Supreme Court No. 100171-1
(Court of Appeals No. 80156-2-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TIMOTHY FORREST BASS, Appellant.

ANSWER/CONTINGENT CROSS PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT/ CONTINGENT CROSS-PETITIONER

Respondent/Contingent Cross-Petitioner, State of Washington, by Hilary A. Thomas, Appellate Deputy Prosecutor for Whatcom County, seeks the relief designated in Part B.

B. COURT OF APPEALS DECISION

Petitioner Bass has asked this Court to review the Court of Appeals opinion upholding his conviction for the felony murder of Mandy Stavik (hereinafter "Mandy"). The decision is attached as Appendix E to Bass's petition. As Contingent Cross-Petitioner, the State is only requesting this Court to accept review of the Court of Appeals finding there was a due process violation if it accepts review of this case. Otherwise, the State requests this Court deny review.

C. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should accept review of petitioner's state agency claim based on the assertion that the Court of Appeals, Division I, decision is in conflict with a prior Division I case, where the court relied on Supreme Court precedent that state agency does not exist unless law enforcement instigated, encouraged or directed the citizen's private search and the prior Division I case also cites that Supreme Court precedent.

2. Whether petitioner has shown that the Supreme Court precedent of State v. Athan, holding that there is no inherent privacy interest in saliva where there was no invasive procedure used to obtain the saliva and where law enforcement did not create a DNA profile for any purpose other than investigation of a crime, is incorrect, harmful and should be overruled.

3. Whether this Court should accept review to clarify ex post facto, instead of due process, applies to an information and jury instruction that erroneously used 1990 statutory language when the crime was committed in 1989 where the legislation did not apply retrospectively.

4. Whether this Court should accept review of the Court of Appeals decision holding that the use of the phrase "in the course of or in furtherance of" in the jury instruction violated due process because the applicable statutory phrase, "in the course of and in furtherance of" created two distinct elements, where caselaw held both before and after the amendment to the first degree felony murder statute that murder occurs within the perpetration of a felony if it occurs within the res gestae of the felony, if this Court accepts review of this case.

5. Whether this Court should accept review of the Court of Appeals application of the constitutional harmless error standard to the due process violation it found where the violation related to an error in the phrasing of a jury instruction and that is the standard that is applied to other such flawed jury instructions.

6. Whether this Court should accept review of petitioner's claim the Court of Appeals erred in finding no violation of his constitutional right to present a defense where the evidence to support the allegation that the victim might have committed suicide was speculative and the evidence clearly showed the victim was murdered.

7. Whether this Court should accept review of the Court of Appeals decision finding there was sufficient evidence to support the felony murder verdict by rape and/or kidnapping where the evidence showed beyond a reasonable doubt that the victim had been murdered after being kidnapped and raped and the defense that the defendant had had a secret sexual relationship with the victim was not credible.

D. STATEMENT OF THE CASE

The State relies on the Court of Appeals statement of the facts for the purposes of answering Bass's petition for review. See Court of Appeals Published Opinion dated 08/16/2021 (hereinafter "Opinion") at 2-8.

E. ARGUMENT

1. The Court of Appeals opinion appropriately followed the precedent in the Supreme Court case of *Smith* and is not in conflict with its opinion in *Swenson.*

Bass asserts this Court should accept review of his case because the Court of Appeals opinion regarding state agency creates a conflict with its own decision in *State v. Swenson,* 104 Wn. App. 744, 9 P.3d 933 (2000). The Court of Appeals opinion is not in conflict with *Swenson*, and is predicated on the

long-standing precedent of *State v. Smith*, 110 Wn.2d 658, 756 P.2d 722 (1988), which holds in order for state agency to exist, law enforcement must have instigated, encouraged or directed the private citizen's actions. While the federal *Miller*[1] factors have assisted some Washington courts in determining whether law enforcement's conduct satisfied that standard, the *Miller* factors are not determinative, as Bass asserts they should be. Moreover, even under *Miller,* mere knowledge and contacts are insufficient to create state agency. The trial court found factually that the detective did not instigate, encourage or direct Wagner, a co-employee of Bass', to take the cup and soda can out of the waste basket. The Court of Appeals found there was substantial evidence to support the trial court's finding. The Court of Appeals applied settled law in concluding that Wagner

[1] *United States v. Miller*, 688 F.2d 652 (9th Cir. 1982), held there were two "critical factors" in determining governmental agency: "(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends." Id. at 657.

was not a state agent when she obtained the items that were ultimately used by law enforcement to create a DNA profile for Bass.

Prior to *Smith,* as acknowledged by Bass, *State v. Clark,* 48 Wn. App. 85, 743 P.2d 822 (Div. I 1987), held that in order to show state agency, the defendant must show the government was directly involved in the search or indirectly encouraged or instigated the private citizen's actions. *Clark*, 48 Wn. App. at 856. In order to make this determination, the court referenced the *Miller* factors as two factors that should be *included* in the court's consideration as to whether the private citizen was a state agent at the time of the contested search. (emphasis added). While it found them to be critical factors, it did not find them determinative. Id.

The Washington Supreme Court in *Smith* subsequently held that in order to establish state agency, "it must be shown that the State in some way 'instigated, encouraged, counseled, directed or controlled' the conduct of the private person."

Smith, 110 Wn.2d at 666. It further explained that "mere knowledge by the government that a private citizen might conduct an illegal private search without the government taking deterrent action [is] insufficient to turn the private search into a governmental one." Id. (quoting *State v. Agee*, 15 Wn. App. 709, 713-14, 552 P.2d 1084 (1988)). The court noted, "For agency to exist there must be manifestation of consent by the principal [the police] that the agent [the informant] acts for the police and under their control and consent by the informant that he or she will conduct themselves subject to police control." Id. at 670. The court ultimately found the informant had not acted as a state agent when looking through the roof's skylight at marijuana plants because he had not been working under or subject to the control of law enforcement at the time, even though the informant had previously suggested to the detective he could go onto the property and the detective had been unsuccessful in obtaining a search warrant for the property. Id at 670.

Swenson, the case that Bass asserts is now in conflict with the Court of Appeals in this case, itself cited *Smith* for the proposition that "It must be shown that the State in some way 'instigated, encouraged, counseled, directed or controlled' the conduct of the private person." *Swenson*, 104 Wn. App. at 755 (quoting *Smith*, 110 Wn.2d at 666). In addition, while the court recited that the "critical factors" in looking at state agency were in part knowledge and acquiescence, it also reiterated *Smith's* caveat that, "[m]ere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterrent action is insufficient to turn the private search into a governmental one." Id. at 755. The test it actually applied to the facts was whether the police had 'instigated, encouraged, counseled, or directed" the private person, the victim's father, to obtain the defendant's phone records. Id. The court found the police had not, even though there had been significant contacts between the police and the father and the police were well aware the father had been

actively investigating the death of his son in order to assist the police investigation. Id. at 755-56.

The facts of *Miller* itself demonstrate that its "critical factors" require more than a private citizen's desire to help law enforcement and law enforcement's knowledge of the citizen's efforts. The *Miller* court rejected the defendant's argument the officers had given tacit approval to the citizen victim's plan to enter the defendant's property via a ruse based on the officers' knowledge of the plan and the officers' failure to discourage it because the officers hadn't encouraged the victim to act on their behalf and hadn't suggested the idea of the victim engaging in a private search. *Miller*, 688 F.2d at 657. The *Miller* court's conclusion that its facts weren't sufficient to create government agency clearly indicate something more is required than "mere knowledge" and "acquiescence" as those terms are commonly understood. *See also*, *State v. Sines*, 379 P.3d 502, 511-12 (Oregon 2016) (federal cases that use *Miller* terms of "knowledge of" and "acquiescence in" require more than the

common understanding of those phrases; the cases require some affirmative encouragement, initiation or instigation of, or participation in, the private action before state agency can be found).

In his opening brief, Bass himself noted the holding in *Smith* that this Court relied on in its opinion:

> Courts recognize "mere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterrent action [is] insufficient to turn the private search into a governmental one." *State v. Smith*, 110 Wn.2d 658, 666, 756 P.2d 722 (1988) (alteration in original) (quoting *State v. Agee*, 15 Wn. App. 709, 714, 552 P.2d 1084 (1976)). Instead, *the government must have "in some way 'instigated, encouraged, counseled, directed, or controlled' the conduct of the private person*." Id. (quoting *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985)).

Appellant's Opening Brief at 30-31 (emphasis added).

The Court of Appeals applied the correct legal standard in order to determine if Wagner was acting as a state agent at the time she took the cup and can from the waste basket. As the Court of Appeals stated, the trial court found no state agency

because Wagner was the one who conceived the idea to search the garbage and the detective did not direct, entice or instigate that search. Opinion at 11. In upholding the trial court's findings, the Court noted that both Wagner and the detective testified the detective did not ask or encourage her to look for items to seize and did not tell her what to take. Wagner testified the detective had not told her to find an item with Bass's saliva, she had determined that on her own, based on her husband's ancestry DNA experience and her watching of television crime shows. Opinion at 12. In addition, Wagner testified that she had talked with law enforcement less than 10 and maybe less than 5 times, over a two-year period. Opinion at 14. In addition to finding the detective had not told Wagner what to take, the trial court also specifically found the detective did not tell her how to handle the items or how to package them. Opinion at 12.

Should this Court decide to accept review of this state agency issue, the State requests the Court also address its

standing argument, which the Court of Appeals did not address given its determination that there was no state agency. Below the State argued that Bass had failed to meet his burden to show he had a private affairs interest in his saliva in the cup and can at the time they were taken because he had disposed of those items in a breakroom waste basket and had not acted in any manner as to assert a continued privacy interest over those items. The State argued whatever private affairs interest Bass originally had in the cup and can was abandoned when he voluntarily placed them into a communal trash can at the bakery outlet store where numerous people had access to the trash can on a daily basis. State's Response Brief at 25-35.

Relying on *State v. Hepton*, 113 Wn. App. 673, 54 P.3d 233 (2002), and *State v. Rodriguez*, 65 Wn. App. 409, 418-19, 828 P.2d 636, *rev. den.*, 119 Wn.2d 1019 (1992), the State argued that state law did not recognize a privacy interest in items disposed of in a communal, or another person's, garbage receptacle. The State also argued that while an employee can

have an expectation of privacy against state action in his/her workplace, the reasonableness of that expectation is determined on a case-by-case basis. *O'Connor v. Ortega*, 480 U.S. 709, 716-18, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). As the Ninth Circuit in *United States v. SDI Future Health, Inc.*, 568 F.3d 684 (9th Cir. 2009), held:

> … an individual challenging a search of workplace areas beyond his own internal office must generally show some personal connection to the places searched and the materials seized. To adapt *Anderson*, although all the circumstances remain relevant, we will specifically determine the strength of such personal connection with reference to the following factors: (1) whether the item seized is personal property or otherwise kept in a private place separate from other work-related material; (2) whether the defendant had custody or immediate control of the item when officers seized it; and (3) whether the defendant took precautions on his own behalf to secure the place searched or things seized from any interference without his authorization. Absent such a personal connection or exclusive use, a defendant cannot establish standing for Fourth Amendment purposes to challenge the search of a workplace beyond his internal office.

Id. at 698 (internal footnotes omitted).

The State maintains the trial judge erroneously concluded that Bass had standing to object to the seizure of the cup and

soda can based on the fact that Bass was an employee of the bakery and the garbage can was located in the employee breakroom. An employee does not necessarily have standing to object to a search of the employer's property solely based on their status as an employee. Bass failed to demonstrate at trial that he retained a private affairs interest in the discarded cup and soda can in order to establish standing to challenge the seizure of the cup and can by Wagner.

2. *Athan* was not wrongly decided and is not harmful.

Bass asserts this Court should accept review in order to determine if he retained a privacy interest in the DNA contained in his saliva in the discarded cup and can. The Court of Appeals held he did not under *State v. Athan*, 160 Wn.2d 354, 367, 158 P.3d 27 (2007). Opinion at 15 n.5. Bass asserts *Athan* is incorrect, harmful and should be overruled.

Athan held that there is "no inherent privacy interest in saliva," and "[t]here is no subjective expectation of privacy in discarded genetic material." *Athan*, 160 Wn.2d at 366-367, 374.

The court noted there had been no coercive or invasive procedure used to obtain the genetic material from the saliva in that case. Id. at 367. The majority in *Athan* rejected the argument that DNA itself should constitute a privacy interest based solely on the vast amount of information DNA can reveal about a person, the same argument Bass made. Id. at 367-68. Moreover, "[p]rivate affairs are not determined according to a person's subjective expectation of privacy because looking at subjective expectations will not identify privacy rights that citizens have held or privacy rights that they are entitled to hold." *State v. Surge*, 160 Wn.2d 65, 72, 156 P.3d 208 (2007).

Bass asserts *Athan* should be overruled because it is incorrect and harmful. Courts do not take overruling prior precedent lightly. *State v. Otton,* 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). The question posed by such a request is "whether the prior decision is so problematic that it must be rejected, despite the many benefits of adhering to precedent—" 'promot[ing] the evenhanded, predictable, and consistent

development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process." Id. A decision is incorrect if it is not supported by the authority upon which it relies or if it conflicts with other Washington Supreme Court precedent. *State v. Nuñez*, 174 Wn.2d 707, 713, 285 P.3d 21 (2012); *accord*, *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011). It can also be incorrect if it is inconsistent with the constitution, statutes or public policy. *Barber*, 170 Wn.2d at 864. A decision is harmful if it undermines an important public policy or a fundamental legal principle. *Nuñez*, 174 Wn.2d at 716-19. Bass's petition fails to meet the stringent showing required to demonstrate that *Athan* is incorrect and harmful.

3. The Ex Post Facto clause does not apply to the information and instruction that erroneously used language from the 1990 statute.

Bass asserts this Court should accept review of his ex post facto claim in order to clarify when the ex post facto clause applies. Bass chose to couch the erroneous use of the 1990

statutory language instead of the 1989 language as an ex post facto issue instead of alleging an error regarding the language of the information or the instruction. Bass asserts that *State v. Aho*, 137 Wn.2d 736, 741-42, 975 P.2d 512 (1999), upon which the Court of Appeals relied in concluding there was no ex post facto violation, is clear as to when the ex post facto clause applies, but asserts that a couple prior cases make it less clear. Those prior cases, however, also specifically state that the ex post facto clause applies to the legislation itself. The ex post facto clause restricts the *legislature's* ability to enact laws that retrospectively increase punishment or change the definition of criminal conduct. The legislature did not state the statutory amendment from "in the course of and in furtherance of" to "in the course of or in furtherance of" applied retrospectively. Therefore, while there was an error in the information and the instruction due to the use of "or" instead of "and," it does not present an ex post facto issue.

The Court of Appeals concluded the state and federal ex post facto clauses were not implicated by the 1990 amendment of the first degree felony murder statute, RCW 9A.32.030(1)(c). Opinion at 23-24. "The ex post facto clauses prohibit the Legislature from enacting laws that alter the definition of criminal conduct or increase the punishment for the crime." *Aho*, 137 Wn.2d at 741-42 (emphasis added). The new law must apply retrospectively, i.e., apply to events that occurred before its enactment, in order for the law to violate ex post facto. Id. at 742. Laws generally apply prospectively unless the Legislature indicates specifically that they are to be applied retrospectively. *State v. Humphrey*, 139 Wn.2d 53, 57, 60, 983 P.3d 1118 (1999). "An amendment is like any other statute and applies prospectively only." Id.

Bass asserts under *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994) and *In re Powell*, 117 Wn.2d 175, 814 P.2d 635 (1991) that it isn't clear that ex post facto only applies to

legislation, as opposed to application of the legislation by the judiciary or prosecution. However, in *Ward* the court stated:

> The ex post facto clauses of the federal and state constitutions forbid *the State from enacting any law* which imposes punishment for an act which was not punishable when committed or increases the quantum of punishment annexed to the crime when it was committed."

Ward, 123 Wn.2d at 496 (emphasis added). Citing to *Powell*, it explained that "[c]ritical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the *legislature increases punishment* beyond what is prescribed when the crime was consummated." *Ward*, 123 Wn.2d at 496. (citing *Powell,* 117 Wn.2d at 184-85) (emphasis added). In determining whether the sex offender registration statute violated ex post facto, the court looked at the *legislature's* stated purpose and the actual effect of the *statute*. Id. at 499 (emphasis added). Like *Ward*, the *Powell* court stated that the ex post facto clauses "forbid the State from enacting laws"

which increase punishment and punish an act which wasn't punishable when it was committed. *Powell*, 117 Wn.2d at 184; *see also, State v. Edwards,* 104 Wn.2d 63, 71, 701 P.2d 508 (1985) (emphasis added) ("Finding a violation [of ex post facto prohibition] turns upon whether *the law* changes legal consequences of acts completed before its effective date.")

Ex post facto asks whether the law itself impermissibly increases punishment, not whether the erroneous use of amended statutory language in an information or in instructions violates ex post facto. The Court of Appeals correctly determined ex post facto was not implicated here because the legislative amendment applied only prospectively.

4. The erroneous use of the word "or" instead of "and" did not violate due process because Bass had notice the State had to prove the murder occurred during the res gestae of the crime.

The Court of Appeals concluded that instead of an ex post facto issue, the erroneous use of the 1990 statutory language, which amended the felony murder statute from "in

the course of *and* in furtherance of" to "in the course of *or* in furtherance of," violated due process. Should this Court accept review of Bass's claim the Court of Appeals erred in finding the use of the word "or" instead of "and" to be harmless error, the State asks this Court to accept review of the Court's conclusion that due process was violated by the erroneous instruction. The change of the statutory language from "in the course of and in furtherance of" to "in the course of or in furtherance of" did not substantively change what the State had to prove. Under either version of the statute, the State had to prove that the homicide occurred within the res gestae of the felony. However, should this Court disagree, the Court of Appeals applied the correct constitutional harmless error test, and therefore reversal is not warranted.

a. The use of the language "in the course of *or* in furtherance of" instead of "*and* in furtherance of" did not violate due process because the proof required was essentially the same under both phrases.

The Court of Appeals determined that the amendment to first degree felony murder in 1990 altered the elements of first degree felony murder because of the change from "and" to "or." In doing so, it rejected the State's argument that both before and after the 1990 amendment the State was only required to prove that the murder was committed within the res gestae of the felony.

Relying upon a footnote in its opinion in *State v. Leech*, 54 Wn. App. 597, 775 P.2d 463 (1989), the Court of Appeals held the use of the term "and" created two separate elements, "in the course of," i.e., during the felony, and "in furtherance of," i.e., within the res gestae of the crime. Opinion at 26-27. In doing so, it noted that while the Supreme Court opinion in *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990) overruled its conclusion that the arson had not occurred "in furtherance of" the arson, the court had not specifically overruled its conclusion that the phrase "in the course of" meant "during." Opinion at 27. It concluded that the 1990 amendment had altered the

elements of the offense, and therefore Bass's due process rights had been violated. Opinion at 27-28.

The State submits the Court of Appeals erred in finding that the phrase "in the course of and in furtherance of" had a substantively different meaning than the phrase "in the course of or in furtherance of" phrase. Both before and after the amendment to the statute, the State was required to prove the murder occurred within the res gestae of the alleged felony. In 1989, the law provided that a homicide was "deemed committed during the perpetration of a felony, for the purpose of felony murder, if the homicide [was] within the "res gestae" of the felony, i.e., if there was a close proximity in terms of time and distance between the felony and the homicide." *State v. Leech*, 114 Wn.2d 700, 706, 790 P.2d 160 (1990), *abrogated on other grounds by In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). This "res gestae" standard is the same proof standard that is applied under the amended

statutory language. *See*, *State v. Brown*, 132 Wn.2d 529, 608–10, 940 P.2d 546 (1997).

> To establish that a killing occurred in the course of, in furtherance of, or in immediate flight from a felony, there must be an "intimate connection" between the killing and the felony. The killing must be part of the "res gestae" of the felony, that is, in "close proximity in terms of time and distance."

Brown, 132 Wn.2d at 607–08 (footnotes omitted); *see also*, *State v. Bottrell*, 103 Wn. App. 706, 720, 14 P.3d 164 (2000), *rev. den*., 143 Wn.2d 1020 (2001) (homicide occurs within perpetration of the felony if there's close proximity in time and distance between the felony and the murder and there's no break in the chain of events). Contrary to the Court of Appeals' opinion, the *Leech* Supreme Court opinion was not addressing just the phrase "in furtherance of" when it stated that in order to prove felony murder, the State must prove that the murder occurred within the res gestae of the felony. It did not specifically distinguish between the "in the course of" and "in the furtherance of" when it stated the general proposition:

> A homicide is deemed committed during the perpetration of a felony, for the purpose of felony murder, if the homicide is within the "res gestae" of the felony, i.e., if there was a close proximity in terms of time and distance between the felony and the homicide.

Leech, 114 Wn.2d at 706. In fact, its rejection of the defendant's argument, that the act of arson was complete once the fire was set such that the death that occurred afterwards did not occur within the res gestae of that felony, implies the Court of Appeals holding here, that the State bore the burden of proving the murder occurred in the course of, i.e., during, commission of the felony as well as in furtherance of the felony, is wrong. In rejecting the defendant's argument, the Supreme Court in *Leech* relied on a New York case which treated the phrase "in the course of and in furtherance of" as one elemental phrase:

> We reject defendant's contention that the felony murder statute, insofar as it applies to the crime of arson, is unconstitutionally vague because it does not define what is meant by "in the course of and in furtherance of such crime". The statute is sufficiently definite. It is illogical to interpret the statute, as defendant contends, as meaning that the death must occur at the time of the commission

> of the crime; it need only be caused by the commission of the crime.

Leech, 114 Wn.2d at 708 (quoting *People v. Zane*, 543 N.Y.S.2d 777, 778 (1989)); *see also*, *State v. Gilmer*, 96 Wn. App. 875, 981 P.2d 902 (1999), *rev. den.*, 139 Wn.2d 1023 (2000), *overruled in part on other grounds by State v. Salavea*, 151 Wn.2d 133, 86 P.3d 125 (2004) (for purposes of second degree felony murder element that the death was caused "in the course of *and* in furtherance of such crime or in immediate flight therefrom, the "homicide is deemed committed during the perpetration of the felony if there is a close proximity in terms of time and distance") (emphasis added).

In fact, in the context of the RCW 10.95.010(9) aggravating circumstance that the premeditated murder occurred in the course of a felony, the Supreme Court held in *State v. Hacheney*, 160 Wn.2d 503, 158 P.3d 1152 (2007), that in order to prove this aggravator, "there must be a causal connection such that the death was a probable consequence of

that felony." *Hacheney*, 160 Wn.2d at 505. In doing so, the court quoted the 1978 felony murder case of *State v. Golladay*, 78 Wn.2d121, 470 P.2d 191 (1970), *overruled on other grounds by State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976):

> "As to when a homicide may be said to have been committed *in the course of the* perpetration of another crime, the rule is ...:
> 'It may be stated generally that a homicide is committed in the perpetration of another crime, when the accused, intending to commit some crime other than the homicide, is engaged in the performance of any one of the acts which such intent requires for its full execution, and, while so engaged, and within the *res gestae* of the intended crime, *and in consequence thereof, the killing results*. It must appear that there was such actual legal relation between the killing and the crime committed or attempted, that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it. In the usual terse legal phraseology, *death must have been the probable consequence of the unlawful act*.' "

Id. at 514 (quoting *Golladay*, 78 Wn.2d at 131) (underline emphasis added). Confronting the issue of whether to continue to apply the *Golladay* rule, or to adopt a broader rule regarding the phase "in the course of," the *Hacheney* court chose to adhere to the *Golladay* rule, and defined "course" for purposes

of establishing a murder occurred "in the course of a felony," as something that is "ordered continuing process, succession, sequence or series." *Hacheney*, 160 Wn.2d at 518. While the court ultimately found that the murder had not occurred during the course of the arson because the murder occurred before the arson, the court adhered to the *Golladay* definition of "in the course of." Id. at 518.

The *Hacheney* court acknowledged that in some felony murder cases it is difficult to pinpoint when exactly the death occurred in relation to commission of the felony. Id. at 515-16. The court cited to the case of *State v. Whitfield*, 129 Wash. 134, 224 P. 559 (1924), as one of those cases. In *Whitfield*, the defendant was charged with first degree murder by killing someone and having done so "in the commission of, or in an attempt to commit, or in withdrawing from the scene" of a rape. *Whitfield*, 129 Wash. at 138. The defendant claimed that the information was deficient, and failed to apprise him of whether the killing occurred in the commission of the attempt to rape,

the rape or in withdrawing from the scene of the rape. Id. The court held:

> The proof of the killing, together with the fact that it was committed in connection with a rape, is sufficient to constitute murder in the first degree. From the very nature of things—and the evidence in this case illustrates the situation as well as any case could—it is often impossible for the state to know at just what instant a killing was committed, whether it was done in the commission of a felony, or in attempting to commit a felony, or while withdrawing from the scene of a felony. The facts here show that there were blows on the head of the child which may have been inflicted before the rape took place or after the rape had been committed, or may have been inflicted while the accused was withdrawing from the scene. The child's throat was also cut, and the same uncertainty exists as to when that mortal wound was inflicted. It is impossible to tell whether the wounds to the head or throat occasioned the death. Under such circumstances, to compel the state to make a choice as to the exact instant that an unwitnessed killing took place is but a technicality to embarrass justice. The real charge against the appellant was the killing; the rape was an incident qualifying the homicide as murder in the first degree. *State v. Fillpot*, 51 Wash. 223, 98 Pac. 659. He was charged with one crime and only one, and if the killing took place while the appellant was concerned in a rape it is immaterial if it was during the attempt, consummation, or flight.

Id. at 138-39.

Bass had notice of the requirement that the State had to prove his killing of Mandy occurred within the res gestae of the rape or kidnapping, as a probable consequence of the rape or kidnapping. The State was not required to prove two distinct elements of "in the course of" and "in furtherance of." It was required to prove the one element that the killing occurred "in the course of and in furtherance of, or in immediate flight" from the rape or kidnapping. The Court of Appeals erred in finding the State had to prove two distinct elements and that the jury instructions violated due process because they did not make this apparent.

b. If the Court of Appeals was correct that there was a due process violation, the Court applied the correct harmless error test.

Bass asserts that the Court of Appeals erred in finding that the due process violation was harmless under a constitutional harmless error analysis. He asserts that, under *Aho*, the Court should have asked whether it is *possible* that the jury convicted based on the standard of "in the course of *or* in

the furtherance of" instead of "in the course of and in furtherance of." He suggests this Court should apply the harmless error standard that was applied in two alternative means cases. The Court of Appeals applied the correct constitutional harmless error standard here, the standard that applies to flawed instructions regarding elements of a crime.

The State would first note that if Bass had asserted a due process notice violation regarding the language of the *information*, the analysis of the information would fall under the liberal, post-conviction *Kjorsvik*[2] standard. The constitutional harmless error analysis the Court of Appeals applied with respect to the *instructions* was the appropriate analysis because it is the one most analogous to the situation at issue here. "An instruction that omits an element of the offense … does not *necessarily* render a criminal trial fundamentally unfair or unreliable for determining guilt or innocence." *Neder*

[2] *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991).

v. United States, 527 U.S. 1, 2, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Where instructions are flawed regarding the elements of the offense, a constitutional harmless error analysis is applied. *State v. Brown*, 147 Wn.2d 330, 339-40, 58 P.3d 889 (2002); *see also, State v. Carter*, 154 Wn.2d 71, 109 P.3d 823 (2005) (constitutional harmless error test applied to faulty accomplice liability instruction in felony murder case).

Bass cites to the alternative means cases of *In re Brockie*, 178 Wn.2d 532, 309 P.3d 498 (2013), and *State v. Brewcynski*, 173 Wn. App. 541, 294 P.3d 825 (2013), in support of his argument the harmless error test here should be whether it was possible that the jury convicted him under the 1990 "lower" standard. *In re Brockie* actually held that the harmless error test regarding an uncharged alternative means case on direct appeal presumes prejudice unless the State can show the error was harmless. *In re Brockie*, 178 Wn.2d at 538-39. The Court of Appeals likewise presumed prejudice, but concluded the State had proven the error harmless beyond a reasonable doubt.

While the court in *Brewcynski* did hold that including an uncharged alternative means in the jury instructions in that case was not harmless because it was possible the jury convicted the defendant on that uncharged means, uncharged alternative means jury instructions cases are not as analogous to the alleged error in this case, which alleges an error regarding the essential element language, not an uncharged alternative means.

The Court of Appeals did not err in applying the constitutional harmless error standard to the due process violation it found here. The Court found the error not harmless as to the rape because the State had not proved the death occurred during the rape, but found it harmless as to the kidnapping because kidnapping is a continuing course of conduct offense that continues until the person reaches safety. Opinion at 28-29. It concluded there was no other reasonable interpretation of the evidence other than that Mandy had died while fleeing her captor, and the evidence clearly showed that the death occurred within close proximity and time to the

kidnapping. Opinion at 29. Therefore, the error regarding the use of the word "or" instead "and" in the instructions was harmless beyond a reasonable doubt.

5. The Court of Appeals did not err in finding no constitutional violation of Bass's right to present a defense because the defense was speculative and the evidence didn't support such a defense.

Bass next asserts this Court should accept review in order to address the trial court's exclusion of evidence he alleged showed that Mandy might have committed suicide instead of having been murdered. He acknowledges that the Court of Appeals referenced the correct standard, set forth in *Arndt*, but misapplied it. The Court of Appeals did not misapply the *Arndt* standard, but correctly found the evidence Bass sought to admit to show Mandy's state of mind when she died was too speculative. Therefore, the denial of Bass's motion to admit entries from Mandy's diary did not violate his constitutional right to present a defense.

As noted by the Court of Appeals, there were only three out of 28 entries over a one year period that even could be characterized as reflecting suicidal thoughts: one indicated Mandy had thought about suicide, another that she was depressed and hated life, and the last that she questioned whether life was worth living. Opinion at 37-38. However, those three entries occurred well over five months before she died. Entries within the intervening months did not show a depressive state of mind, and entries within the month before her death reflected a happy mindset and excitement about going home for Thanksgiving with her college friend Yoko. Mandy's diary contained typical musings of someone living away from home, at college, for the first time. The diary did not present evidence that showed that Mandy was suicidal the day she died.

Furthermore, the evidence was overwhelming that Mandy was murdered. Mandy went out for a jog in the afternoon the day after Thanksgiving, was expected back that day and had plans to go out for the evening with Yoko, Brad

and Tom. She had plans to go back to college after the Thanksgiving holidays. She was found naked except for her running shoes in a shallow section of the river, miles away from where she had been running. The cause of death was freshwater drowning. She had semen inside her from someone she never spent time with and had never been in a relationship with. Bass's right to present a defense was not violated by the trial court's refusal to admit entries from Mandy's diary because the evidence was speculative at best, remote in time and clearly did not support a viable, relevant theory given the overwhelming evidence that Mandy was murdered.

6. Bass's petition is insufficient to show the Court of Appeals erred in finding the evidence was sufficient to establish felony murder by rape or kidnapping, or attempts thereof.

Bass also requests this Court to review the Court of Appeals sufficiency of the evidence finding. The Court of Appeals found, taking the evidence in the light most favorable to the State, that Mandy was abducted and raped. Opinion at

18-19. The forensics evidence showed that she died between 3:30 and 4:30 p.m., that Friday afternoon, and further that the intercourse occurred within 12 hours before her death. Opinion at 19. The only question was by whom.

Bass's semen was found inside Mandy. Bass admitted to having sexual intercourse with Mandy while she was home for Thanksgiving. Given the forensics evidence, the only time Bass would have had to have sexual intercourse with Mandy was within one to two hours of her death. As the Court of Appeals found, the evidence was more than sufficient to dispense with his defense that he had had a secret affair with Mandy. Opinion at 19-21. No one ever saw her with Bass. Bass admitted to his brother that on the weekend of her death, he had been in the homestead field near where Mandy's body was ultimately found. Bass's brother expressed surprise when Bass informed him that he had had a secret affair with Mandy. Bass's explanation as to how the secret affair started, by his having gone up to her and telling her she looked fit, was not

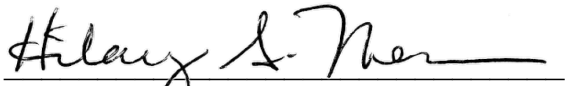
credible. Bass asked his brother and mother to come up with false alibis for him. When initially spoken to by police, Bass claimed he didn't know who Mandy was. He asked his mother if they could blame Mandy's killing on his father. Taking all the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Bass murdered Mandy after having abducted and raped her.

F. CONCLUSION

For the reasons set forth above, Cross-Petitioner, State of Washington, respectfully requests this Court deny the petition for review, but should the Court accept review, the State requests this Court review the Court of Appeals finding that the use of the word "or" instead of "and" in the to-convict instruction's language of "in the course of or in furtherance of" violated Bass's due process rights. The State also requests this Court address the State's standing argument should the Court accept review of the state agency issue.

This document contains 7,067 words, excluding parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 11th day of October, 2021



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