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Court of Appeals
Division III
State of Washington
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No. 34677-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

SHALIN E. ALLTUS,

Appellant.

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

The Honorable Judge Henry Rawson

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

16-year-old Shalin E. Alltus lived with her uncle, Patrick Alltus, and another 16-year-old, Parker Bachtold. Patrick Alltus was found dead in his home. He had sustained two gunshot wounds and a blunt impact injury to his forehead. Ms. Alltus and Mr. Bachtold were later found in Oregon, along with a pick-up truck belonging to Patrick Alltus and two firearms that were consistent with the caliber of Patrick Alltus' gunshot wounds.

Ms. Alltus was charged in adult court, when the juvenile court automatically declined jurisdiction, of the following crimes: aggravated first degree murder; first degree robbery; theft of a motor vehicle; two counts of theft of a firearm; and two counts of second degree unlawful possession of a firearm. Mr. Bachtold also faced criminal charges, and he pleaded guilty prior to Ms. Alltus' jury trial held on the charges.

Both in her statements given at the time of her arrest and at her jury trial, Ms. Alltus denied shooting Patrick Alltus. Mr. Bachtold testified Ms. Alltus fired the first gunshot at Patrick Alltus, and he fired the second gunshot. Mr. Bachtold was the only witness to testify to Ms. Alltus' involvement in the murder.

The jury found Ms. Alltus guilty of premeditated first degree murder, and guilty of the other six counts, as charged. The trial court

sentenced Ms. Alltus the day after the jury returned its verdict, approximately 18 hours later. The trial court denied Ms. Alltus' request for a continuance so that a presentence investigation report could be prepared. The trial court sentenced Ms. Alltus to 460 months confinement, without taking into consideration the mitigating factor of youth.

Ms. Alltus now appeals, challenging the charging document for one count of second degree unlawful possession of a firearm; the prohibition on cross-examining Mr. Bachtold regarding his reasons for committing the murder; the denial of allowing her to testify to a prior inconsistent statement by Mr. Bachtold, or in the alternative, defense counsel's failure to question Mr. Bachtold about this statement; the failure to give her requested jury instruction regarding the testimony of an accomplice; her sentence imposed without taking into consideration the mitigating factor of youth; the denial of her motion to continue the sentencing hearing for preparation of a presentence investigation report; and the automatic decline statute. Ms. Alltus also asks this Court to correct an error in her judgment and sentence, and preemptively objects to the imposition of appellate costs.

B. ASSIGNMENTS OF ERROR

1. The first amended information charging second degree unlawful possession of a firearm (count 7) was inadequate to give Ms. Alltus notice of the crime charged.
2. Ms. Alltus was denied her constitutional right to present a defense when she was prohibited from cross-examining Parker Bachtold regarding his reasons for committing the murder.
3. The trial court erred by not allowing Ms. Alltus to testify to a prior inconsistent statement by Parker Bachtold.
4. The trial court denied Ms. Alltus her constitutional right to confront witnesses by preventing her from impeaching Parker Bachtold with a prior inconsistent statement.
5. Ms. Alltus was denied her Sixth Amendment right to effective assistance of counsel when defense counsel failed to question Parker Bachtold about the prior inconsistent statement he made to Ms. Alltus, so that defense counsel could impeach Mr. Bachtold with the prior inconsistent statement.
6. The trial court erred in not giving a jury instruction regarding the testimony of an accomplice.
7. The trial court violated Ms. Alltus' rights under the Eighth Amendment by imposing a standard range, de facto life sentence without conducting an individualized evaluation of her age and circumstances surrounding her youth.
8. The trial court erred in sentencing Ms. Alltus to a de facto life sentence without conducting a *Miller* hearing to consider mitigating circumstances related to her age at the time of the crimes.
9. The trial court abused its discretion by denying Ms. Alltus' motion to continue the sentencing hearing for preparation of a presentence investigation report.
10. Ms. Alltus was deprived of her due process rights when juvenile court jurisdiction was automatically declined and no

hearing was held to determine whether juvenile court should retain jurisdiction.

11. The judgment and sentence contains an error that should be corrected: it indicates Ms. Alltus was sentenced to a maximum term of confinement of life.
12. An award of costs on appeal against Ms. Alltus would be improper in the event that the State is the substantially prevailing party.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the first amended information charging second degree unlawful possession of a firearm (count 7) was inadequate to give Ms. Alltus notice of the crime charged.

Issue 2: Whether Ms. Alltus was denied her constitutional right to present a defense when she was prohibited from cross-examining Parker Bachtold regarding his reasons for committing the murder.

Issue 3: Whether the trial court erred by not allowing Ms. Alltus to testify to a prior inconsistent statement by Parker Bachtold.

Issue 4: In the alternative, whether Ms. Alltus was denied her Sixth Amendment right to effective assistance of counsel when defense counsel failed to question Parker Bachtold about the prior inconsistent statement he made to Ms. Alltus, so that defense counsel could impeach Mr. Bachtold with the prior inconsistent statement.

Issue 5: Whether the trial court erred in not giving a jury instruction regarding the testimony of an accomplice.

Issue 6: Whether the trial court erred in sentencing Ms. Alltus to a de facto life sentence without conducting a *Miller* hearing to consider mitigating circumstances related to her age at the time of the crimes.

Issue 7: Whether the trial court abused its discretion by denying Ms. Alltus' motion to continue the sentencing hearing for preparation of a presentence investigation report.

Issue 8: Whether Ms. Alltus was deprived of her due process rights when juvenile court jurisdiction was automatically declined and no hearing was held to determine whether juvenile court should retain jurisdiction.

Issue 9: The judgment and sentence contains an error that should be corrected: it indicates Ms. Alltus was sentenced to a maximum term of confinement of life.

Issue 10: Whether this Court should deny costs against Ms. Alltus on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

In September 2014, 16-year-old Shalin E. Alltus lived with her uncle, Patrick Alltus in Riverside, Washington. (RP¹ 334, 614-616; 2 RP 252, 261, 317, 324). Patrick Alltus also allowed another teenager, 16-year-old Parker Bachtold, to live with him at that time. (RP 332, 334-335, 371, 616-618). Ms. Alltus and Mr. Bachtold were boyfriend and girlfriend. (RP 13, 15, 336, 371, 618, 641).

On October 5, 2014, Patrick Alltus was found dead inside his home. (2 RP 210, 218-220, 234-235, 237-239, 252-253, 255-256). His body was laying on the floor covered in blankets, with a plastic bag over his head. (RP 417; 2 RP 218, 237, 255-256, 341-342). The plastic bag contained a large quantity of blood and biological fluids. (2 RP 237, 255-256).

¹ The Report of Proceedings consists of seven volumes: two consecutively paginated volumes, reported by Alison Sosa; four consecutively paginated volumes, reported by Charlene Beck; and one volume transcribed by Amy Brittingham. The four volumes reported by Charlene Beck are referred to herein as "RP." The two volumes reported by Alison Sosa are referred to herein as "2 RP." The volume transcribed by Amy Brittingham is referred to herein as "3 RP."

The last time anyone heard from Patrick Alltus was around 11:20 p.m. on September 30, 2014. (2 RP 213-215; Pl.'s Ex. 2). One of his pick-up trucks was missing from his property. (RP 270-274, 415-416; 2 RP 217, 246-247, 257, 264-266). At the time Patrick Alltus was found, no one else was found on his property, and Ms. Alltus' and Mr. Bachtold's whereabouts were unknown. (2 RP 239-240, 242-243, 245-246, 343).

Patrick Alltus sustained three wounds: two gunshot wounds and a blunt impact injury to the left side of his forehead. (RP 225, 230, 417, 421, 470-490, 512-517). He had one gunshot wound in the face, in the upper lip, consistent with a .410 shotgun. (RP 421, 470, 472, 482-490, 514-515). The other gunshot wound went through the right forearm, and then re-entered his body in the right bicep region. (RP 417, 470-480, 491; 2 RP 237-238).

An autopsy of Patrick Alltus was conducted. (RP 421-423, 459-500, 511-517). The forensic pathologist removed shotgun pellets and wading from the gunshot wound to the face. (RP 318-319, 486, 490). This wading was consistent with a .410 caliber shotgun, but it could not be matched with a particular weapon. (RP 266-268). The forensic pathologist also removed bullet fragments from the gunshot wound to the right arm. (RP 318, 491). These bullet fragments were consistent with a .22 caliber Magnum rimfire rifle. (RP 263-265, 318).

The forensic pathologist identified the most likely mechanism of his death as bleeding out, and determined his cause of death was a homicide. (RP 498-500, 511).

Law enforcement issued a state-wide alert for Patrick Alltus' missing pick-up truck, listing Ms. Alltus and Mr. Bachtold as potential suspects. (2 RP 247, 348).

On October 6, 2014, Okanogan County Sheriff's Office Detective Deborah Behymer learned that an Oregon State Trooper had contacted individuals believed to be Ms. Alltus and Mr. Bachtold, but they were not apprehended. (RP 354-356, 633-634, 652-654; 2 RP 348-350, 352; Pl.'s Ex. 1). Detective Behymer then learned that Mr. Bachtold's father was in Curtin, Oregon, and she obtained an address. (RP 85-86; 2 RP 349). She requested the local sheriff's office check that address. (2 RP 349).

That same day, Ms. Alltus and Mr. Bachtold were arrested at the motel in Curtin, Oregon, where Mr. Bachtold's father and stepmother were staying at the time. (RP 38-41, 64-65, 33-364; 2 RP 349, 352-353, 364-371, 379). Patrick Alltus' pick-up truck was also located outside the motel. (2 RP 364-365).

A .22 Magnum rifle and a Mossberg .410 shotgun were found in the motel room where Mr. Bachtold's father and stepmother were staying. (RP 93-95, 304-305, 320; 2 RP 354-355, 376-377). Mr. Bachtold's father took these two guns from Mr. Bachtold after Mr. Bachtold and Ms. Alltus arrived at the motel. (RP

48, 72). The guns had both been cleaned. (RP 560). A box of .410 ammunition was found in the motel room where Ms. Alltus and Mr. Bachtold were staying. (RP 91-92).

The arresting police officer in Oregon interviewed Ms. Alltus. (RP 10-16; 2 RP 371-372). In addition, Detective Behymer traveled to Oregon and interviewed Ms. Alltus. (RP 17-36, 89; 2 RP 352-353, 375-376). In these interviews, Ms. Alltus denied shooting Patrick Alltus. (RP 10-12, 21-23, 30-31).

Okanogan County Sheriff's Office Detective Kreg Sloan traveled to Oregon along with Detective Behymer, and he interviewed Mr. Bachtold. (RP 84, 86-88, 315, 321, 364-365, 368, 372-373, 388-399, 560-561, 562-564). Mr. Bachtold initially denied what happened, but later in the same interview, he admitted shooting Patrick Alltus. (RP 364, 368, 372-373, 404-405, 560-561).

The State charged Ms. Alltus in adult court with the following counts: aggravated first degree murder (count 1); first degree robbery (count 2); theft of a motor vehicle (count 3); two counts of theft of a firearm (counts 4 and 5); and two counts of second degree unlawful possession of a firearm (counts 6 and 7). (CP 446-451). The State alleged a firearm enhancement on counts 1, 2, and 3. (CP 446-449).

Second degree unlawful possession of a firearm (count 6) was charged as follows:

On or between September 30, 2014 and October 1, 2014, in the State of Washington, the above-named Defendant, did knowingly

own or possess or control a firearm, to-wit: .22 rifle, and the defendant was at that time under eighteen years of age

(CP 450).

Second degree unlawful possession of a firearm (count 7) was charged as follows:

On or between September 30, 2014 and October 1, 2014, in the State of Washington, the above-named Defendant, did knowingly own or possess or control a firearm, to-wit: .22 rifle, and the defendant was at that time under eighteen years of age

(CP 451).

Given the nature of the charges and Ms. Alltus' age, RCW 13.04.030 mandated automatic transfer of the case from juvenile to adult court without the hearing otherwise held to determine whether such transfer is appropriate. (CP 469-474, 446-451; 2 RP 109-110, 124). Ms. Alltus had no criminal history. (CP 43; 3 RP 222).

Prior to Ms. Alltus' trial, Mr. Bachtold pleaded guilty to first degree premeditated murder, first degree robbery, theft of a motor vehicle, two counts of theft of a firearm, and two counts of juvenile in possession of a firearm, in relation to this incident. (RP 315-316, 320, 332-333, 370). He was sentenced to a term of confinement of 30 years. (RP 333).

The case against Ms. Alltus proceeded to a jury trial. (RP 1-807; 2 RP 1-386; 3 RP 204-215).

The State filed a motion in limine seeking to exclude "evidence or argument concerning victim's character or specific acts." (CP 379-381, 411-414).

The State anticipated the defense “may seek to assert testimony about alleged sexual misconduct by [Patrick Alltus]” with Ms. Alltus, and sought to limit any discussion about that subject. (CP 411; 3 RP 142, 150). The State argued that because Ms. Alltus asserted a defense of general denial, rather than self-defense, this evidence “in no way goes to the elements of the crime or any sort of defense in this case.” (CP 411-414; 3 RP 142, 144-145, 149-152).

Ms. Alltus objected to the State’s motion in limine seeking to exclude evidence of the victim’s character. (CP 389-390; 3 RP 142-143, 145, 147-148, 152-154). Ms. Alltus argued:

[I]f [the State] intends to put on Mr. Bachtold, we do intend to cross examine him on the entirety of the statements he’s made, especially his motive for actually committing this murder, which is what he said during his plea, the reason he did it was. That is certainly relevant. Ms. Alltus asserts actual innocence. Asserts she did not do any of those shootings and therefore, the element of her being part of this as some sort of accomplice had to come into play.

. . . .

The crime the State is trying to prove is that Ms. Alltus was in some way either an actor or some sort of participant in the murder of Patrick Alltus and the reason for that is relevant and her interaction with that victim is relevant and whether or not there was some sort of sexual interaction between her and the victim is relevant. It does not have to be a self-defense argument. Actual innocence that she was not involved in this, but perhaps Mr. Bachtold assumed that there was such a thing and that’s what Mr. Bachtold had told [the State]. That is what [the State] has tendered in evidence. That’s what he’s told - - - that was part of the reasoning for his plea, according to him and those are things that are certainly relevant to whether he committed the crime and whether Ms. Alltus had something to do with it. We have to be able to address how and why he committed the crime in order for her to defend, if she’s somebody who’s supposed to be

accountable. Not the actual actor. Because otherwise, what would she have to defend with?

....

If you say that Ms. Alltus cannot address whether or not the victim was killed by the co-defendant then you are saying to her she cannot address the crime charged. That literally cuts her off from the facts of the crime that she is defending against.

(3 RP 145, 147-148).

Ms. Alltus argued that she has “an absolute, constitutional under [sic] the sixth and fourteenth amendment, to present a defense and [she] cannot cross examine the co-defendant who is literally the only individual there and saying that she did this.” (3 RP 149). She argued the State “wishes to limit [her] ability to cross examine the co-defendant as to his motive, his mode of action, what his actions were, whether he killed this individual, how he did and for what purpose, which is the crux of the trial.” (3 RP 149).

Ms. Alltus further argued:

There is at no point is Mr. Bachtold has he said [sic] - - stated to the Court, has he stated in his statements, has he stated to anything to the police that he had a belief that there was a sexual relationship between Ms. Alltus and the victim based on her statements. This was based on what he says he heard and what the [sic] observed. This is not something based on her statements.

....

We’re not taking about the victim’s character one way or another, honestly. We’re talking about specific acts that have . . . been given as statements, as complete statements by the co-defendant who is the only witness on the scene who says that Ms. Alltus had some involvement in this and to limit the defense’s ability to fully cross examine on all things that Mr. Bachtold says occurred before, during and directly after this murder of this individual occurred, absolutely, completely violates her sixth and fourteenth amendment rights.

.....

[Mr. Bachtold] says the reason he commits the crime and that is in evidence. It is relevant.

(3 RP 152-154).

The trial court granted the State's motion in limine to exclude evidence of the victim's character. (3 RP 156-158).

At the jury trial, witnesses testified consisted with the facts stated above. (RP 1-682; 2 RP 208-386). In addition, Colt Hatch, who previously worked for Patrick Alltus, testified that "within a few-day period" of the death of Patrick Alltus, Mr. Bachtold, Ms. Alltus, and Patrick Alltus came to his house. (2 RP 304-307, 666). Mr. Hatch testified Patrick Alltus brought a ".410" with him, and that Mr. Hatch had a ".22." (2 RP 309-310). He testified that he went outside with Mr. Bachtold and Ms. Alltus and they shot these guns. (2 RP 308-310). Mr. Hatch testified Ms. Alltus was nervous, and "had shot, like, one or two." (2 RP 309).

Tamara Justice, who dated Ms. Alltus' father (who was also Patrick Alltus' brother) testified she had contact with Ms. Alltus at the juvenile detention facility following her arrest, on three occasions. (2 RP 314-316, 322-323). When asked if Ms. Alltus described any injuries to Patrick Alltus, Ms. Justice testified "she had told us that he had been shot in the bottom part of his hand and that it had went out his elbow." (2 RP 323). Ms. Justice also testified Ms. Alltus

“[s]tarted to state that Patrick [Alltus] had been teaching her how to shoot and that she had liked it.” (2 RP 323).

The State offered into evidence an undated writing of Ms. Alltus stating she loved shooting Patrick Alltus’ gun. (RP 141-155, 646; Pl.’s Ex. 144).

Mr. Bachtold testified for the State. (RP 331-406). He testified that on the night in question, he was asleep in a bedroom when he heard a gunshot. (RP 340-342, 392). He testified he then woke up, and loaded a .410 shotgun that he had with him in the bedroom. (RP 342-343, 392). Mr. Bachtold testified he then “stepped into the hallway, and that’s where the crime took place.” (RP 343).

Mr. Bachtold testified when he came into the hallway, he saw Ms. Alltus behind the couch, Patrick Alltus coming around the side of the couch, and a .22 Magnum rifle on the ground. (RP 343, 345). He testified he saw blood on Patrick Alltus’ hand and the side of his head, and heard Patrick Alltus state “you shot me[.]” (RP 343, 345-346). Mr. Bachtold testified that after seeing this “[t]he victim as he came around the couch I fired one fatal round, and it was to the cranium, I believe[,]” with the .410 shotgun. (RP 346-347). He denied striking Patrick Alltus in the head with any hard object. (RP 366). He also denied shooting Patrick Alltus with the .22 rifle. (RP 369).

After shooting Patrick Alltus, Mr. Bachtold testified he covered his body with one or two blankets. (RP 347-348, 398). Mr. Bachtold testified Ms. Alltus

covered Patrick Alltus' head with some plastic bags. (RP 348, 365). He testified he and Ms. Alltus did not speak to each other at this time. (RP 348).

Mr. Bachtold testified he then grabbed some items from the house, including the .410 and .22 caliber guns, and along with Ms. Alltus, fled the scene in Patrick Alltus' pick-up truck. (RP 349-350). He testified he did not force Ms. Alltus to leave with him. (RP 369-370).

Later in his testimony, Mr. Bachtold stated "[b]efore [Ms. Alltus] dropped the firearm, it was raised." (RP 367). He testified he was referring to the .22 rifle, and that he believed it ended up on the ground because she dropped it. (RP 368).

Mr. Bachtold testified Ms. Alltus shot guns "[a]t one point in time." (RP 346).

On cross-examination, defense counsel did not ask Mr. Bachtold about making the statement "I just killed your uncle" to Ms. Alltus on the night in question. (RP 371-399).

Also on cross-examination, defense counsel asked Mr. Bachtold "[d]o you recall telling Detective Sloan that you confronted Patrick Alltus and stated, 'I don't know what you've done, but I'm leaving'?" (RP 373). The State objected, arguing this testimony was leading into the motion in limine addressing "the information that Mr. Bachtold had provided by [Ms. Alltus] of some sort of

sexual misconduct between Patrick [Alltus] and [Ms. Alltus].” (RP 373-374).

Defense counsel made the following offer of proof:

[T]here’s a statement in the first story, as I stated, where Mr. Bachtold begins the story and he states . . . “But she wouldn’t talk to him, she wouldn’t look him in the eye. I’ve been noticing it going on for a couple of days.” . . . And I believe that this is . . . the statement that the Court has previously addressed, but it’s linked to that . . . “I don’t know what you’ve done, but I’m leaving.”

(RP 383-384).

The State objected to the line of questioning, arguing “it keeps coming back to wanting to elicit the statements that he had some suspicion of some misconduct between [Ms. Alltus] and the victim.” (RP 385). Defense counsel disagreed, asserting it sought to question Mr. Bachtold about the different statements he gave to Detective Sloan. (RP 384-385).

The trial court ruled defense counsel could question Mr. Bachtold about these different statements, but limited the testimony:

I really find that there’s an aspect of relevance that is of concern here, what may have been going on between Mr. Bachtold and [Ms. Alltus] to the effect that “she wouldn’t talk to me” or things of that nature . . . , I question the relevancy of that in this proceeding.

. . . .
[I]f you’re moving into an area that deals with the victim’s character traits or alluding to some action by the victim, the Court has already ruled in motion in limine that that will be prohibited.

(RP 386-387).

Brandi Knowles testified she was roommates with Ms. Alltus in juvenile detention. (RP 520, 534). Ms. Knowles testified that Ms. Alltus discussed the

murder with her on multiple occasions, and that the facts changed. (RP 521-523).

She testified Ms. Alltus “told me she knew it was gonna [sic] happen” (RP 524). Ms. Knowles testified:

She . . . told me she . . . explained to [Mr. Bachtold] what was happening and that she wanted him to do but she didn’t . . . believe he was going to, like she wanted it to - - she said she wanted it to happen but she didn’t believe [Mr. Bachtold] was actually going to do it.

. . . .

I think the second story she told me she - - second or first she said she wanted to build a fire and she wanted to push him in it so there wouldn’t be any evidence left.

(RP 524-525).

When asked who Ms. Alltus wanting to push into the fire, Ms. Knowles testified “Pat” or “Patrick.” (RP 525).

Ms. Knowles testified Ms. Alltus would talk about how she prepared herself to go to court:

She would talk about - - she - - when I was in - - her roommate like the third time she would tell me how she would try and go to court and look as innocent as possible.

. . . .

She said she would try and put her hair like braided or put it in pigtails and try to look innocent and she would pretend to cry sometimes but it wouldn’t be real.

(RP 528).

After he testified for the State, the defense called Mr. Bachtold as a witness. (RP 571-606). Defense counsel questioned Mr. Bachtold about the statements he gave to Detective Sloan. (RP 575-576, 585, 596, 603-605). The

trial court instructed the jury that the statements Mr. Bachtold made to law enforcement were allowed for impeachment purposes, but not as substantive evidence. (RP 585).

Defense counsel did not ask Mr. Bachtold about making the statement “I just killed your uncle” to Ms. Alltus on the night in question. (RP 571-606). Mr. Bachtold testified Ms. Alltus did not ever mention to him that she wanted to kill Patrick Alltus. (RP 598). After Mr. Bachtold testified for the defense, defense counsel excused him as a witness. (RP 606).

Ms. Alltus testified in her own defense. (RP 612-670). She denied shooting Patrick Alltus and hitting him with any blunt object. (RP 627, 637, 667). She also denied asking Mr. Bachtold to hurt him, or planning anything so that Patrick Alltus would get hurt. (RP 637, 667).

Ms. Alltus testified that on the night of the shooting, she went to bed around 10:00 p.m. (RP 619). She testified she was asleep in her bed when she heard “a loud popping noise.” (RP 620). She testified that after this sound it was quiet, and “then there was another popping noise.” (RP 621, 651). Ms. Alltus testified she stayed in her room, and “I waited a few minutes and then my door and light turned on . . . [Mr. Bachtold] stepped into my room.” (RP 621).

Defense counsel sought to ask Ms. Alltus if Mr. Bachtold said anything to her:

[Defense counsel:] Did he say anything to you?
[Ms. Alltus:] “I just killed your uncle.”

(RP 621).

The State objected based on hearsay, and moved to strike the response. (RP 621).

The Court sustained the objection and instructed the jury to disregard the response. (RP 621). Defense counsel then stated “I believe Ms. Alltus is allowed to impeach [Mr.] Bachtold’s testimony by statements he made to her.” (RP 621-622). The State objected, stating:

[I]n this case the question is getting into claims of what [Mr.] Bachtold had said to the defendant or that she alleges were said to her. It’s hearsay. It’s not impeachment. There was no questioning of him about statements made to the defendant . . . after she claims he shot [Patrick] Alltus regarding this incident. So it’s hearsay and it’s not proper impeachment.

(RP 622).

Defense counsel responded:

I am addressing the fact that [Mr.] Bachtold has told an entire fabrication and Ms. Alltus is allowed to defend against that fabrication by saying what happened, what occurred, and that is in its entirety, impeaches his story in its entirety [Defense counsel] wasn’t allowed to ask any of those questions of Mr. Bachtold and now we’re being told that Ms. Alltus cannot in her own defense be able to say what happened on that night. That is impeaching . . . perhaps not directly one specific question, but it impeaches his entire story because he says he was in his room. And he got to say what she supposedly did and where she went about.

(RP 623).

The trial court sustained the State’s hearsay objection and did not allow Ms. Alltus to testify to statements made by Mr. Bachtold, stating his statements

are hearsay, and are not proper impeachment, because Mr. Bachtold “could have been asked on his examination and was not.” (RP 623).

Ms. Alltus testified that when Mr. Bachtold came into her room, he was carrying a gun, and he talked to her. (RP 624). She testified she was directed to go pick up her things and come with Mr. Bachtold. (RP 625). She testified she went into the living room and saw Patrick Alltus lying on the ground, covered with two blankets. (RP 625-626).

Ms. Alltus testified she did not want to leave Patrick Alltus’ house, but she left and went to Oregon with Mr. Bachtold because she was scared of him. (RP 628, 630, 667). She testified that Mr. Bachtold told her he would leave her behind to get blamed. (RP 651-652).

Ms. Alltus testified she did not pack up anything but her own clothes, and she denied putting the firearms into the pick-up truck. (RP 628). She testified she had shot a gun before, but does not confidentially know how to shot. (RP 665-666, 668-669). When asked if she shot the “.22 Win Mag” several times, Ms. Alltus testified “I believe so.” (RP 669).

Ms. Alltus proposed the following jury instruction regarding the testimony of an accomplice:

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

(CP 169, 185; RP 688-689, 720-721).

The trial court declined to give this jury instruction, ruling that it was not appropriate because Ms. Alltus called Mr. Bachtold as a witness. (RP 688-689, 720-721). The trial court stated:

[C]learly he was subpoenaed by the State. He was relieved of that. And you asked specifically that he be brought up for the purposes of the defense. You, in fact, conducted direct examination . . . of Parker Bachtold, and the State, in fact, conducted cross examination. He became your witness as such. The Court will not give that instruction.

(RP 688-689).

The trial court gave the following to-convict jury instruction for second degree unlawful possession of a firearm (count 7):

To convict the defendant of the crime of second-degree unlawful possession of a firearm by a minor, as charged in Count 7, (410 shotgun) each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 30, 2014, the defendant knowingly had a firearm in her possession or control;
- (2) That the defendant on September 30, 2014, was under the age of eighteen;
- (3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 134; RP 738-739).

In her closing argument, Ms. Alltus argued she not involved in the shooting of Patrick Alltus. (RP 774-783). She argued that the only evidence connecting her to the crime came from Mr. Bachtold:

None of the other evidence, none of the other stories suggest it was her other than the story Parker Bachtold told you. That's it. Parker's the one that's saying she was involved. That's all. And it's up to you to decide and determine who is right.

(RP 782).

The jury found Ms. Alltus guilty of first degree premeditated murder, but declined to find the existence of aggravating factors. (CP 87, 90-91; 3 RP 206-207). The jury also found Ms. Alltus guilty of the other six counts, as charged. (CP 87-88; 3 RP 206). The jury found that Ms. Alltus was armed with a deadly weapon that was a firearm on counts 1 and 2. (CP 92; 3 RP 207-208).

The jury returned their verdict at 9:30 p.m. on August 29, 2016. (CP 82; 3 RP 204, 212). The State requested sentencing be held the following day, and the trial court suggested holding sentencing at 10:00 a.m. (3 RP 211). Ms. Alltus objected, stating "we cannot possibly prepare the mitigation necessary by ten o'clock tomorrow morning to have her sentenced in this size of a case. That would be an absolute miscarriage of justice" (3 RP 211). Over defense objection, the trial court scheduled sentencing for 3:30 p.m. the next day, August 30, 2016. (3 RP 212).

The sentencing hearing was held on August 30, 2016 at 3:30 p.m. (CP 33-39; 3 RP 218-259). Ms. Alltus filed a motion to continue sentencing, so that a

presentence investigation report could be prepared. (CP 64-66; 3 RP 218-226).

Ms. Alltus argued:

This is an extremely serious charge with extremely high potential punishment. Ms. Alltus has been being treated and has mental health documents that go from April 28, 2015 to August 17, 2016. That includes behavioral health assessment, diagnostic summary, initial treatment plan, suicide risk assessment, thirty-four separate mental health progress notes from her therapist She was the victim of a rape and kidnapping at the age of thirteen where that perpetrator was convicted and sent to prison. She was less than two months past her sixteenth birthday at the time of this crime that she is convicted of. I believe there is some extensive CPS interaction based on the information I have. I have none of those CPS records, nor do the Court. Her biological mother gave up parental rights to her. She had an order of protection against her biological father. She is asking for a presentence evaluation of these and all other relevant issues that should be considered at sentencing for mitigation and the Court could not possibility make an informed decision on this type of case without evaluating all of those factors.

. . . .

Ms. Alltus cannot be properly sentenced without the proper investigation. Especially, based upon her very tender age, the seriousness of this crime, and the fact that there are mental health issues and multiple records that are not before the Court.

(3 RP 218-219, 221-222).

The trial court denied the motion, stating that a presentence investigation report was discretionary, and that it would not have added anything significant, given Ms. Alltus' lack of criminal history and any financial condition. (3 RP 224-225). The trial court ruled it could issue an effective sentence based upon the sentencing guideline scoresheets. (3 RP 225-226). The trial court proceeding with sentencing, over defense objection. (3 RP 224, 239).

At sentencing, defense counsel argued that Ms. Alltus should not receive a longer sentence than Mr. Bachtold, which was 30 years, or 360 months, which would require a downward departure from the standard range sentence. (3 RP 241-244). Defense counsel argued “[w]e believe that this, if ever there was a case for a downward departure from sentence, there is no possible way that Ms. Alltus - - - family members have mentioned plots and plans. You never heard any testimony. The Court cannot rely on some assumption of plots or plans.” (3 RP 241). Defense counsel also argued “you have to consider her age, barely sixteen.” (3 RP 243).

The trial court sentenced Ms. Alltus to a standard range sentence, to a total term of confinement of 460 months. (CP 41-52; 3 RP 250-252, 257). The judgment and sentence includes the following language:

If the defendant committed the above crime(s) while under age 18 and is sentenced to more than 20 years of confinement . . . [a]s long as the defendant’s conviction is not for aggravated first degree murder or certain sex crimes, and the defendant has not been convicted of any crime committed after he or she turned 18 or committed a disqualifying serious infraction as defined by DOC in the 12 months before the petition is filed, the defendant may petition the Indeterminate Sentence Review Board (Board) for early release after the defendant has served 20 years.

(CP 46; 3 RP 252-253).

The judgment and sentence indicates Ms. Alltus was sentenced to a maximum term of confinement of life. (CP 45).

The trial court imposed the following legal financial obligations: \$500 victim assessment; \$100 crime lab fee; and \$100 DNA collection fee. (CP 47; 3 RP 251, 256). The trial court declined to impose additional legal financial obligations requested by the State, based on Ms. Alltus' age and lack of work experience. (3 RP 251).

The Judgment and Sentence contains the following boilerplate language:

2.5 Legal Financial Obligations/Restitution: The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

(CP 44).

The Judgment and Sentence also contains the following boilerplate language: "[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations." (CP 48).

Ms. Alltus timely appealed. (CP 18-31). The trial court entered an Order of Indigency, granting Ms. Alltus a right to review at public expense. (CP 2-17).

The Order of Indigency states:

Defendant has previously been found to be indigent by order of this court. There has been no change in her financial status since that time and she continues to lack sufficient funds to seek review in this case, furthermore she has been sentenced to the Department of Corrections for 460 months.

(CP 2).

E. ARGUMENT

Issue 1: Whether the first amended information charging second degree unlawful possession of a firearm (count 7) was inadequate to give Ms. Alltus notice of the crime charged.

The to-convict jury instruction for count 7 instructed the jury that in order to find Ms. Alltus guilty of that count, it had to find unlawful possession of a “410 shotgun.” (CP 134; RP 738-739). However, Ms. Alltus was not charged with unlawful possession of a “410 shotgun.” (CP 450-451). The charging document (the first amended information) for count 7 was inadequate to give Ms. Alltus notice of the crime charged. Therefore, her conviction for count 7 should be reversed.

“The Sixth Amendment and Const. art. I, § 22 (amend. 10) require inclusion in the charging document of the essential elements, statutory and otherwise, of the crime charged so as to apprise the defendant of the charges against him and to allow him to prepare his defense.” *State v. Tunney*, 129 Wn.2d 336, 339, 917 P.2d 95 (1996) (citing *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992)).

“The Sixth Amendment and Const. art. I, § 22 entitle the defendant to notice of the charge he will face at trial and, therefore, he may be convicted only of charges contained in the information.” *State v. Peterson*, 133 Wn.2d 885, 892, 948 P.2d 381 (1997).

“[T]he standard of review depends on when the charging document is challenged.” *State v. Tresenriter*, 101 Wn. App. 486, 491, 4 P.3d 145 (2000) (citing *Kjorsvik*, 117 Wn.2d at 103). Here, Ms. Alltus challenges the charging document for the first time on appeal. Therefore, the charging document is liberally construed. *Tresenriter*, 101 Wn. App. at 491 (citing *Kjorsvik*, 117 Wn.2d at 104).

The test for determining whether the charging document is sufficient is the following two-prong test: “(1) do the necessary elements appear in any form, or by fair construction can they be found, in the information; and, if so, (2) can the defendant show he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice.” *Tunney*, 129 Wn.2d at 340 (citing *Kjorsvik*, 117 Wn.2d at 105–06). “The first prong requires at least some language in the information giving notice of the missing element.” *Id.* (citing *Kjorsvik*, 117 Wn.2d at 106).

Here, even when liberally construed, the charging document is deficient. There is no other language in the charging document giving Ms. Alltus notice of unlawful possession of a “410 shotgun” on the date alleged. (CP 446-451). The fact that the charging document alleged theft of a firearm (count 5) of a “.410 shotgun” as a principal or accomplice is insufficient to give Ms. Alltus notice of unlawful possession of a “410 shotgun.” (CP 450). She could have committed theft of a firearm, as charged in count 5, without unlawfully possessing this same

firearm. The charging document did not give Ms. Alltus notice of unlawful possession of a “410 shotgun” on the date alleged. (CP 446-451).

Because the charging document fails the first prong of the test, this Court need not consider the second prong of the test, whether Ms. Alltus was actually prejudiced by the deficiency. *See Tresenriter*, 101 Wn. App. at 492; *see also State v. Franks*, 105 Wn. App. 950, 958, 22 P.3d 269 (2001) (if the first prong of the test is met, prejudice is presumed, even where the defendant appeared and defended against the charge).

Because the charging document (the first amended information) for count 7, unlawful possession of a “410 shotgun” was inadequate to give Ms. Alltus notice of the crime charged, her conviction for count 7 should be reversed without prejudice. *See Tresenriter*, 101 Wn. App. at 492-93; *Franks*, 105 Wn. App. at 959-60 (stating this remedy).

Issue 2: Whether Ms. Alltus was denied her constitutional right to present a defense when she was prohibited from cross-examining Parker Bachtold regarding his reasons for committing the murder.

The trial court erred by prohibiting Ms. Alltus from cross-examining Mr. Bachtold regarding his reasons for committing the murder of Patrick Alltus. Ms. Alltus denied any involvement in the murder and the other charged crimes. Mr. Bachtold’s reasons for committing the murder of Patrick Alltus were relevant to Ms. Alltus’ defense of denial of any involvement. By prohibiting Ms. Alltus from cross-examining Mr. Bachtold regarding his reasons for committing the murder of

Patrick Alltus, Ms. Alltus' constitutional right to present a defense was violated, requiring a new trial in this matter.

Both the United States and Washington Constitutions guarantee the right to present a defense. U.S. Const. amend. VI; Wash. Const. art. I, §22; *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "At a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

A full and meaningful confrontation of the State's witnesses "helps assure the accuracy of the fact-finding process." *Darden*, 145 Wn.2d at 620 (internal citations omitted). The purpose of a meaningful cross-examination of adverse witnesses is to "test the perception, memory, and credibility of witnesses." *Id.* "Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question." *Id.* "As such, the right to confront must be zealously guarded." *Id.*

Generally, as a matter of constitutional due process of law, a trial court must allow a defendant to present his defense theory of the case, including through cross examination, so long as the law and evidence support it. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005); *Darden*, 145 Wn.2d at 620-21. “However, the right to cross-examine adverse witnesses is not absolute.” *Darden*, 145 Wn.2d at 620-21. “Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative.” *Id.* at 621 (citing *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)).

The constitutional right to present a defense “does not extend to the introduction of otherwise inadmissible evidence.” *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). “Evidence that a defendant seeks to introduce ‘must be of at least minimal relevance.’” *Jones*, 168 Wn.2d at 720 (citing *Darden*, 145 Wn.2d at 622). “[I]f 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.” *Id.* (quoting *Darden*, 145 Wn.2d at 622) (alteration in original). “The State’s interest in excluding prejudicial evidence must also ‘be balanced against the defendant’s need for information sought,’ and relevant information can be withheld only ‘if the State’s interest outweighs the defendant’s need.’” *Id.* (quoting *Darden*, 145 Wn.2d at 622).

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable

or less probable than it would be without the evidence.” ER 401. To be relevant, the evidence need only provide “a piece of the puzzle.” *Bell v. State*, 147 Wn.2d 166, 182, 52 P.3d 503 (2002). “The threshold to admit relevant evidence is very low.” *Darden*, 145 Wn.2d at 622 (internal citations omitted). “Even minimally relevant evidence is admissible.” *Id.* On the other hand, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Darden*, 145 Wn.2d at 625 (quoting ER 403).

Claims that the constitutional right to present a defense has been violated are reviewed de novo. *Jones*, 168 Wn.2d at 719. A trial court’s decision to exclude evidence is reviewed for an abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). “An abuse of discretion occurs if ‘discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *Id.* (quoting *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 446 (1999)). To review whether a trial court’s ruling violated the constitutional right to present a defense, this Court reviews “whether the evidence satisfied evidence rule strictures.” *State v. Farnworth*, No. 33673-5-III, 2017 WL 2378168, at *8 (Wash. Ct. App. June 1, 2017); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

“[A] court’s limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion.” *Darden*, 145 Wn.2d at 619 (internal citations omitted). “However, 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.” *Id.*

Here, the trial court erred by prohibiting Ms. Alltus from cross-examining Mr. Bachtold regarding his reasons for committing the murder of Patrick Alltus. (CP 379-381, 411-414; RP 373-387; 3 RP 142-158). The State asserted this line of questioning, addressing a sexual relationship between Patrick Alltus and Ms. Alltus, was character evidence pertaining to Patrick Alltus. (CP 379-381, 411-414; RP 373-374, 385; 3 RP 142, 144-145, 149-152). Ms. Alltus argued the evidence was not character evidence pertaining to Patrick Alltus, but rather, evidence of why Mr. Bachtold committed the murder of Patrick Alltus. (3 RP 152-154). Ms. Alltus argued this evidence was relevant because Mr. Bachtold was the only witness asserting that Ms. Alltus was involved in the murder. (3 RP 145, 147-148, 152-154). Ms. Alltus argued:

We have to be able to address how and why [Mr. Bachtold] committed the crime in order for [Ms. Alltus] to defend, if she’s somebody who’s supposed to be accountable. Because otherwise, what would she have to defend with?

.....

If you say that Ms. Alltus cannot address whether or not the victim was killed by the co-defendant then you are saying to her she

cannot address the crime charged. That literally cuts her off from the facts of the crime that she is defending against.

(3 RP 148).

The trial court agreed with the State and ruled this evidence would be excluded, as evidence of the victim's character. (RP 386-387; 3 RP 156-158).

The trial court erred in finding the line of questioning, addressing a sexual relationship between Patrick Alltus and Ms. Alltus, was character evidence. "The term character evidence is normally thought to encompass evidence offered for the purpose of showing a party's general tendencies with respect to honesty, peacefulness, carelessness, temperance, or truthfulness." 5D Washington Practice, Handbook Washington Evidence, ER 404 (2017-2018 ed.). Ms. Alltus did not seek to admit evidence of Mr. Bachtold's reasons for committing the murder of Patrick Alltus for the purpose of showing Patrick Alltus' character, but rather, to support her defense that she was not involved in the murder. (3 RP 145, 147-148, 152-154).

Mr. Bachtold's reasons for committing the murder of Patrick Alltus were relevant to the jury's determination of whether Ms. Alltus was also involved in the crime. The threshold for admitting relevant evidence is relatively low and, in this case, Mr. Bachtold's reasons for committing the murder of Patrick Alltus - did tend to make the existence of a material fact - whether Ms. Alltus was a principal or accomplice to that crime - less true than without the evidence. Mr. Bachtold's reasons for committing the murder of Patrick Alltus could have made

the jury doubt whether Ms. Alltus was involved in the crime. This is especially true given the fact that Mr. Bachtold was the only witness to assert that Ms. Alltus was involved in the murder.

Ms. Alltus had the right to put evidence before the jury that might influence its determination of guilt. *See Ritchie*, 480 U.S. at 56. Mr. Bachtold's reasons for committing the murder of Patrick Alltus might have influenced the jury's determination of Ms. Alltus' guilt. Based on this evidence, the jury could have determined that Mr. Bachtold committed the murder alone after learning about the nature of the relationship between Ms. Alltus and Patrick Alltus. The evidence was relevant to disprove a material fact, whether Ms. Alltus was a principal or accomplice to the murder. Given the low threshold for admitting relevant evidence, the court abused its discretion by denying Ms. Alltus a meaningful cross examination of Mr. Bachtold. *See Day*, 142 Wn.2d at 5. This Court's de novo review of the constitutional error in this case should result in a new trial. *See Jones*, 168 Wn.2d at 719. Mr. Bachtold's reasons for committing the murder of Patrick Alltus was the missing "piece of the puzzle" that should have been put before the jury. *See Bell*, 147 Wn.2d at 182.

"An erroneous evidentiary ruling that violates the defendant's constitutional rights . . . is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt." *State v. Franklin*, 180 Wn. 2d 371, 377 n.2, 325 P.3d 159, 162 (2014). The trial court's ruling prohibiting Ms.

Alltus from cross-examining Mr. Bachtold regarding his reasons for committing the murder of Patrick Alltus was not harmless beyond a reasonable doubt. Mr. Bachtold was the only witness to testify to Ms. Alltus' involvement in the murder, and there was no other evidence presented at trial to corroborate her involvement. The fact that Ms. Alltus had shot guns, enjoyed shooting guns, and that she was aware, after the fact, of the injury to Patrick Alltus' arm, do not corroborate that she was involved in the murder. (RP 155, 346, 646, 665-666, 668-669; 2 RP 308-310, 323; Pl.'s Ex. 144).

Ms. Alltus respectfully requests this matter be reversed and remanded for a new trial on all charges so she can experience her constitutionally protected right to fully present her defense.

Issue 3: Whether the trial court erred by not allowing Ms. Alltus to testify to a prior inconsistent statement by Parker Bachtold.

The trial court erred by not allowing Ms. Alltus to testify to a prior inconsistent statement made by Mr. Bachtold on the night in question, "I just killed your uncle." (RP 621). The testimony was admissible under ER 613(b) and Ms. Alltus' right to offer this prior inconsistent statement was guaranteed by her constitutional right to confront witnesses. Her convictions should be reversed and remanded for a new trial.

ER 613 governs the admissibility of impeachment evidence. *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006). ER 613(b) governs the admission of prior inconsistent statements for impeachment purposes. Under ER

613(b), “[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.” ER 613(b). “A prior inconsistent statement is a comparison of something the witness said out of court with a statement the witness made on the stand.” *State v. Spencer*, 111 Wn. App. 401, 409, 45 P.3d 209 (2002).

“Prerule case law required the examiner, *before* introducing extrinsic evidence of a prior inconsistent statement, to direct the declarant's attention to the exact content of the allegedly contradictory statement as well as to the time and place where the declarant made the statement and to the persons present.” *State v. Johnson*, 90 Wn. App. 54, 70, 950 P.2d 981 (1998) (emphasis added). “Under ER 613(b), however, it is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination or *after* the introduction of extrinsic evidence.” *Id.* (emphasis added); *see also* 5A Washington Practice, Evidence Law and Practice § 613.13 (6th ed. 2017) (stating “[t]he requirements of Rule 613 are satisfied if the party originally calling the witness is afforded an opportunity to recall the witness to explain or deny the statement at a later time.”). “The traditional ‘foundation questions’ on cross-examination are now an optional tactic rather than a mandatory requirement.” *Id.*;

see also Spencer, 111 Wn. App. at 410 (acknowledging this holding from *State v. Johnson*).

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *Day*, 142 Wn.2d at 5. "An abuse of discretion occurs if 'discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting *McDonald*, 138 Wn.2d at 696).

In addition, "[a] defendant's right to impeach a prosecution witness with . . . a prior inconsistent statement is guaranteed by the constitutional right to confront witnesses." *Johnson*, 90 Wn. App. at 69 (citing *Davis v. Alaska*, 415 U.S. 308, 316–18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Dickenson*, 48 Wn. App. 457, 469, 740 P.2d 312 (1987)). "[A]ny error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place." *Id.*

Here, Ms. Alltus sought to impeach Mr. Bachtold's testimony by offering extrinsic evidence of a prior inconsistent statement he made on the night in question, her testimony that Mr. Bachtold told her "I just killed your uncle." (RP 621-623). The trial court excluded this evidence, ruling the statement was not proper impeachment because Mr. Bachtold was not asked about the statement during his previous testimony. (RP 371-399, 571-606, 623).

The trial court abused its discretion in excluding this evidence, because ER 613(b) did not require that Mr. Bachtold have the opportunity to explain or deny the statement *before* it was offered. *See Johnson*, 90 Wn. App. at 70; *Spencer*, 111 Wn. App. at 410; 5A Washington Practice, Evidence Law and Practice § 613.13 (6th ed. 2017). It was sufficient that the State could recall Mr. Bachtold *after* introduction of this statement to address it. *See Johnson*, 90 Wn. App. at 70; *Spencer*, 111 Wn. App. at 410; 5A Washington Practice, Evidence Law and Practice § 613.13 (6th ed. 2017). Ms. Alltus was not required to ask foundational questions before offering this evidence.

By excluding extrinsic evidence of the prior inconsistent statement “I just killed your uncle” made by Mr. Bachtold on the night in question, the trial court denied Ms. Alltus her constitutional right to confront Mr. Bachtold. *See Johnson*, 90 Wn. App. at 69 (citing *Davis*, 415 U.S. at 316–18; *Dickenson*, 48 Wn. App. at 469). This error is presumed prejudicial. *See id.*

Furthermore, reversal is required, because it cannot be said that no rational jury could have a reasonable doubt that Ms. Alltus would have been convicted even without the error. *See Johnson*, 90 Wn. App. at 69. Mr. Bachtold was the only witness to testify to Ms. Alltus’ involvement in the murder, and there was no other evidence presented at trial to corroborate her involvement. The fact that Ms. Alltus had shot guns, enjoyed shooting guns, and that she was aware, after the fact, of the injury to Patrick Alltus’ arm, do not corroborate that she was involved

in the murder. (RP 155, 346, 646, 665-666, 668-669; 2 RP 308-310, 323; Pl.’s Ex. 144). Because Mr. Bachtold was the only witness who implicated Ms. Alltus, truthfulness of his testimony was essential to the State’s case, and it was crucial for Ms. Alltus to be able to impeach his testimony. Accordingly, this matter should be reversed and remanded for a new trial on all charges.

Issue 4: In the alternative, whether Ms. Alltus was denied her Sixth Amendment right to effective assistance of counsel when defense counsel failed to question Parker Bachtold about the prior inconsistent statement he made to Ms. Alltus, so that defense counsel could impeach Mr. Bachtold with the prior inconsistent statement.

Ms. Alltus requests this Court consider this argument, made in the alternative, if it rejects her argument presented in Issue 3 above. Ms. Alltus requests this Court consider this argument if it finds that defense counsel was required to question Mr. Bachtold regarding the prior inconsistent statement “I just killed your uncle” before offering extrinsic evidence of this statement, Ms. Alltus’ testimony to this statement, under ER 613(b).

Defense counsel’s failure to question Mr. Bachtold about the prior inconsistent statement he made to Ms. Alltus before offering extrinsic evidence of this statement constituted ineffective assistance of counsel, the result of the trial would have been different absent defense counsel’s error, and the decision was not tactical. Therefore, Ms. Alltus’ convictions should be reversed and remanded for a new trial.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that “counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S. at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

In *State v. Horton*, the defendant sought to call two witnesses to testify to pretrial statements made by the alleged victim, which were inconsistent with her trial testimony. *State v. Horton*, 116 Wn. App. 909, 913-14, 68 P.3d 1145 (2003). The trial court prohibited the testimony, ruling that the defendant had not complied with ER 613(b). *Id.* at 914.

On appeal, the court found that defense counsel's performance fell below an objective standard of reasonableness, where defense counsel did not give the alleged victim an opportunity to explain or deny her prior statements while testifying, or arrange for her to remain in attendance after her testimony. *Id.* at 916-17. The court found defense counsel's actions were not tactical, because compliance with ER 613(b) would only have benefitted the defendant. *Id.* at 917. The court concluded "that defense counsel could have impeached [the alleged victim] if she had complied with ER 613(b); and that defense counsel's failure to comply with ER 613(b) constituted deficient performance under the particular circumstances here." *Id.* at 920. When viewed along with prosecutorial misconduct that occurred during the State's closing argument, the court found the defendant was prejudiced by defense counsel's deficient performance. *Id.* at 921-22.

Here, Ms. Alltus was denied her Sixth Amendment right to effective assistance of counsel when defense counsel failed to question Mr. Bachtold about

the prior inconsistent statement he made to Ms. Alltus, “I just killed your uncle,” before offering extrinsic evidence of this statement, or arrange for Mr. Bachtold to remain in attendance after his testimony. (RP 371-399, 571-606, 621-623); *see also Horton*, 116 Wn. App. at 915-16.

Defense counsel’s failure to question Mr. Bachtold about the prior inconsistent statement he made to Ms. Alltus, or arrange for Mr. Bachtold to remain in attendance so he could be re-called to address the statement, was not tactical. Questioning Mr. Bachtold about this statement so that defense counsel could then offer Ms. Alltus’ testimony to the statement could have only benefitted the defense. Mr. Bachtold’s prior inconsistent statement, “I just killed your uncle” would call into question Mr. Bachtold’s trial testimony, and Mr. Bachtold was the sole witness implicating Ms. Alltus in the murder.

Ms. Alltus was prejudiced by defense counsel’s deficient performance. Prejudice requires “‘a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.’” *Horton*, 116 Wn. App. at 921-22 (quoting *Strickland*, 466 U.S. at 694). Had Ms. Alltus been able to present Mr. Bachtold’s prior inconsistent statement, the result of the trial would have been different. Mr. Bachtold was the only witness to testify to Ms. Alltus’ involvement in the murder, and there was no other evidence presented at trial to corroborate her involvement. Mr. Bachtold’s prior inconsistent statement, “I just killed your uncle” would call into question Mr. Bachtold’s trial testimony

implicating Ms. Alltus as being involved in the murder, and there is a reasonable probability that the result of the trial would have been different.

Ms. Alltus has proven that defense counsel's failure to question Mr. Bachtold about the prior inconsistent statement he made to Ms. Alltus, "I just killed your uncle," before offering extrinsic evidence of this statement, constituted ineffective assistance of counsel. Her convictions should be reversed and remanded for a new trial.

Issue 5: Whether the trial court erred in not giving a jury instruction regarding the testimony of an accomplice.

Ms. Alltus requested the trial court instruct the jury regarding the testimony of an accomplice, and the trial court declined to give her proposed instruction. Because the State relied solely on the uncorroborated accomplice testimony of Mr. Bachtold to convict Ms. Alltus, the trial court erred in not giving Ms. Alltus' requested jury instruction, and the case should be reversed and remanded for a new trial.

Ms. Alltus requested the trial court give the following standard cautionary jury instruction regarding the testimony of an accomplice:

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

(CP 169, 185; RP 688-689, 720-721); *see also* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 6.05 (4th ed. 2016) (WPIC).

“[F]ailure to give this instruction is always reversible error when the prosecution relies *solely* on accomplice testimony” *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984) (emphasis in original) *overruled on other grounds by State v. McKinsey*, 116 Wn.2d 911, 914, 810 P.2d 907 (1991). However, the trial court does not commit reversible error by failing to give the instruction if the accomplice testimony is substantially corroborated by independent evidence. *Harris*, 102 Wn.2d at 155; *see also State v. Sherwood*, 71 Wn. App. 481, 485, 860 P.2d 407 (1993); *State v. Willoughby*, 29 Wn. App. 828, 831, 630 P.2d 1387 (1981). “[W]hether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration.” *Id.*

Here, the accomplice testimony, the testimony of Mr. Bachtold, was not corroborated by independent evidence. Mr. Bachtold was the only witness to testify to Ms. Alltus’ involvement in the murder. The fact that Ms. Alltus had shot guns, enjoyed shooting guns, and that she was aware, after the fact, of the injury to Patrick Alltus’ arm, do not corroborate that she was involved in the murder. (RP 155, 346, 646, 665-666, 668-669; 2 RP 308-310, 323; Pl.’s Ex. 144). No eyewitnesses other than Mr. Bachtold observed Ms. Alltus shot Patrick Alltus or otherwise participate in the events on the night in question. Ms. Knowles’

testimony did not corroborate Mr. Bachtold's testimony. (RP 518-542). Ms. Knowles did not testify that Ms. Alltus asked Mr. Bachtold to commit the murder or that Ms. Alltus said she was physically involved. (RP 518-542). No physical evidence connected Ms. Alltus to the firearms or the plastic bag placed on Patrick Alltus' head.

In declining to give the accomplice jury instruction, the trial court ruled it was not appropriate because Ms. Alltus called Mr. Bachtold as a witness. (RP 688-689, 720-721). The "note on use" for the pattern jury instruction states "[u]se this instruction, if requested by the defense, in every case in which the State relies on the testimony of an accomplice. *Do not use this instruction if an accomplice or codefendant testifies for the defendant.*" 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 6.05 (4th ed. 2016) (emphasis added).

However, even though Ms. Alltus called Mr. Bachtold as a witness, Ms. Alltus did not rely on Mr. Bachtold's testimony as part of her defense. (RP 571-606, 774-783). When Ms. Alltus called Mr. Bachtold as a witness, the jury was instructed it was only for impeachment, not substantive evidence. (RP 585). Mr. Bachtold remained the State's most powerful witness against Ms. Alltus, and the fact that she called him as a witness in order to impeach his testimony, did not affect this. In her closing argument, rather than relying on Mr. Bachtold's testimony to support her defense, Ms. Alltus argued the only evidence connecting her to the crime came from Mr. Bachtold. (RP 774-783).

In addition, there was no risk of confusion to the jury by giving the requested jury instruction regarding the testimony of an accomplice. The instruction addressed testimony of an accomplice “given on behalf of the State,” and here, Mr. Bachtold was a State’s witness. (CP 169, 185; RP 331-406).

The State relied solely on the uncorroborated accomplice testimony of Mr. Bachtold to convict Ms. Alltus. Accordingly, the trial court erred in not giving a jury instruction regarding the testimony of an accomplice. Ms. Alltus’ convictions should be reversed and remanded for a new trial before a properly instructed jury.

Issue 6: Whether the trial court erred in sentencing Ms. Alltus to a de facto life sentence without conducting a *Miller* hearing to consider mitigating circumstances related to her age at the time of the crimes.

The trial court violated Ms. Alltus’ rights under the Eighth Amendment by imposing a standard range, de facto life sentence of 460 months without conducting an individualized evaluation of her age and circumstances surrounding her youth. The case should be reversed and remanded for resentencing, during which the trial court must consider the factors set forth in *Miller v. Alabama* and exercise its discretion to consider a sentence below the standard adult range, including a mitigated sentence on the sentencing enhancements.

“When a juvenile offender is sentenced in adult court, youth matters on a constitutional level.” *State v. Ramos*, 187 Wn.2d 420, 428, 387 P.3d 650 (2017). In *Miller v. Alabama*, the United States Supreme Court held “the Eighth

Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). While the *Miller* decision does not categorically bar a penalty of life without parole for a juvenile defendant, it does mandate that the sentencing court conduct an individualized hearing and “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 480; *see also Ramos*, 187 Wn.2d at 428. This *Miller* hearing “gives effect to *Miller*’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 735, 193 L. Ed. 2d 599 (2016); *see also Ramos*, 187 Wn.2d at 428-29.

In *Ramos*, our Supreme Court held “while not every juvenile homicide offender is automatically entitled to an exceptional sentence below the standard range, every juvenile offender facing a literal or *de facto* life-without-parole sentence is automatically entitled to a *Miller* hearing. *Ramos*, 187 Wn.2d at 434, 436 (emphasis added). The Court further held:

At the *Miller* hearing, the court must meaningfully consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life-without-parole sentence for a juvenile homicide offender is constitutionally permissible. If the juvenile proves by a preponderance of the evidence that his or her crimes reflect transient immaturity, substantial and compelling reasons would necessarily justify an exceptional sentence below the standard range because a standard range sentence would be unconstitutional.

Id. at 434-35.

The Court “reject[ed] the notion that *Miller* applies only to literal, not de facto, life-without-parole sentences.” *Id.* at 438. The Court stated “[t]he juvenile cannot forfeit his or her right to a *Miller* hearing merely by failing to affirmatively request it, and all doubts should always be resolved in favor of holding a *Miller* hearing.” *Id.* at 443.

In *State v. Houston-Sconiers*, our Supreme Court held “[t]rial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA [Sentencing Reform Act] range *and/or sentence enhancements.*” *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 34, 391 P.3d 409 (2017) (emphasis added).

Here, Ms. Alltus was sentenced to a de facto life sentence, to a total term of confinement of 460 months.² (CP 41-52; 3 RP 250-252, 257). She is entitled to be re-sentenced, with consideration given to the factors set forth in *Miller*. See *Miller*, 567 U.S. at 479-80; *Ramos*, 187 Wn.2d at 434, 436; *Houston-Sconiers*, 188 Wn.2d at 21, 34.

² Our Supreme Court has not decided the specific number of years required for a sentence to be considered a de facto life sentence. See *State v. Ramos*, 187 Wn.2d 420, 439 n. 6, 387 P.3d 650 (2017). However, in *Houston-Sconiers*, the two defendants received lower sentences than Ms. Alltus (312 months and 372 months, compared to 460 months for Ms. Alltus), and the Court ruled the defendants were entitled to a *Miller* hearing. See *State v. Houston-Sconiers*, 188 Wn.2d 13, 34, 391 P.3d 409 (2017); see also, e.g., *In re Pers. Restraint of Light-Roth*, 200 Wn. App. 149, 153, 165-66, 401 P.3d 459 (2017) (holding the trial court erred in failing to consider youth as a mitigating factor, for a sentence of 335 months).

Following *Miller*, the Washington legislature enacted RCW 9.94A.730, which provides that under specified circumstances, “any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement” RCW 9.94A.730(1).

RCW 9.94A.730 statute applies to Ms. Alltus’ sentence. (CP 46; 3 RP 252-253). However, RCW 9.94A.730 does not remedy a *Miller* violation.

Division I of this Court has held that this *Miller*-fix statute remedies a violation of *Miller*. See *State v. Scott*, 196 Wn. App. 961, 385 P.3d 783 (2016), *review granted*, 188 Wn.2d 1001, 393 P.3d 362 (2017).³ In *Scott*, a case on collateral review over 20 years after the defendant’s direct appeal, the court concluded that RCW 9.94A.730 remedies a *Miller* violation. *Scott*, 196 Wn. App. at 964-65, 971-72. In reaching this conclusion, the court relied upon dicta from the United States Supreme Court opinion in *Montgomery v. Louisiana*, a case on collateral review over 50 years after the defendant’s arrest on the charged crime. *Id.*; see also *Montgomery*, 136 S. Ct. at 736 (stating “[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.”).

³ Our Supreme Court heard oral argument in this case on September 12, 2017. See Washington State Supreme Court Docket, Fall 2017, https://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/?fa=atc_supreme_calendar.display&year=2017&file=docfal17, last visited Nov. 8, 2017.

Ms. Alltus requests this Court decline to follow *Scott* and instead, find that she is entitled to a new sentencing hearing, under *Miller*. Our Supreme Court has previously rejected the argument that the possibility of parole can cure a constitutional sentencing error. *See State v. Fain*, 94 Wn.2d 387, 393-95, 617 P.2d 720 (1980). In addition, RCW 9.94A.730 does not take into account the mitigating factor of youth in its considerations for release by parole. *See* RCW 9.94A.730(3); *see also Houston-Sconiers*, 188 Wn.2d at 22 (noting that RCW 9.94A.730 makes no allowance for consideration of any of the mitigating factors of youth that *Miller* requires at the time of sentencing).

This is a direct appeal where the sentence imposed was unlawful, and therefore, Ms. Alltus is entitled to resentencing. *See Ramos*, 187 Wn.2d at 435-36; *Houston-Sconiers*, 188 Wn.2d at 20, 22-23.

In *Ramos*, decided after *Scott*, the State argued the defendant's Eighth Amendment arguments were moot, because the defendant could petition for early release under RCW 9.94A.730. *Ramos*, 187 Wn.2d at 435-36. Our Supreme Court disagreed, stating "[t]he possibility of another remedy in the future cannot displace [the defendant's] right to appeal his sentence on the basis that it was unlawfully imposed in the first instance." *Id.* at 436. The *Ramos* Court acknowledged the Supreme Court's language in *Montgomery*, but distinguished the defendant's case, because it was on direct review, rather than on collateral review, as in *Montgomery*. *Id.* at 436; *see also Montgomery*, 136 S. Ct. at 736.

The Court stated “[the defendant] was unquestionably facing a de facto life-without-out-parole sentence, and we are reviewing his case on direct appeal to determine whether that sentence was lawfully imposed. If it was not, he is entitled to resentencing.” *Id.*

In *Houston-Sconiers*, also decided after *Scott*, the Court held “the Eighth Amendment requires trial courts to exercise its discretion at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line.” *Houston-Sconiers*, 188 Wn.2d at 20. The Court acknowledged “the only time the [United States] Supreme Court has spoken approvingly of a postsentencing *Miller* ‘fix’ such as extending parole eligibility to juveniles is when addressing how to remedy a conviction and sentence that were long final.” *Id.* (citing *Montgomery*, 136 S. Ct. at 736).

The *Houston-Sconiers* Court rejected the arguments that RCW 9.94A.730 satisfied the requirements of *Miller* and relieved the Court from reaching the question of whether the sentences imposed violate *Miller*. *Id.* at 22. The Court stated “[s]tatutes like RCW 9.94A.730 may provide a remedy on collateral review, *Montgomery*, 136 S. Ct. at 736, but they do not provide sentencing courts with the necessary discretion to comply with constitutional requirements in the first instance.” *Id.* at 23. The Court reasoned:

Miller is mainly concerned with what must happen at sentencing because *Miller's* holding rests on the insight that youth are generally less culpable *at the time of their crimes* and culpability is of primary relevance in sentencing. But the part of the *Miller* fix

statute that is applicable to this case, RCW 9.94A.730, prioritizes public safety considerations and likelihood of recidivism. It makes no allowance for consideration of any of the mitigating factors of youth that *Miller* requires at the time of sentencing. The fact that a recently enacted statute may offer the possibility of another remedy in the future, or on collateral review, does not resolve whether petitioners' sentences are unconstitutional and in need of correction now, and it does not provide for the consideration of mitigating factors to which they are entitled now, while their convictions are still not yet final.

Id. at 22-23 (citations omitted).

Ms. Alltus' sentence violates the Eighth Amendment. RCW 9.94A.730 does not change this fact; it does not provide the sentencing court "with the necessary discretion to comply with constitutional requirements in the first instance." *Houston-Sconiers*, 188 Wn.2d at 23; *see also Ramos*, 187 Wn.2d at 435-36. Ms. Alltus is entitled to a *Miller* hearing. The case should be reversed and remanded for resentencing.

Issue 7: Whether the trial court abused its discretion by denying Ms. Alltus' motion to continue the sentencing hearing for preparation of a presentence investigation report.

The trial court sentenced Ms. Alltus approximately 18 hours after the jury returned its verdict. Despite the fact that Ms. Alltus was a first-time offender, 16 years old at the time of her offenses, faced a de facto life sentence, and was requesting a mitigated sentence below the standard range, the trial court denied her request for a continuance for the preparation of a presentence investigation report before imposing a sentence. Under these circumstances, the trial court abused its discretion by denying Ms. Alltus' motion to continue the sentencing

hearing for preparation of a presentence report. The case should be reversed and remanded for resentencing with a presentence investigation report.

In Ms. Alltus' case, the trial court was not required to order a presentence investigation report, but rather, had the discretion to order a presentence report. *See* CrR 7.1(a); RCW 9.94A.500(1). The trial court's failure to order a presentence investigation report is reviewed for an abuse of discretion. *See State v. Niemann*, 35 Wn. App. 89, 94, 665 P.2d 906 (1983) (applying this standard of review under a previous version of the court rule).

"A sentencing judge must possess the fullest information possible concerning the defendant's past life and personal characteristics." *State v. Russell*, 31 Wn. App. 646, 648, 644 P.2d 704 (1982) (citing *Williams v. New York*, 337 U.S. 241, 247, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949); *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)). "In determining the proper sentence, a trial court is vested with broad discretion and 'can make whatever investigation (it) deems necessary or desirable.'" *Id.* (alteration in original) (quoting *State v. Dainard*, 85 Wn.2d 624, 626, 537 P.2d 760 (1975)).

A presentence investigation report "shall contain the defendant's criminal history, as defined by RCW 9.94A.030, such information about the defendant's characteristics, financial condition, and the circumstances affecting the defendant's behavior as may be relevant in imposing sentence or in the

correctional treatment of the defendant, information about the victim, and such other information as may be required by the court.” CrR 7.1(b).

Here, Ms. Alltus was 16 years old at the time of her offenses, had no previous criminal history, and faced a de facto life sentence. (CP 43; RP 614; 3 RP 222). In her request for a pretrial investigation report, Ms. Alltus highlighted these factors and outlined past life circumstances that she wished to have investigated so “the court may be fully informed of her circumstances prior to sentencing[,]” and consider at sentencing for mitigation. (CP 64-66; 3 RP 218-219, 221-222). Ms. Alltus requested a mitigated sentence below the standard range. (3 RP 241-244).

Without a presentence investigation report, the trial court did not have the fullest information possible concerning Ms. Alltus’ past life and her personal characteristics. *See Russell*, 31 Wn. App. at 648 (citing *Williams*, 337 U.S. at 247; *Blight*, 89 Wn.2d at 41). Given her young age, lack of criminal history, and the fact that she faced a de facto life sentence, the trial court should have ordered a presentence investigation report. *See, e.g., State v. Langford*, 12 Wn. App. 228, 231, 529 P.2d 839 (1974) (ruling that a presentence report should have been ordered where the defendant “is young, a first offender, and faces a possibly lengthy incarceration[.]”). Moreover, the trial court could not effectively consider Ms. Alltus’ request for a mitigated sentence below the standard range, without a complete view of Ms. Alltus’ past life and personal characteristics.

The trial court abused its discretion by denying Ms. Alltus' motion to continue the sentencing hearing for preparation of a presentence report. The case should be reversed and remanded for resentencing with a presentence investigation report.

Issue 8: Whether Ms. Alltus was deprived of her due process rights when juvenile court jurisdiction was automatically declined and no hearing was held to determine whether juvenile court should retain jurisdiction.

Prior to this case, Ms. Alltus had no criminal history. (CP 43; 3 RP 222). Given the nature of the charges and Ms. Alltus' age, RCW 13.04.030 mandated automatic transfer of the case from juvenile to adult court without the hearing otherwise held to determine whether such transfer is appropriate. (CP 469-474, 446-451; 2 RP 109-110, 124); *see also* RCW 13.04.030(1)(e)(v)(A) (stating "the juvenile courts in this state shall have exclusive original jurisdiction over all proceedings . . . [r]elating to juveniles alleged or found to have committed offenses . . . unless . . . [t]he juvenile is sixteen or seventeen years old on the date the alleged offense is committed and the alleged offense is . . . [a] serious violent offense as defined in RCW 9.94A.030[.]"); RCW 9.94A.030(46)(a)(i) (first degree murder is a serious violent offense).

Ms. Alltus was entitled to a hearing before juvenile court jurisdiction was declined, and because she was deprived of the ability to present evidence of why she should remain in juvenile court, she was deprived of due process of law. Her convictions should be reversed and remanded for a declination hearing. *See*

Dillenberg v. Maxwell, 70 Wn.2d 331, 355-56, 422 P.3d 783 (1967) (setting forth the remedy for faulty transfer of a case from juvenile to adult court).

The constitutionality of the automatic decline procedure was upheld in *In re Boot*. See *In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996). However, in *State v. Houston-Sconiers*, our Supreme Court recognized that some of its discussion in *In re Boot* stands in “tension” with United States Supreme Court precedent. See *Houston-Sconiers*, 188 Wn.2d at 26. Although the Court declined to address the validity of the automatic decline statute, it stated “we do not intend to foreclose consideration of such an argument in the future.” See *Houston-Sconiers*, 188 Wn.2d at 27 n.11. Ms. Alltus now argues the automatic decline statute is unconstitutional.⁴

In upholding the constitutionality of the automatic decline procedure in *In re Boot*, our Supreme Court relied upon *Stanford v. Kentucky*. See *In re Boot*, 130 Wn.2d at 571 (citing *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989)). However, *Stanford v. Kentucky* was abrogated by the United States Supreme Court in *Roper v. Simmons*. See *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Since *Roper*, the United States Supreme Court had made clear that youth who are charged with crimes must be treated

⁴ Our Supreme Court recently accepted review of the issue of whether a defendant’s due process rights are violated when juvenile court jurisdiction is automatically declined. See *State of Washington v. Tyler William Watkins*, Supreme Court No. 949735, COA No. 76205-2-I, motion to transfer the case to the Supreme Court granted October 26, 2017, oral argument scheduled for March 13, 2018.

differently than adults. *See Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed 2d 825 (2010); *Miller*, 567 U.S. 460; *Montgomery*, 136 S. Ct. 718. Our Supreme Court has also recognized the special status juveniles have in the criminal justice system. *See Houston-Sconiers*, 188 Wn.2d at 21. For these reasons, *In re Boot* is no longer good law.

The United States Supreme Court explained that “there is no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without effective assistance of counsel, without a statement of reasons” as the question of when a youth may be transferred to adult court. *Kent v. United States*, 383 U.S. 541, 554, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). The liberty interests at stake in the transfer of a youth from juvenile to adult criminal court are “critically important,” and they call for heightened procedural protections not provided under Washington’s automatic decline statute. *Id.* at 553-54; *see also* RCW 13.04.030(1)(e)(v) (automatic decline statute). In *Kent*, the Court found it “clear beyond dispute that the waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile,” and thus it must “satisfy the basic requirements of due process and fairness.” *Kent*, 383 U.S. at 553, 556.

Due process requires a hearing before juvenile court jurisdiction is declined for youth charged with a crime. “[T]he Due Process Clause provides that certain substantive rights – life, liberty, and property - - cannot be deprived

except pursuant to constitutionally adequate procedures.” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). At a minimum, compliance with due process and fundamental fairness requires the court to identify the private interest affected by the official action, the risk of erroneous deprivation, the probable value of additional safeguards, and the State’s interest. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). To satisfy this due process requirement, courts must conduct an inquiry into the youth’s needs, amenability to treatment, and the underlying facts to determine whether decline is appropriate. *See Kent*, 383 U.S. at 546; *Miller*, 567 U.S. at 489; *see also In re Gault*, 387 U.S. 1, 31, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). It is only by conducting an individualized assessment of whether a child should be transferred to adult court that due process can be satisfied. *See Kent*, 383 U.S. at 546; *Miller*, 567 U.S. at 489.

Automatic decline of juvenile court jurisdiction is inconsistent with due process. Due process requires a hearing prior to a juvenile court declining jurisdiction. Because Ms. Alltus was deprived of her due process rights, her convictions should be reversed and the case remanded for a declination hearing.

Issue 9: The judgment and sentence contains an error that should be corrected: it indicates Ms. Alltus was sentenced to a maximum term of confinement of life.

The trial court sentenced Ms. Alltus to a total term of confinement of 460 months. (CP 41-52; 3 RP 250-252, 257). However, the judgment and sentence

indicates Mr. Alltus was sentenced to a maximum term of confinement of life. (CP 45).

Ms. Alltus was not sentenced to a maximum term of confinement of life. (3 RP 250-252, 257). This term of confinement applies to convictions for aggravated first degree murder, and Ms. Alltus was not found guilty of aggravated first degree murder. (CP 87, 90-91; 3 RP 206-207); *see also* RCW 10.95.030(3) (sentence for a juvenile convicted of aggravated first degree murder). Therefore, this court should remand this case for correction of the judgment and sentence to remove the language indicting Ms. Alltus was sentenced to a maximum term of confinement of life. *See, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

Issue 10: Whether this Court should deny costs against Ms. Alltus on appeal in the event the State is the substantially prevailing party.

Ms. Alltus preemptively objects to any appellate costs being imposed against her, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

An order finding Ms. Alltus indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 2-17; 3 RP 251). To the contrary, Ms. Alltus' report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Ms. Alltus remains indigent. The report shows that Ms. Alltus' financial circumstances have not improved since the date she was sentenced in this case.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835, 44 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing

thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Ms. Alltus has demonstrated her indigency and current and future inability to pay costs. In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs, as suggested by the trial court in this case. *See Blazina*, 182 Wn.2d at 832, n.1. Ms. Alltus would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). The trial court is

required to conduct an individualized inquiry prior to imposing the costs, not prior to the State's collection efforts. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. Ms. Alltus met this standard for indigency. (CP 2-17; 3 RP 251).

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 2-17. “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to “seriously question” this indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Ms. Alltus to demonstrate her continued indigency given the newly amended RAP 15.2, since her indigency is

presumed to continue during this appeal. Nonetheless, Ms. Alltus' report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Ms. Alltus remains indigent.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the "supreme court . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State's requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Ms. Alltus' current indigency or likely future ability to pay has significantly improved since the trial court entered its order of

indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Ms. Alltus remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

Ms. Alltus' conviction for second degree unlawful possession of a firearm (count 7) should be reversed, because the charging document was inadequate to give Ms. Alltus notice of the crime charged.

Ms. Alltus requests that the remaining counts be reversed and the matter remanded for a new trial so that she has the opportunity to cross-examine Mr. Bachtold regarding his reasons for committing the murder and to testify to the prior inconsistent statement made by Mr. Bachtold.

A new trial is also warranted based upon the trial court's failure to give a jury instruction regarding the testimony of an accomplice.

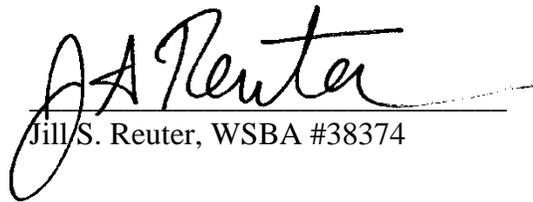
Ms. Alltus is entitled to a resentencing, during which the trial court must consider the factors set forth in *Miller v. Alabama* and exercise its discretion to consider a sentence below the standard adult range, including a mitigated sentence on the sentencing enhancements. A presentence investigation report should also be ordered before imposing a sentence.

In addition, because Ms. Alltus was deprived of due process of law when her case was automatically transferred to adult court, her convictions should be reversed and remanded for a declination hearing.

The judgment and sentence should be corrected to remove the language indicting Ms. Alltus was sentenced to a maximum term of confinement of life.

Ms. Alltus asks this Court to deny the imposition of any costs against her on appeal.

Respectfully submitted this 9th day of November, 2017.



Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

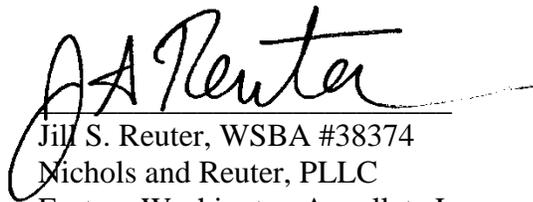
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34677-3-III
vs.)
SHALIN E. ALLTUS)
Defendant/Appellant)
PROOF OF SERVICE)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 9, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Shalin Alltus, DOC No. 393403
Unit: CCU East 311
Washington Corrections Center for Women
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Gig Harbor, WA 98332-8300

Having obtained prior permission from the Okanogan County Prosecutor's Office, I also served the Respondent State of Washington at bplatter@co.okanogan.wa.us and sfield@co.okanogan.wa.us using the Washington State Appellate Courts' Portal.

Dated this 9th day of November, 2017.



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