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SUPREME COURT NO. 100540-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

WILLIAM TALBOTT, II,

Respondent.

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

The Honorable Linda Krese, Judge

ANSWER AND CROSS-PETITION

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TABLE OF CONTENTS

Page

A. IDENTITY OF RESPONDENT AND COURT OF APPEALS DECISION 1

B. COUNTERSTATEMENT OF THE ISSUES 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 4

1a. **This Court should deny review because the court of appeals properly determined Juror 40 expressed actual bias and was never able to guarantee her ability to be fair and impartial** 4

1b. **This Court should deny review because clear authority from the U.S. Supreme Court, this Court, and the court of appeals holds defendants cannot waive a claim of actual juror bias by not exhausting their peremptory challenges** 14

2. **If this Court grants review, the Double Jeopardy Clause requires this Court also review Mr. Talbott's challenge to the sufficiency of the evidence** 22

3. **If this Court grants review, it should also consider whether the trial court improperly excluded other suspect evidence that another individual confessed to the murders** 27

<u>TABLE OF CONTENTS</u> (CONT'D)

Page

4. **If this Court grants review, it should also grant review of Mr. Talbott's challenge to the lead detective's improper opinion on guilt** 29

5. **If this Court grants review, it should also consider whether the trial court erroneously admitted evidence of Mr. Talbott's refusal to provide identification and refusal to comply with arrest orders 30 years after the murders** 31

6. **If this Court grants review, it should also grant review to address whether pervasive prosecutorial misconduct in closing and rebuttal arguments denied Talbott a fair trial** 34

7. **If this Court grants review, then is should also consider whether cumulative error deprived Mr. Talbott of a fair trial** 40

8. **If this Court grants review, then is should also resolve whether its decision in Monschke extends to individuals like Talbott, who was 24 at the time of the offenses** 40

E. <u>CONCLUSION</u> 42

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Cheney v. Grunewald
55 Wn. App. 807, 780 P.2d 1332 (1989) 10

Dean v. Grp. Health Coop. of Puget Sound
62 Wn. App. 829, 816 P.2d 757 (1991)..................................... 19

In re Pers. Restraint of Monschke
197 Wn.2d 305, 482 P.3d 276 (2021).............................. 3, 40, 41

State v. Belgarde
110 Wn.2d 504, 755 P.2d 174 (1988).. 37

State v. Bruton
66 Wn.2d 111, 401 P.2d 340 (1965).. 32

State v. Cho
108 Wn. App. 315, 30 P.3d 496 (2001).. 8

State v. Clark
143 Wn.2d 731, 24 P.3d 1006 (2001)............................ 18, 19, 21

State v. Contreras
57 Wn. App. 471, 788 P.2d 1114 (1990)................................... 39

State v. David
118 Wn. App. 61, 74 P.3d 686 (2003)................................. 17, 20

State v. DeJesus
7 Wn. App. 2d 849, 436 P.3d 834 (2019).................................. 32

<u>TABLE OF AUTHORITIES</u> (CONT'D)

Page

<u>State v. Fire</u>
100 Wn. App. 722, 998 P.2d 362 (2000)
<u>rev'd on other grounds</u>, 145 Wn.2d 152, 34 P.3d 1218 (2001). 13, ... 16, 17, 18, 19

<u>State v. Franklin</u>
180 Wn.2d 371, 325 P.3d 159 (2014)........ 28

<u>State v. Gebremariam</u>
No. 80235-6-I, 2021 WL 164707 (Jan. 19, 2021)
<u>review denied</u>, 198 Wn.2d 1012 (2021) 19

<u>State v. Girault</u>
No. 81224-6-I, 2021 WL 4947120 (Oct. 25, 2021) 13, 20

<u>State v. Gonzales</u>
111 Wn. App. 276, 45 P.3d 205 (2002)........ 8, 17

<u>State v. Guevara Diaz</u>
11 Wn. App. 2d 843, 456 P.3d 869
<u>review denied</u>, 195 Wn. 2d 1025 (2020) 7, 12, 13, 14, 15

<u>State v. Hickman</u>
135 Wn.2d 97, 954 P.2d 900 (1998)........ 27

<u>State v. Irby</u>
187 Wn. App. 183, 347 P.3d 1103 (2015)
<u>review denied</u>, 184 Wn.2d 1036 (2016)........ 12, 15

<u>State v. Jones</u>
168 Wn.2d 713, 230 P.3d 576 (2010)........ 28

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Kirkman
159 Wn.2d 918, 155 P.3d 125 (2007).. 30

State v. Loughbom
196 Wn.2d 64, 470 P.3d 499 (2020).. 35

State v. McDaniel
155 Wn. App. 829, 230 P.3d 245 (2010)............................. 33, 34

State v. Munzanreder
199 Wn. App. 162, 398 P.3d 1160
review denied, 189 Wn.2d 1027 (2017) 19

State v. Noltie
116 Wn.2d 831, 809 P.2d 190 (1991)............. 7, 9, 10, 11, 12, 14

State v. Parnell
77 Wn.2d 503, 463 P.2d 134 (1969).............................. 16, 17, 18

State v. Peña Salvador
17 Wn. App. 2d 769, 487 P.3d 923
review denied, 198 Wn.2d 1016 (2021) 20

State v. Pierce
169 Wn. App. 533, 280 P.3d 1158 (2012)................................. 36

State v. Ramos
164 Wn. App. 327, 263 P.3d 1268 (2011)................................. 36

State v. Ramsey
No. 54638-8-II, 2021 WL 5783285 (Dec. 7, 2021) 21

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Slater
197 Wn.2d 660, 486 P.3d 873 (2021).. 32

State v. Talbott
No. 80334-4-I, filed December 6, 2021....................................... 1

State v. Taylor
18 Wn. App. 2d 568, 490 P.3d 263 (2021)................................ 20

State v. Thompson
90 Wn. App. 41, 950 P.2d 977 (1998).. 30

State v. Turnbough
53921-7-II, 2021 WL 3739178 (Aug. 24, 2021)...................... 13

State v. Winborne
4 Wn. App. 2d 147, 420 P.3d 707 (2018).................................... 8

FEDERAL CASES

Bailey v. Bd. of County Comm'rs
956 F.2d 1112 (11th Cir. 1992).. 8

Burks v. United States
437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)...................... 22

Burton v. Johnson
948 F.2d 1150 (10th Cir. 1991).. 8

Hughes v. United States
258 F.3d 453 (6th Cir. 2001)... 14, 15

TABLE OF AUTHORITIES (CONT'D)

Page

Kyles v. Whitley
514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) 29

Miller v. Webb
385 F.3d 666 (6th Cir. 2004) 7, 8

Patton v. Yount
467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984) 7, 9

United States v. Gonzalez
214 F.3d 1109 (9th Cir. 2000) 8, 12, 20

United States v. Kechedzian
902 F.3d 1031 (9th Cir. 2018) 12

United States v. Martinez-Salazar
528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) 16, 17,
.... 19, 20, 21

United States v. Myers
550 F.2d 1036 (5th Cir. 1977) 33

United States v. Nell
526 F.2d 1223, 1230 (5th Cir. 1976) 8

United States v. Nelson,
277 F.3d 164, 202 (2d Cir. 2002) 8

RULES, STATUTES, AND OTHER AUTHORITIES

RAP 13.4 .... 1, 22, 29, 31, 34, 39, 41

U.S. CONST. amend. VI 1, 28, 29

A. IDENTITY OF RESPONDENT AND COURT OF APPEALS DECISION

Respondent William Talbott, II, answers the State's petition for review following the court of appeals' unpublished decision in State v. Talbott, No. 80334-4-I, filed December 6, 2021. If review is granted, Mr. Talbott asks this Court to review the remaining trial and sentencing issues not reached by the court of appeals. RAP 13.4(b)(d).

B. COUNTERSTATEMENT OF THE ISSUES

1a. Should this Court deny review, where the court of appeals correctly determined, consistent with decisions from this Court, the court of appeals, and federal circuit courts applying the Sixth Amendment, that Juror 40 expressed actual bias and was never thereafter able to guarantee her ability to decide the case based solely on the evidence and the court's instructions?

1b. Should this Court deny review, where clear authority from the United States Supreme Court, this Court, and

the court of appeals holds that defendants cannot waive their right to an impartial jury, including a claim of actual juror bias?

2. If this Court grants review, must it also address whether there is insufficient evidence to sustain Talbott's convictions?

3. If this Court grants review, should it also consider whether the trial court erred in excluding other suspect evidence that another individual confessed to the murders, which also impeached the police investigation?

4. If this Court grants review, should it consider whether the lead detective's improper opinion testimony that the DNA match meant "the case was solved" also requires reversal?

5. If this Court grants review, should it also consider whether evidence of resisting arrest becomes stale and irrelevant where a significant amount of time has passed since the crimes?

6. If this Court grants review, should it also consider whether pervasive prosecutorial misconduct in closing and rebuttal arguments denied Talbott a fair trial and, alternatively,

whether Talbott's counsel was ineffective for failing to object to much of the misconduct?

7. If this Court grants review, should it also consider whether cumulative error deprived Talbott of a fair trial?

8. If this Court grants review, should it also resolve whether In re Personal Restraint of Monschke, 197 Wn.2d 305, 482 P.3d 276 (2021), extends to youthful individuals like Talbott who were 21 to 25 years old at the time of the offense?

C. STATEMENT OF THE CASE

Mr. Talbott was charged with two counts of aggravated murder for the 1987 deaths of Jay Cook and Tanya Van Cuylenborg. CP 262-63. The prosecution alleged Talbott raped and then shot Van Cuylenborg at close range, and killed her traveling companion, Cook. RP 1919-23. The evidence related to Van Cuylenborg included graphic descriptions and photographs of her body where it was found in a culvert down a steep road embankment, as well as several more images of her autopsy. See, e.g., Exs. 6-14, 25, 26, 31-33; RP 1013-21, 1072-

84. The remaining relevant substantive facts are set forth in Talbott's Brief of Appellant at pages 4-10. After several days of deliberations, a jury convicted Talbott as charged. RP 1997, 2000-01; CP 142-46.

Talbott appealed, challenging the sufficiency of the evidence, multiple trial errors, as well as his mandatory life sentence. In an unpublished opinion, the court of appeals reversed Talbott's convictions, holding the trial court erred in refusing to dismiss an unrehabilitated biased juror for cause, who then sat on Talbott's jury and deliberated on his guilt. Opinion, 11-12. The court declined to resolve Talbott's remaining assignments of error. Opinion, 12.

D. ARGUMENT

1a. **This Court should deny review because the court of appeals properly determined Juror 40 expressed actual bias and was never able to guarantee her ability to be fair and impartial.**

The court of appeals correctly held Juror 40 made "clear, repeated expressions of actual bias as to the precise nature of the

allegations at the heart of this trial and evidence which would be introduced." Opinion, 12. The court of appeals quoted Juror 40's colloquy in full at pages 5 to 8 of its opinion. See also RP 293-300.

It is worth reiterating, however, that Juror 40 expressed serious concerns about her ability to be fair and impartial in a case involving violence against a woman, because of her own experiences growing up with domestic violence in the home and because of her feelings as a new mother. The State does not appear to dispute the evidence related to Van Cuylenborg involved graphic descriptions and numerous photographs of Van Cuylenborg's deceased body and autopsy. Exs. 6-14 (photos series of Van Cuylenborg's body in the culvert, including two close-ups of her face), 25-26, 31 (photos of Van Cuylenborg's autopsy, including another close-up of her face and extensive lividity on her backside), 32-33 (extreme close-ups of gunshot wound to Van Cuylenborg's head).

Juror 40 explained she "might take that personally and not be able to be impartial" (RP 293); a "flood of emotion might come over" her and "cloud [her] judgment" (RP 294-95); she "probably couldn't get past" it (RP 297) because "it's just something that I've already experienced in my life" (RP 296). When asked directly if she may "see things" that would make her "think of the defendant unfavorably" so that she could not be fair, she responded, "Yes." RP 295. She did not believe she would be a good juror for Talbott's case. RP 296-97 ("That's my position."). These are clear expressions of actual bias.

The State complains that the court of appeals incorrectly created a "two-stage analysis" that "has no basis in this court's decisions." Pet. for Review, 19-20. The State is, put simply, wrong. The court of appeals analysis is consistent with decisions from this Court and federal courts.

The United States Supreme Court holds a juror is considered to be impartial "only if he can lay aside his opinion and render a verdict based on the evidence presented in court."

Patton v. Yount, 467 U.S. 1025, 1037 n.12, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). This is a "constitutional standard," id., which Washington courts must and, indeed, have followed. Consistent with Patton, this Court in State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991), recognized the relevant question "is whether a juror with preconceived ideas can set them aside" and decide the case based solely on the trial evidence and court's instructions. Thus, if a juror expresses reservations, that juror may still be rehabilitated. This is the proper "two-stage analysis" of which the State complains.

Since Noltie, Washington's intermediate courts have looked to federal courts for guidance in assessing whether a biased juror has been rehabilitated. For instance, "if the court has only a 'statement of partiality without a subsequent assurance of impartiality,' a court should 'always' presume juror bias." State v. Guevara Diaz, 11 Wn. App. 2d 843, 855, 456 P.3d 869 (quoting Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004)), review denied, 195 Wn. 2d 1025 (2020). Likewise, "[d]oubts

regarding bias must be resolved against the juror." State v. Cho, 108 Wn. App. 315, 330, 30 P.3d 496 (2001) (citing Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991)); State v. Winborne, 4 Wn. App. 2d 147, 172, 420 P.3d 707 (2018) (citing Cho); see also State v. Gonzales, 111 Wn. App. 276, 282, 45 P.3d 205 (2002) (juror never rehabilitated where she could not "express confidence in her ability to deliberate fairly or to follow the judge's instructions regarding the presumption of innocence"). The Talbott court did not "announce[]" this rule, as the State claims; it has been applied for over 20 years by the court of appeals. Pet. for Review, 18-19. It is also consistent with the great weight of authority from federal circuit courts.[1]

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[1] E.g., United States v. Gonzalez, 214 F.3d 1109, 1114 (9th Cir. 2000) ("Doubts regarding bias must be resolved against the juror." (quoting Burton, 948 F.2d at 1158); United States v. Nelson, 277 F.3d 164, 202 (2d Cir. 2002) (same); United States v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976) ("Doubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid."); Bailey v. Bd. of County Comm'rs, 956 F.2d 1112, 1127 (11th Cir. 1992) (quoting Nell); see also Miller, 385 F.3d at 674-75 ("In this

These decisions, including Talbott, have not "expressly abandoned the standards" set out in Noltie. Pet. for Review, 22. To the contrary, they are consistent with Noltie. The facts of Noltie are critical to this question. As the court of appeals explained, the challenged juror in Noltie stated she "might" have difficulty being fair, explaining she had never been on a jury before. Opinion, 10 (quoting Noltie, 116 Wn.2d at 836). "However, that statement was followed by numerous clear indications of her rehabilitation, providing 'The more I've listened to the Court and the more I participated in it, it seems that it would be a lot easier to be fair, but at first I was very apprehensive about it.'" Opinion, 10 (quoting Noltie, 116 Wn.2d at 836). "The Noltie juror then went even further with her

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context, when a juror makes a statement that she thinks she can be fair, but immediately qualifies it with a statement of partiality, actual bias is presumed when proper juror rehabilitation and juror assurances of impartiality are absent," emphasizing "[i]t is essential that a juror 'swear that [she] could set aside any opinion [she] might hold and decide the case on the evidence.'" (alteration in original) (quoting Patton, 467 U.S. at 1036)).

comments indicative of rehabilitation, expressly declaring that 'it would be a terrible injustice to the defendant not to have a fair trial and not to have people see him as innocent.'" Opinion, 10-11 (quoting Noltie, 116 Wn.2d at 836).

No such rehabilitation or subsequent assurance of impartiality occurred with Juror 40 in Talbott's case.[2] When asked if she could set aside her experiences and deliberate fairly and impartially, Juror 40 twice offered only, "I could try." RP 298-99. And, each time, she added a caveat:

> A. I could try.
>
> Q. Okay.
>
> A. *I can't guarantee anything; right?*
>
> . . . .
>
> A. I could try.

[2] Noltie is also distinguishable from Talbott's case because, here, Juror 40 doubted her ability to be fair based on personal traumatic experiences growing up witnessing domestic violence against her mother. Noltie, 116 Wn.2d at 838 (finding this relevant in distinguishing Cheney v. Grunewald, 55 Wn. App. 807, 780 P.2d 1332 (1989), where the prospective juror's niece had been killed by a drunk driver).

> Q. Okay.
>
> A. Just to note, it's something I usually express with my husband, that there's always multiple sides to a story, and I'm a fact-based person, so I could tell you that I will give it my very best, should I end up being on the jury, to do that. *I just wanted to point this out to you, in case, in how you make your determination, that's a factor, you know. I'm an emotional being, like all of us, so it's just -- the potential is there.*

RP 298-99 (emphasis added). The State noticeably omits these caveats from its petition. See, e.g., Pet. for Review, 4 (omitting the entire second emphasized statement). In short, Juror 40 never promised she could set aside her experiences, follow the court's instructions, and deliberate fairly.

Noltie does not answer the question of whether "I could try," without any other assurances, is sufficient rehabilitation. The court of appeals was reasonably guided by the persuasive decisions from federal circuit courts. Opinion, 8-9. As the court explained, "the federal constitution is implicated in cases where one is claiming a violation of their right to a fair trial and federal

case law guides us as to the minimum standards for jury selection." Opinion, 10.

The Ninth Circuit held in Gonzalez: "When a juror is unable to state that she will serve fairly and impartially despite being asked repeatedly for such assurances, we can have no confidence that the juror will 'lay aside' her biases or her prejudicial personal experiences and render a fair and impartial verdict."[3] 214 F.3d at 1114. The Ninth Circuit then applied this same rule in United States v. Kechedzian, 902 F.3d 1031 (9th Cir. 2018), where the juror repeatedly expressed concern about her ability to be fair and stated only that she would "try" to deliberate fairly and impartially.

The court of appeals is correct that Noltie, "decided decades prior to Guevara Diaz and Gonzalez," "does not reflect the nuance that has developed in the case law over time."

[3] The court of appeals had already relied on Gonzalez as persuasive authority multiple times before. See, e.g., Guevara Diaz, 11 Wn. App. 2d at 851 & n.7; State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015), review denied, 184 Wn.2d 1036 (2016).

Opinion, 11. Quite simply, Noltie is not "one size fits all," that any time a prospective juror makes an equivocal statement, bias cannot be established. Instead, courts must examine whether a juror who professes bias can nevertheless make assurances that she will set that bias aside and deliberate fairly.

Finally, Talbott and other recent decisions do not "reflect a new era of scrutinizing trial courts' denials of challenges for cause," as the State laments. Pet. for Review, 21. A look at the facts of these cases readily demonstrates as much.[4] Appellate courts are not a "rubber stamp." State v. Fire, 100 Wn. App. 722, 729, 998 P.2d 362 (2000), rev'd on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001). Rather, the trial court's discretion in

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[4] State v. Girault, No. 81224-6-I, 2021 WL 4947120, at *5-*6 (Oct. 25, 2021) (unrehabilitated juror statements that she would "[p]robably" presume guilt "if there's past history" and was "lining [sic] towards guilty"); State v. Turnbough, 53921-7-II, 2021 WL 3739178, at *1, *3 (Aug. 24, 2021) (unrehabilitated juror statements that he had a "zero tolerance feeing" and "unconscionable biases" about drinking and driving); Guevara Diaz, 11 Wn. App. 2d at 858 (juror answered "no" when asked in questionnaire, "Can you be fair to both sides in a case involving allegations of sexual assault or sexual abuse?"; never rehabilitated).

assessing juror bias is "'subject to essential demands of fairness.'" Guevara Diaz, 11 Wn. App. 2d at 856 (quoting Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2001)).

Juror 40 expressed serious doubts about deliberating fairly in a case involving violence against a woman, particularly if it involved graphic images, as Talbott's case did. Juror 40 could not thereafter make assurances of her ability to set her own experiences aside and follow the court's instructions. The court of appeals reached the correct conclusion, based on careful consideration of the record and the case law, including Noltie, subsequent decisions from the court of appeals, and persuasive authority from federal circuit courts. Because there is no conflict in the law, this Court should deny review.

1b. **This Court should deny review because clear authority from the U.S. Supreme Court, this Court, and the court of appeals holds defendants cannot waive a claim of actual juror bias by not exhausting their peremptory challenges.**

The State urges this Court to consider whether defendants waive a challenge to the seating of a biased juror following the

erroneous denial of a for-cause challenge by not exhausting their peremptory challenges. Pet. for Review, 14. What the State ignores, however, is defense counsel cannot waive, strategically or otherwise, a defendant's right to an impartial jury. Hughes, 258 F.3d at 463.

Seating a biased juror is manifest constitutional error that necessitates a new trial, even where the defense failed to seek excusal for cause. Guevara Diaz, 11 Wn. App. 2d at 851-52; State v. Irby, 187 Wn. App. at 193. If the accused cannot waive a claim of juror bias on appeal even where he fails to challenge the juror in the first place, then an attorney who raises that initial challenge does not thereby render the claim waivable. Simply put, the seating of a biased juror cannot be both manifest constitutional error and a waiver of that error. Holding otherwise would require overruling the now well-established law set forth in Irby and its progeny.

Contrary to the State's claims, the applicable rule is clearly set forth in United States v. Martinez-Salazar, 528 U.S. 304, 120

S. Ct. 774, 145 L. Ed. 2d 792 (2000). In Martinez-Salazar, the United States Supreme Court held a defendant has no obligation to "use a peremptory challenge curatively" when the trial court erroneously denies a challenge for cause. Id. at 315. Instead, the defendant may "let[] . . . [the challenged juror] sit on the petit jury and, upon conviction, pursu[e] a Sixth Amendment challenge on appeal." Id.

A majority of this Court expressly adopted the rule of Martinez-Salazar in Fire. There, this Court abandoned the previous rule of State v. Parnell, 77 Wn.2d 503, 463 P.2d 134 (1969), which required reversal if improper denial of a for-cause challenge forced the defendant to remove the biased juror with a peremptory challenge and he thereafter exhausted all of his peremptory challenges. Fire, 145 Wn.2d at 159-60, 165. The Fire court instead held:

> As the [Martinez-Salazar] Court indicated, if a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be

> seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

Id. at 158. This portion of Fire is not dicta. Having rejected the old Parnell rule for preserving error on appeal, it was incumbent on this Court to announce and explain the new one. A majority of the Fire court adopted Martinez-Salazar, which makes clear the only way to preserve a claim of juror bias for appeal is to forgo an available peremptory challenge. Martinez-Salazar and Fire describe the method currently available to preserve for appeal the erroneous denial of a for-cause challenge.

Even if the clear language in Fire is dicta, it is persuasive dicta that has been repeatedly applied by the court of appeals. State v. David, 118 Wn. App. 61, 68, 74 P.3d 686 (2003) ("[A] defendant need not use all of his peremptory challenges before he can show prejudice arising from the selection and retention of a particular juror."), rev. granted, cause remanded, 154 Wn.2d 1032 (2005), opinion withdrawn in part and modified in part, on other grounds, 130 Wn. App. 232 (2007); Gonzales, 111 Wn.

App. at 282 (reversing where defense did not exhaust all its peremptories).

The State is wrong that State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001), sets out "[t]he rule governing this case." Pet. for Review, 5. Clark was decided five months before Fire. When Clark was decided, the Parnell rule was still the law in Washington, which required peremptory exhaustion. Fire changed that.

Clark is also factually distinguishable. In Clark, no juror sitting on the panel was the subject of a for-cause challenge. 143 Wn.2d at 763-64. Instead, Clark "tactically withheld his last peremptory challenge because . . . [he] knew he would get a putatively more adverse juror," one he had unsuccessfully challenged for cause, if he removed anyone. Id. at 759-60. This Court concluded that withholding a peremptory strike to prevent seating a biased juror did not prejudice the defendant. Id. at 762.

Mr. Talbott acknowledges some panels of the court of appeals have come to divergent conclusions on this issue. See,

e.g., State v. Gebremariam, No. 80235-6-I, 2021 WL 164707, at *2 (Jan. 19, 2021), review denied, 198 Wn.2d 1012 (2021) (Division One, unpublished); State v. Munzanreder, 199 Wn. App. 162, 179-80, 398 P.3d 1160, review denied, 189 Wn.2d 1027 (2017) (Division Three).

Similar to Clark, however, no jurors who were challenged for cause actually sat on Munzanreder's jury, so "Munzanreder was able to have a jury empaneled composed entirely of jurors he did not consider biased." Munzanreder, 199 Wn. App. at 179. Having resolved Munzanreder's claims on this basis, Division Three proceeded to hold, in the alternative, that the claims were waived because Munzanreder did not exhaust his peremptories. Id. at 179-80. This "holding" is arguably dicta. Additionally, the Munzanreder court engaged in no analysis, citing only to a single civil case that predates Martinez-Salazar and Fire. Munzanreder, 199 Wn. App. at 180 (citing Dean v. Grp. Health Coop. of Puget Sound, 62 Wn. App. 829, 836, 816 P.2d 757 (1991)).

Regardless, all of these court of appeals decisions predate Division One's published decision in State v. Peña Salvador, 17 Wn. App. 2d 769, 487 P.3d 923, review denied, 198 Wn.2d 1016 (2021). After extensive analysis of the case law, Division One concluded "the Washington Supreme Court has not differentiated between cases in which a defendant has exhausted their peremptory challenges and those in which they have not for purposes of the waiver argument," and reached the merits of Peña Salvador's juror bias claim. Id. at 783.

Consistent with its prior precedent in David and Gonzalez, and now Peña Salvador, Division One is now consistently holding defendants do now waive a claim of juror bias when they do not exhaust their peremptory challenges. See, e.g., Opinion, 4; State v. Taylor, 18 Wn. App. 2d 568, 577, 490 P.3d 263 (2021) ("This argument misunderstands the distinctions between preservation and prejudice in the context of for-cause and peremptory challenges."); Girault, 2021 WL 4947120, at *3-*4 (unpublished) (finding Martinez-Salazar controlling and rejecting

Clark as "inapposite"). Division Two has reached the same conclusion, holding "a defendant who challenges a conviction based on a claim of juror bias established by the record raises an issue of manifest constitutional error that is not waived even where that defendant fails to exercise all his peremptory challenges." State v. Ramsey, No. 54638-8-II, 2021 WL 5783285, at *7 (Dec. 7, 2021) (unpublished).

Thus, all the published authority, both controlling and persuasive, recognizes the seating of a biased juror can be challenged on appeal, whether or not defendants exhaust their peremptory challenges. The State's suggested rule deprives the defense of the "hard choice" the United States and Washington Supreme Courts has recognized it is entitled to; encourages the prosecution to oppose valid motions to excuse biased jurors for cause; and conflicts with precedent holding the defense cannot waive a claim of actual juror bias. Martinez-Salazar, 528 U.S. at 316. There is no need for this Court's clarification.

2. **If this Court grants review, the Double Jeopardy Clause requires this Court also review Mr. Talbott's challenge to the sufficiency of the evidence.**

Talbott argued on appeal that the prosecution failed to prove the essential element that he was the one who caused the deaths of Cook and Van Cuylenborg. Br. of Appellant, 10-15; Reply Br., 1-7. The Double Jeopardy Clause prohibits a second trial if the prosecution failed to supply sufficient proof at the first trial. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). Therefore, if this Court grants the State's petition for review, it is incumbent upon this Court to also consider whether insufficient evidence prohibits retrial. RAP 13.4(b)(3).

The gravamen of the prosecution's case was its theory that Talbott raped Van Cuylenborg. RP 1919-23. There is no dispute Talbott had sexual contact with Van Cuylenborg, based on the DNA match. RP 1808-11. And, for purposes of sufficiency analysis on appeal, the palm print on the rear door of the van

established Talbott's physical contact with the van, likely from intercourse with Van Cuylenborg in the back of the van. RP 1271. But these two facts—the only pieces of evidence linking Talbott to Van Cuylenborg—do not establish Talbott raped and then shot Van Cuylenborg in the head or that he bludgeoned and then strangled Cook to death.

Considering Van Cuylenborg's murder first, there was no evidence linking Talbott to violence of any kind, including sexual violence. Though Van Cuylenborg was found nude from the waist down, she did not have any signs of vaginal trauma that might indicate rape, such as bruising or tearing. RP 1047. No ligature marks indicated she had been bound. RP 1056. In fact, she had no physical injuries at all that could be linked to the homicide, except the single, fatal gunshot wound to the head. RP 1015-16. Generally speaking, there is no dispute a rape can occur without injury. But, in this case, there is simply no evidence of Van Cuylenborg's lack of consent.

The fact that Van Cuylenborg was dating Cook does not mean she would not consent to intercourse with Talbott. Significantly, there was no evidence establishing Cook and Van Cuylenborg were in a serious monogamous relationship in November of 1987. The only testimony about their relationship came from Van Cuylenborg's brother and Cook's sister.

Van Cuylenborg's brother testified she came to visit him at university in September of 1987 and knew she was dating Cook at the time. RP 883-84. But he never met Cook in person and did not know anything else about their relationship. RP 884, 902. Cook's sister testified Cook and Van Cuylenborg started dating in June of that year, but explained she had virtually no memory of Van Cuylenborg. RP 912, 932, 940.

Conversely, there was testimony the two were having relationship problems. RP 828. Additionally, Cook was excluded as the third unidentified contributor to non-sperm DNA found on Van Cuylenborg's vaginal swab. RP 1794-97.

Meanwhile, the gun used to kill Van Cuylenborg was never found and Talbott was never linked to any murder weapon. 2RP 61-62, 72. Talbott was never known to possess firearms or have any interest in them. RP 1556-57, 1655. Neither DNA nor fingerprints belonging to Talbott were found anywhere else in the van, despite exhaustive searching and testing. RP 1178-82, 1209, 1215, 1799-1801, 1818-26. No nexus, temporal or otherwise, was established between intercourse and Van Cuylenborg's death. Nothing is known about what happened between November 18, Van Cuylenborg's and Cook's last known location at the Bremerton ferry terminal, and November 24, when Van Cuylenborg's body was found in Skagit County. RP 992-93, 1189, 1491-92. The record indicates only that Talbott had intercourse with Van Cuylenborg, which, by itself, does not establish he raped and killed her.

Even less connects Talbott to Cook's murder. To prove Talbott killed Cook, the prosecution's case rested solely on Cook's connection to Van Cuylenborg and Talbott's supposed

familiarity with the High Bridge area. No DNA or fingerprints linked Talbott to the Cook scene. RP 1799-1801, 1818-26. No connection between Talbott and any of the items at the Cook scene was ever established. RP 1702-14. Cook had a pack of cigarettes shoved down his throat, but Talbott was never known to smoke and did not even let people smoke in his car. RP 1472, 1592, 1655. A "weathered" zip tie was found at the Cook scene, similar to those found at the other scenes. RP 1489. But neither Cook nor Van Cuylenborg had any physical injuries indicating they were bound. RP 1056, 1634. No apparent motive for Cook's murder was ever established.

The prosecution tried but failed to demonstrate Talbott was familiar with High Bridge, where Cook's body was found. Talbott's friend, Michael Seat, testified one time he and Talbott went to a boat launch on the Skykomish River and then walked across some fields to photograph Monroe Prison. RP 1544-45. But Seat, who *was* familiar with High Bridge, testified regarding this excursion, "I don't remember anything about a bridge." RP

1553. Otherwise, the prosecution established only that Talbott's parents' home was approximately seven miles from High Bridge Road, but not that Talbott was living with his parents at the time of the murders. RP 1534-35, 1551, 1723.

Intercourse does not establish rape, let alone the brutal murders of both Van Cuylenborg and Cook. The prosecution failed in its burden to prove Talbott was the one who killed the two young Canadians. Because the remedy is dismissal with prejudice, retrial is prohibited. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

3. **If this Court grants review, it should also consider whether the trial court improperly excluded other suspect evidence that another individual confessed to the murders.**

The trial court excluded evidence that another suspect confessed to a friend that he and his brother (the Maltos brothers) killed Cook and Van Cuylenborg. 2RP 128, 131-32. The brothers knew an unusual detail about the Cook murder—that a cigarette pack had been stuffed down his throat. 2RP 128.

Another prison informant also identified the brothers as the killers. 2RP 128. Law enforcement investigated the Maltos brothers but ultimately excluded them as suspects because their DNA did not match the unknown male profile. 2RP 129.

On appeal, Talbott argued the trial court's ruling violated his Sixth Amendment right to present a defense. Br. of Appellant, 33-41, 44-46; Reply Br., 17-22. Talbott emphasized a confession directly connects a person to the crime and, while a confession alone might not establish the Maltos brothers' guilt, it certainly "tends to create reasonable doubt" as to *Talbott's* guilt. State v. Franklin, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). Combined with the brothers being identified by another informant and knowing an unusual detail about the Cook murder, the evidence established a nonspeculative link between the Maltos brothers and the murders. 2RP 128. Furthermore, concerns about hearsay "cannot be used to bar evidence of extremely high probative value per the Sixth Amendment." State v. Jones, 168 Wn.2d 713, 723-24, 230 P.3d 576 (2010).

Alternatively, Talbott argued that, even if the Maltos confession was not admissible as other suspect evidence, it was admissible to impeach the police investigation. Br. of Appellant, 41-44. A key component of Talbott's defense was that law enforcement developed tunnel vision, focusing singularly on finding a DNA match, to the exclusion of all other potential suspects. RP 145; 2RP 129-30. Well-established law holds the accused has the right to expose inadequacies of the police investigation. Kyles v. Whitley, 514 U.S. 419, 446, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

If this Court grants review on the juror bias issue, then is should also consider whether exclusion of the other suspect evidence violated Talbott's Sixth Amendment right to present a defense. RAP 13.4(b)(3).

4. **If this Court grants review, it should also grant review of Mr. Talbott's challenge to the lead detective's improper opinion on guilt.**

The prosecution's managing witness and lead detective, James Scharf, testified, when he learned of the DNA match,

"Well, I called my sergeant, Scott Fenner, and told him that the case was solved." RP 1678.

Talbott challenged this testimony on appeal as an improper opinion on his guilt. Br. of Appellant, 46-50; Reply Br., 22-24. Though the defense did not object, improper opinion testimony is manifest constitutional error where there is "an explicit or almost explicit witness statement on an ultimate issue of fact." State v. Kirkman, 159 Wn.2d 918, 927, 936, 155 P.3d 125 (2007). Detective Scharf's testimony answered the ultimate disputed question for the jury to decide: identity. The testimony had nothing to do with next steps in Detective Scharf's investigation. It served no purpose except to convey his own opinion that he believed Talbott was the killer.

As to prejudice, Talbott emphasized Washington courts recognize "an opinion as to the defendant's guilt is particularly prejudicial when it is expressed by a government official, such as a police officer." State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998). Detective Scarf's opinion that the DNA match

meant "the case was solved" no doubt held sway with the jury. RP 1678. If this Court grants review on the juror bias issue, it should also grant review to assess Detective Scharf's improper opinion on guilt and the prejudicial affect it had on Talbott's trial. RAP 13.4(b)(3).

5. If this Court grants review, it should also consider whether the trial court erroneously admitted evidence of Mr. Talbott's refusal to provide identification and refusal to comply with arrest orders 30 years after the murders.

Over defense objection, Detective Scharf testified at length regarding his arrest of Talbott over 30 years after Van Cuylenborg's and Cook's deaths. RP 1679-84. Scharf explained he went to arrest Talbott at his place of work on May 17, 2018. RP 1679-81. Scharf testified he twice asked Talbott for his identification, without identifying the sheriff's office or the investigation, and Talbott twice refused. RP 1681-82. Scharf then advised Talbott he was under arrest for first degree murder. RP 1682. Scharf testified he twice instructed Talbott to turn around and put his hands behind his back, but "he didn't

comply." RP 1683. Only when Scharf "reached out, and spun [Talbott's] right shoulder to turn him around" did Talbott "finally comply." RP 1683.

On appeal, Talbott challenged admission of Detective Scharf's testimony because the prosecution failed to demonstrate it was relevant to Talbott's consciousness of guilt. Br. of Appellant, 50-60; Reply Br., 24-34. Evidence of flight, resisting arrest, concealment, and related conduct is relevant and admissible only if it creates "a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." State v. Slater, 197 Wn.2d 660, 668, 486 P.3d 873 (2021) (quoting State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965)).

Talbott emphasized that time matters in assessing the probative value of such evidence. Br. of Appellant, 57; Reply Br., 29-30. In State v. DeJesus, 7 Wn. App. 2d 849, 880, 436 P.3d 834 (2019), evidence of the defendant's false report was

admissible where it was made only 18 days after the crimes. The DeJesus court distinguished United States v. Myers, 550 F.2d 1036 (5th Cir. 1977), where the defendant's flight three to six weeks after the crime was inadmissible. The Myers court held "[t]he immediacy requirement is important," emphasizing, "[t]he more remote in time the alleged flight is from the commission or accusation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense." Id. at 1051. Consistent with this, the court in State v. McDaniel, 155 Wn. App. 829, 855, 230 P.3d 245 (2010), held nine months was too long for admission of resisting arrest evidence.

Talbott was unexpectedly arrested at his workplace, in another county, *30 years* after the fact. Talbott had no forewarning that he was under investigation. He was not even informed that he was being arrested for the 1987 murders of Cook and Van Cuylenborg, only that he was under arrest for first degree murder. Rather than a real and substantive inference of

guilt, Talbott could just as easily have been dismayed by an unfounded arrest for murders he knew nothing about. There are numerous reasons innocent individuals may not want to interact with the police. Talbott's refusal to comply was insolubly ambiguous, far from a "direct inference" of his consciousness of guilt. McDaniel, 155 Wn. App. at 855.

Because this issue impacts how the public may interact with law enforcement, it is one of substantial public interest. RAP 13.4(b)(4). Therefore, if this Court grants review on the juror bias issue, it should also consider whether evidence of concealment or resisting arrest becomes stale, ambiguous, and thereby irrelevant to an individual's consciousness of guilt.

6. **If this Court grants review, it should also grant review to address whether pervasive prosecutorial misconduct in closing and rebuttal arguments denied Talbott a fair trial.**

On appeal, Talbott challenged multiple instances of prosecutorial misconduct in closing and rebuttal arguments, most of which was not objected to. Br. of Appellant, 60-79; Reply Br.,

34-42. Talbott alternatively argued that his counsel was ineffective for failing to timely object to the misconduct. Br. of Appellant, 74-76.

The prosecution began its closing argument with a bald appeal to the passion and prejudice of the jury:

> Tanya was 18, and Jay was 20 in November of 1987. Today, Tanya would be 50, Jay would be 52. What would their lives have looked like?
>
> At this young age, all of life's important decisions were still in front of them. Would they go to college? Or University? They were Canadian, after all. What would they choose as a career? What friends would they make along the way? Would they travel the world? Would they marry? Would they have children? If so, how many? Boys? Girls? These are all questions that their family and friends have asked more than once in the softer moments. But there are also questions that they have asked over and over again over the past 31 years, questions that frame their grief and their loss.

RP 1906-07; State v. Loughbom, 196 Wn.2d 64, 76, 470 P.3d 499 (2020) (recognizing remarks made at the beginning of the prosecution's closing argument "must be understood as 'a prism through which the jury should view the evidence'" (quoting State

v. Ramos, 164 Wn. App. 327, 340, 263 P.3d 1268 (2011)). The prosecutor returned to this theme in rebuttal, emphasizing Cook's and Van Cuylenborg's family and friends "have been waiting for justice for 30-something years." RP 1977-78.

Speculating about the lives Cook and Van Cuylenborg would have led served no purpose except to trigger an emotional response and appeal to jurors' sympathies. Br. of Appellant, 61-63; Reply Br., 36-37. The argument invited to the jury to step into the shoes of not just Cook and Van Cuylenborg, but their grieving family members, as well. It referred to "facts" not in evidence and had nothing to do whatsoever with the evidence or the ultimate question for the jury: did Talbott cause the deaths of Cook and Van Cuylenborg? Courts recognize such "emotionally charged embellishments" and "improper appeal[s] to the jury's sympathy" are misconduct. State v. Pierce, 169 Wn. App. 533, 556, 280 P.3d 1158 (2012).

The prosecution engaged in similar misconduct by speculating that Van Cuylenborg would not have engaged in a

consensual encounter with a stranger "[a]t the height of the AIDS crisis in 1987." RP 1929. No evidence was admitted at trial about the AIDS crisis or Van Cuylenborg's fear it. Br. of Appellant, 66; Reply Br., 37-38. In addition to referring to facts not in evidence, the argument was offensive, unfounded, and inflammatory. See State v. Belgarde, 110 Wn.2d 504, 508-09, 755 P.2d 174 (1988) (provoking the jury's fear and outrage with inflammatory "facts" outside the record is improper).

Immediately following reference to the AIDS crisis, the prosecution began what became a theme of closing and rebuttal: "Beyond that, there is no evidence of that. There is no evidence whatsoever of a consensual sexual encounter. There might be arguments or insinuations from the defense, but no evidence of it." RP 1929-30.

The prosecutor returned to this theme in rebuttal: "[Defense counsel] mentioned again and again in her closing argument this innocent explanation, this innocent alternative explanation for why Mr. Talbott's DNA, his semen, would be

on Tanya. *Where is it? What is it? Have you heard it? Because there is no evidence of anything but rape*." RP 1982-83 (emphasis added). The prosecutor reiterated, "There is simply no evidence to suggest a consensual sexual encounter." RP 1983. Again, later in rebuttal:

> That the defense response, both in the course of the trial and in closing argument, to the fingerprint or palm print evidence is interesting. Because if the theory that the defense wants you to accept is that at some point, under some circumstances, beyond comprehension, Mr. Talbott and Tanya met and had a consensual sexual encounter, *then why are we so worried about his palm print on the van? If there is this innocent alternative explanation for why his semen is here, which again, we haven't heard, then why are we so worried about the palm print? Why expend so much energy attacking the witness on the stand, and trying to discredit the evidence in closing argument if it's just part of this innocent alternative explanation for their encounter?*

RP 1986 (emphasis added).

Talbott contended these arguments improperly shifted the burden of proof and penalized him for the exercise of his right to silence and right to defend against the State's accusations. Br. of

Appellant, 68-71; Reply Br., 38-40. Most egregious were the prosecutor's questions, referring to an alternative explanation to rape, "Where is it? What is it? Have you heard it?" RP 1983. Given the intimate nature of intercourse, it was obvious only Talbott could supply such an explanation. But Talbott had an absolute right not to so do and exercised that right by not testifying or presenting any other evidence except brief impeaching testimony from the defense investigator. RP 1864, 1871. It is "clearly improper" for the prosecutor to comment on the accused's failure to present evidence where the accused does not testify or call witnesses, and so "[t]he only issue was the strength of the State's case." State v. Contreras, 57 Wn. App. 471, 474, 788 P.2d 1114 (1990).

If this Court grants review of the juror bias issue, it should also consider whether the pervasive prosecutorial misconduct denied Talbott a fair trial. RAP 13.4.(b)(3). Part and parcel of this issue is also (1) whether a postverdict motion for a new trial preserves misconduct for review (Br. of Appellant, 71-73) and (2)

whether Talbott's counsel was ineffective for failing to lodge timely objections (Br. of Appellant, 74-76).

7. **If this Court grants review, then is should also consider whether cumulative error deprived Mr. Talbott of a fair trial.**

Talbott argued on appeal that the above-described trial errors accumulated to deprive him of a fair trial. Br. of Appellant, 79. If this Court grants review on the juror bias issue, then it should also consider the cumulative error issue.

8. **If this Court grants review, then is should also resolve whether its decision in Monschke extends to individuals like Talbott, who was 24 at the time of the offenses.**

Talbott argued on appeal that his mandatory life sentence is unconstitutional under article I, section 14 of the Washington Constitution, where he was only 24 years old at the time of the offenses in 1987 and he did not have the opportunity to argue the mitigating qualities of youth at the time of sentencing. Supp'l Br. of Appellant, 1-8. Talbott relied on this Court's recent decision in Monschke, which rejected any "arbitrary line drawing" based

on a defendant's age, emphasizing "no clear line exists between childhood and adulthood." 197 Wn.2d at 306.

If this Court grants review on the juror bias issue, then it should also resolve the open question of whether Monschke is limited 18- to 20-year-olds, or whether it extends to youthful defendants in their early twenties. RAP 13.4(b)(3).

E. CONCLUSION

For the reasons discussed above, this Court should deny the State's petition for review. However, if this Court grants review, then it should also grant review of the remaining trial and sentencing issues the court of appeals declined to reach.

DATED this 18th day of February, 2022.

I certify this document contains 7,177 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

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