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STATE OF WASHINGTON CN

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

PAUL WILLIAM GEBHARDT, Appellant

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Appeal from the Superior Court of Pierce County  
The Honorable Susan K. Serko, DEPARTMENT NO. 14  
Pierce County Superior Court Cause No. 09-1-02751-1

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**BRIEF OF APPELLANT**

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By:

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**A. ASSIGNMENTS OF ERROR:**

1. The trial court erred when it denied Mr. Gebhardt's post-trial motions.

2. The trial court erred when it entered the unnumbered mixed findings of fact and conclusions of law in the order on motions for new trial.

3. The trial court erred when it denied Mr. Gebhardt's post-trial motions based, in part, on a record that was not made available to trial court and is not part of this record on review.

4. The trial court erred when denied Mr. Gebhardt's motion for new trial for the reason that it de facto closed the courtroom to Mr. Gebhardt when it accepted his trial counsel's representation that he would not testify although Mr. Gebhardt was not privy to this conversation and in fact had communicated that he wanted to testify.

5. The trial court erred when it denied Mr. Gebhardt's motion for new trial based on prosecutorial misconduct.

6. The trial court abused its discretion when it made numerous evidential rulings.

7. Mr. Gebhardt is entitled to a new trial where prosecutorial misconduct was so flagrant and ill-intentioned that there is a substantial

likelihood that the instances of prosecutorial misconduct affected the jury's verdict.

a. The prosecutor committed misconduct by instructing witnesses not to speak answer defense questions during pretrial interviews and by providing "secret" advice to them during those interviews.

b. The prosecutor committed misconduct during closing argument.

8. Mr. Gebhardt received ineffective assistance from trial counsel who admittedly provided a \$5000 rather than a "no holds barred" \$15000 - \$20000 defense.

a. Trial counsel failed to make what would have been a dispositive suppression motion.

b. Trial counsel failed to object to hearsay evidence which was not admissible under any exception to the rules, case law, or statute.

c. Trial counsel failed to request a limiting instruction to that hearsay statements attributed to, thereby permitting its use as substantive evidence to the detriment of Mr. Gebhardt.

d. Trial counsel timely failed to seek a limiting instruction for hearsay evidence that the marauding canines belonged to Mr. Gebhardt.

e. Trial counsel failed to advise Mr. Gebhardt that he alone could make the decision to testify or not, even against the recommendation of trial counsel.

9. The State failed to prove beyond a reasonable doubt that Mr. Gebhardt committed the crime of second degree assault against Officer Koskovich.

10. The State failed to prove beyond a reasonable doubt that Mr. Gebhardt was armed with a deadly weapon when he committed the alleged assault against Officer Koskovich.

11. Mr. Gebhardt is entitled to relief under the cumulative error doctrine.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A criminal defendant is constitutionally entitled to trial before a court that fully and fairly considers motions before it based on a record that is available to all litigants so that justice is dispensed in an open manner.

2. Evidence rules exist to secure fairness in the administration, growth, and development of the law of evidence to the end that proceedings may be justly determined.

3. The prosecutor is both a minister of justice who represents all the people, including the criminal defendant, and an advocate for the State. Prosecutorial misconduct that denies a criminal defendant a fair trial and that results in a unreliable verdict required reversal and a new trial.

4. The United States Constitution and the Washington Constitution guarantee effective assistance of counsel to criminal defendants. When trial counsel's serious errors demonstrate that counsel was not functioning as the "counsel" guaranteed the defendant by the constitutions so as to deprive the defendant a fair trial, that is, a trial whose result is reliable, then the defendant is entitled to the relief of reversal and new trial.

5. The State is required to prove the elements of the charged crime and/or any enhancement beyond a reasonable doubt. When the State fails to do so, the defendant is entitled to dismissal.

6. The courts recognize the cumulative error doctrine. Under that doctrine, even if any single error standing alone does not suffice to warrant relief, multiple errors may suffice to require relief.

**C. STATEMENT OF THE CASE:**

*1. PROCEDURAL HISTORY*

On June 2, 2009, Mr. Gebhardt was charged in Pierce County Superior Court under cause number 09-1-02751-1 with one count Attempted Assault in the Second Degree and one count Assault in the Third Degree. On June 10, 2010, the Honorable Susan Serko called this case for trial. The State filed an amended information charging Mr. Gebhardt with second degree assault against Officer Koskovich with a law

enforcement officer aggravator (Count I); assault in the third degree against Officer Koskovich (Count II); assault in the third degree against Officer Kelly (Count III). CP159-160.

Throughout trial preparation, the attorneys had been at logger heads. Deputy prosecutor Neeb informed the trial court that counsel “had a difficult time communicating over the last few months.” RP 22. Defense counsel Moore informed the court that his professional relationship with Mr. Neeb has been as unpleasant as any he had ever in his entire career. RP 22. This lack of professionalism tainted the proceedings throughout.

During pretrial interviews, Mr. Neeb repeatedly advised witnesses how to answer questions posed by the defense and even whispered instructions to one witness. CP 463-484.

\*\*\*During the pretrial interview of Tacoma animal control officer Pamela Velder, trial counsel asked to look at her report. Prosecutor Neeb intervened and stated that it was “all right with [him’]” if trial counsel did so.” CP 463-484, p.9.

\*\*\*During that same interview, trial counsel asked whether Velder had asked witnesses McMahan, Fuster, and Cooper (who either reportedly had been attacked by Mr. Gebhardt’s dog or reportedly had witnessed the dog attack other animals) to see the dog after it had been it caught to determine whether it was the dog involved in the incident. Velder replied that she was not sure what that had to do with the incident. Mr. Neeb then stated, “*It has nothing to do with it, but –*” CP 463-464, p.13.

\*\*\*During that same interview, when trial counsel asked whether Velder previously had attempted to substantiate assertions that Mr. Gebhardt’s dog was dangerous, Mr. Neeb interrupted, “*You know what, you don’t --- this is an interview about Gebhardt being charged with a crime. If you want to do discovery in a dog case, you can do it on your own time with your suit involved. This is an investigation of - - -*”

\*When trial counsel responded. “You’re the one that’s listed victim witnesses in your trial so I’m entitled to ask.

\*Mr. Neeb: You know what, you can ask anything ---

\*Trial counsel: I’m going to ask because I’m entitled to know what they think they were investigating that night.

\*Mr. Neeb: Don’t interrupt me again.

\*Trial counsel: You know, I’m going to talk whenever I want and however I want. What you’ve done is interrupt this interview, which you have no right to do and you know full well you don’t. So I’m going to handle my business the I see fit, and I assume you’re going to do the same, because that sure seems to be the way you work.

\*Mr. Neeb: Are you done?

\*Trial counsel: I don’t know that I’m done.

\*Mr. Neeb: Let me know when you are.

\*Trial counsel: I don’t have to tell you anything. You figure it out on your own.

\*Mr. Neeb: You may interview officer Velder about the facts and circumstances relating to May 29 , the incident charged. Confine yourself to that.

\*Trial counsel: You don’t have a right to dictate the course of the interview.

\*Mr. Neeb: You don’t have to answer questions that that aren’t related to the investigation of May 29<sup>th</sup>.

\*Witness Velder: I don’t see that this has to do with what happened to Mr. Gebhardt.

CP 463-484, pp. 16-17.

The trial record is rife with instances where Mr. Neeb interfered with trial counsels’ attempts to interview the State’s witnesses.

During the pretrial interview of Tacoma Police Department [TPD] Officer Kelly, trial counsel asked her: “What happened next that evening?” At that point Mr. Neeb conferred with the witness off the record. Officer Kelly responded to trial counsel’s question: “I’m sorry? I didn’t hear you.” Trial counsel: “ What did Mr. Neeb whisper to you?”

Mr. Neeb: “If I wanted you to hear it, Ed, I wouldn’t have whispered it.”  
CP 463-484, p.9.

Other egregious acts of prosecutorial interference with trial  
counsel’s pretrial interviews are found at CP 463-484, pp. 46-47, 49-50,  
56-57, 11-12, 54.

During motions in limine, the prosecutor stated that he intended to  
argue that a criminal trial was a “search for the truth” and that it is the  
jury’s job “to determine the truth about the charges based on the evidence  
and the law that they heard.” RP 56. Defense counsel did not object to this  
proposed argument. RP 56.

The court granted in part the defendant’s motion to permit that  
argument. *Id.*

The defendant next moved to prohibit the prosecutor from  
trivializing the concept of reasonable doubt by arguing, for example, that  
it was akin to deciding whether to watch American Idol or play tennis. The  
defendant properly contended that it was a far weightier concept. RP 58.

The court reserved ruling on this motion in part due to a  
misleading and erroneous argument by the prosecutor. RP 58. The  
prosecutor argued:

. . . Let’s not beat around the bush, these first  
motions are based on an unpublished opinion where I made  
a closing argument that the Court of Appeals took issue

with. They affirmed the conviction, and what they didn't like is –

THE COURT: You're telling me something I didn't already know, Mr. Neeb.

MR. NEEB: I understand that because you don't rely on unpublished opinions. But the point is that I have to read that case again because, as it stands, the Court of Appeals appears to be concerned with trying to explain to the jury what it means to be convinced beyond a reasonable doubt, which is astounding to me because, otherwise, we're like Nebraska where you don't get to argue what it means and the jury just decides. . . .RP 58-59.

Prior to trial, the parties had considerable argument about the scope of testimony, if any, about the defendant's dogs. The prosecutor contended that police went to the defendant's house because his dogs were loose and were "mauling" other animals, including a cat and police needed to investigate this. RP 71. As Officer Kelly approached a growling and barking Labrador mix dog, she saw a dog later identified to be Louie, who appeared to her to be a pit bull. RP 72. Officer Kelly did nothing to determine whether the Labrador had been involved in any canine misconduct. *Passim*. "And Louie the pit bull changes everything because Labradors aren't dangerous, pit bulls are." RP 71-72. Officer Kelly takes a shot at Louie who hurries away. RP 72

The court reserved ruling on the cat incident. RP 78.

The prosecutor conceded that it is not a bad act under ER 404(b) to have a pit bull nor is it a bad act for a pit bull to escape unless it's turned

loose, which did not happen here. RP 72. The prosecutor contended that Louie previously had been declared to be a dangerous dog by animal control and that the defendant had been required to pay special licensing fees in order to keep him. RP 74. Neither of the prosecutor's assertions were true. *Passim*

The prosecutor moved to admit evidence that several days before the charged incident, three separate cats were killed in a one or two block radius. RP 77. Although there were no eyewitnesses to these cat deaths, the prosecutor pronounced, "It doesn't take rocket science to put together who the dogs were. One incident was witnessed by a neighbor as the three dogs played tug of war with the cat and tore it to pieces and then got bored and moved on to the next situation." RP 77.

The prosecutor contended that these incidents were somehow relevant in a self defense case because they showed that the dog had bitten Ms. McMahan, another resident in the neighborhood, and who was not a feline, and the police were there to investigate that matter. RP 78. Three dogs had been involved in the McMahan incident. RP 78. These three dogs must have come out of the defendant's gate although there were not witnesses to so testify. RP 78.

The court reserved ruling on all of the dog incidents except for the McMahan matter. RP 83, 86. The court permitted the State to adduce

evidence on the McMahan matter without calling McMahan, any other witness to the incident, or establishing any foundation to any hearsay rule that might possibly make any of her statements admissible. *Passim*.

Immediately prior to trial, defense counsel moved to suppress evidence that police had any exigent circumstance that permitted them to enter the defendant's property. RP 96. The defendant properly contended that absent such reason, the police should not have attempted to open his gate, should not have inserted their hands inside his property (the gate) and were responsible for any resultant injury to themselves. RP 96. At the time the police entered the defendant's property, police were not investigating any crime. RP 96.

The court reserved ruling on this motion. RP 98.

During opening statement, the prosecutor informed the jury that it would hear evidence that a witness had observed dogs tearing a cat apart. RP 32. If the prosecutor were referring to evidence from a non-witness, defense counsel should have but did not object. RP 32.

The prosecutor next told the jury that the State would put on evidence from an unidentified individual who saw "these three dogs" attack and kill a cat and then run merrily on their way. RP 32. Again, if the prosecutor were referring to evidence from a non-witness, defense counsel

should have but did not object. RP 32. The court had not yet made a ruling on this matter.

During the testimony of police officer Kelly, the prosecutor wanted to adduce testimony that she was subject to punishment if she falsified police reports, committed perjury, or used excessive force. RP 530. The prosecutor reasoned:

. . . the defense in opening statement and throughout his questioning of Officer Kelly has attacked her credibility. He again mentioned the fact that he intends to put on a self defense claim in this case. And that means accusing these officers of initiating force and assaultive force. Her credibility is an absolute lynchpin of this case just like Officer Koskovich's will be.

I intend to ---- this is an officer who is halfway or more through a career in law enforcement. I expect her to testify to the number of years she would intend to be an officer, to the fact that she intends to retire as a police officer, to the fact that credibility and truthfulness is absolutely critical to a successful police officer and that if she has no credibility she has no point being a police officer, as a response to the fact that accusing her of lying and setting up and assaulting this defendant and following this through for over a year is too big of a leap for the jury to believe . . . RP 525-526.

The court sustained defendant's motion to exclude this evidence and thus denied the admission of this admission of this evidence. RP 526.

The prosecutor did elicit testimony that a police officer with a perjury conviction could not carry a gun, remain a police officer, and would risk losing her career. RP 535-536.

During the State's case, trial counsel did not object to the admission of a rock supposedly used by Mr. Gebhardt in an assault on TPD Officer Koskovich. The State failed to lay the requisite foundation for this exhibit, which also was the basis for the deadly weapon finding. Officer Koskovich made wildly inconsistent statements, first failing even to mention any rock and, then after the passage of time, "recalling" that Mr. Gebhardt had grabbed a rock and attempted to strike him with it. However, Officer Koskovich could not identify Plaintiff's Exhibit #44 as that rock. RP 709-710. At best, Koskovich viewed some photographs, Plaintiff's Exhibits #18 and #19, which depicted the area of the struggle and rocks therein. RP 706. Exhibit #44 appeared to be inside photograph Exhibit #18, although Koskovich noted, "I can't tell for sure." RP 709. Koskovich could not tell whether there was a bloodstain on the rock. RP 709. TPD forensics took into evidence two rocks that appeared to have blood on them. RP 344. No one ever instructed forensics to take any rocks into evidence. No one ever told forensics that any rocks were involved in any incident alleged between Mr. Gebhardt and the police. *Id*

As the trial progressed and counsel discussed scheduling issues, the prosecutor stated:

" Given [defense counsel's] opening statement, if his case proceeds the way his opening statement went, two things have to happen. The first one is the defendant has to

testify; and the second thing is that is the defendant's girlfriend – former girlfriend has to testify. . . [Defense counsel] also represented that the defendant would say that he was immediately tased and dropped to the ground and didn't struggle . . ." RP 213.

Near the end of the defense case as the parties discussed scheduling, defense counsel informed the court that he would either call the defendant or rest, subject to one additional stipulation. RP 939-940.

Based on the limited availability of the State's rebuttal witness, the prosecutor and the court pressed defense counsel to disclose whether or not the defendant would testify. RP 964-965. Defense counsel replied that this decision could not be made until the conclusion of Ms. Balasundaram's testimony. RP 965.

After Ms. Balasundaram's testimony, the court stated, "Mr. Moore, you need --- excuse me, I'm sorry to interrupt. You need some period of time to discuss this issue with your client. Is 15 minutes sufficient?" RP 1003

Defense counsel averred that 15 minutes would be more than sufficient. RP 1003.

After the conclusion of all the evidence and out of the presence of the defendant, the court and the attorneys had a "kind of in-chambers" sidebar. RP 1033. At that time, defense counsel informed the court that Mr. Gebhardt "was choosing not to testify in this case". RP 1033.

Mr. Gebhardt was not a party to this discussion and there is nothing in the record to suggest that he knew that he alone had the right to decide to whether to testify regardless of advice of counsel.

### **JURY INSTRUCTIONS**

Prior to the submission of jury instructions, trial counsel had not requested any limiting instruction.

The trial court erred when it declined to give Mr. Gebhardt's proposed instruction no. 9. (CP 288-316, #9 - 298).

Mr. Gebhardt proposed instruction no. 9 provided:

The defendant has not been charged with any offense considering dog attacks. The evidence regarding how the dogs got out and the dog attack that precede the factual matters that are actually at issue in this case may be considered by you only for the purpose of providing the context for the matters that are actually at issue. You may not consider this evidence for any other purpose other than providing a factual backdrop for the evidence regarding the assaults that the defendant has been charged with. Any discussion of the evidence during your deliberations must be consistent with this instruction.

The prosecutor objected to this instruction, arguing that ER 105<sup>1</sup> required trial counsel to request a limiting instruction at some point during the evidence phase of the trial and that the defense had waived any objection to its admission by remaining silent. The prosecutor contended

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<sup>1</sup> Appendix A

that because no limiting instruction had ever before been requested at that time, Mr. Gebhardt had waived any claim of error. RP 1071-1073.

The court refused to give defendant's proposed instruction no. 9. RP 1073.

### **CLOSING ARGUMENT**

During closing argument, the prosecutor informed the jury that its purpose was to reach a "just verdict." RP 1112. The prosecutor then defined the term "verdictum" and asserted that the jury's function was to declare the truth about whether Mr. Gebhardt had assaulted the two police officers. RP 1113-1114. The prosecutor notably did not refer to the State's burden to prove the case beyond a reasonable doubt.

The prosecutor also argued that the intent could be proven by the seriousness of the injury inflicted, that is, that bruising and swelling could not occur unless "there is significant force used." P 1125.

The prosecutor also improperly argued that police officers would not lie because they would lose their careers if they did so:

. . .as you go through their testimony [police ], keep in mind that there really isn't anything that a police officer can do that's more damaging or career ending than to lie about a contact with a suspect. Well, I suppose there is one thing worse than filling a police report that has falsity, and that is taking the stand and raising your right hand and swearing to tell the truth under penalty of perjury. Because a police officer with a perjury conviction, a perjury charge, has zero credibility left and that's the end. RP 1126-1127.

... is Mr. Gebhardt really that important? Is he really worth it that these officers are going to throw away their careers just to make sure he's convicted of something he didn't do? RP 1127.

Such arguments also are impermissible because they improperly vouch for the credibility of the state's witnesses.

The prosecutor additionally argued facts not in evidence when he asserted that Mr. Gebhardt wanted to prove that his back gates were closed because "that's a potential defense if he's charged with harboring a dangerous dog, *setting his dog on Ms McMahan* who got bit or something other than what's going on in this case." RP 1133. The prosecutor repeatedly contended that the defendant's dog had bitten a neighbor and threatened a police officer. The identity of the dog committing these acts in fact was never established. RP 1147. Defense counsel failed to object to this argument. *Passim*.

The prosecutor also deflected the jury's attention away from the State's burden of proof by stating that the defense "in banking on the fact that you will keep the institutional knowledge [Rodney King case] in mind just enough to find reasonable doubt." RP 1141. The prosecutor thus suggested that the defense wanted the jury to decide the case on something other than the evidence in this case.

Although the prosecutor much later referenced the state's burden to prove the case beyond a reasonable doubt, the prosecutor incorrectly informed the jury that the state's case had to be measured against the defense case. RP 1141-1142.

The prosecutor inserted his personal beliefs and opinions into the State's closing argument: e.g., "And, you know, maybe the defendant was trying to grab his recorder and turn it back on when he grabbed the rock. I don't know. I don't care, nor should you." RP 1148. In a self defense case, the prosecutor's personal opinion was even more impermissible than usual. Defense counsel's failure to object was unfathomable.

The prosecutor's argument on the concept of reasonable doubt was convoluted and designed to mislead the jury:

*And so we allow for doubt as long as it's not a doubt for which a reason exists. . . . . What we have is a question of whether or not you have enough. And what we have in this case is the sworn testimony of police officers . . . . The beyond a reasonable doubt instruction ---- beyond a reasonable doubt is not a phrase that you folks use in your daily lives generally speaking. It's probably a phrase you'll use in the next few days when you're describing to your friends and family what you did in this case, but it's not a phrase that you use but it's a standard that you apply. It's a standard that you apply and each person has a different level, if you will, which is beyond a reasonable doubt. Each person has a different set or different level of certainty that they require before they will say I'm convinced beyond a reasonable doubt. P 1151-1152.*

The prosecutor then provided examples of every day decisions that reached the reasonable doubt level: whether or not to have surgery or children; where you will take your children; where you will leave your children. RP 1154.

The prosecutor concluded his closing argument by repeatedly urging the jury to “declare the truth.” RP 1154.

Defense counsel failed to object to any of the aforementioned impermissible arguments. *Passim*.

In the defense closing argument, trial counsel made numerous statements that prejudiced his own client. Although the State failed to present any direct evidence to corroborate the following, some of which had been excluded by the court pursuant to a motion in limine, trial counsel argued in closing: “. . .“the dogs got out, the dogs attacked a human, unfortunately a human and unfortunately other animals and there was a reaction . . .” RP 1161; “. . .there’s never been any dispute from us that the dogs got out and that the dogs unfortunately attacked other dogs and Ms. McMahan...” RP 1168. Trial counsel also used Ms. McMahan’s hearsay statements to police as substantive evidence although they were damaging to Mr. Gebhardt – RP 1171

At the conclusion of rebuttal, the prosecutor again asked the jury to render a “true verdict”. RP 1198. The prosecutor did not mention the State’s burden to prove the charges beyond a reasonable doubt. *Passim*.

### **VERDICT**

On June 15, 2010, the jury found Mr. Gebhardt guilty of assault in the second degree while armed with a deadly weapon and also third degree assault, both assaults committed against Officer Koskovich. CP 349, 350, 351. The jury acquitted Mr. Gebhardt of the charge of assault three against Officer Kelly. CP 352.

### **POST CONVICTION MOTIONS:**

On August 6, 2011, the parties appeared before the court for Mr. Gebhardt’s post conviction motions. RP 1221. Mr. Gebhardt’s first and most significant motion was the denial of his constitutional right to testify. Had Mr. Gebhardt known that the decision to testify was his decision alone to make, he would have testified. RP 1223. Mr. Gebhardt also moved for a new trial based upon prosecutorial misconduct. *Id*

Prior to hearing the merits of the motions, the court advised the parties that it had real time transcripts of the proceedings to use for the claims of prosecutorial misconduct. RP 1227. The court refused to allow

defense counsel to view it and instead told counsel, “I’ll tell you what it is.” RP 1227.

With regard to discussion between trial counsel and Mr. Gebhardt, the court noted that trial counsel had 15 minutes to discuss the matter with Mr. Gebhardt. RP 1228. Of course, neither the court nor the prosecutor knew what was discussed during that break. RP 1229. After the break, the court understood that Mr. Gebhardt would not testify. RP 1229. Trial counsel, the prosecutor and the court were outside the presence of Mr. Gebhardt when trial counsel informed the court that Mr. Gebhardt would not testify. RP 1229; 1232.

At no time did trial counsel ever inform Mr. Gebhardt that the decision to testify was his alone. Rather, trial counsel recommended that Mr. Gebhardt not testify and made that decision for him. RP 1229, 1232, 1233; CP 463-484 p.18

Trial counsel’s statement that Mr. Gebhardt should not testify was clear in the e-mail dated June 6, 2010 (prior to trial). That e-mail is part of an on-going pretrial discussion between Mr. Gebhardt and trial counsel regarding the perils of Mr. Gebhardt testifying at trial. Trial counsel has informed him that Mr. Neeb would rip him up.

The court’s ruling denying Mr. Gebhardt’s motions for a new trial or alternately for an evidentiary hearing was based on the fact that the

court gave trial counsel a break so that he and Mr. Gebhardt could “specifically for them to discuss that issue.” RP 1238.

When considering Mr. Gebhardt’s motion for prosecutorial misconduct during closing argument, the trial court considered the court reporter’s draft of that argument. RP 1238. That document was not made available to defense counsel. RP 1238-1239. The court then back stepped and denied relying on the draft document although the court pointed out that the draft had been read “. . . because the argument was made that he [Mr. Neeb] in some way violated Mr. Gebhardt’s rights by engaging in some prosecutorial misconduct, I felt that I should, and so I’ve done that.” RP 1238-1239. After again denying that it had relied on reading the transcribed closing argument, the court averred: [read it] Only because you had made representations of what was said in closing argument, and so I ---- purely on that basis I thought I should go ahead and read it.” RP 1240.

The court informed Mr. Gebhardt’s counsel, who had been made aware of the errors in the prosecutor’s closing argument errors from Mr. Gebhardt’s trial counsel, that the challenged comments appeared less prejudicial in the context of the entire argument. RP 1240-1241.

When defense counsel asked for the opportunity to review and/or obtain a copy of the closing argument to respond to the court’s comments,

the court denied the motion. RP 1242. The court thus denied Mr. Gebhardt an even playing field and made its decision on matters completely unavailable to the defense. RP 1242.

The court then denied the motion for new trial. RP 1243.

The court limited argument on the defense motion for relief based on prosecutorial misconduct during pretrial interviews. RP 1243. The court did so because it's staff had a furlough day and needed to leave at a predetermined time. RP 1244.

The court also advised counsel that the court had limited time to hear the argument. RP 1239. After the prosecutor responded to the defense argument, the court limited the defense reply to 30 seconds, RP 1249.

The court denied Mr. Gebhardt's motion. RP 1250.

### **SENTENCING**

At sentencing, the prosecutor urged the court to consider the recommendation from a victim in the count that resulted in an acquittal. RP 1258. The court sentenced Mr. Gebhardt to six months in the Pierce County Jail and twelve months of community custody. RP 1266-1267; CP 539-550.

Assault in the second degree is a strike offense. RCW 9A.36.021(1)(c).

Mr. Gebhardt thereafter timely filed this appeal. CP 537.

### **RELEVANT TESTIMONY**

On May 29/30 2009, Tacoma Police Department [TPD] police patrol officer Paula Kelly was on duty when she responded to a call that some dogs had killed a cat. RP 67, 79, 81-82. Officer Kelly worked with officer Koskovich that night. RP 77. The officers spoke to a “Mrs. Harman” who related that three dogs had been running around and that one of them had killed the cat. RP 80. Mrs. Harmon could not provide any address for the owner of the dogs and simply told police that the dogs came from the southwest. RP 81.

During contact with juveniles in an unrelated incident, Officer Kelly encountered “vicious barking” or “excitable barking.” RP 90-91. The dogs were  $\frac{3}{4}$ 's of a football field away from a particular house. RP 91-92.

Officer Kelly speculated into the mind of the dog and concluded that the dog had a “heightened sense of awareness and almost like a territorial sense of barking.” RP 92. Based on this hasty psychoanalysis of the dog that apparently did come from the southwest of the Harman residence, Officer Kelly assessed the danger level of the first dog. RP 92-93. Based on her sixth sense, Officer Kelly then intuited that more dogs

might be after her and then almost immediately she saw two more dogs coming at her. RP 97. One of these dogs appeared to be a pit bull that also appeared to be the alpha dog. RP 97. She believed that the dogs were hunting. RP 99.

When Officer Kelly retreated, the dog sensed “She’s a chicken.” RP 103. Officer Kelly jumped to the top of her car. RP 108-109. She fired a shot at the dog she believed to be the pit bull and missed him. RP 110-111.

Officer Kelly did not know which residence was associated with any of the dogs. RP 250. Nevertheless police cordoned off a very large area as a “crime scene”. RP 250.

At some point, a Mrs. McMahan told police that she had been bitten by a dog. RP 255-256.

Police later contacted Mr. Gebhardt and Sara Balasundaram after they arrived at their home and informed them that their dog had killed a cat and bitten a person. RP 866. Police also related that they had shot the dog. RP 865-866.

Officer Kelly, the shooter, was angry and upset when she told him that. RP 895-896. Mr. Gebhardt was understandably distraught and replied, “You shot my dog?” RP 893. At that time it was not clear whether police had shot either Louie or Charlie. RP 890. However police

conveyed the clear impression that whichever dog had been shot had been killed. RP 890.

Police did not know that Mr. Gebhardt owned the dog until Ms. Balasundaram showed Officer Kelly a photo of the dog. RP 896- 897.

After police asked to come onto his property, Mr. Gebhardt clearly denied them permission to do so.. RP 791, 904, 905. Sgt. Martin responded that the police would not enter his property. RP 905. Police did not tell Mr. Gebhardt or Ms. Balasundaram that their yard was a “crime scene” when they sought to enter it. RP 890.

Some of the officers then went around the house via the alley. Officer Kelly was one of them. Mr. Gebhardt’s yard was fenced, with a gate in the rear. Officer Kelly pulled on the gate so that it was swinging back and forth. RP 909.

Officer Kelly apparently did so to determine whether the dogs could use the gate to enter the yard from the alley or vice versa. RP 299-300. She also determined that the back fence gate could not be pushed outward into the alley so that the dogs could exit the yard. RP 439-440. Her observations were consistent with the design and structure of the fence. RP 777-778, 779.

Both Mr. Gebhardt and Officer Kelly were upset. RP 789 - 790. Officer Kelly claimed that she hurt her hand when Mr. Gebhardt closed

the gate on it. Sara Balasundaram never saw Mr. Gebhardt anywhere near the gate. RP 909.

After this event, police rushed into Mr. Gebhardt's backyard where a physical fight broke out. During that fight, one of the police officers used a taser on Mr. Gebhardt. RP 823-824, 911. At one point, Mr. Gebhardt lay facedown in the ground. RP 913. The police then bludgeoned him. RP 824, 913-914. Police beat him with a flashlight and also struck him in the face. RP 921. 926.

Initially officer Koskovich failed to report to anyone that Mr. Gebhardt had in any way assaulted him.

Officer Koskovich belatedly claimed that Mr. Gebhardt had grabbed a rock and attempted to strike him with it. However, Officer Koskovich could not identify Plaintiff's Exhibit #44 as that rock. RP 709-710. At best, Koskovich viewed some photographs, Plaintiff's Exhibits #18 and #19, which depicted the area of the struggle and rocks therein. RP 706. Exhibit #44 appeared to be inside photograph Exhibit #18, although Koskovich noted, "I can't tell for sure." RP 709. Koskovich could not tell whether there was a bloodstain on the rock. RP 709.

TPD forensics officers reported to the neighborhood near the Gebhardt residence for an officer involved shooting. RP 338. At one

point, the officers were directed to the Gebhardt residence where they took photographs of the backyard. RP 340.

Forensics officers collected items of possible evidentiary value, including broken glasses. RP 341. TPD forensics also took into evidence two rocks that appeared to have blood on them. RP 344. Forensics took the rocks without direction from any police officer at the scene. RP 345. They took the rocks because they appeared to have blood on them although they were never sent out for any laboratory analysis. RP 344-345. One of the rocks was stuck in the dirt. Forensics officers had to wiggle and shake it in order to get it out on the ground. RP 345.

No police officer ever directed them to pick up any rock. RP 346. No police officer ever told the forensics officers that a rock had been used in the altercation that night. RP 358.

TPD Forensics Officer Renae Campbell was present at the Gebhardt resident residence during the fracas on May 29, 2010. RP 1007. She observed some of the physical fight in the backyard and did not write in her report that she ever saw Mr. Gebhardt with a rock. RP 1024-1026. She did hear the taser being used. RP 1028.

Even after police arrested Mr. Gebhardt, Officer Koskovich kept his knee in the back of the handcuffed Mr. Gebhardt. RP 976.

After Mr. Gebhardt was handcuffed, the police laughed and joked about what had happened. RP 977.

**D. LAW AND ARGUMENT**

1. THE TRIAL COURT ERRED WHEN IT DENIED MR. GEBHARDT'S POST-TRIAL MOTIONS.

The appellate courts review denials of a motion for a new trial for abuse of discretion. *State v Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008) citing *State v Marks*, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967). Among other things, discretion is abused if it is exercised on untenable grounds or for untenable reasons, such as a misunderstanding of the underlying law that causes no harmless error in the trial. *Burke, supra*.

Cases on appeal are decided only from the record of proceedings below. *Grobe v Valley Garbage Service, Inc.*, 87 Wn.2d 217, 228-29, 551 P.2d 748 (1977). Materials that were not before the trial court and that are not included in the record on appeal cannot be considered by this court. *Supra*; Rule of Appellate Procedure (RAP) 9.1(a)<sup>2</sup>.

In addition to the case law and the RAP, superior court rules also mandate that the parties serve upon each other all written materials to be

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<sup>2</sup> Appendix C

relied upon, for example, in motions before the court. *e.g.*, Civil Rule (CR)  
5<sup>3</sup>.

When the trial court enters a written order denying a motion for new trial, the trial court enters findings of fact and conclusions of law. Findings of fact entered by a trial court are binding on the appellate courts if they are supported by substantial evidence. State v. Broadaway, 133 Wn.2d 118, 129-134, 942 P.2d 361 (1997). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) overruled on other grounds by Brendlin v. California, 127 S.Ct. 2400, 168 L.Ed. 132 (2007).

In this case, for the reasons set forth herein, the trial court erred when it entered the mixed findings of fact and conclusions of law nos. 1, 2, 3, 4 in the Order on Motions for New Trial (Appendix E). Note: The State and the trial court did not number the mixed findings of fact and conclusions of law. For purposes of argument, Mr. Gebhardt has numbered each paragraph beginning "It is hereby ordered" - "Finally, it is hereby ordered" sequentially ordered. Mr. Gebhardt will argue these matters first before proceeding to other trial court errors.

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<sup>3</sup> Appendix D

In this case, for the reasons set forth below, the trial court abused its discretion when it denied Mr. Gebhardt's motion for new trial. The trial court considered portions of a rough draft of a real time record of the trial that was not provided to counsel and has not been preserved to verify accuracy or determine which portions upon which the court relied. The trial court misapplied the law when admitting evidence the probative value of which was substantially outweighed by the danger of unfair prejudice. The trial court failed to grant relief based on egregious acts of prosecutorial misconduct which resulted in a verdict that is not reliable. In addition, the trial court erroneously denied Mr. Gebhardt relief based on ineffective assistance of counsel even where his attorney represented that he was providing only what Mr. Gebhardt had paid for – that is, a \$5, 000 defense. These errors, as well as the other errors noted below, satisfy the requirements for a new trial. The trial court abused its discretion when it denied Mr. Gebhardt's motion.

2. THE TRIAL COURT ERRED WHEN IT RELIED ON COMPUTER DRAFT/ROUGH COPIES OF A REAL TIME TRIAL ACCOUNT TO RESOLVE POST-TRIAL MOTIONS WHILE DENYING THOSE SAME MATERIALS TO DEFENSE COUNSEL WHO HAD NOT BEEN PRESENT AT TRIAL AND WHERE THOSE MATERIALS ARE NOT PART OF THE RECORD ON APPEAL.

The obvious intent of the rules and the case law is ensure in a criminal case the guarantees of due process and fundamental fairness. In this case, despite multiple requests by counsel, the trial court steadfastly refused to provide copies of the draft of the real time account of the trial. Although the trial court hedged on whether it had relied on the real time account to make its decision, the trial court also made contradictory statement (RP 1238-1239, 1240). In its written order, the trial court acknowledged that it had “sufficient information from the pleadings and from its recall and review of portions of the *trial transcripts* to make its rulings on these motions without further evidence being presented.” (Appendix E) (emphasis added). The use of the term *trial transcripts* is wholly misleading. At the time of the motions, NO trial transcripts had been filed. Trial transcripts were not filed until June 16, 2011. (See Appendix F) In this case, the trial court relied on materials that it repeatedly refused to provide to counsel and that therefore are not part of this record on review. The materials thus were not available for argument

on the motion and they were never examined for veracity (they were “rough” documents that are corrected prior to transcription for appeal purposes).

Thus neither Mr. Gebhardt nor this court can ascertain what materials were before the court when it ruled on the motions for new trial. The trial court’s procedural blunders are an abuse of discretion. This court therefore must grant the relief requested by Mr. Gebhardt.

3. THE TRIAL COURT ERRED BY DE FACTO CLOSING THE COURTROOM TO MR. GEBHARDT WHEN IT ACCEPTED HIS COUNSEL’S REPRESENTATION THAT HE WOULD NOT TESTIFY OUTSIDE HIS PRESENCE AND OFF THE RECORD DESPITE KNOWING THAT MR. GEBHARDT DID WANT TO TESTIFY

In this case, the uncontroverted evidence establishes that Mr. Gebhardt wanted to testify at this trial. This evidence comprises e-mail exchanged between Mr. Gebhardt and trial counsel prior to trial as well as Mr. Gebhardt’s post-trial declaration. In violation of Mr. Gebhardt’s constitutional right to be present at all states of trial when his substantial rights may be affected, Mr. Gebhardt was excluded from the conversation between the court, the prosecutor and trial counsel when trial counsel informed the court and the prosecutor that Mr. Gebhardt would not testify.

*Article I, section 22 of the Washington Constitution* provides an explicit guaranty of the defendant's right to be present. "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel." The *United States Constitution* guarantees this right through the *due process clause of the Fourteenth Amendment* . .

The Washington courts long have held that "[i]t is a constitutional right of the accused in a criminal prosecution to appear and defend in person and by counsel . . . at every stage of the trial when his substantial rights may be affected." *State v Shutzler*, 82 Wn.365, 367, 144 P.284 (1914) (emphasis added)

The Washington Supreme Court has routinely analyzed alleged violations of the right of a defendant to be present by applying federal due process jurisprudence. See *In re Pers Restraint of Benn* 134 Wn.2d 868, 920, 952P.2d 116 (1998), *In re Pers Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), *State v Rice*, 110 Wn.2d 577, 616, 757 P.3f 889 (1988).

The United States Supreme Court has held that a criminal defendant's right to be present is protected by the *Due Process Clause* even in some situations where the defendant is not actually confronting witnesses or evidence against him. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). In that vein, the Court

has said that a defendant has a right to be present at a proceeding “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Snyder v Massachusetts*, 291 U.S. 97, 54S.Ct. 330, 78L.Ed.674(1934) *overruled in part on other grounds sub nom Malloy v Hogan*, 378 U.S. 1, 34 S.Ct. 330, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The Court held, however, that because the relationship between the defendant’s presence and his “opportunity to defend”, must be “reasonably substantial”, a defendant does not have a right to be present when his presence would be useless, or the benefit but a shadow.” *Id.* at 106-07.

In this case, trial counsel informed the court and the prosecutor in the hallway leading to judge’s chambers that Mr. Gebhardt would not testify. Mr. Gebhardt was not present for this conversation. The court unreasonably concluded trial counsel and Mr. Gebhardt must have discussed the subject of his testimony during the recess taken for this purpose.

However, the record is uncontroverted that Mr. Gebhardt and trial counsel had discussed his intention to testify prior to the trial. The record is uncontroverted that Mr. Gebhardt never was advised that the decision to testify was his personal decision. The record is uncontroverted that Mr. Gebhardt did not make a personal decision not to testify. Mr. Gebhardt’s

absence from the hallway conversation about whether or not he would testify did bar his participation at a stage of his trial “when his substantial rights [were] affected.”

Given the defendant’s sole decision-making capacity over the decision to testify, the defendant must be present when the court and parties discuss his decision. After all, he is the only person who controls the decision, who can change his mind, etc.

The trial court’s decision to ascertain outside his presence whether Mr. Gebhardt would exercise this most personal of constitutional rights de facto closed the courtroom to him and denied him the opportunity to be present at this significant event in his trial.

In the order on motions for new trial (Appendix E), wherein the trial court denied Mr. Gebhardt’s motion, the trial court found in pertinent part:

. . . the defendant’s motion for new trial based on his claim that he was denied the right to testify by his trial counsel is denied. The court recalls the issue was initially addressed on the record during trial, and then the court took a recess from the trial to allow the defendant and his counsel to discuss the issue privately. It was clear to the court that the defendant was making an informed decision at the time. (Appendix E)

Although there was an on the record discussion regarding whether Mr. Gebhardt would testify, the court gave Mr. Gebhardt and trial counsel some time to discuss this privately. Of course, neither the trial court nor the prosecutor were privy to this conversation. Thereafter trial counsel informed the court *outside Mr. Gebhardt's presence* that Mr. Gebhardt would not testify. Based on these extremely limited facts, the trial court conjectured, "It was clear to the court that the defendant was making an informed decision at the time." In fact, there is nothing in the language preceding that conclusion that supports the court's "clear" finding.

Therefore this court must reverse and remand this case for new trial. This is so because it cannot be controverted that Mr. Gebhardt (1) did not know that he personally could make the decision not to testify, (2) did not tell his attorney that he did not want to testify, and (3) did not know that his attorney told the court and the prosecutor that he would not testify.

4. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR NEW TRIAL BASED ON PROSECUTORIAL MISCONDUCT.

As it did when ruling on a motion for new trial based on prosecutorial misconduct, the trial court could consider the arguments put before the court. In this case, the trial court nevertheless averred that it "considered the statements in the context of the entirety of closing arguments, noting that there was no objection raised at the time and

further noting that the jury must have understood the burden of proof given in the instructions based on its verdict on Count III.”

Of course, neither this court, Mr. Gebhardt, nor the State can ascertain the accuracy of the trial time draft upon which the trial court relied. Real time drafts are not submitted to this court for appellate review. The trial court in this case refused to permit defense counsel to view the real time document.

Mr. Gebhardt’s trial attorney, a civil personal injury attorney, did not make objections to the State’s closing argument or rebuttal. However, given his incompetence, that was not expected. His failure to perform as counsel is not a bar to a finding of error. (See section 5 below). Finally, that the jury acquitted Mr. Gebhardt on Count III has no bearing on the propriety of the prosecutor’s argument. (See section 5, below).

5. THE TRIAL COURT ERRED BY DENYING THE MR. GEBHARDT’S MOTION FOR NEW TRIAL WHERE THE PROSECUTOR REPEATEDLY INTERRUPTED DEFENSE PRETRIAL INTERVIEWS AND PREVENTED THOROUGH PREPARATION OF HIS DEFENSE.

See section 6, below.

6. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT HELD THAT THE STATE'S WITNESSES COULD REFER TO MR. GEBHARDT'S DOG LOUIS AS A "PIT BULL" DESPITE EVIDENCE THAT "LOUIE" IN FACT WAS NOT A "PIT BULL."

The appellate court reviews a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Id*

Evidence must be relevant to be admissible. ER 402. Evidence is relevant only if it increases or decreases the likelihood that a fact exists that is consequential to the jury's determination whether the defendant committed the crimes charged. *See* ER 401. ER 403 further provides that "although 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 . . ."

In this case, the trial court permitted the State to call Louie a pit bull throughout the case, even though Louie was not a pit bull. The court also allowed Officer Kelly to refer to Louie as a pit bull although she did not know that Louie was a pit bull. She thought that Louie appeared to be a pit bull. Her testimony at most should have been limited to her opinion that Louie *appeared* to her to be a pit bull.

Pit bulls have a reputation in the community as aggressive and dangerous dogs. Many citizens perceive them as prone to attack people and animals. The trial court's ruling permitted the State to argue that this incident was provoked by Mr. Gebhardt who permitted his dangerous "Pit bull" to run loose in the neighborhood and thereby knowingly endangered his neighbors and their animals. This obviously painted Mr. Gebhardt in a false and unfairly prejudicial light.

7. MR. GEBHARDT IS ENTITLED TO A NEW TRIAL WHERE PROSECUTORIAL MISCONDUCT WAS SO FLAGRANT AND ILL-INTENTIONED THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE INSTANCES OF PROSECUTORIAL MISCONDUCT AFFECTED THE JURY'S VERDICT.

A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). As a quasi-judicial officer, a prosecutor must subdue courtroom zeal for the sake of fairness to the defendant. *Id*

To prevail on a claim of prosecutorial misconduct, the defendant must establish "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)); accord *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v.*

Dhalwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The burden to establish prejudice requires the defendant to prove that “there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.” Magers, 164 Wn.2d at 191 (alteration in original); *accord* Dhalwal, 150 Wn.2d at 578; Russell, 125 Wn.2d at 85; *see, e.g.*, State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006) (defendant failed to prove that prosecutor's misconduct in eliciting testimony barred by pretrial ruling, to which he [\*5] did not object, caused prejudice affecting the outcome of the trial). The “failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *accord* Fisher, 165 Wn.2d at 747. When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case. Russell, 125 Wn.2d at 86.

“Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995) (citing State v. Hughes, 106 Wn.2d 176, 195, 721 P.2d 902 (1986); *see also* State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). In this case, Mr. Gebhardt easily satisfies his burdens to show that

the prosecutor's conduct was improper and that there is a substantial likelihood the misconduct undermined the results of the trial and resulted in a verdict that is unreliable.

In the instant case, the prosecutor committed egregious misconduct throughout the proceedings, from pretrial interviews through rebuttal arguments

Improper comments are prejudicial “where there is a *substantial likelihood* the misconduct affected the jury's verdict.” *Yates*, 161 Wn.2d at 774 (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997))).

If the defendant fails to object or request a curative instruction at trial, the issue of misconduct is waived unless the conduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Stenson*, 132 Wn.2d at 719

In this case, defense counsel noted that working with the prosecutor made this as unpleasant and trying a case as he had ever been involved in. RP 22. That difficulty started in pretrial interviews and continued through rebuttal.

8. THE PROSECUTOR COMMITTED MISCONDUCT BY INSTRUCTING WITNESSES NOT TO ANSWER DEFENSE COUNSEL'S QUESTIONS AND BY PROVIDING "SECRET" ADVICE TO THEM DURING THOSE INTERVIEWS.

A witness belongs neither to the prosecution nor the defense. *See, e.g. State v. Hofstetter*, 75 Wn.App. 390, 397-98, 878 P. 2d 474 (1994).

"The equal right of the prosecution and the defense in criminal proceedings to interview witnesses before trial is clearly recognized by the courts." *Hofstetter*, 75 Wn.App. at 397, quoting *Kines v. Butterworth*, 669 F.2d 6, 9 (1<sup>st</sup> Cir. 1981)).

Thus, it is not proper for a prosecutor to instruct a witness not to speak with the defense. *See Hofstetter*, 75 Wn.App. at 397-98.

In this case, the prosecutor shamelessly admitted during the defense interviews that he was providing advice to the police witnesses. Specifically the prosecutor advised the police witnesses to not answer questions about TPD policies and training regarding use of force on citizens. Defense counsel wanted to know when police were authorized to use force and what degrees of force were authorized for given situations.

In this self defense case, where Mr.Gebhardt's actions responded to the force used against him by law enforcement, trial counsel was prejudiced by the State's interference in the pretrial interviews. That trial counsel was ignorant of Washington criminal rules and obviously did not

know the available remedy for the prosecutor's flagrant misconduct does not mitigate the prejudice thereof.

In this case, there was a significant dispute whether the police took the proper rock into evidence. Where the prosecutor argued that the size and heft of the rock made it a deadly weapon, the State's ability to prove beyond a reasonable doubt that the proper rock had been seized was critical. It cannot be ruled out that the prosecutor provided advice to the State's witnesses on this very issue as well as issues regarding the appropriate use of police force when confronted with such a large rock.

In this case, the prosecutor adduced evidence that Mr. Gebhardt's dogs had terrorized the neighbor on more than one occasion prior to the charged date. The prosecutor's disruptive conduct during interviews prevented trial counsel from questioning witnesses about this matter. In addition, the prosecutor prevented trial counsel from asking the animal control officer about any prior contacts with Mr. Gebhardt about his dogs - yet the prosecutor adduced exactly that evidence at trial. The prosecutor engaged in the worst kind of gamesmanship and misconduct. This misconduct prevented trial counsel from adequate preparation.

9. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT.

To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor's comments were improper and second that the comments were prejudicial. *See, e.g., State v Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert denied*, 128 S. Ct. 2964 (2008); *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

Mr. Gebhardt hereby incorporates by reference all of the errors and arguments from his motions for new trial. In addition he argues the following:

In *Anderson*, the prosecutor argued to the jury that “[t]he word “verdict” comes from the Latin word “veredictum,” which means to declare the truth. So, by your verdict in this case, you will declare the truth about what happened.” *State v Anderson*, 153 Wn.App. 417, 424, 220 P.3d 1273 (2009). The Court of Appeals held that this argument was improper because the jury’s job is not to “solve” a case . . . “rather the jury’s duty is determine whether the State has proved its allegation against a defendant beyond a reasonable doubt.” *Anderson*, 153 Wn.App. at 429..

In this case, in addition to the “veredictum” argument, the prosecutor repeatedly emphasized that its function was to declare the truth. e.g. RP 1112, 1113, 1114, 1198. Although the jury acquitted on Count III,

the jury may well have been pressured by this repeated and erroneous argument to “solve” the case so as to attempt to determine whether the rock admitted at trial (Exhibit No. 44, CP 241-244) whether or not the rock was even touched by Mr. Gebhardt as opposed to all the rocks at the scene, including those with blood on them, was the rock allegedly used in this case. Certainly there were other evidentiary conflicts in the case that jury may well have decided to “solve” rather than to weigh the evidence to determine whether the State had proved the charges beyond a reasonable doubt.

10. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT AND REBUTTAL BY ARGUING THAT THE POLICE WOULD NOT LIE AND/OR CONSPIRE TO LIE TO CONVICT MR. GEBHARDT BECAUSE THEY WOULD LOSE THEIR JOBS.

The prosecuting attorney represents the people and is presumed to act with impartiality “in the interest only of justice.” *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Prosecutor attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

It is misconduct for a prosecutor to personally vouch for the credibility of a witness. *State v. Brett*, 126 Wn.2d 134, 992 P.2d 129

(1995). Improper vouching generally occurs if the prosecutor expresses his or her personal belief about the veracity of a witness, or if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. United States v. Brooks, 508 F.3d 1205, 1209 (9<sup>th</sup> Cir. 2007) (quoting United States v. Hermanek, 289 F.3d 1076, 1098 (9<sup>th</sup> Cir. 2002). “[A]lthough prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements not supported by the record.” State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006). A prosecutor may not argue facts not in the record or call the jury's attention to matters that the jury has no right to consider. See State v. Warren, 165 Wn.2d 17, 44, 195 P.3d 940 (2008), *cert denied*, 129 S. Ct. 2007 (2009) Courts review comments made by a prosecutor during closing argument in “the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

A prosecutor engages in misconduct during closing argument by giving a personal opinion on the credibility of a witness. State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). Prejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion. State v

Swan, 114 Wn.2d 613, 662, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 112 L.Ed.2d 772, 111 S. Ct. 752 (1991)." Thus, prosecutors may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another. Copeland, 130 Wn.2d at 290-91.

Washington courts have held that it is prosecutorial misconduct to argue that in order for the jury to acquit they must determine that all the police officers were lying. State v Casteneda-Perez, 61 Wn.App. 354, 362-63, 810 P.2d 74, *rev denied*, 118 Wn.2d 1007 (1991). ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying"); State v. Wright, 76 Wn.App. 811, 826, 888 P.2d 1214, **rev. denied** 127 Wn.2d 1010, 902 P.2d 163 (1995); State v. Barrow, 60 Wn.App. 869, 874-75, 809 P.2d 209, *rev. denied*, 118 Wn.2d 1007, 882 P.2d 288 (1991).

Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial. Where improper argument by the prosecutor is alleged, the defendant bears the burden of showing the impropriety of the argument as well as its prejudicial effect. Alleged misconduct must be viewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. If the defendant proves the conduct was improper, the

error still does not warrant a new trial unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *State v Fleming, supra.* *State v Barrow, supra*

This case was a credibility contest between the police officers and Mr. Gedhardt and Sara Balasundaram. In this case the prosecutor impermissibly vouched for the police, violated the court's order regarding the scope of the evidence he could adduce regarding police job consequences if officers lied, and argued unsubstantiated inferences therefrom. By doing so, the prosecutor simply recast the "in order to acquit you must find that the police officers are lying argument" that the Washington appellate courts have condemned.

In this case, the prosecutor's argued facts outside and unsubstantiated and references about the consequences that false testimony would have on police careers. The prosecutor also committed misconduct when he argued that all of the police would have had to engage in a dastardly and criminal conspiracy had they perjured themselves in the same way. RSP 1127, 1188, 1190.

Where the case centered on the credibility of the opposing groups of witnesses (police vs. civilians), the prosecutor's impermissible argument denied Mr. Gebhardt a fair trial.

11. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT AND REBUTTAL BY ARGUING THAT THE POLICE WOULD NOT LIE AND/OR CONSPIRE TO LIE TO CONVICT MR. GEBHARDT BECAUSE THEY WOULD LOSE THEIR JOBS.

Wash. Const. art I, sec. 22 explicitly guarantees defendants the right to exercise their fair trial rights. Thus the prosecution cannot ask a jury to draw an adverse inference, from the defendant’s exercise of a constitutional right. These comments imply all defendants are less believable simply as a result of exercising these rights; the exercise of this constitutional right is not evidence of guilt. These allegations demean “the truth-seeking function of the adversary process.” *Portuondo v Agard*, 529 U.S. 61, 76, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (*Stevens*, J., concurring); *id* at 79 n.1 (*Ginsburg*, J., dissenting).

It is axiomatic that the Fourth Amendment<sup>4</sup> of the United States Constitution and Washington Const. art. I, sec. 7<sup>5</sup> protect an individual’s privacy in a variety of settings. The courts recognize that in no setting is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home. *State v Farrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998).

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<sup>4</sup> Fourth Amendment “The right of the people to be secure in their . . . houses . . . shall not be violated.”

<sup>5</sup> Wash. Const art I, sec 7 “No person shall be disturbed in his private affairs, or his home invaded. without authority of law.”

Absent some legal justification permitting police entry onto an individual's property, an individual may refuse permission to enter to anyone. As argued below in section 12 in the ineffective assistance of counsel argument, Mr. Gebhardt had the constitutional right to deny entry to the police.

The prosecutor repeatedly belittled Mr. Gebhardt for thinking that he could exercise his constitutional rights to protect the privacy of his home under the circumstances of this case, where the police made unlawful entry. e.g., RP 1115. This impermissible comment on his exercise of this fundamental right warrants reversal.

12. MR. GEBHARDT RECEIVED INEFFECTIVE ASSISTANCE FROM TRIAL COUNSEL WHO ADMITTEDLY PROVIDED A \$5,000 DEFENSE RATHER THAN A "NO HOLDS BARRED \$15,000 - \$20,000 DEFENSE.

As Mr. Gebhardt's case prepared for trial, he wanted to take an active role. The attorney who had referred him to his trial counsel, worked in the same firm, and had agreed to assist his trial attorney pro bono chastised him. His attorney chastised him in an email dated January 16, 2010. (Appendix E) In that email, she noted that "now" Mr. Gebhardt had informed them that he wanted to pull out all the stops in his defense. The attorney noted that Mr. Gebhardt had only \$5000 for his representation. The attorney continued:

If you have now come up with the resources to spend \$15 to \$25K on a no holds barred defense with a pre-eminent local attorney, then I do not want to begin to discourage you. However, this is a far cry from what I thought was needed when I asked Ed to assist.” *Id.*

In every case, a criminal defendant has the right to effective assistance of counsel. The law does not recognize one level of effective assistance for individuals represented by public defenders, another for financially strapped individuals who nevertheless pull together modest funds to hire counsel, another level for individuals who are able to hire the attorneys of their choice, etc. Rather, the constitutions guarantee the same quality of effective assistance of counsel to all criminal defendants, regardless of financial circumstances. Attorneys who base the quality of the representation on the of the trial fee represent not the criminal defendant but rather their own wallets.

Effective assistant of counsel is guaranteed under the federal and state constitutions. See U.S. CONST., Amend, VI; WASH. CONST., Art. I, sec. 22. This right was comprehensively discussed in *Strickland v Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

In *Strickland*, the U.S. Supreme Court observed that the right to counsel is crucial to a fair trial because “access to counsel’s skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution. 466 U.S. at 685 (citations omitted). Any

claim of ineffective assistance must be judged against this benchmark: “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” 466 U.S. at 686

To prove ineffective assistance of counsel, an appellant must show that (1) trial counsel’s performance was deficient; and (2) the deficient performance prejudiced him. *In re Pers Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel’s performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1998). Put another way, the defendant must show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. 466 U.S. at 687. The prejudice requirement is satisfied by a showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* In other words, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. Reasonable probability is defined as “a probability sufficient to undermine confidence in the outcome.” *Id.*

The American Bar Association has described the role of defense counsel:

The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to the law.  
ABA Standard 4-1.1(b).

Although the reviewing court indulges a strong presumption that counsel's representation falls within the wide range of proper professional assistance, the defendant may overcome that presumption by showing that trial counsel had no legitimate strategic or tactical rationale for his conduct. *State v Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991); *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To establish prejudice, the defendant must show that but for counsel's deficient performance, the result likely would have been different. *State v McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

In *Taylor v/ Kentucky*, 428 U.S. 465, 469 (1976) the Supreme Court adopted the rule that several errors, none of which individually rise to constitutional dimensions, may have the cumulative effect of denying a defendant a fair trial.

The cumulative error doctrine has been applied by the courts to grant relief on the issue of ineffective assistance of counsel. Thus, courts

recognize that a defendant is entitled to relief based on cumulative ineffectiveness. *Mak v Blodgett*, 970 F.2d 614, 622 (9<sup>th</sup> Cir. 1992); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9<sup>th</sup> Cir. 1978) (en banc), cert denied, 440 U.S. 974, 59 L.Ed.2d 793, 99 S.Ct 1542 (1979).

In this case, trial counsel, through his referring associate and case associate, noted that the defendant had not paid for a “no holds barred” defense. Thus trial counsel conceded that there was no intention to do as much for Mr. Gebhardt as would be done for a client who paid more.

Trial counsel was ignorant of his constitutional obligations to Mr. Gebhardt, ignorant of Washington criminal law, ignorant of procedural rules in Washington criminal cases. All of these deficiencies worked to the prejudice of Mr. Gebhardt and resulted in a verdict which cannot be relied upon.

13. TRIAL COUNSEL SHOULD HAVE MADE A PRETRIAL MOTION TO SUPPRESS EVIDENCE REGARDING THE ILLEGAL POLICE TRESPASS ONTO MR. GEBHARDT’S PROPERTY AND ALL RESULTANT EVIDENCE AND ACTIVITY THEREAFTER.

Had trial counsel not been so woefully ignorant of Washington criminal law, he would have made a successful motion to suppress testimony regarding the unlawful police intrusion onto Mr. Gebhardt’s property and all subsequent events. It is axiomatic that the Fourth

Amendment<sup>6</sup> of the United States Constitution and Washington Const. art. I, sec. 7<sup>7</sup> protect an individual's privacy in a variety of settings. The courts recognize that in no setting is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home. *State v Farrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998). The Fourth Amendment also protects the cartilage of the home and extends no further than the nearest fence surrounding a fenced house. *United States v Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326(1987).

Warrantless searches of constitutionally protected areas are presumed unreasonable absent proof that one of the well-established exceptions. *State v Leffler*, 142 Wn.App. 175, 180, 178 P.3d 1042 (2007), citing *State v Ladsen*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The State bears the burden of establishing an exception to the warrant requirement. . *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

In this case, the police had absolutely no probable cause to enter Mr. Gebhardt's property. In fact, they would not have had probable cause to obtain a search warrant. During pretrial motions, the prosecutor was gleeful that defense counsel had not made any suppression motion.

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<sup>6</sup> Fourth Amendment. "The right of the people to be secure in their houses . shall not be violated "

<sup>7</sup> Wash. Const. art. I, sec 7. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law "

In this case, Mr. Gebhardt unequivocally and repeatedly told police that they could not enter his property. Police had no probable cause to do so. As a result of the unlawful intrusion, police asserted that the unlawfully intrusive Officer Kelly hurt her hand. Police then further violated Mr. Gebhardt's privacy rights by entering further into his property and beating him up.

Had police acted within the scope of the law, Mr. Gebhardt would not have been before the court. This is so because his suppression motion would have been granted.

Moreover, had trial counsel recognized this meritorious issue, he also would have objected to the prosecutor's improper arguments/comments on Mr. Gebhardt's legitimate exercise of a constitutional right.

14. TRIAL COUNSEL FAILED TO OBJECT TO THE ADMISSION OF HEARSAY STATEMENTS MADE BY INDIVIDUALS WHO MAY OR MAY HAVE SEEN MR. GEBHARDT'S DOGS ENGAGED IN CERTAIN BEHAVIORS WITH OTHER ANIMALS AND ALSO MS. MCMAHAN.

Hearsay is a statement, other than one made by the declarant testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c).

In this case, trial counsel failed to object to hearsay statements made by unknown witnesses that dogs, whom the police believed to include “Louie”, had attacked and killed other animals. Counsel also failed to object to hearsay statements attributed to a Mrs. McMahan that a dog whom police believed to be “Louie” bit her on the leg. Counsel also failed to object to Mrs. McMahan’s statement that the dogs appeared to come from the alley near Mr. Gebhardt’s residence.

Even worse, trial counsel, having not objected to the inadmissible hearsay, assumed the truth of the matter asserted and in fact argued as true that evidence is closing. There was no legitimate or tactical reason for trial counsel to assist the prosecutor in portraying Mr. Gebhardt’s dogs to be exceedingly dangerous.

15. ASSUMING THAT THE TRIAL COURT WOULD HAVE ADMITTED THE HEARSAY STATEMENTS NOTED ABOVE, TRIAL COUNSEL SHOULD HAVE MOVED FOR A LIMITING INSTRUCTION.

ER 105 provides that when evidence is admissible for one purpose but is admitted for another purpose, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

A limiting instruction is available as a matter of right. *State v. Redmond*, 57 Wn.App. 277, 787 P.2d 949 (1990).

In the instant case, if the court had denied trial counsel's proper yet hypothetically made motion to exclude, then trial counsel should have requested a limiting instruction. This limiting instruction should have provided that these statements were not offered for the truth of the matter asserted but rather were offered only to demonstrate what information police had prior to their contact with Mr. Gebhardt. A limiting instruction would have prevented the State from using the inadmissible hearsay statements as substantive evidence and the jury as considering them as such.

16. TRIAL COUNSEL FAILED TO SEEK A LIMITING INSTRUCTION FOR HEARSAY EVIDENCE THAT THE MARAUDING CANINES BELONGED TO MR. GEBHARDT.

See preceding section. Again, there was no competent evidence, even hearsay evidence, that the marauding dogs belonged to Mr. Gebhardt. In this case, the inadmissible hearsay evidence was used to establish prior bad acts of Mr. Gebhardt's dog. ER 404(b)<sup>8</sup>.

Although trial counsel proposed defendant's jury instruction 9<sup>9</sup> as a limiting instruction for this evidence, trial counsel's action was too little, too late. The trial court denied the instruction. CP 318-348

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<sup>8</sup> Appendix G

<sup>9</sup> Appendix H.

17. TRIAL COUNSEL FAILED TO ADVISE MR. GEBHARDT THAT HE ALONE COULD MAKE THE DECISION TO TESTIFY OR NOT, EVEN AGAINST THE RECOMMENDATION OF TRIAL COUNSEL.

It is axiomatic that a criminal defendant possesses the right to decide whether or not to testify at trial. As the court noted in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 2510, 53 L.Ed.2d 594, n. 1 (1977), “Only such basic decisions as whether to plead guilty, waive a jury, or testify in one’s own behalf are ultimately for the accused to make.”

The right to testify in one's own behalf has been characterized as a personal right of "fundamental" dimensions. *e.g.*, *Rock v. Arkansas*, 483 U.S.44, 52, 107 S. Ct. 2704, 97 L.Ed.2d 37 (1987) Even more fundamental to a personal defense than the right to self-representation “. . . is an accused's right to present his own version of events in his own words."); *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir.), *cert denied*, 114 S. Ct. 620, 126 L. Ed. 2d 584 (1993); *Ortega v. O'Leary*, 843 F.2d 258, 261 (7th Cir.), *cert denied*, 488 U.S. 841, 102 L. Ed. 2d 85, 109 S. Ct. 110 (1988); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987). The defendant, not trial counsel, has the authority to decide whether or not to testify. *eg.*, *Jones v. Barnes*, 463 U.S. 745, 751 n.6, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *Joelson*, 7 F.3d at 177; *State v. King*, 24 Wn. App. 495, 499, 601 P.2d 982 (1979); *RPC 1 2(a)*.

In State v. Robinson, 138 Wn.2d 753, 759, 982 P.2d 590 (1999), the court emphasized the fundamental nature of the right and expressed stated that the right “cannot be abrogated by defense counsel or by the court.”

The defendant’s fundamental right to testify is violated if “the final decision that he would not testify was made against his will.” State v. Robinson, 138 Wn.2d 753, 763, 982 P.2d 590 (1999) The fundamental right is also violated when the attorney flagrantly disregards the defendant’s desire to testify. *Id.*, citing United States v. Robles, 814 F. Supp. 1233, 1242 (E.D. Pa. 1993), United States v. Butts, 630 F.Supp. 1145, 1147 (D. Me., 1986). Further, *Rule of Professional Conduct (RPC) 1 2(a)* provides, in part, that “in a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”

In addition, waiver of the right to testify must be made knowingly. State v. Thomas, 128 Wn.2d 553, 559, 910 P.2d 475 (1996). In order to knowingly waive the right to testify, the defendant first must know that he possesses not only that right but also the ultimate decision regarding exercise of that fundamental right. Because the trial court has no obligation to obtain an on-the-record waiver of this right, defense counsel bears the responsibility to inform the defendant of his right to testify even

contrary to counsel's advice. *128 Wn 2d at 560*. It is unreasonable to impose upon defendants the burden of personally informing the court that their attorney is not acceding to their wishes to testify. *Robinson, 138 Wn.2d at 764*.

A criminal defendant post-trial may assert a claim that his attorney prevented her from testifying and must prove that the attorney refused to allow her to testify in the face of the defendant's unequivocal demands that he be allowed to do so. *Id.*

If the defendant is able to prove by a preponderance of the evidence that his attorney actually prevented him from testifying, she will have established that the waiver of this fundamental constitutional right to testify was not knowing and voluntary. *Robinson, 138 Wn.2d at 765*

The defendant must produce more than a bare assertion that the right was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action. *Robinson, 138 Wn 2d at 760*.

When a criminal defendant asserts evidence that he was denied his constitutional right to testify, the court may order an evidentiary hearing on the issue. *Thomas, 128 Wn.2d at 561 State v Robinson, 138 Wn.2d 753, 982 P.2d 590 (1999)*. A defendant who persuades the court that her

constitutional right to testify has been abrogated is entitled to a new trial.

*Robinson, 138 Wn 2d at 770.*

In this case, the defendant has established that his constitutional right to testify was denied her by the actions of his trial counsel. He had repeatedly informed him that he wanted to testify and was never informed that he had the final decision on that important issue. Prior to trial, Mr. Gebhardt and trial counsel had email communications about his testimony. Trial counsel warned Mr. Gebhardt of the perils of being cross-examined by the prosecutor. Even so, Mr. Gebhardt clearly affirmed his intention to testify. He wanted to place his version of events before the jury, counter the testimony of some of the State's witnesses, and also provide to the jury important information about his pets, whose actions allegedly set this criminal case in motion. The jury may well have believed the defendant's account of the events or, at a minimum, may have found that his testimony raised a reasonable doubt so as to bar conviction.

Because Mr. Gebhardt was denied his constitutional right to testify due to the ineffectiveness of trial counsel, his conviction must be reversed and the case remanded for new trial.

18. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. GEBHARDT COMMITTED THE CRIME OF ASSAULT IN THE SECOND DEGREE.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We interpret statutes de novo. *Morgan v. Johnson*, 137 Wn.2d 887, 891, 976 P.2d 619 (1999). We also review questions of law de novo. *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006).

The elements of assault in the second degree are:

-that Mr. Gebhardt, under circumstances not amounting to assault in the second degree, did intentionally assault Ryan Koskovich with a deadly weapon, to-wit: a rock, contrary to RCW 36.021(1)(c) with, in this case, the aggravator that the offense was committed against a law officer who was committing his official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim’s status as a law enforcement is not element of the offense, all as defined in RCW 9.94A.535(3)(v).

The State also charged Mr. Gebhardt with the lesser included offense of third degree assault against Ryan Koskovich. The trial court merged the lesser crime into the greater crime. Thus Mr. Gebhardt was convicted and sentenced only on second degree assault. For this reason, Mr. Gebhardt makes no argument on the sufficiency of the evidence for

the third degree assault charge. The State filed the same charge of third degree assault against officer Paula Kelly. CP 159-160.

In this case, the jury acquitted Mr. Gebhardt of the alleged assault against Officer Kelly. The jury failed to find that the evidence provided by Officers Koskovich, Kelly, and Nicolaus regarding that assault either was credible and/or met the standard of proof required for conviction on that charge. Indeed, there were significant inconsistencies, both internal and external, in the testimony of the three officers regarding the assault against Officer Kelly and similar inconsistencies in their testimony regarding the alleged assault against Officer Koskovich. Officer Kelly's testimony was riddled with inconsistencies and Officer Koskovich's testimony was inconsistent in several key areas. Both officers admitted that their testimony varied significantly from the facts contained in their incident reports and witness interviews.

Each of the three officers had vastly different recollections about the alleged assault against Officer Koskovich. Officer Nicolaus recalled that Mr. Gebhardt simply picked up a rock and failed to drop it, but never took any action to threaten, attempt to and/or complete an assault. In her police report, Officer Kelly described a swinging motion with the rock. Her trial testimony added a new detail --- the only movement of the rock was akin to a wrist curl that occurred while Officer Koskovich had Mr.

Gebhardt's upper arm and forearm pinned to the ground. Officer Koskovich's report contained only a description of Mr. Gebhardt pricking up a rock and refusing to drop it. His report contained no mention whatsoever of any threatened use or attempted use of the rock beyond simply picking up the rock and refusing to drop it. In his witness interview, Officer Koskovich agreed that his written report was complete. At trial Officer Koskovich testified to completely new multiple details of Mr. Gebhardt's alleged movements. The officer admitted that none of these details were in his original report. He also disingenuously averred that Tacoma Police Department policy prohibits officers from volunteering additional details in defense witness interviews.

More importantly, the State's crime scene investigators completely contradicted the police officers. The police officers never stated that there was any rock involved in this incident. The forensics officer Hassberger gathered the rocks on her own initiative simply because the rocks appeared to possibly have blood on them.

Forensics officer Campbell testified that she saw "85%" of the incident between the three police officers and Mr. Gebhardt. She never saw Mr. Gebhardt pick up a rock, much less use it in any way. Ms. Campbell testified for Mr. Gebhardt.

Given the wild inconsistencies between the State's witnesses, this court must find that the State failed to prove beyond a reasonable doubt that Mr. Gebhardt committed the crime of second degree assault. It is impossible to reconcile how the jury could find insufficient evidence to convict Mr. Gebhardt for assaulting Officer Kelly and yet find sufficient evidence to convict him for assaulting Officer Koskovich.

Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. *State v Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ("The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence." ,citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989))

19. MR. GEBHARDT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE

The cumulative error doctrine applies when several errors occurred at the trial court that would not merit reversal standing alone, but in aggregate effectively denied the defendant a fair trial. *State v. Hodges*, 118

Wn.App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004).

Although Mr. Gebhardt correctly has identified numerous arguments each of which provides the basis for relief, he recognizes that this court may not agree with him. In that event, he is confident that this court will agree that the accumulation of errors committed by the trial court, prosecutor and his counsel denied him a fair trial.

Mr. Gebhardt acknowledges that he is not entitled to a perfect trial, but he is entitled to a fair one. Mr. Gebhardt's trial was grossly unfair throughout. This court therefore must provide to him the only possible relief – that is, reversal of his conviction and remand for a new trial.

**E. CONCLUSION**

For the foregoing reasons, Mr. Gebhardt respectfully asks this court to grant the relief requested, that is, to reverse his conviction and remand the matter for a new trial.

Respectfully Submitted this 29<sup>th</sup> day of September, 2011.

  
\_\_\_\_\_  
BARBARA COREY, WSBA#11778  
Attorney for Appellant

COURT OF APPEALS  
DISTRICT II

11 SEP 29 PM 4:19

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws  
Of the State of Washington that the following is a true  
and correct That on this date, I delivered via ABC- Legal  
Messenger, a copy of this Document to Kathleen Proctor,  
Pierce County Prosecutor's Office, 930 Tacoma Ave So,  
Room 946, Tacoma, Washington 98402 and to Paul Gebhardt  
via US Mail, postage pre-paid at P O Box 22995  
Seattle, WA 98122-0995

9-29-11  
Date

  
\_\_\_\_\_  
Kim Redford, Legal Assistant

# APPENDIX A

RULE ER 105  
LIMITED ADMISSIBILITY

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

[[Adopted effective April 2, 1979.]

Comment 105

[Deleted effective September 1, 2006.]

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# APPENDIX B

From: Paul Gebhardt [mailto:[paulgebhardt@gmail.com](mailto:paulgebhardt@gmail.com)]  
Sent: Sunday, June 06, 2010 7:00 PM

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From: **Paul Gebhardt** <[paulgebhardt@gmail.com](mailto:paulgebhardt@gmail.com)>  
Date: Sun, Jun 6, 2010 at 8:33 PM  
To: "[emoore@ehmpc.com](mailto:emoore@ehmpc.com)" <[emoore@ehmpc.com](mailto:emoore@ehmpc.com)>

Yes, because I have to be cognisant of what I say and consistent so neeb doesn't rip me up, I suppose both can't be true, and one must be a lie. I've gotta look before I leap and they can manilate a misstatement into a lie.

Paul Gebhardt, B.S

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r.

# APPENDIX C

**References**

RCW 19 72 020, Individual sureties—Eligibility

**RULE 8.5 STATE AS OBLIGEE ON BOND**

The obligee in a bond given pursuant to rule 8.1 or 8.3 may be named as the State of Washington for the benefit of whom it may concern. If the State is named as the obligee, anyone has the same right upon or concerning the bond as if named as an obligee in the bond. The State of Washington shall not, solely

because the State is named as an obligee, be sued or named as a party in any suit on the bond

**RULE 8.6 TERMINATION OF SUPERSEDEAS, INJUNCTIONS, AND OTHER ORDERS**

The issuance of the mandate as provided in rule 12.5 terminates any delay of enforcement of a trial court decision obtained pursuant to rule 8.1 and terminates orders entered pursuant to rule 8.3

**TITLE 9. RECORD ON REVIEW**

**RULE 9.1 COMPOSITION OF RECORD ON REVIEW**

(a) **Generally.** The "record on review" may consist of (1) a "report of proceedings", (2) "clerk's papers", (3) exhibits, and (4) a certified record of administrative adjudicative proceedings

(b) **Report of Proceedings.** The report of any oral proceeding must be transcribed in the form of a typewritten report of proceedings. The report of proceedings may take the form of a "verbatim report of proceedings" as provided in rule 9.2, a "narrative report of proceedings" as provided in rule 9.3, or an "agreed report of proceedings" as provided in rule 9.4

(c) **Clerk's Papers.** The clerk's papers include the pleadings, orders, and other papers filed with the clerk of the trial court

(d) **Avoid Duplication.** Material appearing in one part of the record on review should not be duplicated in another part of the record on review.

(e) **Review of Superior Court Decision on Review of Decision of Court of Limited Jurisdiction.** Upon review of a superior court decision reviewing a decision of a court of limited jurisdiction pursuant to rule 2.3(d), the record shall consist of the record of proceedings and the transcript of electronic record as defined in RALJ 6.1 and 6.3.1. When requested by the appellate court, the superior court shall transmit the original record of proceedings and transcript of electronic record as was considered by the superior court on the appeal from the decision of the court of limited jurisdiction

[Amended effective September 1, 1985, September 1, 1994, December 24, 2002, June 24, 2003]

**References**

Rule 13.7, Proceedings (in Supreme Court) After Acceptance of Review (of Court of Appeals decision), (a) Procedure

**RULE 9.2 VERBATIM REPORT OF PROCEEDINGS**

(a) **Transcription and Statement of Arrangements.** If the party seeking review intends to provide a verbatim report of proceedings, the party should arrange for transcription of and payment for an original and one copy of the verbatim report of proceedings within 30

days after the notice of appeal was filed or discretionary review was granted. If the proceeding being reviewed was recorded on videotape, transcription of the videotapes shall be completed by a court-approved transcriber in accordance with procedures developed by the Office of the Administrator for the Courts. Copies of these procedures are available at the court administrator's office in each county where there is a courtroom that videotapes proceedings or through the Office of the Administrator for the Courts. The party seeking review must file with the appellate court and serve on all parties of record and all named court reporters a statement that arrangements have been made for the transcription of the report and file proof of service with the appellate court. The statement must be filed within 30 days after the notice of appeal was filed or discretionary review was granted. The party must indicate the date that the report of proceedings was ordered, the financial arrangements which have been made for payment of transcription costs, the name of each court reporter or other person authorized to prepare a verbatim report of proceedings who will be preparing the transcript, the hearing dates, and the trial court judge. If the party seeking review does not intend to provide a verbatim report of proceedings, a statement to that effect should be filed in lieu of a statement of arrangements within 30 days after the notice of appeal was filed or discretionary review was granted and served on all parties of record

(b) **Content.** A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review. A verbatim report of proceedings provided at public expense will not include the voir dire examination or opening statement unless so ordered by the trial court. If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding. If the party seeking review intends to urge that the court erred in giving or failing to give an instruction, the party should include in the record all of the instructions given, the relevant instructions proposed, the party's objections to the instructions given, and the court's ruling on the objections

# APPENDIX D

Rule may subject the attorney to the sanctions provided in CR 11(a)

[Adopted effective October 29, 2002 ]

### RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) **Service—When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Service—How Made.**

(1) *On Attorney or Party.* Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, filing with the clerk of the court an affidavit of attempt to serve. Delivery of a copy within this rule means: handing it to the attorney or to the party, or leaving it at his office with his clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein, or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service on an attorney is subject to the restrictions in subsections (b)(4) and (5) of this rule and in rule 71, Withdrawal by Attorneys.

(2) *Service by Mail*

(A) *How Made* If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on a Saturday, Sunday or legal holiday, in which event service shall be deemed complete on the first

day other than a Saturday, Sunday or legal holiday, following the third day.

(B) *Proof of Service by Mail.* Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney. The certificate of an attorney may be in form substantially as follows:

#### CERTIFICATE

I certify that I mailed a copy of the foregoing \_\_\_\_\_ to [John Smith], [plaintiff's] attorney, at [office address or residence], and to [Joseph Doe], an additional [defendant's] attorney [or attorneys] at [office address or residence], postage prepaid, on [date].

\_\_\_\_\_  
[John Brown]

Attorney for [Defendant] William Noe

(3) *Service on Nonresidents.* Where a plaintiff or defendant who has appeared resides outside the state and has no attorney in the action, the service may be made by mail if his residence is known; if not known, on the clerk of the court for him. Where a party, whether resident or nonresident, has an attorney in the action, the service of papers shall be upon the attorney instead of the party. If the attorney does not have an office within the state or has removed his residence from the state, the service may be upon him personally either within or without the state, or by mail to him at either his place of residence or his office, if either is known, and if not known, then by mail upon the party, if his residence is known, whether within or without the state. If the residence of neither the party nor his attorney, nor the office address of the attorney is known, an affidavit of the attempt to serve shall be filed with the clerk of the court.

(4) *Service on Attorney Restricted After Final Judgment* A party, rather than the party's attorney, must be served if the final judgment or decree has been entered and the time for filing an appeal has expired, or if an appeal has been taken (i) after the final judgment or decree upon remand has been entered or (ii) after the mandate has been issued affirming the judgment or decree or disposing of the case in a manner calling for no further action by the trial court. This rule is subject to the exceptions defined in subsection (b)(6).

(5) *Required Notice to Party.* If a party is served under circumstances described in subsection (b)(4), the paper shall (i) include a notice to the party of the right to file written opposition or a response, the time within which such opposition or response must be filed, and the place where it must be filed; (ii) state that failure to respond may result in the requested relief being granted, and (iii) state that the paper has not been served on that party's lawyer.

(6) *Exceptions* An attorney may be served notwithstanding subsection (b)(4) of this rule if (i) fewer than 63 days have elapsed since the filing of any paper or the

issuance of any process in the action or proceeding or (ii) if the attorney has filed a notice of continuing representation.

(7) *Service by Other Means.* Service under this rule may be made by delivering a copy by any other means, including facsimile or electronic means, consented to in writing by the person served. Service by facsimile or electronic means is complete on transmission when made prior to 5:00 p.m. on a judicial day. Service made on a Saturday, Sunday, holiday or after 5:00 p.m. on any other day shall be deemed complete at 9.00 a.m. on the first judicial day thereafter; Service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. Service under this subsection is not effective if the party making service learns that the attempted service did not reach the person to be served.

(c) *Service—Numerous Defendants.* In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.*

(1) *Time.* Complaints shall be filed as provided in rule 3(a). Except as provided for discovery materials in section (i) of this rule and for documents accompanying a notice under ER 904(b), all pleadings and other papers after the complaint required to be served upon a party shall be filed with the court either before service or promptly thereafter.

(2) *Sanctions.* The effect of failing to file a complaint is governed by rule 3. If a party fails to file any other pleading or paper under this rule, the court upon 5 days' notice of motion for sanctions may dismiss the action or strike the pleading or other paper and grant judgment against the defaulting party for costs and terms including a reasonable attorney fee unless good cause is shown for, or justice requires, the granting of an extension of time.

(3) *Limitation.* No sanction shall be imposed if prior to the hearing the pleading or paper other than the complaint is filed and the moving attorney is notified of the filing before he leaves his office for the hearing.

(4) *Nonpayment.* No further action shall be taken in the pending action and no subsequent pleading or other paper shall be filed until the judgment is paid. No subsequent action shall be commenced upon the same subject matter until the judgment has been paid.

(e) *Filing With the Court Defined.* The filing of pleadings and other papers with the court as required by

these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him or her, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Papers may be filed by facsimile transmission if permitted elsewhere in these or other rules of court, or if authorized by the clerk of the receiving court. The clerk may refuse to accept for filing any paper presented for that purpose because it is not presented in proper form as required by these rules or any local rules or practices.

(f) *Other Methods of Service.* Service of all papers other than the summons and other process may also be made as authorized by statute.

(g) *Certified Mail.* Whenever the use of "registered" mail is authorized by statutes relating to judicial proceedings or by rule of court, "certified" mail, with return receipt requested, may be used.

(h) *Service of Papers by Telegraph.* [Rescinded]

(i) *Discovery Material Not to Be Filed; Exceptions.* Depositions upon oral examinations, depositions upon written questions, interrogatories and responses thereto, requests for production or inspection and responses thereto, requests for admission and responses thereto, and other discovery requests and responses thereto shall not be filed with the court unless for use in a proceeding or trial or on order of the court.

(j) *Filing by Facsimile.* [Reserved See GR 17—Facsimile Transmission]

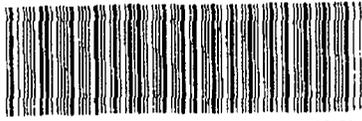
[Amended effective July 1, 1972, September 1, 1978, September 1, 1983, September 1, 1988, September 1, 1993, September 17, 1993, October 29, 1993, September 1, 2005]

## RULE 6. TIME

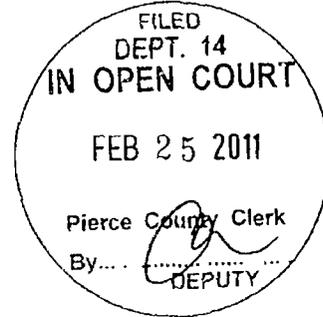
(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect, but it may not extend the time for

# APPENDIX E



09-1-02751-1 35954399 OR 02-28-11



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON  
Plaintiff,  
v.  
PAUL WILLIAM GEBHARDT,  
Defendant.

NO. 09-1-02751-1  
ORDER ON MOTIONS FOR NEW TRIAL

On August 6, 2010, this matter came before the court for the defendant's motions for new trial. The State of Washington was represented by Deputy Prosecuting Attorney John M. Neeb, and the defendant was present and represented by his attorney, Barbara Corey. The court reviewed the documentation submitted by the parties, heard arguments of counsel, and entered an oral ruling on each motion.

Now being duly advised in this matter, the court formally reduces its oral rulings to the following written orders:

**IT IS HEREBY ORDERED** that the defendant's motion for a new trial based on his claim that he was denied the right to testify by his trial counsel is denied. The court recalls the issue was initially addressed on the record during the trial, and then the court took a recess from the trial to allow the defendant and his counsel to discuss the issue privately. It was clear to the court that the defendant was making an informed decision at the time.

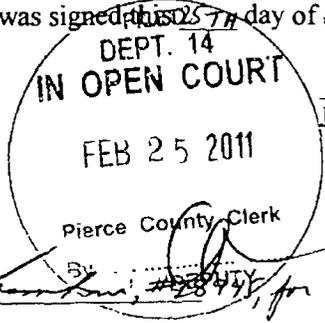
1 **IT IS FURTHER ORDERED** that the defendant's motion for a new trial based on  
2 a number of claims of prosecutorial misconduct during closing argument is denied. The  
3 court considered the statements in the context of the entirety of closing arguments, noting  
4 there was no objection raised at the time and further noting the jury must have understood  
5 the burden of proof given in the instructions based on its verdict on Count III.

6 **IT IS FURTHER ORDERED** that the defendant's motion for a new trial based on  
7 a number of claims relating to the pre-trial interviews that were held is denied. The claim  
8 by current counsel that trial counsel was "intimidated" by the State is counter to the court's  
9 observations of counsel during trial. The court noted a number of pre-trial hearings were  
10 held in front of the court, and trial counsel never complained about issues relating to his  
11 witness interviews. The court was satisfied that trial counsel engaged in thorough cross-  
12 examination of the State's witnesses, including through the use of interview transcripts.

13 **FINALLY, IT IS HEREBY ORDERED** that the defendant's motion to have an  
14 evidentiary hearing on any of the above issues is denied. The court has sufficient  
15 information from the pleadings and from its recall and review of portions of the trial  
16 transcript to make its rulings on these motions without further evidence being presented.

17  
18 The court's oral rulings were given in open court in the presence of the defendant  
19 on August 6, 2010.

This order was signed <sup>FEBRUARY</sup> this 25<sup>TH</sup> day of January, 2011.



*Susan K. Serko*  
JUDGE SUSAN K. SERKO

22 Presented by:

23  
24 *John M. Neeb*  
25 JOHN M. NEEB  
Deputy Prosecuting Attorney  
WSB # 21322

Approved as to form:

~~Presence waived at presentment.~~

*copy received; objections preserved.*  
*Barbara Corey*  
BARBARA COREY  
Attorney for Defendant  
WSB # 11778

August 05 2010 9 32 AM

KEVIN STOCK  
COUNTY CLERK  
NO: 09-1-02751-1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs

PAUL RICHARD GEBHARDT,

Defendant.

NO. 09-1-02751-1  
SUPPLEMENTAL MOTION  
FOR NEW TRIAL

A. ISSUES FOR TRIAL COURT DECISION

1 Must this court grant the defendant' motion for new trial where the defendant received ineffective assistance by trial counsel?

2 Must this court grant the defendant's motion for new trial where the trial counsel refused to allow the defendant to testify at trial?

B. FACTS RELEVANT TO MOTION

PAUL WILLIAM GEBHARDT<sup>1</sup>, the defendant, never had been charged with any crime prior to the instant case. The defendant telephoned a friend for a referral for a criminal defense attorney. I was referred to Karen Koehler, a civil attorney, who then referred me to her boyfriend, Edward Moore.

<sup>1</sup> Appendix A – Declaration of Paul Gebhardt

*DEFENDANT'S MOTION  
FOR NEW TRIAL*

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1 Edward Moore is an attorney who recently had opened a practice in Seattle Mr Moore's  
2 other practice is in Dallas, Texas. Unbeknown to the defendant, Mr. Moore's practice is limited to  
3 personal injury cases. A criminal case is not a personal injury case.

4 During the trial and his post-sentencing motions, Mr. Moore evinced ignorance of  
5 Washington criminal law. He also repeatedly told the defendant that he should no testify at trial  
6 The defendant wanted to testify and to tell his version of the facts to the jury. Trial counsel never  
7 told the defendant that the choice to testify was the defendant's personal choice and that the  
8 defendant had the constitutional right to testify even against his attorney's advice  
9

10 Prior to closing argument, the defendant told trial counsel to tell the jury what he had  
11 wanted to testify but that he had not been permitted to do so. Trial counsel advised the defendant  
12 that he could not provide that information in closing argument.

13 Subsequent to trial, trail counsel filed a "motion to merge counts" wherein he relied upon  
14 pre-Sentencing Reform Act (SRA) case law. Likewise, he filed a "sentencing brief" that was  
15 wholly inadequate.

16 NOTE: Because the trial transcripts are not available, there may well be other issues of  
17 constitutionally ineffective counsel. However, those issues will need to be raised via personal  
18 restraint petition  
19

20 C LAW AND ARGUMENT:

21 *CrR 7.5(a)* permits this court to order a new trial when it affirmatively appears that a  
22 substantial right of the defendant was materially affected One of the recognized bases for new  
23 trial under this rule is that "substantial justice has not been done " *CrR 7.5(a)(8)*. In this case  
24 and for the reasons set forth herein, this court should find that Paul Gebhardt was denied  
25 substantial justice at his trial and therefore should order a new trial.

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1 The purpose of a motion for new trial is to accord the trial judge an opportunity to  
2 consider and correct, if necessary, any erroneous rulings made during the trial. When it  
3 affirmatively appears that a substantial right of the defendant was materially affected, the court,  
4 upon motion of the defendant may grant the motion for new trial for anyone of the following  
5 reasons

6 CrR 7.5, entitled "New Trial", enumerates reasons for which the court may grant a motion  
7 for new trial. (1) receipt by the jury of any evidence, paper, document, or book not allowed by the  
8 court, (2) misconduct by the prosecution or jury; (3) newly discovered evidence material to the  
9 defendant's case which could not have been discovered with reasonable diligence and produced at  
10 trial, (4) accident or surprise, (5) irregularity in the proceedings of the court, jury or prosecution, or  
11 any court order or abuse of discretion which prevented the defendant from receiving a fair trial; (6)  
12 error of law occurring at trial and objected to at that time by the defendant, (7) that the verdict or  
13 decision is contrary to law and the evidence, (8) that substantial justice has not been done

14 In this case the court should order a new trial where there was (factor 2) misconduct by the  
15 prosecution,  
16

17 (1). The defendant is entitled to a new trial where prosecutorial misconduct  
18 interfered with the defendant's pretrial interviews

19 It is axiomatic that witnesses do not belong to any party. Prospective witnesses are not  
20 partisans and should relate the facts as they see them *State v. Hojstetter*, 75 Wn.App 390, 878  
21 P 2d 474, rev denied, 125 Wn 2d 1012 (1994) Since neither party represents a witness, neither  
22 party should provide legal advice to a witness during the course of a pre-trial interviews Defense  
23 counsel has a duty to prepare for trial and may do so without interference by the prosecutor

24 In the instant case, the prosecutor arranged for interviews of the police witnesses The  
25 prosecutor and repeatedly made statements about whether a witness could/should answer certain

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1 questions The prosecutor is not allowed to provide legal advice to a witness. Nor should the  
2 prosecutor whisper into a witness's ear during the defense interview and then refuse to disclose the  
3 content of that conversation. During those interviews, the prosecutor repeatedly interrupted  
4 defense counsel's questioning

5 During the interview of Paula Kelly on April 26, 2010, the prosecutor committed  
6 numerous acts which interfered with the defendant's conduct of interviews

7  
8 p 9 Q. (by defense counsel): And then, what happened next that evening?  
(Plaintiff's counsel confers with the witness off the record )

9 A. (Paula Kelly). I'm sorry, I didn't hear you.

10 Q: What did Mr. Neeb whisper to you?

11 Mr. Neeb: If I wanted you to hear it, Ed, I wouldn't have whispered it

12 Q: Well, you're not supposed to influence her testimony; you're supposed to let her  
13 answer questions.

14 Mr. Neeb: Okay, well I didn't do that, so don't worry about it.

15  
16 .....  
17 p 46-47. Q: (be defense counsel): And then, why did you additionally feel the need to put  
18 your right hand between the wiggly portion and the stationary portion?

19 A: (Paula Kelly) To rule out that there were any sections of the fence that it also  
20 was consistent. I don't know. I'm inspecting the fence. That's what I'm doing I'm inspecting it

21 Q: Are you telling me that you don't know why you put your right hand - - -

22 A: My God, I just told you that.

23 Mr. Neeb: She's told you that she's investigating the fence. And you're  
24 done with this subject. Move on

25 Q: You don't tell me what to do

Mr. Neeb: Just did, Ed

Q: It doesn't matter

Mr. Neeb: Okay, Don't ask her again .

Q: I'm going to ask whatever I want I don't need your help in any way, shape,  
or form.

Mr. Neeb: Don't ask her again why she's inspecting - - -

Q: It's my interview, not yours.

Mr. Neeb: You don't have to answer any more questions about why you  
were inspecting unless it's a new subject matter

Q: I just want to be clear, You don't know why exactly you put your right hand  
in between the fence.

A: I'm not going to answer that.

\*\*\*

*DEFENDANT'S MOTION  
FOR NEW TRIAL*

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1 P. 49-50. Q: (defense counsel) And can you tell me anything about the rest of the physical  
altercation, beyond what's written in your report?

2 A. What specifically are you looking at? It's a pretty broad question.

3 Mr. Neeb: *Do you want her to tell you what happened during the physical  
altercation or do you want her to tell you if she can read?*

4 Q: What I'm trying to avoid doing is reading it, and so my question to her is,  
5 does she have anything else to add to the description of the physical altercation beyond what's in  
the report

6 .....  
7 p. 56-57

8 Q: Well, based on your experience and training, and based on the fact that you  
were out there at the scene, can you tell me any reason why they would not have been able to  
9 photograph his injuries at the scene?

10 A: At the scene? I don't know what their protocol is.

11 Q: But that's not really – I mean, I'm not ---

12 Mr. Neeb: *The answer is no. There's no reason why they could not have  
13 There's no reason physically why they could not have. There is also no reason why you need to  
14 care. So the answer is no.*

15 \*\*\*\*\*

16 During the interview of Robert Nicolaus on March 12, 2010, the prosecutor committed  
17 numerous acts which interfered with the defendant's conduct of interviews:

18 p 40: Q: (defense counsel): Is there some other routine way you could do it? (referring to  
19 whether there were other ways to lift a hand-cuffed prisoner up off the ground without lifting her  
20 up by the handcuffs)

21 A: There's probably plenty of ways you could. .

22 Q: Is there some other routine way you do it?

23 A: Well, there's plenty of ways you could do it

24 Q: How? I don't understand it. How?

25 Mr. Neeb: *You don't have to go down this road. I mean you don't have to  
speculate on the multiple ways you could pick some inmate up*

Q: Well, how were you trained to do it?

A: There's plenty of ways you can do it. I mean, like I said, I'm just not going to  
speculate or go down so many ways?

Q: *So you're going to follow Mr. Neeb's advice and not answer my questions?*

A: *I'm following Mr. Neeb's advice.*

Mr. Neeb: *He can ask the court to make you ask it (sic) and then you'll  
come back and answer it*

\*\*\*\*\*

During the interview of Ryan Koskovich on March 8, 2010, the prosecutor committed numerous  
acts which interfered with the defendant's conduct of interviews:

DEFENDANT'S MOTION  
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1 p. 11-12.

2 Q (defense counsel) If someone wanted to determine whether actions taken by  
3 yourself and Officer Kelly in connection with the incident that led to the arrest of Mr Gebhardt  
4 were in accordance with policies and procedures, would you need to know - - -

5 A If someone -

6 Mr Neeb. Hold on a second That's not something that ---- you know, he's  
7 a fact witness, not an expert. If you want to ask him what other people would be doing in order to  
8 review him, that's not what the purpose of this interview is I mean, you can ask the Judge to make  
9 him answer those kinds of questions if you want, but he needs to be asked what he did, what he  
10 knows, what he didn't do, or whether or not some third party reviewing his actions would have to  
11 know certain things in order to decide if they were right or not. So - - -

12 Q Well, with all - - -

13 Mr Neeb It sounds like you were asking him if there was somebody trying  
14 to review his actions that the person would have to know what the policies and procedures of the  
15 police officer were in order to judge the actions That's not his purview

16 Q I think you're trying to be helpful right now, but I'm not aware that you get to  
17 object or tell him what to answer or not answer

18 Mr. Neeb: I'm not telling him he should or shouldn't answer. I've told him  
19 beforehand that he's in charge of the interview

20 Q: Okay, Fair enough. You know, part of the reason we're here is because the  
21 Judge said go start talking to witnesses about these policies and procedures So I thought it was  
22 pretty obvious that they were material to what's going on this case

23 Mr. Neeb Fine, then ask him what the policies and procedures are. Don't  
24 ask him whether or not somebody reviewing his actions needs to know what the policies and  
25 procedures are. This is a criminal case not a civil lawsuit.

Q Yeah, but I get to ask the questions. And I appreciate I think you're trying to  
help out, so I'm not trying to, you know, get crosswise with you, but I'd like to ask what I ask and  
then see what his responses are.

17 p 54

18 Q (referring to what was occurring when Paula Kelly went into the defendant's  
19 backyard) Was it that she was trying to keep him from closing it when she already knew he was  
20 in the process of closing it?

21 Mr. Neeb: You don't have to answer what she was thinking

22 A Yeah, again, I don't know.

23 Q You don't get to tell him what to answer

24 \*\*\*

25 During the interview of Kirk Martin on March 12, 2010, the prosecutor committed  
numerous acts which interfered with the defendant's conduct of interviews:

Q: (Defense counsel) So I'm just trying to understand, when somebody says they want  
their lawyer, at that point, why would you not take photographs of a defendant in an assaultive  
manner, like this?

1 Mr. Neeb: He just told you that once the defendant said I want a lawyer he's not  
going to take any other actions

2 Q: Would you let him answer. He does –

3 Mr. Neeb: No, he answered

4 Q: He does fine and you know –

5 Mr. Neeb: Ask him a question.

6 Q: You don't get to object. You keep telling me this isn't a civil lawsuit, so let's do this the  
way it's supposed to be done.

7 Mr. Neeb: That's what we're doing. So don't ask him the same question three  
times. You've got another interview set at 3:30.

8 Q: Look, I'm going to do this the way I see fit and you should figure that out.

9 This court should conclude that the prosecutor's persistent interference in defense  
10 counsel's interviews prejudiced the defendant. The only inference that one can make from the  
11 prosecutor's whispered conversation with a witness and subsequent refusal to disclose the subject  
12 of that conversation to the defense is that the prosecutor was advising the witness about how to  
13 answer questions

14 Further, defense counsel may ask the same questions during an interview simply to test the  
15 recollection of the witness and perhaps to generate impeachment evidence. In addition, evidence  
16 of shooting reviews and officer conduct, if conducted in the instant case, could provide  
17 exculpatory evidence to the defendant.

18 (2) The prosecutor committed misconduct in closing.

19 In addition to egregiously interfering with the defendant's pretrial interviews, the  
20 prosecutor also committed misconduct during closing argument. Absent the trial transcript,  
21 defendant cannot provide citations to the record. However, trial counsel stated that the prosecutor  
22 made improper argument but that he failed to object.

23 For these reasons, this court should grant the defendant's motion for a new trial.  
24  
25



1 (4) trial counsel failed to object to inadmissible hearsay regarding the neighbors' complaints  
2 about defendant's dogs; (5) because trial counsel also failed to inform the defendant that he  
3 alone was to make the decision regarding whether he would testify The substance of his  
4 testimony likely would have raised a reasonable doubt regarding the State's case. (6) trial  
5 counsel was wholly unfamiliar with Washington sentencing laws and also totally unfamiliar  
6 with the defendant's constitutional right to allocution at sentencing.  
7

8 (1) Trial counsel failed to disclose to the defendant his inexperience and unfamiliarity  
9 with criminal prosecutions.

10 In this case, the defendant located trial counsel by contacting a friend and a referral  
11 from that friend who practiced civil law and referred the defendant to her boyfriend, Edward  
12 Moore

13 The defendant knew that trial counsel recently had moved here from Texas and that he  
14 purported to be a trial attorney. Because the defendant was assured that Mr. Moore was a  
15 competent attorney he assumed he would receive appropriate representation.

16 However, as the case progressed, the defendant learned that trial counsel had very little  
17 if any experience in criminal law As the case progressed the defendant learned the following:

18 (1) trial counsel did not know the elements of second degree assault and the State's  
19 theory regarding the interface of the law and alleged facts Trial counsel asked the State to  
20 explain this to him<sup>2</sup>,

21 (2) trial counsel attempted to negotiate the case without the defendant's permission  
22 although trial counsel informed the defendant as late as June 10, 2010 that he should permit  
23

24 \_\_\_\_\_  
25 <sup>2</sup> Appendix B

1 counsel to negotiate the case.<sup>3</sup> Trial counsel's statements to me in that regard were not true  
2 when contrasted against his April 28, 2010 email to the prosecutor expressing his expectation  
3 that the case would be resolved by plea.<sup>4</sup>

4 (3) trial counsel failed to interview any of the State's civilian witnesses, and also all of  
5 the potential defense witnesses<sup>5</sup> except for two people

6 (4) trial counsel failed to object to inadmissible hearsay about the alleged conduct of the  
7 defendant's dog Louie on the night of this incident. Although the state called one civilian  
8 witness to testify about a possible dog bite and misconduct with a terrier, the state was allowed  
9 to offer without objection testimony that the defendant's dog Louie had harmed a cat and that  
10 there had been other calls to Animal Control about the dog. The state also put on testimony that  
11 the defendant's dog Louie had been labeled a "potentially dangerous dog." This type of  
12 evidence (absent the eye-witness testimony) either was inadmissible hearsay, unchallenged by  
13 trial counsel, and/or prior bad acts testimony under ER 404(b).

14 (5) trial counsel discouraged the defendant not to testify and he never told him that the  
15 decision was personal to the defendant. Then when the defendant insisted on testifying, trial  
16 counsel had a brief email exchange about it. That email exchange occurred on June 6, 2010<sup>6</sup>  
17 When trial counsel rested the case without permitting the defendant to testify, the defendant  
18 was astonished. When the defendant asked him to tell the jury in closing argument that he  
19  
20

---

21  
22 <sup>3</sup> Appendix C

23 <sup>4</sup> Appendix B

24 <sup>5</sup> Appendix A

25 <sup>6</sup> Appendix E

1 wanted to testify, trial counsel correctly informed him that he could not inject that into the  
2 closing. The defendant was never told that the decision whether to testify was his personal  
3 decision to make and that he did not have to follow his attorney's recommendations on this  
4 subject.

5 (2) THE DEFENDANT IS ENTITLED TO A NEW TRIAL WHERE TRIAL  
6 COUNSEL REFUSED TO PERMIT THE DEFENDANT TO TESTIFY IN HIS TRIAL.

7 It is axiomatic that a criminal defendant possesses the right to decide whether or not to  
8 testify at trial. As the court noted in Wamwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 2510, 53  
9 L.Ed.2d 594, n. 1 (1977), "Only such basic decisions as whether to plead guilty, waive a jury,  
10 or testify in one's own behalf are ultimately for the accused to make."

11 The right to testify in one's own behalf has been characterized as a personal right of  
12 "fundamental" dimensions. E.g., Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97  
13 L. Ed. 2d 37 (1987). Even more fundamental to a personal defense than the right to self-  
14 representation ". . . is an accused's right to present his own version of events in his own  
15 words"), United States v. Joelson, 7 F.3d 174, 177 (9th Cir.), cert. denied, 114 S. Ct. 620, 126  
16 L. Ed. 2d 584 (1993), Ortega v. O'Leary, 843 F.2d 258, 261 (7th Cir.), cert. denied, 488 U.S.  
17 841, 102 L. Ed. 2d 85, 109 S. Ct. 110 (1988); United States v. Bernloehr, 833 F.2d 749, 751  
18 (8th Cir. 1987). The defendant, not trial counsel, has the authority to decide whether or not to  
19 testify. E.g., Jones v. Barnes, 463 U.S. 745, 751 n.6, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983),  
20 Joelson, 7 F.3d at 177; State v. King, 24 Wn. App. 495, 499, 601 P.2d 982 (1979); RPC 1.2(a)

21  
22 In State v. Robinson, 138 Wn.2d 753, 759, 982 P.2d 590 (1999), the court emphasized  
23 the fundamental nature of the right and expressed stated that the right "cannot be abrogated by  
24 defense counsel or by the court."

25  
**DEFENDANT'S MOTION  
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1           The defendant's fundamental right to testify is violated if "the final decision that he  
2 would not testify was made against his will " State v. Robinson, 138 Wn.2d 753, 763, 982 P 2d  
3 590 (1999) The fundamental right is also violated when the attorney flagrantly disregards the  
4 defendant's desire to testify *Id*, citing United States v. Robles, 814 F Supp. 1233, 1242 (E D  
5 Pa 1993), United States v. Butts, 630 F.Supp. 1145, 1147 (D. Me., 1986) Further, *Rule of*  
6 *Professional Conduct (RPC) 1.2(a)* provides, in part, that "in a criminal case, the lawyer shall  
7 abide by the client's decision, after consultation with the lawyer, as to a plea to be entered,  
8 whether to waive jury trial and whether the client will testify."

9  
10           When an attorney tells the client that he is forbidden to testify or in some other way  
11 compels the defendant to remain silent, the attorney has actually prevented the defendant from  
12 testifying Robinson, 138 Wn.2d at 762. Likewise, an attorney can prevent his client from  
13 testifying even without using coercion and misrepresentation Thus, in Robinson, (a case  
14 factually similar to the instant case), the court held that an attorney actually prevents his client  
15 from testifying by refusing to call the defendant as a witness even though the attorney knew  
16 that the defendant wanted to testify 138 Wn 2d at 763.

17           In addition, waiver of the right to testify must be made knowingly State v. Thomas,  
18 128 Wn.2d 553, 559, 910 P 2d 475 (1996). In order to knowingly waive the right to testify, the  
19 defendant first must know that she possesses not only that right but also the ultimate decision  
20 regarding exercise of that fundamental right Because the trial court has no obligation to obtain  
21 an on-the-record waiver of this right, defense counsel bears full responsibility to inform the  
22 defendant of this right to testify even contrary to counsel's advice 128 Wn 2d at 560 It is  
23 unreasonable to impose upon defendants the burden of personally informing the court that their  
24 attorney is not acceding to their wishes to testify Robinson, 138 Wn 2d at 764.  
25

DEFENDANT'S MOTION  
FOR NEW TRIAL

1 A criminal defendant post-trial may assert a claim that his attorney prevented her from  
2 testifying and must prove that the attorney refused to allow his to testify in the face of the  
3 defendant's unequivocal demands that he be allowed to do so *Id.*

4 If the defendant is able to prove by a preponderance of the evidence that his attorney  
5 actually prevented him from testifying, he will have established that the waiver of this  
6 fundamental constitutional right to testify was not knowing and voluntary. *Robinson, 138*  
7 *Wn.2d at 765.*

8 The defendant must produce more than a bare assertion that the right was violated, the  
9 defendant must present substantial, factual evidence in order to merit an evidentiary hearing or  
10 other action *Robinson, 138 Wn 2d at 760.*

11 When a criminal defendant asserts evidence that se was denied his constitutional right to  
12 testify, the court may order an evidentiary hearing on the issue. *Thomas, 128 Wn 2d at 561*  
13 *State v. Robinson, 138 Wn.2d 753, 982 P.2d 590 (1999).* A defendant who persuades the court  
14 that her constitutional right to testify has been abrogated is entitled to a new trial *Robinson,*  
15 *138 Wn.2d at 770.*

16 In this case, the defendant has established that his constitutional right to testify was  
17 denied him by the actions of trial counsel He had repeatedly informed him that he wanted to  
18 testify and was never informed that he had the final decision on that important issue Instead,  
19 the defendant believed that he would testify right up until the moment when her attorney rested  
20 the defense case In addition, the defendant's testimony would have placed his version of  
21 events before the jury, countered the testimony of some of the State's witnesses, and also  
22 provided to the jury insight into the character and demeanor of the defendant. The jury may  
23  
24  
25

*DEFENDANT'S MOTION  
FOR NEW TRIAL*

1 well have believed the defendant's account of the events or, at a minimum, may have found  
2 that his testimony raised a reasonable doubt so as to bar conviction

3  
4 **B. CONCLUSION**

5 For the foregoing reasons, the defendant respectfully asks this court to grant the relief  
6 requested.

7  
8 DATED: AUGUST 4, 2010.

9 Respectfully submitted,

10  
11 /s/BARBARA COREY WSBA#11778  
12 Barbara@bcoreylaw.com

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16 Copyright2010-bcoreylaw.com

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# APPENDIX A

*DEFENDANT'S MOTION  
FOR NEW TRIAL*

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DECLARATION OF PAUL GEBHARDT

I, PAUL GEBHARDT, declare under penalty of perjury that the following declaration is true and correct:

1. I am the defendant in this matter and am competent to make this declaration.

2 When I was charged in this case, I needed to hire a criminal defense attorney Not knowing where to turn, I first retained Nick George, whom I later fired A friend referred me to Karen Koehler, a civil attorney in Seattle She referred me to her boyfriend, Mr Ed Moore Ms. Koehler also stated that she would assist me in my case pro bono<sup>7</sup>. She did not. I contacted him, explained what I needed and asked if he represented individuals who were charged with crimes Ms Koehler assured me that he was competent to represent me I have since learned that his practice is limited to personal injury cases. I have learned that Mr. Moore has experience with civil cases claiming police brutality His business card notes that his practice is limited to personal injury cases.

3. I have always maintained my innocence and never did authorize my attorney to enter into plea negotiations with the prosecutor. I later learned that my attorney wanted me to enter a guilty plea in this case and told the prosecutor that “we both have better and bigger stuff to work on” I would have found another attorney if I had know that my attorney did not consider my case worthy of his time and effort.

<sup>7</sup> Appendix F

1           4. Further I did not know that my attorney did not know the elements of the crimes  
2 charged and that he needed the prosecutor to explain the charge to him and also to explain how the  
3 evidence satisfied the charges <sup>8</sup>

4           5. During the preparation of my case, I provided (at Mr Moore's request) names and  
5 contact information for individuals who would testify regarding my reputation for non-violence,  
6 Mr. Moore endorsed these individuals as trial witnesses.

7           Moore contacted only a couple of these witnesses. Given the allegation of assault, I  
8 thought that these witnesses would be important to show the jury the kind of person I am and am  
9 known to be

10           Although I suggested the names of character/reputation witnesses, he also decided that  
11 some of my longest and closest friends were not suitable to present because they were in my yoga  
12 class (See appendix D, where Mr Moore told me that he would not put on at least one of these  
13 witnesses because "I really still don't want gurus") Mr Moore did not want jurors to know that I  
14 was in a meditation group because the jurors would not like it

15           6. I know that Mr. Moore interviewed seven police witnesses prior to trial. I also know that  
16 he did not interview any of the civilian witnesses, for the State and for my defense. He only  
17 interviewed Nina Gayle and Bernardo Fuster (there are not notes or transcripts from these  
18 interviews.) I expected that he would prepare for trial. I wrote him frequent (copious) notes to him  
19 during trial and also tried to understand what he was doing. After the trial started, Mr. Moore did  
20 not have time to answer most of my on-going questions about the trial.  
21  
22  
23  
24

25 <sup>8</sup> Appendix B – series of email exchanges between trial counsel and Mr Neeb (need to start reading at the end of  
the email as the last email in the exchange is the first email)

1           6. Throughout the trial, I told Mr Moore that I wanted to testify. He told me that he  
2 would make his decision about whether I would testify after he heard Sara's testimony<sup>9</sup> He told  
3 me that he did not think I would be a good witness and that the prosecutor would tear me apart on  
4 cross-examination. Nevertheless I wanted to testify I believed that I would testify and I even had  
5 a brief email exchange with Mr Moore regarding testimony tips<sup>10</sup> I was not told that the decision  
6 to testify was my personal decision and that I was free to ignore Mr. Moore's advice on this  
7 subject

8           I fully expected to testify and was stunned when Mr. Moore rested our case without  
9 allowing me to testify

10           Mr Moore repeatedly told me that he was in charge of my representation

11           Prior to closing argument, I asked Mr. Moore to tell the jury that I wanted to testify but  
12 was not allowed to do so. Of course, I did not know then that it is not possible to argue facts  
13 outside the record.

14           I always wanted to testify. I continue to believe that I should have testified so that the jury  
15 would learn about my version of this incident and also so that the jury could see the kind of person  
16 that I am I believe that in the absence of my testimony and more testimony from my character  
17 witnesses I was unable to communicate this information to the jury.

18           7 My attorney never told me that the maximum penalty for the crime of assault 2 is 10  
19 years Mr Moore always told me that the statutory maximum was 5 years.

20  
21  
22  
23  
24           <sup>9</sup> Appendix G

25           <sup>10</sup> Appendix E.



# APPENDIX B

**bcorey9@net-venture.com**

**From:** Paul Gebhardt [paulgebhardt@gmail.com]  
**Sent:** Tuesday, August 03, 2010 4:41 PM  
**To:** barbara@bcoreylaw.com  
**Subject:** Fwd: Paul Gebhardt - Amended Information  
**Attachments:** Gebhardt EHM 1a decl re MNT 6.25 10.pdf

## Forwarded conversation

Subject: **FW: Paul Gebhardt - Amended Information**

-----  
**From:** [emoore@ehmpc.com](mailto:emoore@ehmpc.com) <[emoore@ehmpc.com](mailto:emoore@ehmpc.com)>  
**Date:** Thu, Jun 24, 2010 at 6:38 AM  
**To:** Paul Gebhardt <[paulgebhardt@gmail.com](mailto:paulgebhardt@gmail.com)>

The email below indicates that I sent you Neeb's email describing a possible 10 year sentence. I do not think that this approach will really help us and, of course, you never really indicated any desire other than to seek an actual trial.

**From:** [emoore@ehmpc.com](mailto:emoore@ehmpc.com)  
**Sent:** Wednesday, April 28, 2010 11:21 AM  
**To:** 'Paul Gebhardt'  
**Subject:** FW: Paul Gebhardt - Amended Information

FYI - Based upon my own research, I believe that everything he says on the law is generally correct. There is no evidence that you swung but were prevented based on my recollection, but, as we have discussed, Kelly says that you did actually swing. I do not think that a judge will go beyond the 18-24 months as this is not that horrible an incident, but the judge will have the ability to do so if he or she thinks it is appropriate. Ld

**From:** John Neeb [mailto:[jneebe@co.pierce.wa.us](mailto:jneebe@co.pierce.wa.us)]  
**Sent:** Wednesday, April 28, 2010 9:35 AM  
**To:** [emoore@ehmpc.com](mailto:emoore@ehmpc.com)  
**Subject:** RE: Paul Gebhardt - Amended Information

The term "assault" is defined in WPIA 35-50. There are three types, which amount to this: 1) hit with a rock; 2) try to hit with a rock and miss or get prevented from succeeding; 3) threaten to hit with a rock in order to scare without ever intending to hit. According to the witnesses, your guy grabbed the rock during his fight with the officers and either swung it at Koskovich or tried to swing it at him but was prevented. Meets the second and third definitions. Even tensing up his

8/3/2010

arm as if to swing it, suffices legally. That actually is up to the jury. And I will likely be requesting a lesser of attempted assault 2 when the jury is instructed.

The deadly weapon enhancement adds 12 months to the standard range sentence. If your guy is convicted of Assault 3 and Assault 3, he will have an offender score of 1 point on Assault 2, range of 6 - 12 months, and 1 point on Assault 3, range of 3 - 8 months, concurrent. The deadly weapon finding increases his range to 18 - 24 months on the Assault 2. Enhancements are served "flat time" or "hard time", not subject to any reduction.

The aggravating factor subjects the defendant to an exceptional sentence above the standard range, so it removes the requirement that the court sentence within the standard range for the correct offender score. The State could ask for, and the court could impose, any sentence up to 120 months in prison (including any sentence enhancement). I would not ask for that sentence, but I would absolutely consider requesting an exceptional sentence after trial depending on how the facts came out.

I need an answer about the hearing by 4:30 p.m. tomorrow - Thursday, 4/29. If we are striking the hearing, I don't have to wear a suit, so I want to know before I leave the night before.

Let me know if you have any other questions or want to discuss this case further.

John M. Neeb

Deputy Prosecuting Attorney

(253) 798-6247

[jneeb@co.pierce.wa.us](mailto:jneeb@co.pierce.wa.us)

**From:** [emoore@ehmpc.com](mailto:emoore@ehmpc.com) [mailto:[emoore@ehmpc.com](mailto:emoore@ehmpc.com)]

**Sent:** Wednesday, April 28, 2010 8:58 AM

**To:** John Neeb

**Subject:** RE: Paul Gebhardt - Amended Information

8/3/2010

I think that we can agree, but I need to confirm with my client. Before I visit with him, can you help me try to understand how you prove a completed assault if he did not actually strike anyone with the rock? Also, I think that I understand that the deadly weapon enhancement adds a hard one year to his sentence. What does the police victim aggravating factor add? Finally, do I understand you correctly - if the jury convicts of both assault 2 attempted assault 2 and assault 3 on Koskovich that he will only be sentenced on the more serious offense, the 2<sup>nd</sup>?

I really do continue to try to talk to him about a plea. We both have better and bigger stuff to work on. I appreciate any responses that you can give me. Ed

**From:** John Neeb [mailto:[jneeb@co.pierce.wa.us](mailto:jneeb@co.pierce.wa.us)]  
**Sent:** Wednesday, April 28, 2010 8:34 AM  
**To:** [emoore@ehmpc.com](mailto:emoore@ehmpc.com)  
**Subject:** RE: Paul Gebhardt - Amended Information

if you reply to this in writing stating that you will not object to the filing of the amended information and arraignment occurring on the first day of trial I will agree to strike the status conference and will advise the court that the motions we were scheduled to have will not be raised.

John M. Neeb

Deputy Prosecuting Attorney

(253) 798-6247

[jneeb@co.pierce.wa.us](mailto:jneeb@co.pierce.wa.us)

**From:** [emoore@ehmpc.com](mailto:emoore@ehmpc.com) [mailto:[emoore@ehmpc.com](mailto:emoore@ehmpc.com)]  
**Sent:** Tuesday, April 27, 2010 7:37 PM  
**To:** John Neeb  
**Subject:** RE: Paul Gebhardt - Amended Information

I did not realize that I was scheduled to be out of town on 4/30. Do we still need to have that hearing since I have not filed any motions?

8/3/2010

# APPENDIX C

**bc Corey9@net-venture.com**

---

**From:** Paul Gebhardt [paulgebhardt@gmail.com]  
**Sent:** Tuesday, August 03, 2010 4:50 PM  
**To:** barbara@bc Coreylaw.com  
**Subject:** Fwd: Power of belief in Ed and Truth

----- Forwarded message -----

**From:** Paul Gebhardt <paulgebhardt@gmail.com>  
**Date:** Thu, Jun 10, 2010 at 8:55 PM  
**Subject:** Power of belief in Ed and Truth  
**To:** "emoore@ehmpc.com" <emoore@ehmpc.com>

Ed,

I just read this and do not agree that I've tried to take over trial in the way you suggest. Some of my notes you asked me to provide do suggest a strategy (from me, a man who's stressed, frazzled, inexperienced with trials, the law, etc). It does not mean I ever expect you to use my strategies, just comments from the peanut gallery.

I just want you to consider my input and briefly explain things when possible so I understand, if possible. Especially when you are making decisions, not because I doubt you, but because I just love to understand. As a small child my mom would often yell at me because I asked SO MANY QUESTIONS! It's just me.

Oftentimes it is difficult to get your attention at all without you jumping down my throat right in front of the jury and judge. I am very happy with the way you've conducted trial for the most part and I plan on giving you the civil case assuming you and I agree on what is a just amount of reparations for what has occurred in my life because of this nasty, violent, lengthy, dramatic, and unfortunate event which now causes me to basically live in constant fear in a city I used to take pride in as my home.

# APPENDIX D

**bcorey9@net-venture.com**

**From:** Paul Gebhardt [paulgebhardt@gmail.com]  
**Sent:** Tuesday, August 03, 2010, 4:52 PM  
**To:** barbara@bcoreylaw.com  
**Subject:** Fwd: Dennis Becker cell phone for tonight

## Forwarded conversation

Subject: **Dennis Becker cell phone for tonight**

-----  
From: **Paul Gebhardt** <paulgebhardt@gmail.com>  
Date: Tue, Jun 8, 2010 at 6:59 PM  
To: Ed Moore Attorney <emoore@ehmpc.com>

Call Dennis Becker at 206-406-2049 tonight. Thx Ed.

-----  
From: **emoore@ehmpc.com** <emoore@ehmpc.com>  
Date: Tue, Jun 8, 2010 at 9:39 PM  
To: Paul Gebhardt <paulgebhardt@gmail.com>

Sorry, Becker won't do it; let's go with Dailey, I guess - I really still don't want Guru. I may call him back to be sure he's good with the law. Ed

Edward Moore  
Law Offices of Edward H. Moore, P.C.

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Seattle, WA 98119-4204  
phone: 206/826-8214  
fax: 206/826-8221

email: [emoore@ehmpc.com](mailto:emoore@ehmpc.com)

DALLAS OFFICE  
6031 Yellow Rock Trail  
Dallas, Texas 75248  
phone: 972/386-8881  
fax: 206/826-8221

-----  
From: **Paul Gebhardt** <paulgebhardt@gmail.com>  
Date: Tue, Jun 8, 2010 at 9:50 PM  
To: "emoore@ehmpc.com" <emoore@ehmpc.com>

8/3/2010

# APPENDIX E

From: Paul Gebhardt [mailto:[paulgebhardt@gmail.com](mailto:paulgebhardt@gmail.com)]  
Sent: Sunday, June 06, 2010 7:00 PM

-----  
From: **Paul Gebhardt** <[paulgebhardt@gmail.com](mailto:paulgebhardt@gmail.com)>  
Date: Sun, Jun 6, 2010 at 8:33 PM  
To: "[emoore@ehmpc.com](mailto:emoore@ehmpc.com)" <[emoore@ehmpc.com](mailto:emoore@ehmpc.com)>

Yes, because I have to be cognisant of what I say and consistent so neeb doesn't rip me up, I suppose both can't be true, and one must be a lie. I've gotta look before I leap and they can manilate a misstatement into a lie.

Paul Gebhardt, BS

-----  
c.

# APPENDIX F

**bcorey9@net-venture.com**

**From:** Paul Gebhardt [paulgebhardt@gmail.com]  
**Sent:** Tuesday, August 03, 2010 6:23 PM  
**To:** barbara@bcoreylaw.com  
**Subject:** Fwd: Gebhardt

## Forwarded conversation

Subject: Gebhardt

-----  
From: **Karen Kochler** <karenk@stritmatter.com>  
Date: Sat, Jan 16, 2010 at 2:39 PM  
To: paul@investintacoma.com, Ed Moore <emoore@ehmpc.com>  
Cc: John Meyers <johnm@skwwc.com>

Paul - your level of angst and expression while understandable is also bound to make your devoted counsel grow weary. I thought money was a serious problem for you. If not, I would never had asked Ed to represent you in this kind of a case for \$5,000 which he is doing. Now you say you would like to pull out all stops. If that is so, then you should go ahead and do so. I was going to try your case pro bono - i.e. for free to assist Ed. If you have now come up with the resources to spend \$15 to 25K on a no holds barred defense with what you consider to be a pre-eminent local attorney, then I do not want to begin to discourage you to do so. However, this is a far cry from what I thought was needed when I asked Ed to assist. Your inability to get adequate medical attention due to your uninsured status likewise led me to the above belief.

Please let me know as soon as possible regarding your decision so that you can either go procure new counsel or settle down with your present ones.

Karen Kochler

Stritmatter Kessler Whelan Cefuocio

200 2nd Ave W

Seattle WA 98119

P: 206 448 1777

[www.stritmatter.com](http://www.stritmatter.com)

8/4/2010

# APPENDIX G

Paul Gebhardt  
"The Investor's Agent"  
Tacoma Dream Team &  
RE/Max Masters

1-253-229-0148  
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On Jun 10, 2010, at 5:29 AM, "[emoore@ehmpc.com](mailto:emoore@ehmpc.com)" <[emoore@ehmpc.com](mailto:emoore@ehmpc.com)> wrote:

I do not feel that this is necessary. Everything that you were concerned about was highlighted in great detail by Sara. The jury has heard that portion of the tape multiple times. We have highlighted the Saturday night thing quite clearly and if they hear it and it means anything to them, they can consider it. I appreciate your input, but respectfully intend to move forward without this based on my professional judgment.

I realize that your career is at stake and have advised you many times during my representation of the significant risk of a conviction based upon my professional judgment of the facts, law and jury sentiment in Tacoma, especially in light of the Lakewood shootings. I have advised you repeatedly that I thought that you should allow me to seek a plea bargain with gross misdemeanors which would allow you to keep your real estate license. You have never allowed me to even discuss the matter with the prosecutor because you have never, ever wanted anything but this trial and you have never authorized me to conduct any plea negotiations on your part. I did discuss the general prospect of plea negotiations with both prosecutors that I have dealt with. They both indicated that we could have reached a plea agreement that would have avoided felonies on your record. I have discussed this with you on multiple occasions and you continued steadfastly to allow me to engage in any negotiations for a plea. I have also discussed with you whether we should ask the judge to instruct the jury on lesser included offenses of misdemeanor assault and you have repeatedly indicated that you did not want to do so.

I have conducted your trial to the best of my abilities and have offered to allow you to conduct the trial due to your continued attempts to tell me how to try the case. As I recall, you declined to take

8/3/2010

over representation at that point. If you want to take over now, we can raise the matter with the judge, although I do not really think that that course of action is in your best interests. During this trial, I have, as always, listened to your many thoughts about how to deal with matters in the case. I have welcomed your comments and considered all of them and incorporated some of them into my handling of the trial. We have discussed the trial transcript at length in front of this jury and I am comfortable that my cross of the officers and direct exam of Sara has given the jury ample opportunity to consider and hear all of the matters on the tape where we thought that the transcript was inaccurate

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fax: 206/826-8221

# APPENDIX F

Pierce County Superior Court Criminal Case 09-1-02751-1



Defendant: **PAUL WILLIAM GEBHARDT**  
 Access: Public  
 Jurisdiction: SUPERIOR CT - PIERCE CTY  
 Initial Arrest Date: 05/30/2009  
 Initial Bail Amount: \$21,000 00

**Attorneys**

Type	Name	Firm	Role
Pros	JOHN M NEEB	Prosecuting Attorney	LEAD COUNSEL
Defe	BARBARA L COREY		COUNSEL

**Charges**

Count	Type	Description	RCW	Disposition	Sentence Date
1	Original	ATTEMPTED ASSAULT IN THE SECOND DEGREE	<u>9A.28.020</u> , <u>9A.36.021(1)(c)</u> ,		
	Amended	ASSAULT IN THE SECOND DEGREE	<u>9A.36.021(1)(c)</u>		
	Final	ASSAULT IN THE SECOND DEGREE	<u>9A.36.021(1)(c)</u>	GLTY LESSER CHG/JURY	08/06/2010
2	Original	ASSAULT IN THE THIRD DEGREE	<u>9A.36.031(1)(g)</u>		
	Amended	ASSAULT IN THE THIRD DEGREE	<u>9A.36.031(1)(g)</u>		
	Final	ASSAULT IN THE THIRD DEGREE	<u>9A.36.031(1)(g)</u>	GLTY AS CHGD/JURY	
3	Original	ASSAULT IN THE THIRD DEGREE	<u>9A.36.031(1)(g)</u>		
	Final	ASSAULT IN THE THIRD DEGREE	<u>9A.36.031(1)(g)</u>	NOT GLTY/JURY	

**Filings** e-file document | download filings

Filing Date	Filing	Access	Pages	Microfilm
06/02/2009	PRE-TRIAL ELIGIBILTY REPORT	Sealed	1	
06/02/2009	<u>ORDER FOR HEARING</u>	Public	1	
06/02/2009	<u>ORDER ESTABLISHING CONDITIONS OF RELEASE</u>	Public	2	
06/02/2009	<u>AFFIDAVIT / DETERMINATION FOR PROBABLE CAUSE</u>	Public	1	
06/02/2009	<u>INFORMATION</u>	Public	2	
06/03/2009	<u>NOTICE OF APPEARANCE SPECIAL / LIMITED</u>	Public	1	
06/04/2009	<u>BAIL BOND</u>	Public	3	
06/04/2009	<u>NOTICE OF APPEARANCE AND REQUEST FOR DISCOVERY</u>	Public	4	
06/17/2009	<u>STATEMENT OF ARRESTING OFFICER</u>	Public	3	
06/18/2009	<u>RECEIPT OF DISCOVERY</u>	Public	1	
06/18/2009	<u>ORDER FOR HEARING</u>	Public	1	
07/09/2009	<u>AFFIDAVIT OF BERNARDO FUSTER</u>	Public	2	
07/16/2009	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1	
07/22/2009	<u>RECEIPT OF DISCOVERY</u>	Public	1	
09/14/2009	<u>RECEIPT OF DISCOVERY</u>	Public	1	
10/02/2009	<u>MOTION TO WITHDRAW</u>	Public	1	
10/02/2009	<u>AFFIDAVIT OF NICHOLAS GEORGE</u>	Public	3	
10/02/2009	<u>ORDER FOR HEARING</u>	Public	1	
10/08/2009	<u>ORDER FOR WITHDRAWAL OF ATTORNEY</u>	Public	1	
10/09/2009	<u>NOTICE OF APPEARANCE</u>	Public	3	
10/13/2009	<u>ORDER FOR HEARING</u>	Public	1	

11/03/2009	<u>MOTION TO MODIFY TRAVEL RESTRICTIONS</u>	Public	3
11/03/2009	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
11/03/2009	<u>ORDER ESTABLISHING CONDITIONS OF RELEASE</u>	Public	2
12/02/2009	<u>RECEIPT OF DISCOVERY</u>	Public	1
12/29/2009	<u>RECEIPT OF DISCOVERY</u>	Public	1
12/29/2009	<u>RECEIPT OF DISCOVERY</u>	Public	1
12/29/2009	<u>RECEIPT OF DISCOVERY</u>	Public	1
02/01/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
02/02/2010	<u>RETURN ON SUBPOENA, VELDER</u>	Public	1
02/02/2010	<u>RETURN ON SUBPOENA, NIST</u>	Public	1
02/03/2010	<u>RETURN ON SUBPOENA, CAMPBELL</u>	Public	1
02/03/2010			1
02/03/2010	<u>RETURN ON SUBPOENA, HASSBERGER</u> <u>RETURN ON SUBPOENA, VOCE</u>	Public Public	1
02/03/2010	<u>WITNESS LIST</u>	Public	2
02/08/2010	<u>RETURN ON SUBPOENA, MARTIN</u>	Public	1
02/08/2010	<u>RETURN ON SUBPOENA, KELLY</u>	Public	1
02/08/2010	<u>RETURN ON SUBPOENA, KOSKOVICH</u>	Public	1
02/09/2010	<u>RETURN ON SUBPOENA -4</u>	Public	4
02/09/2010	<u>RETURN ON SUBPOENA -NICOLAUS</u>	Public	1
02/10/2010	<u>MOTION TO CONTINUE</u>	Public	14
02/10/2010	<u>MOTION TO CONTINUE</u>	Public	3
02/10/2010	<u>DECLARATION OF EDWARD MOORE</u>	Public	11
02/17/2010	<u>ORDER FOR HEARING</u>	Public	1
02/17/2010	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
02/17/2010	<u>CLERK'S MINUTE ENTRY</u>	Public	2
02/17/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
02/17/2010	<u>DECLARATION OF EDWARD MOORE AMENDED</u>	Public	25
02/17/2010	<u>MOTION TO SHORTEN TIME</u>	Public	3
02/17/2010	<u>MOTION TO CONTINUE AMENDED</u>	Public	8
02/17/2010	<u>MOTION TO COMPEL</u>	Public	13
02/25/2010	<u>DECLARATION OF EDWARD MOORE</u>	Public	6
02/25/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
02/25/2010	<u>ORDER FOR HEARING</u>	Public	1
02/25/2010	<u>CLERK'S MINUTE ENTRY</u>	Public	2
02/25/2010	<u>ORDER ON MOTION TO COMPEL DISCOVERY</u>	Public	2
03/19/2010	<u>CLERK'S MINUTE ENTRY</u>	Public	2
03/19/2010	<u>ORDER RE: DISCOVERY</u>	Public	1
04/14/2010	<u>ORDER FOR HEARING</u>	Public	1
04/14/2010	<u>OMNIBUS ORDER</u>	Public	3
05/04/2010	<u>DEFENDANT'S LIST OF WITNESSES</u>	Public	4
05/04/2010	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
05/06/2010	<u>AFFIDAVIT / DECLARATION OF SERVICE</u>	Public	1
05/06/2010	<u>AFFIDAVIT / DECLARATION OF SERVICE</u>	Public	2
05/10/2010	<u>RETURN ON SUBPOENA, VOCE</u>	Public	1
05/10/2010	<u>RETURN ON SUBPOENA, NIST</u>	Public	1
05/10/2010	<u>RETURN ON SUBPOENA, VELDER</u>	Public	1

05/11/2010	<a href="#">RETURN ON SUBPOENA, CAMPBELL</a>	Public	1
05/11/2010	<a href="#">RETURN ON SUBPOENA, KELLY</a>	Public	1
05/11/2010	<a href="#">RETURN ON SUBPOENA, HASSBERGER</a>	Public	1
05/12/2010	<a href="#">RETURN ON SUBPOENA, MARTIN</a>	Public	1
05/13/2010	<a href="#">DEFENDANT'S LIST OF WITNESSES</a>	Public	5
05/14/2010	<a href="#">RETURN ON SUBPOENA, KOSKOVICH</a>	Public	1
05/17/2010	<a href="#">ORDER FOR CONTINUANCE OF TRIAL DATE</a>	Public	1
05/18/2010	<a href="#">TRAILING ORDER</a>	Public	1
05/20/2010	<a href="#">ORDER FOR CONTINUANCE OF TRIAL DATE</a>	Public	1
05/27/2010	<a href="#">ORDER FOR CONTINUANCE OF TRIAL DATE</a>	Public	1
06/01/2010	<a href="#">REASSIGNED TO DEPT 14</a>	Public	1
06/01/2010	<a href="#">RETURN ON EXHIBITS</a>	Public	1
06/01/2010	<a href="#">ORDER ALLOWING JURY TO SEPARATE</a>	Public	1
06/01/2010	<a href="#">AMENDED INFORMATION</a>	Public	2
06/01/2010	<a href="#">MOTION TO CONTINUE</a>	Public	7
06/01/2010	<a href="#">MOTION IN LIMINE</a>	Public	8
06/01/2010	<a href="#">MOTION FOR JURY QUESTIONNAIRE</a>	Public	12
06/01/2010	<a href="#">PLAINTIFF'S PROPOSED INSTRUCTIONS</a>	Public	34
06/01/2010	<a href="#">DEFENDANT'S PROPOSED INSTRUCTIONS</a>	Public	19
06/01/2010	<a href="#">EXHIBITS RECEIVED</a>	Public	4
06/01/2010	<a href="#">EXHIBITS RECEIVED</a>	Public	1
06/02/2010	<a href="#">DEFENDANT'S PROPOSED INSTRUCTIONS</a>	Public	19
06/02/2010	<a href="#">JURY PANEL SELECTION LIST</a>	Public	3
06/02/2010	<a href="#">JURY PANEL</a>	Public	1
06/02/2010	<a href="#">RECEIPT OF DISCOVERY</a>	Public	1
06/02/2010	<a href="#">PEREMPTORY CHALLENGE SHEET</a>	Public	1
06/02/2010	<a href="#">MOTION IN LIMINE</a>	Public	5
06/03/2010	<a href="#">STIPULATION REGARDING DIGITAL RECORDING</a>	Public	2
06/07/2010	<a href="#">ORDER ON MOTION IN LIMINE</a>	Public	7
06/08/2010	<a href="#">RECEIPT OF DISCOVERY</a>	Public	1
06/10/2010	<a href="#">AFFIDAVIT / DECLARATION OF SERVICE</a>	Public	2
06/10/2010	<a href="#">STIPULATION REGARDING DIGITAL RECORDING</a>	Public	2
06/10/2010	<a href="#">DEFENDANT'S PROPOSED INSTRUCTIONS</a>	Public	29
06/10/2010	<a href="#">WITNESS RECORD</a>	Public	1
06/15/2010	<a href="#">COURT'S INSTRUCTIONS TO JURY</a>	Public	31
06/15/2010	<a href="#">VERDICT FORM A COUNT -1</a>	Public	1
06/15/2010	<a href="#">SPECIAL VERDICT FORM COUNT 1</a>	Public	1
06/15/2010	<a href="#">VERDICT FORM COUNT 2</a>	Public	1
06/15/2010	<a href="#">VERDICT FORM COUNT 3</a>	Public	1
06/15/2010	<a href="#">ORDER FOR HEARING</a>	Public	1
06/15/2010	<a href="#">ORDER ESTABLISHING CONDITIONS OF RELEASE</a>	Public	2
06/15/2010	<a href="#">CLERK'S MINUTE ENTRY</a>	Public	13
06/18/2010	<a href="#">BAIL BOND</a>	Public	3
06/25/2010	<a href="#">RESTITUTION INFORMATION</a>	Confidential	1
06/25/2010	<a href="#">AFFIDAVIT / DECLARATION IN SUPPORT</a>	Public	8

06/25/2010	<a href="#">e</a> <b>MOTION FOR NEW TRIAL</b>	Public	9
07/12/2010	<a href="#">e</a> <b>DEF'S 2ND MOTION TO MODIFY TRAVEL</b>	Public	3
07/12/2010	<a href="#">e</a> <b>DEF'S MOTION FOR MERGER</b>	Public	3
07/22/2010	<a href="#">e</a> <b>BRIEF SENTENCING</b>	Public	60
07/23/2010	<a href="#">e</a> <b>STATES RESPONSE</b>	Public	4
07/23/2010	<a href="#">e</a> <b>ORDER FOR HEARING</b>	Public	1
07/23/2010	<a href="#">e</a> <b>ORDER AUTHORIZING SUBSTITUTION OF COUNSEL</b>	Public	1
07/23/2010	<a href="#">e</a> <b>CLERK'S MINUTE ENTRY</b>	Public	2
08/04/2010	<a href="#">e</a> <b>MOTION FOR NEW TRIAL</b>	Public	22
08/05/2010	<a href="#">e</a> <b>AMENDED MOTION FOR NEW TRIAL</b>	Public	34
08/05/2010	<a href="#">e</a> <b>DECLARATION OF BARBARA COREY IN SUPPORT OF MOTION</b>	Public	2
08/05/2010	<a href="#">e</a> <b>MOTION FOR NEW TRIAL</b>	Public	8
08/06/2010	<a href="#">e</a> <b>NOTE AGREED MODIFICATION TO PROPOSED INSTR</b>	Public	6
08/06/2010	<a href="#">e</a> <b>CLERK'S MINUTE ENTRY</b>	Public	2
08/06/2010	<a href="#">e</a> <b>NOTICE OF APPEAL</b>	Public	1
08/06/2010	<a href="#">e</a> <b>NOTICE OF APPEARANCE ON APPEAL</b>	Public	1
08/06/2010	<a href="#">e</a> <b>JUDGMENT &amp; SENTENCE &amp; WARRANT OF COMMITMENT JAIL</b>	Public	12
08/06/2010	<a href="#">e</a> <b>NOTICE/ADVICE OF COLLATERAL ATTACK</b>	Public	2
08/06/2010	<a href="#">e</a> <b>ORDER FOR BIOLOGICAL SAMPLE</b>	Public	2
08/13/2010	<a href="#">e</a> <b>TRANSMITTAL LETTER COPY FILED</b>	Public	1
08/16/2010	<a href="#">e</a> <b>LETTER FROM COURT OF APPEALS RE INDIGENCY</b>	Public	1
08/18/2010	<a href="#">e</a> <b>REPORT FROM DEPARTMENT OF CORRECTIONS</b>	Public	4
08/30/2010	<a href="#">e</a> <b>REPORT DOC CLOSURE</b>	Public	4
09/16/2010	<a href="#">e</a> <b>NOTICE OF DELINQUENCY</b>	Public	1
09/23/2010	<a href="#">e</a> <b>DESIGNATION OF CLERK'S PAPERS</b>	Public	4
10/05/2010	<a href="#">e</a> <b>CLERK'S PAPERS PREPARED</b>	Public	7
10/05/2010	<a href="#">e</a> <b>INDIGENCY BILLING VOUCHER</b>	Public	1
10/05/2010	<a href="#">e</a> <b>CLERK'S PAPERS SENT</b>	Public	1
12/16/2010	<a href="#">e</a> <b>STIPULATED AGREEMENT TO FINANCIAL OBLIGATION</b>	Public	1
12/21/2010	<a href="#">e</a> <b>DECLARATION OF BARBARA COREY IN SUPPORT OF ENTRY</b>	Public	29
12/22/2010	<a href="#">e</a> <b>DECLARATION OF PAUL WILLIAM</b>	Public	3
12/22/2010	<a href="#">e</a> <b>DECLARATION IN SUPPORT OF PARTIAL INDIGENCY</b>	Public	3
12/23/2010	<a href="#">e</a> <b>CLERK'S MINUTE ENTRY</b>	Public	2
12/29/2010	<a href="#">e</a> <b>DECLARATION OF PAUL GEBHARDT 2ND SUPPLEMENTAL</b>	Public	45
12/30/2010	<a href="#">e</a> <b>CLERK'S MINUTE ENTRY</b>	Public	2
01/07/2011	<a href="#">e</a> <b>ORDER FOR HEARING</b>	Public	1
01/10/2011	<a href="#">e</a> <b>MOTION FOR RECONSIDERATION</b>	Public	1
01/10/2011	<a href="#">e</a> <b>BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION</b>	Public	5
01/25/2011	<a href="#">e</a> <b>STATES RESPONSE</b>	Public	13
01/26/2011	<a href="#">e</a> <b>ORDER FOR HEARING</b>	Public	1
02/10/2011	<a href="#">e</a> <b>MOTION FOR INDIGENCY</b>	Public	13
02/11/2011	<a href="#">e</a> <b>ORDER FOR HEARING</b>	Public	1
02/25/2011	<a href="#">e</a> <b>ORDER OF INDIGENCY - PARTIAL</b>	Public	2
02/25/2011	<a href="#">e</a> <b>ORDER MERGING CNT I AND II</b>	Public	2
02/25/2011	<a href="#">e</a> <b>ORDER ON MOTION FOR NEW TRIAL</b>	Public	2

02/25/2011	<b>CLERK'S MINUTE ENTRY</b>	Public	2
03/07/2011	<b>INDIGENCY BILLING VOUCHER</b>	Public	1
03/30/2011	VERBATIM REPORT TRANS TO DIV II *06-02-10*	Restricted	
03/30/2011	<b>TRANSMITTAL LETTER VRP COPY FILED</b>	Public	1
06/16/2011	VERBATIM REPORT TRANS TO DIV II *06-01-10*VOL 1	Restricted	
06/16/2011	VERBATIM REPORT TRANS TO DIV II *06-03-10*VOL 3	Restricted	
06/16/2011	VERBATIM REPORT TRANS TO DIV II *06-07-10*VOL 4	Restricted	
06/16/2011	VERBATIM REPORT TRANS TO DIV II *06-08-10*VOL 5	Restricted	
06/16/2011	VERBATIM REPORT TRANS TO DIV II *06-09-10*VOL 6	Restricted	
06/16/2011	VERBATIM REPORT TRANS TO DIV II *06-10-10*VOL 7	Restricted	
06/16/2011	VERBATIM REPORT TRANS TO DIV II *06-14-10*VOL 8	Restricted	
06/16/2011	<b>TRANSMITTAL LETTER VRP COPY FILED</b>	Public	1
06/16/2011	<b>NOTICE OF FILING A VERBATIM REPORT</b>	Public	1
06/16/2011	<b>TRANSMITTAL LETTER VRP COPY FILED</b>	Public	1
08/05/2011	<b>SATISFACTION OF JUDGMENT</b>	Public	1



**PURCHASE COPIES**

**Proceedings**

Date	Judge	Dept Type	Outcome
06/02/2009 01:30 PM	CRIMINAL DIVISION 1	CD1 ARRAIGNMENT-BAIL RETURN	ARRAIGNED
06/18/2009 08:30 AM	CRIMINAL DIVISION 1	CD1 RETURN WITH ATTY	HELD
06/18/2009 08:30 AM	CRIMINAL DIVISION 1	CD1 PRE-TRIAL CONFERENCE	CONTINUED
07/13/2009 08:45 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	CONTINUED
07/16/2009 08:30 AM	CRIMINAL DIVISION 1	CD1 PRE-TRIAL CONFERENCE	HELD
07/21/2009 02:45 PM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	CONTINUED
07/30/2009 08:30 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED
10/08/2009 01:30 PM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ MOTION- WITHDRAWAL/SUBSTITUTION	HELD
10/13/2009 08:45 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	CONTINUED
11/03/2009 01:30 PM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	CONTINUED
11/03/2009 01:30 PM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ CONTINUANCE	HELD
11/09/2009 08:30 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED
02/10/2010 08:45 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	CANCELLED
02/17/2010 08:30 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	CONTINUED
02/17/2010 08:30 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ STATUS CONFERENCE HEARING	CANCELLED
02/17/2010 08:30 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ CONTINUANCE	HELD
02/25/2010 01:30 PM	CRIMINAL DIVISION 1	CD1 MOTION-COMPEL	HELD
03/01/2010 08:30 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED
03/19/2010 10:30 AM	K. A. van Doorninck	20 HEARING	HELD
04/14/2010 08:45 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	HELD
04/30/2010 01:30 PM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ STATUS CONFERENCE HEARING	CANCELLED
05/04/2010 08:30 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED

05/17/2010 08:30 AM	CRIMINAL DIVISION- PRESIDING CDPJ JURY TRIAL JUDGE			CONTINUED/ NO COURTOOMS
05/18/2010 08:30 AM	CRIMINAL DIVISION- PRESIDING CDPJ JURY TRIAL JUDGE			CONTINUED/ NO COURTOOMS
05/19/2010 08:30 AM	CRIMINAL DIVISION- PRESIDING CDPJ JURY TRIAL JUDGE			CONTINUED/ NO COURTOOMS
05/20/2010 08:30 AM	CRIMINAL DIVISION- PRESIDING CDPJ JURY TRIAL JUDGE			CONTINUED
05/27/2010 08:30 AM	CRIMINAL DIVISION- PRESIDING CDPJ JURY TRIAL JUDGE			CONTINUED
06/01/2010 08:30 AM	SUSAN K SERKO	14	JURY TRIAL	HELD
06/01/2010 09:00 AM	SUSAN K SERKO	14	REARRAIGNMENT	HELD
07/15/2010 03:00 PM	SUSAN K SERKO	14	MOTION-CHG CONDITIONS RELEASE	CANCELLED
07/23/2010 01:30 PM	SUSAN K. SERKO	14	SENTENCING DATE	CONTINUED
08/06/2010 11:00 AM	SUSAN K. SERKO	14	SENTENCING DATE	HELD
12/23/2010 01:30 PM	SUSAN K SERKO	14	MOTION (NOT CONTINUANCE)	CONTINUED
12/30/2010 01:30 PM	SUSAN K. SERKO	14	MOTION (NOT CONTINUANCE)	HELD
01/14/2011 01:30 PM	SUSAN K SERKO	14	PRESENTATION OF ORDER	CONTINUED
01/28/2011 01:30 PM	SUSAN K SERKO	14	PRESENTATION OF ORDER	CONTINUED
01/28/2011 01:30 PM	SUSAN K SERKO	14	MOTION (NOT CONTINUANCE)	CONTINUED
02/11/2011 01:30 PM	SUSAN K SERKO	14	MOTION (NOT CONTINUANCE)	CONTINUED
02/11/2011 01:30 PM	SUSAN K. SERKO	14	PRESENTATION OF ORDER	CONTINUED
02/25/2011 01:30 PM	SUSAN K SERKO	14	PRESENTATION OF ORDER	HELD
02/25/2011 01:30 PM	SUSAN K. SERKO	14	MOTION (NOT CONTINUANCE)	HELD

**Incidents**

<b>Incident Number</b>	<b>Law Enforcement Agency</b>	<b>Offense Date</b>
091500240	TACOMA POLICE DEPARTMENT	05/30/2009

**Superior Court Co-Defendants**

<b>Cause Number</b>	<b>Defendant</b>
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**Judgments**

<b>Cause #</b>	<b>Status</b>	<b>Signed</b>	<b>Effective</b>	<b>Filed</b>
<u>10-9-09340-1</u>	SATISFIED as of 08/05/2011	SUSAN K SERKO on 08/06/2010	08/06/2010	08/06/2010

- Hearing and location information displayed in this calendar is subject to change without notice. Any changes to this information after the creation date and time may not display in current version.
- Confidential cases and Juvenile Offender proceeding information is not displayed on this calendar. Confidential case types are: Adoption, Paternity, Involuntary Commitment, Dependency, and Truancy.
- The names provided in this calendar cannot be associated with any particular individuals without individual case research.
- Neither the court nor clerk makes any representation as to the accuracy and completeness of the data except for court purposes.

# APPENDIX G

RULE ER 404  
CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT;  
EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or 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.

[Amended effective September 1, 1992.]

Comment 404

[Deleted effective September 1, 2006.]

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# APPENDIX H

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**Instruction No. 9**

*Certain evidence has been admitted in this case for only a limited purpose. This consists of the evidence regarding how the dogs got out and the dog attacks that precede the factual matters that are actually at issue in this case may be considered by you only for the purpose of providing the context for the matters that are actually at issue. You may not consider this evidence for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.*

**WPIC 5.30 Evidence Limited as to Purpose**