

WASHINGTON COURT OF APPEALS

Randy Reynolds & Associates, Inc. v. Harmon, 1 Wn. App. 2d 239, 404
P.3d 602 (2017)... 19

State v. Williams, 104 Wn. App. 516, 17 P.3d 648 (2001)... 33

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State v. Huckins, 5 Wn. App.2d 457, 426 P.3d 979 (2018)... 1, 8, 21-23,
25, 30, 32

State v. Ingram, __ Wn. App.2d __, __ P.3d __ (June 4, 2019) (2019
WL 2347441). 1, 8, 22, 23, 25, 30, 32

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RULES, STATUTES, CONSTITUTIONAL PROVISIONS

Article 1, § 14. 8, 17, 18, 27

Article 1, § 20. 8, 17, 27

BLACKS LAW DICTIONARY (10th ed. 2014).. 17

Butler v. Kato, 137 Wn. App. 515, 154 P.3d 259 (2007). 16

CrR 3.2. 1, 7, 8, 16, 17, 19, 20, 22, 23, 26, 28, 30, 32

CrR 3.3. 33

Eighth Amendment. 8, 27

ESHJ Res. 4220, 61st Leg., Reg. Sess. (Wash. 2010) 18

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A. ASSIGNMENTS OF ERROR

1. Appellant's state and federal due process rights were violated when the trial court failed to follow the requirements of CrR 3.2 before imposing financial conditions of release.
2. Appellant's rights to equal protection were violated when he was kept in physical custody by the state solely because of his inability to meet a financial condition due to his poverty.
3. The lower court's failure to comply with the mandates of CrR 3.2 is a systemic problem raising serious constitutional concerns of equal protection and state and federal constitutional rights regarding pretrial release and the presumption of innocence.

B. QUESTIONS PRESENTED

1. CrR 3.2 requires that trial courts apply a presumption of release on personal recognizance and limits the imposition of financial conditions of release. Does the trial court's failure to follow the specific mandates of the rule violate both the rule and due process?
2. Does the state violate the rights of the accused to equal protection when they set financial conditions of pretrial release which allow a person who has money to pay for pretrial release while an indigent with the same level of risk is kept in custody based solely on their inability to meet a financial condition due to their poverty?
3. In *State v. Huckins*, 5 Wn. App.2d 457, 426 P.3d 979 (2018), and *State v. Ingram*, __ Wn. App.2d __, __ P.3d __ (June 4, 2019) (2019 WL 2347441), this Court has declared that similar violations of the mandates of CrR 3.2 occurred but not reversed because there was no relief available. Where, as here, the improper deprivation of the physical liberty of the accused is extended by the state's failure to timely secure its main witness, should dismissal be granted?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Lucas R. Ewing was charged by information in

Pierce County superior court with second-degree assault charged with a deadly weapon enhancement (domestic violence) and a domestic violence aggravating factor (count I), two counts of fourth-degree assault (domestic violence) (counts II and III), third-degree malicious mischief (domestic violence) (count IV), and two counts of felony harassment (domestic violence) with a domestic violence aggravating factor (counts V and VI). CP 3-6; RCW 9.94A.530; RCW 9.94A.533; RCW 9.94A.535(3)(h); RCW 9A.36.021; RCW 9A.36.041(1)(2); RCW 9A.46.020(1)(a)(I); RCW 9A.46.020(2)(b); RCW 9A.48.090(1)(a); RCW 9A.48.090(2); RCW 10.99.020.

After pretrial proceedings before the Honorable Judge Megan Foley on January 4 and March 8, and the Honorable Judge Stephanie Arend on April 5 and 20, May 14 and 23, June 1 and 11, a jury trial was held before the Honorable Judge Stanley Rumbaugh on June 13-14, 18-20, 2018.¹ The state dismissed count II, the fourth-degree assault and count IV, the third-degree malicious mischief (CP 152-55; 7RP 13) and only submitted the “[p]resence of a child” aggravator to the jury. 7RP 13; CP 152-54.

¹The verbatim report of proceedings consists of 12 volumes, separately paginated and not all chronological. They will be referred to as follows:
the volume containing January 4, March 8 and May 14, 2018, as “1RP;”
April 5, 2018, as “2RP;”
April 20, 2018, as “3RP;”
May 23, 2018, as “4RP;”
June 1, 2018, as “5RP;”
June 11, 2018, as “6RP;”
June 13, 2018, as “7RP;”
June 14, 2018, as “8RP;”
June 18, 2018, as “9RP;”
June 19, 2018, as “10RP;”
June 20, 2018, as “11RP;”
June 29, 2018, as “SRP.”

Mr. Ewing was convicted of second-degree assault with the deadly weapon enhancement (as an “aggravated domestic violence felony”) (count I) and felony harassment (count V), also with a finding that the crime occurred between members of the “same family or household.” CP 82-91.

On June 29, 2018, Judge Rumbaugh imposed an exceptional sentence of 24 months flat time for the “deadly weapon” enhancement for count I, consecutive to 78 months on count I, also consecutive to 30 months for count V, for a total sentence in prison of 132 months followed by 18 months of community custody. CP 104-118, 120-23. Mr. Ewing appealed and this pleading follows. See CP 119.

2. Testimony at trial

On November 13, 2017, at about 11 p.m., Pierce County Sheriff’s Department (PCSD) Deputy Dustin Lee Markholt and several other officers responded to a “call” reporting an alleged crime at a home. 8RP 29, 46. When they arrived at the relevant address, however, no one was there. 8RP 29, 46. Deputy Markholt said they knocked on the door and announced themselves multiple times without response. 9RP 31.

Over defense objection, the deputy was allowed to testify at the later trial that the officer’s “understanding of what was going on” when he got the original call was that it was “a domestic violence with a weapon, and the call read in our CAD that the reporting party’s mother was being hit in the head with a pipe.” 8RP 73.

The “reporting party” was R.R.E., then about 13-14 years old. 8RP 46-50, 73-75. The 9-1-1 tape included R.R.E. saying her dad started “smashing everything in the house,” that everything was “broken,” that her mom was driving away with her brother in the car and her dad was chasing after it on foot. 7RP 133.

After getting no response to their knock, the officers did “a perimeter check,” walking around and looking through windows to see inside the home. 9RP 31. From his vantage point of peering in, the deputy saw a broken table and “objects all over.” 9RP 32.

“Dispatch” told the deputy that R.R.E. was at a nearby house, so the deputy contacted her there, speaking with her for 10-15 minutes and ultimately taking her to her grandfather’s house, 25-30 minutes away. 8RP 20-22, 46, 49-50, 73, 9RP 33. When they arrived, R.R.E.’s mom, Shalandra² Ewing was there, as was R.R.E.’s brother, A.R.E., and their grandfather, “Andrew.” 8RP 20, 22, 69, 9RP 33.

Deputy Markholt interviewed Shalandra for 10-15 minutes, also taking a written statement on a “domestic violence supplemental statement form.” 8RP 26, 28, 29. At the later trial, the prosecutor would have the officer read into the record a declaration on the form which indicated that the statement was made under “penalty of perjury[.]” 8RP 30. In her written statement, Shalandra said:

My husband and I had been arguing about his drug use for

²Because they share a last name, Shalandra and Lucas Ewing will be referred to by first name herein for clarity, with no disrespect intended.

the last several days. Then he woke me up in my daughter's room going berserk. He broke everything in the house and then came back into my daughter's room attacking me by punching me in my face and telling my daughter he had to do this to make me stay away from him forever. And my daughter called the police and escaped to the neighbor's.

...

Then my son woke up and he threw him down, after which he figured out my daughter had gotten away and called the police, he came back in a violent rage hitting me again and again and trying to force my son and I into the car because it was time for us to die. Then when he got out and said to go get my daughter, I put the car into gear and locked the doors and sped away to my father's with my son.

9RP 36. The deputy testified that Shalandra also said that Lucas told her it was "time for you guys to die" when he found out police had been called. 9RP 38. According to the deputy, Shalandra told him her belief that "they would have died" if she had not driven away. 9RP 38.

When the deputy later arrested Shalandra on a material witness warrant, she told him she could not be forced by the state to testify against Lucas and would "plead the Fifth." 9RP 58-59, 83.

Photographs showed bruising on Shalandra's arm, "shoulder/back" area, by her left eyebrow and towards the nose, but Shalandra declined all offers of medical aid. 8RP 32-38, 57. The deputy ultimately conceded he could not say when any of the bruises had been caused. 8RP 17-19, 61-62.

At trial, Shalandra said she, not Lucas, had been at fault that day and that she was the only one who was aggressive "or did anything" wrong. 8RP 118. She had been drunk starting at about 1

p.m. that day, having consumed what she called “a half gallon of Jack” with her father-in-law. 8RP 120. She and Lucas were at her in-laws’ home and Lucas was working on a car. 8RP 121. He had at most a “shot” and she, in contrast, had a lot. 8RP 121. She thought she had a problem with it, actually. 8RP 121. “There’s a reason I haven’t drank since that day,” she admitted. 8RP 121.

Shalandra said that she was drunk and “being emotional” that day and had convinced herself that Lucas had “relapsed” on drugs although he had not. 8RP 121. She was angry and hurt and frustrated, she said, and got drunk and. . . got dramatic[.]” 8RP 121. She started arguing with him at her in-laws and did not stop when they got to her home, where she was loud and “out of control” and “overemotional.” 8RP 122-23.

Lucas was not living at the house at the time but was still there when the kids went to bed. 8RP 126. He was trying to get someone to give him a ride home but also wanted to keep her calm, too. 8RP 126. Shalandra was seeking his attention and lunged towards him, falling onto a cheap table and breaking it, hitting her arm. 8RP 123. The kids woke up from the sound and her screaming and Shalandra said R.R.E. had run out to the neighbor’s house without knowing what was really going on. 8RP 126-27.

Shalandra remembered going to her father’s house but did not remember writing a statement or talking to police. 8RP 130. She recalled that police told her they would not return her daughter unless Shalandra spoke to them. 8RP 129. She felt like they were

holding her daughter “hostage” and said she would not have called police otherwise. 8RP 130.

Shalandra denied that Lucas had woken her up or broken stuff in the house, saying she had only made those statements because she wanted to get her daughter back from police. 8RP 133. She did not recall making a phone call to the police emergency telephone number, 9-1-1, that night and saying she had fled her house because her husband had “freaked out,” “just got violent and broke everything in the house.” 8RP 139-40. Shalandra also denied that Lucas had threatened her but on the 9-1-1 recording, when asked if she had left because her husband was threatening her, Shalandra responded, “[y]es, yes.” 8RP 142.

D. ARGUMENT

THE TRIAL COURT VIOLATED THE MANDATES OF CRIMINAL RULE 3.2, AS WELL AS MR. EWING’S RIGHTS TO DUE PROCESS, TO BE FREE FROM EXCESSIVE BAIL AND TO BE GIVEN EQUAL PROTECTION AND THIS COURT SHOULD GRANT RELIEF

Our criminal justice system is based upon the foundation of the presumption of innocence. See, State ex rel Wallen v. Judges Noe, Towne, Johnson, 78 Wn.2d 484, 487, 475 P.2d 787 (1970); Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed 481 (1895).

That presumption ensures that the state may not simply keep someone in custody pretrial based solely on an unproven accusation. Hudson v. Parker, 156 U.S. 277, 285, 15 S. Ct. 450, 39 L. Ed. 424 (1895).

Instead, a person accused of a crime is entitled to have the state prove their guilt beyond a reasonable doubt before punishment

- such as jail time - may be imposed. See, State v. Barton, 181 Wn.2d 148, 331 P.3d 50 (2014). As a result, pretrial liberty is supposed to be “the norm.” United States v. Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095, 96 L. Ed. 2d 697 (1987); see, Barton, 181 Wn.2d at 152.

Indeed, the U.S. Supreme Court has declared, “detention prior to trial or without trial” should be “the carefully limited exception.” Salerno, 481 U.S. at 742.

In addition to the presumption of innocence, the Eighth Amendment, Washington’s Article 1, §§ 14, 20 and CrR 3.2 apply when the government decides to physically confine someone who has been accused but not yet convicted of a charged crime. Barton, 181 Wn.2d at 152-54. All of these provisions and Ewing’s state and federal rights to equal protection were violated in this case. Further, this issue keeps repeating despite the clear mandates of the rule and deliberate, intentional changes made by our state’s highest court more than 15 years ago to stop it. This Court has already issued two clear decisions restating these principles, in Huckins and Ingram. In this case, it should condemn the failure of the lower court to follow the criminal rules, and should reiterate this state’s commitment to the constitutional protections against excessive and unconstitutional pretrial proceedings which violate fundamental state and federal rights. Further, Mr. Ewing was subjected to having his rights to physical liberty violated by the government, which then repeatedly failed to exercise due diligence to bring Ewing to trial in a timely manner. This Court should therefore reverse and dismiss the

convictions.

a. Relevant facts

The incident was alleged to have occurred on November 12, 2017. CP 3-6. The charging document was filed on December 19, 2017. CP 3. On December 22, 2017, Commissioner Megan M. Foley entered an order for summons for Mr. Ewing to appear on January 4, 2018. CP 128. When the 4th arrived, Mr. Ewing was not present in the courtroom and a warrant issued. CP 130.

In later proceedings, a judge would note that the summons was not sent to the address Ewing had given when arrested, and counsel would indicate Ewing had not received it. 1RP 22.

Mr. Ewing was taken into custody on March 8, 2018. CP 130; 1RP 4. That same day, the parties appeared for arraignment and the court found Ewing indigent and entitled to a court-appointed attorney. 1RP 9. The prosecutor then told the court the state wanted \$200,000 bail for “flight risk,” saying Ewing had “nine cases with warrant history” and “significant criminal history related to flight” because of a 2012 “attempted allude [sp].” 1RP 10. The prosecutor also declared that Ewing posed “significant community safety concerns and risk” to the victim, based on the nature of the charges. 1RP 10. The prosecutor told the court there was “significant domestic violence related history,” listing a fourth-degree and second-degree assault, a second-degree robbery and a third-degree malicious mischief. 1RP 10-11. In addition to the \$200,000 bail, the prosecutor wanted an order of “no contact” with the alleged victims. 1RP 10-11.

The attorney working with Ewing at the hearing objected, asking that bail be set no higher than \$60,000. 1RP 11-12. Counsel noted that Ewing had lived in the state his entire life, had family in the area, had a “stable residence” in Puyallup, and had been employed at the same job for the past year. 1RP 11-12.

The judge verified the residence address Mr. Ewing would be living if released and noted it was not the same address as where the victim lived. 1RP 11-12. The court then ruled:

Well, this Court has seen approximately ten court cases with warrant activity, assaults dating back to 1994, previous conviction for assault in the second degree as well as domestic violence assaults.

These allegations are particularly disconcerting in that the two children were present, one 14, one 10, one child had to call 911. Bail will be set at \$125,000.

1RP 11. The judge also imposed “a number of conditions and restrictions” such as no contact-orders and that any weapons must be “surrendered” to the police. 1RP 11.

The written orders entered that day included three prohibiting contact with Shalandra, R.R.E. and Shalandra’s son, A.L.E., and one ordering Lucas to turn over any firearms or dangerous weapons. CP 7-8.

An order entitled “ORDER ESTABLISHING CONDITIONS OF RELEASE PENDING PURSUANT TO CrR 3.2” provided, in relevant part:

THE COURT HAVING found probable cause, establishes the following conditions that shall apply pending in this cause number or until entry of a later order; it is hereby ordered

Release Conditions:

[x] Defendant shall be released upon execution of a surety bond in the amount of \$125,000.00 or posting cash in the amount of \$125,000.00.

NEW BAIL

CP 7. The order restricted Ewing's address to only his home residence and limited travel to Pierce, King, Thurston, and Kitsap counties. CP 7-8. It also mentioned the three no-contact orders, prohibited Ewing from possessing "weapons or firearms," prohibited him from consuming or possessing alcohol, marijuana, or nonprescription drugs, and provided he was not allowed to "knowingly associate with any known drug users or sellers, except in treatment[.]" CP 8. Separate "no contact" orders were issued for Shalandra and the two kids. CP 131-37.

A few days later, on March 9, 2018, trial counsel filed a notice of appearance. CP 9.

On March 26 and 27, 2018, the state issued its first subpoenas. CP 138-43. None were for Shalandra Ewing. *Id.* A witness list filed by the state on March 27 nevertheless included her name. CP 144-45. The state issued more subpoenas on April 3, again not including Shalandra. CP 146-49.

The parties next appeared on April 5, 2018, for "omnibus." 2RP 1-2. At that hearing, the prosecutor told the court that the parties were passing forward a proposed scheduling order with a "continuance date." 2RP 3. Mr. Ewing was "declining to sign" and counsel admitted that Mr. Ewing was objecting to any continuances.

2RP 3. Ewing was still in custody. 2RP 3. The judge noted it Ewing's objection for the record but granted the continuance. 2RP 2-4.

It appears that only on April 17, 2018, that the state tried to serve Shalandra with a subpoena, which she refused. CP 150.

The next appearance was on April 20, 2018, in front of Judge Arend. 3RP 6. The case was set to go to trial the following week, and Ewing was still in custody. 3RP 7-8. The prosecutor told Judge Arend that he needed "some time to secure a material witness in this case." 3RP 7. He said, "[w]e have not yet been able to get ahold of" Shalandra Ewing. 3RP 7-8. As a result, the state needed a continuance to "go through the material witness process and see whether it's necessary to do that in order to bring her to court." 3RP 7-8.

Mr. Ewing objected. 3RP 8. He wanted his trial to go forward. 3RP 7-8. He was sitting in custody, waiting. 3RP 7-8. Counsel, however, was asking to have a brief continuance, because counsel was going to be on vacation the end of the following week through the weekend and the following Monday. 3RP 8. At that point, counsel said, he would then have a number of trials which would take priority because of how long they had been pending. 3RP 8. Counsel repeated that Ewing himself was opposed to any continuance asked for the case to be set "maybe a couple weeks [sic] out." 3RP 8-9.

The prosecutor responded that he needed at least a month in order to "secure [the] victim" and set witness interviews for the

defense. 3RP 9. While the prosecutor understood that Ewing was stuck in custody, the prosecutor declared that the state still needed “to ensure that we have all the evidence so that we can put it in front of the jury.” 3RP 9. Judge Arend set the trial out on a “shorter leash,” granting a continuance of about two weeks, to Monday, May 14. 3RP 9; see CP 14. On May 1, Mr. Ewing filed an objection to the trial setting. CP 15.

On May 14, when the parties again appeared before Judge Arend, the state was *still* not ready to go forward with its case. 1RP 17-18. The court heard a bail hearing and motion to dismiss, at which the prosecutor admitted that the state had not been able to get ahold of Shalandra. 1RP 17-18. The prosecutor asked for “a little bit more time” - such as 30 more days. 1RP 17. The prosecutor based the request on the fact that charges were serious, also noting the case was “fairly early in its life” because it was on the “89th day since arraignment[.]” 1RP 17.

The judge indicated an intent to give the state a continuance for short time, but set a motion to dismiss the case on the new date if the state did not then have Shalandra Ewing present. 1RP 18.

Mr. Ewing objected. 1RP 18-19. Counsel pointed out that the continuance on April 20 had been granted based on the state’s need to secure the witness but it still had not occurred. 1RP 18-19. The court declined to reconsider its ruling and refused to dismiss. 1RP 19.

Counsel then raised the issue of bail. 1RP 20-21. He told the court that Mr. Ewing’s employer was not able to keep his job open

much longer based on Ewing being in custody. 1RP 21. Counsel also stated that there was an available address and a back up address where Ewing could stay. 1RP 21. He pointed out that Mr. Ewing's arrest after not responding to the summons in this case was because it had not been sent to his correct address. 1RP 21. The court agreed that the summons was not sent to the address Mr. Ewing had given as his address when he was arraigned. 1RP 22.

The prosecutor objected to the court reconsidering the bail, arguing there had not been "a change in circumstances that would warrant a departure from the bail that was originally set at arraignment." 1RP 22. The prosecutor relied on the claims in the declaration for determination of probable cause, stating they were "very serious." 1RP 22. The prosecutor also pointed out that the state had requested higher bail of \$200,000 in the first instance. 1RP 22.

The prosecutor stated that the reasons for setting high bail were that Mr. Ewing was a "risk of flight" based on past warrant history and the 2012 attempt to elude. 1RP 23. The prosecutor also said there was a risk to the victim because there was a death threat made during a serious assault, noting that there was a history of "domestic violence and violent" crimes, but citing 2015 third-degree malicious mischief, a 1994 fourth-degree assault and a 1996 fourth-degree assault, a 2001 burglary two and a 2009 assault "two" and robbery "2." The prosecutor listed a number of theft and drug crimes as well. 1RP 23. The prosecutor declared that the defendant was "looking at a significant sentence" because of the expected high

offender score of 16, that he was therefore facing a “high incentive to flee and a high incentive to tamper with a victim who is yet unaccounted for.” 1RP 23.

Counsel pointed out that Ewing had no felony bench warrants since 2001 and just a few minor misdemeanors. 1RP 24. Mr. Ewing sought and received permission to talk to the court directly. 1RP 24. He told the judge that he had completely changed his life over the previous three years, going from homeless to having a job and paying a child support with a roof over his head. 1RP 25. Mr. Ewing talked about being so concerned about breaking the law that he had been taking the bus and not driving his cars without a proper license. 1RP 25.

At that point, the prosecutor talked about the various prior bail amounts which had been set in Ewing’s prior cases over the years, ranging from \$25,000 to \$150,000. 1RP 25-26. The prosecutor speculated that Ewing might not have committed recent felonies because he had high bail imposed and therefore was in custody, not released and thus having a chance to fail to appear. 1RP 25-26. The judge then said, “[a]ll right, I’m going to decline a reduction in bail at this time.” 1RP 26.

Only on May 23, 2018, did the state file a motion and order for material witness warrant. 4RP 12-13. On June 1, Shalandra Ewing appeared in court after being arrested. 5RP 16-17. On June 11, the parties appeared for trial. 6RP 21. The prosecutor wanted a continuance for his trial preparation; counsel said he would be ready

in two days. 6RP 21-23. Mr. Ewing objected that he was “ready to get this over with,” that he needed to get back out to work and have this “done with.” 6RP 23-24. The judge noted the objection for the record and said she would look for a department to send the case to. 6RP 23-24. Trial started on June 13, 2018. 7RP 1.

- b. The trial court violated CrR 3.2, the presumption of release on personal recognizance and fundamental state and federal constitutional principles in imposing bail on an indigent

The trial court’s decisions below violated CrR 3.2 and both the state and federal constitutions, in multiple ways. First, the court repeatedly violated the language and purposes of CrR 3.2, which governs pretrial release. Butler v. Kato, 137 Wn. App. 515, 154 P.3d 259 (2007). CrR3.2(1)(a) provides:

Presumption of Release in Noncapital Cases. Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance . . . be ordered released on the accused’s personal recognizance pending trial unless

- (1) the court determines that such recognizance will not reasonably assure the accused’s appearance, when required, or
- (2) there is shown a likely danger that the accused:
 - (a) will commit a violent crime, or
 - (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

Release on “personal recognizance” means “the court takes the defendant’s word he or she will appear for a scheduled matter” or the arrested person promises, “without supplying a surety or posting

bond, to appear.” BLACKS LAW DICTIONARY (10th ed. 2014).

Thus, under CrR 3.2, the presumption is that a person who is charged with a crime in this state will be released based upon the promise to return, without any conditions placed on that person’s release. State v. Rose, 146 Wn. App. 439, 450-51, 191 P.3d 83 (2008). Any other result requires the trial court to rebut the presumption of release by making the specific findings under CrR 3.2(a)(1) or (2), prior to imposing any conditions of release. Rose, 146 Wn. App. at 450-51.

This is true no matter the charged crime, short of one which results in a capital sentence. And this is not just as a result of CrR 3.2. It is improper and unconstitutional to rely on the nature of a charge as the primary reason for detaining someone pretrial or making other decisions about their pretrial release. See Stack v. Boyle, 342 U.S. 1, 5-6, 72 S. Ct. 1, 96 L. Ed. 3 (1951).

Indeed, the U.S. Supreme Court has declared, “[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act” itself - one which would inject into “our own system of government the very principles of totalitarianism[.]” 342 U.S. at 6.

Our state’s constitutional also applies. Article 1, § 20, of the Washington Constitution provides a right to bail in all but the most extreme case, while Article 1, § 14 prohibits “excessive bail.” State v. Heslin, 63 Wn.2d 957, 959-60, 389 P.3d 892 (1964); Barton, 181 Wn.2d at 152-53. Before 2010, in this state, a trial court had **no** authority at

all to deny bail in any case other than one in which the crime alleged was a capital (i.e. death penalty) crime. Barton, 181 Wn.2d at 152-53. After Maurice Clemmons shot and killed several police officers while on pretrial release, however, the constitution was amended. Barton, 181 Wn.2d at 153. Article 1, § 20, now provides, in relevant part, “[a]ll persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evidence or the presumption great,” and that bail may be denied for offenses punishable with possible life without parole, “upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any person.” See, Barton, 181 Wn.2d at 153; see ESHJ Res. 4220, 61st Leg., Reg. Sess. (Wash. 2010) (amending Article 1, § 20).

The function of bail is “limited” so that fixing of it for “any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.” Barton, 181 Wn.2d at 153. Further, bail “is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial[.]” Stack, 342 U.S. at 7-8 (Jackson, J, and Frankfurter, J, concurring). In this respect, the right to be free from “excessive” bail reflects a principle of proportionality, requiring that the court setting bail must consider the specific situation of the individual involved and set bail only at the amount required for the relevant purpose, in light of the situation of the accused. Stack, *supra*; see also, Salerno, *supra*, 481 U.S. at 744-47.

CrR 3.2 reflects these principles by requiring that the presumption of pretrial release without conditions is only overcome based on consideration of mandatory factors. Under CrR 3.2(b),

[i]n making the determination herein, the court **shall**, on the available information, consider all the relevant facts including, but not limited to, those in subsections (c) and (e) of this rule.

CrR 3.2(b) (emphasis added). “Shall” usually denotes a mandate. See Randy Reynolds & Associates, Inc. v. Harmon, 1 Wn. App. 2d 239, 404 P.3d 602 (2017).

CrR 3.2(e) provides the relevant factors for determining whether there is “shown a likely danger that the accused” will either “commit a violent crime” or “will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice,” requiring the court to consider:

- (1) The accused’s criminal record;
- (2) The willingness of responsible members of the community to vouch for the accused’s reliability and assist the accused in complying with conditions of release;
- (3) The nature of the charge;
- (4) The accused’s reputation, character and mental condition;
- (5) The accused’s past record of threats to victims or witnesses or interference with witnesses or the administration of justice;
- (6) Whether or not there is evidence of present threats or intimidation directed to witnesses;
- (7) The accused’s past record of committing offenses while on pretrial release, probation or parole; and
- (8) The accused’s past record of use of or threatened use of

deadly weapons or firearms, especially to victim's [sic] or witnesses.

CrR 3.2(c) provides the following factors for determining whether the "Future Appearance" exception of CrR 3.2(a)(1) applies:

- (1) The accused's history of response to legal process, particularly court orders to personally appear;
- (2) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;
- (3) The accused's family ties and relationships;
- (4) The accused's reputation, character and mental condition;
- (5) The length of the accused's residence in the community;
- (6) The accused's criminal record;
- (7) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
- (8) The nature of the charge, if relevant to the risk of nonappearance;
- (9) Any other factors indicating the accused's ties to the community.

CrR 3.2(c).

Thus, under our state constitution, Mr. Ewing had a right to be released on bail, and to have bail set only at the amount required for the state purpose. And under CrR 3.2, he was entitled to be released on personal recognizance unless the presumption of such release was overcome.

But CrR 3.2 does not require proof of just any degree of “danger” or risk. Rose, 146 Wn. App. at 452. The evidence must show that the risk of a violent crime or witness intimidation or unlawful interference with the administration of justice is not just the normal risk but instead is “**substantial.**” See Rose, 146 Wn. App. at 452 (emphasis added).

Even if that standard had been met in this case and pretrial detention was proper, Mr. Ewing’s pretrial and constitutional rights were violated by the trial court’s failure to follow the mandates of the rule regarding the setting of pretrial conditions of release. CrR 3.2 does not give the court unlimited authority to craft whatever conditions of release it desires - instead, it must follow the rule. Butler, 137 Wn. App. at 524. It is an abuse of discretion to fail to do so. See id. Further, “the court may not impose onerous or unconstitutional provisions where lesser conditions are available to ensure the public is protected against potential violent acts.” Id. To do so is also “an abuse of discretion. Id.

Under CrR 3.2(d), even if there is sufficient proof to rebut the presumption of release without conditions, the court is only allowed to require a financial condition of release (i.e. “Bail”) if certain requirements are met. Huckins, 5 Wn. App.2d at 468. The rule provides:

[The court may] [r]equire the accused to pose a secured or unsecured bond or deposit cash in lieu thereof, conditioned on compliance with all conditions of release. **This condition may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the**

safety of the community. If the court determines under this section that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused's financial resources for the purposes of setting a bond that will reasonably assure the safety of the community and prevent the defendant from intimidating witnesses or otherwise unlawfully interfering with the administration of justice.

CrR 3.2(d)(6) (emphasis added).

Thus, under the rule, the trial court must make an “effort to ascertain a less restrictive condition or combination of conditions that would reasonably assure” the safety of the community or the defendant's return to court. See Huckins, 5 Wn. App.2d at 468-69. It is an abuse of discretion for the court to require “monetary bail without considering less restrictive conditions as required by the law.” Id.

Recently, in Ingram, supra, this Court addressed these issues in a case where the defendant was accused of a domestic violence burglary and violation of a domestic violence court order, after which a “risk assessment” put him at medium to high risk. Ingram, __ Wn. App.2d at __ (slip op. at 2). He was unemployed, had no family in the county, had a history of escape, had prior failures to appear and was currently on probation out of another state, which led the court to issue an order that he was not subject to bail until a court hearing could be held on the matter. Id. The court initially set the bail at \$60,000, based on the statement in a restraining order from the alleged victim that Ingram had “recently held a gun to her head.” Id.

But “[a]t no point during the hearing did the trial court discuss

any less restrictive alternatives to bail or Ingram’s financial resources.” Id. Nor was there any such discussion when the issue of bail was raised several weeks later. __ Wn. App.2d at __ (slip op. at 3).

This Court cited Huckins and noted that the setting of bail is “an issue of a public nature” for which there are a “dearth of cases.” Ingram, __ Wn. App.2d at __ (slip op. at 4). It first decided that no written or oral findings are required for the presumption of pretrial release to be overcome, then found sufficient evidence to support the trial court’s apparent determination that the presumption had been rebutted.

The Court then turned to the requirements of CrR 3.2, again citing Huckins and stating that, once the trial court has determined that the presumption of release on personal recognizance has been rebutted, a court “must impose the least restrictive of several enumerated conditions.” Ingram, __ Wn. App.2d _ (slip op. at 6-7). That includes any financial conditions, which may only be imposed “if no less restrictive condition or combination of conditions would reasonablel[e] assure the safety of the community.” Id., quoting, CrR 3.2(d)(6). Further, if a financial condition is going to be required, the trial court must consider the accused’s financial resources “for the purposes of setting a bond.” Ingram, __ Wn. App.2d _ (slip op. at 6), quoting, CrR 3.2(d)(6).

Here, the superior court did not make any findings that \$125,000 bail as a financial condition was required because “no less restrictive condition or combination of conditions would reasonably

assure” the safety of the community or Mr. Ewing’s return. There was no discussion of less restrictive options at all.

The trial court’s failure to follow the rule is not a trivial error. The portions of the rule the court specifically ignored were *added* to the rule in 2002 for the very purpose of reducing the unconstitutional, unfair disparities between the treatment of those with resources and those without. See *In the Matter of the Adoption of the Amendments to CrR 3.2, CrR 3.2.1, CrRLJ 3.2 and CrRLJ 3.2.1*, Order No. 25700-A-721 (WSR 02-01-025) (Dec. 6, 2001).³

Indeed, the 2002 amendments were proposed by a blue-ribbon Commission proposed amendments after it received a study which “concluded the criteria established by court rule for pretrial release may discriminate against persons who are economically disadvantaged. Id; see, George Bridges, *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trial Detention Practices in Washington*, Washington State Minority and Justice Commission (Oct. 1997).⁴

With these amendments, both the exceptions for “securing future appearance” and “preventing substantial danger” exceptions now have requirements for the trial court considering imposing a financial condition on a person pretrial. See id. Yet here, as in

³Available at <http://apps.leg.wa.gov/documents/laws/wsr/2002/02/02-01-025.htm>.

⁴Available at http://www.courts.wa.gov/committee/pdf/1997_ResearchStudy.pdf.

Ingram and Huckins, the lower court did not follow the mandates of the rule before imposing a huge \$125,000 financial condition of bail on Mr. Ewing despite his indigence.

This Court should soundly reject the lower court's failure to follow the clear mandates of the rule. Holding to the rule is vital to ensuring the rights of those only accused and not yet convicted of a crime. Pretrial detention has a significant negative impact on people who are kept in custody - "warehoused" despite not having been convicted of the crime:

The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.

Barker v. Wingo, 407 U.S. 514, 532-33, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972).

Further, there is strong evidence that pretrial detention correlates to increased likelihood of conviction and higher sentences. See Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1165 (2005); Christopher T. Lowenkamp et. al, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation (Nov. 2013).⁵ There can be no question that a person still cloaked with the presumption of innocence suffers significant negative impact on their lives - and their case - when deprived of the presumption of release on

⁵Available at <https://csgjusticecenter.org/courts/publications/investigating-the-impact-of-pretrial-detention-on-sentencing-outcomes/>

personal recognizance set forth in CrR 3.2.

The errors below did not just violate CrR 3.2 and the court's reasons below did not just violate the presumption of innocence. They also violated fundamental constitutional rights, including due process, equal protection and the state and federal rights to be free of excessive bail. The federal and state constitutions protect against the state depriving any person of "life, liberty or property, without due process of law." Hardee v. Dep't. of Soc. & Health Svcs., 172 Wn.2d 1, 256 P.3d 339 (2011); Salerno, supra. These protections apply pretrial. Salerno, 481 U.S. at 744. And it is an essential part of pretrial due process - even "implicit in the concept of ordered liberty" - that every person is presumed innocent unless and until proven guilty by the state, beyond a reasonable doubt. See Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 368 (1970).

As a result, being a pretrial detainee is far different and due process provides far greater protection for such detainees as compared with those being detained *after* conviction, either in custody or on parole. See Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1997); State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981).

The state violates due process when it discriminates on the basis of wealth. Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974). In Reanier, the state's highest Court recognized that, under the system as it existed then, wealthy defendants were treated differently and secured release (except where no bail was allowed), while

indigent defendants did not. 83 Wn.2d at 349. Put bluntly, the Court declared, based on the existing “present (especially state) bail procedures,” the wealthy “are able to remain out of prison until conviction and sentencing; the poor stay behind bars.” 83 Wn.2d at 349. And the Court held that “[p]re-trial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty.” Rainier, 83 Wn.2d at 349, quoting, Culp v. Bounds, 325 F. Supp. 416 (D. N.C. 1971).

Here, \$125,000 was clearly an amount intended to keep Mr. Ewing from securing his own release. Given exactly the same risks to the community and situation, a richer man could have bought his liberty. This is discrimination on the basis of wealth at its most flagrant - because a rich man in the exact same position with the same circumstances and creating the same risk would be able to buy his way out of jail. Those in poverty, like Mr. Ewing, cannot.

Article 1, § 20, of the Washington Constitution provides a right to bail in all but the most extreme case, while Article 1, § 14 prohibits “excessive bail.” Heslin, 63 Wn.2d at 959-60; Barton, 181 Wn.2d at 152-53. Incarcerating people because they are unable to pay to be freed is not just a violation of the Eighth Amendment and Article 1, sections 14 and 20; it also violates equal protection. See, e.g., Tate v. Short, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971); Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S. Ct. 2016, 76 L. Ed. 2d 221 (1983). Equal protection requires that similarly situated individuals receive similar treatment under the law. State v. Simmons, 152 Wn.2d 450, 458, 98

P.3d 789 (2004).

Even applying the most deferential standard of review, “rational basis,” the violation of equal protection by the trial court below is clear. Mr. Ewing is part of the class of people who are accused of crimes in this state. He is also part of a subset of that class - those without money. There is no legitimate or rational difference between a person in Mr. Ewing’s situation who is indigent and the same person with money. They both present exactly the same risk. Yet Ewing was required to remain in custody pretrial, despite the presumption of innocence, despite the principles of CrR 3.2, based on imposition of bail which was excessive - simply because he was too poor to pay for his own liberty.

This biased, unfair and unconstitutional procedure is nothing new - it has been discussed with concern for years. See, e.g., John S. Goldkamp, *Two Classes of the Accused: A Study of Bail and Detention in American Justice* (Ballinger Publishing Co., 1979) (Cambridge, Ma); see also, Ram Subramanian et al, *Incarceration’s Front Door: The Misuse of Jails in America*, Vera Institute of Justice) (Feb. 2015).⁶ During this time, the average length of pretrial stay also increased during this time, from 14 to 23 days, but in Washington state it is usually far, far longer. See, e.g., Caseloads of the Courts, Superior Courts, Criminal Case Management (2016).⁷

⁶Available at <https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>

⁷Available at <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=trend&fileID=Crimcm>

Over this same time, there has been a stark increase in the use of “financial” conditions upon people presumed innocent, awaiting trial. From 1990 to 1998, “non-financial” release in state courts dropped from 40% of all those released to 28%. See Thomas H. Cohen and Brian A. Reaves, Bureau of Justice Statistics, Special Report, *Pretrial Release of Felony Defendants in State Courts* (Nov. 2007).⁸ In 2009, the percentage of pretrial release involving financial conditions had grown to an estimated average of 61 percent of all cases involving felonies in large urban counties. See Brian A. Reaves, Bureau of Justice Statistics, State Court Processing Statistics, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables* (Dec. 2013).⁹

There has been a concurrent rise in costs not only to the accused and his or her family but to society itself. Just a few years ago, then-U.S. Attorney General Eric Holder acknowledged that the cost of increased pretrial detention of the accused was an estimated 9 billion taxpayer dollars. Eric Holder, Attorney General of the United States, Speech at the National Symposium on Pretrial Justice (June 1, 2011).¹⁰ Closer to home, the Honorable Theresa Doyle of King County Superior Court in our state has noted, “[s]ociety bears the non-economic costs of lost employment, housing, family support, public

⁸Available at <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

⁹Available at <https://www.bjs.gov/content/pub/pdf/fdluco9.pdf>.

¹⁰Available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice>.

benefits, and financial and emotional security for the children of the incarcerated person.” Hon. Theresa Doyle, *Fixing the Money Bail System*, KING COUNTY BAR BULL. (KCBA, Seattle, WA) (April 2016).

Today, it is estimated that, like Mr. Ewing, pretrial, three out of five people sitting in jail in our country are legally presumed innocent, awaiting trial or plea resolution, too poor to afford bail. See Timothy R. Schnacke, *Fundamentals of Bail: a Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. Dept. Of Justice, Nat’l Inst. of Corrections (2014).¹¹ More than half of the people in our nation’s local jails - in 2012, an estimated 60 percent - are estimated to be presumed innocent but simply too poor to make bail. See *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, Justice Policy Institute (Sept. 2012).¹² And again, there is evidence that this has impacts on whether a person is convicted and how long their later sentence will be. See Lowenkamp et. al, supra.

In this state, CrR 3.2 could - and should - be the guidance on the proper procedures to use. It applies a presumption of release without conditions. It gives very clear mandatory requirements for considering the least restrictive means of ensuring governmental ends pretrial. Here, just as in Huckins and Ingram, the rule was again not followed. And the resulting order, imposing \$125,000 as the price for

¹¹Available at <http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf>.

¹²Available at <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>.

pretrial freedom, does not withstand constitutional review.

This Court should address these important, significant issues regarding the constitutionality of our pretrial procedures but also the serious failure of the trial court to follow the established rule. In response, the prosecution may urge the Court to decline to do so by arguing that the case is “moot,” because Mr. Ewing has now been convicted and is of course no longer suffering from the improperly set bail.

This Court should reject any such claim. A case is moot if the court can no longer provide the appellant “effective relief.” In re Det. of M.W., 185 Wn.2d 633, 648, 374 P.3d 1123 (2016). While in general the Court does not consider a case which is moot, this Court also retains discretion to consider such a case, where the question is of “continuing and substantial public interest.” See State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

The superior court’s refusal to apply the presumption of personal recognizance and the other provisions and limits of CrR 3.2, and the constitutional implications of those failures, are issues of continuing and substantial interest, likely to arise again but evade review. See, e.g., Federated Publ’ns, Inc. v. Swedberg, 96 Wn.2d 13, 16, 633 P.2d 74 (1981), cert. denied, 456 U.S. 984 (1982). To determine if a case meets this standard, the Court considers 1) the public or private nature of the question presented, 2) the desirability of an authoritative determination on the issue for “the future guidance of public officers,” and “the likelihood of future recurrence of the

question.” Hunley, 175 Wn.2d at 907.

Matters involving interpretation and proper application of a rule or statute tends to be more public in nature, more likely to arise again and the more likely it is that a ruling would be desirable in order to provide future guidance. See Hart v. Dep’t of Soc. & Health Serv., 111 Wn.2d 445, 449, 759 P.2d 1206 (1988). In addition the Court considers “the likelihood that the issue will escape review because the facts of the controversy are short-lived.” In re the Marriage of Horner, 151 Wn.2d 884, 892, 93 P.3d 124 (2004) (quotations omitted).

This case meets all of those requirements. Decisions on pretrial release occur all the time and the failure to properly apply the relevant court rule is an issue of serious public importance. It is desirable for this Court to provide guidance as there are a limited number of cases on the issue but appears to be a lack of understanding and application of the rule. And as this Court has noted in Huckins and Ingram, the failure to follow CrR 3.2 meets the standards for this Court to address the issue.

In Huckins and Ingram, the Court did not grant any particular relief, but here it should. This is not the first time this Court has declared that the rule means what it says. Yet the failure to follow the rule has not been resolved by the declarations in Huckins and Ingrams. Further, in this case, the record shows repeated delays because of the state’s failure to exert due diligence and subpoena the crucial state’s witness for months. Mr. Ewing was forced to remain in state custody pretrial based on his indigence for an extended period

of time as a result.

There is no question that, under CrR 3.3, a lower court's decision to grant or deny a continuance under the "speedy trial" rule is reviewed for abuse of discretion. See State v. Williams, 104 Wn. App. 516, 520-21, 17 P.3d 648 (2001). But the continued violation of mandatory court rules will not be redressed unless there is an incentive for the state or lower courts to comply with the clear mandates of CrR 3.2 at this point as there is no consequence for that failure. Where, as here, additional delay is caused by the state's failure to attempt to serve a crucial witness in a timely fashion, the Court should consider reversing and dismissing on that grounds.

E. CONCLUSION

This Court should address the issues, should roundly decry the lower court's violations of CrR 3.2 and should hold that the procedures here used violated due process, the right to the presumption of innocence, the state and federal prohibitions against excessive bail, and equal protection. Further, the Court should consider dismissing the convictions as a remedy in order to ensure compliance by trial courts and the state in the future.

For the reasons stated herein, this Court should grant appellant relief.

DATED this 17th day of June, 2019.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, at Pierce County Prosecutor's Office, prosecutor@clark.wa.gov, and to Mr. Ewing, at DOC 807361, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 17th day of June, 2019,

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