710346

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NO. 71034-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT A. BAKER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. Robert Baker was denied his right to cut off police questioning as guaranteed by the Fifth Amendment and the broader protections of article I, section 9 of the Washington Constitution.

2. The court erroneously concluded Mr. Baker was not in custody until he was arrested despite the substantial limits on his freedom. CP 47 (Conclusions of Law 3, 4, 9. 10).[1]

3. The court erred in entering Finding of Fact 5, because its assertion that Mr. Baker understood his right to remain silent or have counsel's assistance is contrary to the evidence. CP 43.

4. The court erred in entering Finding of Fact 15, to the extent it implies Mr. Baker understood his right to remain silent or have counsel without any *Miranda* warnings. CP 44.

5. The court erred in entering Finding of Fact 19 because it incorrectly states that the police did not request that Mr. Baker tell them where he was going. CP 45.

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[1] CrR 3.5 findings of fact and conclusions of law are attached as Appendix A.

6. The court erred in entering Finding of Fact 28 by mischaracterizing the nature of the lengthy interrogation process over several days. CP 46-47.

7. The court improperly imposed an exceptional sentence based on the aggravating factor of victim vulnerability.

8. The aggravating factor of victim vulnerability is impermissibly vague contrary to the requirements of due process.

9. The prosecution improperly premised its request for an exceptional sentence based on factors not proven to the jury.

10. Mr. Baker was denied his right to effective assistance of counsel at sentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A suspect's request to cut off questioning when police press him to provide incriminating evidence must be fully honored under the Fifth Amendment and the greater protections of article I, section 9. The police failed to fully honor Mr. Baker's unambiguous statement that he did not want to answer any questions after a lengthy interaction with investigating police. Did the police violate Mr. Baker's right to cut off questioning under the Fifth Amendment and article I, section 9 by

resuming questioning about the same incident despite Mr. Baker's request to cease interrogation?

2. The trial court sidestepped the issue of Mr. Baker's right to remain silent by finding he was not in custody until formally arrested. But Mr. Baker was forced to wait outside his home while guarded by an armed police officer, not permitted to access any personal property such as his wallet, informed by the police they were getting a warrant to search his home, and later brought to the police station's interview room for further questioning. Was Mr. Baker's freedom of action substantially curtailed by the limitations the police placed on his freedom of movement to trigger the right to remain silent?

3. The aggravating factor of a particularly vulnerable victim is a permissible basis for an exceptional sentence only when the victim has some disability that the perpetrator uses as a substantial reason in committing the offense. Kathie Baker was a healthy woman in her 50s who did not suspect that her husband might try to kill her. Was there insufficient evidence that Ms. Baker was more particularly vulnerable than typical and this vulnerability was a substantial factor in the offense as required to justify an exceptional sentence?

4. Sentencing is a critical stage at which counsel plays at important role. Mr. Baker's trial lawyer did not come to court for sentencing following Mr. Baker's conviction of first degree murder for which the State was seeking an exceptional sentence. Another attorney came to court who was uninvolved in the trial and said he had "no argument" for sentencing. Was the complete absence of a prepared attorney at sentencing a structural deprivation of counsel? Alternatively, does the ineffective assistance of counsel provided to Mr. Baker require a new sentencing hearing?

C. STATEMENT OF THE CASE.

In early June 2012, Kathie Baker's employer, who was based in Colorado, became concerned when she did not respond to messages. 3RP 268.[2] He called the Whidbey Island police and two uniformed officers drove to her home in separate cars. 1RP 15, 17; 4RP 52; 8/16/13RP 55, 65. They spoke with her husband, Robert Allen Baker, known as Al, who thought his wife was away on business. 8/16/13RP 27, 58. Lieutenant Evan Tingstad was suspicious and told Detective Laura Price to investigate. *Id.* at 8.

Detective Price and Officer Timothy Haugen went to Mr. Baker's workplace, a pizzeria that he and his wife owned, at about 1 p.m. the next day. 8/16/13RP 10. They asked him to come to the police station to discuss his missing wife. *Id.* at 11. Mr. Baker agreed. *Id.* The officers questioned Mr. Baker for at least one hour about his wife's whereabouts. *Id.* at 13, 60. Mr. Baker agreed they could come to his home so he could retrieve banking and credit card records. *Id.* at 15-16. They drove separately to Mr. Baker's house and a third officer, Lieutenant Tingstad, met them there. *Id.* at 16, 32. Mr. Baker let the officers search his home while he spoke with Detective Price and showed her his bank records. *Id.* at 34-35.

The officers saw a possible blood stain on the carpet, more stains in the bedroom, and found a comforter in the laundry room with additional blood-like stains. *Id.* at 33; 4RP 528. They questioned Mr. Baker in a persistent fashion. 8/16/13RP 34-35; 4RP 529-45.

At about 6:30 p.m., Lieutenant Tingstad read *Miranda* warnings to Mr. Baker. 8/16/13RP 35. Mr. Baker said he did not want to answer "any more questions." *Id.* at 37. Lieutenant Tingstad told Mr. Baker he

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[2] The verbatim report of proceedings (RP) from trial is consecutively paginated and is referred to by the volume number listed on the cover page. Any

could not re-enter his home because they were obtaining a search warrant. *Id.* at 39. He directed Officer Haugen to guard Mr. Baker. *Id.* at 37. Three hours later, Lieutenant Tingstad told Mr. Baker he would have to leave the property. *Id.* at 39. He said he would get Mr. Baker a single credit card and his driver's license from inside the home. *Id.* They called a taxi and asked Mr. Baker where he would spend the night. *Id.* at 39-40.

The next morning, a team of forensic scientists and police investigators searched Mr. Baker's home. 1RP 75, 3RP 312, 4RP 655. They found Ms. Baker's body wrapped in a tarp on the property. 1RP 80. She had two blows to the head and something had been pressed against her neck such as a ligature, both of which contributed to her death. 4RP 631-34. The time of death could not be established, nor could the medical examiner say which injury occurred first. 4RP 487, 635. She had no defensive wounds. 4RP 501, 605. Her toxicology tests were negative and she had no other medical problems. 4RP 634.

Lieutenant Tingstad and Officer Haugen went to Mr. Baker's hotel room after learning Ms. Baker had been killed. 8/16/13RP 41; 4RP 547. They told him they needed to talk to him more. 8/16/13RP 41,

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other proceedings are referenced by their date.

63. He agreed to go with them to the police station. *Id.* at 41, 63. Officer Haugen frisked Mr. Baker and put him in the rear seat of his patrol car. *Id.* at 63. They took him to the interview room at the police station and read him *Miranda* warnings. *Id.* at 43-44. Mr. Baker wrote a statement denying knowledge of Ms. Baker's whereabouts. *Id.* at 46; 4RP 553-4. For the first time, he explained that he and his wife had separated and he had become interested in another woman, Lisa Schulte. 4RP 553. Lieutenant Tingstad pressed Mr. Baker to say more, telling him he knew he was lying. 4RP 565. Mr. Baker admitted that most of what he said the day before was a lie. 4RP 554. Ms. Schulte had arrived for a visit from Alaska on June 3, 2012, and she thought the Bakers had divorced. 5RP 820, 852. He insisted that he thought his wife had left town and he did not know where she was. 5RP 559, 561. He also explained that they never locked their doors and they had several workers building a deck who had free access on their property. 6RP 976; *see* 3RP 16, 432.

People who spent time with the Bakers in the spring of 2012 believed they were happy. 1RP 12; 3RP 282. Two women who were employees at the Baker's pizzeria last saw Ms. Baker on Saturday June 2, 2012. 3RP 377, 397-98. The pizzeria celebrated its one year

anniversary and the Bakers were friendly and smiling. 3RP 376, 399. The employees spoke to Ms. Baker when they called their home about the restaurant's receipts that night, as they did regularly. 3RP 380, 404. Ms. Baker had mentioned that she might have to go out of town for work, which was something she did regularly. 3RP 391.

The State charged Mr. Baker with first degree murder committed with premeditated intent, as well as a deadly weapon enhancement and the aggravating factor of the victim's particular vulnerability. CP 39-41.

He was convicted after a jury trial. CP 15-18. His attorney throughout trial, Thomas Pacher, failed to appear at Mr. Baker's sentencing hearing. 8/16/13RP 1; 1RP 1; 8RP 1134. Another lawyer from Mr. Pacher's office came to court, but that lawyer had admitted he was "not at all" up to speed on the case and he played no role in the trial. 2RP 228-29. The State requested an exceptional sentence of 600 months above the standard range, which was 240-320 months based on Mr. Baker's offender score of "0." 8RP 137-38. Relatives and friends of Ms. Baker spoke about the depth of their loss, called Mr. Baker "evil," and asked the court to impose the maximum sentence possible. 8RP 1140, 1142, 1144, 1146, 1149. The lawyer standing in for Mr. Pacher

told the judge he would not be "making any statement" about sentencing and also said that Mr. Baker would not make any statement on his own behalf. 8RP 1151. The court imposed an exceptional sentence of 600 months consecutive to a deadly weapon enhancement of 24 months. 8RP 1159.

Pertinent facts are addressed in more detail in the relevant argument sections below.

D. ARGUMENT.

1. **The police improperly elicited statements from Mr. Baker after he invoked his right to remain silent**

a. *Mr. Baker clearly invoked his right to cut off questioning and remain silent.*

When a person expresses "an objective intent to cease communication with interrogating officers," questioning must cease. *State v. Piatnitsky*, _ Wn.2d _, 325 P.3d 167, 170 (2014); *Miranda v. Arizona,* 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); U.S. Const. amend. 5; Wash. Const. art. I, § 9. Even if an accused person initially waives his right to silence, he may invoke his "right to cut off questioning" at any time. *Miranda*, 384 U.S. at 474.

This is a "critical safeguard" of the privilege against self-incrimination. *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 46

L.Ed.2d 313 (1975) (citing *Miranda*, 384 U.S. at 474). The right to remain silent is "fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Miranda*, 384 U.S. at 460 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964)).

When a person makes it "sufficiently clear" that he wishes to cut off questioning by the police, the police may not resume questioning about the same criminal investigation "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona,* 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). If an individual's right to cut off questioning is not "scrupulously honored," statements obtained after the suspect invoked his right to silence must be suppressed at trial. *Mosley*, 423 U.S. at 104. "[T]his inquiry is objective" and it is reviewed *de novo*. *Piatnitsky*, 325 P.3d at 170; *United States v. Santistevan*, 701 F.3d 1289, 1293 (10th Cir. 2012).

A suspect's statement "that he did not want to talk with police," would "invoke[] his right to cut off questioning." *Berghuis v. Thompkins*, 560 U.S. 370, 382,130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).

Mr. Baker said, "I don't think I want to answer any questions - - any more questions." 8/16/13RP 37. The detective understood this statement as an invocation of his right to remain silent and stopped questioning him for a time. *Id.* But the police resumed questioning Mr. Baker the next morning about the same incident without acknowledging Mr. Baker had requested to end interrogation. 8/16/13RP 63. Although they gave him *Miranda* warnings before this final round of questioning, these warnings do not permit the police to disregard his prior unequivocal request to cut off questioning.

b. *Once Mr. Baker told police he did not want to answer further questions, they were required to respect his right to remain silent.*

The right to cut off questioning must be scrupulously honored. *Mosley*, 423 U.S. at 104. Failing to honor the request sends the message that no invocation will shield the suspect from further interrogation, which undermines the right to remain silent. *Id.* at 106.

In *Mosely*, the defendant was "carefully advised" before any questioning that he had "no obligation to answer any questions and could remain silent if he wished." 423 U.S. at 104. He received written and oral *Miranda* warnings. *Id.* After brief questioning about the robberies for which he was arrested, questioning ceased when he said

he did not want to answer questions about the robberies. *Id.* at 97, 104. Several hours later, another police officer questioned Mosely about an "unrelated holdup murder." *Id.* at 104. "He was given full and complete *Miranda* warnings at the outset of the second interrogation." *Id.*

The subsequent questioning of Mosely "focused exclusively" on an unrelated incident "different in nature and in time and place of occurrence" from the robberies. *Id.* at 105. Based on these circumstances, the *Mosely* Court held that the later questioning "did not undercut Mosley's previous decision not to answer Detective Cowie's inquiries." *Id.* at 105.

As the court stated in *Miranda*, when a person "has shown that he intends to exercise his Fifth Amendment privilege [ ] any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 U.S. at 474.

Although there are circumstances when the police may initiate questioning of a person who has invoked his right to remain silent, these circumstances are not present in the case at bar. Mr. Baker told

police that he did not want to answer any more questions. 8/16/13RP 37. The police only respected this request for a few hours. The next day they said they needed more information from him. 8/16/13RP 41, 63.

Before this final round of questioning, Mr. Baker had been questioned at length by the police for many hours as the police narrowed their investigation to believe he committed "a violent act" in his home against his wife. 8/16/13RP 38. He first answered questions from two uniformed police officers on June 7, 2012, when they visited his home. CP 42-43. The next day at about 1 p.m., another police detective and uniformed officer came to Mr. Baker's workplace and took him to the police station for further questioning, with Mr. Baker's consent. 8/16/14RP 11. Detective Price, Officer Haugen, and Mr. Baker spoke at the police station for "at least one hour," then Mr. Baker agreed to let the police come to his house where he could access his bank account and credit card passwords. 8/16/13RP 15. Lieutenant Tingstad also came to the house and the officers searched it while Mr. Baker answered Detective Price's questions. *Id.* at 33.

The degree of blood in the home and Mr. Baker's inconsistent answers to Lieutenant Tingstad's questions led the officer to give *Miranda* warnings and prohibit Mr. Baker from re-entering his home.

8/16/13RP 35-37, 39. It was 6:30 p.m. when Mr. Baker said he did not want to talk any further. *Id.* at 40.Mr. Baker stood by his truck for three more hours until the police ordered him to leave the scene. *Id.* at 38-39. He was guarded by Officer Haugen while the other officers remained inside the home, gathering information for a search warrant. *Id.* at 37-39. Although he was not handcuffed, he was not permitted to take his car or any possessions beyond a jacket, his driver's license, and a credit card that the police retrieved from inside the house. *Id.* When the police ordered him to leave, they summoned a taxi and questioned Mr. Baker about where he would spend the night. *Id.* at 40.

The next day, two uniformed police officers came to the motel where Mr. Baker spent the night. 8/16/13RP 41, 55. They told him they "needed to talk to him." *Id.* at 63. Officer Haugen "patted him down for weapons and placed him in the patrol car." *Id.* Not until he was seated in the police station's interview room did he receive *Miranda* warnings and agreed to give a written statement, which was followed by further questioning, then he was arrested. *Id.* at 53.

In sum, Mr. Baker had spent hours with the police and answered many questions before he was advised of his *Miranda* rights orally and promptly invoked his right to cut off questioning. 8/16/13RP 13, 16-18,

34-35. The trial court erroneously entered findings that Mr. Baker knowingly, intelligently and voluntarily waived his rights to remain silent and have counsel, without acknowledging that he had not been advised of those rights at the time. CP 43-44 (Findings of Fact 5, 15). The court also incorrectly found the police did not know where Mr. Baker was going when he was ordered to leave his home. CP 45 (Finding of Fact 19). They asked him where he was going and he told them, although he ended up staying in a nearby motel that the police easily located. 8/16/13RP 40. The court also found that the process of investigation and interrogation was not "overly long" or during "off hours," yet Mr. Baker experienced almost 12 hours of police questioning or waiting under police guard outside his home, and was called a liar by the police. CP 46-47 (Finding of Fact 28); 4RP 565. The court's portrayal of the interaction is incorrect.

Mr. Baker was not fully apprised of his rights before he was initially questioned, unlike *Mosely*. His final *Mirandized* statements came after a long day of police questioning, including barring him from his home or from accessing personal property. Although his later statements were preceded by *Miranda* warnings, "from his point of view the warnings came at the end of the interrogation process."

Mosely, 423 U.S. at 106. By pressing him to answer more questions about the same incident after he invoked his right to remain silent, the police disregarded his clearly expressed request to cut off questioning about this incident and undermined his free choice.

c. *Mr. Baker was not free to leave when he requested that questioning cease.*

The right to remain silent when police officers seek incriminating evidence about a criminal investigation is triggered by custodial interrogation. "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

Contrary to the trial court's finding that Mr. Baker was not "in custody" until he was actually arrested, Mr. Baker was deprived of his freedom of action in a significant way by the time he invoked his right to cut off questioning. CP 47-48. Even though he was at his home and the questioning began voluntarily, the police gave him *Miranda* warnings based on the evidence they uncovered. 8/16/13RP 35. They would not allow him to go back inside his home. *Id.* at 37. Officer Haugen watched Mr. Baker while he stood outside for three hours. *Id.*

Mr. Baker had no access to his keys, driver's license, or wallet until the police ordered him to leave and gave him a single credit card and his driver's license. *Id.* at 41. Mr. Baker's freedom of action was curtailed in a significant way as defined by *Miranda* when he was taken out of his home and not allowed access to any of his property.

Because interrogation was custodial for purposes of the privilege against self-incrimination, Mr. Baker was entitled to have his right to cut off questioning "fully honored." *Miranda*, 384 U.S. at 467. Instead, the police disregarded his request and initiated further questioning. This resumption of questioning "undermined" his "will to resist" and "compelled him to speak where he would not otherwise do so freely," in violation of his rights under the Fifth Amendment and article I, section 9. *Id.*

d. *Article I, section 9 more broadly protects the right to remain silent.*

To determine whether a state constitutional provision supplies different or broader protections than its federal counterpart, this Court evaluates six nonexclusive criteria. These are: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-

existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986).

i. *The text of article I, section 9 and differences in language between article I, section 9 and the Fifth Amendment.*

It is "well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution." *State v. Simpson*, 95 Wn. 2d 170, 177, 622 P.2d 1199 (1980). Doing so "is particularly appropriate when the language of the state provision differs from the federal, and the legislative history of the state constitution reveals that this difference was intended by the framers." *Id.* This is the case with article I, section 9.

Article I, section 9 of the Washington Constitution provides, "No person shall be compelled in any criminal case to *give evidence* against himself" Const. art. I, § 9 (emphasis added). The language is significantly different from that of the Fifth Amendment, which

provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. 5.

In using the word "witness," the federal constitution's focus is guaranteeing the right not to testify against oneself at trial. *See Michigan v. Tucker*, 417 U.S. 433, 440, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974) (although caselaw has extended its meaning, the language of the Fifth Amendment "might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify"); *Cf. Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (a "witness" is a person who "bears testimony"). Our framers rejected a proposal for article I, section 9 that protected only a person's right not to "testify against himself." *Journal of the Washington State Constitutional Convention, 1889*, at 498 (B. Rosenow ed. 1962).[3] Instead, they adopted the broader "give evidence" language that protects against self-incrimination at the investigatory stage.[4]

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[3] The *Journal* is available online through the Washington State Constitutional Law Project. *See* https://lib.law.washington.edu/content/guides/waconst#section-6.

[4] The framers also changed the order of the clauses, placing the protection against self-incrimination first and double jeopardy second. It is reasonable to conclude this rearrangement is another sign of the importance our founders attached to the right not to be compelled to give evidence against oneself. *See* Rosenow at 498.

The Massachusetts Constitution uses language similar to Washington's, providing, "No subject shall … be compelled to accuse, or furnish evidence against himself." Mass. Const. art. 12. Applying factors similar to our *Gunwall* factors, that state's constitution is treated as more protective than the Fifth Amendment. *Commonwealth v. Clarke*, 461 Mass. 336, 345-46, 350, 960 N.E.2d 306 (Mass. 2012). The differences in text between the Fifth Amendment and article I, section 9, should similarly result in broader protection.

The text of article I, section 9 and its differences with the language of the Fifth Amendment demonstrate that the framers of our constitution intended to confer stronger protection against self-incrimination upon Washingtonians than that provided by the federal constitution. *See Gunwall*, 106 Wn.2d at 65 (difference in language between Fourth Amendment and article I, section 7 is "material," and suggests state constitution provides broader protection).

ii. *Constitutional history and pre-existing state law.*

The third and fourth *Gunwall* factors, constitutional and common-law history and pre-existing state law, also demonstrate that article I, section 9 provides stronger protection than the Fifth

Amendment. As discussed above, the Framers rejected language similar to the federal constitution in favor of language which more broadly protects persons against compelled self-incrimination.

Furthermore, this state's earlier decisions provided greater protection to people invoking the right to remain silent than the U.S. Supreme Court later endorsed under the federal constitution. *See State v. Robtoy*, 98 Wn.2d 30, 39, 653 P.2d 284 (1982). *Robtoy*, which was the law in this state for decades, held that:

> Whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. *Further questioning thereafter must be limited to clarifying that request* until it *is* clarified.

Robtoy, 98 Wn.2d at 39 (emphases in original). At the same time *Robtoy* construed the constitution to protect equivocating suspects from compelled self-incrimination, some other courts were denying such protection, instead requiring unequivocal assertions of the rights to silence or to counsel. *See Smith v. Illinois*, 469 U.S. at 96 n.3 (describing three different approaches state and federal courts had taken with respect to equivocal invocations; *Robtoy* fell in the middle, while the U.S. Supreme Court later adopted the least-protective rule).

Although *Robtoy* addressed an invocation of the right to counsel as opposed to the right to silence, it makes sense to apply the same rule to both contexts. *Thompkins*, 560 U.S. at 381. *Robtoy* limited detectives to clarifying an equivocal invocation of that right to give "a suspect the proper amount of protection to his rights without unduly burdening the police from taking voluntary statements." *Robtoy*, 98 Wn.2d at 39.

In *Radcliffe*, the Washington Supreme Court noted that *Robtoy* was no longer good law as to the Fifth Amendment under subsequent U.S. Supreme Court rulings, but declined to separately consider the state constitution. *Radcliffe*, 164 Wn.2d at 907. Other state courts applied the *Robtoy* rule under their state constitutions, rejecting the Fifth Amendment's narrower protections. *See, e.g., State v. Diaz-Bridges*, 208 N.J. 544, 564, 34 A.3d 748 (N.J. 2012); *State v. Hoey*, 77 Hawai'i 17, 36, 881 P.2d 504, 523 (Haw. 1994); *State v. Draper*, 49 A.3d 807, 810 (Del. 2002); *State v. Holcomb*, 213 Or. App. 168, 159 P.3d 1271 (Or. Ct. App. 2007). Those cases help determine the scope our state constitution's protection and show that article I, section 9 precludes the police from eliciting self-incriminating evidence against a person who invokes that right more protectively than the federal Fifth Amendment. *See Gunwall*, 106 Wn.2d at 67-68 (reviewing state

constitutional cases from Colorado and New Jersey in determining scope of protection under article I, section 7).

iii. *Structural differences and matters of particular state concern.*

The fifth *Gunwall* factor, differences in structure between the state and federal constitutions, always supports an independent constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). While individual rights were tacked on as amendments to the federal constitution, our state constitution begins with the Declaration of Rights.

State law enforcement measures are a matter of local concern. *Id. Miranda* "encouraged" states to "search for increasingly effective ways of protecting the rights of the individual" while still efficiently enforcing criminal laws, as other states have done. 384 U.S. at 467.

The fundamental fairness of trials in Washington is a matter of particular state concern. *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984). Here, fundamental fairness dictates that the federal rule does not apply in Washington. Rather, when a suspect

invokes his rights during a custodial interrogation, further questioning should be confined to clarifying the request if ambiguous. *See Robtoy*, 98 Wn.2d at 39.

In sum, article I, section 9 provides broader protection against compelled self-incrimination than the Fifth Amendment. The framers of the Washington Constitution purposely chose language different from the Fifth Amendment, the structure of our state constitution emphasizes individual rights, and prior case law in this state protected individuals who asserted their rights ambiguously from continued interrogation absent clarification. This Court should hold that under article I, section 9, if a suspect asserts his rights during a custodial interrogation, the only questions that may be asked are limited to clarifying the equivocal invocation, not embarking on further interrogation about the incident. *Robtoy*, 98 Wn.2d at 39.

e. *The statements elicited after Mr. Baker said he did not want to answer any more questions must be suppressed.*

The evidence resulting from the impermissible interrogation occurring after Mr. Baker asserted his right to cut off questioning violated article I, section 9 and the Fifth Amendment and is inadmissible. *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002)

("The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means."); *United States v. Blue*, 384 U.S. 251, 255, 86 S.Ct. 1416, 1419, 16 L.Ed.2d 510 (1966) (if Government acquired incriminating evidence in violation of the Fifth Amendment, defendant "entitled to suppress the evidence and its fruits" at trial).

Admitting an accused person's statements that were obtained in violation of an invocation of the right to remain silent is "presumed to be prejudicial." *See State v. Nysta*, 168 Wn. App. 30, 42, 275 P.3d 1162, 1168 (2012), *rev. denied*, 177 Wn.2d 1008 (2013). The prosecution must prove the error is harmless beyond a reasonable doubt. *Id.*

The prosecution heavily relied upon the inconsistent descriptions of events Mr. Baker gave to the police in his written statement and interrogation by Lieutenant Tingstad at the police station. 7RP 1053, 1064-65. It was during the final round of questioning that Mr. Baker made his most egregious statements, admitting he was romancing a woman without his wife's knowledge and repeatedly lied to the police. 4RP 553-54. During this final interrogation, Lieutenant Tingstad condemned Mr. Baker as a liar, telling him "I find it very disrespectful to be lied to" and "I know when someone is lying to me."

4RP 565. Lieutenant Tingstad's allegations about Mr. Baker's credibility, and Mr. Baker's admission that he had lied to the police were brought before the jury as substantive evidence, and were emphasized by the prosecution. 7RP 1064-65, 1112. Although Mr. Baker testified at trial, he made the decision to testify after the court had ruled all of his pretrial statements could be admitted against him. CP 42-48. The State introduced his statements to the police in great detail and used them as a central argument in urging the jury to convict Mr. Baker of first degree murder. Their erroneous admission was not harmless beyond a reasonable doubt and a new trial is required.

2. **There was insufficient evidence that the healthy, middle-aged victim was exceptionally more vulnerable than a typical victim of premeditated murder, which is essential to imposing an exceptional sentence based on particular vulnerability**

a. *An aggravating factor justifies an exceptional sentence only if its necessary elements are proven by the prosecution beyond a reasonable doubt.*

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential

elements is an "indispensable" threshold of evidence that the State must establish to garner a conviction. *Winship*, 397 U.S. at 364.

An aggravating factor that permits the imposition of an exceptional sentence constitutes an element of a greater offense and must be proved beyond a reasonable doubt to the jury. *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *see Alleyne v. United States*, _U.S. _, 133 S.Ct. 2151, 2162, 186 L.Ed.2d 314 (2013) ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury"); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 21, 22.

To determine whether there is sufficient evidence proving an offense's essential elements, reasonable inferences are construed in favor of the prosecution but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010); *see also State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013) (inferences of

accused person's intent "may not be inferred from evidence that is 'patently equivocal'").

To impose an exceptional sentence, the jury must find that a charged aggravating factor has been proven beyond a reasonable doubt, and the court must find this aggravating factor presents substantial and compelling grounds to impose a sentence above the standard range. *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010); RCW 9.94A.535(3); RCW 9.94A.537(3). Whether an aggravating factor legally justifies an exceptional sentence is reviewed *de novo*. *Id*. at 124.

An exceptional sentence premised on victim vulnerability requires "more than mere vulnerability" that would apply to most victims of the same offense. *State v. Cardenas*, 129 Wn.2d 1, 11-12, 914 P.2d 57 (1996). An exceptional sentence may not be imposed based on conduct that was already considered by the Legislature in crafting the standard range. *Stubbs*, 170 Wn.2d at 124. The acts must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense because such conduct was used to establish the standard range. *State v. Tili,* 148 Wn.2d 350, 369, 60 P.3d 1192 (2003); *see also State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986) (substantial and compelling reasons to impose

exceptional sentence "must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense").

When the Legislature amended the exceptional sentence statute to comply with *Blakely*, it specified that the aggravating factors listed in RCW 9.94A.535(3), were intended "*to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances.*" *State v. Williams*, 159 Wn.App. 298, 309, 244 P.3d 1018 (2011) (quoting Laws of 2005, ch. 68, § 1 (emphasis added by *Williams*)).

In addition to charging Mr. Baker with first degree murder, the prosecution charged him with committing the offense when he knew or should have known that the victim was particularly vulnerable or incapable of resistance. CP 39-40; RCW 9.94A.535(3)(b). The jury was instructed it must find the State proved the victim was more vulnerable than the typical victim of the crime charged, first degree murder committed with premeditated intent and that the victim's vulnerability must be a substantial factor in the commission of the crime. CP 33 (Instruction 12). The court imposed an exceptional sentence premised solely on this aggravating factor. CP 5, 13.

b. *The particularly vulnerable victim aggravator requires proof that the exploitation of a particular vulnerability was a substantial motivating factor in committing the offense.*

To prove a victim's vulnerability justifies an exceptional sentence, the State must show (1) the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability was a substantial factor in the commission of the crime. *State v. Gordon*, 172 Wn.2d 671, 680, 260 P.3d 884 (2011) (citing *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006)).

The State never specified what particular vulnerability rendered Ms. Baker substantially more vulnerable than other victims of the same crime. Medical testimony indicated no other health concerns or injuries beyond those that caused her death. 4RP 634. She did not suffer from a disability. She worked full time as a meteorologist, and had a second job as co-owner of a pizza restaurant. 1RP 9; 3RP 373-74. She traveled regularly for work. 3RP 264. She was not particularly weak or small, weighing 240 pounds, unlike Mr. Baker who was described as small in stature. 4RP 507; 8/16/13RP 68, 73. The toxicology tests were negative, showing no drugs or alcohol in her system. 4RP 634.

The State made only a single reference to this aggravating factor in its closing argument, arguing that "she was particularly vulnerable at that time. She was asleep in her bed." 7RP 1070.

However, there was no affirmative evidence was asleep. She may have been asleep at the start, but that is sheer speculation. It is equally possible that while awake, she and Mr. Baker argued; she learned of his feelings for another woman and became upset; or she was so surprised by the physical attack that she did not appreciate the force of the blows. The blood stains indicated Ms. Baker was in bed when attacked, but there was no evidence she was actually asleep. Indeed, even if asleep at the start, it is unlikely she remained asleep.

Merely being asleep does not satisfy the particular vulnerability required to set apart one first degree murder offense as substantially more egregious than typical. In *State v. Baird*, 83 Wn.App. 477, 488, 922 P.2d 157 (1996), the defendant was convicted of first degree assault after he hit his wife until she was unconscious then sliced off part of her nose and eyelids. The wife had no memory of how she was injured. *Id.* By rendering his wife unconscious before disfiguring her face, the defendant in *Baird* created the vulnerability of the victim and used it to commit a crime in a more appalling fashion than a typical

assault. *Id.* But *Baird* is an assault prosecution that also rested on the aggravating factor of deliberate cruelty.

While the first degree assault at issue in *Baird* involved a nonlethal injury, it is inherent in a murder that the victim will be rendered unconscious and incapable of resistance. An exceptional sentence may not be imposed for act inherent in the offense. *See Stubbs*, 170 Wn.2d at 127-28. The Legislature gave first degree murder a seriousness level of XV for purposes of setting the standard range, which falls just below aggravated first degree murder for which life in prison or the death penalty are mandatory. RCW 9.94A.515 (Table 2). The Legislature set the standard range with full understanding of the inherent nature of the offense, including acts necessarily rendering the victim incapacitated.

In *State v. Barnett*, 104 Wn.App. 191, 194, 16 P.3d 74 (2001), the defendant was convicted of multiple offenses after a "vicious attack on a short-term girlfriend." The State sought an exceptional sentence based on several aggravating factors, including victim vulnerability. *Id.* at 204-05. It claimed the victim was vulnerable because she was 17 years old and home alone. *Id.* at 202.

In rejecting victim vulnerability as an aggravating factor, the court in *Barnett* explained that the 17-year old was healthy enough to flee from the defendant during part of the incident, and she "did not suffer because of age, disability, or ill health." *Id.* Moreover, she was not selected as a victim because she was home alone. *Id.* at 205. "Mr. Barnett chose Ms. M because of their failed relationship, not because she presented an easy target for a random crime." *Id.*

Similarly, Ms. Baker was not disabled or exploited due to a physical or mental vulnerability. Like *Barnett*, it was the victim's relationship with the offender, thus her vulnerability was not the substantial motivating factor in committing the charged offense as required under RCW 9.94A.535(3)(b). Planning and violence is inherent in committing first degree premeditated murder. Ms. Baker was healthy and not rendered more vulnerable than typical during the offense. There is no substantial and compelling reason to depart from the standard range where the Legislature understood the conduct inherent in this offense when setting the standard range. This aggravating factor does not apply to the case at bar and does not justify the imposition of an exceptional sentence above the standard range.

c. *The aggravating factor of comparable vulnerability violates due process vagueness prohibitions.*

A law violates the Fourteenth Amendment's due process vagueness doctrine if it fails to either: (1) to provide the public with adequate notice of what conduct is proscribed or (2) to protect the public from arbitrary or ad hoc enforcement. *Spokane v. Douglass*, 115 Wn.2d 171, 177, 795 P.2d 693 (1990) (internal citation omitted); *see City of Bellevue v. Lorang*, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). The party challenging the prohibition has the burden of overcoming the presumption of constitutionality. *Douglass*, 115 Wn.2d at 177.

A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Laws which impart an uncommon degree of subjectivity to the jury's consideration of a fact may be invalidated on due process vagueness grounds. A criminal statute that "leaves judges and jurors free to decides, without any legally fixed standards, what is prohibited and what is not in each particular case," violates due

process. *Giacco v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

The aggravating circumstance of particular vulnerability violates due process vagueness prohibitions because its requirement that the jury find the victim was more vulnerable than "typical" is so subjective as to render the aggravating factor standardless.

Prior to *Blakely*, courts relied on the faulty premise that aggravating circumstances could not be challenged as impermissibly vague because they involved matters of judicial sentencing discretion. *See e.g.*, *State v. Jacobsen*, 92 Wn.App. 958, 966, 965 P.2d 1140 (1998). It was assumed that because judges had the experience to assess the "typical" case when deciding whether a particular case met the criteria of the aggravating circumstance, it minimized the subjectivity of certain aggravating circumstances and reduced the likelihood of a due process violation. *Nordby*, 106 Wn.2d at 518-19. Given the now-irrefutable proposition that aggravating circumstances operate as elements of a higher offense which must be found by a jury beyond a reasonable doubt, the due process vagueness inquiry must apply.

In the death penalty context, the Supreme Court has held a sentencing provision is unconstitutionally vague in violation of the

Eighth Amendment if it "fails to adequately inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)." *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). A vague sentencing factor creates "an unacceptable risk of randomness," *Tuilaepa v. California*, 512 U.S. 967, 974, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), and for this reason the "channeling and limiting of the sentencer's discretion. . . is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Cartwright*, 486 U.S at 362 (citations omitted).

The Court explained in *Cartwright*:

> To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'

486 U.S. at 364.

Comparably here, reasonable minds will differ on what might establish a typical victim of first degree premeditated murder. For

example, some jurors may believe any woman is more vulnerable than the typical male victim of a murder. Other jurors may believe that the premeditated nature of the killing rendered the victim vulnerable. Likewise, some jurors may imagine that anytime a victim would not anticipate that a fatal injury would soon befall him, he is more vulnerable than typical.

Considering similar undefined aggravators, the Ninth Circuit held that the failure to narrow a vague aggravator is not cured by *de novo* appellate review. *Valerio v. Crawford*, 306 F.3d 742, 756-57 (2002), *cert. denied sub nom.*, *McDaniel v. Valerio*, 538 U.S. 994 (2003). The *Valerio* Court reasoned that where an appellate court performs the narrowing construction, the court violates the defendant's Sixth Amendment jury trial guarantee, because "the state appellate court is not reviewing a lower court finding for correctness; it is, instead, acting as a primary factfinder." *Id.* at 756-57.

The impermissibly vague direction to the jury to determine whether Ms. Baker was more vulnerable than the typical victim of the same offense renders the jury's verdict too speculative and standardless to satisfy due process. This Court should reverse Baker's sentence and remand for resentencing within the standard range.

d. *The remedy is remand for a new sentencing hearing before a different judge.*

When a judge makes a sentencing decision based on allegations that should not have been considered, the judge's continued involvement creates an appearance of unfairness and the remedy is remand before a different judge. *City of Seattle v. Clewis*, 159 Wn.App. 842, 851, 247 P.3d 449 (2011); *see State v. Harrison*, 148 Wn.2d 550, 559, 61 P.3d 1104 (2003) (remedy for prosecution's breach of plea is "reversal of the original sentence and remand for a new sentencing, preferably before a different judge"); *State v. Sledge*, 133 Wn.2d 828, 843, 846 n.9, 947 P.2d 1199 (1997) (we "provide for a new judge at the disposition hearing in light of the trial court's already-expressed views on the disposition"); *see also State v. Aguilar-Rivera*, 83 Wn.App. 199, 203, 920 P.2d 623 (1996) ("the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court announced the sentence it intends to impose the remedy is to send the defendant before a different judge for a new sentencing hearing.").

> Even when the court stands ready and willing to alter the sentence when presented with new information (and we assume this to be the case here), from the defendant's perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position.

State v. Crider, 78 Wn.App. 849, 861, 899 P.2d 24 (1995). It is appropriate to assign this case to a judge who did not already announce a sentence, so that Mr. Baker is not disadvantaged in his request for a sentence that does not rest on an inapplicable aggravating factor.

3. **Mr. Baker's stand-in attorney at sentencing was unfamiliar with the case and made no arguments to counter the improper sentence, denying Mr. Baker his right to counsel at sentencing**

a. *Sentencing is a critical stage of proceedings at which an offender has the constitutional right to the meaningful assistance of counsel*

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of a case. *United States v. Cronic*, 466 U.S. 648, 653-54, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. amend. 6;[5] Wash. Const. Art I, §

[5] The Sixth Amendment provides:
In all criminal prosecutions, the accused shall enjoy the right to ...have the Assistance of Counsel for his defense.

22.[6] Sentencing is a critical stage of a criminal case. *State v. Bandura*, 85 Wn.App. 87, 97, 931 P.2d 174, *rev. denied*, 132 Wn.2d 1004 (1997).

Mr. Baker was denied his right to counsel at sentencing because he was represented by a substitute attorney who had not participated in the trial, who did not subject the prosecution's arguments to any adversarial testing, and who did not advocate on Mr. Baker's behalf.

b. *The appearance* of *a stand-in attorney who does not participate in sentencing constitutes a structural deprivation of counsel.*

The court held a critical stage of proceedings in the *absence* of the sole attorney who represented Mr. Baker throughout the trial proceedings, thereby inflicting a complete denial of counsel upon Mr. Baker. "A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal." *State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009).

A person is denied the right to counsel under *Cronic* if (1) counsel is absent or prevented from assisting the defendant; (2) counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; or (3) counsel represents a client in circumstances

[6] Article I, section 22 provides, in pertinent part:

under which no lawyer could provide effective assistance. *Miller v. Martin*, 481 F.3d 468, 472 (7th Cir. 2007) (citing *Cronic*, 466 U.S. at 659). Even when counsel is present in court, where his representation is "so inadequate that, in effect, no assistance of counsel is provided" the "defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied." *Cronic*, 466 U.S. at 654 n.11 (*quoting United States v. Decoster*, 199 U.S.App.D.C. 359, 382, 624 F.2d 196, 219 (MacKinnon, J., concurring), *cert. denied*, 444 U.S. 944 (1979)).

Mr. Baker's assigned attorney failed to appear for the sentencing hearing even though the day before he told the judge, "I'll be available" and that setting sentencing for 9:30 the following morning was, "Fine by me, Your Honor." 7RP 1131. A different attorney appeared without explanation or any indication he had been "fully apprised" of disputed issues or available arguments. *See Heddrick*, 166 Wn.2d at 911-12.

The sentencing hearing was not the first time Mr. Baker's trial attorney failed to appear in court as required. During the trial, the judge warned Mr. Pacher that he would not accept any future tardiness after he was late one day and then failed to appear another day. 9/20/13RP 3;

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

2RP 237-38. When Mr. Pacher was ill during one day of the trial, another lawyer in his office, Matthew Montoya, appeared as a messenger to convey Mr. Pacher's unavailability. 2RP 237. The judge was not pleased with Mr. Pacher's absence and asked Mr. Montoya if he could "sit here with Mr. Baker" if the trial went forward without Mr. Pacher. 2RP 228. Mr. Montoya admitted he "would certainly not be up to speed." 2RP 228. The judge agreed it would be improper for Mr. Montoya to represent Mr. Baker if he was not up to speed and Mr. Montoya conceded he was "not at all" prepared to represent Mr. Baker. 2RP 228-29. Mr. Pacher returned the next day and represented Mr. Baker throughout trial; Mr. Montoya took no part in the trial.

Yet at sentencing, Mr. Pacher inexplicably failed to appear and Mr. Montoya came instead, where he was listed as counsel for Mr. Baker. 8RP 1134. He made no record that he was familiar with the case or had received Mr. Baker's permission to represent him at sentencing. He made no argument whatsoever on Mr. Baker's behalf. He did not try to dissuade the judge from imposing an exceptional sentence above the standard range and did not object to improper arguments by the State.

After multiple relatives and friends of Ms. Baker asked the court to impose the maximum sentence possible, the judge asked Mr.

Montoya if he had any statements to make about sentencing. 8RP 1151. Mr. Montoya said, "the defense is not making any statement at this time." 8RP 1151. The judge then asked Mr. Montoya if he had any argument he would like to present, but Mr. Montoya said, "No argument at this time, Your Honor." 8RP 1151. He also told the judge that Mr. Baker would not be making a statement either. *Id.*

No attorney subjected the State's assertions to adversarial testing or assisted Mr. Baker at his sentencing hearing. There was no other time at which Mr. Baker could plead for a lower sentence. Mr. Montoya simply stood in court without offering any advocacy despite several sentencing issues that merited contesting, as discussed *infra*.

Mr. Baker received the equivalent of complete denial of counsel at sentencing. The State's sentencing arguments were not subjected to any meaningful adversarial testing. The lack of counsel is a structural error requiring automatic reversal and remand for a new sentencing hearing at which Mr. Baker is represented by a prepared attorney. *Cronic*, 466 U.S. at 658-60.

c. *Defense counsel's deficient sentencing performance prejudiced Mr. Baker.*

Alternatively, the failure to competently represent a person at sentencing by raising available objections to the legality of the sentence sought by the prosecution may constitute ineffective assistance of counsel. *State v. Saunders,* 120 Wn.App. 800, 824–25, 86 P.3d 232 (2004). Ineffective assistance of counsel occurs when "counsel's representation fell below an objective standard of reasonableness," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler v. Cooper*, _U.S. _, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012) (quoting *Strickland,* 466 U.S. at 688).

Deficient performance includes an attorney's failure to know the law or to raise valid objections. *State v. Horton*, 116 Wn. App. 909, 917, 921, 68 P.3d 1145 (2003). Here, the prosecution urged the court to impose an exceptional sentence for several invalid reasons and stand-in attorney Montoya did not object or raise any counterarguments.

First, the prosecutor made unsupported accusations that Mr. Baker deserved "no leniency" because he had "victimized a family member" in the past, resulting in convictions for sexual offenses in 1991. 8RP 1137. The prosecutor did not mention that this criminal history is not listed in Mr. Baker's offender score, where the only

reference to any other convictions is a notation that "criminal history 'washes' out." CP 4. "Unscored" criminal history justifies an exceptional sentence only is authorized by RCW 9.94A.535(2)(b), (d), but the aggravating factor that the standard range is clearly too lenient must be proven to the jury. *See State v. Alvarado*, 164 Wn.2d 556, 567-68, 192 P.3d 345 (2008); *State v. Hughes*, 154 Wn.2d 118, 138-40, 110 P.3d 192 (2005), *overruled in part on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006). This aggravating factor was not alleged or proven to the jury.

Likewise, "future dangerousness" concerns or past criminal history are not bases for exceptional sentences absent express authorization in the statute. *See State v. Barnes,* 117 Wn.2d 701, 707, 818 P.2d 1088 (1991); *State v. Hicks*, 77 Wn.App. 1, 6, 888 P.2d 1235 (1995); *see* RCW 9.94A.535(2); RCW 9.94A.010. Unproven allegations of criminal misconduct are not a basis for any sentence, standard range or exceptional. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). The stand-in attorney failed to object to the prosecution's use of unproven allegations of serious criminal conduct to seek a longer sentence.

Second, the prosecutor claimed that Mr. Baker had lied about being a "degreed scientist" according to an unnamed ex-wife. 8RP 1137. This allegation was never even mentioned during trial proceedings. Unproven allegations are not a valid consideration at sentencing. *Barnes*, 117 Wn.2d at 707 ("the 'real facts' concept excludes consideration of either uncharged crimes or of crimes that were charged but later dismissed"); RCW 9.94A.530. The stand-in attorney did not object or complain about the court considering this unproven allegation as a basis for imposing an exceptional sentence.

Third, defense counsel made no argument against and registered no opposition to the imposition of an exceptional sentence premised on victim vulnerability. There is no legitimate reason to silently acquiesce to the applicability of this aggravating factor when the victim bore no trappings of the type of vulnerability that case law requires for this aggravating factor.

The prosecutor urged the court to impose an exceptional sentence because Ms. Baker did not anticipate being killed, but being surprised by a husband's deceit is not an aggravating factor. 8RP 1137.

He also claimed a sentence above the standard range would further the SRA's goal of deterrence. 8RP 1138. The court listed

deterrence as a sentencing goal when pronouncing its exceptional sentence. 8RP 1159. But deterrence is factored into the standard range and may not serve as a basis for an exceptional sentence. *State v. Butler*, 75 Wn.App. 47, 54-55, 876 P.2d 481 (1994) ("enhancing a sentence for the purpose of deterrence would be an impermissible basis upon which to impose an exceptional sentence.").

An attorney's representation is unreasonable and deficient when it falls below prevailing professional norms. *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison,* 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). Professional norms include offering a presentence report or other sentencing advocacy.

The American Bar Association's standards directed counsel to either file a presentence report or "submit to the court and the prosecutor all favorable information relevant to sentencing." *Criminal Justice Standards, Defense Function, Standard 4–8.1 Sentencing,* American Bar Association (3d ed.1993). The National Legal Aid and Defender Association (NLADA) standards for attorney performance state that defense counsel at sentencing "should be prepared" to "advocate fully for the requested sentence and to protect the client's

interest." NLADA Performance Guidelines for Criminal Defense Representation, 8.7 (1985).[7] The advocacy required includes requesting evidentiary hearings for disputed facts and being prepared to "contradict erroneous or misleading information unfavorable to the defendant." *Id.* at 8.7(b), (c).

Mr. Montoya declined to make any argument or statement in Mr. Baker's favor. 8RP 1151. He did not present any argument, factually or legally, in favor of a standard range sentence. He did not challenge unsupported allegations made by the prosecutor. He did not argue that the Legislature considered this type of conduct when it set the standard range for premeditated murder.

It is reasonably probable that had defense counsel explained that the particularly vulnerable victim aggravating factor was legally inapplicable to a person in Ms. Baker's circumstances; explained that deterrence is not a valid basis for an exceptional sentence; and objected to uncharged allegations of other criminal conduct used as a reason for an increased sentence, the court would not have imposed a 600-month exceptional sentence against Mr. Baker that far exceeded the standard

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[7] Available at: http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#ei

range. Mr. Baker never had a chance to escape the exceptional sentence when his lawyer made no argument giving the court any reason why one should not be imposed, even though there were many legal and factual reasons available to object to the sentence.

d. *The remedy for the ineffective assistance of counsel at sentencing is remand for a new sentencing hearing before a different judge.*

When a case is remanded for resentencing and the judge has already expressed views on the disposition, the remedy should be remand before a different judge. *Sledge*, 133 Wn.2d at 846 n.9. In *Sledge*, the court reversed an exceptional sentence based on the State's breach of a plea agreement and the court's reliance on improper considerations. *Id.* at 843, 845. The Supreme Court remanded for a new sentencing hearing before a different judge "in light of the trial court's already-expressed views on the disposition." *Id.* at 846 n.9.

It is appropriate to reassign this case to a different judge who did not already announce a sentence, so that Mr. Baker is not disadvantaged in his request for a sentence that does not rest on inapplicable aggravating factors or improper factual allegations.

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ghtone.

F. CONCLUSION.

Mr. Baker's conviction should be reversed due to the violation of his right to remain silent and his sentence reversed because the aggravating factor does not apply and he received ineffective assistance of counsel at sentencing. Remand for further proceedings is required.

DATED this 14th day of July 2014.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

FILED

SEP 27 2013

DEBRA VAN PELT
ISLAND COUNTY CLERK

IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. ROBERT ALLAN BAKER, Defendant.	NO. 12-1-00127-9 FINDINGS OF FACT & CONCLUSIONS OF LAW ON DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT (CrR 3.5)

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KW

This matter came before the court on August 16, 2013, on motion of the State for a hearing pursuant to CrR 3.5, the plaintiff appearing by and through Island County Prosecuting Attorney Gregory M. Banks, or his deputy, Eric Ohme, the defendant appeared in person with his attorney, Thomas Pacher; the court having heard the testimony of Detective Laura Price, Lieutenant Evan Tingstad and Deputy Leif Haugen of the Island County Sheriff's Office, and having reviewed the exhibits and deeming itself fully apprised in the premises, the court makes the following:

I. FINDINGS OF UNDISPUTED FACTS

1. On June 7, 2012, the Island County Sheriff's Office was requested to do a welfare check concerning the whereabouts of Kathie Baker as her employer, Raytheon, had not heard from Kathie since June 1, 2012. Deputy Leif Haugen and Lieutenant Evan Tingstad responded to the Baker residence in Greenbank, Washington.
2. Lieutenant Tingstad made contact with the defendant, Robert Baker, the husband of Kathie Baker, at the end of the driveway at the Baker residence. The contact was during daylight hours. Lieutenant Tingstad explained that he was there because

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Raytheon had not heard from Kathie. Mr. Baker made statements to Lieutenant Tingstad.

3. Mr. Baker agreed to speak with the deputies regarding Kathie. Both Mr. Baker and Lieutenant Tingstad drove their vehicles to the residence and met up with Deputy Haugen. Mr. Baker made additional statements to the deputies in the driveway of the residence.
4. Neither Deputy Haugen nor Lieutenant Tingstad made any threats or promises to the defendant.
5. The defendant answered questions knowingly, intelligently and voluntarily. The defendant did not request an attorney or ask the officers to halt their questioning.
6. The defendant was not handcuffed. The defendant was not told he was under arrest. The deputies departed the residence after a short time.
7. On June 8, 2012, Kathie had not been located. On that day, during daylight hours, Detective Laura Price contacted the defendant at his restaurant, Harbor Pizza. Detective Price asked the defendant if they could talk about his wife's whereabouts at the South Precinct.
8. The defendant agreed and drove his vehicle to the South Precinct with a female passenger. The defendant and Detective Price walked into the conference room together. The door was left open. The defendant was not handcuffed. The defendant was not told he could not leave. The questioning was not aggressive. The defendant's female passenger did not come into the precinct.
9. The defendant answered questions and agreed to look at bank account information on the computer as Detective Price hoped that could provide information as to Kathie's whereabouts. The defendant made statements to Detective Price. Deputy Haugen was also present part of the time.
10. The defendant then agreed to meet deputies at his residence to look up additional banking information that was not available at the South Precinct because the defendant stated he had the passwords for the accounts at home. The defendant drove to the residence in his own vehicle with his female passenger.

11. At the residence, during daylight hours, the defendant looked up bank account information on his computer with Detective Price and Deputy Haugen. Lt. Tingstad arrived a short time later. The defendant made statements to the deputies.

12. The deputies asked the defendant if they could look around the residence to make sure Kathie was not there. The defendant was provided *Ferrier* warnings including telling the defendant he could refuse to allow the search, could limit the search and could stop the search at any time. The defendant indicated that he understood by nodding his head and began walking with deputies through the home.

13. During this time the defendant made additional statements to Detective Price, Deputy Haugen and Lieutenant Tingstad.

14. None of the deputies made any threats or promises to the defendant.

15. The defendant answered questions both at Harbor Pizza and his residence knowingly, intelligently and voluntarily. The defendant did not request an attorney or ask the deputies to halt their questioning or their search of the residence. The defendant did ask the deputies not to look in the guest room where his houseguest, Liza Schuldt, was staying. The deputies complied with the defendant's request.

16. The defendant was not handcuffed. The defendant was not told he was under arrest. The defendant was never told that he could not leave.

17. After observing what he believed to be blood stains while in the garage, Lieutenant Tingstad thought it would be prudent to advise the defendant of his *Miranda* rights even though the defendant was not in custody. Lt. Tingstad advised the defendant of the following rights from a pre-printed card he carries for this purpose:

    a. That he had the right to remain silent.

    b. That anything he said could and would be used against him in a court of law.

    c. That he had the right to talk to a lawyer and have him/her present while he was being questioned.

    d. That if he could not afford to hire a lawyer, one would be appointed to represent him before any questioning if he wished.

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e. That he could decide at any time to exercise those rights and not answer any question or make any statements.

18. After being read the *Miranda* warnings, the defendant indicated that "I don't think I want to answer any more questions." The defendant was not asked any more questions by the deputies. The defendant was not placed under arrest. The defendant was not told he could not leave. The defendant was not handcuffed. The defendant was not placed in a patrol vehicle. The defendant was not asked any more questions on June 8, 2012. Deputies began to prepare to apply for and serve a search warrant for the residence and informed the defendant that he could not go back inside the residence because deputies were going to apply for a search warrant. Deputies provided the defendant with a jacket, his driver's license and a credit card.
19. After spending three hours standing at his truck in the driveway, the defendant left the scene in a taxi at approximately 10:00 p.m. The defendant was not told where to go and the deputies did not know where the defendant was going.
20. The following day, June 9, 2012 at approximately 12:00 p.m., Lieutenant Tingstad and Deputy Haugen located the defendant at the Harbor Inn Motel. The deputies did not know the defendant was staying there. The defendant was asked if he would speak to them some more regarding his wife, Kathie. The defendant agreed. There was some incidental talk at the motel.
21. The defendant was frisked for weapons, which is standard procedure, and rode to the precinct in the back of Deputy Haugen's patrol car. He was not handcuffed nor was he advised that he was under arrest.
22. At the South Precinct, Lieutenant Tingstad once again advised the defendant of his *Miranda* rights from an Advice of Rights form. The rights he was advised of were:
    a. That he had the right to remain silent.
    b. That anything he said could and would be used against him in a court of law.
    c. That he had the right to talk to a lawyer and have him/her present while he was being questioned.

d. That if he could not afford to hire a lawyer, one would be appointed to represent him before any questioning if he wished.

e. That he could decide at any time to exercise those rights and not answer any question or make any statements.

23. The defendant initialed each right on a written form. He also signed that he understood his rights and also that he agreed to waive his rights and speak to the deputies about his wife's whereabouts.

24. Deputy Haugen sat in on the interview with the defendant.

25. Neither Lieutenant Tingstad nor Deputy Haugen made threats or promises to the defendant. The defendant appeared to understand his rights and questioned Lieutenant Tingstad about one of his rights. Lieutenant Tingstad explained and pointed to the responsive answer on the form and the defendant then signed the form in acknowledgment.

26. After waiving his *Miranda* rights as listed in the Advice of Rights form and signing the same that he waived said rights, the defendant wrote out a written statement. The defendant sat at a table in a conference room with the door open as he wrote his statement. Lieutenant Tingstad and Deputy Haugen remained in another room. The defendant signaled to Lieutenant Tingstad when he had completed the written statement. The defendant supplemented that written statement with additional verbal statements that Lieutenant Tingstad wrote on the statement form and Mr. Baker acknowledged. A photocopy of the form signed by the defendant is attached as Exhibit A.

27. The defendant also made additional statements to Lt. Tingstad which were not placed on the written statement.

28. The defendant was then placed under arrest and was not asked any further questions. Prior to being told he was under arrest on June 9, 2012, the defendant was not subject to photographing, fingerprinting or any other booking procedure None of the interviews were overly long nor did they take place at off hours, nor were the deputies

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aggressive in their questioning. The defendant was not handcuffed while making any statement.

29. The credibility of the witnesses, Lieutenant Tingstad, Detective Price and Deputy Haugen, was good.

II. FINDINGS OF DISPUTED FACTS

1. The deputies were not intimidating in their interactions with the defendant.

III. CONCLUSIONS OF LAW

1. The statements given by the defendant to Lieutenant Tingstad, Deputy Haugen and Detective Price on June 7, 8, and 9, 2012, were knowingly, intelligently and voluntarily made.

2. There was no coercion of the defendant by the sheriff's deputies to induce the defendant to make statements on June 7, 8 or 9, 2012.

3. The defendant was not in custody at any time he made statements on June 7, 8, or 9, 2012.

4. The defendant was not in custody on June 9, 2012 until he was told he was under arrest and placed in handcuffs and transported to the Island County Jail, which was after he made written and verbal statements to Lt. Tingstad and Deputy Haugen. The defendant did not make statements to law enforcement after he was in custody.

5. The defendant was fully advised, pursuant to *Miranda v. State of Arizona* of his rights against self incrimination and right to an attorney on both June 8 and 9, 2012.

6. The defendant acknowledged those rights and agreed to waive the same voluntarily and to speak to the deputies. His statements were voluntary and admissible. The defendant was not in custody until his formal arrest on June 9, 2012, at which time the deputies ceased questioning of the defendant.

7. However, even if the defendant invoked his right to silence on June 8, 2012, when he stated that he didn't think he wanted to answer any more questions, the deputies

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scrupulously honored that invocation as the deputies did not re-contact Mr. Baker until June 9, 2012 under *Michigan v. Mosley*, 423 U.S. 96 (1975).

8. In the present case, there was a significant period of time or cooling off period that elapsed between the initial reading of the *Miranda* rights on June 8, 2012, and the later reading of the rights on June 9, 2012.

9. Mr. Baker was never in custody at any time that he made any of these statements, and he had significant time to consider the rights that he was advised of on June 8, 2012 before the rights were again administered to him on June 9, 2012.

10. The rights were properly administered on both June 8, 2012 and June 9, 2012. There was no effort to overbear Mr. Baker's will or persuade him to give up his right to remain silent. He did not invoke his right to an attorney prior to making any statements to Deputy Haugen, Detective Price or Lieutenant Tingstad. The defendant was not subject to the restraints associated with formal arrest until he was actually told he was under arrest on June 9, 2012, which was after the defendant had made statements to Deputy Haugen, Detective Price and Lieutenant Tingstad.

11. The defendant's verbal and written statements made on June 7, June 8 and June 9, 2012, were voluntary and admissible even without the *Miranda* warnings which were provided.

IV. ORDER

Based upon the Findings of Fact and Conclusions of Law, it is hereby ordered that all of the defendant's statements to Lieutenant Tingstad, Deputy Haugen and Detective Price on June 7, 8 and 9, 2012, are admissible.

Dated this 27th day of September, 2013.

JUDGE OF THE SUPERIOR COURT

Presented by:

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: _____
ERIC M. OHME
DEPUTY PROSECUTING ATTORNEY
WSBA #28398

Approved as to form/Copy received

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71034-6-I
v.	)	
	)	
ROBERT BAKER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ISLAND COUNTY PROSECUTOR'S OFFICE P.O. BOX 5000 COUPEVILLE, WA 98239	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ROBERT BAKER 369769 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF JULY, 2014.

X_____

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