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NO. 34677-3-III

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

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STATE OF WASHINGTON  
PLAINTIFF/RESPONDENT,

V.

SHALIN E. ALLTUS  
DEFENDANT/APPELLANT

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BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

STATEMENT OF THE CASE.....	1
ARGUMENT.....	7
A. <u>The charging document was adequate to give Appellant notice of the crime charged for Count 7, unlawful possession of a firearm in the second degree</u> .....	7
B. <u>Appellant was not denied her right to present a defense as Mr. Bachtold's motive for shooting the victim was inadmissible and irrelevant</u> .....	14
C. <u>The trial court did not err when it prohibited Appellant from testifying to prior statements by Mr. Bachtold because no foundation had been laid for impeachment</u> .....	22
D. <u>Defense counsel was not ineffective for failing to ask Mr. Bachtold about his prior inconsistent statement given the substantial other prior inconsistent statements elicited on cross-examination</u> .....	26
E. <u>Any error by the trial court in excluding evidence was harmless error</u> .....	33
F. <u>The trial court did not err in refusing to give the accomplice liability jury instruction because the State did not rely solely on the uncorroborated testimony of Mr. Bachtold</u> .....	36
G. <u>The trial court was not required to conduct a <i>Miller</i> hearing prior to sentencing as Appellant was not sentenced to a de facto life sentence</u> .....	43
H. <u>The trial court did not abuse its discretion in refusing to continue sentencing to allow defense to prepare a pre-sentence investigation report</u> .....	47

I.	<u>Appellant’s due process rights were not violated when she was subject to original adult jurisdiction as a juvenile in compliance with RCW 13.04.030(1)(e)(v)</u> .....	51
J.	<u>There is no error in the judgment and sentence</u> .....	60
K.	<u>Imposition of Costs on Appeal</u> .....	61
CONCLUSION.....		61

## TABLE OF AUTHORITIES

### Washington State Authority

<i>Amunrud v. Board of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006) ...	58
<i>Driggs v. Howlett</i> , 193 Wn.App. 875, 371 P.3d 61 (Div.3 2016) ....	28, 36
<i>In re Boot</i> , 130 Wn.2d 553, 925 P.2d 964 (1996) .....	51, 52, 57, 59
<i>In re Dalluge</i> , 152 Wn.2d 772, 100 P.3d 279 (2004) .....	57
<i>In re Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004) .....	27
<i>Jones v. City of Seattle</i> , 179 Wn.2d 322, 314 P.3d 380 (2013) ...	29, 35, 36
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997) .	14, 22
<i>State v. Aguirre</i> , 168 Wn.2d 350, 229 P.3d 669 (2010) .....	14, 15, 22
<i>State v. Allen</i> , 176 Wn.2d 611, 294 P.3d 679 (2013) .....	10
<i>State v. Babich</i> , 68 Wn.App. 438, 842 P.2d 1053 (Div.3 1993) .....	24, 29
<i>State v. Baird</i> , 83 Wash. App. 477, 922 P.2d 157 (Div. 1 1996) .....	17
<i>State v. Beaver</i> , 184 Wn.2d 321, 358 P.3d 385 (2015) .....	54
<i>State v. Carothers</i> , 84 Wn.2d 256, 525 P.2d 731 (1974) .....	39
<i>State v. Clinkenbeard</i> , 130 Wn.App. 552, 123 P.3d 872 (Div.3 2005) ...	29
<i>State v. Cunningham</i> , 93 Wn.2d 823, 613 P.2d 1139 (1980) .....	33, 35
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002) .....	15, 16, 20, 22
<i>State v. DeLeon</i> , 185 Wn.2d 478, 374 P.3d 95 (2016) .....	20
<i>State v. Dixon</i> , 114 Wn.2d 857, 792 P.2d 137 (1990) .....	57
<i>State v. Donald</i> , 178 Wash. App. 250, 316 P.3d 1081 (Div. 1 2013) .....	17

<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009) .....	10
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008) .....	29, 36
<i>State v. Furman</i> , 122 Wn.2d 440, 858 P.2d 1092 (1993) .....	54
<i>State v. Grant</i> , 89 Wn.2d 678, 575 P.2d 210 (1978) .....	10
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011) .....	26, 27
<i>State v. Gross</i> , 31 Wn.2d 202, 196 P.2d 297 (1948) .....	39
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985) .....	35
<i>State v. Horton</i> , 116 Wn.App. 909, 68 P.3d 1145 (Div.2 2003) ..	30, 31, 32
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017) .....	44, 45
<i>State v. Jamison</i> , 93 Wn.2d 794, 613 P.2d 776 (1980) .....	35
<i>State v. Johnson</i> , 40 Wn.App. 371, 699 P.2d 221 (1985) .....	29, 30
<i>State v. Johnson</i> , 124 Wn.2d 57, 873 P.2d 514 (1994) .....	28, 36
<i>State v. Johnson</i> , 180 Wn.2d 295, 325 P.3d 135 (2014) .....	10, 11
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010) .....	14
<i>State v. Jones</i> , 19 Wn.App. 850, 578 P.2d 71 (Div. 1, 1978) .....	19
<i>State v. Jorgenson</i> , 179 Wn.2d 145, 312 P.3d 960 (2013) .....	52
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991) .....	8, 9
<i>State v. Langford</i> , 12 Wn.App. 228, 529 P.2d 839 (1974) .....	48
<i>State v. Lile</i> , 188 Wn.2d 766, 782, 398 P.3d 1052 (2017) .....	15, 22
<i>State v. Lizarraga</i> , 191 Wn.App. 530, 364 P.3d 810 (Div.1 2015) ...	16, 17

<i>State v. Lynch</i> , 178 Wn.2d 487, 309 P.3d 482 (2013) .....	35
<i>State v. Madison</i> , 53 Wash. App. 754, 770 P.2d 662 (Div. 1 1989) .....	17
<i>State v. Manussier</i> , 129 Wn.2d 652, 921 P.2d 478 (1996) .....	60
<i>State v. Martin</i> , 73 Wn.2d 616, 440 P.2d 429 (1968) .....	35
<i>State v. Maynard</i> , 183 Wn.2d 253, 351 P.3d 159 (2015) .....	57, 59
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	26
<i>State v. Mee Hui Kim</i> , 134 Wash. App. 27, 139 P.3d 354 (Div. 1 2006) .....	17
<i>State v. Merrill</i> , 23 Wn.App. 577, 597 P.2d 446 (Div.3, 1979) .....	10
<i>State v. Myles</i> , 127 Wn.2d 807, 903 P.2d 979 (1995) .....	52
<i>State v. Noltie</i> , 116 Wn.2d 831, 809 P.2d 190 (1991) .....	9
<i>State v. Norlin</i> , 134 Wn.2d 570, 951 P.2d 1131 (1998) .....	14
<i>State v. Perez-Valdez</i> , 172 Wn.2d 808, 265 P.3d 853 (2011) .....	14, 22
<i>State v. Peterson</i> , 168 Wn.2d 763, 230 P.3d 588 (2010) .....	10
<i>State v. Picard</i> , 90 Wash. App. 890, 954 P.2d 336 (Div. 2 1998) .....	17
<i>State v. Posey</i> , 174 Wn.2d 131, 272 P.3d 840 (2012) .....	51
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995) .....	14, 15, 22
<i>State v. Rafay</i> , 168 Wash. App. 734, 285 P.3d 83 (Div. 1 2012) .....	17
<i>State v. Ramos</i> , 187 Wn.2d 420, 387 P.3d 650 (2017) .....	43, 44
<i>State v. Rhoads</i> , 35 Wn.App. 339, 666 P.2d 400 (Div.3 1983) .....	36
<i>State v. Ronquillo</i> , 190 Wn.App. 765, 361 P.3d 779 (Div. 1, 2015) .....	46

<i>State v. Rogers</i> , 83 Wn.2d 553, 520 P.2d 159 (1974) .....	34, 35
<i>State v. Salavea</i> , 151 Wn.2d 133, 86 P.3d 125 (2004) .....	57
<i>State v. Saloy</i> , 197 Wn.App. 1080 (Div.1, 2017) (Unpublished Opinion, GR 14.1) .....	46
<i>State v. Saunders</i> , 177 Wn.App. 259, 311 P.3d 601 (Div.1, 2013) ...	10, 11
<i>State v. Scott</i> , 196 Wn.App. 961, 385 P.3d 783 (Div. 1, 2016) .....	45
<i>State v. Soper</i> , 135 Wash. App. 89, 143 P.3d 335 (Div. 2 2006) .....	17
<i>State v. Strizheus</i> , 163 Wash. App. 820, 262 P.3d 100 (Div. 1 2011) ....	17
<i>State v. Sublett</i> , 156 Wash. App. 160, 231 P.3d 231 (Div. 2 2010) .....	17
<i>State v. Thomas</i> , 123 Wash. App. 771, 98 P.3d 1258 (Div. 1 2004) .....	17
<i>State v. Vangerpen</i> , 125 Wn.2d 782, 888 P.2d 1177 (1995) .....	10
<i>State v. Watt</i> , 160 Wn.2d 626, 160 P.3d 640 (2007) .....	35
<i>State v. Willis</i> , 113 Wash. App. 389, 54 P.3d 184 (Div. 1 2002) .....	17
<i>State v. Willoughby</i> , 29 Wn.App. 828, 630 P.2d 1387 (Div.1, 1981) .....	39
<i>State v. Zillyette</i> , 178 Wn.2d 153, 158, 307 P.3d 712 (2013) .....	10
<i>Tumelson v. Todhunter</i> , 105 Wn.2d 596, 716 P.2d 890 (1986) .....	29
 <u>United States Authority</u>	
<i>Albright v. Oliver</i> , 510 U.S. 266, 114 S.Ct. 807 (1994) .....	58
<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038 (1973) .....	16
<i>District Attorney's Office of Third Judicial District v. Osborne</i> , 557 U.S. 72, 129 S.Ct. 2308 (2009) .....	58

<i>Ewing v. California</i> , 538 U.S. 11, 123 S.Ct. 1179 (2003) .....	60
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S.Ct. 2011 (2010) .....	43, 52, 53, 55
<i>Hagner v. United States</i> , 285 U.S. 427, 52 S.Ct. 417 (1932) .....	8
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S.Ct. 2455 (2012) .....	43, 44, 52, 53, 55, 60
<i>Montgomery v. Louisiana</i> , ___ U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) .....	52
<i>Neder v. United States</i> , 527 U.S. 1, 19 (1999) .....	35
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S.Ct. 1183 (2005) .....	43, 52, 53, 57
<i>Stanford v. Kentucky</i> , 492 U.S. 361, 109 S.Ct. 2969 (1989) .....	57
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984) .....	26
<i>Taylor v. Illinois</i> , 484 U.S. 400, 108 S.Ct. 646 (1988) .....	15
<i>United States v. Blevins</i> , 960 F.2d 1252 (1992) .....	34
<i>United States v. Scheffer</i> , 523 U.S. 303, 118 S.Ct. 1261 (1998) .....	16, 17
<i>Washington v. Glucksberg</i> , 521 U.S. 702, 117 S.Ct. 2258 (1997) .....	58
 <u>Additional State Authority</u>	
<i>People v. Patterson</i> , 25 N.E.3d 526 (Ill. 2014) .....	55
<i>State v. Aalim</i> , 150 Ohio St.3d 489, 83 N.E.3d 883 (Ohio 2017) ( <i>Aalim II</i> ) .....	56, 58
<i>State v. Jensen</i> , 161 Idaho 243, 385 P.3d 5 (Idaho 2016) .....	55, 59

Constitutional Authority

US Const. Amend. 8 ..... 51, 53

US Const. Amend. 14 ..... 54

WA Const. art. 1, §3 ..... 54

WA Const. art. 1, §22 ..... 9

WA Const. art. 4, §5 ..... 51

WA Const. art. 4, §6 ..... 51

Washington Statutes and Court Rules

CrR 7.1(a) ..... 47, 48

ER 401 ..... 18, 22

ER 402 ..... 18

ER 403 ..... 18

ER 404(a) ..... 18, 19

ER 404(b) ..... 18, 19, 21

ER 611(a) ..... 24

ER 613(b) ..... 23, 24, 31, 32, 38

ER 801 ..... 23

ER 802 ..... 23

RCW 9.41.010(10) ..... 11, 13

RCW 9.41.040(2)(a) ..... 11

RCW 9.94A.500(1) .....	47, 48, 49
RCW 13.04.030(1)(e)(v) .....	51, 54, 56, 57, 59
RCW 13.40.110(3) .....	54

Additional Authority

5 Wash. Prac., Evidence Law and Practice §103.24 .....	34
11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 6.05 (4th Ed) ...	36, 37, 39
11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 133.02.04 (4th Ed) ...	11
ABA Criminal Standards, Sentencing Alternatives and Procedures §4.1 (Approved Draft, 1968) .....	48
Dennis J. Sweeney, <i>An Analysis of Harmless Error in Washington: A Principled Process</i> , 31 GONZ.L.REV. 277, 319 (1995) .....	29
<i>Karl Tegland</i> , Washington Practice, Courtroom Handbook on Washington Evidence (5D 2017-2018) .....	19, 20, 24
Laws of Washington 1 <sup>st</sup> Sp. Sess. Ch. 7, §1 .....	60

## STATEMENT OF THE CASE

On October 5, 2014, the victim, Patrick Alltus, was found dead in his home. [RP 210, 218-220, 234-35, 237-39, 255-56] His body was discovered laying on the floor in the living room area; his body was covered by a blanket and a plastic bag was covering his head. [RP 417, 218, 237, 255-56, 341-42] The victim had been shot twice. [RP 225, 230, 417, 421, 470-90, 512-17]. The first shot was a single .22 caliber Magnum rimfire rifle round to the right forearm which traveled through his arm and re-entered his bicep. [RP 417, 470-80, 491, 237-38, 263-65, 318] The second shot was from a .410 shotgun to the victim's face. [RP 421, 470, 472, 482-90, 514-15] While shotgun pellets and shot wading were found in the victim's facial wound during the autopsy, the fragments could not be matched to any particular weapon. [RP 266-68, 318-19, 486, 490]

At the time of his death, Appellant, sixteen year old Shalin Alltus, lived with the victim. [RP 334, 614-616; RP 252, 261, 317, 324] The co-defendant, sixteen year old Parker Bachtold, also lived with the victim at the time. [RP 332, 334-35, 371, 616-18] Appellant and Mr. Bachtold were "boyfriend and girlfriend." [RP 13, 15, 336, 371, 618, 641]

When the victim's body was found, one of his vehicles was missing from the property. [RP 270-74, 415-16, 217, 246-47, 257, 264-

66] Appellant and Mr. Bachtold were not at the house and their whereabouts were unknown. [RP 239-40, 242-43, 245-46, 343] Law enforcement issued a state-wide alert for the victim's missing vehicle and listed Appellant and Mr. Bachtold as suspects. [RP 247, 348]

On October 6, 2014, law enforcement learned that an Oregon State Trooper had contacted Appellant and Mr. Bachtold on a traffic stop, but they were not apprehended because they had given false names to the Trooper who was called away to another incident. [RP 322, 326, 354-56, 633-34, 652-54, 348-50, 352] It was learned that Mr. Bachtold's father was in Curtain, Oregon so law enforcement requested local law enforcement check the address. [RP 85-86, 349] The victim's vehicle was located outside a local motel in an extremely remote area. [RP 364-65] Local officers began surveillance and witnessed Mr. Bachtold come out of a motel room, sit on a chair, and start smoking a cigarette. [RP 368] Appellant then came out shortly after, sat on Mr. Bachtold's lap, and began sharing his cigarette. [RP 368] They were then arrested by law enforcement. [RP 371]

A .22 Magnum rifle and a Mossberg .410 shotgun were found in the motel room, along with clothes, makeup, hairspray, .410 shotgun ammunition, and other personal belongings. [RP 321, 377, 91-92] Both of the guns had been cleaned. [RP 560]

Appellant was interviewed by law enforcement. In her interview she admitted to giving a false name to the Oregon State Trooper, even though Mr. Bachtold was removed from the vehicle and was not within earshot. [RP 322, 326] She had also given a false name to people at the motel. [RP 322, 326] Appellant admitted that she had thrown her identification and the victim's cell phone out of the vehicle window before they had gotten to the motel. [RP 372-73] Appellant gave conflicting accounts of events during her interviews. [RP 372-73] Appellant further admitted that there were multiple times that she was separate from Mr. Bachtold after the murder. [RP 14, 24, 46]

While Appellant was detained in the Okanogan County Juvenile Detention Facility pending trial, she told her father information about the victim being shot in the arm. [RP 323] She also wrote a note to Mr. Bachtold telling him that she was going to help him bail out and they would run away together. [RP 281] Appellant gave different versions of the events to her roommate at the detention facility and told her "she knew it was gonna happen..." [RP 521-24]

Appellant was charged with Count 1- First Degree Aggravated Murder, Count 2- Robbery in the First Degree, Count 3- Theft of a Motor Vehicle, Count 4- Theft of a Firearm, Count 5- Theft of a Firearm, Count 6- Unlawful Possession of a Firearm Second Degree, and Count 7-

Unlawful Possession of a Firearm Second Degree. [CP 446-451] Per RCW 13.04.030, her case was charged in adult court.

Mr. Bachtold plead guilty to his charges and was sentenced to 30 years in prison with no requirement that he testify in the case involving Appellant. [RP 315-16, 320, 332-33, 370] The State called Mr. Bachtold as a witness. [RP 341-355] Mr. Bachtold testified that he was in the bedroom when he heard one gunshot. [RP 341] He grabbed the .410 shotgun from his room and went out into the living room. [RP 342] He saw Appellant behind the couch and the victim was coming around the side of the couch. [RP 345] He was cursing and saying “you shot me.” [RP 345] The victim was bleeding from his arm. [RP 343] The .22 Magnum firearm was on the floor by Appellant’s feet. [RP 345] Mr. Bachtold testified that he came around the couch and shot the victim in the head with the .410 shotgun. [RP 346] Mr. Bachtold testified that he did not shoot the victim with the .22 rifle. [RP 369] Mr. Bachtold then covered the body with a blanket and Appellant placed a plastic bag on his head. [RP 348] Both of them grabbed personal items and left the house together, taking the victim’s truck. [RP 349] They fled to Oregon and when they were pulled over by an Oregon State Trooper for an infraction, they both gave fake names. [RP 355] They were later arrested at the motel.

Mr. Bachtold was extensively cross-examined regarding prior inconsistent statements he had made during interviews with law enforcement. [RP 387-399] Defense counsel later called Mr. Bachtold as a witness in their case. [RP 576-584]

In pre-trial motions and during trial the parties argued regarding defense's intent to elicit testimony regarding Mr. Bachtold's motive for his part in the murder. [CP 411, 389-90; RP 142-154] Specifically, defense counsel believed Mr. Bachtold's motive involved the belief of sexual impropriety between Appellant and the victim. [RP 142] However, the trial court excluded that evidence on the grounds that it was character evidence. [RP 146, 156-158] The trial court found there was no affirmative defense being offered that would put the victim's character at issue and the evidence would also be irrelevant. [RP 142, 154]

Appellant testified at trial and denied shooting the victim. [RP 612-670] She attempted to testify that on the night of the murder, she was in her room when Mr. Bachtold came into her room and said, "I just killed your uncle." [RP 621] The State objected to the statement as hearsay as Mr. Bachtold had not been asked about the statement either of the two times he testified so it was not proper impeachment. [RP 622] The trial court excluded this prior statement because no foundation had been laid under ER 613, either when he was cross-examined by defense counsel

during the State's case or when the defense called them as a witness themselves. [RP 371-399, 571-606]

The trial court later refused to give Appellant's requested "accomplice testimony" instruction because the defense had called Mr. Bachtold as a witness in their own case. [RP 688-89] The "to convict" jury instruction for Count 7 referenced the .410 shotgun in its introductory language. [CP 134] The charging document contained a scrivener's error in Count 7 which included "to wit: .22 rifle" similar to Count 6, rather than the correct "to wit: .410 shotgun." [CP 451]

The jury found Appellant guilty of Murder in the First Degree as well as all other six counts. [CP 87, 90-91] The jury also found that Appellant was armed with a firearm for Counts 1 and 2. [CP 92] The verdict was returned the evening of August 29, 2016. [CP 82; RP 204, 212] The State requested sentencing be held the next day due to the family being present. [RP 211] Defense counsel objected citing the need to prepare mitigating circumstances for sentencing. [RP 211] However, defense counsel then indicated her contract with public defense had expired and she would not be continuing on with sentencing and new counsel would have to handle sentencing. [RP 212] The trial court indicated that due to another trial starting, the family being present, and

defense counsel's schedule, sentencing would commence the following day. [RP 212]

The trial court denied defense counsel's subsequent motion to continue sentencing and indicated the court felt it could render an effective sentence based on Appellant's criminal history, financial situation, and the sentencing guidelines. [RP 225-26] Appellant was sentenced to a total sentence of 460 months. [CP 41-52] This included 400 months on the controlling Count 1 with an additional 60 month firearm enhancement. [RP 41-52]

#### **ARGUMENT**

- A. The charging document was adequate to give Appellant notice of the crime charged for Count 7, unlawful possession of a firearm in the second degree.

Appellant was given proper notice of the elements of unlawful possession of a firearm in the charging document as the specific firearm unlawfully possessed is not, itself, an element of the crime. Furthermore, the jury instruction for Count 7 did not instruct the jury that it had to find unlawful possession of a ".410 shotgun." The reference to a .410 shotgun appears in the introductory language of the instruction as a reference to the jury regarding which firearm applied to that charge.

Charging documents which are not challenged until after the verdict will be more liberally construed in favor of validity than those

challenged before or during trial. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). A different standard of review should be applied when no challenge to the charging document has been raised at or before trial because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refile of the charge. *Id.* Applying a more liberal construction on appeal discourages “sandbagging.” *Id.* This is a potential defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading. *Id.*

Washington has adopted the federal standard of review for challenges to charging documents laid out in *Hagner v. United States*, 285 U.S. 427, 433, 52 S.Ct. 417 (1932) with some additions. *Id.* at 104. The standard of review set out in *Hagner* was as follows- “Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.” *Id.* at 104 citing *Hagner*, 285 U.S. at 433. *Kjorsvik* subsequently added an essential elements prong and an inquiry into whether there was actual prejudice. *Id.* at 105.

The first prong- the liberal construction of the charging document language- looks to the face of the document. *Id.* at 106. The construction

is often asked as “do the necessary facts appear in any form, or by fair construction can they be found, in the charging document?” *Id.* at 105. The second prong looks beyond the charging document to determine if the accused actually received notice of the charges he or she must have been prepared to defend against. *Id.* Put another way, “can the defendant show that he or she was nonetheless actually prejudiced by the inartful [*sic*] language which caused a lack of notice?” *Id.*

In this case, Appellant never challenged the charging document until this appeal. This Court must therefore construe the charging document liberally in favor of validity. *Id.* at 102.

A defendant has a constitutional right to be informed of the nature and cause of the accusation against him or her to enable the defense to prepare a defense and to avoid a subsequent prosecution for the same crime. *State v. Noltie*, 116 Wn.2d 831, 840, 809 P.2d 190 (1991); WA Const. art. 1, §22. The omission of any element of the charged crime, statutory or otherwise, renders the charging document constitutionally defective. *Kjorsvik*, 117 Wn.2d at 97. The constitutional right of a criminal defendant to be appraised with reasonable certainty as to the charges against him or her is ordinarily satisfied by a charging document which charges a crime in the language of the statute, where the crime is defined with certainty within the statute. *State v. Merrill*, 23 Wn.App.

577, 580, 597 P.2d 446 (Div.3, 1979), review denied, 92 Wn.2d 1036;  
*State v. Grant*, 89 Wn.2d 678, 686, 575 P.2d 210 (1978).

The information is constitutionally sufficient if all essential elements of a crime are included in the document. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014); *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The elements of a crime are commonly defined as “[t]he constituent parts of a crime-[usually] consisting of the actus reus, mens rea, and causation- that the prosecution must prove to sustain a conviction.” *State v. Peterson*, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) citing *State v. Fisher*, 165 Wn.2d 727, 754, 202 P.3d 937 (2009). “An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.” *Johnson*, 180 Wn.2d at 300; *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).

It is well established that definitions of terms are not essential elements and need not be included in the charging document. *See Johnson*, 180 Wn.2d 295<sup>1</sup>; *State v. Allen*, 176 Wn.2d 611, 626-27, 294 P.3d 679 (2013)<sup>2</sup>; *State v. Saunders*, 177 Wn.App. 259, 311 P.3d 601

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<sup>1</sup> The definition of “restrain” within the language for unlawful imprisonment is not an essential element and need not be included in the charging language. *Johnson*, 180 Wn.2d at 302.

<sup>2</sup> The “true threat” requirement of harassment is not an essential element of the crime of harassment and need not be included in the charging document. The concept of a “true threat” merely defines and limits the scope of the essential threat element. *Allen*, 176 Wn.2d at 626-27.

(Div.1, 2013)<sup>3</sup>. “The State need not include definitions of elements in the information.” *Johnson*, 180 Wn.2d at 302. A definition defines and limits the scope of the essential element; however, “[t]hat does not make the definition itself an essential element that must be included in the information.” *Id.*

Under RCW 9.41.040(2)(a),

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person... owns, has in his or her possession, or has in his or her control any firearm: (iv) If the person is under eighteen years of age, except as provided in RCW 9.41.042.

A “firearm” means “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder. RCW 9.41.010(10). The First Amended Information charged Appellant in Count 7 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; contrary to RCW 9.41.040(2)(a)(iv).

[CP 451]

The jury was given WPIC 133.02.04 in Jury Instruction No. 19

which read as follows:

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<sup>3</sup> The definition of “restrain” is not an essential element of kidnapping for purposes of being included in a to-convict instruction, it is merely a definitional term that clarifies the meaning of “abduct” which is the essential element. *Saunders*, 177 Wn.App. 259.

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; and
- (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 738-39] See also 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 133.02.04 (4th Ed). The jury was instructed that the element of the crime itself was “a firearm.” Given that there were multiple firearms involved in this case, the reference to a “.410 shotgun” was inserted into the introductory clause so that the jury knew which firearm applied to this charge. This ensured jury unanimity, without adding any additional elements to the crime. The designation of a “.410 shotgun” is not an element that the State need prove and therefore need not appear in the charging document. The State need only prove that Appellant possessed a

*firearm*. The specific firearm is merely a piece of evidence to show that the specific firearm qualifies as “a firearm” under the firearm definition in RCW 9.41.010(10).

Furthermore, Appellant cannot show actual prejudice by any defect in the charging document. Both Counts 6 and 7, the Unlawful Possession of Firearm Second Degree counts that correspond to the two firearms involved in this case, mistakenly have the same “to wit” language referencing a .22 rifle. [CP 450-51] Appellant was charged with theft of the .22 rifle and the .410 shotgun. [CP 449-450, Count 4 and Count 5] She was then charged with corresponding unlawful possession of firearm due to being under the age of eighteen at the time she possessed the weapons. [CP 450-51] Reference to a shotgun appeared throughout this case and Appellant was on notice that a .410 shotgun was alleged in this case.

While Count 7 contains a scrivener’s error in the “to wit” language, Appellant was on notice that she was accused of theft of a 410 shotgun and that the possession of any firearm by her was unlawful due to her age. Furthermore, the “to wit” language is not an element of the charge. It is superfluous language to provide clarification of which charge applies to which firearm. Appellant recognizes that reference to a 410 shotgun was included in the charging document with reference to Count 5.

[*Appellant's Brief*: pg. 26] Therefore, Appellant had sufficient notice and ability to prepare a defense. Appellant was not prejudiced by the scrivener's error in Count 7.

B. Appellant was not denied her right to present a defense as Mr. Bachtold's motive for shooting the victim was inadmissible and irrelevant.

The trial court did not err when it excluded evidence of co-defendant, Parker Bachtold's, motive for his participation in the murder. While the trial court excluded the evidence as character evidence, the evidence would also properly be excluded as irrelevant. A reviewing court may affirm a trial court's decision as to the admissibility of evidence on any basis supported by the record. *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998); *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

A claim of denial of Sixth Amendment rights is reviewed de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and they are reviewed only for manifest abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-663, 935 P.2d 555 (1997); *State v. Perez-Valdez*, 172 Wn.2d 808, 814, 265 P.3d 853 (2011); *Powell*, 126 Wn.2d at 258. An erroneous ruling with respect to such

questions requires reversal only if there is a reasonable possibility that the testimony would have changed the outcome of trial. *Aguirre*, 168 Wn.2d at 361. A trial court's decision to limit cross-examination of a witness for impeachment purposes is also reviewed for abuse of discretion. *Id.*; *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A manifest abuse of discretion arises when "the trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or reasons.'" *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017); *Darden*, 145 Wn.2d at 619; *Powell*, 126 Wn.2d at 258. The reviewing court need not agree with the trial court's decision in order to affirm the decision. *Lile*, 188 Wn.2d at 782. The Court must merely hold the decision to be reasonable. *Id.*

Appellant asserts that she was denied her constitutional right to present a defense due to her inability to cross-examine Mr. Bachtold about his motive or reasons for his participation in the murder. However, the constitutional right to present a defense does not extend to the introduction of otherwise inadmissible evidence. *Aguirre*, 168 Wn.2d at 363. "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646 (1988). The right to cross-examine adverse witnesses is not absolute. *Darden*, 145

Wn.2d at 620. Courts may, within their discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. *Id.*

In *State v. Lizarraga*, 191 Wn.App. 530, 553, 364 P.3d 810 (Div.1 2015), review denied, 185 Wn.2d 1022 (2016), the defendant attempted to introduce out-of-court hearsay statements.<sup>4</sup> Division One held that the trial court did not violate the defendant's Sixth Amendment right to present a defense when it excluded the hearsay statements. *Id.* at 553.

Division One recognized that “[t]he defendant’s right to present a defense is subject to ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *Id.* at 553 citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038 (1973). “Evidentiary ‘rules do not abridge an accused’s right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Lizarraga*, 191 Wn.App. at 553 citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261 (1998). Accordingly, a defendant’s interest in presenting

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<sup>4</sup> In *Lizarraga*, the nature of the defendant’s defense to a charge of murder was that he was not the shooter. *Lizarraga*, 191 Wn.App. at 544. During the investigation, a witness, Cervantes, told law enforcement that a different individual, Vaca-Valencia, had shot the victim. *Id.* at 539. Cervantes did not testify at trial. *Id.* at 544. The defendant sought to admit evidence of Cervantes’ statement that Vaca-Valencia had shot the victim. *Id.* at 521. The trial court denied the evidence on the grounds that it was hearsay. *Id.*

relevant evidence may “bow to accommodate other legitimate interest in the criminal trial process.” *Lizarraga*, 191 Wn.App. at 553 citing *Scheffer*, 523 U.S. at 308. There is nothing ... to suggest that defendants in general are exempted from the normal rules of evidence in presenting their case.” *State v. Madison*, 53 Wash. App. 754, 770 P.2d 662 (Div. 1 1989). Courts have routinely held that a trial court’s exclusion of defense evidence pursuant to the rules of evidence does not violate the defendant’s right to present a defense.<sup>5</sup>

Defense counsel suggested that Mr. Bachtold’s motive for the murder was his belief that the victim and Appellant were engaged in some

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<sup>5</sup> *State v. Donald*, 178 Wash. App. 250, 316 P.3d 1081 (Div. 1 2013) (testimony that other suspect had a propensity for criminal behavior and therefore committed the robbery properly excluded under ER 404(b)); *State v. Rafay*, 168 Wash. App. 734, 285 P.3d 83 (Div. 1 2012) (expert who would testify that defendant’s confession was coerced properly excluded); *State v. Strizheus*, 163 Wash. App. 820, 262 P.3d 100 (Div. 1 2011) (911 phone call where the defendant’s son confessed to the crime the defendant was charged with properly excluded); *State v. Sublett*, 156 Wash. App. 160, 231 P.3d 231 (Div. 2 2010), as amended on reconsideration, (June 29, 2010) and aff’d, 176 Wash. 2d 58, 292 P.3d 715 (2012) (evidence that was hearsay and irrelevant properly excluded); *State v. Soper*, 135 Wash. App. 89, 143 P.3d 335 (Div. 2 2006) (testimony of the defendant’s unlicensed physician properly excluded under medical marijuana defense); *State v. Mee Hui Kim*, 134 Wash. App. 27, 139 P.3d 354 (Div. 1 2006), as amended, (July 11, 2006) (in vehicular homicide and vehicular assault case, the driver defendant’s evidence that the passenger may have given her the date-rape drug properly excluded as lacking foundation); *State v. Thomas*, 123 Wash. App. 771, 98 P.3d 1258 (Div. 1 2004) (testimony of a defense expert on diminished capacity properly excluded as inadmissible under rules of evidence); *State v. Willis*, 113 Wash. App. 389, 54 P.3d 184 (Div. 1 2002), as corrected on reconsideration, (Nov. 5, 2002) and judgment aff’d in part, rev’d on other grounds in part, 151 Wash. 2d 255, 87 P.3d 1164 (2004) (testimony of expert was proper where expert was not qualified and lacked basis for opinion); *State v. Picard*, 90 Wash. App. 890, 954 P.2d 336 (Div. 2 1998) (trial court properly refused to allow defendant to introduce exculpatory hearsay that did not fall within any exception to the hearsay rule); *State v. Baird*, 83 Wash. App. 477, 922 P.2d 157 (Div. 1 1996) (trial court properly excluded recording obtained in violation of Privacy Act).

sort of sexual impropriety. [RP 142] Appellant contends that she should have been permitted to question Mr. Bachtold regarding this. The trial court excluded any cross-examination of Mr. Bachtold with regard to his motive for the murder based in large part on it being character evidence. [RP 156] The trial court did not err because the evidence did not fall within the scope of ER 404(a) or (b) and was further irrelevant to any material issue at trial.

All evidence must be relevant to be admissible. ER 402. Relevant evidence means 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. Facts are relevant if they have a tendency to make the existence of any consequential fact more or less probable. *Aguirre*, 168 Wn.2d at 362; ER 401. Furthermore, although relevant, 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. ER 403.

Under ER 404(a), character evidence of the victim is inadmissible except:

Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

Under ER 404(a), evidence of the victim's character is admissible only in cases in which the defense is self-defense or suicide. *Karl Tegland*, Washington Practice, Courtroom Handbook on Washington Evidence § 405:5 (5D 2017-2018) citing *State v. Jones*, 19 Wn.App. 850, 578 P.2d 71 (Div. 1, 1978). Mr. Bachtold's subjective belief of an inappropriate sexual relationship between the victim and Appellant is not a pertinent character trait and no affirmative defense was raised by Appellant so Mr. Bachtold's motive would not be admissible under ER 404(a).

Appellant asserts that this evidence was not being used for "character" purposes, but for motive, to support her defense that she was not involved in the murder. [*Appellant's Brief*: pg. 32] Under ER 404(b), evidence of other crimes, wrongs, or acts are not admissible to prove character, but may be admissible for other purposes. "Evidence of other misconduct may be admissible to prove motive, *assuming that motive is at issue...*" *Karl Tegland*, Washington Practice, Courtroom Handbook on Washington Evidence § 404:20 (5D 2017-2018) (emphasis added). "[S]uch evidence is often highly prejudicial and must be highly

constrained to comply with the rules of evidence.” *Karl Tegland*, Washington Practice, Courtroom Handbook on Washington Evidence § 613:5 (5D 2017-2018) citing *State v. DeLeon*, 185 Wn.2d 478, 374 P.3d 95 (2016).

As cited by Appellant, the purpose of a meaningful cross examination of adverse witnesses is to “test the perception, memory, and credibility of witnesses.” [*Appellant’s Brief*: pg. 28 citing *Darden*, 145 Wn.2d at 620.] Appellant argues that Bachtold’s motive for the murder is relevant to his credibility because he was the only witness asserting that Appellant was involved in the murder. [*Appellant’s Brief*: pg. 31] However, Mr. Bachtold’s speculated motive, or even his actual motive, do not go to any of the purposes of cross-examination.

Appellant’s proffered evidence did not pertain to the victim’s motive or even Appellant’s motive. It pertained to the motive of an individual who was a third party to Appellant’s case. By that point, Mr. Bachtold was nothing more than any other witness and the victim’s alleged prior bad act would not be relevant toward any motive of any material party to the trial. What makes Mr. Bachtold’s motive even more irrelevant is the fact that he testified and admitted to his part in the murder. This is not a case of “other suspect” evidence where Appellant is asserting that she did not commit the crime, but some other uncharged individual

did. Mr. Bachtold was charged, plead guilty, and admitted his part. Appellant was charged for her participation in the crimes. While ER 404(b) allows prior bad acts to be admitted to show motive, the evidence must still be relevant and Mr. Bachtold's motive for his participation was simply not relevant. It was therefore properly excluded as character evidence.

The record reflects that the evidence was not only character evidence, but it was speculative, and not relevant. While referencing only character evidence in excluding the evidence, during the extended argument on the issue during motions, the State argued the information was also irrelevant. [RP 144] The trial court made multiple statements indicating the court believed the evidence to be irrelevant. [RP 142, 154] The trial court also recognized that there is no affirmative defense being offered that would put the victim's character at issue. [RP 154] Defense counsel was unable to point to any evidence rule that would allow them to cross-examine Mr. Bachtold about his motivation for the murder based on a belief of sexual impropriety between the victim and Appellant. [RP 146]

No logical connection can be drawn between Mr. Bachtold's motive for his participation in the murder and the question of whether or not Appellant committed the crimes for which she was charged. A person's subjective reasoning for committing a crime does not make it any

more or less likely that another individual participated in the crime. It is simply their own reason for participating in the crime. The question is whether or not Mr. Bachtold's motive, regardless of whether it was based on accurate or inaccurate beliefs, makes it more or less likely that Appellant participated in the crime. It does not. It is therefore irrelevant. ER 401.

Because the evidence was an alleged prior bad act by the victim, and Appellant did not assert any affirmative defenses, the evidence was not admissible as character evidence. Furthermore, it was properly excluded as it is irrelevant and a defendant has no constitutional right to present irrelevant evidence.

C. The trial court did not err when it prohibited Appellant from testifying to prior statements by Mr. Bachtold because no foundation had been laid for impeachment.

The trial court did not err when it precluded Appellant from testifying to a prior inconsistent statement from Mr. Bachtold, allegedly that he entered Appellant's room and stated "I just killed your uncle."

A trial court's evidentiary rulings will not be disturbed absent an abuse of discretion. *Aguirre*, 168 Wn.2d at 361; *Sintra, Inc.*, 131 Wn.2d at 662-663; *Perez-Valdez*, 172 Wn.2d at 814; *Powell*, 126 Wn.2d at 258. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v.*

*Powell*, 126 Wn.2d at 258; *State v. Lile*, 188 Wn.2d at 782; *Darden*, 145 Wn.2d at 619.

Appellant testified at trial. [RP 612] She testified that she was in her room at the time of the murder. [RP 620] Defense counsel asked her if Mr. Bachtold said anything when he came into her room. [RP 621] Appellant's response that Mr. Bachtold said "I just killed your uncle" was objected to by the State as hearsay and sustained by the court. [RP 621] The State argued that this was not proper impeachment because Mr. Bachtold was not asked by defense counsel about this statement on cross-examination. [RP 622] Defense counsel did not point to any evidence rule that would allow such testimony. [RP 622-23] The court stated that counsel could have asked Mr. Bachtold about this statement during cross-examination, but they did not; therefore, the statement is hearsay. [RP 623]

An out of court statement by a non-testifying declarant asserted for the truth of the matter is generally inadmissible as hearsay. ER 801, ER 802. However, evidence of a prior statement that is inconsistent with the witness' current testimony is not considered hearsay if offered for impeachment only. ER 801. A prior inconsistent statement is admissible for impeachment under certain circumstances. ER 613(b) provides:

Extrinsic 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.

Proper impeachment by prior inconsistent statement utilizes a procedure in which the cross examiner first asks the witness whether he made the prior statement. *State v. Babich*, 68 Wn.App. 438, 443, 842 P.2d 1053 (Div.3 1993). If the witness admits the prior statement, extrinsic evidence of the statement is not allowed because such evidence would waste time and would be of little additional value. *Id.*

“Unless the court requires otherwise, extrinsic evidence may be introduced without first cross-examining the witness about the specific statement in question.” *Karl Tegland*, Washington Practice, Courtroom Handbook on Washington Evidence § 613:5 (5D 2017-2018). While ER 613 does not strictly require the witness be presented with the statement *before* extrinsic evidence is admitted, the trial court maintains control over the mode of interrogating witnesses and presenting evidence. ER 611(a).

The trial judge in this case refused to allow the impeachment because Mr. Bachtold was not asked about the statement when he was on the stand. Not only did Mr. Bachtold testify for the State and was subject to cross-examination by defense counsel, defense called Mr. Bachtold as their own witness in their case. [RP 371-399, 571-606] Neither time did

defense counsel ask Mr. Bachtold about the alleged statement made to Appellant. Counsel elected to sit on the statement and then, without giving Mr. Bachtold an opportunity to admit, deny, or explain the statement, tried to admit Mr. Bachtold's statement through extrinsic evidence. Defense counsel's cross-examination of Mr. Bachtold was almost exclusively regarding other prior inconsistent statements. [RP 387-399] For all of those statements, defense counsel asked Mr. Bachtold if he made the statement prior to attempting to introduce extrinsic evidence of the statement. [RP 387-399] There is also no indication in the record that defense counsel made plans for Mr. Bachtold to remain in attendance so that he could be re-called as a witnesses to be given an opportunity to explain the statement.

Given that Mr. Bachtold had already testified twice, once for the State and once for the defense, it was not an abuse of discretion for the trial court to prohibit this particular prior inconsistent statement. Admission of the statement would have required Mr. Bachtold to be called to the stand a third time and defense counsel had already spent considerable time cross-examining Mr. Bachtold directly regarding many other prior inconsistent statements.

D. Defense counsel was not ineffective for failing to ask Mr. Bachtold about his prior inconsistent statement given the substantial other prior inconsistent statements elicited on cross-examination.

In order for Appellant to show ineffective assistance of counsel, she must show (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) that the deficient representation prejudiced the defendant, i.e., that 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, 334-335, 899 P.2d 1251 (1995) citing and applying *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) citing *Strickland*, 466 U.S. at 694. In assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law" and must "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like." *Grier*, 171 Wn.2d at 34 citing *Strickland*, 466 U.S. at 694-95.

The Court approaches an ineffective assistance of counsel argument with a strong presumption that counsel's representation was

effective. *In re Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004); *Grier*, 171 Wn.2d 17. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Grier*, 171 Wn.2d at 34. Ineffective assistance of counsel is a fact-based determination that is "generally not amendable to per se rules." *Id.*

Appellant argues that counsel was ineffective for failing to lay the foundation for admitting Mr. Bachtold's prior inconsistent statement, "I just killed your uncle." [*Appellant's Brief*: pg. 41] Defense counsel was not deficient and there was no prejudice to Appellant given that this one prior inconsistent statement was merely cumulative of the substantial inconsistent statements brought out by defense counsel during cross examination of Mr. Bachtold.

During cross-examination of Mr. Bachtold, defense counsel brought out numerous and substantial prior inconsistent statements of Mr. Bachtold to impeach him. The following are merely some of the prior inconsistencies elicited on cross-examination:

- Mr. Bachtold's prior statement that he was not home when the murder occurred as opposed to in his room as he testified. [RP 387-88]

- Mr. Bachtold's prior statement that he first saw the .22 rifle on the sofa as opposed to in Appellant's hands as he testified. [RP 392-93]
- Mr. Bachtold's prior statements that Appellant never got close to the victim but also that Appellant and victim fought over the gun. [RP 393]
- Mr. Bachtold's three different statements of where the victim was when he entered the room: on the couch, on the floor, and standing by the coffee table. [RP 394-95]
- Mr. Bachtold's different statements regarding whether the victim was standing, sitting, or kneeling when he was shot. [RP 394-96]
- Mr. Bachtold's different statements regarding whether he or Appellant covered the victim's body. [RP 398]
- Mr. Bachtold's different statements regarding whether Appellant was outside crying or not. [RP 399]

In fact, defense counsel's entire cross-examination of Mr. Bachtold involved impeachment based on prior inconsistent statements and multiple versions of the events that he had given. [RP 387-99] Therefore, the jury was given ample evidence regarding the credibility of Mr. Bachtold's testimony.

Exclusion of cumulative evidence is generally harmless. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); *Driggs v. Howlett*, 193 Wn.App. 875, 903-04, 371 P.3d 61 (Div.3 2016). "Washington has a long history of ruling error harmless if the evidence admitted or excluded was

merely cumulative.” *State v. Flores*, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008) citing Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ.L.REV. 277, 319 (1995); *Jones v. City of Seattle*, 179 Wn.2d 322, 356, 314 P.3d 380 (2013). Exclusion of evidence is not prejudicial where the evidence is merely cumulative. *Tumelson v. Todhunter*, 105 Wn.2d 596, 603, 716 P.2d 890 (1986).

Furthermore, Mr. Bachtold’s prior inconsistent statement, “I just killed your uncle,” could not have been admitted for substantive evidence; it would have only been properly considered as a statement inconsistent with his current testimony. “A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court, even if such a statement would otherwise be inadmissible hearsay.” *State v. Clinkenbeard*, 130 Wn.App. 552, 569, 123 P.3d 872 (Div.3 2005). Impeachment evidence affects the witness’s credibility but is not probative of the substantive facts encompassed by the evidence. *Id.* citing *State v. Johnson*, 40 Wn.App. 371, 377, 699 P.2d 221 (1985). Because such evidence cannot be used as substantive proof of guilt, the State may not use impeachment as a guise for submitting to the jury substantive evidence that would otherwise be inadmissible. *Id.* citing *Babich*, 68 Wn.App. at 444. The concern behind this prohibition is that

prosecutors will exploit the jury's difficulty in making the subtle distinction between impeachment and substantive evidence. *Id.* The same rules apply to a defendant.

The reason defense counsel was so adamant about admitting this particular statement is because of its substance; it appears to be a confession to the murder by the co-defendant and would therefore aid in Appellant's defense of innocence. However, that would be improper and inadmissible use of the substance of the statement. The statement could only be used to show inconsistency, not substance. The jury spent the entire cross-examination of Mr. Bachtold listening to prior inconsistent statements. This one additional statement, that is frankly unduly prejudicial under ER 403, was merely one more in an already admitted plethora of prior inconsistent statements. This one statement would not have reasonably affected the jury's determination of Mr. Bachtold's credibility given the substantial inconsistencies the jury already had before them.

Appellant relies heavily on *State v. Horton*, 116 Wn.App. 909, 68 P.3d 1145 (Div.2 2003). In *Horton*, the defendant was charged with rape of a child. *Id.* at 911. The victim was found to have "penetrating trauma to the hymen." *Id.* The victim told the doctor that the defendant had touched her sexually and that she had not been sexually active with

anyone else. *Id.* She testified to the same at trial. *Id.* at 913. The victim had purportedly told other individuals that she had previously had sexual intercourse with a prior boyfriend. *Id.* On cross-examination, defense counsel reiterated the victim's testimony that she had not had sexual intercourse with anyone except the defendant, but did not ask any questions regarding out of court statements to others that she previously had sexual intercourse with a prior boyfriend. *Id.* Defense counsel did not ask the victim to explain her statement to the contrary or ask the court to have her remain in attendance after testifying. *Id.* at 914. In the defense's case, counsel sought to call as witnesses the two individuals the victim had discussed her sexual relationship with her boyfriend to. *Id.* The trial court excluded the testimony because defense counsel had not complied with ER 613(b). *Id.*

The court's ruling in *Horton* was very fact specific. The court recognized that defense counsel wanted to impeach the victim's testimony that she had not had sexual intercourse with anyone other than the defendant. *Id.* at 916. However, defense counsel did not give the victim an opportunity to explain the statement, or arrange for her to remain available to be re-called as a witness. *Id.* The court found counsel's failure to comply with ER 613(b) was entirely to the defendant's detriment and a reasonable attorney would have complied with the requirements of

ER 613(b). *Id.* at 917. The court therefore found that defense counsel was deficient under *Strickland*. *Id.* However, the court noted that the failure to comply with ER 613(b) will not *always* be deficient performance. *Id.* at 920, n.35. Whether or not it is depends on the particular facts and circumstances of each case. *Id.* at 920, n.35.

The court then turned to the question of prejudice. *Id.* at 922. The court recognized that when the victim testified at trial that she had not had intercourse with anyone except the defendant, she necessarily implied that the defendant was the source of the “penetrating trauma” to her hymen. *Id.* Defense counsel could have defused that implication by presenting the testimony of the witnesses regarding her prior sexual intercourse with her boyfriend. *Id.* The inability to rebut the victim’s statement was “extremely detrimental to [the defendant’s] position at trial.” *Id.*

*Horton* is therefore distinguishable. In *Horton*, defense counsel’s deficiency prevented the defendant from being able to rebut a very specific and probative piece of evidence, whether the defendant could have been the only person to cause trauma to her hymen or whether she had actually had intercourse with someone else before. In Appellant’s case, the specific statement made did not go to a specific fact. It was not an inconsistent statement of any specific piece of evidence, but rather was a purported prior inconsistent statement that constituted a general

inconsistency with the broader aspect of his current testimony. Defense counsel's intent was not to rebut a particular fact or rebut a particular statement made on the stand during trial, but to show general inconsistency between his previous statements and his current testimony. Given the vast amount of inconsistencies elicited by defense counsel at trial, that task was accomplished without this specific statement. There is no prejudice to Appellant.

Counsel also cannot be considered "deficient" merely because one cumulative inconsistent statement was not brought forward amongst numerous others. Were this to be considered "deficient," defense counsel would have zero room for error in a trial. Zero room for error is a standard much higher than an objective standard of reasonableness.

Defense counsel was not ineffective as the failure to lay foundation to one cumulative piece of evidence was not unreasonable and there was no prejudice to Appellant as there is no reasonable probability that the outcome of the case would have been different had this one inconsistent statement been admitted.

E. Any error by the trial court in excluding evidence was harmless error.

A defendant cannot avail himself of error as a ground for reversal unless it has been prejudicial. *State v. Cunningham*, 93 Wn.2d 823, 832,

613 P.2d 1139 (1980) citing *State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974).

Appellate courts long ago rejected the notion that reversal is necessary for any error committed by a trial court. Our judicial system is populated by fallible human beings, and some error is virtually certain to creep into even the most carefully tried case. The ultimate aim of the system, therefore, is not unattainable perfection, but rather fair and correct judgments .... When a court blindly orders reversal of a judgment for an error without making any attempt to assess the impact of the error on the outcome of the trial, the court encourages litigants to abuse the judicial process and bestirs the public to ridicule it .... As a practical response to the realities of the trial process, therefore, appellate courts have developed a series of doctrines for analyzing whether error in various types of cases was harmless. The fundamental premise of this sort of analysis is that a defendant is entitled to a fair trial but not a perfect one.

5 Wash. Prac., Evidence Law and Practice § 103.24 citing *United States v. Blevins*, 960 F.2d 1252 (1992).

A prejudicial error may be defined as one which affects or presumptively affects the final results of the trial. When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial. But, where the defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached except that the defendant is guilty as charged, then the conviction should not be set aside because of unsubstantial errors.

*State v. Jamison*, 93 Wn.2d 794, 800-801, 613 P.2d 776 (1980) citing *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968). Even exclusion of witnesses is subject to harmless error review. *Jones*, 179 Wn.2d at 356. A violation of the defendant's right to control his own defense may be subject to review for harmless error. *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013).

If the error is of a constitutional nature, the error will be deemed harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Watt*, 160 Wn.2d 626, 636, 160 P.3d 640 (2007). A constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is unattributable to the error. *Id.* citing *Neder v. United States*, 527 U.S. 1, 19 (1999). The appellate court looks at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* citing *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985).

If the error is not of a constitutional magnitude, the error is not prejudicial unless, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Cunningham*, 93 Wn.2d at 832 citing *Rogers*, 83 Wn.2d 553; *State v.*

*Rhoads*, 35 Wn.App. 339, 343, 666 P.2d 400 (Div.3 1983), *aff'd*, 101 Wn.2d 529 (1984).

If the trial court committed any error in this case with respect to exclusion of Mr. Bachtold's motive for his part in the murder or denial of admission of Mr. Bachtold's prior inconsistent statement, that error was harmless. Mr. Bachtold's motive is irrelevant and has no bearing on whether Appellant committed the crimes for which she was charged. Had the jury heard Mr. Bachtold's motive, it would not have had any significant outcome on the verdict.

Furthermore, given that Mr. Bachtold's alleged prior statement "I just killed your uncle" could have only been admitted for impeachment, rather than substantive evidence, it was cumulative. Exclusion of cumulative evidence is harmless error. *Johnson*, 124 Wn.2d at 76; *Driggs*, 193 Wn.App. at 903-04; *Flores*, 164 Wn.2d at 19; *Jones*, 179 Wn.2d at 356.

F. The trial court did not err in refusing to give the accomplice liability jury instruction because the State did not rely solely on the uncorroborated testimony of Mr. Bachtold.

Appellant assigns error to the trial court's refusal to give her proposed jury instruction on accomplice testimony. The proposed instruction, WPIC 6.05, reads as follows:

Testimony of an accomplice, given on behalf of the [State] [City] [County], 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 alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

11 Wash.Prac., Pattern Jury Instr. Crim. WPIC 6.05 (4th Ed). The Note on Use reads, “Do not use this instruction if an accomplice or co-defendant testifies for the defendant.” 11 Wash.Prac., Pattern Jury Instr. Crim. WPIC 6.05 (4th Ed), Note on Use.

The trial court denied the defense proposed instruction on accomplice testimony predominantly because Appellant called Mr. Bachtold as a witness in their own case. [RP 571] Appellant now argues that because Mr. Bachtold’s ultimate testimony when he testified for the defense was not helpful to Appellant, that Mr. Bachtold did not testify for the defense. However, that is not the standard for use on the instruction. When this issue was argued during trial, the trial judge stated,

But clearly [Mr. Bachtold] 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, and/or Mr. Johnson did, of Parker Bachtold, and the State, in fact, conducted cross examination. He became your witness as such. The Court will not give [the accomplice testimony] instruction.

[RP 688-89] The trial court ruled that because the defense elected to call Mr. Bachtold as their own witness, the instruction was not appropriate.

[RP 688]

Appellant argues that Mr. Bachtold was only called as a witness by the defense for the purposes of impeaching him. [*Appellant's Brief*: pg. 44] However, that statement is misleading. The defense called Mr. Bachtold as a witness and began asking him questions about the incident. At the point defense counsel began asking Mr. Bachtold about statements he made to law enforcement, the State objected and argument was held outside the presence of the jury. [RP 576-584] The Court agreed with the State that because the statements defense counsel was inquiring about were not made under oath, they were not admissible for substantive evidence, but only for impeachment under ER 613(b). [RP 582-83] The court then gave a cautionary instruction that the testimony pertaining to Mr. Bachtold's statements to law enforcement were for impeachment purposes only. [RP 585]. No such instruction was given, nor could it be supported, that Mr. Bachtold's entire testimony for defense was impeachment as contended by Appellant's brief.

The defense did call Mr. Bachtold as their own witness and conducted direct examination on him; therefore, he did testify for the defense. It just so happens that his testimony was not helpful to

Appellant's theory of the case at trial and trial counsel elected not to rely on any of his testimony in closing. Exclusion of the instruction was therefore proper.

Furthermore, the comments to WPIC 6.05 make clear that the instruction is only appropriate where the prosecution relies solely upon the uncorroborated testimony of an accomplice. "A conviction may rest solely upon the uncorroborated testimony of an accomplice only if the jury has been sufficiently cautioned by the court to subject the accomplice's testimony to careful examination and to regard it with great care and caution. 11 Wash.Prac., Pattern Jury Instr. Crim. WPIC 6.05 (4<sup>th</sup> Ed) Comment; *State v. Carothers*, 84 Wn.2d 256, 525 P.2d 731 (1974), as reinterpreted in *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), overruled on other grounds in *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989). The instruction is required only if the accomplice's testimony is uncorroborated. *State v. Willoughby*, 29 Wn.App. 828, 831, 630 P.2d 1387 (Div.1, 1981) citing *State v. Gross*, 31 Wn.2d 202, 196 P.2d 297 (1948).

Appellant argues that the instruction was required because the State relied solely on the uncorroborated testimony of Mr. Bachtold. [*Appellant's Brief*, pg. 42] However, this is far from correct. Testimony

may be corroborated by circumstantial evidence and there was significant circumstantial evidence linking Appellant to the crimes.

Mr. Bachtold testified that he was in the bedroom when he heard one gunshot. [RP 341] He grabbed the .410 shotgun from his room and went out into the living room. [RP 342] He saw Appellant behind the couch and the victim was coming around the side of the couch. [RP 345] He was cursing and saying “you shot me.” [RP 345] The victim was bleeding from his arm. [RP 343] The .22 Magnum firearm was on the floor by Appellant’s feet. [RP 345] Mr. Bachtold testified that he came around the couch and shot the victim in the head with the .410 shotgun. [RP 346] Mr. Bachtold then covered the body with a blanket and Appellant placed a plastic bag on his head. [RP 348] Both of them grabbed personal items and left the house together, taking the victim’s truck. [RP 349] They went to Oregon and were pulled over in Oregon where they both gave fake names. [RP 355] They were later arrested at the motel.

Mr. Bachtold’s testimony was corroborated by numerous other witnesses. The evidence showed that Mr. Bachtold and Appellant were located at a motel in Curtain, Oregon, a small and remote area. [RP 319-20, 364-65] The motel room had clothes, makeup, hairspray, and personal belongings. [RP 321] The .410 shotgun and .22 rifle were located in the

room where Appellant was staying. [RP 377] Law enforcement confirmed with management that both Mr. Bachtold and Appellant had stayed in the motel overnight. [RP 365]

Officers witnessed Mr. Bachtold come out of the motel room and sit down outside to smoke a cigarette. [RP 368] Appellant then came outside, sat on his lap and shared the cigarette. [RP 368] When they were arrested, they told each other they loved each other as they were separated. [RP 371]

In Appellant's statement to law enforcement, she admitted giving a false name to the officer who pulled them over and to the people at the motel. [RP 322, 326] Appellant admitted that she had thrown her identification and the victim's cell phone out of the window near the motel. [RP 372-73]

Appellant gave conflicting accounts of the events between different interviews and even within individual interview. [RP 10-16, 20, 31] Appellant gave a false story to Mr. Bachtold's mother about the vehicle. [RP 42] Appellant admitted that there were multiple times that she was separate from Mr. Bachtold after the murder. [RP 14, 24, 46]

When Appellant was detained in the Juvenile Detention Facility, she started speaking to her father about the shooting, specifically stating that the victim had been shot in the bottom part of his hand and that it

went out his elbow. [RP 323] While in the Juvenile Detention Facility, Appellant wrote a note to Mr. Bachtold telling him that they were going to post his bail and they would run away together. [RP 281] The note also stated that if they can't pay his bail, she will be a runaway and people will be looking for her. [RP 281]

The autopsy showed a bullet wound through the victim's forearm which exited and then re-entered the bicep. [RP 470, 475] The autopsy also showed a shotgun wound to the victim's face. [RP 472]

What the evidence shows is that Mr. Bachtold's testimony is corroborated by the physical evidence of the firearm wounds from the autopsy and the observations of law enforcement at the scene. Appellant's own behavior is also circumstantial evidence corroborating Mr. Bachtold's testimony. She knew about the specific wound to his arm from the firearm that she used. She fled the scene with Mr. Bachtold and threw the victim's phone and wallet out the window. Despite her claims that she was essentially kidnapped, Appellant had multiple opportunities to escape when Mr. Bachtold was not directly around her. When they were stopped by law enforcement, Appellant gave a false name when Mr. Bachtold was not even in the vehicle. This all supports Mr. Bachtold's testimony and therefore the State did not rely on the uncorroborated testimony of Mr. Bachtold. The accomplice testimony jury instruction was properly denied.

G. The trial court was not required to conduct a *Miller* hearing prior to sentencing as Appellant was not sentenced to a de facto life sentence.

In *Miller v. Alabama*, 567 U.S. 460, 469, 132 S.Ct. 2455 (2012), the US Supreme Court recognized that the concept of proportionality in juvenile sentencing is central to the Eighth Amendment. *Id.* *Miller*'s extensive analysis regarding juvenile culpability and proportional sentencing need not be recounted here. Respondent concedes that *Roper v. Simmons*, 543 U.S. 551, 560, 125 S.Ct. 1183 (2005), *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010), and *Miller* clearly establish that the Eighth Amendment prohibits certain punishments for juveniles. Respondent further concedes that *Miller* requires a sentencing court to hold an individualized hearing, in certain cases, regarding "how children are different" and how those differences affect potential sentencing. *Miller*, 567 U.S. at 480.

Finally, Respondent concedes that in *State v. Ramos*, 187 Wn.2d 420, 434, 387 P.3d 650 (2017), the Washington Supreme Court held that the right to a *Miller* hearing extends to not just literal life-without-parole sentences, but de facto life-without-parole sentences as well. In *Ramos*, the Court recognized that there is no set length of time that a sentence must be in order to be considered a de facto life sentence under Washington law, and given that Ramos' sentence was 85 years, the issue

was not before the Court. *Id.* at 420, n.6. However, that issue is now before this Court as the question of whether Appellant was entitled to a *Miller* hearing rests on whether her 460 month (38 year) sentence constitutes a de facto life sentence.

As a starting point, the sentence in *Miller* was a literal life-without-parole sentence. *Miller*, 567 U.S. at 466, 469. In *Ramos*, the case extending the *Miller* requirement to de facto life sentence, the sentence was 85 years. *Ramos*, 187 Wn.2d at 432. Appellant then cites to *State v. Houston-Sconiers*, 188 Wn.2d 1, 12-13, 391 P.3d 409 (2017), which involved ultimate sentences of 26 and 31 years for the two defendants. Appellant asserts *Houston-Sconiers* as suggestive that 26 and 31 year sentences are considered a de facto life sentence by Washington courts. However, *Houston-Sconiers* did not hold, nor did it address the issue, whether such sentences were de facto life sentences. *Id.* at 21.

In *Houston-Sconiers*, the defendants were sentenced for multiple underlying crimes with corresponding firearm enhancements. *Id.* at 12. The court noted that one defendant faced 41.75-45.25 years, of which 31 of those years were attributable to enhancement time that would be served as “flat time.” *Id.* The other defendant faced 36.75-40.25 years, of which 26 were attributable to enhancement time that would be served as “flat time.” *Id.* The court actually did hold what, in effect, was a *Miller*

hearing, as the court heard mitigating evidence for the defendants based on their youth. *Id.* at 13. However, the sentencing judge did not believe that he had the authority to depart from the statutory sentencing guidelines with regard to the imposition of the firearm enhancements. *Id.* at 21. *Houston-Sconiers*, was not a case involving whether a *Miller* hearing was required, but whether the sentencing court could impose an exceptional sentence on sentencing enhancements, not just the standard range sentence. *Id.*

The Court in *Houston-Sconiers*, specifically recognized that *Miller*'s requirement for a hearing may not apply in that case. The Court stated "the Supreme Court has not applied the rule that children are different and require individuated sentencing consideration of mitigating factors in exactly this situation, i.e., with sentences of 26 and 31 years for Halloween robberies." *Id.* at 20. Therefore, *Houston-Sconiers* is not persuasive that 26 and 31 years constitute a de facto life sentence. The case did not hold that a *Miller* hearing was required; it merely held that a trial judge has the discretion, based on juvenile mitigating factors, to depart from the sentencing guidelines including mandatory enhancements. *Id.* at 21.

In *State v. Scott*, 196 Wn.App. 961, 964, 385 P.3d 783 (Div. 1, 2016) the Division One Court considered the defendant's 900 month (75

years) sentence a de facto life sentence. In *State v. Ronquillo*, 190 Wn.App. 765, 770, 361 P.3d 779 (Div. 1, 2015) the Division One Court considered the defendant's 51.75 year sentence a de facto life sentence. See also, e.g., *State v. Saloy*, 197 Wn.App. 1080 (Div.1, 2017) (Unpublished Opinion) (Considering 712 month (59 year) sentence a de facto sentence).<sup>6</sup>

Given that defendants sentenced under these sentencing schemes will generally be either 16 or 17 years old at the time of the offense, whether the sentence is a "life" sentence should consider the defendant's age upon latest possible release (not taking into account earned released time). *Ramos*, *Scott*, and *Ronquillo*, can easily be considered "life" sentences as the defendants would be approximately 100 years old, 90 years old, and 68 years old, respectively, at the time of release.

Appellant was 16 years old at the time of the crime and was sentenced to 460 months (38 years). This is half the time sentenced in *Ramos* and *Scott*. This means that upon her release, she will only be 54 years old, maximum. Appellant was certainly sentenced to a significant sentence. Her crimes justify as much. However, a significant sentence is not a "life" sentence. Being as she will be in her early 50s when released,

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<sup>6</sup> This is an unpublished opinion, has no precedential value, and is not binding upon any court. This case may be accorded such persuasive value as the court deems appropriate. GR 14.1.

it is far from a “life” sentence. Given the 16 years she spent out of custody prior to the murder, and the significant number of years ahead of her after her release, she will likely spend more time out of custody living her life than she spent in custody on her 38 year sentence. A juvenile who is more likely to spend more of their life out of custody than in cannot be said to have a “life” sentence.

Because Appellant’s sentence was not a literal or de facto life-without-parole sentence, *Miller* does not apply and the trial court was not *required* to hold a *Miller* hearing prior to sentencing.

H. The trial court did not abuse its discretion in refusing to continue sentencing to allow defense to prepare a pre-sentence investigation report.

The trial court did not abuse its discretion when it refused to grant defense counsel’s requested continuance in order to prepare a pre-sentence investigation report. There is no *right* to a pre-sentence report. Under RCW 9.94A.500(1) and CrR 7.1(a), the court “may,” but is not required to order the Department of Corrections to complete a risk assessment report in any case except where the defendant is sentenced to life without parole or sentenced to death. RCW 9.94A.500(1); CrR 7.1(a). The court is only required to order a pre-sentence report when a defendant is convicted of a violation of RCW 69.50 or a felony sexual offense. RCW 9.94A.500(1). During the sentencing hearing, the court shall consider the risk assessment

report and pre-sentence reports, “if any,” and statements by the victim, prosecutor, defense counsel, offender, and the investigating officer. RCW 9.94A.500(1). There is no requirement under RCW 9.94A.500(1) or CrR 7.1(a) that the court order, or defense counsel prepare, a pre-sentence investigation report. Appellant concedes that there is no right to a pre-sentence investigation. [*Appellant’s Brief*: pg. 52]

Appellant’s reliance on *State v. Langford*, 12 Wn.App. 228, 529 P.2d 839 (1974) is misplaced. That case involved a previous version of then CrR 7.2 which allowed the court to forgo a pre-sentence report when the court “finds in writing, with reasons stated, that the report would be of no practical use.” *Id.* at 230. The court recognized that pre-sentence reports are encouraged when a defendant is a first time offender, is youthful, or faces a prison sentence over one year. *Id.* at 231 citing ABA Criminal Standards, Sentencing Alternatives and Procedures s 4.1 (Approved Draft, 1968). The court then ruled that because the court did not make the required findings that a report would be of no practical use, in light of the defendant being a young first offender facing prison, the case should be remanded to the trial court for re-sentencing. *Id. Langford* is a 1974 Division Two case relying on a 1968 ABA suggested standard. The legislature has had sufficient time to determine whether, and under what circumstances, a pre-sentence report should be generated. Absent a

few mandatory situations which do not apply to this case, the trial court maintains discretion whether or not to order a pre-sentence report. RCW 9.94A.500(1).

The verdict was rendered on Monday, August 29, 2016 at approximately 9:30 pm. [RP 204] The State requested sentencing be held the following day due to several members of the victim's family being present. [RP 211] Defense counsel objected saying that did not give them sufficient time to prepare mitigation for sentencing. [RP 211] When asked when defense counsel wanted sentencing, counsel indicated that she would no longer be under contract with the public defense as of Wednesday. [RP 211] Counsel intended on gathering mitigating information and then passing that information on to new counsel who would handle sentencing. [RP 212] The trial judge indicated that he had another trial beginning Wednesday and that Tuesday was the only practical day to hold sentencing. [RP 212] Sentencing was held at 3:30 pm on August 30, 2016. [RP 218]

Defense counsel filed a motion to continue sentencing and requested that the court order a pre-sentence risk assessment be done. [RP 219] Appellant's brief argues the need for a pre-sentence investigation report based in large part on Appellant's age at the time of the offense and her lack of criminal history. [*Appellant's Brief*: pg. 53] However, the

court and defense counsel recognized that Appellant had no prior criminal history [RP 222], recognized her age [RP 222], and the fact that she had no work history due to her age [RP 223].

The court considered the motion, rule CrR 7.1, the fact that she has no criminal history and her financial situation was known, and that she was facing a standard range sentence. [RP 224] The court stated, “[t]he Court is exercising its discretion in this matter and finds that in review of the rule, we --- risk assessment would not have added anything of significance from the Court’s perspective---.” [RP 225] The court recognized that the court rule authorizing the pre-sentence report was adopted from a Minnesota rule and gives the court discretion to dispense with a report when the appropriate sentence can readily be determined on the basis of the sentencing guidelines. [RP 225] “In this case, in scoring and the procedures, the Court rules the Court can issue an effective sentence based on sentencing guideline scoresheets.” [RP 225]

Defense counsel spoke at length during sentencing regarding Appellant’s personal history and how it has affected her as well as multiple arguments regarding mitigation. [RP 239-244] Appellant also had an opportunity to address the court at sentencing. [RP 245]

The trial court was able to render a proper sentence based on the sentencing guidelines. The trial court was aware of Appellant’s age, lack

of criminal history, and heard argument regarding mitigation. The court did not abuse its discretion in refusing to order a pre-sentence report.

- I. Appellant's due process rights were not violated when she was subject to original adult jurisdiction as a juvenile in compliance with RCW 13.04.030(1)(e)(v).

Appellant asserts that RCW 13.04.030(1)(e)(v) now violates Due Process in light of recent US Supreme Court decisions. However, the US Supreme Court decisions relied upon by Appellant for this argument pertain to punishment under the Eighth Amendment, not Due Process. The constitutionality of RCW 13.04.030(1)(e)(v) was already upheld in *In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996) which remains unaffected by recent US Supreme Court decisions.

Article 4, section 6 of the Washington State Constitution grants original jurisdiction to superior courts in all cases amounting to a felony. The legislature may further promulgate procedures directing which "sessions" of the superior court will hear certain types of cases. WA Const. art. 4, §5. Juvenile court is a "session" of the superior court created by the legislature to preside over juvenile cases. *State v. Posey*, 174 Wn.2d 131, 136-137, 272 P.3d 840 (2012).

Juvenile court has original and exclusive jurisdiction over most criminal offenses committed by juveniles. RCW 13.04.030(1)(e). However, RCW 13.04.030(1)(e)(v) expressly exempts certain crimes

committed by persons who are sixteen or seventeen years old from juvenile court's exclusive jurisdiction. It is this provision that Appellant asserts is unconstitutional.

The constitutionality of a statute is an issue of law, which is reviewed de novo. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013). A statute is presumed constitutional. *Id.* The court will presume a legislative enactment is constitutional and, if possible, will construe an enactment so as to render it constitutional. *Id.* The party challenging the constitutionality of a statute has a heavy burden to prove the statute is unconstitutional beyond a reasonable doubt. *State v. Myles*, 127 Wn.2d 807, 812, 903 P.2d 979 (1995).

The Supreme Court has already considered a Due Process challenge to RCW 13.04.030(1)(e)(v) in *In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996). There the Court held the statute did not violate due process principles. *Id.* at 570-572.

Appellant argues that the authority *Boot* relied on to reach this conclusion has been overruled by *Roper*, 543 U.S. at 554, *Graham*, 560 U.S. 48, *Miller*, 567 U.S. 460, and *Montgomery v. Louisiana*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016). Appellant therefore concludes that *Boot* is no longer good law. [*Appellant's Brief*: pg. 55-56] The court should reject this argument because those cases were decided on the basis

of a completely different constitutional provision. The analysis in those cases does not compel the conclusion that *Boot* was incorrectly decided.

In *Roper*, the Court concluded that the Eighth Amendment categorically barred the death penalty for juvenile offenders. *Roper*, 543 U.S. at 569-575. It reached the same conclusion as applied to sentences of life without the possibility of parole for juvenile offenders who did not commit homicide in *Graham*. 560 U.S. at 82. For those offenders the Eighth Amendment required that juveniles be afforded a meaningful opportunity for release, although it did not foreclose the possibility that persons convicted of non-homicide offenses as juveniles could ultimately be incarcerated for life. *Id.* at 75. In *Miller* the Court held the Eighth Amendment mandated individualized sentencing for juveniles convicted of murder who were facing a potential sentence of life without possibility of parole. *Miller*, 567 U.S. at 479.

The holdings in each of these forgoing cases do not support Appellant's arguments because each of these cases was decided on the theory that the Eighth Amendment barred a particular punishment. They did not address Due Process concerns regarding the jurisdiction of the court presiding over a juvenile defendant's case.

The framework for deciding cases under the Eighth Amendment is different from the framework for deciding whether a statute violates Due

Process under the Fourteenth Amendment or Washington Constitution article 1, section 3. An Eighth Amendment analysis relates to punishment. In contrast Due Process encompasses procedural and substantive rights. The substantive component bars wrongful and arbitrary government action. *State v. Beaver*, 184 Wn.2d 321, 332, 358 P.3d 385 (2015). If the substantive component of due process is satisfied procedural due process requires that government action be implemented in a fundamentally fair way. *Id.*

These analytical differences reveal that each constitutional provision is designed to address distinct concerns. *Roper*, *Graham*, and *Miller* all dealt with punishment. Whether a punishment is disproportionate is concerned with the impact of the sentence on the defendant. In contrast RCW 13.04.030(1)(e)(v) deals with the court's jurisdiction. Whether a juvenile's case should be processed in juvenile or adult court is a question that relates to both the public's interest and the youth's interests. *State v. Furman*, 122 Wn.2d 440, 447, 858 P.2d 1092 (1993); RCW 13.40.110(3).

*Miller* and *Graham* acknowledged the existence of statutes providing for exclusive jurisdiction in adult courts over juveniles throughout the country, but did not suggest those statutes were

constitutionally infirm. *Miller*, 567 U.S. at 478-489; *Graham*, 560 U.S. at 66-67.

Three courts from other jurisdictions have recently addressed the same argument the defendant makes here in light of those states' statutes conferring adult jurisdiction on certain juvenile offenders. In *People v. Patterson*, 25 N.E.3d 526 (Ill. 2014) a fifteen year old was charged with three counts of aggravated criminal sexual assault. Pursuant to the Illinois automatic transfer statute his case was transferred from the juvenile court to the adult court where he was convicted. Like the defendant here, Patterson argued the Illinois automatic transfer statute violated Due Process, relying on *Roper*, *Graham*, and *Miller*. The court rejected the argument noting those cases were decided under an Eighth Amendment theory. "[A] constitutional challenge raised under one theory cannot be supported by decisional law based purely on another provision." *Id.* at 549.

The Idaho Supreme Court came to the same conclusion in *State v. Jensen*, 161 Idaho 243, 385 P.3d 5 (Idaho 2016). Jensen was seventeen years old when he was charged with attempted murder, an offense that caused his case to be tried in adult court under I.C. §20-509. He argued that his Due Process right had been violated relying on *Miller*, *Graham*, and *Roper*. He claimed that juveniles had a liberty interest in not

automatically being treated as adults in the criminal justice system. The Court rejected the argument finding the Eighth Amendment cases were not on point. *Id.* at 10.

Most recently the Ohio Supreme Court addressed the issue in *State v. Aalim*, 150 Ohio St.3d 489, 83 N.E.3d 883 (Ohio 2017) (*Aalim II*). Like *Patterson* and *Jensen* the Court in *Aalim II* found the cases decided under the Eighth Amendment were inapplicable to support the defendant's Due Process claim that he had a right to juvenile court jurisdiction. *Aslim II*, 83 N.E.3d 883.

The reasoning in *Patterson*, *Jensen*, and *Aslim II* applies equally to Washington's comparable statute conferring adult court jurisdiction over sixteen and seventeen year old offenders who commit certain enumerated serious violent and violent offenses. *Roper*, *Graham*, and *Miller* do not support the defendant's Due Process challenge to the statute conferring adult court jurisdiction over his case.

Having established that *Miller*, *Graham* and *Roper*'s Eighth Amendment decisions have no effect on *Boot*'s holding, the question is then whether RCW 13.04.030 remains constitutionally valid.

As noted above the court found RCW 13.04.030(1)(e)(v) does not violate Due Process principles in *Boot*. The court found that since "there is no constitutional right to be tried in a juvenile court" the defendants were

not deprived of any constitutionally protected right when the statute conferred original jurisdiction on the superior court without a decline hearing. Thus there was no procedural due process violation. *Boot*, 130 Wn.2d at 571 quoting *State v. Dixon*, 114 Wn.2d 857, 860, 792 P.2d 137 (1990).

Since *Boot* was decided the Court has reiterated that there is no constitutional right to be tried as a juvenile. *State v. Maynard*, 183 Wn.2d 253, 259, 351 P.3d 159 (2015), *In re Dalluge*, 152 Wn.2d 772, 783 n.8, 100 P.3d 279 (2004). The right attaches only if a court is given statutory discretion to assign juvenile or adult court jurisdiction. *State v. Salavea*, 151 Wn.2d 133, 140, 86 P.3d 125 (2004). Just as *Boot* found, the statute does not deprive juveniles subject to RCW 13.04.030(1)(e)(v) of any constitutionally protected right. *Boot*, 130 Wn.2d at 571. Conferring jurisdiction on sixteen and seventeen year olds who commit certain crimes does not violate procedural due process.

The defendant's assertion that the Court's substantive Due Process analysis in *Boot* is no longer valid rests on the assertion that the court's reasoning relied on *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969 (1989) which was later abrogated in *Roper*, 543 U.S. at 574. That was not the sole basis for the court's reasoning however. Considering the interests at issue the statute satisfies substantive due process requirements.

The statute should be strictly construed only if the court finds an identified interest is a fundamental liberty interest. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006). “Fundamental” liberty interests are those that are deeply rooted in the Nation’s history and tradition. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258 (1997). “The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.” *Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807 (1994). The Court has been reluctant to expand the concept of substantive due process beyond those limited concerns. *District Attorney’s Office of Third Judicial District v. Osborne*, 557 U.S. 52, 72, 129 S.Ct. 2308 (2009).

Appellant’s asserted interest in juvenile court jurisdiction is not one of those interests the court has traditionally considered “fundamental.” Nor is it one that should be included in that class of interests. The Ohio Supreme Court held the Ohio statute conferring adult jurisdiction on certain juveniles was not “deeply rooted in the Nation’s history and tradition” and therefore did not violate substantive due process. *Aalim II*, 83 N.E.3d 883.

Similarly the Idaho court found that a juvenile had no liberty interest in being placed in the juvenile court system. Since he had no

“statutory right and no expectation, from either legislation or state conduct” to be initially processed in that court the Fourteenth Amendment was not implicated. *Jensen*, 385 P.3d at 11.

Like Ohio and Idaho, Washington has reaffirmed repeatedly that there is no constitutional right to be tried as a juvenile. *Boot*, 130 Wn.2d at 571; *Maynard*, 183 Wn.2d at 259. It should therefore not be treated as a “fundamental” liberty interest entitled to strict scrutiny. Analyzed under the rational relationship test, RCW 13.04.030(1)(e)(v) satisfies substantive due process requirements.

The 1994 amendment to RCW 13.04.030 conferring adult court jurisdiction on sixteen and seventeen year olds who committed certain offenses was enacted as part of comprehensive changes to state law for the express purpose of deterring violent conduct. *Boot*, 130 Wn.2d at 560-561.

The legislature found:

[T]he increasing violence in our society causes great concern for the immediate health and safety of our citizens and our social institutions. Youth violence is increasing at an alarming rate and young people between the ages of fifteen and twenty-four are at the highest risk of being perpetrators and victims of violence. . . The legislature finds that violence is abhorrent to the aims of a free society and that it cannot be tolerated. State efforts at reducing violence must include changes in criminal penalties...it is the immediate purpose of this chapter ..., Laws of 1994 (this act) to: (1) Prevent acts of violence by encouraging change in social norms and individual behaviors that have been shown to increase the risk of violence, ... (3) increase

the severity and certainty of punishment for youth and adults who commit violent acts...

Laws of Washington 1<sup>st</sup> Sp. Sess. Ch. 7, §1.

Deterrence is recognized as a legitimate state interest. *Miller*, 567 U.S. at 479 citing *Ewing v. California*, 538 U.S. 11, 25, 123 S.Ct. 1179 (2003). Deterrence relates to public safety, a goal achieved by reducing the rates at which violent crimes are committed. Providing for increased penalties is rationally related to that interest. Cf. *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 478 (1996) (Increased penalties under the three strikes law is rationally related to the legitimate state goal of public safety.) Conferring adult court jurisdiction on sixteen and seventeen year old juveniles who commit certain serious offenses allows for the potential for increased penalties on those juvenile offenders. This is rationally related to the goal of public safety and deterrence.

Despite *Roper*, *Simmons*, and *Miller*, *Boot* remains good law and Washington's statute conferring original adult jurisdiction on juveniles charged with certain offenses is constitutionally valid.

J. There is no error in the judgment and sentence.

There is no error in the Judgment and Sentence as Appellant was not sentenced to a maximum term of confinement of life. Section 2.3 of the Judgment and Sentence indicates that the crime Appellant was

convicted of carries a maximum sentence of life imprisonment. [CP 43] The sentence itself is reflected in Section 4.1(a) of the Judgment and Sentence. [CP 45] The sentence is reflected as 400 months on Count 1, 126 months on Count 2, 13 months on Count 3, 30 months on Count 4, 30 months on Count 5, 10.5 months on Count 6, and 10.5 months on Count 7. [CP 45] The Judgment and Sentence also reflects a 60 month firearm enhancement on Counts 1 and 2. [CP 45] The total sentence ordered is reflected as: “Actual number of months of total confinement ordered is: 460 months.” [CP 45]. Appellant may be mistaken by the presence of the pre-filled language in Section 4.1(b). [CP 45] That section, which is not filled in with regard to any counts or sentences, has a pre-generated indication of “Life” as the maximum sentence. [CP 45]. However, Section 4.1(b) is not filled in and no counts were sentenced under this subsection. [CP 45] Therefore, there is no error in the Judgment and Sentence.

K. Imposition of Costs on Appeal.

Respondent takes no position on the imposition of costs on appeal.

**CONCLUSION**

Based on the foregoing, Respondent requests that this court affirm Appellant’s convictions and sentence. Appellant was provided notice of all elements charged in Count 7. Appellant was not denied her right to

present a defense when the trial court excluded evidence of Mr. Bachtold's motive for the murder as his motive was character evidence and irrelevant. The trial court did not err when it prohibited Appellant from testifying to Mr. Bachtold's prior statement as no foundation had been laid and trial counsel was not ineffective for failing to lay foundation because the evidence was cumulative. If the trial court did err, the error was harmless given the cumulative nature of the evidence. The trial court did not abuse its discretion in refusing to give the accomplice testimony jury instruction as Mr. Bachtold testified for defense and his testimony was corroborated. The trial court was not required to hold a *Miller* hearing as Appellant was not sentenced to a de facto life-without-parole sentence and the defendant had no right to a pre-sentence investigation report. RCW 13.04.030 is constitutional and Appellant's Due Process rights were not violated by the imposition of adult court jurisdiction. Finally, there was no error in the judgment and sentence. For these reasons, this Court should affirm Appellant's convictions and sentence.

Dated this 26 day of February, 2018

Respectfully Submitted:

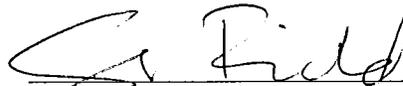
  
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PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 27th day of February, 2018, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Motion to File Over-length Brief and the Brief of Respondent:

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