

64134-4

64134-4

NO. 64134-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRUCE HUMMEL,

Appellant.

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

APPELLANT'S OPENING BRIEF

2010 JUN 10 10:41 AM
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A. INTRODUCTION.

In 2003, Alice Hummel's children reported to the police that their mother had been missing since 1990. The police never gathered any corroborative evidence about what happened to Alice, other than receiving some different explanations from her husband Bruce Hummel. In 2008, the State decided Bruce had a motive to kill Alice, and even without any confirmatory evidence, they charged Bruce with first degree premeditated murder. Because the State's case relied on Bruce Hummel's own statements, without independent evidence showing his guilt, the State lacked the required corpus delicti for a prosecution. Further, trial and sentencing errors explained in detail below also denied Hummel a fair trial and an accurate sentence.

B. ASSIGNMENTS OF ERROR.

1. The prosecution presented insufficient evidence of the corpus delicti for first degree murder.

2. The trial court erroneously denied Hummel's motions to dismiss and to bar the admission of Hummel's statements based on the lack of corpus delicti.

3. The State violated Hummel's right to confront witnesses against him as protected by the Sixth Amendment and Article I, section 22.

4. The court's denial of Hummel's request for an instruction on evaluating the credibility of a jailhouse informant denied Hummel his rights to present a defense and receive a fair trial as guaranteed by the Sixth and Fourteenth Amendments and Article I, sections 3, 21, and 22 of the Washington Constitution.

5. The court conducted private trial proceedings in violation of the First, Sixth, and Fourteenth Amendments, and Article I, sections 10 and 22 of the Washington Constitution.

6. The court sentenced Hummel based on a legally erroneous offender score by including convictions for a non-comparable federal offense.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The prosecution must present independent evidence corroborating the fact of death and cause of death before it may use an accused person's statements against him. Where the State had no proof of either the fact or cause of death independent of Hummel's statements, was there sufficient evidence of the

necessary corpus delicti to allow admission of Hummel's statements and permit his conviction for first degree murder?

2. An accused person's right to confront witnesses against him includes testimony assessing the content of records. The State called numerous witnesses who testified that they conducted sweeping searches of government records and found no evidence that Alice Hummel was alive. Where the testifying witnesses had no knowledge of the precise records searched, the methodology or completeness of the search, or accuracy of the records, did the testimony reporting the results of records searches violate Hummel's state and federal right of confrontation?

3. A jailhouse informant has an obvious motive to lie when he gains a substantial personal benefit from his testimony yet need not implicate himself in wrongdoing to testify. The court refused Hummel's request for a jury instruction explaining how the jury should assess the credibility of a jailhouse informant. Did the court's refusal to instruct the jury about assessing the informant's critical testimony against Hummel deny him his right to accurate jury instructions relating to his theory of defense?

4. This State stringently protects the public's right to open administration of justice. The trial court closed a portion of the trial

from the public without undertaking the required pre-closure analysis. Does the court's disregard for the mandatory procedures needed to conduct court proceedings in private violate Article I, sections 10 and 22 and the First and Sixth Amendments?

5. A sentencing court must determine the comparability of a prior offense under the laws in effect at the time of the crime. The laws in effect in 1990 did not permit the court to count a federal conviction unless it was comparable to a Washington felony. Since wire fraud is not comparable to a Washington felony in effect in 1990, did the court miscalculate Hummel's offender score by including his federal wire fraud convictions?

D. STATEMENT OF THE CASE.

In 2008, the State accused Bruce Hummel of having killed his wife, Alice Kristina Hummel,¹ in October 1990. Alice had left her family home in October 1990 and her family had not heard from her again. The Hummels had three children: the eldest, Sharinda, was married and had little contact with her family as of 1990; Sean, was in his senior year of high school in 1990; and Shanalynn, the

¹ Mrs. Hummel was primarily referred to as Alice during the trial, but those close to her called her "Kristy." For the purpose of clarity, this brief will refer to her as Alice; no disrespect is intended.

youngest, was in seventh grade. 1RP 77; 2RP 103-04, 244.² The family moved to Bellingham after living in many locations in Alaska where the parents worked as teachers in an array of schools. 2RP 90-92, 229. Bruce Hummel told the children their mother had left the family, for a job and a new relationship. 2RP 103, 106, 250. In 2003, the Hummel siblings reported their mother missing to the police. 2RP 118.

In an effort to look for Alice's body, the police searched the property surrounding the Hummel's 1990 home with ground-penetrating radar and cadaver dogs. 1RP 151-53, 200. They used forensic tools to search the house for traces of blood and dug trenches four feet underground to search pipes. 1RP 185, 200. They searched the Bellingham Bay. 2RP 203-04. They found no physical evidence related to Alice Hummel. 4RP 385-96, 408.

The police also searched large databases that collected official records of employment, driver's licenses, vehicle registration, court records, utility records, and other public records. 4RP 477-79, 483. The results of these searches found no records indicating Alice Hummel was living in the United States after 1990.

² The verbatim report of proceedings (RP) from the trial are consecutively paginated and will be referred to by the volume number listed on the cover page. All other transcripts will be referred to by the date of the

Bruce Hummel made several statements about his wife. He wrote a letter with a detailed story of her committing suicide and her desire that the children not know about it. 2RP 175-83. In 2008, Hummel admitted he defrauded the Alaska retirement system so they would continue sending retirement disability payments to Alice. In his guilty plea statement, he said Alice died in October 1990. 6RP 823-24; Ex. 6. His Whatcom County jail cellmate, Donald Cargill, claimed Hummel confessed that he poisoned his wife by giving her an overdose of medication. 4RP 518, 522-23. Cargill received a significant reduction in his own pending charges in exchange for his testimony against Hummel. 4RP 562.

The State charged Hummel with first degree premeditated murder. CP 498. It claimed his motive to kill Alice was a disclosure by their daughter Shanalynn that Hummel had been molesting her. 6RP 740. The State had no explanation for how or where she died, but argued it did not need to prove those specifics. 6RP 829.

After a jury trial, Hummel was convicted of first degree premeditated murder. CP 843. He received a sentence at the high end of the standard range, predicated on an offender score that

proceeding.

included 12 separate convictions for wire fraud in federal court. CP 16-20. The pertinent facts are addressed in further detail below.

E. ARGUMENT.

1. WITHOUT ANY PHYSICAL EVIDENCE INDICATING A PERSON DIED OR HOW SHE MAY HAVE DIED, THE PROSECUTION'S RELIANCE ON HUMMEL'S STATEMENTS TO PROVE THE CRIME CHARGED CONSTITUTES A LACK OF *CORPUS DELICTI* BARRING PROSECUTION AND REQUIRING REVERSAL

The State must offer evidence corroborating the specific crime charged, independent of the defendant's own statements, to establish the mandatory corpus delicti. The prosecution charged Hummel with first degree murder, accusing him of premeditatedly killing his wife 19 years ago, but the prosecution had no independent evidence corroborating her death or the circumstances of her death. Absent independent evidence corroborating the specific crime charged, there is no corpus delicti.

a. Corpus requires independent evidence of the particular crime charged. The prosecution's evidence must corroborate the specific crime charged, independently of the defendant's statements. State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006); see also State v. Dow, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010). The corpus delicti doctrine guards against a

conviction predicated on a defendant's statements alone, where there is no separate proof that the particular crime occurred. Thus, the prosecution "must present evidence that is independent of the defendant's statement and that corroborates not just *a crime* but *the specific crime* with which the defendant has been charged." Brockob, 159 Wn.2d at 329; see Dow, 168 Wn.2d at 254 ("the State must still prove every element of the crime charged by evidence independent of the defendant's statement.").

In Brockob, the defendant stole about 20 packages of Sudafed, which could be used to make methamphetamine, and he admitted his purpose was to help someone make methamphetamine. 159 Wn.2d at 319. The State charged him with possession of pseudoephedrine with intent to manufacture methamphetamine. Id. Possession of Sudafed alone does not prove the intent to make methamphetamine, and the only evidence independent of Brockob's statement of his intent was a police officer's testimony that Sudafed was commonly used to make methamphetamine. Id. at 331. The Brockob Court held the prosecution had not proved the corpus delicti of the crime independently of the defendant's statement because the officer's testimony that Sudafed may be used to make methamphetamine

“does not necessarily lead to the logical inference that Brockob intended to do so, without more.” Id. at 332.

In Brockob and Dow, the Washington Supreme Court explained the rigors of Washington’s judicially-created corpus rule. Washington departed from a more lenient federal standard for corpus in State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996), which it reaffirmed in Dow, 168 Wn.2d at 252, and Brockob, 159 Wn.2d at 328-29. While the federal rule requires only evidence tending to establish the reliability of a confession, Washington demands sufficient evidence to prove a prima facie case of every element of the crime charged by evidence independent of the defendant’s statements. Dow, 168 Wn.2d at 254. The evidence fails the federal and the state tests. Opper v. United States. 348 U.S. 84, 93-94, 75 S.Ct. 158, 99 L.Ed 101 (1954) (corroborative evidence independent of defendant's statement must support conviction).

Not only must the corroborating evidence confirm the defendant’s statements, the other evidence must also be “consistent with guilt and inconsistent with a hypothesis of innocence.” Brockob, 159 Wn.2d at 329 (internal citations omitted). If “the evidence supports both a hypothesis of guilt and a

hypothesis of innocence, it is insufficient to corroborate the defendant's statement." Id. at 330.

In Aten, an infant died while in a babysitter's care. 130 Wn.2d at 649-50. After the incident, the babysitter put her belongings in storage, expressed fear the sheriff would be coming to her home, and became severely depressed. Id. Then, she confessed her guilt to several people, including the police. Id. at 652-53. The State charged her with second degree manslaughter.

In order to prove the corpus delicti for this offense, the prosecution was required to prove both (1) the fact of death, and (2) the death was caused by the criminal act charged, based on independent evidence. Id. at 655, 658. The fact of death was not in dispute. The threshold for corpus delicti rested on the charged act of second degree manslaughter, and thus the State needed evidence supporting a logical and reasonable inference that the actions causing the death were criminally negligent. Id. at 658-59. As articulated in Aten, corpus delicti required evidence that the babysitter "acted in a manner which showed lack of awareness of a substantial risk that a wrongful act might occur and that lack of awareness constituted a gross deviation from reasonable care which resulted in the death of the infant Sandra." Id. at 658.

The Aten Court concluded that the infant could have been smothered negligently or have died as a result of actions for which no person was culpable. Id. at 661. Consequently, the cause of death was too speculative to prove the necessary corroborating proof of criminal negligence absent the babysitter's statements.

Applying Aten and its progeny to Hummel's case, the State was required to have independent confirmation of the fact of death and that the death was caused by premeditated murder to establish the corpus delicti. The fact of and circumstances of her death are unknown. Putting aside Hummel's statements, the remaining evidence is the lack of evidence about what happened to Alice. But "[u]nder the corpus delicti rule, if the independent evidence supports hypotheses of both guilt and innocence, it is insufficient to corroborate a defendant's admission of guilt." Brockob, 159 Wn.2d at 334-35; Aten, 130 Wn.2d at 660.

b. The prosecution relied on Hummel's uncorroborated statements. Despite extensive efforts to locate Alice Hummel's body, the police never found any physical evidence that she died. They had no forensic support for how or whether she died. The only evidence about what may have become of

Alice came from several statements by Bruce Hummel and the prosecution's case rested on these statements.

Bruce Hummel wrote a letter giving a detailed account of Alice's suicide. 2RP 176-80. The police tested its accuracy. 2RP 184-85. They found no support for the scenario depicted in the letter recounting how Bruce found Alice in the bathroom, with a deep cut on her wrist, and he disposed of her body in Bellingham Bay. There would have been too much blood to clean without leaving a trace; her body would have been too heavy to get out of the house and put into a van singlehandedly as claimed; there was no wind on Bellingham Bay that night as the letter said; the Bellingham Bay was an essentially confined area and the body would have been discovered at some point yet no remains were found. Supp. CP __, sub. no. 82, p. 14-15; 3RP 396; 5RP 585, 590-94. Rather than corroborating the letter's version of events, the prosecution tried to discredit the manner of death and means of disposing of the body depicted in the letter. 5RP 768, 774. This statement was inadmissible based on its lack of trustworthiness. Opper, 348 U.S. at 93; RCW 10.58.035.

Bruce Hummel also pled guilty in federal court to theft for taking Alice Hummel's disability payments. In his guilty plea, he

said that Alice died and he used her money knowing she was dead. 6RP 824. The prosecutor repeatedly referred to these statements in his closing argument but Hummel's statement that Alice died does not provide independent evidence she died or that he caused her death. 6RP 823-30.

Finally, a jailhouse informant named Donald Cargill claimed Hummel admitted to him that he gave his wife an overdose of barbituates. 4RP 518, 523. Cargill plied this information from Hummel after he heard about Hummel's charge from other inmates and he immediately contacted police investigators for the purpose of obtaining a personal benefit for himself. 4RP 517-20. Although Alice Hummel took many medications for a variety of serious health problems, no one testified about what medications she took, that her medications were missing after she disappeared, or of any other evidence that Alice died by an involuntary overdose. 1RP 30, 2RP 95. Cargill's testimony that Hummel admitted causing Alice's death by arranging her overdose was uncorroborated by independent evidence and it was inadmissible on this basis as well. Oppen, 348 U.S. at 94; RCW 10.58.035.

Absent Hummel's various statements about Alice having died, the prosecution had no evidence about how or whether she

died. In fact, the prosecution's theory in closing argument was that it did not need to prove how Alice died, only that Bruce caused her death somehow. 6RP 829-30. They heavily relied on Bruce's admissions, combined with the absence of evidence that Alice was alive, to speculate that Hummel must have killed her and presumably did it in a premeditated fashion given his ability to cover up his commission of this purported crime. 5RP 819-20, 823-24, 828-30. The very lack of evidence of a crime became the crux of the State's claim that Hummel must have planned to kill her and then accomplished this goal in secret because he covered it up so well. 6RP 756-61.

Independent evidence corroborated that Alice was seeking a job in California and she may have gone there for an interview. 2RP 235, 250, 3RP 301. Alice had a number of health problems, including epileptic seizures and lupus, suffered from depression, and took a significant amount of medication. 2RP 234; 252. Alice spent time on her own, often staying at a local hotel as a retreat from home, and enjoyed going out shopping. 2RP 80, 84, 235. There is reason to believe she could have left Bellingham on her own free will or that she died of natural causes.

There is no corroboration of her death. The police searched the Hummels' home extensively, using ground-penetrating radar and cadaver dogs to look for any trace of a body on the property. 3RP 318. They made a replica model of the Hummels' bathroom and experimented to determine the path of blood if she had died there as Hummel's letter said she did. 3RP 321-31. They pursued any possible blood stain in the home. Id. They examined any body parts that came from Bellingham Bay. 5RP 583-85. Yet they found no evidence of how Alice died or whether she died.

They searched for Alice Hummel elsewhere, looking through databases of government records, including business records, employment records, death records, driving license records, telephone records, and more, but found no record. 4RP 477-83.

This complete lack of evidence does not establish or confirm that her death was caused by an act of premeditated intentional murder. The mere possibility that Alice Hummel could have died in many different ways, and no particular way demonstrably occurred, does not demonstrate the corpus delicti for first degree murder.

Finally, independent evidence is insufficient to corroborate a defendant's admission if it could support a hypothesis of innocence. While Alice took prescribed medications due to health

problems, there is no evidence that she overdosed. While it is possible that Hummel secreted the body, carried it outside, and took it to a remote area while his children were at school or sleeping, a biomechanical engineer testified that it would be impossible for Hummel to carry Alice out of the house by himself undetected and load it into his vehicle. 4RP 372-75, 389.

Corpus delicti for first degree murder requires corroborating evidence of the fact of death as well as the cause of death by premeditated intent. Aten, 130 Wn.2d at 658-59. Premeditation “means thought over beforehand,” and is not proven by a concerted effort of concealment afterward. CP 55. The absence of evidence supporting the fact and circumstances of death in a manner that excludes hypotheses of guilt leads to the necessary conclusion that there is insufficient evidence of corpus delicti.

c. The court misunderstood the requirements of corpus delicti when rejecting Hummel’s motions to dismiss based on the lack of corpus. Hummel moved to dismiss the charge as well as exclude Hummel’s statements based on the lack of corroborating evidence that Alice died or Hummel caused her death. CP 322-38, 459-70. The court denied these requests. 7/21/09RP 83-89; 8/10/09(A)RP 14.

The trial court misapplied the framework dictated by Brockob and Aten, and affirmed in Dow. It reasoned that there was sufficient evidence to “support a logical and reasonable inference” that Hummel killed his wife because she disappeared and he had an apparent motive. 7/21/09RP 86. The court found “I think that a rational trier of fact could come to that sort of conclusion.” Id. But Brockob dictates that the court must consider whether there are reasonable interpretations consistent with innocence, not merely surmising that the evidence could be interpreted to find the accused person guilty. 159 Wn.2d at 334-35.

The court did not find there was sufficient independent evidence demonstrating that Alice died by the criminal act of premeditated intentional murder. See Aten, 130 Wn.2d at 658-59. Its speculation that a juror could so conclude because there was no evidence disproving this scenario does not constitute affirmative, independent evidence confirming the specific crime charged. See Brockob, 159 Wn.2d at 331.

Absent evidence of the corpus delicti of the crime without Hummel’s statements, his statements are inadmissible and the evidence is insufficient. Dow, 168 Wn.2d at 255. The remedy is to reverse the conviction and dismiss the charge.

2. HUMMEL WAS DENIED HIS RIGHT TO
CONFRONT WITNESSES AGAINST HIM BY
THE STATE'S RELIANCE ON THE RESULTS
OF RECORDS SEARCHES

The prosecution tried to prove the critical fact that Alice Hummel must be dead by showing that several police officers searched multiple trustworthy, extensive databases but found no records showing Alice had been alive and living in the United States. Hummel was denied his right to confront testimony against him because he could not test the sweeping database evidence by inquiring into the methodology, accuracy, or completeness of the records.

a. The confrontation clause bars the State from introducing evidence without offering the accused person the opportunity to confront and cross-examine the evidence. The prosecution may not introduce “testimonial” hearsay against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant, or unless the declarant is unavailable and the defendant has an opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 54, 68, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004), **Error! Bookmark not defined.**U.S. Const. amend. 6 (guaranteeing a defendant the right, “to be

confronted with witnesses against him.”); Wash. Const. art. I, § 22 (guaranteeing the accused the right “to meet the witnesses against him face to face.”). The Supreme Court has further explained that it violates the Confrontation Clause for a police officer to testify about the results of analysis conducted by another person who tested a substance out-of-court. Melendez-Diaz v. Massachusetts, U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

The confrontation guaranteed by the Sixth Amendment is live testimony before the trier of fact with an opportunity for cross-examination. It is by confronting the person who personally speaks for the analysis performed that the “honesty, proficiency, and methodology,” may be explored by the accused. Melendez-Diaz, 129 S.Ct. at 2538. When the person testifying has no basis to know of the underlying methods used and precise circumstances of the tests’ operations, the defendant cannot effectively cross-examine the testimony presented. Id.

In Melendez-Diaz, the Court explained that evidence need not be “accusatory” to constitute testimony that the accused has the right to confront. 129 S.Ct. at 2533-35. It also rejected the claim that recounting a scientific test is neutral evidence that could not be distorted. The Court refused the prosecution’s efforts to

paint the evidence gathered as the result of a simple test as presumptively reliable, or consider the availability of other means to challenge the forensic test results at issue. Id. at 2536. The Supreme Court ruled “the Constitution guarantees one way [of confronting evidence]: confrontation. We do not have the license to suspend the Constitution when a preferable trial strategy is available.” Id.

The Melendez-Diaz Court paid specific attention to reports generated for the purpose of prosecution. Police reports are inadmissible at trial because their purpose is for use in prosecution. 129 S.Ct. at 2538. Similarly, while a clerk may certify the authenticity of an existing record, the clerk has “no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect,” without the opportunity to confront the record-keeper. Id.

A number of courts have determined that, based on Melendez-Diaz, the prosecution may not rely on a clerk’s affidavit that no record exists. In United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010), the government introduced a certificate of non-existent record (CNR), stating no record was found after diligent search of the defendant’s permission to re-enter the United States

following an earlier deportation.³ The Fifth Circuit ruled this testimony violated the confrontation clause because it “serve[d] as substantive evidence against the defendant whose guilt depended on the nonexistence of the record” and was “used to establish a necessary fact to convict.” Id. at 586. By offering evidence of the record search without producing the witness who searched and maintained the records at issue, Martinez-Rios was unable to confront the person who analyzed the records. Id.; see also United States v. Orozco-Acosta, 607 F.3d 1156, 1161 (9th Cir. 2010) (certificate claiming no record exists in agency databases is testimonial, overruling United States v. Cervantes-Flores, 421 F.3d 825 (9th Cir. 2005);⁴ Tabaka v. District of Columbia, 976 A.2d 173, 176 (D.C. Ct. App. 2009) (clerk’s statement that no record of driver’s license used as substantive evidence attesting to an important element of the charged offense is inadmissible without confrontation).

³ The court also noted that Melendez-Diaz “calls into doubt” prior cases finding no confrontation clause violation based on an unconfrosted affidavit from a clerk’s that no record exists. 595 F.3d at 585.

⁴ The State’s motion seeking to admit the results of computer records searches relied heavily and quoted extensively from the now-overruled decision in Cervantes-Flores. CP 273-75. Orozco-Acosta held that Cervantes-Flores is “irreconcilable” with Melendez-Diaz. 607 F.3d 1161 n.3.

Another application of Melendez-Diaz occurs where a live witness testifies, but this witness is not the person who tested the evidence at issue. The Massachusetts Supreme Court held that Melendez-Diaz and Crawford require the witness to testify only about his or her own tests. The analyst may not testify about another analyst's factual findings. Commonwealth v. Avila, 912 N.E.2d 1014, 1029 (Mass. 2009); see also State v. Locklear, 681 S.E.2d 293, 304-305 (N.C. 2009) (introducing one forensic analyst's report through the live testimony of a different analyst "violate[s a] defendant's constitutional right to confront the witnesses against him."); State v. Lui, 153 Wn.App. 304, 221 P.3d 948, rev. granted, 168 Wn.2d 1018 (2010) (expert may testify about own evaluation and interpretation of tests).

The evidence introduced in the case at bar intersects both of these applications of the right to confrontation following Melendez-Diaz. The State relied on the non-existence of official records as substantive proof that Alice had died. The State called witnesses to repeat the results they received from searching records databases, but those witnesses did not control, maintain, or even know the scope of the records and the mechanisms of the

searches. Absent testimony about the records from the keepers of the records, Hummel was denied his right to confrontation.

b. Testimony that other entities maintain databases and reporting the results of searches generated by unexplained database searches violates the confrontation clause. The prosecution elicited evidence from database searches, for the truth of the matter, to prove that after a diligent search, the State found no official records Alice Hummel after her purported death in 1990. Two police officers testified that they did searches on broad, reliable databases that store a vast amount of official records and discovered no records for Alice Hummel. 3RP 297-300; 4RP 454, 479-82. The databases collected official records, including driver's licenses, court records, criminal records, and bankruptcy records. 3RP 297; 4RP 479-82. They relied on these searches for "to prove or disprove" Alice's existence. 4RP 477.

Sean Hummel worked as a computer programmer and purchased software to search for his mother, although he could not recall the name of the program or its details. 2RP 214-16, 241. Sean and Shanalynn paid a company called USA Search to search records for social security numbers, but received no results that could be their mother. 1RP 55, 63; 2RP 242-43.

Hummel objected. CP 281-86.⁵ He complained that the State's witnesses were repeating out-of-court analysis that he could not confront. The people who compiled the records or maintained the databases did not testify. A sales consultant and trainer from LexisNexis testified but he had no knowledge of the scope, accuracy, or methodology of the records searches performed by the computer. 4RP 467-72. He could simply repeat the breath of the official records contained in the LexisNexis system and the intent to gather comprehensive official records. 4RP 454. He repeatedly answered that he did not know and was not the right witness to explain the completeness, accuracy, or methodology of the databases. 4RP 429-32, 468-49.

Retired police major and then-private investigator Alton Terry used LexisNexis as well as IRSC, Northwest Locators and Capital Search. 3RP 286, 296. He did not know what IRSC meant but believed it was a national database centrally collecting public records, and the Northwest and Capital companies collected Washington court records. 3RP 296-98.

⁵ Hummel raised confrontation clause objections in a pretrial motion, a pretrial hearing, and throughout the trial as each witness testified. 8/10/09(A)RP 21-22, 33; 1RP 54-55; 2RP 214, 224; 3RP 279-80; 4RP 442, 446-49.

Terry searched these databases and did not find records for Alice. 3RP 297-300. Detective Allen Jensen also used “full search engines” from records collected by LexisNexis and found no results confirming Alice’s existence after 1990. 4RP 475-78.

The court overruled Hummel’s objections, finding that if the jury thought the State did not show the comprehensiveness of the records, it would go to the “weight” the jury accorded the evidence. It also ruled that testimony of “no record” was not evidence requiring confrontation. 8/10/09(A)RP 36; 1RP 56; 2RP 224.

The trial court’s analysis is precisely what the Supreme Court found contrary to the Sixth Amendment in Crawford and Melendez-Diaz. Police officers reported the final result of searches of broadly compiled government records but they had no firsthand knowledge about the scope of the information contained in the databases, its source, the method of collection, its accuracy, or the methodology of the search process.

The trial court’s insistence that Hummel could expose the witness’s lack of firsthand knowledge of the results they received from computer records searches by cross-examination is contrary to the Confrontation Clause, which “guarantees one way [of

confronting evidence]: confrontation.” Melendez-Diaz, 129 S.Ct. at 2536.

c. The critical testimonial evidence admitted without the opportunity for cross-examination undoubtedly affected the jury’s deliberations. Admission of evidence in violation of the “bedrock” right of confrontation requires reversal unless the State proves beyond a reasonable doubt the unfronted evidence did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (“The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt”); United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5th Cir. 2008) (harmless error analysis following confrontation violation requires court to assess whether possible jury relied on testimonial statement when reaching verdict).

The prosecution must prove the erroneously admitted conclusory opinions from police officers, as well lay witnesses, there was no official record of Hummel’s employment, driver’s

license, vehicle registration, or otherwise, did not “contribute to the verdict obtained.” Fields v. United States, 952 A.2d 859, 864 (D.C. 2008) (finding improperly admitted drug analysis not harmless when government could not prove it did not contribute to the verdict obtained); see Van Arsdell, 475 U.S. at 684; Chapman, 386 U.S. at 24.

The prosecution relied on the inference that the lack of proof Alice was living elsewhere left the only conclusion that Hummel must have killed her. 6RP 764-65. The non-existence of records was a centerpiece of the case and multiple witnesses testified to the lack of records. 1RP 63; 2RP 241-42; 3RP 299-300; 4RP 479-83. Undoubtedly, the jury considered and relied on the witnesses’ proclamations they used large, reliable databases collecting government records to prove there is no record of Alice Hummel. The prosecution’s “insistent reliance” on this testimony in its closing argument, as well as the number of witnesses who recounted their unsuccessful searches of broad public records shows the error contributed to the verdict obtained. Alvarado-Valdez, 521 F.3d at 341; see United States v. Tirado-Tirado, 563 F.3d 117, 126 (5th Cir. 2009) (considering the “emphasis that the government placed on

this evidence” in closing argument, the confrontation clause violation cannot be harmless).

3. THE COURT’S REFUSAL TO INSTRUCT THE JURY ON THE CAUTION WITH WHICH THEY SHOULD WEIGH STATEMENTS BY A JAILHOUSE INFORMANT DENIED HUMMEL A FAIR TRIAL

a. The unreliability of a jailhouse informant requires careful instruction on credibility. The testimony of a prison informant is inherently untrustworthy. Banks v. Dretke, 540 U.S. 668, 701-02, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); On Lee v. United States, 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed.2d 1270 (1952). The use of informant testimony is strongly correlated to wrongful convictions. See e.g., Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice, 77 (2009) (“often juries believe lying criminal informants, even when juries know that the informant is being compensated and has the incentive to lie”; in study of 51 wrongful capital convictions, “each one involve[ed] perjured informant testimony accepted by jurors as true.”).

Because it has “long recognized the ‘serious questions of credibility’ informants pose,” the Supreme Court has allowed

defendants broad latitude in cross-examination. Banks, 540 U.S. at 701-02 (quoting On Lee, 343 U.S. at 757). In addition to cross-examination, the Supreme Court has “counseled” the use of “careful instructions” to the jury regarding the credibility of the informant. Id. The defendant is “entitled” to have informant credibility issues “submitted to the jury with careful instructions.” Lee, 343 U.S. at 757.

In federal courts, the use of informant testimony is usually accompanied by an instruction requiring the jury to view the testimony with “caution” or “great care.” Banks, 540 U.S. at 701 (citing 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 15.02 (5th ed.2000) (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on informant testimony)). There is a “consensus” in federal courts that the informant-credibility instruction is “necessary” when an informant’s testimony is uncorroborated because the general credibility instruction is not sufficient. United States v. Luck, _F.3d_, 2010 WL 2635812, *4 (4th Cir. 2010) (finding ineffective assistance of counsel where attorney fails to request informant instruction). Informant testimony raises special concerns about the person’s incentive to fabricate for his or her own benefit. Id. The

general credibility instruction does not sufficiently caution jurors as to the importance of corroboration when evaluating an informer's testimony. Id. at *6 ("the informant instruction is *sui generis*; it alerts jurors to the potentially unique problems that inhere where an individual is paid to inculcate a defendant").

Other states similarly require instructions on evaluating the credibility of a jailhouse informant based on the unique concerns that arise. The Connecticut Supreme Court held that an informant instruction, like an accomplice instruction, should be given to the jury because informant testimony is "inevitably suspect." State v. Patterson, 886 A.2d 777, 789 (Conn. 2005). The court held that, "an informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused," therefore, a defendant is entitled to a specific instruction regarding how to measure the informant's credibility. Id. at 790; see also Moore v. State, 787 So.2d 1282, 1286 (Miss. 2001) (abuse of discretion for trial court to refuse cautionary instruction regarding informant testimony); Dodd v. State, 993 P.2d 778, 784 (Okla. Crim.App. 2000) (requiring cautionary instruction "in all cases" where jailhouse informant testifies).

California has enacted a statute requiring that a court “shall” provide an informant credibility instruction for any in-custody informant. Cal. Penal Code § 1127(a). The California provision was recommended by a commission which “concluded that the testimony of in-custody informants potentially presents even greater risks than the testimony of accomplices, who are incriminating themselves as well as the defendant.” California Commission on the Fair Administration of Justice, Report and Recommendations Regarding Informant Testimony, (Report on Informant Testimony), p. 6 (2006).⁶

Washington has no published case law on the importance of a specific instruction addressing the methods by which the jury should measure the credibility of a jailhouse informant, but the weight of authority from the Supreme Court and other courts suggests such an instruction is not only appropriate, but important and necessary.

b. Hummel's requested instruction would have informed the jurors regarding the weight they should give the testimony of the jailhouse informant who testified against him, accurately stated the law, and was necessary to ensure Hummel

⁶ Available at: <http://www.ccfaj.org/documents/reports/jailhouse/>

could present his defense and receive a fair trial. An accused person has a due process right to have the jury accurately instructed on his theory of defense, provided the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. 5, 6, 14; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

Hummel proposed several alternative versions of jury instructions regarding the credibility of the informant. CP 75, 76; 6RP 725. After the court rejected Hummel's proposed instructions, including one identical to the federal pattern instruction, Hummel asked for the same instruction as courts must give when the State uses testimony from a purported accomplice, which warns the jury that special attention should be given in evaluating the testimony of an accomplice. 6RP 725. The court refused to provide any of the alternative versions Hummel requested. 6RP 723-26.

Washington courts require a particular instruction when the

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prosecution relies solely upon the uncorroborated testimony of an accomplice. Comment, WPIC 6.05.⁷ The Note on Use for WPIC 6.05 instructs courts to “[u]se this instruction, if requested by the defense, in every case in which the State relies upon the testimony of an accomplice.” Note on Use, WPIC 6.05 (emphasis added).

The accomplice credibility instruction should be given in most instances and is imperative when the accomplice offers critical information that is not substantially corroborated by other evidence.

The Washington Supreme Court ruled:

We hold: (1) it is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration.

State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984)

(emphasis in original), overruled on other grounds in State v.

Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

⁷ Washington Practice: Washington Pattern Jury Instructions: Criminal (3d. ed. 2008), WPIC 6.05 reads:

The prosecution opposed Hummel's request on two related grounds: that the general credibility instruction was all the court should give and the court would impermissibly comment on the credibility of a witness if it gave an instruction specific to informant credibility. 6RP 719-20. The prosecution's arguments were wrong.

The mere fact that there is a body of pattern jury instructions does not mean that these instructions accurately state the law, or that the court should not give a non-pattern instruction. State v. Studd, 137 Wn.2d 533, 547-49, 973 P.2d 1049 (1999). Further, the defense-proposed instruction finds ample support in the law as explained by the United States Supreme Court, federal courts and other state court authority. See Banks, 540 U.S. at 701; State v. Land, 121 Wn.2d 494, 851 P.2d 678 (1993) (Washington Courts will look to federal decisions as persuasive authority in assessing analogous situations under state law); State v. Terrovona, 105 Wn.2d 632, 639-41, 716 P.2d 295 (1986) (in the absence of persuasive Washington case authority, court looks to federal cases

Testimony of an accomplice, given on behalf of the [State] [City] [County], should be subjected to careful examination in light of the other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

for appropriate rule). An informant has a far greater incentive to fabricate than an accomplice. Report on Informant Testimony, p. 6. The informant does not need to implicate herself to testify against another person and may see little or no repercussions from fabricating a story against another but has a great incentive to believe she may benefit from the testimony. Id.

The proposed defense instructions, either the one mirroring the federal pattern instruction or the accomplice instruction in WPIC 6.05, would accurately state the law and would not be a comment on the credibility of a witness. CP 76; 6RP 716, 725. Courts must give instructions to guide jury deliberations with the purpose of insuring a fair trial. Courts tell juries to weigh accomplice testimony with great care because of the significant motive accomplices have to fabricate testimony. Harris, 102 Wn.2d at 155. Similarly, an informant who faces criminal charges has a great incentive to fabricate and the general credibility instruction does not sufficiently convey this concern to the jury. A wrongful conviction is not in the interest of the judiciary or society, and the problems caused by perjured informant testimony are well-documented. The court would not comment on the evidence by instructing the jury to weigh an informant's testimony with great

care.

Cargill's testimony about Hummel poisoning his wife was uncorroborated. No one else said Hummel admitted killing his wife or how he did it. Despite its lack of corroboration, it was the only potential explanation the State offered of how she died, and the State tried to refute alternative theories.

Additionally, Cargill had a plain motive to sell out Hummel in exchange for leniency. He faced multiple counts of first degree burglary, unlawful possession of firearms, and a charge of bail jumping, based on allegations that he entered two homes during a methamphetamine binge, stole thousands of dollars of property including firearms, and did not return to court after making bail. 4RP 509, 538-43, 549-51, 555-56. His standard range would be 57-75 months, and the charged class A felonies were "strike" eligible offenses. 4RP 546-48. But after he claimed he heard Hummel's confession, the State promised to recommend he receive a 20-month term, with only nine months in jail and the rest served in community-based drug treatment. 4RP 510.

In addition to his pending charges, Cargill was on probation in Idaho and his recent criminal charges directly violated his probation conditions. 4RP 558-60. He faced seven years of prison

in Idaho if his suspended sentence was revoked. 4RP 558.

In Patterson, the State similarly used an informant who had an obvious motive to curry favor in exchange for leniency, and the defense explored his motive to lie and his extensive criminal history during cross-examination. 886 A.2d at 787. The jury heard of his uses of aliases and false statements when arrested, as well as his numerous pending charges and the benefit he expected from testifying. Id. Notwithstanding the opportunity to cross-examine the informant, the Connecticut Supreme Court ruled that the defendant was entitled to an instruction on the caution with which they jury should view the informant's statements. Id. at 789-90. It rejected the claim that such an instruction interfered with the jury's role in weighing witness credibility or was adequately addressed in the general credibility instruction. Similarly, Hummel was entitled to "careful instruction" explaining the means by which the jurors should assess the credibility of this witness who possessed a uniquely powerful incentive to fabricate. Banks, 540 U.S. at 701; Agers, 128 Wn.2d at 93.

The court's general credibility instruction was not extensive or specific. CP 46; see WPIC 6.05. Based on the critical importance of this witness to the State's case, as well as the

undeniable effect of hearing Cargill's claim that Hummel actually confessed to the crime, the failure to instruct the jury regarding the care with which it should evaluate the informant's testimony denied Hummel his right to a fair trial by an accurately instructed jury.

Patterson, 886 A.2d at 473; see Harris, 102 Wn.2d at 155.

4. THE COURT'S CLOSURE OF THE COURT PROCEEDINGS WITHOUT FOLLOWING THE STRICT MANDATES OF BONE-CLUB DENIED HUMMEL AND THE PUBLIC THEIR RIGHTS TO THE OPEN ADMINISTRATION OF JUSTICE

The trial court questioned a number of jurors in chambers, but only articulated its reasons for doing so after the private questioning was complete. By closing the courtroom to the public without identifying the need for the closure and weighing alternatives before the closure, the court violated the right to open proceedings protecting by the state and federal constitutions.

a. The court has a fundamental obligation to conduct proceedings in public. It is the trial court's duty to conduct proceedings that are open to the public to protect both the defendant's the public's constitutional rights to public court proceedings. State v. Strode, 167 Wn.2d 222, 217, P.3d 310 (2009); State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009); see also Presley v. Georgia, __ U.S. __, 130 S.Ct. 721, 725 (2010) ("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," including the *voir dire* of prospective jurors); U.S. Const. amends. 1, 6, 14; Wash. Const. art. I, §§ 10, 22.

The presumption of open, publicly accessible court hearings, including voir dire, may be overcome “only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to preserve that interest.” Strode, 167 Wn.2d at 227; Momah, 167 Wn.2d at 148; see also Presley, 130 S.Ct. at 724 (circumstances in which the right to an open trial may be limited “will be rare,” and, “the balance of interests must be struck with special care”).

The trial court must articulate the “overriding interest” justifying any limit on public access to voir dire “along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” Strode, 167 Wn.2d at 227.⁸ The trial court “must ensure” that the “five criteria are satisfied” before closing court proceedings. Id.

The five criteria, referred to as the Bone-Club factors, are mandatory.⁹ “[A] trial court must engage in the Bone-Club analysis;

⁸ Quoting In re Personal Restraint of Orange, 152 Wn.2d 75, 806, 100 P.3d 291 (2004); Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed 2d 31 (1984); and Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Presley relies on the same standards, as explicitly set forth in Waller and Press-Enterprise. 130 S.Ct. at 724.

⁹ The required factors are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right.

failure to do so results in a violation of the defendant's public trial rights." Strode, 167 Wn.2d at 228 (quoting State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005)). It is the trial court's "affirmative duty" to determine the compelling interest for privately questioning any jurors and to weigh the competing interests. Id. at 228 (quoting Bone-Club, 128 Wn.2d at 261).

The right to a public trial, including the public's right to access trial court proceedings, may be raised for the first time on appeal. Strode, 167 Wn.2d at 230. Any waiver must have been affirmatively executed in a knowing, intelligent, and voluntarily manner. Id. at 229 n.3.

Additionally, the court protects the public's right to open proceedings. Id. at 230; Wash. Const. art. I, § 10. Courts are independently obligated to "ensure the public's right to open trials is protected." Id. at 230 n.4; see Presley, 130 S.Ct. at 724-25 ("The

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Each requirement is explained in more detail in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-38, 640 P.2d 716 (1982).

public has a right to be present whether or not any party has asserted the right,” and therefore, “trial courts are required to consider alternatives to closure even when they are not offered by the parties”).

Finally, Washington “has never found a public trial right violation to be [trivial or] de minimis.” Strode, 167 Wn.2d. at 230 (quoting State v. Easterling, 157 Wn.2d 167, 180, 137 P.3d 825 (2006)). For a courtroom closure to be trivial, it must be “brief and inadvertent.” Id. A closure is not trivial when jurors are questioned in chambers and that information is used for purposes of jury selection. Id. Prejudice is presumed. Id. at 231.

b. The court closed the courtroom without considering and weighing the *Bone-Club* factors. Before prospective jurors entered the courtroom, the trial judge sua sponte declared he would question jurors in private if the jurors requested and after making “Bone-Club findings.” 8/10/09(A)RP 100. The trial judge did not make these findings before closing the court proceedings.

The court announced that any juror who noted a “preference” to answer questions outside the rest of the jury panel, the juror may come into chambers for further discussion about the

questions marked private. 8/10/09(B)RP 24. The jury questionnaire said, "If you feel that your answer to any question might be embarrassing to you, you may indicate that you would prefer to discuss your answer in private." Supp. CP _, sub. no. 80. Question 19 also said if "any" questions were "sensitive," the juror could note the number and respond privately. Id.

In the courtroom, the judge asked if "anyone in the courtroom objected," and hearing no response, he said, "we'll go do that." 8/10/09(B)RP 24. Before leaving the courtroom, the judge did not explain the specific need for closed proceedings, consider alternatives, weigh the interests in the closure against the public's right to open courtrooms, or order that the closure would be no broader in application or duration than necessary to serve its limited purpose. Bone-Club, 128 Wn.2d at 258-59.

The closed jury voir dire lasted the rest of the afternoon and upon its completion, the court adjourned for the day. 8/10/09(B)RP 24-103. The court questioned nine prospective jurors. The court also discussed a few other matters while in chambers, including its ruling on the scope of cross-examination of the jailhouse informant. Id. at 98-103.

The next day, the court acknowledged it had not engaged in the necessary findings and tried to make the record it had neglected before closing the courtroom. 8/11/09RP 17-18. The court noted there was at least one member of the media and member of the public in the courtroom when it left for in-chambers questioning. 8/11/09RP 17. It said jurors need the “opportunity” to “speak freely” for a fair trial; the issues “inquired of” were related to trial; and it believed they got more candid comments than they would have in the large panel. Id. The judge said it was a limited and least restrictive means of closure. Id. at 18.

The defense identified a tenth juror whose questionnaire indicated an interest in privacy but who had not affirmatively requested to speak in private. 8/11/09RP 18-19. The court called that juror into chambers for private questioning. Before leaving the open courtroom with this juror, the court said it was “consistent” with its Bone-Club ruling. Id. at 20. The court never asked if anyone in the courtroom objected to this second closed proceeding. Id. at 18-20.

c. The court’s failure to comply with the mandatory procedures before closing the courtroom violates the right to a public trial. On the second day of jury selection, the court did not

ask if anyone objected to the closure of the courtroom, even though the case attracted the attention of the public and media, who were present. This violates the court's obligation. Presley, 130 S.Ct. at 724-25.

For both closures, the court never considered alternatives before closing the courtroom. Presley, 130 S.Ct. at 724-25. ("whether or not any party has asserted the right," the court is "required to consider alternatives to closure even when they are not offered by the parties"). The court did not explain why jurors could not be questioned in the courtroom, with all other potential jurors waiting elsewhere, outside the courtroom. It took an entire afternoon to question the jurors individually and privately, so the court could have let all potential jurors go home who did not have a private matter to discuss. The potential jurors could have been questioned in the courtroom. It is the court's obligation to consider and weigh obvious alternatives, and it is not excused from this obligation simply because no one offered alternatives to the court. Presley, 130 S.Ct. at 725.

If "generic" risks such as the fear jurors could hear prejudicial information justified closed courtrooms and overrode the constitutional right to a public trial, "the court could exclude the

public from jury selection almost as a matter of course.” 130 S.Ct.

at 725. The Presley Court further held,

even assuming, *arguendo*, that the trial court had an overriding interest in closing voir dire, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.”

130 S.Ct. at 725.

Additionally, the court did not weigh the other mandatory Bone-Club factors until after it initially closed the court proceedings to the public. This post hoc justification of a closure that already occurred undermines the purpose of the findings, which are required so that the court sets both a strict justification for the closure and the narrowest framework for the closure. See Strode, 167 Wn.2d at 231. The court’s assurance that it conducted a proper, private inquiry of jurors after-the-fact did not guarantee the closure would be as narrow as possible or the least restrictive means available before the court closed the hearings.

Although Hummel did not object to the closed courtroom proceeding, he did not propose it. 8/10/09(A)RP 100. The trial court instigated the closure and it took the lead in questioning jurors. 8/10/09(B)RP 25-27, 32-34, 36-39, 44-51, 58-62, 64-68, 73-78, 85-95, 98-99. Its failure to meet its obligations to the public and

the defendant is a structural error requiring reversal. Easterling, 157 at 179-80.

5. UNDER THE STATUTE IN EFFECT AT THE TIME OF THE OFFENSE, HUMMEL'S CONVICTIONS FOR THE FEDERAL OFFENSE OF WIRE FRAUD MAY NOT BE USED TO CALCULATE HIS OFFENDER SCORE

- a. The court must predicate its calculation of an offender score based solely on the controlling statutes. The law in effect at the time the offense was committed controls the punishment available for the offense. RCW 9.94A.345 ("Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."); State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). The saving statute, RCW 10.01.040, also directs that the law in effect on the date of the offense governs the applicable penalties. State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004).

The State charged Hummel with committing the charged offense in October 1990. CP 50, 498. In 1990, out-of-state convictions could be included in a person's offender score if comparable to a Washington felony under former RCW

9.94A.360(1)(1990).¹⁰ The statute did not address federal convictions, but this Court construed “out-of-state” convictions to include those from federal courts if comparable. State v. Villegas, 72 Wn.App. 34, 37, 863 P.2d 560 (1993).

But only comparable federal convictions could count in an offender score. Id. The prior convictions must be “equivalent” to a Washington offense. Id. at 38-39. The statute was subsequently amended to speak to federal convictions, providing that convictions for exclusively federal offenses or federal offenses not clearly comparable could be included in an offender score as a Class C felony.¹¹ This amendment did not exist in 1990.

A non-Washington offense must be legally and factually comparable to a Washington felony to be counted in the offender score. If elements of a foreign conviction are “on their face” the same as a Washington felony, the foreign conviction may be used

¹⁰ RCW 9.94A.360(3)(1990) provided in pertinent part, “Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.”

¹¹ Cf. RCW 9.94A.525(3), which provides in pertinent part: Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

as a prior conviction. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

The elements of the offenses “must remain the cornerstone of the comparison.” Id. at 256. When a person may be convicted of an out-of-state offense without having the same intent as required in Washington, the other offense is not comparable to a Washington offense. Id.; In re Pers. Restraint of Carter, 154 Wn.App. 907, 924, 230 P.3d 181 (2010) (“Carter’s California assault is not legally comparable to second degree assault in Washington because of the different intent elements.”).

Although the facts proven beyond a reasonable doubt may also be considered when determining the application of an out-of-state conviction, this comparability analysis is constrained by the principle that an accused person has no reason to contest a fact that is not essential to the underlying offense. Lavery, 154 Wn.2d at 257. If the fact was not proven beyond a reasonable doubt, it may not be used as a basis to assess comparability. Id. “Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.” Id. at 258.

b. Wire fraud is not comparable to a Washington felony.

i. Elements of wire fraud. Hummel was convicted in federal court of 12 counts of wire fraud, in violation of 18 U.S.C. § 1343. Ex. 6.

The elements of wire fraud are:

- (1) the formation of a scheme or artifice to defraud;
- (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme;
- and (3) specific intent to deceive or defraud.

Odom v. Microsoft Corp., 486 F.3d 541, 554 (9th Cir. 2008) (internal quotation marks omitted); 18 U.S.C. § 1343.

Wire fraud focuses on a scheme involving an intent to defraud. It does not require any particular value of property having been taken. See United States v. Oren, 893 F.2d 1057, 1061-62 (9th Cir. 1990) (no actual loss of money or property required for wire fraud). Wire fraud does not require “proof of theft.” United States v. Williams, 527 F.3d 1235, 1241 (11th Cir. 2008); see also Oren, 893 F.2d at 1061 (9th Cir. 1990) (government need not show fraud scheme was “successful” for wire fraud).

The defendant in Oren concocted a false property appraisal in hopes of getting a higher price for land he wished to sell. The

defendant claimed the fake appraisal was accurate, but the court ruled the true value of the property was immaterial and inadmissible. Oren, 893 F.2d at 1062. By using a fraudulent scheme in an effort to deceive, Oren was guilty of wire fraud. Oren, 893 F.2d at 1062. The intent to deceive, not the actual deprivation, is the gravamen of wire fraud. Carpenter v. United States, 484 U.S. 19, 27, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987) (wire fraud statute “reach[es] any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.”).

ii. Elements of theft in Washington. Theft in Washington requires the specific intent to deprive another of property or services, combined with an actual taking. State v. Walker, 75 Wn.App. 101, 106, 897 P.2d 957 (1994); RCW 9A.56.020(1).¹² The deprivation must be of some duration: “the theft statute proscribes the continued or permanent unauthorized

¹² RCW 9A.56.020(1) defines “theft” as:

- (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

use” of property. Id. at 108. The value of the theft is also an element and a certain value is necessary for the offense to be a felony, with a few narrow exceptions for certain property such as firearms. See RCW 9A.56.030(1)(a) (1990) (first degree theft requires property value exceeded \$1500, or firearm); RCW 9A.56.020(1)(a) (second degree theft requires property value between \$250 and \$1500).

Identity theft, RCW 9.35.020, was not enacted until 1999. Laws 1999, Ch. 368. It cannot be referenced as a potentially comparable offense for purposes of calculating Hummel’s offender score. RCW 9.94A.345.

iii. Wire fraud is not legally comparable. The trial court did not identify the Washington felony to which the federal offense was comparable, as is technically required. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d452 (1999). Presumably, the parties did not realize that the 1990 version of the SRA required a federal conviction to be comparable to a Washington felony, and considered wire fraud to fall within the exclusive federal jurisdiction. RCW 9.94A.525(3). Because the then-in-effect statute required proof of comparability, this legal issue may be raised and must be

addressed on appeal. See State v. Renier, Wn.App. , 2010 WL 3001431, *7 (Aug. 2, 2010) (citing In re West, 154 Wn.2d 204, 213, 110 P.3d 1122 (2005)).

The legal elements of wire fraud and felony theft are not the same. Theft specifically requires the actual taking of property of a certain value with the intent to deprive, and is therefore narrower than wire fraud, which embraces the intent to defraud without requiring proof of an actual theft or taking. See Carter, 154 Wn.App. at 922-23 (Washington assault requires specific intent and therefore not comparable to general intent assault in other jurisdiction); State v. Bunting, 115 Wn.App. 135, 141, 61 P.3d 375 (2003) (Washington robbery requires specific intent to steal or deprive, unlike general intent robbery in Illinois).

A person can intend to deceive or defraud without showing that intent to deprive another of property or services. See State v. Tinajero, 154 Wn.App. 745, 750, 228 P.3d 1282 (2009), rev. denied, Wn.2d (S.Ct. No. 84322-8, August 5, 2010). Civil fraud or simple acts of deception may occur without being a criminal act.

In his guilty plea, Hummel admitted he made up a scheme to obtain money by false promises and he acted with the intent to defraud. CP 208. He admitted that he falsely represented himself

as his deceased wife, Alice Hummel and the purpose was to maintain a fiction that his wife was alive so the state would send her disability payments to their joint bank account. CP 210. He admitted that the scheme included forging her name, but did not specify how often any such forgery occurred. CP 210.¹³ Hummel also agreed to pay restitution, but restitution needs to be proven only by a preponderance of the evidence. See United States v. Statman, 604 F.3d 529, 535 (8th Cir. 2010). Facts not proven beyond a reasonable doubt may not be used for a comparability finding. Lavery, 147 Wn.2d at 257. Hummel's wire fraud convictions are not comparable to felony theft in Washington.

c. Resentencing is required. The court sentenced Hummel based on an offender score of nine, counting the 12 counts of wire fraud as separate convictions. The wire fraud convictions are not comparable as a matter of law. Hummel must be resentenced to a standard range term with an accurate offender score.

¹³ Although forgery is a felony in Washington, Hummel was not convicted of forgery and there is no factual basis to know how often he signed a forged signature because that was not part of the plea agreement.

F. CONCLUSION.

For the reasons stated above, Mr. Hummel respectfully asks this Court to reverse his conviction for first degree murder and dismiss the charge due to the lack of corpus delicti supporting the charge. Alternatively, he asks the Court to order a new trial due to the violation of the Confrontation Clause, the denial of an instruction explaining the credibility issues that arise in testimony by a jailhouse informant, and the court's improper closing of the courtroom. The legally incorrect calculation of his offender score also requires resentencing.

DATED this 12th day of August 2010.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 64134-4-I
)	
BRUCE HUMMEL,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **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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<input type="checkbox"/> | U.S. MAIL
HAND DELIVERY
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| <input checked="" type="checkbox"/> | BRUCE HUMMEL
334240
CLALLAM BAY CORRECTIONS CENTER
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CLALLAM BAY, WA 98326 | <input checked="" type="checkbox"/>
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<input type="checkbox"/> | U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF AUGUST, 2010.

X _____ *AMS*

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