

NO. 28195-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

**FILED**

APR 22 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

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STATE OF WASHINGTON,

Respondent,

v.

PAUL STATLER,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

---

BRIEF OF APPELLANT

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LILA J. SILVERSTEIN  
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## A. INTRODUCTION

This is a case of actual innocence.

Appellant Paul Statler and his co-defendants were framed for a robbery that was actually committed by another group of young people – the same group who had pled guilty to a similar robbery that occurred the same month as the incident at issue here. After a jury found the defendants guilty based on the testimony of the person who framed them, another young man came forward with written statements and testimony admitting that the defendants were innocent and that the other group (of which he was a member) had committed the crimes.

Mr. Statler and his co-defendants moved for a new trial based on this newly discovered evidence. The trial court denied the motion, applying the wrong legal standards to the issue. This Court should reverse and remand for a new trial.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Statler's motion for a new trial based on newly discovered evidence.

2. Mr. Statler received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution.

3. The State violated Mr. Statler's right to due process by threatening to prosecute a defense witness for perjury and obstruction of justice if he testified.

4. Mr. Statler's convictions for assault and drive-by shooting, based on the same act, violate the double jeopardy provisions of the state and federal constitutions.

5. Mr. Statler's right to equal protection under the Fourteenth Amendment and article I, section 12 was violated by the imposition of three double firearm enhancements where the jury did not find beyond a reasonable doubt the facts necessary to double the enhancements.

6. Mr. Statler's right to notice under article I, section 22 was violated by the omission of double firearm enhancement allegations from the information.

#### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A new trial should be granted where the defendant shows that he has newly discovered evidence which (1) will probably change the result of the trial, (2) was discovered since trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. In this case, Matthew Dunham – who pled guilty in exchange for a lenient sentence – testified that he, Anthony Kongchunji, appellant Paul Statler, Tyler Gassman, and

Robert Larson committed the crimes in question. The victims identified only Dunham and Kongchunji. After the trial, Kongchunji wrote a letter exculpating Mr. Statler, Mr. Gassman, and Mr. Larson, and explaining that Dunham's brother and friend committed the crimes with Dunham and Kongchunji. He also testified to this effect in another trial regarding another robbery, and the jury in that case found Kongchunji credible and acquitted Mr. Statler. Did the trial court err in denying Mr. Statler's motion for a new trial based on Kongchunji's post-trial recantation?

2. A new trial should be granted for ineffective assistance of counsel if a defense attorney's performance was deficient and the deficiency prejudiced the defendant. Here, Mr. Statler's attorney did not call Anthony Kongchunji as a witness even though Mr. Kongchunji had indicated in a defense interview that Mr. Statler and his co-defendants were innocent and another group of men had committed the crimes in question. Mr. Statler was convicted based on the testimony of a jail-house informant who pled guilty in exchange for a lenient sentence; none of the victims identified Mr. Statler as having committed the crimes. Must Mr. Statler be granted a new trial for ineffective assistance of counsel?

3. If a defense witness is threatened and those threats effectively keep that witness off the stand, the defendant is deprived of due process of law. Here, Anthony Kongchunji indicated to defense attorneys in a pre-

trial interview that he would recant his allegations against the defendants and admit that others committed the crimes at issue. The State then threatened to prosecute Mr. Kongchunji for perjury and obstruction of justice if he so testified, leading him to decline to recant. Did the State's actions deprive Mr. Statler of due process, requiring reversal?

4. A defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. Here, Mr. Statler was convicted of two counts of first-degree assault for shooting at Clifford Berger and Kyle Williams from Matt Dunham's car, and Mr. Statler was convicted of two counts of drive-by shooting for shooting at Clifford Berger and Kyle Williams from Matt Dunham's car. Must the drive-by shooting convictions be vacated?

5. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on prior convictions. However, in some cases these prior convictions must be proved to a jury beyond a reasonable doubt in order for the defendant to be subject to an increased penalty, and in other cases (like the double-firearm

enhancement here) the prior convictions are merely proved to a judge by a preponderance of the evidence. Where no rational basis exists for treating similarly situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

6. Article I, section 22 of the Washington Constitution requires that an information include all facts necessary to prove an offense, including enhancements. The information in this case alleged that Mr. Statler committed the present offenses while armed with a firearm, but did not allege he was subject to a doubling of the resulting sentence enhancement due to a previous deadly weapon enhancement. Were Mr. Statler's constitutional rights violated by the imposition of three double firearm enhancements?

#### D. STATEMENT OF THE CASE

a. The robberies and plea deals. In the winter and spring of 2008, a series of four home-invasion robberies occurred in the Spokane Valley. The incidents took place on February 28, April 15 or 17, April 21, and April 23. The crime spree stopped after the April 23 incident because the robbers' face masks had fallen down, and the victims recognized their

assailants from prior drug deals. 4 RP 367.<sup>1</sup> Police officers arrested and jailed the perpetrators on April 25, 2008. 4 RP 367. The offenders were Matthew Dunham, his brother Larry Dunham, Anthony Kongchunji, and Nicholas Smith. 4 RP 331-335.

Matthew Dunham, who was 17 years old, admitted he was the getaway driver for all of the robberies, but negotiated a plea deal whereby he would be treated as a juvenile and serve only 18 months in confinement. 4 RP 337, 370. In exchange, Matthew Dunham talked about the crime spree. He told detectives that his brother, Larry, and friend, Nicholas Smith, were not involved in any of the other robberies. 4 RP 340. Instead, he accused appellant Paul Statler and other men of joining him and Anthony Kongchunji in committing the first three robberies. 4 RP 302, 338.

In the meantime, Nicholas Smith and Larry Dunham joined Matthew Dunham in pleading guilty to the April 23 incident in exchange for light sentences. Smith and Larry Dunham each received sentences of 50-54 months instead of the decades-long sentences they had been facing. 4 RP 369.

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<sup>1</sup> There are six volumes of verbatim reports of proceedings under Paul Statler's cause number: 1 RP(1/12/09, 1/21/09, 1/28/09, 2/25/09, 4/21/09); 2 RP ((2/4/09, 2/17/09); 3 RP (2/9/09, 2/10/09); 4 RP (2/11/09); 5 RP (2/12/09); and 6 RP ((5/20/09, 6/4/09).

As to the other three robberies, the State filed charges not against those who had been caught red-handed on April 23, but against those Matthew Dunham had accused during plea negotiations. However, the State subsequently dropped all charges with respect to the February 28 incident. Specifically, the prosecutor indicated that there was “an identification problem related to Mr. Statler,” so the charges were dismissed with prejudice. 1 RP 100, 212. That left two incidents unresolved: the April 15 or 17 robbery, and the April 21 robbery.

As to the April 15 or 17 incident, the State charged Mr. Statler, Mr. Kongchunji, Robert Larson, and Tyler Gassman with one count of first-degree robbery, two counts of first-degree attempted murder or in the alternative first-degree assault, and two counts of drive-by shooting. CP 20-21. For the first three counts, the State also alleged: “and the defendants, as actors and/or accomplices, [were] at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3).” CP 20-21.

The State originally alleged that the incident took place on April 15, 2008. But Mr. Larson was at work that evening, and his attorney provided the prosecutor with documents showing he was at his place of employment and could not have been involved in a robbery. The State then spoke to one of the victims, Kyle Williams, who, based on a telephone call made to a friend on April 17, suggested the incident might

have occurred on that date instead. 4 RP 281. Months later, on the day trial was set to commence, the State moved to amend the information to change the date of the crimes to April 17. 1 RP 3. The defendants objected on the basis that this destroyed Mr. Larson's alibi defense and that the prosecutors waited until the last minute to request amendment. 1 RP 3-12; 15, 30-38. The trial court allowed the late amendment but sanctioned the prosecutor because of the additional time the defense attorneys would need to prepare the case. 1 RP 41-42.

b. The trial. Before trial, Anthony Kongchunji pleaded guilty to having committed the April 15 or 17 incident with Mr. Statler, Mr. Larson, and Mr. Gassman. Mr. Statler and the other co-defendants proceeded to trial. Their attorneys planned to call Mr. Kongchunji as a witness, because they hoped he would recant and testify that the three remaining defendants were wrongly accused and that the same people who committed the April 23 robbery had committed the instant robbery. CP 102. However, after speaking with law enforcement officers and his attorney, Mr. Kongchunji stated that he would exercise his Fifth Amendment rights and would not testify. CP 103. Mr. Kongchunji's attorney prohibited the defendants' attorneys from speaking with him. CP 174. The defendants therefore did not call him as a witness. CP 103; 2 RP 10.

Trial began on February 9, 2009. Four victims of the April 15 or 17 incident testified. 3 RP 46-136, 147-227; 4 RP 231-262. None identified Mr. Statler, Mr. Gassman, or Mr. Larson as the perpetrators. One victim, Joni Jeffries, did not even know whether the robbers were male or female. 3 RP 59, 66, 153. Another victim, Clifford Berger, thought they were male but did not know their race. 3 RP 132. A third victim, Kyle Williams, could not identify either their gender or their race. 3 RP 153, 159, 192.

The fourth victim, Eric Weskamp, identified only Anthony Kongchunji and Matt Dunham as having perpetrated these crimes. 3 RP 219. Mr. Weskamp had bought drugs from Mr. Kongchunji in the past. 3 RP 214. When Mr. Berger told Mr. Weskamp he wanted to buy \$4,000 worth of oxycontin, Mr. Weskamp invited Mr. Kongchunji (known as "Poncho") to Mr. Berger's house in the evening to make the sale. 3 RP 213-216. Matt Dunham drove Mr. Kongchunji to the house. Mr. Kongchunji then called Mr. Weskamp and told him to come outside and meet them at their truck. Mr. Weskamp and his friend Rob went outside, and Mr. Weskamp recognized both Mr. Kongchunji and Matt Dunham. 3 RP 219. No one else was in the truck. 3 RP 220.

In short order, masked men attacked Mr. Weskamp and Rob and stole the money they had received from Joni Jeffries and Clifford Berger.

3 RP 222-26; 4 RP 249. The masked men then joined Matt Dunham and Anthony Kongchunji in the truck and Dunham drove away. 3 RP 105.

Mr. Weskamp could not identify his attackers, but he noted that the one with the gun was very tall, pale, and skinny. 4 RP 233; 5 RP 496.

Mr. Berger and Mr. Williams got in Mr. Williams' car and chased the truck. 3 RP 104-05, 107, 153-55. Someone in the back of the truck opened the rear window and fired two shots toward them, striking their car. 3 RP 108-10, 156-58. Mr. Berger and Mr. Williams returned to the house. 3 RP 164. They could not identify the shooter or any of the men in the truck. 3 RP 111, 117, 132, 159, 192.

Consistent with his plea deal, Matt Dunham testified that the men who accompanied him and Mr. Kongchunji that day were the three defendants. 4 RP 365. He acknowledged that he didn't know Mr. Statler, Mr. Larson, or Mr. Gassman very well. 4 RP 329. In contrast, he spent a lot of time with his brother, Larry Dunham, as well as Mr. Kongchunji (who lived with the Dunhams for a while) and his brother's good friend Nicholas Smith. 4 RP 327-331, 374. Mr. Dunham admitted that he, his brother, Mr. Kongchunji, and Mr. Smith had committed a very similar robbery on April 23, 2008, and that they used the same gun and getaway car that had been used in the April 15 or 17 incident. 4 RP 331-32, 339. Yet he told the jury that his brother and friend did not commit the April 15

or 17 crime with him, and that instead he committed it with people he barely knew. 4 RP 329, 340, 365.

Mr. Statler's community corrections officer testified that Mr. Statler was being monitored by video camera and remote breathalyzer three times per day in April of 2008. 5 RP 437. Consistent with his responsibilities, Mr. Statler performed these remote tests from his home three times on April 17, including at 6:00 p.m. and 10:00 p.m. 5 RP 438-40.

Detective William Francis testified that the only evidence police had that Mr. Statler, Mr. Larson, and Mr. Gassman committed these crimes was the statement of Matt Dunham. 4 RP 323.

Prior to closing arguments, the defendants argued that the drive-by shooting and first-degree assault charges were concurrent offenses and that the drive-by shooting charges should be dismissed. 5 RP 506-13. The court ruled that charging multiple offenses was appropriate and that it would revisit the issue at sentencing if the defendants were convicted of both offenses. 5 RP 519-20.

In closing arguments, the defendants argued that the only evidence the State presented implicating Mr. Statler, Mr. Gassman, and Mr. Larson was the uncorroborated testimony of Matt Dunham. 5 RP 580, 587. They argued that Mr. Dunham testified against the three defendants in order to

protect his brother and his friend, and to receive a low sentence. 5 RP 583.

The jury nevertheless convicted Mr. Statler and his co-defendants of one count of first-degree robbery, two counts of first-degree assault, and two counts of drive-by shooting. CP 260. By special verdict the jury found the defendants were armed with a firearm during the commission of the crimes. CP 82-84.

c. The co-defendant's post-trial recantation and Mr. Statler's motion for a new trial. After the trial, Anthony Kongchunji wrote a letter to Paul Statler's father, Duane. He said:

I'm writing you this letter to tell you it is wrong and unjust what the State is doing to your son Paul. I found out that Paul, Tyler, and Robert lost their recent trial and I'm stun[n]ed. I don't see how the jury could believe Matthew at all because I've read his statement and they are all lies.

I thought I should let you know that Paul, Tyler, and Robert were not involved with any of the alleged incidents and the reason I know this is because I was involved. The other individuals involved were Larry Dunham, Matthew Dunham, and Nicolas Smith.

...

CP 106.

On March 31, 2009, Mr. Kongchunji explained to Mr. Statler's attorney that the reason he had been unwilling to recant at trial was that he was threatened with additional charges, including perjury, if he testified on

Mr. Statler's behalf. CP 104. The threats scared Mr. Kongchunji, and he did not have the courage to come forward until he heard about the unjust convictions of Mr. Statler, Mr. Larson, and Mr. Gassman. CP 104.

At the subsequent trial regarding the April 21 robbery, Matt Dunham again testified against Mr. Statler. But this time, Anthony Kongchunji testified that he, the Dunham brothers, and Nicholas Smith had perpetrated the crimes on April 21, just as they had on April 23. CP 174, 183-228. Mr. Kongchunji explained that the four of them used and sold oxycontin together, and that he lived with the Dunham brothers. CP 186-87. Mr. Kongchunji described both Dunham brothers as "tall and skinny." CP 189.

Mr. Kongchunji testified that he and Matthew Dunham were placed in jail cells near each other after having been arrested for the April 23 robbery, and that they decided to "save our friends and his brother" by pinning the other incidents on Mr. Statler and other acquaintances. CP 194. When describing the April 21 robbery, Mr. Kongchunji testified that he committed the crimes with the "same people I always go rob people with: Larry, Nick, Matt." CP 194. He stated that Larry Dunham fired a gun a few times. CP 199. Mr. Kongchunji said, "I've seen the – how innocent people get found guilty all the time. It's just not right, that's why I'm here today." CP 227.

The jury acquitted Mr. Statler of the April 21 crimes. CP 172. In the meantime, the State dismissed charges against Mr. Gassman and Mr. Larson for the April 21 incident. 1 RP 230; 3 RP 31.

Mr. Statler, Mr. Gassman, and Mr. Larson filed motions for a new trial for the April 15 or 17 incident based on this newly discovered evidence. CP 85-90, 101-14, 171-229; 6 RP . They further argued that the State committed misconduct and violated the defendants' rights to due process by threatening a potential witness. CP 175-77.

The trial court denied the motions. The judge stated that there was no newly discovered evidence that could not have been discovered earlier with the exercise of due diligence. The court reasoned that Mr. Kongchunji was available and the defendants should have called him as a witness at trial despite his refusal to speak to them and their lack of knowledge as to what he would say. The court stated, "the 5<sup>th</sup> amendment does not apply because Mr. Kongchunji had already pled to charges in this case." Contrary to the letter and testimony presented, the court stated that Mr. Kongchunji "did not say these three didn't commit the crime." The court ruled that even if Mr. Kongchunji did say the three defendants did not commit the crime, his testimony "would be merely impeaching." Finally, the court ruled that the new testimony would not likely change the

result because “there was a sufficient basis for these jurors’ verdicts.” The court did not address the misconduct issue. CP 231-32; 6 RP 25-30.

d. Sentencing. The court sentenced Mr. Statler to 87 months on Count I, 138 months on Count II, 93 months on Count III, and 41 months on Counts IV and V. CP 263. In addition, the court imposed 360 months’ confinement for firearm enhancements on counts I, II, and III – double the enhancements imposed on the codefendants. CP 264; 6 RP 63. The doubling was based on the following statement by the prosecutor:

With respect to the deadly weapons enhancements, I did file with the Court certified copy of Mr. Statler’s first-degree robbery conviction here in Spokane County. That conviction, 03-1-00289-6, was filed with the court clerk on July 2, 2003.

...

What the State would like to bring to the Court’s attention is that at that time, the Court found that Mr. Statler, in the commission of that crime, there was a deadly weapon other than a firearm that was returned as to Count I. As it relates to the firearms provision in this particular matter, because of that prior finding and because of the way the SRA reads, is that the standard firearm enhancement for class A felonies would be 60 months for each Count 1, Count 2, Count 3, to run consecutive to each other for a total of 180 months. However, because of the prior finding from the Court that a deadly weapon was used, the Court has to double that amount in this particular proceeding, so for the firearm enhancements alone, Mr. Statler must be sentenced to 360 months for that particular firearm enhancement.

6 RP 36.

Mr. Statler appeals. CP 275-91.

E. ARGUMENT<sup>2</sup>

1. THE TRIAL COURT ERRED IN DENYING MR. STATLER'S MOTION FOR A NEW TRIAL BASED ON ANTHONY KONGCHUNJI'S POST-TRIAL ADMISSION THAT HE AND ANOTHER GROUP OF MEN COMMITTED THE CRIMES.

Under CrR 7.5, the court may grant a new trial if presented with “[n]ewly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial.” CrR 7.5(3). CrR 7.8 provides that a defendant may move to vacate judgment for any of several reasons, including “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5.” CrR 7.8 (b)(2).<sup>3</sup>

A new trial should be granted where the defendant shows the newly discovered evidence (1) will probably change the result of the trial, (2) was discovered since trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. State v. Williams, 96 Wn.2d 215, 222-23, 634

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<sup>2</sup> In addition to the arguments set forth in this brief, Mr. Statler adopts by reference the arguments made in the appellate briefs filed by his co-defendants Robert Larson and Tyler Gassman. RAP 10.1(g)(2).

<sup>3</sup> In this case, Mr. Statler presented Mr. Kongchunji's letter exculpating him in support of his motion for a new trial under CrR 7.5, and attached Mr. Kongchunji's testimony from the subsequent trial on the April 21<sup>st</sup> robbery in an addendum to the motion pursuant to CrR 7.8(b). CP 171.

P.2d 868 (1981). These factors constitute the standard regardless of the procedural posture. See id. (motion for a new trial); State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996) (motion to vacate judgment); In re Personal Restraint of Lord, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994) (personal restraint petition); State v. D.T.M., 78 Wn. App. 216, 219, 896 P.2d 108 (1995) (motion to withdraw plea).

A trial court's decision on a motion for a new trial is reviewed for abuse of discretion. State v. Roche, 114 Wn. App. 424, 435, 59 P.3d 682 (2002). A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. Id. A discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). "Indeed, a court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." Id. (internal citation omitted).

Mr. Kongchunji's post-trial letter and testimony in the other robbery case was newly discovered evidence that could not have been discovered earlier with the exercise of due diligence. This new evidence was material, not merely cumulative or impeaching, and probably would have changed the result of the trial in this case. The trial court

misapprehended both the legal standards and the record in denying the motion for a new trial.

a. Mr. Kongchunji's testimony was newly discovered evidence that could not have been discovered before trial with the exercise of due diligence. Anthony Kongchunji conspired with Matt Dunham to tell authorities that Mr. Statler, Mr. Gassman, and Mr. Larson had committed crimes that in fact were committed by Kongchunji, the Dunham brothers, and Nicholas Smith. Although the defendants in this case were hopeful that Mr. Kongchunji would recant at trial and testify on their behalf, he refused to do so. Mr. Kongchunji finally recanted after trial, when he saw that innocent young men had been convicted of a crime they did not commit.

It is axiomatic that a recantation constitutes newly discovered evidence satisfying the second and third Williams factors. State v. Scott, 150 Wn. App. 281, 294 & 297, 207 P.3d 495 (2009); In re Personal Restraint of Smith, 80 Wn. App. 462, 469, 909 P.2d 1335 (1996); D.T.M., 78 Wn. App. 216. The trial court mistakenly focused on Mr. Kongchunji's availability at the time of trial. His availability is of no moment because his statements up to that point (including his "free talk" and his guilty plea) implicated the defendants, and he refused to recant because he had been threatened with additional charges. His post-trial

recantation – both in a letter to Duane Statler and on the stand at the trial on the April 21<sup>st</sup> robbery – is newly discovered evidence.

In D.T.M., the alleged victim in a child-molestation case recanted her allegations after the defendant had pled guilty, and the defendant moved for a new trial based on the newly discovered evidence. D.T.M., 78 Wn. App. at 217. The trial court denied the motion, ruling that the defendant could have obtained the recantation earlier because the possibility of a recantation had been raised at a pretrial hearing. Id. at 219. But this Court reversed, noting that although the victim had been under pressure to recant before trial, she had not done so, and this did not mean the defendant failed to act with due diligence. Id. at 221. Similarly here, the defense attorneys acted with due diligence in seeking Mr. Kongchunji's recantation prior to trial, but they were rebuffed. As in D.T.M., this Court should reverse.

Scott is also instructive. There, the alleged victim and other witnesses recanted statements they had given police prior to the defendant's guilty plea. Scott, 150 Wn. App. at 287-88. The State argued that the defendant's motion to vacate his conviction should be denied, because he did not act with reasonable diligence in discovering the new evidence. Id. at 291. This Court disagreed, stating, "it is unlikely that these witnesses would have changed their stories earlier or that Scott could

have done anything to cause these changes. A defendant cannot precipitate a witness's recantation." Id. at 292. The same is true here. The defense attorneys tried to convince Mr. Kongchunji to recant prior to trial, but he refused and his attorney forbade the other attorneys from continuing to contact him. As soon as Mr. Kongchunji recanted, Mr. Statler's attorney and the other defense attorneys acted with due diligence in immediately moving for a new trial. Thus, as in Scott and D.T.M., the recantation here is newly discovered evidence that could not have been discovered earlier with the exercise of due diligence.

b. Mr. Kongchunji's testimony was material, not merely impeaching, and probably would have changed the result of the trial. The trial court ruled that the first Williams factor – “whether the new evidence would probably change the result” – was not satisfied because “there was a sufficient basis for these jurors' verdicts.” 6 RP 30. The court applied the wrong legal standard to this factor. It treated it as a challenge to the sufficiency of the evidence presented at the original trial, rather than considering whether the new testimony would probably change the result of a future trial.

The proper question is not whether sufficient evidence was presented to support the convictions; the question is whether the result probably would have been different if that same evidence plus the new

evidence were presented to a jury. See State v. Davis, 25 Wn. App. 134, 140-41, 605 P.2d 359 (1980) (a new trial should be granted if probable result of jury hearing new evidence combined with previously introduced evidence would be either acquittal or conviction on a lesser offense); State v. Hutcheson, 62 Wn. App. 282, 297, 813 P.2d 1283 (1991) (in deciding whether newly discovered evidence would probably change the result, “the trial court must evaluate the credibility, significance and cogency of the new evidence”).

Without question, the first Williams factor is satisfied in this case. Unlike in most newly discovered evidence cases, one need not engage in an analysis of hypothetical scenarios here. Rather, the result of the subsequent trial for the April 21 robbery mandates a conclusion that Mr. Kongchunji’s testimony would probably change the result in a new trial for the April 15 or 17 robbery. In the April 21 case, although Matt Dunham again accused Mr. Statler and his co-defendants of having committed the crime, Mr. Kongchunji testified that he, the Dunham brothers, and Nicholas Smith were responsible. The jury found Mr. Kongchunji credible enough to raise a reasonable doubt, and acquitted Mr. Statler. Mr. Kongchunji’s testimony changed the result in that case and probably would change the result of a new trial in this case.

Roche is instructive. In consolidated drug-possession cases, the defendants presented newly discovered evidence that a state crime lab chemist had engaged in misconduct. 114 Wn. App. at 428. The Court of Appeals reversed the two defendants' convictions and remanded for new trials despite the fact that there was clearly sufficient evidence to support the convictions: for one defendant, a properly conducted field test had come back positive for controlled substances, and the other defendant had admitted the substances were illegal drugs. Id. at 432, 437-38, 442. This Court held that the newly discovered evidence would probably have changed the result even though the juries' verdicts were supported by sufficient evidence. Id. The trial court's application of the sufficiency-of-the-evidence standard in Mr. Statler's case was error.

Furthermore, as in Roche, Mr. Kongchunji's testimony in this case would not have been "merely impeaching." The Roche court explained that "[i]mpeaching evidence can warrant a new trial if it devastates a witness's uncorroborated testimony establishing an element of the offense. In such cases the new evidence is not merely impeaching, but critical." Roche, 114 Wn. App. at 438 (quoting State v. Savaria, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996)). Mr. Kongchunji's testimony, like the new evidence in Roche, was critical.

Additionally, the new evidence here would have been substantive. Mr. Kongchunji would not simply have attacked Matt Dunham's credibility by, for example, discussing other times he had lied. Rather, Mr. Kongchunji would have described exactly what happened on April 15 or 17 and who committed the acts in question. This is substantive evidence on a material fact at issue – the identity of the perpetrators. See State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), aff'd 123 Wn.2d 877, 872 P.2d 1097 (1994) (the identity of an offender and his presence at the crime scene is a material element that must be charged and proved beyond a reasonable doubt); Cf. State v. Jones, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (No. 826137, filed 4/15/10) (evidence of alleged rape victim's sex acts on the night in question should have been admitted because it was not offered merely to impeach her credibility but to prove consent). In sum, Mr. Kongchunji's recantation was not merely impeaching, but was substantive, material, and critical. See D.T.M., 78 Wn. App. at 221 (recantation of complaining witness "is clearly material and is not merely cumulative or impeaching").

In addition to misunderstanding the legal standards, the trial court misread the contents of Mr. Kongchunji's letter and the transcript of his testimony in the other trial. The trial court concluded that Mr. Kongchunji "does not at any point in his testimony vindicate either Mr. Larson,

Gassman, or Statler as to this cause number.” 6 RP 25. This statement is wrong as a matter of fact. Mr. Kongchunji wrote the letter to Duane Statler in response to Paul Statler having been convicted in this case. The letter stated:

I found out that Paul, Tyler, and Robert lost their recent trial and I'm stun[n]ed. I don't see how the jury could believe Matthew at all because I've read his statement and they are all lies.

I thought I should let you know that Paul, Tyler, and Robert were not involved with any of the alleged incidents and the reason I know this is because I was involved. The other individuals involved were Larry Dunham, Matthew Dunham, and Nicolas Smith.

CP 106. The letter could not have been discussing any other incident, because there was no other incident for which these three defendants “lost their trial.” The letter then goes on to also discuss the April 21st robbery, but that in no way undercuts the fact that the first two paragraphs vindicate Mr. Statler and his co-defendants with respect to the April 15 or 17 robbery. Furthermore, in his testimony in the case involving the April 21<sup>st</sup> robbery, Mr. Kongchunji said he committed the crimes with the “same people I always go rob people with: Larry, Nick, Matt.” CP 194. Thus, his testimony referenced not only the April 21<sup>st</sup> incident, but also the April 15<sup>th</sup> or 17<sup>th</sup> incident at issue here.

The trial court correctly recognized that witness credibility is a determination for the jury to make, and that the jury had apparently found Matt Dunham credible. CP 232. The problem is that unless a new trial is granted, a jury will never have the opportunity to listen to Anthony Kongchunji's testimony and make a credibility determination as to him. "The question is not whether the trial court believes the recanting witness, but whether the recantation has such indicia of reliability or credibility as to be persuasive to a reasonable juror if presented at a new trial." Smith, 80 Wn. App. at 471. The jury in the case involving the April 21 robbery apparently found Mr. Kongchunji credible enough to raise a reasonable doubt.<sup>4</sup> A jury must be given the same opportunity with respect to the April 15 or 17 incident.

On this point, Hutcheson is instructive. There, defendants Bowerman and Hutcheson were tried separately. Hutcheson, 62 Wn. App. at 285. Bowerman did not testify at Hutcheson's trial, which preceded Bowerman's. Id. at 286. After Bowerman testified at her own subsequent trial, Hutcheson moved for a new trial based on the newly discovered testimony. Id. at 289. This Court affirmed the trial court's conclusion that Bowerman's testimony would not change the result of Hutcheson's trial,

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<sup>4</sup> For this reason, an evidentiary hearing is not required. Cf. Scott, 150 Wn. App. at 294 (trial court must hold evidentiary hearing on motion for new trial to determine whether witness is credible); D.T.M., 78 Wn. App. at 221 (same).

because the jury in the second trial did not believe Bowerman and convicted her. Id. at 298.

The Bowerman jury heard her testimony denying Seaver's account of their conversation. ... The Bowerman jury's verdict clearly indicates how little weight they accorded this testimony: they found Bowerman guilty of aggravated first degree murder. That verdict reveals that Bowerman's and Dr. Brown's testimony on the question of whether Bowerman intended to kill Nickell was not believable.

Id.

In contrast, in Mr. Statler's case the jury at the second trial did believe Mr. Kongchunji, and acquitted Mr. Statler of the April 21 robbery. This verdict reveals that Mr. Kongchunji's testimony was believable, and probably would have changed the result in a new trial on the April 15 or 17 robbery.

"Horror stories abound" of jailhouse snitches who frame innocent people in pursuit of lenience for their own crimes or other benefits. Alexandra Natapoff, Beyond Unreliable: How Snitches Contribute to wrongful Convictions, 37 Golden Gate U. L. Rev. 107 (2006). Indeed, false informant testimony is the leading cause of wrongful convictions in U.S. capital cases. Id. Anthony Kongchunji's recantation raises the specter that Mr. Statler was wrongfully convicted on the basis of false informant testimony. This Court should reverse and remand for a new trial.

This Court need not reach the alternative arguments below.

2. IN THE ALTERNATIVE, MR. STATLER'S  
CONSTITUTIONAL RIGHT TO THE EFFECTIVE  
ASSISTANCE OF COUNSEL WAS VIOLATED WHEN  
HIS ATTORNEY DID NOT CALL ANTHONY  
KONGCHUNJI AS A WITNESS AT TRIAL.

As Mr. Statler argues above, a new trial should be granted because Mr. Kongchunji's recantation could not have been obtained before or during trial with the exercise of due diligence. But if this Court concludes to the contrary, then a new trial should be granted on the basis that Mr. Statler's attorney provided ineffective assistance of counsel in failing to call Mr. Kongchunji as a witness.

a. Mr. Statler had a constitutional right to effective assistance of counsel. A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI;<sup>5</sup> Const. art. I, § 22;<sup>6</sup> United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity

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<sup>5</sup> The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

<sup>6</sup> Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ."

to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998).

A decision is not permissibly tactical or strategic if it is not reasonable.

Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance

remains simply reasonableness under prevailing professional norms”) (quoting Strickland, 466 U.S. at 688). While an attorney’s decisions are treated with deference, his or her actions must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel’s inadequate performance, the result would have been different, prejudice is established and reversal is required. Hendrickson, 129 Wn.2d at 78. A reasonable probability “is a probability sufficient to undermine confidence in the outcome.” State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the “more likely than not” standard. Id.

b. Defense counsel’s performance was deficient because he failed to call Mr. Kongchunji as a witness even though Mr. Kongchunji’s testimony would have exculpated Mr. Statler. The trial court concluded that Mr. Kongchunji’s recantation could have been obtained earlier with the exercise of due diligence. If true, then trial counsel’s performance was deficient because he failed to exercise due diligence in interviewing this witness and ensuring he would recant at trial.

A lawyer has a duty to investigate what information a potential witness possesses. Sanders v. Ratelle, 21 F.3d 1446, 1456-57 (9<sup>th</sup> Cir. 1994). A failure to interview key witnesses constitutes inadequate

investigation. Thomas, 109 Wn.2d at 231 (defendant received ineffective assistance of counsel where attorney failed to ascertain his expert witness's credentials and failed to call a different expert witness to testify). "Moreover, the failure to conduct a reasonable investigation is considered especially egregious when the evidence that would have been uncovered is exculpatory." State v. Weber, 137 Wn. App. 852, 858, 155 P.3d 947 (2007). Finally, a failure to subpoena a necessary witness is deficient performance. State v. Jury, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978), rev. denied, 90 Wn.2d 1006.

Mr. Kongchunji was clearly a necessary witness because he committed the crimes in question and could testify that Mr. Statler had nothing to do with the offenses. But after Mr. Kongchunji's attorney told Mr. Statler's attorney to cease speaking with Mr. Kongchunji, and further stated Mr. Kongchunji would not testify at trial, Mr. Statler's attorney acquiesced. This acquiescence constituted deficient performance.

Thomas, 109 Wn.2d at 226; Jury, 19 Wn. App. at 264; Ratelle, 21 F.3d at 1456-57.

In Weber, the defendant was charged with assault and his attorney failed to investigate two key witnesses. Weber, 137 Wn. App. at 856.

This Court stated:

Here, the failure of defense counsel to investigate witnesses who may have corroborated Mr. Weber's defense could fall below an objective standard of reasonableness. Mr. Weber's attorney conceded that he was aware of the witnesses, and found their potential testimony material to Mr. Weber's defense, but "simply did not get the job done."

Id. at 858. Similarly in this case, Mr. Statler's attorney was aware of Mr. Kongchunji and was aware that his testimony would be material to Mr. Statler's defense if he recanted and admitted that other men committed the crime.

Jury is also instructive. There, the defendant had been in a car accident with two of his friends, after which he kicked out a window of a police car and was charged with malicious mischief. Jury, 19 Wn. App. at 258. The defense attorney briefly interviewed one of the defendant's passengers, but failed to properly subpoena that person or the other passenger for trial, even though these potential witnesses had information relevant to the defendant's mental state. Id. at 260. This Court held that the failure to fully interview the witnesses and failure to subpoena them constituted deficient performance. Id. at 264. Similarly here, counsel's failure to perform a follow-up interview with Mr. Kongchunji and failure to subpoena him for trial constituted deficient performance.

c. Defense counsel's deficient performance prejudiced Mr. Statler, because it is reasonably probable that Mr. Statler would have been acquitted had Mr. Kongchunji testified. As to prejudice, it is reasonably probable that the outcome would have been different but for the deficient performance. Again, the outcome of the subsequent trial on the April 21 robbery demonstrates the effect of Mr. Kongchunji's testimony. Mr. Statler's acquittal on the charges related to the April 21 robbery is sufficient to undermine confidence in the outcome of the case regarding the April 15 or 17 robbery. Accordingly, Mr. Statler's convictions should be reversed and his case remanded for a new trial. Thomas, 109 Wn.2d 222, 226.

In Lord v. Wood, the Ninth Circuit reversed a conviction and death sentence because the defendant's trial attorneys failed to call three witnesses to the stand who would have testified that they had seen the victim alive the day after the defendant was alleged to have killed her. Lord v. Wood, 184 F.3d 1083 (9<sup>th</sup> Cir. 1999). Although defense investigators had interviewed these potential witnesses, the attorneys did not personally interview them and did not call them to testify. The Court of Appeals ruled that this decision was unreasonable: "A lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubt

as to that question to undermine confidence in the verdict, renders deficient performance.” Id. at 1093.

The failure was prejudicial because the prosecution’s case was weak: there was no DNA evidence and no witnesses saw the defendant with the victim on the day in question. Id. at 1094. Additionally, the State’s case depended in part on jail-house witnesses who “were subject to doubt because of their evident self-interest in pleasing the prosecution.” Id. at 1095.

We cannot say that the government’s case was so strong that the testimony of these three witnesses could not have raised a reasonable doubt in the minds of the jurors. Rather, we find the possibility that their testimony would have led to Lord’s acquittal to be sufficient to undermine confidence in the outcome.

Id. at 1095-96 (internal citation omitted). The defendant was therefore entitled to a new trial. Id. at 1096.

As in Lord, Mr. Statler’s lawyer failed to adequately investigate and introduce into evidence information that demonstrated his client’s factual innocence, or that raised sufficient doubt as to that question to undermine confidence in the verdict. And as in Lord, this deficient performance was prejudicial because the State’s case was weak. Mr. Statler’s DNA was not found at the crime scene and none of the four victims identified Mr. Statler as having committed the crimes. Mr.

Statler's conviction was based on the testimony of a jail-house witness who was subject to doubt because of his self-interest in pleasing the prosecution. Indeed, the prosecution's evidence here was much weaker than in Lord v. Wood, so if the failure to call exculpatory witnesses in Lord was prejudicial, it was certainly prejudicial here.

Ratelle is also instructive. There, defense counsel failed to call the defendant's brother as a witness, even though the brother had admitted that he, and not the defendant, had committed the crime in question. Ratelle, 21 F.3d at 1456. The attorney also did not attempt to obtain a statement from the brother which he could have introduced at trial as a declaration against penal interest in the event the brother invoked his Fifth Amendment rights at trial. Id. at 1457. The Court of Appeals concluded:

Mistaken identity would have been a plausible, and quite possibly a successful, defense if [the brother] had admitted to the shooting at trial or his admissions had been introduced in lieu of such testimony. Accordingly, [the attorney's] failure to call [the brother] as a witness or to introduce his admissions, so as to provide Sheldon's mistaken identification defense with its most powerful possible support, constitutes a strong basis for finding his representation of Sheldon ineffective.

Id. at 1458. The court granted a new trial, noting, "it is quite possible that an innocent man was convicted." Id. at 1455.

It is quite possible that an innocent man was convicted in this case as well. The failure to call Anthony Kongchunji to the stand to exculpate

Mr. Statler constituted ineffective assistance of counsel for which a new trial should be granted.

3. THE STATE VIOLATED MR. STATLER'S RIGHT TO DUE PROCESS WHEN IT COERCED MR. KONGCHUNJI'S SILENCE BY THREATENING HIM WITH PROSECUTION FOR PERJURY.

“It is well established that ‘substantial government interference with a defense witness’s free and unhampered choice to testify amounts to a violation of due process.’” United States v. Vavages, 151 F.3d 1185, 1188 (9<sup>th</sup> Cir. 1998) (quoting United States v. Little, 753 F.2d 1420, 1438 (9<sup>th</sup> Cir. 1984)); U.S. Const. amend. XIV. “If a defense witness is threatened and those threats effectively keep that witness off the stand, the defense is deprived of due process of law.” State v. Carlisle, 73 Wn. App. 678, 679, 871 P.2d 174 (1994). Threats of prosecution for perjury aimed at discouraging defense witnesses from testifying not only violate due process, but also deprive a defendant of his Sixth Amendment right to compulsory process for obtaining witnesses in his favor. Vavages, 151 F.3d at 1188 (citing Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972)).

Here, the State’s threats of perjury charges effectively kept Mr. Kongchunji off the stand, depriving Mr. Statler of his right to due process. In a pre-trial discussion with attorneys for Mr. Statler and Mr. Larson, Mr.

Kongchunji indicated that he was willing to recant and that he had in fact committed the crimes with a different group of men. CP 102, 109-10, 173. The defense attorneys proceeded to draft subpoenas for Mr. Kongchunji. CP 173.

However, law enforcement officers then threatened Mr. Kongchunji, telling him that if he testified on behalf of the defendants, he would be charged with perjury and obstruction of justice, and would “receive a long sentence.” CP 111. After receiving these admonitions, Mr. Kongchunji “was afraid to testify,” and refused to testify on behalf of the defendants. CP 111. The government’s silencing of a crucial defense witness violated Mr. Statler’s constitutional rights.

In Vavages, the defendant planned to call his wife as an alibi witness, but the prosecutor warned the wife’s attorney that if she testified falsely, the government could bring perjury charges against her and withdraw from a plea agreement in her own criminal case. Vavages, 151 F.3d at 1187-88. As a consequence, the wife’s attorney advised her to assert her Fifth Amendment privilege, and she did not testify at trial. Id. at 1188. The Court of Appeals reversed the defendant’s conviction and remanded for a new trial, stating that the prosecutor’s statement of his belief that the wife would be lying was “no more than a thinly veiled attempt to coerce a witness off the stand.” Id. at 1190. Furthermore, there

was “no question that the prosecutor’s warnings were a ‘but for’ cause of [the wife]’s refusal to testify.” Id. at 1191.

Similarly here, the State’s threats were a “but for” cause of Mr. Kongchunji’s refusal to testify. CP 111. The State’s attempts to coerce the key defense witness off the stand were successful. But in successfully coercing Mr. Kongchunji off the stand, the State also succeeded in undermining the truth-seeking function of the trial, and in depriving Mr. Statler of due process of law. For this reason, too, the convictions should be reversed and the case remanded for a new trial.

**4. THE CONVICTIONS FOR ASSAULT AND DRIVE-BY SHOOTING VIOLATE DOUBLE JEOPARDY, REQUIRING VACATION OF THE DRIVE-BY SHOOTING CONVICTIONS.**

Mr. Statler was convicted of two counts of first-degree assault (counts 2 and 3) and two counts of drive-by shooting (counts 4 and 5). CP 260. But the convictions for counts 2 and 4 were for the same act of shooting at Clifford Berger and the convictions for counts 3 and 5 were for the same act of shooting at Kyle Williams . CP 20-21. Accordingly, entering convictions for both drive-by shooting and assault violated the prohibition on double jeopardy. The drive-by shooting convictions should be vacated.

a. A defendant's right to be free from double jeopardy is violated if he is convicted of two offenses that are identical in fact and law. The Fifth Amendment to the United States Constitution provides, "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. Const. amend. V. Similarly, article I, section 9 of our state constitution provides, "No person shall be ... twice put in jeopardy for the same offense." Const. art. I, § 9. These clauses protect defendants against "prosecution oppression." State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007) (quoting 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 25.1(b), at 630 (2d ed. 1999)).

To determine whether multiple convictions violate double jeopardy, Washington courts apply the "same evidence" test. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to the contrary, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. Id.; State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other. Freeman, 153 Wn.2d at 772 (citing State v. Reiff, 14 Wash. 664, 667, 45

P. 318 (1896)). Courts evaluate the elements “as charged and proved, not merely as the level of an abstract articulation of the elements.” Freeman, 153 Wn.2d at 777.

Although the State may bring, and the jury may consider, multiple charges arising from the same conduct, courts may not enter multiple convictions for the same offense without violating double jeopardy. Id. at 770. The double jeopardy clause bars multiple convictions arising out of the same act even if concurrent sentences have been imposed. Rutledge, 517 U.S. at 302; Calle, 125 Wn.2d at 775. Where two convictions violate double jeopardy, the court must vacate the conviction on the lesser offense. Womac, 160 Wn.2d at 656; State v. Weber, 159 Wn.2d 252, 266, 149 P.3d 646 (2006).

This Court reviews de novo the question of whether multiple convictions violate double jeopardy. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

b. The assault and drive-by shooting convictions entered in this case are identical in fact and law. The State’s evidence establishing the assaults of Clifford Berger and Kyle Williams was that Mr. Statler fired two shots at them from Matt Dunham’s car. 3 RP 110; 4 RP 349-52. The State’s evidence establishing the drive-by shootings of Clifford Berger and

Kyle Williams was that Mr. Statler fired two shots at them from Matt Dunham's car. 3 RP 110; 4 RP 349-52.

Neither the first-degree assault statute nor the drive-by shooting statute expressly authorizes multiple convictions for a single act. RCW 9A.36.011; RCW 9A.36.045. Accordingly, the two convictions for each act violate double jeopardy because they are identical in fact and law. See Hughes, 166 Wn.2d at 682.

Although assault and drive-by shooting may each have an element that the other does not, this is not determinative. The question is whether the State could have proved either crime in this case without also proving the other. United States v. Dixon, 509 U.S. 688, 698, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). It is irrelevant whether in other scenarios one crime could be established without also proving the other. Id.

Hughes is instructive. There, the supreme court held that the defendant's convictions for rape and rape of a child violated double jeopardy even though "the elements of the crimes facially differ." Hughes, 166 Wn.2d at 683-84. The convictions were the same in law and fact because based on the same act of sexual intercourse with a victim who was under 14 years of age and disabled. Id. at 679, 684. Similarly, in Harris v. Oklahoma, the Court concluded that convictions for both felony murder with the predicate crime of robbery and for robbery itself violated

double jeopardy even though the felony murder statute on its face did not require proof of robbery. Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

Here, the State's theory was that Mr. Statler committed assault because he shot at Clifford Berger and Kyle Williams from Matt Dunham's car, and that Mr. Statler committed drive-by shooting because he shot at Clifford Berger and Kyle Williams from Matt Dunham's car. The two convictions are the same in law and fact, and violate the prohibition on double jeopardy. The drive-by shooting convictions should be vacated. Womac, 160 Wn.2d at 656.

5. THE SENTENCING COURT VIOLATED MR. STATLER'S CONSTITUTIONAL RIGHTS BY DOUBLING THE FIREARM ENHANCEMENTS BASED ON FACTS NEITHER ALLEGED NOR PROVED TO A JURY BEYOND A REASONABLE DOUBT.

a. The imposition of double firearm enhancements without a jury having found the necessary facts beyond a reasonable doubt violated Mr. Statler's right to equal protection. The sentencing court imposed three double firearm enhancements pursuant to RCW 9.94A.533(3)(d)<sup>7</sup> based on

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<sup>7</sup> The statute provides, "(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed."

a prior deadly weapon enhancement that was not proved to the jury beyond a reasonable doubt. The failure to require the State to prove the prior enhancement to the jury beyond a reasonable doubt violates equal protection, because in other cases in which a recidivist fact increases the punishment, the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).

In Roswell, the Court considered the crime of communication with a minor for immoral purposes. Id. at 191. The court stated that in the context of this and related offenses,<sup>8</sup> proof of a prior conviction functions as an “elevating element,” thereby altering the substantive crime from a misdemeanor to a felony. Id. at 191-92. But in each of these circumstances, the “elements” of the substantive crime remain the same, except for the prior conviction “element.”

In fact, the Legislature has expressly provided that the purpose of the prior conviction “element” is to elevate the penalty for the substantive crime. See RCW 9.68.090 (“Communication with a minor for immoral purposes – Penalties”). But there is no rational basis for classifying recidivism as an “element” (which must be proved to a jury beyond a

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<sup>8</sup> Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

reasonable doubt) in certain circumstances and an “aggravator” (which must only be proved to a judge by a preponderance of the evidence) in others. The difference in classification, therefore, violates the equal protection clauses of the state and federal constitutions.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). Although physical liberty is at stake in criminal cases, Washington courts apply rational basis scrutiny to statutes and practices punishing recidivism. Thorne, 129 Wn.2d at 771.

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation.

State v. Smith, 117 Wn.2d 263, 279, 814 P.2d 652 (1991). A “purely arbitrary” classification violates equal protection. Id.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of a prior conviction to double a

firearm enhancement share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

A couple of examples illustrate the arbitrary nature of the classification. Imagine a defendant who was previously convicted of rape in the first degree with a deadly weapon enhancement. If that person communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism the State would have to prove the prior conviction to a jury beyond a reasonable doubt. But if that same person commits robbery with a firearm, in order to punish that person more harshly based on his recidivism the State would only have to prove the prior conviction to a judge by a preponderance of the evidence – even though the purpose of imposing harsher punishment remains the same, and the defendant is necessarily similarly situated to himself.

Another example is the difference between the double enhancement and unlawful possession of a firearm. In this case, Mr. Statler received 15 additional years of punishment based on the fact that he was previously convicted of robbery with a deadly weapon

enhancement – a fact that was not proved to jury beyond a reasonable doubt. But if the State had chosen to charge him with unlawful possession of a firearm, it would have been required to prove the very same prior conviction to a jury beyond a reasonable doubt. WPIC 133.02 (citing RCW 9.41.040(1)(a)).

The legislative classification that permits these results is wholly arbitrary. This Court should hold that the differential treatment violates equal protection. Mr. Statler’s sentence should be reduced by 15 years.

b. The State’s failure to allege in the information facts necessary to double the firearm enhancement violated article I, section 22.<sup>9</sup> The essential elements rule requires that a charging document allege facts supporting every element of the offense and identify the crime charged. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (Recuenco III) (citing State v. Leach, 113 Wn.2d 678, 689, 782 P.2d 552 (1989)). The essential elements rule is based upon article I, section 22 of the Washington Constitution.<sup>10</sup> Quismundo, 164 Wn.2d at 503. The rule applies with equal force to sentence enhancements. Recuenco III, 163 Wn.2d at 434-35.

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<sup>9</sup> This issue is pending before the Washington Supreme Court in State v. Simms, 151 Wn. App. 677, 214 P.3d 919 (2009), review granted, \_\_\_ P.3d \_\_\_ (March 3, 2010).

<sup>10</sup> Article I, section 22 provides, in relevant part: “In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him ....”

Here, the court imposed double firearm enhancements for counts I, II, and III, but only single enhancements were alleged: “and the defendants, as actors and/or accomplices, [were] at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3).” CP 20-21. The jury returned a special verdict on each count finding that Mr. Statler was armed with a firearm at the time of the commission of the crimes. CP 82-84. At sentencing, the court determined that Mr. Statler had previously been convicted of first-degree robbery with a deadly weapon enhancement, and thus was subject to the doubling provisions of RCW 9.94A.533(3)(d).

Because the fact that Mr. Statler had a prior deadly weapon enhancement was not included in the information, the State did not comply with the essential elements rule. The State did allege that Mr. Statler was armed with a firearm during the current offenses. CP 20-21. But that allegation supports only the base level enhancement of five years per count, not the 10 years per count that was imposed. RCW 9.94A.533(3)(a). Mr. Statler received 15 additional years of confinement based upon the court’s finding that he had previously been sentenced to an enhancement. That fact was not alleged in the information. Accordingly, Mr. Statler’s case should be remanded for correction of the sentence. Recuenco III, 163 Wn.2d at 442. Mr. Statler’s sentence should be reduced

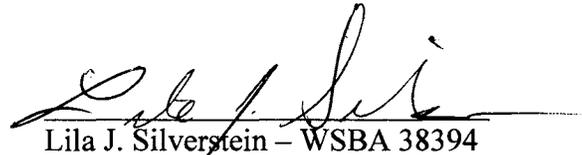
by 15 years, to reflect the facts charged in the information and found by a jury beyond a reasonable doubt.

F. CONCLUSION

For the reasons set forth above this Court should reverse Mr. Statler's convictions and remand for a new trial. In the alternative this Court should reverse and remand for dismissal of the drive-by shooting convictions and for vacation of half the time imposed for firearm enhancements.

DATED this 20<sup>th</sup> day of April, 2010.

Respectfully submitted,

  
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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

STATE OF WASHINGTON,            )  
  )  
                          Respondent,    )  
  )  
                          v.                )  
  )  
PAUL STATLER,                    )  
  )  
                          Appellant.     )

NO. 28195-7-III

**FILED**

APR 22 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
B.

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> MARK LINDSEY, DPA	<input checked="" type="checkbox"/>	U.S. MAIL
SPOKANE COUNTY PROSECUTOR'S OFFICE	<input type="checkbox"/>	HAND DELIVERY
1100 W. MALLON AVENUE	<input type="checkbox"/>	_____
SPOKANE, WA 99260-0270		

<input checked="" type="checkbox"/> PAUL STATLER	<input checked="" type="checkbox"/>	U.S. MAIL
858939	<input type="checkbox"/>	HAND DELIVERY
CLALLAM BAY CORRECTIONS CENTER	<input type="checkbox"/>	_____
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CLALLAM BAY, WA 98326		

SIGNED IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF APRIL, 2010.

X \_\_\_\_\_ *gme*

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