

No. 31642-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

FILED  
JUNE 17, 2015  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

DAVID E. NICKELS,

Appellant.

---

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

The Honorable Evan E. Sperline

---

SECOND AMENDED BRIEF OF APPELLANT

---

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**TABLE OF CONTENTS**

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR AND RELATED ISSUES ..... 2

C. STATEMENT OF THE CASE..... 6

    1. Footprints in the snow..... 6

    2. “Things got out of hand” – Ian Libby confesses to Crystal Tycksen 8

    3. “I’m going to kill you like I killed that man” – Libby assaults and threatens Tycksen..... 10

    4. Tycksen notifies the police that Libby is the killer, but Detective Rodriguez fails to investigate the allegation..... 10

    5. “I do not want an innocent person to be convicted” -- post verdict, the Powells come forward with evidence that on the morning of the crime, Latimer confessed that he was an accomplice to Munro’s murder ..... 14

    6. Libby confesses to his cellmates..... 15

    7. The motion for a new trial is denied ..... 16

D. ARGUMENT ..... 16

    1. **The court’s “to convict” instruction, which substituted the permissive “should” for “must” regarding the jury’s duty to acquit where the State did not prove guilt beyond a reasonable doubt, violated Nickels’s right to due process of law and was a structural error** ..... 17

    2. **The trial court denied Nickels his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process of law when it permitted an unfit juror to deliberate and reach a verdict**..... 18

        a. “This is a small town, he’ll be taken care of.” ..... 18

b. Bundy’s bias made her an unfit juror and permitting her to deliberate violated Nickels’s Sixth and Fourteenth Amendment and Article I, sections 3 and 21 right to a fair trial by an impartial jury .....	21
3. <b>The court’s decision to not notify the parties and instead resolve the grave concerns about Bundy’s impartiality <i>ex parte</i> violated Nickels’s Sixth and Fourteenth Amendment rights to be present and to the assistance of counsel</b> .....	23
a. The court had the duty to investigate Bundy’s apparent bias at a hearing at which Nickels and his lawyers would be present .....	23
b. The court’s <i>ex parte</i> resolution of Bundy’s misconduct violated Nickels’s right to be present .....	23
c. The trial court violated Nickels’s right to the assistance of counsel .....	25
d. The constitutional error requires a new trial .....	27
4. <b>The secret ‘proceeding’ violated Nickels and the public’s right to a public trial</b> .....	28
a. Accused persons have the constitutional right to a public trial....	28
b. The <i>ex parte</i> , in-chambers ‘proceeding’ wherein the court determined how to resolve concerns regarding juror misconduct should have been held in open court.....	28
i. <i>Experience demonstrates that proceedings to assess and respond to juror bias and misconduct historically were open to the defendant, press, and public</i> .....	29
ii. <i>The “logic” prong supports open proceedings</i> .....	32
c. The closure was not justified.....	34
d. The structural error requires reversal .....	35

5. <b>The State’s <i>Brady</i> violations, mismanagement, and misconduct required dismissal</b> .....	35
a. “We have these terrible discovery problems” .....	35
b. “There seems to be this attitude that we can just engage in these sorts of investigations without letting anybody know.” .....	37
c. Libby reoffends and threatens defense witnesses; the State does nothing .....	39
d. The State’s <i>Brady</i> violations and mismanagement violated due process and prejudiced Nickels, warranting dismissal .....	40
i. <i>In withholding the Cox statement until after the trial, the State withheld material exculpatory evidence</i> .....	41
ii. <i>The State’s failure to preserve and withholding of potentially exculpatory evidence, viewed cumulatively, evinces bad faith</i> .....	42
iii. <i>Nickels was prejudiced and reversal and dismissal are required</i> .....	43
e. Dismissal was required under CrR 8.3(b) .....	44
6. <b>The trial court erred in denying Nickels’s motion to suppress where his seizure was based on the unlawful trap and trace of his phone, and in denying a <i>Franks</i> hearing based on law enforcement’s deliberate or reckless misrepresentations in the warrant to collect Nickels’s DNA</b> .....	45
a. The stop of Nickels and collection of his DNA was based on false statements and material omissions in the warrant affidavit and information unlawfully received from an unauthorized trap and trace device .....	45
b. Nickels’s stop was done without authority of law .....	47
c. Alternatively a <i>Franks</i> hearing was required .....	50

<b>7. The trial court’s exclusion of evidence that Ian Libby murdered Munro violated Nickels’s Sixth Amendment right to present a defense and Fourteenth Amendment right to due process of law</b>	<b>51</b>
.....	
a. Principles of due process and the Sixth Amendment right to a defense require evenly-applied rules of evidence	52
b. The court’s corroboration requirement was contrary to <i>Holmes</i> and violated Nickels’s Sixth Amendment right to a defense	53
i. <i>The trial court improperly weighed the strength of the prosecution’s case against Nickels’s right to a defense and required corroboration for each ‘fact’ asserted in Libby’s inculpatory confession as a predicate to admission</i>	54
ii. <i>The trial court’s ruling excluding portions of Libby’s confession to Tycksen even though they were plainly corroborated was an abuse of discretion</i>	55
iii. <i>Alternatively, the prosecution opened the door to the introduction of Libby’s complete confession</i>	60
<b>8. The trial court’s exclusion of other evidence material to Nickels’s defense denied Nickels his Sixth Amendment right to a defense</b>	<b>62</b>
a. An accused person has the Sixth Amendment right to present all relevant evidence in his defense	62
b. The trial court unfairly limited evidence that Libby was the killer	63
i. <i>Evidence that on the day of the homicide, Libby broke into Tosha Devyak’s safe and stole her money</i>	63
ii. <i>Testimony of Lisa and Carmella Haley regarding Tycksen’s demeanor when she reported Libby’s assault to the police</i>	64
iii. <i>Evidence of the severity of Tycksen’s injuries</i>	65

iv. <i>Amber Harmon’s testimony about Munro’s missing .45 caliber handgun with a laser sight</i> .....	66
c. The trial court unfairly barred the defense from presenting evidence of Munro’s other romances that would have undermined the State’s theory.....	67
d. The constitutional error requires reversal .....	68
<b>9. The trial court’s admission of unduly prejudicial, irrelevant ER 404(b) evidence denied Nickels a fair trial</b> .....	<b>69</b>
a. The trial court erroneously admitted propensity evidence that was irrelevant for any proper purpose under ER 404(b).....	69
i. <i>Barber</i> .....	70
ii. <i>Craigslist posting</i> .....	70
iii. <i>Messick</i> .....	71
iv. <i>Rex Lain</i> .....	72
b. The error in admitting ER 404(b) evidence was prejudicial.....	73
<b>10. The WSPCL DNA analyst and prosecutor committed reversible misconduct that denied Nickels his due process right to a fair trial when they misstated key evidence</b> .....	<b>73</b>
a. WSPCL analyst Anna Wilson repeatedly mischaracterized the results of DNA testing of the mixed DNA profile found on the handcuffs in Munro’s yard to benefit the prosecution, and the prosecutor capitalized on the misstatements in closing argument	73
b. Principles of due process prohibit the government or its agents from engaging in misconduct.....	74
c. Wilson’s repeated misstatements that Nickels was “included as a contributor” to a mixed DNA profile located on handcuffs found in Munro’s yard were prejudicial misconduct .....	75

i. <i>Both the FBI and ASCLD/LAB impose upon forensic scientists the ethical obligation to testify in a manner that is consistent with the data, does not create false inferences, and is not slanted towards one party or the other</i> .....	75
ii. <i>Wilson’s testimony was inconsistent with the data obtained during her analysis, was designed to create the false impression that Nickels was a contributor to the mixed DNA profile, and was misconduct</i> .....	76
d. The prosecutor’s misuse of the DNA evidence in closing argument was prejudicial misconduct.....	78
<b>11. Nickels was entitled to a new trial based on the Powell declarations, Libby’s jailhouse confessions to having committed the murder, and “Witness A”’s declaration regarding Libby having tried to sell him a .45 matching the description of Munro’s missing gun</b> .....	<b>81</b>
a. The trial court’s determination that Latimer’s statements to Travis Powell were not excited utterances was substantively unreasonable .....	83
i. <i>The court’s ruling does not address whether Latimer was still under the stress of the murder he had witnessed when he made the statements to Travis Powell</i> .....	84
ii. <i>The statement was spontaneous and not made in response to questions, weighing in favor of its admissibility as an excited utterance</i> .....	85
iii. <i>The self-inculpatory content of the statement weighs in favor of its admissibility as an excited utterance</i> .....	86
iv. <i>Neither Latimer’s self-serving trial testimony nor the self-serving statement he gave Rectenwald undercuts the reliability of the excited utterance, since Latimer’s statement to Rectenwald establishes that he perjured himself at trial</i> .....	87
v. <i>The trial court’s ruling was an abuse of discretion</i> .....	88

b.	The trial court’s determination that the Powells’ testimony would have been merely impeaching was based upon an unsound and premature conclusion that Latimer was not “unavailable” .....	89
i.	<i>Latimer’s statements to Travis Powell exposed him to prosecution for felony murder in the first or second degree and perjury, but he was not advised of his right to “plead the Fifth” when Rectenwald obtained his assurance that he would “answer questions ... about [his] conversation with Travis Powell” at a new trial</i> .....	89
ii.	<i>The court’s determination that Latimer was not “unavailable” was premature and constitutionally unsound</i> .....	91
c.	In the alternative, Latimer’s statement would have been admissible under the “open door” doctrine to rebut the State’s claim that Tycksen fabricated Libby’s confession and to corroborate the full confession .....	92
d.	The trial court’s finding that Rodriguez and Perry’s testimony about Libby’s jailhouse confessions would not change the outcome of the trial was error .....	94
i.	<i>The court’s ruling that Perry’s statement would not be admissible as a statement against penal interest was incorrect</i> .....	94
ii.	<i>The court’s ruling that a jury would not find Rodriguez credible was an abuse of discretion</i> .....	95
e.	The trial court erred in ruling that evidence Libby had tried to sell a gun resembling the gun that was missing from Munro’s collection was not relevant.....	95
f.	The trial court’s ruling denying Nickels a new trial was reversible error.....	97
14.	<b>The intimate friendship of the trial judge’s stepson with Munro created an appearance of unfairness, in violation of the Fourteenth Amendment guarantee of due process of law</b> .....	97

a. The trial judge’s stepson, with whom the judge enjoyed a close relationship, was “good friends” with Munro and celebrated Nickels’s conviction but the judge never disclosed the association to the parties.....	97
b. The close relationships between the judge’s stepson and Munro and the judge and his stepson, and the court’s concealment of the relationships, violated the appearance of fairness required by the due process clause of the Fourteenth Amendment .....	99
15. <b>Cumulative error denied Nickels the fundamentally fair trial he was guaranteed by the Fourteenth Amendment and article I, section 3</b> .....	100
E. CONCLUSION .....	100

## TABLE OF AUTHORITIES

### Washington Supreme Court Decisions

<u>Adkins v. Clark County</u> , 105 Wn.2d 675, 717 P.2d 275 (1986).....	26
<u>Allied Daily Newspapers of Washington v. Eikenberry</u> , 121 Wn.2d 205, 848 P.2d 1258 (1993).....	31
<u>Cohen v. Everett City Council</u> , 85 Wn.2d 385, 535 P.2d 801 (1975) .	29-31
<u>Federated Publications, Inc. v. Kurtz</u> , 94 Wn.2d 51, 615 P.2d 440 (1980) .....	32
<u>In re Stenson</u> , 174 Wn.2d 474, 276 P.3d 286 (2012).....	41
<u>State v. Afana</u> , 169 Wn.2d 169, 233 P.3d 879 (2010) .....	49
<u>State v. Aguirre</u> , 168 Wn.2d 350, 229 P.3d 669 (2010) .....	65
<u>State v. Anderson</u> , 107 Wn.2d 745, 733 P.2d 517 (1987) .....	58
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007) .....	17
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995) .....	34
<u>State v. Caliguri</u> , 99 Wn.2d 501, 664 P.2d 486 (1983).....	23
<u>State v. Chenoweth</u> , 160 Wn.2d 454, 158 P.3d 595 (2006).....	50
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.3d 668 (1984) .....	100
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002) .....	63, 68, 96
<u>State v. Easterling</u> , 167 Wn.2d 167, 137 P.3d 825 (2006).....	34
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012) .....	80
<u>State v. Franklin</u> , 180 Wn.2d 371, 325 P.3d 159 (2014) .....	53, 60
<u>State v. Frawley</u> , 181 Wn.2d 452, 334 P.3d 1022 (2014).....	34
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986) .....	48
<u>State v. Hinton</u> , 179 Wn.2d 862, 319 P.3d 9 (2014).....	47
<u>State v. Irby</u> , 170 Wn.2d 874, 246 P.3d 796 (2011) .....	24, 31
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2012).....	63, 69
<u>State v. Lindsay</u> , 180 Wn.2d 423, 326 P.3d 125 (2014).....	80
<u>State v. McHenry</u> , 88 Wn.2d 211, 558 P.2d 188 (1977).....	17
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	49
<u>State v. Michielli</u> , 132 Wn.2d 229, 937 P.2d 587 (1997) .....	44
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	74
<u>State v. Njonge</u> , 181 Wn.2d. 546, 334 P.3d 1068 (2014).....	28, 35
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008) .....	58, 97
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2000) .....	56
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982) .....	70
<u>State v. Shutzler</u> , 82 Wash. 365, 144 P. 284 (1914) .....	27, 30
<u>State v. Smith</u> , 181 Wn.2d 508, 334 P.3d 1049 (2014) .....	28, 29, 33
<u>State v. Strasburg</u> , 60 Wash. 106, 110 P. 1020 (1910) .....	21

<u>State v. Strauss</u> , 119 Wn.2d 401, 832 P.2d 78 (1992) .....	84
<u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	28
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	69, 72
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	84
<u>State v. Wise</u> , 176 Wn.2d 1, 288 P.3d 1113 (2012).....	35
<u>State v. Wroth</u> , 15 Wash. 621, 47 P. 106 (1896) .....	23, 24, 30
<u>State v. Young</u> , 160 Wn.2d 799, 161 P.3d 967 (2007).....	57, 58, 84, 85, 87
<u>Sun Life Assur. Co. of Canada v. Cushman</u> , 22 Wn.2d 930, 158 P.2d 101 (1945).....	30

### **Washington Court of Appeals Decisions**

<u>Ang v. Martin</u> , 118 Wn. App. 553, 76 P.3d 787 (2003) .....	61, 93
<u>In re Dependency of J.R.U.-S.</u> , 126 Wn. App. 786, 110 P.3d 773 (2005) 90	
<u>In re Personal Restraint of Delmarter</u> , 124 Wn. App. 154, 101 P.3d 111 (2004).....	75
<u>State v. Bache</u> , 146 Wn. App. 897, 193 P.3d 198 (2008).....	84
<u>State v. Bander</u> , 150 Wn. App. 690, 208 P.3d 1242, <u>rev. denied</u> , 167 Wn.2d 1009 (2009) .....	77, 78
<u>State v. Briscoeray</u> , 95 Wn. App. 167, 974 P.2d 912, <u>rev. denied</u> , 139 Wn.2d 1011 (1999) .....	86, 88
<u>State v. Cardenas-Muratalla</u> , 179 Wn. App. 307, 319 P.3d 811 (2014) ...	49
<u>State v. Cho</u> , 108 Wn. App. 315, 30 P.3d 496 (2001) .....	22
<u>State v. Flett</u> , 40 Wn. App. 277, 699 P.2d 774 (1985).....	84
<u>State v. Freeburg</u> , 105 Wn. App. 492, 20 P.3d 384 (2001).....	64, 71
<u>State v. Fuller</u> , 169 Wn. App. 797, 282 P.3d 186 (2012) .....	70
<u>State v. Gantt</u> , 163 Wn. App. 133, 257 P.3d 682 (2011) .....	49
<u>State v. Grier</u> , 168 Wn. App. 635, 278 P.3d 225 (2012).....	64
<u>State v. Halverson</u> , 176 Wn. App. 972, 309 P.3d 795 (2013).....	31, 32
<u>State v. Irby</u> , -- Wn. App. --, 347 P.3d 1103 (April 30, 2015).....	22, 27
<u>State v. Johnson</u> , 125 Wn. App. 443, 105 P.3d 85 (2005).....	26, 27
<u>State v. Madry</u> , 8 Wn. App. 61, 504 P.2d 1156 (1972) .....	99
<u>State v. Ortega</u> , 134 Wn. App. 617, 142 P.3d 175 (2006) .....	60
<u>State v. Robinson</u> , 44 Wn. App. 611, 722 P.2d 1379, <u>rev. denied</u> , 107 Wn.2d 1009 (1986) .....	86
<u>State v. Scott</u> , 150 Wn. App. 281, 294, 207 P.3d 495 (2009).....	82
<u>State v. Smith</u> , 174 Wn. App. 359, 298 P.3d 785, <u>rev. denied</u> , 178 Wn.2d 1008 (2013).....	17, 18, 28
<u>State v. Sunde</u> , 98 Wn. App. 515, 985 P.2d 413 (1999).....	84
<u>State v. Thomas</u> , 46 Wn. App. 280, 730 P.2d 117 (1986) .....	84, 85

<u>State v. Williamson</u> , 100 Wn. App. 248, 996 P.2d 1097 (2000) .....	84
<u>State v. Wilson</u> , 141 Wn. App. 597, 171 P.3d 501 (2007) .....	31
<u>Tatham v. Rogers</u> , 170 Wn. App. 76, 283 P.3d 583 (2012) .....	99

### **Washington Constitutional Provisions**

Const. art. I, § 3.....	viii, 2
Const. art. I, § 7.....	3, 48
Const. art. I, § 9.....	90
Const. art. I, § 10.....	3, 30
Const. art. I, § 21.....	2, 23
Const. art. I, § 22.....	2, 23

### **United States Supreme Court Decisions**

<u>Arizona v. Fulminante</u> , 499 U.S. 279 (1991).....	21
<u>Arizona v. Youngblood</u> , 488 U.S. 51 (1988).....	41
<u>Berger v. United States</u> , 295 U.S. 78 (1935) .....	74
<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1973) .....	63, 65
<u>Chapman v. California</u> , 386 U.S. 18 (1967) .....	69
<u>Clark v. United States</u> , 289 U.S. 1 (1933) .....	26, 30
<u>Counselman v. Hitchcock</u> , 142 U.S. 547 (1892) .....	90
<u>Crawford v. United States</u> , 212 U.S. 183 (1909) .....	22
<u>Dawson v. Delaware</u> , 503 U.S. 159 (1992) .....	70
<u>Dennis v. United States</u> , 339 U.S. 162 (1950).....	26, 27
<u>Duncan v. Louisiana</u> , 391 U.S. 145 (1968).....	33
<u>Franks v. Delaware</u> , 438 U.S. 154 (1978).....	3, 45, 47, 50, 51
<u>Holmes v. South Carolina</u> , 547 U.S. 319 (2006) .....	52, 53, 55, 60
<u>In re Murchison</u> , 349 U.S. 133 (1955).....	99
<u>In re Oliver</u> , 333 U.S. 257 (1948) .....	33
<u>In re Winship</u> , 397 U.S. 358, 364 (1970) .....	17
<u>Irvin v. Dowd</u> , 366 U.S. 717 (1961) .....	21
<u>Johnson v. Zerbst</u> , 304 U.S. 458 (1938) .....	92
<u>Kastigar v. United States</u> , 406 U.S. 441 (1964).....	90
<u>Kyles v. Whitley</u> , 514 U.S. 419 (1995).....	41
<u>Malloy v. Hogan</u> , 378 U.S. 1 (1964).....	90
<u>Maness v. Meyers</u> , 419 U.S. 449 (1973).....	90, 91
<u>Morgan v. Illinois</u> , 504 U.S. 719 (1992).....	21
<u>Press-Enterprise Co. v. Superior Court</u> , 478 U.S. 1 (1986) .....	29, 32
<u>Remmer v. United States</u> , 347 U.S. 227 (1954).....	23, 26, 30

<u>Reynolds v. United States</u> , 98 U.S. 145 (1878) .....	21
<u>Richmond Newspapers, Inc., v. Virginia</u> , 448 U.S. 555 (1980) .....	28
<u>Riley v. California</u> , -- U.S. --, 134 S.Ct. 2473 (2014).....	48
<u>Rushen v. Spain</u> , 464 U.S. 114 (1983).....	24
<u>Smith v. Phillips</u> , 455 U.S. 209 (1982).....	23
<u>Strickler v. Greene</u> , 527 U.S. 263 (1999) .....	41
<u>Sullivan v. Louisiana</u> , 508 U.S. 275 (1993).....	17
<u>Taylor v. Kentucky</u> , 436 U.S. 478 (1978).....	100
<u>Tumey v. Ohio</u> , 273 U.S. 510 (1927) .....	21
<u>United States v. Cronin</u> , 466 U.S. 648 (1984) .....	25
<u>United States v. Gagnon</u> , 470 U.S. 522 (1985).....	23, 24
<u>United States v. Gonzalez-Lopez</u> , 548 U.S. 140 (2006).....	18
<u>Washington v. Texas</u> , 388 U.S. 14 (1967).....	63
<u>Williams v. Taylor</u> , 529 U.S. 362 (2000) .....	100
<u>Williamson v. United States</u> , 512 U.S. 594 (1994).....	56, 57, 86

### **United States Court of Appeals Decisions**

<u>Burton v. Johnson</u> , 948 F.2d 1150 (10th Cir. 1991) .....	22
<u>Dyer v. Calderon</u> , 151 F.3d 970 (9th Cir. 1998).....	21-23
<u>Ellis v. United States</u> , 416 F.2d 791 (D.C. Cir. 1988) .....	90
<u>Fields v. Woodford</u> , 309 F.3d 1095 (9th Cir. 2002) .....	22
<u>In re Neff</u> , 206 F.2d 149 (3rd Cir. 1953) .....	90
<u>United States v. Edwards</u> , 823 F.2d 111 (5th Cir. 1987), <u>cert. denied</u> , 485 U.S. 934 (1988).....	31
<u>United States v. Gonzalez</u> , 214 F.3d 1009 (9th Cir. 2000).....	21
<u>United States v. Stanert</u> , 762 F.2d 775 (9th Cir. 1985).....	50

### **United States Constitutional Provisions**

U.S. Const. amend. IV .....	3, 50
U.S. Const. amend. V.....	54, 89, 90, 91
U.S. Const. amend. VI.....	2-4, 18, 21, 23-25, 31, 51, 52, 53, 55, 60, 62, 67
U.S. Const. amend. XIV .....	2-4, 6, 18, 21, 23, 51, 52, 97, 99, 100

### **Other State Cases**

<u>Alves v. Rosenberg</u> , 948 A.2d 701 (N.J. Super. App. 2008).....	62, 93
<u>Duncan v. Commonwealth</u> , 322 S.W.3d 81 (Ky. 2010).....	79

<u>Oahu Publications Inc. v. Ahn</u> , 331 P.3d 460 (Haw. 2014).....	31
<u>People v. Linscott</u> , 566 N.E.2d 1355 (Ill. 1991) .....	80
<u>State v. Bloom</u> , 516 N.W.2d 159 (Minn. 1994).....	80
<u>State v. Dewberry</u> , 301 P.3d 788 (Kan. App. 2013) .....	80
<u>Whack v. State</u> , 73 A.3d 186 (Md. 2013) .....	76, 79, 81

### Statutes

RCW 2.32.330 .....	26
RCW 4.44.300 .....	26
RCW 43.43.756 .....	75
RCW 9.73.260 .....	48
RCW 9A.32.030.....	87, 89
RCW 9A.32.050.....	87, 89
RCW 9A.56.300.....	89
RCW 9A.72.020.....	88
RCW 9A.72.030.....	88

### Rules

CJC 2.9(B) .....	26
CJC 2.9(D) .....	26
CrR 4.7 .....	43
CrR 7.5 .....	82
CrR 8.3(b) .....	3, 44
ER 404(b).....	4, 69-73, 100
ER 803(a)(2) .....	5, 83, 84
ER 804(b)(3) .....	4, 5, 55, 56, 57, 60, 89, 95
Fed. R. Evid. 804(b)(3) .....	56
Kansas Supreme Court Rule 7.04(f) .....	80
RAP 10.3(a)(4).....	2

### Journals and Treatises

Brandon L. Garrett & Peter J. Neufeld, <u>Invalid Forensic Science Testimony and Wrongful Convictions</u> , 95 Va. L. Rev. 1 (2009).....	78
DNA Advisory Board, <u>Statistical and Population Genetics Issues Affecting the Evaluation of the Frequency of Occurrence of DNA</u>	

<u>Profiles Calculated from Pertinent Population Database(s)</u> , 2 Forensic Sci. Comm. No. 3 (2000).....	76, 78
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## A. INTRODUCTION

Sage Munro was shot to death in the early morning hours of December 29, 2009. There were no witnesses to the crime. Soon after the murder, Ian Libby, a local hoodlum, confessed to his girlfriend that he was the killer. But because they had already decided that David Nickels was the “correct” suspect, investigating officers did not preserve evidence that incriminated Libby, did not pursue investigative leads, concealed evidence inculcating Libby, and even destroyed evidence that exculpated Nickels.

Nickels’s conviction should be reversed on numerous grounds. The to-convict instruction told the jury that acquittal in the face of reasonable doubt was permissive, not mandatory. The trial court permitted an unfit juror to deliberate to verdict following a secret, *ex parte* proceeding regarding the juror’s misconduct. In addition, Nickels was denied due process by Brady violations, unfair limitations on his right to a defense, egregious misconduct by the State’s forensic scientist and the prosecutor, the court’s refusal to grant a new trial despite new, material, and exculpatory evidence that could not have been discovered before trial, and appearance of fairness violations. Nickels is entitled to reversal of his conviction.

B. ASSIGNMENTS OF ERROR AND RELATED ISSUES<sup>1</sup>

1. The “to convict” instruction substituted “should” for “must” in describing the jury’s duty to acquit where the State has not met its burden of proof, in violation of Nickels’s right to due process of law safeguarded by the Fourteenth Amendment and article I, section 3.

2. The trial court violated Nickels’s Fourteenth Amendment and article I, sections 3, 21, and 22 rights to due process of law and to a jury trial when it permitted an unfit juror to deliberate and reach a verdict.

3. The trial court violated Nickels’s Sixth and Fourteenth Amendment and article I, section 22 right to be present when it addressed a juror’s bias and misconduct in a secret, *ex parte* proceeding and permitted the bailiff to have *ex parte* contacts with the jury.

4. The trial court’s concealment of juror misconduct from the parties and the bailiff’s *ex parte* communications with the juror in question resulted in a complete denial of Nickels’s Sixth Amendment and article I, section 22 right to the assistance of counsel.

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<sup>1</sup> RAP 10.3(a)(4) requires “A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.” No separate “issues” section is required. For the sake of brevity and clarity, the issues are incorporated into the Assignments of Error. See Ruling Denying Review, at 4-5 (No. 91505-9, June 5, 2015).

5. The trial court conducted a secret proceeding regarding juror misconduct that violated the right to a public trial secured by article I, sections 10 and 22 and the Sixth Amendment.

6. The trial court erred in denying Nickels's motions to dismiss based upon law enforcement's failure to preserve and intentional destruction of Brady material, in violation of Nickels's Fourteenth Amendment right to due process of law.

7. The trial court erred in denying Nickels's CrR 8.3(b) motions to dismiss despite repeated instances of mismanagement and misconduct by law enforcement and the prosecution that prejudiced Nickels.

8. In violation of article I, section 7, the trial court erred in denying Nickels's motion to suppress where his seizure was based on an invalid "trap and trace" and so done without authority of law.

9. In violation of the Fourth Amendment and article I, section 7, the trial court erred in denying Nickels's motion for a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978).

10. Finding of Fact regarding Suppression of DNA Evidence and Defense Request for a Franks Hearing (hereafter "FOF") 2.2 lacks evidentiary support. CP 5997.

11. FOF 2.4 lacks evidentiary support. CP 5998.

12. FOF 2.5 lacks evidentiary support. CP 5998.

13. The trial court erred in entering Conclusions of Law 3.1, 3.2, 3.3, 3.4, and 3.5, concluding that misstatements and omissions in the warrant application were not material. CP 5998-99.

14. The trial court's exclusion of portions of Ian Libby's inculpatory confession to Crystal Tycksen violated Nickels's Sixth Amendment right to present a defense and Fourteenth Amendment right to due process of law, and was contrary to ER 804(b)(3).

15. The trial court's ruling that the State's cross-examination of Crystal Tycksen did not open the door to previously-excluded evidence violated Nickels's Fourteenth Amendment right to due process of law and principles of fundamental fairness.

16. The trial court's exclusion of witnesses necessary to Nickels's defense theory violated his Sixth Amendment right to a defense.

17. The trial court's erroneous admission of unduly prejudicial and irrelevant evidence under ER 404(b) denied Nickels a fair trial.

18. The prosecutor and WSPCL DNA analyst committed misconduct that denied Nickels his Fourteenth Amendment right to a fair trial when the analyst falsely testified, and the prosecutor argued, that Nickels's DNA was "included" in the mixed DNA profile found on handcuffs in the victim's yard.

19. The trial court erred in denying Nickels's motion for a new trial based on newly discovered evidence.

20. The trial court erred in finding that Julian Latimer's statement inculpatory himself as an accomplice to Libby's murder of Munro did not qualify as an excited utterance, pursuant to ER 803(a)(2), and so would not be admissible at a second trial.

21. The trial court erred in finding that Latimer had not been shown to be unavailable for purposes of rendering his inculpatory statement admissible as a statement against penal interest, pursuant to ER 804(b)(3), in connection with Nickels's motion for a new trial.

22. The trial court erred in ruling that Latimer's statement would not be substantively admissible at a second trial to rebut the State's theory that Crystal Tycksen had fabricated Libby's confession.

23. The trial court erred in ruling that Ian Libby's jailhouse confession to inmate Jerry Perry would be inadmissible under ER 804(b)(3), and so could not support granting a new trial.

24. The trial court erred in ruling that Ian Libby's jailhouse confession to inmate Adrian Rodriguez would not change the outcome of trial because Rodriguez could be impeached by his criminal history.

25. The trial court erred in ruling newly-discovered evidence that Ian Libby had tried to sell a gun (1) whose description matched a gun that

was missing from Munro's collection at the time of his death and (2) was the same caliber as the likely murder weapon was not relevant and could not support granting a new trial.

26. The trial court's personal associations with the victim violated the appearance of unfairness, contrary to the Fourteenth Amendment guarantee of due process of law.

27. Cumulative error denied Nickels his right to a fair trial guaranteed by the Fourteenth Amendment.

### C. STATEMENT OF THE CASE<sup>2</sup>

#### 1. Footprints in the snow.

Sage Munro was shot to death outside of his home in Ephrata, Washington, early on the morning of December 29, 2009. RP (7/23/12) 36, 66-67; RP (Beck Vol. 4) 1029.<sup>3</sup> His neighbor across the street, Colleen Gibbins, heard the shot, saw Munro run into view, sliding in the snow and holding his chest, then go into his house and shut the door. RP (7/23/12) 39. Gibbins called 9-1-1. Id. at 43, 76-77.

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<sup>2</sup> Given the length of the brief and the record, in the interest of brevity, this Statement of the Case summarizes the facts surrounding the crime, investigation, prosecution and trial to the extent they are necessary to supply background to the issues raised on appeal. Additional facts are included with the arguments to which they pertain.

<sup>3</sup> The verbatim report of proceedings consists of 6,904 pages and spans three years of pre-trial, trial, and post-trial hearings. Multiple court reporters transcribed the proceedings, and each used a different method of referencing the transcripts. Where possible, transcripts are referenced by date followed by page number, e.g., "RP (7/23/12) 35-36." Where multiple hearings are contained in consecutively-paginated volumes, they are referenced by the court reporter's name and volume number, e.g., "RP (Beck Vol. 4) 941."

The 9-1-1 call was placed at 6:42 a.m. RP (Beck Vol. 4) 941. Ephrata Police Officers Damon Powell and Billy D. Roberts were the first responders and arrived within two to three minutes of receiving the 9-1-1 dispatch. RP (Beck Vol. 4) 947. Munro's silver Dodge pickup was parked in front of his house. Id. at 963-64. There was fresh snow on the ground. Id. at 966. Roberts and Powell noticed scuff marks in the snow, as if someone had dragged their feet, and shoe impressions on the driver's side of Munro's pickup. Id. at 961, 988, 1024. Roberts also saw "a single set of tracks from the pickup", CP 2132, and shoe impressions in the snow on the walkway to the house. RP (Beck Vol. 4) 965.

When Roberts and Powell entered Munro's home, he was already dead. Id. at 1029; RP (7/24/12) 19. Keys, including a Dodge key, were found near his hand. RP (7/24/12) 17.

Little was done to secure the scene or protect the delicate shoe impression evidence from being destroyed before emergency personnel and law enforcement arrived. RP (Beck Vol. 4) at 988. Powell took some photographs but he had never investigated a homicide before. Id. at 1041. Most of the shoe impressions around and leading away from Munro's truck were not preserved. No one photographed the scuffed shoe impressions, the shoe impressions on the sidewalk, or the impressions on the walkway that led to Munro's house. Id. at 1050-51, 1059. By the time

Major Crimes Detective Ryan Rectenwald arrived, the center sidewalk from where the truck was parked to Munro's front door was "covered in footprints." Id. at 120.

Rectenwald found a .45 caliber shell casing and a set of handcuffs in the front yard that he speculated might have some evidentiary value. Id. at 130, 189-90, 195. He also noted a few shoe impressions by the truck, and other impressions that appeared to lead towards the back yard. Id. at 223. The remaining impressions observed by Roberts and Powell were no longer visible.

2. "Things got out of hand" – Ian Libby confesses to Crystal Tycksen.

That same morning, a young woman named Crystal Tycksen woke up to find several text messages on her cell phone from Ian Libby, whom she was dating. RP (Beck Vol. 5) 1256. The messages started in the middle of the night and continued until morning. Id. They stated that something bad had happened, it was an emergency, and he needed her to pick him up. Id. at 1253; RP (8/23/12) 91-93, 95-96.

When Tycksen picked him up, Libby was paranoid and frantic. Id. at 1262. He had "pick marks"—scabs on his face, from picking at his skin until it bled—that to Tycksen meant that he was high on methamphetamines. Id. Libby wanted Tycksen to drive "out to the middle

of nowhere” where there was a well, so that he could get rid of something. Id. Tycksen found the situation frightening, so she turned around and brought Libby back to Ephrata. RP (Beck Vol. 5) 1265; CP 3846.<sup>4</sup>

Tycksen had heard about Munro’s murder, and Libby’s behavior made her suspicious. RP (Beck Vol. 5) at 1266. She accused him of being involved in the homicide, and he did not deny it. Id. He told her that “things got out of hand,” that two other people, Julian Latimer and another person, were with him, and that one of them ended up shooting the man, although he did not specifically name Munro as the victim. Id. at 1267. He indicated that he knew Munro occasionally kept guns and weapons in his truck, id. at 1269, and that the guns were what they were after. CP 3847.

Within days of the murder, Tycksen confided in an elderly friend, Laura Hays, about what Libby had told her about the murder. RP (Beck Vol. 5) 1272. Hays decided that she needed to report to the police what Tycksen had told her, and went to the Soap Lake Police Department and the Ephrata Police Department but was turned away. Id. at 75, 88-89. Eventually she learned a tip line had been set up in connection with the homicide investigation. Id. at 76. She telephoned the tip line and stated

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<sup>4</sup> Clerk’s Paper’s citations in this section are to a sworn declaration executed by Tycksen. CP 3846-48. The trial court prohibited Tycksen from testifying to much of what Libby told her about his commission of the homicide.

that Ian Libby had killed Sage Munro, and someone needed to do something about it. Id.

3. “I’m going to kill you like I killed that man” – Libby assaults and threatens Tycksen.

On January 21, 2010, Tycksen, Libby, and Libby’s friend James Morrison drove to the Lake Lenore Caves. Id. at 1274, 1280. There, Morrison left Tycksen alone with Libby. RP (Beck Vol. 5) 1281, 1283. Libby and Tycksen had a dispute over the future of their relationship, and he became enraged and assaulted her violently with his fists, feet, and teeth. Id. at 1284; CP 3850-51; RP (8/27/12) 58-59. In Morrison’s car, Libby still was unable to control his rage. At one point, he turned around and told her she was “fucking dead” and that he was going to “go get a gun from his brother’s house and kill her like he killed that man.” CP 3851; RP (Beck Vol. 5) 1293.

4. Tycksen tells police that Libby is the killer, but Detective Rodriguez fails to investigate the allegation.

Later that day, Tycksen called 9-1-1 to report the assault. Officer Powell responded. Tycksen was obviously frightened and had been seriously injured. RP (Beck Vol. 6) 1394.<sup>5</sup> She related to Powell what she knew about Libby’s involvement in Munro’s murder. RP (Beck Vol. 5)

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<sup>5</sup> The trial court excluded evidence regarding the severity of Tycksen’s injuries on the basis that it raised what the court termed a “jerkitude inference” about Libby. RP (Beck Vol. 5) 1205..

1298; RP (Beck Vol. 6) 1394-95. Powell telephoned lead detective Juan Rodriguez of the Moses Lake Police Department regarding Tycksen's report, and also sent a follow-up email at approximately midnight that same night. RP (Beck Vol. 6) 1396-97.

Although Hays did not give her name, when she named Libby as the killer on the tip line, law enforcement were able to identify her phone number, and Ephrata Chief of Police Dean Mitchell gave Rodriguez a "main names table", indicating that Libby was a suspect, cataloguing his criminal history, and supplying a telephone number for the tipster. RP (7/25/12) 157-59.

Rodriguez did not call the telephone number on the main names table when the tip was received on January 10, 2010, or direct anyone else to do so.<sup>6</sup> RP (7/25/12) 182. He also did not try to contact or try to interview Libby. RP (7/26/12) 178. Neither Rectenwald nor Rodriguez obtained or asked another person to preserve Gibbins's 9-1-1 call. RP (7/24/12) 163; RP (7/25/12) 153; RP (8/8/12) 156.

When he died, Munro had been in a relationship with a much younger woman, Marita Messick. RP (7/23/12) 105-06; RP (8/7/12) 24. Before she became involved with Munro, Messick was in a long-term

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<sup>6</sup> Rodriguez did not try to call the telephone number left on the tip line for over two years, until after he was interviewed by Nickels's defense team on April 27, 2012. RP (7/25/12) 181. By this time, the number was no longer in service.

relationship with Nickels, who was the father of her son. RP (8/7/12) 13, 15-16, 23, 79. Even after Messick became romantically involved with Munro, she continued to be intimate with Nickels. RP (7/26/12) 143-51; RP (8/7/12) 77-78, 83-85, 109, 133-34.

Messick told law enforcement she tried to end her relationship with Nickels shortly before the homicide and that she feared he might have committed the crime.<sup>7</sup> Law enforcement rapidly focused their investigation on Nickels, devoting substantial resources and involving agencies from other states<sup>8</sup> in their pursuit, and identified several facts that they believed supplied circumstantial evidence that Nickels had killed Munro in retaliation for the breakup. In particular, cell phone tower data suggested Nickels had driven to Spokane on December 28, 2009, and the handcuffs which were found at the scene yielded a mixed DNA sample containing at least three profiles, to which Nickels was a *possible* contributor. RP (7/31/12) 85-118; RP (8/1/12) 76, 87.<sup>9</sup>

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<sup>7</sup> Messick gave multiple conflicting statements to law enforcement during the investigation, a fact which was conceded in the certification for determination of probable cause. See e.g. CP 9 (“[Messick] admitted during the first interview she failed to say that she is still having a relationship with Nickels but denied the relationship was intimate”); CP 10 (Messick offers excuse for failing to inform police of ongoing telephone contacts with Nickels); CP 16 (individuals contacted during the investigation say “Messick would lie for Nickels all the time”). At trial she maintained that she ended her relationship with Nickels a few days before the homicide. RP (8/7/12) 39, 103.

<sup>8</sup> Nickels bought and sold cars at auction and was in the catalytic converter business, which caused him to travel from state to state frequently. RP (8/2/12) 89.

<sup>9</sup> Witness Erick Alsager also claimed Nickels confessed to him, but he got the facts surrounding the shooting wrong, and other witnesses contradicted his testimony.

Focused on Nickels, police investigators did little to follow up on the leads pointing to Libby as the killer. Although he interviewed Tycksen after she reported the assault and Libby's confession, Rodriguez concealed this fact from Nickels's defense team for over two years. RP (7/25/12) 195; RP (7/26/12) 160-64, 167-69. Rodriguez destroyed his notes of the interview and did not record it or take a written or taped statement from Tycksen. RP (7/26/12) 163-64. Rodriguez did not seek an order to preserve Tycksen or Libby's telephone records. Id. at 181-83. Nor did he make any effort to secure Libby's telephone. Rodriguez did not interview Latimer, Libby's accomplice, or request another officer do so. Id. at 177.

Rectenwald interviewed Libby, who at the time was in jail for his assault on Tycksen, but did not examine Libby's property to determine whether it contained anything of evidentiary significance. He did not take any action to follow up on the text messages that Tycksen had described. RP (8/8/12) 120, 123, 127. Libby claimed he had an alibi for the homicide, and Rectenwald interviewed Tosha Devyak, his claimed alibi witness, but did nothing further to verify whether it checked out or was consistent with other evidence in the case.<sup>10</sup> Id. at 127.

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<sup>10</sup> It was not: Devyak (who later recanted the alibi), told Rectenwald that Libby was with her the whole night before and morning of the homicide. RP (8/15/12) 601. However Powell, a first responder at the scene, recognized Libby among the several people at the scene watching the police activity. RP (Beck Vol. 4) 1036, 1056.

Nickels was ultimately prosecuted and convicted for the crime of first degree murder in connection with the Munro homicide. CP 3291.

5. “I do not want an innocent person to be convicted” -- post verdict, the Powells come forward with evidence that on the morning of the crime, Latimer confessed that he was an accomplice to Munro’s murder.

The Powells lived a block and a half away from Munro. CP 3930. They did not read newspapers or follow other media, and believed Libby was on trial for murdering Munro. *Id.* After Nickels was convicted, a friend told Richard Powell, “it looks like Libby is getting off again.” CP 3934. Powell “had a sick feeling” and contacted local attorney Garth Dano<sup>11</sup> to tell him that he and his family had information about Libby’s involvement. *Id.* Sharon, Richard, and Travis Powell<sup>12</sup> subsequently executed written declarations detailing what they knew about the murder.

The morning of the homicide, Sharon was awakened by her dogs barking. CP 3931. She heard a loud noise between 6:00 and 6:30 a.m. *Id.* Sometime in the mid-morning, shortly after 10:00 a.m., Julian Latimer knocked on Sharon’s son Travis’s window. *Id.* He told her that he needed to speak with Travis right away. He looked “very frightened, scared, and extremely pale.” *Id.* She let him in and he went into Travis’s room and shut the door. *Id.*

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<sup>11</sup> Mr. Dano is now the elected prosecutor for Grant County.

<sup>12</sup> Members of the Powell family are referenced in this brief by their first names since they share a surname. No disrespect is intended.

Latimer's demeanor piqued Sharon's interest, and she stayed by the door to listen to their conversation. There was a hole in the door which had been covered with paper but through which she could hear clearly. CP 5491. She overheard Latimer tell Travis, "I hope I am not in trouble. I was with Ian and we was robbing a guy's truck, the guy came out of his house and that is when Ian shot him. I just took off running." CP 3931. He told Travis, he was scared that he would "be in a lot of trouble." CP 3932. Even though she was "scared to death" because she feared "what Mr. Libby and his gang may do to me and my family" Sharon decided to come forward because "I do not want an innocent person to be convicted." Id.

Travis Powell remembered Latimer coming to his home but tried to tune out what he was telling him. CP 4089, 5510. He recalled, however, that "Julian proceeded to say that he was with Ian Libby and some people and someone got shot." CP 4088. He stated, "I honestly believe Nickles [sic] is innocent based off of Julian's statement and Ian's suspicious activities as well as Ian carrying firearms." CP 4089.

6. Libby confesses to his cellmates.

In December 2012, after the trial, Libby was arrested on unrelated matters and booked into Grant County Jail. CP 4166. There, Libby confessed to his cellmate, Jerry Perry, that he "and another dude" were stealing guns from a man's truck, the man came out of his house, and

Libby shot him with one of the stolen guns. CP 4166-68. Libby said “another guy named Nickels got convicted for his crime”, and Libby was worried that Nickels would win his appeal and Libby would be held responsible for what he had done. CP 4169.

Another inmate, Adrian Rodriguez, also said that Libby had confessed to him in December 2012. Rodriguez reported that “Ian started tripping out” because he thought “Nickels was going to get a new trial.” CP 4172. He told Rodriguez that he was thinking of going to the prosecutor and telling the prosecutor that he was car prowling at night, he was scared, and he shot the guy because he was confronted when he had the gun in his hand. CP 4172. Libby said he thought he might get “a good deal like manslaughter” if he told the prosecution that he was scared. Id. Libby told Rodriguez that the police had walked over his footprints and there was “no way” that his prints could be recovered. CP 4173.

7. The motion for a new trial is denied.

The trial court denied Nickels’s motion for a new trial on this and other bases, CP 5955-61, and sentenced him to serve 300 months in prison. CP 5965; RP (4/12/13) 72. Nickels appeals. CP 5982-83.

D. ARGUMENT

1. **The court’s “to convict” instruction, which substituted the permissive “should” for “must” regarding the jury’s duty to acquit where the State did not prove guilt beyond a**

**reasonable doubt, violated Nickels's right to due process of law and was a structural error.**

Fundamental principles of due process impose upon the State the duty to prove an accused person's guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970); State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); U.S. Const. amend. XIV; Const. art. I, § 3. The due process right to proof of guilt beyond a reasonable doubt intertwines with the right to a jury trial. Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). "It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt." State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (citing Sullivan, 508 U.S. at 280). Jury instructions must make it manifestly apparent that the State bears the burden of proof, and that the jury must acquit if that burden is not met. Bennett, 161 Wn.2d at 307; State v. Smith, 174 Wn. App. 359, 366, 298 P.3d 785, rev. denied, 178 Wn.2d 1008 (2013).

In Smith, this Court held that a non-standard "to convict" instruction which directed the jury that they "should" return a verdict of not guilty if the State did not meet its burden of proof rendered the jury's duty to acquit permissive and violated due process. 174 Wn. App. at 367-69. This Court noted that "should" is permissive, not compulsory, and

“expresses mere appropriateness, suitability, or fittingness.” Id. (citations omitted). But “where reasonable doubt remains, acquittal is mandatory.” Id. at 367 (citation omitted). This Court further held that the defective reasonable doubt instruction denied Smith his right to trial by jury. Id. at 368 (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 149 (2006)). This Court accordingly concluded the error was structural, and reversed Smith’s convictions. Id. at 368-69.

Here, as in Smith, the elements instruction stated, “if after weighing all of the evidence you have a reasonable doubt as to any of these elements, then you **should** return a verdict of not guilty.” CP 3909 (emphasis added). Under Smith, this was a structural error that requires reversal of Nickels’s conviction.<sup>13</sup>

**2. The trial court denied Nickels his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process of law when it permitted an unfit juror to deliberate and reach a verdict.**

a. “This is a small town, he’ll be taken care of.”

Post-trial, an alternate juror, Brian Reese, contacted Nickels’s defense team with concerns about the fairness of the proceedings. He

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<sup>13</sup> If this Court agrees that the issuance of the defective “to convict” instruction is a structural error that warrants reversal, it will be unnecessary for the court to reach many of the other errors briefed on appeal. The same is true if the court reverses based on the errors briefed in arguments 2, 3, or 4. Arguments 6, 7, 8, 9, and 11 concern trial court rulings which determined the evidence that the jury was permitted to hear and/or the evidence a jury would be permitted to hear if the conviction is reversed for a new trial, and must be decided in the event of a retrial.

related that during the trial, an “older female juror” told Reese she pitied Nickels because he “wasn’t going to last long.” CP 4086. She said that this was a small town and they were going to “take care of him.” Id. Reese believed “this juror had decided that the defendant was guilty before hearing all the evidence.” Id. He stated he reported his concerns to the bailiff, but never heard back. The defense submitted Reese’s declaration in support of a motion for new trial. Id.

The bailiff responded, “[d]uring the trial of this matter, I had two or three occasions to admonish a juror that she had been instructed not to discuss the case during recesses.” CP 4128. After two admonishments, the communications ceased, but some days thereafter, he was approached by alternate juror Reese, who said the same juror had spoken to him about “some concerns” for the defendant. Id. The bailiff said he advised Judge Sperline of the communication, and Judge Sperline said he would remind the jury in open court that any conversations regarding the trial or the people involved in it were forbidden. Id.

In a post-trial hearing, the juror, Arlene Bundy, denied doing, saying, or hearing anything improper during the trial. RP (Jackson Vol. 7) 906-08.<sup>14</sup> Two other empanelled jurors, however, contradicted Bundy and

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<sup>14</sup> The court conducted all questioning of jurors post-trial and did not directly confront Bundy with the allegation that she had made the statements. Instead, the court

corroborated Reese's account. Juror Gail Taylor testified, "There was a comment made by a juror that she said that she actually felt sorry for ... him being tried in Grant County, because he was going to ... get what he deserved." *Id.* at 950-51. Juror Nancy Tracy testified that she recalled someone saying, prior to deliberations, "this is a small town, he'll be taken care of." *Id.* at 962. Nickels moved for a new trial, arguing that Juror Bundy's statements raised an inference that she had prejudged Nickels's guilt, and that the court's failure to bring the matter to the attention of the parties was a separate error that violated Nickels's right to a jury trial. CP 4079; RP (12/20/12) 32-34.

Judge Sperline acknowledged the bailiff had reported Bundy's comments to him, and that this happened two or three times. RP (12/20/12) 39-40, 43. He stated,

[W]hat I decided to do in response to Mr. Reese's report to the bailiff was to admonish the entire jury ... that if they talk about people involved or any aspect of the trial during the recess, they're violating the court's order. **So without reporting Mr. Reese's comment to the parties,** that's the way the court addressed it.

RP (12/20/12) 40 (emphasis added). The court further ruled its failure to advise counsel of the issue was "inadvertent" and the error's impact on the trial was "*de minimus* [sic]." CP 5959.

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asked whether "anyone" had done so. Bundy answered this question in the negative. RP (Jackson Vol. 7) 908.

- b. Bundy’s bias made her an unfit juror and permitting her to deliberate violated Nickels’s Sixth and Fourteenth Amendment and Article I, sections 3 and 21 right to a fair trial by an impartial jury.

“[T]he criminally accused [have a right to] a fair trial by a panel of impartial, indifferent jurors.” Irvin v. Dowd, 366 U.S. 717, 722 (1961) (citation and internal quotation marks omitted); State v. Strasburg, 60 Wash. 106, 116-17, 110 P. 1020 (1910); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21. “The theory of the law is that a juror who has formed an opinion cannot be impartial.” Reynolds v. United States, 98 U.S. 145, 155 (1878). Thus, the bias or prejudice of even a single juror denies an accused person his right to a fair trial, Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998) (*en banc*) (citation omitted), and is a structural defect that requires reversal of the conviction. Tumey v. Ohio, 273 U.S. 510, 522 (1927); see also Arizona v. Fulminante, 499 U.S. 279, 291 (1991) and Morgan v. Illinois, 504 U.S. 719, 729 (1992).

Federal courts differentiate between actual bias and implied bias. Actual bias is “bias in fact” and is usually established by a juror’s express admission that she cannot be fair or impartial. United States v. Gonzalez, 214 F.3d 1009, 1112 (9th Cir. 2000) (citation omitted). Some jurors, however, are unaware of their bias, or may not acknowledge it. This circumstance is described as “implied bias.” Crawford v. United States,

212 U.S. 183, 196 (1909). Both actual and implied bias require a juror's removal. Fields v. Woodford, 309 F.3d 1095, 1103 (9th Cir. 2002); State v. Irby, -- Wn. App. --, 347 P.3d 1103 (April 30, 2015) ("Irby II"); State v. Cho, 108 Wn. App. 315, 328-29, 30 P.3d 496 (2001). Whether a juror's bias may be implied is a question of law. "Doubts regarding bias must be resolved against the juror." Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991); Cho, 108 Wn. App. at 330.

Bundy's repeated comments that the jury would "take care of" Nickels because Ephrata was a small town and he would "get what he deserved" equate to assertions that Bundy intended to return a guilty verdict, and establish actual bias. In the alternative, the comments, considered together with her other misconduct, support a presumption of implied bias.

In Dyer, the *en banc* Ninth Circuit held that a juror's lack of candor during a hearing conducted to explore her bias itself gave rise to an inference of implied bias. Dyer, 151 F.3d at 979, 982. Bundy's troubling comments, her repeated misconduct that continued in the face of admonitions from the bailiff, and her perjury during the post-trial proceeding establish her implied bias and thus her unfitness to serve on the jury. The structural error requires reversal of Nickels's conviction.

3. **The court’s decision to not notify the parties and instead resolve the grave concerns about Bundy’s impartiality *ex parte* violated Nickels’s Sixth and Fourteenth Amendment rights to be present and to the assistance of counsel.**

a. The court had the duty to investigate Bundy’s apparent bias at a hearing at which Nickels and his lawyers would be present.

The trial judge bears the primary responsibility to investigate a claim of juror misconduct. Dyer, 151 F.3d at 978. “[A] court confronted with a colorable claim of juror bias **must** undertake an investigation of the relevant facts and circumstances.” Dyer, 151 F.3d. at 974 (citing, *inter alia*, Remmer v. United States, 347 U.S. 227, 230 (1954)) (emphasis added); see Smith v. Phillips, 455 U.S. 209, 215 (1982) (noting that the Supreme Court has “long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias”).

b. The court’s *ex parte* resolution of Bundy’s misconduct violated Nickels’s right to be present.

An accused person has the right to be present at all stages of the proceedings. United States v. Gagnon, 470 U.S. 522, 526 (1985); U.S. Const. amend. XIV. In Washington, the right to be present is specifically guaranteed by article I, section 22 of the Constitution, and is also secured by the “inviolable” right to trial by jury. State v. Wroth, 15 Wash. 621, 623-34, 47 P. 106 (1896), abrogated on other grounds, State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 486 (1983); Const. art. I, §§ 21, 22.

In addition to those proceedings at which the Sixth Amendment guarantees an accused the right to be present,

a defendant has a due process right to be present at a proceeding “whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.... [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence...”

Gagnon, 470 U.S. at 526 (citation omitted); see also State v. Irby, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011) (“Irby I”); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22.

The right to be present is violated when the court has *ex parte* contacts with the jury, or when it resolves a matter relating to juror bias without affording the defendant an opportunity to be present. Rushen v. Spain, 464 U.S. 114, 118-19 (1983); Irby, 170 Wn.2d at 800; Wroth, 15 Wash. at 623-24. Whether an accused person’s right to be present has been violated is reviewed *de novo*. Irby I, 170 Wn.2d at 880.

Irby is instructive. In Irby, the court and the parties agreed via email to excuse seven jurors during voir dire. 170 Wn.2d at 878. The court did not hold a hearing on the record or afford Irby the opportunity to be present or consulted on the issue. Id. The Supreme Court held the “proceeding” was one which Irby had a due process right to attend. Id. at 881-82. In so holding, the court emphasized, “this novel proceeding did not simply address the general qualifications of 10 potential jurors, **but**

**instead tested their fitness to serve as jurors in this particular case.”**

Id. at 882 (emphasis added).

Bundy’s misbehavior directly bore upon her fitness to serve as a juror. The bailiff responded to the comments *ex parte*, and the judge did not consult with or give Nickels an opportunity to be present when he decided how he would address Bundy’s continued misconduct. Similar to Irby, the court determined Bundy’s “fitness to serve as [a] juror[.]” without affording Nickels the right to be present. Irby, 170 Wn.2d at 882. Consequently, Bundy was permitted to deliberate to verdict. This Court should hold that the bailiff’s *ex parte* discussions with Bundy and Nickels’s exclusion from the process wherein the court determined how to respond to Bundy’s misconduct violated Nickels’s right to be present.

c. The trial court violated Nickels’s right to the assistance of counsel.

In addition to violating Nickels’s right to be present, the trial court violated Nickels’s Sixth Amendment right to the assistance of counsel by preventing counsel from learning of Bundy’s misconduct and instead deciding how the misconduct should be addressed in secret.

The right to counsel is violated when counsel is completely absent from a critical stage of the proceedings. United States v. Cronin, 466 U.S. 648, 659 (1984). The procedure in which the court decided to take no

further evidence of Bundy's misconduct beyond the bailiff's report and formulated an instruction for the jury was a critical stage. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. United States, 339 U.S. 162, 167 (1950); Remmer, 347 U.S. at 228-29; State v. Johnson, 125 Wn. App. 443, 460, 105 P.3d 85 (2005).

This rule necessarily extends to non-innocuous communications between the bailiff and the jury. Juries view the bailiff as speaking on the judge's behalf. Johnson, 125 Wn. App. at 461; RCW 2.32.330, 4.44.300. "When a judge delegates part of the judge's official duties to a bailiff, the bailiff becomes in effect the alter ego of the judge; the actions of the bailiff are the actions of the judge and the shortcomings of the bailiff are the shortcomings of the judge." Adkins v. Clark County, 105 Wn.2d 675, 678, 717 P.2d 275 (1986) (citation omitted).<sup>15</sup>

The bailiff communicated with both Bundy and Reese about matters of substance. The bailiff even admonished Bundy *ex parte*. Instead of telling counsel about Bundy's improper and biased comments, the court also resolved the issue *ex parte*. The court thereby deprived Nickels of

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<sup>15</sup> Additionally, under Code of Judicial Canon (CJC) Rule 2.9(B), a judge who receives an unauthorized *ex parte* communication shall "promptly ... notify the parties of the substance of the communication and provide the parties with an opportunity to respond." CJC 2.9(B). A judge must also make reasonable efforts to ensure the prohibition on *ex parte* communications is not violated by court staff. CJC 2.9(D).

“the opportunity to prove actual bias”, a safeguard that is necessary to protect the right to an impartial jury. Dennis, 339 U.S. at 167.

d. The constitutional error requires a new trial.

Allowing a biased juror to serve is a structural error. Irby II, 347 P.3d 1103 at ¶ 16. Additionally, where the court has prevented a party from learning of an important communication between the court and the jury and thereby denied an accused person his right to be present and to the assistance of counsel at a critical stage, prejudice may be presumed, and reversal is required. See State v. Shutzler, 82 Wash. 365, 367-68, 144 P. 284 (1914); Johnson, 125 Wn. App. at 460.

The court should have held a timely hearing in open court with Nickels and all counsel present in which the question of Bundy’s bias could have been fully explored. At such a hearing, the court likely would have ascertained that other jurors had heard similar remarks to that reported by Reese. Bundy herself could have been questioned. And the court, with both parties participating and the accused present, could have identified a remedy that would have respected Nickels’s due process right to a trial by an impartial jury. The court did none of these things. This Court should conclude that the violation of Nickels’s rights to a jury trial, to be present, and to the assistance of counsel require reversal of his conviction.

4. **The secret ‘proceeding’ violated Nickels and the public’s right to a public trial.**

a. Accused persons have the constitutional right to a public trial.

An accused person has the constitutional right to a public trial, Const. art. I, § 22, a right shared by the press and public. Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 580 (1980); U.S. Const. amend. I; Const. art. I, §10. The right to a public trial addresses concerns regarding “perjury, transparency, [and] the appearance of fairness.” State v. Smith, 181 Wn.2d 508, 514, 334 P.3d 1049 (2014).

b. The *ex parte*, in-chambers ‘proceeding’ wherein the court determined how to resolve concerns regarding juror misconduct should have been held in open court.

The Washington Supreme Court has adopted a three-step framework to analyze claimed public trial violations. Smith, 181 Wn.2d at 514. The Court first decides whether the public trial right is implicated. If the public trial right is implicated, the Court then considers whether there was in fact a closure of the courtroom. Finally, if the Court concludes there was a closure, the Court assesses whether the closure was justified. Id.

Washington uses the “experience and logic” test to determine whether a proceeding implicates the public trial right. State v. Njonge, 181 Wn.2d. 546, 553-54, 334 P.3d 1068 (2014); State v. Sublett, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012). The “experience” prong asks “whether

the place and process have historically been open to the press and general public.” Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (“Press-Enterprise II”). The “logic” prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise II at 8). In making this latter determination, the “guiding principle is ‘whether openness will enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.’” Smith, 181 Wn.2d at 514-15 (citation and internal quotations omitted).

- i. *Experience demonstrates that proceedings to assess and respond to juror bias and misconduct historically were open to the defendant, press, and public.*

The “experience” analysis must start with the presumption that criminal trials are open to the public. “A trial is a public event. What transpires in a court room is public property.” Cohen v. Everett City Council, 85 Wn.2d 385, 387, 535 P.2d 801 (1975) (citation omitted). This Court should hold that a proceeding wherein the court determines its response to juror bias or misconduct is one which experience dictates should be held in open court.

Both the United States Supreme Court and the Washington Supreme Court have found potential inconvenience or embarrassment to a

juror or the tribunal from open proceedings is outweighed by “the lawful right of a party to have his case tried in open court.” Wroth, 15 Wash. at 623; see Clark v. United States, 289 U.S. 1, 16 (1933). Early Washington decisions concerning the right of the accused to be present likewise broadly support the principle that a “proceeding” such as the one here, in which the court determined how to address juror misconduct, would have been conducted in open court. See e.g. Wroth, 15 Wash. at 623-24; Sun Life Assur. Co. of Canada v. Cushman, 22 Wn.2d 930, 158 P.2d 101 (1945); Shutzler, 82 Wash. at 867-68.

The conclusion that the ‘proceeding’ should have been public is also supported by the plain language of article I, section 10, which requires that justice “be administered openly.” Const. art. I, § 10; Cohen, 85 Wn.2d at 389 (holding that because court reached merits of controversy, it had “reached a stage where justice was being ‘administered’ and therefore constitutionally required to be open”); cf. Remmer, 347 U.S. at 229-30 (“**The trial court should not decide and take final action ex parte on information** [regarding an allegation that someone had tampered with a juror], but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, **in a hearing with all interested parties permitted to participate**”)

In State v. Halverson, 176 Wn. App. 972, 309 P.3d 795 (2013), the trial court conducted *in-camera* preliminary questioning of a deliberating juror regarding suspected misconduct. Division Two held the court did not err by holding the proceeding in chambers. However the Court’s analysis of historical practice was shallow and its conclusion is unconvincing.

The Court relied on State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007), and United States v. Edwards, 823 F.2d 111 (5th Cir. 1987), cert. denied, 485 U.S. 934 (1988). In Wilson, the defendant contended that an in-chambers conference regarding whether a prospective juror should be excused for cause violated his right to be *present*. 141 Wn. App. at 603. Wilson apparently did not argue, and the Court did not address, whether the conference violated the public trial right. Wilson thus is not on point.<sup>16</sup> Additionally, Wilson dates from 2007. The great weight of *historical* authority establishes the proceeding is one that would have been public.

Edwards was decided under the First and Sixth Amendments, not Washington’s ““separate, clear and specific provision [that] entitles the public, and ... the press is part of that public, to openly administered justice.”” Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 209-10, 848 P.2d 1258 (1993) (quoting Cohen, 85 Wn.2d at

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<sup>16</sup> It is questionable in any event whether the holding in Wilson would survive Irby I. See Oahu Publications Inc. v. Ahn, 331 P.3d 460, 500 (Haw. 2014) (noting, “our law does not allow a judge to question a juror about potential misconduct without the defendant present”).

388). Cf. Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 56-57, 615 P.2d 440 (1980) (declining to follow federal precedent since it is “not clear on the source of the asserted public interest in free and open access to judicial proceedings”, whereas “the Washington Constitution provides more specific guidance”). Further, instead of applying the “experience and logic” test, the Edwards court reached its decision based on “functional considerations.” 832 F.2d at 116-17.

Finally, Halverson does not answer the question presented here because, although the court in Halverson initially questioned the juror in chambers, “[o]n the record the next morning with Halverson and trial counsel present, the trial court recounted the prior afternoon’s events.” 176 Wn. App. at 975. Here, the court not only conducted its truncated ‘evidentiary’ portion of the proceeding in chambers, it also rendered its decision secretly, without disclosing what had transpired in open court. This Court should conclude that experience dictates that the proceeding should have been public.

ii. *The “logic” prong supports open proceedings.*

The accused and the public share a common concern that is served by the public trial right, the assurance of fairness. Press-Enterprise II, 478 U.S. at 7. A public trial supplies accountability and transparency, and boosts confidence in the impartial functioning of our judicial system.

Smith, 181 Wn.2d at 515. A public trial also operates “as a safeguard against any attempt to employ our courts as instruments of persecution.” In re Oliver, 333 U.S 257, 269 (1948). Like the right to a jury trial, public proceedings protect against “the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” Press-Enterprise II, 478 U.S. at 12-13 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

All of the salutary purposes of public proceedings identified in the logic prong of the “experience and logic” test are served by making the proceeding here open to the public. Indeed, the secret, *ex parte* proceeding raises the specter of the precise evils that the right to a public trial is intended to guard against: justice done in a “covert manner,” the “compliant, biased, or eccentric judge,” and the possibility of “abuse of judicial power.” In the ‘proceeding’ in question the court took preliminary evidence regarding juror bias and misconduct and made a final decision regarding how the issue should be addressed. But for Reese’s disclosure, this highly charged issue of juror bias probably would never have become part of the public record at all.

There is no plausible justification for the court to have concealed the issue from the parties.<sup>17</sup> Imagine, for example, if Bundy had explicitly said to Reese, “I believe Mr. Nickels is guilty and I intend to vote to

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<sup>17</sup> The court’s assertion that its failure to disclose the issue to the parties was “inadvertent”, CP 5959, is unconvincing.

convict.”<sup>18</sup> If the court had learned of this statement *ex parte* and then, on its own, determined how the matter should be addressed without creating a public record of its decision, there would be no disagreement that the core interests the public-trial right is intended to protect would have been breached. This Court should conclude that the logic prong of the “experience and logic” test compels the conclusion that the proceeding should have been open.

c. The closure was not justified.

Before the trial court may close a portion of the proceedings to the public, it must apply the five-part analytic framework articulated in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). The trial court did not conduct a Bone-Club inquiry. The trial court “administered justice”, but instead of doing so openly, it did so in a secret proceeding hidden from the public record.

The trial court defended the closure on the basis that it was “*de minimus* [sic].” CP 5959. But the Washington Supreme Court has rejected the suggestion that any public trial violation may be *de minimis*. State v. Easterling, 167 Wn.2d 167, 180-81, 137 P.3d 825 (2006); accord State v. Frawley, 181 Wn.2d 452, 465-66, 334 P.3d 1022 (2014) (lead opinion). Both Nickels and the public deserved to have the issue of Bundy’s bias

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<sup>18</sup> The statements Bundy did make were tantamount to an express assertion that she had prejudged the case.

and misconduct heard in open court. This Court should conclude that the secret proceeding violated the right to a public trial.

d. The structural error requires reversal.

The wrongful deprivation of the right to a public trial is a structural error. Njonge, 181 Wn.2d at 554; State v. Wise, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012). The violation of the public trial right thus requires reversal of Nickels's conviction.

5. **The State's *Brady* violations, mismanagement, and misconduct required dismissal.**

a. "We have these terrible discovery problems".

From the outset of the proceedings, the State withheld discovery; it provided incomplete discovery; it provided discovery piecemeal; it provided discovery after court-imposed deadlines; it surprised the defense with discovery even as trial began.<sup>19</sup> The State evinced no understanding of its duty to procure materials held by others, and it did little to encourage cooperation by law enforcement agencies involved in the investigation. RP (Jackson Vol. 6) 814, 841-42.

On August 19, 2011, the court acknowledged a pervasive pattern in Grant County of police agencies failing to comply with discovery

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<sup>19</sup> CP 39-81; RP (12/13/10) 107; RP (4/25/11) 129-31; RP (8/19/11) 2-16RP (9/6/11) 188-90, 203, 296; RP (2/28/12) 427-29, 433-34, 437; RP (5/8/12) 449; RP (Jackson Vol. 4) 461, 524; RP (Jackson Vol. 5) 662, 664; RP (Jackson Vol. 6) 841-42, 853-55.

obligations. RP (8/19/11) 18, 21. The court lamented, “we have these terrible discovery problems,” and ordered the State and its police agencies to comply with defense discovery demands. CP 121; *Id.* at 21, 28-29.

Before trial, the defense moved to dismiss based upon the State’s<sup>20</sup> ongoing violation of discovery rules and court orders, failure to preserve and destruction of evidence, and “continuous and overwhelming misconduct.” RP (Jackson Vol. 4) 461; CP 751-1205.

As early as January 10, 2010, the Moses Lake Police Department knew that Ian Libby was a real suspect. RP (Jackson Vol. 4) 464-66. Law enforcement failed to preserve evidence of Libby’s involvement and instead allowed it to be destroyed. *Id.* at 484-86; CP 805. The voicemail message from Hays “probably got deleted.” CP 1883. Rodriguez did not turn over notes or a report from his interview in January 2010 with Tycksen. In fact, he lied and claimed the interview never took place. CP 798-99. Law enforcement destroyed investigation notes, even after the court ordered notes be preserved. RP (Jackson Vol. 4) at 478-80; RP (Jackson Vol. 5) 814; CP 1526, 1866. Exculpatory information was withheld from official reports. CP 1526; RP (Jackson Vol. 4) 480; CP 1826. Although some witnesses described seeing a silver car leaving the

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<sup>20</sup> “The State” as used in this section refers to the police and law enforcement agencies, consistent with Brady. Where necessary, the prosecution is differentiated from police agencies.

area around the crime and Idaho law enforcement determined Nickels had only one silver car, which was inoperable, Dale directed Idaho law enforcement to destroy photographs of the vehicle, asserting they “were of no evidentiary value.” CP 782-83.

The prosecution did little to nothing to discourage this misconduct. A memorandum was generated by the county prosecutor purportedly to apprise law enforcement of their obligations regarding Brady and potential impeachment evidence, but it was not disseminated to case investigators. The prosecution did not facilitate defense efforts to obtain Brady material regarding Montana detective Michael Mlekush or his confidential informant, Christopher Bonck, who eventually (based on the defense’s own investigation) was thoroughly discredited. CP 821, 825.

The court denied Nickels’s motion to dismiss, but it conceded that law enforcement’s failure to preserve exculpatory or impeachment evidence was negligent. CP 2007-08.

b. “There seems to be this attitude that we can just engage in these sorts of investigations without letting anybody know.”

Over the course of the trial, the misconduct continued unabated. The State disclosed supplemental reports after trial commenced that were in law enforcement’s possession many days before. CP 2569. For months,

law enforcement backed by the prosecutors refused to turn over witnesses' criminal conviction data. RP (Jackson Vol. 2) 231; RP (7/9/12) 115-23.

The State lied about the whereabouts of the bullet casing that had been discovered at the crime scene and withheld it to conduct secret testing. RP (7/6/12) 18-23. A gun which was discovered in Bellevue was also tested by the State in secret, without notice to the defense. RP (7/6/12) 30-31. The court professed it was "bewildered" by the State's failure "to involve the defense in any testing of any kind." Id. at 31. The court noted, "there seems to be this attitude that we can just engage in these sorts of investigations without letting anybody know", and found that the State's conduct was "not conducive to notions of a fair trial and an appropriate administration of justice, and it's not consistent with the State's discovery obligations." Id. at 32-33. The court found Nickels had shown governmental mismanagement, but did not dismiss because it found the defense was not prejudiced. Id. at 33.

Four days after the ruling, the defense again moved to dismiss. From newly-provided discovery, they learned that law enforcement had finally tried to track Hays's phone number, but that all records that might have existed had been purged. RP (7/10/12) 19-26. The State also had Sage Munro's cell phone "dumped" without notice to the defense. Id. at

34. The court voiced frustration with the State, but ruled there was no new prejudice to the defense. Id. at 38-39.

c. Libby reoffends and threatens defense witnesses; the State does nothing.

On July 27, 2012, after trial had started and less than 24 hours after he was released from custody on a material witness warrant on strict conditions, Libby broke into the home of defense witness Matt Cox and assaulted Cox and two other persons, sending them to the hospital. RP (7/30/12) 5. One defense witness opined that the crime was committed because Libby's "back is up against the wall" and he was scared. Id. at 9.

The State did not tell the defense about the incident. Again, the defense found out by their own investigation. Id. at 5-9, 13. The court ordered the State to turn over all police reports regarding the incident. Id. at 21. A week later, having received nothing, the defense moved to compel discovery. RP (8/6/12) 95-100. The court ordered Ephrata police to turn over whatever they had, even if the materials were piecemeal or incomplete. RP (8/6/12) 100; RP (8/7/12) 5.

As of August 8, 2012, the defense still had not received reports from the incident. RP (8/8/12) 4. The court again directed Ephrata Police to turn over the material, stating,

for the Ephrata Police Department to take the position, well, we don't want to give up ... anything in our investigation until our

investigation is complete is elevating a potential burglary and robbery case in the future over a first degree murder now pending. That's ... just not going to work.

RP (8/8/12) 12.

On August 27, 2012, the State received a copy of a transcribed interview with Cox. CP 3943. In that interview—which took place on August 11, 2012—Cox said Libby's girlfriend told him to watch his back, and explained, "I know Ian's pissed off about this whole thing." CP 3951. The State did not turn over the transcript until *after* closing arguments.

In a final letter ruling filed by the court regarding Nickels's fifth motion to dismiss, the court ruled that the defense "clearly established ... mismanagement ... necessary to support dismissal." CP 5750. Among the many instances of mismanagement, the court cited Rodriguez's failure to follow up on the anonymous tip, his failure to secure Libby and Tycksen's cell phones or cell phone data, and "Rodriguez's long denial that he had interviewed Tycksen on January 22, 2010." *Id.* The court held, however, that "this official bungling" did not prejudice Nickels, ruling that Nickels had the opportunity to present a complete defense and did so. CP 5750-51.

d. The State's *Brady* violations and mismanagement violated due process and prejudiced Nickels, warranting dismissal.

"The suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to

guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady v. Maryland, 373 U.S. 83, 86 (1963). In re Stenson, 174 Wn.2d 474, 476, 276 P.3d 286 (2012); U.S. Const. amend. XIV; Const. art. I, § 3. The duty to turn over evidence exists whether or not the defense requests the information, extends to impeachment and potentially exculpatory as well as exculpatory evidence, and to material held by others. Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); Strickler v. Greene, 527 U.S. 263, 280-81 (1999); Stenson, 174 Wn.2d at 486.

“Materiality” under Brady only requires a reasonable probability that the outcome would have been different if the evidence had been disclosed. Kyles, 514 U.S. at 433-34. The Court asks whether in the absence of the evidence, the defendant received a fair trial, “understood as a trial resulting in a verdict worthy of confidence.” Id. at 434. In making this assessment, suppressed evidence should be considered collectively, not item by item. Id. at 436.

- i. *In withholding the Cox statement until after the trial, the State withheld material exculpatory evidence.*

When the State fails to disclose material exculpatory evidence, the good or bad faith of the State is irrelevant. Arizona v. Youngblood, 488 U.S. 51, 57 (1988). Despite the trial court’s explicit and unmistakable order that discovery be turned over as soon as it was available, law

enforcement did not disclose Cox's interview inculcating Libby to the defense or provide a summary of his statements. The prosecutors did not give the interview transcript to the defense, even though they received it before closing arguments.

Eleven days after the interview took place, the State objected to any discussion of the July 27, 2012 incident. RP (8/22/12) 176. The court ruled there was nothing in the police reports regarding the event that connected the home invasion to the Munro homicide or the fact of Cox being a witness in Nickels's trial, and barred the defense from presenting evidence concerning the incident. *Id.* at 176-77. Cox's statement was unquestionably material, as it provided the link the court believed was absent between Libby's July 27, 2012 criminal offense and the trial by supplying a motive for the commission of that crime. This Court should conclude that the State's withholding of this material, exculpatory evidence violated its obligations under Brady, and requires reversal.

- ii. *The State's failure to preserve and withholding of potentially exculpatory evidence, viewed cumulatively, evinces bad faith.*

The trial court repeatedly declined to find the State acted in bad despite its disregard of court orders and Brady obligations. When the misconduct is viewed in the aggregate, bad faith is apparent.

Police officers lied. They withheld exculpatory and impeachment evidence from their written reports. They concealed evidence. They permitted exculpatory evidence to be destroyed. They affirmatively directed the destruction of exculpatory evidence. They destroyed their notes after being ordered not to do so. They withheld material discovery until it was too late for the defense to use it.

The prosecution colluded in this misconduct. The trial prosecutors never disseminated the State's own Brady/impeachment evidence memo to the detectives who were running the investigation. Prosecutors made minimal effort to obtain materials held by others. Even as law enforcement relied on Montana police to track and prosecute Nickels, the prosecution took a hands-off approach to Brady material from Montana, averring that it was "not the State's problem." RP (Jackson Vol. 2) 219. The prosecution continued to violate its discovery obligations under CrR 4.7 and to withhold evidence favorable to Nickels right up until the last day of trial. This Court should conclude that, viewed cumulatively, the State's malfeasance demonstrates bad faith.

iii. *Nickels was prejudiced and reversal and dismissal are required.*

By disregarding its Brady obligations, the State succeeded in preventing Nickels from availing himself of a wealth of evidence

inculping Libby and exculpating Nickels, such as Libby's text messages, his call detail record, his cell phone tracking data, and Cox's recorded interview. The trial court ruled Nickels was not prejudiced because "none of [Tycksen's] testimony was contradicted." CP 5750. This assessment underestimates the State's efforts to assassinate Tycksen's character.<sup>21</sup> Because the messages were not preserved, the jury may have disbelieved that they were sent, or doubted their content. It certainly is likely that they may have hesitated to convict Nickels if that hard evidence had been before them. The same is true for the other evidence that the State permitted to be destroyed, failed to preserve, or did not pursue. This Court should conclude that Nickels was prejudiced by the State's due process violations and reverse and dismiss Nickels's conviction.

e. Dismissal was required under CrR 8.3(b).

Under CrR 8.3(b), the court may, in the interests of justice, dismiss any prosecution due to arbitrary action or government misconduct where there has been prejudice to the rights of the accused. CrR 8.3(b). Actual misconduct is not required for dismissal under the rule; "simple mismanagement is sufficient." State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). The trial court found that Nickels had shown mismanagement, but denied the motion to dismiss on the basis that Nickels

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<sup>21</sup> The State's attack on Tycksen is addressed in detail in arguments 7, 8, and 11, infra.

was not prejudiced. CP 5750-51. As shown, this determination was incorrect. The motion to dismiss should have been granted.

**6. The trial court erred in denying Nickels's motion to suppress where his seizure was based on the unlawful trap and trace of his phone, and in denying a *Franks* hearing based on law enforcement's deliberate or reckless misrepresentations in the affidavit for a warrant to collect Nickels's DNA.**

- a. The stop of Nickels and collection of his DNA was based on false statements and material omissions in the warrant affidavit and information unlawfully received from an unauthorized trap and trace device.

On May 3, 2010, Dale and Rectenwald obtained an order from Grant County Judge John Antosz for a trap and trace device for Nickels's cell phone. CP 1317. The order was emailed to the U.S. Marshal's Office, but, on May 5, 2010, the Marshals advised that they could not assist with a phone track unless there was an active warrant for Nickels's arrest, so the order was never served. *Id.*

The following day, Montana Detective Michael Mlekush got a warrant to collect a DNA sample from Nickels. Mlekush's affidavit swore an informant said Nickels would be in Helena on May 6, 2010. CP 1327. Mlekush also swore that Rectenwald told him a search warrant had been issued for Nickels's DNA by a Grant County judge. This was not true.

In a report dated May 14, 2010, Mlekush stated that on May 10, 2010, he and a partner, Deputy Michael Hayes, conducted a traffic stop on

Nickels's vehicle, took him into custody, and obtained two buccal swabs.

CP 1360-61. Contrary to Mlekush, Hayes's report indicated,

Detective Mlekush advised me he received information David may be in the area ... **Detective Mlekush was receiving updates from David's cell phone provider as to the location of David's phone, and it showed recent activity in this area.**

CP 1363 (emphasis added).

On April 14, 2011, Mlekush was fired, and on January 9, 2012, he pleaded guilty to criminal offenses related to his termination. CP 1367, 1371; RP (12/30/12) 71, 74-76. It subsequently came to light that before Mlekush executed the affidavit for search warrant, he mishandled police buy money, which was the event that led to the disciplinary investigation. CP 2647; RP (7/23/12) 12; RP (7/30/12) 61.

Nickels moved to suppress evidence from the stop. CP 1296-1417. In response, the State provided brand new discovery, which claimed Mlekush was relying on information Rectenwald obtained pursuant to a valid trap and trace order authorized by Judge Antosz. CP 1930. A supplemental report authored by Rectenwald asserted that information regarding Nickel's whereabouts was provided by Verizon, Nickels's cell phone provider, to the Drug Enforcement Administration (DEA), which gave it to him, and that he in turn passed the information to Mlekush. CP

1937. The State also supplied an undated, unsworn email from Mlekush in which he asserted,

Det. Rectenwald advised me he could ‘Ping’ Nickels cell phone in an attempt to assist us in locating Nickels. While I remained on the phone ... with Det. Rectenwald, Det. Rectenwald was able to provide me with a general location of Nickels’ cell phone.

CP 1998.

In addition to the conflicts between Mlekush’s affidavit, Hayes’s report, and Mlekush’s undated, unsworn letter, in earlier statements law enforcement repeatedly denied the use of a trap and trace. In defense interviews done well in advance of trial, Rectenwald unequivocally stated one was not used. CP 1990 (“There was absolutely no track and trace being done”). He and Dale repeatedly told the defense the DEA was not involved in the case. CP 1985-90. Their story changed only when the defense moved to suppress, two years after the stop.

The trial court denied Nickels’s motion to suppress without taking testimony and refused to schedule a Franks hearing, and entered findings of fact and conclusions of law in support of its ruling. CP 5997-99.

b. Nickels’s stop was done without authority of law.

Washington has a “long history of extending strong protections to telephonic and other electronic communications.” State v. Hinton, 179 Wn.2d 862, 871, 319 P.3d 9 (2014) (citing State v. Gunwall, 106 Wn.2d

54, 66, 720 P.2d 808 (1986)). A cell phone is a “private affair” within the meaning of article I, section 7, and intrusion into its contents or a search of the data it supplies must be done under authority of law. Hinton, 179 Wn.2d at 873-74; cf., also, Riley v. California, -- U.S. --, 134 S.Ct. 2473, 2488-89 (2014). RCW 9.73.260 generally prohibits the use of a trap and trace device without a prior court order. Thus a valid court order must supply the constitutionally-required authority of law for use of trap and trace technology.

Without a hearing, the trial court found Rectenwald “applied for and received a Track and Trace warrant” and that he gave the information to Mlekush, who relied upon it to conduct the traffic stop. CP 5997-98. But although it is true that Judge Antosz signed an order for a trap and trace device, three lead detectives, including Rectenwald himself, averred that the order either was never served upon a federal agency, or the U.S. Marshals would not execute it. CP 1985-90.

Further, if the State’s claim that a valid trap and trace supplied the basis for the stop is taken as true, then Mlekush lied under oath when he swore Nickels was stopped based on information received from a confidential informant. Finally, Hayes’s report contradicts Rectenwald and Mlekush, because he asserted Mlekush was *personally* receiving updates

from Nickels's cell phone provider. If this was the case, the stop was unlawful.

Findings of Fact must be supported by substantial evidence in the record. Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); cf. State v. Cardenas-Muratalla, 179 Wn. App. 307, 317, 319 P.3d 811 (2014). Rectenwald's after-the-fact claims appear tailored to dispel credible and substantive defense arguments. The unsworn, undated email authored by Mlekush, a proven liar, does not supply reassurance that Rectenwald's claims are true.

The State bears the burden of justifying a warrantless seizure. State v. Gantt, 163 Wn. App. 133, 138, 257 P.3d 682 (2011). This Court should conclude the State did not meet its burden to show the seizure was lawful.

Washington's exclusionary rule is "nearly categorical" and requires the suppression of all illegally-obtained evidence. State v. Afana, 169 Wn.2d 169, 181, 233 P.3d 879 (2010). The evidence obtained as a result of the unlawful seizure, including Nickels's DNA sample, should have been suppressed. Because the mixed DNA profile from which Nickels could not be excluded was Nickels's sole link to the crime scene, the error in denying suppression was prejudicial. Nickels's conviction should be reversed and this matter remanded for a new trial.

c. Alternatively a *Franks* hearing was required.

The warrant clause of the Fourth Amendment requires that, absent certain exceptions, police must obtain a warrant based upon probable cause from a neutral and disinterested magistrate before embarking on a search. *Franks v. Delaware*, 438 U.S. 154, 164 (1978); U.S. Const. amend.

IV. Under *Franks*,

where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56; accord *State v. Chenoweth*, 160 Wn.2d 454, 478-79, 158 P.3d 595 (2006); Const. art. I, § 7. Similarly, where material facts are deliberately or recklessly omitted from a warrant application in a manner that tends to mislead, an accused person will be entitled to a *Franks* hearing unless, if the omitted facts were included, the warrant would still establish probable cause. *United States v. Stanert*, 762 F.2d 775, 780-81 (9th Cir. 1985).

The warrant here suffered from both defects under *Franks*. In making the warrant application in Montana, Mlekush falsely stated that a Grant County search warrant had been issued for DNA evidence. Whether (a) Mlekush himself knew that no warrant had been approved by a neutral

magistrate in Washington; (b) Rectenwald falsely informed Mlekush that a warrant had issued; or (c) both officers were aware of the falsity of the statement, it is reasonable to conclude that the misstatement was made with either deliberate or reckless disregard for the truth. Second, Mlekush omitted mention of his own misconduct and disciplinary investigation, which were ongoing when he made the application for a search warrant. RP (7/23/12) 12. Both errors support a Franks hearing.

The trial court found the misstatement regarding the existence of a warrant in Washington was not material. CP 5998-99. The court resolved this legal question incorrectly. The court also did not address Mlekush's material omission of his misconduct and the internal investigation. But a magistrate who learned that an officer was being investigated by his own office for dishonesty and corruption likely would have second thoughts about taking that officer's sworn assertions at face value.

This Court should conclude that the trial court wrongly denied Nickels a Franks hearing. If this Court does not order suppression based upon the spurious trap and trace, this Court should reverse with direction that a Franks hearing be conducted.

- 7. The exclusion of evidence that Libby murdered Munro violated Nickels's Sixth and Fourteenth Amendment rights to present a defense and to due process of law.**

a. Principles of due process and the Sixth Amendment right to a defense require evenly-applied rules of evidence.

“[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citation omitted); U.S. Const. amends. VI; XIV; Const. art. I, §§ 3, 22. The right to a defense “is abridged by evidence rules that ‘infring[e] upon a weighty interest of the accused.’” Id. at 324 (citation and internal quotations omitted). In Holmes, the Supreme Court found unconstitutional a South Carolina evidence rule that allowed third-party perpetrator evidence to be excluded where the prosecution’s case against the defendant was strong. 547 U.S. at 330. The gist of the Court’s holding is that the evidence rules must be evenly applied. A rule that requires a defendant to meet a higher standard than would be required of the prosecution is arbitrary and disproportionate to the ends it is designed to advance, and is unconstitutional. Holmes, 547 U.S. at 325.

Thus, where an accused person seeks to show that another suspect committed the crime charged, the Sixth and Fourteenth Amendments prohibit exclusion of the evidence under rules “that serve no legitimate interest” or “are disproportionate to the ends that they are asserted to promote.” Id. at 325-326. The only limitations that may be placed on other-suspect evidence are those found in “well-established rules of

evidence.” Id. at 326. The evidence may only be excluded if “its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” Id.

b. The court’s corroboration requirement was contrary to *Holmes* and violated Nickels’s Sixth Amendment right to a defense.

In State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014), the Washington Supreme Court reversed a conviction where, in prohibiting the defense from introducing other suspect evidence, the trial court (a) considered the strength of the prosecution’s case and (b) subjected the evidence to a “high bar.” Franklin, 180 Wn.2d at 376-77. The Court held this violated the right to a defense and was contrary to Holmes. Id. at 378-79, 382. The Court stressed that the analysis must focus solely “on the relevance and probative value of the other suspect evidence itself.” Id. at 378-79 (citing Holmes, 547 U.S. at 329).

“The standard for relevance of other suspect evidence is whether there is evidence “‘tending to connect’ someone other than the defendant with the crime.” Id. at 381 (citation omitted). The focus is on “whether the evidence offered tends to create a reasonable doubt as to the *defendant’s* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt.” Id. (citation omitted).

i. *The trial court improperly weighed the strength of the prosecution’s case against Nickels’s right to a defense and*

*required corroboration for each ‘fact’ asserted in Libby’s inculpatory confession as a predicate to admission.*

The court ruled the defense could introduce other suspect evidence. Id. at 1188. But this did not end the court’s analysis. Rather, even in the face of an explicit confession of guilt by Libby,<sup>22</sup> the court applied the “high bar” of requiring corroboration for each individual component of the confession. The court then barred Tycksen from testifying:

- That Libby told Tycksen Munro had guns behind the seat of his truck and the guns were what they were after. RP (Beck Vol. 5) 1232, 1237.
- That Libby, a convicted felon, told her that on December 28, 2009, the night before Munro’s murder, he shot guns with Latimer and Matt Cox. RP (Beck Vol. 5) 1220.
- That in the days after the murder, Libby and Latimer acted suspicious and secretive, and when Libby made comments about the shooting, Latimer would tell him to “shut up.” RP (Beck Vol. 5) 1229-31.
- That Morrison bought Libby a gun before the murder. RP (Beck Vol. 5) 1270-71.
- That Libby told Tycksen he was high and drunk when he murdered Munro. RP (Beck Vol. 5) 1233.

The court thus prevented Nickels from eliciting, and the jury from hearing, the heart of Libby’s confession. The court refused to revisit its ruling even when the State took advantage of the exclusion of the statements by asking Tycksen, on cross-examination,

[O]n December 29<sup>th</sup>? What guns did you see Mr. Libby shoot?

On the 28<sup>th</sup> or 29<sup>th</sup> did you see a gun in Mr. Libby’s possession?

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<sup>22</sup> At trial, Libby asserted his Fifth Amendment privilege against self-incrimination. RP (8/23/12) 27-62.

So you never saw Mr. Libby or Mr. Latimer trying to steal guns from Mr. Munro's truck?

RP (Beck Vol. 5) 1325-26.

Nickels argued the State's questions had opened the door to the excluded evidence. RP (Beck Vol. 6) 1361-62. The court disagreed. The court explained:

[T]hose statements were not excluded because they were irrelevant, a subject that was forbidden and, therefore, now that subject has been opened. **They were excluded because there was no corroboration under Evidence Rule 804(b)(3) that requires corroboration for the statement of an unavailable witness.**

RP (Beck Vol. 6) 1367-68.

The trial court's ruling violated Holmes. And, in requiring that each individual fact asserted within a presumptively admissible statement against interest be corroborated, the court also appears to have misunderstood the *reliability* component of ER 804(b)(3).

ii. *The trial court's ruling excluding portions of Libby's confession to Tycksen even though they were plainly corroborated was an abuse of discretion.*

Washington's ER 804(b)(3) provides that even though it may be hearsay, a "statement against interest" is admissible if the declarant is unavailable. ER 804(b)(3).<sup>23</sup> To ensure that the accused's Sixth

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<sup>23</sup> A "statement against interest" is:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the

Amendment right to a defense is fully respected, in evaluating a statement proffered under ER 804(b)(3), “the presumption is admissibility, not exclusion.” State v. Roberts, 142 Wn.2d 471, 497, 14 P.3d 713 (2000).

In Williamson v. United States, 512 U.S. 594 (1994), interpreting the federal counterpart to ER 804(b)(3), the Supreme Court clarified the meaning of “statement” as the term is used in the rule.<sup>24</sup> The court noted that statements against interest “are less subject to [the] dangers” ordinarily associated with hearsay. “Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.” Id. Self-exculpatory statements, however, “are exactly the ones which people are most likely to make when they are false.” Id. at 599-600. Courts thus should analyze narrative “statements” as aggregations of “declaration[s] or remark[s]” and admit only the self-inculpatory portions. Id.

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declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarants position would not have made the statement unless the person believed it to be true. **In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.**

ER 804(b)(3) (emphasis added).

<sup>24</sup> Although Fed. R. Evid. 804(b)(3) is worded slightly differently from Washington’s ER 804(b)(3), for purposes of what constitutes a “statement” under the rule, the two provisions are construed identically. Roberts, 142 Wn.2d at 492 n. 3.

Washington adopted this construction of the rule in Roberts. 142 Wn.2d at 493. The Court held Williamson was more consistent with ER 804(b)(3)'s "underlying principle" that "[h]earsay statements against interest are admissible because it is presumed that one will not make a statement damaging to one's self unless it is true." Id. at 495.

The trial court started by correctly dividing Libby's confession to Tycksen into multiple "statements." However the court then veered off-course. The court did not analyze whether the individual "statements" were inculpatory or self-serving. The court did not presume Libby's confession to Tycksen that he murdered Munro was admissible because a reasonable person, even one who was "not especially honest," would not admit to having murdered someone unless it were true. Williamson, 512 U.S. at 599. Instead, the court applied the "high bar" of requiring extrinsic *factual* corroboration for each individual component "statement" within the confession as a predicate to admission, even though all "statements" were plainly inculpatory as to Libby.

Neither the rule used by the trial court nor its application make sense. In State v. Young, 160 Wn.2d 799, 161 P.3d 967 (2007), the Supreme Court clarified that under ER 804(b)(3),

There is no requirement that the past facts [within the statement] be material to the criminal action ... or that independent evidence corroborating the facts even be introduced. Clearly, this explicit

requirement to corroborate a hearsay statement's trustworthiness is satisfied with circumstantial evidence focused on the declarant and the context of the statement, without independent proof of the criminal act alleged.

Young, 160 Wn.2d at 811; see also State v. Anderson, 107 Wn.2d 745, 751, 733 P.2d 517 (1987) (“[a]dequate indicia of reliability must be found in reference to circumstances surrounding the **making** of the out-of-court statement, and **not from subsequent corroboration of the criminal act**”) (citation omitted) (emphasis added).

A court abuses its discretion if a decision was reached by applying the wrong legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). The trial court's requirement of corroboration for each “fact” in Libby's confession was wrong. The court agreed the excluded evidence was relevant and highly probative: the court excluded Libby's detailed account, given the day after the homicide, of how and why the crime was committed. RP (Beck Vol. 6) 1367. Libby's admission that he was high and drunk when Munro confronted him may have explained why Libby shot Munro. And Libby's admission that he had been shooting guns with Cox and Latimer earlier that night placed him in possession of a firearm within hours of Munro's murder.<sup>25</sup>

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<sup>25</sup> As defense counsel noted, Libby was a convicted felon and barred from possessing guns, so the admission was against Libby's penal interest and, in light of the facts of the case, was unquestionably inculpatory. RP (Beck Vol. 5) 1226; see also Comment, Fed. R. Evid. 804(b)(3) (“Whether a statement is in fact against interest must

Setting aside the legal incorrectness of the court’s ruling, it is difficult to imagine what additional evidence Nickels would have had to produce to satisfy the court’s demand for “corroboration.” Munro was dead, the victim of a single gunshot wound. Munro had a truck which was parked near where he was shot. Shoe impressions were seen by the first responders in the snow around the truck. Munro had a formidable collection of guns, and was known to take his guns trap shooting. RP (8/15/12) 463, 470. The evidence supported an inference that one of Munro’s guns—a .45 caliber weapon, like the murder weapon—was missing. *Id.* at 464, 466. Libby had “pick marks” consistent with methamphetamine use. RP (Beck Vol. 5) 1262. The “alibi” that Libby offered to law enforcement when he was interviewed in January 2010 was called into doubt by other evidence. Tosha Devyak, Libby’s alibi witness, recanted and testified under oath that although Libby had fallen asleep in her home on December 28, 2009, when she woke up between 5:00 and 5:30 a.m., Libby was no longer there. RP (8/15/12) 601. Libby’s alibi was also contradicted by Officer Powell, who saw Libby at the scene of the murder at approximately 7:30 a.m. RP (Beck Vol. 4) 1036, 1056. All of these facts corroborated the excluded statements.

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be determined from the circumstances of each case”). The court excluded this portion of Libby’s confession to Tycksen based on its erroneous view that extrinsic factual corroboration was required.

The State had control over the crime scene and allowed it to be contaminated. Further, as the defense noted, the manner in which the State processed Munro's truck would have eliminated any fingerprints on the door handle. RP (Beck Vol. 5) 1234. And the State permitted Libby's frantic text messages to Tycksen to be destroyed. Because of the State's malfeasance, Nickels's ability to supply "corroboration" of the sort demanded by the trial court was severely compromised.

In short, Libby had the opportunity, means, and motive to commit the crime. The trial court's ruling barring Nickels from eliciting Libby's highly material, unquestionably inculpatory statements was based on a misapplication of ER 804(b)(3). Because the Sixth Amendment right to a defense requires the admission of relevant evidence tending to show that a third party committed the crime with which the defendant is charged, the Court's ruling was also contrary to Holmes and Franklin, and violated Nickels's right to a defense.

iii. *Alternatively, the prosecution opened the door to the introduction of Libby's complete confession.*

"A party's introduction of evidence that would be inadmissible if offered by the opposing party 'opens the door' to explanation or contradiction of that evidence." State v. Ortega, 134 Wn. App. 617, 624, 142 P.3d 175 (2006). The "open-door" doctrine is rooted in fairness and is

designed to promote the truth-seeking function of a trial. Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787 (2003).

After it successfully persuaded the trial court to exclude the heart of Libby's confession, the State cross-examined Tycksen about whether she had seen Libby shoot a gun, possess a gun, or prowl Munro's car. RP (Beck Vol. 5) 1325-26. Given the trial court's prior ruling, Tycksen was constrained to answer these questions in the negative. Id. These questions and answers told only part of the story, however. By virtue of the ruling, Tycksen was muzzled from stating that although she did not personally witness these things, Libby *told her* that this is what he had done. The State thus presented the jury with half-truths advantageous to its theory of the case and created the false suggestion that these things did not happen.

That this was the intended effect of the State's questions is confirmed by the State's closing argument. The prosecutor argued that there was "zero evidence that those three individuals were out prowling the truck" and "[t]here's zero evidence that Sage Munro even kept guns in his truck." RP (8/28/12) 44. He argued, "There's no evidence that Ian Libby, Julian Latimer and Brenza Mills were planning in advance to break into the truck." Id. at 44-45. In rebuttal argument, the prosecutor again asserted the evidence contained "nothing about guns." RP (8/29/12) 17. Nickels objected to this argument but the court overruled the objection. Id.

As shown, the State understood and profited from its partial inquiry into the subject.

New Jersey likens the “open door” doctrine to the rule of completeness: it permits a party to place evidence in its proper context where otherwise the evidence would have “a real capacity to unjustly influence the trier of fact.” Alves v. Rosenberg, 948 A.2d 701, 708 (N.J. Super. App. 2008). The trial court’s ruling barring Nickels from walking through the door that the State opened permitted the State to unjustly influence the jury regarding the key issue at trial: how Munro was murdered. This Court should conclude the ruling violated Nickels’s right to a defense.

**8. The trial court’s exclusion of other evidence material to Nickels’s defense denied Nickels his Sixth Amendment right to a defense.**

The defense theory was that Libby was the murderer, and police investigators, through ineptitude and tunnel vision, let evidence of his guilt slip away and disappear. Nickels thus sought to present evidence that: (1) completed his “other suspect” defense, and (2) undermined the State’s theory that he killed Munro out of jealousy. The trial court unfairly limited defense witness testimony and barred other witnesses altogether.

a. An accused person has the Sixth Amendment right to present all relevant evidence in his defense.

“Few rights are more fundamental than that of an accused to present witnesses in his own defense.” Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14, 18 (1967); U.S. Const. amend. VI. Where evidence proffered by an accused is relevant, “the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2012); State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Only if the State’s interest outweighs the defendant’s need may relevant evidence offered in the accused’s defense be excluded. Jones, 168 Wn.2d at 720; Darden, 145 Wn.2d at 622.

b. The trial court unfairly limited evidence that Libby was the killer.

i. *Evidence that on the day of the homicide, Libby broke into Tosha Devyak’s safe and stole her money.*

Libby spent some portion of the night of December 28-29, 2009, with Tosha Devyak. RP (8/15/12) 598-602. At trial, the State moved to bar the defense from presenting evidence that Libby stole money from Devyak the morning of the homicide. CP 3804; RP (Beck Vol. 5) 1195-96. The court ruled the evidence “would ... invite speculation,” and excluded it.

The court’s ruling was erroneous: the evidence was relevant to show consciousness of guilt, and should have been admitted.

“Analytically, flight is an admission by conduct.” State v. Freeburg, 105

Wn. App. 492, 497, 20 P.3d 384 (2001). Actual flight is not the only evidence that is admissible in this category. “[E]vidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime.” *Id.* at 497-98. Here, it is logical to infer Libby stole Devyak’s savings after killing Munro because he thought he would need to flee. The evidence should have been admitted.

In the alternative, the evidence was *res gestae* evidence. *Res gestae* evidence supplies factual context for the crime. State v. Grier, 168 Wn. App. 635, 646, 278 P.3d 225 (2012). As such, if it is relevant, it is admissible. *Id.* at 646-47. Libby’s theft of Devyak’s savings within a couple of hours of the homicide was relevant. It established consciousness of guilt and completed the picture of the homicide by showing Libby’s desperation after the crime. The evidence’s exclusion violated Nickels’s right to a defense.

ii. *Testimony of Lisa and Carmella Haley regarding Tycksen’s demeanor when she reported Libby’s assault to the police.*

The trial court excluded the testimony of Lisa and Carmella Haley. RP (Beck Vol. 5) 1217. Both observed Tycksen’s demeanor when she reported Libby’s January 21, 2010 assault and would have testified that she was fearful and reluctant to come forward, in opposition to the

allegation that she was making the report out of spite or a desire for vengeance. RP (Beck Vol. 5) at 1217.

The State's case depended on the jury discrediting Tycksen. The State repeatedly claimed she lied because she was angry at Libby about the assault.<sup>26</sup> See e.g. RP (8/28/12) 52, 59. Evidence that Tycksen was frightened and visibly reluctant to report Libby's assault to the police would have rebutted the State's attacks and provided circumstantial evidence of her credibility. Cf. State v. Aguirre, 168 Wn.2d 350, 360-61, 229 P.3d 669 (2010) (finding that testimony about victim's demeanor when reporting crime was relevant to assist jury in assessing her credibility). Moreover, the excluded evidence was crucial to Nickels's other-suspect defense, and thus was presumptively admissible. Chambers, 410 U.S. at 295. The trial court erred in excluding the testimony.

iii. *Evidence of the severity of Tycksen's injuries.*

The trial court also excluded witnesses who would have testified to the severity of the injuries Libby inflicted on Tycksen during the January 21, 2010 assault.<sup>27</sup> RP (Beck Vol. 5) 1205-06; RP (Beck Vol. 6) 1403. The evidence was relevant to Tycksen's credibility and should have been

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<sup>26</sup> The State's theory failed to explain why Tycksen would have told Hays that Libby had confessed to her if it had not been true, as Hays's report to the police preceded Libby's violent assault by eleven days.

<sup>27</sup> This evidence took three forms: photographs taken after the assault, testimony from a physician who treated Tycksen, and observations from lay witnesses.

admitted. Libby beat Tycksen viciously and brutally, an action which lent literal force to his threat to kill her “like he did that man.” Notwithstanding the brutal beating, she came forward with the report of his confession about Munro’s murder. Given the State’s attack on Tycksen’s character and credibility, this evidence too was relevant and admissible. The trial court’s ruling to the contrary denied Nickels his right to a defense.

*iv. Amber Harmon’s testimony about Munro’s missing .45 caliber handgun with a laser sight.*

Amber Harmon was romantically involved with Munro when the crime occurred. RP (8/15/12) 462-64. She was familiar with Munro’s extensive gun collection because the two would go shooting together. RP (8/15/12) 463. One of Munro’s guns was a .45 caliber handgun with a laser sight. RP (8/15/12) 464. Harmon last saw the gun a few months before the homicide. *Id.* When the guns were inventoried after Munro’s murder, the .45 caliber handgun with a laser sight was not among the weapons. *Id.* at 466. The trial court ruled the defense had not established the relevance of Munro’s missing gun or Harmon’s romantic relationship with Munro.<sup>28</sup>

The relevance of the testimony about the missing handgun to the defense theory was apparent: (1) the defense alleged Libby was surprised

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<sup>28</sup> The court’s error in excluding evidence of the romantic relationship is addressed *infra* in argument 8c.

by Munro while prowling his truck for guns; (2) Munro most likely was shot by a .45 caliber gun, but the murder weapon was never recovered; (3) Munro was known to possess a distinctive .45 caliber handgun close in time to the homicide; and (4) his .45 caliber handgun was missing from his collection after his murder. The State would have been free to argue it had not been shown that Libby stole the handgun or that it was the murder weapon. But it was improper for the court to exclude the evidence, because it was part of Nickels's other-suspect defense and was vital to his theory of the case. This Court should conclude that trial court's ruling violated Nickels's Sixth Amendment right to a defense.

c. The trial court unfairly barred the defense from presenting evidence of Munro's other romances that would have undermined the State's theory.

The court excluded evidence that a woman named Herlinda Gomez was seeing Munro romantically near the time of his death. CP 3806; RP (Beck Vol. 4) 1200-01. As noted, the court also excluded evidence that Harmon was seeing Munro romantically, that she had plans to spend the night with him on December 28, 2009, and that she intended to explore marriage. The court ruled the State's case did not depend on exclusivity and that the evidence would interject matters into the case that were irrelevant and would cause unintended prejudice. RP (Beck Vol. 5) 1201.

The court's ruling was erroneous. The court may not have believed that the State's case depended on exclusivity, but Messick fostered this impression, and the State emphasized it in its closing argument. See e.g. RP (8/7/12) 39; RP (8/7/12) 45; RP (8/28/12) 23; RP (8/7/12) 53; RP (8/28/12). In fact, neither the relationship between Nickels and Messick nor between Messick and Munro was exclusive. Messick was heavily impeached at trial, and she gave many conflicting statements to law enforcement. RP (8/7/12) 77-151.

The court's reference to "unintended prejudice" suggests that it thought the jurors would take a negative view of Munro because he was sexually active with other women at the same time that he was involved with Messick. But the evidence was relatively innocuous and would not have cast aspersions on Munro's character. Instead, the evidence would have undermined the State's false portrait of Messick's romance with Munro and called into doubt its theme of Nickels's jealous obsession, and so was plainly relevant. The State demonstrated no compelling reason for the evidence's exclusion. Darden, 145 Wn.2d at 621-22. The court's ruling violated Nickels's right to a defense and to compulsory process.

d. The constitutional error requires reversal.

The State bears the burden of proving constitutional error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24

(1967); Jones, 168 Wn.2d at 724. Only circumstantial evidence linked Nickels to the crime, and there was powerful evidence to suggest that Libby was the real murderer. The trial court applied an unreasonably high bar to Nickels's defense case and prevented him from introducing relevant testimony that corroborated his other suspect defense and undermined the State's theory.<sup>29</sup> The error was prejudicial. Nickels's conviction should be reversed. On remand, he should be allowed to present a complete defense, including the evidence that was wrongly excluded by the trial court.

9. **The trial court's admission of unduly prejudicial, irrelevant ER 404(b) evidence denied Nickels a fair trial.**

a. The trial court erroneously admitted propensity evidence that was irrelevant for any proper purpose under ER 404(b).

Before a court may admit evidence of a person's prior misconduct under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify a non-propensity purpose for the evidence, (3) determine whether it is relevant to prove an element of the crime charged, and (4) weigh its probative value against its prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). If the danger of undue prejudice outweighs the evidence's probative value, then it must be excluded. State v. Saltarelli, 98 Wn.2d

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<sup>29</sup> The standard that the court applied to the defense case was particularly unreasonable given that it permitted the State to elicit all manner of highly prejudicial evidence against Nickels under a very liberal relevance theory.

358, 361, 655 P.2d 697 (1982). The erroneous admission of unduly prejudicial evidence may violate the right to a fair trial. Dawson v. Delaware, 503 U.S. 159, 166-67 (1992); U.S. Const. amend. XIV.

i. *Barber*.

Zeb Barber was in a dating relationship with Messick during 2006-08. At some point during that relationship, Nickels allegedly telephoned Barber, said he (Nickels) was still involved with Messick, and that Barber should leave her alone. RP (7/30/12) 100-01. Barber testified vaguely that he felt threatened by the call. RP 101. Messick testified that when Nickels learned of her relationship with Barber, he showed her a photograph of Barber's house and threatened to burn it down. RP (8/7/12) 20.

This was pure propensity evidence: that because Nickels had allegedly displayed hostility towards one of Messick's previous boyfriends over two years earlier, he was more likely to have killed Munro. It therefore was inadmissible. Cf. State v. Fuller, 169 Wn. App. 797, 831, 282 P.3d 186 (2012).

ii. *Craigslist posting*.

The court permitted the State to introduce evidence that on December 23, 2009, an advertisement was posted on Craigslist from an email address associated with Nickels stating, "I am looking for a .22

pistol. Not a revolver though. Thanks.” RP (8/6/12) 116. The Craigslist posting also was inadmissible and prejudicial propensity evidence.

Evidence of weapons is very inflammatory and a court must exercise great care in its admission. Freeburg, 105 Wn. App. at 501. The gun that was used to kill Munro was a .45 caliber, not a .22 caliber weapon. RP (7/24/12) 42. A .22 caliber gun differs significantly from a .45 caliber gun, and the Craigslist posting was not for any gun, but for a .22 caliber weapon. RP (8/6/12) 46. That the court found the evidence admissible is particularly surprising given its refusal to allow Nickels to present evidence showing Libby had been shooting the night of the homicide and that a .45 caliber weapon was missing from Munro’s gun collection. The evidence should have been excluded.

iii. *Messick*.

The court used a similar double standard with regard to evidence of Nickels’s alleged misconduct during his relationship with Messick. Messick and her mother were permitted to testify to telephone calls and text messages from Nickels, purportedly to establish the motive for the crime, even though they had little probative value towards motive or premeditation. Nancy Messick also testified that she disapproved of Nickels. See e.g. RP (7/25/12) 14-19; RP (8/7/12) 16, 20-21, 24, 26, 28-

30, 48-49. But the court excluded similar other acts evidence relating to Libby. The evidence should have been excluded.

iv. *Rex Lain*.

Finally, the court should have barred Rex Lain's testimony. Lain was an ex-convict with prior convictions for manslaughter and forgery and a history of dishonest behavior in prison. RP (8/6/12) 55, 61, 68. Lain befriended Nickels in April 2009 in Big Piney, Wyoming, and they spent time together occasionally when Nickels was in town. *Id.* at 53-54. Lain told police that Nickels would sometimes ask him how it felt when Lain committed the manslaughter. *Id.* at 75. Later, Lain claimed Nickels asked whether Lain would kill someone for him. *Id.* at 65, 67-8, 71. Right before he testified, Lain alleged Nickels had offered him \$2,000 to kill someone. *Id.* at 125. The trial court found Lain's claim about an offer of money was perjury and excluded it. *Id.* at 138-39. The court nevertheless found sufficient evidence to admit the alleged solicitation. *Id.* at 77, 140.

This ruling was an abuse of discretion. Where other acts evidence would be a crime, it must be proven by a preponderance. *Thang*, 145 Wn.2d at 642. Lain perjured himself in open court. He had prior convictions for crimes of dishonesty and had engaged in dishonest behavior in prison. Despite being interviewed on multiple occasions, Lain

never mentioned the alleged solicitation until shortly before trial.<sup>30</sup> This Court should conclude that the State did not prove the solicitation occurred. The supposed conversations about Lain's prior manslaughter were too attenuated from Munro's homicide to be relevant and should also have been excluded.

b. The error in admitting ER 404(b) evidence was prejudicial.

The trial court's error in admitting ER 404(b) evidence requires reversal. The State's evidence against Nickels was circumstantial only. Nickels presented strong evidence that Libby murdered Munro. Given the weakness of the State's case, the prejudicial ER 404(b) evidence was reasonably likely to have affected the verdict. The error requires reversal.

**10. The WSPCL DNA analyst and prosecutor committed reversible misconduct that denied Nickels his due process right to a fair trial when they misstated key evidence.**

a. WSPCL analyst Anna Wilson repeatedly mischaracterized the results of testing of the mixed DNA profile found on the handcuffs in Munro's yard to benefit the prosecution, and the prosecutor capitalized on the misstatements in closing argument.

A DNA sample on the handcuffs that Rectenwald located in Munro's yard was tested by WSPCL DNA analyst Anna Wilson. RP (8/1/12) 76. Wilson extracted a mixed DNA profile, and estimated that at least three individuals, possibly more, were contributors. RP (8/1/12) 76,

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<sup>30</sup> Lain also demanded \$100 from defense investigator Dave Wyrick, an ex-police officer, as an inducement to sign a written statement. RP (Beck Vol. 6) 1427.

100. She determined Nickels was a potential contributor to the mixed profile. Id. at 87. She did not identify any individual as a major contributor. She also could not identify any of the other possible contributors, other than that one was female. Nevertheless, she repeatedly testified Nickels was “**included** as a contributor to that mixture.” Id. at 87, 104, 114, 116. In closing argument, the State took advantage of this mischaracterization of the evidence. The prosecutor told the jury Nickels was “included as a contributor to that mixture.” and accused the defense of trying to “downplay the significance of the DNA[.]” RP (8/28/12) 41. He said, “Ladies and gentlemen, the defendant’s DNA was on those handcuffs” and, “There is [DNA] for David Nickels.” Id. at 64. In rebuttal he said Nickels’s “DNA [was] at the scene.” RP (8/29/12) 27-29.

b. Principles of due process prohibit the government or its agents from engaging in misconduct.

A prosecutor serves two equally important functions. She enforces the law and she represents the people in a quasijudicial search for justice. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Defendants are among the people the prosecutor represents. Id. (citation omitted). Thus, the prosecutor “owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” Id.; see also Berger v. United States, 295 U.S. 78, 88 (1935); U.S. Const. amend. XIV; Const. art. I, § 3.

The WSPCL crime laboratory is an agent of the State, RCW 43.43.756, and Wilson is therefore a government actor who has the same obligations as the prosecution to refrain from committing misconduct. Cf., In re Personal Restraint of Delmarter, 124 Wn. App. 154, 101 P.3d 111 (2004).

- c. Wilson’s repeated misstatements that Nickels was “included as a contributor” to a mixed DNA profile located on handcuffs found in Munro’s yard were prejudicial misconduct.
- i. *Both the FBI and ASCLD/LAB impose upon forensic scientists the ethical obligation to testify in a manner that is consistent with the data, does not create false inferences, and is not slanted towards one party or the other.*

DNA is powerful evidence that can supply a scientific foundation for a prosecution case. At the same time, jurors trust that it is accurate and reliable, often without fully comprehending the science or the formulas used to determine the statistical probability of a match. Studies indicate that “DNA evidence [leads] to significantly higher estimates of guilt compared to [other forms of evidence].”<sup>31</sup> Even “after damaging cross-examination testimony and jury instructions detailing how to prudently use scientific evidence testimony, jurors [are] still more likely to convict when DNA evidence exist[s].” Id. at 44. “The result is a potentially dangerous combination: jurors place a great deal of weight on DNA evidence, but this

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<sup>31</sup> Joel D. Lieberman et al., Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared With Other Types of Forensic Evidence, 14 Psychol. Pub. Pol’y & L, 27, 43 (2008).

evidence has the potential to be confusing or misunderstood.” Whack v. State, 73 A.3d 186, 197-98 (Md. 2013).

Because of the likelihood that juries will be unduly persuaded by DNA evidence relative to other evidence, the FBI DNA Advisory Board<sup>32</sup> advises that statistical conclusions be conveyed “meaningfully.” The analysis must be “conservative” and must not provide “false inferences.”<sup>33</sup>

The ASCLD/LAB<sup>34</sup> Guiding Principles similarly require that forensic scientists

[t]estify to results obtained and conclusions reached only when they have confidence that the opinions are based on good scientific principles and methods. Opinions are to be stated so as to be clear in their meaning. **Wording should not be such that inferences may be drawn which are not valid, or that slant the opinion to a particular direction.**<sup>35</sup>

- ii. *Wilson’s testimony was inconsistent with the data obtained during her analysis, was designed to create the false impression that Nickels was a contributor to the mixed DNA profile, and was misconduct.*

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<sup>32</sup> The FBI standards govern forensic laboratories in Washington. WAC §445-75-050.

<sup>33</sup> DNA Advisory Board, Statistical and Population Genetics Issues Affecting the Evaluation of the Frequency of Occurrence of DNA Profiles Calculated from Pertinent Population Database(s), 2 Forensic Sci. Comm. No. 3, ¶ 3 (2000); available at <http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2000/dnastat.htm>, last visited November 1, 2014.

<sup>34</sup> The American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) is a voluntary accreditation program that sets national standards for accredited laboratories. WSPCL is accredited by ASCLD/LAB.

<sup>35</sup> ASCLD/LAB, ASCLD/LAB Guiding Principles of Professional Responsibility for Crime Laboratories and Forensic Scientists (emphasis added), available at <http://www.asclcd-lab.org/guiding-principles/>, last visited November 1, 2014.

A mixed DNA profile presents particular challenges for a forensic scientist. State v. Bander, 150 Wn. App. 690, 702-03, 208 P.3d 1242, rev. denied, 167 Wn.2d 1009 (2009). In the case of a mixed DNA profile, multiple factors may contribute to the detected presence of alleles consistent with an individual's DNA profile at particular loci, complicating the evaluation of whether that individual *in fact* contributed to the mixed profile. Statistically, the probability of a random match also will be greater with a mixed source profile. Bander, 150 Wn. App. at 707. It is improper to claim that a person's DNA is "included" in a mixture where major and minor contributors cannot be identified; at most the person is a *possible* contributor to the sample.<sup>36</sup>

Wilson's testimony that Nickels's "DNA is included"<sup>37</sup> in the mixed sample fostered the false impression that there was a definitive DNA "match." But it was not possible to discern a major contributor among the three or more profiles on the handcuffs. In fact, Wilson conceded that she could not "pull out a single profile" from the sample. RP (8/1/12) 104. Wilson's testing results at most permitted the conclusion

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<sup>36</sup> Scientific Working Group on DNA Analysis Methods (SWGDM), Short Tandem Repeat Interpretation Guidelines, 2 Forensic Sci. Comm. No. 3, ¶ 3.1.4 (2000), Available at <http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2000/index.htm/strig.htm>, last visited November 1, 2014. The WSPCL uses short tandem repeat analysis.

<sup>37</sup> RP (8/1/12) 87; see also RP (8/1/12) 87, 104.

that Nickels was a possible contributor to the profile, or that he could not be excluded.<sup>38</sup> See Bander, 150 Wn. App. at 705.

Wilson’s testimony that Nickels’s DNA was “included” within the mixed profile was a reckless and irresponsible misstatement of what the evidence actually established. It also violated the protocols established by the FBI DNA Advisory Board and ASCLD/LAB, which prohibit forensic analysts from testifying in a way that is not a valid representation of testing results, encourages false inferences, or is slanted in favor of one party or another. Wilson’s testimony misrepresented the test results, encouraged the false inference that there was a DNA “match,” slanted the evidence in the prosecution’s favor, and was misconduct.

d. The prosecutor’s misuse of the DNA evidence in closing argument was prejudicial misconduct.

When DNA evidence is misused, it may lead to wrongful conviction.<sup>39</sup> Especially in a case in which the evidence of an accused person’s guilt is doubtful or highly circumstantial, an overstatement regarding DNA evidence may silence lingering doubts and sway a jury towards a guilty verdict. In such a case, reversal may be required.

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<sup>38</sup> Because the WSPCL consumed the entire DNA sample recovered from the handcuffs without notice to Nickels, RP (8/1/12) 99, Nickels did not have an expert present to observe Wilson’s methods or the opportunity to independently test the sample.

<sup>39</sup> Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 63-66 (2009).

In Whack, the Maryland Court of Appeals reversed a murder conviction based upon the prosecution's overstatement of DNA evidence from a mixed profile like in this case. As here, in closing argument the prosecutor contended that Whack "left his DNA" on the truck and insisted the DNA evidence established that Whack was there. Id. at 193-94. The Court explained:

It was the DNA evidence ... that potentially provided the missing link between these strands of [circumstantial] evidence and the crime scene itself ... [T]he prosecutor's statement that Petitioner's DNA was conclusively found on the truck was incorrect based on the evidence presented at trial. The prosecutor compounded the error by discussing the statistics behind the DNA analysis in a misleading manner. From the prosecutor's statements, jurors could have concluded that the DNA evidence *proved* Petitioner touched the passenger armrest in the truck. In actuality, the evidence showed only that Petitioner could not be *excluded* as a source of DNA in the truck, i.e., he *might* have touched the armrest.

Id. at 201 (emphasis in original). Even though the trial court gave a curative instruction, the Court held "the prosecutor's remarks likely misled the jury 'to the prejudice of the accused.'" Id. at 202.

Other state courts have found similar misstatements to be misconduct. See Duncan v. Commonwealth, 322 S.W.3d 81, 91-92 (Ky. 2010); State v. Dewberry, 301 P.3d 788, 2013 WL 2321039 (Kan. App.

2013)<sup>40</sup>; State v. Bloom, 516 N.W.2d 159, 169 (Minn. 1994); cf. also People v. Linscott, 566 N.E.2d 1355 (Ill. 1991).

An accused person alleging prosecutorial misconduct must show that a prosecutor's comments were improper and prejudicial. State v. Lindsay, 180 Wn.2d 423, 429, 326 P.3d 125 (2014). Ordinarily the failure to object to prosecutorial misconduct waives the error unless the misconduct was flagrant and ill-intentioned. Id. The Supreme Court has emphasized, however, that in reviewing unobjected-to misconduct, the “focus [is] less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Even though the defense did not object, the State's misconduct (both that engaged in by Wilson during her testimony and the prosecutor in closing argument) was so flagrant and ill-intentioned that no curative instruction could have dispelled the prejudice. The State's case depended on the jury assigning an undeserved weight to the DNA evidence. With this in mind, the prosecutor peppered his closing argument with misstatements and exaggerations regarding its significance. RP (8/28/12) 41-42, 64; RP (8/29/12) 27-29.

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<sup>40</sup> Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.

Invalid DNA testimony presents particular hazards in criminal trials and prosecutors and state actors should take care to accurately describe the evidence to ensure that an accused person's right to a fair trial is respected. Here, both the prosecutor and the DNA analyst flagrantly violated this imperative. No curative instruction could have dispelled the prejudice. Whack, 73 A.3d at 202. This Court should conclude that the misconduct created an enduring prejudice that could not be cured by an instruction and denied Nickels a fair trial.

**11. Nickels was entitled to a new trial based on the Powell declarations, Libby's jailhouse confessions that he committed the murder, and "Witness A"'s declaration regarding Libby having tried to sell him a .45 matching the description of Munro's missing gun.**

In response to Nickels's motion for a new trial, the State submitted a number of police reports that purported to respond to the Powells's sworn declarations about Latimer's confession. Despite being aggressively questioned by Rectenwald as part of the State's investigation, the Powells maintained that what they had told attorney Dano and sworn to in their declarations was the truth. CP 4203-4240.

Rectenwald also interviewed Latimer and persuaded him to execute a sworn affidavit. Latimer admitted that, in opposition to his trial testimony, he went to Travis's house the morning of the homicide, but claimed he did so "smoke weed, and buy morphine 100 pills." CP 4236.

He denied talking to Travis Powell “about a murder,” and said he would “answer all questions truthfully” at a new trial. Id.

The court initially agreed that the newly-discovered evidence of Latimer’s statement to Travis met the first four requirements for a new trial to be granted under CrR 7.5. RP (12/20/12) 71-72.<sup>41</sup> The court also acknowledged that if it had known of Latimer’s statements to Travis when it ruled on the admissibility of Libby’s confession to Tycksen, it would have ruled differently. Id. at 75.

But the court denied the motion for new trial. CP 5958-61.<sup>42</sup> The court found the statement Sharon attributed to Latimer “was not sufficiently spontaneous to be admitted as an excited utterance.” CP 5960. The court further found that there was “no showing of unavailability of Latimer.” Id. Based on this reasoning, the trial court found that Sharon’s statements “would amount only to impeachment of Julian Latimer as a witness.” Id. The court ruled that “[t]he same is true of Travis Powell’s proffered testimony.” The court was “satisfied” that “whether taken individual or collectively with other evidence, the Powell family’s

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<sup>41</sup> An accused person seeking a new trial based on newly discovered evidence must demonstrate:

that the evidence (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before the trial by exercise of due diligence, (4) is material, *and* (5) is not merely cumulative or impeaching.

State v. Scott, 150 Wn. App. 281, 294, 207 P.3d 495 (2009).

<sup>42</sup> The court denied the motion for a new trial by letter, CP 5526-28, and subsequently incorporated the letter into an order. CP 5958-61.

recollection would be extremely unlikely to have an impact on the outcome of the trial.” Id.<sup>43</sup>

- a. The trial court’s determination that Latimer’s statements to Travis Powell were not excited utterances was substantively unreasonable.

Within four hours of witnessing Libby gun down and kill Munro following their botched attempt to steal guns from Munro’s truck, Latimer appeared unannounced at his friend Travis’s home to tell him what he had seen and express his fear that he would get in trouble for his involvement. Both Sharon and Travis related that Latimer was noticeably scared, pale, and shaken about what had happened. CP 3931, 4225-26, 5437, 5456, 5511. Given the graphic and frightening nature of the startling event, the temporal proximity of Latimer’s statement to the murder, and Sharon and Travis’s observations regarding Latimer’s demeanor, the statement plainly was admissible as an excited utterance.

An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2). An excited utterance is admissible whether or not the declarant is available to testify. The court must find that “(1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling

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<sup>43</sup> The portions of the court’s ruling addressing the other bases for a new trial are addressed infra.

event or condition, and (3) the statement related to the startling event or condition.” Young, 160 Wn.2d at 806.

An excited utterance is considered to be reliable because the declarant’s stress from the event is believed to diminish the likelihood that the statement was untrue. Young, 160 Wn.2d at 812. The event described in the declarant’s statement does not need to be the event that caused the excited emotional state. The focus, instead, is “on whether *some* event startled the declarant, rather than on whether there is proof that the specific event giving rise to the action is the event that elicited the declarant’s statement.” Id. at 810 (emphasis in original). The length of time between the startling event and the statement is not dispositive.<sup>44</sup>

- i. *The court’s ruling does not address whether Latimer was still under the stress of the murder he had witnessed when he made the statements to Travis Powell.*

Under ER 803(a)(2), a judge must make a preliminary finding of fact that the declarant was under the influence of an event when the statement was made. State v. Bache, 146 Wn. App. 897, 903, 193 P.3d 198 (2008). Sharon and Travis’s observations of Latimer’s demeanor

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<sup>44</sup> See State v. Thomas, 150 Wn.2d 821, 853-54, 83 P.3d 970 (2004) (statement made an hour and a half after a homicide); State v. Williamson, 100 Wn. App. 248, 257-59, 996 P.2d 1097 (2000) (statements made the morning after the event); State v. Strauss, 119 Wn.2d 401, 407, 832 P.2d 78 (1992) (statement made three and a half hours after startling event); State v. Sunde, 98 Wn. App. 515, 520, 985 P.2d 413 (1999) (statement made two hours after stressful event); State v. Thomas, 46 Wn. App. 280, 284, 730 P.2d 117 (1986) (statements made six to seven hours after startling event), aff’d, 110 Wn.2d 829 (1988); State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985) (statement made seven hours after event)

amply support the conclusion that Latimer was still under the stress of the murder he had witnessed when he told Travis what Libby had done.

The State argued that because other witnesses had testified that Latimer's demeanor appeared "normal," the statement could not qualify as an excited utterance. CP 4454. This contention is not persuasive. A startled demeanor is not a precondition to admissibility. The focus is upon whether "the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." Thomas, 46 Wn. App. at 284. The court thus looks to whether "intervening influences ... might have rendered [the statements] unreliable." Id. Because this is the emphasis, "the startling event" need not even be the "principal act" underlying the case." Young, 160 Wn.2d at 810 (citation omitted).

That some witnesses may have believed Latimer's demeanor was "normal" does not preclude his statement to Travis from qualifying as an excited utterance. This was not a sufficient basis to exclude the statement, absent some other reason to conclude intervening influences may have rendered the statement unreliable. Here, the State did not identify any such influences, and there were none.

- ii. *The statement was spontaneous and not made in response to questions, weighing in favor of its admissibility as an excited utterance.*

The court ruled Latimer’s statement was not an excited utterance because it was “not sufficiently spontaneous.” CP 5960. In determining spontaneity, courts look to “the amount of time that passed between the startling event and the utterance, as well as any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it.” State v. Briscoeray, 95 Wn. App. 167, 174, 974 P.2d 912, rev. denied, 139 Wn.2d 1011 (1999). An excited utterance “need not be contemporaneous to the event.” State v. Robinson, 44 Wn. App. 611, 616, 722 P.2d 1379, rev. denied, 107 Wn.2d 1009 (1986).

Here, the amount of time between the murder and the statement was not substantial. And the statements were spontaneous: Latimer showed up unannounced, looking pale and frightened, and began to relate the events of the morning as soon as he was alone with Travis. Travis did not have to ask Latimer questions to extract the excited narrative. The trial court’s cursory assessment that the statement was “not sufficiently spontaneous” is not supported by the record.

iii. *The self-inculpatory content of the statement weighs in favor of its admissibility as an excited utterance.*

“[R]easonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.” Williamson, 512 U.S. at 599. Latimer admitted to

being an accomplice to at least felony murder in the second degree, and possibly felony murder in the first degree. RCW 9A.32.050(1)(b); RCW 9A.32.030(1)(c). He feared he would be in “a lot of trouble.” The State identified no reason why Latimer would have fabricated a story implicating himself in a murder, and there is none. The self-inculpatory nature of Latimer’s statement weighs in favor of its reliability and admissibility as an excited utterance. Williamson, 512 U.S. at 599.

*iv. Neither Latimer’s self-serving trial testimony nor the self-serving statement he gave Rectenwald undercuts the reliability of the excited utterance, since Latimer’s statement to Rectenwald establishes that he perjured himself at trial.*

Even a sworn recantation at trial does not undercut the reliability of an excited utterance. Young, 160 Wn.2d at 808. Latimer testified at trial. He was evasive and his testimony conflicted with that of other witnesses. Compare RP (Beck Vol. 6) 1437, 1442 with RP (Beck Vol. 6) 1468; RP (8/16/12) 576-78, 582.

The sworn declaration Latimer executed to rebut the Powells’ evidence also materially conflicted with his sworn trial testimony. Compare RP (Beck Vol. 6) 1440, 1442, 1457-58 (Latimer denies going anywhere but the crime scene) with CP 4236 (Latimer visits Travis). Latimer testified that he was on DOC supervision in December 2009 and so “would not have used drugs.” RP (Beck Vol. 6) 1448. In his sworn

statement to Rectenwald, he stated he went to see Travis to use and buy drugs. CP 4236. This too was in direct conflict with his sworn testimony.

Latimer lied either during his sworn testimony at trial, or when he swore under penalty of perjury that his statement to Rectenwald was true and correct. If he lied at trial then he committed perjury in the first degree. RCW 9A.72.020. If he lied when he executed a sworn declaration for Rectenwald, then he committed perjury in the second degree. RCW 9A.72.030. The inconsistencies between Latimer's sworn testimony and his statement to Travis thus have little bearing on the analysis whether the statement was an excited utterance.

*v. The trial court's ruling was an abuse of discretion.*

Whether a statement qualifies as an excited utterance is reviewed for an abuse of discretion. Briscoeray, 95 Wn. App. at 171. While in a state of noticeable shock and fear, Latimer made an unprompted statement inculcating himself in a murder. The statement was made close in time to when the murder occurred, and two people attested to the statement's content, spontaneity, and Latimer's agitated state. The statement's obviously inculpatory nature supports a finding that it was truthful and admissible as an excited utterance. The trial court's ruling was an abuse of discretion.

- b. The trial court's determination that the Powells' testimony would have been merely impeaching was based upon an unsound and premature conclusion that Latimer was not "unavailable".

The trial court also ruled Latimer had not been shown to be unavailable as required for the statement to be admissible as a statement against penal interest under ER 804(b)(3). If the ruling was based on Latimer's assertion to Rectenwald that he would answer questions "truthfully" at a new trial, CP 4236, since the court would have to afford Latimer the advice of counsel or ensure a knowing waiver of the right before he could be compelled to give testimony against himself, the finding was premature, and therefore improper.

- i. *Latimer's statements to Travis Powell exposed him to prosecution for felony murder in the first or second degree and perjury, but he was not advised of his right to "plead the Fifth" when Rectenwald obtained his assurance that he would "answer questions ... about [his] conversation with Travis Powell" at a new trial.*

Latimer's statement to Travis Powell establishes the elements of felony murder in the first degree, RCW 9A.32.030(1)(c); RCW 9A.56.190, felony murder in the second degree, RCW 9A.32.050(1)(b), and theft of a firearm. RCW 9A.56.300. As shown, he also committed perjury in the first degree, perjury in the second degree, or both crimes.

The Fifth Amendment and article I, section 9 of the Washington Constitution protect a person against compelled self-incrimination. U.S.

Const. amend. V; Const. art. I, § 9. The federal protection against compelled self-incrimination has been extended to the states, and attaches whether the person is the accused or a witness. Malloy v. Hogan, 378 U.S. 1, 6 (1964). The privilege against self-incrimination includes the right of a witness not to give incriminatory answers in any proceeding. Kastigar v. United States, 406 U.S. 441, 444 (1964); In re Dependency of J.R.U.-S., 126 Wn. App. 786, 793, 110 P.3d 773 (2005).

When compulsion is present, the privilege is self-executing, and at that point, a right to counsel may arise. J.R.U.S., 126 Wn. App. at 793; see also Maness v. Meyers, 419 U.S. 449, 466 (1973). A subpoena to testify in a trial is “compulsion” that triggers constitutional protection. Counselman v. Hitchcock, 142 U.S. 547, 584-85 (1892), limited on other grounds in Kastigar, 406 U.S. at 451-52.

At a second criminal trial, Latimer would have a Fifth Amendment privilege and a right to counsel, given his substantial exposure to prosecution for serious crimes. He would have a Fifth Amendment privilege at a second trial even though he testified at the first trial. See e.g. In re Neff, 206 F.2d 149, 152 (3rd Cir. 1953) (“a person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it as to the same matter in a subsequent trial or proceeding”); accord Ellis v. United States, 416 F.2d 791, 804 (D.C. Cir. 1988) (“To the extent that

... counsel's ... examination might probe matters of substance as yet unrevealed, the witness must retain his privilege...").

ii. *The court's determination that Latimer was not "unavailable" was premature and constitutionally unsound.*

The court's finding that Latimer was not "unavailable" hangs from the thin thread of Latimer's uncounseled claim to Rectenwald that "if there is a new trial I will answer all questions truthfully." CP 4236. Rectenwald did not tell Latimer that he would have a constitutional right to the advice of counsel before he incriminated himself at a trial. As shown, the jeopardy that Latimer faced was very grave indeed, and it is reasonable to assume that a prudent defense attorney would advise him to invoke his Fifth Amendment privilege against self-incrimination.

Latimer would make the ultimate decision whether to claim the privilege, but the constitution requires that he be advised of his right. Maness v. Meyers, 419 U.S. at 466. Thus, absent proof that Latimer had been afforded the advice of counsel or expressly waived the right **in connection with his testimony at a second trial**, it was improper and premature for the court to determine that Latimer would be available to testify at such a trial.

The trial court's summary determination that Latimer was not unavailable rests on unsound constitutional footing. Put simply, on the

existing record, the court cannot presume that Latimer understood the risks he faces if he takes the witness stand at a second trial, nor can the court hold him to the preemptive “waiver”<sup>45</sup> of the privilege against self-incrimination attempted in the Rectenwald statement. The court’s determination that Latimer was not unavailable must be reversed.

- c. In the alternative, Latimer’s statement would have been admissible under the “open door” doctrine to rebut the State’s claim that Tycksen fabricated Libby’s confession and to corroborate the full confession.

The State’s case hinged on the jury discrediting Crystal Tycksen. In closing argument, the prosecutor contended, “Crystal Tycksen’s story cannot be believed because of her exaggerations, her half truths, and her all-out lies.” RP (8/28/12) 52. He argued, “she’s furious at Ian Libby,” *id.*, and that her testimony was “bogus.” *Id.* at 59.

Latimer’s statement to Travis eviscerates the State’s theory. Close in time to Libby’s frantic text messages to Tycksen, at least half a day before Tycksen saw Libby and he confessed to her what he had done, Latimer appeared at the Powell residence and blurted an account of the murder that in all salient respects mirrored Libby’s confession.

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<sup>45</sup> “A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) Given that there is no indication that Latimer is aware of the import of giving up his right not to testify against himself, the statement in the Rectenwald declaration cannot fairly be called a “waiver.”

Like the rule of completeness, the “open door” doctrine permits a party to place evidence in its proper context where otherwise the evidence would have “a real capacity to unjustly influence the trier of fact.” Alves, 948 A.2d at 708; Ang, 118 Wn. App. at 562.

The State attacked Tycksen so it could argue that she had a motive to lie when she related Libby’s confession to law enforcement. Evidence that Latimer told the same story to independent witnesses on the same day that Libby confessed to her rebutted the inference that the story was fabricated. The consistency between the two accounts lends credibility to Tycksen’s testimony.

Nickels made this argument in support of his motion for a new trial. CP 4550-55, 4560-65. As Nickels correctly noted, Latimer’s statement also corroborated the portions of Libby’s confession that the court excluded, rendering them reliable and admissible. The court rejected these arguments. CP 5960. The court rationalized that the jury heard enough of the story from Tycksen and that allowing Libby’s full confession to be heard by the jury would not change the outcome. Id.

But if the jury had heard that Latimer confessed his involvement in the murder to persons who were not associated with Tycksen, the jury may have rejected the State’s spurious allegations of recent fabrication, and had a reasonable doubt as to guilt. Latimer’s statements to Travis Powell were

substantively admissible under the open door doctrine to rebut the State's theory, and the trial court erred in ruling otherwise.

- d. The trial court's finding that Rodriguez and Perry's testimony about Libby's jailhouse confessions would not change the outcome of the trial was error.
- i. *The court's ruling that Perry's statement would not be admissible as a statement against penal interest was incorrect.*

When Perry was interviewed by law enforcement, he maintained that Libby told him he stole guns out of the truck, but said he used the words, "pow-pow," meaning gunshots, instead of "kill." CP 4221. Libby then pointed to the ceiling and said, "I did not kill anyone." *Id.* Perry said that Libby mentioned the name Sage and acknowledged he was high when he stole the guns. CP 4222.

In implicitly finding that Libby's statements disavowing involvement in the homicide might render Libby's inculpatory statements inadmissible, the court applied the "whole statement" approach repudiated in Williamson and Roberts.<sup>46</sup> But under Roberts, only the inculpatory portions of the confession would be admissible for their truth. If Perry testified at a new trial consistently with the statement he gave to law enforcement, he would testify that Libby told him about stealing guns from Munro's truck and used words and gestures that jurors would

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<sup>46</sup> See Argument 7, *supra*.

reasonably understand to refer to shooting and killing Munro. The statements were plainly admissible under ER 804(b)(3).

- ii. *The court's ruling that a jury would not find Rodriguez credible was an abuse of discretion.*

Unlike Perry, Rodriguez did not back off his account of Libby's confession when he was confronted by law enforcement. The court nevertheless found that because of Rodriguez's criminal history, he would be "impeachable" and hence not credible. CP 5960.

Inmates in jails and prisons tend to have criminal history. If this fact were a sufficient basis to deny a new trial, then new trials would seldom be granted. Since Perry's testimony would have been admissible under ER 804(b)(3) and the State did not show that Perry and Rodriguez knew each other,<sup>47</sup> Rodriguez's criminal history does little to detract from his credibility. A jury should have been permitted to decide whether Rodriguez's testimony created a reasonable doubt as to Nickels's guilt. The trial court's contrary ruling was an abuse of discretion.

- e. The trial court erred in ruling that evidence Libby had tried to sell a gun resembling the gun that was missing from Munro's collection was not relevant.

As noted in argument 8biv, supra, the court barred Nickels from presenting evidence that Harmon knew Munro had a .45 caliber handgun

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<sup>47</sup> Perry accepted a favorable plea deal while the defense motion was pending and cooperated with law enforcement, so it can be assumed that he would have disclosed any collusion with Rodriguez if it had occurred.

with a laser sight and that it was missing when his guns were inventoried. RP (Beck Vol. 6) 1501-02, 1506-08; RP (8/15/12) 464, 466, 470-71. Nickels was further able to complete this picture when, post-trial, “Witness A” came forward with evidence that, in the summer of 2012,<sup>48</sup> Libby had tried to sell him a .45 caliber handgun with a laser sight. CP 4064, 4072. Nickels argued this evidence would have supported Harmon’s testimony, which the court had excluded. RP (12/20/12) 20. The court found this evidence did not support granting a new trial because there was “no basis” to associate the gun with Munro’s murder. CP 5960. The court’s reservations go to weight, not admissibility.

“The threshold to admit relevant evidence is very low.” Darden, 145 Wn.2d at 621. Even minimally relevant evidence is admissible. Id. At a new trial, the State could argue the .45 caliber handgun with a laser sight that Libby tried to sell to Witness A was not the same gun that was missing from Munro’s collection, and was not the .45 caliber gun that was used to shoot and kill Munro. But the court’s conclusion that there was “no basis” to associate the gun with Munro’s murder was flawed and belied by the strong circumstantial evidence that Libby had stolen just such a gun from Munro’s truck and used it to shoot and kill Munro when

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<sup>48</sup> Nickels was tried in the summer of 2012.

Munro surprised him in the act. The trial court erred in finding that Witness A's proposed evidence was not relevant.

- f. The trial court's ruling denying Nickels a new trial was reversible error.

As shown, each conclusion reached by the trial court was based upon a legally incorrect premise. A court *de facto* abuses its discretion if it bases a discretionary ruling on an incorrect legal standard. Quismundo, 164 Wn.2d at 504. This Court should conclude that the trial court abused its discretion in denying Nickels's motion for a new trial.

13. **The intimate friendship of the trial judge's stepson with Munro created an appearance of unfairness, in violation of the Fourteenth Amendment guarantee of due process of law.**

- a. The trial judge's stepson, with whom the judge enjoyed a close relationship, was "good friends" with Munro and celebrated Nickels's conviction but the judge never disclosed the association to the parties.

The trial judge had a close relationship with his stepson, Eric Newstrand. CP 603, 6034, 6038. Newstrand attended Ephrata High School with Munro and was a member of a Facebook "group" entitled, "In Loving Memory of Sage Munro." When Nickels was convicted, Newstrand posted on the page, "G-U-I-L-T-Y!!! Justice has been served!!!" Id. On his personal Facebook page, Newstrand wrote, "The best birthday present

ever! Jury came back with a guilty verdict in my good friend's murder trial! Justice has been served!!"<sup>49</sup> CP 6060.

The judge did not disclose his relationship with Newstrand and Newstrand's good friendship with Munro to the parties. Nickels's counsel filed an Objection to Biased Tribunal, arguing the court's failure to disclose the close association and the association itself created an appearance of unfairness that violated due process. CP 6000-07.

The court denied that a relationship existed between the judge and Munro and filed a bar complaint against counsel.<sup>50</sup> CP 6182. In response, the defense submitted an additional declaration from Andrew Phipps, who went to high school with Munro and Newstrand and was friends with both of them. CP 6209. Phipps was aware that Newstrand was Sperline's stepson and opined that "Judge Sperline had to have known that his stepson, Eric Newstrand, had a friendship with Sage Munro because of our friendship while in high school." *Id.* He also believed it "highly unlikely" that Sperline did not know Munro. *Id.* He said another mutual friend "confirmed our belief that Judge Sperline would have known that Eric Newstrand and Sage Munro were friends." CP 6210.

b. The close relationships between the judge's stepson and Munro and the judge and his stepson, and the court's concealment of

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<sup>49</sup> The judge listed Newstrand as a Facebook "friend." CP 6058.

<sup>50</sup> The Washington State Bar Association dismissed the complaint. CP 6213-16.

the relationships, violated the appearance of fairness required by the due process clause of the Fourteenth Amendment.

A fair trial in a fair tribunal is a basic requirement of due process.

In re Murchison, 349 U.S. 133, 136 (1955); U.S. Const. amend. XIV.

Fairness requires not only the absence of actual bias but the appearance of fairness. Id.; accord State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude all parties obtained a fair, impartial, and neutral hearing. Tatham v. Rogers, 170 Wn. App. 76, 96, 283 P.3d 583 (2012). Even where there is no proof of actual bias, the appearance of unfairness will require a new trial. Madry, 8 Wn. App. at 70.

The judge had a close relationship with his stepson who was “good friends” with Munro and exulted in the guilty verdict. Friends of Newstrand and Munro found it inconceivable that the judge did not know about Newstrand’s close friendship with Munro, and also believed that the judge knew Munro personally. Given the relationship and the many trial irregularities, a reasonably prudent and disinterested person would conclude that Nickels did not receive a fair trial. Nickels’s conviction should be reversed and the case remanded for trial before a different judge.

**15. Cumulative error denied Nickels the fundamentally fair trial he was guaranteed by the Fourteenth Amendment and article I, section 3.**

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find that errors combined together denied the defendant a fair trial. Williams v. Taylor, 529 U.S. 362, 396-98 (2000); Taylor v. Kentucky, 436 U.S. 478, 488 (1978); State v. Coe, 101 Wn.2d 772, 789, 684 P.3d 668 (1984); U.S. Const. amend. XIV; Const. art. I, § 3. Even if this Court does not find that any single error merits reversal, this Court should conclude cumulative error rendered Nickels's trial fundamentally unfair.

E. CONCLUSION

Nickels's conviction should be reversed and dismissed. If the case is remanded for a new trial, the DNA evidence should be suppressed, the ER 404(b) evidence excluded, and Nickels be permitted to fully present his other suspect defense.

DATED this 17th day of June, 2015.

Respectfully submitted:

/s/ Susan F. Wilk  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 31642-4-III
v.	)	
	)	
DAVID NICKELS,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, NINA ARRANZA-RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF JUNE, 2015, I CAUSED THE ORIGINAL **SECOND AMENDED 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:

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[X] GARTH DANO	(X)	U.S. MAIL
ATTORNEY AT LAW	( )	HAND DELIVERY
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**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF JUNE, 2015.



X \_\_\_\_\_

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