NO. 1009402

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

DAMIAN BRADLEY BELANDER

PETITION FOR REVIEW FROM THE COURT OF APPEALS
(DIVISION II)

ANSWER TO PETITION FOR REVIEW

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I. ISSUE PRESENTED

Is a significant question of Constitutional law or an issue of substantial public interest that should be determined by the Supreme Court presented by the following three holdings of the Court of Appeals:

A. That the admission of a redacted recording of a custodial interview of the petitioner, Damian Bradley Belander, did not constitute "manifest error affecting a constitutional right" under RAP 2.5(a)(3)?

B. That three statements made closely in time by the prosecutor during his rebuttal argument did not constitute misconduct that was so flagrant and ill-intentioned such that an instruction could not have cured any resulting prejudice?

C. That Belander's trial counsel was not ineffective when failing to object to the admission of a recorded custodial interview as violative of the Washington Privacy Act and as containing allegedly irrelevant and prejudicial material?

II. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

On January 22nd, 2019, victim Brian Bodle contacted Breanna Teafatiller to borrow $200.00 for heroin in Portland. RP2 623-626. He also needed a ride to Portland. RP2 628. Teafatiller contacted Belander, who agreed to give Bodle a ride to Portland. *Id.* Bodle was known to sell heroin, but Belander was not known as a drug dealer in the McMinnville, Oregon area. RP 658-659, 664, 682, 689, 700-01, 703.

At around 3 am, Belander arrived at Teafatiller's residence in what evidence showed was a 2002 Chrysler Voyager van registered to his mother's boyfriend Joshua Lewis, a van Belander was known to commonly use around that time period. RP2 588, 597, 629, 631-632. Bodle agreed to pay Belander to drive him to Portland. RP2 632. The two left in the early morning of January 23rd, 2019. RP2 633. Bodle texted Teafatiller at around

6:00 am, the last she ever heard from Bodle. RP2 634-635. At 4:29 pm on January 23rd, 2019, Belander removed Bodle from his Facebook friends. RP3 1277-78.

At approximately 8:57 pm on January 23rd, 2019, a red van matching the description of Joshua Lewis' Chrysler Voyager was captured on video traveling on the most common and direct route from the Portland Metro area to the Mt. St. Helens recreational area in Skamania County. RP3 1030, 1048. At approximately 9:42 pm on January 23rd, 2019, a vehicle matching the description of the Voyager and another dark sedan drove East, past the Swift Power Canal dam toward the Mount Saint Helens and Ape Caves recreational area in Skamania County. RP2 756-57, RP3 1029-1037, 1231. At 10:04 pm that same day, the same dark sedan that had traveled east with the van now traveled west past the Swift Power Canal. RP3 1039-1042, 1231.

At 11:13 pm, Belander's cell phone pinged off of a tower in Vancouver, WA near the natural return route from Mount St. Helens to Portland. RP3 1219, 1232. At 12:09 am on January 24th, 2019, Belander's phone pinged off of a cell tower near 7021 Northeast Halsey Street, Portland, Oregon. RP3 1219-20.

At around 12:00 am on January 24th, 2019, Belander told former girlfriend Felicity Torres via Facebook that he was in Portland and needed help, clothing and shoes. RP3 1079-1080.

At approximately 3:30am, Off-Duty police officer Ryan Ohlman arrived at the Mount Saint Helens area to go hiking. RP1 444. While driving there, he saw a van that had been burned, later identified as Lewis' red Chrysler Voyager van, parked on the side of the road. RP1 444, RP2 743. Roughly twelve hours later, on his way down from the area, Ohlman saw the same van in the same area. RP1 444-45.

At 11:31 am on January 24th, 2019, Belander asked his friend Lydia Layton on Facebook for help, saying that his van was stolen, he was stuck in Portland, and his clothes were wet and bloody. Exhibit 173, RP3 1060-1061. Later that same day, he told Layton he had heroin for sale. RP3 1063-64.

At around 2:00 pm, Jennifer Lorz, Lance Lorz and Mitchell Gundy-Hampton saw the burnt van later identified as Lewis' red Chrysler Voyager minivan on the forest road that leads to the Mount Saint Helens recreation area. RP1 455-62. Gundy-Hampton also noticed Brian Bodle's body in the woods near the van. RP1 462. Gundy-Hampton and the Lorz's contacted police. RP1 462-66.

Amber Greenfield picked up Belander in Portland at 7:10 pm on January 24th, 2019. RP3 1286. In the hours and days following, Belander sent multiple messages to friends telling them he needed new clothes, had drugs for sale, was in trouble, needed help, and was on the run.

RP3 1297-99, 1304-08. Belander also told a friend via Facebook that he might be facing prison for the rest of his life. RP3 1305.

Starting January 25th, 2019 at 9:40pm, Belander told multiple friends on Facebook that he had heroin for sale. RP2 1087-1088, RP3 1291-1293. On January 27th, 2019, Belander told Amber Greenfield that he was "f*cked" and that he needed to leave the State. RP3 1288.

On January 31st, 2019, Belander was arrested in Yamhill County, Oregon on unrelated charges. RP2 797. Shortly after his arrest, Detective Jeremy Schultz and former Detective Sergeant Monty Buettner of the Skamania County Sheriff's office interviewed Belander. RP3 1013-1016, 1023. During the interview, Belander denied ever being in Skamania County and even said that he had never been to Washington State. SRP 6, 19-20. Belander also denied driving a van or borrowing a van, SRP 15, 20, 23-24, 28, 32, or ever having seen Lewis in a

van, SRP 23-24, 28. Belander also denied knowing anyone named Bree (the name used by Breanna Teafatiller). SRP 30.

A forensic scientist determined that there was very strong scientific support for inclusion of Belander's DNA on the stocking cap found near Bodle's body, RP2 736, 863-64, 919, and for Belander having contributed to the DNA found on the shoulder of the jacket worn by Bodle when his body was discovered in the woods, RP2 934-35. If Belander gripped Bodle's jacket very hard and dragged him through the woods, it would have been more likely that his DNA would transfer or be left on the jacket. RP2 938. It did appear that Bodle had been dragged by grabbing his clothing, which was torn near the left arm area. RP2 865-66.

Bodle was determined to have died from blunt force injury to his head. RP3 1132, 1174. His injuries were

consistent with being struck in the head with a tire iron similar to the tire iron found in the burnt van. RP3 1184.

B. PROCEDURAL FACTS

On March 13th, 2019, Belander was charged by the Fourth Amended Information in Skamania County Superior Court with murder in the first degree, murder in the second degree, and arson in the second degree. CP 348-352.

On December 20th, 2019, the Court conducted a CrR 3.5 hearing to determine the admissibility of Belander's statements to law enforcement. RP1 40-82. During the hearing, former Det. Monty Buettner testified that he and Det. Jeremy Schultz traveled to Yamhill County on January 31st, 2019 to interview Belander. RP1 45-46, 59-60. Belander had been in custody on an unrelated Oregon case for a few hours when the detectives met with him. RP1 47. The detectives recorded the interview, and at the beginning of the recorded

interview Buettner indicates "the recorder's on and we're detectives with the Skamania County Sheriff's Office." RP1 50.

On the recording, Buettner read Belander his *Miranda* rights. RP1 52. Buettner testified that Belander nodded in the affirmative to understanding his rights. RP1 52.

The recorded interview lasted approximately one hour, with a ten to fifteen minute break, when the detectives left the interview room. RP1 53. Prior to the break, Belander also asked for more snacks. RP 54. After the break, the detectives reentered the room, put the snacks on the table, and restarted the recording. RP1 55.

Towards the end of the recorded interview, the following exchange occurred:

> Q So, what was her name?
> A I'm not answering hard questions, so.
> Q Okay, that one a hard one?

> A No, it's not a hard one. It's just like, I'm tired of dealing with all this bullsh*t, so like, if you want to talk to me, you can talk to a lawyer.

RP1 57-58. After a brief exchange with the detectives clarifying Belander's wishes, the interview ended. RP1 58-59.

Detective Schultz testified at the CrR 3.5 hearing that prior to starting the recording, Belander had consented to the interview being recorded. RP1 66-67.

At the conclusion of the hearing, the trial court held that Belander's indication that the detectives could talk to his lawyer was an unequivocal request to invoke his right and therefore that anything after that would be inadmissible at trial. RP1 81. Therefore, when the recording was played at trial, the State stopped it once Belander said "No, it's not a hard one. It's just like I'm tired of dealing with all this bullsh*t." SRP 38.

A jury trial was held from January 27th, 2020 to January 31st, 2020. RP1 332-500, RP2 502-1001, RP3

1003-1501. Belander was found guilty by jury of murder in the first degree and of arson in the second degree. CP 396-397, 400. He was sentenced to 385 months in prison on February 27th, 2020. CP 470-482.

On direct appeal, the Court of Appeals affirmed his convictions. Opinion at Page 2. This petition for review follows.

III. ARGUMENT

NO SIGNIFICANT CONSTITUTIONAL LEGAL QUESTIONS OR ISSUES OF SUBSTANTIAL INTEREST TO THE PUBLIC THAT THE SUPREME COURT SHOULD DETERMINE ARE PRESENTED BY THIS CASE.

The Supreme Court only accepts review under four circumstances, including "[i]f a significant question of law under the Constitution of the State of Washington or of the United States is involved" and "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3), (4). Belander argues that these two grounds apply to the

issues he wants the Supreme Court to review. Brief of Petitioner at 28-30. However, neither of these grounds are presented by this case.

A. THE COURT OF APPEALS PROPERLY HELD THAT THE ADMISSION OF A REDACTED RECORDING OF BELANDER'S CUSTODIAL INTERVIEW DID NOT CONSTITUTE "MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT" UNDER RAP 2.5(A)(3).

Since Belander did not object in the trial court that the admission of the recording of his custodial interview constituted a comment on his Constitutional rights, the Court of Appeals properly analyzed whether this issue could be reviewed by asking whether it involves a "manifest error affecting a constitutional right," RAP 2.5(a)(3). Opinion at 16. Finding "no manifest constitutional violation," the Court of Appeals declined to review this issue. *Id.* at 17.

Belander argues that that this holding was in error. Brief of Petitioner at 9-12.

i. TECHNICALLY, NO CONSTITUTIONAL QUESTION IS RAISED.

In determining that the admission of the recording of Belander's custodial interview did not involve a "manifest error affecting a constitutional right," RAP 2.5(a)(3), the Court of Appeals was interpreting a court rule, not the Constitution. Therefore, no Constitutional question is involved, and review by the Supreme Court under RAP 13.4(b)(3) would be inappropriate.

ii. THE CASE LAW ON MANIFEST CONSTITUTIONAL ERROR IS NOT UNCLEAR.

Belander argues not only that the Court of Appeals misapplied the case law on manifest Constitutional error, Brief of Petitioner at 9-10, but also that "[t]his is understandable" because the case law is itself "misleading", *Id.* at 11. However, the case law is clear.

Both the Court of Appeals and Belander focus on *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). Opinion at 16-17; Brief of Petitioner at 10-11.

Belander argues that "[t]he test [for manifest error] involves the sufficiency of the record rather than the strength of the argument," but that *O'Hara* "is misleading because it erroneously suggests that the standard involves the *impact* of the error" by "equat[ing] the question of whether or not 'the trial record [is] sufficient to determine the merits of the claim' with the phrase 'actual prejudice.'" Brief of Petitioner at 10-11 (quoting *O'Hara*, 167 Wn.2d at 99, 217 P.3d at 761)(emphasis in original brief).

However, the Supreme Court clearly lays out first that "'"[m]anifest" in RAP 2.5(a)(3) requires a showing of actual prejudice." *O'Hara*, 167 Wn.2d at 99, 217 P.3d at 761 (quoting *State v. Kirkman,* 159 Wn.2d 918, 935, 155 P.3d 125 (2007)(citing *State v. Walsh,* 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *State v. McFarland,* 127 Wn.2d 322, 333–34, 899 P.2d 1251 (1995))).

Then, the Supreme Court explains that "[t]o demonstrate actual prejudice, there must be a '"plausible showing by the [appellant] that the asserted error had practical and *identifiable* consequences in the trial of the case."'" *Id.* (quoting *Kirkman,* 159 Wn.2d at 935, 155 P.3d 125 (internal quotation marks omitted) (quoting *State v. WWJ Corp.,* 138 Wn.2d 595, 603, 980 P.2d 1257 (1999))) (emphasis added by this writer).

Finally, and only in defining the term *identifiable*, the Supreme Court explains that "[i]n determining whether the error was *identifiable*, the trial record must be sufficient to determine the merits of the claim." *Id.* (citations omitted)(emphasis added by this author).

Belander correctly quotes the way in which the Supreme Court distinguishes the manifest error standard from the harmless error standard, i.e., by explaining that for manifest error, "the focus of the actual prejudice must be on whether the error is so obvious on the record that

the error warrants appellate review." *Id.* at 99-100, 217 P.3d at 761 (quoted in Brief of Petitioner at 10). However, the Supreme Court further explains that

> [t]his distinction also comports with the common legal definition of "manifest error": "[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." [citation omitted] "Manifest constitutional error" is defined as "[a]n error by the trial court that has an identifiably negative impact on the trial to such a degree that the constitutional rights of a party are compromised." [citation omitted]

Id. at 100, 217 P.3d at 761 (footnote 1)(quoting BLACK'S LAW DICTIONARY 622 (9th ed.2009)).

This law is crystal clear and does not require further review.

iii. THE COURT OF APPEALS CORRECTLY APPLIED THE LAW CONCERNING MANIFEST ERROR.

Belander argues that the Court of Appeals, "instead of focusing on whether necessary facts appeared in the record, . . . burdened Mr. Belander with proving that the

error prejudiced him." Brief of Petitioner at 10. "The Court of Appeals erroneously focused on the impact of the error," Belander continues, "rather than the sufficiency of the record." *Id.* at 11. Belander concludes that since "the necessary facts supporting the error appear in the record. . . [t]his means that the error is manifest, and review is appropriate under RAP 2.5(a)(3)." *Id.*

But it is actually Belander who is mis-stating the law here. The question is "whether the error is so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d at 99-100, 217 P.3d at 761. Is it "'[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.'"? *Id.* at 100, 217 P.3d at 761 (footnote 1)(quoting BLACK'S LAW DICTIONARY 622).

The Court of Appeals correctly held that Belander had not demonstrated any such obvious error by the admission of his custodial interview ending with his

refusal to answer "hard questions", his denial that the just-asked question was "a hard one", and finally, "It's just like I'm tired of dealing with all this bullsh*t." Opinion at Page 17 (quoting SRP 39).

By way of comparison, had the jury heard the complete interview, including Belander's indication that the law enforcement officers could speak with his lawyer, *that* would be the sort of obvious error contemplated by the case law to constitute manifest error. But as it is, it is very ambiguous and thus not manifest error.

B. THE COURT OF APPEALS PROPERLY HELD THAT THREE STATEMENTS MADE CLOSELY IN TIME BY THE PROSECUTOR DURING HIS REBUTTAL ARGUMENT DID NOT CONSTITUTE MISCONDUCT THAT WAS SO FLAGRANT AND ILL-INTENTIONED SUCH THAT AN INSTRUCTION COULD NOT HAVE CURED ANY RESULTING PREJUDICE.

"Because Belander did not object to any of the prosecutor's arguments that he now alleges are improper," the Court of Appeals properly ruled, "he 'is deemed to have waived any error, unless the prosecutor's

misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.'" Opinion at 18 (quoting *State v. Emery*, 174 Wn.2d 741, 760-761, 278 P.3d 653 (2012)). Finding no such misconduct, the Court held that Belander had waived this argument by not objecting at trial. *Id.* at 20-22.

Belander argues that the prosecutor's comments "improperly . . . disparag[ed] the role of defense counsel" and that "[t]he misconduct was flagrant and ill-intentioned, requiring reversal of Mr. Belander's convictions." Brief of Petitioner at 12. He cites *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014) and *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011), Brief of Petitioner at 13-16, and concludes that his prosecutor's arguments were "at least as bad as the misconduct at issue in [those cases]." *Id.* at 15.

The Court of Appeals also examined *Lindsay* and *Thorgerson* on this point:

> In *Lindsay*, our Supreme Court concluded that, among the numerous rude and self-serving exchanges between counsel that permeated the record, one statement by the prosecutor impugned defense counsel: "This is a crock. What you've been pitched for the last four hours is a crock." [citation omitted] The court reasoned that describing defense counsel's argument as a "crock" impugned defense counsel's integrity because it implied that defense counsel was deceptive and dishonest. [citation omitted]
>
> Similarly, in *Thorgerson*, our Supreme Court concluded that the prosecutor impugned defense counsel's integrity by referring to his presentation of the case as "bogus" and involving "sleight of hand." [citation omitted] The court reasoned that the prosecutor went beyond the bounds of acceptable behavior in disparaging defense counsel because their comments implied wrongful deception or even dishonesty in the context of a court proceeding. [citation omitted]

Opinion at 20-21 (quoting and citing *Lindsay*, 180 Wn.2d at 433-34, 326 P.3d 125 and *Thorgerson*, 172 Wn.2d at 451-52, 258 P.3d 43).

However, as the Court of Appeals pointed out, "*Thorgerson* turned on the defendant's failure to object:

the court held that 'a curative instruction would have alleviated any prejudicial effect of this poorly thought out attack on defense counsel's strategy.'" *Id.* at 21 (quoting *Thorgerson*, 172 Wn.2d at 452, 258 P.3d 43). On the other hand, *Lindsay* was not decided on the flagrant and ill-intentioned standard because "defense counsel made a motion for a mistrial due to prosecutorial misconduct directly following the prosecutor's rebuttal closing argument, citing many of the same examples that are raised on appeal," thereby preserving the issue for appellate review, 180 Wn.2d at 430-431, 326 P.3d at 129.[1]

In any case, the Court of Appeals properly applied these two precedents to Belander's case and found that "[u]nlike *Lindsay*, here, there were not multiple, pervasive instances of misconduct throughout the trial; the alleged

[1] The Court of Appeals did add in *dicta* that "[e]ven under the more stringent standard for determining prejudice, the

misconduct occurred only in closing argument," but that "[l]ike *Thorgerson*, even if the prosecutor improperly impugned defense counsel, . . . a curative instruction would have alleviated any prejudicial effect of the prosecutor's attack on defense counsel's strategy." Opinion at 22.

Belander inappropriately argues that it is "especially true given the ambiguity of the evidence" that "an instruction would not have cured the prejudice." Brief of Petitioner at Page 16. First of all, the evidence was not ambiguous. "[T]here is an overwhelming amount of untainted evidence that supports the jury's finding of guilty." Opinion at 29.

Secondly, the question of whether an instruction would have cured any prejudice is entirely separate from the question of sufficiency of the evidence. As Belander himself notes, "[p]rosecutorial misconduct may require

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results would be the same." *Id.* at 443, 326 P.3d at 135.

reversal even where ample evidence supports the jury's verdict. [citation omitted] The focus of the reviewing court's inquiry 'must be on the misconduct and its impact, not on the evidence that was properly admitted.'" Brief of Petitioner at Page 13 (citing and quoting *In re Glassman*, 175 Wn.2d 696, 711-712, 286 P.3d 673). "[D]eciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts." *Glassman*, 175 Wn.2d at 711, 286 P.3d at 681.

C. THE COURT OF APPEALS PROPERLY HELD THAT BELANDER'S TRIAL COUNSEL WAS NOT INEFFECTIVE WHEN FAILING TO OBJECT TO THE ADMISSION OF A RECORDED CUSTODIAL INTERVIEW AS VIOLATIVE OF THE WASHINGTON PRIVACY ACT AND AS CONTAINING ALLEGEDLY IRRELEVANT AND PREJUDICIAL MATERIAL.

The Court of Appeals rejected Belander's argument that he was denied effective assistance of counsel when his trial counsel did not object to the admission of his custodial interview in whole as violative of the Washington Privacy Act and/or in part as containing irrelevant and

prejudicial material. Opinion at Pages 25-29. Belander argues that the Court of Appeals was in error on this point, Brief of Petitioner at Pages 17-27.

i. THE COURT OF APPEALS INCORRECTLY FINDS THAT THE TRIAL COURT WOULD LIKELY HAVE SUSTAINED AN OBJECTION TO THE ADMISSION OF THE RECORDING OF BELANDER'S INTERVIEW.

As the Court of Appeals correctly states, "[w]hen the defendant bases his ineffective assistance of counsel claim on defense counsel's failure to object, the defendant must show that the objection would have succeeded." Opinion at 25-26 (citing *State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007)).

However, the Court of Appeals incorrectly holds that the trial court would likely have sustained an objection to the admission of Belander's custodial interview since both parts of it violated the Washington Privacy Act by not beginning and ending with a statement of the time. *Id.* at Pages 26-27 (citing RCW 9.73.090(1)(b)(ii)). These are

technical violations that have been excused by our courts. *State v. Rupe*, 101 Wn.2d 664, 685, 683 P.2d 571, 585 (1984), *habeas corpus granted on other grounds*, *Rupe v. Wood*, 863 F.Supp. 1315 (W.D. Wash. 1994)(no starting time); *State v. Gelvin*, 43 Wn. App. 691, 695-696, 719 P.2d 580, 582-583 (1986) (no ending time).[2]

Thus, an objection to the recording's admission would *not* necessarily have been sustained.

Belander analyzes his interview as two separate interviews because of the 10-15 minute break taken in the middle and thus finds additional violations of the Washington Privacy Act in the second half. Brief of Petitioner at 21-22. However, these recordings should be analyzed as one continuous interview. *See Rupe*, 101 Wn.2d at 684-685, 683 P.2d at 585 (two interrogations

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[2] *Gelvin* actually involved the admission of testimony of officers regarding contents of a video tape which had been suppressed, where the State did not contest the suppression of the tape.

conducted by two different officers with one-minute time gap treated as one statement for purposes of Privacy Act).

ii. THE COURT OF APPEALS CORRECTLY RULED THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO THE ADMISSION OF BELANDER'S RECORDED CUSTODIAL STATEMENT WAS NOT DEFICIENT PERFORMANCE.

The Court of Appeals held that "counsel's failure to object to the admission of the custodial interview does not constitute deficient performance because there is a conceivable, legitimate trial tactic explaining counsel's decision" in that "the admission of the custodial interview permitted defense counsel to argue in closing that any guilty conscience Belander had could be explained by the fact that he was involved in a separate criminal matter in Yamhill County—not about Bodle's death." Opinion at 27.

Belander takes issue with this holding, arguing first that "a claim of strategy must be supported by evidence that counsel was actually pursuing the alleged strategy"

and that there was no such evidence in this case. Brief of Petitioner at 26-27 (citing *State v. Hendricksen*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996), *overruled on other grounds*, *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L.Ed.2d 482 (2006)).

However, more recently, the State Supreme Court has established that there is no need to show trial counsel was *actually* using a particular strategy to defeat a claim of deficient performance. "'When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260, 1268-1269 (2011)(quoting *State v. Kyllo,* 166 Wn.2d 856, 863, 215 P.3d 177 (2009))(cited in Opinion at 27). The burden is actually on the petitioner, who "can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance,'" *Id.* at 33, 246 P.3d at 1269 (quoting *State*

v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Furthermore, in *Hendrickson*, the Court looked at trial counsel's closing argument and could not find any evidence that counsel was utilizing the argued strategy, 129 Wn.2d at 79, 917 P.2d at 572. Here, however, trial counsel *did* proceed in his close from Belander's recorded interview to argue that Belander's guilty conscience resulted from an unrelated incident in Yamhill County, Oregon and not the Skamania County murder. RP3 1456-1457, 1461-1462.

Belander also argues that a strategy to forego objecting to the admission of his recorded custodial interview was "inherently unreasonable" because he "could have pursued the same strategy—explaining Mr. Belander's guilty conscience—with evidence of the Oregon arrest, without introducing his entire statement."

Brief of Petitioner at 27 (citing *State v. Crow*, 8 Wn.App.2d 480, 509, 438 P.3d 541 (2019)).

However, the Supreme Court has also stated that "[d]eficient performance is not shown by matters that go to trial strategy or tactics." *Hendrickson*, 129 Wn.2d at 77-78, 917 P.3d at 571. Also, "a defendant alleging ineffective assistance must overcome 'a strong presumption that counsel's performance was reasonable.'" *Grier*, 171 Wn.2d at 33, 246 P.3d at 1268 (quoting *Kyllo*, 166 Wn.2d at 862, 215 P.3d 177).

Here, as Belander himself argues, "jurors heard Mr. Belander's own words, phrasings, and tone of voice as he spoke with the officers." Brief of Petitioner at 23. Just as "[t]his allowed the jury to give more weight to anything they found incriminating in his statement," *Id.*, this also allowed the jury to give more weight to anything they found probative that his guilty conscience could be

explained by his involvement in the Yamhill County criminal matter and not the murder.

iii. THE COURT OF APPEALS CORRECTLY HELD THAT EVEN IF BELANDER'S TRIAL COUNSEL WAS DEFICIENT IN NOT OBJECTING TO PORTIONS OF HIS CUSTODIAL INTERVIEW, THERE WAS NO PREJUDICE.

The Court of Appeals held that "even if defense counsel was deficient for failing to object to certain statements made by him in the custodial interview, Belander fails to establish prejudice" because "[t]here is an overwhelming amount of untainted evidence that supports the jury's finding of guilt even in the absence of the recorded custodial interview." Opinion at 27. Belander disagrees. Brief of Petitioner at 23.

The Court of Appeals is correct. The overwhelming evidence of Belander's guilt is outlined in Statement of the Case above and in the Court of Appeals Opinion. *See* Opinion at 27-28.

It must also be noted that, as Belander stipulates, even had the recording been suppressed, the detectives would still have been allowed to testify as to what he told them. Brief of Petitioner at 23. *See also Lewis v. State, Dept. of Licensing*, 157 Wn.2d 446, 472-473, 139 P.3d 1078, 1090 (2006) (". . . [T]he violations of RCW 9.73.090(1)(c) in these cases do not require the exclusion of other evidence acquired at the same time as the improper recordings, such as the officer's simultaneous visual observations."); *State v. Courtney*, 137 Wn. App. 376, 383-384, 153 P.3d 238, 242 (2007) (". . . [A] violation of section .090 of the privacy act does not require suppression of derivative evidence.").

Belander argues that "[t]he State's evidence was entirely consistent with a charge of rendering criminal assistance rather than murder." *Id.* at 23. However, the crime of rendering criminal assistance can only occur *after* the underlying crime has been committed. RCW

9A.76.050. Here, the evidence is that Belander was with victim Bodle in the hours leading up to and during Bodle's murder. Opinion at 27-28. Thus, the evidence proves that Belander was either the principal to murder or a legally accountable accomplice to murder, meaning, as explained to the jury, someone who "aids or agrees to aid another person in planning or committing the crime," meaning "all assistance whether given by words, acts, encouragement, support, or presence." CP 317.

D. NO SIGNIFICANT CONSTITUTIONAL QUESTIONS OR ISSUES OF SUBSTANTIAL INTEREST TO THE PUBLIC THAT THE SUPREME COURT SHOULD DETERMINE ARE PRESENTED BY THE THREE CONTESTED HOLDINGS OF THE COURT OF APPEALS.

Belander argues that the three holdings of the Court of Appeals he contests all raise significant Constitutional questions and issues of substantial interest to the public that the Supreme Court should determine Brief of Petitioner at 28-30. This argument fails because, for one

reason, as argued above, the Court of Appeals did not err with respect to these three issues.

Also, as is clear from the above, these holdings are highly fact specific.[3] Thus, they do not present significant Constitutional questions or issues of substantial interest to the public that the Supreme Court should review.

IV. CONCLUSION

For the above reasons, the Supreme Court should decline to accept review in this matter.

DATED this 29th day of June, 2022.

RESPECTFULLY submitted,

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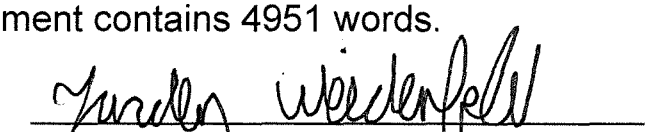
By: 

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[3] *See Grier*, 171 Wn.2d at 34, 246 P.3d at 1269 (quoting *State v. Cienfuegos,* 144 Wn.2d 222, 229, 25 P.3d 1011 (2001)) ("Ineffective assistance of counsel is a fact-based determination that is 'generally not amenable to per se rules.'")

CERTIFICATE OF SERVICE

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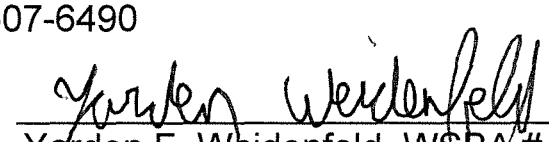

Yarden F. Weidenfeld, WSBA # 35445
June 29, 2022, City of Stevenson, Washington

OFFICE OF THE SKAMANIA COUNTY PROSECUTIN

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