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DIVISION II

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STATE OF WASHINGTON  
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No. 42024-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Kyle Taylor,**

Appellant.

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Thurston County Superior Court Cause No. 10-1-01936-1

The Honorable Judge Paula Casey

**Appellant's Opening Brief**

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### ASSIGNMENTS OF ERROR

1. Mr. Taylor's conviction for Intimidating a Witness infringed his Fourteenth Amendment right to due process, because the court instructed the jury on an uncharged alternative means.
2. Mr. Taylor's conviction for Intimidating a Witness infringed his First and Fourteenth Amendment right to free speech and to due process because the court's instructions relieved the state of its burden to prove a "true threat."
3. The Information was deficient as to Count II because it failed to allege that Mr. Taylor attempted to influence testimony by means of a "true threat."
4. The sentencing court failed to properly determine Mr. Taylor's criminal history and offender score.
5. The sentencing court's criminal history finding was based on insufficient evidence.
6. The sentencing court improperly shifted the burden of proof at sentencing.
7. The sentencing court violated Mr. Taylor's Fifth and Fourteenth Amendment right to remain silent pending sentencing.
8. The sentencing court violated Mr. Taylor's Fourteenth Amendment right to due process.
9. The trial court erred by scoring Mr. Taylor's prior robbery and assault convictions separately.
10. The trial court erred by adopting Finding of Fact No. 2.2 of the Judgment and Sentence (relating to criminal history and same criminal conduct finding).
11. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence (relating to offender score).
12. The trial court erred by sentencing Mr. Taylor with offender scores of nine and seven.

13. Mr. Taylor was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
14. Defense counsel was ineffective for failing to argue that Mr. Taylor's prior robbery and assault convictions comprised the same criminal conduct.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. It is reversible error to instruct a jury on an uncharged alternative means of committing a crime. In this case, the trial judge instructed the jury on an uncharged alternative means of committing witness intimidation. Did Mr. Taylor's conviction for witness intimidation violate his Fourteenth Amendment right to due process?
2. The First Amendment requires the trial court to instruct a jury considering a charge of witness intimidation on the requirement that the state prove a "true threat." In this case, the trial judge did not instruct the jury on the "true threat" requirement. Did Mr. Taylor's conviction for Intimidating a Witness violate his First and Fourteenth Amendment rights?
3. A criminal Information must set forth all essential elements of an offense. The Information charged Mr. Taylor with Intimidating a Witness, but failed to allege that he made a "true threat." Did the Information omit an essential element of the offense in violation of Mr. Taylor's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?
4. At sentencing, the prosecution must prove criminal history by a preponderance of the evidence. Here, the prosecutor did not introduce any evidence establishing Mr. Taylor's criminal history. Must the sentence be vacated and the case remanded for resentencing?

5. The Court of Appeals has found the SRA unconstitutional, insofar as it permits a sentencing court to consider a prosecutor's bare assertions of criminal history as prima facie evidence. Here, the trial court determined Mr. Taylor's criminal history and offender score based on the prosecutor's bare assertions of criminal history. Must the sentence be vacated and the case remanded for a new sentencing hearing?
6. Prior offenses comprise the same criminal conduct for purposes of calculating the offender score if they occurred at the same time and place and if they were committed for the same overall criminal purpose. Here, the court erroneously scored Mr. Taylor's prior robbery and assault convictions separately. Must the sentence be vacated and the case remanded for a new sentencing hearing?
7. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Mr. Taylor's attorney unreasonably failed to argue that his prior robbery and assault convictions comprised the same criminal conduct. Was Mr. Taylor denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Kyle Taylor was charged by Information with Assault in the Second Degree (Count I) and Intimidating a Witness (Count II).<sup>1</sup> CP 2-3. The language in Count II alleged that “by use of a threat directed against a current or prospective witness,” he “attempted to influence the testimony of that person...” CP 2. The Information did not aver that he made a “true threat.” CP 2-3. Nor did it allege that he attempted to induce a person not to report information relevant to a criminal investigation. CP 2-3.

The prosecution’s evidence on the intimidating charge consisted of testimony that Mr. Taylor pointed his finger like a gun and made the sound of a gun firing, implying that he would shoot his girlfriend if she told police his secrets. RP 66. At the conclusion of the evidence, the court defined the crime as follows:

A person commits the crime of intimidating a witness when he or she by use of a threat against a current or prospective witness attempts to influence the testimony of that person or induce that person not to report the information relevant to a criminal investigation.

Instruction No. 11, Court’s Instructions to the Jury, Supp. CP.

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<sup>1</sup> He was also charged with third-degree theft and fourth degree assault. CP 2.

The court's "to convict" instruction outlining the elements required for conviction included the following language:

(1)...the defendant by use of a threat against a current or prospective witness attempted to influence the testimony of that other person or attempted to induce a person not to report information relevant to a criminal investigation...  
Instruction No. 14, Court's Instructions to the Jury, Supp. CP.

Defense counsel did not object to these instructions. RP 191-210.

Mr. Taylor was convicted of all counts by general verdict. Verdict Forms I-IV, Supp. CP.<sup>2</sup> At sentencing, the prosecutor alleged that he had a number of prior convictions. Prosecutor's Statement of Criminal History, Supp. CP. Mr. Taylor did not admit to any prior convictions. *See RP generally.* The state presented no evidence to support its allegation that Mr. Taylor had criminal history. *See RP 257-276.* Nor did the state present evidence that any prior offenses should score separately instead of as the same criminal conduct. RP 257-276.

Mr. Taylor was initially sentenced with an offender score of 13 (Count I) and 11 (Count II). Original Judgment and Sentence (filed 3/10/11), Supp. CP. At a second sentencing hearing, the prosecutor acknowledged that she had not received Mr. Taylor's prior judgments at the time he was sentenced, and that some of his prior convictions

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<sup>2</sup> By special verdict, the jury also found that each offense was against a family or household member.

comprised the same criminal conduct. RP 268-269. Mr. Taylor was resentenced with offender scores of 9 (Count I) and 7 (Count II). Defense counsel made no argument regarding the offender score at either sentencing hearing. RP 257-276.

Mr. Taylor timely appealed. CP 12.

### ARGUMENT

**I. MR. TAYLOR'S CONVICTION FOR INTIMIDATING A WITNESS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS.**

A. Standard of Review

Constitutional errors are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

B. Mr. Taylor was tried on an uncharged alternative means of committing witness intimidation.

In criminal cases, it is reversible error to instruct the jury on an uncharged alternative means. *State v. Laramie*, 141 Wash.App. 332, 343, 169 P.3d 859 (2007); *State v. Chino*, 117 Wash.App. 531, 540, 72 P.3d 256 (2003). Where the Information alleges only one alternative means of committing a crime, the jury may not be instructed on other uncharged alternatives, regardless of the strength of the evidence; this is so because a defendant cannot be tried for an uncharged offense. *Chino*, at 540.

Under RCW 9A.72.110, Intimidating a Witness is an alternative means crime. *State v. Brown*, 162 Wash.2d 422, 429, 173 P.3d 245 (2007). Mr. Taylor was charged under alternative (a) (“A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to: (a) Influence the testimony of that person....”). However, the court instructed the jury under alternatives (a) and (c). *See* Instructions Nos. 11 and 14, Court’s Instructions to the Jury, Supp. CP.

Because the jury returned a general verdict of guilt on Count II, the error is presumed prejudicial. *Chino, supra*. Accordingly, Mr. Taylor’s intimidating conviction must be reversed and the charge remanded for a new trial. *Id.*

**II. MR. TAYLOR’S CONVICTION FOR INTIMIDATING A WITNESS VIOLATED HIS FIRST AMENDMENT RIGHT TO FREE SPEECH AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

**A. Standard of Review**

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kylo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009); *State v.*

*Berg*, 147 Wash.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

B. The court's instructions relieved the prosecution of its burden to prove that Mr. Taylor made a "true threat."

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). A person is guilty of Intimidating a Witness when s/he attempts to influence testimony "by use of a threat against a current or prospective witness." RCW 9A.72.110.

There is an additional, non-statutory element: to avoid violating the First Amendment, the state must prove the threat constitutes a "true threat" rather than idle chat. U.S. Const. Amend. I; *State v. King*, 135 Wash.App. 662, 145 P.3d 1224 (2006); see *State v. Williams*, 144 Wash.2d 197, 26 P.3d 890 (2001). A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. *State v. Johnston*, 156 Wash.2d 355, 360-361, 127 P.3d 707 (2006).

The trial court failed to instruct the jury on this non-statutory element. The words "true threat" did not appear in the "to convict" instruction. Instruction No. 14, Court's Instructions to the Jury, Supp. CP.

Nor did the constitutionally required definition of a “true threat” appear elsewhere in the instructions. Court’s Instructions to the Jury, Supp. CP. Because the court’s instructions did not make the relevant standard manifestly clear to the average juror, the prosecution was relieved of its burden to prove a true threat. Accordingly, Mr. Taylor’s conviction for Intimidating a Witness violated his Fourteenth Amendment right to due process and his First Amendment right to free speech. *Aumick, supra*; *Johnston, supra*.

C. The error was prejudicial and requires reversal.

The omission of an essential element requires reversal. *Aumick, supra*. Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000).

Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.

*State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

The error here is presumed prejudicial. *Toth*, at 615. Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. First, the evidence was not overwhelming. Mr. Taylor's conduct was ambiguous and subject to interpretation. A reasonable person in his position would not necessarily foresee that his conduct would be interpreted as a serious expression of an intention to inflict damage. *Johnston*, at 360-361.

Second, the errors were not trivial, formal, or merely academic, because they prejudiced Mr. Taylor and likely affected the final outcome of the case. *Lorang*, at 32. A reasonable jury could have concluded that Mr. Taylor's conduct did not constitute a "true threat."

Because the error was not harmless, Mr. Taylor's conviction for Intimidating a Witness must be reversed. *Id.* The case must be remanded to the trial court for a new trial. *Id.*

**III. MR. TAYLOR'S CONVICTION FOR INTIMIDATING A WITNESS VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 22.**

A. Standard of Review

Constitutional questions are reviewed *de novo*. *Schaler*, at 282. A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wash.2d 93, 102, 812 P.2d 86

(1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.*, at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.*, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. The Information was deficient because it failed to allege that Mr. Taylor attempted to influence testimony by means of a “true threat.”

The Sixth Amendment to the Federal Constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI.<sup>3</sup> A similar right is secured by the Washington State Constitution. Wash. Const. Article I, Section 22. All essential elements—both statutory and nonstatutory—must be included in the charging document. *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992). An essential element is “one whose specification is necessary to establish the very illegality of the behavior.” *Id.* (citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

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<sup>3</sup> This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

As noted above, the state must prove a “true threat” in order to obtain a conviction for Intimidating a Witness.<sup>4</sup> *King, supra*. A “true threat” is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. *State v. Johnston*, 156 Wash.2d 355, 360-361, 127 P.3d 707 (2006).

Here, the state alleged that Mr. Taylor attempted to influence testimony “by using a threat” against a witness. CP 2. The Information did not allege that his threat qualified as a “true threat;” nor can this element be implied from the charging language. CP 2. Accordingly, the allegation in the Information was not (by itself) sufficient to charge a crime, and prejudice is presumed. *King, supra; Kjorsvik, supra*. Because the Information was deficient, Mr. Taylor’s conviction for Intimidating a Witness must be reversed and the charge dismissed without prejudice. *Kjorsvik, supra*.

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<sup>4</sup> Division I has decided that the requirement of a “true threat” is not an element, and need not be alleged in a charging document. *State v. Tellez*, 141 Wash.App. 479, 483-484, 170 P.3d 75 (2007); *State v. Atkins*, 156 Wash.App. 799, 805, 236 P.3d 897 (2010). This is incorrect: a threat that is not a “true threat” is not illegal. Thus the existence of a “true threat” is essential “to establish the very illegality of the behavior.” *Johnson, at 147*. The Supreme Court has explicitly reserved ruling on the question. *See Schaler, at 289 n. 6*.

**IV. THE SENTENCING PROCEEDING VIOLATED MR. TAYLOR'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO REMAIN SILENT AND HIS RIGHT TO DUE PROCESS.**

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *In re Detention of Post*, 145 Wash.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)).

The state does not meet its burden to establish an offender's criminal history through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wash.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." *Id.*, at 482. This rule is constitutionally based, and thus cannot be altered by statute; as the Supreme Court pointed out, requiring the offender to object when the state presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." *Id.*, at 482.

In light of this, the Court of Appeals has found RCW 9.94A.500 and RCW 9.94A.530 unconstitutional. *State v. Hunley*, \_\_\_ Wash. App. \_\_\_, \_\_\_, 253 P.3d 448 (2011). The statutes violate due process because

they permit a sentencing court to make a criminal history finding based on the offender's silence when faced with a prosecuting attorney's summary of criminal history. *Id.*

- A. The trial court violated Mr. Taylor's right to remain silent and his right to due process by entering a finding that he had criminal history, based solely on the allegations contained in the prosecutor's statement of criminal history.

Here, the prosecutor alleged that Mr. Taylor had a number of prior convictions. Prosecutor's Statement of Criminal History, Supp. CP. Mr. Taylor did not admit to any prior convictions, yet the state presented no evidence to support its allegations.<sup>5</sup> RP (3/10/11); RP (3/22/11).

Absent an admission or some proof of criminal history, the trial court's criminal history finding is not supported by the record. Accordingly, the sentence was entered in violation of Mr. Taylor's right to remain silent and his right to due process. *Hunsley, supra*. The sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

- B. The trial court violated Mr. Taylor's right to remain silent and his right to due process by scoring his prior assault and robbery convictions separately when calculating his offender score, in the absence of evidence proving they were not the same criminal conduct.

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<sup>5</sup> In fact, it later developed that the prosecutor had not even reviewed Mr. Taylor's prior judgments at the time of the sentencing hearing. RP (3/22/11) 268. Presumably, defense counsel had also failed to review the prior convictions.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. The judge is required to analyze multiple prior convictions to determine whether or not they are based on the "same criminal conduct:"

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except: (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations.

RCW 9.94A.525.

The burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. *See State v. Dolen*, 83 Wash.App. 361, 365, 921 P.2d 590 (1996), *review denied*, 131 Wash.2d 1006, 932 P.2d 644 (1997); *State v. Jones*, 110 Wash.2d 74, 750 P.2d 620 (1988); *State v. Gurrola*, 69 Wash.App. 152, 848 P.2d 199, *review denied*, 121 Wash.2d 1032, 856 P.2d 383 (1993). "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed

at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

The analysis requires examination of the extent to which the offender’s criminal intent, objectively viewed, changed from one crime to the next. *State v. Haddock*, 141 Wash.2d 103, 113, 3 P.3d 733 (2000); *see also State v. Anderson*, 72 Wash.App. 453, 464, 864 P.2d 1001 (1994). Sometimes this necessitates determination of whether one crime furthered another. *Haddock*, at 114. A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wash.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wash.2d 177, 183, 942 P.2d 974 (1997).

The sentencing court is bound by prior determinations that multiple offenses comprise the same criminal conduct. RCW 9.94A.525(a)(i). However, in the case of multiple offenses not previously found to be the same criminal conduct, the sentencing court must exercise its discretion and decide whether multiple prior offenses should count separately or together. *State v. Mehaffey*, 125 Wash. App. 595, 600-01, 105 P.3d 447 (2005).

The prosecuting attorney’s statement of criminal history listed assault and robbery convictions with a shared offense date and a shared sentencing date in Lewis County Superior Court. Prosecutor’s Statement

of Criminal History, Supp. CP. Under these circumstances, the court was not permitted to presume the two offenses scored separately. RCW 9.94A.525(a)(i); *Hunley, supra*.

The prosecutor did not present any evidence suggesting that the two offenses should score separately.<sup>6</sup> Accordingly, the evidence was insufficient to prove that they were not the same criminal conduct. *Hunsley, supra*. By scoring the two offenses separately, the sentencing court violated Mr. Taylor's right to remain silent and his right to due process. *Id.*

Furthermore, in the face of his own attorney's inactivity, Mr. Taylor filed a *pro se* CrR 7.8 motion in which he declared (under oath) that the prior assault and robbery convictions had been counted as the same criminal conduct when he was originally sentenced on the charges.<sup>7</sup> *See* Motion to Modify or Correct Judgment and Sentence, p. 2, Supp. CP.

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<sup>6</sup> And, in fact, it is not clear that either the prosecutor or defense counsel had reviewed documents relating to these offenses, even by the time of the second sentencing hearing. *See* RP (3/22/11) 268.

<sup>7</sup> Although Mr. Taylor properly noted the motion for a hearing and sought an order transporting him from DOC, he was not transported and the motion was denied. *See* Note to Docket; Proposed Order of Transport, Supp. CP. At a hearing on the motion, conducted in Mr. Taylor's absence, the judge erroneously remarked that "There is no basis stated for the modification; it was just modify it." RP (5/5/11) 277. Neither the prosecutor nor defense counsel corrected her misunderstanding. RP (5/5/11) 277.

Given this undisputed evidence, the sentencing court is bound by the prior determination under RCW 9.94A.525(a)(i).

Mr. Taylor's sentence must be vacated and the case remanded to the superior court for a new sentencing hearing. *Id.* If, on remand, the state is unable to prove that the two prior offenses score separately,<sup>8</sup> they must be counted as the same criminal conduct. *Id.*

**V. MR. TAYLOR WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

**A. Standard of Review**

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

**B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is

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<sup>8</sup> Or if the prior offenses were found to comprise the same criminal conduct by the 2004 sentencing court.

applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption of adequate performance, though it is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct

for an attorney includes carrying out the duty to research the relevant law.” *Kyllo*, at 862. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- C. Defense counsel provided ineffective assistance by failing to review Mr. Taylor’s prior judgments before sentencing, and by failing to argue that his assault and robbery convictions comprised the same criminal conduct.

It is clear from the record that defense counsel did not review Mr. Taylor’s prior judgments before the March 10<sup>th</sup> sentencing hearing.<sup>9</sup> RP (3/22/11) 268. There is no indication in the record that defense counsel reviewed any documentation relating to the 2004 assault and robbery convictions prior to Mr. Taylor’s March 22<sup>nd</sup> re-sentencing hearing. RP (3/10/11); RP (3/22/11). Had counsel made the effort to obtain and review the appropriate documents, he would have argued that the assault and robbery convictions comprised the same criminal conduct and therefore

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<sup>9</sup> The prosecutor did not receive—and thus could not share—documentation establishing Mr. Taylor’s 2004 burglary and theft convictions until after the initial March 10<sup>th</sup> sentencing hearing. RP (3/22/11) 268. There is no indication that the prosecutor ever received documentation relating to the assault and robbery convictions. RP (3/10/11); RP (3/22/11).

scored together in Mr. Taylor's criminal history. *See* Motion to Modify or Correct Judgment and Sentence, p. 2, Supp. CP.

Even without having reviewed the records, counsel should have pointed out the prosecution's failure to prove that the assault and robbery convictions counted separately. If counsel had pointed out the deficiency in proof, the court would have sentenced Mr. Taylor with a lower offender score and a lower standard range on each offense.

Counsel's unreasonable failure to request a "same criminal conduct" finding prejudiced Mr. Taylor. Accordingly, the sentence must be vacated and the case remanded for a new sentencing hearing.

*Reichenbach, supra.*

**CONCLUSION**

For the foregoing reasons, the intimidating charge must be dismissed without prejudice or remanded for a new trial. In addition, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on August 17, 2011.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

STATE OF WASHINGTON  
BY Ka  
DEPUTY

I certify that I mailed a copy of Appellant's Opening Brief to:

Kyle Taylor, DOC #870547  
Coyote Ridge Corrections Center  
P.O. 769  
Connell, WA 99326

and to:

Thurston County Prosecutor's Office  
2000 Lakeridge Dr SW Bldg 2  
Olympia WA 98502-6045

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 17, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 17, 2011.



Jodi R. Backlund, WSBA No. 22917  
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