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### ASSIGNMENTS OF ERROR

1. The trial court erred by giving Instruction No. 10.
2. Instruction No. 10 unconstitutionally shifted the burden of proof.
3. Instruction No. 10 failed to make manifestly clear the state's burden to prove Ms. Thoman's knowledge (as a component of her alleged intent to deliver).
4. The prosecutor committed misconduct in his closing argument requiring reversal.
5. The prosecutor improperly shifted the burden of proof in closing argument.
6. The government violated Ms. Thoman's constitutional right to privacy under Article I, Section 7 and her Fourth Amendment right to be free of unreasonable searches and seizures.
7. Ms. Thoman's convictions were obtained in violation of her constitutional right to a jury trial under the Sixth and Fourteenth Amendments and Article I, Section 21 of the Washington Constitution.
8. Officer Smerer invaded the province of the jury by expressing his opinion on Ms. Thoman's guilt.
9. Ms. Thoman was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.
10. Defense counsel was ineffective for failing to seek suppression of evidence seized following an illegal search.
11. Defense counsel was ineffective for failing to object to the introduction of evidence that was irrelevant and prejudicial.
12. Defense counsel was ineffective for failing to object to improper opinion evidence.
13. Defense counsel should have objected to Instruction No. 10, requested a clarifying instruction limiting its application, and objected to and rebutted the prosecuting attorney's improper closing argument.

14. The trial court erred by sentencing Ms. Thoman with an offender score of ten.
15. The evidence at sentencing was insufficient to prove that Ms. Thoman's prior convictions all scored separately.
16. The trial court erred by finding that none of Ms. Thoman's three felonies committed 8/22/2004 comprised the same criminal conduct.
17. The trial court erred by finding that none of Ms. Thoman's four felonies committed 9/12/2004 comprised the same criminal conduct.
18. The trial court erred by adopting Finding of Fact No. 2.2 of the Judgment and Sentence.
19. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A trial court may not instruct jurors in a way that shifts the burden of proof. Here, the trial judge erroneously instructed the jury that Ms. Thoman bore the burden of proving that she did not know there was methamphetamine in the trunk of the car. Was Ms. Thoman's conviction for Possession with Intent to Deliver entered in violation of her Fourteenth Amendment right to due process?
2. It is misconduct for a prosecutor to shift the burden of proof during closing argument. In this case, the prosecutor improperly argued that Ms. Thoman bore the burden of disproving knowledge by a preponderance of the evidence. Did the prosecutor commit misconduct that infringed Ms. Thoman's Fourteenth Amendment right to due process?
3. In order to obtain a search warrant for containers found in the trunk of a car, the police must have probable cause to believe that evidence of a crime will be found therein. Here, the police observed a drug pipe (containing what appeared to be methamphetamine) in the passenger compartment of Ms. Thoman's car. Did the police lack probable cause to search containers found in the trunk of the car?

4. A “nearly explicit” or “almost explicit” opinion on an ultimate issue violates an accused person’s constitutional right to a jury trial. Here, Officer Lowrey opined that the methamphetamine was in Ms. Thoman’s possession. Did the officer’s opinion testimony invade the province of the jury and violate Ms. Thoman’s constitutional right to a jury trial?
5. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel failed to seek suppression of illegally obtained evidence and statements, failed to object to the introduction of irrelevant and prejudicial evidence, and failed to address errors caused by the court’s instructions. Was Ms. Thoman denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel?
6. When faced with prosecutorial misconduct in closing, a reasonably competent defense attorney will request a bench conference to lodge objections, seek curative instructions, or request a mistrial. In this case, defense counsel failed to make appropriate objections to prosecutorial misconduct in closing. Was Ms. Thoman denied her right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?
7. A trial judge must determine whether or not multiple prior offenses comprise the same criminal conduct. Here, the prosecutor failed to establish that all of Ms. Thoman’s prior offenses scored separately. Did the trial judge violate RCW 9.94A.525 by failing to appropriately score some of Ms. Thoman’s prior offenses as the same criminal conduct?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Miranda Thoman was homeless in December of 2009. RP<sup>1</sup> 127, 130. She borrowed a car from a friend named Dan Miracle. Miracle was in the process of purchasing the car. RP 50, 102. She got the car on November 28, 2009, and kept all of her belongings in it. RP 97, 130.

Her boyfriend Leonard Young hid methamphetamine and paraphernalia in the spare tire compartment of the trunk, so that Ms. Thoman would not see it and become angry. RP 121, 125. Ms. Thoman put a couple of bags and a laundry basket in the trunk. RP 123-124.

As she was driving the car on December 3, 2009, Ms. Thoman was pulled over for failure to use her turn signal. RP 37-38. She stopped immediately, in front of the Washington Elementary School. RP 38. Because Officer Smerer learned that Ms. Thoman was a party to a restraining order, he and Officer Lowrey removed the passenger Leonard Young from the car. RP 40, 62. As Young got out of the car, Lowrey saw two suspected drug pipes which appeared to contain methamphetamine. RP 41; Affidavit Regarding Probable Cause, Supp. CP The pipes were in the passenger compartment of the car, on the floor. RP 41, 63. Young

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<sup>1</sup> The trial spanned two days, and the Verbatim Report of Proceedings from those two days is numbered sequentially and therefore cited as "RP" without a date reference. Citations to other hearings include the date.

turned out not to be the subject of the order. RP 62. Mr. Young gave a false name, which he couldn't spell, shoved candy into his mouth while talking with police, and had a significant amount of cash on him. RP 44, 62.

Ms. Thoman was cited and released;<sup>2</sup> Mr. Young was arrested and taken to jail. RP 63, 120. The police impounded the car, obtained a search warrant based on their observation of the drug pipes, and searched the entire vehicle. RP 42. In the trunk, officers found a machete case containing a machete and small empty baggies with a Batman logo. RP 42-43. There were also two backpacks and a laundry basket containing Ms. Thoman's property. RP 48-50, 58. After removing a panel in the trunk, Lowrey found methamphetamine, pipes, and a scale. Some of the items were in a cell phone case. RP 42, 65.

Ms. Thoman called the officers on December 7, 2009 to see about retrieving her property from the car. RP 74. Officer Smerer told her to come in to the station. When she did, he arrested her. RP 74-75, 85-86. She told him that she did not know there was any methamphetamine in the trunk of the car, and that she and Young cleaned out the trunk a day or two before the incident. RP 76, 87. Dan Miracle came with her to the police

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<sup>2</sup> The keys to the vehicle remained in the ignition. RP 100.

station, and told the officers that he was in the process of purchasing the car and that he had lent it to Ms. Thoman. RP 95-97.

The state charged Ms. Thoman with Possession of Methamphetamine with Intent to Deliver, and added a school zone enhancement. CP 1-2.

Defense counsel did not move to suppress the evidence found in the trunk. Omnibus Order, Supp. CP.

At trial, Officer Smerer opined that the methamphetamine, the scales, the baggies, and the pipes were all “in her [Ms. Thoman’s] possession in the trunk.” RP 78. Ms. Thoman’s attorney did not object to this testimony, or ask for a limiting instruction. RP 78. Smerer also said that Ms. Thoman told him that she does use methamphetamine and sometimes makes jewelry in exchange for it. RP 77. This testimony also came in without defense objection, even though the court had ruled pretrial that Ms. Thoman’s use was not relevant and that her statements should not be admitted. RP 15-18, 77.

Leonard Young testified at trial. He acknowledged that the methamphetamine and drug-related items were his and not Ms. Thoman’s. RP 119-130. He told this to the jury despite the fact that he was charged with drug offenses out of the incident and he had not yet been tried. RP 122.

The prosecuting attorney proposed jury instructions which included the lesser offense of simple possession and an instruction on the affirmative defense of unwitting possession. Plaintiff's Proposed Instructions, Supp. CP. The court gave both instructions. Instructions Nos. 6, 10, Supp. CP. Defense counsel did not object or seek an instruction clarifying that the unwitting possession instruction applied only to the lesser offense. RP 131.

In his closing argument, the prosecutor discussed the elements of the Possession with Intent to Deliver and the burden of proof:

Let me ask you one more question, answer it to yourself. And this instruction, this element instruction, which is what the state has to prove, is the word knowing up there anywhere, do you see the word knowing[?] It is not there, and this is why. Once again, like Number 9, this next instruction, quite frankly, what the state considers to be the pivotal instruction of this entire case, it is Number 10. This one you have to look at very, very carefully. A person is not guilty of possession of a controlled substance if the possession is unwitting. They didn't know about it. But read further, possession of a controlled substance is unwitting if that person did not know the substance was in her possession, the second paragraph, the burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of evidence means that you must be persuaded concerning all the evidence in the case it is more probably true than not true. This is one of the very few times in our jurisprudence system that the defendant has to prove anything. But in this case, it is the circumstance. Ask yourself did the defense prove to you by a preponderance that Ms. Thoman didn't know she had this in her car[?] What's the evidence show[?] Why is this in her car[?] This is mixed in the trunk. Once again, the evidence shows a person who had a vehicle, actually made modifications in the sense she installed speakers, she had to be in the trunk, she got

the car earlier, about a week earlier, apparently cleaned out the trunk, put other things inside of it, does all that evidence prove to you that she didn't know the stuff was there, or does it lend support to the fact that she did know it was there. What makes sense[?] The state submits to you all this evidence and where it was located and the circumstances of her possession of the vehicle and driving it all leads to the conclusion that she knew it was there. But, more importantly, it doesn't prove by a preponderance that she didn't know it was there. What makes sense[?] The state would simply ask you to take a hard look at Instruction Number 9, Instruction Number 10, and ask yourself those questions.  
RP 134-145.

Defense counsel did not object or request an instruction. RP 134-145.

The jury returned a verdict of guilty to the charge of Possession of Methamphetamine with Intent to Deliver, with a special finding that the crime occurred in a school zone. RP 162-163.

At sentencing, the state alleged that Ms. Thoman had ten prior felony convictions. RP (4/14/10) 168. The state presented four Judgments and Sentences, two of which were from 2004. The first, from cause number 04-1-778-4, indicated convictions for Residential Burglary, Burglary in the Second Degree, and Theft in the First Degree, with an offense date of 8/22/2004. Exhibit 1, filed 4/13/10, Supp. CP. The second, cause number 04-1-765-2, indicated convictions for Burglary in the Second Degree, Conspiracy to Commit Burglary in the Second Degree, Trafficking in Stolen Property in the first Degree, and Theft in the First

Degree, all with an offense date of 9/12/2004. Exhibit 2, filed 4/13/10, Supp. CP.

The prosecutor did not present evidence or argument addressing whether or not these offenses comprised the same criminal conduct. The court scored each prior felony separately. RP (4/14/10) 167-174; CP 5. The court sentenced Ms. Thoman with a score of 10. CP 4-11. Ms. Thoman timely appealed. CP 13-22.

### **ARGUMENT**

#### **I. THE COURT'S INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN OF PROOF AND RELIEVED THE PROSECUTION OF ITS BURDEN TO PROVE MS. THOMAN'S MENTAL STATE.**

##### A. Standard of Review

Alleged constitutional violations are reviewed *de novo*.

Constitutional questions are reviewed *de novo*. *State v. Schaler*, \_\_\_ Wash. 2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2010). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kylo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009); *State v.*

*Berg*, 147 Wash.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

B. The state was required to prove that Ms. Thoman possessed methamphetamine with intent to deliver.

Due process requires the state to prove every element of a criminal offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Reversal is required whenever jury instructions “have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution.” *Francis v. Franklin*, 471 U.S. 307, 326, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

An essential element of the crime charged in this case is the intent to deliver methamphetamine. RCW 69.50.401; *see also* Instructions Nos. 3 and 4, Supp. CP. The prosecution bore the burden of proving not only that Ms. Thoman possessed methamphetamine, but also that her possession was specifically “with the intent to deliver.” Instruction No. 4, Supp. CP.

This mental element—intent to deliver—implicitly requires proof of knowledge as a component of intent to deliver. This is so because

[i]t is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one

who acts intentionally acts knowingly... Without knowledge of the controlled substance, one could not intend to manufacture or deliver that controlled substance. Therefore, there is no need for an additional mental element of guilty knowledge.

*State v. Sims*, 119 Wash.2d 138, 142, 829 P.2d 1075 (1992). As the Supreme Court recognized in *Sims*, a person whose possession is unwitting does not possess with the intent to deliver. The state therefore bears the burden of proving knowing possession, not as a separate element of the offense, but as a necessary part of its proof on the accused person's intent to deliver. Accordingly, the accused person has no burden to prove unwitting possession where the charge is Possession with Intent to Deliver. *Sims*, at 142.

C. The court's instructions shifted the burden of proof, and failed to make manifestly clear the state's burden to prove Ms. Thoman's knowledge (as a component of her alleged intent to deliver).

In this case, the prosecutor asked the court to instruct the jury on the affirmative defense of unwitting possession.<sup>3</sup> Plaintiff's Proposed Instructions, Supp. CP. The court gave the instruction, which included language directing the jury that "[t]he burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly." Instruction No. 10, Supp. CP. The Court did not clarify that

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<sup>3</sup> The defense did not apparently propose any instructions.

this burden could only be lawfully applied to the lesser offense. *See* Court’s Instructions to the Jury, Supp. CP. The problem was compounded by the prosecutor’s remarks in closing argument. Relying on Instruction No. 10, the prosecutor specifically told the jury that the state was not required to prove knowledge. RP 142; *Sims*, at 142.

Instruction No. 10 unconstitutionally shifted the burden of proof, and conflicted with the Supreme Court’s decision in *Sims*, *supra*. Because the court failed to make manifestly clear the state’s burden to prove Ms. Thoman’s knowledge—as a component of her alleged intent to deliver—the instructions violated Ms. Thoman’s Fourteenth Amendment right to due process. *Kyllo*, *supra*; *Francis*, *supra*. Accordingly, Ms. Thoman’s conviction must be reversed and the case remanded for a new trial. *Id.*

## **II. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.**

### **A. Standard of Review**

Prosecutorial misconduct may be raised for the first time on appeal when it amounts to a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Jones*, 71 Wash.App. 798, 809-810, 863 P.2d 85 (1993). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143

Wash.2d 1, 8, 17 P.3d 591 (2001).<sup>4</sup> An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.<sup>5</sup> *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

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<sup>4</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

<sup>5</sup> Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash. App. 794, 800, 998 P.2d 907 (2000). In the absence of an objection, such misconduct requires reversal if it is “so flagrant and ill-intentioned” that no curative instruction would have negated its prejudicial effect. *Id.*, at 800.

B. The prosecutor committed misconduct by shifting the burden of proof in closing argument.

A prosecuting attorney commits misconduct by making a closing argument that shifts the burden of proof. *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2006). It is improper even to imply that the defense has a duty to present evidence relating to an element of the charged crime. *Toth*, at 615. Such misconduct affects a constitutional right and requires reversal of the conviction unless the error is harmless beyond a reasonable doubt. *Id.*

In this case, the prosecutor improperly argued that Ms. Thoman bore the burden of proving unwitting possession by a preponderance of the evidence. RP 142. This argument would have been appropriate had the prosecutor limited his remarks to the lesser offense, since unwitting possession is an affirmative defense to that charge. *State v. George*, 146 Wash. App. 906, 915, 193 P.3d 693 (2008). However, when the charge is Possession with Intent to Deliver, the burden is on the state to prove knowing possession as part of its burden to prove intent to deliver. *Sims*, *supra*.

The prosecutor's misconduct in this case shifted the burden of proof, and is presumed prejudicial. *State v. Dixon*, 150 Wash.App. 46, 54,

207 P.3d 459 (2009); *Toth, supra*. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

**III. THE EVIDENCE ADMITTED AT MS. THOMAN’S TRIAL WAS SEIZED IN VIOLATION OF HER RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 7 AND HER FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES.**

A. Standard of Review

The existence of probable cause is a question of law, reviewed *de novo*. *State v. Neth*, 165 Wash. 2d 177, 182, 196 P.3d 658 (2008). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, the appellant “must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the [appellant’s] rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wash.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wash. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).<sup>6</sup>

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<sup>6</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those

- B. The search warrant was not based on probable cause to believe that evidence of a crime would be found in containers within the trunk of the car.

The Fourth Amendment to the federal constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.<sup>7</sup> Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.<sup>8</sup>

A search warrant may issue only upon a showing of probable cause to believe that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. *Neth*, at 182. Probable cause requires a nexus between the suspected

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claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

<sup>7</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

<sup>8</sup> It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

criminal activity, the item to be seized, and the place to be searched. *Id.*, at 183.

Probable cause “must be tailored to specific compartments and containers within an automobile.” *United States v. Carter*, 300 F.3d 415, 422 (4th Cir. 2002).

Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

*United States v. Ross*, 456 U.S. 798, 824, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). *See also California v. Acevedo*, 500 U.S. 565, 579-80, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991) (probable cause that a paper bag in the trunk of a car contains marijuana will not support a search of the entire vehicle.)

In this case, the police lacked probable cause to believe evidence of a crime would be found in the trunk (much less in closed containers within the trunk). The only indication they had of any wrongdoing was the presence of a drug pipe that “appeared to have methamphetamine” in it. Affidavit<sup>9</sup> Regarding Probable Cause, Supp. CP; RP 41, 64. This did

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<sup>9</sup> This Affidavit related to the filing of the Information; it was not the application for a search warrant. The search warrant affidavit is not part of the trial court file.

not justify a search of containers in the trunk, because it did not suggest that additional evidence would be found therein. *Ross, supra; Acevedo, supra*. Accordingly, Ms. Thoman’s conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Neth, supra*.

**IV. MS. THOMAN’S CONVICTION WAS OBTAINED IN VIOLATION OF HER RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 21 OF THE WASHINGTON CONSTITUTION.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler, at \_\_\_*. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *Kirwin, at 823*.

B. The prosecution introduced impermissible opinion testimony, which violated Ms. Thoman’s constitutional right to a jury trial.

A criminal defendant has a constitutional right to a jury trial.

Under Article I, Section 21 of the Washington Constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Article I, Section 22 provides that “the accused shall have the right . . . to have a speedy public trial by an impartial jury.” Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S.

Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Impermissible opinion testimony on the accused person's guilt violates the constitutional right to a jury trial. *State v. Kirkman*, 159 Wash.2d 918, 155 P.3d 125 (2007); *State v. Black*, 109 Wash.2d 336, 745 P.2d 12 (1987). Opinion testimony on an ultimate issue is forbidden if it is a "nearly explicit" or "almost explicit" statement by the witness that the witness believes the accused is guilty. *Kirkman*, at 937.

To convict Ms. Thoman, the prosecution was required to establish beyond a reasonable doubt that she possessed a controlled substance with the requisite intent. RCW 69.50.401; Instructions Nos. 3 and 4, Supp. CP. Officer Smerer's opinion—that the contraband "was in her possession in the trunk"—was an explicit opinion that he believed that Ms. Thoman was guilty, at least of possession. RP 78; *Kirkman*, at 937. This deprived Ms. Thoman of her constitutional right to a jury trial under both the state and federal constitutions. *Id.*

C. The violation of Ms. Thoman's constitutional right to a jury trial was not harmless beyond a reasonable doubt.

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *Toth*, at 615. To overcome the presumption, the state must establish beyond a

reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. Ms. Thoman's defense was that she did not possess the contraband in the trunk. RP 156. Officer Smerer's opinion directly contradicted this position, and provided the jury with sufficient evidence upon which to base a finding of guilt.

Under these circumstances, the error was not trivial, formal, or merely academic; it prejudiced Ms. Thoman and likely affected the final outcome of the case. *Lorang*, at 32. A rational juror could have entertained a reasonable doubt about whether or not she had dominion and control over the contraband found in the trunk. Because the error was not harmless, the conviction must be reversed and the case remanded for a new trial. *Id.*

**V. MS. THOMAN WAS DENIED HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash. App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *see also State v. Pittman*, 134 Wash. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wash. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

- C. Ms. Thoman was denied the effective assistance of counsel by her attorney's failure to seek suppression of evidence seized pursuant to the illegal vehicle search.

In *Reichenbach*, the Supreme Court reversed the defendant's conviction and dismissed his case because defense counsel failed to seek suppression of evidence. *Reichenbach, supra*. The Court examined the merits of the suppression issue, concluded that the evidence should have been suppressed, and held that defense counsel was ineffective for failing to seek suppression. *Id.*

Here, as in *Reichenbach*, defense counsel's performance fell below an objective standard of reasonableness because he failed to seek suppression of evidence critical to the state's case. The evidence should have been suppressed because the police lacked probable cause for a search warrant, as discussed above. There was no possible advantage in permitting the seized items to be admitted. Without the evidence, the prosecution would have been unable to proceed. Because of this, there was no legitimate strategic or tactical reason justifying the failure to move to exclude the evidence. *Reichenbach, supra*.

Accordingly, Ms. Thoman's conviction must be reversed. *Id.* The evidence must be suppressed and the case dismissed with prejudice. *Id.*

D. Ms. Thoman was denied the effective assistance of counsel by her attorney's failure to object to irrelevant and prejudicial evidence introduced at trial.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

1. Defense counsel should have objected when Officer Smerer violated the court's pretrial ruling.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 403, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Under ER 404(b), "[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Before evidence of prior acts may be admitted, the trial court is required to analyze the evidence and must ““(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.”” *State v. Asaeli*, 150 Wash.App. 543, 576, 208 P.3d 1136 (2009) (quoting *State v. Pirtle*, 127 Wash.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record.<sup>10</sup> *Asaeli*, at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wash.App. 727, 733, 25 P.3d 445 (2001).

In this case, defense counsel should have objected when the prosecution introduced Ms. Thoman’s confession that she sometimes traded jewelry for methamphetamine. RP 77. Counsel had already obtained a favorable ruling excluding the evidence. RP 15-18.

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<sup>10</sup> However, if the record shows that the trial court adopted a party’s express arguments addressing each factor, then the trial court’s failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at 576 n. 34.

Accordingly, when Officer Smerer violated the court's pretrial ruling, defense counsel should have objected and requested a curative instruction.

The evidence was irrelevant under ER 401, and thus should have been excluded under ER 402. Even if it had some minimal relevance, it was highly prejudicial, and should have been excluded under ER 403. Furthermore, the evidence might have suggested a propensity to commit drug crimes, and thus was inadmissible under ER 404(b). If the prosecution had identified a proper purpose for admitting it, the trial court would have been obliged to instruct the jury to consider it only for that purpose. *State v. Russell*, 154 Wash. App. 775, 784, 225 P.3d 478 (2010) *review granted*, 169 Wash. 2d 1006, 234 P.3d 1172 (2010).

Without such an objection, the jury was permitted to consider the evidence for any purpose, including as propensity evidence.<sup>11</sup> *See State v. Myers*, 133 Wash. 2d 26, 36, 941 P.2d 1102 (1997) (In the absence of a limiting instruction, "evidence admitted as relevant for one purpose is deemed relevant for others.") In fact, the court's instructions actually *required* the jury to consider the robbery evidence as proof of guilt. Instruction No. 1, Supp. CP; *Russell*, at 786.

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<sup>11</sup> The use of propensity evidence to establish guilt violates ER 404(b); it may also violate the Fourteenth Amendment's due process clause. U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).

Thus defense counsel's failure to object prejudiced Ms. Thoman. Without the improper evidence, a reasonable juror might have voted to acquit. Accordingly, Ms. Thoman was denied the effective assistance of counsel. *Saunders, supra*. Her convictions must be reversed and the case remanded for a new trial. *Id.*

2. Defense counsel should have objected to Officer Smerer's improper opinion testimony.

Officer Smerer's opinion—that the contraband “was in her possession in the trunk”—was a “nearly explicit” or “almost explicit” opinion that Ms. Thoman was guilty. RP 78. Accordingly, a proper objection would have been sustained. *Kirkman*, at 937.

No legitimate strategy explains defense counsel's failure to object; the testimony bolstered the prosecution's case, and was available for the jury's use as direct evidence that Ms. Thoman possessed the contraband. Accordingly, the failure to object constituted deficient performance. Furthermore, Ms. Thoman was prejudiced by the error: had counsel objected, the testimony would have been stricken.

If the improper admission of the Officer Smerer's opinion testimony cannot be reviewed as a manifest error affecting Ms. Thoman's constitutional right to a jury trial, her conviction must be reversed for

ineffective assistance, and the case remanded for a new trial.

*Reichenbach, supra.*

- E. Defense counsel should have objected to Instruction No. 10, requested a clarifying instruction limiting its application, and objected to and rebutted the prosecuting attorney's improper closing argument.

To be reasonably competent, defense counsel must be familiar with the relevant legal standards and instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). Failure to request appropriate instructions may require reversal. *Id.*

A failure to object to improper closing arguments is objectively unreasonable "unless it 'might be considered sound trial strategy.'" *Hodge v. Hurley*, 426 F.3d 368, 385 (6<sup>th</sup> Cir. 2005) (quoting *Strickland*, at 687-88). Under most circumstances,

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

*Hurley*, at 386 (citation omitted).

In this case, defense counsel did not object to Instruction No. 10, did not seek a clarifying instruction, did not object to the prosecutor's misconduct in closing, and did not present argument rebutting the prosecutor's misstatements. RP 131, 142, 146-156. Counsel's failures deprived Ms. Thoman of the effective assistance of counsel. Her conviction must be reversed and the case remanded for a new trial.

*Reichenbach, supra.*

**VI. THE TRIAL JUDGE ABUSED HIS DISCRETION BY FAILING TO FIND THAT ANY OF MS. THOMAN'S PRIOR OFFENSES COMPRISED THE SAME CRIMINAL CONDUCT.**

Under RCW 9.94A.525, the sentencing court is required to analyze multiple prior convictions to determine whether or not they are based on the same criminal conduct:

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from

sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

RCW 9.94A.525.<sup>12</sup>

The sentencing court is not bound by prior determinations, but must exercise its discretion and decide whether multiple prior offenses should count separately or together. *State v. Mehaffey*, 125 Wash. App. 595, 600-01, 105 P.3d 447 (2005). Where sentences were imposed on the same date, in the same county, and under the same cause number, the court may not presume prior offenses count separately. *Id.*

The sentencing court failed to exercise its discretion in this case. CP 6; *Id.* Accordingly, Ms. Thoman's sentence must be vacated and the case remanded for a new sentencing hearing. At the new sentencing hearing, the court must determine whether or not those offenses committed on the same day comprised the same criminal conduct. *Id.*

### **CONCLUSION**

For the foregoing reasons, Ms. Thoman's conviction must be reversed and the case remanded to the trial court for a new trial. In the

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<sup>12</sup> Under RCW 9.94A.589(1)(a), "same criminal conduct" means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

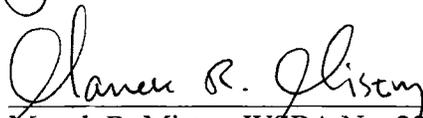
alternative, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on September 3, 2010.

**BACKLUND AND MISTRY**



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CERTIFICATE OF MAILING

I certify that I mailed, postage prepaid, a copy of Appellant's Opening Brief to:

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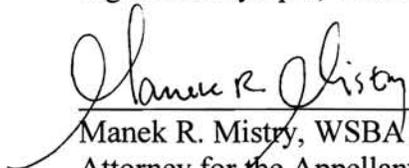
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DIVISION II  
10 SEP -3 AM 8:30  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

And that I personally delivered the original and one copy to the Court of Appeals, Division II, for filing;

On September 3, 2010.

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

Signed at Olympia, Washington on September 3, 2010.

  
\_\_\_\_\_  
Manek R. Mistry, WSBA No. 22922  
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