

8. Since Petitioner's conviction, Petitioner has not asked the courts for relief from the sentences other than as written above and as follows. After the Court of Appeals of the State of Washington, Division I, filed its decision on February 2, 2015, Petitioner filed a Motion for Reconsideration. An order denying the Motion for Reconsideration was entered on May 11, 2015.
9. Petitioner filed a Petition for Review, which was filed in June 2015. An order denying the Petition for Review was entered in the Washington State Supreme Court on November 4, 2015. By order dated, December 11, 2015, this case was Mandated to the Superior Court of Thurston County for further proceedings in accordance with the opinion of the Court of Appeals of the State of Washington, Division I.
10. Petitioner's counsel in all proceedings after denial of the appeal is Gloria J. Johnson, who is representing the Petitioner pro bono.
11. This Petition is timely under the provisions of RCW 10.73.090, as well as pursuant to the provisions of RCW 10.73.100, as addressed in the grounds set forth herein.
12. The sentences in this case amount to extreme and cruel punishment, given the facts. Here, Petitioner, a young African American veteran, had no criminal record. On the morning of May 14, 2012, Petitioner engaged in impassioned actions to preserve a two-year relationship with Ms. Wojdyla. Petitioner insisted upon having a conversation with Ms. Wojdyla. Petitioner insisted upon her staying at the apartment and talking through their situation in efforts to "win her back." Petitioner did take Ms. Wojdyla's cell phone from her hand, allegedly causing an abrasion to her finger. They engaged in dialogue and later engaged in sexual intercourse as they had done many times before over the past two years. As a licensed security officer, Petitioner was legally authorized to carry a firearm as well as other tools for his profession. Even if Petitioner had threatened to harm Ms. Wojdyla, which Petitioner consistently maintains he did not, such a threat without actions to follow-through, given the facts of May 14, 2012, should not have resulted in prosecution and resultant punishment at the level in this case. Out of the one event on May 14, 2012, came three first degree felony charges as well as three others. The initial sentence of 17+ years is extreme and far out of proportion to the gravity of Petitioner's actions in this case. Based upon the record in this case, this is an extreme case of over-prosecution and over-punishment, and justice, as well as the legal arguments set forth herein, demand complete reversal.

B. GROUNDS FOR RELIEF

FIRST GROUND

Evidence Presented at Trial was Insufficient to Support the Alternative Means of Kidnapping in the First Degree Presented to the Jury

Petitioner's conviction for kidnapping in the first degree must be reversed as there is insufficient evidence to support each of the alternative means of kidnapping set forth in the jury instructions.

Under Washington law, in cases where alternative means of committing a single offense are presented to a jury, each alternative means must be supported by substantial evidence to assure protection of a defendant's right to a unanimous jury determination. *State v. Garcia*, 179 Wn.2d 828 (Wash. 2014); *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012); *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

The court must view the "evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Garcia*, p. 836, citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). See *State v. Wright*, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009) ("The Washington Constitution provides greater protection of the jury trial right [than the federal constitution], requiring reversal if it is impossible to rule out the possibility the jury relied on a charge unsupported by sufficient evidence. A trial court may not retry a defendant on alternative means for which a reviewing court has determined that there is insufficient evidence. See *State v. Ramos*, 163 Wn.2d 654, 660-61, 184 P.3d 1256 (2008); *State v. Joy*, 121 Wn.2d 333, 345-46, 851 P.2d 654 (1993). *Garcia*, 179 Wn.2d at 843-844 (alteration in original).

In Petitioner's case, the alternative means presented at trial were: "(A) To facilitate the commission of: (1) Burglary in the First Degree; or (2) Rape in the First Degree, or flight thereafter; or (B) To inflict bodily injury on the person; or (C) To inflict extreme mental distress on that person..." RP. p. 1239 (Jury Instruction 16). *Also see* RCW 9A.40.020(1) (kidnapping in the first degree).

The court must first review statutory interpretation of the kidnapping elements de novo, and thereafter determine whether there is sufficient evidence to support each alternative. *See State v. Garcia*, p. 836; *Engel*, 166 Wn.2d at 576.

1) Insufficient Evidence to Support Rape in the First Degree

The evidence was insufficient as it would not have supported a finding of rape for several reasons, including that because the record reflects that during the sexual encounter, which Petitioner contends was consensual, Ms. Wojdyla sought sexual gratification from Petitioner, with whom she had been in a sexual relationship for two years; and she engaged in laughter. No reasonable juror would have believed that the alleged victim engaged in intercourse unwillingly or that she feared for her life. Moreover, Petitioner's mindset before and during the encounter, as stated to Ms. Wojdyla, was not to be accused of the crime of rape. In response to Petitioner's request that Ms. Wojdyla "put it in," Ms. Wojdyla laughed. Specifically, in response to questioning by the Prosecutor, Ms. Wojdyla stated, in part, as follows:

Q. So I -- and I hate to be kind of specific --

A. That's okay.

Q. -- but we need to.

How did the sexual act start if you weren't actually wanting to go through with it?

A. I know I took my pants off, he took his pants off, and we laid down. And he was on top. And he said "You're going to put it in, because you're not going to get me for rape."

Q. Okay. Let me stop you there. Was Mr. Johnson using a condom?

A. No.

Q. And were those -- what you just said, was that his exact words?

A. Yes.

Q. What was Mr. Johnson's demeanor at that point?

A. It was --

Q. How --

A. -- it was still calm. It wasn't aggressive.

Q. Had it changed at all during any of this point?

A. No.

Q. Was he -- when you say he took his pants off, did he still have his sweatshirt on?

A. I don't -- I don't remember -- no. He did not have his sweatshirt on anymore. No, he didn't.

Q. Okay. Now, when you say he told you "You're going to put it in," you -- and we need to be specific. What was he referring to with "it," as far as you believed?

A. His penis.

Q. And when he said that, what were you thinking?

A. In my mind, I was thinking who makes a comment like that when they know they're not doing wrong.

Q. What, if anything, did you say to the Defendant when he made that comment?

A. I -- I think I just laughed. I mean, because I didn't -- what can you say to that? You really can't say much to it.

Q. Had Mr. Johnson ever made a request like that of you before during any of your sexual encounters?

A. Putting it in? Verbally speaking it, no, but something that maybe happened? Absolutely.

Q. Yeah. And I'll be a little more specific. Had Mr. Johnson specifically requested that the -- leaving that "you're not going to get me for rape"

part off, but specifically requested in any other of your other sexual acts that you place his penis inside of you?

A. No.

Q. So what happened, then, after he made that comment?

A. I mean, I obviously did what he asked, and I reached down there, and I put it in --

Q. Okay.

A. -- and we had sex.

Q. And again, just because we need to be specific, when you say "put it in," put it in where?

A. Into my vagina.

Q. So there was an actual sexual act.

A. Um-hmm. Yes.

Q. And you said he was on top of you?

A. Correct.

Q. Did you stay in that one position the entire time?

A. Yes.

Q. Did Mr. Johnson ultimately climax?

A. He did.

Q. What was -- before that happened, while the sexual act was progressing, was there any -- did he say anything?

A. He had his eyes closed, but I asked. I said when we're done, can I please go to work, and he shook his head yes.

Q. Besides the request to go to work, did you say anything while the sexual act itself was occurring?

A. During, no.

Q. Was it long? Was it brief?

A. It was brief.

Q. And I hate to ask this, but I need to.

In comparison to your prior sexual activities with the Defendant, was it about normal? Was it shorter? Was it longer?

A. I mean, it felt like forever, but it was shorter.

Q. What happened when Mr. Johnson finished?

A. We got up, and I made a comment to him, because I was just trying to do everything that felt normal in our previous relationships. And I apologized that this is not the word to use, but I asked him. I said, "Are you going to make me come."

Q. Okay. Let me stop you there.

A. Okay.

Q. Were you already standing?

A. Yes.

Q. Were both of you standing?

A. Correct. Yes.

Q. Was -- had either of you started to get dressed at that point?

A. No. No.

Q. Now, you indicated that -- the comment that you made to Mr. Johnson. And we'll get into why in a second.

But the comment itself, what were you requesting Mr. Johnson do for you?

A. To make me climax.

Q. Okay. Was -- you indicated that you were -- I don't want to -- if I change your words, correct me, but you were trying to do what seemed normal?

A. Yes. Absolutely.

Q. First of all, why were you trying to do what seemed normal?

A. Because I was giving him everything that he wanted, based on the fact that he threatened to take my life as well as his own.

Q. Okay. I believe there might be some tissues for you down there, ma'am.

A. Sorry. You can only do stuff that's normal.

Q. Were you concerned that Mr. Johnson might think you were going to report this if he --

A. Yeah.

Q. -- left?

A. Absolutely.

Q. Okay. Were you concerned that if he didn't believe that you were voluntarily engaged, that you were still in danger?

A. Yes.

Q. And that he was still in danger?

A. Yes.

Q. So that the -- the request that you made of Mr. Johnson to help you reach orgasm, did he say anything when you made that request?

A. I think he just shook his head "yes," if I can recall.

Q. Okay. What happened then?

A. I laid back down, and he attempted, and it just was -- it wasn't there. That's not what it was supposed to be.

Q. Okay. And again, I apologize for getting specific --

A. That's okay.

Q. -- but how did he attempt to bring you to climax?

A. With his finger.

Q. Was that something that was normal in your prior sexual activities?

A. Yes.

Q. And was that prior -- something that was normal in those activities after Mr. Johnson had already climaxed?

A. Sometimes.

Q. And you'd made that request of him before?

A. Yeah. When -- yeah. It just kind of leads into that.

Q. How long did you let Mr. Johnson attempt to make you reach climax?

A. Less than two minutes. It wasn't -- it just -- it wasn't gonna happen.

Q. Okay. What brought it to an end? How did it end?

A. I don't remember what was said. I -- I remember saying that "it's just not gonna happen," and he just stopped.

Q. Okay. Did Mr. Johnson say anything at that point?

A. I don't recall.

Q. Once you had made that comment that "it's just not gonna happen," what happened then?

A. We got up. He put his pants on; I put my pants on. And he handed me my cellphone.

RP pp. 821-827.

The above testimony reflects laughter by the alleged victim as well as a request for an orgasm. Given this, no reasonable jury would have found sufficient evidence to support a conviction of rape. The jury acquitted the Petitioner on the rape charge.

It cannot reasonably be argued that the jury acquitted the Petitioner of rape but at the same time argue that the evidence was sufficient to support the charge of rape. It would be absurd and absolutely impossible to find such. The jury, as a matter of law, had to have concluded that the evidence to convict the Petitioner was insufficient, otherwise, as a matter of law, it was obligated to convict.

2) Insufficient Evidence to Prove the Alternative Means of Extreme Mental Distress

In Petitioner's case, another alternative means of committing first degree kidnapping presented in the jury instructions was: "To inflict extreme mental distress on that person." RP p. 1239 (Jury Instruction No. 16). RCW 9A.40.020(1)(d). The court in *State v. Garcia*, evaluated the statutory background of this alternative means of proving first degree kidnapping, concluding as follows:

Therefore, a reasonable interpretation of " extreme mental distress" is an intention to cause more mental distress than a reasonable person would feel when being restrained by the threat of deadly force. When measuring the level of mental distress intended, the focus must be on the mental state of the defendant rather than the actual resulting distress. This is because kidnapping in the first degree focuses on the

intent of the defendant rather than the result on the victim. *See* RCW 9A.40.020(1); Manual, *supra*, at 9A.40.020-2.

Therefore, the extreme mental distress prong requires an intent to cause mental distress above that of "regular" abductions, meaning those falling under kidnapping in the second degree. This is a fact-specific determination. In some cases, the method of abduction (i.e., threat of deadly force) may be so extreme as to evidence an intent to cause extreme mental distress. However, it should not be assumed that every time a person is abducted by someone showing a weapon that the defendant intends to inflict extreme mental distress.

State v. Garcia, pp. 843-844.

When viewing the evidence in the light most favorable to the State, no reasonable jury could have found beyond a reasonable doubt that Petitioner abducted Wojdyla with the intent to inflict extreme mental distress. Although there is conflicting evidence whether Petitioner threatened to physically harm Ms. Wojdyla, the evidence is undisputed that Petitioner never made any movements towards any such alleged threats. There is absolutely no evidence that the Petitioner intended to inflict extreme mental distress upon Ms. Wojdyla.

The record reflects that the only way Ms. Wojdyla knew the Petitioner was carrying his firearm was because of her specific request, i.e., she asked him if he was carrying his firearm. Ms. Wojdyla was aware that the Petitioner was legally authorized to carry a firearm and that he did so routinely, as he was a licensed security officer. Similarly, Petitioner took no other items out of his pockets nor out of his belongings which could have been interpreted as weapons used to inflict extreme mental distress upon Ms. Wojdyla. Specifically, in questioning by the Prosecutor, Ms. Wojdyla testified as follows:

Q. Did he make any other comments to you that made you feel unsafe?

A. I had asked him at one point -- I don't -- I cannot recall exactly when. I said, do you have your gun on you? And he laughed. And he said, actually, I do. And he lifted up his shirt -- his sweatshirt pocket. Because I couldn't see it. And that's why I asked.

He lifted up his sweatshirt, and he said -- and he kind of chuckled, and he laughed, and he said actually, I do.

Q. Okay. Did you know that Mr. Johnson owned a firearm?

A. I did.

Q. Had you seen the firearm before?

A. I had.

Q. To the best of your knowledge, did Mr. Johnson usually carry the firearm with him?

A. He did.

Q. Had he brought it into your apartment before?

A. Maybe a handful of times.

RP p. 802.

In *State v. Garcia*, p. 843, the court noted that Defendant had shown the alleged victim a kitchen knife for only a short while, and the alleged victim testified that Defendant neither told her he was going to use the knife nor made threatening movements with it. The court determined that this does not evidence intent to cause extreme mental distress. Similarly, in Petitioner's case, Petitioner took no action to use any weapon against Ms. Wojdyla. Moreover, he never stated that he intended to use a firearm or any weapon to harm Ms. Wojdyla.

In addition, although the Petitioner had a backpack with him while he was in Wojdyla's apartment, Petitioner never removed any of the items out of the backpack. He did nothing with the items in the backpack to threaten Ms. Wojdyla.

Given the above, no reasonable jury could have found beyond a reasonable doubt that Petitioner intended Ms. Wojdyla to experience extreme mental distress due to any of the items contained in the backpack. In addition, although Petitioner had his asp in his sweatshirt pocket and his firearm in the holster under his sweatshirt, he never removed these items in any way to threaten Wojdyla. Evidence at trial was that Petitioner lifted his sweatshirt to reveal the firearm

only after Ms. Wojdyla asked him if he had it with him. Further as Petitioner was a licensed security officer and Petitioner and Ms. Wojdyla had dated and periodically lived together for the last two years, Ms. Wojdyla was aware that Petitioner often carried his asp and handgun on his person or otherwise had them with or near him while in her presence. As such, no reasonable jury could have found beyond a reasonable doubt that Petitioner intended Ms. Wojdyla to experience extreme mental distress due to the asp, handgun or anything else Petitioner may have had with him or on his person. Nothing in the record reflects an intent by the Petitioner to inflict extreme distress upon Ms. Wojdyla. The evidence also does not show that Ms. Wojdyla in fact experienced extreme distress.

In view of the record in this case there is not sufficient evidence to support each of the alternative means of kidnapping presented to the jury. No rational fact finder could have found the essential elements of the crime beyond a reasonable doubt for each alternative presented to the jury. This case must be reversed.

SECOND GROUND

The Kidnapping Merged into The Rape Charge and should be Dismissed based upon the Theory of Merger

Kidnapping and Rape are the same for purposes of conviction. Under the merger doctrine, when a particular degree of crime requires proof of another crime, the courts presume the legislature intended to punish both offenses through a greater sentence for the greater crime. In *State v. Johnson*, 92 Wash.2d 671, 679-680, 600 P.2d 1249 (1979), *disapproved on other grounds*, *State v. Sweet*, 138 Wash.2d 466, 980 P.2d 1223 (1999), the offence of kidnapping was incidental to the alleged charge of rape; and the court reversed convictions for first degree rape, first degree kidnapping, and first degree assault, based upon the merger principle. The court concluded that the convictions for kidnapping and assault had to be stricken even though their elements were legally distinct from rape. The court reached this conclusion because the offenses were incidental to the central crime of rape. Further, it was necessary to prove one such offense to prove first degree rape, and the restraints and use of force did not result in any injury greater than what was encompassed by the crime of first degree rape. *See State v. Vladovic*, 99 Wash.2d 413, 419-21, 662 P.2d 853 (1983) (describing doctrine of merger).

In the instant case, the offence of kidnaping was incidental to the allege offence of rape in the first degree. The crime of kidnapping was one of the offences that must have been proven if the Petitioner was to be convicted of the crime of rape. The jury did not find the Petitioner guilty of committing the crime of Rape. Further, based upon the record in this case, any restraints or use of force resulted in no injury greater than what was allegedly encompassed by the crime of first degree rape. As the jury found that the Petitioner was not guilty of the crime of first degree rape, the crime of kidnapping also fails based upon the theory of merger. The kidnapping conviction must be reversed.

THIRD GROUND

The Trial Court Erred in Failing to Suppress Evidence Seized in Violation of Petitioner's Rights under the Fourth Amendment of the U.S. Constitution and Wash. Const. Art. I § 7 because the Resultant use of Such Evidence at Trial Tainted the Entire Trial such that Convictions on all Charges must be Reversed.

The trial court abused its discretion by failing to suppress all fruits flowing from an illegal search of Petitioner's vehicle and seizure of items therefrom.

On June 22, 2012, Petitioner was out of jail on bail awaiting trial for the charges that had been leveled against him related to the events that took place in Thurston County on May 14, 2012. The Thurston County Superior Court had issued a Protection Order directing Petitioner not to be within the vicinity of Ms. Wojdyla. On June 22, 2012, allegedly while driving from work, going to her father's home in Bonney Lake, Ms. Wojdyla called 9-1-1 stating that she believed Petitioner was following her on the highway and that she was afraid to stop. Police officers responded to Ms. Wojdyla's call and subsequently stopped Petitioner, who ended up parking in a Grocery Outlet store parking lot. During questioning, Petitioner told the officers that he was on his way to a restaurant in the area to meet a friend. Nonetheless, Petitioner was arrested and booked into the Pierce County jail on a charge of violating the Thurston County Protection Order. The Petitioner was charged in Pierce County with a misdemeanor count of violation of a Protection Order.¹ Petitioner's car remained in the Grocery Outlet parking lot until

¹ Petitioner remained jailed in Pierce county for approximately 45 days. One week before trial in Pierce County, the charge was dismissed.

the next day when local law enforcement had it towed to the Washington State Patrol evidence bay.

On June 25th, 2012, three days after Petitioner had been arrested, Trooper Caton applied for and received a search warrant to search Petitioner's vehicle (a black BMW). He also applied for a separate warrant to get the key to the BMW, which had been booked into the Pierce County Jail, as part of Petitioner's personal property.

In the Affidavit for a warrant to search Petitioner's vehicle, Trooper Caton, the affiant, stated that "Trooper [Hurd], later advised me that he had spoke[n] to Sara Wojdyla's father regarding the history between her and Johnson." CR. P. 85. Ms. Wojdyla's father was a police officer in King County, Washington, as reflected in the record:

Q. You said your sister mentioned going to the police, and she knew all of the history. Did your sister know the Defendant? Had she ever met him?

A. No.

Q. Had anybody in your family met him?

A. They had not.

Q. During the entire course of your relationship?

A. Absolutely nobody met him.

Q. What is -- what does your dad do for a living?

A. He's a police officer.

Q. Where at?

A. King County.

RP p. 845.

The Affidavit was laced with untrue statements, i.e., statements that were clearly contrary to the official complaints and records in the matter pending in Thurston County. For example, the Affidavit stated that Petitioner had held Ms. Wojdyla "at gunpoint" and that Petitioner had

"forcibly raped her." The affidavit further stated that Petitioner "had a history of carrying firearms on his person which is a clear violation of the Protection Order." After Petitioner's arrest in Thurston County, Petitioner's weapon was taken and he was prohibited from carrying a firearm. There had been no incident after his arrest where the Petitioner was found carrying a firearm contrary to the Protection Order. These statements were not supported by the record, but, based upon sworn statements in the Affidavit, were included by Trooper Caton after his conversations with Ms. Wojdyla's father and other officers from the Lacey Police Department.

In the Affidavit for the Search Warrant prepared by Trooper Caton, he stated that he believed that "evidence of the crime, Violation of the Domestic Violence Violation of a Protection Order 'Brady Firearms Restrictions' is present in the above describe black 2003 BMW 525."

As a result of the search of Petitioner's vehicle, Trooper Caton seized several items from various locations within Petitioner's car, including from the floor, under the seat, on the seat, and in the trunk of Petitioner's vehicle. Items seized were as follows: roll of duct tape, pair of black gloves, black sox hat, black pair of sunglasses, a black wig, and a Midway Beauty Supply receipt.

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. V. One of the purposes of the search warrant particularity requirement is to prevent the issuance of a "general warrant" which would authorize and unlimited search for and seizure of any evidence of any crime. *Andresen v. Maryland*, 427 U.S. 463, 479-480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976); *United States vs. Holzman*, 871 F.2d 1496, 1508 (9th Cir.1989); *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

The Fourth Amendment's particularity requirement prevents general searches and "the issuance of warrants on loose, vague, or doubtful bases of fact." *State v. Perrone* at p. 545. "The problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings... [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized." *Collidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2nd 564 (1971); *Andresen*, 427 U.S. at 480.

The warrant to search Petitioner's car was unconstitutionally overbroad and not supported by probable cause because a) the affidavit did not provide probable cause to believe that the officers would find evidence of a crime in Petitioner's car; and b) the warrant authorized police to search for and seize items that were not described with sufficient particularity nor "scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L.Ed.2d 431 (1965). In addition, the seized and admitted items were neither listed on the warrant nor admissible under the plain view doctrine.

Petitioner requests review of this issue due to the impact of this unsuppressed evidence on influencing the jury in determining whether to find that Petitioner had the requisite "intent," which must have been proven by the State beyond a reasonable doubt, regarding the charged crimes for which he was convicted, i.e., burglary in the first degree; kidnapping in the first degree/felony harassment; and assault in the fourth degree. Although Petitioner's conviction on the felony stalking charge was reversed by the Appellate Court, Petitioner respectfully requests the court to review whether the trial court abused its discretion in failing to grant Petitioner's motion to suppress, as the court's failure to suppress evidence seized as a result of the illegal search tainted the trial in all respects, including each of the other criminal charges, making it

impossible for Petitioner to have received a fair trial. A trial court's failure to suppress evidence seized under an overbroad search warrant is prejudicial to the defendant if there is conflicting evidence about whether the defendant committed the crime charged and the State heavily relies on the seized evidence to prove its case. *State v. Higgins*, 136 Wn. App. 87, 147 P.3d 649, (2006). At Petitioner's trial, there was much conflicting evidence about whether Petitioner committed the charged crimes. Given the context in which the illegal evidence was used at Petitioner's trial, as discussed in further detail below, the appellate court should conclude beyond a reasonable doubt that a reasonable jury would not have reached the verdicts rendered in this case absent introduction and use of some of the illegal items at trial.

- A. The Search warrant was not supported by probable cause and did not particularly describe the things to be seized.

Search warrants must be supported by probable cause and must particularly describe the things to be seized.

Under the Fourth Amendment to the U.S. Constitution states as follows:

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

U. S. Const. Amend. IV.

Similarly, Art. I, § 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Art. I, § 7. Also, Wash. Const. Art. I, § 7 provides stronger protection to an individual's right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Meneese*, 174 Wn.2d 937, 946, 282 P. 3d 83 (2012).

Under the federal, as well as the Washington State, constitutional provisions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314

(2012). An affidavit in support of a search warrant " must state the underlying facts and circumstances on which it is based to facilitate a detached and independent evaluation of the evidence by the issuing magistrate." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Generalizations cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Id.* at 147-148.

Probable cause requires a nexus between criminal activity, the item to be seized, and the place to be searched. *Thein*, 138 Wn.2d at 140. A search warrant must also describe the items to be seized with sufficient particularity to limit the executing officers' discretion and inform the person whose property is being searched what items may be seized. *State v. Riley*, 121 Wn.2d 22, 27-29, 846 P. 2d 1365 (1993). The particularity requirement prevents the issuance of warrants based on facts that are " loose, vague, or doubtful." *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The requirement also limits law enforcement officials from engaging in a "general, exploratory rummaging in a person's belongings..." *Id.*, at 545 (citations omitted).

Conformity with the rule "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Id.*, at 546. The particularity and probable cause requirements are inextricably interwoven. *Perrone*, 119 Wn.2d at 545. A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to describe the things to be seized with sufficient particularity. *State v. Maddox*, 116 Wn. App. 796, 805, 67 P. 3d 1135 (2003).

In the instant case, there are no facts contained in the Affidavit concerning the alleged Protection Order violation that indicate that the Petitioner did anything to cause either Ms. Wojdyla or the arresting officers to believe that he had a firearm. If there had been, then the

police would have sought to obtain a search warrant immediately after the arrest rather than simply leave the car unattended in the parking lot.

- B. The warrant to search Petitioner's car was not based on probable cause to believe evidence of a crime would be found therein.

Generalizations and boilerplate are insufficient to establish probable cause. *Thein*, 138 Wn.2d at 147-48. In *Thein*, the court reversed a conviction based on evidence seized pursuant to a warrant authorizing search of a suspected drug dealer's home. *Id.* at 151. The affidavit in support of the warrant provided that drug dealers commonly keep inventory, large sums of money, and business records hidden in their homes. *Id.* at 139. The Supreme Court held that the affidavit did not establish probable cause to believe that evidence or fruits of a crime would be found in the suspect's home. *Id.* at 148. The court refused to adopt a rule that probable cause to believe that a person is a drug dealer automatically provides probable cause to search that person's home:

Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. *Id.* at 147-148.

Here, the Affidavit in support of the warrant to search Petitioner's car provided that "it is common" for officers to find certain documents as well as weapons and restraints during warrant searches. Motion to Suppress (1/4/2013), Supp. CP.

The only other information in the affidavit related to any of the items listed on the warrant is general information about Petitioner's possession of a gun during the May 14th incident. Motion to Suppress (1/4/13), Supp. CP. The affidavit also mentioned Petitioner's practice of carrying a gun before he was prohibited from doing so by the Protection Order. Motion to Suppress (1/4/13), Supp. CP.

The officer's generalized statements about what is commonly found during warrant searches do not provide any information about the underlying circumstances in Petitioner's case. *Id.* Nor do they provide any reason to believe that the categories of items listed would be found in Petitioner's car specifically. *Id.*

Likewise, the affiant's statements regarding Petitioner's prior possession of a firearm did not provide probable cause to believe that a gun would be found in Petitioner's car, as the police had already seized Petitioner's gun after his arrest related to the Thurston County charges. RP p. 429; Ex. 9. Motion to Suppress (1/4/13), Supp. CP. The statements amounted to no more than a propensity-based assertion that Petitioner had carried a gun in the past so he was likely to do so again. Such a claim does not provide probable cause to issue a search warrant. The warrant to search Petitioner's car was issued without probable cause to believe that evidence of a crime would be found inside. *Thein*, 138 Wn.2d at 147-148. Petitioner's convictions must be reversed and the evidence suppressed on retrial. *Id.*

C. The search warrant was unconstitutionally overbroad.

The search warrant authorized police to search for and seize items that were not described with sufficient particularity and for which the affidavit did not provide probable cause. Three factors determine whether a warrant is unconstitutionally overbroad. *State v. Higgins*, at 91 -92. First, probable cause must exist to seize all items of a particular type described in the warrant. *Id.* Second, the warrant must set out objective standards by which officers can differentiate items subject to seizure from those which are not. *Id.* Finally, the warrant must describe the items as particularly as possible in view of the information available to the government at the time. *Id.* A search warrant does not meet the particularity requirement if it allows the officer unbridled discretion. *State v. Reep*, 161 Wn.2d 808, 815, 167 P.3d 1156 (2007).

The warrant to search Petitioner's car authorized the seizure of:

All firearms, any containers, implements, fruits of the crime, equipment or devices used or kept for illegal purposes, evidence of ownership of such property or rights of ownership or control of said property; records including any notebooks or written or electronic records, associated with any firearms found in violation of RCW 9. 41.098.

Motion to Suppress (1/ 4/ 13), Supp. CP.

By permitting seizure of "any containers, implements ... equipment or devices used or kept for illegal purposes," the warrant authorized a general exploratory search of Petitioner's vehicle for anything that looked like it could be used in any crime. Under the *Higgins* factors, the warrant was unconstitutionally overbroad. *Higgins*, 136 Wn. App. at 91-92. First, the Affidavit did not provide probable cause to believe that any of the listed items were located in Petitioner's car. *Id.* The information that the Petitioner had previously carried a firearm before he was prohibited from doing so did not establish probable cause to believe that he had a firearm in his possession on the date of the warrant. As stated above, the police had already seized Petitioner's gun. RP p. 429; Ex. 9. Likewise, nothing in the affidavit provides reason to believe that Petitioner owned or had in his car "any containers, implements, fruits of the crime, equipment or devices used or kept for illegal purposes" or " records including any notebooks or written or electronic records, associated with any firearms." Motion to Suppress (1/ 4/ 13), Supp. CP.

The warrant and Affidavit do not provide probable cause for all of the listed items, as required by the first *Higgins* factor. *Higgins*, 136 Wn. App. at 91-92. Second, the warrant did not set out any standards for the officers to determine which items were subject to seizure. *Higgins*, 136 Wn. App. At 91-92. The provision authorizing seizure of "any containers, implements, fruits of the crime, equipment or devices used or kept for illegal purposes" afforded the officers almost unbounded discretion. Motion to Suppress 1/ 4/ 13), Supp. CP; *Reep*, 161 Wn.2d at 815. The warrant does not describe how an officer would know whether, for example, a container or

implement is used or kept for illegal purposes or what the illegal purposes would be. Nor does it explain what might constitute "fruits" of the crime of violation of a protection order. Further, the warrant was overbroad regarding these materials. First, the majority of these broad categories, i.e., "notebooks or written or electronic records associated with any firearms..." were not actually evidence of a crime. Neither the Fourth Amendment nor Washington Constitution Art. I, § 7 allow police to search for or seize items that are not themselves contraband or evidence of a crime, no matter how helpful they might be to the government. See, e.g. *United States v. McMurtrey*, 705 F.3d 502 (7th Cir. 2013). The Affidavit provides no specific information suggesting that any notebooks or written or electronic records existed or would be found in the vehicle. Additionally, the warrant did not include any language limiting the officers in their search through any notebooks and records that might have been in the car.

Under these circumstances involving Petitioner's vehicle, officers were permitted to rummage through any paperwork or digital media they found regardless of whether it had anything to do with the alleged crime under investigation. The absence of any limiting language renders the warrant invalid for failure to comply with the particularity requirement. *Riley*, 121 Wn.2d at 27.

The court erred by admitting evidence seized pursuant to an overbroad warrant. *Perrone*, 119 Wn.2d at 547. The Petitioner's convictions must be reversed. *Id.*

The warrant fails the second factor described in *Higgins*. *Higgins*, 136 Wn. App. at 91 - 92.

Because the officers did not have probable cause to believe that they would find any evidence of a crime in Petitioner's vehicle, the third *Higgins* factor - whether the warrant

described the items with as much particularity as possible given the available information - is not met. *Id.*

The state cannot show that the admission of evidence seized pursuant to the overbroad search warrant was harmless beyond a reasonable doubt. *State v. Lynch*, 178 Wn.2d 487, 309 P. 3rd 482 (2013).

The state relied on the wig, sunglasses, and receipt to argue that Petitioner intended to disguise himself or Wojdyla. RP p. 1296. This argument encouraged the jury to find Petitioner guilty of stalking based on otherwise innocuous items. It also created the inference that Petitioner was planning some other, unspecified crime or crimes. The admission of the evidence seized pursuant to the overbroad warrant prejudiced the Petitioner.

D. The court erred by admitting items seized from Petitioner's car that were not listed on the warrant and were not admissible under the plain view doctrine.

Under the plain view exception to the warrant requirement, an officer may lawfully seize an item when 1) he is lawfully standing in the place where he sees the item and (2) he immediately knows that the item is incriminating evidence. *State v. Link*, 136 Wn. App. 685, 696-697, 150 P. 3d 610 (2007) (citing *State v. Kull*, 155 Wn.2d 80, 85, 118 P. 3d 307 (2005)).

In the vast majority of cases, evidence seized by the police is in plain view when found. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971).

In Petitioner's case, the officers seized items that were not listed on the warrant, including a wig, a pair of sunglasses, and a receipt, which they found in his car. RP pp. 688-89; Exs. 105, 106, 108. The plain view doctrine does not justify seizure of these items. None of the items were immediately recognizable as evidence of a crime. *Link*, 136 Wn. App. at 696-697; *Coolidge*, 403 U.S. at 465. The state relied heavily on the wig, sunglasses, and receipt at trial. RP p. 1296. The admission of the unlawfully seized evidence was not harmless beyond a

reasonable doubt. *Lynch*, 178 Wn.2d 487. The court erred by admitting evidence found in Petitioner's car that was not listed on the warrant as was not admissible under the plain view doctrine. *Link*, 136 Wn. App. at 696-697; *Coolidge*, 403 U.S. at 465.

E. The illegally seized evidence was produced at trial and used extensively by the prosecution in arguing that Petitioner was generally guilty, i.e., having intent, to commit all charged crimes.

Petitioner's convictions must be reversed and the evidence suppressed on remand. *Id.* As discussed above, among illegally seized items were a wig, sunglasses and two receipts. RP p. 684. This illegally seized evidence was produced at trial and used extensively by the prosecution in arguing that Petitioner was generally guilty, i.e., having intent, to commit all charged crimes, not just felony stalking. For example, during closing, the Prosecutor stated to the Jury, in part, as follows:

Now you have the law. And like I said -- or like was said, excuse me, during opening statement, this is when *the attorneys get to talk to you about how the law and the facts you heard interact...*

You have direct evidence. You have circumstantial evidence; you have testimony; you have photographic evidence; you have physical; you have expert. You were given one of the instructions that said each charge is to be looked at individually. And that's absolutely correct. *But the evidence that you are given can overlap. It can go between charges. A piece of evidence can apply to Count 1 as well as it can to Count 3 as well as it can to Count 6. It's one giant puzzle. And it's all interactive with each other...*

You have the troopers from Pierce County who saw the Defendant's vehicle in the proximity of Ms. Wojdyla's on June 22nd, who talked to the Defendant, who saw the wig...

We saw the wig and the receipts that are — the fact that the wig was bought two-and-a-halfish hours before he was stopped by State Patrol. Again, that's circumstantial evidence. Mostly, all of these are of his intent, and we'll get to that in a bit. What does your common sense tell you the reason he had those items were?
(Emphasis added)

RP pp. 1255-1258.

In the Prosecutor's closing argument to the jury, including his statements regarding trial evidence such as: "the evidence that you are given can overlap;" "it's all interactive with each other;" "[i]t can go between charges;" and "all of these are of his intent," on their face encouraged the jury to consider all the evidence for whatever charges they desired in making decisions about intent and guilt. Based upon these arguments by the State, it cannot reasonably be said that a reasonable jury would not have been influenced significantly by the wig, sunglasses and receipts in reaching a decision to convict Petitioner of burglary, kidnapping and the other charges. In Petitioner's case, items taken from his vehicle as a result of an illegal search and seizure, i.e., the wig, sunglasses, and receipts, which were speculative as to whether they even belonged to the Petitioner, tainted the entire trial, being touted by the prosecution as evidence to be overlapped from Count to Count. The Fourth Amendment protects "against unreasonable searches and seizures." U.S. Const. amend. IV. Searches and seizures that offend the Fourth Amendment are unlawful and evidence obtained as a direct or indirect result of such invasions is considered "fruit of the poisonous tree" and is inadmissible under the exclusionary rule. *Wong Sun*, 371 U.S. 471, at 484-487, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (citation omitted).

During deliberations, the jury submitted a question to the court regarding intent. Specifically, the jury questioned as follows: "Relative to instruction 8, [Burglary] for intent does the perpetrator/defendant need to know the act is a crime for intent?" Jury Question to Court (5/2/13), Supp. CP. This question makes clear that the jury was actively focused on Petitioner's intent and any illegally introduced evidence likely directly influenced its decision on this issue. It

cannot reasonably be said that the Petitioner suffered no prejudice as a result of the illegally seized and admitted evidence.

The prejudicial impact of the illegally seized and introduced items and their taint on the entire trial made it impossible for Petitioner to have received a fair trial.

FOURTH GROUND

Based Upon Unrefuted Facts in the Record, Petitioner was not "Armed" for purposes of Firearm Enhancements

In *State v. Brown*, 162 Wn.2d 422, 173 P. 3d 245, 2007 Wash. LEXIS 950 (Wash. 2007), the Washington Supreme Court ruled that although the defendant was convicted of first-degree burglary, and a deadly weapon enhancement was added to his sentence, the facts did not support a finding that defendant was "armed" for purposes of either the conviction or the sentencing enhancement. Similarly, in the instant case, based upon unrefuted facts in the record, Petitioner should not have been determined to have been "armed" for purposes of firearm enhancements for either the burglary or kidnapping convictions or for purposes of sentencing. In *Brown*, the court determined that no evidence existed that defendant or his accomplice handled a rifle in a manner indicative of an intent or willingness to use it in furtherance of the burglary; merely because the rifle was briefly in defendant's possession did not make him armed within the meaning of the *RCW 9.94A.533*.

Under the law, a person is "armed" if the weapon is readily accessible and easily available for use, and there is a nexus between the defendant, the crime, and the weapon. *State v. Easterlin*, 159 Wn.2d 203, 206, 149 P.3d 366 (2006). (Also see *RCW 9.94A.825* ("... a deadly weapon is an implement or instrument which has the capacity to inflict death **and from the manner in which it is used**, is likely to produce or may easily and readily produce death.")) [Emphasis Added]. In determining the nexus, the court must analyze "the nature of the crime, the type of weapon, and the circumstances under which the weapon is found." *Brown*, 162 Wn.2d at 431 (quoting *State v. Schelin*, 147 Wn.2d 562, 570, 55 P.3d 632 (2002)).

In the instant case, as the record is undisputed that no evidence exists that Petitioner handled the handgun or any other object defined as a deadly weapon in a manner indicative of an intent or willingness to use them in furtherance of the charged crimes, the court erred in finding that Petitioner was "armed."

As the record in this case reflects, Petitioner was legally licensed, as authorized by the State of Washington, to carry a concealed weapon. CP 234. Ms. Wojdyla was fully aware of this authorization. RP pp. 161, 802. In fact, Petitioner was authorized to carry a weapon at the time the relationship began, during the approximately two years Petitioner and Ms. Wojdyla were in the relationship, and on the many previous occasions they interacted.

On the morning of May 14, 2012, Petitioner did not, at his initiative, mention nor reveal his licensed firearm or any other object. Rather, discussion about the gun ensued only at the request of Ms. Wojdyla, as she testified as follows:

Q. Did he make any other comments to you that made you feel unsafe?

A. I had asked him at one point -- I don't -- I cannot recall exactly when. I said, do you have your gun on you? And he laughed. And he said, actually, I do. And he lifted up his shirt -- his sweatshirt pocket. Because I couldn't see it. And that's why I asked. He lifted up his sweatshirt, and he said -- and he kind of chuckled, and he laughed, and he said actually, I do.

RP p. 802.

Given the facts and circumstances in the instant case, Petitioner should not have been determined to have been "armed" for purposes of firearm enhancements for either the burglary or kidnapping convictions or for purposes of sentencing. The statute that the defendant was convicted of violating was unconstitutional as applied to the defendant's conduct. Petitioner's convictions must be reversed.

FIFTH GROUND

It was Prejudicial Trial Error for the Court to Comment on Evidence Presented at Trial

The court shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. Washington Constitution, Art. 4, § 16.

It was prejudicial trial error for the court to comment on evidence presented at trial. In determining what evidence the court would allow to go into the jury room, the court told the Jury that certain items would not be allowed to go into the jury room because, "This court has a responsibility to keep potentially dangerous items away from you..." RP p. 711. The court in effect expressed its opinion that the items were not only potentially dangerous, but even too dangerous for the jury to handle. The items at issue were allegedly present at the scene of the alleged crimes; the asp was in the Petitioner's shirt pocket and a knife and a hand saw were in Petitioner's backpack, which Petitioner described as a survival bag. The items were not used in any way against anyone. A major part of the jury's obligation was to determine if the Petitioner was guilty of crimes involving "intent."

The asp (baton) was an item used by the Petitioner in his job as a security officer. This was an item Ms. Wojdyla had seen throughout her two-year relationship with the Petitioner. The knife and handsaw were items maintained in Petitioner's survival bag, which were never taken out of the bag around Ms. Wojdyla, nor mentioned or used to threaten Ms. Wojdyla. Given the nature of their use and their context as related to the events involving Petitioner and Ms. Wojdyla, these items were not deadly weapons nor were they potentially dangerous. The court's description of these items as "potentially dangerous" prejudiced the Petitioner. Specifically, the court's prejudicial comments occurred in the context of the following exchanges:

Then Exhibits 118, 119, and 120 are photographs taken by the detective this morning, per his testimony, of the knife. And the detective has testified this morning that those photographs are photographs of the knife that was previously admitted into evidence.

The purpose of admitting these photographs into evidence, 113 through 120, is because this court has ruled that the exhibits, consisting of the -- what is purported to be the asp, the saw, and the knife, will not go with you back into the jury deliberation room. This court has a responsibility to keep potentially dangerous items away from you, so I don't want those going back -- in fact, they will not go with you back into the deliberation room. The photographs will, but not the actual objects.

I've made an exception for the exhibit which is purported to be the handgun. That particular item of evidence will go back to the deliberation room with you. And the reason I have made that decision for the exception is because that handgun has been rendered inoperable.

(State's Exhibits 113 - 120 were admitted into evidence.)

THE COURT: Thank you, Mr. Juris. Thank you, Mr. Lapin.

MR. JURIS: And permission to publish, Your Honor?

THE COURT: Yes.

And ladies and gentlemen, while those items are being published -- that means shown to you, and you are allowed to handle them -- please do not deploy what is purported to be the asp, and please do not unsheath what is purported to be the knife. And please do not take the cardboard sheath off of what is purported to be the handsaw for the reasons that I have explained a couple of minutes ago.

(The knife inside sheath, handsaw in cardboard sheath, and asp were published to the jury.)

MR. JURIS: I have no further questions,
Your Honor.

THE COURT: Thank you, Mr. Juris. Mr. Lapin
any further questions?

MR. LAPIN: I don't have any further
questions, either, for this detective based on that line of questioning.

THE COURT: Thank you, Mr. Lapin. Detective, you are excused.

The court's comments on the evidence, describing the items as "potentially dangerous," helped to bolster the Prosecutor's arguments that the items were "deadly weapons" supporting intent to commit either of the charged crimes. The jury instructions defined deadly weapon as follows:

"Deadly weapon" also means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RP p. 1238 (Instruction No. 14).

The Prosecutor used the deadly weapon definition to argue to the jury that the items described by the court as "potentially dangerous," were in fact deadly weapons. The court's characterization of the items as "potentially dangerous" did nothing but bolster the Prosecutor's argument. For example, in closing the Prosecutor stated as follows:

The other deadly weapons we've talked about. But to be more precise, it means anything, under the circumstances in which it was used, attempted to be used, or threatened to be used is capable of causing death. It's a pretty broad definition. But look at the baton -- the asp, to use the police term. Look at the knife. Is there really much other purpose?

RP p. 1264.

Although the items at issue were never used, attempted to be used, nor threatened to be used against Ms. Wojdyla, the court's characterization of the items as "potentially dangerous" and the Prosecutor's arguments before the jury that these items were "deadly weapons" prejudiced the Petitioner such that Petitioner was unable to receive a fair trial. Petitioner's convictions must be reversed.

SIXTH GROUND

Petitioner was not afforded Effective Assistance of Counsel.

Under the Washington and United States Constitutions, a criminal defendant is entitled to the effective assistance of counsel at critical stages in the litigation. *State v. Page*, 147 Wn. App. 849, 855, 199 P.3d 437 (2008), review denied, 166 Wn.2d 1008 (2009). To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The benchmark for judging a claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). A defendant may rebut the presumption of effective assistance by proving that his attorney's representation "was unreasonable under prevailing professional norms." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)).

In this case, Petitioner's counsel failed to provide effective assistance of counsel in many respects. Specific instances are identified and addressed below.

1. Arguing against the Petitioner's interests by stating several legal conclusions in direct conflict with Petitioner's plea of not guilty, thereby reducing the State's burden of proof. These statements included the following:

During Counsel's closing argument, counsel made several remarks which were in direct conflict with Petitioner's right to be defended by counsel. Based upon the comments, it is unclear if counsel was representing the Petitioner or if his motivation was to assure Petitioner's conviction for the charges for which Petitioner had plead not guilty. Counsel's comments were improper expressions of legal conclusions, which improperly reduced the State's burden of proof.

a) Stating that the Petitioner was guilty of harassment

During closing argument, counsel told the jury that Petitioner was guilty of harassment. Among the several charges against the Petitioner was a charge of felony harassment. The jury was charged with responsibility to determine if the Petitioner was guilty of the charge of harassment by considering each element of the alleged offense. By telling the jury that the Petitioner was guilty of harassment, counsel diminished the state's burden of proof. It was not counsel's responsibility to make such a judgment, i.e., legal conclusion, before the jury. Specifically, counsel stated, in relevant part, that:

"Mr. Johnson was guilty of Harassment and is guilty of Harassment. Because Harassment just requires that you are continually in contact with the person and it is annoying; it is bothersome; okay? So we concede that between April 25th and May 13th, when he's constantly texting her and she's telling him to stop, that's Harassment; okay?"

RP p. 1344.

In addition to diminishing the state's burden of proof, Petitioner's counsel also misstated the elements of the offense of harassment.² Further, he minimized the magnitude of the charge

² Jury Instruction No. 26 describes the crime of harassment as follows: "A person commits the crime of Harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person and when he or she, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out and the

and mis-stated the elements of the charge by stating that harassment “just requires that you are continually in contact with the person and it is annoying; it is bothersome...” RP p. 1344.

b) Stating that the Petitioner was armed with a firearm

The jury was charged with determining if firearm enhancements were to be imposed against Petitioner. In making this determination, the jury was required to determine if the Petitioner was “armed” with a firearm. Again, as in the case of the charge of harassment, it was the jury’s responsibility to determine if the Petitioner was “armed” with a firearm by considering the specific jury instructions. By telling the jury that the Petitioner was “armed,” counsel diminished the state’s burden of proof. It was not counsel’s responsibility to make such a judgment, i.e., legal conclusion, before the jury. Specifically, counsel stated, in relevant part, as follows:

I want to talk about the firearm allegations on Counts 1, 2, and 3, because I wouldn't be doing my job for Mr. Johnson if I didn't address those issues. And the instruction tells you -- first of all, let's be clear. Mr. Johnson was armed with a firearm. He's always armed with a firearm; okay? And what the instruction is telling you for the special verdict is, you have to find more than that.

RP p. 1342.

Under the law, a person is “armed” if the weapon is readily accessible and easily available for use, and there is a nexus between the defendant, the crime, and the weapon. *State v. Easterlin*, 159 Wn.2d 203, 206, 149 P.3d 366 (2006). In determining the nexus, the court must analyze “the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” *Brown*, 162 Wn.2d at 431 (quoting *State v. Schelin*, 147 Wn.2d 562, 570, 55 P.3d 632 (2002)). It was the jury’s responsibility to assess these factors, including the circumstances under which the

threat to cause bodily harm consists of a threat to kill the threatened person or another person.”
RP p. 1243.

weapon was found, and then render a decision as to whether or not the Petitioner was armed. The instruction to the jury was consistent with this legal standard. By telling the jury that the Petitioner was "armed," Petitioner's counsel in effect rendered a legal conclusion and diminished the state's burden of proof. The jury agreed with Petitioner's counsel in finding that the Petitioner was "armed," thereby adding an additional 10 years to his base sentence. Petitioner's counsel, by diminishing the state's burden, prejudiced the Petitioner. The jury, after having been told by Petitioner's counsel that the Petitioner was armed, had no need to consider the circumstances under which the weapon was found.

2. Not objecting to the judge's determination not to allow his aunt, his only relative present in the courtroom during sentencing, to speak in Petitioner's favor in mitigation.

During sentencing, counsel made no objection to the court's decision not to allow Petitioner's aunt, who was the only relative present at the hearing, to speak on Petitioner's behalf. The interchange at court on this point proceeded as follows:

MR. LAPIN: Your Honor, present in the courtroom on behalf of Mr. Johnson is his aunt, Gloria Johnson, who would like to address the court. Salinda Gafford and her mother are both present. They both submitted letters. As the Court may be aware, there would have been many more family members here, but because the sentencing was continued from the June 3rd date to today's date, they were not able to get here. Many of them were coming in from out of state. And so we did submit letters on behalf of many of them who would have been here, in particular, his father who was here for the entire trial. At this point I guess I would like the Court to hear from Gloria Johnson who would like to address the Court, and then I will make my presentation.

THE COURT: The Court is not inclined to hear from Ms. Johnson, with all due respect to whomever Ms. Johnson may be, in light of the fact of – in light of what I earlier mentioned, the language

contained within 9.94A.500 and the fact that the Court is required to hear from certain individuals. And again, with no disrespect to whomever Ms. Johnson may be, she does not have a right to address the Court. And again, at the risk of repeating this now for the third time, I mean that with no disrespect.

The Court will consider, and in fact has considered all of the written statements that have been provided to the Court on behalf of Mr. Johnson. Mr. Lapin?

MR. LAPIN: In that case, Your Honor, I guess then I'll make my presentation.

RP pp. 1415-1416.

As reflected in the above exchange, not once did counsel for the Petitioner attempt to present a counter position to the court. With regard to the relevant statute, the court stated as follows:

RCW 9.94A.500 provides, in part, that before imposing a sentence, the court shall "allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor and an investigative law enforcement officer as to the sentence to be imposed."

RP pp. 1408-1409.

Although the above statutory provision provides, in part, that the court "shall" allow the identified individuals to provide arguments before the court, that same provision does not expressly forbid others from presenting argument before the court. Given that Petitioner's aunt was the only family member present, due to unexpected changes in the date for the Sentencing hearing, it was within the court's discretion to allow Petitioner's aunt to present argument. Any reasonable counsel seeking to zealously represent his client would have made an argument

before the court in favor of allowing the aunt's arguments in Petitioner's favor. Further, any reasonable attorney would have argued that the statute is broadly written to allow arguments from the alleged offender's representatives. For example, the statute states that the court "shall allow arguments from ... the offender." This language does not expressly prohibit statements from the alleged offender's representatives. This statutory language is broad enough to allow arguments from family members of the offender as arguments from the offender. Such an interpretation is consistent with Washington case law, which reflects argument during the sentencing phase on behalf of offenders from the offender's family members and teachers. See *In re Pers. Restraint of Solis Diaz*, 2012 Wash. App. LEXIS 2257 (Wash. Ct. App., Sept. 18, 2012)

Defense counsel's failure to argue for a statutorily contemplated exceptional sentence downward-coupled with defense counsel's failure to inform the trial court of important procedural considerations and counsel's failure to have the defendant's family members, teachers, or other community members testify at sentencing rises to the level of deficient performance).

3. Failure to propose an exceptional sentence downward, including failure to bring to the court's attention case law precedent supporting downward exceptional sentences in a case where Petitioner had no previous convictions on his record.

At sentencing, the Prosecutor identified a standard range sentence of 197 months to 222 months, and recommended that the court sentence the Petitioner to 222 months. Specifically, the Prosecutor stated as follows:

So all of these things, the State believes, lead to it being appropriate that Mr. Johnson be sentenced to the high end of the standard range, which the State calculates as 222 months. I broke it down in the Sentencing Memorandum of what sentence should be given on each separate crime. I don't know that the State needs to get into that. But all together, with the firearm enhancements running consecutively, the

standard range would be 197 months to 222 months. The State believes all of this evidence points to the fact that Mr. Johnson should be sentenced to 222 months, and the State would ask that you do that.

RP p. 1413.

Petitioner's Counsel even advocated for imposition of a 197-month sentence, stating, in relevant part, as follows:

I think it should be -- first of all, Your Honor, the low end is not an insignificant amount of time. It's over 16 years at the Department of Corrections. And because of the good time rules as it relates to firearms and to the Kidnapping in the First Degree, he's going to serve almost all of it, day for day. So we'd ask the Court to take that into consideration....

In addition, 10 years of the 16 years, Your Honor, is for the firearm. They put firearm enhancements on two Class A felonies, which adds ten years to the sentence. He has to serve every day of that....

So, Your Honor, it's the defense position that for all of those reasons, 197 months is sufficient to hold Mr. Johnson accountable. And so we'd ask the Court to impose the low end.

RP pp. 1418-1420.

Petitioner's counsel did not propose an exceptional downward sentence, rather counsel agreed, with no objection or counter argument, with the range as identified by the Prosecutor. Counsel took this position although the Petitioner did not have a criminal record. In addition to agreeing with the Prosecutor that the identified range was proper and that Petitioner should be sentenced to 197 months, counsel also opined that the court's discretion was limited by the SRA [Sentencing Reform Act], implying that the court had no legal right to impose a sentence below the lower end of the range identified by the Prosecutor. Based upon counsel's statement, he

appeared to be unaware of the court's authority to impose an exceptional sentence downward, as counsel stated as follows:

MR. LAPIN: ... Your Honor, the defense is asking the Court to impose the low end of 197 months. Obviously, under the SRA, the Court's discretion here is somewhat limited. And the difference in the range, as far as the Court's sentencing, is the difference between 77 and 102 months. So basically, the Court does have a 25-month discretion.

RP p. 1416.

Counsel's position was that the court only had discretion within the standard range, limited to the months between the lower and higher end of the range. This position is not consistent with the SRA and related case law. *State v. Guadalupe Solis-Diaz*, 194 Wn. App. 129, 136-137, 376 P.3d 458 (2016). The SRA is clear that exceptional sentences are possible below the standard range, given certain mitigating factors in a particular case. *Id.* In Petitioner's case, the court wasn't even asked to consider granting an exceptional downward sentence. This was directly due to counsel's unequivocal agreement with a sentence as identified by the Prosecutor at the lower end of the identified range, i.e. 197 months.

The Sentencing Reform Act of 1981 (SRA), *Wash. Rev. Code ch. 9.94A*, is clear that a sentencing court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. *Wash. Rev. Code § RCW 9.94A.535(1)*. Among mitigating circumstances identified by law is the circumstance where operation of the multiple offense policy of *Wash. Rev. Code § 9.94A.589* results in a presumptive sentence that is clearly excessive considering the purpose of this chapter, as expressed in *Wash. Rev. Code § 9.94A.010*, *Wash. Rev. Code § 9.94A.535(1)(g)*.

Petitioner was sentenced for multiples offences which, given the circumstances of the case and the fact that the Petitioner had no criminal record, appear to be extremely excessive.

Although there were contested accounts of what happened at Ms. Wojdyla's apartment on the morning of May 14, 2012, it is undisputed that nobody was shot and nobody attempted to shoot anyone, nobody was stabbed and nobody attempted to stab anyone, nobody fought and nobody attempted to fight anyone, nobody was slapped and nobody attempted to slap anyone. It is also undisputed that there was much conversation on the morning of May 14, 2012, including requests by the Petitioner that Ms. Wojdyla reconcile and continue their relationship of approximately two years. RP pp. 790-791.

The single event of May 14, 2012 led to Petitioner being charged with, and aggressively prosecuted for, several separate crimes, including three (3) Class A first degree felonies. In the instant case, even if Petitioner had threatened to harm Ms. Wojdyla, which Petitioner consistently maintains he did not, such a threat without actions to follow-through, given the alleged acts of May 14, 2012, should not have resulted in prosecution at the level in this case. Had the court been asked by Petitioner's counsel and presented with compelling legal arguments and supporting precedent, the sentencing court reasonably could have determined that the sentences were clearly excessive. Counsel's failure to request an exceptional downward sentence and his unequivocal agreement that Petitioner be sentenced to 197 months severely prejudiced the Petitioner at the sentencing hearing.

In considering the Washington State Legislature's purposes of the SRA as well as the specific factors the court must evaluate in making its sentencing decision, the court also specifically stated that it had little concern that the Petitioner would re-offend; and the court expressly acknowledged that the Petitioner had no criminal record.

When this court imposes a sentence, I always start with the purposes of the Sentencing Reform Act, which are codified in RCW 9.94A.010. And that statute requires the Court to take into consideration certain

factors. And they include, "Insuring that the punishment for an offense is proportionate to the seriousness of the offense and the offender's criminal history."

This is a very serious offense -- offenses, plural. And Mr. Johnson, the offender here, has zero criminal history. "Promote respect by the law by providing punishment which is just." And that means, in layman's terms, hold not only Mr. Johnson accountable for his acts, but let the public know that people who commit these types of acts are going to be held accountable. And in law school that is referred to as a general deterrent. "Be commensurate on the punishment imposed on others committing similar offenses." That means I must treat people equally. "Protect the public" speaks for itself. "Offer the offender an opportunity to improve himself or herself, make frugal use of the state and local government's resources," which means take into account the overcrowding situation that this state faces in its correctional institutions. And, "Reduce the risk of re-offending by offenders in the community."

That means, at least in my consideration, the odds of Mr. Johnson re-offending. And all of these factors, of course, are not to be considered in a vacuum; rather, they are all to be considered at the same time and in relationship to each other. **This court has very little concern, given Mr. Johnson's lack of criminal history and the fact that he has support, that he's going to re-offend. [Emphasis Added]**

RP pp. 1427-1430.

Given the court's evaluation of the SRA factors and his specific determinations regarding these factors, it reasonable that he would have considered a request from counsel on behalf of the Petitioner for an exceptional downward sentence. Again, counsel's failure to ask the court to consider an exceptional sentence amounted to ineffective assistance of counsel, prejudicing the Petitioner at the Sentencing phase.

4. Calling the Prosecutor as a witness in an attempt to impeach testimony by Ms. Wojdyla, although the Prosecutor had made clear, prior to being called, that his testimony would be that he did not recall what Ms. Wojdyla had said to him.

As a general rule, it is improper for the prosecution to vouch for the credibility of a government witness. Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness' testimony. *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981).

Whether a witness has testified truthfully is entirely for the jury to determine; it is improper to communicate that a credibility determination has been made by a Prosecutor, law enforcement agent, or the court, or that the government knows whether the witness is being truthful and stands behind the veracity of the witness's testimony. *United States v. Ortiz*, 362 F.3d 1274, 1279 (9th Cir. 2004); *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007).

At trial, Petitioner's counsel attempted to impeach the credibility of Ms. Wojdyla by calling the deputy prosecutor as a witness to elicit his testimony that Ms. Wojdyla had not informed the Prosecutor of particular key points, contrary to Ms. Wojdyla's testimony. If Ms. Wojdyla had informed the Prosecutor of these points, it would have been the Prosecutor's responsibility to have informed Petitioner's counsel. Since the Prosecutor had not provided to Petitioner's counsel notice of these alleged key points, Petitioner's counsel believed the Prosecutor would state in testimony that Ms. Wojdyla had not previously made these statements to him. At trial was the first-time Petitioner's counsel became aware of these statements by Ms. Wojdyla. They were not in Ms. Wojdyla's written statement nor in other law enforcement reports. Specifically, Ms. Wojdyla had testified that she told the Prosecutor that the Petitioner had told her that "if I can't have you no one else can;" and that she told the Prosecutor "I hit my head." When asked if she told the prosecution, her answer was "yes." RP p. 1151.

In communications before the court, outside the presence of the jury, the prosecuting attorney clearly informed Petitioner's counsel that he did not recall what Ms. Wojdyla has said to him, yet, counsel called the Prosecutor as a witness anyway. Given this fact, any reasonable attorney would have known that the attempt at impeachment would be futile and would most likely have the effect of bolstering the state's case. Based upon the record, the interchange on this point before the court proceeded as follows:

MR. LAPIN: And I won't stray. And I guess, just so we're clear, I guess I would say, I'm not going to stray as long as the answers are the answers that I think we all expect to be given.

THE COURT: Well, I will be --

MR. LAPIN: Which I expect them to be. I mean, but that's the only -- I mean, obviously, I haven't -- he made a representation that he had not heard those before. So I'm expecting his answer to be "no," and then that yesterday was the first time I heard it.

MR. JURIS: Actually, I want to clarify, Your Honor. I made a representation that I did not recall ever hearing those before, and I think that is an important distinction.

MR. LAPIN: Okay. Well, if he's going to say he didn't recall, then I'm not limiting myself. Because then I get to the issue of if she had said that, that's an important -- I mean, I think if she had said that to him, he would have done something about it. He can't say, well, I just don't recall it. Because if she did say it, then 4.7 kicks in, in his obligation as a prosecutor. And I --

THE COURT: I understand that. And I think I'll give you some latitude in that regard. When I say I don't want you to stray too far, what I mean is, limit it to that line of questioning.

MR. LAPIN: Well, I --

THE COURT: And I know you will, because that's all you intend to do.

MR. LAPIN: Well, now I'm concerned that the answer is going to be "I don't recall."

THE COURT: I understand that. And if the answer is "I don't recall," I'm going to give you a little bit of latitude to explore why it is that he doesn't recall, if he doesn't recall. And I will allow you to ask Mr. Juris something along the lines of, well, if it was important to you, would you have made note of this or words to that effect. And --

MR. LAPIN: Yeah. I understand. If he -- yeah. That's fine.

RP pp. 1154-1156.

In testimony at trial, the Prosecutor testified that he had not heard Ms. Wojdyla make the statements at issue. The Prosecutor's testimony, in relevant part, was as follows:

Q. Okay. You -- do you recall hearing Ms. Wojdyla testify yesterday that Mr. Johnson made a statement, "If I can't have you, no one else can"?

A. Yes.

Q. And do you recall her testifying that she had, on a previous occasion, told you about that?

A. I recall that.

Q. Did Ms. Wojdyla ever tell you that Mr. Johnson said, "If I can't have you, no one else can"?

A. I don't remember ever hearing her say that.

Q. All right. And if she had said that, would you have documented that, as is your obligation as a prosecutor?

A. If I had caught it, I would have.

Q. And would you have informed me of that?

A. If I had caught it, I would have.

Q. Okay. So would it be fair to say that when she said

it yesterday in court, it was the first time that you heard her say that?

A. That's the first time I can remember hearing her say it.

Q. Do you recall Ms. Wojdyla testifying that she hit her head?

A. Yes.

Q. Do you recall Ms. Wojdyla testifying that she specifically told you about that on a prior occasion?

A. I remember her saying that.

Q. Do you recall -- did Ms. Wojdyla tell you on a prior occasion that she hit her head?

A. I don't remember ever hearing her say that before.

Q. And if she had said that before, would you have documented it?

A. Again, just like with the prior issue, if I had caught her -- if I had heard her say it, I would have documented it.

RP pp. 1167-1168.

In effect, the Prosecutor ended up impeaching Petitioner's counsel rather than impeaching Ms. Wojdyla's testimony. The Prosecutor argued during closing that if Ms. Wojdyla lied because there were inconsistencies or inaccurate memories, then Petitioner's counsel lied.

Specifically, the Prosecutor stated as follows:

Counsel tells you over and over and over that Ms. Wojdyla lied, that Ms. Wojdyla lied, that Ms. Wojdyla lied because there were inconsistencies, there was inaccurate memories. Well, if that's the case, Mr. Lapin lied to you. Mr. Lapin told you that I took the stand and said Ms. Wojdyla had never said those things to me. What I told you was, actually, I don't remember ever hearing her say those things to me. Mr. Lapin told you that I made a big deal with Ms. Cole when I asked her questions. This was just from last week. Ms. Archer's the one that actually questioned Ms. Cole, not me. Is that lying?

RP p. 1351.

This attack of Petitioner's counsel was invited by Petitioner's counsel himself and worked to prejudice the Petitioner.

Not only did the above interchange constitute ineffective assistance by Petitioner's counsel, the Prosecutor's comments about Petitioner's counsel, implying that he was lying, constituted prejudicial prosecutorial misconduct.

The right to a fair trial is a fundamental liberty guaranteed by both the federal and Washington constitutions. *U.S. CONST. amend. VI, XIV; WASH. CONST. art. I, § 22*. It constitutes misconduct when a prosecutor impugns defense counsel's role or integrity. *State v. Houston-Sconiers*, 191 Wn. App. 436, 365 P.3d 177 (2015); *State v. Lindsay*, 180 Wn.2d 423, 431-432, 326 P.3d 125 (2014). As an example, a prosecutor commits misconduct by referring to the defense's case as "bogus" or involving "sleight of hand," which implies "wrongful deception or even dishonesty in the context of a court proceeding." *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011).

In the instant case, by implying that Petitioner's counsel was lying, the Prosecutor in effect implied deception and dishonesty by Petitioner's counsel. In fact, the Prosecutor's comments were related to his own testimony at Petitioner's trial, and constituted a tit-for-tat, i.e., Petitioner's counsel attempted to impeach Ms. Wojdyla's testimony through testimony by the Prosecutor; then, the Prosecutor attempted to impeach Petitioner's counsel's representation of Petitioner's case by suggesting to the jury that Petitioner's counsel was lying. The Prosecutor's comment was bold, abrasive, blatant and ill-intentioned. No instruction could have cured the resulting prejudice to the Petitioner. See *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

5. Petitioner's counsel failure to object to improprieties throughout the trial, including the following specific instances.

Petitioner's counsel failed to object to the Prosecutor's attack on his (Petitioner's counsel's) credibility, as discussed above in Section 4. Also, Petitioner's counsel failed to object to the court's improper and prejudicial comments, as discussed in the Fifth Ground herein.

C. STATEMENT OF FINANCES

1. Petitioner asks the court to file this without payment of a filing fee because the Petitioner is indigent and cannot pay the fee.
2. Petitioner has a spendable balance of \$~10 in his prison or institution account.
3. Petitioner does not ask the court to appoint a lawyer for him because he has counsel representing him pro bono.
4. Petitioner is not employed.
5. During the past 12 months Petitioner did not get any money from a business, profession or other form of self-employment.
6. During the past 12 months, Petitioner did not get any rent payments, Interest, dividends, or any other money.
7. Petitioner does not have any cash except as said in answer 2. Petitioner does not have any savings accounts or checking accounts. Petitioner does not own stocks, bonds, or notes.
8. Petitioner does not own real estate and other property or things of value which belong to him or in which he has an interest.
9. Petitioner is not married.
10. Petitioner's daughter is presently being supported by her mother.
11. Any debts the Petitioner had prior to his incarceration are in default and Petitioner does not have information concerning their amount or status.

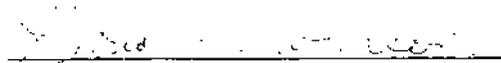
D. REQUEST FOR RELIEF

Petitioner respectfully request that this court reverse all convictions and remand for a new trial.

E. OATH OF ATTORNEY

I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the Petitioner, that I have read the petition, know its contents, and I believe the petition to be true.

Respectfully submitted,



Signature

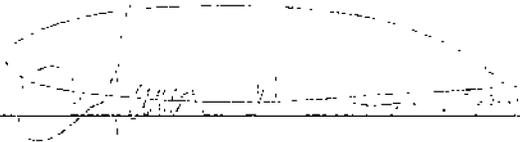
Signed this 9th Day of December, 2016, at Tacoma, Washington

Gloria J. Johnson, WSBA #48727
Attorney for Petitioner Aaron Mercedes Johnson
P. O. Box 112219
Tacoma, WA 98411
575-302-8495

VERIFICATION OF PETITIONER

I declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

Dated this 9th day of December 2016

Signature  Petitioner

Gloria J. Johnson, WSBA #48727
Attorney for Petitioner Aaron Mercedes Johnson

PO Box 112219
Tacoma, WA 98411
575-302-8495
Johnson010102@live.com

GLORIA JOHNSON

December 09, 2016 - 11:09 AM

Transmittal Letter

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Case Name: State v. Aaron M Johnson

Court of Appeals Case Number:

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Motion:

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Objection to Cost Bill

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Letter

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Hearing Date(s):

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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Comments:

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