No. 37774-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

IN RE THE PERSONAL RESTRAINT OF

CHRISTOPHER RAMIREZ,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

Marla L. Zink
LUMINATA, PLLC
212 Broadway E. #22815
Seattle, Washington 98102
(360) 726-3130

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington Court of Appeals Cases

Other Federal Cases

Cases from Other States

Constitutional Provisions

Statutes

Rules

Other Authorities

A. INTRODUCTION

Christopher Ramirez stood trial for two counts of premeditated murder in the first degree while armed with a firearm and faced a sentence of actual or effective life without parole. Despite the incredibly high stakes and the modest evidence against him, Ramirez's trial attorney provided ineffective assistance in five regards: counsel did not move to exclude patently unreliable eyewitness identification evidence, he failed to introduce impeachment evidence against the state's key eyewitness, he did not object to the state's submission of uncharged sentencing enhancements to the jury, he failed to advise Ramirez of the correct sentencing implications upon conviction, and he abandoned Ramirez at sentencing by accepting the state's high-end sentencing recommendation and presenting no mitigation evidence or argument. Viewed independently or together, the Court should reverse and remand for a new trial or resentencing.

B. STATEMENT OF THE CASE

1. Arturo and Juan Gallegos were murdered without witness.

Arturo and Juan Gallegos[1] were killed by gunfire at their apartment complex on November 1, 2014. *E.g.*, RP 369-70, 450-59, 848-88, 895-96. No one witnessed their deaths or saw the assailants. App. 5

[1] First names are used for the brothers, who share a last name. No disrespect is intended.

(Slip Op.). The murder weapon was never discovered. *See* RP 508, 523, 531, 763.

2. Carlton Hritsco, who lived a couple blocks away, spoke to someone on the night of the murders. Although he twice did not identify Ramirez, he became a key witness for the state.

Following a K-9 track, the police met Carlton Hritsco, who lived two blocks from the brothers' apartment complex. RP 475-76. Hritsco told the officers that, a couple hours before, he talked outside in "pitch black" for 15 or 20 minutes with a person he later described as Indian- or Hispanic-looking, 5'8" tall, and 180 pounds, and who called himself "Demon." RP 475-76, 513-18, 522. Hritsco said he would "definitely" be able to identify the man if shown a photograph. RP 485-86. Officers showed Hritsco photographs of five individuals identified in a database as "Demon," including Christopher Ramirez. RP 476-78, 486, 518. Hritsco did not identify anyone. RP 476-78.[2]

Within 24 hours, the police showed Hritsco a second photographic lineup that again included Ramirez. RP 949, 1053-56. Hritsco still thought he would "definitely" be able to identify the man with whom he spoke. RP 1056. He again did not pick Ramirez or any other person. RP 1055.

[2] Later, Hritsco could not recall being shown photographs that night. RP 518-19.

3. The state charged Christopher Ramirez.

Despite Hritsco's repeated failure to identify Ramirez as the person he spoke with, the police charged Ramirez, who is the nephew of the deceased, with two counts of premeditated murder in the first degree while armed with a firearm and one count unlawful possession of a firearm.[3] The information alleges the murders were "part of a common scheme or plan" and charges Ramirez as being armed with a firearm under RCW 9.94A.533(3). CP 1-2, 232-33. It does not contain any statutory citation to or language of aggravating factors or circumstances codified at RCW 9.94A.535 or 10.95.020.

Months after Ramirez was charged, Hritsco saw him on the news as the suspect. RP 519, 1163-64.

4. The limited evidence at trial was circumstantial.

Defense counsel did not interview Hritsco before the trial. RP 58, 63-64. During pretrial proceedings, the prosecution revealed that Hritsco recently told them he had seen Ramirez on the news and could now recognize him as the conversant, "Demon." RP 47-65; CP 218-36. The state planned for Hritsco to identify Ramirez at trial. RP 62; CP 224-26.

[3] CP 1-2 (information), 232-33 (amended information); RCW 9A.32.030; RCW 9.41.040; RCW 9.94A.533(3).

Trial counsel moved to exclude the late identification as a discovery violation, which the court denied. CP 218-36. But counsel did not move to exclude the identification on any other basis.[4]

At trial, the state produced evidence that Ramirez sent a text message to several family members in July 2014, approximately four months before his uncles died, that stated, "13 or we all die RIP fuck you all if that's how it is!!!" App. 75-76 (Exs. 141-42). The message could have been suicidal or a threat, but the family continued contact with Ramirez. RP 373-79, 398, 442-43, 1079-81; *see* RP 170-71. Ramirez even helped his uncles with a recent move. RP 398-99.

DNA evidence showed that at an unknown prior time, Ramirez wore a hat and glove found in Arturo's bedroom and there was another unidentified contributor of DNA. RP 801-15, 822-27, 833.[5] An FBI Cellular Analysis Survey Team member testified Ramirez's cell phone appeared to be in an area near the apartment complex around the time his uncles died. RP 919, 921, 927-29. Ramirez exchanged text messages about getting together with his uncle Arturo that day. RP 1013-29.

Hritsco described the conversation he had with Demon on the night of November 1, 2014. RP 513-18. When the state asked Hritsco if he

[4] *See* CP 66-74; App. 14-22.

[5] Ramirez had lived with Arturo and Juan and helped them move. RP 386-87, 398-99.

could identify the person with whom he spoke, Hritsco identified the person sitting in the defendant's chair, Ramirez. RP 47, 48-69, 516-20; CP 66-74, 145-62, 193-96, 218-26. Hritsco could not recall the first time the police presented him with a photographic array, but he testified about the second montage. RP 518-19. He tried to explain that he recognized Ramirez from television because that image was "updated," whereas the photograph shown to him on November 2 was "old." RP 519-20. However, the photograph Hritsco was shown on November 2 was a booking photo that been taken the same day. RP 1053-56.

Without objection, the prosecution proposed a special verdict for each count under RCW 10.95.020(10), "There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person." CP 390-93.

5. Ramirez was found guilty and sentenced to die in prison after his attorney did nothing at sentencing.

The jury returned guilty verdicts on all counts and special verdicts. CP 275-81. Defense counsel did not contest the state's sentencing position or present available mitigation evidence and argument. RP 1225-26. The court imposed a high-end, standard range sentence of 998 months, with the murder counts running consecutively. CP 311-25; RP 1229-31.

C. SUPPLEMENTAL ARGUMENT

The right to the effective assistance of counsel is guaranteed by the Sixth Amendment and article I, section 22 because it is necessary to ensure the defendant receives a fair and impartial trial.[6] Whether counsel acted ineffectively is reviewed de novo.[7] When brought in a personal restraint petition, ineffective assistance of counsel claims are subject to the same standard applied on direct appeal, and petitioner necessarily meets his burden to show actual and substantial prejudice by establishing trial counsel performed ineffectively.[8]

Ramirez establishes ineffective assistance of counsel by showing, first, trial counsel's performance fell below an objective standard of reasonableness in light of all the circumstances and, second, in the absence of counsel's deficiencies, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.; *In re Pers. Restraint of Garcia-Mendoza*, 196 Wn.2d 836,

[6] U.S. Const. amends. VI, XIV; Const. art. I, § 22; *see, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 343-45, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

[7] *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 538-39, 397 P.3d 90 (2017).

[8] *Id*.; *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

847, 479 P.3d 674 (2021). The reasonable probability standard is lower than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 693).

While courts presume defense counsel was not deficient, that presumption is rebutted if no legitimate tactic explains counsel's performance. *Id*. at 689-90; *Lui*, 188 Wn.2d at 539.

1. Trial counsel acted without reasonable strategy by failing to challenge the reliability of the identification under either constitution or the rules of evidence.

Ramirez's trial counsel acted ineffectively when he failed to move to exclude eyewitness identification testimony on readily available legal bases—its unreliability under the federal constitution, our state constitution, and Evidence Rules 403, 602, and 701.[9]

a. Witness identification evidence must be scrutinized prior to admission at trial because it is well-known to be both unreliable and highly persuasive.

"The identification of strangers is proverbially untrustworthy."[10] Paradoxically, despite the science demonstrating flaws in eyewitness identification, to a jury "there is almost nothing more convincing than a

[9] In an expert report, Geoffrey R. Loftus, Ph.D. applies memory science to the facts of Hritsco's identification, concluding the identification is unreliable on numerous bases. App. 124-30. Ramirez filed a motion to supplement on November 20, 2020.

[10] *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"[11] Thus, to preserve due process, "trial courts [must] scrutinize whether the pretrial identification procedures employed in a particular case were 'so [unnecessarily] suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'"[12]

When a jury receives unreliable eyewitness identification evidence, no countervailing measure is adequate.[13] Specifically, cross-examination and jury instructions do not adequately counteract an unreliable identification.[14] In Washington, [15] cross-examination and jury instructions

---

[11] *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981) (Brennan, J., dissenting) (quoting Elizabeth Loftus, Eyewitness Testimony 19 (1979)).

[12] *United States v. Nolan*, 956 F.3d 71, 79-80 (2d Cir. 2020) (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); citing *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967)). This Court previously determined "unnecessarily suggestive," which reflects that no bad faith is required, is preferable to the term "impermissibly suggestive." *State v. Gray*, 2018 Wash. App. LEXIS 195, *13 n.6 (Jan. 23, 2018) (cited as nonbinding authority under GR 14.1 and to be accorded such persuasive value as the Court deems appropriate).

[13] National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification, at 110 (2014), https://www.nap.edu/read/18891/chapter/8#110 ("NAS Report").

[14] *E.g.*, *State v. Lawson*, 352 Or. 724, 291 P.3d 673, 760-61 & n.10 (2012); S*tate v. Guilbert*, 306 Conn. 218, 49 A3d 705 (2012); *State v. Henderson*, 208 N.J. 208, 288-89, 27 A.3d 872 (2011); *Nolan*, 956 F.3d at 82-83.

[15] *State v. Allen*, 176 Wn.2d 611, 625-26, 294 P.3d 679 (2013) (lead opinion); *id*. at 632-33 (Madsen, J. concurring) (noting other cases would likely demand greater protections); *see id*. at 634 (Chambers, J.) (joining dissent that additional protection will be required in other cases but joining lead opinion on specific facts of case); *id*. at 636 (Wiggins, J. dissenting) (two Justices would reverse due to insufficient protections against unreliable identification).

may be sufficient to educate the jury on unreliable identifications in the narrow context of a request for a cross-racial identification instruction where the identification was not based on cross-racial facial features. Those narrow circumstances do not exist here.

When unreliable identifications are not excluded, the consequences are dire. Eyewitness misidentification is the leading cause of wrongful convictions.[16] Misidentification evidence contributes to around 70 percent of post-conviction DNA exoneration cases.[17] One jurisdiction recently found, in 5 of 25 cases reviewed, unreliable identification evidence resulted in innocent people spending decades incarcerated.[18]

b. Brief interactions in dark viewing conditions, individuals of different races, the passage of time, successive exposure to the same suspect, and knowing someone has been named as a suspect contribute to misidentifications.

---

[16] Innocence Project, In Focus: Eyewitness Misidentification, https://www.innocenceproject.org/in-focus-eyewitness-misidentification/#:~:text=Eyewitness%20misidentification%20is%20by%20far,identifications%20from%20victims%20or%20witnesses (Oct. 21, 2008); Innocence Project, The Causes of Wrongful Conviction, https://www.innocenceproject.org/causes-wrongful-conviction./ (last visited Apr. 28, 2021).

[17] Innocence Project, Eyewitness Identification Reform, https://www.innocenceproject.org/eyewitness-identification-reform/ (last visited Apr. 28, 2021); Jason Cantone, *Do You Hear What I Hear?: Empirical Research on Earwitness Testimony*, 17 Texas Wesleyan L. Rev. 123, 128 (Winter 2011).

[18] Office of the District Attorney, Kings County, 426 Years: An Examination of 25 Wrongful Convictions in Brooklyn, NY, at 1, 10, 31 (Jul. 9, 2020) (all were exonerated), http://www.brooklynda.org/wp-content/uploads/2020/07/KCDA_CRUReport_v4r3-FINAL.pdf.

Trial counsel provides ineffective assistance by failing to challenge the reliability of an eyewitness identification that bears features known to distort accuracy. *Nolan*, 956 F.3d at 75-84 (reversing conviction on habeas review because defendant received ineffective assistance when his lawyers did almost nothing to challenge the eyewitness identification testimony that formed the core of the Government's case, even though the identifications bore glaring indicia of unreliability).

Features known to distort an identification's reliability include:

- Presenting multiple suspects in a single photographic array;[19]
- Successive photographic arrays or multiple identification procedures with the same suspect;[20]
- The administrator of the identification procedure knows who the suspect is (i.e., the procedure is not double-blind);[21]

[19] *E.g.*, Wash. Assn. of Sherriff's & Police Chiefs, Model Policy: Eyewitness Identification – Minimum Standards, pp.2-3 (May 21, 2015) (App. 179-80) (only one suspect and minimum of 5 fillers per array); Spokane Cty Sheriff's Office Policy Manual 610.7 (2021) (multiple suspects should each be presented in separate procedures) (App. 193); *Walker v. Medeiros*, 911 F.3d 629, 635-36 (1st Cir. 2018) (discussing unreliability of presenting multiple suspects in a single procedure).

[20] *E.g.*, *Henderson*, 208 N.J. at 255-56; Ryan D. Godfrey & Steven E. Clark, Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value, 34 Law & Hum. Behav. 241, 241, 256 (2010) (false identification rates increase, and accuracy decreases, when there are multiple identification procedures); Brandon L. Garrett, Eyewitnesses and Exclusion, 65 Vand. L. Rev. 451, 485 (2012); 426 Years at 37.

[21] 426 Years at 35-36.

- Memory decay or the "retention interval"—the elapse of time between witnessing and identification;[22]

- First-in-time in-court identifications, even where preceded by acceptable pretrial identification procedures;[23]

- Knowledge of who is the suspect, arrestee, or person, or even that the police have identified a suspect;[24]

- Witness and victim of different races (i.e., a cross-racial identification);[25]

---

[22] *Id*.; App. 126-27 (Loftus Report); *Henderson*, 208 N.J. at 267; NAS Report at 110.

[23] App. 127-28 (Loftus report); *State v. Dickson*, 322 Conn. 410, 423 (2016); *Comm. v. Collins*, 21 N.E.3d 528, 534 (Mass. 2014); *State v. Rogers*, 44 Wn. App. 510, 516, 722 P.2d 1349 (1986); *State v. Herrera*, 902 A.2d 177, 183 (N.J. 2006); Godfrey & Clark, 34 Law & Hum. Behav. at 241, 256; Loftus, Doyle & Dysart, Eyewitness Testimony §8-17[d], at 181 (5th ed. 2013); Steblay & Dysart, Repeated Eyewitness Identification Procedures With the Same Suspect, 5 J. Applied Res. Memory & Cognition 284, 287 (2016); 426 Years at 43-44.

[24] *State v. McDonald*, 40 Wn. App. 743, 744, 700 P.2d 327 (1985); *United States v. Rogers*, 126 F.3d 655, 659 (5th Cir. 1997); 426 Years at 36.

[25] *E.g.*, *State v. Scabbyrobe*, __ Wn. App. 2d__, 482 P.3d 301, 2021 Wash. App. LEXIS 628 (2021) (Fearing, J. dissenting) (citing, inter alia, Taki V. Flevaris & Ellie F. Chapman, Cross-Racial Misidentification: A Call to Action in Washington State and Beyond, 38 Seattle U. L. Rev. 861, 870-71 (2015); *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003); Christian A. Meissner & John C. Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychol., Pub. Pol'y & L. 3, 15 n.17 (2001)); 426 Years at 34. "Cross-racial identifications may be one explanation for the disproportionate conviction of minorities among those exonerated by postconviction DNA testing." *Scabbyrobe*, 2021 Wash. App. LEXIS 628, at *41; Letter from Wash. State Supreme Court to Members of Judiciary & Legal Cmty. (Jun. 4, 2020) ("The legal community must recognize that we all bear responsibility for this on-going injustice [of systemic racism], and that we are capable of taking steps to address it, if only we have the courage and the will."), https://www.courts.wa.gov/newsinfo/?fa=newsinfo.internetdetail&newsid=35481.

- Circumstances that impact the opportunity to view the suspect including the length of the time, distance between the witness and suspect, lighting conditions, stress or fear (*e.g.*, from the presence of a weapon), intoxication, and use of disguises.[26]

In *Nolan*, four of the five victims of a robbery in their apartment identified the defendant. 956 F.3d at 77-78. The Second Circuit found the presence of numerous factors supporting an unreliable identification made counsel's failure to challenge the identification ineffective. 956 F.3d at 81. The identification could have been impaired by the robbers' disguises, which "partially obstructed their facial features," they were armed, their physical aggressiveness placed the victims in stress, the victims were of a different race than the identified robbers, and "highly irregular" identification procedures lead to the identifications. *Id*. at 80-81.

Despite these hallmarks of unreliability, defense counsel "made little effort to exclude the [identification] evidence." *Nolan*, 956 F.3d at 78. The court held counsel's inaction was ineffective:

> defense counsel, after initially bringing such a motion, abandoned it on the theory that the defense would be better off impeaching the eyewitnesses at trial. **We do not understand how he could have reached that conclusion**. If defense counsel had succeeded in the exclusion motion, it would appear that the case would have been effectively over in light of the Government's heavy reliance on the

[26] 426 Years at 33-34.

> eyewitness identifications. And even if defense counsel had lost the motion, they would have educated the judge as to the frailty of the identifications and would . . . still have been free to fully impeach the eyewitnesses at trial. Even making "every effort ... to eliminate the distorting effects of hindsight," *Bell* [*v. Miller*], 500 F.3d [149,] 156 [(2d Cir. 2007)] (quoting *Strickland*, 466 U.S. at 689), we conclude that this strategy fell outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Id. (emphasis added).

c. Hritsco's in-court identification bore hallmark features of unreliability and should have been the subject of a motion to exclude under the federal constitution.

The Fourteenth Amendment compels the exclusion of identifications that result, at least in part, from unnecessarily suggestive government action unless circumstantial indicia of reliability are strong enough to outweigh the suggestiveness. U.S. Const. amend. XIV; *Perry v. New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012). Counsel should have moved to exclude Hritsco's identification under federal due process protections.

To be sure, the suggestiveness of the identification resulted, at least in part, from government action. Officers presented Hritsco with an array of multiple suspects, including Ramirez. CP 78; RP 476-78, 486. Within about a day, the lead detective, who knew Ramirez was in custody about to be charged with the murders, administered a second photographic array

with an updated picture of Ramirez.[27] Finally, the state called Hritsco at trial to identify Ramirez nearly two years later in a highly suggestive procedure.[28] Out-of-court identifications can irreparably taint the reliability of an in-court identification, even if the out-of-court procedures resulted in no identification and were not unnecessarily suggestive. *See Young v. Conway*, 698 F.3d 69, 82-84 (2d Cir. 2012). All of this government action tainted Hritsco's identification. App. 127-28 & n.8.

To the extent the state argues suggestive identifications are only unreliable under federal due process if *all* suggestiveness is attributable directly to the government, the argument is unsupported. As the Supreme Court noted in *Perry v. New Hampshire*, due process prohibits unreliable identifications where "police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." 565 U.S. at 232. "When *no* improper law enforcement activity is involved," federal due process does not require exclusion. *Id*. at 233

[27] RP 1054-55; *see* NAS Report at 104, 106-07 (recommending double-blind administration); *Henderson*, 208 N.J. at 255-56.

[28] *Perry*, 565 U.S. at 244 ("all in-court identifications" involve suggestiveness); *Dickson*, 322 Conn. at 423 (it is difficult "to imagine . . . a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime"); *Collins*, 21 N.E.3d at 534; *Rogers*, 44 Wn. App. at 516 (single-person show-ups are "widely condemned").

(emphasis added).[29] Here, at least *some* suggestive circumstances were due to state action. Thus, federal due process protections apply to deter such use of improper procedures, separate and in addition to broader state constitutional protections and the evidence rules.

Moreover, the government-contributed suggestiveness was unnecessary. *See Stovall*, 388 U.S. at 302. In *Stovall*, the Court found a hospital-room showup identification was necessary because the only witness who could identify or exonerate the defendant was in the hospital with life-threatening injuries. *Id*. On the other hand, *Foster v. California* is more akin to the case at bar. 394 U.S. 440, 89 S. Ct. 1127, 22 L.Ed.2d 402 (1969). There, the police used suggestive procedures during an initial lineup but the witness did not identify the defendant. *Id*. at 441. Police then arranged subsequent suggestive procedures repeatedly showing the defendant to the witness. 394 U.S. at 441-42. The witness identified the defendant during a second lineup and at trial. *Id*. at 442. Under the totality of the circumstances, the Court held the conduct of identification procedures was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process. *Id*. at 442-44 (In effect, the police repeatedly said to the witness, "This is the man.").

[29] In *Perry*, the defendant conceded *no* law enforcement action contributed to the suggestiveness, and the court did not consider circumstances such as the one at bar where at least *some* government action is involved. 565 U.S. at 234, 240.

As in *Foster*, the first police procedure here was suggestive because it involved multiple suspects; yet, Hritsco did not identify anyone.[30] Also as in *Foster*, the police again showed Ramirez to Hritsco before Hritsco ultimately claimed he could identify Ramirez after seeing him on the news.[31] The lead detective, who knew Ramirez was the suspect, conducted the successive montage, increasing its suggestiveness.[32]

As in *Foster*, but unlike *Stovall*, the suggestiveness was not necessary.[33] The police could have produced multiple montages using other suspects who had been previously shown to Hritsco. Another officer could have administered the procedure, so it was double-blind.[34] Because Hritsco's identification was not critical to charging Ramirez, as he was ultimately charged without Hritsco's identification, the police could have

---

[30] CP 78; RP 476-78, 486; *see supra* n.19 (suggestiveness occurs from multiple suspects).

[31] RP 476-78, 486, 518, 949, 1053-56; CP 66-74, 145-62. Hritsco believed he did not identify Ramirez during the montage because the picture was older, but Hritsco was in fact shown Ramirez's booking photograph, taken just hours earlier. RP 1053-56.

[32] RP 1054-55.

[33] Petitioner interviewed the officers who administered the procedures, but they would not agree to reduce their oral statements to written form. Aff. of Investigator Lawrence D. Valadez (filed herewith). The officers did not contend the written statements were untrue. *Id*. To the extent the court finds their testimony necessary to decide the petition, Ramirez requests remand for a reference hearing at which he can compel the officers' testimony.

[34] *See* NAS Report at 104, 106-07.

avoided the second procedure altogether. Finally, having used suggestive procedures and knowing Hritsco was exposed to Ramirez on the news, the government conducted the ultimate suggestive procedure—an in-court identification. *See* App. 127-28 (Loftus report). No exigency justified the use of these suggestive procedures.

Countervailing circumstances do not support the reliability of Hritsco's identification. Hritsco's identification was not corroborated by the description he provided police.[35] He had viewed the individual in suboptimal conditions: "pitch black" darkness for 15 to 20 minutes with a weapon present.[36] Hritsco subsequently viewed Ramirez in the media where he was portrayed as the person the government charged with the crimes.[37] The identification was subject to memory decay, as it came well

[35] App. 127 & n.8. Hritsco told the officers that the person he spoke with was 5 feet 8 inches tall, weighed 180 pounds, was Indian or Hispanic-looking, called himself "Demon," and had long, slicked-back hair and scars or acne. RP 476, 516-18, 522. Ramirez, on the other hand, is six feet tall and weighs 220 pounds, does not have scars or acne, does not have long, slicked-back hair, and is one of five of more people in the Spokane area who identifies as "demon." RP 51, 385, 441, 463-64, 469, 1069.

[36] App. 127; RP 514, 516-17.

[37] RP 57-64, 519, 1163-64. Source memory confusion can occur when a witness is shown an individual's face numerous times. The witness may ultimately identify that person due to the repetition, not because they recognizes the person from the circumstances of the crime. *Collins*, 21 N.E.3d at 534 & n.9.

over one year after the 15- to 20-minute conversation.[38] And yet, Hritsco still exhibited inflated confidence in his identification of Ramirez.[39]

As with *Nolan*, the identification here should have been excluded as unreliable. In both cases, "many of the typical causes of mistaken eyewitness identifications were apparent," yet "trial counsel did almost nothing to challenge the introduction of such identifications." 956 F.3d at 75.[40] Hritsco was the only witness who claimed to see Ramirez near the complex where his uncles died. However, his identification was highly unreliable because it followed successive police identification procedures, compromised viewing conditions, cross-racial identification, non-double-blind administration, memory decay due to the passage of nearly two years, and singling out Ramirez as the suspect in the media and in court.

Also as in *Nolan*, the state recognized Hritsco's identification was critical to its case and the government's remaining evidence was

---

[38] App. 126-27; *Henderson*, 208 N.J. at 267 (research is clear, memory never improves with time, instead it decays).

[39] *E.g.*, App. 125-26 (expert Loftus explains how the eyewitness's confidence at trial derives from his reconstructed memory of the suspect, not his actual memory); *Lawson*, 291 P.3d at 687-88, 704-05, 710-11 (discussing inverse relationship between confidence and accuracy of identification).

[40] Although the specific features of unreliability are not identical to those at issue in *Nolan*, in both cases, unreliability stemmed at least in part from successive procedures, misdescriptions based on race or ethnicity, the presence of a weapon, viewing the defendant in media, and witness assertions of confidence. *Id*. at 75-76, 77, 80.

circumstantial.[41] The *Nolan* court concluded counsel's decision not to challenge the reliability of unreliable identification evidence "was professionally unreasonable." 956 F.3d at 79. The same is true here.

The relevant question here is not whether trial counsel's choices were strategic, but whether they were reasonable. *E.g.*, *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Ramirez's attorney made the strategic decision that suppressing the identification was desirable. CP 218-26. There was no downside to raising the additional legal theory that the identification is unreliable to support suppression.[42] While not pursuing alternative strategies in front of the jury might make strategic sense, the same concern is not present in a pretrial motion to the court.[43] Therefore no reasonable strategic basis explains counsel's failure to follow up a discovery motion to suppress with an alternative legal theory for the same relief. *See* Reid Aff. ¶¶ 4-8; CP 66-

---

[41] *Compare id*. at 78 (government focused on identification in summation), 82 n.9 *with* RP 62-63 (recognizing Hritsco is a "very critical witness" whose exclusion would be "a big deal" and a "significant blow to the State's case"); RP 1158-64 (focusing on Hritsco's importance in closing argument).

[42] *Nolan*, 956 F.3d at 81 (even if counsel "lost the motion, they would have educated the judge as to the frailty of the identifications and" could still have fully impeached at trial); *see Richards v. Quarterman*, 566 F.3d 553, 567 (5th Cir. 2009) (no legitimate strategy).

[43] *See In re Pers. Restraint of Khan*, 184 Wn.2d 679, 692, 363 P.3d 577 (2015) (petitioner should have presented alternative legal basis for relief sought); *State v. Carson*, 184 Wn.2d 207, 220-21, 357 P.3d 1064 (2015) (pursuing alternative arguments in front of a jury might lead jurors to question strength of primary argument).

74, 145-62; *Nolan*, 956 F.3d at 79 ("counsel's strategy of abandoning defendant's pretrial motion to exclude the eyewitness testimony . . . in favor of trying to impeach such testimony at trial was professionally unreasonable, thereby satisfying *Strickland*'s first prong").

d. Because Hritsco's identification bore hallmark features of unreliability, it also should have been the subject of a motion to exclude under the state constitution.

Our state due process right to a fair trial primarily guarantees reliability, where the federal constitution focuses on deterrence of suggestive government action. Const. art. I, §§ 3, 22. The standard for reliability of evidence embodied in our due process clause provides broader protection than federal due process. *Marriage of King*, 162 Wn.2d 378, 414, 174 P.3d 659 (2007) (Madsen, J., dissenting) (citing *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984)).[44] A

[44] Although the texts of the federal and state provisions are similar, the six *Gunwall* factors support broader state due process protections as found in *Bartholomew*. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986); Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 514-16 (1983-1984) (interpret identically worded provisions independently absent a strong "historical justification for assuming the framers intended an identical meaning"). Article I, section 3 was intended to serve as the primary protection of individual rights. Justice Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 3 (2002). *Bartholomew* demonstrates preexisting state law counsels broader interpretation. 101 Wn.2d at 639-41. Moreover, the reliability of identifications and their admissibility in state court proceedings are inherently matters of state or local concern. *Id.* at 643-44; *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); *Gunwall*, 106 Wn.2d at 66. Ramirez provided a lengthy *Gunwall* analysis on direct appeal. App'ts Corrected Op. Br., No. 34872-5, pp.23-29 (filed Aug. 30, 2017).

proceeding cannot achieve fairness if it depends upon unreliable evidence. *Bartholomew*, 101 Wn.2d at 640; *see State v. Davis*, 38 Wn. App. 600, 686 P.2d 1143 (1984) (state analysis focuses on fundamental fairness).

Therefore, a motion to exclude an identification under the state constitution should focus on the totality of the circumstances to determine, ultimately, whether the identification is reliable enough to be presented to the jury. Such is the practice in numerous states.[45]

Trial counsel should have moved to exclude under the state constitution. As discussed, the totality of the circumstances show Hritsco's identification was unreliable. The identification resulted from successive police identification procedures, compromised viewing conditions, cross-racial identification, a description of the suspect that did not closely match Ramirez, non-double blind administration, memory decay over nearly two

[45] *E.g.*, *Henderson*, 27 A.3d 872 (replacing the existing test for admissibility of eyewitness identifications with one that incorporates the findings of scientific research on eyewitness reliability); *Lawson*, 291 P.3d 673 (same); *State v. Chen*, 208 N.J. 307, 27 A.3d 930 (2011) (reliability of eyewitness identification must be examined before trial even when suggestiveness derives from private actor); *State v. Dubose*, 699 N.W.2d 582, 591-92, 598 (Wis. 2005) (recognizing "extensive studies on the issue of identification evidence" makes it "impossible" to ignore need for new approach to determining reliability of showup identifications); *State v. Harris*, 330 Conn. 91, 191 A.3d 119 (2018) (modifying test under state constitution to conform to recent developments in social science and the law); *Young v. State*, 374 P.3d 395 (Alaska 2016) (identifying factors to discern reliability under state constitutional due process requirements); *State v. Hunt*, 69 P.3d 571 (Kan. 2003) (adopting new test); *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991) (new, more rigorous test applies to admissibility of identifications to align with the science); *Comm. v. Johnson*, 650 N.E.2d 1257 (Mass. 1995) (adopting more protective rule under state constitution); *State v. Adams*, 423 N.E.2d 379 (N.Y. 1981) (same).

years, and singling out of Ramirez as the suspect in the media and in court. *E.g.*, App. 126-29 (Loftus's expert opinion that identification was unreliable). Had trial counsel challenged the identification under article I, section 3, the court likely would have found it unreliable.

e. Because Hritsco's identification was unreliable and highly prejudicial, it should have been the subject of a motion to exclude under ER 403, 602, and 701.

Trial counsel also should have moved to exclude Hritsco's identification under the rules of evidence.[46] Under ER 602, Hritsco could not identify Ramirez unless it was based on his own personal knowledge. Memory science makes clear that Hritsco's memories were not based on personal knowledge but were substantially tainted by police conduct, media exposure, and the passage of time. App. 126-29. Exclusion could also have been based on ER 701. Hritsco's unreliable identification was not helpful to determination of a fact in issue because it was unreliable. Moreover, the evidence is not helpful because it appears reliable to jurors but is actually not reliable. Further, it is not rationally based on Hritsco's perception but on successive exposure to Ramirez, memory decay, seeing

[46] *Chen*, 27 A.3d at 930 (reliability of tainted identifications must be considered under evidentiary rules); *State v. Hibl*, 290 Wis.2d 595, 714 N.W.2d 194 (2006) (remanding to consider whether identification should be suppressed under evidentiary rules); *Lawson*, 291 P.3d at 691-97 (adopting new test incorporating evidentiary rules); *State v. Davis*, 2018 ME 116, 191 A.3d 1147, 1154-57 (Maine 2018) (holding reliability should be determined under state evidence rules as part of trial court's gatekeeping function).

Ramirez as the suspect in the media and in court, suboptimal viewing conditions, and its cross-racial nature.

Finally, ER 403 serves as an independent basis for exclusion.[47] The probative value of the identification is low because it does not bear independent indicia of reliability. On the other hand, the risk of prejudice is high because jurors over-inflate the value of identification evidence, particularly where a witness is confident. Under ER 403's balancing test, the identification should have been excluded.

f. Trial counsel's failure to object to the unreliability of Hritsco's identification undermines confidence in the outcome of the case.

The failure to challenge the reliability of eyewitness identification evidence prejudices the defendant where the government's other evidence is weak and relies on accuracy of the identification. *Nolan*, 956 F.3d at 82-83. In *Nolan*, the government's other evidence against the defendant consisted of the defendant's association with a coconspirator, the defendant told police the coconspirator had set him up without the police telling defendant the coconspirator was a suspect, a Facebook image of the defendant posing with a gun, and the defendant admitted to the moniker, "White Boy," identified by one of the victims. *Id*. at 82 & n.9. The court

[47] *Perry*, 565 U.S. at 247 (unreliable identification should be excluded under ER 403 if probative value is substantially outweighed by prejudicial impact or risk of misleading).

found the probative value of this evidence would have been limited, at best, had the trial court excluded the identifications. *Id*. at 82. "Therefore, had defense counsel successfully excluded the eyewitness identifications and Government nonetheless proceeded with the prosecution, a reasonable jury would likely have rendered an acquittal," requiring reversal for ineffective assistance of counsel. *Id*.

The failure to move for suppression due to unreliability on any legal theory prejudiced Ramirez. Prejudice is established by showing that, but for counsel's deficient errors, the result of the proceeding would have been different within a reasonable probability. *Garcia-Mendoza*, 196 Wn.2d at 847. A reasonable probability only requires a probability sufficient to undermine confidence in the outcome.[48] Because the identification was highly unreliable, the court was likely to exclude it under due process or the evidence rules. As Dr. Loftus explains, a confident witness identification sways the jury, but is not actually predictive of accuracy. App. 125; *accord* App. 126 ("a highly confident eyewitness can be quite persuasive to a jury"), 128 ("confidence cannot be used as an index of accuracy"). Inaccuracy is particularly likely, despite the witness's confidence, where a longer interval of time has passed and

[48] Under this analysis, the Court must evaluate the effect on the trial if there had been no identification. Thus, evidence that "corroborates" the identification is irrelevant *See* PRP Resp. at 33-34.

where suggestive post-event information, such as viewing Ramirez in the media, biased the witness. App. 125-26. Thus, despite the unreliability of Hritsco's identification, it was likely very persuasive to the jury.

Moreover, the other evidence against Ramirez was not particularly strong. It was circumstantial and at a minimum, as this Court recognized on direct appeal, a finding of guilt depended on jurors interpreting that evidence a particular way. App. 27-28, 29-30. No fingerprints were identified on the apartment doors, vomit around the complex was not examined, and four other people in Spokane with the moniker "Demon" were not investigated. *See, e.g.*, RP 1177-79, 1183-87 (counsel discusses evidence and lack of evidence in closing); *see also* RP 1188-89 (evidence suggests victims' drug dealer could also be a suspect). The murder weapon was not located. *See* RP 531, 763, 1052, 1074, 1076-77.[49]

The state's only evidence supporting premeditation was a four-month-old text message containing, at best, a cryptic message and which was followed by months of innocuous communications, including the uncles using Ramirez as a housing reference. *E.g.*, RP 1017, 1149. The evidence at trial also provided an innocent explanation for Ramirez's

[49] The state notes the detective reported an odor of bleach from within Ramirez's apartment's bathroom. PRP Resp. at 12 (citing RP 1001). But Ramirez's lease had begun just two days earlier and the detective testified to finding cleaning agents consistent with moving into a new apartment. RP 995-96, 1072.

DNA appearing on the cap and glove. Ramirez had lived with Arturo and Juan, he had helped them move, and Arturo may have been returning the items to Ramirez. RP 386-87, 398-99, 1171, 1183-85. This Court previously recognized that the evidence the state claimed showed motive was open to interpretation as well. App. 27; RP 1171-72 (arguing in closing that text message was not a threat or example of motive).

In light of the relatively limited and inconclusive evidence, it is at least reasonably likely Hritsco's confident yet unreliable identification pushed jurors to find guilt beyond a reasonable doubt and that any one of them would not have so found without Hritsco's confident identification. *See Nolan*, 956 F.3d at 82-83; *Garcia-Mendoza*, 196 Wn.2d at 847 (a reasonable probability is a probability sufficient to undermine confidence in the outcome). The Court should reverse and remand for a new trial with new counsel appointed for Ramirez.

2. Counsel provided ineffective assistance by failing to cross-examine the eyewitness about convictions that impeach his credibility.

Trial counsel also acted ineffectively by failing to impeach Carlton Hritsco with evidence of prior convictions and Hritsco's deal to cooperate with the prosecution to his great benefit.

a. <u>The theft conviction is a crime of dishonesty highly relevant to Hritsco's credibility.</u>

Hritsco's 2002 conviction for theft in the third degree is per se admissible as a crime of dishonesty. ER 609(a)(2); App. 123; PRP Resp. at Attachment B (conviction was reduction from felony forgery charge).[50] "The act of taking [someone else's] property is positively dishonest." *State v. Brown*, 113 Wn.2d 520, 552, 782 P.2d 1013 (1989); *accord State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991); *State v. Teal*, 117 Wn. App. 831, 843, 73 P.3d 402 (2003). Thus, the 2002 theft conviction was not only a crime of dishonesty but its impeachment value was significant. *See State v. Rivers*, 129 Wn.2d 697, 705, 921 P.2d 495 (1996) (impeachment value is one of six factors to weigh under ER 609(a)(2)).

Moreover, balancing the factors under ER 609(b), the prior conviction is admissible for impeachment purposes. First, the impeachment value of this per se crime of dishonesty is high due to the nature of the crime as well as the centrality of Hritsco's testimony. The jury's assessment of Hritsco's credibility would have a substantial impact on how jurors assess his belated identification of Ramirez and the evidence of preceding non-identifications close-in-time to the event. *See State v. Martinez*, 38 Wn. App. 421, 424, 685 P.2d 650 (1984) (credibility

[50] Although the prosecution was uncertain at the time of trial, it now appears clear Hritsco's 2002 conviction resulted from a 1999 charge, and they are not two separate convictions. *See* App. 123. Ramirez identified two theft convictions in the opening brief, but proceeds under the understanding there is only one.

takes on added importance for key state's witnesses and quality of other impeachment evidence of witness can also be weighed in determining admissibility under ER 609). Second, the 2002 conviction is not remote when viewed in context of Hritsco's intervening convictions in 2003 and 2008. *See* App. 123; *Rivers*, 129 Wn.2d at 705 (length of record and remoteness of conviction are two additional factors under ER 609(a)(2)). Moreover, the two convictions establish the longevity of Hritsco's trouble with veracity, increasing the probative value of the entire line of impeachment evidence. Stated otherwise, they are probative of Hritsco's propensity to act dishonestly. Third, any prejudice to the state is minimal. Particularly, as explained below, because these convictions would be admitted along with convictions from 2008, the prejudice ascribed to admission of this conviction for impeachment purposes is minimal. *See State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995) (affirming trial court's admission under ER 609 in part because prejudice was minimal where other convictions were also admissible for impeachment).

b. Hritsco's felony convictions are critical evidence of his bias towards the prosecution.

Hritsco's 2008 felony convictions for kidnapping in the second degree and assault in the second degree with a deadly weapon are

admissible under ER 609(a)(1).[51] Violent felonies are not per se probative for impeachment. However, the circumstances make these convictions particularly probative of Hritsco's veracity.

"A witness's bias is always relevant as discrediting the witness and affecting the weight of his testimony. . . . And the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, [or] credibility." *State v. Orn*, No. 98056-0, ___ Wn. 2d ___, slip op. at 11, 2021 Wash. LEXIS 156 (Mar. 18, 2021) (internal quotation marks and citations omitted). "[W]henever a prosecution witness may be biased in favor of the prosecution because of outstanding criminal charges or because of any non-final criminal disposition against him within the same jurisdiction, that possible bias, in fairness, must be made known to the jury." *Commonwealth v. Evans*, 511 Pa. 214, 224-25, 512 A.2d 626 (1986). "Even if the prosecutor has made no promises . . . the witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way that is helpful to the prosecution. And if the possibility exists, the jury should know about it." *Id*.

[51] App. 107-21, 123; RCW 9A.40.030 (second degree kidnapping is a class B felony); RCW 9A.36.021(2)(a) (second degree assault is a class B felony); RCW 9A.20.021(1)(b) (class B felonies are punishable by up to 10 years imprisonment).

Hritsco's 2008 convictions are the result of a negotiated plea deal with the Spokane County Prosecuting Attorneys.[52] In exchange for reducing the charges from murder to kidnapping and assault, Hritsco agreed to testify against a codefendant.[53] Hritsco's cooperation with the prosecution garnered him reduced charges and a 15-month sentence, which is significantly lower than his codefendant, who received 45 years.[54] Importantly, Hritsco had outstanding obligations stemming from these convictions at the time of trial in this case. App. 122 (satisfaction of judgment entered one year *after* trial).

The jury should have learned about Hritsco's prior cooperation with the prosecution to his advantage when receiving his testimony that although he did not identify Ramirez in two arrays within hours of his conversation with Demon, he could identify Ramirez after Ramirez was charged as a suspect. RP 514-20.

The import of the prior convictions here was not merely that Hritsco was a convicted man of violence but that he cooperated with the prosecution to his own substantial benefit in a case that remained open.

---

[52] App. 56-58, 65-66, 82-106, 145-58.

[53] App. 57, 150.

[54] App. 107-21, 145-58; Man gets 45 years for drug killing, The Spokesman-Review (Nov. 22, 2008), https://www.spokesman.com/stories/2008/nov/22/man-gets-45-years-for-drug-killing/ (reproduced at App. 67-68).

Moreover, in addition to admissibility under ER 609, the fact that Hritsco struck a significant deal with the prosecution in exchange for testifying against his codefendant would have been admissible under ER 608(b) and the Sixth Amendment as a specific instance of conduct relating to his credibility as a State's witness against Ramirez. *See State v. Clark*, 143 Wn.2d 731, 766-67, 24 P.3d 1006 (2001) (ER 608 impeachment evidence applies more broadly to specific instances than under ER 609).

The state claims, if Hritsco had been motivated to cooperate with the prosecution, he simply would have identified Ramirez "after the first opportunity to do so." PRP Resp. at 39. However, when Deputy Palmer showed Hritsco five photographs on the night of the crime, Hritsco did not yet know which, if any, photograph aligned with the state's case. Thus, Hritsco could not have acted on any conscious or subconscious motivation to please the prosecution. However, by the time the prosecution interviewed Hritsco on the eve of trial, Hritsco knew exactly who the state needed identified because Hritsco had seen Ramirez in a second montage and on the news. Hritsco's subsequent in-court identification and motivation at that time would have been relevant to the court's analysis under ER 608, had trial counsel sought to admit the evidence.

c. Trial counsel acted deficiently by failing to impeach Hritsco's credibility.

Counsel's performance is reasonable only if his tactics or strategy are legitimate. *E.g.*, *State v. Kyllo*, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The record in this case rebuts the presumption of reasonable performance. No legitimate tactic justified the failure to impeach a key state witness. *See generally* PRP Resp. (state fails to discuss any reasonable strategic basis).

Counsel could not have reasonably believed not impeaching Hritsco's credibility was the best tactic, at least after the court ruled Hritsco could identify Ramirez in court. Hritsco identified Ramirez as the individual he spoke to near the crime scene within minutes of the murders. If the jury found Hritsco credible, it would almost certainly accept his belated identification as well as his prior non-identifications as honest and trustworthy. However, counsel had unutilized bases to discredit Hritsco. Failing to impeach the most important state witness in a circumstantial evidence case is not a legitimate strategy.

d. The failure to impeach the state's key witness undermines confidence in the jury's verdicts.

Had the jury heard evidence undermining Hritisco's credibility *and* demonstrating his motive to curry favor, it would have had bases to seriously question the veracity of Hritsco's identification as well as other testimony about his conversation with Demon. For example, Hritisco testified he "got kind of a weird vibe," an "eerie feeling," and "just felt uncomfortable" even though he spoke to Demon for up to 20 minutes. RP 514, 517. On cross-examination, Hritsco also testified Demon was acting "extremely" nervous. RP 521. If jurors had reason to question Hritsco's credibility, they would have been less likely to credit Hritsco's testimony here as well.

Hritsco's testimony was central to the convictions. *See* RP 62-63 (prosecutor argues Hritsco is a "very critical witness" whose exclusion would be "a big deal" and a "significant blow to the State's case"). The state's evidence showed only that Ramirez was related to the victims, exchanged messages with Arturo about getting together, and may have in fact been in the area of their apartment on the night they were killed. RP 919, 921, 927-29. However, the state lacked other evidence connecting Ramirez to the murders. No one saw Ramirez at the apartment complex, or with Arturo or Juan. The apartment complex was notorious for criminal

activity, there was drug paraphernalia in the apartment, and both had metabolized methamphetamine in their bloodstreams and Juan was also positive for marijuana. RP 539-40, 896-97, 1056-57. The state's evidence of premeditation was weak and contained no indication of motive. *See* App. 27-28 (opinion on appeal, recognizing "much of the State's evidence might have been subject to interpretation"; reciting evidence of premeditation as to Arturo as July text message, making plans to see Arturo, and a single shot to the head; evidence of premeditation as to Juan included July text message and continuous shots fired);[55] RP 1164-66 (state's argument). No evidence connected Ramirez to a gun, and the murder weapon was never recovered. *E.g.*, RP 508, 523, 620, 763, 972-74. In short, the state needed the jury to believe Hritsco.

The prejudicial effect of counsel's failure to use admissible evidence to impeach Hritsco's credibility is enough to undermine confidence in the verdicts. *See Thomas*, 109 Wn.2d at 226. The Court should reverse and remand for a new trial.

[55] This citation is from the unpublished portion of the Court's opinion on direct appeal and is not binding authority. GR 14.1.

3. Defense counsel acted ineffectively in failing to object to the presentation of uncharged aggravating circumstances to the jury, resulting in convictions.

Only aggravating circumstances for which Ramirez had ample notice should have been presented to the jury. The state is prohibited from seeking enhanced penalties unless "notice of their intent [is] set forth in the information" or notice is otherwise provided prior to trial. *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012); *State v. Theroff*, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980) (remanding to strike enhancement where prosecutor had neglected to file notice advising defendant that the state intended to seek an enhanced penalty); *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).[56]

Here, the jury was sworn and opening statements commenced on October 5 and 6, 2017. Five days after trial commenced, the state filed proposed jury instructions that included an aggravating circumstance under RCW 10.95.020, the aggravated murder statute, and a proposed special verdict for each count. CP 390-93; RP 228.

The information did not provide notice Ramirez was being charged with an aggravating circumstance under RCW 10.95.020 or even that the case was subject to Chapter 10.95 RCW. The closest language in the

[56] *See* Const. art. I, §§ 3, 22; U.S. Const. amend. VI, XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

information is that the murders were part of a "common scheme or plan." CP 1-2, 232-33. But this language is very different than the special verdict that was ultimately provided to the jury, which requires "There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person." RCW 10.95.020(10). "Common scheme or plan" is insufficient to satisfy due process as to the aggravating circumstance at RCW 10.95.020(10). *See State v. McCarty*, 140 Wn.2d 420, 425-28, 998 P.2d 296 (2000) (reversing where conclusory language in information does not fairly encompass or imply charge for which defendant was tried); *Theroff*, 95 Wn.2d at 392 (notice should be provided by pleading the statutory language and citing the statute).

In fact, the information provided the opposite of notice. Not only did RCW 10.95.020(10) not appear anywhere in the charging documents, but the state actually alleged a firearm enhancement from RCW 9.94A.533(3). By charging the firearm enhancement, the prosecution indicated this was a case under the Sentencing Reform Act, not the aggravated murder statute at Chapter 10.95 RCW.

The state admits the information was "potentially incomplete" with regard to whether an aggravating circumstance was adequately charged. PRP Resp. at 42-43 & Attachment C. Because the prosecution found the "potential[] incomplete[ness]" significant, it did not seek a life without

parole sentence for aggravated murder. *Id*.[57] Yet, the jury was instructed and special verdicts were returned finding Ramirez guilty of these aggravating circumstances. Whether characterized as incomplete or potentially incomplete, the information failed to provide notice of the aggravating circumstances to Ramirez. *See Theroff*, 95 Wn.2d at 392.

It was defense counsel's duty to recognize the incompleteness of the charge and object to presenting uncharged aggravating circumstances to the jury. *Boyde v. Brown*, 404 F.3d 1159, 1180 (9th Cir. 2005) (counsel acted deficiently by failing to object to presentation of aggravating evidence where prosecution provided inadequate notice); *Kyllo*, 166 Wn.2d at 868-69 (counsel acted deficiently by failing to object to erroneous jury instructions). There is no reasonable strategic basis for failing to object to uncharged (or potentially incomplete) aggravating circumstances that elevate a client's charge from first degree murder to aggravated first degree murder.

Because Ramirez's due process right to notice applied at and before trial, counsel's deficiency and any prejudice must be measured at that juncture. The constitution guarantees Ramirez notice because it is critical to his opportunity to prepare an adequate defense and the right to

[57] This is different from the state's position on direct appeal where it argued the amended information "adequately apprised" Ramirez that he was charged with aggravated murder. Brief of Respondent, *State v. Ramirez*, No. 34872-5-III, pp.67-71 (filed Jan. 23, 2018).

decide whether to enter into a plea agreement to a lesser charge. *Theroff*, 95 Wn.2d at 392-93; *Siers*, 174 Wn.2d at 277. These rights apply prior to trial and thus counsel's conduct cannot be measured only at sentencing. As explained in *Theroff* and *Siers*, defense counsel's failure to challenge the lack of notice prejudiced Ramirez prior to and during trial. Counsel had no reasonable strategic basis not to object at trial, and how the state acted at sentencing is irrelevant. *Cf. State v. Turner*, 169 Wn.2d 448, 454, 464-66, 238 P.3d 461 (2010) (in double jeopardy context, a conviction without sentence still constitutes punishment due to potential collateral consequences from conviction itself).

Indeed, if defense counsel had objected to the proposed instructions, it is reasonably likely the trial court would have rejected presenting the special verdicts to the jury. *See Theroff*, 95 Wn.2d at 392; *State v. Recuenco*, 163 Wn.2d 428, 440-41, 180 P.3d 1276 (2008); *Cosner*, 85 Wn.2d at 50-51. The State's concession that the charging documents were potentially incomplete provides sufficient basis to find the court was reasonably likely to sustain counsel's objection, if it had been lodged.

Because counsel failed to object, the jury received the special verdict instructions and convicted Ramirez of both aggravating circumstances. CP 271-72, 276, 278. Counsel's deficient performance prejudiced Ramirez. *See Kyllo*, 166 Wn.2d at 869-70 (counsel's failure to

object to improper instruction was prejudicial because jury reasonably likely to have reached decision based on improper instruction); *Boyde*, 404 F.3d at 1180 (prejudice stemming from admission of evidence on aggravating circumstances that should have been excluded). The Court should reverse and remand for retrial. *See Theroff*, 95 Wn.2d at 392-93.

4. If the Court finds notice sufficient, trial counsel acted ineffectively by failing to inform Ramirez he was charged with offenses punishable by life without parole or death.

To the extent the state adequately charged Ramirez with aggravated murder under Chapter 10.95 RCW, trial counsel acted ineffectively by failing to inform Ramirez of the mandatory sentencing consequences of a conviction. As a result, Ramirez could not make an informed decision about trial and pleas. *See State v. Estes*, 188 Wn.2d 450, 466-68, 395 P.3d 1045 (2017).

In *Estes*, our Supreme Court reviewed circumstances similar to Ramirez's case. 188 Wn.2d 450. Based on comments made at trial, the record showed Estes's trial attorney failed to investigate the consequences of charged deadly weapon enhancements. *Id*. at 466. The unexplored implication of the charge was that Estes was facing a third strike and, if convicted, would be sentenced to life without parole as a persistent offender. *Id*. at 468. Because Estes's attorney did not research the

consequences of the charge, he did not inform Estes of the actual punishment he faced if convicted. *Id*. at 466. Counsel performed deficiently by failing to inform his client of the actual consequences he could face if convicted. *Id*. at 468.

The record before the Court did not show with 100 percent certainty the ultimate result would have been different if counsel had informed Estes that he faced life without parole. 188 Wn.2d at 466. Nevertheless, the Court found the record sufficient to show prejudice and require reversal and remand for a new trial. The Court held prejudice derived from the fact that Estes was misinformed of the consequences and therefore was denied the opportunity to make an informed decision about whether to plead guilty. *Id*. at 466.

Prejudice must be viewed from the perspective of what Estes would have done had he been properly informed, not whether the prosecution would have offered a deal he would have accepted. 188 Wn.2d at 466, 468.[58] Because trial counsel failed to inform Estes of the consequences of the charge, he was unable to make an informed decision

[58] The *Estes* Court distinguished *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006), where a 5-Justice majority found deficient performance but no evidence that the prosecution might have considered any lesser sentence. *Estes*, 188 Wn.2d at 464-65. In *Estes*, on the other hand, the prosecutor expressed the possibility of mitigation at the sentencing hearing. *Id*. at 465. Viewed from the defendant's perspective, this is sufficient to find a reasonable probability and certainty is not required. *Id*. at 465-66.

about pleading guilty. 188 Wn.2d at 466. Therefore, Estes was prejudiced by counsel's deficient performance. *Id*. The Court reversed and remanded for a new trial. *Id*. at 468.

Here, counsel's affidavit states he advised Ramirez that life without parole or the death penalty were possibilities, but it does not state he informed Ramirez he was charged with aggravated murder. Reid Aff. ¶¶ 10-11. It also does not state he informed Ramirez aggravated murder *required* a sentence of either death of life without parole. *See id*. Furthermore, Ramirez's affidavit attests that he was *not* informed he had been charged with aggravated murder. Petit. Am. Aff. ¶ 3.

Reid's affidavit indicates he informed Ramirez that life without parole was one of several *possible* sentences. Reid Aff. ¶¶ 10-11. However, because life without parole is a mandatory sentence for aggravated murder, counsel clearly did not understand Ramirez was charged with aggravated murder and did not advise Ramirez he was charged with an offense that carried mandatory life without parole.[59]

Counsel's failure to advise Ramirez caused prejudice if Ramirez's decision making was affected. *Estes*, 188 Wn.2d at 466. It was. Ramirez would have viewed his options differently if he knew of the higher stakes.

[59] To the extent the Court finds a conflict in the record, it should remand for an evidentiary hearing. *See* RAP 16.11, 16.12.

> If I had known life without parole or even death were possible punishments, I would have more seriously considered entering a guilty plea to avoid the risk of trial. . . . I continue to declare my innocence, [but] I would have told my attorney I wanted to consider a plea deal. I would have pushed him to negotiate a deal with the prosecutors. I would have considered any deal he brought to me and weighed it against the risk of life without parole or death.

Petit. Am. Aff. ¶ 5.

To the extent any record evidence of the prosecution's position is required to establish prejudice, the prosecution's failure to seek a life without parole or death sentence here demonstrates willingness to exercise some leniency. *See Estes*, 188 Wn.2d at 464-65.

The State claims the prosecution's request for a standard range sentence was based on its failure to adequately plead aggravating circumstances, and not on leniency. PRP Resp. at 46 (citing Attachment C). There are at least three problems with this claim. Deputy prosecutor Stephen Garvin states it was office policy "to not make settlement offers on murder cases." PRP Resp. at Attachment C. However, the state settled Hritsco's murder charge with substantially lesser charges. App. 107-21, 145-58. Second, emails from April 2016 show defense counsel and prosecutor Garvin *did* discuss plea options. In fact, Garvin had "some ideas [about a plea] that might be workable on [his] end." App. 160. Prosecutor Treece, with copy to Garvin, also indicated willingness to

consider a plea deal. App. 161. Finally, a degree of leniency was demonstrated not only through the prosecution's request for a standard range sentence under Chapter 9.94A RCW, but also in its pretrial decision not to seek the death penalty. *See* Reid Aff. ¶ 9.

Because trial counsel's failure to inform Ramirez of the nature and consequences of the charge against him prejudiced Ramirez's pretrial decision making, the Court should reverse and remand for a new trial. *See Estes*, 188 Wn.2d at 466.

5. Ramirez was effectively denied counsel at sentencing because his attorney put forward no evidence or argument on his behalf.

At sentencing, Ramirez faced a lifetime in prison and the standard range reflected a variation of 217 months. CP 314. Despite the stakes, counsel filed no sentencing brief, made no argument, failed to present available mitigation, and simply accepted the state's sentencing position—the top of the standard range. RP 1225-26. Counsel's total abandonment at sentencing was patently deficient and an effective denial of counsel.

a. <u>The right to counsel is effectively denied when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.</u>

The adversarial process requires both sides be represented by attorneys who perform as advocates. *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Therefore, the right to

effective counsel is not met by the mere presence of counsel in the courtroom. *Strickland*, 466 U.S. at 685. To constitute effective assistance, the attorney must actually assist the client and play a role in ensuring the proceedings are adversarial and fair. *Id*. Effective assistance of counsel at sentencing includes the right to have mitigation presented.[60]

A defendant is effectively denied counsel when counsel is physically present but entirely fails to perform as an advocate. *Cronic*, 466 U.S. at 658-62. In such a case, prejudice is presumed. *Id*.

b. Because trial counsel did not present any evidence or argument in Ramirez's favor or contest the government's argument, Ramirez was effectively denied counsel at sentencing and prejudice is presumed.

Ramirez's attorney effectively abandoned him at sentencing. Although he faced a lifetime in prison—a sentence which he received—his attorney put forward no evidence or argument as to why the court should show any leniency. *See* CP 314 (standard range sentence could vary by 217 months).

In briefing and at the sentencing hearing, the prosecution requested the court sentence Ramirez to the high end of the standard range. RP

[60] *Williams v. Taylor*, 529 U.S. 362, 393, 395-97, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992). The right to the effective assistance of counsel extends to sentencing. *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987); U.S. Const. amends. VI, XIV; Const. art. I, § 22; CrR 3.1(b)(2).

1221-22; CP 304-07. The state acknowledged Ramirez would die in prison, arguing his criminal history required him "to be locked away from society" and the sentence would account for the two deaths. RP 1221-22.

Ramirez's trial attorney abandoned him at sentencing. Although he stood in the courtroom, trial counsel did not file a sentencing brief and made no legal or factual argument to advocate for Ramirez, except to ask for five dollar monthly payments towards the legal financial obligations requested by the state. RP 1225-26 ("we don't have anything to add to the State's sentencing brief at this point"); *see* App. 79 (docket shows no defense sentencing brief). Counsel's abandonment was contrary to the ABA Standards, which mandate counsel should "present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused." ABA Standard 4-8.3(c) (2017). "Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible." *Id*. at (d).

"The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Cronic*, 466 U.S. at 659. In *Bell v. Cone*, the Court clarified that *Cronic* applies to counsel's complete lack of opposition to the government at sentencing. 535 U.S. 685, 696, 122 S. Ct.

1843, 152 L. Ed. 2d 914 (2002). On the other hand, claims that counsel partially failed to act at sentencing are resolved under *Strickland*. *Id*.

Miller v. Martin demonstrates the distinction. 481 F.3d 468 (7th Cir. 2007). There, the defendant was represented by new counsel for sentencing who, convinced the findings of guilt would be reversed on appeal, stood silent and advised his client to do the same. *Miller*, 481 F.3d at 470. The court contrasted counsel's performance from *Bell*, where counsel made some effort at sentencing:

> [Counsel] said nothing throughout the sentencing hearing. . . . did not offer a shred of mitigating evidence, object to (or consult with his client about) errors in the PSR, or even lobby for a sentence lower than the one urged by the State. . . . [His] performance was therefore even more lacking than that of the attorney in *Bell*, who made a brief opening statement asking for mercy, cross-examined a witness for the State, highlighted his client's distinguished military service, and objected to the introduction of photographs of the victims.

Id. at 473. Because counsel abandoned his client, the court reversed and remanded under *Cronic*. *Id*. at 473-74.[61]

As in *Miller*, Ramirez's attorney entirely failed to advocate for him at sentencing. Although strategic bases for the deficiencies need not be

[61] *Accord Clabourne v. Lewis*, 64 F.3d 1373, 1387 (9th Cir. 1995) (Counsel's "representation at the sentencing hearing 'amount[ed] in every respect to no representation at all,' *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985), and the 'total absence of advocacy falls outside *Strickland*'s 'wide range of professionally competent assistance,' *Kubat v. Thieret*, 867 F.2d 351, 368 (7th Cir. 1989).").

examined where counsel fails to act at all, counsel's lack of representation served no advantage. *Cronic*, 466 U.S. at 659 (*Strickland*'s two-part test does not apply where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"); *see Miller*, 481 F.3d at 473 ("To hold that 'strategy' justified [counsel]'s decision [to present no evidence or argument at sentencing] would be to make a mockery of the word."). Guilty verdicts had been entered, there was no plea deal, and the state sought the high end of the standard range. Nothing limited counsel from arguing Ramirez should receive a low-end, or mid-range, sentence.

Counsel's decision was also unreasonable in light of the record. Counsel could have used the circumstantial and limited nature of the trial evidence to advocate for a lower sentence. RCW 9.94A.530(1); RCW 9.94A.535(1). He could have combatted the state's narrative by showing Ramirez's good character, mental health issues, and difficult life experiences. *See generally* Petit. Am. Aff. ¶¶ 7-9 (counsel did not discuss mitigation with Ramirez, although Ramirez could have provided the described mitigating character evidence); CP 61-63 (order finding Ramirez incompetent); App. 162-76 (diagnosing Ramirez with psychosis, describing substance abuse from age 12, reports of trauma, and lack of treatment opportunities). He also could have advocated for a mitigated exceptional sentence below the standard range by requesting concurrent

sentences for the enhancements or the underlying counts. *See In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 327-28, 331, 166 P.3d 677 (2007); *State v. McFarland*, 189 Wn.2d 47, 50, 55, 399 P.3d 1106 (2017).

Therefore, even under *Strickland*, counsel should be found ineffective due to this lack of reasonable strategy and resulting prejudice to Ramirez. *See, e.g.*, *Correll v. Stewart*, 137 F.3d 1404, 1412-13 (9th Cir. 1998) (counsel's "almost complete absence of effort" to investigate, develop, and present mitigating evidence constitutes deficient performance outside the wide range of professionally competent assistance).

State v. Goldberg is inapposite. *State v. Goldberg*, 123 Wn. App. 848, 853, 99 P.3d 924 (2004). Unlike here, Goldberg's attorney did not simply accept the state's sentencing request; he presented evidence and argument in support of a lower sentence. *Id.* at 851. In fact, Goldberg's attorney "argue[d] for a minimum standard range sentence, and with apparent success resisted an above range sentence." *Id*. at 854.

Ramirez's attorney simply stated "we don't have anything to add to the State's sentencing brief at this point." RP 1225. Thus, *Goldberg* examines counsel's ineffectiveness under *Strickland*, but *Cronic*'s effective denial of counsel standard applies here. 123 Wn. App. at 851-52 (applying *Strickland*); *Bell*, 535 U.S. at 696.

Without counsel's advocacy, Ramirez faced an effective life in prison. The sentence could only improve. Moreover, Ramirez was entitled to an advocate in his favor to stand averse to the government. Counsel's failure to act beyond accepting the state's argument deprived Ramirez of his constitutional right to counsel at this critical stage. *See Bell*, 535 U.S. at 696; *Cronic*, 466 U.S. at 659.

6. The Court can also view counsel's ineffectiveness on a cumulative basis.

To the extent there is uncertainty about whether counsel's deficiencies prejudiced Ramirez, the Court should examine the cumulative impact of trial counsel's conduct and reverse and remand for a new trial with effective counsel.

The prejudice prong of *Strickland*'s ineffective assistance of counsel test can be satisfied from the cumulative effect of counsel's multiple errors. *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (reversing based on cumulative prejudice from multiple deficiencies of trial counsel); *Boyde*, 404 F.3d at 1176, 1180 (viewing cumulative prejudice from multiple deficiencies); *Mak*, 970 F.2d at 622 (reversing based on cumulative prejudice from multiple errors at sentencing).

Trial counsel's performance failed at every stage of the proceedings. Counsel failed to advise Ramirez of the correct sentencing

implications upon conviction. Therefore, Ramirez was unable to intelligently weigh his options or negotiate a plea deal. Counsel also failed to object to uncharged sentencing enhancements, of which Ramirez was found guilty. Further, counsel did not move to exclude patently unreliable eyewitness identification evidence or introduce impeachment evidence against the state's key eyewitness. Then, at sentencing, counsel failed to make any legal or factual argument in Ramirez's favor.

Trial counsel's grossly deficient performance collectively undermines confidence in the fairness of Ramirez's trial on these serious charges that carried an exceptionally harsh sentence. The Court should reverse and remand for appointment of new counsel and a new trial.

D. CONCLUSION

Trial counsel lacked reasonable strategic basis for a myriad of deficiencies from failing to object to evidence and sentencing enhancements and failing to present impeachment evidence to completely failing to represent Ramirez at sentencing. Individually, or when viewed as cumulative error, these deficiencies prejudiced the outcome of trial and sentencing in this very serious case. The Court should reverse and remand based on one or more of counsel's deficiencies.

Respectfully submitted this 5th day of May, 2021.

Marla L. Zink, WSBA 39042
Luminata, PLLC
212 Broadway E. #22815
Seattle, WA 98102
(360) 726-3130
marla@luminatalaw.com

Attorneys for Petitioner

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

IN RE PERSONAL RESTRAINT OF CHRISTOPHER RAMIREZ, Petitioner.	)	No. 37774-1-III CERTIFICATE OF SERVICE OF COUNSEL

I, Marla Zink, state that on the below indicated date, I caused to be filed in the Court of Appeals, Division Three the foregoing document and a true and correct copy of the same to be served on the following in the manner indicated below:

Larry D. Steinmetz	lsteinmetz@spokanecounty.org;scpaappeals@spokanecounty.org

SIGNED and DATED this 5th day of May, 2021 in Seattle, WA:

s/ Marla L. Zink
Marla L. Zink, WSBA 39042
Luminata, PLLC
212 Broadway E. #22815
Seattle, WA 98102
(360) 726-3130
marla@luminatalaw.com