

No. 43413-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Danielle Newton,**

Appellant.

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Clark County Superior Court Cause No. 11-1-02073-8

The Honorable Judge Scott A. Collier

**Appellant's Reply Brief**

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## ARGUMENT

**I. THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE SEARCH WARRANT WAS OVERBROAD.**

A. The error is preserved for review.

The error is preserved for review, because Ms. Newton objected to the introduction of the evidence and argued that the warrant was overbroad. RP 82, 93-95, 99, 157-159, 168-169, 171, 176; Ex. 62.

Even if the court were to find that trial counsel's oral objection/motion<sup>1</sup> did not preserve the error, the issue can be reviewed as a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3); *State v. Jones*, 163 Wn. App. 354, 360, 266 P.3d 886 (2011) *review denied*, 173 Wn.2d 1009, 268 P.3d 941 (2012); *State v. Abuan*, 161 Wn. App. 135, 146, 257 P.3d 1 (2011). All of the necessary facts appear in the record, and the erroneous admission of the evidence had practical and identifiable consequences at trial. *Jones*, 163 Wn. App. at 360; *Abuan*, 161 Wn. App. at 146.

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<sup>1</sup> This was necessitated by the prosecution's late disclosure of discoverable material. RP 13, 19-23, 72-76, 93-94, 100-102.

B. The warrant was overbroad for five reasons.

1. The warrant failed to specify the crime under investigation, and provided no limitation on the officers' discretion.

A search warrant must limit the discretion to be exercised by the executing officers, and must notify the person subject to search of the items to be seized. *State v. Riley*, 121 Wn.2d 22, 27, 846 P.2d 1365 (1993). One means of doing so is to specify the crime under investigation. *Id.*

In this case, the warrant neither specified the crime under investigation nor limited the executing officers' discretion in any other way. Ex. 62. Accordingly, the warrant was overbroad. *Id.*

Even assuming the correctness of Respondent's argument,<sup>2</sup> Respondent fails to address one critical category: "Cellular telephones and their electronically stored memory..." Ex. 62; *see* Brief of Respondent, p. 12. The warrant authorized seizure of *any* cell phone and *any* stored information, regardless of whether or not the phone or the information constituted evidence of a crime. Ex. 62. Because of this the warrant was overbroad with regard to any cell phones seized from the car. *Riley*, 121 Wn.2d at 27.

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<sup>2</sup> A point Ms. Newton does not concede.

2. The warrant authorized police to search for and seize items for which they lacked probable cause.

The affidavit failed to include sufficient “underlying facts and circumstances” to allow “a detached and independent evaluation” of probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Instead of establishing probable cause through specific information related to the case, the affiant improperly relied on “conclusory predictions,” “[b]lanket inferences,” and impermissible “generalities.” *Id.*, at 147-148.

Respondent does not directly address this argument. Brief of Respondent, pp. 5-14. Instead, Respondent apparently assumes that *some* evidence of drug dealing necessarily establishes the existence and evidentiary value of *all possible items* that could be associated with drug dealing. *See* Brief of Respondent, p. 10 (“[I]t was likely... that other items associated with selling and distributing drugs would be found...”)

This assumption is not merely unwarranted; it is unconstitutional. *Thein*, 138 Wn.2d at 147-148. Speculation and wishful thinking cannot support issuance of a search warrant. *Id.*

3. The warrant failed to describe items protected by the First Amendment with sufficient particularity.

A reviewing court must closely scrutinize any warrant authorizing seizure of items protected by the First Amendment. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford*

*v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)); *State v. Perrone*, 119 Wn.2d 538, 545-547, 834 P.2d 611 (1992). The particularity requirement “is to be accorded the most scrupulous exactitude” in such cases. *Stanford*, 379 U.S. at 485. Generic terms and general descriptions are unacceptable if more particular descriptions are available.” *Perrone*, 119 Wn.2d at 547.

Cell phones have become repositories of vast amounts of personal information, and should be afforded the same First Amendment protections as comparable written materials. *See, e.g., State v. Boyd*, 295 Conn. 707, 721, 992 A.2d 1071 (2010) (outlining cases addressing a person’s expectation of privacy in her or his cell phone). Here, the warrant authorized seizure of all “[c]ellular telephones,” and the information stored on such phones. Ex. 62. This generic description was unacceptable, because the affiant had a more particularized description available. Specifically, officers saw an iPhone, which was described in the affidavit but not in the warrant. Ex. 62.

The failure to give the most particular description available is fatal to the warrant. *Perrone*, 119 Wn.2d at 547. Respondent does not address this argument. Brief of Respondent, pp. 5-14. Respondent’s silence on this point may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

4. The affiant failed to establish probable cause to believe evidence of a crime would be found outside the passenger compartment.

The affidavit must recite specific facts establishing a nexus between the item to be seized and the place to be searched. *Thein*, 138 Wn.2d at 140. Here, the affiant provided no specific information suggesting that evidence would be found in the “trunk, engine compartment, glove box and door panels.” Ex. 62.

Without adequate citation to authority, Respondent erroneously asserts that probable cause is all-or-nothing—that justification for searching the passenger compartment of a car provides probable cause to search the entire vehicle. Brief of Respondent, pp. 9-10 (citing *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003); *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982); and *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 2068, 85 L.Ed.2d 406 (1985)). This is incorrect, and none of the cited cases support Respondent’s position.

Respondent does not provide a pinpoint cite to *Jackson* and gives no explanation as to how the case might help Respondent’s argument. In fact, *Jackson* undermines Respondent’s position. In *Jackson*, the court held that a warrant authorizing search of a car did not permit officers to

attach a GPS device.<sup>3</sup> *Jackson*, 150 Wn.2d at 261. The court cited with approval a Florida case in which a warrant authorizing police to attach a GPS device “upon or under” an aircraft could not justify placing such a device under a panel inside the airplane. *Id.* This part of *Jackson* suggests that the different parts of a car are to be considered separately, and that probable cause to search one part cannot justify search of another part. *Id.* The *Jackson* court also reaffirmed the holding of *Thein*, ruling that generalizations cannot substitute for specific facts and circumstances establishing probable cause. *Id.*, at 267. No other portion of *Jackson* relates to the issues in Ms. Newton’s case.

*Ross* also undermines Respondent’s position.<sup>4</sup> The *Ross* court held that the scope of an automobile search “is defined by the object of the search *and the places in which there is probable cause to believe that it may be found.*” *Ross*, 456 U.S. at 824 (emphasis added). As an example, the *Ross* court explained that “[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.” *Id.*

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<sup>3</sup> A second warrant authorizing GPS tracking was upheld.

<sup>4</sup> Furthermore, *Ross* is a Fourth Amendment case and does not control issues under Wash. const. art. I, §7.

In *Carney*, the court applied the automobile exception to a motor home. It did not purport to allow police to search those portions of the motor home for which probable cause was lacking.<sup>5</sup> *Carney*, 471 U.S. at 390-395.

Respondent goes on to claim that the suspected methamphetamine in the passenger compartment justified issuance of the warrant when combined with the affiant's training and experience. Brief of Respondent, p. 11. But this is the reasoning rejected by the court in *Thein*. In *Thein*, the court refused to allow a search based on the affiant's training and experience, even when combined with facts establishing the defendant's drug dealing.

In essence, the prosecution is arguing for a *per se* rule: the discovery of some evidence of drug dealing in the passenger compartment of a car necessarily establishes probable cause to search for all possible forms of such evidence anywhere in the car, including information contained in cell phones or personal writings. But *Thein* cautions against this type of approach: "we emphasize that the existence of probable cause is to be evaluated on a case-by-case basis." *Id.*, at 149.

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<sup>5</sup> Furthermore, *Carney* is a Fourth Amendment case. It does not address art. I, §7.

The affidavit in this case did not provide specific facts and circumstances suggesting that additional evidence of a crime—beyond the tub of methamphetamine in the passenger compartment—would be found in the car. Accordingly, the search warrant was overbroad. *Thein*, 138 Wn.2d at 140.

5. Art. I, §7 does not permit police to search for or seize items protected by the First Amendment that are not evidence of a crime.

Respondent does not dispute that the warrant authorized police to search for and seize written materials that were not evidence of a crime. Brief of Respondent, p. 12-13. Instead, Respondent argues that searches and seizures of this type are justified to show a suspect's connection to the crime. Brief of Respondent, pp. 12-13 (citing *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)). Significantly, Respondent cites no cases that have reached the same conclusion under our state constitution. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

Because the warrant was overbroad, the evidence must be suppressed. Ms. Newton's conviction must be reversed and the case dismissed with prejudice. *Thein*, 138 Wn.2d at 140.

**II. THE COURT SHOULD NOT HAVE INSTRUCTED ON UNWITTING POSSESSION, BECAUSE THAT AFFIRMATIVE DEFENSE DOES NOT APPLY TO POSSESSION WITH INTENT TO DELIVER.<sup>6</sup>**

Ms. Newton was charged with possession with intent, which necessarily required the prosecution to prove her guilty knowledge:

[i]t is impossible for a person to intend to... deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly... Without knowledge of the controlled substance, one could not intend to manufacture or deliver that controlled substance.

*State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992). Accordingly, Ms. Newton had no burden to prove unwitting possession. *Id.* But the court's instructions placed this burden squarely upon her. CP 44.

Respondent concedes that the instruction does not apply to possession with intent. Brief of Respondent, pp. 15-16. Respondent argues that the jury followed the "to convict" instruction and not the unwitting possession instruction. *See* Brief of Respondent, p16 ("[I]t would be impossible for a jury to convict..."). There is no basis for this assumption. In fact, conflicting instructions are presumed to have misled jurors in a manner prejudicial to the defendant, if the discrepancy results from a clear misstatement of the law. *State v. Walden*, 131 Wn.2d 469,

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<sup>6</sup> If this error was invited, Ms. Newton was denied the effective assistance of counsel, as argued previously.

478, 932 P.2d 1237 (1997). In this case, the “to convict” instruction conflicted with the unwitting possession instruction. This inconsistency is presumed to have prejudiced Ms. Newton. *Id.*

Because the court’s instructions unconstitutionally shifted the burden of proof, Ms. Newton’s conviction must be reversed and the case remanded for a new trial with proper instructions. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

**III. IF THE SUPPRESSION ISSUE AND THE INSTRUCTIONAL ERROR ARE NOT PRESERVED FOR REVIEW, MS. NEWTON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Ms. Newton stands on the argument set forth in Appellant’s Opening Brief.

**IV. MS. NEWTON WAS DENIED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND TO PRESENT A DEFENSE WHEN THE TRIAL COURT REFUSED TO ADMIT A PORTION OF HER STATEMENT UNDER ER 106 AND THE COMMON LAW RULE OF COMPLETENESS.**

Ms. Newton stands on the argument set forth in Appellant’s Opening Brief.

**V. RCW 9A.08.020 VIOLATES THE FIRST AMENDMENT BECAUSE IT IS UNCONSTITUTIONALLY OVERBROAD.**

A. The burden of justifying a restriction on speech rests with the government; Ms. Newton need not show the statute has no valid application.

The government bears the burden of justifying any restriction on speech. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

Respondent's contrary contention is incorrect, and its reliance on *Hunley* and *Barnhart* is misplaced. Brief of Respondent, p. 25 (citing *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012) and *Bothell v. Barnhart*, 172 Wn.2d 223, 257 P.3d 648 (2011)). *Hunley* and *Barnhart* state the general rule that statutes are presumed constitutional and the challenging party bears the burden of proving unconstitutionality. *Hunley*, 175 Wn.2d at 908 (analyzing SRA provision under the due process clause); *Barnhart*, 172 Wn.2d at 229 (analyzing jury trial right under Wash. const. art. I, §22).

However, this rule is inapplicable in the First Amendment context, where the burden rests with the government. *Immelt*, 173 Wn.2d at 6. See also *Resident Action Council v. Seattle Hous. Auth.*, 162 Wn.2d 773, 778, 174 P.3d 84 (2008) (“[T]he State bears the burden of justifying a restriction on speech”); *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 482, 166 P.3d 1174 (2007) (same);

*Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154 *as amended*, 943 P.2d 1358 (1997) (same); *Fine Arts Guild, Inc. v. City of Seattle*, 74 Wn.2d 503, 506, 445 P.2d 602 (1968) (“[A]ny restraint imposed upon a constitutionally protected medium of expression comes into court bearing a heavy presumption against its constitutionality.”)

Respondent also misunderstands what is involved in a facial overbreadth challenge. Respondent apparently believes that Ms. Newton is charged with showing that “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” Brief of Respondent, p. 25 (quoting *City of Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004)). But *Moore* is a due process case; it is not a First Amendment case. *Moore*, 151 Wn.2d at 669.

The standard outlined in *Moore* does not apply in the First Amendment context. *See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008); *see also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004). Respondent appears to recognize this. After quoting the inapplicable standard, Respondent goes on to cite the correct standard: “[A] statute is overbroad if it prohibits a substantial amount of protected speech and conduct.” Brief of Respondent, p. 25.

Having relied on an inapplicable standard, Respondent makes little effort to meet its burden of justifying the restrictions on speech imposed by RCW 9A.08.020. Brief of Respondent, pp. 25-27. Because Respondent has failed to overcome the presumption of invalidity, Ms. Newton's conviction must be reversed.

B. RCW 9A.08.020 is overbroad on its face because (as currently interpreted) it prohibits a substantial amount of protected speech.

The federal constitution "gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002)). The overbreadth doctrine prohibits the government from criminalizing unprotected speech "if a substantial amount of protected speech is prohibited or chilled in the process." *Id.*, at 255.

Overbreadth analysis starts with understanding how a statute has been construed: "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Stevens*, 559 U.S. 460, \_\_\_, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (quoting *United States v. Williams*, 553 U.S. 285, 293, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)). A criminal statute "may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional,

judged in relation to the statute's plainly legitimate sweep.” *Stevens*, 559

U.S. at \_\_\_ (quoting *Washington State Grange v. Washington State*

*Republican Party*, 552 U.S. at 449 (internal quotation marks omitted)).

Put another way, a statute is substantially overbroad if there is “a realistic

danger that the statute itself will significantly compromise recognized

First Amendment protections of parties not before the Court.” *Members of*

*City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S.

789, 800-01, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).<sup>7</sup>

6. The accomplice liability statute is overbroad because it permits conviction for pure speech absent proof of (1) intent to further a crime and (2) a likelihood of imminent lawless action.

Speech advocating criminal activity may only be punished if it “is

directed to inciting or producing imminent lawless action and is likely to

incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447,

23 L.Ed.2d 430, 89 S.Ct. 1827 (1969). Thus, in order to be constitutional,

a statute that criminalizes speech must require proof of *intent* (not mere

knowledge) and a probability of *imminent* lawless action.<sup>8</sup> *Id.*

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<sup>7</sup> On the other hand, a statute will be upheld against an overbreadth challenge if its “legitimate reach dwarfs its arguably impermissible applications.” *New York v. Ferber*, 458 U.S. 747, 773, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Thus a statute is not substantially overbroad if the “arguably impermissible applications of the statute amount to [no] more than a tiny fraction of the materials within the statute's reach.” *Id.*

<sup>8</sup> Thus, “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and imminent illegal conduct.” *Ashcroft*, 535 U.S. 234 at 253.

The government “cannot constitutionally sanction ‘advocacy of illegal action at some indefinite future time.’” *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (quoting *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973)). The *Brandenburg* test requires “temporal imminence.” *James v. Meow Media, Inc.*, 300 F.3d 683, 698-99 (6th Cir. 2002).

In *McCoy*, the defendant was a former gang member who “advised a street gang...on at least two separate occasions on how to operate their gang.” *McCoy*, 282 F.3d at 628. He suggested that the gang reduce the violence used to eject gang members, and advised them to “tag up the neighborhood [with graffiti] to let their presence be known.” *Id.*, at 632. He was charged under an Arizona statute making it unlawful to assist a criminal street gang. The statute required proof that he acted with intent to promote or further the gang’s criminal objectives and to promote, further, or assist the gang in any criminal conduct. *Id.*, at 630 n. 3 (citing former A.R.S. § 13-2308 (1993)).

The Ninth Circuit found his advice “very general,” and noted the improbability that someone would act imminently on the advice. It reversed his conviction, finding that his speech “fit more closely the profile of mere abstract advocacy of lawlessness” rather than “demonstrating a specific intent to further illegal goals.” *Id.*, at 631.

Similarly, the government may not punish doctors who recommend marijuana to their patients. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). This is so even though a doctor’s recommendation “may encourage illegal conduct by the patient.” *Id.*, at 638. As the Fourth Circuit has pointed out:

in order to prevent the punishment or even the chilling of entirely innocent, lawfully useful speech, the First Amendment may in some contexts stand as a bar to the imposition of liability on the basis of mere foreseeability or knowledge that the information one imparts could be misused for an impermissible purpose.

*Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 247 (4th Cir. 1997)

(publisher stipulated that *Hit Man*, a manual for contract killers, was disseminated with knowledge and intent that it be immediately used in the planning and commission of murder; this stipulation removed the publication from First Amendment protection.)

By their plain terms, RCW 9A.08.020 and WPIC 10.51 permit conviction even in the absence of intent and a likelihood of imminent lawless action. In Washington, a jury may convict a person as an accomplice if s/he provides the principal with aid in the form of “words” or “encouragement,” even if the person acts with mere knowledge—not intent—that the words or encouragement will promote or facilitate the principal’s crime, and even if imminent lawless action is unlikely. RCW 9A.08.020; WPIC 10.51.

Under Washington law, the doctors in *Conant* would have no protection from accomplice liability if they gave medical advice they knew would promote illegal drug possession.<sup>9</sup> *See Conant*, 309 F.3d at 638. The defendant in *McCoy* would be convicted for his advocacy, despite the improbability of imminent unlawful activity. *See McCoy*, 282 F.3d at 631. Under the statute, criminal liability would also attach to an attorney who promised free representation to trespassing protesters (if the attorney knew that the promise would promote criminal trespass).

RCW 9A.08.020 could be construed to reach only unprotected speech. *See, e.g., State v. Johnston*, 156 Wn.2d 355, 364, 127 P.3d 707 (2006) (Bomb threat statute “must be limited to apply to only true threats”); *State v. Schaler*, 169 Wn.2d 274, 284, 236 P.3d 858 (2010) (construing the crime of harassment to reach only true threats). The *Brandenburg* court provided the appropriate standard: were RCW 9A.08.020 construed to reach speech made with intent to incite and likely to produce imminent lawless action, it would not be overbroad. With such a construction, trial courts could instruct juries in conformity with *Brandenburg*. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (“[T]he jury should have been charged that the expression was

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<sup>9</sup> Of course, both medical and recreational use of marijuana are legal in Washington at this point. RCW 69.50.101.

protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur”) (citing *Brandenburg*.)

Under the current prevailing construction, RCW 9A.08.020 is unconstitutionally overbroad. *Brandenburg*, 395 U.S. at 447; *see Immelt*, 173 Wn.2d at 6. Because Ms. Newton was tried as an accomplice, his conviction must be reversed. *Immelt*, 173 Wn.2d at 6. She may not be retried on an accomplice theory. *Id.*

7. Respondent has failed to meet its burden of justifying the restrictions on speech imposed under the current interpretation of RCW 9A.08.020.

Respondent argues that accomplice liability only attaches to speech that occurs “during the commission of ‘the crime.’” Brief of Respondent, p. 26-27. This is incorrect: the statute (and WPIC 10.51) impose criminal liability for words that promote or facilitate the crime; such words need not occur during commission of the crime.

Respondent next argues that because conviction requires proof of knowledge, “no one could be convicted of unintentionally or consequentially promoting or facilitating a crime...” Brief of Respondent, p. 27. This is incorrect: neither the statute nor the WPIC requires proof of

intent.<sup>10</sup> Both permit conviction upon proof of knowledge, even in the absence of intent. RCW 9A.08.020; WPIC 10.51. *Brandenburg* requires proof that the speaker *intended* to promote or facilitate crime; this element is missing from accomplice liability in Washington. *Brandenburg*, 395 U.S. at 447.

The accomplice liability statute reaches the doctor who suggests that a patient would benefit from an illegal drug,<sup>11</sup> the lawyer who promises to provide free legal services to trespassing protesters, and the former gang member who advises others to “tag up the neighborhood [with graffiti] to let their presence be known.” *McCoy*, 282 F.3d at 632. In each case, the speaker’s words would promote or facilitate a particular crime (drug possession, trespass, graffiti) and incur criminal liability even absent the proof of intent required under *Brandenburg*.

As these examples show, the overbreadth is not purely theoretical; instead, there is “a realistic danger” that the statute will prohibit or chill protected speech. *Vincent*, 466 U.S. at 800-01; *Ashcroft*, 535 U.S. at 255. RCW 9A.08.020 is unconstitutional. *Brandenburg*, 395 U.S. at 447.

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<sup>10</sup> The *Coleman* court appears to equate the word “aid” with proof of intent. *State v. Coleman*, 155 Wn. App. 951, 960-61, 231 P.3d 212 (2010) (The statute “requires the criminal *mens rea* to aid...”) This equivalence does not originate in the language of the statute or in WPIC 10.51. Both make clear that the only mental state required for conviction is knowledge.

<sup>11</sup> See *Conant* 309 F.3d 629 at 638.

Accordingly, Ms. Newton's conviction must be reversed and his case remanded for a new trial. *Id.* She may not be retried under an accomplice theory. *Id.*

**CONCLUSION**

Ms. Newton's conviction for possession with intent must be reversed. Evidence seized pursuant to the overbroad search warrant must be suppressed, and the case remanded for a new trial. Ms. Newton may not be tried on a theory of accomplice liability.

Respectfully submitted on April 24, 2013,

**BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Danielle Newton, DOC #790279  
Washington Corrections Center for Women  
9601 Bujacich Rd. NW  
Gig Harbor, WA 98322

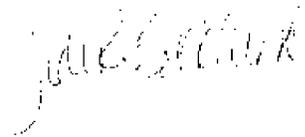
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 April 24, 2013.



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Jodi R. Backlund, WSBA No. 22917  
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# BACKLUND & MISTRY

**April 24, 2013 - 9:54 AM**

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