

No. 39598-3-II  
(Consolidated)

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

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STATE OF WASHINGTON,

Respondent,

v.

CARL SMITH,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

The Honorable Brian Tollefson

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DIVISION TWO  
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APPELLANT SMITH'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Carl Smith was deprived of his Article I, § 22, Sixth Amendment and Fourteenth Amendment due process rights to present a defense by the trial court's exclusion of evidence relevant and material to Smith's defense.

2. The trial court abused its discretion and violated Smith's due process rights by refusing to allow Smith to introduce evidence to rebut the improper "good character" evidence the prosecution introduced.

4. Smith was deprived of his Article I, § 22 and Sixth Amendment rights to effective assistance of counsel at trial and sentencing.

5. The prosecutors committed flagrant, prejudicial, constitutionally offensive misconduct and violated Smith's due process rights to fundamental fairness in several ways, including ways which violated the doctrine of separation of powers and Smith's Article I, § 9 and Fifth Amendment rights to remain silent.

6. The prosecution cannot satisfy the heavy burden of proving the constitutional misconduct harmless beyond a reasonable doubt.

7. The prosecutors committed flagrant, prejudicial nonconstitutional misconduct in several ways.

8. Smith's due process rights to a fair trial were repeatedly violated by the admission of prejudicial and irrelevant evidence.

9. Smith's First Amendment and Article I, § 5 rights to

freedom of association and speech were violated.

10. Jury instructions 24, 25 and 29, the instructions on self-defense, misstated the law.<sup>1</sup>

11. Under the rules of statutory construction, the rule of lenity and In re the Personal Restraint of Andress,<sup>2</sup> RCW 9A.32.050(1)(b) must be interpreted to apply only to assault predicates which are separate from the act causing the death.

12. Smith's Article I, § 12 and Fourteenth Amendment rights to equal protection and his rights to fundamental fairness were violated by the conviction for second-degree felony murder.

13. Jury Instruction 57, the instruction on the deadly weapon special verdict, misstated the law and deprived Smith of his rights to the benefit of any reasonable doubt and the presumption of innocence.<sup>3</sup>

14. The sentencing court erred in failing to follow the statutory requirements for sentencing by apparently relying on improper convictions and out-of-state convictions not proven "comparable."

15. The trial court erred in denying the motions for a new trial.

16. The cumulative effect of the errors deprived Smith a fair trial.

17. Pursuant to RAP 10.1(g) and this Court's Order of

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<sup>1</sup>Copies of the instructions are attached for convenience as Appendix B.

<sup>2</sup>In re the Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

<sup>3</sup>A copy of the instruction is contained in Appendix B.

Consolidation, Smith adopts and incorporates the arguments presented in the opening briefs of Barry Ford, Mike McCreven and Terry Nolan.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a defendant raises self-defense, his out-of-court statements may be admissible to prove his “state of mind.” Did the trial court abuse its discretion and was exclusion of Smith’s statements a violation of Smith’s rights to present a defense where those statements were admissible under this exception and were relevant, necessary and material to his defense? Further, was counsel prejudicially ineffective in failing to cite to the relevant law?

2. Did the prosecutors commit flagrant, prejudicial misconduct when they first successfully moved to prevent Smith from admitting evidence and then repeatedly argued in closing argument that the jury should rely on the absence of such evidence as proof of Smith’s guilt?

3. Were Smith’s rights to present a defense and to fundamental fairness violated when he was refused the opportunity to introduce evidence to balance the prosecutors’ repeated introduction of “good character” evidence to bolster their case even though the prosecution had elicited that evidence for the purpose of supporting its claim that the decedent was not the aggressor and that Smith thus had not acted in self-defense?

4. Did the prosecutor commit constitutionally offensive

misconduct, misstate the law, shift the burden of proof and violate the doctrine of separation of powers in repeatedly arguing that Smith had failed to prove self-defense even though due process mandated that the prosecution bear that burden?

5. Did the prosecutor commit constitutionally offensive misconduct in violation of Smith's Fifth Amendment and Article I, § 9 rights by repeatedly commenting on and arguing a negative inference from Smith's decision not to testify and commenting on the "lack" of evidence only Smith could have provided?

6. Is reversal required for the constitutionally offensive misconduct where the prosecution cannot meet the heavy burden of proving that misconduct harmless beyond a reasonable doubt?

7. Did the prosecutor commit flagrant, prejudicial misconduct in misstating the jury's role by telling them they had to decide the "truth" and who was telling that "truth" in order to decide the case and in deliberately asking questions designed to misrepresent the evidence on a crucial issue and further bolster its case?

8. Were Smith's due process rights to a fundamentally fair trial and his rights to freedom of association and speech violated by admission of irrelevant, highly prejudicial evidence of his sympathies and speech regarding an unrelated motorcycle group, as well as unrelated weapons?

9. A claim of self-defense negates the mental element of the

charge against which it is leveled. Because felony murder renders criminal an unintentional death which has occurred in the course of or furtherance of an underlying felony, the mental element is that of the underlying felony. Where the defendant is charged with felony murder based upon the commission of a second-degree assault, was it error to instruct the jury on a standard of self-defense greater than that required for a second-degree assault? Further, was counsel prejudicially ineffective in both failing to object to erroneous instructions which applied the higher, inapplicable standard and in failing to propose instructions with the proper standard?

10. The only way to avoid an absurd and nonsensical result and comply with the rule of lenity is to interpret the current second-degree felony murder statute so as to permit conviction based upon the predicate crime of assault only if the assault is not the conduct which results in the death. Should this Court so interpret the statute and should the conviction be reversed where the predicate assault in this case was the conduct which caused the death?

11. Does the current second-degree felony murder statute violate equal protection where there is no limit to the prosecutor's discretion to charge a higher crime for the same acts and no basis whatsoever, let alone a rational basis, for treating such similarly situated defendants differently? Further, does it offend fundamental principles of fairness to allow such unfettered discretion and to permit the prosecutor to

prohibit defendants who commit essentially the same crime from presenting lesser included offense options to the jury under one charge but not the other and to arbitrarily select which defendant faces far greater punishment for the exact same act?

12. Did the sentencing court err and act outside its statutory authority by failing to set forth the criminal history it used in sentencing Smith, relying on convictions the state conceded it could not prove and on out-of-state convictions even though the prosecutor presented no evidence those out-of-state convictions were comparable to Washington felonies? Further, was counsel ineffective in failing to be prepared for sentencing?

13. Does cumulative error compel reversal where all of that error went directly to Smith's claim of self-defense and the result of those errors was that Smith was deprived of a fair trial?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Carl Smith was charged by amended information with second-degree felony murder and second-degree assault, both with deadly weapon enhancements and with the allegations regarding "multiple current offenses" and "prior unscored misdemeanor or foreign criminal history."<sup>4</sup> CP 1096-1097; RCW 9A.32.050(1)(b); RCW 9A.36.021(a); RCW 9.94A.510; RCW 9.94A.533; RCW 9.94A.535; RCW 9.94A.602. Pretrial and trial proceedings were held before the Honorable Brian

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<sup>4</sup>The aggravating factors were later dismissed. See SRP 1-47.

Tollefson on November 14 and 21, 2008, January 22, 30, February 5, 6, March 14, April 2, 9, 13-17, April 20-23, 30, May 4-7, 11-4, 18-21, June 1-4, 8-10, 12 and 15, 2009, after which Smith was acquitted of the second-degree assault but found guilty of the felony murder and the deadly weapon enhancement. RP 1, 131, 263, 444, 539, 689, 846, 989, 1143, 1278, 1435, 1580, 1706, 1833, 1986, 2156, 2307, 2402, 2501, 2901, 2769, 2798, 2966, 2975-2991, 1RP 1, 2RP 1, 3RP 1, 4RP 1, 5RP 1, 6RP 1, 7RP 1, 8RP 1, 9RP 1, 10RP 1, 11RP 1, 12RP 1, 13RP 1, 14RP 1, 15RP 1, 16RP 1.<sup>5</sup> CP 1242-48. After motions and other hearings on July 23, 24, August 7, August 10, August 28, September 25 and October 29, 2009, on December 11, 2009, the trial court denied a motion for a new trial and ordered Smith to serve a standard-range sentence which included 24 months for the enhancement. 17RP 1, 18RP 1, 19RP 1, 20RP 1, 21RP, 22RP, 23RP, SRP 1-47; CP 1366-1379. Smith appealed and this pleading follows. See CP 1413-25.

2. Testimony at trial

On the rainy night of April 5, 2008, Dana Beaudine was in a fight outside the Bull's Eye Tavern at about 9:45 p.m.. RP 1717, 2007. The fight was not unusual, as fights broke out at the bar almost every night, according to longtime bartender Joy Hutt. RP 2582, 2595. Because Beaudine died as a result of his injuries, however, the fight and events leading up to it became the subject of the police investigation which

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<sup>5</sup>Citation to the verbatim report of proceedings is explained in Appendix A.

followed. See RP 1557-62.

Before the fight, Beaudine had been in the tavern with his fiancée, Shannon Ford, and friends Vince James and Reyna Blair. RP 699-703, 970-78. Also there, as was often the case, were people described as wearing “biker” gear. RP 454-59, 980-81, 2345-46. Some of these people and others with them not wearing such gear were ultimately accused of being involved in the fight and causing Beaudine’s death. Those accused were Carl Smith, Barry Ford, Mike McCreven, and Terry Nolan. RP 1009, 1192.

Witnesses gave very different versions of the events leading up to the fight and the fight itself. Some witnesses did not notice any “heated words” or similar exchanges between Beadine and Smith, Ford, McCreven and Nolan while they were all sitting with their respective parties at separate tables inside the bar. RP 235, 347-401, 699-703, RP 2209. The bartender, however, was clear that Beaudine, a “regular,” was “mouthing... off” at one of the men in biker gear. RP 2525. Hutt, who had worked there for years, heard Beaudine say something very derogatory about the “patch,” i.e., motorcycle club symbol the other men were wearing. RP 2525. In fact, Hutt saw Beaudine grab one of the men by the coat physically and say something like, “your colors aren’t worth anything.” RP 2525. Beaudine was also “yapping . . . off” on the other side of the bar, loudly proclaiming that he was a member of the Hell’s Angels. RP 2526, 2545.

Hutt did not think the “bikers” were really paying much attention to Beaudine’s antics, though. RP 2531-44. Instead, they were focused on a group of young ladies who were at the bar for a “bachelorette” party and were sitting nearby. RP 2531-44.

An officer who later investigated conceded that someone had told him that Beaudine had made some statements of some kind in the bar. RP 659-60.

Of the witnesses who did not notice any altercations or “heated words,” Vincent James admitted he was not really paying attention to anyone else. RP 2209. James also conceded that Beaudine had to have gotten up and left the table to use the restroom because “[h]e drank a lot of beer” that night, and James had no idea what happened then. RP 2244. Howden, who was standing near the door and not next to the relevant groups, admitted the bar was noisy and it was difficult to hear people when they were talking. RP 234-35. Heather Diamond, there with the “bachelorette” party, confirmed that the bar was very loud and that she left several times to go outside and smoke. RP 343-401. For her part, Reyna Blair admitted she was “pretty buzzed” that night and was not really paying attention. RP 699-703. In fact, she did not even notice anyone wearing biker jackets that night. RP 699-703.

Shannon Ford, Beaudine’s fiancée, did not see any “exchanges” but said instead that at least one of the men at the other table had appeared to be “glaring” at Beaudine at some point and it made Ford so

uncomfortable that she suggested they leave. RP 641, 663, 667, 983, 1005. At the later trial, she said more than one person was “glaring” but in a defense interview she had said it was only one, later identified as Nolan. RP 1138, 1193. Ford admitted she never said anything to anyone about feeling uncomfortable or about any “glaring” to anyone at her table, the bartender or the security personnel. RP 277, 1005, 1072, 1175.

Ford admitted that Beaudine was not sitting but instead standing at the table much of the time. RP 1003. She also admitted that she was out of the bar several times to go smoke a cigarette but said no one had said anything had happened while she was gone. RP 999-1000. Ford was not with Beaudine when he went up to the bar to get his drinks so she did not know what happened at those times. RP 980-83, 999-1000.

Ford also said she saw Nolan turn towards another man at the other table, later identified as Barry Ford<sup>6</sup>, who then had his phone out. RP 1006-1007, 1191, 1195-96.

When they left, Ford said, she thought “a couple” of the men were following them and it made her “uneasy.” RP 1076, 1197. Again, however, she never said anything about any concerns to Beaudine, James or Blair, who were all walking out together. RP 1076.

Diamond, who was outside smoking, said the four men from the “biker” table inside the bar were already outside and appeared to be just

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<sup>6</sup>To distinguish between Shannon Ford and Barry Ford, Mr. Ford will be referred to as “B. Ford.”

talking amongst themselves when Beaudine came out and walked across the parking lot towards them. RP 359, 377. Kathleen Baccus, also outside, saw something far different, noticing a couple of guys come out the door together, “clearly not happy with one another,” fighting, yelling at each other and arguing, with a woman behind them yelling. RP 2328-41.

According to Ford, she and Beaudine said goodbye to Blair and James just outside the restaurant, then went to Ford’s SUV. RP 1017-18, 1074, 1179. Blair, however, testified that she went with Beaudine and Ford to Ford’s truck because Blair had left her purse inside and needed to get it. RP 754-72. Ford said that, once they were at the SUV, she saw a man, later identified as Carl Smith, approach Beaudine with his “fist cocked back.” RP 1022, 1025-26, 1169. Ford first said she was not sure if Beaudine blocked the fist but then said she saw him do so. RP 1206. Ford admitted she did not see Smith’s fist make contact with Beaudine. RP 1206.

Ford said someone then came up and grabbed Beaudine from behind and a fight ensued, heading towards the back of her SUV where it ended up with people on the ground “intermingled.” RP 1029, 1170. She did not see who took it “to the ground,” thought there were more than three people involved and said she tried to go into the “pile” for Beaudine but was unsuccessful. RP 1030, 1112. Ford next saw a man she said was Nolan leave the melee, go to a nearby motorcycle, grab something which

she could not see from a saddle bag and go back to the group. RP 1032-39. From a distance, someone yelled something about the police coming and everyone then “scrambled” and left. RP 1040. Ford thought she saw men leaving on motorcycles and that one of those men was the one who she thought had started the fight. RP 1041.

Ford’s version of events changed over time. The night of the incident, she told officers that neither she nor Beaudine had been drinking at all. RP 1068, 1183. At trial, she admitted they had and said what she had really meant was that they had not had as much to drink as Blair and James. RP 1183. In her interview she had said she did not see Beaudine hit Smith. RP 1184. But she had also said that, after Smith swung at Beaudine, Beaudine then hit him. RP 1187-88. At trial, she was sure one man came up and started the fight, but to police, that night, she claimed five people had suddenly jumped Beaudine at the same time. RP 1076-77. Also at trial, Ford tried to minimize Beaudine’s own acts by saying he never hit anyone, but in a pretrial interview she had said he had, making that concession three separate times. RP 1087-88. Ford declared that, over time, she had thought about what happened and “recalled” things differently now. RP 1201.

In contrast to Ford’s version of events, Baccus, the bystander, saw two men leave arguing and yelling with a woman following behind and said the fight occurred when the men went through the parking lot and it became “more physical.” RP 2329. Baccus said the fight went on for a

few minutes and then others joined in. RP 2323. Baccus made it clear that it was “not like one guy was clearly jumped by a whole mob of people” but that it instead looked more like “kind of a big mess of people.” RP 2332-33. Baccus also said it did not appear that anyone got “jumped.” RP 2333. There was a lot of yelling and screaming, a man fell and was hit in the face a few times and everyone left. RP 2336, 2358. Baccus thought some men left on motorcycles shortly after that. RP 2360.

Diamond gave yet another version, saying she saw Beaudine come out, go across the parking lot and go up to the four guys she had seen inside the bar. RP 361, 368. Something occurred but she could not say what until she saw Beaudine go to the passenger side of a vehicle where he then hollered “[f]uck your colors.” RP 361, 386. At that point, Diamond said, two of the men went over to Beaudine and “kind of pushed” him, after which a fight then started. RP 363-64. Diamond saw the other two men ultimately go over to the fight and thought everyone was fighting. RP 364-65. It ended after Diamond went inside to tell someone and Diamond then heard a car and some motorcycles leave, although she did not know if the people involved were riding or driving those vehicles. RP 367.

When she spoke to police, Diamond told them she could not really see much from where she stood. RP 375. Unlike her testimony, with police she described the fight as involving two guys who walked towards the coffee stand and started fighting with each other, after which

some other guys got involved. RP 374, 398. She also said it looked like “just a scuffle.” RP 399. Diamond admitted at trial that the level of detail she had given about the incident had gotten more extensive with each interview and over time. RP 384-85.

Hutt, the bartender, heard that a fight had started and ran outside, screaming at everyone to leave and that she was calling the police. RP 2529. She said she saw two men, one of them Beaudine, with blood on their shirts, no longer fighting. RP 2529-30. She told them both to leave and again said she was calling police, at which point each man pointed to the other like kids, declaring “he started it.” RP 2530. Hutt ran back into the bar to call police and people were kind of scattering when she came back out. RP 2548, 2578.

Reyna Blair was not really focused on Beaudine when they were at the truck and did not know what he was doing or if he was confronting anyone. RP 754-72. She saw the fight but was not sure who was involved. RP 744-72. She said she did not see Beaudine hit anyone but admitted that, once the fight started, she turned her back and ran away. RP 761-62. Blair, who described herself as “buzzed,” admitted that a lot of what she thought she “knew” about what happened came from the gossip going around as everyone was milling about later that night. RP 763. For example, she told an officer Beaudine was stabbed 15 times, although she saw nothing of the sort. RP 763. She conceded she had told him that because that was what she had heard. RP 763.

Jennifer Abbott, also there for the bachelorette party, was also outside smoking at the relevant time. RP 466. Abbott described the incident differently as well, saying she first heard a woman screaming and then saw a group of “bikers” run across the lot to where a woman and man and possibly some others were. RP 466. She could see punching but not who was being punched or what was really going on. RP 472, 484. Like Diamond, by trial Abbott was saying someone might have been held by another during the fight but she had not said anything about that to officers. RP 472, 474, 497, 508-509. Abbott’s view was also obscured and she did not see anyone on the ground. RP 475-79, 491.

James did not see how the fight started because he was talking with someone at the time. RP 2211-17, 2235. In fact, he did not even see where Beaudine and others were. RP 2211-17. James said he went over once he heard what was going on, then tried to drag Beaudine out. RP 2246. Although he claimed at trial that he did not punch anyone himself, James had admitted to the contrary when talking to police. RP 2246. And officer who interviewed James said he was not very cooperative that night and seemed vague and evasive. RP 580.

Ford was sure that James never got involved in the fight. RP 1043-44.

Howden, who ran outside after the fight started, thought he saw James there and saw him get hit in the back of the head. RP 207, 245. Howden did not see how the fight started or who started it. RP 241, 245,

279-301. He could not say whether Beaudine was throwing a lot of punches himself. RP 213-14. At trial, Howden described the guys involved as wearing “biker” jackets with “Hidalgos” on them. RP 208, 212. When he spoke to officers that night, however, he did not give that description, just saying they were wearing “biker” jackets. RP 271-73.

At trial, Howden admitted he could not really see what was going on or who was doing what during the fight because he was too far away and his vision was obscured by cars. RP 241-45, 312. He nevertheless said he thought some people were holding Beaudine while others were beating him “kind of.” RP 312. He conceded that he did not know for sure that was what was actually happening. RP 312, 329-30.

After the fight, Howden saw a guy who was involved and was wearing a white shirt get into a car after talking a little with three men on motorcycles. RP 216-17. The men on the motorcycles drove away but not quickly or with any sense of “urgency.” RP 253, 258, 307. Howden noted the license plate number and later gave it to police. RP 217, 308.

None of the witnesses saw a weapon during the fight. RP 246, 260, 370, 717. Howden said he was focused on the man in the white shirt, later identified as Carl Smith, and that he never saw that man with any weapon at all. RP 295. Beaudine died shortly thereafter, however, from stab wounds to his neck and torso. RP 1557-62, 1693-95.

A folding pocket knife was found about 6-12 feet away from the coffee stand in the parking lot, with what appeared to be blood on it. RP

540, 567, 2007-2009. No one tested it to determine if it was, in fact, blood, and to whom it belonged, nor did any of the officers take samples of or test what they testified appeared to be blood in the parking lot and on a few of the cars. RP 519-40, 564, 573, 611, 2068-69. The lead detective, Detective Wood, admitted that there had been information indicating that Beaudine might have been armed at the time of the fight. RP 2098-99. The officer declared, however, that he had not tested the blood at the scene as the lead investigator because the “only information” he had been given of anyone bleeding was Beaudine. RP 2146.

Another officer admitted he had been told that Beaudine may have been armed with some type of weapon during the fight. RP 1370. That officer was ordered to search Shannon Ford’s vehicle for weapons. RP 1370. Although no weapons were found, it came to light that there had been a purse on the floor of the vehicle before and during the fight but it had been removed by someone after the fight, before the vehicle was impounded. RP 2103. Wood admitted that this meant someone who was not an officer must have had access to that vehicle, which further meant that the area was not as fully secured as he thought. RP 2103.

Shannon Ford claimed she did not keep weapons in her car and did not think Beaudine did, either. RP 1020. She admitted, however, that Beaudine had driven her truck by himself just a few days before, all the way to Vancouver. RP 1020.

No usable fingerprints were on the knife. RP 1865-67, 2097. A

forensic expert with Washington State Patrol tested the knife's handle looking for "handler DNA," comparing it with DNA profiles of, *inter alia*, Beaudine and Smith. RP 1935-55. It matched Beaudine's profile exactly. RP 1940, 1955. While the state's expert maintained that it was not without the realm of possibility that others could have handled the knife, he admitted the entire rough half of the knife handle was "swabbed" and the DNA profile was not a "mixed" profile of several individuals but just Beaudine's DNA alone. RP 1941, 1952, 1965.

Ford testified that she did not think Beaudine had any time to arm himself with a weapon during the fight. RP 1090. She admitted, however, that while she was watching the man retrieve something from the motorcycle, turn around and walk back, 3-4 minutes passed during which she had no idea what Beaudine was doing. RP 1092-93.

The license plate of the car seen leaving was traced to a woman who had a trailer on Carl Smith's property, so officers went there in the early morning hours after the incident. RP 1525-50. Smith welcomed the officers and they found the suspect car there in a shed. RP 1540-57. There was suspected blood inside the car, on the driver's side door armrest, a headrest and upper portion of the seat. RP 1244, 1314-17, 1365-66. It was not tested to verify it was blood and whether it belonged to Smith, Beaudine or someone else. RP 2069, 2111.

Smith voluntarily gave a statement, as did several of the other men ultimately accused of being involved in the fight. At the time of Smith's

statement, just hours after the fight, officers observed injuries on Smith's fingers and hands. RP 1558. An officer who initially denied seeing any injuries admitted another officer had seen them and commented. RP 1548, 1557-58. The same officer who had not noted the first injuries also initially denied there were any injuries on Smith's head but admitted that he had been made aware that there was, in fact, such an injury. RP 1558-59. That officer did not take steps to inspect it and took no photo of it. RP 1559, 1565. Another officer saw injuries and was told that Smith was dizzy from the head injury he suffered during the fight. RP 1408. That officer opined that the injuries were not "serious" but conceded that he was not an expert and that someone can have a life threatening head injury which did not really show on the outside. RP 1395-1403.

The lead officer asked about Smith's head injury and Smith said he had been struck or had struck his head during the fight and it made him somewhat dizzy. RP 2106. That officer testified that he looked at Smith's head and did not see anything but admitted he did not part Smith's hair and look at his scalp and never put anything in his report about looking at Smith's head. RP 2107- 2110.

At the time of the interview, Smith had scratches on his left cheek that looked "fresh," scratches and abrasions to parts of his forehead and the left and right side of his face, dried blood or an abrasion on his scalp, dried blood beneath his nose and mustache and swelling of his nose indicating a bloody nose. RP 1235, 1363, 1364, 2104, 2214. Although

the lead officer initially denied that Smith had dried blood beneath his nose when interviewed, he admitted it when shown a picture showing that injury and his swollen nose. RP 2105, 2114

Beaudine's blood alcohol level was .18 at the time he died. RP 1767, 1786-87. The medical examiner thought Beaudine had probably more than 10 drinks in him at the time of his death. RP 1767, 1786-87. Indeed, the doctor admitted, he "would not get in a car with" Beaudine in his condition. RP 1788-91, 1801. The doctor also said that someone with that much alcohol in their system might have not only slowed coordination and reflexes but also lower inhibitions which might make him more aggressive or violent. RP 1788-91, 1801.

An officer admitted that Hutt, the bartender, told him she never had any problems with the men she said were "Hidalgos" and that they were "regulars" at that bar and others where she worked. 16RP 15-24. Beaudine, however, was another story. 16RP 15-16. He was also a "regular," Hutt said, and Hutt told Wood she had problems with him. 16RP 15-16.

### 3. Codefendant's improper "facts"

At his sentencing, Mr. Smith addressed the court, Shannon Ford, Beaudine's family and Smith's codefendants. SRP 46. Smith said he was sorry about what had happened on that "horrible night" when he had been "attacked with a knife" and defended himself. SRP 46. He said that, although people might think he "overdid" his response, "they wasn't in

my shoes so they don't know." SRP 46.

Smith disputes the characterizations of codefendant Barry Ford of these statements. See Brief of Ford at 18, 22 (describing the statements as follows: Smith having "taken responsibility for killing" Beaudine and having "confessed to stabbing" Beaudine); see SRP 1-48. Smith also objects to Ford's declarations that Beaudine's knife was "eventually obtained by Mr. Smith and used to stab Mr. Beaudine" as unsupported by any evidence in the record. See BOF at 36; RP 246, 260, 370, 717 (no witness saw a weapon in anyone's hands). This Court should not consider as "facts" these improper declarations in Ford's brief as those declarations relate to the issues presented on appeal for Smith.

C. ARGUMENT

1. SMITH'S ARTICLE 1, §22 AND SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO FUNDAMENTAL FAIRNESS WERE VIOLATED, COUNSEL WAS PREJUDICIALLY INEFFECTIVE AND THE PROSECUTOR COMMITTED MISCONDUCT IN EXPLOITING THE VIOLATIONS

Under the state and federal due process clauses, defendants in criminal cases have the right to present a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 51 (1983), limited in part and on other grounds by State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); Sixth Amend.; 14<sup>th</sup> Amend.; Art. 1, § 22. This right guarantees a defendant the opportunity to "present the defendant's version of the facts" to the jury, instead of having them hear only the version presented by the state. State

v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), abrogated in part and on other grounds by, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). In addition, due process mandates that criminal prosecutions comport with prevailing notions of fundamental fairness, which requires giving the defendant a meaningful opportunity to present a complete defense. See State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994).

In this case, this Court should reverse, because Smith's rights to present a defense and to a fundamentally fair trial were violated when the court excluded evidence which was relevant, material and necessary to Smith's defense. Further, counsel was ineffective in addressing these issues and the prosecutors committed flagrant, prejudicial misconduct in arguing Smith's guilt based upon his "failure" to present the very evidence the prosecutors moved to exclude.

- a. Improper exclusion of Smith's statements
  - i. Smith's rights were violated by exclusion of his statements, which were relevant, necessary and material to his defense

First, Smith's rights to present a defense and to a fundamentally fair trial were violated when the trial court prevented Smith from admitting evidence of the statements he made to police. The right to present a defense ensures the defendant the opportunity to "put before a jury evidence that might influence the determination of guilt."

Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40

(1987). Further, a defendant is entitled to a “fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). While this right does not guarantee the defendant the opportunity to admit irrelevant, immaterial evidence, it does ensure that he is allowed to present evidence which is relevant and material to establish his defense. See, e.g., State v. Bell, 60 Wn. App. 561, 565, 805 P.2d 815, review denied, 116 Wn.2d 1030 (1991).

Here, Smith’s defense was self-defense, and the evidence excluded by the court was directly relevant, material and necessary to that defense. Although the prosecutors had initially announced their intention to use Smith’s statements at trial - and have even held a suppression hearing so those statements would be deemed admissible - ultimately they decided not to use them. 4RP 11-4, 22-36, 5RP 8, 14-16, 7RP 31-33, 9RP 11, 119, RP 99-104. When counsel then indicated that he was planning on introducing the statements himself, the prosecutors then moved to prevent it, arguing that those statements were inadmissible hearsay. RP 99. Counsel argued that the statements were admissible under the “state of mind” hearsay exception of ER 803(a)(3), because Smith was claiming self-defense. RP 99-104. The court ruled the statements were inadmissible, questioning whether “state of mind” was relevant when self-defense was raised. RP 99-104. The court indicated, however, that it

would be willing to reconsider if counsel provided briefing indicating to the contrary. RP 106.

While counsel apparently never filed such briefing, he tried to introduce evidence of Smith's statement later in the trial, asking an officer whether he had searched Shannon Ford's vehicle for guns or knives because Smith had told said in his interview that Beaudine had been armed during the fight. RP 1370. The prosecutor's objection was sustained and the prosecutor declared, "[t]his was a subject of a motion in limine, and move to strike the question." RP 1370. With the jury out, there was argument about whether the prosecution had "opened the door" by asking the officer about conducting that search, so that Smith should be allowed to establish why. RP 1371-73. The prosecutor argued that Smith could not claim self-defense unless he testified, because it was only then that he could "establish that he believed that there was a weapon in the hand of the victim." RP 1371. The court did not think the door had been opened but did not strike the question. RP 1375.

Later, in presenting Smith's case, counsel again moved to admit the Smith's statements, arguing they were not hearsay because they were evidence of Smith's "state of mind," directly relevant to his defense of self-defense. RP 2648. The prosecutor again argued that Smith could not introduce such evidence unless he testified, claiming that Smith was not entitled to use the "state of mind" exception and could only introduce such evidence through direct testimony. RP 2650. Counsel pointed out

that the evidence rules applied equally to defendants and prosecutors. RP 2651. Without further explanation of its reasoning, the court denied Smith's motion. RP 2655.

That ruling was both an abuse of discretion and a violation of Smith's rights to present a defense. At the outset, while the admissibility of evidence is usually a discretionary decision, reviewed for "abuse of discretion," the "exclusion of evidence which a defendant has a constitutional right to elicit is an unreasonable exercise of discretion." State v. Reed, 101 Wn. App. 704, 709, 6 P.3d 43 (2000), limited in part and on other grounds by, Darden, supra; see also State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). Thus, the first question is whether the evidence is relevant and material to the defense.

Here, there can be no question Smith's statement met that standard. As a threshold matter, although neither the prosecutor nor counsel offered that statement as an exhibit, there is ample evidence to establish its content and thus its materiality and necessity to Smith's defense. At the suppression hearing and in discussions about the statement, it was made clear that Smith had told police not only that Beaudine had been loud and obnoxious inside the tavern, telling people he was a Hell's Angel and trying to cause trouble by his "exchanges" with Smith's friends, but also that Beaudine - not Smith - had started the physical fight. 4RP 58-60, 5RP 40-46. Smith told police that, when they left the tavern, Smith said, Beaudine had "flanked" Smith and started

beating on Smith until one of Smith's friends pulled Beaudine off. 5RP 40-46. Smith also told police that Beaudine was getting the best of Smith until Smith's friends helped him out, and that Smith had not stabbed Beaudine or anyone else. 5RP 40-46, 57.

Thus, Smith's statement was directly relevant to whether Smith had acted in self-defense at the time of the incident. See, e.g., ER 401 (standard for relevance); Darden, 145 Wn.2d at 621 (threshold for proof of "relevancy"). Indeed, the evidence of the statement was more than just relevant - it was necessary and material to Smith's claim of self-defense. Such a claim is evaluated from both a subjective and objective perspective, "from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993).

Further, when a defendant raises self-defense, the defendant's "state of mind" is directly relevant. See State v. Stockmyer, 83 Wn. App. 77, 81, 920 P.2d 1201 (1996). Such evidence is admissible in cases of self-defense because it is "relevant to whether a reasonable person in [the same] . . . situation could have feared imminent danger," sufficient to allow the defendant to act in self-defense. State v. Walker, 136 Wn.2d 767, 775, 966 P.2d 883 (1998); State v. Painter, 27 Wn. App. 708, 709-10, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981). Because the "justification of self-defense must be evaluated from the defendant's point of view" at the time of the incident, evidence of his "state of mind"

is proper. Stockmyer, 83 Wn. App. at 81-82 n. 5, quoting, State v. Hughes, 106 Wn.2d 176, 189, 721 P.2d 902 (1986). Further, statements expressing a defendant's state of mind are not considered hearsay. See State v. Johnson, 61 Wn. App. 235, 242, 809 P.2d 764 (1991), affirmed, 119 Wn.2d 167, 829 P.2d 1082 (1992) (“[i]t is well-established that out-of-court statements offered to show the defendant's state of mind are admissible so long as they are relevant”).

Indeed, in this case, the prosecutors specifically acknowledged that the defendants' “state of mind” was, in fact, relevant to “whether or not they felt that they had to defend themselves.” RP 2510. Their contention, however, was that the only way a defendant could introduce evidence of his state of mind was if he testified, rather than introducing such evidence through the “state of mind” hearsay exception. RP 1371, 2510.

But that contention ignores not only the relevant rule but the rights at issue. Nothing in ER 803(a)(3) limits the evidence which may be introduced under the “state of mind” exception to testimony. See ER 803(a)(3). Indeed, the rule specifically contemplates that the evidence will come in through testimony of another about the declarant's statements, because it admits those statements as nonhearsay “even if the declarant is available as a witness.” ER 803(a); ER 803(a)(3). Further, the prosecution's theory runs afoul of the defendant's rights under the Fifth Amendment and Article I, § 9. Under those provisions, Smith had the right to decide not to testify. See, e.g., State v. Ramirez, 49 Wn. App.

Wn.2d 1012 (1997); see also Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed.2d 504 (2006) (rules excluding evidence may violate the right to present a defense if the rules are disproportionate to the purposes they are designed to serve). And where evidence has high probative value to the defense, “no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. Art. 1, § 22” rights to present a defense. Hudlow, 99 Wn.2d at 16; Jones, 168 Wn.2d at 723-24.

Thus, in Jones, the Supreme Court recently held that, even if evidence would have been inadmissible under the “rape shield” law, the exclusion of that evidence violated the state and federal rights to present a defense because the evidence had “high probative value” to the defendant’s defense. Jones, 168 Wn.2d at 720-21. Thus, the Court held, the evidence “could not be restricted regardless how compelling the State’s interest” may be in doing so and despite the provisions of the rape shield law. 168 Wn.2d at 720-21.

Here, the evidence excluded by the court was more than just of “high probative value” to Smith’s defense - it was crucial. Smith’s defense was self-defense. That defense necessarily required the jury to be aware of Smith’s beliefs about what happened during the incident, i.e., his state of mind. Walker, 136 Wn.2d at 709-10. Indeed, as the Supreme Court has held, “[b]y learning of the defendant’s perceptions and the circumstances surrounding the act, the jury is able to make the ‘critical

determination of the ‘degree of force which . . . a reasonable person’” in the same situation would believe to be necessary. Janes, 121 Wn.2d at 239, quoting, State v. Wanrow, 88 Wn.2d 221, 238, 559 P.2d 548 (1977) (quotations omitted). Put another way, the subjective aspect of self defense requires that the jury be presented with evidence so that “the jury fully understands” the defendant’s actions “from the defendant’s own perspective.” Janes, 121 Wn.2d at 239.<sup>8</sup> Only then can the jury evaluate whether the defendant had a reasonable apprehension of harm even if there was no objective evidence of actual harm. See State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999), reversed on other grounds sub nom. Riley v. Payne, 352 F.3d 1313 (9<sup>th</sup> Cir. 2003), cert. denied, 543 U.S. 917 (2004).

Because Smith’s statements were relevant, material and necessary to Smith’s defense of self-defense, the trial court’s decision preventing Smith from admitting that evidence violated his rights to present a defense and to fundamental fairness. This Court should so hold.

- ii. Counsel was prejudicially ineffective in failing to provide and argue the relevant caselaw when given the opportunity

This Court should also find counsel prejudicially ineffective for failing to provide the trial court with briefing which would have satisfied the court that Smith’s “state of mind” was relevant - and thus Smith’s

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<sup>8</sup>Thus, in Janes, the Court held that evidence of “battered child syndrome” was admissible to explain the defendant’s state of mind when it was claimed that he acted in self-defense due to suffering from that syndrome. 121 Wn.2d at 236-39.

statement admissible - despite the court's willingness to reconsider its ruling. Both the state and federal constitutions guarantee the accused the right to effective assistance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). If Mr. Smith can show that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Here, Smith can more than meet that standard. Counsel is ineffective even despite a presumption of effectiveness if counsel's performance fell below an objective standard of reasonableness, under the circumstances, and counsel's action or inaction cannot be seen as legitimate strategy or tactics. See e.g., State v. Red, 105 Wn. App. 62, 66, 18 P.3d 615 (2001), review denied, 145 Wn.2d 1036 (2002). Failure to argue or cite to relevant caselaw may fall below that standard if that failure prevents the court from making an informed decision in light of that law. See, e.g., State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002); see also, State v. Ermert, 94 Wn.2d 839, 850, 621 P.2d 121 (1980).

In this case, there could be no tactical or strategic reason for counsel to have failed to present the relevant caselaw when offered the chance to do so. Having already made the motion to admit the evidence, counsel clearly understood how incredibly crucial it was to his client's defense. Cases such as Walker, supra, Janes, supra, and Painter, supra, would have made it clear to the trial court that Smith's state of mind was relevant and evidence of it admissible in order to support Smith's claim of self-defense. Yet counsel failed to provide this authority, despite the court's apparent willingness to consider it. See RP 2656. Instead, counsel only gave an oral citation to a completely distinguishable case which involved not a defendant's state of mind and a claim of self-defense but a victim's state of mind introduced by the state for a different purpose. RP 2656; see State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003).

Given the court's invitation and given that there was, in fact, authority to support introduction of the evidence, counsel's failure to cite that caselaw is inexplicable. And given that this failure resulted in the trial court's continued exclusion of crucial evidence which was material and necessary for Smith's defense, counsel was prejudicially ineffective and this Court should so hold.

- iii. The prosecutor committed serious, prejudicial misconduct in faulting Smith and arguing his guilt based on the "failure" to present evidence when that "failure" was caused by the prosecution's own motion

Counsel's failure to present the relevant caselaw not only ensured

that the evidence crucial to his client's defense was excluded but also allowed the prosecutors to commit flagrant, prejudicial misconduct in relation to the exclusion of that evidence. It is improper and misconduct for a prosecutor to denigrate the defendant for failing to present evidence when that "failure" was actually based upon the prosecutor's successfully moving to exclude it. State v. Kassahun, 78 Wn. App. 938, 952, 900 P.2d 1109 (1995). Thus, in Kassahun, such misconduct occurred when the prosecutor first moved to exclude evidence that the victim and witnesses were gang members and involved in gang activity outside the defendant's store and then belittled the defendant during closing argument for his claim that he felt threatened by the gang activity because there had been no evidence of such activity presented. 78 Wn. App. at 952. Using the absence of the very evidence the state had moved to exclude in arguing that the defendant's claims of fear and self-defense were not credible was serious misconduct, the Court held, because it was the prosecution's own efforts which kept the evidence out rather than a lack of the existence of the evidence. 78 Wn. App. at 952.

Here, that is exactly what the prosecutors did. After first successfully preventing Smith from presenting his statement, the prosecutor then faulted Smith in closing argument for having "failed" to present that very evidence. Repeatedly, the prosecutor told the jury that Smith had somehow failed to establish self-defense because he had presented no evidence that he reasonably believed that he was in

imminent danger, or that Beaudine was going to commit a felony (RP 2936), that there was “no evidence” of self-defense (RP 2936-37), and that there was no evidence of any reasonable belief on the part of the defendants, including Smith, that Beaudine was going to cause them harm, and no testimony to that effect.<sup>9</sup> RP 2936-37. Yet it was the prosecutors themselves who ensured that the jury heard no such evidence, by moving to exclude Smith’s statement. Had it been admitted, Smith’s statement would have established that, in fact, Smith had acted in self-defense and that he had a reasonable belief that Beaudine was going to cause harm because Beaudine was causing such harm, beating Smith until Smith’s friends intervened. See 5RP 40-46. It was patently improper for the prosecutor to first prevent the admission of this relevant, material evidence by way of moving to exclude it and then argue that the jury should rely on the lack of such evidence being presented as evidence of Smith’s guilt. These arguments were flagrant, prejudicial misconduct which went directly to the heart of Smith’s defense, and this court should so hold.

- b. Violation by refusing to allow Smith to admit evidence of Beaudine’s reputation for violence and to rebut “good character” evidence after the prosecution repeatedly opened the door

A further violation of Smith’s rights to present a defense and to a fundamentally fair trial occurred when the trial court first prevented Smith

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<sup>9</sup>The impropriety of this argument in relation to Smith’s rights to decline to testify is discussed in more detail, *infra*.

from introducing evidence of Beaudine's reputation for violence and then repeatedly refused to allow Smith rebut the improper, prejudicial "good character" and bolstering evidence the prosecutors elicited throughout the trial. Pursuant to RAP 10.1(g) and this Court's Order of Consolidation, Smith adopts and incorporates by reference the arguments presented in the opening brief on appeal filed by Ford (Assignment of Error ("AOE") 16) and Nolan (AOE 1) on the issue of the improper exclusion of this evidence even though it was directly relevant to whether Beaudine was the aggressor. In addition to those arguments, the Court should consider the following:

The exclusion of the evidence amounted to more than just an abuse of discretion. In addition to improperly excluding Beaudine's reputation for violence as argued by codefendants Ford and Nolan, the trial court's refusal to allow Smith to rebut the improper "good character" evidence the prosecutors repeatedly admitted to bolster their case was improper and a violation of Smith's rights. The right to present a defense is the right to have "a fair opportunity to defend against the state's accusations." Chambers, 410 U.S. at 294. Further, once improper bolstering has occurred, it would be "curious" and a violation of principles of "fundamental fairness" to preclude the opposing party from presenting evidence to rebut that bolstering. See, State v. York, 28 Wn. App. 33, 36-37, 621 P.2d 784 (1980). Indeed, when character is put in issue by a party, evidence which would not ordinarily be admissible

becomes admissible to respond to it. See State v. Renneberg, 83 Wn.2d 735, 736-37, 522 P.2d 835 (1974); State v. Brush, 32 Wn. App. 445, 448, 648 P.2d 897 (1982), review denied, 98 Wn.2d 1017 (1983).

Thus, in Renneberg, where there was testimony about the college experience of the defendant, as well as her background as a beauty pageant contestant, her membership in a glee club and science club and other evidence designed to bolster her in the eyes of the jury, the state was allowed to introduce otherwise irrelevant drug addiction evidence in order to “complete the tapestry” for the jury. 83 Wn.2d at 736-38.

Here, Smith was deprived of his right to “complete the tapestry” of Beaudine for the jury even after the prosecution had woven an intricate, pervasive web of “good character” evidence about Beaudine in an effort to bolster its case. First, the prosecutor successfully excluded evidence from the bartender, Hutt, and another witness which would have established that Beaudine caused problems nearly every time he was in the bar and was “loud and obnoxious.” RP 81-84. Next, the prosecutor successfully moved to exclude as “improper character evidence” Beaudine’s wearing of a “Hell’s Angels” jacket, testimony about whether he was a member of that gang (RP 658) and photos which would have shown Beaudine as he looked in life, including his detailed tattoos which the medical examiner described as including one with a “demon” appearance. (RP 71-74, 1692). Indeed, the photos of the tattoos were excluded as “prejudicial” even though the doctor had already talked about

and described Beaudine's tattoos at the prosecutor's behest. RP 1775-77. While there was some minimal testimony allowed to describe the tattoos, that evidence was not allowed to be supported with the same kind of high-impact pictures the prosecution was allowed to use against Smith and his codefendants. RP 1162, 1181.

At the same time that she was working hard to exclude evidence which might possibly complete the picture of Beaudine, the prosecutor was also introducing and eliciting evidence to bolster him, in an effort not only to garner sympathy with the jury for Beaudine but also to undermine the self-defense that Smith and the others were raising by convincing the jury that Beaudine was, effectively, not the kind of guy who would have acted aggressively and thus forced Smith and the others to act in self-defense. Over defense objection, the prosecution was allowed to introduce an "in-life" photograph which portrayed Beaudine wearing a silly hat, sitting with several young children at a kid's birthday party. RP 60. The prosecutor was then allowed to ask Shannon Ford, over defense objection, whether Beaudine had children and how many he had, and Ford identified the in-life photo as "Blaine's birthday party," describing Blaine as Beaudine's middle son and the other son as "Brett." RP 973. In case the jury was not already swayed by the happy, friendly and playful look Beaudine was wearing along with the silly hat, the prosecutor elicited from Ford that the picture depicted how Beaudine "appeared at the time of his death." RP 973. And to drive the point home, the prosecutor then

elicited testimony from Ford about Beaudine's "demeanor" the night of the fight, to which she responded, "[h]e was happy and social, **and that's how he is.**" RP 999-1000 (emphasis added).

Adding to the "happy and social" "family man" portrayal, the prosecutors then worked to distance Beaudine even further from any association with motorcycle gangs, to thus distinguish him from the taint the prosecution was laying against such groups. Ford testified that Beaudine was not a part of a motorcycle group or club - and true to the pretrial motion to exclude that he was a member (RP 658), the jury was left with that impression. RP 976.

Yet in juror voir dire, the prosecution specifically argued that it should be allowed to ask about jurors' knowledge of such groups as the Hell's Angels and other outlaw motorcycle groups because the prosecutor had a right to know if jurors had a negative view of the Hell's Angels as Beaudine was "supposedly representing himself" as a member of that group. 13RP 107.

Thus, Beaudine was painted as a happy, social family man with kids, who wore goofy hats for his child's birthday, who was someone who was responsible enough to tell a friend (James) that he could not drive because he had been drinking (RP 979), a man who was not in a motorcycle club, as distinguished from the men who were on trial for assaulting and killing him. The obvious purpose of introducing this "good character" evidence was to incite sympathy for Beaudine in an effort to

convince the jury that Beaudine could not have been guilty of acting aggressively or causing Smith to need to act in self-defense. And the obvious purpose of the prosecution's repeated, concerted effort to keep out any evidence which might have cast a shadow on the portrayal of Beaudine as a happy, social, family man was to prevent the defendants from balancing the state's improper "good character" evidence in any way.

By allowing the prosecution to admit the "good character" evidence designed to bolster the state's theory that Beaudine could not have caused any need for Smith to have acted in self-defense and then excluding all of the evidence to the contrary, the trial court violated Smith's rights to present a defense and his due process rights to fundamental fairness. This is especially so because of the incredibly prejudicial evidence the prosecution was allowed to introduce to cast the stain of "bad character" on Smith and his codefendants, such as the completely irrelevant, repeated evidence that they supported the notorious criminal motorcycle gang the "Bandidos."<sup>10</sup> Indeed, the inherent unfairness and hypocrisy of the prosecution arguing strenuously - and successfully - to exclude any potentially prejudicial evidence against Beaudine and paint him in a positive light while trying to introduce completely irrelevant evidence which could only paint Smith and his

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<sup>10</sup>Further issues regarding the improper admission of the extremely corrosive and prejudicial nature of the "Bandidos" evidence is discussed, *infra*.

codefendants in an extremely bad light was so obvious at trial that one of the trial counsel called it “telling.” See RP 953 (when the prosecution objected to excising part of a picture which showed support for the violent outlaw motorcycle gang the Bandidos).

Notably, it is well-recognized that visual images - such as those the prosecution succeeded in admitting to cast “bad” light on Smith and his codefendants - have an enduring, disproportionate impact on juries. See Belli, *Demonstrative Evidence: Seeing is Believing*, Trial, July 1980 at 70-71 (visual images resonate with jurors in a way “no amount of verbal description by itself could”); Chatterjee, *Admitting Computer Animations: More Caution and a New Approach are Needed*, 62 Def. Couns. J. 34, 36 (1995) (noting that “juries remember 85 percent of what they see as opposed to only 15 percent of what they hear”). Thus, the fact that the jury heard, in passing, that Beaudine had tattoos, or that he wore a Hell’s Angels shirt on the night of the incident cannot be deemed sufficient to have rebutted the “good character” evidence, starting with the “in-life” “family man with kids” smiling, happy photo of Beaudine.

The prosecution expended great effort to portray Beaudine as a friendly, likeable family man in order to bolster its case and make the jury believe that Beaudine could not have been the aggressor, an issue which was at the heart of Smith’s defense. The trial court’s inexplicable refusal to allow Smith to rebut this improper bolstering even though the prosecution had opened the door violated Smith’s rights to present a

defense and the due process mandates of fundamental fairness. It left the jury with an impression of Beaudine completely woven by the prosecution with no rebuttal and balancing by the defense. Smith's rights were violated by these rulings and this Court should so hold.

- c. Reversal is required because the prosecution cannot meet the heavy burden of proving these serious violations of Smith's fundamental constitutional rights constitutionally harmless

Reversal is required. Exclusion of evidence relevant and necessary to the defense is constitutional error because it "deprives the defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." See Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). Thus, if the trial court excludes evidence which is relevant and material to the defense of self-defense, reversal is required unless the prosecution can prove the constitutional error harmless. See State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)., cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986).

The prosecution cannot meet that heavy burden in this case. The constitutional harmless error test is only met if the state can prove, beyond a reasonable doubt, that the jury would have reached the same result if the evidence had been admitted. See Maupin, 128 Wn.2d at 929. It is important to note that this is a far different standard than the one employed when the issue on review is the sufficiency of the evidence.

Where the question is sufficiency, this Court uses a relatively deferential standard, looking to see if the evidence, taken in the light most favorable to the state, would be enough for *any* rational fact-finder to convict. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In addition, the burden is on the defendant to prove that the evidence was so deficient that no reasonable fact-finder could have made the required findings below. See, e.g., State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007).

In stark contrast, to prove a constitutional error “harmless,” the prosecution bears the burden of showing that *every* reasonable fact-finder would have convicted even if the error had not occurred. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Indeed, constitutional error is presumed prejudicial. Id. Rather than being deferential, the standard for constitutional harmless error, the “overwhelming evidence test, requires the Court to reverse unless it is convinced - beyond a reasonable doubt - that the constitutional error could not have had *any* effect on the fact-finder’s decision to convict. Easter, 130 Wn.2d at 242.

Thus, even when there is enough evidence to uphold a conviction against a “sufficiency of the evidence” challenge, that is not enough to meet the “overwhelming evidence” test. See, e.g., State v. Romero, 113 Wn. App. 779, 783-85, 54 P.3d 1255 (2002). Romero is instructive. In Romero, the defendant was accused of having shot a gun in a mobile

home park. 113 Wn. App. at 783. In addition to the evidence that Mr. Romero ran from the officers and was seen in the area of the crime just after the shooting, officers also found a shotgun inside the mobile home where Mr. Romero was hiding, and shell casings on the ground next to the mobile home's front porch. Romero, 113 Wn. App. at 783. Descriptions of the shooter seemed to point to Mr. Romero, and an eyewitness testified to seeing him shooting the weapon. 113 Wn. App. at 784. Although the witness was "one hundred percent" positive the shooter was Romero, the witness remembered seeing that man wearing a blue-checked shirt, rather than a grey-checked shirt Romero had. 113 Wn. App. at 784. And although another man, wearing a blue-checked shirt, was also with Romero that night, when shown the shirt Romero was wearing the eyewitness identified it as the one the shooter had worn. 113 Wn. App. at 784.

In reversing, the court of appeals rejected Romero's argument that the evidence was insufficient, taking the evidence in the light most favorable to the state. 113 Wn. App. at 794. But the same evidence the Court found adequate to support the conviction against a sufficiency challenge was *not* enough when the constitutional harmless error standard applied. 113 Wn. App. at 793. Even though there was significant evidence that Romero was guilty, that was not sufficient to amount to "overwhelming" evidence of guilt, sufficient to find the constitutional error harmless. 113 Wn. App. at 795-96. Indeed, the Court held, because

the evidence was disputed, the jury was “[p]resented with a credibility contest,” and “could have been swayed” by an officer’s comment that Romero had not spoken to police, “which insinuated that Romero was hiding his guilt.” 113 Wn. App. at 795-96.

The Romero decision serves to highlight the differences between the amount of proof of guilt required to be sufficient to support a conviction on review and the amount required to be “overwhelming evidence” which renders a constitutional error harmless. 113 Wn. App. at 797-98. Further, it indicates that, even when there is strong evidence of guilt, a reviewing court will not affirm a conviction tainted by constitutional error if the jury’s decision could have been affected by the error. See also, Easter, 130 Wn.2d at 242 (reversing based on the failure to prove constitutional error harmless because, while the state’s theory regarding Easter’s guilt was supported by significant evidence, there was disputing evidence so that the evidence did not “overwhelmingly establish” guilt).

Here, there can be no question that the jury’s decision could have been affected by the exclusion of the evidence. In making this determination, the Court does not conduct a “credibility” analysis of whether the Court believes that evidence to be credible. Maupin, 128 Wn.2d at 929. Instead, the Court must assume the excluded evidence to be true and evaluate the likely effect of its exclusion on the outcome of the case based upon that assumption. Id.

First, taking Smith's statement as true, the exclusion of that statement clearly could have had an effect on a reasonable jury's decision. The statement would have established that Beaudine, not Smith, was the aggressor and that Beaudine, not Smith, had started the fight. It also would have established that Smith was only fighting back in a lawful effort to defend himself, not as an aggressive, criminal act. These facts were the heart of Smith's defense. Indeed, this is the very reason the absence of the evidence was used so powerfully and repeatedly in closing argument by the prosecutor.

Similarly, the exclusion of the evidence of Beaudine's reputation for aggressiveness and violence and the evidence Smith repeatedly tried to introduce to rebut the prosecution's "good character" bolstering of Beaudine clearly could have had an effect on a reasonable jury's decision. The only real question in Smith's case was whether Smith had acted in self-defense. All of the improperly excluded evidence was directly relevant to that defense. And without that evidence, the only picture of Beaudine the jury was given was the one the prosecutors created, bolstered by "good character" evidence designed to try to sway the jury into believing that Beaudine could not have acted in a way which would have required Smith to act in self-defense.

In short, the trial court's exclusion of Smith's statement, the reputation evidence of Beaudine and the evidence which would have rebutted the prosecutors' improper, repeated bolstering of Beaudine left the

prosecutors' case untested, preventing Smith from subjecting that case to "meaningful adversarial testing." See Crane, 476 U.S. at 690-91. Smith's rights to present a defense and to a fundamentally fair trial were violated, as were his rights to effective assistance of counsel and to be tried based upon the evidence, without prejudicial misconduct tainting the jury.

Reversal is required.

2. THE PROSECUTORS' REPEATED SERIOUS,  
PERVASIVE CONSTITUTIONAL AND  
NONCONSTITUTIONAL MISCONDUCT COMPELS  
REVERSAL

It is well-settled that, as quasi-judicial officers, prosecutors have a duty to ensure that an accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct at trial which is likely "to produce a wrongful conviction." State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). Because of her role, the words of a prosecutor carry great weight with the jury, so that a prosecutor's misconduct does not just violate her duties but may also deprive the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5<sup>th</sup> Amend.; 6<sup>th</sup> Amend.; 14<sup>th</sup> Amend.; Art. I, § 22.

In this case, reversal is required, because the prosecutor committed serious, prejudicial, constitutionally offensive and nonconstitutional misconduct which was not and cannot be proven harmless under the relevant standards. Further, even if the individual acts of misconduct did not compel reversal, the prosecutors' repeated, flagrant and almost constant acts of misconduct throughout the trial were so pervasive and corrosive that they deprived Smith of his due process rights to a fair trial before an impartial tribunal. And the trial court erred in refusing to grant the motions for mistrial based upon all of this misconduct.

- a. Constitutionally offensive misconduct
  - i. Purposefully shifting the state's constitutionally mandated burden of proof to the defense on the issue of self-defense

First, the prosecutor committed egregious, prejudicial and constitutionally offensive misconduct in purposefully shifting her constitutionally mandated burden of proof to the defense on the crucial issue of self-defense. Pursuant to RAP 10.1(g) and this Court's Order of Consolidation, Smith adopts and incorporates by reference the arguments presented in the opening briefs on appeal filed by Ford (AOE 10), McCreven (AOE 2) and Nolan (AOE 4) on this issue. In addition, Smith asks the Court to consider the following:

Under the state and federal due process clauses, the prosecution bears the burden of proving every element of the crimes charged beyond a reasonable doubt, while the defendant has no obligation to produce any

evidence of his innocence. See State v. Cleveland, 58 Wn. App. 634, 648, 794 P. 2d 546 (1990). Because the defense of self-defense negates the mental element of the charged crime, it is well-settled that, in this state, the prosecution bears the burden of disproving self-defense, once the defendant makes a sufficient showing to be entitled to make a self-defense claim. See State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). In this case, the trial court clearly found that Smith and his codefendants had made such a showing, as the court allowed the jury to be instructed on self-defense. See CP 1179-1241. As a result, the prosecution had to shoulder the burden of disproving self-defense as an essential part of the prosecution's case. Acosta, 101 Wn.2d at 615-16; Adams, 31 Wn. App. at 396.

In both initial and rebuttal closing argument, however, the prosecutor deliberately, repeatedly and intentionally threw the burden from her shoulders and onto those of the defense. In initial closing argument, in referring to the statutory defense to second-degree murder contained in RCW 9A.32.050 and set forth in Instruction 31, the prosecutor specifically tied that defense - for which the defendants had the burden of proof - to the separate defense of self-defense, for which the prosecution was supposed to bear the burden. She told the jury that, if the defendants "want you to believe they were defending themselves or defending others" they had to "prove to you by a preponderance of the evidence that it's more likely than not that that particular defendant did not aid in the [crime]" and all of the

other elements of the statutory defense to second-degree felony murder. RP 2816-17. Thus, the prosecutor confused and conflated the statutory defense with self-defense, making it seem as if the defendants could not claim self-defense unless they could satisfy the burden of proving the statutory defense - even though the two defenses were separate.

The burden shift this improper argument caused was obvious, as evidenced by the arguments of counsel for McCreven, Ford, Nolan and Smith, emphasizing that it was the prosecution's burden to disprove self-defense and that the prosecutor had misstated the law in stating to the contrary. RP 2835-36, 2838, 2847, 2867, 2870, 2872, 2877-79, 2894. If there remained any question about the prosecutor's intent to shift the burden, however, that question was laid to rest by the prosecutor's rebuttal closing argument in which she first declared that the defendants could not claim self-defense unless they admitted committing the assault, then went on to again conflate the self-defense and statutory defense instructions, referring to them as two "self-defense" instructions until after a defense objection, when the prosecutor admitted that instruction 31 was a "statutory defense" for accomplices. RP 2934. A moment later, the prosecutor declared the state had the burden of disproving self-defense but then went on to tell the jury that the state had no burden to "disprove self-defense" because there had been no "proof of self-defense" and the defense had presented "no evidence that the Defendant reasonably believed that Dana was going to commit a felony, or he was going to inflict death or

personal injury.” RP 2936. Repeatedly, the prosecutor declared that she could not “disprove” self-defense because the defendants had presented no evidence of self-defense and “[h]ow does the State disprove” something “when there is no evidence of it?” RP 2936.

Answering her own question, she declared that she had nothing to disprove “because there is no evidence of it.” RP 2936. Indeed, she declared, because they had failed to present evidence of self-defense, “how is it that they [the defense] even get to argue it?” RP 2937. The repeated objections of counsel throughout this argument were met by the same response from the trial court: that the jury had been properly instructed in the law. RP 2931-37. Indeed, the trial court denied a request from Smith’s counsel for the jury to be excused for argument on the misconduct. RP 2937-38. And the trial court subsequently denied a motion for a mistrial and to dismiss because it found that, while it was “concerned” about the self-defense arguments, the statements were “proper” or so minor no curative instruction was required. RP 2959.

The trial court, however, was mistaken. The prosecutor’s arguments were serious, constitutionally offensive misconduct which compel reversal. There can be no doubt that these statements were misstatements of the law and the prosecutor’s constitutionally mandated burden of disproving self-defense. Indeed, the fact of the state’s burden was patently clear under the law. Acosta, 101 Wn.2d at 615-16. Once Smith had met the threshold burden of proving sufficient evidence to

satisfy the trial court that a claim of self-defense may be raised, the burden shifted to the state to disprove self-defense as part of its constitutional mandate. Acosta, 101 Wn.2d at 615-16. It has been so for more than 25 years. See id.

Thus, the prosecutor's arguments could not be seen as anything other than a deliberate, intentional misstatement of the law. See, e.g., State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997) (where prosecution makes an argument contrary to clearly settled law, it is flagrant, prejudicial misconduct). Despite the "wide latitude" given to prosecutors in closing argument, no attorney is permitted to misstate the law and thus mislead the jury. See State v. Davenport, 100 Wn.2d 757, 763, 675 P. 2d 1213 (1984). This is especially true of the prosecutor, whose status as a quasi-judicial officer entrusts him with not only special authority in the eyes of the jury but also with a special responsibility to ensure the defendant receives a fair trial. State v. Reeder, 46 Wn.2d 888, 892-93, 285 P.2d 884 (1955). Not only were these arguments misstatements of the law, they were misstatements of and shifting of the prosecutor's constitutionally mandated burden of proof under the state and federal due process clauses. Thus, the arguments were not just improper but in fact deprived Smith of the constitutionally protected due process rights to which he was entitled.

In addition, in making these arguments, the prosecutor violated the fundamental doctrine of the separation of powers. This doctrine, which

derives from the constitution's distribution of governmental authority into three branches, mandates that one branch of government may not encroach upon the fundamental function of another. See State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The purpose of the separation of powers is to limit the acts of a particular branch to its own sphere of activity. See Talmadge, Philip, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695 (1999).

In criminal cases, judicial authority is vested in the court, not the prosecutor, who is part of the executive branch. See Article IV, § 1, 6; see, State v. Posey, 130 Wn. App. 262, 271, 122 P.3d 914 (2005). And it is the judge who decides whether the evidence is sufficient to support giving a self-defense instruction, at which point the burden shifts to the prosecution to disprove self-defense. See State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1327 (1997), disapproved of in part and on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Indeed, a judge may deny a request to give self-defense instructions if "no credible evidence appears in the record" to support a claim of self-defense. State v. McCullum, 98 Wn.2d 484, 489, 656 P.2d 1069 (1983). By definition, then, in deciding to give the self-defense instructions in this case, the trial court made a determination that there was such evidence. As a result, the defense had met their burden of proof and the burden had shifted to the prosecution.

By arguing that the defendants were not entitled to claim self-

defense because they had not presented any evidence to support that claim, the prosecutor thus infringed upon the trial court's decision to the contrary, in violation of the doctrine of the separation of powers. It was not the role or function of the prosecutor to countermand the court's decision that there was sufficient evidence to give the instructions. Nor was the prosecutor vested with the authority to overrule the trial court's decision and shift the burden back to the defense. Yet that is what she did with this argument.

Notably, the prosecutor **did not even object** to the court's decision to give the self-defense instructions in the first place. See RP 2781-83 (only exception by the state was to an instruction regarding "participant"). Instead, she simply laid in wait, biding her time until rebuttal closing argument, when there would be no chance for any correction by defense counsel in their arguments and when the impact of her completely improper arguments would be at its peak. These arguments were not just offensive; they were constitutionally offensive. This Court should not countenance such disregard for the trial court's authority and the clear, settled law of self-defense, especially in a case where, as here, the prosecution had already engaged in multiple acts of serious misconduct in its effort to gain convictions.

- ii. Repeatedly, deliberately telling the jury to draw a negative inference from Smith's decision not to testify, in violation of Smith's Fifth Amendment, Article I, § 9 and due process rights

These same arguments of the prosecutor were constitutionally

offensive misconduct in a second way, because they amounted to improper comments on Smith's right to remain silent and an improper urging the jury to find guilt based upon his exercise of that right, in violation of not only those rights but also, again, Smith's due process rights. Pursuant to RAP 10.1(g) and this Court's Order of Consolidation, Smith adopts and incorporates by reference the related arguments presented in the opening briefs on appeal filed by Ford (AOE 10), McCreven (AOE 2) and Nolan (AOE 4, 5, 6) on this issue, and submits the following additional argument:

When a prosecutor's comments invite the jury to draw a negative inference from a defendant's exercise of a constitutional right, those comments are constitutionally offensive misconduct because they "chill" the defendant's free exercise of that right. State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). As a result, it is grave misconduct for the prosecutor to make such arguments. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

Both the state and federal constitutions guarantee the accused the right to remain silent and to be free from self-incrimination. Easter, 130 Wn.2d at 242; Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. I, §9. As part of these rights, a defendant is entitled to choose whether to testify at a trial in which he is the accused. See State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726



(1987); Griffin, 380 U.S. at 614-15. A prosecutor need not directly declare that the defendant should have taken the stand in his defense in order for the prosecutor to have made an improper comment on the defendant's right to remain silent. Ramirez, 49 Wn. App. at 336. Instead, such a comment is made when the prosecutor makes arguments which are "of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify." State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442, review denied, 91 Wn. 2d 1013 (1978); State v. Sargeant, 40 Wn. App. 340, 346, 698 P.2d 595 (1985). Thus, if the prosecutor comments on the defendant's failure to present evidence on a particular issue, those comments are improper comments on the defendant's exercise of his right to decide not to testify if the only person who could have provided the missing testimony was the defendant. See State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 409 (1969); see also, State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995).

Here, the prosecutor's arguments in closing about the defendants having to admit the acts in order to claim self-defense might have been proper in isolation but were clearly improper comments on the failure of Smith and his codefendants to testify when coupled with the arguments that the state had no burden of disproving self-defense because the defendants had failed to present evidence which could only have come from them. RP 2936. After telling the jurors the state only had to disprove self-defense if there was "proof of self-defense," then went on:

How does the State disprove when **there is no evidence that the Defendant reasonably believed that Dana was going to commit a felony**, or he was going to inflict death or personal injury? How do I disprove it when there is no evidence of it? **How do I disprove that the Defendant reasonably believed that there was imminent danger, when there has been no evidence that the Defendant reasonably believed that there was imminent danger?**

Ladies and gentlemen, there is nothing to disprove because there is no evidence of it.

RP 2936 (emphasis added). And a moment later, after asking whether Smith's acts could be deemed "defending himself," the prosecutor went on to declare that there was "no evidence of self-defense," questioning why the defendant "even get to argue it." RP 2937. After the court made the same ruling that the jury had been "instructed on the law of the case," the prosecutor then declared that Smith's counsel was asking jurors to make '[a]ssumptions of fact **that was not introduced, that no one testified about**' in order to argue that Smith was defending himself. RP 2937 (emphasis added). Despite counsel's request that the jury be excused and noting that the prosecutor had now clearly commented on the defendants' right to remain silent, the court simply made the same ruling about the jury having been instructed on the law, saying any objection could be taken up after the argument. RP 2937. The prosecutor then told the jurors that Smith's counsel wanted jurors to assume that Beaudine took a knife from the passenger side of the SUV "[a]nd you have heard no evidence of it, **no one has testified about it**, but that's what he wants you to assume." RP 2938 (emphasis added). A later motion to dismiss based upon the

improper comments on the defendants' decision not to testify was denied, even though the court stated its concern about some of the arguments. RP 2951-59.

There can be no question that these arguments were comments on the decision of Smith - and his codefendants - to exercise their rights to remain silent and decide not to testify. Smith was the only one who could have testified to a belief that Beaudine was about to commit a felony or that Smith believed he was in imminent danger at the time of the incident. See State v. Fiallo-Lopez, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995) (where only the defendant can provide the testimony the prosecution declares "missing," the prosecutor's argument about its absence is a comment on the exercise of the right to remain silent). As a result, the prosecutor's comments were patently obvious attempts to have the jurors draw a negative inference from Smith's failure to testify. These arguments were constitutionally offensive misconduct and this Court should so hold.

iii. The prosecution cannot prove the constitutionally offensive misconduct harmless beyond a reasonable doubt

Reversal is required based upon this misconduct. Again, constitutionally offensive misconduct is presumptively prejudicial and thus compels reversal unless the prosecution can meet the heavy burden of proving the misconduct harmless under the standard of "constitutional harmless error." Easter, 130 Wn.2d at 242. It cannot meet that burden unless it can show that any reasonable jury would still have reached the

same result, even absent the error. Guloy, 104 Wn.2d at 425. As noted, *infra*, this standard is much more stringent than the deferential standard used in cases where the issue is sufficiency of the evidence. See Romero, 113 Wn. App. 779, 783-85. Rather than asking whether no reasonable fact-finder could have made the required findings below as with a sufficiency challenge and rather than Smith bearing the burden, here the burden is on the prosecution to prove that every reasonable fact-finder would have reached the same conclusion and convicted even absent the error. Easter, 130 Wn.2d at 242.

Just as with the violations of Smith's rights to present a defense and to fundamental fairness argued *infra*, here the prosecution cannot meet the heavy burden of satisfying the constitutional harmless error test. Smith's entire defense was self-defense. The constitutionally offensive misconduct went directly to that defense. There can be no question that the jury's decision to convict could have been affected by the prosecutor's repeated shifting of the burden on self-defense to Smith and exhorting the jury to find that Smith could not claim self-defense because he had exercised his constitutional right not to testify. Further, there can be no question that the jury's decision to convict could have - and likely was- affected by the prosecutor's repeated misstatements of the crucial law of self-defense, shouldering Smith with a burden he was not required to carry, faulting him for failing to satisfy that burden and inviting the jury to draw negative inferences from Smith's refusal to testify. Given that Smith's defense was

supported by sufficient evidence for the trial court to give the self-defense instructions and given that all of the constitutionally offensive misconduct had a direct, immediate and flagrantly improper impact on the jury's ability to fairly and properly evaluate the issue of self-defense, the prosecution cannot meet its heavy burden of showing that every reasonable fact-finder would have convicted even absent that misconduct. Reversal is required.

b. Other flagrant, prejudicial misconduct

Reversal is also required based on the other flagrant, prejudicial misconduct committed by the prosecutors in this case. Pursuant to RAP 10.1(g) and this Court's Order of Consolidation, Smith adopts and incorporates by reference the related arguments presented in the opening briefs on appeal filed by Ford (AOE 8, 9, 11, 12, 13), McCreven (AOE 2, 3) and Nolan (AOE 4, 5, 6) on this issue, including but not limited to the arguments about vouching that the state had gotten the right people, personally attacking defense counsel Schwartz and Berneberg, misleading the court and jury about Dobiash having refused to speak unless there was a court order, coaching witnesses and eliciting testimony that Blair was afraid of testifying. In addition, Smith submits the following:

i. Misstating the jury's role and function and thus minimizing her constitutionally mandated burden of proof

The prosecutor also committed flagrant, prejudicial misconduct and improperly minimized her own constitutionally mandated burden by telling the jurors they had to decide the "truth" and who was telling the truth in

order to decide the case. In addition to the arguments presented by Smith's codefendants on this issue, the Court should declare that the prosecutor's arguments that the jury had to decide or declare the "truth" with their verdicts was a misstatement of the jury's role and functions and an improper minimization of the state's constitutionally mandated burden. Notably, the prosecutors started with this improper theme in juror voir dire. 15RP 110-14 (asking potential jurors how they would "try to figure out who's telling you the truth" and how they would make the determination when they "have got someone sitting on the stand there, and you have got to make that kind of judgment call, are they telling the truth or no"). 15RP 110-14. Then, in opening argument, the prosecutor said she was going to ask the jury "to return a verdict of guilty that represents the truth of what occurred that night," further emphasizing the concept that jurors had to determine the "truth" in order to perform their required role. RP 158 (emphasis added). And a defense objection, albeit by Nolan's counsel, was overruled. RP 158.

With this groundwork, the prosecutor then returned to the theme in closing argument, first by implying that the jurors would have to find that state's witnesses were lying in order to acquit (RP 2806 (Diamond "no motive to lie" and "no motive to fabricate"), RP 2930 (same), then by declaring that the law required jurors to determine not only if they had an "abiding belief in the truth of the charge" but also "[t]he truth, and what happened that night, truth in what each of these defendants did that night

against Dana Beaudine.” 2925-26, 2951. Ultimately, the prosecutor emphasized that this requirement of “truth” was “in the instructions” and was “the law,” and that jurors had to find “the truth of what happened” which she declared was that “these defendants, each of them participated in assaulting Dana, and during that commission of the assault, Dana died.” RP 2925-26, 2951 (emphasis added).

These arguments were flagrant, prejudicial misconduct. The jury is *not* required to determine who is telling the truth and who is lying in order to perform its duty. State v. Boehning, 127 Wn. App. 511, 524, 111 P.3d 899 (2005). Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 824-26, 88 P.2d 1214, review denied, 127 Wn.2d 1010 (1995).

More important, the jury is not tasked with finding and declaring the “truth” in order to perform its essential function. As this Court recently noted in State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), arguments making such a false implication are improper because “[a] jury’s job is not to ‘solve’ a case. . .or determine what happened on the day in question. Rather the jury’s duty is to determine whether the State has proven its allegations against a defendant beyond a reasonable doubt.” See also, Wright, 76 Wn. App. at 826. The prosecutor committed flagrant, prejudicial misconduct in making these arguments, to which counsel timely objected. This Court should so hold.

ii. Misconduct in asking questions without a good faith basis for the sole purpose of misrepresenting the facts and prejudicing the defense

The prosecutor also committed serious, flagrant and prejudicial misconduct in eliciting testimony for the apparent purpose of misleading the jury as to crucial facts so as to bolster her case. In cross-examination of an officer who had responded to the tavern, one of McCreven's counsel asked about a man later identified as William Cody with whom the officer had spoken in the tavern who had known Beaudine, establishing that no written or taped statement had been taken. RP 1737. In redirect examination, the prosecutor asked if the person who he had spoken to who knew Beaudine had given any information to the officer about what had occurred in the parking lot, eliciting a "no." RP 1745. The prosecutor then went on:

Q: Did you learn any information from this individual about any confrontation that may have occurred inside of the Bull's Eye?

A: No.

Q: Why was that? **Did that person indicate that there even was a confrontation inside the Bull's Eye?**

[SMITH'S COUNSEL]: Objection, Your Honor, calls for hearsay.

THE COURT: Objection overruled.

[THE PROSECUTOR]: Did that person indicate to you whether or not there was any confrontation inside of the Bull's Eye?

A: No.

Q: When you say no, do you mean that, no, you didn't learn that from the individual, or no, that they indicated there was no confrontation inside the Bull's Eye?

A: I didn't learn that from that individual.

Q: How about any of the other witnesses that you spoke with, did you learn about any confrontation that may have occurred inside of the Bull's Eye?

A: No.

Q: **The person that you spoke with who knew Dana Beaudine, did that person make you aware of any unusual behavior by Mr. Beaudine inside the Bull's Eye?**

RP 1747 (emphasis added). Hearsay objections were then sustained. RP 1747. The clear tenor of the prosecutor's line of questioning was that Cody had been in the bar at the time of the incident and had not seen Beaudine involved in any confrontation or "unusual" (i.e. aggressive) behavior. RP 1737-38, 1751. And the obvious implication was that Beaudine was not usually aggressive because acting that way would be "unusual" and the person who was being asked "knew" Beaudine. It is patently clear that the prosecutor engaged in this questioning to give the jury those impressions for the purpose of bolstering the state's theory of the case and try to cast doubt on any idea that Beaudine might have been aggressive or acted in any way which would have triggered a right to self-defense in Smith or the codefendants.

Yet the officer's police report made it clear that Cody did not arrive at the tavern until after Beaudine was being treated by medics. RP 1750-52; Ex. 301. He was not there earlier in the evening as the prosecutor's

questioning of the officer improperly implied. RP 1750-52; Ex. 301.

There can be no question that the prosecutor was trying to mislead the jury with this line of questioning, in violation not only of her duties as a quasi-judicial officer but as an officer of the court. See RPC 3.3;<sup>11</sup> see also, State v. Montgomery, 163 Wn.2d 577, 593, 183 P.3d 267 (2008) (“duty of every trial advocate not to intentionally introduce prejudicial inadmissible evidence” in an improper way). This deliberate attempt to imply evidence which did not exist in an effort to bolster the prosecution’s case was further flagrant, prejudicial misconduct and this Court should so hold.

iii. The nonconstitutional misconduct compels reversal

Even if the serious, constitutionally offensive misconduct did not compel reversal, the flagrant, prejudicial and pervasive “non-constitutional” misconduct in which the prosecutors repeatedly engaged would. Where, as here, counsel objected below, such misconduct will compel reversal if there is a substantial likelihood that it affected the verdict. See State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209 (1991). Further, the few instances of misconduct to which Smith’s counsel did not explicitly object were objected to by other counsel whose objections were routinely ignored or overruled, so that any further objection by Smith’s counsel would have been pointless. See, e.g., State ex rel Clark v. Hogan,

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<sup>11</sup>RPC 3.3 provides, in relevant part, that “[a] lawyer shall not knowingly : (1) make a false statement of material fact to a tribunal. . . [or] (4) offer evidence the lawyer knows to be false.”

49 Wn.2d 457, 462, 303 P.2d 290 (1956) (the law does not require doing that which would be “vain and fruitless”).

There is more than a substantial likelihood that the repeated, pervasive and prejudicial nonconstitutional misconduct affected the verdict in this case. All of the nonconstitutional misconduct went to the heart of Smith’s claim of self-defense and affected the jury’s ability to fairly and impartially decide the case. And the trial court did essentially nothing to correct it. Instead, it simply repeated the same generic instruction that the jury had been “instructed on the law.” Where, as here, the prosecutor repeatedly misstates that law in closing argument, such a non-specific “cure” could not erase the evocative arguments presented to the jury. Even if each of the individual acts of nonconstitutional misconduct did not compel reversal, the cumulative effect of the misconduct would.

Notably, it is well-recognized that “[p]rosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case.” Fleming, 83 Wn. App. at 215. And “improper suggestions” made by a prosecutor “carry much weight against the accused,” because the average juror will believe that a prosecutor will act in the interests of justice and as befits an officer of the court and the people. Berger, 295 U.S. at 88. The prosecutor fell far short of acting in that fashion here, the trial court erred in denying the motions for mistrial, and reversal is required.

3. SMITH'S SIXTH AMENDMENT AND ARTICLE I, § 5 RIGHTS TO A FAIR TRIAL WERE REPEATEDLY VIOLATED, AS WERE HIS OTHER IMPORTANT CONSTITUTIONAL RIGHTS

While a “perfect trial” is not part of the state and federal due process guarantees, at a minimum any trial in a criminal case must comport with basic norms of fairness. See State v. Miles, 73 Wn. 2d 67, 70, 436 P.2d 198 (1968). Here, the trial fell far short of these standards, because of the repeated admission of highly prejudicial evidence of Smith’s associations and weapons completely irrelevant to the crime. Pursuant to RAP 10.1(g) and this Court’s Order of Consolidation, Smith adopts and incorporates by reference the arguments presented in the opening briefs on appeal filed by Ford (AOE 5, 6, 11, 12-13) and McCreven (AOE 1, 2, 3) on these issues, including but not limited to the violations of Smith’s rights which occurred when the jurors committed misconduct and a witness testified that she was afraid of the defendants and the trial court’s erroneous failures to grant the motions for mistrial and to dismiss. In addition, this Court should consider the following:

Smith has a state and federal constitutional right to freedom of expression and association. Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992); First Amendment; Article 1, § 5. A defendant’s exercise of his constitutional rights cannot be used as evidence against him in a criminal trial unless and until it is shown to be necessary to prove an essential part of the state’s case. See, e.g., United States v. Jackson, 290 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968); State

v. Eide, 83 Wn.2d 676, 679, 521 P.2d 706 (1974). This is because a man is entitled to be tried based upon the evidence against him, rather than his opinions or those with whom he chooses to associate. See Dawson, 503 U.S. at 167-69.

As a result, to admit evidence of gang affiliation or association, “[t]here must be a connection between the crime and the organization” before the evidence is admissible as relevant. State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). Evidence which is irrelevant must be excluded, especially where it is highly likely to incite the jury to decide guilt based upon an improper basis. See, e.g., State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984).

Here, these principles were violated by the admission of both the evidence portraying the opinions of Smith and his codefendants about the outlaw motorcycle gang the “Bandidos” and unrelated weapons.

First, the evidence was completely irrelevant for any improper purpose. There was never any claim that the people involved in the fight wore “Bandidos” gear. Nor was there any evidence that the Bandidos had anything to do with anything in the case. As a result, that evidence should not have been admitted. See Dawson, 503 U.S. at 166 (error and violation of associational rights to introduce evidence of membership in the Aryan Brotherhood when there was no relationship to the crime).

Counsel for Smith objected to the exhibits and evidence on this point on Smith’s behalf. See, e.g., RP 871-72, 879, 884-86, 892-94, 901,

912-13, 953, 1258-60. Further, because counsel raised the motion to exclude associational/gang evidence pretrial and the court made no indication that further objections would be required, it was clearly preserved for review. See e.g., State v. Powell, 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995).

The prejudice this evidence engendered cannot be denied, even though the prosecution wisely chose not to emphasize it flagrantly in closing argument. The “Bandidos” evidence was admitted not once in passing but over and over. The Bandidos are a notorious outlaw motorcycle gang nationally known for its extreme and violent criminal activity. See e.g., U.S. v. Cortinas, 142 F.3d 242 (5<sup>th</sup> Cir.), cert. denied sub nom, Martinez v. U.S., 525 U.S. 897 (1998) (Bandidos “shot up” a house, killing a 14-year old boy, use a strategy of taking over other people’s criminal activity using fear, violence and intimidation, were described by a “National Officer” of the gang as being into “motorcycles and crime,” including trafficking in drugs, prostitution, “strong arm” and “violence”); U.S. v. Jackson, 845 F.2d 1262, 1264 (5<sup>th</sup> Cir. 1988) (evidence that Bandidos “do not consider themselves to be law-abiding citizens,” make money through drug trafficking, prostitution, theft, guns and automatic weapons and use violence freely against those who get in their way and that a person must commit a felony to become a member); see also, U.S. v. Shrader, 56 F. 3d 288 (N.H. 1995) (noting “Bandidos” activity in that state). Indeed, more than 20 years ago one judge declared that “the

reputation of the Bandido Motorcycle Club is common knowledge,” especially to law enforcement and judges trying criminal cases. Tamminen v. State, 653 S.W.2d 799, 807 (Tex. Crim. App. 1983) (Onion, P.J., concurring in part and dissenting in part), reversed in part and on other grounds by Young v. State, 994 S.W.2d 387 (Tex. App. 1999).

Coupled with this evidence of Smith’s association with or sympathy for a known violent criminal motorcycle gang was the repeated admission of evidence of other weapons admitted sometimes at the direct behest of the prosecution even after the prosecutors had stipulated that such evidence was inadmissible. For example, in photos of Nolan’s residence, there was a depiction of a box which had the words “Morgan Daggers” on it - a box which contained nothing of evidentiary value and which the court admitted photos of, after which the prosecution emphasized it. RP 1342-43. And in direct examination of Dobiash, the prosecutor tried to admit pictures of a room in the house which contained a picture of a knife, only withdrawing from that effort after heated argument. RP 1447-54. It was only a minute or two later that Dobiash told the jury officers had searched her house for “any kind of weapons, gang” items. RP 1457. And it was then revealed that the prosecutors had never told Dobiash or her lawyer of the pretrial ruling keeping out such evidence. RP 1457, 1501.

More damaging to Smith, however, was Officer Donlin’s testimony that, in Smith’s garage, along with the car with suspected blood in it, “there were several knives.” RP 1596. While the prosecutor did not explicitly

elicit this testimony, clearly asking the open-ended question of what was found in the garage gave the officer an opening that should have been avoided. RP 1596. And even though the officer later apologized, the damage had already been done. The jury had already heard the highly inflammatory evidence. It is well-recognized that “[e]vidence of weapons is highly prejudicial, and courts have ‘uniformly condemned. . . evidence of. . . dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged.’” State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001). Indeed, introduction of a knife unrelated to the crime when the crime involved a knife is “of highly questionable relevance” and improper because it “tended to impugn the defendant’s character or suggest the propensity for using knives as a ‘weapon.’” State v. Oughton, 26 Wn. App. 74, 83-84, 612 P.2d 812 (1980). Thus, the jury heard evidence about Smith’s association with and sympathies for an outlaw, criminal motorcycle gang along with all the other “bad character” and associational evidence the prosecution used. Jurors then were faced with the specter of this “dangerous” man who had weapons of exactly the same type as used in the crime in the garage, where the car seen leaving the crime scene was parked. There can be no question that there was more than a reasonable probability that this evidence was highly likely to affect the jury’s ability to fairly and impartially decide the case - especially the merits of Smith’s claim of self-defense.

Nor were the “curative” instructions sufficient to erase the enduring prejudice to Smith’s rights to a fair trial. It is true that the jury was told that the detective’s “response” about the knives was “non-responsive” and they could not consider it. See RP 1603-1604. It is also true that the court gave a watered-down version of limiting instructions which addressed the evidence, telling the jury “[c]ertain evidence has been admitted” only for a “limited purpose” i.e., photos “depicting motorcycle garb and/or club affiliation” and that it “maybe [sp] considered by you for the purpose of identification, and, in relation to the “Hidalgos” evidence, that “mere association with a motorcycle club” was a “protected constitutional right” so that discussion of the evidence must be “consistent with this limitation.” CP 1189-92. The instruction regarding the “Hidalgos” evidence did not explain, however, exactly *how* the jury was supposed to consider that evidence in light of that limitation, failing to identify the relevant purpose to which the jury was limited in considering that evidence.

Further, as counsel objected below, those instructions were simply insufficient to erase the corrosive impact of the highly prejudicial evidence. See RP 894, 2784-88. The improper evidence was exactly the kind of evidence which cannot be erased from jurors’ minds, because it was “propensity” evidence under ER 404(b), highly prejudicial and likely to cause the jury to “prejudge” the defendant, thus denying him a fair opportunity to defend against the state’s case. See Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed 168 (1948). Such

evidence is akin to “superglue” in jurors’ minds, so likely to stick in their memory and cause them to convict the defendant based upon the belief he is a bad person who is “by propensity” a probable perpetrator of the crime. Id.; see also, State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984). That is why there are such stringent requirements before such evidence is admissible even when relevant. See State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002); see, State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995) (must not just be “relevant” but in fact have “substantial probative value” to prove a necessary part of the state’s case).

Put another way, “[w]hile it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence. . .is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.” Miles, 73 Wn.2d at 71, citing, State v. Suleski, 67 Wn.2d 45, 406 P.2d 613 (1965). Indeed, the “curative” instructions only emphasized the improper evidence in the jurors minds, drawing their attention back to it and reemphasizing the emotional response they likely had to the “outlaw criminal motorcycle gang” association and the presence of multiple weapons like the one that killed Beaudine in the very same place as the alleged “getaway” car.

Mr. Smith was entitled to express his opinions under the First Amendment and Article I, § 5, with bumper stickers, t-shirts and the like. He was also allowed to associate with whomever he chose, without that

association being used against him in a criminal trial for which the association was completely irrelevant. In addition to the errors relating to the scope of the “Hidalgos” evidence, the Bandidos evidence was extremely prejudicial and irrelevant and its admission violated not only Smith’s rights to free speech and association but also his due process right to a fundamentally fair trial. His ability to receive a fair trial was further eviscerated by the improper evidence of completely irrelevant weapons. A “trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” Miles, 73 Wn. 2d at 70. Reversal is required and this Court should so hold.

4. THE JURY INSTRUCTIONS ON SELF-DEFENSE WERE IMPROPER AND COUNSEL WAS AGAIN PREJUDICIALLY INEFFECTIVE

Reversal is also required because jury instructions 24 (“justifiable homicide”), 25 (“act on appearances” instruction), and 29 (defining “great personal injury”), the jury instructions on self-defense, used an improperly high standard for the degree of harm Smith had to reasonably fear in order to be entitled to have acted in self defense for the felony murder. Further, counsel was again prejudicially ineffective.

Pursuant to RAP 10.1(g) and this Court’s Order of Consolidation, Smith adopts and incorporates by reference the arguments presented in the opening brief on appeal filed by Nolan (AOE 7-8) on this issue. In addition to those arguments, the Court should consider the following:

a. The jury instructions used the wrong standard

To be sufficient, jury instructions must, when read as a whole, properly inform the jury of the applicable law. See State v. Rodriguez, 121 Wn. App. 180, 184-85, 87 P.3d 1201 (2004). Instructions 24, 25 and 29 improperly indicated the applicable law. Instruction 24 set forth the self-defense standard as the one required for “justifiable homicide,” i.e., that the defendant must have reasonably believed that the decedent “intended to commit a felony or to inflict death or great personal injury” and that there was “imminent danger” of such harm being accomplished. CP 1207. Instruction 25 told jurors that people may only “act on appearances in defending” themselves if they reasonably believe that they or another were in danger of “great personal injury.” CP 1208. And Instruction 29 then gave the definition of “great personal injury” as an injury which the defendant had to reasonably believe “would produce severe pain and suffering.” CP 1211.

These instructions were erroneous, because they required a far higher standard than that required for Smith to have acted in self-defense in this case.<sup>12</sup> A claim of self-defense generally negates the mental element of the crime. See State v. McCullum, 98 Wn.2d 484, 495-96, 656 P.2d 1064 (1983); see also, Acosta, 101 Wn.2d at 617-18. In Acosta, the Supreme Court examined whether the state was required as a matter of

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<sup>12</sup>The prosecutors never objected to the giving of self-defense instructions in this case, nor did they cross-appeal that decision, either. See RP 2781-83.

constitutional due process to disprove the defense. 101 Wn.2d at 615. Examining the elements of the relevant crime (second-degree assault), the Court noted that the crime requires acting “knowingly” and that “knowledge” is defined as being aware of “a fact, facts, or circumstances or result described by a statute defining an offense.” Because self-defense is “defined by statute as a lawful act,” it was therefore “impossible for one who acts in self-defense to be aware of facts or circumstances ‘described by a statute defining an <sup>13</sup>offense.’” 101 Wn.2d at 615. Put another way, the Court held, “self-defense negates the knowledge element of second degree assault.” *Id.* As a result, “due process and our prior cases require us to hold that the State must disprove self-defense in order to prove that the defendant acted unlawfully.” *Id.*

In reaching this conclusion, the Acosta Court noted that it had reached a parallel conclusion involving other crimes and their mental elements in the past. 101 Wn.2d at 615. In McCullum, for example, the Court noted, a claim of self-defense in a first-degree murder case negated the mental element of “intent,” i.e., the intent to act with a purpose to accomplish a result which constitutes a crime. Acosta, 101 Wn.2d at 617; see McCullum, 98 Wn.2d at 495. Similarly, in State v. Hanton, 94 Wn.2d 129, 132, 614 P.2d 1280, cert. denied, 449 U.S. 1035 (1980), the Court had

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<sup>13</sup>In the context of sexual assaults, the Supreme Court has held that the fact that the defense of consent impacts an element of sexual assault is not necessarily a violation of due process. See State v. Camara, 113 Wn.2d 631, 639-40, 781 P.2d 483 (1989). It has not extended that concept to self-defense or overruled Acosta and continues to cite it for the proposition that due process requires the state to disprove self-defense. See, e.g., O’Hara, 167 Wn.2d at 105.

found that a claim of self-defense negated the “recklessness” element of first-degree manslaughter. See Acosta, 101 Wn.2d at 617. Due process requires the state to disprove the mental element of the crime, the Court noted, because “[i]f we were to hold that the defendant bore the burden of proving self-defense, we would be reliving the State of its obligation to prove that the defendant’s use of force was unlawful.” 101 Wn.2d at 617.

Thus, the defense of self-defense negates the mental element of the specific crime against which the claim is leveled.

In felony murder cases, however, there is no separate *mens rea*, or mental element. See State v. Wanrow, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978), disapproved of in part and on other grounds by Andress supra. The felony murder scheme in this state “substitutes the incidents surrounding certain felonies” for the mental state, such as premeditation, deliberation, or malice. State v. Craig, 82 Wn.2d 777, 781, 514 P.2d 151 (1973), overruled in part and on other grounds by, Ellis, supra. Thus, the underlying crime functions as the substitute for the mental state the prosecution would otherwise be required to prove. Craig, 87 Wn.2d at 781-82; State v. Bryant, 65 Wn. App. 428, 828 P.2d 1121, review denied, 119 Wn.2d 1015 (1992).

As a result, “[t]he state of mind necessary to prove felony murder is the same state of mind necessary to prove the underlying felony.” State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984); Wanrow, 91 Wn.2d at 311.

These concepts - 1) that the underlying felony replaces the *mens rea* in felony murder and 2) that the prosecution does not have to prove a separate mental state in relation to the death but only the mental state of the underlying felony in felony murder - lead to the conclusion that the self-defense instructions in this case were in error. Because the underlying offense in this case was second-degree assault, the mental element which the self-defense was available to negate was not a mental element related to the unintended death which occurred “in the course of and in furtherance” of the assault - it is for the assault itself. Thus, the proper standard of self-defense which the instructions should have reflected was the standard required for the assault which was the predicate felony for the felony murder.

This makes sense not only under Acosta and McCullum but also under the general law of self-defense and principles of fundamental fairness. The degree of force a person may use in self-defense “is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” Walden, 131 Wn.2d at 477. For a person to act in self-defense in committing an assault, he or she must reasonably fear injury, not great personal injury. See RCW 9A.16.020(3). The charge of felony murder in this case was based upon the unintentional death of Beaudine in the course of and in furtherance of second-degree assault. CP 1096-97. As a result, it was required only for the state to prove that there was such an assault and that a death occurred, without the state

having to prove any separate murderous intent or anything of that nature.

See e.g., Andress, 147 Wn.2d at 614-15.

It is patently illogical and fundamentally unfair to require a defendant to meet standard of self-defense which is far greater than the mental state the prosecution has to prove. The whole point of self-defense is that it negates the mental element the state must prove - that is why the state bears the burden of disproving it. Further, allowing the state's discretionary charging decision to first relieve itself of having to prove a higher mental state while at the same time requiring the defendant to have to have as great a degree of fear as would have been required for the higher crime smacks of the kind of fundamental unfairness due process does not allow. See, e.g., State v. Arth, 121 Wn. App. 205, 87 P.3d 1206 (2004) (rejecting the idea that the state's discretionary decision to charge a particular crime instead of another should be allowed to dictate the availability of self-defense, because "[t]here is no logical or legal reason why the right to protect oneself should turn on the State's charging decision in a particular case").

These are just some of the flaws in this Court's decision in State v. Ferguson, 131 Wn. App. 855, 129 P.3d 856 (2006), review denied. In that case, the defendant was charged with, *inter alia*, second-degree murder, committed either as second-degree felony murder with assault as the underlying felony or as intentional second-degree murder. 131 Wn. App. at 859. The jury rendered a general verdict which did not specify whether

it had found guilt for felony or intentional murder. Id. On appeal, Ferguson argued that the self-defense instructions were wrong because the jury should have been instructed on self-defense relevant to assault, rather than the standard used, for murder. 131 Wn. App. at 860. This Court declared, “it can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm.” 131 Wn. App. at 861.

But in reaching this conclusion, this Court relied only on cases which did not involve the unique situation of a charge of felony murder. Walker, supra, involved a charge of first-degree murder and the jury was instructed on that charge, second-degree murder and manslaughter for fatally stabbing someone in a fight, not felony murder. 136 Wn.2d at 771; see Ferguson, 131 Wn. App. at 861. In Walden, supra, the defendant was charged not with murder or felony murder but rather with second-degree assault for going after teens who taunted him with a knife. 131 Wn.2d at 472-73; see Ferguson, 131 Wn. App. at 861. And State v. Churchill, 52 Wash. 210, 100 P.3d 309 (1909), was also not a felony murder case.

Thus, Ferguson did not rely on cases involving the unique situation of felony murder. Instead, the charges in those cases required the prosecution to prove the *mens rea* associated with the death, i.e., for a murder charge. The problem with that reliance is that it ignores the very function and role of the claim of self-defense in a felony murder case. And it ignores the fact that the *mens rea* the state must prove is based upon the

underlying felony, not the death.

Because the state only had to prove that Smith or an accomplice committed an assault and there was a death which occurred in the course of and in furtherance of that assault, the only mental state Smith was required to have was that required to commit assault. The only fear he had to have to act in self-defense in committing that assault was the fear required for assault. The instructions given in this case were thus in error.

Reversal is required. When the self-defense instructions do not accurately state the law, reversal is required unless the Court can say the result would have been the same had the correct instruction been given. State v. Woods, 138 Wn. App. 191, 194, 156 P.3d 309 (2007). Further, errors in self-defense instructions may be raised for the first time on appeal as “manifest constitutional error” if the errors are to the “elemental components” of the defense. See O’Hara, 167 Wn.2d at 105. Here, the very standard applicable to the defense was affected. Indeed, the prosecution specifically exploited the higher standard, arguing, *inter alia*, that Smith had to prove that he “reasonably believed that Dana [Beaudine] was going to commit a felony, or he was going to inflict death or personal injury.” RP 2936.<sup>14</sup>

b. Counsel was again prejudicially ineffective

Counsel was again prejudicially ineffective. Not only did he fail to

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<sup>14</sup>This shifting of the burden of proof to Smith was constitutionally offensive misconduct as discussed, *infra*.

propose jury instructions using the proper standard, he failed to object to the improper instructions even though they required an improperly high standard. See RP 2783-89. Failure to request a proper jury instruction or object to an improper instruction is ineffective assistance if it prejudices the defendant. See, e.g., State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). Counsel's failure to object to the improper instruction and propose instructions which would have used the correct standard prejudiced Smith because the erroneous instructions applied an improperly high standard to Smith's claim of self-defense, requiring the jury to find Smith was in far greater fear of harm than he had to be in order for self-defense to apply. On remand, new counsel should be appointed.

5. THE SPECIAL VERDICT MUST BE STRICKEN AND  
COUNSEL WAS AGAIN PREJUDICIALLY  
INEFFECTIVE

In addition, the special verdict and resulting enhancement must be reversed under the controlling precedent of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). Pursuant to RAP 10.1(g) and this Court's Order of Consolidation, Smith adopts and incorporates by reference the arguments presented in the opening brief on appeal filed by Ford (BOF at 115) on this issue. In addition to those arguments, the Court should consider the following:

Jury instructions are reviewed de novo, to determine whether they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole,

properly inform the jury of the applicable law. See State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The jury instruction on the deadly weapon special verdict, Instruction 57, not only misstated the law but also deprived Smith of the presumption of innocence and of the benefit of a reasonable doubt.<sup>15</sup> The instruction provided, in relevant part:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form(s). In order to answer the special verdict form(s) “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer “no.”

CP 1241. In Bashaw, the Supreme Court declared, plainly, that “a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence,” such as a special verdict. 169 Wn.2d at 146. Instead, unanimity is only required to find the “*presence* of a special finding increasing the maximum penalty. . . [but] it is not required to find the *absence* of such a special finding. 169 Wn.2d at 147 (emphasis in original); see also, State v. Goldberg, 149 Wn.2d 888, 890, 72 P.3d 1083 (2003).

Thus, not all jurors have to agree that the prosecution has not proven an enhancement in order to answer “no” on a special verdict. This has the practical effect of ensuring that the defendant receives the benefit of any reasonable doubt - a benefit to which he is clearly entitled as part of

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<sup>15</sup>A similar issue is pending before the Court in State v. Campbell, No.40012-0-II.

the presumption of innocence. See State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). If some jurors have such doubts whether the state has met its burden of proving a special verdict, the special verdict is answered “no” and the defendant is given the benefit of those doubts.

Here, by telling the jurors they had to be unanimous in order to answer the special verdict “no,” Instruction 27 misstated the law. In addition, although the Bashaw Court did not explicitly so hold, the instruction deprived Smith of the benefit of any reasonable doubt and the presumption of innocence. That presumption is the “bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). A defendant is constitutionally entitled to the benefit of the doubt when it comes to determining whether the state has proven its case. Warren, 165 Wn.2d at 26-27. In the context of a special verdict, indicating to jurors that they have to be unanimous not only to answer “yes” but also to answer “no” deprives the defendant of the benefit of the doubts some jurors may have had. As the Bashaw Court noted, where, as here, the jury is under the mistaken belief that unanimity is required, “jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” 169 Wn.2d at 147-48.

Dismissal of the special verdict and resulting sentence is required, regardless whether the Court orders relief on the other issues raised herein.

As the Bashaw Court noted, when the jury is improperly instructed in this way, the deliberative process is so “flawed” that it is not possible to “say with any confidence what might have occurred had the jury been properly instructed.” 169 Wn.2d at 147-48. As a result, a reviewing court “cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.” 169 Wn.2d at 148.

Notably, the Bashaw Court reached this conclusion even though it had already found that there was sufficient evidence to uphold two of the three special verdicts in that case, despite evidentiary errors. 169 Wn.2d at 143-48.<sup>16</sup> The Court was unconcerned with the sufficiency of the evidence when examining the instructional error, because the question was not whether there was evidence to support the enhancement but rather whether the procedure in gaining the verdict rendered it fundamentally flawed. 169 Wn.2d at 147-48. Further, the Court held, it would be improper to allow retrial on just the special verdict. Id.

If the Court grants a new trial based on any of the arguments presented herein, it should do so with instructions that a correct instruction

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<sup>16</sup>In Bashaw, the three enhancements were for three counts of delivery of a controlled substance, alleged to have each occurred within 1,000 feet of a school bus route stop and thus subject to a “school bus route stop” sentencing enhancement. 169 Wn.2d at 140-42. The prosecution relied on evidence from a measuring device which was not properly shown to be reliable. Id. The measuring device indicated that the three deliveries occurred 1) within 924 feet of a school bus route stop, 2) within 100 feet of a school bus route stop and 3) within 150 feet of a school bus route stop. 169 Wn.2d at 142-43). Officers also testified that the first delivery was approximately 1/10 mile (528 feet) or 1/4 mile (1,320 feet) from the stop. 169 Wn.2d at 143-44. The Court found that there was “no reasonable probability” that error in admitting the faulty measuring device readings was harmless for two of the enhancements because there was “no reasonable probability” the jury would have concluded those deliveries had not taken place within 1,000 feet of the stop even if the device evidence had been excluded. 169 Wn.2d at 144-45.

must be used on remand. In addition, even if the Court does not grant relief on any of the other grounds presented herein, dismissal of the enhancement and remand for resentencing is still required under Bashaw. This Court should so hold. Further, because counsel failed to object to the improper instruction even though Goldberg had been decided years before, new counsel should be appointed.

6. THE SENTENCING COURT FAILED TO FOLLOW THE REQUIREMENTS FOR PROPERLY SENTENCING SMITH AND COUNSEL WAS AGAIN PREJUDICIALLY INEFFECTIVE

Reversal and remand for a new sentencing hearing is also required, because the court failed to follow the requirements for properly sentencing Smith by failing to set forth the relevant criminal history on which it relied, apparently relying on improper convictions the prosecution conceded it could not prove were Smith's, and imposing a sentence based on an offender score which included out-of-state convictions even though the prosecution had utterly failed to prove that any of those convictions were comparable to Washington felonies and thus could be counted under RCW 9.94A.525(3). Further, counsel was again prejudicially ineffective.

a. Relevant facts

At sentencing, the prosecutor presented an affidavit from a fingerprint expert who had compared Smith's booking prints to documents submitted by the prosecution. SRP 36. Based on the affidavit, the prosecutor conceded she could not validate convictions of delivery of controlled substances out of Lewis County in 1981, two counts of

possession of stolen property from Lewis County in December of 1985, and a second-degree burglary conviction from Lewis County in October of 1985. SRP 36-37. She argued that Smith's offender score was "13" without those convictions, based largely upon alleged out-of-state criminal history, and asked for a sentence at the high end of the standard range. SRP 36-37.

Although new counsel had been appointed for Smith on July 23, 2009, he said he had only gotten the exhibits the prosecution was presenting that same day. SRP 40. He also said he had only looked at them "briefly" and was not sure what the correct offender score was but was "comfortable" that it was "somewhere above nine." SRP 40. A moment later, he admitted that the sentencing exhibits, including multiple pages of judgment and sentence documents and other documents from out-of-state had probably been given to him when he was appointed, contained "in the three boxes that I received somewhere." SRP 40.

Smith addressed the court, Shannon Ford and his codefendants, saying that he was sorry about what had happened, it was a "horrible night," he "was attacked with a knife," defended himself and although people may think he "overdid" his response "they wasn't in my shoes so they don't know." SRP 46.<sup>17</sup>

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<sup>17</sup>Smith disputes how codefendant Ford characterizes this in his brief as follows: that Mr. Smith "took responsibility for killing Mr. Beaudine" and that "Mr. Smith confessed to stabbing Mr. Beaudine and apologized" to the codefendants. Brief of Ford, at 18, 22 (emphasis added). No "confession" of "stabbing" or declaration of having been the one who killed Beaudine is contained anywhere in the relevant transcript. See SRP 1-52. Smith told police and maintains that he did not stab Beaudine or anyone else. See SRP 40-

Based upon a “9+” offender score, the court ordered Smith to serve 421 months in custody, including 24 months for the deadly weapon enhancement. SRP 47.

- b. The sentencing court erred in failing to follow the statutory requirements and in relying on unproven prior convictions and counsel was ineffective

Reversal and remand for resentencing is required. First, the sentencing court failed to follow the requirements for properly sentencing Smith, making it extremely difficult to determine how the court arrived at the sentence it imposed. Under RCW 9.94A.500(1), when it is alleged that the defendant has prior convictions, the court must determine which, if any, of those alleged prior convictions the prosecution has proved by a preponderance of the evidence. The statute then mandates that, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist” and that “[a]ll of this information shall be part of the record.” RCW 9.94A.500(1) (emphasis added).

Here, the court did not satisfy those requirements. Although the court clearly relied on prior convictions as it ordered a sentence based on an offender score of “9+,” the judgment and sentence does not set forth any such criminal history. CP 1372. Instead, that document simply provides, in the section on “criminal history,” “attached Exhibit 3.” Id. But that document has no such attachment. CP 1366-79.

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46, 57.

Further, while there is an "Exhibit 3" in the exhibits filed during the sentencing hearing, that Exhibit does not set forth anything from the court but is instead a listing of alleged criminal history apparently produced from some computer system at the prosecutor's behest. See Exhibit 3.<sup>18</sup> But that listing includes several prior convictions that the prosecutor conceded she could not prove belonged to Smith. Before using a prior conviction for sentencing purposes, the prosecution is required to make some showing that the defendant and the person named in the prior conviction are one and the same. See State v. Ammons, 105 Wn.2d 175, 190, 713 P.2d 796, cert. denied, 479 U.S. 930 (1986). Exhibit 3 included as "adult felony convictions" two Lewis County convictions with disposition dates of 12/09/85 for "PSP 2 (2 CTS) and a Lewis County conviction, disposition date 10/31/85 for Burglary 2. Exhibit 3. But in Exhibit 1, the exhibit containing the declaration of a fingerprint analyst who examined Smith's "booking" fingerprint card and certain documents at the prosecution's request, the Lewis County convictions dated 10/31/85 and 12/09/85 were in the name "Michael J. Ritter" and were not made by the same person who made the booking fingerprints. Ex. 1. Thus, three convictions indicated in exhibit 3 could not properly have been relied on by the court in imposing the sentence. Yet they are included in Exhibit 3, thus making it appear they were counted by the sentencing court.

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<sup>18</sup>Smith has filed a request for transmission of this and the other relevant exhibits to the Court.

Because the court failed to comply with the mandates of RCW 9.94A.500(1) to specifically set forth the criminal history it found Smith to have, it is extremely difficult to determine exactly how the court reached its result. Further, the court's failure raises questions about whether the court actually examined the record and made an independent determination on the evidence before it, instead of simply relying on declarations made in the prosecution's papers. See, e.g., State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009) (due process mandates that the court's decision in sentencing is based upon some evidence beyond mere allegation).

In addition, the sentencing court obviously and erroneously relied on out-of-court convictions even though the prosecution completely failed in its burden of proving that those convictions should, in fact, be counted in Smith's criminal history. To properly sentence a defendant, the court is required to calculate his offender score based upon his prior convictions and the seriousness level of the current offense. See State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). When prior convictions include some from out-of-state, those prior convictions cannot be included in the offender score calculation unless the prosecution proves that the offense is "comparable" to a Washington state felony. RCW 9.94A.525(3); State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999). It is the state's burden to prove, by a preponderance of the evidence, the existence of all of the defendant's prior convictions and both the existence and comparability of any such convictions which are from out-of-state. State v. McCorkle, 137

Wn.2d 490, 495, 973 P.2d 461 (1999); Ford, 137 Wn.2d at 482-83. The only exception is if the defendant explicitly stipulates to the comparability of his prior convictions, in which case the sentencing court may rely on that stipulation as sufficient to support a finding of comparability. In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 878, 123 P.3d 456 (2005). Absent such stipulation or sufficient evidence to prove the existence and comparability of a prior out-of-state conviction, “the sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score.” Ford, 137 Wn.2d at 480-81.

Here, the court did not have the necessary evidence, because the prosecution failed to provide it. Assuming Exhibit 3 is intended to serve as the list of criminal convictions which the sentencing court found, that Exhibit lists as “adult felony convictions” the following: 1) a Pennsylvania conviction, disposition date 4/23/90, for “theft by unlawful taking or disposition,” 2) a California conviction, disposition date 5/09/89, for “UPCS-Heroin,” 3) three California convictions with the same commission date (11/12/99) and the same disposition date (5/24/90): Receiving Stolen Property, Unlawful Taking of a Vehicle, and Possession of a Controlled Substance - cocaine, 4) a California conviction, disposition date 9/21/89, for “Rec/etc/knwn/stl prop,” 5) a California conviction, disposition date 4/01/91, for Receiving Stolen Property, 6) a California conviction, disposition date 12/23/92, for Vehicle Theft, 7) three California

convictions with the same commission date (2/01/95) and disposition dates (02/17/95) for “Poss. Controlled Substance,” “DUI Bodily injury” and “inflict injury,” 8) two California convictions with the same commission date (5/16/96) and disposition date (1/06/97), for “Vehicle Theft” and “Disregard for Safety,” and 9) three California convictions with the same commission date (11/01/96) and disposition dates (1/06/97), for “Vehicle Theft,” Receiving Stolen Property and “Disregard for Safety.” Exhibit 3.

Yet the only evidence the prosecutor presented to prove these prior convictions were documents relating to whether the convictions occurred and whether the fingerprints on those documents matched those of Smith. See Ex. 1-17. Nothing in those documents established that those offenses were in any way comparable to any Washington felonies as required under RCW 9.94A.525(3). There were no California or Pennsylvania statutes presented. Ex. 1-17. Nor did the prosecution present any Washington statutes. Id.

Indeed, the prosecutor did not file any sentencing memorandum alleging “comparability” or even argue that issue at sentencing. SRP 1-48.

Further, Smith did not stipulate to comparability for any of those crimes. “Stipulation” for these purposes does not occur unless the defendant makes an “affirmative acknowledgment” that the out-of-state convictions are comparable. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). Failure to object is not a “stipulation,” nor is it a “waiver” of the issue. Ross, 152 Wn.2d at 230.

Indeed, the Supreme Court has made it clear that the prosecutor's burden of proof does *not* depend upon an objection by the defense. McCorkle, 137 Wn.2d at 496. "Objection to unsupported argument regarding classification is not required to put the State to its [burden of] proof," the Court held, because "[u]nder the SRA, the State's burden is mandatory." Id. Instead, the Court has held, "[t]he SRA [Sentencing Reform Act] expressly places this burden on the State because it is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'" Ford, 137 Wn.2d at 480, quoting, In re Williams, 111 Wash.2d 353, 357, 759 P.2d 436 (1988).

Thus, because the prosecutor failed to present any evidence of "comparability" of any of these offenses, the prosecutor failed to meet her burden of proof to support reliance on those priors at sentencing and it was clearly error for those convictions to be included in the offender score. See e.g., Ford, 137 Wn.2d at 480.

On remand for resentencing, new counsel should be appointed, because counsel for the sentencing was utterly ineffective. While it is not required that an objection occur in order for the prosecution to be required to prove comparability, Mr. Smith was certainly entitled to counsel who had at least attempted to prepare for sentencing. Counsel has a duty to inform himself of the applicable law and research available defenses. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d

1006 (1978). This includes not only investigation into factual matters but also legal matters, in order to be prepared. *Id.* Further, the adversarial process is only meaningful if counsel investigates all reasonable lines of possible defense. *See In re Davis*, 152 Wn.2d 647, 744, 101 P.3d 1 (2003). Here, counsel admitted he had only looked at the state's evidence that day, even though he likely had been given copies of it when he was appointed nearly five months before. SRP 40; CP 1325. Given that he had barely even looked at the state's evidence, counsel clearly had not taken the time necessary to compare the relevant Washington statutes to the out-of-state statutes to determine whether there were issues with those convictions being deemed "comparable." On remand for resentencing, Mr. Smith is entitled to counsel who will at least attempt to prepare to adequately represent his client, and this Court should thus order new counsel appointed for resentencing, even if a new trial is not ordered.

7. THE CONVICTION FOR SECOND-DEGREE FELONY MURDER MUST BE DISMISSED BECAUSE THE POST-ADDRESS STATUTE DOES NOT APPLY AND COULD NOT BE APPLIED WITHOUT VIOLATION OF EQUAL PROTECTION AND DUE PROCESS GUARANTEES
  - a. RCW 9A.32.050(1)(b) is ambiguous and application of the rule of lenity and mandates of statutory construction require interpreting it in Smith's favor to apply only to assaults which are separate from the act causing death

Under the rule of lenity, where a statute is ambiguous and thus subject to several interpretations, the Court is required to adopt the interpretation most favorable to the defendant. *See State v. Roberts*, 117

Wn.2d 576, 586, 817 P.2d 855 (1991). Further, interpreting a statute, a reviewing court must try to construe it in order to effect its purpose, but “strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided.” State v. Leech, 114 Wn.2d 700, 708-709, 790 P.2d 160 (1990), quoting, State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). In addition, it is presumed that the Legislature does not intend absurd results, so courts will not construe a statute to allow such a result. Address, 147 Wn.2d at 610; see State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1985).

After this Court’s decision in Address, the Legislature amended the second-degree felony murder statute to provide, in relevant part:

A person is guilty of murder in the second degree when . . . he or she commits or attempts to commit any felony, including assault . . . and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants[.]

RCW 9A.32.050(1)(b) (emphasis added); see Laws of 2003, ch.3, § 1 (statute amended in response to Address). Although the statute does not state whether it applies to assaults which are the act which results in death or only to separate assaults, this Court has examined the “in furtherance of” language in another context and held that it means that the death has to be “sufficiently close in time and place” to the underlying felony so as “to be part of the *res gestae* of that felony.” Leech, 114 Wn.2d at 706.

In Address, this Court applied the holding of Leech and held that the language of the felony murder statute requiring that the death had to be

“in the course of and in furtherance of” the predicate felony, “or in immediate flight therefrom,” meant that the Legislature could not have intended to include assault as a predicate felony, because:

the statute would provide, essentially, that a person is guilty of second degree felony murder when he or she commits or attempts to commit assault on another, causing the death of the other, and the death was sufficiently close in time and place to that assault to be part of the *res gestae* of the 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 (emphasis added). It was necessary to reject this “absurd” interpretation, this Court held, because otherwise “the in furtherance of” language would be meaningless as to that predicate felony” as “the assault is not independent of the homicide.” 147 Wn.2d at 610. Indeed, as the Supreme Court later noted, the “felony murder statute is intended to apply when the underlying felony is *distinct* from, yet related to, the homicidal act.” In re Bowman, 162 Wn.2d 325, 331, 172 P.3d 681 (2007).

Although the new statute specifically includes reference to assault as the predicate felony, it still suffers from the same infirmity as that which led the Andress Court to its inescapable conclusion. The statute still contains the same “in furtherance of” language which the Supreme Court found in Andress would be rendered superfluous by allowing conviction for felony murder based upon an assault which causes death. And the

statutory language is still nonsensical if applied to such situations, because it still speaks of “a criminal act - - an assault, that results in death as being part of the res gestae of that same criminal act,” even though “the conduct constituting the assault and the homicide are the same.”

Because the statute does not declare whether it applies to all assaults or only those which are separate from the act which causes the death but still contains the “in furtherance of” language, it is ambiguous. Applying the rule of lenity and the rules of statutory construction against absurd results and assuming the Legislature did not intend such results, the Court is required to interpret the statute to apply only to assaults which are separate from the act causing death. This is the only way to avoid rendering superfluous the “in furtherance of” language or requiring an absurd result, and the only way to honor the Legislature’s apparent desire to include at least *some* assaults as predicate felonies for second-degree felony murder while following these mandates of statutory construction.

In response, the prosecution may cite to State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009), review granted, 169 Wn.2d 1011 (2010)<sup>19</sup>, a Division One case in which the Court first declared, without explanation, that the statute “is not ambiguous,” then stated that, if it was ambiguous, looking at the legislative history clarified that the Legislature “wants assault to be a predicate felony,” which means it should be so. 153 Wn.

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<sup>19</sup>Smith’s counsel represents Mr. Gordon. See Gordon, 153 Wn. App. at 520. The Supreme Court granted review in Gordon only on the issues raised by the prosecution in its Petition for Review regarding the exceptional sentence.

App. at 529. This Court should decline to follow Gordon, because that case was not well-reasoned and does not withstand scrutiny.

First, Gordon ignored the very language of the statute in finding it was not ambiguous. The language used by the 2003 Legislature did not clarify *which* assaults it intended to be as predicate felonies, because it still included the “in furtherance of” language in the statute. See Laws of 2003, ch. 3. Further, in amending the statute, the 2003 Legislature specifically stated that the purpose of the second-degree felony murder statute was punishing those who “commit a homicide in the course *and in furtherance of a felony*,” which the Legislature said meant the death was to be “sufficiently close in time and proximity to the predicate felony.” Laws of 2003, ch. 3, § 1 (emphasis added). Thus, the mere fact that the Legislature included the word “assault” in the statute does not answer the question posed as a result of the statute’s ambiguity, contrary to Division One’s declaration in Gordon.

Further, Division One’s ruling failed to apply the rule of lenity, despite the mandate to do so under such cases as Roberts, supra. See Gordon, 153 Wn. App. at 524-27. And it ignored the Supreme Court’s holding in Bowman, supra, that the felony murder scheme is intended to apply “when the underlying felony is distinct from, yet related to, the homicidal act” - a distinction which is lost if the underlying felony is the assault which results in death but not if the underlying felony is an assault and a *different* act causes the death. Bowman, 147 Wn.2d at 616. Because

Gordon is not well-reasoned and ignores fundamental law and principles, it should not be followed by this Court.

The only way to interpret the post-Andress RCW 9A.32.050(1)(b) to make sense of all of the language, avoid absurdity and follow the rule of lenity as required is to hold that the statute applies only when the predicate assault is an assault separate from the act which caused the death. This Court should so hold and should reverse.

- b. Allowing prosecution for second-degree murder based upon an assault predicate violates Fourteenth Amendment and Article I, §12 equal protection principles and due process mandates of fundamental fairness

Even if RCW 9A.32.050(1)(b) could be interpreted to apply to this case, application was still improper because allowing prosecution for second-degree murder based upon an assault predicate violates the constitutional mandates of equal protection and the fundamental fairness requirements of the state and federal due process clauses. Pursuant to RAP 10.1(g) and this Court's Order of Consolidation, Smith adopts and incorporates by reference the arguments presented in the opening brief on appeal filed by Ford (AOE 18) on this issue. In addition to those arguments, the Court should consider the following:

Both Article I, §12, of the Washington constitution and the Fourteenth Amendment require that similarly situated individuals receive like treatment under the law. See Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997); Dandridge v. Williams, 397 U.S. 471, 518, 90 S. Ct.

1153, 25 L. Ed. 2d 491 (1970).<sup>20</sup> When conducting an equal protection analysis, the first step is to determine the appropriate standard of review. See State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). This is done by looking at the nature of the interests or class affected. See State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998). Although physical liberty is an important liberty interest, the Supreme Court has held that it implicates only the “rational relationship” test. See State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996), cert. denied sub nom Manussier v. Washington, 520 U.S. 1201 (1997). Under that test, the courts ask 1) whether the classification applies to all members of the class, 2) whether there was some rational basis for distinguishing between those within and those outside the class, and 3) whether the challenged classification bears a “rational relationship” to the legitimate state objective which must be the basis for the classification. See, In re Bratz, 101 Wn. App. 662, 669, 5 P.3d 755 (2000).

While identical treatment is not required in all circumstances, it is still required that any distinction “have some relevance to the purpose for which the classification is made.” Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966). Further, even a seemingly valid law will violate equal protection if it is administered in a manner which

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<sup>20</sup>Washington courts have thus far construed the Washington clause as “substantially identical” to the federal clause, and use the same analysis. See State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

unjustly discriminates between similarly situated people. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990).

Here, Smith is a class of defendants who commit second degree assault which results in death. Under the statutes, the prosecution was given the astounding choice of charging such persons with either second-degree felony murder or the much lesser crime of second-degree manslaughter, as the Supreme Court had noted in Andress and Bowman. Yet there is absolutely no distinction between the people who would be subject to the far disparate punishments and higher crimes, save for the prosecutor's unfettered discretion. The complete lack of any standards for treating similarly situated defendants who commit exactly the same acts so differently cannot possibly serve any legitimate state objective, so that the "rational relationship" test was not met and concepts of fundamental fairness were violated.

In response, the prosecution may again attempt to rely on Gordon, in which Division One held that there was no equal protection violation. Any such reliance would be misplaced. In Gordon, Division One relied on its own decision in State v. Armstrong, 143 Wn. App. 333, 178 P.3d 1048 (2008), review denied, 164 Wn.2d 1035 (2008), holding that it was sufficient that the Legislature had declared that it intended to "[p]unish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony." Gordon, 153 Wn. App. at 546.

But Armstrong itself specifically recognized that equal protection is

violated when a statutory scheme proscribes crimes that do not require proof of different elements. Armstrong, 143 Wn. App. at 338. Put simply, the Armstrong Court noted, “[w]hen the crimes have different elements, the prosecutor’s discretion is not arbitrary, but is constrained why which elements can be proved under the circumstances.” Id.

Further, in Gordon, Division One completely ignored the Supreme Court’s holdings in a related, instructive area of the law. Applying equal protection principles and the need to limit the prosecution’s discretion, the Supreme Court has held that, “where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute.” State v. Shriner, 101 Wn.2d 576, 579, 681 P.2d 237 (1984), quoting, State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979); see State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982). Both the courts of appeals and the Supreme Court have indicated that equal protection principles underlie this rule, because those principles are offended when the prosecutor is allowed to make a choice of which comparable crime to charge when one is far more serious. See State v. Pyles, 9 Wn. App. 246, 511 P.2d 1374, review denied, 82 Wn.2d 1013 (1973); see also, State v. Collins, 55 Wn.2d 469, 348 P.2d 214 (1960). This line of cases illustrates the equal protection problems with application of the second-degree felony murder statute to Smith in this case.

Further, the Supreme Court has stated that, under equal protection

principles, the prosecution should not be permitted the discretion to chose “different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations.” Olsen v. Delmore, 48 Wn.2d 545, 550, 295 P.2d 324 (1956). The only way to interpret the post-Andress version of RCW 9A.32.050(1)(b) to avoid an absurd result and honor basic principles of statutory construction such as the rule of lenity is to limit its application to felony murders where the underlying assault is not the act which causes the death, and this Court should so hold and should reverse and dismiss Smith’s felony murder conviction.

#### 8. CUMULATIVE ERROR COMPELS REVERSAL

Even if each of the individual errors in this case did not compel reversal, the cumulative effect of those errors, taken together, would. This Court will reverse for “cumulative error” where “the combined effect of the errors during trial effectively denied the defendant her right to a fair trial, even if each error standing alone would be harmless.” State v. Venegas, 155 Wn. App. 507, 520, 228 P.2d 813 (2010). Thus, in Venegas, where the trial court improperly excluded evidence relevant to the defense, the prosecutor twice made arguments impinging on Venegas’ presumption of innocence and the trial court admitted improper evidence without properly balancing its prejudicial effect in a case which “largely turned on witness credibility,” this Court reversed based on cumulative error. Id.

Here, although each of the errors Smith and his codefendants have

identified standing alone support reversal, there can be no question that the incredible weight of the cumulative effect of all of the errors, taken together, mandate such a result. Smith was prevented from admitting evidence material and necessary to support his only defense - self-defense. He was prevented from introducing the statement which would have supported that defense. And the prosecution was allowed to bolster its case on that very point by painting Beaudine in a "good character" light so as to convince the jury he could not have been the aggressor - again going directly to Smith's claim of self-defense. At the same time, virtually all evidence which would have balanced the "good character" portrait of Beaudine was excluded. And completely irrelevant evidence tainted the jurors minds with the specter of Smith as a man involved with a violent, criminal motorcycle gang who had numerous weapons at his home.

If this were not enough, the prosecutor repeatedly told the jury that Smith could not claim self-defense because he had not testified, and that he had some burden of proving self-defense. And the prosecutor told the jury to fault Smith for exercising his right not to testify, while at the same time bolstering her own case over and over.

There is no way that a fair trial could have been eked out from under the crushing weight of these completely pervasive errors. The trial court should have granted one of the many motions to dismiss the charges or for a mistrial. Reversal is required.

9. PURSUANT TO RAP 10.1(g) AND THIS COURT'S ORDER OF CONSOLIDATION, SMITH ADOPTS AND INCORPORATES HEREIN BY REFERENCE THE ARGUMENTS OF HIS CODEFENDANTS

RAP 10.1(g) provides that, in consolidated cases, parties may adopt and incorporate by reference arguments of parties similarly situated. The purpose of the rule is “to facilitate shared briefing related to shared issues.” C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 728 n. 18, 985 P.2d 262 (1999). Pursuant to RAP 10.1(g) and this Court’s Order of Consolidation, Smith adopts and incorporates by reference all of the arguments presented in the opening briefs on appeal filed by Ford, McCreven and Nolan which are relevant to Mr. Smith. In that respect, the Court should also consider the following: The “to-convict” instruction for Smith for second-degree felony murder did not include the requirement for the state to prove the absence of self-defense beyond a reasonable doubt. CP 1217. Counsel objected to that failure. RP 2785-86. Smith’s counsel also objected to the court’s failure to give a defense proposed “to convict” instruction, which would have told the jury that the prosecution’s duty of disproving self-defense was an essential element of the prosecution’s case. RP 2785-86. He excepted to the failures to give “lesser included offense” instructions on first- and second-degree manslaughter, and the self-defense instruction as not making it clear the jury was to evaluate that defense “standing in the shoes” of the defendants, and joined in the other defendant’s objections, including to a “first aggressor” instruction. RP 2786-89.

Smith also moved to dismiss the charges or for a mistrial based upon the repeated prosecutorial misconduct and admission of improper evidence. See e.g., RP 829, 850-52, 16RP 42-45, 2954-59, 17RP 2-8. He also objected to the misconduct in closing argument, such as the personal attack on himself. See RP 2945-46. And he moved repeatedly for a separate trial. See, e.g., RP 730-34, 1345-49, 2312, 9RP 9, 16RP 40; CP 1085-95. Smith also moved for a new trial just after closing argument and joined the motions for a new trial/motions in arrest of judgment made after the convictions. RP 2955-65, 17RP 3-6; see also CP 1260-76. As a result, those issues are properly incorporated herein.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial. In the alternative, remand for resentencing is required. In either instance, new counsel should be appointed to ensure that Smith receives effective assistance on remand.

DATED this 12<sup>th</sup> day of October, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel, counsel for codefendants and to appellant as follows:

by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Carl Smith, DOC 293917, Clallam Bay CC, 1830 Eagle  
Crest Way, Clallam Bay, WA. 98326;

to counsel for codefendant Nolan: c/o Nielsen, Broman and Koch  
PLLC, 1908 E. Madison St., Seattle, Washington 98122;

and via email with return receipt confirmation:

to counsel for codefendant Ford, Lise Ellner, at

[liseellner@hotmail.com](mailto:liseellner@hotmail.com);

to counsel for codefendant McCreven, Mary Kay High, at  
[mhigh@co.pierce.wa.us](mailto:mhigh@co.pierce.wa.us).

DATED this 12<sup>th</sup> day of October, 2010.



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DIVISION II  
10 OCT 14 AM 11:33  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

The verbatim report of proceedings consists of 35 physical volumes, which are not all chronologically paginated and several of which contain multiple, non-sequential and not chronologically paginated dates.

While it is nearly impossible to make this confusion of transcripts easy to cite, following is the explanation of citations used in that effort in this brief.

The 35 volumes are as follows, with their citations in bold:

November 14, 2008 ("**1RP**") and January 22, 2009 ("**3RP**"), contained in one volume but separately paginated and with a cover sheet which mistakenly also includes November 21, 2008 on it;

November 21, 2008 ("**2RP**") and August 28 ("**21RP**"), September 25 ("**22RP**") and October 29, 2009 ("**23RP**"), contained in one volume, separately paginated;

January 30, 2009 ("**4RP**");

February 5 ("**5RP**"), 6 ("**6RP**"), March 13 ("**7RP**") and April 2 ("**8RP**"), 2009, in one volume, separately paginated;

April 9, 2009 ("**9RP**");

April 13, 2009 ("**10RP**"), which does not indicate on the cover but which is for the morning proceedings on that date;

April 13, 2009 "p.m. session" ("**11RP**");

April 14, 2009 "a.m. session" ("**12RP**");

April 15, 2009 ("**13RP**");

April 16, 2009, with the caption "motions; jury voir dire (a.m.)" ("**14RP**");

April 16 and 17, 2009, chronologically paginated ("**15RP**");

20 chronologically paginated volumes containing the pretrial and trial proceedings of April 20-23, 30, May 4-7, 11-14, 18-21, June 1-3, 8-10, 12 and 15, 2009, (all volumes cited as "**RP**"); (PLEASE NOTE, ALTHOUGH THESE VOLUMES ARE NUMBERED WITH VOLUME NUMBERS THERE IS NO VOLUME 19)

A separately paginated volume containing the trial proceedings of June 4, 2009 ("**16RP**");

July 23 (“**17RP**”) and August 10, 2009 (“**20RP**”), in one volume,  
separately paginated;

July 24, 2009 (“**18RP**”);

August 7, 2009 (“**19RP**”);

the separately paginated volume containing the motion and  
sentencing December 11, 2009, as “**SRP**.”

INSTRUCTION NO. 24

It is a defense to a charge of murder in the second degree that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the defendant or any person in the defendant's presence or company when:

(1) the defendant reasonably believed that the person killed or others whom the defendant reasonably believed were acting in concert with the person killed intended to commit a felony or to inflict death or great personal injury;

(2) the defendant reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the defendant, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

INSTRUCTION NO. 29

"Great personal injury" means an injury that the defendant reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the defendant or another person.

## INSTRUCTION NO. 57

You will also be furnished with special verdict forms for each of the counts charged against each defendant. If you find a defendant not guilty of either or both of the crimes charged, do not use the special verdict form for that count or defendant. If you find a defendant guilty of either or both of the crimes charged, you will then use the special verdict form for that count and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form[s]. In order to answer the special verdict form[s] "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer "no."