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Supreme Court No. 88854-0

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,
Petitioner,
vs.
Joel Condon
Appellant/Respondent**

Yakima Cause No. 09-1-00544-9
The Honorable Judge David A. Elofson

ANSWER TO PETITION

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I. THE PETITION SHOULD BE DENIED BECAUSE THE CASE DOES NOT MEET ANY OF THE CRITERIA SET FORTH IN RAP 13.4(B).

The Supreme Court will accept review of a Court of Appeals decision only if the decision conflicts with another appellate decision, raises a significant constitutional question, or presents an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). In this case, Petitioner raises no issues that merit review.

A. The Court of Appeals decision does not conflict with any controlling Supreme Court authority. Furthermore, Petitioner conceded the very issue it now seeks to raise in the Supreme Court.

An accused person has the “unqualified right” to jury instructions on an included offense if there is “even the slightest evidence” that s/he is guilty only of that offense. RCW 10.61.003; RCW 10.61.010; *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984). The evidence is taken in a light most favorable to the accused person. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). This true even if the state files alternative charges. *State v. Schaffer*, 135 Wn.2d 355, 957 P.2d 214 (1998).

In the Court of Appeals, Petitioner conceded that *Schaffer* requires instructions on an included offense even if the accused person faces alternative charges. *See* Brief of Respondent, p. 14; *see also* Opinion, p. 11 n. 1. Now, Petitioner seeks to repudiate that position. Without reference to *Schaffer*, Petitioner now argues that Mr. Condon was not entitled to instructions on second-degree murder in the absence of evidence that he committed only intentional murder to the exclusion of

first-degree felony murder. Petition, pp. 9-12.

The argument raised by Petitioner has repeatedly been rejected by the Supreme Court. It is well-settled that a person facing alternative charges is entitled to instructions on an included offense of either alternative. *Schaffer* 135 Wn.2d at 358-359; *see also State v. Berlin*, 133 Wn.2d 541, 552-553, 947 P.2d 700 (1997) (manslaughter instructions appropriate in prosecution for alternative charges of intentional and felony murder); *State v. Warden*, 133 Wn.2d 559, 562-565, 947 P.2d 708 (1997) (manslaughter instructions appropriate in prosecution for alternative charges of premeditated and felony murder).

This is so even if the facts supporting the lesser instruction do not exclude conviction for both alternative charges. *Schaffer* 135 Wn.2d at 358-359; *Berlin*, 133 Wn.2d at 552-553; *Warden*, 133 Wn.2d at 562-565. In *Schaffer*, for example, the Supreme Court reversed a conviction for felony murder because of the trial court's failure to instruct on manslaughter. Under the facts, manslaughter was included within the charge of premeditated murder but not within the felony murder alternative. *Schaffer* 135 Wn.2d at 358-359.

Instead of addressing *Schaffer*, Petitioner focuses on *State v. Bowerman*, 115 Wn.2d 794, 802 P.2d 116 (1990). The Supreme Court decided *Bowerman* in the pre-*Berlin* era. At that time, the *Workman* test¹ proscribed lesser-included instructions unless the lesser offense was included within every alternative means of

committing the greater offense. *See, e.g., State v. Davis*, 121 Wn.2d 1, 7, 846 P.2d 527 (1993); *State v. Curran*, 116 Wn.2d 174, 182, 804 P.2d 558 (1991). The Supreme Court articulated the test as follows:

[I]f, when viewed from a perspective where only the statutory elements are considered, it is possible to commit the “greater offense” without necessarily committing the purported lesser offense, an instruction on the lesser offense is not warranted. The logical consequence of this rule is that whenever there are alternative means of committing a “greater” crime, there can be no lesser included offense unless the alternative means each overlap to the extent that they are not mutually exclusive.

State v. Lucky, 128 Wn.2d 727, 735, 912 P.2d 483 (1996) *overruled by Berlin* (citing *Davis* and *Curran*).

The portion of *Bowerman* on which Petitioner relies was abrogated by *Berlin*. The Supreme Court reaffirmed *Berlin* in *Schaffer*, and has never hinted at a return to the *Lucky* test. Mr. Condon’s case is controlled by *Schaffer*. The Court of Appeals followed *Schaffer*. The court’s decision does not conflict with a decision of the Supreme Court; accordingly, review cannot be justified under RAP 13.4(b)(1).

B. The Court of Appeals decision does not conflict with any other Court of Appeals decision.

Where the evidence supports instruction on an included offense, a court’s failure to give the requested instructions is reversible error: The Supreme Court “has never held that, where there is evidence to support a lesser-included-offense instruction, failure to give such an instruction may be harmless.” *Parker*, 102

¹ *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

Wn.2d at 163-64. Since *Parker*, the Supreme Court has found only one exception to this general rule. *State v. Southerland*, 109 Wn.2d 389, 391, 745 P.2d 33 (1987) (failure to instruct on trespass as a lesser-included offense of burglary required reversal of burglary conviction, but was harmless as to assault convictions).

The exception presented in *Southerland* is not applicable here. Given a choice, jurors might have convicted Mr. Condon of second-degree murder rather than premeditated murder. He does not argue that the instructional error affected his convictions on the other charges.

The Court of Appeals has found harmless error in limited circumstances. Specifically, the failure to instruct on one included offense is harmless if jurors actually rejected an intermediate included offense in voting to convict on the greater offense. *State v. Guilliot*, 106 Wn. App. 355, 368, 22 P.3d 1266 (2001).²

Thus, in *Guilliot*, the court's failure to instruct on manslaughter did not require reversal of a first-degree murder conviction where the jury considered and rejected the intermediate included offense of second-degree murder. *Guilliot*, 106 Wn. App. at 368-369. Similarly, in *Hansen*, convictions for first-degree kidnapping was allowed to stand despite the court's failure to instruct on unlawful imprisonment because the jury considered and rejected the intermediate included offense of second-degree kidnapping. *Hansen*, 46 Wn. App. at 298. In *Barriault*, failure to in-

² See also *State v. Hansen*, 46 Wn. App. 292, 296, 730 P.2d 706 (1986) *aff'd as modified*, 737 P.2d 670 (1987); *State v. Barriault*, 20 Wn. App. 419, 427, 581 P.2d 1365 (1978).

struct on second-degree manslaughter was harmless because jurors considered and rejected the intermediate included offense of first-degree manslaughter and convicted the defendant of murder. *Barriault*, 20 Wn. App. at 427.

These decisions do not apply in Mr. Condon's case.³ He was charged with premeditated murder, and the trial court refused to instruct jurors on an included offense. RP⁴ 1082-1085. Unlike the juries in *Guilliot*, *Hansen*, and *Barriault*, the jury here did not consider and reject an intermediate included offense. Because of this, the error here is not harmless under the principles those cases outlined, and there is no conflict between this decision and the decisions in *Guilliot* and *Hansen*.

Petitioner attempts to manufacture a conflict with *Guilliot* and *Hansen* by stretching the holdings of those cases. In essence, Petitioner suggests that the logic of those decisions should be adapted and applied to cases in which jurors convict the defendant of one alternative means of committing an offense and thus don't reach another alternative means outlined in the instructions. The state contends that such a verdict is equivalent to rejecting an intermediate included offense. Petition, p. 13-14.

This is incorrect. An alternative means of committing a particular crime is

³ Furthermore, Mr. Condon argued a due process violation stemming from the court's failure to instruct on second-degree murder. Harmless error analysis thus requires application of the stringent test for constitutional error, as argued elsewhere in this Answer. *See City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

⁴ The majority of the transcript is sequentially numbered, and is cited as RP. Portions that are not sequentially numbered are cited as RP (date).

neither a lesser nor an included offense of that crime. In this case, the jury voted to convict on premeditated murder. Jurors followed the court's instructions and did not reach the felony murder alternative. Jurors did not consider and reject an offense included within premeditated murder because they were not provided instructions on any included offenses. CP 205-240. As the Court of Appeals noted, "[t]he instructions given with respect to [premeditated and felony murder] did not draw the jury's attention to the difference between premeditation and intent, as instruction on second degree murder would have." Opinion, p. 15.

There is no conflict between the decision here and either *Guilliot* or *Hansen*. Thus review is not appropriate under RAP 13.4(b)(2). Furthermore, Petitioner's argument makes little if any sense.

Petitioner's proposal to stretch *Guilliot* and *Hansen* contravenes *Parker's* admonition regarding the general inapplicability of harmless error analysis to this situation. 102 Wn.2d at 163-64. The state's argument also invites the court to speculate on the jury's deliberative process, something the Supreme Court has always been loathe to do: "[I]t is not within the province of the court to say that the defendant was not prejudiced by the refusal of [instructions on an included offense], or to speculate upon probable results in the absence of such instructions." *State v. Young*, 22 Wash. 273, 276, 60 P. 650 (1900) (quoted with approval by *Parker*, 102 Wn.2d at 163-164). Finally, Petitioner's harmless error analysis contravenes the core holding of *Berlin*: instructions on an offense included within one alternative

means of committing the charged crime are appropriate even where jurors are instructed on another alternative means that does not include the lesser offense. *Berlin*, 133 Wn.2d at 552-553.

The unpublished decision reversing Mr. Condon's conviction conflicts with no decision of the Court of Appeals. Review is inappropriate. RAP 13.4(b)(2).

II. IF REVIEW IS ACCEPTED, ADDITIONAL ISSUES MUST ALSO BE REVIEWED FOR A FAIR AND COMPLETE RESOLUTION OF THE CASE.

Although the Court of Appeals ruled in Mr. Condon's favor on one issue and reversed his conviction, it decided five issues against him and declined to reach two other issues. If this Court accepts review of the issue identified by the Petitioner, it should also review the following issues:

1. Did Mr. Condon's conviction for aggravated first-degree murder infringe his Fourteenth Amendment right to due process because it was based on insufficient evidence of premeditation?
2. Did the trial judge's refusal to instruct on second-degree intentional murder violate Mr. Condon's Fourteenth Amendment right to due process and his state constitutional right to a jury trial?
3. Did the erroneous admission of tainted identification testimony violate Mr. Condon's Fourteenth Amendment right to due process?
4. Did the trial judge violate Mr. Condon's Sixth and Fourteenth Amendment right to present a defense by excluding expert testimony undermining a critical prosecution witness?
5. Did the prosecutor's flagrant misconduct disparaging the role of counsel and vouching for the evidence violate Mr. Condon's Sixth and Fourteenth Amendment rights to counsel, to a jury trial, to due process, and to a decision based solely on the evidence?
6. Was Mr. Condon denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel when his attorney failed to object to inadmissible and highly prejudicial evidence and failed to request instructions limiting the jury's consideration of such evidence?

7. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments because it criminalizes speech that is not directed at and likely to incite imminent lawless action?

8. Did the trial court violate Mr. Condon's Fourteenth Amendment right to due process by sentencing him with an offender score of nine in the absence of any proof that he had prior felony convictions?

C. Mr. Condon's conviction for aggravated first-degree murder violated his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.

Evidence is insufficient for conviction unless, when viewed in the light most favorable to the state, it permits a rational trier of fact to find the essential elements beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In this case, conviction for aggravated first-degree murder required proof that Mr. Condon premeditated the intent to kill Ramirez. CP 216, 217, 219; *see also* RCW 9A.32.030.

The state did not present direct evidence of premeditated intent. Circumstantial proof of premeditated intent requires some showing that the perpetrator planned the killing ahead of time or demonstrated clear intent to kill over more than a moment in time. *State v. Gentry*, 125 Wn.2d 570, 599, 888 P.2d 1105 (1995) (summarizing cases).⁵ The circumstantial evidence here was insufficient, even when considered in a light most favorable to the state.

Mr. Condon's intent (according to Lozano) was to commit robbery. RP 792.

⁵ The sole exception to this general rule appears to be *State v. Massey*, 60 Wn. App. 131, 145, 803 P.2d 340 (1990). In *Massey*, the Court of Appeals concluded that bringing a weapon to the scene of a killing can be sufficient to allow the issue of premeditation to go to the jury. *Id.* at 145. *Massey* relied on *dicta* from *State v. Bingham*, 105 Wn.2d 820, 828, 719 P.2d 109 (1986). Its result is there-
(Continued)

He never made any statements showing a plan to kill anyone. He didn't know the target of the planned robbery, and apparently arrived at the wrong house. RP 1123. He didn't immediately shoot anyone upon entering the house; instead, he fired only after Ramirez responded aggressively. RP 745, 796-797. Neither shot was a head shot or a direct shot into the torso.⁶ The shots were fired in quick succession. RP 746. He allegedly told jailhouse informant Bruce Davis that he'd "screwed up on a home invasion" and that he could easily have shot his accomplice by accident during the incident. RP 1001-1002, 1004.

These facts establish that Mr. Condon was reacting to the struggle; they do not show a premeditated intent to kill. Accordingly, the evidence was insufficient and the conviction violated Mr. Condon's Fourteenth Amendment right to due process. *Engel*, 166 Wn.2d at 576. The court should accept review and hold that the circumstantial evidence was insufficient to prove premeditated intent to kill. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

D. The trial court's refusal to instruct on second-degree murder denied Mr. Condon his Fourteenth Amendment right to due process.⁷

Refusal to instruct on an included offense *may* violate the right to due pro-

fore questionable.

⁶ One of the bullets went through both thighs; the other went through Ramirez's elbow and into his chest cavity. RP 775-781.

⁷ The Court of Appeals reversed Mr. Condon's conviction on statutory grounds. It did not address his constitutional argument regarding the failure to instruct on second-degree murder.

cess under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988); *see also Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).⁸ Here, the jury was forced to either acquit or convict Mr. Condon; they did not have “the ‘third option’ of convicting on a lesser included offense...” *Beck*, 447 U.S. at 634. Because the trial judge refused to instruct the jury on the inferior-degree offense, Mr. Condon was denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic*. The Supreme Court should accept review and hold that refusal to instruct on an applicable included offense violates due process. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

E. Mr. Condon’s conviction was based on tainted identification testimony derived from an unduly suggestive procedure.

Admission of an eyewitness’s identification violates due process if it is “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968); *State v. McDonald*, 40 Wn. App. 743, 700 P.2d 327 (1985); U.S. Const. Amend. XIV.⁹ A substantial likelihood of irreparable misidenti-

⁸ The *Beck* court explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck*, 447 U.S. at 638, n.14.

⁹ Whether or not an identification procedure is unduly suggestive is a mixed question of law and fact, subject to review *de novo*. *See, e.g., Humphrey Industries, Ltd. v. Clay Street Associates, LLC*, 170 Wn.2d 495, 502, 242 P.3d 846, 242 P.3d 846 (2010); *See also United States v. Gallo-Moreno*, 584 F.3d 751, 757 (7th Cir. 2009).

fication occurs when the corrupting effect of a suggestive identification outweighs factors indicating reliability. *Neil v. Biggers*, 409 U.S. 188, 199-200, 34 L.Ed.2d 401, 93 S.Ct. 375 (1972). These factors include (1) the opportunity of the witness to view the perpetrator, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the witness' certainty at the time of the identification, and (5) the length of time between the crime and the identification. *Id.*

Here, the government used an impermissibly suggestive procedure that created a likelihood of irreparable misidentification. State agents twice brought Mr. Condon into Gregorio's presence and indicated that he was the person suspected of murdering her husband. Only after this occurred was she asked to pick him from a lineup.¹⁰ RP 20, 756-757. Under the totality of the circumstances, this procedure was so impermissibly suggestive as to create a very substantial likelihood of irreparable misidentification. First, Gregorio had only a limited opportunity to view the perpetrator. RP 738-743. Second, her attention was focused on getting her children to safety and then struggling with Lozano. RP 738-739, 740, 742. Even if she looked at the shooter, she was likely preoccupied with his gun rather than his face.¹¹ Third, her prior description was extremely generic. RP 757. Fourth, she was uncertain of her identification at the time she made it. RP 758. Fifth, the lineup occurred

¹⁰ Despite this, the trial judge failed to analyze the five factors outlined in *Biggers*. RP 379-383.

¹¹ This is known as weapon-focus. RP 576; *see also* Laura Beil, "The Certainty of Memory Has Its Day in Court," *New York Times* (11/28/2011) p. D1.

nearly three months after the killing, so her memory was likely distorted. CP 70.

Under these facts, Gregorio should not have been allowed to testify that Mr. Condon was the shooter.¹² The circumstances were impermissibly suggestive, and created a substantial likelihood of irreparable misidentification. *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).

The Supreme Court should accept review and hold that Gregorio's identification of Mr. Condon as the shooter was tainted by the government's impermissibly suggestive procedure and violated his Fourteenth Amendment right to due process. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

F. The trial court violated Mr. Condon's Fourteenth Amendment right to due process by excluding relevant and admissible evidence.

Due process guarantees an accused person a meaningful opportunity to present a complete defense. U.S. Const. Amend. XIV; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). This includes the right to introduce relevant and admissible evidence. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

¹² Gregorio's selection of Mr. Condon at the lineup should have been suppressed. Her in-court identification might have been admissible had the prosecution been able to establish an independent source for the evidence. *See, e.g., State v. Johnson*, 132 Wn. App. 454, 459, 132 P.3d 767 (2006). On the existing record, there does not appear to have been an independent source.

Expert testimony is admissible if it will help the jury understand the evidence or determine a fact in issue. ER 702. Helpfulness is construed broadly. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). The rule favors admissibility in doubtful cases. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). Expert testimony on perception, memory, and problems with eyewitness testimony are commonly admitted in a significant majority of federal and state courts. *State v. Cheatam*, 150 Wn.2d 626, 645-646, 81 P.3d 830 (2003). Here, the trial court erred by excluding such testimony.

Gregorio's identification of Mr. Condon was a key element of the state's case. Her perception, memory, and ability to correctly identify the perpetrator were all likely affected by weapon focus, cross-racial identification issues, and stress, all of which are significant factors identified by the *Cheatam* court.¹³ *Cheatam*, 150 Wn.2d at 649-650. As noted above, her testimony was tainted by an impermissibly suggestive procedure: Mr. Condon was brought into her presence twice and identified as the murderer before she tentatively picked him from a lineup. RP 72-110, 756; RP (3/31/09). She claimed to be 100% confident in her identification, even though she'd initially been uncertain.¹⁴ The proffered expert testimony would have directly addressed problems with the identification procedure and her inflated sense

¹³ Furthermore, the prosecutor disparaged Mr. Condon's attempts to cast doubt on Gregorio's identification. RP 1155. Expert testimony would have enabled Mr. Condon to counter these criticisms.

¹⁴ Gregorio's confidence was evidently an important point from the prosecutor's point of view; he mentioned it more than five times in closing. RP 1137, 1153-1154, 1156, 1157.

of confidence. CP 60-78.

Gregorio's identification testimony was central to the prosecution's case. No physical evidence tied Mr. Condon to the crime. The other witnesses implicating him had severe credibility problems. In the absence of expert testimony, the jury had no reason to doubt Gregorio's account.

The Supreme Court should accept review and hold that the trial court violated Mr. Condon's due process right to present a defense by excluding expert testimony on perception, memory, and problems with eyewitness testimony. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

G. The prosecutor committed misconduct that violated Mr. Condon's Sixth and Fourteenth Amendment rights to counsel, to a jury trial, to due process, and to a decision based solely on the evidence.

Right to Counsel. It is improper for a prosecuting attorney to comment disparagingly on defense counsel's role or to impugn the defense lawyer's integrity. *State v. Thorgerson*, 172 Wn.2d 438, 451-452, 258 P.3d 43 (2011). Here, the prosecutor went beyond the misconduct in *Thorgerson*, by directly and unambiguously accusing defense counsel of "skillful" trickery, and suggested that this was the job of a defense attorney. RP 1156.

The prosecutor also outlined what he called "Defense 101," which included distracting the jury from the evidence, creating resentment toward the police, impugning the police for laziness or incompetence, confusing witnesses, and confus-

ing jurors about the law. RP 1154, 1155, 1157. The court compounded the problem by overruling defense counsel's objection to the most egregious misconduct. *State v. Gonzales*, 111 Wn. App. 276, 283-284, 45 P.3d 205 (2002). This had the effect of "giving additional credence to the argument." *Id.*

Right to jury trial and due process. The right to due process and the jury trial right guarantee an accused person a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). It is misconduct for a prosecutor to vouch for evidence, to suggest that information not presented at trial supports conviction, or to appeal to the jury's passion and prejudice. *State v. Jones*, 144 Wn. App. 284, 293-94, 183 P.3d 307 (2008); *State v. Perez-Mejia*, 134 Wn. App. 907, 915-916, 143 P.3d 838 (2006).

Here, the prosecutor told jurors that the evidence of Mr. Condon's guilt was more substantial than the prosecution's evidence in other criminal cases. RP 1153. This comment was an improper personal opinion that referenced "facts" outside the record. It violated Mr. Condon's right to a jury verdict free from improper influence. *Jones*, 144 Wn. App. at 293-94; *Perez-Mejia*, 134 Wn. App. at 915-916.

The prosecutor's misconduct here violated Mr. Condon's right to counsel, his right to a jury trial, and his right to due process. The Supreme Court should accept review and reverse his convictions. This case presents significant issues of

constitutional law that are also of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

H. Mr. Condon was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). An appellant claiming ineffective assistance must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Here, defense counsel unreasonably failed to object to the admission of Lozano's unredacted recorded interview from March of 2010. The recording was inadmissible under ER 802. Because of the circumstances under which Lozano's statements were made, they did not qualify for admission under ER 801(d)(1)(ii); *State v. Thomas*, 150 Wn.2d 821, 865, 83 P.3d 970 (2004); *State v. Makela*, 66 Wn. App. 164, 168-169, 831 P.2d 1109 (1992).

In addition, even if the recording were admissible under ER 801(d)(1)(ii), defense counsel should have sought an instruction prohibiting jurors from considering it as substantive evidence. *Makela*, 66 Wn. App. at 168; *State v. Redmond*, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). Counsel's failure to do so allowed jurors to consider the evidence as substantive evidence of guilt. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Furthermore, defense counsel should have sought to redact irrelevant and prejudicial portions of the recording pursuant to ER 403 and

ER 404(b). The recording contained references to drugs and gang involvement, and painted Mr. Condon in a bad light. Ex. 106, p. 32-33.

Counsel's failure to object cannot be dismissed as strategic. It is clear that counsel wished to have the evidence excluded, but couldn't think of a basis for objecting. RP 829, 835.

The Supreme Court should accept review and hold that Mr. Condon was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

I. The accomplice liability statute is overbroad because it criminalizes pure speech that is not directed at and likely to incite imminent lawless action.

The First Amendment protects speech advocating criminal activity: "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Because of this, 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).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech protected by the First Amendment. Under RCW 9A.08.020, one may be convicted as an accomplice if s/he, acting "[w]ith knowledge that it will promote or facilitate the commission of the crime... aids or

agrees to aid [another] person in planning or committing it.” The statute does not define “aid.” No Washington court has limited the definition of aid to bring it into compliance with the U.S. Supreme Court’s admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) “imminent lawless action.” *Brandenburg*, 395 U.S. at 447-449.

Washington courts, including the trial judge here, have adopted a broad definition of aid: “The word ‘aid’ means all assistance whether given by words, acts, encouragement, support, or presence.” *See* WPIC 10.51; CP 221-222, 229. By defining “aid” to include assistance... given by words... [or] encouragement..., the instruction criminalizes a vast amount of pure speech protected by the First Amendment, and runs afoul of the U.S. Supreme Court’s decision in *Brandenburg*.

Thus, for example, Washington’s accomplice liability statute would criminalize the speech protected by the U.S. Supreme Court in *Hess v. Indiana*, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (“We’ll take the fucking street later...”), in *Ashcroft* (virtual child pornography found to encourage actual child pornography), and *Brandenburg* itself (speech “‘advocat(ing) * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform’”) (quoting Ohio Rev. Code Ann. s 2923.13). Each of these cases involved words or encouragement made with knowledge that the words or encouragement would promote or facilitate the commission of crime, yet the Supreme Court found this speech—which would subject

each speaker to criminal prosecution under RCW 9A.08.020—to be protected by the First Amendment.

It is possible to construe the accomplice statute in such a way that it does not reach constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. *Brandenburg*, 395 U.S. at 447. However, such a construction has yet to be imposed. The prevailing construction—as expressed in WPIC 10.51 and adopted by the trial court—is overbroad; RCW 9A.08.020 is unconstitutional. *Brandenburg*, 395 U.S. at 447.

The Supreme Court should accept review and hold that RCW 9A.08.020 is unconstitutionally overbroad. This significant question of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

J. The sentencing court failed to properly determine Mr. Condon’s criminal history and offender score.

Following conviction, the sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). Due process requires the prosecution to prove criminal history by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 914, 287 P.3d 584 (2012). An offender’s silence at sentencing cannot provide the basis for a criminal history finding. *Id.*, at 912.

Mr. Condon stipulated that he had two prior felony convictions. CP 154-155. The prosecutor failed to prove any additional criminal history. Mr. Condon

should have been sentenced with an offender score of two. Instead, the court found that Mr. Condon had 15 prior felonies and sentenced him with an offender score of 9+. CP 312-315.

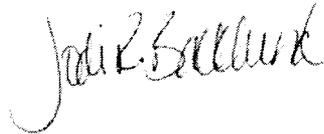
The Supreme Court should accept review and hold that the court's criminal history finding, offender score calculation, and sentence violated Mr. Condon's Fourteenth Amendment right to due process. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

III. CONCLUSION

For the foregoing reasons, this Court should not accept review. If review is accepted, this Court should review the additional issues listed above.

Respectfully submitted on June 13, 2013.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of this Answer to the State's Petition postage pre-paid, to:

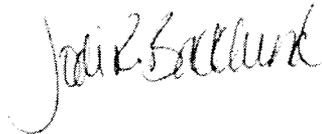
Joel Condon, DOC #820953
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

With the permission of the recipient(s), I emailed an electronic version of this answer to:

Yakima County Prosecuting Attorney
kevin.eilmes@co.yakima.wa.us

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 June 13, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

OFFICE RECEPTIONIST, CLERK

To: Backlund & Mistry; Kevin Eilmes
Subject: RE: 88854-0-State v. Joel Condon-Answer to Petition

Rec'd 6-13-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Sent: Thursday, June 13, 2013 12:15 PM
To: OFFICE RECEPTIONIST, CLERK; Kevin Eilmes
Subject: 88854-0-State v. Joel Condon-Answer to Petition

Attached is the Answer to Petition.

Thank you.

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