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No. 36967-6-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Alvaro Guajardo,**

Appellant.

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

The Honorable Judge Raymond F. Clary

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Guajardo's homicide conviction violated his Fourteenth Amendment right to due process.
2. Mr. Guajardo's conviction was based on insufficient evidence.
3. The prosecution failed to establish the *corpus delicti* of felony murder by *prima facie* evidence independent of Mr. Guajardo's statements.

**ISSUE 1:** The State may not use an accused person's uncorroborated statement to obtain a conviction. Was the independent evidence insufficient to *prima facie* establish the *corpus delicti* of felony murder?

4. The court erred by denying Mr. Guajardo's motion to suppress DNA test results produced on the day trial was scheduled to start.
5. The court erred by denying Mr. Guajardo's motion to dismiss the case for governmental mismanagement.
6. The trial court erred by adopting Finding of Fact No. 5 (CP 13).
7. The trial court erred by adopting Finding of Fact No. 13. (CP 13).
8. The trial court erred by adopting Finding of Fact No. 16 (CP 13).
9. The trial court erred by adopting Conclusion of Law No. 1 (CP 14).
10. The trial court erred by adopting Conclusion of Law No. 2 (CP 14).

**ISSUE 2:** Evidence must be suppressed when government mismanagement forces an accused person to choose between his right to a speedy trial and his right to the effective assistance of counsel. Should the court have suppressed late DNA test results when government mismanagement forced Mr. Guajardo to choose between his right to a speedy trial and his right to the effective assistance of counsel?

**ISSUE 3:** A prosecution must be dismissed when government mismanagement injects new facts into a case and thereby prejudices the accused person. Should the trial court have dismissed Mr. Guajardo's case when, due to mismanagement by the crime lab, defense counsel received DNA test results on the day trial was scheduled to start?

11. The trial court violated Mr. Guajardo's state constitutional right to juror unanimity.
12. The trial court erred by failing to instruct jurors on the requirement of unanimity as to Mr. Guajardo's mode of participation in the homicide.

**ISSUE 4:** Historically, a criminal conviction required jurors to unanimously determine if an accused person acted as principal or accomplice. Was the common law requirement of unanimity as to the mode of participation incorporated into Wash. Const. art. I, §21?

**ISSUE 5:** Under the state constitution, juror unanimity is required for conviction of a criminal offense. Did the trial court violate Mr. Guajardo's state constitutional right to a jury trial by failing to instruct on unanimity as to the mode of his participation in the homicide?

13. Mr. Guajardo was convicted through the operation of a statute that is overbroad in violation of the First Amendment.
14. The trial judge erred by giving Instruction No. 20, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.

**ISSUE 6:** A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad, in violation of the First and Fourteenth Amendments?

15. The sentencing court failed to properly determine Mr. Guajardo's offender score and standard range.
16. The sentencing judge erred by sentencing Mr. Guajardo with an offender score of 9.
17. The court exceeded its authority by adding two points to Mr. Guajardo's offender score based on his California conviction for assault.
18. The court exceeded its authority by adding one point to Mr. Guajardo's offender score based on his California conviction for Evading an Officer.
19. The State failed to establish that Mr. Guajardo's California convictions were legally comparable to any Washington felonies in effect at the time of each offense.

**ISSUE 7:** An out-of-state conviction cannot add to an offender score at sentencing unless it is comparable to a Washington felony. Did the court err by adding three points to Mr. Guajardo's offender score based on his California convictions for assault and evading?

## INTRODUCTION AND SUMMARY OF ARGUMENT

At Alvaro Guajardo's trial for felony murder, the State failed to produce a body, a murder weapon, or an eyewitness to the alleged killing. Instead, it relied primarily on the testimony of an informant who claimed that Mr. Guajardo had "confessed." The State failed to prove the *corpus delicti* of felony murder by evidence independent of Mr. Guajardo's alleged statements.

Police recovered a mattress where the alleged victim had supposedly been killed and dismembered. They immediately submitted it to the state crime lab. The crime lab waited 2 ½ months to perform work that it could have completed in 10 days. DNA test results were provided to defense counsel on the day trial was scheduled to begin. The trial court should have granted Mr. Guajardo's motion to dismiss the case or to suppress the late DNA evidence.

The court instructed jurors on a theory of accomplice liability. The court's instructions did not require juror unanimity as to the mode of Mr. Guajardo's participation in the homicide. This violated his state constitutional right to a unanimous jury. In addition, the accomplice statute (and associated pattern instruction) are unconstitutionally overbroad, in violation of the First Amendment.

For all these reasons, Mr. Guajardo's murder conviction must be

reversed.

At sentencing, the State alleged that Mr. Guajardo had an offender score of nine. Included in this calculation were California convictions for assault and for evading an officer. The State failed to prove these out-of-state convictions were comparable to any Washington felonies. They should not have been included in the offender score. The sentence must be vacated and the case remanded for a new sentencing hearing.

The court and the parties agreed that Mr. Guajardo's kidnapping conviction merged with his felony murder conviction. Despite this, the court did not vacate the kidnapping conviction. The case must be remanded with instructions to vacate the kidnapping conviction.

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Brett Snow's family reported him missing in early December 2015. RP (6/17/19) 378, 384, 391. Snow had been homeless and using and distributing drugs. RP (6/17/19) 376-379, 382-383, 386, 403; RP (6/18/19) 571. Over the next months, investigation revealed no body, murder weapon, or eyewitnesses.

In fact, the investigation never revealed Snow's body. Nor did police find any murder weapons, or any eyewitnesses. RP (6/17/19) 470; RP (6/19/19) 736; See RP.

Snow's mother did not know where he was living, even though she spoke to him every few weeks. RP (6/17/19) 377. According to Snow's sister, he lived "random places." RP (6/17/19) 383. There'd been a time when "he wasn't around [the North Starr Road address] because he had stolen [a] van" belonging to Sutton and Stone. RP (6/17/19) 403.

That North Starr Road refers to a property owned by Russell Joyce where Joyce lived, along with Cheryl Sutton, Ken Stone, and Alberto Guajardo. RP (6/17/19) 395-398. Joyce allowed Stone and Sutton to live in the main house, where they established a drug distribution business. RP (6/17/19) 399-401; RP (6/18/19) 569, 571. Joyce stayed in a room above the shop, and Mr. Guajardo sometimes stayed in the shop room right below him. RP (6/17/19) 397.

By January of 2016, everyone had been evicted from Joyce's property and a new owner set about remodeling. RP (6/17/19) 452-453.

More than a year after Snow was reported missing, Christopher Schoonover, a drug user and dealer himself, contacted police from an Idaho prison. RP (6/18/19) 593. Schoonover alleged that Alberto Guajardo had told him what happened to Snow. RP (6/18/19) 574. Schoonover claimed that Mr. Guajardo told him that Sutton hit Snow over the head, then Snow was "finished off" and cut up. RP (6/18/19) 567-568, 574-577. Schoonover further asserted that Mr. Guajardo had told him that Mr.

Guajardo helped with the murder. RP (6/18/19) 576. Schoonover was given consideration for his statement that included dismissal of two drug charges and a significantly reduced jail term on unrelated offenses. RP (6/18/19) 579-581, 606.

Schoonover's description of the murder, as he attributed to Mr. Guajardo, included use of a lawnmower blade, a firearm, one or more knives, a tarp and a bucket. None of these items that Schoonover claimed were ever recovered. RP (6/18/19) 574, 576-577.

In June of 2016, still without any arrests, a search dog identified scents in the remodeled shop that later were found to be blood. RP (6/18/19) 486-487, 491-492, 506-509. Police had also rounded up several cell phones and traced calls and messages. None of these phones had any tie to Mr. Guajardo. RP (6/18/19) 519, 526-528; RP (6/19/19) 690-713.

The state charged Mr. Guajardo with murder on June 22, 2017.<sup>1</sup> CP 1. After numerous continuances, trial was set to begin on November 26, 2018. Scheduling Order filed 10/12/18, Supp. CP. Two weeks before trial, police found a mattress "where Brett Snow was laying [sic] when he was stabbed to death." State Motion to Continue Trial filed 11/15/18, Supp. CP; CP 13. Police immediately submitted the mattress to the crime lab for testing. CP 13.

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<sup>1</sup> The state also charged Cheryl Sutton and Ken Stone with murder. RP (6/18/19) 526.

Over Mr. Guajardo's objection, the court continued the case to allow for DNA testing of the mattress. RP (11/16/18) 2-14. Trial was ultimately reset to begin on February 4, 2019. Scheduling Order filed 11/16/18, Supp. CP; Scheduling Order filed 11/29/18, Supp. CP.

By the morning trial was scheduled to begin, defense counsel had still not been provided the results of the DNA test. RP (2/4/19) 123; Defense Motion to Dismiss or Exclude filed 2/4/19, Supp. CP. The results of the DNA tests were provided later that day. RP (2/4/19) 136.

The State did not explain the reason for the delay, other than to say that "there was another case that had priority that bumped [the] analysis of the mattress back." RP (1/25/19) 102. This other case accounted for only one week of the delay. RP (1/25/19) 102. Once the crime lab began work on the case, it provided results within approximately 10 days. RP (1/25/19) 102; RP (2/4/19) 136.

Mr. Guajardo moved the court for an order dismissing the case or suppressing the new DNA evidence. Defense Motion to Dismiss or Exclude, filed 2/4/19, Supp. CP; RP (2/4/19) 104-138. The court denied the motion but granted Mr. Guajardo a lengthy continuance to allow his attorney to prepare to meet the new DNA evidence. Scheduling Order filed 2/4/19, Supp. CP; Scheduling Order filed 2/8/19, Supp. CP; RP (2/4/19) 127-132; RP (2/8/19) 140-146. Trial was rescheduled to June 17, 2019.

Scheduling Order filed 2/8/19, Supp. CP.

At trial, the State's expert testified that the mattress contained DNA from both Mr. Guajardo and Snow.<sup>2</sup> RP (6/19/19) 669-673. No other piece of evidence contained DNA from both men. RP (6/19/19) 649-683. The expert could not determine if Snow's DNA came from blood or saliva. RP (6/19/19) 672.

Russell Joyce told the jury that everyone who lived on his property used and sold drugs, as did Snow. RP (6/17/19) 398, 401, 403. He said that Snow talked to him about Snow's idea of setting up a methamphetamine lab, because Snow knew that Joyce knew how to cook methamphetamine. RP (6/17/19) 405, 429. Joyce testified that Snow wanted to distribute this methamphetamine without the participation of Sutton, so the operation would need to be a secret. RP (6/17/19) 405-406; RP (6/18/19) 571.

Snow had stolen Sutton's van around this time as well. RP (6/17/19) 403, 429. Joyce said that he encouraged Snow to come back to face what he'd done, and Snow did. RP (6/17/19) 403-404. According to Joyce, while the two were in his room talking about cooking methamphetamine and making money, Sutton burst into the room very angry. RP (6/17/19) 405-406, 429. Joyce said that Sutton had a steel bar, and Stone

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<sup>2</sup> There was also blood containing DNA from Nicole Price, who had the mattress at the time it was seized by police. RP (6/18/19) 531-532; RP (6/19/19) 671-672.

tied Snow up with a phone cord. RP (6/17/19) 405-406. Joyce said that Mr. Guajardo came up and the group went downstairs. RP (6/17/19) 406.

Joyce admitted he didn't contact police at the time, or ever. RP (6/17/19) 408. He said that when police contacted him, he did not report to them the information to which he testified at trial. RP (6/17/19) 415. Joyce also acknowledged that he did not hear any sounds of fighting or yelling, and that he didn't ever see a body or even any blood. RP (6/17/19) 434.

The court instructed the jury on a theory of accomplice liability. CP 34, 35, 44, 48. The court did not instruct jurors that they had to be unanimous as to the mode of Mr. Guajardo's participation in the charged crimes. CP 22-48. Nor did the court instruct jurors that accomplice liability could not rest on Mr. Guajardo's speech unless it was directed to inciting or producing imminent lawless action and likely to incite or produce such action. CP 22-48.

The jury convicted Mr. Guajardo of first-degree felony murder.<sup>3</sup> CP 61.

At sentencing, Mr. Guajardo did not admit or acknowledge any prior convictions. RP (7/19/19) 856. Instead, his attorney asked the court "to examine the State's proposed evidence of his prior convictions and to

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<sup>3</sup> The jury also returned a guilty verdict on a charge of first-degree kidnapping; however, the Judgment and Sentence makes no reference to that charge. CP 61.

determine the appropriate range on his sentence.” Defendant’s Sentencing Brief, p. 3, filed 7/12/19, Supp. CP.

The court found that Mr. Guajardo had an offender score of nine. CP 64. Included in this calculation were a number of California convictions. Among these were convictions for “Force/Asslt w/Deadly Weap” and “Evade Police Officer.” CP 63. Based on information submitted by the State, the court concluded that these offenses were comparable to Washington felonies. RP (7/19/19) 868; CP 64; Certified Copies California DOC and Plea Paperwork, filed 7/22/19, Supp. CP.

Mr. Guajardo was sentenced to 572 months in prison, with a mandatory minimum term of 240 months. CP 66. He timely appealed. CP 78.

### **ARGUMENT**

**I. THE EVIDENCE WAS INSUFFICIENT BECAUSE THE STATE FAILED TO PROVE THE *CORPUS DELICTI* OF FELONY MURDER.**

At Mr. Guajardo’s murder trial, the State did not produce a body, a murder weapon, or an eyewitness. Instead, the case rested on an informant’s claim that Mr. Guajardo had confessed to killing Snow. Because the State failed to produce independent proof of the *corpus delicti*, the evidence was insufficient to convict Mr. Guajardo of felony murder.

A. The State was required to produce independent evidence establishing the *corpus delicti*.

Due process requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction based on insufficient evidence must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

The prosecution may not use an accused person's uncorroborated statement to obtain a conviction. *State v. Cardenas-Flores*, 189 Wn.2d 243, 252-263, 401 P.3d 19 (2017). Instead, the State must produce independent evidence that *prima facie* establishes the *corpus delicti* of the charged crime. *Id.*, at 258.

Here, the murder conviction rested primarily on Mr. Guajardo's alleged "confession" to Schoonover. The State failed to introduce sufficient independent evidence to prove the *corpus delicti* of felony murder. Because of this, the murder conviction must be reversed and the charge dismissed with prejudice.

The *corpus delicti* rule "protects against convictions based on false confessions." *Id.*, at 247. A *corpus delicti* argument challenges the sufficiency of the evidence, and thus may be raised for the first time on review. *Id.*, at 263. Failure to independently establish the *corpus delicti* requires dismissal. *Id.*, at 260, 262-263.

To prove a *prima facie* case, the State's independent evidence of the *corpus delicti* must be consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007). If the independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Id.*, at 329-330.

In homicide cases, the *corpus delicti* rule requires independent proof of "(1) the fact of death and (2) a causal connection between the death and a criminal act." *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). Where the charge is felony murder, the State need not establish the underlying felony as an element of the *corpus delicti*. *State v. Burnette*, 78 Wn.App. 952, 957, 904 P.2d 776 (1995).

Here, the independent evidence was insufficient to prove the *corpus delicti* of murder. The State did not prove the "fact of death" or a causal connection to some criminal act. Because of this, Mr. Guajardo's conviction must be reversed, and the charge dismissed with prejudice. *Aten*, 130 Wn.2d at 655.

B. The independent evidence introduced at trial was insufficient to prove the *corpus delicti* of felony murder.

Here, the State failed to prove the *corpus delicti* of murder. The prosecution did not independently show that Snow was deceased. Nor did

it prove a causal connection between some criminal act and Snow's alleged death. Instead, the State relied on Schoonover's unsupported claims regarding Mr. Guajardo's "confession."

**The "fact of death."** The independent evidence did not prove "the fact of death." *Aten*, 130 Wn.2d at 655. Although Snow went missing, the independent evidence supports reasonable and logical inferences of both guilt and innocence. *Brockob*, 159 Wn.2d at 329.

Snow was a drug user who lived in "random places." RP (6/17/19) 383. There'd been a time when "he wasn't around" one of his regular haunts<sup>4</sup> "because he had stolen [a] van" belonging to Sutton and Stone. RP (6/17/19) 403. Snow's driver's license and EBT card were found in Montana.<sup>5</sup> RP (6/17/19) 462. He'd apparently distributed some of his other personal property to people "in the community" before his disappearance. RP (6/17/19) 462.

The evidence is consistent "with a hypothesis of innocence": that Snow fled Washington to evade further retribution from Sutton and/or to escape the difficult life he'd made for himself in order to begin anew in Montana or elsewhere. His departure from Spokane County can be explained without assuming he'd been killed.

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<sup>4</sup> The North Starr Road address.

<sup>5</sup> Some of Snow's other personal property was in the possession of people "in the community." RP (6/17/19) 462.

Without a body, the State *can* rely on circumstantial evidence to prove the fact of death. *State v. Thompson*, 73 Wn.App. 654, 659, 870 P.2d 1022 (1994). But in such cases the supporting evidence is considerably stronger than that produced here. *See, e.g., State v. Lung*, 70 Wn.2d 365, 423 P.2d 72 (1967); *State v. Sellers*, 39 Wn.App. 799, 695 P.2d 1014 (1985); *State v. Quillin*, 49 Wn.App. 155, 160, 741 P.2d 589 (1987).

In *Sellers*, two people witnessed a shooting and “saw the gunman put the inert victim in a car and drive away.” *Sellers*, 39 Wn.App. at 803. This was found to be independent proof establishing the fact of death. *Id.* Here, no witnesses claim to have seen Snow killed.

In *Lung*, police found a coat belonging to a woman who’d gone missing. The coat had blood stains surrounding a bullet hole. *Lung*, 70 Wn.2d at 372-373. This was held sufficient to prove the fact of death. *Id.* Here, police did not find any bloody clothing that had belonged to Snow.

The defendant in *Quillin* was seen driving a car that belonged to the mother of a missing person. *Quillin*, 49 Wn.App. at 160. The car had been stolen the day of the victim’s disappearance. *Id.* It was later found burned and abandoned, and witnesses testified that the defendant had burned it. *Id.* The defendant (and his half-brother, who pled guilty to the murder) had some of the victim’s clothing, including a leather jacket stained with reddish-brown mud. *Id.*, at 162 n. 1. The defendant and his

half-brother had mud on their own clothing. *Id.*, at 162 n. 1. Bloodstains were found on the pants worn by the defendant's half-brother and on a pair of shoes. *Id.*, at 162 n. 1. The likely murder weapon was a box knife that had been seen in the defendant's possession. *Id.*, at 162 n. 1.

Here, by contrast, nothing suggests that Mr. Guajardo or his companions tried to destroy property that had belonged to Snow. They did not have bloody clothing that had been worn by Snow. Nor did they themselves have clothing with blood on it. Nor did the State produce a description of a murder weapon or show that Mr. Guajardo was in possession of such a weapon.

In *Thompson*, the missing victim “never missed appointments without informing the affected parties, she never had been gone for more than a 24-hour period, she was a good housekeeper, she let people know where she was, she did not have any dangerous habits, she had prepared for the upcoming fall quarter and had made plans to remodel her mother's house, she took excellent care of her pets, and her physical and psychological health was good.” *Id.*, at 663.

The consistency of her habits provided strong evidence that she had died suddenly: “there was evidence that [the victim], after making several appointments and having numerous obligations to fulfill, disappeared without telling anyone, that a moldy coffeepot and dirty dishes

were found in her house, and that her cat was left for days without food and water.” *Id.* In addition, the defendant was found using the victim’s ATM card and her car, which had bloodstains in it. *Id.*

Snow, by contrast, was not known for his consistency. Unlike the missing person in *Thompson*, Snow had previously “been gone for more than a 24-hour period,” he did not regularly “let people know where [he] was,” he had “dangerous habits,” he had not described any plans for upcoming activities, and his “physical and psychological” health were questionable in light of his long-standing drug habit. *Id.* Furthermore, unlike the defendant in *Thompson*, Mr. Guajardo did not possess or use Snow’s ATM card, vehicle, or other property.

Even the trace amounts of Snow’s blood discovered in the shop do not establish that he’d been killed.<sup>6</sup> As Joyce testified, it was not uncommon in the drug world for people to be beaten for their transgressions. RP (6/17/19) 404, 406, 408. The small amounts of blood found in the shop may have resulted from a beating rather than a killing. After Snow left Joyce’s apartment, Joyce did not hear any yelling, fighting, or sounds of torture from the shop where Snow was allegedly killed and dismembered. RP (6/17/19) 434. Joyce never saw a body or blood, even though he had

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<sup>6</sup> A small amount of Snow’s DNA was also recovered from the mattress where he was allegedly killed; however, it was not clear that the DNA came from blood rather than saliva. RP (6/19/19) 672.

cameras set up to monitor the property. RP (6/17/19) 434.

The independent evidence was insufficient to prove the “fact of death.” Because the State failed to prove the *corpus delicti* of murder by independent evidence, the conviction must be reversed, and the charge dismissed with prejudice. *Aten*, 130 Wn.2d at 655.

A “**causal connection.**” The independent evidence here also failed to establish “a causal connection between the [alleged] death and a criminal act.” *Aten*, 130 Wn.2d at 655. First, in the absence of a body, no cause of death could be determined. Second, no one claims to have witnessed a murder or other criminal act that could have caused Snow’s death. Third, police did not find a murder weapon, despite Schoonover’s claim that the perpetrators used a lawnmower blade, a firearm, a knife, and tools for dismembering Snow.<sup>7</sup> RP (6/18/19) 574, 576-577.

Although Joyce testified that Mr. Guajardo was involved in unlawfully restraining and assaulting Snow in Joyce’s apartment, the independent evidence did not prove any causal connection between those acts and Snow’s alleged death. In the absence of proof showing a causal connection between the “fact of death” and some criminal agency, the independent evidence was insufficient to prove the *corpus delicti*.

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<sup>7</sup> Nor did police find the tarp or buckets Schoonover described when relaying Mr. Guajardo’s purported “confession.” RP (6/18/19) 574, 576.

The State failed to present independent evidence establishing the *corpus delicti* of the charged crime. Accordingly, the evidence was insufficient for conviction. Mr. Guajardo's felony murder conviction must be reversed, and the charge dismissed with prejudice. *Aten*, 130 Wn.2d at 655.

**II. THE TRIAL COURT ERRED BY DENYING MR. GUAJARDO'S MOTION TO SUPPRESS EVIDENCE BASED ON GOVERNMENTAL MISMANAGEMENT.**

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 court should have suppressed the new DNA evidence based on the state crime lab's mismanagement.

A. The state crime lab mismanaged its analysis of the evidence in Mr. Guajardo's case.

A trial court may dismiss a criminal prosecution based on "arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b). A court may also order a less severe remedy, such as suppression of evidence. *City of Seattle v. Holifield*, 170 Wn.2d 230, 239, 240 P.3d 1162 (2010).

Under CrR 8.3, misconduct "need not be of an evil or dishonest nature; *simple mismanagement is sufficient.*" *State v. Michielli*, 132

Wn.2d 229, 239, 937 P.2d 587 (1997) (quoting *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)) (emphasis in *Michielli*). Furthermore, the mismanagement may stem from the conduct of any governmental entity, including the state crime lab. See *State v. Woods*, 143 Wn.2d 561, 583, 23 P.3d 1046 (2001); see also *State v. Wake*, 56 Wn.App. 472, 475, 783 P.2d 1131 (1989) (addressing impact of crime lab mismanagement on speedy trial); *State v. Jieta*, No. 77800-5-I, Slip Op. at \*2 (Wash. Ct. App. Feb. 10, 2020) (affirming that CrRLJ 8.3 reaches mismanagement by court administration).

In this case, police submitted the mattress to the crime lab one day after they'd recovered it. CP 13. The crime lab did not report the results of DNA testing until 2 ½ months later, on the day trial was scheduled to begin. RP (2/4/19) 123, 136. The State provided no information explaining the delay, other than to say that “there was another case that had priority that bumped [the] analysis of the mattress back.” RP (1/25/19) 102. This higher priority case apparently accounted for only one week of the 2 ½ month delay. RP (1/25/19) 102. Indeed, once the crime lab finally started work on Mr. Guajardo’s case, the record suggests that the analysis, preparation of the report, and peer review took approximately 10 days. RP (1/25/19) 102; RP (2/4/19) 136.

The crime lab mismanaged the evidence in this case by delaying

analysis for 2 ½ months without explanation. Because the lab’s mismanagement prejudiced Mr. Guajardo, his convictions must be reversed. *Michielli*, 132 Wn.2d at 239. The case must be remanded with instructions to suppress the late DNA evidence.

B. The crime lab’s mismanagement forced Mr. Guajardo to choose between his right to a speedy trial and his right to the effective assistance of counsel.

The prejudice contemplated by CrR 8.3 “includes the right to a speedy trial and the ‘right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.’” *Michielli*, 132 Wn.2d at 240 (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

In *Michielli*, the State added charges shortly before trial was scheduled to begin. As a result, the defendant “was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance.” *Id.*, at 244. Here, as in *Michielli*, the delay at the crime lab forced Mr. Guajardo to seek a continuance when the court refused to dismiss the case or suppress the evidence. The *Michielli* court noted that “[d]efendant’s being forced to waive his speedy trial right is not a trivial event.” *Id.*, at 245. It found that “[t]he State’s delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and

prejudice sufficient to satisfy CrR 8.3(b).” *Id.*

Here, as in *Michielli*, the lab’s mismanagement forced Mr. Guajardo to choose between his right to a speedy trial and his right to adequately prepared counsel. *Michielli*, 132 Wn.2d at 240

The late DNA evidence was significant. The new results, provided on the very day trial was scheduled to start, showed that the mattress contained DNA from both Mr. Guajardo and Snow. RP (6/19/19) 669-673. The evidence was critical to the prosecution’s case, given the State’s failure to produce a body, a murder weapon, or an eyewitness.

The overall weakness of the state’s case magnified the importance of the DNA test results, which might otherwise have been less significant. In the absence of other evidence, jurors may well have placed great weight on the presence of Snow’s DNA on Mr. Guajardo’s mattress, even though the forensic expert could not determine if Snow’s DNA came from blood or saliva. RP (6/19/19) 672.

Defense counsel was not prepared to meet the evidence, given that he received it on the day scheduled for trial. RP (2/4/19) 120, 127, 137-138. Instead, Mr. Guajardo was forced to waive speedy trial and request a continuance so his attorney could consult with an expert and prepare a defense. RP (2/4/19) 120, 127, 137-138.

The crime lab’s mismanagement prejudiced Mr. Guajardo. The

trial court should have granted the defense motion to suppress the late DNA test results. *Id.*

- C. Mr. Guajardo was not required to show that the crime lab’s mismanagement injected “new facts” into the case.

To obtain an order suppressing evidence, an accused person need not show that government mismanagement injected new facts into the case. The “new facts” standard applies only to the remedy of dismissal.

In *Price*, the Supreme Court held that a person seeking *dismissal* under CrR 3.3 (the speedy trial rule) must prove that government mismanagement injected new facts into the case, forcing a choice between speedy trial and counsel who is adequately prepared. *Price*, 94 Wn.2d at 814.

This “heightened ‘new facts’ standard deals with the extreme remedy of dismissal—not suppression.” *State v. Salgado-Mendoza*, 189 Wn.2d 420, 436 n. 10, 403 P.3d 45 (2017). Mr. Guajardo was not required to meet the “new facts” standard to obtain suppression of the evidence.<sup>8</sup>

- D. The trial court should have dismissed the murder charge because the late DNA test results injected “new facts” into the case.

The late DNA test results injected new facts into the proceeding. No other piece of evidence included DNA from both Snow and Mr.

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<sup>8</sup> The trial court concluded that the late DNA test results did not amount to new evidence. RP (2/4/19) 134.

Guajardo. Its significance was magnified by the weakness of the State’s case—the absence of a body, a murder weapon, or an eyewitness.

Defense counsel could not reasonably be expected to meet this new DNA evidence produced on the day of trial. *See* RP (2/4/19) 138; RP (2/8/19) 140. Instead, Mr. Guajardo was forced to choose between his right to a speedy trial and his “right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.” *Price*, 94 Wn.2d at 814.

Here, the trial court initially recognized that the late DNA evidence amounted to “new facts.” RP (2/4/19) 118. Later, relying on *Woods, supra*, the court concluded that the late DNA test results did not inject new facts into the proceedings. RP (2/4/19) 134.

In *Woods*, the Supreme Court upheld a conviction, finding that a “delay in producing... DNA test results did not cause the interjection of new information into the case.” *Woods*, 143 Wn.2d at 584. According to the *Woods* court, no new facts arose because the defendant had been “placed on notice from the time of the charging that the State intended to use the results from forensic testing to prove that [the defendant] was the perpetrator of the crimes.” *Id.*, at 584–585 (citing *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996)).

If taken at face value, this reasoning suggests that the untimely

production of evidence will never permit dismissal. Thus, late disclosure of a fact witness cannot interject new facts into the case if the defendant was “placed on notice... that the State intended to use” fact witnesses to prove guilt. *Id.*

The “new facts” test, as outlined in *Woods*, is overly strict. If Mr. Guajardo’s case reaches the Supreme Court, the court should take the opportunity to fashion a more realistic test. For example, the court could hold that “new facts” arise whenever a reasonable attorney would need additional time to prepare to meet the State’s late disclosure.

Applying this test to Mr. Guajardo’s case, dismissal was appropriate. The state crime lab committed mismanagement by taking 2 ½ months to perform tasks that it could complete in approximately 10 days. RP (1/25/19) 102; RP (2/4/19) 136. The lab’s mismanagement resulted in late disclosure of results showing DNA from both Snow and Mr. Guajardo on the mattress. RP (6/19/19) 669-673. When provided such information on the morning of trial, any reasonable attorney would seek a continuance to consult an expert and prepare to defend against the new evidence.

The crime lab’s mismanagement forced Mr. Guajardo to choose between his right to a speedy trial and his right to the effective assistance of counsel. The trial court should have dismissed the murder charge.

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

The jury was instructed that Mr. Guajardo could be convicted as an accomplice. The court did not instruct jurors they were required to reach a unanimous decision as to Mr. Guajardo’s mode of participation. This violated his state constitutional right to a unanimous verdict.

A. The state constitution incorporated the common law rule requiring jury unanimity as to the mode of participation in a crime.

The common law drew sharp distinctions between principals and other participants in criminal activity. Historically, jury unanimity was required as to the mode of participation. This unanimity requirement was incorporated into the state constitutional jury right.

Under Washington’s constitution, “[t]he right of trial by jury shall remain inviolate.”<sup>9</sup> Wash. Const. art. I, §21. This provision is more protective of the jury trial right than is the federal constitution. *State v. Clark-El*, 196 Wn.App. 614, 621, 384 P.3d 627 (2016). In Washington, a criminal conviction requires jurors to unanimously agree that the accused person committed the charged criminal act.<sup>10</sup> *State v. Coleman*, 159 Wn.2d 509,

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<sup>9</sup> Another provision guarantees an accused person the right to “trial by an impartial jury.” Wash. Const. art. I, §22.

<sup>10</sup> Currently, the federal constitution does not require jury unanimity in state criminal courts. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). The Supreme Court is revisiting this issue. See *Ramos v. Louisiana*, --- U.S. ---, 139 S. Ct. 1318, 203 L. Ed. 2d 563 (2019) (granting certiorari).

511, 150 P.3d 1126 (2007).

Washington’s Supreme Court has pointed out that “[n]o Washington court has examined article I, section 21 under *Gunwall*<sup>11</sup> 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.” *State v. Walker*, 182 Wn.2d 463, 484–85, 341 P.3d 976 (2015). In *Walker*, the court declined to address the issue, citing the petitioner’s “cursory *Gunwall* analysis.”<sup>12</sup> *Id.*, at 484.

Under *Gunwall*, “[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.” *Williams-Walker*, 167 Wn.2d at 913-914. This requires analysis of six “nonexclusive neutral criteria.” *Gunwall*, 106 Wn.2d at 58. Proper analysis of these factors shows that the “inviolable” right to a jury trial includes a right to unanimity as to the mode of participation. This right was incorporated into the state constitution from the common law at the time of ratification in 1889. Accordingly, under Wash. Const. art. I, §21, jurors must

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<sup>11</sup> *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), which outlines six nonexclusive factors used to determine the scope of state constitutional protections.

<sup>12</sup> This was despite the court’s earlier determination that “it is unnecessary to engage in a full *Gunwall* analysis... to determine whether a claim under article I, section 21 warrants an inquiry on independent state grounds.” *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010).

unanimously determine if the defendant acted as a common law ‘principal’ (the perpetrator or an accomplice who was present during commission of the crime) or a common law ‘accessory’ (an accomplice who was not present during commission of the crime).

**The first *Gunwall* factor** requires examination of the text of the state constitutional provision. *Id.*, at 61. The plain language “provides the most fundamental guidance.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989), *amended*, 780 P.2d 260 (Wash. 1989). The constitutional provision describes as ‘inviolable’ the right to a jury trial; this language “connotes deserving of the highest protection.” *Id.* The provision’s clear and direct language “indicates a strong protection of the jury trial right.” *State v. Smith*, 150 Wn.2d 135, 150, 75 P.3d 934 (2003). Under *Gunwall*, the text weighs in favor of unanimity as to the mode of participation in an offense.

**The second *Gunwall* factor** also supports a unanimity requirement as to the mode of participation. This factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. *Gunwall*, 106 Wn.2d at 61. The provision declaring the jury trial right ‘inviolable’ “has no federal counterpart.” *State v. Schaaf*, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987). This amounts to “an expression by the framers that the state right to a jury trial is broader than the federal

right.” *Id.*, at 14 (citing *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982)). In *Mace*, the Supreme Court found the state constitutional provision broad enough to guarantee a jury trial for offenses deemed too insignificant to warrant a jury trial under the federal constitution. *Id.* The second *Gunwall* factor weighs in favor of an independent state constitutional right to juror unanimity as to the mode of participation.

Under **the third *Gunwall* factor**, courts look to state constitutional and common law history. The state constitution preserves the jury trial right “as it existed at common law in the territory at the time of its adoption.” *Mace*, 98 Wn.2d at 96. This factor weighs in favor of a unanimity requirement as to the mode of participation, because the common law required jurors to differentiate between principals and other participants (common law ‘accessories’).

Historically, the common law distinguished between four types of participants in crime. First, a principal in the first degree was the person “who actually perpetrated the offense.” *Standefer v. U. S.*, 447 U.S. 10, 15, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980). Second, a principal in the second degree was anyone who was “actually or constructively present at the scene of the crime and aided or abetted its commission.” *Id.* The third category comprised “accessories before the fact who aided or abetted the crime, but were not present at its commission.” *Id.* Finally, an accessory

after the fact “rendered assistance after the crime was complete.” *Id.*

These “‘intricate’ distinctions” were crucial to a successful prosecution. *Id.* The State was required to charge the offender under the correct theory of participation, and the accused person’s mode of participation determined the proper venue.<sup>13</sup> Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *Fordham L. Rev.* 1341, 1357-58 (2002). An accessory could not be convicted absent the prior conviction of the principal offender. *Standefer*, 447 U.S. at 15. Accordingly, “considerable effort was expended in defining the categories.” *Id.*, at 16.

The common law required jurors to unanimously determine if a participant acted as a ‘principal’ (who was present during commission) or an ‘accessory’ (who was not).<sup>14</sup> 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). The common law “absolutely prohibited... eliminating the requirement of unanimity of theory as between an aider and abettor and a principal.” Kurland, 57 *S.C.L. Rev.* at 112. The federal system did not

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<sup>13</sup> The principal(s) had to be prosecuted where the crime took place, while accessories had to be prosecuted where their act of abetting took place.

<sup>14</sup> Unanimity was not required as to whether a participant qualified as a principal in the first or second degree. Kurland, 57 *S.C.L. Rev.* at 100.

abrogate this until 1909. Kurland, 57 S.C.L. Rev. at 105, 112.

In Washington, the “‘intricate’ distinctions”<sup>15</sup> between ‘principals’ and ‘accessories’ remained in effect after ratification of the state constitution in 1889. This was so despite the enactment of a territorial statute which, on its face, appeared to eliminate all such divisions.<sup>16</sup> Code of 1881, § 956. In 1898, the Supreme Court reaffirmed the distinction between ‘principals’ and ‘accessories.’ *State v. Gifford*, 19 Wash. 464, 53 P. 709 (1898). In *Gifford*, the State charged the defendant as a principal. *Id.*, at 465. The Supreme Court reversed, finding that the defendant was an accessory rather than a principal. *Id.* The court opined that the territorial statute would be unconstitutional if interpreted to permit conviction of an accessory as a principal. *Id.*, at 468.

The following year, relying on *Gifford*, the Supreme Court again applied the distinction between principal and accessory to reverse a conviction. *State v. Morgan*, 21 Wash. 355, 356, 58 P. 215 (1899). In *Morgan*, the defendant was charged as a principal. *Id.* However, at trial, “[t]here was no testimony tending to show that appellant was present when the

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<sup>15</sup> *Standefer*, 447 U.S. 15.

<sup>16</sup> This territorial statute continued in effect following the 1889 adoption of the state constitution, pursuant to Wash. Const, art. XXVII, §2. That provision reads: “All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature.”

crime was committed.” *Id.* The court found that “[t]he case at bar seems to fall directly within the rule announced in [*Gifford*].” *Id.*, at 357. Because the defendant was charged as a principal but shown to be an accessory, the court reversed. *Id.*

The court again reaffirmed the distinction in 1925. *State v. Nikolich*, 137 Wash. 62, 241 P. 664 (1925). In *Nikolich*, several defendants were convicted of aiding or abetting another in committing arson. *Id.*, at 65. The Supreme Court reversed based on the acquittal of the person shown to be the principal offender.<sup>17</sup> *Id.*, at 66-67.

These early cases show that the distinction between ‘principals’ and ‘accessories’ survived ratification of the constitution in 1889. Although they do not specifically address the requirement of unanimity, the early cases were consistent with the common law principles that predated adoption of the constitution. The third *Gunwall* factor—state common law and constitutional history—supports a unanimity requirement as to the mode of participation.

**The fourth *Gunwall* factor** “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d

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<sup>17</sup> The principal had been erroneously charged as an accessory.

419 (2004) (quoting *Gunwall*, 106 Wn.2d at 62). Courts must consider “[p]reviously established bodies of state law, including statutory law.” *Gunwall*, 106 Wn.2d at 61.

There are no statutory provisions addressing the need for jury unanimity regarding the mode of participation.<sup>18</sup> Although the territorial legislature purported to abolish all distinctions between principals and other participants, the Supreme Court determined that the object of the statute was merely “to do away with some of the technical hindrances which before existed.” *Gifford*, 19 Wash. at 468 (addressing Code of 1881, §956). Had the legislature intended substantive changes, “the law itself would be unconstitutional.” *Id.*

Successor statutes were interpreted in conformity with the common-law rule equating first and second degree principals. *See, e.g., State v. Olson*, 50 Wn.2d 640, 642, 314 P.2d 465 (1957) (addressing former RCW 9.01.030, Laws of 1909, Ch. 249 §8); *State v. Carothers*, 84 Wn.2d 256, 264, 525 P.2d 731 (1974); *State v. McDonald*, 138 Wn.2d 680, 687-691, 981 P.2d 443 (1999) (addressing RCW 9A.08.020). Thus both principal and accomplice were present during the crime’s commission.<sup>19</sup>

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<sup>18</sup> Neither the territorial statute (Code of 1881, § 956) nor its successor statutes address the unanimity requirement. *See* Laws of 1909, Ch. 249 §8; RCW 9A.08.020.

<sup>19</sup> *See also State v. Holcomb*, 180 Wn. App. 583, 321 P.3d 1288 (2014); *State v. Alires*, 92 Wn. App. 931, 966 P.2d 935 (1998); *State v. Haack*, 88 Wn. App. 423, 958 P.2d 1001 (1997); *State v. Wilder*, 25 Wn. App. 568, 608 P.2d 270 (1980).

Because all defendants in these cases were present during commission of the crime, they qualified as common law ‘principals.’ Unanimity would not have been required under the common law rule, and thus was not required under Wash. Const. art. I, §21.

More recently, the Supreme Court has dispensed with the unanimity requirement even where a participant is not present at the scene. *See Walker*, 182 Wn.2d at 484-485. Decided in 2015, *Walker* appears to be the first Supreme Court case excusing the jury from unanimously deciding whether a participant acted as a common law ‘principal’ or a common law ‘accessory’. *Walker* marks a departure from the common-law rule distinguishing between common law ‘principals’ and common law ‘accessories.’ *Id.*; *see Kurland*, 57 S.C.L. Rev. at 112 (2005).

*Walker* should have very little impact on *Gunwall* factor four. This is so because “[s]tate cases and statutes from the time of the constitution's ratification, rather than recent case law, are more persuasive in determining whether the state constitution gives enhanced protection in a particular area.” *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 120, 937 P.2d 154 (1997), *amended*, 943 P.2d 1358 (Wash. 1997). In addition, the *Walker* court explicitly declined to examine the state constitutional right to unanimity as to mode of participation. *Walker*, 182 Wn.2d at 484-485. Under *Gunwall* factor four, the common law rule and cases such as *Gifford*

should be given greater weight than *Walker*. *Id.* At most, factor four should be considered neutral.

**The fifth *Gunwall* factor** (structural differences in the two constitutions) always points toward pursuing an independent analysis, “because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State's power.” *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). Indeed, the federal constitution does not guarantee any right to juror unanimity in state criminal prosecutions. *Apodaca* 406 U.S. at 406. The state constitution does guarantee such a right. *Coleman*, 159 Wn.2d at 511. Factor five weighs in favor of a state constitutional right to unanimity as to the mode of participation.

**The sixth *Gunwall* factor** deals with whether the issue is a matter of particular state interest or local concern. An accused person's right to juror unanimity is an issue of particular state interest or local concern. *See State v. Silva*, 107 Wn.App. 605, 621, 27 P.3d 663 (2001). In *Silva*, the court of appeals concluded that “the manner in which an accused's state constitutional right of self representation is effectively exercised is plainly of state interest and local concern.” *Id.* The *Silva* court also outlined other matters found to be of state interest and local concern, including double jeopardy issues, the State's interest in law enforcement, and Washington citizens' right to privacy. *Id.* These are analogous to the right at issue here.

Factor six favors a state constitutional right to jury unanimity as to the mode of participation. This is especially true given that there is no federal constitutional right to unanimity in any state prosecution. *Apodaca* 406 U.S. at 406; *but see also Ramos*, 139 S. Ct. 1318 (granting certiorari).

Five of the six *Gunwall* factors establish that art. I, §21 preserved the common law right of unanimity as to mode of participation in a crime. The remaining factor (pre-existing state law) is, at most, neutral, and thus does not favor either side of the analysis.

*Gunwall* analysis establishes that the “inviolable” right to a jury trial includes the right to jury unanimity as to the mode of participation. Art. I, §21. In keeping with the common law rule, jurors must determine if the accused person is a common law ‘principal’ who was present during commission of the crime, or a common law “accessory” who was not.

B. The Supreme Court's decisions in *Carothers* and *Hoffman* do not require a different result.

No Washington court has performed a *Gunwall* analysis to determine if the state constitution guarantees a right to jury unanimity “as to the mode of participation in a felony accomplice case.” *Walker*, 182 Wn.2d at 484-485. Instead, the Supreme Court has addressed the issue without examining the state constitution. *Id.*; *see also Carothers*, 84 Wn.2d at 262-266; *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991).

In *Carothers*, the defendant was charged as a principal. *Carothers*, 84 Wn.2d at 259. Evidence showed he was present during commission of the crimes. *Id.*, at 258. In rejecting the defendant’s challenge to an accomplice instruction, the Supreme Court held that “[t]he jury was not obliged to decide who held the gun or who committed the physical act of taking possession of the property of the victims.” *Id.*, at 261. The court did not analyze the issue under the state constitution.<sup>20</sup>

In *Hoffman*, the defendant argued that he was entitled to “a unanimous decision as to which defendant was the principal and which the accomplice.” *Hoffman*, 116 Wn.2d at 103. As in *Carothers*, evidence showed that the defendant was present during commission of the crime. *Id.*, at 62. Relying on *Carothers*, the *Hoffman* court upheld an instruction telling the jury that it “need not determine which defendant was an accomplice and which was a principal.” *Id.* The court concluded that jurors were not required to unanimously decide “who actually shot and killed [the victim] so long as both participated in the crime.” *Id.*, at 105. Again, the court did not analyze the issue under the state constitution.

Both *Carothers* and *Hoffman* were consistent with the common law rule; hence they were also consistent with the common law require-

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<sup>20</sup> Even if *Carothers* had specifically examined art. I, §21, it would not have had the benefit of *Gunwall* (which was not decided until 1986).

ment incorporated into Wash. Const. art. I, §21. Each defendant was present during commission of the charged crimes. Under the common law, those participants who were present during commission of the crime could be convicted as principals, regardless of the degree of their participation. *See Standefer v. U. S.*, 447 U.S. at 15; Kurland, 57 S.C.L. Rev. at 112.

In both *Carothers* and *Hoffman*, the evidence showed that each defendant was present during commission of the charged crimes. Neither *Carothers* nor *Hoffman* addressed the common law distinction between ‘principals’ (who were present) and common law ‘accessories’ (who participated but were not present). *Id.*; Kurland, 57 S.C.L. Rev. at 113.

*Walker*, by contrast, involved a defendant who remained in his car while two codefendants went and shot an armored truck ‘custodian.’ *Walker*, 182 Wn.2d at 470. After noting the absence of any controlling authority under the state constitution, the Supreme Court declined to address the state constitutional issue. *Id.*, at 484-485.

The Supreme Court has not determined if art. I, §21 requires juror unanimity as to the mode of a defendant’s participation in criminal activity. *Id.* Neither *Carothers* nor *Hoffman* decided the issue. They should not control here.

- C. Mr. Guajardo’s murder conviction must be reversed because the trial court failed to require unanimity as to his mode of

participation in the crime.

A conviction for first-degree felony murder requires proof that the defendant “cause[d] the death of a person” during the course of, in furtherance of, or in immediate flight from a kidnapping. RCW 9A.32.030(c).

The jury was instructed on accomplice liability. CP 34, 35, 44, 48.

The trial court did not instruct the jury that it had to be unanimous regarding Mr. Guajardo’s mode of participation in the offense. CP 22-48. This requires reversal of his murder conviction. The state constitution required the jury to unanimously determine the mode of his participation.<sup>21</sup> Kurland, 57 S.C.L. Rev. at 112.

This is so because the common law requirement of unanimity was incorporated into the state constitution when it was ratified. Under common law, jurors were required to unanimously determine if a defendant acted as a common law ‘principal’ (who was present during commission of the crime) or as a common law ‘accessory’ (who was not).

Failure to provide a unanimity instruction is presumed prejudicial. *Coleman*, 159 Wn.2d at 512 (addressing multiple acts case). Reversal is required unless the error is harmless beyond a reasonable doubt. *Id.* The presumption of prejudice is overcome only if no rational juror could have

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<sup>21</sup> Arguably, the unanimity requirement would not apply if the State proved beyond a reasonable doubt that Mr. Guajardo was a common law ‘principal’ who was present at the time someone caused Snow’s death.

a reasonable doubt as to the fact on which unanimity is required. *Id.*

Here, it is possible that Mr. Guajardo left the scene while Sutton or Stone “cause[d] the death of [Snow].” RCW 9A.32.030(c). It is also possible that he remained, or that he himself caused Snow’s death. Some jurors may have believed that the State proved he was in the room; others may have believed that the State failed to carry its burden on this point.

The court failed to provide a unanimity instruction as to the mode of Mr. Guajardo’s participation in the offense. This violated Mr. Guajardo’s state constitutional right to a unanimous jury under Wash. Const. art. I, §21. His murder conviction must be reversed, and the case remanded for a new trial. *Id.*

D. The Court of Appeals should review *de novo* this manifest constitutional error.

Alleged constitutional errors are reviewed *de novo*. *Blomstrom v. Tripp*, 189 Wn.2d 379, 389, 402 P.3d 831 (2017). A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

To raise a manifest error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The showing required under RAP 2.5(a)(3) “should not be confused with the

requirements for establishing an actual violation of a constitutional right.” *Id.* An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Instructions “that fail to require a unanimous verdict constitute manifest error affecting a constitutional right.” *Lamar*, 180 Wn.2d at 586. The Court of Appeals should review this manifest constitutional error *de novo*. *Id.*; *Blomstrom*, 189 Wn.2d at 389.

**IV. THE ACCOMPLICE LIABILITY STATUTE AND ASSOCIATED JURY INSTRUCTION ARE OVERBROAD BECAUSE THEY CRIMINALIZE CONSTITUTIONALLY PROTECTED SPEECH.**

Speech advocating criminal activity may only be punished if it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Washington’s accomplice liability statute and the associated pattern instruction allow conviction for protected speech that is not directed to or likely to produce imminent lawless action. The statute and instruction are facially overbroad.

- A. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds.

The First Amendment protects free speech.<sup>22</sup> U.S. Const. Amend.

I. A statute is overbroad under the First Amendment if it sweeps within its prohibitions a substantial amount of constitutionally protected speech.

*State v. Immelt*, 173 Wn.2d 1, 6-7, 267 P.3d 305 (2011); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

Anyone accused of violating such a statute may bring an overbreadth challenge; the accused person need not have engaged in constitutionally protected activity or speech. *Immelt*, 173 Wn.2d at 33. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Id.*

In other words, “[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds.” *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). The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003). Instead of applying the

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<sup>22</sup> This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases). Washington’s constitution gives similar protection: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” Wash. Const. art. I, §5.

general rule for facial challenges, “[t]he Supreme Court has ‘provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or “chill” constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.’” *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005) (quoting *Hicks*, 539 U.S. at 119).

Mr. Guajardo’s jury was instructed on accomplice liability. CP 34, 35, 44, 48. Accordingly, he is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks*, 539 U.S. at 118-119; *Webster*, 115 Wn.2d at 640.

B. Washington’s accomplice liability statute punishes protected speech, including mere advocacy.

The U.S. Supreme Court has recently accepted review of a 9<sup>th</sup> Circuit case invalidating a federal statute on First Amendment grounds.<sup>23</sup> *U.S. v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), *cert. granted* 140 S. Ct. 36, 204 L. Ed. 2d 1194 (2019). The federal statute makes it a felony to knowingly “encourages or induces” another to illegally enter or reside in the U.S. *Id.* at 467 (citing 8 U.S.C. §1324(1)(A)(iv)). The statute also requires proof that the person act with knowledge “or in reckless disregard of the fact that such... entry, or residence is or will be in violation of law.”

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<sup>23</sup> The court heard argument on February 25, 2020.

8 U.S.C. §1324(1)(A)(iv). The 9<sup>th</sup> Circuit found the statute overbroad under the First Amendment. *Id.*, at 485.

The improper language—“encourages or induces”—is similar to language used in Washington. RCW 9A.08.020(3). As in *Sineneng-Smith*, Washington’s accomplice liability statute and the associated pattern jury instruction are unconstitutionally overbroad. *Id.* Mr. Guajardo’s conviction must be reversed, and the case remanded for a new trial.

The First Amendment protects speech advocating criminal activity: “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” *Ashcroft*, 535 U.S. at 253. Because of this, speech advocating criminal activity may only be punished if it “is directed to inciting or producing imminent lawless action and is 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).

This requires courts to instruct juries in a manner ensuring that mere advocacy is not criminalized. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). In *Freeman*, the defendant was charged with counseling others to violate the tax laws. The court reversed some of his convictions<sup>24</sup> because the trial court failed to instruct on the *Branden*

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<sup>24</sup> In the remaining counts, the defendant “actually assisted in the preparation of false tax returns.” *Sineneng-Smith*, 910 F.3d at 481.

*burg* standard: “[T]he jury should have been charged that the expression was 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.” *Freeman*, 761 F.2d at 552.

Accomplice liability in Washington does not meet the *Brandenburg* standard. The accomplice statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes “a substantial amount of constitutionally-protected expression.” *Sineneng-Smith*, 910 F.3d at 467.

In Washington, a person may be convicted as an accomplice for “encourage[ment]” provided “[w]ith knowledge that it will promote or facilitate the commission of the crime.”<sup>25</sup> RCW 9A.08.020(3)(a); *see also* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (4th Ed). This language is nearly identical to that found unconstitutional in *Sineneng-Smith*.

Accomplice liability in Washington does not require proof of criminal intent. Under the statute and the pattern instruction, knowledge is sufficient for conviction. Thus a person may be convicted for speaking, even if the speech is not “directed to inciting or producing imminent lawless action.” *Brandenburg*, 395 U.S. at 447. Nor does accomplice liability in Washington require any proof that the speaker’s “encourage[ment]” will

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<sup>25</sup> Accomplice liability may also be premised on “aid,” which has been interpreted to include “all assistance whether given by words [or] encouragement.” WPIC 10.51; RCW 9A.08.020(3)(a)(ii).

likely produce imminent lawless action. *Id.*; RCW 9A.08.020(3)(a).

Like the federal statute at issue in *Sineneng-Smith*, Washington's accomplice liability statute criminalizes a vast amount of pure speech protected by the First Amendment, and thus it runs afoul of *Brandenburg*. Because the law governing accomplice liability "is susceptible to regular application to constitutionally protected speech," it is unconstitutional. *Sineneng-Smith*, 910 F.3d at 483.

Indeed, Washington's accomplice liability statute and WPIC 10.51 would criminalize speech protected by the U.S. Supreme Court. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (reversing a disorderly conduct conviction stemming from a protester's statement that "We'll take the f\*cking street later"); *Brandenburg*, 395 U.S. at 445 (reversing a Klan leader's conviction for "'advocat(ing) \* \* \* the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform'") (quoting Ohio Rev. Code Ann. §2923.13).

It would also criminalize the examples of protected speech outlined by the 9<sup>th</sup> Circuit in *Sineneng-Smith*. Thus "'a loving grandmother who urges her grandson to overstay his visa,' by telling him 'I encourage you to stay'" could face charges under a theory of liability derived from RCW 9A.08.020 and WPIC 10.51. *Sineneng-Smith*, 910 F.3d at 483

(quoting *amicus* brief). Such a grandmother would be guilty if she “encourages... such other person to commit [a crime],” speaking “[w]ith knowledge that [her encouragement] will promote... the commission of the crime.” RCW 9A.08.020(3)(a).

Similarly, a speech or a social media post encouraging undocumented people to remain in the U.S. pending immigration reform would subject the speaker to criminal sanctions under Washington accomplice law. *Id.*, at 484. The speaker would be providing encouragement, knowing that it would promote the commission of the crime.

Even an attorney “who tells her client that she should remain in the country while contesting removal” would be punished if Washington’s theory of accomplice liability applied. *Id.* This would be encouraging a law violation, knowing that it would promote its commission.

Each of these examples involve encouragement made with knowledge that the encouragement would promote or facilitate a violation of law. Each would lead to conviction in Washington, despite being protected by the First Amendment.

It is possible to construe Washington’s accomplice statute in such a way that it does not reach constitutionally protected speech. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction in *Brandenburg*. Thus, in *Freeman*, the 9<sup>th</sup> Circuit reversed based

on the lower court's failure to instruct the jury in a manner consistent with *Brandenburg*. *Freeman*, 761 F.2d at 552.

However, neither the statute nor the pattern instruction includes the limitations required by *Brandenburg*. Washington's law of accomplice liability, as expressed in the statute, WPIC 10.51, and the court's instructions in this case, is overbroad. *Id.* Mr. Guajardo's conviction must be reversed, and the case remanded for a new trial. *Id.*

C. The *Coleman*, *Ferguson*, and *Holcomb* courts applied the wrong legal standard in upholding RCW 9A.08.020.

The Court of Appeals has upheld Washington's accomplice liability statute. *State v. Coleman*, 155 Wn.App. 951, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011); *see also State v. Ferguson*, 164 Wn.App. 370, 264 P.3d 575 (2011); *State v. Holcomb*, 180 Wn.App. 583, 590, 321 P.3d 1288 *review denied*, 180 Wn.2d 1029, 331 P.3d 1172 (2014).

According to the *Coleman* court,<sup>26</sup> the statute "requires the criminal *mens rea* to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime." *Coleman*, 155 Wn.App. at 960-961. The *Coleman* court opined that the statute "avoids protected speech

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<sup>26</sup> Divisions II and III essentially adopted the *Coleman* court's reasoning. *Ferguson*, 164 Wn. App. 370; *Holcomb*, 180 Wn. App. at 590.

activities that are not performed *in aid of* a crime and that only consequentially further the crime.” *Id.* (emphasis added).

This reference to “aid” ignores subsection (a)(i), which permits conviction when a person “encourages” criminal activity without aiding or agreeing to aid the other person. RCW 9A.08.020(3)(a)(i). Encouragement, even when coupled with knowledge, is insufficient to meet the *Brandenburg* standard. *Sineneng-Smith*, 910 F.3d at 483.

The *Coleman* court’s phrase “the criminal *mens rea* to aid or agree to aid” implies that accomplice liability requires proof of intent. *Coleman*, 155 Wn.App. at 960-961. But accomplice liability in Washington can be premised on speech made with knowledge that it will facilitate the crime, even if the speaker lacks the intent to facilitate the crime. RCW 9A.08.020(3)(a); *see* WPIC 10.51. Under *Brandenburg*, the First Amendment protects speech made with knowledge but without intent to incite imminent lawless action. *Freeman*, 761 F.2d at 552. Washington accomplice law directly contravenes this requirement.

The *Holcomb* court attempted to remedy this error in *Coleman* by noting that the accomplice liability statute has been construed to require knowledge of the specific crime charged, rather than any other crime. *Holcomb*, 180 Wn.App. at 590. But proving specific knowledge does not establish that “both the intent of the speaker and the tendency of [their]

words was to produce or incite an imminent lawless act, one likely to occur.” *Freeman*, 761 F.2d at 552. Requiring proof of knowledge—even specific knowledge of the crime to be committed – is insufficient to meet the *Brandenburg* standard. *Id.*; *Brandenburg*, 395 U.S. at 447.

Furthermore, the First Amendment protects much more than speech “that only consequentially further[s] the crime.” *Coleman*, 155 Wn.App. at 960-961. The state cannot criminalize mere advocacy of criminal activity. *Hess*, 414 U.S. at 108. Even words spoken “in aid of a crime”<sup>27</sup> may be protected.

Such words may only be punished if “directed to inciting or producing imminent lawless action” and “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447; *cf. Coleman*, 155 Wn.App. at 960-961. Even if accomplice liability required proof of intent (as *Coleman* implies), it would remain unconstitutional unless it also required proof that the speech was likely to produce imminent lawless action.

Speech that “encourage[s] unlawful acts” is protected, unless it falls within the narrow category outlined by *Brandenburg*. *Ashcroft*, 535 U.S. at 253. The state cannot ban speech made with knowledge that it will promote a crime. Nor can it ban speech made with intent to promote the commission of a crime, unless the speech is (1) made with intent to incite

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<sup>27</sup> *Coleman*, 155 Wn. App. at 960-961.

or produce “imminent lawless action” and (2) “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447.

Like the federal statute prohibiting a person from “encourag[ing] or induc[ing]” a violation of law, Washington’s accomplice liability statute and associated pattern jury instruction are unconstitutionally overbroad. *Sineneng-Smith*, 910 F.3d at 467, 483. They permit conviction for pure speech encouraging criminal activity, even if the speech is not “directed to inciting or producing imminent lawless action” and “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447; *Freeman*, 761 F.2d at 552. Mr. Guajardo’s conviction must be reversed, and the case remanded for a new trial. *Freeman*, 761 F.2d at 552.

D. The Court of Appeals should review this manifest constitutional error *de novo*.

Constitutional violations are reviewed *de novo*. *Blomstrom*, 189 Wn.2d at 389. 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, e.g., State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010). Given what the trial judge knew at the time of the trial, “the court could have corrected the error.” *O’Hara*, 167 Wn.2d at 100. The problem posed by the statute and the court’s accomplice instruction are evident in

the record. The issue may be reviewed for the first time on appeal. *Id.*

Free speech challenges are different from most constitutional challenges to statutes.<sup>28</sup> Under the First Amendment, the State bears the burden of justifying a restriction on speech. *Immelt*, 173 Wn.2d at 6.. Because the accomplice liability statute and the associated jury instruction reach pure expression, the State bears the burden of establishing their constitutionality. *Id.*

**V. THE STATE FAILED TO PROVE COMPARABILITY FOR TWO OF MR. GUAJARDO'S CALIFORNIA CONVICTIONS.**

The sentencing court found that Mr. Guajardo had prior California convictions for assault and evading an officer. Neither offense was comparable to a Washington felony. Neither conviction should have contributed to Mr. Guajardo's offender score. His sentence must be vacated, and the case remanded for a new sentencing hearing.

An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn.App. 801, 312 P.3d 784 (2013). Offender score calculations are reviewed *de novo*. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014); *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014).

For sentencing purposes, prior out-of-state convictions are

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<sup>28</sup> Ordinarily, the burden is on the party challenging the statute to show beyond a reasonable doubt that it is unconstitutional. *Washington Off-Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 733, 260 P.3d 956 (2011), *aff'd* 176 Wn.2d 225, 290 P.3d 954 (2012).

classified according to their Washington equivalents, if any. RCW 9.94A.525 (3). An out-of-state conviction may not be used to increase an offender score unless it is comparable to a Washington felony. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

There are two steps involved. First, the court must consider legal comparability. *Olsen*, 180 Wn.2d at 472. Second, if the two offenses are not legally comparable, the court determines if the crimes are factually comparable. *Id.* The burden is on the State to prove comparability. *Id.* The prosecutor failed to do so in this case.

To determine whether an out-of-state conviction is legally comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *In re Pers. Restraint Petition of Crawford*, 150 Wn.App. 787, 793–94, 209 P.3d 507 (2009). If the elements are “substantially similar,” the offenses are legally comparable. *State v. Bluford*, 188 Wn.2d 298, 316, 393 P.3d 1219 (2017); *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). This permits the sentencing court to classify the offense in the manner “provided by Washington law.” RCW 9.94A.525(3).

The State failed to prove that Mr. Guajardo’s California convictions for assault and evading are comparable to any Washington felonies.

Accordingly, they should not have added to his offender score.

- A. The State failed to prove that Mr. Guajardo's California assault is comparable to any Washington felony.

The court added two points to Mr. Guajardo's offender score based on a 1996 conviction for "Assault with a Deadly Weapon" under California Penal Code §245(a)(1) (1996). That provision applies to "any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." California Penal Code §245(1)(a).

Contrary to the court's findings, this offense is not comparable to Washington's Second Degree Assault, RCW 9A.36.021.

California's definition of assault is broader than Washington's definition. It is thus possible to commit the offense in California without also committing a Washington felony. *See In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 256, 111 P.3d 837 (2005).

**Legal comparability - mens rea.** One difference between the two statutes involves the mens rea required for conviction. California defines assault as a general intent crime; Washington requires proof of specific intent. This is similar to the problem addressed in *Lavery*.

In *Lavery*, the Supreme Court determined that a federal conviction for bank robbery was not comparable to any Washington felony. *Id.* The

court noted that the federal offense is a general intent crime, while the Washington offense (second-degree robbery) “requires specific intent to steal as an essential, nonstatutory element.” *Id.*, at 255. Thus “a person could be convicted of federal bank robbery without having been guilty of second degree robbery in Washington.” *Id.*, at 256.

The same is true regarding the assault at issue here.

Under California law, assault is defined as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Penal Code §240. The offense is a general intent crime. *People v. Williams*, 26 Cal. 4th 779, 785, 788, 29 P.3d 197, 111 Cal. Rptr. 2d 114 (2001). A person need only intend the assaultive act, without intending a particular result. *Id.*

In Washington, by contrast, the two applicable definitions of assault require proof of specific intent.<sup>29</sup> *State v. Stevens*, 158 Wn.2d 304, 314, 143 P.3d 817 (2006). First, a person may commit an attempted battery, requiring the State to show “specific intent to cause bodily injury.” *Id.* (internal quotation marks and citation omitted). Second, a person may assault another with “specific intent to create reasonable fear and

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<sup>29</sup> The third definition, involving actual battery, is not at issue here, since Mr. Guajardo was convicted under Penal Code §245 (assault) rather than Penal Code §242 (battery). Certified Copies California DOC and Plea Paperwork, pp. 98, 104, filed 7/22/19, Supp. CP. Actual battery in Washington does not require proof of specific intent. *Cardenas-Flores*, 189 Wn.2d at 266.

apprehension of bodily injury.” *Id.* (internal quotation marks and citation omitted). It is thus possible to commit the California offense without committing a Washington felony. As in *Lavery*, the two offenses are not legally comparable. *Lavery*, 154 Wn.2d at 255-256.

**Legal comparability - assault by means of force.** In California, a person may be convicted for any assault “by any means of force likely to produce great bodily injury.” Penal Code §245(a)(1). So the assault could be committed “without the involvement of any sort of weapon.” *People v. Perez*, 3 Cal. App. 5th 812, 824, 208 Cal. Rptr. 3d 138, 147–48 (2016), *aff’d*, 4 Cal. 5th 1055, 416 P.3d 42, 232 Cal. Rptr. 3d 51 (2018). Washington has no comparable provision. The crimes are not legally comparable.

**Factual comparability.** Determinations of factual comparability implicate due process and the constitutional right to a jury trial. *Lavery*, 154 Wn.2d at 258. This is so because any fact (other than the fact of a prior conviction) must be submitted to a jury and proved beyond a reasonable doubt before it may be used to increase the penalty for a crime. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004). Thus, when evaluating factual comparability, the sentencing court may consider only those facts previously admitted, stipulated to, or found by the trier of fact beyond a reasonable doubt. *State v. Davis*, 3 Wn.App.2d 763, 772, 418 P.3d 199 (2018).

Here, the State did not prove that the offenses are factually comparable. Mr. Guajardo had agreed that the California court could consider police reports and other documents as the factual basis for his plea. Certified Copies California DOC and Plea Paperwork, p. 105, filed 7/22/19, Supp. CP. But the State did not provide these materials to the sentencing court.<sup>30</sup> Accordingly, the State did not prove factual comparability.

Mr. Guajardo's California assault conviction is neither legally nor factually comparable to a Washington felony. The California assault conviction should not have added two points to Mr. Guajardo's offender score. His sentence must be vacated, and the case remanded for a new sentencing hearing. *Lavery*, 154 Wn.2d at 262.

B. The prosecution did not prove that Mr. Guajardo's California conviction for evading an officer is comparable to a Washington felony.

In Washington, conviction for attempting to elude a pursuing police vehicle requires proof that the officer who signaled the driver to stop "shall be in uniform." RCW 46.61.024 (1999). The complaint charging Mr. Guajardo with evading an officer did not allege this element. Certified Copies California DOC and Plea Paperwork, p. 72, filed 7/22/19, Supp.

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<sup>30</sup> Furthermore, the sentencing court could not have reviewed the police reports and other documents without running afoul of *Blakely*. *Lavery*, 154 Wn.2d at 258; *Davis*, 3 Wn.App.2d at 772.

CP. Accordingly, the offense charged in California is not legally comparable to the corresponding Washington felony.

Nor did the State prove factual comparability. Mr. Guajardo had agreed to allow the California court to consider the police reports and other documents to supply the factual basis for his plea. Certified Copies California DOC and Plea Paperwork, p. 78, filed 7/22/19, Supp. CP. The prosecution did not provide the sentencing court with these materials.

The State failed to prove that the conviction for evading an officer is comparable to a Washington felony. Accordingly, Mr. Guajardo's sentence must be vacated, and the case remanded for a new sentencing hearing. *Lavery*, 154 Wn.2d at 262.

**VI. THE COURT'S FAILURE TO DISMISS THE KIDNAPPING CHARGE VIOLATED MR. GUAJARDO'S DOUBLE JEOPARDY RIGHTS.**

The State agreed that Mr. Guajardo's kidnapping offense merged with his first-degree felony murder conviction. RP (7/19/19) 857; Sentencing Memorandum filed 7/19/19, Supp. CP. Despite this, the court did not vacate the kidnapping conviction. This violated double jeopardy.

The constitution protects an accused person "from being twice put in jeopardy for the same offense." *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. Const. Amend. V; U.S. Const. Amend. XIV; Wash. Const. art. I, §9. This prohibits courts from "imposing multiple

punishments for the same criminal conduct.” *Id.*

The term ‘punishment’ encompasses more than just an offender’s sentence. *Id.* This is so because adverse consequences attach to a conviction, even if no sentence is imposed. *Id.*, at 454-455. At a minimum, “a conviction carries a societal stigma.” *Id.*, at 464. The remedy for a double jeopardy violation is to vacate one of the underlying convictions. *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007). Here, the sentencing court did not vacate Mr. Guajardo’s kidnapping conviction.

The Supreme Court “treat[s] felony murder and the felony on which it is based as greater and lesser offenses that must merge.” *State v. Muhammad*, --- Wn.2d ---, \_\_\_, 451 P.3d 1060 (2019). In this case, the prosecutor agreed that the kidnapping conviction merged with the felony murder conviction. RP (7/19/19) 857; Sentencing Memorandum filed 7/19/19, Supp. CP. Under these circumstances, the sentencing court was obligated to vacate the kidnapping charge. *Womac*, 160 Wn.2d at 160. The case must be remanded with instructions to vacate the kidnapping charge. *Id.*

### **CONCLUSION**

The State did not prove that Mr. Guajardo murdered anyone. The prosecution did not produce a body, a murder weapon, or an eyewitness. It

did not produce independent evidence of the *corpus delicti* of the charged crime. Instead, the State relied on an informant's claim that Mr. Guajardo had confessed to murder. The evidence was insufficient. The murder conviction must be reversed, and the charge dismissed with prejudice.

Although it was immediately provided a significant piece of evidence, the state crime lab waited 2 ½ months to perform analysis that it could have completed in 10 days. The crime lab's mismanagement forced Mr. Guajardo to choose between his right to a speedy trial and his right to the effective assistance of counsel. The trial court should have granted his motion to suppress the evidence or to dismiss the case.

Mr. Guajardo was denied his state constitutional right to a unanimous jury. Under Wash. Const. art. I, §21, the jury was required to determine the mode of his participation in the crime. His conviction must be reversed, and the case remanded for a new trial.

The court should not have submitted an accomplice theory to the jury. The accomplice liability statute and associated instruction are unconstitutionally overbroad, violating the First Amendment. Mr. Guajardo's conviction must be reversed and the case remanded for a new trial.

The State failed to prove that two of Mr. Guajardo's California convictions were equivalent to Washington felonies. The sentence must be vacated, and the case remanded for a new sentencing hearing.

The trial court violated Mr. Guajardo's double jeopardy rights by failing to vacate his kidnapping conviction. The kidnapping merged with the felony murder charge and should not have been allowed to stand. The case must be remanded for vacation of the kidnapping conviction.

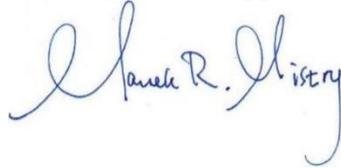
Respectfully submitted on February 26, 2020,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

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

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

Signed at Olympia, Washington on February 26, 2020.



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