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I. ASSIGNMENTS OF ERROR

A. Mr. Sublett assigns error to the entry of a judgment of conviction against him.

B. The trial court violated Mr. Sublett's right to a public and open trial when it conducted a closed courtroom hearing in response to a question asked by the jury during deliberations.

C. The trial court violated Mr. Sublett's right to be present when it conducted a hearing without him in response to a jury question.

D. The trial court erred when it refused to clarify an ambiguity in the accomplice liability instruction where the jury reasonably indicated that the instruction was susceptible to two interpretations—and where one was correct and the other impermissibly and significantly lowered the State's burden of proof.

E. Because Mr. Sublett and Mr. Olsen had mutually antagonistic defenses, the trial court erred when it denied Mr. Sublett's motion to sever.

F. Measured cumulatively, various instances of prosecutorial misconduct denied Mr. Sublett his right to a failure trial.

G. Mr. Sublett's California robbery convictions are not legally comparable to a most serious offense because the elements of the crime and the available defenses differ. The State failed to establish that either conviction was factually comparable. Therefore, the trial court erred when it concluded he was a persistent offender and sentenced him to life in prison.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Whether holding a hearing in response to a jury question in chambers constituted a closure of the courtroom?

B. Whether the State can demonstrate that denying Mr. Sublett the right to be present at the hearing in response to the jury's question was harmless beyond a reasonable doubt where Mr. Sublett could have meaningfully assisted counsel in suggesting a response to the jury question?

C. When jurors reasonably interpret an instruction as ambiguous and when one interpretation is correct and the other

impermissibly lowers the State's burden of proof, did the trial court abuse its discretion by failing to answer the question by directing the jury to consider only the correct interpretation?

D. When Mr. Sublett had to defend against two accusers—the State and co-defendant Olsen (who testified *after* Sublett rested)—and where the trial court did not give sufficient instructions directing jurors to compartmentalize the evidence, did the trial court err by refusing to sever the defendants' cases for trial?

E. Whether several instances of prosecutorial misconduct violated Mr. Sublett's right to a new trial when measured cumulatively?

F. Where comparing Sublett's California robbery convictions to the elements of robbery in Washington reveal several differences in both the elements and available defenses are the crimes comparable?

G. Where Sublett's foreign robbery convictions are not factually comparable to a Washington strike, did the trial court err in concluding that he was a persistent offender?

III. STATEMENT OF THE CASE

Procedural History

Michael Sublett and Christopher Olsen were charged by Information with first-degree murder under two theories of liability—premeditation and felony murder based on a predicate of robbery. CP 102. Both defendants were joined for trial. CP 32. Prior to trial, Mr. Sublett moved to sever the cases, arguing that the defendants had antagonistic defenses. CP 35. On May 8, 2008, the trial court denied Sublett's motion to sever. CP 52.

Both Sublett and Olsen were tried by a jury. After the jury was instructed and closing arguments delivered, the jury submitted a written question concerning the instruction defining accomplice liability. CP 129. In response, the Court met with counsel (but, not the defendant) in chambers. CP 71. No answer was given to the jury question, other than to tell the jurors to re-read the instructions. CP 129. Shortly thereafter, the jury returned guilty verdicts. CP 130.

Mr. Sublett was sentenced on July 23, 2008. CP 208. At sentencing, the State argued that Mr. Sublett was a persistent

offender, based on his prior California robbery convictions. CP 166-207. Sublett argued that the foreign crimes were not comparable to Washington "most serious offenses." The trial court concluded that the crimes were comparable and sentenced Sublett to life in prison as a persistent offender. CP 208-217.

This appeal timely follows.

*Facts*¹

Jerry Totten was found dead in a truck. RP 62. He had been bound, gagged and beaten. RP 63. According to the medical examiner, although Mr. Totten's body showed signs of blunt force trauma (RP 341-67), he died as a result of strangulation. RP 373.

After accepting a deal in return for her testimony, April Frazier testified against Mr. Sublett and Olsen. RP 495-595. Ms. Frazier testified that the three of them planned and then carried out the robbery and murder of Mr. Totten. RP 521-33. Ms. Frazier stated that both Sublett and Olsen when into the living room of Totten's house where presumably both attacked Totten, who she

¹ Just as they were joined in the trial court, Mr. Sublett and co-defendant Olsen's cases have been joined on appeal. Thus, in addition to his own statement of the case, Mr. Sublett relies on Mr. Olsen's statement of facts. Further, Mr. Sublett joins in Olsen's arguments where specifically indicated in the body of this opening brief.

later observed in the living room, dead. Later, the three returned and removed Totten's body. RP 539.

Karen Green, a forensic scientist, testified that a baseball bat which was thought to have been used to hit Totten contained skin cells near the grip. RP 334. When those cells were analyzed using DNA testing, a partial, mixed profile was generated. Based on the FBI database, "one in every 130 individuals is a potential contributor to this mixture;" Mr. Sublett cannot be excluded; and neither can Mr. Totten. RP 336. Later, Ms. Green testified that a DNA profile generated from a recovered glove matched Mr. Olsen, noting that "the estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile to the glove is one in six quadrillion." RP 338.

A number of items that belonged to Mr. Totten were later found in Mr. Sublett's possession. *See e.g.*, RP 438.

Mr. Sublett did not testify. Mr. Olsen did.

Mr. Olsen testified that Mr. Sublett killed Mr. Totten and then threatened Olsen with a gun in order to force Olsen to assist Sublett in the murder and robbery. RP 854. During cross-examination, Mr.

Sublett's counsel emphasized Mr. Olsen's post-crime relationship with Mr. Frazier. RP 909.

During closing argument, the prosecutor argued that "the probability that he [Sublett] the contributor to [the DNA on the bat] was one in 130." RP 997. Later, he argued: "Turns out that Mr. Sublett's DNA is on a wooden bat." RP 1074.

When describing accomplice liability, the prosecutor argued that there needed to be "some showing of presence and being *capable or able* to help out in the commission of the crime." RP 981. During closing, the prosecutor also used several altered images of Sublett and Olsen with arrows and the word *guilty* superimposed. RP 1003; 1151-52.

IV. ARGUMENT

1. The Trial Court Violated Mr. Sublett's Right to Open and Public Trial Proceedings When it Held a Hearing in Response to a Jury Question in Chambers.
2. The Trial Court Violated Mr. Sublett's Right to be Present When It Held a Hearing in Response to a Jury Question Without Him.
3. The Trial Court Failed to Correct an Ambiguity in the Accomplice Liability Instruction Where the Jury Indicated that the Instruction Given was Susceptible of Two Constructions and Where One of Those

Constructions Misstated the Law and Significantly
Lowered the State's Burden of Proof.

Introduction

Because these three claims of error all arise from one factual predicate, Mr. Sublett groups them together.²

CrR 6.15 (f), the court rule regarding answering jury questions, provides in pertinent part: The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing.

Of course, the court rule operates within the confines of the state and federal constitutional protections guaranteeing an open and public trial.

Violation of the Open and Public Trial Guarantees

This Court reviews *de novo* whether a trial court procedure violates the right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A defendant's failure to object at the

² Mr. Sublett joins Mr. Olsen's arguments on these issues.

time of a courtroom closure does not waive this right. *Brightman*, 155 Wn.2d at 514-15. Appellate courts presume prejudice where the court proceedings violate this right. *State v. Rivera*, 108 Wash. App. 645, 652, 32 P.3d 292 (2001). The remedy for such a violation is to reverse and remand for a new trial. *In the Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution each guarantee a criminal defendant the right to a public trial. *State v. Russell*, 141 Wash. App. 733, 737-38, 172 P.3d 361 (2007). Additionally, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," which provides the public itself a right to open, accessible proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

Article I, Section 10's guarantee of public access to proceedings and article I, section 22's public trial right together perform complementary, interdependent functions that assure the fairness of our judicial system. *State v. Bone-Club*, 128 Wn2d 254, 259, 906 P.2d 325 (1995); *see also State v. Easterling*, 157 Wn2d

167, 187 2006) (Chambers, J., concurring) (“[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts.”).

Protection of the right to public trial requires a trial court “to resist a closure motion except under the most unusual circumstances.” *Bone-Club*, 128 Wn2d at 259. A trial court may close a courtroom only after considering the five requirements enumerated in *Bone-Club* and entering specific findings on the record to justify the closure order. 128 Wn2d at 258-59. A trial court's failure to undertake the *Bone-Club* analysis, which directs the trial court to allow anyone present an opportunity to object to the closure, undercuts the guarantees enshrined in both article I, section 10 as well as article I, section 22. 128 Wn2d at 258-59.

Relying on *Allied Daily Newspapers v. Eikenberry*, 121 Wn2d 205, 210-11, 848 P.2d 1258 (1993), the *Bone-Club* court articulated five criteria to “assure careful, case-by-case analysis of a closure motion”:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is

based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

128 Wn.2d at 258-59.

Although this Court will likely need additional portions of the record in order to finally resolve this issue,³ the existing fully supports the conclusion that the courtroom was improperly closed

³ If the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may, on its own initiative or on the motion of a party direct the transmittal of additional clerk's papers. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court. In those cases, the appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

Mr. Sublett will shortly file a motion requesting supplementation of the record.

when the court held a hearing to determine whether to provide a written or oral response to the jury question.

First, the public was excluded from the hearing, which took place in the judge's chambers. Here, the trial court's affirmative act of holding the proceeding in chambers, a part of the court not ordinarily accessible to the public, without any evidence of an invitation the public to attend, had the same effect as expressly excluding the public. Judge's chambers are not ordinarily accessible to the public. Nor does the presence of the lawyers (but, not the defendant or anyone else) demonstrate that the *public* was entitled to attend this hearing. Without an explicit invitation by the trial judge, no member of the public would have understood that the jury room was serving as a courtroom for the purposes of the hearing. *See State v. Sandler*, 147 Wn. App. 97, 112-13, 193 P.3d 1108 (2008) (chambers conference on *Batson* challenge violated right to open and public trial).

Next, this Court must determine whether the right to a public trial extends to hearings in response to jury questions. The public trial right applies to the evidentiary phases of the trial, and to other

“adversary proceedings.” *Sandler, supra*. A defendant does not, however, have a right to a public hearing on purely ministerial issues. *State v. Rivera*, 108 Wash. App. 645, 652, 32 P.3d 292 (2001) (neither public nor defendant had a right to be present when trial court addressed a juror's complaint about another juror's hygiene). However, the United States Supreme Court has made clear that when faced with an inquiry from the deliberating jury, “the jury's message should [be] answered in open court and ... [defendant's] counsel should [be] given an opportunity to be heard before the trial judge respond[s].” *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 2094-95, 45 L.Ed.2d 1 (1975).

Whether a Court should answer a jury's question and what that answer should be is certainly not a ministerial matter. A trial court has discretion whether to give further instructions to a jury after it has begun deliberations. CrR 6.15(f)(1); *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). Because there were several potential responses to the jurors' question, the hearing on this issue was adversarial and part of trial. Thus, the trial court erred by closing the courtroom for this hearing.

This error mandates automatic reversal.

Violation of the Right to be Present

A defendant has a state and federal constitutional right to be present at all stages of the proceedings. A criminal defendant has a constitutional right to be present at every proceeding at which his presence bears a “reasonably substantial” relation to the fairness of the proceeding:

The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court explained that a defendant has a due process right to be present at a proceeding “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.... [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”

United States v. Gagnon, 470 U.S. 522, 526 (1985) (*per curiam*).

Any communication between the court and the jury in the absence of the defendant is error and must be proven by the State to be harmless beyond a reasonable doubt. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). We apply the harmless error standard

set forth in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). A constitutional error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Rice*, 120 Wash.2d 549, 569, 844 P.2d 416 (1993).

Mr. Sublett's constitutional right to be present was violated when the Court held a hearing in response to the jury inquiry, but did not permit him to attend. The question is whether the State can now demonstrate its harmlessness beyond a reasonable doubt.

Sublett contends that in order to show harmlessness beyond a reasonable doubt the State must demonstrate both that the jury question involved is not one on which counsel would be likely to consult the defendant, or if it is not one for which the defendant, if consulted, would be likely to have an answer that would sway the judge. Although any answer by any party on this issue now is speculative, the jury's question in this case was the type of question that a defendant (concerned about being unjustly convicted based on an erroneous accomplice liability theory) would urge counsel to answer. And, as Sublett demonstrates below, an answer should have

been given.

The Trial Court's Failure to Instruct on the Law

The trial court has discretion whether to give further instructions to a jury after it has begun deliberations. CrR 6.15(f)(1); *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). A trial court abuses its discretion when its decision is manifestly unreasonable, rests on untenable grounds, or is made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The purpose of jury instructions is to provide the jury with the applicable law. *State v. Borrero*, 147 Wn.2d 353, 362, 58 P.3d 245 (2002). A trial court has considerable discretion in formulating jury instructions. *State v. Rehak*, 67 Wn. App 157, 165, 834 P.2d 641 (1992).

Constitutionally sufficient jury instructions must be readily understood and not misleading to the ordinary mind. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 409 (1968); *State v. Alexander*, 7 Wn. App. 329, 336, 499 P.2d 263 (1972). A trial court must fully and accurately instruct a jury on the law of accomplice liability. *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000); *State v. Cronin*,

142 Wn.2d 568, 579, 14 P.3d 752 (2000). If the jury could have been confused and reached its decision based on an incorrect understanding of the law, this possibility taints the verdict and requires a new trial. *State v. Carter*, 154 Wn.2d 71, 84-85, 109 P.3d 823 (2005).

Where a defective jury instruction lowers the State's burden of proof, it constitutes a structural error and reversal is required. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

In this case, the jury reasonably concluded that the instruction defining accomplice liability was ambiguous. Seizing on the lack of specificity in Instruction 21's use of the pronoun "he," Mr. Sublett's jury set forth the two reasonable alternative interpretations of the instruction.⁴

One interpretation, the first, constituted a correct statement of the law. The other interpretation permitted the jury to convict Sublett on a near-strict liability basis. The second reasonable interpretation of Instruction 21 permitted the jury to convict on much

⁴ Both the instruction at issue and the jury question are attached as Appendix A and B, respectively.

less evidence than is legally required.

Under the second reasonable interpretation, Sublett was legally accountable for the conduct of Olsen, if Olsen was an “accomplice” of Sublett. Also according to the instruction, Olsen was an accomplice of Sublett if Olsen knew he was promoting a murder and aided another, Frazier, in planning or committing the crime. Under this interpretation, Sublett could be found guilty even if he acted without the intent or knowledge that he was aiding a murder or even a crime.

In short, Instruction 21 could reasonably be interpreted to permit Sublett’s jury to convict him on much less proof than is required under the statute.

Given that the jury indentified two reasonable interpretations of the instruction—one correct, the other unconstitutionally deficient, the trial court abused its discretion when it refused to answer the jury’s question: the first interpretation is correct. Instead, the Court refused to clarify the ambiguity. Telling the jurors to re-read their instructions could not have resolved the ambiguity. Thus, the Court left the jury to guess, when it could have easily given the

correct answer.

Because the instructions permitted the jury to convict on legally insufficient proof, this Court must reverse and remand for a new trial.

4. The Trial Court Erroneously Failed to Sever the Defendants, Where They Had Mutually Inconsistent Defenses.

Mr. Sublett sought severance from Mr. Olsen by arguing that the two defendants had irreconcilably inconsistent defenses. The trial court should have granted this motion.

Separate trials are disfavored in Washington and a defendant seeking severance must demonstrate that a joint trial will result in specific unfair prejudice that outweighs the State's interest in judicial economy. Specific unfair prejudice exists when the defendants present antagonistic defenses that are so conflicting as to be irreconcilable and mutually exclusive. *State v. Medina*, 112 Wn. App. 40, 52-53, 48 P.3d 1005 (2002) (affirming denial of severance where two of three defendants admitted involvement in robbery but minimized their respective roles in the crime). The defenses must be

so antagonistic that to believe one is to disbelieve the other. *Medina*, 112 Wn. App. at 53.

That is exactly the situation in the case at bar.

Mr. Sublett's defense was denial that he was involved in the murder. Mr. Olsen's defense was duress. Thus, Olsen's defense directly implicated Sublett in the murder. The two defenses were clearly antagonistic. Further, Mr. Olsen's duress defense both directly implicated Sublett in the murder, as well as actions subsequent to the murder. Just as importantly, the Court took no efforts in this case to minimize the prejudice to Sublett—no instruction was given to compartmentalize the evidence.

The case most on point comes from Louisiana: *State v. Webb*, 424 So. 2d 233 (La. 1982), where the court held that the trial court, at the hearing on the motion to sever, was presented with evidence that one of the defendants was going to lay blame for the offense at the feet of his codefendant by testifying that his codefendant had forced him to participate in the crime by threatening him and his family, thereby placing his codefendant in the position of having to defend against two accusers—the defendant and the State.

Thus, the trial court erred by refusing to sever the cases. If Sublett had been tried separately, he would not have had to defend against two accusers. Instead, he would have received a fair trial.

5. Prosecutorial Misconduct Merits a New Trial, Especially Where Considered Cumulatively.

There were several instances of prosecutorial misconduct during trial. Considered separately, no single incident of misconduct merits a new trial. However, considered cumulatively, the misconduct denied Mr. Sublett his right to fair trial.

The cumulative effect of errors violates the due process guarantee of fundamental fairness. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Taylor v. Kentucky*, 436 U.S. 478, 488 n.15 (1978). Relief is warranted where the cumulative effect of individual errors so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007). The fundamental question in determining whether the combined effect of trial errors violated a defendant's due process or effective assistance of counsel rights is whether the errors rendered the defense "far less persuasive," *Chambers*, 410 U.S. at 294, and

thereby had a “substantial and injurious effect or influence” on the jury's verdict, *Brecht*, 507 U.S. at 637.

There were several instances of misconduct in this case.

First, the prosecutor severely misstated the probative value of the DNA evidence—falling into what is now commonly called the “prosecutor’s fallacy.” The prosecutor argued that science proved Sublett’s guilt.

The science of human DNA is highly complex and difficult to understand, even for the well educated and patient student. It involves the matching of human genome materials or alleles and a statistical calculation of how often that match might occur in a chosen population. An allele is any alternative form of a gene that can occupy a particular chromosomal locus. In humans and other diploid organisms there are two alleles, one on each chromosome of a homologous pair. Forensic DNA tests compare allele combinations at loci where the alleles tend to be highly variable across individuals and ethnic groups. If there is no match between the alleles from the evidence DNA and the potential suspect's DNA, the suspect is generally ruled out as the source of the evidence, unless the failure is

attributable to inadequate test conditions or contaminated samples. If there is a match, analysts use the frequency of the alleles' appearance in the relevant population to calculate the probability that another person could have the same pattern of allele pairs.

Here, the prosecutor subtly shifted the analysis, using what has come to be known as the “prosecutor's fallacy” to try to convince the jury that the evidence had much greater probative value than the science actually permits. The prosecutor's fallacy occurs when the prosecutor elicits testimony that confuses source probability with random match probability. Put another way, a prosecutor errs when he “presents statistical evidence to suggest that the [DNA] evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having been found in a randomly selected sample.” *United States v. Shonubi*, 895 F.Supp. 460, 516 (E.D.N.Y.1995) (internal quotation marks and citation omitted), *vacated on other grounds*, 103 F.3d 1085 (2d Cir.1997); *see also United States v. Chischilly*, 30 F.3d 1144, 1157 (9th Cir.1994) (“To illustrate, suppose the ... evidence establishes that there is a one in 10,000 chance of a random match. The jury might equate this likelihood

with source probability by believing that there is a one in 10,000 chance that the evidentiary sample did not come from the defendant. This equation of random match probability with source probability is known as the prosecutor's fallacy.”); Richard Lempert, *Some Caveats Concerning DNA as Criminal Identification Evidence*, 13 CARDOZO L. REV. 303, 305-06 (1991). Such a fallacy is dangerous, as the probability of finding a random match can be much higher than the probability of matching one individual, given the weight of the non-DNA evidence. See William C. Thompson and Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials*, 11 L. AND HUM. BEHAV. 167, 170-71 (1987) (noting that the prosecutor's fallacy “could lead to serious error, particularly where the other evidence in the case is weak and therefore the prior probability of guilt is low”).

In addition, the prosecutor used inadmissible visual aids—misstating the evidence and misleading the jury. For example, the prosecutor apparently altered a photograph, inserting the word guilty. Taken as a whole, these improper tactics rendered Sublett’s trial unfair.

6. Mr. Sublett's California Robbery Convictions Are Not Comparable to a Most Serious Offense. Thus, Sublett is not a Persistent Offender.

Mr. Sublett was convicted on two separate occasions of robbery in California. The trial court erred when it found these convictions "comparable" to a strike because the elements of the crimes differ.

The Test for Comparability

Washington law employs a two-part test to determine the "comparability" of a foreign offense. A court must first query whether the foreign offense is legally comparable--that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If a conviction is not *legally* comparable, then the court must examine whether the conviction is *factually* comparable, *i.e.*, whether defendant admitted to or his jury found facts beyond those ordinarily required making the crime equivalent to its Washington counter-part.

To determine if a foreign crime is legally comparable to a Washington offense, the sentencing or reviewing court first looks to

the elements of the crime. The Washington Supreme Court has explained:

To determine if a foreign crime is comparable to a Washington offense, the sentencing court must first look to the elements of the crime. More specifically, the elements of the out of state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed. If the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense.

In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (internal citations removed).

The comparison of elements includes a careful examination of each required mental state, *including* the available defenses permitted by the requisite *mens rea*. *Lavery, supra*; *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (Crimes not comparable where Montana attempted robbery statute is broader than its Washington counterpart because Montana law permits a conviction for assault with a lesser *mens rea* than required under Washington law). For example, in *Lavery*, the Washington Supreme Court found that federal bank robbery was not comparable to a state

robbery because defenses were available under state law, not applicable in a federal prosecution:

The crime of federal bank robbery is a general intent crime. The crime of second degree robbery in Washington, however, requires specific intent to steal as an essential, nonstatutory element. Its definition is therefore narrower than the federal crime's definition. Thus, a person could be convicted of federal bank robbery without having been guilty of second degree robbery in Washington. Among the defenses that have been recognized by Washington courts in robbery cases which may not be available to a general intent crime are (1) intoxication, (2) diminished capacity; (3) duress; (4) insanity; and (5) claim of right. Because the elements of federal bank robbery and robbery under Washington's criminal statutes are not substantially similar, we conclude that federal bank robbery and second degree robbery in Washington are not legally comparable.

Id. at 255 (internal citations removed).

The Differences in California and Washington's Robbery

Sublett was convicted of robbery in California in 1994 and 1997. At that time, a robbery in the second-degree in Washington was defined as the unlawful taking of personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury. RCW 9A.56.200. The statutory elements of robbery presuppose that intent to steal is an element of the offense. *See State v. Matthews*, 38 Wn.

App. 180, 184, 685 P.2d 605 (1984). The use of force or intimidation in attempting to escape, rather than in the physical taking of the property, does not supply the element of force or intimidation essential to a robbery charge. *See State v. Johnson*, 155 Wn. 2d 609, 121 P.3d 91 (2005); *State v. Handburgh*, 119 Wn 2d 284, 830 P2d 641 (1992). Washington law recognizes diminished capacity as a defense. *State v. Thamert*, 45 Wn. App. 143, 723 P.2d 1204 (1986). Under the Washington diminished capacity standard, it is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at the time in question-only that it could have, and if so, how that disorder operates. *See State v. Greene*, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999); *State v. Ellis*, 136 Wn.2d 498, 523, 963 P.2d 843 (1998).

The elements of robbery and their corresponding defenses in California differ from ours in significant respects.

First, diminished capacity is not a defense in California. Section 25 of the California Code provides "(t)he defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused

person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged." *See also People v. Spurlin*, 156 Cal.App.3d 119, 128, 202 Cal.Rptr. 663 (1984) ("The legislative mandate is clear-the defense of diminished capacity has been abolished."). Section 29 further provides: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." Section 29 was first added to the Penal Code in 1981. (Stats.1981, ch. 404, § 5, p. 1593.) The act which added section 29 also amended section 22 and disallowed evidence of voluntary intoxication to negate the capacity to form the requisite mental state. ("Evidence of voluntary intoxication shall not be admitted to negate the capacity to

form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.”).

Thus, like in *Lavery*, there are defenses to robbery available in Washington which are unavailable in California.

Other differences exist. In *People v. Carroll*, 1 Cal.3d 581, 463 P.2d 400 (1970), the defendant took a wallet, threw it on the ground (after discovering it had no money), and then shot at the victim. The California Supreme Court held that the shooting was part of the robbery, even though the defendant had already abandoned the property. Washington law differs. *State v. Johnson, supra*.

In Washington, a robbery requires a threat of immediate force. In contrast, under California law the requisite fear need not be the result of an express threat. (See *People v. Garcia*, 45 Cal.App.4th 1242, 1246, 53 Cal.Rptr.2d 256 (1996) (“rather polite ... tap” of cashier sufficient where it caused cashier to fear defendant might be armed); *People v. Davison*, 32 Cal.App.4th 206, 214, 38 Cal.Rptr.2d 438 (1995) (victim is confronted by two men at an

automatic teller machine, and ordered to “stand back”); *People v. Brew*, 2 Cal.App.4th 99, 104, 2 Cal.Rptr.2d 851 (1991) (relative size of defendant and victim a factor); *In re Anthony H.*, 138 Cal.App.3d 159, 166, 187 Cal.Rptr. 820 (1982) (after following victim in car, suspect says, “I don't want to harm you, but I want your purse”).)

Thus, it is clear that a robbery in California is not legally comparable to a robbery in Washington.

The State failed to establish that the crimes were factually comparable. None of the documents submitted by the State at sentencing show that Mr. Sublett admitted to elements required by Washington, but not California law.

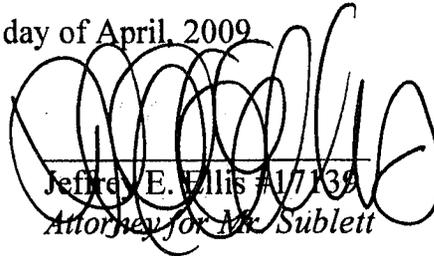
Thus, the trial court erred when it concluded that the crimes were comparable and that Mr. Sublett was a persistent offender.

This Court should reverse Sublett's sentence and remand for resentencing within the standard range.

V. CONCLUSION

Based on the above, this Court should reverse Sublett's conviction and remand for a new trial. In the alternative, this Court should vacate Sublett's life sentence and remand for resentencing.

DATED this 15th day of April, 2009



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Attorney for Mr. Sublett

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APPENDIX A ~
JURY INSTRUCTION NO. 21

INSTRUCTION NO. 21

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

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APPENDIX B ~
JURY QUESTION

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THURSTON

'08 JUN 18 P4:58

BY _____ DEPUTY

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SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

State of Washington
Plaintiff,
vs.
Michael Lynn Sablett and
Christopher Keenan
Defendant.

~~07-1-00312-0~~
No. 07-1-01363-0
QUESTION FROM
JURY

Question: Clarification of Instruction 2.1. The structuring of the 2nd sentence in the 1st paragraph is unclear. Which of the following is correct for intent? A person (X) is legally accountable for the conduct of another person (Y) when he or she (X) is an accomplice of such other person (Y) in the commission of the crime. -OR- A person (X) is legally accountable for the conduct of another person (Y) when he or she (Y) is an accomplice of such other person (X) in the commission of the crime.

----- DO NOT WRITE BELOW THIS LINE -----

Date: 6/18/07 Time: 12:05 pm

Plaintiff: _____ Defendant: _____

Court Action: I cannot answer your question please re-read your instructions. Judge [Signature]
THURSTON COUNTY SUPERIOR COURT
2000 Laveridge Dr. S.W.
Olympia, WA 98502
(360) 786-5560

CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on April 15, 2009, I served the parties listed below and the defendant with a copy of Mr. Sublett's *Opening Brief* by mailing it, postage pre-paid to:

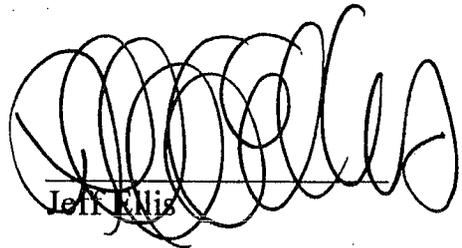
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4/15/09 SEATTLE, WA
Date and Place

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DIVISION II
09 APR 16 PM 12:33
STATE OF WASHINGTON
BY _____
DEPUTY



Jeff Ellis