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STATE OF WASHINGTON
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No. 94813-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KENNETH LINVILLE,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION

The State charged Kenneth Linville with the offense of leading organized crime, requiring the state to prove Mr. Linville engaged in criminal profiteering activity. In a prosecution for leading organized crime the Legislature, in RCW 9A.82.085, has prohibited joining any offense which is not within the statutory definition of “criminal profiteering.” As this Court has previously determined, the Legislature has provided a specific statutory definition of “criminal profiteering” in RCW 9A.82.010(4), limiting it to the specific offense enumerated in that statute.

Ignoring the limitations of RCW 9A.82.085 and the specific statutory definition of “criminal profiteering,” the State charged the one count of leading organized crime and joined 140 additional counts. None of these counts were alleged to be a part of Mr. Linville’s criminal profiteering activity, and more than 50 of them do not meet the statutory definition of criminal profiteering at all. Despite the plain limits of RCW 9A.82.085, defense counsel never objected to the improper joinder of these offenses. Had counsel objected, the clear requirements of the statute would have required the trial court to sever those counts. Instead, Mr. Linville was convicted of more than 50 counts; four of which required 240 months mandatory prison time.

The Court of Appeals concluded defense counsel's failure to be aware of and raise the clear mandate of RCW 9A.82.085 was unreasonably deficient performance. The Court also concluded that but for that deficient performance, the result of Mr. Linville's trial would have plainly been different. Thus, the court found Mr. Linville was denied his Sixth Amendment right to the effective assistance of counsel.

B. ISSUES PRESENTED

Where a person is charged with the offense of leading organized crime, RCW 9A.82.085 limits the offenses which may be joined at trial to only those offenses alleged to be a part of the criminal profiteering activity. Where more than 50 of the counts against Mr. Linville involved crimes which are not within the broad statutory definition of "criminal profiteering activity" the Court of Appeals properly concluded Mr. Linville was denied his Sixth Amendment right to the effective assistance of counsel by defense counsel's failure to object to the improper joinder of those offenses at trial.

C. STATEMENT OF THE CASE

In late 2013, authorities began noticing an increase in residential burglaries in Thurston County. RP 477-78. Police noticed similarities among the burglaries including the fact that the vast majority involved

entry through the front door and involved use of a tool to pry and force the door open. RP 478-80.

The police investigation led them to Kelly Olsen, who acknowledged her involvement but deflected blame to Mr. Linville as the one responsible. RP 485-86.

Police also arrested Jessica Hargrave after she sold numerous items stolen in a burglary. RP 514. Ms. Hargrave admitted her involvement in a substantial number of the burglaries for which Mr. Linville was ultimately charged. RP 517-18.

Upon searching the apartment where Mr. Linville lived with Ms. Hargrave and Teya Harris, police recovered numerous items belonging to several homeowners whose homes had been burglarized. RP 578-80.

The State charged Mr. Linville with 138 counts, including: one count of leading organized crime, 41 counts of burglary, 39 counts of trafficking in stolen property, numerous counts of theft, numerous counts of possession of stolen property, firearm possession counts, and possession of controlled substances. CP 365-391. The State also alleged four firearm enhancements. CP 370, 377, 386, 390.

A number of persons who actively participated in the crimes received substantially reduced sentences. In turn, each testified to their involvement, but pointed the finger at Mr. Linville as the instigator of the

crimes. Ms. Hargrave, despite her admission to participating in the vast majority of burglaries, pleaded guilty in exchange for a Drug Offender Sentencing Alternative of 90 months. RP 977. Ms. Harris, who participated in several burglaries, whose car was regularly used to commit the offenses, and in whose apartment a large amount of stolen property was recovered, entered drug court with a sentence of 22 to 29 months. RP 4247-48. David Knutson, Mr. Linville's drug dealer and in whose home a large amount of stolen property was recovered, including guns, entered drug court with a sentence of 18 to 20 months. RP 3526-28. Ms. Olsen, who participated in a number of burglaries, pleaded guilty with a standard range of 63 to 84 months. RP 3122-23. Avery Garner, who participated in some of the burglaries, pleaded guilty with a standard range of 43 to 57 months. RP 1378-79.

A jury convicted Mr. Linville of 138 counts and four firearm enhancements. CP 528-712.

Mr. Linville received a sentence in excess of 76 years in prison. CP 878.

On appeal he argued in part that defense counsel's representation of him violated the Sixth Amendment's guarantee of the effective assistance of counsel. Specifically, he argued that had defense counsel objected to the improper joinder of more than 50 offenses under RCW

9A.82.085 the jury could not have convicted him of those offenses. The convictions for those offenses, by themselves, contributed more than 20 years of mandatory prison time.

The Court of Appeals agreed that counsel's failure to object to the improper joinder constituted deficient performance which prejudiced Mr. Linville. Finding Mr. Linville was denied his Sixth Amendment right to counsel, the court reversed Mr. Linville's convictions.

D. ARGUMENT

1. Defense counsel's failure to object to 52 improperly joined offenses deprived Mr. Linville of his Sixth Amendment right to the effective assistance of counsel.

The Sixth Amendment guarantees the effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An attorney's performance constitutes ineffective assistance of counsel when her actions "fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010) (quoting *Strickland*, 466 U.S. at 688); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Counsel's failure "to research or apply relevant law [is] deficient performance." *Kyllo*, 166 Wn.2d at 868. The Court of Appeals properly concluded defense counsel's failure to object based upon RCW 9A.82.085 was deficient performance which prejudiced Mr. Linville. Further, the court properly found that but for counsel's error the result of this trial would have been different as a proper objection would have barred 52 of the convictions and resulted in a substantially lower sentence.

In reaching that conclusion the Court of Appeals properly gave effect to the plain language of RCW 9A.82.010 and the court's application of that statute is consistent with opinions of this Court and the Court of Appeals.

a. Because the State charged Mr. Linville with leading organized crime, RCW 9A.82.085 did not permit joinder of any other offense at trial unless the State alleged the offense is a "part of the [a] pattern of criminal profiteering activity."

Count 1 charged Mr. Linville with the offense of leading organized crime in violation of RCW 9A.82.060. CP 365. That statute provides

A person commits the offense of leading organized crime by:
(a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity.

"Pattern of criminal profiteering activity"

means engaging in at least three acts of criminal profiteering In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events.

RCW 9A.82.010(12). RCW 9A.82.010(4), in turn, defines the term “criminal profiteering,” providing first

“Criminal profiteering” means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following . . .

RCW 9A.82.010(4) then sets forth a list of 46 specific crimes with the relevant statutory cites. As is clear from its plain language, “[t]he statute has a very detailed definition of ‘pattern of criminal profiteering activity.’” *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820, 838, 355 P.3d 1100 (2015). It is defined “as commission of specific enumerated felonies for financial gain.” *Id* at 837 (citing RCW 9A.82.010(4)).

When a person is charged with leading organized crime, RCW 9A.82.085, limits those offenses which may be joined in the prosecution.

In a criminal prosecution alleging a violation of RCW 9A.82.060[Leading Organized Crime]. . . . the state is barred from joining any offense other than the offenses

alleged to be part of the pattern of criminal profiteering activity. . . .

Id.

In this case, numerous offenses that do not fall within the statutory definition of “criminal profiteering” were nonetheless joined with the leading organized crime charge contrary to RCW 9A.82.085. That statute affords no discretion to the trial court. An objection based upon RCW 9A.82.085 to the improper joinder of counts would have required the court to sever 52 counts and four accompanying firearm enhancements from the remaining counts. Defense counsel never made such a motion.

Instead, defense counsel did make a motion asking the court to exercise its discretion to sever the burglaries from one another under CrR 4.4. RP at 28-33. In doing so defense counsel shouldered the burden of attempting to demonstrate the “potential” prejudice of joint trials, rather than point to legislative recognition of prejudice in RCW 9A.82.085. Rather than seize a remedy to which he was entitled, he sought a discretionary remedy for which he carried the burden of persuasion.

In the course of his motion, counsel did mention that severing the leading organized crime charge could alleviate the prejudice. RP 33. But he never argued it was a mandatory outcome under RCW 9A.82.085. Nor, did counsel renew that motion as required by CrR 4.4.

b. The Court of Appeals properly gave effect to the plain language of RCW 9A.82.010 and the court's application of that statute is consistent with opinions of this Court and the Court of Appeals.

This Court

[d]etermine[s] legislative intent from the statute's plain language, "considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole."

State v. Conover, 183 Wn.2d. 706, 711, 355 P.3d 1093 (2015) (quoting *Association of Washington Spirits & Wine Distributors. v. Washington State Liquor Control Board*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015)).

The Court of Appeals accepted Mr. Linville's contention that the plain language of RCW 9A.82.010(4) limits the acts which constitute criminal profiteering to acts chargeable as one of the enumerated crimes. Opinion at 6-7. Breaking the somewhat convoluted structure apart, a natural reading of the statute provides "criminal profiteering" is:

- (1) any act, including any anticipatory or completed offense, committed for financial gain,
- (2) that is chargeable or indictable under the laws of the state in which the act occurred

and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year,

- (4) regardless of whether the act is charged or indicted,

(5) as any of the following [enumerated offenses].

Opinion at 6. This is the construction given the statute by this Court and the Court of Appeals in prior cases.

Again, *Trujillo* found RCW 9A.82.010 provides a detailed definition of “criminal profiteering activity” limited to “specific enumerated” offenses. 183 Wn.2d at 837 (citing RCW 9A.82.010(4)). That conclusion echoes an early ruling by the Court of Appeals that “[c]riminal profiteering’ is any act committed for financial gain that is chargeable as one of the predicate felonies enumerated in RCW 9A.82.010(4).” *State v. Munson*, 120 Wn. App. 103, 106, 83 P.3d 1057 (2004); *see also, Winchester v. Stein*, 135 Wn.2d 835, 849, 959 P.2d 1077 (1998); *Robertson v. GMAC Mortg. LLC*, 982 F. Supp. 2d 1202, 1209 (W.D. Wash. 2013).

The Court of Appeals employed the very same definition in this case. In fact, it is the very construction the State gave the statute at trial. In closing argument the State displayed a slide identifying “qualifying crimes” for leading organized crime and listed only first and second degree theft, trafficking, and identity theft. CP 520. As the State agreed at trial, the plain language of the statute limits the “qualifying crimes,” to

use the State's phrase, those the which fall within the definition of "criminal profiteering activity;" the statute limits

There can be no doubt that the list of crimes in RCW 9A.82.085 is exclusive. Nothing in the plain language of RCW 9A.82.085(4) suggests the listed crimes "are examples meant only to guide a court's thinking." *In re Post Sentence Review of Leach*, 161 Wn.2d 180, 186, 163 P.3d 782 (2007). *Leach* concluded a list of 47 crimes defined as "crimes against persons" was exhaustive, as the statute did not contain language such as "similar offenses" or "like offenses." *Id.* Such language is absent from RCW 9A.82.085 as well. The plain language makes clear the opposite is true.

First, if the statute meant to include any criminal act committed for financial gain it could have simply said that. Second, if the Legislature meant to include any crime committed for financial gain there would be no reason for a list at all, much less a list that singles out 46 distinct types and degrees of crimes, from murder to unlawful shipment of cigarettes. RCW 9A.82.010(4)(a)(II). There would be no reason to list eight specific types of theft, while omitting others. There would be no reason to specifically cite "assault as defined in RCW 9A.36.011 and 9A.36.021" (first and second degree assault), if the legislature intended to include all assaults committed for financial gain.

Every legislative act is presumed to have a material purpose. *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978).

Since its enactment, the Legislature has amended the list in RCW 9A.82.085 to add new crimes. *See e.g.*, Laws 2013, ch. 302 § 10 and Laws 2012, ch. 139 § 1 (subsection (4) (ss) (rr) and (tt) adding crimes related to trafficking and promoting commercial sexual abuse of minor); Laws 2008, ch. 108 § 24 (subsection (4)(qq) adding mortgage fraud). If the Legislature intended criminal profiteering to include any crime committed for financial gain, or any “similar or like” crime, these additions were wholly unnecessary and meaningless. Plainly the Legislature only intended to include the listed crimes within the definition of “criminal profiteering activity.” *See Trujillo*, 183 Wn.2d at 837.

c. The State’s interpretation of RCW 9A.82.010(4) contradicts its position at trial, fails to give effect to the statute’s plain language, renders portions of the statute meaningless, and creates substantial limitations on a number of other provision of the Criminal Profiteering Act.

Abandoning the position it held at trial, the State now insists the statute should be read to define criminal profiteering to mean:

- (1) any act, including any anticipatory or completed offense, committed for financial gain,
- (2) that is chargeable or indictable under the laws of the state in which the act occurred and,

(3) if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following [enumerated offenses].

Importantly, by the State's reading the list of enumerated offenses modifies only the provision of the statute pertaining to out-of-state acts, and thus **any** criminal act in Washington can be a part of criminal profiteering activity. The State's interpretation of the statute must be rejected for a number of reasons. The first of which is that it is contrary to the construction given the statute by this Court and the Court of Appeals in previous cases.

i. The State's interpretation renders large portions of RCW 9A.82.010 meaningless.

Beyond its contradiction of established case law, the State's strained reading of the statute renders portions of RCW 9A.82.010(4) entirely superfluous. "A court must not interpret a statute in any way that renders any portion meaningless or superfluous." *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014).

The State contends the language "would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year" applies only to out-of-state conduct and is than modified by the list of

enumerated offenses. However, the list of enumerated offenses includes several misdemeanors. Moreover, because the list includes a number of Class C felonies and also includes anticipatory offenses, an attempt, solicitation or conspiracy to commit those Class C offenses are also gross misdemeanors. RCW 9A.28.020(3)(d); RCW 9A.28.030(2); RCW 9A.28.040(3)(d).

Given that, under the State's reading, combining the two requirements that the out-of-state act must be chargeable as a felony in Washington and constitute one of the listed offenses creates an insurmountable hurdle in interpreting the statute as a whole. For example there is no circumstance in which a first instance of the unlawful practice of a business or profession is chargeable as a felony in Washington and yet that offense is included. RCW 9A.82.010(4)(ii). The same is true for numerous other enumerated offenses in RCW 9A.82.010 from an attempted theft of telecommunication services to conspiracy to traffic in insurance claims. RCW 9A.82.010(4)(ee)(g). In each case, it is impossible to charge these offenses as a felony in Washington.

To accept the State's interpretation one would have to assume the Legislature, while requiring the offenses be chargeable as a felony in Washington, nonetheless included numerous misdemeanors in the list of enumerated offenses. That construction would render substantial portions

of the statute completely meaningless contrary to basic rules of statutory construction. *K.L.B.*, 180 Wn.2d at 742.

This absurd outcome is avoided by applying the interpretation employed by the Court of Appeals and *Trujillo*. By that plain interpretation the statute requires out-of-state conduct to be indictable in the foreign state as a felony offense and that it be chargeable in this state as one of the listed offenses. This reading substantially limits extraterritorial jurisdiction. This interpretation does not require a Washington offense be charged or even chargeable as a felony so long as it is one of the listed offenses, which would allow some but not all Washington misdemeanors to be predicate acts. If the legislature had intended any criminal act to serve as a predicate offense it could have simply said so. This Court's interpretation in *Trujillo*, relied upon by the Court of Appeals here, gives full effect to all the language of the statute.

- ii. The State's interpretation of RCW 9A.82.010(4) creates substantial limitations on the civil remedies provided by the Criminal Profiteering Act.

Additionally, the State's interpretation creates substantial problems in applying other provisions of the Criminal Profiteering Act (CPA). When interpreting a statute a court must do so in context of the act in which the statute is found. *State, Dep't of Ecology v. Campbell & Gwinn*,

L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002). First, by the State’s reading the phrase “regardless of whether the act is charged or indicted” refers only to out-of-state acts. Thus, any act occurring in Washington act must be charged in order to be a part of a “pattern of criminal profiteering activity.” While that may not cause problems in criminal prosecutions under the Act, it would substantially limit the civil remedies provided for in RCW 9A.82.100.

Courts have concluded those civil remedy provisions are intended to be independent of the criminal penalties in the Act. *State v. Barnes*, 85 Wn. App. 638, 654, 932 P.2d 669 (1997). Indeed, RCW 9A.82.100(13) says: “A private civil action under this section does not limit any other civil or criminal action under this chapter or any other provision.” But under the State’s reading of RCW 9A.82.010(12), no civil action, private or public, can exist for acts committed in Washington unless the State first files criminal charges. This is because the the State’s reading limits “pattern of criminal profiteering activity” to only charged offenses. Beyond making the civil proceeding dependent upon the criminal, that also substantially limits a private party’s ability to seek a civil remedy. If the State does not charge the offense, the private party has no civil recourse at all.

As an example, RCW 9A.82.100(2) permits injunctive relief to “prevent, restrain, and remedy a pattern of criminal profiteering.” By the State’s definition there could be no “pattern of criminal profiteering activity” unless the acts have already resulted in the filing of charges. That means the acts must have already occurred and thus an injunction could not possibly prevent or restrain the commission of those acts. The State’s current interpretation of statute drastically limits the CPA’s civil remedies.

iii. The problems the State perceives with the Court of Appeals interpretation of RCW 9A.82.010(4) are not real.

The State contends the Court of Appeals gave too narrow a construction of RCW 9A.84.010(4), insisting that because RCW 9A.82.010(12) requires the State to prove at least three acts formed a pattern, the State must be permitted to join for trial any act that is connected to that pattern even if those acts are not themselves within the definition of criminal profiteering activity. Petition for Review at 10. That contention ignores the plain language of RCW 9A.82.010(12). That subsection provides in relevant part:

“Pattern of criminal profiteering activity” means engaging in at least three acts of criminal profiteering In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events. . . .

The State focuses only on the requirement of the second sentence that it must prove a nexus between the acts. From this the State concludes it must also prove a nexus between collateral acts even if they do not fit the definition of “criminal profiteering activity.” However, the first sentence makes clear the nexus must exist between “three acts of criminal profiteering.” Thus, if an act or acts does not fit the definition of “criminal profiteering” there is no requirement that the State prove a nexus between those collateral acts and the acts that actually fit the definition of “criminal profiteering activity.” Finally, the State imagines a double jeopardy problem arises where RCW 9A.82.085 mandates inclusion of theft charges that are a part of the pattern of criminal profiteering but bars joint prosecution of a burglary committed at the same time. Petition at 15-16. The State contends, the prior prosecution of the theft will bar a subsequent prosecution of the burglary charge. However, the state’s hypothetical is premised upon long overturned case law and no such problem exists. *Id.* (citing *State v. Laviolette*, 118 Wn.2d 670, 826 P.2d 155 (1995); *overruled*, *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995)).

Laviolette recognized that convictions, and thus separate prosecutions, of both theft and burglary are permissible under the *Blockburger* test. 118 Wn.2d at 677. Only by applying the same evidence test from *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L.Ed.2d

548 (1990), did the *Laviolette* Court find a double jeopardy violation. 118 Wn.2d at 678-79 The United States Supreme Court soon thereafter overruled the *Grady* test. *United State v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Thus, the only portion of *Laviolette* that remains valid is the conclusion that separate prosecutions of both burglary and theft do not violate double jeopardy. That is also consistent with the burglary anti-merger statute. RCW 9A.52.050.

e. If RCW 9A.82.010(4) is ambiguous the Court must adopt the interpretation most favorable to Mr. Linville.

The State's new reading of the statute seems born of expedience rather than from an interpretation of the CPA as whole or even the plain language of RCW 9A.82.010(4) itself. Even assuming the State's new construction of the statute is reasonable, this Court must still adopt the interpretation offered by Mr. Linville. Where a statute is subject to more than one reasonable interpretation the statute is ambiguous. *State v. Jacobs*, 154 Wn.2d 596, 600–01, 115 P.3d 281 (2005). In such cases, the rule of lenity requires the Court adopt the reading most favorable to the defendant. *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998).

To be sure, Mr. Linville's interpretation is reasonable, as it was employed by the Court of Appeals in this case and several prior cases. It is

the interpretation previously employed by this court in *Trujillo*. Further, it is the interpretation the State gave the statute at trial. Given its thus far universal application, Mr. Linville's interpretation is undeniably a reasonable one. As such, even if the State's interpretation is reasonable, Mr. Linville's interpretation of RCW 9A.82.010(4) must prevail. To constitute "criminal profiteering activity" and act must be chargeable as one of the offenses enumerated in RCW 9A.82.010(4).

f. Defense counsel's error prejudiced Mr. Linville.

As set forth above, the Court of Appeals properly interpreted the various provisions of the Criminal Profiteering Act. Because they do not fall within the statutory definition of criminal profiteering activity, RCW 9A.82.085 mandated severance of the 52 offenses. Counsel's failure to be aware of the statute and object to the improper joinder of those offenses was plainly deficient. *Kyllo*, 166 Wn.2d at 862 (reasonable conduct for an attorney includes knowing the relevant law). That deficient performance requires reversal if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla*, 559 U.S. at 366.

Had counsel objected based on RCW 9A.82.085 to the impermissible joinder of offenses in Mr. Linville's trial on the leading organized crime charge, Mr. Linville would not be serving a mandatory

minimum sentence of 240 months for the firearm enhancements attached to the four counts of first degree burglary as those charges could not be joined. Mr. Linville would not be serving consecutive sentences for the four firearm possession counts and four theft of a firearm counts as those counts could not be joined. Beyond that, without the unlawful possession of a firearm charges, the jury would not have heard of his prior conviction.

In its closing argument, the State specifically pointed to the improperly joined burglaries as evidence of Mr. Linville's guilt for leading organized crime. CP 518-19. But for the improper joinder of the burglary counts, the State could not make that argument.

There is no doubt that but for counsel's performance, Mr. Linville could not have been convicted of 52 of the counts at trial. Beyond simply a reasonable probability of a different outcome, there is clear proof the outcome would have been different. Applying this standard, the Court of Appeals properly concluded Mr. Linville was prejudiced by counsel's performance. Opinion at 9.

The State's argument to the contrary is based entirely on its speculation that it could have gained those added convictions had it actually conducted a separate trial. But the outcome of a hypothetical trial is not relevant to the analysis of what impact counsel's deficiency had on *this* trial. Hypothetical verdicts by a hypothetical jury do not alter the

correctness of the conclusion that but for counsel's failure to object to the improper joinder of 52 offenses in *this* trial, the result of *this* trial would have been different. Because counsel's error prejudiced Mr. Linville reversal is required. *Padilla*, 559 U.S. at 366; *Kyllo*, 166 Wn.2d at 862.

2. If this Court concludes the Court of Appeals was incorrect the matter must be remanded to the Court of Appeals to permit it to resolve the remaining issue in Mr. Linville's appeal.

Because it found the violation of Mr. Linville's Sixth Amendment right to counsel required reversal the Court of Appeals did not address five additional arguments raised by Mr. Linville. Opinion at 1, n.1. If this Court were to reverse the opinion of the Court of Appeals, Mr. Linville's right to appeal under Article I, section 22 requires the Court of Appeals to resolve those claims as they provide a separate basis to reverse some or all of Mr. Linville's convictions.

First, and as discussed above, RCW 9A.82.085 limits the offenses which may be joined for trial to those "offenses *alleged* to be part of the pattern of criminal profiteering activity." (Emphasis added.). Here, the Information does not allege any offense(s) "to be part of the pattern of criminal profiteering activity" for purposes of the leading organized crime charge. CP 365-93. The language for the leading organized crime charge merely alleges Mr. Linville acted with intent "to engage in a pattern of

criminal profiteering activity” without specifying the three or more acts which constituted that pattern. CP 365. Similarly, the charging language for the remaining 140 counts does not allege that any of these acts constituted part of the required pattern. Because the State did not allege that any of the remaining 140 counts were a part of the pattern, RCW 9A.982.085 precluded the State from joining any of the remaining counts at Mr. Linville’s trial.

Mr. Linville raised this argument in the Court of Appeals. Because it reversed Mr. Linville’s convictions based upon counsel’s deficient performance, the Court of Appeals declined to reach this argument. Opinion at 3, n.8.

Moreover, Mr. Linville also contended the mandate of RCW 9A.82.085 required the trial court on its own to sever the improperly joined charges.

RCW 9A.82.085 represents a legislative conclusion that a fair trial cannot be had on either class of offense if they are tried together; *i.e.*, the joint trial was manifestly prejudicial. Any other conclusion would render RCW 9A.82.085 superfluous to the discretionary severance rule of CrR 4.4. RCW 9A.82.085 represents a legislative conclusion that a joint trial for leading organized crime and offenses which do not constitute a part of the pattern of criminal profiteering activity is manifestly unfair. A

manifestly unfair trial deprives a defendant of due process in violation of the Fourteenth Amendment. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) (“only a fair trial is a constitutional trial.”). Mr. Linville can challenge his manifestly unfair trial regardless of whether he objected. A trial court must follow the law regardless of the arguments raised by the parties before it. *State v. Quismundo*, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008). Again, the Court of Appeals declined to reach this argument as it reversed the convictions on other grounds.

The remaining unresolved claims are:

- (1) Whether a conviction for trafficking in stolen property may rest on accomplice liability;
- (2) Whether the Double Jeopardy Clause of the Fifth Amendment permits 39 separate convictions of trafficking in stolen property; and
- (3) Whether the State’s amendment of the Information to charge a greater offense after the close of evidence violated Article I, section 22.

RAP 12.1 generally requires a court decide a case based upon the issues raised in the briefs. Because those claims were not addressed by the Court of Appeals Mr. Linville has not had an opportunity to exhaust those claims for purposes of federal habeas review.

If this Court reverses the Court of Appeals because there are several unresolved issues, the Court should remand the matter to the Court of Appeals to permit resolution of those claims.

E. CONCLUSION

Mr. Linville was denied the effective assistance of counsel. The Court of Appeals properly concluded that violation of his Sixth Amendment right required reversal of Mr. Linville's convictions.

Respectfully submitted this 19th day of January, 2018.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Petitioner,)	
)	NO. 94813-5-II
v.)	
)	
KENNETH LINVILLE,)	
)	
Respondent.)	

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