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Court of Appeals
Division III
State of Washington

No. 34157-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joseph Richmond,

Appellant.

Kittitas County Superior Court Cause No. 14-1-00247-4

The Honorable Judge Scott Sparks

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court violated Mr. Richmond's Sixth and Fourteenth Amendment right to present a defense.
2. The court violated Mr. Richmond's right to present a defense under Wash. Const. art. I, §§3 and 22.
3. The court violated Mr. Richmond's right to present a defense by excluding critical evidence that was relevant and admissible.
4. The court violated Mr. Richmond's right to present a defense by excluding evidence tending to corroborate Mr. Richmond's testimony that Higginbotham was the aggressor in the conflict.
5. The court violated Mr. Richmond's right to present a defense by excluding expert testimony supporting Mr. Richmond's perception that Higginbotham was the aggressor in their conflict.
6. The court erroneously excluded testimony that Higginbotham's postmortem toxicology report revealed an extremely high level of methamphetamine in his system at the time of his death.
7. The court violated Mr. Richmond's right to present a defense by excluding expert testimony establishing that methamphetamine use can increase aggression and volatility, and impair impulse control.

ISSUE 1: An accused person has a constitutional right to present relevant, admissible evidence necessary to the defense. Did the court violate Mr. Richmond's right to present a defense by excluding relevant, admissible evidence critical to his theory of the case?

8. The court's instructions violated Mr. Richmond's Fourteenth Amendment right to due process.
9. The court's instructions relieved the state of its burden to prove the absence of self-defense.
10. The court erred by giving Instruction No. 20.
11. The court's aggressor instruction did not make the relevant legal standard manifestly apparent to the average juror.
12. The aggressor instruction improperly stripped Mr. Richmond of his self-defense claim even if his lawful conduct on his own property provoked an unreasonable belligerent response.

ISSUE 2: The aggressor doctrine precludes a person from acting in self-defense after provoking an attack through *unlawful* conduct. Did the court's aggressor instruction improperly direct jurors to disregard Mr. Richmond's self-defense claim, even absent proof that he acted unlawfully?

13. The aggressor instruction improperly disallowed Mr. Richmond's self-defense claim if jurors concluded his actions were reasonably likely to provoke an *unreasonable* belligerent response from Higginbotham.

ISSUE 3: The aggressor doctrine does not protect a person's unreasonable or unlawful belligerence. Did the court's aggressor instruction improperly strip Mr. Richmond of his self-defense claim based on intentional actions reasonably likely to provoke an *unreasonable* belligerent response?

14. The evidence did not support an aggressor instruction in this case.
15. The state failed to identify evidence of any unlawful intentional act reasonably likely to provoke a belligerent response.

ISSUE 3: Lawful conduct that is not reasonably likely to provoke a belligerent response does not warrant a jury instruction on the aggressor doctrine. Did the court err by giving an aggressor instruction based on evidence that Mr. Richmond picked up a board and told Higginbotham to leave his property?

16. The court violated Mr. Richmond's confrontation right under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22.
17. The court erred by refusing to allow Mr. Richmond to cross-examine Dresp and Zackuse about their methamphetamine use and its effects on their perception and memory the day of the incident.
18. The court erred by refusing to allow Mr. Richmond to cross-examine Dresp and Zackuse about their drug use with Higginbotham, which was admissible to prove bias.
19. The court's refusal to allow Mr. Richmond to introduce evidence showing the effects of methamphetamine use on perception and memory violated his constitutional right to present a defense.

ISSUE 4: An accused person has a constitutional right to confront adverse witnesses. Did the trial judge err by

restricting Mr. Richmond's cross-examination of the most important prosecution witnesses?

ISSUE 5: The constitution guarantees an accused person's right to introduce bias evidence and other facts that undermine the credibility of an adverse witness. Did the court's ruling excluding evidence that Dresp and Zackuse used drugs with the deceased on the day of the incident violate Mr. Richmond's confrontation right and his right to present a defense, because the proffered testimony demonstrated bias and cast doubt on their perception and memory?

20. The sentencing court failed to properly determine Mr. Richmond's offender score and standard range.
21. The sentencing judge erred by sentencing Mr. Richmond with an offender score of five.
22. The sentencing judge erred by (implicitly) concluding that Mr. Richmond's Idaho conviction is comparable to a Washington felony.
23. The trial court erred by adopting Finding of Fact No. 2.2.
24. The trial court erred by adopting Finding of Fact No. 2.3.

ISSUE 6: An out-of-state conviction does not add to the offender score unless it is comparable to a Washington felony. Did the court err by adding one point to Mr. Richmond's offender score based on a foreign conviction that is not comparable to any Washington felony?

ISSUE 7: Stipulations to matters of law do not bind courts. Did the trial court err by accepting an improper legal stipulation to Mr. Richmond's offender score, which included a foreign conviction that is not comparable to a Washington felony?

25. Defense counsel provided ineffective assistance by noting the comparability issue but then allowing the court to add a point to the offender score for Mr. Richmond's Idaho conviction.

ISSUE 8: An offender is entitled to the effective assistance of counsel at sentencing. Was Mr. Richmond denied the effective assistance of counsel when his attorney noted the likelihood that his Idaho conviction did not equate to a Washington felony?

but then allowed the court to increase Mr. Richmond's offender score with it?

26. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 9: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Richmond is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Throughout the day on September 22, 2014, Higginbotham, Dresp, and Zackuse used methamphetamine together. RP 184. Toxicology results later showed that Higginbotham had enough meth in his system to kill most people. CP 68-77.

In the evening, the three decided to go to Dresp's ex-boyfriend's house to retrieve her property.¹ When Joseph Richmond refused to open the door, they threatened to kick it down. RP 270, 363. When Dresp retrieved a crowbar and broke open a locked shed, Richmond called the police. RP 271, 364, 556, 981.

Officer Jennifer Rogers responded and conducted some negotiations. RP 272, 557, 984. Dresp agreed to return the next day at 4pm for a civil standby. RP 273, 282, 374, 437, 623. After the officer left, however, the three meth users resumed their efforts to get Dresp's property. RP 437-438, 564. They turned their van around and went back onto Mr. Richmond's property. RP 438, 465-466, 568.

Higginbotham and Mr. Richmond yelled at each other, Higginbotham yelling that he was not afraid of Mr. Richmond. RP 992. Higginbotham ignored Dresp when she told him to stop and grabbed him

¹ Mr. Richmond was responsible for rent at the house, and is the party who signed the lease. RP 484.

to pull him away. RP 290-291, 379-380, 993. Mr. Richmond was on his porch, and then moved right in front of it. RP 470, 998. Higginbotham yelled and walked toward Mr. Richmond. RP 382, 467, 993.

Higginbotham had a large flashlight in one hand. RP 358, 380, 694, 698, 989.

Mr. Richmond told Higginbotham not to come any closer, twice, but Higginbotham kept walking toward him. RP 292, 993, 1046. Mr. Richmond saw him reach toward what Mr. Richmond thought was a knife, so he picked up a board and hit Higginbotham. RP 995, 1016.

Higginbotham went down, his head touching the porch stair. RP 526. Mr. Richmond got into his truck and left the area. RP 292, 294, 300, 443, 1000. Mr. Richmond slept in his vehicle in the woods that night, contacted his employer the next morning and then contacted police. RP 499, 717, 1007, 1009-1010, 1049.

Higginbotham died as a result of the board's strike to his head. RP 845-846. The state charged Mr. Richmond with murder in the second degree. CP 1.

The defense retained several experts to help in preparation and presentation of the defense case. In September of 2015, Mr. Richmond's attorney told the prosecutor and court that the defense planned to offer evidence that Higginbotham was on methamphetamine when the assault

occurred, and that he also had methamphetamine in his pocket. RP 89-91. Further, the defense planned to offer expert testimony on what methamphetamine would do to a person's perceptions and actions. RP 89-91. Trial dates were reset to accommodate expert schedules and state investigation. RP 97-130.

Trial started January 27, 2016, but evidence presentation didn't begin until February 3, 2016. RP131-259. During motions in limine, the state moved to prevent the defense from offering evidence about the methamphetamine in Higginbotham's system. The state also claimed that the lab report from the autopsy was hearsay and inadmissible. RP 163-166.

The defense argued that the levels of substances in Higginbotham's system, combined with their proposed expert testimony, rendered the evidence relevant. RP 167-169. Specifically, the extremely high level of methamphetamine in Higginbotham's system, when explained and interpreted by an expert who could also opine that people can become aggressive and irrational with those levels, would be very helpful to the jury in evaluating Mr. Richmond's self-defense claim. RP 167-169.

The court excluded the evidence, ruling that because there was no evidence that Mr. Richmond was aware of Higginbotham's

methamphetamine level, it was not relevant. RP 170-173. The trial judge excluded the methamphetamine level of Higginbotham from the autopsy, the methamphetamine in Higginbotham's pocket, and the defense expert. RP 170-175.

The defense sought to admit that the two state witnesses to the alleged assault also used methamphetamine that day. The court ruled that, since Dresp and Zackuse both ingested the substance with Higginbotham, their drug use was likewise inadmissible. RP 183-190. The defense motion to reconsider the ruling was also denied. RP 221-223.

Mr. Richmond also sought to explain his own actions after the incident, when he left the area and hid overnight. The defense had an expert help the jury understand how the brain's amygdala and a person's fight-or-flight reaction work. RP 187-189, 244-245. The court granted the state's motion to preclude this testimony as well. RP 190. Again, the defense sought reconsideration; again the request was denied. RP 244-249.

The jury heard first from Veronica Dresp, who said she used to live with Mr. Richmond where he rented. RP 262, 264-265. She said her and Mr. Richmond had argued and broken up, and she was staying with her friend Zackuse. RP 266. After some texting back and forth, she decided that she needed to use her friend Higginbotham's van and go with

Zackuse and Higginbotham to get her property at Mr. Richmond's home. Dresp admitted that she threatened to break the door down, and that she used a crowbar that she'd brought to enter the shed. RP 270-271. She admitted that she'd told the officer she would leave and come back the next day, and that instead she went back to Mr. Richmond's to get her stuff as soon as the officer left the area. RP 283.

The defense was only able to offer one of their experts to the jury. Kay Sweeney was limited in his testimony, but did testify that the most likely scenario included that Higginbotham was moving toward Mr. Richmond when he was struck. RP 863-940.

Mr. Richmond planned to testify and explain his need to defend himself. The prosecutor sought to cross-examine him regarding his drug use, arguing that it would impact his perception and memory. RP 943-945. After further analysis and discussion, the state withdrew this request. RP 947-951.

Mr. Richmond told the jury he was afraid for his life. RP 1031, 1045. He described multiple people on his property, ignoring his demands that they leave. RP 1044. He said that Higginbotham kept coming toward him threateningly, despite Mr. Richmond's repeated warnings to stay back. RP 987-997. He said he struck Higginbotham as Higginbotham came at him. RP 993, 995-996.

The state proposed a jury instruction addressing the law relating to an initial aggressor. CP 106. The court gave the instruction over the defense objection. RP 1080-1092. The prosecutor argued the issue repeatedly in closing:

You can't create a need for self-defense. You don't get to go crazy on people who have a lawful right to be at your house and then say, "Well, one of them attacked me so I defended myself."

"I was screaming at Veronica to get off the property," but she had a lawful right to be there. And then -- and then when Dennis stepped up to defend them, "I just defended myself." No self-defense. You don't get to create the situation that entitles you to self-defense. You don't get to stir everybody up around you, and then when people respond say, "I was just defending myself, I didn't do anything wrong."
RP 1125-1126.

The prosecutor returned to the theme in rebuttal:

Dennis responds to Joe, because Joe is the initial aggressor. He stirs this whole thing up, he takes it to a next level by coming out of his house, armed with a board, screaming at them. He doesn't get to claim self-defense. He stirred it all up. He left, thought about himself only.
RP 1165.

The jury convicted Mr. Richmond as charged. CP 109.

At sentencing, the state alleged that Mr. Richmond had an Idaho conviction for rape. CP 111. During the hearing, Mr. Richmond's attorney noted the conviction and said that it should only count as 1 point.

RP 1195. The state agreed. RP 1196. Then the defense attorney and court had a brief colloquy:

MR. SILVERTHORN: Arguably it wouldn't have been a crime in Washington, (inaudible) 48 months between teenagers who allegedly have -- intercourse.

THE COURT: I understand. But they did call it that--

MR. SILVERTHORN: (Inaudible).

THE COURT: It's a felony in Idaho.

MR. SILVERTHORN: It is.

RP 1196.

The sentencing document indicated the conviction and counted it as a point. CP 111-112.

Mr. Richmond timely appealed. CP 126-139.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. RICHMOND'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING CRITICAL EVIDENCE THAT WAS RELEVANT AND ADMISSIBLE.

Mr. Richmond's self-defense claim rested on evidence that Higginbotham was the aggressor in their conflict. The other eyewitnesses were aligned with Higginbotham, and Mr. Richmond had no eyewitnesses sympathetic to him. RP 131-1165.

To corroborate his own testimony, he wished to introduce circumstantial evidence suggesting that Higginbotham was the aggressor. 163-190, 241-249; CP 68-77. The evidence consisted of (1) a toxicology result showing that he'd consumed methamphetamine, and (2) expert

testimony that the test result was extremely high and that methamphetamine use produces aggression and volatility, and inhibits impulse control.² CP 68-72.

The trial court excluded the evidence. CP 30-39. This violated Mr. Richmond's constitutional right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

A. Because the trial court infringed Mr. Richmond's constitutional right to present a defense, review is *de novo*.

Appellate courts review constitutional issues *de novo*. *Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016).

Even when a trial court makes a discretionary decision, review is *de novo* if the error is alleged to violate a constitutional right. *Jones*, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

Thus, for example, the *Jones* court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719.³ Similarly, the *Iniguez* court

² He also wished to show that Higginbotham had used methamphetamine that day, and had a supply of methamphetamine in his pocket. RP 165.

³ Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court specifically pointed out that review would have been for abuse of discretion had not the defendant argued a constitutional violation. *Id.*

Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,⁴ review is *de novo* where such a ruling violates a constitutional right. *Id.*; *Jones*, 168 Wn.2d at 719.⁵ Here, as in *Jones*, Mr. Richmond alleges a violation of his constitutional right to present a defense. Review is therefore *de novo*. *Jones*, 168 Wn.2d at 719.

The Supreme Court's decision in *Dye* does not compel a different result. *See State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013). Although the *Dye* court indicated that merely alleging a violation of the "right to a fair trial does not change the standard of review," it did so without citing *Iniguez* or *Jones*. *Id.*, at 548. In fact, the petitioner in *Dye* did not ask the

⁴ A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

⁵ *See also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).

court to apply a *de novo* standard. *See Dye*, Petition for Review⁶ and Supplemental Brief.⁷ As the *Dye* court noted, the petitioner “present[ed] no reason for us to depart from [an abuse-of-discretion standard].” *Id.*⁸

There is no indication that the *Dye* court intended to overrule *Iniguez, Jones*.⁹ This is especially true given the absence of any briefing addressing the appropriate standard of review in *Dye*. Accordingly, review in this case should be *de novo*, notwithstanding the *Dye* court’s *dicta*.

Although defense counsel did not specifically mention Mr. Richmond’s constitutional right to present a defense during argument on the state’s motion, the denial of that right may be reviewed for the first time on appeal because it is a manifest error affecting a constitutional right. RP 163-190; RAP 2.5(a)(3).

⁶ Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf> (last accessed 11/7/16).

⁷ Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf> (last accessed 11/7/16).

⁸ By contrast, the Respondent did argue for application of an abuse-of-discretion standard. *See Dye*, Respondent’s Supplemental Brief, pp 8-9, 17-18, available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20Obrief.pdf> (last accessed 11/7/16).

⁹ The same is true for of the Supreme Court’s decision in *State v. Clark*, 92021-4, 2017 WL 448990 (Wash. Feb. 2, 2017). In that case, as in *Dye*, Respondent argued for application of the abuse-of-discretion standard. *See* Respondent’s Supplemental Brief, p. 16, available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf> (last accessed 2/10/17). Petitioner did not ask the court to apply a different standard. Petitioner’s Supplemental Brief, available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf> (last accessed 2/10/17).

To raise a manifest constitutional error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).¹⁰ An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010)

The trial court knew that Mr. Richmond’s defense rested on the justifiable use of force. Given this, the court “could have corrected” the violation of Mr. Richmond’s constitutional right to present a defense by admitting the excluded evidence. *Id.*

B. Due process guaranteed Mr. Richmond a meaningful opportunity to present his defense.

An accused person has a constitutional right to present a defense. U.S. Const. Amends. VI, XIV; art. I, §§3, 22; *Jones*, 168 Wn.2d at 720; *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (*Chambers I*) and *Holmes v. S. Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). The right to present a defense

¹⁰ The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

includes the right to introduce relevant and admissible evidence. *Jones*, 168 Wn.2d at 720.

Evidence is relevant “if it has any tendency to make the existence of any consequential fact more probable or less probable.” *Washington v. Farnsworth*, 185 Wn.2d 768, 782–83, 374 P.3d 1152 (2016) (citing ER 401). The threshold to admit relevant evidence is low; “even minimally relevant evidence is admissible.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010) (internal quotation marks and citation omitted).

Evidence that meets the “minimally relevant” standard can only be excluded if the state proves that it is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720. No state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

Here, Mr. Richmond sought to introduce evidence corroborating his self-defense claim. The evidence was at least “minimally relevant,” and should not have been excluded. *Id.*; *Salas*, 168 Wn.2d at 669.

C. The court erroneously excluded evidence of Higginbotham’s recent methamphetamine use and expert testimony explaining that it would have made him aggressive.

A qualified expert may provide opinion testimony based on scientific, technical, or other specialized knowledge if it would “assist the

trier of fact to understand the evidence or to determine a fact in issue.” ER 702. Expert testimony is admissible if it will be helpful to the trier of fact, with “helpfulness” construed “broadly.” *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (citing *Miller v. Likins*, 109 Wn.App. 140, 148, 34 P.3d 835 (2001)). The rule favors admissibility in doubtful cases. *Likins*, 109 Wn.App. at 148.

In addition, the underlying facts supporting an expert opinion are “admissible for the limited purpose of explaining the basis for [that] opinion.” *Allen v. Asbestos Corp., Ltd.*, 138 Wn.App. 564, 579, 157 P.3d 406 (2007); ER 703. This is so even if the underlying facts would otherwise be inadmissible. *Id.*, ER 703.

Methamphetamine is “a powerful stimulant” that can produce aggressive behavior, sometimes including “out-of-control violent rages.” Christopher Haas, *Owner and Promoter Liability in "Club Drug" Initiatives*, 66 Ohio St. L.J. 511, 522 (2005) (citations omitted). Police officers know that meth users “present special dangers because of their irrationality, paranoia, unpredictability, and tendency to react violently to confrontation.” Michelle Kommer, *Protecting Children Endangered by Meth: A Statutory Revision to Expedite the Termination of Parental Rights in Aggravated Circumstances*, 82 N.D.L. Rev. 1461, 1470 (2006) (citing Ells et al., American Prosecutors Research Institute, *Behind the Drug: The*

Child Victims of Meth Labs (2002)); see also *State v. Hopkins*, 113 Wn.App. 954, 956, 960, 55 P.3d 691 (2002) (quoting officer testimony that people using methamphetamine “can get pretty aggressive and mean.”).

Those who repeatedly use high doses to maintain intoxication “are often delusional and extremely violent.” Dr. Mary Holley, *How Reversible Is Methamphetamine-Related Brain Damage?*, 82 N.D.L. Rev. 1135, 1139 (2006) (citing Joan E. Zweben et al., *Psychiatric Symptoms in Methamphetamine Users*, 12 Am. J. Addictions 181, 184-85 (2004)). Meth addicts also tend to show “poor decision-making, impulsivity, and lack of insight.” Dr. Jane Carlisle Maxwell, *Methamphetamine: Epidemiological and Research Implications for the Legal Field*, 82 N.D.L. Rev. 1121, 1129 (2006) (citing Edythe London et al., *Mood Disturbances and Regional Cerebral Metabolic Abnormalities in Recently Abstinent Methamphetamine Abusers*, 61 Archives of General Psychiatry 73 (2004)).

In this case, Mr. Richmond sought to introduce evidence that Higginbotham’s postmortem toxicology results showed not just that he’d used methamphetamine, but that he had “a super-high level” in his system, sufficient to kill a non-user. RP 167-168; CP 68-77. He offered expert testimony to explain the results of this level of use: irrationality, poor

decision-making, impulsivity, lack of insight, and extreme violence. RP 160-190; CP 68-77.

The evidence was offered to corroborate Mr. Richmond's testimony that Higginbotham was the aggressor. RP 167- 168. The extraordinary level of methamphetamine in Higginbotham's system made it highly probable that he, and not Mr. Richmond, was the aggressor.¹¹ *See* Holley, 82 N.D.L. Rev. at 1139. The proffered testimony was not "marginally relevant evidence;" instead it was "evidence of extremely high probative value." *Jones*, 168 Wn.2d at 721. It went directly to the heart of Mr. Richmond's entire defense.

Because the evidence was "of *high* probative value... 'no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, §22.'" *Jones*, 168 Wn.2d at 720 (emphasis in original) (quoting *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). Because no state interest "can possibly be compelling enough to preclude [its] introduction..., the trial court violated the Sixth Amendment^[12] when it barred [the] evidence." *Id.*, at 721.¹³

¹¹ It also provided at least slight evidence that Mr. Richmond's fear of Higginbotham was reasonable.

¹² And Wash. Const. art. I, §§3 and 22.

¹³ Even if the excluded evidence were only minimally relevant, it should not have been excluded absent prejudice so great "as to disrupt the fairness of the fact-finding process." *Jones*, 168 Wn.2d at 720. The state did not show prejudice of that magnitude. Furthermore,

(Continued)

D. The violation of Mr. Richmond's constitutional right to present a defense is not harmless beyond a reasonable doubt.

Violation of the right to present a defense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Here, the state cannot prove beyond a reasonable doubt that the error was trivial, formal, or merely academic, and that "any reasonable jury would have reached the same result without the error." *Jones* 168 Wn.2d at 724; *Lorang*, 140 Wn.2d at 32. Without the evidence, Mr. Richmond's self-defense claim rested almost entirely on his own testimony. The excluded evidence went directly to the defense, especially

any improper prejudicial effect could have been cured with an instruction. *See, e.g., State v. Sublett*, 176 Wn.2d 58, 70 n. 5, 292 P.3d 715 (2012) ("[L]imiting instructions are assumed to cure most risks of prejudice.")

in light of the trial court's decision to give the state's aggressor instruction over Mr. Richmond's objection. CP 106; RP 1080-1092.

The trial court violated Mr. Richmond's constitutional right to present a defense. *Jones*, 168 Wn.2d at 720. The state cannot show that the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. Mr. Richmond's conviction must be reversed and the case remanded with instructions to admit the excluded evidence. *Id.*

II. THE COURT'S AGGRESSOR INSTRUCTION MISSTATED THE LAW AND IMPROPERLY STRIPPED MR. RICHMOND OF HIS RIGHT TO ARGUE SELF-DEFENSE.

The trial court instructed the jury on the aggressor doctrine, even though Mr. Richmond did not engage in any unlawful provoking conduct prior to the alleged assault. The aggressor instruction improperly stripped Mr. Richmond of his self-defense argument. It precluded Mr. Richmond from claiming self-defense, even if he "provoked" Higginbotham through lawful action that would not have provoked a reasonable person. CP 106. This violated Mr. Richmond's Fourteenth Amendment right to due process and impermissibly lowered the state's burden to disprove self-defense.¹⁴

¹⁴ Mr. Richmond objected to the aggressor instruction at trial. RP 1080-1092. If the objection was insufficient to preserve the specific constitutional arguments presented here, review is nonetheless appropriate under RAP 2.5(a)(3). *State v. McCreven*, 170 Wn.App. 444, 462, 284 P.3d 793 (2012).

- A. The aggressor instruction erroneously directed jurors to disregard Mr. Richmond’s self-defense claim even absent an unlawful provoking act.

Washington courts disfavor aggressor instructions. *State v. Stark*, 158 Wn.App. 952, 960, 244 P.3d 433 (2010). Such instructions are rarely necessary to permit the parties to argue their theories of the case, and have the potential to relieve the state of its burden in self-defense cases. *Id.*

The “aggressor doctrine” derives from the common-law rule that a person who provokes a fight may not claim self-defense. *See, e.g., State v. McCann*, 16 Wash. 249, 47 P. 443 (1896). The common law has always required evidence of an unlawful (or “lawless”) aggressive act.¹⁵ *See, e.g., State v. Turpin*, 158 Wash. 103, 290 P. 824 (1930).

When first published, the pattern aggressor instruction required jurors to determine if the defendant created the need to act in self-defense “by any *unlawful* act.” Former WPIC 16.04, 11 Wash. Prac., Pattern Jury Instr. Crim. (1st. Ed) (emphasis added). This language was found to be “vague and overbroad *unless directed to specific unlawful intentional conduct.*” *State v. Thompson*, 47 Wn.App. 1, 8, 733 P.2d 584, 589 (1987)

¹⁵ *See also State v. Thomas*, 63 Wn.2d 59, 385 P.2d 532 (1963), *overruled on other grounds by State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974); *State v. Upton*, 16 Wn.App. 195, 556 P.2d 239 (1976); *State v. Bailey*, 22 Wn.App. 646, 591 P.2d 1212 (1979).

(emphasis added) (citing *State v. Arthur*, 42 Wn.App. 120, 708 P.2d 1230 (1985)).¹⁶

The pattern committee subsequently replaced the word “unlawful” with the word “intentional.” See WPIC 16.04 (4th Ed.). This was an attempt to address the *Arthur* court’s concern—that jurors in that case might have stripped the defendant of his self-defense claim because of an accidental fender bender. See *Arthur*, 42 Wn.App. at 124.

However, this revision created a new problem. If taken literally, the amendment significantly lowers the state’s burden to disprove self-defense. The language precludes a self-defense claim based on *lawful* intentional acts that foreseeably provoke a belligerent response, relieving the state of its burden to prove an unlawful or lawless provoking act.¹⁷

Washington appellate courts have continued to require clear proof of an unlawful provocation before the instruction can be given.¹⁸ For

¹⁶ In *Arthur*, jurors may have believed that an automobile accident was the unlawful act that made the defendant the aggressor. *Id.*, at 123-124. The *Arthur* court found that this was “not rational, reasonable, or fair.” *Id.*

¹⁷ For example, approaching a group of drug dealers to tell them to leave the neighborhood is an intentional act reasonably likely to produce a belligerent response. Starting a business next to a competitor is an intentional act reasonably likely to produce a belligerent response. These actions are lawful but come within a literal reading of the aggressor instruction’s language.

¹⁸ See *State v. Hardy*, 44 Wn.App. 477, 484, 722 P.2d 872 (1986) (“the jury, by treating the name-calling as an unlawful act, [may have] improperly denied Hardy her claim of self-defense”); *State v. Brower*, 43 Wn.App. 893, 902, 721 P.2d 12 (1986) (“Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident”); *State v. Douglas*, 128 Wn.App. 555, 563-564, 116 P.3d 1012

(Continued)

example, the Supreme Court has held that “words alone do not constitute sufficient provocation” for an aggressor instruction. *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). The *Riley* court’s explanation rested, in part, on the “unlawful” force requirement inherent in the aggressor rule:

the reason one generally cannot claim self-defense when one is an aggressor is because “the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense.”

Id. (quoting 1 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 657–58 (1986) (footnotes omitted by court)).

In this case, the jury may have believed that Mr. Richmond’s lawful conduct—telling Higginbotham to leave, or picking up the board to defend himself when Higginbotham approached—qualified as a provoking act. Jurors could read the instruction to strip Mr. Richmond of his self-defense claim based on his lawful conduct, if they found it reasonably likely to provoke Higginbotham.¹⁹

(2005) (“The record [did] not show that Douglas was the aggressor or that he was involved in any wrongful or unlawful conduct.”); *Stark*, 158 Wn.App. at 960 (lawfully obtaining a restraining order was not provocation that warranted an aggressor instruction).

Other decisions have upheld use of the aggressor instruction based on the defendant’s unlawful conduct, even where the unlawfulness determination was left to the jury. *Thompson*, 47 Wn.App. at 8 (noting that former WPIC 16.04 “is vague and overbroad unless directed to specific unlawful intentional conduct”); *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986) (“the evidence of unlawful conduct was clear”).

¹⁹ Furthermore, the instruction applied even if Mr. Richmond’s acts were reasonably likely to provoke an *unreasonable* belligerent response, as argued elsewhere in this brief.

The instruction lowered the state’s burden of disproving the lawful use of force. The court erroneously told jurors that Mr. Richmond was not entitled to defend himself, even if his allegedly provocative actions were wholly lawful. *McCreven*, 170 Wn.App. at 462. Mr. Richmond’s conviction must be reversed and his case remanded for a new trial. *Id.*

B. The aggressor instruction improperly stripped Mr. Richmond of his self-defense claim even if his actions provoked an *unreasonable* belligerent response.

The court instructed jurors that Mr. Richmond was not entitled to act in self-defense if he had committed “any intentional act reasonably likely to provoke a belligerent response...” CP 106. The instruction did not require proof that the intentional act would provoke a belligerent response from a reasonable person. CP 106.

But the common-law aggressor doctrine cannot be premised on unreasonable or illegal belligerence, no matter how foreseeable. *See, e.g., Riley*, 137 Wn.2d at 911 (explaining that aggressor instructions apply when the victim’s use of force qualifies as self-defense). If it were, it would grant those who are known to be bellicose, combative, and thin-skinned the right to attack others with impunity.²⁰ For example, a letter carrier who approaches the house of a person known to hate postal

²⁰ This is especially true if the “unlawfulness” requirement is eliminated as well, as argued above.

workers would be guilty of an “intentional act reasonably likely to provoke a belligerent response.” CP 106. Similarly, efforts to calm someone who is having an angry public meltdown might be “reasonably likely to provoke a belligerent response.” CP 106. In both examples, the actor would be unable to ward off an attack from the other person.

The instruction given at Mr. Richmond’s trial was flawed. It did not make manifestly clear the aggressor rule’s objective standard, because it directed jurors to disregard Mr. Richmond’s self-defense claim even if they believed Higginbotham’s belligerent response to be unreasonable or even unlawful.

The jury may have concluded that Mr. Richmond’s words were reasonably likely to provoke a belligerent response, given Higginbotham’s stubbornness and innate aggressiveness. They may have believed that Mr. Richmond provoked an attack simply by picking up the board, even if he did so out of fear, anticipating that Higginbotham might attack.

The court’s aggressor instruction did not properly convey the aggressor rule’s objective standard. CP 106. It stripped Mr. Richmond of his right to use self-defense if his lawful acts were likely to provoke an unreasonable belligerent response.

The court’s instruction violated due process because it improperly relieved the state of its burden to disprove self-defense. *McCreven*, 170

Wn.App. at 462. Mr. Richmond’s conviction must be reversed and his case remanded for a new trial. *Id.*

C. Substantial evidence did not support the aggressor instruction because Mr. Richmond did not engage in any “specific unlawful intentional conduct” reasonably likely to provoke a belligerent response.

Jury instructions are not warranted unless supported by substantial evidence. *Cooper v. State Dep’t of Labor & Indus.*, 188 Wn.App. 641, 647–48, 352 P.3d 189 (2015). Courts review *de novo* whether sufficient evidence justifies a first aggressor instruction in a self-defense case. *Stark*, 158 Wn.App. at 959.

As outlined above, a court may not give an aggressor instruction absent intentional unlawful conduct. *See Hardy*, 44 Wn.App. at 484; *Brower*, 43 Wn.App. at 902; *Douglas*, 128 Wn.App. at 563-564; *Stark*, 158 Wn.App. at 960. The provoking act cannot be the assault itself. *Brower*, 43 Wn.App. at 902; *State v. Kidd*, 57 Wn.App. 95, 786 P.2d 847 (1990).

The court did not identify any specific action that warranted instructing the jury on provocation. RP 1080-1092. Nor did the prosecutor point to any specific unlawful intentional act reasonably likely to provoke a belligerent attack, either in requesting the instruction or in arguing the case to the jury.

Instead, the prosecutor repeatedly suggested that Mr. Richmond's general attitude precluded him from defending himself against a perceived attack. The state came back to the theme repeatedly, telling the jury that "You don't get to go crazy on people who have a lawful right to be at your house and then say, 'Well, one of them attacked me so I defended myself.'" "You don't get to create the situation that entitles you to self-defense. You don't get to stir everybody up around you, and then when people respond say, 'I was just defending myself, I didn't do anything wrong.'" RP 1125-1126.

Even during rebuttal, she reminded the jury of her theory: "[Mr. Richmond] stirs this whole thing up, he takes it to a next level by coming out of his house, armed with a board, screaming at them. He doesn't get to claim self-defense. He stirred it all up." RP 1165.

The instruction was not supported by substantial evidence. It improperly prevented the jury from considering Mr. Richmond's self-defense claim, and relieved the state of its burden of proof. *Stark*, 158 Wn.App. at 961. Mr. Richmond's conviction must be reversed and the case remanded for a new trial with proper instructions. *Id.*

- D. The erroneous aggressor instruction prejudiced Mr. Richmond because it improperly prevented the jury from considering his defense and relieved the state of its burden to disprove justification.

An improper aggressor instruction violates the accused person's right to due process. *Stark*, 158 Wn.App. at 961. The error is not harmless unless the state proves beyond a reasonable doubt "that the jury would have reached the same result in the absence of the error." *State v. Ortuno-Perez*, 196 Wn.App. 771, 385 P.3d 218 (2016). The state cannot do so in this case.

Jurors may have decided that Mr. Richmond was the aggressor because of his words, or because he picked up the board out of fear that Higginbotham was about to attack. Applying the court's instruction, the jury would have disregarded his self-defense claim. CP 106.

Furthermore, the state relied heavily on the aggressor instruction in closing argument. RP 1117-1134, 1164-1166. The prosecutor improperly claimed that Mr. Richmond's attitude precluded him from using force in self-defense. RP 1125-1126, 1165.

The instruction relieved the state of its burden to disprove self-defense, and the error is not harmless beyond a reasonable doubt. *Stark*, 158 Wn.App. at 961. Mr. Richmond's conviction must be reversed and his case remanded for a new trial. *Id.*

III. THE EXCLUSION OF RELEVANT AND ADMISSIBLE TESTIMONY IMPEACHING ADVERSE WITNESSES VIOLATED MR. RICHMOND'S CONFRONTATION RIGHT AND HIS RIGHT TO PRESENT A DEFENSE.

Dresp and Zackuse used methamphetamine with Higginbotham on the day of the incident. RP 184. Mr. Richmond sought to cross-examine them about this, and to introduce testimony showing the effect of methamphetamine on perception and memory. RP 163-190.

The evidence was relevant and admissible to undermine the credibility of the state's most important witnesses. By excluding this evidence, the trial court violated Mr. Richmond's right to confront the state's witnesses and his right to present a defense. *State v. Darden*, 145 Wn.2d 612, 620-626, 26 P.3d 308 (2002); *Jones*, 168 Wn.2d at 719-720.

A. The Court of Appeals should review these constitutional errors *de novo*.

As outlined above, courts review constitutional issues *de novo*, even when based on discretionary decisions at the trial level. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. This court should review the ruling excluding the impeachment evidence *de novo*. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281.

Furthermore, both constitutional arguments issues may be reviewed on appeal, even though defense counsel did not specifically mention Mr. Richmond's confrontation right or his right to present a

defense. RP 163-190. Both issues involve manifest error affecting a constitutional right. RAP 2.5(a)(3). Given what the trial court knew at the time, the court could have avoided these constitutional errors by allowing Mr. Richmond to impeach Dresp and Zackuse with the proffered evidence. Accordingly, the errors had practical and identifiable consequences and can be reviewed under RAP 2.5(a)(2). *O'Hara*, 167 Wn.2d at 100; *see also State v. Rohrich*, 132 Wn.2d 472, 476 n. 7, 939 P.2d 697 (1997) (confrontation error may be raised for the first time on appeal).

B. The court's ruling excluding evidence impeaching the state's main witnesses infringed Mr. Richmond's right to confrontation and his right to present a defense.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. U.S. Const. Amend. VI; Wash. Const. art. I, §22; *Darden*, 145 Wn.2d at 620 (citing *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). The court's refusal to allow Mr. Richmond to impeach the state's main witnesses violated his confrontation right. *Id.*

The confrontation clause protects more than "mere physical confrontation." *Darden*, 145 Wn.2d at 620 (quoting *Davis*, 415 U.S. at 315). The bedrock of the confrontation right is the guarantee of an opportunity to conduct a "meaningful cross-examination of adverse witnesses" to test for memory, perception, and credibility. *Darden*, 145

Wn.2d at 620. The trial judge excluded evidence that went directly to the perception, memory, bias, and credibility of the state's most important witnesses.

Confrontation helps assure the accuracy of the fact-finding process. *Id.* (citing *Chambers I*, 410 U.S. at 295). The right to confront adverse witnesses must be "zealously guarded." *Darden*, 145 Wn.2d at 620. The trial court failed to zealously guard this critical right in Mr. Richmond's case.

Cross-examination that is even "minimally relevant" must be permitted under most circumstances. *Id.*, at 621. To justify exclusion, the state must demonstrate that the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process." *Id.*, at 622. Even disruptively prejudicial evidence must be admitted if the defendant's need for the evidence outweighs the state's interest in exclusion. *Id.* Here, the state advanced no justification strong enough to warrant excluding the proffered evidence, especially given the importance of the two witnesses Mr. Richmond sought to cross examine.

In fact, "the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." *Darden*, 145 Wn.2d at 619. Dresp and Zackuse were critical to the state's

case: they provided the only eyewitness testimony to the altercation besides Mr. Richmond own testimony. Accordingly, Mr. Richmond should have had “more latitude” to explore credibility issues than he would have had with other witnesses. *Darden*, 145 Wn.2d at 619.

Mr. Richmond wanted to introduce evidence that Dresp, Zackuse, and Higginbotham used methamphetamine together on the day of the offense. RP 163-190. The evidence was relevant for two reasons: (1) to show bias²¹ (stemming from the relationship between them), and (2) to cast doubt on the two women’s perception and memory.

1. The evidence of the trio’s drug relationship should have been admitted to show potential bias.

Bias evidence is always relevant. *State v. Spencer*, 111 Wn.App. 401, 408, 45 P.3d 209 (2002) (citing *Davis*, 415 U.S. at 316-18). Exposure of witness bias is “a core value of the Sixth Amendment.” *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010), *as amended* (Sept. 1, 2010). Bias is a “quintessentially appropriate topic for cross-examination.” *Id.*

Even “minimally relevant” evidence showing bias is admissible under the confrontation clause. *State v. Fisher*, 165 Wn.2d 727, 752, 202

²¹ “Bias” describes a relationship (usually between a witness and a party) “which might lead the witness to slant, unconsciously or otherwise, his testimony.” *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469, 83 L. Ed. 2d 450 (1984).

P.3d 937 (2009). And an accused person has “more latitude to expose the bias of a key witness.” *Id.*

The fact that the two women were close enough to Higginbotham and each other to engage in criminal activity together is at least “minimally relevant” to the issue of bias. *Fisher*, 165 Wn.2d at 752. Because of this relationship, Dresp and Zackuse may have slanted their testimony against Mr. Richmond, “unconsciously or otherwise.” *Abel*, 469 U.S. at 52. They may also have tempered any negative information about Higginbotham, or felt some desire to corroborate rather than contradict each other.

The trio’s use of methamphetamine together showed a relationship that raised a potential for bias. The bias evidence was at least minimally relevant, and therefore should have been admitted. *Darden*, 145 Wn.2d at 620-622.

The state cannot show any justification sufficient to uphold the state’s ruling. Although any evidence of drug use carries some possibility of prejudice, that is not enough reason to exclude the evidence. *Id.* Indeed, even highly prejudicial evidence of gang membership is admissible to show potential witness bias. *State v. Craven*, 67 Wn.App. 921, 927, 841 P.2d 774 (1992); *see also Abel*, 469 U.S. at 56 (upholding

prosecution's introduction of witness's membership in the same murderous prison gang as defendant).

The evidence should have been admitted. *Darden*, 145 Wn.2d 620-626. Its exclusion violated Mr. Richmond's confrontation right under the state and federal constitutions. *Id.*

2. The evidence of drug use on the day of the incident should have been admitted because it raised questions about the two women's perception and memory of the altercation.

It is "well settled in Washington that evidence of drug use is admissible to impeach the credibility of a witness if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony." *State v. Russell*, 125 Wn.2d 24, 83, 882 P.2d 747 (1994).²² In such circumstances, the defendant is entitled to prove "the effect of the drug upon the mind and memory of its user." *State v. Smith*, 103 Wash. 267, 269, 174 P. 9 (1918).²³

²² In *Russell*, the Supreme Court upheld admission of such testimony on behalf of the state; accordingly, the decision was not even supported by the confrontation clause. Here, the reasons for admission are even stronger, given that Mr. Richmond had a constitutional right to confront his accusers. *Darden*, 145 Wn.2d at 620.

²³ In *Smith*, "the prosecuting witness, a sporting woman, was under the influence of morphine at the time of the alleged [offense]." *Smith*, 103 Wash. at 269. The Supreme Court's reversal rested in part on the trial court's exclusion of testimony explaining the drugs effects on her mind and memory. *Id.*

Mr. Richmond should have been permitted to cross-examine Dresp and Zackuse about their drug use on the day of the offense, and to introduce expert testimony showing the effects of methamphetamine on a person's perceptions and memory. *Russell*, 125 Wn.2d at 83. The exclusion of this impeachment evidence violated his confrontation right and his right to present a defense. *Darden*, 145 Wn.2d at 620-626; *Jones*, 168 Wn.2d at 719-20.

The state failed to meet its burden to justify exclusion. Although evidence of drug use is prejudicial, the state failed to show that it was "so prejudicial as to disrupt the fairness of the fact-finding process." *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 620. In addition, Mr. Richmond's "need for the information sought" outweighed the prosecution's interest in keeping it from the jury. *Darden*, 145 Wn.2d at 622.

3. The error requires reversal because the state cannot prove it was harmless beyond a reasonable doubt.

Constitutional violations are presumed prejudicial. *State v. Chambers*, 72093-7-I, 2016 WL 7468214, at *15 (Wash. Ct. App. Dec. 19, 2016) (*Chambers II*). The state bears the burden of proving harmlessness beyond a reasonable doubt. *Id.*

The state cannot meet this burden. Dresp and Zackuse were the state's most important witnesses. They were the only eyewitnesses to the confrontation, and their testimony provided the only direct evidence undermining Mr. Richmond's self-defense claim.

By excluding the impeachment evidence, the court violated Mr. Richmond's confrontation right and his right to present a defense. *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 620. The error is presumed prejudicial, and the state cannot meet its burden to show harmlessness beyond a reasonable doubt. *Chambers II*, 72093-7-I, 2016 WL 7468214, at *15. The conviction must be reversed and the case remanded with instructions to admit the impeachment evidence on retrial. *Darden*, 145 Wn.2d at 620-26.

IV. MR. RICHMOND'S IDAHO CONVICTION IS NOT COMPARABLE TO A WASHINGTON FELONY AND SHOULD NOT HAVE ADDED TO HIS OFFENDER SCORE.

A. Mr. Richmond's Idaho conviction is not comparable to a Washington felony.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn.App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn.App. 801, 312 P.3d 784 (2013).

For sentencing purposes, prior out-of-state convictions are classified according to their Washington equivalents, if any. RCW 9.94A.525(3). An out-of-state conviction may not be used to increase an offender score unless it is comparable to a Washington felony. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Comparability questions present issues of law. *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014).

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). If the elements of the out-of-state statute are broader than its Washington counterpart, it would “(at least) raise serious Sixth Amendment concerns” to attempt to discern the underlying facts that were not found by a court or jury. *Descamps v. United States*, --- U.S.---, ___, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) *reh'g denied*, 134 S.Ct. 41, 186 L.Ed.2d 955 (2013).

Mr. Richmond has a 2004 Idaho conviction for rape. CP 111; RP 1195. At that time, rape was defined to include intercourse “[w]here the female is under the age of eighteen (18) years,” regardless of the (male)

perpetrator's age. Former I.C. §18-6101 (2004).²⁴ In Washington, by contrast, the closest comparable offense is third-degree child rape, which requires proof that the victim is under 16 and that the perpetrator is at least 48 months older. RCW 9A.44.079.

The Idaho offense is thus much broader than the Washington crime. The sentencing court should not have included the Idaho conviction in Mr. Richmond's offender score. *Thiefaul*, 160 Wn.2d at 415. His sentence must be vacated and the case remanded for a new sentencing hearing with a corrected offender score. *Id.*

B. If defense counsel waived the error, Mr. Richmond was denied the effective assistance of counsel.

Defense counsel noted the lack of comparability between the Idaho conviction and any Washington felony, but then appeared to stipulate that it added a point to the offender score. RP 1195-1196. This legal stipulation did not bind the sentencing court, and does not bind the Court of Appeals. *State v. Cosgaya-Alvarez*, 172 Wn.App. 785, 790, 291 P.3d 939 *review denied*, 177 Wn.2d 1017, 304 P.3d 114 (2013).

Accordingly, the comparability error should be addressed despite the apparent stipulation in the trial court. In the alternative, if the error is

²⁴ Subsequent amendments have made the statute gender neutral and incorporated an age differential; however, even with these changes, the Idaho statute encompasses acts that are not crimes in Washington. *See* I.C. §18-6101 (2017)(1) and (2).

not preserved, Mr. Richmond was denied the effective assistance of counsel.

An accused person is entitled to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *State v. Phuong*, 174 Wn.App. 494, 548, 299 P.3d 37 (2013). To prevail on an ineffective assistance claim at sentencing, the offender must show deficient performance resulting in prejudice. *Phuong*, 174 Wn.App. at 547.

Failure to raise a comparability issue at sentencing amounts to deficient performance. *Thiefault*, 160 Wn.2d at 417. Defense counsel's failure to argue the comparability issue in this case deprived Mr. Richmond of the effective assistance of counsel. *Id.*

Defense counsel drew the court's attention to the comparability issue, but then inexplicably allowed the court to add a point to the offender score. RP 1195-1196. Competent counsel would have argued the comparability issue. *Id.* Accordingly, counsel's performance was deficient. *Id.*

Counsel's deficient performance prejudiced Mr. Richmond. Proper argument would have resulted in an offender score of four, rather than five. *Id.* With an offender score of four, his standard range would have been 165-265 months, rather than 175-275 months. Caseload

Forecast Council, *2014 Washington State Adult Sentencing Guidelines Manual*, p. 405 (2014).

Mr. Richmond was denied the effective assistance of counsel. *Thiefault*, 160 Wn.2d at 417. His sentence must be vacated and the case remanded for a new sentencing hearing with a corrected offender score. *Id.*

V. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD APPELLATE COSTS.

The Court of Appeals should decline to award appellate costs because Mr. Richmond “does not have the current or likely future ability to pay such costs.” RAP 14.2. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). The trial court found Mr. Richmond indigent at the beginning and end of the proceedings in superior court. CP 124. That status is unlikely to change, especially with the addition of a murder conviction and the imposition of a lengthy prison term. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should deny any appellate costs requested. RAP 14.2.

CONCLUSION

For the foregoing reasons Mr. Richmond's conviction must be reversed and the case remanded for a new trial. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing. If the state substantially prevails, the court should decline to impose appellate costs.

Respectfully submitted on February 17, 2017,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Joseph Richmond, DOC #884586
Clallam Bay Corrections Center
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Clallam Bay, WA 98326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kittitas County Prosecuting Attorney
prosecutor@co.kittitas.wa.us and greg.zempel@co.kittitas.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 17, 2017.



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BACKLUND & MISTRY

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