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A. ARGUMENT IN REPLY TO RESPONDENT'S CHARACTERIZATION OF THE EVIDENCE

It is long-standing and firmly rooted in both the federal and state constitutions that an accused is entitled to a fair trial.¹ It is also well understood that a trial proceeding must not only be fair, it must also appear fair to all who observe.²

Mr. Pierce's trial was neither fair nor had the appearance of fairness. It was instead fraught with prejudicial error that the Respondent flippantly characterizes as "a myriad of insignificant events." BOR 18. An observer of the trial proceeding would learn these "insignificant events" included:

- the prospective jurors being permitted, during general *voir dire*, to openly voice that Mr. Pierce was "guilty as hell" and other bias comments before any evidence was presented;
- the representatives of the state telling the jury that the prosecution against Mr. Pierce "had nothing to do" with him, but was being brought on behalf of the victims;
- the prosecution telling jurors to "do their duty" and convict Mr. Pierce so the prosecution, the victims' family, and the victims would personally be "satisfied" and that justice would be done;

¹ U.S. Const. Amend VI, IVX; Wash. Const. Art. I, §§ 3, 21, 22; *Duncan v. Louisiana*, 391 U.S. 145, 177, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *State v. Johnson*, 25 Wn.App 443, 457, 105 P.3d 85, 92 (2005).

² *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379 (2008); *Wheat v. U.S.*, 486 U.S. 153, 108 S.Ct. 1692, (1988).

- the prosecution arguing to the jurors to put themselves in the victim’s “nightmare” and imagine being murdered in their home where their kids play;
- the prosecution wholly inventing outrageously and prejudicially factitious dialogues that had no support in the record;
- the prosecution intentionally withholding prejudicial evidence from the defense until after the trial began;
- the trial court permitting jurors to consider prejudicial and unreliable evidence;
- the trial court inexplicably telling the jurors that the death penalty was not a sentencing option;
- the state’s key witness, and other suspect, had previously been represented by Mr. Pierce’s defense counsel or his office nearly thirty times;
- Mr. Pierce requesting an attorney and not given one; yet, the violation went without a remedy as the trial court permitted the statements to be introduced at trial; and
- the jurors, in convicting Mr. Pierce, considered extremely prejudicial testimony as true and accurate although it was undisputed that the testimony was erroneous.

And this observer would also learn that the Respondent does not dispute these “events”, but contends the trial was nevertheless fair. The Respondent’s overarching and repeated argument is that although these errors existed, they were harmless because the evidence was overwhelming. *Brief of Respondent (BOR)* 13, 18,79,81,96,103,107, 112, 116, and 136.

Repetition of an assertion makes it neither accurate nor persuasive. The Respondent's characterization that the evidence is overwhelming is an exaggeration.³ It is also distortedly incomplete. For instance, the Respondent conveniently neglects to mention: (1) that the person who the state touted as seeing Mr. Pierce as the person walking near the victims' house the night of the fire could not and did not identify him (RP (3/17/10) 52 – 71); (2) there was no fingerprints, DNA, or any other forensic evidence at the victims' house to suggest Mr. Pierce had been there (RP (3/16/10) 1298); (3) the casings found at the house were not connected or tied to Mr. Pierce (RP (3/16/10) 1314 – 1317); (4) there was no evidence recovered at the victims' house suggesting Mr. Pierce's presence there (RP (3/15/10) 1249 – 1259); (5) that when the police,

³ Some examples of when the courts have found overwhelming evidence demonstrate the Respondent's overreaching assertion. *See e.g., State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007)(overwhelming evidence of murder existed when DNA showed victim's blood on defendant's jacket; defendant's hair on victim's jacket; defendant's semen identified on victim's vaginal and anal swabs; and same gun used in prior murders); *State v. Trujillo*, 112 Wn.App. 390, 49 P.3d 935 (2002)(co-defendant/accomplice plans to shoot victim was direct, clear and overwhelming, including: witnesses testified that he drove six others to victim's house for the shooting; guns used in the shooting were hidden in his van's secret compartment; was member of rival gang); *State v. Bolar*, 118 Wn.App. 490, 78 P.3d 1012 (2003)(overwhelming evidence found to exist when: defendant confessed that he was the shooter; evidence that defendant shot victim in the back; and forensics support defendant's confession); *State v. Curtis*, --- P.3d ---, 2011 WL 1743926 (2011)(overwhelming evidence when: defendant confessed to murder and dismembering victim; defendant confessed that she wanted the victim to "go away"; and confessed to rendering assistance by helping cover up the murders); *State v. Davis*, 2008 WL 3846119, 5 (2008)(overwhelming evidence found when: defendant returned to his mothers' house "drenched in blood"; defendant discussed stomping a woman to death; stated that "he killed him a bitch"; pointed out location where the murder occurred; bloody boots matched bloody footprints at the scene; and DNA strongly suggested victim's blood on defendant's boot). The Petitioner cites to an unpublished opinion not as authority but to demonstrate "overwhelming" factual scenarios.

assisted with an “arson canine”, searched Mr. Pierce’s residence, there was no “hit”, no traces of blood, no gun casings, no weapons, no soot, no fingerprints, or anything resembling gas or accelerants tying him to the crime (RP (3/15/10) 1249 – 1259; RP (3/18/10) 362 – 373); and (6) there was no blood of either the victims or Mr. Pierce found on the items recovered by the police(tennis shoes, t-shirt, socks or knife block).⁴ RP (3/16/10) 1306 – 1307.

The Respondent further claims that Mr. Pierce’s comments to the detective provide “overwhelming evidence.” But Mr. Pierce denied the murder allegation, stating that he didn’t shoot anyone, that he knew who did, but was scared of repercussions. RP (3/15/10) 1233 – 1240. Mr. Pierce indicated the shooter was “Mr. B.” who the police quickly learn is Tommy Boyd, a suspect that had been represented by Mr. Pierce’s attorney/office nearly thirty times.

The Respondent also vigorously asserts, as the prosecution did at trial, that Mr. Boyd’s testimony that Mr. Pierce sought methamphetamine the night of the incident established overwhelming evidence of guilt. This testimony was crucial to the state’s case and jury’s determination. RP (3/24/10) 1022; 1045; 1103; 1113; CP 346. However, the Respondent

⁴ The knife block was claimed to belong to the victims; however, there was no direct evidence to support this assertion. There was no DNA or any forensic evidence to suggest it was ever at the victims’ house. In fact, there was testimony that the knife set belonged to a friend of Mr. Pierce’s mother. RP (3/22/10) 648 – 659.

fails to mention that Mr. Boyd is the only source of this alleged statement, who was another suspect with questionable credibility and an incentive to lie.

At the outset, Mr. Boyd failed to share this crucial revelation with anyone for over a year and did so for the first time just days before the trial. RP (3/22/10) 694 – 696; 701 - 703. Further, Mr. Boyd could not (and did not) provide any specifics surrounding his “methamphetamine” claim. He did not, for instance, provide any information regarding the amount of drugs Mr. Pierce allegedly sought; or the amount of money Mr. Pierce was allegedly seeking to spend; or that he ever saw Mr. Pierce with any money. Mr. Boyd also lied about “calling around” looking for the requested drugs since a review of his phone records established that no such calls existed; nor could Mr. Boyd recall the number that he allegedly made on behalf of Mr. Pierce. RP (3/22/10) 720. He further testified that he was not a drinker, but photographs of his residence showed numerous empty cans lying around his trailer and lot. RP (3/22/10) 704.⁵

Moreover, the Respondent’s assertion fails to consider these additional facts: (1) Mr. Boyd, as another suspect, knew and lived close to the victims (RP (3/22/10) 674); (2) he had previously worked for the

⁵ The veracity of Mr. Boyd’s claim that he doesn’t use drugs is questionable, but unknown as the state moved, and the court agreed, that his prior drug and/or alcohol use was inadmissible. RP (3/8/10) 519; CP 249.

victims; (3) there was gasoline and gas cans found at his residence (RP (3/22/10) 717 – 718); there was charred materials located in his burn barrel (RP (3/22/10) 709 – 710); (5) he was transported and interviewed by the detectives (RP (3/22/10) 698); his DNA was also taken by the detectives (RP (3/15/10) 1242, RP (3/22/10) 699); (6) search warrants were issued to search his premise and vehicles (RP (2/18/10) 492); (7) a shotgun was seen at his house (RP (3/23/10) 815 – 816); and (8) no one, other than himself, could account for his whereabouts the night of the homicides. RP (3/22/10) 733.

With a more complete review of the facts, we turn to the “myriad of individually insignificant events” or rather the errors that permeated this trial.

B. ARGUMENTS IN REPLY

I. TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR A CHANGE OF VENUE

"A motion for change of venue should be granted when necessary to effectuate a defendant's due process guaranty of a fair and impartial trial." *State v. Hoffman*, 116 Wn.2d 511, 571, 804 P.2d 577 (1991)). Under both the state and federal constitutions, a defendant makes a showing sufficient to meet this due process standard by showing a "probability of unfairness or

prejudice from pretrial publicity." *Shepard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966).

In Washington, the appellate courts have identified nine factors relevant to the determination of whether there was a probability of unfairness or prejudice and whether the trial court abused its discretion in denying the defense motion for change of venue. *State v. Crudup*, 11 Wn.App. 583, 587, 524 P.2d 479, *review denied*, 84 Wn.2d 1012 (1974). A review of the *Crudup* factors as set forth in Appellant's Opening Brief demonstrates a "probability of unfairness or prejudice from pretrial publicity" existed warranting a change of venue. *See* AOB 21 – 41.

II. MR. PIERCE WAS DENIED A RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY BECAUSE OF THE FLAWED JURY SELECTION PROCEDURE AND FAILURE TO GRANT A CHANGE OF VENUE

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of an accused in all criminal prosecutions to a trial by an impartial jury. *Turner v. Murray*, 476 U.S. 28, 36 n. 9, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). Under Washington law, the right to a jury trial includes the right to an unbiased and unprejudiced jury. WASH. CONST. art. I, §§ 3, 21, 22. "The failure to accord an accused a fair hearing violates the minimal standards of due process." *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (1969) (quoting *Irvin v. Dowd*, 366 U.S.

717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)).

Pointing to the fact that fifteen jurors were selected out of ninety-three prospective jurors in only two-and-half days, the Respondent argues the jury selection process was fair. BOR 60. Swiftness of the jury selection process does not, however, equate to fairness or impartiality. *Parnell*, 77 Wn.2d at 508 (“[M]ore important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it.”).

The guarantee of a fair and impartial jury afforded to Mr. Pierce was not fulfilled because: (a) the trial court significantly altered the jury selection process mid-stream; (b) the trial court allowed prospective jurors to voice their biases openly thus contaminating the jury pool; (c) the trial court denied defense counsel’s “for cause” challenge; and (d) trial court impermissibly informed the jury the case was not a death penalty case.

1. THE INADEQUATE JURY SELECTION PROCESS PREVENTED MR. PIERCE FROM RECEIVING A FAIR TRIAL.

Although trial courts have discretion in determining how to conduct the *voir dire* process; that discretion is abused when, like here, the record reveals that procedure implemented failed to secure a fair and impartial jury.

It is undisputed that the trial court altered *voir dire* in at least two significant ways mid-way through the jury selection process. First, on the second day of *voir dire*, the trial court unreasonably limited the time to inquire into prospective jurors' knowledge of the case and reported biases. Then, the trial court changed the jury selection method by removing the questions and answers about these prejudicial biases from individual to general *voir dire*.

The Respondent takes the position that the trial court's substantial modifications to the jury selection process mid-way through *voir dire* were due to perceived ineffectiveness and abuse caused by the defense. BOR 66. This alleged abuse, according to the Respondent, was because defense counsel's request to interview "pretty much" every juror individually. *Id.*

The Respondent's argument fails to appreciate the unique facts and circumstances of this case. This case involved an allegation of double-aggravated murder, a level of violence apparently not experienced in Jefferson County. *See* RP (5/24/10) 1511 (prosecutor: "This is Jefferson County, it's not Pierce County, it's not King County, it's not supposed to happen here").⁶ Second, this case involved victims that lived in the

⁶ According to the "trial reports" filed pursuant to RCW 10.95.120, there has never been a conviction of aggravated first degree murder in Jefferson County. Mr. Pierce was charged, in the alternative, with aggravated murder. The jury returned a verdict of guilty to felony murder. CP 275.

community for nearly four decades, who were known and loved by the community, including many of the prospective jurors. *See e.g.*, CP 212 (“In a community such as this, this family touched so many lives.”). Finally, the majority of the prospective juror stated on his or her questionnaire knowing significant facts about the case, the defendant or the victims – with many expressing predetermination of Mr. Pierce’s guilt. *See* Vol. VI, VII, VIII.⁷ Thus, in order to adequately gauge the extent of the jurors’ knowledge and potential bias, the parties needed to explore with “pretty much” every juror the content of their questionnaire.

The Respondent repeatedly cites to *State v. Frederiksen*, 40 Wn.App. 749, 700 P.2d 369 (1985) and *State v. Davis*, 141 Wn.2d 798, 10 P.3d 977 (2000) to suggest the trial court’s significant mid-stream modifications were not an abuse of discretion. BOR 61 – 67. However, the issue in both *Davis* and *Frederiksen* was whether the trial court’s refusal to allow specific questions or a specific line of questioning an abuse of discretion. Here, the issue is whether the court abused its discretion by changing the planned method of questioning during the middle of voir dire. *See e.g. State v. Brady*, 116 Wn.App. 143, 147, P.3d

⁷ *See e.g.*, RP (3/9/10) 729: Prospective juror: “[m]ost the people here have heard about the case. It’s a small town. Everybody knows everyone and it seems to me that Mr. Pierce deserves a fair trial. . . I’m just saying that I’m surprised that he is not being tried someplace else.”

1258 (2003) (the trial court abused its discretion by altering the planned time for juror questioning).

After the first day of jury selection, the court imposed time restrictions on the parties. The Respondent asserts that jury selection here was beginning to reach “too long.” The three-days allotted for jury selection here is a far cry from the six months referenced in the single case cited by the Respondent. BOR 63.

The trial court not only unreasonably modified the time allotted for questioning; it significantly altered the method for which the questioning was to occur by prohibiting individual *voir dire*. RP (3/9/10) 704. During the first and second day of jury selection, explorations into a juror’s bias, publicity, knowledge of the case (i.e., answers on the jury questionnaire) were done individually, and thus outside the presence of other jurors. RP (3/8/10) 538 – 647. In fact the trial court invited this procedure. RP (3/9/10) 640 – 645 (court asks the parties for juror numbers they believe necessitated individual *voir dire*, after providing its own and claiming that “obviously we’ll add more to it.”). But once defense counsel, based on the jury questionnaire answers and upon the request of the trial court, provided its list of jurors, the trial court “altered the planned” process and refused. *Id.* at 643 – 647. Consequently, defense counsel was compelled to inquire of the numerous jurors that voiced a predisposition about the

case into a shortened time period and amongst the entire jury pool. *See e.g.*, RP (3/9/10) 763 (because so many jurors expressed an opinion about the defendant's guilt on their jury questionnaires, defense counsel informed it intended to ask individual questions of each jury the following [third] day).

Additionally, the new modified jury selection process prohibited the proper inquiry into stated biases as defense counsel was cautioned not to contaminate the jury pool with prejudicial answers. RP (3/9/10) 744-745 (juror expressing that he/she formed a "definite opinion" based on three major reasons, but defense counsel fearful to inquire because of potentially tainting other jurors).

Given the unique facts and circumstances of this case, the restrictions placed on the time for - and method of - asking questions were unreasonable. As a result, the defense was unable to adequately explore the numerous jurors from the first day that expressed substantial pre-trial publicity, information about the case and pre-disposition about the facts and the defendant. RP (3/9/10) 629. The trial court abused its discretion when it substantially changed the rules of jury selection mid-way through *voir dire*. *Brady*, 116 Wn.App at 148.

2. THE FAMILIARITY OF THE PROSPECTIVE JURORS WITH THE PUBLICITY AND THE NUMEROUS BIAS OPINIONS EXPRESSED DURING GENERAL VOIR DIRE CONTAMINATED THE JURY AND PREVENTED MR. PIERCE FROM RECEIVING A FAIR AND IMPARTIAL JURY.

The majority of the prospective jurors had more than mere acquaintance with the case. Most expressed having been exposed to the media about the case and having formed an opinion that affected their ability to be fair and impartial. See Vol. I, VI, VII, VIII. The Respondent does not appear to dispute this fact. Nor does the Respondent disagree that numerous inappropriate comments about guilt and biases were expressed openly during general *voir dire*.⁸

The Respondent nonetheless argues that the trial court exercised care during this process because it struck jurors. BOR 67 – 68 (nearly two-thirds of all prospective jurors – or 60 of the 92 - examined were excused for cause). This fact proves the Appellant’s point, namely the unique facts and circumstances of this case, plus the extraordinary amount of publicity and knowledge the jurors possessed, warranted a more thorough method of exploring a fair and impartial jury. *See supra*, 7 – 12.

The Respondent first argues that defense counsel requested general *voir dire* and thus cannot now claim error. BOR 68. A review of the

⁸ See Appellant’s Opening Brief (AOB), pgs. 36 – 38 for the many examples of such statements.

record disputes this assertion. Defense counsel, in requesting the court to reconsider its time restriction because of the number of jurors expressing preconceived notions about the case, merely pleaded for additional time, even if it meant “Donahue-style” *voir dire*. RP (3/9/10) 629. This is hardly a ringing endorsement to have questions and answers about biases and prejudice be done in front of the whole panel.

The Respondent next argues that not all jurors who expressed view points during general *voir dire* did so at the detriment of the defendant. BOR 69 (at least two of the forty-one jurors declared that Mr. Pierce was not guilty).⁹ There is a fundamental difference between a juror expressing, pre-trial, that a defendant is not guilty and jurors that voice he is. Since a defendant maintains the presumption of innocence during *voir dire*, the former is the law; the latter is not.

The Respondent also relies on *State v. Ford*, 151 Wn.App. 530, 213 P.3d 54 (2009). BOR 69. This reliance, however, is misplaced. In *Ford*, the trial court found that two potential jurors who, during general *voir dire*, stated that their past experience as victims of sexual assault would affect their ability to be fair and impartial jurors on a case alleging sexual abuse. *Id.* at 542. The trial court excused the jurors for cause and

⁹ One juror was dismissed because he didn’t trust the legal system. RP (3/8/10) 561 – 562. The Respondent’s cite to the other juror, RP (3/9/10) 649, must be erroneous as there is no reference an excusal of a juror.

the appellate court found these two statements did not contaminate the remaining jury pool. *Id.*

That is simply not this case. In this case, there were significantly more than two jurors that held preconceived bias opinions about Mr. Pierce with many voicing their opinions during general *voir dire*. Further, many of the opinions revealed during general *voir dire* were specific to Mr. Pierce or the alleged facts of the incident; not mere statements about “past experiences.” *See* AOB 36 – 38.

The crux of the Respondent’s argument is that the Appellant cannot establish prejudice from the flawed jury selection process because no juror that sat on the panel was bias. BOR 69 – 70. This claim fails to acknowledge defense counsel’s repeated request for additional time to explore the significant number of jurors who expressed opinions about the case and Mr. Pierce; a request that was denied by the trial court. RP (3/9/10) 763. Given the time constraints placed on defense counsel, it is expected that jurors’ bias opinions were not fully explored and revealed.

The trial court’s restrictions are more problematic when understanding the practical effect of changing the method of *voir dire*. For example, during the first day of jury selection, of the forty-nine (49) jurors summoned, with many excused during individual *voir dire*. RP (3/8/10). Some jurors were not excused because they did not know or

express an opinion about the case or Mr. Pierce's guilt. These jurors returned on the third day and took part of the general *voir dire* process, where they became privy to other jurors expressing overtly bias opinions about Mr. Pierce's guilt. And because of the limited time restrictions defense counsel was required to focus its attention on the jurors that were "new" to the *voir dire* process and could not properly inquire of the "first day" jurors to explore the impact of hearing the bias opinions expressed by other jurors. In essence, the lack of challenges should not be a safe harbor for - but rather the by-product of - the flawed jury selection process.

3. THE DENIAL OF THE FOR CAUSE CHALLENGE PREVENTED MR. PIERCE FROM RECEIVING A FAIR TRIAL.

The Respondent argues that it was proper for the trial court not to excuse Juror 92. BOR 71 – 76. This juror, however, indicated having read about the case, including the suggested facts that Mr. Pierce supposedly argued with the victims over money and Mr. Pierce alleged use of the victims' stolen ATM card. The source of the information was the newspaper, the internet and word of mouth. Juror No. 92 also acknowledged discussing the case with others prior to jury selection. Additionally, Juror No. 92 indicated "I know there were no other suspects leading to the arrest of Mr. Pierce" and "I honestly haven't heard much

about his innocence”, but expressed a willingness to keep an open mind. Juror No. 92 also indicated knowing Detective Mark Apeland, one of the lead detectives on the case. CP Questionnaire Juror 92.

The juror was aware of facts that suggest Mr. Pierce committed a theft of an ATM card, that nothing the juror read suggested anything other than Mr. Pierce being guilty, and no other potential suspects were considered. The information Juror No. 92 described supported a for cause challenge being granted. Because the court denied the motion, and because Juror No. 92 remained on the jury as the defense had no peremptory challenges remaining, a new trial is warranted.

4. TRIAL COURT ERRED BY TELLING THE JURY IT IS NOT A DEATH PENALTY CASE.

The Respondent concedes, as it must, that it is inappropriate for jurors to learn that the death penalty was not involved in this case. *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008). The Respondent further agrees that is exactly what happened in this case. Nevertheless, the Respondent seeks to minimize this error by claiming that trial counsel did not object and that the error was harmless.

It is accurate that defense counsel did not object to the trial court informing the jury that the death penalty was not a sentencing option. However, the Washington State Supreme Court has not taken such a

limited few, declining to recognize a distinction between whether the court, counsel, or a juror-initiated discussion of the inapplicability of the death penalty. *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007). Moreover, the *Hicks* Court concluded defense counsel's performance was deficient insofar as counsel informed the jury that the case was noncapital and failed to object when the trial court and prosecution made similar reference.

The Respondent then claims the error was harmless because, in part, jurors were instructed that they “have nothing whatever to do with punishment.” BOR 79.¹⁰ That is precisely the reason why jurors are not to be told about a sentencing option that is not applicable: “{i}t is well established that when a jury has no sentencing function, it should be admonished to ‘reach its verdict without regard to what sentence might be imposed.’ ” *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001) quoting *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed. 459 (1994). Also to suggest harmlessness, the Respondent repeats its mantra that the evidence is overwhelming – an exaggerated claim that has been addressed and is simply not supported by the facts presented at trial.

¹⁰ Given that this instruction is found in WPIC 1.02, a general instruction given in nearly every criminal case, it is reasonable to assume the same instruction was given in *Hicks*, *Townsend*, and *Mason*; and not found to overcome the harm in telling a non-capital jury that the death penalty is not a sentencing option.

The error was prejudicial. The erroneous instruction “would only increase the likelihood of a juror convicting” Mr. Pierce since “they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility” – a realistic concern here since during general questioning the prosecution told the jurors that “holding out” may result in an undesired hung jury. *Hicks*, 163 Wn.2d at 847; RP (3/10/10) 825-826.

Because the jury selection procedure was fraught with error, including: substantially altering, mid-stream, the time and method of asking jurors about their biases and opinions; complete contamination of the jury panel by forcing jurors to express those biases and opinions during general *voir dire*; failure to excuse a for cause challenge; and inexplicably telling the jurors that the death penalty is not applicable to this case, Mr. Pierce was denied a right to a fair and impartial jury. Additionally, the care taken by the trial court to impanel a jury in lieu of a change of venue was woefully inadequate. For these reasons, Mr. Pierce’s conviction and sentence must be reversed.

III. MR. PIERCE WAS DENIED A FAIR TRIAL BECAUSE OF THE NUMEROUS INCIDENTS OF PROSECUTORIAL MISCONDUCT

The prosecution committed misconduct numerous times throughout this trial. Misconduct occurred when: (a) the prosecution told

the juror's it was their duty to convict Mr. Pierce; (b) the prosecution shifted the burden of proof to the defense; (c) the prosecution told the jury that the charges against and conviction of Mr. Pierce was "on behalf" of the victims and had "nothing to do" with him; and (d) the prosecution told the jury to imagine being brutally murdered in their home, where their children play and in the area where they attend school.

And the prosecution committed misconduct and violated Mr. Pierce's right to remain silent and to be tried by a fair and impartial jury when it invented outrageously inflammatory statements to Mr. Pierce and heart-wrenching pleas to the victims, none of which are found in the record.

The Respondent appears to concede that the prosecutor uttered the complained about statements, but seeks to remedy the misconduct by primarily claiming that defense counsel did not object.¹¹

1. PROSECUTOR MISCONDUCT – DO YOUR DUTY AND CONVICT.

It is undisputed that the prosecution, during closing argument, told the jurors that it was their duty to convict Mr. Pierce. The Respondent,

¹¹ BOR 78,83,85,86,88,90,91,93,95,96 and 110. Although failures by defense counsel to object are more appropriately reviewed under a claim of ineffective assistance of counsel in a personal restraint petition, the rampant misconduct here was so flagrant or ill intentioned to warrant a reversal. *State v. Anderson*, 153 Wn.App. 417, 427, 220 P.3d 1273 (2009).

however, chalks this up to “essentially rephrasing” a jury instruction. BOR 85. But the argument nearly mirrors the one that was disapproved in *State v. Coleman*, 74 Wn.App. 835, 876 P.2d 458, 461 (1994), where the prosecution told jurors it was their job to “apply the facts to the law” and then implied that they would violate their oath if they disagreed with the prosecution’s theory of the case. *Id.* at 839. Because of the ambiguity in how the prosecutor’s argument could be construed, the court found it improper. *Id.* The prosecution made nearly an identical argument here, telling the jury to “apply the facts to the law” and then implied their oath would be violated if they disagreed with the state’s theory and believed the defense. RP (3/24/10) 1146 - 1149.

This improper argument was further compounded when the prosecutor told the jurors that he (the prosecutor) and the victims’ family would be “satisfied”, and justice would be served to the victims if the jury complied with their duty and convicted Mr. Pierce. RP (3/24/10) 1147 – 1148. The Respondent ignores these additional improper statements; but they clearly cannot be characterized as a “rephrasing” of a jury instruction since no such instruction exists.

The misconduct was flagrant, ill-intentioned, and prejudicial, warranting a new trial.

2. PROSECUTOR MISCONDUCT – SHIFTING THE BURDEN ONTO THE DEFENSE.

During closing argument the prosecution shifted the burden of proof by stating “[i]f you put on a defense of any sort, then, you, as a juror, got to hold them to it.” RP (5/24/10) 1089. The Respondent argues this statement was conditional, meaning only “if” Mr. Pierce had raised a defense. BOR 88. But a review of the argument demonstrates the true intent of the prosecutor.

As part of shifting the burden, the prosecution suggested that evidence was missing because of Mr. Pierce. It then went on to argue that although the state does have the burden of proof, so does the defense:

It’s like, ‘Well, I got to get rid of this piece. I got to get rid of that piece,’ so you have to understand who controls that and why law enforcement may or may not have it. . .

In fact, I think he [defense counsel] said, “I could sit here like a potted plant and not do a thing and it’s the State’s burden to go ahead and prove beyond a reasonable doubt that somebody has broken the law,” and that’s correct.

But the flip side of that coin is if you put on a defense of any sort, then, you know, as a juror, you got to hold them to it. Say, “Okay. You threw it out there to see whether or not it would stick, so we’re going to go ahead and hold you to it.” Just, you know, throw something out here and throw something out over there. Hold them to that. Hold them to it. That’s very, very important.

RP (3/25/10) 1088 – 1089 (emphasis added).

This line of argument is unacceptable as it shifted the burden of proof to the defense to explain why certain pieces of evidence were missing and improperly suggested to the jury that the defense has a similar burden to prove their theory. By telling the jury that the defense had some obligation to present witnesses, explain the factual basis of the charges, or present evidence to support a defense theory (i.e., that items were missing), the prosecution committed misconduct necessitating a new trial. *State v. Anderson*, 153 Wn.App. 417, 220 P.3d 1273 (2009)(argument improper if implied that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reasons for the jury not to convict).

Moreover, this type of argument misstates the law on the presumption of innocence, which is the “bedrock upon which [our] criminal justice system stands” and thus found to be of “great prejudice because it reduces the State's burden and undermines a defendant's due process rights. *State v. Johnson*, 158 Wn.App. 677, 686, 243 P.3d 936, 941 (2010), quoting *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); *Anderson*, 153 Wn.App. at 432. As such, the misconduct warrants a new trial.

3. PROSECUTOR MISCONDUCT – THIS CASE IS BROUGHT ON BEHALF OF THE VICTIMS AND HAS NOTHING TO DO WITH THE DEFENDANT.

It is undisputed that the prosecution repeatedly told the jury that the case against Mr. Pierce was being brought on “behalf of the victims.” RP (3/10/10) 832, 900; RP (3/24/10) 1085. The Respondent argues that such a statement is not misconduct, and alternatively, if it is, trial counsel did not object.

To argue its first point, the Respondent claims that courts disagree whether its misconduct for prosecutor’s to “speak for” a victim. BOR 91. The Respondent’s reliance on the cases it cites is misplaced since in each the issue was whether it was misconduct for the prosecutor to “speak for” the victim. Here, the prosecutor did more than merely “speak for” the victims - he told the jury repeatedly that the charges and state’s presentation of the case were being “brought on the victims’ behalf.” Given that the Respondent cannot cite to a single Washington State case to support its position, and most of the cases it relies upon found the argument improper, it is reasonable to conclude that such an argument is considered inappropriate and misconduct by Washington Courts.

The Respondent suggests that the ultimate question is whether the prosecutor’s argument, in the context of other statements, appeals to the juror’s emotion. BOR 93. The answer is yes. The prosecutor’s

inappropriate claim that the matter was being brought on the victims' behalf and was only about the victims was done so at the exclusion of the defendant. RP (3/24/10) 1085 (It's not about Michael Pierce. It's about them.) This is misconduct. *State v. Monday*, 82736-2, (6/09/11) citing *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)). ("a prosecutor also functions as the representative of the people in a quasijudicial capacity . . . defendants are among the people the prosecutor represents.").

The Respondent's final argument is that the defense did not object so no harm is established. However, the prosecutor's argument that the case (and by extension the verdict) has nothing to do with the defendant "trivialize[s] and ultimately fail[s] to convey the gravity of the State's burden and the jury's role in assessing" the matter, which has been found to be "flagrant and ill-intentioned" to the level of undermining the defendant's due process rights. *Johnson*, 158 Wn.App. at 686. Consequently, a new trial is warranted.

4. PROSECUTOR MISCONDUCT – PUT YOURSELF IN THE VICTIMS' NIGHTMARE AND IMAGINE BEING KILLED IN YOUR HOUSE.

During closing argument the prosecutor told the jurors to put themselves in the victims' nightmare and imagine being killed in their own home. RP (3/24/10) 1086 – 1087.

The Respondent appears to concede this argument is improper. Nevertheless, the Respondent attempts to minimize the misconduct by claiming it was simply “a regrettable slip of the tongue.” BOR 95. But telling jurors sitting on a double aggravated murder trial, in a tight-knit community like Jefferson County, to imagine being murdered in their home, where they grew up, where they raised their kids and where they hoped to grow old and play with their grandchildren, can hardly be characterized as a “slip of the tongue.” It is inflammatory, prejudicial, and with the sole intent to appeal to the juror’s passion and to invoke community fear. In short, this outrageous argument is not merely a “minor mistake in speech”¹² - it is prosecutorial misconduct.

The Respondent urges this court to find that the prosecutor’s plea for the jurors to imagine themselves in the victims’ nightmare and being murdered is not a “Golden Rule” argument. BOR 95. Asking jurors to put themselves in the shoes (or nightmare) of the victims is a quintessential “Golden Rule” argument. *State v. Thach*, 126 Wn.App. 297, 317, 106 P.3d 782 (2005).¹³

¹² “Slip of the tongue” as defined by Oxford English Dictionary, Sixth Edition (2006).

¹³ Examples of “Golden Rule” argument include: *State v. Carter*, WL 22839804(2003)(prosecutor arguing “{i}magine yourself in that situation” found to be a “Golden Rule” argument); *People v. Vance*, 188 Cal.App.4th 1182, 1187-1188, 116 Cal.Rptr.3d 98, 102 (2010) (prosecutor telling the jurors “you have to walk in [victim’s] shoes. You have to literally relive in your mind's eye and in your feelings what [victim] experienced the night he was murdered” found to be a “Golden Rule” argument); and

The Respondent concedes, as it must, that the prohibition of “Golden Rule” arguments is “universal” in both civil and criminal cases, by both state and federal courts.” BOR 94. Nonetheless, the Respondent seems to imply that Washington State should not join the long list of jurisdictions that prohibit such an argument in criminal cases. For the reasons expressed in its Opening Brief, including the unique quality and potential deprivation of liberty of criminal matters, the Appellant urges this court to align itself with the vast support and sound reasoning of other jurisdictions and hold that the “Golden Rule” argument has no place in criminal cases. AOB 59 – 61.

The Respondent also seeks to minimize the impact of the improper “Golden Rule” argument by claiming it was merely a “lone statement” in a 65 minute closing argument. BOR at 94 – 95. This argument fails to acknowledge that review of improper remarks are not done in isolation, but rather in the context of the total argument. *Anderson*, 153 Wn.App. at 417. Therefore, the “Golden Rule” argument must be considered with the other inappropriate arguments advanced by the prosecutor. For instance, the prosecutor not only told the jurors to put themselves in the nightmare of the victims and imagine being killed, but also - without support of the

Jacobs v. State, 101 Nev. 356, 359, 705 P.2d 130, 132 (1985) (Found to be a “Golden Rule” argument: I will not tell you to put yourselves in Mrs. Jacobs' position looking down the barrels of this shotgun, because that would be improper.). Citation to an unpublished opinion is intended for demonstrative purposes only and not for authority.

record - wholly invented a heart-wrenching tale of that nightmare:

“don’t hurt us. Don’t hurt my wife. Don’t hurt me. I’ll give you my debit card. Please don’t hurt us,” okay?
“I’ll give you my debit card. Please don’t hurt us.”

Makes these two people lay down on their floor, in their home, in their kitchen, almost head-to-head, face-to-face where they can see each other. . . Where they look into their eyes. They can look into their eyes. “Lay down on the floor. Say your goodbye’s.”

RP (3/24/10) 1115 – 1117(quotations in the transcript).

The Respondent also resorts to the claim that the evidence was overwhelming; however, this repeated assertion has been thoroughly addressed and disputed. *See infra*, 3 – 6.

Finally, the Respondent contends that the jury was able to overcome any emotion and sympathy brought on by the prosecutor’s inappropriate arguments because it rejected the “greatest charge.” BOR 97. This claim is incorrect and does nothing to support their position since the jury convicted Mr. Pierce of First Degree Murder (felony murder) and “rejected” the alternative means of committing the same - not a greater - charge (premeditation). CP 317, 318, 322, 323.

There should be no dispute, the prosecution’s argument sought to inflame the jury by not only resorting to community fear, but also a passionate plea for each juror to imagine being placed in the victims’ nightmare of being murdered. This line of argument is prejudicial,

harmful and inappropriate - and warrants a new trial.

**5. PROSECUTION MISCONDUCT – INVENTING
PREJUDICIAL STATEMENTS AND IMPROPER
INFERENCES.**

The Respondent agrees that the prosecutor invented dialogue which is not found in the record. As expected, the Respondent argues that the prosecutor's prejudicially fictitious dialogue were merely reasonable inferences. BOR 93 – 107. They weren't.

The latitude afforded to a prosecutor during closing argument ceases when it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. *Anderson*, 153 Wn.App. at 427. It is clear and unmistakable that the prosecutor exceeded permissible inferences by injecting improper personal opinions and beliefs, and by conjuring up prejudicial statements to the defendant and passionate pleas to the victims.

It is clear from the record that defense counsel objected three times during the prosecution's rebuttal argument, and the court overruled each one. RP (3/24/10) 1105; 1115; 1116. The Respondent attempts to isolate the facts surrounding each objection to claim the argument was a reasonable inference. BOR 99 – 102. However, the Respondent's narrow interpretation of defense counsel's objection is misplaced since defense counsel objected to this "line of argument." And since the trial court

repeatedly overruled the objections and denied the request for a mistrial, it was reasonable for defense counsel to forgo further objections even though the entire rebuttal closing argument is peppered with the prosecutor's personal opinions.¹⁴

The prosecutor's fictitious dialogue between Mr. Pierce and the victims at the residence was nothing more than an improper appeal to the jury's passion and prejudice. The prosecution's outrageous claims that the victims were forced to lie on the ground next to each other, "face to face", looking into each other's eyes, while begging for mercy – none of which finds support in the record – were impermissible and inappropriate appeals to the jurors' passion or prejudice.¹⁵ *See e.g., State v. Claflin*, 38 Wn.App.

¹⁴ *See* RP (3/24/10) 1090 (prosecution attributes made-up statements about cutting class); 1093 ("I guess that's the only explanation she could come up"); 1095 ("I'm telling you what I believe or remember the evidence may be..."); 1095 ("I'm not going to misdirect you..."); 1097 ("I think it's reasonable for you to . . . infer..."); 1097 ("So I think it's reasonable to infer that [witness] is probably telling the truth.."); 1098 (prosecution twice makes up his own fictitious statements about needing drugs and attributes them Mr. Pierce); 1099 – 1101 (personal fictitious statements); 1101- 1102 (personal fictitious statements); 1103 (prosecutor personally commenting on evidence: "I've [the prosecutor] been up and down that road several times since this happened. I'm thinking like, 'Golly, but how could you not see that? How could you not see that car?' Well he hides his car..."); 1104 – 1105 (personal fictitious statements); 1109 (personal fictitious statements); 1113 – 1114 (personal fictitious statements attributed to both Mr. Pierce and victims); 1115 – 1117 (personal fictitious statements attributed to both Mr. Pierce and victims); 1118 (personal comment about the evidence: "this is how much I know about guns, .25 caliber, I remember .25 calibers when I was a policeman."); 1121 – 1122 (personal fictitious statements about drugs attributed to Mr. Pierce); 1127 (personal fictitious statements attribute to Mr. Pierce); 1134 (personal comment regarding missing evidence: "if he's [Mr. Pierce] like my mom, he watches CSI."); and 1138 (personal fictitious statements attributed to Mr. Pierce).

¹⁵ The Respondent cites to RP (3/17/10) 150 to somehow claim that evidence existed to support the dialogue (BOR 106). There is no such support in the record.

847, 690 P.2d 1186 (1984)(court found prosecutor committed misconduct when it read a poem to the jury during closing argument describing how a rape victim may have felt because it was an appeal to the jury's passion and prejudice, and because it contained prejudicial allusions to matters outside the actual evidence submitted at trial).

It strains the imagination to suggest that the numerous personal opinions offered by the prosecution are somehow tethered to the evidence. The prosecutor went astray from permissible argument as he no longer attempted to convince the jurors of "certain ultimate facts and conclusions" drawn from the evidence; but rather, expressed personal opinions about events and conversations - derived not from the evidence - but concocted entirely from his imagination.

The fictitious statements the prosecutor attributed to Mr. Pierce also violated his rights guaranteed under the state and federal constitutions. It is undisputed that Mr. Piece exercised his right not to testify at trial. Both the United States and Washington Constitutions guarantee an accused the right to be free from self-incrimination, including the right to silence. A comment by the prosecution on these rights is prohibited. *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106, *reh. denied*, 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed.2d 730 (1965); *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285

(1996)(prohibited by Washington State Constitution). Additionally the assertion of this constitutionally protected due process rights cannot be considered as evidence of guilt. *State v. Silva*, 119 Wn.App. 422, 428-429, 81 P.3 889 (2003).

Relying on *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006), the Respondent maintains that a prosecutor may comment on an accused's right to remain silent with appropriate hypothetical dialogue. BOR at 103-104. A review of the facts in *McKenzie* does not approvingly support what occurred here. In *McKenzie*, the court concluded the prosecutor's comment about the defendant's guilt was a clear and direct response to the defense's repeated argument to the jury to find Mr. McKenzie "innocent" rather than "not guilty," *Id.* Here, the prosecution repeatedly made up a wide-range of incriminating statements and attributed them to Mr. Pierce. They were not a "clear and direct" response to any argument advanced by the defense.

Further, the only way Mr. Pierce could challenge these baseless and prejudicially fictitious statements was to forgo a constitutional rights. *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)(defendant need not have to surrender one constitutional right in order to assert another). The jury was therefore invited to improperly infer that a defendant is more likely guilty and attribute unfounded

prejudicial statements to him because he exercised his constitutional right not to testify. *Silva*, 119 Wn.App. at 428-429. More telling is the fact that the Respondent cannot cite to a single Washington case to support its argument that the improper fictitious statements, in the context found here, is appropriate. *See* BOR at 104 – 106.

6. PROSECUTOR MISCONDUCT – CONCLUSION.

The Respondent repeatedly attempts to isolate the prosecutorial misconduct that occurred during rebuttal closing argument. However, courts reviewing prosecuting attorney's improper remarks consider the context of the total argument. *Anderson*, 153 Wn.App. at 427. The prosecutor's initial closing argument lasted approximately 30 minutes (16 pages of transcript). RP (3/24/10) 1019 – 1045. The defense's closing argument lasted approximately the same length, reaching 38 pages in the record. RP (3/24/10) 1046 – 1084. The prosecution's rebuttal closing lasted 65 minutes (twice as long as its initial closing) and reached 65 pages of transcript. RP (3/24/10) 1084 – 1149. A review of the prosecution's rebuttal closing clearly demonstrates misconduct was rampant.

- RP (3/24/10) 1085: Prosecutor improperly tells jurors that case is being brought **on behalf of victims**;
- RP (3/224/10) 1086: Prosecutor inappropriately tells jurors the case (and thus implicitly the verdict) has **nothing to do with**

the defendant;

- RP (3/24/10) 1086 – 1087: Prosecutor’s invokes an **improper Golden Rule** argument and asks the jurors to imagine being killed in their homes;
- RP (3/24/10) 1087: Prosecution **shifts burden** to the defense;
- RP (3/24/10) 1090: Prosecutor attributes **fictitious statements** to defendant;
- RP (3/24/10) 1093: Prosecutions gives **personal opinion** about evidence (“I guess that’s the only explanation”);
- RP (3/24/10) 1095: **Personal opinion** (“I’m telling you what I believe or remember the evidence” and “I’m not going to misdirect you.”);
- RP (3/24/10) 1096: **Personal opinion** (“I think it’s reasonable for you to infer”) (twice);
- RP (3/24/10) 1098: **Fictitious statement** about “needing some meth” to Mr. Pierce;
- RP (3/24/10) 1099 – 1100: **numerous fictitious statements** about needing drugs, money, planning the crime to Mr. Pierce;
- RP (3/24/10) 1103: **Personal opinion** about evidence (I’ve been up and down that road several times since this happened. I’m thinking like, ‘Golly, but how could you not see that? How could you not see that car?’ Well he hides his car.”);
- RP (3/24/10) 1104 – 1105: **fictitious statements** attributed to Mr. Pierce;
- RP (3/24/10) 1109: **fictitious statements** attributed to Mr. Pierce;
- RP (3/24/10) 1113: **fictitious statements** attributed to Mr. Pierce about needing drugs;

- RP (3/24/10) 1114 – 1115: **fictitious statements** attributed to both Mr. Pierce and victims;
- RP (3/24/10) 1117: **fictitious statements** attributed to both Mr. Pierce and victims (“don’t hurt us” and “Lay down and say your goodbyes”);
- RP (3/24/10) 1118: **personal opinion** about evidence (have knowledge about weapon from my experience as a police officer);
- RP (3/24/10) 1121: **fictitious statements** attributed to Mr. Pierce;
- RP (3/24/10) 1122: **fictitious statements** about drugs attributed to Mr. Pierce;
- RP (3/24/10) 1127: **fictitious statements** attributed to Mr. Pierce;
- RP (3/24/10) 1130 – 1132: argument about needing dope and methamphetamine;
- RP (3/24/10) 1134: **personal opinion** regarding missing evidence (“If Mr. Pierce is like my mother, he watches CSI.”);
- RP (3/24/10) 1138 – 1139: **fictitious statements** attributed to Mr. Pierce;
- RP (3/24/10) 1147 - 1149: **improper argument** for jury to “do its job” and convict Mr. Pierce and the prosecutor and victims’ family will be satisfied and justice would be served for the victims.

The prosecution committed numerous acts of misconduct when it impermissibly implied that the jurors would honor their oath and provide justice for the victims by convicting Mr. Pierce; when it improperly

aligned itself with the victims by claiming that prosecution was brought on the victims behalf, while also telling the jurors the case had “nothing to do with” Mr. Pierce; when it erroneously told the jury that the defense had a burden and the jury should hold them to it; when it sought a conviction based on community fear and passion, and resorted to a “Golden Rule” argument by asking jurors to imagine the horrors occurring to them; and when it argued unreasonable inferences, invented outrageous conversations, and asserted unfounded and prejudicial facts not in evidence.

The misconduct was relentless, consistent, and prejudicial, resulting in a violation of Mr. Pierce’s right to a fair trial. Contrary to the Respondent’s claim, the evidence was far from overwhelming to overcome the numerous acts of misconduct. Further, given all the misconduct, no instruction would have minimized the prejudicial impact. As such, the conviction and sentence should be reversed.

IV. PROSECUTOR’S UNJUSTIFIED DELAY IN PROVIDING DISCOVERY AND THE TRIAL COURT’S ERRONEOUS ADMISSION OF PREJUDICIAL EVIDENCE

1. THE PROSECUTOR’S UNJUSTIFIED AND UNWARRANTED LATE DISCOVERY RESULTED IN MR. PIERCE BEING DENIED A FAIR TRIAL.

It is undisputed that the prosecution intentionally and unjustifiably

withheld information that it had a duty to disclose to the defense. The Respondent wants to remove the blame from the prosecution and place it on their key witness, Mr. Boyd, for not divulging the information until a year later and just before trial. BOR 111. The Respondent claims that the prosecution was unaware of the prejudicial evidence until their witness told them on March 4, 2010, four days before jury selection. *Id.* According to the Respondent, the prosecution, surprised by the revelation, sought to confirm the information by apparently asking their witness the following day, March 5th; three days before jury selection. BOR 111.

This does not, however, explain or justify why the prosecution withheld the information from the defense for two weeks and after the jury was impaneled and trial had begun. The only rationale given was that the prosecution was too busy. CP 355. Being too busy does not alleviate the state's affirmative duty and obligation to disclose crucial information to the defense. As a result, the state's untimely disclosure was intentional and unjustified. CrR 4.7(h)(2); *State v. Greiff*, 141 Wn.2d 910, 919, 10 P.3d 390 (2000).

The Respondent's claim that nothing prejudicial came of the prosecution's untimely disclosure is not accurate. BOR 112.¹⁶ The

¹⁶ The Respondent's suggestion that the new evidence was already known to Mr. Pierce because it was his statement is absurd. Nothing in the record supports this assertion and Mr. Boyd, with questionable credibility and an incentive to lie, is its only source.

prosecution sought, and the court agreed, to preclude evidence of Mr. Boyd's prior drug and/or alcohol. RP (3/8/10) 519; CP 249. Both topics became relevant areas of inquiry on cross-examination when Mr. Boyd, upon being asked questions from the state about the "new" evidence [i.e., methamphetamine], testified that he "doesn't mess with that stuff" and that "doesn't know much about that crap." RP (3/22/10) 696. He also claimed that he rarely drank beer, even though there were pictures of his mobile home with numerous empty beer cans lying around. RP (3/22/10) 704.

Because the prosecution and Mr. Boyd sought to bolster his credibility by claiming ignorance about methamphetamine and drug use [i.e., "new" evidence], and by minimizing his own alcohol use, his prior drug and/or alcohol use was subject to proper cross-examination. But the late discovery prevented defense counsel the necessary opportunity to investigate and explore the information for a proper examination – a fact that is more pronounced since defense counsel's agency had represented Mr. Boyd nearly thirty (30) times.¹⁷ Consequently, defense counsel was conflicted since it was forced to choose between cross-examining a former

¹⁷ Whether trial counsel provided ineffective assistance of counsel for not seeking a continuance is better suited for a Personal Restraint Petition. This may be even more problematic given the conflict of interest concern since trial counsel apparently did not investigate Mr. Boyd's drug and alcohol abuse in advance of the testimony when they, as Mr. Boyd's previous counsel, were privy to his personal files.

client about matters of prior representation (i.e., drug/alcohol use) for the benefit of a current client or don't at the current client's detriment.

2. THE TRIAL COURT'S ERRONEOUS ADMISSION OF PREJUDICIALLY UNRELIABLE EVIDENCE PREVENTED MR. PIERCE FROM RECEIVING A FAIR TRIAL

The defense objected when the state sought to admit the untimely testimony. RP (3/22/10) 694. Although the prosecution agreed the testimony was prejudicial, it claimed it was relevant to the "motive behind the crime was committed." *Id.* at 695. The court merely concluded: "I'll allow it. It is prejudicial, but I can see it being relevant. The jury can give it whatever weight they want." *Id.* Undoubtedly, this untimely and unreliable testimony had a prejudicial impact on the jury. CP 346, attachment 7 (Juror: "Of course, the bombshell was the methamphetamine ...").

The Respondent argues the basis for the admission of the untimely evidence was not ER 404(b), but rather ER 402 and ER 403. BOR 113. The Respondent's desire to pigeonhole the untimely evidence into ER 402 or ER 403 is transparent: it knows that the court did not perform its gate-keeping function to determine whether the proposed alleged misconduct was established by preponderance of the evidence; and it knows there was no evidence to support the unreliable claim but numerous reasons to doubt it. *See* AOB 77-78.

The Respondent' attempt to isolate the review to ER 403 fails to appreciate that ER 403 incorporates ER 404(b) evidence into its analysis. ER 403 specifically reads: All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. (emphasis added). Further, reviewing courts may consider bases mentioned by the trial court as well as other proper bases in determining the admissibility of evidence. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

The Respondent then argues that the untimely testimony is relevant because it provided evidence of motive. The cases cited by the Respondent to advance this argument fall short. In one case, the relevance of motive was specific to the facts of that case. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997)(We have held in a case involving the murder of a wife by her husband that evidence of quarrels and ill-feelings may be admissible to show motive...). A situation and basis not found here.

The Respondent also cites to *State v. Powell*, 126 Wn.2d 244, 258-259, 893 P.2d 615, 624 (1995) and *State v. Burkins*, 94 Wn.App. 677, 689, 973 P.2d 15 (1999). Both cases, however, support the Appellant's position since the court considered the "motive" evidence under ER

404(b). And as such, the trial court was required to perform its gate-keeping function to determine whether the evidence should be admitted. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). A prerequisite that was not conducted here.

The Respondent also cites to *State v. Mathews*, 94 Wn.App. 677, 973 P.2d 15 (1999), to argue its dual motive theory: Mr. Pierce's alleged desire for methamphetamine and his lack of money to satisfy that urge, was motive for the homicides.¹⁸ However, *Mathews* does not help the Respondent's argument. First, the *Mathews* court cautioned that the introduction of prejudicial evidence of financial motive should be done with caution. *Id* at 285 – 286, citing *United States v. Zipkin*, 729 F.2d 384, 390 (6th Cir.1984) (noting in dicta that to establish motive for a theft offense by demonstrating impecuniosity of defendant requires a chain of inferences that is highly speculative and therefore of little probative value); and *Davis v. United States*, 409 F.2d 453, 458 (D.C.Cir.1969) (financial background may be relevant in a prosecution for robbery, but the prosecution must proceed gingerly, and the trial judge should permit this inquiry only where there is a proffer that the evidence, in light of other

¹⁸ See e.g., RP (3/24/10) 1098 (prosecutors argues to the jurors that Mr. Pierce cannot “wait 10 more days” to get some methamphetamine); *Id.* at 1103 (“when you want that methamphetamine, you’ll take those kind of chances, I guess. You’ll take those kinds of chances”); and *Id.* at 1113 (prosecutor argues that Mr. Pierce needs money and doesn’t want to work but has “the urge or the drive to go ahead and do some methamphetamine”).

proof, is highly probative).

Second, the *Mathews* court acknowledged a qualitative difference between “motive” evidence based on financial stability and evidence of an alleged drug habit; the latter possessing a prejudicial impact that is unacceptable. *Mathews*, 75 Wn.App at 285 (We do not equate the prejudice of a recent bankruptcy and evidence of living beyond one's means with the prejudice of heroin addiction); citing *State v. LeFever*, 102 Wn.2d 777, 785, 690 P.2d 574 (1984) (refusing to allow evidence to link robbery to heroin habit; “[t]he resultant prejudice to one accused of a crime completely overwhelms any possible relevance or probativeness”), *overruled on other grounds*, *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

Here the trial court did not conduct a sufficient balancing test to determine whether the allegation that Mr. Pierce sought narcotics the night of the incident was admissible or reliable. Nor did the trial court conduct any inquiry or obtain a proffer into whether the assertions was more than mere speculation or conjecture; a substantial concern that would have become obvious if the court conducted any gate-keeping function since the only person supporting this claim was a suspect with no credibility and an incentive to lie. There was no analysis at all to determine whether the alleged prejudicial claim was established by a preponderance of the

evidence. Also, as discussed above, permitting unsubstantiated claims that Mr. Pierce needed money for an alleged drug habit and was seeking methamphetamine the night of the incident was extremely prejudicial.

Finally, the prosecution's argument went beyond any claimed motive and argued instead that Mr. Pierce was acting in conformity with a drug addict, an argument clearly prohibited under the evidence rules. *See* footnote 19, *supra*.

The prosecution untimely disclosure of prejudicial evidence and the trial court's failure to conduct any proper analysis and ultimately erroneous admission of the prejudicial evidence warrants a new trial.

V. THE DENIAL OF THE MOTION FOR NEW TRIAL PREVENTED MR. PIERCE FROM RECEIVING A FAIR TRIAL

The Respondent does not dispute that the jurors misapplied a critical piece of testimony, but argues that the trial court did not abuse its discretion in denying a motion for new trial or alternatively permit additional time for further inquiry. BOR 117 – 119. The Respondent argues that since the jury considered evidence (albeit false) that was admitted a new trial wasn't warranted. CrR 7.5 supports a new trial when the substantial rights of the defendant was materially affected due to irregularity in the proceedings of the jury; or when the verdict is contrary to the evidence; or when substantial justice had not been done. All three

are present here.

It is undisputed that the jury considered prejudicial evidence that was simply not accurate. At trial, Michael Donahue, a state witness, testified that on the night of the incident Mr. Pierce showed up at a trailer where Mr. Donahue and Mr. Boyd were watching television. RP (3/22/10) 743 – 747. The witness also testified that Mr. Pierce smelled as if he had taken a shower. *Id.* Although the witness had been previously interviewed by the detectives and the defense at various times before trial, this was the first time he mentioned Mr. Pierce’s cleanliness. Defense counsel therefore sought to cross-examine the witness on this new revelation by asking whether he [witness] ever made this claim to the defense witness. The witness responded that “he asked me if he smelled like gasoline.” RP (3/22/10) 764. During its deliberation the jury considered this statement extremely damaging. CP 346, attachment 8 (Juror: “Michael Pierce asked Donahue if Michael Pierce smelled like gas. That’s a damning piece of evidence right there.”).

It is unchallenged and undisputed that the statement about “smelling like gas” was never uttered by Mr. Pierce. The “he” was referring to being asked by the defense investigator. CP 346, attachment 10. The trial court was made aware of this undisputed fact, but refused to grant a mistrial or additional time for defense counsel to investigate.

Mr. Pierce's substantial rights, including a right to a fair trial, were materially affected by this trial irregularity. The jury attributed an extremely prejudicial statements to Mr. Pierce, when in fact he asked no such question. Additionally, it is undisputed (and was known to the trial court) that the jury's verdict was reached contrary to the evidence. And finally, an observer of these proceedings would acknowledge that this irregularity, which was at no fault of Mr. Pierce, thwarted justice from being done. As a result, the court abused its discretion for failing to grant a mistrial or alternatively permit additional time for further inquiry.

VI. BECAUSE MR. PIERCE WAS NOT AFFORDED CONFLICT-FREE COUNSEL, HIS RIGHT TO A FAIR TRIAL WAS DENIED.

Mr. Pierce is afforded the right to the assistance of an attorney who is free from any conflict of interest in the case. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432, 436 (2003). The Respondent does not challenge the fact that Mr. Pierce's trial counsel and/or counsel's office (JAC) had previously represented Mr. Boyd, a state key witness and a potential suspect nearly thirty times. The trial court acknowledged the potential conflict of interest. RP (6/16/09) 81 – 83 (His interests are clearly adverse to those of Mr. Pierce). The Respondent argues removal of counsel was still unnecessary. BOR 119 – 122.

Mr. Boyd's involvement in Mr. Pierce's case is substantial. Mr. Pierce repeatedly and directly implicated Mr. Boyd as the culprit of the homicides, the charges that JAC was appointed to represent Mr. Pierce. Mr. Boyd's substantial involvement in Mr. Pierce's case went beyond mere assertions by Mr. Pierce. Mr. Boyd was investigated, interrogated, and his residence searched by the investigating officers. Mr. Boyd's testimony was crucial to the state's case and instrumental in the jury's verdict.

During trial, Mr. Boyd and the prosecution sought to bolster his credibility by claiming ignorance about methamphetamine and drug use, and by minimizing his own alcohol use. As a result, Mr. Boyd's prior drug and/or alcohol use was subject to proper cross-examination.¹⁹ However, as a former client, JAC was forbidden to reveal information relating to the representation of their prior client (*i.e.*, Mr. Boyd) unless he gave informed consent. This conflict of interest was never thoroughly explored by the court, especially a year later when Mr. Boyd made the unsubstantiated claim that Mr. Pierce sought his assistance in obtaining

¹⁹ Defense counsel never attempted to cross-examine Mr. Boyd with any of his prior criminal convictions. The record does not provide any insight into this failure, but under ER 609(a) would have permitted some convictions that were deemed more probative than prejudicial or crimes of dishonesty.

methamphetamine.²⁰ The trial court erred when it denied the existence of the conflict of interest, and thus forced Mr. Pierce to proceed to trial without conflict-free counsel.

VII. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS STATEMENTS MADE IN VIOLATION OF CRIMINAL RULE 3.1.

This issue was thoroughly briefed in Appellant's Opening Brief (92 – 100) and *Appellant's Supplemental Brief Specifically Addressing Findings of Fact and Conclusions of Law* (filed May 9, 2011).

In sum, the trial court erred in concluding that CrR 3.1(c)(2) was either unnecessary or was satisfied because during the initial interrogation, Mr. Pierce never “expressly asked to contact an attorney” and because after Mr. Pierce was booked, he did not ask the jail officer to call an attorney. Mr. Pierce did request an attorney and that request was imputed to members of the Jefferson County Jail when he was transported. It was merely ignored. Mr. Pierce was not required to reassert his request nor was he required to demand access to the means to effectuate his request. The state had an obligation to comply with CrR 3.1(c)(2). They didn't and

²⁰ Appellant acknowledges that the initial motion to the trial court regarding the conflict of interest was raised by co-counsel who was subsequently removed and never addressed again defense counsel. The issue was never raised again by either trial counsel or the court again. The failure to re-raise the issue could be evidence of the conflict of interest or a claim of ineffective assistance of counsel, the latter not being raised here since better suited in a Personal Restraint Petition.

as a result statements obtained in violation of CrR 3.1(c)(2) should have been suppressed.

Nothing in the Respondent's reply changes this analysis or result.

VIII. CUMULATIVE ERROR DENIED MR. PIERCE A FAIR TRIAL

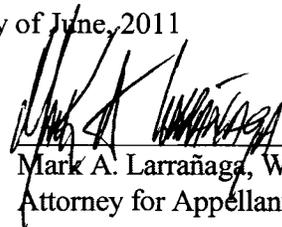
Cumulative error, as well as individual error, denied Mr. Pierce a fair trial. *See* AOB 100 – 101.

C. CONCLUSION

Mr. Pierce's trial was neither fair nor had the appearance of fairness. An observer would see a proceeding that was the by-product of a substantially flawed jury selection process; infected with numerous acts of prosecutorial misconduct; consisted of untimely disclosure and improper admission of prejudicial evidence; contained an atmosphere of undisputed irregularity in the jury verdict; and the absence of conflict-free counsel. As a result, this observer would conclude the "a myriad of insignificant events" denied Mr. Pierce a fair trial.

Respectfully submitted,

DATED this 22nd day of June, 2011



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Attorney for Appellant

CERTIFICATE OF SERVICE:

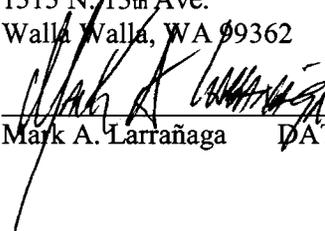
I certify that on the 22nd day of June, 2011, I caused a true and correct copy of the Appellant's Reply Brief was served upon the following individuals by depositing same in the United States Mail, first class, postage prepaid:

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