

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

CLABON BERNIARD,

Appellant.

---

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

---

BRIEF OF APPELLANT

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LILA J. SILVERSTEIN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711  
[lila@washapp.org](mailto:lila@washapp.org)

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## A. INTRODUCTION

Clabon Bernard's trial was riddled with constitutional violations. He was convicted as the fourth participant in a home-invasion robbery and murder, but only after (1) over his objections, a holdout juror who was upset that the other jurors were "against her" and not following instructions was removed as "mentally defective;" (2) over his objections, two police officers testified about what three other suspects who were not at the trial had told them about the crimes during custodial interrogations; (3) over his objections, a surviving victim who could only describe the first two intruders the day after the crime and was not even sure whether there were three or four perpetrators was permitted to testify that one week later, when she saw Mr. Bernard on TV, she was sure he was the fourth intruder; and (4) other serious errors occurred.

This Court should reverse and remand for a fair trial. In the alternative, two convictions should be vacated for double-jeopardy violations and the exceptional sentence should be reversed for several independent reasons explained below.

## B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Bernard's rights under the Sixth Amendment to the United States Constitution and article I, sections 21 and

22 of the Washington Constitution by dismissing a holdout juror during deliberations.

2. The trial court violated Mr. Berniard's Sixth Amendment right to confront his accusers by admitting detectives' testimony about what Amanda Knight, Joshua Reese, and Kiyoshi Higashi told them during police interrogations following their arrests several days after the crime.

3. The trial court erred in denying Mr. Berniard's motion to suppress evidence obtained in violation of the Privacy Act.

4. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 3 in the order denying the motion to suppress identification evidence, insofar as it describes the perpetrator of the acts as "the defendant". CP 648.

5. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 4 in the order denying the motion to suppress identification evidence, insofar as it describes the perpetrator of the acts as "the defendant". CP 648.

6. In the absence of substantial evidence, the trial court erred in finding that Charlene Sanders heard and saw Mr. Berniard on the news on May 5, 2010 rather than May 6, 2010. CP 649 (Finding of Fact 11).

7. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 16 in the order denying the motion to suppress

identification evidence; the encounter was not “accidental” because the Pierce County Sheriff’s Department was responsible for the press release. CP 650.

8. In the absence of substantial evidence, and to the extent it was properly labeled a finding of fact, the trial court erred in entering Finding of Fact 18 in the order denying the motion to suppress identification evidence. CP 650.

9. In the absence of substantial evidence, and to the extent it was properly labeled a finding of fact, the trial court erred in entering Finding of Fact 19 in the order denying the motion to suppress identification evidence. CP 650.

10. The trial court erred and violated Mr. Berniard’s rights under article I, section 3 of the Washington Constitution by concluding the circumstances of Charlene Sanders’s identification of Mr. Berniard were not impermissibly suggestive, that the identification was reliable, and in denying the motion to suppress Charlene Sanders’s identification of Mr. Berniard. CP 651-52.

11. The convictions for robbery (count two) and felony murder predicated on robbery (count one) violate the Fifth Amendment prohibition on double jeopardy.

12. The trial court erred in ruling the convictions for robbery (count two) and felony murder predicated on robbery (count one) did not constitute the same criminal conduct for sentencing purposes.

13. The convictions for robbery (count four) and assault (count five) violate the Fifth Amendment prohibition on double jeopardy.

14. The trial court erred in ruling the convictions for robbery (count four) and assault (count five) did not constitute the same criminal conduct for sentencing purposes.

15. The State presented insufficient evidence that Mr. Bernard manifested “deliberate cruelty” in the commission of counts four and five.

16. The State presented insufficient evidence that Mr. Bernard engaged in a high degree of “sophistication and planning” in the commission of counts one through six.

17. The aggravating factors are unconstitutionally vague.

18. The trial court erred in imposing an exceptional sentence of consecutive terms totaling 1,486 months.

19. The trial court erred and violated the Fourteenth Amendment and article IV, section 16 by providing a jury instruction and special verdict forms allowing the jury to return verdicts of “yes” but not “no”.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment and article I, sections 21 and 22 guarantee a defendant the right to trial by a unanimous, impartial jury. These provisions are violated where a juror is dismissed during deliberations and there is any reasonable possibility the dismissal stems from the juror's doubts about the sufficiency of the evidence. Here, the trial court dismissed a juror as "mentally defective" after she was concerned other jurors were not following instructions, broke down crying, and told the mental health professional employed by the court to help jurors that she was distressed because it appeared all the other jurors were against her. The juror ultimately assured the mental health professional she felt better, was not going to harm herself, and could continue deliberations. Did the trial court violate Mr. Berniard's constitutional rights by dismissing this juror?

2. The Confrontation Clause of the Sixth Amendment prohibits the admission of testimonial statements of absent, unavailable witnesses unless the defendant had a prior opportunity for cross-examination. Statements taken by police officers in the course of investigating crimes are part of the core class of testimonial statements covered by the Confrontation Clause. In Mr. Berniard's trial, which was severed from that of his codefendants, the trial court allowed two detectives to testify

about what codefendants Amanda Knight, Kiyoshi Higashi, and Joshua Reese told them about the crimes at issue. The codefendants did not testify and Mr. Berniard had no prior opportunity for cross-examination. Did the admission of this testimony violate Mr. Berniard's Sixth Amendment right to confront the witnesses against him?

3. When co-defendants are tried together, one defendant's out-of-court statement may be admitted against him, so long as it is redacted to exclude reference to the other co-defendant. This rule applies only to joint trials; in separate trials the Confrontation Clause prohibits admission of out-of-court testimonial statements altogether. Did the trial court err and violate Mr. Berniard's Sixth Amendment rights by ruling that the statements of his co-defendants who were not tried with him were admissible so long as they were redacted?

4. The Privacy Act prohibits the recording of private conversations absent the consent of all parties. All information obtained in violation of the Act must be suppressed at trial. Here, a KOMO TV reporter and camera operator went to Joan and Lacey Berniard's home and were let in by someone else. Joan came upstairs in her pajamas, and, while blocking Joan's view of the camera, the reporter told Joan her son was wanted for murder. The camera operator continued to record as Joan wailed in disbelief, and as she and her 14-year-old daughter had a

conversation during which the daughter tearfully told her mother she had overheard an incriminating conversation between Clabon Bernard and another sibling. The KOMO employees admitted they never introduced themselves to Joan or Lacey, never asked if they could record them, and purposefully turned off the light on the camera that indicates it is recording. Did the trial court err in ruling KOMO's recording did not violate the Privacy Act, and in denying the motion to suppress the video and testimony thereby obtained?

5. Article I, section 3 of the Washington Constitution prohibits the introduction of unreliable evidence. Here, Charlene Sanders could not even describe, let alone identify, the fourth intruder immediately after the crimes. As Dr. Geoffrey Loftus testified, this makes sense because (a) the situation was highly stressful; (b) the perpetrator was wearing a mask; (c) Ms. Sanders was face down on the floor while the perpetrator was behind her; (d) the perpetrator was much younger and was a different race; and (e) the perpetrator was holding a gun to her head. But when she saw Mr. Bernard on TV a week later, she said she knew he was the fourth intruder. Dr. Loftus explained that Ms. Sanders used post-event information to construct her "memory," and that the identification was unreliable. Did the trial court violate Mr. Bernard's right to due process under article I, section 3, by denying his motion to suppress the identification evidence?

6. The United States Supreme Court and Washington Supreme Court have held that the double jeopardy clause of the Fifth Amendment prohibits convictions for both robbery and felony murder predicated on robbery. Here, Mr. Berniard was convicted of both robbery and felony murder predicated on robbery. Did the entry of convictions for both crimes violate double jeopardy, requiring vacation of the robbery conviction?

7. Two convictions constitute the “same criminal conduct” for sentencing purposes if they involved the same intent, same victim, and same time and place. The State alleged that Clabon Berniard or his accomplices robbed Jim Sanders in his home and killed him in the course and furtherance of that robbery. Did the sentencing court err in concluding the resulting robbery and felony murder convictions did not constitute the same criminal conduct?

8. “[S]ince 1975 courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes and that the conviction for assault must be vacated at sentencing.” *State v. Freeman*, 153 Wn.2d 765, 774, 108 P.3d 753 (2005). Did the trial court violate Mr. Berniard’s Fifth Amendment right to be free from double jeopardy by denying his motion to vacate the conviction on count five for assaulting Charlene Sanders in light of the

conviction on count four for the robbery of Charlene Sanders, which was based on the same alleged violent act of kicking her in the head?

9. Two convictions constitute the “same criminal conduct” for sentencing purposes if they involved the same intent, same victim, and same time and place. The State presented evidence and argued to the jury that Clabon Berniard assaulted Charlene Sanders by kicking her in the head and robbed her by kicking her in the head. Did the sentencing court err in concluding the resulting robbery and felony murder convictions did not constitute the same criminal conduct?

10. “Deliberate cruelty” is gratuitous violence inflicted as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime. The State argued Mr. Berniard inflicted “deliberate cruelty” when he assaulted and robbed Charlene Sanders by holding a gun to her head and threatening to kill her if she did not give them the combination to the safe. Where the State showed the violence was for purposes of effectuating the robbery and assault – not an end in itself – and where the State presented no evidence whatsoever of violence “normally associated with” first-degree robberies and second-degree assaults, did the State present insufficient evidence as a matter of law to prove the “deliberate cruelty” aggravating factor beyond a reasonable doubt?

11. A high degree of sophistication or planning means conduct that goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime. It requires that the high degree of sophistication or planning be demonstrated by the defendant, rather than by somebody else involved in the crime. Here, the State argued Mr. Berniard was guilty of this aggravating factor because a group of four people planned and executed a home-invasion robbery of a Craigslist seller. The State did not present evidence that Mr. Berniard planned the crimes and did not present evidence of the level of planning or sophistication “normally associated” with the crimes. Did the State present insufficient evidence as a matter of law to prove the “sophistication or planning” aggravating factor beyond a reasonable doubt?

12. A statute is void for vagueness under the Due Process Clause if it either (a) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (b) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Here, the jury found Mr. Berniard guilty of aggravating factors based on conduct “not normally associated with the crimes,” without being told what conduct was normally associated with

the crimes. Are the aggravating factors unconstitutionally vague as applied because they allowed for the exercise of standardless discretion?

13. Under caselaw, the WPICs, and the Fourteenth Amendment a jury must be told it can answer “no” to the question of whether the State proved an aggravating factor or enhancement, not that the only verdict it can return is “yes”. Here, the concluding instruction and special verdict forms told the jury it could either return a “yes” verdict or not return any verdict; there was no option to find Mr. Berniard not guilty of the aggravators and enhancements. Did the instructions and verdict forms violate Mr. Berniard’s right to due process?

14. Article IV, section 16 of the Washington Constitution prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case. Did the concluding instruction and special verdict forms, which allowed for a “yes” answer but not a “no” answer, violate article IV, section 16?

#### D. STATEMENT OF THE CASE

On April 28, 2010, four people committed a home-invasion robbery at the home of Jim and Charlene Sanders. A woman claiming to be interested in a ring Jim Sanders advertised on Craigslist went to the Sanders’s house, along with a male companion. After looking at the ring, the two pulled out a gun, tied up Jim and Charlene Sanders, placed them

facedown on the floor, and began stealing items from the house. Two other people wearing bandanas over their faces then entered the home, went upstairs, and brought the couple's two children downstairs. The intruders attacked the Sanderses and screamed at them to provide the code to their safe. Jim Sanders tried to break free, and the first man who had come to the house shot and killed him. The intruders fled with several items, and Charlene Sanders called the police. 6 RP 895-977.

Charlene and her children described the first two intruders in detail to the police and to a sketch artist, but they could not describe the third and fourth intruders who arrived in masks after the first two had already tied up Charlene and Jim. Indeed, Charlene was not even sure whether there were three or four intruders. But they were able to identify the first intruders, Amanda Knight and Kyoshi Higashi, and police shortly thereafter apprehended Knight, Higashi, and a third suspect, Joshua Reese, after the three fled to California. 6 RP 936-45; 8 RP 1193-1201; 9 RP 1349.

The police interrogated them, and eventually decided that Clabon Bernard was a fourth suspect in the crime. 8 RP 1210-29; 9 RP 1363-81. The police issued a press release, and KOMO TV tracked down Mr. Bernard's mother while she was in her home in her pajamas and informed her, while surreptitiously filming her, that her son was wanted for murder.

2 RP 302-56; 3 RP 360-81. As she wailed in disbelief, her daughter told her she had overheard an incriminating conversation between Clabon and another sister. Ex. 164.

After the police arrested Mr. Berniard, they called Charlene Sanders to let her know the fourth suspect had been detained. Even though Charlene Sanders could not describe a fourth intruder – and was not even sure there was one – at the time of the incident, when she saw Mr. Berniard on television she said she was sure he was the fourth intruder. 9 RP 1402-03.

The State charged Mr. Berniard and the other three suspects with two counts of robbery, two counts of assault, burglary, and felony murder. The State also alleged the crimes were committed with the aggravating factors of deliberate cruelty and a high degree of sophistication and planning. CP 6-9.

The trial court granted the defendants' motions to sever, and separate trials were held for each defendant. CP 99-103. Before his trial, Mr. Berniard moved to suppress Charlene Sanders's unreliable identification of him under the due process clause, to suppress the information obtained from the KOMO video under the Privacy Act, and to suppress the statements the three other suspects made to police under the Sixth Amendment. CP 22-51, 92-98, 135-39; 1 RP 69-155; 3 RP 442-566;

4 RP 570-695. The trial court denied the motions. CP 276-83, 647-54; 3 RP 435-39; 6 RP 857. Charlene Sanders was allowed to testify she was sure Mr. Bernard was the fourth intruder. 6 RP 930. Two police officers were allowed to testify about what the three absent co-defendants told them about the crimes. 8 RP 1210-1227; 9 RP 1363-81; 10 RP 1462-63. The State was allowed to call Mr. Bernard's sister as a witness and to compel her to testify about what she said during KOMO's ambush interview. 9 RP 1286-1314. The video itself was also played over Mr. Bernard's objections. 12 RP 1728-34.

After a two-and-a-half-week trial, the jury retired to deliberate. On the second day of deliberations, one juror broke down crying when the jury administrator asked how she liked jury service. She was upset because other jurors were not following instructions and were ganging up on her, and she feared there would come a time when they would all be against her. The court dismissed this juror as mentally unfit, without interviewing her directly, and over Mr. Bernard's objections that dismissal of this holdout juror would violate his constitutional rights. CP 410-15, 605-07, 640-42; 15 RP 2213-49.

Mr. Bernard was convicted on all counts, and the jury found he committed two counts with deliberate cruelty and six counts with a high

degree of sophistication and planning. CP 392-409. The court imposed an exceptional sentence of 1,486 months. CP 657-66.

Additional relevant facts are set forth in the argument sections below.

E. ARGUMENT

**1. The trial court violated Mr. Berniard's rights under the Sixth Amendment and article I, sections 21 and 22 when it removed a holdout juror as "mentally defective".**

- a. During deliberations, the trial court removed Juror 2 after she became upset that the other jurors were against her and were not following instructions.

After a two-and-a-half week murder trial in which both sides presented emotional and gruesome evidence, the jury retired to deliberate on August 24, 2011. In an initial vote, seven jurors believed the State had proved its case beyond a reasonable doubt, three believed it had not, and two were undecided. CP 640. Juror 2, Tara Ruark, did not believe the State had proved its case. CP 640.

As the jury deliberated, Ms. Ruark challenged other jurors who refused to follow instructions. CP 641. One juror stated that if Mr. Berniard "knew anything about the crime, he was an accomplice," despite the instruction stating that more than knowledge is necessary. CP 641. Another wrote on the whiteboard, "Jimenez said Reese had named YG," despite the fact that the jury was to use Reese's statement only against

Reese.<sup>1</sup> CP 605. Two jurors refused to follow the court's instruction that the jury was not to consider the fact that Mr. Bernard did not testify. CP 605, 641. These two jurors "repeatedly argued about why the defendant did not offer explanations to prove his innocence." CP 641.

Ms. Ruark became upset because these jurors ignored her when she tried to point out the instructions, were "very aggressive" in trying to persuade her to find Mr. Bernard guilty, and "gang[ed] up on" her repeatedly during deliberations. CP 641-42; CP 606.

When Ms. Ruark went to have her parking validated before the second day of deliberations, the juror administrator said something like, "How are you liking jury duty?" or "Have a good day at jury service." CP 607; 15 RP 2213-14. Ms. Ruark burst into tears and said, "This has been so stressful for me." 15 RP 2214. The juror administrator said, "You know, we do have a service that will assist you with this." She gave Ms. Ruark the business card for Judy Snow, a Pierce County mental health counselor and jury debriefer. 15 RP 2214, 2218.

Ms. Ruark called Ms. Snow and left a message, but continued deliberating. 15 RP 2218. During the lunch break, the two spoke on the

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<sup>1</sup> YG is the nickname Clabon Bernard's family and friends use for him. 8 RP 1162. As explained in argument section 2, Detective Jiminez's repetition of what Reese said should not have been admitted at all since Reese was not tried with Mr. Bernard, but the point here is that the jury did not follow the limiting instruction, and Ms. Ruark was upset by that.

telephone and Ms. Ruark told Ms. Snow she was “quite distressed” about the case and felt as if she “almost wanted to get in an accident” or hurt herself so she would not have to continue with jury service. 15 RP 2219-21, 2223; CP 607. Ms. Ruark told Ms. Snow she was “afraid that soon [she] would be the only juror with all of the others against [her],” and she “was trying hard to find courage within [herself].” CP 607; 15 RP 2220, 2222.

Ms. Snow told her she understood it was traumatic and she would be there to support her, but could not do so during deliberations. Ms. Ruark and the rest of the jury resumed deliberations at 1:00 p.m. When they were on a break, Ms. Ruark met with Ms. Snow in person and told her she felt better after their talk, did not think she could hurt herself, and was able to continue deliberating now that she knew Ms. Snow’s services would be available after jury service ended. 15 RP 2219-23; CP 607.

Ms. Snow alerted the court to the fact that a juror had contacted her, even though Ms. Ruark had done so on the advice of the juror administrator. 15 RP 2219. The court held a hearing at which Ms. Snow and the juror administrator were questioned. Over Mr. Berniard’s objections, the court did not call Ms. Ruark in for questioning but instead discussed her actions with Ms. Snow and the administrator. 15 RP 2213-23; 2240-41.

The State argued Ms. Ruark should be dismissed as an “unfit juror” due to “mental defect” under RCW 2.36.110. CP 328-33. Mr. Berniard objected, arguing that the dismissal of Ms. Ruark would violate his rights under the Sixth Amendment and the Washington Constitution. CP 410-15; 15 RP 2238-41, 2246-48. Mr. Berniard cited several decisions of this Court, the Supreme Court, and other jurisdictions, including *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005) and *State v. Johnson*, 125 Wn. App. 443, 105 P.3d 85 (2005). Mr. Berniard noted that pursuant to these cases, the court should either retain Ms. Ruark on the jury or declare a mistrial. CP 410-15; 15 RP 2238-41, 2246-48. To dismiss her would be erroneous in light of the reasonable possibility that the impetus for removal would stem from her views on the merits of the case. *Id.* Mr. Berniard stated that at a minimum, if the court was considering dismissing Ms. Ruark, it should talk to her first to “determine if she is able to proceed consistent with her statement to Ms. Snow yesterday that she was able to proceed, she felt better, she might like to talk to Ms. Snow afterwards, but she felt confident that she could go on.” 15 RP 2246.

The court did not interview Ms. Ruark. Instead, the judge dismissed her from the jury because “her unstable mental and emotional condition makes her unfit to serve as a juror in this matter.” The court stated, “The reference to everyone else being against her does not in my

mind rise to the level of showing evidence that she is actually a holdout juror in this situation.” 15 RP 2249. As explained below, the ruling violated Mr. Berniard’s constitutional rights, and this Court should reverse and remand for a new trial.

- b. The dismissal of the holdout juror violated Mr. Berniard’s constitutional rights under *Elmore* and *Johnson* because it was reasonably possible that any problems stemmed from Juror 2’s view that the evidence was insufficient to convict.

The trial court dismissed Juror 2 under RCW 2.36.110, which provides:

It shall be the duty of a judge to excuse from further service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

The statute, however, is circumscribed by the Constitution. The Sixth Amendment and article I, section 22 guarantee trial by an impartial jury, and article I, section 21 provides the right to a unanimous jury. U.S. Const. amend. VI; Const. art. I, §§ 21, 22; *see Elmore*, 155 Wn.2d at 771-72. Dismissing a juror on grounds stemming from the juror’s doubts about the sufficiency of the evidence violates these constitutional clauses. *Elmore*, 155 Wn.2d at 771, 772. Instead, the court must either allow the

juror to continue deliberating or declare a mistrial. *Id.* at 772; *United States v. Symington*, 195 F.3d 1080, 1087 (9<sup>th</sup> Cir. 1999).

In *Elmore*, the Washington Supreme Court adopted the “heightened” standard used in the Ninth Circuit to evaluate the propriety of dismissing a juror during deliberations: “if the record evidence discloses ‘*any reasonable possibility* that the impetus for a juror’s dismissal stems from the juror’s views on the merits of the case, the court must not dismiss the juror.” *Id.* at 776 (quoting *Symington*, 195 F.3d at 1087) (emphases altered). “Where there is conflicting evidence as to the reasoning behind a juror’s position, the heightened standard requires the trial court to err on the side of allowing the juror to continue to deliberate.” *Elmore*, 155 Wn.2d at 779.

It is also important for the trial court “to conduct a ... balanced investigation.” *Id.* at 775. For example, in *Elmore* the Supreme Court disapproved of a trial court’s dismissal of one juror after having read complaints about that juror from two other jurors, without having interviewed the target juror. *Id.* Similarly here, over Mr. Berniard’s objections, the trial court dismissed Ms. Ruark without interviewing her, solely on the basis of the statements made by the jury debriefer and juror administrator. Also as in *Elmore*, the court here improperly dismissed a juror despite a reasonable possibility that the problem stemmed from her

views on the merits of the case. The juror told Ms. Snow that she was “distressed” because she was “afraid that soon [she] would be the only juror with all of the others against [her],” and she “was trying hard to find courage within [herself].” CP 607; 15 RP 2220, 2222. This information clearly precluded dismissal under *Elmore*.

In addition to *Elmore*, this Court’s decision in *Johnson*, 125 Wn. App. 443, controls. There, this Court reversed where the trial court improperly removed a juror who was “emotionally distraught”. *Id.* at 451, 459. The juror herself (Juror 9) had asked to be removed during deliberations, expressing that “she was in an emotional and physical state such that she could not continue deliberating.” *Id.* at 451. At a hearing on the issue, the foreperson told the trial court that Juror 9 was crying a lot, often retreated to a corner to embroider, and would cease communicating with other jurors. *Id.*

Juror 9 testified that she was having difficulty because her “understanding of how a decision is made” was “confused.” She further testified that she had been crying and experiencing stress during deliberations because the foreperson had directed the jury to “put everything away and just to sit around the table and have a discussion.” Juror 9 stated: “I would like to see the – I’m not ready to put my notebooks away. I’m not ready to put the evidence away. I think there’s more discussion that needs to be done.” In addition, she testified that she felt “strongly” about the jury instructions and believed that she had interpreted those instructions differently from the other members of the jury.

*Id.* at 451-52. The trial court dismissed the juror based on the foreperson's testimony that Juror 9 had "curled up in a ball in the corner" and ceased communicating.

On appeal, the defendant argued the dismissal of Juror 9 violated his constitutional rights, and in response, the State made arguments remarkably similar to those made here: "the State argues that juror 9 was 'not so much a hold out on a hung jury as she was a disabled juror who was, for psychological or emotional reasons, unable to participate meaningfully in the jury's deliberative process.'" *Id.* at 457. This Court agreed with the defendant, noting, "[w]here the record shows *any reasonable possibility* that the impetus for a juror's removal stems from his or her views on the merits of the case, the dismissal is error." *Id.* This Court recognized that Juror 9 was "emotionally distraught," but noted that her own testimony indicated that one of the reasons she had been crying and was upset was "because she took a different view of the jury instructions and other issues in the case." *Id.* at 458-59. Thus, the trial court violated the defendant's constitutional rights when it removed the juror. *Id.* at 459; *see also United States v. Hernandez*, 862 F.2d 17 (9<sup>th</sup> Cir. 1988) (reversing where trial judge removed juror for "mental incompetence" after discovering that he had been discharged from the

armed services for psychiatric reasons and that he was holding out to acquit).

The same is true here. As in *Johnson*, the juror here was upset and crying, but as in *Johnson*, the reason the juror was upset because of disagreement over the evidence and jury instructions. Also as in *Johnson*, although the juror here was initially reluctant to continue deliberating, she made clear before the hearing on the issue that she felt better and was able to continue deliberating. As noted in *Elmore*, the trial court here should have interviewed Juror 2. But regardless, because there was conflicting evidence, the trial court was required to err on the side of retaining the juror in order to protect Mr. Berniard's constitutional rights. *Elmore*, 155 Wn.2d at 779; *Johnson*, 125 Wn. App. at 458-59.

In sum, the trial court violated Mr. Berniard's rights under the Sixth Amendment and article I, sections 21 and 22 when it dismissed a holdout juror who was upset about the other jurors being against her. The remedy is reversal of the convictions on all counts and remand for a new trial. *Johnson*, 125 Wn. App. at 446.

- c. The dismissal of the holdout juror was also improper under the statute because Juror 2's reaction to the deliberative process was normal, not "mentally defective".

Although the constitutional error alone requires reversal, it is worth noting that dismissal of Juror 2 was improper under the statute as well, because she did not have a "mental defect". *See* RCW 2.36.110. To the contrary, she was performing her duties conscientiously, and was understandably upset by the aggressive treatment she received from other jurors, their failure to follow instructions, and her status as a holdout for acquittal.

It is normal for jurors to be traumatized by the deliberative process. *See* Robertson, N., Davies, G. and Nettleingham, A. (2009), Vicarious Traumatization as a Consequence of Jury Service, *The Howard Journal of Criminal Justice*, 48: 1–12. Indeed, that is the reason mental health professionals like Ms. Snow are employed to assist jurors post-trial. Washington State Jury Commission, Report to the Board for Judicial Administration, at 30 (July 2000). Studies show that the depression and "intrusive thoughts" Ms. Ruark experienced are widespread among jurors serving on murder trials. Vicarious Traumatization, *supra*, at 3. The most comprehensive study of American jurors found that in cases like this one, lasting more than 11 days, 92% of jurors reported "significant" stress. *Id.*

Furthermore, multiple studies have found that the deliberation process is the most traumatizing part of jury service, not the gruesome exhibits or emotional testimony. *Id.* at 4. “Again, jury discussions and reaching a verdict were rated the most distressing aspects of the trial, more so than harrowing aspects of the evidence.” *Id.* at 5. Both American and British studies also found “[w]omen as a group appear to be more vulnerable than men,” and women “attached greater stress to dealing with dissension and answering questions in the jury room.” *Id.* at 9; *see id.* at 4, 8.

In this case, Juror 2, Ms. Ruark, had a common reaction to the stress of difficult deliberations following a long murder trial. She should be praised for insisting that the other jurors follow the instructions and for “trying hard to find courage within [herself]” to hold the State to its burden of proof, even in the face of aggressive mistreatment by other jurors and a traumatic deliberations process. CP 607. Instead, she was labeled by the prosecutors and judge in open court as “mentally defective” and dismissed from the jury. This action not only violates the statute and requires reversal of Mr. Berniard’s convictions, it is grossly offensive and warrants an official apology to the juror. This is not the way our system should treat citizens who sacrifice their own needs in order to serve an important civic duty. *Cf. Powers v. Ohio*, 499 U.S. 400, 406-07, 111 S.Ct. 1364 (1991) (improper race-based exclusion of juror violates not only

defendant's rights, but also the rights of the juror and community as a whole).

The Washington Courts' website states:

The American system of trial by jury is unique. No other nation relies so heavily on ordinary citizens to make its most important decisions about law, business practice, and personal liberty--even death. Ideally, Americans take their participation seriously lest they someday stand before their peers seeking justice.

<http://www.courts.wa.gov/newsinfo/resources/> (quoting Stephen J. Adler).

The website also says, "We hope you find your experience as a juror interesting and satisfying. Thanks for your willingness to serve!"

[http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo\\_jury.jury\\_guide](http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.jury_guide)

de. Ms. Ruark took her participation seriously, but was not thanked for her willingness to serve. She was treated with derision instead of with dignity. Her dismissal violates the statute, the constitution, and principles of sound judicial administration. This Court should reverse.

**2. The trial court violated Mr. Berniard's Sixth Amendment right to confront the witnesses against him by allowing two detectives to testify about what three absent co-defendants told them about the crimes.**

- a. The trial court allowed detectives to testify about what three other suspects told them about the crimes at issue, even though the three other suspects did not appear at Mr. Berniard's trial and had never been subject to cross-examination.

Mr. Berniard moved in limine to prevent detectives from testifying that they talked to Mr. Berniard's codefendants and as a result identified Mr. Berniard as the fourth suspect in the crimes. CP 135; 5 RP 795. Mr. Berniard argued that such testimony would violate his rights under the Confrontation Clause of the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d (2004). CP 136-39. The codefendants had been severed for trial, would not appear at Mr. Berniard's trial, and had never been subject to cross-examination. CP 287. The court denied the motion, and denied a subsequent motion to reconsider, stating the testimony "is necessary as background information to explain the course of the investigation." 6 RP 857; CP 276-83.

The court gave limiting instructions stating that the jury was to consider the co-defendants' statements "only for the purpose of determining [their] involvement in the charged crime." CP 377 (instruction for Kiyoshi Higashi's statements); CP 378 (same for Amanda Knight); CP

379 (same for Joshua Reese). But the other co-defendants were not tried with Mr. Bernard, so their involvement was not a question for this jury.

During trial, before the detectives testified about the codefendants' statements, Mr. Bernard reiterated that he had a "standing objection" under *Crawford* to the "evidence the State intends to introduce from the prior codefendants." 8 RP 1137. The court acknowledged, "You will have a standing objection to any testimony by the codefendants in this case." 8 RP 1138. The court nevertheless proceeded to allow the testimony.

Detective Kevin Johnson testified that he interviewed Amanda Knight on May 4<sup>th</sup> and May 5<sup>th</sup>, 2010. 8 RP 1212. Officer Eddy Klier had arrested Ms. Knight, Kiyoshi Higashi, and Joshua Reese on May 1, 2010. 8 RP 1193-99. According to Detective Johnson, Ms. Knight told him that "she was part of a plan to commit a robbery" in the Sanders residence and that "she was looking for expensive items to steal." 8 RP 1212. The detective said that Ms. Knight told him "she was involved in looking [for] expensive items on Craigslist to steal" and that "she had a plan to go into the house, tie them up, ransack the house, looking for expensive things to take." 8 RP 1213. Detective Johnson testified that Ms. Knight said "that there were four people involved" in the crimes. 8 RP 1213.

Detective Johnson testified that Ms. Knight said she called regarding the Craigslist ad, that she spoke to Jim Sanders, and that she told him she wanted to buy the advertised ring for her mother for Mothers' Day. 8 RP 1214. Detective Johnson testified that Ms. Knight told him she wore a Bluetooth ear phone device with an open line so that someone outside could hear what was going on. 8 RP 1215. She said that she and one of her accomplices went into the home together pretending to be interested in the ring, and that her accomplice pulled a gun and the two of them tied up Jim and Charlene Sanders with zip ties. 8 RP 1215-16. Detective Johnson testified that Ms. Knight told him that after they secured Jim and Charlene two more robbers from their team entered the house, and that they were both armed. 8 RP 1216.

At this point, even though he had already objected numerous times, Mr. Berniard objected again. 8 RP 1216. Outside the presence of the jury, Mr. Berniard said, "there just cannot be any reasonable argument that this is not a violation of his right to confrontation." 8 RP 1219. Mr. Berniard noted that the cases cited by the State for the proposition that the testimony was proper "predated *Crawford* by about seven years." 8 RP 1219. The trial court told the parties they could brief the issue again before Detective Johnson resumed his testimony. 8 RP 1227-28.

However, the next day the State called another detective, Detective John Jimenez, who testified about what another absent co-defendant told him. 9 RP 1345, 1365-94. Detective Jimenez testified that on May 3<sup>rd</sup> he received information that Higashi, Knight, and Reese had been arrested in California. 9 RP 1363. He traveled to California and interviewed Joshua Reese on May 4<sup>th</sup> and May 5<sup>th</sup>. 9 RP 1365. Detective Jimenez testified that Mr. Reese told him about his own involvement in this crime and the involvement of others. 9 RP 1365-66. Mr. Berniard objected, but the trial court overruled the objection and allowed Detective Jimenez to continue. 9 RP 1366.

Detective Jimenez testified that he also interviewed Kiyoshi Higashi on May 7, 2010. 9 RP 1377. Detective Jimenez said that Mr. Higashi told him about his participation in the crime and who the other participants were. 9 RP 1377. Detective Jimenez testified that during the course of the investigation, he began trying to identify a black male known as YG. 9 RP 1380. He eventually associated the name with Clabon Berniard. 9 RP 1381.

Outside the presence of the jury, Mr. Berniard moved for a mistrial based on, inter alia, multiple confrontation clause violations. 9 RP 1389-94; CP 287-94. The court denied the motion, ruling there was “no confrontation clause violation.” 10 RP 1442. The court thought there was

no Sixth Amendment problem because the statements of the codefendants “would appear to be statements regarding their own participation in these crimes.” 10 RP 1458. The court did not acknowledge that this is relevant only when co-defendants are tried together. The State was then allowed to continue examining Detective Jimenez about the absent codefendants’ statements.

Detective Jimenez testified that Joshua Reese told him he had a plan to find “expensive stuff” on Craigslist to set up a robbery. 10 RP 1462. Detective Jimenez testified that Reese told him he went to the Sanders house and waited outside wearing a Bluetooth phone device with an open line inside, and that at some point he entered the residence. 10 RP 1462. Detective Jimenez testified that Reese said he was armed with a revolver, that he went upstairs and saw the kids, and that he stole property from the upstairs portion of the house. 10 RP 1463.

Because the court had ruled there was “no confrontation clause violation,” the State was also able to recall Detective Johnson to continue detailing what Amanda Knight had told him. 11 RP 1539. Detective Jimenez repeated that Ms. Knight told him she went into the Sanders’s home with zip-ties, that she zip-tied Charlene, and that her companion zip tied Jim. 11 RP 1540. Detective Jimenez testified that Ms. Knight told him she went upstairs “looking for stuff to steal,” that she took Charlene’s

wedding ring off her finger, and that she pawned Jim's wedding ring in California. 11 RP 1540. Detective Jimenez testified that Ms. Knight also told him about other participants in the crime. 11 RP 1540-41.

As explained below, the admission of Detective Johnson's testimony describing Amanda Knight's statements and the admission of Detective Jimenez's testimony describing statements of Joshua Reese and Kiyoshi Higashi violated Mr. Berniard's Sixth Amendment rights. The trial court erred in denying Mr. Berniard's motion in limine to exclude this evidence, in denying the motion to reconsider that ruling, in overruling Mr. Berniard's timely Confrontation Clause objections during trial, and in denying the motion for a mistrial.

- b. The admission of the detectives' testimony about the absent codefendants' statements violated Mr. Berniard's Sixth Amendment rights because the statements were testimonial and Mr. Berniard was never able to cross-examine the codefendants.

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The right to confront one's accusers is a concept that dates back to Roman times. *Crawford*, 541 U.S. at 43. The Confrontation Clause prohibits the admission of testimonial statements of a witness who does not appear at trial unless (1) the witness is unavailable to testify, *and*

(2) the defendant had a prior opportunity for cross examination. *State v. Beadle*, 173 Wn.2d 97, 107, 265 P.3d 863 (2011) (citing *Crawford*, 541 U.S. at 53-54).

Statements taken by police officers in the course of interrogations are within the “core class” of testimonial statements subject to the Confrontation Clause. *Crawford*, 541 U.S. at 51-52. Although statements elicited to address an “ongoing emergency” are not testimonial, where “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution,” the statements are testimonial and cannot be admitted at trial unless the speaker is available for cross-examination. *Beadle*, 173 Wn.2d at 108 (citing *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)).

Here, in violation of the Sixth Amendment, the trial court allowed Detectives Johnson and Jimenez to testify at length about what Amanda Knight, Joshua Reese, and Kiyoshi Higashi told them about the crimes at issue in Mr. Berniard’s case. The statements fell within the “core class” of testimonial statements subject to the Confrontation Clause because they were elicited during police interrogations several days after the crimes, and the police were interviewing the suspects as part of their investigation for criminal prosecution. None of the three was present or available for

cross-examination at Mr. Berniard's trial, and none had been available for prior cross-examination. Thus, the introduction of their statements violated Mr. Berniard's constitutional rights.

The trial court allowed the testimony under the theory that *Bruton* and its progeny allow a nontestifying codefendant's statement to come in so long as the defendant is not named. 10 RP 1458; *see Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). But *Richardson* and *Bruton* apply only to joint trials, because in such cases the codefendant's statement is admissible against him. *See Richardson*, 481 U.S. at 201-02 (at a joint trial, nontestifying co-defendant's confession properly admitted against him where it was redacted to omit all indication that a third perpetrator even existed). Here, the codefendants' cases were severed from Mr. Berniard's, so *Bruton* and its progeny are inapposite and *Crawford* controls.

In *Crawford*, Michael Crawford was accused of stabbing a man who allegedly tried to rape his wife, Sylvia. *Crawford*, 541 U.S. at 38. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though Michael Crawford had no opportunity to cross-examine Sylvia. *Id.* Both Michael and Sylvia had been suspects in the crime, and indeed had gone to the victim's house

together the night of the stabbing. *Id.* Detectives gave both Crawfords *Miranda* warnings and interrogated each of them regarding the crimes. *Id.* But the State eventually charged only Michael Crawford, and used Sylvia Crawford's statements against him. *Id.* at 40. Sylvia herself did not testify due to the spousal privilege, so the statements were admitted through a detective. *Id.*

The defendant was convicted, but the United States Supreme Court reversed. The Court noted, "Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case." *Id.* at 65. It held that "[w]hatever else the term [testimonial] covers, it applies at a minimum to ... police interrogations." *Id.* at 68.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment.

*Id.*

The same is true here. Under *Crawford*, there can be no doubt that the statements of the other suspects, taken in police custody as part of detectives' investigation of the crime, were testimonial statements subject to the Confrontation Clause. Yet two detectives were permitted to testify at length about the other suspects' descriptions of the crimes at issue, and Mr. Berniard had no opportunity to cross-examine the other suspects. The

trial court's admission of this evidence violated Mr. Bernard's rights under the Sixth Amendment. U.S. Const. amend. VI; *Crawford*, 541 U.S. at 68.

In addition to wrongly believing *Bruton* rather than *Crawford* controlled, the trial court ruled there was no confrontation clause problem because the testimony was "necessary as background information to explain the course of the investigation." 6 RP 857. The ruling was improper for two independent reasons.

First, the statements were used for their truth, not to "explain the investigation." Officers relayed the co-defendants' detailed descriptions of the planning and execution of the crimes. These descriptions of the crimes had nothing to do with "the course of the investigation." They were relevant only to proving the group committed all of the crimes charged and did so with deliberate cruelty and a high degree of sophistication and planning. *See State v. Johnson*, 61 Wn. App. 539, 545-46, 811 P.2d 687 (1991) (trial court improperly admitted officer's testimony about what he learned from affidavit for ostensible purpose of explaining his "state of mind;" this court reversed because it was really inadmissible hearsay and violated the Confrontation Clause).

Second, as Mr. Bernard pointed out below, whether the statements were admissible under the Rules of Evidence does not resolve the

Confrontation Clause question. 6 RP 851-53. Court rules cannot trump the Constitution. *State v. Frawley*, 140 Wn. App. 713, 721, 167 P.3d 593 (2007). “Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence.” *Crawford*, 541 U.S. at 61. As explained above, the question under the Confrontation Clause is whether the statements are testimonial and whether the defendant had a prior opportunity for cross-examination. Because, as in *Crawford*, the answer to the first question is “yes,” and the answer to the second question is “no,” the admission of the co-defendants’ statements violated Mr. Bernard’s Sixth Amendment rights.

c. The remedy is reversal and remand for a new trial.

The State bears the burden of proving a constitutional error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). The State cannot meet that burden here. The trial court allowed the State to elicit testimony from two detectives about what all three codefendants said occurred on the night in question. The codefendants were not available or subject to cross-examination, but through the detectives, they described in detail the plan and execution of the crimes. Although the State presented other evidence of the identity of

the fourth perpetrator, including cell-phone records and testimony from Charlene Sanders and Lacey Berniard, the detailed description of the plan and execution of the crimes came in only through the statements of the absent co-defendants.<sup>2</sup> Based on this testimony, the jury found Mr. Berniard guilty not only of the underlying charges, but also of the aggravating factor of “high degree of sophistication and planning”. CP 658. The jury relied on the testimony of the absent codefendants, even writing “Jimenez said Reese had named YG” on the whiteboard in the deliberation room. CP 605. Under these circumstances, the State cannot prove the Sixth Amendment violation was harmless beyond a reasonable doubt. This Court should reverse and remand for a new trial.

**3. The trial court erred in admitting a video KOMO TV recorded of their reporter informing Mr. Berniard’s family that he was wanted for murder.**

- a. KOMO TV ambushed Mr. Berniard’s mother and sister and informed them, while surreptitiously filming them, that Clabon was wanted for murder.

On May 5, 2010 KOMO TV news anchor Sabra Gertsch learned that a fourth suspect in the “Craigslis killing” had been identified. 2 RP 303. She and camera operator Dan Strothman obtained addresses that the

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<sup>2</sup> Furthermore, the admission of Lacey Berniard’s testimony violated the Privacy Act and Charlene Sanders’s identification testimony violated due process, as explained below.

station thought might be related to the name “Berniard,” and went “to go knock on a few doors and see what we can find.” 2 RP 304-05.

At the second address, Gertsch went to the door while Strothman waited in the car. 2 RP 324, 3 RP 345. Clabon Berniard’s aunt answered the door, and let Gertsch in. 2 RP 308, 324. Strothman followed. 3 RP 346.

Clabon’s mother, Joan Berniard, was downstairs at the time. Clabon’s aunt (Joan’s sister) went downstairs and told her the police were there. 2 RP 166. Even though she was still in her pajamas, Joan went upstairs, and her sister explained that the visitors had information about “that Craigslist thing.” Joan Berniard said, “what Craigslist thing?” Ex. 164 at 0:00 -0:15. Strothman had the camera on and recording, but it was low and pointed at the floor. The light which indicates the camera is recording was not on even though Strothman was recording both audio and video. 2 RP 350. Strothman had purposely turned the light off. 3 RP 367-68.

Gertsch stood between Strothman and Joan Berniard, completely blocking Joan Berniard’s view of Strothman and his camera. Ex. 164 at 0:30. After about 30 seconds of recording, Strothman moved the camera up so that it was recording the back of Gertsch’s head. Gertsch was covering Joan Berniard’s face, but Ms. Berniard’s arm was visible. Ex.

164 at :30. Sabra Gertsch told Joan Berniard that her son was wanted for murder. Ex. 164 at 0:30-0:40.

Joan Berniard screamed, “murder?!” and stumbled backward into an armchair. At this point, Gertsch moved out from between the camera and Joan Berniard. Ex. 164 at 0:40.

Gertsch and Strothman never introduced themselves to Ms. Berniard and never told her they were recording her. 2 RP 327-28; 3 RP 369-71. Strothman later explained it was rare that they recorded someone without asking first, but they did so when they wanted to perform an “ambush interview”. 3 RP 365, 375-76.

By the time Gertsch stopped blocking Joan Berniard’s view of the camera, Joan Berniard was stunned and consumed with grief because of the horrific news she had just received. 2 RP 329-30; Ex. 164 at 0:30-40. Joan Berniard broke down crying and asked Gertsch questions about what she had heard. Ex. 164. Ms. Berniard repeatedly expressed her disbelief and put her head in her hands. Ex. 164. She never looked toward the camera operator, whose existence no one had acknowledged. When she was not putting her head in her hands or staring in wide-eyed disbelief, she was looking at Gertsch. Ex. 164. When Gertsch showed her a picture of the fourth suspect, Ms. Berniard put her head in her hands and heaved with sobs. The camera zoomed in on her. Ex. 164 at ~3:38.

Gertsch knelt down, caressed Ms. Berniard's back, and repeatedly said, "I'm so sorry." Ex. 164 at ~3:50. Ms. Berniard put her head in her hands and said, "oh god, no, oh god, no." Ex. 164 at ~3:50-4:20.

After about 4 ½ minutes, Joan's daughter Lacey Berniard walked into the room and stood behind her mother. Ex. 164 at 4:30. Lacey was 14 years old and took special education classes because she had been deprived of oxygen at birth. 2 RP 170, 182. When she heard what Gertsch was telling her mother, she wiped tears from her eyes. Ex. 164 at ~4:30-5:00.

After Gertsch named the other three suspects, Lacey said her brother knew somebody named "Reese". Ex. 164 at ~5:00-5:45. After a few more minutes, Lacey said, "I know what she's talking about." Ex. 164 at ~7:30. As she was gasping with tears, Lacey told her mother that she overheard her brother tell her sister that "they" broke into a house and "brung the little kids downstairs." Ex. 164 at ~7:30-8:00. At this point, after they had already been surreptitiously recording the conversation for eight minutes, Gertsch picked up her hand microphone and held it in front of Lacey. Ex. 164 at ~7:55. After answering a couple of followup questions, Lacey cried in her mother's arms before leaving the living room. Ex. 164 at ~8:00-9:00.

Before trial in this case, both parties obtained copies of the KOMO video. Mr. Bernard moved to suppress the video and the information obtained therefrom because the surreptitious recording of the “ambush interview” and Joan and Lacey’s conversation in their own home without their consent violated the Privacy Act, RCW Ch. 9.73. 2 RP 160-356; 3 RP 360-439; CP 37-51, 92-98. The court denied the motion. 3 RP 435-39.

Although the parties agreed that the video was inadmissible as substantive evidence because its admission would violate the rule against hearsay, the State called Lacey Bernard as a witness in its case-in-chief and forced her to relay what she had told her mother in her living room during KOMO’s ambush recording. 9 RP 1286-98. Mr. Bernard then called an expert to testify about Lacey’s disabilities and how they would affect her memories and perception of conversations. 11 RP 1658-85. Over Mr. Bernard’s objections, the court allowed the State to play a redacted version the KOMO video to the jury pursuant to ER 705 in order to allow them to “evaluate the basis” of the expert’s opinion. 11 RP 1692-1713; 12 RP 1718-1773; ex. 164A. The State also called Sabra Gertsch to testify in its case-in-chief. 10 RP 1472.-88.

b. The admission of the video and information obtained therefrom violated the Privacy Act.

Washington's Privacy Act, chapter 9.73 RCW, is "one of the most restrictive in the nation." *State v. Christensen*, 153 Wn.2d 186, 198, 102 P.3d 789 (2004). It proscribes the recording of private conversations "without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030(1)(b). "Any information obtained" in violation of the act is inadmissible for any purpose at trial. RCW 9.73.050; *State v. Salinas*, 121 Wn.2d 689, 692, 853 P.2d 439 (1993).

The trial court concluded that the conversation in Joan Bernard's living room was not private and that she and her daughter consented to KOMO's recording. 3 RP 435-39. The court was wrong. Because the conversation was private and was recorded without the consent of all parties, the admission of the recording and the information obtained from it (Lacey's and Gertsch's testimony) violated the Privacy Act.

i. *The conversation in Joan Bernard's living room was private.*

A conversation is private for purposes of the Privacy Act when (1) parties manifest a subjective intention that it be private, and (2) that expectation is reasonable. *Christenson*, 153 Wn.2d at 193. The primary focus of the inquiry is the parties' intent. *State v. Faford*, 128 Wn.2d 476, 484, 910 P.2d 447 (1996). The secondary consideration of objective

privacy is analyzed by reviewing the duration and subject matter of the conversations, the location, the presence of third parties, and the relationship between the speakers. *State v. Clark*, 129 Wn.2d 211, 225-26, 916 P.2d 384 (1996). Where, as here, the facts are undisputed, the question of whether a conversation is private is a question of law this Court reviews *de novo*. *Christenson*, 153 Wn.2d at 192.

Here, both subjective and objective factors show the conversation was private. The communication was not “an inconsequential, nonincriminating telephone conversation with a stranger.” *Faford*, 128 Wn.2d at 484 (citing *Kadoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992)). It was a conversation during which a daughter told her mother one of the worst things a parent could hear: that her son discussed participating in a home-invasion robbery that resulted in someone’s death. *See Faford*, 128 Wn.2d at 485 (parties’ conversation was intended to be private regardless of their using cordless telephones because it was a consequential, incriminating communication between girlfriend and boyfriend).

An analysis of the objective factors also leads to the conclusion that the conversation in question was private. Unlike the communications in *Clark*, the conversation here was long, and the subject matter was sensitive. *See Clark*, 129 Wn.2d at 225, 228 (“very abbreviated”

conversations consisting of “routine” subject matter not private). Here, the relationship between the parties also weighs in favor of privacy, because Joan and Lacey Bernard are mother and daughter, unlike the strangers at issue in *Clark*, 129 Wn.2d at 227, and *Kadoranian*, 119 Wn.2d at 190.

An analysis of the final factor -- location and presence of third parties -- also reveals that the conversations were private. Although a third party was obviously present (because they were obtaining the illegal recording at issue), the conversation occurred in Joan Bernard’s home, the location in which individuals enjoy the utmost protection of privacy. *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994); *contrast Clark*, 129 Wn.2d at 228 (conversation on public street not private). “Generally, a person's home is a highly private place. In no area is a citizen more entitled to his privacy than in his or her home.” *Young*, 123 Wn.2d at 185. Joan Bernard clearly was not expecting guests or contemplating a public conversation; she was in her pajamas and the house was not picked up. Ex. 164. In sum, the circumstances show the conversation at issue here was a “private conversation” subject to the prohibitions of RCW 9.73.030(1)(b).

- ii. *The Berniards did not consent to KOMO’s recording of the conversation.*

Because the conversation between Lacey and Joan was private, KOMO was required to obtain consent from both of them before recording it. RCW 9.73.030(1)(b). In Washington, “*all* parties to a private communication must consent to its disclosure.” *Christensen*, 153 Wn.2d at 198 (emphasis in original). A television station’s recording of a conversation is illegal unless every party to the conversation has expressly consented to its recording or “the recording or transmitting device is readily apparent or obvious to the speakers.” RCW 9.73.030(4).

The KOMO reporter and camera operator admitted they did not obtain the express consent of either Joan or Lacey Berniard before recording their conversation. The trial court concluded that consent was implicit because the camera was “readily apparent or obvious,” but this conclusion was erroneous. Indeed, Gertsch’s and Strothman’s testimony made clear that they purposely hid the fact that they were recording until the Berniards were so shocked and grief-stricken that they would not notice. This is also apparent on the video itself.

The testimony and video reveal:

- The camera operator, Strothman, did not go to the door with Gertsch initially (2 RP 324);
- Neither Joan nor Lacey let Gertsch inside; she was already in the living room when they came upstairs (2 RP 309);

- Both Gertsch and Strothman admitted they did not introduce themselves to either Joan or Lacey (2 RP 327; 3 RP 369);
- Both Gertsch and Strothman admitted they did not tell either Joan or Lacey they were recording or seek their consent (2 RP 325; 3 RP 371-72);
- Strothman explained that the only time they don't seek consent or notify subjects of the recording is when they want to "ambush" them (3 RP 365);
- Strothman admitted that although he was recording he turned off the red light that indicates the camera is recording (3 RP 367);
- Gertsch blocked Joan Berniard's view of the camera until after she delivered the devastating news (ex. 164 at ~0:30);
- Lacey Berniard was only 14 years old, had been deprived of oxygen at birth, and had an IQ of 30-55; Child psychiatrist Marsha Kent did not think Lacey understood she could refuse consent (2 RP 170, 182, 215-16, 229);
- Gertsch did not pick up her hand microphone until 8 minutes into the recording, after Lacey had already told her mother about the incriminating conversation she overheard. (Ex. 164 at ~8:00).

In light of the above facts, consent was neither explicit nor implicit. The camera was hidden until after Gertsch delivered the devastating news, at which point no reasonable person would have noticed it. As Mr. Berniard's attorney pointed out, no one would have consented to being recorded in their own home after hearing news like that, as they

were wailing with grief in their pajamas. “No one with a shred of dignity or privacy would do that.” 3 RP 418. Neither Joan nor Lacey Berniard consented to the recording of this unbearable family conversation. KOMO simply recorded it anyway, in violation of the Privacy Act.

- c. The remedy is reversal and suppression of the video as well as the testimony of Lacey Berniard and Sabra Gertsch.

“Any information obtained” in violation of the Privacy Act is inadmissible. RCW 9.73.050. Thus, not only must the KOMO video be excluded, but the testimony of Lacey Berniard and Sabra Gertsch must also be suppressed, because the information about which they testified was obtained in violation of RCW 9.73.030. *See State v. Fjermestad*, 114 Wn.2d 828, 834, 791 P.2d 897 (1990) (“We have ... held that illegally obtained information would be excluded whether the information was disseminated by introducing the tape recordings *or the testimony of the [person] who participated in the conversation*”).

The Supreme Court has explained the broad scope of the Privacy Act’s exclusionary rule. In *Fjermestad*, for example, a police officer wore a body wire without the proper authorization, then engaged in a drug transaction with the defendant. *Id.* at 829-30. The Supreme Court held that not only was the recording of the conversation subject to suppression,

but the officer could not even testify about his visual observations at the time of the recorded transaction. *Id.* at 836. In so doing, the Court described the exclusionary rule of RCW 9.73.050 as “all encompassing”. *Id.* at 835.

The Court reaffirmed *Fjermestad* in *Salinas*, 121 Wn.2d at 690. There too, an officer wore a body wire without authorization. *Id.* at 691. The officer went to the defendant’s apartment. Another individual arrived, placed cocaine on the table, and left. The officer then left also. *Id.* at 691-92. The Supreme Court held the officer was not allowed to testify about his observation of cocaine because he made the observation while he was illegally recording – even though the device recorded only sound. *Id.* at 692-93. This was so because “RCW 9.73.050 prohibits the admission of all information obtained in violation of RCW 9.73.030.” *Id.* at 697.

Finally, in *Faford*, a neighbor eavesdropped on the defendants’ telephone conversations in violation of the Privacy Act. *Faford*, 128 Wn.2d at 479. He heard the defendants discussing their marijuana grow operation, and reported it to police. *Id.* at 479-80. The Supreme Court held “the trial court erred by admitting any testimony from [the neighbor] regarding the intercepted conversations and the accompanying visual observations of suspect activity,” and also erred by admitting “evidence subsequently seized by the police pursuant to [the neighbor’s] tips. *Id.* at

488. The Court reiterated that the Privacy Act's exclusionary remedy must be interpreted "broadly".

Applying this broad exclusionary rule here requires suppression of the KOMO video, Lacey Berniard's testimony, and Sabra Gertsch's testimony. The trial court erred in admitting this evidence. "Failure to suppress evidence obtained in violation of the [Privacy] act is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *Christensen*, 153 Wn.2d at 200.

The erroneous admission of the testimony and recording here was prejudicial and requires reversal. The identity of the fourth perpetrator was the issue at trial, and Lacey Berniard's statements implicating her own brother materially affected the outcome. Indeed, the prosecutor relied on Lacey's statements extensively in closing argument. *See* 14 RP 2110, 2117, 2124-30, 2199. This Court should reverse and remand for suppression of the evidence, and for a new trial.

**4. The trial court violated Mr. Berniard's right to due process under article I, section 3 of the Washington Constitution by admitting Charlene Sanders's unreliable identification of Mr. Berniard as one of the perpetrators.**

- a. Dr. Loftus explained that Ms. Sanders's identification of Mr. Berniard was unreliable because she could not describe the fourth intruder right after the event, the event was highly stressful, the identification was made more difficult by weapon-focus and own-race bias, and post-event information altered her "memories".

Before trial, Mr. Berniard moved to suppress Charlene Sanders's identification of Mr. Berniard as one of the perpetrators of the crime. CP 22-36; 1 RP 69-155; 3 RP 442-566; 4 RP 570-695. Ms. Sanders did not identify Mr. Berniard until a week after the event. 1 RP 74, 94. The night of the crimes, she was not even sure whether there were three or four perpetrators, and could describe only the first two who entered the house, Ms. Knight and Mr. Higashi. 1 RP 78-85, 105-09. The next day, she and her children described the first two perpetrators to a sketch artist, but they could not provide any information about the third and fourth perpetrators, so the sketch artist did not draw them. 3 RP 559-64. Neither Ms. Sanders nor her children ever described the voices of the assailants. 1 RP 85, 109, 139. They could not describe the faces of the third and fourth suspects because the perpetrators were wearing masks. 1 RP 81; 3 RP 564.

A week after the crime, on May 6, Detective Jimenez called Charlene Sanders to tell her they had captured the fourth suspect. 1 RP 134. Ed Troyer, the media relations officer for the Pierce County Sheriff's Office, issued a press release stating the office was 100% certain they had all four perpetrators. 1 RP 146-47. The next day, May 7, Ms. Sanders called Detective Jimenez and told him she had seen Clabon Berniard on TV the night before and that she recognized his voice as that of the fourth assailant. 1 RP 134. Eight months later, she said she recognized his face and that it was burned into her memory. 3 RP 542. At the suppression hearing, Ms. Sanders testified that although she could not describe the fourth assailant's appearance or voice immediately after the event, she was certain Mr. Berniard, whom she saw on TV a week later, was the perpetrator. 1 RP 94.

Dr. Geoffrey Loftus, a professor and expert on perception and memory, testified at the suppression hearing and explained why Ms. Sanders's identification of Mr. Berniard was unreliable. 3 RP 445-543. He explained that the brain is not like a video recorder; instead, memory is malleable and may be altered by post-event information. 3 RP 452-53. He noted that there is not necessarily any correlation between confidence and accuracy. 3 RP 454. He stated that it is harder to remember people accurately during high-stress situations like the one Ms. Sanders

experienced. 3 RP 469, 473. It would have been easier for her to perceive and remember the first two perpetrators, because the encounter was not initially stressful. 3 RP 480. But it would be “almost prohibitive” to remember the third and fourth suspects. 3 RP 480. Dr. Loftus further explained that Ms. Sanders’s identification of the fourth perpetrator would be compromised by the phenomena of “weapon focus” and own-race bias.<sup>3</sup> 3 RP 470, 481. Finally, the appearance of Mr. Berniard on television was essentially a one-person “show-up,” which is a notoriously suggestive identification procedure. 3 RP 486-95. In sum, Ms. Sanders – without realizing it – used post-event information to reconstruct her memory of the fourth perpetrator. 3 RP 500. Although she genuinely believed she remembered the face and voice of the fourth intruder, the identification was unreliable. 3 RP 500, 537-42.

The trial court nevertheless denied the motion to suppress, concluding that Ms. Sanders’s identification was “based on her memory of the event,” the circumstances were not unduly suggestive, and the identification was reliable. 4 RP 693-95; CP 647-52.

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<sup>3</sup> Own-race bias means it is more difficult for someone of one race to identify a person of another race. 3 RP 481. Ms. Sanders is white but the fourth perpetrator was African-American.

- b. This Court should hold that article I, section 3 of the Washington Constitution prohibits the admission of unreliable identification evidence, regardless of whether the State purposefully employed suggestive procedures, and should revise the factors to be considered in assessing reliability based on current scientific data.

The U.S. Supreme Court has held that the federal due process clause prohibits the introduction of identification evidence only where (1) police arranged suggestive circumstances leading to the identification; and (2) the identification was unreliable in light of (a) the opportunity of the witness to view the criminal at the time, (b) the witness's degree of attention, (c) the accuracy of her prior description of the criminal, (d) the level of certainty in the identification, and (e) the time between the event and the identification. *Perry v. New Hampshire*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)).

This Court should hold a different standard applies under the state constitution. The first step of the analysis under the federal constitution is driven by a deterrence rationale, and therefore limits suppression to cases involving police misconduct. But reliability is the primary concern under article I, section 3, so police misconduct is not a prerequisite to suppression. As to the reliability analysis, the U.S. Supreme Court has not

updated the factors to be considered in four decades, despite hundreds of scientific studies showing other factors are more relevant to the question of whether an identification is reliable. Many other states have updated their standards in light of current scientific data, and this Court should do the same. *See, e.g., State v. Henderson*, 27 A.3d 872 (N.J. 2011); *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005); *State v. Hunt*, 69 P.3d 571 (Kan. 2003); *Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *State v. Ramirez*, 817 P.2d 774 (Utah 1991); *People v. Adams*, 423 N.E.2d 379 (N.Y. 1981).

i. *The Gunwall factors show an independent state constitutional analysis is appropriate.*

To find that a state constitutional provision supplies different or broader protections than its federal counterpart, courts analyze six nonexclusive criteria. These are: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986).

As to the first two factors, the language of the federal and state due process clauses are identical. Both prohibit the deprivation of “life,

liberty, or property without due process of law.” U.S. Const. amend. XIV;  
Const. art. I, § 3. This does not end the inquiry, however.

The dissent erroneously asserts that it is improper to construe our state constitution as more protective of individual rights than the federal constitution when the pertinent provisions are similarly or identically phrased. Only if constitutional decisions by federal courts are “logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

*State v. Davis*, 38 Wn. App. 600, 605 n.4, 686 P.2d 1143 (1984) (quoting Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977)).

In addition, “[e]ven where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.” *Gunwall*, 106 Wn.2d at 61.

While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary. The people of this state shaped our constitution, and it is our solemn responsibility to interpret it.

*Dubose*, 699 N.W.2d at 597.

With respect to the third *Gunwall* factor, there does not appear to be any legislative history from the constitutional convention that sheds

light on whether the state due process clause should be interpreted differently from the federal one. *See State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992) (citing *Journal of the Washington State Constitutional Convention, 1889*, at 495-96 (B. Rosenow ed. 1962)).

Regarding the fourth factor, pre-existing state law, the Washington Supreme Court has held that the reliability of evidence standard embodied in the state constitution's due process clause provides broader protection than the federal due process clause, and it has never retreated from this holding. *Marriage of King*, 162 Wn.2d 378, 414, 174 P.3d 659 (2007) (Madsen, J., dissenting) (citing *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) ("*Bartholomew II*"). In *Bartholomew I*, the Court held that certain provisions of Washington's death penalty statute violated the federal due process clause because they permitted consideration of any relevant evidence at the penalty phase regardless of its reliability. *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982) ("*Bartholomew I*"). The U.S. Supreme Court vacated the judgment and remanded for reconsideration in light of its decision in *Zant v. Stephens*, 462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983). On remand, the state supreme court declined to rely solely on the federal constitution.

[I]n interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court's interpretation of the Fourteenth Amendment does

not control our interpretation of the state constitution's due process clause. *Olympic Forest Prods., Inc., v. Chaussee Corp.*, 82 Wn.2d 418, 511 P.2d 1002 (1973); *Pestel, Inc. v. County of King*, 77 Wn.2d 144, 459 P.2d 937 (1969).

*Bartholomew II*, 101 Wn.2d at 639. The Court held that the statute violated article I, section 3, declaring, "We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." *Id.* at 640. The Court stressed that "the independent state constitutional grounds we have articulated are adequate, in and of themselves, to compel the result we have reached." *Id.* at 644.

This independent interpretation of article I, section 3 was not an anomalous result. In *Davis*, the trial judge inferred guilt from the defendant's post-arrest silence. This did not violate the federal due process clause because the defendant had not been read *Miranda* warnings. *Davis*, 38 Wn. App. at 604 (citing *Fletcher v. Weir*, 455 U.S. 603, 71 L.Ed.2d 490, 102 S.Ct. 1309 (1982)). But this Court held that article I, section 3 required a different result. *See id.*

Thus, pre-existing state law addressing both the fairness of procedures in state courts and the specific question of whether article I, section 3 provides greater protection against the admissibility of unreliable evidence in a criminal trial unequivocally favors an independent constitutional analysis with respect to identification testimony.

The fifth *Gunwall* factor, differences in structure between the state and federal constitutions, always supports an independent constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Finally, state law enforcement measures are a matter of state or local concern, *id.*, as is the fundamental fairness of trials held in this state. *Bartholomew II*, 101 Wn.2d at 643-44. An application of the six *Gunwall* factors shows that article I, section 3's greater concern for the reliability of evidence requires renunciation of the federal standard for admissibility of identification evidence.

ii. *This Court should hold that article I, section 3 prohibits the admission of unreliable identification evidence.*

This Court should hold that article I, section 3, prohibits the admission of unreliable identification evidence. Admissibility should not turn on whether police purposefully employed suggestive identification procedures, because our constitution is more concerned with reliability and fairness than with deterrence. *See Bartholomew II*, 101 Wn.2d at 640 (“We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability”); *cf. State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (unlike federal fourth

amendment, primary purpose of article I, section 7 of Washington Constitution is not to deter police misconduct, but to protect privacy). Indeed, the same was true under the federal constitution until this year. *See Perry*, 132 S.Ct. at 731 (Sotomayor, J., dissenting) (majority opinion “recasts the driving force of our decisions as an interest in police deterrence, rather than reliability”); *Manson*, 432 U.S. at 114 (“reliability is the linchpin in determining the admissibility of identification testimony”). Thus, the existence of suggestive circumstances surrounding the identification – whether employed by a private or state actor – should be just one factor in the totality-of-circumstances analysis. *See Recent Case, Evidence – Eyewitness Identifications – New Jersey Supreme Court Uses Psychological Research to Update Admissibility Standards for Out-of-Court Identifications. – State v. Henderson*, 27 A.3d 872 (N.J. 2011), 125 Harv. L. Rev. 1514 (2012) (praising New Jersey Supreme Court’s update of standards but lamenting requirement of police misconduct; “The court should have treated equally all factors that might undermine the reliability of an identification”).

The other factors to be considered in determining whether an identification is reliable should be updated based on the decades of scientific research that has occurred since the U.S. Supreme Court adopted the five *Biggers* factors. On this point, the Court should follow the lead of

the New Jersey Supreme Court. *See Henderson*, 27 A.3d 872. In *Henderson*, the court revised the reliability factors to include those noted by Dr. Loftus at the suppression hearing in Mr. Berniard's case.

After appointing a Special Master to evaluate scientific evidence about eyewitness identifications, the court concluded that the federal standard "does not offer an adequate measure for reliability" and "overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate." *Henderson*, 27 A.3d 878. As Dr. Loftus explained in this case, the court found that "misidentifications stem from the fact that human memory is malleable." *Id.* at 888. Again mirroring Dr. Loftus's testimony, the court noted that "accuracy and confidence may not be related to one another at all." *Id.* at 889 (citing *State v. Romero*, 922 A.2d 693 (N.J. 2007)). Yet, to a jury, "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting) (quoting Elizabeth Loftus, *Eyewitness Testimony* 19 (1979)).

Although the trial court here inexplicably rejected Dr. Loftus's testimony on this point, the New Jersey Supreme Court agrees with him that "studies have shown consistently that high degrees of stress actually

impair the ability to remember.” *Henderson*, 27 A.3d at 894. Indeed, if an event is very stressful, then even if it lasts for a long time (e.g. more than 30 minutes), eyewitness memory is “subject to substantial error.” *Id.* at 904. And as Dr. Loftus emphasized at Mr. Berniard’s suppression hearing, “retained memory can be unknowingly contaminated by post-event information.” *Id.* at 894. These “concerns about feedback are not limited to law enforcement officers.” *Id.* at 900. Rather, “confirmatory feedback from non-State actors can also affect the reliability of identifications and witness confidence.” *Id.* This includes feedback from news media. *Id.* at 907.

The New Jersey Supreme Court also found that one-person showups like that which occurred here “are suggestive” when they occur more than two hours after the incident. *Id.* at 903. Like Dr. Loftus, the New Jersey Supreme Court discussed the problem of “weapon focus,” finding “an average decrease in accuracy of about 10% when a weapon was present.” *Id.* at 905. There is also an “own-age bias” and “own-race bias”, meaning people have a harder time accurately identifying people whose race and/or age group are different from their own. *Id.* at 906-907. The *Henderson* court updated its admissibility standard to incorporate all of this evidence. *See id.* at 920-22.

In light of the scientific evidence and article I, section 3's paramount concern for fair trials using reliable evidence, this Court should adopt a standard similar to that of the New Jersey Supreme Court. This Court should hold that article I, section 3 prohibits the admission of unreliable identification evidence, and that reliability should be determined based on consideration of the following nonexclusive list of factors:

- Whether the circumstances of the identification were suggestive (blind administration, pre-identification instructions, lineup construction, feedback, multiple viewings, showups, other identifications made, etc.);
- Level of stress during the event (moderate stress produces more accurate memories and high stress produces less accurate memories);
- Weapon focus;
- Duration;
- Distance and lighting;
- Witness characteristics (was the witness under the influence of alcohol or drugs; was age a relevant circumstance?);
- Perpetrator characteristics (was the perpetrator wearing a disguise?);
- Memory decay (how much time elapsed between the crime and the identification?);
- Race bias (does the case involve a cross-racial identification?).

*See Henderson*, 27 A.3d at 921; *see also* 3 RP 445-543 (Dr. Loftus's testimony consistent with *Henderson*). Additional factors may be considered as scientific understanding of eyewitness perception and memory evolves. *Henderson*, 27 A.3d at 922.

In sum, this Court should hold that article I, section 3 prohibits the admission of unreliable identification evidence, and that the above factors – derived from decades of scientific study – should guide the reliability determination.

- c. Because the admission of Ms. Sanders's unreliable identification violated Mr. Berniard's right to due process under article I, section 3, this Court should reverse and remand for suppression of the evidence and a new trial.

As explained in section 3(a) above, Charlene Sanders's identification of Mr. Berniard is unreliable based on a consideration of the relevant factors. Ms. Sanders could not even describe, let alone identify, the fourth perpetrator immediately after the crimes. This makes sense in light of the above factors, because (a) the situation was highly stressful; (b) the third and fourth perpetrators were wearing masks; (c) Ms. Sanders was face down on the floor while the perpetrator was behind her; (d) the perpetrator was much younger and was a different race (African American); and (e) the perpetrator was holding a gun to her head. The

appearance of Mr. Berniard on TV a week later was essentially a one-person showup, which Ms. Sanders used to construct a memory of the fourth suspect that she did not actually perceive during the incident. 3 RP 445-543. Because an analysis of the relevant factors shows Ms. Sanders's delayed identification of Mr. Berniard as the fourth perpetrator after viewing a TV newscast was unreliable, this Court should hold the admission of the identification violated Mr. Berniard's right to due process under article I, section 3. This Court should reverse and remand for suppression of the evidence, and for a new trial.

**5. The convictions for robbery and felony murder predicated on robbery violate the Fifth Amendment prohibition on double jeopardy, requiring vacation of the robbery conviction.<sup>4</sup>**

- a. A defendant's Fifth Amendment right to be free from double jeopardy is violated by convictions for both felony murder and the predicate felony.

A double-jeopardy violation may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2007). This Court reviews *de novo* the question of whether two convictions violate double jeopardy. *Jackman*, 156 Wn.2d at 746.

The Fifth Amendment to the United States Constitution provides, "No person shall ... be subject for the same offense to be twice put in

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<sup>4</sup> If this Court reverses and remands for a new trial based on one or more of the first four arguments, it need not reach arguments 5 through 10.

jeopardy of life or limb....” U.S. Const. amend. V. Similarly, article I, section 9 of our state constitution provides, “No person shall be ... twice put in jeopardy for the same offense.” Const. art. I, § 9. These clauses protect defendants against “prosecution oppression.” *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007) (quoting 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 25.1(b), at 630 (2d ed. 1999)).

To determine whether multiple convictions violate double jeopardy, courts apply the “same evidence” test. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to the contrary, a defendant’s double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. *Id.*; *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other. *Freeman*, 153 Wn.2d at 772 (citing *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896)).

Prosecutors may not “divide a defendant's conduct into segments in order to obtain multiple convictions.” *Jackman*, 156 Wn.2d at 749. Furthermore, if the prosecution has to prove one crime in order to prove

the other, entering convictions for both crimes violates double jeopardy. *Id.* In other words, entering convictions for two crimes violates double jeopardy if “it was impossible to commit one without also committing the other.” *Id.*

In light of the above rules, both the United States Supreme Court and Washington Supreme Court have recognized that entering convictions for both felony murder and the underlying felony violates the Fifth Amendment right to be free from double jeopardy. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); *In re the Personal Restraint of Francis*, 170 Wn.2d 517, 522 n.2, 242 P.3d 866 (2010); *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 818, 100 P.3d 291 (2004) (citing *Harris*, 433 U.S. 682). This is so because “[t]o convict a defendant of felony murder the State is required to prove beyond a reasonable doubt each element of the predicate felony.” *State v. Quillin*, 49 Wn. App. 155, 164, 741 P.2d 589 (1987). It is therefore impossible to commit felony murder without committing the underlying felony, and entering convictions for both violates double jeopardy. *See Jackman*, 156 Wn.2d at 749.

- b. Mr. Berniard was convicted of both robbery and felony murder predicated on the robbery, in violation of his constitutional right to be free from double jeopardy.

In violation of the Fifth Amendment and *Harris*, the trial court here entered convictions for both robbery (count two) and felony murder based on the robbery (count one). CP 437-38 (judgment and sentence); CP 322-23 (“second corrected second amended information”). The remedy is vacation of the robbery conviction and its associated firearm enhancement. *See Womac*, 160 Wn.2d at 656; *State v. Weber*, 159 Wn.2d 252, 266, 149 P.3d 646 (2006) (remedy for double-jeopardy violation is vacation of the lesser offense).

This Court, the Washington Supreme Court, and the U.S. Supreme Court have all required that convictions be vacated for double-jeopardy violations in similar circumstances. This Court reversed an attempted robbery conviction where the defendant had also been convicted of felony murder based on the attempted robbery in *State v. Williams*, 131 Wn. App. 488, 128 P.3d 98 (2006). This Court recognized, “the attempted robbery count merged into the felony murder because it was the predicate offense.” *Id.* at 491-92. In other words, “the essential elements of the homicide include all the elements of the robbery, such that the facts establishing one necessarily also establish the other.” *Id.* at 498.

This Court similarly reversed predicate convictions in *State v. Fagundes*, 26 Wn. App. 477, 614 P.2d 198 (1980). There, the defendant was convicted of first-degree felony murder as well as the predicate felonies of first-degree kidnapping and first-degree rape. *Id.* at 485. This Court vacated the convictions for kidnapping and rape, noting that these convictions violated double jeopardy because proof of the underlying felonies provided essential elements of the first-degree murder. *Id.* at 485-86.

Similarly in *Womac*, the defendant was convicted of homicide by abuse, felony murder predicated on assault, and assault, but the Washington Supreme Court ordered the latter two convictions vacated. *Womac*, 160 Wn.2d at 647. Only one of the first two convictions could be sustained because there was only one homicide, and the assault conviction could not stand because “Womac could not have committed felony murder in the second degree without committing assault in the first degree.” *Id.* at 656.

In *Harris*, the U.S. Supreme Court held the Fifth Amendment prohibited the defendant’s conviction for robbery following a conviction for felony murder predicated on robbery. *Harris*, 433 U.S. 682. The Court similarly vacated a conviction for a predicate felony in *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

There, the defendant was convicted of both rape and felony murder predicated on rape. *Id.* at 685-86. In vacating the rape conviction, the Court noted:

[R]esort to the *Blockburger* rule leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that “each provision requires proof of a fact which the other does not.” A conviction for killing in the course of a rape cannot be had without proving all of the elements of the offense of rape.

*Id.* at 693-94.

The same is true here. Mr. Berniard could not have committed felony murder without also committing the underlying robbery. *Quillin*, 49 Wn. App. at 164; *Williams*, 131 Wn. App. at 498-99; *Fagundes*, 26 Wn. App. at 485-86. Thus, his convictions for both counts one and two violate the Fifth Amendment prohibition on double jeopardy. *Harris*, 433 U.S. 682; *Orange*, 152 Wn.2d at 818; *Jackman*, 156 Wn.2d at 749. The conviction on count two should be vacated, and the case remanded for resentencing. *Weber*, 159 Wn.2d at 266; *Fagundes*, 26 Wn. App. at 486.

**6. In the alternative, felony murder and the underlying robbery constitute the same criminal conduct for sentencing purposes.**

As explained above, count two and its associated enhancement should be vacated for the double-jeopardy violation. If, however, the conviction on count two remains, it constitutes the same criminal conduct

as count one. The trial court erred in concluding to the contrary, and this Court should reverse and remand for resentencing. This Court reviews *de novo* the question of whether two convictions constitute the same criminal conduct for sentencing purposes. *State v. Torngren*, 147 Wn. App. 556, 562, 196 P.3d 742 (2008).

- a. Current offenses constitute the same criminal conduct for SRA scoring purposes when they involve the same victim, occur at the same time and place, and share the same criminal intent.

The Sentencing Reform Act (“SRA”) provides for the structured sentencing of felony offenders through standard sentence ranges derived from the seriousness of the offense and the defendant’s offender score. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is calculated by adding points from the defendant’s criminal history as well as other current offenses. RCW 9.94A.589(1)(a). However, multiple current offenses count as only one crime if they constitute the “same criminal conduct.” *Id.* “Same criminal conduct’ . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” *Id.*

- b. The robbery of Jim Sanders and the felony murder of Jim Sanders predicated on the robbery involved the same victim, occurred at the same time and place, and shared the same criminal intent.

Mr. Berniard argued that counts one and two constituted the same criminal conduct but the State contended they did not. CP 421-22, 613-15. The sentencing court ruled for the prosecution, saying only, “With regard to the issue of Mr. Berniard’s points for purposes of calculation of his criminal history, the court finds that we do not have same criminal conduct and would therefore rule in favor of the state on those issues as well.” 15 RP 2266. The State had conceded that counts one and two involved the same victim (Jim Sanders), the same intent (theft), and the same place (the Sanders home). But it argued the same “time” requirement was not satisfied because the homicide occurred “several minutes” after a ring was removed from Mr. Sanders’s finger. CP 422. The court erred in adopting this argument.

The “same time” requirement does not mean the relevant acts must be simultaneous. *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). For example, where a defendant sold methamphetamine to a buyer and 10 minutes later sold marijuana to the same buyer, the Supreme Court reversed the trial court’s finding that the crimes did not constitute the same criminal conduct. *Id.* at 180. The State’s argument here that the

murder and robbery did not occur at the same time because the killing occurred “several minutes” after a ring was removed from Mr. Sanders’s finger fails under *Porter*.

But it fails for an even more basic reason: the murder by definition occurred in the course of and in furtherance of the predicate felony, the robbery. RCW 9A.32.030(1)(c); CP 349. As this Court explained in *Williams* in the face of a similar argument by the State:

If, as the State suggests, the jury found the attempted robbery was complete when Mr. Williams took some undefined substantial step earlier in the evening, then it could not have found that the shooting was in furtherance of ... that attempt. And the first degree murder conviction could not stand. Likewise, the State’s assertion that the two crimes were completely unrelated is inconsistent with the felony murder charge.

*Williams*, 131 Wn. App. at 499; *see also Porter*, 133 Wn.2d at 185-86 (a sequence of separate events occurred at the “same time” for purposes of sentencing because they were all part of the same “scheme or plan” – to sell drugs). The robbery was not complete with the removal of Mr. Sanders’s ring; the perpetrators were still in the Sanders home and had not yet successfully exited the house with the stolen goods. Higashi killed Jim Sanders during the robbery, in furtherance of the robbery. Indeed, this is why the jury convicted Mr. Berniard of felony murder. *See Williams*, 131 Wn. App. at 499. Counts one and two constituted the same criminal

conduct. *Porter*, 133 Wn.2d at 180; *Williams*, 131 Wn. App. at 499. This Court should reverse and remand for resentencing.

**7. The convictions for robbery of Charlene Sanders and assault of Charlene Sanders violate the Fifth Amendment prohibition on double jeopardy, requiring vacation of the assault conviction.**

In addition to being convicted of robbing and murdering Jim Sanders, Mr. Berniard was convicted of robbing and assaulting Charlene Sanders. At sentencing, Mr. Berniard moved to vacate the assault conviction (count five) because entry of both a robbery conviction as to Charlene Sanders (count four) and an assault conviction as to Charlene Sanders (count five) violates the Fifth Amendment prohibition on double jeopardy. CP 608-11. The trial court erroneously denied the motion, and this Court should reverse. 15 RP 2266-67.

“[S]ince 1975 courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes and that the conviction for assault must be vacated at sentencing.” *Freeman*, 153 Wn.2d at 774. Indeed, there is “no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.” *Id.* at 776. Furthermore, the merger doctrine precludes two convictions where an assault is committed in furtherance of a robbery. *Id.*

at 778. The only exception is where the injury from the assault is “separate and distinct from and not merely incidental to” the robbery. *Id.* But in the usual case where the assault furthers the robbery, the assault conviction cannot stand. *Id.* at 779 (reversing second-degree assault conviction under double jeopardy clause because it merged with first-degree robbery conviction); *Francis*, 170 Wn.2d at 525 (vacating second-degree assault conviction under double jeopardy clause because it merged with first-degree attempted robbery conviction).

In this case, the jury was instructed that Mr. Berniard was guilty of first-degree robbery of Charlene Sanders if he took or retained property by use or threatened use of force and he or an accomplice either (1) inflicted bodily injury or (2) was armed with a deadly weapon. CP 359 (instruction 19). The jury was instructed that Mr. Berniard was guilty of second-degree assault of Charlene Sanders if he or an accomplice either (1) intentionally assaulted her and thereby recklessly inflicted substantial bodily harm; or (2) assaulted her with a deadly weapon. CP 368 (instruction 27).

The State did not elect an alternative or an act for either charge. Indeed, in closing arguments, the State discussed the fact that Mr. Berniard allegedly kicked Charlene Sanders in the head to support both the assault count and the robbery count. 14 RP 2148-50. The State also

discussed the fact that both Higashi and Mr. Berniard allegedly pointed guns at Charlene Sanders. 14 RP 2148-50.

In its sentencing memorandum, the State for the first time elected separate acts supporting the robbery and assault charges and thereby claimed the two convictions did not violate double jeopardy:

The assault that elevates the robbery is Higashi pointing a firearm at Charlene and Jim Sanders and directing them down onto the kitchen floor and zip tying their hands behind their backs. It is at that point that Amanda Knight removed Charlene's wedding ring from her hand and the robbery is complete. The assault that is charged in count V occurred later during the incident and was committed by the defendant, who assaulted Charlene Sanders by kicking her in the face and pointing a completely different firearm at Ms. Sanders.

CP 429-30. The trial court erred in adopting this argument, because it is foreclosed by *State v. Kier*, 164 Wn.2d 798, 194 P.3d 212 (2008). 15 RP 2266-67.

In *Kier*, the State charged the defendant with second-degree assault of a victim named Ellison and first-degree robbery of both Ellison and his companion, Hudson. *Id.* at 803. The State argued that the two convictions did not violate double jeopardy because during closing argument it elected Hudson as the victim of the robbery and Ellison as the victim of the assault. *Id.* at 805. The Supreme Court disagreed, because even though the State referred to different victims for the two counts in closing

argument, the evidence and instructions in the case allowed the jury to convict if it found that Ellison was the victim of both counts. *Id.* at 811. “This creates an ambiguity in the jury’s verdict, which, under the rule of lenity, must be resolved in the defendant’s favor.” *Id.*; accord *State v. DeRyke*, 110 Wn. App. 815, 823-34, 41 P.3d 1225 (2002), *aff’d on other grounds*, 149 Wn.2d 906 (2003) (holding first-degree kidnapping conviction merged into attempted rape conviction even though jury might have based latter on deadly weapon element because neither jury instructions nor verdict form required jury to specify alternative on which it was relying).

Here, the verdict is even more ambiguous because unlike in *Kier*, the State did not elect a particular act or alternative for each charge during closing argument. Indeed, the prosecutor referred to Mr. Bernard’s kicking Charlene in the head during her discussion of the robbery count and again during her discussion of the assault count. 14 RP 2148-50. The evidence the State presented throughout trial showed an ongoing course of conduct in which Mr. Bernard and his accomplices allegedly brandished guns, beat and kicked the victims, and stole multiple items from their persons and the house. The assault was not a separate and distinct act from the robbery. Under *Freeman*, *Francis*, and *Kier*, the assault

conviction and its associated enhancement must be vacated, and the case remanded for resentencing. *Francis*, 170 Wn.2d at 531.

**8. In the alternative, the convictions for robbery of Charlene Sanders and assault of Charlene Sanders constitute the same criminal conduct for sentencing purposes.**

As explained above, count five and its associated enhancement should be vacated for the double-jeopardy violation. If, however, the conviction on count five remains, it constitutes the same criminal conduct as count four. The trial court erred in concluding to the contrary, and this Court should reverse and remand for resentencing.

Again, “‘Same criminal conduct’ . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). The State did not dispute that these counts involved the same victim (Charlene Sanders), same place (Sanders home), and same intent (to steal expensive items). But the State argued the “same time” argument was not satisfied based on the same erroneous reasoning it provided for the double-jeopardy issue. It argued for the first time that the robbery was over as soon as the ring was removed from Charlene’s finger and that Mr. Bernard’s subsequent kicking of Charlene’s head was an independent assault. CP 422. As explained above, this is incorrect because throughout trial the

State argued that Mr. Berniard's kicking of the head was an essential part of both the assault and the robbery and that Mr. Berniard and his accomplices stole not just a ring but many other household items during the course of this crime. The offenses were not separate but instead constituted the same criminal conduct. This Court should reverse and remand for resentencing.

**9. The aggravating factors should be vacated and the exceptional sentence reversed because the aggravators inhere in the crimes and the State presented no evidence of atypicality.**

As explained above, this Court should vacate the convictions on counts two and five because they violate double jeopardy, and should remand for resentencing. Not only must the sentences for counts two and five and their associated firearm enhancements be vacated, but the sentences on the remaining counts should be run concurrently rather than consecutively.

The sentencing court ordered consecutive sentences based on: (1) its finding that "the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished;" CP 660; RCW 9.94A.535(2)(c); (2) the jury's finding that counts four and five involved "deliberate cruelty;" CP 658; RCW 9.94A.535(3)(a); and (3) the jury's finding that counts one through six

involved “a high degree of sophistication and planning.” CP 658; RCW 9.94A.535(3)(m). The first reason no longer applies given that there are two fewer convictions than the sentencing court thought there were. The second and third reasons do not apply because, as explained below, these aggravators are inherent in the crimes and the State presented no evidence of atypicality.

- a. Aggravating factors must be based on sufficient evidence to support a finding beyond a reasonable doubt, and must not inhere in the elements of the underlying crimes.

The trial court’s imposition of consecutive, rather than concurrent, sentences constitutes an exceptional sentence under the Sentencing Reform Act. RCW 9.94A.535; RCW 9.94A.589. A judge may not impose an exceptional sentence based on aggravating factors set forth in RCW 9.94A.535(3) unless the jury has found those factors beyond a reasonable doubt. RCW 9.94A.537(3); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Even if the jury makes such a finding, the court may not impose an exceptional sentence unless the facts found are “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.537(6).

The reasons for the exceptional sentence must take into account factors not already considered by the legislature in computing the

presumptive range for the offense. *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986). “[F]actors inherent in the crime – inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant’s behavior from that inherent in all crimes of that type – may not be relied upon to justify an exceptional sentence.” *State v. Ferguson*, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001).

On appellate review, evidence is sufficient to support a jury’s finding of an aggravating factor only if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the [aggravator] beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *See State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010) (same standard of review applies to aggravating factors and elements of a crime). An appellate court reviews *de novo* the legal justification for an exceptional sentence. *Stubbs*, 170 Wn.2d at 124; *Ferguson*, 142 Wn.2d at 646.

- b. The “deliberate cruelty” aggravator does not apply because the violence was inherent in the crimes and the State presented no evidence of atypicality.

The jury found that the “deliberate cruelty” aggravating factor existed for counts four and five. CP 404, 406. The finding as to count

five must be reversed because count five itself must be vacated for the double-jeopardy violation explained above. The aggravator must be set aside for the remaining count for the reasons explained herein.

The court instructed the jury:

“Deliberate cruelty” means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime.

CP 383 (Instruction 41); *see* WPIC 300.10. “The extreme conduct must be significantly more serious or egregious than typical in order to support an exceptional sentence.” *State v. Scott*, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993) *aff’d sub nom. State v. Ritchie*, 126 Wn. 2d 388, 894 P.2d 1308 (1995); *accord State v. Strauss*, 54 Wn. App. 408, 417, 773 P.2d 898 (1989). Whether a defendant’s conduct is “normally associated” with this crime or is instead “significantly more serious or egregious than typical” requires a comparison of the current offense with similar offenses. *See State v. Payne*, 45 Wn. App. 528, 531, 726 P.2d 997 (1986); Comment to WPIC 300.10.

Because the State presented *no* evidence of other first-degree robberies on which the jury could base an “atypicality” finding, the verdict on this aggravating factor must be vacated. *Payne* is instructive. There, the trial court imposed an exceptional sentence based in part on its finding

of deliberate cruelty (the case took place before the law required juries to make such findings), but did not identify the specific facts which allegedly supported the finding. *Payne*, 45 Wn. App. at 531. This Court reversed because it could not “assume facts” supporting a determination that the cruelty was “of a kind not usually associated with the commission of the offense in question.” *Id.* at 531-32. Here no facts were presented supporting a determination that the cruelty was “of a kind not usually associated with” first-degree robbery, because no comparative evidence was presented at all.

Although the absence of evidence of atypicality requires reversal of this aggravating factor, it is also worth noting that the State failed to prove Mr. Berniard inflicted “pain as an end in itself,” as opposed to inflicting injury to achieve a robbery. Indeed, even the State’s closing argument shows the violence was not gratuitous but was part and parcel of the robbery:

And I submit to you that this is a particularly violent crime, beating Charlene Sanders in front of her husband and children, the countdown with a gun to Charlene’s head was gratuitous. It went beyond what is necessary for the elements of the crime of robbery. Threatening to kill Charlene, threatening to kill her children. *What’s the combination to the safe? Where is the safe? I’ll kill you. I’ll kill them.* I submit there was deliberate cruelty on each and every count in this case.

14 RP 2154-55 (emphasis added). The fact that Mr. Berniard was allegedly beating and threatening Ms. Sanders *in order to obtain her property* is precisely what makes it first-degree robbery, not *gratuitous* violence. Indeed, the exact same acts were used by the State to support its argument that Mr. Berniard was guilty of first-degree robbery and second-degree assault. 14 RP 2148-50. To impose aggravating factors on these counts for the same acts of violence that supported the convictions in the first place is improper. *Ferguson*, 142 Wn.2d at 647-48.

In *Ferguson*, the trial court imposed an exceptional sentence for deliberate cruelty where the defendant had intentionally exposed another person to HIV. *Id.* at 633. The Supreme Court reversed the exceptional sentence, because the fact that the defendant had intentionally exposed another to HIV was precisely what had made him guilty of the underlying crime of second-degree assault. *Id.* at 648-49. “An exceptional sentence is not justified by mere reference to the very facts which constituted the elements of the offense proven at trial.” *Id.* at 648.

In contravention of this rule, the “deliberate cruelty” aggravator on counts four and five was justified by reference to the very facts which constituted the elements of the underlying convictions for assault and robbery. The State referred to the beating and threatening use of a gun in arguing Mr. Berniard was guilty of assaulting Charlene on count five. The

State referred to the beating and threatening use of a gun in arguing Mr. Berniard was guilty of robbing Charlene on count four. The State referred to the beating and threatening use of a gun in arguing the “deliberate cruelty” aggravator applied. 14 RP 2148-50, 2154-55. The aggravator must vacated because it cannot be justified by reference to the very facts which constituted the elements of the underlying offenses. *Ferguson*, 142 Wn.2d at 648.

This Court’s decision in *Strauss* is also instructive. There, the defendant grabbed a woman on a running trail and told her if she cooperated she would not get hurt. *Strauss*, 54 Wn. App. at 410. When the victim tried to break free, the defendant “grabbed her by the throat and told her that she had better do what he said, because her life depended on it.” *Id.* After more struggle, the defendant raped the woman. *Id.* at 410-411. A jury convicted him of second-degree rape, and the court imposed an exceptional sentence based on, *inter alia*, deliberate cruelty. *Id.* at 411.

This Court reversed because “[the defendant’s] conduct was not *gratuitous* violence, but rather was for the purpose of exacting compliance from [the victim].” *Id.* at 419 (emphasis in original). The same is true here. Mr. Berniard’s conduct was not *gratuitous* violence, but was for the purpose of exacting compliance from Charlene Sanders. It was part of the robbery and assault, not an end in itself. For this reason – and the

independent reason that no evidence of atypicality was presented – the deliberate cruelty aggravating factor should be vacated.

- c. The “sophistication and planning” aggravator does not apply because it was inherent in the crimes and the State presented no evidence of atypicality.

The jury found that the “high degree of sophistication or planning” aggravating factor existed for counts one through six. CP 398, 400, 402, 404, 406, 408. The finding as to counts two and five must be reversed because those underlying convictions violate double jeopardy, as explained above. The aggravator must be set aside for the remaining counts for the reasons explained herein.

The jury was instructed:

A high degree of sophistication or planning means conduct that goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime. In deciding whether the defendant demonstrated a high degree of sophistication or planning, you may consider the length of time that the defendant planned the offense, the defendant’s use of any specialized knowledge, and whether the defendant took any actions to conceal his identity, to hide evidence, or to conceal the commission of the crime.

CP 384 (Instruction 42); *see* WPIC 300.22. “The pattern instruction requires more specifically that the high degree of sophistication or planning be demonstrated *by the defendant*, rather than by somebody else involved in the crime.” Comment to WPIC 300.22. This the State failed

to prove. Detectives testified that Amanda Knight and Kyoshi Higashi described the plans in detail, but neither of them stated that the fourth suspect was responsible for the planning.<sup>5</sup> In closing argument, the prosecutor characterized *the group's* crimes as involving a high degree of sophistication or planning, and did not claim Mr. Berniard himself demonstrated such sophistication:

There was also a high degree of sophistication or planning in this case. A high degree of sophistication or planning is conduct that goes beyond what's inherent in the elements that's normally associated with the commission of this crime. They targeted a family who listed expensive items on Craigslist, waited until after dark to arrive at the Sanders residence. Two intruders entered first, lulled them into a false sense of security, brandished the firearms, zip tied them, put them facedown on the ground. Additional people came in afterwards. The people who came afterwards were in the vehicle. They waited out of sight. They parked deliberately on the side of the house. There was a great deal of thought that went into this case. The two people who came in later ha[d] masks to prevent easy identification.

14 RP 2155. Because the State presented no evidence or argument that Mr. Berniard planned this crime – as opposed to taking part on the orders of one of his accomplices – the aggravator does not apply.

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<sup>5</sup> As explained in section 2, the admission of this testimony requires reversal of the convictions and remand for a new trial because of the confrontation clause violation. But even assuming the testimony could be considered, it would not support a finding that the aggravating factor applied to Mr. Berniard as opposed to the co-defendants.

The proof on this aggravating factor also fails for one of the same reasons that proof on the “deliberate cruelty” aggravator fails, namely, the State presented no evidence whatsoever about the level of sophistication and planning “normally associated with” the crimes at issue. To justify an exceptional sentence, the sophistication or planning *must* be of a kind not normally associated with the commission of the offense. *State v. Gore*, 143 Wn.2d 288, 321, 21 P.3d 262 (2001), *overruled on other grounds*, *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005); *State v. Dunaway*, 109 Wn.2d 207, 219, 743 P.2d 1237 (1987). The complete absence of evidence regarding this benchmark requires reversal.

Finally, even if evidence regarding the sophistication of other home-invasion robberies had been presented and even if evidence that Mr. Berniard himself planned the crimes as opposed to one of his accomplices had been presented, the aggravator would not apply to count one. Count one was felony murder of Jim Sanders. The reason this count was charged as felony murder rather than premeditated or intentional murder is that the killing *was not planned*. It occurred in the course of the robbery because Mr. Sanders unexpectedly fought back. Because the murder was not planned it necessarily did not involve a high degree of sophistication and planning.

For each of the independent reasons described above, the aggravating factors must be vacated for each count. The remedy is remand for resentencing within the standard range; i.e., the sentences must be run concurrently rather than consecutively. *Ferguson*, 142 Wn.2d at 649.

d. The aggravating factors are unconstitutionally vague as applied.

As explained above, the aggravating factors are not supported by sufficient evidence and are not legally applicable. Thus, the Court need not reach the vagueness argument. However, it is worth noting that as applied in this case, the aggravating factors are unconstitutionally vague.

The Due Process Clause of the Fourteenth Amendment requires that statutes give citizens fair warning of prohibited conduct and protect them from “arbitrary, ad hoc, or discriminatory law enforcement.” *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993); U.S. Const. amend. XIV. A statute is void for vagueness if it either (1) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute that “leaves judges and jurors free to decide, without any legally

fixed standards, what is prohibited and what is not in each particular case,” is unconstitutional. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). “It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.” *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2348, 153 L.Ed.2d 556 (2002).

If the “deliberate cruelty” and “sophistication and planning” aggravating factors can be applied in this case, they are unconstitutionally vague. This is because absolutely no evidence was presented regarding what conduct is “normally associated” with the underlying crimes. In the absence of the relevant benchmark, the jury was “free to decide, without any legally fixed standards,” whether Mr. Berniard was guilty of these aggravating factors. *See Giaccio*, 382 U.S. at 402-03. This type of standardless discretion violates due process. *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). For this reason, too, this Court should reverse and remand for vacation of the aggravating factors and imposition of concurrent sentences.

**10. The instructions and special verdict forms for the aggravators and enhancements told the jury they could return a “yes” verdict but not a “no” verdict, requiring reversal of the exceptional sentence.**

- a. The jury was not allowed to return a “not guilty” verdict on the aggravating factors and enhancements.

The last three paragraphs of the concluding instruction to the jury provided:

You must fill in the blank provided in each verdict form [with] the words “not guilty” or the word “guilty”, according to the decision you reach.

You will also be given special verdict forms for the crime of Murder in the First Degree as charged in Count I, Robbery in the First Degree as charged in Count II, Assault in the Second Degree as charged in Count III, Robbery in the First Degree as charged in Count IV, Assault in the Second Degree as charged in Count V, and Burglary in the First Degree as charged in Count VI. If you find the defendant not guilty of any of these crimes, do not use the special verdict forms for that count. If you find the defendant guilty of any of these crimes, you will then use the special verdict forms. **In order to answer the special verdict forms “yes,” all twelve of you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you do not unanimously agree that the answer is “yes” then the presiding juror should sign the section of the special verdict form indicating that the answer has been intentionally left blank.**

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

CP 380-81 (Instruction 39) (emphasis added). Although the instruction properly allowed for either a “guilty” or “not guilty” verdict on the underlying crimes, it did not allow the jury to return a “no” verdict on any of the aggravating factors or enhancements. *Id.* During closing argument, the prosecutor similarly stated, “If you were to return the special verdict form, you would answer it yes.” 14 RP 2154.

Not only did the instructions fail to allow for a “no” verdict, the special verdict forms themselves were similarly flawed. All of the special verdict forms were of the following form:

We, the jury, having found the defendant guilty of Robbery in the First Degree as charged in Count IV and defined in Instruction 28, return a special verdict by answering as follows:

QUESTION 1: Did the defendant’s conduct during the commission of the crime manifest deliberate cruelty to the victim?

ANSWER 1: \_\_\_\_\_ Write “yes” if unanimous agreement that this is the correct answer.

QUESTION 2: Did the defendant use a high degree of sophistication or planning when committing this crime?

ANSWER 2: \_\_\_\_\_ Write “yes” if unanimous agreement that this is the correct answer.

CP 404; *see also* CP 398-403, 405-409. There was no provision for writing “no” on the special verdict forms. *See id.*

- b. The instruction and special verdict forms are contrary to current and prior caselaw and current and prior WPICs.

It is axiomatic that when a jury finds the State failed to prove its case beyond a reasonable doubt, it must find the defendant “not guilty,” rather than doing nothing at all. The only confusion in recent years has been over whether the jury must be unanimous to answer “no” on a special verdict form, or whether a “no” answer is required when the jury cannot unanimously agree on a “yes” answer. In *State v. Bashaw*, the Supreme Court held that if the jury did not unanimously agree that the State had proved a special finding beyond a reasonable doubt, it must answer “no” on the relevant verdict form. *State v. Bashaw*, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010). The Court recently overruled *Bashaw* and held that – as is the case with “guilty” or “not guilty” verdicts – the jury must unanimously agree to return either a “yes” or a “no” verdict. *State v. Nuñez*, 174 Wn.2d 707, \_\_\_ P.3d \_\_\_ (2012). The Court approved the jury instruction given in *Nuñez*, which was as follows:

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

*Id.* at ¶ 2. Under neither *Bashaw* nor *Nuñez* was it permissible to tell the jury it could *only* return a “yes” verdict, as occurred here.

Nor were the instructions and verdict forms used here correct under any version of the Washington Pattern Instructions. The pattern special verdict form for aggravating circumstances is as follows:

QUESTION [1]:

[Did the defendant’s conduct during the commission of the crime manifest deliberate cruelty to the victim?] (see WPIC 300.10)

...

[Did the defendant use a high degree of sophistication or planning when committing this crime?] (see WPIC 300.22)

...

[QUESTION [\_\_]: (Insert appropriate question from the prior list. Repeat as necessary.)

[ANSWER: \_\_\_\_\_ (Write “yes” or “no”)]

WPIC 300.50 (2011); WPIC 300.50 (2008). Similarly, the pattern special verdict form for the firearm enhancement is:

QUESTION: Was the defendant (defendant’s name) armed with a firearm at the time of the commission of the crime [in Count \_\_\_\_]?

ANSWER: \_\_\_\_\_ (Write “yes” or “no”)

WPIC 190.02 (2011); WPIC 190.02 (2008).

Under both the 2008 and 2011 versions of the WPICs, juries were to be told they could answer “yes” or “no” to aggravating factors and

enhancements. But the verdict forms here did not say “write ‘yes’ or ‘no’”; they said only “write ‘yes’”. CP 398-409.

As for the concluding jury instruction, although the unanimity rule changed with *Bashaw* and again with *Nuñez*, the jury was always to be told it could (and must, in certain circumstances) answer “no” on a special verdict form. The pattern instruction following *Bashaw* was:

In order to answer the special verdict form[s] “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously agree that the answer to the question is “no,” or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer “no.”

WPIC 160.00 (2011). The pattern instruction before *Bashaw*, which is again proper under *Nuñez*, is:

In order to answer the special verdict form[s] “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

WPIC 160.00 (2008); *see Nuñez*, at ¶ 2. Contrary to both versions of the WPIC, the concluding instruction here told the jury it must answer “yes” if it found the State had proved the special allegation, but was not told it could answer “no” under any circumstances.

- c. The instruction and special verdict forms constitute an unconstitutional comment on the evidence and violate due process.

In addition to violating caselaw and the WPICs, the instruction and special verdict forms in Mr. Bernard's case violated his right to due process and constituted an unconstitutional comment on the evidence. A party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). A jury instruction that lowers the State's burden of proof is a manifest error affecting a constitutional right – the right to due process. *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *State v. McCullum*, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); U.S. Const. amend. XIV. Similarly, “[s]ince a comment on the evidence violates a constitutional prohibition, a failure to object or move for a mistrial does not foreclose [a defendant] from raising this issue on appeal.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (quoting *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968)).

By telling the jury the only answer it could return on the special verdict forms was “yes,” the court violated Mr. Bernard's Fourteenth Amendment right to due process and commented on the evidence in violation of article IV, section 16 of the Washington Constitution. The state constitution provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Const. art. IV, § 16. This provision “prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case.”

*Becker*, 132 Wn.2d at 64. Moreover, “the court’s personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied.” *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). “[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment” in violation of article IV, section 16. *Id.*

The concluding instruction and special verdict forms here stated that the only answer the jury could return was “yes”; there was no provision whatsoever for a “no” verdict. Thus, the court’s instruction and verdict forms did more than “suggest” or “imply” a particular answer – they outright prohibited any other answer. The court stated the jury was allowed to either do nothing or rule for the State. The court did not allow the jury to rule for the defendant. This violated Mr. Berniard’s rights under article IV, section 16.

It also violates his rights under the due process clause, which guarantees a presumption of innocence and proof beyond a reasonable doubt. U.S. Const. amend. XIV; *Cool v. United States*, 409 U.S. 100, 104,

93 S.Ct. 354, 34 L.Ed.2d 335 (1972); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) . These rights form the bedrock of our criminal justice system. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt, including aggravating factors. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Here, the concluding instruction and special verdict forms turned the presumption of innocence into a presumption of guilt by not even allowing the jury to make a finding other than guilty. *Cf. State v. Pam*, 98 Wn.2d 748, 760, 659 P.2d 454 (1983) (reversing special verdicts where instructions failed to state that deadly weapon and firearm findings must be proved beyond a reasonable doubt).

Because the instructions and verdict forms violated not only *Nuñez*, *Bashaw*, and the WPICs but also the Fourteenth Amendment and article IV, section 16, reversal of all special verdicts is required unless the State proves no prejudice resulted. *Levy*, 156 Wn.2d at 725 (State must show the defendant was not prejudiced by art. IV, § 16 violation); *State v.*

*Peters*, 163 Wn. App. 836, 850, 261 P.3d 199 (2011) (State must prove beyond a reasonable doubt that due process violation was harmless). Mr. Berniard asks this Court to reverse the aggravators and enhancements and remand for resentencing. *See State v. Eaker*, 113 Wn. App. 111, 121, 53 P.3d 37 (2002) (reversing where jury instruction constituted improper comment on the evidence and State could not prove prejudice); *In re Detention of R.W.*, 98 Wn. App. 140, 145-46, 988 P.2d 1034 (1999) (same).

**11. The aggravating factors cannot apply to the counts for which Mr. Berniard was an accomplice.**

For at least three of these six crimes (counts one, two, and three), Mr. Berniard was convicted as an accomplice, not as the principal. The aggravating factors therefore cannot be applied to those counts. *See State v. McKim*, 98 Wn.2d 111, 115-16, 653 P.2d 1040 (1982). In *McKim*, the Court explained that the accomplice liability statute, RCW 9A.08.020, cannot be the basis to impose a sentencing enhancement on an accomplice. *Id.* Instead the language of the applicable sentencing statute must provide a basis to apply accomplice liability for the sentencing provision. *Id.* at 116.

The legislature responded to *McKim* by including express language in the weapon enhancement statutes to allow for accomplice liability, but

did not do the same for aggravating factors. The weapon enhancement statute now provides, in relevant part, “The following additional times shall be added to the standard sentence range ... if the offender *or an accomplice* was armed with a firearm.” RCW 9.94A.533(3) (emphasis added).

RCW 9.94A.535, in contrast, does not provide for accomplice liability on the aggravating factors. The statute sets forth the aggravators used in this case as follows:

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

...

(m) The offense involved a high degree of sophistication or planning.

RCW 9.94A.535. Nothing in this statute provides for accomplice liability.

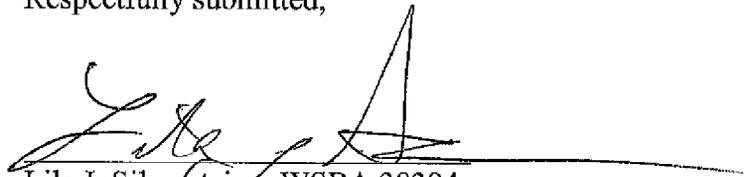
Thus, the aggravating factors should be vacated for counts one, two, and three, and the case remanded for resentencing.

E. CONCLUSION

For several independent reasons discussed above, this Court should reverse the convictions on all counts and remand for a new trial. In the alternative, because of the double-jeopardy violations, Mr. Bernard asks this Court to reverse the robbery conviction on count two and its associated enhancement and reverse the assault conviction on count five and its associated enhancement, and remand for resentencing on the remaining counts. The aggravating factors and exceptional sentence should be vacated, and concurrent sentences imposed.

DATED this 1st day of November, 2012.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 42579-3-II
v.	)	
	)	
CLABON BERNIARD,	)	
	)	
APPELLANT.	)	

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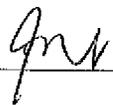
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TACOMA, WA 98402-2171		
E-MAIL: PCpatcecf@co.pierce.wa.us		

[X] CLABON BERNIARD	(X)	U.S. MAIL
301475	( )	HAND DELIVERY
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1313 N 13 <sup>TH</sup> AVE.		
WALLA WALLA, WA 99362		

**SIGNED** IN SEATTLE, WASHINGTON THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2012.

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# WASHINGTON APPELLATE PROJECT

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Court of Appeals Case Number: 42579-3

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PCpatcecf@co.pierce.wa.us