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I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Bukovsky's motion to dismiss the case on grounds the felony murder statute is unconstitutional on its face and as applied.
2. The trial court applied the wrong standard in interpreting the constitutionality of the felony murder statute.
3. There was insufficient evidence to establish that either of the aggravating factors existed.
4. The trial court erred in sending the special verdict questions to the jury.
5. Mr. Bukovsky's sentence was clearly excessive.
6. Error is assigned to Finding of Fact Regarding Exceptional Sentence Number 5 which reads:

The standard range for the crime committed by the defendant is listed in the Judgment and sentence that was entered on December 21, 2007. That standard range does not constitute an adequate length of incarceration.

7. Error is assigned to Finding of Fact Regarding Exceptional Sentence Number 7 which reads:

The evidence that supported the jury's verdict and that also supports the court's conclusions of law includes: (a) the evidence from the medical examiner as to the location and severity of the injuries inflicted upon Brian Lewis; (b) the evidence from Detective Brian Johnson as to the location where the fatal beating took place and the positioning of his head as the source of the blood spatter on the adjacent vans; (c) the evidence from paramedic Vi Diamond as to Mr. Lewis having died of the beating injuries *en route* to the hospital; (d) the evidence from Shecola

Thomas and Anthony Knoefler as to the participation and positioning of the participants and as to Brian Lewis [sic] position as having been trapped between the two vans and restrained on the ground.

II. ISSUES PRESENTED

1. Is RCW 9A.32.050(1)(b), the felony murder statute, unconstitutional on its face where it violates the equal protection rights of a defendant charged under it? (Assignment of Error No. 1)
2. Is RCW 9A.32.050(1)(b), the felony murder statute, unconstitutional as applied where it violates the equal protection rights of a defendant charged under it? (Assignment of Error No. 1)
3. What standard should the trial court have applied to the constitutionality analysis of RCW 9A.32.050? (Assignments of Error Nos. 1 and 2)
4. Did the State present sufficient evidence to establish the aggravating factor of deliberate cruelty to the victim where the facts supporting the aggravating factor were already accounted for by the legislature in the definition of the elements of the underlying crime? (Assignments of Error Nos. 3, 6, and 7)
5. Did the State present sufficient evidence to establish the aggravating factor that the victim was particularly vulnerable where Mr. Lewis was able, and did, fight back and defend himself and where Mr. Lewis was not extremely young, extremely old, or otherwise infirm? (Assignments of Error Nos. 3, 6, and 7)
6. Did the trial court err in sending the special verdict question regarding whether or not Mr. Lewis was particularly vulnerable to the jury where the facts of the case did not support giving the instruction and counsel for Mr. Bukovsky objected to the special verdict? (Assignments of Error Nos.

3, 4 and 7)

7. Is Mr. Bukovsky's sentence clearly excessive where the facts introduced at trial do not support the aggravating factors? (Assignments of Error Nos. 3, 4, 5, and 6)

III. STATEMENT OF THE CASE

A. Procedural Background

On September 7, 2006, Charles Bukovsky was charged with committing second degree felony murder with the underlying crime being an assault on Brian Lewis. CP 1-2.

On February 15, 2007, John Gordon, a codefendant of Mr. Bukovsky, filed a motion for a bill of particulars. CP 1047-1054. On March 1, 2007, Mr. Gordon filed a motion to dismiss the case on grounds that the felony murder statute was unconstitutional. CP 1055-1065. On March 2, 2007, Mr. Gordon filed a motion to suppress photo lineups of the defendants. CP 1066-1079. On March 9, 2007, Mr. Gordon filed a motion to sever the defendants. CP 1080-1081. Mr. Bukovsky joined in these motions. CP 15. ¹

On March 9, 2007, argument was heard on the motion for bill of particulars. RP 35-41, 3-9-07. ² The trial court denied the motion for a bill

¹ The motions filed by Mr. Gordon and joined by Mr. Bukovsky were filed in Mr. Gordon's Superior Court case but were not filed in Mr. Bukovsky's case. The defendants were tried together and all parties referenced these motions at trial.

² Portions of the transcript are not numbered consecutively with others. Further, several portions of the transcript covering different days have been bound together. Reference to the record will be made by giving the page number of the proceeding, as well as the date it was held, and any other information necessary to locate the pertinent portion of the record. The transcript of the hearing held on March 9, 2007, is included in the volume which has the date October 4, 2006, on the cover page.

of particulars without prejudice. RP 41, 3-9-07.

On April 6, 2007, argument was heard on the motion to sever, the motion to dismiss, and the motion to exclude the photomontages. RP 69-110, 4-6-07. The trial court denied the motion to sever. RP 74, 4-6-07, CP 30-31. Counsel for Mr. Bukovsky withdrew his joinder of Mr. Gordon's motion to suppress the photomontages. RP 78, 4-6-07. The motion for a bill of particulars was renewed but was denied. RP 84-86, 4-6-07, CP 32-33. The trial court heard argument from Mr. Gordon's attorney (RP 95-100, 4-6-07) and from Mr. Bukovsky's attorney (RP 106-107, 4-6-07) on the motion to dismiss, but denied the motion. RP 108, 4-6-07, CP 34-35.

On April 18, 2007, the motion for a bill of particulars was again renewed and denied. RP 243-246, 4-18-07.³ CP 36.

On July 10, 2007, the State amended the charges to allege the underlying crime was first, second, or third degree assault and to add the aggravating factors of deliberate cruelty to the victim and that the victim was particularly vulnerable. CP 45-50.

Jury trial began on November 5, 2007. RP 996, 11-5-07.

During the testimony of Shecola Thomas, counsel for Mr. Bukovsky objected to the introduction of exhibits 174A and B, photomontages

³ The transcript for April 18, 2007, is bound in the volume which has the date April 13, 2008, on the cover.

including Mr. Bukovsky's picture, on grounds that the photomontages were not probative and that Mr. Bukovsky's photograph in the montage was overly suggestive. RP 1115-1116, 1128-1130, 11-6-07. The trial court overruled the objection and admitted the photographs. RP 1129-1130, 11-6-07.

Counsel for Mr. Bukovsky objected to jury instructions numbers 11, 13, 20, and 29, as well as the two special verdicts. RP 2144-2147, 11-19-07. The trial court gave the instruction of Mr. Bukovsky's objections. RP 2151, 11-19-07, CP 248-286.

On November 20, 2007, the jury returned a verdict of guilty on the charge of second degree felony murder and also found that the State had established the existence of both aggravating factors. RP 5-6, 11-20-08.⁴ CP 300-301.

Mr. Bukovsky was sentenced to 244 months, the high end of the standard range, and an exceptional sentence of an additional 144 months based on the aggravating factors. CP 309-320.

Notice of Appeal was filed on December 21, 2007. CP 534.

B. Factual Background

On September 5, 2006, Shecola Thomas was living in apartment number 3 at the Lakewood Garden Apartments. RP 1064, 11-6-07. Ms.

⁴ The transcript for November 20, 2007, is separated into a morning session and an afternoon session. The verdict was entered during the afternoon session. The transcript for the afternoon session is bound in its own volume.

Thomas shared the apartment with Charlotte Songer, John Gordon, and Charles Bukovsky. RP 1065-1067, 11-6-07.

Ms. Thomas returned to her apartment at 3 a.m. after having attended a barbeque at a friends house and smoking crack. RP 1071, 11-6-07. When Ms. Thomas knocked on the door to her apartment, the door was answered by a tall Indian man who Ms. Thomas didn't know. RP 1072-1073, 11-6-07. Ms. Thomas entered her apartment and saw Mr. Gordon and Mr. Bukovsky in the living room. RP 1073, 11-6-07. Ms. Songer was in the back room with a man named Brian Lewis. RP 1073, 11-6-07.

John Vlahas, a friend of Ms. Songer, was also at the apartment. RP 1266-1268, 9-6-07. Mr. Lewis was the father of one of Mr. Vlahas' friends and Mr. Vlahas knew Mr. Lewis as "Pops." RP 1269-1270, 11-6-07.

Mr. Gordon became upset with Ms. Thomas and told her she needed to leave because she had called the police about him previously. RP 1074-1075, 11-6-07. Mr. Gordon was extremely upset and was speaking with a raised voice. RP 1075, 11-6-07.

The situation got out of control and Mr. Lewis came out of the back bedroom and told Mr. Gordon and Ms. Thomas to "keep it down." RP 1077, 11-6-07. Mr. Gordon continued to threaten Ms. Thomas so Mr. Lewis suggested that he and Ms. Thomas go for a ride in his van and use drugs and Ms. Thomas agreed. RP 1080-1083, 11-6-07.

Ms. Thomas and Mr. Lewis left the apartment and went to the courtyard of the apartment. RP 1083, 11-6-07. As Ms. Thomas and Mr. Lewis approached Mr. Lewis' mini-van, Mr. Gordon approached them and told Ms. Thomas, "I told you that I was going to put hands on you and that's what I meant." RP 1084-1089, 11-6-07. Mr. Gordon was accompanied by Mr. Bukovsky and a man named Tony who lived in apartment number 5. RP 1084-1085, 11-6-07. Ms. Thomas said, "Whatever" and turned around and Mr. Gordon punched her in the eye. RP 1089, 11-6-07. Mr. Lewis confronted Mr. Gordon and Mr. Lewis and Mr. Gordon got into an argument. RP 1094, 11-6-07.

"Tony" is Anthony Knoefler. RP 1379-1380, 11-7-07. On the morning of September 5, 2006, Mr. Knoefler was standing outside his apartment smoking a cigarette when he heard a commotion around apartment number 3. RP 1404-1405, 11-7-07. Mr. Bukovsky came up to Mr. Knoefler and asked for a cigarette while Mr. Gordon exited apartment number 3 angry and yelling. RP 1406, 11-7-07.

As Ms. Thomas and Mr. Lewis walked towards the van, followed by Mr. Gordon, Mr. Gordon asked Mr. Knoefler and Mr. Bukovsky if they "had [Mr. Gordon's] back." RP 1408, 11-7-08. Mr. Knoefler responded that it was going to be a one-on-one fight if Mr. Gordon was going to do anything, but went to the back of the vans. RP 1408-1409, 11-7-07.

After Mr. Gordon punched Ms. Thomas in the face, Mr. Lewis got angry and said he was going to beat everybody up and that he had someone in his van with a gun. RP 1412-1413, 11-7-07. Mr. Lewis was in between the two vans. RP 1412, 11-7-07. The argument escalated and Mr. Gordon punched Mr. Lewis in the face. RP 1097, 11-6-07, RP 1413, 11-7-07. Mr. Lewis turned around and ran towards Mr. Knoefler at the back of the vans, but Mr. Knoefler pushed Mr. Lewis away. RP 1413, 11-7-07. Mr. Lewis punched Mr. Knoefler and Mr. Knoefler punched him back. RP 1413, 11-7-07.

Mr. Lewis ran back to the front of the vans and Mr. Knoefler ran around to the front as well. RP 1413, 11-7-07. Mr. Lewis hit Mr. Knoefler again and Mr. Knoefler hit Mr. Lewis back again. RP 1413, 11-7-07. Mr. Gordon punched Mr. Lewis and Mr. Lewis fell to the ground. RP1413, 11-7-07. Mr. Knoefler kicked Mr. Lewis once and then Mr. Gordon and Mr. Bukovsky began jumping on Mr. Lewis. RP 1413, 11-7-07.

The three men punched Mr. Lewis for several minutes until a man named Jessie came around the corner of a building, hit Mr. Lewis and Mr. Lewis fell to the ground. RP 1098-1099, 11-6-05. As Mr. Knoefler was walking away from the beating, he saw Jessie approaching the fight. RP 1413, 11-7-07. Jessie walked up to Mr. Lewis, put him in a choke hold, and held him down while Mr. Gordon and Mr. Bukovsky repeatedly kicked Mr.

Lewis. RP 1419-1420, 11-7-07.

Ms. Thomas went back inside her apartment, looked out her window, and saw Mr. Gordon, Mr. Bukovsky, Tony, and Jessie kicking Mr. Lewis and stomping on him. RP 1100-1101, 1122, 11-6-07. Ms. Thomas told Ms. Songer to call the police. RP 1217, 11-6-07.

Mr. Vlahas didn't see the fight, but he saw Ms. Thomas return to the apartment and saw Ms. Songer use the telephone. RP 1277-1278, 11-7-07. Mr. Vlahas went outside and saw Mr. Lewis on the ground between two vans moaning and reaching at his face. RP 1278-1280, 11-7-07.

At 3:13 a.m. on September 5, 2006, Lakewood police officer Brian Wurts was dispatched to the Lakewood Garden Apartments in response to a call. RP 996-1003, 11-5-07. It was dark when he arrived, but Officer Wurts saw a man rolling on the ground between two cars. RP 1003, 11-5-07. Officer Wurts heard the man groaning. RP 1003, 11-5-07. The lighting was poor and there was no direct light between the two vans. RP 1014, 11-5-07.

Officer Wurts approached the man and observed that the man had serious injuries. RP 1004, 11-5-07. The man was moving back and forth, as if he was seizing, and there was a large amount of blood around the man's face, so Officer Wurts immediately radioed for medical aid. RP 1004-1005, 11-5-07. Officer Wurts also called for backup. RP 1008-1009, 11-5-07.

Officer Wurts later learned that the man on the ground was named

Brian Lewis. RP 1007, 11-5-07. Mr. Lewis was loaded into the ambulance quickly and transported by the paramedics. RP 1009, 11-5-07. Mr. Lewis stopped breathing and lost his pulse on the way to the hospital. RP 1534-1535, 11-8-07.

When the paramedics arrived, Officer Wurts began looking for witnesses. RP 1006, 11-5-07. Officer Wurts contacted a male and a female who were standing in a doorway close to where Mr. Lewis was laying on the ground and who had been watching. RP 1006, 11-5-07. The man and woman were standing outside apartment number 14. RP 1008, 11-5-07. Officer Wurts learned that the man in the doorway was named Bobby Cook and the woman in the doorway was named Felicia Brown. RP 1008, 11-5-07. Officer Wurts located the renter of apartment 14, Mr. Mike Smith, passed out inside the apartment. RP 1008, 11-5-07.

At 3:45 a.m., Lakewood forensic officer Rick Wade was dispatched to the scene and arrived at the scene between 4:15 and 4:30 a.m. RP 1016-1018, 11-5-07. Officer Wade processed the scene and determined that the vans between which Mr. Lewis had been laying were four feet apart. RP 1023, 11-5-07.

Mr. Lewis ultimately died due to multiple traumatic injuries to the head. RP 1860, 11-14-07.

Police interviewed witnesses and identified Mr. Bukovsky as a

potential suspect. RP 1620-1621, 11-8-07. Mr. Bukovsky was interviewed by police on September 7, 2006. RP 1707, 11-13-07. Mr. Bukovsky initially denied being present at the beating of Mr. Lewis, but then changed his story and told police that he was the first person who punched Mr. Lewis but he withdrew and the others continued the beating. RP 1708-1709, 11-13-07. Mr. Bukovsky told police that he hit Mr. Lewis with his right hand and that if he really wanted to hurt Mr. Lewis he would have punched him with his left hand. RP 1710, 11-13-07. Mr. Bukovsky's right hand was swollen at the time of the interview. RP 1710, 11-13-07. Mr. Bukovsky said the swelling was from a fight he had been in several days prior to the interview, but he could not provide any details about the fight. RP 1710, 11-13-07.

IV. ARGUMENT

- 1. The trial court erred in denying Mr. Bokovsky's motion to dismiss the charge against him since RCW 9A.32.050(1)(b) violates a defendant's constitutional right to equal protection and is therefore unconstitutional on its face.**

At trial, Mr. Bukovsky joined in Mr. Gordon's motion to dismiss the charge against him on grounds that RCW 9A.32.050(1)(b) was unconstitutional on its face since it violated Mr. Bukovsky's equal protection rights. CP 15, CP 1055-1065. Mr. Bukovsky argued that he was a member of a semi-suspect class and that the proper standard of review of the constitutionality of the statute was intermediate level; scrutiny. CP 1055-

1065.

The trial court denied the motion to dismiss, stating, “I don’t believe that the defendants have overcome [sic] their burden of showing that this is an unconstitutional statute.” RP 108, 4-6-07.

A person challenging a statute as being unconstitutional on its face must show that there is no set of circumstances in which the statute, as currently written, can be constitutionally applied. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). “The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative.” *Id.*

a. Historical and Procedural Background of the Felony Murder Statute.

Washington has by far the broadest felony murder practice of any state in the union. Indeed, Washington stands virtually alone in allowing assault to serve as the predicate felony in a felony murder prosecution. While nearly every state restricts the underlying felonies to either inherently dangerous felonies or to a short list of enumerated felonies, Washington allows any felony to suffice.

State v. Tamalini, 134 Wn.2d 725, 744, 953 P.2d 450 (1998) (J. Sanders, dissenting opinion).

In *Tamalini*, our Supreme Court held that in cases of second degree assault felony murder juries may not consider whether the defendant should be convicted instead of the lesser crime of manslaughter. *Tamalini*, 134 Wn.2d at 736, 953 P.2d 450. After *Tamalini*, only defendants charged with

premeditated and intentional murders are given the right to jury instructions on lesser included crimes, and if a defendant is charged with both intentional and unintentional murder, the anomaly arises where jury instructions on lesser included crimes are allowed only for the intentional murder. *See State v. Berlin*, 133 Wn.2d 541, 947 P.2d 200 (1997) (if a defendant has been charged with both intentional and felony murder, he is entitled to lesser included instructions on the intentional charge only). Thus, a person charged with an unintentional killing is treated more harshly under Washington law than a person charged with intentional killing.

This rule was changed by *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002)⁵. In *Andress*, the defendant was involved in a fight between four individuals which resulted in a stabbing death. Andress was initially charged with both second degree intentional murder and second degree felony murder predicated on second degree assault. Pre-trial, the State amended the information to include only the felony murder charge. The jury found Andress guilty, and his direct appeal was unsuccessful. Andress filed a personal restraint petition, raising both constitutional and non-constitutional challenges to his felony murder conviction. The *Andress* court considered only the non-constitutional challenge, holding after “careful review of the

⁵ Westlaw Keycite service states that *Andress* has been “superceded by statute.”

history of this question and the relevant statutory and decisional law” that when the Legislature amended the felony murder statute in 1975, it “became clear that assault could not serve as the predicate felony.” *Andress*, 147 Wn.2d at 605.

Following the decision in *Andress*, the Washington Legislature amended the felony murder statute to specifically provide that assault is a predicate felony which will support a felony murder charge. Laws of 2003, ch. 3, sec. 2. See RCW 9A.32.050(1)(b). In its findings of intent, the Legislature also refused to accept “the court’s findings of legislative intent” in *Andress*, and professed its intent that the amendment to the statute was “curative in nature” and should be applied “retroactively to July 1, 1976.” *Id.* Notes, Findings.

In *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 860, 100 P.3d 801 (2004), the Washington Supreme Court declined to apply the 2003 amendment to the felony murder statute retroactively, and held that at the time the petitioners committed the acts for which they were convicted of felony murder predicated on assault, they were convicted of a non-existent crime because to apply the 2003 amendment retroactively would violate the ex post facto clauses of the federal and state constitutions.

Most recently, in *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005), the Washington Supreme Court strongly criticized the harshness of

the new amended felony murder statute. In *Gamble*, the defendant was convicted on second degree felony murder charges, predicated on second degree assault, but, during the pendency of his appeal, the Supreme Court issued *Andress*, holding that assault could not serve as a predicate felony under the former statute. The Court of Appeals vacated and remanded with directions to enter a guilty verdict on the offense of first degree manslaughter, despite a concession by the appellant and the assertion by the State that manslaughter is not, and cannot be, a lesser included offense of felony murder. Reaffirming that under *Tamalini*, manslaughter cannot be a lesser included offense for that crime, in a concurring opinion Justice Madsen stated:

...I am writing separately to encourage the legislature to take a closer look at the statutory scheme that permits a conviction for a second degree felony murder based on second or third degree assault, with no right to request jury instructions on manslaughter as an inferior degree offense.

...[A]s things now stand, this state has an exceedingly harsh statutory scheme where a defendant may be convicted of murder when the killing of another resulted from the defendant's reckless conduct or, worse yet, criminal negligence.

Thus, a defendant can be charged and convicted of second degree murder under RCW 9A.32.050(1)(b) based on an assault in the second degree under RCW 9A.36.021(1)(a)

where he or she intentionally assaults another and unintentionally but recklessly inflicts substantial bodily harm. Compare this to manslaughter in the first degree under RCW 9A.32.060(1)(a), where guilt is based on recklessly causing the death on another person.

An even more serious problem 'could arise from use of another means of committing a felonious assault: by the infliction of bodily harm with criminal negligence, if the harm is either inflicted with a weapon or is accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.'...Thus the statutes authorize a conviction for second degree murder based on 'a purely negligent killing.'...

When compared to punishments for first and second degree manslaughter, the disproportionate punishment for second degree felony murder based upon second degree assault where the homicide occurs as a result of the defendant 'recklessly inflict[ing] substantial bodily harm,' RCW 9A.36.021(1)(a), or results from a first degree assault where the defendant acts with 'criminal negligence,' RCW 9A.36.031(1)(d), (f), is obvious...Assuming a zero offender score the standard range sentences are: for second degree felony murder, a level XIV offense, 123-220 months; for first degree manslaughter, a level XI offense, 78-102 months; and for second degree manslaughter, a level VIII offense, 21-27 months. RCW 9.94A.510.

...The problems posed by the second degree felony murder statute and assault statutes call for a change.

Gamble, 154 Wn.2d at 470-473, 114 P.3d 646 (J. Madsen, concurring opinion, emphasis added).

Justice Chambers also wrote separately to express his "specific concern":

...that the legislature has created a double standard. Why do we have two crimes that may be charged for exactly the same act, done with exactly the same intent, causing exactly the same devastation to the victim, but with dramatically different consequences for the actor?

Discriminatory treatment is not the purpose of our criminal code, yet, inexplicably, permitting either manslaughter or felony murder to be charged for the very same act creates and condones a double standard. Our current law explicitly allows two people who commit the same offense to be charged and convicted of different crimes, perhaps because of their different background or socioeconomic status or merely the county in which they live. Because our criminal code creates this double standard, the law is not clear, understandable or predictable, and that should be troubling to all.

Gamble, 154 Wn.2d at 476-477, 114 P.3d 646 (J. Chambers, concurring opinion, emphasis added).

These judicial comments express our Supreme Court's condemnation of such a harsh statute, and render it subject to the constitutional challenge left unaddressed by *Andress*.

b. *RCW 9A.32.050(1)(b) is unconstitutional on its face because it violates a defendant's rights to equal protection.*

The Fourteenth Amendment provides that, "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws," and the Washington State Constitution provides for the right of equal protection in article I, section 12.

Article 1, section 12 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution both provide “like treatment under the law.” *See Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997); *State v. Clark*, 76 Wn.App. 150, 155, 883 P.2d 333 (1994), *affirmed*, 129 Wash.2d 211, 916 P.2d 384 (1996).

When evaluating an equal protection claim, a court must first determine whether the individual claiming the violation is similarly situated with other persons. *State v. Handley*, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination. *Id.* at 290, 796 P.2d 1266. Although equal protection does not require that the State treat all persons identically, any classification must be relevant to the purpose for the disparate treatment. *In re Det. of Thorell*, 149 Wn.2d 724, 745, 72 P.3d 708 (2003), *cert denied* 541 U.S. 990, 124 S.Ct. 2015, 158 L.Ed.2d 496 (2004) (*citing Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966)).

Three tests are used to determine whether the constitutional right to equal protection has been violated. Under the rational relationship test, a law is subjected to minimal scrutiny and will be upheld “unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective.” Under the strict scrutiny test, a law will be upheld only if it is shown to be necessary to accomplish a compelling state interest.

Under the intermediate or heightened scrutiny test, the challenged law must be seen as furthering a substantial interest of the State.

State v. Smith, 117 Wn.2d 263, 277, 814 P.2d 652 (1991).

Intermediate scrutiny applies if the individual is a member of a “semisuspect” class or the state action threatens “important” rights. *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993). To withstand intermediate scrutiny, the challenged statute must further a substantial interest of the State. *State v. Coria*, 120 Wn.2d 156, 170, 839 P.2d 890 (1992).

- i. The trial court committed an error of law in applying the rational relationship test to the determination of the constitutionality of RCW 9A.32.050(1)(b).

“To be a ‘suspect’ or ‘quasi-suspect’ class, [the group of people] must (1) have suffered a history of discrimination; (2) exhibit obvious immutable, or distinguishing characteristics that define them as a discrete group; and (3) show that they are a minority or politically powerless....” *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (1990), citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03, 107 S.Ct. 3008, 3018, 97 L.Ed.2d 485 (1987).

In the Order Denying Defendant’s Motion to Dismiss for Equal Protection Violation, the trial court explained its ruling:

The defendant’s motion to have this case dismissed because the charging statute violates the Equal Protection Clause is denied where the defense has failed to establish that the

defendant is entitled to anything other than “rationally related review” and where the statute that predicates felony murder on assault is rationally related to a state interest – the punishment of assaultive criminal conduct.

CP 34-35.

Thus, the trial court’s ruling rests on its determination that Mr. Bukovsky was not a member of a suspect or semi-suspect class, otherwise the trial court would have applied intermediate level scrutiny. This was error.

Here, Mr. Bukovsky is a member of a “quasi-suspect” class made up of defendants charged with second degree felony murder predicated on assault. These defendants constitute a “quasi-suspect” class because: (1) they have historically been denied the right to have the jury instructed on lesser included offenses to second degree felony murder, at the very least since *Tamalini* was decided in 1998; (2) these defendants exhibit the obvious and immutable characteristic of being charged with second degree felony murder predicated on assault; and (3) these defendant’s are a politically powerless minority unable to change the charges brought against them or have the jury instructed on any lesser included crimes.

The proper standard of review of the constitutionality of RCW 9A.32.050 is “intermediate level” scrutiny. The trial court erred in applying the wrong standard to review the constitutionality of the statute.

- ii. RCW 9A.32.050(1)(b) does not pass “intermediate scrutiny.”

As the statute now stands, and in view of the above authorities, there is no conceivable set of facts that would constitute second degree intentional murder but not second degree felony murder predicated on assault.

It is nonsensical to speak of a criminal act-an assault-that results in death as being part of the res gestae of that same criminal act *since the conduct constituting the assault and the homicide are the same*. Consequently, in the case of assault there will never be a res gestae issue because the assault will always be directly linked to the homicide.

Andress, 147 Wn.2d at 610, 56 P.3d 981 (emphasis added).

However, the current second degree murder law, as interpreted by *Tamalini* and *Gamble*, creates two categories of second degree murder defendants: those charged with killing intentionally, and those charged with killing unintentionally by a second degree assault. Although defendants in the first group are more culpable than those in the second group, because they intended the result of death, the second group is denied a statutory right to lesser included offense instructions, and are thereby threatened with harsher punishment. This presents a serious equal protection problem, recognized and articulated in Justice Chambers' concurring opinion in *Gamble*.

The current second degree felony murder statute cannot withstand constitutional scrutiny because it gives the prosecutor the unfettered discretion to choose whether or not to place a defendant in the group of defendants who are, by law, the less culpable, and render them unable to claim the right to instructions for the lesser offense of manslaughter:

Lesser offense instructions play a critical role in our criminal

justice system. First and foremost, lesser crime instructions allow the jury to more closely correlate the verdict to the act committed and thus arrive at the 'true verdict.' This is particularly true in murder cases where there is often a dead body and the only question is the moral culpability of the defendant. In such cases the jury should have access to all the varying lesser degrees of murder. In this respect, lesser offense instructions allow the defendant to present his theory of the case, at least to the extent his theory is compatible with the commission of a lesser crime. As the Supreme Court has noted, failure to give lesser crime instructions where the evidence supports such instructions puts the jury to an impermissible choice. This fear of a Hobson's choice is substantial enough that erroneous failure to give lesser crime instructions is reversible error.

Tamalini, 134 Wn.2d at 747-748 (J. Sanders, dissenting opinion) (internal citations omitted).

No conceivable state interest is furthered by giving persons charged with unintentional homicides less fair and reliable trials than those charged with intentional crimes or by threatening them with longer prison sentences. There is even less legitimate state interest in giving prosecutors the completely unfettered discretion to deny a defendant any right to lesser included offense instructions by striking the intentional murder allegation, as the prosecutor did in *Andress*. "The principle of equality before the law is inconsistent with the existence of a power in a prosecuting attorney to elect, from person to person committing this offense, which degree of proof shall apply to his particular case." *Tamalini*, 134 Wn.2d at 746, n. 23 (J. Sanders, dissenting opinion), quoting *State v. Collins*, 55 Wn.2d 469, 470, 348 P.2d 214 (1960).

There is no fair or rational explanation or state interest which supports the current version of the second degree felony murder statute, and it cannot be construed in any way as constitutional, with such disparate and unequal results between individuals similarly situated.

The trial court erred in reviewing the constitutionality of RCW 9A.32.050 under the rational relationship test. Under the facts of this case, RCW 9A.32.050 must be examined under intermediate level scrutiny. Under intermediate level scrutiny, it is clear that RCW 9A.32.050 is unconstitutional on its face and should be struck down. Mr. Bukovsky's conviction should be vacated and the charge dismissed.

2. RCW 9A.32.050(1)(b) is unconstitutional as applied to Mr. Bukovsky.

As discussed above, RC 9A.32.050 is unconstitutional on its face. As a result, the statute is also unconstitutional as applied to Mr. Bukovsky. Application of RCW 9A.32.050 to Mr. Bukovsky violated his due process rights to equal treatment under the law because he is a member of the class of defendant's who are charged with second degree felony murder predicated on assault and is therefore denied the statutory right to have the jury instructed on lesser included offenses.

For the reasons stated above, this court should find that RCW 9A.32.050 is unconstitutional and vacate Mr. Bukovsky's conviction and dismiss the charge against him.

3. The State presented insufficient evidence to establish either of the alleged aggravating factors.

The due process clause of the United States and Washington State Constitutions require proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. *State v. Nicholson*, 119 Wn.App. 855, 859, 84 P.3d 877 (2003), citing *State v. Byrd*, 72 Wn.App. 774, 782, 868 P.2d 158 (1994) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

When the sufficiency of the evidence to convict the defendant of a crime is challenged on appeal, the appellate court reviews the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Hernandez*, 120 Wn.App. 389, 391-392, 85 P.3d 398 (2004), citing *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

In the amended information, the State alleged that the assault of Mr. Lewis was aggravated because: (1) Mr. Bukovsky's conduct manifested deliberate cruelty to Mr. Lewis in violation of RCW 9.94A.535(3)(a); and (2) Mr. Bukovsky or should have known that Mr. Lewis was particularly vulnerable or incapable of resistance in violation of RCW 9.94A.535(3)(b).

- a. *The State presented insufficient evidence to establish that Mr. Bukovsky's actions manifested deliberate cruelty to Mr. Lewis.*

When the offender's conduct during the commission of the crime manifests deliberate cruelty to the victim, the trial court may impose an exceptional sentence. Deliberate cruelty consists of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. To justify an exceptional sentence, the cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense-elements of the crime that were already contemplated by the legislature in establishing the standard range.

State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003) (internal citations omitted).

[F]actors inherent in the crime-inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type-may not be relied upon to justify an exceptional sentence” An element of the charged offense may not be used to justify an exceptional sentence. An exceptional sentence is not justified by mere reference to the very facts which constituted the elements of the offense proven at trial.

State v. Ferguson, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001).

For example, in *State v. Armstrong*, 106 Wn.2d 547, 723 P.2d 1111 (1986), Mr. Armstrong pled guilty to second degree assault based on his acts of throwing boiling coffee on an 10 month old infant and then holding the baby's foot in the coffee. *Armstrong*, 106 Wn.2d at 548-549, 15 P.3d 1271. The presumptive sentence range for Mr. Armstrong's crime was 12-14 months, but Mr. Armstrong received an exceptional sentence of five years. *Armstrong*, 106 Wn.2d at 548-549, 15 P.3d 1271. The trial court gave four

reasons to justify Mr. Armstrong's exceptional sentence: (1) the victim of the assault was a totally defenseless 10-month-old child; (2) the child was injured twice, once when Armstrong threw boiling coffee on him, and a second time when Armstrong plunged the child's foot in the coffee; (3) the injuries were very serious first- and second-degree burns to the child's body; and (4) the incident could have been avoided had Armstrong simply walked away from the crying child. *Armstrong*, 106 Wn.2d at 549, 15 P.3d 1271.

Mr. Armstrong appealed, arguing that his sentence was clearly excessive. *Armstrong*, 106 Wn.2d at 548, 15 P.3d 1271.

The *Armstrong* court held that the first two reasons given by the trial court were sufficient to support the exceptional sentence, but held that the second two reasons were insufficient to support an exceptional sentence. *Armstrong*, 106 Wn.2d at 550, 15 P.3d 1271. The *Armstrong* court held that burns inflicted on the 10-month-old victim by defendant's throwing boiling coffee on the child and plunging the child's foot in the coffee were injuries already accounted for in the offense of second degree assault and could not therefore justify an exceptional sentence. *Armstrong*, 106 Wn.2d at 550-551, 15 P.3d 1271. The court reasoned, "[t]he fact that Armstrong inflicted serious first- and second-degree burns upon the baby merely brings Armstrong's crime within the definition of second degree assault...Hence, the nature of the injuries inflicted were already accounted for in determining the

presumptive sentence range for second-degree assault; they cannot be counted a second time to justify an exceptional sentence.” *Armstrong*, 106 Wn.2d at 550-551, 15 P.3d 1271.

This case is like *Armstrong*. Here, Mr. Bukovsky was charged with felony murder with the predicate offense being first, second, or third degree assault. CP 45-46. The State alleged that the beating of Mr. Lewis was performed with deliberate cruelty based on “the severity of the beating, the number of assailants, the location where it took place, the length of time it lasted and the strangulation and positioning of the victim’s head for full force kicks.” CP 47-50. However, as in *Armstrong*, these facts were already accounted for by the legislature in defining the underlying crimes.

In this case, none of the participants in the beating used any firearms or weapons. Thus, the definitions of assault that might possibly apply to this case are:

- (1) RCW 9A.36.011: A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm...Assaults another and inflicts great bodily harm;
- (2) RCW 9A.36.021: A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or...(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
- (3) RCW 9A.36.031: (1) A person is guilty of assault in the third

degree if he or she, under circumstances not amounting to assault in the first or second degree...(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

In fact, these are the definitions of assault provided to the jury in instructions numbers 15, 16, and 19. CP 248-286.

RCW 9A.04.110(4)(c) defines great bodily harm as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.”

RCW 9A.04.110(4)(b) defines substantial bodily harm as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.”

Given the facts that Mr. Lewis suffered a broken nose and died as a result of the beating, it is likely that the jury found that the underlying felony was first or second degree assault. However, no matter what degree of assault the jury found Mr. Bukovsky committed, the legislature already accounted for the severity of the beating in defining the underlying crime. As in *Armstrong*, despite the brutal and gratuitous nature of the assault that took place, the length and severity of the beating merely brought the act within the definition of first, second, or third degree assault. No matter which definition

of assault the jury believed was satisfied, the length and severity of the beating was an element of the underlying crime (great bodily harm, substantial bodily harm, pain or agony equivalent to torture, or harm accompanied by substantial pain) and therefore could not be the basis for an aggravating factor.

Because the legislature already accounted for the severity of the beating in defining the underlying crime, the manner in which the beating was delivered and the severity of the injuries suffered as a result of the beating cannot serve as the basis for an aggravating factor. The State therefore presented insufficient evidence to establish that Mr. Bukovsky assaulted Mr. Lewis in a manner which manifested deliberate cruelty.

b. The State presented insufficient evidence to establish that Mr. Lewis was particularly vulnerable or incapable of resistance.

“In order for the victim's vulnerability to justify an exceptional sentence, the defendant must know of the particular vulnerability and the vulnerability must be a substantial factor in the commission of the crime.” *State v. Gore*, 143 Wn.2d 288, 318, 21 P.3d 262 (2001), *overruled on other grounds State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).

The critical inquiry regarding victim vulnerability focuses on whether or not the victim was more vulnerable to the offense than other victims due to extreme youth, advanced age, disability, or ill health and whether the defendant knew of that vulnerability. Accordingly, the mens rea element of the crime

with which the defendant is charged has no relevance; instead, what is critical is whether the defendant knew or should have known of the victim's vulnerability, and whether the particular vulnerability was a substantial factor in accomplishment of the crime.

State v. Ross, 71 Wn.App. 556, 565, 861 P.2d 473 (1993), *review denied*, 123 Wash.2d 1019, 875 P.2d 636 (1994), *citing State v. Jones*, 59 Wn.App. 744, 753, 801 P.2d 263 (1990), *review denied*, 116 Wn.2d 1021, 811 P.2d 219 (1991).

Here, Mr. Lewis was not extremely young, advanced in age, suffering from disability or ill health, or in any other way particularly vulnerable. The State alleged that Mr. Lewis was particularly vulnerable or incapable of resistance because the assault took place between two vans. CP 47-50. The fact that the attack took place between the vans was not a substantial factor in the commission of the crime. The assault took place between the vans because that is where the men happened to be when the fight broke out.

Further, the evidence introduced at trial at trial was that the vans were four feet apart (RP 1023, 11-5-07) and that Mr. Lewis was able to and did fight back and defend himself until he was overpowered by the force of three men attacking him. RP 1412-1413, 11-7-07. Where a victim is able to fight back and defend themselves, that victim is not particularly vulnerable. *See State v. Barnett*, 104 Wn.App. 191, 16 P.3d 74 (2001) (17 year old was not considered particularly vulnerable where she was able to and did resist

commission of the crime).

In *State v. Baird*, 83 Wn.App. 477, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012, 932 P.2d 1256 (1997), Division I held that a victim who is rendered unconscious by an early portion of an assault becomes particularly vulnerable to the remainder of the assault if the assault continues. *Baird*, 83 Wn.App. at 487-488, 922 P.2d 157. However, the instant case is distinguishable. Here, the evidence introduced at trial indicates that Mr. Lewis was never rendered unconscious by the attacks. Several witnesses reported that Mr. Lewis was moaning and rolling on the ground following the attacks (RP 1003, 11-5-07; RP 1278-1280, 11-6-07; RP 1314, 11-7-07), and the paramedics reported that Mr. Lewis was conscious and resisted their efforts to help him. RP 1530, 11-8-07. Thus, it cannot be argued that Mr. Lewis was particularly vulnerable because he was rendered unconscious by the assault.

The State presented insufficient evidence to establish that Mr. Bukovsky committed the crime with knowledge that Mr. Lewis was particularly vulnerable or incapable of resistance.

4. **The trial court erred in sending the special verdict question regarding whether or not Mr. Lewis was particularly vulnerable to the jury.**

Jury instructions, taken as a whole, must provide an accurate statement of the law and allow each party to argue its theory of the case to the

extent that it is supported by the evidence. *In re Hegney*, 138 Wn.App. 511, 521, 158 P.3d 1193 (2007).

As discussed above, the evidence introduced at trial did not support the jury's finding that the two aggravating factors existed. Counsel for Mr. Bukovsky objected to giving the special verdict question regarding whether or not Mr. Lewis was particularly vulnerable to the jury. RP 2146-2147, 11-19-07. Because the evidence in this case did not support a conclusion that Mr. Lewis was particularly vulnerable, it was error for the trial court to send the special verdict regarding the aggravating factor of whether or not Mr. Lewis was particularly vulnerable to the jury.

5. Mr. Bukovsky's sentence is clearly excessive.

Under RCW 9.94A.585(4), to reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

Prior to *Blakely*, our Supreme Court established a three-part analysis to review the trial court's findings and conclusions, justifying an exceptional sentence under RCW 9.94A.585.

First, the court must determine if the record supports the reasons given by the sentencing court for imposing an exceptional sentence.

As this is a factual inquiry, the trial court's reasons will be upheld unless they are clearly erroneous. The appellate court must next determine, as a matter of law, whether the reasons given justify the imposition of an exceptional sentence. The sentencing court's reasons must ... be "substantial and compelling." Former RCW 9.94A.120(2) [(2000)]. Finally, the court is to examine whether the sentence is clearly excessive or clearly lenient under the "abuse of discretion" standard. Former RCW 9.94A.210(4) [(2000)].

State v. Hale, ___ Wn.App. ___, 189 P.3d 829, 832 (2008), *citing State v. Fowler*, 145 Wn.2d 400, 405-406, 38 P.3d 335 (2002).

Post-*Blakely*, an appellate court employs a three part test when examining a trial court's imposition of an exceptional sentence after the jury finds aggravating circumstances. *Hale*, ___ Wn.App. ___, 189 P.3d 829, 832-833.

Under the first prong, instead of determining whether the record supports the reasons the sentencing court gave for imposing an exceptional sentence, we must review whether the record supports the jury's special verdict on the aggravating circumstances.

We next review de novo whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling.

Finally, we examine whether the trial court abused its

discretion by imposing a sentence that is clearly excessive.

Hale, ___ Wn.App. ___, 189 P.3d 829, 832-833.

a. *The record does not support the jury's special verdicts.*

As discussed above, the evidence introduced at trial was insufficient to support either of the special verdicts found by the jury.

b. *The trial court's reasons for imposing an exceptional sentence were not substantial and compelling.*

The trial court's reasons for imposing the exceptional sentence were the special verdicts found by the jury. Again, as discussed above, the facts of the case do not support the jury's finding that the aggravating factors existed. Therefore, as the court's reasons for imposing the exceptional sentence are based on the jury's finding that the aggravating factors existed, and since the facts of the case do not support the jury's findings that the aggravating factors existed, the trial court's reasons for imposing the exceptional sentence are not substantial or compelling.

c. *The trial court abused its discretion in imposing a sentence that is clearly excessive.*

A sentence is clearly excessive if it is based on untenable grounds or untenable reasons, or is an action no reasonable judge would have taken. *State v. Branch*, 129 Wn.2d 635, 649-650, 919 P.2d 1228 (1996).

Again, as discussed above, the facts of the case do not support the jury's

finding that the aggravating factors existed. It was therefore an abuse of discretion for the trial court to impose an exceptional sentence on the basis of those aggravating factors.

V. CONCLUSION

Given that RCW 9A.32.050(1)(b) is unconstitutional, this court should vacate Mr. Bukovsky's convictions and dismiss the charge against him. Alternatively, this court should vacate Mr. Bukovsky's sentence and remand for resentencing without any aggravating factors to a sentence within or below the standard sentencing range.

DATED this 17th day of October, 2008.

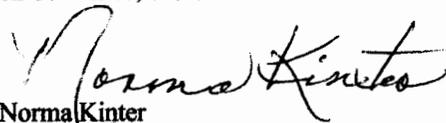
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on October 17, 2008, I delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by U. S. Mail to Charles Andrew Bukovsky, DOC # 313225, Washington State Penitentiary, 1313 North 13th Street, Walla Walla, Washington 99362, 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 October 17, 2008.


Norma Kinter

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