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COURT OF APPEALS  
DIVISION II

**Court of Appeals No. 35269-9-II**

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STATE OF WASHINGTON  
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**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**ERONI JOSEPH WILLIAMS,**

**Defendant/Appellant.**

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**BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 04-1-05575-1  
The Honorable Katherine M. Stolz, Presiding Judge**

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- d. *The introduction of irrelevant and highly prejudicial evidence regarding the threatening phone calls to Blacc’s house*

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**I. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence to convict Mr. Williams of second degree murder.
2. Mr. Williams' Constitutional right to counsel was violated by the trial court granting the motion to consolidate where Mr. Williams was indigent but not represented at the hearing on the motion.
3. The trial court erred in granting the State's Motion to Consolidate the cases where the motion was not properly scheduled in relation to the date the motion was filed.
4. The trial court abused its discretion in allowing the introduction of gang evidence.
5. The trial court abused its discretion in allowing Detective Ringer to give expert testimony regarding Kushman Blokk.
6. The trial court abused its discretion in allowing in evidence of gang related graffiti in Mr. Williams' cell.
7. The trial court abused its discretion in allowing photos of alleged gang graffiti on a fence where the State presented no evidence of who made the graffiti or when it was made.
8. The trial court abused its discretion in allowing the introduction of evidence threatening phone calls made to Blacc's residence.
9. The State's improper use of PowerPoint slides denied Mr. Williams his right to a fair trial.
10. Cumulative error denied Mr. Williams his right to a fair trial.
11. Mr. Williams' federal and state constitutional rights to a jury trial and proof beyond a reasonable doubt were violated where

prior convictions that were not found by a jury were used to impose a sentence that exceeded the maximum term.

## **II. ISSUES PRESENTED**

1. Was there sufficient evidence to convict Mr. Williams of second degree felony murder with assault as the underlying felony where there was insufficient evidence that an assault occurred? (Assignment of error No. 1)
2. Was there sufficient evidence to convict Mr. Williams of second degree felony murder with assault as the underlying felony where there was insufficient evidence that the shooting occurred in the course of or in the furtherance of or in the flight from the assault? (Assignment of error No. 1)
3. Was there sufficient evidence to convict Mr. Williams of second degree felony murder where there was insufficient evidence that Mr. Williams was an accomplice of Mr. Asaeli? (Assignment of Error No. 1)
4. Does a trial court violate a defendant's right to counsel at all stages of proceeding where the trial court grants the State's motion to consolidate cases knowing that the defendant is indigent and will be represented by the Department of Assigned counsel but that the defendant currently does not have an attorney? (Assignment of Error No. 2)
5. Does a trial court properly grant a motion to consolidate cases which is filed the day before the hearing on the motion and the defendant is not represented by counsel? (Assignment of Error No. 3)
6. Is highly prejudicial evidence that the defendants may have been involved in gang activity admissible where the trial court failed to identify the specific purpose for which the evidence was admissible and failed to perform the requisite on the record probative value analysis? (Assignment of Error No. 4)

No. 4)

7. Is highly prejudicial evidence that the defendants may have been involved in gang activity admissible where there was not sufficient evidence in the record to establish that a criminal gang existed? (Assignment of Error No. 4)
8. Is highly prejudicial evidence that the defendants may have been involved in gang activity admissible where the State failed to establish the necessary nexus between the alleged gang behavior and the alleged crimes in this case? (Assignment of Error No. 4)
9. May a witness give expert testimony regarding the behavior and characteristics of a gang where the State failed to establish that the witness had sufficient expertise to offer such testimony? (Assignment of Error No. 5)
10. Does a trial court abuse its discretion in allowing highly prejudicial evidence that gang graffiti was found in a defendant's jail cell where the State presented no proof that the defendant created the graffiti? (Assignment of Error No. 6)
11. Does a trial court abuse its discretion in allowing highly prejudicial evidence of alleged gang graffiti to be introduced where the State failed to present evidence of who made the graffiti or when the graffiti was made? (Assignment of Error No. 7)
12. Does a trial court abuse its discretion in allowing irrelevant but prejudicial evidence of threatening phone calls to a victim's residence to be admitted where there is no evidence linking the phone calls to the defendants? (Assignment of Error No. 8)
13. Was Mr. Williams denied his right to a fair trial by the prosecutor's misuse of PowerPoint slides where the slides

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misstated and supplemented the jury instructions provided by the court? (Assignment of Error No. 9)

14. Did cumulative error deny Mr. Williams his right to a fair trial? (Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9)
15. Was Mr. Williams denied his federal and state constitutional rights where the trial court imposed a sentence that exceeded the maximum statutory term based on prior convictions that were not found by a jury beyond a reasonable doubt? (Assignment of Error No. 11)

### **III. STATEMENT OF THE CASE**

#### ***A. Procedural Background***

On December 2, 2004, Mr. Williams was charged with one count of first degree murder charged alternatively as premeditated first degree murder and as first degree murder by means of engaging in conduct which created a grave risk of death, thereby causing the death of Faalata Fola. Mr. Williams was also charged with one count of second degree felony murder for the shooting death of Faalata Fola during the commission of an assault in the first, second, or third degree. CP 1-7.

On January 12, 2005, the Department of Assigned Counsel filed a Special Notice of Appearance indicating that DAC would represent Mr. Williams for purposes of arraignment and the bail hearing only. CP 8. Also on January 12, 2005, the State filed a Persistent Offender Notice indicating

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that, should Mr. Williams be convicted of either charge, he would be classified a “persistent offender” and would be sentenced to life imprisonment without the possibility of parole. CP 9. On January 12, 2005 the trial court entered a scheduling order noting a Motion for Joinder for January 20, 2005. CP 10.

On January 19, 2005, the State filed a Motion for Consolidation of Defendants for Trial pursuant to CrRs 3.3, 4.3, 4.3.1, and 4.4 to consolidate the separate cases of Mr. Williams, Mr. Benjamin Asaeli, and Mr. Darius Vaielua arguing that the men acted as accomplices with a common motive, purpose, and intent in the death of Faalata Fola. CP 11-18.

On January 20, 2005, the trial court granted the State’s Motion to Consolidate and entered an Order Consolidating the cases. CP 19-20. The trial court was aware that Mr. Williams did not have an attorney assigned to him at the time of the hearing but that an attorney would be assigned to him in the future. RP 2-3, 1-20-05.

On July 22, 2005, the State filed a Memorandum in Support of Gang Motivation Evidence (CP 156-168) and a Declaration of James S. Schacht in Support of Gang Evidence. CP 33-155.

On November 22, 2005, Mr. Williams filed a Response to State’s Memorandum in Support of Gang Motivation Evidence. CP 234-239.

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On August 24, 2005, the trial court ruled that evidence of gang affiliation and motivation was admissible. RP 82, 8-24-05.

On November 28, 2005, the State filed a Memorandum in Response to Motions to Suppress Gang Evidence. CP 240-251. Also on November 28, 2005, the State filed a Supplemental Declaration of James S. Schacht in Support of Gang Evidence. CP 252-266.

On May 25, 2006, the State filed a Corrected Information which charged Mr. Williams with the same crimes as the Original Information. CP 326-327.

On July 17, 2006, Mr. Williams filed a Motion to Exclude or Limit Expert Gang Evidence. CP 320-323.

On August 4, 2006, the jury returned a verdict of the lesser included crime of murder in the second degree as charged in count 1 (CP 399), guilty of the crime of murder in the second degree (CP 401), and returned a special verdict that Mr. Williams was not armed with a firearm at the time of the commission of the murder in the second degree. CP 402.

On January 12, 2007, Mr. Williams was sentenced under the Persistent Offender Accountability Act<sup>1</sup> to Life Without the Possibility of Parole. CP 419-423. Mr. Williams' predicate "most serious offense(s)" were

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<sup>1</sup> RCW 9.94A.570

two prior Pierce County second degree robbery convictions.<sup>2</sup> A timely Notice of Appeal was filed on the same date. CP 426.

***B. Factual Background***

Sometime after midnight, on October 30, 2004, Faalata Fola, and his cousins, James Fola and Taiulu Gago,<sup>3</sup> decided to go to a Tacoma waterfront park to “hang out.” RP 264, 275, 278-79, 6-13-06.<sup>4</sup> Faalata Fola’s street name was Blacc.<sup>5</sup> RP 264, 6-12-06. “Blacc” is spelled with two Cs because Faalata Fola was a Crip. RP 264, 6-13-06. The park is a common place for young Samoans to party on Friday and Saturday nights.<sup>6</sup> RP 253, 284, 6-13-06, 377, 395, 6-14-06, 1259, 6-27-06. Gago drove them to the park. RP 279, 6-13-06.

When they got to the park there was nobody else there. RP 288, 6-13-06. A short time later, however, Blacc’s girlfriend, Breanne Ramaley,

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<sup>2</sup> RCW 9.94A.030(28); RCW 9.94A.030(32).

<sup>3</sup> Gago’s nickname is “Psycho T.” RP 298, 7-13-06. Gago said he is a member of a gang called West Side USO. RP 297-298, 7-13-06.

<sup>4</sup> The volumes of the transcript of the proceedings are not numbered continuously. Reference will be made by giving the page number and then the date of the proceeding.

<sup>5</sup> Because Fola is the last name of a number of witnesses, Faalata Fola will be referred to as Blacc, as he was at trial.

<sup>6</sup> Asaeli, the co-defendants and most of the witnesses at trial were Pacific Islanders.

arrived. RP 288, 6-13-06. Tiare Misionare, her sister, Tami Misionare, and another friend, Angeline Paulo, were with Ramaley. RP 1694, 6-29-06. Tiare and Tami<sup>7</sup> both testified they considered Blacc like a brother. RP 592, 6-15-06, 1343, 6-27-06.

The two groups briefly greeted each other and Blacc got into Ramaley's car and drove it next to where Gago's car was parked. RP 632, 6-19-06, 1358, 6-27-06, 1701, 6-29-06. Ramaley sat in the front passenger seat and rolled a "blunt."<sup>8</sup> RP 1701, 6-29-06; RP 63, 7-11-06. Tiare got into the back seat and Tami walked towards the water. RP 632, 6-19-06, 1382, 6-27-06. Blacc's group and Ramaley's group also drank alcohol before they arrived at the park. RP 299, 6-14-06, 628, 697-98, 6-19-06, RP 240, 7-12-06.

About 20 minutes later three other cars arrived; a white sedan, green Explorer and a green Jetta. RP 300-304, 6-14-06, 630, 6-19-06, 1362-1365, 6-27-06, RP 61, 7-10-06, 250, 7-12-06. Eugene Van Camp and Feleti Asi came in Van Camp's green Jetta. RP 835-36, 897, 6-20-06. Asaeli and his friend, Rosette Flores, were in Flores' white Lumina sedan. RP 1167, 6-26-06. Van Camp told police he met up with the Explorer and the sedan on the

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<sup>7</sup> To avoid confusion Tami and Tiare Misionare will be referred to by their first names.

<sup>8</sup> A "blunt" is marijuana rolled into a Swisher Sweet cigar. RP 1701, 6-29-06.

freeway and all three followed each other to the park. RP 904, 6-20-06.

Fola testified that Vaielua<sup>9</sup> got out of the Explorer<sup>10</sup>, wanted to know what “was up”, and asked for Blacc. RP 307-308, 6-14-06. Fola said that Mr. Williams stood nearby but he was uncertain if Mr. Williams<sup>11</sup> arrived in the Explorer or another car. RP 311, 6-14-06. Fola had met Mr. Williams a couple times prior to the night of the shooting and interacted with him for about five minutes on the night of the shooting. RP 269-270, 6-13-06. Fola was aware that Mr. Williams was a member of “K-Block” or “Kushman Blokk.” RP 271, 6-13-06. Fola testified that K-Block was a gang or a “click” [sic]. RP 271-272, 6-13-06. Fola has no firsthand knowledge of Kushman Blok and only knows what he has heard from other people. RP 391, 6-14-06. Fola considered a gang and a “click” to be the same thing, and defined both as a “group of people growing up together. With a color.” RP 272, 6-13-06. Fola testified that Kushman Blokk wore brown “flags” or rags. RP 272, 6-13-06.

Asi grew up on the east side of Tacoma and knows the Kushman Blok

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<sup>9</sup> Vaielua’s nickname is “Skills.” RP 307, 6-14-06.

<sup>10</sup> Vaielua’s girlfriend owns the Explorer. RP 917, 7-19-06.

<sup>11</sup> Mr. Williams’ nickname is “Twix.” RP 311, 6-14-06, 641, 6-19-06.

as “just family.” RP 820, 6-20-06. Kushman Blok is “just all the boys” and the boys make music together. RP 821, 6-20-06. Asi views Kushman Blok as extended family. RP 877, 6-20-06. Asi does not know if Mr. Williams is a member of Kushman Blok (RP 820-821, 6-20-06) and believes that there is no such thing as a “member” of Kushman Blok. RP 877, 6-20-06. Asi told police that he hung around with a group called the Kushman Group and that the Kushman Group was not a gang. RP 1329, 6-27-06.

Van Camp does not believe Kushman Blok is a gang. RP 1032, 6-22-06.

Flores was not familiar with any people that call themselves Kushman Blok, but was familiar with Kushman Blok as a neighborhood. RP 1202-1203, 6-26-06. Flores knows Asaeli and his cousins are in a “set” called K Blok because they live on Cushman street. RP 1241, 6-27-06.

Gago and Ramaley testified the man who asked for Blacc was wearing a brown bandana over his face.<sup>12</sup> RP 66, 7-10-06, 294, 7-13-06. Tami, however, testified the driver of the Explorer was wearing a red bandana and another man, who got out of the white car, was wearing a dark

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<sup>12</sup> Ramaley did not know who was wearing the bandana. RP 68, 7-11-06.

colored bandana. RP 1369, 1379, 6-27-06, 1544, 6-28-06. Tiare testified Vaielua was wearing a blue bandana around his neck. RP 676-677, 6-19-06.

Tiare and Fola said that three men then walked over to the Ramaley's car. Blacc was still sitting in the driver's seat with the window rolled down. RP 312, 6-14-06, 640, 6-19-06. Flora identified the three men as Mr. Williams, someone named Shaak<sup>13</sup>, and a man wearing a black hoody. RP 313, 6-14-06.

Shortly after the other cars arrived, Ramaley finished rolling her "blunt", got out of her car, and started walking towards where Tami had gone. RP 67, 7-11-06. Tiare, who was still sitting in the back seat of the car, testified that one of the men who walked up to Ramaley's car said to Blacc, "this be Twix, let's go heads-up", which Tiare explained meant come and fight. RP 634, 6-19-06. Tiare believes Mr. Williams was the man who spoke to Blacc but only because the man who spoke to Blacc identified himself as "Twix." RP 640-641, 647-648, 6-19-06. The man who came to the window of the car did not have a gun in his hands and had both hands on the window. RP 738, 6-19-06.

According to Tiare, Blacc started to reach towards the car's glove box

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<sup>13</sup> "Shaake" is Verdel Malo. RP 878, 7-19-06.

when she heard the same man in a shocked voice say, “this nigga got a gun.” RP 649, 710, 6-19-06, 771, 6-20-06. Tiare then heard gunshots and ducked down behind the front seat. She said the first shot went through the car’s front window. RP 650-51, 6-19-06.

Van Camp said he too heard someone in a shocked voice say, “he’s reaching for a gun” just before shots were fired. RP 1011-1013, 1043, 1064, 6-22-06. Van Camp told police that Asaeli was the person who fired the shots. RP 1052, 6-22-06. Ramaley saw four men standing near the car. RP 70, 7-11-06. The men were positioned as one man standing in front of three others. RP 73, 7-11-06. Ms. Ramaley could not tell who was shooting the gun. RP 74, 7-11-06.

Tiare told police that after the shooting someone yelled “K”, which she took to mean “Kushman Blok<sup>14</sup>.” RP 686, 6-19-06. Tiare believed “K” referred to Kushman Blok (RP 686, 6-19-06), however, Tiare was not really sure that she had heard someone yell “K” and testified that it could have been “let’s get out of here, okay?” RP 781, 6-20-06.

Van Kamp testified that when Asaeli approached the red Nissan and was shooting Blacc, two men backed away from the Nissan and did not

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<sup>14</sup> In the transcripts the term is referred to as either “Kushman Blok” or “Kushman Blokk.” RP 271, 6-13-06, RP 295, 7-13-06.

appear to be assisting or directing Asaeli. RP 1015, 6-22-06.

Blacc was shot. He suffered ten bullet wounds caused by seven to ten separate bullets. RP 1561, 6-28-06, 1629, 6-29-06. The wounds were to his torso and left arm. RP 1579-1593, 1654, 6-29-06. At least one of the wounds was consistent with Blacc leaning towards the right when he was shot, however, an impact from one of the bullets could have caused him to lean in that direction. RP 1634, 1643, 6-29-06. The angles of the wounds were consistent with Blacc holding a gun in his left hand. RP 1654, 6-29-06.

Blacc's wounds were not immediately fatal or incapacitating. RP 1646, 6-29-06. After he was shot, Blacc got out of Ramaley's car and asked Gago to take him to the hospital. RP 319-321, 6-14-06, RP 307, 7-13-06. Gago and Fola put Blacc in Gago's car and drove him to the hospital, where Blacc eventually died. RP 321, 6-14-06, 1634, 6-29-06. Ramaley, Tiare and Tami followed Gago in Ramaley's car. RP 660, 6-19-06.

After they all got to the hospital, the police arrived. RP 201, 6-13-06. Gago told Tami, Tiare and Ramaley to tell police his name was Lucas and then he left because he had outstanding warrants and did not want to get arrested. RP 312-314, 6-14-06. When police spoke with each woman they all three lied and identified Gago as Lucas. RP 663, 6-19-06, 1472, 6-28-06,

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RP 215, 7-12-06.

Prior to the night of the shooting, Fola was not aware of Blacc having any disputes with Kushman Blok or any of the defendants. RP 332-333, 6-14-06.

A week prior to the shooting, Fola was at the bridge with Blacc and Mr. Williams was there as well. RP 333, 6-14-06. Nothing was going on between Blacc and Mr. Williams. RP 333, 6-14-06. James Fola told a detective that he believed Blacc was shot because Blacc always “talked shit on the donut.” RP 444, 6-14-06. At trial, James Fola testified that he had no idea what Blacc’s being on the donut had to do with the fact Blacc was shot. RP 445, 6-14-06.

Police seized Ramaley’s car. RP 206-208, 6-13-06. There were two bullet holes in the front windshield. RP 1075, 6-22-06. In the car’s glove box police found a .25 Raven handgun and two empty gun magazines. RP 523, 558, 6-15-06. On the back floorboard was a box containing two boxes of 9-millimeter bullets, an empty box of .25 bullets and 12-gauge shotgun shells. RP 519, 6-15-06. Two spent 9 millimeter bullets were also found in the car and were the same make as two bullets found in Blacc’s body. RP 46-65, 6-11-06. Asaeli’s palm print was found near the left front window. RP

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508-509, 6-15-06.

A week before the shooting, a group of Samoans were at the same park. RP 603-605, 6-19-06. Tiara and Ramaley were there along with Blacc, Asi, Van Camp, Fola<sup>15</sup> and Gago. RP 603-605, 6-19-06, RP 1003, 6-21-06, RP 235, 7-12-0-6, 391, 7-13-06. While at the park, Gago testified that he and Blacc shot about 12 rounds out towards the water from the .25 caliber gun that Blacc kept in the glove box of Ramaley's car. RP 349, 392-395, 7-13-06. Tiare said that while they were there a white car arrived and she heard some breaking beer bottles and some shooting. RP 609-610, 6-19-06.

Flores, Asaeli's friend, testified that in the summer of 2005, Asaeli introduced her to Gilbert Smith, a soldier. RP 1155-1158, 6-26-06. She, Asaeli, Smith, and others spent the day at American Lake and then went to Smith's house. RP 1159-1161, 6-26-06. The next day Smith asked her about a gun he was missing. RP 1164, 6-26-06. Smith said that when they all went to American Lake he brought his 9-millimeter Lugar and put it under the passenger seat of Flores' car. RP 571-580, 6-15-06. The following day, he noticed his gun was gone. He also asked Asaeli about the gun and Asaeli said he had not seen it. RP 580, 6-15-06.

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<sup>15</sup> Fola admitted he was with Blacc at the park but did not remember if Blacc shot a gun. 1RP 285-286, 6-13-06, 415, 6-14-06.

Flores said that on the night of the shooting she went to Papayas, a nightclub. Asaeli, Mr. Williams, and Vaielua were there along with about 200 people. RP 1168-1172, 6-26-06; RP 913, 7-19-06. At about 2:00 a.m., when the club closed, Asaeli asked her if she wanted to go the waterfront, which was commonplace, or go home. RP 1176, 6-26-06, 1259, 1275, 1280, 6-27-06. Asaeli indicated he wanted to go to the waterfront to see some of his cousins who he does not often get a chance to see. RP 1269, 6-27-06. She decided to go to the waterfront so she and Asaeli drove to the park in her Lumina. Flores said several other cars leaving the club were going to the park as well and they followed an Explorer. RP 1214, 6-26-06, 1289, 6-27-06.

Flores testified that when they got to the park, there were lots of cars already there and about 30 people. RP 1178, 6-26-06. Asaeli got out of the car and went to talk to some of the people standing around. RP 1180-1181, 6-26-06.

A short time later, Flores heard popping sounds. RP 1183, 6-26-06. Asaeli then came back to the car in a hurry and they left. RP 1266, 6-27-06. From the Park they went to Asaeli's cousin's house where Flores used the bathroom. RP 1185-1186, 6-26-06. Then, they went to Asaeli's house where

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Flores spent the night. RP 1188, 6-26-06. The next day police came and arrested Asaeli. RP 1188, 6-26-06.

When police arrived, Asaeli consented to allow them to search his house. RP 466, 6-15-06. In a clothes hamper police found Smith's Lugar. RP 457, 583, 6-15-06. In a box in a closet police also found ammunition for the gun. RP 459-460, 6-15-06. There were four bullets in the Lugar's magazine. RP 457, 6-15-06, RP 30, 7-10-06. Police did not find a bandana or any other clothing associated with gangs. RP 467, 6-15-06.

The day before the shooting Asaeli was at Flores' parent's house for a barbecue. RP 999, 7-20-06. Flores asked him to do some work to her car so he drove it home. RP 1000, 7-20-06. At about 8:00 p.m., he took his friend Richard Stevens to return some videos and later took Stevens to a bowling alley. RP 1001-1003, 7-20-06. After dropping Stevens off at the bowling alley, Asaeli went to Papayas. RP 1003, 7-20-06. At Papayas he saw Flores and Flores' friend Shamira, his cousin Ishmail Asaeli, Mr. Williams, Vaielua and others. RP 1003-1004, 7-20-06. Flores had come with her friend Shamira. RP 1007, 7-20-06. At the club, Asaeli spent his time dancing with women and talking to Ismail, who had returned from Iraq. RP 903-904, 7-19-06, 1005, 7-20-06.

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Asaeli, who still had Flores' car, planned to have Flores drive him home after the club closed. RP 1007, 7-20-06. After the club closed, Asaeli walked Shamira to her car. RP 1007, 7-20-06. She was drunk and tense because somebody was "messaging with her at the bar." RP 1008-1009, 7-20-06. Shamira showed Asaeli Smith's 9-millimeter gun and told him she was going to go back to the bar and "handle my business." RP 1337-1338, 7-25-06. Asaeli did not think she should have the gun in the state she was in so he took the gun from her and told her he would return it to her the next day when she was sober. RP 1009-1010, 7-20-06.

Asaeli tried to talk Shamira into riding home with Flores, but she declined. RP 1336, 7-25-06. Asaeli put the gun in his pocket and walked to Flores' car. RP 1011, 7-20-06. He and Flores then decided to go to the waterfront and hang out. RP 1011-1012, 7-20-06. They eventually arrived at the park where Blacc and the others were. RP 1025, 7-24-06.

When Flores and Asaeli got to the park, Asaeli saw the Explorer, which he recognized, and Verdel Malo and Vaielua standing outside. RP 1033-1035, 7-24-06. Mr. Williams was standing by Ramaley's car talking to Blacc who was sitting in the driver's seat of the car. RP 1124, 1036, 7-24-06. Asaeli walked up to Malo and Vaielua, exchanged a few words, and then

heard someone yell, "I'm going to cap your ass motherfucker." RP 1036, 7-24-06. Asaeli turned, saw Mr. Williams throw his hands up and say, "He's got a gun." RP 1036, 7-24-06.

Asaeli saw Blacc's left arm out the driver side window. He had a gun in his hand and Blacc fired a shot.<sup>16</sup> RP 1037, 7-24-06. Asaeli pulled out the gun he had taken from Shamira and started shooting at the gun in Blacc's hand. RP 1038, 7-24-06. Asaeli fired the gun until it was empty. RP 1190, 7-24-06. He then saw Blacc get out of the car so he walked back to Flores' car and told her to drive. RP 1040, 7-24-06. They drove to his cousin Tito's house, where Flores used the bathroom, and then back to his house. RP 1042, 7-24-06.

The following day, Asaeli told Flores he shot Blacc because Blacc took a shot at his cousin, Mr. Williams, and he just reacted. RP 1060, 7-24-06. Police arrived before Asaeli had the opportunity to talk to his family. RP 1064, 7-24-06. Asaeli gave them permission to search his room and told them where he put the gun. RP 1062, 7-24-06. Asaeli said he took the magazine out of the gun and it was empty. RP 1062-1063, 7-24-06. He did

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<sup>16</sup> Gago testified Blacc did not have a gun and said "I wish we did. Then it would have been a whole different subject." RP 308, 7-13-06. He explained that if he had a gun he would have shot back. RP 381, 7-13-06.

not know how the four bullets got into the magazine when police found it. RP 1062-1063, RP 1192, 7-24-06. Asaeli said that the box of bullets police found in his closet was given to him by a friend a few years earlier. RP 993, 7-20-06, 1063, 7-24-06.

Asaeli was also at the park the previous weekend with his sisters. RP 1025-1027, 7-24-06. He too saw Blacc shooting a gun so he told his sisters to leave. RP 1027-1028, 7-24-06. A short time later, some Asians arrived in a white car and people started throwing beer bottles at the car. RP 1029, 7-24-06. When one of the Asians got out of the car and asked what was going on, Blacc shot at the car. RP 1030, 7-24-06, 1325, 7-25-06.

Kristy Devault, Asaeli's friend, said she never discussed the shooting with Asaeli. RP 1417, 7-25-06, 1565, 7-26-06. The State was allowed to impeach Devault with a statement she made to police where she said Asaeli told her that Blacc was trying to instigate some problems with other people and one of the boys gave him a warning to let him know how things were done in Tacoma. RP 1570, 7-26-06. Blacc needed to prove himself so he started shooting and someone shot back at him in self-defense. RP 1571-1572, 7-26-06. She said Asaeli also told her the witnesses' description of the shooter did not fit him. RP 1572, 7-26-06. Devault testified what she told

police did not come from Asaeli but from other people she talked to and her own research. RP 1574, 7-26-06, 1666-1667, 1673-1674, 1677, 7-27-06.

Fola testified that Blacc was a member of a subgroup of the Crip gang called Everybody Killer (EBK). RP 264, 6-13-06, 406-407, 6-14-06. Gago said he was also a member of the EBK. RP 374, 7-13-06. Fola said it is not uncommon for members of his group to fire guns in public. RP 423, 6-14-06. Tiara testified that Blacc had CGD, which stood for Connect Gang, tattooed on his arm. RP 747, 6-19-06.

Blacc's sister, Roseann Fola, testified that about 2 weeks before the shooting a man called and asked for Blacc. RP 1122-1125, 6-22-06. The man started giggling and told her to tell Blacc he was a marked man. RP 1125-1126, 6-22-06. A week before the shooting another man and woman called and said they were going to "drop" Blacc. RP 1127-1128, 6-22-06. They were giggling as well. RP 1131, 6-22-06. Blacc told his sister he believed the calls were from his friends and he did not take them seriously. RP 1132, 1145, 6-22-06.

Blacc's mother said that the Thursday night before the shooting she heard Blacc yelling to someone on the "donut." RP 1137-1140, 6-22-06. The "donut" is a telephone party line used primarily by Samoans. RP 395,

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6-14-06, 863-864, 6-20-06. Fola denied Blacc talked “shit” on the “donut” but he told police he thought that was why Blacc was shot. RP 444-445, 6-14-06.

The State was allowed to present evidence that Mr. Williams and Vaielua were members of a group called Kushman Blokk, which the State characterized as a gang. Fola, Blacc’s cousin, testified that a group of people who grew up together were members of a group calling themselves the Kushman Blokk.<sup>17</sup> RP 271-272, 6-13-06. Although Fola testified that all he knows about Kushman Blokk is what he heard from others, he said Mr. Williams and Vaielua were members and members wore the color brown.<sup>18</sup> RP 271-273, 6-13-06, 391, 6-14-06. Gago, Blacc’s other friend, said that the brown bandana worn by one of the men at the park meant he was a member of the Kushman Blokk. RP 295, 7-13-06. Gago described the Kushman Blokk is clique of “homeys” from the same neighborhood. RP 297, 7-13-06. Devault told police that Kushman Blokk was a group of boys who grew up

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<sup>17</sup> Asi was impeached with evidence that he told police he was a member of Kushman Blokk, that Blacc would “trash” talk Kushman Blokk on the “donut” and that Asaeli wanted to be a member of Kushman Blokk. RP 1328, 1335, 6-27-06, RP 458, 467, 469, 494, 7-17-06.

<sup>18</sup> Fola and Gago did not know Asaeli. RP 413, 6-14-06, RP 365, 7-13-06. Flores heard from others that Asaeli’s cousins were members of Kushman Blokk. RP 1268, 1314, 1321, 6-27-06.

near Cushman Street in Tacoma and who went to church together. RP 1007, 7-24-06.

The State also presented evidence that in Mr. Williams' jail cell someone had written "Loco Boy" on the doorframe, Kushman Blokk, 73, "Brown Flag" gangsta, ESOLBZ, and the name Twix. RP 472, 477, 7-17-06, 682-691, 7-18-06; CP 252-266 Exhibit M. Tacoma Police Department Detective John Detective Ringer testified that graffiti similar to the graffiti in Mr. Williams' cell was recently found in the area of 73rd and Cushman in Tacoma. RP 677, 7-18-06. The jury was instructed the evidence of the graffiti in Mr. Williams' cell was limited to the State's case against Mr. Williams. RP 681, 7-18-06.

Detective Ringer was also allowed to testify as a gang expert. RP 655-660, 7-18-06. Detective Ringer gave a history of two gangs; the Crips and the Bloods. He said the two gangs were formed in the late 1960's and early 1970's and their respective members were from rival Los Angeles high schools. RP 662-663, 7-18-06. The two gangs are associated with Tacoma gangs and that a gang's primary goal is to control the criminal activity in a neighborhood. RP 665-666, 7-18-06. Graffiti in a neighborhood indicates which gang operates in that neighborhood. RP 671, 7-18-06. According to

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Detective Ringer, in Tacoma, the Crips control the Hilltop area and the Bloods control the Eastside. RP 666-668, 7-18-06. Gangs adopt colors and sometimes wear bandanas of the color adopted by the gang. The Bloods associate with the color red and Crips with the color blue. RP 661, 669, 7-18-06. Subsets of the gangs are sometimes referred to as cliques. RP 661, 7-18-06. Gangs will tend to avoid using the letters in the name of a rival gang. For example, Bloods will substitute the letter “C” with the letter “K”. RP 672, 7-18-06.

Detective Ringer asked two of his Crip informants and they had never heard of Kushman Blok. RP 704, 7-18-06. Detective Ringer had no way of knowing if the same person made all the graffiti in Mr. Williams’ cell. RP 708, 7-18-06. Detective Ringer was not aware of any criminal activity associated with Kushman Blok. RP 744, 7-18-06.

#### **IV. ARGUMENT**

##### **1. There was insufficient evidence to convict Mr. Williams of second degree felony murder.**

The Court of Appeals reviews challenges to sufficiency of evidence by determining whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the charged crimes beyond a reasonable doubt. *State v. Zakel*, 61 Wn. App.

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805, 811, 812 P.2d 512 (1991), *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992), citing *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Here, Mr. Williams was convicted of second degree felony murder with the underlying felony of assault. CP 326-327, 401-402. The jury specifically found that Mr. Williams was not armed with a firearm (CP 402), therefore the jury found that Mr. Williams was not the person who shot Blacc and therefore was guilty as an accomplice only.

*a. There is insufficient evidence that an assault occurred.*

Assault is not defined by statute, but, “[t]hree definitions of assault have been recognized by Washington courts: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.”

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*State v. Hupe*, 50 Wn.App. 277, 282, 748 P.2d 263, *review denied*, 110 Wn.2d 1019 (1988).

The evidence introduced at trial indicates that Mr. Williams arrived at the waterfront with the codefendants, walked over to Blacc's car, asked Blacc if he wanted to fight, stepped back and exclaimed that Blacc had a gun, and then Mr. Asaeli shot Blacc. Mr. Williams never touched or attempted to touch Blacc, rendering the first two definitions of assault inapplicable to the facts of this case. In closing argument, the State made clear that it was alleging that the assault in this case was committed by putting another person in apprehension of harm. RP 2200, 8-2-06.

Where someone is charged with assault committed by putting another in apprehension of harm, the State must prove the defendant acted with an intent to create in the victim's mind the reasonable apprehension of harm. *State v. Byrd*, 125 Wn.2d 707, 713 887 P.2d 396 (1995), *see State v. Krup*, 36 Wn.App. 454, 676 P.2d 507, *review denied*, 101 Wn.2d 1008 (1984), and *see State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996) (attempt to cause fear and apprehension of injury requires specific intent to create reasonable fear and apprehension of bodily injury). In support of this principle, *Byrd* and *Krup* both quote a passage from LaFave & Scott's

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*Handbook on Criminal Law,*

A majority of jurisdictions have extended the scope of the crime of assault to include, *in addition to* (not as an alternative to) the attempted-battery type of assault, the tort concept of the civil assault, which is committed when one, with intent to cause a reasonable apprehension of immediate bodily harm (though not to inflict such harm), does some act which causes such apprehension. It is sometimes stated that this type of assault is committed by an act (or by an unlawful act) which reasonably causes another to fear immediate bodily harm. This statement is not quite accurate, however, for one cannot (in those jurisdictions which have extended the tort concept of assault to criminal assault) commit a criminal assault by negligently or even recklessly or illegally acting in such a way (as with a gun or a car) as to cause another person to become apprehensive of being struck. There must be an actual intention to cause apprehension, unless there exists the morally worse intention to cause bodily harm.

Wayne R. LaFave & Austin W. Scott, Jr., *Handbook on Criminal Law*, at 611 (1972) (footnotes omitted; emphasis in the original). *See Krup*, 36 Wn.App at 458-459, 676 P.2d 507; *Byrd*, 125 Wn.2d at 713, 887 P.2d 396.

When a person is charged with assault by putting another in apprehension of harm, the apprehension created in the victim must be reasonable. *See State v. Maurer*, 34 Wn.App. 573, 663 P.2d 152 (1983); *State v. Strand*, 20 Wn.App. 768, 582 P.2d 874, *review denied*, 91 Wn.2d 1005 (1978); *State v. Byrd*, 125 Wn.2d at 713, 887 P.2d 396.

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The State failed to introduce any evidence that the actions of Mr. Williams caused Blacc to be apprehensive of any harm prior to being shot or that Mr. Williams intended to create apprehension of harm in the mind of Blacc. Mr. Williams did not approach Blacc and threaten him. Rather, Mr. Williams approached Blacc and asked him if he wanted to fight. RP 634, 6-19-06. This was a question, not a threat.

In closing, the State argued that Blacc was put in apprehension of harm by the actions of the defendants because the defendants were “fairly large,” were “from the same group, Kushman Blokk,” and because the defendants outnumbered Blacc. RP 2014, 8-01-06. However, the evidence introduced at trial was that on the night of the shooting Tiare-Ann Misionare was nervous when the Explorer arrived at the waterfront because she thought the occupants might be a group of people who had attacked her earlier, but Blacc calmed her, saying, “Don’t worry about it. Those are just Tacoma cats.” RP 635, 6-19-06. Blacc clearly knew the individuals in the Explorer and was not alarmed by their presence.

The State presented insufficient evidence to establish that Mr. Williams’ act of asking Blacc a question put Blacc in apprehension of harm. Because there was insufficient evidence to establish the underlying felony,

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there was insufficient evidence to convict Mr. Williams of committing felony murder based on that felony.

*b. There was insufficient evidence to establish that the shooting occurred in the course of and the furtherance of or in the flight from the assault.*

While it is true that a person who is an accomplice to the underlying felony is liable for a murder committed in the course of committing the underlying felony (*State v. Davis*, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984)), even if this court finds that Mr. Williams' act of asking Blacc if he wanted to fight was an assault, that assault was completed prior to Blacc being shot. The shooting occurred after Mr. Williams had asked Blacc if Blacc wanted to fight and Mr. Williams was not fleeing from the scene of the assault at the time of the shooting.

The shooting was a separate assault on Blacc and there was no evidence to suggest that Mr. Williams knew Mr. Asaeli was going to shoot Blacc or even that Mr. Williams knew Mr. Asaeli was armed.

Even viewed in a light most favorable to the State, the facts do not support an inference that the shooting occurred in the course of, furtherance of, or flight from the assault.

*c. There was insufficient evidence to establish that Mr. Williams was acting in concert with Mr. Asaeli to*

*make Mr. Williams liable for Mr. Asaeli's actions.*

An accomplice is someone who, “[w]ith knowledge that it will promote or facilitate the commission of the crime... aids or agrees to aid such other person in planning or committing it.” RCW 9A.08.020(3). Presence and knowledge are not enough; the accomplice must associate himself with the crime charged, participate in it, and seek to make it succeed. *State v. Amezola*, 49 Wn.App. 78, 89, 741 P.2d 1024 (1987). An accomplice is not strictly liable for all acts arising from the initial crime in which he participated unless he associates himself with those acts. *State v. Roberts*, 142 Wn.2d 471, 512, 14 P.3d 713 (2000).

[A]n accomplice need not have knowledge of each element of the principal’s crime in order to be convicted under RCW 9A.08.020. General knowledge of “the crime” is sufficient. Nevertheless, knowledge by the accomplice that the principal intends to commit “a crime” does not impose strict liability for any and all offenses that follow.

*Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713.

Here, the shooting of Blacc was committed by Mr. Asaeli, making Mr. Asaeli the principal actor for purposes of the shooting. Even if Mr. Williams knew Mr. Asaeli was going to participate in the assault, there is no evidence that Mr. Williams knew Mr. Asaeli was going to shoot Blacc. Under *Roberts*, Mr. Williams is not liable for Mr. Asaeli’s action of shooting

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Blacc because Mr. Williams had no knowledge that the shooting was going to occur and the crime of assault had already been completed. There was no evidence that Mr. Williams associated himself with the shooting and sought to make the shooting succeed.

2. **The trial court violated Mr. Williams' 6<sup>th</sup> Amendment right to counsel by granting the State's motion to consolidate cases knowing that Mr. Williams was indigent and would be represented by the Department of Assigned counsel but that Mr. Williams was not represented at the hearing on the Motion.**

Under the sixth amendment of the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). A defendant has a constitutional right to counsel at all 'critical stages' of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). By court rule, counsel must be provided at every stage of the proceedings. CrR 3.1(b)(2); *Robinson*, 153 Wn.2d at 692, 107 P.3d 90.

Critical stages include those in which "potential substantial prejudice to defendant's rights inheres in the particular confrontation and ... [counsel may] help avoid that prejudice." *Schantz v. Eymann*, 418 F.2d 11, 13 (9th Cir.1969) (internal quotation marks omitted). The Supreme Court has further

defined a “critical stage” in criminal proceedings as one which affects the defendant’s right to a fair trial. *United States v. Wade*, 388 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

*U.S. v. Fernandez*, 231 F.3d 1240, 1248 (9<sup>th</sup> Cir. 2000).

The guarantee reads: “In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence.” The plain wording of this guarantee thus encompasses counsel’s assistance whenever necessary to assure a meaningful “defence.” As early as *Powell v. State of Alabama*, *supra*, we recognized that the period from arraignment to trial was “perhaps the most critical period of the proceedings,” during which the accused “requires the guiding hand of counsel, if the guarantee is not to prove an empty right.

*U.S. v. Wade*, 388 U.S. 218, 224-225, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (internal citations omitted).

“[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” *Wade*, 386 U.S. at 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149.

*a. Mr. Williams had a Constitutional right to be represented at the hearing on the Motion to Consolidate.*

The defendant’s right to counsel at a given stage in a criminal prosecution is not linked only to protection of Fifth Amendment rights. Rather the essential determinants are whether potential substantial prejudice to defendant’s rights

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inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

*Schantz v. Eyman*, 418 F.2d 11, 13 (9<sup>th</sup> Cir. 1969), *cert denied Eyman v. Schantz*, 397 U.S. 1021, 90 S.Ct. 1259, 25 L.Ed.2d 530 (1970) (internal citations omitted) (citing *Wade*, 386 U.S. at 227, 87 S.Ct. 1926, 18 L.Ed.2d 1149).

When the effectiveness of legal counsel ultimately afforded to a defendant is likely to be prejudiced by a prior lack of representation, the earlier period may be deemed a critical stage in the proceedings and a conviction obtained in such circumstances is invalid. *State v. Jackson*, 66 Wn.2d 24, 26, 400 P.2d 774 (1965); see also *State v. Harell*, 80 Wn.App. 802, 804, 911 P.2d 1034 (1996). No case, however, permits courts to extend the right to counsel in proceedings where the likelihood of later prejudice arising from the failure to appear is absent. *Jackson*, 66 Wn.2d at 26, 400 P.2d 774.

Mr. Williams was represented by DAC at his arraignment, but DAC initially appeared solely for purposes of Mr. Williams' arraignment and bail hearings. CP 8. At the hearing on the State's Motion to Consolidate, the trial court was aware that Mr. Williams was not represented, but was waiting for counsel to be appointed. RP 2-3, 1-20-05.

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Joinder with the other defendants in this case was highly prejudicial. The State's theory was that Blacc was shot by a gang called "Kushman Blok" and that Mr. Williams was guilty of second degree felony murder because he and the shooter were allegedly members of Kushman Blokk and had agreed to commit either a first, second, or third degree assault against Blacc which escalated to a shooting. CP 156-168. As discussed below, evidence of alleged gang activity is inherently highly prejudicial. Had Mr. Williams been represented by counsel at the hearing on the Motion to Consolidate, such counsel could have argued against the consolidation, filed a response brief, and preserved issues relating to the improper consolidation of the cases for appeal.

Ultimately, Mr. Williams was appointed counsel and Mr. Williams' counsel did bring several motions to sever (RP 175, 6-12-06, 565-569, 6-15-06), however, Mr. Williams was prejudiced in the motions because he had not had an attorney to represent him at the consolidation hearing and argue on his behalf and present and preserve issues. The effectiveness of Mr. Williams' trial counsel was very likely affected by the failure of the trial court to postpone the hearing on the Motion to Consolidate until Mr. Williams had appointed counsel.

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- b. *Mr. Williams was prejudiced by the trial court's failure to postpone the hearing on the Motion to Consolidate.*

As stated above, had Mr. Williams been represented at the hearing, his attorney could have objected to the consolidation of the cases. Mr. Williams was prejudiced by not having appointed counsel at the hearing because an attorney could have argued against the consolidation and preserved issues for later reconsideration or appeal and, because the cases were consolidated, Mr. Williams was forced to stand trial with two other people in a case where the State's theory required Mr. Williams be found to be a member of a gang in order to be found guilty of any crime. Further, in the later motions to sever, counsel for Mr. Williams faced the more difficult task of convincing the trial court to reverse its previous ruling, rather than the lesser burden of arguing against the initial consolidation.

The trial court's failure to postpone the hearing on the Motion to Consolidate until Mr. Williams was represented by an attorney violated Mr. Williams' 6<sup>th</sup> amendment right to counsel and prejudiced Mr. Williams.

3. **The trial court erred in granting the State's Motion to Consolidate where the motion was not properly filed and Mr. Williams was not represented.**

Here, the State's Motion to Consolidate was filed on January 19,

2005, one day before the scheduled hearing on the motion and the day before the motion was granted. CrR 8.2 dictates that CR 7(b) governs motions in criminal cases. PCLR 7(a)(4) requires that “[t]he moving party shall serve and file all motion papers *no later than six court days before the date the party notes the motion.*” (emphasis added). PCLR 7(a)(3) provides that “If a motion is noted but not filed, the court may strike the same from the calendar, or may deny it for want of proper prosecution.”

Had Mr. Williams been represented by counsel, Mr. Williams’ counsel could have objected to the untimely filing of the motion and requested time to respond. Even without an objection by Mr. Williams’ trial counsel, the State failed to comply with Pierce County Local Court Rules in filing the Motion and the Motion to Consolidate was therefore not properly before the court and it was error for the court to consider the motion.

**4. The trial court erred in admitting evidence of a gang affiliation and motivation.**

In its Memorandum in Support of Gang Motivation Evidence (CP 156-168), the State argued that the alleged gang activity of the defendants, while normally barred by ER 404(b), was admissible here to prove premeditation and motive and that the “expert” testimony of Detective John Detective Ringer regarding gangs was admissible because it would “educate

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the jury about why a group of young men would contemplate killing over so small a dispute.” Over objection, the State was allowed to introduce at trial testimony from witnesses regarding the existence of an alleged Blood sub-gang called “Kushman Blokk,” the testimony of Detective John Detective Ringer about street gangs in general and about the Bloods and Crips gangs, and evidence of allegedly gang-related graffiti found in Mr. Williams’ jail cell.

- a. *The trial court failed to conduct the requisite ER 404(b) analysis prior to admitting the evidence of alleged prior gang affiliation and alleged gang motivation.*

Decisions as to the admissibility of evidence are within the discretion of the trial court. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Smith*, 115 Wn.2d 434, 444, 798 P.2d 1146 (1990). Discretion is abused if it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State v. Alexander*, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995); *State v. Herzog*, 69 Wn.App. 521, 524-25, 849 P.2d 1235, *review denied*, 122 Wn.2d 1021, 863 P.2d 1353 (1993).

Under ER 404(b), evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith. *Powell*, 126 Wn.2d at 258, 893 P.2d 615; ER 404(b). Such

evidence is admissible, however, for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). The list of other purposes for which evidence of a defendant’s prior misconduct may be introduced is not exclusive. *See State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

If admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove and essential ingredient of the crime charged. Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable.

*Powell*, 126 Wn.2d at 258-59, 893 P.2d 615 (citations omitted). Such evidence is admissible if its probative value outweighs its prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). A trial court must balance the probative versus prejudicial value of the evidence on the record. *State v. Acosta*, 123 Wn.App. 424, 433, 98 P.3d 503 (2004). Where ER 404(b) is implicated, the trial court must identify on the record the purpose for which other crimes or misconduct are admitted. *Acosta*, 123 Wn.App. at 433, 98 P.3d 503.

The State must establish the existence of the prior act and the defendant’s connection with that act by a preponderance of the evidence. *State v. Norlin*, 134 Wn.2d 570, 577-78, 951 P.2d 1131 (1998). A trial

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court's ruling that a prior act had occurred will not be disturbed if it is supported by substantial evidence in the record. *State v. Roth*, 75 Wn.App. 808, 816, 881 P.2d 268 (1994)*review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995).

In ruling on the State's Memorandum in Support of Gang Evidence (CP 156-158) and Mr. Williams' Response to State's Memorandum in Support of Gang Motivation Evidence (CP 234-239), the trial court's analysis of why the gang evidence was admissible and was more probative than prejudicial consisted of a single sentence, "Now based on the evidence that is in front of me I think that the State has carried its burden and the gang evidence will come in." RP 82, 8-24-05.

The trial court's on the record analysis of the probative versus prejudicial aspects of this evidence is clearly absent and the trial court completely failed to indicate the purpose for which the gang related evidence was admissible. The trial court failed to engage in the mandatory on the record comparability analysis and failed to state the specific purpose for which the gang evidence was being admitted. Therefore, the gang evidence was improperly admitted.

- b. There was not sufficient evidence in the record to establish that a criminal gang called "Kushman*

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*Blokk” existed.*

In support of its motion to admit gang evidence, the State attached a multitude of police reports, supplemental police reports, and witness interview transcripts to several declarations filed by the prosecutor. CP 33-155, 252-266. However, despite the voluminous documents filed to support the State’s assertion that a street gang called “Kushman Blokk” existed, very little evidence actually supported that conclusion.

James Fola told Detective Werner that the men who had arrived with the person who shot Blacc belonged to the “Cushman Block” gang and that this alleged gang flew a “brown flag.” CP 33-155, Exhibit A, Supplemental Report of Detective Werner p. 4.

Feleti Asi also told Detective Werner that a gang named “Cushmen Block” existed. CP 33-155, Exhibit A, Supplemental Report of Detective Werner p. 5. However, Feleti Asi told Detective Bair in a later interview that he hung out with a group of people from the “Cushman Block” and that the group was not a gang but that other people in the Samoan community might believe it was a gang. CP 33-155, Exhibit E, Supplemental Report of Detective Bair p. 6.

Tami Misionare told Detective Holden that the driver of the Explorer

was waving a red bandana and that the bandana symbolized gang affiliation with the Bloods. CP 33-155, Exhibit C, Supplemental Report of Detective Holden, p. 3, Exhibit G, Supplemental Report of Detective Holden p. 3, 6, 7, 10, 21. Tami Misionare told Detective Holden that the passenger of the Explorer was wearing a black or a blue bandana over his face. CP 33-155, Exhibit G, Supplemental Report of Detective Holden, p. 7.

Rosette Flores told Detective Holden that Mr. Asaeli was with the “K block” gang. CP 33-155, Exhibit C, Supplemental Report of Detective Holden p. 3. Ms. Flores told Detective Farrison that she did not see “Twix” wearing a bandana. CP 33-155, Exhibit F, Supplemental Report of Detective Farrison p. 20. Ms. Flores told Detective Farrison that Mr. Asaeli was affiliated with a gang called K-block and that the gang was called K-block because the members lived on Cushman street. CP 33-155, Exhibit F, Supplemental Report of Detective Farrison p. 21. Ms. Flores also told Detective Farrison that she was not sure that it was a gang because she heard Mr. Asaeli refer to the people in the alleged gang as “the boys from the block” and that the alleged three members of this gang, “Shake”, “Twix,” and “Skills,” were always together. CP 33-155, Exhibit F, Supplemental Report of Detective Farrison p. 20-21. Ms. Flores told Detective Pendrak she knows

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that “Shake,” “Skills,” and “Twix” are members of the Cushman Bloc and that they frequent the area of 72<sup>nd</sup> and Cushman. CP 33-155, Exhibit I, Supplemental Report of Detective Pendrak p. 4.

Angeline Paulo told Detective Bair that she had seen an individual with a rag or possibly a bandanna across their face at the waterfront prior to the shooting. CP 33-155, Exhibit E, Supplemental Report of Detective Bair p. 4.

Tiare Misionare told Detective Farrison that she had heard someone yell “K” and that “K” stood for “Cushman Block” which was a group of hardcore gangsters who were from Cushman block. CP 33-155, Exhibit F, Supplemental Report of Detective Farrison p. 7, 12. Tiare told Detective Werner that K block stood for Cushman block. CP 33-155, Exhibit H, Supplemental Report of Detective Werner p. 5. Tiare also told Detective Farrison that some of the people who arrived in the Explorer on the night of the shooting were wearing blue bandanas. CP 33-155, Exhibit F, Supplemental Report of Detective Farrison p. 10, 11. Tiare told Detective Werner that the driver of the Explorer was waiving a red bandana. CP 33-155, Exhibit H, Supplemental Report of Detective Werner p. 6.

Taiulu Gago told Detective Werner that there was a Cushman Block

gang, the color of the gang is brown, and that the person sitting behind the driver of the Explorer had a brown “flag” over his face. CP 33-155, Exhibit H, Supplemental Report of Detective Werner p. 7.

When the trial court ruled that the evidence of gang affiliation was admissible, the only evidence before the court that a criminal street gang named “Kushman Blok” existed was the statements of James Fola, Feleti Asi, Rosette Flores, Tiare Misionare, and Taiulu Gago. However, the statements of these individuals are conflicting on the issue of whether or not Kushman Blokk was actually a criminal gang. Some people stated that it was not a gang, others stated they didn’t know if it was a gang or not but it was made up of a group of men who were always together and who frequented Cushman Street, and others stated that it was a gang, but none of the witnesses described the Kushman Blokk as engaging in criminal activity.

During argument on the State’s motion, counsel for Mr. Vaielua indicated to the court that the State had sent out a request to all law as Kushman Blokk existed mainly for criminal purposes.

The State failed to meet its burden of establishing by a preponderance of the evidence that a street gang calling itself Kushman Blokk existed because the State failed to establish that the purpose of Kushman Blokk was

mainly to commit crime. The most logical inference to draw from the statements given to the detectives was that there was a group of close friends who lived in the area of Cushman street who referred to themselves and who other people referred to as the Kushman Blokk. There was not sufficient evidence that this group was a criminal gang to meet the State's burden under ER 404(b).

The trial court abused its discretion in ruling that evidence of gang affiliation was admissible because the State failed to establish by a preponderance of the evidence that a street gang identified as the Kushman Blok existed. Because the state failed to present sufficient evidence, the grounds on which the court based its ruling were insufficient and therefore untenable.

- c. *The State failed to establish the necessary nexus between the alleged gang behavior and the alleged crimes in the current case.*

Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. See *State v. Campbell*, 78 Wn.App. 813, 901 P.2d 1050, review denied 128 Wn.2d 1004,

907 P.2d 296 (1995).<sup>19</sup> Evidence of gang membership is inadmissible when it proves no more than a defendant's abstract beliefs. *Dawson v. Delaware*, 503 U.S. 159, 165, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (gang membership inadmissible to prove abstract belief because it is protected by constitutional rights of freedom of association and freedom of speech); *Campbell*, 78 Wn.App. at 822, 901 P.2d 1050.

Even if this court finds that the trial court did not err in ruling that evidence of the Kushman Blok was admissible, the State presented insufficient evidence to establish a nexus between the Kushman Blokk and the shooting.

The statements given to police by the witnesses indicated that the Kushman Blokk allegedly uses brown bandanas to signify membership, but that the individuals involved in the shooting were displaying, red, blue, *and* brown bandanas. Aside from the one individual seen with a brown bandana, the only other evidence that Kushman Blokk might be involved in the

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<sup>19</sup> See also *State v. Monschke*, 133 Wn. App. 313, 335, 135 P.3d 966 (2006)(evidence of white supremacist beliefs admissible to prove motive, premeditation, and to show the context of the crime where the State's theory was that defendant killed victim out of hatred for anyone deemed inferior and to enhance his status among white supremacists); *State v. Boot*, 89 Wn.App. 780, 950 P.2d 964 (1998) (gang affiliation evidence admissible to prove motive for murder where evidence established that killing someone heightened a gang member's status).

shooting was Tiare's statement that someone yelled "K" and that "K" stood for Kushman Blokk.

The State presented insufficient evidence to establish a nexus between Mr. Williams' membership in the alleged Kushman Blokk street gang and the shooting of Blacc. Even assuming for the sake of argument that there was a gang identified as Kushman Blokk and that Mr. Williams was a member, evidence of Mr. Williams' membership in such a gang was only marginally probative of any issue before the jury.

In its Memorandum in Response to Motions to Suppress Gang Evidence, the State argued that the evidence of gang affiliation was probative of the motive behind the shooting and, citing *State v. Boot*, 89 Wn.App. 780, 790, 950 P.2d 964 (1998), that the evidence was necessary "to permit the jury to get the whole picture and try to make some sense out of a senseless crime." CP 240-251.

Here, Mr. Asaeli had already confessed to the shooting and told the police that it was a matter of self defense. Further, eye witnesses had identified Mr. Williams as having been with the group of men at the shooting. Even if Mr. Asaeli had not told the police why he shot Blacc, the State did not need to prove motive to convict any of the defendants of murder. *See*

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RCW 9A.32.030, RCW 9A.32.050. “Although motive is not an element of murder, it is often necessary when only circumstantial evidence is available.” *State v. Athan*, \_\_\_ Wn.2d. \_\_\_, 158 P.3d 27, 41 (2007). *See also State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995) (“A number of cases dealing with the admissibility of evidence of prior assaults and quarrels have found that evidence of previous quarrels and ill-feeling is admissible to show motive. Evidence of prior threats is also admissible to show motive or malice. *However, such evidence must also be of consequence to the action to justify its admission.*”) (emphasis added) (internal citations omitted). In this case motive was not an issue and the State had far more than simply circumstantial evidence.

Given that motive was not an element the State had to prove, and given that gang evidence is highly prejudicial, any probative value associated with the evidence regarding Kushman Blok was far outweighed by the prejudice caused to Mr. Williams and the other defendants by the introduction of such evidence. The State failed to present sufficient evidence of a nexus between the gang affiliation of any defendant and the shooting of Blacc to overcome ER 404(b)’s prohibition of such evidence.

**5. The trial court abused its discretion in allowing Detective Ringer to testify as an expert where the State failed to**

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**establish that Detective Ringer had any knowledge about the Kushman Blokk or Samoan gangs in general.**

The State was allowed to present Detective Ringer's expert testimony on the history and general characteristics of gangs and how gangs operate in the Tacoma area. RP 655-672, 7-18-06. Detective Ringer's testimony about gangs violated Mr. Williams' right to a fair trial.

The court held an evidentiary hearing prior to Detective Ringer's testimony. At the hearing, Detective Ringer said that with any gang the culture of its members had to be considered when determining its structure, rules and activities. RP 517-518, 7-17-06. He then admitted he knew very little about Samoan culture and has never testified as an expert on Samoan gangs. RP 516, 7-17-06. During his testimony Detective Ringer admitted he had never heard of the group Kushman Blokk until he was asked to review this case. RP 698-699, 7-18-06. He also admitted he spoke with his informants who are gang members and none of them had ever heard of the Kushman Blokk. RP 704, 7-18-06.

In general, ER 702 and 703 govern the admissibility of an expert witness' testimony. Under these rules, (1) the witness must be qualified as an expert, and (2) the expert's testimony must be helpful to the trier of fact. *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). Expert

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opinion is helpful to the trier of fact when it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. *Farr-Lenzini*, 93 Wn. App. at 461. Under certain circumstances, expert testimony about gangs is admissible for limited purposes. *See Campbell*, 78 Wn. App. at 823 (upholding the admission of expert testimony on the meaning of gang symbols). The trial court's admission of evidence under ER 702 is reviewed under the abuse of discretion standard. *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999).

Expert opinion is inadmissible over objection "unless the witness has first been qualified by a showing that he has sufficient expertise to state a helpful and meaningful opinion." 5A K. Tegland, *Wash Prac., Evidence* 289, at 381 (3d ed. 1989). To qualify as an expert, a witness must have sufficient specialized knowledge to assist the jurors in the case. *State v. Maule*, 35 Wn. App. 287, 294, 667 P.2d 96 (1983).

Although Detective Ringer may be an expert on gangs like the Crips or the Bloods, by his own admission he knows nothing about Samoan gangs and knew nothing about a group called Kushman Blokk. On this basis alone Detective Ringer's expert opinion testimony should not have been admitted under ER 702 because he had no expertise on the subject of the Kushman

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Blokk or whether it was even a gang.

Even if Detective Ringer was qualified to testify, his testimony did not help the jury reach the ultimate decision of whether Mr. Williams was an accomplice to a murder or an assault. Detective Ringer's testimony described the history of the modern urban gangs the Crips and Bloods and the general characteristics common to those gangs in Tacoma, such as turf, signs and symbols and their general purpose to control criminal activity in a particular neighborhood. RP 661-674, 7-18-06. There was no evidence, however, that Mr. Williams or any of the co-defendants were members of the Crips or Blood gangs. Additionally, there was no substantive evidence that the motive for the shooting was in anyway related to gang activity.

Detective Ringer's testimony was simply irrelevant and not helpful. The evidence was not probative to the central issue of whether Mr. Williams was an accomplice to a murder or an accomplice to an assault. The affect of Detective Ringer's gang testimony was to plant in the minds of the jurors a visceral prejudice against Mr. Williams, stimulate the jurors' biases against gangs and gang members and instill the fear that the Tacoma area is a hotbed of violent gang activity and the defendants, including Mr. Williams, were part of that activity. Furthermore, "testimony from a law enforcement officer may

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be especially prejudicial because the officer's testimony often carries a special aura of reliability." *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001). Detective Ringer's testimony evidence carried a high potential for prejudice because he was presented to the jury as an expert and his testimony allowed the jury to impermissibly infer Mr. Williams' guilt by his alleged association with individuals who may have belonged to the Kushman Blokk or other gangs.

Because Detective Ringer lacked sufficient knowledge about Samoan gangs or Kushman Blokk to render his testimony relevant, the trial court lacked tenable grounds to admit Detective Ringer's testimony. The court erred in admitting Detective Ringer's testimony and, like the gang evidence, its admission denied Mr. Williams a fair trial. Thus, Mr. Williams' conviction should be reversed.

**6. The trial court abused its discretion in allowing the evidence of the graffiti found in Mr. Williams' cell to be admitted.**

Over objection from Mr. Williams' trial counsel, the trial court allowed photographs of alleged gang related graffiti found in Mr. Williams' jail cell to be admitted at trial and allowed witnesses to discuss what the graffiti meant. RP 471-477, 7-17-06, 682-691, 7-18-06; CP 252-266 Exhibit

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M. The introduction of this testimony was an abuse of the trial court's discretion.

The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response. *State v. Powell*, 126 Wn.2d at 264, 893 P.2d 615. Evidence that the defendant is a member of a group considered disreputable by the public has virtually no probative value and carries a high potential for prejudice because it allows the jury to infer guilt by association. *United States v. Roark*, 924 F.2d 1426 (8th Cir. 1991) (in narcotics prosecution, government attempted to tie the defendant's guilt to his membership in Hells Angels motorcycle club; reversed); *People v. Perez*, 114 Cal.App.3d 470, 477, 170 C.R. 619 (Cal. App. 1987) ("We agree with this basic proposition and state at the outset that evidence of gang membership is not per se inadmissible. In order to be admissible it must meet the test of relevancy."); see *State v. Stone*, 802 P.2d 668 (Ore. 1990) (error to allow evidence of likely gang affiliation for unlawful use of a car, where it was not relevant to the issue of knowledge that the car was stolen).

At trial, no evidence was introduced regarding who made the graffiti or even when it was made. The trial court even acknowledged nobody knew who made graffiti in the cell. RP 641, 7-18-06. Given that Mr. Williams was

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housed in a jail cell through which countless other individuals had passed, the existence of any allegedly gang related graffiti would only be probative if the State had evidence that it was Mr. Williams who had created the graffiti. Without such evidence indicating who made the graffiti, evidence of the existence of the graffiti was not probative of any issue before the trial court and the introduction of such evidence would be extremely prejudicial to Mr. Williams in that the jury would draw the inference that Mr. Williams was in a gang and had decorated his cell with gang graffiti.

The State failed to establish who made the graffiti in Mr. Williams' cell or even when the graffiti was made. Without a factual foundation linking the creation of the graffiti to Mr. Williams, the evidence of the graffiti was irrelevant yet highly prejudicial. This prejudice was compounded by the trial court allowing Detective Ringer to interpret the graffiti and explain the gang connotations of the graffiti to the jury. RP 682-691, 7-18-06.

**7. The trial court abused its discretion in allowing evidence of graffiti on a fence to be admitted.**

Over objection from Mr. Williams' trial counsel (RP 630-631, 7-18-06), the trial court allowed Detective Ringer to testify regarding pictures of alleged Kushman Blokk gang graffiti on a fence. RP 691-694, 7-18-06. Similar to the testimony regarding the graffiti in Mr. Williams' cell, the State

failed to introduce any evidence regarding when this graffiti was made or who made it. Without such a factual foundation the graffiti was irrelevant and highly prejudicial.

**8. The Prosecutor's PowerPoint Slides were improper, prejudicial, and denied Mr. Williams his right to a fair trial.**

The right to a fair and impartial trial is guaranteed to a criminal defendant by Washington Cons. Art. 1 § 22 and the Sixth and Fourteenth Amendments to the United States Constitution. *State v. Finch*, 137 Wn.2d 792,843,975 P.2d 967, *cert. denied* 528 U.S. 922 (1992). Prejudicial prosecutorial misconduct denies a defendant his or her right to a fair trial. *State v. Davenport*, 100 Wn.2d 757,675 P.2d 1213 (1984). Where there is a substantial likelihood that a prosecutor's improper comments affected the verdict reversal is required. *State v. Brown*, 132 Wn.2d 529,940 P.2d 546 (1987).

In closing argument a prosecutor is permitted to draw and express reasonable inferences from the evidence presented at trial, but is prohibited from expressing personal opinions or inflammatory characterizations. *State v. Montgomery*, 95 Wn.App.192,974 P.2d 904, *review denied*, 139 Wn.2d 1006 (1999). *State v. Claflin*, 38 Wn.App. 847,690 P. 2d 1186 (1984), *review denied*, 103 Wash.2d 1014 (1985).

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Furthermore, a prosecutor is forbidden from supplementing or misstating the law that has been provided by the court in the jury instructions. *State v. Davenport, Supra; State v. Estill*, 80 Wn.2d 196,492 P.2d 1037 (1972).

- a. *The prosecutor improperly misstated and supplemented the court's self-defense instructions which prejudiced Mr. Williams.*

In Mr. Williams' case the prosecutor began and concluded his PowerPoint presentation with the following comment which was written in bold:

**“When a challenge to a fight is used as an excuse to kill, it's murder!”**

CP 638-644: (A copy of the State's PowerPoint slides is attached as Appendix and incorporated by reference herein.)

The prosecutor proceeded to show the jury a slide that read:

**“Self defense: Killing after a challenge to a fight is not lawful defense, it's murder.”**

Additional PowerPoint slides pertaining to the law on self-defense presented by the prosecutor included the following language:

**“Self Defense Is”**

**“A near death experience. *Unforgettable*. A him or me decision,**

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**Apparent to those around. Something that affects what happens afterward. In short true self defense is known to the “slayer” and to those who saw what the “slayer” did!”**

**“Killing Is Not Lawful When....”**

**“No provocative behavior by the victim. No verbal warning “Stop or I’ll shoot!” No warning shot. No attempt to hold at gunpoint. No taking Cover. Victim is shot seven times and had no means to shoot back. Putting other people at risk. Killing is now lawful as the first, last and only action taken against a person sitting in his own car minding his own business!”**

The prosecutor then look the liberty of supplementing the law on self defense by advising the jury of what some selected terminology in the court’s instructions actually “means.” The following slides illustrate:

#### ***Lawful Defense***

“...lawful defense of the slayer or any person in the slayers presence...”  
**MEANS** One can’t plan or threaten to do harm to a person then shoot him, that’s not “lawful defense.”

#### ***From An Attack***

“...reasonably believes that the person slain intended to inflict death or great personal injury...”  
**MEANS** An actual belief (not one made up for trial) that he WILL be (not just a possibility) killed or mortally wounded.

#### ***Imminent Danger***

“...that there was an imminent danger of [death or great personal injury] being accomplished...”  
**MEANS** If a killing, it was the slayers life or the victims.

#### ***Reasonable Amount of Force***

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“...such force and means as a reasonably prudent person would use...”  
**MEANS** Overreaction is not permitted. If there was a non-lethal alternative it *must* be used if reasonable.

Rephrasing the court’s instructions to the jury, by telling (and showing) the jurors what the instructions actually meant was nothing short of improperly supplementing the instructions to the jury without the court’s permission. The prosecutor’s slides constituted the equivalent of the first aggressor instruction which the court had already correctly rejected based on the evidence and the applicable law. Additionally, the prosecutor wrongly sought to convince the jurors to apply an objective standard of reasonableness in evaluating self-defense. Furthermore, the slides misstated the law on self-defense.

In fact, the aggressor instruction applies only when the defendant creates the need to act in self-defense by an intentional act that reasonably provokes a belligerent response from the victim. *State v. Birnel*, 89 Wn.App. 459,473,949 P.2d 433 (1998).

Moreover, it has long been the law in Washington that a jury may find self-defense on the basis of the defendant’s subjective, reasonable belief of imminent harm; a finding of actual imminent harm is not required. *State v. LeFaber*, 128 Wn.2d 896,899,913 P.2d 369 (1996). The subjective standard

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must be “manifestly apparent to the average juror.” *Id.* at 900.

The trial court’s instructions properly instructed Mr. Williams’ jury that a person who reasonably believes he is defending himself or another is justified in using reasonable force even where the defended person is the aggressor. CP 555-615 Moreover, the jurors were instructed that self-defense or the defense of another is justified if done in good faith even where the defender was mistaken as to the actual extent of the danger. Mr. Williams’ jury was further instructed that the law in Washington imposes no duty to retreat. CP 555-613.

Here, the self-defense/defense of another theory was critical to each of the jointly tried defendants. The prosecutor was acutely aware of the impact of Mr. Asaeli’s self-defense/defense of another theory upon Mr. Williams’ ultimate verdict, as evidenced by his remark during rebuttal closing, that if the jury believed Mr. Asaeli’s defense claim it would also be required to acquit Mr. Williams. RP 2187, 8-3-06.

*b. The prosecutor improperly misstated and supplemented the court’s accomplice liability instructions which prejudiced Mr. Williams.*

Mr. Williams’ jury was correctly instructed by the court as follows concerning accomplice liability:

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## INSTRUCTION NO. 6

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or request another person ato commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, or acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aid in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty

of that crime whether present at the scene or not. CP 555-615.

\*\*\*\*\*

At no point did the court instruct Mr. Williams' jury that ***“accomplices are there to help if needed”*** or that ***“Under the law an accomplice is just as guilty as the one who pulled the trigger!”*** Yet the prosecutor's PowerPoint slides and argument did just that. CP 638-644.

In Mr. Williams' case, the prosecutor's supplemental legal phrasing was misleading, confusing, and misstated the law provided by the court.

Under Washington law an accomplice is someone who, “[w]ith knowledge that it will promote or facilitate the commission of the crime...aids or agrees to aid such person in planning or committing it.” RCW 9A.08.020(3). Presence and knowledge are not enough; the accomplice must associate himself with the crime charged, participate in it, and seek to make it succeed. *State v. Amezola*, 49 Wn.App.78,89,741 P.2d 1024 (1987).

A person who is an accomplice to the underlying felony may be liable for a murder committed in connection with the underlying felony. *State v. Davis*, 101 Wn.2d 654,658-59,682 P.2d 883 (1984). However, an accomplice is not strictly liable for all acts arising from the initial crime in which he participated unless he associates himself with those acts. *State v.*

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*Roberts*, 142 Wn.2d 471,512,14 P.3d 713 (2000).

[A]n accomplice need not have knowledge of each element of the principal's crime in order to be convicted under RCW 9A.08.020. General knowledge of "the crime" is sufficient. Nevertheless, knowledge by the accomplice that the principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow.

The supplemental language that reads: "***Under the law an accomplice is just as guilty as the one who pulled the trigger!***" imposes strict liability upon an accomplice contrary to the law. Viewed another way, the trial court would never have given such an instruction, nor would the trial court have accepted a proposed instruction that so grossly over-simplified the description of accomplices as people who "***are there to help if needed.***" The prosecutor circumvented the court's instructions by writing his own to present to the jury. His actions constituted misconduct.

The prosecutor's misconduct was unequivocally prejudicial to Mr. Williams who was tried under an accomplice liability theory. Mr. Williams' jury's correct understanding of the law of accomplice liability was critical to his defense. Had the jury been instructed by the court alone it would not have been misled into believing that accomplice liability imposed strict

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liability for the crime of murder, and there is a substantial likelihood the jury would not have convicted Mr. Williams.

- c. *The cumulative effect of the multitudinous improper PowerPoint slides, viewed in the context of the entire record, prejudiced Mr. Williams.*

Improper prosecutorial comments are reviewed in the context of the total argument, the issues presented in the case, the evidence, and the jury instructions. *State v. Graham*, 59 Wn.App. 418,428,798 P.2d 314 (1990). Reversal is required where the improper remarks are not a pertinent reply to a defense argument and where the improper comments are prejudicial to the defendant. *State v. Dennison*, 72 Wn.2d 842,849,435 P.2d 526 (1967).

In the case at bar, a total of thirty-six (36) PowerPoint slides were presented and argued by the prosecutor. Of the thirty-six slides at least eleven (11) constituted misstatements of and improper supplements to the instructions provided by the court. Viewed in the context of the complete case the slides were improper and prejudicial. The slides focused on the most crucial components of the defense theories: self-defense/defense of another and accomplice liability. That the prosecutor's improper words were not only spoken but also written and shown to the jury as impressive images only exacerbated the prejudicial effect to Mr. Williams.

The prosecutor here should have known better. A prosecutor is a quasi-judicial officer who must ensure that a defendant receives fair trial.

*State v. Charlton*, 90 Wn.2d 657,664,585 P.2d 142 (1978)

A prosecutor must always remember that he or she does not conduct a vendetta when trying any case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided . . . if prosecutors are permitted to convict guilty defendant by improper, unfair means then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means.

*State v. Torres*, 16 Wn.App. 254,263,554 P.2d 1069 (1976).

Featuring the improper language that supplemented and misstated the court's instructions as a demonstrative exhibit created a tremendous risk of prejudice. That the improper words reached to the heart of the defense case ensured the likelihood that prejudice would result.

*d. Trial counsel objected to the prosecutor's PowerPoint slide presentation.*

Trial counsel repeatedly objected to the prosecutor's misstatements of law, misuse of PowerPoint slides, and argument pertaining to the slides, both during the State's closing and rebuttal closing. RP 1944, 1969, 1976, 1997: 8-1-06; RP 2216, 6-3-06. Each objection was overruled.

Federal authority suggests prejudice may be enhanced by an erroneous

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ruling on prosecutorial misconduct in closing argument. *Mahorney v. Wallman*, 917 F.2d 469,473 (10<sup>th</sup> Cir. 1990). In *Mahorney*, defense counsel “vigorously objected” to the prosecutor’s misconduct and was “immediately and categorically overruled in the presence of the jury.” 917 F.2d at 473. Reversing the defendant’s conviction, the Court observed. “[t]he official imprimatur . . . placed upon the prosecution’s misstatements of law obviously amplified their potential prejudicial effect on the jury.” *Id.*

Even where trial counsel fails to object reversal is, nonetheless, appropriate where the misconduct is flagrant and ill-intentioned so that no curative instructions could have alleviated the prejudice. *State v. Belgarde*, 110 Wn.2d at 507; *State v. Rivers*, 96 Wn.App. 672,675 n.6, 981 P.2d 16 (1999). Remarks that strike at the very heart of the right to a fair trial, or are made at the close of the final jury summation, are often so prejudicial that no object or instructions could have cured the harm. *State v. Stith*, 71 Wn.App. 14,23,856 P.2d 415 (1993); *State v. Powell*, 62 Wn.App. 914,919,816 P.2d 86 (1991), rev. denied. 118 Wn.2d 1013 (1992).

Generally, an accused alleging prosecutorial misconduct has the burden of showing both improper conduct and prejudicial affect. *State v. Brown, Supra.* at 561. Misconduct, however, that constitutes manifest error

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that affects a constitution right is subject to the constitutional harmless error standard. *State v. Heller*, 58 Wn.App 414,793 P.2d 461 (1990); *State v. Keene*, 86 Wn.App.589,938 P.2d 839 (1997). Errors affecting a defendant's self-defense claim are constitutional in nature. *State v. Birnel*, 89 Wn.App. 459,949 P.2d 433 (1998 ).

In Mr. Williams' case, therefore, the improper PowerPoint slides and supporting argument pertaining to self-defense/defense of another are properly reviewed under a harmless error standard, although prejudice can and has been established.

**9. Cumulative error denied Mr. Williams his right to a fair trial.**

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. *State v. Hodges*, 118 Wn.App. 668, 673, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004). Rather, the combined errors effectively denied the defendant a fair trial. *Hodges*, 118

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Wn.App. at 673-674, 77 P.3d 375.

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

In addition to the errors listed above, numerous other errors occurred at trial which combine to deprive Mr. Williams of his right to a fair trial.

- a. *The trial court erred in denying Mr. Williams' motions to sever his trial from the codefendants.*

At several times during the trial, counsel for Mr. Williams moved to sever Mr. Williams' trial from that of the codefendants on grounds that evidence introduced against one of the other defendants would prejudice the jury against Mr. Williams. RP 175, 6-5-06, (evidence that gun used to shoot Blac and found in Mr. Asaeli's possession was stolen) 565-569, 6-15-06, (evidence of Mr. Asaeli's statements to Ms. Devault based on an inability to confront Mr. Asaeli about statements he made to Ms. Devault because Mr. Asaeli denied making them) 1407-1413, 7-25-06, (evidence of tape recorded statement of Ms. Devault used to rebut credibility of Mr. Asaeli) 1522-1523, 7-26-06. The trial court denied each of these motions to sever, ruling that instructions to the jury that the evidence was to be considered solely against

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only one of the defendants were sufficient to avoid undue prejudice to the other defendants. RP 175, 6-5-06, 567, 6-15-06, 1413, 7-25-06, 1523, 7-26-06.

It is presumed that juries follow the instructions of the court. However, where evidence is admitted which is inherently prejudicial and of such a nature as to be most likely to impress itself upon the minds of the jurors, a subsequent withdrawal of that evidence, even when accompanied by an instruction to disregard, cannot logically be said to remove the prejudicial impression created. As was aptly observed in *State v. Meader*, 54 Vt. 126, 132 (1881):

(T)he school boy uses his sponge to rub out the pencil marks on his slate. He eventually discovers that at some time-he never can tell when-his pencil has Scratched, and learns to his sorrow, that the ugly evidence of the fact, however vigorously he may apply his sponge, cannot be removed. The question in all cases, is not whether the court, if trying the case, would disregard the obnoxious evidence, but whether the court is assured that the jury has done so.

We are not assured that the evidentiary harpoon here inserted could effectively be withdrawn. It was equipped with too many barbs.

*State v. Suleski*, 67 Wn.2d 45, 51, 406 P.2d 613 (1965) (internal citations omitted).

Here, the “evidentiary harpoon” used against Mr. Williams was the evidence introduced at trial and which the jury was instructed was admissible

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either solely against one of the other defendants or was admissible only for purposes of determining the credibility of one of the other defendants. Here, the jury was not asked to “withdraw” the “harpoon”; rather, the jury was instructed to ignore the harpoon. Similar to the evidence the jury was asked to disregard in *Suleski*, the evidence in this case “scratched” into the “slate” of the jurors’ understanding of the evidence in this case and prejudiced Mr. Williams. This evidence included the alleged gang evidence, evidence that Mr. Asaeli possessed a stolen firearm and used it to shoot Blaac, and evidence that Mr. Asaeli had potentially discussed the case with Ms. Devault.

*b. The trial court erred in overruling objections of Mr. Williams’ trial counsel regarding testimony of James Fola concerning Mr. Williams’ membership in any organization.*

At trial, following testimony from James Fola that he had only met Mr. Williams a “couple times” and that he was not friends with Mr. Williams and only knew him from the streets, counsel for Mr. Williams objected to testimony from James Fola that Mr. Williams was a member of an organization known as “K-Blok” or “Kushman Blok” on grounds that Mr. Fola lacked factual knowledge to offer such testimony. RP 270-272, 6-5-06. The trial court overruled the objections. RP 270-271, 6-5-06.

Trial counsel was correct. ER 602 mandates that “[a] witness may not

testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Mr. Fola’s limited and casual relationship certainly did not qualify him to testify as to what organizations Mr. Williams was a member of, and, as trial counsel objected, any such testimony would be hearsay. RP 270, 6-5-06.

The trial court erred in overruling the objections to this evidence and allowed highly prejudicial evidence that Mr. Williams was a member of a gang to be introduced.

*c. The trial court erred in denying motion to strike testimony of James Fola regarding Kushman Blok where James Fola’s testimony was based on hearsay and James Fola had no direct knowledge of Kushman Blok*

During cross-examination of Mr. Fola by counsel for Mr. Vaielua, counsel for Mr. Williams joined in a motion to strike Mr. Fola’s testimony regarding Kushman Blok on grounds that he lacked sufficient personal knowledge to offer such testimony. RP 391-394, 6-14-06. On cross-examination, Mr. Fola revealed that he had no first-hand knowledge of Kushman Blok and that all he knew about Kushman Blok was what he had heard from other people. RP 391, 6-14-06.

Again, under ER 602, Mr. Fola lacked sufficient personal knowledge

to offer testimony regarding Kushman Blokk. It was error for the trial court to deny the motion to strike Mr. Fola's testimony regarding Kushman Blokk. The introduction of this evidence and the trial court's denial of the motion to strike it prejudiced Mr. Williams in that the jury heard evidence that Mr. Williams was a member of an alleged street gang.

These errors, standing alone, most likely would not warrant a reversal of Mr. Williams convictions. However, taking the errors in conjunction with the errors discussed in previous sections of this brief reveals that the cumulative effect of these errors was to deny Mr. Williams a fair trial.

*d. The introduction of irrelevant and highly prejudicial evidence regarding the threatening phone calls to Blacc's house deprived Mr. Williams of a fair trial.*

All relevant evidence is admissible, except as limited by constitutional requirements, statute, the evidentiary rules, or other rules applicable in Washington courts. ER 402. To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, the likelihood that introduction of the evidence would confuse the

issues or mislead the jury, or if introduction of the evidence would be a waste of time, cause an undue delay, or be needlessly cumulative. ER 403.

An evidentiary error requires reversal if, within reasonable probability, the error materially affected the verdict. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-469, 39 P.3d 294 (2002).

Mr. Williams moved to exclude the testimony from Blacc's sister, Roseann Fola, that two weeks before the shooting a man called the Fola house and told her Blacc was "marked" and that a week before the shooting another man called and said he was going to "drop" Blacc. RP 1125, 6-22-06; RP 1126-1127, 6-22-06. Mr. Williams argued that because there was no evidence that Mr. Williams or anyone connected with Mr. Williams made the telephone calls, the evidence was irrelevant and unfairly prejudicial. *Id.* The court denied the motion.

As stated above, a trial court's ruling as to the relevance of evidence is reviewed for an abuse of discretion. *State v. Hutchins*, 73 Wn. App. 211, 214, 868 P.2d 196 (1994).

At trial, the State introduced no evidence as to who made the threatening telephone calls. The State argued the calls were relevant because they showed Blacc was not shot in self-defense, but that the shooting was

pre-planned. However, similar to the alleged gang-related graffiti found in Mr. Williams' jail cell, without evidence of who made the threatening phone calls, evidence that the calls were made was not probative of any issue before the jury but was highly prejudicial. The jury would likely make the inference the State was arguing for and assume that the phone calls were made by the defendants and were evidence of premeditation and planning to assault or shoot Blacc. Any inference by the jury that the defendants made the phone calls would not be supported by any facts in the record and would therefore be improper. Thus, Mr. Williams' conviction should be reversed.

**10. Mr. Williams' Federal Constitutional Rights to a jury trial and proof beyond a reasonable doubt were violated when the court imposed a sentence over the maximum term based upon prior convictions that were not found by a jury beyond a reasonable doubt.**

The sentencing court determined by a preponderance of the evidence that Mr. Williams had two prior convictions for "most serious offences," and sentenced Mr. Williams to life without the possibility of parole under the Persistent Offender Accountability Act. CP 414-423. Had Mr. Williams not been a persistent offender, his offender score would have been six (6), and his standard range would have been one hundred ninety-five to two hundred ninety-five (195-295) months in the Department of Corrections. CP 414-423.

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Mr. Williams sentence of life without the possibility of parole exceeded the maximum term permitted by Mr. Williams' jury verdict and violates federal constitutional right to due process and to a jury trial.

- a. *The constitutional rights to due process and a jury trial require that any fact that increases a defendant's maximum sentence must be found by a jury beyond a reasonable doubt.*

The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. 14. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. 6,14. Thus it is axiomatic that a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296,124 S.Ct. 2531,2536-37,159 L.Ed.,2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466,476077,120 S.Ct.2348,147 L.Ed..2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506,510,115 S.Ct. 2310, 32 L.Ed.2d 444(1995); *In re Winship*, 397 U.S. 358,364,90 S.Ct. 1068,25 L.Ed.2d 368 (1970). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to a jury determination that [he] is guilty of very element of the crime beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476-77 (quoting *Gaudin*, 515 U.S.

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at 510).

The United States Supreme Court applied this principle to facts the Legislature had labeled “sentencing factors” but that nonetheless increased the maximum penalty faced by the defendant. In *Blakely*, the Court found that an exceptional sentence imposed under Washington’s Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. *Blakely*, 124 S.Ct. at 2537. Likewise, the Court held Arizona’s death penalty scheme was unconstitutional where a defendant received the death penalty based upon aggravating factors found by a judge by a preponderance of the evidence. *Ring v. Arizona*, 536 U.S. 584,609,122 S.Ct. 2428,153 Ed.2d 556 (2002). In *Apprendi*, the Court found New Jersey’s “hate crime” legislation unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. *Apprendi*. 530 U.S. at 491-492,497.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime. The *Ring* Court pointed out the dispositive question is one of substance, not form. “If a State makes an

increase in the defendant's authorized punishment contingent on the finding of a fact, that fact - - no matter how the State labels it - - must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482-83). Thus, a judge may only impose punishment within the maximum term justified by the jury verdict or guilty plea. *Blakely*, 124 S.Ct. at 2537.

*b. No controlling United States Supreme Court precedent mandates a determination that the POAA is constitutional.*

The Washington Supreme Court has previously held that the POAA does not violate an offender's federal constitutional right to due process even though it increase the mandatory sentence based upon the court's determination of prior convictions by only a preponderance of the evidence. *State v. Smith*, 150 Wn.2d 135,143,75 P.3d 934 (2003); *State v. Wheeler*, 145 Wn.2d 116,123-24,34 P.3d 799 (2001); *State v. Thorne*, 129 Wn.2d 736,783,921 P.2d 473 (1996); *State v. Mamusssier*, 129 Wn.2d 652,682,921 P.2d 473 (1996). In each of these cases, the court believed it was following federal precedent. Yet, as will be shown blow, that precedent is either no longer viable or it never supported the Washington court's conclusion.

*i. Almendarez-Torres does not control this issue.*

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Both *Smith* and *Wheeler* rely upon the United States Supreme Court opinion in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1996). The *Wheeler* Court recognized that the continuing validity of *Almendarez-Torres* is questionable in light of *Apprendi*, but refused to reconsider the issue unless *Almendarez-Torres* was overruled. *Wheeler*, 145 Wn.2d at 123-24. In *Smith*, the court stated it was obligated to “follow” *Almendarez-Torres*. *Smith*, 150 Wn.2d at 143.

But the Washington court misread the *Almendarez-Torres* ruling. *Almendarez-Torres* did not address whether prior convictions must be proved to a jury beyond a reasonable doubt. Instead, the Court ruled only that recidivism was not an element of the substantive crime that needed to be pled in the information. 523 U.S. at 246. See *Apprendi*, 530 U.S. at 488; *Jones*, 526 U.S. at 248.

*Almendarez-Torres* was charged with being found in the United States after being deported, and his maximum term was twenty (20) years because he had been deported for an aggravated felony. *Almendarez-Torres* pled guilty and admitted three prior aggravated felony convictions, but argued he faced only a two-year maximum because the aggravated felonies were not included in his indictment. 523 U.S. at 227. The Court determined that

Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. *Id.* at 235. The Court reasoned that creating a separate crime with the prior conviction as an element could be unfair to defendants because juries would learn of their prior convictions. *Id.* at 234-35.

The Court had previously held that Pennsylvania's Mandatory Minimum Sentencing Act did not violate due process in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). *Almendarez-Torres* attempted to distinguish *McMillan* because in that case visible possession of a firearm triggered a mandatory minimum term, whereas *Almendarez-Torres* received a higher maximum term. The Court found *McMillan* nonetheless controlled because (1) recidivism is a traditional basis for increasing an offender's sentence, (2) the increased statutory maximum was not binding upon the sentencing judge, (3) the procedure was not unfair because it created a broad permissive sentencing range and judges have typically exercised their discretion within a permissive range, and (4) the statute did not change a pre-existing definition of the crime; Congress did not try to "evade" the Constitution. *Id.* at 1231-32. The *Almendarez-Torres* Court, however, expressed no opinion as to the constitutionally-required

burden of proof of sentencing factors that increase the severity of the sentence or whether a defendant has a right to a jury determination of such facts. *Id.* at 1233.

ii. *The reasoning of Almendarez-Torres is not persuasive.*

As mentioned above, *Almendarez-Torres* holds only that due process does not require notice in the indictment of prior convictions used to enhance a sentence; it does not address the burden of proof required by due process or the right to a jury trial. Moreover, the Court's reasoning does not support the conclusion the POAA does not violate due process by failing to provide a jury trial or proof beyond a reasonable doubt.

First, the *Almendarez-Torres* Court looked to legislative intent and found that Congress did not intend to define a separate crime. But later Supreme Court cases make clear that legislative intent does not establish the parameters of due process. *Blakely*, 124 S.Ct. at 2539; *Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 476. See *State v. Sawatzky*, 196 Or.App. 159, 96 P.3d 1288, 2004 WL 1987638 at 7 (2004) (*Blakely* makes clear that Sixth Amendment analysis not dependent on legislative intent). Nor does the placement of an enhancement in the sentencing provisions of the criminal code mean that the enhancement is not really an element of a higher offense.

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*Ring*, 536 U.S. at 605; *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). The Supreme Court has recently and unambiguously reaffirmed that facts increasing the penalty beyond the statutory maximum are essential elements of a criminal offense, even if such facts have traditionally been labeled sentencing factors. *Washington v. Recuenco*, \_\_\_\_\_ U.S. \_\_\_\_\_, 126 S.Ct. 2546, 2552, 165 L.Ed.2d 466 (2006) (citing *Apprendi*, 530 U.S. at 478). The right to have a jury determine such facts beyond a reasonable doubt derives from their characterization as elements of an offense. *Recuenco*, 126 S.Ct. at 2552 (citing *Apprendi*, 530 U.S. at 483-84). Thus, the fact the voters intended the POAA as a sentencing provision is not determinative of whether the act violates due process.

The *Almendarez-Torres* Court noted that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant's sentence. 118 S.Ct. at 1230. Both the *Almendarez-Torres* dissent and Justice Thomas' concurring opinion in *Apprendi*, however, cast doubt on the Court's assumption that recidivism has historically been treated differently from other elements of a crime. *Apprendi*, 530 U.S. at 506-19 (Thomas, J., concurring); *Almendarez-Torres*, 523 U.S. at 259-260 (Scalia, J., dissenting). Two of the cases relied upon in *Almendarez-Torres* to support the proposition that the

prior conviction need not be pled in the indictment involve the West Virginia recidivist statute, where the prior conviction must be found by the jury. *Oyler v. Boles*, 368 U.S. 448,449-51,82 S.Ct. 501, 7 L.Ed.2d 446 (1962) (prosecutor filed separate information charging defendant as recidivist after conviction for crimes; defendant admitted prior convictions); *Graham v. West Virginia*, 224 U.S. 616,624,32 S.Ct. 583,56 L.Ed. 917 (1912) (jury found identity in separate proceeding after separate information). Although not mentioned in those cases, West Virginia also requires prior convictions be proven beyond a reasonable doubt. W.Va. Code § 61-11-19; *Wanstreet v. Bordenkircher*, 166 W.Va. 523,276, S.E. 2d 205,208 (1981).

The fact that recidivism is a “traditional” sentencing factor does not mean it need not be proven beyond a reasonable doubt or found by a jury. The *Apprendi* Court rejected the government’s argument that motive need not be found by a jury beyond a reasonable doubt because it was a traditional sentencing factor. *Apprendi*, 530 U.S. at 492-95. Many states’ recidivist statutes provide for proof beyond a reasonable doubt of prior convictions. Ind. Code Ann. § 35-50-2-8; Mass. Gen.Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code Ann. § 61-11-19. This was historically true in Washington. *Manussier*, 129 Wn.2d at 690-91.

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The *Almendarez-Torres* Court also noted the fact of prior convictions in that case only triggered an increase in the maximum permissive sentence. “[T]he statute’s broad permissive sentencing range does not itself create significantly greater unfairness” because judges traditionally exercise discretion within broad statutory ranges. 118 S.Ct. at 1231-32. Here, in contrast, Williams’ prior convictions led to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. Williams’ sentence - - life without the possibility of parole - - is much higher than the statutory standard sentence range and is even higher than the maximum term found at RCW 9A.20.021(1) <sup>20</sup>

The *Almendarez-Torres* Court also held the federal statute did not “create significantly greater unfairness” because judges traditionally exercise discretion within broad statutory ranges. 523 U.S. at 245. The opinion then

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The Washington Supreme Court has said that life without the possibility of parole is not a higher sentence than life with the possibility of parole, but this is not a logical conclusion. *Thorne*, 129 Wn.2d at 775; *State v. Rivers*, 129 Wn.2d 697,714,921 P.2d 495 (1996) (both citing *In re Pers. Restraint of Grisby*, 121 Wn.2d 419,427,853 P.2d 901 (1993)). In *Grisby*, however, the court held Grisby could not show the sentence of life without the possibility of parole prejudice him because he was serving five consecutive life terms for five murders, thus making the difference between life with and without parole academic in his case. More recently, the court has noted a “significant difference” between life with and without parole in the context of capital case, *State v. Thomas*, 150 Wn.2d 821,848,83 P.3d 970(2004).

notes new sentencing guidelines channel that discretion with sentencing factors the defendant did not claim were elements of the crime. 523 U.S. at 245-46. This argument has now been completely undermined by *Blakely*, where the Court found that Washington's aggravating factors act as elements of the crime because they permit the judge to sentence the defendant over the statutory standard sentence range. *Blakely*, 124 S.Ct. at 2537-38. Here, Mr. Williams prior convictions mandate a sentence that exceeds both the SRA standard range and the statutory maximum found at RCW 9A.20.021(1).

The *Almendarez-Torres* Court further noted Congress had not changed the traditional elements of a crime and was not trying to "evade" the Constitution by treating an element as a sentencing factor. 523 U.S. at 246. Washington had a well-established crime - - being an habitual offender - - and a long history of treating persistent offender status as a separate offense. The POAA radically changed that crime by eliminating its elements and reducing them to sentencing factors. Thus, the voters may well have been attempting to avoid traditional constitutional requirements by placing the POAA within the SRA.

Finally, the Court noted there was no reason to require the government to plead any fact that increases the statutory maximum term

when the judge may determine aggravating factors warranting the death penalty. 523 U.S. at 247 (citing, inter alia. *Walton v. Arizona*, 497 U.S. 639,110 S.Ct.3047,111 L.Ed.2d.511 (1990)). This argument is no longer valid as the Court overruled *Walton* because it was “irreconcilable” with *Apprendi*, further demonstrating the weakness of the *Almendarez-Torres* reasoning. *Ring*, 536 U.S. at 588-89. There is no reason for this Court to feel “bound” by *Almendarez-Torres*.

- ii *Apprendi did not created an “exception” for prior convictions.*

Since *Almendarez-Torres*, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. *Shepard v. United States*, 544 U.S. 13,24-26, 125 S.Ct. 1254,161 L.Ed.2d 205 (2005); *Blakely*, 124 S.Ct. at 2536; *Apprendi*, 530 U.S.at 476; *Jones*, 526 U.S. at 243 n.6. The *Apprendi* Court distinguished *Almendarez-Torres* because it involved recidivism and because the defendant raised only the indictment issue. 530 U.S. at 488,495-96. The *Apprendi* Court went so far as to state “it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” 530 U.S. at 489. The Court therefore treated *Almendarez-Torres* as a “narrow exception” to the

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rule that a jury must find any fact that increases the statutory maximum sentence for a crime beyond a reasonable doubt. *Id.*

The State will no doubt rely on the oft-cited statement from *Blakely* and *Apprendi*: “Other than the fact of a prior conviction, any fact that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely*, 124 S.Ct. at 2536; *Apprendi*, 530 U.S. at 490. This statement is not a holding that prior convictions are excluded from the *Apprendi* rule. Rather, it demonstrates that the Court has not yet addressed the issue of prior convictions. Colleen P. Murphy, *The Use of Prior Convictions After Apprendi*, 37 U.C. Davis L. Rev. 973,989-90 (2004).

For example, Justice Thomas, who signed the majority opinion in *Almendarez-Torres*, wrote in a concurring opinion in *Apprendi* that both *Almendarez-Torres* and its predecessor, *McMillan*, were wrongly decided. 530 U.S. at 499. Justice Thomas reiterated this position more recently in his concurring opinion in *Shepard* where he pointed out that *Almendarez-Torres* had been eroded by the Court’s subsequent Sixth amendment jurisprudence, and that “a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.” 544 U.S. at 27. Rather than focusing on whether

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something is a sentencing factor or an element of the crime, Justice Thomas has maintained that the Court should determine if the fact, including a prior conviction, is a basis for imposing or increasing punishment. *Apprendi*, 530 U.S. at 499-519; accord *Ring v. Arizona*, 536 U.S. 610 (Scalia, J., concurring). (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth amendment is that all facts essential to imposition of the level of punishment that the defendant receives - - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt.”)

c. *Mr. Williams’ constitutional rights to a jury trial and to due process were denied.*

*Almendarez-Torres*, *Apprendi*, and *Blakely* do not answer the question here - - whether Williams was entitled to have a jury decide beyond a reasonable doubt that he had two prior conviction for most serious offenses - - before he could be sentenced as a persistent offender. The United States Supreme Court has held that a defendant has a right to notice and an opportunity to be heard on whether he has prior convictions that change his maximum possible punishment. *Oyler v. Boles*, 368 U.S. 448,452,82 S. Ct. 501,7 L.Ed 2d 446 (1962) (habitual criminal statute); *Specht v. Patterson*, 386 U.S. 605,610,87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (sex offender

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statute). More recent cases such as *Blakely*, *Ring*, and *Apprendi* make clear that facts that increase a defendant's maximum sentence are elements of a greater crime and must be found by the jury beyond a reasonable doubt. This constitutional principle logically applies to prior convictions, and this Court should hold that the Sixth Amendment requires jury finding beyond a reasonable doubt of prior convictions used to impose a sentence of life without the possibility of parole under the POAA.

**11. The state constitution bars imposing a life sentence without the possibility of parole absent a jury determination of the defendant's prior convictions beyond a reasonable doubt.**

Mr. Williams was sentenced to life without the possibility of parole without a jury determination of his prior convictions. Mr. Williams is aware that the Washington Supreme Court has held the POAA procedures do not violate the state constitution's jury trial guarantees in *State v. Smith*, 150 Wn.2d 135. The *Smith* Court's decision, however, is grounded on its assumption that prior convictions for purposes of POAA sentencing are sentencing factors and are not elements of a crime. As recent United States Supreme Court cases such as *Blakely* make clear, this analysis is flawed and must be re-examined. Moreover, the *Smith* Court ignored the recognized common law right to a jury determination of identity and the existence of

prior convictions when those convictions increase the maximum penalty.

Washington's Constitution protects a criminal defendant's right to a jury trial in two places. Article 1, section 21 provides that in criminal cases, "the right of trial by jury shall be inviolate".<sup>21</sup>

Article 1, section 22 states: "In criminal prosecutions the accused shall have the right ...to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed."<sup>22</sup>

Given the language, the right to a jury trial is paramount in this state. "For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636,656,771 P.2d 711,780 P.2d 260 (1989). Washington

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Article 1, section 21 states in full: The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

<sup>22</sup> Art. 1, section 22 states in pertinent part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases...

courts construe the scope of the right to jury trial under Article 2, section 21 in light of the common law in the Territory at the time of the sections adoption. *Id.* at 645.

Washington courts have specifically recognized and rigorously protected a criminal defendant's right to a jury determination regarding a factor which aggravates an offense and causes the defendant to be subject to greater punishment than would be otherwise imposed. *State v. Nass*, 76 Wn.2d 368,370,456 P.2d 347 (1969) (age of person in drug transaction); *State v. Harkness*, 1 Wn.2d 530,540,96 P.2d 460 (1939) (proof of identity is essential element); *State v. Dale*, 110 Wash. 181,184,188 Pac.473 (1920)(judge invaded province of jury by failing to instruct on priors); *State v. Dericho*,107 Wash. 468,470,182 Pac. 597 (1919)("a verdict finding a prior conviction is generally held essential to empower the court to impose increased punishment"). When the history and jurisprudence of Article 1, section 21 are reviewed in light of *Gunwall* factors, it is clear there is a broader right to trial by jury under the Washington Constitution than under the federal constitution and this right extends to prior convictions that increase the maximum possible punishment. *Pasco v. Mace*, 98 Wn.2d 87,653 P.2d 618 (1982) (recognizing right to jury trial in misdemeanors and

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violations of local criminal ordinances); *State v. Furth*, 5 Wn.2d 1, 104 P.2d 925 (1940) (acknowledging right to jury trial in habitual offender proceedings); *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910) (finding right to jury trial allows person to mount insanity defense).

To assist this Court in determining the scope and nature of a state constitutional provision, Mr. Williams offers an analysis of the six *Gunwall* factors as they relate to the right to a jury determination of prior convictions that raise the maximum penalty. *State v. Wheeler*, 145 Wn.2d at 124; *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

*a. The textual language of the state constitution.*

The right to a jury trial in criminal cases appear twice in the Washington constitution. Art 1 §§ 21,22. Article 1, section 22 guarantees the right to a jury trial in criminal prosecutions, and article 1, section 21 provides the right to trial by jury is “inviolable.” The word “inviolable” means the right “is deserving of the highest protection.” *Sofie v. Fibreboard Corp*, 112 Wn.2d at 656. Thus, while the Legislature may modify details of the administration of right to a jury trial, it may not affect citizens’ enjoyment of that important right. *Furth*, 5 Wn.2d at 18-19.

In *Smith*, the court agreed that the “inviolable” indicated the

constitution's strong protection of the jury trial, but the court concluded that right applied only to "offenses" and not to sentencing proceedings. *Smith*, 150 Wn.2d at 150. Factors that increase the sentence to which a defendant is exposed are not merely sentencing factors but are elements of the offense that must be found by the jury beyond a reasonable doubt. *Recuenco*, 126 S.Ct. at 2552; *Blakely*, 124 S.Ct. at 2537; *Sattazahn v. Pennsylvania*, 537 U.S. 101,111,123 S.Ct. 732, 154 L.Ed.2d 588 (2003); *Ring*, 536 U.S. at 604-05; *Apprendi*, 530 U.S. at 482-84,490,494. The *Furth* Court recognized that prior convictions were used to enhance punishment and thus must be found by the jury. *Furth*, 5 Wn.2d at 19. The *Smith* Court's conclusion that the textual language of the Washington Constitution does not support a right to a jury determination of recidivism is thus based of faulty distinction between sentencing factors and elements of the crime.

*b. Significant differences in the texts of parallel provisions of the federal and state constitutions.*

The federal constitution states, "[t]he trial of all crimes...shall be by jury." U.S. Const.Article II, § 2. Additionally, the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." While article 1, section 22 of the Washington Constitution is similar to the Sixth Amendment, article 1,

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section 21 provides the right to trial by jury “shall remain inviolate” and has no federal counterpart. *State v. Schaaf*, 109 Wn.2d 1,13-14,743 P.2d 240 (1987).

In *Smith*, the court noted that the jury trial right is mentioned twice in the Washington Constitution and only once in the federal constitution. *Smith*, 150 Wn.2d at 151. The court nonetheless concluded this fact provided no “guidance” in determining the scope of the jury trial right. In other cases, however, the Supreme Court recognized that the unique language of Article 1, § 21 results in a broader guarantee than the federal constitution affords. *Mace*, 98 Wn.2d at 99; *Strasburg*, 60 Wash. at 106. The differences are significant because the drafters of the state constitution sought to preserve the right to jury trial as it had developed during the time between the adoption of the federal constitution in 1789 and the state constitution 100 years later. *Mace*, 98 Wn.2d at 99; *Strasburg*, 60 Wash. at 118. When a criminal offense is aggravated to a mandatory life sentence based upon the existence of prior convictions, depriving the defendant of a jury trial on the existence of the prior convictions is a “substantial impairment” of the jury trial right as envisioned at the time of statehood.

*c. State constitutional and common law history.*

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The Washington Supreme Court has declared the special importance of this factor in analyzing whether the state constitution provides the right to jury trial in a given context. “In construing section 21, this court has said that it preserves the right as it existed at common law in the territory at the time of its adoption.” *Mace*, 98 Wn.2d at 96 (citations omitted). In *Smith*, the court found this was the only factor that assisted the court in determining the nature and extent of the state right a jury trial. *Smith*, 150 Wn.2d at 152-53.

The *Smith* Court held that at the time Washington became a state, juries were not involved in sentencing, citing a 1889 statute providing that the court fix the fine and punishment after a defendant is found guilty. *Smith*, 150 Wn.2d at 154 (citing Laws of 1866, § 239). The *Smith* Court noted that Washington did not have an habitual criminal statute until after statehood. *Id.* It does not logically follow from these two facts, however, that the common law at the time of statehood did not provide for jury trials of prior convictions when those convictions were the basis for a higher maximum term.

Mechanisms for imposing the sentences based upon prior criminal offenses existed at common law in both England and America. *Manussier*, 129 Wn.2d at 688 (Madsen, J., dissenting); 1 Joel Prentiss Bishop,

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*Commentaries on the Criminal Law*. § 963-64. The Washington Territorial Code of 1881 adopted English common law so far as it was consistent with federal and territorial laws and constitutional provision. Code of 1881, ch. 1, § 1; ch. LXVII § 782. The Code provided for jury trials in all criminal cases. *Id.* ch. LXVI, § § 764, 766.<sup>23</sup>

Also instructive is Justice Thomas' concurring opinion in *Apprendi*, where he explained that prior convictions were considered elements of a crime at common law that were found by a jury beyond a reasonable doubt if they were used to justify increased punishment. *Apprendi*, 530 U.S. at 500-01. Justice Thomas examined cases from the beginning of the federal government to roughly the end of the Civil War. *Id.* at 501-19. "[T]his traditional understanding - that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment - continued well into the 20<sup>th</sup> century, at least until the middle of the century." *Id.* at 518.

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<sup>23</sup>

Ch. VXVI, § 764 provided that "no person shall be held to answer in any court for an alleged crime or offense, unless upon an indictment by a grand jury, except in cases of misdemeanor before a justice of the peace, or before a court martial." Ch. VXVI § 766 stated "[o]n the trial of any indictment the party accused shall have the right to ...a speedy public trial by an impartial jury." *Id.* § 766. A separate section provided for jury trial before the justice of the peace. Ch. CXXXI, § 1890.

Many state courts have concluded their state constitutions require the full panoply of due process protections for proof of a prior conviction that increases maximum punishment. See e.g. *State v. McClay*, 146 Me. 104,108-11,78 A.2d 345 (1951); *Tuttle v. Commonwealth*, 68 Mass. 505,506 (1854); *Roberson v. State*, 362 P.2d 1115,1118-19 (Okla.Crim.App. 1961). Even more states specifically recognized the right to trial by jury on proof of prior convictions as a matter of common law. See e.g. *State v. Pennyne*, 102 Ariz. 207,208-09,427 P.2d 525,526-27 (1967); *Robbins v. State*, 219 Ark. 376,380-81, 242 S.W. 2d 640 (1951); *McWhorter v. State*, 118 Ga. 55,44 S.E. 873 (1903); *State v. ex rel Lockmiller v. Mayo*, 88 Fla. 96,102,202 So.228 (1924); *State v. Smith*, 129 Iowa 709,710-12,106 N.W. 187 (1906); *People v. McDonald*, 233 Mich. 98,102,206 N.W. 516 (1925); *State v. Finding*, 123 Minn. 413,416-17,144 N.W. 142 (1913); *People ex rel Cosgriff v. Craig*, 195 N.Y. 190,194-95,88 N.E. 38 (1909); *Osborne v. State*, 115 Neb. 65,211 N.W. 179,184 (1926); *State v. Waterhouse*, 209 Or. 424,428-33,307 P.2d 327 (1957). This was also common practice in England. *Rex v. Jones* [1834] 6 Car. & P.391,172 Eng. Rpts. 1290; *Rex v. Norman*, [1924] 2 K.B. 315, C.C.A.

California, for example, granted the right to trial by jury on prior

convictions through statute. See *People v. Calderon*, 9 Cal. 4<sup>th</sup> 69,77 N.3, 885 P.2d 83 (1994)(listing states that provide for bifurcated trials by statute). California's statute, originally enacted in 1874, provided for a jury determination of prior convictions if they were denied by the defendant, thus reflecting the almost universal view at the time that this was a jury question. *Id.* (citing Cal. Penal Code § 1025). Given that Washington's jury trial guarantee was modeled in part on the California Constitution, it is noteworthy that the California habitual criminal statute requiring a jury finding on priors predates the Washington Constitution. *Calderon*, 9 Cal. 4<sup>th</sup> at 73; Utter & Spitzer, *The Washington Constitution*, at 34.

It was, therefore, natural that the Washington Supreme Court found the Washington Constitution required the jury find prior convictions beyond a reasonable doubt when the habitual criminal statute did not expressly include this procedure. *Furth*, 5 Wm/2d at 18-19. “[C]ourts cannot trench on the province of the jury upon questions of fact ... On a charge of second or subsequent offense, the question of the prior conviction is an issue of fact to be determined by the jury.” *Id.*

The common law in the territory at the time of the adoption of the constitution provided for a jury trial in criminal cases. *Mace*, 98 Wn.2d at 96.

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The right to a jury determination of habitual criminal status was enumerated in Laws of 1903, ch. 86 (Rem. Bal. Code, § § 2177-78. Although omitted from the Laws of 1909, ch. 249 § 34 (Rem. Rev. Stat., § 2286), the Supreme Court in its seminal case on this issue held that because the right was inherently constitutionally derived, the Legislature did not have the power to take it away. *Furth*, 5 Wn.2d at 18-19. The principle of the right to jury trial for recidivists was embodied in Washington law until at least 1980. *State v. Barton*, 93 Wn.2d 301,306,609 P.2d 1353 (1980).

The *Smith* Court found that Washington abolished the jury's role in sentencing by statute before the constitution was adopted. *Smith*, 150 Wn.2d at 154 (citing Law of 1866 § 239). That statute, however, simply states judges fix the punishment after a jury determination of guilt. *Id.* I certainly does not limit the jury's role as finder of the elements of the crime. The *Smith* Court's determination that the third *Gunwall* factor did not demonstrate that Washington's constitutional right to a jury trial includes the fact of prior convictions is thus based upon a misreading of Washington law combined with a misunderstanding of what constitutes an element of the crime. The third *Gunwall* factor actually supports construing the Washington jury trial right as evidencing a constitutional and common law history supporting a

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broader right to a jury trial than the federal constitution in the particular context of determining the existence and identity of prior crimes in a proceeding imposing a sentence of life without the possibility of parole based on prior criminal offenses.

*d. Pre-existing state law.*

Washington has a long history of cases upholding the state constitutional right to a jury determination of facts, which, if proved, will increase a defendant's penalty. *State v. Tongate*, 93 Wn.2d 751,754-55,613 P.2d 121 (1980); *State v. Frazier*, 81 Wn.2d 628,633,503 P.2d 1073 (1972).

The bedrock of the right to jury in statutes at the time of statehood in the Code of 1881. The rights of accused parties included the right to a jury trial. Code of 1881, ch. LXVI § 3-766. The power of the judge to sentence was limited to offenses found by a jury. Code of 1881, ch. LXVI § § 7-767, 7-770. And the jury was responsible for finding of fact. Code of 1881, ch. LXXXVII, § 316-1078. The jury's fact-finding function is the core of what is protected by the right to trial by jury. *Sofie*, 112 Wn.2d at 645; *Strasburg*, 60 Wash. at 113-16. At the time of statehood, Washington's criminal procedure required jury fact-finding of the elements of a crime.

Washington enacted its first habitual criminal statute in 1903. Laws

of 1903, ch. 86, Former RCW 9.92.090; RCW 9A.20.020. It authorized an aggravated sentence only if prior convictions were found by a jury beyond a reasonable doubt. *Furth* 5 Wn.2d at 18. This was the rule in Washington for more than 90 years, even after 1909 amendment omitted the statutory guarantee. *Id*; *State v. Kelly*, 52 Wn.2d 676,678,328 P.2d 362 (1958); *State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27 (1909)

Where previous convictions are charged in an information for the purpose of enhancing the punishment of the defendant, such convictions must be proved beyond a reasonable doubt, since the fact of the prior convictions is to be taken as an essential element of the offense charged, at least to the extent of aggravating it and authorizing an increased punishment.

*Furth*. 5 Wn.2d at 11. The 1903 statute was thus declaratory of rights the accused already possessed under common law and reflected the contemporary understanding of the scope of the right to a jury trial. *Furth*, 5 Wn.2d at 19.

A long line of case law existing before the enactment of the POAA recognized the right to a jury determination of any fact that might aggravate the sentence imposed.

It is the rule that, where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, the issue of whether that factor is present must be presented to the jury . . . before the court can impose the harsher penalty.

*Nass*, 76 Wn.2d at 370. In support of this rule, *Nass* begins with a 1919 case,

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*State v. Dereiko*, which held that “a verdict finding a prior conviction is generally held essential to empower the court to impose the increased punishment provided by the act.” 107 Wash.at 470. In *State v. Dale*, the court explained “that the above-quoted language from *State v. [Dereiko]* is only a recognition that the question of a defendant’s former conviction in such cases is a jury question.” 110 Wash. at 188. Thus, when the simple offense of unlawfully transporting liquor was defined in one section of the act but another section punished a second or third conviction more severely, the judge invaded the province of the jury by failing to instruct on the prior convictions. 110 Wash. at 182-185 (citing *People v. Sickles*, 156 N.Y. 541,51 N.E. 288 (1898)).

Finally, in *State v. Harkness*, the court examined an habitual criminal charge following a narcotics conviction and cited favorably a line of cases supporting the proposition that, where proof of prior convictions aggravates the punishment, the prior convictions must be proved to the jury beyond a reasonable doubt. 1 Wn.2d 530,542-44,96 P.2d 460 (1939). This opinion was followed the next year by *Furth*, which definitively established that if prior convictions aggravate the statutorily prescribed punishment, they must be proved to the jury. 5 Wn.2d at 18-19.

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Crucial to determining the nature and scope of the right to a jury trial in these proceeding was the court's understanding that issues of identity and the existence of prior convictions are questions of fact in the traditional sense. *Furth*, 5 Wn.2d at 11-19. After thoroughly surveying authorities from England and across the United States, the court concluded that article 1, section 21 guarantees the right to jury trial "on the question of a prior conviction." *Id.* at 11-19.

With the enactment of the SRA in 1981, the Legislature abandoned the habitual offender statute and indeterminate sentencing schemes. The SRA made clear that prior convictions could be used only for sentencing within the maximum penalty provided at RCW 9A.20.020. Law of 1981 ch. 137 § 12(9); current RCW 9.94A.030(41), RCW 9.94A.599. In *Ammons*, although the court held prior convictions need not be proved to a jury beyond a reasonable doubt under the SRA, the court made sure to emphasize these protections were not required simply because the sentence imposed could not exceed the statutory maximum. *State v. Ammons*, 105 Wn.2d 175,713 P.2d 719,718 P.2d 796 (1986). The SRA was thus consistent with Washington's statutory and common law recognition of the right to a jury trial for prior convictions that lead to habitual offender status. When the voters passed the

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POAA, commentators and practitioners therefore expected that, consistent with due process, the jury would determine the prior convictions beyond a reasonable doubt. D. Stiller, *Initiative 593: Washington's Voters Go Down Swinging*, 30 Gonz. L.Rev. 433,453-55 (1995).

The *Smith* Court ignored Washington's long tradition by blurring the difference between a prior conviction used to sentence a defendant within the statutory maximum and a prior conviction that increases the maximum possible penalty. A proper analysis shows Washington's pre-existing state laws calls for an independent interpretation of Washington's jury trial guarantee that provides for a jury determination of prior offenses in POAA cases.

*e. Differences in structure between the federal and state constitutions.*

The state constitution is structured as a limitation to the otherwise plenary power of the state to do anything not expressly forbidden; this supports the rigorous enforcement of the jury trial guarantee against encroachment by the Legislature. *Gunwall*, 106 Wn.2d at 66. Furthermore, because the state constitution, unlike the federal constitution, guarantees these fundamental rights, rather than restricting them, the structural differences point toward broader independent state constitutional protections.

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*Id.* at 62; *State v. Young*, 123 Wn.2d 173,180,867 P.2d 593 (1994).

The *Smith* Court recognized that this factor supported an independent construction of Washington's jury trial guarantee, but held the difference in structure was not helpful in resolving the issue. *Smith*, 150 Wn2d at 152. This is in conflict with *Gunwall*, which holds the non-exclusive facts are "relevant" and this factor demonstrates, at a minimum, that the fundamental rights in our state constitution are a guaranty of those rights and not a restriction on them. *Gunwall*, 106 Wn.2d at 58,62.

*f. Matters of particular state interest or local concern.*

The conduct of criminal trials in state courts is a matter of particular state or local concern which does not warrant adherence to a national standard. *Smith*, 150 Wn.2d at 152; *Schaaf*, 109 Wn.2d at 16; *Gunwall*, 106 Wn2d at 62. As was noted by a state constitutional law scholar:

[S]tate courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts . . . the histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty.

H. Spitzer, *Which Constitution? Eleven Year of Gunwall in Washington State*, 12 Seattle U.L.R. 1187 (1998). The sixth *Gunwall* factor thus favors

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construing Article 1, § § 21 and 22 more broadly than its federal counterpart.

*g. Reversal is required.*

The right to trial by jury is “inviolable” under our state constitution. Wash. Const. art. 1 § 21. The nature and scope of the right is defined by the common law and statutory law at the time the constitution was adopted. *Sofie*. 112 Wn.2d at 645. The *Smith* Court’s analysis is flawed because it assumes prior convictions are sentencing facts even when they elevate the maximum penalty to life without possibility of parole required by the POAA. At the time of Washington’s constitution, however, there was an identifiable statutory and common law right to a jury determination of the existence of prior convictions and the defendant’s identity when the prior offense was used to increase the statutory maximum sentence. Because Mr. Williams was denied his right to a jury determination of his prior offenses by proof beyond a reasonable doubt as required by the Washington Constitution, vacation of his sentence is required.

**V. CONCLUSION**

The errors in this case began with the charging document which did not sufficiently specify which actions constituted the underlying assault and Mr. Williams’ trial counsel failed to move for a bill of particulars. The

theory of accomplice liability was predicated upon the existence of a criminal gang known as Kushman Blokk, but the State failed to present sufficient evidence that Kushman Blokk existed. Despite the lack of evidence, the trial court allowed highly prejudicial yet irrelevant evidence about street gangs to be admitted through Detective Ringer and other witnesses. Not only was there not sufficient evidence to convict Mr. Williams of felony murder in the second degree, but the numerous erroneous evidentiary rulings and procedural errors deprived Mr. Williams of his right to a fair trial.

“A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). Here, the State’s case was almost entirely founded on innuendo: the innuendo that the Kushman Blokk was a street gang; the innuendo that the shooting was in retaliation for unproven actions by Blacc which showed disrespect to Kushman Blokk; the innuendo of Detective Ringer’s testimony that street gangs are violent and present in Tacoma and that the defendants were members of a gang; the innuendo that the shooting was related to the assault because it didn’t make sense otherwise; the innuendo that the threatening phone calls were made by the defendants and demonstrated that

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he defendants were planning retaliation against Blacc. Other than the fact that Blacc was shot by Mr. Asaeli and died, and that Mr. Williams asked Blacc if he wanted to go “heads up,” very few facts were introduced by the State which did not require innuendo to reach the conclusion that second degree felony murder had been committed.

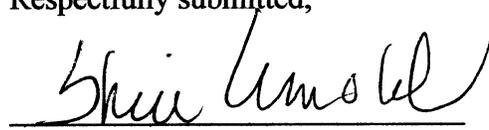
Furthermore, there is a substantial likelihood that the verdict was affected by the improper PowerPoint slides presented during closing by the prosecutor in which the court’s self-defense/defense of another instructions, as well as the court’s accomplice liability instructions, were impermissibly supplemented and misstated.

Finally, while Mr. Williams acknowledges that the Washington Supreme Court has held that prior strike convictions need not be proved to a jury beyond a reasonable doubt, Mr. Williams respectfully challenges the correctness of this legal conclusion under both the federal and state constitutions.

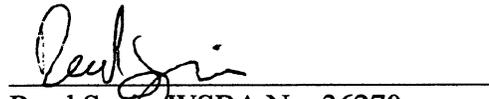
For the reasons stated above, this court should vacate Mr. Williams’ convictions and either dismiss he charges against him or remand for a new trial.

DATED this 13<sup>th</sup> day of July, 2007.

Respectfully submitted,



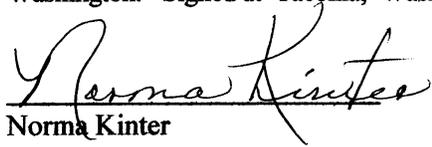
Sherri Arnold, WSBA No. 18760  
Attorney for Appellant



Reed Spett, WSBA No. 36270  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

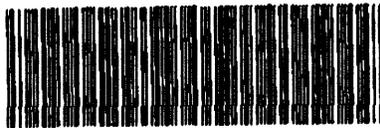
The undersigned certifies that on July 13, 2007, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402,, and by U.S. Mail to: appellant, Eroni Joseph Williams, DOC # 797705, Washington State Penitentiary, 1313 North 13<sup>th</sup> Street, Post Office Box 520, Walla-Walla, Washington 99362-1065, Eric J. Nielsen, Nielsen Broman & Koch PLLC, 1908 E. Madison Street, Seattle, WA. 98122-2842, Lise Ellner, Attorney at Law, P. O. Box 2711, Vashon, WA. 98070-2711, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on July 13, 2007.

  
Norma Kinter

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**APPENDIX**

**STATE'S POWERPOINT CLOSING ARGUMENT SLIDES**



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-05087-3  
04-1-05574-3  
04-1-05575-1

vs.

BENJAMIN ASaeli, DARIUS VAIELUA,  
and ERONI WILLIAMSEnter Defendant's  
Name,

Defendant.

STATE'S POWERPOINT CLOSING  
ARGUMENT SLIDES

Attached are true and correct handout copies of the Powerpoint slide used during the  
state's closing argument in this case on August 1, 2006.

DATED this 9th day of August, 2006.

GERALD A. HORNE  
Prosecuting Attorney

By: \_\_\_\_\_

*J. Schacht*  
James S. Schacht  
Deputy Prosecuting Attorney  
WSB# 17298

jss

ORIGINAL

***When a challenge to a fight is used as an excuse to kill, it's murder!***

***Murder is not complicated***

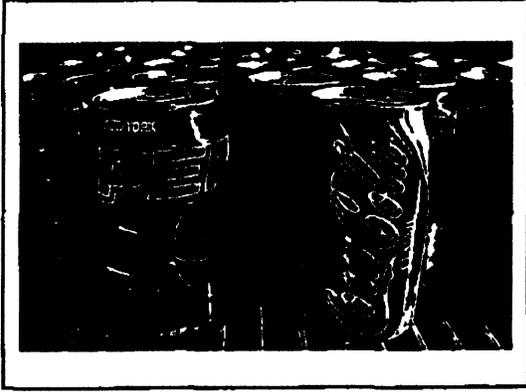
- Five Forms Of Murder***
1. Premeditated Murder – Murder, First Degree
  2. Extreme Indifference Murder – Murder, First Degree
  3. Intentional Murder – Murder, Second Degree
  4. Felony Murder – Based on Assault, First Degree
  5. Felony Murder – Based on Assault, Second Degree

***Each Form Of Murder Requires***

- ❖ An act: "shot Faalata Fola" OR "shot into a car" and "created a grave risk of death to any person"
- ❖ An effect: "Faalata Fola died as a result"
- ❖ A mental state: "intent to cause the death of Faalata Fola" and "the intent to cause the death was premeditated" OR "an extreme indifference to human life"

❖ Done alone or with accomplices

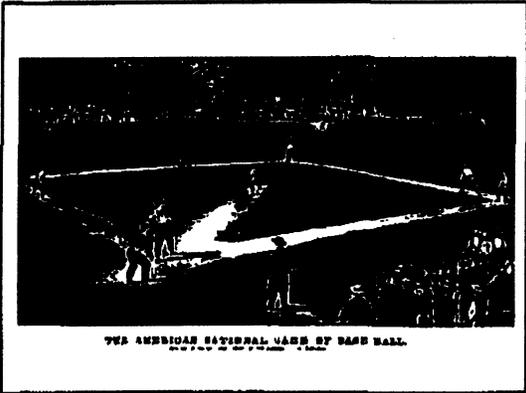
***Premeditation: It's Like Pepsi vs. Coke***



***Accomplices are there  
to help if needed***

***To Be An Accomplice Requires***

- ◆ An act: "solicits, commands, encourages, or requests another person to commit the crime" OR "aids or agrees to aid another person in planning or committing the crime"
- ◆ An effect: the crime is committed
- ◆ A mental state: "knowledge that it will promote or facilitate the commission of the crime"



***"Aid"***

- ◆ The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

***Under the law  
an accomplice is just as  
guilty as the one who  
pulled the trigger!***

***Self defense: Killing after a  
challenge to a fight is not  
lawful defense, it's murder.***

### ***Four Required Elements***

1. "... committed in the lawful defense..."
2. "... reasonably [actually] believed..."
3. "... imminent danger ..."
4. "... such force and means as a reasonably prudent person would use..."

State's burden is to disprove one of these elements.

### ***Lawful Defense***

"... lawful defense of the slayer or any person in the slayer's presence ..."

#### MEANS

One can't plan or threaten to do harm to a person then shoot him, that's not "lawful defense".

### ***From An Attack***

"... reasonably believes that the person slain intended to inflict death or great personal injury ..."

#### MEANS

*An actual belief (not one made up for trial) that he WILL be (not just a possibility) killed or mortally wounded.*

### ***Imminent Danger***

"... that there was imminent danger of [death or great personal injury] being accomplished ..."

#### MEANS

If a killing, it was the slayers life or the victim's.

### ***Reasonable Amount Of Force***

"... such force and means as a reasonably prudent person would use ..."

#### MEANS

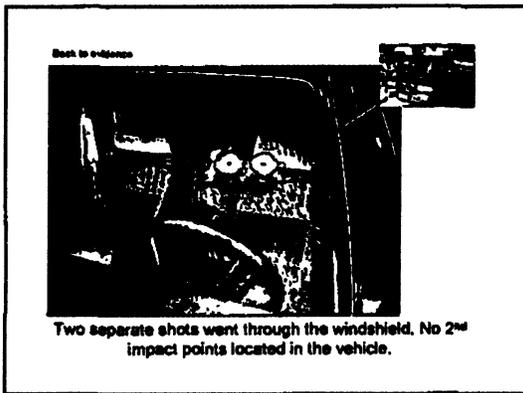
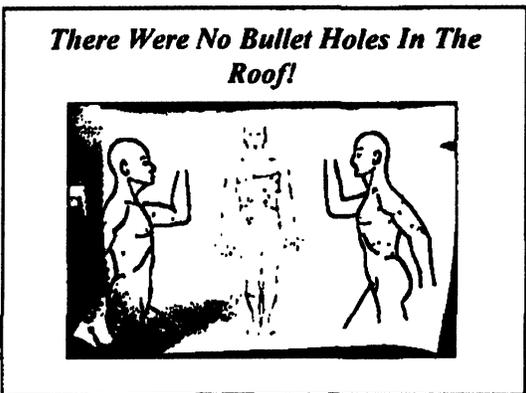
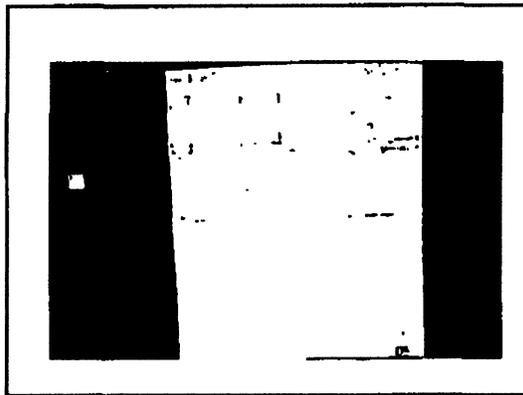
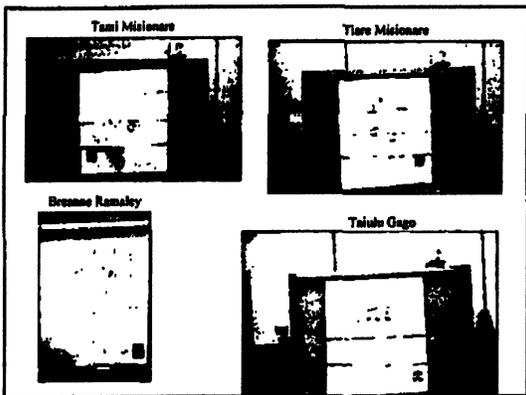
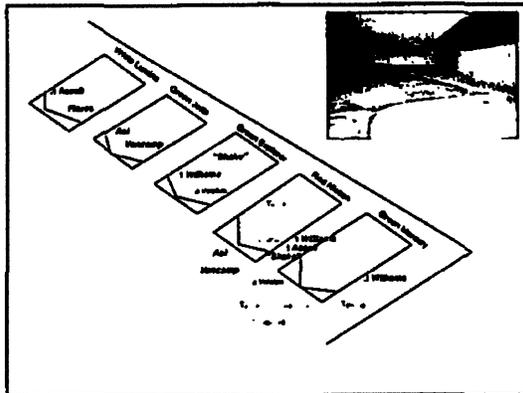
Overreaction is not permitted. If there was a non-lethal alternative it *must* be used if reasonable.

### ***Killing Is Not Lawful When. . .***

- ↪ No provocative behavior by the victim
  - ↪ No verbal warning: "Stop or I'll shoot!"
  - ↪ No warning shot
  - ↪ No attempt to hold at gunpoint
  - ↪ No taking cover
  - ↪ Victim is shot seven times and had no means to shoot back
  - ↪ Putting other people at risk
- Killing is not lawful as the first, last and only action taken against a person sitting in his own car minding his own business!

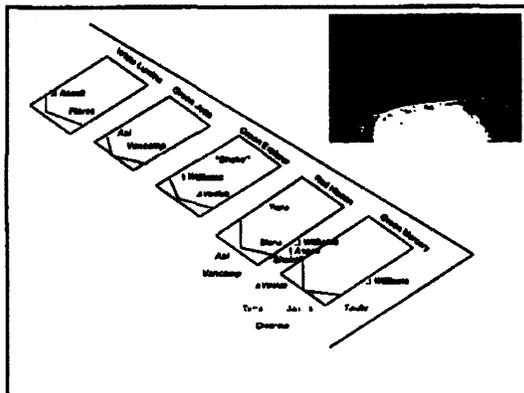
# POOR QUALITY ORIGINAL

*Actions speak louder than words!*



### *The Hiding Of Features*

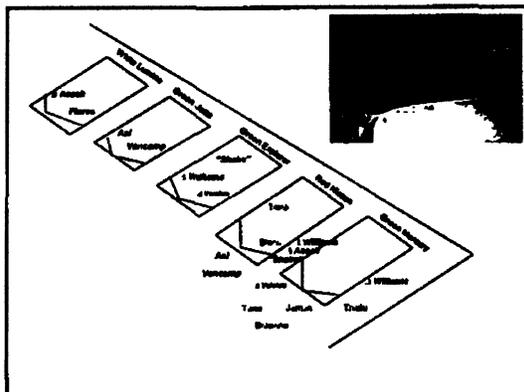
- ♦ James Fola – the shooter was in the middle and wore a hoodie with the hood up
- ♦ Tiare Misionare – the front passenger wore a windbreaker and a bandana over nose and mouth
- ♦ Breanne Ramaley – a tall guy came over with a bandana over his face and asked James where Blacc was
- ♦ Taiulu Gago – a guy with a flag over his face came over from the Explorer and asked for Blacc
- ♦ Eugene Vancamp – there were two guys at Blacc's car, the one on the right had a brown rag on his face.



Ben Asaeli exited his car. He went up to Blacc. He confronted Blacc. He said something to Blacc. Then he started shooting. He was holding the gun two-handed.

I watched as the window glass went flying. "Yeah he shot right through the window at first, then kept shooting."

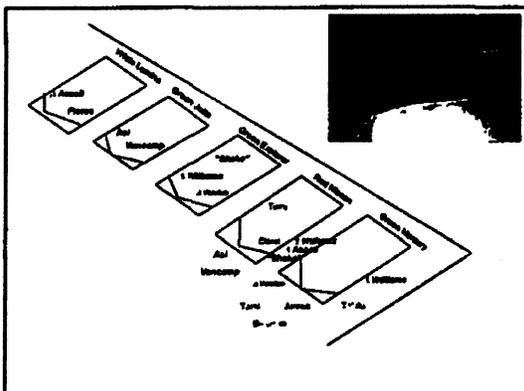
— Feleti Asi  
10/30/2004



Pendrak: Ben walked out of his car, you saw him go across ---

VanCamp: Uh huh (affirmative). Ben walked out of his car over to the red Nissan. I heard some gunshots and I saw the flash up on the bridge and Ben walked back to his car and started to leave. And then ---

— Eugene VanCamp  
10/30/04



Skills came up and asked for Blacc by name. Shake was also there. Three guys went up to Blacc in Breanne's car. Twix was on the right, someone he did not know in a hoodie with the hood pulled up was in the middle, and Shake was on the left.

He heard a ruckus . . . arguing.

He went toward the back of Tai's car to "go see what was wrong." The gunshots started as he got to the back of the car.

He ducked for cover. It sounded like a "whole clip."

— Justice Peck  
with "Shake" and "Tai" in the photo

## Credibility

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the *opportunity of the witness to observe* or know the things he or she testifies about; the *ability of the witness to observe accurately*; the *quality of a witness's memory* while testifying; the *manner of the witness while testifying*; any *personal interest* that the witness might have in the outcome or the issues; any *bias or prejudice* that the witness may have shown; the *reasonableness of the witness's statements in the context of all of the other evidence*; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

## Coincidences

- Just happens to be present at the time and place that gun is stolen
- Just happens to go to waterfront from Parkland to protect sisters the week before
- Blacc just happens to be there
- Because of Blacc's actions, his sisters just happen to need his protection
- Just happens to go to Popeyes on 10/29
- Twix, Skills and Shake just happen to be there
- Just happens to leave Popeyas at roughly same time that Twix Skills and Shake leave
- Just happens to obtain gun from drunken friend just before shooting (a first for him)
- Gun just happens to be the stolen gun
- Just happens to go to the waterfront
- Just happens to try two places at the waterfront where Blacc wasn't
- A white vehicle just happens to go through the parking lot turn around and leave
- Moments later Twix, Skills, Shake and other associates of Kushmen Blokk happen to arrive
- Asaeli happens to arrive just behind them

## Coincidences, Continued

- Blacc happens to be there
- Blacc happens to be in the same car from the week before
- Blacc just happens to be a Crip
- Twix, Skills, Shake and others just happen to be part of a group called Kushmen Blokk
- Kushmen Blokk just happens to have all the hallmarks of a Blood set
- Asaeli just happens to be "family" to Kushmen Blokk
- Blacc just happens to be the one they were looking for
- Happens to arrive too late to hear Twix call out Blacc
- Happens to arrive just in time to see Blacc fire a shot at Twix
- Just happens to have the gun at the one time in his life when he claims to need one in self defense
- Gun just happens to be loaded
- Gun just happens to be so similar to the gun that he used 18 years ago that he has no difficulty operating it quickly under stressful circumstances
- The shell casing from Blacc's gun just happens to be the one shell casing that Mary Lally does not find
- Bullets from Asaeli's gun just happen to be the same type (FMJ) that Gilbert Smith had
- Police happen to arrive just before he calls a family meeting and arrange to turn himself in
- He just happens to have additional 9 mm ammo in his closet

## Self Defense Is

A near death experience  
 Unforgettable  
 A him or me decision  
 Apparent to those around  
 Something that affects what happens afterward  
 In short true self defense is known to the  
 "slayer" and to those who saw what the  
 "slayer" did!

*When a challenge to  
 a fight is used as an  
 excuse to kill, it's  
 murder!*