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COA NO. 72055-4-I

COURT OF APPEALS,  
DIVISION I,  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

IRA DECHANT, Appellant,

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AMENDED BRIEF OF APPELLANT

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**Mitch Harrison**

**Attorney for the Appellant**

Harrison Law Firm  
101 Warren Avenue N, Suite 2  
Seattle, Washington 98109  
Tel (206) 732 - 6555

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## **I. Assignments of Error**

1. The trial court erred when it entered convictions for three inchoate murder-related crimes.
2. The trial court violated the Double Jeopardy Clause when it entered convictions for solicitation and attempted murder.
3. The trial court violated the Double Jeopardy Clause when it entered convictions for conspiracy and attempted murder.
4. The trial court erred in permitting the jury to rely on Mr. Dechant's out of court statements in convicting Mr. Dechant of solicitation, conspiracy, and attempted murder.
5. Trial counsel's failure to move to suppress constituted ineffective assistance of counsel.

## **II. Issues Pertaining to Assignments of Error**

1. Whether the trial court erred in permitting the jury to rely on Mr. Dechant's out of court statements when it entered three inchoate murder-related crimes without proving every element of the crimes independent of the defendant's incriminating statements as is required by the *Corpus Delecti* Doctrine?
2. Whether the evidence was sufficient, without Mr. Dechant's out of court statements, for the jury to convict Mr. Dechant of three inchoate murder-related crimes when it considered testimonial evidence provided by Michael Rogers, who cooperated with law enforcement in exchange for a reduced sentence?
3. Whether trial counsel's performance was deficient when he failed to move to suppress when (1) Mr. Dechant was in possession of the BMW; (2) Mr. Dechant did not consent to the search of the vehicle; (3) Mr. Didomenici provided consent to the police to search the vehicle; (4) Mr. Dechant signed a "borrow car agreement" and (5) incriminating evidence was found in the vehicle?

## **III. Statement of the Case**

### **A. CASE OVERVIEW**

This appeal involves two separate, but related cases, each of which began with Ira Dechant's arrest on January 7, 2013 when Mr. Dechant was arrested for an outstanding DOC warrant. The State ultimately charged Mr. Dechant with multiple crimes under two different cause numbers. Under 13-1-00737-8, Mr. Dechant was charged with VUCSA Possession—for drugs found on Mr. Dechant when he was initially booked into King County Jail (KCJ)—and unlawful possession of firearm—based upon a firearm that police did not locate during the initial search of the BMW, but Didomenici allegedly found in the vehicle days after Mr. Dechant's arrest.

While Mr. Dechant was in custody, another KCJ inmate, Michael Rogers, told the KCJ jailers that Mr. Dechant had approached him and discussed a plan to kill Didomenici. Based upon these allegations, the State later charged Mr. Dechant, under cause number 13-C-00964-8, Mr. Dechant was charged with multiple crimes relating to the alleged murder plot, including, solicitation to commit murder, conspiracy to commit first degree murder, and attempt to murder in the first degree.

At trial, the State argued that Mr. Dechant was so upset with Didomenici for causing his arrest in cause number 13-1-00737-8 (the firearm and drug charges), that Mr. Dechant decided to recruit others (i.e. Rogers) to help him kill Didomenici (cause number 13-C-00964-8). The

defense conceded that Mr. Dechant was a drug user and even a drug dealer (in fact, he regularly sold drugs to Didomenici). The defense denied that Mr. Dechant had any knowledge of the firearms found in the BMW (13-1-00737-8), which Mr. Dechant had only possessed for a few days.<sup>1</sup> In addition, though the defense conceded that Mr. Dechant resented Didomenici for “ratting” him out, the defense denied that Mr. Dechant ever tried to cause others to kill him.

**B. FACTS RELATING TO 13-1-00737-8 SEA – THE DRUG & FIREARM POSSESSION CHARGE**

Didomenici is a self-admitted heroin user and notorious paid informant for SPD. As of 2013, he had been an informant for Detective Lazarou for over five years. During that time, said Didomenici, he had received over \$10,000 from SPD for providing tips about individuals in possession of firearms in the Seattle area.<sup>2</sup> Didomenici was paid \$500 per handgun recovered.<sup>3</sup> Didomenici even admitted that on the day Mr. Dechant was arrested, Didomenici had purchased heroin from him.<sup>4</sup>

Didomenici was, in addition to a paid informant, also a car broker and also the source of the BMW in which Mr. Dechant was arrested. Just days before Mr. Dechant in the BMW, Didomenici had encouraged Mr.

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<sup>1</sup> It was no coincidence that Didomenici found the firearm in the BMW and police did not, the defense argued, because Didomenici was paid \$500 for each firearm recovered.

<sup>2</sup> *Id.* at 541.

<sup>3</sup> *Id.* at 548.

<sup>4</sup> *Id.* at 538, 544.

Dechant a BMW from its registered owner, Sharon Wysgoll. Mr. Dechant agreed and the two executed a “borrowed car agreement” which allowed Mr. Dechant to test drive the car for an undisclosed period of time.<sup>5</sup>

A few days after loaning the car to Mr. Dechant, Didomenici called Det. Lazarou with a tip: Didomenici told police that Mr. Dechant had a felony on his record, had a DOC warrant, and Mr. Dechant unlawfully possessed two firearms.<sup>6</sup> After providing this tip, Didomenici drove over to Wysgoll’s home and waited for police to arrest Mr. Dechant in the BMW.<sup>7</sup>

Detective Lazarou conveyed this information to several other police officers,<sup>8</sup> who eventually stopped Mr. Dechant at a gas station at 65th and 8th Avenue Northeast.<sup>9</sup> SPD Detective Miller, who was involved in the stop, would later testify that the sole basis for the arrest was Mr. Dechant’s felony warrant.<sup>10</sup>

During Mr. Dechant’s arrest, Detective Lazarou asked Mr. Dechant if he would consent to a search the BMW.<sup>11</sup> At first, Mr. Dechant gave oral consent, but then immediately revoked that consent once

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<sup>5</sup> *Id.* at 557-58. At trial, Didomenici claimed that he could not remember the exact details, but he did admit that Mr. Dechant intended to purchase the car for approximately \$10,000. *Id.* at 587.

<sup>6</sup> *Id.* at 102-03.

<sup>7</sup> *Id.* at 550.

<sup>8</sup> *Id.* at 105.

<sup>9</sup> *Id.* at 109.

<sup>10</sup> *Id.* at 97-98.

<sup>11</sup> *Id.* at 113.

Detective Lazarou started reading Mr. Dechant's rights from an SPD consent to search form to him.<sup>12</sup>

Despite Mr. Dechant's revocation, Detective Lazarou still searched the BMW, without Mr. Dechant's consent and without a warrant. Instead, Detective Lazarou called his paid informant, Didomenici, who shortly after receiving the call, arrived at the scene, conveniently bringing the registered own, Wysgoll, with him. Unsurprisingly, both the informant and the registered owner "consented" to the search of the vehicle, even though the vehicle was given to Mr. Dechant lawful (under contract) and the vehicle had not been in Wysgoll's possession for at least several days. Detective Lazarou obtained a signed consent from both individuals and police searched the vehicle.<sup>13</sup>

The car was returned to Didomenici and Wysgoll after SPD completed their search that night. However, upon the vehicle's return, Didomenici contacted SPD to arrange for an officer to retrieve contraband that was allegedly left behind in the vehicle. This miraculous tale of honesty resulted in Detective Lazarou returning to the vehicle to collect large zip ties, a couple of masks, and very large black polo shirt which had

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<sup>12</sup> *Id.* at 113-14.

<sup>13</sup> *Id.* at 113-14.

the word "sheriff" on the back. According to Didomenici, these items were located in one of the backpacks found in the vehicle.<sup>14</sup>

Detective Donald Gallagher took DNA swabs from the two handguns, though he later decided to not send them to the crime lab for analysis.<sup>15</sup> Detective Gallagher testified that the case detective, in this case Detective Lazarou makes that decision.<sup>16</sup>

### **C. FACTS RELATING TO 13-C-00964-8 -- THE ALLEGED MURDER PLOT**

#### **1. SUMMARY**

The facts supporting the charges under this cause number all evolved while Mr. Dechant was in custody in the King County Jail for the above-mentioned case.

On January 19, 2013, Michael Rogers, another KCJ inmate during Mr. Dechant's pre-trial detention, approached a KCJ Jail Officer and claimed that Mr. Dechant was trying to recruit him to help in a plot to murder Didomenici. This information was communicated to Sgt. Catey Hicks of the Special Investigations Unit at the Jail. She contacted Detective Renihan who commenced the investigation with Detective Brown by interviewing Mr. Dechant.

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<sup>14</sup> *Id.* at 555.

<sup>15</sup> *Id.* at 605.

<sup>16</sup> *Id.*

On January 22, 2013, police recruited Rogers, who was still in KCJ at the time, to wear a wire and engage Mr. Dechant in a conversation about the alleged murder plot. During their investigation, investigators targeted one of Dechant's visitors at the jail, Charles Schuelke, who was eventually lured into the conspiracy by Mr. Rogers once he was released from KCJ.

Believing that Schuelke was also involved, police arranged for Mr. Rogers's release from KCJ. Once released, Mr. Rogers contacted Schuelke and brought up the alleged murder plot. Schuelke denied having any knowledge of such a plan, despite the unfounded speculation by police based upon his one meeting with Mr. Dechant at the jail. Nevertheless, Schuelke apparently agreed to participate in the plan to murder the police informant, but only after Mr. Rogers explained the plan to him.

The two co-conspirators were pre-emptively arrested as they drove to Didomenici's residence. Inside their car, police located a firearm, provided by Schuelke, some brass knuckles, an expandable baton and money which Schuelke had provided to Mr. Rogers. Schuelke was arrested by police. Schuelke plead guilty to a lesser offense and agreed to testify for the State in Mr. Dechant's trial.

On January 29, 2013, Detectives Brown and Renihan interviewed Mr. Dechant hoping to get him to confess to his knowledge of the alleged

plan to murder Didomenici. That interview was recorded, but Mr. Dechant was not advised of this at the beginning of the interview. Police questioned Mr. Dechant for over an hour. During that interview, Mr. Dechant never once admitted to offering Rogers anything to kill Didomenici.

The defense theory at trial was that Mr. Dechant never planned or intended to have anyone killed. Rather, Rogers, who was facing considerable prison time, falsified this alleged murder plan to gain favor with the police and reduce his potential sentence for his nine pending robbery charges. The defense argued that Rogers took advantage of Mr. Dechant's frustration with the person who snitched on him, twisted his words, and took advantage of an opportunity to avoid considerable jail time.

## 2. MICHAEL "ACE" ROGERS

While Mr. Dechant was in jail, he shared a cell with Michael Rogers, also known as "Ace." According to Rogers' testimony, Mr. Dechant was angry with Didomenici for snitching on him.<sup>17</sup> While Mr. Dechant and Rogers were sitting at a table in jail with four or five other inmates, Mr. Dechant, according to Rogers, unabashedly asked everyone

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<sup>17</sup> *Id.* at 703.

within earshot, “Hey anybody willing to take care of this guy for me?”<sup>18</sup> Rogers told Mr. Dechant to stay quiet, and then agreed to kill Didomenici for him.<sup>19</sup>

Rogers claimed that he agreed to kill Didomenici “because he was a rat,” but, then conceded, “Kind of like me right now.”<sup>20</sup> Eventually, this information was relayed to Detective Timothy Renihan.<sup>21</sup> On cross examination Rogers admitted that he came forward hoping to receive a favorable plea offer from the State, as he was currently facing a ninth pending robbery charge after already being convicted of eight.<sup>22</sup> In exchange for Rogers’ compliance, the prosecutors agreed to dismiss all of those robbery charges and allowed him to plead guilty to rendering criminal assistance.<sup>23</sup> As part of that plea offer, Rogers agreed to wear a body wire and engage Mr. Dechant in a conversation about the alleged murder plot. Detective Renihan told Rogers to not consult with his attorney about this agreement.<sup>24</sup>

Rogers testified that Mr. Dechant directed him to meet up with a friend of his, Charles Schuelke, after being released from jail on January

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<sup>18</sup> *Id.* at 704.

<sup>19</sup> *Id.* at 704-05.

<sup>20</sup> *Id.* at 716. To

<sup>21</sup> *Id.* at 814.

<sup>22</sup> *Id.* at 835, 693.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 819.

29. Schuelke was to provide Mr. Rogers with a handgun. Regarding Mr. Rogers' payment for the murder, there was never a settled price, or definitive agreement on how or what Mr. Rogers would receive for his services.

### 3. MR. DECHANT'S "OFFER" TO KILL DIDOMENICI

Mr. Dechant never actually gave anything of value to Rogers in connection with this alleged murder plot. Rogers, however, testified that Mr. Dechant had tried to entice him to kill Didomenici by offering him several things of value, none of which Mr. Dechant actually possessed.

Rogers claimed for example, that Mr. Dechant offered to pay him eight thousand dollars from the \$10,900 and some gold coins that were confiscated at the time of Mr. Dechant's arrest, but Rogers knew that Mr. Dechant did not possess that money or the gold coins, and there was no guarantee that Mr. Dechant would ever get those items back, as they were subject to police forfeiture. Rogers also testified that Mr. Dechant told him where he could find an ATM card with \$152,000 on it, but that card belonged to Didomenici and was located in a lock box inside Didomenici's home. Similarly, Rogers testified that Mr. Dechant told him where to locate the proceeds of several other crimes, none of which Mr. Dechant had direct access to, such as allegedly stolen identity information

located at Mr. Dechant's father's house, and the proceeds from a potential KFC robbery.<sup>25</sup>

In the end, Rogers admitted that Mr. Dechant rebuffed Roger's requests to actually give him money to kill Didomenici, even though Rogers asked him specifically to put "some money on [Rogers'] books," a request that Mr. Dechant specifically rebuffed not once, but twice.<sup>26</sup>

#### 4. CHARLES SCHUELKE'S TESTIMONY

Charles Schuelke, the man who eventually supplied Mr. Rogers with a firearm, was a long-time friend of Mr. Dechant's. He testified that he and Mr. Dechant had committed several previous home invasions together, and like Didomenici, had regularly used drugs with Mr. Dechant. *Id.* at 950. Schuelke testified that he did not personally know Didomenici, but said that Mr. Dechant told him that he received the BMW from Didomenici as payment for a heroin debt.<sup>27</sup>

Through Schuelke, the State introduced several jail phone calls between Schuelke and Mr. Dechant, which were recorded shortly after Mr. Dechant was arrested. In these conversations, Mr. Dechant and Schuelke can be heard discussing how upset Mr. Dechant was with Didomenici for "setting him up," and the two discuss how Rogers would meet up with

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<sup>25</sup> *Id.* at 719-20, 751-52, 756.

<sup>26</sup> *Id.* at 861-62.

<sup>27</sup> *Id.* at 956.

Schuelke once he was released from jail.<sup>28</sup> In none of those conversations though, did the two discuss any plan to *kill* Didomenici, nor was there any discussion about any offer by Mr. Dechant, to Rogers or Schuelke, to kill Didomenici in return for anything of value.

The State also introduced, through Schuelke's testimony, a letter that Mr. Dechant allegedly wrote to him.<sup>29</sup> But, the State's handwriting expert was unable to conclusively say that Mr. Dechant, rather than someone else, actually wrote the letter. Though that letter gave details about Didomenici's home, such as where it was located, nothing in that letter said anything about Mr. Dechant's alleged offer to Rogers or his plan with Schuelke to allegedly kill Didomenici.

#### **D. VERDICT, SPECIAL FINDINGS, & SENTENCE**

On March 3, 2014, the jury found Mr. Dechant guilty as charged in Counts I, II, III, specifically of Solicitation to Commit Murder in the First Degree, Conspiracy to Commit Murder in the First Degree and Attempted Murder in the First Degree. Additionally, the jury returned a special verdict imposing a firearm enhancement as to Counts II and III, answering "Yes" to the special verdict asking it whether "Mr. Dechant or an

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<sup>28</sup> *Id.* at 962.

<sup>29</sup> *Id.*

accomplice was armed with a firearm *at the time commission of* [Counts II-III].<sup>30</sup>

After a brief bench trial, the court also found Mr. Dechant guilty of Counts IV and V, Unlawful Possession of a Firearm in the Second Degree (Count IV), and Possession of Heroin (Count V). Based upon the jury's finding that an "accomplice" was armed with a firearm in Counts II and III. Per RCW 9.94A.533(3), the court imposed two 60-month firearm enhancements for a total of 120 months.<sup>31</sup>

After calculating Mr. Dechant's offender score as 6, the trial court imposed a sentence of 300 months on Counts I—III concurrent to each other and the sentences for Counts IV and V. In total, after adding the two firearm enhancements, the court ordered that Mr. Dechant serve a lengthy 420-month sentence.<sup>32</sup>

#### **IV. Argument**

**A. WASHINGTON'S CORPUS DELECTI DOCTRINE APPLIES TO THIS CASE. THIS DOCTRINE INCREASES THE STATE'S BURDEN OF PROOF BY REQUIRING IT TO PROVE THE CHARGED CRIME BY EVIDENCE THAT IS INDEPENDENT OF THE DEFENDANT'S OWN INCRIMINATING STATEMENTS.**

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<sup>30</sup> CP 125-26 (emphasis added).

<sup>31</sup> CP 154-57.

<sup>32</sup> CP 154-57.

Corpus delicti (Hereinafter “Corpus”) means the “body of the crime.”<sup>33</sup> The rule’s sole purpose is to prevent a defendant from being convicted based upon his incriminating statements alone.<sup>34</sup> To serve that purpose, Washington has adopted *Corpus* as a substantive, common law rule.<sup>35</sup> The Legislature has also enacted RCW 10.58.035, which limits only the “admissibility” of the defendant’s incriminating out-of-court statements. This evidentiary rule, however, did not abrogate this State’s long-standing *Corpus* doctrine which was first established by our judiciary over 100 years ago.

Under Washington’s version (as well as the version used by the Federal Courts), it still remains true that “a defendant's incriminating [out-of-court] statement[s] alone [are] not sufficient to establish that a crime took place.”<sup>36</sup> If the State fails to present such evidence, the court must reverse the defendant’s conviction and dismiss it with prejudice.<sup>37</sup> If there

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<sup>33</sup> *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006).

<sup>34</sup> *Id.* at 249.

<sup>35</sup> *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010) (“Historically, courts have grounded the rule in judicial mistrust of confessions.”)

<sup>36</sup> *State v. Dow*, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010) (citing *Brockob*, 159 Wn.2d at 328. In *Brockob*, the Court noted that courts use a variety of terms to describe a defendant's statement when analyzing corpus delicti claims, such as “admissions,” “confessions,” “statements,” “incriminating statements,” “inculpatory statements,” “exculpatory statements,” and “facially neutral” statements. *Id.* For the sake of clarity and uniformity, the court used the term “incriminating statements.” *Id.*

<sup>37</sup> *Id.* at 254 (“Any departure from the traditional corpus delicti rule under RCW 10.58.035 pertains only to admissibility and not to the sufficiency of evidence required to support a conviction.”).

was any doubt about this, the Supreme Courts recent holdings have clarified any such doubt.

In *Dow*, the Supreme Court gave a summary of the rule and its purpose:

The corpus delicti doctrine generally is a principle that tests the sufficiency or adequacy of evidence, other than a defendant's confession, to corroborate the confession. *State v. Brockob*, 159 Wash.2d 311, 327–28, 150 P.3d 59 (2006). The purpose of the rule is to ensure that other evidence supports the defendant's statement and satisfies the elements of the crime. Where no other evidence exists to support the confession, a conviction cannot be supported solely by a confession. The purpose of the corpus delicti rule is to prevent defendants from being unjustly convicted based on confessions alone. *City of Bremerton v. Corbett*, 106 Wash.2d 569, 576, 723 P.2d 1135 (1986). Historically, courts have grounded the rule in judicial mistrust of confessions.<sup>38</sup>

1. RCW 10.58.035 DOES NOT ALTER THE ANALYSIS WHEN THE DEFENDANT CHALLENGES THE SUFFICIENCY OF THE EVIDENCE ON APPEAL.

The State may respond by arguing that *Corpus* is just a rule of “admissibility” of the defendant’s out-of-court statements, but the Supreme Court has, in recent years repeatedly rejected this argument. As the court observed in *Dow*, *Corpus* “tests the sufficiency or adequacy of evidence,” independent of the defendant's confession, to corroborate a

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<sup>38</sup> *Dow*, 168 Wn.2d at 249.

defendant's incriminating statement.<sup>39</sup> The facts of *Dow*, and its application of *Corpus* to those facts resolves any doubt about this.

In that case, the Court was asked to determine whether RCW 10.58.035 changes the *Corpus* rule. Dow was charged with first degree child molestation.<sup>40</sup> Dow and the three-year-old child were the only people present at the time of the alleged offense.<sup>41</sup> During a recorded police interview, Dow made statements regarding the events and the State conceded that the child was too young to testify. Before trial, Dow moved to exclude these statements, arguing they were inadmissible under RCW 10.58.035<sup>42</sup> (no such motion was made by Mr. Dechant's counsel in this case).<sup>43</sup> The trial court granted the motion to exclude, finding that under that statute, the statements were not reliable, and therefore inadmissible in Dow's trial. And, without those statements, the trial court ruled that the evidence was insufficient to prove the charged crimes and had to dismiss the charges.<sup>44</sup>

The Court of Appeals reversed the trial court.<sup>45</sup> However, the Supreme Court reversed the appellate court and reinstated the trial court's

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 247.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Notably, the court dismissed the charge even though Dow's admissions, to multiple people, clearly established his guilt. *See id.*

<sup>45</sup> *Id.* at 248.

dismissal order, holding that even if the defendant's statements are admissible under RCW 10.58.035, the evidence must still be sufficient, without those statements, to prove the charged crime. The Court reasoned that RCW 10.58.035 pertains "only to [the] admissibility" of a defendant's out-of-court statements; it does not, however, affect the court's analysis regarding the "sufficiency of evidence required to support a conviction."<sup>46</sup> Because the evidence, independent of Dow's out-of-court incriminating statements, was insufficient to prove that Dow molested anyone, the evidence was insufficient to prove that crime and the Supreme Court had no choice but to dismiss it.<sup>47</sup>

Here, Mr. Dechant's out-of-court statements would likely have been inadmissible under RCW 10.58.035. But here, Mr. Dechant's counsel inexplicably failed to bring such a motion. That failure, however, does not change the court analysis here, just as it did not change the court's analysis in *Dow* or in any other recent case under *Corpus*.<sup>48</sup> Under *Dow* and the cases cited therein, regardless of RCW 10.58.035, "a defendant's incriminating [out-of-court] statement[s] alone [are] not sufficient to establish that a crime took place."<sup>49</sup> The holding in *Dow*,

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<sup>46</sup> *Id.* at 253-54.

<sup>47</sup> *Id.* at 254.

<sup>48</sup> See, e.g., *id*; *Brockob*, 159 Wn.2d at 328. *State v. Ray*, 130 Wn.2d 673, 675, 926 P.2d 904 (1996); *State v. Aten*, 130 Wn.2d 640, 659, 927 P.2d 210 (1996).

<sup>49</sup> *Dow*, 168 Wn.2d at 254 (citing *Brockob*, 159 Wn.2d at 328).

and the cases upon which it relied, controls this court's analysis of the sufficiency of the evidence in this case.

Just as the evidence, independent of Dow's out-of-court statements was insufficient to prove that Dow molested his victim, the evidence here is insufficient to prove that Mr. Dechant committed any of the three crimes related to the alleged murder plot to kill Didomenici.

2. DEFENDANT'S OUT-OF-COURT STATEMENTS ARE NOT "INDEPENDENT" PROOF THAT MR. DECHANT ATTEMPTED, CONSPIRED, OR SOLICITED ANOTHER TO KILL DIDOMENICI.

In Washington, the defendant's incriminating statements must be corroborated by evidence that is entirely "independent" of the defendant's own out-of-court statements, even if those statements are completely "innocent" on their own.<sup>50</sup> The State may ask this Court to ignore these clearly articulated rules by our Supreme Court and hold that Mr. Dechant's alleged incriminating statements, to Rogers for example, constitute "independent" corroborating evidence under *Corpus*. Though this may be the proper way to analyze such statements under the Federal Court's formulation of the *Corpus* doctrine, it is entirely prohibited under

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<sup>50</sup> *Aten*, 130 Wn.2d at 657-658 (holding that "the purpose of the corpus delicti doctrine would be frustrated if the court allowed a false confession to be 'corroborated' by a false admission, or even by seemingly innocent statements.").

Washington's *Corpus* doctrine, which places a far greater burden on the State than does its federal counterpart.<sup>51</sup>

This distinction makes sense when one recognizes that Washington's *Corpus* rule and the Federal *Corpus* rule are vastly different conceptually. The Federal *Corpus* rule only seeks to establish that the defendant's incriminating statements are "trustworthy,"<sup>52</sup> by, for example, showing that incriminating statements were not made under duress. Washington's version of the rule is far more demanding. Under Washington's version of the rule, *Corpus* is not satisfied if the State merely shows that we can trust the circumstances under which the statement was made. Rather, it demands that the State must produce evidence that actually corroborates *the facts* contained in the defendant's allegedly incriminating statements.<sup>53</sup>

3. MR. DECHANT DID NOT WAIVE HIS RIGHT, UNDER *CORPUS*, TO REQUIRE THE STATE TO PRODUCE INDEPENDENT PROOF THAT HE COMMITTED THE CHARGED CRIMES.

To argue *Corpus* on appeal, the defendant need not "raise a corpus delicti challenge during the State's case in chief."<sup>54</sup> To rule otherwise

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<sup>51</sup> See *id.*; *Brockob*, 159 Wn.2d at 328-29;

<sup>52</sup> *Id.*; *Aten*, 130 Wn.2d at 662-63.

<sup>53</sup> *Id.* (noting that the word "corroborate" is defined as "to provide evidence of the truth: make more certain: confirm."); *Aten*, 130 Wn.2d at 662-63.

<sup>54</sup> *State v. Pietrzak*, 110 Wn. App. 670, 680, 41 P.3d 1240 (2002) (citing *Aten*, 130 Wn.2d at 654 (defendant raised *Corpus* challenge after close of State's case in chief)). The Supreme Court has addressed *Corpus* arguments raised for the first time on appeal. See

would contravene the very purpose of the rule, which serves “to protect a defendant from the possibility of an unjust conviction based upon a false confession alone.”<sup>55</sup> The rule is therefore inseparable from the sufficiency claim that follows and can, therefore, be raised for the first time on appeal.<sup>56</sup> Thus, it makes no difference that Mr. Dechant’s counsel inexplicably failed to challenge the State’s proof, which rests solely on Mr. Dechant’s alleged out-of-court statements to a fellow inmate. This court must still determine whether the evidence is sufficient, based upon evidence apart from those statements. As the Court observed in *Dow*, “a defendant's incriminating statement alone is not sufficient to establish that a crime took place.”<sup>57</sup>

4. UNDER CONTROLLING SUPREME COURT PRECEDENT, THE STATE MUST PROVE BOTH THE CRIMINAL ACTS, AND THE DEFENDANT’S CRIMINAL STATE OF MIND, BY EVIDENCE INDEPENDENT OF HIS OUT-OF-COURT STATEMENTS.

Historically, Washington’s corpus doctrine has not required the State to produce independent proof of the defendant’s out-of-court statements to prove the defendant’s state of mind.<sup>58</sup> That rule recently changed however. In *Brockob* and *Cobabe*, two companion cases, the

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*Vangerpen*, 125 Wn.2d at 795-96; *State v. Riley*, 121 Wn.2d 22, 31-32, 846 P.2d 1365 (1993).

<sup>55</sup> *Id.* (citing *Corbett*, 106 Wn.2d at 576).

<sup>56</sup> *Id.*

<sup>57</sup> *Dow*, 168 Wn.2d at 254 (citing *Brockob*, 159 Wn.2d at 328).

<sup>58</sup> See, e.g., *State v. Smith*, 115 Wn. 2d 775, 770, 801 P.2d 975, 980 (1990) (holding that, to prove Corpus for attempted first degree murder, the State independent needed to only corroborate the criminal act, a substantial step, and causation).

Court established a new rule for *Corpus* under which the State must now produce evidence, independent of the defendant's out of court statements, not only to prove the criminal acts charged, but also to prove the defendant's criminal intent.<sup>59</sup> This was an under-appreciated, but entirely new and expansive rule of law. Though the State will surely argue otherwise, both the Court's reasoning from those cases, and the results reached in those cases, compel this conclusion.

In *Brockob*, the defendant was arrested after he stole 15 to 20 packs of Sudafed from a drugstore. After his arrest, Brockob told police that he stole the Sudafed with the specific intent to give to it a friend so that the friend could manufacture methamphetamine with it. The State then charged Brockob with possession with the intent to manufacture it into methamphetamine (as an accomplice).

At trial, the State introduced the defendant's confession. In addition, a police officer testified that Sudafed is commonly used in the manufacture of methamphetamine. The State argued that the police officer's statement was "prima facie" corroboration of the intent to manufacture. The Court rejected that argument, reasoning that "the mere fact that Sudafed is known to be used to manufacture methamphetamine

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<sup>59</sup> *Brockob*, 159 Wn.2d at 332.

does not necessarily lead to the logical inference that” the defendant intended manufacture methamphetamine with it.<sup>60</sup>

In *Cobabe*, the Court came to the same conclusion, and applied it to an entirely different crime. Cobabe was charged with attempted second degree robbery after he confessed to police that “he took [the victim’s] DVD player to compel [the victim] to come see him.”<sup>61</sup> At trial, the State presented testimony that Cobabe went to the victim’s apartment, tried to take the DVD player, unplugged the player from the wall and television, and was about to take the DVD player from the wall until the victim’s roommate stopped him. Despite these facts, the Court still held that the State failed to prove that Cobabe, as he admitted to police, intended to steal the defendant’s DVD with the specific intent to “compel” victim to do anything, a required finding to prove robbery under the facts of that case. Although these facts clearly suggested that the owner did not give Cobabe permission to take the DVD player (allowing the jury to infer an intent to steal), these facts failed to allow a rational jury to conclude, without guessing, that Cobabe stole those items with the intent to compel the victim to do anything.

There is simply no rational basis, in those opinions or otherwise, to

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<sup>60</sup> *State v. Cobabe*, 159 Wn. 2d 311, 340, 150 P.3d 59, 74 (2006), as amended (Jan. 26, 2007)

<sup>61</sup> *Id.*

conclude that the analysis in those cases requires a different result here. In fact, the *Corpus* rule appears far more necessary, in light of its sole purpose (to protect defendant's from wrongful convictions based upon their confessions alone) when, as happened here, the defendant has been convicted of solicitation, conspiracy, and attempted first degree murder, and those convictions rely, in large part, upon the testimony of two Government witnesses who had every incentive to lie.

To conclude otherwise would almost certainly contradict the clear results reached in those cases, as described above. *Brockob's* holding unmistakably requires the State to present independent evidence that corroborates not just the act of possession (i.e. of Sudafed or a firearm) but also that the defendant possessed the mens rea required to prove the crime charged (i.e. intent to manufacture, knowing possession, or knowledge that the firearm is stolen).<sup>62</sup> And the Court's application of the doctrine to *Cobabe's* robbery conviction, a crime that is both a crime against person and a property crime, shows quite clearly that the Court's holding was not merely limited to the crime of Possession of Sudafed with Intent to Manufacture Methamphetamine.

5. THIS COURT CANNOT IGNORE RECENT SUPREME COURT PRECEDENT IN *ATEN*, *BROCKOB*, AND *DOW*, ALL OF WHICH

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<sup>62</sup> *Brockob*, 159 Wn.2d at 332.

CLEARLY INCREASED THE STATE'S BURDEN TO PROVE  
CORPUS.

The State may, as it has asked in previous appellate cases, for this court to ignore the Supreme Court's prior cases, i.e. *Dow*, *Aten*, *Ray*, and *Brockob*, if this court holds *Corpus* was not satisfied in this case. But this, as our Supreme Court has previously observed, is something that this Court cannot do.

Under the Ex Post Facto Clause of the Constitution, this Court and our Supreme Court is "bound to follow [our Supreme Court's] previous rulings on [a particular] issue unless the State can show how those rulings are incorrect or harmful."<sup>63</sup> Stare Decisis serves many vital functions. It promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.<sup>64</sup> These considerations require the State to meet a very high burden to over-turn existing precedent. It must make a "clear showing that an established rule is incorrect and harmful before it is abandoned."<sup>65</sup>

At least one lower court has ignored this doctrine and our Supreme Court's formulation of *Corpus* in *Aten*, *Ray*, and *Brockob*, all of

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<sup>63</sup> *Ray*, 130 Wn.2d 673, 679, 926 P.2d 904 (1996)

<sup>64</sup> *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997)

<sup>65</sup> *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn. 2d 649, 653, 466 P.2d 508, 511 (1970)

which have upheld the current and much more stringent Corpus standard that this court must apply to the facts of this case.<sup>66</sup> One such case is Division III's decision in *Angulo*. Over a strong dissent, the *Angulo* Court flatly rejected *Brockob's* expansion of Corpus in Washington and clearly ignored the doctrine of Stare Decisis.<sup>67</sup> In *Angulo*, the court held that although the defendant was charged with first-degree rape of a child, rather than child molestation, the State need not provide independent evidence of the element of penetration to corroborate the defendant's confession to the rape.<sup>68</sup> The majority expressed its "view" that *Brockob* was wrongly decided. The *Angulo* Court held that "in our view," in *Brockob*, the Supreme Court "unnecessarily" replaced "[t]he traditional requirement" that the State only prove "a criminal act" with "a specific element."<sup>69</sup> The majority concluded that, "[w]e do not think the purpose of the corpus delicti corroboration rule is served by trying to apply it to the elements of the crime rather than focusing on whether a criminal act has been established."<sup>70</sup>

Furthermore, the reasoning in *Angulo* is even less persuasive now than when it was decided, because Division III decided *Angulo* before our

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<sup>66</sup> See *Angulo*, 148 Wn. App. at 656-57 (refusing to follow *Brockob*, but doing so before *Dow* reaffirmed the *Brockob* holding).

<sup>67</sup> See *id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 658-59.

Supreme Court's recent decision in *Dow*, in which the Court re-affirmed its holdings in *Brockob* and *Aten*: [T]he State must still prove every element of the crime charged by evidence independent of the defendant's statement."<sup>71</sup> "The purpose of the [new and modified version of the] rule is to ensure that other evidence supports the defendant's statement and satisfies the elements of the crime."<sup>72</sup>

Certainly, then, although *Aten* began a clear departure from the previously established *Corpus* rules in Washington, this court is nonetheless bound by our Supreme Court's holdings in *Brockob*.<sup>73</sup> The Supreme Court has been presented with similar opportunities to throw out Washington's defendant-friendly *Corpus* rule and replace it with the federal courts' formulation of the doctrine, but has declined to do so every time. In one such case, *Ray*, the Court summarily rejected the State's request, reasoning that to do so would require a complete "disregard [for] the doctrine of stare decisis":

[T]he State urges this court to reject the traditional corpus delicti doctrine and adopt in its place the "trustworthiness" standard used by the federal courts. The State claims the "trustworthiness" standard is more workable. If this court abandoned the corpus delicti rule, it would have to overrule nearly 100 years of well-settled case law. This court has infrequently discussed under what conditions it should disregard the doctrine of stare decisis and overturn an

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<sup>71</sup> *Dow*, 168 Wn.2d at 254.

<sup>72</sup> *Id.*

<sup>73</sup> *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

established rule of law... Without stare decisis, the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions--a kind of amorphous creed yielding to and wielded by them who administer it. Take away stare decisis, and what is left may have force, but it will not be law. . . .<sup>74</sup>

Finally, even if the Supreme Court did decide to reverse course, any new, easier to prove formulation of the law could not apply to Mr. Dechant's case under the ex post facto clause of the Constitution. The concurring opinion of *Roy* accurately explains why:

This framework applies not only to new legislative enactments, but also to changes in the common law. *State v. Gore*, 101 Wn.2d 481, 489, 681 P.2d 227 (1984). The abandonment of the corpus delicti rule would change the legal rules to permit less testimony to convict the offender than was required when the crime in this case was originally committed and hence is not constitutionally permissible. *Tapia v. Superior Court*, 53 Cal. 3d 282, 807 P.2d 434, 279 Cal. Rptr. 592 (1991) (portions of initiative changing California's corroboration requirement retroactively violate rule against ex post facto legislation and will be effective only prospectively).<sup>75</sup>

Accordingly, if the State here encourages this Court to adopt the *Angelo* Court's reasoning, this Court should and must reject it.

**B. WITHOUT MR. DECHANT'S OUT-OF-COURT STATEMENTS, THE JURY COULD NOT HAVE FOUND THAT MR. DECHANT TOOK A SUBSTANTIAL STEP TOWARDS KILLING, OR THAT HE AIDED ANOTHER WITH THE INTENT TO KILL DIDOMENICI. THE EVIDENCE IS THEREFORE INSUFFICIENT TO PROVE THAT MR. DECHANT, AS AN ACCOMPLICE OR A PRINCIPAL, ATTEMPTED TO COMMIT FIRST DEGREE MURDER.**

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<sup>74</sup> *Ray*, 130 Wn.2d at 677-678.

<sup>75</sup> *Id.* at 682 (Talmadge, J. concurring)

## 1. STANDARD OF REVIEW

The substantial evidence test has been replaced by *Jackson's* "more rigorous review for sufficient evidence."<sup>76</sup> Under the *Jackson* standard, the record must contain enough evidence for a "rational trier of fact" to find each of "the essential elements of the crime beyond a reasonable doubt."<sup>77</sup> Under that test, the evidence is still viewed in the light most favorable to the State, but a jury may not make inferences based upon mere speculation or conjecture.<sup>78</sup>

But, in Washington, our Supreme Court has clearly held, as argued above, that "a defendant's incriminating [out-of-court] statement[s] alone [are] not sufficient to establish that a crime took place."<sup>79</sup> Thus, the State's evidence must prove that the defendant committed the charged crime and it must do so by evidence independent of any out-of-court statements.<sup>80</sup> If no such evidence is in the record, the court must reverse the defendant's conviction and dismiss it with prejudice.<sup>81</sup>

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<sup>76</sup> *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980).

<sup>77</sup> *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

<sup>78</sup> *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010).

<sup>79</sup> *Dow*, 168 Wn.2d at 254.

<sup>80</sup> *See, e.d., id.* and the argument in Section A, *infra*.

<sup>81</sup> *Id.* at 254 ("Any departure from the traditional corpus delicti rule under RCW 10.58.035 pertains only to admissibility and not to the sufficiency of evidence required to support a conviction.").

2. *WITHOUT MR. DECHANT'S OUT-OF-COURT STATEMENTS, NO RATIONAL JURY COULD HAVE FOUND MR. DECHANT GUILTY OF ATTEMPTED FIRST DEGREE MURDER AS A PRINCIPAL.*

To convict Mr. Dechant of attempted murder as the principal, the State was required to prove that Mr. Dechant: “(1) actually intended to take a life; and (2) took a substantial step toward the commission of the act.”<sup>82</sup> Under *Corpus*, the State must prove these elements by evidence independent of Mr. Dechant’s out-of-court statements. Yet, in this case, the State simply failed to prove, without Mr. Dechant’s out-of-court statements, that Mr. Dechant either intended to kill Didomenici, or that he took a substantial step towards carrying out the alleged murder plot against him.

a. *The independent evidence is insufficient to prove that Mr. Dechant intended to kill Didomenici.*

A defendant acts with intent to commit a crime when he acts with “objective or purpose to accomplish a result which constitutes a crime.”<sup>83</sup> Normally, the trier of fact determines a defendant's intent by looking to “all of the circumstances of the case, which can include prior statements of the defendant, such as threats to the victim or statements to others about his future intentions.”<sup>84</sup>

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<sup>82</sup> *Smith*, 115 Wn. 2d at 782; *State v. DeRyke*, 149 Wn.2d 906, 73 P.3d 1000 (2003).

<sup>83</sup> RCW 9A.08.010(1)(a).

<sup>84</sup> *State v. Wilson*, 125 Wash.2d 212, 217, 883 P.2d 320 (1994)

But, as argued above, the Supreme Court's decision in *Brockob* and *Cobabe* changed that rule.<sup>85</sup> Under that rule, the State must produce evidence, independent of the defendant's out-of-court statements, to prove that the defendant intended to commit *the* crime charged. In *Brockob*, the defendant's confession that he intended for his accomplice to manufacture methamphetamine was ruled inadmissible, and so the Court reversed his conviction. Without Brockob's statements to police that he intended to aid in the manufacture of methamphetamine, the remaining evidence, his possession of the drugs, was "patently equivocal" conduct, which is insufficient to support a conviction.

There is no difference, factual or legal, that requires a different result in this case. Without Mr. Dechant's out-of-court statements, his conduct, i.e. drawing a map of the victim's residence, is at best patently equivocal. In other words, no jury could conclude, without guessing, that Mr. Dechant intended to kill Didomenici because it is at least equally likely that Mr. Dechant wrote that map, intending to aid in another lesser crime, such as burglary or robbery.

*b. The independent evidence is insufficient to prove that Mr. Dechant, as a principal, took a substantial step towards killing Didomenici.*

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<sup>85</sup> *Brockob*, 159 Wn.2d at 332.

Whether the defendant took a substantial step depends upon the facts of the case at hand.<sup>86</sup> The defendant's acts constitute a substantial step only if "it is strongly corroborative of the actor's criminal purpose," i.e. his intent to have the victim killed.<sup>87</sup> Merely "preparing" to commit the target crime is not enough.<sup>88</sup> Without Mr. Dechant's out-of-court statements, none of Mr. Dechant's alleged criminal *acts*, such drawing a map of the victim's home, no rational jury could find that Mr. Dechant, rather than one of his accomplices, took a substantial step towards killing Didomenici.

*Smith*, a case in which the Supreme Court upheld a conviction for attempted first degree murder, is instructive here.<sup>89</sup> Smith was sitting in a rented car, in a park late at when he was approached by a police officer. That officer questioned Smith and other occupants of the car and ultimately arrested Smith.<sup>90</sup> Before arresting Smith, police searched Smith's car and discovered several incriminating items, including fifteen \$100 bills, new clothes, a shovel, a pick, a compound bow and arrows, rope, tarps, rain gear, a 100-pound bag of lime, and a large ammunition

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<sup>86</sup> *State v. Bencivenga*, 137 Wn.2d 703, 974 P.2d 832 (1999).

<sup>87</sup> *State v. Workman*, 90 Wash.2d 443, 449, 584 P.2d 382 (1978);

<sup>88</sup> *Id.*; *State v. Cozza*, 19 Wn.App. 623, 626, 576 P.2d 1336, 1339 (1978).

<sup>89</sup> *Smith*, 115 Wn. 2d at 770.

<sup>90</sup> *Id.* at 778-79

box.<sup>91</sup> After her arrest, Smith confessed to police that someone had paid her \$1500 to kill one of the other occupants of the vehicle that night. She also admitted she had planned to use the tools found in the car to facilitate her plan.<sup>92</sup> This evidence was admitted during Smith's trial and a jury convicted Smith of attempted first degree murder.

On appeal, Smith argued that this evidence was insufficient under *Corpus* to prove that she had taken a substantial step towards committing first degree murder. The Court upheld the conviction, reasoning that

[e]ven without Smith's confession, the State's evidence—Smith's 15 \$100 bills, the arsenal of weapons, the ammunition, a digging implement, as well as the police observations—supports a logical and reasonable deduction that a substantial step had been taken to kill someone. This logical and reasonable deduction was all that the State was required to prove in order to allow Smith's confession to be considered.<sup>93</sup>

Unlike the State in *Smith*, the State presented no physical evidence evidence or observations of Mr. Dechant's conduct that could establish any of the crimes related to the State's theory that Mr. Dechant recruited Rogers to kill Didomenici. No evidence, apart from Mr. Dechant's out-of-court statements, make is reasonable to conclude that Mr. Dechant offered anything of value to Rogers to have Didomenici killed (solicitation), that he agreed with Rogers to have Didomenici killed (conspiracy), or that Mr.

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<sup>91</sup> *Id.* at 779-80

<sup>92</sup> *Id.* at 780

<sup>93</sup> *Id.* at

Dechant, rather than someone else, took a substantial step towards accomplishing that conspiracy to murder Didomenici.

It is true that the State presented evidence that Mr. Dechant's two co-conspirators, both of whom testified under very favorable plea bargains, took substantial steps towards killing Didomenici. But that would only be enough to satisfy *Corpus* for Mr. Dechant's co-conspirators. It does nothing to serve the purpose of the *Corpus* doctrine, which is to ensure that Rogers did not exaggerate or misinterpret Mr. Dechant's words, which now stand as the sole basis for his conviction.

In the end, we are simply left with Mr. Dechant's alleged statements to alleged accomplices, who had every motive to lie and, as Mr. Dechant argued in trial, "rat" on Mr. Dechant to obtain a significantly reduced sentence for themselves. After all, the only reason that the *Corpus* doctrine exists, as the Supreme Court observed in *Dow*, is because courts inherently "distrust" such statements, especially when the State cannot muster any proof to corroborate such claims.

As the Court has stated, it is particularly crucial in homicide cases, like this one, where life and liberty are at stake, that the State meet the appropriate burden. While *corpus delicti* can be established by

circumstantial evidence,<sup>94</sup> “the causal connection between the death of the decedent and the unlawful acts of the [accused] cannot be supported on mere conjecture and speculation.”<sup>95</sup>

Yet here, the State proved no more this. Rogers’ unsubstantiated claims that Mr. Dechant solicited Rogers to kill Didomenici while the two were both in King County Jail are statements that cannot be considered under Washington’s *Corpus* doctrine, as argued above. Without these alleged statements, the jury had no objective facts from which to conclude that Mr. Dechant himself took any action that could be considered a substantial step under Washington law, i.e., acts by Mr. Dechant that strongly suggests that he intended to have Didomenici killed.

The State may point out that the actions of Mr. Dechant’s co-conspirators, Schuelke and Rogers, could be viewed as a substantial step. For example, the State may point out that Schuelke, Mr. Dechant’s friend and alleged accomplice, gave Rogers the firearm that Rogers said was supposed to be used to kill Didomenici. Then, as the State may argue, Rogers and Schuelke drove towards Didomenici’s house, apparently to kill Didomenici. Though these facts certainly implicate Schuelke as an accomplice to the attempt to murder Didomenici, they fail to meet the

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<sup>94</sup> See, e.g., *State v. Smith*, 115 Wn.2d 775, 780-84, 801 P.2d 975 (1990)

<sup>95</sup> *State v. Little*, 57 Wn.2d 516, 358 P.2d 120 (1961)

State's burden to prove that Mr. Dechant himself, as a principal, took a substantial step towards that plan.

The State will likely respond by relying upon the map of Didomenici's home that, according to Rogers, Mr. Dechant drew while they were in jail together. But this map, without Mr. Dechant's alleged out-of-court statements to Rogers, fails to "strongly corroborate" Mr. Dechant's alleged intended to kill Didomenici. Though it is true that a substantial step may be shown, in some cases, by a defendant's "unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed,"<sup>96</sup> Mr. Dechant never entered Didomenici's residence. Without Roger's testimony about what Mr. Dechant allegedly told him while in KCJ, all that is left is Rogers' claims that Mr. Dechant drew a map of Didomenici's home. But, drawing a map of the intended target's home is no more than a mere predatory step, and therefore insufficient, as the jury instructions reveal, to "strongly corroborate" the State's theory that Mr. Dechant drew that map so Rogers could kill Didomenici.<sup>97</sup>

But, even had Mr. Dechant had actually entered the home, without Mr. Dechant's alleged out-of-court statements, such entry would not

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<sup>96</sup> *Workman*, 90 Wash.2d at 451–52, n. 2

<sup>97</sup> CP 116 (Substantial Step—Attempted Murder 1) ("For purposes of Attempted Murder in the First Degree as charged in Count III, a substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.").

“strongly corroborate” the State’s theory that he did so with the intent to kill Didomenici because it is still unclear, under the State’s independent evidence, what crime Mr. Dechant would have intended to commit. Such entry, without more, is “patently equivocal” and no jury could conclude, without guessing, that Mr. Dechant intended to kill Didomenici as it is at least equally plausible that he merely intended to burglarize, or perhaps even rob Didomenici.<sup>98</sup>

Instead, that act of drawing a map with or without actual entry, is, under these facts, patently equivocal. In other words, had Mr. Dechant, or one of his accomplices actually entered the residence, it is certainly plausible that they could have intended to kill Didomenici; but he also could have merely intended for this map to aid in a planned burglary, or possibly an armed robbery had Didomenici or someone else been home.<sup>99</sup> Without Rogers’ testimony about Mr. Dechant’s out-of-court statements, this map does not prove that Mr. Dechant intended to kill Didomenici, nor does it prove he took a substantial step towards accomplishing that alleged goal. At best, it only proves that he intended to help his accomplices break

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<sup>98</sup> See *State v. Vasquez*, 178 Wn. 2d 1, 8, 309 P.3d 318, 321 (2013) (dismissing forgery conviction where the defendant’s statements to a security guard did not clearly indicate his intent to defraud); *State v. Woods*, 63 Wash.App. 588, 591, 821 P.2d 1235 (1991) (reversing a burglary conviction when the defendant’s conduct did not clearly indicate that the defendant intended to commit the crime of burglary, where it was equally likely, considering *all* relevant undisputed facts, that the defendant could have intended to commit the lesser crime of trespass).

<sup>99</sup> See *id.*

into his home. But, to say that such evidence is enough to prove intent to kill Didomenici would be no more than a guess, which is never sufficient to prove an element of a crime beyond a reasonable doubt.<sup>100</sup>

In sum, the State introduced absolutely no physical evidence, or observations about Mr. Dechant's conduct, from which a jury could rationally conclude that Mr. Dechant took a substantial step towards killing Didomenici. The evidence is, therefore insufficient to prove that Mr. Dechant, as a principal, committed the crime of attempted first degree murder.

3. *WITHOUT MR. DECHANT'S OUT-OF-COURT STATEMENTS, NO RATIONAL JURY COULD FIND THAT MR. DECHANT WAS AN ACCOMPLICE TO ATTEMPT MURDER.*

As instructed, to find Mr. Dechant guilty of attempted murder, the jury had to find that, Mr. Dechant “*or an accomplice*” engaged in some act that strongly suggested that Mr. Dechant, or an accomplice, intended to have someone kill Didomenici.<sup>101</sup> Under the court's instructions, the jury could find that Mr. Dechant committed the crime of attempted first degree murder, as an accomplice, if Mr. Dechant (1) “solicit[ed] . . . another [i.e. Rogers] to commit [that] crime” (solicitation), or if he “agreed to aid another [such as Rogers] in planning or committing [that] crime,”

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<sup>100</sup> See, e.g. *Vasquez*, 178 Wn. 2d at 8.

<sup>101</sup> See CP 115 (to-convict for attempted first degree murder) (emphasis added) and CP 116 (Substantial Step—Attempted Murder 1) (defining substantial step as “conduct that strongly indicates a criminal purpose and that is more than mere preparation.”).

(conspiracy) and (2) he did either of those acts knowing it would further the alleged murder plot against Didomenici.<sup>102</sup> Without Mr. Dechant's out-of-court statements, no rational jury could have found either of these two elements.

Thus, unless there is some other evidence that Mr. Dechant otherwise "aided" in the alleged plot to murder Didomenici, without his out-of-court statements, Mr. Dechant's conviction for attempted murder cannot stand. Here, the state produced no such evidence, however. Though a defendant can be convicted if he is present at the scene with the intent to promote the underlying crime, it was undisputed that Mr. Dechant was not present at the scene. Thus, the State had to produce some evidence, independent of his alleged out-of-court statements, that Mr. Dechant did some act that "aided" in the alleged murder plot, *and* he did so *knowing* that those acts would further the plan to kill Didomenici.

As established in the two argument sections below (sections 4 and 5), without Mr. Dechant's alleged out-of-court statements, the evidence fails to show that Mr. Dechant either offered anything of value to Rogers to kill Didomenici (solicitation), or that he ever agreed to participate in an plan to kill Didomenici (conspiracy). Without such proof, it is impossible for Mr. Dechant to have "aided" in the commission of attempted first

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<sup>102</sup> CP 117.

degree murder, which imposes a higher burden on the State. Thus, the evidence, without Mr. Dechant's alleged out-of-court statements, is insufficient to prove that Mr. Dechant actually aided in the alleged plan to kill Didomenici.

In *Stein*, the Supreme Court held that, to prove accomplice liability (or a conspiracy), the State must do more than prove that it was foreseeable that the principal would commit a particular crime.<sup>103</sup> As the court observed, accomplice liability requires knowledge of "the crime" charged, not merely "a crime."<sup>104</sup> In other words, under *Stein*, *Cronin*, and *Roberts*, Mr. Dechant cannot be convicted as an accomplice (or co-conspirator) if the evidence requires the jury to guess about which crime (i.e. burglary or murder) that the defendant intended to commit.<sup>105</sup>

Without Mr. Dechant's statements to Rogers, no jury could rationally find, without guessing, that Mr. Dechant intended to have his alleged accomplices kill Didomenici (first degree murder) because it is at least equally plausible that Mr. Dechant intended some other crime, i.e. burglary or armed robbery. Apart from the dubious testimony from Rogers

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<sup>103</sup> *State v. Stein*, 144 Wn.2d 236, 245, 27 P.3d 184 (2001)

<sup>104</sup> *Id.* (citing *State v. Roberts*, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000) and *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000)).

<sup>105</sup> *Stein*, 116 Wn.2d at 104 ("In [*Roberts* and *Cronin*], we held the jury instructions to be legally defective because each allowed the jury to convict the defendant if he had general knowledge of any crime rather than requiring knowledge of the crime charged. Clearly then, under this court's holdings in *Roberts* and *Cronin*, the accomplice liability statute, RCW 9A.08.020, requires knowledge of 'the' specific crime, and not merely any foreseeable crime committed as a result of the complicity.").

about Mr. Dechant's out-of-court statements, all of the remaining evidence about what crime Mr. Dechant wanted his alleged accomplices to commit is, at best, equivocal. As a result, the evidence produced at trial, independent of Mr. Dechant's alleged statements, is insufficient to prove that Mr. Dechant attempted to kill Didomenici, as accomplice or as a principal. This conviction must, therefore, be dismissed.<sup>106</sup>

4. WITHOUT MR. DECHANT'S OUT-OF-COURT STATEMENTS, THE EVIDENCE IS INSUFFICIENT TO ALLOW A RATIONAL JURY TO FIND THAT MR. DECHANT FORMED AN AGREEMENT FOR ROGERS (OR SCHUELKE) TO KILL DIDOMENICI. THE EVIDENCE IS THEREFORE INSUFFICIENT TO PROVE THAT MR. DECHANT CONSPIRED TO COMMIT FIRST DEGREE MURDER.

Although no formal agreement is required, the state must still prove that the defendant agreed with another to commit the underlying crime.<sup>107</sup> A conspiracy may be shown by a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose."<sup>108</sup>

The State's theory, as argued to the jury, was that Mr. Dechant planned to kill Didomenici and recruited Rogers and then Schuelke to carry out that plan while Mr. Dechant was in KCJ. But, the only evidence to prove that Mr. Dechant ever planned *to kill* Didomenici is Mr. Dechant's alleged out-of court statements. Without those statements, the

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<sup>106</sup> See *Woods*, 63 Wash.App. at 591.

<sup>107</sup> *State v. Miller*, 131 Wn.2d 78, 929 P.2d 372 (1997).

<sup>108</sup> *State v. Israel*, 113 Wn.App. 243, 284, 54 P.3d 1218 (2002).

State utterly failed to prove that Mr. Dechant knowingly participated in this alleged plan to kill Didomenici. In arguing the case to the jury, which is instructive though not conclusive, the State's sole source of proof that there was any agreement *to kill* Didomenici were Mr. Dechant's alleged out-of-court statements to his co-conspirators,<sup>109</sup> both of whom had every reason to lie.

The prosecutor argued, for instance, that according to Rogers, Mr. Dechant told him that he wanted to kill Didomenici. Once released from KCJ, Rogers then relayed that plan to Schuelke "on the 29th telling Schuelke about Mr. Dechant's alleged 'purpose and intent [to kill Didomenici]' and Mr. Dechant's alleged intents and interests . . . to kill Didomenici."<sup>110</sup>

But, without Mr. Dechant's alleged statements, most of which counsel adamantly denied throughout trial, no evidence showed that Mr. Dechant ever agreed, formally or informally, to the alleged plan to kill Didomenici. Simply put, without Mr. Dechant's totally uncorroborated

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<sup>109</sup> The State relied heavily upon Mr. Dechant's alleged written, out-of-court statement "that car salesman, that snitch, he owes me six grand. I want him washed in gas and dried with a match so he can't testify." RP 1469. But that statement was never conclusively matched to Mr. Dechant. Further, this statement, on its own, could easily been mere "puffery" and not, a true statement indicating Mr. Dechant truly wanted Didomenici killed. It is at least equally plausible that Mr. Dechant wanted to simply steal money from Didomenici, but had no intent to actually kill him. From this statement, even regardless of Corpus, no reasonable juror could conclude that Mr. Dechant was not merely "puffing."

<sup>110</sup> RP 1472.

out-of-court statements the State failed to prove that he joined in Roger's plan to kill Didomenici. The evidence is therefore insufficient to prove that Mr. Dechant joined the alleged conspiracy with which he was a convicted. This conviction, like the others, must be dismissed.

5. WITHOUT MR. DECHANT'S OUT-OF-COURT STATEMENTS, NO RATIONAL JURY COULD HAVE FOUND THAT MR. DECHANT OFFERED ANYTHING OF VALUE TO ROGERS (OR SCHUELKE) TO KILL DIDOMENICI. THE EVIDENCE IS THEREFORE INSUFFICIENT TO PROVE THAT MR. DECHANT SOLICITED ROGERS TO COMMIT FIRST DEGREE MURDER.

Mr. Dechant was convicted of solicitation to commit first degree murder. Proof of this crime requires this court to apply two separate criminal statutes: the one defining "solicitation," and the one defining First Degree Murder. RCW 9A.28.030 defines the crime of solicitation. That statute reads, in relevant part, as follows:

[A] person commits criminal solicitation when, with intent to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct, [i.e. which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed].<sup>111</sup>

This crime is, when properly analyzed, viewed as an "attempt to conspire" to commit the target crime.<sup>112</sup> To prove that the defendant "attempted to conspire," the State must prove: (1) that the defendant

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<sup>111</sup> RCW 9A.28.030

<sup>112</sup> *State v. Jensen*, 164 Wn. 2d 943, 953, 195 P.3d 512, 518 (2008)

“offered “something of value” to another person, i.e. Rogers, and (2) that he did so “with the intent to promote or facilitate [the] target crime,”<sup>113</sup> i.e. first degree murder.<sup>114</sup> Applying these rules to this case, Mr. Dechant is only guilty of solicitation to commit first degree murder if the State proved two facts beyond a reasonable doubt: (1) that Mr. Dechant offered Rogers something of value, and (2) that he did so with a premeditated intent to encourage Rogers to kill Didomenici.

Yet, for many of the same reasons articulated above, the State failed to prove any such crime. The only evidence of such an offer was Mr. Dechant’s alleged out-of-court statements. And again, those statements simply fail, without more, to prove that Mr. Dechant either offered something of value to Rogers, or that he intended for either of his alleged co-conspirators to actually follow through on the alleged plot to murder Didomenici.

Further, even if Mr. Dechant’s out-of-court statements are considered, the State still failed to prove, *beyond a reasonable doubt*, that Mr. Dechant ever offered *to give* either of his co-conspirators anything of value to kill Didomenici because most of the items relied upon by the

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<sup>113</sup> *Id.* (“The harm of solicitation is fully realized when the solicitor offers something of value to another person with the intent to promote or facilitate a target crime or crimes.”).

<sup>114</sup> RCW 9A.32.030, states that “a person commits first degree murder when, with premeditated intent to cause the death of another person, he causes the death of such person or of a third person.”

State to prove such an offer were not even in Mr. Dechant's possession, and Rogers himself knew this.

The State's closing argument shows the holes in its own theory. The State suggested, for example, that Mr. Dechant "offered to give" Rogers "money that *could be taken from Didomenici*" if Rogers himself stole it from Didomenici's home.<sup>115</sup> This argument fails as a matter of common sense, however, as Mr. Dechant simply cannot give Rogers something he does not have. And there is no way that Rogers could have interpreted this as a real "offer," because Rogers himself knew that Mr. Dechant never possessed these items. This is neither a real offer under contract law, nor a real offer as contemplated by the criminal solicitation statute. Rather, it is simply, at best, a suggestion from Mr. Dechant to steal property from Didomenici and nothing more.

Although the prosecutor was correct in arguing that Mr. Dechant's statements to Rogers "could" have been an offer,<sup>116</sup> could have been is not "beyond a reasonable doubt." The same problem follows the prosecutor's argument that Mr. Dechant's "offered to give" Rogers \$10,900, money that was in the possession of police, not Mr. Dechant or any of his agents, and almost certainly not a real "offer" within the meaning of the solicitation statute. Even the prosecutor himself admitted, in closing, that

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<sup>115</sup> RP 1465 (emphasis added)

<sup>116</sup> *See id.*

it was “probably a longshot” that this was a real “offer” upon which the jury could find Mr. Dechant guilty of solicitation.<sup>117</sup> This conviction, just as the other two, must therefore be dismissed.

6. WITHOUT THE DECHANT’S ALLEGED OUT OF COURT STATEMENTS, NO JURY CAN RATIONALLY CONCLUDE WITHOUT GUESSING, THAT MR. DECHANT, RATHER THAN ROGERS, WAS THE SOURCE OF THE ALLEGED MURDER PLOT TO KILL DIDOMENICI.

The State may point out that its independent evidence does not need to rule out “every reasonable hypothesis” than tends to negate the defendant’s guilt. While that may be true, that evidence must still allow the jury to “reasonably and logically” conclude that Mr. Dechant, rather than someone else, caused the criminal result defined by statute, here, the “substantial step” towards killing Didomenici.<sup>118</sup> Yet, without Mr. Dechant’s out-of-court statements, no rational juror could make such a conclusion. Such a conclusion would be pure speculation about what Mr. Dechant actually said to Rogers who, as Mr. Dechant’s alleged accomplice, was integral to actually carrying out the alleged murder plot.

Again, Supreme Court precedent is instructive. In *Aten*, the Supreme Court held that, without the defendant’s out-of-court admissions, the State failed to prove, beyond a reasonable doubt, that the defendant actually caused the death of a young homicide victim. The State had urged

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<sup>117</sup> *Id.*

<sup>118</sup> *Aten*, 130 Wn.2d at 660 (1996).

the Court to find causation because at least “one logical and reasonable inference from the evidence is that [the victim] died as a result of a criminal act.”<sup>119</sup> Rejecting that argument, the Court held that if the independent evidence “supports the reasonable inference of a criminal explanation of what caused the event” but it also supports “one that does not involve criminal agency, the evidence is not sufficient to corroborate the defendant's statement.”<sup>120</sup>

In *Ray*, the Court re-affirmed its decision in *Aten* and re-instated an order that dismissed Ray’s conviction for First Degree Child Molestation. In *Ray*, the defendant was convicted of one count of first degree child molestation after he confessed to have sexual contact with his three-year-old daughter.<sup>121</sup> Although the opinion does not reveal the specific details of the molestation, it was quite clear that Ray had confessed to molesting the victim to at least three separate people, first his wife, then his sexual deviance therapist, and finally to police. Each of these confessions were “consistent” with each other and established the elements of the crime.

Aside from the defendant’s confessions, the State presented evidence of these facts at trial: (1) the victim entered Ray’s room at 1:00 A.M. at night to ask for a glass of water; (2) Ray woke up, got out of bed,

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<sup>119</sup> *Id.* at 659.

<sup>120</sup> *Id.*

<sup>121</sup> *Ray*, 130 Wn.2d at 675

and left the room with the victim to get her a glass of water; (3) Ray was nude when he awoke and was nude when he left the room with the victim; (4) Ray normally slept in the nude; (5) when Ray later returned to the bedroom upset and crying; (6) he awoke his wife to have a discussion, but the details were inadmissible based upon the spousal privilege; (7) the details of the conversation with Ray made his wife upset and she immediately ran to the victim's bedroom to make sure that her daughter was okay; (8) Ray's wife returned to their bedroom and had another discussion with Ray; and (9) after that final conversation, Ray placed an emergency call to his sexual deviancy therapist.

Despite the consistency amongst the three separate confessions made by the defendant, these facts failed to adequately corroborate the criminal act—the sexual touching of the victim—because they failed to independently corroborate “the specific conduct of first degree child molestation.”<sup>122</sup> The Court noted that the last night call to his sexual deviancy therapist, perhaps the most damning piece of independent evidence, certainly suggested that the defendant harbored a “subjective sense of guilt.” Yet, the Court noted that this fact was simply “inconclusive” as to the defendant's guilt.

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<sup>122</sup> *Id.* at 680-681 (1996) (“Even though Ray speculatively could have molested L.R., and even though he had the opportunity to do so, the mere opportunity to commit a criminal act, standing alone, provides no proof that the defendant committed the criminal act.”).

Even when combined with the rest of the evidence, the State simply failed to rule out other reasonable explanations for the defendant's actions, such as "unfulfilled urges, nightmares, or a subjective sense of guilt," all of which failed to prove that Ray molested the victim. At best, these facts only established that Ray had the *opportunity* to molest the victim, but it failed to independently show that he did in fact molest the victim.<sup>123</sup> In sum, these "sparse facts" failed "to rule out Ray's criminality or innocence."<sup>124</sup>

Finally, several years in later, in *Brockob*, the Court confirmed what it said in *Aten* and *Ray*:

*Aten* modified the rule and, in so doing, increased the State's burden. It held that if the evidence supports both a hypothesis of guilt and a hypothesis of innocence, it is insufficient to corroborate the defendant's statement. In other words, if the State's evidence supports the reasonable inference of a criminal explanation of what caused the event and one that does not involve criminal agency, the evidence is not sufficient to corroborate the defendant's statement.<sup>125</sup>

Here, there is no legally significant difference between *Aten*, *Dow* and *Barockob* that would require a result different in this case. Even if the State can find some admissible evidence in the record to corroborate some of the facts in Mr. Dechant's incriminating statements, it certainly will not be provide a logical basis for a reasonable jury to determine that Mr.

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<sup>123</sup> *Ray*, 130 Wn.2d at 680-681 (citing *Aten*, 130 Wn.2d at 660).

<sup>124</sup> *Id.*

<sup>125</sup> *Brockob*, 159 Wn.2d at 330 (citing *Aten*, 130 Wn.2d at 660-61).

Dechant solicited Rogers, or anyone else, to kill Didomenici, nor could it conclude that devised such a plan or that he attempted to much such a plan actually happen.

Even if the jury believed that Mr. Dechant actually wrote the map of Didomenici's home, nothing in that letter indicates *what crime*, if any, Mr. Dechant intended to be committed by providing that information to his alleged co-conspirators. It is, for example, at least equally plausible that Mr. Dechant wrote that letter, even assuming he did, that Mr. Dechant simply wanted to burglarize Didomenici's home, or possibly rob Didomenici at gun point if he was in the home at the time of the burglary.

Once we excise Roger's claims that Mr. Dechant solicited him to murder Didomenici, as required under *Corpus*, a plan to commit a home invasion robbery, not to murder Didomenici, is actually the most likely explanation under these facts. This was, after all, Mr. Dechant's MO. As his co-defendant testified, he and Mr. Dechant had completed two such robberies before this alleged murder plot. And apart from Roger's completely unverified claims about Mr. Dechant's out-of-court statements about Mr. Dechant's plan to have Didomenici killed, absolutely no evidence supports a reasonable inference that Mr. Dechant, rather than the State's star witness, ever planned to kill anyone.

In the end, there is absolutely no assurance that Mr. Dechant planned to kill Didomenici, apart from Roger’s claims about Mr. Dechant’s out-of-court statements, from which a jury could conclude that Mr. Dechant ever planned to have Didomenici killed. Without such evidence, the State simply failed to satisfy *Corpus* under Washington law, and the evidence is therefore insufficient to prove any of Mr. Dechant’s convictions related to Rogers’ unverified accusations that Mr. Dechant tried to have Didomenici killed.

**C. EVEN IF MR. DECHANT’S ACTIONS WERE SUFFICIENT TO CONSTITUTE ONE OR MORE CRIMES, THE LEGISLATURE DID NOT INTEND TO PUNISH SOMEONE MULTIPLE TIMES FOR HIS ACTIONS IN THIS CASE.**

1. STANDARD OF REVIEW

The double jeopardy clauses of the state and federal constitutions protect individuals from being “punished multiple times for the same offense.”<sup>126</sup> This prohibition generally means that a person cannot be prosecuted for the same offense after being acquitted, be prosecuted for the same offense after being convicted, or receive multiple punishments for the same offense.<sup>127</sup> It is that last principle—that a person cannot receive multiple punishments for the same offense—that applies here.

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<sup>126</sup> *State v. Linton*, 156 Wash.2d 777, 783, 132 P.3d 127 (2006); see U.S. Const. amend. V; Wash. Const. art. I, § 9.

<sup>127</sup> *State v. Villanueva-Gonzalez*, 180 Wn. 2d 975, 979-86, 329 P.3d 78, 80-83 (2014)

The jury found Mr. Dechant guilty of counts I to III: solicitation, conspiracy and attempt to commit first degree murder against Didomenici. At sentencing, the defense argued that each of these convictions should count as but one offense. The trial court, however, court rejected each of these arguments, and entered separate convictions for each offense.<sup>128</sup> Whether these convictions violate double jeopardy is a question of law reviewed *de novo*.<sup>129</sup>

## 2. DOUBLE JEOPARDY PRINCIPLES ARE APPLICABLE TO THIS CASE.

Only the legislature has the power to define criminal conduct and set out the appropriate punishment for that conduct.<sup>130</sup> Thus, whether the defendant's conduct constitutes more than one crime is "a question of statutory interpretation and legislative intent."<sup>131</sup> The legislature is tasked with defining criminal offenses, and the prohibition on double jeopardy imposes "[f]ew, if any, limitations" on that power.<sup>132</sup> Thus, this case

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<sup>128</sup> CP 154-57. The judgment and sentence reads, in pertinent part:

**Count No. I:** Solicitation to Commit Murder in the First Degree  
RCW: 9A.28.030(1) and 9A.32.030(1)(a)  
Date of Crime: 01/13/2013 through 01/29/2013  
**Count No. II:** Conspiracy to Commit Murder in the First Degree  
RCW: 9A.28.040(1) and 9A.32.030(1)(a)  
Date of Crime: 01/13/2013 through 01/29/2013  
**Count No. III:** Attempted Murder in the First Degree  
RCW: 9A.28.020 and 9A.32.030(1)(a)  
Date of Crime: 01/13/2013 through 01/29/2013

<sup>129</sup> *Id.*

<sup>130</sup> *Bell*, 349 U.S. at 82.

<sup>131</sup> *Villanueva-Gonzalez*, 180 Wn. 2d at 981 (citing *State v. Adel*, 136 Wash.2d 629, 634, 965 P.2d 1072 (1998)).

<sup>132</sup> *Id.* (citing *Sanabria v. United States*, 437 U.S. 54, 69 (1978)).

requires this court to determine whether Mr. Dechant was punished multiple times for the “same offense,” which turns on the question of “whether the legislature intended to define [the charged crimes] in such a way that [Mr. Dechant’s] actions constituted one offense or multiple offenses.”<sup>133</sup>

RCW 10.43.050 prohibits a court from entering multiple convictions for an attempt to commit an underlying crime, as well as crimes that the Legislature has separated into different degrees.<sup>134</sup> Although the statute has been held to not apply to lesser-included offenses,<sup>135</sup> this does not end the inquiry into whether Mr. Dechant’s convictions for solicitation and conspiracy violate double jeopardy.

If the legislature still intended to punish the defendant’s conduct as just one offense, i.e. as an attempt to commit first-degree murder, the remaining convictions violate double jeopardy.<sup>136</sup> The double jeopardy inquiry looks into the offenses as *charged and proved*.<sup>137</sup> Once the court determines that the crimes *could* constitute the same offense (the “as

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<sup>133</sup> *Id.*

<sup>134</sup> That statute reads: “Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he or she cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof.”

<sup>135</sup> *State v. Netling*, 46 Wn. App. 461, 731 P.2d 11, review denied, 108 Wn.2d 1011 (1987).

<sup>136</sup> See, e.g., *Blockburger v. United States*, 284 U.S. 299 (1932); *State v. Tvedt*, 116 Wn. App. 316, 319, 65 P.3d 682 (2003).

<sup>137</sup> See, e.g., *State v. Freeman*, 153 Wn.2d at 776-77, 778, 108 P.3d 753 (2005); *State v. Kier* 164 Wn.2d 798, 813 -14, 194 P.3d 212 (2008).

charged” element), the Court must determine whether the State *proved* that the defendant committed *separate crimes*.<sup>138</sup>

3. MR. DECHANT’S CONVICTIONS FOR SOLICITATION AND AN ATTEMPT TO COMMIT THE SAME CRIME VIOLATE DOUBLE JEOPARDY.

To determine whether multiple convictions or punishments violate the constitutional guarantee against double jeopardy, this Court applies the *Blockburger*<sup>139</sup> “same evidence” test to determine whether the crimes are “identical in both fact and law.”<sup>140</sup> Under that test, “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.”<sup>141</sup>

If one offense is a greater and the other a lesser-included offense, they satisfy this test and multiple convictions are barred.<sup>142</sup> One offense is a lesser-included of another if each element of the lesser constitutes an element of the greater.<sup>143</sup> This is true even if there are different means of

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<sup>138</sup> *Id.*

<sup>139</sup> *Blockburger*, 284 U.S. at 304.

<sup>140</sup> *State v. Calle*, 125 Wn.2d 769, 776-77, 888 P.2d 155 (1995).

<sup>141</sup> *Blockburger*, 284 U.S. at 304.

<sup>142</sup> *State v. Laviollette*, 118 Wn.2d 670, 675, 826 P.2d 684 (1992), *overruled in part on other grounds by, State v. Maxfield*, 125 Wn.2d 378 (1994) (“Another way of stating the *Blockburger* test is that if the elements of each offense are identical, or if one is a lesser included offense of the other, then a subsequent prosecution is barred) (citing *Brown v. Ohio*, 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977)).

<sup>143</sup> *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

committing the greater offense.<sup>144</sup> Under this test, the solicitation to commit murder charge in this case must be considered a lesser-included offense of the attempted first-degree murder charge.

An attempt to commit a crime is a lesser included offense of the completed crime.<sup>145</sup> Thus, convictions for both the target crime and the attempt to commit that crime must merge to avoid violating double jeopardy.<sup>146</sup> One cannot be convicted of both without violating double jeopardy.

The same is true when the defendant is convicted of both solicitation and attempt for the same target crime based upon the same alleged plan against the same victim. The Supreme Court's opinion in *Jenson* supports this conclusion. In that case, the Supreme Court has characterized attempt as the greater offense and the solicitation as the lesser.<sup>147</sup> After reviewing the history of Washington's solicitation statute, the court in *Jenson* observed that the crime of solicitation is a pre-attempt

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<sup>144</sup> *Id.*

<sup>145</sup> *State v. Gallegos*, 65 Wn. App. 230, 828 P.2d 37, review denied, 119 Wn.2d 1024 (1992) (attempted crime is lesser included offense of crime charged and jury may convict defendant of attempting to commit crime charged, even though attempt was not specifically charged); *State v. Rowe* (1962) 60 Wn.2d 797, 376 P.2d 446 (“attempt to commit a crime” is offense included in crime itself).

<sup>146</sup> *State v. Arnett*, 38 Wn. App. 527, 529, 686 P.2d 500 (1984).

<sup>147</sup> *Jensen*, 164 Wn. 2d at 953 (“By offering something of value to another person to commit a crime, a solicitor supplies a motive that otherwise would not exist, thereby increasing the risk the greater harm will occur. The harm of solicitation is fully realized when the solicitor offers something of value to another person with the intent to promote or facilitate a target crime or crimes. If the greater harm of an attempted or completed crime occurs, the solicitor will be criminally liable for that greater harm under the principles of accomplice liability and will be punished accordingly.”) (emphasis added).

step that can “ripen[] into... attempt” if the defendant, or an accomplice, takes another step, a “substantial step,” towards committing that crime.<sup>148</sup>

Here that is exactly what happened. Thus, *Jenson* compels the conclusion that the crime of solicitation is a lesser included offense of the greater offense of solicitation and therefore, the two convictions must be counted as one offense.

4. MR. DECHANT’S CONVICTIONS FOR CONSPIRACY AND AN ATTEMPT TO COMMIT THE SAME CRIME VIOLATE DOUBLE JEOPARDY.

Criminal conspiracy, as defined in RCW 9A.28.040(1) states that “[a] person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.”<sup>149</sup> This statute, as recognized in *Jenson*, requires that criminal conspiracy punishes “a course of conduct, not a single act.”<sup>150</sup> In so holding, *Jenson* relied upon *Bravernman* to hold that conspiracy was also a course of conduct, rather than a single criminal act.<sup>151</sup> In that case, the U.S. Supreme Court held that, for conspiracy, the prohibited course of conduct

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<sup>148</sup> *Id.* at 950 (emphasis added).

<sup>149</sup> RCW 9A.28.040(1)

<sup>150</sup> *Jensen*, 164 Wn. 2d at 956-57.

<sup>151</sup> *Id.*

is the agreement to commit the target crime.<sup>152</sup> In so holding the court observed that

[t]he single agreement is the prohibited conspiracy, and however diverse its object it violates but a single statute . . . For such a violation only the single penalty prescribed by the statute can be imposed.<sup>153</sup>

For an attempt to commit a crime, defining the course of conduct is not so easy. Though a “substantial step” is a necessary element of any crime under the attempt statute, that phrase has no meaning, for double jeopardy purposes, without considering it in light of the facts proved at trial.<sup>154</sup> In *Orange*, the Supreme Court held that the phrase “substantial step” must be viewed only as “a placeholder” for the facts actually used to prove that element at trial. This is so because, without considering the facts of the case at hand, the phrase has “no meaning with respect to any particular crime.”<sup>155</sup> Instead, the phrase only requires meaning “*from the facts of each case.*”<sup>156</sup>

In other words, to determine whether a conviction for an attempt violates double jeopardy, the court must consider what facts the jury relied upon to find that the defendant took a “substantial step” towards the

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<sup>152</sup> *Braverman v. United States*, 317 U.S. 49, 54, 63 S. Ct. 99, 102, 87 L. Ed. 23 (1942)

<sup>153</sup> *Id.*

<sup>154</sup> *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 818-821 (citing RCW 9A.28.20(1), the attempt statute with its “substantial step” element); *In re the Personal Restraint of Borrero*, 161 Wn.2d 532, 167 P.3d 1106 (2007), cert. denied, 552 U.S. 1154 (2008).

<sup>155</sup> *Orange*, 152 Wn.2d at 818.

<sup>156</sup> *Id.* (emphasis added).

commission of the underlying crime. Here, as argued below, the facts, the jury instructions, and the rest of the record fail to offer any conclusive guidance, thus requiring the conspiracy conviction to merge into the attempted first-degree murder conviction.

5. AS CHARGED AND PROVED, THE JURY COULD HAVE FOUND MR. DECHANT GUILTY OF CONSPIRACY TO COMMIT FIRST DEGREE MURDER BASED UPON THE SAME CONDUCT USED TO FIND HIM GUILTY OF ATTEMPTED FIRST DEGREE MURDER. BECAUSE THE JURY VERDICT IS AMBIGUOUS, THIS COURT MUST VACATE THE LESSER OFFENSE.

When the jury’s verdict does not unambiguously show that the defendant has been convicted of multiple offenses, the rule of lenity requires this court to find a double jeopardy violation, unless, the “entire record” makes it “manifestly clear” that the jury did not find the defendant guilty based upon the same criminal acts.<sup>157</sup>

In *Mutch*, a jury convicted the defendant, in relevant part, of five counts of second degree rape.<sup>158</sup> The victim testified that the defendant forced her to engage in five distinct episodes of assault that each included oral sex and vaginal intercourse over the course of a night and the next morning.<sup>159</sup> Like the trial court in the present case, the trial court in *Mutch* gave separate but “nearly identical” to-convict instructions for the five

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<sup>157</sup> See *Mutch*, 171 Wash.2d at 652-663.

<sup>158</sup> *Id.* at 652.

<sup>159</sup> *Id.* at 651.

rape counts and a “separate crime is charged in each count” instruction.<sup>160</sup> Also, like the trial court in the present case, the trial court in *Mutch* did not give a “separate and distinct” act instruction, or any other instruction that could have prevented the issue before the court now.<sup>161</sup>

Relying on two previous decisions by the court of appeals, the *Mutch* court held that these instructions were “flawed” because they did not include a “separate and distinct” act instruction.<sup>162</sup> The *Mutch* court explained that, to determine whether multiple convictions violate double jeopardy, the reviewing court must look at “the entire trial record.”<sup>163</sup> A double jeopardy violation occurs if it was not “*manifestly apparent* to the jury” from the evidence, arguments, and instructions that “the State [was] not seeking to impose multiple punishments for the same offense and that each count was based on a separate act.”<sup>164</sup>

Applying these standards, the *Mutch* court observed that the case before it “present[ed] a *rare circumstance* where, despite deficient jury

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<sup>160</sup> *Id.* at 662.

<sup>161</sup> Notably, defense counsel did ask for such an instruction, citing WPIC 4.25 (2008), which would have required the jury to “unanimously agree” as to which act of solicitation stood as the basis for that conviction, but that instruction was not given. *See* CP 86 (“The State alleges that the defendant committed the acts of solicitation to commit murder in the first degree on multiple occasions. To convict the defendant of solicitation to commit murder in the first degree, one particular act of solicitation to commit murder in the first degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed the acts of solicitation to commit murder in the first degree.”).

<sup>162</sup> *Id.* at 663 (citing *State v. Carter*, 156 Wash.App. 561, 234 P.3d 275 (2010); *State v. Berg*, 147 Wash.App. 923, 198 P.3d 529 (2008)).

<sup>163</sup> *Id.* at 664.

instructions, it is nevertheless manifestly apparent that the jury found [Mutch] guilty of five separate acts of rape to support five separate convictions.”<sup>164</sup> Accordingly, the *Mutch* court concluded: “In light of all this, we find that it was manifestly apparent to the jury that each count represented a separate act; if the jury believed [the victim] regarding one count, it would as to all.”<sup>165</sup> Unlike in *Mutch*, this does not “constitute a “rare circumstances” where despite the ambiguous jury verdict, that this court could conclude that Mr. Dechant’s convictions do not violate double jeopardy.

Here, just as in *Mutch* , the jury instructions failed ensure that the jury rendered its verdicts by relying upon on separate criminal acts. As instructed, to find Mr. Dechant guilty of attempted murder, the jury had to find that, Mr. Dechant “*or an accomplice*” engaged in some act that strongly suggested that Mr. Dechant, or an accomplice, intended to have

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<sup>164</sup> *Id.* at 665. The court based its conclusion on the following circumstances: (1) The information charged the defendant with five counts “based on allegations that constituted five separate units of prosecution”; (2) the victim testified to five separate episodes of rape, which was the exact number of “to convict” instructions given to the jury; (3) the defense’s cross-examination of the victim focused on the issue of consent, not on the number of alleged sexual acts that occurred; (4) a detective testified that the defendant had admitted to engaging in “multiple sexual acts” with the victim; (5) the State discussed all five episodes of rape in its arguments; and (6) the defense argued that the victim consented and that she was not credible to the extent that she denied consenting, rather than arguing that the State presented insufficient evidence as to the number of alleged sexual acts or questioning the victim’s credibility regarding the number of rapes.

<sup>165</sup> *Id.* at 665-66.

someone kill Didomenici.<sup>166</sup> Under the court’s instructions, the jury could find that Mr. Dechant committed the crime of attempted first degree murder, as accomplice, if Mr. Dechant (1) “solicit[ed] . . . another [i.e. Rogers] to commit [that] crime” (solicitation), or if he “agreed to aid another [such as Rogers] in planning or committing [that] crime,” (conspiracy) and (2) he did either of those acts knowing it would further the alleged murder plot against Didomenici.<sup>167</sup>

Notably, the jury was not asked to find that Mr. Dechant was the principal or an accomplice, nor was it asked to find which act constituted the “substantial step” upon which the jury found Mr. Dechant. In this respect, the jury’s verdict is undeniably ambiguous. The jury, for example, may have found that Mr. Dechant was merely an accomplice, i.e. that he “solicited” Rogers to commit the underlying crime, and that Rogers later conduct, obtaining a gun and driving to Didomenici’s home was the “substantial step.” Though the prosecutor could have asked the jury to make such a finding, i.e. by requesting a unanimity instruction, he did nothing to ensure that the jury’s would not violate double jeopardy.

This case, however, requires a different result than *Mutch* because, unlike in that case, this is not one of those “rare circumstances” under

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<sup>166</sup> See CP 115 (to-convict for attempted first degree murder) (emphasis added) and CP 116 (Substantial Step—Attempted Murder 1) (defining substantial step as “conduct that strongly indicates a criminal purpose and that is more than mere preparation.”).

<sup>167</sup> CP 117.

which the “it was manifestly apparent to the jury that each count represented a separate act.”<sup>168</sup>

6. THE REQUIRED REMEDY IS DISMISSAL OF THE LESSER OFFENSES, I.E. SOLICITATION AND CONSPIRACY.

The remedy for a double jeopardy violation is to vacate any multiple convictions.<sup>169</sup> Here, the evidence only clearly proves but one offense, so this court must reverse the lower court’s sentence, based upon three separate convictions, with orders to merge each of those into the greater offense: attempted first degree murder.

D. TRIAL COUNSEL’S FAILURE TO MOVE TO SUPPRESS THE EVIDENCE OBTAINED FROM THE BMW CONSTITUTES INEFFECTIVE ASSISTANCE, GIVEN THE CIRCUMSTANCES

1. STANDARD OF REVIEW

It is well established that the standard for evaluating counsel’s performance, under the *Strickland* standard, has two components: the defendant must show that counsel’s performance was deficient and that it deprived him of a fair trial, thereby undermining confidence in the verdict.<sup>170</sup>

Counsel’s performance is evaluated under a basic standard of reasonableness; the reviewing court must consider, taking account of all

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<sup>168</sup> *See id.*

<sup>169</sup> *State v. Varnell*, 162 Wn.2d 165 (vacating three of four convictions for solicitation to commit murder all occurring in the same conversation); *State v. Knight*, 162 Wn.2d 806, 174 P.3d 1167 (2008) (vacating conviction that violated double jeopardy clause despite the fact that it was entered following a guilty plea).

<sup>170</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

circumstances present at trial, whether the identified omission was outside the broad range of professionally competent assistance for criminal defense attorneys.<sup>171</sup> The reviewing court must also bear in mind that while ensuring the defendant receives a fair trial, counsel's performance must further the adversarial role that the Sixth Amendment requires.<sup>172</sup>

Actual denial of effective assistance of counsel is legally presumed to result in prejudice.<sup>173</sup> The burden is on the defendant to affirmatively prove prejudice, that is, "what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding."<sup>174</sup> This can only occur if the impairments are so serious as to undermine the reliability of the outcome, "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."<sup>175</sup>

## 2. LAW ENFORCEMENT OFFICIALS DID NOT OBTAIN VALID CONSENT TO SEARCH THE BMW

Because law enforcement officials did not receive valid consent to search the BMW, all evidence that followed the illegal search is tainted and therefore inadmissible. Mr. Dechant signed a borrowed car agreement at the direction of Didomenici, which entitled Mr. Dechant to a reasonable expectation of privacy. In *U.S. v. Henderson*, the Court rejected the

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<sup>171</sup> *Id.* at 687, 690.

<sup>172</sup> *Id.* at 688.

<sup>173</sup> *Id.* at 692.

<sup>174</sup> *Id.* at 693.

<sup>175</sup> *Id.* at 694.

government's argument that the defendant did not have standing to challenge law enforcement's search of the rental car that he was driving.<sup>176</sup> The Court held that even though the rental agreement was expired, the fact that the rental car company did not attempt to repossess the car and that the parties acted as if the agreement was still valid, entitled the defendant to a reasonable expectation of privacy as the lessee.<sup>177</sup> As a corollary to that ruling, the rental company cannot consent to a search of the vehicle for the person in actual possession because it would contravene Fourth Amendment protections.

For purposes of Mr. Dechant's contractual relation with Didomenici, it was agreed that Mr. Dechant would retain possession of the BMW and possibly decide to purchase it. Mr. Schuelke even testified that it was his belief that the BMW was actually payment for a heroin debt Didomenici owed Mr. Dechant. Regardless, Mr. Dechant was in actual possession of the BMW and authorized by Didomenici to do so. Logically, then, Didomenici *cannot* provide consent for a search. This would be the equivalent of a landlord providing consent to the police to search the residence of a tenant. The impropriety of the "consent" ACT officers obtained is further expounded by the fact that Didomenici, as a police

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<sup>176</sup> *United States v. Henderson*, 241 F.3d 638, 647 (9th Cir. 2000), as amended (Mar. 5, 2001).

<sup>177</sup> *Id.*

informant, was acting as an agent of the police. In essence, the police furnished their own consent by façade.

3. TRIAL COUNSEL’S FAILURE TO MOVE TO SUPPRESS FELL BELOW THE STANDARD OF A REASONABLE CRIMINAL ATTORNEY AND RESULTED IN TWO CONVICTIONS THAT SHOULD HAVE BEEN DISMISSED

“When trial counsel's failure to file a motion to suppress is the basis for a claim of ineffective assistance, the defendant must make a strong showing that the damaging evidence would have been suppressed had counsel made the motion.”<sup>178</sup> In the present matter, trial counsel knew that Didomenici was a police informant who set up Mr. Dechant and provided officers with consent to search the car which resulted in the two initial charges contained in 13-1-00737-8 SEA. With this information, a reasonable defense attorney would have moved to suppress.

In *Grumbley v. Burt*, the Court found that trial counsel’s performance was deficient after failing to move to suppress evidence tainted from an illegal search.<sup>179</sup> The Court even went so far as to state “it is difficult to conceive of a legitimate trial strategy or tactical advantage to be gained by *not* filing a motion to suppress.”<sup>180</sup> In this case, is more likely than not that the trial judge would have granted this meritorious motion, as explained above. Although this Court must initially presume that trial

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<sup>178</sup> *Biggs v. State*, 281 Ga. 627, 631, 642 S.E.2d 74, 79 (2007).

<sup>179</sup> *Grumbley v. Burt*, 591 F. App’x 488, 499 (6th Cir. 2015).

<sup>180</sup> *Id.*

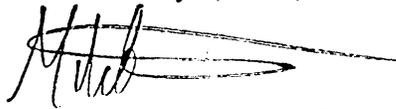
counsel's decision to not move to suppress was a reasonable trial tactic,<sup>181</sup> this presumption is inapposite due to the fact that there is no conceivable reason why any attorney in Mr. Mahoney's position would have failed to move to suppress.

*Strickland* imposes a low standard on the defendant to show that trial counsel's omission determined the outcome of the case – the defendant does not even have to show by a preponderance of the evidence that counsel's deficiency was outcome determinative. Be that as it may, Mr. Dechant's trial lawyer's failure was so substantial that it far exceeds any doubt that it was harmless error. Had the motion been granted, the VUCSA and UPFA charges would have been dismissed, thereby eliminating the prejudice that Mr. Dechant is objecting to.

## VI. CONCLUSION

For the reasons stated above, this court should dismiss Mr. Dechant's convictions. In the alternative, the court should order a new trial.

Dated May 1, 2015,



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Mitch Harrison, ESQ.,  
WSBA#43040  
Attorney for Appellant

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<sup>181</sup> *State v. Wilson*, 29 Wn.App. 895, 626 P.2d 998 (1981).

**CERTIFICATE OF SERVICE**

I, Ryan English, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by the law firm of Harrison Law.

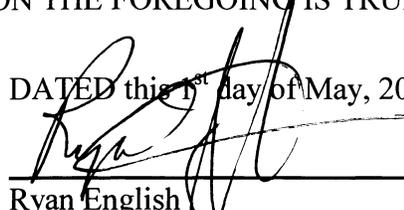
At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

This **10<sup>th</sup> day of April, 2015**, I caused a true and correct copy of this **Appellant's Amended Brief** to be served on the following in the manner indicated below:

The Appellant, Ira Dechant DOC #914697 Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Email <input type="checkbox"/> Fax
Court of Appeals, Division I One Union Square 600 University St Seattle, WA 98101-1176	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivery ( <b>original and one copy</b> ) <input type="checkbox"/> Email <input type="checkbox"/> Fax: 206-389-2613
King County Prosecuting Attorney's Office King County Courthouse, Room W554 516 Third Avenue Seattle, WA 98104-2362	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email: paoappellateunitmail@kingcounty.gov <input type="checkbox"/> Fax

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THE FOREGOING IS TRUE AND CORRECT

DATED this 1<sup>st</sup> day of May, 2015.

  
 \_\_\_\_\_  
 Ryan English  
 Law Clerk  
 Harrison Law Firm LLC  
 101 Warren Ave N,  
 Seattle, WA 98109