

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY 

No. 40772-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Alvin Witherspoon,**

Appellant.

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Clallam County Superior Court Cause No. 09-1-00496-9

The Honorable Judge Craddock Verser

**Appellant's Reply Brief**

**Corrected Copy**

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## ARGUMENT

### I. MR. WITHERSPOON'S ROBBERY CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE.

- A. The prosecution failed to produce evidence of actual force or fear under the law of the case.

The court's "to convict" robbery instruction included two different elements relating to Mr. Witherspoon's alleged use of force. CP 55. Under Instruction No. 11, the fourth element required proof "[t]hat force or fear was used by [Mr. Witherspoon] to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking..." CP 55.<sup>1</sup> The state did not object to this language; it therefore became the law of the case, even if it increased the state's burden at trial. *See, e.g., State v. Atkins*, 156 Wash.App. 799, 807-811, 236 P.3d 897 (2010), *State v. Hickman*, 135 Wash.2d 97, 954 P.2d 900 (1998)).

The prosecution could not establish the fourth element by proof that Mr. Witherspoon *threatened* the use of force. Instead, under the plain language of the instruction, the prosecution was required to prove "force or fear." CP 55. This it failed to do: Mr. Witherspoon did not touch or

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<sup>1</sup> By contrast, the third element required the prosecution to prove the "use or threatened use  
(Continued)

frighten Pittario (even though he allegedly claimed to have a gun). RP (4/12/10) 25-27, 40, 46-48. Accordingly, the evidence was insufficient to prove force or fear—and hence robbery—under the law of the case. Respondent argues that the evidence was sufficient to prove robbery under the statute. Brief of Respondent, pp. 2-9. This is irrelevant, since Mr. Witherspoon does not challenge the evidentiary sufficiency under the statute. *See* Appellant’s Opening Brief, pp. 26-29.

The prosecution did not introduce evidence establishing the use of actual force, and Respondent does not suggest otherwise. Brief of Respondent, pp. 2-9. The absence of argument on this point may be treated as a concession. *See In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). Nor can actual fear be inferred from the circumstances, given Pittario’s affirmative testimony that she was not afraid.<sup>2</sup> RP (4/12/10) 46, 48. Respondent’s factual assertions and argument to the contrary are without merit. *See* Brief of Respondent, p. 8 (citing *State v. Redmond*, 122 Wash. 392, 210 P. 772 (1922)).<sup>3</sup>

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of immediate force, violence, or fear of injury.” CP 55 (emphasis added).

<sup>2</sup> Even if she had not testified to her lack of fear, the circumstantial evidence did not suggest that she was afraid. RP (4/12/10) 25-27.

<sup>3</sup> In *Redmond*, the victim was robbed at gunpoint. He complied with the robbers’ demands, but was not asked if he was afraid when they held a gun to his head. *Redmond*, at 393. The Supreme Court upheld the conviction, finding sufficient circumstantial evidence of fear. *Id.*

Under the law of the case, the evidence was insufficient to convict Mr. Witherspoon of robbery. Accordingly, his robbery conviction must be reversed and the charge dismissed with prejudice. *Hickman, supra*.

B. The prosecution failed to establish the *corpus delicti* of robbery by proof independent of Mr. Witherspoon's statements.

Respondent does not contend that evidence independent of Mr. Witherspoon's statements established the crime of robbery. Brief of Respondent, pp. 9-11. This failure to argue the issue may be viewed as a concession that the record is devoid of such independent evidence. *Pullman, at* 212 n.4. Accordingly, Mr. Witherspoon's robbery conviction must be reversed and the charge dismissed for insufficient evidence. *State v. Dow*, 168 Wash.2d 243, 227 P.3d 1278 (2010); *State v. Brockob*, 159 Wash.2d 311, 328, 150 P.3d 59 (2006).

C. Division II should not follow *Dyson and Pietrzak*.

Divisions I and III have refused to apply the *corpus delicti* rule to exclude statements made prior to or during the commission of a crime. *See State v. Dyson* 91 Wash.App. 761, 959 P.2d 1138 (1998); *State v. Pietrzak*, 110 Wash.App. 670, 41 P.3d 1240 (2002). Respondent relies on these cases in arguing that the rule is inapplicable to Mr. Witherspoon's statement. Brief of Respondent, pp. 9-11.

Division II should not follow *Dyson* and *Pietrzak*, because those two cases were wrongly decided. The purpose of the rule, according to *Dyson* and *Pietrzak*, is to eliminate convictions based on false confessions.<sup>4</sup> *Dyson*, at 763; *Pietrzak*, at 680. But this rationale can be applied to all statements, whether made prior to, during, or after a crime. An individual can have many reasons for making a statement; the rule serves to ensure that ill-considered statements of any kind do not provide the basis for conviction absent some minimal independent proof of the essential elements. *Dow*, *supra*.

The Supreme Court has never expressly limited the *corpus delicti* rule to confessions or other statements made after completion of a crime. This Court should not restrict the rule to post-crime confessions.

**II. MR. WITHERSPOON’S TAMPERING CONVICTION INFRINGED HIS RIGHT TO A UNANIMOUS JURY UNDER WASH. CONST. ARTICLE I, SECTION 21.**

A jury must be unanimous as to the means by which the crime was committed, unless sufficient evidence of guilt supports each alternative means submitted to the jury. *State v. Lobe*, 140 Wash.App. 897, 903, 167 P.3d 627 (2007). If the evidence is *insufficient* as to any alternative means,

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<sup>4</sup> Another identified rationale is “promoting better law enforcement through investigation rather than inquisition.” *State v. Ray*, 130 Wash.2d 673, 683, 926 P.2d 904 (1996).

(Continued)

failure to provide a unanimity instruction requires reversal (absent a particularized expression of unanimity in the form of a special verdict). *Lobe*, at 902-906.

Here, the state presented sufficient evidence to establish only one of the three<sup>5</sup> alternative means of tampering. Specifically, the record suggests that Mr. Witherspoon attempted to induce Conklin to testify falsely or to improperly withhold testimony, and the prosecutor focused on this evidence in closing.<sup>6</sup> Exhibit 40, pp. 3-6; RP 120, 134-135.

The jury received instruction on all three alternative means of committing the crime, but was not instructed that a guilty verdict required unanimity as to the means. Under these circumstances, their verdict cannot be considered unanimous as to means for two reasons. First, as Respondent concedes, there was no evidence supporting one alternative means of committing tampering. Brief of Respondent, p. 11; RCW 9A.72.120(1)(b). Second, there was insufficient evidence supporting one alternative. Mr. Witherspoon told Conklin (during the recorded phone

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(Talmadge, J., concurring).

<sup>5</sup> See RCW 9A.72.120(1); *Lobe*, at 903.

<sup>6</sup> Respondent suggests that the prosecution “focused its argument on the fact Witherspoon told his fiancée not to speak with the police...” Brief of Respondent, p. 14. A review of the prosecutor’s closing argument casts doubt on this assertion. The prosecutor never clearly asserts that Mr. Witherspoon attempted to induce Conklin to withhold information from law enforcement (as opposed to withholding truthful testimony during court).

call): “I don’t want you to talk to them no more... To the Sheriff.” Exhibit 40, pp. 3-4, Supp. CP. Some jurors may have considered this proof of a violation of RCW 9A.72.120(1)(c); however, the evidence was insufficient for conviction—(a) there was no attempt at inducement, (b) Mr. Witherspoon did not seek to have Conklin withhold any information (since she had already provided her information to the police), and (c) Conklin had a right to remain silent because of her own potential criminal liability.<sup>7</sup>

Third, the prosecutor made a passing reference to Mr.

Witherspoon’s request that Conklin stop talking to the police:

[Y]ou clearly know from that exhibit that the Defendant thought Violet Conklin was going to be a witness for him because what did he say, I want you to talk to my lawyer, *I don’t want you talking to the police any more*. Clearly he thought she was going to be a witness....

RP (4/13/10) 133-134 (emphasis added).

Although the prosecutor’s argument did not specifically urge conviction under RCW 9A.72.120(1)(c), it contributed to the risk that jurors would improperly vote to convict under the third alternative means. *See Lobe, at* 907 (“[T]his brief argument advancing a second alternative means may have been what some jurors relied on when convicting Lobe...”)

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<sup>7</sup> During the conversation, Mr. Witherspoon expressed concern that Conklin might get herself in trouble if she spoke to police. Exhibit 40, Supp. CP.

Because the trial court failed to provide a unanimity instruction, Mr. Witherspoon's tampering conviction must be reversed. *Id.* Respondent asks the court to indulge two presumptions in favor of unanimity—first, that the jury could not possibly have convicted under RCW 9A.72.120(1)(b), and second, that unanimity should be presumed because substantial evidence supports the other two alternative means of tampering. Brief of Respondent, pp. 13-14.

The Court rejected this approach in *Lobe*, explaining the problem as follows:

[I]n order to affirm the conviction, we would be required to both (1) find unanimity based on the substantial evidence supporting each of two alternative means, and (2) presume that the jury relied only on the alternatives for which evidence was presented. In other words, the State in this one count is invoking two different presumptions to establish unanimity. In the context of a case where the jury was also improperly instructed on another similar count and where simple changes in the jury instructions could have avoided the error, we find there is too unstable a foundation to permit us to affirm the conviction.

*Lobe*, at 906.<sup>8</sup>

As in *Lobe*, affirming Mr. Witherspoon's tampering conviction would require reliance on two presumptions. The problem is even greater

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<sup>8</sup> Although this case involved only one count of tampering, this does not provide a basis to distinguish it from *Lobe*. Here, as in *Lobe*, the double presumption cannot support conviction.

here than in *Lobe*, because the evidence was insufficient to support one of the two alternatives Respondent claims the prosecution relied on at trial.

The trial court's failure to provide a unanimity instruction requires reversal of Mr. Witherspoon's tampering conviction. *Id.* Upon retrial, the jury may not be instructed under alternatives (b) and (c).

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

A. Defense counsel provided ineffective assistance by failing to seek instructions on the lesser-included offense of theft.

1. Mr. Witherspoon's argument remains viable even after the Supreme Court's decision in *Grier*.

The Supreme Court has recently restricted an appellant's ability to argue ineffective assistance when defense counsel makes a strategic decision not to pursue instructions on a lesser-included offense. *State v. Grier*, \_\_\_ Wash.2d \_\_\_, 246 P.3d 1260 (2011). However, two facts critical to the *Grier* decision are absent from this case.

First, Mr. Witherspoon's attorney did not propose and then affirmatively withdraw instructions on a lesser-included instruction. *See Grier*, at \_\_\_\_\_. In *Grier*, counsel's decision not to pursue a lesser-included offense was clearly a strategic choice, and one that ultimately rested on

counsel's shoulders.<sup>9</sup> Indeed, the *Grier* Court returned to this fact in its conclusion: "under the standard... set forth in *Strickland*, the withdrawal of jury instructions on lesser included offenses did not constitute ineffective assistance." *Grier*, at \_\_\_ (citing *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).<sup>10</sup>

Here, no mention was made of the lesser-included offense instructions during the court's on-the-record instructions conference. RP (4/13/10) 106-114. Nor does the record otherwise establish a tactical decision to forgo instructions on a lesser-included offense. Thus, unlike the attorney's performance in *Grier*, defense counsel's failure to pursue a lesser-included offense on Mr. Witherspoon's behalf cannot be evaluated as a strategic choice. *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.")

Second, in *Grier* the Court concluded from the record "that defense counsel consulted with Grier as to the exclusion of lesser included

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<sup>9</sup> *See Grier*, at \_\_\_ ("the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her counsel but ultimately rests with defense counsel.")

<sup>10</sup> Presumably, there remain some situations in which counsel's tactical decision to forgo a lesser-included offense would constitute deficient performance.

offenses and that Grier agreed to defense counsel’s withdrawal of these instructions.” *Grier*, at \_\_\_\_\_. Here, by contrast, there is no affirmative indication that counsel ever discussed the option of a lesser-included offense with Mr. Witherspoon. Nothing in the record suggests that Mr. Witherspoon was aware of the option to pursue a lesser-included offense, or that he acquiesced in a strategic decision to forgo such instructions.

These factual differences distinguish this case from *Grier*. In this case, counsel’s failure to request any lesser-included offense instructions cannot be analyzed as strategic choice. *Hendrickson*, at 78-79.<sup>11</sup> Accordingly, even after *Grier*, a defense attorney’s mistakes cannot be dismissed as legitimate strategy unless there is some support in the record—whether direct or indirect—that counsel actually was pursuing such a strategy. *Id.* Respondent’s argument (that appellant and his attorney “could have believed that an all or nothing strategy was the best approach”) finds no support in the record, and Respondent cites to none. Brief of Respondent, pp. 2-22.

2. *Grier* requires application of the *Strickland* standard when defense counsel fails to request applicable instructions on a lesser-included offense.

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<sup>11</sup> The *Grier* decision did nothing to undermine the Supreme Court’s decision in *Hendrickson*.

At first glance, the *Grier* decision appears to absolve counsel from any responsibility to act reasonably when choosing to forgo instructions on a lesser-included offense. *See, e.g., Grier, at* \_\_\_ (“[A]n objective determination as to whether a given level of risk is acceptable... overlooks the subjective nature of the decision to pursue an all or nothing approach.”) However, throughout the opinion, the Court makes clear that the *Strickland* standard governs. *See Grier, at* \_\_\_ (requiring counsel to meet an objective standard of reasonableness); \_\_\_ (noting that “[t]he relevant question is not whether counsel’s choices were strategic, but whether they were reasonable” (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000))); and \_\_\_ (“Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant’s prerogative to take this gamble, *provided her attorney believes there is support for the decision*”) (emphasis added).

Furthermore, the *Grier* Court did not purport to announce a *per se* rule that failure to request a lesser-included offense instruction could *never* constitute deficient performance. Instead, the Court abandoned *per se* rules in favor of the fact-specific requirements of the *Strickland* test. *See, e.g., Grier, at* \_\_\_ (“Today, we reaffirm our adherence to *Strickland*...”) and \_\_\_ (“Ineffective assistance of counsel is a fact-based determination that is ‘generally not amenable to *per se* rules’”) (citation omitted). In

other words, even if an accused person insists on pursuing an outright acquittal, counsel still must evaluate the options and make a reasonable decision, overruling the client where necessary. *See Grier*, at \_\_\_ (“[T]he decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her counsel but ultimately rests with defense counsel.”)

3. Counsel’s nonstrategic failure to pursue a lesser-included offense was objectively unreasonable in this third-strike case.

Because counsel’s conduct in this case cannot be dismissed as a strategic choice, it must be evaluated under the general standards set forth in *Strickland*.<sup>12</sup> Reversal is required if (1) defense counsel’s conduct fell below an objective standard of reasonableness and (2) there is “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*).

Under *Strickland*, an attorney must be familiar with the relevant legal standards and instructions appropriate to the representation. *See, e.g., State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*,

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<sup>12</sup> This showing is slightly more difficult after *Grier*, given the Supreme Court’s abandonment of the three-part test first outlined in *State v. Ward*, 125 Wash.App. 243, 104 P.3d 670 (2004).

19 Wash. App. 256, 263, 576 P.2d 1302 (1978). Given the absence of any suggestion counsel made a strategic choice to forgo instructions on theft, counsel's failure to propose appropriate instructions most likely was based on a misunderstanding of the law or an inaccurate analysis of the facts.

In this case, counsel's "decision" to forgo a lesser-included instruction was objectively unreasonable. First, counsel should have been familiar with the applicable law. *See, e.g., State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009) ("Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.")

Second, counsel should have assessed Mr. Witherspoon's chances of an outright acquittal on the robbery charges as zero, given the client's overwhelming credibility problems and the prosecution's evidence that he had sought to tamper with a witness. Viewed objectively, counsel could not reasonably have believed there was any chance of outright acquittal on the robbery charge.

Third, there was more than "a significant discrepancy between penalties for the greater and lesser offenses" (*Grier, at \_\_\_*); instead, the penalties were qualitatively different, consisting of (at most) 10 years in prison for theft, compared to a mandatory term of life in prison without possibility of parole for robbery. *See Sentencing Guidelines Commission, Adult Sentencing Manual* 2008, p. III-208.

Under these circumstances, counsel's failure to pursue a lesser-included offense—whether the result of strategic choice or simple error—was objectively unreasonable under *Strickland*. In addition, Mr. Witherspoon was prejudiced by his attorney's failure to request instructions on theft.

Mr. Witherspoon was entitled to instructions on theft under the two-prong test set forth in *State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978). Theft is a lesser-included offense of robbery under the legal prong of the *Workman* test. *See, e.g., State v. Herrera*, 95 Wash.App. 328, 330, 977 P.2d 12 (1999). Respondent erroneously argues that *first-degree* theft is not a lesser-included offense of second-degree robbery under the legal prong of the test. Brief of Respondent, p 19.

This is irrelevant;<sup>13</sup> Mr. Witherspoon's argument is that defense counsel should have sought instructions for theft, generically, without any limitation on the proper degree.<sup>14</sup> *See* Appellant's Opening Brief, Assignment of Error No. 17, Issue No. 4, *and* headings III C, III C 1.

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<sup>13</sup> It is also incorrect. First-degree theft qualifies as a lesser-included offense of robbery under the legal prong of the *Workman* test. *See, e.g., State v. O'Connell*, 137 Wash.App. 81, 95, 152 P.3d 349 (2007).

<sup>14</sup> Appellant's Opening Brief refers specifically to first-degree theft on two occasions. The first instance occurred on p. 37, and was an error; the reference should have been to theft, generically. The second instance, on p. 39, was intended to illustrate the qualitative difference between sentencing consequences between the greater and lesser offenses.

Respondent does not—and cannot—dispute that third-degree theft is a lesser-included offense of robbery. Brief of Respondent, pp. 17-20.

Next, Respondent erroneously asserts that theft was unavailable under the factual prong of *Workman*. Brief of Respondent, pp. 19-20. Some of Respondent’s argument is erroneously directed at first-degree theft, a crime not specifically raised by Appellant’s issues, assignments of error, or arguments (as noted above). Brief of Respondent, p. 20. The balance of Respondent’s argument supports Mr. Witherspoon’s position: “The evidence in this case permits a jury to rationally find Witherspoon obtained Ms. Pittario’s jewelry and other belongings *without* such a threat...” Brief of Respondent, p. 20 (emphasis in original).

A reasonable jury could have believed that Mr. Witherspoon stole from Pittario without the use or threatened use of force or fear. Because the evidence must be interpreted in favor of an instruction’s proponent, Mr. Witherspoon was entitled to have the jury instructed on theft. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000).

The failure to propose proper instructions constituted deficient performance under *Strickland*. Counsel’s deficient performance prejudiced Mr. Witherspoon, because there is a reasonable possibility that the jury would have acquitted him of robbery in favor of a theft conviction. The *Grier* court’s implied suggestion that this type of error can *never* prejudice

a criminal defendant is *dicta*, and should not be followed here. *See Grier, at \_\_\_* (“Because the jury returned a guilty verdict, we must presume that the jury found Grier guilty beyond a reasonable doubt of second degree murder.”) Indeed, the U.S. Supreme Court has held that allowing conviction on a lesser included offense “ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...” *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).<sup>15</sup> There is no reason to ignore the *Beck* Court’s analysis of the potential for prejudice, simply because the error arose in the context of attorney error rather than judicial error.

Because Mr. Witherspoon was deprived of effective assistance, his conviction must be reversed. The case must be remanded to the superior court for a new trial. *Strickland, supra*.

B. If the *corpus delicti* argument is not preserved for review, Mr. Witherspoon was deprived of the effective assistance of counsel.

Mr. Witherspoon rests on the argument set forth in the Opening Brief.

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<sup>15</sup> In *Beck*, which was a capital case, the Court explicitly reserved the question of whether or not the rule should apply in noncapital cases. *Beck, at* 638, n.14. Some federal courts only review a state court’s failure to give a lesser included instruction in noncapital cases when the failure “threatens a fundamental miscarriage of justice...” *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990).

- C. The trial judge infringed Mr. Witherspoon's right to effective assistance when he failed to adequately inquire into the nature and extent of the conflict and erroneously ignored his request.

Appellant rests on the argument set forth in the Opening Brief.

**IV. THE INFORMATION WAS DEFECTIVE BECAUSE IT FAILED TO OUTLINE THE ESSENTIAL FACTS SPECIFIC TO MR. WITHERSPOON'S ROBBERY CHARGE.**

An Information charging a criminal offense must outline (1) the essential legal elements of the offense and (2) the essential facts specific to the accused person's alleged crime. *State v. Leach*, 113 Wash.2d 679, 689, 782 P.2d 552 (1989). It is permissible to combine these two requirements by alleging specific facts that support each legal element. *Id.*

The rule requires a prosecuting authority to charge crimes with reference to the specific facts of the offense, rather than relying solely on the abstract and general language of the statute. *Id.* This reflects the historical practice that has prevailed in Washington since before the adoption of the state constitution.

For example, an 1888 indictment charging first-degree murder used the following language:

Henry Timmerman is accused by the grand jury...of the crime of murder in the first degree, committed as follows: He (said Henry Timmerman) in the said county of Klickitat, on the 3d day of October, 1886, purposely, and of his deliberate and premeditated malice, killed William Sterling, by then and there purposely, and of his deliberate and premeditated malice, shooting and mortally wounding the said William Sterling with a pistol which he (the

said Henry Timmerman) then and there held in his hand, and from which mortal wound the said William Sterling instantly died.

*Timmerman v. Territory*, 3 Wash.Terr. 445, 448, 17 P. 624 (1888). The *Timmerman* Indictment thus contains a recitation of both the legal elements required for conviction and the specific conduct committed by the accused person.

In this case, by contrast, the Information alleged only three specific facts: the offense date (November 12<sup>th</sup>, 2009), the county in which the conduct occurred (Clallam County), and the alleged victim's name (B. Pittario). CP 21. With the exception of these three details, the Information included nothing more than the bare, abstract language of the statute. CP 21. It did not inform Mr. Witherspoon of the specific conduct he was charged with having committed.

Because the Information lacked the minimal factual specificity required by *Leach*, it was factually deficient. *Leach, supra; see also Auburn v. Brooke*, 119 Wash.2d 623, 629-630, 836 P.2d 212 (1992). Respondent's argument that the Information "pleads the essential elements of the crime" is beside the point. Brief of Respondent, p. 40. Mr. Witherspoon does not challenge the legal sufficiency of the Information. See Appellant's Opening Brief, pp. 44-46. The bare-bones abstract recitation of statutory elements—although legally sufficient—does not

relate the charge to Mr. Witherspoon's specific conduct, as required under *Leach*.

Because the essential facts are missing from the Information, Mr. Witherspoon need not demonstrate prejudice. *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000). It is therefore irrelevant that Mr. Witherspoon "was aware of the specific facts" charged. The obligation is on the prosecuting authority to include the essential facts. *Leach*, at 689. Once it has done so, the defense may clear up any lingering vagueness by requesting a bill of particulars, as Respondent suggests. Brief of Respondent, p. 41. If the Information is deficient, the accused person's failure to request a bill of particulars makes no difference. *Id.*

The Information's factual deficiency requires reversal, regardless of Mr. Witherspoon's knowledge, his failure to request a bill of particulars, or any lack of demonstrable prejudice. *Id.* The "zealously guarded" right to a constitutionally sufficient Information requires this result. *State v. Royse*, 66 Wash.2d 552, 557, 403 P.2d 838 (1965); U.S. Const. Amend. V, VI, XIV; Wash. Const. Article I, Sections 3 and 22.

**V. JUDGE VERSER VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE.**

The official transcript in this case reflects Judge Verser's disclosure that he may have represented Mr. Witherspoon in the past, Mr.

Witherspoon's statement ("I have objections"), and Judge Verser's failure to address the matter further. RP (4/12/10) 15-16. According to Respondent, "the State believes [sic] there is a typographical error in the verbatim report of proceedings," based on the "context and tone" of the hearing. Brief of Respondent, p. 30.

RAP 9.5(c) governs objections to the Report of Proceedings, and requires a party to serve and file objections to a verbatim report of proceedings within 10 days after receipt. Under the rule, objections and proposed amendments "must be heard by the trial judge before whom the proceedings were held for settlement and approval." RAP 9.5. Respondent failed to avail itself of this procedure, and thus cannot complain about the contents of the VRP.<sup>16</sup>

Respondent's reliance on *Russell* is misplaced, because the error in that case—whether a misstatement made by counsel or a typographical error made by the court reporter—did not affect the merits of the issue under consideration. *State v. Russell*, \_\_\_ Wash.2d \_\_\_, \_\_\_ n.1, \_\_\_ P.3d \_\_\_ (2011). Furthermore, the Supreme Court noted the likelihood of error, but did not purport to correct the transcript. *Id.*

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<sup>16</sup> Nor has Respondent sought enlargement of the time for objection, or otherwise asked the Court to waive the provisions of RAP 9.5(c).

Judge Verser's recollection (that he may have previously represented the accused), his failure to inquire into Mr. Witherspoon's objections, and his statement that he trusted the prosecutor create an appearance of fairness problem. These three things provide at least some evidence of potential bias. *State v. Dugan*, 96 Wash.App. 346, 354, 979 P.2d 85 (1999). Accordingly, Mr. Witherspoon's conviction must be reversed and the case remanded for a new trial. *Id.*

**VI. MR. WITHERSPOON'S LIFE SENTENCE WAS UNCONSTITUTIONALLY CRUEL.<sup>17</sup>**

A cruel sentence cannot stand. Wash. Const. Article I, Section 14; *State v. Roberts*, 142 Wash.2d 471, 506, 14 P.3d 713 (2000). Mr. Witherspoon's life sentence is cruel because it is disproportionate considering the nonviolent nature of the offense (and Mr. Witherspoon's lack of violent criminal history),<sup>18</sup> the purpose of the POAA (to punish "the most dangerous criminals" and "serious, repeat offenders"),<sup>19</sup> the significantly lower punishment imposed for second-degree robbery in

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<sup>17</sup> Appellant's Eighth Amendment argument, outlined in the Opening Brief, will not be repeated here.

<sup>18</sup> Criminal history is often considered in discussions regarding proportionality. *See, e.g., State v. Magers*, 164 Wash.2d 174, 194, 189 P.3d 126 (2008).

<sup>19</sup> *See* RCW 9.94A.555.

other jurisdictions,<sup>20</sup> and the punishment imposed for other offenses in Washington.<sup>21</sup> *State v. Fain*, 94 Wash.2d 387, 397, 617 P.2d 720 (1980).

Respondent's primary argument on this issue—that the POAA is not unconstitutionally cruel in the abstract—ignores the as-applied challenge to the sentence actually raised by the appellant. Brief of Respondent, p. 42-43. Similarly, Respondent's analysis of the first, second, and fourth *Fain* factors neglects the specifics of Mr. Witherspoon's case, focusing instead on statutory definitions and other generalities. Brief of Respondent, pp. 43-45. Respondent's discussion of the third *Fain* factor fails to address data from other jurisdictions, and ignores the problems with *Rivers* outlined in Appellant's Opening Brief. Brief of Respondent, p. 44; *see* Appellant's Opening Brief, pp. 53-55 (citing *State v. Rivers*, 129 Wash.2d 697, 921 P.2d 495 (1996)).

Respondent's analysis is mechanical, lacking in specifics, and ultimately unpersuasive. Accordingly, Mr. Witherspoon's cruel and disproportionate sentence must be vacated and the case remanded for a new sentencing hearing. *Fain, supra*.

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<sup>20</sup> *See* Appellant's Opening Brief, pp. 48-55.

<sup>21</sup> The maximum penalty for non-persistent offenders convicted of robbery is ten years. RCW 9A.20.021. The average sentence imposed is less than 20 months. Table 2, Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing* (2010). The only offense for which life without parole is authorized is aggravated first-degree murder. RCW  
(Continued)

**VII. THE PROSECUTION PRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT MR. WITHERSPOON IS A PERSISTENT OFFENDER.**

Appellant rests on the argument set forth in the Opening Brief.

**VIII. MR. WITHERSPOON’S PRIOR OFFENSES ARE ELEMENTS THAT ALTER THE CRIME OF CONVICTION FROM A CLASS B FELONY INTO A “SUPER-FELONY,” AND THUS MUST BE PROVED TO A JURY BEYOND A REASONABLE DOUBT.**

A prior conviction that “alters the crime that may be charged” is an essential element that must be proved to a jury beyond a reasonable doubt. *State v. Roswell*, 165 Wash.2d 186, 192, 196 P.3d 705 (2008). When a prior conviction elevates an offense from one category to another, it “actually alters the crime” charged. *Id.* For example, where a prior conviction elevates a crime from a misdemeanor to a felony, the prior conviction is an element of the felony charge. *Id.*

In this case, Mr. Witherspoon’s prior strike convictions elevated the charged offense from a Class B felony (with a maximum penalty of 10 years in prison) to a “super-felony” (with a mandatory penalty of life in prison without parole). As in *Roswell*, he was entitled to have his prior convictions proved to a jury beyond a reasonable doubt. *Id.*

Respondent does not articulate a rational basis for distinguishing between Mr. Witherspoon and the defendant in *Roswell*. Brief of

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10.95.030(1).

Respondent, p. 50-51. Nor does the lead opinion in *McKague*, the case upon which Respondent relies.<sup>22</sup> *State v. McKague*, \_\_\_ Wash.App. \_\_\_, 246 P.3d 558 (2011).<sup>23</sup>

Mr. Witherspoon's case should be controlled by *Roswell*.

Accordingly, his life sentence must be vacated and the case remanded for a new sentencing hearing. *Roswell*.

**IX. MR. WITHERSPOON'S LIFE SENTENCE VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY DETERMINATION BEYOND A REASONABLE DOUBT THAT HE HAD TWO PRIOR QUALIFYING CONVICTIONS.**

Appellant rests on the argument set forth in his Opening Brief.

**X. THE IMPOSITION OF A LIFE SENTENCE WITHOUT POSSIBILITY OF PAROLE VIOLATED MR. WITHERSPOON'S STATE CONSTITUTIONAL RIGHT TO DUE PROCESS.**

Appellant rests on the argument set forth in the Opening Brief.

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<sup>22</sup> Instead, the *McKague* decision sidesteps the issue by pointing out that there that the Supreme Court already has already upheld the POAA against an unrelated equal protection challenge. *McKague*, at \_\_\_.

<sup>23</sup> Interestingly, neither Respondent nor the *McKague* court cite the only other published opinion addressing this issue in the wake of *Roswell*. See *State v. Langstead*, 155 Wash.App. 448, 453-457, 228 P.3d 799 (2010).

**CONCLUSION**

Mr. Witherspoon's robbery and tampering convictions must be reversed. The robbery charge must be dismissed with prejudice, or remanded for a new trial (along with the tampering charge).

If the convictions are not reversed, Mr. Witherspoon's life sentence must be vacated and the case remanded for sentencing.

Respectfully submitted on April 28, 2011.

**BACKLUND AND MISTRY**



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U.S. DISTRICT COURT  
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BY \_\_\_\_\_

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief (corrected copy) to:

Alvin Witherspoon, DOC #998026  
Washington State Penitentiary  
1313 N. 13th Ave  
Walla Walla, WA 99362

and to:

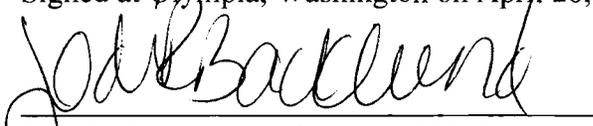
Clallam County Prosecutor  
223 E. Fourth Ave.  
Pt. Angeles, WA 98362

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

All postage prepaid, on April 28, 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 April 28, 2011.



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