

No. 41347-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY EDWARD TARRER,

Appellant.

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

The Honorable Katherine Stolz (trials) and the Honorables Rosanne
Buckner, Vicki Hogan and Brian Tollefson (pretrial, previous plea and
sentencing proceedings), Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed multiple acts of constitutionally offensive misconduct which cannot be deemed “harmless.”
2. The prosecutor’s repeated and flagrant, prejudicial and ill-intentioned misconduct compels reversal.
3. The cumulative effect of the misconduct deprived appellant Larry Tarrer of his state and federal constitutional due process rights to a fair trial.
4. Tarrer’s Sixth Amendment and Article I, § 22, rights to effective assistance of counsel were violated.
5. The sentencing court erred and violated Tarrer’s state and federal rights under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), by entering findings and conclusions expressing an opinion on whether the evidence supported the jury’s findings of guilt and on the aggravating factors.

Tarrer assigns error to the portions of Findings I, VIII, IX, X and XI and Conclusion IV in the Findings and Conclusions for the exceptional sentence which provide, as follows in relevant part:

- I. . . .The trial court heard all of the evidence presented at trial, and the jury’s finding of guilt on each count is supported by substantial, credible evidence.

...

- VIII. The jury found beyond a reasonable doubt the defendant knew his victim was pregnant. Claudia McCorvey was 6 ½ months pregnant when she was shot. Several witnesses testified that she was visibly pregnant. Those witnesses included Rickey Owens, who had not met Claudia McCorvey before that night, and Monte Moore, who lived in the same apartment complex but was not friends with her. Ms. McCorvey said she was visibly pregnant and that the baby had been kicking and moving inside her for several months. That [sic] court finds the jury’s finding is supported by substantial[,] credible evidence.

- IX. The jury found the crime committed against Claudia McCorvey, attempted murder, was a crime that invaded her (as the victim) privacy. Claudia McCorvey was shot in the living room of her own apartment. The shooting occurred at approximately 1:00 a.m. Ms. McCorvey testified she allowed people to come into her apartment that night to smoke rock cocaine; defendant was one of the persons who came into her apartment, but she had never met him before that night. The shooting occurred inside the apartment, and five separate shots were fired. A person's home is a recognized "zone of privacy." The court finds the jury's finding is supported by substantial[,] credible evidence.
- X. The jury found Claudia McCorvey's injuries substantially exceeded the level of injuries necessary to commit the crime of attempted murder first degree. Claudia McCorvey was shot twice in the chest and upper abdomen, and one or both of the shots severed her spinal cord. She has never walked since that night, and she is a "T9" paraplegic, which means she has no feeling in her body from just above her belly button down to her toes. At trial, Ms. McCorvey had a cast on her left lower leg and foot. She explained she was doing some of her normal stretching exercises one morning and heard a bone break, but she did not feel any pain. Ms. McCorvey is confined to a motorized wheelchair and has been in a wheelchair since her release from the hospital in 1991, which she said was after being there for several months. The court finds the jury's finding is supported by substantial credible evidence.
- XI. . . . The court finds the jury's finding relating to the level of injury is supported by substantial and credible evidence . . .

...

CONCLUSIONS OF LAW

...

- IV. The jury's special verdicts were each supported by substantial[,] credible evidence.

6. The “zone of privacy” aggravating factor did not apply and cannot support the exceptional sentence. Tarrer incorporates and again assigns error to Finding VIII. CP 716.
7. The “pregnant victim” aggravating factor did not and could not apply without violating the prohibitions on ex post facto legislation and double jeopardy.
8. The sentencing court erred in imposing a term of custody which exceeded the statutory maximum.
9. The judge violated the appearance of fairness at sentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is completely improper and misconduct for a prosecutor to misstate the law. Such misconduct amounts to a constitutional violation when it directly impacts a constitutional right of the defendant.

Did the prosecutor commit constitutionally offensive misconduct in repeatedly misstating and minimizing his burden of proof by comparing the degree of certainty jurors would need to have in order to find the state had proven its case beyond a reasonable doubt with the certainty jurors would need to take action on important personal decisions and even trivial decisions like what picture was depicted on a puzzle?
2. Did the prosecutor commit further constitutionally offensive misconduct by telling the jurors they could not acquit unless they could say they had a “reasonable doubt” and could affirmatively say what that doubt was?
3. Was it further misconduct when the prosecutor invoked the terrorist attacks of 9/11 even though they were completely irrelevant and highly inflammatory?
4. It is not the duty of the jury to “solve” a case or “declare what happened.” Instead, they are tasked solely with deciding whether the state has proven its case against a defendant, beyond a reasonable doubt. Was it flagrant, prejudicial misconduct for the prosecutor to repeatedly tell the jury they were required to decide and declare the truth with their verdict and that they were required to “figure out” the case?
5. The jury is not required to decide who is telling the truth

and who is lying in order to do its job. Did the prosecutor commit flagrant, prejudicial misconduct in repeatedly telling the jury they had to decide who was telling the truth and who was lying and that either the defendant or the victim was lying?

Was it further flagrant, prejudicial misconduct for the prosecutor to imply that jurors would have to find that police officers convinced witnesses to lie about crucial evidence in order to acquit?

6. If the Court deems that the multiple acts of serious, flagrant and prejudicial misconduct could somehow have been “cured,” was counsel ineffective in failing to object and request such an instruction?
7. Defendants are entitled to be sentenced based upon the law in effect at the time of their crime. Did the sentencing court err in imposing an exceptional sentence based upon a “pregnant victim” aggravating factor even though that factor did not exist until years after the crime?
8. Did the sentencing court err in imposing an exceptional sentence based upon a “violation of a zone of privacy” simply because the crimes occurred in someone’s apartment? Further, because the victim had effectively converted her living room into a drug bazaar where strangers came to purchase and ingest drugs, was there insufficient evidence of a “zone of privacy” at all?
9. The statutory maximum for the manslaughter conviction was 120 months. Did the sentencing court err in imposing a sentence of 144 months in custody?
10. Did the sentencing court violate the appearance of fairness by stating that she had always intended to give Tarrer a “high end” sentence and that she would do whatever she could to make sure he was never released from custody?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Larry Tarrer was charged by information with first-degree, premeditated murder with an “extreme indifference” alternative, attempted first-degree murder with the same alternative, and first-degree

manslaughter. CP 1-3; former RCW 9A.28.020 (1991); former RCW 9A.32.030(1)(a) (1991); former RCW 9A.32.030(1)(b) (1991); former RCW 9A.32.060(1)(b) (1991). On May 20, 1991, Tarrer entered an Alford¹ plea to an amended information, which charged second-degree felony murder and first-degree assault. CP 6-11; former RCW 9A.32.050(1)(b) (1991); former RCW 9A.36.011(1)(a) (1991). Tarrer's motion to withdraw his plea before sentencing was denied and an exceptional sentence was imposed. CP 12, 18-31, 50-52. Tarrer appealed and, on April 8, 1994, this Court affirmed in an unpublished opinion. CP 54-73.

After some further proceedings on collateral relief, Tarrer's conviction for felony murder was dismissed pursuant to In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). 1RP 1-16. On August 14, 2007, this Court affirmed the trial court's decision setting aside the plea agreement based upon that dismissal and the case was remanded for further proceedings. CP 105-113, 182-87.

After hearings on June 25 and on July 2 and 24, 2008 before the Honorable Judges Vicki Hogan and Rosanne Buckner, respectively, pretrial motions were held before the Honorable Judge Katherine Stolz on May 8, June 11 and 22, July 13 and 15, May 29, July 22-23, August 31, and September 1, 2009.² On September 21, 2009, an amended

¹North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). This is a plea which allows the defendant to take advantage of a plea offer from the state while maintaining their innocence. See State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1972).

²Citation to the verbatim report of proceedings is explained in Appendix A.

information was filed, charging first-degree premeditated murder, first-degree manslaughter and attempted first-degree murder with the aggravating factors that the victim's injuries substantially exceeded those required to commit the crime, the offense was a violent offense and the defendant knew the victim was pregnant, and the offense involved an "invasion of the victim's privacy." CP 320-21; RCW 9A.28.020; RCW 9A.32.030(1)(a).

Trial was held before Judge Stolz on September 21, 23, 28, 29 and 30, October 1, 12, 13, 14, 15, 19-20, 21, 23 and 29 and 19, 2009, after which a mistrial was declared. Retrial was held before Judge Stolz on November 19, 2009, October 4-7, 11, 18-19, 2010, after which Tarrer was convicted as charged, including special verdicts finding each of the alleged aggravating circumstances. CP 598-602; 30RP 1-9.

At sentencing on October 21, 2010, Judge Stolz imposed an exceptional sentence for the attempted murder and high end sentences for the other two offenses, for a total sentence length of 896 months. CP 638-50; 30RP 24-67. Tarrer appealed and the prosecution cross-appealed. CP 701, 704-705. This pleading follows.

2. Testimony at trial

On January 9, 1991, at about 1 in the morning, someone shot into Claudia McCorvey's apartment, hitting McCorvey and another woman, Lavern Simpkins. 22RP 18-43. Simpkins was killed by two gunshot wounds to the chest. 22RP 18-43. McCorvey was shot in the spine and ended up paraplegic. 21RP 28-30, 37. The baby she was carrying was born prematurely and died within an hour. 21RP 28-30, 37.

At the time of its death, the baby had both cocaine and metabolites of cocaine in its system. 21RP 51-52. This meant McCorvey must have ingested cocaine both just before the incident, as well as some earlier time. 21RP 51-52. McCorvey admitted she had been smoking "crack" cocaine not just that day but in fact on a regular basis for a "long time." 25RP 5-9. An officer who searched the clothes McCorvey was wearing at the time she was shot found in them some "rock-style," white suspected cocaine. 21RP 118.

In fact, McCorvey admitted, she sometimes sold a little "rock" herself, not as a "dealer" but as an intermediary for crack dealers who would then give her some cash or a little bit of crack in return. 25RP 10, 66. One of the men she did this for was Bishop Johns, also known as "Slim." 25RP 66-67. Johns was there the night of the shooting, using McCorvey's living room as his drug sales venue. 24RP 10-18. McCorvey said that, when she had started getting back into crack, people then knew they could come to her apartment to get high, so people were there all the time. 24RP 10-18. Because McCorvey had let Johns "set up shop" in her living room to sell crack before, people also knew to come to her apartment to get drugs from him. 25RP 13-15, 65.

Simpkins was just one of the strangers who came into McCorvey's house the night of the incident to buy and use crack cocaine. 25RP 13-21. Another person McCorvey said was there was a man she had also not previously met but heard someone call "Larry." 25RP 29-22, 68. McCorvey testified that she really did not interact with "Larry," instead staying in her bedroom while, as far as she knew, he was in the living

room. 25RP 22-24, 69.

At trial, McCorvey testified that, at some point, she heard “Larry” getting “loud and rude and obnoxious.” 25RP 22-24, 71, 120. She said he and Johns had argued for about 15 seconds about Johns telling Larry to leave. 25RP 22-24, 71, 120. She also testified that she heard something between the two men that “Larry” was looking for his “canister.” 25RP 30-31. She thought he sounded mad but admitted that she was still in the bedroom at the time, not in the living room where the men were. 25RP 30, 32.

On cross-examination, however, McCorvey admitted that, when specifically asked pretrial about whether she had seen “Larry” get into any conflicts with anyone or have any exchange of words with anyone, she had said she did not recall anything like that at all. 25RP 78. She had only said that “Larry” was intoxicated and being obnoxious, rude and a jerk about his missing canister. 25RP 98-99.

Johns, who was busy selling his drugs that night, said that he did not see “Larry” come in but that “Larry” and some “other dude named ‘Tab’” probably came in when Johns was in the bedroom with McCorvey and Simpkins. 23RP 21-24. According to Johns, at some point, “Larry” came into the bedroom and asked if he could speak to McCorvey, then went with McCorvey into the bathroom. 23RP 25-28. Johns initially said he heard nothing until McCorvey came out and sat on the bed and “Larry” returned to the living room. 23RP 28-30. According to Johns, McCorvey then asked Simpkins if she would take them to a local late-night deli shop, also saying something about there being some issue about cocaine being

missing. 23 RP 29-30. Johns said he could not say for sure what was said because he was busy getting “high” on crack. 23RP 29-30.

Later, Johns changed his testimony, now saying he had heard the bathroom conversation and remembered something about “Larry” looking for his “stuff” and McCorvey saying “you can search me.” 24RP 49. Johns was still clear, however, that there was not any “heated” argument between McCorvey and “Larry,” even taking great pains to try to convey that to the police when they wanted him to say such argument had occurred. 24RP 52-55. Johns was also clear that McCorvey did not act “scared” or anything like that after speaking with “Larry.” 23RP 72.

McCorvey flatly she never got into any argument or had any discussions like that with “Larry” at all. 25RP 62.

McCorvey and Johns also gave conflicting testimony about other things, such as Johns claiming he would not smoke with or sell crack to McCorvey, due to her pregnancy, and McCorvey admitting she had gotten her drugs from Johns that night, while more than 6 months pregnant. 23RP 16-18, 46, 25RP 65.

Johns testified that he stayed another 15 minutes in the bedroom after “Larry” left, and then left himself to go to another apartment. 23RP 72. Johns admitted, however, that he had previously said it was more like 30-45 minutes before he left and after the alleged dispute with McCorvey. 23RP 72. At the time he left, Johns said, McCorvey, Simpkins, “Tab” and “Larry” were all still there. 23RP 31-32.

According to Johns, he was about halfway across the street a few moments later when he heard what sounded like shots fired close together.

23RP 31-35. Johns did not stop or turn around, and testified that whatever was happening, it was none of his business, so he kept going to where he had been headed. 23RP 34-40.

After Johns left, McCorvey said, she went into the living room, turned over the music cassette tape and, when she turned away, was shot twice when the front door opened and someone fired a gun. 25RP 25.

The living room was dark, with no lights on in that room or the nearby kitchen area. 25RP 92. Instead, the only lights on were in the bedroom and somewhere outside. 25RP 92. McCorvey admitted that, when the shots occurred, she focused on the flashes from the muzzle. 25RP 33-35, 38-40. She nevertheless thought she could see that it was "Larry" who was shooting, although she could not say in which hand he held the gun or in which direction he was firing. 25RP 36. She said the man did not say anything when he shot and she thought she said, "Larry, what the fuck?" 25RP 38. She could hear Simpkins screaming but could not tell where Simpkins was. 25RP 39.

McCorvey could not recall hearing a gunshot and saw only two muzzle flashes. 25RP 39. The officer who arrived first testified that McCorvey was struggling to breathe and said she thought her baby would die. 19RP 83. That officer asked McCorvey multiple times "who did this" and McCorvey, who was able to speak at the time, did not say. 19RP 142-43. She also did not answer when asked the same question by people who tried to help her before police arrived, or when paramedics wanted to know. Five shell casings from the same gun were recovered at the scene. 21RP 61-62, 104.

Monte Moore was 19 years old and living in the apartment complex at the time of the incident. 27RP 22-24. He did not know McCorvey but knew "of" her and suspected that there was drug dealing going on at her apartment because of the "[h]igh traffic there and individuals going in and out." 27RP 59-60. He was home playing video games at about midnight or 12:30 a.m. when he heard a male voice saying "[b]itch," so he looked out the window. 27RP 28-30. He then heard a woman scream. 27RP 28-30. He saw the light on in the apartments where the noise seemed to be coming from and saw silhouettes against the blinds. 27RP 30, 33-35.

At the point, Moore heard multiple shots, which he thought were three initial shots and then two more. 27RP 34. After the first three shots, he saw three people come out the front door and then a man paused in the doorway, turned back and appeared to fire two more shots. 27RP 38. The man Moore saw was wearing a puffy, thicker jacket, blue jeans, a "doo rag," was African American, medium build, "very strong looking and agile," and "[s]ix foot plus." 27RP 61-62. He had told police at various times that he thought the shooter was five feet nine inches to six feet tall or six feet to maybe six foot two inches. 27RP 134.

Moore had seen the man he saw in the doorway at the apartments before, "numerous times." 27RP 64. The three people who came out got into a car which was a darker sedan, probably four doors. 27RP 48. The fourth man then got into the passenger side front seat and the car drove away. 27RP 49.

Moore got his shoes and pants on and went outside, across the

street to McCorvey's apartment. 27RP 54-55. He and another neighbor went inside and saw a black female, later identified as Simpkins, and McCorvey. 27RP 55. Both were on the floor and Simpkins was dead. 27RP 55. Moore and the other neighbor stayed until police arrived and ultimately Moore gave a statement telling them what he had seen. 27RP 59.

The lead detective on the case, former Pierce County Sheriff's detective Fred Reineke, first declared that, when he went to see McCorvey the day after the shooting, he had not talked to any eyewitnesses. 26RP 89. The officer conceded, however, that he had spoken to Moore shortly after the incident, the morning of January 9th, before the officer had seen McCorvey. 26RP 89. The interview with Moore was tape-recorded and the officer wrote a report about what Moore had said, but Reineke baldly declared at trial that he did not believe Moore had seen the shooting. 26RP 90.

Reineke never followed up or did any further interviews of Moore and did not ever show Moore any montage of people to have him try to identify the four suspects he had seen. 26RP 137.

At trial, Moore was asked about whether he had his glasses on that night and he did not recall. 27RP 102-103. He said he usually wore his glasses to see distances and, while it was possible he looked out without his glasses when he heard the first yell, he also thought it was more likely he would have grabbed his glasses if he did not have them on. 27RP 141. He had been told by the manager to "keep an eye out" for McCorvey's apartment so he would have wanted to see what was going on. 27RP 104-

105. In any event, Moore said plainly, he was not claiming to have seen the full facial features of anyone and did not recall anything being “fuzzy” or anything like that. 27RP 105-107.

Rickey Owens was discharged from the army in 1979 after an altercation with another soldier. 25RP 129. Since, then he had gotten involved in “drinking, doing drugs” and being “with the wrong people at the wrong time.” 25RP 129. He was using crack every day and had lost his wife and family by the time he went to McCorvey’s the night of the incident to get crack. 25RP 131. Owens said he had called his usual supplier but they were out. 25RP 134, 140. His friend said they should go to see someone named “Larry” at McCorvey’s apartment, so they did. 25RP 134, 140.

Owens repeatedly said that he arrived at the apartment and went to buy the drugs at around 8 or 9 p.m. at night. 25RP 134, 140. He told police at one point that he had met “Larry” at about 7 or 8 p.m. 26RP 11. He was confident that, whatever time it was, it was before midnight. 25RP 169.

According to Owens, when they arrived, he knocked on the door, asked for “Larry,” and a man then came out. 25RP 138-43. Owens said he showed the man a bottle of liquor and arranged to exchange it for crack. 25RP 138-42. A woman’s voice then said “[y]ou got to get the hell out of here,” so Owens left. 25RP 138-39, 142-43.

When he spoke to police just after the incident, Owens said nothing about trading a bottle of alcohol for drugs. 26RP 129-30. The officer who talked to Owens admitted that, when he interviewed Owens,

the officer already knew that there were some fingerprints found on a bottle of gin in McCorvey's apartment. 26RP 133-34. The officer conceded that he would have thought it important to memorialize if Owens had said anything about such a bottle. 26RP 133. Nothing like that was included in the officer's report, and the officer admitted Owens said nothing of the sort. 26RP 129-33.

At trial, Owens testified that, right after he left the apartment, as he was walking towards his car, he heard someone walking sort of behind him say something like "[s]omebody got my shit, or got my sack[.]" 25RP 145. Owens thought the person who made that comment was the man he knew as "Larry," who Owens said then went to a white and green car, a "Cutlass," and pulled out a silver pistol. 25RP 145-46, 171, 26RP 9. Pretrial, when asked where the man got the gun from inside the car, Owens admitted that he had not paid attention. 25RP 145-46, 173-74. By trial, however, Owens had more details, locating it in the front seat driver's side. 25RP 145-46, 173-74. He also had more details about the car, which he previously could not describe at all. 26RP 7-10.

When speaking to police shortly after the incident, Owens never said anything about someone sort of walking out of the apartment behind him, nor did he mention hearing someone saying something about people having his stuff. 26RP 136.

Owens admitted he was not physically "real close" to the man that he saw that night, and there was only one streetlight across the street. 25RP 173. Like Johns, once he saw the gun, Owens figured it was not his business. 25RP 173. Because he had already gotten the drugs he wanted,

Owens decided not to “be snooping around and getting noseey,” so he went on his way. 25RP 149.

Owens came back about an hour later to try to buy some more crack. 25RP 154. He initially said that, right after he arrived, some lady pointed him out to police, who had already arrived to investigate. 25RP 150. Owens then described going back to his car where he was approached by and talked to police. 25RP 150-51.

When confronted, however, Owens admitted that he had, in fact, arrived back at the complex and gone upstairs to talk to his friend - Johns - before Owens spoke to police. 25RP 174-75, 26RP 7. And Owens admitted that he had told Johns that he had spoken to someone in the apartment and exchanged a bottle of Tanqueray with “a young fella,” before either man spoke to police. 25RP 177, 26RP 8.

Initially, Owens tried to claim that Johns was not there and that they were not “good friends” but just knew each other slightly. 25RP 164. Ultimately, however, Owens admitted that they were “good friends” but claimed they did not hang out together. 25RP 166, 26RP 17.

Owens disputed that he had gotten into any argument with “Larry” about whether the drug/alcohol exchange was fair. 25RP 177, 26RP 7. He denied that it had occurred and also denied telling Jones that had happened or that, at some point, “Larry” had gone to the trunk of his car and flashed a gun at him. 25RP 8-9. An officer who interviewed Owens shortly after the incident, however, said that Owens had reported arriving at about 7 or 8, talking with “Larry” outside the apartment and, at some point, watching as “Larry” got a “blue” gun from the trunk of his car. 26RP 134. And

Johns testified that Owens had, in fact, told Johns those very things; that Owens was unhappy with “Larry” for not giving Owens what he felt he deserved for the liquor, that they argued about it, and that “Larry pulled out his piece” from the trunk. 24RP 13, 27RP 67, 75-77.

Indeed, Johns admitted that his conversation with Owens prior to talking to police was such that Johns admitted that some of what Johns said in his own testimony about what had happened that night was stuff he might have learned from being told by Owens, rather than perceiving it himself. 24RP 52-53.

Owens initially denied having smoked crack “throughout the day.” 25RP 162. On cross-examination, however, when confronted with his previous testimony, Owens admitted that he had actually smoked drugs a number of times that day. 25RP 163. Police never asked either Owens or Johns if they had been smoking crack the night of the incident. 26RP 139.

The day after she was shot, McCorvey was in the hospital, on a breathing tube and morphine, unable to speak and just out of surgery, when Reineke showed her several photographs of men who looked very different from one another except for being black males. 26RP 36, 85, 92. The officer showed her each of six different pictures, asking, “is this the man that shot you?” 26RP 40. McCorvey ultimately picked out the photo of a young man named Larry Tarrer as the assailant by nodding her head. 26RP 40-41, 92.

Reineke admitted that McCorvey had given no description of the assailant, so Reineke thus had not tried to get a bunch of photos of people who looked similar for the identification procedure. 26RP 85-855.

Instead, Reineke had started with a photo of Tarrer, who police suspected was involved, then filled in with “as many photographs of known acquaintances” of McCorvey as possible, on the theory that the perpetrator was probably someone she knew at least slightly. 26RP 23.

McCorvey admitted that, in a previous proceeding, she had not been able to identify Tarrer as the man who had shot her. 25RP 96. She conceded that she had changed her testimony by the second trial because she recognized him “[j]ust because of the earlier proceedings[.]” 25RP 96.

In addition to Tarrer, McCorvey picked out someone else she knew, a man named “Benny Shell.” 26RP 156.

Reineke also asked McCorvey if there was a large, black male at the apartment with “Larry” at the time of the shooting, too. 26RP 94. McCorvey then got very agitated, tried to speak, and actually got so worked up the hospital staff had to come in and sedate her. 26RP 94.

Reineke admitted that, after McCorvey made her choice, the officer might have told her that the man she had picked out was named Larry Tarrer. 26RP 92. In his report, the officer said that, when he showed McCorvey the pictures, he asked if each was “Larry Tarrer.” 26RP 92.

Two days after the initial identification, Reineke went with another officer back to McCorvey’s hospital bed and repeated the identification procedure, then taking a tape-recorded statement as McCorvey now had the tube out and could talk. 26RP 44-45. Viewing the same pictures, McCorvey again identified Tarrer. 26RP 46. McCorvey was still heavily sedated and actually kept either falling asleep or trying to fall asleep during the interview, so that she had to be woken or reminded to wake up

several times. 26RP 120.

McCorvey did not have any personal recollection of the procedures or talking to the officers while she was in the hospital and actually thought she had spoken the first time she interacted with police. 25RP 53-56.

Owens was told by the detective that “something happened” and shown the same photos with completely different looking people. 24RP 157, 26RP 71. He picked out a photo of Tarrer as the person he had seen with the gun that night. 25RP 158. Owens had given the description that the man was a “light-skinned” black male only. 26RP 152.

Nothing in Reineke’s reports indicated that he advised either Owens or McCorvey, prior to viewing the lineup, that the person involved might or might not be in the pictures that they were being shown, although the officer claimed he had done so. 26RP 84.

Tarrer’s fingerprints were found on the bottle of gin found in the apartment. 21RP 74. Tarrer explained that he had handled a bottle of alcohol fairly recently, when he held the one Johns had while Johns was selling Tarrer drugs. 28RP 34-35, 89. Johns, however, claimed he was not a “Tanqueray” drinker, the brand of the bottle found. 23RP 50-53.

A state’s expert admitted that it was not possible to “date” a fingerprint and that a print on a “transitory” item like a bottle could have been touched in one place and brought to another. 21RP 131-33.

At the second trial, McCorvey suddenly declared that she had seen Tarrer take a drink out of a bottle while in the apartment the night of the incident. 25RP 100, 120. In all of her pretrial interviews and even at the previous proceeding, however, she had never once said anything of the

sort. 25RP 100, 120. And she admitted that she had somehow neglected to mention this important fact in multiple interviews with police, prosecutors and even though she had been specifically asked in the defense interview whether there was anything else they had not asked about that she recalled of the incident. 25RP 120. McCorvey admitted that she knew Johns to be not only a dealer and drug smoker but also a drinker and that he drank at her apartment. 25RP 64.

A state's expert admitted that it was not possible to "date" a fingerprint and that a print on a "transitory" item like a bottle could have been touched in one place and brought to another. 21RP 131-33.

Tarrer, who was 17 at the time, had a friend who had started selling crack for extra money and Tarrer decided to do it, too. 28RP 18-19. He explained that he did not trade crack for anything other than money and would not have traded for alcohol, which was worth less than the crack. 28RP 40. Tarrer had a roommate who was over 21 so he had no need to get alcohol from someone in exchange for more valuable drugs. 28RP 41. Tarrer mostly drank something called "Old English" anyway, and said he had actually never once exchanged his drugs for anything but money. 28RP 65. Tarrer himself did not smoke crack. 28RP 63.

Tarrer unequivocally declared that he did not shoot McCorvey or Simpkins. 28RP 41. He had been met Johns, who was Tarrer's supplier, at some other place. 28RP 22-24. Tarrer and his friend had gone there to try to sell to people who "obviously, looked like they smoked crack[.]" 28RP 22. Johns ran into them and told them they had "no business up in here," letting them know "[y]ou don't come to somebody else's place like

that and try to sell dope,” that it was “his territory.” 28RP 22. Tarrer said Johns was very “aggressive and hostile” and said something about “[y]ou can get hurt.” 29RP 22. Tarrer said he and his friend were young and really did not know what they were doing. 28RP 23.

A few days later, he ran into Johns again and Johns said he was not mad and that he had a lot of good crack at a good price that they could purchase from him. 28RP 23. Johns then became their supplier and Tarrer started making more money, buying a car, moving into his own place with friends and other things. 28RP 24.

Tarrer testified that he had been to the apartment complex exactly twice, when Johns said that was where he wanted to meet to do a deal. 28RP 24. Once, it was after Christmas of the previous year and then next time was a few weeks before the incident, when he knocked on the door, Johns came to the door and said “[n]ot here” and they ended up in Johns’ car. 28RP 33-34. Tarrer said Johns was drinking at the time and handed him a bottle at one point to hold while Johns pulled out a “bigger sack of dope.” 28RP 34. Tarrer said that Johns had a bottle with him most of the time and Tarrer had previously held one, taking sips from it when drinking with Johns. 28RP 34-35, 89. Tarrer did not know much about the bottle except he recalled holding it briefly during that deal. 28RP 72-73.

Tarrer also explained that nobody would put their drugs in a canister because it would not be easy to carry or get rid of if needed. 28RP 35.

Moore said the man he saw pull the gun and shoot into the apartment grabbed it from the left side of his body, using his right hand.

27RP 39. Tarrer is left handed. 28RP 36.

An officer testified that Tarrer's car had different colors of paint inside the trunk and on the outside, and a different license plate on the front than than on the back when it was impounded. 21RP 73-75. Tarrer explained that the front plate had gotten lost and instead of trying to get a new one he had just had a friend of his put an invalid or fake license plate on the front. 28RP 38. He also said his friend and roommate, Bruce or "Snoopy" had wrecked the car while being "drunk and stupid," sometime in late October or early November, so the whole front end was "smashed in." 28RP 27, 54. Tarrer had gotten it out of impound and had it repaired and his friend was supposed to help pay to get it repainted. 28RP 29. The car was initially sky blue although at some point it had a white hood and white fender. 28RP 50, 52. It was painted black before Christmas of 1990 and the paint job was bad, with an "orange peel" effect. 26RP 53, 65-67.

D. ARGUMENT

1. THE PROSECUTOR'S REPEATED, PERVASIVE ACTS OF FLAGRANT, PREJUDICIAL MISCONDUCT AND CONSTITUTIONALLY OFFENSIVE MISCONDUCT UNBECOMING A QUASI-JUDICIAL OFFICER COMPEL REVERSAL

Prosecutors enjoy special status as "quasi-judicial officers." See State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Along with the status, however, come responsibilities. Id. One of those is to ensure that a defendant receives a constitutionally fair trial. See, State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011). Another is to seek a verdict free of prejudice and based on reason and law. Id.; see Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935),

overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). And another is that a prosecutor must act in seeking justice instead of making himself a “partisan” who is trying to “win” a conviction at all costs.” See State v. Rivers, 96 Wn. App. 672, 981 P.2d 16 (1999).

In this case, the prosecutor utterly failed in all of those duties. Instead, he repeatedly engaged in serious, flagrant, prejudicial, ill-intentioned and even constitutionally impermissible misconduct. This misconduct completely permeated the entire case and deprived Tarrer of a fair trial. Further, to the extent this Court could find any of the misconduct to which counsel did not object was “curable,” counsel was ineffective in failing to make the attempt to have such a “cure” applied to his client’s case.

a. Misconduct: shifting, minimizing and misstating the constitutionally mandated burden of proof

i. Relevant facts

In closing argument, the prosecutor discussed the burden of proof beyond a reasonable doubt, saying he accepted that burden. 29RP 42. He then said he would not read the whole “reasonable doubt” instruction out loud but would just tell jurors what it “says” and what in it was “important[.]” 29RP 42. One important thing, he said, was that it provided:

“A doubt for which a reason exists.” And that means that at the end of this trial, **if you were to find the defendant not guilty** . . . and you go home and your family and friends say, hey, is that trial finally over and you say, yes, it is. What did you do. We found the defendant not guilty. You did? How come? Well, we

had a reasonable doubt or **I had a reasonable doubt and then the person says to you, what was it. You have to answer that question.**

29RP 44 (emphasis added). At that point, counsel objected, asking to be heard outside the presence of the jury. 29RP 44. Counsel then pointed out that the prosecutor's "Powerpoint" computer presentation was displaying a slide which said:

WHAT IT SAYS

A doubt for which a reason exists

If you were to find the defendant not guilty, and you were asked why, you have to say, "I had a reasonable doubt."
What was the reason for your doubt?" "My reason was ____[.]"

29RP 44; CP 680. Counsel said that the prosecutor's argument impermissibly shifted the burden to Tarrer "to give them a reason" i.e., disprove the state's case. 29RP 45. The prosecutor admitted having read recent caselaw condemning a similar argument but nevertheless claimed that it was proper for him to argue to the jury that "if they find him not guilty they have to be able to say their reason." 29RP 46. Counsel objected that the jury did not have to "come up with a reason" but the court overruled. 29RP 46.

Back in front of the jury, the prosecutor told them that he was not saying they should start with "the fact that he's guilty and then only come back with a not guilty verdict if you can fill in this blank[.]" 29RP 47. Instead, the prosecutor said, what he was saying was that the "only way" the jurors could "not find beyond a reasonable doubt this defendant is guilty" or "come out and return a verdict of **not guilty**" was if they could

say the state had not met its burden “**and** you find that you **have reasonable doubt.**” 29RP 48-49 (emphasis added). He said jurors could not rely on arbitrary reasons but had to have “a reasonable doubt from the evidence or lack of evidence,” then went on:”

if you were to find the defendant not guilty and folks asked you why **you would have to explain it to them.** That’s what it means: A doubt for which a reason exists.

29RP 48-49 (emphasis added).

The prosecutor also repeatedly described the question of “lack of evidence” as “do you have enough” not “do you wish you had more.” 29RP 49. He called the jurors “essentially puzzle builders,” saying they were to evaluate both sides and come to a conclusion about “what happened the night of January 8 and 9.” 29RP 49.

At that point, the prosecutor told the jury that each juror would have “a different level of certainty” that they would require before they could say, “I am convinced beyond a reasonable doubt.” 29RP 50. The relevant “Powerpoint” slide provided:

BEYOND A REASONABLE DOUBT

NOT A COMMON PHRASE YOU SAY

A COMMON STANDARD YOU APPLY

IT IS A SERIOUS DECISION THAT YOU CAN ONLY REACH AFTER YOU CONSIDER ALL THE EVIDENCE

EACH OF US HAS A LEVEL OF CERTAINTY WE REQUIRE BEFORE MAKING A SERIOUS DECISION, BEFORE SAYING “I HAVE ENOUGH” TO ACT ON THIS

CP 688 (emphasis in original).

The prosecutor then said, “[t]here is no percentage that gets

attached” to ensure that a juror is convinced beyond a reasonable doubt, that “[n]o number gets attached to beyond a reasonable doubt,” because it was simply “a firmly held conviction.” 29RP 50. A moment later, the prosecutor declared:

Essentially what it means is this: When you’re at home and you’re trying to reach a decision about your family, you are going to not make that decision unless you’re convinced beyond a reasonable doubt it’s the right decision to make. For example, child care. Each one of us has a different standard at which point we will allow someone else to care for our children, especially when we’re talking about, for example, a daycare facility. You will research the daycare facility. How long has it been in business? What’s its reputation. Do I know anyone else who is there? Who are the employees? Do I know any of them? Do they let other younger people have contact with the kids? What about the other kids in the daycare? What do we know about them? What do we know about their families?

All of these things are factors you’re going to consider . . . If you do, you have reached a level of being convinced beyond a reasonable doubt that it’s the right decision to make. It doesn’t mean you won’t have questions in your mind and that you won’t think to yourself I hope this is the right decision. But it is the level of certainty you have before you make a serious important very, very personal decision.

29RP 52 (emphasis added).

Later, in rebuttal closing argument, the prosecutor asked jurors if their high school graduation, wedding or the birth of their children had “happened” even though the juror might not be able to say all of the details if asked years later. 29RP 94. The prosecutor then asked if jurors could “find beyond a reasonable doubt” that they had been selected as jurors even if they did not recall specific:

Better yet, how about this trial; you folks came here on what day? When you go back there, ask yourselves if you can remember the day and the date that you first were in court. How many others were here with you? Where did you sit? What were the names of

the other people that were around you at the time. **I'll bet you're not going to be able to find beyond a reasonable doubt the answer to all those questions. And, yet, I would ask you overall, could you find beyond a reasonable doubt that you were involved as a juror in this cause.**

29RP 95 (emphasis added).

At that point, the prosecutor then asked if jurors had “any reasonable doubt about whether or not” two planes had smashed into the World Trade Center Twin Towers in New York City on September 11, 2001, and whether the jurors would “doubt” someone who was actually there if they said it had happened even though they did not have all the specifics. 29RP 96. Two “Powerpoint” slides were projected, including one which went into details, asking such things as “[w]hat tower was hit first,” “[w]hat floor did each plane hit” and “[h]ow many died in each tower,” CP 686. One also asked jurors, “[d]o you have reasonable doubt that two airplanes were flown into the WTC[?]” Id.

After that, the prosecutor queried, if “asked to find beyond a reasonable doubt the style and color of tie that I wore every single day in this trial, could you do it?” 29RP 96. He then told the jury he was not going to use his “puzzle” analogy and demonstration as he had thought, as an “illustration of beyond a reasonable doubt,” but instead as “an example of how you have to keep the question in mind for what you are doing.”

29RP 97. He then went on:

If you're told that you're supposed to figure out what city this skyline is and then you get part of the picture, so you get some evidence that's presented and it includes a mountain, you're going to think to yourself, maybe it's in the [sic] west Tacoma. Then you get more evidence and it's a downtown area. Now it's maybe Portland, Seattle or Tacoma. And then you get some more

evidence. And that evidence shows you something that is unique to Seattle. **Can you find from this picture whether or not this is Seattle or Tacoma? Seattle or Portland? The question is what makes it a determination of whether you can find beyond a reasonable doubt.**

This does help to describe the beyond a reasonable doubt standard though, because the last piece of this puzzle is a giant piece of this puzzle, but it comes in as individual pieces of evidence. . . . This is beyond any doubt. Beyond a shadow of a doubt or beyond all doubt. That's not what's required in a criminal case.

29RP 98 (emphasis added).

- ii. The arguments were serious, constitutionally offensive misconduct

All of these arguments were serious, prejudicial and even constitutionally offensive misconduct. Under both the state and federal constitutions, as part of the mandate of due process, the prosecution has the burden of proving each element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). reversed on other grounds on petition for writ of habeus corpus sub nom Hanna v. Riveland, 87 F.3d 1034 (9th Circ. 1996); 14th Amend.: Art. 1, § 3. It is misconduct for a public prosecutor, with all the weight of his office behind him, to mislead the jury as to the relevant law, especially in a way which deprives a defendant of his full rights. See, e.g., State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

Here, the prosecutor repeatedly misstated the crucial law regarding the prosecution's constitutionally mandated burden of proof, in multiple ways. First, he committed such misconduct when he repeatedly compared

the degree of certainty jurors would need to find that the state had proven guilt beyond a reasonable doubt with the degree of certainty jurors would need to make a decision to act on matters in everyday life. Nearly a year before this trial, this Court condemned just such argument. See State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273, review denied, 170 Wn.2d 1002 (2010).

In Anderson, this Court declared that a “prosecutor’s comments discussing the reasonable doubt standard in the context of everyday decision making” were “improper because they minimized the importance of the reasonable doubt standard and of the jury’s role in determining whether the State had met its burden.” 153 Wn. App. at 431. The prosecutor in Anderson argued to the jurors that, while they do not use the phrase “beyond a reasonable doubt” every day, the standard of proof is a standard jurors apply “every single day,” in such things as deciding to have elective dental surgery or whether to leave a child with a babysitter or change lanes on the freeway. 153 Wn. App. at 425. By comparing the certainty required to find guilt beyond a reasonable doubt with the certainty people use when making even very serious, significant personal decisions, this Court held, the prosecutor had “trivialized and ultimately failed to convey the gravity of the State’s burden and the jury’s role in assessing its case[.]” Anderson, 153 Wn. App. at 427-29.

Many other courts have also found such arguments to be an improper minimization and misstatement of the prosecutor’s constitutionally mandated burden of proof. See Commonwealth v. Ferreira, 364 N.E. 2d 1264, 1272 (Mass. 1977); Scurry v. United States,

347 F.2d 468, 470 (U.S. App. DC 1965), cert. denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). As the highest court in Massachusetts has said, “[t]he degree of certainty required to convict is unique in the criminal law,” so high that people not only do not “customarily make private decisions” using the standard but that it might not even be possible for them to do so without causing great inertia in society. Ferreira, 364 N.E.2d 1264, 1727 (Mass. 1977). And even though a “prudent person” who was deciding “an important business or family matter would certainly gravely weigh” that decision, that person still would not necessarily “be convinced beyond a reasonable doubt that he had made the right judgment.” Scurry, 347 F.2d at 470.

Another problem with such comparisons is that they focus on the degree of certainty jurors would have in order to be willing to take some action instead of what would make them “hesitate to act.” Anderson, 153 Wn. App. at 428-29. The U.S. Supreme Court has condemned using “willing to act” language, finding it far more proper to talk about the degree of certainty which would make someone “hesitate to act.” See Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954). Since Holland, in fact, courts have “consistently criticized” the “willing to act” language, noting that people are willing to take great risks in their personal matters and may even take action in them sometimes on a whim. See Tillman v. Cook, 215 F.2d 1116, 1126-27 (10th Cir. 2000). This Court has similarly condemned comparing the certainty jurors need to be convinced of guilt beyond a reasonable doubt with the certainty they would need to take action in everyday, even important, matters. See

Anderson, 153 Wn. App. at 427-29; see State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011).

Here, again and again, the prosecutor made just these same offensive arguments. Proof beyond a reasonable doubt was described to the jury as “A COMMON STANDARD YOU APPLY[.]” CP 688 (emphasis in original). The prosecutor’s computer presentation told jurors that deciding the case - and deciding guilt - was essentially the same as making a serious, personal decision. CP 688. Jurors were told that “beyond a reasonable doubt” was the same standard they used when making a decision about their family. 29RP 51-52. The decision jurors faced was compared to the decision about whether to let someone care for your child. 29RP 52. And the jury was told that it did not matter if jurors still had “questions in your mind” and might think “I hope this is the right decision,” because the degree of certainty they needed to decide the case was “the level of certainty you have before you make a serious, important very, very personal decision.” 29RP 52. Further, after describing jurors as “puzzle builders,” the prosecutor then compared the degree of certainty required for conviction with the degree of certainty jurors would need to figure out what picture was depicted on a puzzle. 29RP 98.

These improper comparisons to everyday decisionmaking were serious, prejudicial misconduct under Anderson. See Anderson, 153 Wn. App. at 431-32; see also Johnson, 158 Wn. App. at 684 (reversing based upon flagrant, prejudicial misconduct including making a “puzzle” comparison). By comparing the degree of certainty jurors would need to be convinced of guilt beyond a reasonable doubt with the degree of

certainty they would need to make even important personal decisions and to act rather than hesitate, the prosecutor seriously, improperly misstated and minimized his constitutionally mandated burden of proof.

He went even further in trivializing and minimizing his burden of proof when he made the argument that jurors could “find beyond a reasonable doubt” that certain events had happened even if they did not have all the details they wanted. 29RP 94-95. Citing events such as the jurors’ high school graduation, wedding, birth of their children or even being selected as jurors, the prosecutor then asked jurors if they would believe that those things had occurred even if they did not have a perfect memory of all the details. 29RP 94-95.

But all of those things are things the jurors would have personally experienced. Thus, jurors would **know**, based on their own experience, whether those things happened, regardless of whether there was “evidence” to prove them other than those perceptions. And the degree of certainty jurors would have in such a situation would still not be certainty “beyond a reasonable doubt” as that term is uniquely defined in our criminal law. Further, these arguments improperly placed jurors in McCorvey’s shoes and asking them if they would doubt *their own experiences* even if they could not provide all the details later.

Still more egregious was the prosecutor’s invocation of the specter of the most horrific and serious terrorist attack ever to have happened on U.S. soil:

September 11, 2001, two airplanes flew into the World Trade Center in New York. I don’t know if any of you were there, but I believe probably none of you were there. **Do you have any**

doubt? Do you have a reasonable doubt about whether or not that happened?

If you were talking to someone who was actually there, and you asked them questions like, what tower was hit first? What airplane was being flown in each plane? What type of airplane was each one? What floor did you see the plane hit? Which tower went first? How many died in those towers? All of those things are questions that individuals are not going to have the specific answers to. **Would you doubt the person if they said two airplanes flew into the World Trade Centers in New York?**

29RP 96 (emphasis added). And these comments were emphasized by two Powerpoint slides. See CP 686.

Thus, the prosecutor again minimized and misstated his burden of proof. Again, he invoked an out-of-court situation when jurors would feel personally certain about something. Again, he then equated that feeling of certainty with the certainty required to believe the state had proven its case beyond a reasonable doubt. Even worse, the prosecutor effectively equated doubting the state's version of events with doubting that the 9/11 attacks had occurred.³

It is completely improper for a prosecutor to inject highly inflammatory events into a case where there have absolutely no relevance. See, e.g., People v. Barnes, 437 N.E. 2d 848 (Ill. 1982). Thus, in Barnes, an argument rebutting "good character" evidence by the defendant, in which the prosecutor declared that every murderer has someone who likes him and John Wayne Gacy's mother would have said he was a "good

³The prosecutor's closing argument then raised a patriotic theme, with the prosecutor projecting the words "THIS COUNTRY" onto the screen, declaring that "this country is the greatest country in the world" because "[w]e have rights and freedoms that no other country can possibly compare with," and then telling the jury that Tarrar had "enjoyed every single one of those rights" such as the right trial and now should enjoy his "final" right of a "true and just verdict" of "guilt." 29RP 101-102.

body.” 437 N.E. 2d at 852. The appellate court found that the comments a “clearly improper” “effort by the State to inject into this case the image of a mass murderer whose case was fresh in the public mind.” Id.; see also, Hope v. State, 732 P.2d 905, 907 (Okl. Cr. 1987) (raising the names of legendary or notorious criminals improper). And courts have similarly found it misconduct to refer to or compare a case to famous events. See United States v. Thiel, 619 F.2d 778 (8th Cir.), cert. denied sub nom Thiel v. U.S., 449 U.S. 856 (1980) (reference to the Holocaust and suicides in Guyana); State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993) (comparing the “war on drugs” to the recently fought Gulf War).

These rulings reflect the prosecutor’s duty to refrain from igniting the passions and prejudices of jurors and the further duty not to invite them to decide the case on the improper basis of strong emotions. See, e.g., State v. Belgarde, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988). Here, there was absolutely no proper purpose for invoking the national tragedy of 9/11 in this completely unrelated criminal trial. It could only have been an attempt by the prosecutor to exploit the incredibly profound and deeply felt emotions that virtually every juror and indeed American has about the horrific events of that historical, tragic and deeply troubling day for some perceived potential advantage.

Notably, these comments occurred in a trial where the prosecutor knew that the defendant was Muslim and thus, unfortunately, potentially a target of strong feelings by anyone who wrongly held against all members of that faith the acts of people who committed the 9/11 atrocities purportedly in aim of that faith. See, e.g., State v. Roque, 213 Ariz. 193,

141 P.3d 368 (2006) (defendant, distraught by September 11, 2001, attacks, shoots and kills people who he thought appeared Muslim); 19RP 1-66.⁴ While the prosecutor never said anything to jurors about Tarrer's religion, the fact that he raised the irrelevant 9/11 attacks in this case at all was already unconscionable, but in the context of this case, even more troubling.

This was not a case about terrorists. It was not a case about 9/11. These arguments of the prosecutor not only misstated and minimized his constitutionally mandated burden. They were completely unprofessional and unbecoming a quasi-judicial officer. The specter of 9/11 did not belong in this already highly charged murder case. This Court should so hold.

As if these arguments were not enough, the prosecutor misstated and minimized his burden of proof in another way, by repeatedly arguing that the jurors would have to come up with a specific reason and "fill in the blank" with a reasonable doubt in order to find Tarrer "not guilty." It is misconduct to tell jurors they had to be able to articulate a reason to find the defendant not guilty. Anderson, 153 Wn. App. at 431. Instead, "[t]he jury need not engage in any such thought process." Anderson, 153 Wn. App. at 431. As one court has noted, "[j]urors may harbor a valid reasonable doubt even if they cannot explain the reason for the doubt." State v. Medina, 147 N.J. 43, 52, 685 A.2d 1242, cert. denied, 519 U.S.

⁴In fact, everyone who read the News Tribune newspaper the morning of trial knew Tarrer was Muslim - including a juror who was allowed to stay on the panel - because his picture was featured in that paper as one of the Muslim inmates suing the county over violation of religious rights in jail. 19RP 1-15.

1135 (1996); see also, State v. Banks, 260 Kan. 918, 928-28, 927 P.2d 456 (1996).

Indeed, the language of the reasonable doubt instruction that reasonable doubt is “a doubt for which a reason exists” was only found proper because, in context, it did not require the jury to come up with specific reasons for their doubts. State v. Thompson, 13 Wn. App. 1, 5, 533 P.2d 395 (1975). Although the phrase itself was problematic, this Court relied on the fact that the entire instruction in which that phrase was contained “does not direct the jury to assign a reason for their doubts but merely points out that their doubts must be based on reason, and not something vague or imaginary.” Id.

Jurors do not have to be able to articulate a reason to find a defendant not guilty and in implying to the contrary a prosecutor effectively ignores the presumption of innocence. Anderson, 153 Wn. App. at 431. Further, such argument improperly implies that the defendant “was responsible for supplying such a reason in order to avoid conviction.” Id.; see also, State v. Venegas, 155 Wn. App. 507, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010).

In this case, the prosecutor repeatedly told the jurors that they were required to be able to come up with a specific reason why if they found Tarrer not guilty. He told them that, if they acquit, they would have to be able to “answer” if asked to state the “reasonable doubt” that they relied on. 29RP 44. He told them they had to be able to say “I had a reasonable doubt” and then articulate that doubt. CP 680; 29RP 42-49. He projected a “Powerpoint” telling jurors that the reasonable doubt instruction defines

such doubt as a “doubt for which a reason exists” and then went further, telling jurors, “[i]f you were asked to find the defendant not guilty, and you were asked why, you **have to say**” not only that they had a reasonable doubt but that the reason was “_____.” CP 680-81.

And even though he tried to minimize that argument after counsel’s objection was overruled, the prosecutor’s efforts, in fact, had the contrary effect, because he told jurors the “only way” they could “not find beyond a reasonable doubt this defendant is guilty” or “come out and return a verdict of not guilty” was to find the state had not met its burden **and** be able to explain what that doubt was. 29RP 44-6. Thus, even after he “corrected” his argument, the prosecutor still told the jury they had to come up with a specific reason to doubt the state’s case in order to acquit. There is no functional difference between the “fill in the blank” argument here and the one this Court has now repeatedly condemned. See Venegas, 155 Wn. App. at 524; State v. Evans, ___ Wn. App. ___, ___ P.3d ___ (2011 WL 4036102). The trial court erred in failing to sustain counsel’s objection and allowing this serious, constitutionally offensive misconduct to continue.

Over and over, the prosecutor in this case misstated his burden of proof as something far less than was constitutionally required. He then told the jury that they had to be able to come up with a specific reason to doubt the state’s case in order to acquit. And he invoked the single most horrific terrorist attack on U.S. soil, despite its complete irrelevance to this case. This was serious, prejudicial and constitutionally offensive misconduct which urged the jurors to convict based on far less than the

constitutionally mandated burden. This Court should so hold.

b. Misconduct: deciding/declaring/searching for the “truth” and who is lying

i. Relevant facts

In the beginning of initial closing argument, the prosecutor told jurors, “[a] **criminal trial is supposed to be a search for the truth.** It’s the way that we establish the identity of persons who establish [sic] crimes and it’s the way we establish their actions.” 29RP 8 (emphasis added). At the same time that this argument was being made, an image from the “Powerpoint” computer presentation the prosecutor was projecting saying “CRIMINAL TRIAL” and “A SEARCH FOR THE TRUTH.” CP 661-62.

The prosecutor went on to say that the “goal of closing argument is to point you toward a just verdict. Notice that I did not say just a verdict. I said ‘a just verdict.’” 29RP 11. An image with that language was also projected. CP 661-62. The prosecutor then declared:

The word verdict itself comes from a Latin word which is verdictum, and verdictum means **declare the truth. So by your verdict in this case, you will be declaring the truth as to the charges in this case. And you will declare the truth about whether Larry Tarrer committed murderer[sic], attempted murderer [sic] and manslaughter.**

29RP 11 (emphasis added). The images projected at the time indicated: “VERDICT[.] VEREDICTUM[.] TO DECLARE THE TRUTH,” and “BY YOUR VERDICT, YOU WILL DECLARE THE TRUTH AS TO THE CHARGES IN THIS CASE. YOU WILL DECLARE THE TRUTH ABOUT WHETHER LARRY TARRER COMMITTED MURDER, ATTEMTPED [SP] MURDER, AND MANSLAUGHTER.” CP 662-63 (emphasis in original).

A few minutes later, the prosecutor told the jury that, because Tarrer denied committing the crime but McCorvey had identified him, the jury had to “**determine who is telling the truth;**” that there were no “shades of grey” and one or the other thus was lying. 29RP 29 (emphasis added). The prosecutor said that McCorvey’s “testimony under oath” identifying Tarrer as the shooter and Tarrer’s testimony that he did not do it “**cannot both be the truth.**” 29RP 30 (emphasis added). A slide in the “Powerpoint” presentation asked, “WHO IS TELLING THE TRUTH,” noting that McCorvey said Tarrer had done it and Tarrer said he had not, so they “CANNOT BOTH BE TRUE” and “ONLY ONE OF THEM IS BEING HONEST WITH YOU.” CP 677 (emphasis in original). The prosecutor then argued about the kinds of things the jury should consider “in determining whether a witness is **telling you the truth.**” 29RP 31 (emphasis added).

At that point, the prosecutor asked what “interest” McCorvey would have in identifying the wrong person as the one who had committed the crime. 29RP 31-32. He said that the fact that she had come to court and testified and identified Tarrer was proof he was guilty because she swore to tell the truth and “faced the guy who shot her.” 29RP 33. A slide reiterated all of those points. CP 678.

A little later, regarding Tarrer’s testimony that he had previously handled a bottle when he was with Slim, the prosecutor said, “I can’t stop you from buying it,” but that he could “remind you folks that you all said, yes, we have common sense.” 29RP 38. A moment later, he implied that jurors would be violating their “oath to do justice” if they found Tarrer

credible. 29RP 39.

After more argument, the prosecutor returned to the “declare the truth” theme, telling jurors they could “render a **true verdict**,” which was a verdict “that the defendant is guilty,” even if jurors did not have all the answers to all their questions. 29RP 50 (emphasis added). The prosecutor also described the jurors’ oath as swearing to “render a **true verdict** according to the evidence and the law.” 29RP 50 (emphasis added).

Just a few moments later, the prosecutor apparently gestured to Tarrer, declaring:

The evidence presented at trial established the truth of the charges. The truth of the charges is that that is a murderer. Larry Tarrer is a murderer. He’s an attempted murderer. He’s a manslaughterer. And his attempt to kill Claudia McCorvey was aggravated by the fact that he knew she was pregnant. He invaded her own privacy to do it and he injured her more dramatically[,] significantly than he needed to.

On behalf of the State of Washington and all the law abiding citizens in it I would ask you to render a true verdict in this case and that verdict - -

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: - - murder in the first degree.

29RP 54. The objection was overruled and the prosecutor went on to repeat himself and exhort the jury to render “a true verdict, a verdict that represents the truth of the charges,” which was that Tarrer was guilty as charged. 29RP 55.

For his part, in his closing argument, counsel for Tarrer corrected the prosecutor’s declarations about delivering the “truth” and having a “duty to deliver a just verdict:

a just verdict, it is you duty to deliver a just verdict. And you

can throw around Latin phrases and say that it's to speak the truth, that you will deliver the truth. That's not your job. Your job is not to deliver anything. It's not to deliver the truth. It's to evaluate their case.

29RP 58. Several times, counsel reminded the jurors that their “job is not to figure this out” or “decide how it happened” and somehow create a case for the prosecution but rather it was the prosecutor’s job to present a version of what they think occurred and prove it beyond a reasonable doubt. 29RP 63, 73. He also told the jury that the prosecution often puts up a blank screen and puts in pieces of the puzzle and argues that jurors can still be sure even if they do not have all the pieces of the puzzle. 29RP 86. In anticipation of this potential argument, counsel noted that it was a “false analogy” because jurors knew what the picture of the local skyline or Mount Rainier would look like even before seeing the puzzle, whereas they had no personal knowledge of this case. 29RP 86.

Counsel also faulted the prosecution’s claims that it was interested in a “search for the truth and truly what happened,” because the prosecution had not called Moore as a witness simply because what he said was inconsistent with that of McCorvey. RP 75.

The prosecutor began rebuttal closing argument by baldly declaring that defense counsel was wrong and that it was “**exactly**” the job of the jurors to “**figure it out**,” rather than just figuring out if the prosecution had proven its case. 29RP 88 (emphasis added). In fact, the prosecutor stated, that was the reason why the jurors were there - not just to decide whether the prosecution had proved its case. 29RP 88.

The prosecutor next told jurors they were “puzzle builders.”

required to “take all of the facts presented by both sides and put them together into an overall picture of what happened” that night. 29RP 89.

Later, the prosecutor returned to his theme that the jury would have to believe some nefarious actions on the part of police or McCorvey in order to believe that what the prosecution said had occurred was “not what happened,” saying:

I cannot stop you from believing that Detective Reinike called up Rickey Owens and went out to meet with Rickey Owens and told Rickey Owens before the conversation started, listen, I need you to tell me that you gave this guy a bottle of Tanqueray gin that was in the apartment because we planted it in there and it's got his fingerprints on it and we're this close to wrapping this thing up and we're this close to getting this one person. I can tell you that's not what happened.

29RP 91.

He returned this theme a few moments later, casting aspersions on the defense for pointing out that McCorvey had never before, in all of the interviews and pretrial proceedings or even in the first trial, claimed to have seen Tarrer drinking from a bottle in the apartment:

I suppose you guys could find that Claudia McCorvey has decided that she needs to help the State along a little bit and so she decided she was to say something that would be consistent with a bottle of liquor that was found in the kitchen. I can only tell you that's not what the evidence supports.

29RP 92. After that, the prosecutor told the jury that the “real truth about it” was that they had to look at the “overall picture of what happened” and “[t]he **overall ring of truth** is what you're supposed to put together.”

29RP 94 (emphasis added).

ii. The arguments were serious misconduct

All of these arguments were further serious, improper and

prejudicial misconduct. And like the misconduct in repeatedly misstating the standard of proof beyond a reasonable doubt, the “declare/decide the truth” and “decide who is lying” misconduct had already been condemned by our courts before the prosecutor chose to make these arguments. In Anderson, a prosecutor from the same office as in this case made virtually the same argument, declaring that “verdict” was Latin for “veredictum, which means to declare the truth,” and that jurors would, by their verdict, “declare the truth about what happened.” Anderson, 153 Wn. App. at 424. This Court explained why such argument was misconduct:

A jury’s job is not to “solve” a case. It is not, as the State claims, to “declare what happened on the day in question.” Rather, the jury’s duty is to determine whether the State has proven its allegations against a defendant beyond a reasonable doubt.

153 Wn. App. at 424. Since Anderson, this Court has repeatedly reaffirmed that the “declare the truth” argument is improper. See State v. Emery, 161 Wn. App. 172, 193-94, 253 P.3d 413, review granted, ___ Wn.2d ___ (2011). Most recently, this Court reversed where a prosecutor from the same office as here and in Anderson told the jury, *inter alia*, that their job was to “get to the truth” and “decide what happened.” Evans, supra, slip op. at 4-5. Again, this Court said, such arguments are misconduct because they “miscast the jurors’ role” into “determining what happened and not whether the State had met its burden of proof.” Id.

Further, this Court found this misconduct exacerbated because the prosecutor had also made the argument that jurors should ask only if they have “enough” to convict, even if they “wish” they had “more.” Id. Taken together, the Court held, the arguments of the prosecutor “aggravated the

erroneous truth-seeking argument by suggesting that the jurors disregard weaknesses in the state’s case.” Id.

Here, the prosecutor similarly coupled his “declare/decide the truth” arguments with admonitions not only that the question before jurors was not “do you wish you had more” but even further, with the misstatements of the standard of proof beyond a reasonable doubt. And the prosecutor told the jurors they could be convinced beyond a reasonable doubt even if they still had question or did not have all the details, thus again effectively telling them they should disregard weaknesses in the state’s case. See 29RP 49, 52.

Not only that, the prosecutor specifically told the jury that counsel was wrong when he said the jurors did not have the task of deciding or declaring the truth about what happened that day:

I want to start with one of the last things that [defense counsel] . . . said, which was it’s not your job to figure it out. It’s exactly what it is. It is exactly your job to figure it out. If it was just my job to figure it out, what are you guys doing here.

29RP 88.

And this misconduct was further exacerbated by the prosecutor’s repeated efforts to cast the jury’s role and duty as deciding who was telling the truth and who was lying was improper. Jurors need not decide that anyone is lying or telling the truth in order to perform their duties. State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). Instead, they need only to determine whether the prosecution has proved its case, beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995).

And this is true even if the various versions of events seem inconsistent with or contradict each other. Id. A witness may give testimony which is wholly or partially incorrect even without “deliberate misrepresentation” being involved. State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). Further, witnesses may give conflicting testimony even if they are all attempting “in good faith to tell the truth.” Id. Thus, it is a misstatement of the law and the jury’s role to declare that the jury must find either the victim or defendant is lying in order to decide the case.

Further, the argument is offensive because it again minimizes the prosecutor’s burden. Arguments implying that the jury should decide based upon which “side” of the case they most believed have such an improper effect, inviting decision on far less than the constitutional standard of proof beyond a reasonable doubt. See, United States v. Pine, 609 F.2d 106, 108 (3rd Cir. 1979). Such arguments effectively tell the jury they are supposed to be “determining whose version of events is more likely true, the government’s or the defendant’s,” which “intimates a preponderance of [the] evidence standard,” not the much higher constitutionally required standard of proof “beyond a reasonable doubt. See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994).

In making these arguments, again, the prosecution misstated the law. The jurors did not have to conclude that McCorvey was lying, or the officers had conspired with Owens to make him lie, in order to decide to acquit. McCorvey could have been mistaken in her identification without

deliberate deception involved, especially given the fact that she was high on crack, the shots were in a darkened living room, she only had a moment to see the shooter and she admitted she was focused on the flashes from the muzzle.

Notably, counsel never once argued that either the police or McCorvey were lying or deliberately setting Tarrer up for a crime he did not commit. 29RP 56-86. Instead, he argued that the jurors should not convict based on McCorvey's version of events because of inconsistencies in it which showed "[m]aybe she was wrong" or forgot things over the years. 29RP 64-66, 69. He also said that, although she was "mistaken" in thinking Tarrer was guilty, it did not "take away" what she suffered from being shot or injured. 29RP 64-66, 69. The prosecutor's arguments could not be seen as a response to the defense argument in that respect.

The prosecutor committed serious misconduct when he told the jurors they had to "speak the truth" and "declare the truth" with their verdict, that they had to "figure out" what had happened on the night in question, that they had to decide who was telling the truth and who was lying and that the police were so corrupt that they were urging such deliberate deception. This Court should so hold.

c. Reversal is required

The prosecutor's repeated acts of extremely serious misconduct compel reversal. In general, this Court will reverse for misconduct to which counsel objected below if there is a substantial likelihood the misconduct affected the verdict. Belgarde, 110 Wn.2d at 504. Where counsel does not object, the Court will nevertheless reverse if the

misconduct is so flagrant and ill-intentioned it could not have been cured by jury instruction. Id.

Here, counsel objected both to the arguments that jurors had to be able to articulate a reasonable doubt in order to acquit (29RP 44-46) and the prosecutor's exhortation to the jury to render a "true" verdict of guilt on behalf of the state and "all law abiding citizens." 29RP 54. And there is more than a substantial likelihood that, even standing alone, those two acts of misconduct would compel reversal.

But there is also ongoing question about whether misconduct should be subjected to additional scrutiny by our courts if the misconduct has a direct impact on the defendant's constitutional rights. It is well-recognized that the cumulative effect of misconduct may compel reversal as a violation of due process if it deprives the defendant of the opportunity for a fair trial. Davenport, 100 Wn.2d at 762. Further, application of a constitutional standard where there is harm to a defendant's constitutional rights is proper. State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And the Supreme Court has applied constitutional harmless error standards when the misconduct amounts to a comment on the defendant's exercise of a constitutional right, such as the right to remain silent. See State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). More recently, the Supreme Court has applied the constitutional harmless error test to prosecutorial misconduct when it was so egregious that it "fundamentally undermines the principle of equal justice" that the appellate courts needed to set "appropriate standards to deter such conduct." Monday, 171 Wn.2d at 678.

Here, the constitutional harmless error test should be applied to the misconduct, at least that misstating and minimizing the prosecutor's constitutionally mandated burden of proof and misleading the jury as to their proper, constitutional role of deciding whether that burden had been met. Tarrer had a due process right to have the state prove every part of its case against him, beyond a reasonable doubt. Further, the correct standard of proof beyond a reasonable doubt is the "touchstone" of the criminal justice system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Under the constitutional harmless error test, this Court must presumptively reverse for such error unless and until the prosecution meets the very heavy burden of proving that the error was "harmless." Guloy, 104 Wn.2d at 425-26.

Error is only "harmless" for this purpose if the untainted evidence is so overwhelming that it necessarily would lead to a conviction regardless of the error. 104 Wn.2d at 426. And this test is far, far different than the one used for cases involving questions of sufficiency of the evidence. In sufficiency cases, the question for the reviewing court is whether, taking the evidence in the light most favorable to the state, *any* reasonable jury could possibly have convicted - a very forgiving and liberal standard for the state. See State v. Romero, 113 Wn. App. 779, 786, 54 P.2d 1317 (1993). Only the minimum is required to uphold the conviction, because the test is not whether even the *average* reasonable jury would have convicted but whether *any* reasonable jury would have

convicted, thus requiring such an extreme lack of evidence that it is inconceivable anyone would have convicted.

In stark contrast, the constitutional harmless error test requires proof that *every* reasonable jury would *necessarily* have convicted even absent the error - in other words, evidence so “overwhelming” that it was impossible to conceive that anyone could have possibly had a doubt about guilt and thus failed to convict. See State v. Evans, 96 Wn.2d 1, 7, 633 P.2d (1981). This evidence is far, far more than the minimum required for a sufficiency challenge, something Romero makes clear. In that case, the defendant was charged with having unlawful possession of a firearm after shots were heard being fired near a trailer home in a mobile home park. 113 Wn. App. at 784. Romero was seen near the home, ran from officers, was found near a shotgun and some shell casings, looked like descriptions of the man, and was identified by an eyewitness who was relatively sure of the id. 113 Wn. App. at 784. The Court upheld the conviction against a sufficiency challenge, finding the evidence ample to meet that test. Id.

But the same evidence was *not* sufficient when weighed in light of a prosecutor drawing a negative inference from the defendant’s exercise of his right to remain silent. 113 Wn. App. at 795-96. Because Romero had denied guilt and disputed the evidence, the Court said, the jury was faced with questions of credibility which could have been affected by the error. Id. Put another way, there was no way to say beyond a reasonable doubt that the jury would necessarily have convicted if the inference had not been drawn, because the jurors could well have evaluated credibility differently. Id. As a result, the Court held, the constitutional harmless

error test was not met.

Nor is it met here. The evidence against Tarrer was not so overwhelming that *any* reasonable jury would *necessarily* convict even absent the improper arguments. McCorvey saw the assailant for a moment in the door, in a darkened room, when she was focused on the gun. She made the identification while sedated, with a breathing tube, just out of surgery, when shown pictures of men who looked nothing like each other except for their race. Both she and Owens were high on crack cocaine at the time they perceived the events. And Tarrer provided an explanation for his fingerprint on the bottle. As in Romero, here, there was conflicting evidence which would have supported a reasonable juror in acquitting. Under the constitutional harmless error test, reversal is required.

Reversal is also required under the non-constitutional standard, because all of the misconduct was so flagrant, prejudicial and ill-intentioned. Every one of the arguments made in this case were condemned, by this Court or another, well before the prosecutor here chose to make them. See Anderson, 153 Wn. App. at 423-24; Wright, 76 Wn. App. at 826. And in fact, those cases involved the **same** prosecutor's office as here, making the same arguments in various combinations that are made here.

This should give the Court some pause. The very fact that all of these types of arguments have been seen together in various iterations in other cases before our courts starkly proves that none of this misconduct is happening as a slip of the tongue. It is not the work of some single rogue prosecutor. It is a strategic decision to make these arguments despite their

being condemned.

The public prosecutor is vested with such authority that his words carry the weight of his role, holding special sway for jurors. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); see Suarez-Bravo, 72 Wn. App. at 367. This is one reason why a prosecutor's role as a "quasi-judicial" officer is to do justice, rather than seeking to "gain" convictions. See, State v. Reed, 102 Wn.2d 140, 147, 685 P.2d 699 (1984). By the same token, if the prosecutor makes improper arguments, that will have a greater impact and is more likely to "produce a wrongful conviction" than other evidence or argument. State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). The misconduct which occurred here had that effect.

Even in isolation, each of these improper arguments would be highly troubling. But even in the unlikely event this Court is not persuaded that the very significant, serious and persuasive individual acts of misconduct did not compel reversal, their cumulative effect mandates that result. Such an effect may so "infect the trial with unfairness as to make the resulting conviction a denial of due process" and the right to a fair trial. Donnelly, 416 U.S. at 643; see State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

Reversal would be required if even one of the types of serious misconduct made here was all that was made. But all of these improper arguments were made in a single case. They were made one after the other. Indeed, they permeated the entire closing. The prosecutor's

misstatements of the beyond a reasonable doubt standard, declarations of speaking the “truth” with the verdict, telling the jurors they had to be able to articulate a reason to acquit, his comparison to everyday decisions and the certainty needed to act, and invoking the specter of the worst terrorist attack on U.S. soil in history was incredible corrosive and pervasive and could not have been cured by instruction.

All of the misconduct misstated the jury’s role, and their function, and their duty. All of it misstated and minimized the constitutionally mandated burden of proof, inviting the jury to convict based upon far, far less than the required standard. And all of it occurred in a trial where the evidence against the defendant was not overwhelming and there were some significant inconsistencies in the claims. The prosecution’s flagrant, prejudicial misconduct and constitutionally offensive misconduct in this case compels reversal, and this Court should so hold.

d. In the alternative, counsel was ineffective

Counsel objected to much of the prosecutor’s misconduct below, each time getting rebuffed. 19RP 44-46, 54. Nonetheless, if this Court were to find that any of the serious, prejudicial misconduct in this case could possibly have been cured by instruction, it should nevertheless reverse based on counsel’s failure to request such instruction. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.3d 563 (1996); Sixth. Amend.: Art. I, § 22. Counsel is ineffective despite a strong presumption to the contrary if his conduct falls below an objective

standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). And even though, in general, the decision to object or request instruction is considered “trial tactics,” that is not the case if there is no legitimate tactical reason for counsel’s failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).

Here, counsel’s two objections fell on deaf ears. It is thus questionable whether further objection would receive any different response. But if the Court somehow finds that the misconduct could have been cured by instruction, counsel was ineffective in failing to seek such instruction.

It is Tarrer’s position that the incredibly corrosive misconduct committed in this case could not possibly have been cured - and indeed, this Court has so held with respect to the “fill in the blank” argument. See Venegas, 155 Wn. App. at 524 n. 16. Further, it is difficult to see how these arguments could not have been ill-intentioned, because they were made after this Court issued Anderson and made it clear that most of them were misconduct - yet the prosecutor chose to engage in them anyway. The misconduct in this case was so frankly egregious and pervasive that it offends basic concepts of fairness. Tarrer was entitled to a fair trial before a jury which properly applied the constitutionally mandated standard in a proper way. Due to the prosecutor’s extreme, repeated misconduct in this case, he was completely deprived of those rights. This Court should so hold and should reverse.

2. THE EXCEPTIONAL SENTENCE WAS IMPOSED IN VIOLATION OF TARRER'S CONSTITUTIONAL RIGHTS AND BASED UPON INAPPLICABLE OR UNSUPPORTED FACTORS

Even if this Court does not order a new trial, reversal and remand for resentencing is required, because the exceptional sentence was based on aggravating factors which did not or could not constitutionally apply, the record did not support the finding on one of the factors and the lower court erred in concluding that there were substantial and compelling reasons to depart from the standard range sentence. Further, the lower court violated Tarrer's rights under Blakely by entering improper factual findings and rendering improper opinions about the jury's decisions.

a. Relevant facts

Tarrer was charged with having committed the attempted murder of McCorvey with the "aggravating" factors that 1) the crime was a violent crime and the defendant knew the victim was pregnant, 2) there was a violation of the victim's "zone of privacy," and 3) the injuries were significantly greater than typical for an attempted murder. CP 215-16. Before the first trial in this case, when the prosecution added the aggravating factors, counsel objected. 9RP 77. He pointed to RCW 9.94A.345, arguing that Tarrer was entitled to have the sentence based on the law in effect when the current offense was committed and noting that, *inter alia*, the "pregnant victim/violent offense" factor was added to the statutory scheme in 1996, well after the crimes in the case. 9RP 78-79. He argued that he was prejudiced in allowing the increased penalty he would face. 9RP 78. The prosecutor argued that the exceptional sentence

factors applied because the “list” of such factors in the statute was “illustrative only.” 9RP 79. The court denied Tarrer’s motion. 9RP 79-80.

At sentencing, after the court held that it would not rely on the “significantly greater injury” claim as a result of binding Supreme Court precedent, the prosecutor argued that the court should nevertheless impose an exceptional sentence based on the jury’s findings regarding the aggravating circumstances that the crime involved an “invasion of a zone of privacy” and that Tarrer knew McCorvey was pregnant. 30RP 42. Regarding the zone of privacy, the prosecutor argued that Tarrer “committed this crime against a woman who he knew to be pregnant, and in her living room, which is an area that she is entitled to privacy.” 30RP 45.

The court imposed a high end sentence of 416 months for the murder, an exceptional sentence of double the high end (480 months) for the attempted murder and 144 months on the manslaughter, with the murder and attempted murder time running consecutive. 3RP 60. The court said it entered the exceptional sentence based upon the two remaining aggravating factors, which it said “the jury found to their satisfaction.” 30RP 60.

The court also noted that, when he was out of prison, Tarrer had committed some federal drug crimes “almost as if he were Lazarus rising from the tomb when the rock is rolled.” 30RP 61. The court then told Tarrer he was not likely to “ever luck out again” and have an appellate court reverse his conviction and that “this court is going to do its best to

make sure you never get out of prison alive.” 30RP 62.

The court later entered written findings and conclusions in support of its decision. See CP 711-18.

b. The court erred and violated Tarrer’s rights under *Blakely* and his right to trial by jury

The findings and conclusions entered by the court in support of the exceptional sentence are highly problematic and the bulk of them must not be considered by this Court. First, most of those findings were made in violation of Tarrer’s rights under *Blakely*, supra. In *Blakely*, it was established that the defendant’s rights to trial by jury and proof beyond a reasonable doubt are violated when a judge makes factual findings regarding “aggravating factors” by a preponderance of the evidence, then relies on those findings in imposing an exceptional sentence. *Blakely*, 542 U.S. at 311-14. Because of that ruling, a new exceptional sentencing procedure has been adopted in our state and that procedure applies to Tarrer’s case.⁵ Under that procedure, all but a very limited number of specific aggravating circumstances must be “proved to a jury beyond a reasonable doubt.” RCW 9.94A.537(3). This includes the three factors submitted to the jury in this case. See RCW 9.94A.535(3).

Thus, it is now well-settled that, under Article I, §§ 21 and 22 and the Sixth Amendment, defendants have constitutional rights to trial by jury, which includes having the jury - not a judge - make factual findings to support an exceptional sentence. *State v. Williams-Walker*, 167 Wn.2d

⁵ It is only the new procedure, however, and not the substantive changes which apply, as Tarrer points out, *infra*.

889, 896, 225 P.3d 913 (2010); see Blakely, 542 U.S. at 311-14. As a result, it is the jury - not the judge - which decides the factual basis for the aggravating circumstances. State v. Suleiman, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006). After Blakely, in entering findings and conclusions in support of an exceptional sentence, the judge is “left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence.” Suleiman, 158 Wn.2d at 290-91.

Division One therefore found it improper for a sentencing court entering written findings and conclusions in support of an exceptional sentence to list the evidence it believed “supported the jury’s verdict and that also supports the court’s conclusions of law,” because that amounted to judicial fact-finding in violation of Blakely and the defendant’s constitutional rights. State v. Gordon, 153 Wn. App. 516, 539, 223 P.3d 59 (2009), reversed in part and on other grounds, ___ Wn.2d ___, ___ P.3d ___ (2011 WL 4089893). Instead, a sentencing court entering such findings and conclusions must not make its own declarations about the facts, evidence or aggravating factors except as to the question of whether those factors are sufficiently “substantial and compelling” to support the exceptional sentence. See, e.g., State v. Hale, 146 Wn. App. 299, 308, 189 P.3d 829 (2008) (noting “the trial court carefully worded its findings to reiterate the jury’s special verdict and avoided entering any additional findings that would have violated Hale’s rights to have a jury find beyond a reasonable doubt any factor used to increase his sentence”).

Here, the trial court’s findings and conclusions in support of the

exceptional sentence fall far short of those standards. Over and over, the court made its own factual findings about the aggravating factors, citing to testimony it had obviously weighed and finding facts to support each of the factors. CP 111-18. For example, in Finding IX, regarding the aggravating factor of violation of a “zone of privacy,” the court made factual findings about 1) where McCorvey was shot, 2) what time the shooting occurred, 3) what McCorvey said, 4) what McCorvey agreed to and let people do in her living room at the time of the incident, 5) whether McCorvey knew Tarrer before the incident, and 6) how many shots were fired, before declaring without citation to authority that a person’s home “is a recognized zone of privacy.” CP 714; see also CP 714 (Finding VIII) (finding on whether Tarrer knew McCorvey was pregnant; making factual findings about how far along she was, whether she had felt the baby, etc.); CP 714-15 (Finding X) (finding on injuries substantially exceeding that required for the crime: making factual findings on how many times McCorvey had been shot, where one of the shots went, how she was injured, etc.).

But none of those factual findings were made by the jury. See CP 598-603. The jury’s findings were simply “yes” to each of the special verdicts. CP 602. They said nothing about how far along McCorvey was, etc. It was a violation of Tarrer’s rights under Blakely and its progeny for the trial court to make factual findings in order to support the exceptional sentence and this Court should therefore give them no weight.

Most egregious, the trial court’s findings repeated its improper evaluation of the quantum of evidence supporting the jury’s verdicts again

and again, making such a “finding” for each of the aggravating factors and even the verdicts of guilt. CP 711-18 (Finding I, VII, IX, X and XI and Conclusion I) (declaring the verdicts were all “supported by substantial, credible evidence”). And the court gave its own opinion, based upon its own evaluation of the evidence, about the jury’s verdicts, declaring that it had “heard all of the evidence presented at trial” and had decided that “the jury’s finding of guilt on each count is supported by substantial, credible evidence.” CP 712-13.

Here, however, the judge’s role was not to sit in review of the jury’s verdicts or declare the quantum of evidence she thought supported those verdicts. Compare, RALJ 9.1. Her role was to preside at sentencing. And that role with respect to the jury’s findings was limited to examining the factors found by the jury in order to determine if they were substantial and compelling enough to support an exceptional sentence. See Suleiman, 158 Wn.2d at 290-91. The propriety of the verdicts of guilt on the charges was not an issue before the sentencing court. There was thus absolutely no reason for the trial court to interpose its personal opinion about whether the jury’s verdicts of guilt for the murder, attempted murder and manslaughter were supported by a particular quantum of evidence. And it was wholly improper for her to do so.⁶

This Court should give the improper opinions and all of the factual findings the trial court made in Findings I, VIII, IX, X and XI and Conclusion IV no credence or consideration at all.

⁶This is especially concerning in light of the comments the judge made at sentencing which violated the appearance of fairness doctrine as discussed, *infra*.

c. There was insufficient evidence to support the aggravating factor of invasion of a “zone of privacy” and the prosecutor again misstated the law

One of the aggravating factors upon which the trial court relied in imposing the exceptional sentence on the attempted first-degree murder charge, count II, was that the crime involved an “invasion” of the victim’s “zone of privacy.” CP 215-16, 711-18; 30RP 35-43. That statutory aggravating factor, contained in RCW 9.94A.535(2)(p), was enacted in 2005, well after 1991, when the crimes in this case occurred. See Laws of 2005, ch. 68, § 3; CP 215-16. However, by 1991, there was some indication of a common law aggravating factor involving “invasion of a zone of privacy,” at least in the courts of appeals. See, e.g., State v. Smith, 123 Wn.2d 51, 57 n. 7, 864 P.2d 1371 (1993), overruled in part and on other grounds by, State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled in part and on other grounds by, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); State v. Post, 118 Wn.2d 596, 614, 826 P.2d 172 (1992). Thus, even though the factor did not statutorily exist at the time of the crime, a common law factor did apply and could be applied to Mr. Tarrer’s case, providing that it was also supported by evidence as required under the common law parameters. See, e.g., State v. Hylton, 154 Wn. App. 945, 226 P.3d 246, review denied, 169 Wn.2d 1025 (2010).

There was not such evidence in this case. The common law factor was sparsely discussed but applied in certain cases where the facts indicated a separate, unique psychological injury from the victim losing a

very real sense of safety and privacy he or she had enjoyed in their “home and hearth.” See, e.g., State v. Hicks, 61 Wn. App. 923, 929-30, 812 P.2d 893 (1991); State v. Falling, 50 Wn. App. 47, 55, 747 P.2d 1119 (1987); State v. Ratliff, 46 Wn. App. 466, 470, 731 P.3d 1114 (1987). Thus, when the defendant repeatedly harassed the victim at her home until she felt so unsafe she had to move, and then he committed another crime at her new home, that sense of extreme violation existed and the aggravating factor applied. Ratliff, 46 Wn. App. at 470. And when the victim was asleep in her bedroom when the offender broke in and raped her, the aggravating factor applied because the resulting trauma meant the victim “has to contend psychologically not only with the fact that she was sexually assaulted in a brutal way but also with the fact that her home is no longer the island of security that she perhaps thought it was.” Falling, 50 Wn. App. at 55, quoting, State v. Van Gorden, 326 N.W.2d 633 (Minn. 1982); see also, Hicks, 61 Wn. App. at 929-30.

The reasoning in those cases focused both on the “expectation” that people have when they are in a “protected zone” of their private home and the lasting emotional trauma of having that protection violated. Hicks, 61 Wn. App. at 929-30; Falling, 50 Wn. App. at 55. But such a violation does not automatically occur - nor the “violation of the zone of privacy” factor apply - every time a violent crime occurs in someone’s home. State v. Drummer, 54 Wn. App. 751, 759, 755 P.2d 981 (1989); State v. Campas, 59 Wn. App. 561, 568, 799 P.2d 744 (1990), remanded. on other grounds, 118 Wn.2d 1014 (1992).

As one court put it, bluntly, “[b]eing murdered in your own home is

not per se an aggravating factor.” Drummer, 54 Wn. App. at 759. To hold otherwise would expand the factor far beyond its confines into “almost limitless application.” something against which this Court has cautioned. Campas, 59 Wn. App. at 568. In contrast, limiting the aggravating factor so that it applies only to those cases where there is some exceptional invasion of real feelings of privacy and safety is proper because it honors the maxim that an aggravating factor must be “sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” See State v. Zatkovich, 113 Wn. App. 70, 79, 52 P.3d 36 (2002).

Here, despite the holdings of Drummer and Campas, the prosecutor told the jury it could find the aggravating factor simply because the crime occurred in a room in someone’s home:

Rhetorical question: Can you be more invaded in your privacy than when someone comes into your home and shoots you twice[?]
Shouldn’t be any dispute about that.

29RP 41; see CP 680-81 (Powerpoint slide saying McCovey was “SHOT IN HER OWN HOME” and asking “CAN THERE BE A MORE OBVIOUS INVASION OF A PERSON’S PRIVACY?”).

Thus, the prosecutor urged the jury to find the aggravating factor of an invasion of McCovey’s “zone of privacy” simply because the crime occurred in her home. And he made this argument even though courts have specifically rejected it. See Drummer, 54 Wn. App. at 759; see also Campas, 59 Wn. App. at 568. Once again in this case, the prosecutor

misstated crucial law.⁷

This further misconduct was especially harmful here, because the jury was not otherwise properly instructed on the proper application of this factor. There were no jury instructions defining when there was a “violation of the zone of privacy” significant enough to warrant departing from the sentencing range the Legislature has deemed proper and sufficient to satisfy all of the competing policies behind our system. See CP 604-37. As a result, the only “instruction” the jury got on this factor was the prosecutor’s misstatement of the law.

Most importantly, the evidence in this case did not support the finding that there was such an exceptional violation of McCorvey’s “zone of privacy” that it supported a departure from the sentence the Legislature has decided is proper for someone who commits first-degree murder, first-degree attempted murder and manslaughter at the same time. See State v. Vaughn, 83 Wn. App. 669, 675, 924 P.2d 27 (1996).

To the contrary. Aside from the technical fact that the living room was part of the apartment in which she lived, there was no evidence that the living room where the crimes occurred was a particularly special “zone of privacy” for McCorvey such that intrusion into it caused an unusual, exceptional feeling of “violation” greater than that typical whenever a crime occurs in your home. Instead, the evidence was that McCorvey had completely abandoned any sense of privacy she had in the living room. She testified that, when she started using crack again, she started letting

⁷The other instances are discussed in the section on prosecutorial misconduct, *infra*.

people come over to smoke crack there. 25RP 13. She also let Johns take that room over as a place to run his drugs sales business. 25RP 13-15, 20. She had, in fact, let him sell out of her apartment before so that people would actually come there to see him and buy drugs from him even though he did not live there. 25RP 36-65. And he was the one who opened the door to the buyers, many of whom were total strangers to McCorvey. 25RP 18-21.

Not only were total strangers coming into her living room, sitting down and buying and/or consuming crack there, McCorvey admitted, but she would **leave** those strangers there all alone when she went to the store. 25RP 15-16.

Johns also admitted that, at the time, McCorvey's apartment was known by people to be a place they could go to smoke crack. 23RP 21-24, 42-45. In fact, he said, it was a good place to sell because there were lots of people there all the time and people were always coming over to get high. 23RP 42-45. Johns had sold there so often that people now knew to go to McCorvey's apartment to buy drugs as well as smoke them. 23RP 43-45. And this was confirmed by Owens, who testified that he was directed to McCorvey's as a place where he could buy drugs even though he had never been there before. 25RP 132-33.

Even neighbor Moore who was not involved in the drug scene had noticed McCorvey's apartment had "[h]igh traffic there and individuals going in and out" which led him to suspect that there was drug dealing going on there. 27RP 59-60.

In the related context of asking when an entry by police is into a

constitutionally protected area, courts have recognized that a person diminishes their right to privacy by “opening her home to outsiders for illegal drug sales.” State v. Houvener, 145 Wn. App. 408, 186 P.3d 370 (2008), citing, State v. Dalton, 43 Wn. App. 279, 284-84, 716 P.2d 940, review denied, 106 Wn.2d 1010 (1986). Indeed, the U.S. Supreme Court has also so held, declaring that, where a home is “converted into a commercial center to which outsiders are invited for the purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street.” Lewis v. U.S., 385 U.S. 206, 211, 87 S. Ct. 424, 17 L. Ed. 2d 312 (1966).

Here, the sad fact is that McCorvey did not even have the same sense of privacy in her living room that the average person not in the drug life would have. McCorvey lived in a way where total strangers were expected to come into her home, sit in her living room, engage in illegal drug purchases and even ingest their drugs there. 25RP 13-21, 36-65. The living room was a known place to buy and use drugs. not a space of refuge for family and friends. McCorvey was not even the person in control of those purchases or who was let inside. 25RP 18-21. And she left total strangers in that living room while she went to the store. 25RP 15-16.

Under the facts of this case, McCorvey actually suffered a far lesser intrusion into a “zone of privacy” than the average person, rather than such a serious, unusual intrusion that an exceptional sentence was warranted. This Court should so hold.

- d. The aggravating factor that the offense was violent and the defendant knew the victim was pregnant did not apply and subjected Tarrer to double jeopardy

The other aggravating factor upon which the exceptional sentence relied was the factor that the offense was violent and the defendant knew that the victim was pregnant. CP 713-18; 30RP 35-43. But this factor did not and could not constitutionally apply.

Under RCW 10.01.040, a defendant is entitled to be sentenced based upon the substantive law in effect at the time their crime was committed. See State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007). That statute provides, in relevant part:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act. . . Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, not withstanding any amendment or repeal, unless a contrary intention is expressly set forth in the amendatory statute.

RCW 10.01.040. The statute thus prevents any substantive changes in law from applying to crimes which occurred before those changes except in very limited circumstances.

In Hylton, supra, this Court upheld application of an “abuse of trust” aggravating factor to a crime which occurred before that factor was written into the relevant sentencing statute. 154 Wn. App. at 953-55. The Court reached that conclusion because there had been an equivalent common law “abuse of trust” aggravating factor, so that the codification was essentially procedural. Id. In addition to not violating the “savings”

statute, the Court held, because there was no change in the factor, there was also no violation of the state and federal prohibitions on ex post facto legislation. 154 Wn. App. at 956-57.

Here, in contrast, the application of the “pregnant/violent crime” factor to the attempted murder charge violates both the “savings” statute and the prohibitions on ex post facto legislation. The statutory aggravating factor that an offense was violent and the defendant knew the victim was pregnant was not added to the statute until 1996, fully five years after the crimes in this case. See, e.g., Laws of 1996, ch. 121, § 1. Further, it does not appear that there was a similar common law aggravating factor prior to the enactment of the statute. See, e.g., House Bill Report HB 2075 (Law and Justice and Appropriations Report, 1996) (the only purpose of the bill was to add the aggravating factor and a reason for it was that “[t]here is no additional penalty under law for murdering or assaulting pregnant women”).

Thus, for Tarrer, the addition of the aggravating factor that the offense was violent and the offender knew the victim was pregnant was a substantive change i.e., a change in the law regarding the punishment for the crime, adding an aggravator that did not exist when the crimes occurred. See Hylton, 154 Wn. App. at 956. The legislation adding the aggravating factor increased the punishment that Tarrer could face prior to its enactment, allowing the court to impose an exceptional sentence on a new basis. As a result, application of the “pregnant victim/violent crime” aggravating factor to Tarrer’s case was not only a violation of the savings statute, RCW 10.01.040 but also a violation of the state and federal

prohibitions against ex post facto legislation. This Court should so hold.

In the alternative, even if the factor could apply retroactively to Tarrer's crimes, however, that application was nevertheless improper because it violated Tarrer's rights to be free from double jeopardy. Both the Fifth Amendment and Article I, § 9 provide the same protections, which include prohibiting multiple punishments for the same offense. See In re Personal Restraint of Borrero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007), cert. denied sub nom Borrero v. Washington, 552 U.S. 1154 (2008); State v. Womac, 160 Wn.2d 643, 650-52, 160 P.3d 40 (2007). This Court reviews questions of double jeopardy de novo. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

The first part of the determination is to look at the language of the statutes to see whether they expressly disclose and intent by the Legislature to impose multiple punishments. Borrero, 161 Wn.2d at 536. Because the Legislature has such authority, if there is clear legislative intent, it may impose multiple punishments for arguably the same conduct, such as in the case where use or possession of a firearm is an element of the crime and a firearm enhancement is also imposed. See State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010).

Here, however, the relevant statutes provide no such clear intent. Again, in 1991, there was **no** statutory provision allowing for an exceptional sentence to be based upon a finding that the crime was violent and the defendant knew the victim was pregnant. Thus, there could be no "legislative intent" to allow punishment based upon that aggravating factor as such punishment was not yet allowed.

But even if the statutory aggravating factor could apply, that statute and the manslaughter statute indicate no clear legislative intent for there to be multiple punishment. The manslaughter statute provides, in relevant part:

(1) A person is guilty of manslaughter in the first degree when

(b) He or she intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.

RCW 9A.32.060. The statutory aggravating factor applies when “[t]he current offense was a violent offense and the defendant knew that the victim of the offense was pregnant.” RCW 9.94A.535(3)(c). Neither of those provisions indicate an intent that separate punishments be imposed when the defendant commits an attempted murder which results in the death of the child, for both first-degree manslaughter and an aggravating factor for the attempted murder that the crime was a violent crime and the defendant knew the victim was pregnant. Compare, RCW 9A.52.050 (anti-merger statute indicating such an intent).

In Kelley, the Supreme Court recently held that there was no violation of the rights to be free from double jeopardy where a defendant was both convicted of and sentenced for an offense which required proof of use of a firearm as well as a separate “firearm enhancement.” 168 Wn.2d at 77. The Court found the Legislature had the intent to impose “cumulative punishment” in those situations, and in fact that such intent “could hardly be clearer.” 168 Wn.2d at 79. The Court looked at the history of the firearm enhancement statute, noting that those enhancements

were designated as mandatory. 168 Wn.2d at 80-81. The Court then pointed out that the enhancements specifically applied to nearly “all felony crimes” including some others which also included use of a firearm, without indicating an exception for cases where the use of a firearm was an element of the crime. 168 Wn.2d at 80-81. These things were dispositive of the “intent” behind the enhancements, indicating that there was intent for separate punishments both with an enhancement and an underlying offense, so that the Court thus did not need to undergo the Blockburger analysis. Id; see also, State v. Oakley, 158 Wn. App. 544, 242 P.3d 866 (2010), review denied, 171 Wn.2d 1021 (2011).

Here, unlike the firearm enhancement statute, there is nothing in the statutory language indicating an intent for separate punishments. The aggravating factor is not mandatory and has no automatic effect but simply provides authority for a court to exercise its discretion in light of the purposes of the Sentencing Reform Act. See RCW 9.94A.537. In other words, the existence of the factor does not apply to all crimes or even most crimes and the statute provides no specific requirement of additional punishment, only the possibility. Similarly, there is nothing in the statutory language creating the crime of first-degree manslaughter of an unborn quick child indicating an intent that the Legislature intended that the facts which prove the crime should also be used to enhance the punishment for a separate crime committed by the very same act.

As a result, the rules of statutory construction would then be applied, starting with a test called the Blockburger test, which asks if each offense contains an element the other does not or “requires proof of a fact

which the other does not.” See Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The Blockburger test is sometimes called the “same evidence” and our understanding of how it should be applied has changed over time. At one point, courts applied the test as if it involved an abstract comparison of statutory elements. See In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). But in Orange, this analysis was rejected as based upon a “misconception” about Blockburger. Orange, 152 Wn.2d at 819. Instead, the Court held, it is required to look at each crime in light of the facts as alleged at trial, to see if “the evidence required to support a conviction upon one. . . would have been sufficient to warrant a conviction upon the other.” Orange, 152 Wn.2d at 820 (quotations omitted). Thus, in Orange, a first-degree attempted murder by taking the “substantial step” of shooting at someone and the first-degree assault of that person committed with a firearm are “the same in fact and law” under Blockburger even though they involved different statutory elements. 152 Wn.2d at 820. The two crimes were “based on the same shot directed at the same victim, and the evidence required to support the conviction for first[-]degree attempted murder was sufficient to convict Orange of first[-]degree assault.” Id. As a result, this Court does “not consider the elements. . .on an abstract level” but rather as proven in the particular case. See State v. Freeman, 153 Wn.2d 765, 776, 108 P.2d 753 (2005).

Here, even if the statutory aggravating factor applied, as proven here, under the Blockburger test as described in Orange and its progeny, the manslaughter and the aggravating factor were for the same shot,

directed at the same victim, and the evidence of conviction for the manslaughter was also sufficient to support the aggravating factor. The manslaughter was for shooting the mother and intentionally killing the unborn child. The aggravating factor was for shooting the mother knowing that she was pregnant. For both, it was the very same act of shooting McCorvey knowing she was pregnant which made up the proof. The aggravating factor did not apply and could not be constitutionally applied, and this Court should so hold.

e. The court erred in imposing a sentence above the statutory maximum for manslaughter

The trial court's errors at sentencing also included imposing a sentence which improperly exceeded the statutory maximum, in violation of former RCW 9.94A.420 (1991) and former 9.94A.120(11) (1991). Under the latter, a "court may not impose a sentence providing for a term of confinement that exceeds the statutory maximum for the crime." See State v. Brooks, 107 Wn. App. 925, 932, 29 P.3d 45 (2001). Because it is a Class B felony, the statutory maximum for first-degree manslaughter is 120 months. See former RCW 9A.20.021(1)(b) (1991); RCW 9A.32.060(2). Thus, the maximum the court could impose for the offense was 120 months. And indeed, under former RCW 9.94A.420 (1991),

[i]f the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence.

Here, the court failed to follow the mandates of either former RCW 9.94A.420 (1991) or former RCW 9.94A.120(14) (1991). Instead, it imposed a sentence on the first-degree manslaughter of 144 months in

custody, 24 months **longer** than the statutory maximum even without any community placement or custody being added. CP 638-50. Further, it did not use the statutory maximum as the presumptive sentence, as required. CP 638-50.

It is improper for a sentencing court to exceed the statutory maximum in ordering time in custody, even if it believes that the time the defendant will actually spend there will be reduced based upon the defendant earning “good time” credits. See, e.g., State v. Fisher, 108 Wn.2d 419, 430 n. 6, 739 P.2d 683 (1987). Instead, the court “is required to impose a determinate sentence that does not exceed the statutory maximum” when it imposes a term of custody. In re Brooks, 166 Wn.2d 664, 671, 211 P.3d 1023 (2009). The sentencing court erred in imposing a sentence of 144 months, 24 months over the standard range, in custody.

The 144 month sentence exceeded the statutory maximum by 144 months, and the sentencing court erred in imposing it. This further error may seem trivial in light of the fact that this sentence runs concurrently with the others, which are longer. But it further illustrates the serious problems in this case.

On remand, this case should go before a different court, because, unfortunately, comments the judge made and the sentence the judge imposed betrayed at the very least the appearance of having prejudged the case unfairly. Due process, the appearance of fairness doctrine, and Canon 3(D)(1) of the Code of Judicial Conduct require a judge to disqualify herself if, *inter alia*, her “impartiality may reasonably be questioned.” State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). Further,

the “appearance of fairness” doctrine requires “the absence of actual or apparent bias on the part of the judge or decision-maker.” State v. Worl, 91 Wn. App. 88, 96, 955 P.2d 814, review denied, 136 Wn.2d 1024 (1998). The law requires not only that the judge **be** impartial but that the judge **appear** impartial. See Post, 118 Wn.2d at 618.

Here, the judge did not appear impartial. At sentencing, in fact, she admitted prejudging the case, declaring “it was my intention **all along** to give Mr. Tarrer the high end and I am going to do that.” 30RP 60 (emphasis added). Later, after telling Tarrer that he had lucked out in getting his conviction reversed under Andress, she told him, “this court is going to do its best to make sure you never get out of prison alive.” 30RP 62. She imposed a sentence accordingly, of more than 800 months - 70 + years in custody, including an exceptional sentence of 480 months for the attempted murder. Yet a different judge faced with the same facts believed that an exceptional sentence of 270 months was proper and sufficient, even with the mistaken belief that the murder and attempted murder sentences would run concurrent.

Tarrer is not arguing that this judge was required to reimpose the same sentence that a different judge had imposed after the earlier Alford pleas to charges in this case. He is fully aware that there is no presumption of vindictiveness which applies where, as here, there is an entirely new proceeding at which evidence is presented to the new judge. See State v. Parmelee, 121 Wn. App. 707, 711-12, 90 P.3d 1092 (2004). But here, the judge did not just impose a sentence multiple times over the original sentence - she did so saying she had *intended* to impose the high

end “all along” and in order to ensure that Tarrer never got out of prison alive. 30RP 60-62. Taken in light of those comments, the serious differences in the two sentences takes on added significance, because another reasonable judge had reached such a different conclusion about what exceptional sentence was appropriate for the conduct in this case. On remand, Tarrer should be allowed to go in front of a different judge, because the sentencing judge here violated the appearance of fairness doctrine and there is no way Tarrer could feel confident that he would be treated fairly in front of the same judge, given her comments to him at sentencing.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial. In the alternative, resentencing is required.

DATED this 10th day of October, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant’s Opening Brief to opposing counsel via this Court’s portal and appellant by depositing the same in the

to Mr. Larry Tarrer, DOC 979867, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 10th day of October, 2011.

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APPENDIX A:
REFERENCE TO TRANSCRIPT

The verbatim report of proceedings consists of 30 separately paginated volumes, some of which contain multiple dates out of sequence. In an effort to attempt some clarity, the volumes will be referred to as follows:

the volume containing the proceedings of May 5, 2006, as "1RP;"
June 25, 2008, as "2RP;"
the volume containing the proceedings of July 2 and 24, 2008, as
"3RP;"
the volume containing May 8, June 11 and 22, July 13 and 15,
2009, as "4RP;"
May 29, 2009, as "5RP;"
July 22, 2009, as "6RP;"
July 23, 2009, as "7RP;"
August 31, 2009, as "8RP;"
September 1, 2009, as "9RP;"
the volume containing September 21, 23 and 28, 2009, as "10RP;"
September 29, 2009, as "11RP;"
September 30, 2009, as "12RP;"
October 1, 2009, as "13RP;"
October 12, 2009, as "14RP;"
October 13, 2009, as "15RP;"
October 14, 2009, as "16RP;"
October 15, 2009, as "17RP;"
the volume containing October 19-21, 23 and 29 and November
19, 2009, as "18RP;"
the volume containing May 3, September 21-23, 2010, as "19RP;"
September 20, 2010, as "20RP;"
September 27, 2010, as "21RP;"
September 28, 2010, as "22RP;"
the volume containing a portion of September 29 and September
30, 2010, as "23RP;"
the volume containing the afternoon of September 29, 2010, as
"24RP;"
October 4, 2010, as "25RP;"
October 5, 2010, as "26RP;"
October 7, 2010, as "27RP;"
October 7, 2010, as "28RP;"
October 11, 2010, as "29RP;"
the volume containing October 18, 19 and 21, 2010, as "30RP."

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