NO. 72120-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM PHILLIP, JR.,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Unsure of who might have killed Seth Frankel, the police obtained a warrant to search cell phone records of several men friendly with Mr. Frankel's girlfriend to track the men's locations and read their communications. Two years later, a judge ruled this warrant lacked probable cause and article I, section 7 mandates the exclusion of illegally obtained evidence. Even though the invalidated cell phone warrant led to most of the evidence the State used at trial, the court ruled that none of the evidence obtained as a result of the illegal search would be excluded.

In addition, the lead detective showed the prosecution emails between Mr. Phillip and a lawyer. The court ruled the State deliberately intruded into privileged attorney-client communications but there was no remedy. During trial, the court learned that numerous jurors violated its clear instructions not to discuss the case before deliberations but found no remedy applied. These errors and others discussed below require the reversal of Mr. Phillip's conviction and sentence.

B. ASSIGNMENTS OF ERROR.

1. The State violated Mr. Phillip's right to be free from unlawful searches and seizures under the Fourth Amendment and article I, section 7.

2. The court improperly refused to exclude illegally seized evidence obtained as a result of an invalid warrant.

3. The State did not prove that a second warrant to seize cell phone records was supported by probable cause or satisfied the independent source doctrine.

4. The court erroneously ruled that the State's omissions from the second warrant to seize cell phone records were not deliberate, reckless, and material to establishing probable cause.

5. The court improperly upheld the State's use of Mr. Phillip's exercise of his rights to counsel and to remain silent as incriminating evidence to obtain search warrants.

6. The court erroneously entered Finding of Fact A(7)(d). CP 904 (Findings of Fact from CrR 3.6 motion attached as Appendix A).

7. The court erroneously entered Finding of Fact C(1)(a). CP 907.

8. The court erroneously entered Finding of Fact C(1)(b). CP 907.

9. The court erroneously entered Finding of Fact C(1)(c). *Id*.

10. To the extent the court's conclusions of law are considered findings of fact, the court erroneously entered Conclusions C (2)(b), (c), (d), (e), (f). CP 908.

11. The court erroneously entered Conclusions of Law D (2), (3).

12. The court erroneously found no prejudice possibly resulted from the State's deliberate intrusion into privileged attorney-client communication. U.S. Const. amend, 6; Const. art.I, § 22; CrR 8.3.

13. The court improperly admitted lay testimony about the mechanisms of accurately tracking cell phone locations.

14. The jurors' violation of the court's instructions not to discuss the case during trial denied Mr. Phillip a fair trial by an impartial jury.

15. The court violated Mr. Phillip's right to a fair sentencing proceeding by unjustifiably ordering him to be shackled.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When the State seizes evidence pursuant to an invalid warrant, the evidence obtained as a result must be excluded from trial. The State used an invalid warrant to get Mr. Phillip's cell phone data, which shaped the investigation and was central to the prosecution's case. Was the court required to suppress evidence seized due to an invalid warrant?

2. The independent source doctrine is a narrow exception to the near categorical exclusionary rule. Because its first cell phone warrant was flawed, the State obtained a second warrant for the same information. The second warrant application did not contain sufficient facts to justify the cell phone search, deliberately or recklessly omitted material exculpatory

information, used the exercise of the right to counsel as evidence of guilt, and was not independent of the prior illegal search. Do the numerous inadequacies in this second warrant require suppression of unlawfully seized private information?

3. A person may not be punished for legitimately exercising his rights to remain silent and have the assistance of counsel because these rights are constitutionally guaranteed. The State used Mr. Phillip's desire to have counsel before answering questions as demonstrating his guilt and thus authorizing the police to search his private affairs. Did the State punish Mr. Phillip for exercising his rights under the Fifth and Sixth Amendments and article I, sections 9 and 22?

4. When the State violates the guarantee of confidential communication between attorney and client by reading private communications, dismissal is the mandatory remedy unless the State proves beyond a reasonable doubt there is no possibility of prejudice. Is there a possibility that Mr. Phillip was prejudiced from the lead detective and prosecutor's deliberate review of private attorney communication referencing the incident when this intrusion was followed by further investigation, an additional search warrant, and likely affected the State's refusal to offer a plea bargain?

5. A witness offering opinions based on specialized knowledge must be qualified as an expert. The defense objected to a cell phone company employee's testimony because he was not qualified as an expert. Did the court improperly allow a lay witness to give specialized expert opinions about critical allegations against Mr. Phillip?

6. The right to a jury trial is predicated on impartial jurors. Jurors insure their impartiality by following the court's instruction not to discuss the case before deliberations. Where numerous jurors violated the court's instructions by discussing the case before deliberations, is there a possibility of prejudice requiring a new trial?

7. A defendant has a constitutionally protected right to appear before the court without wearing restraints. Over objection, Mr. Phillip was required to wear leg and arm shackles at sentencing despite his exemplary behavior. Did the court impermissibly order Mr. Phillip shackled without necessary individualized justification?

D. STATEMENT OF THE CASE.

In May 2010, Seth Frankel was renting apartment in a duplex near downtown Auburn. 3/11/14RP 102, 110-11, 145. He had left his wife one year earlier after rekindling a relationship with Bonnie Johnson, with whom he had an extramarital affair. 3/11/14RP 91, 98. Because Ms.

Johnson worked part-time as a radio announcer in Portland, she stayed with Mr. Frankel some days of the week and otherwise texted or called his cell phone frequently. 3/25/14RP 53, 59-60.

On Friday May 21, 2010, Ms. Johnson worked in the evening in Portland and planned to spend Saturday with her friend Amy Greene in Oregon. 3/25/14RP 70, 73. Mr. Frankel went to Fred Meyer for groceries at 8:20 p.m., according to a cash register receipt. 3/26/14RP 95. He planned on going camping alone for the weekend. 3/25/14RP 71-72. Ms. Johnson grew concerned when Mr. Frankel had not responded to her messages. 3/25/14RP 94. On May 22, 2010, she asked a neighbor to check on Mr. Frankel. 3/11/14RP 20; 3/25/14RP 113.

Next door neighbor Jim Fuston was watching a Mariners game in his living room during the evening of May 21, 2010, and his living room looks directly at Mr. Frankel's living room from 25 feet away. *Id*. at 62-63, 72. He did not hear any noises or see anything unusual from Mr. Frankel, although he saw regular drug trafficking at a nearby apartment and heard a woman crying on the street at about 10 p.m. 3/11/14RP 8, 37-38, 40. When Mr. Fuston checked on Mr. Frankel, he found the doors were locked but saw a body on the floor and called 911. *Id*. at 27, 41.

Police discovered Mr. Frankel had been killed inside his home, near the front door's entry. 3/11/14RP 152-53. He was stabbed in the throat by a sharp instrument and hit on the head, with smaller cuts his arms and hand, and he bled a lot. 3/12/14RP 24; 4/7/14RP 153-4. There was one zip tie under his sleeve and another on the floor. 3/12/14RP 29, 3/26/14RP 215-16. The rest of the apartment was undisturbed. 3/11/14RP 190-91.

The police questioned Ms. Johnson, searching her cell phone and giving her a polygraph test that indicated some deception. 3/24/14RP 40; 3/26/14RP 67, 117, 125; CP 50. Her cell phone records showed she often exchanged text messages with two men, William Phillip and James Whipkey. CP 26. In order to learn if Mr. Phillip or Mr. Whipkey might be involved, the police obtained search warrants for both men's cell phone records for a two-month period. CP 26-28.

Mr. Phillip lived in Portland. He had worked with Ms. Johnson at the Oregon Convention Center, where both had part-time jobs setting up equipment for events. 3/25/14RP 16, 22. The two dated for less than two months in early 2009. 3/25/14RP 25-26. Ms. Johnson ended their romance quickly and they remained friends. *Id*. at 29-30. Mr. Phillip continued to express feelings for her but Ms. Johnson believed they had "transitioned to friendship." *Id*. at 34, 35. After Ms. Johnson and Mr. Frankel resumed

their affair in April 2009, Ms. Johnson left her job at the Oregon Convention Center, spent most of her free time with Mr. Frankel, and rarely saw Mr. Phillip. 3/25/14RP 33, 39-40. She and Mr. Phillip intermittently shared friendly or flirtatious text messages. 3/25/14RP 164. Mr. Phillip dated or flirted with other women as well. 4/3/14RP 23; 4/1/14RP 166-69, 187-88.

In June 2010, the police received Mr. Phillip's cell phone data from the warrant. CP 10. It showed he traveled to Kent and Auburn on May 21, 2010. CP 52-53. He left Auburn sometime before 8:56 p.m. and returned to Portland. *Id*. The medical examiner said Mr. Frankel's time of death was between 8 p.m. and 4:30 a.m., but it was "probably not very close to 8 p.m." and likely much later. 4/7/15RP 135, 159.

Citing the cell phone records, the police procured warrants to search Mr. Phillip's home, his motorcycle, his mother's car, his email accounts, his phone, and obtain his DNA. CP 10-12, 20-138 (warrants attached to CrR 3.6 motion to suppress). They did not find any physical evidence linked to Mr. Frankel but found undated journal entries where Mr. Phillip appeared to express his feelings for Ms. Johnson. 4/8/14RP 103-11. Police extensively searched Mr. Frankel's home and office. The only potential forensic link to Mr. Phillip was from a towel found under

other items in the living room. 3/24/14RP 158-59. The towel had a "very small" blood stain, the size of a grain of rice. 4/2/14RP 104, 174. It contained a mixed sample of DNA; 92 percent was from Mr. Frankel at a statistical likelihood of one in 350 quadrillion. 4/2/14RP 117. The other eight percent of the mixture could not rule out Mr. Phillip as a contributor, at a statistical likelihood of one in 2.2 million. 4/2/14RP 137. The towel also had some long hairs that were not from Mr. Frankel or Mr. Phillip, but could have been Ms. Johnson's. 4/2/14RP 102; 4/3/14RP 72-73; 4/9/14RP 113.

The police interviewed Mr. Phillip several times. He made no incriminating statements but asked to have a lawyer present. 10/16/13RP 15, 44, 107. The police used his request for a lawyer as evidence of his culpability when requesting search warrants. CP 74, 104, 110. Police saw that Mr. Phillip had severe bruising on one hand and a small band-aid on the webbing between his thumb and forefinger, but they verified that his hand was injured in an accident at work. 3/26/14RP 148-59; 4/7/14RP 14-16. He had no other visible wounds. 3/24/14RP 12-13, 17.

Although the investigating detectives knew Mr. Phillip had a lawyer and requested that his counsel be present when questioned about his potential involvement in the incident, the lead detective found emails

Mr. Phillip sent to a second lawyer. 2/24/14RP 20-21. The detective read the email and described them in a report. 2/24/14RP 33, 37, 39. At the prosecutor's request, the detective forwarded the email to him, aware that it was an incriminating statement to a lawyer. 2/24/14RP 38-39. The court ruled these actions violated Mr. Phillip's right to confidential attorney communications but no prejudice resulted. 2/26/14RP 4-7.

The State charged Mr. Phillip with first degree murder. CP 1. At trial, an AT&T records custodian described how AT&T's cell towers track signals from Mr. Phillip's cell phone and show his movements. 3/31/14RP 32-132. The court overruled Mr. Phillip's objection to this specialized testimony. CP 406-11, 521-30; 10/17/13RP 98-112; 3/31/14RP 11, 56, 83.

After a lengthy trial, the jury could not reach a verdict. 11/18/13RP 25. The State immediately set a second trial. 12/20/13RP 5-6. Because the two trials involved essentially the same testimony, the parties relied upon the evidentiary rulings and objections from the first trial. 2/26/14RP 88. The second jury convicted Mr. Phillip of first degree murder. CP 845.

E. ARGUMENT.

1. After the court voided a search warrant of a cell phone because it lacked probable cause, the exclusionary rule required suppression of the private personal details and resulting evidence gathered

The police used a tenuous connection between Mr. Frankel's girlfriend and Mr. Phillip to obtain a warrant for all of Mr. Phillip's cell phone records for a two-month period, including all cell towers his phone had accessed, all calls made and received, and all text messages. A judge later ruled this warrant was invalid because it lacked probable cause. CP 907. But the judge refused to exclude any evidence obtained despite the clear application of the exclusionary rule.

a. A person's unassailable privacy interest in data available from searching his cell phone requires a valid warrant.

Cell phones are capable of storing immense amounts of private information, including tracking a person's location over long periods of time, collecting any personal contacts, and holding thousands of photographs with dates, locations, and descriptions. *Riley v. California*, _ U.S. _, 134 S.Ct. 2473, 2489-90, 189 L/Ed.2d 430 (2014). Cell phones contain "a digital record of nearly every aspect of their [owners'] lives," and include access to "data located elsewhere." *Id*. Consequently, searches of this digital information "involve a degree of intrusiveness much greater

in quantity, if not different in kind" from other searches. *United States v. Payton*, 573 F.3d 859, 861 (9th Cir. 2009).

"It is well-established that article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections." *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014); U.S. Const. amend. 4. Article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations and places greater emphasis on privacy." *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

The personal, sensitive information conveyed over telephones is a private affair protected by article I, section 7. *Hinton*, 179 Wn.2d at 871-72, 874; *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986) (article I, section 7 protects phone numbers dialed, even without listening to the content of the calls). The scope of private information available on a cell phone requires "greater vigilance" from courts when authorizing a search that "could become a vehicle for the government to gain access to a larger pool of data that it has no probable cause to collect." *United States v. Schesso*, 730 F.3d 1040, 1042 (9th Cir. 2013).

The police obtained a warrant for Mr. Phillip's cell phone data on May 27, 2010. CP 26-28. It broadly authorized the police to obtain all cell tower locations his phone accessed, text messages, and call logs between

April 1 and May 26, 2010. *Id*. These records showed Mr. Phillip's phone was near Mr. Frankel's home on the day Mr. Frankel was killed. CP 51-54.

Judge Darvas ruled that this warrant was not supported by probable cause. 10/15/13RP 62; CP 908. The warrant application only mentioned Mr. Phillip in passing, by alleging Ms. Johnson's phone records showed "a significant relationship with two males," one of whom was JR, Mr. Phillip's nickname. CP 26. Its bare allegations that Mr. Phillip had "briefly dated" Ms. Johnson and "still communicated with her via text and phone calls" lacked the necessary reasonable basis to suspect Mr. Phillip was involved in Mr. Frankel's death. 10/15/13RP 62-63; CP 907. Similarly, Judge Cayce refused to sign a warrant seeking Mr. Phillip's DNA due to the sparse connection between Mr. Phillip and the crime. CP 9.[1] Yet the judge concluded that none of the evidence gathered was tainted by the illegal seizure despite its critical link in the police investigation. 10/17/13RP 6-12. This conclusion was erroneous.

[1] The rejected DNA warrant included far more factual allegations than the cell phone warrant. CP 42. It alleged numerous communications between Ms. Johnson and Mr. Phillip on the three days before Mr. Frankel died and included Ms. Johnson's opinion that Mr. Phillip was the only person she could think of who "could/would do something like the murder of Seth Frankel." *Id*.

b. The exclusionary rule bars the State's use of illegally obtained information following an improper invasion of a person's private affairs.

When the police intrude upon a person's private affairs without valid authority of law, the illegality triggers a "nearly categorical" exclusion of the evidence gathered as a result under article I, section 7. *State v. Winterstein,* 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). Unlike the Fourth Amendment, article I, section 7 emphasizes "protecting personal rights rather than ... curbing governmental actions." *Id.* The remedy of exclusion is automatic whenever the right to privacy is violated because article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations." *State v. Afana,* 169 Wn.2d 169, 180, 233 P.3d 879 (2010), quoting *State v. White,* 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

The court may not guess whether illegally obtained evidence would have been inevitably discovered had the police acted differently. *Winterstein*, 167 Wn.2d at 635. The Fourth Amendment's inevitable discovery doctrine "is incompatible with the nearly categorical exclusionary rule under article I, section 7." *Id*. at 636. Unlike the Fourth Amendment, there is no "good faith" exception to article I, section 7. *Afana*, 165 Wn.2d at 180. "When an unconstitutional search or seizure

occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

The independent source doctrine is one of the rare exceptions to article I, section 7's otherwise automatic suppression of unlawfully seizing evidence. *State v. Gaines*, 154 Wn.2d 711, 722, 116 P.3d 993 (2005); *State v. Miles*, 159 Wn.App. 282, 291, 244 P.3d 1030, *rev. denied*, 171 Wn.2d 1022 (2011). But this doctrine is narrowly construed. It requires a separate source of valid legal authority to obtain the information sought and the State also bears the "onerous burden" of proving "that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant," or the magistrate's decision to grant it. *Murray v. United States*, 487 U.S. 533, 540, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). The "ultimate question" is whether the second search is "in fact a genuinely independent source of the information and tangible evidence at issue." *Id*. at 542.

Here, two years after the first warrant, the State asked the same judge to authorize a second warrant for the same cell phone data because it realized the first warrant might not withstand judicial scrutiny. CP 130-35. This second warrant does not cure the constitutional violation because it

lacked the necessary factual basis to obtain vast data tracking Mr. Phillip's private information and was not genuinely independent of the first warrant.

c. The second cell phone warrant does not authorize the cell phone search because it was not supported by probable cause.

First, a search warrant may only be issued upon a showing of probable cause. *Kyllo v. United States*, 533 U.S. 27, 40, 121 S.Ct. 2038, 150 L.Ed. 2d 94 (2001); *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); U.S. Const. amends. 4 & 14; Const. art. I, §§ 3, 7. When an officer uses intentional or reckless perjury to secure a warrant, "a constitutional violation obviously occurs" because "the oath requirement implicitly guarantees that probable cause rests on an affiant's good faith." *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007), citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978).

Unsupported conclusions or speculation are insufficient for probable cause. *Thein*, 138 Wn.2d at 145-46. The court may draw reasonable inferences from the surrounding circumstances. Whether an affidavit contains sufficient facts to establish probable cause is a question of law reviewed *de novo*. *State v. Nusbaum*, 126 Wn.App. 160, 166-67, 107 P.3d 768 (2005).

i. The warrant lacked probable cause to seize a broad array of First Amendment protected information.

Probable cause to invade a person's private affairs requires a "nexus between the items to be seized and the place to be searched" that is "established by specific facts," and not speculation or general conclusions. *Thein*, 138 Wn.2d at 145. There must be "a sufficient basis in fact" showing "evidence of illegal activity will likely be found at the place to be searched" as a matter of law. *Id*. at 147. An affiant's suspicion is legally insufficient. *Id*. at 145-47. When a warrant authorizes the seizure of protected First Amendment speech, including affiliations and interests, courts rigorously enforce the particularity requirement to prevent general rummaging through private affairs. *State v. Besola*, _ Wn.2d _, 2015 WL 6777228, *2-3 (2015).

Applying the wrong standard of review, the court insisted it must defer to the magistrate who issued the warrant, resolving any doubts in favor of upholding it. 10/15/13RP 67-68. But at a suppression hearing, the trial court "acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the affidavit supporting probable cause. . . . [And a] trial court's assessment of probable cause is a legal conclusion we review de novo." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

The sufficient factual basis must appear in the search warrant application. *Thein*, 136 Wn.2d at 146-47.

The court believed a cell phone seemed to be less of a private affair than a home or car. 10/5/13RP 62, 68. It opined that the ubiquity of cell phones and their usefulness to police should make it easier for the government to obtain cell phone records. *Id*. It made this observation before *Riley* and *Hinton*, which dictate the opposite proposition: cell phones enable the government to access such an enormous range of personal information that they may not be searched absent clear legal authority narrowly tailored to particular facts of the case. *Riley*, 134 S.Ct. at 2491 ("a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house"); *Hinton*, 179 Wn.2d at 871-72 ("wealth of detail" available from cell phone requires valid warrant even when police look at sent message on another person's phone).

The court concluded the police were entitled to Mr. Phillip's cell phone data because he was the only person Ms. Johnson could think of who might want to harm Mr. Frankel and the police had no other leads. 10/15/13RP 65. But this suspicion is unconnected to Mr. Phillip's cell phone. *Cf. State v. Henderson*, 854 N.W.2d 616, 632 (Neb. 2014) (warrant application sufficient for cell phone search because detective described

factual basis for believing suspect used phone to communicate about shooting). The application did not contain "sufficient basis in fact from which to conclude evidence of illegal activity will likely be found" in Mr. Phillip's cell phone tower data and call records. *Thein*, 136 Wn.2d at 147.

The affidavit said the police had reviewed Mr. Frankel and Ms. Johnson's cell phone records, including call logs and text messages. CP 26, 132. There was no evidence of communications with or about Mr. Phillip from Mr. Frankel's phone. CP 132. They read the incoming and outgoing text messages between Ms. Johnson and Mr. Phillip from Ms. Johnson's phone. CP 133-34. Having viewed both sides of the conversations, they found no mention any intent, plan, or desire to harm Mr. Frankel. *Id*. The warrant application did not explain why Mr. Phillip's phone would lead to additional evidence. *Id*.

Where the warrant application does not sufficiently state the factual basis connecting the item to be searched with the crime investigated, it does not supply probable cause. *Thein*, 136 Wn.2d at 147. It is unreasonable "to infer evidence is likely to be found in a certain location simply because police do not know where else to look for it." *Thein*, 136 Wn.2d at 150. "General, exploratory searches are unreasonable, unauthorized, and invalid." *Thein*, 136 Wn.2d at 149. The second warrant

had some more information about why the police suspected Mr. Phillip's feelings for Ms. Johnson, but it did not set forth sufficient facts showing Mr. Phillip's phone likely showed evidence relating to Mr. Frankel's death and it did not limit the scope of the search to information about the incident. CP 132-34.

ii. The deliberate omissions of exculpatory information undermines the warrant.

The warrant's legality is further undermined by the deliberate omissions of material information from the warrant application. Misstatements or omissions in affidavits for search warrants affect the warrant's validity if they are (1) material, and (2) made deliberately or with reckless disregard for the truth. *Franks*, 438 U.S. at 155-56; *State v. Seagull*, 95 Wn.2d 898, 907-08, 632 P.2d 44 (1981). Facts are material if the challenged information was necessary to a finding of probable cause. *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992). Facts relating to the reliability of the person providing information, or the information itself, fit into that category. *See State v. Jones*, 55 Wn.App. 343, 347, 777 P.2d 1053 (1989).

The court ruled that the second application for Mr. Phillip's cell phone data omitted relevant information. 10/15/13P 65-66. Any deliberate or reckless omission is significant and undermines the basis of the warrant

due to the paucity of specific facts necessary to establish probable cause, but the court upheld the warrant despite its omissions.

The warrant said Ms. Johnson felt Mr. Phillip was the only person she could think of who might want to harm Mr. Frankel. 10/15/13RP 65; CP 134. But it did not say Ms. Johnson retracted this allegation. CP 232. She had told the police, "I can't believe that he [Mr. Phillip] would do something like this," and when asked if she thought Mr. Phillip would be involved, she said, "He would not." CP 232.

It also omitted Ms. Johnson's description of Mr. Phillip as "really passive, he's not a violent person." CP 233. Instead, it said Mr. Phillip had been in the military, possibly in the Marines, and did a tour in Iraq. CP 235. This information implied Mr. Phillip had expertise in weapons or potentially had been battle-scarred, without mentioning that Ms. Johnson also said Mr. Phillip was "just bored most of the time" in the military and had no battle experience. CP 233. It left out Mr. Phillip's inexperience fighting and his passive, non-violent character as judged by the only person who was potentially accusing Mr. Phillip.

The warrant said Mr. Phillip was the only person who had "spoken ill" of Mr. Frankel to Ms. Johnson, but it did not include that he had never spoken violently or threateningly. CP 235. It omitted the fact that Ms.

Johnson did not think Mr. Phillip knew where Mr. Frankel lived and had never met him and instead implied the opposite. CP 49.

These omitted facts undermine the warrant application's basis for suspecting Mr. Phillip. Ms. Johnson's suspicion was the central basis for searching Mr. Phillip's cell phone yet Ms. Johnson had also said she did not believe Mr. Phillip would have acted violently toward Mr. Frankel. The application said the assailant was likely someone with a personal relationship with Mr. Frankel, but it did not explain that Mr. Phillip had never met Mr. Frankel, did not know where Mr. Frankel lived, and did not know his last name. Had the magistrate been presented with an accurate description of Ms. Johnson's statements about Mr. Phillip's as a potential suspect, there would not have been probable cause to issue a warrant.

The court found these omissions were not deliberate because they were not material. 10/15/13RP 66-67. But tellingly, once the police had the results of the cell phone warrant, they included this omitted information in later warrant applications, demonstrating they knew the equivocal nature of Ms. Johnson's allegations was material and should not be omitted from the warrant applications. CP 48, 63-64. The State deliberately omitted information casting doubt on its allegations in the cell

phone warrant due to the paucity of facts it could muster painting Mr. Phillip as responsible absent the illegally obtained cell phone records.

d. The second cell phone warrant was not genuinely independent of the invalid search for the same information.

The State bears the "onerous burden" of proving the initial illegality was not part of the State's motive for the warrant, "no information gained from the illegal entry affected" the officers' decision to seek a warrant," and the first warrant did not affect magistrate's decision to grant the second warrant. *Murray*, 487 U.S. at 540. The independent source doctrine is reviewed *de novo*. *State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).

i. The motive for the second warrant was the information that had been illegally seized.

Detective Weller admitted that when seeking the initial cell phone warrant, "we really didn't have any suspects." CP 214. "We were pretty much following anything that came out as a possible lead to a motive and a suspect." *Id.* After learning Ms. Johnson's phone showed she "was talking to these two other guys – its like, okay, well, that's also a possibility." *Id.*

Detective Blake agreed that the reason they sought cell phone records for both "guys" to whom Ms. Johnson was talking, Mr. Phillip and

James Whipkey, was because they wanted to "find out . . . especially through the Usage Records" where both men were at the time of the incident. CP 393. Their motivation was "really to find out where . . . where is that tower usage putting" both men. CP 394.

The illegally obtained phone records were critical to the investigation. After receiving the records, the police focused on Mr. Phillip "because of the variants in the phone records and what they told us." CP 216. The phone records were "pretty significant" because there was no other reason the police could think of for Mr. Phillip to be in Auburn. CP 217; *see also* CP 220 (once police got "cell tower stuff," detectives' focus shifted to Mr. Phillip).

The court entered a finding that the police were not motivated by having already obtained the cell phone data because they would have investigated Mr. Phillip any way and were in a rush. CP 907 (Finding of Fact C(1)(b)). This finding of fact is unreasonable and is not supported by the record. The detectives did not say they were in a rush on May 27, 2010, almost one week after the incident, when they sought this cell phone warrant. They admitted they focused on Mr. Phillip because of the information obtained through the illegal warrant. CP 216-17, 220. They hoped that the cell tower usage information would shed light on either Mr.

Phillip's or Mr. Whipkey's involvement. CP 214, 217, 393-94. Without phone data, Mr. Phillip was merely a person who used to date Ms. Johnson and still communicated with her. CP 214, 216-17, 220. There was no other evidence connecting Mr. Phillip to Mr. Frankel or evidence they had met or knew where each other lived. CP 49. There was no allegation Mr. Phillip knew how to find the apartment Mr. Frankel recently rented in Auburn, which did not even appear on his driver's license. CP 49; 3/11/14RP 211. The cell phone records were focal point in the investigation. CP 214.

ii. The court applied the wrong test to decide motive under the independent source doctrine.

The court adopted the State's theory that "motive" for purposes of the independent source doctrine means merely that the police would have wanted this information even if they did not already know its content. 10/15/13RP 47; CP 907 (Finding C(1)(b)). This does not resolve whether the police were genuinely motivated by information separate and apart from the illegally obtained cell phone data. *Murray*, 487 U.S. at 42-43. Satisfying the independent source doctrine may not be based on speculation like the inevitable discovery doctrine, because the court may not guess how the police would have acted had they followed other procedures. *Winterstein*, 167 Wn.2d at 634.

In *Miles*, the State had checks showing the defendant engaged in fraud and probable cause to bring charges before it used an administrative subpoena to access bank records. 159 Wn.App. at 287. Later, the Supreme Court ruled that an administrative subpoena was not the proper legal authority to access bank records, so the State used information they knew at the outset to obtain a judicial warrant. *Id*. at 287-88. Because they had sufficient facts to bring charges before viewing the bank records, the State could show they were not motivated by information gleaned from the invalid subpoena. *Id*. at 296. However, the *Miles* Court remanded the case for the State to prove its motive was genuinely independent. *Id*.

In *Gaines*, the defendants were arrested in a car used to commit the charged kidnapping and other crimes. 154 Wn.2d at 713-14. Incident to the arrest, the police found a gun and ammunition in the car and glanced in the trunk, spotting a gun barrel and ammunition. *Id*. at 714. They immediately sought a search warrant for the whole car. *Id*. at 714-15. Because the police had probable cause for a search warrant based on the victim's allegations alone, and the car had "played a central role in the crimes" alleged, deciding to get a search warrant was not motivated by the illegal warrantless glance into the trunk. *Id*. at 721-22. The car was key

evidence closely connected to the crime and already in the State's control for the on-going prosecution.

Similarly to *Gaines*, in *Murray*, the police acted in the course of a long-term investigation. 487 U.S. at 535-36. They saw several vehicles leave a warehouse, the drivers were arrested, and the police found marijuana in those vehicles. *Id*. Following these arrests, they illegally entered the warehouse, but quickly left, asked for a warrant, and did not mention what they saw in illegal entry in the application. *Id*.

In *Miles*, *Gaines*, and *Murray*, the police had enough information to prosecute the charges without the illegally obtained evidence. The independent source doctrine does not permit the court to speculate that the State would have obtained a valid warrant had it not already acted illegally merely because police would remain suspicious. *See Winterstein*, 167 Wn.2d at 634. Here, the detectives candidly admitted the cell phone records were the driving force in identifying which potenetial suspect to investigate. CP 214, 216-17, 393-94. The second warrant was obtained years after the information from the voided warrant had guided the investigation and charging decision. CP 138.

Detectives Weller and Blake conceded they were casting at sea for some information about people who communicated with Mr. Frankel's

girlfriend. CP 214, 393-94. At the time they sought the first warrant, they had no information indicating Mr. Phillip's connection to the incident. They sought the second warrant simply because the prosecution told them that the first "wasn't as comprehensive as it needed to be." CP 222. By this time, the prosecution against Mr. Phillip was entrenched and it was based on the information from the first, invalid, warrant. The motive was not genuinely independent as required. *See Murray*, 487 U.S. at 540.

iii. The information in the second warrant would not have been available had the first, illegal warrant not been issued.

The independent source doctrine also fails because the police would not have been able to obtain the cell phone records had the earlier illegal search not occurred. AT&T keeps their cell phone data records for only three to six months, 12 months at most. 12/5/13RP 39; CP 523. The second cell phone data warrant was issued on March 22, 2012, almost two years after the initial invalid search. CP 135. The AT&T records custodian tried to independently verify the information before the first trial but it was no longer available in AT&T's database. 12/5/13RP 41-42; CP 522-23. Had the police waited until 2012, the detailed cell phone data would not have been accessible to the police.

The court's written findings claim that after the second warrant, the records "were re-obtained from AT&T (i.e. the APD went through the normal warrant process of obtain a second copy of the documents from AT&T)." CP 904 (Finding of Fact 7(d)). But a finding of fact must be supported by substantial evidence in the record. *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000). The "erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal." *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The State bears the burden of proving the independent source doctrine's requirements. *Murray*, 487 U.S. at 540.

The record does not support the independent availability or retrieval of this information. The time limits for access to AT&T's records show the State could not have obtained 2010 records in 2012. 12/5/13RP 39; CP 523. AT&T's record-keeping time limit was undisputed and is incorporated into the court's findings by its incorporation of additional evidence in the record in its written findings. CP 905, 908 (Finding of Fact A(8)(b); Conclusion of Law d(4)). It is not only purely speculative to presume that AT&T would have preserved this information absent the first warrant, but wrong. Guesswork about how the police might have acted is not permitted under article I, section 7. *Winterstein*, 167 Wn.2d at 634.

The only reason AT&T had the records to provide the State was due to the illegal warrant. The State did not meet its burden of proving it was able to obtain the same information without the initial illegality.

iv. The second warrant relied on the prior granting of the first, illegal warrant by the same judge, showing the magistrate's decision was not truly independent.

The independent source doctrine requires the State prove the magistrate's decision to issue the warrant was "genuinely independent" from the prior invalidated warrant. *Miles*, 159 Wn.App. at 294.

In the second warrant application, the detective explained that "the Honorable Brian Gain" had already "approved" a search warrant for this same information. CP 131. The second warrant "attached and incorporated" the first warrant. *Id*. It said that they had already requested and received this same information. *Id*. It also explained the reason for seeking the second warrant was that the prosecutor assigned to the case had asked the detective to include some additional information in the warrant application. CP 132.

Detective Weller took the warrant directly to Judge Gain in person and told him she "needed him to review a second warrant for a warrant he had already signed, for the same information that we had already obtained." CP 225. By asking the same judge to authorize the warrant

while reminding him that he had already signed it and the State had received the information requested, the State was not seeking an independent evaluation of the warrant. Instead, the judge understood this second warrant was a mere technicality, offered for some strategic advantage. The State conveyed to the judge that it would be incongruous to reject this second one when the only difference was that the second one merely added "some information" known to the police. CP 132. Judge Gain's decision to issue the second warrant was not "genuinely independent" of the first as required for the independent source doctrine to apply. *Murray*, 487 U.S. at 542.

In sum, the independent source doctrine is not satisfied. The State benefitted from the illegally obtained information during two years of investigation before getting the second warrant and would not have had probable cause to pursue this investigation without those records. It presented the second warrant to the same judge with a reminder of his pre-existing approval. It relied on the first request to preserve information that would not have been available but for the earlier warrant. The cell phone evidence was not derived from an independent source as required under article I, section 7 and the Fourth Amendment.

e. The exclusionary rule applies to all evidence gathered by exploiting the illegally obtained cell phone data.

In the two-year span after the first, invalid warrant and before attempting to fix its invalidity by getting a second warrant, the State relied on the cell phone data to obtain other warrants, as documented in Mr. Phillip's CrR 3.6 suppression motion. CP 10-11. This evidence derives from illegally obtained evidence and should have been excluded. *Afana*, 165 Wn.2d at 180; *Ladson*, 138 Wn.2d at 359.

i. The illegally obtained cell phone data was the basis for evidence gathered from Mr. Phillip's home.

The day after the police received and reviewed the data from Mr. Phillip's cell phone, they sought a search warrant for Mr. Phillip's home. CP 51. The nine-page search warrant application included three pages detailing every piece of cell tower data showing Mr. Phillip's purported whereabouts in May 21 and 22, 2010, obtained from the illegal warrant. CP 50-53.[2] This warrant asked to seize a host of information including:

> any clothing that might contain trace evidence, all cell phones that would record and document Mr. Phillip's communications, and "items/evidence relating to a possible motive and/or intent of the homicide" including "any written or printed documents or photographs that refer to . . . or pertain to . . . Bonnie Johnson"

[2] Judge Gain signed this warrant in part on June 21, 2010, and directed the State to seek an Oregon warrant for Mr. Phillip's Portland home. CP 55, 57-58. An Oregon judge authorized the search based on the identical warrant application. CP 57-81.

CP 54. They took his journals and his iphone, which they later searched for internet usage, pictures, texts, contacts, and emails. CP 10; 4/8/14RP 103-11; 4/1/14RP 91, 93, 101, 141-42, 145, 149-0.

They also sought "all calling records," texts and cell data for phone number 503-313-3490 because it was "the number Phillip dialed from Auburn at 2056 hrs on the night of Frankel's murder." *Id*. This led the police to Michael Fowler, Mr. Phillip's childhood friend. CP 114. Without the phone records, Mr. Fowler would not have been known to the police, because he had never met Ms. Johnson and had no connections to Mr. Frankel. 4/3/14RP 23.

From Mr. Fowler, the police learned Mr. Phillip did not have reason to go to Auburn and the content of their phone conversations on May 21, 2010. CP 113. Mr. Fowler directed the police to Mr. Phillip's mother, Kathy Sanguino, who they interviewed based on Mr. Fowler's information about how and where to find her. *Id*. Both Mr. Fowler and Ms. Sanguino testified as prosecution witnesses. 4/3/14RP 34-94.

From Ms. Sanguino, they learned Mr. Phillip borrowed her car near the time of the incident and they searched her car for potential evidence, based on a warrant derived from the illegally seized cell phone evidence. CP 113-16, 118-19. They also gathered further information from her about

Mr. Phillip's feelings for Ms. Johnson. CP 115. This information also derived from the illegal cell phone search. His mother had a different last name and did not live with Mr. Phillip. CP 115. Like Mr. Fowler, the police would not have located her without the cell phone data. CP 115.

The court summarily concluded that the "decisions to seek the subsequent warrants for other evidence from other sources were not the fruit of the poisonous tree of the results of the first warrant." CP 908 (conclusion C(2)(c)). The court's only explanation was that regardless of the cell phone records, the police "would have continued to pursue its investigation of the defendant as a suspect in Frankel's murder." *Id*.

The court's written findings only examined whether the police would have been motivated to pursue Mr. Phillip, not whether the State used the illegally obtained information to further investigate the case. CP 908. Each of the search warrants depended on the illegally seized information and its fruits, both in the police officers' motive and in the evidence used to convince the judges to sign the warrants. *See, e.g.*, CP 52-53, 69-74, 105-10, 125. The warrants included Mr. Phillip's home and motorcycle, and to seize Mr. Fowler's cell phone itself to search its data such as internet usage and pictures. They were sought the day after they received the cell phone records from the first warrant. CP 59, 81.

Because these warrants were not based on sources "genuinely independent" of the illegally obtained cell phone records, and instead were derived directly from them, they are subject to automatic exclusion under article I, section 7. *Afana*, 165 Wn.2d at 180; *Winterstein*, 167 Wn.2d at 636. This Court does not speculate whether the police would have inevitably sought this information absent the invalid warrant. *Winterstein*, 167 Wn.2d at 634-35.

ii. The second DNA warrant was not independent of the illegal search.

Before the illegal seizure of the phone records, in June 2010, the State requested a warrant for Mr. Phillip's DNA but the court rejected it. CP 9, 42-43. It refused to sign the warrant based on the lack of probable cause connecting Mr. Phillip to the homicide. *Id*.; *see also* CP 68. After obtaining and relying on the cell phone records to cement Mr. Phillip as the primary suspect and to investigate people the cell phone records showed he spoke to after the incident, the police sought a second DNA warrant. CP 83-95. The warrant application relied on the illegally obtained cell phone data and the investigation that directly resulted from having obtained this information. CP 85-87.

This warrant was not obtained independently of the illegally obtained cell phone information. While it also reported the new

information that a towel taken from the scene had an unidentified sample of DNA, there were no specific facts connecting Mr. Phillip as the possible source of that DNA other than the information illegally obtained from the cell phone and its direct fruits. CP 88-92. Accordingly, it must be excluded under article I, section 7.

f. Using Mr. Phillip's exercise of his right to counsel and to remain silent against him undermines the warrants.

Because it is "fundamentally unfair" to simultaneously afford a suspect a constitutional right to decline to answer questions from the police and allow the implications of that silence to be used against him, it is constitutionally prohibited for the State to use that silence against an accused person. *Doyle v. Ohio,* 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The Supreme Court has "consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick*, 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). "A person cannot be punished for refusing to speak." *State v. Williams*, 171 Wn.2d 474, 484, 251 P.3d 877 (2011).

A person who asserts his right to remain silent is protected by article I, section 9 and the Fifth Amendment privilege against self-incrimination. *State v. Burke*, 163 Wn.2d 204, 206, 181 P.3d 1 (2008). The

constitution protects a person's right to cut off questioning. *Michigan v. Mosley*, 423 U.S. 96, 100, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *State v. Piatnitsky*, 180 Wn.2d 407, 412, 325 P.3d 167 (2014). Silence may not be used as substantive evidence of guilt. *Burke*, 163 Wn.2d at 206. This right implicitly assures a person asserting it the silence will carry no penalty. *Id*. at 212, quoting *Doyle*, 426 U.S. at 618.

Throughout the investigation, Mr. Phillip unequivocally invoked his right to cut off police questioning by asserting that he did not wish to answer further questions without his attorney's presence. CP 9-10, 134; *see* 10/16/13RP 15, 44, 53, 103, 107. The police used his request for counsel as inculpatory evidence and treated it as an admission of responsibility in several search warrant applications, including the second cell phone warrant. CP 42, 50, 104, 134. The warrants claimed he refused to answer questions even though he had merely asked to have counsel present for questions and they also documented his efforts to contact an attorney shortly after the incident based on cell phone records from the illegal warrant. 10/16/13RP 15, 53, 103; CP 9-10, 110. The court used Mr. Phillip's invocation of his right to counsel as evidence contributing to its finding of probable cause despite his objection. 10/15/13RP 12-13, 64-65.

It is impermissible to use a person's rights to counsel or to remain silent as evidence of guilt. The court also ruled that using Mr. Phillip's right to have counsel present as a basis for inferring his involvement was not important to the warrant application. 10/15/13RP 65-66; CP C(2)(c), (f). However, without the improperly obtained cell phone data, there was no evidence of Mr. Phillip's likely involvement in the incident. The improper inferences drawn from exercising a constitutional right further undermines the validity of the warrants.

g. Suppression of the improperly seized evidence requires vacation of the conviction and remand for further proceedings.

The remedy of exclusion is mandatory for any seizures of evidence that lacked constitutionally valid authority. *Afana*, 165 Wn.2d at 180; *Ladson*, 138 Wn.2d at 359. The lack of probable cause that undermined the first cell phone warrant has necessary repercussions because it was the central to the subsequent investigation. The State relied on private information obtained without proper authority of law. Mr. Phillip's conviction must be reversed and the case remanded to assess whether there is sufficient evidence to proceed with a new trial based on solely on untainted and legally obtained information.

2. The State deliberately violated Mr. Phillip's right to a confidential attorney-client relationship and did not prove there is no possibility of prejudice

a. The fundamental right to the assistance of counsel is strictly protected.

The right to the assistance of counsel is a bedrock procedural guarantee of a particular kind of relationship with counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145-46, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); U.S. Const. amend. 6; Const. art. I, § 22. Its "essence" is the privacy of communication with an attorney. *United States v. Rosner*, 485 F.2d 1213, 1224 (2nd Cir. 1973); *see Patterson v. Illinois*, 487 U.S. 285, 290 n.3, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (Sixth Amendment involves a "distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship").

It is "universally accepted" that effective representation cannot be had without private consultations between attorney and client. *State v. Cory*, 62 Wn.2d 371, 374, 382 P.2d 1019 (1963). The confidential attorney-client relationship is not only a "fundamental principle" in our justice system, it is "pivotal in the orderly administration of the legal system, which is the cornerstone of a just society." *In re Schafer*, 149 Wn.2d 148, 160, 6 P.3d 1036 (2003). The confidentiality of discussions between attorney and client has been protected for centuries. *Id.* It is

inextricably intertwined with the adversarial system of justice, which demands that the lawyer must know all the relevant facts to advocate effectively, and presumes that clients will not provide lawyers with the necessary information unless the client knows what he says will remain confidential. *Id*. at 160-61; *see* RCW 5.60.060(2)(a) (attorney "shall not" be questioned about "any communication made by the client"); RPC 1.6 (lawyer "shall not reveal confidences or secrets" relating to client); RPC 4.4 (attorney may not intrude into other's attorney-client relationship).

Even when armed with a search warrant authorizing the police to seize documents, the warrant does not empower the police to breach the attorney-client privilege. *State v. Perrow*, 156 Wn.App. 322, 328, 231 P.3d 853 (2010). In *Perrow*, the police were authorized to seize a range of written materials when executing a search warrant. *Id*. at 329. A detective took documents that included notes the defendant wrote for a meeting with his attorney about the allegations. *Id*. at 326. Although the defendant was not yet charged, he was aware of the investigation and had retained an attorney. *Id*. The Court of Appeals ruled that "the writings seized from Mr. Perrow's residence were protected by the attorney-client privilege" and the State's seizure violated that privilege. *Id*. at 330. The court held "it is

impossible to isolate the prejudice presumed from the attorney-client privilege violation." *Id*. at 332.

In *Cory*, a sheriff's deputy eavesdropped in a jail conversation between the defendant and his lawyer. 62 Wn.2d at 372. There was no evidence the deputy told the prosecutor about it, but the court presumed some information would have been conveyed and the defendant could not know if the State used it to shape the investigation or prosecution. *Id*. at 377 n.3. "If the prosecution gained information which aided it in the preparation of its case" then the violation of the attorney-client relationship infected the proceedings. *Id*. at 377. Furthermore, once the State interfered with "the defendant's right to private consultation" with his lawyer, "that interference is as applicable to a second trial as to the first," and therefore the court reversed the conviction and dismissed the charge. *Id*.; *see also State v. Granacki*, 90 Wn.App. 598, 959 P.2d 667 (1998) (when detective views defendant's notes about attorney communications, State irreparably intruded into attorney-client privilege even if information not given to prosecutor).

b. Any intrusions by the police or the prosecution into confidential communications are presumptively prejudicial.

The State's violations of attorney-client privilege are punished because they harm the functioning of the adversarial system. Like a prosecutor's use of racial stereotypes to urge a conviction, a deliberate intrusion by the police or prosecution into private communications between attorney and client is "repugnant to the concept of an impartial trial" in an adversarial system. *See State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 558 (2011).

Eavesdropping on an attorney-client conversation is presumptively prejudicial. *State v. Pena Fuentes*, 179 Wn.2d 808, 819, 318 P.3d 257 (2014). Dismissal is mandatory unless the prosecution proves, beyond a reasonable doubt, "there is no possibility of prejudice." *Id*. at 819-20.

The possibility of prejudice is not resolved by merely excluding the improperly gathered evidence from being used substantively at trial. The possibility of prejudice exists if the information is used to shape strategy. *See State v. Lenarz*, 22 A.3d 536, 549 (Conn. 2011). Eavesdropping may aid the State's investigation. *Pena Fuentes*, 179 Wn.2d at 821. Gaining insight into and assurance about the defendant's trial strategy helps the prosecution select jurors, guides the investigation, and cements its theory.

Lenarz, 22 A.3d at 551 n.16. A prosecution involves a "host of discretionary decisions," and may be both "consciously and subconsciously factored into the prosecutor's decisions before and during trial," making it impossible to parse its effect on the state's decisions. *Briggs v. Goodwin*, 698 F.2d 486, 494-95 (D.C. Cir. 1983).

For example, plea bargaining is a "central" aspect of the criminal justice system and a "critical phase of litigation" that depends on confidential communications between attorney and client. *Missouri v. Frye*, __ U.S. _, 132 S. Ct. 1399, 1406-07, 182 L. Ed. 2d 379 (2012). "In today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant. *Id*. A defense attorney's failure to convey a plea bargain constitutes ineffective assistance of counsel, even if the accused person received a fair trial. *Id*. Similarly, if the State's intrusion into attorney-client communications affects the possibility of a negotiated settlement, it necessarily prejudices the accused person.

The State knew from the outset of its investigation that Mr. Phillip had been communicating with counsel. 10/116/13RP 15, 53, 103. The invalid search warrant emphasized his calls to an attorney immediately after the incident to cast suspicion on him. CP 74, 104, 110; 2/24/14RP 33.

When the Auburn detectives spoke to Mr. Phillip in person, he gave them the business card of an attorney and declined to speak further without the attorney's presence. 10/16/13RP 15-17. Mr. Phillip had similarly invoked his right to counsel when Portland police spoke to him at the behest of the Auburn police. 2/24/14RP 31.

Yet when Detective Blake discovered in the data extracted from Mr. Phillip's cell phone that Mr. Phillip had emailed a different lawyer in the early morning hours after the incident, seeking representation for a violent crime, he did not segregate that information as something that would constitute a privileged attorney-client communication. 2/24/14RP 20-21. Instead, he summarized the email's content in a report and promptly told the prosecution about it. *Id*. at 23; CP 756.

The prosecutor did not caution the detective against reviewing or disseminating information about this private contact between Mr. Phillip and a lawyer. CP 740. The detective did not discontinue his involvement in the case, unlike *Pena Fuentes*. 179 Wn.2d at 821. Instead, the prosecution wanted his own copy of the email Mr. Phillip sent to a lawyer. After the prosecutor read the privileged communication, he emailed back the detective saying, "Holy crap," and the detective agreed, saying "God bless cell phones and stupid people." 2/24/13RP 40.

The prosecutor also spoke to the detective over the telephone but there was no record of the conversation to review. 9/30/13RP 38. The defense learned about this breach only by filing a public disclosure request and believed it was missing additional portions of the email thread between the detective and prosecutor. *Id*. at 57.

At the time the detective found and shared this email in February 2012, the State was investigating and preparing for trial. 9/30/13RP 30. After receiving this privileged communication, the State redoubled its efforts to prosecute Mr. Phillip, with the prosecutor re-writing the earlier search warrant for Mr. Phillip's cell phone data and obtaining additional evidence, with the same detective continuing to lead the investigation. 2/24/14RP 30, 41, 46-47.

The court ruled that this purposeful intrusion into attorney-client communications violated Mr. Phillip's constitutional right to counsel, as well as potentially violating CrR 8.3. 9/9/13RP 147-49; 9/30/13RP 26, 74-76. The emails involved a request for representation and were intended to be confidential. 9/9/14RP 148-49. The court expressed disappointment with the detective's failure to understand the sacrosanct nature of attorney-client communications. 9/30/13RP 74-75; 2/25/14RP 105; 2/26/14RP 5. It

chastised the prosecutor for deliberating seeking out the content of the email but found no prejudice to the defense. 9/30/13RP 80-81.

After *Pena Fuentes*, the defense moved for reconsideration based on the high standard of proof placed on the prosecution by the Supreme Court when the State eavesdrops on attorney-client communications. CP 736-80. After a further hearing, the court ruled there was no possibility of prejudice. 2/26/14RP 3-7. It found that the suppression of the statement was an adequate remedy, because suppression is the remedy for Fourth or Fifth Amendment violations. But this conclusion fails to apply the strict standard of proof required by *Pena Fuentes*. It disregards the necessary conscious and subconscious effect of learning that Mr. Phillip essentially admitted his involvement in the offense to a lawyer and also fails to account for the broader Sixth Amendment policies that are protected by the attorney-client privilege. *See Lenarz*, 22 A.3d at 548.

c. The State's failure to meet its burden of proving there is no possibility of prejudice from its intentional invasion and dissemination of privileged attorney-client communications requires reversal.

Pena Fuentes dictates that a violation of attorney-client privilege is so fundamentally at odds with the criminal justice system that the remedy of dismissal is necessary unless the State proves "there is no possibility of prejudice." 179 Wn.2d at 819. The State bears "the highest burden of

proof" to ensure that the "constitutional right to privately communicate with an attorney" is protected. *Id*. at 820.

The State cannot prove the absolute absence of prejudice to Mr. Phillip as it is required to do. The State's evidence was tenuous enough that the first jury could not reach a verdict. Mr. Phillip had no criminal record and had served in the military, which are usually factors that mitigate in favor of a reduction in charge or sentence. Plea bargaining is the default resolution of most every criminal case, but the lack of plea bargaining here is an anomaly that is likely the result of the State's firm belief in Mr. Phillip's guilt despite the slim evidence of his involvement.

No possibility of prejudice means that "no person with knowledge of the privileged communications had any involvement in the investigation or prosecution of the case" or that "the state has access to all of the privileged information from other sources." *Lenarz*, 22 A.3d at 550. For example, Detective Rogers found several voice mails with potential attorney-client communications on Mr. Phillip's cell phone. 2/25/14RP 5. She segregated that information and did not reveal its contents to anyone. *Id*. at 3, 27. In *Pena Fuentes*, the detective who eavesdropped on attorney-client phone calls did not tell the prosecutor what she heard and discontinued her involvement in the case. 179 Wn.2d at 821. But here, the

trial prosecutor deliberately sought the content of the attorney-client communication and the same detective continued to lead the investigation. 2/24/14RP 30, 33, 40.

The State has not proved that its discretionary prosecutorial decisions were unaffected by knowing the content of Mr. Phillip's early morning email to an attorney hours after the incident. The improperly obtained information was available for using against Mr. Phillip in denying any plea bargain, cementing the intensity of the State's prosecution for the most serious charges even after the first jury was unable to reach a verdict and despite the lack of clear evidence of Mr. Phillip's involvement.

The "no possibility of prejudice" standard set in *Pena Fuentes* is a near impossible threshold of proof for the prosecution due to the host of discretionary strategic decisions that occur in the course of a prosecution. The court faulted the defense for failing to show that prejudice had resulted, but the State must prove no possibility of prejudice existed. CP 809. The State's gleeful response to the content of the email, exclaiming Mr. Phillip's stupidity for sending it over his cell phone, shows it affected the tenor of the prosecution and increased the intensity of its efforts to convict Mr. Phillip. 2/24/14RP 40. The court misapplied the standard

required in *Pena Fuente* in its ruling denying the defense motion. CP 809. The State's failure to prove there is "no possibility of prejudice" from its intrusion into attorney-client communication requires reversal and dismissal.

3. The State improperly used a lay witness to give expert opinions about cell phone towers over objection.

a. Qualified expert opinion is necessary when the State offers highly specialized and technical testimony.

Lay testimony is admissible only when the witness is merely relating observations, but not when the witness offers an opinion based on specialized knowledge. *Ashley v. Hall*, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999); ER 701. "[A] lay witness is in no better position to arrive at an opinion or conclusion from the facts known to a witness" than an ordinary person. *Id*.

ER 702 governs the admissibility of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The court must determine whether the expert is qualified and offers testimony that is helpful to the trier of fact and outside the competence of a lay person. *Reese v. Stroh*, 128 Wn.2d 300, 306, 308, 907 P.2d 282 (1995).

A court's decision to admit expert testimony is reviewed for abuse of discretion but a court necessarily abuses its decision if it applied the wrong legal standard. *Id*. at 310.

The court may not admit a lay witness's opinion testimony when the opinion expressed calls for an expert. *Ashley*, 138 Wn.2d at 156. Whether an opinion is lay or expert depends on the source of the witness's knowledge. An expert opinion is based in whole or part on scientific, technical, or specialized knowledge while a lay opinion is based on the person's own perceptions. *State v. Kunze*, 97 Wn.2d 832, 850, 988 P.2d 977 (1999).

b. Contrary to the court's ruling admitting lay opinion testimony, the analysis of the cell phone data tower usage required expert testimony.

"[A] witness using telephone call detail data to locate someone must be qualified as an expert." *Stevenson v. State*, 112 A.3d 959, 967, *cert. denied*, 118 A.3d 863 (Md. 2015). Testimony "concerning how cell phone towers operate constitute[s] expert testimony because it involve[s] specialized knowledge not readily accessible to any ordinary person." *United States v. Reynolds*, 2015 WL 5315518, at *2 (6th Cir. 2015), quoting *United States v. Yeley–Davis*, 632 F.3d 673, 684 (10th Cir. 2011)).

Although no reported Washington decisions address the necessity for an expert to analyze cell phone tracking data, courts in other jurisdictions have ruled that mapping a phone location should be presented through an expert. *See, e.g., Wilder v. State*, 991 A.2d 172, 198 (Md. 2010). The Mississippi Supreme Court recently adopted the Maryland court's analysis as the "better approach," requiring "expert testimony to explain the functions of cell phone towers, derivative tracking, and the techniques of locating and/or plotting the origins of cell phone calls using cell phone records." *Collins v. State*, 172 So. 3d 724, 743 (Miss. 2015), citing *Wilder,* 991 A.2d at 198.

In *Wilder*, a detective obtained certified cellular phone records and used the code that corresponds to longitude and latitude of the cell tower coordinates to map the cell tower locations the phone accessed. 991 A.2d at, 194-95, 199. He testified as a lay witness. The *Wilder* Court concluded that his testimony implicated much more than reciting a telephone bill as a lay witness. *Id*. at 199. Mapping the locations of the towers used by the cell phone "clearly required" specialized knowledge not in the possession of the jurors. *Id*. at 200. The procedures used to "translate the cell phone records into locations is demonstrably based on [the witness's] training and experience." *Id*. Therefore, "he should have been qualified as an

expert" before giving this testimony. *Id*. The trial court "ought not have permitted Hanna to offer lay opinion testimony about the cell site location, and to describe the map created based on the cellular telephone records." *Id*. The erroneous admission of this testimony required reversal because it was key to placing the defendant at or near the scene of the shooting. *Id*.

Mr. Phillip objected to the admission of the cell phone tower maps and testimony. 10/17/13RP 82-122; 10/21/13RP 9, 12; 3/31/14RP 56. The State insisted that it was not offering cell tower mapping evidence through an expert witness. 10/17/13RP 126. It described witness Kenneth Carter as merely a records custodian. *Id*. Mr. Phillip objected to Mr. Carter's qualifications to interpret the cell tower data as well as his ability to serve as a custodian of the telephone records. *Id*. at 100-09; CP 523-25. The court admitted the testimony as a lay witness and overruled the defense objection. 10/21/13RP 12-13.

Mr. Carter testified at length about how cell phone towers operate based on his specialized knowledge. Mr. Carter was a "network manager" for AT&T, whose duties involved assessing whether cell towers had sufficient capacity for special events, dealing with customer complaints, and "sales support." 3/31/14RP 22-23. He uses the database SCAMP Web "to pin down a location of a call or a particular area" when a customer has

complaints. *Id*. at 28. He identified the SCAMP Web database report for Mr. Phillip's phone and explained in detail what the various entries mean. *Id*. at 47-51, 53, 57-77. The prosecutor had asked him to "dig a little deeper into these records," including "mapping this information." Id. at 55.

Mr. Carter explained how cell phones access towers and how towers receive and document cell phone signals. 3/31/14 RP 32-34. The cell phone company records the caller's orientation, meaning "where you're located or where the cell phone is located" and gives a direction so "we know what side of the tower you were placing your call." *Id*. at 35, 36-37. The tower a cell phone is linked to is "whatever you're closest to" when you make a call. *Id*. at 34.

Mr. Carter also explained that not all data is captured by the cell towers or the AT&T records. For example, the records register a long period of time at a particular tower when a person is merely connected to the internet, such as streaming music or watching YouTube. 3/31/14RP 77, 91-92. The initials SMS show a text message and whether it was sent or received at a certain time and location. *Id*. at 93-94, 100. But text messages records are "likely" to show only a single tower due even if the caller was moving and used multiple towers, because the records only register the original tower, not movement over time. *Id*. at 120-22. The

records will only show a transfer to different towers if it is a voice call, unlike data usage, Mr. Carter explained. *Id*. at 144.

Mr. Carter testified at length about maps showing Mr. Phillip's cell phone location throughout the day Mr. Frankel was killed and explained he had verified "that these maps are accurate," even though he had told the defense in an interview that he did not know the scientific basis for determining its accuracy or its level of accuracy. 3/31/14RP 83; CP 524. He placed red flags on maps to plot all data from the cell records for May 21 and 22, 2010, as well as green dots showing the location of each AT&T cell tower in the vicinity, demonstrating the towers that "this phone" did not use. 3/31/14RP 86-88. A blue arrow showed the particular tower being used by the phone at a certain point in time. *Id*. at 90. He documented how the phone was "traveling along the I-5 corridor" from Portland, heading north. *Id*. at 107. He also depicted the "particular orientation" of the cell phone as it connected to a tower. *Id*. at 110. This data means that the person using the phone, or the phone itself, is in a certain position from the tower, which Mr. Carter documented on the map. *Id*. at 111. At 7:57 and 8:52 p.m., the phone was using data from a certain cell tower in Auburn, near where Mr. Frankel lived, and the records showed the user was "due east" of this tower. *Id*. at 114-16. Data from a later call showed the "caller

was moving" south toward Portland. *Id*. at 117-18. The accuracy and reliability of this information depended on Mr. Carter's specialized knowledge of how a cell tower captures a signal from a phone.

Belying the State's insistence that Mr. Carter was not an expert witness, the prosecution elicited his opinion on the accuracy of the information in the records. In its direct examination, it asked his opinion about an "anomaly" in the records that indicated Mr. Phillip had traveled a great distance in a short amount of time. 3/31/14RP 138. It asked Mr. Carter whether, after "plotting these maps yourself . . . do you have an opinion as to its accuracy?" *Id*. at 139. Mr. Carter responded, "I consider this very accurate data." *Id*. It also asked Mr. Carter whether "the totality of the data" assisted him "in drawing an opinion" about a particular entry. *Id*. at 200. As this exchange demonstrates, Mr. Carter testified about his specialized, technical knowledge from analyzing the cell phone data as well as his opinion on the accuracy of the information mapping Mr. Phillip's location.

As in *Wilder*, Mr. Carter's testimony required "some specialized knowledge or skill that is not in the possession of the jurors." 991 A.2d at 200; *see also Collins*, 172 So.3d at 741 ("utilizing cell identification to locate a person does require specialized knowledge regarding such

technology"). Drawing an inference about a cell phone's location "without the aid of specialized experience or knowledge in the field of cellular communications comes too close to mere speculation." *Collins*, 172 So.3d at 742. Similarly, Mr. Carter's testimony was not based on information within the common knowledge of an ordinary person.

As a lay witness, his opinions based on specialized knowledge were inadmissible. ER 701. He served as an expert witness but the State failed to offer him as an expert under CrR 4.7 or prove his qualifications to testify as an expert under ER 702. *See State v. Cauthron*, 120 Wn.2d 879, 890, 846 P.2d 502 (1993).

Mr. Carter's qualifications as an expert were not established. His job title was "engineer" but he had not been to college and had no engineering degree. 3/31/14RP 148, 195. Before trial, the defense complained about his lack of expert qualifications and his inability to explain the accuracy of the cell tower information. CP 523-25. The State said its late disclosure of Mr. Carter was because he was mere "records custodian" of whom they knew nothing about. CP 510-11 (State); 10/17/13RP 123 (no background information available for Mr. Carter's training). The defense objection was overruled because the State called Mr. Carter a lay witness despite its reliance on his specialized knowledge

and opinions, enabling it to escape the difficulties it would have had qualifying him as an expert. CP 524-25.

c. The erroneous admission of cell phone tracking data by an unqualified witness is not mere harmless error.

Evidentiary errors require a new trial when "there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence.'" *Salas v. Hi-Tech Erectors,* 168 Wn.2d 664, 673, 230 P.3d 583 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)).

In the case at bar, the evidence tracking Mr. Phillip's cell phone was central to the State's case. When discussing whether the court should rule on the admissibility of this evidence before trial, the State conceded that if this evidence was inadmissible, the State would be "dead in the water" because it is "a major portion" of its evidence. 10/17/13RP 116. It agreed that the cell phone records play "extremely important role in this case" and the Mr. Carter's mapping was a focal point of the State's closing argument. 4/9/14RP 76-81, 143; CP 509. The only other evidence connecting Mr. Phillip to the incident was a small shred of mixed DNA from which Mr. Phillip merely could not be excluded as a donor. The cell phone evidence was the only other thread indicating Mr. Phillip had ever traveled to the vicinity of Mr. Frankel's apartment. Skirting its obligation

to provide notice and discovery, and hiding behind rules for a lay witness, placed the defense at a distinct disadvantage. Mr. Carter's opinion testimony was central to the State's case and its erroneous admission as testimony from a lay witness under ER 701 requires reversal.

4. Misconduct by the jurors denied Mr. Phillip a fair trial.

a. Several jurors violated the court's instruction by discussing the case prior to deliberations.

At the outset of trial, the court instructed the jury in great detail, "You must not discuss this case during the trial with anyone . . . ." 3/10/14RP 98. By "discuss," the court said it meant "no communication of any sort." *Id*. at 99. It further emphasized, "Please don't discuss this case with your fellow jurors until the time comes for you to begin your deliberations." Id. The court said, "we, again, need to underscore how important it is that you not do that." *Id*. Reasons for this ironclad rule are that it is "extremely important that you keep your minds open" until the close of the case, evidence will come "day by day" in small pieces, and jurors will not have the framework for weighing evidence until final instructions are delivered. *Id*. at 100. The jurors must "work together on this decision when the time for deliberations does arrive." *Id*. If anyone tries "to talk to you about this case outside the courtroom," the jurors should end the conversation and inform the bailiff. *Id*. at 100-01. These

instructions "will continue to apply to conduct throughout the trial . . . whether or not I specifically repeat or refer to them again." *Id*. at 104. "Throughout this trial, you should be impartial and you should permit neither sympathy nor prejudice to influence you." *Id*. at 106.

Despite these explicit instructions, near the end of the trial several jurors complained to the bailiff that Juror 10 had been discussing the case and acting inappropriately. 4/8/14RP 137-38. During individual questioning the court discovered many jurors had been present during conversations about the case before deliberations. 4/9/14RP 5-47. Jurors 1, 2, 6, and 15 said two other jurors, Janey and Eileen, had speculated about aspects of the case and strategy, and gave their impressions of witnesses. *Id*. at 7-8, 11-12, 24, 44-45., Juror 5 had heard "some talk about witnesses" from unnamed jurors. *Id*. at 21-22. Juror 4 had heard Juror 10 discuss the demeanor and attractiveness of a prosecution witness. *Id*. at 20. Juror 8 (who was Eileen) said they had discussed the emotional impact of hearing the details of the case. *Id*. at 30. Juror 9 said Juror 10 had speculated about whether there had been a mistrial. *Id*. at 32. Juror 10 (Janey) denied hearing anyone discuss the case. *Id*. at 35. Juror 12 described a number of jurors going to The Ram after court where the group talked about problems sleeping and general concern about

deliberating. *Id*. at 39-41. No other juror mentioned this trip to The Ram. Juror 15 named a third juror, Leah, as also speculating and offering impressions about the case. *Id*. at 44-46. Juror 15 admitted being "uncomfortable" with "many things" said by other jurors before deliberations and there were "three people that drove those conversations the most." *Id*. at 46-47. Each juror claimed they would not be influenced by these various juror discussions.

The court dismissed Juror 10, who had also been accused of doing a Google search for the case. *Id*. at 48-50. However, defense counsel complained it was "clear" many jurors were not divulging everything that happened and "there is a lot of inconsistencies among the statements of the jurors on these same topics." *Id*. at 49. For example, Juror 15 "seemed very uncomfortable with giving details, and mentioned that not just Juror No. 10, but 8 and 9, as well" were driving discussions about the case. *Id*. The defense asked for a mistrial. *Id*. at 49-50. The court ruled there was not "enough here to grant a mistrial at this point." *Id*. at 56.

b. The jurors' violation of the court's instructions is presumed prejudicial and requires a new trial.

The right to be tried by an impartial jury is fundamental to the fairness of the trial and explicitly protected by the Sixth Amendment and Washington Constitution. U.S. Const. amend. 6; Const. art. I, §§ 21, 22.

This right "means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Tigano,* 63 Wn.App. 336, 341, 818 P.2d 1369 (1991), quoting *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989) .

A juror's misrepresentations in response to questions posed to them by the court or parties are misconduct. *Robinson*, 113 Wn.2d at 159. A jury commits misconduct when it considers extrinsic evidence. *State v. Balisok,* 123 Wn.2d 114, 118, 866 P.2d 631 (1994) (quoting *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990)). That is especially true where the court's instructions expressly prohibit that consideration. *Tigano*, 63 Wn. App. at 341.

Jury misconduct is presumed prejudicial. *State v. Boling*, 131 Wn.App. 329, 333, 127 P.3d 740 (2006). To overcome this presumption the State must prove beyond a reasonable doubt the misconduct, objectively viewed, could not have affected the jury's verdict. *Id*. (citing *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)). Any doubt whether it could have affected the verdict must be resolved against it. *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

Here, the court unambiguously instructed the jurors that their conversations could not involve discussing any aspect of the case with

other jurors before deliberations. But several jurors disregarded these instructions and their conversations were overheard by almost every other juror. While the jurors told the court they would not be influenced by these inappropriate conversations, they also downplayed the out-of-court conversations. Only one juror mentioned a group restaurant outing where they discussed being jurors on the case. The court had told the jurors not talk about the case because of the subconscious effect such conversations have when factual record and legal framework have not been provided.

The evidence was far from overwhelming. The jurors were unable to reach a verdict after the first trial. The second jury deliberated for just over one day, despite weeks of testimony. CP 976-87 (clerk's minutes at 66-68). Some jurors likely made up their minds before deliberations started and unquestionably many violated the court's prohibition on discussing the case prior to deliberations. Their presumptively prejudicial disregard of the court's instructions requires reversal and a new trial.

5. The court impermissibly shackled Mr. Phillip's legs and hands during sentencing despite praising his exemplary in-court behavior over the course of two lengthy trials.

It is well settled that absent some compelling reason for physical restraint, defendants must appear in court free of prison garb and shackles. *See Estelle v. Williams,* 425 U.S. 501, 504, 96 S.Ct. 1691, 48 L.Ed.2d 126

(1976); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *State v. Rodriguez*, 146 Wn.2d 260, 263-64, 45 P.3d 541 (2002); *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837 (2000); *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999); *State v. Hartzog*, 96 Wn.2d 383, 635 P.2d 694 (1981).

The constitutional right "to appear and defend in person" means that a person must "appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty." *State v. Williams*, 18 Wash. 47, 51, 50 P. 580 (1897); Const. art. I, § 22. Thus Washington courts have long recognized that the use of restraints may affect a criminal defendant's constitutional rights to be presumed innocent, to testify on one's own behalf, and to confer with counsel. *Hartzog*, 96 Wn.2d at 398.

It is impermissible for a court to simply grant a jail's request to shackle the hands and legs of a defendant. *State v. Walker*, 185 Wn.App. 790, 796-97, 344 P.3d 227, *rev. denied*, 355 P.3d 1154 (2015). Instead, the court is "required to balance the need for a secure courtroom with the

defendant's presumption of innocence, ability to assist counsel, the right to testify in one's own behalf, and the dignity of the judicial process." *Id*.

The *Walker* Court noted that a judge considering whether to restrain a defendant should assess factors including: the seriousness of the charge, as well as his temperament, age, past record, and threatening conduct toward others. 185 Wn.App. at 801. Any decision to use restraints should occur "only after conducting a hearing and entering findings into the record that are sufficient to justify the use of restraints." *State v. Damon*, 144 Wn.2d 686, 691-92, 25 P.3d 418 (2001). It is an abuse of discretion to rely on the jail's concerns to impose restraints without weighing the court's obligations. *Id*. at 692.

In *Walker*, the court found sufficient reason existed to keep him restrained at sentencing due to his "unique circumstances." 185 Wn.App. at 793, 800. He had a pending felony assault case and prior convictions for violent crimes. *Id*. at 801-02. He was affiliated with a street gang and had fought with or threatened other inmates. *Id*. at 802. Similarly, in *State v. Afeworki*, _Wn.App. _, _ P.3d _, 2015 WL 4724827, * 14 (2015), a *pro se* defendant was restrained during trial. The judge's decision to apply restraints was supported by the defendant's "unruly temperament" in court,

including his "rude and aggressive manner to the court" and regular disruptions that required doubling jail security in the courtroom. *Id*.

Mr. Phillip appeared in court many times over more than three years of pre-trial proceedings and the judge characterized his behavior as "always exemplary." 6/27/14RP 23. The judge noted he had no criminal record whatsoever, had never been in trouble before, and served his country in Iraq. *Id*. at 58. Even the State conceded Mr. Phillip's record in jail was "pretty good behavior wise" over a long pre-trial incarceration. *Id*. at 13. The only reason the State or the court could cite as a basis to shackle his legs and hands was that he had been convicted of a serious crime. *Id*. at 19. 24. Mr. Phillip had been convicted two months earlier and his behavior had not changed in that time. *Id*. at 21-22.

Unlike *Walker*, Mr. Phillip had no past record or pending cases. His behavior was "exemplary" according to the judge. It was the jail's blanket policy to restrain every jail inmate once convicted and its request was not specific to Mr. Phillip. 6/27/14RP 21.

The court did not enter the required findings of fact justifying the restraints. *Id*. It applied the wrong legal standard, faulting the defense for not proving it should remove the shackles rather than requiring the State to justify them. 6/27/14RP 23; *see Walker*, 185 Wn.App. at 800. It did not

acknowledge Mr. Phillip's "right to appear free from restraints." *Walker*, 185 Wn.App. at 800. It did not find Mr. Phillip's behavior posed a threat to courtroom security or safety and the State did not meet its burden of proving restraints were "necessary to prevent injury to persons in the courtroom, disorderly conduct at trial, or escape." *Id*.

Sentencing is a critical stage of the proceedings. *State v. Everybodytalksabout*, 161 Wn.2d 702, 709, 166 P.3d 693 (2007). Mr. Phillip was unable to stand so he could address the court; the court warned him the leg shackles could make him fall over. 6/27/14RP 24. This led to his declining the opportunity to speak his own behalf. CP 850-51; 6/27/14RP 57. He received a sentence near the high end of the standard range, far closer to the maximum the State sought and despite his lack of criminal history and his military service, which the court agreed should mitigate his sentence. 6/27/14RP 27, 58-60. The court abused its discretion by ordering Mr. Phillip shackled at sentencing. *Salas*, 168 Wn.2d at 668–69. He is entitled to a new sentencing hearing.

F. CONCLUSION.

Mr. Phillip's conviction should be reversed due to the requirement of excluding the unlawfully gathered evidence and the violation of the attorney-client privilege. Alternatively, he is entitled to a new trial due to the improper admission of cell phone tracking opinion testimony and a new sentencing proceeding at which he is accorded the freedom and dignity he is entitled at this critical court hearing.

DATED this 19th day of November 2015.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. WILLIAM PHILLIP, JR., Defendant,	No. 10-1-09730-5 KNT WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO SUPPRESS PHYSICAL, ORAL OR IDENTIFICATION EVIDENCE

A hearing on the admissibility of physical and oral evidence was held on October 15th and 17th, 2013, before the Honorable Judge Andrea Darvas. (Judge Darvas further clarified her rulings throughout the trial in light of requests from both parties.)

After considering the evidence submitted by the parties, to wit: the certification for determination of probable cause, affidavits for search warrants, declarations, and transcripts (all attached to the parties' briefing) and considering the briefing and hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

A. THE UNDISPUTED FACTS:

1. Seth Frankel was murdered sometime between 8:30 p.m. on May 21, 2010 and 4:30 a.m. on May 22, 2010. His body was found in his residence in Auburn at about 11:45 a.m. on

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May 22, 2010. It was obvious that Frankel had been murdered and the Auburn Police Department (APD) began investigating the homicide.

2. On May 27, 2010, the APD sought a search warrant for, *inter alia*, the defendant's cellular phone records – including subscriber information, billing records, cell tower site records, text messages, and call logs – between April 1, 2010 and May 26, 2010. The Affidavit for Search Warrant was signed by APD Detective Anna Weller. The Honorable Judge Brian Gain approved the warrant and the records were subsequently obtained from AT&T.

3. On June 22, 2010, the APD sought a search warrant for the defendant's apartment, motorcycle, and person. The Affidavit for Search Warrant was signed by Detective Weller and the search warrant was approved by the Honorable Judge Richard Baldwin of the Multnomah County (Oregon) Circuit Court. The warrant was served later that day.

    a. Detective Weller's affidavit contained information obtained via the May 27, 2010, warrant for the defendant's cellular phone records.

    b. During the service of the search warrant, APD officers photographed the defendant's person, motorcycle, and apartment. Various items, including the defendant's cellular phone and several notebooks containing his writings, were also seized under the authority of the warrant.

4. On November 5, 2010, the APD sought a search warrant to obtain a sample of the defendant's DNA via a buccal swab. The Affidavit for Search Warrant was signed by Gresham (Oregon) Police Department Detective Ryan Gleason. The warrant was approved via an (unidentified) judge of the Multnomah County Circuit Court.

    a. Detective Gleason's affidavit contained information obtained via the May 27, 2010, warrant for the defendant's cellular phone records. Detective Gleason's affidavit also referred to the fact that a warrant had been obtained for the defendant's apartment, motorcycle, and person. However, the affidavit did not contain any information regarding anything that had actually been found in the search of the defendant's apartment, motorcycle, and person.

    b. A buccal swab was obtained from the defendant under the authority of the warrant.

5. The defendant was charged with Murder in the First Degree on December 9, 2010. After being extradited from Oregon, the defendant was arraigned on March 21, 2011.

6. On January 25, 2012, the APD sought a search warrant to forensically analyze the defendant's cellular phone (seized in June of 2010). The Affidavit for Search Warrant was signed by APD Detective Jason Blake. The search warrant was approved by the Honorable Judge Rick Bathum.

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a. Detective Blake's affidavit contained information obtained via the May 27, 2010, warrant for the defendant's cellular phone records and the November 5, 2010, warrant for the defendant's DNA.

b. Detective Blake's affidavit referred to the fact that a warrant had been obtained for the defendant's apartment,.motorcycle, and person. The affidavit indicated that the cellular phone to be searched had been seized under the authority of that warrant. However, the affidavit did not contain any further information regarding anything else that had been found in the service of this warrant.

c. Pursuant to the warrant, the memory of the defendant's cell phone was extracted and forensically analyzed later that day.

7. On March 22, 2012, the APD sought a second search warrant for the same cellular phone records of the defendant that had been obtained via the May 27, 2010, warrant. The Affidavit for Search Warrant was again signed by Detective Weller and again approved by the Honorable Judge Brian Gain.

a. In her March 22, 2012, affidavit, Detective Weller incorporated by reference the facts laid forth in her May 27, 2010, affidavit. Detective Weller also included additional information that was known to her on May 27, 2010, but that she had failed to include in the earlier affidavit.

b. Detective Weller acknowledged that this was a second warrant for the same information and that the documents being requested had already been provided by AT&T. Detective Weller also acknowledged that this second warrant was being sought at the suggestion of the Deputy Prosecuting Attorney assigned to the case because of her failure to include all of the information known to her in the first warrant affidavit.

c. Detective Weller did not include any information gleaned from the previously obtained records. Nor did she include any information that had been learned by the APD since May 27, 2010.

d. After Judge Gain approved the March 22, 2012, warrant, records containing the information sought were re-obtained from AT&T (i.e. the APD went through the normal warrant process to obtain a second copy of the documents from AT&T).

8. For the purposes of the CrR 3.6 hearing, the general facts of the case – including those detailing the course of the APD investigation – are summarized in the Certification for Determination of Probable Cause prepared by Detective Blake and the Affidavits for Search Warrants prepared by Detective Weller, Detective Blake, and Detective Gleason (referenced above).

a. These documents were attached as appendices to the CrR 3.5 and CrR 3.6 briefing filed by the parties.

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b. Except as noted below (and/or in its oral findings and conclusions), the court incorporates by reference the summary of facts contained in these documents.

B. AREAS OF DISPUTE:

1. Disputes As To Factual Issues:

a. What inferences could reasonably by drawn by the reviewing magistrate from the recitation of facts contained in Affidavits for Warrant signed by Detective Blake, Detective Weller, and Detective Gleason.

i. In its briefing, the State set forth both the facts contained in each affidavit and all of the inferences that it argued could be reasonably be drawn from them. The defendant did not challenge the truth of any of the facts, but argued that some or all of the inferences drawn by the State were not reasonable.

b. Whether the decision of the State and the APD to seek a second warrant for the defendant's cellular records was motivated by what was found as a result of the first warrant for the same records (within the meaning of the independent source doctrine).

i. The defendant argued that the State's decision to seek the second warrant was motived by what it discovered through the first one. The State argued that the fact that the APD had initially sought this evidence via a warrant (whether that first warrant was ultimately deemed valid or not) showed that the State was seeking to obtain these records before knowing what information they would ultimately contain. The State argued that this conclusively established that the State's second, prophylactic warrant was not motivated by any improperly obtained information (within the meaning of the independent source exception to the exclusionary rule).

c. Whether, in their Affidavits for Search Warrants, Detective Blake and/or Detective Weller intentionally or recklessly made misstatements or omissions of fact with the intent to misrepresent the truth to the reviewing magistrate or with a reckless disregard for the truth.

i. The defendant argued that the failure of Detective Blake and Detective Weller to include in their affidavits certain comments made by Bonny Johnson in her interviews with law enforcement constituted an intentional or reckless omission made with the intent to misrepresent the truth to the reviewing magistrate or with a reckless disregard for the truth. The State argued that: 1) the non-inclusion of these statements did not constitute an "omission" within the meaning of Franks v. Delaware; 2) even if it was an

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omission, the defendant had failed to establish that it was intentional or reckless; and 3) even if the omission was reckless or intentional, the defendant had failed to establish that the detectives had acted with the intent to misrepresent the truth or with a reckless disregard for the truth.

2. Disputes As To Legal Issues:

   a. Whether the first search warrant for the defendant's cellular phone records was supported by probable cause.

   b. Whether the search warrants for the defendant's cellular phone records were overbroad.

   c. If the first search warrant for the defendant's cellular phone was improperly authorized, whether the evidence found under the authority of the subsequent warrants should be excluded as the fruits of the poisonous tree of the first warrant.

      i. The defendant argued that all of the subsequent warrants (and the evidence they uncovered) generally constituted the fruits of the first warrant simply because the investigative decision to seek those warrants stemmed from the information received via the (invalid) first warrant. The State argued that the mere fact that subsequent warrants came later did not in and of itself establish that they were tainted by the first warrant. Rather, the State argued, the proper method for determining whether the subsequent warrants was invalid would be to excise the portions of the affidavits containing information obtained via the first warrant and then to determine if the affidavits still contained sufficient probable cause to support the warrants.

   d. Whether the subsequent warrants were supported by probable cause.

      i. The defendant argued that, if information obtained via the first search warrant was excised from the affidavits for the subsequent warrants, there was insufficient probable cause for the warrants. The State argued that, even with the information excised from the affidavit, there was sufficient probable cause for the warrant.

   e. If the first search warrant for the defendant's cellular phone was improperly authorized, whether the evidence found under the authority of the second, prophylactic warrant for the defendant's cellular phone specifically constituted the fruits of the poisonous tree of the first warrant.

      i. The defendant argued that the evidence obtained via the second, prophylactic warrant for the defendant's cellular phone records should be excluded because it was a law enforcement search for the same records that had previously been improperly obtained. The State argued that the

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records (obtained via the second warrant) should not be excluded because they fit within the independent source exception to the exclusionary rule.

f. If the affidavits signed by Detective Weller and Detective Blake omitted facts, were the omissions material (within the meaning of Franks v. Delaware).

C. FINDINGS AND CONCLUSIONS AS TO THE AREAS OF DISPUTE:

1. Findings As To Disputed Factual Issues:

a. The court finds that the inferences that the State argued could be drawn by the reviewing magistrate from the facts in the search warrant affidavits were reasonable. The court specifically adopted by reference the recitation of facts and inferences contained in the State's briefing as part of its rationale for its factual findings and legal conclusions (below).

b. The court finds that the additional facts that were in the second, prophylactic warrant for the defendant's cellular phone records were known to the police at the time of the application for the first warrant, but were simply inadvertently omitted in the rush to quickly obtain a warrant to try to solve a serious crime. The court finds that, particularly given that the police initially sought this information via a search warrant (albeit a potentially invalid one), the motive to seek the second warrant was not tainted by the information contained in the phone records obtained via the first warrant. The court finds, therefore, that the decision to seek the second warrant was not motived by what was found in any earlier invalid search (within the meaning of the independent source doctrine).

c. The court finds that there was no indication that any omissions in the detectives' affidavits were either intentional or reckless. The court finds that there was no indication that any omissions were made with either the intent to misrepresent the truth to the reviewing magistrate or with a reckless disregard for the truth.

d. The court incorporates by reference its oral findings at the hearing and any clarification of its findings made during the course of the trial.

2. Conclusions As To Disputed Legal Issues:

a. The court finds that the first search warrant for the defendant's cellular phone records was not supported by probable cause because the facts in the affidavit in support of the warrant (and the reasonable inferences drawn from them) were insufficient for a reasonable person to conclude that there was a probability that the defendant was involved in Frankel's murder.

b. The court finds that the search warrants for the defendant's cellular phone records were not overbroad.

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c. The court finds that the investigative decisions to seek the subsequent warrants for other evidence from other sources were not the fruit of the poisonous tree of the results of the first warrant. The court finds that, regardless of whether the defendant's cellular phone records were obtained and regardless of what they showed, the APD would have continued to pursue its investigation of the defendant as a suspect in Frankel's murder. Therefore, the invalidity of the first warrant did not taint the APD's decision to seek these subsequent warrants.

d. The court finds that the evidence obtained via the second, prophylactic warrant for the defendant's cellular phone records fits within the independent source exception to the exclusionary rule.

e. The court finds that the subsequent warrants were supported by probable cause. The court finds that, even with the information obtained via the first search warrant excised, the facts in the affidavits in support of the subsequent warrants (and the reasonable inferences drawn from them) were sufficient for a reasonable person to conclude that there was a probability that the defendant was involved in Frankel's murder.

f. The court finds that any facts omitted from the affidavits signed by Detective Weller and Detective Blake were not material (within the meaning of Franks v. Delaware) because they were either facts that would be reasonably presumed or inferred by the reviewing magistrate or were facts that would not change the analysis of a reasonable magistrate.

g. The court incorporates by reference its oral conclusions at the hearing and any clarification of its conclusions made during the course of the trial.

D. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:

1. Evidence obtained solely via the May 27, 2010, search warrant for the defendant's cellular phone records on May 27, 2010 is suppressed because the court finds insufficient probable cause to support authorization of the warrant by the reviewing magistrate. The fact that the APD sought this warrant is also suppressed.

2. The court finds no basis to suppress the subsequent warrants or the evidence found under their authority. Therefore, both the fact that the APD sought the subsequent warrants and the substantive evidence found via these warrants is admissible.

3. Because there is no basis to suppress the evidence obtained via the March 22, 2012, search warrant for the defendant's cellular phone records, that evidence is admissible despite the fact that it was also obtained via the May 27, 2010, search warrant. However,

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in presenting any such evidence, the State must comply with Conclusion of Law D.1. (above).

4. The court incorporates by reference its oral conclusions of law at the hearing and any clarification of its conclusions made during the course of the trial.

Signed this 27 day of June, 2014.

JUDGE

Presented by:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72120-8-I
v.	)	
	)	
WILLIAM PHILLIP, JR.,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **REVISED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] WILLIAM PHILLIP, JR. 375763 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF NOVEMBER, 2015.

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