No. 54684-1-II

IN THE COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

STEVEN RUSSELL,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

Two men ambushed Jose Leiva-Aldana and Agustin Morales-Gomez around midnight, in a two-minute attack. Police responded and obtained statements from the two men and two uninvolved eyewitnesses. All four witnesses gave statements identifying the attackers as white, blonde, or Caucasian. The key issue was the identity of the two attackers.

Based on a hunch, officers created two photomontage lineups, each featuring only Native American and Hispanic males. Officers understood there was a disparity between witnesses' descriptions and the photo subjects.

The officers who administered the photo lineups knew who the suspect was in each montage. Three of the four witnesses selected Mr. Russell as one attacker. Mr. Russell is Native American.

Counsel did not move to suppress the identification based on an impermissibly flawed procedure, which resulted in a substantial risk of irreparable misidentification. Nor did counsel seek to present expert testimony on the fallibility of eyewitness identification, to explain how witnesses could describe an attacker as white, and then choose a Native American as the perpetrator. The convictions in this matter must be reversed and vacated.

I. Assignments Of Error

A. Mr. Russell received ineffective assistance of counsel where counsel failed to move for suppression of pretrial and in court identification which was impermissibly suggestive and gave rise to a substantial likelihood of irreparable misidentification.

B. Mr. Russell was denied effective assistance of counsel where counsel failed to engage an expert

witness on eyewitness identification, the key issue at trial.

C. Mr. Russell's offender score must be corrected, and he is entitled to a full resentencing under current law.

Issues Related To Assignment Of Errors

A. Did counsel's failure to seek suppression of eyewitness identification violate Mr. Russell's right to effective assistance of counsel?

B. Was Mr. Russell denied effective assistance of counsel by trial counsel's failure to call an expert to testify about the inaccuracy and unreliability of eyewitness identification?

C. Is Mr. Russell's offender score incorrect?

II. Statement Of Facts

October 24, 2015, Jose Leiva -Aldana ("Aldana") and Agustin Morales-Gomez,("Gomez") both from El

Salvador, spent the afternoon and evening together. (6/28/16 RP 92; 6/29/16 RP 88). Around 10 pm they went to a local bar and stayed until close to midnight. (6/28/2016 RP 93). As they walked home, they were ambushed by two people wanting to steal their money. (6/28/16 RP 94). Both men fought their attackers. Gomez waved his knife, and the attackers fled. (6/28/16 RP 98, 124)(Exhs. 62 and 63). Nearby neighbors called 911 and officers transported the two to the police station to provide statements about the incident. (6/28/16 RP 100-101).

Hospital Events

Detective Perkinson ("Perkinson") of the Aberdeen police department worked as a contract security guard at Grays Harbor Community Hospital. (6/30/16 RP 158). Shortly after midnight, while viewing the ER security camera, he saw three men enter the ER lobby. (6/30/16 RP 159).

He learned one man was being treated for a stab wound. By the time he got to the lobby, the other two men had left the hospital. (6/30/16 RP 161). At trial he identified Steven Russell ("Russell") as one of the individuals who helped Mr. Ramirez ("Ramirez"), the injured person, into the hospital. (6/30/16 RP 159-160, 163). According to Perkinson, Russell, Daniel Galeana ("Galeana") and Devon Armes returned to the hospital a short time later and left again before 1:40 am. (6/30/16 RP 170-171,173).

Russell's wife and friend both testified he arrived home before 2 a.m. and remained home the entire following day, caring for his children with his wife's friend. (7/6/16 RP 511-514, 525-527). Around 6 am, Galeana returned to the hospital to give Ramirez a ride home. (7/1/16 RP 262-263).

After speaking with officers, Aldana and Gomez walked home about 2 a.m. Attackers were in the

alleyway, and in the second encounter shot Aldana in the stomach and a ricochet bullet injured Gomez in his foot. (6/28/16 RP 101, 6/29/16 RP 106). Officers responded and the men were transported to the hospital. (7/1/16 RP 229).

Pre-Photomontage Eyewitness Descriptions Of Attackers

Nichol Smith saw the first attack. Her presence triggered a motion light outside her home but did not illuminate the area of the fight. However, when the suspects fled, they were six to eight feet in front of her. (6/29/16 RP 33,34,42). She reported one man wore tan pants and a black hoodie. (6/29/16 RP 19). In her oral and written statement to police, she described the larger person as “a white guy” and said she might be able to identify him. (6/29/16 RP 31;43).

Aaron Johnson joined his wife Nichol when he heard the noise in the alleyway. (6/29/16 RP 47). He described the larger suspect as wearing tan pants, a

white t-shirt and brown shoes. The second suspect was smaller and wore an oversized black hoodie and black pants. (6/29/16 RP 48-49).

In his statement to officers, he reported the larger man was a white man, who he "might be able to identify." (6/29/16 RP 67-70). In his written statement it was reported he said, "I don't know what race the other guy was because he has his hood over his face." (Exh. 31).

At trial he denied saying the larger suspect was a white man. (6/29/16 RP 67). He said his signed statement had been written by the officer; he disputed he said "white" and that he had crossed it out. (6/29/16 RP 70). The statement did not have the word "white" crossed out. (Exh. 31).

Gomez provided several statements to law enforcement through interpreters. (6/29/16 RP 155-157). After the first attack he told officers that both men who attacked him were white, blonde, with thick blonde

mustaches. (6/29/16 RP 161; Def. Exh. 34). At trial he identified Mr. Russell as *not* being a white man. (6/29/16 RP 168).

After the second incident, he described the larger man as tall and thin, wearing a white jacket, black pants, around 20 years old. He believed the man had black hair. (6/29/16 RP 98-99). He said the smaller man was light skinned with blonde hair. (6/29/16 RP 99-100). He said the man who shot his friend and wounded him was Hispanic and wearing all black clothing. (6/29/16 RP 107).

The second statement, given the morning of October 25th, Gomez said he could not identify his attacker. (Exh. 36). On October 31st, Gomez, told officers three men attacked him and his friend. (Exh. 37). He said the "big white guy" had a gun, but he did not shoot it. (Exh. 37).

At trial Gomez testified there were four attackers[1]. (6/29/16 RP 165). The smaller of the men who attacked him was dark-skinned and the taller one was white. (6/29/16 RP 116, 119-120). He quickly changed his testimony saying the smaller man was white and the larger man wore a white jacket. (6/29/16 RP 119, 165). He did not identify Russell in court as one of the attackers. (6/29/16 RP 109).

Aldana also described being attacked by four men. (6/30/16 RP 94). He identified Galeana as the individual who shot him in the alley. (6/30/2016 RP 103-104; Exh. 28). At trial he testified that no one in the courtroom had been at both incidents. (6/30/16 RP 104). Galeana was seated at defense table as a co-defendant.

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[1] The surveillance video played at trial showed there were only two men who attacked Gomez and Aldana. (Exh. 62 and 63).

Aldana had signed his statement to police verifying the attackers were both American and both white. The interpreter testified she read his statement aloud to him, word by word, and he agreed the two men who attacked him were white, “non-Chicano”. (7/6/16 RP 535-36, 541, 544). (Def. Exh. 38).

The taller man had light-colored eyes and short blonde hair. (6/30/16 RP 143-144). The shorter man had dirty blonde colored short hair. (6/30/16 RP 108-109, 143) (Def. Exh. 38, 39, 40). At trial Aldana vacillated between saying the attackers were Hispanic, and fair skinned white men. (6/30/16 RP 98, 108-109).

Despite Witness Descriptions Of The Men As “White” Police Prepare Photo Montage Using Only Hispanic And Native American Male Mugshots

Officer Blodgett responded to the hospital shortly after midnight to investigate the stabbing incident. He saw Russell, Ramirez, Galeana, and Devon Armes in the lobby. (7/1/16 RP 252, 258-259). After the second incident, Officer Glaser reported he obtained a description of the suspects from Aldana. (7/1/16 RP 230). He reportedly provided that description to Officer Blodgett. (7/1/16 RP 253). The only explanation by Aldana was that the attackers were white. (Def. Exh 38).

Blodgett testified he "receive[d] a description of a suspect" and having seen Galeana at the hospital earlier, he considered him a suspect. He passed that information to other officers. (7/1/16 RP 254-255).

Detective Cox prepared the first photo montage to show to Aldana while he was in the hospital. The montage was all men with dark skin and included a photo of Galeana. (7/1/16 RP 320;410)(Exh. 28). Aldana identified the photo of Galeana as the individual who shot

him. (7/1/16 RP 325-326). Aldana said he was familiar with Galeana through family relationships. (6/30/16 RP 102).

Detective Cox later showed the same photos to Gomez, who did not select the photo of Galeana. (7/1/16 RP 351-52).

Detective Cox directed Officer Hudson to create a second photo montage to include a photo of Russell. (7/1/16 RP 326).

Cox included Russell because, “that was - that was based on the investigation up to this point with the information I had involving Mr. Galeana being at the hospital, along with Mr. Ramirez and Steven Russell and the description of a larger male being at the scene of the robbery. So that's why I made that decision.” (7/1/16 RP 326-327).

Hudson told the jury:

> We typically obtain our photographs from in-house local data records, primarily through our bookings through the Aberdeen police department jail. Some of those bookings are also retrieved from the network computer from Grays Harbor Sheriff's Office, Hoquiam city jail. Typically, it's a mugshot from one of our local agencies. And there's a total of six mug shots, five random that appear to resemble the person that is in question or the suspect.
> In this particular case I had one suspect and five additional mug photographs for a total of six photographs. (7/1/16 RP 272-273).

Officer Hudson showed the second photo montage to Nichol Smith and Aaron Johnson. (7/1/16 RP 294). Because he had not spoken to any witnesses nor had he read any of their statements, he said he was unaware the suspects had originally been described as white men. (7/1/16 RP 294-295). He did not include any white males in the photo lineup. (7/1/16 RP 293-295,296).

Rather, he put together the montage because Detective Cox told him Russell was a suspect. (7/1/16 RP 294; 326-327). He admitted "I was aware at that time that

there was a description, although there was some dispute of a description…" and " a disparity in the description of the suspect." (7/1/16 RP 294-295).

Detective Cox showed the second montage to Gomez, who chose an individual who was not a suspect. (7/1/16 RP 352; Exh. 30).

He showed the same montage to Aldana. Aldana selected Russell from the second photo montage after he had been awake for over 24 hours, had six beers, been beaten, shot, and given pain medication. (6/30/16 RP 136-140)(Exh. 28, 29).

The following day officers presented Nichol Smith with the second montage. (6/29/16 RP 23). None of the photos included a white man. (See Exh 26). She selected Russell, a Native American, as the larger of the two individuals who fled, and identified him in the courtroom. (6/29/16 RP 25-26). She said Russell did not look white to her. (6/29/16 RP 31).

When shown the same photo montage, Johnson selected Russell and commented, “pretty sure, 100%, running funny, really big”. (Exh. 27). At trial, in contrast to his original description, Johnson said both the victims and suspects were Hispanic. (6/29/16 RP 63).

Jury Instruction

The court provided jury instruction 10:

> Eyewitness testimony has been received in this trial on the subject of the identity of the perpetrator of the crime charged. In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given you for evaluating any witness’s testimony, you may consider other factors that bear on the accuracy of the identification. These may include:
> The witness’s capacity for observation, recall, and identification;
> The opportunity of the witness to observe the alleged criminal act and the perpetrator of that act;
> The emotional state of the witness at the time of the observation;
> The witness’s ability, following the observation, to provide a description of the perpetrator of the act;
> The period of time between the alleged criminal act and the witness’s identification;

> The extent to which any outside influences or circumstances may have affected the witness's impressions or recollection; and
> Any other factor relevant to this question.

CP 12.

Petitioner Russell was charged and found guilty of robbery in the first degree, attempted robbery in the first degree, two counts of assault in the first degree with a firearm, and two counts of assault in the fourth degree. CP 184-185.

His conviction history included a possession of a controlled substance, a juvenile first-degree burglary, and a juvenile second-degree burglary. (CP 185-186). The offender score for the current conviction first-degree assault was calculated at "9". (CP 186)(See appendix).

He filed a timely appeal, and the current convictions were affirmed by the Court of Appeals. *State v. Ramirez*, 7 Wn.App.2d 277, 432 P.3d 454 (2019). Mr. Russell prepared and filed a pro se personal restraint petition.

This Court assigned counsel to provide supplemental briefing.

III. Argument

Where a petitioner has had a prior opportunity for judicial review, the petitioner must show in his personal restraint petition he was "actually and substantially prejudiced by constitutional error or that [his] trial suffered from a fundamental defect of a non-constitutional nature that inherently resulted in a complete miscarriage of justice." *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011). Actual prejudice is demonstrated by showing the claimed error had practical and identifiable consequences. *State v. O'Hara,* 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

In his pro se petition Mr. Russell presented constitutional errors which actually and substantially prejudiced him, and demonstrated his trial suffered from fundamental defects of a non-constitutional nature which

inherently resulted in a complete miscarriage of justice. The supplemental briefing will address the same type of errors.

A. Mr. Russell Was Denied Effective Assistance of Counsel Where Counsel Failed To Move For Suppression of Eyewitness Identification.

Both the state and federal constitutions guarantee a criminal defendant the right to a fair trial, which includes effective assistance of counsel. U.S.Const. amend. VI; Wash. Const. Art. I §22; *In re Pers. Restraint of Glassman,* 175 Wn.2d 696, 703, 286 P.3d 673 (2012). The purpose of the guaranty is to ensure a reliable disposition of the case. *State v. Garrett,* 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

A claim of ineffective assistance of counsel is reviewed de novo. *State v. Sutherby,* 165 Wn.2d 870, 204 P.3d 916 (2009). The Court applies the same prejudice standard to ineffective assistance of counsel claim

brought in a personal restraint petition. *In re Pers. Restraint of Crace,* 17 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

To demonstrate ineffective assistance of counsel, a defendant must show two things (1) counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the deficient representation prejudiced the defendant, i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by showing "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach,* 153

Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho,* 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Trial strategies and tactics are no immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Where a defendant makes the claim of ineffective assistance of counsel for failure to move for suppression, he must show the motion had merit and the verdict would have been different had the motion been granted. *Kimmelman v. Morrison,* 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *State v. McFarland,* 127 Wn.2d at 333-334.

a. Unreliable Identifications From Impermissibly Suggestive Procedures Should Be Suppressed.

Here, the key contested issue was the identity of the perpetrators. (4/22/16 RP 38). Washington Courts have long recognized that eyewitness testimony is "notoriously unreliable" and stands as a leading cause of wrongful convictions. *State v. Riofta,* 166 Wn.2d 358, 371, 209 P.3d 467 (2009)(citing to Brandon L. Garrett, *Judging Innocence,* 108 Colum. L.Rev. 55, 60 (2008)("the vast majority of exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect.").

The Due Process guarantee of the Fourteenth Amendment demands exclusion of eyewitness identification that was "obtained by an unnecessarily suggestive police procedure" and "lacks reliability under the totality of circumstances." U.S. Const. Amend. XIV; *State v. Derri,* 199 Wn.2d 658, 673, 511 P.3d 1267 (2002); *State v. Vickers,* 148 Wn.2d 91, 118, 59 P.3d 58 (2002). The reliability of the identification is the "linchpin

to determining its admissibility." *Manson v. Brathwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

Law enforcement use of suggestive procedures increases the likelihood of irreparable misidentification. Where the "indicators of [a witness'] ability to make an accurate identification" are outweighed by the corrupting effect "of law enforcement suggestion, the identification should be suppressed; it is unreliable. *Brathwaite,* 432 U.S. at 114.

Courts use a two-part analysis to determine whether an identification violated due process. *State v. Birch,* 151 Wn.App. 504, 514, 213 P.3d 63 (2009). The defendant must first establish by a preponderance of the evidence that the administered identification procedure was unnecessarily suggestive. *Foster v. California,* 394 U.S. 440, 442, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1960). If that showing is made, the Court then considers the totality of the circumstances to determine whether the

unnecessarily suggestive procedure created the likelihood of irreparable misidentification. *Brathwaite,* 432 U.S. at 114; *State v. Vickers,* 1148 Wn.2d at 118.

Here, the administration of the photomontage procedure was unnecessarily suggestive in both subtle and not so subtle ways. In *Derri,* the Court noted that scientific research has developed the Court's understanding of variables that influence the reliability of eyewitness identifications[2]. *Derri,* 199 Wn.2d at 676.

The issue here is the "system variables", that is those variables which are under police control when administering the identification process; they are relevant to whether the government used a suggestive identification procedure. *Id.* at 677.

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[2] Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 L. & HUM. BEHAV. 3-36, 6-7 (2020) [https://perma.cc/LVQ3-EEV8]

b. The Photo Lineup Was Based On A Hunch Not Witness Descriptions.

There should be evidenced based grounds to suspect that an individual is guilty of the specific crime being investigated before including that individual in an identification procedure and that evidence should be documented in writing prior to the lineup[3]. Evidence based suspicion means articulable evidence that leads to a reasonable inference that a particular person likely committed the crime in questions. *Id.*

Where was no pre lineup evidence of a particular suspect or the police used a hunch someone might be the offender, field studies have shown the suspect was innocent 65% of the time (Texas), 40% of the time

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[3] Gary L. Wells, et al., *Policy and Procedure Recommendations,* at 11, 12.

(Northern California) and an additional 30% of the time where there was minimal evidence of the culprit[4].

In this case, before the photo lineups had been created, every witness initially reported the attackers as either white, Caucasian, American or blonde. Yet the photomontage consisted only of Hispanic and Native American males. The lineup was put together based on the men who brought Ramirez to the hospital rather than any witness descriptions.

Detective Glaser reported he “got a description” from Aldana and shared that with Blodgett. Aldana had described the attackers as white men. Nevertheless, Blodgett, who had seen Galeana at the hospital, included Galeana as a suspect. Galeana is not a white man. Aladana, who knew of Galeana through family, selected

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[4] Gary L. Wells, ete al. *Policy and Procedure Recommendations* at 12.

Galeana, a familiar face, even though he did not fit the description. (6/30/16 RP 102).

Similarly, despite witnesses describing the attackers as white, specifically the larger man (presumed to be Russell), Russell's photo was included in the second montage because the officer had seen him in the ER. His photo was included on a hunch, not a description by any witnesses.

Additionally, aside from not matching the witness description, no physical evidence linked him to the crime. Officers later pointed to the broken cellphone found in a puddle that night, as evidence Mr. Russell, or at least his cell phone, was present in the alleyway. However, the phone had been damaged so badly, it required an out of state forensic group to obtain information from it using a unique process. Officers did not know of the phone content for months after the photo lineup.

c. The Procedure Was Single-Blind.

Significant to this case, the *Derri* Court recognized that "identification procedures should be administered in double-blind fashion, meaning the administrator does not know who the suspect is." *Derri,* 199 Wn.2d at 677.

Double-blind administration protects against both intentional and unintentional behavior that may steer a witness to choose a specific suspect or provide feedback to witnesses that communicates their choice was correct.[5]

Here, Hudson put together the second photo lineup, knowing Russell was the suspect, based on Cox's hunch. Hudson had not spoken to either Smith or Johnson and had not read their statements about the attackers being white male. (7/1/16 RP 291, 293, 295). However, he

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[5] John T. Wixted & Gary L. Wells, *The Relationship between Eyewitness Confidence and Identification Accuracy: A new Synthesis:* 18 Psych. Sci., in Pub Interest 10, 14-17; Margaret Bull Kovera & Andrew J. Evelo, *The case for Double-Blind Lineup Administration,* 23 Psych. Pub. Pol'y & L. 421 (2017).

admitted he knew there was a disparity between how the witnesses had described the suspects and the photos he showed to them. (7/1/16 RP 295).

He testified, “I remember there was some talk about suspect identification. But my focus was a name of a suspect…listed as a potential suspect based on the investigation and information description that was presented…” (7/1/16 RP 293-294). In other words, Hudson knew the descriptions did not match. He knew which individual was the target suspect. And he created a montage based around that suspect.

At trial, Hudson described the source of photos as mugshots from local jails. (7/1/16 RP 272). In her testimony, Smith also described the photos as “mugshots”. (6/29/16 RP 24). The suggestion, however subtle, that one of the individuals in the lineup was guilty because the photos were all mugshots cannot be underestimated.

Research recommends a double-blind administration for exactly this reason: the administrator should not know who is suspected and must not convey that everyone in the montage has a criminal record, thus a mugshot. Even if Hudson never used the words when speaking with Smith, the very fact the witness would use the same word, mugshot, leads to an inference the officer conveyed information either intentionally or unintentionally that distorted the process.

Research confirms that memory distortion may occur "after being exposed to misleading information to that memory [for example] an impairment in the memory of the face of the perpetrator after being exposed to a photo of a police suspect who was not the true perpetrator."[6] An eyewitness's memory of a crime can be

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[6] Joyce W. Lacy & Craig E.L. Stark, *The Neuroscience of Memory; Implications for the Courtroom,* 14 Nature Rev. Neuroscience 649, 651 (2013).

altered by information the witness learns after the crime from other sources.[7]

Here, the combination of a photomontage that did not match the witness descriptions was generated based on a hunch and use of a single-blind administration is sufficient to raise an issue of impermissible suggestibility.

d. Totality of the Circumstances Analysis

Where there has been an impermissibly suggestive lineup procedure, as here, the Court examines whether the procedure created a substantial likelihood of irreparable misidentification under a totality of the circumstances analysis. *State v. Vickers,* 148 Wn.2d at 118. The Court considers: (1) the opportunity of the witness to view the offender at the time of the crime, (2) the witness's degree of attention; (3) the accuracy of the

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[7] Ronald P. Fisher, *Interviewing Victims and witnesses of Crime,* 1 Psychol. Publ. Pol'y & L. 732, 740 (1995).

witness's prior description of the offender; (4) the level of certainty demonstrated at the confrontation and (5) the time between the crime and confrontation. *Neil v. Biggers,* 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

Here, none of the witnesses had good opportunity to view the attackers. It was dark outside, and the lighting was poor. The entire attack lasted less than two minutes. Smith and Johnson had mere seconds to view the attackers as they ran past them.

Witnesses' attention varied. Gomez and Aldana were concerned with fighting off their attackers in the dark. Smith and Johnson only saw the attackers as they sped by. They described no facial features of the attackers but were clear they were white males.

Third, right after the incident, the witnesses described the attackers as white. Aldana and Gomez insisted the men were blonde and fair skinned. Similarly,

Johnson and Smith both thought the attackers were white men. Their initial descriptions and the discrepancies with the photo lineup weigh heavily against reliability of their lineup selections.

Fourth, despite the lineup identifications differing from the original descriptions, the witnesses' confidence in their choice was high. By the time of trial, long after Smith and Johnson had given their original statements, they both insisted they had not told officers the person was white or might have been white. The witnesses disavowed their initial descriptions and became absolutely confident in the accuracy of their photomontage selection.

Eyewitnesses are likely to be overconfident about their identification of a suspect as the perpetrator of a crime when they have incorporated new information about

the event[8]. Information such as awareness the individual has been charged, or confirmation from police officers they chose the right suspect can increase eyewitness confidence with no actual improvement in the accuracy of the identification.[9] Here, the witnesses' confidence in their choice should not be conclusive as confidence does not signify accuracy.

Finally, the time frame between the incident and identification was about 24 hours. This time frame should not control in concluding the identifications were reliable. Under a totality of the circumstances, the identification does not possess sufficient aspects of reliability.

e. A Motion to Suppress Would Have Been Granted

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[8] Wayne Weiten, Psychology: Themes and Variations, Briefer version 130, 231 (7th Ed. 2008).
[9] Michael R. Leippe & Donna Eisenstadt, Eyewitness Confidence and the Confidence-Accuracy relationship in memory for People, in 2 Handbook of Eyewitness psychology, Memory for People 377, 417-18 (Rod C.L. Lindsay, et al. eds. (2007).

Because the eyewitness identification was the key element of the State's case, and it occurred using an impermissibly suggestive process, which did not bear sufficient aspects of reliability, a motion to suppress should have been granted. Failure to make the motion was ineffective assistance of counsel.

B. Counsel Was Ineffective For Failure to Call An Expert Witness.

The Constitution guarantees a criminal defendant the right to a meaningful opportunity to present a complete defense. *Rock v. Arkansas,* 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). And a criminal defendant has the right to offer the testimony of his own witnesses to establish his defense. *State v. Cheatam,* 150 Wn.2d 626, 648, 81 P.3d. 830 (2003).

The Rules of Evidence state that relevant evidence is admissible and will only be excluded where the probative value is substantially outweighed by the danger

of unfair prejudice, confusion, or misleading the jury. ER 402, ER 403. Further,

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training or education may testify thereto in the form of an opinion or others.

ER 702.

Testimony by an expert trained in eyewitness identification reliability is especially important where the key issue in the State's case was identification. *State v. Cheatam,* 150 Wn.2d at 649. With mounting scientific evidence about the "notorious unreliability" of eyewitness identification, an expert could have testified to the research on unreliability based on suggestive lineups, effects of stress and violence, poor lighting, cross-racial identification, and eyewitness confidence in identifying a suspect who did not match the initial description.

Further, an expert could have discussed how the perceptions of witnesses can cause an eyewitness to remember a perpetrator of a crime incorrectly because of prejudicial attitudes he might hold toward a member outside of his or her own race. *State v. Butler,* 200 Wn.2d 695, 727-728, 521 P.3d 931 (2022)[10].

In *Scabbyrobe,* the Court noted that eyewitness confidence is malleable and provides no guarantee of accuracy. *State v. Scabbyrobe,* 16 Wn.App.2d 870, 898, 482 P.3d 301 (2021).(citing to Taki V. Flevaris & Ellie F. Chapman, 38 Seattle U.L.Rev. at 866-67(2015).

Witness misidentification of suspects "plagues the United States." *Scabbyrobe,*16 Wn.App.2d at 895.

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[10] See also Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias In Memory For Faces: A Meta-Analytic Review,* 7 Psycho. Pub. Pol'y & L. 3,15 (2002).

"Decades of research has demonstrated that memory is often incomplete and inaccurate, depends on the witness' goals and expectations, and is influenced by a suggestive process." *Scabbyrobe,* 16 Wn.App.2d at Taki V. Flaris & Ellie F. Chapman, *Cross-Racial Misidentification: A call to action in Washington State and Beyond,* 38 Seattle U.L.Rev. 861, 870 (2015).

Awareness of the fallibility, malleability, and suggestibility involved in eyewitness identification is not within the common understanding of the average juror. "Jurors tend to accept identifications by well-intended and seemingly disinterested persons as absolute proof." *Scabbyrobe,* 16 Wn.App.2d at 897 (citing to Timothy P.O'Toole & Giovanna Shay, Manson v. Brathwaite revisited: Towards A New Rule Of Decision for Due Process Challenges to Eyewitness Identification Procedures, 41 Val.U.L.Rev. 109, 134-135 (2006)). "Jurors place the greatest weight on eyewitness

confidence in assessing identifications *even though the witness' false confidence is a poor gauge of accuracy."* *Perry v. New Hampshire,* 565 U.S. 228, 260, 132 S.Ct. 176, 181 L.Ed.2d 694 (2012)(Sotomayor, J. dissenting).

And research has shown that eyewitness testimony is far less accurate than most jurors believe[11]. Because members of a jury may rely on the confidence of an eyewitness, it may wrongly convict due to ignorance of the vagaries of eyewitness reliability.

An expert witness could have addressed the realities of misidentification based on well-meaning but incorrect identification of a suspect.

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[11] Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 SEATTLE U. L. REV. 861, 866-67 (2015); Jennifer E. Dysart et al., *Show-ups: The Critical Issue of Clothing Bias*, 20 APPLIED COGNITIVE PSYCHOL. 1009, 1017-19 (2006); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 284-85 (2003).

Because identity was the key issue in Mr. Russell's case, it was ineffective assistance of counsel to fail to present an expert witness as part of his defense.

C. Mr. Russell's Offender Score Must Be Corrected And He Is Entitled To A Full Resentencing.

A sentence based on an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. *In re Pers. Restraint of Johnson,* 131 Wn.2d 558, 569, 933 P.2d 1019 (1997); *In re Pers. Restraint of Goodwin,* 146 Wn.2d 861, 868, 50 P.3d 618 (2002).

In 2021, the Supreme Court issued *State v. Blake,* 197 Wn.2d 170, 481 P.3d 521 (2021), holding RCW 69.50.4013 to be an unconstitutional statute. An unconstitutional statute is void *ab initio* and has no legal effect. *State ex rel. Evans v. Brotherhood of Friends,* 41 Wn.2d 133, 143, 247 P.2d 787 (1952). Convictions for

possession of a controlled substance which were entered before 2021 must be vacated. *Blake,* 197 Wn.2d at 195.

Resentencing is warranted where the trial court has included a prior conviction for possession of a controlled substance offender score and the standard range will change with removal of the conviction. *State v, Gouley,* 19 Wn.App.2d 185, 494 P.3d 458 (2021).

Here, Mr. Russell's history included a 2010 conviction for possession of a controlled substance. The sentencing court included that prior conviction when it calculated his offender score in 2016. The court reached an offender score of '9' for the serious violent offense, first degree assault. The second conviction for first degree assault was scored as a '0' under RCW 9.94A.589(1)(b).

With vacation of the now void conviction, Mr. Russell's offender score would correctly be an '8' for the most serious offense. The standard range drops from 240-318 months to 209-277 months. RCW 9.94A.510.

Mr. Russell's judgment and sentence is facially invalid because the standard range changes with removal of the possession of a controlled substance conviction. *State v. LaBounty,* 17 Wn.App.2d 576, 581-82, 487 P.3d 221 (2021). The remedy is resentencing. *State v. Markovich,* 19 Wn.app.2d 157, 173, 492 P.3d 206 (2021). At a resentencing hearing, Mr. Russell must be resentenced under the current sentencing statutes.

Scoring criminal history occurs at sentencing or resentencing, not the time of conviction. RCW 9.94A.500. Scoring for criminal history is defined: "A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed." RCW 9.94A.525(1)(a).

EHB 1324 (2023) codified in RCW 9.94A.525(1)(b) provides:

> For the purpose of this section adjudications of guilt pursuant to Title 13 RCW which are not murder in

> the first or second degree or class A felony sex offenses may not be included in the offender score.

Subsection (1)(a) sets the sentencing hearing as the relevant date for calculating the offender score. Subsection (b) precludes inclusion of certain juvenile convictions in the tabulation of the score.

Because the relevant date for determination of criminal history and offender score is the sentencing date or resentencing, there was no need for EHB 1324 (2023) to include a retroactivity clause. The plain language of the statute makes clear it applies as of the date of sentencing.

RCW 9.94A.345 does not control. RCW 9.94A.345 allows:

> *Except as otherwise provided in this chapter*, any sentence imposed under this statute shall be determined in accordance with the last in effect when the current offense was committed.

.345 is a general rule which applies “except as otherwise provided”. RCW 9.94A.525 is such an exception. As a specific statute, .525 controls over the general statute found in .345. “[T]he [specific statute] will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment.” *Washington State Ass'n of Ctys. v. State*, 199 Wn.2d 1, 13, 502 P.3d 825, 833 (2022).

Even the general saving statute, RCW 10.01.040 does not apply because it has an exception where the specific statute expresses the intent to apply new law. RCW 9.94A/525 is procedural, as it establishes the process where prior convictions as of the date of the current sentencing may or may not be included in an offender score.

State v. Jenks, 197 Wn.2d 708, 487 P.3d 482 (2021) does not compel a different result. There, the

relevant date for determining classification as a persistent offender was the date of conviction, not the date of sentence. The triggering event in that case was a 2017 conviction for first degree robbery, which occurred before the enactment of ESB 5288 (2019). The amendment did not apply prospectively to Mr. Jenks. *Jenks,* 197 Wn.2d at 722-23.

Here, the triggering event will be the resentencing date, that will take place after the enactment of RCW 9.94A.525(1)(b). The two juvenile convictions, burglary 2 and burglary 1 do not fall into the category of offenses which the court could consider in calculating the new offender score.

This Court should direct the trial court to vacate the possession of a controlled substance conviction and prevent consideration of the juvenile adjudications in the offender scoring.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Russell respectfully asks this Court to accept and grant his petition for relief.

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Submitted this 16th day of October 2023.

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CERTIFICATE OF SERVICE

I, Marie Trombley, hereby certify under penalty of perjury under the laws of the State of Washington, that on October 16, 2023 I electronically served, a true and correct copy of the Petitioner's Supplemental Brief to: Grays Harbor County Prosecuting Attorney at appeals@co.grays-harbor.wa.us. And provided a copy to Steven Russell c/o Marie Trombley.

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