No. 41795-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Maddaus,

Appellant.

Thurston County Superior Court Cause No. 09-1-01772-1

The Honorable Judge Christine Pomeroy

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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I. EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT SHOULD HAVE BEEN SUPPRESSED, BECAUSE THE WARRANT WAS OVERBROAD AND WAS NOT SUPPORTED BY PROBABLE CAUSE.

A. Respondent's concession regarding the search warrant's surveillance equipment clause requires suppression of all evidence seized, because that clause cannot be severed from the remainder of the warrant.

Respondent concedes that the warrant affidavit does not provide probable cause to search for or seize surveillance equipment. Brief of Respondent, p. 24. In light of this concession, all of the evidence seized from Mr. Maddaus's home must be suppressed (including a handgun and photographs showing a paintball gun, drug paraphernalia, and assorted ammunition). RP 667, 816-823. The erroneous inclusion of authorization to search for surveillance equipment invalidates the entire warrant. This is so because—contrary to Respondent's assertion—the surveillance equipment clause cannot properly be severed from the remainder of the warrant.

1. The surveillance equipment clause is not severable from the remainder of the warrant under the federal constitution.

The Fourth Amendment was adopted, in part, to prevent general searches. *State v. Perrone*, 119 Wash.2d 538, 557, 834 P.2d 611 (1992). Here, the warrant authorized a "general search of materials protected by

the First Amendment," allowing the executing officers to "rummage through virtually all of defendant's" computer files or other electronic media, despite the lack of any basis in the affidavit. *Id, at* 559. The severability doctrine does not apply to general warrants; in such cases, "the invalidity due to unlimited language of the warrant taints all items seized without regard to whether they were specifically named in the warrant." *Id, at* 557.

In this case, the directive to search for surveillance equipment and electronic media—for which there was no basis in the affidavit—was itself equivalent to a general warrant. The offending language directed the executing officers to seize "any surveillance equipment to include cameras and any device that could contain recordings from the surveillance equipment, any device that could contain surveillance camera recordings from [the Capitol Way apartment]." CP 10-11. This language authorizes the seizure of any audio, video, or still-photo recording device, as well as computers, disks, videotapes and other electronic storage media, all of which might contain images, recordings, or texts protected by the First Amendment.[1]

[1] The authorization is particularly egregious because any such device in regular use can be presumed to contain materials of a private and sensitive nature.

Because the surveillance equipment clause was broad enough to allow such a general rummaging through all of Mr. Maddaus's electronic media, it was itself a general warrant of the type forbidden by the Fourth Amendment. *Perrone, at* 538. Accordingly, the clause cannot be severed from the remainder of the warrant.[2]

Additionally, the Fourth Amendment only allows severance "where 'each of the categories of items to be seized describes distinct subject matter in language not linked to language of other categories…'" *Cassady v. Goering*, 567 F.3d 628, 638 (10th Cir. 2009) (quoting *United States v. Sells,* 463 F.3d 1148, 1158 (10th Cir.2006)). The surveillance equipment clause fails this test as well.

There is significant overlap between the surveillance equipment clause and the authorization to search for "any computers, media storage devices, cell phones, [sic] that could be used to communicate between the victim and suspect or could contain an [sic] recording of subjects speaking about the robbery of Robert Maddaus…" CP 10-11.

Accordingly, the surveillance equipment clause is not severable under the Fourth Amendment. *Perrone, at* 557. Mr. Maddaus's

[2] Furthermore, the remainder of the warrant is overbroad, and is also invalid due to a lack of nexus between the area to be searched and the evidence to be seized.

convictions must be reversed, all evidence seized from the residence must be suppressed, and the case must be remanded for a new trial. *Id.*

2. The surveillance equipment clause is not severable from the remainder of the warrant under Wash. Const. Article I, Section 7.

It is "axiomatic" that Article I, Section 7 provides stronger protection to an individual's right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.[3] *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999). The severability doctrine upon which Respondent relies has never been approved under Article I, Section 7.[4]

Nor should it be. Washington has a history of departing from federal precedent by refusing to recognize exceptions to the exclusionary rule.[5] *See State v. Winterstein*, 167 Wash.2d 620, 220 P.3d 1226 (2009) (rejecting the "inevitable discovery" exception); *State v. Afana*, 169

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[3] Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998) (*White* II); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

[4] Division I has implied in passing that severance can bring a warrant in compliance with the requirements of Article I, Section 7. *See State v. Thein* 91 Wash.App. 476, 484, 957 P.2d 1261 (1998), *reversed by* 138 Wash.2d 133, 977 P.2d 582 (1999) ("As redacted, [the warrant] does not authorize a broad, general search that offends the Fourth Amendment or Article 1, Section 7 of the Washington Constitution.")

[5] For a summary of other cases in which the Washington Supreme Court has rejected federal erosions of the right to privacy, see also *State v. Eserjose*, 171 Wash.2d 907, 938, 259 P.3d 172 (2011) (C. Johnson, J., dissenting).

Wash.2d 169, 233 P.3d 879 (2010) (rejecting "good faith" exception). This is so because Article I, Section 7 "differs from its federal counterpart in that [it] 'clearly recognizes an individual's right to privacy with no express limitations.'" *Winterstein, at* 631-632 (quoting *State v. White*, 97 Wash.2d 92, 110, 640 P.2d 1061 (1982) ("*White* I"). As the Supreme Court has held, "whenever the right is unreasonably violated, the remedy must follow." *White* I, *at* 110. One purpose of Washington's exclusionary rule is to "provide[] a remedy for individuals whose rights have been violated." *Winterstein, at* 632.

A search warrant containing invalid provisions allows officers to search without the authority of law required under Article I, Section 7. Inevitably, it results in a violation of the right to privacy, even if portions of the warrant are valid. Because of this, the severability doctrine should not be an exception to the exclusionary rule under the state constitution. *Winterstein, at* 631-632.

Mr. Maddaus's right to privacy was violated when the issuing magistrate directed a search for surveillance equipment and electronic media. This broad authorization allowed the executing officers to search through materials protected by the First Amendment, seeking items for which the affidavit did not provide probable cause. It is irrelevant that no surveillance equipment was seized; the injury occurred when the search

was authorized. The authorization was wholly unreasonable, because the affidavit did not provide any basis to search for the materials in question.

Accordingly, any evidence seized from the residence must be suppressed, the convictions reversed, and the case remanded for a new trial. *Id.*

B. The search warrant affidavit failed to establish a nexus between the evidence sought and Mr. Maddaus's residence.

An affidavit in support of a search warrant must "establish a reasonable inference… that evidence of the crime can be found at the place to be searched." *State v. Thein*, 138 Wash.2d 133, 140, 977 P.2d 582 (1999). The affidavit in this case did not establish a nexus between Mr. Maddaus's home and the evidence sought.

A review of the affidavit reveals that the police did not have any direct evidence establishing that evidence would be found at the residence. CP 4-9. Respondent tacitly acknowledges this by failing to point to any direct evidence. *See* Brief of Respondent, pp. 15-18.

Respondent erroneously relies on a process of elimination to argue that the required nexus exists: "[S]ince the items were not located in other places where they were known to have been, and Maddaus had last been seen at his own residence, that the items might logically have been left there." Brief of Respondent, p. 17. This approach has been specifically

rejected by the Supreme Court. *Thein*, at 150-151. An item's absence from one location does not imply its presence at another location. *Id.* Furthermore, if Tremblay is to believed, Mr. Maddaus intentionally concealed incriminating items at a location other than his own residence; it is nonsensical to infer that he then moved them to his own residence. RP 1359.

Nor was the error harmless. Evidence seized from the house corroborated Abear's testimony, and thus contributed directly to the assault and attempted kidnapping convictions, along with the corresponding firearm enhancements. Furthermore, it is likely that jurors used evidence of Mr. Maddaus's actions toward Abear as proof that he was so angered by the robbery that he killed Peterson. Respondent's conclusory argument to the contrary is without merit. *See* Brief of Respondent, p. 18.

The search warrant is invalid because of the affidavit's failure to establish a nexus between the place to be searched and the evidence to be seized. *Thein, at* 150-151. The evidence seized from Mr. Maddaus's residence must be suppressed, the convictions reversed, and the case remanded for a new trial. *Id.*

C. The search warrant was unconstitutionally overbroad, especially with regard to items protected by the First Amendment.

1. The search warrant affidavit did not provide probable cause to search for clothing, long guns, ammunition, packaging for guns and ammunition, drugs, and drug paraphernalia.

The affidavit was deficient regarding numerous items of physical evidence. First, the affidavit did not establish that blood-stained clothing would be found at Mr. Maddaus's house. No witness suggested to the affiant that Mr. Maddaus was close enough to Peterson to get blood on his own clothing. No witness – including Akau, who claimed she'd spent the night with Mr. Maddaus on November 16th—described any clothing with blood on it. CP 4-9.

Even assuming the existence of bloody clothing, the officers did not establish (i.e. through Akau) that Mr. Maddaus changed his clothing at home, or, if he did change, that he kept the clothing at the house instead of disposing of it. Furthermore, the affidavit's reliance on unspecified "witnesses" who apparently described Mr. Maddaus's clothing cannot provide probable cause to sustain the authorization to search for the clothing described. *See State v. Jackson*, 102 Wash.2d 432, 435, 688 P.2d 136 (1984) (affidavit must establish both the reliability of an informant and the basis of her/his knowledge.)

Because the affidavit does not identify the "witnesses," establish their reliability, or show their basis of knowledge, the bare assertion that such "witnesses" exist cannot support a finding of probable cause. Respondent fails to address this problem, instead merely reasserting that unnamed witnesses provided the description of Mr. Maddaus's clothing. *See* Brief of Respondent, p. 20 ("[t]he specific items of clothing were identified by witnesses…").[6] This claim does not assist in the analysis.

Second, nothing in the affidavit suggests that rifles, shotguns, or other long-barreled guns were involved in the crime. Despite this, the warrant uses the phrase "any firearms… or firearm related items," without limiting the executing officers' authority to handguns. This error is fatal. *See, e.g., Millender v. County of Los Angeles,* 620 F.3d 1016 (9th Cir. 2010), *reversed on other grounds sub nom Messerschmidt v. Millender,* ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.3d ___ (2012).[7]

In *Millender,* police investigating a domestic violence incident were given authority to search for firearms for which probable cause did not exist:

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[6] Respondent's statement that "[t]here was no need to search for anyone else's clothing" suggests a misunderstanding of Mr. Maddaus's argument. Brief of Respondent, p. 20.

[7] The Supreme Court, in addressing an executing officer's qualified immunity in a §1983 action, specifically noted that "[w]hether any of these facts, standing alone or taken together, actually establish probable cause is a question we need not decide." *Messerschmidt, at* ___.

> There is no dispute that the deputies had probable cause to search for and seize the "black sawed off shotgun with a pistol grip" used in the crime. But the affidavit does not set forth any evidence indicating that Bowen owned or used other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the Millenders' residence.

Id, at 1025.

Furthermore, contrary to Respondent's assertion,[8]

> there is no "dangerousness" exception to the Fourth Amendment's probable cause requirement, regardless of whether a search involves violent suspects or deadly weapons. A police officer's valid safety concerns do not create a "fair probability" that a broad class of weapons may be found in a suspect's residence or that such items are contraband or evidence of a crime.

Id, at 1028.

The warrant in this case gave police authority to search not just for the alleged murder weapon, but also for any other "firearm… or firearm related items." The affidavit did not establish probable cause for this broad category of items.

Similarly, nothing in the affidavit suggested that the residence contained ammunition, packaging for guns and ammunition, drugs, and drug paraphernalia. CP 4-9. Respondent's assertion that such items might have evidentiary value does not establish any likelihood that they'd be found at the residence. Brief of Respondent, p. 21, 26. Nor does

Respondent's statement that "Maddaus was known to be a drug dealer" establish that police would likely find drug or gun paraphernalia at his house. Brief of Respondent, p. 26.

Respondent apparently relies on generalizations of the kind rejected by the Supreme Court in *Thein*—in this case, implying *post hoc* and *sub silentio* that the habits of drug dealers generally provided a basis to search Mr. Maddaus's home. Brief of Respondent, p. 26. This approach cannot save the warrant. *Thein, at* 147-148.

The affidavit failed to provide probable cause to search for and seize clothing, long guns, ammunition, packaging for guns and ammunition, drugs, and drug paraphernalia; thus, the warrant was overbroad. Evidence seized from the house (and any fruits of the residential search) should have been suppressed. Mr. Maddaus's convictions must be reversed, the evidence suppressed, and the case remanded for a new trial. *Thein, at* 151.

2. The search warrant affidavit did not provide probable cause to search for material protected by the First Amendment, and the warrant did not describe such items with the "scrupulous exactitude" required by the constitution.

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[8] *See* Brief of Respondent, p. 21 ("[I]t is a reasonable conclusion that a person who would kill another is a danger to society, and any firearms should be seized to remove access to weapons.")

The constitution imposes special requirements when a warrant is sought for material protected by the First Amendment. Such warrants require close scrutiny, and items must be described with "the most scrupulous exactitude." *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) ; *see also Zurcher v. Stanford Daily,* 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Perrone at* 547.

The warrant in this case authorizes police to search for and seize numerous items protected by the First Amendment—including papers and other media that contain written material, images, video, and audio recordings—but fails to comply with these basic safeguards. Specifically, the warrant is not supported by probable cause to rummage through any writings, recordings, and computer files, and did not describe the materials sought with the "scrupulous exactitude" required by the constitution. *Stanford, at* 485.

First, nothing in the affidavit establishes that that Mr. Maddaus kept "notes and records that relate to the distribution or sales of controlled substances." CP 4-9. None of the witnesses referenced any written notes or records relating to drug dealing; no one told the police that Mr. Maddaus kept a ledger, a list of customers, or anything else relating to the drug business at his home. CP 4-9.

Respondent's argument – that any such documents "would be relevant"—does not explain how the affidavit establishes the existence of such documents or any probability that they'd be found at the residence. Brief of Respondent, p. 22. Instead, Respondent appears to assume that such documents exist, and that they would necessarily be found at the residence. Nothing in the affidavit justifies this assumption; it derives from the kind of reasoning rejected by the Court in *Thein.*

If, upon executing a valid warrant, police stumbled across writings whose evidentiary value was apparent—i.e. a document that was clearly a drug ledger—seizure would be allowed under the "plain view" doctrine. *See, e.g., State v. Tyler,* ___ Wash. App. ___, ___, ___ P.3d ___ (2012). This does not authorize the issuing magistrate to anticipate the speculative possibility that such items might be found and include them in the warrant.

Second, the affidavit does not establish the existence or location of "any computers, media storage devices, [or] cell phones," that could be relevant to the investigation, other than those specifically mentioned.[9] CP 4-9. Respondent is unable to point to any language in the affidavit supporting the broad language authorizing seizure of these items. *See* Brief of Respondent, pp. 22-24.

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[9] These include Mr. Maddaus's cell phone, and a laptop and desktop seen in Leville's apartment. CP 5-8.

Respondent erroneously suggests that the existence of additional computers can be presumed from Tremblay's silence. Brief of Respondent, pp. 22-23. Respondent provides no authority for this astounding claim. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

Respondent also claims that "it is reasonable to infer that communications or relevant information could be on computers" other than the desktop and laptop described by Tremblay. Brief of Respondent, p.23. But the First Amendment prohibits unrestrained authorization to seize "any computers" on the off chance that—if such computers exist—they might contain evidence. *Stanford, supra; Zurcher, supra.* Furthermore, the possibility that relevant evidence might exist on computers somewhere in the world does not establish that those computers are to be found in a particular residence.

Similarly problematic is Respondent's analogy between disks/thumb drives and the VW Jetta's tires. *See* Brief of Respondent, pp. 23-24. The existence of a computer does not imply the existence of disks, thumb drives, or other removable storage media; thus the analogy to a car and its tires does not hold. Furthermore, even if peripheral devices can be presumed to exist, their portability prohibits any conclusion that they'd be

located in the same place as a computer. Thus nothing in the affidavit suggested that such items would be found connected to the laptop and/or desktop, or in the vicinity of those machines.

For all these reasons, Respondent's arguments regarding computers, storage media, and cell phones are unpersuasive. Other than those items specifically referred to by the affiant, the affidavit did not establish probable cause to search for such items. Furthermore, the broad language of the warrant did not limit the officer's authority to only those few items—the laptop and desktop from Leville's apartment, and Mr. Maddaus's cell phone—for which probable cause may have existed. In other words, the warrant was not worded with the "scrupulous exactitude" required for materials protected by the First Amendment. *Stanford, at* 485.

The affidavit is also silent with regard to receipts or other documentation relating to handcuffs (as well as associated packaging). None of the witnesses provided information as to how or when the handcuffs were obtained. If they were purchased years earlier, bought at a garage sale, or obtained by trading with their prior owner, then packaging, receipts, or other documentation would not be available, either in Mr. Maddaus's house or elsewhere. Even if such documents and packaging "would be relevant to the investigation," this does not establish that they existed and were to be found at the residence. *See* Brief of Respondent, p.

25. The warrant was overbroad with regard to these materials as well. *See* Brief of Respondent, p. 25.

Additionally, nothing in the affidavit explains why evidence of dominion and control of the residence would be helpful to the police. The murder did not take place at the residence. The officers had no specific information suggesting that evidence of a crime would be found at the residence (as outlined in the Opening Brief and this Reply Brief). Even though the assault on Abear allegedly took place at the residence, proof that Mr. Maddaus had dominion and control over the residence would not help to establish any element of the assault. Respondent's main contention—that documentary evidence could establish dominion and control if prosecution witnesses disappeared prior to trial—does not explain the need for such proof. Brief of Respondent, p. 21. Respondent's other argument—that such evidence would help establish dominion and control over property found in the residence—presupposes that property with evidentiary value would be found in the evidence. Brief of Respondent, pp. 21-22. But the affidavit includes no specific information establishing that *anything* connected to the crimes would be found at the house. CP 4-9. Without some indication that property of evidentiary value would be found at the house, evidence of dominion and control is irrelevant.

Put succinctly, Respondent's argument is that a home can be searched whenever its owner or occupant is suspected of a crime. But the constitution requires more, especially where materials protected by the First Amendment are concerned. Before a warrant may issue, police must provide facts establishing a reasonable inference that evidence of a crime will be found at the place to be searched. *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d 593 (1994) ; *Thein, at* 140. Written material, recordings, or other items protected by the First Amendment must be described with "the most scrupulous exactitude." *Stanford, at* 485.

For all these reasons, the search warrant was overbroad. Accordingly, the evidence, and any fruits derived therefrom, should have been suppressed. *State v. Eisfeldt*, 163 Wash.2d 628, 640-641, 185 P.3d 580 (2008). Mr. Maddaus's convictions must be reversed and the case remanded for a new trial. *Id.*

II. THE TRIAL COURT IMPOSED PHYSICAL RESTRAINTS ON MR. MADDAUS DURING TRIAL WITHOUT ANY SHOWING OF "IMPELLING NECESSITY."

An accused person is entitled to appear at trial free from all restraints, except in extraordinary circumstances. *State v. Damon,* 144 Wash.2d 686, 691, 25 P.3d 418 (2001); *State v. Finch*, 137 Wash.2d 792, 844, 975 P.2d 967 (1999). Restraints may only be imposed upon a showing of impelling necessity. *Finch, at* 842. Such a showing is required

not merely because of the potential for impact on jurors who observe the restraints, but also because restraints restrict the defendant's ability to assist in the defense of his case, interfere with the right to testify, and offend the dignity of the judicial process. *Finch, at* 845; *State v. Hartzog,* 96 Wash.2d 383, 399, 635 P.2d 694 (1981).

In this case, Respondent concedes that no hearing was held to determine the need for restraint, and that the court did not find any impelling necessity for the imposition of restraints. Brief of Respondent, p. 26, 29. Nor does Respondent contend that an impelling necessity actually existed in this case. Brief of Respondent, pp. 26-31. Instead, Respondent claims the error was harmless because (according to Respondent), no jurors saw Mr. Maddaus in restraints. Brief of Respondent, pp. 28, 30-31. Respondent's single-minded focus on the juror's view of Mr. Maddaus suggests a misunderstanding of the nature of the right.

Even if no jurors saw the restraints, reversal is still required. The court's use of restraints without impelling necessity unfairly restricted Mr. Maddaus's ability to assist in the defense of his case, interfered with his right to testify, and offended the dignity of the judicial process. *Finch, at* 845; *Hartzog, at* 399. This is especially true where, as here, he was fitted with a shock device in addition to the leg brace that restricted his

movement. RP 50-55. It is difficult to conceive of anything that might preoccupy a person more than the possibility that painful—and potentially dangerous—electric shocks might be applied at any moment. *See, e.g., Wrinkles v. Indiana,* 749 N.E.2d 1179 (2001).

Furthermore, contrary to Respondent's assertions, there is a great probability that jurors *did* see the restraints, or at least infer their existence. Defense counsel pointed out the possibility that jurors might see them on three occasions. RP 50-52; 628.[10] The judge's ultimate solution—arranging large flat pieces of cardboard around the table where Mr. Maddaus sat—can hardly be described as "a manner which would not seem contrived..." Brief of Respondent, p. 30.

The illegal imposition of restraints violated Mr. Maddaus's due process rights. *Finch, at* 845. His convictions must be reversed and the case remanded with instructions to permit Mr. Maddaus to appear in court without restraint, absent some impelling necessity. *Id.*

III. THE TRIAL COURT IMPROPERLY RESTRICTED MR. MADDAUS'S CROSS-EXAMINATION OF LEVILLE.

The most crucial aspect of the right to confrontation is the opportunity to conduct meaningful cross-examination of adverse

witnesses. *State v. Foster,* 135 Wash.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). This includes the right to question witnesses about recent uncharged criminal activity. A witness's uncharged criminal activity is relevant to show the witness's bias in favor of the government. *United States v. Martin*, 618 F.3d 705, 727-730 (7th Cir. 2010). Bias may result from an "expectation of immunity," even if no promise has been made. *Alford v. United States*, 282 U.S. 687, 693, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

In this case, the trial judge erroneously limited cross-examination regarding Leville's recent involvement in uncharged criminal activity. RP (12/21/10) 76; RP 1128. The evidence was offered to show that Leville was biased toward the government. Under the circumstances, Leville may have had "a desire to curry favorable treatment" in connection with the uncharged crimes. *Martin, at* 727. Like the trial court judge, Respondent erroneously focuses on Leville's credibility. Brief of Respondent, p. 36 (citing *State v. Cochrane,* 102 Wash.App. 480, 8 P.3d 313 (2000)). The evidence of uncharged offenses was relevant to establish *bias*, not

[10] As Respondent points out, two of these objections were made before the jurors selected to serve were brought in for *voir dire.* However, counsel's concerns—regardless of their timing—demonstrate at least some possibility that Mr. Maddaus would be exposed to view.

credibility. It should have been admitted on that basis. *Martin, supra; Alford, supra.*

By restricting cross-examination, the trial judge violated Mr. Maddaus's confrontation right under the Sixth and Fourteenth Amendments and Article I, Section 22. *Foster, at* 455-56. Accordingly, his conviction must be reversed and the case remanded for a new trial. *Id.*

IV. THE TRIAL JUDGE SHOULD HAVE HELD AN EVIDENTIARY HEARING TO DETERMINE IF GOVERNMENT MISCONDUCT INFRINGED MR. MADDAUS'S CONSTITUTIONAL RIGHTS.

If a government employee—such as a jail officer—compromised the confidentiality of Mr. Maddaus's communications with his attorney, Mr. Maddaus may be entitled to dismissal. *State v. Cory*, 62 Wash.2d 371, 377-379, 382 P.2d 1019 (1963). Through his attorney, Mr. Maddaus presented sufficient information to warrant a hearing on the subject. Specifically, the court was presented with evidence that someone copied a letter from Mr. Maddaus to his attorney and delivered it to the prosecutor's office. The attendant circumstances—including Mr. Maddaus's lack of access to a copy machine, the type of pen used, or the kind of envelope used, combined with the sheriff department's access to the letter—suggest that the action was not taken by Mr. Maddaus himself, contrary to Respondent's position. Brief of Respondent, p. 43 ("It is more likely…")

This evidence strongly suggests impropriety of the type that occurred in *Garza. State v. Garza*, 99 Wash.App. 291, 296, 994 P.2d 868 (2000). As in *Garza,* it should have prompted the trial judge to hold an evidentiary hearing on the defense motions. RP (12/21/11) 51, 53, 54, 56, 74; CP 208-280, 294-303, 308-377. The court's failure to hold a hearing was an abuse of discretion—regardless of any opportunity defense counsel had to conduct additional investigation—because there were "critical factual questions" that needed to be resolved before the defense motions could be ruled upon. *Id, at* 301.

Accordingly, the case must be remanded with instructions to hold an evidentiary hearing. At the hearing, the court must determine how the letter ended up at the prosecutor's office and who had access to it. *Id.* As in *Garza,* misconduct by a government actor (such as a corrections officer) may warrant relief.[11] *Id, at* 300-302.

V. ILLEGALLY RECORDED TELEPHONE CONVERSATIONS WERE ADMITTED AT TRIAL, IN VIOLATION OF RCW 9.73.050.

Recordings made in violation of Washington's Privacy Act are inadmissible. RCW 9.73.050. The erroneous admission of such evidence requires reversal unless within reasonable probability the error did not

[11] This is so even if the assigned prosecutor committed no misconduct when the letter was received at his office. *Garza, at* 301.

materially affect the outcome of the trial. *State v. Porter*, 98 Wash.App. 631, 638, 990 P.2d 460 (1999).

Here, certain telephone conversations were recorded without the prior consent of the parties, in violation of RCW 9.73.030. Respondent does not contend that prior consent was properly obtained. Brief of Respondent, pp. 45-51. Instead, Respondent seeks to avoid the merits of the claim, by arguing that Mr. Maddaus waived the argument, that the conversations were not private, and that Mr. Maddaus forfeited any right to assert a Privacy Act violation. Brief of Respondent, pp. 48-51. These arguments lack merit.

First, Mr. Maddaus did not waive his Privacy Act claim. The statute declares that illegal recordings

> *shall be inadmissible* in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

RCW 9.73.050 (emphasis added).[12] The Act is to be interpreted in favor of the right to privacy. *See State v. Christensen*, 153 Wash.2d 186, 200-201, 102 P.3d 789 (2004); *State v. Williams*, 94 Wash.2d 531, 548, 617 P.2d

[12] Clearly, Mr. Maddaus's trial was not "an action brought for damages" under the act; nor was his alleged crime of a type that "would jeopardize national security." RCW 9.73.050.

1012 (1980) ("*Williams* I"). In light of the mandatory language of the statute, a waiver cannot be implied from Mr. Maddaus's failure to object.

No published opinion has ever held that failure to object to a Privacy Act violation constitutes a waiver. Respondent does not cite any such authority; presumably, counsel found none after diligent search. *Coluccio, at* 779. Furthermore, even if the error is not preserved, the Court of Appeals has discretion to hear any issue raised for the first time on review. RAP 2.5(a); s*ee State v. Russell,* 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

Second, the telephone conversations here were "private communications" within the meaning of the act. A communication is private if (1) the parties manifest a subjective intention that it be private, and (2) that expectation is reasonable. *State v. Modica*, 164 Wash.2d 83, 88, 186 P.3d 1062 (2008). The Supreme Court has cautioned that a conversation may be considered private even if "the participants know it will or might be recorded or intercepted." *Id, at* 88. Conversations between two parties are presumed to be private. *Id, at* 89. Even an announcement that a call may be recorded or monitored will not, in itself, defeat a reasonable expectation of privacy. *Id.*

Here, Farmer, Leville, and Grimes did not hear the jail's automated announcement that the call would be recorded and possibly monitored.

Only the initial recipient of each call (Chelsea Williams) heard the announcement before she either handed the phone over (to Leville and Grimes) or connected a three-way call (to Farmer). Ex. 234. Furthermore, the parties' subjective intent to have a private communication was manifested by the use of false names and oblique or "coded" language.

Without citation to the record, Respondent asserts that "[b]oth Farmer and Leville testified that they knew the conversations were being recorded." Brief of Respondent, p. 50. By itself, this is insufficient to defeat a reasonable expectation of privacy. *Modica, at* 89. Furthermore, Respondent's uncited assertion is questionable: Farmer and Leville's testimony was ambiguous. In addition, as Respondent implicitly concedes, no direct evidence establishes that Grimes knew she was being recorded. Brief of Respondent, p. 50. Grimes did not testify she was aware the conversation would be recorded; instead, Respondent asks the court to presume that she knew, and thus had no expectation of privacy. Brief of Respondent, p. 50. There is no precedent for presuming such knowledge, and Respondent cites no authority suggesting that a conversation can be deemed "non-private" based on an implication that the recipient knew the call would be recorded or monitored. Indeed, even actual knowledge is not, by itself, sufficient to defeat a reasonable expectation of privacy. *Modica, at* 89.

Third, Mr. Maddaus did not "invite" the error. The invited error doctrine prohibits a party "who sets up an error at trial [from claiming] that very action as error on appeal." *State v. Momah*, 167 Wash.2d 140, 153, 217 P.3d 321 (2009). Respondent's "invited error" argument lacks merit. Brief of Respondent, pp. 50-51. Respondent cites no authority applying the doctrine to pretrial conduct, and is therefore presumed to have found none after diligent search. *Coluccio, at* 779.

Mr. Maddaus did not "invite" the error by circumventing the jail's rule against three-way calls; any action he took prior to trial cannot be used to invoke the invited error rule. *Momah, at* 153. Respondent's argument is much more akin to the doctrine of "forfeiture by wrongdoing." *See, e.g., State v. Mason*, 160 Wash.2d 910, 924, 162 P.3d 396 (2007). That doctrine "operates to extinguish confrontation rights on equitable grounds, on the theory that 'one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.'" *State v. Fallentine,* 149 Wash.App. 614, 619, 215 P.3d 945 (2009) (quoting *Davis v. Washington*, 547 U.S. 813, 833, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)).

The doctrine has never been applied outside the confrontation context, and Respondent cites no authority suggesting it is applicable here. Nor is Mr. Maddaus's alleged misconduct comparable to arranging for a

witness to be absent from trial. In addition, the Privacy Act makes clear that illegally obtained evidence must be excluded; it makes no exceptions, regardless of who is at fault. *See* RCW 9.73, *generally.* Finally, even if the doctrine were to apply, it would only apply to the three-way calls with Farmer. Ex. 234. Mr. Maddaus's telephone calls with Leville and Grimes took place when Williams handed her phone to each of them. Ex. 234. Mr. Maddaus did not attempt to circumvent the jail's prohibition on three-way calling to have these conversations, and thus he committed no wrongdoing related to the Privacy Act.

For all these reasons, the court should review the merits of Mr. Maddaus's Privacy Act claim. The illegal recordings should not have been admitted at his trial. Furthermore, Respondent has not attempted to argue that the error was harmless. The absence of argument on this point may be treated as a concession. *See In re Pullman,* 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, the convictions must be reversed and the case remanded for a new trial, with instructions to exclude the illegally recorded conversations. *Porter, at* 638.

VI. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT.

A prosecutor may not comment disparagingly on the defense role or impugn defense counsel's integrity. *State v. Thorgerson*, 172 Wash.2d 438, 451-452, 258 P.3d 43 (2011). Nor may a prosecutor express a

personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wash.App. 909, 921, 68 P.3d 1145 (2003); *State v. Reed*, 102 Wash.2d 140, 684 P.2d 699 (1984). Prosecutor Bruneau did all of these things.

First, Mr. Bruneau claimed the defense investigator had been "duped into being this defendant's agent." RP 2074. Second, he compared defense counsel's argument to "the distractions that sometimes people create when they're passengers in a vehicle." RP 2075. Third, he told jurors that "[w]hat you heard *in the defense case*, those witnesses from the defense *in the defense argument*, was the last gasp of this defendant, the last gasp, *the last effort to develop lies* to try to convince you of what he's not, that he's innocent, and he's not. The last gasp." RP 2077 (emphasis added).

Mr. Bruneau's comments inappropriately maligned the defense team by suggesting that counsel and his investigator were attempting to distract and deceive the jury. Such comments are misconduct, and require reversal under *Thorgerson, supra.* Respondent argues that Mr. Bruneau was simply disparaging defense counsel's argument, and claims that this is "significantly different" from disparaging counsel himself. Brief of Respondent, p. 55. Respondent cites no authority in support of this proposition, and can be presumed to have found none after diligent search. *Coluccio, at* 779. Furthermore, Respondent's claim is undermined by

Thorgerson, in which the prosecutor's comments were directed at counsel's presentation, not at counsel personally.

Respondent next tries to argue that Mr. Bruneau's comments in rebuttal were a proper response to the defense closing. Brief of Respondent, pp. 55-56. Contrary to Respondent's assertion,[13] a defense attorney does not have the "power to 'open the door' to prosecutorial misconduct." *State v. Jones,* 144 Wash.App. 284, 295, 183 P.3d 307 (2008). If Mr. Bruneau thought defense counsel's arguments improper, he should have objected. He was not free to remain silent and "respond" by committing misconduct. *Id.*

In addition to disparaging the defense team, Mr. Bruneau improperly expressed his personal opinion about the evidence. He used words such as "poppycock" and "crazy," and described certain testimony as "unreasonable under the law." RP 1984. These words and phrases were not themselves evidence—no one testified using them—nor were they a legitimate appeal to rationality and common sense. Instead, they can only be understood as expressions of Mr. Bruneau's personal opinion.

Respondent erroneously attempts to defend the statements as "general observation[s] about the nature of the defendant's testimony…"

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[13] *See* Brief of Respondent, pp. 55 (characterizing some of Mr. Bruneau's rebuttal comments as a "response to the defense closing argument.")

Brief of Respondent, p. 53. This is incorrect. Mr. Bruneau used more colorful vocabulary than his colleague in *Reed*; other than that, his statements were equivalent to the misconduct in *Reed,* [14] which the Supreme Court decried "reprehensible." *Reed, at* 145.

Mr. Bruneau's arguments disparaging the defense team and expressing his personal opinion were improper. They violated Mr. Maddaus's Sixth and Fourteenth Amendment right to counsel, and his due process right to a decision based solely on the evidence. *Thorgerson*; *State v. Copeland*, 130 Wash.2d 244, 291, 922 P.2d 1304 (1996). Because the outcome of trial turned on the jury's assessment of Mr. Maddaus's credibility—and hence, also, the trustworthiness of the defense team—Respondent cannot overcome the presumption of prejudice arising from infringement of these constitutional rights. The convictions must be reversed and the case remanded for a new trial. *Copeland, at* 291; *Thorgerson, supra.*

[14] *See Reed, at* 145 (The prosecutor "called the petitioner a liar no less than four times.")

VII. MR. MADDAUS'S TAMPERING CONVICTIONS IN COUNTS VI AND VII VIOLATE HIS DOUBLE JEOPARDY RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 9.

In light of Respondent's concession, Mr. Maddaus provides no additional argument. *See* Brief of Respondent, p. 57-58.

VIII. MR. MADDAUS'S TAMPERING CONVICTIONS IN COUNTS VI AND VII VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION ON EACH CHARGE.

A conviction for tampering requires proof that the accused person attempted to induce "a person whom he or she has reason to believe may have information relevant to a criminal investigation" to either testify falsely or to withhold information from law enforcement agency.[15] RCW 9A.72.120 (1); *see also* CP 22-23, CP 441.

In this case, the prosecution produced evidence that Mr. Maddaus attempted to suborn perjury. *See* RCW 9A.72.020. It did not prove that Mr. Maddaus attempted to tamper with a person whom he had reason to believe might have information relevant to a criminal investigation. This is so because the evidence, even when taken in a light most favorable to the prosecution, did not suggest that Mr. Maddaus had reason to believe that

[15] Respondent does not argue that Mr. Maddaus knew that Farmer was a witness, or was likely to be called as a witness. This failure to argue may be treated as a concession on these points.

Farmer had information relevant to a criminal investigation at the time Mr. Maddaus contacted him. Instead, Mr. Farmer had no connection to the case at the time of the communication. RP 1235-1258, 1998, 2003-2014, 2074, 2076.

Respondent makes two unlikely claims to support the state's position that Mr. Maddaus "had reason to think the police would eventually be speaking to Farmer..." Brief of Respondent, p. 60. First, Respondent notes that Farmer was a confidential informant who had named Mr. Maddaus as a potential target. Brief of Respondent, p. 59. This argument fails because Mr. Maddaus had no reason to believe that Farmer was a confidential informant who planned to target Mr. Maddaus.

Second, Respondent argues that Mr. Maddaus knew Farmer had relevant information consisting of Farmer's unsuccessful attempts to reach Mr. Maddaus by phone on November 15th, and a very brief telephone conversation that same evening, when Mr. Maddaus told Farmer he couldn't talk, but would either speak to him in person or would be in jail. Brief of Respondent, p. 59. But Farmer had no information about the shooting, and, as far as Mr. Maddaus knew, was ignorant of the circumstances leading up to it and the events that followed.

A reasonable person would not believe that the missed phone call and this brief conversation comprised "information relevant to a criminal

investigation." Nor could Mr. Maddaus be expected to know that the police would search phone records and contact every person with whom he'd spoken by telephone before and after the alleged offense.

Mr. Maddaus had no reason to believe Farmer had relevant information at the time of their contact. Without proof on this element, Mr. Maddaus could be found guilty of an attempt to commit perjury (as an accomplice), but not of tampering with a witness. *Compare* RCW 9A.72.020 *with* RCW 9A.72.120.

This failure of proof requires reversal of Counts VI and VII and dismissal of the charges. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

IX. MR. MADDAUS WAS ENTITLED TO INSTRUCTIONS ON THIRD-DEGREE ASSAULT.

An accused person has both a statutory and a state constitutional right to instructions on applicable inferior-degree offenses. RCW 10.61.003; RCW 10.61.010; *see also* Appellant's Opening Brief, pp. 57-68. The accused person has an unqualified right to such instructions if there is "even the slightest evidence" that s/he is guilty of only the inferior offense. *State v. Parker*, 102 Wash.2d 161, 163-164, 683 P.2d 189 (1984). The evidence is viewed in a light most favorable to the instruction's proponent, and the instruction must be given even in the face of

contradictory evidence or other defenses *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000). Failure to give an appropriate inferior-degree instruction requires reversal. *Parker, at* 164.

In this case, jurors could have believed that Mr. Maddaus was not guilty of second-degree assault, but guilty of third-degree assault. This is not unlikely, given (1) Abear's inability to identify the gun allegedly used, (2) the fact that the gun did not fire when Mr. Maddaus allegedly pulled the trigger, (3) Mr. Maddaus's denial that a gun was involved in whatever transpired, (3) the fact that the paintball gun and mace were not readily capable of causing death or substantial bodily injury, and (4) the lack of instruction explaining when/whether something other than a firearm qualified as a "deadly weapon," and (5) the nature of Abear's injuries.

If jurors believed the prosecution's evidence, they would have been justified in concluding that Mr. Maddaus assaulted Abear, that the assault did not involve a working firearm or other deadly weapon, and that he either inflicted bodily harm "accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering," or that he inflicted bodily harm by means of "a weapon or other instrument or thing likely to produce bodily harm." *See* CP 391; *see also* RCW 9A.36.031(1)(d) and (f). Thus, when evaluated in a light most favorable to Mr. Maddaus as the proponent of the instruction, there was at

least "the slightest evidence" that he was only guilty of third-degree assault. *Parker, at* 163-164. Accordingly, the trial court should have given the proposed instructions.[16]

Respondent's contrary argument betrays a fundamental misunderstanding of the law. Mr. Maddaus's argument does not rely on the possibility that the jury "might disbelieve the evidence pointing to guilt," which (as Respondent notes) would not be enough to require the court to give the requested instructions. *Fernandez-Medina, at* 456; *see also* Brief of Respondent, p. 65.

Instead, Mr. Maddaus argues that the jury could have believed all of the state's evidence—that he "hit [Abear] in the head with the butt of a gun, sprayed her with bear mace, ripped off her clothes, shot her with a paintball gun, and aimed the firearm at her foot and pulled the trigger, although the weapon did not fire"[17] – and concluded from it that he was not guilty of second-degree assault, but guilty of third-degree assault. This conclusion would not require the jury to *disbelieve* the evidence. Instead, it would require the jury to *believe* the prosecution's evidence and draw a

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[16] The trial court's comment that "there is no evidence of criminal negligence or assault in the fourth degree" suggests that the court applied the wrong standard in rejecting the instructions. RP 1952. *See* RCW 9A.08.010(2) (proof of intent or knowledge also establishes negligence).

[17] Brief of Respondent, p. 65.

different conclusion from it than that urged by the prosecution. Indeed, this is exactly how the *Workman* test is designed to work: the evidence is to be taken in a light most favorable to the proponent of the instruction. *Fernandez-Medina, at* 456.

Respondent's argument (that Mr. Maddaus's own testimony would not support the instructions) is entirely misplaced. Brief of Respondent, pp. 65-66. Mr. Maddaus would have been entitled to the instructions even if he presented an alibi defense, as the defendant did in *Fernandez-Medina. Id, at* 457 (The trial court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.") The fact that he denied assaulting Abear is irrelevant here; the instruction was not inapplicable simply because it was not supported by Mr. Maddaus's testimony. *Id.*

Nor is Mr. Maddaus's argument regarding the paint-ball gun indicative of any reliance on the jury disbelieving the evidence. *See* Appellant's Opening Brief, p. 57-68. (Respondent points to this argument as evidence that Mr. Maddaus "was relying on the jury disbelieving the evidence that was presented, not that there was affirmative evidence of third degree assault." Brief of Respondent, p. 66). The argument regarding the paintball gun requires the jury to believe that Mr. Maddaus assaulted Abear with the paintball gun, that the paintball gun had all the qualities

described by the testimony, and that the shots fired with it inflicted the injuries described in the testimony. When taken in a light most favorable to Mr. Maddaus (as the proponent), this evidence affirmatively established—at least by the "slightest" evidence, if not more—that he was not guilty of second-degree assault, but guilty of third-degree assault.

Similarly, Mr. Maddaus's argument regarding the firearm's operability relies on the jury *believing* the evidence presented by the state. (Respondent expresses some confusion regarding this argument. Brief of Respondent, p. 67). The argument regarding the gun's operability required the jury to believe that Mr. Maddaus struck Abear with a handgun, that he pointed it at her foot and pulled the trigger, that the gun did not fire when he pulled the trigger, and that she was unable to identify the gun as one that had been test-fired by the police and determined to be operable. Taking this evidence in a light most favorable to Mr. Maddaus, the jury could have decided that he assaulted Abear with a weapon that was not a deadly weapon,[18] and thus was not guilty of second-degree assault but guilty of third-degree assault.

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[18] Under RCW 9A.04.110 "'Deadly weapon' means any... loaded or unloaded firearm." A firearm is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(7). The Supreme Court has held that a gun-like object incapable of being fired does not qualify as a "firearm." *State v. Pam*, 98 Wash.2d 748, 754, 659 P.2d 454 (1983), *overruled on other grounds by State v. Brown*, 113 Wash.2d 520, 782 P.2d 1013 (1989). The Court of Appeals has interpreted this to mean that an

(*Continued*)

The trial court should have instructed the jury on third-degree assault. Its failure to do so violated RCW 10.61.003 and .010, the Fourteenth Amendment, and Article I, Sections 21 and 22. *Parker, at* 163-164; *Fernandez-Medina, at* 456. Accordingly, the conviction in Count IV must be reversed and the charge remanded for a new trial. *Id.*

X. THE CONVICTIONS FOR ASSAULT AND ATTEMPTED KIDNAPPING VIOLATED MR. MADDAUS'S RIGHT TO A UNANIMOUS JURY.

Under the state constitution, an accused person has the right to a unanimous verdict. Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wash.2d 758, 771 n. 4, 123 P.3d 72 (2005); *State v. Coleman,* 159 Wash.2d 509, 511, 150 P.3d 1126 (2007). In this case, the state presented evidence that Mr. Maddaus assaulted Abear with three different weapons. RP 654-655, 691. It also presented evidence of two different attempted kidnappings. RP 656, 657, 1056-1070. Despite this, the prosecutor did not elect to rely on a particular weapon as proof of the assault, and did not formally elect which attempted kidnapping provided the basis for Count III.[19] RP 1393-1394; RP 1979, 1985, 1987-1989, 1992. Nor did the court

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inoperable gun qualifies as a firearm (*see, e.g., State v. Raleigh,* 157 Wash.App. 728, 238 P.3d 1211 (2010)); however, the Supreme Court has never endorsed this view.

[19] The prosecutor made a passing reference linking the kidnapping of Abear with Count III. However, this passing reference was insufficient to constitute an "election," especially given the potential for confusion caused by the other kidnapping references in the instructions. *See* Appellant's Opening Brief, pp. 73-79.

provide a unanimity instruction. CP 413-450. These errors are presumptively prejudicial. *Coleman, at* 512.

Respondent erroneously argues that no unanimity instruction was required for either charge. First, according to Respondent, the alleged use of three different weapons is irrelevant. Brief of Respondent, p. 69. Respondent's position leaves open the possibility that jurors voted to convict without unanimously agreeing on which of the three weapons qualified as a deadly weapon.

Second, Respondent claims that the instructions limited the jury's consideration, permitting conviction only if the jury unanimously agreed (1) that Mr. Maddaus assaulted Abear with a gun, and (2) that the gun qualified as a deadly weapon. Brief of Respondent, p. 69. This argument would have greater merit if the prosecutor hadn't referred to all three weapons in his closing argument. RP 1993-1994.

Third, Respondent claims that the offense dates in the "to convict" instruction for the attempted kidnapping charge required jurors to unanimously agree on the incident involving Abear as the basis for the charge. Brief of Respondent, p. 70. The instruction permitted conviction if the jury found that Mr. Maddaus took a substantial step toward the commission of the crime "on or about November 13, 2009..." CP 37. Such language has been interpreted to include periods other than the

specific date named. *See, e.g., State v. Larson,* 160 Wash.App. 577, 594, 249 P.3d 669 (2011). Jurors would have understood that the language "on or about" permitted them to consider events occurring within a reasonable time after November 13, including November 15th or 16th.

The failure to provide a unanimity instruction violated Mr. Maddaus's right to a unanimous jury. *Coleman, at* 512. The convictions for Counts III and IV must be reversed, and the charges remanded for a new trial. *Id.*

XI. THE COURT'S INSTRUCTIONS ON COUNTS III AND IV RELIEVED THE PROSECUTION OF PROVING AN ESSENTIAL ELEMENT OF EACH CHARGE.

A. The instructions relieved the prosecution of its burden to prove use of a deadly weapon in the assault charge.

The prosecution was required to prove that Mr. Maddaus assaulted Abear with "any explosive or loaded or unloaded firearm, [or] any other weapon, device, instrument, article, or substance… which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6); *see also* WPIC 2.06, 2.06.1. The court failed to instruct the jury on this full definition, providing only a limited instruction explaining that a firearm is a deadly weapon. CP 446. In light of the prosecutor's reliance on all three weapons in closing, the court's failure to

provide the full definition was error, because the absence of a proper definition relieved the prosecution of its burden to prove that Mr. Maddaus assaulted Abear with a deadly weapon.

Respondent's argument that the Information charged an assault with a semi-automatic pistol is misplaced. Brief of Respondent, p. 71. Jurors did not receive a copy of the charging document during their deliberations; thus it cannot be presumed that they focused on Abear's testimony regarding the gun, especially given the prosecutor's reference to all three weapons in closing.

Respondent incorrectly asserts that hitting another person with the butt of an inoperable gun constitutes second-degree assault as a matter of law. Brief of Appellant, pp. 71-72. This is incorrect for several reasons. First, a gun only qualifies as a "firearm" and hence as a deadly weapon *per se* if it is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(7). This requires operability; the Supreme Court has never dispensed with this statutory requirement.

Second, the court's instructions in this case defined "firearm" in keeping with the statutory definition. CP 446. Under the law of the case, the prosecution was therefore required to prove that the gun was a weapon from which a projectile may be fired by means of an explosive. *See, e.g.,*

State v. Hickman, 135 Wash.2d 97, 101-103, 954 P.2d 900 (1998) (outlining "law of the case" doctrine).

Third, although the Court of Appeals has held that the prosecution need not prove operability in order for a gun to qualify as a firearm, it has distinguished between real guns and toy guns. *See, e.g., Raleigh, at* 734. Nothing in this case established that the weapon allegedly used to assault Abear was a real gun, as opposed to a toy gun.

The prosecution introduced evidence that Mr. Maddaus assaulted Abear with three different weapons. It did not prove that any of the weapons was a working firearm as opposed to a toy gun or gun-like object. The prosecutor relied on all three weapons in closing. Under these circumstances, the court should have provided the jury with an instruction explaining how it was to determine if any of the weapons qualified as a deadly weapon. The court's failure to do so relieved the prosecution of its obligation to prove an element of second-degree assault, in violation of Mr. Maddaus's constitutional right to due process. U.S. Const. Amend. XIV; *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004). Accordingly, the assault conviction must be reversed and the charge remanded for a new trial. *Id.*

B. The instructions relieved the prosecution of its burden to prove a "substantial step" toward commission of kidnapping.

The prosecution was required to prove that Mr. Maddaus engaged in "conduct strongly corroborative of" his intent to commit kidnapping. RCW 9A.28.020; *State v. Workman*, 90 Wash.2d 443, 451, 584 P.2d 382 (1978). Instead of providing an appropriate instruction based on *Workman*, the trial court instructed jurors that the prosecution need only prove "conduct that strongly *indicates a* criminal purpose..." CP 438 (emphasis added). This relieved the prosecution of its burden to prove conduct that *corroborated* Mr. Maddaus's purpose, and it also relieved the prosecution of its burden to prove that the conduct was indicative of *the* purpose charged – that is, the intent to kidnap Abear. *Workman, at* 451.

The prosecution is required to prove the actor's intent to commit a particular crime; evidence establishing a generic "criminal purpose" is insufficient. *See* 13 Washington Practice §604 (2012) ("[T]he intent required to establish attempt is the intent to commit a *specific* crime.") (emphasis in original). In keeping with this requirement, the *Workman* Court defined "substantial step" to require the prosecution to introduce evidence corroborating the criminal purpose. *Workman, at* 451.

The instruction in this case was inadequate; it allowed conviction even if the jury did not believe Mr. Maddaus's conduct strongly

corroborated the intent to kidnap Abear. Respondent's argument on this point is apparently that WPIC 100.05 is close enough to the standard set forth in *Workman*.[20] Brief of Respondent, p. 72. This position ignores the requirement that jury instructions make the relevant standard "manifestly apparent" to the average juror. *State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

An instruction substituting "indicates" for "corroborates" and "a criminal purpose" for "the actor's criminal purpose" does not meet this standard. *Id.* Because of this, the conviction must be reversed and the case remanded for a new trial. *Id.*

XII. MR. MADDAUS WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

To establish ineffective assistance, an appellant must show deficient conduct and prejudice. *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this case, defense counsel provided deficient performance by failing to object when Mr. Maddaus was forced to attend trial in restraints, by failing to seek suppression of

[20] Respondent also suggests that cases addressing a similar issue in the context of accomplice liability instructions cannot be used to shed light on the question presented here. Brief of Respondent, pp. 72-73. This argument is perplexing. Courts often examine other contexts when deciding a particular legal problem. *See, e.g., State v. Mertens*, 148 Wash.2d 820, 833, 64 P.3d 633 (2003); *State v. Ferrier*, 136 Wash.2d 103, 117, 960 P.2d 927 (1998).

recordings obtained in violation of the Privacy Act, by failing to object to improper bolstering testimony, by failing to object to object to erroneous instructions or to propose proper instructions defining "substantial step" and "deadly weapon," and by failing to object to prosecutorial misconduct. *See* Appellant's Opening Brief, pp. 79-92.

Respondent contends that defense counsel's performance was not deficient, relying primarily on earlier arguments set forth in its brief. Brief of Respondent, p. 76 ("As argued above, there was no error, or it was harmless, and therefore there was no ineffective assistance of counsel.")

Respondent does specifically address one argument: that defense counsel was ineffective for failing to address certain bolstering testimony. Respondent's argument erroneously implies that a hearsay objection is improper if the declarant testifies at trial. Brief of Respondent, p. 76. Respondent apparently conflates the hearsay rule with the confrontation right. *See, e.g., State v. James*, 138 Wash.App. 628, 639, 158 P.3d 102 (2007) (citing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). Respondent also implies—incorrectly—that testimony does not implicate the rule against hearsay unless the witness quotes the declarant's statements. Brief of Respondent, p. 77 ("Hearsay is a statement.") In fact, hearsay comprises any testimony that has the effect of conveying the substance of an out-of-court statement. *See, e.g., State v.*

Martinez, 105 Wash.App. 775, 782, 20 P.3d 1062 (2001), *overruled on other grounds by State v. Rangel-Reyes,* 119 Wash.App. 494, 81 P.3d 157 (2003).

Here—after an initial objection was sustained—defense counsel failed to object when testimony was introduced that Detective Johnstone had obtained from Abear a statement that was "similar to her testimony here at trial." RP 825-826. The evidence was admitted without any limitations; thus, the jury was permitted to use it to bolster Abear's in-court testimony, or as substantive evidence of guilt. *State v. Myers*, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997).

This error prejudiced Mr. Maddaus, especially when combined with the other errors outlined in Appellant's Opening Brief. Mr. Maddaus was denied the effective assistance of counsel, and his convictions must be reversed. *Reichenbach, at* 130.

XIII. THE THREE FIREARM ENHANCEMENTS WERE IMPROPERLY IMPOSED.

Before a firearm enhancement may be imposed, the prosecution must properly charge the enhancement, the court must properly instruct the jury, and the jury must find (beyond a reasonable doubt) that the accused person was armed with a working firearm. *In re Personal Restraint of Delgado*, 149 Wash.App. 223, 232, 204 P.3d 936 (2009)

(citing *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)).

In this case, the court unambiguously instructed jurors to determine whether or not Mr. Maddaus was armed with a *deadly weapon* during the commission of Counts I, III, and IV. CP 447. Instruction 31—which guided the jury's deliberations with regard to the special verdicts—makes no mention of firearms. The court's unambiguous instructions (which the jurors are presumed to have followed in reaching their verdicts) permitted the sentencing court to impose deadly weapon enhancements, but not firearm enhancements. *Delgado, supra.*

Furthermore, the charging document unambiguously alleged that Mr. Maddaus "was armed with a deadly weapon…" CP 21-22, 451-462. As RCW 9.94A.825 makes clear, a firearm is a kind of deadly weapon; thus, it is not inappropriate to specify the deadly weapon at issue by notifying the accused person that the allegations involve a firearm. The charging language does no more than specify the type of deadly weapon charged; it does not erase the deadly weapon enhancement and substitute a firearm enhancement.

Respondent cites the Information's reference to RCW 9.94A.533(3) on two of the three charges as proof that firearm

enhancements were charged. Brief of Respondent, p. 81. This argument is misplaced. It is the operative language of the Information that is important; not the citation to a particular statutory authority. *See, e.g., State v. Naillieux,* 158 Wash.App. 630, 645, 241 P.3d 1280 (2010).

Furthermore, Count III does not reference the firearm enhancement subsection of RCW 9.94A.533; instead, it refers to former RCW 9.94A.602 (now RCW 9.94A.825), which deals only with deadly weapon enhancements. Respondent dismisses the failure to reference the firearm enhancement statute in Count III, arguing that "there cannot be any serious doubt that Maddaus had notice that the State was seeking a firearm enhancement on all three counts." Brief of Respondent, p. 81.

But notice is only part of the issue. Of equal (or even greater) importance is determining which enhancement the state actually charged. An accused person cannot be tried for an offense (or enhancement) not charged. *See, e.g., State v. Powell,* 167 Wash.2d 672, 683, 223 P.3d 493 (2009). Here, the charging document unambiguously alleged that Mr. Maddaus was armed with a deadly weapon during the commission of Counts I, III and IV. CP 21-23. This unambiguous charging language ("the defendant was armed with a deadly weapon...") charged a deadly weapon enhancement. It did not charge a firearm enhancement.

The fact that a firearm qualifies as a deadly weapon—and that the Information includes language specifying the particular deadly weapon that Mr. Maddaus is alleged to have used—does not change the enhancement charged.

The same is true of the special verdict forms. Each special verdict form made reference to a "deadly weapon." CP 451-462. The law distinguishes between firearms and deadly weapons. RCW 9.94A.533 (referring separately to "firearm enhancements" and "deadly weapon enhancements"). Where the phrase "deadly weapon" is used, a deadly weapon enhancement may be imposed.[21] The same is true when the phrase "deadly weapon" is used in conjunction with the word "firearm," because a firearm may be a deadly weapon under RCW 9.94A.825, just as a blackjack, slingshot, billy, or sand club may be a deadly weapon. RCW 9.94A.825.

Finally, the court failed to instruct jurors on the meaning of the word "armed." CP 413-450. Because of this, the jury's verdicts did not

[21] Respondent is absolutely correct that where the phrase "deadly weapon" is used, "the court must stop reading there and ignore the word 'firearm.'" Brief of Respondent, p. 82. This is because the word 'firearm' merely specifies the particular deadly weapon used. The same would be true if the phrase "deadly weapon" were used in conjunction with any of the other implements described in RCW 9.94A.825, such as a blackjack, a sling shot, a billy, a sand club, etc. Specification of one of these items does not change a "deadly weapon" allegation into something else; nor should the specification of a "pistol, revolver, or any other firearm..." RCW 9.94A.825.

reflect a finding that Mr. Maddaus was "armed" within the meaning of RCW 9.94A.533 and RCW 9.94A.825. Absent a proper jury finding that Mr. Maddaus was armed at the time of each offense, the sentencing court was not empowered to impose an enhancement. *Blakely, supra;* .

Respondent argues that "there is no possibility that the jury was confused about whether Maddaus was armed." Brief of Respondent, p. 83. This is incorrect. The jury did not make a proper finding that Mr. Maddaus was "armed," regardless of any potential confusion or lack thereof. Furthermore, if jurors believed Mr. Maddaus's testimony that no firearm was involved in his interaction with Abear, they might nonetheless concluded that he was armed because police later found a firearm hidden in his residence.

For all these reasons, the enhancements must be vacated and the case remanded to the trial court for correction of the judgment and sentence. *Id.*

XIV. THE PROSECUTION DID NOT ESTABLISH THAT MR. MADDAUS HAS TWO PRIOR "STRIKE" CONVICTIONS.

A. Mr. Maddaus's 1995 conviction should not have counted as a strike.

Before the court could impose a persistent offender sentence, the prosecution was required to establish that Mr. Maddaus had two prior "strikes." *See* former RCW 9.94A.030(31) (2009), former RCW

9.94A.570 (2009). At the time of the shooting in this case, a "felony with a deadly weapon *verdict* under [RCW 9.94A.825]"[22] qualified as a strike offense. *See* former RCW 9.94A.030(27)(t) (2009) (emphasis added).

RCW 9.94A.825 distinguishes between deadly weapon "findings" and deadly weapon "verdicts." The statute provides (in relevant part) as follows:

> [T]he court shall make a *finding* of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special *verdict* as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

RCW 9.94A.825 (emphasis added).[23]

In 1995, Mr. Maddaus pled guilty to possession with intent to deliver, while armed with a firearm, and the sentencing court entered a finding that he was armed with a firearm under former RCW 9.94A.125 (1995). CP 510-514. This conviction did not qualify as a strike offense. First, the conviction was accompanied by a judicial finding, not a deadly weapon verdict. CP 510-514. Respondent argues (without citation to authority) that the two terms ("finding" and "verdict") are equivalent.

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[22] The definition actually referred to RCW 9.94A.602, which was recodified as RCW 9.94A.825.

[23] This language is identical with the language in the statute's predecessors, former RCW 9.94A.602 and former RCW 9.94A.125.

Brief of Respondent, p. 86. Counsel's failure to cite authority is presumed to result from a failure to find any after diligent search. *Coluccio at* 779. Furthermore, "when the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings." *State v. Flores*, 164 Wash.2d 1, 14, 186 P.3d 1038 (2008). Thus a "finding" is not equivalent to a "verdict." Since former RCW 9.94A.030(27)(t) (2009) applies to "verdicts" and not to "findings," Mr. Maddaus's 1995 conviction (following a guilty plea) is not a most serious offense.

Second, the firearm finding was made under RCW 9.94A.125, not RCW 9.94A.825. Respondent implies that changes in "the number at the top of the statute" make no difference. Brief of Respondent, pp. 85-86. This would be true if former RCW 9.94A.030(27)(t) (2009) referred not just to RCW 9.94A.825, but also to any comparable provisions under prior Washington law. *See, e.g.*, RCW 9.94A.030 (37)(b)(ii) (incorporating any "offense *under prior Washington law that is comparable* to the offenses listed [above]") (emphasis added). The omission of such language prohibits application of the definition to Mr. Maddaus's 1995 conviction.

Third, the offense did not qualify under the statute's "catchall" provision, which only incorporated comparable offenses under

predecessor statutes in effect prior to December 2, 1993.[24] *See* former RCW 9.94A.030(27)(u) (2009).

Mr. Maddaus's 1995 conviction does not qualify as a "most serious offense" under former RCW 9.94A.030(27). Because the state failed to prove two prior strikes, the sentence of life without parole must be vacated and the case remanded for a new sentencing hearing. *State v. Mendoza*, 165 Wash.2d 913, 205 P.3d 113 (2009).

B. The prosecutor produced insufficient evidence to prove that Mr. Maddaus was the person named in his alleged prior strikes.

At sentencing, the prosecution bears the burden of proving any prior convictions. *In re Detention of Post*, 145 Wash.App. 728, 758, 187 P.3d 803 (2008); *Mendoza, at* 920; *State v. Knippling*, 166 Wash.2d 93, 206 P.3d 332 (2009). Although identity of names is ordinarily sufficient to prove an offender's criminal history,[25] it is not by itself sufficient to prove that an alleged persistent offender is the person named in prior convictions for strike offenses.

In *Ammons*, the Court felt its holding struck "the proper balance" in part because "[t]he presumptive standard sentence range, regardless of how many prior convictions, can never exceed the statutory maximum

[24] Respondent concedes this issue. Brief of Respondent, p. 85.

[25] *See State v. Ammons*, 105 Wash.2d 175, 190, 713 P.2d 719 (1986).

sentence for the current offense." *Ammons, at* 187, 190.The balance is necessarily different where one potential outcome is a sentence of life without possibility of parole—a sentence which may be imposed even if the statutory maximum is a mere 10 years. Indeed, the Supreme Court itself recognized that ordinary procedures would be constitutionally insufficient to prove habitual offender status (under the laws in effect at the time the "identity of names" rule was adopted). *See Petition of Williams*, 111 Wash.2d 353, 367, 759 P.2d 436 (1988) ("*Williams* II"). Because of this, the "identity of names" rule should not be applied in persistent offender cases.[26]

In this case, the prosecution produced no evidence beyond mere identity of names to prove that Mr. Maddaus was the person named in the documents upon which the life sentence was based.[27] Respondent argues that additional evidence appears in the record, including a date of birth, a state identification number, fingerprints, and handwritten signatures. Brief of Respondent, p. 87. Respondent's argument is without merit. The

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[26] Respondent's only comment about the "identity of names" rule is that "the context of *Ammons*... was discussing [sic] the constitutionality of the prior convictions." Brief of Respondent, p. 87. It is not clear what Respondent intends by this statement. It is true that the *Ammons* Court discussed the state's burden regarding the constitutional validity of prior convictions used at sentencing. *Ammons, at* 186-189. It also created the "identity of names" rule that is at issue here. *Ammons, at* 189-191.

[27] Although defense counsel told the court there was no "dispute" regarding the criminal history, Mr. Maddaus did not knowingly, intelligently, and voluntarily relinquish his right to have the prosecution prove his prior convictions. RP (2/18/11) 124.

inclusion of a date of birth or state identification on the Information (a document prepared by the prosecution) is not *evidence* of Mr. Maddaus's date of birth or his state identification. Nor does the mere existence of fingerprints or handwritten signatures prove anything, absent additional evidence (such as expert testimony comparing fingerprints or handwriting). These pieces of information might prove sufficient on remand, but only if tied to Mr. Maddaus through additional evidence.

Because the evidence was insufficient to establish that Mr. Maddaus had two prior strikes, his sentence of life without parole must be vacated. The must be remanded for a new sentencing hearing. *In re Cadwallader*, 155 Wash.2d 867, 878, 123 P.3d 456 (2005).

XV. THE CLASSIFICATION OF PRIOR CONVICTIONS AS "SENTENCING FACTORS" RATHER THAN "ELEMENTS" VIOLATES EQUAL PROTECTION .

Equal protection is offended whenever a statute employs a "purely arbitrary" classification, and treats people differently on the basis of that classification. *State v. Thorne,* 129 Wash.2d 736, 770-771, 921 P.2d 514 (1996); *State v. Smith*, 117 Wash.2d 117, 263, 279, 814 P.2d 652 (1991) (*Smith* II).

A prior conviction that elevates an offense from one category to another—i.e. from misdemeanor to felony—must be proved to a jury beyond a reasonable doubt. *State v. Roswell,* 165 Wash.2d 186, 192, 196

P.3d 705 (2008); *see also State v. Chambers*, 157 Wash.App. 465, 475, 237 P.3d 352 (2010).

Unfortunately, this rule is not applied even-handedly in Washington. Instead, it is arbitrarily applied to some offenders and not to others similarly situated. This arbitrary distinction violates equal protection. *Smith* II.

Mr. Maddaus's prior convictions elevated his offense from one category to another, because it increased the statutory maximum for the offense, and not merely the maximum standard range.[28] Absent proof of two prior strikes, the murder charge was a Class A felony with a standard range of 411-548 months and a maximum punishment of life *with* the possibility of parole.[29] Upon proof of two prior strikes, the sentencing court was required to exceed the statutory maximum for first-degree murder by imposing a mandatory penalty of life in prison *without* the possibility of parole. Because the prior convictions increased the statutory maximum, and not merely the standard range, they elevated the offense from one category to another. Mr. Maddaus should therefore have had the

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[28] In *Blakely*, the Supreme Court used the phrase "statutory maximum" to refer to the standard sentence range. In this context, the phrase refers to the greatest possible penalty that can be imposed for a particular offense.

[29] In Appellant's Opening Brief, the current conviction is incorrectly described as a Class B felony.

benefit of the procedural rules—including a jury trial and proof beyond a reasonable doubt—announced in *Roswell.*

There is no rational basis to provide greater protection to offenders such as those in *Roswell* (where the legislature has applied labels—"misdemeanor" and "felony"—to classify the lesser and greater offenses), and offenders such as Mr. Maddaus (where the legislature has failed to create a separate label to categorize the greater offense). In both cases, the prior conviction(s) allow punishment that is greater than the statutory maximum for the crime (not just the standard sentence range). The arbitrary classification of some offenders as *Roswell*-type offenders and others as persistent offenders, and the practice of providing heightened protections to the former while denying those same protections to the latter, violates equal protection. *Smith* II, *at* 263.

Respondent erroneously contends that this argument has been rejected by the U.S. Supreme Court. Brief of Respondent, pp. 89, 91. Respondent does not cite a Supreme Court case addressing the issue.[30] Respondent can be presumed to have found none after diligent search. *Coluccio, at* 779.

[30] Counsel for the Appellant is not aware of any such authority.

Respondent next argues that the Washington Supreme Court has addressed the issue. Brief of Respondent, pp. 91, 92-93 (citing *State v. Manussier*, 129 Wash.2d 652, 682, 921 P.2d 473 (1996); *Thorne, supra;* and *State v. Thiefault,* 160 Wash.2d 409, 158 P.3d 580 (2007)). These cases do not control, however, because they all predate the Court's decision in *Roswell.*[31] Prior to *Roswell,* the equal protection argument raised here could not be made; the argument flows from the Court's decision in that case.

Mr. Maddaus should have received the same protections guaranteed to offenders impacted by *Roswell.* The failure to provide those protections violated his right to equal protection. His persistent offender sentence must be vacated, and the case remanded for a new sentencing hearing. *Roswell, supra; Smith* II, *supra.*

C. This Court should not follow *Langstead, Williams,* and *Reyes-Brooks.*

Divisions I and III have both rejected the *Roswell*-based equal protection challenge raised by Mr. Maddaus.[32] *State v. Reyes-Brooks,* ___ Wash. App. ___, 267 P.3d 465 (2011); *State v. Williams,* 156 Wash.App.

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[31] *Thorne* and *Manussier* also predate *Apprendi* and *Blakely.* In addition, *Thiefault* does not address an equal protection challenge.

[32] In Division II, the Court upheld a persistent offender sentence against an equal protection challenge based on *Roswell*; however, the opinion lacked a clear majority. *State v. McKague,* 159 Wash.App. 489, 246 P.3d 558 (2011) (Hunt, J.).

482, 234 P.3d 1174 (2010); *State v. Langstead*, 155 Wash.App. 448, 453-457, 228 P.3d 799 (2010). The *Reyes-Brooks* Court relied on *Williams* III, without providing any additional analysis. Accordingly, *Reyes-Brooks* is not separately addressed here.

In *Williams* III, Division III made some of the same erroneous claims made by Respondent in this case. Specifically, the *Williams* court erroneously stated that *Thiefault* rejected an equal protection challenge. *Williams* III, *at* 499. This is incorrect; in fact, the *Thiefault* opinion makes no reference to equal protection. *See Thiefault, supra.* The *Williams* court also erroneously relied on *Thorne* and *Manussier,* both of which were decided prior to *Roswell, Blakely,* and *Apprendi,* as noted above. Furthermore, none of these three cases (*Thorne, Manussier, Thiefault*) raised the argument made by Mr. Maddaus. For these reasons, Division II should not rely on the reasoning set forth in *Williams.*

Although the *Langstead* opinion rests on a more reliable foundation, it too suffers from flawed analysis. *Langstead*, *at* 453-457. According to the *Langstead* court, the difference between a *Roswell*-defendant and a persistent offender is that the former involves elevation of a misdemeanor to a felony, while the latter involves a charge that is already a felony, and an offender who is already a felon. *Id, at* 456-457.

This distinction adequately explains the difference in penalties imposed on *Roswell*-defendants and persistent offenders. But it does nothing to explain why one group should be denied the *procedural* protections granted the other. There is no rational basis to guarantee important procedural protections to one group and not the other.

Furthermore, *Roswell* is not limited to the divide between misdemeanors and felonies. Presumably a person whose Class C felony charge is elevated to a Class B felony would be entitled to the same protections as the defendant in *Roswell.*

Finally, the *Langstead* approach erroneously prioritizes the label (misdemeanor or felony) over the actual change in the maximum possible penalty. Respondent adopts this argument, disparaging Appellant's use of the phrase "super-felony." Brief of Respondent, p. 94 ("There is no such thing as a 'super-felony.'") But the difference between a Class B felony sentence (with a statutory maximum of 10 years) and a persistent offender sentence (with a mandatory sentence of life without parole) is at least as significant as the elevation of a misdemeanor to a felony. Respondent's insistence on the importance of this elevation to a different classification—rather than the increase in the statutory maximum—has no legal or rational basis.

Under the *Langstead* approach, a misdemeanor-to-felony transformation warrants the rights guaranteed under *Roswell,* while a change from a ten-year maximum to a mandatory life sentence does not. But no difference between the two classes of offenders can rationally explain the procedural differences guaranteed to one group and denied the other.

This Court should apply *Roswell* to Mr. Maddaus's case, vacate his sentence, and remand for a new sentencing proceeding. At the resentencing hearing, he must be afforded the protections set forth in *Roswell.*

XVI. THE LIFE SENTENCE WAS IMPOSED IN VIOLATION OF MR. MADDAUS'S RIGHT TO A JURY TRIAL AND HIS RIGHT TO DUE PROCESS.

Mr. Maddaus stands on the argument set forth in his Opening Brief.

XVII. THE STATE CONSTITUTIONAL TEST FOR EVALUATING THE FAIRNESS OF A CRIMINAL PROCEDURE MUST BE AT LEAST AS PROTECTIVE OF INDIVIDUAL RIGHTS AS THE TEST FOR EVALUATING PROCEDURES IN CIVIL CASES.

Federal courts use a deferential standard to evaluate state criminal procedures: a state procedure will pass constitutional muster "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson v. New York,*

432 U.S. 197, 201-202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (citations omitted).

This test, which is founded on principles of federalism, should not be applied under the state constitution. Washington's state courts are the final arbiters of the fairness of state criminal procedures under the state constitution. The federal test is a peculiarly deferential "floor," sensitive to the degree of independence individual states retain over their own courtroom procedures. Washington courts should adopt a test more sensitive to individual rights when evaluating Washington criminal procedures.

Because the interests at stake in criminal cases are at least as important as those at stake in the civil arena, any test must be at least as protective as the test used to evaluate procedures that affect only civil interests. *See* Appellant's Opening Brief, at pp. 115-123. To evaluate the fairness of a procedure in the civil context, courts consider (1) the private interest at stake, (2) the risk of erroneous deprivation under the existing procedure and the probable value of additional or substitute procedures, and (3) the government's interest in maintaining the existing procedure. *Post v. City of Tacoma*, 167 Wash.2d 300, 313, 217 P.3d 1179 (2009) (citing *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

The current procedure used to impose persistent offender sentences violates due process under this balancing test. A sentence of life without possibility of parole should only be imposed if a jury finds by proof beyond a reasonable doubt that the offender has two prior qualifying convictions. *See* Appellant's Opening Brief, at pp. 115-123.

Respondent declines to "spend the time to address Maddaus' argument..." and instead relies on the Supreme Court's decision in *Manussier, supra.* Brief of Respondent, p. 97. In *Manussier*, the Court declined to find greater due process protection under the state constitution than that afforded by the federal constitution. *Id. at* 679-680.

But *Manussier* does not control, because the argument here differs from that addressed in that case. Instead of relying solely on *Gunwall* analysis, Mr. Maddaus contends that a more protective state standard applies because of the U.S. Supreme Court's explicit reliance on principles of federalism to limit federal court review of state criminal procedures. Adopting this highly deferential federal standard does not make sense, because Washington courts (unlike federal courts) are not required to adopt a deferential attitude toward some other political subdivision.

The *Patterson* standard should not be applied in state court. Application of this standard under the state due process clause shortchanges the citizens of Washington. The rights that flow from Article

I, Section 3 should not be curtailed on the grounds that federal courts are sensitive to principles of federalism that do not apply under the state constitution.

The balancing test applied in civil cases should protect criminal defendants from unfair procedures. Current procedures do not satisfy this test: the basic protections afforded by a jury trial and proof beyond a reasonable doubt would—with minimal cost—safeguard against error and thereby prevent significant consequences. Mr. Maddaus's life sentence was imposed in violation of his right to due process. His sentence must be vacated. *Eldridge, supra.*

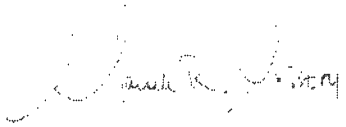
CONCLUSION

Mr. Maddaus's convictions must be reversed. Counts VI and VII must be dismissed with prejudice; the remaining counts must be remanded for a new trial. In the alternative, Mr. Maddaus's sentence must be vacated, and the case remanded for a new sentencing hearing.

Respectfully submitted on March 6, 2012.

BACKLUND AND MISTRY

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



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that on today's date, I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Robert Maddaus, DOC #975429
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

and that I filed it electronically with the Court of Appeals, Division II, through the Court's online filing system,

and that I sent the document electronically to the Thurston County Prosecutor at paoappeals@co.thurston.wa.us, through the Court's online system, with the permission of the recipient.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 6, 2012.

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

BACKLUND & MISTRY

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