

NO. 39115-5-II

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

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IN RE THE PERSONAL RESTRAINT OF:  
GEORGE ANTHONY WILSON

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PETITIONER'S SUPPLEMENTAL OPENING BRIEF

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10/19/07  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

10/19/07  
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A. ISSUES PRESENTED

1. Whether Mr. Wilson must be granted a new trial because the State failed to prove he was an accomplice to rape, but one or more jurors may have convicted him of this unproved alternative means?

2. Whether Mr. Wilson must be granted a new trial because the court instructed the jury it could convict Mr. Wilson as an accomplice if he knew of and aided in the commission of a crime, rather than the crime charged?

3. Whether Mr. Wilson must be granted a new trial because the prosecutor told the jury in closing argument that in order to acquit it had to "fill in the blank" with a reason?

B. STATEMENT OF THE CASE

On January 24, 1997, 17-year-old George Anthony Wilson attended a party at the home of 37-year-old Cecil Davis. 11 RP 1239, 14 RP 1500-01. As the party was winding down, Mr. Wilson, Mr. Davis, and Mr. Davis's friend Keith Burks were standing on Mr. Davis's front porch. 14 RP 1502. Mr. Davis looked at a house across the street and suddenly said, "I need to rob somebody. I need to kill me a motherfucker." 14 RP 1504, 1507. Mr. Burks and

Mr. Wilson thought Mr. Davis was just “talking crazy” because he was drunk. 14 RP 1506.

Mr. Burks went inside Mr. Davis’s house and the other two left. Five or six minutes later, Mr. Wilson returned. His eyes were “big and he had a scared look in his face.” 14 RP 1510. When Mr. Burks let him inside, Mr. Wilson told him that he and Mr. Davis “went over there to rip the lady off, but Cecil just kicked in the door and started beating on her and rubbing all over.” 14 RP 1510.

That evening, Cecil Davis robbed, raped, and killed Yoshiko Couch, who lived across the street from him. The State charged Mr. Davis with aggravated first-degree murder.

The State charged Mr. Wilson with first-degree felony murder, alleging that he was an accomplice to the crimes of rape, robbery, and/or burglary committed by Mr. Davis, and that Ms. Couch was killed in the course of and furtherance of these crimes. Appendix A. At trial, the State presented evidence that Mr. Wilson knew Mr. Davis planned to rob Ms. Couch, but not that he knew Mr. Davis planned to rape her.

The jury was instructed that “a person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he ... aids or agrees to aid

another person in planning or committing a crime.” Appendix B (Instruction 15). The State argued in closing that although Mr. Wilson did not know Mr. Davis was going to rape Ms. Couch, Mr. Wilson was “in for a penny, in for a pound.” 20 RP 2223-25. The State also argued that in order to acquit Mr. Wilson, the jury had to “fill in the blank” with a reason. 20 RP 2291.

Mr. Wilson was convicted of first-degree felony murder as charged. The jury was given a general verdict form, and did not specify the predicate crime or crimes for which it found Mr. Wilson guilty.<sup>1</sup> Appendix C.

On appeal, Mr. Wilson argued the State presented insufficient evidence to convict him of the crime charged. The Court of Appeals affirmed, finding the State presented sufficient evidence that Mr. Wilson was an accomplice to robbery, and the fact “that Davis did more than rob the Couches does not excuse Wilson’s liability” because “an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality.” Appendix D at 13. The mandate terminating direct review was filed on January 18, 2001. Appendix E.

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<sup>1</sup> Mr. Davis was convicted of aggravated first-degree murder and sentenced to death.

Shortly after Mr. Wilson's conviction was affirmed, the Supreme Court decided State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) and State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2001). The Court reversed the defendants' murder convictions in those cases, holding that the accomplice liability instruction describing "a crime" instead of "the crime" was invalid. Roberts, 142 Wn.2d at 513; Cronin, 142 Wn.2d at 579.

[I]n order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged. Because the jury instruction which was given in the Bui and Cronin trials permitted the jury to find accomplice liability on an incorrect legal basis, they were legally deficient.

Cronin, 142 Wn.2d at 579.

In December of 2001, less than one year after the mandate issued terminating his direct appeal, Mr. Wilson filed a motion for relief from judgment pursuant to CrR 7.8. Mr. Wilson argued that the accomplice liability instruction given in his case was improper under Roberts and Cronin. Appendix F.

On February 4, 2002, the superior court ordered Mr. Wilson's motion transferred to the Court of Appeals pursuant to CrR 7.8(c)(2) for consideration as a personal restraint petition. Appendix G. However, some administrative error occurred, and the

trial court apparently never transferred the motion. Thus, this Court never ruled on the petition.

Mr. Wilson was transferred to a prison in Wyoming in 2002, presumably pursuant to the Western Interstate Corrections Compact. He continues to serve his Washington sentence in Wyoming.

After a PRP raising other issues was dismissed in 2007, Mr. Wilson filed a PRP again raising the issue of the erroneous accomplice liability instruction. This Court dismissed the PRP as time-barred.

On March 27, 2009, Mr. Wilson filed a Motion to Reinstate the 2001 CrR 7.8 motion which this Court had never had the opportunity to address. Appendix H. In its response, the State argued that Mr. Wilson “abandoned” his motion by not following up with the trial court to make sure it would transfer the motion as ordered.

This Court dismissed the petition, but the Supreme Court granted Mr. Wilson’s motion for discretionary review and remanded.

C. ARGUMENT

1. A PERSONAL RESTRAINT PETITION SHOULD BE GRANTED WHERE, AS HERE, THE PETITIONER HAS BEEN PREJUDICED BY CONSTITUTIONAL ERROR.

An appellate court will grant relief to an individual who has filed a personal restraint petition if the petitioner is under "restraint" and the restraint is unlawful. RAP 16.4(a). A petitioner is under restraint if, like Mr. Wilson, he is incarcerated. RAP 16.4(b). The restraint is unlawful, if:

The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.

RAP 16.4(c)(2).

Mr. Wilson raises issues under the Sixth and Fourteenth Amendments. Because the issues are constitutional, the PRP must be granted if Mr. Wilson shows actual prejudice stemming from the constitutional errors. In re Personal Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983).<sup>2</sup> As explained below, Mr. Wilson was

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<sup>2</sup> If this Court rules Mr. Wilson made at least a prima facie showing of prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a reference hearing. Hews, 99 Wn.2d at 88; RAP 16.11(a); RAP 16.12. Mr. Wilson submits a reference hearing is unnecessary and the petition should be granted.

prejudiced by several constitutional errors, and a new trial should be granted.

2. MR. WILSON'S PRP SHOULD BE GRANTED  
BECAUSE THE STATE PRESENTED  
INSUFFICIENT EVIDENCE TO PROVE HE  
COMMITTED FELONY MURDER PREDICATED  
ON RAPE.

a. Mr. Wilson may raise this issue under RCW 10.73.100(4).

Generally, a defendant seeking relief on collateral review must raise the issues within one year of the date the conviction becomes final. RCW 10.73.090; CrR 7.8(b). However, there is no time limit for alerting the Court that "the evidence introduced at trial was insufficient to support the conviction." RCW 10.73.100 (4). Mr. Wilson submits the evidence presented was insufficient to support his conviction, and he may present the issue to this Court under RCW 10.73.100(4).

b. The State must prove every alternative means presented to the jury. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient

evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

“In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged.” State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Although unanimity is not required as to the means by which the crime was committed, substantial evidence must support each alternative means presented to the jury. Id. “In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.” Id. at 410-11. “If one of the alternative methods upon which a charge is based fails, the verdict must be set aside unless the court can ascertain that it was based on remaining grounds for which sufficient evidence was presented.” State v. Maupin, 63 Wn. App. 887, 894, 822 P.2d 355 (1992).

c. A new trial must be granted because the State failed to prove Mr. Wilson committed rape but one or more jurors may have convicted Mr. Wilson of this unproved alternative means. Felony murder is an alternative means crime. Maupin, 63 Wn. App. at 894. A felony murder conviction must be supported by sufficient

evidence of each element of the predicate felony. Id. at 892.

Where a felony murder charge is based on more than one predicate felony, the State must prove the defendant committed each element of each predicate felony. Otherwise, the verdict must be set aside unless it is clear that no juror convicted based on the unproven alternative. Id. at 894.

In Maupin, the defendant was convicted of first-degree felony murder where the underlying felonies charged were kidnapping, rape, or attempted rape. Id. at 888-89. This Court reversed the conviction because although the State had presented sufficient evidence of the kidnapping predicate, it failed to present sufficient evidence of rape. Id. Because there was insufficient evidence of rape, the trial court erred in instructing the jury on that alternative means. Id. at 893-94.

This Court granted a new trial because even though no evidence was presented of sexual intercourse, this Court could not be sure the jury's verdict rested only on the kidnapping alternative and not on the rape alternative. Id. at 894. This Court noted that the problem could have been prevented by either not instructing the jury on the rape alternatives or by providing a special verdict form for the jury to delineate the bases on which it found the defendant

guilty. Id. But because the jury was instructed on the unproven alternative means and was provided only a general verdict form, a new trial was required. Id.

The same is true here. The State failed to prove Mr. Wilson was an accomplice to the rape and attempted rape predicate felonies. To prove Mr. Wilson committed rape as an accomplice, it had to show not only that Mr. Davis raped the victim, but that Mr. Wilson knew he was facilitating the commission of rape – not just robbery and burglary – when he accompanied Mr. Davis across the street. RCW 9A.08.020; State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2001). The State did not make this showing.

The evidence presented demonstrated that when Mr. Wilson, Mr. Burks, and Mr. Davis were standing on the porch, the only predicate crime Mr. Davis mentioned was robbery (Keith Burks testified that Mr. Davis said, “I need to rob somebody”). 14 RP 1504. Mr. Burks then went inside, but Mr. Wilson apparently went across the street with Mr. Davis. Five to six minutes later, Mr. Wilson came back alone with wide eyes and a scared look on his face. According to Mr. Burks, Mr. Wilson said that he and Mr. Davis “went over there to rip the lady off, but Cecil just kicked in the door and started beating on her and rubbing all over.” 14 RP 1510.

As soon as Mr. Wilson saw Mr. Davis do this, he left. 14 RP 1528. Although Mr. Davis ultimately raped Ms. Couch and investigators matched Mr. Davis's DNA and hair to evidence recovered at the scene, no physical evidence implicating Mr. Wilson was found in the house. 16 RP 1664-1702, 1744-1766; 18 RP 2035; 19 RP 2143-45. Thus, the State even admitted during closing argument that it did not believe Mr. Wilson knew Mr. Davis was going to rape the victim. 20 RP 2207, 2225, 2295. The State clearly presented insufficient evidence that Mr. Wilson committed rape.

Because the State failed to prove the rape alternative, Mr. Wilson must be granted a new trial unless this Court can ascertain that no juror convicted Mr. Wilson of felony murder predicated on rape. Maupin, 63 Wn. App. at 894. As in Maupin, this Court cannot make that finding. The to-convict and definitional instructions provided to the jury included the rape predicate. Appendix B (Instructions 14, 18, 21); see Maupin, 63 Wn. App. at 893-94. The State argued that all of the alternatives should be listed because "as long as there's substantial evidence of each of those, there is no unanimity required." 20 RP 2193-94.

The verdict form was a general form that did not show which of the underlying felonies the jury relied upon in reaching its verdict.

Appendix C; see Maupin, 63 Wn. App. at 894. The jury could have been confused by the erroneous accomplice liability instruction, which stated that the jury could convict Mr. Wilson of the crime so long as he knew about and aided in the commission of any crime. Appendix B (Instruction 15); see Roberts, 142 Wn.2d at 510-11. Additionally, the one witness other than Keith Burks who testified about Mr. Wilson's participation stated that Mr. Wilson gave him conflicting accounts of what happened, first stating that he went in the house with Davis and later stating he was never inside the house. 17 RP 1873.

Finally, even though the State admitted in closing argument it did not think Mr. Wilson knew anything about rape, it argued Mr. Wilson was guilty of all of the crimes if he knew about any of them:

A person with knowledge that will promote or facilitate the commission of a crime, not necessarily the same crime that Mr. Davis had in mind, but a crime... We're talking about a man who made a deliberate decision to go with him. He went to the scene with Davis and he told friends later on that he wanted something out of it. He wants money. Once he starts participating, it's like getting on a slippery slope and he's sliding down and he can't get off that slope, in for a penny, in for a pound. What crimes were committed by Wilson as an accomplice? Not all of the crimes, but some of the crimes, while in complicity and therefore making him responsible for the rest.

20 RP 2223-25 (emphasis added). In other words, the prosecutor urged the jury to convict Mr. Wilson based on all of the predicate felonies, notwithstanding the insufficiency of the evidence for rape.

Given the above, this Court cannot ascertain that all of the jurors based their verdicts only on the robbery and burglary predicates, and not on the unproven rape predicate. Accordingly, Mr. Wilson should be granted a new trial. Maupin, 63 Wn. App. at 894-95. On remand, only the robbery and burglary predicates may be presented to the jury. Id.; State v. Fernandez, 89 Wn. App. 292, 300, 948 P.2d 872 (1997) (where insufficient evidence of one alternative means is presented, new trial must be limited to theories that were supported by sufficient evidence in the first trial).<sup>3</sup>

3. THE ACCOMPLICE LIABILITY INSTRUCTION  
IMPERMISSIBLY LOWERED THE STATE'S  
BURDEN OF PROOF.

a. Mr. Wilson raised this issue within the one-year time limit.

Under CrR 7.8 and RCW 10.73.090, a petition for collateral relief is timely if filed within one year of the mandate terminating direct review. The mandate terminating Mr. Wilson's direct appeal was filed on January 18, 2001. Appendix E. Mr. Wilson filed the instant CrR 7.8(b) motion raising the issue of the flawed accomplice liability

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<sup>3</sup> This Court need not reach the alternative arguments below.

instruction on December 26, 2001. Appendix F. The motion was clearly timely.

The trial court ruled on the motion on February 4, 2002, ordering it transferred to this Court as a PRP. Appendix G. Unfortunately, some administrative error occurred and the motion was apparently never transferred. Mr. Wilson tried again to raise the Roberts/Cronin violation in a subsequent PRP, but this Court rejected the petition as time-barred. Mr. Wilson then moved to “reinstate” his original, timely, CrR 7.8 motion.

The State concedes that Mr. Wilson’s motion is timely. Response at 4. Yet it argues Mr. Wilson “abandoned” the motion because he “took no action to further pursue” it after the trial court ordered it transferred. Response at 5. This argument is without merit. Mr. Wilson had no authority, as an inmate in a Wyoming prison, to transfer the motion to this Court as a PRP. It was the court’s duty to transfer the motion. Mr. Wilson had satisfied his obligation by filing the motion within the one-year time limit. He reasonably believed the court would follow its own order to transfer the motion. It was not for him to badger the court to make sure it followed its own orders.

Even if it were Mr. Wilson's responsibility to ensure transfer, which it is not, dismissal would be improper. CR 41 provides for dismissal of a case for want of prosecution, but requires notice to the parties before the court may dismiss the case. CR 41(2)(A). This makes sense because "involuntary dismissal for want of prosecution is punitive or administrative in nature and every reasonable opportunity should be afforded to permit the parties to reach the merits of the controversy." Snohomish County v. Thorp Meats, 110 Wn.2d 163, 168, 750 P.2d 1251 (1988). Dismissal is allowed only if the relevant party fails to take action within 30 days of receiving notice that the court will dismiss the case for want of prosecution. CR 41(2)(A). Mr. Wilson received no such notice.

The rule the State proposes is not only unfair to litigants, but would lead to gross inefficiencies for the courts. If prisoners learn that they must not only file timely CrR 7.8(b) motions and PRP's, but must also "follow up" to make sure the courts are complying with their own orders, courts will be inundated with letters, motions, and telephone calls from inmates believing they must check in

repeatedly in order to avoid accusations of abandonment. This system would benefit neither litigants nor the courts.<sup>4</sup>

Because Mr. Wilson timely raised the issue of the erroneous accomplice liability instruction, this Court should proceed to address the merits of the argument.

b. Jury Instruction 15 was defective under *Roberts* and *Cronin*. Shortly after Mr. Wilson's conviction was affirmed on direct appeal, the Supreme Court decided *Roberts*, 142 Wn.2d 471, and *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). The Court reversed the defendants' murder convictions in those cases, holding that the accomplice liability instruction describing "a crime" instead of "the crime" was invalid. *Roberts*, 142 Wn.2d at 513; *Cronin*, 142 Wn.2d at 579. "The Legislature ... intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge,' the mens rea of RCW 9A.08.020." *Roberts*, 142 Wn.2d at 511.

[I]n order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged. Because the jury instruction which was given in the Bui and Cronin trials permitted the jury to find accomplice liability on an incorrect legal basis, they were legally deficient.

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<sup>4</sup> In any event, Mr. Wilson did follow up in 2003 and 2007, and each time was told "the court will handle it." See Appendix I (Declaration of George A. Wilson).

Cronin, 142 Wn.2d at 579.

The same error occurred here. Jury instruction 15 provided:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

...

Appendix B (emphasis added). This instruction is identical to that the Supreme Court rejected in Cronin. Id. at 572. Also as in Cronin, the prosecutor here improperly stated during closing argument that so long as Mr. Wilson agreed to aid in the commission of one crime, he was “in for a penny, in for a pound.” 20 RP 2224-25; Cronin, 142 Wn.2d at 577. The erroneous instruction violated Mr. Wilson’s right to due process because it relieved the State of its burden of proving every essential element of the crime beyond a reasonable doubt. Cronin, 142 Wn.2d at 580.

c. Mr. Wilson was denied his constitutional right to the effective assistance of counsel when his attorney agreed to the defective accomplice liability instruction. Both the federal and state constitutions guarantee a defendant the effective assistance of counsel. The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” Article I, section 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . .” To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel’s performance was deficient, and (2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct.

2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”) (quoting Strickland, 466 U.S. at 688). While an attorney’s decisions are treated with deference, his or her actions must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34. “Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Here, as in Kylo, defense counsel’s failure to research the relevant law resulted in a jury instruction that lowered the State’s burden of proof. As in Kylo, this performance was deficient.

In Kylo, counsel and the court followed the relevant WPIC. Kylo, 166 Wn.2d at 865. The Supreme Court nevertheless held that the lawyer’s performance was deficient because “there were several cases that should have indicated to counsel that the pattern instruction was flawed.” Id. at 866. There is no legitimate strategic or tactical reason for allowing an instruction that incorrectly states the law and lowers the State’s burden of proof. Id. at 869 (citing State v. Woods, 138 Wn. App. 191, 201-02, 156 P.3d 309 (2007); State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004)).

Similarly here, counsel and the court followed the relevant WPIC, but counsel's performance was deficient because the WPIC was inconsistent with the accomplice liability statute. In re the Personal Restraint of Domingo, 155 Wn.2d 356, 119 P.3d 816 (2005). The accomplice liability statute has been in place since 1975, and has always required proof that the defendant knew of the crime the principal would commit. The statute never allowed for strict liability for any and all crimes that followed. Id. at 364-65 (citing RCW 9A.08.020). Cases from 1984 on were consistent with Roberts and Cronin, and did not approve of the proposition that accomplice liability attaches for any and all crimes committed by the principal so long as the putative accomplice knowingly aided in any one of the crimes. Id. at 367-68 & n.7 (listing cases). Thus, had counsel researched the relevant statute and caselaw, he would not have agreed with the incorrect accomplice liability instruction. Mr. Wilson's attorney's failure to research the relevant law and propose a proper instruction deprived Mr. Wilson of the effective assistance of counsel. Kyllo, 166 Wn.2d at 869.

4. THE PROSECUTOR'S CLOSING ARGUMENT  
IMPERMISSIBLY SHIFTED THE BURDEN OF  
PROOF FROM THE STATE TO MR. WILSON.

a. The prosecutor violated Mr. Wilson's right to due process by arguing that in order to acquit, the jury had to state a reason for doing so. During closing argument, the prosecutor stated:

A doubt arising from the lack of evidence is not, as has been suggested to you, could they have tested other clothing, could they have done further testing. The question is have you got enough, that's the question. Is the evidence that you've been presented enough to convince you beyond a reasonable doubt, or can you say I doubt that Cecil Davis killed Mrs. Couch because ..., and then fill in the blank. I doubt that Anthony Wilson is an accomplice to this case because ... and then fill in the blank. That's the standard of proof that you apply here based on the instructions that the Court has given you.

20 RP 2291. This argument improperly shifted the burden of proof from the State to the defense and violated Mr. Wilson's right to due process.

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). It is misconduct for a prosecutor to suggest a shift in the burden of proof during a criminal trial. State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 547 (1990) (holding prosecutor committed misconduct by stating defense attorney "would not have overlooked

any opportunity to present admissible, helpful evidence”). “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt. Winship, 397 U.S. at 364.

In three recent cases this Court held that the same argument made by the prosecutor in this case violates due process by shifting the burden of proof from the state to the defendant. State v. Johnson, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (No. 39418-9-II, filed 11/24/10); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). Indeed, this fill-in-the-blank argument is “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction.” Venegas, 155 Wn. App. at 524 n.16 (internal citations omitted).

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to. Because we begin with a

presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

Anderson, 153 Wn. App. at 431 (emphasis in original). “Misstating the bases upon which a jury can acquit may insidiously lead, as it did here, to burden-shifting.” Fleming, 83 Wn. App. at 214; see also State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007) (“The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve”).

In sum, the prosecutor’s improper argument on the burden of proof violated Mr. Wilson’s right to due process.

b. Mr. Wilson may raise this issue under RCW 10.73.100 (6). Mr. Wilson did not raise the burden-shifting issue in his original motion, but he may raise it now under RCW 10.73.100(6). That subsection allows for relief based on a “significant change in the law” that is “material to the conviction.” RCW 10.73.100(6). Johnson, Anderson and Venegas were not decided until well after the one-year time limit elapsed, so Mr. Wilson could not have relied on those cases in a petition filed pursuant to RCW 10.73.090. He

should, therefore, be able to obtain relief under those cases pursuant to RCW 10.73.100(6).

5. MR. WILSON WAS PREJUDICED BY THE IMPROPER INSTRUCTION AND ARGUMENT ON ACCOMPLICE LIABILITY AND THE IMPROPER ARGUMENT ON THE BURDEN OF PROOF.

As explained above, Mr. Wilson's right to due process was violated by the improper accomplice liability instruction and the improper fill-in-the-blank argument. Mr. Wilson was prejudiced by the constitutional errors, because the result likely would have been different absent the errors. As it is, the State presented insufficient evidence that Mr. Wilson was an accomplice to first-degree murder predicated on rape. See Section (C)(2) above. This failure of proof was exacerbated by a defective accomplice liability instruction and the State's repeated arguments that Mr. Wilson was liable for any and all crimes once he agreed to aid in a robbery.

The State argued:

Now, Mr. Wilson was an accomplice to felony murder. ...Why is he an accomplice? ... A person with knowledge that will promote or facilitate the commission of a crime, not necessarily the same crime that Mr. Davis had in mind, but a crime, he either does one of two things, solicits, commands, encourages, or requests someone to commit the crime, or aids or agrees to aid. ...

We're talking about a man who made a deliberate decision to go with him. He went to the scene with Davis and he told friends later on that he wanted something out of it. He wants money. Once he starts participating, it's like getting on a slippery slope and he's sliding down and he can't get off that slope, in for a penny, in for a pound. ...

What crimes were committed by Wilson as an accomplice?  
Not all of the crimes, but some of the crimes, while in complicity and therefore making him responsible for the rest.

20 RP 2222-25 (emphasis added).

The prejudice was then compounded by the improper statement that the jury had to provide a reason in order to acquit. “[A] misstatement about the law and the presumption of innocence due a defendant, the bedrock upon which our criminal justice system stands, constitutes a great prejudice because it reduces the State’s burden and undermines a defendant’s due process rights.”

Johnson, slip op. at 9 (internal citations omitted).

Absent these due process violations, the jury probably would have found that the State failed to prove its case. Alternatively, this Court probably would have reversed the conviction on direct appeal for insufficient evidence. This Court affirmed based on the State’s erroneous accomplice liability argument and its misrepresentation of the holding in State v. Davis:

[T]hat [Cecil] Davis did more than rob the Couches does not excuse Wilson’s liability. See State v. Davis, 101 Wn.2d

654, 682 P.2d 883 (1984) (stating that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality).

Appendix D at 13.

Finally, absent the constitutional errors, the jury may have found that Mr. Wilson proved his affirmative defense. See RCW 9A.32.030(c) (providing for affirmative defense in accomplice felony murder cases); Appendix B, Instruction 23 (court provided affirmative defense jury instruction in Mr. Wilson's case). Indeed, the fact that the trial court provided the instruction for the affirmative defense means sufficient evidence was presented to prove the defense by a preponderance of the evidence. State v. Buford, 93 Wn. App. 149, 153, 967 P.2d 548 (1998). For all of these reasons, the errors prejudiced Mr. Wilson, and his PRP should be granted.

D. CONCLUSION

For the reasons set forth above, Mr. Wilson respectfully requests that this Court grant his personal restraint petition and remand for a new trial.

DATED this 29<sup>th</sup> day of November, 2010.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorneys for Petitioner

# APPENDIX A

FILED  
IN COUNTY CLERK'S OFFICE

A.M. FEB 03 1997 P.M.

PIERCE COUNTY, WASHINGTON  
TED RUTT, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

GEORGE ANTHONY WILSON,

Defendant.

CAUSE NO. 97 1 00433 2  
INFORMATION

DOB: 021079 B/M  
SS#: UNK SID#: UNK DOL#:

97 1 00432 4

~~60~~ DEFENDANT CECIL EMILE DAVIS

I, JOHN W. LADENBURG, Prosecuting Attorney for Pierce County, in the name and by the name of the State of Washington, do accuse GEORGE ANTHONY WILSON of the crime of MURDER IN THE FIRST DEGREE, committed as follows:

That CECIL EMILE DAVIS and GEORGE ANTHONY WILSON, in Pierce County, Washington, on or about the 25th day of January, 1997, did unlawfully and feloniously, acting as accomplices of each other, as defined in RCW 9A.08.020, while committing or attempting to commit the crime of Robbery in the first or second degree and/or Rape in the first or second degree, and/or burglary in the first degree, did enter the home of Yoshiko Couch, and in the course of and furtherance of said crime or in immediate flight therefrom, Yoshiko Couch, a human being, not a participant in such crime, was choked and/or suffocated,

INFORMATION - 1

**ORIGINAL**

Office of Prosecuting Attorney  
930 Tacoma Avenue South, Room 946  
Tacoma, Washington 98402 2171  
Main Office: (206) 891-7400

thereby causing the death of Yoshiko Couch, on or about the 25th day of January, 1997, contrary to RCW 9A.32.030(1)(c), and against the peace and dignity of the State of Washington.

DATED this 3rd day of February, 1997.

City Case  
WA02703

JOHN W. LADENBURG  
Prosecuting Attorney in and for  
said County and State.

wils.mrj

By:   
MICHAEL R. JOHNSON  
Deputy Prosecuting Attorney  
WSB #2985

## APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CECIL EMILE DAVIS, )  
 GEORGE ANTHONY WILSON, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

NO. 97-1-00432-4  
 NO. 97-1-00433-2

---

COURT'S INSTRUCTIONS TO THE JURY

---

DATED this \_\_\_\_ day of February, 1998.

---

FREDERICK W. FLEMING, JUDGE

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

Charges have been made by the prosecuting attorney by filing a document, called an information, informing the defendants of the charges. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorney's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the

weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed upon defendant George Wilson. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful. The punishment to be imposed upon defendant Cecil Davis will be considered by you in a separate penalty phase only if you unanimously find him guilty of the crime of Premeditated Murder in the First Degree and unanimously find the existence of an Aggravating Circumstance.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdicts.

INSTRUCTION NO. 2

The defendants have each entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff, and has the burden of proving each element of the crime beyond a reasonable doubt.

Each defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

Evidence that a witness has been convicted of a crime may be considered by you in deciding what weight or credibility should be given to the testimony of the witness and for no other purpose.

INSTRUCTION NO. 6

Defendant Cecil Davis is not compelled to testify, and the fact that he has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 7

Defendant George Wilson is not compelled to testify, and the fact that he has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 8

Homicide is the killing of a human being by the voluntary act of another and is either murder, homicide by abuse, manslaughter, excusable homicide, or justifiable homicide.

A person commits the crime of Premeditated Murder in the First Degree when, with a premeditated intent to cause the death of another person, he causes the death of such person.

INSTRUCTION NO. 10

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 11

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. 12

To convict defendant Cecil Davis of the charged crime of Premeditated Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of January, 1997, defendant Cecil Davis suffocated or asphyxiated Yoshiko Couch;
- (2) That defendant Cecil Davis acted with intent to cause the death of Yoshiko Couch;
- (3) That the intent to cause the death was premeditated;
- (4) That Yoshiko Couch died as a result of defendant Cecil Davis' acts; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

If you find defendant Cecil Davis guilty of Premeditated Murder in the First Degree as defined in Instruction 9, you must then determine whether the following aggravating circumstance exists:

The murder was committed in the course of, in furtherance of, or in immediate flight from a Robbery in the First or Second Degree, a Rape in the First or Second Degree, or a Burglary in the First or Second Degree.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt. You need not be unanimous as to any one of the crimes listed within the aggravating circumstance.

INSTRUCTION NO. 14

A person commits the crime of Felony Murder in the First Degree when he or an accomplice commits or attempts to commit Robbery in the First or Second Degree, Rape in the First or Second Degree, or Burglary in the First Degree, and in the course of or in furtherance of such crime or in immediate flight from such crime, he or the other participant causes the death of a person other than one of the participants.

INSTRUCTION NO. 15

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing a crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

INSTRUCTION NO. 16

A person attempts to commit Robbery in the First or Second Degree, Rape in the First or Second Degree, or Burglary in the First Degree, when, with intent to commit that crime, he does any act which is a substantial step toward the commission of that crime.

A person acts with "intent" or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

A "substantial step" is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

INSTRUCTION NO. 17

A person commits the crime of Robbery in the First Degree when, in the commission of a robbery or in immediate flight therefrom, he inflicts bodily injury.

A person commits the crime of Robbery in the Second Degree when he commits robbery.

"Bodily injury" means physical pain or injury, illness, or an impairment of physical condition.

A person commits "robbery" when he unlawfully and with intent to commit theft thereof, takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. The taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom it was taken, such knowledge was prevented by the use of force or fear.

Cigarettes, packaged food items, canned soda pop, canned beer, and jewelry are all "property".

A person acts with "intent" or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

"Theft" means to wrongfully obtain the property of another, with intent to deprive that person of such property.

"Wrongfully obtains" means to take wrongfully the property of another.

A person commits the crime of Rape in the First Degree when he engages in sexual intercourse with another person by forcible compulsion, when the perpetrator inflicts serious physical injury or feloniously enters into the building where the victim is situated.

A person commits the crime of Rape in the Second Degree when he engages in sexual intercourse with another person by forcible compulsion or when the victim is incapable of consent by reason of being physically helpless.

"Sexual intercourse" means any penetration of the vagina, however slight, by a penis or by an object, when committed on one person by another.

"Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself.

"Physical injury" means physical pain or injury, illness, or an impairment of physical condition.

A person "feloniously enters a building" if that person enters into a building with the intent to commit a crime against a person or property therein and the person entering is not then licensed, invited or otherwise privileged to enter that building.

"Building" includes any dwelling; "dwelling" means any structure that is ordinarily used by a person for lodging.

"Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

A person commits the crime of Burglary in the First Degree when, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a dwelling, and in entering, while in the dwelling, or in immediate flight from the dwelling he or an accomplice in the crime assaults any person.

A person commits the crime of Burglary in the Second Degree when, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building.

A person acts with "intent" or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

A person "enters or remains unlawfully" in a building or dwelling when he is not then licensed, invited, or otherwise privileged to so enter or remain.

"Building" includes any dwelling; "dwelling" means any structure that is ordinarily used by a person for lodging.

An "assault" is an intentional touching or striking of another person that is harmful or offensive, regardless of whether any physical injury is done to the person. A touching or striking is offensive if it would offend an ordinary person who is not unduly sensitive.

To convict defendant Cecil Davis of the alternative crime of Felony Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt;

(1) That on or about the 25th day of January, 1997, Yoshiko Couch was killed;

(2) That defendant Cecil Davis was committing or attempting to commit Robbery in the First or Second Degree, Rape in the First or Second Degree, or Burglary in the First Degree;

(3) That defendant Cecil Davis caused the death of Yoshiko Couch in the course of and in furtherance of such crime or in immediate flight from such crime;

(4) That Yoshiko Couch was not a participant in the crime;  
and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

The crimes listed in Element Number (2) are alternatives. You must unanimously agree that defendant Cecil Davis was committing or attempting to commit one of those crimes, but you need not be unanimous as to any particular one of those crimes.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

To convict defendant George Wilson of the charged crime of Felony Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt;

(1) That on or about the 25th day of January, 1997, Yoshiko Couch was killed;

(2) That defendant George Wilson or an accomplice was committing or attempting to commit Robbery in the First or Second Degree, Rape in the First or Second Degree, or Burglary in the First Degree;

(3) That defendant George Wilson or an accomplice caused the death of Yoshiko Couch in the course of and in furtherance of such crime or in immediate flight from such crime;

(4) That Yoshiko Couch was not a participant in the crime;  
and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

The crimes listed in Element Number (2) are alternatives. You must unanimously agree that defendant George Wilson or an accomplice was committing or attempting to commit one of those crimes, but you need not be unanimous as to any particular one of those crimes.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 22

A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to the other defendant.

All of these instructions apply to each defendant, unless a specific instruction states that it applies only to a specific defendant.

INSTRUCTION NO. 23

It is a defense to a charge of Felony Murder in the First Degree based upon committing or attempting to commit Robbery in the First or Second Degree, Rape in the First or Second Degree, or Burglary in the First Degree that defendant George Wilson:

(1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(2) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury; and

(3) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(4) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 24

If you are not satisfied beyond a reasonable doubt that defendant Cecil Davis is guilty of the crime of Premeditated Murder in the First Degree, he may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Premeditated Murder in the First Degree necessarily includes the lesser crime of Murder in the Second Degree. However, Murder in the Second Degree is not a lesser crime of Felony Murder in the First Degree. You should only consider the crime of Murder in the Second Degree if you have unanimously agreed that defendant Cecil Davis is not guilty of the felony murder alternative defined above.

When a crime has been proved against a person and there exists a reasonable doubt as to which of two degrees that person is guilty, he shall be convicted only of the lowest degree.

A person commits the crime of Murder in the Second Degree when, with intent to cause the death of another person but without premeditation, he causes the death of such person.

INSTRUCTION NO. 26

To convict defendant Cecil Davis of the lesser degree crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of January, 1997, defendant Cecil Davis suffocated or asphyxiated Yoshiko Couch;
- (2) That defendant Cecil Davis acted with intent to cause the death of Yoshiko Couch;
- (3) That Yoshiko Couch died as a result of defendant Cecil Davis' acts; and
- (4) That the acts occurred in State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

As jurors, you have a duty to discuss with one another the case against each defendant and to deliberate in an effort to reach unanimous verdicts. Each of you must decide each case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 28

Upon retiring to the jury room for your deliberation of these cases, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence and these instructions. You will be furnished with Verdict Form A, an Interrogatories form, a Special Verdict Form, and Verdict Form B for defendant Cecil Davis. You will be furnished with Verdict Form A for defendant George Wilson. You may consider the case against each defendant in the order you choose.

When you are deliberating the case against defendant Cecil Davis, you will first consider the crime of Murder in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty" according to the decision you reach. If you cannot unanimously agree on a verdict as to that charge, do not fill in the blank provided in Verdict Form A.

If you find defendant Cecil Davis guilty on Verdict Form A, complete the form titled "Interrogatories" by answering the two questions either "Yes" or "No". If you answer the first question "Yes", you will then complete the Special Verdict Form. If you

answer the first question "No", do not complete the Special Verdict Form. In order to answer either question "Yes", you must unanimously be satisfied beyond a reasonable doubt that "Yes" is the correct answer to that question. Otherwise, you must answer "No" to that question. If you find defendant Cecil Davis guilty on Verdict Form A, do not use Verdict Form B.

If you unanimously find defendant Cecil Davis not guilty of the crime of Murder in the First Degree, or if, after full and careful consideration of the evidence, you unanimously find him not guilty of Felony Murder in the First Degree and you cannot agree as to Premeditated Murder in the First Degree, you will then consider the lesser crime of Murder in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot unanimously agree on a verdict, do not fill in the blank provided in Verdict Form B.

When you are deliberating the case against defendant George Wilson, you will only consider the crime of Murder in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty" according to the decision you reach. If you cannot unanimously agree on a verdict as to that charge, do not fill in the blank provided on Verdict Form A.

Since these are criminal cases, each of you must agree for you to return a verdict. When all of you have so agreed, fill in

the proper verdict form or forms to express your decision. The presiding juror will sign it and notify the judicial assistant, who will conduct you into court to declare your verdicts.

## APPENDIX C

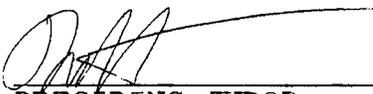
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

3  
STATE OF WASHINGTON, )  
) )  
Plaintiff, ) NO. 97-1-00433-2  
) )  
vs. )  
) )  
GEORGE ANTHONY WILSON, )  
) )  
) )  
Defendant. )  
\_\_\_\_\_ )

VERDICT FORM A

FEB 18 1998

We, the jury, find defendant GEORGE ANTHONY WILSON  
GUILTY (Not Guilty or Guilty) of the crime of  
Murder in the First Degree as charged.

  
\_\_\_\_\_  
PRESIDING JUROR

FILED  
DEPT. 7  
IN OPEN COURT  
FEB - 6 1998  
Pierce County Clerk   
By \_\_\_\_\_  
DEPUTY

## APPENDIX D

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

STATE OF WASHINGTON,

No. 23203-1-II

Respondent,

v.

GEORGE ANTHONY WILSON,

UNPUBLISHED OPINION

Appellant.

Filed:

**AUG 04 2000**

HOUGHTON, J. -- George Anthony Wilson appeals his first degree felony murder conviction, arguing: (1) violation of the right of confrontation, (2) ineffective assistance of counsel, (3) violation of the right to a speedy trial, and (4) insufficient evidence. We affirm.

**FACTS**

In the late morning of January 25, 1997, friends discovered Yoshiko Couch's brutalized body in her upstairs bathtub. Found dead with towels over her face, Couch had been beaten, sexually assaulted, and forced to inhale the toxic bathroom cleaner, xylene. An autopsy revealed Couch died from asphyxiation and xylene toxicity. Couch's death made a widower of her

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husband of more than 40 years, Richard, whose severe disabilities after several strokes left him bedridden, confined to the downstairs portion of their home.

On January 24, 1997, the Davis-Taylor family, who lived across the street from the Couches, had held a party that lasted into the early morning hours of the next day. At approximately 2:30 a.m., on January 25, 1997, Keith Burks, Cecil Davis and George Anthony Wilson were smoking on the family's porch when Davis looked at the Couches' house and stated he needed to rob someone. Shortly thereafter, Davis stated, "I need to kill me a [expletive]." Report of Proceedings at 1507. Burks then went inside the Davis-Taylor residence, leaving Davis and Wilson on the porch.

Approximately five minutes later, Burks let Wilson into the Davis-Taylor residence through the back door. Upon his return, Wilson looked scared and confused and stated that he and Davis had gone to the Couch residence to "rip the lady off," but Davis had gone crazy -- kicking in the door, beating the lady, and rubbing against her as if he was going to rape her. Report of Proceedings at 1510. Admitting that he initially had planned to rob the victim, Wilson left when he realized they were not going to just rob the house. Wilson stated that he never went into the house, but rather, he remained on the porch while Davis kicked in the door.

The police investigation of Couch's death revealed several links between Davis and the crime scene that indicated Davis was the perpetrator. Several items missing from the house were found in Davis' possession, including Couch's wedding ring, which Davis had offered to sell to his mother. Bloodstains were found on Davis' shoes, along with Comet cleanser that was found dusted throughout the Couches' upstairs residence. Hairs found in the upstairs bedroom were

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also linked to Davis as a potential source. None of the physical evidence recovered at the scene was linked to Wilson.

On February 3, 1997, Davis and Wilson were arrested and charged with first degree murder, with Wilson's charge predicated on an accomplice theory of felony murder and Davis' charge later amended to aggravated first degree murder. Over Wilson's speedy trial objections, the court continued the joint trial date from March 31, 1997 to July 7, 1997, on the request of Wilson's counsel who stated that although he could be ready for trial in late June, he could not provide the requisite effective assistance by the end of March. Davis' counsel protested the July 7, 1997 trial date, stating that in order to provide effective assistance for his client, the trial date needed to be moved to November 3, 1997, a date to which his client had agreed through waiver of his speedy trial rights. The trial court noted the objection but maintained the July 7 date.

On June 17, the parties again engaged in a discussion regarding continuance of the trial date. Wilson repeated his objection to a continuance, and Davis' counsel reiterated his position that he could not provide effective assistance to his client if trial began on July 7, 1997. The trial court preliminarily denied the motion for a continuance but set aside the issue for further argument the following week. The court acknowledged the necessary balancing act entailed by a joint trial where one defendant asserts his speedy trial rights and the other claims there would be ineffective assistance if trial went forward on the scheduled date.

On June 24, the trial court heard arguments on continuance and severance. Davis' counsel stated once again that he would be unable to prepare an effective defense by July 7 and moved that the court either sever the cases under CrR 4.4 or continue the joint trial under CrR 3.3(h)(2) to November 3. In arguing for a continuance, Davis' counsel acknowledged the

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importance of Wilson's right to a speedy trial, but he stated that his client's constitutional right to effective assistance should outweigh Wilson's asserted non-constitutional right. The State concurred in the motion to continue, agreeing that concerns about ineffective assistance were more important than speedy trial rights. The State also submitted that Davis' requested continuance put the trial date at only nine months past arraignment, which was "not slow motion" on an aggravated murder charge. Report of Proceedings at 329. The State further suggested that in weighing whether to grant the continuance, the court should err on the side of the more serious charge, Davis', which carried a possible death penalty, as opposed to Wilson's, which carried a 20 to 25 year standard range sentence.

Wilson joined in Davis' motion to sever. Although admitting there was no mandatory severance issue for his client, Wilson's counsel argued that severance still might be appropriate in light of Davis' request for a continuance some eight months beyond the expiration of Wilson's speedy trial rights. When asked about possible prejudice to his client if a continuance to November 3 was granted, Wilson's counsel replied that the only prejudice he could foresee was that witnesses' recollections of events could cloud, leading them to become more invested in their witness statements that incriminated his client. The State countered that time was the friend of Wilson, and that the passage of time made it more likely that witnesses' testimony would differ from their prior statements, thereby allowing Wilson to impeach those witnesses. Davis' counsel agreed that Wilson's asserted prejudice was speculative.

After hearing argument, the trial court denied Davis and Wilson's severance motion. In issuing its ruling, the court stated that there was no reason to sever in terms of legal issues and that the interests of justice were served by trying the cases together. The trial court then

acknowledged the delicate balancing of the respective parties' interests necessary in determining whether to grant Davis' motion for continuance. Although the court announced some skepticism as to Davis' assertion that his experts could not be ready in July, it granted the continuance. The court then stated that it would prefer to begin trial in September rather than on November 3. But Davis' counsel held firm to its requested date, stating, "November 3rd is a realistic date. Anything before that is not." Report of Proceedings at 340. The court later granted Davis' request and set trial for November 3, entering an order indicating that a continuance was merited on "due administration of justice" grounds. Report of Proceedings at 341; Clerk's Papers at 140.

On October 21, the court heard argument on the proposed instructions to be given before voir dire. Wilson's counsel expressed concerns with the opening instruction, which he believed did not adequately distinguish between the differing procedures facing Wilson and Davis. Wilson's counsel then requested an instruction indicating that Wilson was not subject to the death penalty and thus would not be involved in any second trial phase. Davis' counsel concurred in Wilson's request, and the court agreed to language instructing the jury that Wilson did not face the death penalty and would not be involved in any second phase of trial.

On November 3, 1997, jury selection commenced. The parties reconvened the following week before Judge Frederick B. Hayes, who stated that the case's presiding judge, Terry Sebring, was ill and likely unavailable for two to three weeks. Counsel for both defendants moved for mistrial, which was granted on November 13. The parties agreed to a new trial date of January 5, 1998. The case was assigned to Judge Frederick W. Fleming, although all prior orders and rulings remained in effect.

On January 5, 1998, the joint trial began. The court gave the prospective jurors an instruction during voir dire that conformed to the parties' earlier agreed upon language, including informing the jurors that Wilson did not face the death penalty and would not be involved in any second phase of trial. During voir dire, Wilson's counsel asked several jurors whether they understood Wilson did not face the death penalty. Both the State and Davis' counsel repeatedly reminded prospective jurors that the death penalty was sought only against Davis.

During the trial, the court heard extended argument on the admissibility of Asil Hubley's testimony. Hubley, Davis' nephew, had given a statement to police that Wilson had told him conflicting stories about the night in question, including two separate accounts that placed Wilson in the house with Davis while the murder took place. Davis' counsel expressed concern based upon *Bruton*,<sup>1</sup> noting that Hubley's statement implicated Davis. The State suggested it be allowed to ask leading questions to avoid violating the rules set forth in *Bruton*. Wilson then expressed concern about the potential limitation of cross-examination. Eventually, the court allowed Hubley's statement into evidence, deleting all references to Davis, expressed or implied. Wilson objected only to the court's ruling prohibiting inquiry into Hubley and Davis' relationship, which Wilson claimed was essential to establishing potential bias for Hubley placing Wilson at the crime scene.

At trial, Hubley testified that Wilson had twice told him he was inside the Couches' house. Wilson's cross-examination delved only into Hubley's past criminal history.

Wilson appeals.

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<sup>1</sup> *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (holding that a criminal defendant is denied his or her Sixth Amendment right of confrontation when a nontestifying codefendant's pretrial confession is introduced at their joint trial).

## ANALYSIS

## Death Penalty Information

Wilson contends that he received ineffective assistance when his counsel did not object to a voir dire instruction that he was not facing the death penalty.<sup>2</sup>

To establish ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Wilson relies upon *State v. Murphy*, 86 Wn. App. 667, 937 P.2d 1173 (1997), *review denied*, 134 Wn.2d 1002 (1998), in which Division One held that it was error to inform the jury during voir dire that the case did not involve the death penalty. But recently, in *State v. Townsend*, 97 Wn. App. 25, 979 P.2d 453 (1999), *review granted*, 139 Wn.2d 1009 (1999), we rejected the analysis in *Murphy* and held that counsel was not ineffective for failing to object to a voir dire instruction that his client was not facing the death penalty. Here, the need for such an instruction was even more pronounced than in *Townsend* because there are multiple defendants and only one faced the death penalty.

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<sup>2</sup> Wilson's counsel requested the instruction. The invited error doctrine thus prohibits a challenge to the court's instruction. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). But the doctrine does not prohibit a claim of ineffective assistance based on the request. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

### Right of Confrontation

Wilson next contends that the trial court violated his constitutional right of confrontation when it forbid his counsel from inquiring into Hubley's relationship with Davis. He argues that his counsel was entitled to explore any potential bias, including whether Hubley's familial ties to Davis led him to implicate Wilson. The State agreed at oral argument that the trial court unduly limited Wilson's right of confrontation but contends the error was harmless.

The Sixth Amendment to the United States Constitution and article I, section 22 of our state constitution guarantee a criminal defendant's right to confront and cross-examine adverse witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The denial of a defendant's right to cross-examine a witness adequately as to relevant matters tending to show bias or motive violates his right of confrontation. *State v. Buss*, 76 Wn. App. 780, 788-89, 887 P.2d 920 (1995).

Here, the trial court entered an order that prevented Wilson from asking about the familial relationship between Hubley and Davis. The relevant portion of the order provided:

[A]ll counsel shall refrain from asking any witness whether Asil Hubley and Cecil Davis are related;

Clerk's Papers at 210.

Wilson objected to the order. In answering the State's request for a demonstration of the familial relationship's relevance, Wilson's counsel responded:

Your Honor, to the best of my knowledge, this witness, Asil Hubley, is the only witness who attempts through his statement to the police to put my client into [the Couches'] house. His motivation for that is a question mark. The reason why he is testifying like that is a question mark. And it is a reasonable inference,

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it is a reasonable argument to the jury, that quite possibly in a misguided way Asil Hubley feels that Anthony Wilson may have been part of the reason why Cecil Davis was arrested and charged with the crime and that Asil Hubley has a reason to go after Anthony Wilson now.

Report of Proceedings at 1626-27.

The trial court seemingly acknowledged the inquiry's relevance, stating, "I think it shows some sort of a bias, potentially could show that [Hubley] is biased in some way . . . in favor of his uncle." Report of Proceedings at 1629. Nevertheless, the trial court, without further explanation, proceeded to sign the written order prohibiting Wilson's inquiry.

This was error. Wilson should have been allowed to present to the jury Hubley's relationship to Davis and explore his relevant theory of potential bias. Without establishing familial ties between Hubley and Davis, Wilson could not rationally inquire into Hubley's potential motivation for implicating him. Failure to permit the inquiry violated Wilson's constitutional right of confrontation.

Having concluded that the court's order violated Wilson's right of confrontation, we question whether the error was harmless. "Where the right to confront witnesses is violated, reversal is required unless the error was harmless beyond a reasonable doubt." *Buss*, 76 Wn. App. at 789. In making this determination, a court must consider the importance of the witness's testimony, whether the evidence was cumulative, the extent of corroborating and contradicting testimony, the extent of cross-examination otherwise permitted, and the strength of the State's case. *Buss*, 76 Wn. App. at 789.

The complaint here is that the trial court excluded any disclosure of Hubley and Davis' relationship, even though the relationship was relevant to potential bias. But despite the court's prohibition, the litigants twice presented the jury with evidence that Hubley and Davis were

related. First, Wilson's counsel elicited from Davis' mother on cross-examination that she was Hubley's grandmother. Second, in its direct examination of Hubley, the State asked, "Asil, you have a number of rings on today. Did you get any of those from your [U]ncle Cecil?" Report of Proceedings at 1873. The jury thus became aware that Hubley and Davis were related, in spite of the court's order prohibiting references to their familial ties. The litigants' actions nullified the effect of the trial court order and rendered the court's error harmless.

#### Severance

Wilson next contends that he received ineffective assistance when his counsel did not move for severance under CrR 4.4(c)(2)(i) and he was later tried by a "death qualified" jury despite not being subject to the death penalty. Br. of Appellant at 20-22.

Wilson's claim fails. Contrary to Wilson's contention, his trial counsel advocated severance, asserting that the trial court had to consider the prejudice to his client's speedy trial rights if severance was not granted. This argument invokes CrR 4.4(c)(2)(i), which provides that a court should sever when it is deemed necessary to protect a defendant's rights to a speedy trial. Wilson's counsel put the trial court on notice of the discretionary grounds for severance.

Further, even assuming, without so holding, that trial counsel's statement was deficient, Wilson cannot demonstrate the requisite prejudice. Where counsel's failure to litigate a motion to sever is the basis of an ineffective assistance claim, the appellant must demonstrate that the motion should have been granted. *State v. Standifer*, 48 Wn. App. 121, 125, 737 P.2d 1308, review denied, 108 Wn.2d 1035 (1987). Despite the language of CrR 4.4(c)(2)(i), severance is not favored in Washington. *State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991), review denied, 118 Wn.2d 1016 (1992). Our Supreme Court has held that a trial court properly

exercises its discretion in denying severance under CrR 4.4(c)(2)(i) where the interests of judicial economy merit a joint trial. *See State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994). Here, the trial court, after extended discussions on severance, made quite evident that the interests of justice and judicial economy were best served by a joint trial. Thus, because Wilson cannot point to any prejudice, his ineffective assistance claim fails.

### Speedy Trial

Wilson further contends that his CrR 3.3 speedy trial rights were violated when the trial court continued the trial date from July 7 to November 3 in order to maintain joinder with his co-defendant Davis, whose counsel required additional preparation time.<sup>3</sup> We review the grant of a motion to continue the trial date past the speedy trial period for abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984).

CrR 3.3(c)(1), speedy trial rule, provides that a defendant who is not released from jail must be brought to trial no later than 60 days after the date of arraignment. But trial within 60 days is not a constitutional mandate. *State v. Hoffman*, 116 Wn.2d 51, 77, 804 P.2d 577 (1991). Unless the defendant can demonstrate actual prejudice from the delay, a trial court's decision to continue a joint trial past one defendant's speedy trial date to provide a codefendant's counsel adequate time to prepare for trial is not an abuse of discretion. *Dent*, 123 Wn.2d at 484 (delay of just over two months).

On appeal, Wilson asserts no actual prejudice from the four-month delay. Although Wilson asserts that he was prejudiced when tried by a "death qualified" jury, that concern

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<sup>3</sup> Wilson concedes that the original continuance from March to July was proper under *State v. Campbell*, 103 Wn.2d 1, 13-15, 691 P.2d 929 (1984) (holding that it is not error to continue trial over defendant's speedy trial objection where counsel would be unable to provide effective assistance within the speedy trial period.)

properly goes to the propriety of the trial court's denial of severance, rather than to a continuance of the trial date. Br. of Appellant at 23. Failing to find any actual prejudice, we hold that the trial court properly weighed Wilson's interest in a speedy trial against the considerable burden separate trials would have placed on the court, jurors, and witnesses. *See Dent*, 123 Wn.2d at 484. Thus, the trial court did not abuse its discretion.

### Sufficiency of Evidence

Finally, Wilson contends that there was insufficient evidence to convict him of first degree murder.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

The State charged Wilson as an accomplice to first degree felony murder, with first or second degree robbery listed among the alternative underlying felonies. Robbery occurs when a person unlawfully takes personal property from the person of another against his will by the use or threatened use of immediate force, violence, or fear of injury. RCW 9A.56.190, .210. A

23203-1-II

person is guilty as an accomplice if, with knowledge that it will promote or facilitate the crime, he or she aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3). To convict, the jury needed to find that Wilson aided or agreed to aid Davis in planning or committing robbery and knew that his aid would facilitate the robbery.

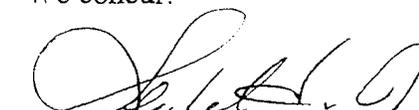
Keith Burks' testimony readily establishes the necessary quantum of proof. Burks testified that Wilson said that he and Davis went over to the Couches' residence "to rip the lady off," but he had left when he realized they were not going to just rob the Couches. Report of Proceedings at 1510. This is sufficient to establish that Wilson agreed to aid Davis in committing the robbery and knew his aid would facilitate the crime. That Davis did more than rob the Couches does not excuse Wilson's liability. *See State v. Davis*, 101 Wn.2d 654, 682 P.2d 883 (1984) (stating that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality).

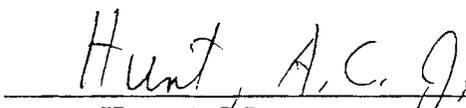
Affirmed.

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

  
 \_\_\_\_\_  
 Houghton, J.

We concur:

  
 \_\_\_\_\_  
 Seinfeld, J.

  
 \_\_\_\_\_  
 Hunt, A.C.J.

## APPENDIX E

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GEORGE ANTHONY WILSON,

Appellant.

No. 23203-1-II

MANDATE

Pierce County Cause No.  
97-1-00433-2

FILED  
IN COUNTY OF PIERCE

A.M. JAN 13 2001 P.M.

PIERCE COUNTY WASHINGTON  
COUNTY CLERK  
*[Signature]*

The State of Washington to: The Superior Court of the State of Washington  
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on August 4, 2000 became the decision terminating review of this court of the above entitled case on January 9, 2001. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs have been awarded in the following amount:

Judgment Creditor Respondent State: \$16.33  
Judgment Creditor A.I.D.F.: \$18,697.15  
Judgment Debtor Appellant Wilson: \$18,713.48



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 16<sup>th</sup> day of January, 2001.

*[Signature]*  
Clerk of the Court of Appeals,  
State of Washington, Div. II

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Tacoma, WA. 98402-2177

Indeterminate Sentence Review Board

## APPENDIX F

In the Superior Court of the State of Washington  
In and for Pierce County

State of Washington  
Plaintiff,

Vs

George A. Wilson  
Defendant.

No. 97-1-00433-2

FILED  
IN COUNTY CLERK'S OFFICE  
PIERCE COUNTY, WASHINGTON  
A.M. DEC 26 2001 P.M.  
BOB SAN SOUCIE  
COUNTY CLERK  
BY:  DEPUTY

Defendant, George A. Wilson, challenges the denial of his Due Process and Equal Protection Constitutional guarantees under Article One Section Three, Article One Section 12 of the Washington State Constitution, and under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

A. PROCEDURAL HISTORY

Defendant was charged via information, in Pierce County superior Court with the crime of murder in the First Degree, in Pierce County Cause Number 97-1-00433-2.

On February 16, 1998 the defendant was found guilty by jury trial and on March 30, 1998 defendant was sentenced to a term of confinement of 304 months.

B. STANDARD OF REVIEW

Pro-se pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. If the court can reasonably read the pleadings to state a valid claim on which the litigant could prevail, the court should do so despite the failure to cite proper authority, confusion of legal theories, poor syntax and sentence construction, or the litigants unfamiliarity with the pleading requirements. See United States vs. MacDougall, 454 U.S. 364, 102 S. Ct 700, 70 L.ED.2d 551 (1982), Haines vs. Kerner, 404 U.S. 519, 92 S. Ct 594, 30 L.Ed.2d 652 (1972).

Courts in the state of Washington have strong policy of deciding cases on the merits, not on potential defects in the pleadings. See State vs. Olsen, 126 Wn.2d 314, 318, 893 P.2d 629 (1995) (providing that the Supreme Court would rule on an issue which the county prosecutor had failed to find error, because of the policy of reaching the merits of an issue).

1  
DEC 27 2001

### C. WHY RELIEF SHOULD BE GRANTED

The present CrR 7.8 Motion for Relief from judgment is properly before this Court and should be granted because the interest of justice so requires. See In Re Taylor, 105 Wn.2d 683, 717 P.2d 755 (1986), In Re Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990), Sanders Vs. United States, 373 U.S. 1, 16, 83 S.Ct 1068, 1077, 10 L.Ed.2d 148 (1963).

The recent Washington State Supreme Court cases of State vs. Roberts, 142 Wn.2d 471 (2000), State vs. Bui, 142 Wn.2d 568 (2000), declared that the accomplice liability jury instructions employed in those cases relieved the state of their burden of proving every element of the crime charged, and were thus unconstitutional.

Defendants jury instructions No. 15 is word for word exactly as the accomplice liability instructions declared unconstitutional in the case of State vs. Cronin, supra, (at page 572), in that it fails to specify "TO WHICH CRIME" was defendant being an accomplice to; "TO WHICH CRIME" did defendant had knowledge of; and "TO WHICH CRIME" did defendant promote or facilitate the commission of.

The Washington State Supreme Court held in Cronin that "the plain language of the complicity statute does not support the states' argument that accomplice liability attaches so long as the defendant knows that he or she is aiding in the commission of a crime." That "the statutory language requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged." That "the legislature intended the culpability of an accomplice to extend beyond the crimes of which the accomplice actually has knowledge(.)" That imposing criminal liability on an alleged accomplice can be done "only so long as that individual has general knowledge of 'the crime for which he or she was eventually charged.'" Cronin at 142 Wn.2d 578-79, citing State vs. Roberts, supra. Because State Vs. Roberts, supra, State vs. Cronin, supra, and State vs. Bui, supra constitute a change in the law that is material to a court order, RCW 10.73.100(6) affords defendant an opportunity to bring this CrR 7.8 motion before this court to be considered on the merits. See In Re Greening 9 p.36 206 (2000) at 211 (RCW 10.73.100(6) preserves access to collateral review in cases where there has been a significant change in the law that is material to a court order citing In Re Personal Restraint of Johnson 131 Wn.2d 558, 933 p2d 1019 (1997).

D. ARGUMENT  
Jury instruction No. 15 Relieved The State  
Of Its' Burden of Proving all Essential  
Elements of the Charged Crime

The state was required to prove every essential element of the crime beyond a reasonable doubt for a conviction to be upheld. See In Re Winship 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.ED.2d 368 (1970). A criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime and absent such a verdict the conviction must be reversed. No matter how inescapable the finding to support that verdict might be. A jury verdict that he is guilty of the crime means of course, a verdict that he is guilty of each necessary element of the crime. California v. Roy 117 S.Ct. 339 (9<sup>th</sup> Cir. 1996) The fifth and sixth amendments require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged. United States v. Gaudin 515 U.S. 506, 132 L.Ed.2d 447, 115 S.Ct. 2310 (9<sup>th</sup> Cir. 1995) State vs. Acosta 101 Wn2d 612, 615, 683 P.2d 1069 (1984) State vs. McCullum 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983), State vs. Green, 94 Wn.2d 216, 224, 616, P.2d 628 (1980). A conviction cannot stand if the jury instructions relieved the state of its' burden to prove every essential element of the crime charged. See State vs. Jackson 137 Wn.2d 712, 727, 976 P.2d 1229 (1999).

It is reversible error to instruct the jury in a manner that would relieve the state of its' burden of proving every essential element of the crime charged. See State vs. Burd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995).

Because accomplice liability requires assistance or agreement to assist in THE CRIME CHARGED, Instruction 15 relieved the state of its' burden of proving the elements of the crime.

A person is legally accountable for the conduct of another person when he or she is an accomplice in the commission of a crime. RCW 9A.08.020 (c). A person is an accomplice when he or she:

(a) with knowledge that it will promote or facilitate the commission of the crime, he (or she)

...

(ii) aids or agrees to aid such other person in planning or committing it;

RCW 9A.08.020(3)(a)(ii). The use of "the" in the statute refers back to the crime charged, i.e., the crime to which a person is an accomplice if he aids or agrees to aid another in planning or committing it. Thus, RCW 9A.08.020 indicates accomplice liability must be read against the crime charge.

Contrary to this law, the trial court's instruction 15 provides:  
A person who is an accomplice in the commission of a crime is guilty of that  
crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge  
that it will promote or facilitate the commission of a crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit  
the crime, or
- (2) aids or agrees to aid another person in planning or committing a crime.

The word "aid" means all assistance whether given by words, acts,  
encouragement, support, or presence. A person who is present at the scene  
and ready to assist by his or her presence is aiding in the commission of the  
crime. However, more than mere presence and knowledge of the criminal  
activity of another must be shown to establish that a person present is an  
accomplice.

Please see exhibit A.

By using "a" instead of "the crime charged", the instruction overlooks  
the required link between the crime the accomplice aids or agrees to aid and  
the crime to which he is alleged to be an accomplice.

By requiring only that the accused aid or agree to aid in the  
commission of "a crime", defendant's Court Jury Instruction No. 15 marks a  
significant departure from the plain language of the accomplice liability  
statute. By referring to "it", not some unnamed crime which may or may not  
include the charged one. The statutory language requires that the putative  
accomplice must have acted with knowledge that his or her conduct would  
promote or facilitate the crime for which he or she is eventually charged.  
See State vs. Cronin supra at 579.

The Washington State Supreme Court went on to rule in Cronin that  
their prior decision in State vs. Roberts, supra directed that "the fact that a  
purported accomplice knows that the principle intends to commit "a crime"  
does not necessarily mean that accomplice liability attaches for any and all  
offenses ultimately committed by the principle." See State vs. Cronin,  
supra, at 579, citing State vs. Roberts supra.

Even the DISSENT in Roberts, written by Justice Ireland agreed that  
accomplice liability instruction should have stated: "THE CRIME  
CHARGED". See State vs. Roberts, supra at 541 (I agree with the majority  
that the accomplice liability instruction, jury instruction 7 (in defendant's  
case jury instruction 15) should have stated "THE CRIME CHARGED"  
rather than 'a crime'" (emphasis added).

The trial court's erroneous jury instruction relieved the state of its'  
burden of proving that the defendant aided or agreed to aid in the

commission of THE CHARGED CRIME. Accordingly, defendant was denied Due Process of the law and his conviction must be reversed.

The instructional error relieved the State of its' burden of proving the elements of the crime, requiring reversal.

In State vs. Jackson, the Washington State Supreme Court reaffirmed the rule that where jury instructions relieve the State of proving all the essential elements, the error is not susceptible to harmless error analysis, but instead requires reversal. See State vs. Jackson, 137 Wn.2d 712, 726-27, 976 P.2d 1229 (1999). There, the Court found an erroneous accomplice instruction relieved the State of its' burden of proving all essential elements of the crime. Id. Therefore, the Court refused to examine the record to determine if the error prejudiced the defendant. Thus, this court must follow Jackson and find that because instruction No. 15 relieved the State of its' burden of proving the elements of accomplice liability, defendant's conviction must be reversed.

#### E. CONCLUSION

Because defendant's constitutional rights were violated, said rights being his 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> amendment rights, (U.S. Constitution) defendant respectfully asks this Court to order a retrial in defendant's case.

Respectfully submitted this 23 day of DECEMBER, 2001.

In the Superior Court of the State of Washington  
In and for Pierce County

FILED  
IN COUNTY CLERK'S OFFICE  
PIERCE COUNTY, WASHINGTON

A.M. DEC 26 2001 P.M.

BY: BOB SAN SOUCIE  
COUNTY CLERK DEPUTY

State of Washington  
Plaintiff,

Vs

No. 97-1-00433-2

George A. Wilson  
Defendant.

Comes now the defendant George A. Wilson, Pro-se, and respectfully moves this court for an order granting relief from Judgment under CrR 7.8 concerning the above cited Pierce County Cause Number.

This motion under 7.8 is based upon the attached affidavit of George A. Wilson and memorandum in support of motion for Relief from Judgment under CrR 7.8.

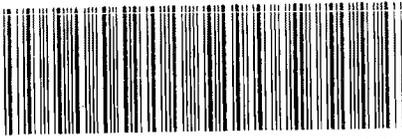
Dated this 23 day of December, 2001

George A. Wilson

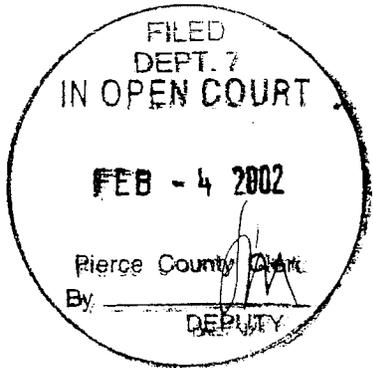


1 DEC 27 2001

APPENDIX G



97-1-00433-2 15965739 ORTR 02-08-02



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,  
  
Plaintiff,  
  
vs.  
  
GEORGE ANTHONY WILSON,  
  
Defendant.

CAUSE NO. 97-1-00433-2  
  
ORDER TRANSFERRING MOTION TO  
COURT OF APPEALS

THIS MATTER came on before the court on the 4th day of February, 2002, the Honorable Frederick W. Fleming, presiding.

In December, 2001, the defendant filed a motion for relief from judgment pursuant to CrR 7.8 in Pierce County Superior Court relating to his conviction and sentence in this cause number. The court is aware that the defendant took a direct appeal from his conviction after jury trial. The Court of Appeals affirmed the defendant's conviction on August 4, 2000, in COA Case No. 23203-1. The mandate on that case is dated January 9, 2001.

ORDER TRANSFERRING MOTION TO  
COURT OF APPEALS - 1

Therefore, being duly advised in all matters, and based on the above stated history of this case, the court finds, pursuant to Criminal Rule 7.8(c)(2), that the ends of justice would be served if the defendant's current motion for relief from judgment were considered by the Court of Appeals as a personal restraint petition.

**IT IS HEREBY ORDERED** that the defendant's motion is transferred to the Court of Appeals pursuant to CrR 7.8(c)(2) for consideration as a personal restraint petition.

**IT IS FURTHER ORDERED** that the State shall serve the defendant with a copy of this order.

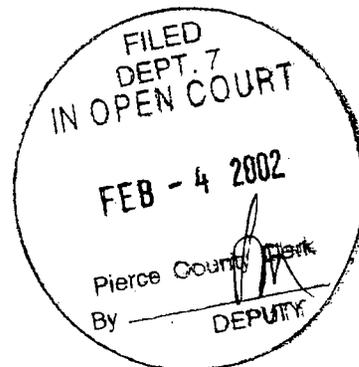
**ORDER WAS SIGNED** this 4<sup>th</sup> day of February, 2002.

*[Handwritten Signature]*  
\_\_\_\_\_  
JUDGE

Presented by:

*[Handwritten Signature]*  
\_\_\_\_\_

JOHN M. NEEB  
Deputy Prosecuting Attorney  
WSB # 21322



ORDER TRANSFERRING MOTION TO  
COURT OF APPEALS - 2

## APPENDIX H



1 October 29, 2006, and November 23, 2006, requesting the current status of the filing, but did not  
2 receive any coherent response from the Clerk of the Superior Court. For instance, on one occasion  
3 the Clerk responded with a docket listing; on another a file-stamped copy of the request for a ruling  
4 filed by the Petitioner in the Superior Court, etc. Nothing substantive telling the Petitioner that his  
5 case had been transferred to this Court, or telling the Petitioner even the case number in this Court.  
6 It remains unknown to the Petitioner to this day whether the transferred case was even *received* by  
7 this Court. Petitioner requests such an explicit statement.

8  
9 RELEVANCE

10 The relevance of the receipt or non-receipt of the transferred case is that the Petitioner, being  
11 wholly ignorant of the law,<sup>4</sup> and particularly ignorant of the import of repeated PRP filings, filed not  
12 just one more PRP, but *two* such additional PRPs.<sup>5</sup> The second dealt with a sentence reduction, and  
13 the third dealt with the facts set out in the *original*, or first, PRP. However, in its decision on the  
14 *third* PRP, this Court mistakenly noted only the one prior PRP:

15 In his prior petition, No. 35635-6-II, filed October 29, 2007, petitioner asked this  
16 court to reduce his sentence based on his good behavior while in prison. This court  
dismissed as there was no legal basis to support his request.

17 *Order Dismissing Petition*, No. 37226-6-II, page 2 footnote 1. This Court entirely neglected to  
18 mention the *first* petition. The relevance of the mistake is found in that same *Order Dismissing*  
19 *Petition*, on the first page:

20 George Wilson seeks relief from personal restraint imposed following his  
21 1998 first-degree murder conviction. In this *his second personal restraint petition*,  
22 Wilson argues the trial court gave an erroneous accomplice liability instruction and  
23 thus denied him his right to a fair trial. See *State v. Cronin*, 142 Wn.2d 568, 14 P.3d  
752 (2000)(incorrect accomplice liability instruction relieved State of its burden of  
proof and is reversible error); and *State v. Roberts*, 42 Wn.2d 471, 14 P.3d 713

24  
25 <sup>4</sup>The Petitioner is not drafting this *Motion for Reinstatement*, but rather has the assistance of  
26 Derrick R. Parkhurst, a prisoner at the Wyoming State Penitentiary. This is the *third* such assistant  
27 the Petitioner has had, which is an argument for appointment of counsel if there ever was one.

28 <sup>5</sup>Counting the original as the first.

1 (2000)(WPIC 10.51 relieves State of its obligation to prove every element of the  
2 crime beyond a reasonable doubt).

3 In order to *overcome the one-year time limit for personal restraint petition*  
4 in RCW 10.73.090, and *the bar against subsequent petitions* in RCW 10.73.140,  
5 Wilson claims that the *Cronin* and *Roberts* decisions represent a significant change  
6 in the law. But they do not. See *Personal Restraint of Domingo*, 155 Wn.2d 356,  
7 119 P.3d 816 (2005)(*Cronin* and *Roberts* decisions do not represent a significant  
8 change in the law justifying an otherwise untimely petition under RCW 10.73.090-  
9 .100).

10 *Order Dismissing Petition*, No. 37226-6-II, page 1 (emphasis added).

11 This Court thus presumed that it was dealing with the second petition; and quite properly  
12 denied it for being out-of-time and a subsequent petition. The Petitioner, *had he known of his*  
13 *ability to file for rehearing in this Court*, a pleading he had no idea of the existence of, would have  
14 immediately corrected this misapprehension.<sup>6</sup> He would have stated the obvious:

15 Generally, a defendant may not collaterally attack a judgment and sentence  
16 in a criminal case more than one year after his judgment and sentence becomes final.  
17 *RCW 10.73.090(1)*. A personal restraint petition is a collateral attack on a judgment.  
18 *RCW 10.73.090(2)*. A judgment and sentence becomes final on the day that it is filed  
19 with the clerk of the trial court, *RCW 10.73.090(3)(a)*, or the day an appellate court  
20 issues its mandate disposing of a timely direct appeal from the conviction. *RCW*  
21 *10.73.090(3)(b)*.

22 *Personal Restraint Petition of Domingo*, 155 Wn.2d 356, 362, 119 P.3d 816 (2005).

23 And, quoting from the *State's Response to Motion to Reduce or Modify Sentence* filed on  
24 March 28, 2006, the *Procedural and Factual History* portion of that document:

25 On February 6, 1998, the defendant was convicted by a jury of one count of  
26 Murder in the First Degree (Felony Murder). He was sentenced to the Department  
27 of Corrections on March 30, 1998. He is still serving the sentence that was imposed.

28 The defendant appealed his conviction. On August 4, 2000, the Division Two  
Court of Appeals affirmed the defendant's conviction in an unpublished opinion.

---

29 <sup>6</sup>The Petitioner is housed in the Wyoming State Penitentiary, at Rawlins, Wyoming, on a  
30 transfer from Washington. Wyoming, however, will not – and adamantly refuses to – provide the  
31 Petitioner with any Washington rules or law. The Petitioner has included statements from the Law  
32 Librarian to this effect, where his requests for law and rules is checked as “Denied.” Petitioner also  
33 has attested to the accuracy of these documents in his Affidavit, attached hereto.

1 (Footnote: Court of Appeals Case No. 23203-1-II) The defendant's petition for  
2 review was denied on January 9, 2001, and the *mandate issued on January 16,*  
3 *2001, terminating his appeal.*

4 Late in 2001 or early in 2002, the defendant filed a motion for relief from  
5 judgment that was transferred to the Court of Appeals as a personal restraint petition.  
6 This Court's order entered on February 2, 2002.<sup>7</sup> *The State has reviewed its records*  
7 *and found the appellate court never ordered the State to respond to that*  
8 *motion/petition.*

9 *Id.* at pages 1-2 (emphasis added).

10 This Court was thus in error, and the error was easily correctable *had the petitioner has*  
11 *access to the rules.* He did not.<sup>8</sup>

### 12 § 24 Effect of breach of duty on rights of litigants

13 Those dealing with the clerk of a court concerning an action or matter then  
14 pending have a right to expect that he or she will perform the ministerial duties  
15 connected with his or her office, and his or her neglect or failure to do so will not  
16 prejudice their rights.

### 17 § 25 Filing of papers

18 It is the official duty of the clerk of a court to file all the papers in a cause  
19 presented by the parties . . .

20 Unless otherwise specifically authorized by statute, the duty of the clerk of  
21 court to file papers presented to him or her is purely ministerial and he or she may not  
22 refuse to perform such a duty except upon the order of the court; a court clerk has no  
23 discretion in the matter of filing papers recognized by law as properly belonging in  
24 the record of causes.

25 If a court clerk makes a mistake in recording a document, the court may  
26 amend the record. Similarly, it is the province of the court alone to correct clerical  
27 errors made by the clerk.

### 28 § Negligence or misconduct

The principle that a public officer should be held to a faithful performance of  
his or her official duties and made to answer in damages to all persons who are  
injured through his or her malfeasance, omission, or neglect applies to the  
negligence, carelessness, or misconduct of a clerk of a court. As a public ministerial  
officer, a court clerk is answerable for any act of negligence or misconduct in office

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<sup>7</sup>See footnote 2.

<sup>8</sup>See footnote 4 above.

1 resulting in an injury to the complaining party.

2 *Am.Jur.2d (2000), Clerks of Court, pp. 159 - 166.*

3 The *original* PRP was thus timely, and of course was *not* a subsequent or successive petition.  
4 If the Petitioner had access to the Washington Rules of Appellate Procedure<sup>9</sup> and statutes, he would  
5 have argued this.<sup>10</sup> The Petitioner takes the position that all filings of Personal Restraint Petitions  
6 after the original PRP were void *ab initio*, and had no legal force or effect. This is the only way to  
7 correct the errors of (1) failing to acknowledge receipt by this Court of the PRP, in a (2) statutory  
8 scheme which penalizes both (a) late and (b) successive PRPs. To interpret the *original* PRP  
9 otherwise would run afoul of the Due Process clauses of the Fifth and Fourteenth Amendments.

10

11 **THE ARGUMENT IN THE ORIGINAL PERSONAL RESTRAINT PETITION**

12 The argument in the original PRP, the *first* PRP, was as follows (between the asterisks):<sup>11</sup>

13

\* \* \*

14

A. PROCEDURAL HISTORY

15

Defendant was charged via information, in Pierce County superior Court with  
16 the crime of murder in the First Degree, in Pierce County Cause Number 97-1-00433-  
2.

17

On February 16, 1998 the defendant was found guilty by jury trial and on  
18 March 30, 1998 defendant was sentenced to a term of confinement of 304 months.

18

19

B. STANDARD OF REVIEW

20

Pro-se pleadings are to be construed liberally and held to a less stringent  
21 standard than formal pleadings drafted by lawyers. If the court can reasonably read  
the pleadings to state a valid claim on which the litigant could prevail, the court should  
22 do so despite the failure to cite proper authority, confusion of legal theories, poor  
syntax and sentence construction, or the litigants unfamiliarity with the pleading  
23 requirements. See United States vs. MacDougall, 454 U.S. 364, 102 S. Ct 700, 70  
L.Ed.2d 551 (1982), Haines vs. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652

24

<sup>9</sup>Petitioner presumes that those Rules would provide for a Petition for Rehearing, but does  
25 not know, until he receives a copy of the Rules themselves.  
26

27

<sup>10</sup>See footnote 6 above.

28

<sup>11</sup>Mistakes in grammar and syntax remain, to the best of the typist's ability.

1 (1972).

2 Courts in the state of Washington have strong policy of deciding cases on the  
3 merits, not on potential defects in the pleadings. See State vs. Olsen, 126 Wn.2d 314,  
4 318, 893 P.2d 629 (1995)(providing that the Supreme Court would rule on an issue  
5 which the county prosecutor had failed to find error, because of the policy of reaching  
6 the merits of an issue).

### 7 C. WHY RELIEF SHOULD BE GRANTED

8 The present CrR 7.8 Motion for Relief from judgment is properly before this Court and  
9 should be granted because the interest of justice so requires. See In Re Taylor, 105 Wn.2d 802, 809,  
10 792 P.2d 506 (1990), Sanders Vs. United States, 373 U.S. 1, 16, 83 S.Ct 1068, 1077, 10 L.Ed.2d 148  
11 (1963).

12 The recent Washington State Supreme Court cases of State vs. Roberts, 142  
13 Wn.2d 471 (2000) and State v. Bui, 142 Wn.2d 568 (2000), declared that the  
14 accomplice liability jury instructions employed in those cases relieved the state of  
15 their burden of proving every element of the crime charged, and were thus  
16 unconstitutional.

17 Defendants jury instructions No. 15 is word for word exactly as the  
18 accomplice liability instructions declared unconstitutional in the case of State vs.  
19 Cronin, supra, (at page 572), in that it fails to specify "TO WHICH CRIME" was  
20 defendant being an accomplice to; "TO WHICH CRIME" did defendant had  
21 knowledge of; and "TO WHICH CRIME" did defendant promote or facilitate the  
22 commission of.

23 The Washington State Supreme Court held in Cronin that "the plain language  
24 of the complicity statute does not support the states' argument that accomplice  
25 liability attaches so long as the defendant knows that he or she is aiding in the  
26 commission of a crime." That "the statutory language requires that the putative  
27 accomplice must have acted with knowledge that his or her conduct would promote  
28 or facilitate the crime for which he or she is eventually charged." That "the  
legislature intended the culpability of an accomplice to extend beyond the crimes of  
which the accomplice actually has knowledge(.)" That imposing criminal liability  
on an alleged accomplice can be done "only so long as that individual has general  
knowledge of 'the crime for which he or she was eventually charged.'" Cronin at 142  
Wn.2d 578-79, citing State vs. Roberts, supra.

29 THERE FOLLOWS AN ARGUMENT THAT  
30 *Roberts*, *Cronin* and *Bui* CONSTITUTE A CHANGE  
31 IN THE LAW, WHICH IS NOT BROUGHT  
32 HEREIN.

### 33 D. ARGUMENT

#### 34 Jury instruction No. 15 Relieved The State 35 Of Its' Burden of Proving all Essential 36 Elements of the Charged Crime

37 The state was required to prove every essential element of the crime beyond  
38 a reasonable doubt for a conviction to be upheld. See In Re Winship 397 U.S. 358,  
364, 90 S. Ct. 1068, 25 L.ED.2d 368 (1970). A criminal defendant is constitutionally

1 entitled to a jury verdict that he is guilty of the crime and absent such a verdict the  
2 conviction must be reversed. No matter how inescapable the finding to support that  
3 verdict might be. A jury verdict that he is guilty of the crime means of course, a  
4 verdict that he is guilty of each necessary element of the crime. California v. Roy,  
5 117 S.Ct. 339 (9th Cir. 1996). The fifth and sixth amendments require criminal  
6 convictions to rest upon a jury determination that the defendant is guilty of every  
7 element of the crime with which he is charged. United States v. Gaudin 515 U.S.  
8 506, 132 L.Ed.2d 447, 115 S.Ct. 3210 (9th Cir. 1995) State vs. Acosta 101 Wn.2d  
9 612, 615, 683 P.2d 1069 (1984) State vs. McCullum 98 Wn.2d 484, 493-94, 656  
10 P.2d 1064 (1983), State vs. Green, 94 Wn.2d 216, 224, 616 P.2d 628 (1980). A  
11 conviction cannot stand if the jury instructions relieved the state of its' burden to  
12 prove every essential element of the crime charged. See State vs. Jackson 137 Wn.2d  
13 712, 727, 976 P.2d 1229 (1999).

14 It is reversible error to instruct the jury in a manner that would relieve the  
15 state of its' burden of proving every essential element of the crime charged. See  
16 State vs. Burd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995).

17 Because accomplice liability requires assistance or agreement to assist in THE  
18 CRIME CHARGED, Instruction 15 relieved the state of its' burden of proving the  
19 elements of the crime.

20 A person is legally accountable for the conduct of another person when he or  
21 she is an accomplice in the commission of a crime. RCW 9A.08.020(c). A person  
22 is an accomplice when he or she:

- 23 a. with knowledge that it will promote or  
24 facilitate the commission of the crime, he (or  
25 she)
- 26 ii aids or agrees to aid such other person in  
27 planning or committing it;

28 RCW 9A.08.020(3)(a)(ii). The use of "the" in the statute refers back to the crime  
charged, i.e., the crime to which a person is an accomplice if he aids or agrees to aid  
another in planning or committing it. Thus, RCW 9A.08.020 indicates accomplice  
liability must be read against the crime charge.

Contrary to this law, the trial court's instruction 15 provides:

A person who is an accomplice in the commission of  
a crime is guilty of that crime whether present at the  
scene or not.

A person is an accomplice in the commission of a  
crime if, with knowledge that it will promote or  
facilitate the commission of a crime, he or she either;

- (1) solicits, commands, encourages, or requests  
another person to commit the crime, or
- (2) aids or agrees to aid another person in  
planning or committing a crime.

The word "aid" means all assistance whether given by words, acts,

1 encouragement, support, or presence. A person who is present at the scene and ready  
2 to assist by his or her presence is aiding in the commission of the crime. However,  
3 more than mere presence and knowledge of the criminal activity of another must be  
4 shown to establish that a person present is an accomplice.

5 Please see exhibit A.<sup>12</sup>

6 By using "a" instead of "the crime charged", the instruction overlooks the  
7 required link between the crime the accomplice aids or agrees to aid and the crime  
8 to which he is alleged to be an accomplice.

9 By requiring only that the accused aid or agree to aid in the commission of  
10 "a crime", defendant's Court Jury Instruction No. 15 marks a significant departure  
11 from the plain language of the accomplice liability statute. By referring to "it", not  
12 some unnamed crime which may or may not include the charged one. The statutory  
13 language requires that the putative accomplice must have acted with knowledge that  
14 his or her conduct would promote or facilitate the crime for which he or she is  
15 eventually charged. See State vs. Cronin supra at 579.

16 The Washington State Supreme Court went on to rule in Cronin that their  
17 prior decision in State vs. Roberts, supra directed that "the fact that a purported  
18 accomplice knows that he intends to commit "a crime" does not necessarily mean  
19 that accomplice liability attaches for any and all offenses ultimately committed by the  
20 principle." See State vs. Cronin, supra, at 579, citing State vs. Roberts supra.

21 Even the DISSENT in Roberts, written by Justice Irelant agreed that  
22 accomplice liability instruction should have stated: "THE CRIME CHARGED"  
23 rather than "a crime" (emphasis added).

24 The trial court's erroneous jury instruction relieved the state of its' burden of  
25 proving that the defendant aided or agreed to aid in the commission of THE CRIME  
26 CHARGED. Accordingly, defendant was denied Due Process of the law and his  
27 conviction must be reversed.

28 The instructional error relieved the State of its' burden of proving the  
elements of the crime, requiring reversal.

In State vs. Jackson, the Washington State Supreme Court reaffirmed the rule  
that where jury instructions relieve the State of proving all the essential elements, the  
error is not susceptible to harmless error analysis, but instead requires reversal. See  
State v. Jackson, 137 Wn.2d 712, 726-27, 976 P.2d 1229 (1999). There, the Court  
found an erroneous accomplice instruction relieved the State of its' burden of proving  
all essential elements of the crime. Id. Therefore, the Court refused to examine the  
record to determine if the error prejudiced the defendant. Thus, this court must  
follow Jackson and find that because instruction No. 15 relieved the State of its'  
burden of proving the elements of accomplice liability, defendant's conviction must  
be reversed.

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<sup>12</sup>This exhibit A has been reduced to just the instruction no. 15 complained of, for the sake  
of brevity. If this Court requires the other pages of the exhibit, please say so.

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E. CONCLUSION

Because defendant's constitutional rights were violated, said rights being his 5th, 6th and 14th amendments rights, (U.S. Constutition) defendant respectfully asks this Court to order a retrial in defendant's case.

Respectfully submitted this 23 day of December, 2001.

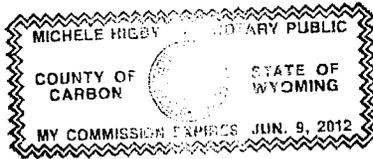
\* \* \*

While this author believes the arguments above were needlessly complex, they are sufficient to state a case. This Court should (1) grant the *in forma pauperis* application, (2) declare that the case filed on December 26, 2001 is reinstated to active status, (3) grant the Motion for Production of Documents in its entirety, and (4) order that counsel be appointed to represent the Petitioner. To do less would create a mockery of the Due Process clauses of the Fifth and Fourteenth Amendments.

**DECLARATION**

I swear that the foregoing facts are true and correct, under penalty of perjury under the laws of the States of Washington and Wyoming.

DATED this 23 day of MARCH, 2009.



George A. Wilson, pro se

EXECUTED BEFORE ME:

Michele Higby  
Notary Public

My commission expires:

June 9 2012

INSTRUCTION NO. 15

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing a crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

# APPENDIX I

DECLARATION OF GEORGE A. WILSON

11-15-10

IN 2003 A PROSECUTOR FROM PEIRCE COUNTY  
CAME TO SEE ME CONCERNING MY CO-DEFENDANT  
BEFORE HE LEFT I ASKED ABOUT MY APPEAL  
HE TOLD ME THE COURT WILL HANDLE IT.

IN 2007 WHEN I WAS TAKEN TO COURT CONCERNING  
MY CO-DEFENDANT, A PROSECUTOR CAME TO SEE ME  
IN PEIRCE COUNTY JAIL, WHEN I ASKED ABOUT  
MY APPEAL HE TOLD ME THE COURT WOULD HANDLE  
IT. I ALSO SENT A LETTER TO THE COURTS  
IN 2006 ASKING OF THE STATUS OF MY  
APPEAL AND RECEIVED KNOW RESPONSE.

I DECLARE UNDER PENALTY OF PERJURY THAT  
THESE STATEMENTS ARE TRUE

George A Wilson



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

IN RE THE PERSONAL RESTRAINT PETITION OF )  
 )  
 )  
GEORGE WILSON, ) NO. 39115-5-II  
 )  
 )  
 )  
Petitioner. )

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] STEPHEN TRINEN, DPA PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	(X) U.S. MAIL ( ) HAND DELIVERY ( ) _____
[X] GEORGE WILSON ID #21881 WYOMING CORRECTIONS CENTER PO BOX 400 RAWLING, WY 82301	(X) U.S. MAIL ( ) HAND DELIVERY ( ) _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2010.

X \_\_\_\_\_ *grw*

10 NOV 2010 11:21:47  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
COURT OF APPEALS  
DIVISION TWO

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
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