

FILED  
Court of Appeals  
Division III  
State of Washington  
6/1/2020 9:55 AM

No. 36967-6-III  
COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Alvaro Guajardo,**

Appellant.

---

Spokane County Superior Court Cause No. 17-1-02220-0

The Honorable Judge Raymond F. Clary

**Appellant's Reply Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iii**

**ARGUMENT..... 1**

**I. The State did not prove the *corpus delicti* of felony murder. .... 1**

**II. The crime lab mismanaged analysis of evidence showing DNA from both Mr. Guajardo and Snow on the mattress..... 5**

**III. Mr. Guajardo was denied his state constitutional right to a unanimous verdict. .... 8**

A. The state constitution preserved the common-law right to juror unanimity, including unanimity as to the mode of participation in an offense..... 9

B. Respondent does not address Mr. Guajardo’s discussion of *Carothers* and *Hoffman*..... 15

C. The jury was not instructed on the requirement of unanimity as to Mr. Guajardo’s mode of participation. .... 16

D. Mr. Guajardo may raise his unanimity argument for the first time on review. .... 17

**IV. Mr. Guajardo was convicted under a statute that is unconstitutionally overbroad..... 18**

A. Mr. Guajardo is entitled to challenge the statute and associated instruction on First Amendment grounds regardless of the facts of his case..... 18

B. The complicity statute and associated jury instruction are unconstitutionally overbroad..... 19

C. *Holcomb* and its antecedents failed to properly apply *Brandenburg* because they approve conviction based on knowledge rather than intent..... 21

D. The constitutional error may be raised for the first time on appeal. .... 24

**V. Mr. Guajardo’s sentence must be vacated because Respondent has conceded error regarding his criminal history and the court’s calculation of the offender score. .... 25**

**VI. Respondent concedes that the kidnapping conviction must be vacated. .... 26**

**CONCLUSION ..... 26**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Brandenburg v. Ohio</i> , 395 U.S. 444, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969) .....	20, 21, 22, 23, 24
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).....	21
<i>City of Houston, Tex. v. Hill</i> , 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).....	20
<i>Tison v. Arizona</i> , 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987) .....	11
<i>U.S. v. Freeman</i> , 761 F.2d 549 (9th Cir. 1985).....	20, 21, 22, 23, 24
<i>United States v. Sineneng-Smith</i> , --- U.S. ---, 140 S. Ct. 1575, --- L.Ed.2d - -- (2020) .....	20
<i>Virginia v. Hicks</i> , 539 U.S. 113, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003) .....	19

### WASHINGTON STATE CASES

<i>City of Seattle v. Holifield</i> , 170 Wn.2d 230, 240 P.3d 1162 (2010) .....	5
<i>City of Seattle v. Webster</i> , 115 Wn.2d 635, 802 P.2d 1333 (1990), <i>cert.</i> <i>denied</i> , 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991) .....	19
<i>Goehle v. Fred Hutchinson Cancer Research Ctr.</i> , 100 Wn.App. 609, 1 P.3d 579 (2000).....	8
<i>In re Pers. Restraint of Lavery</i> , 154 Wn.2d 249, 111 P.3d 837 (2005)....	26
<i>In re Pullman</i> , 167 Wn.2d 205, 218 P.3d 913 (2009).....	16, 26
<i>Pub. Util. Dist. No. 2 of Pac. Cty. v. Comcast of Washington IV, Inc.</i> , 8 Wn.App.2d 418, 438 P.3d 1212 (2019), <i>review denied</i> , 193 Wn.2d 1031, 447 P.3d 162 (2019).....	25

<i>State ex rel. Billington v. Sinclair</i> , 28 Wn.2d 575, 183 P.2d 813 (1947) .	12
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996).....	1, 2, 4
<i>State v. Binnard</i> , 21 Wash. 349, 58 P. 210 (1899).....	14
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006), <i>as amended</i> (Jan. 26, 2007) .....	1, 2, 4
<i>State v. Cardenas-Flores</i> , 189 Wn.2d 243, 401 P.3d 19 (2017).....	1
<i>State v. Gifford</i> , 19 Wash. 464, 53 P. 709 (1898).....	13
<i>State v. Golden</i> , 11 Wash. 422, 39 P. 646 (1895).....	13
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991) .....	15
<i>State v. Holcomb</i> , 180 Wn.App. 583, 321 P.3d 1288 <i>review denied</i> , 180 Wn.2d 1029, 331 P.3d 1172 (2014).....	10, 21, 22
<i>State v. Hummel</i> , 165 Wn.App. 749, 266 P.3d 269 (2012).....	2, 3
<i>State v. Immelt</i> , 173 Wn.2d 1, 267 P.3d 305 (2011).....	19, 20, 24
<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014) .....	17
<i>State v. Lung</i> , 70 Wn.2d 365, 423 P.2d 72 (1967).....	1, 4
<i>State v. McNeair</i> , 88 Wn.App. 331, 944 P.2d 1099 (1997) .....	16, 22, 26
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	5, 6, 7
<i>State v. Morgan</i> , 21 Wash. 355, 58 P. 215 (1899).....	13
<i>State v. Neslund</i> , 50 Wn.App. 531, 749 P.2d 725 (1988) .....	3
<i>State v. Nikolich</i> , 137 Wash. 62, 241 P. 664 (1925) .....	13
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), <i>as corrected</i> (Jan. 21, 2010) .....	25
<i>State v. Pierce</i> , 195 Wn.2d 230, 455 P.3d 647 (2020).....	22
<i>State v. Price</i> , 94 Wn.2d 810, 620 P.2d 994 (1980) .....	6

<i>State v. Quillin</i> , 49 Wn.App. 155, 741 P.2d 589 (1987).....	4
<i>State v. Salgado-Mendoza</i> , 189 Wn.2d 420, 403 P.3d 45 (2017).....	5
<i>State v. Sellers</i> , 39 Wn.App. 799, 695 P.2d 1014 (1985) .....	4
<i>State v. Smith</i> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	13, 15
<i>State v. Turner</i> , 169 Wn.2d 448, 238 P.3d 461 (2010).....	26
<i>State v. Vander Houwen</i> , 163 Wn.2d 25, 177 P.3d 93 (2008).....	11, 12
<i>State v. Walker</i> , 182 Wn.2d 463, 341 P.3d 976 (2015).....	8, 9, 10, 16
<i>State v. Webb</i> , 20 Wash. 500, 55 P. 935 (1899).....	13
<i>State v. Williams-Walker</i> , 167 Wn.2d 889, 225 P.3d 913 (2010).....	14, 15
<i>State v. Womac</i> , 160 Wn.2d 643, 160 P.3d 40 (2007) .....	26

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. I.....	18, 19, 20, 21, 24
Wash. Const. art. I, §21.....	9, 10, 12, 13, 15, 16

**WASHINGTON STATE STATUTES**

Code of 1881, §956.....	13, 14
RCW 46.61.024 .....	25
RCW 9A.08.020.....	19, 21, 24

**OTHER AUTHORITIES**

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (4th Ed) ..	18, 19, 21
Adam Harris Kurland, <i>To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles</i> , 57 S.C.L. Rev. 85 (2005).....	8, 14

CrR 8.3.....	5
RAP 1.2.....	8
RAP 2.5.....	17, 18, 24, 25
<i>State v. Barker</i> , 191 Ohio App.3d 293, 945 N.E.2d 1107 (2010).....	4
<i>State v. Copeland</i> , 321 S.C. 318, 468 S.E.2d 620 (1996).....	4
<i>State v. Speights</i> , 263 S.C. 127, 208 S.E.2d 43 (1974).....	4

## ARGUMENT

### **I. THE STATE DID NOT PROVE THE *CORPUS DELICTI* OF FELONY MURDER.**

Under the *corpus delicti* rule, the prosecution must produce independent evidence that *prima facie* establishes the charged crime. *State v. Cardenas-Flores*, 189 Wn.2d 243, 252-263, 401 P.3d 19 (2017). Here, where no body was ever found, the State failed to independently establish the *corpus delicti* of felony murder, relying instead on Mr. Guajardo’s purported “confession.”

The State did not produce independent evidence that was “consistent with guilt and inconsistent with [any] hypothesis of innocence.” *State v. Aten*, 130 Wn.2d 640, 660, 927 P.2d 210 (1996) (quoting *State v. Lung*, 70 Wn.2d 365, 372, 423 P.2d 72 (1967)); *see also State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007). In this context, “innocence” does not mean there is a lack of all criminality. Instead, it refers to innocence of the charged crime.<sup>1</sup>

The State failed to independently prove “the fact of [Snow’s] death” and a causal connection between the death and any criminal act, both of which are required to establish the *corpus delicti* of homicide. *Aten*, 130 Wn.2d at 655. Accordingly, the independent evidence was insufficient, and Mr. Guajardo’s purported confession could not contribute to a finding of guilt.

The fact of death was not established because the independent

---

<sup>1</sup> Here, for example, the evidence was consistent with the hypothesis that Snow fled after being assaulted. This is insufficient to independently establish the *corpus delicti* of homicide.

evidence supported reasonable and logical inferences of both guilt and innocence. *Brockob*, 159 Wn.2d at 329. Snow may have fled the area after a beating. This explanation is consistent with other facts introduced into evidence: he was a drug user and dealer who lived in “random places,” he avoided contact with others when he was in trouble (such as when he’d stolen a van), his driver’s license and EBT card were found in another state, he distributed some of his possessions to others in the community before leaving, and such beatings are common in the drug distribution milieu. RP (6/17/19) 383, 403, 404, 406, 408, 462. His departure from the area can be explained without presuming that he’d been killed.

The State also failed to show “a causal connection between the [alleged] death and a criminal act.” *Aten***Error! Bookmark not defined.**, 130 Wn.2d at 655. The State did not produce a body, a cause of death, an eyewitness, a murder weapon, or any proof that Snow was killed by the unlawful restraint and assault that occurred in Joyce’s presence. RP (6/17/19) 405-406, 429. The small amounts of blood found in the shop area were consistent with a beating rather than a homicide; as noted, such beatings are not uncommon in drug circles. RP (6/17/19) 404, 406, 408.

Respondent claims that Mr. Guajardo’s case is akin to that described in *State v. Hummel*, 165 Wn.App. 749, 266 P.3d 269 (2012). Brief of Respondent, p. 17. Mr. Guajardo’s case is unlike *Hummel*.

The victim who disappeared in *Hummel* “was close with her children and was unlikely to simply abandon them.” *Id.*, at 770. By contrast, Snow did not abandon any children. Furthermore, his connection to his

mother and sister was more tenuous than the relationship between a parent and a young child. RP (6/17/19) 377, 382. The victim in *Hummel* “failed to attend a special event for her daughter’s birthday” without explanation. *Id.* Snow had no important events on his calendar. RP (6/17/19) 376-394. The victim in *Hummel* acted out of character by failing to complete a work assignment. *Id.* Snow did not forego any responsibilities. RP (6/17/19) 376-394. Any failure to keep a commitment was not entirely out of character, given his drug-involved lifestyle. RP (6/17/19) 376-379, 382-383, 386, 403; RP (6/18/19) 571.

*Hummel* does not support conviction in this case. Nor does *State v. Neslund*, 50 Wn.App. 531, 749 P.2d 725 (1988). *See* Brief of Respondent, p. 17. In *Neslund*, the appellate court outlined a large quantity of evidence establishing the fact of death. This included significant physical and forensic evidence, numerous statements from the defendant threatening to kill the victim, the victim’s statements “that he was afraid of the defendant [and was] concern[ed] for his physical safety,” and that “he feared for his life and wanted an autopsy performed if he died,” the victim’s failure to pick up eyeglass lenses that he’d ordered, and his disappearance prior to a visit from his brother that he was “eagerly awaiting.” *Id.*, at 543-547. The appellate court’s convincing summary of the evidence in *Neslund* stands in stark contrast to the relatively sparse facts surrounding Snow’s disappearance.

Respondent also cites several cases from other jurisdictions to

suggest that the *corpus delicti* was independently established.<sup>2</sup> See Brief of Respondent, p. 17 (citing *State v. Barker*, 191 Ohio App.3d 293, 945 N.E.2d 1107 (2010); *State v. Speights*, 263 S.C. 127, 208 S.E.2d 43 (1974); *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996)). These cases do not support Respondent’s position, because other states have different approaches to the *corpus delicti* rule.<sup>3</sup>

For example, in Ohio, the independent evidence need not even make a *prima facie* case to establish the *corpus delicti*. *Barker*, 191 Ohio App. 3d at 297. Nor does Ohio law require the State to produce evidence that is inconsistent with a hypothesis of innocence. *Id.*, at 299. Likewise, South Carolina law does not appear to impose the requirements that Washington’s rule demands. See *Speights*, 263 S.C. at 137-138.

Although a *corpus delicti* challenge admits the truth of the State’s evidence and reasonable inferences that can be drawn therefrom,<sup>4</sup> this does not end the inquiry. The State’s evidence must be “inconsistent with [any] hypothesis of innocence.” *Lung*, 70 Wn.2d at 372; see also *Aten*, 130 Wn.2d at 660; *Brockob*, 159 Wn.2d at 329.

The evidence here is consistent with a hypothesis of innocence. It does not rule out the possibility that Snow fled town after a beating.

---

<sup>2</sup> The two other Washington cases cited by Respondent are addressed in Appellant’s Opening Brief, pp. 14-15 (citing *State v. Quillin*, 49 Wn.App. 155, 741 P.2d 589 (1987) and *State v. Sellers*, 39 Wn.App. 799, 695 P.2d 1014 (1985)).

<sup>3</sup> Respondent’s citation to *Copeland* is perplexing; that case involved the sufficiency of the evidence where an eyewitness described the killing. *Copeland*, 321 S.C. at 322. The court did not address any *corpus delicti* issues.

<sup>4</sup> See Brief of Respondent, pp. 14, 20; *Cardenas-Flores*, 189 Wn.2d at 264.

Accordingly, it is insufficient to permit consideration of Mr. Guajardo’s statements. *Aten*, 130 Wn.2d at 660.

The State failed to present independent evidence establishing the *corpus delicti* of the charged crime. Mr. Guajardo’s felony murder conviction must be reversed, and the charge dismissed with prejudice. *Id.*, at 655.

**II. THE CRIME LAB MISMANAGED ANALYSIS OF EVIDENCE SHOWING DNA FROM BOTH MR. GUAJARDO AND SNOW ON THE MATTRESS.**

A court may suppress evidence based on simple mismanagement by a government agency. CrR 8.3(b); *City of Seattle v. Holifield*, 170 Wn.2d 230, 239, 240 P.3d 1162 (2010); *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Here, the trial court should have suppressed DNA results that were provided on the day of trial, because the state crime lab mismanaged the evidence.

Respondent’s arguments address “[t]he extraordinary remedy of dismissal.” Brief of Respondent, p. 27. On appeal, Mr. Guajardo is also arguing for suppression of the late evidence. Appellant’s Opening Brief, pp. 18, 20, 22; *see Holifield*, 170 Wn.2d at 239.

Where suppression is sought, the defendant need not show that late evidence injected “new facts” into the case; the “heightened ‘new facts’ standard deals with the extreme remedy of dismissal—not suppression.”<sup>5</sup> *State v. Salgado-Mendoza*, 189 Wn.2d 420, 436 n. 10, 403 P.3d 45 (2017). Instead, the defendant need only show mismanagement and prejudice.

In this case, Appellant agrees that police acted diligently by

---

<sup>5</sup> In the alternative, this case provides an opportunity to modify the “new facts” standard. *See* Appellant’s Opening Brief, pp. 22-24.

immediately submitting the mattress to the state crime lab.<sup>6</sup> CP 13. However, the crime lab mismanaged the evidence by delaying testing for 2 ½ months. RP (2/4/19) 123, 136. Only one week of the 2 ½ month delay stemmed from processing a higher priority case; the remainder of the delay went unexplained. RP (1/25/19) 102.

Once it began work, the crime lab was able to complete DNA analysis and peer review within approximately 10 days. RP (1/25/19) 102; RP (2/4/19) 136. This can be seen by examining the record. On January 25, the prosecutor reported that analysis of the mattress had been put “on the back burner” because of a higher priority case. RP (1/25/19) 102. The prosecutor indicated that the crime lab expert had been “working on it this week.” RP (1/25/19) 102. Nine days later—the day trial was scheduled to begin—the prosecutor announced that the results had been peer-reviewed, and a report provided to defense counsel. RP (2/4/19) 108, 131, 135.

The crime lab’s mismanagement prejudiced Mr. Guajardo by forcing him to choose between his right to a speedy trial<sup>7</sup> and his right to the

---

<sup>6</sup> In response to Appellant’s arguments, Respondent defends the officers’ and the prosecutors’ actions. Brief of Respondent, pp. 22-35. This argument is misdirected. Appellant’s claim concerns the crime lab’s delay in testing the evidence. He does not contend that the police should have found the mattress sooner, or that they waited too long to provide it to the crime lab. Nor does he argue that the prosecution contributed to the delay in analyzing the evidence.

<sup>7</sup> Respondent concedes that the amount of time remaining on speedy trial is “unknown.” Brief of Respondent, pp. 32, 34. Contrary to Respondent’s assertion, it is not Mr. Guajardo’s responsibility to determine speedy trial timeframes; rather, “[i]t shall be the responsibility of the court to ensure a trial in accordance with [the speedy trial] rule.” CrR 3.3(a)(1). The speedy trial expiration date in this case is murky because the court repeatedly failed to note commencement dates when trial was reset. CP 96, 100-101, 107. Whatever the actual expiration date, Mr. Guajardo was forced to seek a continuance beyond the last day of speedy trial to ensure that his attorney had time to meet the late DNA evidence.

effective assistance of counsel. *See Michielli*, 132 Wn.2d at 240; *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). Here, as in *Michielli*, Mr. Guajardo was forced to request a continuance so his attorney could meet the newly disclosed evidence. RP (2/4/19) 120, 127, 137-138. This was “not a trivial event.” *Michielli*, 132 Wn.2d at 245.

The late evidence was important: it showed that the mattress contained DNA from both Mr. Guajardo and Snow. RP (6/19/19) 669-673. In the absence of a body, a murder weapon, or an eyewitness, the evidence was critical to the State’s case. Jurors likely placed great weight on the DNA evidence. Because of this, defense counsel could not afford to go forward without a full understanding of the DNA results.

In its brief, Respondent suggests that three of Appellant’s assignments of error should not be addressed because of insufficient briefing. Brief of Respondent, p. 25. This argument is without merit.

Entire sections of the brief are devoted to contesting the court’s findings. Appellant’s arguments are clear from the brief: Mr. Guajardo does not agree that “[t]he crime lab promised and did expedite testing” (Finding No. 5); instead, he argues that the lab mismanaged the evidence and delayed the testing. Appellant’s Opening Brief, pp. 18-24. He does not agree that “Mr. Snow was killed” (Finding No. 13); instead, he disputes that the State proved Snow was killed. Appellant’s Opening Brief, pp. 10-17. He does not agree that “[t]he parties and the court have done everything they can to keep this case on track and expedite the trial” (Finding No. 16); instead, he argues that the case was unreasonably delayed.

Appellant's Opening Brief, p. 18-24.

Appellant assigned error to these findings and outlined the reasons they should be vacated. Under RAP 1.2(a), the Rules of Appellate Procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." In keeping with this principle, "[t]he appellate court will review the merits of the appeal where the nature of the challenge is perfectly clear and the challenged ruling is set forth in the appellate brief." *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn.App. 609, 614, 1 P.3d 579 (2000). The Court of Appeals should reject Respondent's argument and vacate the challenged assignments of error. *Id.*

The prosecution did not provide defense counsel DNA test results until the day of trial. The crime lab had waited 2 ½ months to perform testing which it was ultimately able to complete in approximately 10 days.

The lab's mismanagement prejudiced Mr. Guajardo by forcing him to choose between speedy trial and effective assistance. The late DNA evidence should have been suppressed.

### **III. MR. GUAJARDO WAS DENIED HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.**

Historically, the common law required jurors to unanimously determine whether an accused person acted as a principal or an accessory. Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C.L. Rev. 85, 112 (2005). This common law

requirement was incorporated into the Washington Constitution.<sup>8</sup> *See* Appellant’s Opening Brief, pp. 25-35.

Here, the trial court failed to instruct jurors that unanimity was required as to the mode of Mr. Guajardo’s participation in the offense. CP 22-48. This violated Mr. Guajardo’s “inviolate” right to a jury trial under Wash. Const. art. I, §21.

A. The state constitution preserved the common-law right to juror unanimity, including unanimity as to the mode of participation in an offense.

Analysis of Wash. Const. art. I, §21 reveals that the provision incorporates the right of unanimity as to the mode of participation in an offense. Appellant’s Opening Brief, pp. 25-35. No Washington court has examined the state constitutional right under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *See Walker*, 182 Wn.2d at 484.

Respondent begins by outlining cases that do not explore the state constitutional right. According to Respondent, Washington courts “have repeatedly held that a specific unanimity instruction” as to the mode of participation “is not required.” Brief of Respondent, p. 38. Respondent goes on to discuss (at length) cases that have declined to impose a unanimity requirement as to the mode of participation. Brief of Respondent, pp. 38-42.

These cases do not apply to Mr. Guajardo’s state constitutional argument. Although Respondent references *Walker*, Respondent does not

---

<sup>8</sup> The Washington Supreme Court has expressly reserved ruling on this issue. *State v. Walker*, 182 Wn.2d 463, 484, 341 P.3d 976 (2015).

address the *Walker* court’s acknowledgment that “[n]o Washington court has examined article I, section 21 under *Gunwall* to determine whether or not an accused person has a constitutional right to jury unanimity as to the mode of participation in a felony accomplice case, and we decline to do so without sufficient analysis.”<sup>9</sup> *Walker*, 182 Wn.2d at 484.

Mr. Guajardo’s argument is founded on *Gunwall* analysis of Wash. Const. art. I, §21. Respondent’s discussion of cases that do not address the statute constitution under the *Gunwall* framework does not address the issue raised in this case.

Respondent makes several concessions when addressing Mr. Guajardo’s *Gunwall* analysis. Respondent appears to agree that the first, second, and fifth *Gunwall* factors favor an independent state analysis. Brief of Respondent, pp. 43-48. Respondent also appears to concede that the issue is a matter of particular state interest or local concern (*Gunwall* factor six).<sup>10</sup> Brief of Respondent, pp. 48-49 (citing cases from numerous jurisdictions).

---

<sup>9</sup> Instead, Respondent cites *Holcomb*, in which the Court of Appeals determined, without explanation, that “a *Gunwall* analysis is unnecessary.” *State v. Holcomb*, 180 Wn.App. 583, 588, 321 P.3d 1288 (2014) (*Gunwall*); see Brief of Respondent, pp. 40-41. It is not clear how the *Holcomb* court reached this conclusion. Its decision predated the Supreme Court’s opinion in *Walker*, where the court acknowledged that the state constitutional issue had yet to be addressed. *Walker*, 182 Wn.2d at 484.

<sup>10</sup> Although Respondent apparently agrees that the issue is one of particular state interest or local concern, Respondent goes on to imply that this court should follow federal law and cases from other jurisdictions. Brief of Respondent, pp. 48-49. This reflects a misunderstanding of *Gunwall* factor six. Factor six requires the court to determine if “there appear[s] to be a need for national uniformity” on the issue. *Gunwall*, 106 Wn.2d at 62. Respondent does not argue that the unanimity issue is one that requires for a uniform approach across all jurisdictions. The cases cited by Respondent do not address Washingtonians’ “inviolable” right to a jury trial. Wash. Const. art. I, §21.

Thus, even under Respondent’s argument, four of the six *Gunwall* factors favor an independent interpretation of Wash. Const. art. I, §21. Respondent’s analysis of the remaining *Gunwall* factors (state constitutional law, common law, and preexisting state law) does not address the arguments raised by Mr. Guajardo.

Respondent begins by mischaracterizing Mr. Guajardo’s argument. The State erroneously suggests that appellant’s issue relates to a jury determination of “whether [Mr. Guajardo] was a ‘major participant.’” Brief of Respondent, p. 44.

This is incorrect. Mr. Guajardo makes no argument relating to “major participants.” See Appellant’s Opening Brief, pp. 25-40. That concept stems from death penalty jurisprudence and has no applicability here. Brief of Respondent, p. 44 n. 20; See *Tison v. Arizona*, 481 U.S. 137, 151, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987).

Respondent agrees that the common law required juries to distinguish between common-law principals and other participants in criminal activity. Brief of Respondent, pp. 44-46. Respondent’s focus is on the legislature’s general authority to abolish common law distinctions. Brief of Respondent, pp. 46.

Again, this is not the issue on appeal. Mr. Guajardo’s argument addresses the scope of the constitutional protection, not the legislature’s general authority to modify common law principles. Appellant’s Opening Brief, pp. 25-40.

The legislature does not have the authority to eliminate rights

protected by the constitution. *See, e.g., State v. Vander Houwen*, 163 Wn.2d 25, 36, 177 P.3d 93 (2008) (“[N]o legislative scheme can abrogate a property owner's constitutional right to protect his property”); *State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 577, 183 P.2d 813 (1947) (“[T]he residents of a city containing 20,000 or more inhabitants have a constitutional right to frame a charter for their own government[;]... this constitutional right cannot be abrogated, restricted or limited in any manner by the legislature.”)

The question is not whether the legislature has attempted to eliminate the distinction between common-law principals and other participants. Rather, the question is whether the legislature has the authority to dispense with the right to juror unanimity as to the mode of participation in a criminal offense. The legislature is powerless to do so if that right is protected by Wash. Const. art. I, §21.

It is irrelevant that “[m]odern criminal law has eliminated the distinction” between common-law principals and accessories. Brief of Respondent, p. 46. Instead, this court is tasked with determining if the elimination of such distinctions violates the constitutional right to jury unanimity.

Respondent’s arguments regarding *Gunwall* factors three and four miss the mark. They are not addressed to the legislature’s authority to eliminate the right to juror unanimity as to the mode of participation. Brief of Respondent, pp. 46-48. Instead, Respondent’s sole concern is whether the legislature purported to do so. As noted, any action taken by the

legislature must be measured against limits imposed by the constitution. See *Vander Houwen*, 163 Wn.2d at 36; *Billington*, 28 Wn.2d at 577.

Respondent does not appear to dispute the existence of the common-law right prior to adoption of the territorial code of 1881. Brief of Respondent, p. 47. Respondent's argument thus turns on the code provision addressing the modes of committing an offense.

The salient provision of that code provides that “[n]o distinction shall exist between [accessories and principals], and all persons concerned in the commission of an offense, or counsel, aid and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals.” Code of 1881, §956.

Although the statute eliminates “distinction[s]” between the various types of liability, it does not specifically address juror unanimity as to the mode of participation. The effect of this provision is at the heart of Respondent's argument.<sup>11</sup>

If the unanimity right survived the enactment of this code section, then unanimity as to the mode of participation is protected by Wash. Const. art. I, §21. If the code provision abolished the right to unanimity as to mode of participation, then there is no constitutional protection for that right.

---

<sup>11</sup> Despite the statute's clear language that all participants “shall hereafter be indicted... as principals,” the Supreme Court struggled with the provision's effect on charging decisions. Compare *State v. Gifford*, 19 Wash. 464, 465, 468, 53 P. 709 (1898); *State v. Morgan*, 21 Wash. 355, 356-357, 58 P. 215 (1899); and *State v. Nikolich*, 137 Wash. 62, 65-67, 241 P. 664 (1925) with *State v. Webb*, 20 Wash. 500, 502, 55 P. 935 (1899); *State v. Golden*, 11 Wash. 422, 422, 39 P. 646 (1895).

This is because the state constitution “preserve[d] inviolate the right to a trial by jury as it existed at the time of the adoption of the constitution.” *State v. Smith*, 150 Wn.2d 135, 150–51, 75 P.3d 934 (2003). Thus “[t]he key to determining whether our state constitution offers greater jury trial rights within a particular context is the state of the law at the time of adoption of the constitution.” *State v. Williams-Walker*, 167 Wn.2d 889, 913–14, 225 P.3d 913 (2010).

The territorial code provision is “in derogation of the common law.” *State v. Binnard*, 21 Wash. 349, 353, 58 P. 210 (1899). It must therefore be “construed strictly, not operating beyond [its] words...that is, the new displaces the old only as directly and irreconcilably opposed in terms.” *Id.*

In other words, “when the legislative power professes to add to the law, as it does in the enactment of an affirmative statute, [courts] cannot assume for it an intention also to subtract from it.” *Id.* Instead, courts must adopt a rule of interpretation which “applied to the old, to the new, or to both, will enable all to stand.” *Id.*

In this case, the “old” rule is the common law rule requiring unanimity as to the mode of participation. Kurland, 57 S.C.L. Rev. at 112. The “new” rule is the 1881 statute providing that “[n]o distinction shall exist” between accessories and principals, and that all participants “shall hereafter be indicted, tried and punished as principals.” Code of 1881, §956.

This “new” provision must be strictly construed. *Binnard*, 21

Wash. at 353. Because it does not mention jury unanimity, it cannot be assumed to eliminate that right.

A strict construction, “not operating beyond [the statute’s] words,” suggests that the legislature did not intend to abolish the common-law right to juror unanimity as to the mode of participation. *Id.* The statutory provision is not “directly and irreconcilably opposed” to the common law right. *Id.* It cannot be taken to “subtract” from the common law right. *Id.*

There is an “interpretation which, applied to the old, to the new, or to both, will enable all to stand.” *Id.* The “old” and “new” can be harmonized: participants may be “indicted, tried and punished as principals,” but jurors must still unanimously determine whether they acted as common-law principals or accomplices.

Under this interpretation, the common-law right to juror unanimity as to the mode of participation survived the 1881 enactment and remained in effect when the state constitution was ratified in 1889. Accordingly, the “inviolable” constitutional right to a jury trial protects the right to juror unanimity as to the mode of participation, regardless of the prosecutor’s charging decision or the punishment imposed. *Smith*, 150 Wn.2d at 150–51; *Williams-Walker*, 167 Wn.2d at 913–14; Wash. Const. art. I, §21.

B. Respondent does not address Mr. Guajardo’s discussion of *Carothers* and *Hoffman*.

Neither *Carothers* nor *Hoffman* included *Gunwall* analysis<sup>12</sup> or any discussion of Wash. Const. art. I, §21. *See* Appellant’s Opening Brief, pp.

---

<sup>12</sup> *Carothers* predated *Gunwall*.

35-37. Both cases were consistent with the common-law right to juror unanimity since the defendant in each case qualified as a common-law principal. Appellant's Opening Brief, pp. 35-37.

Despite this, Respondent cites both *Hoffman* and *Carothers* in support of its argument. Brief of Respondent, pp. 40-41. Respondent does not address the absence of a *Gunwall* analysis or the cases' consistency with the common-law rule. Brief of Respondent, pp. 40-41. Nor does Respondent mention the *Walker* court's observation that the state constitutional argument has yet to be addressed. *Walker*, 182 Wn.2d at 484-485.

*Hoffman*, *Carothers*, and the other cases cited by Respondent do not control here.

C. The jury was not instructed on the requirement of unanimity as to Mr. Guajardo's mode of participation.

The court instructed jurors on accomplice liability. CP 44. Jurors were permitted to convict Mr. Guajardo as an accomplice even if he were not present during the alleged killing and thus did not qualify as a common-law principal. CP 44. The court did not instruct jurors that they were required to be unanimous as to Mr. Guajardo's mode of participation in the offense. CP 22-48.

As outlined above, the failure to require unanimity as to his mode of participation violated his state constitutional right to a unanimous jury. Wash. Const. art. I, §21. The error is presumed prejudicial. *Coleman*, 159 Wn.2d at 512 (addressing multiple acts case).

Respondent does not contend that the error was harmless beyond a

reasonable doubt. Brief of Respondent, pp. 35-50. This may be treated as a concession. See *In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009); *State v. McNeair*, 88 Wn.App. 331, 340, 944 P.2d 1099 (1997).

Mr. Guajardo's murder conviction must be reversed, and the case remanded for a new trial with proper instructions. *Id.*

D. Mr. Guajardo may raise his unanimity argument for the first time on review.

Mr. Guajardo is entitled to raise this claim for the first time on appeal. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014) (citing RAP 2.5(a)(3)). The Supreme Court has determined that unanimity issues "constitute manifest error affecting a constitutional right." *Id.*

Respondent argues that the error here is not manifest but does not address *Lamar*. Brief of Respondent, pp. 35-37. Even if the Supreme Court had not unequivocally permitted unanimity claims to be raised for the first time on review, the issue falls well within the scope of RAP 2.5(a)(3). See Appellant's Opening Brief, pp. 39-40.

Respondent does not dispute the constitutional dimension involved. Brief of Respondent, pp. 35-37. Nor does Respondent explicitly argue that the error is not manifest. Brief of Respondent, p. 37.

Instead, Respondent erroneously suggests that a manifest constitutional error cannot be asserted on appeal unless the issue was first raised in the trial court. Brief of Respondent, p. 37 (pointing out that "such an instruction was neither proposed by the defendant, nor did he take any exception to the court's instructions, despite being given the

opportunity...”). This is a curious interpretation of a rule addressing issues that were *not* raised in the trial court. RAP 2.5(a)(3). The rule provides an avenue for raising issues for the first time on appeal; under RAP 2.5(a)(3) it is unnecessary to propose an instruction or take exception in the trial court. Mr. Guajardo’s failure to propose an instruction or to take exception in the trial court is not a bar to review under RAP 2.5(a)(3).

Respondent also argues that the error does not qualify for review under RAP 2.5(a)(3) because there is no “constitutional or case authority supporting giving such an instruction.” Brief of Respondent, p. 37. This argument regarding the *merits* of Mr. Guajardo’s claim is not a basis to *avoid* review.

The argument is available for the first time on review. Appellant’s Opening Brief, pp. 39-40. The Court of Appeals should reach the merits of the issue.

**IV. MR. GUAJARDO WAS CONVICTED UNDER A STATUTE THAT IS UNCONSTITUTIONALLY OVERBROAD.**

The accomplice liability statute and WPIC 10.51<sup>13</sup> allow conviction for protected speech. Because the court instructed jurors on accomplice liability, the statute’s overbreadth requires reversal of Mr. Guajardo’s conviction.

A. Mr. Guajardo is entitled to challenge the statute and associated instruction on First Amendment grounds regardless of the facts of his case.

Facts are not essential to a First Amendment overbreadth

---

<sup>13</sup> See 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (4th Ed).

challenge. Appellant's Opening Brief, pp. 40-51. Thus, even a person whose activity is clearly not protected may challenge a law as overbroad under the First Amendment. *State v. Immelt*, 173 Wn.2d 1, 33, 267 P.3d 305 (2011).

Mr. Guajardo is entitled to bring a First Amendment argument even if he allegedly engaged in unprotected conduct. *City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991); *Virginia v. Hicks*, 539 U.S. 113, 118-119, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003). Respondent does not contend otherwise.

However, Respondent erroneously suggests that “[s]tatutes are presumed to be constitutional,” even when challenged on First Amendment grounds.<sup>14</sup> Brief of Respondent, p. 51. In fact, statutes regulating speech are not presumed constitutional; instead, the State bears the burden of justifying any restriction on speech. *Immelt*, 173 Wn.2d at 6. Because RCW 9A.08.020(3) as expressed in WPIC 10.51 reaches “words [and] encouragement,” the State bears the burden of establishing its constitutionality. *Id.*

B. The complicity statute and associated jury instruction are unconstitutionally overbroad.

A statute is unconstitutionally overbroad if it reaches a substantial

---

<sup>14</sup> Respondent also makes passing reference to statutes “that regulate[ ] behavior, not pure speech.” Brief of Respondent, p. 52. As interpreted and expressed in the pattern instruction, the complicity statute RCW 9A.08.020 criminalizes “words [or] encouragement,” and thus is directed at pure speech. *See* WPIC 10.51. Standards governing the regulation of conduct are inapplicable.

amount of protected speech in relation to its plainly legitimate sweep. *Hicks*, 539 U.S. at 119. Criminal statutes must be scrutinized with particular care. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 459, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).

A person may be punished for speech advocating criminal activity, but only if the person's words are "directed to inciting or producing imminent lawless action and [are] likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969). Jury instructions must inform jurors that speech is protected "unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur." *U.S. v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

Here, the court's accomplice instruction did not meet this standard. CP 44. The pattern instruction (from which Instruction No. 20 is drawn) and the accomplice statute upon which it is based violate the First Amendment because they criminalize a substantial amount of constitutionally protected speech. *Immelt*, 173 Wn.2d at 6-7; *Ashcroft*, 535 U.S. at 255.

The pattern instruction permits conviction for words or encouragement.<sup>15</sup> Although it is directed to pure speech, there is no requirement that "the intent of the speaker and the tendency of [the] words [are] to produce

---

<sup>15</sup> The U.S. Supreme Court recently reviewed a 9<sup>th</sup> Circuit decision invalidating a similar federal statute on First Amendment grounds. *United States v. Sineneng-Smith*, --- U.S. ---, 140 S. Ct. 1575, --- L.Ed.2d --- (2020). Although the Supreme Court vacated and remanded the 9<sup>th</sup> Circuit decision, it did not address the merits. Instead, it based its decision on the lower court's departure from the principle of party presentation: the 9<sup>th</sup> Circuit's overbreadth analysis stemmed from the court's invitation to amici to address an issue not briefed by the parties. *Id.*

or incite an imminent lawless act, one likely to occur.” *Freeman*, 761 F.2d at 552.

Instead, guilt may be premised on speech coupled with mere knowledge, regardless of the speaker’s intent and regardless of the likelihood of imminent lawless action. RCW 9A.08.020(3)(a); WPIC 10.51. The statute and the pattern instruction are unconstitutionally overbroad.

The statute could be saved, however, by “a limiting construction or partial invalidation [that] so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). Were the statute construed to fit within the *Brandenburg* formulation, no constitutional violation would result.

Washington courts have not imposed a limiting construction that comports with *Brandenburg*. Instead, Washington’s pattern instruction explicitly adopts an interpretation that reaches protected speech. As in *Freeman*, the trial court’s failure here to instruct in a manner consistent with *Brandenburg* requires reversal. *Freeman*, 761 F.2d at 552.

The Court of Appeals must construe RCW 9A.08.020(3) in keeping with the *Brandenburg* standard. Mr. Guajardo’s conviction must be reversed, and the case must be remanded for a new trial with proper instructions.

C. *Holcomb* and its antecedents failed to properly apply *Brandenburg* because they approve conviction based on knowledge rather than intent.

Respondent concedes that the complicity statute “regulates

speech.” Brief of Respondent, p. 53. However, Respondent erroneously argues that it reaches only “speech undeserving of First Amendment protection.”<sup>16</sup> Brief of Respondent, p. 53.

Respondent relies on *Holcomb*, *supra***Error! Bookmark not defined.** *Holcomb* is based on two prior decisions addressing the same issue.<sup>17</sup> *State v. Coleman*, 155 Wn.App. 951, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011); *State v. Ferguson*, 164 Wn.App. 370, 264 P.3d 575 (2011).

*Holcomb* (and its antecedents) should be overruled because they are incorrect and harmful. *See State v. Pierce*, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (“We will overrule prior precedent when there has been a clear showing that an established rule is incorrect and harmful”) (internal quotation marks and citations omitted).

As Respondent points out, the *Holcomb* court upheld the accomplice liability statute because it “has been construed to apply solely when the accomplice acts *with knowledge* of the specific crime that is eventually charged.” Brief of Respondent, p. 53 (quoting *Holcomb*, 180 Wn.App. at 590) (emphasis added).

This quotation encapsulates the problem. The *Brandenburg* standard requires more than mere knowledge – even knowledge about a specific

---

<sup>16</sup> Respondent does not argue that any encroachment on protected speech is insubstantial compared to the statute’s legitimate sweep. This may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n. 4; *McNeair*, 88 Wn.App. at 340.

<sup>17</sup> Respondent erroneously claims that Mr. Guajardo did not address *Holcomb*. Brief of Respondent, p. 54. This is incorrect. *See Appellant’s Opening Brief*, pp. 47-50.

crime. Rather, under *Brandenburg*, the focus is on “both the *intent* of the speaker and the tendency of his words.” *Freeman*, 761 F.2d at 552 (emphasis added).

Knowledge that one’s words will encourage a specific crime is insufficient. *Id*; *Brandenburg*, 395 U.S. at 447. For example, an attorney may legitimately promise to defend those who protest construction of a pipeline by trespassing on private property. The attorney *knows* that the promise will encourage the crime but cannot be prosecuted absent proof of *intent* to encourage the crime.

Nothing in Washington’s complicity statute or the pattern instruction requires jurors to find criminal intent before convicting. Instead, as Respondent points out, the statute applies “when the accomplice acts *with knowledge* of the specific crime that is eventually charged... [It] requires that a defendant *have knowledge* that it will promote or facilitate the commission or planning of the crime.” Brief of Respondent, p. 56 (emphasis added).

This is insufficient under *Brandenburg*. *Freeman*, 761 F.2d at 552. The State must prove intent, and the jury must be instructed that conviction requires proof that the accomplice intends commission of the crime charged.

*Brandenburg* also protects speech that is unlikely to produce imminent lawless action. *Brandenburg*, 395 U.S. at 447. A protester who yells to police to come join the protest may intend to encourage a specific crime. However, despite the speaker’s intent, the protester will not be

guilty as an accomplice unless jurors find that the speech is “likely to incite or produce” imminent lawless action. *Id.*

Nothing in the statute or the pattern requires jurors to find the speech “likely to... produce” imminent lawless action. *Id.* Respondent does not contend that the statute or the pattern instruction incorporates this prong of the *Brandenburg* test. Brief of Respondent, pp. 50-57.

RCW 9A.08.020(3), as currently interpreted, is unconstitutionally overbroad. *Id.* The pattern instruction that was used in this case allowed conviction for words uttered with knowledge that they would promote or facilitate a specific crime, even if the speaker did not intend to encourage the crime and even if the speech was not likely to produce imminent lawless action. *Id.*

Mr. Guajardo is entitled to challenge the statute and instruction on First Amendment grounds, even if his own words or conduct are unprotected. *Immelt*, 173 Wn.2d at 33. Mr. Guajardo’s conviction must be reversed. If he is to be retried on an accomplice theory, the trial court must instruct jurors in a manner consistent with the *Brandenburg* standard. *Id.*; *Freeman*, 761 F.2d at 552.

D. The constitutional error may be raised for the first time on appeal.

A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Mr. Guajardo’s First Amendment challenge raises a manifest error affecting a constitutional right. *See* Appellant’s Opening Brief, pp. 50-51.

Without elaboration, Respondent claims that Mr. Guajardo “fails to

identify or argue any obvious error on the record that warrants appellate review under RAP 2.5(a).” Brief of Respondent, p. 51. In the absence of authority or argument, the Court of Appeals should disregard this unsupported claim. *Pub. Util. Dist. No. 2 of Pac. Cty. v. Comcast of Washington IV, Inc.*, 8 Wn.App.2d 418, 444 n. 28, 438 P.3d 1212 (2019), *review denied*, 193 Wn.2d 1031, 447 P.3d 162 (2019).

Given what the trial judge knew at the time of the trial, “the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). The problem posed by the statute and the court’s accomplice instruction are evident in the record. The constitutional issue is manifest and may be reviewed for the first time on appeal. *Id.*; RAP 2.5(a)(3); *see* Appellant’s Opening Brief, pp. 50-51.

**V. MR. GUAJARDO’S SENTENCE MUST BE VACATED BECAUSE RESPONDENT HAS CONCEDED ERROR REGARDING HIS CRIMINAL HISTORY AND THE COURT’S CALCULATION OF THE OFFENDER SCORE.**

Respondent concedes that Mr. Guajardo’s prior California conviction for assault is not comparable to any Washington felony. Brief of Respondent, p. 58. Because the trial court miscalculated Mr. Guajardo’s offender score, the sentence must be vacated, and the case remanded for a new sentencing hearing. *See* Appellant’s Opening Brief, pp. 51-56.

The trial court also erred by including Mr. Guajardo’s California conviction for evading an officer. Although both states criminalize similar behavior, the complaint charging Mr. Guajardo with evading an officer did not allege that the officer was in uniform, as required under the

Washington statute. RCW 46.61.024 (1999); CP 184. Because the record does not include the documents supporting Mr. Guajardo's plea, nothing shows that Mr. Guajardo pled guilty to conduct that would qualify as a Washington felony. CP 184, 190. Respondent does not discuss the discrepancy between the California complaint and that state's evading statute. This failure may be taken as a concession. *Pullman*, 167 Wn.2d at 212 n. 4; *McNeair*, 88 Wn.App. at 340.

Based on the state's concessions, Mr. Guajardo's sentence must be vacated, and the case remanded for a new sentencing hearing. *See In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 256, 111 P.3d 837 (2005).

**VI. RESPONDENT CONCEDES THAT THE KIDNAPPING CONVICTION MUST BE VACATED.**

Respondent agrees that "this Court should remand with instructions to enter an order vacating the first-degree kidnapping." Brief of Respondent, p. 60. This will ensure compliance with the double jeopardy clause. *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007).

Based on Respondent's concession, remand is required.

**CONCLUSION**

Mr. Guajardo's homicide conviction must be reversed, and the charge dismissed with prejudice because the State failed to independently prove the *corpus delicti* of felony murder. In the alternative, the case must be remanded for a new trial because the state crime lab mismanaged its

analysis of DNA evidence and because Mr. Guajardo was deprived of his state constitutional right to a unanimous verdict.

In addition, Washington's complicity statute and the associated pattern jury instruction violate the First Amendment. This court must impose a limiting construction on the statute and remand Mr. Guajardo's case for a new trial with proper instructions.

Based on the state's concessions, Mr. Guajardo's sentence must be vacated, and the case must be remanded for a new sentencing hearing and an order vacating the kidnapping conviction.

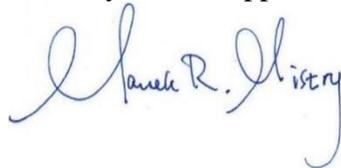
Respectfully submitted on June 1, 2020,

**BACKLUND AND MISTRY**



---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



---

Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Alvaro Guajardo, DOC #382871  
Washington State Penitentiary  
1313 N. 13<sup>th</sup> Ave.  
Walla Walla, WA 99362

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

Spokane County Prosecuting Attorney  
lsteinmetz@spokanecounty.org  
scpaappeals@spokanecounty.org

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

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

Signed at Olympia, Washington on June 1, 2020.

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

**BACKLUND & MISTRY**

**June 01, 2020 - 9:55 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36967-6  
**Appellate Court Case Title:** State of Washington v. Alvaro Guajardo  
**Superior Court Case Number:** 17-1-02220-0

**The following documents have been uploaded:**

- 369676\_Briefs\_20200601095406D3694857\_1886.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was 36967-6 State v Alvaro Guajardo Reply Brief.pdf*
- 369676\_Motion\_20200601095406D3694857\_4624.pdf  
This File Contains:  
Motion 1 - Waive - Page Limitation  
*The Original File Name was 369676 State v Alvaro Guajardo Motion for Overlength Reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org

**Comments:**

---

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com  
Address:  
PO BOX 6490  
OLYMPIA, WA, 98507-6490  
Phone: 360-339-4870

**Note: The Filing Id is 20200601095406D3694857**