

Cause No. 30212-1-III

**COURT OF APPEALS  
STATE OF WASHINGTON  
(Div. III)**

**FILED**

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STATE OF WASHINGTON

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*Respondent,*

v.

**JACK HEWSON**

*Appellant,*

SUPERIOR COURT No. 2010-01-01038-7  
SPOKANE COUNTY  
HONORABLE LINDA TOMPKINS

**OPENING BRIEF**

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## **INTRODUCTION AND STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

This appeal challenges three fundamental errors that, singly or in combination, deprived defendant Jack Hewson of a fair trial. The issues include two undue restrictions on Hewson's confrontation of a key State's witness and the withholding of impeachment evidence regarding another State's witness.

### **A. ASSIGNMENTS OF ERROR**

Appellant Hewson raises the following assignments of error:

1. The trial court erred as a matter of law, over counsel's objection, by excluding counsel's cross examination of Robert Delao regarding his gang affiliations and his consequent protection of the missing fourth member of the robbery team. See Error 4(a) for related factual errors in connection with this issue.
2. The trial court erred as a matter of law in curtailing, over counsel's objection, counsel's cross examination of key prosecution witness Robert Delao regarding his exposure to the severe sentencing consequences for his role in the armed home invasion.

3. The trial court erred as a matter of law in determining, over counsel's objection and without an evidentiary hearing, that State's witness James Crabtree did not have a basis to believe that he was going to have a "good word" put in for him in exchange for his cooperation in testifying against Hewson. See Error 4(b) for related factual errors in connection with this issue.
4. The trial court erred in finding the following facts during post trial motions based upon insufficiency of the evidence.
  - a. The basis for the bias attack on Robert Delao's gang membership did not involve only the matters cited by the lower court in its oral or writing findings when it denied the defense motion for a new trial. The defense did not solely rely on the business animus for proffering Delao's gang affiliation.
  - b. The certificates from prosecutor Cipolla and case agent Miya (CP 96-99) in response to the defense's post-trial allegation of a *Brady* violation

do not support the court's finding "[t]hat the State proffered that no such promise was made." CP 127.

## **B. STATEMENT OF THE CASE & PROCEEDINGS**

The defendant was charged by information with one count each of Conspiracy to Commit 1<sup>st</sup> Degree Robbery and 1<sup>st</sup> Degree Burglary. Three firearm enhancements were brought with each charge. CP 1-2.

The defendant was tried before a jury commencing with a video perpetuation deposition on February 2, 2011, and a live trial on May 17-28, 2011. The jury returned guilty verdicts on both substantive offenses and included two of the three firearm special verdicts as to each offense. CP 103-104.

The defendant brought post-trial motion seeking a new trial based on the lower court's exclusion of a key witness's gang affiliation and on an allegation of a *Brady* violation. The lower court heard argument and accepted proffers from the State before ruling against both motions. CP 118-123, 126-128, 96-99.

## **C. FACTS**

### **1. State's case**

The State charged Mr. Hewson with being a member of a four-person robbery/burglary team involved in a botched home-invasion in the fall of 2007. The State's evidence showed that three members of the conspiracy entered the residence of Jamie Robinson armed and intending to steal "drugs, guns, and money." RP 192-193. The first to enter were Delao and Andrew Oakes, both masked. RP 30, 237. Confronted by Ms. Robinson, Delao and Oakes fled the scene. RP 274. The next to enter was alleged to be Defendant Hewson, without mask but wearing a hood. RP 276, 60. When Robinson confronted this man, he too fled. RP 278. The last member, the getaway driver Joseph Hoofman, remained nearby in a Jeep owned by Hewson's girlfriend. RP 136. Hoofman was arrested on a traffic stop shortly after Robinson called 911. RP 29, 30. A search in the vicinity failed to locate the other three accomplices. RP 29. An inventory search of the Jeep turned up Jack Hewson's name on paperwork. RP 138. Months later, the arrested driver Hoofman was interviewed, offered immunity, and he agreed to cooperate. RP 28. Within weeks Hoofman, Delao, and Oakes (who were housed together at a local

jail) all named Jack Hewson as the fourth member of the conspiracy. RP 29. Shown sets of “associates” believed to be connected to Delao and Oakes over the next weeks, victim Jamie Robinson ultimately picked out Defendant Hewson as the fourth member. RP 29, 94.

Charges were brought 2 years later with the State contending that Mr. Hewson was “the man who planned this, set it up and did it.” RP 29, 509:12. The State challenged Hewson’s alibi defense noting that one witness gave a conflicting statement in December, 2010 regarding Hoofman’s whereabouts on the night of the robbery in November, 2007. RP 322-323, 333, 427-428.

## **2. Defense Theory**

Hewson’s defense was alibi. *In Limine Hearing 5/9/11*, at 5.<sup>1</sup> He claimed that the getaway driver was a childhood friend, generally a transient, who was nevertheless an occasional household guest in the Hewson household. RP 317, 389. According to the testimony of Hewson and two women in his household, Hoofman stole Hewson’s girlfriend’s Jeep the night of the robbery. RP 323-324, 392. Finding the Jeep missing the next morning and knowing Hoofman, Hewson

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<sup>1</sup> To avoid confusion with the 5/17/11 trial transcript pagination, all references to the 5/9/11 *in limine* hearing will designate the date.

first called the jail and learned Hoofman had been arrested for DWLS and the Jeep impounded. RP 392. Hewson refused to post Hoofman's bond. RP 393.

**a. Previous animus against Hewson: Progressive Roofing**

Defense witnesses related that a serious rift had occurred between Delao, Oakes, and Hewson months before the robbery. RP 422-423. The rift involved Progressive Roofing, a business started by Hewson as superintendent but owned by Delao. RP 369-370. Six months prior to the Robinson robbery, Hewson fired Delao's close friend Oakes. RP 382. (Oakes, for his part, testified to the opposite: that he and Delao fired Hewson. CP 30:11-24.) The lower court noted that Oakes and Delao appeared particularly proud of the fact that they had "excluded him and he was an outsider." CP 130. The court noted that the "testimony of Mr. Oakes and Mr. Delao combined established very clearly that there was a business animus." CP 130:13-15. Roofing contractor Mark Lang, one of Hewson's general contractors, noted that Hewson appeared to be a credible businessman, RP 339, but that he and Delao failed on a particular project. RP 341. Pastor Broderhausen, a customer of Progressive Roofing, also testified regarding business transactions with Hewson

and Delao. Broderhausen stated that Delao had asked him to make payment directly to him and not to Progressive Roofing. RP 350.

Hewson's probation officer, too, specifically stated that Delao had targeted business partner Hewson a few months before the robbery by trying to get Probation to take action against Hewson. RP 423.

**b. Hewson had no reason to target Robinson's home**

At trial Hewson faced four eye-witnesses: the getaway driver (Hoofman), two of the three accomplices who entered the residence (Delao and Oakes), and the burglary victim herself (Robinson).

According to Delao and Oakes, Hewson masterminded the selection of Ms. Robinson's home because he claimed that they could steal "drugs, guns, and money". RP 192-93. The accomplices stated that based on Hewson's advice, they expected as many as seven armed men might be inside. RP 192.

The Defendant believed that James Crabtree, who had resided with the victim in early 2007, could testify that the victim in fact *had* seen Hewson on more than one occasion. In particular there was evidence that Robinson saw him at her home and that she saw him in

connection with circumstances that could cause her to later confabulate his presence on the night of the robbery.

Crabtree testified for the State that, as Hewson's occasional drug source, he recalled Hewson coming to Robinson's home four or five times to obtain small quantities of drugs. RP 214:21-24, 218. Crabtree stated that he did not introduce Robinson to Hewson. RP 215. He knew of no reason why Hewson would believe that Robinson's house contained drugs guns or money. RP 226:15 to 227:7. Crabtree admitted, however, that he also knew and had spent time with Delao, having met him in 2003 and spent time with him in prison in 2006. RP 211. Crabtree admitted having a good relationship with Delao. RP 212:21-22. According to Crabtree, Delao never came to Robinson's home. RP 216.

**c. Oakes was to be sole beneficiary**

In addition, Hewson pointed out that key accomplice, Delao, related to the jury that it was agreed among the co-conspirators that if the robbery went bad Andrew Oakes would take the fall.

**MR. FINER \* \* \*** if something went wrong, there was an agreement that Mr. Oakes would take the fall. Do you remember saying that?

A (by DELAO) Yes, I remember saying that.

Q \* \* \* Can you explain how it was he was taking the fall for you?

A \* \* \* if everything went right, that everything we gained financial, whether it be cash, drugs or whatever we got from the score, it would all go to Mr. Oakes.

RP 208-209.

**d. Defendant's theory of the case**

The defense's theory of the case therefore combined several factors, among which the principal thrust was the bias of each of the three accomplices, including their personal motivation to testify falsely against him and to use the false identification of Hewson to protect the actual (unidentified) fourth conspirator. *In Limine Hearing 5/9/11*, at 34. See footnote 1 at page 5, above.

Defendant's theory of bias included Delao's stealing Hewson's share of their roofing business months *before* the robbery/burglary: first by sabotaging Hewson on his bids and projects — then by attempting to have his probation violated — and ultimately by firing him and promoting accomplice Andrew Oakes to take Hewson's place. As part of the *res gestae*, Hewson showed that Delao and

Oakes used the roofing company to launder drug proceeds, that they structured events to cause Hewson to fail in his work, that they tried to use Hewson's probation officer to assist them in forcing Hewson from the company and to return property allegedly belonging to the company. All these matters were demonstrated at trial through the testimony of Hewson's construction clients and contractors, his probation officer, and from concessions by Oakes and Delao themselves. CP 120 (court recognizing that animus was established).

Victim Robinson's identification of the Defendant arose from her third photo-montage session, shown to her some 2+ months following the crime. She initially stated some reservation ("90%" certainty when she first saw the photograph) in her identification, RP 433:23 to 434:1, which reservation changed by the time of trial (97%). RP 300-301. Her unshakable opinion was that she had never seen the Defendant in any other circumstance prior to the robbery. RP 277. She positively identified him in court. RP 277.

Hewson's closing argument emphasized that Delao and Oakes had stolen Hewson's business, fired him in retaliation for his terminating Oakes, and set him up as the organizer of the robbery/burglary at Robsinson's house. RP 493:22 to 499:22. He was

precluded, however, by virtue of a series of *in limine* rulings, from arguing that the set up was based on Delao's intention to protect a gang affiliation.

### **3. *In Limine* rulings**

#### **a. Initial ruling (2/1/11)**

The lower court's initial *in limine* ruling regarded only the use of the accomplices' prior bad acts. The lower court entered this ruling during a video preservation deposition conducted months before the jury trial. CP 35-36. The witness was Andrew Oakes. Hewson's counsel cross examined Oakes about Oakes's previous testimony against Delao given before a federal magistrate at Delao's federal bail hearing. Hewson's defense counsel asked Oakes to confirm that he had testified regarding Delao's drug dealing.

**Q** You described knowing him pretty well?

**A** Yep.

**Q** You described your drug deals with him?

CP 35.<sup>2</sup>

The State objected that Hewson's question went to prior bad acts "that are not impeachment." Defense counsel proffered the evidence

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<sup>2</sup> Oakes Perpetuation Deposition 2/1/11, at 28.

as bias against Hewson and stated that he would ask Delao about his affiliation with a specific gang in later testimony.

**MR. FINER** [The questions] are for bias, Your Honor. I will be able to establish that the gentleman has testified against his other co-defendant in this case alleging substantial connections with gang activity. Mr. Delao will take the stand in this case later. He will also be asked the question about his gang activity, and this goes specifically to bias issues involving my client who met these gentlemen while in jail.

**THE COURT:** All right. The extent of prior testimony, adverse testimony is relevant and admissible. The problem is the detailed nature of the activities, and that is where Rule 403 may result in unfair prejudice so to the extent that, Counsel, you can just keep the reference to the activities without particulars and specifics you may proceed. \* \* \* Prior drug deals is what I believe you had, how you framed the question.

That would be violative of the order so you will have to rephrase, but you may proceed along the balance.”

CP 35<sup>3</sup>. Having advised the lower court that he would later inquire into Delao’s gang relationship and having received permission to “proceed along the balance” counsel understood that there was no order restricting questions regarding Delao’s gang affiliation, only details of prior drug deals.

Accordingly, counsel next asked Oakes referencing Delao’s gang affiliation — as opposed to specifics about drug deal — and the question was asked and affirmatively answered without objection from the State. CP 36:8<sup>4</sup>.

Following this testimony in February, 2011, Defense developed its case for the upcoming May trial in large part upon the direct ruling from the Court that, while particulars and specifics on past crimes was off limits, counsel could “proceed along the balance” — i.e., Delao’s gang relationship.

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<sup>3</sup> Oakes Perpetuation Deposition at 28.

<sup>4</sup> Oakes Perpetuation Deposition at 29:8.

**b. Second ruling (5/9/11)**

The week prior to the May jury trial, the State formally moved *in limine* to restrict the Defense from referencing gang membership. Defense counsel asserted that Delao's gang membership was evidence supporting his bias against Hewson and in favor of members of his affiliated gangs. Counsel specifically stated that the bias of the alleged accomplices went to the heart of the defense:

**MR. FINER \* \* \*** The bias evidence in this case is going to affect three of the State's key witnesses and denial of the ability to bring out those biases would cripple the Defense . .

*In Limine Hearing 5/9/11, at 18:15-19.*

The Court received briefing on the matter and held oral argument. The State asserted that gang bias is extreme and that the unique circumstances of *United States v. Abel*, 469 U.S. 45 (1984)(one gang member testifying against another) distinguished the rule. As far as the State was concerned, there was no evidence that "gang membership in any way affected this case." *In Limine Hearing 5/9/11, at 32.*

Defense counsel proffered that the issue of Delao's gang membership was not guesswork or speculation: Delao's membership was made plain during sworn testimony at Mr. Delao's federal bail hearing; and, according to the State's case agent who testified at that same hearing, Delao had gang tattoos and was a member of the *Sureños* gang of Southern California. *In Limine Hearing 5/9/11*, at 33.

Defense counsel specifically stated that the gang membership was important because the issue in the case was whether Mr. Hewson was the missing fourth member of the robbery conspiracy and burglary of Ms. Robinson. Defense proffered the theory that the actual fourth member was being protected. *In Limine Hearing 5/9/11*, at 34.

The Court ruled that the unlike the *Abel* case, here the Defendant was not proffering "the very precise evidence available to indicate" that Delao was bound and obligated to provide false information to protect other members or similar tenets. *In Limine Hearing 5/9/11*, at 35. Thus, in the Court's view, the Defense had not made the necessary foundation to make membership sufficiently

relevant. The Court explicitly held that testimony regarding gang membership was not permissible. *In Limine Hearing 5/9/11*, at 35-36.

**c. The State Introduces Delao's Gang Affiliation**

At trial the State played the entire Oakes deposition video, without redaction or limiting instruction, including the following exchange regarding Delao's membership in a gang:

**Q (By Mr. Finer)** At the bail hearing where Mr. Delao's bail was being reconsidered you testified regarding his prior criminal acts; true?

A True.

**Q** And you testified about them from first person experience?

A True.

**Q** His gang affiliation, you testified to that too; did you not?

A True.

CP 36.<sup>5</sup>

The State interposed no objection: not at the time of the video testimony, not at the time of the Court's initial ruling that permitted

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<sup>5</sup> Oakes Perpetuation Deposition at 29.

defense counsel to address the “balance” of his questions, and not during the playback of the video.

The Defense did not seek to exploit the issue without first clarifying the Court’s ruling. The issue arose after the State finished its direct of witness Delao. Prior to cross examination, defense counsel re-raised the gang affiliation issue under the bias and 404(b) plan theories. RP 159-168. The State again argued that gang membership is considered “extremely prejudicial” and referenced 404(b) considerations such as motive, intent, etc. RP 160. Defense counsel added to his original argument regarding gang membership as a basis to protect the fourth member and falsely accuse Mr. Hewson. Counsel expanded the basis for admission arguing that there was testimony at Delao’s original bail hearing in federal court that he and Oakes had used the roofing business to launder drug money and plotted to remove Hewson from the business. RP 162-164. The Court agreed to permit the business history including the plot to remove Hewson from the roofing company but, again, refused to permit counsel to reference Delao’s gang membership as grounds for its defense theory that Delao (and through his influence, Oakes, and the

getaway driver) were protecting the identity of the actual fourth accomplice. RP 163:15 to 164.

The Court's rulings on the business history and plot against Hewson was distinct from its handling of the gang-bias issue. Using a balancing analysis the Court ruled in favor of admitting the fact that Delao and Oakes engineered Hewson's firing from their roofing business:

"to the extent that the personal bias against can be established by the removal, by the firings, that would be appropriate balance."

RP 164:2-4.

The Defense's other theory regarding bias was rejected. The Defense had argued that, independent of Delao's personal animus and bias against Hewson, his gang membership was fair game for cross-examination in order to show a bias to protect an unidentified, gang-connected, fourth member of the robbery/burglary team. The Court forbade questions regarding Delao's gang affiliations. The Court held that the Defense failed to provide a foundation on all fours with the facts in *Abel*. *In Limine Hearing 5/9/11*, at 35:14-16. The Court held that gang membership alone was "certainly more

prejudicial” and a distraction to the jury and “does not provide the necessary probative value for veracity, reliability of testimony.” *In Limine Hearing 5/9/11*, at 35:17-23.

In closing argument defense counsel attempted to reference — based on the unredacted, un-objected to and unedited, Oakes testimony — that Delao had gang ties and intended to argue that he would be motivated to protect a fellow gang member. RP 486. Defense counsel began by referencing Oakes’s acknowledgement during the video testimony that Delao was a gang member. The State raised no objection to the first reference:

**CLOSING by Mr. Finer \* \* \*** In 2008, here is what we do know. After this botched robbery/burglary at Ms. Robinson's house Mr. Oakes got his deal and cut years of his time off when he agreed to implicate Mr. Hewson. We also have Robert Delao. Mr. Oakes told us, "Oh, yeah. Robert Delao, my good friend, old gang member, we go way back."

RP 484:15-21.

Moments later, however, as defense counsel prepared to argue the import of this fact, stemming from the revelation that Delao testified that *Oakes* was going to obtain all the benefits of the robbery (RP 208-209) and consequently the accomplices decided that Oakes would take the fall if anything went wrong.

**CLOSING by Mr. Finer \* \* \*** This was a deal that Andy Oakes was going to benefit from. It is as if Mr. Hewson's experience or assistance at that moment had just sort of evaporated. That is from the Delao, gang member, friend of Delao –

**MR. CIPOLLA:** Objection, Your Honor.

RP 485-486.

Defense counsel stated that Delao's gang membership was put into evidence during the playback of Oakes's perpetuation video. RP 486:5. The State, however, disagreed that gang membership had been previously put into evidence and misstated the record:

**MR. CIPOLLA:** Your Honor, on the video there was argument of whether Mr. Finer could go into that and the reference of gang, the argument where the Court denied him going off the gang membership. That was never testified to. It was argument by Counsel.

**MR. FINER:** That is simply incorrect. I was ordered I could not go into it with Mr. Delao. Mr. Oakes testified on video. It was played in front of this jury. He explained [sic] Mr. Delao, a gang member, in open court on the video.

RP 485.

The lower court acknowledged that the Oakes testimony was played without redaction, and stated that “if the objection was sustained, it should have been edited so as not to run. It was not.” RP 487:15-17. The court did not recollect that the State had made no objection to Andrew Oakes’s gang membership testimony. RP 36. (An objection to gang affiliation was raised, for the first time, during the May 9 *in limine* motions, months after Oakes’s February testimony.) The only objection made at the time of Oakes testimony resulted in a ruling that forbade defense counsel from going into the specifics of particular crimes. CP 34-36.<sup>6</sup>

The lower court ordered defense counsel to forego further reference to the Oakes testimony and counsel complied. RP 485-486. Due to the ruling, the jury heard no argument connecting Delao’s gang affiliation or its part in the accomplices’ plan to remove a disfavored business partner — Hewson — from Delao’s roofing company and, independently, part of Delao’s bias to falsely cast

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<sup>6</sup> Oakes Perpetuation Deposition, at 26-28.

Hewson as the fourth member of the robbery/burglary in order to protect a gang partner.

**d. Final *in limine* ruling**

During the cross examination of Delao, defense counsel sought again to show Delao's bias, this time by revealing to the jury Delao's sentencing exposure at the point in time he agreed to give State's evidence. The cross established that Mr. Delao had shaved three years from the substantive offense. RP 201:18 to 202:6. Counsel attempted then to show that in fact, Delao escaped exposure to some 24 years in Washington State firearm enhancements, beginning with the penalty for one firearm. RP 202:7

The lower court, *sua sponte*, halted the cross examination. RP 202:9. The lower court stated it would not instruct the jury to disregard the testimony to that point in time, where Delao had stated he had saved himself "not much" time, "three years off". But counsel was forbidden from showing that Delao escaped State prosecution for up to three firearms distributed over two felonies and thus saved himself more than 21 years above what he admitted to the jury. Counsel stated that he had more on this topic but that he would adhere to the court's ruling despite concern that this was reversible error. RP 203.

The jury returned guilty verdicts on the Conspiracy to Commit First Degree Robbery (Class B) and First Degree Burglary (Class A),

with two special verdicts for weapons on each offense (totaling 16 years on special verdicts alone) and acquitted on two of the six firearm enhancements. CP 88-95.<sup>7</sup>

#### **4. Post-trial rulings**

The defense raised two issue post-trial: (1) the lower court's restriction on Delao's gang membership and any basis Delao and his accomplices would have to protect an unidentified gang member by accusing Hewson as being the fourth member in the failed robbery/burglary, and (2) the defense's discovery, post-trial, that witness Crabtree testified under a belief that he would be given consideration for his testimony in his pending controlled substance prosecution. No new facts were presented to the lower court regarding the first issue. The facts presented to the lower court regarding Crabtree's eleventh hour interview with the State prior to his testimony included the following facts:

Prior to trial, the Defense sought all *Brady* material. See CP 6, granting the Omnibus motion for exculpatory evidence.

Months later the Defense gave notice that one of its witnesses was James Crabtree. RP 431. Mr. Crabtree was a former housemate of the victim's and had also been housed with Hewson and Delao

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<sup>7</sup> Although Robinson testified to seeing 3 firearms (assault rifle, shotgun, and pistol), RP 273, 278, Delao and Oakes stated that the shotgun was a hammer. RP 149:7, 153:18, 188:1, and see RP 52.

when all three were imprisoned at the same correctional facility. RP 211-212. Hewson advised the trial court in briefing his post-trial motion that he originally expected that Crabtree would testify that Hewson had been inside Robinson's house in early 2007 while Robinson was present and that Robinson had formed an awareness and even an animus against Hewson based on her concern over his and Crabtree's using drugs together. On the eve of trial, however, the State reached Mr. Crabtree first. RP 216-217. He testified that Mr. Hewson had never come *into* the living portion of the residence nor had any direct encounters with Ms. Robinson. RP 222, 215. That portion of Crabtree's testimony was consistent with Robinson's and contradicted Hewson's.<sup>8</sup> He equivocated during cross examination at one point and agreed that Robinson was at home on some of the instances when Hewson came to her house to visit Crabtree. RP 220:16-19.

A month after Hewson's trial the defense learned for the first time that during Crabtree's trial testimony he was facing potential criminal charges. Contacted by defense investigator, Larry Valadez,

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<sup>8</sup> Crabtree was not a wholly adverse witness: Crabtree testified that he could not understand why Hewson would target Robinson's home for a robbery designed to get drugs, guns and money as Hewson knew Crabtree could only access a modest retail quantity of cocaine by leaving the residence. RP 226-227.

Crabtree made the following statement regarding the State's contact with him the week before trial.

Mr. Cipolla met with me at my home in early May, 2011, along with Detective Miya. I did ask if he would put in a good word for me on the pending controlled substance charge and he said he would. I understood that I was being subpoenaed to testify in the Hewson case and *I wanted to know whether I would get any consideration for my help.* We did not discuss details but I was given the impression that my testimony would get a good word from Mr. Cipolla to the prosecutor in my controlled substance case.

CP 101 (emphasis added).

The State had not disclosed prior to or during trial that it had made any type of agreement with Crabtree for his testimony, or that it had given Crabtree a basis to believe he could obtain consideration of any kind in exchange for his testimony. The State did not disclose that Crabtree was expecting that the State would put in a "good word" for him.

In response, the State submitted the following statements:

- In response to Crabtree's concerns about scheduling his testimony and his upcoming case, Mr. Cipolla indicated to Mr. Crabtree that he would let the prosecutor on his case know he was testifying in the present matter and that he was under subpoena. CP 96-97, 99.

- That it would be inappropriate for him to get involved in plea offers and negotiations in Crabtree's pending case. "If the prosecutor or defense counsel had any questions they could contact Mr. Cipolla." CP 97.

- That the prosecutor specifically told Mr. Crabtree, after the initial interview, "I would let the prosecutor on his case or cases know he was testifying in the case at bar if there were any issues." CP 99.

On August 31, 2011, the lower court heard argument in support of Hewson's two bases for his motion for a new trial. The court entered written findings and conclusions, CP 126-28, based upon its oral decision, CP 118-123. The lower court found that, regarding the gang testimony:

1. The defense proffered that the witness Delao was a gang member through the testimony of an accomplice witness.

2. There was no other evidence or testimony proffered regarding gang membership, although the lead detective was present in a previous federal bail hearing testified [sic] that Deloa [sic] was a gang member.
3. That the video deposition of Andrew Oakes referred to Delao as a gang member, without objection and came in unedited.

And regarding the Brady issue:

4. James Crabtree was a witness in this matter proffered by the State at the time of trial.
5. That Crabtree believed that the prosecutor was going to “put in a good word for him.”
6. That the State proffered that no such promise was made.

CP 127.

The lower court held, regarding the gang testimony, that Delao’s gang affiliations were “not relevant” and that under ER 403 the evidence was far more prejudicial than probative. CP 128. The court held, regarding the *Brady* issue, that there was no violation under the five-prong criteria in *State v. Riofta*, 166 Wn.2d 372 (2009). CP 128. The court noted, in its oral remarks that the gang evidence was

offered to show the business animus between Delao and Hewson, which was independently established already from the testimony of Oakes and Delao. CP 120. The court rejected any use of Delao's gang affiliation for veracity as there had been no proffer of Delao's gang's tenets. The court stated that the ruling would protect Hewson from speculation as to his possible membership in a gang. CP 120-121. Finally, regarding Hewson's *Brady* claim, the court noted in its oral ruling that the claimed reference to putting in a good word was "too fleeting" to have been subjectively or objectively sufficient to create a motive to fabricate. CP 122.

## **ARGUMENT**

### **I. THE TRIAL COURT CURTAILED HEWSON'S CONFRONTATION OF DELAO, DESPITE THE STATE'S INTRODUCTION OF DELAO'S GANG AFFILIATION, EMASUCLATING HEWSON'S BIAS ARGUMENT THAT ACCOMPLISES WERE PROTECTING UNDISCLOSED FOURTH MEMBER**

**Standard of Review** This Court reviews Confrontation errors *de novo*. *State v. Turnipseed*, 162 Wn.App 60, 68 (Div 3, 2011) (noting the distinction from abuse of discretion standard applied to cross examination constituting harassment, prejudice, confusion of the issues, repetition or is of marginal relevance). Errors involving non-

constitutional evidentiary rulings are reviewed for abuse of discretion. *State v. Mason*, 160 Wn.2d 910, 922 (2007). Abuse of discretion is shown when a decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. McDaniel*, 83 Wn.App. 179, 185 (1996).

### **Argument**

This State recognizes that bias — as opposed to mere impeachment — implicates the right to confrontation. See *State v. Gerard*, 36 Wn.App 7, 11 (1983) (citing *Davis v. Alaska*, 415 U.S. 308, 315-18, (1974)). Although the right to confrontation is “of constitutional magnitude” two general limits pertain: “(1) the evidence sought to be admitted must be relevant; and (2) the defendant’s right to introduce relevant evidence must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process.” *State v. Perez*, 139 Wn.App. 522, 529 (Div 2, 2007).

Hewson argues, below, that the matter of Delao’s gang membership and the actual number of years he saved by testifying against Hewson went directly to his bias to testify untruthfully, were proper cross-examination topics, did not embarrass or harass the

witness, and would not have caused confusion for the jury nor disrupt the fairness of the fact-finding process.

**a. Admission of bias evidence**

Evidence of bias and fabrication is generally favored. *State v. Knapp*, 14 Wn. App. 101 (1975). Bias evidence is not subject to 404(b) or 608. It may include collateral matters; it may be proven by extrinsic evidence; and, unlike the rule for prior inconsistent statements, proof of bias has no foundational requirements prior to admission. *State v. Spencer*, 111 Wn. App. 401, 409 (2002); and see 5A Washington Practice, § 607.8 and -.9.

The decision in *United States v. Abel*, 469 U.S. 45 (1984) is instructive. In *Abel*, the Supreme Court acknowledged that gang membership, including “a full description of the gang and its odious tenets”, “bore directly on bias, not only for the *fact* of bias but also on the *source* and *strength* of [the witness’s] bias.” *Abel*, 469 U.S. at 53 (emphasis in original). The Court stated that a “witness’ and a party’s common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias.” *Id.*, at 52. There is no requirement, in a bias impeachment, to show that the witness has subscribed to any or all the tenets of the organization. “For the purposes of the law of evidence the jury may be

permitted to draw an inference of subscription to the tenets of the organization from membership alone.” *Id.*, at 53. Finally, the Supreme Court noted that the trial court’s limiting instruction on gang affiliation helped “ensure that the admission of this highly probative evidence did not unduly prejudice respondent.” *Id.*, at 54.

Here, however, the lower court distinguished *Abel* and held that Hewson lacked the specifics offered in that case. The court then held that, despite the State’s insertion of co-accomplice Andrew Oakes’s perpetuation testimony referencing Delao’s gang membership or developing evidence regarding the gang’s tenets, the issue was not available for Defendant to argue during closing.

In consequence, while the Court initially permitted and the jury heard Oakes state that Delao was a gang member, asking Delao *directly* regarding his gang membership was over the line. In further consequence, Jack Hewson was prohibited from developing the argument that Delao and accomplices would have reason to protect an unidentified fourth member, pinning culpability onto Jack Hewson. In the face of Delao’s and Oakes’s evident “business” animus against Hewson, this ruling eviscerated Hewson’s confrontation rights and was manifestly unreasonable.

In Washington, even the *possibility* of gang membership as an aspect of bias or motive to testify falsely has been sufficient to permit

admission. In *State v. Craven*, 67 Wn.App. 921 (1992), the State was permitted to question the defendant and defendants' witnesses regarding their "clothing and possible gang membership." As the Court noted, "the possibility that Craven and other defense witnesses were in the same gang justified questions about gang membership for impeachment purposes." *Craven*, 67 Wn. App. at 928.

In this case, one accomplice acknowledged that another was a gang member. It was established that both Delao and Oakes had engineered the removal of the Defendant from their roofing business. It was established that Hewson had attempted to run the business legitimately. It was established that Delao had considered using the company to launder his drug proceeds and at least on one occasion had a business payment diverted to his personal account. Questioning Delao regarding his gang affiliation was not a fishing expedition nor unrelated to the case. It was known by the defense that he had been giving cooperation to federal authorities against rival gang members in the Eastern District and that his membership in the *Sureños* gang was a well-established fact.

The State argued that the admission of Andrew Oakes testimony regarding Delao's gang membership was inadvertent error. The argument simply ignores the actual timeline and impact of the court's rulings. The trial court did not forbid the admission of Oakes

testimony. In fact, the court granted the defense the opportunity to go into Delao's gang affiliation during the Oakes video deposition. During the Oakes perpetuation deposition, the State objected to reference to defense counsel questioning Oakes regarding his and Delao's specific crimes. In argument, defense counsel stated the following:

**MR. FINER** [The questions] are for bias, Your Honor. I will be able to establish that the gentleman has testified against his other co-defendant in this case alleging substantial connections with gang activity. Mr. Delao will take the stand in this case later. *He will also be asked the question about his gang activity, and this goes specifically to bias issues involving my client who met these gentlemen while in jail.*

CP 35 (emphasis supplied).<sup>9</sup>

The proffer made clear that Delao's gang connections and the bias such connections create would be central to the defense. *The lower court did not bar this inquiry, but ordered counsel to stay away from specific*

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<sup>9</sup> Oakes Perpetuation Transcript 2/1/11, page 28.

descriptions of past crimes. CP 36-37. The balance of the inquiry, the lower court ruled, was permitted.

Following post trial motions, the lower court entered four conclusions of law, CP 128, determining that Evidence Rule 403 weighed in favor of exclusion because the gang evidence was “far more prejudicial than probative *and not relevant.*” CP 128. The lower court held that case law excluded Delao’s gang membership “*as a matter of law.*” CP 128. The lower court concluded “[t]hat defendant theory of the case was not affected by the exclusion of this evidence.” CP 128.

The lower court premised these findings in part on the erroneous belief that the sole bases for proffering Delao’s gang membership was “to establish the business plan, the money laundering, the gains and spoils, and efforts to conver them into a purported legitimate business.” CP 120:8-12. Hewson specifically disputes this finding as erroneously trimming the argument made to the court. Hewson also relied on the theory that Delao as his two accomplices were protecting an unidentified fourth member based on Delao’s gang allegiance. RP 163:15 to 164.

**b. Gang membership, as a prelude to gang tenets, is admissible for bias.**

In *Abel*, the defendant and two accomplices were indicted for a robbery. The accomplices pled guilty. Accomplice Ehle agreed to testify against Abel. The defense proffered a separate witness (Mills) to attack Ehle's testimony based on alleged statements by Ehle to Mills to the effect that Ehle would testify falsely in Abel's trial. *Abel*, 469 U.S. at 47. The prosecutor in turn disclosed that he intended to elicit from Ehle that all three were gang members and that one of the tenants of the gang was to give false testimony. Defense objected on the grounds of prejudice to the defendant Abel. At trial the prosecutor was ordered to not use the term "Aryan Brotherhood," as being too prejudicial but permitted inquiry into "a secret type of prison organization" with a creed for lying. Punishment for breaching the tenets was excluded. The defendant did not testify.

The government's witness, Ehle, testified that it would have been suicide for him to have said to Mills what was attributed to Ehle, thus challenging Mills' exculpatory testimony. The jury convicted Abel and on appeal the Supreme Court held that the district court was within its discretion to permit the prosecutor to introduce Ehle's testimony that Mills and Abel were gang members. The Supreme Court stated:

We hold that the evidence showing Mills' and respondent's membership in the prison gang was sufficiently probative of Mills' possible bias towards respondent to warrant its admission into evidence.

*Abel*, 469 U.S. at 49.

In other words, there was no violation of *Abel's* rights to a fair trial stemming from the prosecution's use of the gang affiliation of the defendant, his accuser Ehle, and the defense's exculpatory bias witness.

The Court went on to discuss the central role in bias evidence. Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which *might* lead the witness to *slant, unconsciously or otherwise, his testimony in favor of or against a party.*

Bias may be induced by a witness' like, dislike, or fear of a party, *or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness'*

*testimony*. The “common law of evidence” allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to “take the answer of the witness” with respect to less favored forms of impeachment.

*Abel*, 469 U.S. at 52 (italics supplied).

Hewson acknowledges that the *Abel* ruling involved a case with defendant and key witnesses being members of a single gang. It is not correct to confine the ruling to such narrow instances.

In Hewson’s case, the defendant’s theory was that there was an unidentified fourth member of the group, a member who was associated with Delao whom Delao was protecting due to his gang membership. That Delao was a member of *Los Sureños* gang was not speculative. As for the tenets of the gang, these were never reached because the Court forbade any inquiry along any lines touching on gang membership, much less the tenets of the gang. The State would have it that only if Hewson was also a gang member would the evidence of their membership and tenets be admissible. Under that approach, the defense was precluded from pursuit of the truth of

Delao's allegiances — and his gang's tenets — before it left the starting gate.

Given Delao's candid remarks on the stand, including his admission regarding his intentions to use Progressive Roofing to launder his drug money, there is little substance to an argument that the State would have been unduly prejudiced by admission of his membership in *Los Sureños*. He also freely admitted to providing assistance, and testimony, against others. Had the defense been permitted to inquire, it would have been shown that Delao's testimony was against rival gang members. The inference that he protected his own, or that his gang protected its own, was fair game.

Hewson's defense was *alibi*. Given the number of individuals who entered Robinson's home — three, two of whom were State's witnesses — it is plain that Hewson's defense must show that there was an unidentified accomplice. Hewson himself had no suspect to offer, but he could show that along with his alibi there was a recent deep rift between him and Delao/Oakes, that they had stolen his business, used it at least partially as a front, took his truck, and tried to have his probation revoked — all in the weeks leading up to his allegedly masterminding the Robinson robbery/burglary. Hewson

argued that in addition to his being excluded by Delao/Oakes since that spring, the robbery itself was intended exclusively for Oakes' benefit. Hewson argued, too, that he knew there was nothing likely worth stealing from the Robinson residence.

These matters were established by the State's own witnesses and two business persons who had dealings with Delao/Oakes and Mr. Hewson. Hewson's theory of the defense, that Delao and company were hiding a fourth unidentified gang-affiliated member, was consistent with the evidence and should have been allowed even if a specific fourth suspect was not proffered.

Finally, by cutting defense counsel off from further questions regarding gang affiliation, the jury was free to consider whether Hewson — as an associate of Delao's — was somehow involved with gang activity. The trial court's conclusion to the contrary, CP 121:1-2, is conclusory and erroneous. Once the door to gang affiliation was opened, under the defense theory that the State's witness(es) were inclined to protect an unidentified gang confederate, the confrontation should have been allowed.

## **II. THE FULL BENEFIT OF DELAO'S PLEA INCLUDED THE ELIMINATION OF SIX**

**POTENTIAL FIREARM ENHANCEMENTS,  
TOTALLING 24 YEARS; HEWSON HAD A RIGHT  
TO HAVE THE JURY EVALUATE HIS  
TESTIMONY IN THAT LIGHT**

**Standard of Review** The same standard of review governing  
Argument I, above, applies.

**Argument.**

In *Smith v. State of Illinois*, 390 U.S. 129, 133 (1968), the  
Supreme Court, in direct review of a state prosecution, held that the  
extent of cross-examination with respect to an  
appropriate subject of inquiry is within the sound  
discretion of the trial court. It may exercise reasonable  
judgment in determining when the subject is exhausted.  
\* \* \* But no obligation is imposed on the court \* \* \* to  
protect a witness from being discredited on cross-  
examination, short of an attempted invasion of his  
constitutional protection from self incrimination,  
properly invoked. There is a duty to protect him from  
questions which go beyond the bounds of proper cross-  
examination merely to harass, annoy or humiliate him.

The *Smith* Court acknowledged that the defendant was not prohibited  
from “all right of cross-examination.” 390 U.S. at 131. But the

restrictions on elemental facts of the witness's identity or circumstances could, in effect, emasculate the right and required reversal. *Id.*

In this instance, Robert Delao testified under an agreement that spared him some 18 to 20 years of prison — just on the firearm enhancements.<sup>10</sup> Yet he was permitted to testify in a manner that would lead the jury to conclude that he only saved three years by his cooperation. This is manifestly untrue. Any jury conclusion regarding Delao's mere three-year savings would be a gross distortion of the Delao's State sentencing exposure.

### **III. THE TRIAL COURT ERRED IN FAILING TO TAKE ACCOUNT OF CRABTREE'S VALID SUBJECTIVE BELIEF THAT HE WAS BEING OFFERED FAVORABLE CONSIDERATION FOR HIS TESTIMONY**

**Standard of Review** This Court reviews materiality of *Brady* evidence *de novo*. *State v. Burden*, 104 Wn.2d 507, 511-12 (Div. 2,

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<sup>10</sup> Hewson's trial alleged three enhancements for firearms used in the commission of the combined Class A and Class B felonies. The five-year range for Class A, plus the three-year range for Class B felonies, distributed over the conspiracy to commit first degree robbery and commission of a first degree burglary total 26 years. Delao's plea bargain resulted in a sentence under 5 years.

2001) (“trial court’s determination that missing evidence is materially exculpatory is a legal conclusion which we review *de novo*”).

In consequence of the Court’s pretrial order and prevailing Supreme Court rulings, the State had an affirmative duty to disclose *Brady* evidence. The duty is broad: evidence favorable to the defendant on the issue of guilt or punishment, including impeachment evidence. This obligation also flows both from ethical duties (Model Rule 3.8(d) and Washington State’s counterpart) and from specific case authority. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); *State v. Campbell*, 103 Wn.2d 1, 17 (1984).<sup>11</sup>

The trial court held, CP 128 at ¶ 5, that there was no *Brady* violation and “if there were it did not meet the five prong criteria set under *State v. Riofta*, 166 Wn.2d 372 (2009).” Counsel cannot determine what five-prong criteria is referenced. The Court in *Riofta* dealt with a post conviction request for DNA testing under RCW 10.73.170(2)(a)(iii), a provision that has no relevance to Hewson’s

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<sup>11</sup> The ethics rule is not before this Court and defense counsel has no evidence to show that the failure to disclose the understanding between Crabtree and the State was deliberate. The State’s good or bad faith is irrelevant. *Brady*, 373 U.S. at 87.

case. At page 379 the *Riofta* court cites *Brady*, but in a context that sheds no light on Hewson's contentions.

The test for Brady reversal is found in *State v. Campbell*, 103 Wn.2d at 17. In that case, the State suppressed prompt disclosure of the fact that a witness could not identify the defendant's jacket as being worn by an intruder. The State, however, did stipulate to the fact that the defendant's jacket was not the one worn by the intruder and the court found no violation. Still, the Campbell court was clear:

If the omitted evidence creates a reasonable doubt that this not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is not reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

*Campbell*, 103 Wn.2d at 17, citing *United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

*a. Crabtree's expectations are proper Brady evidence*

The crucial questions are whether the State's failure to provide information about James Crabtree's expectations constitutes a *Brady* violation, and whether the State's failure to disclose requires reversal.

Three components must be met: (1) the evidence must be favorable to the accused — in this context, it must impeach the witness; (2) the evidence must have been suppressed by the State, willfully or inadvertently, such that the defendant using reasonable diligence did not obtain the information; and, (3) the evidence must be material, such that held against the entire record the court the inclusion of the evidence “undermines confidence in the verdict.” *In re Benn*, 134 Wn.2d 868, 916 (1988) (defense must use due diligence); *In re PRP Woods*, 154 Wn.2d 400, 428-29 (2005) (prejudice shown if confidence in verdict undermined). See also, *United States v. Bagley*, 473 U.S. 667, 682 (1985) (prejudice requiring reversal shown if “reasonable probability” exists to conclude that evidence would “undermine confidence in the outcome.”).

Crabtree's expectation of a benefit is proper impeachment material. *United States v. Agurs*, 427 U.S. 97 (1976). The State was obligated by the Omnibus order to disclose this agreement is plain on the face of the order. CP 3-6 (granting Hewson's *Brady/Agurs* request).

Crabtree's request for a "good word" was not provided in discovery. CP 7.<sup>12</sup> The defense is not obligated to know that the State has a deal with its witnesses after the State has already been ordered to disclose any such arrangements.

It makes no difference that Crabtree was facing a charge entirely disconnected with the matters on trial: "Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross examination that his testimony was affected by fear or favor growing out of his detention." *Alford v. United States*, 282 U.S. 687, 693 (1931).

Further, Crabtree's subjective belief — not the State's — controls.

The Washington State Supreme Court decision *In re PRP Gentry*, 137 Wn.2d 378 (1999) addressed the scope of disclosure required of the State when it provides benefits in exchange for testimony. In that instance, the State incorrectly reported that it had given no benefit to its

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<sup>12</sup> The State did not challenge Crabtree's affidavit with actual denials. CP 96-99. Neither the prosecutor nor the case agent state that the conversation reported by Crabtree did not take place. The trial court rejected the incident with baseless findings: no evidence supports the view that Crabtree's request for a quid pro quo was fleeting or that he did not have a subjective belief that he would obtain a benefit for his testimony. Crabtree only speculated that the State likely thought little of it when he questioned whether Mr. Cipolla remembered his promise.

cooperating witness. *Gentry*, 137 Wn.2d at 420-21. The defendant learned post conviction that the State had given its witness (Hicks) a single phone call to assist Hicks obtain an improved parole status. The Supreme Court held,

[h]ad the defense possessed this information [Hicks' letter] at the time of trial undoubtedly it would have used it in a serious effort to attack Hicks's credibility. Even if the prosecutor did not perceive his telephone call to the Department of Corrections as actually providing a "benefit" to Hicks, *from Hicks's perspective a causal relation between his testimony and favorable treatment would have been a more than reasonable inference, thus providing an arguable incentive to misrepresent the facts regarding Gentry for selfish gain.* But nondisclosure denied the defense this basis for impeachment.

*Gentry*, at 423 (emphasis added).

*b. The effect of Crabtree's testimony*

Crabtree's testimony bolstering the victim's version was critical to the State's theory that Robinson did not know Hewson, had never seen Hewson, and had no basis on which to confabulate an identification of

Hewson in the third montage session. Had Crabtree's expectation of "a good word" in exchange for his testimony been available to defense counsel, Crabtree could have been impeached and his claims regarding Robinson challenged.

The final factor in the *Brady* analysis requires that the suppressed evidence be "material." Its suppression must have had an impact.

"[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal, \* \* \* [Reversal is required] upon a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to *undermine confidence in the verdict.*

*Kyles v. Whitney*, 514 U.S. 419, at 434 (1995).

Hewson argues that the evidence was in a very close state, that he readily met every point raised by the prosecution, that he demonstrated the high degree of unlikelihood that he was the source of the plan to rob Ms. Robinson's home (Crabtree), that a few months before the robbery Delao/Oakes had sabotaged his projects (clients, roofing contractor), that Delao/Oakes had similarly used law enforcement to take his truck away (Oakes), that Delao/Oakes tried to have his probation suspended (probation officer), and that Delao and Oakes reviled him (Oakes), etc., etc.

#### **IV. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S KEY FINDINGS**

**Standard of Review** This Court reviews challenges to the sufficiency of facts by viewing the record most favorably for the State. *State v. Gatlin*, 158 Wn.App. 126, 129 (Div. 3, 2010).

The trial court erred in finding the following facts during post trial motions based upon insufficiency of the evidence.

**Basis for proffering gang bias.** The basis for the bias attack on Robert Delao's gang membership did not involve only the matters cited by the lower court in denying the defense motion for a new trial (i.e., business animus, etc). CP 118-123, 126-128. Counsel's bias theory included Delao's shielding the robbery's fourth member by laying blame on Hewson. *In Limine Hearing 5/9/11*, at 34. The trial court failed to reference or give any consideration to this proffered purposes. It is untenable for the lower court to justifying its ruling by eliminating an alternative theory of admissibility.

**The State did *not* directly deny contents of Crabtree's statement or his subjective belief.** The lower court found that the State countered Crabtree's affidavit by denying that any such promise had been made. CP 127. This is incorrect. The certificates from prosecutor Cipolla and case agent Miya (CP 96-99) in response

to the defense's post-trial allegation of a *Brady* violation do not support the court's finding "[t]hat the State proffered that no such promise was made." CP 127. The State did not directly deny Crabtree's statement that he asked for consideration. CP 97, 99. The State's two certificates do state that Crabtree was told that Mr. Cipolla would not discuss the pending case. CP 96-99. The certificates state that Crabtree was told that the prosecutor on his unrelated drug charge would be told about his cooperation. CP 99 ("That I told Mr. Crabtree I would let the prosecutor on his case or cases know he was testifying in the case at bar if there were *any* issues.") (emphasis supplied). Neither certificate states plainly that Crabtree did not ask for a "good word" to his prosecutor, nor was he told he would not receive consideration for his testimony. He was given a reasonable basis on which to believe he would receive favorable consideration for his efforts.

There is simply no express denial of Crabtree's actual claims — as set forth in his affidavit — in either of the two answering certificates.

The lower court's finding that Mr. Cipolla and Officer Miya denied making "any such promise" is plainly unsupported by either certificate.

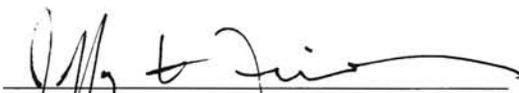
A showing that Crabtree believed that his cooperation would result in favorable consideration in his pending drug case would have provided important bias evidence casting doubt on his claim that Robinson and Hewson never met. The promises made to Crabtree (advising prosecutor of his assistance, having counsel call with "any questions") were covered by the pretrial Omnibus order to disclose favorable evidence. CP 6. It should have been provided to the defense.

### CONCLUSION

For the reasons set forth above, Jack Hewson respectfully asks this Court to vacate the verdict and remand for new trial.

DATED THIS 24<sup>th</sup> day of April, 2012.

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