Supreme Court No. 90479-1
Court of Appeals No. 71067-2-I
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,
vs.
Brian Brush
Respondent/Cross-Petitioner

Pacific County Superior Court Cause No. 09-1-00143-8
The Honorable Judge Michael J. Sullivan

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

FACTS PERTAINING TO STATE'S PETITION

A jury convicted Brian Brush of first-degree murder. Following the verdict, the court held the second phase of the trial to address the allegation that Mr. Brush engaged in an ongoing pattern of domestic violence. Over defense objection, the court instructed the jury on the elements required to find an aggravated domestic violence offense based on a pattern of abuse:

> (1) That the victim and the defendant were family or household members; and
> (2) That the offense was part of an ongoing pattern of psychological abuse of the victim manifested by multiple incidents over a prolonged period of time.
> An "ongoing pattern of abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.
> CP 229; RP (12/6/11) 206-209.

The jury endorsed this aggravating factor. RP (12/6/11) 227-230; CP 232.

The judge imposed an exceptional sentence of 1000 months, to which was added a 60-month firearm enhancement. RP (2/9/12) 67-68; CP 45-66. Mr. Brush timely appealed. CP 45-68. The Court of Appeals reversed Mr. Brush's exceptional sentence and vacated the "ongoing pattern of abuse" aggravating factor.[1] Opinion, p. 11-17.

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE THE CASE DOES NOT MEET ANY OF THE CRITERIA SET FORTH IN RAP 13.4(B).

A. Petitioner's dissatisfaction with the result reached by the Court of Appeals does not present an issue appropriate for review.

[1] The Court of Appeals also vacated two other aggravating factors. Opinion, p. 11-17. The state's Petition addresses only the "ongoing pattern of abuse" aggravating factor.

The Supreme Court will only accept review of a Court of Appeals decision if it conflicts with another appellate decision, raises a significant constitutional question, or presents an issue of substantial public interest. RAP 13.4(b). Under these criteria, the petition does not merit review. The Court of Appeals applied well-established principles of law. Opinion, pp. 13-14 (citing, *inter alia, State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006) and *State v. Becker,* 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997)). Respondent does not contend that the court used the wrong legal standards in resolving the issue. *See* Petition, pp. 11-15. Because the Court of Appeals applied settled law, the Supreme Court should not accept review. The case does not meet the criteria for review. RAP 13.4(b).

B. The Court of Appeals correctly reversed Mr. Brush's exceptional sentence because the judge improperly commented on the evidence and directed a verdict in the state's favor.[2]

Under art. IV, § 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, § 16. A comment on the evidence "invades a fundamental right." *Becker*, 132 Wn.2d at 64. A judicial comment is presumed prejudicial and is only harmless if the record affirmatively shows no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).[3]

[2] The state does not seek review of the Court of Appeals decision invalidating two other bases for the court's exceptional sentence. *See* Opinion, pp. 12-13 (deliberate cruelty), 15-16 (intimidation), 16-17 (injury substantially exceeds the level of bodily harm necessary to satisfy the elements). Accordingly, the case must be remanded for resentencing, even if the aggravating factor is reinstated. *See* Appellant's Opening Brief, pp. 48-49.

[3] This is a higher standard than that normally applied to constitutional errors. *Id.*

Jury instructions are reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). A trial court may not instruct the jury in a way that relieves the state of its burden to prove every element. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995) (addressing elements of the substantive crime).

Before an exceptional sentence can be imposed under RCW 9.94A.535(3)(h)(i), the prosecution must establish beyond a reasonable doubt that the offense was part of a pattern of abuse, consisting of multiple incidents occurring "over a prolonged period of time." Above some minimal threshold, the phrase "prolonged period of time" is a jury question; it is not defined by statute. *State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 *reconsideration denied, review denied,* 170 Wn.2d 1011, 245 P.3d 773 (2010).

Here, the trial court defined the phrase "prolonged period of time" to mean "more than a few weeks." CP 229. This phrase conveyed to jurors that any time period greater than a few weeks necessarily qualified as a "prolonged period of time." In other words, "the instruction resolved any factual dispute whether the domestic violence was over a prolonged period of time." Opinion, p. 13. The instruction directed a jury verdict in the

state's favor.[4] By defining "prolonged period of time" as more than a few weeks, the judge commented on the evidence, relieving the state of its burden to establish the aggravating factor beyond a reasonable doubt. *Levy,* 156 Wn.2d at 725; *Aumick,* 126 Wn.2d at 429.

The Court of Appeals applied well-established legal principles, and correctly vacated the domestic violence aggravating factor. Opinion, pp. 13-14. This case does not present an issue that qualifies for review under RAP 13.4(b). The Supreme Court should deny review.

RESPONDENT'S CROSS PETITION

I. IF THE COURT ACCEPTS REVIEW, IT MUST REVIEW ADDITIONAL ISSUES FOR A FAIR AND COMPLETE RESOLUTION OF THE CASE.

A. The Court of Appeals erroneously decided six issues against Mr. Brush and failed to reach one issue.

Although the Court of Appeals ruled in Mr. Brush's favor on issues relating to his exceptional sentence, it decided six issues against him, and failed to reach a sentencing issue rendered moot by its decision. Appellant's Opening Brief, pp. 3-5, 18-38; Opinion, pp. 7-11, 15 n. 12. If this court accepts review of the issue identified by the Petitioner, it should also review the seven issues set forth below.

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[4] Contrary to Petitioner's suggestion, the instruction does not merely define a legal term. Petition, p. 13, 14-15. Before a court may impose an exceptional sentence, the jury must find that the multiple incidents making up a pattern of abuse occurred over a sufficient period of time to qualify as "prolonged." What constitutes a "prolonged period of time" will depend on the type of abuse, the frequency of the incidents, and the overall number of incidents. By telling jurors that "more than a few weeks" qualifies as a prolonged period of time as a matter of law, the trial judge erroneously took this issue from the jury. Mr. Brush was entitled to have the jury determine what constitutes a "prolonged period of time" in light of the evidence submitted to the jury.

B. Statement of Additional Issues for Review

1. The recording of a custodial interrogation is inadmissible at trial unless it was made in strict compliance with the Privacy Act. Here, the prosecution introduced a recording made in violation of the Privacy Act. Did the erroneous admission of Mr. Brush's illegally recorded statements violate his rights under the Privacy Act?

2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to seek suppression of Mr. Brush's illegally recorded statements under the Privacy Act. Was Mr. Brush denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

3. An accused person's custodial statement may not be admitted at trial if it is tainted by a prior coerced statement. Here, Mr. Brush was asked at gunpoint if he'd shot a human, and he confessed that he had. Did the admission of Mr. Brush's subsequent custodial statements violate his Fifth Amendment privilege against self-incrimination because they were not sufficiently insulated from his prior coerced statement?

4. Police must scrupulously honor a suspect's invocation of his her right to remain silent. In this case, Deputy Police Chief Layman failed to scrupulously honor Mr. Brush's initial invocation of his right to remain silent. Did the trial court err by refusing to suppress statements made after Mr. Brush invoked his right to remain silent?

5. Under the federal constitution, police may not question a suspect after he invokes his right to counsel, unless the suspect himself initiates contact with police and waives his rights. Here, the prosecution failed to prove that Mr. Brush initiated contact after he'd invoked his right to counsel. Did the trial court err by refusing to suppress statements made after Mr. Brush invoked his Fifth and Fourteenth Amendment right to remain silent and his right to counsel?

6. An accused person has the constitutional right to have his case decided by the jury he helped select. Here, the trial judge removed a juror over Mr. Brush's objection after the jury had been impaneled and sworn to try the case. Did the trial court violate Mr. Brush's rights under the Fifth, Sixth, and Fourteenth Amendments and Wash. Const. art. I, §§ 21, 22?

7. Hearsay evidence is generally inadmissible. Here, the trial judge overruled Mr. Brush's hearsay objection to the testimony of Bonney's daughter, relaying her mother's out-of-court statements. Did the trial judge abuse his discretion by admitting hearsay in violation of ER 802?

C. Generally Applicable Standards of Review

Constitutional violations are reviewed *de novo*. *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 316 P.3d 469 (2013). Questions of statutory interpretation are reviewed *de novo*. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

D. Facts Pertaining to Additional Issues

Brian Brush had a very successful boat business until the economy started to fail in late 2007. RP (12/5/11) 43, 45. Around that same time, his mother passed away, and his wife divorced him. RP (11/28/11) 220; RP (11/29/11) 17-18; RP (12/5/11) 46-48, 111.

Mr. Brush met Lisa Bonney online, and they fell in love. RP (11/28/11) 208, 238; RP (12/5/11) 49. They were very attached to each other; however, their relationship was volatile. At one point they became engaged; the engagement was broken off during the summer of 2009. RP (11/28/11) 230, 238; RP (12/5/11) 51, 110. By this time, Mr. Brush was estranged from his children, his business was in receivership, and he was under investigation by the Federal Bureau of Investigation for tax-related issues. RP (10/12/11) 62-63; RP (11/28/11) 199-200, 206, 220; RP (12/5/11) 49-51, 111. Mr. Brush suffered from major depression, as well as post-traumatic stress disorder stemming from his previous work as a police officer. RP (12/5/11) 103-106, 113-114, 166-167.

On September 11, 2009, the town of Long Beach put on a car show called Rod Run. The town's beach was crowded with both locals and tourists. RP (10/12/11) 3, 27; RP (12/5/11) 61, 64. That morning, Mr.

Brush went hunting with his dog, did some yard work at Bonney's house, and went to the bank to sign over a boat to his creditors. RP (11/28/11) 228, RP (11/29/11) 102, 115; RP (12/5/11) 56. In the afternoon, he met Bonney at the beach. Their relationship was strained, and both felt they would break up permanently. They sat on a bench and spoke about issues relating to assets they shared, including a home he'd purchased for her. RP (11/28/11) 231-232, 247; RP (12/5/11) 57-61, 146, 200.

The couple argued; Bonney didn't want Mr. Brush to allow the bank to foreclose on the home; Mr. Brush saw no other options. At some point, Bonney angrily told Mr. Brush that he was not a man, and called him a "pussy". RP (11/28/11) 249; RP (12/5/11) 57-61. Mr. Brush walked to his truck, grabbed his shotgun, and shot Bonney four times in quick succession. RP (11/28/11) 81-83, 102, 112, 115, 120-122, 124, 135, 138. The shooting occurred at 4:41pm. RP (11/28/11) 104-106.

Three police officers saw him do this and immediately came over and yelled commands. Mr. Brush threw down the gun, walked toward the officers, knelt on the ground, and then lay prone. RP (10/12/11) 17; RP (11/28/11) 83-85, 110-111, 137. All three officers had their weapons drawn. RP (10/12/11) 16.

While Mr. Brush was on the ground being handcuffed, Officer Arlie Boggs asked, "Were you shooting at a human?" RP (10/12/11) 7, 8. Mr. Brush replied that he was. RP (10/12/11) 7, 19. As he was being taken into custody, Officer Boggs read Mr. Brush his rights. RP (10/12/11) 10-11,

17, 18. When asked if he wished to talk with police, Mr. Brush replied "no". RP (10/12/11) 11, 20.

Officers put Mr. Brush in the back of Cosmopolis Deputy Police Chief Heath Layman's car. At 4:48 p.m. Layman read Mr. Brush his rights from a form, and again asked if he wished to talk. He was not asked to sign the rights form. RP (10/12/11) 50-54, 78. Layman checked the box labeled "no", indicating that Mr. Brush did not wish to answer questions. RP (10/12/11) 53-54, 78; Ex. I.

After about forty-five minutes, Mr. Brush was transported to the police station. RP (10/12/11) 59. Layman and Pacific County Undersheriff Ron Clark interviewed him. RP (10/12/11) 44. They recorded the interview, which started at 5:52pm. RP (10/12/11) 32, 58. The recording of the interview does not include any indication that Mr. Brush consented to the recording. Nor did the recording include a recitation of Mr. Brush's *Miranda* rights. RP (10/12/11) 32-38; Ex. H.

Mr. Brush described his volatile relationship with Bonney, outlined abuse he'd suffered at her hands, and indicated that he had no memory of the shooting itself. RP (11/28/11) 205-239. Towards the end of his statement, he expressed surprise at discovering that he'd shot Bonney. RP (10/12/11) 73; RP (11/28/11) 239.

After about thirty minutes, Mr. Brush requested an attorney and the interview stopped. RP (10/12/11) 33-36, 66; Ex. H.

Layman returned to his office. Once there, he received a phone call from Long Beach Police Chief Flint Wright, indicating that Mr. Brush

wished to speak with him further. RP (10/12/11) 66-68. Layman returned and conducted a second recorded interview, starting at 7:27 pm. This time, he administered *Miranda* warnings as part of the recorded interview. RP (10/12/11) 67-69, 79; Ex. H, K.

> LAYMAN: Alright we are recording It's uh September 11, Friday, 7:27 pm. We are at the south Pacific County Sheriff's Office in Long Beach. I was requested to come back at the request of Brian to uh provide me some additional information. This is with the understanding that he had earlier advised me that he did not want to talk to me anymore because he wanted an attorney at that point we ended it. However, he has initiated contact asking to come back and talk to him. With that in mind Brian do you still want to talk to me?
> Ex. H.

Mr. Brush agreed to talk to Layman; the second recorded interview lasted until 7:39 p.m. Ex. H, Ex. K. Mr. Brush described how Bonney had scratched him, hit him, and told him to "be a f*cking man." He told the officer that the last thing he remembered was Bonney telling him "Be a man, don't be a pussy." He also said he didn't remember getting the gun from the truck. He told Layman that he tried to get in the truck to get away from her, and again said he didn't remember getting the gun or shooting her. Ex. H, Ex. K.

Deputy Chief Layman said he thought Mr. Brush did remember, but was trying hard to forget because it was painful, and suggested that he was "intentionally blocking that image from [his] mind." Mr. Brush told him that he remembered nothing until he was on the ground, responding to directives from the police. He also said that when he stepped on the running board to get in the truck and drive away, Bonney grabbed him and

wouldn't let him leave. Layman ended the interview by confirming that Mr. Brush understood he was being charged with murder. Ex. H, Ex. K, S. *See also* RP (11/28/11) 247-259.

The state charged Mr. Brush with Murder in the First Degree. The state alleged several aggravators:

> (3)(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.
>
> (3)(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present: (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; . . . or (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.
>
> (3)(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).
>
> And furthermore, at the time of the commission of the crime, the Defendant was armed with a firearm, contrary to RCW 9.94A.533(3)(a) which adds an additional 60 months confinement. CP 11-13.

The court held a hearing to determine the admissibility of Mr. Brush's statements. RP (10/12/11). At the hearing, Layman testified that while he did check the "no" box regarding whether Mr. Brush was willing to answer questions, Mr. Brush actually said that he would talk but not while still at the scene. RP (10/12/11) 50-53. He said that he did not ask Mr. Brush to sign the form when it was completed. RP (10/12/11) 54.

The state also presented Layman's testimony that he'd been told Mr. Brush wished to speak to him (after concluding the first recorded

interview by requesting an attorney.). RP (10/12/11) 65-66. According to Layman, he received a call from Long Beach Chief of Police Wright, who told him that "Mr. Brush had asked that I come back and talk to him." RP (10/12/11) 66-68. Layman said that no one affirmatively stated that they had tried to get Mr. Brush to talk more. RP (10/12/11) 70. However, the state did not present the testimony of Chief Wright or anyone else who spoke with Mr. Brush after the first recorded interview; nor did the state introduce any evidence regarding who initiated the conversation between Mr. Brush and Chief Wright, what was discussed, or how Mr. Brush came to make his request to see Layman again. RP (10/12/11) 1-90.

Mr. Brush argued that all of his statements should have been suppressed, because all were tainted by his initial coerced admission that he was shooting at a human being. RP (10/12/11) 96-101. He also argued that the recorded statements were inadmissible because Mr. Brush didn't sign a rights form at the scene or before the first recorded statement. RP (10/12/11) 98-99.

The court suppressed Mr. Brush's initial statement (when he admitted shooting at a human), but found the remaining statements admissible. RP (10/12/11) 103-116; CP 30-40.

Jury selection lasted two days. A jury was selected and jurors were sworn to try the case. CP 86-111. On the third day of trial, the bailiff told the judge that Juror 1 had learned that his boss had purchased him a plane ticket to go to Alaska. He'd received no advance notice, and his trip was expected to last a month. RP (11/28/11) 2-7. The court and parties

questioned the juror. Juror 1 told the court that missing the trip would create a financial hardship, but would not impact his ability to "concentrate fully on the trial." RP (11/28/11) 15-20. The court excused the juror over Mr. Brush's objection. RP (11/28/11) 21-23.

The trial was bifurcated, so that jurors would not hear any allegations of a pattern of domestic violence until a second sentencing phase. RP (11/15/11) 102-126. During the guilt phase, one state expert opined that at least one of the shots was fired from a distance of three feet or less, and that the others were fired from three to nine feet away. RP (11/29/11) 66-71.

The medical examiner who conducted the autopsy opined that the first shot was to Bonney's torso, from roughly four or five feet away. He testified that the shot would have caused pain, but would not have been fatal. RP (11/30/11) 20-24. The second shot was a fatal shot: it hit her spine and pierced many vital organs. RP (11/30/11) 25-27, 31-33. The third shot hit her buttocks, and was also fatal. RP (11/30/11) 34-37. The last shot was to her head, displacing bone and tissue from her skull; it too was a fatal shot. RP (11/30/11) 38-43.

The medical examiner told the jury that the third and fourth shots were not necessary to kill her, but that they were "to make sure she was dead". RP (11/30/11) 45-46. Over defense objection, he opined that the damage done by the shots was "far in excess of what is required to just kill somebody." RP (11/30/11) 48-49.

Mr. Brush presented expert testimony in support of a diminished capacity defense. The prosecution countered with its own expert, who claimed that Mr. Brush acted intentionally and with premeditation. RP (12/5/11) 25-224. Both experts diagnosed Mr. Brush with major depression, post-traumatic stress disorder, and a personality disorder. RP (12/5/11) 103-106, 113-114, 166-167.

During cross-examination of the defense expert, the prosecutor brought out past incidents that the doctor considered in developing her opinion. RP (12/5/11) 130-153. These included an incident in which Mr. Brush hit Bonney's car with a hammer during an argument, and another incident in which he'd followed Bonney to a man's home and confronted both of them. RP (12/5/11) 133, 138. Mr. Brush had apparently also threatened Bonney with "financial ruin". RP (12/5/11) 139.

The jury found Mr. Brush guilty of Murder in the First Degree. CP 200. They also returned special verdicts finding that Mr. Brush and Bonney were members of the same family or household, that Mr. Brush was armed with a firearm, that Mr. Brush's conduct manifested deliberate cruelty, that the injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense, and that the crime was an "aggravated domestic violence offense" (based on allegations that Mr. Brush's conduct manifested deliberate cruelty and that Bonney's injuries substantially exceeded those necessary to meet the elements of the offense). CP 201-205.

Following these verdicts, the court held the second phase of the trial to address the allegation that Mr. Brush engaged in a pattern of domestic violence. The state sought to admit evidence from Bonney's then 20-year-old daughter Elizabeth Bonney[5] regarding statements Bonney had made about prior alleged domestic violence incidents with Mr. Brush. Mr. Brush objected. RP (11/15/11) 102-128; RP (12/6/11) 137-167; CP 207-222. The court ruled the evidence admissible. RP (12/6/11) 161, 167.

Elizabeth testified that she and her mother became convinced that Mr. Brush was following them as they went for a walk in August of 2009. RP (12/6/11) 174-178. During that walk, Bonney told Elizabeth that the day before, Mr. Brush had driven past the house of a male friend while she was there. RP (12/6/11) 184. In describing the incident, Bonney said that "[Mr. Brush] always stalks the house." The court overruled a defense objection. RP (12/6/11) 180.

At sentencing, the state urged the judge to impose an aggravated sentence of three times the standard range, for a total of 75 years. RP (2/9/12) 39-47. The defense countered that Mr. Brush's mental illness and failed diminished capacity defense balanced against the aggravating factors, and urged a standard range sentence. RP (2/9/12) 47-50.

The judge imposed an exceptional sentence of 1000 months, to which was added a 60-month firearm enhancement. RP (2/9/12) 67-68; CP 45-66. Mr. Brush timely appealed. CP 45-68.

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[5] To avoid confusion, Elizabeth Bonney will be referred to as "Elizabeth."

II. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE MR. BRUSH'S CONVICTION BECAUSE THE EVIDENCE USED TO CONVICT HIM INCLUDED ILLEGAL RECORDINGS MADE IN VIOLATION OF THE PRIVACY ACT.

The Court of Appeals has discretion to accept review of any issue argued for the first time on appeal, including issues that do not implicate a constitutional right. RAP 2.5(a); *see State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011). A conviction based in part on a violation of the Privacy Act must be reversed unless, "within reasonable probability, the [error] did not materially affect the outcome of the trial." *State v. Porter*, 98 Wn. App. 631, 638, 990 P.2d 460 (1999).

Under the Privacy Act, illegal recordings "*shall be inadmissible* in any civil or criminal case..." RCW 9.73.050 (emphasis added). Recordings of custodial interrogations made in conformity with the Act are exempt from RCW 9.73.050; however, the exemption does not apply to such recordings if they violate RCW 9.73.090(1)(b). *See* RCW 9.73.090(1) (listing "instances" under which "[t]he provisions of RCW 9.73.030 through 9.73.080 shall not apply to police... personnel") *and* RCW 9.73.090(3) (declaring that "[c]ommunications or conversations *authorized to be...recorded... by this section* shall not be inadmissible under RCW 9.73.050") (emphasis added).

The Act "puts a high value on the privacy of communications,"[6] and even requires exclusion of "conversations relating to unlawful matters if

[6] *State v. Christensen,* 153 Wn.2d 186, 201, 102 P.3d 789 (2004).

the recordings were obtained in violation of the statutory requirements." *State v. Williams*, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980). It embodies the legislature's strong desire to protect the privacy of Washington residents, including those engaged in criminal activity. *Williams,* 94 Wn.2d at 548. The robust expression of this sentiment—which is consistent with the strong protections available under Wash. Const. art. I, § 7—suggests the legislature intended to allow parties to raise Privacy Act violations on review, even absent objection in the trial court. *See* RCW 9.73.050.

Washington's Privacy Act "govern[s] the conditions under which police may make recordings of suspects during custodial interrogations." *State v. Courtney*, 137 Wn. App. 376, 382, 153 P.3d 238 (2007). Any such recording "must strictly comply with statutory provisions to ensure that consent to the interrogation is capable of proof and to avoid a 'swearing contest' regarding whether such consent actually occurred." *Id.* As the Supreme Court has noted, "the legislature enacted [RCW 9.73.090(1)(b)] so that police officers would comply with those provisions." *Lewis v. State, Dept. of Licensing*, 157 Wn.2d 446, 466-67, 139 P.3d 1078 (2006).

> The Act requires that
> [S]ound recordings [of custodial interrogations] shall conform strictly to the following:
> (i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;
> (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

> (iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights and such statements informing him or her shall be included in the recording; (iv) The recordings shall only be used for valid police or court activities.

RCW 9.73.090(1)(b). Failure to strictly comply renders any recording inadmissible. *State v. Mazzante*, 86 Wn. App. 425, 428, 936 P.2d 1206 (1997). With regard to subsection (iii), an officer's "[m]ere reference to a prior written waiver [of constitutional rights] is insufficient." *Id.*

In this case, Layman conducted two recorded interviews that did not strictly comply with the statute, and were thus inadmissible at trial. Ex. H. Neither of the two recorded interviews included a statement informing Mr. Brush that the recording was being made, as required under RCW 9.73.090(1)(b)(i). Ex. H, pp. 1, 25-26. In addition, the first recording did not include a recitation of Mr. Brush's constitutional rights, as required under RCW 9.73.090(1)(b)(iii). Ex. H, p. 1.

Because Layman failed to strictly comply with the Privacy Act's requirements, the two recorded statements should have been excluded from evidence. Furthermore, the error materially affected the outcome of trial: "a confession is typically 'powerful evidence.'" *Sivak v. Hardison*, 658 F.3d 898, 917 (9th Cir. 2011) (quoting *Premo v. Moore*, ___U.S. ___, ___, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011)). There can be little doubt that jurors might have reached a different verdict had Mr. Brush's statements been excluded.

The Supreme Court should accept review and reverse Mr. Brush's conviction. *Porter*, 98 Wn. App. at 638. The case must be remanded for a

new trial, with instructions to exclude the two recorded statements made in violation of the Privacy Act. *Id.* This case presents issues of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(4).

III. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT MR. BRUSH WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment.[7] U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*,

[7] Likewise, art. I, § 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. art. I, § 22.

153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach,* 153 Wn.2d at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert,* 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." *Kyllo*, 166 Wn.2d at 862. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

Defense counsel argued that Mr. Brush's custodial statements should be suppressed because they were taken in violation of his Fifth Amendment rights. RP (10/12/11) 96-100. However, counsel neglected to argue a violation of the Privacy Act. As described in the preceding section, Mr. Brush's statements were illegally recorded in violation of RCW 9.73.090. There was no strategic reason for counsel's failure to argue the Privacy Act violation; furthermore, counsel's constitutional arguments show that he was not seeking admission of the illegal recording for tactical reasons. Accordingly, counsel's failure to argue the Privacy Act violation

was unreasonable under the first prong of the *Strickland* test. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

The error was prejudicial, because the illegal recordings included damaging material that the jury could have used as evidence of Mr. Brush's mental state at the time of the shooting. As noted above, confessions are always powerful evidence. *Sivak* 658 F.3d at 917. There is a reasonable probability that the outcome of the trial would have been different had counsel sought to have the recordings suppressed for violation of the Privacy Act.

The Supreme Court should accept review and hold that counsel's failure to seek suppression of the illegal recordings violated Mr. Brush's right to the effective assistance of counsel. *Saunders,* 91 Wn. App. at 578. This case presents a significant issue of constitutional law that is of substantial public importance. It should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

IV. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT POLICE VIOLATED MR. BRUSH'S PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, § 9.

The validity of an accused person's *Miranda* waiver presents an issue of law requiring *de novo* review. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007); *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain their burden on the issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948

P.2d 1280 (1997); *State v. Byrd*, 110 Wn. App. 259, 265, 39 P.3d 1010 (2002).

The Fifth Amendment to the U.S. Constitution provides that "No person shall... be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V.[8] Absent *Miranda* warnings, a suspect's statements during a custodial interrogation are presumed involuntary. *State v. Hickman*, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010); *Miranda,* 384 U.S. 436.

To implement the privilege against self-incrimination and to reduce the risk of coerced confessions, an accused person must be informed of her or his rights prior to custodial interrogation. *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004); *State v. Nelson,* 108 Wn. App. 918, 924, 33 P.3d 419 (2001). Failure to provide the required warnings and obtain a waiver requires exclusion of any statements obtained. *Seibert,* 542 U.S. at 608. It is "clearly established" that statements taken in the absence of counsel are inadmissible unless the government meets its heavy burden of showing that the suspect made a voluntary, knowing, and intelligent waiver of her or his rights. *Hart v.*

[8] . The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Similarly, art. I, § 9 of the Washington State Constitution, provides that "No person shall be compelled in any case to give evidence against himself..." Wash. Const. art. I, § 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

Attorney General of Florida, 323 F.3d 884, 891-892 (C.A.11, 2003) (citing *Miranda,* 384 U.S. at 475).

A. The trial court should have suppressed statements tainted by Mr. Brush's initial coerced confession.

Statements obtained through unwarned custodial interrogation are inadmissible under *Miranda.* In addition, any subsequent post-*Miranda* statements are also inadmissible, unless the taint of the earlier statement is removed; this is so because any initial confession exerts additional pressure on the suspect:

> "After an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag."

United States v. Tyler, 164 F.3d 150, 156-57 (3d Cir. 1998) (quoting *United States v. Bayer,* 331 U.S. 532, 540–41, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947)).

A *Miranda* violation that produces an otherwise voluntary statement can generally be cured by the subsequent administration of *Miranda* warnings.[9] *See Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The same is not true of involuntary statements extracted from a suspect in violation of due process. *United States v. Perdue*, 8 F.3d 1455, 1468 n. 7 (10th Cir. 1993).

If the prosecution hopes to introduce a statement obtained after a prior involuntary statement, it "must show intervening circumstances which

[9] Unless police deliberately engage in a two-step interrogation. *Seibert* 542 U.S. 600. (plurality).

indicate that the second confession was 'insulate[d] ... from the effect of all that went before.'" *Id, at* 1467-1468 (quoting *Clewis v. Texas,* 386 U.S. 707, 710, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967)). The proper administration of *Miranda* warnings is only one factor to be considered in making this determination. *Tyler,* 164 F.3d at 157. Other insulating factors can include a significant delay between the first and second interrogations, a change of location, and a change of personnel; however, "[t]he most critical factor is a showing that the defendant knew earlier statements made prior to the *Miranda* warnings could not be used against him." *State v. Lavaris*, 99 Wn.2d 851, 858, 664 P.2d 1234 (1983).

In this case, Mr. Brush was seized at gunpoint by three officers who gave commands, and he was made to kneel and then lie prone on the ground. RP (10/12/11) 4-7, 16-19, 27. As he was being handcuffed, Officer Boggs asked Mr. Brush if he'd been shooting a human. RP (10/12/11) 7-8, 16-17; 19; RP (11/28/11) 83-85, 110-111, 137. *Cf. Perdue,* 8 F.3d at 1468 (suspect seized at gunpoint and ordered onto the ground.) Under these circumstances, his initial statement was not merely obtained in violation of *Miranda;* it was also involuntary, in violation of due process. *Perdue,* 8 F.3d at 1468. Accordingly, *Elstad* does not apply. *Perdue,* 8 F.3d at 1468 n. 7.

Mr. Brush's subsequent statements are inadmissible, because they were insufficiently insulated from the taint of his initial involuntary statement. The delay between the initial involuntary statement and the

post-*Miranda* interview was only 70 minutes,[10] which, under the circumstances, was not long enough to dissipate any taint. *Cf. United States v. Swanson*, 635 F.3d 995, 1004 (7th Cir. 2011) (two hour delay insufficient)

Furthermore, Officer Boggs and then Deputy Chief Layman both asked Mr. Brush to waive his *Miranda* rights within minutes after initial coerced statement. Furthermore, Mr. Brush was not re-advised of his *Miranda* rights when the recorded interrogation commenced at the police station. Finally, there is no indication Mr. Brush understood that his initial involuntary response to police questioning could not be used against him. RP (10/12/11) 64-66, 25-87; Ex. H. Under these circumstances, Mr. Brush's two recorded interviews should have been suppressed. *Perdue,* 8 F.3d at 1468. His conviction must be reversed and the case remanded to the trial court for a new trial, with instructions to exclude his statements from evidence. *Id.*

B. The police failed to scrupulously honor Mr. Brush's initial invocation of his right to remain silent.

If an accused person invokes her or his right to remain silent, the police must "scrupulously honor[]" the request to cut off questioning. *Michigan v. Mosley,* 423 U.S. 96, 104-106, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Where the request is not "scrupulously honored," subsequent

[10] The initial coerced statement, made at gunpoint, occurred around 4:41 p.m., which is also (approximately) when Mr. Brush invoked his right to remain silent. RP (10/12/11) 4-13. Layman arrived at the scene and sought a *Miranda* waiver at 4:48 p.m., and started the recorded interview at 5:52 p.m. RP (10/12/11) 32, 51, 58; Ex. H.

statements cannot be used at trial.[11] *Id.* The critical safeguard associated with the right to remain silent is the right to cut off questioning. *Id, at* 103.

Officers may only seek a subsequent *Miranda* waiver if (1) all questioning ceased, (2) a significant period elapsed between the invocation of rights and any subsequent attempt to obtain a waiver, (3) *Miranda* warnings are readministered, and (4) the subject of the second interrogation is unrelated to the first. *United States v. Rambo*, 365 F.3d 906, 910-11 (10th Cir. 2004). The second requirement is critical: *Mosley* prohibits "the immediate cessation of questioning, and ... a resumption of interrogation after a momentary respite." *Mosley,* 423 U.S. at 102.

A suspect's invocation of the right to remain silent "serves as a complete bar to any questioning related to the subject of the initial interrogation for a 'significant period of time'..." *Christopher v. State of Fla.*, 824 F.2d 836, 844 (11th Cir. 1987). During this significant period of time, "the suspect stands in virtually the same position as he would be had he requested counsel: the police are barred from interrogating him." *Id.*

In this case, Mr. Brush unequivocally invoked his right to remain silent when administered *Miranda* warnings by Boggs shortly after the shooting. RP (10/12/11) 10-11, 17-18, 20. This invocation almost immediately after the shooting, which had occurred at approximately 4:41 p.m. RP (10/12/11) 4; RP (11/28/11) 77. The police did not scrupulously honor Mr. Brush's decision to invoke his right to remain silent. Instead,

[11] This is referred to as a *Mosley* violation.

only seven minutes (or less) after Mr. Brush invoked his right to remain silent, Deputy Police Chief Layman re-administered *Miranda* warnings and sought a waiver; this occurred at 4:48 p.m. RP (10/12/11) 49-54; Ex. I.

Furthermore, after transporting Mr. Brush to the police station, Layman did not readminister *Miranda* warnings or seek a waiver before he actually began the recorded interview. Ex. H; RP (10/12/11) 58-59.

Because the police failed to scrupulously honor Mr. Brush's invocation of his right to remain silent, any subsequent waiver was ineffective. *Mosley,* 423 U.S. at 104-106. Accordingly, Mr. Brush's statements at the jail should have been suppressed. *Id; Tyler,* 164 F.3d at 157-158.

C. The trial court should have suppressed statements extracted from Mr. Brush after he unequivocally invoked his right to counsel, because the prosecution failed to meet its heavy burden of proving that Mr. Brush initiated contact with law enforcement and waived his right to counsel.

An accused person who has invoked his right to counsel may not be interrogated unless he himself initiates further communication with the police. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Necessary components of this "'rigid' prophylactic rule" are a determination that the accused person "(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith v. Illinois*, 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (quoting *Fare v. Michael C.,* 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)).

The question of initiation and waiver "are separate, and clarity of application is not gained by melding them together." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). In other words, the prosecution must establish both that the accused person initiated another conversation about the case *and* that he or she knowingly, intelligently, and voluntarily waived his right to remain silent and his right to have counsel present. *Id.*

> Not all inquiries by the accused person amount to initiation:
>
> there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.

Id.

In this case, the evidence established that Mr. Brush invoked his right to counsel, and that Long Beach Police Chief Wright told Layman that Mr. Brush wished to speak with him. RP (10/12/11) 66-69; Ex. H. Missing from the record is any indication of what transpired between Mr. Brush and Chief Wright at the jail. RP (10/12/11) 2-87.

That interaction was just as crucial to the issue of "initiation" as Mr. Brush's subsequent contact with Layman (in which he affirmed that he wished to talk to Layman). Ex. H. If Chief Wright asked Mr. Brush about the case, or told him that invoking his right to counsel could hurt his chances of lenience from the prosecutor, then the *Edwards* rule was

violated, even if Mr. Brush responded by asking to speak to Layman again.[12] *Edwards,* 451 U.S. at 484-485.

The record shows that some interaction may have occurred between Mr. Brush and Chief Wright (or, in the alternative, between Mr. Brush and a corrections officer at the jail). RP (10/12/11) 66. It does not reveal the nature of the interaction or who initiated the conversation that resulted in the summons to Layman. RP (10/12/11) 66.

The court's findings of fact are likewise devoid of any indication of what transpired between Mr. Brush and Chief Wright; instead, the court simply summarized Layman's testimony, finding that Mr. Brush "indicated that he wanted to speak to police." CP 33. The absence of any findings on the particulars of this interaction between Mr. Brush and Chief Wright confirms that the state failed to sustain its burden to prove "initiation." *Armenta,* 134 Wn.2d at 14; *Byrd,* 110 Wn. App. at 265.

Furthermore, without knowing the details of Mr. Brush's interaction with Chief Wright, it is impossible to determine whether any subsequent waivers of his right to remain silent and his right to counsel were knowing, intelligent, and voluntary. Obviously, any threat, promise, or other coercive pressure applied by the corrections officer would vitiate the waiver subsequently obtained by Layman. *See, e.g., Miranda,* 384 U.S. at 476 ("any evidence that the accused was threatened, tricked, or cajoled

[12] It is not necessary to conclude that Chief Wright sought to influence Mr. Brush: she or he may have asked about the case out of simple curiosity, or provided sincere advice in an effort to help Mr. Brush.

into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.")

The absence of proof and the lack of findings compels the conclusion that Mr. Brush did not initiate conversation within the meaning of *Edwards*. Accordingly, his second interview with Layman should have been suppressed. The conviction must be reversed and the case remanded for a new trial. *Edwards,* 451 U.S. at 484-485.

D. The Supreme Court should accept review of Mr. Brush's *Miranda* and *Edwards* claims.

This case raises significant constitutional issues that are of substantial public interest. They should be decided by the Supreme Court. The court should accept review pursuant to RAP 13.4(b)(3) and (4).

V. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE TRIAL COURT VIOLATED MR. BRUSH'S CONSTITUTIONAL AND STATUTORY RIGHTS TO HAVE HIS TRIAL COMPLETED BY THE JURY HE HAD HELPED TO SELECT.

Although removal of a juror is ordinarily reviewed for an abuse of discretion,[13] this discretion is subject to the requirements of the constitution: a court necessarily abuses its discretion by denying an accused person her or his constitutional rights. *See, e.g., State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009); *see also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992). The Sixth Amendment

[13] A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

guarantees an accused person the right to a jury trial.[14] U.S. Const. Amends. VI; XIV; *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The Fifth Amendment's double jeopardy clause protects a related right: "the interest of an accused in retaining a chosen jury." *Crist v. Bretz*, 437 U.S. 28, 35-36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). That interest has been described as "a defendant's 'valued right to have his trial completed by a particular tribunal.'" *Id, at* 36 (quoting *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949)).

RCW 2.36.110 governs removal of a juror after a superior court jury has been impaneled.[15] Under the statute, "[i]t shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, *has manifested unfitness as a juror* by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110 (emphasis added). The statute is supplemented by CrR 6.5 (captioned "Alternate Jurors"), which provides as follows: "If at any time before submission of the case to the jury a juror is found *unable to perform the duties* the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury." CrR 6.5 (emphasis added).

[14] The state constitution guarantees an accused person the right to trial by an impartial jury; this "right of trial by jury shall remain inviolate." Wash. Const. art. I, §§ 21, 22.

[15] RCW 2.36.100, cited by the Court of Appeals, has never been applied to excuse a juror after the jury has been empaneled.

In this case, Juror 1 should have remained on the jury. He did not manifest unfitness as a juror, and thus could not be removed pursuant to RCW 2.36.110. Nor was Juror 1 "unable to perform the duties" of a juror; thus, the trial court lacked the power to remove him under CrR 6.5. In fact, when asked if missing the trip would impact his "ability to concentrate fully on the trial," Juror 1 replied that it would not. RP (11/28/11) 15-20.

By removing Juror 1 from the jury, the judge violated Mr. Brush's "valued right" to have the jury he'd helped select decide his case. *Crist*, 437 U.S. at 36. The decision was contrary to RCW 2.36.110 and CrR 6.5, and it infringed Mr. Brush's rights under the Fifth, Sixth, and Fourteenth Amendments. It also infringed his state constitutional right to a jury trial under Wash. Const. art. I, §§ 21, 22.

The Supreme Court should accept review, reverse Mr. Brush's conviction, and remand the case for a new trial. *Crist,* 437 U.S. at 35-36. This case presents a significant constitutional issue that is also of substantial public interest, and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

VI. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE THE TRIAL JUDGE'S DECISION ADMITTING HEARSAY INTO EVIDENCE.

Where no constitutional rights are infringed, evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). An erroneous evidentiary ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009).

An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id., at* 579.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay evidence is generally inadmissible. ER 802.

A statement's proponent bears the burden of establishing an exception to the rule against hearsay. *State v. Nieto*, 119 Wn. App. 157, 161, 79 P.3d 473 (2003). In this case, the prosecution failed to establish an exception for a hearsay statement admitted through Bonney's daughter.

Prior to the second phase of trial, Mr. Brush sought a ruling excluding Elizabeth Bonney's testimony regarding her mother's out-of-court statements. The court admitted the statements, and Elizabeth was permitted to relay her mother's description of prior incidents between herself and Mr. Brush. RP (12/6/11) 174-186. Although some of these statements were made while Bonney was under stress and excitement, they were not excited utterances because they did not relate to the "startling event or condition" causing the stress and excitement. *See* ER 803(a)(2).

In other words, Bonney's statements to her daughter about things that had happened on other occasions were not admissible simply because Bonney was stressed or excited at the time she made the statements. Elizabeth's testimony regarding her mother's statements should have been excluded under ER 802.

These statements related directly to the domestic violence aggravating factor. Because of this, the jury's "pattern of abuse" special verdict should not be reinstated, even if the Supreme Court reverses the Court of Appeals' decision on the issue raised by Petitioner.

The Supreme Court should accept review and overturn the trial court's ruling admitting hearsay evidence. If the case is remanded for a new sentencing proceeding, the trial court should be directed to exclude the evidence. This is an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(4).

CONCLUSION

Petitioner has failed to provide a proper basis for review. This Court should deny the Petition. If review is accepted, this Court should also review additional issues raised by Mr. Brush. Mr. Brush's arguments address significant constitutional issues that are of substantial public interest. RAP 13.4(b)(3) and (4). The court should reverse the conviction and remand the case for a new trial. In addition, the Supreme Court should direct the trial court to exclude inadmissible hearsay should a new sentencing proceeding be held.

Respectfully submitted August 4, 2014.

BACKLUND AND MISTRY

Jodi R. Backlund, No. 22917 Attorney for Respondent	Manek R. Mistry, No. 22922 Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Answer to Petition for Review/Cross-Petition, postage pre-paid, to:

Brian Brush, DOC #337561
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

With the permission of the recipient(s), I delivered an electronic version of the Answer/Cross-Petition to:

Pacific County Prosecuting Attorney
dburke@co.pacific.wa.us

I filed the Answer/Cross-Petition electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 4, 2014.

Jodi R. Backlund

Jodi R. Backlund, WSBA No. 22917
Attorney for the Respondent/Cross-Petitioner

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, August 04, 2014 11:44 AM
To: Tracy, Mary
Subject: FW: 90479-1-State v. Brian Brush-Answer to Petition and Cross-Petition

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, August 04, 2014 11:44 AM
To: 'Backlund & Mistry'; dburke@co.pacific.wa.us
Subject: RE: 90479-1-State v. Brian Brush-Answer to Petition and Cross-Petition

Received 8-4-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Backlund & Mistry [mailto:backlundmistry@gmail.com]
Sent: Monday, August 04, 2014 11:37 AM
To: OFFICE RECEPTIONIST, CLERK; dburke@co.pacific.wa.us
Subject: 90479-1-State v. Brian Brush-Answer to Petition and Cross-Petition

Attached is Respondent's Answer to Petition for Review/Cross-Petition and Motion for Permission to File Overlength Answer.

Thank you.

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