

NO. 34716-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL TILTON,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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## A. INTRODUCTION

When Nathaniel Tilton was released from prison, he came home to live with his father. Mr. Tilton has had lifelong struggles with mental health issues. He already had a strained relationship with his father, which did not improve while they were living together. The two men started fighting soon after Mr. Tilton arrived, culminating in Mr. Tilton's assault of his father about a day after he had moved in.

At no time was Mr. Tilton told he could no longer live in their house, let alone enter it. Nevertheless, the prosecutor charged Mr. Tilton with residential burglary, among other charges. This Court should hold that the absence of evidence Mr. Tilton entered or remained unlawfully in the house he lived in with his father requires reversal of his conviction for residential burglary.

This and other errors raised in this brief require reversal. Mr. Tilton asks this Court to reverse his convictions and, in the alternative, remand this matter for resentencing.

## B. ASSIGNMENTS OF ERROR

1. The government failed to present sufficient evidence of the essential element of entering or remaining unlawfully in a dwelling that is required to prove residential burglary.

2. Mr. Tilton was constructively denied his right to the assistance of counsel.

3. There is a substantial likelihood the jury's verdict was affected when the prosecutor committed misconduct in his closing argument by arguing facts not in evidence and by misstating the elements required to prove residential burglary.

4. The sentencing court abused its discretion when it imposed the maximum sentence allowed by statute, a clearly excessive sentence.

5. The court failed to make an individualized determination into whether Mr. Tilton's legal financial obligations, including the court filing fee and the DNA fee, should be waived because of his mental health conditions.

#### C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment requires the government to prove every element of the crime charged beyond a reasonable doubt. To prove residential burglary, the government must establish the accused entered or remained unlawfully in a residence. Did the prosecutor fail to establish sufficient evidence of residential burglary, where the prosecutor did not establish Mr. Tilton entered or remained unlawfully in the house he lived in with his father?

2. The Sixth Amendment guarantees the right to counsel to all persons accused of crimes that are unable to afford their own attorney. Constructive denial of counsel occurs where the breakdown in the attorney-client relationship is so extreme as to deprive the accused of meaningful representation. Where such a breakdown occurs, the court is obligated to determine whether a constructive denial of counsel has taken place. Was the court required to conduct an inquiry into whether there was a constructive denial of counsel where both Mr. Tilton and his attorney informed the court of their inability to communicate with each other?

3. Prosecutorial misconduct is prohibited by Sixth and Fourteenth Amendments and Article I, § 22 of the Washington State Constitution. Prosecutors commit misconduct when they argue facts not in evidence and misstate the law in their closing arguments. The prosecutor misstated the law by arguing that merely intending to commit a crime in a building was sufficient to prove unlawful entry or remaining. The prosecutor also argued facts not in evidence, suggesting Mr. Tilton was using methamphetamines when he assaulted his father. Is reversal required where there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict?

4. Where there are facts supporting aggravating factors that justify an exceptional sentence, the court must find there are substantial and compelling reasons to impose an exceptional sentence. An exceptional sentence is only justified where the circumstances of the crime distinguish it from other crimes of the same statutory category. Did the sentencing court abuse its discretion by imposing an excessive sentence of ten years where the circumstances of Mr. Tilton's conviction do not distinguish his crimes from other crimes in the same statutory category?

5. Sentencing courts must determine whether a person who suffers from a mental health condition has the ability to pay legal financial obligations that can otherwise be waived, including court costs and the DNA fee. Is resentencing required where the trial court failed to make this inquiry?

#### D. STATEMENT OF THE CASE

Nathaniel Tilton has a history of mental illness. When he was incarcerated at the Monroe Correctional Facility, he was housed in the mental health unit. 8/11/15 RP 163.<sup>1</sup> He was released to Grant County

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<sup>1</sup> The transcripts are not in chronological order. In this brief, I refer to each transcript by the date of the first proceeding recorded in that volume. E.,g. 8/11/15 RP.

on July 13, 2015, to live with his father, Michael.<sup>2</sup> 7/13/16 RP 170.

Both Mr. Tilton and his father recognized this arrangement would be temporary, lasting until Mr. Tilton was able to get back on his feet and locate a permanent address. 7/13/16 RP 170. Other than his father's bedroom, Mr. Tilton had free reign of the house while he was living there. 7/14/16 RP 252. No end date was set for when Mr. Tilton would move out, although he hoped to find a place to live in Bellingham. 7/14/16 RP 252. Mr. Tilton's father expected his son to stay with him for as long as it took to "form a new plan for him to carry on with his life. He was homeless." 7/13/14 209. Mr. Tilton's personal belongings had been stored at his father's house before he moved in with his father and were still there when Mr. Tilton fought his father. 7/14/16 RP 236. Mr. Tilton had almost no other possessions. 7/14/16 RP 250.

When Mr. Tilton arrived at his father's house for the first time on July 13, 2015, they sat outside and talked. 7/13/16 RP 170.

Eventually, Mr. Tilton gave himself a haircut and then the men had dinner together. 7/13/16 RP 171. After dinner, Mr. Tilton's father gave him \$50 to buy some new clothes. 7/13/16 RP 171. Mr. Tilton walked

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<sup>2</sup> Because Nathaniel and Michael Tilton share the same last name, Mr. Tilton's father will be referred to by his first name. No disrespect is intended.

to the Walmart. 7/13/16 RP 171. His father was asleep before he returned. 7/13/16 RP 171.

When his father woke the next day, Mr. Tilton was sitting at the breakfast table using the laptop. 7/13/16 RP 171-72. Mr. Tilton's father had breakfast and the two men agreed to go fishing. 7/13/16 RP 171-72. They left their home in Mr. Tilton's father's truck, stopping at Walmart to get Mr. Tilton a license on their way to their fishing site. 7/13/16 RP 171-72.

While they were fishing, Mr. Tilton's line broke. 7/13/16 RP 179. He returned to the truck and his mood changed. 7/13/16 RP 180. The men started to fight, with Mr. Tilton blaming his father for many of his problems and for not providing him with the support he needed as a child. 7/13/16 RP 181. Mr. Tilton's father decided to drive the two of them back to their house. 7/13/16 RP 181. On the way, they continued to fight, with Mr. Tilton's father almost stopping the truck to insist that Mr. Tilton get out. 7/13/16 RP 183. Instead, they continued to drive towards their home. 7/13/16 RP 181.

Mr. Tilton's father parked the truck and started to remove his dog and belongings. 7/13/16 RP 183. With no apparent warning, Mr. Tilton hit his father in the head. 7/13/16 RP 184. Mr. Tilton continued

to verbally and physically assault his father. 7/13/16 RP 185. Mr. Tilton's father then went into the house, locking the door behind him. 7/13/16 RP 186. Mr. Tilton's father never told him that he could not stay in the house or that his invitation to live with his father had been revoked. 7/14/16 RP 244-45, 249.

Mr. Tilton demanded his father give him the keys to his truck. 7/13/16 RP 189. Mr. Tilton started kicking at the doors of the house, damaging two of them and gaining entry. 7/13/16 RP 187. Inside the house, he insisted his father give him the keys to the truck. 7/13/16 RP 189. The police arrived shortly afterwards and arrested Mr. Tilton. 7/13/16 RP 190. As the police were investigating the house, they discovered a lightbulb that had been modified so it could be used to smoke methamphetamine. 7/14/16 RP 349. The residue in the lightbulb tested positive for methamphetamines. 7/14/16 RP 714.

Mr. Tilton was charged with residential burglary, assault in the fourth degree, malicious mischief in the second degree, and possession of a controlled substance. CP 46-48. The prosecutor also alleged an aggravating factor for rapid recidivism and for committing the burglary with a person present when the burglary occurred. CP 46-48.

Mr. Tilton was held for exactly one year before his trial commenced on July 13, 2016. He had a hard time while he was in jail, and had difficulty communicating with both of his attorneys. With his first attorney, he was disoriented and agitated. 8/11/15 RP 3. His first attorney recognized his severe mental health issues and asked to have Mr. Tilton's competency examined. 8/11/15 RP 13. Mr. Tilton was found to be competent, but his ability to communicate with his attorney did not improve. 8/11/15 RP 18. Mr. Tilton's first lawyer continued to recognize Mr. Tilton's mental health issues. 8/11/15 RP 23.

Mr. Tilton's condition did not improve over time. 8/11/15 RP 38-39. While represented by his first lawyer, Mr. Tilton declined to appear in court on at least four occasions. 8/11/15 RP 3, 40, 46, 57. When he was in court, Mr. Tilton had trouble controlling his behavior and language. 8/11/15 RP 30, 32, 38. Mr. Tilton's first lawyer continued to have concerns about Mr. Tilton's competency, but instead of asking for a second competency exam, she asked to be relieved in the hope that a new attorney would be able to communicate better with Mr. Tilton than she had. 8/11/15 RP 51.

Mr. Tilton also had difficulty communicating with his new lawyer. 8/11/15 RP 58, 64, 80, 88, 93. Mr. Tilton frequently refused to

come to court. 8/11/15 RP 63, 78, 86. Even a month before trial, Mr. Tilton's second attorney told the court he had not had any effective communication with his client. 8/11/15 RP 100. On several occasions, Mr. Tilton informed the court his attorney had been fired. 7/5/16 RP 3, 7/14/16 RP 291, 8/11/15 RP 113. Mr. Tilton's second lawyer also acknowledged he had great difficulty communicating with Mr. Tilton and that he was in a position where he felt he could not communicate with his client. 7/5/16 RP 6. The court never inquired into whether there was a breakdown in the attorney-client relationship so as to affect Mr. Tilton's right to counsel.

When trial commenced, Mr. Tilton tried to control his behavior. 7/14/16 RP 386. Mr. Tilton's behavior disrupted proceedings on at least two occasions. 7/14/16 RP 288, 385. There were other times when the court warned Mr. Tilton about his behavior. Mr. Tilton advised the court he was trying to behave. 7/13/16 RP 26; 7/14/16 RP 225, 358. By the end of testimony, Mr. Tilton was no longer able to stay quiet. 7/15/16 RP 429. He voluntarily absented himself from the remainder of the proceedings, including the reading of the verdict. 7/15/16 RP 426. On several occasions, the sheriff informed the court Mr. Tilton would

not respond to requests to come to court, choosing instead to lie on his bed under his covers. 7/15/16 RP 438, 537, 559.

In his motions in limine, Mr. Tilton asked the court to preclude any evidence Mr. Tilton was using drugs on July 14, 2015. CP 49. This motion was granted. 7/13/16 RP 34. In his closing, however, the prosecutor twice attempted to argue Mr. Tilton had acted the way he had because he was under the influence of methamphetamines. 7/15/16 RP 470, 479. The court sustained Mr. Tilton's objections. 7/15/16 RP 470, 479. The second time, the court instructed the jury to disregard the prosecutor's argument. 7/15/16 RP 479.

The prosecutor also argued that when a person entered a store with the intent to commit a crime, they could be found guilty of burglary. 7/15/16 RP 474. The prosecutor equated this with Mr. Tilton's case, arguing that when Mr. Tilton hit his father, his right to remain in their house was revoked. 7/15/16 RP 475. Mr. Tilton did not object to this mischaracterization of the law.

Mr. Tilton was found guilty of residential burglary, assault in the fourth degree, and malicious mischief in the second degree. 7/15/16 RP 547-48. The jury was unable to reach a verdict on the possession of

controlled substance charge. 7/15/16 RP 546. The jury also found evidence of the aggravating factors. RP 547-48, 587.

At sentencing, the court and the prosecutor recognized Mr. Tilton's mental illness. Mr. Tilton had been housed with the mentally ill when he was in prison. 8/11/15 RP 163. The prosecutor suggested to the court it include an order directing the Department of Corrections to provide Mr. Tilton with services while incarcerated, although this was not included in the order. 8/11/15 RP 163. Mr. Tilton's father recognized the need for drug treatment for his son. 8/11/15 RP 158. The prosecutor also recognized Mr. Tilton was eligible for the Drug Offender Sentencing Alternative, but asked the court to not consider it. 8/11/16 RP 164. In his statement to the court at sentencing,

The prosecutor asked the court to impose the maximum allowable sentence for the residential burglary conviction, which is ten years. 8/11/16 RP 135. The court followed the prosecutor's recommendation, sentencing Mr. Tilton to ten years for the residential burglary. 8/11/16 RP 165, CP 185. The court made no other findings regarding how Mr. Tilton's conduct could be distinguished from other crimes in the same statutory category. *See* CP 128.

The court inquired into Mr. Tilton's ability to pay legal financial obligations. 8/11/16 RP 167. Mr. Tilton's lawyer informed the court about Mr. Tilton's desperate condition, noting that he had suffered from mental health issues and had deteriorated badly in jail, losing 30 to 40 pounds. 8/11/16 RP 168. The court waived attorney's fees, but imposed court costs and the DNA fee. 8/11/16 RP 168, CP 187. The court did not consider whether these fees should be waived because of Mr. Tilton's mental health.

#### E. ARGUMENT

**1. The government failed to establish Mr. Tilton lacked permission to enter the residence he lived in with his father.**

*a. Due process requires the government to prove every element of residential burglary beyond a reasonable doubt.*

The Due Process Clause of the Fourteenth Amendment requires the government to prove every element of the crime charged beyond a reasonable doubt. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence the government must establish to garner a conviction. *Winship*, 397 U.S. at 364.

While reasonable inferences are construed in favor of the prosecution, they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Evidence is insufficient to support a verdict where “mere speculation, rather than reasonable inference, supports the government’s case.” *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010).

*b. The government failed to prove Mr. Tilton entered or remained unlawfully in the home he lived in with his father.*

Entering or remaining unlawfully in a building is an essential element of burglary in the first degree. RCW 9A.52.025(1); *State v. Miller*, 90 Wn. App. 720, 725, 954 P.2d 925 (1998). Entry is unlawful if made without invitation, license, or privilege. *State v. Gohl*, 109 Wn. App. 817, 823, 37 P.3d 293 (2001). But where unlawful acts occur in a building, the evidence is insufficient to establish a burglary when the facts demonstrate the accused had permission to be in the building. *State v. Wilson*, 136 Wn. App. 596, 604, 150 P.3d 144 (2007).

This Court has made clear that not every crime that occurs in a building is a burglary. *Wilson*, 136 Wn. App. at 604. There is not sufficient evidence of burglary when the government only establishes

the accused entered the building with the intent to commit a crime. *State v. Collins*, 110 Wn.2d 253, 255, 751 P.2d 837 (1988); *Wilson*, 135 Wn. App at 604. Instead, the prosecution must prove the accused entered or remained unlawfully to establish that a burglary occurred. *State v. Cantu*, 156 Wn.2d 819, 829, 132 P.3d 725 (2006).

Washington's courts have long adhered to the common law definition of burglary, which defines the crime as an offense against habitation and occupancy. *State v. Klein*, 195 Wash. 338, 342, 80 P.2d 825 (1938). Under this definition, a court could not convict a defendant of burglary for entering his own home with felonious intent. *Id.* This rule applied to joint occupants as well as to sole owners of homes. *See Clarke v. Commonwealth*, 66 Va. 908, 916–17 (1874) (the important factor has been occupancy, rather than ownership, of the home).

Modern interpretations of burglary statutes remain the same. *Wilson*, 136 Wn. App. at 606. Burglary statutes remain an offense “against the security of habitation or occupancy, rather than against ownership or property.” 3 Charles E. Torcia, *Wharton's Criminal Law* § 316 (15th edition 1995) (footnote omitted); *see also Klein*, 195 Wash. at 342, 80 P.2d 825 (the test of ownership in Washington is not legal title, but rather occupancy and possession at the time of the offense.).

Thus, in determining whether an offender's presence is unlawful, courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises. *Wilson*, 136 Wn. App. at 606.

In *State v. Wilson*, this Court found insufficient evidence of burglary where there was evidence the defendant resided in the house where the crime occurred. Mr. Wilson had been ordered to have no contact with his girlfriend, but had not been prohibited from entering her residence. 136 Wn. App. at 600. Mr. Wilson returned to their shared home after his conviction and continued to have contact with his girlfriend. *Id.* After getting into an argument with his girlfriend, he was locked out. *Id.* Mr. Wilson then kicked in the door, assaulted his girlfriend, threatened to kill her, and assaulted her with splinters from the broken door. *Id.* at 601. In reversing Mr. Wilson's conviction for burglary in the first degree, this Court held there was insufficient evidence of unlawfully entry or remaining. *Id.* at 611-12. The *Wilson* court analyzed the question of whether there can be implied permission to revoke, rejecting the government's argument Mr. Wilson's girlfriend revoked his permission to remain on the premises by calling 911. *Id.* at 612. Mr. Wilson did considerable damage to the residence before he was arrested, including kicking in and splintering the front door. *Id.* at

601. Like here, calling 911 and locking Mr. Wilson out were insufficient to establish unlawful entry in a shared residency. *Id.* at 611-12.

Like *Wilson*, this Court should hold there is insufficient evidence Mr. Tilton entered or remained unlawfully in the home he was sharing with his father, however temporarily. The evidence was uncontested that Mr. Tilton assaulted his father. 7/13/16 RP 184. It was also clear that Mr. Tilton was residing in his father's home. 7/13/16 RP 170. Mr. Tilton intended to remain until he was able to form a plan to get on with his life. 7/13/16 RP 209. There was no end date set on when Mr. Tilton would move out. 7/14/16 RP 252. He had no other residence. 7/13/15 RP 209. All of his belongings were stored at his father's house. 7/14/16 RP 236. Other than his father's bedroom, Mr. Tilton had free reign of the house while he was living there. 7/14/16 RP 252. He had no other place to live. 7/13/14 209.

There was no evidence Mr. Tilton's father revoked Mr. Tilton's invitation to live in the house. 7/14/16 RP 244-45, 249. Mr. Tilton's father stated unequivocally that he never expressed this to Mr. Tilton. 7/14/16 RP 244-45, 249. Mr. Tilton had hoped to live with his father until he got back on his feet. 7/13/16 RP 209. Unlike other cases where

a resident's permission to enter a building has been revoked, no such revocation occurred here. *Cf. State v. Howe*, 116 Wn.2d 466, 468, 805 P.2d 806 (1991).

Nor does the fact that Mr. Tilton's father tried to lock Mr. Tilton out of the house show Mr. Tilton could never enter the residence again. Just like *Wilson*, Mr. Tilton kicked in a door. *Wilson*, 136 Wn. App. at 600. This Court found that this was insufficient to convict Mr. Wilson of burglary. *Id.* This Court should likewise hold that this is not enough to establish burglary here. Clearly, Mr. Tilton's father was trying to protect himself from a further assault. 7/13/16 RP 244. There is no dispute that the assault was continuing. However, shutting the door does not establish Mr. Tilton's permission to reside in the house had been revoked. 7/13/16 RP 245. Like *Wilson*, it only establishes Mr. Tilton's intent to commit a crime within the building. *Wilson*, 136 Wn. App. at 600.

Dismissal of the burglary charge is necessary where the government fails to establish the accused entered or remained unlawfully within the building. *State v. Thomson*, 71 Wn. App. 634, 640-41, 861 P.2d 492 (1993). There is no evidence Mr. Tilton had been excluded from his father's home when the assault took place. The

government failed to prove the essential element of entering or remaining unlawfully. *Wilson*, at 611-12. Without proof of this essential element, there is insufficient proof of residential burglary. *Id.* The remedy is reversal and remand for judgement of dismissal with prejudice. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016), *review denied*, 187 Wn.2d 1; *State v. Vasquez*, 178 Wn.2d 1, 18, 309 P.3d 318 (2013).

**2. The court did not make adequate inquiries into whether Mr. Tilton’s failure to communicate with his attorney constituted a constructive denial of his right to counsel.**

The constructive denial of counsel doctrine applies to cases where the defendant has an irreconcilable conflict with his counsel, and the trial court fails to substitute counsel. *See United States v. Nguyen*, 262 F.3d 998, 1003–04 (9th Cir.2001); *United States v. Adelzo–Gonzalez*, 268 F.3d 772, 778–79 (9th Cir.2001). “Even if [trial] counsel is competent, a serious breakdown in communications can result in an inadequate defense.” *Nguyen*, 262 F.3d at 1003(citing *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir.2000)). When a request for new court-appointed counsel is denied, a reviewing court will examine (1) the timeliness of the substitution motion and the extent of resulting inconvenience or delay; (2) the adequacy of the inquiry into the

defendant’s complaint; and (3) whether the conflict between the defendant and his attorney was so great that it prevented an adequate defense. *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010). This inquiry is designed to determine whether the attorney-client conflict is such that it impedes the adequate representation that the Sixth Amendment guarantees to all defendants. *See Daniels v. Woodford*, 428 F.3d 1181, 1198 (9th Cir.2005).

Mr. Tilton never established a relationship with his attorney. Mr. Tilton’s second attorney apprised the court that he had not been able to communicate with Mr. Tilton before trial commenced on many occasions. 8/11/15 RP 100. The court was aware of the difficulties Mr. Tilton’s attorney had speaking with his client.

Date	Statement by Mr. Tilton’s second attorney concerning communication challenges	
3/28/16	I have not been able to physically meet with Mr. Tilton yet, I did make attempts, it was not successful.	8/11/16 RP 58
4/12/16	It took more than one attempt to accomplish that, and that meeting did not go well. But I am making the effort, Your Honor.	8/11/16 RP 64
5/2/16	I have had one successful conversation with him, multiple attempts that were not successful.	8/11/16 RP 80
5/9/16	This morning I attempted to have a conversation with him about the State’s offer and possible resolution or, in the alternative, possibly setting it	8/11/16 RP 86

	for a trial with the additional discussion of a jury waiver. We did not have that discussion.	
5/16/16	I went over and attempted to talk to him again before the weekend. It was unsuccessful.	8/11/16 RP 93
6/14/16	I inherited the case when, when Ms. Oglebay had to withdraw, and to report to the Court, I think that I am in the same position that Ms. Oglebay was where I don't believe there's been any effective communication at this point with the client about the charges, and I'm frankly a little bit unsure where I go from here.	8/11/16 RP 98
7/5/16	Your Honor, I think I'm likely in the same position as Miss Oglebay was when she withdrew.	7/5/16 RP 4

Mr. Tilton was frequently absent from court during these proceedings. He refused to come to court at least four times with his first attorney. 8/11/15 RP 3, 40, 46, 57. With his new lawyer, Mr. Tilton refused to appear in court on at least three occasions. 8/11/15 RP 63, 78, 86.

When Mr. Tilton was in court and his attorney began to discuss the difficulties they had communicating with each other, Mr. Tilton informed the court that he had fired his attorney. 7/5/16 RP 3. The following colloquy then took place between Mr. Tilton and the court.

THE COURT: Is the matter ready for trial?

THE DEFENDANT: Today? Today, your Honor?

THE COURT: I'm talking to your attorney.

THE DEFENDANT: He's not my attorney. I already fired him three times.

7/5/16 RP 3.

The court then had the following colloquy with Mr. Tilton.

THE COURT: Right now he's your attorney of record.

THE DEFENDANT: Damn, that sucks.

7/5/16 RP 4.

Mr. Tilton's lawyer then began to explain the difficulties he had communicating with Mr. Tilton. He told the court he had tried on seven or eight occasions to speak with Mr. Tilton, without success. 7/5/16 RP 4. He then described the difficulty they had communicating and how Mr. Tilton could not stay on track when they did speak. 7/5/16 RP 5. Mr. Tilton's attorney told the court "I'm kind of in a position where I'm not able to communicate with the client." 7/5/16 RP 6.

Despite clear evidence since the appointment of Mr. Tilton's second attorney that he was unable to communicate with his client, the court never made an inquiry of Mr. Tilton into why Mr. Tilton could not communicate with his attorney. Even when Mr. Tilton expressed the belief that his attorney had been fired, the court made no effort to discover the extent of the conflict. See 7/5/16 RP 6. When Mr. Tilton tried to speak, he was told by the court that if he interrupted the

proceedings again, he would be held in contempt. 7/5/16 RP 7. Mr. Tilton then declared, “I have no voice.” 7/5/16 RP 7. He returned to jail and the court made no more inquiry into the conflict between Mr. Tilton and his lawyer.

When Mr. Tilton alerted the court to his belief his attorney no longer represented him, the court owed him to duty to inquire into whether there was a constructive denial of counsel. The conflict articulated by both Mr. Tilton and his attorney demonstrated a complete breakdown in communication. Without further inquiry, this conflict constituted a constructive denial of counsel. *Rivera-Corona*, 618 F.3d at 979. The court abused its discretion by failing to make an inquiry into why Mr. Tilton believed he had fired his attorney, especially in light of their failure to communicate with each other. Mr. Tilton asks this Court to reverse his convictions and order a new trial. *United States v. Brown*, 785 F.3d 1337, 1352 (9th Cir. 2015).

**3. There is a substantial likelihood the prosecutor’s misconduct in closing arguments affected the jury’s verdict.**

*a. Prosecutorial misconduct impairs the right to a fair trial.*

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments and Article I, § 22 of the

Washington Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Trial proceedings must not only be fair, they must “appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

Every prosecutor has the duty to ensure that an accused person receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). “As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice.” *Warren*, 165 Wn.2d at 27; *State v Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). It is the prosecutor’s duty to seek a verdict free of prejudice and based on reason. *State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976 (2015), *cert. denied*, 135 S. Ct. 2844. Prosecutorial misconduct violates the “fundamental fairness essential to the very concept of justice.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

Prosecutorial misconduct is established where the conduct is found to be both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Prejudice is established when the court finds there was a substantial likelihood the misconduct affected

the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

Even where defense counsel fails to object, a reviewing court will reverse where it finds the conduct flagrant and ill-intentioned and incurable. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2006).

*b. After the court properly limited testimony about drug use, the prosecutor impermissibly argued that Mr. Tilton was using methamphetamines when he assaulted his father.*

A prosecutor has no right to call to the jury's attention matters jurors may not consider. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing *State v. Case*, 49 Wn.2d 66, 74-75, 298 P.2d 500 (1956)). And while prosecutors have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008).

The prosecutor violated these rules when he argued Mr. Tilton was under the influence of methamphetamines in his closing argument. 7/15/16 RP 470, 479. Mr. Tilton moved pre-trial to preclude testimony that he was under the influence of methamphetamines or suffered from mental illness when he assaulted his father. CP 49. The prosecutor did not oppose this motion, except that to say he expected to ask the officer about how the broken lightbulb he found might be used for ingesting

methamphetamines and to elicit testimony regarding Mr. Tilton's general demeanor. 7/13/16 RP 33. The court granted Mr. Tilton's motion to preclude the testimony. 7/1/3/16 RP 33.

The prosecutor did not abide by the court's order. In closing argument, the prosecutor argued Mr. Tilton had assaulted his father because he had used methamphetamines. 7/15/16 RP 470. The prosecutor first argued:

Was there any evidence that the defendant was, you know, had so much methamphetamine in him that he didn't know what he was doing or –

MR. LANG: Objection, your Honor, I don't believe any evidence has been presented that would allow the state to make that argument. I believe it was covered in motions in limine.

7/15/16 RP 470.

The court sustained Mr. Tilton's objection. 7/15/16 RP 470.

The prosecutor, however, returned to the argument Mr. Tilton was using methamphetamines when he assaulted his father. 7/15/16 RP 479. The prosecutor argued:

Also keep in mind that when the officers searched the defendant, the younger Mr. Tilton, he didn't have any methamphetamine on his person. And that's because he had already used it all and he needed to –

7/15/16 RP 479.

Mr. Tilton objected. 7/15/16 RP 479. The court again sustained Mr. Tilton's objection and instructed the jury to disregard the prosecutor's argument. 7/15/16 RP 479.

There was no testimony Mr. Tilton had consumed methamphetamines before his fight with his father. While the police found what they believed to be a lightbulb that had been modified so that it could be used to ingest methamphetamines, there was no testimony it had been recently used. 7/13/16 RP 243, 273, 371. To the contrary, the timeline of the fight makes it almost impossible Mr. Tilton could have smoked methamphetamines in the middle of the fight he had with his father. Mr. Tilton assaulted his father as he was unloading the truck they had taken fishing. 7/13/16 RP 184. He then kicked in the doors to the house as the neighbor was calling the police. 7/14/16 RP 384. The neighbor did not see Mr. Tilton smoking anything. 7/14/16 RP 384. There seems to have been no time for him to have done so.

Additionally, there was considerable evidence Mr. Tilton's anger had nothing to do with using drugs. He had developed these conditions as a child, with anger manifesting itself when he was 11 to 12-years old. 7/14/16 RP 247. His anger caused him to be disruptive.

7/14/16 RP 288, 385. He interrupted the court when it was making decisions. 7/5/16 RP 8. On several occasions, the court held hearings without Mr. Tilton to address his in-court disruptions. 7/14/16 RP 293, 352. Ultimately, Mr. Tilton absented himself from proceedings, after having been warned on many occasions he could not disrupt the courtroom. 7/15/16 RP 437.

Of course, there was no suggestion Mr. Tilton had access to drugs while he was in custody. To the contrary, it would have been almost impossible for Mr. Tilton to smoke methamphetamines while the trial was pending because he was in custody. By arguing Mr. Tilton was angry with his father because he was under the influence of methamphetamines, the jury could have thought Mr. Tilton was also using drugs while he was in trial. The jury was not aware of Mr. Tilton's custody status and could not have known he did not have access to controlled substances. By arguing it was the drugs that made Mr. Tilton angry, the prosecutor made impermissible comments that deprived Mr. Tilton of his right to a fair trial.

This Court has been clear that a prosecutor may not attempt to argue facts based on inadmissible evidence. *State v. Alexander*, 64 Wn. App. 147, 155-56, 822 P.2d 150 (1992). Where the content of an

argument is inadmissible, the repeated attempts to argue it requires reversal. *Id.* When this Court reversed the conviction in *State v. Jones*, it focused on prejudicial statements made by the prosecutor in closing arguments, among other misconduct. 144 Wn. App. at 314. This Court found that the arguments the prosecutor made in his closing about evidence that was not presented at trial constituted misconduct. *Id.*

The Supreme Court has also held it is misconduct for a prosecutor to present altered versions of the facts. *See Walker*, 182 Wn.2d at 478; *In Re Glasmann*, 175 Wn.2d 696, 706-07, 286 P.3d 673 (2012). In both those matters, the prosecutor created visual aids that were inflammatory. While the prosecutor did not create a visual aid to support his argument Mr. Tilton was under the influence of methamphetamine when he assaulted his father, the misconduct is no different. It was a calculated attempt to argue facts not supported by the evidence, in defiance of the court's ruling the evidence had no place in Mr. Tilton's trial. *Glasmann*, 175 Wn.2d at 705 (citing *State v. Pete*, 152 Wn.2d 546, 553-55, 98 P.3d 803 (2004)). This court should again hold that arguments made in closing that are not based on the evidence the jury heard at trial is impermissible misconduct. *Alexander*, 64 Wn. App. at 155-56.

The calculated decision of the prosecutor to argue Mr. Tilton was using drugs when he assaulted his father also substantially affected the jury's verdict. The jury had witnessed Mr. Tilton's outbursts in court. 7/14/16 RP 288, 385. He was no longer present when the parties made their closing arguments. 7/15/16 RP 444. They had no way of knowing Mr. Tilton was in a controlled environment and did not have access to controlled substances. By arguing Mr. Tilton became angry when he used drugs, the prosecutor violated the court's order and improperly implied Mr. Tilton was using drugs during the trial. And while Mr. Tilton's objections were sustained, this repeated misconduct was likewise incurable. This Court should hold this misconduct substantially affected the verdict. Mr. Tilton is entitled to reversal and a new trial. *Jones*, 144 Wn. App. at 293.

*c. The prosecutor's incorrect statement regarding the elements required to prove residential burglary constituted misconduct.*

Statements made by prosecutors in their closing arguments must be confined to the law as instructed by the court. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). A prosecutor commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *see also Warren*, 165 Wn.2d at 28.

In his closing argument, the prosecutor misstated the law regarding the elements of residential burglary. The prosecutor argued that burglary can be committed by “walking into Walmart.” 7/15/16 RP 473. The prosecutor argued that under the definition given to the jury by the court, that if:

“you walked into Walmart and you walked in there with the intent to commit a crime, you’re going to shoplift some food or you’re going to shoplift something else, then you’ve committed the crime of burglary under this definition.”

7/15/16 RP 473-74.

This is an incorrect statement of law. Burglary cannot be committed by simply walking into a building with the intent to commit a crime. RCW 9A.52.025. Instead, it requires that the defendant enter or remain unlawfully within the building with the intent to commit the crime. *Id*; *Miller*, 90 Wn. App. at 725. It is insufficient to only establish the person intended to commit a crime in the building, as argued above. *Wilson*, 136 Wn. App. at 604.

The prosecutor then addressed whether Mr. Tilton’s right to enter his father’s house had been revoked by Mr. Tilton’s intent to commit a crime. 7/15/16 RP 474. The prosecutor argued by punching his father, Mr. Tilton no longer had the privilege to enter the house.

7/15/16 RP 474. But this was an erroneous argument, suggesting that the jury only had to find Mr. Tilton intended to commit a crime inside the house in order to find him guilty of burglary. This is not the state of the law and the prosecutor's argument to the contrary was improper.

*See Wilson*, 136 Wn. App. at 604. *Id.*

In *State v. Allen*, the Supreme Court held that the prosecutor's repeated misstatement of the law regarding accomplice liability constituted misconduct. 182 Wn.2d at 375. Mr. Allen objected to the misconduct, so the court did not need to address whether the conduct was flagrant and ill-intentioned. *Id.* The Supreme Court recognized, however, that the question of whether prejudice occurred does not rest on whether there was sufficient evidence to support the verdict, but whether there was a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 375-76.

Mr. Tilton did not object to this misconduct. Where defense counsel fails to object to misconduct at trial, this Court must find the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Glasmann*, 175 Wn.2d at 678. However, the failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial. *Walker*, 182 Wn.2d at

477. Here, the prosecutor's misstatement of law was flagrant and ill-intentioned. It reduced his burden of proof and made the jury more likely to convict Mr. Tilton. *Allen*, 182 Wn.2d at 382.

Like *Glasmann* and *Walker*, the failure of Mr. Tilton's lawyer to object should not end this Court's analysis of whether a prosecutor may so misconstrue the elements of residential burglary. Instead, this Court should hold that the prosecutor's argument that the jury could find unlawful entering or remaining by finding Mr. Tilton intended to commit a crime inside the house constituted flagrant and ill-intentioned misconduct, particularly in this case where the complexities of the law allow a lay jury to be easily misled.

There was no evidence Mr. Tilton had been told he could not enter his father's house. To the contrary, Mr. Tilton's father testified he never told Mr. Tilton he was no longer welcome in the house. 7/14/16 RP 244-45, 249. This was the central issue in the case. The prosecutor's argument reduced his burden. It is substantially likely this misconduct affected the jury's verdict. Mr. Tilton is entitled to reversal and a new trial. *Glasmann*, 175 Wn.2d at 678.

*d. The prosecutor's misconduct requires reversal of Mr. Tilton's convictions.*

Closing argument provides an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to present an alternative version of the law. *Jones*, 144 Wn. App. at 314. Trained and experienced prosecutors "do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1075 (1996).

While there was evidence Mr. Tilton had assaulted his father and damaged their house, the evidence of burglary and possession of a controlled substance was weak. By suggesting drugs made Mr. Tilton angry, the prosecutor unbalanced the scales of justice. This would cause the jury to speculate about facts not in evidence and make them worry that acquitting Mr. Tilton would result in them releasing a dangerous drug addict. When the prosecutor argued that by proving Mr. Tilton intended to commit a crime in a building was sufficient to commit a burglary, he created the substantial likelihood the jury's verdict would be affected. Repetitive misconduct can have a cumulative effect. *Glasmann*, 175 Wn.2d at 707. The combination of

inflammatory arguments and misstatements of the law constituted misconduct. The court’s curative instruction may have been enough to resolve the prosecutor’s first instance of misconduct, but nothing could have been done to correct the misstatement of law, after the prosecutor had already argued Mr. Tilton was under the influence of methamphetamines when he assaulted his father.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney’s conduct is both improper and prejudicial. *Fisher*, 165 Wn.2d at 747 (citing *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006)). For some misconduct, once the “bell” has rung, it “cannot be unrung.” *State v. Trickel*, 16 Wn. App 18, 30, 553 P.2d 139 (1976). The prosecutor’s closing argument is such an example. There is a substantial likelihood the prosecutor’s argument affected the jury’s verdict. This Court should reverse Mr. Tilton’s convictions and order a new trial.

**4. Sentencing Mr. Tilton to the statutory maximum of ten years for residential burglary was clearly excessive.**

*a. Exceptional sentences are only appropriate where the circumstances of the crime distinguish it from other crimes of the same statutory category.*

Rather than sentence Mr. Tilton within the standard range, the court sentenced Mr. Tilton to the statutory maximum of 120 months for

the residential burglary. 8/1/15 RP 165. While an aggravating sentence was authorized by the jury's verdict, there is no further justification by the court as to why an exceptional sentence was necessary. CP 128. If the Court does not dismiss Mr. Tilton's residential burglary conviction for insufficient evidence, he asks this Court to hold his sentence was clearly excessive.

RCW 9.94A.010(4) states that the punishment for a criminal offense must be proportionate to the seriousness of the offense and the offender's criminal history. The Sentencing Reform Act brings proportionality and uniformity to what had been a highly discretionary sentencing scheme. *State v. Hayes*, 182 Wn.2d 556, 561–62, 342 P.3d 1144 (2015). The extensive and detailed guidelines require sentencing judges to impose an individualized punishment within a range to achieve these goals. *Id.*

A trial court may only impose a sentence outside the standard range it finds there are substantial and compelling reasons to justify the exceptional sentence. RCW 9.94A.535. An exceptional sentence is only appropriate “when the circumstances of the crime distinguish it from other crimes of the same statutory category.” *State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989). Future dangerousness is not an

appropriate factor to justify an exceptional sentence in a non-sexual case. *State v. Barnes*, 117 Wn.2d 701, 703, 818 P.2d 1088 (1991).

Reversal of an exceptional sentence is required if (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

*b. The court's sentence was clearly excessive because the facts underlying Mr. Tilton's conviction for burglary do not distinguish it from other crimes of the same statutory category.*

Mr. Tilton committed his crimes soon after he was released from jail. The prosecutor sought and secured a rapid recidivism verdict from the jury. 7/15/16 RP 587. Mr. Tilton does not challenge this verdict. The prosecutor also secured an aggravator because Mr. Tilton's father was present when the crimes occurred, but conceded that this was a necessary element of the crime in this case and should not be used to justify an exceptional sentence. 8/11/15 RP 150-51.

The court gave no reason for why it was imposing the maximum sentence possible on Mr. Tilton, other than to state it would follow the

prosecutor's recommendation. CP 128. And while the prosecutor's brief urged the court to impose an exceptional sentence, no justification was made for why this case warranted an exceptional sentence, other than that the jury had found aggravating factors to exist. CP 108. Likewise, the prosecutor made no attempt to justify the sentence in court, other than to make clear the government was requesting a ten year sentence. 8/11/15 RP 135. The prosecutor in fact acknowledged that the aggravating factor for a person being in the house was a required element of the crime charged. 8/11/15 RP 150-51. He instead relied on the rapid recidivism to argue for the statutory maximum sentence. 8/11/15 RP 151.

Importantly, the court's written findings lack any reason for why an exceptional sentence should be imposed. CP 128. The conclusions of law merely state that the "imposition of an exceptional sentence is appropriate in this case." CP 128. The lines below this pre-printed statement are left blank. CP 128.

The imposition of an exceptional sentence is appropriate in this case.

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CP 128. Likewise, the court made no statement in court for why an exceptional sentence should be imposed, other than to state the court was following the prosecutor's recommendation. 8/11/15 RP 165.

And while Mr. Tilton was recently released from prison, this fact does not distinguish Mr. Tilton's case from that of other crimes in the same statutory category. Mr. Tilton did not leave prison intent on committing new crimes, but instead hoped to get his life back together. 7/13/16 RP 170. He hoped to return to Bellingham, where he had lived most of his life. 7/14/16 RP 252. His goal while living with his father was to create a plan to carry on his life. 7/13/14 209.

It is clear that Mr. Tilton's mental illness got in the way of his intended reentry. For while Mr. Tilton was found to be competent to stand trial, there was no dispute that he suffered from mental illness. In fact, Mr. Tilton's release from prison had been from the mental health unit at Monroe Correctional Facility. 8/1/15 RP 163. When the court sentenced Mr. Tilton, the court considered how it could require the Department of Corrections to provide Mr. Tilton with mental health services. 8/1/15 RP 163. Mr. Tilton's mental illness was pervasive throughout the trial.

Studies strongly suggest that prison often exacerbates psychiatric disabilities. Michael J. Sage et al., *Butler County SAMI Court: A Unique Approach to Treating Felons with Co-Occurring Disorders*, 32 Cap. U. L. Rev. 951, 953 (2004). The evidence demonstrates that individuals with major mental illnesses face a substantial likelihood of incurring serious harm in prison and are far more likely to suffer serious harms than non-ill prisoners. E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. Crim. L. & Criminology 147, 229 (2013). Mentally ill prisoners are more likely to be the victim of physical assaults. Paula M. Ditton, *Bureau of Justice Statistics, U.S. Dep't of Justice, Mental Health and Treatment of Inmates and Probationers 9* (1999)<sup>3</sup>. Victimization by staff is also more common. See Cynthia L. Blitz et al., *Physical Victimization in Prison: The Role of Mental Illness*, 31 Int'l J.L. & Psychiatry 385, 389-90 (2008) (Tables 2 and 3). Mentally ill prisoners are also at a heightened risk of sexual victimization. Johnston, at 222 (citing Nancy Wolff et al., *Rates of Sexual Victimization in Prison for Inmates with and Without Mental Disorders*, 58 Psychiatric Servs. 1087, 1088 (2007)). They are also

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<sup>3</sup> Available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhtip.pdf>.

more likely to be confined in stark conditions, including solitary confinement. *See, e.g.,* Maureen L. O’Keefe et al., *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation*, at iv (2010) (estimating that the rate of inmates with mental illnesses in administrative segregation is around 50% higher than the rate within the general prison population).<sup>4</sup>

There is no reason to believe that Mr. Tilton will not be exposed to these dangers. Neither the community nor Mr. Tilton will benefit from the exceptional sentence the court imposed here. The community is not made safer by incarcerating him for the maximum term allowed for his sentence. Mr. Tilton’s mental illness is unlikely to improve while he is incarcerated. Harvard Law Review Association, *Booker, the Federal Sentencing Guidelines, and Violent Mentally Ill Offenders*, 121 Harv. L. Rev. 1133, 1144 (2008). With no indication Mr. Tilton will be provided any services while in prison, the only purpose the exceptional sentence serves is to delay addressing the underlying problems Mr. Tilton must deal with because of his mental illness.

With the sentence the court imposed, Mr. Tilton will remain in custody for ten years. CP 185. When he is released, he will return to the

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<sup>4</sup> Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/232973.pdf>.

community with no services or support network, just like he was when he was released this time. CP 186. There are other options the court could have considered within the standard range. At sentencing, Mr. Tilton's father stated he wished a drug offender sentencing alternative was available for his son. 8/11/15 RP 158. Mr. Tilton was in fact eligible for a Drug Offender Sentencing Alternative (DOSA). RCW 9.94A.660. Mr. Tilton would have been subject to a prison based DOSA, where he would have been sentenced to the mid-point of the standard range and half the sentence would be suspended on the condition he completed the remainder of his time in the community successfully. RCW 9.94A.660(3). Sentencing Mr. Tilton to this alternative would have provided him with support for his drug addiction problems while in custody and would have given him a considerable amount of time where he could transition into the community while on supervision. RCW 9.94A.660(6). Unlike the exceptional sentence the court imposed, this sentence could have provided a measure of future safety for the community, as some of the underlying problems Mr. Tilton faces in his life could have been addressed. *Id.*

While the rapid recidivism aggravator authorizes an exceptional sentence, the court must still find the facts of the crime distinguish it from other crimes in the same statutory category. This crime is not distinguishable from other residential burglaries. This Court should hold the sentencing court abused its discretion in imposing an exceptional sentence of 120 months for Mr. Tilton's conviction for residential burglary. *France*, 176 Wn. App. at 469. If this Court does not dismiss Mr. Tilton's conviction for residential burglary for insufficient evidence, this Court should remand this matter for resentencing within the standard range.

**5. The trial court failed to consider whether Mr. Tilton's court fees and the DNA fee should have been waived because of Mr. Tilton's mental health conditions.**

RCW 9.94A.777(1) requires that a sentencing court determine whether a defendant who suffers from a mental health condition has the ability to pay any LFOs, other than restitution or the victim penalty assessment. *State v. Tedder*, 194 Wn. App. 753, 756, 378 P.3d 246 (2016).

Mr. Tilton clearly suffers from a mental health condition as defined under RCW 9.94A.777. The court had evidence Mr. Tilton had been housed in the mental health unit when he was in prison and

ordered he be examined for mental competency. 8/11/15 RP 163, 13. The record established Mr. Tilton anger and mental health problems began to manifest when he was 11 to 12 years old. 7/14/16 RP 247. When he was released from prison, he moved in with his father to avoid being homeless. 7/13/16 RP 209. While he was in custody, his mental health deteriorated badly, with apparent weight loss noted by his attorney. 8/11/16 RP 168. He had no resources and no apparent work history. 7/13/14 RP 209. All of his belongings were stored at his father's house. 7/14/16 RP 250.

In *State v. Blazina*, the Supreme Court remanded the trial court's imposition of discretionary LFOs for an individualized determination, because it found that the pernicious consequences of "broken LFO systems" on indigent defendants "demand" that it reach the issue. 182 Wn.2d 830, 835, 344 P.3d 680 (2015); *see also City of Richland v. Wakefield*, 186 Wn.2d 596, 606, 380 P.3d 459 (2016). Mr. Tilton will face those same consequences when he is released. The court found Mr. Tilton could not pay discretionary legal financial obligations. 8/11/15 RP 168. The court does not appear to have been aware it could waive the DNA fee and court costs under RCW 9.94A.777. As a result, the court failed to assess whether Mr. Tilton's

mental health issues authorized waiver of all other legal financial obligations, except the victim penalty assessment and restitution. RCW 9.94A.777.

This Court should remand to trial court for a consideration of whether Mr. Tilton's remaining legal financial obligations, including the court filing fee and the DNA fee, should be waived. *Tedder*, 194 Wn. App. at 757. To the extent that this Court considers imposing additional court costs should Mr. Tilton not substantially prevail in his appeal, this Court should decline imposing any costs pursuant to RAP 14.2 and RCW 9.94A.777(1).

#### F. CONCLUSION

Mr. Tilton asks this Court to dismiss the charge of residential burglary because the prosecution failed to present sufficient evidence that Mr. Tilton entered or remained unlawfully in a building. In the alternative, Mr. Tilton asks this Court to remand for resentencing on this charge, because the court's sentence of ten years was clearly excessive.

In addition, Mr. Tilton asks that the remainder of his convictions be reversed because of the misconduct committed by the prosecutor in his closing argument. Mr. Tilton asks this Court to remand the

remaining charges after it addresses Mr. Tilton's sufficiency motion for a new trial. Mr. Tilton also asks this Court to remand this matter in order for the trial court to conduct a hearing to determine whether legal financial obligations should be waived because of Mr. Tilton's mental health.

DATED this 30 day of August 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 34716-8-III
	)	
NATHANIEL TILTON,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] NATHANIEL TILTON 339481 MONROE CORRECTIONAL COMPLEX PO BOX 514 MONROE, WA 98272	(X) ( ) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF AUGUST, 2017.

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**Washington Appellate Project**  
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# WASHINGTON APPELLATE PROJECT

August 30, 2017 - 4:16 PM

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**Appellate Court Case Title:** State of Washington v. Nathaniel E. Tilton  
**Superior Court Case Number:** 15-1-00431-2

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