Supreme Court No. 95661-8
COA 34174-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES KUNEKI,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY

The Honorable Randall Krog
The Honorable Brian Altman

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

CONSTITUTIONAL PROVISIONS

UNITED STATES SUPREME COURT CASES

CASES FROM OTHER STATE JURISDICTIONS

STATUTES AND COURT RULES

A. IDENTITY OF PETITIONER

Charles Kuneki was the appellant in Court of Appeals No. 34174-7-III, and is the Petitioner herein.

B. COURT OF APPEALS DECISION

Mr. Kuneki seeks review of the Court of Appeals decision issued February 13, 2018. Appendix A (Decision).

C. ISSUES PRESENTED ON REVIEW

1. Whether the court erroneously overruled Mr. Kuneki's hearsay objection to the testimony of WSPCL forensic scientist Heather Pyles.

2. Whether Mr. Kuneki's confrontation clause rights under the Sixth Amendment to the United States Constitution[1] and Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) were violated when Pyles testified to expert determinations reached by the non-testifying analyst, Wendy Cashawbara.

3. Whether the confrontation clause issue was waived.

D. STATEMENT OF THE CASE

According to Deputy Douglas Farris, 25 year old Richard Maine, an inmate at the Klickitat County Jail, approached him in early August

[1] The Sixth Amendment provides, "the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"

of 2014, wanting to be cellmates with the defendant, Mr. Charles Kuneki. RP 403; RP 458-59.

Less than a week later, Maine alleged that Mr. Kuneki had raped him in their cell, forcing intercourse twice by threatening to kill Maine with a pencil if he resisted. CP 6; RP 326-28, 356-57, 365-66. Mr. Kuneki was charged with first degree rape (sexual intercourse by forcible compulsion with threat to use a deadly weapon) and harassment-threat to kill; and a further set of first degree rape and harassment charges for the second set of allegations, based on the affidavit of probable cause. CP 0-2, 3-7; RCW 9A.44.040; RCW 9A.46.020(1)(b).

Mr. Kuneki refused to take a plea offer "[o]f any kind" and proceeded to trial, testifying, over his admitted embarrassment, that there was one instance of intercourse and it was consensual. RP 23; RP 462-67. The jury, which unsuccessfully asked the court if it could see Mr. Maine's written statements during deliberations, acquitted Mr. Kuneki of the first set of charges. CP 106-07 (judgments of acquittal on rape count and harassment); CP 5. However, the jury found Mr. Kuneki guilty of the second set of harassment and rape counts, although failing to reach any verdict on a deadly weapon enhancement. CP 90, 92, 93.

On appeal, the Court of Appeals, Division Three, reversed the harassment conviction, holding that Mr. Kuneki waived any

confrontation clause error, that there was no violation of the confrontation clause or hearsay error, and that any confrontation clause or hearsay error was harmless.

This was a very close case and the uncomfortable evidence of semen and DNA inside Maine's anus swayed the jury, just as the prosecutor hoped it would. The evidence strongly pointed toward a fabrication by the complainant. Charles Kuneki testified; he had developed a relationship with Richard Maine, a fellow inmate at the Klickitat County Jail. After a period of time, Mr. Kuneki felt that Maine had a good background, and so he promised him employment and a place to live after their upcoming release. RP 459-60. Mr. Maine had previously made fishing nets on the Columbia River, and he had a small business and several dogs that he needed help with. RP 455, 460-61.

Although it was embarrassing for him to say in front of the jury, Mr. Kuneki did become close with Mr. Maine. RP 462. At some point, Maine asked Kuneki to have sex with him, and this happened once. RP 465-66. There was no rape and no threat; at one point, Mr. Kuneki said, over continued embarrassment, that Mr. Maine said to "go slower." RP 494. In addition, because of their relationship and the way Maine acted with other inmates, "the whole pod kind of knew about it." RP 464-66.

However, Mr. Kuneki later felt that Mr. Maine had been lying and dishonest, and they had arguments, although Mr. Kuneki at the same time tried to stick up for Mr. Maine when other inmates felt he had started causing problems. RP 467-68. Mr. Kuneki also learned that Maine might have drug issues, the relationship soured, and after an AA (Alcoholics Anonymous) meeting and an argument, he told Mr. Maine that he could not go through with his offer of a place for Maine to live. Soon after, Maine accused him of rape. RP 467-68; RP 482-89. Another inmate, Andrew Kahklamat, testified that he spoke with Maine about the incident and Maine was laughing and joking about it. RP 412-15. Mr. Kuneki testified in some detail that Mr. Maine had frequently acted sexually toward not only himself, but other inmates. RP 339-45.

Following the verdict, the trial court sentenced Mr. Kuneki to a 318 month minimum term. CP 94-96; RP 566.

E. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY EVIDENCE OF SEMEN IN THE ACCUSER'S ANUS AND A DNA PROFILE MATCH, WHICH ALSO VIOLATED MR. KUNEKI'S CONFRONTATION RIGHTS, REQUIRING REVERSAL IN A CLOSE CASE WHERE THE PROSECUTION INSISTED ON ITS NEED FOR THE SEMEN AND DNA EVIDENCE TO PERSUADE THE JURY.

In this very close case where Mr. Kuneki testified in his own defense and provided a resoundingly viable account of events and facts

that demonstrated a motive to fabricate by Mr. Maine, where the evidence significantly pointed to reasons why the jury found a lack of credibility of the complainant Maine as to the series of claims, and where the jury found Mr. Kuneki guilty on only one of the two rape allegations, the hearsay and confrontation clause errors, infra, were not harmless, even though the defense was consent. CP 5, 89-93.

1. Review is warranted on multiple grounds and issues. The Court of Appeals decision warrants review under RAP 13.4(b)(3), because a significant constitutional question regarding the confrontation clause is presented under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and State v. Lui, 179 Wn.2d 457, 476, 315 P.3d 493 (2014). Further, although it is Mr. Kuneki's primary argument that his objections that the witness "did not do the testing" squarely preserved the confrontation clause issue, see infra, the question whether the confrontation clause issue may be appealed as manifest constitutional error under RAP 2.5(a)(3) involves a significant constitutional question, a decision below that is in conflict with decisions of this Supreme Court including Lui, a decision in conflict with other decisions of the same Division, and a split of authority amongst the Divisions, as argued infra. RAP 13.4(b)(1), (2) and (3). Regarding the hearsay issue, review is warranted because the Court of Appeals decision

is in conflict with decisions of this Court, including In re Detention of Marshall, 122 Wn. App. 132, 144-46, 90 P.3d 1081 (2004) (discussing expert *reliance* on hearsay admitted for that purpose, under ER 703/705), as argued infra.

2. The State insisted on the need for testimony regarding "semen" and testimony regarding DNA. The Court of Appeals was wrong to dismiss this issue as immaterial or harmless from an evidentiary perspective. Decision, at p. 16. Prior to trial, the defense made clear that it would be arguing that there was a single instance of consensual intercourse between Mr. Kuneki and Mr. Maine, with no threat involved. RP 73-74, 105-06 (pre-trial hearings). The trial court, given this defense, inquired of the prosecutor as to "why we need all the forensic evidence" of DNA and of "Mr. Kuneki's semen in the rectum of the alleged victim." RP 217. When the court suggested a stipulation to the fact of intercourse, and the defense offered to stipulate, the prosecutor refused, stating the evidence was necessary for victim corroboration and credibility. RP 217-18.

In opening statement, the State told the jury that swabs taken from Mr. Maine at the hospital contained "the defendant's semen from the anus of Mr. Maine," according to an analysis conducted by the Washington State Patrol Crime Laboratory. RP 198 (opening

statement); RP 306, 314-15. The prosecutor also told the jury that WSPCL had determined that Mr. Kuneki's DNA was present on the swabs. RP 198-99; RP 316.

3. <u>The trial court abused its discretion in overruling Mr. Kuneki's hearsay objections, and violated his 6th Amendment confrontation clause rights, by permitting Heather Pyles to testify about the absent forensic scientist's semen, sperm and DNA determinations.</u> The witness who testified was not the originally announced witness. Prior to trial, the prosecutor told the court and counsel that he would produce Wendy Cashawbara, of the Washington State Patrol Crime Laboratory, who would testify regarding the results of the DNA testing that she had conducted. RP 65 (prosecutor, referring to witness list). The court confirmed with defense counsel that he was informed of Cashawbara's expected forensic testimony. RP 66, 99. However, at trial, the prosecutor orally indicated that the witness instead was one Heather Pyles; Pyles stated that Cashawbara had taken a better forensics job on the east coast. RP 101-02, 304, 309-10.

(i) Continuing objection. Over multiple objections, the trial court permitted Heather Pyles to testify about Cashawbara's (1) semen and sperm identification in Mr. Maine's anus, and (2) Cashawbara's DNA profile match conclusions. Pyles first stated that the laboratory had

received physical evidence in this case. RP 309. Pyles then began testifying about what Cashawbara, who she described as "the analyst that performed the DNA analysis in this case," had determined from that evidence. RP 304, 309. In aid of an objection, defense counsel questioned Pyles several times on *voir dire* and then raised hearsay objections and multiple objections that this witness "didn't do the testing" and was simply testifying to *Cashawbara's* report. RP 310-12.

When overruling the fourth of defense counsel's five objections that Pyles "didn't do the testing" and "didn't do" the DNA profiling, the court noted that counsel was making a proper record for appeal, effectively granting defense counsel a standing objection. RP 310-312. The court later allowed further defense *voir dire* questioning in which counsel continued to make a record, and in which Pyles admitted, "I did not do the testing." RP 314.

In overruling the defense objections, the trial court found that witness Pyles had not conducted the forensic testing, but her testimony was admissible nonetheless:

> She agrees she did not do the testing so she's responding as an expert in this field to a report [a] colleague of hers produced.

RP 312. Pyles then stated that she had "reviewed the data and independently came to the same conclusion as Wendy did," but counsel

again objected, because it clearly remained the case that Pyles had not any of the testing. RP 312.

(ii) Appealability. Mr. Kuneki objected to the admission of Ms. Pyles' testimony, and the Court of Appeals was wrong to hold that the objection was not understood as a confrontation challenge. Decision, at pp. 12-15. In the context of the *voir dire* questioning, the argument on the objections, and the court's ruling, it is clear that the court understood the objections to be based not just on the hearsay rule, but also the right to confront the WSPCL analyst who did do the testing. See State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (objection must be specific enough to place the issue before the trial court and preserve the issue for appeal), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). An appellate court may consider the propriety of a court's ruling where the specific basis for the objection is "apparent from the context." State v. Braham, 67 Wn. App. 930, 934–35, 841 P.2d 785 (1992); ER 103(a)(1).

Further, a violation of the right to confront witnesses is constitutional error which, if manifest, the reviewing court may consider for the first time on appeal. RAP 2.5(a)(3); State v. Bates, 195 Wn. App. 65, 73, 383 P.3d 529, 533 (2016). Here, it is clear and identifiable within the record that Mr. Kuneki was deprived of his ability to cross-examine

the forensic scientist, Cashawbara, who determined the presence of semen, and who concluded there was a DNA profile match, which the record shows was evidence the State determined it crucially needed in order to convict. See State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007); State v. Hart, 195 Wn. App. 449, 459 and note 3, 381 P.3d 142, 146 (2016), review denied, 187 Wn. 2d 1011, 388 P.3d 480 (2017) (noting that this Supreme Court has held that a defendant may raise an alleged confrontation violation for the first time on appeal if the defendant meets the requirements of RAP 2.5(a)(3)) (citing State v. Hieb, 107 Wn.2d 97, 104–108, 727 P.2d 239 (1986)). RP 217-18.[2]

(iii) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted, and it is not admissible. ER 801(c); ER 802; ER 803. Following Mr. Kuneki's hearsay objection below, the prosecutor offered no hearsay exception that might apply, but the trial court overruled the objection. The trial court ruled that Pyles was "responding" to a report a colleague of hers produced. RP 312. This is not a hearsay exception, much less one allowing admission of a matter for the purpose of establishing its truth. See, e.g., In re Detention of

[2] The standard of review for a hearsay challenge is an abuse of discretion, and a confrontation clause challenge to the admission of evidence is reviewed *de novo*. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

Marshall, 122 Wn. App. 132, 144-46, 90 P.3d 1081 (2004) (discussing expert witness *reliance* on hearsay admitted solely for that purpose, under ER 703 and 705).

The Court of Appeals was wrong when it held that this witness testified to her own independent conclusions in a manner that resulted in no viable hearsay issue. Decision, at pp. 15-16. Further argued herein, Pyles did not testify to Cashawbara's conclusions as matters on which she 'relied' for expert testimony by her. She related the factual assertions of Cashawbara that Cashawbara made out of court, and she did not offer her own conclusions, only her assessment that the testing process met the laboratory's protocol and procedural standards.

As shown by the entirety of Pyles' testimony in the case and the manner in which the presence of semen, and the DNA profile match, was employed by the prosecutor in closing, this testimony was erroneously offered and admitted for the truth of the matter asserted. The trial court abused its discretion. State v. Brown, 145 Wn. App. 62, 73-75, 184 P.3d 1284 (2008) (expert could not "relay" the opinion of another nontestifying expert without running afoul of the hearsay rule) (citing State v. Nation, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002)).

(iv) Pyles improperly communicated the non-testifying Cashawbara's testimonial, scientific conclusions. Pyles' testimony

was inadmissible under the Sixth Amendment's confrontation clause, pursuant to Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In confrontation analysis, the State bears the burden of proving that challenged statements are non-testimonial. State v. Lui, 179 Wn.2d 457, 476, 315 P.3d 493 (2014); State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009).

The Sixth Amendment confrontation clause provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. Const., amend. 6. The confrontation clause prohibits the admission of testimonial statements against a defendant unless the witness making the statements appears at trial or the defendant has a prior opportunity for cross-examination. Melendez–Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). A witness is a declarant who makes a factual statement to a tribunal. State v. Lui, 179 Wn.2d at 482. And, if the witness's statements help to identify "or inculpate the defendant," then the witness is a "witness against" him. Lui, at 482.

Thus in Melendez–Diaz, the Supreme Court found a confrontation violation in the admission of a document containing statements that a substance was "cocaine," where the laboratory analyst did not testify. Melendez–Diaz, 557 U.S. at 308, 310-11. The Court of Appeals was

significantly wrong when it held that the witness testified to her own independent conclusions in a manner that eviscerated concerns of confrontation clause problems. Decision, at pp. 14-15. Witness Pyles simply relayed to the jury that Wendy Cashawbara had analyzed the swabs from Mr. Maine's anus and determined that semen and sperm was present, and then related Cashawbara's further determination that there was a DNA profile match between matter on the anal swabs and Mr. Kuneki's reference sample. RP 312-16. Although the documentary report prepared by Cashawbara was not admitted, its assertions, through Pyles, were an affidavit-like, formal attestation to facts for the trial; Pyles simply related its contents to the jury. See Melendez–Diaz, 557 U.S. at 329-30 (concurring opinion of Thomas, J.) (agreeing with decision of confrontation violation because documentary statement that matter was cocaine was a formal attestation in a pending criminal case).

This case contrasts sharply with Williams v. Illinois, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), wherein a DNA analyst testified to her own expert comparison of DNA profiles to testify that there was a match between DNA found on the victim and the defendant's DNA. Williams, 132 S. Ct. at 2229-30. Here, Heather Pyles' testimony was clear – it was Cashawbara who matched the DNA profiles. RP 316. Pyles testified that it was Cashawbara who "did identify sperm cells in

the anal swabs" and who concluded that "[t]he profile from the sperm fraction of the anal swabs matched the DNA profile from Charles Kuneki." RP 316-317. The court's factual finding was correct -- "she [Ms. Pyles] did not do the testing." RP 313. Rather, she was testifying to the presence of semen and sperm, and a DNA match, that were inculpating determinations made by Cashawbara. RP 312, RP 313-16.

In a portion of Pyles' testimony, given after the trial court overruled Mr. Kuneki's first objection that Ms. Pyles did not do the testing, Pyles stated that she "reviewed the data and independently came to the same conclusions as Wendy did." RP 312. However, her testimony as a whole made clear that Pyles merely did a technical review of the testing process to make sure that Ms. Cashawbara followed standard operating procedure at WSPCL. RP 311-12. Cashawbara was the person who came to the DNA match result from the anal swabs in comparison to the reference sample; in contrast, Pyles did no expert work, and testified to none.[3] RP 316.

[3] In fact, Pyles admitted that the only independent determination she made in the matter was a later January, 2016 re-assessment of the numerical probability that "an unrelated individual [selected] at random from the U.S. population" would have the same DNA "sperm fraction profile" as the one located on Mr. Maine's anal swabs. RP 317-18. This statistical re-determination was based on a recent DNA database correction by the FBI, and was the only work done by Pyles. RP 318 ("what I did as my part was is [sic] I recalculated the match estimate using the data that Wendy generated with the corrected database numbers").

Pyles admitted she only reviewed the analyst's work for whether it followed the Crime Laboratory's standard operating procedure, and her testimony does not fall within the reasoning of Lui's admission of DNA, but in fact should have been excluded for the reason Lui rejected the admissibility of toxicology reports in that case. Lui, supra, 179 Wn.2d at 466 (DNA evidence), 464-65 (toxicology evidence); see also Commonwealth v. Bizanowicz, 459 Mass. 400, 410-11, 945 N.E.2d 356 (2011) (testimony by police chemist concerning non-testifying chemist who conducted tests for presence of semen was testimonial hearsay).

Unlike Lui, which involved an expert witness presenting an independent DNA analysis premised on interpreting basic information generated by the work of others in the DNA testing process, this case involves admission, through Pyles, of the ultimate inculpatory statements made by the actual human analyst who used *her* expertise. Lui, at 489. Cashawbara was not a technician whose base data merely "facilitated [Pyles'] role as an expert witness." Lui, at 486. Pyles' witness testimony never brought to bear her expertise, nor offered any original analysis, such as making any comparison of the allele tables of the DNA samples, or giving an interpretation of the DNA gene sequences that allows a match to be deciphered. See Lui, at 488-89. It was Cashawbara who was the inculpatory expert witness, and Cashawbara

who should have been produced. Compare Lui, at 493-94 and note 11 (toxicology results inadmissible where testifier simply communicated the conclusions and offered no true expert interpretation). It does not matter that Pyles deemed Cashawbara's process to meet standard WSPCL protocols, or that Pyles was *qualified* to give the jury rudimentary information about DNA profiling generally. "[T]he [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Melendez-Diaz, at 2716. Counsel objected vigorously, the court's finding that Pyles did not do the testing required exclusion, the court's ruling that Pyles was responding to another expert's report was error and is not a basis for admission, under hearsay or Sixth Amendment rules, and this witness did not substantively testify as the expert making a determination of semen, or a DNA match.

c. This evidence regarding the presence of DNA and semen discovered in the anus of male complainant Maine was so prejudicial to any lay jury that reversal is required not merely for the *Crawford* error, but even under a non-constitutional hearsay error standard. Hearsay error, as non-constitutional evidentiary error, requires reversal if, within reasonable probabilities, the outcome would have been different without

the error. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The improper admission of evidence constitutes harmless error only if the evidence is of minor significance in reference to the evidence as a whole. Bourgeois, 133 Wn.2d at 403. Pyles' testimony was the only evidence of DNA and the only evidence Mr. Kuneki's "semen in the rectum of the alleged victim." RP 217-18.[4]

To a lay jury, this inflammatory material was likely just as pertinent to the credibility of the claim of forced intercourse, and just as corroborative of the proof to convict, as the prosecutor asserted it would be. But it would not have been admitted at trial, because the evidence was hearsay and testimonial, and the actual analyst was unavailable for the trial. Erroneously admitting testimonial hearsay is harmless only if the appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wn.2d at 425-26. The error is presumed prejudicial, and it is the State that bears the burden of proving that the outcome was not affected. State v. Stephens, 93 Wn.2d 186, 190–91, 607 P.2d 304

[4] Dr. Mary Klingner had earlier testified that she saw Mr. Maine at Klickitat Valley Health Care, and obtained swabs which were sent for laboratory analysis. RP 286-87, 303. However, Dr. Klingner provided no testimony regarding detection of any semen or sperm. See Decision, at p. 17.

(1980); Guloy, 104 Wn.2d at 425. Only "overwhelming untainted evidence" will render the error harmless. Guloy, 104 Wn.2d at 426.

Although the defense was consent, the prosecutor in opening statement, recognizing the effect of this evidence on a jury, emphasized that the State "did a DNA analysis, and they discovered the defendant's semen from the anus of Mr. Maine." RP 198. And at the end of trial, the State again made sure to remind the jury that "the defendant's semen was found in Mr. Maine's anus." RP 536.[5]

Early in trial, the court carefully questioned the prosecutor regarding the need for semen and DNA evidence in the present case, and the prosecutor responded on the record that the evidence went to corroboration and credibility, and was necessary to the State's ability to persuade the jury. RP 217-18 (arguing that the evidence was necessary

[5] During *voir dire*, various remarks by potential jurors were made after the prosecutor described the case as that of intercourse between the defendant "and another man." RP 157, 175. Some potential jurors expressed that they might have difficulty sitting fairly on the cause, for a range of reasons. The prosecutor observed that the reading of the charges had made juror 19 "blanch." RP 139. Juror 13 volunteered that the charges "make me sick to my stomach." RP 140, 165. After juror 12 stated that he would try to decide the case according to both legal and "moral requirements," the prosecutor conscientiously attempted to explain that the law does not make moral judgments. RP 177-80. However, juror 51 remarked that anybody who committed a degrading crime should be punished, he described homosexuality as, "morally, most people don't – don't have that kind of life style. I know I certainly don't." RP 180-81.

to showing that the defendant was the perpetrator and to "corroborate credibility-wise his -- [Maine's] claim." RP 217-18.

This difficult evidence was material, in a close case. Defense witness Andrew Kahklamat, who occupied a nearby cell to Mr. Maine and Mr. Kuneki, stated that two days after this claimed incident, Mr. Maine and another inmate named Marcos were walking around laughing and joking about what had happened. RP 412. Mr. Kahklamat also testified that Maine himself was laughing and joking to Mr. Kahklamat about it. RP 413-15. Mr. Kuneki testified that it was well known in the jail that Mr. Maine was homosexual, and he did not hide the fact. At one point Mr. Maine pushed himself up against Mr. Kuneki from behind while they and other inmates were playing basketball. 371-75. All of this foregoing defense testimony was in sharp contrast to the claims by Mr. Maine that he never acted sexually in the jail – which is why the court ruled that excluding it would be a denial of justice. RP 339-45.

Notably, the Respondent in the Court of Appeals never offered any argument of harmlessness under either the non-constitutional, nor even under the constitutional error test. See Chapman v. California, 386 U.S. 18, 21-22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Importantly, it is the State that bears the burden of proving harmlessness of a constitutional error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640

(2007); Guloy, 104 Wn.2d at 425. Ultimately, the evidence, although inadmissible, was relevant to a lay jury, as the prosecutor argued. In all of the circumstances of this case, the erroneous admission of the semen and DNA evidence was not harmless under any standard. See, e.g., State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987) (reasoning that, despite a trial court admonition to disregard inflammatory character evidence, "it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact.").

F. CONCLUSION

For the reasons argued herein, Charles Kuneki respectfully requests that this Court accept review and reverse his conviction.

Respectfully submitted this 12th day of March, 2018.

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

STATE OF WASHINGTON, Respondent, v. CHARLES WILLIAM KUNEKI, Appellant.	))))))))))	No. 34174-7-III UNPUBLISHED OPINION

SIDDOWAY, J. — While serving time in the Klickitat County Jail, Charles Kuneki was accused by a cellmate of twice raping him late at night, with accompanying threats to kill if the cellmate did not submit. Mr. Kuneki admitted to intercourse with his cellmate, but claimed it was consensual. The State filed twin sets of first degree rape and felony harassment charges against him for the two alleged events. Following a jury trial, Mr. Kuneki was acquitted of the charges related to the first alleged event but was found guilty of the charges related to the second.

On appeal, he contends (1) the trial court improperly admitted forensic testimony over valid hearsay and confrontation clause objections, (2) the two convictions violated double jeopardy, (3) the trial court failed to give a "true threat" instruction, violating his rights under the First Amendment to the United States Constitution, and (4) his trial lawyer provided ineffective assistance of counsel when he failed to argue the two convictions were the same criminal conduct for sentencing purposes.

Because the State relied on the same evidence to prove the elements of first degree rape and the elements of felony harassment, double jeopardy applies. We vacate the conviction for felony harassment, rendering moot the other assignments of error relating to that conviction. We affirm the conviction for first degree rape.

FACTS AND PROCEDURAL BACKGROUND

One morning in August 2014 corrections officer Gloria Rosales was distributing inmate medications in the Klickitat County Jail when inmate R.M.[1] whispered that he wanted to speak with her. He was red-eyed, "like he'd been either crying or hadn't got any sleep." Verbatim Transcript of Proceedings (VTP) at 327. She took him to the booking room to talk but he started sobbing and was unable to speak. Another corrections officer, Andrew Gonzalez, took R.M. to a more private area, where R.M. told the officer that he had been raped by his cellmate, Charles Kuneki.

[1] We use the initials of the victim, R.M., to protect his privacy.

Sheriff's Deputy Randy Wells was called in to investigate and took R.M. to the hospital for a sexual assault examination. Under the supervision of an emergency room physician, a nurse took oral and rectal swabs. Together with blood, urine, and pubic hair samples, the swabs were sealed in a sexual assault evidence collection kit and given to Deputy Wells. Once back at the jail, R.M. provided the deputy with a written statement describing the rapes.

Mr. Kuneki was charged with two counts of first degree rape and two counts of felony harassment (threats to kill). A search warrant was obtained to take a DNA[2] sample from Mr. Kuneki. That, and R.M.'s sexual assault kit were forwarded to the Washington State Patrol Crime Laboratory. The lab determined that the DNA result from the anal swab of R.M. taken at the emergency room was a mixture of two individuals, and that the DNA profile from the nonsperm fraction of the anal swab matched R.M.'s DNA profile, while the DNA profile from the sperm fraction of the anal swab matched Mr. Kuneki.

At Mr. Kuneki's trial, the prosecutor told jurors in his opening statement, "We know that there was sexual intercourse. And the only issue is consent." VTP at 199. Mr. Kuneki's lawyer delivered his opening statement immediately thereafter, agreeing there was sexual intercourse and "it is a question of whether or not there was consent." *Id*.

[2] Deoxyribonucleic acid.

The defense lawyer reminded jurors that "as we discussed in selecting you as jurors," a homosexual act in and of itself is not a crime.[3] *Id.* at 206-07.

R.M. and Mr. Kuneki testified at trial to their different versions of their relationship and the nights of the alleged rapes. R.M. testified that on the first occasion, after accusing R.M. of having used his toothpaste, which R.M. denied, Mr. Kuneki grabbed a pencil, moved to where R.M. was lying on the bed, and told R.M. to be quiet—that if R.M. yelled, or screamed, or pushed a call button on the wall he would kill him. Holding the pencil to R.M.'s neck, he then pulled down R.M.'s pants and underwear to his knees. Repeating his threat to kill if R.M. made a sound, made R.M. raise his feet in the air (R.M. was on his back) and raped him anally for between 30 to 45 minutes.

R.M. testified that the next day, Mr. Kuneki followed him everywhere, making it impossible for R.M. to tell anyone what had happened. That night, he was sleeping on his stomach when, sometime between lockdown and midnight or 1:00 a.m., he awoke to find that Mr. Kuneki was on top of him, again armed with the pencil that he held to R.M.'s neck. According to R.M., he said to Mr. Kuneki, "Don't do this again," but Mr. Kuneki told him to shut up, penetrated his anus with his penis, and again raped R.M. for

[3] This portion of the opening statement is reported by the verbatim transcript of proceedings as partially inaudible, but based on what was discussed during jury selection, we are confident of this substance of the opening statement. *See, e.g.*, jury selection at Verbatim Transcript of Proceedings at 183 (obtaining juror agreement that if the sex is consensual, it is not rape, and that homosexual activity is not a crime).

30 to 45 minutes. VTP at 243. R.M. testified that Mr. Kuneki again threatened that if R.M. said anything or pushed the call button he would kill him.

In the defense case, Mr. Kuneki testified there had been a single instance of consensual sex. According to him, R.M. was openly gay and would grab at Mr. Kuneki's and other inmates butts during basketball games. Mr. Kuneki said he jokingly made comments like "[y]ou want that" after R.M. would grab at him. *Id.* at 463.

Mr. Kuneki stated that he and R.M. became "pretty close." *Id.* at 461. The men expected R.M. to be released before Mr. Kuneki, who was looking at prison time, and Mr. Kuneki told R.M. that when released, he could live in Mr. Kuneki's trailer free of charge in exchange for watching his place and his dogs and cashing checks Mr. Kuneki received from his tribe. Mr. Kuneki also said that when he was released, he would give R.M. a job. Eventually, following a proposition by R.M., Mr. Kuneki said they engaged in five minutes of consensual anal sex one Saturday morning around 1:00 a.m. Mr. Kuneki denied threatening R.M. in any way.

Mr. Kuneki said that it was after the two had an argument later that Saturday and Mr. Kuneki withdrew his offer of housing that R.M. made the rape allegations.

In the State's case, it called Heather Pyles, a forensic DNA analyst with the state patrol crime lab, to provide further evidence of the anal intercourse. Before she testified, and outside of the hearing of the jury, the trial judge asked, "[W]hy do we need all the forensic evidence[?]" observing "this is a consent case." *Id.* at 216. The prosecutor

stated that beyond the testimony of R.M. and the forensic evidence, the only evidence that intercourse occurred would be the possible testimony of Mr. Kuneki, and "there's nothing to guarantee Mr. Kuneki's going to testify." *Id.* at 217. He also told the court that the forensic evidence "should go really quickly." *Id.* at 218.

Ms. Pyles testified to the crime lab's analysis of a sexual assault kit reportedly collected from R.M. and an oral swab reportedly collected from Mr. Kuneki, which the lab had determined to be a match for sperm in R.M.'s anal swab. After first describing the DNA analysis process, she was asked "who did the initial testing" of evidence in Mr. Kuneki's case and answered it had been Wendy Cashawbara, who was no longer employed by the state patrol. *Id.* at 309.

When Ms. Pyle began to testify to the results of the lab's analysis, the defense lodged a hearsay objection. The objection was overruled but the State still elicited clarifying testimony from Ms. Pyles that although Ms. Cashawbara did the analysis, Ms. Pyles did the "technical review" of Ms. Cashawbara's report, which she testified is standard laboratory procedure:

> [A]s part of the process of completing a case, every case goes through a process called technical review. . . . [W]hat that means is . . . that I looked over all of the case file that she created, looked over all of her notes, and I compared that with our standard operating procedures and verified that everything that [Ms. Cashawbara] did was within our operating procedures, that it was technically sound and scientifically relevant, *and that I agreed with her conclusions* based on my review of her notes as well as the electronic data.

Id. at 311-12 (emphasis added).

The trial court overruled a second defense objection that Ms. Pyles "didn't do the testing," *Id.* at 312, and heard a few more complaints from defense counsel about the testimony. It allowed Ms. Pyles to testify to the lab's test result detecting semen in the anal swab taken from R.M., her conclusion that the profile from the sperm fraction of that anal swab matched Mr. Kuneki's DNA profile, and her calculation that the odds of some other individual having a DNA profile that would match the sperm fraction profile was one in 160 quadrillion.

The jury acquitted Mr. Kuneki of the first set of rape and harassment charges, but convicted him of the second set. It returned a special verdict stating that it had been unable to agree whether Mr. Kuneki was armed with a deadly weapon during the rape.

The trial court calculated Mr. Kuneki's offender score as a nine for the rape and an eight for the felony harassment. It sentenced Mr. Kuneki to the high end of the standard range on both counts, with the sentences to run concurrently. Mr. Kuneki appeals.

ANALYSIS

Of the five assignments of error made by Mr. Kuneki, three prove dispositive. Given the State's evidence and argument at trial, we accept its concession that Mr. Kuneki's Fifth Amendment right to be free of double jeopardy was violated by entering judgment convicting him of both felony harassment and first degree rape. We vacate the felony harassment conviction.

As to the remaining conviction of first degree rape, we reject Mr. Kuneki's arguments that the trial court erroneously overruled his hearsay and confrontation clause objections. Alternatively, we would find any error harmless.

We address the issues in the order stated.

Double jeopardy

Mr. Kuneki argues that his double jeopardy right was violated when he was punished for both first degree rape and felony harassment. The State conceded the double jeopardy violation in its brief without elaboration At oral argument, we questioned whether we should accept the State's concession. The State's counsel on appeal, who also represented the State at trial, explained that its concession was based on the factual basis for the rape charge. *E.g.*, Wash. Court of Appeals oral argument, *State v. Kuneki*, No. 34174-7-III (Oct. 18, 2017), at 13 min., 41 sec. to 14 min., 10 sec.[4]

The federal and state double jeopardy clauses protect against multiple punishments for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). "Within constitutional constraints, the legislative branch has the power to define criminal conduct and assign punishment," so "the question whether punishments imposed by a court, following conviction upon criminal charges, are unconstitutionally multiple cannot be resolved without determining

[4] Available at http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showDateList&courtId=a03&archive=y.

what punishments the legislative branch has authorized." *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Appellate courts review claims of double jeopardy de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

The Washington Supreme Court has identified several steps to be taken in making the determination of what punishments the legislative branch has authorized. The first is to see whether the legislature expressed its intent in the criminal statute. A paradigm is the express provision that a burglary shall be punished separately from other crimes committed during commission of the burglary. *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005) (citing RCW 9A.52.050). In this case, neither RCW 9A.44.040(1), which identifies when a person is guilty of the crime of rape in the first degree, nor RCW 9A.46.020(1), which identifies when a person is guilty of felony harassment, expressly authorize multiple punishment.

If the legislative intent is not clear, we may apply what Washington courts have called a "'same evidence'" or *Blockburger*[5] test, as rules of statutory construction for discerning legislative purpose. *Calle*, 125 Wn.2d at 778; *Freeman*, 153 Wn.2d at 772. Under the test, "If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes." *Id.* In applying

[5] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

the test, we do not compare the statutory elements of each crime at their most abstract level; rather, "'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 817, 100 P.3d 291 (emphasis omitted) (quoting *Blockburger*, 284 U.S. at 304). Accordingly, a generic term that acquires meaning only from the facts of the case must be given its factual definition in order to assess whether one crime requires proof of *a fact* not required to prove the other. *Id.* at 818.

RCW 9A.44.040(1)(a) provides that "[a] person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator . . . [u]ses or threatens to use a deadly weapon or what appears to be a deadly weapon." The "forcible compulsion" element acquires meaning only from the facts of the case. "'Forcible compulsion' means physical force which overcomes resistance, *or* a threat, express or implied, that places a person in fear of death or physical injury to [oneself] or another person." RCW 9A.44.010(6) (emphasis added). The State agreed at oral argument that in Mr. Kuneki's case, the type of forcible compulsion relied on was not "physical force which overcomes resistance," but was instead a threat that placed R.M. in fear of death or physical injury. This is borne out by the record. *See* VTP at 533, 535 (State's closing argument).

RCW 9A.46.020(1)(a) provides in relevant part that "[a] person is guilty of harassment if: . . . Without lawful authority, the person knowingly threatens: (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . [and] (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." Applying the *Blockburger* test at the concrete (as opposed to abstract) level, first degree rape includes an element that felony harassment does not: sexual intercourse. But felony harassment includes only elements that are elements of first degree rape as applied in Mr. Kuneki's case: a threat and resulting fear. Application of the *Blockburger* test supports the finding of a double jeopardy violation.

Although the result of the *Blockburger* test is presumed to be the legislature's intent, it is not controlling if there is clear evidence of contrary legislative intent. *Freeman*, 153 Wn.2d at 777.[6] Neither party suggests nor do we find that other evidence of legislative intent supports a conclusion that the legislature intended multiple

[6] In *State v. Eaton*, 82 Wn. App. 723, 919 P.2d 116 (1996), *reversed on other grounds by State v. Frohs*, 83 Wn. App. 803, 811 n.2, 924 P.2d 384 (1996), this court held that a defendant's convictions of both first degree rape and felony harassment *did not* violate double jeopardy. But in that case, the dispute was over whether the merger doctrine applied and this court correctly held that it did not. The merger doctrine is an additional tool for determining legislative intent. Under *Calle*'s approach, it is applied after the *Blockburger* test. We assume the *Blockburger* test was not urged as a basis for finding a double jeopardy violation in *Eaton* because in that case the acts constituting felony harassment were alleged and proved to continue after the rape.

punishments for the crimes with which Mr. Kuneki was charged. Because conviction of both crimes violates double jeopardy, we vacate the conviction for felony harassment.[7]

Hearsay and confrontation clause objections

Mr. Kuneki assigns error to the admission of Ms. Pyles's testimony, arguing it was hearsay and violated his confrontation right. We first consider whether a confrontation clause objection was made or was waived.

Any challenge under the confrontation clause was waived

Before error can be predicated on a ruling that admits evidence, an objection "stating the specific ground of [the] objection, if the specific ground was not apparent from the context" must be made. ER 103(a)(1). Mr. Kuneki's lawyer stated a specific ground for objection only once, and the ground was hearsay:

> Q You did not do the tests.
> A That is correct.
> Q So you're going to be testifying as to Wendy's document.
> A As to her report, yes.
> [DEFENSE COUNSEL]: Now, I'm going to object that it's going to be hearsay.
> THE COURT: Overruled. Please proceed.

VTP at 311.

[7] The finding of a double jeopardy violation renders moot Mr. Kuneki's assignments of error to the trial court's failure to give a "true threat" instruction and his claim that counsel was ineffective for failing to argue same criminal conduct at sentencing.

Shortly thereafter, he objected without stating a specific ground for objection, but only that Ms. Pyles "didn't do the testing":

> A . . . I looked over all of the case file that she created, looked over all of her notes, and I compared that with our standard operating procedures and verified that everything that Wendy did was within our operating procedures, that it was technically sound and scientifically relevant, and that I agreed with her conclusions based on my review of her notes as well as the electronic data.
> [DEFENSE COUNSEL]: Your Honor, I'm going to object because she didn't do the testing. And—she doesn't—
> THE COURT: She—
> [DEFENSE COUNSEL]: —testify.
> THE COURT: She agrees she did not do the testing so she's responding as an expert in this field to a report [a] colleague of her[s] produced.
> [DEFENSE COUNSEL]: Yeah. So,—
> Q —you—you have reviewed?
> A Yes. I have reviewed the data and independently came to the same conclusions as [Ms. Cashawbara] did.
> [DEFENSE COUNSEL]: Yeah. I'm still going to object. She didn't do the testing.

VTP at 312. If Mr. Kuneki's lawyer had a confrontation clause challenge in mind, he never stated it. The words "confrontation" or "Sixth Amendment" were never used. It was also not apparent from the context. The trial court could reasonably understand defense counsel to be repeating his hearsay objection. It evidently did, since the court's ruling ("she's responding as an expert in this field to a report [a] colleague of her[s] produced") was implicitly based on ER 703 and/or 705, which would apply to a hearsay objection but not to a challenge under the confrontation clause.

Mr. Kuneki argues that a confrontation clause violation is a manifest constitutional error that can be raised for the first time on appeal under RAP 2.5(a)(3). But we never reach that rule because the defendant's obligation to assert the right to confrontation at or before trial is more fundamental—it "is part and parcel of the confrontation right itself. . . . When a defendant's confrontation right is not timely asserted, it is lost." *State v. O'Cain*, 169 Wn. App. 228, 240, 279 P.3d 926 (2012) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)).

We also point out that a further consequence of defense counsel not making a confrontation clause challenge is that the record is not well-developed on which steps of the analysis Ms. Pyles repeated independently. At the time of trial, Ms. Pyles had been performing DNA analysis for nine years, and was competent to perform and explain it to jurors. Mr. Kuneki bases his argument on appeal to Ms. Pyle's statements that she did not do "the testing," but Ms. Pyles's testimony also includes a number of statements that she performed an independent analysis. *E.g.*, VTP at 312 ("I agreed with her conclusions" and "I have reviewed the data and independently came to the same conclusions"), 313 (Pyles was "able to develop DNA profiles"), 317 ("I did do a statistical estimate" for the profile from the sperm fraction.). As far as we can tell from the record, Ms. Pyle's involvement is indistinguishable from the testifying DNA analyst in *State v. Lui*, 179 Wn.2d 457, 489, 315 P.3d 493 (2014), *aff'd*, 188 Wn.2d 525, 397 P.3d 90 (2017), whose testimony did not violate the confrontation clause. That analyst

was held to be sufficiently involved to "produce her own analysis, 'an original product that can be tested through cross-examination.'" *Id.* (quoting *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009)).

> She reviewed the results of the control samples, she reviewed the testing procedures, and she reviewed her subordinate analysts' results at each step in the process. She was 'a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.' *Bullcoming* [*v. New Mexico*], [564 U.S. 647, 672,] 131 S. Ct. [2705, 180 L. Ed. 2d 610 (2011)] (Sotomayor, J., concurring).

Id. at 490-91. Mr. Kuneki cannot demonstrate from the record developed that Ms. Pyles could not be cross-examined about how she arrived at *her* interpretation and conclusions. That is all that the confrontation clause requires. *Id.* at 491.

Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). We can infer from the trial court's ruling that it overruled Mr. Kuneki's objection based on ER 703 and/or 705. ER 703 permits an expert to base her opinion on facts that are not otherwise admissible if they are of a type reasonably relied on by experts in the particular field. ER 705 grants the trial court discretion to allow an expert to relate hearsay or otherwise inadmissible evidence to the trier of fact to explain the reasons for her expert opinion. While we review many evidentiary decisions for manifest abuse of

discretion, we review whether or not a statement was hearsay de novo. *State v. Hudlow*, 182 Wn. App. 266, 281, 331 P.3d 90 (2014).

Mr. Kuneki points to the distinction between the expert's right to *base an opinion* on otherwise inadmissible facts and whether the expert should be allowed to *tell jurors* about those inadmissible facts. Notably, the most significant facts on which Ms. Pyles based her opinion were the testing results, which would probably have been admissible as business records under RCW 5.45.020,[8] although we recognize that the State did not attempt to offer the records themselves.

As to facts that were otherwise inadmissible, ER 705 grants the trial court discretion to allow an expert to relate hearsay or otherwise inadmissible evidence to the trier of fact to explain the reasons for her expert opinion. Mr. Kuneki does not demonstrate an abuse of discretion. For otherwise inadmissible facts that Ms. Pyles related under this rule, Mr. Kuneki was entitled to a limiting instruction if requested. ER 105 (providing that court "upon request" shall restrict the evidence to its proper scope and instruct the jury accordingly); *State v. Lui*, 153 Wn. App. 304, 323 and n.20, 221

[8] RCW 5.45.020 provides: "A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

P.3d 948 (2009), *aff'd*, 188 Wn.2d 525, 397 P.3d 90 (2017). He did not request a limiting instruction, however.

Finally, if the evidence had been admitted in error, it was harmless. An erroneous evidentiary ruling "is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). It was uncontested that Mr. Kuneki engaged in anal intercourse with R.M. Ms. Pyles's opinion that the odds were one in 160 quadrillion that someone other than Mr. Kuneki would match the sperm fraction profile was irrelevant. Her testimony did not shed light on the disputed issues of whether intercourse took place once or twice, or whether it was consensual or not.

Mr. Kuneki argues that he was prejudiced because only Ms. Pyles provided evidence of "Mr. Kuneki's 'semen in the rectum of the alleged victim,'" which he contends would have been "inflammatory" for jurors. Br. of Appellant at 21. But Mr. Kuneki never objected to Ms. Pyles's testimony on ER 403 grounds. And we disagree that Ms. Pyle's necessary references to "sperm," "semen," "anus" and "rectum" would have discomfited jurors any more than the testimony of R.M., or Mr. Kuneki, or the emergency room physician.

We vacate the conviction for felony harassment and remand to the superior court for any further proceedings consistent with our disposition.[9]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Korsmo, J.

[9] Mr. Kuneki asked that we exercise discretion to not impose appellate costs if the State substantially prevailed. Since it has not, his request is moot.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES KUNEKI, Petitioner.	)))))))))	COA NO. 34174-7-III

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