

65127-7

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No. 65127-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

PEPPER NICOLE PRIGGER,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. MS. PRIGGER WAS DENIED HER
CONSTITUTIONAL RIGHT TO COUNSEL OF
CHOICE AT TRIAL

Pepper Prigger argues her Sixth Amendment right to be represented by counsel of her own choice was violated when the trial court refused to grant a continuance of the trial date so that her chosen private attorney could appear. The State responds that Ms. Prigger's request was properly denied because it was untimely and because she did not have an irreconcilable conflict with her attorney. This Court should reject the State's argument because (1) Ms. Prigger's conflict with her court-appointed attorney arose only days before trial, making it impossible for her to raise the issue earlier, and (2) Ms. Prigger need not show her relationship with her lawyer was irretrievably broken in order to assert her constitutional right to retained counsel of choice.

The Sixth Amendment's right to counsel includes the right to be represented by any qualified attorney the defendant can afford to retain. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-25, 109 S.Ct. 2646, 105

L.Ed.2d 528 (1989). This right derives from the right to counsel, not the right to a fair trial. Gonzalez-Lopez, 548 U.S. at 147-48.

The right to counsel of choice applies here because Ms. Prigger was prepared to hire the attorney she wanted to represent her; she was not asking the court to appoint a new attorney at public expense. Gonzalez-Lopez, 548 U.S. at 151; Caplin & Drysdell, 491 U.S. at 626 (describing right to choice of counsel as “the individual’s right to spend his own money to obtain the advice and assistance . . . of counsel”); 2/26/10RP (Nishimoto) 2-3; 2/26/10RP (Meek) 2-4. Thus, the State’s citation to the Roberts Court’s admonishment that a defendant is not entitled to counsel she cannot afford is inapplicable. Brief of Respondent at 19 (citing State v. Roberts, 142 Wn.2d 471, 516, 14 P.3d 713 (2000) (right to counsel of choice not denied when defendant in death penalty case moved the court to appoint a particular lawyer, who was not available, at public expense)).

A defendant’s right to counsel of her choice may be limited when necessary to protect “a fundamental tenet of the adversary system – such as ensuring competent legal representation, requiring adherence to the ethical standards of the legal profession, or preserving the appearance of fairness.” Wayne R. LaFave,

Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 11.4(c), p. 713 (3rd ed. 2007). For example a defendant may not be represented by a person who is not a member of the bar or has a conflict of interest. Wheat v. United States, 486 U.S. 153, 150, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); LaFave at 713-14.

In some circumstances the court may permissibly deny the defendant the opportunity to be represented by counsel of choice if the request would necessitate a continuance that would thwart the efficient administration of justice. A court's scheduling concerns, however, do not necessarily outweigh the defendant's interest in being represented by counsel she has chosen and retained. "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." People v. Covedj, 65 Cal.2d 199, 207, 417 P.2d 868, 64 Cal.Rptr. 284 (1966).

Thus, Washington courts have denied continuances made on the second day of trial or after jury selection. State v. Chase, 59 Wn.App. 501, 799 P.2d 272 (1990); State v. Price, 126 Wn.App. 617, 109 P.2d 27, rev. denied, 155 Wn.2d 1018 (2005). Here, however, the request was made before the trial began. Similarly, Ms. Prigger's case is more compelling than Roth, where the

defendant wanted to delay the trial so that both of his retained attorneys would be present for jury selection. State v. Roth, 75 Wn.App. 808, 825, 881 P.2d 268, rev. denied, 126 Wn.2d 1016 (1995).

In reviewing continuances to permit a defendant to be represented by retained counsel of choice, Washington courts have looked to (1) the number of continuances previously granted and whether they were requested by the defense, (2) whether the defendant's dissatisfaction with her counsel was legitimate "even though it fell short of likely incompetent representation," and (3) whether substitute counsel is prepared to go to trial. Price, 126 Wn.App. at 632. These factors are not exclusive, however, and other jurisdictions have looked at a number of factors, including whether the defendant made the request for a continuance so that she could be represented by counsel of choice in a timely manner – i.e., when she first became aware of the need. Roth, 75 Wn.App. at 825; LaFave, § 11.4(c), at 717-20. This factor is important here, as Ms. Prigger's conflict with her public defender did not become clear until a few days before trial.

a. Ms. Prigger requested a continuance to exercise her right to retained counsel of choice as soon as her disagreement with her public defender developed. Ms. Prigger's trial had been continued before, but not at her request. The State nonetheless attempts to lay blame for prior continuances at the feet of Ms. Prigger. This argument misses the point, as the prior continuances demonstrate that Ms. Prigger's disagreement with her court-appointed attorney arose when a new public defender was substituted and, just before trial, abandoned the defense developed by Ms. Prigger and her prior attorney.

Ms. Prigger was represented by two different lawyers, both staff attorneys at the Snohomish County Public Defender. Her first attorney, William Steffener, vigorously investigated a defense based upon a letter Ms. Prigger had found on her doorstep which showed Christen and Kelly Gregerson were attempting to influence Riannah Rammage to lie about the case. A forensics expert was retained to determine if latent fingerprints could be obtained from the document. SuppCP ____ at Exhibit 3 (Motion and Declaration to Compel Discovery, sub. no. 25, 1/26/10); 1/29/10RP 20, 22. Mr. Steffener also moved for the production of fingerprints from Ms. Rammage, Mr. Gregerson, and Mrs. Gregerson, and was

successful in obtaining a court order for Ms. Rammage's fingerprints and cooperation from the prosecutor in obtaining the others. Id; CP 88; SuppCP ____ (Order, sub. no. 32.4, 1/29/10); SuppCP __ (Motion and Declaration to Compel, sub. no. 19, 12/22/09); 1/29/10RP 14-26, 44, 51; 2/5/10RP 1.

Marybeth Dingley, however took over the case in February 2010. 2/5/10RP 2. While she initially continued Mr. Scheffener's work in attempting to obtain fingerprint comparisons, 2/5/10RP 8, 12-13, 21, by the time of trial Mr. Dingley had abandoned this avenue of defense. CP 76-77; 4RP 22-24. Ms. Prigger learned of Ms. Dingley's decision only two days before trial, and tried unsuccessfully to change her court-appointed attorney's mind. Ex. A. In a hand-written note to the court, Ms. Prigger explained that her lawyer was not planning to introduce the letter or the Gregersons' refusal to provide fingerprints, but instead planned to defend on the theory that the police pressured Ms. Rammage into changing her testimony.¹ In a later typed statement, Ms. Prigger explained:

¹ Mr. Gregerson was employed as a Washington State trooper, and Ms. Dingley apparently raised a "blue line" defense in opening argument and voir dire. 2RP 5, 7-8 (court rules State can respond to "blue line" defense because seed was planted in jury's mind during voir dire that police conspired to protect each other); 4RP 72-73 (defense counsel cross-examines investigating detective

Then the judge kind of accused me of waiting until the last minute to ask for private council [sic] because I didn't agree with my public defender on trial strategy and evidentiary issues and witness interviews when clearly I had been communicating with Ms. Dingledey [sic] about this for some time and could have done this earlier. Again, this is not true. I was told on Wednesday evening, less than 2 days before trial call what her trial strategy was and what evidence and interviews she was going to put forward. I was upset and told her that wasn't what happened nor was anyone going to believe it that way, she agreed. She told me that she would think about what I said and then decide. Thursday[,] the day before trial call[,] she emailed me telling me she thought about it and was going her original way. I immediately started looking for private council [sic]. I found new council [sic] who agreed with me and was willing to get on board. She told me to have the funds to her by the next Friday. I wasted no time what so ever [sic].

Ex. A (page 1). Ms. Prigger also disagreed with her lawyer's decision to answer "ready" on the trial calendar, which the trial court factored against her in denying the motion.

2/26/10RP (Avery) 7; 4RP 23-24; Ex. A.

b. Ms. Prigger's differences with her lawyer were significant.

Although Ms. Prigger wanted to use the letter that was under her door as a defense to the bribery charges, Ms. Dingledey both stopped the effort to locate fingerprints on the letter and refused to

about his knowledge of Mr. Gregerson's employment and the impact on his job of Ms. Prigger's allegation).

use it at trial.² CP 87; 4RP 3-5, 23, 184. Prior to Ms. Prigger's testimony, Ms. Dingley asked the court to ruled on whether she could use the letter in examining her client, but made clear this was against her legal advice and offered no legal argument as to why the letter was admissible. 4RP 184-97. Defense counsel's disagreement with her client was so marked on this point that she successfully asked the court for permission to treat Ms. Prigger as a hostile witness to prevent Ms. Prigger from mentioning the letter. 5RP 37-38, 40-43. The record thus demonstrates that Ms. Prigger had a serious disagreement with her attorney and promptly contacted substitute counsel and moved for a continuance.

The State claims the court properly determined Ms. Prigger's dissatisfaction with her trial attorney was not sufficient to warrant a continuance because there was not a complete breakdown in communication and the public defender was providing effective assistance of counsel. Brief of Respondent at 15, 22-23. The State is incorrect that a complete breakdown of the attorney-client relationship is necessary before the defendant may retain counsel of choice. The State cites Personal Restraint of Stenson, 142

² The prosecutor questioned two witnesses about the letter; it was marked as Exhibit 19 but never introduced as evidence. CP 107; 1RP 46; 3RP 42-43. Defense counsel never mentioned the letter when the jury was present.

Wn.2d 710, 722, 16 P.3d 1 (2001), which is not controlling as Stenson moved for appointment of new counsel at public expense and/or to represent himself. State v. Stenson, 132 Wn.2d 668, 730-31, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Ms. Prigger, in contrast, was asking for a continuance so that she could be represented by retained counsel.

While the State downplays Ms. Prigger's disagreement with her trial attorney, they had a significant difference concerning the nature of Ms. Prigger's defense. Her lawyer did not pursue the letter by completing forensic testing, and Ms. Prigger was not even permitted to testify about the letter she believed demonstrated her innocence.

The State can provide no authority for the proposition that this disagreement was not sufficient and that Ms. Prigger must demonstrate her attorney was not providing effective assistance of counsel, as that argument was rejected in Gonzalez-Lopez. Gonzalez-Lopez, 548 U.S. at 144-46. The Sixth Amendment right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best." Id. at

146. Thus, whether Ms. Dingley was a capable attorney was irrelevant to the court's determination.

c. Ms. Prigger's conviction must be reversed due to the denial of counsel of choice. The State also argues a fourth factor listed in Price and Roth must be considered - "whether the denial of the motion [for a continuance] is likely to result in identifiable prejudice to the defendant's case of a material and substantial nature." Brief of Respondent at 21 (citing Roth, 75 Wn.App. at 825), 24-25. This factor, however, is not longer viable in light of Gonzalez-Lopez. The right to counsel of choice derives from the right to counsel, not the right to a fair trial. Gonzalez-Lopez, 548 U.S. at 147-48. The Gonzalez-Lopez Court made it clear that the defendant need not show counsel was ineffective in order to succeed on a claim that her constitutional right to counsel of choice was violated. Id. at 148. Thus, Ms. Prigger need not show that the trial strategy she wanted to pursue would have succeeded if she had been permitted to proceed with private counsel.

The defendant need not show prejudice when this important constitutional right is violated, Gonzalez-Lopez, 548 U.S. at 150-51, and Ms. Prigger's conviction should be reversed and remanded for a new trial.

2. MS. PRIGGER WAS IMPROPERLY DENIED HER
CONSTITUTIONAL RIGHT TO COUNSEL OF
CHOICE AT SENTENCING

Ms. Prigger argues her constitutional right to choice of counsel was also violated when the trial court refused to continue her sentencing hearing so that she could be represented by private counsel James Lobsenz who could be ready within two weeks. The trial court denied the motion because he found Ms. Prigger's current counsel was competent to represent her, because Mr. and Mrs. Gregerson would miss work or lose vacation days if they wanted to attend the sentencing, and because Ms. Prigger had requested a trial continuance. 3/17/10RP 6-8, 9. These reasons do not justify the denial of Ms. Prigger's constitutional right to choice of counsel.

The State again argues that the court correctly found Ms. Dingley provided effective assistance of counsel and Ms. Prigger must demonstrate prejudice by the denial of her choice of counsel Brief of Respondent at 29, 30. As pointed about above, this argument must be rejected because it is contrary to the United States Supreme Court's holding in Gonzalez-Lopez, 548 U.S. at 148. Moreover, while the State claims defense counsel adequately represented Ms. Prigger at sentencing by arguing for a first

offender, defense counsel acknowledged she had not mentioned a first offender waiver in her sentencing brief, and Ms. Prigger did not receive a first-offender waiver. CP 14-24; 3/18/10RP 5, 17.

The State also argues the court properly refused to continue the sentencing hearing because the judge was not available on the day suggested by defense counsel. Brief of Respondent at 29. While defense counsel said Mr. Lobsenz preferred an April 7 sentencing hearing, she added he was available as early as March 31. 3/17/10RP 2, 7. The court, however, did not consider any date except for April 7 in denying the motion. 3/17/10RP 7. Moreover, March 31 was only two weeks away; this is a far cry from the two-month continuance rejected in State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010).

Again, the State claims Ms. Prigger's request for a continuance for new counsel was too late. The continuance of a sentence hearing, however, lacks the complexity of continuing a trial where witnesses are under subpoena.

The trial court denied Ms. Prigger's request for a continuance in part because it would be unfair to Mr. and Mrs. Gregerson. 3/17/10RP 9-10. While interested in the case, the Gregersons were not victims of the crimes as the State claims, as

bribery and perjury are crimes against the public. 3/17/10RP 7 (trial court noted it was appropriate for the Gregersons to be present even though they were arguably not victims). The Gregersons thus were not constitutionally entitled to attend Ms. Prigger's sentencing. Const. art. I, § 35. The court also failed to consider alternatives, such as asking the Gregersons what dates would be convenient for them, permitting them to address the court that day, or putting their comments in writing.

Ms. Prigger had retained a private attorney who could be ready to represent her within two weeks. The trial court's refusal to continue the sentencing hearing was unreasonable, and Ms. Prigger's case should be remanded for a new sentencing hearing.

**3. THE STATE DID NOT PROVE BEYOND A
REASONABLE DOUBT THAT MS. PRIGGER
COMMITTED THREE COUNTS OF PERJURY IN
THE SECOND DEGREE**

Ms. Prigger was convicted of three counts of second degree perjury, RCW 9A.72.030, one as a principal and two as an accomplice to Ms. Rammage. CP 40-42, 58-60. She argues each conviction must be reversed because the statements do not include the place where they were signed as required by RCW 9A.72.085 and the court's instruction to the jury, CP 66. RCW 9A.72.085

outlines the manner in which a statement may be certified to be a sworn statement when required by statute or court rule and requires the statement state “the date and place of its execution.”

The three counts of perjury were based upon three exhibits – Exs. 2, 3, 38 – none of which contain a certification of where they were made. The State argues this Court may nonetheless look at the rest of each document to resolve any uncertainty as to where it was signed, citing Veranth v. Department of Licensing, 90 Wn.App. 1028, 91 Wn.App. 339, 91 Wn.App. 339, 342, 959 P.2d 128 (1998). Veranth, however, dealt with the jurisdiction of the Department of Licensing (DOL) to revoke an individual’s license to drive. The court held DOL had jurisdiction because the initials “SPD N. PCT” were sufficient to inform the driver where the declaration was made where there was no question “SPD” referred to the Seattle Police Department and the officer’s address at the north precinct was on the other side of the document next to his signature. Veranth, 91 Wn.App. at 341-43. While a document’s failure to strictly comply with the statute does not deprive DOL of jurisdiction, the document is not admissible to prove the truth of the matter asserted, Frank v. Department of Licensing, 94 Wn.App. 306, 310, 972 P.2d 491

(1999). Logically, it is also not sufficient to prove an element of a crime beyond a reasonable doubt.

The State argues Exhibits 2 and 38, which are on Arlington Police Department forms, were therefore signed in Arlington. The evidence, fails to establish where they were signed. Ms. Prigger took a blank statement form and later returned Exhibit 2 to the police department. 1RP 31. Sergeant Cone did not witness Ms. Prigger sign the statement, but merely signed that he received it. 1RP 31. Ms. Prigger also delivered Exhibit 38, signed by Ms. Rammage, to the Arlington Police Department, but Ms. Rammage testified she did not remember where she signed it. 3RP 27. The remaining exhibit contains nothing to show where it was signed, and the evidence was only that it was at "Kinkos." Ex. 3; 3RP 19-21.

The state and federal due process clauses require the government prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. None of the three documents relied upon by the State to prove perjury comply with the requirements of RCW 9A.72.085,

as none contain the place where they were signed. As a result, the State did not prove beyond a reasonable doubt that the statements were made “under an oath required or authorized by law,” an essential element of perjury in the second degree. RCW 9A.72.030(1). Ms. Prigger’s three convictions for second degree perjury must therefore be reversed and dismissed.

4. MS. PRIGGER’S ATTORNEY DID NOT PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL

In her supplemental brief, Ms. Prigger argued her defense counsel did not provide effective assistance of counsel because she (1) failed to object to improper testimony vouching for the credibility of Ms. Rammage and (2) she failed to impeach Heather Moseley with her prior conviction for a crime of dishonesty. Supplemental Brief of Appellant.

a. Ms. Prigger may raise her ineffective assistance of counsel arguments on appeal. The State first argues that Ms. Prigger may not raise ineffective assistance of counsel for the first time on appeal. Brief of Respondent at 37-40. The State is incorrect. Effective assistance of counsel is a constitutional argument that may be raised for the first time on appeal. State v. Killo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Nichols,

161 Wn.2d 1, 9, 162 P.3d 1122 (2007); U.S. Const. amends. VI, XIV; Const. art. I § 22; RAP 2.5(a).

The State bases its argument in large part upon on State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). McFarland makes it clear an appellate court will only review an ineffective assistance claim if the record shows the counsel's deficient performance and is sufficient for the appellate court to evaluate prejudice. McFarland, 127 Wn.2d at 334. "[W]hen an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal." State v. Contreras, 92 Wn.App. 307, 312, 966 P.2d 915 (1998) (reading RAP 2.5 and McFarland together to permit review of defendant's ineffective assistance of counsel claim). Here, the record shows what evidence Ms. Prigger's counsel should have objected to and what evidence she should have used to impeach a state's witness. The record is adequate in this case to permit appellate review.

b. Ms. Prigger did not assign error to prosecutorial misconduct. In its response brief, the State argues the prosecutor did not commit misconduct, as evidenced by defense counsel's

failure to object, and further argues any misconduct could have been cured by a limiting instruction. Brief of Respondent at 48- 59. The State's response would be logical if Ms. Prigger had assigned error to prosecutorial misconduct. She did not. Ms. Prigger assigned error to her lawyer's failure to object to the prosecutor eliciting testimony that improperly vouched for Ms. Rammage's credibility. Supplemental Brief at 1.

Whether the prosecutor's questions and the answers they elicited were improper is of course an important component of Ms. Prigger's ineffective assistance of counsel argument. This Court, however, must disregard the prosecutor's irrelevant arguments that the absence of an objection demonstrates the questions and answers were proper and that the misconduct was not so egregious that it could not have been cured by a limiting instruction. Brief of Respondent at 49, 52-53, 59. The standard of review suggested by the prosecutor is similarly inapplicable. *Id.*

c. Defense counsel's performance was deficient when she failed to object to evidence improperly vouching for an essential government witness's credibility. The question before the court is whether Ms. Prigger's lawyer did not provide the effective assistance of counsel guaranteed by the Sixth Amendment

because she did not object when the prosecuting attorney (1) questioned Ms. Rammage about the immunity granted her by the court, (2) elicited the immunity agreement's requirement that Ms. Rammage tell the truth, (3) elicited Ms. Rammage's testimony that she was telling the truth in court, and (4) elicited testimony from two law enforcement officers that the investigating detective told Ms. Rammage to tell the truth.

The jury is the sole determiner of whether a witness testifies truthfully. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). The terms of a witness's immunity agreement, especially an agreement to testify truthfully, are thus not admissible unless the witness's credibility is attacked by the defense. Id. at 198; State v. Green, 119 Wn.App. 15, 23, 79 P.3d 460 (2003), rev. denied, 151 Wn.2d 1035, cert. denied, 543 U.S. 1023 (2004); State v. Jessup, 31 Wn.App. 304, 316, 641 P.2d 1185 (1982). These cases make it clear that it was improper for the State to mention Ms. Rammage's immunity agreement in the absence of a challenge to her credibility by the defense.

The prosecutor attempts to distinguish these cases because (1) they involve plea agreements between the witness and the prosecution rather than a grant of immunity, and (2) the plea

agreements were introduced in those cases, whereas the immunity agreement here was not admitted as an exhibit. Brief of Respondent at 57-58.

The distinctions suggested by the prosecutor are meaningless and instead demonstrate the evidence in this case was even more harmful than a plea agreement. Here, the jury learned that Ms. Rammage was granted immunity by the court agreement in exchange for testifying truthfully against Ms. Prigger. 3RP 44. The jury could thus easily believe the court was guaranteeing Ms. Rammage's truthful testimony or that the court could impose sanctions or even stop the proceedings if the court believed she was not truthful.

This is much more prejudicial than learning that a witness is testifying as a result of a favorable plea bargain. And it is far removed from the cases cited by the State where the jury learned that an accomplice had pled guilty to the offense. State v. Redden, 71 Wn.2d 147, 149, 426 P.2d 854 (1967) (holding prosecutor had not impeached his own witness by introducing guilty plea); State v. Portnoy, 43 Wn.App. 455, 461, 718 P.2d 805 (evidence that accomplice testifying as prosecution witness had pled guilty

permissible to permit jury to evaluate testimony), rev. denied, 106 Wn.2d 1013 (1986).

Nor did the pattern jury instruction concerning accomplice testimony cure the problem as suggested by the State. CP 55; 11 Washington Practice: Pattern Jury Instructions Criminal, 6.05 (3rd ed. 2008). The pattern instruction did not mention the court's grant of immunity, let alone explain that the court was not ensuring Ms. Rammage's reliability by granting immunity. CP 55.

Finally, the prosecutor argues that evidence of Ms. Rammage's immunity agreement was necessary to deflate Ms. Prigger's use of the letter, marked as Exhibit 19, to attack Ms. Rammage.³ Brief of Respondent at 58. Ms. Prigger, however, did no such thing. Only the prosecutor used the letter in examining witnesses. 1RP 46; 3RP 42-43. Ms. Prigger's trial attorney did not want the letter admitted at trial and never mentioned it when the jury was present.

d. Defense counsel did not provide effective assistance of counsel when she failed to impeach a government witness with a prior crime of dishonesty. Ms. Prigger also argues her trial attorney did not provide effective assistance of counsel because she failed

³ While the prosecutor repeatedly refers to the letter as Exhibit 19, it was never admitted at trial or mentioned by defense counsel in front of the jury.

to impeach a key witness, Heather Moseley, with her prior conviction for a crime of dishonesty. Supplemental Brief at 1-2, 17-19. The State responds that defense counsel may have made a tactical decision to impeach Ms. Moseley with her prior inconsistent statements instead. Response Brief at 43-44.

The State's argument incorrectly assumes counsel may only impeach a witness in one way. Witnesses, however, may be impeached for many reasons – bias, prejudice, motive to lie, inability to perceive events, prior misconduct, or prior contradictory statements are but some of the avenues for impeachment. ER 607, 608. Letting the jury know that Ms. Moseley had a prior conviction for dishonesty would have bolstered the cross-examination tactic employed by defense counsel.

The prosecutor also argues cross-examination decisions are made in the “heat of the conflict” and thus necessarily matters of “judgment and strategy.” Brief of Respondent at 44 (quoting State v. Stockman, 70 Wn.2d 941, 945, 425 P.2d 898 (1967)). Ms. Prigger's lawyer, however, planned her cross-examination strategy ahead of time and discussed it with her client. Ex. A. Additionally, impeaching a witness with prior convictions is not a decision made on the spur of the moment, as counsel must first investigate the

witness's prior record, obtain certified copies of relevant judgments if needed, and secure a ruling from the court that the conviction is admissible for impeachment purposes. ER 609.

The State acknowledged Ms. Moseley's prior conviction was admissible under ER 609, and thus there can be no legitimate tactical reason for defense counsel not to impeach Ms. Moseley with her prior conviction for a crime of dishonesty. CP 128; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (presumption trial counsel is effective is rebutted if there is no possible tactical explanation for counsel's actions or inactions). "The relevant question is not whether counsel's decisions were tactical, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). The decision not to impeach Ms. Moseley with her prior conviction was ineffective.

Defense counsel did not object to evidence that the court had granted Ms. Rammage immunity as long as she testified truthfully, suggesting the court was vouching for her testimony or for Ms. Rammage's own assurances that she was telling the truth. Defense counsel also failed to impeach a critical witness with a prior conviction for dishonesty. This Court must reverse Ms.

Prigger's convictions and remand for a new trial because her attorney did not provide effective assistance of counsel.

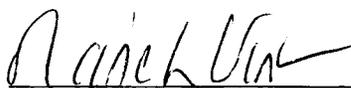
B. CONCLUSION

Pepper Prigger's convictions for three counts of perjury in the second degree and one count of bribery of witness must all be reversed and dismissed because the State failed to prove an essential element of each crime beyond a reasonable doubt.

The trial court also violated Ms. Prigger's constitutional right to choice of counsel at trial and at sentencing. Ms. Prigger's convictions and/or her sentence must be reversed and remanded for a new trial or sentencing hearing. In addition, her convictions must be reversed and remanded for a new trial because she did not receive the effective assistance of counsel guaranteed by the federal and state constitutions

DATED this 14th day of April 2011.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65127-7-I
)	
PEPPER NICOLE PRIGGER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 14TH DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 14TH DAY OF APRIL, 2011.

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