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Supreme Court No. 93112-7

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

vs.

**Jason Hernandez**

Appellant/Respondent

---

Pierce Cause No. 13-1-02943-1

The Honorable Judge Garold Johnson

**ANSWER TO PETITION**

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 ORIGINAL

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## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jason Hernandez was at a 7-11 store in Tacoma when he was picked up by his child's mother. She was in a car driven by someone he didn't know. RP 10, 262, 318; CP 68. Soon after he got into the back seat, the car accelerated with a police car following. RP 140-141, 262.

The car raced through traffic until it eventually flipped and crashed into an unoccupied car in a parking lot. RP 141, 143-145. Mr. Hernandez, his ex-girlfriend, and the driver all climbed out of the car and ran. RP 189-190.

The police caught up to the car's three occupants and arrested them all. RP 214-217, 224-225. Officer Michel Volk immediately *Mirandized* Mr. Hernandez. RP 225. At some point, Mr. Hernandez told the officers that he was not the one who had been driving the car. RP 10. He said that the driver of the car had picked him up at 7-11 just before the accident, and that he'd been in the back seat. RP 10.

At booking, a jail nurse interviewed Mr. Hernandez to ensure he could be safely admitted to the jail. RP 232. The nurse asked how fast the car had been going, and Officer Volk estimated 60 mph. RP 233. Mr. Hernandez corrected her, saying that it had actually been between 70 and 100 mph. RP 234.

The state charged Mr. Hernandez with possession of a stolen vehicle, reckless driving, and hit and run unattended. CP 1-2. The charging language for possession of a stolen vehicle alleged:

That [Mr. Hernandez], in the State of Washington, on or about the 24<sup>th</sup> day of July, 2013, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.  
CP 1.

The defense theory at trial was that the state had failed to prove that Mr. Hernandez drove the vehicle. RP 381-402.

At trial, Officer Matthew Watters testified that, while he was still on the phone with his wife and before he knew that the car was stolen, he was able to look over his shoulder and through two windows to see that Mr. Hernandez was the one driving the car. RP 161-165. He acknowledged that he did not put in his report that he saw any other people in the car. RP 165. However, he told the jury that he'd seen the head of one other person in the car. RP 164-165.

Only one other witness identified Mr. Hernandez as the car's driver. RP 211. This witness testified that the car had been occupied by four Hispanic men. RP 201.

The prosecution also called Volk. Volk testified that she read Mr. Hernandez his *Miranda* rights and that he said he did not want to talk. RP

227. Volk testified about Mr. Hernandez's statement that the car had been going 70-100 mph. RP 234.

In the closing argument, the prosecutor brought up Mr.

Hernandez's apparent failure to speak in his defense:

PROSECUTOR: What we have in this case is a person who the moment he realized he was caught did everything he could to avoid taking accountability. And who even when he had a chance to say something about it, the only thing he said was a prideful boast about how fast he actually was going, because he was concerned not ...

DEFENSE ATTORNEY: Your Honor, I'm sorry. I have to make an objection.

THE COURT: Objection is sustained. You can continue.

PROSECUTOR: *The only thing he said was that* I'm sorry, you don't know what you're talking about. We were driving -- we were going 70 to 100 miles per hour. RP 373 (emphasis added).

Defense counsel asked to be heard outside the jury's presence. RP

373-74. She objected again and moved for a mistrial:

Your Honor, I think that was a huge comment on his right to remain silent, him saying that the only thing he said is that we were speeding. That leaves the jurors with an impression that he was refusing to make any statements or say anything, when, in fact, we know he did but it's been suppressed. It was self-serving. I don't know how that can be cured. I would move for a mistrial at this time.

RP 374.

The court denied the motion but offered to give another curative instruction. RP 377. Mr. Hernandez's attorney expressed concern that an instruction would call more attention to the prosecutor's comments. RP

378. In the end, the court admonished the jury that the attorney's arguments are not evidence in the case. RP 380.

At the conclusion of trial, the court adopted instructions proposed by the prosecution. CP 117-145. The "to-convict" instruction for possession of a stolen vehicle permitted the jury to convict if they found that Mr. Hernandez "knowingly received, retained, possessed, or disposed of a stolen motor vehicle." CP 38.

The jury convicted Mr. Hernandez of all three counts. RP 414.

Mr. Hernandez timely appealed. CP 97-111. Mr. Hernandez argued, *inter alia*, that the charging language for his possession of a stolen vehicle offense violated his constitutional right to notice of the charges, that the court's to-convict instruction for the possession of a stolen vehicle charge violated his right to due process by permitting conviction even absent proof of each element, and that the prosecutor committed misconduct by encouraging the jury to infer guilt based on his exercise of his right to silence. Appellant's Opening Brief; Appellant's Supplemental Brief.

In an unpublished decision, the Court of Appeals reversed Mr. Hernandez's possession of a stolen vehicle conviction based on constitutionally insufficient charging language. Opinion, pp. 4-6.

Two members of the panel found that the prosecutor's arguments were not improper. Opinion, pp. 9-10; *but see* Bjorgen, C.J. (dissenting) at Opinion, pp. 16-19.

The court declined to address the issue regarding the court's to-convict instruction. Opinion, p. 1. The state petitioned this court for review of the charging language issue.

### **ARGUMENT**

**I. THE PETITION SHOULD BE DENIED BECAUSE THE ISSUE THE STATE RAISES DOES NOT MEET ANY OF THE CRITERIA SET FORTH IN RAP 13.4(B).**

The Supreme Court will accept review of a Court of Appeals decision only if the decision conflicts with another appellate decision, raises a significant constitutional question, or presents an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

The issue raised in the state's Petition for Review does not meet any of these standards. The unpublished Court of Appeals decision in Mr. Hernandez's case does not conflict with this court's decision in *Johnson* or Division III's unpublished decision in *Torres*. *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014) ; Petition for Review, pp. 7-8 (*citing State v. Torres*, 186 Wn.App. 1047 (Not Reported in P.3d), *review denied*, 184 Wn.2d 1013, 360 P.3d 818 (2015)).

The Court of Appeals recently clarified that possession of a stolen vehicle includes the essential element that the accused “with[held] or appropriate[d]” the vehicle “to the use of any person other than the true owner or person entitled thereto.” *State v. Satterthwaite*, 186 Wn.App. 359, 364, 344 P.3d 738, 740 (2015).

This is because the withholding or appropriation of a stolen car is what actually makes its possession illegal. *Id.* Otherwise, a person could be convicted, for example, of recovering a stolen vehicle in order to drive it back to its owner’s home.

The charging language in Mr. Hernandez’s case suffered from exactly the same infirmity as that in *Satterthwaite*. CP 1. Accordingly, it failed to include language key to the very illegality of Mr. Hernandez’s alleged conduct. CP 1; *Id.*

The Court of Appeals correctly reversed Mr. Hernandez’s conviction for possession of a stolen vehicle.

The *Satterthwaite* court analyzed and applied the standard set forth by this court in *Johnson*. *Id.* at 363-365 (*applying Johnson*). The Court of Appeals applied the same authority to reverse Mr. Hernandez’s conviction. Opinion, pp. 4-6 (*relying on Johnson*, 180 Wn.2d at 300; *Satterthwaite*, 186 Wn.App. at 364).

Still, the state argues that this court should accept review, claiming that the Court of Appeals decision conflicts with *Johnson*. State's Petition for Review, pp. 5-7. But the state's claim is incorrect.

*Johnson* merely holds that the state need not include definitional language in the Information. *Johnson*, 180 Wn.2d at 302-303.

But the "withhold or appropriate" element of possession of a stolen vehicle is not a definition. *Satterthwaite*, 186 Wn.App. at 364. Rather, under *Johnson*, it is an essential element because it is part of what makes the conduct illegal. *Id.*

The Court of Appeals decision in this case applies and complies with *Johnson* - it does not conflict with it.

The state also argues that the Court of Appeals decision in this case has "potential disagreement" with Division III's unpublished holding in *Torres*. Petition for Review, pp. 7-8 (*citing Torres*).

The *Torres* court, however, declined to address the charging language at issue in this case. *Torres*, 186 Wn.App. 1047. The state's argument that the court's choice to "decline to agree or disagree" with *Satterthwaite* poses a conflict is unpersuasive.

Additionally, as an unpublished decision, *Torres* has no precedential force.

The Court of Appeals decision in this case does not conflict with any Supreme Court or Court of Appeals decision. This court should deny review. RAP 13.4(b).

**II. IF REVIEW IS ACCEPTED, ADDITIONAL ISSUES MUST ALSO BE REVIEWED FOR A FAIR AND COMPLETE RESOLUTION OF THE CASE.**

If this Court accepts review of the issue identified by the Petitioner, it should also review the issues set forth below:

**A. Statement of Additional Issues**

1. The legislature has provided a broad definition of “possession of stolen property,” but has elected not to apply that definition to the crime of possession of a stolen vehicle. Here, the court instructed jurors they could convict based on the broad definition, which did not apply to Mr. Hernandez’s possession of a stolen vehicle charge. Did the court’s instruction violate Mr. Hernandez’s Fourteenth Amendment right to due process by permitting the jury to convict him absent proof of each element of the charged offense?
2. A prosecutor commits misconduct by commenting on an accused person’s post-*Miranda* exercise of his/her right to remain silent. Here, the prosecutor encouraged the jury to infer that Mr. Hernandez was guilty because he failed to speak in his defense after arrest. Did prosecutorial misconduct deprive Mr. Hernandez of his due process right to a fair trial and his privilege against self-incrimination?

**B. Argument**

1. The court’s to-convict instruction for possession of a stolen vehicle violated Mr. Hernandez’s right to due process because

it permitted the jury to find him guilty even if the state did not prove each element of the crime. This significant question of constitutional law is of substantial public interest and should be reviewed by this court. RAP 13.4(b)(3), (4).

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const Amend. XIV; Wash. Const. art. I, § 3.

The jury is entitled to regard the court's to-convict instruction as a yardstick against which to measure guilt or innocence. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). A to-convict instruction violates due process if it permits conviction absent proof of each element of a charged offense.<sup>1</sup> *Id.* at 7.

A court's instructions are improper if they inaccurately state the law or mislead the jury. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). An improper jury instruction affecting a constitutional right requires reversal unless the state can demonstrate beyond a reasonable doubt that it did not contribute to the verdict. *State v. Montgomery*, 163 Wn.2d 577, 600, 183 P.3d 267 (2008).

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<sup>1</sup> Jury instructions are reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions that violate an accused person's constitutional rights create manifest error and may be raised for the first time on appeal. RAP 2.5(a)(3).

Issues of statutory interpretation are also reviewed *de novo*. *Barton v. State, Dep't of Transp.*, 178 Wn.2d 193, 202, 308 P.3d 597 (2013).

A statute must be construed according to its plain language. *Seashore Villa Ass'n v. Hugglund Family Ltd. P'ship*, 163 Wn.App. 531, 538-39, 260 P.3d 906 (2011) *review denied*, 173 Wn.2d 1036, 277 P.3d 669 (2012). If the statute's language is unambiguous, the analysis ends. *Id.* An interpretation that leads to absurd results must be rejected, as it "would belie legislative intent." *Troxell v. Rainier Public School Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005).

Under the maxim *expressio unius est exclusio alterius*, statutory omissions are deemed to be exclusions. *In re Detention of Martin*, 163 Wn.2d 501, 510, 182 P.3d 951 (2008).

The statute criminalizing possession of a stolen vehicle covers simple possession of a stolen vehicle. RCW 9A.56.068. Possession of stolen property, on the other hand, is defined more broadly as:

knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140(1).

By its plain language, this definition applies only to "possession of stolen property." RCW 9A.56.140(1); *Seashore Villa Ass'n*, 163 Wn.App. at 538-39. The legislature's omission of possession of a stolen vehicle

from the definition of possession of stolen property indicates an intentional exclusion. *Martin*, 163 Wn.2d at 510.

Here, the court instructed the jury that it could convict Mr. Hernandez for possession of a stolen vehicle if they found that he “knowingly received, retained, possessed, or disposed of a stolen motor vehicle.”<sup>2</sup> CP 38.

The court’s instruction violated Mr. Hernandez’s right to due process by permitting conviction for disposing of a vehicle even if the state did not prove that he actually possessed it. *Mills*, 154 Wn.2d at 6.

The state cannot demonstrate that this constitutional error was harmless beyond a reasonable doubt. *Montgomery*, 163 Wn.2d at 600. It was uncontested at trial that Mr. Hernandez ran from a stolen car after it had crashed. The defense theory, however, was that Mr. Hernandez never actually possessed the car because he was not the driver. RP 381-402.

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<sup>2</sup> This language is taken from the pattern to-convict instruction for possession of a stolen vehicle. WPIC 77.21. The instruction’s comment acknowledges that the legislature did not apply the definition of possession of stolen property to the offense of possession of a stolen vehicle. Comment to WPIC 77.21. Still, the WPIC committee chose to include it in the instruction to prevent possession of a stolen vehicle from becoming a strict liability offense. Comment to WPIC 77.21.

But a court can prevent possession of a stolen vehicle from becoming a strict liability offense by inferring a knowledge requirement without needlessly incorporating the broader definition of possession from the statutory definition of possession of stolen property. See e.g. *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000). Additionally, the issue of whether possession of a stolen vehicle is a strict liability offense is not relevant to Mr. Hernandez’s case and does not affect his due process right to have the jury instructed in a manner permitting conviction only if the state proves each element of the offense with which he was charged.

The jury could have found that Mr. Hernandez disposed of the vehicle by running from it after the accident even if he did not possess it by driving it. Accordingly, the jury could have convicted Mr. Hernandez for possession of a stolen vehicle even if the state did not prove that he actually possessed it. Mr. Hernandez was prejudiced by the instruction's violation of his right to due process.

The court's instructions violated Mr. Hernandez's right to due process by permitting conviction even if the state did not prove each element of the charge. *Mills*, 154 Wn.2d at 6. Mr. Hernandez's conviction for possession of a stolen vehicle must be reversed. *Id.*

The Court of Appeals declined to address this issue because it reversed Mr. Hernandez's possession of a stolen vehicle conviction on other grounds. Opinion, p. 1 fn 1.

This error raises a significant issue of constitutional law and is of substantial public interest. If this court accepts review of the charging language issue, it should also review the court's erroneous to-convict instruction. RAP 13.4(b)(3), (4).

2. The prosecutor committed misconduct by commenting on Mr. Hernandez's right to remain silent. This significant question of constitutional law is of substantial public interest and should be reviewed by this court. RAP 13.4(b)(3), (4).

Prosecutorial misconduct can deprive the accused of a fair trial. U.S. Const. Amend. XIV; *In re Glasmann*, 175 Wn.2d 696, 702-704, 286 P.3d 673 (2012). In considering whether prosecutorial misconduct warrants reversal, the court looks to its prejudicial nature and its cumulative effect. *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005). Misconduct prejudices the accused if there is a substantial likelihood that the jury's verdict was affected. *Glasmann*, 175 Wn.2d at 704.

Accused persons have a constitutional privilege to remain free from self-incrimination. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9. A suspect's post-*Miranda* invocation of the right to remain silent is not admissible for any purpose. *State v. Pinson*, 183 Wn.App. 411, 417, 333 P.3d 528, 532 (2014) (citing *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008)). Even partial silence, post-*Miranda*, may not be used as evidence of guilt. *Id.*

An inference of guilt resting on exercise of a constitutional right "always adds weight to the prosecution's case and is always, therefore, unfairly prejudicial." *State v. Silva*, 119 Wn.App. 422, 429, 81 P.3d 889 (2003). A reviewing court presumes that an impermissible comment on the exercise of the right to silence harmed the accused unless the state

proves otherwise beyond a reasonable doubt.<sup>3</sup> *State v. Fuller*, 169 Wn.App. 797, 813, 282 P.3d 126 (2012) *review denied*, 176 Wn.2d 1006, 297 P.3d 68 (2013).

Once an improper comment on an accused person's silence has been made, "the bell is hard to unring." *State v. Holmes*, 122 Wn.App. 438, 446, 93 P.3d 212 (2004). The situation puts defense counsel in the difficult position of gambling on whether to ask for a curative instruction "—a course of action which frequently does more harm than good" — or ignoring the comment. *Id.*

A prosecutor commits misconduct and violates the privilege against self-incrimination by arguing that constitutionally protected silence constitutes evidence of guilt. *State v. Knapp*, 148 Wn.App. 414, 420, 199 P.3d 505 (2009).

Here, the prosecutor committed misconduct by twice commenting on Mr. Hernandez's "failure" to speak in his defense after his arrest. RP 373. The state's attorney continued with the improper argument even after Mr. Hernandez's first objection was sustained. RP 373.

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<sup>3</sup> Prosecutorial misconduct can be so flagrant and prejudicial that it requires reversal even though the court attempts to cure it with an instruction. *State v. Stith*, 71 Wn.App. 14, 22-23, 856 P.2d 415 (1993); *see also State v. Fisher*, 165 Wn.2d 727, 749, 202 P.3d 937 (2009). A curative instruction is insufficient, for example, if it tells the jury to disregard an improper argument's evidentiary value but does not admonish against considering the argument when determining guilt. *Fisher*, 165 Wn.2d at 749.

Mr. Hernandez's alleged post-*Miranda* silence was not admissible for any purpose. *Burke*, 163 Wn.2d at 217. His purported exercise of his right was not probative of any element of the charges offenses. The only possible objective of the prosecutor's argument was to encourage the jury to infer Mr. Hernandez's guilt based on his supposed exercise of his right to remain silent. The prosecutor's argument was improper.<sup>4</sup>

Even so, the majority of the Court of Appeals panel found that the prosecutor's arguments were not improper because his statements such as: "[E]ven when he had a chance to say something about it, the only thing he said was a prideful boast about how fast he was actually going" were actually discussions of what Mr. Hernandez *did* say. Opinion, p. 10 (*citing* RP 373) (emphasis added).

As Chief Judge Bjorgen's dissent points out, however, the prosecutor's argument was the equivalent to saying that Mr. Hernandez "made a prideful boast and he did not say anything else." Opinion, p. 16 (Bjorgen, C.J. *dissenting*). Viewed in the context of the case as a whole, this argument was more than a "mere reference" to silence. It encouraged the jury to convict Mr. Hernandez based on the exercise of his

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<sup>4</sup> The argument was especially egregious in this case because Mr. Hernandez *did* tell police that he had not been the driver. RP 9-10. Thus, the prosecutor's statements were deliberately misleading, in addition to commenting on Mr. Hernandez's constitutional right to silence.

constitutional rights. The prosecutor's argument was improper. *Pinson*, 183 Wn.App. at 417.

There is a substantial likelihood that the prosecutor's improper argument affected the verdict. *Glasmann*, 175 Wn.2d at 704. The state presented only slim evidence that Mr. Hernandez was the driver of the car. The state here encouraged the jury to infer from Mr. Hernandez's post-*Miranda* "silence" that he'd been driving the car.<sup>5</sup> The state cannot prove that the prosecutor's improper comment on Mr. Hernandez's exercise of his right to remain silent was harmless beyond a reasonable doubt. *Emery*, 174 Wn.2d at 757.

The prosecutor committed prejudicial misconduct by making repeated comments on Mr. Hernandez's post-*Miranda* exercise of his right to remain silent. *Silva*, 119 Wn.App. at 429; *Knapp*, 148 Wn.App. at 420. Mr. Hernandez's convictions must be reversed. *Id.*

This error presents a significant question of constitutional law and is of substantial public interest. If the court decides to review the issue raised in the state's petition, it should address prosecutorial misconduct as well. RAP 13.4(b)(3), (4).

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<sup>5</sup> As noted, this also reflects a deliberate attempt to mislead the jury. RP 9-10.

**CONCLUSION**

For the foregoing reasons, this Court should not accept review. If review is accepted, this Court should also review the additional issues listed in the preceding section.

Respectfully submitted on June 13, 2016.

**BACKLUND AND MISTRY**

A handwritten signature in black ink, appearing to read 'STBrett', with a horizontal line extending from the end of the signature.

---

Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of this Answer to Petition postage pre-paid, to:

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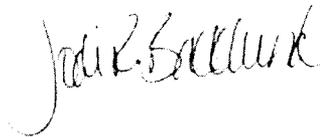
With the permission of the recipient(s), I delivered an electronic version of the brief, via email to:

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I filed the Answer to 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 June 13, 2016.



---

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Attorney for the Appellant/Respondent

## OFFICE RECEPTIONIST, CLERK

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I have attached for filing our Answer to Petition in the case of State v. Jason Hernandez, cause number 93112-7.  
Thank you.  
Jodi Backlund

--  
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