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No.

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

IN RE THE RESTRAINT OF:

BRADLEY DAVID KNOX,

Petitioner.

OPENING BRIEF OF PETITIONER

Judgments in Cowlitz County Superior Court
No. 14-1-00095-0
No. 14-1-01283-4
The Hon. Michael Evans, Presiding

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A. ARGUMENT

1. *Claim 1: Significant Brady[1] Violations Require Either a New Trial or Dismissal*

a. The State Withheld Key Information about its Main Witness, Otis Pippen

Mr. Knox testified that Otis Pippen followed him around the jail for weeks, haranguing him to "hire" him to kill various people but that he never intended that anyone be hurt. He said Cassandra Crimmins was his friend, he wanted her to come to court, he could not care less about Steven Walker, and he just had a "big stupid mouth." RP 844-55. A forensic psychologist, Dr. Jerry Larsen, testified that Mr. Knox suffered from bi-polar disorder, that he was highly suggestible, and his speech on the jail recording evidenced nonsensical, non-logical thinking. RP 864-883.

Pippen, on the other hand, claimed that it was Knox who initiated the conversations about killing people and that he (Pippen) mostly just listened. RP 607. Pippen told the jury that he was motivated because he did not want his friends (Crimmins and Walker) to be killed, RP 609, and that if he did nothing "I'm no better than he is." RP 632. Pippen explained:

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[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

> I might be a lot of things, but I'm not a murderer. I don't kill nobody. I had to take my dog to the vet to be put down, I couldn't do that. How could I kill somebody else.

RP 608.

Pippen's credibility and biases therefore were key to the State's case. There were no other recordings of the many conversations Pippen had with Knox over a month period of time; the police did not turn over the first (10/6/14) "scratchy" recording; and the 10/8/14 recording in fact supported Dr. Larsen's conclusions that Mr. Knox's statements were nonsensical. Ultimately, the one conviction for trying to hire Pippen to kill Steven Walker, a person of little consequence to Mr. Knox's cases, rested on whether the jury believed Pippen's description of what took place off the recording.

Accordingly, the defense requested that the State turn over everything in Pippen's criminal history – the charges that he was "working off" which would be dismissed upon his testimony against Knox, and anything else in his history that would bear on his credibility. Ex. 3 at 151; Ex. 30 at 745. The lead detective made Pippen appear in his report to be a very reliable informant, Ex. 5 at 203, while the deputy prosecutor provided some of Pippen's history, such a list of convictions. Ex. 17 at 354. He also provided

the defense access to the police reports underlying the drug and theft charges Pippen was facing, stating "this is it." Ex. 30 at 746.

The State, however, withheld key information about Pippen that could have been used by Mr. Knox's attorney to destroy Pippen's credibility at trial. This evidence included Pippen's history of sexually abusing children (his own grandchildren,"J.E." and others), the 2014 allegations that he raped M.S., Pippen's admission to the police that he continued to buy and sell drugs even after he was released from the Cowlitz County Jail in October 2014, and the favorable treatment he received by not being incarcerated pending disposition of his cases even after the police and the Cowlitz County Prosecuting Attorney's Office knew that he was out in the community accused of committing new crimes.

The Due Process Clauses of the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution require full disclosure of exculpatory and impeachment evidence. *See Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). As the Washington Supreme Court summarized:

> Significantly, "[t]here are three components of a true *Brady* violation: The evidence at issue must be favorable to

> the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.*[2] at 281-82. With respect to the third *Brady* factor, the terms "material" and "prejudicial" are used interchangeably. *See United States v. Price*, 566 F.3d 900, 911 n.12 (9th Cir. 2009).

In re Stenson, 174 Wn.2d 474, 486-87, 276 P.3d 286 (2012).[3]

Where the State's case depends on the witness of a "cooperating witness," it is obligated to disclose any information regarding his or her credibility. *Benn v. Lambert*, 283 F. 3d 1040, 1054 (9th Cir. 2002). This obligation ties into the defendant's right to cross-examination of a witness' pro-government bias, guaranteed by the Confrontation Clauses of the Sixth Amendment and article I, section 22. *See Davis v. Alaska*, 415 U.S. 308, 315-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (fact that witness was on probation subject to cross-examination to show witness's motivation).

It is the State's obligation to obtain and disclose information about an cooperating witness' misconduct, his/her own exposure to criminal charges, and any other information that would show his/her dishonesty and past lying.

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[2] *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

[3] Importantly, as *Stenson* reveals, *Brady* requires disclosure of *impeachment* material. Thus, the federal requirement of disclosure is broader than the state law "newly discovered" evidence test that excludes evidence that is "merely impeaching." *See In re Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001).

See Benn v. Lambert, 283 F.3d at 1054-58.[4] The State must disclose unresolved criminal charges, whether formally charged or not, since even possible charges that are not actively being prosecuted are subject to cross-examination because of the witness's subjective fear of future prosecution or because of their evidence of the witness' dishonesty.[5] These constitutional obligations are at their height when the State relies on the testimony by a "cooperating" witness who gets immunity:

> [C]riminals who are rewarded by the government for their testimony are inherently untrustworthy, and their use triggers an obligation to disclose material information to protect the defendant from being the victim of a perfidious bargain between the state and its witness.

Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) (en banc).

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[4] Information about a witness' prior acts must be disclosed because it may be admissible under ER 608(b), even if extrinsic evidence is not admissible. *See United States v. Kohring*, 637 F.3d 895, 905-06 & n.4 (9th Cir. 2011) (pending investigation for sexual misconduct should have been disclosed); *State v. Gregory*, 158 Wn.2d 759, 798-800,147 P.3d 1201 (2006), *overruled on other grounds State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), *after remand*, ___ Wn.2d ___, 427 P.3d 621 (2018) (reversing rape conviction because defendant was denied access to dependency files that showed informant/complainant had lied about her drug use).

[5] *See United States v. Price*, 566 F.3d 900, 907-14 (9th Cir. 2009) (*Brady* violation based on failure to reveal arrest history); *Blunt v. United States*, 863 A.2d 828, 834 (D.C. App. 2004) (improper to curtail cross-examination about pending charges as because it would show witness's motive "to lie in order to curry favor with the prosecution."); *State v. Pickens*, 27 Wn. App. 97, 100-01, 615 P.2d 537 (1980) (possibility that witness subject to prosecution); *State v. Roberts*, 25 Wn. App. 830, 836, 611 P.2d 1297 (1980) (possibility that witness coerced to cooperate with prosecution).

In *Kyles v. Whitley*, *supra*, the Supreme Court specifically held that, under the Fourteenth Amendment's Due Process Clause, the State has the obligation to turn over evidence that is in the hands only of cooperating police agencies, even if the prosecutor is ignorant. *Kyles*, 514 U.S. at 438. In this case, though, some of Mr. Pippen's sordid history was actually known by the chief criminal deputy of the Cowlitz County Prosecuting Attorney's office – Thomas Ladouceur – who not only observed Pippen's child victim's forensic interview, Ex. 20 at 388, but who had recently represented Pippen when he wanted to inform on Mr. Knox. Ex. 41.[6] This was not "innocent" mistake and the Cowlitz County Prosecuting Attorney's office had actual knowledge of Pippen's history.[7]

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[6] Whether Det. B.J. Mortensen told the deputy prosecutor (Sean Brittain) who tried the cases against Mr. Knox about the allegations that Pippen raped M.S. in January 2014 is irrelevant under *Kyles*, even though it would be highly unusual that the lead detective would have withheld that information from the prosecutor. Even if the negligence of a busy police department (where one detective may not know what another is doing) was at all an issue in this analysis, Det. Mortensen clearly knew about M.S.'s rape allegations and the State cannot be insulated from its *Brady* obligations.

[7] Mr. Ladouceur had represented Mr. Pippen in at least one other case, as well. Ex. 14 at 301-02. And although a public defender representing multiple people on a probation review calendar might not recall each of his or her clients years later, Pippen's desire to cooperate with the police against Knox in September 2014 would be of such character that it would unlikely that Mr. Ladouceur would forgotten Pippen just a few months later when Ladouceur found out that Pippen was suspected of molesting a young girl.

This history, though, was not just that J.E. and M.S. both made recent sexual allegations against Pippen. Rather, the significance is also the favored treatment that Pippen received as apparent payment for his services, and his own perceptions that he had a lot to gain from making his testimony "pro-State." Pippen could be accused of raping M.S., without recrimination, and still work as a confidential informant for Det. Mortensen, not just in the drug cases in 2014, but then in the jail against Mr. Knox. He could be accused of child molestation, repeatedly over a twenty-year period,[8] causing harm to many, many children, Exs. 20, 21 and 22 at 382-503, but he would not be prosecuted because he could "pass" a "voice stress" test.[9] He could admit to a police officer that he was still using and selling drugs as late as December 2014, while he was out of custody pending his own charges, and nothing

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[8] Pippen apparently had been a police informant on another occasion, RP 601; Ex. 5 at 203, but it is not known when and whether his prior work coincided with the failure to prosecute him for the sex allegations in the 1990s and early 2000s.

[9] Courts have long rejected the reliability of so-called "voice stress" analyses, finding them to be less reliable than polygraphs. *See Dixon v. Conway*, 613 F. Supp.2d 330, 379-80 & n. 33 (W.D.N.Y. 2009) (surveying law). Whether a decision not to charge an offender with sex crimes because he or she can "pass" a voice stress test is an appropriate way to protect the public and other children is beyond the scope of this case. *But see* Ex. 32 at 758 (Mr. Baldwin raising questions about whether the test is regularly used in decisions not to charge offenders in Cowlitz County).

However, one must ask why Pippen never had to stand trial for repeatedly molesting children because he "passed" voice stress tests, but Mr. Knox, in contrast, is incarcerated for really the rest of his life, but was never offered the chance to take a similar test and get out from under the threat of prosecution?

would happen to him. The State did not move to revoke his release on his pending charges based not only upon his on-going involvement in the drug culture, but also upon the fact that allegedly molested a young child.

All of this information would have been a gold mine for impeachment, particularly when Pippen put his character into evidence and claimed he came forward because he was the type of person who could not take his own dog to the vet to be "put down" (RP 608) and had to come forward or else he would be "no better" than Knox (RP 632). Apparently, Pippen could rape M.S. or molest children with impunity, but Knox's ramblings in the jail bothered him.[10] Similarly, when the State tried to rehabilitate Pippen on re-direct, by making him out to be a sympathetic person who "struggled" with his addiction problems, Pippen testified that when he used drugs he could not see his grandchildren. RP 631. In fact, the likely reason he could not see his grandchildren was because he molested them, *see* Ex. 21 at 437-44 and the defense could have corrected the picture had it known of the prior incidents. Had Knox's trial counsel known of Pippen's twenty-year history of molesting children and raping an adult

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[10] The State repeated Pippen's purported concern for others in its closing argument. RP 976-77 ("The other thing he tells you is I'm [INAUDIBLE], but I'm no murderer. I couldn't go to prison with those three dead bodies hanging over my head. That's what he told you from the stand last week.").

woman, she could have cross-examined him about the fact that the statute of limitations for many of these crimes had not yet lapsed, that he was still at the mercy of the State and that had every reason to tailor his testimony in a way that kept the State and Det. Mortensen happy.

United States v. Kohring, 637 F.3d 895 (9th Cir. 2011), is very similar. In *Kohring*, the Ninth Circuit reversed convictions for three public corruption charges and remanded for a new trial where the Government withheld significant evidence that the defense could have used for impeachment. Significantly, there were video recordings documenting the alleged bribes that were paid to the defendant. Still, it turned out that the main witness against Mr. Kohring had a past that included an investigation for sexual misconduct with a minor and attempts to conceal that behavior by soliciting perjury from the minors and arranging to make one minor unavailable to testify. *Kohring*, 637 F.3d at 903. The Ninth Circuit held that the undisclosed information was material, was admissible under FRE 403 or FRE 608 and the Confrontation Clause of the Sixth Amendment. *Id.* at 637 F.3d at 905-06 & n. 4.

Similarly, even though there was a recording from the jail offered against Mr. Knox, Mr. Pippen's history would have been highly relevant in

assessing his credibility and biases regarding who approached who in the jail and whether Pippen was haranguing a person with some serious mental health issues or whether, as he claimed, Mr. Knox initiated the idea. Given the centrality of Pippen's credibility and biases, Mr. Knox was prejudiced by the State's withholding of this evidence.

To prove prejudice under *Brady*, the issue is not whether there was sufficient evidence to sustain a conviction:

> He or she must show there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . . A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. . . . One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but rather by showing that the favorable evidence could reasonably be taken to put the whole case in a different light. The suppressed evidence must be considered collectively, not item by item.

Stenson, 174 Wn.2d at 487 (internal quotations and citations omitted)

The importance of evaluating the cumulative effect was underlined just recently in *Wearry v. Cain*, 577 U.S. ___, 136 S. Ct. 1002, 194 L.Ed.2d 798 (2016), where the U.S. Supreme Court criticized the state post-conviction court because it "improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively." *Id*. at 1007. The Supreme

Court made it clear also that "Wearry need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted. . . . He must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." 136 S. Ct. at 1006. The proper inquiry is there is a reasonable probability that "a single juror" would have had a reason to doubt the State's evidence had all evidence come out at trial. *In re Stenson*, 174 Wn.2d at 493; *Milke v. Ryan*, 711 F.3d 998, 1019 (9th Cir. 2013) (en banc).[11]

Here, Pippen's troubling history would clearly have put the State's case in a different light and the withheld evidence undermines confidence in the verdict. In light of the the credibility issues about who approached who in the jail and given the jury's already split decision, finding Mr. Knox "not guilty" of the counts involving Ms. Crimmins and Ms. Crookshanks, there is a reasonable probability that one juror would have had a reason to doubt Pippen's testimony had he or she known of Pippen's true history. This Court should grant relief and at least vacate the convictions.

However, in *Kohring*, the late Judge Betty Fletcher would have dismissed the charges based upon government misconduct for not disclosing

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[11] Indeed, in *Wearry*, the Court held that the "undermine confidence" standard was such that "Wearry can prevail even if . . . the undisclosed information may not have affected the jury's verdict." *Wearry v. Cain*, 136 S. Ct at 1006 n. 6.

the witness' complete history. *Kohring*, 637 F.3d at 913-14 (Fletcher, J., concurring and dissenting). The Court here should adopt the same remedy. Given the personal knowledge that the lead detective and chief criminal deputy had of the sex allegations against Pippen, dismissal is appropriate.

b. <u>Withheld Evidence Regarding Cassandra Crimmins Should Also Lead this Court to Grant Relief</u>

Mr. Knox's defense to the VUCSA charges was that although he owned the motor home at 909 California Way, he was not residing there on January 17, 2014, and that the drugs and guns found there on that day belonged to others. Although Mr. Knox's attorney specifically tried to blame Christian Sullivan, Knox also blamed Cassandra Crimmins who he had hoped would come to court and take responsibility and admit the drugs and guns belonged to her. RP 846-47. The State chided Mr. Knox's attempts to shift the blame, pointing out that Crimmins never came to court to testify on his behalf and only then did he try to shift the blame to Sullivan.[12]

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[12] In cross-examination of Mr. Knox, the prosecutor stated:

> Cassandra and Steven aren't here to say those drugs and guns are mine, you told the officers back in January that you're a drug dealer, but now today you're saying this is all Christian Sullivan's fault for the drugs?

RP 852.

In fact, the Longview police had evidence in their possession that supported Mr. Knox's case that Ms. Crimmins had an intimate connection to 909 California Way, having stored her personal belongings at the property. Ex. 10 at 229. While not an acceptance of responsibility for the drugs and guns found at the motor home, the report supported Knox's theory that there were lots of people with connections to that property, and that some of them could have been the owners of the drugs and guns.

This documentation was not just impeaching, it was exculpatory, and was not disclosed to the defense. Ex. 30 at 749; Ex. 32 at 757; Ex. 33 at 762. Yet, the report was in the possession of a cooperating law enforcement agency and should have been disclosed under *Kyles*. It was material as it would have undermined confidence in the verdict. Had the information been put before the jury – that Crimmins stored her belongings at 909 California Way – there is a reasonable probability that one juror would have had a reason to doubt the State's theory. This alone, or considered in conjunction with the other *Brady* violations, should lead this Court to grant relief.[13]

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[13] Mr. Knox was told that the police had knowledge of Ms. Crimmins' connection to 909 California Way. Ex. 11 at 237-38. He recalls telling his lawyers about this, but because he did not know the name of the officer, there was no follow up. Ex. 37 at 778. Whether this constituted ineffectiveness or not does not change the fact that the State's cooperating police agency had evidence in its possession that was exculpatory and the State should have disclosed the report, even if Mr. Knox's lawyers did not seek to

(continued...)

2. *Claim 2(A) – Multiple Actual Conflicts of Interest Require a New Trial*

Mr. Knox's trial strategy on the VUCSA case was to shift the blame to others who had deep connections to 909 California Way. In particular, Mr. Knox sought to introduce evidence at trial that Christian Sullivan was responsible for the drugs and guns found in the motor home. Christian Sullivan, though, was represented in this very same matter by Thad Scudder, another attorney in Ms. Baer's office and an attorney who actually appeared in at least one hearing for Mr. Knox, Ex. 1 at 127; while Mr. Knox's lawyer, Joshua Baldwin, appeared for Mr. Sullivan. Ex. 24 at 550; Ex. 25 at 599.

People accused of crimes are entitled to the assistance of counsel under the Sixth Amendment and article I, section 22. This right to counsel is understood to be the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 685-686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The definition of effectiveness includes a duty of loyalty. As the U.S. Supreme Court stated in *Strickland*, "Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of

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[13](...continued)
uncover it.

interest." *Id*. at 688. The Court went on to say that the duty of loyalty is "perhaps the most basic of counsel's duties." *Id*. at 692.

Where counsel is laboring under an actual conflict of interest that adversely affects his or her representation of the defendant, counsel has breached the duty of loyalty and thus is ineffective. *See Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *State v. Dhaliwal*, 150 Wn.2d 559, 568-71, 79 P.3d 432 (2003). An actual conflict of interest is present where defense counsel "'actively represented conflicting interests.'" *State v. Davis*, 141 Wn.2d 798, 864, 10 P.3d 977 (2000) (quoting *Strickland*, 466 U.S. at 692). An actual conflict may also arise from successive representation, "particularly when a substantial relationship exists between the cases, such that the factual contexts of the two representations are similar or related." *Houston v. Schomig*, 533 F.3d 1076, 1081 (9th Cir. 2008) (internal quotations and citations omitted).

The mere possibility of a conflict is insufficient. *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed.2d 291 (2002) "There is an actual, relevant conflict of interests if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action." *Cuyler v. Sullivan*, 446 U.S. at 356 n.3. In

other words, an "actual conflict" is "a conflict *that affected counsel's performance* — as opposed to a mere theoretical division of loyalties." *Mickens*, 535 U.S. at 171 (emphasis in original). "To establish an 'adverse effect' a defendant must show that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v. Walter-Eze*, 869 F.3d 891, 901 (9th Cir. 2017) (internal quotations and citations omitted)).

If there is an actual conflict of interest that adversely affected an attorney's performance, a defendant need not show the same "prejudice" that is usually required on collateral attack – i.e., the defendant need not show that the outcome of the trial would have been different. *In re Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983); *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008).[14] Rather, the conflict (1) "must cause some lapse in representation contrary to the defendant's interests" *or* (2) "have 'likely' affected particular aspects of counsel's advocacy on behalf of the defendant." *State v. Regan*, 143 Wn. App. at 428 (internal quotes and citations omitted).

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[14] *Compare In re Stockwell*, 179 Wn.2d 588, 597-601, 316 P.3d 1007 (2014) (requiring actual prejudice in case involving incorrect information and guilty plea, and limiting *Richardson* to cases involving conflicts of interest).

"That is to say, a defendant need not show[] actual harm, but just actual conflict." *United States v. Walter-Eze*, 869 F.3d at 901 (internal citations and quotes omitted).

Concurrent or former representation in and of itself does not necessarily require a conclusion that counsel actively represented conflicting interests. Rather, there must be actual evidence that counsel actually had access, for instance, to confidential information by the other client. Thus, in an unpublished decision, *State v. Hill,* 2014 Wash. App. LEXIS 1621, 2014 WL 3012833 (44099-7-II, 7/1/14) (unpub.), this Court cited to two Division One opinions, *State v. Ramos*, 83 Wn. App. 622, 632, 922 P.2d 193 (1996) and *State v. Hunsaker*, 74 Wn. App. 38, 48, 873 P.2d 540 (1994), and held that "Hill did not present any evidence that his defense counsel's cross examination of Alston would involve the use of information gained by way of counsel's representation of Alston." Slip Op. at 5.

In this case, there was no regularly established conflict screening mechanism set up at the public defender's office at all – no "Berlin Walls" were normally present to prevent one lawyer from accessing the files of another lawyer representing a client in the same cases (let alone past cases) or to restrict even talking about a case with a lawyer with conflicting interests

(or talking about cases in public areas of the office). Ex. 32 at 756. More importantly, the fluidity of lawyers between cases made the existence of a "wall" here superfluous. Not only did Christian Sullivan's lawyer, Thad Scudder,[15] actually appear for Mr. Knox at one hearing (on 3/3/15), Ex. 1 at 127, and Mr. Knox's lawyer, Mr. Baldwin, appeared for Mr. Sullivan, Ex. 24 at 550; Ex. 25 at 599, but Ms. Baer met with Mr. Sullivan at Stafford Creek Corrections Center and interviewed him in this very case. Ex. 30 at 750. Thus, Ms. Baer, Mr. Scudder, and Mr. Baldwin at least had access to confidential information regarding both clients.

It is also apparent that Ms. Baer's performance was likely affected because she tried to blame Mr. Sullivan for the drugs and guns but did not have him transported to testify, or take any other steps to prove that Sullivan was the real culprit. To be sure, in contrast to cases where conflicted counsel might not have attempted to blame the firm's other client for the drugs and guns allegedly possessed by one client, Ms. Baer appeared to act in many ways as if there was no conflict at all, not only interviewing Mr. Sullivan at

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[15] Scudder never withdrew from representing Mr. Sullivan in his drug case related to 909 California Way after sentencing, and his name appears on restitution documents through October 27, 2014. Ex. 24 at 539. Even after he was sentenced, Mr. Sullivan was still in prison as a result of the judgment and would be on community custody for a year after his release, and would rationally think that the public defender's office was still representing him, if need be.

prison but then trying to introduce evidence of his conviction for the contraband found at 909 California Way.

Yet, the fact that Sullivan told Ms. Baer that the drugs were Knox's is not the issue because it really is not known how the joint representation and Sullivan's own perceptions of the effect of that joint representation would have impacted whether he would tell a conflicted lawyer the truth. Mr. Sullivan, whose lawyer's own firm appeared to be trying to shift the blame to him, would understandably be confused about what he should say or do when Ms. Baer appeared at the prison. Not being "helpful" is certainly a rational response, even if it was not truthful. In a situation where there was no conflict of interest, Ms. Baer would have contacted Mr. Sullivan's attorney (who was not in the same firm as Ms. Baer) and Sullivan could have discussed the ramifications of testifying for Mr. Knox with his own independent legal counsel, and may well have decided to come forward and accept responsibility for the drugs and guns in the motor home.

It is undisputed that Mr. Knox was never made aware of this web of conflicts. Ex. 30 at 749; Ex. 37 at 777-78. It is not even clear that he could waive such conflicts of interest. *See In re Marriage of Wixom*, 182 Wn. App. 881, 902, 332 P.3d 1063 (2014) ("Some conflicts are nonconsentable,

meaning that the lawyer cannot properly ask for a waiver or provide representation on the basis of the client's consent."). But that issue does not even arise as there was no attempt to secure a waiver.

Once there is a conflict of interest, the Supreme Court refuses "to indulge in nice calculations as to the amount of prejudice attributable to the conflict. The conflict itself demonstrated a denial of the right to have the effective assistance of counsel." *Cuyler v. Sullivan*, 446 U.S. at 349-50 (internal quotes and citations omitted). "A showing of 'adverse effect' is not the same as showing prejudice under the *Strickland* analysis. . . . Accordingly, [t]he strength of the prosecution's case is not relevant to whether counsel's performance was adversely affected." *United States v. Walter-Eze*, 869 F.3d at 901 (internal quotations and citations omitted). Mr. Knox has shown an "adverse effect" of the joint representation with Sullivan, the person who his lawyer tried to blame as another suspect.

Moreover, all the other conflicts and potential conflicts must be considered.[16] In light of the web of overlapping representation, it is apparent

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[16] These include: (1) OPD's occasional representation of Steven Walker in 2006 and 2015, Ex. 28 at 679-701, Ex. 29 at 703-09; (2) Mr. Blondin's appearance for Mr. Pippen at hearings during the summer of 2015, Ex. 15 at 337-39; (3) Mr. Blondin's representation of Cassandra Crimmins on her arson case at the time she was interrogated by Det. Mortensen about her statements (some made to Blondin) accepting responsibility for the drugs and guns, Ex. 12 at 240-67, Ex. 33 at 761-62; (4) Mr. Jurvakainen's brief

(continued...)

that Mr. Knox's right to conflict free representation, guaranteed under the Sixth and Fourteenth Amendments and article I, sections 3 & 22, was violated. The convictions should be vacated.

3. *Claims 3 and 4 – The Prosecutor's and the Judge's Conflicts Require Granting Relief*

Otis Pippen's lawyer, Tom Ladouceur, not only worked in the same office as Knox's attorney at the time Pippen wanted to inform on Knox, but then Ladouceur became the prosecutor who helped make the decision not to file sex charges against Pippen a few months later when Pippen was accused of molesting J.E. Ex. 20 at 388; Ex. 41. Yet another lawyer at the public defenders (Ryan Jurvakainen) briefly represented Christian Sullivan's friend, Robert Tubbs, for drug possession arising out the same incident as the VUCSA case against Mr. Knox.[17] Although Mr. Jurvakainen conflicted out of representing Mr. Tubbs (as his office was representing Christian Sullivan

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[16](...continued)
representation of Mr. Tubbs, Ex. 27 at 645; (5) Mr. Ladouceur's representation of Mr. Pippen, who withdrew due to a conflict, but then went on to be the prosecutor who helped decide not to file charges against Pippen for sexual abuse. Ex. 27, at 645-46, Ex. 41; and (6) the association of Bruce Hanify (Mr. Pippen's next lawyer) with OPD such that his name still appeared on OPD's letterhead in 2014, Ex. 32 at 759, possibly in violation of RPC 7.5(d), even though he probably had left the firm.

[17] Mr. Knox's defense at trial was that many drug addicts used his motor home and that they could have left their drugs and guns there. Tubbs was clearly someone who fit the bill, having been arrested with Christian Sullivan in the possession of drugs, and whose police report listed his address as "transient." Ex. 27 at 678. Tubbs was as much of another suspect as was Christian Sullivan or Cassandra Crimmins.

on the same case), Ex. 27 at 645-46, Mr. Jurvakainen went on to become the elected prosecutor of Cowlitz County and then prosecuted Mr. Knox for the same case in which Mr. Jurvakainen represented Tubbs. While Mr. Jurvakainen and Mr. Ladouceur purported to screen themselves from some of Mr. Knox's cases (although Jurvakainen did not file a screening declaration in the VUCSA case), Ex. 1 at 24-25; Ex. 3 at 146-49, not only did Mr. Ladouceur continue to be involved with Mr. Pippen (as a prosecutor who did not file sex charges against him), but Mr. Jurvakainen's name continued to appear on pleadings in Mr. Knox's cases. Ex. 1 at 13, 14, 28-31, 40; Ex. 3 at 152,164, 165-66, 167-70, 171-72. Moreover, neither Mr. Ladouceur nor Mr. Jurvakainen actually screened themselves from Mr. Pippen's case, as reflected by the lack of screening declarations in his court file, Ex. 15 at 303-345, and the lack of any mention in the prosecutor's own files for Pippen's case regarding a potential conflict of interest. Ex. 36 at 773-74.

Pippen's other former lawyer (on the case when he attacked his family in 2006) was Michael Evans, Ex. 13 at 268-293, who became a judge and ultimately presided over Mr. Knox's trial. Judge Evans never withdrew from representing Pippen, and Pippen's case was not closed by DOC until 2011, just a few years before Pippen's encounter with Mr. Knox at the Cowlitz

County Jail. Ex. 13 at 294-299. Judge Evans' role as Mr. Pippen's former attorney was never disclosed and Knox's trial lawyer did not know about it. Ex. 30 at 747-48; Ex. 37 at 777.

This situation – where witnesses against Mr. Knox and at least one other suspect (Tubbs) were represented by the judge and those in positions of control in the prosecuting attorney's office in Cowlitz County – violated Mr. Knox's right to due process of law under the Fourteenth Amendment and article I, section 3.

a. Claim 3 – The Cowlitz County Prosecutors Should Have Been Disqualified from Prosecuting This Case

A "prosecuting attorney is disqualified from acting in a criminal case if the prosecuting attorney has previously personally represented . . . an accused with respect to the offense charged." *State v. Stenger*, 111 Wn.2d 516, 520, 760 P.2d 357 (1988). A prosecutor who previously represented the defendant "has likely acquired some knowledge of facts upon which the prosecution is predicated." *Stenger*, 111 Wn.2d at 520- 21.

Generally, when an attorney is disqualified, that attorney's entire office is also disqualified. RPC 1.10(a). In some cases, the lawyer can be screened to prevent any involvement in the case, allowing others in the firm

to participate in the case. RPC 1.10(e). When the disqualified lawyer is a deputy prosecuting attorney who is appropriately screened, disqualification of the entire office is not necessary. *See Stenger*, 111 Wn.2d at 522- 23; *State v. Schmitt*, 124 Wn. App. 662, 668-69, 102 P.3d 856 (2004). However, when the elected prosecutor personally represented the defendant in the same case, the entire prosecuting attorney's office should be disqualified and a special prosecutor appointed. *Stenger*, 111 Wn.2d at 522.

While defense lawyers can certainly "switch sides" and become prosecutors, when a defense lawyer who regularly practices in a county is elected that county's prosecuting attorney, the potential for conflicts of interest are heightened. The Sixth and Fourteenth Amendment right to due process and the Sixth Amendment's right to counsel and article I, sections 3 and 22, guarantee a fair trial and conflict-free counsel. *State v. Dhaliwal*, 150 Wn.2d at 566; *State v. Sanchez*, 171 Wn. App. 518, 558, 288 P.3d 351 (2012). These constitutional concerns exist when defense counsel becomes a prosecutor. Our Supreme Court has recognized how a fair trial can be compromised by a prosecutor's conflicts in such circumstances:

> The rationale for this [conflict of interest] rule lies in the appearance of impropriety created by vesting the "inherently antagonistic and irreconcilable" roles of the prosecution and the defense in one attorney. *Howerton v. State*, 1982 OK CR

> 12, 640 P.2d 566, 567 [(1982)]. In holding that a part-time district attorney may not represent a criminal defendant anywhere in the state of Oklahoma, the Court of Criminal Appeals of Oklahoma reasoned that although it was difficult or impossible to determine whether the representation was actually affected, "[t]he public has a right to absolute confidence in the integrity and impartiality of the administration of justice. The conflicts presented in this case, at the very minimum, give the proceeding an appearance of being unjust and prejudicial." *Id*. at 568.

State v. Tracer, 173 Wn.2d 708, 720, 272 P.3d 199 (2012) (footnote omitted).[18]

In a recent unpublished decision, this Court addressed the problem as it related to the very same elected prosecutor as is involved in this case, Ryan Jurvakainen. *State v. Fox*, 198 Wn. App. 1034, 2017 Wash. App. LEXIS 806

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[18] *Tracer* involved the on-the-spot appointment of a defense lawyer to be a special prosecutor in a particular case. The Supreme Court upheld the right of the judge to appoint a special prosecutor, but held that the appointment of a defense lawyer who regularly defended clients in the same jurisdiction constituted a conflict of interest, even if the defense lawyer was not involved in the particular case at hand:

> Harrison regularly represented criminal defendants in actions brought by the State of Washington in Jefferson County. When Harrison was appointed as a special deputy prosecuting attorney in Jefferson County, the State of Washington also became Harrison's client. . . . The interests of the criminal defendants represented by Harrison were therefore directly adverse to the interests of the State. No one claims that Harrison received his clients' informed, written consent to undertake the representation. Therefore, even assuming Tracer's case was unrelated to Harrison's other criminal cases, a concurrent conflict of interest existed under RPC 1.7, and the RPCs prohibit Harrison from representing the State.

Tracer, 173 Wn.2d at 720-21.

(No. 48466-8-II, 4/4/17) (unpub.). Mr. Jurvakainen had appeared for the defendant at his omnibus hearing, but then was elected prosecutor in Cowlitz County and attorney Patricia VanRollins took over. The same type of "screening" declaration was filed in *Fox* as in some of Mr. Knox's cases. Although Mr. Fox did not move to disqualify Mr. Jurvakainen's office and the issue was raised for the first time on appeal, this Court held there to be manifest constitutional error:

> Here, because Jurvakainen had represented Fox in this case and was later elected county prosecutor during the pendency of Fox's case, a conflict of interest existed, and he was disqualified from the case. *In fact, Jurvakainen admitted in his declaration that he was disqualified from the case*. And because Jurvakainen became the elected prosecutor for the county, the entire Cowlitz County Prosecuting Attorney's Office should have been disqualified as well, and a special deputy prosecutor should have been appointed.

State v. Fox, Slip Op. at 6 (emphasis added). This Court cited to foreign cases to concluded that a prosecutor's conflict of interest violates due process of law. *State v. Fox*, Slip Op. at 4-5.[19]

In this case, the web of conflicts were even more insidious than in *Fox*. Although Mr. Jurvakainen's and Mr. Ladouceur's declarations suggest that they were perhaps personally involved in Mr. Knox's cases, they were

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[19] *Citing Landers v. State*, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008) & *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967).

likely simply law partners with Mr. Knox's attorneys, but law partners who represented individuals with interests adverse to Mr. Knox (Mr. Tubbs briefly and Mr. Pippen) in an office without any regular screening mechanisms for conflict of interests. They then became the elected prosecuting attorney and chief criminal deputy of the same office that prosecuted Mr. Knox.

Although their declarations state that they would be screened from Mr. Knox's cases, not only were the declarations not filed for months after Mr. Jurvakainen and Mr. Ladouceur became prosecutors, there was no such declaration from Mr. Jurvakainen that was filed in the VUCSA case, the one case where Mr. Jurvakainen had an actual conflict. Moreover, despite Mr. Jurvakainen's declaration in the solicitation case, the pleadings filed in Mr. Knox's cases continued to be filed over Mr. Jurvakainen's name, including subpoenas, jury instructions and trial memos.[20] More importantly, even though Mr. Ladouceur claimed to have been screened from Mr. Knox's case, he was directly involved in the investigation into his former client's sex case and participated in the decision not to charge him for molesting J.E, and was head of the division that did not disclose Pippen's history to Mr. Knox's

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[20] *See State v. Fox*, Slip Op. at 7 ("Although Jurvakainen was allegedly screened from Fox's case, an amended information was filed in this case with only Jurvakainen's name on the signature line identifying him as the Cowlitz County Prosecuting Attorney").

defense attorney. Although a screening mechanism might theoretically have been able to have been erected to prevent Mr. Ladouceur (who was not the elected prosecutor but merely the chief criminal deputy) from involvement in Knox's case,[21] not only was there no screening in force to prevent Mr. Ladouceur from having involvement in Mr. Pippen's case, it is apparent that Ladouceur continued to have contact with Pippen as demonstrated by his involvement in child sex cases.[22]

Mr. Knox's rights to a fair trial, to counsel and to due process of law were therefore violated when Mr. Ladouceur and Mr. Jurvakainen became his prosecutors, not only because of their prior employment in the public defender office, but also because of their representation of people at that office who had interests that conflicted with Mr. Knox's interests and also their continuing involvement in protecting Mr. Pippen, the State's key witness against Mr. Knox. The Cowlitz County Prosecuting Attorney's Office should have been disqualified and a special prosecutor appointed.

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[21] S*ee State v. Schmitt*, 124 Wn. App. at 668-69. Mr. Ladouceur, though, was not just a "normal" deputy prosecutor -- he was the chief criminal deputy, with administrative responsibilities that mirror those of the elected prosecutor.

[22] The lack of any screening mechanism in the prosecutor's office regarding Pippen's continuing case is notable, Ex. 36 at 774, and suggests the conclusion that his former lawyer who became chief criminal deputy played a dual role – first as Mr. Pippen's attorney and then as his protector in the prosecutor's office.

RCW 36.27.030 - .040. The convictions should be vacated and the charges retried with a special prosecutor.

b. <u>Claim 4 – Mr. Knox's Right to an Impartial Judge Was Violated</u>

Those accused of crimes have a due process right to a fair trial by an impartial judge. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). Impartial means the absence of bias, either actual or apparent. *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972).

There have been older cases where courts have upheld the denial of recusal motions where judges have represented people or prosecuted them in the distant past, and were still able to preside over later proceedings.[23] These older cases may no longer be viable in light of a series of cases over the past

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[23] *See In re Swenson*, 158 Wn. App. at 818-23 (fact that judge once helped prosecute defendant in another case years earlier did not disqualify her); *State v. Dominguez*, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996) (fact that judge "worked as a lawyer for or against a party in a previous, unrelated case," without a specific showing of bias, is not sufficient to establish grounds for disqualification under the appearance of fairness doctrine, former CJC Canon 3(D)(1), or due process); *Alexander v. Chicago Park Dist*., 773 F.2d 850, 857 (7th Cir. 1985) (upholding denial of recusal motion where judge had once represented a witness: "The association between Judge Leighton and Mr. Jones in 1958 was ancient history.").

decade where the U.S. Supreme Court clarified that recusal is required even if there is no allegation of a personal bias in a particular case. Under modern Supreme Court jurisprudence, judges must recuse themselves where "there is a serious risk of actual bias – based on objective and reasonable perceptions." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884,129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009). The test is objective: "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge ha[s] no actual bias. . . . Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Rippo v. Baker*, ___ U.S. ___, 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017) (internal quotes and citations omitted).[24]

Applying this objective test, Judge Evans here should have recused himself, and his failure to do so violated Mr. Knox's due process rights under

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[24] *See also Williams v. Pennsylvania*, ___ U. S. ___, 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.") (internal quotation marks omitted); *Reed v. State*, ___ P.3d ___, 2018 Fla. LEXIS 2210 (Fla. SC17-896, 11/15/18) (per curiam), Slip Op. at 6 (recusal in post-conviction matter required -- "While Judge McCallum was not the assigned prosecutor on Reed's case, she was actively prosecuting capital cases during the time period when Reed's prosecution was ongoing. It was alleged that she was a part of the team of capital prosecutors and that, 'as part of the capital team during her tenure with the State Attorney's Office, each capital prosecutor including Judge McCallum had input in the decision making in each other's cases.'").

the Fourteenth Amendment and article I, section 3. Judge Evans was Mr. Pippen's former lawyer, having represented him a few years earlier, when Pippen viciously attacked his own family, a crime that took place only a few years after Pippen had once again been accused of child molestation. Ex. 13 at 268-93. As Mr. Pippen's lawyer, Judge Evans would have been privy to confidential information about Pippen (either good or bad information) and would have had intimate knowledge about the way Pippen's mind worked. Judge Evans also clearly still had a duty of loyalty to his former client.[25]

Thus, when Pippen became the star witness against Knox, in a case where his background was key to determining his credibility, Judge Evans should not have been in a position of determining anything about Pippen at all. While there does not appear to have been any extensive litigation over the admissibility of Pippen's past history,[26] Judge Evans specifically referenced his own opinions about his former client, Pippen, when sentencing

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[25] *See In re Estate of Griffith*, 2 Wn. App. 2d 638, 646-47, 413 P.3d 51 (2018) ("The relevant rule . . . is RPC 1.9(a). The rule prohibits lawyers from 'switching sides' and representing a party adverse to a former client in the same or a substantially related matter. . . . RPC 1.9(a) is based on the attorney's duty of loyalty to a client.").

[26] Judge Evans may well have known about the history of child molestation accusations against his former client. When he was negotiating with the prosecutors in 2006 about Pippen's assaults on his family members, it is entirely possible that the prosecutors may have have brought up Pippen's history. Thus, given the prosecuting attorney's office knowledge of Pippen's history and Det. Mortensen's knowledge, and Judge Evans' possible knowledge, the only party in the courtroom who clearly did not know of Pippen's unique history was Knox's lawyer, Ms. Baer.

Mr. Knox, stating that he did not think Pippen had "forced" Mr. Knox to say the things he did.[27] Yet, there would be no way to separate Judge Evans' view of the evidence and his views about Pippen from having represented him just a few years earlier, and had Mr. Knox or Ms. Baer known of this history, they would have filed either a recusal motion or an affidavit of prejudice against him. Ex. 30 at 747-48; Ex. 37 at 777.

Moreover, Judge Evans' role as a former lawyer for the State's star witness against Mr. Knox needs to be viewed in conjunction with the conflicted role of the prosecutor's office – including Pippen's other lawyer, Mr. Ladouceur, being involved in the non-prosecution of Pippen for molesting J.E. When these things are looked at together, there clearly is not an appearance of impartiality. Any neutral observer who came into Cowlitz County and looked at what was taking place – the main informant being protected by his former lawyer now the chief criminal deputy, with the trial overseen by the informant's other former lawyer – would conclude that Judge Evans was not impartial, and that the deck was stacked against Mr. Knox.

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[27] RP 1122 ("Mr. Pippen, you know, certainly he has his motives and he has his desires to achieve certain things, and certainly he played a part in this. There was nobody forcing Mr. Knox to say or do the things he did.").

For these reasons, the convictions should be vacated and the charges retried before another judge, one who did not represent the main witness a few years earlier.

4. *Claim 5 – The Lack of a True Threat Instruction Violated the First Amendment*

Mr. Knox's defense at trial to the solicitation charges was that he suffered from diminished capacity and that he did not mean what he said to Pippen in the jail – that his statements were the product of a mentally stressed person who was preyed on by Pippen, a skilled informant who was manipulating Knox to get out of jail himself. No money was ever exchanged, and the State did not prove that Mr. Knox did anything other than just ramble on in the jail. Thus, the conviction for solicitation was really based solely on what one witness described as Knox's speech.

The Supreme Court of Washington has recognized that criminal solicitation under RCW 9A.28.030 can, in fact, be based upon pure speech:

> In the crime of solicitation, criminal liability may attach to words alone. Solicitation involves no more than asking someone to commit a crime in exchange for something of value. Unlike conspiracy and attempt, it requires no overt act other than the offer itself.

State v. Jensen, 164 Wn.2d 943, 952, 195 P.3d 512 (2008).

Yet, the First Amendment (incorporated through the Fourteenth Amendment) and article I, section 5, protect an individual's freedom of speech, even speech of a hateful nature and even advocacy of violence. *See Watts v. United States*, 394 U.S. 705, 705-08, 89 S.Ct. 1399, 22 L. Ed. 2d 664 (1969) (per curiam) (First Amendment protected speaker saying "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.").

To be sure, the First Amendment's protections are not absolute and advocacy of the use of force or of violation of the law can be made illegal but only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). "True threats" can be made illegal. *Watts v. United States*, 394 U.S. at 708. A "true threat" is a statement made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual]." *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (internal quotation omitted).

In cases construing Washington's harassment statute, RCW 9A.46.020, and the bomb threat statute, RCW 9.61.160, the Washington

Supreme Court requires not only that the elements of the statute be met, but that there is independent proof to satisfy the First Amendment's demands by proving that a "true threat" was made.[28] Indeed, although under federal law, the U.S. Supreme Court has required proof subjective intent to cause another person fear of harm, *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001, 192 L.Ed.2d 1 (2015), our Supreme Court had rejected this argument, re-affirming the objective requirement that a reasonable person would construe the statements as a true threat of harm. *See State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016), *cert. denied*, 138 S. Ct. 313 (2017).

Seen through this First Amendment lens, it is apparent that Mr. Knox's conviction for solicitation should be vacated. Neither the general definition of "solicitation" nor the "to convict" instruction, Ex. 1 at 69, 73 contained a "true threat" requirement. Rather, the instructions simply track the statutory language of RCW 9A.28.030, which fails to include a "true threat" requirement in its literal terms. Without reading a "true threat" into the RCW 9A.28.030, the statute would be unconstitutionally vague and

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[28] *See State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004) ("Because of the First Amendment implications, a conviction for felony harassment based upon a threat to kill requires that the State satisfy both the First Amendment demands – by proving a true threat was made – and the statute, by proving all the statutory elements of the crime."); *State v. Johnston*, 156 Wn.2d 355, 360-64, 127 P.3d 707 (2006). *See also State v Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010) (failure to instruct on "true threat" was not harmless and could be raised for first time on appeal).

overbroad under the First and Fourteenth Amendments and article I, sections 3 and 5, and this Court must adopt a narrowing construction of the statute to prevent it from being unconstitutional. *See State v. France*, 180 Wn.2d 809, 818, 329 P.3d 864 (2014) ("[E]ven though 'true threat' is not an element of felony harassment, the State still must prove it. However, this is because "true threat" defines and limits the scope of criminal statutes, such as felony harassment, that potentially encroach on protected speech. . . We require the State to prove a 'true threat' to prevent encroachment on protected speech.")

In an unpublished opinion, this Court once rejected a similar argument, concluding that a "true threat" instruction is unnecessary in solicitation cases because of the inclusion of *mens rea* requirement. *State v. Constance*, 185 Wn. App. 1012, 2014 Wash. App. LEXIS 3057, No. 40504-1-II (12/30/14) (unpub.), Slip Op. at 34. With all due respect, this Court should not follow *Constance*. Apart from the factual differences,[29] subjective "intent" is different than the objective requirement of a "true threat." *See Watts*, 394 U.S. at 708 (distinguishing between "true threat" and "willfulness"). As noted previously, advocacy of the use of force or of

[29] The defendant was mortgage broker who was in the middle of a ugly divorce and child custody battle, and he allegedly solicited three people to kill his ex-wife. There was no evidence of diminished capacity.

violation of the law can be made illegal only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. at 447. This requires that there be an objective "true threat," whatever the speaker's subjective intent might be.

Without a "true threat" requirement, a person suffering mental health distress by being falsely accused of a crime and locked up in a jail and beat up by another inmate, like Mr. Knox, could blurt something out about harming another person and be convicted, when no reasonable person would take the ramblings of that person to be a serious expression to harm another person. *See State v. Schaler*, 169 Wn.2d at 289-90 (court doubted that there was a "true threat" given mental instability of defendant).

Accordingly, Mr. Knox's rights to due process of law and freedom of speech under the First and Fourteenth Amendments and article I, sections 3 and 5, were violated. Either RCW 9A.28.030 is unconstitutional or the jury instructions were erroneous by their failure to contain a "true threat" requirement.

5. *Claim 6 – The State's Failure to Tie Up its Impeachment of Mr. Knox Violated Due Process and His Right to Confront Witnesses*

During the State's cross-examination of Mr. Knox, he denied paying Ms. Crimmins $8000, he denied that Mr. Walker had bought a truck with the money, he denied knowledge of his attorney announcing that Crimmins would be a witness and he denied that Crimmins had failed to appear. He responded by asking, "Was there something I could see to see where I said that?" and noted that when he met Walker, he already had a truck, "so I don't know where you guys are coming up with this stuff." RP 839-40. The State never called Ms. Crimmins or Mr. Walker as witnesses, or anyone to testify that Mr. Knox's former lawyer had announced Crimmins would be a witness.

"A person being tried on a criminal charge can be convicted only by evidence, not by innuendo." *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). "It also is error to question a witness in a manner that suggests evidence exists outside of the record that has been provided to the jury." *State v. Ruiz*, 176 Wn. App. 623, 641, 309 P.3d 700 (2013). "Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when

such information is not otherwise admitted as evidence." *State v. Denton*, 58 Wn. App. 251, 257, 792 P.2d 537 (1990).

A prosecutor's impeachment of a witness by referring to extrinsic evidence that is never introduced violates a defendant's right to due process and confrontation under the Sixth and Fourteenth Amendments and article I, sections 3 and 22. *See State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007); *State v. Babich*, 68 Wn. App. 438, 443-46, 842 P.2d 1053 (1993). A prosecutor who asks questions that imply the existence of a prejudicial fact must be prepared to prove that fact. *Miles*, 139 Wn. App. at 886. When a prosecutor fails to tie up the impeachment, this is when the constitutional violation occurs. *See Babich*, 68 Wn. App. at 446. Failing to tie up impeachment constitutes prosecutorial misconduct that violates due process of law under the Fourteenth Amendment and article I, section 3. *See Miles*, 139 Wn. App. at 889 (referring to failing to tie up impeachment as "misconduct").

In this case, the prosecutor impeached Mr. Knox about Cassandra Crimmins and Steven Walker. Yet, even though Crimmins was in custody during portions of the trial and Walker was in the Department of Corrections serving a lengthy sentence, the prosecutor made no attempt to call them as

witnesses[30] to verify that there was in fact a $8000 payment, that Walker and Crimmins used the money for a truck, or that a prior lawyer for Knox had announced Crimmins would be a witness.[31] Yet, when Knox denied knowledge of these things, the State could have, but chose not to, tied up the impeachment by calling Crimmins or Walker (and some witness to testify what Knox's former lawyer supposedly said).

This impeachment, without evidence, violated Mr. Knox's rights to due process and his right to confront witnesses. The error here was constitutional, and thus such an error is harmless only "if the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *Babich*, 68 Wn. App. at 446. Given the Sixth Amendment's right to a jury trial, the issue "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan*

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[30] The State misleadingly told the jury during the cross of Mr. Knox that "we don't know where" Crimmins or Walker were at, even though it was clear that both were in custody at times during the trial. RP 851; Ex. 1 at 93, 97-106; Ex. 29 at 730-42.

[31] In fact, Mr. Blondin did tell the prosecutors that Crimmins would be a witness. Ex. 33 at 762. This fact actually is exculpatory as it shows that there was no motive for Mr. Knox to pay someone to kill his main witness or her boyfriend, Mr. Walker. The bizarreness of the entire fact pattern though does not excuse the prosecutor from not tying up its impeachment by producing witnesses.

v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993) (emphasis in original).

The State's theory was that Mr. Knox paid Crimmins to accept responsibility and that she somehow did not keep her end of the bargain, buying a truck with Walker instead. This theory, of course, made no sense on so many levels. But whether it made sense, the State allowed the jury to have the mis-impression that the State knew the truth that there really had been some sort of payment and a bought truck. Given how cockeyed the State's theory was to begin with it is likely the verdict was attributable to that error. The Court should grant relief.

6. *Claim 7 – There Was Insufficient Evidence to Support a Conviction For Possession with Intent to Deliver*

The State's case on the VUCSA charge was that Mr. Knox possessed 27.4 grams of methamphetamine at the motor home, about an ounce. There were some baggies in the motor home, a scale and cell phones, but the only direct evidence of an intent to deliver was Mr. Knox's alleged confession (which he denied) that he was a "lower-end drug dealer." RP 480. This is insufficient evidence to sustain a conviction.

When reviewing a challenge to the sufficiency of the evidence, under the Due Process Clauses of the Fourteenth Amendment and article I, section 3, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). This is a restrictive standard of review designed *to protect* people from being wrongfully convicted based upon a mere "modicum" of evidence and is a standard that requires the finder of fact to "to reach a subjective state of near certitude of the guilt of the accused." *Jackson v. Virginia*, 443 U.S. 307, 315, 320, 99 S. Ct. 2781, 61 L Ed. 2d 560 (1979).

When considering whether there is sufficient evidence, a court on appeal cannot consider an uncorroborated confession. "The corpus delicti 'must be proved by evidence sufficient to support the inference that' a crime took place, and the defendant's confession 'alone is not sufficient to establish that a crime took place.'" *State v. Cardenas-Flores*, 189 Wn.2d 243, 252, 401 P.3d 19 (2017) (quoting *State v. Brockob*, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006)). Specifically, "[t]he State must present other independent evidence … that the crime a defendant described in the [confession] actually occurred." *Brockob*, 159 Wn.2d at 328. Our Supreme Court has held that

corpus delicti is a rule of sufficiency that may be raised for the first time on appeal. *Cardenas-Flores*, 189 Wn.2d at 257, 263.

In *State v. Cobelli*, 56 Wn. App. 921, 788 P.2d 1081 (1989), the Court of Appeals reversed a possession with intent conviction, holding that "[m]ere possession, without more, does not raise an inference of the intent to deliver." *Id*. at 925. The court acknowledged Cobelli possessed several bags of marijuana, but there was no evidence that such an amount was associated with an intent to deliver. Cobelli also removed cash from his pockets, but the record did not establish an amount. *Id*. at 924-25. Generally, the corpus delicti rule is satisfied if "at least one additional factor, suggestive of intent" is present. *State v. Whalen*, 131 Wn. App. 58, 63, 126 P.3d 55 (2005). These factors could include cash at the scene where the drugs are stored, scales with residue, packaging with residue, and testimony about the amount of drugs consistent with personal use. *State v. Hotchkiss*, 1 Wn. App. 2d 275, 280-81, 404 P.3d 629 (2017).

In this case, Mr. Knox has a modest amount of cash ($2405) on his person at the time of his arrest, but the cash was not near the drugs. There was no testimony that the 27.4 grams of methamphetamine was consistent or not consistent with personal use, and there was no testimony that the baggies

or scale had residue on them nor was there was any forensic analysis of the cell phones to show that they were used for criminal purposes. In contrast, the police found in the motor home a glass pipe with residue on it, RP 408-09, showing that whoever lived at the motor home used methamphetamine. In sum, there was no evidence of an intent to deliver other than Mr. Knox's confession (which he denied) that he was a "lower-end" drug dealer. There was insufficient evidence to sustain the conviction in Count 1.

7. *Claims 2(B) and 8 – Mr. Knox Was Denied Effective Assistance of Counsel at Trial and on Appeal*

As noted above, a person accused of a crime has the right under the Sixth and Fourteenth Amendments and article I, section 22, to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 685-90. While counsel is not expected to perform flawlessly, counsel is required to meet an objectively reasonable minimum standard of performance. *Id*. at 688. Evidence of ineffective assistance includes the failure to conduct appropriate investigations, proposed proper jury proper instructions or make proper motions.[32]

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[32] Proper investigation – *Strickland*, 466 U.S. at 691; *State v. Jones*, 183 Wn.2d 327, 340, 352 P.3d 776 (2015); Proper instructions – *State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009); *State v. Thomas*, 109 Wn.2d 222, 225-29, 743 P.2d 816 (1987); *In re Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007); Proper motions – *State v. Reichenbach*, 153 Wn.2d 126, 130-31, 101 P.3d 80 (2004); *In re Maxfield*, 133 Wn.2d

(continued...)

Similarly, someone convicted of a crime not only has a constitutional right to an appeal under article I, section 22, but also has a right to counsel and effective assistance of counsel on appeal (as a matter of due process of law under the Fourteenth Amendment and article I, section 3). Such rights are violated when appellate counsel does not raise meritorious issues.[33]

Under *Strickland*, to show prejudice, petitioners need not prove that "counsel's deficient conduct more likely than not altered the outcome in the case," but rather only must demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 693-694. Prejudice under *Strickland* involves the same analysis as "materiality" under *Brady*. *See Kyles*, 514 U.S. at 434 (adopting *Strickland* standard in *Brady* context). In other words, the test is whether the deficient representation put the entire case in a different light, such that confidence in the verdict is undermined and one juror would have had a reason to doubt had there not be ineffectiveness. *Kyles v. Whitley*, 514 U.S. at 435; *In re Stenson*, 174 Wn.2d at 493.

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[32](...continued)
332, 334, 945 P.2d 196 (1997).

[33] *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985); *In re Morris*, 176 Wn.2d 157, 166-68, 288 P.3d 1140 (2012); *In re Orange*, 152 Wn.2d 795, 814,100 P.3d 291 (2004).

Here, neither trial counsel nor appellate counsel raised the "true threat" issue, either by proposing such an instruction or raising the failure to give such an instruction on appeal. Trial counsel did not know about the conflicts of interest within her office, within the prosecutor's office or with the judge, and thus not only did not discuss these with her client, but failed to move for disqualification of the prosecutor or the judge. Trial counsel did not sufficiently investigate Mr. Pippen's background, relying on the State's disclosure alone. Even though Mr. Knox told his lawyers about Pippen's history of sex abuse and about the police officer who had told him that Crimmins kept her property at 909 California Way, none of Mr. Knox's lawyers obtain that information on their own, through their own investigation (i.e. by subpoenaing records or making PRA requests). Finally, counsel on appeal failed to raise the issue about the prosecutor not tying up the impeachment of Mr. Knox on direct appeal, and also failed to raise a meritorious sufficiency issue (that had been raised below). This combination of errors undermines confidence in both the result of the trial and the appeal.

The issue of locating Ms. Crimmins is a different matter. Ms. Baer actually did do a lot of work to try to find Ms. Crimmins. Ex. 30 at 748. However, when denying the motion for a new trial, the trial court made a

finding that Ms. Baer did not use due diligence to locate Ms. Crimmins, despite finding her testimony was material. Ex. 1 at 110-11.

This raises two issues. First, if the record shows that Ms. Baer did use due diligence to try to find Ms. Crimmins, then it was error to deny the new trial motion. The trial court's error should have been raised on direct appeal, and Ms. Tabbut's failure to raise this issue was ineffective. On the other hand, if Ms. Baer did not use due diligence to locate Ms. Crimmins, then she was ineffective, justifying relief not only on direct appeal but now, on collateral attack. Either way, Mr. Knox's defense should not be prejudiced by the fact that Ms. Crimmins did not testify, and if her statement was material, then Mr. Knox should get a new trial.[34]

All of these issues call into question the validity of the verdict, and cast the entire case in a different light. There is prejudice; the Court should grant relief due to ineffective assistance of counsel at trial and on appeal.

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[34] The State claimed that had Ms. Crimmins testified, she could have been impeached with her statements supposedly made to Det. Mortensen that Mr. Knox paid her to say the drugs and guns were hers. RP 1072-73. However, Mortensen not only failed to write a contemporaneous report of his contact with Crimmins, Ex. 9 at 222-24, but had the State disclosed Mortensen's protection of Otis Pippen (hiding the allegations that he raped M.S.), the defense could have destroyed Mortensen's credibility and the accuracy of his interview with Crimmins (who was then represented by conflicted counsel, Mr. Knox's lawyer, Kevin Blondin) could have been challenged.

8. *Claim 9 – Cumulative Error Requires All Counts to Be Vacated*

A defendant has a fundamental right to a fair trial, protected both by the right to a jury and due process of law under the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. "[T]he fundamental right to a fair trial demands minimum standards of due process." *State v. Gonzalez*, 129 Wn. App. 895, 905, 120 P.3d 645 (2005). Cumulative error can interfere with this right to a fair trial. *See State v. Cloud*, 195 Wn. App. 1054, 2016 Wash. App. LEXIS 2108, Slip Op. at 5 (46912-0-II, 8/30/16) (unpub.).

"Where, however, there are multiple trial errors, a balkanized [sic], issue-by-issue . . . review is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the defendant." *United States v. Preston*, 873 F.3d 829, 835 (9th Cir. 2017) (internal quotes and cites omitted). The test to determine if cumulative error requires reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him or her a fair jury trial, in violation of the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. *See In re Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). "[T]he cumulative effect of multiple trial errors can violate due process even where no single error . . . would independently warrant

reversal. . . . In deciding whether the combined effect of multiple errors prejudiced a defendant we ask whether the errors stand in unique symmetry . . . , such that [they] amplify each other in relation to a key contested issue in the case." *United States v. Preston*, 873 F.3d at 835 (internal quotes and citations omitted).[35]

Here, there were a combination of errors that should be considered in conjunction with each other – pervasive *Brady* violations and conflicts of interest, ineffective counsel, a prosecutor's office that should have been disqualified, a judge who should have been recused, instructional errors, and prosecutorial misconduct in not tying up impeachment. All of these errors amplify each other and should result in vacating the convictions.

Moreover, all counts were joined for trial, over the defense objection. Ex. 1 at 26-27. The State specifically argued that evidence of each count was cross-admissible on the other counts: "These cases are inextricably intertwined, and the evidence is cross-admissible." Ex. 1 at 16. Because the charges were so inextricably intertwined, granting relief for any count should lead to all counts being vacated.

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[35] *See also State v. Cloud*, *supr*a, Slip Op. at 6 ("We may reverse a defendant's convictions when the combined effect of errors during trial effectively denied the defendant his right to a fair trial, even if each error standing alone would be harmless.") (unpub.).

B. CONCLUSION

For the foregoing reasons, and the reasons set out in the PRP, this Court should enter an order vacating the convictions and sentences, and ordering either a retrial or dismissal, under RAP 16.4(c)(2), (3), (5) and (7).

DATED this 5th day of December 2018.

Respectfully submitted,

s/ Neil M. Fox
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Attorney for Petitioner

STATUTORY APPENDIX

(Former) CJC Canon 3(D)(1) provides in part:

> Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:
>
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge previously served as a lawyer . . . in the matter in controversy . .

FRE 403 provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FRE 608 provides in part:

> (b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
>
> (1) the witness; or
>
> (2) another witness whose character the witness being cross-examined has testified about.

RAP 16.4 provides:

> (a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section (c).
>
> (b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.
>
> (c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons: (1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or (2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or (3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or (5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or (6) The conditions or manner of the

> restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or (7) Other grounds exist to challenge the legality of the restraint of petitioner.
>
> (d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

RCW 9.61.160 provides in part:

> (1) It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy; or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

RCW 9A.28.030 provides:

> (1) A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he or she offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

(2) Criminal solicitation shall be punished in the same manner as criminal attempt under RCW 9A.28.020.

RCW 9A.46.020 provides in part:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.'

RCW 36.27.030 provides:

When from illness or other cause the prosecuting attorney is temporarily unable to perform his or her duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

> When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of his or her county, or is unable to perform his or her duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of the prosecuting attorney: PROVIDED, That in counties wherein there is no person qualified for the position of prosecuting attorney, or wherein no qualified person will consent to perform the duties of that office, the judge of the superior court shall appoint some suitable person, a duly admitted and practicing attorney-at-law and resident of the state to perform the duties of prosecuting attorney for such county, and he or she shall receive such reasonable compensation for his or her services as shall be fixed and ordered by the court, to be paid by the county for which the services are performed.

RCW 36.27.040 provides:

> The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal. Each appointment shall be in writing, signed by the prosecuting attorney, and filed in the county auditor's office. Each deputy thus appointed shall have the same qualifications required of the prosecuting attorney, except that such deputy need not be a resident of the county in which he or she serves. The prosecuting attorney may appoint one or more special deputy prosecuting attorneys upon a contract or fee basis whose authority shall be limited to the purposes stated in the writing signed by the prosecuting attorney and filed in the county auditor's office. Such special deputy prosecuting attorney shall be admitted to practice as an attorney before the courts of this state but need not be a resident of the county in which he or she

> serves and shall not be under the legal disabilities attendant upon prosecuting attorneys or their deputies except to avoid any conflict of interest with the purpose for which he or she has been engaged by the prosecuting attorney. The prosecuting attorney shall be responsible for the acts of his or her deputies and may revoke appointments at will.
>
> Two or more prosecuting attorneys may agree that one or more deputies for any one of them may serve temporarily as deputy for any other of them on terms respecting compensation which are acceptable to said prosecuting attorneys. Any such deputy thus serving shall have the same power in all respects as if he or she were serving permanently.
>
> The provisions of chapter 39.34 RCW shall not apply to such agreements.
>
> The provisions of *RCW 41.56.030(2) shall not be interpreted to permit a prosecuting attorney to alter the at-will relationship established between the prosecuting attorney and his or her appointed deputies by this section for a period of time exceeding his or her term of office. Neither shall the provisions of *RCW 41.56.030(2) require a prosecuting attorney to alter the at-will relationship established by this section.

RPC 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the

lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

RPC 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom that lawyer had acquired information protected by Rules 1.6 and

1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

RPC 1.10 provides:

(a) Except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11. However, lawyers appointed or assigned to represent indigent members of the public (public defenders) are subject to this rule regardless of whether they are government employees.

(e) When the prohibition on representation under paragraph (a) is based on Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, no other lawyer in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified unless:

(1) the personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;

(2) the former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of information relating to the former representation;

(3) the firm is able to demonstrate by convincing evidence that no material information relating to the former representation was transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.

Any presumption that information protected by Rules 1.6 and 1.9(c) has been or will be transmitted may be

> rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.
>
> (f) When LLLTs and lawyers are associated in a firm, an LLLT's conflict of interest under LLLT RPC 1.7 or LLLT RPC 1.9 is imputed to lawyers in the firm in the same way as conflicts are imputed to lawyers under this rule. Each of the other provisions of this Rule also applies in the same way when LLLT conflicts are imputed to lawyers in the firm.

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 5 provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Wash. Const. art. I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for

> waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. 1, § 22 (Amendment 10) provides in part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . . .

STATE OF WASHINGTON)
COUNTY OF KING)ss

After being first duly sworn, on oath, under penalty of perjury under the laws of the State of Washington, I verify this brief and I depose and say: That, I am the attorney for the petitioner, that I have read the brief, know its contents, and I believe the brief is true.

Signed this 5 day of December 2018, at Seattle, Washington

NEIL M. FOX
WSBA NO. 15277

Subscribed and sworn to before me this 5 day of December 2018.

Notary Public in and for
the State of Washington, residing at 2812 44th Ave SW Unit A Seattle WA 98116

SIENNA WAKATSUKI
NOTARY PUBLIC
COMMISSION EXPIRES 11-08-20
STATE OF WASHINGTON

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

IN RE THE PERSONAL RESTRAINT OF:	)	
	)	CAUSE NO. _____
BRADLEY DAVID KNOX,	)	
	)	CERTIFICATE OF SERVICE
Petitioner.	)	
	)	
	)	
	)	
	)	
	)	

I, Alex Fast, certify and declare that I served a copy of the attached OPENING BRIEF OF PETITIONER by delivering it to a commercial mails service to deposit a copy into the United States Mail with proper postage attached, addressed to:

Ryan Jurvakainen
Cowlitz County Prosecuting Attorney
Jason Laurine, Deputy
312 SW 1st Ave Rm 105
Kelso, WA 98626-1799

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 5th day of December 2018, in Seattle, Washington.

s/ Alex Fast
Legal Assistant

Law Office of Neil Fox, PLLC
2125 Western Ave. Ste. 330
Seattle, Washington 98121
206-728-5440

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

IN RE THE PERSONAL RESTRAINT OF: BRADLEY DAVID KNOX, Petitioner.	)))))))))	CAUSE NO. _____ CERTIFICATE OF SERVICE

I, Neil M. Fox, certify and declare that I served a copy of the PERSONAL RESTRAINT PETITION, OPENING BRIEF OF PETITIONER, MOTION TO SEAL DOCUMENTS, and EXHIBITS IN SUPPORT OF PRP by filing through the Portal, which will deliver an electronic copy to all parties. I also had these documents served by United States Mail on December 5, 2018 as indicated in the certificates of service that were filed on that date in No. 52971-8-II.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 20th day of December 2018, in Seattle, Washington.

s/ Neil M. Fox
WSBA No. 15277
Attorney for Petitioner

Law Office of Neil Fox, PLLC
2125 Western Ave. Ste. 330
Seattle, Washington 98121
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LAW OFFICE OF NEIL FOX PLLC

December 20, 2018 - 9:21 AM

Filing Personal Restraint Petition

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	Case Initiation
Trial Court Case Title:	State Vs Bradley David Knox
Trial Court Case Number:	14-1-01283-4
Trial Court County:	Cowlitz Superior Court
Signing Judge:	Michael Evans
Judgment Date:	12/24/2015

The following documents have been uploaded:

- PRP_Affidavit_Declaration_20181220090901D2625319_7038.pdf
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- PRP_Motion_20181220090901D2625319_2637.pdf
  This File Contains:
  Motion 2 - Other
  The Original File Name was Motion to Seal Documents.pdf
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  Motion 1 - Consolidate
  The Original File Name was motion to consolidate.pdf
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  The Original File Name was VERIFICATION OF PETITIONER 122018.pdf

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- Jurvakainen.ryan@co.cowlitz.wa.us
- LaurineJ@co.cowlitz.wa.us

Comments:

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